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Description of document:	Litigation records from the Bureau of Prisons (BOP) content manager e-storage system with a settlement or judgement of $1000 or more, 2005-2016
Requested date:	2017
Released date:	29-September-2017
Posted date:	13-August-2018
Source of document:	FOIA Request FOIA/PA Section Office of General Counsel, Room 924 Federal Bureau of Prisons 320 First Street, N.W. Washington, DC 20534 Email: OGC_EFOIA@BOP.GOV

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U.S. Department of Justice
Federal Bureau of Prisons

Central Office
320 First St., NW
Washington, DC 20534

September 29, 2017

Request Number: 2017-05901

Pursuant to our discussions, provided herein as satisfaction of Freedom of Information Act (FOIA) 2017-05901 request are the litigation records from our Content Manager e-storage system for approximately the last 10 years in cases in which the Federal Bureau of Prisons (BOP) was a party and in which either a settlement or judgment was entered in an amount $1,000 or more.

To assist in your understanding of the records provided and in navigating their contents, the following information is provided. The records are divided into seven files, one each for the six Bureau of Prisons regions and our Central Office. These files represent some 9,277 pages of records, of which 7,796 pages are released in full or with very few redactions, as will be described for each of the files below.

Regarding the Central Office records, we have located 511 pages of responsive records in the Central Office files. After a careful review of these 511 pages of responsive records, and applying our discretionary release authority, we have determined that 510 pages were appropriate for release in full. Only page 478 has been withheld from production in full. That document is a Statement of Reasons, the last page of Order of Judgment and Conviction, which is being withheld as a result of the application of exemption (b)(6) and (b)(7)(C) of the FOIA, which concern the release of records which would constitute a clearly unwarranted invasion of the personal privacy of third parties and the release of records or information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties, respectively. Additionally, the Statement of Reasons indicates on the face of the form that its contents are not for public disclosure. The only other redactions which appear on any pages of these records were not made contemporaneously with the release process now underway. Pages 120 – 137 contain a report of investigation of the Department of Justice Office of Inspector General (OIG) which the plaintiff in the action against BOP must have requested from the OIG during 2004. Similarly, at pages 177 and 178 appear two documents that plaintiff appears to have requested from the Bureau of Prisons in 2005. All of these pages of documents that contain redactions were utilized in support of his litigation some years ago, and the redactions are not the result of our current efforts. Lastly, in situations where the litigation case file did not include evidence of a settlement, but the entry of information in

the Content Manager system by the individual who filed the records indicated a settlement amount that made the records responsive (as involving a settlement or judgment of $1,000 or more) we have printed off what we refer to as the Content Manager "Face Sheet" which provides the settlement information. An example of this can be found at page 38 of the Central Office file; this technique was also employed relative to one other case included in the 510 pages of fully released records.

Regarding the Bureau of Prisons Mid-Atlantic Regional Office (MARO) records, we have located 867 pages of responsive records in the MARO files. After a careful review of these 867 pages of responsive records, and applying our discretionary release authority, we have determined that 773 pages were appropriate for release in full. A total of 80 pages have been withheld in their entirety. These 80 pages include five pages of records that would have been at pages 162 – 166 of the MARO records and which contain a complete recitation of the claimant/plaintiff's medical records; those pages have been withheld in their entirety as a result of the application of the aforementioned exemption (b)(6) of the FOIA. The remaining pages that have been withheld in their entirety include (at pages 383 – 401) an entire tort claim investigation, and elsewhere (at pages 362 – 369; 403 – 406; 524 – 532; 544 – 552; 671 – 689; and 745 – 751) which consist of privileged legal liability analysis memoranda and have been withheld as a result of the application of exemption (b)(5) of the FOIA, which concerns the release of pre-decisional advisory matters. Fourteen pages of records have been released with partial redactions of certain information. These redactions include medical information concerning the claimant/plaintiff (page 167); the name of the tort claim investigator and a recommendation regarding the disposition of a tort claim (page 382); the name of a BOP employee and that individual's e-mail address, and bank account and routing numbers (pages 518 – 521); bank account numbers (pages 604 and 668); pre-decisional advisory matters relating to the disposition of a tort claim (pages 741 – 742 and 744); bank account and routing numbers (pages 776 and 783); and pre-decisional advisory matters relating to the disposition of a tort claim (page 851), all of which were redacted as a result of the application of the aforementioned FOIA exemptions (b)(5) and (b)(6), as well as (b)(7)(C), which concerns the release of records compiled for law enforcement purposes which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. Lastly, in situations where the litigation case file did not include evidence of a settlement, but the entry of information in the Content Manager system by the individual who filed the records indicated a settlement amount that made the records responsive, we have again printed off and released the Content Manager "Face Sheet" which provides the settlement information. Examples of this can be found at pages 200, 553, 619, 852, and 867.

Regarding the Bureau of Prisons North Central Regional Office (NCRO) records, we have located 2,033 pages of responsive records in the NCRO files. After a careful review of these 2,033 pages of responsive records, and applying our discretionary release authority, we have determined that 1,871 pages were appropriate for release in full. A total of 162 pages have been withheld in their entirety; 153 of these pages (at pages 162 – 63; (Clark case); 302 – 307 (Chess case); 383 – 386 (Buechel case); 467 – 471 (Gil case); 607 – 615 (McClinton case); 733 – 738 (Anderson case); 809 – 814 (Rappe case); 1,163 – 1,166 (Estate of Adam Montoya case); 1,179 – 1,188, and 2,029 – 2,033 (Cunningham case); 1,206 – 1,214 (Hudson case); 1,254 – 1,259 (Hildebrand case); 1,272 – 1,280 and 1,318 – 1,326 (Penick case); 1,384 – 1,389 (Drake case);

1,404 – 1,413 (Mika Hilare on behalf of Stafford Hilare case) 1,418 – 1,425 and 1,436 – 1,443 (Pappas case); 1,826 – 1,843 (Fritts case); 1,923 – 1,925 (Williams case); 1,957 – 1,960 and 1,962 – 1,965 (Jones cases); and 1,995 – 2,000 (Sachsenmaier case)) which consist of privileged legal liability analysis memoranda and have been withheld as a result of the application of the aforementioned exemption (b)(5) of the FOIA. The remaining nine pages (pages 254 – 256 and 1,328 – 1,333) withheld in their entirety consist of a medical evaluation of an inmate and a medical opinion regarding an inmate's condition; these pages were withheld as a result of the application of the aforementioned exemption (b)(6) of the FOIA. Approximately seven pages of records have been released with partial redactions of certain information; these redactions include the names of BOP employees involved in the investigation of a prison fight and the name of a BOP inmate other than a claimant also involved in that situation (pages 251 – 253), the redactions of e-mail addresses of BOP or DOJ employees involved in processing payment for a claim (page 219), and bank account information from settlement agreements (pages 56, 221, 225, and 2,022), all redactions pursuant to the application of the aforementioned FOIA exemption (b)(6) as well as (b)(7)(C), which concerns the release of records compiled for law enforcement purposes which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy. Lastly, in situations where the litigation case file did not include evidence of a settlement, but the entry of information in the Content Manager system by the individual who filed the records indicated a settlement amount that made the records responsive, we have printed off the Content Manager "Face Sheet" which provides the settlement information. Examples of this can be found at pages 381, 472, 481, 622, 660, 1,167, 1,334, 1,389, 1,689, 1,701, 1,784, 1,965, 2,008, 2,026, and 2,028.

Regarding the Bureau of Prisons Northeastern Regional Office (NERO) records, we have located 848 pages of responsive records in the NERO files. After a careful review of these 848 pages of responsive records, and applying our discretionary release authority, we have determined that 827 pages were appropriate for release in full. A total of 21 pages have been withheld in their entirety; nine of these pages are at 466 - 474 (Mitchell case); 10 of the pages are at 779 - 788 (Chicarielli case); and two of the pages are at 829 – 830 (Ram case), which consist of privileged legal liability analysis memoranda and have been withheld as a result of the application of the aforementioned exemption (b)(5) of the FOIA. Consistent with the records pertaining to other regions, where the litigation case file did not include evidence of a settlement, but the entry of information in the Content Manager system by the individual who filed the records indicated a settlement amount that made the records responsive, we have printed off and released the Content Manager "Face Sheet" which provides individual case settlement information. Examples of these "Face Sheets" can be found at pages 1, 3, 61, 124, 190, 246, 263, 289, 446, 476, 496, 584, 592, 608, 621, and 831.

Regarding the Bureau of Prisons Southeastern Regional Office (SERO) records, we have located 1,341 pages of responsive records in the SERO files. After a careful review of these 1,341 pages of responsive records, and applying our discretionary release authority, we have determined that 1,091 pages were appropriate for release in full. A total of 249 pages have been withheld in their entirety: 27 of these pages are at 269 – 295 (Irwin case); eight pages at 338 – 345 (West case); seven pages at 516 – 522 (Hensarling case); 12 pages at 543 – 554 (Beck case); six pages at 567 – 572 (Hernandez case); 608 – 627 and 628 – 653 (an original and updated memo for the

Alvorado case; nine pages at 730 - 738 (Bennett case); 19 pages at 746 – 762 and 763 – 764 (an original and updated memo for the Michael Cruz case); 16 pages at 843 – 858 (Edwin Cruz case); 13 pages at 898 – 910 (Ellington case); 28 pages at 1,063 – 1,090 (Riopedre case); three pages at 1,127 – 1,129 (Carter case); 12 pages at 1,135 – 1,146 (Alessi case); 23 pages at 1,254 – 1,276 (Withers case); and one page at 1,298 and 19 pages at 1,323 – 1,341 (Brons case), which consist of privileged legal liability analysis memoranda and have been withheld as a result of the application of the aforementioned exemption (b)(5) of the FOIA. Additionally, bank routing, account, and Federal Reserve numbers were redacted from settlement agreements appearing at pages 767 and 1,252 pursuant to the aforementioned FOIA exemption b(6). I would also note that the redactions which appear on pages 302 – 304, and the poor quality of documents at pages 305, 306, and 311, appear to be the result of the use of documents requested pursuant to an unrelated FOIA request by the plaintiff in that case, and the use of poor-quality documents in litigation by the plaintiff, as the precisely same limitations regarding those records are noted in the same pages contained in that case's electronic records available by the use of PACER. Finally, I noted in my final review that pages 346 – 353 may be duplicate pages; I apologize if that is the case, as we have exerted great energy to ensure that duplicate documents are not part of our releases to you. Again, where the litigation case file did not include evidence of a settlement, but the entry of information in the Content Manager system by the individual who filed the records indicated a settlement amount that made the records responsive, we have again printed off and released the Content Manager "Face Sheet" which provides individual case settlement information pages 1, 33, 51, 354, 523, 555, 573, 654, and 769.

Regarding the Bureau of Prisons South Central Regional Office (SCRO) records, we have located 1,390 pages of responsive records in the SCRO files. After a careful review of these 1,390 pages of responsive records, and applying our discretionary release authority, we have determined that 1,249 pages were appropriate for release; six of those 1,249 pages (76, 529, 818, 843, 1,142, and 1,190) have redactions of bank routing, account, and/or Federal Reserve numbers from settlement agreements, and one page (293) has a redaction of the Social Security Number of the plaintiff, all these redactions the result of the application of the aforementioned exemption b(6) of the FOIA. A total of 141 pages have been withheld in their entirety; three of these pages are at 213 – 215 (Benavides case); two pages at 273 – 274 (Gonzales case); four pages at 410 – 413 (Weathington case); 26 pages at 443 – 468 (Hall case); two pages at 524 and 526 (Medrano case); two pages at 609 – 610 (Dale case); 11 pages at 782 – 792 (Lamer case); nine pages at 825 – 833 (Baker case); 24 pages at 968 – 991 (Clarke case); 17 pages at 1,015 – 1,031 (Ruiz case); 14 pages at 1,145 – 1,156 and 1,162 – 1,163 (Smith case, government memos) and 11 pages at 1,165 – 1,175 (Smith case defense submission); one page at 1,226 (Pierce case, settlement justification discussion, settlement amount not redacted); five pages at 1,227 – 1,231 (Pierce case); eight pages at 1,247 – 1,254 (Simpson case); and one page at 1,347 (Bynum case), which consist of privileged legal liability analysis memoranda and have been withheld as a result of the application of the aforementioned exemption (b)(5) of the FOIA. As has been our previous practice, where the litigation case file did not include evidence of a settlement, but the entry of information in the Content Manager system by the individual who filed the records indicated a settlement amount that made the records responsive, we have again printed off and released the Content Manager "Face Sheet" which

provides individual case settlement information pages 432, 689, 1,032, 1,255, 1,387, and 1,390.

Finally, regarding the Bureau of Prisons Western Regional Office (WXRO) records, we have located 2,287 pages of responsive records in the WXRO files. After a careful review of these 2,287 pages of responsive records, and applying our discretionary release authority, we have determined that 1,475 pages were appropriate for release; five of those 1,475 pages (52, 1,422, 1,573, 2,137, and 2,178) have redactions of bank routing, account, and/or Federal Reserve numbers from settlement agreements, all redactions pursuant to FOIA exemption b(6), which concerns the release of records which would constitute a clearly unwarranted invasion of the personal privacy of third parties. A total of 812 pages have been withheld in their entirety; 270 of those pages consist of advisory memoranda or communications in which the Bureau of Prisons attorneys (and in two cases, plaintiff's attorney) responsible for either the claim or litigation at issue advised the regional counsel, or the court or mediation authority, regarding the merits of the claim or litigation and opined on the appropriateness of settling the claim, and were withheld pursuant to FOIA exemption b(5), which concerns the release of pre-decisional advisory matters. These withholdings are at pages 59 – 68 (Lisonbee case); 183 – 185 (Northington case); 298 – 310 (Murillo case); 397 – 403 (Vincent case, plaintiff's submission); 1,440 – 1,441 (Richardson case); 1,540 – 1,553 (Cottini case); 1,601 (Montenegro case); 1,859 – 1,906 (Satterwhite case, government memorandum) and 1,907 – 2,029 (Satterwhite case, plaintiff's memorandum); 2,065 – 2,084 (Conner case); 2,099 – 2,101 and 2,104 – 2,113 (Furtney case); 2,146 – 2,148 (Skurdal case); 2,227 – 2,232 (Argento case); and 2,259 – 2,265 (Halemau case). Additionally, 542 of the 2,287 pages of records have been withheld in their entirety under both the aforementioned b(5) and b(6) FOIA exemptions; these are large portions of the attachments to plaintiff's settlement memorandum in the Vincent case (the cover letter narrative is at pages 397 – 403); the redacted attachment pages are at 461 – 733 (plaintiff's deposition); 734 – 952; 963 – 986; 989 – 996; and 1,052 – 1,056 (plaintiff's medical records); and 1,066 – 1,087 and 1,094 – 1,104 (plaintiff's medical records and life care/rehabilitation plans). As has been our previous practice, where the litigation case file did not include evidence of a settlement, but the entry of information in the Content Manager system by the individual who filed the records indicated a settlement amount that made the records responsive, we have again printed off and released the Content Manager "Face Sheet" which provides individual case settlement information. Examples of these "Face Sheets" can be found at pages 311, 1,162, 1,442, 1,575, 1,602, 2,052, 2,140, 2,187, 2,266, and 2,287. Additionally, I note that the settlement amount in the Willis case can be located at page 1,412.

If you have questions about this response please feel free to contact the undersigned, this office, or the Federal Bureau of Prisons' (BOP) FOIA Public Liaison, Mr. C. Darnell Stroble at 202-616-7750, 320 First Street NW, Suite 936, Washington DC 20534, or ogc_efoia@bop.gov.

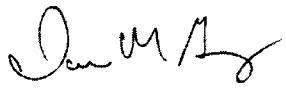
Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information, Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at

ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account at: https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

9/29/2017

X 

Ian Guy
Supervisory Attorney
Signed by: BOP

Explanation of FOIA Exemptions Used by the Federal Bureau of Prisons

5 U.S.C. § 552(b)(1) protects classified information.

5 U.S.C. § 552(b)(2) concerns matters related solely to internal agency personnel rules or practices.

5 U.S.C. § 552(b)(3) concerns matters specifically exempted from release by statute.

5 U.S.C. § 552(b)(4) concerns trade secrets and commercial or financial information obtained from a person that is privileged or confidential.

5 U.S.C. § 552(b)(5) concerns certain inter- and intra-agency communications protected by the deliberative process privilege, the attorney work-product privilege, and/or the attorney-client privilege.

5 U.S.C. § 552(b)(6) concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties.

5 U.S.C. § 552(b)(7)(A) concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings.

5 U.S.C. § 552(b)(7)(B) concerns records or information compiled for law enforcement purposes the release of which would deprive a person of a right to a fair trial or an impartial adjudication.

5 U.S.C. § 552(b)(7)(C) concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties.

5 U.S.C. § 552(b)(7)(D) concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to disclose the identities of confidential sources and information furnished by such sources.

5 U.S.C. § 552(b)(7)(E) concerns records or information compiled for law enforcement purposes the release of which would disclose techniques and procedures for law enforcement investigations or prosecutions.

5 U.S.C. § 552(b)(7)(F) concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to endanger the life or personal safety of an individual.

5 U.S.C. § 552(b)(8) concerns matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

5 U.S.C. § 552(b)(9) concerns geological and geophysical information and data, including maps, concerning wells.

Central Office

Washington DC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOISE T. WORMLEY,
2303 BROOKS DRIVE
APARTMENT 104
SUITLAND, MD 20746

Plaintiff,

v.

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
P.O. BOX 888
BENJAMIN FRANKLIN STATION
WASHINGTON, D.C. 20044

THE DISTRICT OF COLUMBIA
OFFICE OF RISK MANAGEMENT, 441
4TH STREET, NW
SUITE 800 SOUTH
WASHINGTON, DC 20001

CORRECTIONS CORPORATION OF
AMERICA
102 WOODMONT BOULEVARD,
SUITE 800
NASHVILLE, TN 37205

REYNOLDS & ASSOCIATES, INC.,
D/B/A WASHINGTON HALFWAY
HOMES
1430 G. ST., NE
WASHINGTON, D.C.

COMPLAINT AND
DEMAND FOR JURY TRIAL

CASE NO. _____

Case: 1:08-cv-00449
Assigned To : Kollar-Kotelly, Colleen
Assign. Date : 3/14/2008
Description: Civil Rights-Non-Employ.

RECEIVED

APR 21 2008

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WASHINGTON, DC 20530-1000)
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JOHN OR JANE DOES 31-40	)
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AND EMPLOYEES	)
REYNOLDS & ASSOCIATES,	)
D/B/A WASHINGTON HALFWAY	)
HOMES	)
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JOHN OR JANE DOE 41	)
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WASHINGTON, DC 20534	)
	)

COMPLAINT

Plaintiff, Eloise T. Wormley, by and through her attorneys, brings the following action for damages arising out of the United States Constitution and the laws of the United States and the District of Columbia, under 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Federal Tort Claims Act, District of Columbia Code and District of Columbia Common Law, and alleges as follows:

NATURE OF THE ACTION

1. This is an action to recover for the five-month unlawful incarceration of Plaintiff Eloise Theresa Wormley. Her unlawful imprisonment was due to the willful and negligent acts and omissions of a host of federal and District officers and employees. Ms. Wormley was wrongfully imprisoned from October 22, 2006 until March 19, 2007, first in the Correctional Treatment Facility (CTF) in Washington, D.C., then in the Central Detention Facility (CDF). For that period of detention, she was never brought before a judge, she was never appointed a

lawyer, she was never advised of her rights. And for that five month period, she was never accurately told by anyone why she was in jail, or how long she could expect to remain there—not by the U.S. Marshals who issued and executed an invalid detainer, not by the officers or administrators at CTF who breached their duty to inform her of the detainer, and not by her CTF case manager, from whom Ms. Wormley repeatedly sought answers. There was no justification for that five-month period of incarceration. And she was unlawfully detained against a backdrop of widespread publicity of the problem of unlawful imprisonment of inmates at CDF and CTF through news stories, government reports, and the widely-reported multi-million dollar class action settlement in *Bynum, et al. v. District of Columbia*, No. 02-0956 (D.D.C.), providing all Defendants with actual and constructive knowledge that inmates at CDF and CTF were at an extreme risk of overdetention. She now seeks compensation from the individuals and entities that falsely imprisoned her, breached their duties of care, and denied Ms. Wormley her due process right to a hearing before depriving her of her liberty and property.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331 and the U.S. Constitution.

3. Venue is proper in this district under 28 U.S.C. § 1391. A substantial part of the events or omissions alleged herein occurred within the District of Columbia.

4. Plaintiff brings causes of action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 et seq., after having exhausted her administrative remedies.

PARTIES

5. Plaintiff Eloise T. Wormley ("Ms. Wormley") is a fifty-four year old Army veteran currently living in Suitland, Maryland, and working at the Veteran's Administration Hospital in Washington, D.C.

6. Defendant United States of America is the proper defendant under the FTCA and is named as a defendant by and through the actions of the following agencies' officers:

(a) United States Marshals Service ("USMS"), which employed Defendants Sean McLeod, David Baldwin, Donna Scott, and John or Jane Does 21–30, who are herein named as defendants in their official and individual capacities;

(b) Federal Bureau of Prisons ("BOP"), which employed Defendants Randal White and John or Jane Does 1 and 41, who are herein named as defendants in their official and individual capacities;

(c) United States Parole Commission ("USPC").

7. The District of Columbia is named by and through the actions of the District of Columbia Department of Corrections, which employed Defendants John or Jane Does 11–20, who are herein named as defendants in their official and individual capacities

8. Defendant Corrections Corporation of America (CCA) is a private company doing business in the District of Columbia and performing a traditionally governmental function of operating a prison through contractual relationships with the United States of America and the District of Columbia. Defendant CCA's principal place of business is at 10 Burton Hills Boulevard, Nashville, Tennessee. Defendant CCA employed Defendant Tuttwiler and Defendants John and Jane Does 2–10 who are herein named as defendants in their official and individual capacities.

9. Defendant Reynolds Halfway Homes, d/b/a Washington Halfway Homes, Inc., ("Reynolds") is a private company doing business in the District of Columbia and performing a traditionally governmental function of operating a prison through contractual relationships with

the United States of America and the District of Columbia. Defendant Reynolds is located at 1430 G St., NE, Washington, D.C. At all times relevant to this Complaint, it owned and operated the Fairview Halfway House (the "Fairview"), a halfway house for women located at 1430 G St., NE, Washington, D.C. Defendant Reynolds employed Defendants John and Jane Does 31–40 who are herein named as defendants in their official and individual capacities.

10. Defendant Sean McLeod was, at all times relevant to this Complaint, a Deputy United States Marshal responsible for requesting detainers, and for ensuring such detainers complied with all applicable laws, rules, and directives, and is named in his official and individual capacity.

11. Defendant Randal White was, at all times relevant to this Complaint, a Federal Bureau of Prisons Institutional Community Officer and is named in his official and individual capacity.

12. Defendant David Baldwin was, at all times relevant to this Complaint, a Deputy U.S. Marshal and is named in his official and individual capacity.

13. Upon information and belief, Defendant Donna Scott was, at all times relevant to this Complaint, employed by USMS and is named in her official and individual capacity

14. Defendant Harley G. Lappin is the Director of the Federal Bureau of Prisons and is named in his official and individual capacity.

15. Defendant Devon Brown is the Director of the D.C. Department of Corrections and is named in his official and individual capacity.

16. Defendant Tuttwiler was, at all times relevant to this Complaint, an employee of CCA and an officer at the Correctional Treatment Facility, located in Washington, D.C., and was

responsible for the care and custody of the inmates under her supervision, including plaintiff. She is named in her official and individual capacity.

17. Defendant John or Jane Doe 1 is a person with name currently unknown who was, at all times relevant to this Complaint, the official responsible for overseeing inmate records at the Federal Bureau of Prisons and is named in his official and individual capacity.

18. Defendants John and Jane Does 2–10 are persons with names currently unknown who were, at all times relevant to this Complaint, employees of CCA responsible for the management and oversight of CCA employees and CTF officers who were directly responsible for the care and custody of the inmates under their supervision. They are named in their official and individual capacities.

19. Defendants John or Jane Does 11–20 are persons with names currently unknown who were, at all times relevant to this Complaint, employees of the CDF and/or DOC responsible for the management and oversight of CDF and/or DOC employees directly responsible for the care and custody of the inmates under their supervision. They are named in their official and individual capacities

20. Defendants John or Jane Does 21–30 are persons with names currently unknown who were, at all times relevant to this Complaint, employees of the USMS responsible for oversight and execution of detainers and warrants lodged against federal and District individuals. They are named in their official and individual capacities.

21. Defendants John or Jane Does 31–40 are persons with names currently unknown who were, at all times relevant to this Complaint, employees of Reynolds & Associates, Inc. and/or Fairview Halfway house who are responsible for the care and custody of inmates under their supervision. They are named in their official and individual capacities.

22. Defendant John or Jane Doe 41 is a person with name currently unknown who was, at all times relevant to this Complaint, the official responsible for the duties of the Bureau of Prisons Community Corrections Manager, and who received a letter from Ms Wormley regarding Ms. Wormley's detention at CDF, and is named in his or her official and individual capacity.

FACTUAL BACKGROUND

23. Eloise Wormley is a fifty-four year old Army veteran living in Suitland, Maryland. She was born and raised in Washington, D.C., attended public schools in the District, and received an Associate's Degree in X-Ray technology from the University of the District of Columbia in 1980. Shortly after receiving her degree, Ms. Wormley joined the United States Army, where she remained until 1983, when she was discharged under honorable conditions.

24. Immediately before the period of her unlawful imprisonment, Ms. Wormley completed a 135-day sentence in CTF for a probation violation relating to a prior offense. This period of detention was ordered by District of Columbia Superior Court Judge Craig S. Iscoe and expired on October 21, 2006.

25. Rather than being released on October 21, 2006, as the law required, Ms. Wormley was held for an additional 150 days, until March 19, 2007.

26. For the duration of this five-month period, Ms. Wormley languished in a legal limbo. This limbo was created by a procedurally-flawed USMS detainer that should never have been issued, which required CTF to keep Ms. Wormley in its custody upon the expiration of her sentence, and was perpetuated by the negligence and indifference of the Defendants, none of

whom exercised their clearly established responsibilities toward Ms. Wormley with the care that she was due.

Wrongdoing Leading to Ms. Wormley's Overdetention.

27. The detainer that led to Ms. Wormley's five months of wrongful incarceration was lodged on June 16, 2006 by Officer Sean McLeod of the USMS, under the authority of George Walsh, U.S. Marshal for the District of Columbia, and was received by Shirley Chisolm at CDF. This detainer, and the processes surrounding its conception, processing, lodging, and execution, were severely flawed.

28. The detainer was lodged pursuant to a "Notice of Escaped Federal Prisoner" (the "Notice") issued by Defendant Randal White, a BOP Institution Community Corrections Officer, on June 5, 2005.

29. That Notice falsely stated that on June 2, 2006, Ms. Wormley failed to return to the Fairview Halfway House, a community corrections facility owned by Reynolds & Associates, Inc. and under contract with the BOP at which Ms. Wormley was residing.

30. Ms. Wormley had in fact returned to the Fairview. All or some of John or Jane Does 31–40 (unnamed officers and employees of the Fairview) had wrongfully refused to let Ms. Wormley return, in violation of its agreement with the BOP and BOP program directives.

31. Upon information and belief, the Fairview did not provide a hearing for Ms. Wormley on the charge of escape, whether in person or in absentia, nor did it provide written findings of fact to BOP or undertake any other protections of Ms. Wormley's liberty interests.

32. Neither Randal White, nor John or Jane Doe 1 (BOP Records Manager) or 41 (BOP Community Corrections Manager) properly investigated the circumstances surrounding

Fairview's report of Ms. Wormley's "escape," and failed to ensure that she received the due process to which she was entitled at the Fairview, resulting in a false charge of "escape."

33. Despite being wrongfully evicted from the Fairview, and unsure of which agencies in D.C.'s labyrinth had authority over her, Ms. Wormley endeavored to turn herself in to USMS and DOC in the days following her eviction. She eventually managed to contact D.C. Metro Police, who escorted her to CDF, where she surrendered on June 14, 2006.

34. By June 16, 2006, the date that the USMS detainer was lodged, the BOP had already determined that Ms. Wormley's "escape" had been resolved, that she was in official custody at CDF, and that her remaining BOP sentence obligations would naturally terminate June 21, 2006. Accordingly, no federal purpose for the detainer existed after June 21, 2006.

35. This fact was or should have been known to Sean McLeod, John or Jane Does 21–30 (unnamed officers and employees of the USMS), John or Jane Doe 41 (BOP Community Corrections Manager), the District of Columbia, Devon Brown, and John or Jane Does 11–20 (unnamed officers and employees of the D.C. Department of Corrections).

36. The detainer purported to be based on a Federal Parole Violation Warrant issued by the United States Parole Commission (USPC). Ms. Wormley was not, and has never been, on parole, nor has she ever been subject to the jurisdiction of the USPC.

37. This fact was or should have been known to Sean McLeod, John or Jane Does 21–30 (unnamed officers and employees of the USMS), John or Jane Doe 41 (BOP Community Corrections Manager), the District of Columbia, Devon Brown, and John or Jane Does 11–30 (unnamed officers and employees of the DOC).

38. The detainer was lodged using an incorrect form. Had USMS and Sean McLeod used the correct form, Ms. Wormley would have been advised of her rights under the Speedy

Trial Act (STA), 18 U.S.C. §§ 3161-3174. Deputy Marshal McLeod's use of the incorrect form failed to inform Ms. Wormley of her right to a timely hearing.

39. The detainer requires that the receiving party read a notice provision to the inmate and return a signed copy to the USMS certifying that the notice was provided. CDF and all or some of John or Jane Does 11–20 (unnamed officers and employees of the DOC) never informed Ms. Wormley of the detainer lodged against her. Upon information and belief, USMS did not receive a signed certification that notice was provided, or follow up to ensure that notice was provided.

40. The detainer was not accompanied by a required Form USM-41 regarding the "Remand or Order to Deliver and Receipt of U.S. Prisoners." This form is creates the legal basis for detention of a prisoner under USMS authority. Had USMS and all or some of John or Jane Does 21–30 completed this form, it would have discovered that BOP had already resolved Ms. Wormley's escape charge and stated an exhaustion date of June 21, 2006, rendering further detention illegal.

41. Upon information and belief, USMS and all or some of John or Jane Does 21–30 violated their duty to notify the case Assistant U.S. Attorney (AUSA) of (1) the place of Ms. Wormley's confinement, and (2) the date the detainer was filed. The USMS and all or some of John or Jane Does 21–30 also failed in their duty to provide a copy of the detainer to the AUSA.

42. If USMS, Sean McLeod, and all or some of John or Jane Does 21–30 believed that the detainer was properly based upon a parole violation, USMS, Sean McLeod, and all or some of John or Jane Does 21–30 should have notified USPC upon its lodging of the detainer. Upon information and belief, USMS, Sean McLeod, and all or some of John or Jane Does 21–30 violated their duty to notify USPC. Alternatively, if such notice was provided to USPC, USPC

failed in its duty to correct the error and to ensure that an inmate purportedly held under its authority and jurisdiction was not improperly detained.

43. If USMS, Sean McLeod, and all or some of John or Jane Does 21–30 did not believe the detainer was based on a parole violation, but knew instead that it was based on the BOP notice of escape, USMS, Sean McLeod, and all or some of John or Jane Does 21–30 should have notified the BOP of the lodging of the detainer. Upon information and belief, USMS, Sean McLeod, and all or some of John or Jane Does 21–30 did not notify BOP that the detainer had been lodged. Had it done so, BOP could have informed USMS of Ms. Wormley's status and of the exhaustion of the escape charge on June 21, 2006. Alternatively, if USMS, Sean McLeod, and all or some of John or Jane Does 21–30 notified BOP of the lodging of the detainer, BOP failed in its duty to correct the invalid parole violation detainer and to ensure that an inmate held under its authority and jurisdiction was not improperly detained.

44. Upon information and belief, Officer MacLeod failed in his duty to notify the originating USMS office when Ms. Wormley came into federal custody.

45. The USMS detainer was lodged with CDF on June 15, 2006 after Ms. Wormley voluntarily surrendered to CDF on June 14. By June 21, 2006—the day she appeared before Judge Iscoe—Ms. Wormley had completed the remaining balance on the six-month conspiracy sentence that had been interrupted by her "escape." Upon information and belief, Ms. Wormley's June 21, 2006 release date from the escape charge was computed and recorded by SENTRY, BOP's computerized inmate tracking system, and was available directly or indirectly to each of the Defendants. Thus, Ms. Wormley had been cleared of her "escape," and should have been freed from the detainer, before she even began her 135-day sentence.

46. Despite Ms. Wormley's clearance of the escape charge on June 21, 2006, and the concurrent exhaustion of any remaining legal validity to the detainer, Defendant MacLeod and other USMS officers did not lift the detainer in the months between June and October 2006. For every day after June 21, 2006, the date upon which Ms. Wormley's federal sentence was exhausted, USMS violated its directives by allowing an erroneously lodged and now exhausted detainer to remain on Ms. Wormley's file.

47. Each of these violations directly contributed to Ms. Wormley's subsequent detention for five months, and to her loss of liberty and property.

Wrongdoing during Ms. Wormley's Overdetention.

48. As her October 21, 2006 release date neared, communication increased about Ms. Wormley's case between several Defendants, including Defendants Scott, Baldwin, John or Jane Does 2-10, 11-20, and 21-30. These communications involved preparation for Ms. Wormley's release, her arrest and processing by USMS, and communication to CDF regarding her ongoing detention status to CDF. In each of these interactions, as described below, Defendants prolonged Ms. Wormley's detention and caused her other constitutional harms.

49. On October 18, 2006, in preparation for Ms. Wormley's release, Rollins Wayne Hunter, Legal Instruments Examiner at the D.C. Department of Corrections Case Management Services, faxed a notice to Defendant Donna Scott at USMS to inform her that Ms. Wormley's sentence would expire on October 21, 2006. The fax requested that that USMS execute the outstanding detainer on October 19, 2006 and asked Ms. Scott to arrange a court to issue an order for the inmate to appear before the court. This fax put Ms. Scott and USMS on notice that Ms. Wormley's 135-day sentence was nearing completion and that any further detention was the

responsibility of USMS. Upon information and belief, Ms. Scott arranged for Ms. Wormley to be arrested and fingerprinted, but did not arrange for Ms. Wormley to appear before a court or participate in any hearing or any kind regarding her custody status. Upon information and belief, Ms. Scott, in arranging for Ms. Wormley's processing, did not determine Ms. Wormley's lawful date of release and/or whether a valid, lawful detainer existed for her arrest by USMS.

50. On October 19, 2006, Ms. Wormley was transported, via a CTF transportation vehicle, to the E. Barrett Prettyman Courthouse, 333 Constitution Ave. NW, Washington, DC 20001. There, she was led to a room where she was fingerprinted and processed by USMS officers pursuant to the facially invalid parole violator warrant. Ms. Wormley was not told why she was being processed until she asked one of the USMS officers. On information and belief, one of the officers responded that she was being processed for an "escape." This was the first Ms. Wormley had heard of an escape charge being lodged against her. Upon receiving this information, Ms. Wormley protested to the USMS officers processing her that she had never escaped from anywhere, and, in fact, had turned herself into D.C. Jail in June 2006. She was given no further details regarding the legal basis for her processing by the USMS or her rights regarding her continued detention.

51. Also on October 19, 2006, Deputy U.S. Marshal David Baldwin wrongfully issued a form to CDF, requesting that CDF "Place [Ms. Wormley] in transit hold pending federal designation." Ms. Wormley's federal designation had already been determined by the exhaustion of her (wrongfully instigated) escape charge. The detainer could and should have been lifted at that time, and Defendants Baldwin, Scott, and Does 1, 21-30, and 41 should have ensured that it was. Instead, Ms. Wormley was transported back to CTF to languish under the unlawful "transit hold."

52. After her return to CTF, Ms. Wormley's continued incarceration was wrongfully perpetuated by the intentional, recklessly indifferent, and negligent acts of various actors who, though having notice of Ms. Wormley's plight and the capacity and duty to end it, did little or nothing to secure her freedom.

53. On multiple occasions, Ms. Wormley asked her case manager, Mrs. Tuttwiler, why she was being held. Mrs. Tuttwiler responded that she was being held because of a "probation violation." When Ms. Wormley asked Mrs. Tuttwiler why the detainer, which she had endeavored on her own to obtain through the CTF system, said she had a parole violation, the case manager erroneously stated that sometimes probation "switches over to parole." Ms. Wormley received this response every time she asked Mrs. Tuttwiler—between three and five times over the five-month period of her unlawful detention.

54. On December 6, 2006, Ms. Flythe of the Correction Corporation of America's record office faxed a notice to Donna Scott of USMS, stating "This inmate's sentence was complete on 10/21/06. Please execute her warrant." Despite this clear notice to Ms. Scott, Ms. Wormley was not immediately released, as she should have been. Nor did Ms. Scott, or anyone else, upon information and belief, provide Ms. Wormley with due process of any kind.

55. On January 11, 2007, Defendant John or Jane Doe 21 faxed certain documents from USMS to CDF. The documents included the "transit hold" form pursuant to which Ms. Wormley was erroneously being held, and the original BOP Notice of Escape that led to the initial detainer lodged by the USMS. Upon information and belief, Defendants John or Jane Doe 11 (CDF) and/or John or Jane Doe 21 (USMS) was/were aware of questions regarding the validity of the continued detention of Ms. Wormley. Despite awareness of the potential illegality

of Mrs. Wormley's detention, however, sender John or Jane Doe 21 and recipient John or Jane Doe 11 continued this detention unabated.

56. Ms. Wormley wrote a letter in February 2007 to the John or Jane Doe 41 (Bureau of Prisons Community Corrections Manager), asking for the reasons for her detention and information on when she would be released. She never received a response.

57. Ms. Wormley submitted an inmate request to Walter "Sonny" Fulton, the Assistant Warden of Programs, in March 2007 to find out about her status. She specifically asked whether the Parole Board was going to pick her up.

58. After inmates—not her case manager, not officers at CTF, not USPC, BOP, or USMS officers—told her that she should have had a parole hearing within 90 days of detention, Ms. Wormley asked her case manager what the status of her court hearing was. She was only told by her case manager that she was "looking into it."

59. Each of these failures contributed to Ms. Wormley's five-months of unlawful imprisonment and occurred in the face of notice of her plight. Moreover, they occurred against a backdrop of widespread publicity of the problem of unlawful imprisonment of inmates at CDF and CTF through news stories, government reports, and the widely-reported multi-million dollar class action settlement in *Bynum, et al. v. District of Columbia*, No. 02-0956 (D.D.C.), providing all Defendants with actual and constructive knowledge that inmates at CDF and CTF were at an extreme risk of overdetention.

60. After 147 days of unwarranted incarceration, Ms. Wormley was finally released from CTF into the custody of CDF.

61. Still more unjust incarceration awaited Ms. Wormley, however. Rather than release her from prison, CTF and erroneously transferred Ms. Wormley to CDF because its

computer system listed that she had a "program failure" on her record. This program failure was the same June 5, 2006 "escape" for which Mrs. Wormley was illegally detained and for which she had specifically just been cleared. Nevertheless, CDF continued to detain Ms. Wormley for this "program failure" for three additional and unjustifiable days.

62. On March 19, 2007 Ms. Wormley was finally released from prison when the USMS Prisoner Coordination and Logistics office sent a fax to CDF stating that Ms. Wormley was released from her escape charge on June 21, 2006, and admitting that the parole violation detainer had been erroneously lodged.

63. In sum, the story of Ms. Wormley's unlawful five-month detention is a story of wrongful and negligent conduct by a host of United States and District of Columbia officers and agencies, violating clearly established mandates, procedures and duties. It is also the story of a dysfunctional bureaucracy whose victims could include—and probably do include—scores of individuals who, like Ms. Wormley, are unfamiliar with their rights and have no choice but to acquiesce to the sometimes unreasonable demands of a complex and poorly managed system. There would have been no excuse had Ms. Wormley been overdetained by only a day. That she was wrongfully detained for five months; that she never knew and was never told when she would ever leave; and that she neither saw a judge nor was appointed a lawyer—these facts make her detention nothing short of unconscionable.

CONSTITUTIONAL CLAIMS UNDER *BIVENS V. SIX UNKNOWN NAMED AGENTS*, 403 U.S. 388 (1971)

COUNT I – Overdetention

Against Defendants MacLeod, Baldwin, Scott, Defendant John or Jane Doe 1, John and Jane Does 21–30.

64. Plaintiff realleges and incorporates by reference all preceding allegations.

65. Ms. Wormley was detained in CTF and CDF without justification or legal authority from October 21, 2006 until March 19, 2007, in violation of her clearly established constitutional rights under the Fifth Amendment.

66. Defendant White proximately caused and contributed to Ms. Wormley's overdetention by issuing an inaccurate "Notice of Escape" for Ms. Wormley that contained false statements regarding her efforts to return to the Fairview Halfway House without due process of law.

67. Defendant MacLeod proximately caused and contributed to Ms. Wormley's overdetention by their intentional acts and omissions, including illegally issuing an invalid detainer for a parole violation warrant and violating their reporting and notice duties to Ms. Wormley and other federal agencies.

68. Defendant John or Jane Doe 1 proximately caused and contributed to Ms. Wormley's overdetention by violating his/her monitoring responsibilities over inmates such as Ms. Wormley, including failing to communicate to USMS or CDF that Ms. Wormley had been cleared from her escape charge by June 21, 2006.

69. Defendants Does 21-30 proximately caused and contributed to Ms. Wormley's overdetention by arresting and processing her pursuant to an unlawful and facially invalid parole violation warrant on October 19, 2006.

70. Defendant Baldwin proximately caused and contributed to Ms. Wormley's overdetention by his improper and unlawful issuance of a Form USM-41 requesting that CDF place Ms. Wormley in a "transit hold pending federal designation," when in fact BOP records reflected that Ms. Womley's escape charge had been released and her sentence had been exhausted.

71. Defendant Scott proximately caused and contributed to Ms. Wormley's overdetention by refusing to act upon multiple notifications that Ms. Wormley's lawful detention period at CDF had been exhausted and/or failing to reasonably ascertain Ms. Wormley's lawful status.

72. At all relevant times, the above-named Defendants acted under color of federal law.

73. As a result of the actions and omissions of the above-named Defendants, Ms. Wormley suffered harm to her person, liberty, and property, and to rights under the Fifth and Eighth Amendments to the Constitution.

COUNT II – Denial of Procedural Due Process

Against Defendants White, MacLeod, Scott, Baldwin, and Doe 1

74. Plaintiff realleges and incorporates by reference all preceding allegations.

75. From October 21, 2006 to March 19, 2006, Ms. Wormley was deprived of her liberty without the procedural safeguards to which she is entitled under the Due Process Clause of the Fifth Amendment.

76. Defendant White deprived Ms. Wormley of due process by issuing a "Notice of Escape" based upon the constitutionally inadequate procedures of the Fairview in categorizing Ms. Wormley as an escapee, including, but not limited to, Fairview's failure to provide a written

statement by a fact-finder as to the evidence relied upon and the reasons for her categorization as an escapee by the Fairview.

77. Defendant MacLeod deprived Ms. Wormley of her constitutional rights to due process by violating USMS directives related to interagency and inmate notice that Ms. Wormley received notice of the detainer lodged against her.

78. Defendant John or Jane Doe 1 deprived Ms. Wormley of due process by allowing her to be processed and detained for over five months for an escape violation based upon the constitutionally inadequate procedures of the Fairview, including, but not limited to, Fairview's failure to provide a written statement by a fact-finder as to the it evidence relied upon, and by failing to provide Ms. Wormley with any notice of or hearing regarding her escape violation during her five months of confinement.

79. At all relevant times, the above-named Defendants acted under color of federal law.

80. As a result of the actions and omissions of the above-named Defendants, Ms. Wormley suffered harm to her person, liberty, and property, and to rights under the Fifth Amendment to the Constitution.

COUNT III – Unlawful Search and Seizure

Against Defendants White, MacLeod, Scott, Doe 1, and Does 21–30

81. Plaintiff realleges and incorporates by reference all preceding allegations.

82. Ms. Wormley was subjected to an unreasonable search and seizure pursuant to a facially invalid parole violation warrant on October 19, 2006, in violation of her rights under the Fourth Amendment.

83. Defendant White proximately caused and contributed to Ms. Wormley's

unreasonable search and seizure by issuing an inaccurate "Notice of Escape" for Ms. Wormley that contained false statements regarding her efforts to return to the Fairview Halfway House without due process of law.

84. Defendant MacLeod proximately caused and contributed to Ms. Wormley's unreasonable search and seizure by their intentional acts and omissions, including illegally issuing an invalid detainer for a parole violation warrant, failing to lift that detainer upon its lawful exhaustion, and violating their reporting and notice duties to Ms. Wormley and other federal agencies.

85. Defendant John or Jane Doe 1 proximately caused and contributed to Ms. Wormley's unreasonable search and seizure by violating his/her monitoring responsibilities over inmates such as Ms. Wormley, including failing to communicate to USMS or CDF that Ms. Wormley should be released.

86. Defendants John and Jane Does 21–30 proximately caused and contributed to Ms. Wormley's unreasonable search and seizure by executing an unlawful and facially invalid parole violation warrant on October 19, 2006.

87. Defendant Scott proximately caused and contributed to Ms. Wormley's unreasonable search and seizure by arranging and instigating Ms. Wormley's unlawful search and seizure after the escape charge against Ms. Wormley had been exhausted, instead of immediately lifting the detainer.

88. At all relevant times, the above-named Defendants acted under color of federal law.

89. As a result of the actions and omissions of the above-named Defendants, Ms. Wormley suffered harm to her person, liberty, and property and to rights under the Fourth

Amendment to the Constitution.

COUNT IV – Deliberate Indifference

Against Defendants Scott and Doe 41

90. Plaintiff realleges and incorporates by reference all preceding allegations.

91. Ms. Wormley suffered deliberate indifference to her plight and her pleas from direct and supervisory officials with the authority to obtain her release, in violation of her rights under the Eighth Amendment.

92. Defendant Scott was given actual notice of Ms. Wormley's sentence termination and of the need to lift the USMS detainer on December 6, 2006, yet did nothing to secure Ms. Wormley's release.

93. Defendant Doe 41 was given actual notice of Ms. Wormley's unlawful detention by a February 2007 letter from Ms. Wormley, yet did nothing to secure her release.

94. At all relevant times, the above-named Defendants acted under color of federal law.

95. As a result of the actions and omissions of the above-named Defendants, Ms. Wormley suffered harm to her person, liberty, and property, and to rights under the Fifth Amendment to the Constitution.

COUNT V – Supervisory Liability for Deliberate Indifference

Against Defendant Lappin

96. Plaintiff realleges and incorporates by reference all preceding allegations.

97. Defendant Lappin was responsible for supervising the BOP, including BOP employees charged with ensuring the timely release of detainees and inmates, and held a duty to instruct his subordinates regarding the prevention of constitutional harms resulting from BOP's

execution of its powers.

98. Defendant Lappin held actual and constructive knowledge that inmates at CDF and CTF were at an extreme risk of overdetention.

99. Based on this actual and constructive knowledge of the risk of overdetention at CDF, Defendant Lappin had a duty to ensure that BOP employees were sufficiently trained and supervised to prevent the overdetention of inmates held at CDF pursuant to BOP authority.

100. As a consequence of Defendant Lappin's failure train and/or supervise BOP employees responsible for ensuring the timely release of detainees and inmates, Ms. Wormley's rights to be free from overdetention, deprivations of due process, and deliberate indifference under the Fifth and Eighth Amendment were violated.

101. At all relevant times, Defendant Lappin acted under color of federal law.

102. As a result of the actions and omissions of Defendant Lappin, Ms. Wormley suffered harm to her person, liberty, and property, and to her rights under the Fifth and Eighth Amendments to the Constitution.

CLAIMS FOR TORTIOUS CONDUCT BY EMPLOYEES OF THE UNITED STATES OF AMERICA – FEDERAL TORT CLAIMS ACT

COUNT VI – False Imprisonment

Against Defendant United States of America

103. Plaintiff realleges and incorporates by reference all preceding allegations.

104. Ms. Wormley was unlawfully detained on October 19, 2006 and from October 21, 2006 until March 19, 2007, against her will and within the confines established by Defendants.

105. Defendant White proximately caused and contributed to Ms. Wormley's false imprisonment by issuing an inaccurate "Notice of Escape" for Ms. Wormley that contained false

statements that violated his duty to investigate the facts surrounding her efforts to return to the Fairview Halfway House.

106. Unnamed BOP employees proximately caused and contributed to Ms. Wormley's false imprisonment by failing to properly supervise Fairview staff to ensure that Ms. Wormley's rights to due process were protected.

107. Defendant MacLeod proximately caused and contributed to Ms. Wormley's false imprisonment by their intentional acts and omissions, including illegally issuing an invalid detainer for a parole violation warrant and violating their reporting and notice duties to Ms. Wormley and other federal agencies.

108. Defendant Doe 1 proximately caused and contributed to Ms. Wormley's false imprisonment by failing to notify USMS and CTF of the exhaustion of Ms. Wormley's BOP sentence.

109. Defendant Doe 41 proximately caused and contributed to Ms. Wormley's false imprisonment by violating his/her monitoring responsibilities over inmates such as Ms. Wormley, including failing to communicate to USMS or CDF that Ms. Wormley should be released.

110. Defendants Does 21–30 proximately caused and contributed to Ms. Wormley's false imprisonment by arresting and processing her pursuant to an unlawful and facially invalid parole violation warrant on October 19, 2006.

111. Defendant Baldwin proximately caused and contributed to Ms. Wormley's false imprisonment by his improper and unlawful issuance of a Form USM-41 requesting that CDF place Ms. Wormley in a "transit hold pending federal designation," when in fact Ms. Womley's escape charge had been exhausted as reflected in BOP records.

112. Defendant Scott proximately caused and contributed to Ms. Wormley's false imprisonment by arranging for the October 19, 2006 execution of the invalid detainer and by refusing to act upon multiple notifications that Ms. Wormley's lawful detention period at CDF had been exhausted.

113. Members of the USPC proximately caused and contributed to Ms. Wormley's false imprisonment by allowing her to be detained for five months pursuant to a purported USPC parole violator warrant.

114. Defendant Doe 41 proximately caused and contributed to Ms. Wormley's false imprisonment by refusing to initiate her release following actual notice of Ms. Wormley's overdetention via a February 2007 letter from Ms. Wormley.

115. Defendant Lappin proximately caused and contributed to Ms. Wormley's false imprisonment by failing to train and/or supervise BOP employees responsible for ensuring the timely release of detainees and inmates, despite actual and constructive knowledge that overdetentions at CDF and DOC occurred with notorious and alarming frequency.

116. At all relevant times, the above-named Defendants were employees of Defendant United States.

117. At all relevant times, the above-named Defendants were acting within the scope of their office or employment.

118. At all relevant times, the acts and omissions of the above-named Defendants were not based on discretionary policy considerations, but instead violated clear agency directives and/or constitutional mandates.

119. As a direct and proximate result of the actions and omissions of the above-named

Defendants, Ms. Wormley suffered harm to her person and was deprived of her dignity, liberty and property.

COUNT VII – Negligence

Against Defendant United States of America

120. Plaintiff realleges and incorporates by reference all preceding allegations.

121. By virtue of their position as USMS law enforcement agents with authority over Ms. Wormley's liberty, Defendants MacLeod, Baldwin, Scott, and Does 21–30 owed a duty of care to Ms. Wormley.

122. By virtue of their position as BOP correctional officers with authority over Ms. Wormley's liberty, Defendants White, Does 1 and 41, and Lappen owed a duty of care to Ms. Wormley.

123. Defendant White breached his duty of care by issuing an inaccurate "Notice of Escape" for Ms. Wormley that contained false statements that violated his duty to investigate the facts surrounding her efforts to return to the Fairview Halfway House.

124. Defendant MacLeod breached his duty of care by negligently issuing an invalid detainer for a parole violation warrant, including negligently using the wrong form in violation of USMS directives, and by failing to comply with their reporting and notice duties to Ms. Wormley and other federal agencies.

125. Defendants Does 1 and 41 and Defendant Lappen breached his duty of care by violating his/her monitoring responsibilities over inmates such as Ms. Wormley, including failing to communicate to USMS or CDF that Ms. Wormley should be released.

126. Defendants Does 2130 breached their duty of care by arresting and processing Ms. Wormley without noticing the invalidity and unlawfulness of the detainer.

127. Defendant Baldwin breached his duty of care by negligently issuing of a Form USM-41 requesting that CDF place Ms. Wormley in a "transit hold pending federal designation," without verifying that Ms. Womley's escape charge had been exhausted as reflected in BOP records.

128. Defendant Scott breached her duty of care by negligently monitoring the execution process after receiving multiple notifications that Ms. Wormley's lawful detention period at CDF had been exhausted.

129. Members of the USPC breached their duty of care to Ms. Wormley by negligently allowing her to be detained for five months pursuant to a purported USPC parole violator warrant.

130. Defendant Doe 41 breached his or her duty of care by negligently monitoring the release of Ms. Womley after receiving actual notice of her overdetention.

131. Defendant Lappen breached his duty of care by negligently failing to train and/or supervise BOP employees responsible for ensuring the timely release of detainees and inmates, despite actual and constructive knowledge that overdetentions at CDF and DOC occurred with notorious and alarming frequency.

132. At all relevant times, the above-named Defendants were employees of Defendant United States.

133. At all relevant times, the above-named Defendants were acting within the scope of their office or employment.

134. At all relevant times, the acts and omissions of the above-named Defendants were not based on discretionary policy considerations, but instead violated clear agency directives

and/or constitutional mandates.

135. As a direct and proximate result of the negligent actions and omissions of the above-named Defendants, Ms. Wormley suffered harm to her person and was deprived of her dignity, liberty and property.

DISTRICT OF COLUMBIA COMMON LAW CLAIMS

COUNT VIII – Negligence

Against the Corrections Corporation of America, Defendant Tuttwiler, and John or Jane Does 2–10

136. Plaintiff realleges and incorporates by reference all preceding allegations.

137. Defendant CCA, and Defendants Tuttwiler and John or Jane Does 2–10, maintained and managed the Correctional Treatment Facility in Washington, D.C., while Ms. Wormley was an inmate at the facility. At all times, Defendants were under contract with the D.C. Department of Corrections.

138. Defendant CCA and Defendants Tuttwiler and John or Jane Does 2–10 owed a duty of care to Ms. Wormley to assure that she was accurately informed of the reasons for her detention, and to assure that Ms. Wormley was not incorrectly detained at CTF.

139. Defendant CCA and Defendants Tuttwiler and John or Jane Does 2–10 breached their duty of care to Ms. Wormley by failing to assure that she was accurately informed of the reasons for her detention, and by failing to assure that Ms. Wormley was not incorrectly detained at CTF.

140. Ms. Tuttwiler, an employee of Defendant CCA and an officer of CTF, breached her duty of care to Ms. Wormley by failing to accurately and timely respond to Ms. Wormley's repeated requests for information concerning her detention, and by failing to accurately and

timely notify any and all superiors at Defendant CCA and CTF that Ms. Wormley was being incorrectly detained.

141. As a direct and proximate result of Defendant CCA's and Defendants Tuttwiler and John or Jane Does 2–10 breach of their duty of care to Ms. Wormley, Ms. Wormley suffered harm to her person and was deprived of her dignity, liberty, and property because of her five month unlawful overdetention at CTF.

COUNT IX – False Imprisonment

Against the Corrections Corporation of America, Defendant Tuttwiler, and John or Jane Does 2–10

142. Plaintiff realleges and incorporates by reference all preceding allegations.

143. Ms. Wormley was unlawfully detained on October 19, 2006 and from October 21, 2006 until March 19, 2007, against her will and within the confines established by Defendant CCA and Defendants Tuttwiler and John or Jane Does 2–10. At all times, Defendants were under contract with the D.C. Department of Corrections.

144. As a direct and proximate result of Defendant CCA's and Defendants Tuttwiler's and John or Jane Does 2–10's unlawful detention of Ms. Wormley, Ms. Wormley suffered harm to her person and was deprived of her dignity and liberty.

COUNT X – Negligence

Against Reynolds & Associates, d/b/a Washington Halfway Homes, The Fairview Halfway House, and John or Jane Does 31–40.

145. Plaintiff realleges and incorporates by reference all preceding allegations.

146. Defendants Reynolds & Associates, d/b/a Washington Halfway Homes and John or Jane Does 31–40 maintained and managed the Fairview Halfway House in Washington, D.C., while Ms. Wormley was an inmate at the halfway house. At all times, Defendants were under

contract with the Federal Bureau of Prisons.

147. Defendants owed a duty of care to Ms. Wormley to abide by rules and directives set forth in their contract with the Federal Bureau of Prisons.

148. Defendants breached their duty of care on June 2, 2006, by violating their rules and directives and Ms. Wormley from their care.

149. As a direct an proximate result of Defendants' actions, Ms. Wormley was wrongfully charged with an "escape" from the Federal Bureau of Prisons, and wrongfully detained because of a warrant lodged subsequent to her alleged escape.

COUNT XI – False Imprisonment

Against Devon Brown and John or Jane Does 11–20

150. Plaintiff realleges and incorporates by reference all preceding allegations.

151. Ms. Wormley was unlawfully detained on October 19, 2006 and from October 21, 2006 until March 19, 2007, against her will and within the confines established Devon Brown and John or Jane Does 11–20.

152. As a direct and proximate result of Defendant Devon Brown's and John or Jane Does 11–20's unlawful detention of Ms. Wormley, Ms. Wormley suffered harm to her person and was deprived of her dignity, liberty and property.

COUNT XII – Negligence

Against Devon Brown and John or Jane Does 11–20

153. Plaintiff realleges and incorporates by reference all preceding allegations.

154. Defendants owed a duty of care to Ms. Wormley to assure that she was accurately informed of the reasons for her detention, and to assure that Ms. Wormley was not incorrectly detained at CTF.

155. Defendants breached their duty of care to Ms. Wormley by failing to assure that she was accurately informed of the reasons for her detention, and by failing to assure that Ms. Wormley was not incorrectly detained at CTF.

156. As a direct and proximate result of Defendants' breach of its duty of care to Ms. Wormley, Ms. Wormley suffered harm to her person and was deprived of her dignity and liberty because of her five month overdetention at CTF when there was no justification for that detention.

COUNT XIII – Negligence and False Imprisonment
(Vicarious Liability/Respondeat Superior)

Against the District of Columbia

157. Plaintiff realleges and incorporates by reference all preceding allegations.

158. At all times, Defendant District of Columbia employed District of Columbia officers and employees during Ms. Wormley's five-month overdetention.

159. The District of Columbia is responsible for the actions and omissions of its officers and employees.

160. Because of the actions and omissions of its officers, the District of Columbia breached its duty of care to Ms. Wormley. The breach of its duty of care directly and proximately resulting in Ms. Wormley's injuries.

161. Because of the actions and omissions of its officers, the District of Columbia wrongly detained Ms. Wormley in CTF for five months.

CLAIMS FOR CONSTITUTIONAL VIOLATIONS – 42 U.S.C. § 1983

COUNT XIV – Overdetention, Due Process

Against Devon Brown and John or Jane Does 11–20 (DOC Officers and Employees)

162. Plaintiff realleges and incorporates by reference all preceding allegations.

163. From October 21, 2006 to March 19, 2006, Ms. Wormley was deprived of her liberty without the procedural safeguards to which she is entitled under the Due Process Clause of the Fifth Amendment.

164. Defendant Devon Brown and Defendants John and Jane Does 11–20 violated Ms. Wormley's Fourth, Fifth, and Eighth Amendment rights by unlawfully detaining Ms. Wormley at CTF even though they knew or should have known that there was no justification for Ms. Wormley's detention.

165. Defendant Devon Brown and Defendants John and Jane Does 11–20 also directly and proximately violated Ms. Wormley's rights under the Fourth, Fifth, and Eighth Amendments by recklessly disregarding Ms. Wormley's excessive risk of unlawful detention.

166. At all relevant times, the above-named Defendants acted under color of state law.

167. As a result, the above-named Defendants directly and proximately caused Ms. Wormley to suffer harm to her liberty and property and to her rights under the Fifth and Eighth Amendments to the Constitution.

CLAIMS FOR CONSTITUTIONAL VIOLATIONS – 42 U.S.C. § 1983

COUNT XV – Overdetention, Due Process

Against Defendant Tutwiler and John or Jane Does 2–10 (Unnamed CCA Officers and Employees)

168. Plaintiff realleges and incorporates by reference all preceding allegations.

169. From October 21, 2006 to March 19, 2006, Ms. Wormley was deprived of her liberty without the procedural safeguards to which she is entitled under the Due Process Clause of the Fifth Amendment.

170. Defendant Tutwiler and Defendant John and Jane Does 2–10 violated Ms.

Wormley's rights under the Fourth, Fifth, and Eighth Amendments by unlawfully detaining Ms. Wormley at CTF even though they knew or should have known that there was no justification for Ms. Wormley's detention.

171. Defendant Tutwiler and Defendant John and Jane Does 2–10 also directly and proximately violated Ms. Wormley's rights under the Fourth, Fifth, and Eighth Amendments by recklessly disregarding Ms. Wormley's excessive risk of unlawful detention.

172. At all relevant times, the above-named Defendants acted under color of state law.

173. As a result of these actions and omission, Defendants directly and proximately caused Ms. Wormley to suffer harm to her liberty and property and to her rights under the Fifth and Eighth Amendments to the Constitution.

COUNT XVI – Overdention, Unlawful Search and Seizure, Deliberate Indifference

Against the District of Columbia

174. Plaintiff realleges and incorporates by reference all preceding allegations.

175. The District of Columbia failed to supervise and properly train its employees and officers, and the employees and officers of its agent, Defendant CCA in the proper oversight of inmates and in accurately notifying inmates of the reasons for their incarceration, the length of their incarceration, and their rights to due process.

176. This District of Columbia's failure to supervise and properly train its employees and officers, and the employees and officers of its agent, Defendant CCA, rose to the level of custom and policy.

177. The District of Columbia's custom and policy directly and proximately caused the violations of Ms. Wormley's Fourth, Fifth, and Eighth Amendment rights.

178. The District of Columbia was further deliberately indifferent to the lack of proper

training and supervision of its officers and employees, and the officers and employees of its agent, Defendant CCA.

179. The District of Columbia's deliberate indifference directly and proximately caused the violations of Ms. Wormley's Fifth, and Eighth Amendment rights.

COUNT XVII – Overdention, Unlawful Search and Seizure, Deliberate Indifference

Against the Corrections Corporation of America

180. Plaintiff realleges and incorporates by reference all preceding allegations.

181. CCA is a state actor performing the traditional governmental function of operating a prison.

182. CCA was and is under contract with the District of Columbia Department of Corrections.

183. CCA failed to supervise and properly train its employees and officers in the proper oversight of inmates and in accurately notifying inmates of the reasons for their incarceration, the length of their incarceration, and their rights to due process.

184. CCA's failure to supervise and properly train its employees and officers rose to the level of custom and policy.

185. CCA's custom and policy directly and proximately caused the violations of Ms. Wormley's Fourth, Fifth, and Eighth Amendment rights.

186. CCA was further deliberately indifferent to the lack of proper training and supervision of its officers and employees.

187. At all relevant times, CCA was acting under color of state law.

188. CCA's deliberate indifference directly and proximately caused the violations of Ms. Wormley's Fifth, and Eighth Amendment rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and a judgment against Defendants:

189. Ordering Defendants to pay, jointly and severally, $5,000,000 in compensatory damages to Ms. Wormley;

190. Ordering the District of Columbia, its agencies and its named and unnamed officers and employees; the Corrections Corporation of America and its named and unnamed officers and employees; Reynolds & Associations, Inc. and its named and unnamed officers and employees; and all named and unnamed the federal officers to pay, jointly and severally, $5,000,000 in punitive damages to Ms. Wormley;

191. Awarding Plaintiff costs, attorneys' fees, and other disbursements for this action; and

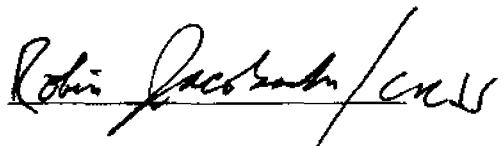
192. Granting Plaintiff such other and further relief as this Court deems just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury as to all issues.

Respectfully Submitted:

March 14, 2008

By: 

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CASE DETAILS

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Case ID: CIV-BOP-2008-00659 **Short Description:** WORMLEY V. UNITED STATES OF AMERICA DEPARTMENT OF JUSTICE ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:08-cv-00449-CKK
Short Description	WORMLEY V. UNITED STATES OF AMERICA DEPARTMENT OF JUSTICE ET AL
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	CENTRAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$
Estimated Amount	$100,000.00
Office	Washington, DC
Jurisdiction	DISTRICT OF COLUMBIA
Responsible Legal Office	Central Office

Legal Liability Evaluation

Estimated Amount	$10,000.00 - 100,000.00
Estimated Outcome	Probable

Case Resolution

Date	03/02/2010
Type	Settled
Reason	
Sought	
Amount offered	$50,000.00
Total Amount Paid	$50,000.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	04/21/2008
Date Filed	03/14/2008

Case Progress

Current Owner	RENEE FORNSHILL
Case Status	Open
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:2671 FEDERAL TORT CLAIMS ACT
Further Case Classification	
Comments	

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United States Department of Justice - Office of General Counsel & Review

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KAMAL K. PATEL, 6 Rivington Apt Railway Terrace Slough SL2 fFQ United Kingdom Plaintiff, v. THE FEDERAL BUREAU OF PRISONS 320 First Street, N.W. Washington, D.C. 20534 and HARLEY LAPPIN, in official and individual capacities, 320 First Street, N.W. Washington, D.C. 20534 and CORY CLARK, in official and individual capacities, 320 First Street, N.W. Washington, D.C. 20534 and JOHN DOE 1, JOHN DOE 2, and JOHN DOE 3, in official and individual capacities, 320 First Street, N.W. Washington, D.C. 20534 Defendants.	**FOURTH AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** **Civil Action No. 09-cv-0200-RDM**

REVISED FOURTH AMENDED COMPLAINT

1. Plaintiff Kamal Patel, by and through his attorneys, brings the following action arising out of the United States Constitution and the laws of the United States and alleges as follows.

NATURE OF THE ACTION

2. Plaintiff is a lawful permanent resident serving a criminal sentence under custody of the Federal Bureau of Prisons ("BOP"). Plaintiff was incarcerated for many years in federal facilities operated by the BOP, where he was treated similarly to inmates born in the United States.

3. Recently the situation changed for the worse. Defendants began treating Plaintiff, a long time lawful permanent resident of the United States, differently than similarly-situated United States citizens. Plaintiff was transferred based upon his national origin and/or alienage to facilities owned and/or operated by for-profit corporations ("private facilities" or "private prisons"), including Moshannon Valley Correctional Center ("MVCC"), Rivers Correctional Institution ("Rivers"), and Big Spring Correctional Center ("Big Spring").

4. MVCC, Rivers, and Big Spring are operated by The GEO Group, Inc. ("Geo Group"), a for-profit corporation with annual revenues exceeding $1.4 billion.

5. Geo Group refuses to comply with applicable constitutional and statutory standards and claims it is not bound by certain BOP policies and procedures governing the treatment of federal prisoners. Defendants Lappin, Clark, and the BOP have failed to enforce applicable constitutional, statutory, and regulatory standards in facilities operated by private entities, including but not limited to Geo Group. John Does 1-3 are on-site BOP staff who have failed to enforce applicable constitutional, statutory, and regulatory standards at Big Spring. As a result of Defendants' acts and omissions, Plaintiff has been subjected to harsher prison conditions than similarly situated U.S. citizen federal prisoners. The harsher treatment of Plaintiff as compared to U.S. citizens federal prisoners includes, but is not limited to, being denied the benefit of certain BOP policies and programs, being required to subsidize the cost of his incarceration, and substantially and unlawfully burdening his exercise of religion.

6. The United States Government Accountability Office (then known as the General Accounting Office) concluded in 1991 that the BOP lacks statutory authority to confine federal prisoners in such private facilities and warned Congress that if such authority were to be granted, controls should be established to preserve prisoner rights, ensure contractor accountability, and provide for effective government oversight.

7. Defendants continue to confine aliens in privately-owned facilities without adequate statutory authority and without preserving prisoner rights. In doing so, Defendants have delegated authority to private parties in violation of Defendants' statutory and regulatory obligations.

8. Plaintiff seeks both injunctive and declaratory relief against all Defendants, and monetary relief against Defendants Lappin, Clark, John Doe 1, John Doe 2, and John Doe 3.

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. § 1331 and the United States Constitution.

10. Venue is proper in this district under 28 U.S.C. § 1391.

11. Plaintiff has exhausted administrative remedies and bring claims under the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a.

PARTIES

12. Kamal K. Patel is the Plaintiff in this action. Mr. Patel is a lawful permanent resident of the United States. He previously was confined at Rivers in Winton, North Carolina, and he is presently confined at Big Spring in Big Spring, Texas. On information and belief, Mr.

Patel was transferred from Rivers to Big Spring to facilitate his participation in legal proceedings in Texas, and he remains subject to transfer back to Rivers.

13. Defendant BOP is an agency of the United States Department of Justice established in 1930 to oversee the confinement of federal prisoners. The BOP consists of 119 institutions, 6 regional offices, a Central Office, 2 staff training centers, and 26 residential reentry management offices. The Central Office serves as the headquarters for the BOP and is located in Washington, D.C.

14. Defendant Harley G. Lappin is the former Director of the BOP and was responsible for its acts and omissions. His office is located in Washington, D.C. Defendant Lappin is sued in his official and individual capacities.

15. Defendant Cory Clark is a Senior Designator at the Federal Bureau of Prisons whose duties include processing transfer requests from institution staff and making initial designations of inmates to federal facilities after they have received a term of imprisonment. Defendant Clark is sued in his official and individual capacities. His office is located in Grand Prairie, Texas.

16. Defendant John Doe 1 is the Privatization Field Administrator ("PFA") who supervises the on-site Privatization Management Branch ("PMB") manager at Big Spring, is the assigned Contracting Officer's Representative ("COR") for Big Spring, and is responsible for ensuring that Big Spring is operated in accordance with applicable contractual and legal requirements. Defendant John Doe 1 is sued in his official and individual capacities.

17. Defendant John Doe 2 and Defendant John Doe 3 are the on-site PMB managers for Big Spring who act as Contracting Officer's Technical Representatives ("COTRs"). They are directly responsible for the BOP's failure to enforce Geo Group to adhere to BOP policies

concerning the religious practices of Muslims at Big Spring. Defendant John Doe 2 and Defendant John Doe 3 are sued in their official and individual capacities.

FACTUAL BACKGROUND

The Bureau of Prisons

18. Before federal prisons were built, federal prisoners were confined in state facilities at federal expense.

19. In states unwilling to accept federal prisoners, the First Congress permitted the federal marshal to hire a convenient place to serve as a temporary jail.

20. Later Congresses continued to authorize the marshal service to contract for temporary facilities for confinement until permanent arrangements could be made.

21. By the end of the nineteenth century, due to overcrowding in state prisons, some states stopped accepting federal prisoners convicted in other states and one refused to accept federal prisoners at all. In 1891, Congress authorized construction of the first federal penitentiaries. Congress created the BOP in 1930 to provide more progressive and humane care for federal prisoners, to professionalize the prison service, and to ensure consistent and centralized administration of the eleven Federal prisons in operation at the time.

22. Historically, federal, state, and local correctional agencies entered into contracts with the private sector to provide services such as food preparation and medical care, as well as certain pre-release programs.

23. As a result of expanded federal law enforcement and new legislation that altered sentencing, the 1980s brought a significant increase in the number of federal inmates.

24. From 1980 to 1989, the inmate population more than doubled, from just over 24,000 to almost 58,000. During the 1990s, the population more than doubled again, reaching approximately 136,000 at the end of 1999.

25. In the 1980s and 1990s, the BOP expanded its use of private sector resources in response to growing inmate populations and escalating costs. The BOP expanded beyond contracting for goods or services within BOP-operated facilities to contracting with for-profit corporations to operate private prisons housing federal prisoners. Upon information and belief, the BOP generally does not use such private prisons to confine United States citizen federal prisoners for its general adult inmate population, with the exception of District of Columbia offenders whose confinement is governed by unique statutory authority.

26. In 1991, the agency then known as the United States General Accounting Office ("GAO") reviewed BOP's practice of confining federal prisoners in private facilities. The GAO concluded that the BOP lacks statutory authority to confine federal prisoners in private facilities.

27. The GAO further found that even if Congress were to authorize the BOP to confine federal prisoners in private facilities, controls on contracting should be established to preserve prisoner rights, ensure contractor accountability, and provide for effective government oversight.

28. Congress has not enacted legislation authorizing the BOP to confine federal prisoners, other than District of Columbia offenders, in privately-owned facilities.

29. Further, the BOP has been unable to demonstrate that private facilities are more efficient or cost effective than BOP facilities.

30. Today, the BOP exercises custody over approximately 215,000 federal prisoners, including the Plaintiff.

31. Approximately 82 percent of these federal prisoners are confined in federal facilities operated by the BOP, with the balance, including Plaintiff, in privately-managed or community-based facilities and local jails.

32. BOP confines non-U.S. national federal prisoners (including lawful permanent residents) in these privately-operated secure facilities, including but not limited to Rivers and Big Spring, which are owned and operated by Geo Group.

33. The BOP retains custody of and responsibility for all persons sentenced to a term of imprisonment under Title 18 of the U.S. Code ("United States prisoners" or "federal prisoners").

34. Congress has mandated that the BOP maintain charge over, and management and regulation of, all federal prisoners, wherever confined.

35. Congress has mandated that the BOP provide for the safekeeping, care, and subsistence of all federal prisoners, wherever confined.

36. Congress has mandated that the BOP provide for the protection, instruction, and discipline of all federal prisoners, wherever confined.

37. Congress has mandated that the BOP establish appropriate standards of health and habitability for facilities in which federal prisoners are confined.

38. Congress and BOP regulations prohibit Defendants from redelegating authority to private parties.

39. Defendants' use of private prisons results in the unlawful delegation of authority to private entities and persons through management activities such as promulgation of rules different than those applicable to BOP facilities, day-to-day management decisions, and disciplining of federal prisoners by employees of private entities.

Defendants' Transfer Policies Are Unlawful As Applied to Plaintiff

40. Congress has mandated that the BOP consider on a case-by-case basis five factors in designating federal prisoners to serve confinement in a particular facility and in making decisions to transfer such prisoners between facilities.

41. The BOP may not disregard these statutory factors in making initial designation or transfer decisions.

42. Defendants transferred Plaintiff to private facilities based upon his national origin and/or alienage without appropriately considering the relevant statutory factors.

43. Plaintiff is treated differently and worse in private facilities than inmates in BOP facilities with respect to conditions as to which they are similarly situated.

Defendants Lack Authority To Designate Plaintiff to Private Confinement Facilities

44. Plaintiff is a federal prisoner in the custody of BOP.

45. Congress has enacted laws that constrain BOP's authority to classify and designate the place of confinement for federal prisoners.

46. Congress has permitted federal prisoners in the custody of the BOP to be confined in federal penal or correctional institutions or in facilities operated by officials of a State, Territory, or political subdivision.

47. Congress has not authorized BOP to confine United States prisoners in facilities owned and operated by private entities.

48. The state of North Carolina has prohibited the operation of any correctional facility for confinement of inmates serving sentences for violation of laws of a jurisdiction other than North Carolina, except facilities owned or operated by the federal government and used exclusively for the confinement of inmates serving sentences for violation of federal law.

Rivers Correctional Institution and Big Spring Correctional Center

49. Rivers Correctional Institution ("Rivers") is a low-security correctional facility with a capacity of approximately 1380 males that is owned and operated by Geo Group.

50. Big Spring Correctional Center is a low-security correctional facility with a capacity of approximately 3509 inmates that is owned and operated by Geo Group.

51. Geo Group is a private, for-profit corporation with 2012 revenues in excess of $1.4 billion.

52. BOP designates federal prisoners to confinement in private prisons, including but not limited to Rivers and Big Spring, based upon national origin and/or alienage.

53. BOP's practice of classifying and designating federal prisoners based upon national origin and/or alienage violates the Fifth Amendment to the United States Constitution and BOP's own regulations.

54. The practice of classifying and designating prisoners based upon national origin and/or alienage has not been subject to notice and comment in accordance with the Administrative Procedure Act.

Defendants Fail To Enforce Applicable Constitutional, Statutory, and Regulatory in Private Prisons

55. Plaintiff filed numerous grievances seeking to enforce applicable constitutional, statutory, and regulatory standards at Rivers and Big Spring.

56. Plaintiff requested that that the private prisons in which he was confined on behalf of BOP follow applicable constitutional, statutory, and regulatory standards, including but not limited to religious freedom, access to courts and counsel (including availability of writing paper and envelopes), communication with family, commissary prices, telephone charges, email, and programming opportunities.

57. Plaintiff requested that private prisons in which he was confined be required to comply with constitutional, statutory, and regulatory standards applicable to the BOP and detention in federal facilities. Plaintiff's requests were denied.

58. Defendants have failed to require private prisons to abide by applicable constitutional, statutory, and regulatory requirements.

59. Plaintiff has exhausted his administrative remedies.

It is Unlawful for BOP To Utilize Commissary Fund Monies To Offset the Cost of Contracts for the Management of Private Prisons

60. BOP has directed that income collected by contractors in excess of expenses incurred for telephone usage shall offset the cost of its contracts with private entities for the management and operation of private prisons.

61. BOP permits for-profit corporations to charge much higher rates to non-U.S. citizens in private facilities than similar-situated U.S. citizens in BOP prisons for telephone usage and other commissary items.

62. BOP owes common law fiduciary duties to federal prisoners with respect to management of the Commissary Fund and Inmate Trust Fund. Profits from the operation of the commissary are to be deposited in the Commissary Fund and ordinarily used for purposes which benefit the inmate body as a whole.

63. Commissary Fund monies may be expended only for purposes provided by law. It is unlawful to use Commissary Fund monies to offset the cost of contracting for private prisons.

Plaintiff Kamal K. Patel

64. Plaintiff Kamal K. Patel was born in Leicester, England, in 1969, and is a British citizen. When Mr. Patel was ten years old, he moved to the United States with his father, mother, brother, and sister. He graduated as valedictorian of Alva High School, received a degree in Accounting from the University of Texas, and was in his first semester of law school at the University of Texas when he was arrested.

65. Mr. Patel has lived in the United States for more than 30 years.

66. Mr. Patel is a lawful permanent resident of the United States and has been since 1986.

67. According to BOP records, Mr. Patel is a legal resident of Alva, Oklahoma. Mr. Patel has family members located near Alva.

68. In March 1993, Mr. Patel pled guilty and was sentenced to 293 months of incarceration and three years of supervised release on federal drug charges, and ten years (to run concurrently) for witness tampering.

69. From March 1993 until August 2008, Mr. Patel was transferred to nine different BOP facilities. Since August 2008, Mr. Patel has been confined in three private prisons.

70. Mr. Patel began his confinement in March 1993 in **FCI Florence**, a medium-security BOP facility in Florence, Colorado.

71. When his security level dropped in 1996 as a result of good conduct, Mr. Patel was transferred to **FCI Fort Worth**, a low-security BOP facility in Fort Worth, Texas.

72. Mr. Patel converted to Islam in 1998.

73. In 1998, Mr. Patel was transferred to **USP Beaumont**, a high-security BOP facility in Beaumont, Texas. Mr. Patel's transfer to this facility was prompted by a false charge

of assault brought against him while he was confined in FCI Fort Worth. This charge was later expunged by BOP in response to a lawsuit brought by Mr. Patel, and a federal court's finding that the charge was predicated upon false testimony. Mr. Patel remained at Beaumont for two years.

74. In 2000, Mr. Patel was transferred to **FCI El Reno**, a medium-security BOP facility in El Reno, Oklahoma.

75. In 2000, Mr. Patel was again transferred to the **Federal Transfer Center** in Oklahoma City, Oklahoma. While Mr. Patel was confined in Oklahoma, his family, including his mother, who was unable to travel long distances because of her health, was able to visit him on a regular basis.

76. In July 2001, Mr. Patel was transferred to **FCI Bastrop**, a low-security BOP facility in Bastrop, Texas.

77. In late 2001, Mr. Patel was transferred to **FCI Beaumont**, a low-security BOP facility in Beaumont, Texas.

78. In 2003, Mr. Patel was transferred to **FCI Big Spring**, a low-security BOP facility in Big Spring, Texas.

79. While at FCI Big Spring in 2003, Mr. Patel met David Duke and had reason to believe that Duke was given unlawful preferential treatment.

80. Mr. Patel filed with prison officials a grievance concerning such unlawful preferences.

81. Mr. Patel contacted the Office of Inspector General for the United States Department of Justice. The Inspector General exposed a disturbing pattern of "discriminatory and retaliatory actions against Muslim inmates" at FCI Big Spring and specifically found that the

Warden had unjustly ordered Mr. Patel transferred to the Special Housing Unit for more than 120 days for cooperating with the Inspector General's investigation.

82. While confined in FCI Big Spring, Mr. Patel wrote a letter to the *Dallas Morning News* informing the newspaper of his impressions regarding Duke's treatment. Mr. Patel's letter was motivated by his observation that David Duke was receiving favorable treatment based upon his notoriety and Mr. Patel's suspicion that prison officials embraced David Duke's racist ideas. Mr. Patel's suspicion is strongly supported by the findings of the Inspector General.

83. In particular, Mr. Patel observed that David Duke was given an incident report for violating regulations by promoting, while incarcerated, his book *Jewish Supremacism: My Awakening to the Jewish Question*. Rather than being given a high severity incident report—which would have required a disciplinary hearing, the mandatory loss of good-time credits, and placement in the Special Housing Unit—staff deliberately downgraded his offense and allowed him to avoid these consequences.

84. Mr. Patel's letter was properly marked as protected by the First Amendment and not to be opened by prison officials.

85. FCI Big Spring staff unlawfully opened Mr. Patel's letter, read it, and placed a memorandum in Mr. Patel's file concerning Mr. Patel's exercise of his First Amendment right to communicate with the press.

86. Mr. Patel has unsuccessfully requested that the file be removed under BOP policy and the Privacy Act.

87. In 2004, Mr. Patel was transferred to **FCI Forrest City**, a low-security BOP facility in Forrest City, Arkansas. He remained at Forrest City for two years.

88. In 2006, Mr. Patel was transferred to **FMC Butner**, a BOP medical center in Butner, North Carolina, to receive treatment for a herniated disc. This was the last federal BOP facility in which Mr. Patel was confined.

89. In August 2008, Mr. Patel was transferred for the first time to a private facility. Mr. Patel was sent to the **Moshannon Valley Correctional Center** ("MVCC"), a private, low-security facility in Philipsburg, Pennsylvania. MVCC was then operated by Cornell Companies. In August 2010, Geo Group acquired Cornell Companies and now operates MVCC.

90. In January 2009, Mr. Patel was transferred to **Rivers**, a private, low-security facility in Winton, North Carolina. Rivers is owned and operated by Geo Group.

91. In March 2010, Mr. Patel was transferred to **Big Spring**, a private, low-security facility in Big Spring, Texas, operated by Geo Group.

92. The BOP's decision to transfer Mr. Patel to private prisons has prevented him from maintaining a strong record of rehabilitation and close family and community ties.

Restriction of Religious Freedoms

93. BOP regulations recognize that Muslims should have the opportunity to pray five times daily.

94. BOP regulations require prison officials to permit inmates to pray while on work detail, to relieve inmates of work detail during conflicts with religious activities, or to provide for placement in a different work detail if the current one violates or jeopardizes a religious tenet.

95. Due to a policy or practice followed by prison officials at Rivers of not permitting inmates to pray while on work detail, Mr. Patel was not permitted to pray at the times required by his religious beliefs. Other Muslim inmates at Rivers were subject to the same restriction, which substantially burdened their exercise of religion.

96. BOP regulations accommodate the religious dietary restrictions of Muslim prisoners by providing a religious diet free of prohibited foods.

97. Prior to Geo Group's purchase of Big Spring, Muslim inmates were provided halal meals. After Geo Group's purchase of Big Spring, halal meals were no longer offered and Muslim inmates such as Mr. Patel are prevented from partaking in kosher meals.

98. The meals available to Muslim inmates frequently contain items that would not be considered halal or kosher. For instance, the vegetarian menu that is available to Muslim inmates has at times contained items with meat-derived ingredients that would be inappropriate for an inmate following a halal diet.

99. BOP policy requires menus to be available for review at least one week in advance and posted so that inmates can examine them before reaching the serving counter. BOP policy also requires nutritional information to be made available to inmates.

100. Contrary to BOP policy, Geo Group has refused to provide menus and nutritional information to inmates, such as Mr. Patel, who request special religious diets and who wish to view the ingredients for upcoming meals.

101. Muslim inmates such as Mr. Patel are required to fast on days other than during Ramadan. However, Geo Group refuses to accommodate such additional fasts even though it accommodates fasts of Jewish inmates by allowing them to take all of their meals in the evening.

102. Defendants have failed to cause BOP policies related to religious prayer and diet, which are mandated by the Religious Freedom Restoration Act, the First Amendment, and by the BOP's contract with GEO Group, to be enforced in private prisons including Rivers and Big Spring. This substantially burdens the ability of Muslim inmates at Big Spring and in other Geo

Group facilities to freely exercise their religious beliefs by consuming a religiously appropriate diet.

Additional Inequities Plaintiff Has Suffered While Confined in Private Facilities

103. Plaintiff has been denied the benefit of BOP policies because of his status as a permanent legal resident.

104. Federal prisoners in BOP prisons are provided writing paper and envelopes free of charge. BOP does not require private prisons, including those operated by Geo Group, to follow this policy.

105. BOP permits private prisons, including those operated by Geo Group, to charge substantially higher rates for telephone calls and basic items from the commissary. At BOP's direction, this revenue is unlawfully applied to the contract between BOP and the Private Prison, causing federal prisoners in such facilities to subsidize their incarceration. This practice violates applicable statutory, regulatory, and common law restrictions on the use of such funds, which are to be expended for the benefit of the inmate population.

106. BOP permits private prisons, including those operated by Geo Group, to depart, to the detriment of inmates in those facilities, from BOP policies and practices regarding e-mail access.

107. Plaintiff has exhausted his administrative remedies with respect to these issues.

Count One
Designation Based on National Origin and/or Alienage
Equal Protection and Administrative Procedure Act
(Damages Against Defendant Clark in His Personal Capacity)

108. Plaintiff incorporates by reference Paragraphs 1 through 107 alleged above.

109. Segregating prisoners in private prisons on the basis of national origin can only be justified if narrowly tailored to address a compelling governmental interest.

110. Defendant Clark is a Senior Designator with the BOP whose primary duties include processing transfer requests from institution staff and making initial designations of inmates to federal facilities after they have received a term of imprisonment.

111. The practice of BOP and Defendant Clark of segregating prisoners in private prisons is not narrowly tailored to address a compelling governmental interest.

112. Binding BOP regulations prohibit discrimination on the basis of national origin.

113. The practice of BOP and Defendant Clark of segregating prisoners in private prisons violates BOP regulations.

114. There is no rational basis for segregating alien federal prisoners in private prisons.

115. BOP and Defendant Clark are acting in a manner that violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment to the United States Constitution and binding BOP regulation.

Count Two
Conditions of Confinement
First Amendment and Religious Freedom Restoration Act
(Damages Against Defendants Lappin and John Does 1-3 in Their Personal Capacities)

116. Plaintiff incorporates by reference Paragraphs 1 through 115 alleged above.

117. Plaintiff is a Muslim whose sincere religious beliefs require him to pray five times each day and to adhere to special dietary restrictions.

118. BOP accommodates the religious practices of Muslims like Plaintiff by allowing them to pray while on work detail, relieving them of work detail during conflicts with religious activities, and providing for placement in a different work detail if the current one violates or jeopardizes a religious tenet.

119. Plaintiff was prohibited from praying while on work detail at Rivers and was not otherwise accommodated. Those actions substantially burdened Plaintiff's exercise of religion

by preventing him from praying at the times and in the manner required by his sincere religious beliefs.

120. BOP accommodates the religious dietary needs of Muslims like Plaintiff in BOP facilities providing a religious diet free of prohibited foods and by making the menus for special religious diets available to inmates in advance of their meals.

121. Plaintiff has been denied a diet conforming to his religious needs and denied the opportunity to review special diet menus in advance while confined at Big Spring, which is operated by Geo Group. These denials have substantially burdened Plaintiff's ability to partake in a religiously appropriate diet pursuant to his exercise of religion.

122. The denial of Plaintiff's requests for religious accommodations cannot be justified as the least restrictive means of furthering compelling governmental interests.

123. BOP requires all private facilities to comply with their contract with BOP, all BOP policies that are outlined in the statement of work, and all applicable federal, state, and local law. BOP's contract with Geo Group requires Geo Group to comply with RFRA.

124. BOP requires all policies and procedures that will be used by a private prison to be submitted in writing to the BOP for review and approval. The private prison may not modify the previously-approved policies and procedures without BOP's permission.

125. BOP has on-site staff, known as COTRs or PMB managers, who provide general oversight at each private prison and ensure compliance with the contract. These on-site personnel are directly supervised by a PFA.

126. One or two COTRs and one PFA are assigned to each private prison. In total, between the COTRs and the PFAs, there are approximately 50 field staff overseeing twelve private prisons.

127. BOP has the right to conduct announced and unannounced inspections at private prisons and to examine all records related to contract performance to ensure compliance with the contract.

128. The COTRs participate directly in various aspects of operating the private prisons and have the opportunity to observe conditions in these facilities because they work on-site. Additionally, both the COTRs and the PFAs can examine records of contract compliance by the private prisons, giving them full access to detailed information concerning any aspects of which they were not personally aware.

129. Through deliberately indifferent monitoring, BOP permits private prisons, including those operated by Geo Group, to act in contravention of BOP policies concerning religious accommodation.

130. The COTRs and the PFAs who were assigned to Big Spring knew or should have known that Geo Group was violating BOP policies concerning religious accommodation through personal observation of the conditions in the prisons, personal knowledge of or access to records of inmate grievances related to religious practices, and/or access to other records that show Geo Group's failure to comply.

131. By refusing to require private entities such as Geo Group to follow BOP regulations, Defendants Lappin and John Does 1-3 set in motion the conditions that led to the violation of Mr. Patel's religious rights.

132. Defendant Lappin is responsible for the acts and omissions of the employees and agents acting under his direction and is responsible for the alleged violations at Rivers.

133. Defendant John Doe 1 is the PFA who supervises the on-site PMB managers at Big Spring, is the assigned COR for Big Spring, and is responsible for the acts and omissions of the agents acting under his direction at Big Spring.

134. Defendant John Doe 2 and Defendant John Doe 3 are the COTRs who are the on-site PMB managers for Big Spring. They are directly responsible for Geo Group's failure to adhere to BOP policies concerning the religious practices of Muslims at Big Spring.

135. Geo Group and its employees act under color of federal law with respect to confinement of federal prisoners.

136. Geo Group refuses to comply with the requirements of the First Amendment and RFRA.

137. Defendants have refused to enforce the requirements of the First Amendment and RFRA in private prisons, including those operated by Geo Group.

138. Defendants' failure to enforce applicable constitutional, statutory, and regulatory standards in private prisons, including those operated by Geo Group, violates the First Amendment and RFRA.

Count Three
Privacy Act
(Injunctive and Declaratory Relief Against BOP)

139. Plaintiff incorporates by reference Paragraphs 1 through 138 alleged above.

140. In 2004, while incarcerated at FCI Big Spring, Plaintiff Patel wrote a letter to the *Dallas Morning News*, communicating what Mr. Patel believed was BOP employees' favorable treatment of David Duke, also an inmate at FCI Big Spring.

141. The letter Mr. Patel wrote to the newspaper commented on the favorable treatment afforded David Duke by prison officials. Mr. Patel's letter is protected speech under

the First Amendment. Mr. Patel marked the correspondence "Special Mail" to indicate that it was a protected communication.

142. BOP policy prohibits BOP employees from opening correspondence marked "Special Mail" outside the presence of inmates.

143. Contrary to BOP policy, BOP employees opened and read Mr. Patel's letter to the *Dallas Morning News*.

144. Upon opening and reading Mr. Patel's letter to the *Dallas Morning News*, BOP personnel wrote a memorandum documenting Mr. Patel's communication with the newspaper and recommending that Mr. Patel be moved from FCI Big Spring to another facility as a consequence.

145. The presence of this memorandum in Mr. Patel's files continues to be used by the BOP to discriminate against Mr. Patel.

146. Under the Privacy Act, 5 U.S.C. § 522a(e)(7), the BOP is prohibited from maintaining any record "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

147. The BOP's continued maintenance of this memorandum in its entirety, without redaction of Mr. Patel's communication with the *Dallas Morning News*, is in violation of 5 U.S.C. § 522a(e)(7).

148. Mr. Patel initiated an administrative remedy request to amend his record on February 20, 2010. This request was finally denied on April 30, 2010.

149. Under 5 U.S.C. § 522(g)(1)(A), Mr. Patel is provided a civil action against the BOP upon the Agency's "determination . . . not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection."

150. The BOP's decision to maintain the unredacted memorandum in his files violates the Privacy Act.

Count Four
Documents Related to Office of Inspector General Report
Freedom of Information Act
(Injunctive and Declaratory Relief Against BOP)

151. Plaintiff incorporates by reference Paragraphs 1 through 150 alleged above.

152. On November 22, 2004, Mr. Patel filed a Freedom of Information Act ("FOIA") request to the Office of the Inspector General ("OIG") for documents related to an OIG Report.

153. BOP provided Mr. Patel with 21 pages of documents, 15 of which were released in their entirety and 6 of which were redacted. None of the exhibits or witness interviews associated with the OIG report—in which the OIG determined Muslims were being discriminated against—were provided, nor was any reason provided for their withholding. BOP provided no index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) ("*Vaughn* Index").

154. Mr. Patel appealed this response. BOP responded to this appeal on November 28, 2007, affirming its denial and stating, regarding the missing documents, that BOP's action "was limited to documents that were referred to it by OIG" and recommending that he ask for documents in a separate FOIA request.

155. Mr. Patel filed similar requests with the BOP, two on February 14, 2005, and one on March 5, 2005.

156. Pursuant to these three 2005 requests, on March 24, 2005, BOP provided Mr. Patel with a total of 10 pages. No mention was made of the 40 page OIG report or the 99 exhibits attached to it. No *Vaughn* Index was provided.

157. Mr. Patel appealed this request on April 24, 2005, objecting to the missing documents. A final denial was issued on May 18, 2007.

Count Five
Documents Related to Protection Hearing
Freedom of Information Act
(Injunctive and Declaratory Relief Against BOP)

158. Plaintiff incorporates by reference Paragraphs 1 through 157 alleged above.

159. On April 25, 2009, Mr. Patel sent the BOP a request for documents related to a protection hearing while he was incarcerated at Moshannon Valley Correctional Center.

160. On April 19, 2010, BOP released 247 pages in their entirety to Mr. Patel, 128 pages with redactions, and withheld 46 pages in their entirety. It did not provide a *Vaughn* Index as to the withheld pages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and a judgment against Defendants:

1. Awarding monetary damages, including nominal damages, based upon the designation and transfer of Mr. Patel on the basis of national origin and/or alienage and ordering Defendant Clark to pay an appropriate amount determined at trial;

2. Awarding monetary damages, including nominal damages, based upon Defendants' failure to require Geo Group to comply with the First Amendment and the Religious Freedom Restoration Act and ordering Defendants Lappin and John Does 1-3 to pay an appropriate amount to be determined at trial;

3. Ordering Defendant BOP to amend records pertaining to Plaintiff to remove reference to Plaintiff's exercise of his First Amendment rights;

4. Ordering Defendant BOP to produce in their entirety documents that have not been produced pursuant to Plaintiff's Freedom of Information Act requests, to produce a *Vaughn* Index providing information for each and every withheld document, and to produce in full documents that have only been produced with redactions;

5. Awarding Plaintiff reasonable attorney's fees, expert witness fees, and other costs; and

6. Awarding such other relief as this Court may deem just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury as to all issues so triable.

March 5, 2015

Respectfully Submitted,
WILLIAMS & CONNOLLY LLP

By: /s/ F. Greg Bowman

Thomas G. Hentoff (D.C. Bar No. 438394)
F. Greg Bowman (D.C. Bar No. 486097)
Mary Beth Hickcox-Howard (D.C. Bar No. 1001313)
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for Plaintiff

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

KAMAL K. PATEL
Plaintiff
v.
BUREAU OF PRISONS, HARLEY LAPPIN
Defendant

Civil Action No. 1:09-CV-00200

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
Bureau of Prisons
320 First St, N.W.
Washington, D.C. 20534

RECEIVED
APR 09 2009
BUREAU OF PRISONS
OGC/LITIGATION BRANCH

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Kamal K. Patel
#56496-020
P.O. Box 650
Winton, NC 27986

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT NANCY MAYER-WHITTINGTON

Date: MAR 9 2009

Jackie Flowers
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

on *(date)* ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

KAMAL K. PATEL,)
Plaintiff,)

- VS -)

BUREAU OF PRISONS, and)
HARLEY LAPPIN, Director,)
Defendants,)

Case: 1:09-cv-00200
Assigned To : Roberts, Richard W.
Assign. Date : 2/2/2009
Description: Pro Se Gen. Civil

(To Be Supplied By Clerk)

RECEIVED
APR 0 6 2009
BUREAU OF PRISONS
OGC/LITIGATION BRANCH

CIVIL COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Plaintiff, KAMAL K. PATEL, appearing herein Pro Se, and hereby files this Civil Complaint for Injunctive and Declaratory Relief.

I.

INTRODUCTION

1. In this suit, the plaintiff alleges and will show that the Bureau of Prisons has implemented policies in regards to opportunities for prison transfers and opportunities to enroll in and participate in residential programs which are discriminatory by denying foreign born inmates, even legal permanent residents, the opportunity to participate on the basis of their citizenship and nationality. Mr. Patel seeks an order requiring these illegal and unconstitutional practices to cease and a declaration holding such policies and practices unconstitutional.

II.

JURISDICTION AND VENUE

2. Jurisdiction over this matter is invoked under 28 U.S.C. §§ 1331, 1361 and the Equal Protection Clause of the Fifth Amendment as well as any other provisions providing for injunctive and declaratory relief.

3. Venue is proper in this court under 28 U.S.C § 1391(b)(1), (b)(2), and (b)(3) and § 1391(e)(1) and (e)(2).

III

PARTIES

4. KAMAL K. PATEL (hereinafter "Plaintiff" or "PATEL") is the plaintiff in this action. Plaintiff is A British citizen and a Legal Permanent Resident. ("LPR") of the United States. Plaintiff's legal residence is in Oklahoma and mailing address is:

Kamal K Patel
Reg. No 56496-080
555-I Cornell Dr.
Philipsburg, PA 16866

5. BUREAU OF PRISONS (hereinafter "BOP") is A defendant in this action. The BOP is A federal agency of the United States headquartered at:

Bureau of Prisons
320 First St, N.W.
Washington, D.C. 20534

The BOP is sued only for injunctive and declaratory relief.

6. HARLEY LAPPIN (hereinafter "Lappin") is A defendant in this action. Mr. Lappin is the Director of the BOP and is sued in his official capacity only. Mr. Lappin's work/address is:

Harley Leappin - Director
Bureau of Prisons
320 First St., N.W.
Washington, D.C. 20534

The BOP is sued for Injunctive and Declaratory Relief Only.

V.

General Allegations

7. Mr Patel, the plaintiff, was a Legal Permanent Resident also known as a Green Card Holder at all times relevant here

8. The immigration service has placed a detainer action letter against plaintiff to determine if plaintiff is subject to removal from the United States Exhibit Three. This is not a determination of removability or deportability. If a determination is made that plaintiff is subject to removal, plaintiff would be entitled to have such a determination made by the Appropriate immigration judges, entitled to various procedural protections, and to have any decision reviewed by appeal to the federal judiciary.

9. At all times relevant here, the plaintiff has not had any hearing or any other process in relation to his

whether or not he may remain in the United States or be removed. At the time of plaintiffs conviction, the law permitted Waivers under INA § 212(c) and plaintiff is also entitled to A judicial determination under § 212(c).

10. The BOP has no authority to order plaintiff deported, removed, nor make any order affecting his immigration status in the United States.

11. Plaintiffs legal residence at all times relevant here is At 420 E. Oklahoma Blvd, Alva, OK 73717. This is the legal residence recognized by the probation office in the PSR and the BOP. Exhibit Two

12. The BOP has implemented regulations that state that the "legal residence" At the time of conviction as "reported by the United States Probation Office at the time of conviction" will be deemed to be the inmate's legal residence for purposes of its classification, transfer, and program participation decisions under it Custody Classification Manual. Exhibit One.

13. The immigration service explicitly instructs the BOP in the detainer letter that it is not indicative of any legal findings and that it is not to serve to limit the BOP's discretion in classification, programs, assignments, or other treatment the inmate would otherwise receive. Exhibit Three.

14. As A LPR, the plaintiff is entitled to the Equal Protection of the laws and the same rights, benefits, and privileges afforded U.S. citizen.

IV

FIRST CAUSE OF ACTION

DENIAL OF EQUAL PROTECTION AND DISCRIMINATION BY BEING PRECLUDED THE SAME TRANSFER OPPORTUNITIES AS THOSE PROVIDED TO U.S. CITIZENS.

15. Paragraphs 1 through 14, supra, are hereby incorporated here as if fully set forth herein.

16. Most of plaintiffs family members including brother, nephews, nieces, aunts, uncles, grandparents, etc are U.S. citizens living in Oklahoma. Due to medical concerns, some of plaintiffs family members are unable to travel long distances. Consequently, plaintiff has only seen his grandmother once during almost 17 years of incarceration.

17. The BOP has A policy to place U.S. citizens close to their legal residence or release destination. The BOP provides this as an incentive for good behavior. Exhibit Seven (PS 5100.07, Ep 10, p.7).

18. The BOP also recognizes that placing inmate close to the legal residence or release destination will enable the inmate to have greater opportunity to visit with his family members and enhance these First Amendment rights

19. At all times relevant here, plaintiffs legal residence has been at 420 E. Oklahoma Blvd, Alva, OK 73717

20 Unless otherwise ordered by ICE, plaintiff intends to be released to his legal residence. At all times relevant here, plaintiffs release destination is the above legal address.

21. The BOP has implemented regulations that pending charges and detainers do not affect classification or transfer decisions. Exhibit Five (P.S. 5100-07, Ch. 10, p. 18). It only applies this policy to U.S. citizens and non-U.S. citizens do have these decisions affected.

22. The BOP has implemented regulations that an inmate, as an incentive for 18 months good behavior, may be transferred to a facility near to the inmates legal residence or release destination." Exhibit Four (P 5100.08 Ch 7, p. 4)

23. The BOP has created a regulation that, state any inmate with an immigration detainer will be deported. Exhibit Four. This regulation is alleged to be arbitrary and capricious since it makes a legal determination which is within the providence of the immigration judge and attaches legal consequences.

24. The BOP does not treat other detainers such as pending charges detainers as findings of conviction

25. The plaintiff alleges that the actions described in para. 21-24, supra, are based on an intent to single out non-citizens for discriminatory treatment.

26. Although a LPR, the plaintiff has been discriminated against and denied the Equal Protection of the laws by being informed that the BOP will not consider him for a transfer nearer to his legal residence or release destination due to his detainer.

27. Although a LPR, the plaintiff has been discriminated against and denied the Equal Protection of the laws by being denied the same opportunities to maintain familial and community relationships under the First Amendment as those provided U.S. citizens.

28. The BOP is acting arbitrarily, capriciously, and outside its authority by stating all immigration detainee inmates will be deported.

29. The BOP has discriminatory motives in refusing immigration detainee inmates a nearer to release transfer since it permits U.S. citizen inmates sentenced to Life sentences the opportunity to have nearer to release transfers despite judicial findings that the inmate

with the life sentence will never be released.

30. Even if inelisible for A nearer to release destination transfer, the plaintiff will not be consided for a near to legal residence transfer. The BOP regulation does not prohibit legal residence transfer for immigration detainees and the implementation of such a rule for plaintiff is arbitrary and discriminatory violating his Equal Protection right.

31. Title 28, Code of Federal Regulation, Section 551.90 prohibits the BOP from discriminating against inmates on the basis of national origin in the making of administrative decisions including classification and access to programs. Exhibit Six.

32. Plaintiff, on the basis of his citizenship, despite being a Legal Permanent Resident, has been denied the opportunity to receive the same incentives for good behavior in the form of A transfer closer to his family, has been denied the opportunity to be transferred to his release destination, and has been denied the opportunity to be transferred nearer to his legal residence.

33. Plaintiff Alleges the BOP's actions in stating All non U.S. citizen will be deported constitutes impermissible speculation and is the

flimsiest of rationales to deprive plaintiff of the Equal Protection of the laws.

CLAIMS FOR RELIEF

COUNT ONE: DECLARATORY RELIEF. Plaintiff seeks a Declaration that the BOP and Lappin violated plaintiffs rights to the Equal Protection of the laws under the Fifth Amendment as follows:

(a) By refusing and denying plaintiff the same opportunities for A transfer as an incentive for good behavior as provided U.S. citizens;

(b) By refusing and denying plaintiff an opportunity to be transferred near to his legal residence as provided U.S. citizens;

(c) By refusing and denying plaintiff the same opportunities to be transferred near to his release destination as provided to U.S. citizens;

(d) By denying and refusing plaintiff the same opportunity to maintain First Amendment relationships with family and the community as provided U.S. citizens

COUNT TWO: DECLARATORY RELIEF. Plaintiff seeks a Declaration that the BOP and Lappin have enacted an illegal and unconstitutional policy which states all non U.S. citizens will be removed from the U.S. and by attaching adverse legal consequences

to this policy.

COUNT THREE: INJUNCTIVE RELIEF Plaintiff seeks an injunction against the BOP and Lappin as follows:

(a) Compel BOP and Lappin to provide plaintiff the same opportunities for good behavior as provided to U.S. citizens, including consideration for favorable transfers;

(b) Prohibit the BOP and Lappin from ignoring the plaintiff LPR status;

(c) Compel BOP and Lappin to provide plaintiff the same opportunities for nearer to legal residence or nearer to release destination transfer as afforded U.S. citizens;

(d) Prohibit the BOP and Lappin from making legal determinations as to an inmate's deportability until the INS or ICE process;

(e) Compel BOP and Lappin to provide plaintiff the same First Amendment opportunities to associate with and maintain relationships with family and the community as provided U.S. citizens.

VI

SECOND CAUSE OF ACTION

DENIAL OF EQUAL PROTECTION AND DISCRIMINATION BY BEING DENIED THE SAME OPPORTUNITY TO ENROLL IN AND COMPLETE THE LIFE CONNECTIONS PROGRAM AS PROVIDED U.S. CITIZENS

32. Paragraphs 1 through 31, supra, are hereby incorporated and re-alleged as if fully set forth in this cause of action

33. The BOP has established a residential Faith Based program called the Life Connection Program.

34. Upon Arriving At M.V.C.C., plaintiff spoke to various prison officials including Mr. Stepanovich (Religious Program Coordinator), Mr. Magnuson (Case Manage Coordinator), Mr. Lumachue (Unit Manager) and Mr. Justa (BOP specialist) about the Life Connection Program and asked that he be permitted to enroll in the program

35. Plaintiff was informed that because he had an immigration detainer, his request is denied and that he would not be considered for this program

36. The policy on the Life Connections Program does

SAy it is limited to U.S. citizen but the policy in practice At the instant facility per the BOP excludes non U.S. citizens.

37. The plaintiff, as a LPR, is entitled to the same rights, benefits, and privileges, including programming opportunity as U.S. citizens.

38. Plaintiff alleges that his exclusion from the Life Connections Program based on his citizenship denied him the Equal Protection of the laws as well As constituted A violation of 28 CFR § 551.90 (Exhibit Six) which prohibits discrimination on the basis of national origin in making program Access decisions.

CLAIMS FOR RELIEF

COUNT FOUR: Plaintiff seeks A declaration that limiting the Life Connections Program to U.S. citizens is a violation of the Equal Protection Clause and federal regulation.

COUNT FIVE: Plaintiff seeks an injunction requiring the BOP and Lappin to permit him Access to participate in the Life Connections Program in the same manner as the opportunity provided U.S. citizens

VII

PRAYER FOR RELIEF

39. Paragraphs 1 through 38, supra, are hereby incorporated as if fully set forth herein.

40. Plaintiff requests that this court issue Declaratory and Injunctive relief as requested in Counts One, Two, three, and Four, supra.

41. Plaintiff asks that this court assess costs, fees, and Attorney costs against defendants.

42. Plaintiff asks for a trial by jury on all issues so triable.

Wherefore, all things considered the plaintiff Kamal K. Patel respectfully prays this court order all relief requested.

Dated: 1/18/09

Kamal K. Patel
#56496-080
555-I Cornell Dr
Philipsburg, PA 16866

CURRENT OFFENSE. For classification purposes, the current offense is the most severe documented instant offense behavior regardless of the conviction offense.

CUSTODY CLASSIFICATION. The review process to assign a custody level based on an inmate's criminal history, instant offense, and institutional adjustment. A custody level (i.e., **COMMUNITY**, **OUT**, **IN**, and **MAXIMUM**) dictates the degree of staff supervision required for an individual inmate.

DESIGNATION. An order from the DSCC indicating the initial facility of confinement for an inmate.

DESIGNATION FACILITY (DFCL). Each of the separate missions within an institution for designation purposes. Each DFCL is shown as a separate line on the Population Report and has its own security level and destination (DST) assignment. Designations are made to a DFCL code rather than to a facility (FACL) code.

JUDGMENT. The official court document (e.g., Judgment and Commitment Order or Judgment in a Criminal Case) which is signed by the Judge. The Judgment contains the offense(s) for which the court imposes its sentence, which ordinarily includes a financial, confinement and supervision obligation.

HISTORY. The inmate's entire background of criminal convictions (excluding the current offense) and institutional disciplinary findings used to assess points related to his/her history of violence and/or history of escape.

IN CUSTODY. The second highest custody level assigned to an inmate which requires the second highest level of security and staff supervision. An inmate who has **IN** custody is assigned to regular quarters and is eligible for all regular work assignments and activities under a normal level of supervision. Inmates with **IN** custody are not eligible for work details or programs outside the institution's secure perimeter.

LEGAL RESIDENCE. The inmate's local and state address as reported by the United States Probation Office at the time of conviction.

LONG-TERM DETAINEE. A non-U.S. citizen (alien) who has:

- finished serving a local, state, or federal sentence;
- completed immigration proceedings that have resulted in an order of deportation, exclusion, or other means of

EXHIBIT ONE

CORNELL COMPANIES, INC.

INMATE REQUEST TO A STAFF MEMBER
PETICION DEL PRESO PARA PERSONAL DE LA INSTITUCION

TO/PARA: MR Miller CAR MGR
(NAME AND TITLE OF OFFICER/NOMBRE Y TITULO DEL OFFICIAL)

SUBJECT: STATE, COMPLETELY, BUT BRIEFLY, THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE, AND WHAT YOU THINK SHOULD BE DONE. (GIVE DETAILS)
RAZON: ESCRIBA EL PROBLEMA, BREVEMENTE Y COMO USTED PIENSE QUE PODEMOS RESOLVERLO. (ESCRIBA CON DETALLES)

On my PSR what does it list as my Legal residence

(USE OTHER SIDE OF PAGE IF MORE SPACE IS NEEDED.)
(USE EL OTRO LADO DE LA HOJA SI NECESITA MAS ESPACIO.)

NAME/NOMBRE: Kamal Patel No./Numero: 56496-080

CASE MANAGER/GERENTE: Miller DATE/FECHA: 4/16/09

WORK ASSIGNMENT/ASIGNACION DE TRABAJO: _____ UNIT/UNIDAD: Sky

BED ASSIGNMENT/NUMERO DE CAMA

NOTE: If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently. You will be interviewed, if necessary, in order to satisfactorily handle your request. Your failure to specifically state your problem may result in no action being taken.
NOTA: Si usted sigue las instrucciones en preparar su petición, puede estar contestada mas rápida y inteligentemente. Usted estará entrevistado, si necesario, para contestar su petición satisfactoriamente. Su negligencia en declarar su problema especificamente puede resultar en que no se tome ninguna acción.

DISPOSITION: (DO NOT WRITE IN THIS SPACE)
DATE/FECHA: _____
DISPOSICION: (NO ESCRIBA EN ESTE ESPACIO)

420 Oklahoma Blvd (Parent)
Alva Oklahoma
73717

IM-004 ATTACHMENT A

Officer/Official

MVCC PS IM-004 10/2005

Exhibit Two

E Morick

U.S. Department of Homeland Security

Immigration Detainer – Notice of Action

Subject ID : 277070626
Event No: ALN0809000347
File No. A090 386 542
Date: September 22, 2008

TO: (Name and title of institution)	From: (Office address)
MOSHANNON VALLEY CORRECTIONAL 210 LOCH LOMAND RD PHILIPSBURG, PA 16866	ALLENWOOD, PA, PROCESSING CENTER P.O.BOX 209 WHITE DEER, PA 17887

Name of alien: PATEL, Kamalbhai Rantigbai AKA: PATEL, KAMAL K. (CONTINUED ON I-831) (does not file in Sentry) BOP# 56496-080 DOB- 11-29-1969
... (MISCELLANEOUS NUMBERS CONTINUED ON I-831)

Date of birth: 03/08/1969 Nationality: UNITED KINGDOM Sex: M

You are advised that the action noted below has been taken by the U.S. Department of Homeland Security concerning the above-named inmate of your institution:

☒ Investigation has been initiated to determine whether this person is subject to removal from the United States.

☐ A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____ (Date)

☐ A warrant of arrest in removal proceedings, a copy of which is attached, was served on _____ (Date)

☐ Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work, and quarters assignments, or other treatment which he or she would otherwise receive.

☒ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sunday's and Federal holidays) to provide adequate time for DHS to assume custody of the alien. You may notify DHS by calling 570-547-6903 during business hours or _____ after hours in an emergency.

☐ Please complete and sign the bottom block of the duplicate of this form and return it to this office. ☐ A self-addressed stamped envelope is enclosed for your convenience. ☐ Please return a signed copy via facsimile to _____ (Area code and facsimile number)

Return fax to the attention of _____, at _____ (Name of officer handling case) (Area code and phone number)

☒ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☒ Notify this office in the event of the inmate's death or transfer to another institution.

☐ Please cancel the detainer previously placed by this Office on _____

STEWART L. GINGERICH _____ SDDO
(Signature of Immigration Officer) (Title of Immigration Officer)

Receipt acknowledged:

Date of last conviction: _____ Latest conviction charge: _____

Estimated release date: _____

Signature and title of official: _____ 09/22/08

Form I-247 (Rev. 08/01/07)

Exhibit Three

This is more cost-effective than allowing the inmate to remain at the higher level facility with a Management Variable unless the inmate is within 18 months of release.

** When considering an inmate for a nearer to release transfer, the inmate should not currently be housed within a 500-mile radius of his legal residence, and the requested transfer should place the inmate within the 500-mile radius. If the transfer is denied, no additional request for redesignation may be submitted until one year has elapsed since the date of the denial. Lastly, inmates will be considered for a nearer to release transfer after serving 18 months of clear conduct.

e. **Institution Classification**

(1) **Security Changes**

(a) A decreased security level may be indicated by a decrease in the security total of the Custody Classification Form. This change may result in transfer of the inmate to a lower security level institution.

(b) An increased security level may be indicated in a similar fashion. The security total may increase to a higher security level range.

If an updated security scoring, combined with Public Safety Factors, indicate that an inmate is rated at a different security level, the inmate must be referred to the Regional Designator for either transfer or application of a Management Variable. For example, if an inmate in a Low security level institution is reclassified to Minimum security, the case must be referred for transfer or application of a Management Variable. If transfer is denied, the regional office shall apply an appropriate Management Variable and add a Management Security Level, if applicable.

(2) **Custody Changes.** During an inmate's custody review, a custody level may be increased or decreased (ordinarily, only one level at a time) indicating a transfer is appropriate. For example:

(a) A Medium security level inmate has OUT custody, and becomes eligible for COMMUNITY custody. If the Unit Team decides to reduce custody, the inmate would normally be referred for redesignation to a Low or Minimum security level facility, since Medium security level institutions do not house COMMUNITY custody inmates. **If approved for transfer by the Regional Office, the Management Variable of**

6. **TRANSFER CODES.** The reason for transfer, as shown by one of the codes listed at the end of this chapter is to be visible on the original and each copy of the Transfer Order. When there is more than one reason for transfer, the most pertinent code is to be used. Note that all Unescorted Transfers are Discharge Code - FURL TRANS for Furlough Transfer.

7. **SPECIAL REQUIREMENTS.**

a. An inmate having a detainer or pending charge may be transferred to any institution for which he or she properly classifies; however, generally when there is a formally filed detainer, the inmate is not to be transferred to an institution more distant from the detaining authority unless there is substantial reason to believe the detainer will be dropped or the pending charge will not be prosecuted.

An inmate who indicates an intention to oppose extradition is not to be transferred within the last 30 calendar days prior to release to an institution in the state that placed the detainer. Such cases, and others in which there are legal or jurisdictional problems, are to be referred to the Regional Correctional Programs Administrator (See Program Statement entitled Detainers and the Interstate Agreement on Detainers).

b. When there is reason to transfer an inmate to a non-federal institution for concurrent service of federal and state sentences, the Warden shall refer the case to the Regional Director. Refer to the Program Statement, Transfer of a Prisoner to State Custody Prior to Release from the Federal Sentence, for procedures.

When an inmate is accepted by a non-federal institution for concurrent service of federal and state sentences, a Transfer Order will be prepared.

Transfer to a facility in an area other than the inmate's legal residence or sentencing district may be considered by the inmate's Unit Team provided the inmate can provide strong evidence of community and/or family support. Institution staff should use sound correctional judgment when reviewing such requests for transfer to ensure the transfer is consistent with guidelines established in this chapter. At the time of the Unit Team's recommendation for CCC placement, the Case Manager should submit release plans to the USPO if other than the sentencing district. A relocation acceptance letter should be included in the CCC referral packet.

8. **RELATIONSHIPS WITH OTHER AGENCIES.**

Exhibit Five

(2) An inmate's transfer to a higher security institution could be triggered by an increase in custody needs. For example, a Medium security level inmate with IN custody becomes eligible for a custody increase. The team agrees to increase the custody to Maximum. Since Medium security level facilities are not authorized to house Maximum custody inmates, the inmate must be referred for transfer to a High security level institution and the MSL changed in accordance with the application of an MGTV.

2. **NEARER RELEASE TRANSFERS (Code 313).** Nearer release transfers move the inmate closer to their legal residence or release destination, consistent with their security level. Inmates may be considered for a nearer release transfer only after serving 18 consecutive months of clear conduct in a general population. Nearer release transfers should be incorporated with "Lesser Security" transfers whenever possible. Once the inmate has been transferred within 500 miles of his or her release residence, no further referrals will be made for nearer release transfer consideration.

Transfer to a facility in an area other than the inmate's legal residence or sentencing district may be considered by the inmate's Unit Team provided the inmate can provide strong evidence of community and/or family support. Institution staff should use sound correctional judgment when reviewing such requests for transfer to ensure the transfer is consistent with guidelines established in this chapter.

Inmates with an Order for Deportation, an Order of Removal, an ICE detainer for an unadjudicated offense(s) or an ICE detainer for a hearing will not be transferred for nearer release purposes since they will be returning to the community outside, rather than inside, the United States upon release.

3. **WITSEC TRANSFERS.** All movement of Witness Security cases is coordinated exclusively through the Inmate Monitoring Section of the Correctional Programs Branch, Central Office. Witness Security cases will not be transferred without authorization from that office. Witness Security inmates who require medical or mental health treatment at a medical center must also be approved by the Medical Designator.

If the inmate is classified as a WITSEC case, a copy of the medical referral will be sent simultaneously to the Inmate Monitoring Section (IMS) and the Medical Designator. The Inmate Monitoring Section will coordinate with the CMDT regarding an appropriate placement. Placement will be based on available medical resources, security needs, bed space availability, and

Exhibit Seven

mAL K. Patel
No 56496-080
rs C.I.
. BOX 630
ton, NC 27986

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL™

7006 0810 0006 4306 4454

95

Return Re

BUREAU OF PRISONS
ATTN: Legal Department
320 First St., N.W.
Washington, D.C. 20534

gal Mail

APR
2
2009
27986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KAMAL K. PATEL, and DALE BROWN,	§	Civil No. 1:09-CV-00200 RWR
Plaintiffs,	§	CIVIL COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF
vs.	§	
BUREAU OF PRISONS, and HARLEY LAPPIN,	§	FIRST AMENDMENT
Defendants.	§	

PLAINTIFFS' FIRST AMENDED COMPLAINT
(Fed.R.Civ.P. 15 & 20)

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES, your Plaintiffs in this action, KAMAL K. PATEL and DALE BROWN, appearing herein Pro Se, and hereby submit this First Amended Complaint seeking Injunctive and Declaratory Relief.

I.

INTRODUCTION

The initial complaint sought injunctive and declaratory relief in regards the discriminatory policies as applied to non-citizen Legal Permandent Residents ("LPR") by the Bureau of Prisons. In the instant First Amended Complaint, Dale Brown has been joined as a co-plaintiff complaining of the identical matters alleged in the initial complaint. Additionally, plaintiff Kamal Patel has added additional claims for relief under the Freedom of Information Act.

RECEIVED
JUN - 8 2009
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

II.

AMENDMENT UNDER FED.R.CIV.P. 15 & 20

1. This amendment is submitted pursuant to Rule 15(a) of the Federal Rules of Civil Procedure which permits an amendment as of right before the filing of a responsive pleading by the defendants. Defendants have not filed a responsive pleading.

2. Co-Plaintiff Dale Brown is added to this complaint pursuant to Rule 20(a)(1)(A) & (B). Both plaintiffs seek relief complaining of common questions of fact and law. Both plaintiffs are LPR's who have been unfairly discriminated against and denied the Equal Protection of the laws by the BOP on account of their LPR status.

III.

PARTIES

3. **KAMAL K. PATEL** (hereinafter "Patel" is the Plaintiff in this action. Patel is a British citizen and a Legal Permanent Resident of the United States. Pate's legal residence is in the State of Oklahoma. Plaintiff's current addresses are as follows:

LEGAL RESIDENCE:

Kamal K. Patel
420 E. Oklahoma Blvd.
Alva, OK 73717

MAILING ADDRESS:

Kamal K. Patel
Reg. No. 56496-080
P.O. Box 630
Winton, NC 27986

4. **DALE BROWN** (hereinafter "Brown" is a Co-Plaintiff in this action. Brown is a Jamaican citizen and a Legal Permanent Resident of the United States. Brown's legal residence is in the State of Florida with the same mailing address as co-plaintiff Patel listed in Paragraph 3, supra.

5. **BUREAU OF PRISONS** (hereinafter "BOP") is a Defendant in this action. The BOP is a federal agency of the United States headquartered at:

Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

The BOP is sued only for injunctive and declaratory relief. There are no claims for money damages in this case.

6. **HARLEY LAPPIN** (hereinafter "Lappin" or "Director") is the Director of the Federal Bureau of Prisons. Lappin is sued solely in his official capacity as the Director of the BOP. No claims for money damages are asserted in this action against Director Lappin, a defendant, in this action. Lappin's work/official address is alleged to be as follows:

Harley Lappin--Director
Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

IV.

JURISDICTION & VENUE

7. Jurisdiction over this matter is invoked under Title 28, United States Code, §§ 1331 and 1361; Title 5, United States Code, § 552 et. seq.; the Equal Protection Clause of the Fifth Amendment, and any other applicable provisions unknown to plaintiffs providing for the relief sought.

8. Venue is proper in this court under 28 U.S.C. § 1391(b)(1), (b)(2), (b)(3), (e)(1) and (e)(2).

V.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

9. At the time the instant suit was filed, there were no "available" administrative remedies for Plaintiff Patel to file.

10. The Bureau of Prisons has a grievance procedure which mandates that an inmate first complete an informal resolution request before he files the formal appeals; first to the Warden via a form called the BP-9, then to the Regional Director via a form called the BP-10, and finally to the Central Office on a form called the BP-11.

11. Plaintiff Patel attempted to initiate his grievances complaining of the claims made in this suit by requesting the appropriate forms from his Counselor, Mr. Benbow. See Exhibit A at Para. 1 & A-1. Patel was informed that he would only be able to file a grievance on one of the issues he sought to file a administrative remedy for. Exhibit A, supra; A-1. Thus, for the instant claims brought in this suit, there were no avaiable remedies.

12. Plaintiff sought to again attempt to exhaust his administrative remedies after he was transferred from FMC Butner, North Carolina to CI Moshannon Valley, Pennsylvania. Plaintiff Patel made many requests for grievance forms from the prison officials at CI Moshannon Valley, both verbally and in writing. See Exhibit A & A-2. Patel's requests were ignored and he was not provided the forms to file any grievances while at CI Moshannon Valley.

13. Co-Plaintiff Brown has exhausted his administrative remedies for the claims he brings in this suit. See Exhibit B & B-1.

14. The claims brought by Plaintiff Patel via the Freedom of Information Act have been fully exhausted at the BOP level. See Exhibit A & A-3, A-4, A-5, A-6.

VI.

FACTS PERTINENT TO COUNTS ALLEGING DISCRIMINATORY AND UNCONSTITUTIONAL POLICIES DIRECTED TOWARDS LEGAL PERMANENT RESIDENTS

15. Plaintiff Patel is and was a Legal Permanent Resident of the United States of America, also known as a Green Card Holder, at all times relevant here.

16. Plaintiff Brown is and was a Legal Permanent Resident of the United States of America, also known as a Green Card Holder, at all times relevant here.

17. The immigration service has placed a detainer action letter against both plaintiffs, Patel and Brown, to determine if they are subject to removal from the United States. See Exhibit C (Patel's Detainer Action Letter); Exhibit D (Brown's Detainer Action Letter).

18. A Detainer Action Letter filed by the immigration service is not a determination by the immigration service, an immigration judge, or any other agency or official that the person is to be removed or deported from the United States. The Detainer Action Letter is only a notification.

19. A Legal Permanent Resident of the United States, like the plaintiffs, are entitled to have a determination as to his or her deportation and removal before an appropriate immigration judge and are entitled to various procedural protections including the right to a review of any adverse decision by the appropriate appellate and/or district court.

20. At all times relevant here, neither of the plaintiffs have been provided any hearing or any other process in relation to whether or not they may remain in the United States or be removed. Additionally, for convictions before 1996, waivers were permitted under INA § 212(c).

21. The Bureau of Prisons is not vested with any authority to make any decision or determination to order any person removed or deported. The BOP cannot

order the Plaintiffs to be deported or removed.

22. The BOP is also without any authority to make any order affecting the immigration status of the Plaintiffs in the United States.

23. At all times relevant to this action, both the Plaintiffs had legal residence in the United States.

24. The legal residence of Plaintiff Patel was at 420 E. Oklahoma Blvd., Alva, Oklahoma 73717. The United States Probation Office has stated that this is the Plaintiff Patel's legal residence in Patel's Presentence Investigation Report.

25. The legal residence of Plaintiff Brown was at 3286 N.W. 42nd Street, Ft. Lauderdale, Florida 33311. The United States Probation Office has recognized this to be the legal residence of Brown at the time of his conviction.

26. The Bureau of Prisons has defined the term "legal residence" to mean the legal residence as recognized by the United States Probation Office at the time of conviction. Exhibit E **(P5100.08, Chapter 2, Page 2, defining term "Legal Residence").**

27. Under the definition of "legal residence" as defined by the BOP at P5100.08, Chapter 2, Page 2 (Exhibit E), both Plaintiffs Patel and Brown are considered to have legal residence within the United States.

28. The definition of the term "legal residence" by the BOP is in the Program Statement pertaining to the classification, transfer and program participation decisions it makes under the Program Statements in the Custody Classification Manual. See **BOP P5100.08 (Introduction).**

29. The BOP's Custody Classification Manual outlines guidelines for the purposes of classification, transfer, and program participation needs.

30. The BOP's guidelines on transfers under the Code 313 category

titled "Nearer Release Transfers" state that it is to transfer the inmate for either:

(a) "move the inmate closer to their legal residence" or
(b) move the inmate closer to their "release destination".

See Exhibit G (BOP P5100.08, Chapter 7, Page 4).

31. The BOP has also created P5100.08, Chapter 7, Page 4, a Program Statement which prohibits inmates with a ICE detainer from being eligible for transfers for nearer release purposes. **Id.**

32. In crafting the above guideline, the BOP stated as its rationale that inmates with an ICE detainer are ineligible since "they will be returning to the community outside, rather than inside, the United States upon release." **Id.**

33. By an unwritten mandate, the BOP has directed that the prohibition against nearer to release destination transfers will also include a nearer to legal residence transfers although the two transfers are listed as being distinct.

34. The immigration service has expressly instructed the BOP in its detainer letter that the detainer is not an indication of any legal findings and taht it is not to be used to limit the BOP's discretion in classifying, giving program assignments, or other treatments to the inmate that he would otherwise receive. **Exhibit C** (Patel's Detainer Letter); **Exhibit D** (Brown's Detainer Letter).

35. The BOP has acted in the role of a judicial fact-finder by declaring that any inmate with an ICE detainer will be deported or removed from the United States. This action by the BOP is arbitrary, capricious, and without any legal basis.

36. Both the Plaintiffs, as Legal Permanent Residents of the United States, are entitled to the full protection of the laws under the Equal Protection Clause of the Fifth Amendment to the United States Constitution and must receive the

same rights, benefits, and privileges afforded the United States citizensh by the BOP.

37. The BOP may not discriminate against LPR's on the basis of their nationality in making the transfer, classification, and program participation decisions.

38. Under federal law, an inmate serving a federally imposed sentence of LIFE is ineligible for parole and if required to serve this sentence, will only be released from prison upon his death.

39. The BOP permits these inmates with LIFE sentences who will not be returning to the community but who are U.S. citizens to be transferred for purposes of nearer to release residence.

40. The BOP has implemented a policy for U.S. citizens that pending detainers and charges will not affect their transfer or classification decisions. **Exhibit H.**

41. The BOP's guidelines treat similarly situated U.S. citizens and non-U.S. citizen Legal Permanent Residents differently with no legitimate purpose.

42. The BOP's guidelines arbitrarily deny Legal Permanent Residents the opportunity to be closer to their families but provide U.S. citizens with LIFE sentences with this opportunity although it is the LIFE sentenced U.S. citizens with no chance of being released to the community and the LPR's with a chance to avoid deportation or removal after the immigration hearing.

43. The BOP's guidelines treating immigration detainers different than other detainers is premised on discriminatory intentions and motives directed against non-U.S. citizensh.

44. Both the plaintiffs have most of their immediate and extended families living in the United States. Furthermore, most of these family members are U.S.

citizens.

45. The BOP recognizes that placing inmates far from their families would place a burden upon the inmate and the family for visitation purposes. The BOP also recognizes that placing inmates closer to the legal residence or release destination will enable the inmate to have greater opportunities to visit with his family members and enhance his First Amendment rights.

46. Unless otherwise ordered by the immigration agency, both the Plaintiffs intend to be released to their legal residence and intent to reside in the United States.

47. The Plaintiffs allege that the BOP's sole basis for treating LPR's different than similarly situated U.S. citizens is based on an impermissible, unsupportable and unconstitutional reason. The Plaintiffs allege that these discriminatory actions are based on the intentions to single out non-U.S. citizens for discriminatory treatment.

48. The BOP is prohibited from discriminating against inmates on the basis of their national origin in making administrative decisions such as transfers and classification. **Exhibit I** (28 C.F.R § 551.90).

49. The Plaintiffs state that the BOP's actions in delaring that all non-citizens with ICE detainers will be deported engages on impermissible speculation and casts the BOP into the role of the immigration agencies, a role for which BOP is not legally authorized.

50. As a direct result of the BOP's discriminatory actions, both Plaintiffs have been discriminated against on the basis of their nationality despite being LPR's and have been denied the Equal Protection of the laws.

RELIEF REQUESTED

COUNT ONE: DECLARATORY RELIEF. Plaintiffs Patel and Brown seek Declaratory Relief as follows. Patel and Brown seek a declaration by this court that:

A. The BOP and Lappin violated the Plaintiffs rights under the Equal Protection Clause of the Fifth Amendment by refusing each of them a transfer to be close to their legal residence while providing U.S. citizens this transfer.

B. The BOP and Lappin violated the Plaintiffs' rights under the Equal Protection Clause of the Fifth Amendment by denying each of them the same opportunities for a Code 313 transfer as an incentive for good behavior as provided U.S. citizensh.

C. The BOP and Lappin have violated the Plaintiffs' rights under the Equal Protection Clause of the Fifth Amendment by denying them the same opportunity to maintain their First Amendment relationships with family and the community as provided to U.S. citizens.

D. The BOP's regulation declaring that all inmates with an ICE detainer will be deported or removed from the United States is an unconstitutional policy which the BOP is not authorized to promulgate.

E. The BOP's regulation that precludes LPR's from being eligible for nearer to legal residence transfers on the basis of an ICE detainer is unconstitutional.

F. The BOP's regulation that precludes LPR's from being eligible for nearer to release destination transfers on the basis of an unadjudicated ICE detainer is unconstitutional.

G. The BOP engaged in capricious, arbitrary and unconstitutional acts in violation of the Fifth Amendment's Equal Protection Clause by applying criteria

VII.

FACTS PERTINENT TO COUNTS ALLEGING DISCRIMINATORY AND UNCONSTITUTIONAL POLICIES DENYING LPR PLAINTIFF PATEL ACCESS TO PROGRAMMING OPPORTUNITIES AS GIVEN U.S. CITIZENS

51. Paragraphs 15-50, supra, are hereby incorporated into these Counts alleged here as if fully set forth herein.

52. Plaintiff Patel has been discriminated against and denied the Equal Protection of the laws mandated by the Fifth Amendment by being denied the opportunity to participate in the residential faith based program, called the Life-Connections Program, on the basis of his immigration detainer.

53. The BOP has established a residential faith based program, the Life Connections Program.

54. Upon arriving at Moshannon Valley Correctional Institute, Philipsburg, Pennsylvania, Plaintiff Patel requested that he be allowed to enroll in the Life-Connections Program. Patel made these requests to many of the prison officials at the institute (hereinafter referred to as "MVCC") including Mr. Stepanovic, the Religious Program Coordinator, Ms. Magnuson, the Case Manager Coordinator, Mr. Lumadue, the Unit Manager, and Mr. Juster, the BOP Specialist on-site.

55. Plaintiff Patel was informed by all these persons that his request was denied and that MVCC did not allow inmates to enroll in such program since the inmates at the prison were all with immigration detainers and due to the detainer, the inmates were excluded from the program.

56. The Life-Connections policy does not state that it excludes inmates with INS detainers but such a policy is practices as an unwritten mandate by the BOP ands it officials and contractors.

VIII.

FACTS PERTINENT TO FREEDOM OF INFORMATION CLAIMS

59. In 2003, the Plaintiff, Kamal K. Patel, was a complainant in an investigation into violations of the USA Patriot Act by the Office of the Inspector General.

60. Plaintiff Patel filed for copies of the investigation report. In response to the FOIA request, only portions of the investigation report were released. Patel appealed the denial of the relevant portions of the FOIA request and fully exhausted his remedies at that stage. The matter is brought to this court for resolution in regards to Request No. 2005-05331, Appeal No. 05-2152. **Exhibit A-3.**

61. On April 25, 2009, Patel filed a Freedom of Information request to teh Bureau of Prisons requesting the following documents:

a) All documents pertaining to a protection hearing conducted at MVCC in which Patel was involuntarily placed under protection custody;

b) All documents created after the initial protection hearing; and

c) All documents of any segregation review hearings at MVCC.

On May 5, 2009, the BOP returned the FOIA letter requesting a Certificate of Identity. Patel mailed the Certificate of Identity and FOIA request to the BOP on May 19, 2009. This FOIA request numbered 2009-07187 has exceeded the statutory time frame without response. **Exhibit A-4.**

62. On October 6, 2008, Patel filed a FOIA request to the Department of Justice asking for the following:

a) All transfer documents including 409 forms, medical clearance documetns created for transfer and any other documents pertaining to the transfer decisions regarding Patel's transfer from FCI Forrest City, Arkansas to FMC Butner, North Carolina in 2006, from FMC Butner, North Carolina to Pine Prairie Correctional Facility in Louisiana in January

or February 2008.

See Exhibit A-5. Patel did not receive an answer to this request and the statutory time frames have elapsed.

63. Patel filed a FOIA request to the Bureau of Prisons for a copy of a medical transfer request submitted by officials at MVCC in late 2008. This request has not been provided by the time frames established in the Freedom of Information Act. **See Exhibit A-6.**

RELIEF REQUESTED

COUNT FIVE: Plaintiff Patel seeks an Order requiring the BOP to release to him the documents described in paragraphs 59 and 60, supra, and Exhibit A-3 under the Freedom of Information and Privacy Acts.

COUNT SIX: Plaintiff Patel seeks an Order requiring the BOP to release to him the documents described in paragraph 61, supra, and Exhibit A-4 under the Freedom of Information and Privacy Acts.

COUNT SEVEN: Plaintiff Patel seeks an Order requiring the BOP to release to him the documents described in paragraph 62, supra, and Exhibit A-5 under the Freedom of Information and Privacy Acts.

COUNT EIGHT: Plaintiff Patel seeks an Order requiring the BOP to release to him the documents described in paragraph 63, supra, and Exhibit A-6 under the Freedom of Information and Privacy Acts.

IX.

CONCLUSION

The Plaintiffs, Kamal K. Patel and Dale Brown, bring this civil action asking this court to enforce their rights while in the custody and care of the Bureau of Prisons. Plaintiff Patel brings claims under Counts One through Eight. Plaintiff Brown brings claims only in Counts One and Two.

PRAYER FOR RELIEF

The paragraphs numbered 1 through 63, supra, and all attached exhibits are hereby incorporated here as if fully set forth herein.

64. Plaintiffs Patel and Brown request Declaratory and Injunctive Relief as set forth in Counts One and Two, supra.

65. Plaintiff Patel requests Declaratory and Injunctive Relief as set forth in Counts Three and Four, supra.

66. Plaintiff Patel requests relief under the Freedom of Information and Privacy Acts as set forth in Counts Five, Six, Seven and Eight, supra.

67. Both plaintiffs ask this court to assess costs, fees, attorney fees, and other costs against Defendants.

68. A TRIAL BY JURY is DEMANDED on all issues so triable.

69. Both Plaintiffs ask for such other relief as is just.

WHEREFORE, all things considered, the Plaintiffs, KAMAL K. PATEL and DALE BROWN, respectfully pray that this court order all relief requested.

DATED: 6-2-09

Respectfully submitted,



Kamal K. Patel
Reg. No. 56496-080
P.O. Box 630
Winton, NC 27986

DATED: 6/2/09

Respectfully submitted,

Dale Brown
Reg. No. 29087-004
P.O. Box 630
Winton, NC 27986

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a true and correct copy of the foregoing to opposing counsel at the last known address by first class mail, postage prepaid, by depositing in the prison legal mailbox on this the 2nd day of June, 2009. Declared under 28 U.S.C. § 1746.

Kamal K. Patel

AFFIDAVIT OF KAMAL K. PATEL

I state that my name is Kamal K. Patel, that I am over the age of 18, and that I am competent to testify to the matters declared herein.

1. I state that the exhibits attached to this affidavit are true and correct copies and/or the originals to the best of my knowledge and beliefs. Exhibit A-1 is a request I submitted to my counselor, Mr. Benbow. Exhibit A-2 is a true and correct copy of a request I submitted to my case manager at CI Moshannon Valley, Pennsylvania. Exhibit A-3 is a true and correct copy of a of the denial I received in a FOIA request. Exhibit A-4 is a true and correct copy of a letter I sent under the Freedom of Information Act on May 19, 2009 for which I have not received the requested materials. Exhibit A-5 is a true and correct copy of a letter I sent on October 6, 2008 for which I have not received teh requested materials.

2. I state that the exhibit labelled Exhibit C to the instant Amended Complaint is a true and correct copy of a detainer letter I received.

3. I state that I attempted to exhaust my administrative remedies in relation to the claims brought in Counts One through Four in this Amended Complaint. I sent my counselor at FMC, Mr. Benbow, a request for informal resolution forms to file the claims raised in Counts One through Four. Mr. Benbow responded by informing me that he would only provide me one BP-8 at a time. The BP-8 is the term used for the informal resolution form which must be filed before a formal grievance can be filed on a BP-9 form. Thus, I had to pick which of the issues I could file the grievance on and the remedies were unavailable as to the other issues.

4. I state that I was transferred to Moshannon Valley Correctional Facility in Pennsylvania from FMC Butner, North Carolina sometime in September 2008. Upon arrival at this prison, I asked for grievance forms to exhaust my administrative remedies. At Attachment A-2 to this affidavit, it shows a request I made to my case manager at the prison for grievance forms. Although a response was given to me that the forms would be provided by the case manager on his next visit to me, no forms were ever brought. I made many requests for forms for grievances to these prison fficials. On September 22, 2008, I stopped by case manager Miller's office and Mr. Miller was there which a lady named Ms. Norfolk. At this time I requested 6 BP-8 forms and was told to write my request on a cop-out. I submitted a written request as instructed which was not answered. On September 25, 2008, I had a team meeting in which I again requested grievance forms and was told that I would be provided them when they were logged in. I was not provided these either. On October 2, 2008, I submitted a written request for 15 grievance forms and did not receive any reply to this. On October 1, 2008, Unit Manager Lamadue verbally told me that per the warden, I would only be issued three grievance forms at a time. I asked for these three forms and for this restriction in writing. Mr. Lamadue said he would get back with me. He never provided me with any forms nor the restriction in writing as requested. I sent the Central Office of the BOP a letter notifying them that I could not get grievance forms.

5. At the time I filed this suit, I was not permitted access to the administrative remedy process at the prison and was denied all necessary forms with which to file my grievances.

I state that the aboe statements are true and correct to the best of my knowledge and beliefs under the penalty of perjury as provided by 28 USC 1746.

DATED: 6/2/09

Kamal K. Patel #56496-080
P.O. Box 630
Winton, NC 27986

A

EXHIBIT

(171)

BP-S148.055 INMATE REQUEST TO STAFF CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) Mr. Benbow - counsel	DATE: 7-31-08
FROM: Kamal Patel	REGISTER NO.: 56496-080
WORK ASSIGNMENT:	UNIT: S1/4

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

(1) I mailed legal packet 7-11-08 certified # 7003 3110 0001 3506 2808 to Raleigh, N.C. court. Its disappeared & I haven't got my receipt back. Can you try to locate it.

(2) I need pink forms, (50) copouts, & 15 BP-8 forms. Issue all for BP8: (1) retaliatory transfer to Pennsyl (2) Need Feb 08 transfer dents (3) medical PT denied (4) SIS interfere w/ my in & out mail (5) T-Hill discrimination in shots (6) Equal Protection denied in not letting me have 500 mile transfer halfway house, Life-connections program, (7) Sick Call request ignored (8) refused my newspapers (9) Discrimination in application of custody levels only to US citizens (10) my certified court mail disappear

(3) I need (10) tort claim forms.

(Do not write below this line)

DISPOSITION:

I will Send 10 BP 11's, 10 copy-outs A 1 BP 8 At All Time. And A Tort Claim.

Signature Staff Member [signature]	Date 8/3/08

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

Exhibit A-1

CORNELL COMPANIES, INC.

(116)

INMATE REQUEST TO A STAFF MEMBER
PETICION DEL PRESO PARA PERSONAL DE LA INSTITUCION

TO/PARA: Mr. Miller - A Unit Case Mgr
(NAME AND TITLE OF OFFICER/NOMBRE Y TITULO DEL OFFICIAL)

SUBJECT: STATE, COMPLETELY, BUT BRIEFLY, THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE, AND WHAT YOU THINK SHOULD BE DONE. (GIVE DETAILS)
RAZON: ESCRIBA EL PROBLEMA, BREVEMENTE Y COMO USTED PIENSE QUE PODEMOS RESOLVERLO. (ESCRIBA CON DETALLES)

Per my verbal request, please provide
8 BP-8 grievance forms to me.

Thank You

(USE OTHER SIDE OF PAGE IF MORE SPACE IS NEEDED.)
(USE EL OTRO LADO DE LA HOJA SI NECESITA MAS ESPACIO.)

NAME/NOMBRE: Kamal Patel No./Numero: 56496-08

CASE MANAGER/GERENTE: Miller DATE/FECHA: 12/4/08

WORK ASSIGNMENT/ASIGNACION DE TRABAJO: Sha UNIT/UNIDAD: SHU

BED ASSIGNMENT/NUMERO DE CAMA 116-C

NOTE: If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently. You will be interviewed, if necessary, in order to satisfactorily handle your request. Your failure to specifically state your problem may result in no action being taken.
NOTA: Si usted sigue las instrucciones en preparar su petición, puede estar contestada mas rápida y inteligentemente. Usted estará entrevistado, si necesario, para contestar su petición satisfactoriamente. Su negligencia en declarar su problema específicamente puede resultar en que no se tome ninguna acción.

DISPOSITION: (DO NOT WRITE IN THIS SPACE)
DATE/FECHA: 12/5/08
DISPOSICION: (NO ESCRIBA EN ESTE ESPACIO)

Requested BP230 at 9:10 AM 12/5/08. Case Manager will deliver to SHU when received.

Robins US

IM-004 ATTACHMENT A

Officer/Official

MVCC PS IM-004 10/2005

Exhibit A-2

 016 Rpt

U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642 *Washington, D.C. 20530*

NOV 2 8 2007

Mr. Kamal K. Patel
Register No. 56496-080
Federal Correctional Institution
Post Office Box 9000
Forrest City, AR 72336

Re: Appeal No. 05-2152
Request No. 2005-05331
ALB:CG

Dear Mr. Patel:

You appealed from the action of the Central Office of the Federal Bureau of Prisons (BOP) on records referred to it by the Office of the Inspector General (OIG) pursuant to your request to OIG for access to certain records pertaining to yourself. I regret the substantial delay in responding to your appeal.

After carefully considering your appeal, I am affirming, on partly modified grounds, BOP's action on the records referred to it. The records referred to BOP are exempt from the access provision of the Privacy Act of 1974 pursuant to 5 U.S.C. § 552a(j)(2). See 28 C.F.R. § 16.97 (2007). Because these records are not available to you under the Privacy Act, they have been reviewed under the Freedom of Information Act in order to afford you the greatest possible access to them.

BOP properly withheld certain information that is protected from disclosure under the FOIA pursuant to:

5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege;

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties; and

5 U.S.C. § 552(b)(7)(F), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to endanger the life or personal safety of an individual.

Exhibit A.3. p.1 of 2

In your appeal letter, you contend that BOP failed to provide you with certain records. Please note that BOP's action was limited to documents that were referred to it by OIG. If you have not done so already, I suggest that you make a separate request to BOP for the additional documents that you now seek. For your convenience, I am including the address of BOP's FOIA Office:

Wanda M. Hunt
Chief, FOIA Section
FOIA/Privacy Act Requests
Federal Bureau of Prisons
Department of Justice
Room 841, HOLC Building
Washington, DC 20534

If you are dissatisfied with my action on your appeal, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Janice Galli McLeod
Associate Director

By: Anne D. Work

Anne D. Work
Attorney-Advisor

Exhibit A-3. p. 2 of 2

2009-07187

Remail. 5/19/09 w/ cert of ID

FOIA (9)

KAMAL K. PATEL
Reg. No. 56496-080
P.O. Box 630
Winton, NC 27986

Received
MAY 5 2009
FOIA/PA Section
Federal Bureau of Prison

April 25, 2009

RE: FREEDOM OF INFORMATION/PRIVACY ACT REQUEST
FOR DOCUMENTS FROM FEDERAL BUREAU OF PRISONS

Dear FOIA/PA Section:

Please provide me the below described documents pursuant to the Freedom of Information and Privacy Acts:

1. All documents pertaining to a Protection Hearing conducted during my incarceration at Moshannon Valley Correctional Institution, Philipsburg, Pennsylvania, a private contract facility for the Bureau of Prisons. The approximate date of this protection hearing is around November/December 2008.

2. As part of this request, please include any other documents, memos, etc. which pertain to my classification as a protection hearing case, any documents created after the initial protection hearing and in any way relevant to this matter.

3. Any and all segregation review hearing reports created from November 2008.

4. A copy of all documents in my Inmate Central File created since September 15, 2008 up to the present.

I would appreciate it if you could provide this information to me within the time frames as provided by the Freedom of Information Act.

Thank you very much for your kind consideration in this matter.

Sincerely,

Kamal K. Patel

Exhibit A-4

Kamal K. Patel
Reg. No. 56496-080
CI Moshannon Valley
555-I Cornell Dr., A-2
Philipsburg, PA 16866

October 6, 2008

FOIA/PA MAIL REFERRAL UNIT
U.S. Dept of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

RE: FOIA/PA REQUEST FOR BOP TRANSFER DOCUMENTS

Dear FOIA/PA Unit:

Please provide me the following documents pursuant to the Freedom of Information and Privacy Acts:

1. A copy of all transfer documents including 409 forms, medical clearance documents for transfer, and any other document created for a transfer between prisons for the prison trasnfers which occurred or were approved to occur for myself as follows:

1. Transfer from FCI Forrest City, Arkansas to FMC Butner, North Carolina in 206;

2. Transfer approved from FMC Butner, North Carolina to Private Prison Facility Pine Prairie, Louisiana in Jan/Feb 2008; (include documents for any cancellation of this transfer);

3. Transfer from FMC Butner, North Carolina to CI Moshannon Valley, Pennsylvania in 2008.

Thank you very much.

Sincerely,

/s/

Kamal K. Patel

Exhibt A-5

AFFIDAVIT OF DALE BROWN

I state that my name is Dale Brown, that I am over the age of 18, and that I am competent to testify to the matters declared herein:

1. The document attached to this Affidavit as Exhibit B-1 is a true and copy of the Step Two grievance I filed at Rivers Correctional Institute and the reply provided to me. Step Two is the final stage of administrative remedies for filing grievances at this prison.

2. The document attached to the Amended Complaint as Exhibit D is a true and correct copy of a detainer letter I received.

I declare the above to the best of my knowledge and beliefs under the penalty of perjury as provided by 28 U.S.C. § 1746.

DATED: 6/2/09

Dale Brown
Reg. No. 29087-004
P.O. Box 630
Winton, NC 27986

EXHIBIT "B"

Administrative Remedy
Step 2 – Response

Date Filed: 05 -19 -2009 Remedy ID No. 09-079

Inmate Name: Dale, Brown Reg# 29087-004

This is in response to your Step 2 Administrative Remedy dated 05/18/09, in which you are appealing the Step 1 administrative remedy response. Specifically, you are requesting a transfer to be closer to your family and friends residing in the State of Florida.

After reviewing your concerns the following has been determined, as indicated in the Step 1 response, you may be considered for a nearer release transfer only after serving 18 consecutive months with clear conduct in a general population. Per your request, your primary concern is to be transferred to a facility closer to your family and friends. This issue was appropriately addressed by the Assistant Warden at the Step 1 level.

The Step 1 response was accurate and was in no violation of any procedures.

After a thorough review of the circumstances pertaining to your requested Administrative Remedy, we find that there is no evidence to support your grievance. Based on the above information and facts, your request for Step 2 Administrative Remedy is denied.

You have exhausted all your Administrative Remedies at this level.

7-22-09
Date

George E. Snyder, Warden

Exhibit B-1, p. 1/3

C

The GEO Group, Inc.

Correctional Programs
Administrative Remedies

Rivers Correctional Institution
Step 2 Administrative Remedy Form
Paso 2 Forma De Remedio Administrativo

Admin Coordinator
MAY 19 2009
DATE RECEIVED

Name: DALE BROWN Nombre:	Number: 29087-004 Numero:
Date: May 18, 2009 Fecha:	Housing Assignment: A5 Unidad Asignada:

For Official Use Only - Para Uso Oficial Solamente

Date Received:	Remedy #:	Date Due:
05-19-09	09-079	06-26-09

Complaint - Reclamo

Describe your complaint in the section below. Be as concise as possible, but be sure to include enough identifying data to assist in a through investigation (e.g. dates, names, locations, times, etc...) Attach one (1) additional page if necessary and the Informal Resolution Form and Step 1 response with any other supporting documentation.

Describa su telaino en la seccion de abajo. Dea lo mas breve posible, pero asegurese de incluir suficiente informacion para asistir en una completa investigacion (pe.. Fechas, nombres, ubicaciones, tiempos, etc...) Agregue una página si es necesario.

COMPLAINT: I am requesting that I be placed for a transfer closer to my legal residence in florida in order to be closer to family and friends. I have had clear conduct in a general population for 18 **years.** Due to the immigration detainer, I was moved to this facility and told that under BOP regulations, I would not be approved for this sort of transfer. This BOP policy (PS 5100.07, Chapter 7) violates the Constitution. It denies me the same rights and privileges given toU.S. citizens even though I am a Legal permanent Resident. The policy arbitrarily states that I will be deported as grounds to deny me placement closer to my legal residence. This conclusion is not the realm of the BOP but rather, the realm of the immigration judge and until the immigration judge makes this determination, the BOP's actions are illegal and an impermissible intrusion upon my rights to have this determination made only by an immigr. judge.

REPLY TO THE STEP ONE RESPONSE: The Step One reply is not responsive to my grievance requests. First, I requested that I be notified that the immigration detainer will not be used against me for consideration for a nearer to legal residence transfer. The Step One completely ignores this aspect of my requested relief. Thus, it appears that by omission, this institution will continue to use BOP PS 5100.07, Chpater 7's prohibition of nearer to legal residence transfers for immigration detainer inmates agsint me. Secondly, the Step One reply states that I will not be submitted for this transfer until serving 18 months clear conduct at this institution. The BOP policy does not state that the 18 months clear conduct must be served at one institution but rather, states taht it has to be 18 consecutive months of clear conduct in a general population thereby allowing the 18 months to be served at more than one institution as long as there are 18 months consecutive of clear conduct. The interpretation taken by RCI would allow transfers far from my family before each 18 month term and permit a re-starting of the clock thereby ensuring that I can never attain 18 months consecutively of clear conduct at one institution.

Dale Brown
Inmate Signature

SEE ATTACHED SHEET FOR CONTINUATION

Exhibit B-1 P. 2/3

STEP TWO CONTINUATION

REQUESTED RELIEF:

1. I have 18 years of clear conduct consecutively. This clearly is above and beyond the 18 mohths required by BOP policy. I am eligible to receive the nearer to legal residence trasnfer and I am requesting that it be submitted at this time.

2. The request for relief in Step One about providing me a memo or other written notification that the langauge of PS 5100.07, Chpater 7 which prohibits inmates with an immigration detainer from being eligible for nearer to legal residence/release transfers will not be used against me to deny me such a transfer was not addressed and I request that this memo or other written notification be provided in this Step Two request.

(2)

Exhibit B-1, p. 3/3

2 Pages

U.S. Department of Homeland Security — **Immigration Detainer – Notice of Action**

Subject ID : 277070626
Event No: ALW0809000147
File No. A090 386 542
Date: September 22, 2008

TO: (Name and title of institution)	From: (Office address)
MOSHANNON VALLEY CORRECTIONAL 210 LOCH LOMAND RD PHILIPSBURG, PA 16866	ALLENWOOD, PA, PROCESSING CENTER P.O.BOX 209 WHITE DEER, PA 17887

Name of alien: PATEL, Kamalbhai Kantiglai AKA: PATEL, KAMAL (CONTINUED ON I-831) (does not file in Sentry) BOP# 56496-080 Ped- 11-29-2013
... (MISCELLANEOUS NUMBERS CONTINUED ON I-831)

Date of birth: 03/08/1969 Nationality: UNITED KINGDOM Sex: M

You are advised that the action noted below has been taken by the U.S. Department of Homeland Security concerning the above-named inmate of your institution:

☒ Investigation has been initiated to determine whether this person is subject to removal from the United States.
☐ A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____ (Date).
☐ A warrant of arrest in removal proceedings, a copy of which is attached, was served on _____ (Date).
☐ Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work, and quarters assignments, or other treatment which he or she would otherwise receive.

☒ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sunday's and Federal holidays) to provide adequate time for DHS to assume custody of the alien. You may notify DHS by calling 570-547-6903 during business hours or _____ after hours in an emergency.
☐ Please complete and sign the bottom block of the duplicate of this form and return it to this office. ☐ A self-addressed stamped envelope is enclosed for your convenience. ☐ Please return a signed copy via facsimile to _____ (Area code and facsimile number).
Return fax to the attention of _____ (Name of officer handling case), at _____ (Area code and phone number).
☒ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
☒ Notify this office in the event of the inmate's death or transfer to another institution.
☐ Please cancel the detainer previously placed by this Office on _____

STEWART L. GINGERICH _____ SDDO
(Signature of Immigration Officer) (Title of Immigration Officer)

Receipt acknowledged:

Date of last conviction: _____ Latest conviction charge: _____
Estimated release date: _____
Signature and title of official: _____ 09/22/08

Form I-247 (Rev. 08/01/07)

EXHIBIT C

DETAINER

U.S. Department of Justice
Immigration & Naturalization Service

IMMIGRATION DETAINER-NOTICE OF ACTION
BY IMMIGRATION & NATURALIZATION SERVICE
OAKDALE, LOUISIANA

Date: August 6, 1993

To: Warden
Federal Correctional Institution
P.O. Box 5050
Oakdale, Louisiana 71463

From: U.S. Immigration Service
P.O. Box 5095
Oakdale, Louisiana 71463
Phone: (318) 335-4070
Ext: 251, 252, 253

NAME OF INMATE: DALE BROWN

INS FILE #: 35964036

BOP REG. #: 29087004

DATE OF BIRTH: January 31, 1965 SEX: Male NATIONALITY: JAMAICA

YOU ARE ADVISED THAT THE ACTION NOTED BELOW HAS BEEN TAKEN BY THIS SERVICE CONCERNING THE ABOVE-NAMED INMATE:

X — Investigation has been initiated to determine whether this inmate is subject to deportation from the United States.

IT IS REQUESTED THAT YOU:

X — Accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work, and quarters assignment or other treatment which he would otherwise receive.

X — Please ensure this inmate is immediately transferred to FCI, Oakdale, Louisiana when he is designated to OAK INS.

Jeannine Brady, IDA

MCK — LOCATION

1/11/13 — PRD

DETAINER

Exhibit D

CORNELL COMPANIES, INC.

INMATE REQUEST TO A STAFF MEMBER
PETICION DEL PRESO PARA PERSONAL DE LA INSTITUCION

TO/PARA: MR Miller CASE MGR
(NAME AND TITLE OF OFFICER/NOMBRE Y TITULO DEL OFFICIAL)

SUBJECT: STATE, COMPLETELY, BUT BRIEFLY, THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE, AND WHAT YOU THINK SHOULD BE DONE. (GIVE DETAILS)
RAZON: ESCRIBA EL PROBLEMA, BREVEMENTE Y COMO USTED PIENSE QUE PODEMOS RESOLVERLO. (ESCRIBA CON DETALLES)

On my PSR; what does it list As my Legal residence

(USE OTHER SIDE OF PAGE IF MORE SPACE IS NEEDED.)
(USE EL OTRO LADO DE LA HOJA SI NECESITA MAS ESPACIO.)

NAME/NOMBRE: Kamal Patel No./Numero: 56496-083

CASE MANAGER/GERENTE: Miller DATE/FECHA: 4/16/09

WORK ASSIGNMENT/ASIGNACION DE TRABAJO: _____ UNIT/UNIDAD: Sky

BED ASSIGNMENT/NUMERO DE CAMA

NOTE: If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently. You will be interviewed, if necessary, in order to satisfactorily handle your request. Your failure to specifically state your problem may result in no action being taken.
NOTA: Si usted sigue las instrucciones en preparar su petición, puede estar contestada mas rápida y inteligentemente. Usted estará entrevistado, si necesario, para contestar su petición satisfactoriamente. Su negligencia en declarar su problema específicamente puede resultar en que no se tome ninguna acción.

DISPOSITION: (DO NOT WRITE IN THIS SPACE)
DATE/FECHA: _____
DISPOSICION: (NO ESCRIBA EN ESTE ESPACIO) 420 Oklahoma Blvd (Parcel) Alva Oklahoma 73717

IM-004 ATTACHMENT A

Officer/Official

Exhibit E

CURRENT OFFENSE. For classification purposes, the current offense is the most severe documented instant offense behavior regardless of the conviction offense.

CUSTODY CLASSIFICATION. The review process to assign a custody level based on an inmate's criminal history, instant offense, and institutional adjustment. A custody level (i.e., **COMMUNITY**, **OUT**, **IN**, and **MAXIMUM**) dictates the degree of staff supervision required for an individual inmate.

DESIGNATION. An order from the DSCC indicating the initial facility of confinement for an inmate.

DESIGNATION FACILITY (DFCL). Each of the separate missions within an institution for designation purposes. Each DFCL is shown as a separate line on the Population Report and has its own security level and destination (DST) assignment. Designations are made to a DFCL code rather than to a facility (FACL) code.

JUDGMENT. The official court document (e.g., Judgment and Commitment Order or Judgment in a Criminal Case) which is signed by the Judge. The Judgment contains the offense(s) for which the court imposes its sentence, which ordinarily includes a financial, confinement and supervision obligation.

HISTORY. The inmate's entire background of criminal convictions (excluding the current offense) and institutional disciplinary findings used to assess points related to his/her history of violence and/or history of escape.

IN CUSTODY. The second highest custody level assigned to an inmate which requires the second highest level of security and staff supervision. An inmate who has **IN** custody is assigned to regular quarters and is eligible for all regular work assignments and activities under a normal level of supervision. Inmates with **IN** custody are not eligible for work details or programs outside the institution's secure perimeter.

LEGAL RESIDENCE. The inmate's local and state address as reported by the United States Probation Office at the time of conviction.

LONG-TERM DETAINEE. A non-U.S. citizen (alien) who has:

- finished serving a local, state, or federal sentence;
- completed immigration proceedings that have resulted in an order of deportation, exclusion, or other means of

EXHIBIT F

(2) An inmate's transfer to a higher security institution could be triggered by an increase in custody needs. For example, a Medium security level inmate with IN custody becomes eligible for a custody increase. The team agrees to increase the custody to Maximum. Since Medium security level facilities are not authorized to house Maximum custody inmates, the inmate must be referred for transfer to a High security level institution and the MSL changed in accordance with the application of an MGTV.

2. **NEARER RELEASE TRANSFERS (Code 313).** Nearer release transfers move the inmate closer to their legal residence or release destination, consistent with their security level. Inmates may be considered for a nearer release transfer only after serving 18 consecutive months of clear conduct in a general population. Nearer release transfers should be incorporated with "Lesser Security" transfers whenever possible. Once the inmate has been transferred within 500 miles of his or her release residence, no further referrals will be made for nearer release transfer consideration.

Transfer to a facility in an area other than the inmate's legal residence or sentencing district may be considered by the inmate's Unit Team provided the inmate can provide strong evidence of community and/or family support. Institution staff should use sound correctional judgment when reviewing such requests for transfer to ensure the transfer is consistent with guidelines established in this chapter.

Inmates with an Order for Deportation, an Order of Removal, an ICE detainer for an unadjudicated offense(s) or an ICE detainer for a hearing will not be transferred for nearer release purposes since they will be returning to the community outside, rather than inside, the United States upon release.

3. **WITSEC TRANSFERS.** All movement of Witness Security cases is coordinated exclusively through the Inmate Monitoring Section of the Correctional Programs Branch, Central Office. Witness Security cases will not be transferred without authorization from that office. Witness Security inmates who require medical or mental health treatment at a medical center must also be approved by the Medical Designator.

If the inmate is classified as a WITSEC case, a copy of the medical referral will be sent simultaneously to the Inmate Monitoring Section (IMS) and the Medical Designator. The Inmate Monitoring Section will coordinate with the OMDT regarding an appropriate placement. Placement will be based on available medical resources, security needs, bed space availability, and

Exhibit G

6. **TRANSFER CODES.** The reason for transfer, as shown by one of the codes listed at the end of this chapter is to be visible on the original and each copy of the Transfer Order. When there is more than one reason for transfer, the most pertinent code is to be used. Note that all Unescorted Transfers are Discharge Code - FURL TRANS for Furlough Transfer.

7. **SPECIAL REQUIREMENTS.**

a. An inmate having a detainer or pending charge may be transferred to any institution for which he or she properly classifies; however, generally when there is a formally filed detainer, the inmate is not to be transferred to an institution more distant from the detaining authority unless there is substantial reason to believe the detainer will be dropped or the pending charge will not be prosecuted.

An inmate who indicates an intention to oppose extradition is not to be transferred within the last 30 calendar days prior to release to an institution in the state that placed the detainer. Such cases, and others in which there are legal or jurisdictional problems, are to be referred to the Regional Correctional Programs Administrator (See Program Statement entitled Detainers and the Interstate Agreement on Detainers).

b. When there is reason to transfer an inmate to a non-federal institution for concurrent service of federal and state sentences, the Warden shall refer the case to the Regional Director. Refer to the Program Statement, Transfer of a Prisoner to State Custody Prior to Release from the Federal Sentence, for procedures.

When an inmate is accepted by a non-federal institution for concurrent service of federal and state sentences, a Transfer Order will be prepared.

Transfer to a facility in an area other than the inmate's legal residence or sentencing district may be considered by the inmate's Unit Team provided the inmate can provide strong evidence of community and/or family support. Institution staff should use sound correctional judgment when reviewing such requests for transfer to ensure the transfer is consistent with guidelines established in this chapter. At the time of the Unit Team's recommendation for CCC placement, the Case Manager should submit release plans to the USPO if other than the sentencing district. A relocation acceptance letter should be included in the CCC referral packet.

8. **RELATIONSHIPS WITH OTHER AGENCIES.**

Exhibit H

Case 1:09-cv-00200-RWR Document 6-2 Filed 06/08/2009 Page 19 of 37

OPI: OGC
NUMBER: 1040.04
DATE: 1/29/99
SUBJECT: Non-Discrimination Toward Inmates

U.S. Department of Justice
Federal Bureau of Prisons

Change Notice

DIRECTIVE AFFECTED: 1040 04

CHANGE NOTICE NUMBER: 1040 04

DATE 1/29/99

1 PURPOSE AND SCOPE To update the Program Statement pertaining to Non-Discrimination Toward Inmates

2 SUMMARY OF CHANGES In addition to restating the policy in clearer language, Program Objectives have been added and ACA Standards have been updated

3 ACTION File this Change Notice in front of the Program Statement on Non-Discrimination Towards Inmates

/s/

Kathleen Hawk Sawyer

Director

U.S. Department of Justice

Federal Bureau of Prisons

U.S. Department of Justice
Federal Bureau of Prisons

Program Statement

OPI: OGC

NUMBER: 1040 04

DATE: 1/29/99

SUBJECT: Non-Discrimination Toward Inmates

Rules Effective Date 10/16/98

1 **[POLICY § 551.90. Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.]**

2 PROGRAM OBJECTIVE The expected result of this program is

Assignments in housing work and programs will be available to inmates on an equal opportunity basis

3 DIRECTIVES AFFECTED

a Directive Rescinded

PS 1040 03 Non-Discrimination Towards Inmates (4/18/94)

b Regulations Referenced The rule cited in this Program Statement is contained in 28 CFR § 551 90

3 STANDARDS REFERENCED

a American Correctional Association 3rd Edition Standards for Adult Correctional Institutions 3-4265, 3-4266

b American Correctional Association 3rd Edition Standards for Adult Detention Facilities 3-ALDF-3E-04, 3E-05, 3E-06

[Bracketed Bold - Rules]

Regular Type - Implementing Information

c American Correctional Association 3rd Edition for Adult Correctional Boot Camp Programs 1-ABC-3D-04

d Standards for Administration of Correctional Agencies 2nd Edition 2-CO-3C-01

4 PROCEDURE Each Warden shall review and, as necessary, establish local procedures to ensure that inmates are provided essential equality of opportunity in being considered for various program options, work assignments, and decisions concerning classification status

/s/

Kathleen Hawk Sawyer

Director

Exhibit H

Pages missing but this is how they gave it to me

U.S. Department of Justice
Office of the Inspector General

REPORT OF INVESTIGATION

SUBJECT(S)	CASE NUMBER
[redacted] - Bureau of Prisons, Federal Correctional Institution - Big Spring, Big Spring, Texas	2003005723
OFFICE CONDUCTING INVESTIGATION	**DOJ COMPONENT**
Dallas Field Office	Bureau of Prisons

DISTRIBUTION

- ☒ Field Office — DFO
- ☒ AIG/INV
- ☒ Component — BOP
- ☐ USA
- ☐ Other

STATUS

- ☐ OPEN ☐ OPEN PENDING PROSECUTION
- ☒ CLOSED

PREVIOUS REPORT SUBMITTED: None

Date of Previous Report:

SYNOPSIS

This investigation was initiated by the Office of the Inspector General (OIG), based on allegations by Muslim inmates at the Federal Correctional Institution (FCI), Big Spring, Texas, that the institution's staff discriminated against them and subjected them to retaliatory actions.

Specifically, five Muslim inmate complainants alleged they were subjected to discriminatory bedding assignments that interfered with their ability to pray in a manner consistent with the Islamic faith. The inmates claimed also that staff goaded Muslim inmates to solicit a reaction to justify use of force or some other method of retaliation, such as their individual placement into the Special Housing Unit. In addition, [redacted] allegedly attempted to verbally intimidate Muslim inmate Kamal Patel by threatening Patel with an adverse transfer if Patel continued his litigious actions.

The OIG investigation uncovered discriminatory practices in the dormitory unit bedding assignments made by [redacted]. Our investigation found that Muslim inmates meeting the established criteria for bedding reassignment were denied an opportunity to relocate within the unit to facilitate their prayer requirements. In contrast, non-Muslim inmates requesting bedding reassignments were generally accommodated.

DATE	SIGNATURE
December 15, 2004	[redacted] Exh J
PREPARED BY SPECIAL AGENT	
DATE	SIGNATURE
December 15, 2004	Stephen P. Beauchamp (WDB)
APPROVED BY SPECIAL AGENT IN CHARGE	Stephen P. Beauchamp

No evidence was developed supporting the allegation Muslim inmates were harassed as a ploy to elicit responses that could result in disciplinary action. Likewise, insufficient evidence was developed to sustain inmate Patel's allegation that [redacted] made verbal threats regarding Muslim inmate transfers.

The investigation determined executive staff targeted and exerted significant control over litigious inmates, some of whom were Muslim. Executive staff recognized the Islamic faith as important to the complainant inmates and that taking actions affecting their ability to practice Islam would send a message to the inmates that frivolous complaints would no longer be tolerated. [redacted] proposed and took actions directed toward Muslim inmates that were considered by the complainant inmates and some staff members to be discriminatory and retaliatory.

After this investigation began, the executive staff took action against Muslim complainants who were viewed by both staff and complainant inmates as punitive. For example, inmate complainant Patel was placed in the Special Housing Unit for 4 months for specious reasons. The four inmates who provided significant assistance to the overall investigative effort were subsequently transferred against their wishes to other facilities. The transfers exemplified [redacted] retaliatory actions against Muslim inmates at the FCI.



In conclusion, the evidence indicates that [redacted] engaged in discriminatory and retaliatory actions against Muslim inmates. The OIG has completed its investigation and is providing this report to the Bureau of Prisons for appropriate action.

DETAILS OF INVESTIGATION

Predication

This investigation was initiated based on a letter to the Office of the Inspector General (OIG), authored by [redacted] Federal Correctional Institution (FCI), Big Spring, Texas. In the letter, dated April 3, 2003, [redacted] alleged, [redacted] alleged, [redacted] treatment." [redacted] asserted that correctional officers routinely harass and intimidate Muslims to elicit a reaction to justify use of force or some other method of retaliation. As an example, [redacted] cited an incident wherein a Muslim prayer rug was grabbed by staff and tossed to the floor. When the Muslim inmate protested, the offending correctional officer placed the inmate in the Special Housing Unit (SHU).

In addition, [redacted] alleged Muslim inmates were "prevented from making their prayers," based on bedding assignments not conducive for Muslim prayer needs. [redacted] explained that Muslim inmates must be in an area of the dormitory unit where they could face the "east direction and pray." [redacted] alleged that the [redacted] and other staff, including [redacted] discriminated against Muslim inmates seeking bedding reassignments.

Lastly, [redacted] "despise Muslims," claiming also that the [redacted] expressed "his hatred toward Muslims to other staff." [redacted] added he is afraid to acknowledge being a Muslim for fear of staff retaliation.

[redacted] letter was co-signed by co-complainant [redacted] and Kamal Patel, who collectively alleged they were subjected to discriminatory and retaliatory practices noted by [redacted].

In a letter dated April 25, 2003, addressed to the OIG, Patel made similar allegations regarding discriminatory bedding assignment practices at the FCI. Secondly, Patel reported that [redacted] attempted to verbally intimidate him by threatening an adverse transfer if Patel continued with litigious actions.

Patel also wrote, "There is a consistent and illegal pattern of attacking Muslim inmates at this prison through policies designed to interfere with the practices of their faith." Patel also complained about the difficulty of properly conducting Muslim prayers at the FCI. Patel further alleged, "Muslims are harassed by frivolous *Incident Reports* and threats of placement in the "hold," shakedowns constantly, and the instant threat for a transfer far from family."

Investigative Process

The OIG investigation consisted of a total of 60 FCI interviews, including 24 inmates and 36 Bureau of Prisons (BOP) employees. In addition, 51 written affidavits and one audio recorded affidavit were obtained. The BOP Office of Internal Affairs (BOP OIA) assisted in a later phase of this investigation and was present during the

first interview of [redacted] In addition, the OIG examined various BOP and FCI documents, records, policies, and logs.

FCI staff identified Patel and the [redacted] as litigious inmates. The staff based this characterization of Patel and the [redacted] on the number of complaints filed and the corresponding time required by BOP staff to provide appropriate responses to a variety of general operational concerns, including religious practices, diet, facility transfer requests, staff misconduct, tobacco usage, and so forth.

Records kept at the FCI included data on requests filed by Patel and the [redacted] Since being incarcerated in 1993, Patel filed 425 administrative remedy requests at the institution, regional office, and central office levels. (The request total does not include the number of *Inmate Request to Staff Member* forms Patel filed prior to seeking a formal resolution.) Specifically, during one 10-month period at the FCI, Patel filed 169 administrative remedy requests. According to FCI records, of the 1,800-inmate population, Patel filed 17 percent of all institution remedy requests. [redacted]

For the purposes of this report, "executive staff" usage is limited t[redacted] "Staff" usage represents all other FCI staff.

Bedding Reassignments

Muslim inmates allegedly were prevented from "making their prayers" according to religious requirements and "placed in areas of the dorm where they cannot face the east direction and pray." The Muslim inmates blamed [redacted]r for orchestrating this circumstance. The complainants alleged Muslims were not afforded bedding reassignments to facilitate privacy for praying.

Background

The Muslim inmates explained they preferred their bunks to be against the housing unit's east wall, which allowed them to face their bunks in an easterly direction and pray without other inmates walking in front of them, creating a distraction.

The Muslim inmates were assigned bunks in either the FCI Sunrise or Sunset Units. The larger Sunrise Unit houses inmates with bunk beds grouped in rows and has 430 bed spaces and a maximum bed capacity for 856 inmates. The Sunset Unit has 370 bunk bed spaces and a maximum bed capacity for 740 inmates.

[redacted] explained that inmate bedding reassignment criteria included a requirement of no misconduct resulting in discipline, participation in the Financial Responsibility Program, and participation in educational programs. Normally, an inmate is required to maintain a bedding assignment for 6 months prior to seeking any type of change.

[redacted] maintained that the Muslim inmates, including Patel, should be given consideration for bedding reassignment if they meet the established criteria. [redacted] told the OIG she believed [redacted] was making

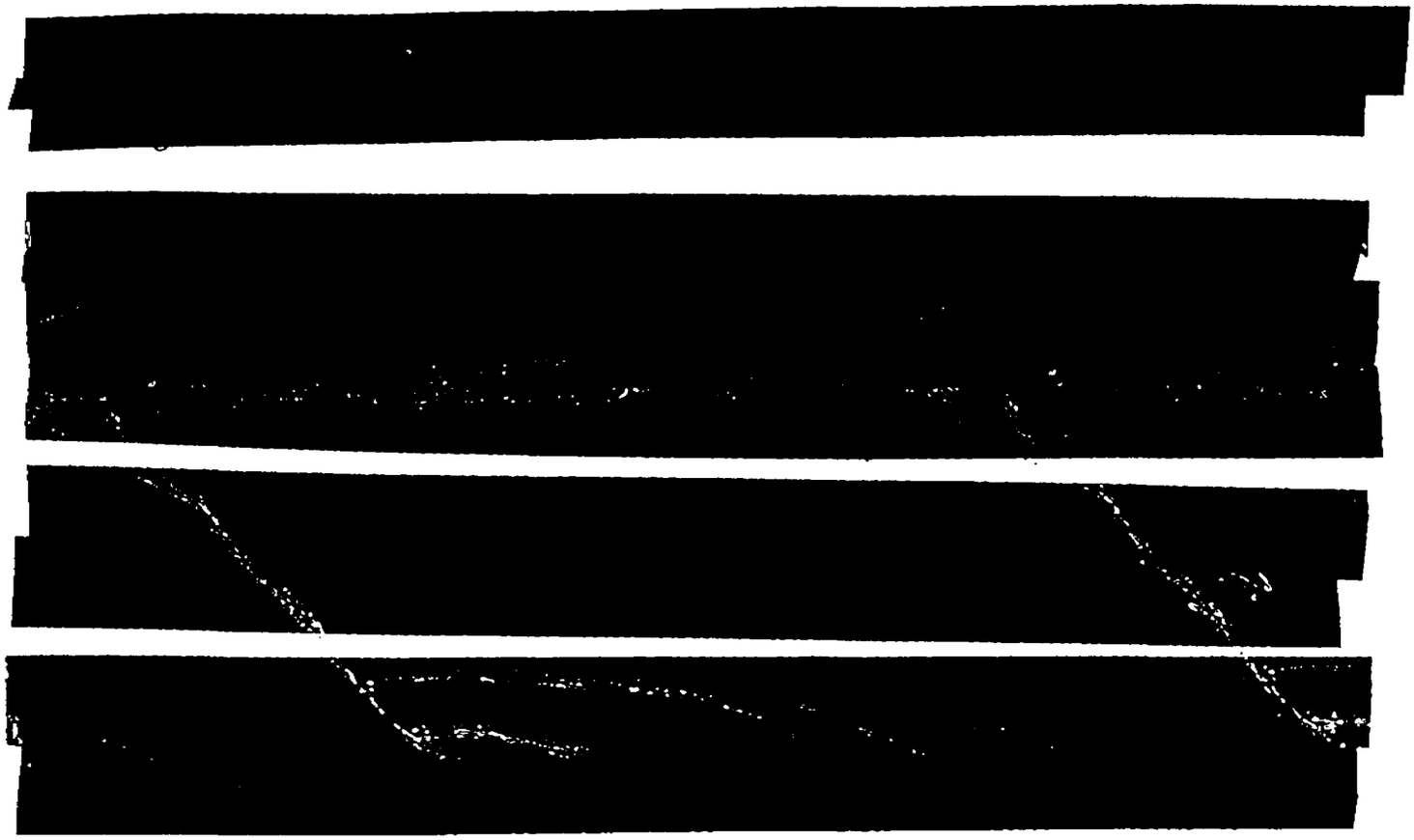
assignments in accordance with policy. [redacted] denied Patel was discriminated against concerning his bedding assignment, adding that BOP records reflected Patel received his requested bedding reassignment near the end of June 2003.

[redacted] handled the Sunrise Unit's bedding assignments. [redacted] named by the complainants as a part of the bedding reassignment problem, denied discriminating against Muslim inmates. However, [redacted] told the OIG he believed the Muslims used their religion as an excuse to generally congregate daily on the east wall during prayer time. [redacted] both said there was no policy requirement to move Muslim inmates in order to accommodate their prayer needs.

[redacted]

investigation was initiated.

In his OIG affidavit, [redacted] explained he attempted to follow "established guidelines" to prohibit any group of inmates from congregating at the Sunrise Unit's interior east wall. (The OIG requested but was never provided and could not find evidence of any such guidelines.) [redacted] thinking was, he said, ". . . too many Muslims, or any other religious, ethnic, gang, etc., group, in one location might pose a security threat to the institution." [redacted] took it upon himself not to move Muslim inmates, even those who qualified (i.e., Nino), because he deemed it to be a potential safety issue for the institution.



Patel arrived at the FCI on March 6, 2003, and was assigned a bunk near the bathroom. Patel claimed odors emanating from the bathroom area and the sight of naked inmates walking in front of him prohibited proper prayers. Patel sought a bedding reassignment through normal BOP processes, but his requests were repeatedly denied. Patel's bedding reassignment was eventually granted during May 2003, several weeks after the OIG investigation initiated.

[redacted] said, "I acknowledge that I repeatedly denied all of the quarters reassignment requests of Kamal Patel, who is a Muslim inmate. Again, I did this primarily to stop the Muslim inmates from congregating in one specific location in the Sunrise Unit."

[redacted] told the OIG he was aware of the bedding issue and supported the Muslim inmates who wanted to move to an east wall for privacy during prayers. [redacted] discussed these issues with the Sunrise Unit Team that included [redacted] told [redacted] he did not like Muslim inmates and would not agree to their requests and move them.

On March 20, 2003, [redacted] e-mailed [redacted] and urged him to reconsider his position on bedding reassignments. [redacted] informed [redacted] about numerous court cases substantiating the need to move Muslim inmates under these circumstances. However, [redacted] took the position there was no BOP policy requiring him to move an inmate solely for religious beliefs or practices.

[redacted] who related he had limited experience with bedding assignments, stated that correctional counselors, unit officers, and case managers were responsible for those duties. When asked about the reassignment process, [redacted] denied there was an organized campaign to deny Muslim inmates access to east wall bedding

[redacted] stated in his OIG affidavit that in early August 2003, he was informed by [redacted] that [redacted] was not supporting the issue of moving Muslim inmates to an east wall [redacted] said he asked [redacted] for policy or guidance showing the requirement of placing Muslim inmates against an east wall, and [redacted] did not find any such written policy [redacted] stated to the OIG that prior to [redacted] November 4, 2002, arrival at the FCI, Muslims were accommodated regarding this issue.

[redacted]

[redacted]

Retaliation Against Muslim Inmates

Muslim inmates described examples of actions taken by the executive staff that gave the appearance of retaliation against Muslims or because of their cooperation with the OIG investigation.

Loss of Religious Services Department Jobs by [redacted] and Kamal Patel

[redacted] and Patel were assigned to jobs in the Religious Services Department. [redacted] alleged in late July or early August 2003 tha[redacted] instructed him to move Patel and [redacted] to other work assignments. The reassignments occurred after [redacted] and Patel provided affidavits to the OIG. According to [redacted] rationalized his decision to rotate inmates into different jobs every few years as good correctional judgment. [redacted] However, Patel worked in the department for less than 6 months.

[redacted] explained that, based on [redacted] explanation for job reassignments, there was no justification to move Patel. [redacted] said [redacted] did not mention reassigning inmates, other than Patel and [redacted] stated he recognized the potential problems in singling out Muslim inmates and suggested to [redacted] he should move other inmates from the Religious Services Department as well. [redacted] said [redacted] comment regarding Patel and [redacted] typifies the discriminatory statements and actions [redacted] directs toward Muslims. [redacted] acknowledged [redacted] suggestion to move other inmates, and [redacted] was directed to draft a list of inmates to be moved from the Religious Services Department.

The OIG interviewed [redacted] and Patel to other jobs. During an initial OIG interview, [redacted] recalled [redacted] specifically instructing [redacted] to remove Patel and [redacted] from job assignments in the Religious Services Department. After reviewing

his OIG affidavit, [redacted] changed his statement, saying he could not recall Patel [redacted] as the specific inmates singled out by [redacted].

[redacted]

Kamal Patel's Placement in the SHU

Patel was interviewed by the OIG in May, June, and August 2003. On September 7, 2003, Patel was placed in the SHU for allegedly inciting a potential disturbance at the FCI. However, the OIG uncovered no evidence of a possible disturbance involving or related to Patel.

The OIG learned on September 6, 2003, that [redacted] advised [redacted] about a problem with the housing unit air conditioner [redacted] told [redacted] that approximately 30 to 40 inmates who were upset about an air conditioner problem were told by correctional officers on September 5, 2003, to file their complaints. [redacted] documented [redacted] information in an e-mail dated September 6, 2003, to [redacted] and other staff [redacted] r on September 7, 2003, was informed of [redacted] e-mail. [redacted] said he was told the instigators of the alleged filing campaign were Kamal Patel, [redacted] told the OIG he consulted wit[redacted], who directed these three inmates be placed in the SHU, pending an investigation. [redacted] explained that Patel, [redacted] were placed in the SHU for reasons related to a possible institutional disturbance.

When interviewed by the OIG, Patel and [redacted] denied advising inmates to file any complaints regarding air conditioner problems. Rather, Patel and [redacted] said [redacted] addressed the air conditioner problem in a meeting with inmates in their housing unit. During this meeting, [redacted] made a statement to the effect, "1,000 air conditioner complaints need to be on the warden's desk in order to get the problem fixed."

[redacted] acknowledged he encouraged inmates to file complaints. [redacted] prepared a memorandum, dated September 6, 2003, acknowledging he instructed inmates to follow their grievance process and submit copouts. This document was available for executive staff review and action prior to placing Patel, [redacted] in the SHU.

[redacted], who was assigned to work on the heating, ventilation, and air conditioner systems, provided no information suggesting a potential disturbance within the Sunrise Unit because of the air conditioning problems. Further, [redacted] was unaware of any attempts by Patel or [redacted] to have inmates file copouts regarding the problem.

In a recorded affidavit [redacted] said [redacted] contacted him at home about an air conditioning problem at the FCI, telling him approximately 30 to 40 inmates were upset and voicing complaints. Based on verbal information and written documentation, [redacted] directed inmates Patel, [redacted] would be placed in the SHU. [redacted] said this type of situation could escalate if not handled quickly. [redacted] stood by his decision and claimed his actions quelled potential unrest in the unit.

The OIG found no evidence or documentation of a potential disturbance in the Sunrise Unit. [redacted] worked in the unit on Friday and Saturday, September 5-6, 2003, and in a written affidavit, maintained there was no evidence of any potential disturbance or any type of problem in the unit. [redacted] who has a background in supervisory correctional services, worked on Saturday, September 6, 2003. [redacted] provided an affidavit stating the unit was operating in a normal manner, and there was no reason to believe a potential disturbance was looming.

The only documentation linking inmates Patel and [redacted] to this matter was [redacted] memorandum, which documented information provided by [redacted] claimed Patel and [redacted] encouraged other inmates to file paperwork to address the air conditioning problem. In reality, [redacted] instructed inmates to write and file air conditioning complaints.

The OIG found no documented information justifying placing Patel in the SHU. Relying on [redacted] explanation as to why Patel was placed in the SHU, the OIG determined Patel was exercising his right to exhaust administrative remedies. Based on [redacted] memorandum in which he admitted advising inmates to file copouts, Patel's circumstance could have been quickly resolved.

On December 12, 2003, more than 3 months after being placed in the SHU, Patel was interviewed by [redacted] Addressing this interview delay, [redacted] acknowledged in an OIG affidavit that he was previously asked twice by the OIG to expeditiously investigate Patel's placement in the SHU. [redacted] was told Patel was a complainant in a USA PATRIOT Act, Section 1001 investigation, and to delay his investigation and interview of Patel could give an appearance of retaliation. [redacted] took responsibility for the delay in Patel's interview and maintained no one influenced the timing of any aspect of his investigation.

Patel remained in the SHU from September 7, 2003, until January 20, 2004, when he was transferred to another institution. As a result of the length of time being housed in the SHU, Patel expressed thoughts of suicide and was placed on suicide watch by staff. Patel is currently classified as mentally ill by the BOP. As described in the next section, during Patel's placement in the SHU, he was assaulted by another inmate.

[redacted] esponded in an affidavit to the OIG that Patel's placement on suicide watch was another example of Patel's manipulativness.

Assault on Kamal Patel

On October 23, 2003, while housed together in a SHU cel[redacted] ysically assaulted Patel. [redacted] provided the OIG an affidavit acknowledging he assaulted Patel.)

A review [redacted] BOP Form 292, *Special Housing Unit Record*, revealed [redacted] and indicated "Cell/Rec Alone," BOP terminology used to indicate that an inmate is not to have contact with any inmate while in SHU.

Patel wrote a letter, dated October 28, 2003, to the Northern District of Texas, U.S. Attorney's Office, Lubbock, Texas, requesting an investigation of the assault. Patel stated in his letter he was placed in a cell with an inmate who was classified for solitary confinement status. Patel also stated he was placed in the cell because staff wanted him assaulted. Patel expressed further concern that the assaulter was not disciplined for his actions. Patel's letter was forwarded to the FBI, which provided it to the OIG.

The OIG determined the assault on Patel was only superficially investigated by FCI staff, and [redacted] received no disciplinary action. The OIG reviewed photographs, a medical assessment, and other documents regarding Patel's injuries. Patel suffered multiple contusions to an eye, the back of his head and shoulder, and a bloody nose.

According t[redacted] the assault consisted of [redacted] striking Patel in the head several times with his fist. [redacted] stated he completed a required notification form to the BOP Regional Office; however, he failed to write an *Incident Report* charging [redacted] with assault. [redacted] assumed [redacted] would investigate the assault and [redacted] assumed the same of [redacted] The result was neither wrote an *Incident Report* or further investigated this assault. [redacted] stated he was "surprised to learn" from the OIG "that [redacted] was never disciplined for his assault on Patel."

According t[redacted] it is not unusual for someone other than the SIS to investigate assaults. As a result of this assault not being investigated, no disciplinary action was taken against [redacted] He concluded his sentence without the universal sanction of "loss of good time," and was released from BOP custody.

[redacted], acknowledged in his OIG affidavit he told [redacted] Good job [redacted] told the OIG that by stating "Good job," he was referring to [redacted] assaulting Patel.

[redacted] told the OIG the Cell/Rec Alone assignment was for [redacted] safety - not Patel's. [redacted] explained [redacted] had been labeled a snitch by the Texas Syndicate and was housed in the SHU for protective custody. However, no other inmate was to be placed in [redacted] cell unless authorized by [redacted] who authorized Patel's placement with [redacted]

During OIG questioning, it became apparent [redacted] was unaware [redacted] was not disciplined for his actions [redacted] acknowledged that the FCI's failure to not discipline [redacted] was a mistake. However, when asked why [redacted] was not disciplined, [redacted] stated that the potential harm from Patel agitating inmates in the unit was more serious than the assault of Patel by [redacted]

Incident Report Charging Kamal Patel

On August 26, 2003, Patel filed a *Request for Administrative Remedy* regarding what he perceived to be discriminatory resolutions of rule violations. As examples of his claim, Patel cited disparate resolutions of

telephone abuse matters. Specifically, Patel alleged [redacted] received lenient treatment compared to Muslim inmates such as the [redacted] as referenced earlier in this report), and Patel stated [redacted] would provide affidavits supporting his allegation.

[redacted] received unrelated *Incident Reports* alleging they conducted personal business using the ITS, which is a violation BOP policy. In [redacted] case, the charge was reduced to a lower level violation. In [redacted] case, the charge was informally resolved and then expunged. The FCI's resolution of both cases violated BOP policy to the benefit of [redacted] whose infractions were resolved by the unit team. According to BOP policy, the DHO, who can impose harsher sanctions, should have resolved both matters instead of the unit team.

In his *Request for Administrative Remedy*, Patel wrote th[redacted] were supportive of his position and would provide affidavits bolstering his allegation. However, Patel was placed in the SHU before he could speak wit[redacted] about affidavits [redacted] nvestigated Patel's *Request for Administrative Remedy* and concluded tha[redacted] ever intended to provide Patel with affidavits. However, rather than addressing the disparate treatment issue[redacted] wrote an *Incident Report* charging Patel with lying about securing affidavits fro[redacted]

Patel admitted to [redacted] he failed to speak t[redacted] ior to filing his remedy, explaining, "I got ahead of myself in making this comment." Although Patel received disciplinary actions for lying, he never received a response to his administrative remedy claim of discriminatory resolutions of rule violations, which [redacted] acknowledged to be true.

[redacted] told the OIG he reported his findings t[redacted] specifically, that Patel had lied in his remedy when he alleged D[redacted] would provide affidavits corroborating Patel's allegation. However [redacted] told executive staff that his investigation revealed Patel's claims of disparate treatment were accurate.

[redacted] acknowledged Patel received a response from executive staff stating, erroneously, there was no evidence to substantiate Patel's claims of discrimination and retaliation. The response Patel received conflicted with wha[redacted] old the OIG he previously reported [redacted] that Patel's claims of disparate treatment were, in fact, accurate. However, as a result o[redacted] investigation and discussion wit[redacted] Patel was issued an *Incident Report* for lying to staff[redacted] had no answer as to why Patel was not told by executive staff that his administrative remedy claims were true. [redacted] so acknowledged it is rare that an inmate is given an *Incident Report* for lying to staff.

In conflict with [redacted] statemen[redacted] informed the OIG he was unaware Patel's allegation was true until the OIG informed him. Althoug[redacted] acknowledged the veracity of Patel's claims, he questioned its importance, asking, "Do two wrongs make a right?" [redacted] was adamant Patel should be held accountable for his actions, regardless of the outcome i[redacted] cases.

[redacted] made a distinction between "evidence of discrimination, and people messing up" in the context of Patel's allegation. [redacted] determined there was no discriminatory or retaliatory resolution in any of these *Incident Reports*. Rather, [redacted] maintained that staff erred in the resolution of telephone abuse charges against

[redacted] but handled th[redacted] incident appropriately. For that reason[redacted] did not include any reference to [redacted]'s allegations in his response to Patel[redacted] repeatedly denied any collusion by executive staff and saw Patel's misconduct as an opportunity to hold a litigious inmate accountable for lying. [redacted] admitted sanctioning inmates for lying was rare, and he recalled possibly one other instance in which an inmate was sanctioned.

According to Patel, his administrative remedy request describing discipline disparity was not investigated but, rather, was turned into an investigation of himself, and he was subsequently disciplined.

Inmates Interviewed at [redacted] Request

[redacted] suggested the OIG interview[redacted] who would corroborate that Patel was filing frivolous administrative remedy requests.

In an OIG interview[redacted] related Patel encouraged inmates to file excessive complaints. However[redacted] believed Patel generally took on issues needing attention. For example[redacted] claimed he was discriminated against in a bedding reassignment (addressed earlier in this report).

[redacted] told the OIG he reported to the FCI executive staff that Patel purposefully filed frivolous administrative remedy requests. [redacted] believed Patel was on a crusade against the FCI and acknowledged writing a letter to [redacted] addressing this matter. However, [redacted] estimated one-half of Patel's filings were legitimate.

Followin[redacted] letter t[redacted] interviewed and took an affidavit from[redacted] affidavit pertained to allegations made by Patel of discriminatory practices at the FCI regarding resolutions of *Incident Reports*. However, as the interview progressed, [redacted] believed Patel was the focus of [redacted] questioning, rather than Patel's concerns of discrimination.

In his affidavit to the OIG[redacted] said he had a good relationship with the Shahs and other Muslim inmates because he provided them with legal assistance. [redacted] related that once the FCI executive staff realized he was assisting Muslim inmates, he was targeted for retaliation. As examples[redacted] said he was removed from his position in the law library; his request for a job in the chapel was denied; and on May 20, 2004, against his wishes, he was transferred from FCI-Big Spring to FCI-La Tuna.

[redacted] told the OIG that[redacted] was not causing any problems at the FCI, but because [redacted] assisted inmates with legal matters, he was identified as a problem inmate by FCI executive staff[redacted] said the justification used for [redacted] transfer was suspect, and she, too, questioned the rationale behind the move.

[redacted] told the OIG he was directed by either[redacted] to submit a transfer referral for inmate[redacted] based on Adjustment Purposes. [redacted] stated this transfer referral was based on an SIS investigation concerning misconduct by[redacted] said the investigation appeared to have merit, but several days later[redacted] told[redacted] that[redacted] instructed[redacted] to amend the referral.[redacted] told[redacted] to use a

WITNESS LIST

1. [redacted]
2. [redacted]
3. [redacted]
4. [redacted]
5. Kamal Patel, inmate, FCI-Forrest City, Forrest City, Arkansas, (870) 630-6000.
6. [redacted]
7. [redacted]
8. [redacted]
9. [redacted]
10. [redacted]
11. [redacted]
12. [redacted]
13. [redacted]
14. [redacted]

LIST OF EXHIBITS

1. Letter dated April 3, 2003, from five Muslim inmate complainants regarding disparate treatment at the FCI.
2. Letter dated April 25, 2003, from Muslim inmate Patel regarding verbal threats from [redacted]
3. Affidavit dated May 28, 2003, o[redacted]
4. Affidavit dated May 28, 2003, o[redacted]
5. Affidavit dated May 28, 2003, o[redacted]
6. Affidavit dated May 28, 2003, o[redacted]
7. Affidavit dated May 28, 2003, of inmate Kamal Patel.
8. Affidavit dated July 15, 2003, o[redacted]
9. Affidavit dated May 30, 2003, o[redacted]
10. Affidavit dated May 28, 200[redacted]
11. Affidavit dated August 8, 2003,[redacted]
12. Affidavit dated May 30, 200[redacted]
13. Affidavit dated May 30, 2003[redacted]
14. Affidavit dated July 22, 2003, o[redacted]
15. Affidavit dated January 15, 2004, o[redacted]
16. Affidavit dated January 13, 2004, o[redacted]
17. Affidavit dated January 14, 2004, o[redacted]
18. Affidavit dated August 8, 2003[redacted]
19. BOP Program Statement 5360.08.

62. BOP Form 229, *Request For Administrative Remedy*, dated May 8, 2003, file[redacted]

63. Response to *Request For Administrative Remedy*, dated May 28, 2003.

64. FCI *Inmate Information Handbook*, dated 2003-2004.

65. *Inmate Injury Assessment and Follow-Up* for inmate Kamal Patel.

66. *Inmate Injury Assessment and Follow-Up*[redacted]

67. Photographs documenting inmate Kamal Patel's injuries.

68. Patel's letter dated October 28, 2003, to Northern District of Texas, Assistant United States Attorney Robert McRoberts.

69. Criminal Referral letter dated November 15, 2003, from Assistant United States Attorney Robert McRoberts to the FBI.

70. Letter dated November 15, 2003, from Assistant United States Attorney Robert McRoberts to inmate Patel.

71. E-mail dated March 20, 2003, fro[redacted] addressing bedding reassignment.

72. *Bedding Change Sheet*, dated June 9, 2003.

73. *Bedding Change Sheet*, dated June 11, 2003.

74. *Bedding Change Sheet*, dated June 12, 2003, regardi[redacted]

75. SENTRY printout regarding[redacted]edding reassignment on July 17, 2003.

76. SENTRY printout regarding *Inmate Profile and Security/Designation* for inmate Patel.

77. SENTRY printout regarding *Inmate Profile and Security/Designatio*[redacted]

78. SENTRY printout regarding *Inmate Profile and Security/Designation* fo[redacted]

79. SENTRY printout regarding *Inmate Profile and Security/Designatio*[redacted] Shah.

80. SENTRY printout regarding *Inmate Profile and Security/Designation*[redacted]

81. SENTRY printout regarding inmate Patel's medical history with mention of mental illness.

82. MOI dated July 1, 2004, regarding housing unit information provided [redacted]

83. MOI dated July 1, 2004, regarding housing unit information provided [redacted]

84. MOI dated January 21, 2004, regarding BOP OIA interview o[redacted]

85. MOI dated July 1, 2004, regarding the interview of BOP South Central Region Chaplainry [redacted]

86. MOI dated February 18, 2004, regarding inmate Patel's allegation of discriminatory practices pertaining to the disposition of *Incident Reports*..

87. *Incident Report*, dated May 28, 2003, written agains[redacted]

88. *Incident Report*, dated March 10, 2003, written agains[redacted]

89. *Incident Report*, dated March 31, 2003, written agai[redacted]

90. *Incident Report*, dated April 25, 2003, written agains[redacted]

91. *Incident Report*, dated April 25, 2003, written agains[redacted].

92. *Discipline Hearing Officer Report*, dated May 9, 2003, regarding[redacted]

93. *Discipline Hearing Officer Report*, dated May 9, 2003, regarding[redacted]

94. *Incident Report* (Inmate of Inmate Assault), dated October 23, 2003, regarding[redacted] assault on inmate Patel.

95. BOP Form 292, *Special Housing Unit Record*[redacted]

96. Memorandum dated October 23, 2003,[redacted] regarding[redacted] assault on inmate Patel.

97. Memorandum dated November 3, 2003, from[redacted] regarding[redacted] assault on inmate Patel.

98. E-mail dated September 6, 2003, fro[redacted]o FCI staff regarding Sunrise Unit air conditioning problems.

99. MOI dated July 23, 2004, regarding the interview o[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KAMAL K. PATEL, and DALE BROWN,	§	Civil No. 1:09-CV-00200
Plaintiffs,	§	PLAINTIFFS SECOND AMENDED CIVIL COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF.
vs.	§	
BUREAU OF PRISONS, and HARLEY LAPPIN,	§	V E R I F I E D
Defendants.	§	

PROPOSED
PLAINTIFFS' SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COMES, your Plaintiffs, KAMAL K. PATEL and DALE BROWN, each appearing herein Pro Se, and hereby submit this Second Amended Civil Complaint for Injunctive and Declaratory Relief.

I.

AMENDMENT UNDER FED.R.CIV.P. 15(a)(2)

The Plaintiffs have filed a joint motion for leave to amend under Federal Rules of Civil Procedure, Rule 15(a)(2) in conjunction with this Proposed Second Amended Civil Complaint for Injunctive and Declaratory Relief. The Plaintiffs hereby adopt that motion as if fully set forth herein and move this court to consider this instant Second Amended Complaint filed and on its merits.

II.

INTRODUCTION

The initial complaint was filed by Plaintiff Kamal K. Patel only. He asserted claims for injunctive and declaratory relief based on discriminatory policies implemented by the Bureau of Prisons which targeted non-citizens for unfavorable and harsher treatment in as compared to similarly situated United States citizen inmates in the decisions affecting the programming, housing, and classification of the non-U.S. citizen inmates.

The First Amendment complaint was filed as of right under Fed.R.Civ.P. 15(a) before any responsive pleading or motion was filed by the defendants. The First Amended complaint sought to add Plaintiff Dale Brown and raised additional claims under the Freedom of Information Act.

The instant Second Amended Complaint seeks to add factually similar issues which had not been exhausted at the time the First Amended Complaint was filed. The Second Amended Complaint expands the allegations of discrimination to not only include the practices of the Bureau of Prisons to keep a non-U.S. citizen inmate far from their family, friends and community within the United States but to also include allegations that the Bureau of Prisons has implemented an unconstitutional policy, custom and practice to classify inmates solely on the basis of their nationality for placement into private prisons to save costs, provide fewer rights and privileges, and to impose a hidden tax not imposed on U.S. citizens to offset the costs of incarceration. The Second Amended Complaint further adds an additional claim under the Privacy Act for heavy-handed intrusions by the Bureau of Prisons into Plaintiff Patel's communication with the media and maintaining records of such communication.

III.

PARTIES

1. **KAMAL K. PATEL** (hereinafter "Patel") is the Plaintiff in this action. Patel is a British citizen and a Legal Permanent Resident of the United States. Patel's legal residence is in the state of Oklahoma. Plaintiff Patel's current addreses are as follows:

LEGAL RESIDENCE:

Kamal K. Patel
420 E. Oklahoma Blvd.
Alva, OK 73717

MAILING ADDRESS:

Kamal K. Patel
Reg. No. 56496-080
P.O. Box 630
Winton, NC 27986

2. **DALE BROWN** (hereinafter "Brown") is a Co-Plaintiff in this action. Brown is a Jamaican citizen and a Legal Permanent Resident of the United States. Brown's legal residence is in the State of Florida. Brown's current addresses are as follows:

LEGAL RESIDENCE:

Dale Brown
3236 NW 4th St.
Lauderdale Lake, FL 33309

MAILING ADDRESS:

Dale Brown
Reg. No. 29087-004
P.O. Box 630
Winton, NC 27986

3. **BUREAU OF PRISONS** (hereinafter "BOP") is a defendant in this action. The BOP is a federal agency of the United States headquartered in Washington D.C. at:

Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

4. **HARLEY LAPPIN** (hereinafter "Lappin" or "Director") is the Director of the Federal Bureau of Prisons. Lappin is sued solely in his official capacity as the Director of the BOP. No claim for money damages are made against Lappin.

Lappin's work address is alleged to be as follows:

Harley Lappin, Director
Federal Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

IV.

JURISDICTION & VENUE

5. This court's jurisdiction over this matter is invoked under Title 28, U.S.C. §§ 1331, 1367 & 2201, Title 5, U.S.C. §§ 552 and 552a and 702; the Equal Protection Clause of the Fifth Amendment, and any other applicable statutory and constitutional provisions.

6. Venue is proper in this court under 28 U.S.C. §§ 1391(b)(1), (b)(2), (b)(3), (e)(1), (e)(2) and 5 U.S.C. § 552a(g)(5).

V.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

7. Plaintiffs Patel and Brown have fully exhausted all available remedies on claims raised in the First Amended Complaint which are re-alleged in this complaint. Plaintiff Patel hereby specifically adopts and incorporates by reference here the facts alleged at Paragraph V, Page 4 of the First Amended Complaint pertaining to the issue of exhaustion. **King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994).** The Exhibits A, A-1, A-2, A-3, A-4, A-5, and A-6 are also adopted from the First Amended Complaint as if attached hereto. King, supra.

8. Plaintiff Brown has fully exhausted his administrative remedies in relation all claims he makes in this complaint. Brown hereby specifically adopts and incorporates by reference herein the facts alleged at Paragraph V, Page 4 of the First Amended Complaint and Exhibits B and B-1 as if fully set forth and

attached hereto. Exhaustion of the additional claims raised in this Second Amended Complaint has been completed and proof of exhaustion is attached to this complaint as **Exhibit B-2.**

9. Plaintiff Patel has exhausted the additional claims pertaining to the Second Amended Complaint. The Privacy Act violation has been administratively exhausted at the prison as Remedy Id. #09-047 and at the level of the Bureau of Prisons as Remedy ID # 538229-R1. The additional claims pertaining to the use of an inmate's nationality to make classification and other decisions has been administratively exhausted at the prison at Remedy Id. #09-134 and at the level of the Bureau of Prisons as Remedy #545437-R1. **See Exhibits A-8 and A-9**

VI.

FACTS PERTINENT TO COUNTS ALLEGING DISCRIMINATORY AND UNCONSTITUTIONAL POLICIES INTENDED TO DENY LEGAL PERMANENT RESIDENTS THE SAME OPPORTUNITIES TO BE PLACED CLOSER TO THEIR FAMILIES AS U.S. CITIZENS

10. Plaintiffs, Patel and Brown, are both Legal Permanent Residents ("LPR") of the United States and were such at all times relevant herein.

11. The BOP has a custom, policy and practice of denying Legal Permanent Residents of the United States the same opportunities for programming, housing, classification, and protections of important constitutional rights as that provided to U.S. citizens.

12. The BOP's custom, policy, and practice alleged in paragraph 11, supra, stems from an intent to invidiously and arbitrarily deprive non-U.S. citizens of the same rights, benefits, and privileges as provided to U.S. citizens.

13. The BOP's custom, policy and practice alleged in paragraph 11, supra, is applied to LPR's even if these LPR's are non-deportable or have no detainers from ICE.

14. Pursuant to such custom, policy and practice, inmates such as Ali Alghazali #34367-183 and Osam Yahya #34394-183 were placed in prisons over 500 miles from their legal residence even though neither had any detainer from ICE. **See Exhibits** K & L.

15. The immigration service has placed a detainer action letter against plaitniffs Patel and Brown to determine if they are subject to removal from the United States. **See Exhibit C** (Patel's Detainer Action Letter); **Exhibit D** (Brown's Detainer Action Letter).

16. A Detainer Action Letter is not a determination by any official of the immigration service or an immigration judge that the person is to be removed or deported from the United States.

17. A Detainer Action Letter is not a detainer and does not authorize the BOP to hold the inmate upon his expiration of his sentence.

18. Legal Permanent Residents of the United States are entitled to a determination by the immigration service, an immigration judge or other such official vested with the authority to order removal and/or deportation that he or she is to be removed or deported from the United States and are entitled to various procedural protections.

19. At the time both plaintiffs were convicted for which each is serving an imposed sentence, the law in effect permitted waivers under INA § 212(c) & INA § 212(h) of any removal or deportation.

20. At all times relevant here, neither of the plaintiffs ahve been provided any hearing or other process in relation to whether he may or may not remain in the United States.

21. The Bureau of Prisons is not vested with any authority to make any decision or determination to order a person deported or removed from the United States. The BOP does not have the authority to order either one of the plaintiffs removed or deported.

22. The BOP is also not vested with any authority to make any order or decision affecting the immigration status of the plaintiffs.

23. At all times relevant to this action, both the plaintiffs had legal residence in the United States. **Exhibit E (Patel) and Exhibit B-3 (Brown).**

24. The legal resident of Plaintiff Patel was at 420 E. Oklahoma Blvd., Alva, OK 73717. The United States Probation Officer and the Bureau of Prisons both recognize that this address is Patel's legal residence. **Exhibit E.**

25. The legal residence of Plaintiff Brown was at 3236 NW 4th St., Lauderdale Lake, FL 33309. This address is recognized by the U.S. Probation

Office and the Bureau of Prisons as Brown's legal address. Exhibit B-3.

26. The Bureau of Prisons has defined the term "legal residence" to mean the legal residence as recognized by the United States Probation Office at the time of conviction. See Exhibit F **(P5100.08, Chapter 2, Page 2, defining term "Legal Residence").**

27. Under the definition of "legal residence" as defined by the BOP at P5100.08, Chapter 2, Page 2 (Exhibit F), both Plaintiffs are considered to have legal residence within the United States.

28. The definition of the term "legal residence" by the BOP is in the Program Statement pertaining to the classification, transfer and program participation decisions it makes under the Program Statements in the Custody Classification Manual. See **P5100.08, Introduction.**

29. The BOP's Custody Classification Manual outlines guidelines for the puroses of classification, transfer, and program participation needs of inmates.

30. The BOP's guidelines on transfers under Code 313 category titled "Nearer Release Transfers" state that this code is to be used to transfer the inmate to permit him to either:

(1) "move the inmate closer to their legal residence" or
(2) move the inmate closer to their "release destination".

See Exhibit G **(BOP P5100.08, Chapter 7, Page 4).**

31. The BOP has created P5100.08, Chapter 7, Page 4, a Program Statement which prohibits inmates with a ICE detainer from being eligible for transfers for nearer release purposes. Id.

32. The BOP has implemented a mandate, custom and practice to treat all Detainer Action Letters as ICE detainers.

33. In crafting the aforecited guideline (P5100.08, Chapter 7, Page 4), the BOP stated that its rationale for prohibiting inmates with an ICE detainer or Detainer Action Letter to be ineligible for a nearer to release destination transfer on the grounds that "they will be returning to the community outside, rather than inside, the United States upon release." Id.

34. By an unwritten mandate, the BOP has a custom and practice that such prohibition against nearer to release destination transfers will also include a prohibition against nearer to legal residence transfers for non U.S. citizen inmates.

35. The immigration service has expressly instructed the BOP in its Detainer Action Letters that the letter is not to be construed as an indication of any legal findings having been made and that it is not to be used to limit the BOP's discretion in classifying, giving program assignments, or other treatments to the inmate that he would otherwise receive. **Exhibit C** (Patel's Detainer Action Letter); **Exhibit D** (Brown's Detainer Action Letter).

36. The BOP's actions in declaring that any inmate with either an ICE detainer or such an Detainer Action Letter will be deported or removed from the United States is outside the scope of its legal authority and a wholly speculative, arbitrary and capricious action premised on nothing but conjecture and without any legal basis.

37. Both the plaintiffs, who are Legal Permanent Residents of the United States, are entitled to the full protection of the laws under the Equal Protection Clause of the Fifth Amendment and both must receive the same rights, benefits, and privileges afforeded to similarly situated United States citizens.

38. The BOP may not discriminate against LPRs on the basis of their nationality in making transfer, classification, program participation and other

administrative decisions.

39. The BOP's rationale for denying LPRs placement opportunities closer to their legal residence is applied on a discriminatory and arbitrary manner targeting only non-U.S. citizens and excluding all U.S. citizens who fit under the same criteria.

40. Under federal law, an inmate serving a federally imposed sentence of LIFE is ineligible for parole and if required toserve this sentence, will only be released upon death. Such an inmate with a LIFE sentence would not be returning to the community within or outside the United States.

41. For such inmates sentenced to LIFE who are U.S. citizens, the BOP permits them to be placed nearer to their legal residence.

42. The BOP has also arbitrarily and discriminatrely excluded U.S. citizen inmates from the effect of detainers pending against them and has specifically stated that detainers and charges will not affect the transfer or classification decisions for these inmates. **Exhibit H.**

43. The BOP's guidelines treat similarly situated U.S. citizens and non-U.S. citizen differently with no legitimate purpose.

44. The BOP's guidelines arbitrarily deny Legal Permanent Residents the opportunity to be closer to their families but provide U.S. citizens with LIFE sentences with this opportunity even though it is the LIFE sentenced inmates with no chance of being released to the community and the LPR's with a chance to avoid deportation or removal and be released back into the United States.

45. The BOP's guidelines treating immigration detainers differently than other detainers lodged against U.S. citizen inmates which would also prevent them from being released to the community is premised on discriminatory intentions and is motivated by an intent to target non-U.S. citizens for disparate treatment.

46. Both the plaintiffs have most of their immediate and extended families living in the United States. Furthermore, most of these family members are U.S. citizens including a significant amount of second-generation, U.S. born family members.

47. The BOP recognizes that placing inmates fare from their families would place a burden upon the inmate and the family for visitation purposes. The BOP also recognizes that placing inmates closer to the legal residence or release destination will enable the inmate to have greater opportunities to visit with his family members and enhance his First Amendment rights.

48. Unless ordered by the immigration judge, both the plaintiffs desire to remain within the United States and be released to their legal residences.

49. The plaintiffs allege that the BOP's primary reason for treating LPR's differently than similarly situated U.S. citizens inmates is based on an impermissible, unsupportable, and unconstitutional rationale. The plaintiffs allege that these discriminatory actions are based on the intentions to single out non-U.S. citizens for disparate and discriminatory treatment.

50. The BOP is prohibited from discriminating against inmates on the basis of their national origin in making administrative decision such as transfers and classification. **Exhibit I (28 C.F.R. §551.90).**

51. The plaintiffs state that the BOP's actions in declaring that all non-U.S. citizens will be deported engaged on impermissible speculation and casts the BOP into the role of the immigration judge or immigration officials.

52. As a direct result of the BOP's discriminatory actions, both the plaintiffs have been discriminated against and denied the Equal Protection of the Laws solely on the basis of each of the plaintiffs' nationality.

RELIEF REQUESTED

COUNT ONE: DECLARATORY RELIEF. Plaintiffs Patel and Brown seek Declaratory Relief as follows. Patel and Brown seek a declaration by this court that:

A. The BOP and Lappin violated the Plaintiffs rights under the Equal Protection Clause of the Fifth Amendment by refusing each of them a transfer to be close to their legal residence while providing U.S. citizens this transfer.

B. The BOP and Lappin violated the Plaintiffs' rights under the Equal Protection Clause of the Fifth Amendment by denying each of them the same opportunities for a Code 313 transfer as an incentive for good behavior as provided U.S. citizensh.

C. The BOP and Lappin have violated the Plaintiffs' rights under the Equal Protection Clause of the Fifth Amendment by denying them the same opportunity to maintain their First Amendment relationships with family and the community as provided to U.S. citizens.

D. The BOP's regulation declaring that all inmates with an ICE detainer will be deported or removed from the United States is an unconstitutional policy which the BOP is not authorized to promulgate.

E. The BOP's regulation that precludes LPR's from being eligible for nearer to legal residence transfers on the basis of an ICE detainer is unconstitutional.

F. The BOP's regulation that precludes LPR's from being eligible for nearer to release destination transfers on the basis of an unadjudicated ICE detainer is unconstitutional, and in violation of the APA and 18 USC §3621(b).

G. The BOP engaged in capricious, arbitrary and unconstitutional acts in violation of the Fifth Amendment's Equal Protection Clause by applying criteria

to LPR's that they must be releaseable to the community inside the United States to deny them transfer and classification opportunities and not applying the same criteria to U.S. citizen inmates sentenced to LIFE imprisonment.

H. The BOP's violated the law and acted outside the scope of its authority in declaring that Detainer Action Letters are Detainers.

COUNT TWO: INJUNCTIVE RELIEF: The Plaintiffs seek Injunctive Relief from this Court as follows:

A. Compel the BOP and Lappin to provide plaintiffs Patel and Brown the same opportunities for nearer to legal residence and/or release destination trasnfers for good behavior as given to U.S. citizens.

B. Prohibit the BOP and Lappin from treating the plaintiffs different from U.S. citizens who are similarly situated in the transfer, classification, and program participation decisions.

C. Prohibit the BOP and Lappin from declaring that all inmates with ICE detainers including plaintiffs will be deported and require the BOP to await an official adjudication before applying this criteria.

D. Prohibit the BOP from declaring that both plaintiffs will be deported and prohibit the BOP from making such legal determinations until the completion of the INS or ICE removal/deportation process.

E. Compel the BOP and Lappin to provide the plaintiffs with the same First Amendment opportunities for association with family and maintain relationships are are provided to U.S. citizen inmates.

F. Prohibit the BOP from using Detainer Action Letters as an actual detainer.

VII.

FACTS PERTINENT TO COUNTS ALLEGING VIOLATIONS OF THE EQUAL PROTECTION CLAUSE AND 28 C.F.R. § 551.90 IN SINGLING OUT INMATES BASED ON THEIR NATIONALITIES TO PLACE THEM INTO PRIVATE PRISONS AND SUBJECTING THEM TO SIGNIFICANTLY MORE ONEROUS CONDITIONS OF CONFINEMENT INCLUDING A HIDDEN TAX STRUCTURE DESIGNED TO IMPOSE A COST OF INCARCERATION FEE, ABDICATION OF CONSTITUTIONAL AND STATUTORY PROTECTIONS ENJOYED BY U.S. CITIZEN INMATES

53. Plaintiffs hereby adopt by reference paragraphs 1 through 52, supra, and incorporate them into these counts as if fully set forth herein.

54. The BOP has implemented a policy, custom and practice of placing low custody inmates born overseas into private prisons (hereinafter referred to as the "Nationality Policy").

55. Except for inmates from the District of Columbia, inmates born in the United States are not placed in these private prisons and are excluded from the Nationality Policy. **Exhibit J.**

56. The Nationality Policy looks only at an inmate's place of birth to determine if he is eligible for placement in private prisons.

57. Pursuant to the Nationality Policy, inmates who have no pending detainers from ICE or who are not subject to deportation or removal are also placed into private prisons solely on the basis of their place of birth, i.e. their nationality. **See e.g. Exhibit K & Exhibit L.**

58. The rationale for placing these inmates in the private prisons is to provide significant cost savings over prisons operated by the BOP.

59. The BOP achieves signficant cost savings by permitting the private prison officials to provide significantly fewer services, programming opportunities, and constitutional and statutorily required services.

60. The BOP also achieves significant cost savings by imposing a hidden tax structure in which the BOP permits the private prison officials to set

exorbitant fees to such services as telephone usage and using such profits to offset the cost of incarceration. **Exhibit M.**

61. The Equal Protection Clause and 28 C.F.R. 551.90 both prohibit the BOP from using nationality in making such classification decisions.

62. Inmates placed in private prisons enjoy significantly less services, privileges, opportunities to practice their religious beliefs, contact with family and friends, ability to communicate with attorneys in confidence, and substantially more onerous conditions of confinement than those enjoyed by U.S. born citizens in BOP operated prisons.

63. Inmates in private prisons are not provided the protections of the Religous Freedom Restoration Act as provided to inmates in BOP operated prisons. **Exhibit N.**

64. Inmates in private prisons are not permitted to practice their religious faith in many ways as inmates in BOP prisons are permitted. Examples include, but are not limited to the following:

a) Private prison Muslim inmates may not pray in any location other than the chapel or their cells and thus, are prohibited from making their five daily prayers due to their prison required job assignments. **Exhibits O & P.** Muslim inmates in BOP prisons may pray at their job sites, schools, etc. to comply with their five daily prayer requirements. **Exhibit Q** (BOP Policy on Religious Practices).

b) Inmates in BOP operated prisons pay a flat charge throughout the BOP of $0.23 per minute for using the telephones. Inmates in private prisons pay up to $5.00 per minute to use the telephone. Both classes of inmates can use a maximum of 300 minutes per month. Thus, the maximum cost to BOP inmates is $69.00 per month and the private prison inmates may incur a cost of up to $1500.00 per

month. Such a significantly higher cost structure limits the frequency of contact with the outside world.

c) Inmates in private prisons are charged higher telephone usage costs to fund their cost of incarceration as a fee imposed by the BOP. **Exhibit M.** Inmates in BOP prisons are not charged a cost to pay for their incarceration under this hidden tax structure.

d) Inmates in private prisons are not provided the constitutional right to communicate with their attorneys in confidentiality. The private prisons have been exempted by the BOP from complying with he policy statements and requirements in the Code of Federal Regulations pertaining to correspondence and special/legal mail requirements. **Exhibit X** (Grievance reply that Geo Group, Inc. is exempted from PS 5265.11, the policy statement requiring that mail to and from attorneys be treated confidentially and mailed unopened and received only to be opened in the inmate's presence). BOP inmates enjoy the full constitutioanl rights to communicate with their attorneys in confidence.

e) Inmates in private prisons do not have the right to speak to their attorneys on an unmonitored phone line and must make all calls only on the monitored phones. **Exhibit R.** BOP policy requires its inmates to be permitted to speak to their attorneys in confidence on unmonitored phones.

f) Inmates in private prisons pay double, triple and sometimes, ten-fold the prices for commissary items than paid by BOP inmtates for the exact same item. **Exhibit S.**

g) Inmates in the BOP are provided access to e-mail and other such forms of communication. **See P.S. 5265.13.** Inmates in private prisons are not provided e-mail. **Exhibit T.** Moreover, private prisons do not provide Residential Drug Abuse programs to foreign born inmates. **See Exhibit Y.**

h) Inmates in private prisons are subjected to exposure to second-hand tobacco smoke in unreasonable levels. **Exhibit U.** All BOP facilties are tobacco and smoke-free. There is a significant and qualitative difference in the application of the Eighth Amendment's prohibition to be free from future harms or exposure to harmful chemicals. All outdoor areas of exercise in the Geo Group, Inc. private prison are smoking areas.

65. Both plaintiffs have been placed in private prisons due to their nationality.

66. Both plaintiffs have suffered the aforedescribed violations and disparate treatment compared to that available to inmates in BOP operated facilities as a result of their placement in the private prison.

67. The BOP's Nationality Policy violates the Equal Protection Clause of the Constitution.

68. The BOP's Nationality Policy violates Title 28, Code of Federal Regulations, § 551.90.

69. The BOP's Nationality Policy constitutes an impermissible taking in violation of due process to the extent that a hidden tax structure is imposed to offset the cost of incarceration.

RELIEF REQUESTED

COUNT THREE: DECLARATORY RELIEF. Plaintiffs Patel and Brown seek Declaratory Relief as follows. Patel and Brown seek a declaration by this court that:

A. The BOP and Lappin violated the Equal Protection Clause by singling out foreign born inmates for placement in private prisons.

B. The BOP and Lappin violated Title 28, Code of Federal Regulations, Section 551.90 in using nationality as a basis for making classification decisions.

C. The higher charges imposed upon inmates' telephone usage in private prisons to offset the cost of incarceration constituted an impermissible taking and fees in violation of the Due Process Clause.

D. The imposition of a hidden tax structure imposed on telephone rates on inmates in private prisons to offset the cost of incarceration violated the Equal Protection Clause since BOP inmates were exempted from this offset to their costs of incarceration.

E. The policy, custom, and practice (Nationality Policy) of using nationality for purposes of making classification decisions is unconstitutional.

COUNT FOUR: INJUNCTIVE RELIEF. The plaintiffs, Patel and Brown, seek this court to order the following injunctive relief:

A. An injunction prohibiting the BOP and Lappin from using nationality in making any classification decisions.

B. An injunction prohibiting the BOP and Lappin from imposing the hidden tax to offset the cost of incarceration upon the phone rates of inmates in private prisons.

VIII.

FACTS PERTINENT TO COUNTS ALLEGING DISCRIMINATORY AND UNCONSTITUTIONAL POLICIES DENYING LPR PLAINTIFF PATEL ACCESS TO PROGRAMMING OPPORTUNITIES AS GIVEN U.S. CITIZENS

70. Paragraphs 1-69, supra, are hereby incorporated into these Counts alleged here as if fully set forth herein.

71 Plaintiff Patel has been discriminated against and denied the Equal Protection of the laws mandated by the Fifth Amendment by being denied the opportunity to participate in the residential faith based program, called the Life-Connections Program, on the basis of his immigration detainer.

72. The BOP has established a residential faith based program, the Life Connections Program.

73. Upon arriving at Moshannon Valley Correctional Institute, Philipsburg, Pennsylvania, Plaintiff Patel requested that he be allowed to enroll in the Life-Connections Program. Patel made these requests to many of the prison officials at the institute (hereinafter referred to as "MVCC") including Mr. Stepanovic, the Religious Program Coordinator, Ms. Magnuson, the Case Manager Coordinator, Mr. Lumadue, the Unit Manager, and Mr. Juster, the BOP Specialist on-site.

74. Plaintiff Patel was informed by all these persons that his request was denied and that MVCC did not allow inmates to enroll in such program since the inmates at the prison were all with immigration detainers and due to the detainer, the inmates were excluded from the program.

75. The Life-Connections policy does not state that it excludes inmates with INS detainers but such a policy is practices as an unwritten mandate by the BOP ands it officials and contractors.

76. As a LPR, Plaintiff Patel is to be afforded the same opportunities for program participation as that provided to U.S. citizens.

77. The implementation of the unwritten mandate to exclude plaintiff and other ICE detainer inmates constituted an unconstitutional action violating the Fifth Amendment's Equal Protection Clause.

RELIEF REQUESTED

COUNT FIVE: DECLARATORY RELIEF. The Plaintiff, Kamal K. Patel, seeks a Declaration that limiting the Life-Connections Program to U.S. citizens and excluding LPR's including Patel is a violation of the Equal Protection Clause of the Fifth Amendment and a discriminatory act based on national origin in violation of Title 28, C.F.R. § 551.90.

COUNT SIX: INJUNCTIVE RELIEF. Plaintiff Patel seeks an Injunction requiring the BOP and Lappin to permit him access to and to enable him to participate in the Life-Connections Program in the same manner as provided to U.S. citizens.

IX.

FACTS PERTINENT TO THE PRIVACY ACT CLAIMS

78. Plaintiff Kamal K. Patel was housed at the Federal Correctional Institute, Big Spring, Texas in approximatley 2003 to 2004.

79. While at FCI Big Spring, Texas, Patel met David Duke, the former grand wizard of the Ku Klux Klan.

80. Plaintiff became aware of discriminatory and illegal practices occurring at the prison in relation to David Duke. Among such practices, officials of the prison broke prison regulations as well as the regulations in the Code of Federal Regulations in relation to disciplinary actions against David Duke.

81. David Duke had received a 200 series incident report (high severity) which would mandate a loss of good credit time and confinement in the hole if found guilty. Additionally, such a high level incident report was required by federal regulations be be referred to a hearing before the Disciplinary Hearing Official.

82. Contrary to these disciplinary regulations, David Duke's incident report for engaging in the business in relation to the sale of his book "Jewish Supremecy" was downgraded by officials other than the Disciplinary Hearing Officer.

83. Plaintiff became aware of these facts and filed a grievance complaining of discriminatory practices pertaining to the prison's stated unbendable policy of referring all such high series incident reports to the DHO when it pertained to minority inmates.

84. Plaintiff was also given an incident report claiming that he lied in his prison grievance.

85. The matter was investigated by an investigation from the Office of Inspector General. As a result of this investigation, plaintiff's claims of disparate treatment were found to be verified. Additionally, the incident report plaintiff received was expunged.

86. In relation to such practices at the prison, the plaintiff attempted to contact the Dallas Morning News and did so by writing the editor of the newspaper a letter explaining the discriminatory practices.

87. Bureau of Prisons policy and the regulations in Title 28 of the Code of Federal Regulations state that such mail is considered "special mail" and is not subject to being opened or inspected.

88. Despite the policy prohibiting such mail from being opened and inspected, officials at the prison stole the letter to the newspaper, opened it, and read it.

89. SIS Lt. Rangel wrote a memo detailing the contents of the letter afer having stolen it and illegally reading it. **Exhibit V.**

90. The memo created memoralizing the contents of plaintiff's attempted communications with the Dallas Morning News is a record which describes the plaintiff's exercise of First Amendment rights.

91. The memo has been maintained in plaintiff's central inmate file and it continues to adversely affect him. It causes the plaintiff to be harassed and intimidated by white officials of the prisons. It has led to less favorable job assignments and other programming activities.

92. The BOP engaged in such actions against plaintiff in order to suppress plaintiff's attempts to expose the BOP officials' conduct which was to give special favors and benefits to David Duke and to suppress exposure of an anti-immigrant policy and custom within the Bureau of Prisons.

93. The actions of the officials of the BOP in seizing the "legal" media correspondence of Patel also directly led to a retaliatory transfer from the prison in Texas to one much farther from his family. **Exhibit V.** The BOP officials premised a transfer of plaintiff based on the contents of his letter to the Dallas Morning News.

94. The BOP continues to maintain the record describing Patel's First Amendment communications with the editor of the Dallas Morning News in his Central Inmate File. Patel's request to have it removed have been denied.

95. The Privacy Act, Title 5 USC § 552a(e)(7) prohibits any agency of the United States from maintaining any "record describing how any individual exercises guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

96. The compilation and maintenance of the record described supra was not authorized by Patel nor by any statute. Moreover, it was not in furtherance of any law enforcement activity but in actuality, was intended to impede and obstruct ongoing law enforcement activity consisting of an active and ongoing investigation by the Office of Inspector General into violations of the USA Patriot Act by these prison officials.

RELIEF REQUESTED

COUNT SEVEN: INJUNCTIVE RELIEF: Plaintiff Patel seeks an injunction requiring the Bureau of Prisons, Harley Lappin, and any successors, agents, or persons under their control and authority to remove any copies of the memo from any and all files in which this memo may be maintained and to redact all references to this memo.

COUNT EIGHT: DECLARATORY RELIEF. Plaintiff Patel seeks a Declaration from this Court declaring that the aforedescribed memo in which Patel's communication with the Dallas Morning News was kept as a record violated the rights of Patel under the Privacy Act Section 552a(e)(7).

X.

FACTS PERTINENT TO FREEDOM OF INFORMATION CLAIMS

97. In 2003, the Plaintiff, Kamal K. Patel, was a complainant in an investigation into violations of the USA Patriot Act by the Office of the Inspector General.

98. Plaintiff Patel filed for copies of the investigation report. In response to the FOIA request, only portions of the investigation report were released. Patel appealed the denial of the relevant portions of the FOIA request and fully exhausted his remedies at that stage. The matter is brought to this court for resolution in regards to Request No. 2005-05331, Appeal No. 05-2152. **Exhibit A-3.**

99. On April 25, 2009, Patel filed a Freedom of Information request to teh Bureau of Prisons requesting the following documents:

a) All documents pertaining to a protection hearing conducted at MVCC in which Patel was involuntarily placed under protection custody;

b) All documents created after the initial protection hearing; and

c) All documents of any segregation review hearings at MVCC.

On May 5, 2009, the BOP returned the FOIA letter requesting a Certificate of Identity. Patel mailed the Certificate of Identity and FOIA request to the BOP on May 19, 2009. This FOIA request numbered 2009-07187 has exceeded the statutory time frame without response. **Exhibit A-4.**

100. On October 6, 2008, Patel filed a FOIA request to the Department of Justice asking for the following:

(a). All transfer documents including 409 forms, medical clearance documetns created for transfer and any other documents pertaining to the transfer decisions regarding Patel's transfer from FCI Forrest City, Arkansas to FMC Butner, North Carolina in 2006, from FMC Butner, North Carolina to Pine Prairie Correctional Facility in Louisiana in January

on February 2008. **See Exhibit A-5.** Patel did not receive any answer to this request at the time he initiated claims in this court within the statutory time frames.

101. Plaintiff Patel filed a FOIA request to the Bureau of Prisons for a copy of a medical transfer request submitted by officials at MVCC in late 2008. This request was not responed to in the time frames provided by the FOIA. **See Exhibit A-6.**

102. Plaintiff filed a FOIA request to the Bureau of Prisons (Request number 2005-03090 and Appeal Number 05-1672) asking for copies of records pertaining to the investigations he was placed under while incarcerated at FCI Big Spring, Texas, the placement in the hole relation to the prison's obstruction of the OIG investigation. **See Exhibit W** (Report to Congress which describes the instant matter at Page 7 of this report). Patel's FOIA request was denied as was a request for a listing of each withheld item. **Exhibit A-7.**

RELIEF REQUESTED

COUNT NINE: Plaintiff Patel seeks an Order requiring the BOP to release to him the documents describedin Paragraphs 97 and 98 , supra, and Exhibit A-3 as required by the FOIA and the Privacy Acts.

COUNT TEN: Plaintiff Patel seeks an Order requiring the BOP to release to him the documents described in Paragraph 99 , supra, and Exhibit A-4 under the FOIA and Privacy Acts.

COUNT ELEVEN: Plaintiff Patel seeks an Order requiring the BOP to release to him the documents described in Paragraph 100, supra, and Exhibit A-5 under the FOIA and Privacy Acts.

COUNT TWELVE: Plaintiff Patel seeks an Order requiring the BOP to release to him documents described in Paragraph 101, supra, and Exhibit A-6 under the FOIA and Privacy Acts.

COUNT THIRTEEN: Plaintiff seeks an Order requiring the BOP to release to him documents described in Paragraph 102, supra, and Exhibit A-7 under the FOIA and Privacy Acts.

The Plaintiff asks that the BOP be ordered to provide all these FOIA and PA requested materials in electronic format under 5 U.S.C. § 552(a)(2) and to require the BOP to provide plaintiff Patel access to a computer to view the material.

XI.

CONCLUSION

The Plaintiffs in this case, Kamal K. Patel and Dale Brown, bring suit to address important constitutional principles and the actions of a government agency which are intended to defy these constitutional principles under guise of legitimacy. The draconian tactics employed by the BOP against foreign born residents of the United States can have no place in a fair and just system of government. The BOP's policy would allow a convicted child rapist and serial murderer with a Life sentence to be placed in a prison close to his community to foster "community ties" but would deny a non-violent foreign born legal resident of the United States this right. This matter is brought to this forum for appropriate redress.

Plaintiff Patel also brings claims for relief under the Freedom of Information and Privacy Acts to obtain records which evidence the BOP's subversion of investigations into its misconduct as well as claims to redact records which are kept in violation of the Privacy Act commenting on Patel's exercise of his rights to communicate with the media.

XII.

PRAYER FOR RELIEF

The paragraphs numbered 1 through 102, supra, and Counts One through Thirteen supra, are hereby incorporated here as if fully set forth herein.

103. Plaintiffs Patel and Brown request Declaratory and Injunctive Relief as set forth in Counts One, Two, Three and Four, supra.

104. Plaintiff Patel seeks Declaratory and Injunctive relief as set forth in Counts Five and Six, supra.

105. Plaintiff Patel seeks Injunctive and Declaratory relief as set forth in Counts Seven and Eight, supra, under the Privacy Act.

106. Plaintiff Patel seeks relief under the Freedom of Information and Privacy Acts as set forth in Counts Nine, Ten, Eleven, Twelve, and Thirteen, supra, and an order requiring that such documents be provided in electronic format under 5 USC § 552(a)(2) with provisions made to provide Patel access to a method to view the material.

107. Both Plaintiffs ask for this court to assess costs, fees, attorney costs, and other such costs as permitted by the Privacy Act and law against the Defendants.

108. A TRIAL BY JURY is DEMANDED on all issues so triable.

109. Both Plaintiffs ask for such further relief as justice demands and is just and proper.

WHEREFORE, all things considered, the Plaintiffs, KAMAL K. PATEL and DALE BROWN, respectfully pray that this court order all relief as requested by these Plaintiffs.

DATED: 7/28/09

Respectfully submitted,

Kamal K. Patel
Reg. No. 56496-080
P.O. Box 630
Winton, NC 27986

DATED: 7/28/09

Respectfully submitted,

Dale Brown
Reg. No. 29087-004
P.O. Box 630
Winton, NC 27986

VERIFICATION

I, the undersigned Plaintiff, do hereby verify the truth and accuracy of the statements in this complaint which relate to the claims relating to myself, to the best of my knowledge and beliefs under 28 U.S.C. § 1746.

DATED: 7/28/09

Kamal K. Patel
Reg. No. 56496-080
P.O. Box 630
Winton, NC 27986

DATED: 7/28/09

Dale Brown
Reg. No. 29087-004
P.O. Box 630
Winton, NC 27986

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a true and correct copy of the foregoing Second Amended Complaint to opposing counsel at the last known address with proper first class postage affixed by depositing in the prison legal mailbox on this date. Declared under 28 USC 1746.

DATED: 7/28/09

Kamal K. Patel

AFFIDAVIT OF KAMAL K. PATEL

I state that my name is Kamal K. Patel, that I am over the age of 18, and that I am competent to testify to the matters declared herein.

1. I state that I am a plaintiff in this civil action. I am currently incarcerated at a private prison operated by Geo Group, Inc. at Rivers Correctional Institute, P.O. Box 630, Winton, NC 27986.

2. I state that the exhibits I have attached in this lawsuit are true and correct copies to the best of my knowledge and beliefs. Exhibits A-1 and A-2 are true and correct copies of requests I made to prison officials and the responses I received. Exhibits A-3 through A-7 are true and correct copies of documents relating to my requests under the Freedom of Information and Privacy Acts.

3. The attached Exhibit C is a true and correct copy of a Notice of Action letter I received.

4. The attached Exhibits A-8 and A-9 are true and correct copies of my atempts to exhaust my administrative remedies in relation to Counts Three and Four in the Second Amended Complaint. In filing the grievance at the institution level, I was informed that "This issue should be addressed by the Bureau of Prisons" and that "the issue raised in the remedy is not appealable at the institution level." See Exhibit A-8. In attempting to exhaust my remedies at the level of the Bureau of Prisons, the grievance attempt was rejected and I was told that "This issue is not appealable to the BOP. You must use the grievance procedures at your facility." See Exhibit A-9.

5. I hereby adopt by reference the statements I made in my affidavit attached to the First Amended Complaint at paragraphs 3, 4 and 5 in relation to the exhasution of available administrative remedies on the claims initially brought forth in this suit.

6. Exhibit D is a true and correct copy of a Detainer Action Letter I received from prison officials. Exhibit E is a true and correct copy of a request and reply inquiring about the legal residence as in my inmate file. Exhibit M is a true and correct copy of pages copied from a document avaiable in the inmate law library as the contract between the BOP and Geo Group, Inc. Exhibit N is a request I made and a reply received from BOP Contract Monitor, Mr. Paul Ja ster, as a private prison in Philipsburg, Pennsylvania. Exhibit O is a copy of a RCI policy. Exhibit P are two pages consisting of two requests I made to staff at the Rivers Correctional Facility asking for permission to pray at work sites and other areas other than the individual cell and the chapel and the reply received. Exhibit R are two requests I made to staff at Rivers Correctional Institution and their resplies denying me unmonitored calls with my attorney and informing me to use the inmate legal mail system. Exhibit X is a true and correct copy I received from the warden in reply to a grievance in

EXHIBIT "A"

which the warden of Rivers Correctional Institution informed me that BOP Program Statement 5265.11 is not applicable to Rivers Correctional Institution. Exhibit V is a true and correct copy of a memo in redacted form I obtained from prison officials maintained in my inmate file.

7. I have made many requests to call my attorney in confidence. I have a pending criminal case against me in North Carolina. I have been denied these requests and I have not had the chance to speak to my attorney, Mr. Doug Kingsbery, on a single occasion on the telephone while at Rivers Correctional Institute. The BOP policy on special/legal mail is outlined in PS 5265.11. In a grievance reply I received from the warden, I was told "Further investigation into this matter has revealed that this facility is not required by the Bureau of Prisons (BOP) Statement of Work to comply with PS 5265.11." See Exhibit X to the Second Amended Complaint.

8. There are significant qualitiative and substantial differences between the treatment I receive at this facility (a privte facility) and the BOP facilities in which I have been incarcerated. The differences include a signifiantly lesser ability to practice my faith, communiate with my attorneys, and also, I am asthmatic and at this prison, unlike the BOP prisons, tobacco is sold and smoking is prevalent. I affirmatively state that there is not a single occasion I can remember since I have been at Rivers Correctional Institute that I have not inhaled second hand tobacco smoke when I have stepped outside. The smoking areas are only a few steps from the entranceways to the units and they are in the immediate area of the gates which are requird to be travelled through to get to the compound (inner). Also, the inner compound and the outer rec. are smoking areas. I have had to increase my asthma medication since arriving at Rivers Correctional Institution.

I state that these statements are true and correct to the best of my knowledge and beliefs under the penalty of perjury as provided by 28 U.S.C. § 1746.

DATED: 7/22/09

Kamal K. Patel #56496-080
P.O. Box 630
Winton, NC 27986

EXHIBIT "A"

(171)

BP-S148.055 INMATE REQUEST TO STAFF CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member)	DATE:
MR. Benbow- counsels	7-31-08
FROM:	REGISTER NO.:
Kamal Patel	56496-083
WORK ASSIGNMENT:	UNIT:
	SHU

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

(1) I mailed legal packet 7-11-08 certified # 7003 3110 0001 3506 2808 to Raleigh, N.C. court. Its disappeared & I haven't got my receipt back. Can you try to look it.

(2) I need pink forms, (50) copouts, & 15 BP-8 forms. Issued all for BP8's (1) retaliatory transfer to Pennsyl (2) Need Feb 08 transfer denials (3) medical PT denied (4) SIS interfer w/ my incoming mail (5) T-Hill discrimination in shots (6) Equal Protection denied in not letting me have 500 mile transfer halfway house, Life-connections program, (7) Sick Call request ignored (8) refused my newspapers (9) Discrimination in application of custody levels only to "US citizens" (10) my certified court mail disappear

(3) I need (10) tort claim forms.

(Do not write below this line)

DISPOSITION:

I will send 10 BP 11's, 10 cop-outs A 1 BP 8 at A Time. And A Tort Claim.

Signature Staff Member	Date
SEPC	8/3/08

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

Exhibit A-1

CORNELL COMPANIES, INC.

(116)

INMATE REQUEST TO A STAFF MEMBER
PETICION DEL PRESO PARA PERSONAL DE LA INSTITUCION

TO/PARA: Mr. Miller- A Unit Case Mgr
(NAME AND TITLE OF OFFICER/NOMBRE Y TITULO DEL OFFICIAL)

SUBJECT: STATE, COMPLETELY, BUT BRIEFLY, THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE, AND WHAT YOU THINK SHOULD BE DONE. (GIVE DETAILS)
RAZON: ESCRIBA EL PROBLEMA, BREVEMENTE Y COMO USTED PIENSE QUE PODEMOS RESOLVERLO. (ESCRIBA CON DETALLES)

Per my verbal request, please provide
8 BP-8 grievance forms to me.

Thank You

(USE OTHER SIDE OF PAGE IF MORE SPACE IS NEEDED.)
(USE EL OTRO LADO DE LA HOJA SI NECESITA MAS ESPACIO.)

NAME/NOMBRE: Kamal Patel No./Numero: 56496-08

CASE MANAGER/GERENTE: Miller DATE/FECHA: 12/4/08

WORK ASSIGNMENT/ASIGNACION DE TRABAJO: SHU UNIT/UNIDAD: SHU

BED ASSIGNMENT/NUMERO DE CAMA 116-C

NOTE: If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently. You will be interviewed, if necessary, in order to satisfactorily handle your request. Your failure to specifically state your problem may result in no action being taken.
NOTA: Si usted sigue las instrucciones en preparar su petición, puede estar contestada mas rápida y inteligentemente. Usted estará entrevistado, si necesario, para contestar su petición satisfactoriamente. Su negligencia en declarar su problema especificamente puede resultar en que no se tome ninguna acción.

DISPOSITION: (DO NOT WRITE IN THIS SPACE)
DATE/FECHA: 12/5/08
DISPOSICION: (NO ESCRIBA EN ESTE ESPACIO)

Requested BP230 at 9:10 AM 12/5/08. Case Manager will deliver to SHU when received.

Robins US
Officer/Official

IM-004 ATTACHMENT A

MVCC PS IM-004 10/2005

Exhibit A-2

016 Rpt

U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642 *Washington, D.C. 20530*

NOV 2 8 2007

Mr. Kamal K. Patel
Register No. 56496-080
Federal Correctional Institution
Post Office Box 9000
Forrest City, AR 72336

Re: Appeal No. 05-2152
Request No. 2005-05331
ALB:CG

Dear Mr. Patel:

You appealed from the action of the Central Office of the Federal Bureau of Prisons (BOP) on records referred to it by the Office of the Inspector General (OIG) pursuant to your request to OIG for access to certain records pertaining to yourself. I regret the substantial delay in responding to your appeal.

After carefully considering your appeal, I am affirming, on partly modified grounds, BOP's action on the records referred to it. The records referred to BOP are exempt from the access provision of the Privacy Act of 1974 pursuant to 5 U.S.C. § 552a(j)(2). See 28 C.F.R. § 16.97 (2007). Because these records are not available to you under the Privacy Act, they have been reviewed under the Freedom of Information Act in order to afford you the greatest possible access to them.

BOP properly withheld certain information that is protected from disclosure under the FOIA pursuant to:

5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege;

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties; and

5 U.S.C. § 552(b)(7)(F), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to endanger the life or personal safety of an individual.

Exhibit A.3. p.1 of 2

In your appeal letter, you contend that BOP failed to provide you with certain records. Please note that BOP's action was limited to documents that were referred to it by OIG. If you have not done so already, I suggest that you make a separate request to BOP for the additional documents that you now seek. For your convenience, I am including the address of BOP's FOIA Office:

Wanda M. Hunt
Chief, FOIA Section
FOIA/Privacy Act Requests
Federal Bureau of Prisons
Department of Justice
Room 841, HOLC Building
Washington, DC 20534

If you are dissatisfied with my action on your appeal, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Janice Galli McLeod
Associate Director

By: Anne D. Work

Anne D. Work
Attorney-Advisor

Exhibit 1-3, p. 2 of 2

2009-07187 Remail 5/19/09 w/ cert ID FOIA (9)

KAMAL K. PATEL
Reg. No. 56496-080
P.O. Box 630
Winton, NC 27986

Received
MAY 5 2009
FOIA/PA Section
Federal Bureau of Prison

April 25, 2009

RE: FREEDOM OF INFORMATION/PRIVACY ACT REQUEST
FOR DOCUMENTS FROM FEDERAL BUREAU OF PRISONS

Dear FOIA/PA Section:

Please provide me the below described documents pursuant to the Freedom of Information and Privacy Acts:

1. All documents pertaining to a Protection Hearing conducted during my incarceration at Moshannon Valley Correctional Institution, Philipsburg, Pennsylvania, a private contract facility for the Bureau of Prisons. The approximate date of this protection hearing is around November/December 2008.

2. As part of this request, please include any other documents, memos, etc. which pertain to my classification as a protection hearing case, any documents created after the initial protection hearing and in any way relevant to this matter.

3. Any and all segregation review hearing reports created from November 2008.

4. A copy of all documents in my Inmate Central File created since September 15, 2008 up to the present.

I would appreciate it if you could provide this information to me within the time frames as provided by the Freedom of Information Act.

Thank you very much for your kind consideration in this matter.

Sincerely,

Kamal K. Patel

Exhibit A-4

Kamal K. Patel
Reg. No. 56496-080
CI Moshannon Valley
555-I Cornell Dr., A-2
Philipsburg, PA 16866

October 6, 2008

FOIA/PA MAIL REFERRAL UNIT
U.S. Dept of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

RE: FOIA/PA REQUEST FOR BOP TRANSFER DOCUMENTS

Dear FOIA/PA Unit:

Please provide me the following documents pursuant to the Freedom of Information and Privacy Acts:

1. A copy of all transfer documents including 409 forms, medical clearance documents for transfer, and any other document created for a transfer between prisons for the prison trasnfers which occurred or were approved to occur for myself as follows:

1. Transfer from FCI Forrest City, Arkansas to FMC Butner, North Carolina in 206;

2. Transfer approved from FMC Butner, North Carolina to Private Prison Facility Pine Prairie, Louisiana in Jan/Feb 2003; (include documents for any cancellation of this transfer);

3. Transfer from FMC Butner, North Carolina to CI Moshannon Valley, Pennsylvania in 2008.

Thank you very much.

Sincerely,

/s/

Kamal K. Patel

Exhibt A-5

 FOIA Appeal denial BOP Memos 3 B16

U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642 *Washington, D.C. 20530* — B16 - Shu - 11/3/03 & 11/13/02 mems

MAY 18 2007

Mr. Kamal K. Patel
Register No. 56496-080
Federal Medical Center
Post Office Box 1600
Butner, NC 27509

Re: Appeal No. 05-1672
Request No. 2005-03090
ALB:CAS

Dear Mr. Patel:

You appealed from the action of the Central Office of the Federal Bureau of Prisons (BOP) on your request for access to various records pertaining to an investigation and to your placement in the Special Housing Unit. You also requested that BOP "authenticate" the released documents and that it answer questions about them.

After carefully considering your appeal, and as a result of discussions between BOP personnel and a member of my staff, I am releasing to you portions of two pages, copies of which are enclosed. I am otherwise affirming BOP's action on your request. The records responsive to your request are exempt from the access provision of the Privacy Act of 1974 pursuant to 5 U.S.C. § 552a(j)(2). See 28 C.F.R. § 16.97 (2006). Because these records are not available to you under the Privacy Act, your request has been reviewed under the Freedom of Information Act in order to afford you the greatest possible access to them.

BOP properly withheld from you certain information that is protected from disclosure under the FOIA pursuant to:

5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege;

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties; and

5 U.S.C. § 552(b)(7)(F), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to endanger the life or personal safety of an individual.

In addition, I have determined that BOP released to you all of the nonexempt, responsive records that it was able to locate in its files and that it conducted an adequate, reasonable search in response to your request.

Exhibit A-7

Furthermore, please note that the FOIA does not require federal agencies to answer questions or add explanatory material with released records in response to a FOIA request, but rather is limited to requiring agencies to provide access to reasonably described, nonexempt records. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975); Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985). Therefore, BOP properly declined to "authenticate" the documents that were previously released to you or to answer questions about them.

Finally, I am denying your request that this Office itemize and justify each item of the information withheld. You are not entitled to such a listing at the administrative stage of processing FOIA requests and appeals. See, e.g., Judicial Watch v. Clinton, 880 F. Supp. 1, 10 (D.D.C. 1995).

If you are dissatisfied with my action on your appeal, you may seek judicial review in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

Janice Galli McLeod
Associate Director

Enclosure

U.S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Institution

1900 Simler Avenue
Big Spring, Texas 79720

November 3, 2003

MEMORANDUM FOR CONCERNED STAFF

FROM: [redacted] 7C [redacted] 7C

SUBJECT: **Inmate Patel, Kamal # 56496-080**

On October 23, 2003, at approximately 3:55 P.M., Special Housing Unit staff reported an inmate on inmate assault. The inmates involved were [redacted] and 7C
Patel, Kamal # 56496-080, no Security Threat Group affiliation. The Operations Lieutenant interviewed inmate Patel concerning his assault. Inmate Patel stated [redacted] assaulted him 7C
because he (Patel) had made [redacted] "look bad" in front of staff concerning a conversation about football. Inmate Patel was struck several times on the face causing contusions to the right cheek, nose, and back of the head. [redacted] 7C
[redacted] Inmate Patel was removed from the cell and placed in another cell.

[redacted] B5, 7C, 7F

FOI
EXEMPT

(3)

FOI Exempt

A-7 3/4

U.S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Institution

1900 Simler Avenue
Big Spring, Texas 79720

November 13, 2003

MEMORANDUM FOR CONCERNED STAFF

FROM: [redacted]

SUBJECT: **Inmate Patel, Kamal # 56496-080**

On November 12, 2003, staff became aware that inmate Patel, Kamal # 56496-080 had written to the Dallas Morning News concerning inmate [redacted] Inmate Patel states that [redacted] received an incident report for abuse of the telephone and the prohibited act charges were "swept away under the table." Inmate Patel states that inmate [redacted] receives preferential treatment and Bureau of Prisons rules are broken for [redacted] Inmate Patel states that [redacted] is assigned to desirable work details and received favorable treatment. Inmate Patel also states that the preferential treatment allegedly given to [redacted] should be written about. [redacted] Since inmate Patel is writing to a newspaper, it is apparent that he is aware the newspaper may become interested in his allegations and request an interview in which he would present his allegations. Furthermore, the newspaper may want to interview [redacted] as well. [redacted]

7C

7C

7C

[redacted]

BS, 7C, 7F

[redacted]

BS, 7C 7F

FOI EXEMPT

(2)

A-7 4/4

The GEO Group, Inc.
Rivers Correctional Institution

Date: July 23, 2009

To: Kamal Patel
Reg. No. 56496-080

From: S. Rowe
AWP Secretary
Administrative Remedy Clerk

Subject: Administrative Remedy Process

Remedy No: 09-134

This is in response to your step 2 administrative remedy dated July 21, 2009 and filed July 23, 2009. Your Step 2 Administrative Remedy, as stated on your Step 1 response, is being returned due to the issue raised in the remedy is not appealable at the Institution level. This issue should be addressed by the Bureau of Prisons.

If you have any questions or concerns, please contact the Administrative Remedy clerk.

Exhibit A-8 p.1 of 3

(30)

The GEO Group, Inc.

Correctional Programs
Administrative Remedies

Admin Coordinator
JUL 23 2009
DATE RECEIVED

Rivers Correctional Institution
Step 2 Administrative Remedy Form
Paso 2 Forma De Remedio Administrativo

Name: Nombre: Kamal K. Patel	Number: Numero: 56496-080
Date: Fecha: 7/21/09	Housing Assignment: Unidad Asignada: B2/116U

For Official Use Only - Para Uso Oficial Solamente

Date Received:	Remedy #:	Date Due:
7-23-09	09-134	Returned

Complaint - Reclamo

Describe your complaint in the section below. Be as concise as possible, but be sure to include enough identifying data to assist in a through investigation (e.g. dates, names, locations, times, etc...) Attach one (1) additional page if necessary and the Informal Resolution Form and Step 1 request form and Step 1 response with any other supporting documentation.

Describa su telaino en la seccion de abajo. Dea lo mas breve posible, pero asegurese de incluir suficiente informacion para asistir en una completa investigacion (pe.. Fechas, nombres, ubicaciones, tiempos, etc...) Ande 1 forma de la demanda y Ande 1 contestación con cualquier otra documentación de apoyo.

RELIEF REQUEST: I would like the practice employed by the BOP of singling out non-U.S. Citizens for placement in private prisons subjecting them to significantly harsher conditions of confinement stopped or in the alternative, to ensure that the non U.S. citizens in private prisons are provided equality with the U.S. citizens in BOP prisons in all services and rights.

REPLY TO ANSWER BELOW: The fact that all inmates at this prison are treated alike is not responsive to this grievance. This grievance pertains to the different treatment between the inmates of this prison and the inmates in BOP run prisons, specifically, in relation to myself, a Legal Permanent Resident of the United States.

COMPLAINT: The BOP is singling out non-U.S. Citizens for harsher conditions of confinement to include but not limited to more limitations on constitutional rights includint the rights under the First Amendment to the mails, telephones, etc.; the Sixth Amendment to confidential communictions with the courts and the attorneys, rights under the RFRA, the RLUIPA and the First Amendment in regards to religious practice, and the Eighth Amendment in regards to exposure to harmful and dangerous chemicals and second-hand smoke. Please See Attachment For Further Facts Related To This Complaint.

Inmate Signature

Exhibit A-8, p. 2 of 3

(30)

ATTACHMENT TO ADMINISTRATIVE GRIEVANCE
(Violation of Equal Protection & Other Laws In Classification of Non-U.S. Citizens)

COMPLAINT: THE POLICY OF THE BOP IS SINGLING OUT NON U.S. CITIZENS FOR PLACEMENT IN PRIVATE PRISON FACILITIES SUBJECTING THEM TO HIGHER COSTS, HIDDEN FEES TO SUPPORT THEIR COST OF INCARCERATION, AND REDUCED OPPORTUNITIES FOR PROGRAMMING IS A VIOLATION OF MY RIGHTS UNDER THE EQUAL PROTECTION CLAUSE AND FEDERAL REGULATIONS PROHIBITING THE USE OF NATIONAL ORIGIN IN CLASSIFICATION DECISIONS.
The BOP has a policy of placing only inmates from foreign countries including Legal Permanent Residents of the United States in private prison facilities but at the same time, excluding from such placement U.S. citizens. The placement in private prisons is designed to save costs by providing less opportunities for programming as well as placing these inmates including myself under a system of significantly higher costs for basic inmate services such as the telephone and commissary and also, imposing a hidden cost of incarceration tax on myself and these non-U.S. citizen inmates which is not imposed on U.S. Citizens. Such actions are violations of the Equal Protection Clause and my rights to due process to my property. For example, the BOP contract with the private prison operaters provide that profits from the excessive telephone charges given to the inmates in private prisons are to be shared with the BOP to offset the cost of the contract (a de-facto charge for incarceration). While BOP inmates in federal prisons pay a rate per minute and the same rate in all BOP prisons (applicable to U.S. citizens), I, as a foreign citizen but a Legal Permanent Resident, am being subjected to a flat rate of $5.00 per call. This compares to $0.23 for U.S. citizens. Thus, I am potentially liable to incur $1500.00 per month in telephone fees for the 300 minutes of phone time alloted while U.S. citizens pay a maximum of $69.00 for domestic calls. Likewise, the same items from the same companies (e.g. Keefe Corp.) sold in commissary are significantly higher at the privte prison versus the BOP prisons. A soup selling for $0.25 in a BOP facility sells for $0.54 at the private facility. Programming opportunities are also significantly dissimilar. UNICOR job opportunities are unavailable at the private prison. Religious freedoms are significantly lessened and the BOP contends that the constitutional guarantees against government misconduct do not apply to the private prison officials thereby denying me these protections simply on the basis of my national origin.

I contend that the actions of the BOP in singling out only non-U.S. citizens violates the Equal Protection Clause. The BOP does not make decisions to place inmates in the private prisons on a non-discriminatory basis in which all inmates under its care and custody are evaluated for such placement but makes this decision using national origin as the primary distinguishing factor. The use of national origin is also in violation of the regulations in the Code of Federal Regulations which prohibit the making of classification decisions by considering this factor. These actions violate the Equal Protection Clause's prohibition of treating similarly situations persons alike. Furthermore, the hidden tax imposed to offset the cost of incarceration which is only taxed against those inmates in the private facility (and a fortiori, only those of foreign origin), is a discriminatory tax and violates both the Equal Protection Clause and Due Process under the Fifth Amendment.

I ask that this policy of singling out myself (even though I am a Legal Permanent Resident) for classification under much harsher conditions than U.S. citizens due to my citizenship be stopped and that I be given the same consideration as given to U.S. citizens for placement without giving any consideration to my national origin.

Exhibit A-8, P. 3-13

(27)

BP-11 mailed 7/14/09

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JULY 1, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
PRIVATIZATION MGT. BRANCH

TO : KAMAL PATEL, 56496-080
RIVERS CI UNT: B QTR: B02-116L
P.O. BOX 840
WINTON, NC 27986

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 545437-R1 REGIONAL APPEAL
DATE RECEIVED : JULY 1, 2009
SUBJECT 1 : DISCRIMINATION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: SEE REMARKS.

REMARKS : THIS ISSUE IS NOT APPEALABLE TO THE BOP. YOU MUST USE THE GRIEVANCE PROCEDURES AT YOUR FACILITY.

Exhibit A-9

U.S. Department of Justice

Regional Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: Patel, Kamal K (LAST NAME, FIRST, MIDDLE INITIAL) 56496-080 (REG. NO.) B2/114 (UNIT) Rivers Cor. Instl (INSTITUTION)

Part A - REASON FOR APPEAL

Violation of Equal Protection Clause and 28 CFR 551.90 which prohibits using national origin for purposes of making classification decisions. Singling out non-U.S. citizens to place in private prisons, where these inmates are not provided some Rights, privileges, and access to services, work, education opportunities, telephones, e-mail communication, and subjected to higher costs for basic telephone services and commissary to offset cost of incarceration which U.S. citizens are not subjected to. [See Attached Sheet For More]

6/20/09
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED JUL 01 2009 Privatization Mgt. Branch

RECEIVED JUL 01 Privatization Mgt. Branch

RECEIVED JUL 01 Privatization Mgt. Branch

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 545437-R1

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

Exhibit A-9 2

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

ATTACHMENT TO ADMINISTRATIVE GRIEVANCE
(Violation of Equal Protection & Other Laws In Classification of Non-U.S. Citizens)

COMPLAINT: THE POLICY OF THE BOP IS SINGLING OUT NON U.S. CITIZENS FOR PLACEMENT IN PRIVATE PRISON FACILITIES SUBJECTING THEM TO HIGHER COSTS, HIDDEN FEES TO SUPPORT THEIR COST OF INCARCERATION, AND REDUCED OPPORTUNITIES FOR PROGRAMMING IS A VIOLATION OF MY RIGHTS UNDER THE EQUAL PROTECTION CLAUSE AND FEDERAL REGULATIONS PROHIBITING THE USE OF NATIONAL ORIGIN IN CLASSIFICATION DECISIONS.
The BOP has a policy of placing only inmates from foreign countries including Legal Permanent Residents of the United States in private prison facilities but at the same time, excluding from such placement U.S. citizens. The placement in private prisons is designed to save costs by providing less opportunities for programming as well as placing these inmates including myself under a system of significantly higher costs for basic inmate services such as the telephone and commissary and also, imposing a hidden cost of incarceration tax on myself and these non-U.S. citizen inmates which is not imposed on U.S. Citizens. Such actions are violations of the Equal Protection Clause and my rights to due process to my property. For example, the BOP contract with the private prison operaters provide that profits from the excessive telephone charges given to the inmates in private prisons are to be shared with the BOP to offset the cost of the contract (a de-facto charge for incarceration). While BOP inmates in federal prisons pay a rate per minute and the same rate in all BOP prisons (applicable to U.S. citizens), I, as a foreign citizen but a Legal Permanent Resident, am being subjected to a flat rate of $5.00 per call. This compares to $0.23 for U.S. citizens. Thus, I am potentially liable to incur $1500.00 per month in telephone fees for the 300 minutes of phone time alloted while U.S. citizens pay a maximum of $69.00 for domestic calls. Likewise, the same items from the same companies (e.g. Keefe Corp.) sold in commissary are significantly higher at the privte prison versus the BOP prisons. A soup selling for $0.25 in a BOP facility sells for $0.54 at the private facility. Programming opportunities are also significantly dissimilar. UNICOR job opportunities are unavailable at the private prison. Religious freedoms are significantly lessened and the BOP contends that the constitutional guarantees against government misconduct do not apply to the private prison officials thereby denying me these protections simply on the basis of my national origin.

I contend that the actions of the BOP in singling out only non-U.S. citizens violates the Equal Protection Clause. The BOP does not make decisions to place inmates in the private prisons on a non-discriminatory basis in which all inmates under its care and custody are evaluated for such placement but makes this decision using national origin as the primary distinguishing factor.. The use of national origin is also in violation of the regulations in the Code of Federal Regulations which prohibit the making of classification decisions by considering this factor. These actions violate the Equal Protection Clause's prohibition of treating similarly situations persons alike. Furthermore, the hidden tax imposed to offset the cost of incarceration which is only taxed against those inmates in the private facility (and a fortiori, only those of foreign origin), is a discriminatory tax and violates both the Equal Protection Clause and Due Process under the Fifth Amendment.

I ask that this policy of singling out myself (even though I am a Legal Permanent Resident) for classification under much harsher conditions than U.S. citizens due to my citizenship be stopped and that I be given the same consideration as given to U.S. citizens for placement without giving any consideration to my national origin.

Exhibit A-9 3

27

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Patel, Kamal K.	56496-080	B2-116L	Rivers Corr. Instit.
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL

This is an appeal of hte rejection of the BP-10 filed on the ground that this issue is not appealable to the BOP. I am filing this appeal to finish my exhaustion process inthe event that somebody later says tht this issue was appealable. Thus, please refer to the attached pages for the actual issue presented here whihc alleges a violation of the Equal Protection Clause and 28 CFR 551.90 which prohibits the use of national original to make classification decisions and the actions ofthe BOP in placing non citizens in private prisons and excluding any U.S. citizen (except D.C. inmaets)O from the same placement decisiosn. Such decision are also designed to violate the constitutional right to property and comunication and access to family and friends under the 1st amendment and 5 amnendments. The costs of phone, and commmissary is many times higher. Visitations from family is limited. The monies (profits) from phone are used to fof set cost of incarceration, a cost that U.S. citizens do not bear.

7/8/09 SEE ATTACHED SHEET FOR COMPLAINT.?

DATE SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

Exhibit A-9 4

BP-231(13)

ATTACHMENT TO ADMINISTRATIVE GRIEVANCE
(Violation of Equal Protection & Other Laws In Classification of Non-U.S. Citizens)

COMPLAINT: THE POLICY OF THE BOP IS SINGLING OUT NON U.S. CITIZENS FOR PLACEMENT IN PRIVATE PRISON FACILITIES SUBJECTING THEM TO HIGHER COSTS, HIDDEN FEES TO SUPPORT THEIR COST OF INCARCERATION, AND REDUCED OPPORTUNITIES FOR PROGRAMMING IS A VIOLATION OF MY RIGHTS UNDER THE EQUAL PROTECTION CLAUSE AND FEDERAL REGULATIONS PROHIBITING THE USE OF NATIONAL ORIGIN IN CLASSIFICATION DECISIONS.
The BOP has a policy of placing only inmates from foreign countries including Legal Permanent Residents of the United States in private prison facilities but at the same time, excluding from such placement U.S. citizens. The placement in private prisons is designed to save costs by providing less opportunities for programming as well as placing these inmates including myself under a system of significantly higher costs for basic inmate services such as the telephone and commissary and also, imposing a hidden cost of incarceration tax on myself and these non-U.S. citizen inmates which is not imposed on U.S. Citizens. Such actions are violations of the Equal Protection Clause and my rights to due process to my property. For example, the BOP contract with the private prison operaters provide that profits from the excessive telephone charges given to the inmates in private prisons are to be shared with the BOP to offset the cost of the contract (a de-facto charge for incarceration). While BOP inmates in federal prisons pay a rate per minute and the same rate in all BOP prisons (applicable to U.S. citizens), I, as a foreign citizen but a Legal Permanent Resident, am being subjected to a flat rate of $5.00 per call. This compares to $0.23 for U.S. citizens. Thus, I am potentially liable to incur $1500.00 per month in telephone fees for the 300 minutes of phone time alloted while U.S. citizens pay a maximum of $69.00 for domestic calls. Likewise, the same items from the same companies (e.g. Keefe Corp.) sold in commissary are significantly higher at the privte prison versus the BOP prisons. A soup selling for $0.25 in a BOP facility sells for $0.54 at the private facility. Programming opportunities are also significantly dissimilar. UNICOR job opportunities are unavailable at the private prison. Religious freedoms are significantly lessened and the BOP contends that the constitutional guarantees against government misconduct do not apply to the private prison officials thereby denying me these protections simply on the basis of my national origin.

I contend that the actions of the BOP in singling out only non-U.S. citizens violates the Equal Protection Clause. The BOP does not make decisions to place inmates in the private prisons on a non-discriminatory basis in which all inmates under its care and custody are evaluated for such placement but makes this decision using national origin as the primary distinguishing factor. The use of national origin is also in violation of the regulations in the Code of Federal Regulations which prohibit the making of classification decisions by considering this factor. These actions violate the Equal Protection Clause's prohibition of treating similarly situations persons alike. Furthermore, the hidden tax imposed to offset the cost of incarceration which is only taxed against those inmates in the private facility (and a fortiori, only those of foreign origin), is a discriminatory tax and violates both the Equal Protection Clause and Due Process under the Fifth Amendment.

I ask that this policy of singling out myself (even though I am a Legal Permanent Resident) for classification under much harsher conditions than U.S. citizens due to my citizenship be stopped and that I be given the same consideration as given to U.S. citizens for placement without giving any consideration to my national origin.

Exhibit A-9

AFFIDAVIT OF DALE BROWN

I state that my name is Dale Brown, that I am over the age of 18, and that I am competent to testify to the matters declared herein:

1. The document attached to this Affidavit as Exhibit B-1 is a true and correct copy of the Step 2 grievance I filed at Rivers Correctional Institution, and the reply provided to me. Step 2 is the final stage of the Administrative Remedies for filing grievances at this prison.

2. The document attached to this Affidavit as Exhibit B-2 is a true and correct copy of the reply I received from the Rivers Correctional Institution, pertaining to Administrative Remedy 09-131. The reply states that I have exhausted all my administrative issues raised in Administrative Remedy 09-131.

3. The document attached to this Affidavit as Exhibit B-3 is a true and correct copy of the BOP INMATE LOAD SHEET, which identifies that my legal address is 3236 NW 4th Street, lauderdale lakes, Florida 33309, and shows this prison is approximately 730 miles from my legal address.

4. The document attached to this proposed Second Amended Complaint as Exhibit D is a true and correct copy of a Detainer Action Letter I received from the Immigration and Naturalization Service.

5. The document attached to this proposed Second Amended Complaint as Exhibit S-1 is a true and correct copy of a spreadsheet that accurately reflects the difference in prices for similar items sold in a typical BOP operated commissary in Butner North Carolina, compared with the prices for similar items sold in the commissary operated by the GEO/Rivers Correctional Institution.

EXHIBIT - B

5. The document attached to this Second Amended Complaint as Exhibit S-1, is a true and correct copy of a spreadsheet that accurately reports on the difference in the prices for similar items sold in the BOP operated commissary at the Federal Prison in Butner North Carolina, compared with the prices for similar items sold in the commissary operated by the GEO/Rivers Correctional Institution in Winton North Carolina.

6. The Documents attached to this Second Amended Complaint as Exhibits S1 and S2 are Commissary Sales Sheets from the commissary at the BOP prison in Butner North Carolina, and the commissary at the GEO/Rivers Private prison in Winton North Carolina. These are true and correct copies of these commissary sales sheets.

7. The document attached to this Second Amended Complaint as Exhibit T, is a true and correct copy of the reply I received from Rivers Correctional Institution stating that Rivers Private prison is not obligated to provide Electronic Mail for the inmate population in accordance with the Statement of Work in the Contract they signed with the Federal Bureau of Prisons. The The reply was in respone to a Step 1 administrative remedy I filed requesting email access in accordance with the contract and BOP policy.

8. There are significant, qualitative and substantial differences between the treatment I received at this private prison as compared with the treatment I received while I was incarcerated in the BOP facilities for over 17 years of imprisonment. I am unable to receive visits from my family and friends who live in South Florida. I am also subjected to the harmful effects of Second Smoke here at this Private prison, because tobacco is sold in the commissary and smoking is prevalent both outside and

EXHIBIT - B

inside the units. There is absolutely no way to avoid coming in contact Second Hand Smoke on a daily basis. The designated smoking areas are only a few feet from the main entrance gates to the housing units. The Second hand Smoke irritates my eyes, nose and exacerbates my allergies. As opposed to being incarcerated at the non-smoking BOP prisons, there is an increased risk of me getting lung or heart disease from breathing in excessive amounts of Second hand Smoke here at this Rivers private prison.

I declare that the above declaration are true and correct to the best of my beliefs and knowledge under the penalty of perjury pursuant to 28 U.S.C. 1746.

DATED: July 27, 2009.

Dale Brown
29087-004
Rivers Correctional Institution
P.O. Box 630
Winton, NC 27986

EXHIBIT - B

Administrative Remedy
Step 2 – Response

Date Filed: 05 -19 -2009 Remedy ID No. 09-079

Inmate Name: Dale, Brown Reg# 29087-004

This is in response to your Step 2 Administrative Remedy dated 05/18/09, in which you are appealing the Step 1 administrative remedy response. Specifically, you are requesting a transfer to be closer to your family and friends residing in the State of Florida.

After reviewing your concerns the following has been determined, as indicated in the Step 1 response, you may be considered for a nearer release transfer only after serving 18 consecutive months with clear conduct in a general population. Per your request, your primary concern is to be transferred to a facility closer to your family and friends. This issue was appropriately addressed by the Assistant Warden at the Step 1 level.

The Step 1 response was accurate and was in no violation of any procedures.

After a thorough review of the circumstances pertaining to your requested Administrative Remedy, we find that there is no evidence to support your grievance. Based on the above information and facts, your request for Step 2 Administrative Remedy is denied.

You have exhausted all your Administrative Remedies at this level.

5-27-09
Date

George E. Snyder, Warden

Exhibit B-1, P. 1/3

The GEO Group, Inc.

Correctional Programs
Administrative Remedies

Rivers Correctional Institution
Step 2 Administrative Remedy Form
Paso 2 Forma De Remedio Administrativo

Admin Coordinator
MAY 19 2009
DATE RECEIVED

Name: DALE BROWN Nombre:	Number: 29087-004 Numero:
Date: May 18, 2009 Fecha:	Housing Assignment: A5 Unidad Asignada:

For Official Use Only - Para Uso Oficial Solamente

Date Received:	Remedy #:	Date Due:
05-19-09	09-079	06-26-09

Complaint - Reclamo

Describe your complaint in the section below. Be as concise as possible, but be sure to include enough identifying data to assist in a through investigation (e.g. dates, names, locations, times, etc...) Attach one (1) additional page if necessary and the Informal Resolution Form and Step 1 response with any other supporting documentation.

Describa su telaino en la seccion de abajo. Dea lo mas breve posible, pero asegurese de incluir suficiente informacion para asistir en una completa investigacion (pe.. Fechas, nombres, ubicaciones, tiempos, etc...) Agregue una página si es necesario.

COMPLAINT: I am requesting that I be placed for a transfer closer to my legal residence in florida in order to be closer to family and friends. I have had clear conduct in a general population for 18 **years.** Due to the immigration detainer, I was moved to this facility and told that under BOP regulations, I would not be approved for this sort of transfer. This BOP policy (PS 5100.07, Chapter 7) violates the Constitution. It denies me the same rights and privileges given toU.S. citizens even though I am a Legal permanent Resident. The policy arbitrarily states that I will be deported as grounds to deny me placement closer to my legal residence. This conclusion is not the realm of the BOP but rather, the realm of the immigration judge and until the immigration judge makes this determination, the BOP's actions are illegal and an impermissible intrusion upon my rights to have this determination made only by an immigr. judge.

REPLY TO THE STEP ONE RESPONSE: The Step One reply is not responsive to my grievance requests. First, I requested that I be notified that the immigration detainer will not be used against me for consideration for a nearer to legal residence transfer. The Step One completely ignores this aspect of my requested relief. Thus, it appears that by omission, this institution will continue to use BOP PS 5100.07, Chpater 7's prohibition of nearer to legal residence transfers for immigration detainer inmates agsint me. Secondly, the Step One reply states that I will not be submitted for this transfer until serving 18 months clear conduct at this institution. The BOP policy does not state that the 18 months clear conduct must be served at one institution but rather, states taht it has to be 18 consecutive months of clear conduct in a general population thereby allowing the 18 months to be served at more than one institution as long as there are 18 months consecutive of clear conduct. The interpretation taken by RCI would allow transfers far from my family before each 18 month term and permit a re-starting of the clock thereby ensuring that I can never attain 18 months consecutively of clear conduct at one institution.

Dale Brown
Inmate Signature

SEE ATTACHED SHEET FOR CONTINUATION

Exhibit B-1 P. 2/3

STEP TWO CONTINUATION

REQUESTED RELIEF:

1. I have 18 years of clear conduct consecutively. This clearly is above and beyond the 18 mohths required by BOP policy. I am eligible to receive the nearer to legal residence trasnfer and I am requesting that it be submitted at this time.

2. The request for relief in Step One about providing me a memo or other written notification that the langauge of PS 5100.07, Chpater 7 which prohibits inmates with an immigration detainer from being eligible for nearer to legal residence/release transfers will not be used against me to deny me such a transfer was not addressed and I request that this memo or other written notification be provided in this Step Two request.

(2)

Exhibit B-1, p. 3/3

The GEO Group, Inc.
Rivers Correctional Institution

Date: July 10, 2009

To: Dale Brown
Reg. No. 29087-004

From: S. Rowe
AWP Secretary
Administrative Remedy Clerk

Subject: Administrative Remedy Process

Remedy No: 09-131

This is in response to your Step 1 Administrative Remedy dated July 9, 2009 and filed July 10, 2009. This issue has been previously addressed on Remedy #09-079. You signed a receipt for Remedy #09-079 Step 1 on 05-18-09 and Remedy #09-079 Step 2 on 05-29-09. Please see the attachments. Therefore, you have exhausted all of your Administrative Remedies at this level pertaining to this particular issue.

Your Step 1 Administrative Remedy is being returned due to being previously addressed on Remedy #09-079 and being exhausted.

If you have any questions or concerns, please contact RCI's Administrative Remedy Clerk.

EXHIBIT-B2
Page 1 OF 13

GEO

Correctional Programs
Administrative Remedies

Rivers Correctional Institution
Step 1 Administrative Remedy Form
Paso 1 Forma De Remedio Administrativo

Admin Coordinator
JUL 10 2009
DATE RECEIVED

Name: DALE BROWN	Number: 29087-004
Date: 07/09/2009	Housing Assignment: A5

For Official Use Only - Para Uso Oficial Solamente

Date Received:	Remedy #:	Date Due:
7-10-09	09-131	Returned

Complaint - Reclamo

Describe your complaint in the section below. Be as concise as possible, but be sure to include enough identifying data to assist in a thorough investigation (e.g. dates, names, locations, times, etc...). Attach one (1) additional page if necessary and the Informal Resolution Form with any other supporting document(s).

Describa su telaino en la seccion de abajo. Dea lo mas breve posible, pero asegurese de incluir suficiente informacion para asistir en una completa investigacion (pe.. Fechas, nombres, ubicaciones, tiempos, etc...) Agregue una pagina si es necesario.

VIOLATION OF EQUAL PROTECTION AND OTHER LAWS IN CLASSIFICATION AND TRANSFER OF A CERTAIN CLASS OF LEGAL PERMANENT RESIDENTS WHO ARE NON-CITIZENS OF THE UNITED STATES.

COMPLAINT: THE B.O.P. POLICY THAT SINGLES OUT NON-CITIZENS OF THE U.S.A. FOR PLACEMENT IN PRIVATE PRISONS, SUBJECTING THEM TO HIGHER COSTS, WHICH ARE HIDDEN FEES TO SUPPORT THE B.O.P.'S COST OF INCARCERATION, AND REDUCED OPPORTUNITIES FOR PROGRAMMING AND DENIAL OF NEARER TO LEGAL RESIDENCE TRANSFERS ARE ALL VIOLATIONS OF MY RIGHTS AND PRIVILEGES.

I am legal permanent resident of the USA, and I intend to apply for a discretionary waiver of deportation upon completion of my sentence. There is a strong likelihood that I will not get deported. B.O.P instituted a policy where they lump illegal and legal residents together, designate them to private prisons without making individual assessments based on 18 USC 3621(b) five factor criteria. B.O.P. has pre-determined that all criminal aliens will be deported. The BOP makes no distinction between legal aliens who are qualified for a waiver of deportation as opposed to illegal aliens who are not qualified when they make their decision to classify and designate aliens. The BOP policies deny me; (1) nearer to legal residence transfer; (2) camp placement; (3) 12 month sentence reduction for the drug program; (4) 12 month RRC placement under Second Chance Act; (5) Pre-release Preparation; (6) half-way house placement. All these denials are based on the fact that I am not a US Citizen, and The BOP's predetermination and conclusion that all aliens will be deported. The BOP designated me to this private prison, effectively denying me the opportunity to be close to my family. I cannot get any visits like I used to when I was housed in Florida. I cannot maintain strong family and community ties as BOP policy requires. There are no UNICOR here to help me maintain my job skills. There is no TRULINCS email system at this prison like in the BOP facilities to keep in touch with my family. I am subjected to higher commissary and telephone prices. I contend that the BOP actions singling me out as a non-US Citizen violates the equal protection clause and other laws. The BOP makes its classification and designation in an arbitrary and capricious manner and is an abuse of discretion and is discriminatory. **I ask that the B.O.P. cease to discriminate against me and offer me the same rights and privileges and programming as it does for U.S. citizens. I ask that the classification and designation not be done based on my nationality, but on an individual basis under law.**

Signature of Requester

(See Attached Sheet)

EXHIBIT-B2 PAGE 2 OF 13

DALE BROWN REG. NO: 29087-004 STEP 1 ADMINISTRATIVE REMEDY

7-9-09

PAGE (2)

1. I am, and have been a legal permanent resident of the United States since May 28, 1979.
2. At the time of my entry into the U.S.A., I was qualified for a discretionary waiver of deportation under Immigration Law, section 212(c) and 212(h) if I was convicted of a crime anytime after entry.
3. Immediately following my conviction in 1992, immigration commenced deportation proceedings by lodging Deatiner Notice of Action letter. I became subject to the authority of INS and to possible removal. The NOTICE OF ACTION stated that the B.O.P. should not be used to affect my classification, work and qaurters assignments or other treatment I would otherwise receive. I was still qualified for a 212(c) waiver, and that remains so to this day.
4. I am among a large class of legal permanent residents, whose continued residence in this country is dependent on our eligibility for 212(c) and 212(h) relief. A substantial percentage of our applications for such relief have been granted.
5. I intend to file for such discretionary waiver at the end of my sentence, and there is a strong likelihoood that it will be granted and I will stay in the USA and not get deported.
6. The BOP instituted a policy where they lump legal and illegal aliens together, and designate them to held in private prisons, without making individual assessments as required under 18 USC 3621(b) five criteria, and based on their determination that all criminal aliens will be deported. B.O.P. makes no distinction between legal aliens who are qualified for INS waivers as opposed to illegal aliens who are not qualified.
6. The B.O.P. instituted policies that deny aliens (1) Nearer to legal Residence Transfers; (2) Camp Placements; (3) One year off for completing the 500 hr Drug program; (4) Half-way Placements; (5) pre-release prepapration; (6) Second chance Act Pre-Release Placements. All these denials are based on the fact the B.O.P. determines that all aliens will be deported based on their nationality.
7. The B.O.P. cannot make the decision that I will be deported. That is a matter for immigration agency to decide.
8. The B.O.P. designated me to this private prison, effectively denying me the opportunity to be close to my family to maintain strong family and community ties. There are limited educational programs. There is no UNICOR to help me maintain my job skills. As an alien I am unable to continue my rehabilitation programs after completing over 18 years of incident free incarceration. There is no email at this private prison to communicate with my family. The TRULINCS program is not at this private prison.
9. Placement of NON-US CITIZENS in private prisons is designed to save money for the BOP by giving me less programming opportunities, and subjecting me to higher telephone and commissary prices.

I contend that the actions of the BOP in singling me out as a NON-US Citizen violates the equal protection clause and other laws. The BOP makes its decision to place me in this private prison in a discriminatory manner. The BOP did not evaluate my placement as required under 18 USC 3621(b), as it does with designating U.S. Citizens. BOP designated me to this private prison based on my nationality and used it as the primary distinguishing factor in making their designation and classification decision. The Code of federal regulations prohibits the BOP from making classification decisions on a discriminatory basis. The BOP policy which bans me, a legal permanent resident from nearer release transfer, camp placement, halfway house, pre-release placement under the second chance act, sentence reduction for drug program, is arbitray, capricious, abuse of discretion and violation of the laws and congressional intent.

I ask that the BOP policy cease to be implemented and I be afforded the same privileges, rights and rehabilitation opportunities as U.S. Citizen prisoners receive.

I am requesting to be transfered under the nearer to legal residence policy, to the BOP low security prison in Miami Florida to be closer to my family and friends and to continue my rehabilitation programs.

EXHIBIT-B2 PAGE 3OF 13

Administrative Remedy
Step 2 – Response

Date Filed: 05 -19 -2009 Remedy ID No. 09-079

Inmate Name: Dale, Brown Reg# 29087-004

This is in response to your Step 2 Administrative Remedy dated 05/18/09, in which you are appealing the Step 1 administrative remedy response. Specifically, you are requesting a transfer to be closer to your family and friends residing in the State of Florida.

After reviewing your concerns the following has been determined, as indicated in the Step 1 response, you may be considered for a nearer release transfer only after serving 18 consecutive months with clear conduct in a general population. Per your request, your primary concern is to be transferred to a facility closer to your family and friends. This issue was appropriately addressed by the Assistant Warden at the Step 1 level.

The Step 1 response was accurate and was in no violation of any procedures.

After a thorough review of the circumstances pertaining to your requested Administrative Remedy, we find that there is no evidence to support your grievance. Based on the above information and facts, your request for Step 2 Administrative Remedy is denied.

You have exhausted all your Administrative Remedies at this level.

6-22-09
Date

COPY

George E. Snyder, Warden

EXHIBIT-B2 PAGE 4 OF 13

09-079 CP

NEAR RELEASE TRANSFER

The GEO Group, Inc.

Correctional Programs
Administrative Remedies

Rivers Correctional Institution
Step 2 Administrative Remedy Form
Paso 2 Forma De Remedio Administrativo

Admin Coordinator
MAY 19 2009
DATE RECEIVED

Name: Nombre: DALE BROWN	Number: Numero: 29087-004
Date: Fecha: May 18, 2009	Housing Assignment: Unidad Asignada: A5

For Official Use Only - Para Uso Oficial Solamente

Date Received:	Remedy #:	Date Due:
05-19-09	09-079	06-26-09

Complaint - Reclamo

Describe your complaint in the section below. Be as concise as possible, but be sure to include enough identifying data to assist in a through investigation (e.g. dates, names, locations, times, etc...) Attach one (1) additional page if necessary and the Informal Resolution Form and Step 1 response with any other supporting documentation.

Describa su telaino en la seccion de abajo. Dea lo mas breve posible, pero asegurese de incluir suficiente informacion para asistir en una completa investigacion (pe.. Fechas, nombres, ubicaciones, tiempos, etc...) Agregue una pagina si es necesario.

COMPLAINT: I am requesting that I be placed for a transfer closer to my legal residence in florida in order to be closer to family and friends. I have had clear conduct in a general population for 18 years. Due to the immigration detainer, I was moved to this facility and told that under BOP regulations, I would not be approved for this sort of transfer. This BOP policy (PS 5100.07, Chapter 7) violates the Constitution. It denies me the same rights and privileges given toU.S. citizens even though I am a Legal permanent Resident. The policy arbitrarily states that I will be deported as grounds to deny me placement closer to my legal residence. This conclusion is not the realm of the BOP but rather, the realm of the immigration judge and until the immigration judge makes this determination, the BOP's actions are illegal and an impermissible intrusion upon my rights to have this determination made only by an immigr. judge.

REPLY TO THE STEP ONE RESPONSE: The Step One reply is not responsive to my grievance requests. First, I requested that I be notified that the immigration detainer will not be used against me for consideration for a nearer to legal residence transfer. The Step One completely ignores this aspect of my requested relief. Thus, it appears that by omission, this institution will continue to use BOP PS 5100.07, Chpater 7's prohibition of nearer to legal residence transfers for immigration detainer inmates agsint me. Secondly, the Step One reply states that I will not be submitted for this transfer until serving 18 months clear conduct at this institution. The BOP policy does not state that the 18 months clear conduct must be served at one institution but rather, states taht it has to be 18 consecutive months of clear conduct in a general population thereby allowing the 18 months to be served at more than one institution as long as there are 18 months consecutive of clear conduct. The interpretation taken by RCI would allow transfers far from my family before each 18 month term and permit a re-starting of the clock thereby ensuring that I can never attain 18 months consecutively of clear conduct at one institution.

Dale Brown
Inmate Signature

SEE ATTACHED SHEET FOR CONTINUATION

EXHIBIT-B2

STEP TWO CONTINUATION

SP2

REQUESTED RELIEF:

1. I have 18 years of clear conduct consecutively. This clearly is above and beyond the 18 mohths required by BOP policy. I am eligible to receive the nearer to legal residence trasnfer and I am requesting that it be submitted at this time.

2. The request for relief in Step One about providing me a memo or other written notification that the langauge of PS 5100.07, Chpater 7 which prohibits inmates with an immigration detainer from being eligible for nearer to legal residence/release transfers will not be used against me to deny me such a transfer was not addressed and I request that this memo or other written notification be provided in this Step Two request.

COPY

09-09

(2) EXHIBIT-B2 PAGE 6 OF 13

July 9, 2009

Dale Brown
#29087-004
Rivers Correctional Institution
P.O. Box 630
Winton, NC 27986

Federal Bureau of Prisons
Privatization Management Branch
Correctional Programs Division
320 First St. NW
Washington, DC 20534

RE: Appeal of Rejection of Administrative Remedy
Case Number: 545003-R1

I am hereby appealing your rejection of my administrative remedy on the following grounds:

1. There are no BP-9 request forms available at this private prison for the Warden's review and response.

2. This administrative request concerns classification and designation issues. The Administrative Remedy policy statement, 12.006(L), instructs inmates housed at this private prison to send their requests to the B.O.P. if the matter is related to designation and transfer issues.

Therefore, I am resubmitting my administrative remedy for your consideration.

Yours Respectfully,

Dale Brown

PS: Also enclosed, please find a separate Administrative Remedy Request with a separate issue relating classification and designation.

EXHIBIT-B2 PAGE 7 OF 13

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JUNE 30, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
PRIVATIZATION MGT. BRANCH

TO : DALE BROWN, 29087-004
RIVERS CI UNT: A QTR: A05-202L
P.O. BOX 840
WINTON, NC 27986

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 545003-R1 REGIONAL APPEAL
DATE RECEIVED : JUNE 29, 2009
SUBJECT 1 : TRANSFER FOR RELEASE DESTINATION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU MUST FIRST FILE A BP-9 REQUEST THROUGH THE INSTITUTION FOR THE WARDEN'S REVIEW AND RESPONSE BEFORE FILING AN APPEAL AT THIS LEVEL.

REJECT REASON 2: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 3: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

EXHIBIT B2 PAGE 8 OF 13

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From:	BROWN, DALE A.	29087-004	A5/202	06-23-2009
	LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL

VIOLATION OF EQUAL PROTECTION AND OTHER LAWS IN CLASSIFICATION AND TRANSFER OF CERTAIN CLASS OF LEGAL PERMANENT RESIDENTS, AND WHO ARE NON-U.S. CITIZENS.

COMPLAINT: THE BOP POLICY THAT SINGLES OUT A CERTAIN CLASS OF LEGAL PERMANENT RESIDENTS FOR PLACEMENT IN PRIVATE PRISONS, SUBJECTING THEM TO HIGHER COSTS WHICH ARE HIDDEN FEES TO SUPPORT THE BOP'S COST OF INCARCERATION, AND REDUCED OPPORTUNITIES FOR PROGRAMMING, DENIAL OF NEARER TO LEGAL RESIDENCE TRANSFERS, ARE ALL VIOLATIONS OF MY RIGHTS UNDER THE EQUAL PROTECTION CLAUSE AND FEDERAL REGULATIONS PROHIBITING THE USE OF NATIONAL ORIGIN IN TRANSFERS AND CLASSIFICATION DECISONS.

1. I am, and have been a legal permanent of the United States since May 28, 1979.
2. At the time of my legal entry into the U.S.A., I was qualified for a discretionary waiver of deportation under the Immigration and Nationality Act, Sections 212(c) and 212(h), if I was convicted of a crime after entry.
3. Immediately following my conviction in 1992, immigration commenced deportation proceedings by lodging a detainer against me, and at that time I became subject to the authority of the INS and to possible removal. At that time, I was still qualified for a 212(c) and a 212(h) discretionary waiver, and that remains so to this day.
4. I am among a large class of legal permanent residents whose continued residence in this country is dependent

(CONTINUED ON PAGE 2)

6/23/2009
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 545003-R1

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

EXHIBIT B2 PAGE 9 OF 13

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

ATTACHMENT TO ADMINISTRATIVE GRIEVANCE

on our eligibility for 212(c) and 212(h) relief, and not surprisingly, a substantial percentage of our applications for such discretionary relief has been granted.

5. In light of such facts, I intend to file for a discretionary waiver upon the completion of my sentence, and there is a strong likelihood that it will be granted due to my excellent prison record, family and community ties which are very strong, proof of excellent rehabilitation efforts, among other things.
6. The B.O.P. instituted a policy whereby they lump both legal and illegal aliens together and designate them to be housed in private prisons, on the erroneous basis that all immigrants will be deported.
7. The B.O.P. makes no distinction between the class of legal permanent residents like myself, who are qualified to obtain discretionary waivers to remain in this country, as opposed to illegal aliens and other legal aliens who are unable to qualify for such waivers.
8. The B.O.P. instituted Policy number P5100.08, Chapter 7, page 4, and deny me a NEARER TO LEGAL RESIDENCE TRANSFER, because they pre-determined that I will be deported like all other aliens.
9. The B.O.P. cannot make the decision that i will be deported. That is a matter for Immigration agency to decide.
10. I have been incarcerated for the past 18 years. I did 17 years in B.O.P. institutions and almost 1 year at this private prison.
11. I have maintained clear conduct throughout my incarceration. While in the BOP institution, I worked in UNICOR where I learned and maintained my job skills in preparation for my release. I saved up to $800 for my release prior to being transferred to this private prison. I had regular visits from my family and friends who live in Florida. I was able to attend college where I pursued a degree in business Administration. I participated in the numerous educational programs offered by the BOP institutions and i was an inmate tutor.
12. I was able to maintain communication on a regular basis with my family and friends through the email system (TRULINCS), at the BOP Coleman-Low institution in Florida.
13. Because of the BOP classification and predetermination that I will be deported based on my national origin and not being a U.S. citizens, I was deprived of my rehabilitation efforts, visitation and regular contacts when the BOP sent me to this private prison here in North Carolina.
14. Placement of NON-US citizens in private prisons is designed to save incarceration cost to the BOP by giving us less programming opportunities and subjecting us to higher telephone and commissary costs.. I have depleted all my savings since i arrived at this private institution. Inmates in the BOP pay a standard rate for phone calls, while I, a permanent resident, is subjected to a flat rate of $5.00 for a 15 minute domestic call. Keefe commissary items in the commissary are more expensive in this private prison that in the BOP run commissaries.
15. The TRULINCS email system is not available at this private institution, hence i am deprived of communicating regular communication with my relatives and friends, and unavailability of TRULINCS further deprives me of the right to send FOIA requests and inquiries to the BOP office electronically in light of the settlement in the case of sample v Federal Bureau of prisons. All these deprivations stem from BOP's determination that all aliens are to be housed in private prisons because they will be deported.

I contend that the actions of the BOP in singling me out as a non-US citizen violates the Equal Protection Clause. The BOP does not make decisions to place inmates in private prisons on a non-discriminatory basis in which all all inmates under its care and custody are evaluated for such placement, but makes this decison using national origing as the primary distinguishing factor. the use of national origin is also a violation of the regulations in the Code of federal regulations which prohibits the making of classification decisions by considering this factor. The BOP Policy which bans me from getiing a Nearer to legal residence transfer based on their determination that I will be deported is arbitrary and capricious, and even moreso, that I there is a strong likelihood that I will be granted a discretionary waiver of deportation and remain in this country.

I ask that this policy that singles me out for classification under much harsher conditions than those imposed on U.S. citizens cease to exist, and i be given the same consideration as given to U.S. citizens for placement without giving consideration to my national origin, and for legal permanent residents of my class who are eleigible to receive waivers and remain in this country. The BOp must cease to make the determination as to who will be deported. That is a matter for Immigration and the courts to consider and make final determination.

Finally, I am requesting to be transferred under the Nearer to legal residence policy, to the B.O.P. low security institution in Miami Florida to be closer to my relatives and friends and to continue my rehabilitation programs.

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

545003-R2

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From:	Brown, Dale A	29087-004	A5/202	R.C.I.
	LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL

I am appealing at this level because my BP-10 was rejected. The issue I raise in this administrative remedy is not appealable at this private prison, because it concerns matters of classification, designation and transfers. The crux of the complaint is that the BOP is in violation of the Equal Protection Clause and other laws, and unlawfully using national origin as the sole basis for classification, designation and transfer of non-US Citizens to private prisons. There are no BP-9 Forms available at this prison, and the Warden has indicated that the Classification and designation and transfer issues are only appealable to the BOP. This is clearly stated in the Rivers Correctional Institution Policy. (see RCI Policy 12.006, Section L, Page 6 of 8 attached). Hence, if this prison won't accept classification and transfer issues in this appeal, and the BOP is telling me that I have to appeal to this institution first, then I am left without an avenue to have this matter addressed and exhausted. Therefore, at this point, there is no administrative remedy available to me.

7/24/09.
DATE

Dale Brown
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

EXHIBIT-B2 PAGE 11 OF 13

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

BP-231(13)
JUNE 2002

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JULY 20, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
PRIVATIZATION MGT. BRANCH

TO : DALE BROWN, 29087-004
RIVERS CI UNT: A QTR: A05-202L
P.O. BOX 840
WINTON, NC 27986

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 545003-R2 REGIONAL APPEAL
DATE RECEIVED : JULY 17, 2009
SUBJECT 1 : TRANSFER FOR RELEASE DESTINATION
SUBJECT 2 :
INCIDENT RPT NO:
REJECT REASON 1: SEE REMARKS.

REMARKS : YOUR WERE INSTRUCTED TO COMPLETE THE ADMINISTRATIVE REMEDY PROCESS OR PROVIDE A COPY OF THE WARDEN'S RESPONSE TO YOUR BP-9. YOU DID NOT PROVIDE EVIDENCE OF EITHER ONE, THEREFORE YOUR RESUBMISSION IS REJECTED. YOU MAY APPEAL FURTHER TO **THE OFFICE OF GENERAL COUNSEL VIA A BP-11.**

EXHIBIT-B2 PAGE 12 OF 13

The inmate will be informed of the decision and reason in writing within forty (40) calendar days. The Coordinator will return the response to the inmate. Extensions of the forty (40) day period are authorized, if necessary, and the inmate will be notified in writing of any such extension. The staff member investigation the complaint must request the extension in writing to the Coordinator, and provide a valid reason for the request, prior to the forty (40) day deadline. Response from the Warden on the Step 2 form represents exhaustion of the ARP regarding RCI matters.

K. **Extensions**

Where the inmate demonstrates a valid reason for delay, an extension in filing may be allowed. In general, valid reason for delay means a situation which prevented the inmate from submitting the request within the established time frame. Valid reasons for delay include the following:

- An extended period in-transit during which the inmate was separated from documents needed to prepare the Request for Appeal.
- An extended period of time during which the inmate was physically incapable of preparing a Request for Appeal.
- An unusually long period taken for informal resolution attempts verified by staff.

L. **Appeal Procedures to the BOP**:

Grievances from inmates housed at RCI or events which occurred while at RCI may be appealed to the BOP only if they are in under one (1) of the following categories:

- DHO Sanctions,
- Designation,
- Transfer issues,
- Issues directly involving BOP staff, or which arose at a BOP facility.

All other requests will be returned to the inmate with an explanation.

M. **Sentence Computations**

ALL administrative remedies concerning sentence computation and sentence issues should be sent directly to:

Designation & Sentence Computation Center
Attn: Alpha Team
U.S. Armed Forces Reserve Complex
346 Marine Forces Drive
Grand Prairie, TX 75051

EXHIBIT-B2 PAGE 13 OF 13

REG NO: 29087-004 NAME: BROWN, DALE
RSP OF: RIV-RIVERS CI

FBI NO..: 15576NA3
INS NO..: 35964036
SSN.....: 140705095
DNA.....: NEED

DOB(AGE): 01-31-1965(44)
RACE....: BLACK
SEX.....: MALE
ETHNIC..: OTHER THAN HISP
HEIGHT..: 6 01
WEIGHT..: 175
HAIR....: BLACK
EYES....: BROWN
CMC.....: NO
MILEAGE.: 730 MILES

CITIZENSHIP....: JAMAICA
BIRTH PLACE....: JAMAICA
LEGAL RESIDENCE: 3236 NW 4TH ST
LAUDERDALE LAKE, FLORIDA 33309

G0005 TRANSACTION SUCCESSFULLY COMPLETED - CONTINUE PROCESSING IF DESIRED

B3

EXHIBIT-B3

U.S. Department of Homeland Security

Immigration Detainer – Notice of Action

Subject ID : 277070626
Event No: ALW0809000147
File No. A090 386 542
Date: September 22, 2008

TO: (Name and title of institution)	From: (Office address)
MOSHANNON VALLEY CORRECTIONAL 210 LOCH LOMAND RD PHILIPSBURG, PA 16866	ALLENWOOD, PA, PROCESSING CENTER P.O.BOX 209 WHITE DEER, PA 17887

Name of alien: PATSL, Kamalbhai Kantiglai AKA: PATEL, KAMAL (CONTINUED ON I-831) (does not file in Sentry) BOP# 56496-080 Pred- 11-29-2013
... (MISCELLANEOUS NUMBERS CONTINUED ON I-831)

Date of birth: 03/08/1969 Nationality: UNITED KINGDOM Sex: M

You are advised that the action noted below has been taken by the U.S. Department of Homeland Security concerning the above-named inmate of your institution:

☒ Investigation has been initiated to determine whether this person is subject to removal from the United States.

☐ A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____ (Date)

☐ A warrant of arrest in removal proceedings, a copy of which is attached, was served on _____ (Date)

☐ Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work, and quarters assignments, or other treatment which he or she would otherwise receive.

☒ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sunday's and Federal holidays) to provide adequate time for DHS to assume custody of the alien. You may notify DHS by calling 570-547-6903 during business hours or _____ after hours in an emergency.

☐ Please complete and sign the bottom block of the duplicate of this form and return it to this office. ☐ A self-addressed stamped envelope is enclosed for your convenience. ☐ Please return a signed copy via facsimile to _____ (Area code and facsimile number)

Return fax to the attention of _____, at _____ (Name of officer handling case) (Area code and phone number)

☒ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☒ Notify this office in the event of the inmate's death or transfer to another institution.

☐ Please cancel the detainer previously placed by this Office on _____

STEWART L. GINGERICH _____ SDDO
(Signature of Immigration Officer) (Title of Immigration Officer)

Receipt acknowledged:

Date of last conviction: _____ Latest conviction charge: _____

Estimated release date: _____

Signature and title of official: _____ 09/22/08

Form I-247 (Rev. 08/01/07)

EXHIBIT C

DETAINER

U.S. Department of Justice
Immigration & Naturalization Service

IMMIGRATION DETAINER-NOTICE OF ACTION
BY IMMIGRATION & NATURALIZATION SERVICE
OAKDALE, LOUISIANA

Date: August 6, 1993

To: Warden
Federal Correctional Institution
P.O. Box 5050
Oakdale, Louisiana 71463

From: U.S. Immigration Service
P.O. Box 5095
Oakdale, Louisiana 71463
Phone: (318) 335-4070
Ext: 251, 252, 253

NAME OF INMATE: DALE BROWN

INS FILE #: 35964036

BOP REG. #: 29087004

DATE OF BIRTH: January 31, 1965

SEX: Male NATIONALITY: JAMAICA

YOU ARE ADVISED THAT THE ACTION NOTED BELOW HAS BEEN TAKEN BY THIS SERVICE CONCERNING THE ABOVE-NAMED INMATE:

X — Investigation has been initiated to determine whether this inmate is subject to deportation from the United States.

IT IS REQUESTED THAT YOU:

X — Accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work, and quarters assignment or other treatment which he would otherwise receive.

X — Please ensure this inmate is immediately transferred to FCI, Oakdale, Louisiana when he is designated to OAK INS.

Jeannine Brady, IA

MCK — LOCATION

1/11/13 — PRD

DETAINER

Exhibit D

CORNELL COMPANIES, INC.

INMATE REQUEST TO A STAFF MEMBER
PETICION DEL PRESO PARA PERSONAL DE LA INSTITUCION

TO/PARA: MR Miller CAK MGC
(NAME AND TITLE OF OFFICER/NOMBRE Y TITULO DEL OFFICIAL)

SUBJECT: STATE, COMPLETELY, BUT BRIEFLY, THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE, AND WHAT YOU THINK SHOULD BE DONE. (GIVE DETAILS)
RAZON: ESCRIBA EL PROBLEMA, BREVEMENTE Y COMO USTED PIENSE QUE PODEMOS RESOLVERLO. (ESCRIBA CON DETALLES)

On my PSR; what does it list As my Legal residence

(USE OTHER SIDE OF PAGE IF MORE SPACE IS NEEDED.)
(USE EL OTRO LADO DE LA HOJA SI NECESITA MAS ESPACIO.)

NAME/NOMBRE: Kamal Patel No./Numero: 56496-08

CASE MANAGER/GERENTE: Miller DATE/FECHA: 4/16/09

WORK ASSIGNMENT/ASIGNACION DE TRABAJO: _____ UNIT/UNIDAD: Sky

BED ASSIGNMENT/NUMERO DE CAMA

NOTE: If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently. You will be interviewed, if necessary, in order to satisfactorily handle your request. Your failure to specifically state your problem may result in no action being taken.
NOTA: Si usted sigue las instrucciones en preparar su petición, puede estar contestada mas rápida y inteligentemente. Usted estará entrevistado, si necesario, para contestar su petición satisfactoriamente. Su negligencia en declarar su problema específicamente puede resultar en que no se tome ninguna acción.

DISPOSITION: (DO NOT WRITE IN THIS SPACE)
DATE/FECHA:
DISPOSICION: (NO ESCRIBA EN ESTE ESPACIO) 420 Oklahoma Blvd (Parcels) Alva Oklahoma 73717

IM-004 ATTACHMENT A

Officer/Official

Exhibit E

CURRENT OFFENSE. For classification purposes, the current offense is the most severe documented instant offense behavior regardless of the conviction offense.

CUSTODY CLASSIFICATION. The review process to assign a custody level based on an inmate's criminal history, instant offense, and institutional adjustment. A custody level (i.e., **COMMUNITY**, **OUT**, **IN**, and **MAXIMUM**) dictates the degree of staff supervision required for an individual inmate.

DESIGNATION. An order from the DSCC indicating the initial facility of confinement for an inmate.

DESIGNATION FACILITY (DFCL). Each of the separate missions within an institution for designation purposes. Each DFCL is shown as a separate line on the Population Report and has its own security level and destination (DST) assignment. Designations are made to a DFCL code rather than to a facility (FACL) code.

JUDGMENT. The official court document (e.g., Judgment and Commitment Order or Judgment in a Criminal Case) which is signed by the Judge. The Judgment contains the offense(s) for which the court imposes its sentence, which ordinarily includes a financial, confinement and supervision obligation.

HISTORY. The inmate's entire background of criminal convictions (excluding the current offense) and institutional disciplinary findings used to assess points related to his/her history of violence and/or history of escape.

IN CUSTODY. The second highest custody level assigned to an inmate which requires the second highest level of security and staff supervision. An inmate who has **IN** custody is assigned to regular quarters and is eligible for all regular work assignments and activities under a normal level of supervision. Inmates with **IN** custody are not eligible for work details or programs outside the institution's secure perimeter.

LEGAL RESIDENCE. The inmate's local and state address as reported by the United States Probation Office at the time of conviction.

LONG-TERM DETAINEE. A non-U.S. citizen (alien) who has:

- finished serving a local, state, or federal sentence;
- completed immigration proceedings that have resulted in an order of deportation, exclusion, or other means of

EXHIBIT F

(2) An inmate's transfer to a higher security institution could be triggered by an increase in custody needs. For example, a Medium security level inmate with IN custody becomes eligible for a custody increase. The team agrees to increase the custody to Maximum. Since Medium security level facilities are not authorized to house Maximum custody inmates, the inmate must be referred for transfer to a High security level institution and the MSL changed in accordance with the application of an MGTV.

2. **NEARER RELEASE TRANSFERS (Code 313).** Nearer release transfers move the inmate closer to their legal residence or release destination, consistent with their security level. Inmates may be considered for a nearer release transfer only after serving 18 consecutive months of clear conduct in a general population. Nearer release transfers should be incorporated with "Lesser Security" transfers whenever possible. Once the inmate has been transferred within 500 miles of his or her release residence, no further referrals will be made for nearer release transfer consideration.

Transfer to a facility in an area other than the inmate's legal residence or sentencing district may be considered by the inmate's Unit Team provided the inmate can provide strong evidence of community and/or family support. Institution staff should use sound correctional judgment when reviewing such requests for transfer to ensure the transfer is consistent with guidelines established in this chapter.

Inmates with an Order for Deportation, an Order of Removal, an ICE detainer for an unadjudicated offense(s) or an ICE detainer for a hearing will not be transferred for nearer release purposes since they will be returning to the community outside, rather than inside, the United States upon release.

3. **WITSEC TRANSFERS.** All movement of Witness Security cases is coordinated exclusively through the Inmate Monitoring Section of the Correctional Programs Branch, Central Office. Witness Security cases will not be transferred without authorization from that office. Witness Security inmates who require medical or mental health treatment at a medical center must also be approved by the Medical Designator.

If the inmate is classified as a WITSEC case, a copy of the medical referral will be sent simultaneously to the Inmate Monitoring Section (IMS) and the Medical Designator. The Inmate Monitoring Section will coordinate with the OMDT regarding an appropriate placement. Placement will be based on available medical resources, security needs, bed space availability, and

Exhibit G

6. **TRANSFER CODES.** The reason for transfer, as shown by one of the codes listed at the end of this chapter is to be visible on the original and each copy of the Transfer Order. When there is more than one reason for transfer, the most pertinent code is to be used. Note that all Unescorted Transfers are Discharge Code - FURL TRANS for Furlough Transfer.

7. **SPECIAL REQUIREMENTS.**

a. An inmate having a detainer or pending charge may be transferred to any institution for which he or she properly classifies; however, generally when there is a formally filed detainer, the inmate is not to be transferred to an institution more distant from the detaining authority unless there is substantial reason to believe the detainer will be dropped or the pending charge will not be prosecuted.

An inmate who indicates an intention to oppose extradition is not to be transferred within the last 30 calendar days prior to release to an institution in the state that placed the detainer. Such cases, and others in which there are legal or jurisdictional problems, are to be referred to the Regional Correctional Programs Administrator (See Program Statement entitled Detainers and the Interstate Agreement on Detainers).

b. When there is reason to transfer an inmate to a non-federal institution for concurrent service of federal and state sentences, the Warden shall refer the case to the Regional Director. Refer to the Program Statement, Transfer of a Prisoner to State Custody Prior to Release from the Federal Sentence, for procedures.

When an inmate is accepted by a non-federal institution for concurrent service of federal and state sentences, a Transfer Order will be prepared.

Transfer to a facility in an area other than the inmate's legal residence or sentencing district may be considered by the inmate's Unit Team provided the inmate can provide strong evidence of community and/or family support. Institution staff should use sound correctional judgment when reviewing such requests for transfer to ensure the transfer is consistent with guidelines established in this chapter. At the time of the Unit Team's recommendation for CCC placement, the Case Manager should submit release plans to the USPO if other than the sentencing district. A relocation acceptance letter should be included in the CCC referral packet.

8. **RELATIONSHIPS WITH OTHER AGENCIES.**

Exhibit H

§ 551.81 Manuscript preparation.

An inmate may prepare a manuscript for private use or for publication while in custody without staff approval. The inmate may use only non-work time to prepare a manuscript.

§ 551.82 Mailing inmate manuscripts.

An inmate may mail a manuscript as general correspondence, in accordance with part 540, subpart B of this chapter. An inmate may not circulate his manuscript within the institution.

§ 551.83 Limitations on an inmate's accumulation of manuscript material.

The Warden may limit, for housekeeping, fire-prevention, or security reasons, the amount of accumulated inmate manuscript material.

Subpart I—Non-Discrimination Toward Inmates

§ 551.90 Policy.

Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.

[63 FR 55774, Oct. 16, 1998]

Subpart J—Pretrial Inmates

SOURCE: 59 FR 60285, Nov. 22, 1994, unless otherwise noted.

§ 551.100 Purpose and scope.

In addition to convicted inmates, the Bureau of Prisons houses persons who have not been convicted. Procedures and practices required for the care, custody, and control of such inmates may differ from those established for convicted inmates. Pretrial inmates will be separated, to the extent practicable, from convicted inmates. Except as specified by this rule, policies and standards applicable to persons committed to the custody of the Attorney General or the Bureau of Prisons apply also to pretrial inmates as defined in § 551.101.

§ 551.101 Definitions.

(a) *Pretrial inmate.* For purpose of this rule, "pretrial inmate" means a person who is legally detained but for whom the Bureau of Prisons has not received notification of conviction. Thus, "pretrial inmate" ordinarily includes a person awaiting trial, being tried, or awaiting a verdict.

(1) *Civil contempt, deportable aliens, or material witnesses.* For purpose of this rule, an inmate committed for civil contempt, or as a deportable alien, or as a material witness is considered a pretrial inmate.

(2) *Mental evaluation or treatment.* An inmate committed under Title 18 U.S.C. Sections 4241 (b) and (d), 4242(a), or 4243(b) is considered to be a pretrial inmate, whereas commitments under Sections 4243(e), 4244, 4245 or 4246 are treated as convicted inmates.

(3) *Concurrent federal and state sentences.* For purpose of this rule, an inmate in a status described in paragraph (a) introductory text, (a)(1), or (a)(2) of this section and who is at the same time serving a state or federal sentence is not considered a pretrial inmate.

(b) *Convicted inmate.* For purposes of this rule, an individual a court has found guilty of an offense punishable by law.

§ 551.102 Commitment prior to arraignment.

On receipt of a U.S. Marshal remand, the Bureau of Prisons shall accept an individual who has not been arraigned for commitment as a pretrial inmate, provided that the institution has appropriate detention facilities available for that individual.

§ 551.103 Procedure for admission.

Staff in administrative institutions or institutions with administrative components housing U.S. Marshals' prisoners shall establish procedures for admitting a pretrial inmate which include, but are not limited to:

(a) Verification of commitment papers;

(b) Search of the inmate;

(c) Photographing and fingerprinting;

(d) Disposition of clothing and personal possessions;

(e) Intake screening (including Notice of Separation);

EXHIBIT I

(f) Providing ins
governing telepho
procedures for m
calls to an attorney

(g) Provisions fo
to include:

(1) Issue of person

(2) Issue of clean c

(3) Opportunity f
care;

(h) Orientation;

(i) Opportunity f
not to work;

(j) Assignment
housing unit.

§ 551.104 Housing.

To the extent prac
mates will be hous
convicted inmates.

§ 551.105 Custody.

(a) Staff ordinaril
pretrial inmate a
custody.

(b) Where circu
staff may supervise
according to proced
tody levels.

§ 551.106 Institution

Unless a pretrial
waiver of his or her
the Warden may no
mate to work in any
than housekeeping
mate's own cell and
living area.

§ 551.107 Pretrial in

Staff shall conduct
a pretrial inmate's st

(a) Each pretrial
scheduled for an init
unit team within 21
the inmate's first ar
tution, and subsequen
conducted at least

(b) The inmat
least 48 hours
scheduled revie

(c) A pretrial
attend these rev
fuses to appear, st
the record of the mee
refusal and, if known,
fusal.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Charles E. Forrester Jr., Petitioner	
v.	Case Number 06-1945 (HHK)
Thomas Christensen, et al. Defendants	

DECLARATION OF THOMAS CHRISTENSEN

In accordance with the provisions of 28 U.S.C. 1746, I, Thomas Christensen, do hereby make the following unsworn declaration, under penalty of perjury:

1. I, Thomas Christensen, am presently employed by the United States Department of Justice as a Secure Institution Manager. My office is located at the Rivers Correctional Institution in Winton, North Carolina. I have been employed by the Bureau of Prisons since June of 1991 and have held this position since December of 2002. The Rivers Correctional Institution (Rivers) is a private prison operated by GEO Group, Inc. to house offenders from the District of Columbia and criminal alien inmates. It is my primary responsibility to monitor the GEO Group, Inc. to ensure it remains in compliance with its various contractual obligations to the Bureau of Prisons.

2. As part of its rehabilitative agenda, Rivers offers a variety of educational and vocational programs to its inmate population. Those programs include but are not limited to Adult Basic Education, General Equivalent Diploma, Life Skills, Keyboarding, Computer Technology I and II, Woodworking, Workforce Transition, Corrections Learning Network, and Wheels for the World Program. Education staff can also assist inmates in obtaining funding for college-level or correspondance work.

Exhibt J 1/2

3. Inmates are informed of the vocational programs available to them through their Inmate Handbook (Rivers Inmate Handbook, pgs. 22-23).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 5th day of November 2007.

Thomas Christensen
Secure Institution Manager
Rivers Correctional Institution

Exhibit 5 2/2

AFFIDAVIT OF ALI ALGHAZALI

I state that my name is Ali Alghazali, that I am over the age of 18, and that I am competent to testify to the matters declared herein.

1. I state that I am currently incarcerated at the Rivers Correctional Institution, P.O. Box 630, Winton, NC 27986. Rivers Correctional Institute is a privately operated prison operated by Geo Group, Inc.

2. I state that I have no detainers against me. This was verified to me by my case manager at the prison, C. Harrell. Attachment One to this affidavit is a true and correct copy of the response I received from C. Harrell, Records clerk, at Rivers Correctional Institute in which it states in reply to my request, "You currently have no detainers." **Attachment One.**

3. I was born in Yemen. However, I am a Legal Permanent Resident of the United States. My Green Card Number is A46132649. I had no detainers pending against me at the time I was placed at Rivers Correctional Institute to serve my sentence.

4. Attachment 2 to this affidavit is a true and correct copy of a notice I received from Mr. John White, the Inmate Systems Managers, at Rivers Correctional Institute, who wrote to the immigration service (U.S. Immigration and Customs Enforcement) asking if they wished to place a detainer. this notice is dated March 31, 2009.

5. On July 16, 2009, Mr. John White sent me a second copy of a notice letter that he wrote to the U.S. Immigration and Customs enforcement Agency again asking them if they wished to place a detainer and notifying them in bold and all capital letters that this is **"SECOND AND FINAL REQUEST"**. Attachment 3 to this affidavit is a true and correct coy of this letter I received from Mr. John White.

6. Despite these repeated attempts by priosn officials at Rivers Correctional Institute to have a detainer lodged against me, there is no detainer against me. **Attachment One.**

7. I was told by my case manager when I asked about receiving a halfway house placement that I was at this prison because I was not a U.S. citizen and that I would not receive any halfway house placement. I have repeateedly protested this informing my case manager that I have no detainers and that I should be considered for halfway house. At the present time, I am still continuing to seek placement for a halfway house.

I state that the declarations made in this affidavit are true and correct to the best of my knowledge and beliefs under the penalty of perjury as provided in title 28, U.S.C. § 1746.

DATED: 7-24-09

Ali Alghazali

Ali Alghazali
BOP Reg. No. 34367-183
P.O. Box 630
Winton, NC 27986

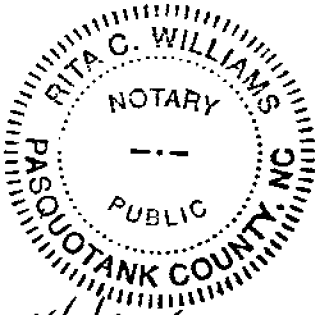
Exhibit K

AFFIDAVIT OF ALI ALBHAZALI
(Page 2 of 2)

NOTARY PUBLIC

The above inmate, Ali Alghazali, personally appeared before me, the undersigned Notary Public, in and of the State of North Carolina, and after presenting properproof of idnetification, personally swore to the contents and declarations made on Page 1 of this (2) page affidavit along with the (3) attachments.

SO SWORN AND SUBSCRIBED BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC, ON THIS THE 24th DAY OF JULY, 2009.



SEAL

NOTARY PUBLIC

My Commission Expires: 4/1/2014

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Mr. John White	DATE: 07-15-09
FROM: Ali-Alghazali	REGISTER NO.: 343-67-183
WORK ASSIGNMENT:	UNIT: C-5

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

I would like to find out, IF, I have a detainer. I would like to apply for the second chance act for the ~~hafe~~ half way House. ~~thank you~~

(Do not write below this line)

DISPOSITION:

You currently have no detainers Please see your case manager or counselor regarding the Second Chance Act.

Signature Staff Member	Date
C. Harvell, Records Clerk	July 16, 2009

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

K

BP-S394.058 DETAINER ACTION LETTER CDFRM
MAR '07
U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

To	Institution:
U.S. Immigration and Customs Enforcement ATTN: Dean Caputo, Deportation Officer Supervisor Ericka Duran, Deportation Officer 140 Centrewest Ct., St., 100 Cary, NC 27513	Rivers Correctional Institution 145 Parker's Fishery Road Winton, North Carolina 27986
	Date March 31, 2009

Case/Dkt#	Inmate's Name	Fed Reg No.	DOB/SEX/RACE
A 46132649	ALGHAZALI, ALI	34367-183	03-04-1983 M/W
Aliases:		Other No. FBI 715728WC2	

The below checked paragraph relates to the above named inmate:

☒ This office is in receipt of the following report: POSSIBLE DEPORTATION - YEMEN. It will you please investigate this report and advise what disposition, if any, has been made of this case. If subject is wanted by your department and you wish a detainer placed it will be necessary for you to forward a certified copy of your warrant to us along with a cover letter stating your desire to have it lodged as a detainer. If you have no further interest in the subject, please forward a letter indicating so.

☐ A detainer has been filed against this subject in your favor charging: _Release is ___; however, will notify you no later than 60 day prior to actual release. **To check on an inmate's location, you may call our National Locator Center at: 202-307-3126 or check our BOP Inmate locator Website at www.bop.gov**

☐ Enclosed is your detainer warrant. Your detainer against the above named has been removed in compliance with your request.

☐ Your detainer has been removed on the basis of the _ Notify this office immediately if you do not concur with this action.

☐ Your letter dated _____ requests notification prior to the release of the above named prisoner. Our records have been noted. Tentative release date at this time is _____.

☐ I am returning your _____ on the above named inmate who was committed to this institution on _____ to serve _____ for the offense of _____. If you wish your _____ filed as a detainer, please return it to us with a cover letter stating your desire to have it placed as a hold or indicate you have no further interest in the subject.

☐ Other:

☐ CC:

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
ATTN: DETAINER/INVESTIGATIONS
101 CONGRESS DR.
CHICAGO, ILL 60604

Sincerely,

John White,
Inmate Systems Manager

Original - Addressee, Copy - Judgment & Commitment File; Copy - Inmate; Copy - Central File (Section 1); Copy - Correctional Services Department
(This form may be replicated via WP)

(Replaces BP-394(58) dtd FEB 1994

C

K

BP-S394.058 DETAINER ACTION LETTER CDFRM
MAR 03

To U.S. Immigration and Customs Enforcement ATTN: Dean Caputo, Deportation Ofcr. Spvr. Ericka Duran, Deportation Officer 140 Centrewest Ct., Ste. 100 Cary, NC 27513	Institution: Rivers Correctional Institution 145 Parker's Fishery Road Winton, North Carolina 27986 Date July 16, 2009 ***SECOND AND FINAL REQUEST***

Case/Dkt#	Inmate's Name	Fed Reg No.	DOB/SEX/RACE
A# 46132649	**ALGHAZALI, ALI**	**34367-183**	**03-04-1983 M/W**

Aliases: **Ahmed Esmail Alghazali** **Ahmed E.M. Al Ghazali** **Ahmed E. Alghazali**	No. FBI # **715728WC2**

The below checked paragraph relates to the above named inmate:

X [redacted]

☐ A detainer has been filed against this subject in your favor charging:____Release is scheduled for _however, will notify you no later than **60 day** prior to actual release. **To check on an inmate's location, you may call our National Locator Center at: 202-307-3126 or check our BOP Inmate locator Website at www.bop.gov**

☐ Enclosed is your detainer warrant. Your detainer against the above named has been removed in compliance with your request.

☐ Your detainer has been removed on the basis of the _ Notify this office immediately if you do not concur with this action.

☐ Your letter dated _____ requests notification prior to the release of the above named prisoner. Our records have been noted. Tentative release date at this time is _____.

☐ I am returning your _____ on the above named inmate who was committed to this institution on _____ to serve _____ for the offense of ____ _____ . If you wish your _____ filed as a detainer, please return it to us with a cover letter stating your desire to have it placed as a hold or indicate you have no further interest in the subject.

☐ Other:

X CC:
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
ATTN: DETAINERS/INVESTIGATIONS
101 WEST CONGRESS PARKWAY
CHICAGO, IL 60605

Sincerely,

John White
Inmate Systems Manager

Original - Addressee, Copy - Judgment & Commitment File; Copy - Inmate; Copy - Central File (Section 1); Copy - Correctional Services Department
(This form may be replicated via WP) (Replaces BP-394(58) dtd FEB

K

AFFIDAVIT OF OSAM YAHYA

I state that my name is Osam Yahya, that I am over the age of 18, and that I am competent to testify to the matters declared herein.

1. I state that I am currently incarcerated at the Rivers Correctional Institution, P.O. Box 630, Winton, NC 27986.

2. I state that I have no detainer lodged against me by any federal or state agency to the best of my knowledge. Attachment One is a copy of Page 1 of the Program Review Report provided to me by my unit team at this prison which states "N" in the section to list detainers.

3. I was also told by my case manager, Mr. Alexander, as well as the Inmate Systems Manager, John White, that I do not have any immigration detainers lodged against me.

4. I received the documents attached to this affidavit from officials at this prison. Attachment 2 is a document dated April 10, 2009 from John White which jpurports to be a Detainer Action Letter authored by John White. This document seeks to notify the immigration agency to investigate my status within the United States.

5. I received Attachment 3 also from prison officials at this prison which is also a document titled "Detainer Action Letter" on a U.S. Department of Justice form but authored by John White which is dated July 9, 2009. This document also asks the immigration officials to investigate my status within the United States.

6. Attachment 4 is a fax sheet I obtained from prison officials which shows that Mr. Alexander, the case manager at Rivers Corr. Instit., submitted a fax to the immigratino officer advising her that there was a detainer action letter and asking if there would be a detainer lodged against me.

7. To the best of my knowledge, the detainer action letters I received were created by officials of Geo Group, Inc. at the Rivers Correctional Institute which formed the basis for these officials asking the immigration officials to investigate these detainer action letters for lodging a possible detainer.

8. Attachment 5 is a copy of a letter I received which is dated June 22, 2009 and which shows that Hillel Green, the U.S. Probation officer, had approved a pre-release plan for my release to the United States.

9. I am a Legal Permanent Resident of the United States. I was born in Yemen.

Exhibit L

1

10. I was told many times by various officials of Rivers Correctional Institute including Case Manager Alexander, Unit Manager Johnson, and ISM White that due to my status as an alien, I was not eligible for any halfway house placement. Even after I informed these officials I did not have any immigration detainers, as they themselves had verified to me, they continued to insist that I was not eligible for halfway house and attempted to convince the immigration services to lodge a detainer by submitting the multiple requests (Attachments 2, 3 & 4). It was only after I spoke to the supervisors including the Case Manager Coordinator at this prison that I was finally told that I would be submitted for halfway house placement. See Attachment 6.

11. I am a Legal Permanent Resident of the United States even though I am not a citizen. I was born in Yemen. I do not have any detainers lodged against me. My crime of convictin is a relatively minor crime involving trafficking in cigarettes. Despite these facts, I was placed at Rivers Correctional Institute, a private prison.

I state that the above declarations are true and correct to the best of my knowledge and beliefs under the penalty of perjury as provided by 28 U.S.C. Sectino 1746.

DATED:_____

_____
Osam Yahya #34394-183
P.O. Box 630
Winton, NC 27986

NOTARY PUBLIC

The above named inmate, Osam Yahya, personally appeared before me, the undersigned Notary Public in and of the State of North Carolina, and after presenting proper proof of identification, personally swore to the contents of this affidavit consisting of 2 pages with (6) attachments.

SO SWORN BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC, ON THIS THE ___ DAY OF JULY, 2009.

_____ _____
SEAL NOTARY PUBLIC

My Commission Expires_____

Exh. L

2

RIVAQ * PROGRAM REVIEW REPORT * 04-14-2009
PAGE 001 11:09:14

INSTITUTION: RIV RIVERS CI

NAME.....: YAHYA, OSAM REG. NO: 34394-183
RESIDENCE..: , YM

TYPE OF REVIEW.....: INITIAL CLASSIFICATION PROGRAM REVIEW
NEXT REVIEW DATE....: 07/09

PROJ. RELEASE DATE..: 02-04-2010 RELEASE METHOD.: GCT REL
PAROLE HEARING DATE.: NONE HEARING TYPE...: NONE

DATE OF NEXT CUSTODY REVIEW: ~~10/09~~ 10/09 DETAINERS (Y/N): N

CIM STATUS (Y/N)....: N IF YES, RECONCILED (Y/N): NA

PENDING CHARGES.....: None

OFFENDER IS SUBJECT TO NOTIFICATION UNDER 18 U.S.C. 4042(B) (Y/N)....: N

IF YES -- CIRCLE ONE - DRUG TRAFFICKING/CURRENT VIOLENCE/PAST VIOLENCE

CATEGORY	- - - - - - - -	CURRENT ASSIGNMENT - - - - - - - - -	EFF DATE	TIME
CMA	IHP PEND	IMMIG FUTURE IHP PART DATE	04-13-2009	1439
CMA	PROG RPT	NEXT PROGRESS REPORT DUE DATE	02-04-2010	1441
CMA	RPP INELIG	RELEASE PREP PGM INELIGIBLE	04-13-2009	1447
CMA	V94 COA913	V94 CURR OTHER ON/AFTER 91394	04-14-2009	1038
CUS	IN	IN CUSTODY	01-29-2009	1411
DRG	ED EXEM	DRUG EDUCATION EXEMPT	04-13-2009	1444
EDI	ESL HAS	ENGLISH PROFICIENT	04-09-2009	0953
EDI	GED EN	ENROLL GED NON-PROMOTABLE	04-09-2009	0953
FRP	PART	FINANC RESP-PARTICIPATES	04-10-2009	1512
LEV	LOW	SECURITY CLASSIFICATION LOW	01-29-2009	1519
MDS	NO F/S	NO FOOD SERVICE WORK	04-09-2009	1225
MDS	REG DUTY W	REGULAR DUTY W/MED RESTRICTION	04-09-2009	1225
QTR	Z01-201LAD	HOUSE Z/RANGE 01/BED 201L AD	04-09-2009	2358
RLG	NO PREFER	NO PREFERENCE	04-13-2009	1437
WRK	A&O PEND	ADMISSION & ORIENTATION PENDIN	04-09-2009	1356

WORK PERFORMANCE RATING: No work performance rating at this time.

INCIDENT REPORTS SINCE LAST PROGRAM REVIEW: N/A

Exh. L 3

BP-S394.058 DETAINER ACTION LETTER CDFRM
MAR 03
U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

To	Institution:
U.S. Immigration and Customs Enforcement ATTN: Dean Caputo, Deportation Officer Supervisor Ericka Duran, Deportation Officer 140 Centrewest Ct., St., 100 Cary, NC 27513	Rivers Correctional Institution 145 Parker's Fishery Road Winton, North Carolina 27986
	Date April 10, 2009

Case/Dkt#	Inmate's Name	Fed Reg No.	DOB/SEX/RACE
A# 055775494	YAHYA, OSAM	34394-183	09-25-1985 W/M/O
Aliases:		Other No. FBI# 866344WC5 SS# 090-92-0841 NY DL 972-562-827	

The below checked paragraph relates to the above named inmate:

☐ This office is in receipt of the following report: **POSSIBLE DEPORTATION - YEMEN**. Will you please investigate this report and advise what disposition, if any, has been made of the case. If subject is wanted by your department and you wish a detainer placed, it will be necessary for you to forward a certified copy of your warrant to us along with a cover letter stating your desire to have it lodged as a detainer. If you have no further interest in the subject, please forward a letter indicating so.

☐ A detainer has been filed against this subject in your favor charging: _Release is ; however, will notify you no later than 60 day prior to actual release. To check on an inmate's location, you may call our National Locator Center at: 202-307-3126 or check our BOP Inmate locator Website at www.bop.gov

☐ Enclosed is your detainer warrant. Your detainer against the above named has been removed in compliance with your request.

☐ Your detainer has been removed on the basis of the _ Notify this office immediately if you do not concur with this action.

☐ Your letter dated _____ requests notification prior to the release of the above named prisoner. Our records have been noted. Tentative release date at this time is _____.

☐ I am returning your _____ on the above named inmate who was committed to this institution on _____ to serve _____ for the offense of _____. If you wish your _____ filed as a detainer, please return it to us with a cover letter stating your desire to have it placed as a hold or indicate you have no further interest in the subject.

☐ Other:

☐ CC:

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
ATTN: DETAINERS/INVESTIGATIONS
101 CONGRESS WAY
CHICAGO, IL 60604

Sincerely,

John White,
Inmate Systems Manager

Original - Addressee, Copy - Judgment & Commitment File; Copy - Inmate; Copy - Central File (Section 1); Copy - Correctional Services Department
(This form may be replicated via WP) (Replaces BP-394(58) dtd FEB 1994

B

Exh. L

BP-S394.058 DETAINER ACTION LETTER CDFRM
MAR 03
U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

To	Institution:
U.S. Immigration and Customs Enforcement ATTN: Dean Caputo, Deportation Officer Supervisor Ericka Duran, Deportation Officer 140 Centrewest Ct., St., 100 Cary, NC 27513	Rivers Correctional Institution 145 Parker's Fishery Road Winton, North Carolina 27986 Date July 9, 2009

Case/Dkt#	Inmate's Name	Fed Reg No.	DOB/SEX/RACE
A# 055775494	YAHYA, OSAM	34394-183	09-25-1985 M/W/O

Aliases:	Other No.
SECOND AND FINAL REQUEST	FBI# 866344WC5 SS# 090-92-0841 NY DL 972-562-827

The below checked paragraph relates to the above named inmate:

☒ This office is in receipt of the following report: POSSIBLE DEPORTATION - YEMEN. Will you please investigate this report and advise what disposition, if any, has been made of the case. If subject is wanted by your department and you wish a detainer placed, it will be necessary for you to forward a certified copy of your warrant to us along with a cover letter stating your desire to have it lodged as a detainer. If you have no further interest in the subject, please forward a letter indicating so.

☐ A detainer has been filed against this subject in your favor charging: _ Release is ___; however, will notify you no later than **60 day** prior to actual release. **To check on an inmate's location, you may call our National Locator Center at: 202-307-3126 or check our BOP Inmate locator Website at** www.bop.gov

☐ Enclosed is your detainer warrant. Your detainer against the above named has been removed in compliance with your request.

☐ Your detainer has been removed on the basis of the _ Notify this office immediately if you do not concur with this action.

☐ Your letter dated _____ requests notification prior to the release of the above named prisoner. Our records have been noted. Tentative release date at this time is _____.

☐ I am returning your _____ on the above named inmate who was committed to this institution on _____ to serve _____ for the offense of _____ _____. If you wish your _____ filed as a detainer, please return it to us with a cover letter stating your desire to have it placed as a hold or indicate you have no further interest in the subject.

☐ Other:

☒ CC:

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
ATTN: DETAINERS/INVESTIGATIONS
101 CONGRESS WAY
CHICAGO, IL 60604

Sincerely,

John White,
Inmate Systems Manager

Original - Addressee, Copy - Judgment & Commitment File; Copy - Inmate; Copy - Central File (Section 1); Copy - Correctional Services Department
(This form may be replicated via WP) (Replaces BP-394(58) dtd FEB 1994

Exh. L

5

PS 5511.07
8/14/98
Attachment A

P-S148 70 **INMATE REQUEST TO STAFF** CDFPM
Oct. 1986
U.S. DEPARTMENT OF JUSTICE **Federal Bureau of Prisons**

TO: John white DATE: 7/7/09
(Name and Title of Staff Member)

FROM Osam Yahya REGISTER NO.: 34394183

WORK ASSIGNMENT: Kitchen UNIT: B2

SUBJECT [illegible] may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.]

Can you Please contct the Immigration about MY Detainar beacus I would LiK To have MY have way house

Thenk You

(Do not write below this line)

DISPOSITION:

See attached

John White 7/9/09

Exh. L 6

07/06/2009 16:06 FAX 2523585511 RCT_UNIT_B 001

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	3737
DESTINATION TEL #	919196788814
DESTINATION ID	
ST. TIME	07/06 16:05
TIME USE	00'36
PAGES SENT	2
RESULT	OK

GEO

FAX TRANSMITTAL

The GEO Group, Inc.
Rivers Correctional Institution
145 Parker's Fishery Road
P.O. Box 840
Winton, NC 27986

Date: July 6, 2009

From: Mr. J. Alexander,
Case Manager, Unit B (B-3 Caseload)

To: Ericka Duran, Deportation Officer

Phone: N/A

Phone: (252) 358-5200 ext. #3208

Fax: (919) 678-8814

Fax: (252) 358-5511

# of Pages (Including cover page): 2

Re: **Yahya, Osam #34394-183/PRD 34394-183 via GCT Release**

****

Comments: The above inmate has a detainer action letter for possible deportation to Yemen. His PSI states that he is a permanent resident of the United States. Please advise if there will be a detainer lodged against this inmate. Thanks.

Exh. L 7

UNITED STATES PROBATION
Eastern District of New York

Eileen Kelly
Chief U.S. Probation Officer

Andrew S. Bobbe
Sr. Deputy Chief U.S. Probation Officer

Michael J. Giatthaar
Deborah A. Donovan
Guillermo G. Figueroa
Deputy Chief U.S. Probation Officers

Reply to:

147 Pierrepont Street
Brooklyn, NY 11201-2712
Tel. No. (347) 534-3400
Fax No. (347) 534-3509

Branch Office:

United States Probation Department
202 Federal Plaza
P.O. Box 9012
Central Islip, NY 11722-9012
Tel. No. (631) 712-6300
Fax No. (631) 712-6395

June 22, 2009

FCI Rivers Correctional Institution
PO Box 840
Winton, NC 27986

Attention: Case Manager J. Alexander

RE: Yahya, Osam
Reg # 34394-183
SS#: 090-92-0841

APPROVAL OF PRE-RELEASE PLAN

Dear Case Manager Alexander,

Reference is made to pre-release plan sent to our office requesting that we investigate the above-named individual's plan to reside in our district.

On June 19, 2009, a home visit was conducted to the proposed residence of release at 144 Decatur Street. Gamil Kaasim, the offender's cousin related that he did not reside in the two bedroom apartment but that it was leased under the releasee's name and shared with another relative. The rent is $900 per month and taken out of the releasee's share of profits of the business he shares with Mr. Kaasim.

Based on the foregoing, we will accept supervision of the case.
If there are any questions, please contact the undersigned at (347) 534-3459.

Very truly yours,

Eileen Kelly
Chief U.S. Probation Officer

Hillel Greene
U.S. Probation Officer

Exh. L 8

BP-S434.073 COMMUNITY BASED PROGRAM AGREEMENT CCFRM
DEC 98
U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

I, Yahya, Osam, Register Number, 34394-183, hereby authorize employees of the Department of Justice and employees of any facility contracting with the Department of Justice to release any or all of the contents of information in my inmate central file to educational facilities, social agencies, prospective employees, etc., for the purpose of assisting in all phases of community programming and release planning. I also authorize the above persons to advise prospective employers that I am currently in the custody of the U.S. Attorney General serving sentence or under the supervision of the U.S. Parole Commission or U.S. Probation Office. This consent will remain in effect until my release from supervision or until revoked in writing by me. Revocation of this authorization may result in my removal from a community-based correctional program.

I understand that while a resident of a community corrections center or work release program I will be expected to contribute to the cost of my residence through payments to the contractor and I agree to make such payments. I understand that failure to make payments may result in my removal from a community-based program (Not applicable for MINT referrals).

I understand that urinalysis or other Bureau of Prisons authorized testing to detect unauthorized drug or alcohol use may be required as a condition of residence in a community corrections center or work release program, and if required, I agree to submit to such testing. I understand that ingestion of poppy seed products may result in positive test results for unauthorized drug use and is therefore prohibited.

I understand that I am expected to assume financial responsibility for my health care while a resident of a community-based correctional program. Should I be unable or unwilling to bear the cost of necessary medical care I understand that I may be transferred to a suitable institution or facility, at the Governments option, to receive such care. I understand that no medical care may be provided to me at Government expense without prior authorization of the Bureau of Prisons.

I understand that I may be required to cooperate with a substance abuse assessment and participate in any treatment recommended as a result of the assessment.

I understand that I may be required to abide by the conditions of supervision as imposed by the sentencing court or the U.S. Parole Commission, including the payments of fines and restitution and to follow the instructions of the probation officer as if on supervision.

I understand that upon arrival at the community corrections center I may be initially placed in the restrictive Community Corrections Component for a period of orientation. In this component, I will be expected to remain at the CCC unless authorized to leave for employment or other authorized program purposes. Additionally, I understand that social visits and recreational/leisure activities will be confined to the CCC.

I understand that while a resident of a community corrections center or work release program I will be required to abide by the rules and regulations promulgated by such program.

For MINT referrals, I understand that I or the guardian shall assume total financial responsibility for my child's care while I am a resident of a CCC. Should I or the guardian be unable or unwilling to bear my child's financial cost, I will be transferred back to my parent institution immediately. I understand that I understand that no financial support will be provided to my child by the Bureau of Prisons.

PART II

In the event that I am approved for home confinement, I agree to abide by the following conditions related to my legal participation in home confinement.

I understand that my participation in home confinement will be an alternative to placement in a CCC for no more than the last six months or 10% of my sentence, whichever is less. I am aware that I will legally remain in the custody of the Bureau of Prisons and/or the U.S. Attorney General and that failure to remain at the required locations may result in disciplinary action and/or prosecution for escape.

I agree to report to my assigned probation officer or the contractor's facility immediately upon reaching my release destination.

I understand that if I decline to participate in the recommended home confinement program I may face administrative reassignment out of the community corrections program.

I agree that during the home confinement period, I will remain at my place of residence, except for employment, unless I am given permission to do otherwise. I also understand that I will be required to pay the costs of the program based on my ability to pay.

I also agree to maintain a telephone at my place of residence without "call forwarding," a modem, "Caller ID" or portable cordless telephones for this period. I also agree that if my confinement is to be electronically monitored, I will wear any electronic monitoring device required, follow procedures specified and not have "call forwarding" on my telephone.

Inmate's Printed Name and Signature	Date
Osam, Yahya/Osam Yahya	7/17/09
Witness' Printed Name and Signature	Date
J. Alexander/	7/17/09

Record copy - CCM; Copy - CCM; Copy - Central File
(This form may be replicated via WP) Replaces BP-S434.073 dtd NOV 95

EXHIBIT 9

CONTRACT AWARD

PAGE 1 OF PAGES 181

1. CONTRACT NUMBER	2. EFFECTIVE DATE	3. SOLICITATION NUMBER	4. REQUISITION/PROJECT NUMBER
-005	See Block 15c	RFP PCC-0004	N/A

5. ISSUED BY	CODE	6. ADMINISTERED BY (If other than Item 5)	CODE
Federal Bureau of Prisons 320 First Street NW Room 500-6 Washington, DC 20534 Scott P. Stermer, Contracting Officer (OMB #1103-0018 EXP 02/28/01)	N/A	Same Block 5	N/A

ORIGINAL

7. NAME AND ADDRESS OF CONTRACTOR	CODE	8. PAYMENT WILL BE MADE BY
Wackenhut Corrections Corporation 4200 Wackenhut Drive Palm Beach Gardens, FL 33410		Federal Bureau of Prisons Mid-Atlantic Region Junction Business Park 10010 Junction Drive, Suite 100-N Annapolis Junction, MD 20701 Regional Comptroller

9A. DUNS NUMBER	9B. TAXPAYER'S IDENTIFICATION NO.	10. SUBMIT INVOICES (4 copies unless otherwise specified) TO
	(b)(4)	[X] ITEM 5 [ ] ITEM 6 [ ] ITEM 8 [ ] OTHER (Specify)

11. TABLE OF CONTENTS

(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
		PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES	
X	A	SOLICITATION/CONTRACT FORM	3	X	I	CONTRACT CLAUSES	11
X	B	SUPPLIES OR SERVICES AND PRICES/COSTS	4			PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
X	C	DESCRIPTION/SPECS./WORK STATEMENT	40	X	J	LIST OF ATTACHMENTS	96
X	D	PACKAGING AND MARKING	1			PART IV - REPRESENTATIONS AND INSTRUCTIONS	
X	E	INSPECTION AND ACCEPTANCE	4				
X	F	DELIVERIES OR PERFORMANCE	2	X	K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	14
X	G	CONTRACT ADMINISTRATION DATA	3		L	INSTRS., CONDS., AND NOTICES TO OFFERORS	
X	H	SPECIAL CONTRACT REQUIREMENTS	3		M	EVALUATION FACTORS FOR AWARD	

12. DESCRIPTION

Contractor-Owned and Contractor-Operated correctional facility for an estimated population of 1,200 low security male District of Columbia (D.C.) sentenced felons.

13. TOTAL AMOUNT OF CONTRACT ▶ $61,890,622.95 (FP010GT120M)

14. CONTRACTOR'S AGREEMENT. Contractor agrees to furnish and deliver the items or perform services to the extent stated in this document for the consideration stated. The rights and obligations of the parties to this contract shall be subject to and governed by this document and any documents attached or incorporated by reference.

[X] A. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN FOUR COPIES TO THE ISSUING OFFICE. (Check if applicable)

15. AWARD. The Government hereby accepts your offer on the solicitation identified in Item 3 above as reflected in this award document. The rights and obligations of the parties to this contract shall be subject to and governed by this document and any documents attached or incorporated by reference.

16. SIGNATURE OF PERSON AUTHORIZED TO SIGN	17. UNITED STATES OF AMERICA (Signature of Contracting Officer)
16C. NAME OF SIGNER Wayne A. Calabrese	
16D. TITLE OF SIGNER President	17B. NAME OF CONTRACTING OFFICER Scott P. Stermer, Contracting Officer
16E. DATE /22/2000	17C. DATE 3/7/2000

AUTHORIZED FOR LOCAL REPRODUCTION

OPTIONAL FORM 307 (9-97)
Prescribed by GSA - FAR (48 CFR 53.215-1(c)

Exhibit M 1/2

The system shall prevent inmates from calling any telephone number not included on the inmate's official telephone list. This list shall be generated within five working days of the inmate's arrival and contain up to 30 telephone numbers that the inmate is authorized to call via debit or collect procedures, except as otherwise authorized by the Warden for good cause.

The contractor shall ensure and document that any individual placed on an inmate's telephone list receives notice that they have been placed on such list. The notice shall advise the individual of the procedures for removal from the inmate's telephone list. The contractor shall ensure that the telephone numbers of an inmate's crime victim or victims are not included on the inmate's official telephone list. The contractor shall allow each inmate the opportunity to update their telephone list up to three times per month, except as otherwise authorized by the Warden for good cause.

If authorized to do so under applicable law, the contractor shall monitor and record inmate telephone conversations. If inmate telephone conversations can be monitored under applicable law, the contractor shall provide notice to inmates of the potential for monitoring. However, the contractor shall also provide procedures for inmates to be able to place unmonitored telephone calls to their attorneys of record.

Telephone rates shall not exceed the dominant carrier tariff rate and shall conform to all applicable Federal, state and local telephone regulations.

Any income received by the contractor from collect calls which is in excess of expenses incurred, to include refunds/rebates from carriers, shall offset the cost of this contract. The contractor shall provide the CO with copies of any contracts between the contractor and the inmate telephone system provider(s). The contractor shall provide the CO with all documentation in support of any agreement that the contractor has regarding income, refunds, rebates and other monetary or nonmonetary reimbursements involving the inmate telephone system. The contractor shall also provide the CO with copies of all invoices and other documentation of expenses incurred and income received in regards to the inmate telephone system with its monthly request for contract payment and apply the credit against the monthly payment. The CO shall also have total access to all telephone operation records.

Exhibit M 3/2

CORNELL COMPANIES, INC.

INMATE REQUEST TO A STAFF MEMBER
PETICION DE INTERNOS PARA UN MIEMBRO INSTITUCIONAL

TO/PARA: MR. Justa – Contract Specialist
(NAME AND TITLE OF OFFICER/NOMBRE Y TITULO DEL OFFICIAL)

SUBJECT: STATE, COMPLETELY, BUT BRIEFLY, THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE, AND WHAT YOU THINK SHOULD BE DONE. (GIVE DETAILS)
RAZON: ESTIPULE COMPLETO PERO BREVEMENTE EL PROBLEMA CON EL CUAL DESEA ASSISTANCIA Y LO QUE DEBE SER HECHO. (DAR DETALLES)

(1) Please provide me A copy of the contract between the BOP & Cornell. I believe there A serious breach or the BOP has entered into A contract in violation of public policy concerns.

(2) Religious violations are rampant here. No place to pray in unit, No muslim halal diet accommodation, Harassment during prayer on yard, no Shawwal fast & Sunni Fast accommodations

(USE OTHER SIDE OF PAGE IF MORE SPACE IS NEEDED.)
(USE EL ATRO LADO DE LA HOJA IS MAS ESPACIO ES NECESITADO.)

NAME/NOMBRE: Kamal Patel No./Numero: 56496-053

CASE MANAGER: Mr. Miller DATE: 10/16/07

WORK ASSIGNMENT/ASIGNACION DE TRABAJO: N/A UNIT/UNIDAD: A-2

NOTE: If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently. You will be interviewed, if necessary, in order to satisfactorily handle your request. Your failure to specifically state your problem may result in no action being taken.
NOTA: Si usted sigue las instrucciones en preparar su peticion, puede ser dispuesta mas rapida y inteligentemente. Usted sera entrevistado si es necesario para poder manejar su peticion satisfactoriamente. Su negligencia en declarar su problema especificamente puede resultar en que no se tome alguna accion.

DISPOSITION: (DO NOT WRITE IN THIS SPACE)
DATE/FECHA: 10-20-08

It appears your inquiry pertains to religious services and religious dietary laws. To save you the time in requesting a contract in which you would have to make a Freedom of Information Act request in order to obtain those documents, I would suggest you familiarize with the American Correctional Association Standards. This contract does not require the contractor to mirror the privileges that you may have has at your previous BOP facility. While there are specific BOP policies the contractor is mandated to follow, it does differ the contractor to follow ACA standards in relation to such issues as 'Religious Programs' and 'Food Service'. This contract requires Cornell Companies to obtain ACA Accreditation. and this has already been achieved at this facility.

Officer/Official

IM-004 ATTACHMENT A

Exhibit "N"

Rivers Correctional Institution



The GEO Group, Inc.

Inmate Handbook

Revised 05/16/08

Exhibit O, #1/2

There are several Intramural Leagues available. League Play is organized by the Recreational Specialist. These activities are made available to identified persons of interest. All inmates are encouraged to participate in these structured activities. For those inmates not interested in league play, there is unstructured leisure time activities scheduled. All of the activities generated through the Recreation Department will be posted on bulletin board.

RELIGIOUS SERVICES

Religious Services are designed to meet the religious needs of each inmate. Services, are provided by the Chaplain and volunteers. If you do not find your faith group represented, feel free to contact the Chaplain.

The Religious Services office provides scriptures, books, pamphlets, and other similar literature. The Chaplains can assist you in making proper arrangements to have religious items sent from a publishing or religious supply company. The library complements the books and periodicals which are available to all inmates. The primary function of the Religious Services staff and volunteers is pastoral care. Pastoral care may be for some difficult problems with which you may be struggling or simply getting an answer for some question about the unique nature of being in a correctional setting. The Chaplain and volunteers are more than willing to discuss your personal, family, or spiritual development problems. You are welcome to speak with the Chaplain to locate the most appropriate person with whom you can discuss your particular concerns.

You are not authorized to receive religious crosses and medallions from home. See the Chaplain concerning religious jewelry.

Inmates with specific religious dietary requirements should discuss their needs with the Chaplain.

Only authorized inmate groups may participate in group prayer or prayers outside the chapel and / or individual cells. Authorization for this must be received thru the Chaplain and Chief of Security. Individual prayer is allowed in the individuals cell and in the institution chapel.

Marriages

If you wish to be married while incarcerated, the Warden is the approving authority. You are responsible for any expenses. If an inmate requests permission to be married, the following criteria must be met:

- Inmate Request Form to your Unit Team indicating your desire to marry at RCI.
- Have a letter from the intended spouse which verifies her intention to marry him.
- Demonstrate legal eligibility to marry.
- Be mentally competent

The Chaplain and Psychologist are available to discuss this matter with you.

Exhibit O, p. 2/2

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) MAJOR, RIVERS C.I. (Mr. Stephenson)	DATE: May 6, 2009
FROM: Kamal K. Patel	REGISTER NO.: 56496-080
WORK ASSIGNMENT: F-S	UNIT: B2-116

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Currently, this prison has a regulation which prohibits Muslim inmates from praying in any area of the prison other than the individual cells and the chapel. The chapel is only open on two evenings for Muslim prayers leaving only the cells. Since I must make my prayers at certain times, can you reconsdier this policy so that I can pray in other areas of the prison. Thank you very much.

(Do not write below this line)

DISPOSITION: Those are the areas for prayer, per policy and will not be considered for change at this time.

Signature Staff Member

Date 051509

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

Exhibit P p1/2

33

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) CHAPLAIN BLEVINS	DATE: MAY 6, 2009
FROM: KAMAL K. PATEL	REGISTER NO.: 56496-080
WORK ASSIGNMENT: F/S	UNIT: B2-116-L

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Chaplain, this prison has regulations which prohibit Muslim inmates from praying in any area other than the individual cells or the chapel. Since the chapel is only open for Muslim prayers two evenings a week, this forces me to the cell prayer location only. Please reconsider this policy so that as a Muslim, I can pray in other areas such as the yard, library, and other locations within the prison. Thank you.

Also, can you provide me a memo authorizing me to make prayers in these other non-cell and non-chapel locations.

(Do not write below this line)

DISPOSITION:

Your request for a change in policy is denied

5/11/09

Exhibit P, P.2/2

OUTLINE FOR RELIGIOUS FAITH GROUPS
ISLAM (SECTION A)



The Shahada: ***La Ilaha Illa Allah; Muhammadur-Rasulullah.***

"There is no God but Allah; Muhammad is the messenger of Allah."

Another translation of this phrase is, "None has the right to be worshiped but Allah, and Muhammad is the Messenger of Allah." This phrase expresses the very kernel of the Islamic faith: the monotheism of the religion and Muhammad as the culmination of a long line of prophets. The final revelation from Allah came to the prophet Muhammad. This prayer is recited five times daily by 1.3 billion Muslims throughout the world.

1. RELIGIOUS PRACTICES

A. REQUIRED DAILY OBSERVANCES

It is incumbent upon Muslims to perform prayers five times daily:

1. Morning prayer (al-Fajr);
2. Noon Prayer (al-Zohr);
3. Afternoon Prayer (al-Asr);
4. Sunset Prayer (al-Maghrib); and,
5. After-sunset Prayer (al-Ashaa).

The time of the morning prayer begins when the dawn is bright and lasts until the sun brightens. The time of the noon prayer begins one minute after noon and ends when a shadow of an object is the exact length of the object. Afternoon prayer begins at that point, and concludes at sunset. The sunset prayer is directly after sunset until the colors in the horizon disappears, and the after-sunset prayer is from the time of the disappearance of color in the horizon until the beginning of morning prayer. While it is preferable to pray at the outset of each prayer time, the obligation to pray may be satisfied anytime during the prescribed times.

Exact prayer times for each locality are available from a variety of sources. An Imam or volunteer Muslim will be able to provide a schedule which states the beginning time of each prayer for a

Exhibit Q 1/3

specific geographical location. Web sites are also available which will print up accurate times to make the required prayers (for example, type "*Salat*" or "Muslim Prayers" in a search engine).

Ritual washing is required as well as a clean place where the prayer can be made. The purification must be total (*ghosl*) after coitus, semen emission and after cessation of menses. The ablution (*wudu*) is prescribed before all prayer. This includes: washing the hands three times; rinsing the mouth three times; cleaning the nostrils by sniffing water three times; washing the face from forehead to chin, and ear to ear, three times; washing the forearms to the elbow, three times; passing a wet hand over the whole head; and washing the feet up to the ankles three times. Ablutions may be performed in a designated place in the chapel, or in the housing unit. The place of ablution should be included in the Institution Supplement.

For the prayer itself, Muslims face Mecca on a clean surface (i. e., prayer rug, towel, mat, carpet, blanket or any other material that is kept clean and used only for this purpose), prostrate themselves before Allah in prayer as prescribed by religious law. These prayers can be made individually. In BOP institutions, these prayers are made during breaks at work, or in between classes at school. If an inmate is in the Special Housing Unit and a prayer rug is not permitted, an extra towel will suffice. Once the prayer has started, the inmate should be able to finish without interruption.

During certain times of the year, the evening prayer comes in around the institution's 4:00 PM stand-up count. It is suggested that the participants not begin their prayer after the unit count has been cleared, but rather wait until the institution count has been cleared in case of a recount in the unit. Remember, nothing interferes with an institution count.

Daily Prayers:

1. Inmates should have opportunity to pray five times daily.
2. Other than Jumu'ah, it is recommended that prayers be made individually or in very small groups (2 or 3 inmates) throughout the day.
3. Prayers can be made at work detail sites, school or units during break times.
4. This requires a clean area, prayer rug or clean towel to cover the floor.

The prayer involves four basic positions. The first position is standing erect, with hands beside the head, palms facing forward, and the individual says silently, or in a low voice, "*Allahu*

Akbar" (Allah is the most great). Then the opening *surah* of the Qur'an is recited. The second position is with back straight, the person bows forward from the hips and rests hands on knees, symbolizing Allah's power over the Muslim. Another phrase is recited. The third position is standing up again with arms at the side, repeats a phrase. Then the phrase *"Allahu Akbar"* is repeated and the person glides to his knees and touches his head to the floor as the act of surrender to the only One who really matters in the universe. Next, the individual gets to a sitting position, places hands on knees and repeats the phrase *"Allahu Akbar."* Upon completion, the individual rises and stands again. This whole procedure is known as *rak'a*. This process is repeated with the number of *rak'as* being dependent on the particular prayer made. Daily prayers can usually be completed in 5-10 minutes.

B. REQUIRED WEEKLY OBSERVANCE

Public congregate prayer, called Jumu'ah, is conducted by an Imam or his designee every Friday. This prayer service takes the place of the noon prayer and is said in congregation including a sermon (*Khutbah*) which can be on any aspect of the life of the Muslim community. The actual prayer consists of two *rak'as*. Before this prayer, as before all prayers, Muslims are required to perform ritual washing (ablution) as outlined in the Qur'an. A minimum of one hour should be set aside for the prayer. When participating inmates are placed on the Call-Out sheet for that day, be sure to schedule in enough time for the ritual ablution. The Muslims line up in rows in order to make the prayers. Only Muslims should be allowed in the prayer rows since there is a ceremonial prerequisite (a confession of the *Shahadah*) to participating in the prayer. Visitors form a separate line behind the Muslims. The two-part sermon can be heard by all without infringing on the sanctity of prayer.

Jumu'ah:

1. Set aside a minimum of one hour for prayer.
2. Allow additional time for inmates to perform ablution (*wudu*) in the chapel or the housing unit before the prayer starts.

C. REQUIRED OCCASIONAL OBSERVANCES

Accommodations may be made for the prayers during the Night of Power which happens on the odd nights during the last third of the month of Ramadhan. For a more complete explanation of the Night of Power, please refer to the section on Ramadhan. Inmates may have a prayer time scheduled later in the evening, but overnight prayer in the chapel is usually not accommodated.

Exhibit O 3/5

Rivers Correctional Institution

Date: May 13, 2009

To: Patel, Kamal
Reg #: 56496-080

This is in response to your Inmate Request to Staff received in the Warden's Office. You stated that you were denied a request to make unmonitored legal calls based on disciplinary sanctions from a prior institution. You are requesting that this issue be re-visited.

Your Unit Team will make arrangements for you to make a legal call through the inmate phone system for a duration of 48 hours. Inmates are not allowed in staff office areas unmonitored. Again, we encourage you to utilize the Inmate Legal Mail System for your legal correspondence.

5-13-09
Date

George Snyder
Warden

ORIGINAL

Exhibit "R" 1/2

PS 5511.07
8/14/98
Attachment A

P-S148.70 INMATE REQUEST TO STAFF CDFRM
Oct. 1986
U.S. DEPARTMENT OF JUSTICE Federal Bureau of Prisons

TO: Ms. Bowser DATE: 6/30/09
(Name and Title of Staff Member)

FROM Patel, K REGISTER NO. 56496-080

WORK ASSIGNMENT 44 UNIT B2

SUBJECT (Briefly [illegible] and the solution you are requesting. Continue on back, if necessary. Your failure to be [illegible] action being taken. If necessary, [illegible] in order to [illegible])

I need to make (2) legal calls. Phone minutes are exhausted, the calls must be confidential & unmonitored and I was charged extra 54 minutes this month causing 300 minutes to have wrongly been exhausted.

(1) Paresh Patel - Fed Pub Defender
301-344-0600
(2) ~~[illegible]~~ Doug Kingsberg - attorney
(Do not write below this line) 919-821-4711

DISPOSITION

Inmates are not allowed to make legal calls from the counselors office. If you are coming up on the docket for court within 1-2 weeks, then your attorney may call and set up a legal call with you. If you are not coming up on the docket within 1-2 weeks then the legal mail system is available. Any questions or concerns, come see me during open house.

Exh. R 2/2

COMMISSARY PRICES COMPARISON TABLE

No	DESCRIPTION OF ITEM	BOP PRICE	BOP ITEM #	GEO PRICE	GEO Item #	PRICE VARIANCE	% VARIANCE
1	Phone Call Local (Flat Rate)	$0.85	-	$1.70	-	$0.80	89%
2	Phone Call 1 minute/Long Distance	$0.23	-	$5.00	-	$4.77	2,074%
3	Photo Tickets	$1.00	1	$2.11	9997	$1.11	111%
4	AA Battery	$2.10	2	$3.75	1210	$1.65	79%
5	Sure Deodorant	$2.95	3	$3.75	144	$0.83	28%
6	Heritage Roll On	$1.45	4	$2.12	100	$0.67	46%
7	Magic Smooth Shave	$4.05	5	$4.68	321	$0.63	16%
8	Toothpaste (Colgate W/Bak Soda)	$2.65	6	$3.36	522	$0.71	27%
9	Petroleum Jelly	$1.60	7	$2.58	6770	$0.98	62%
10	Coco Butter Stick	$1.65	8	$2.19	216	$0.54	33%
11	Tide (Laundry Soap)	$5.90	9	$7.69	1463	$1.79	30%
12	Cereal Bowl With Lid	$0.65	10	$0.99	1400	$0.34	52%
13	Combination Lock	$6.00	11	$7.62	4972	$1.62	27%
14	Maxwell House Coffee	$2.65	12	$3.89	2017	$1.24	47%
15	Honey Bun(1)	$0.21/each	13	$0.99/each	3261	$0.78	371%
16	Butter Popcorn	$0.45	14	$0.75	6201	$0.30	67%
17	Snicker Candy Bar	$0.60	15	$0.97	4010	$0.37	62%
18	Starlight Mint	$0.60	16	$1.12	4145	$0.52	87%
19	White Rice	$0.95	17	$1.30	6050	$0.35	37%
20	Brown Rice	$0.95	18	$1.48	6051	$0.68	42%
21	Refried Beans	$1.65	19	$2.33	6710	$0.68	42%
22	Macaroni & Cheese	$0.60	20	$1.32	2664	$0.72	120%
23	Flour Tortilla	$1.05	21	$1.44	6600	$0.39	37%
24	Saltine Crackers(2)	$0.44	22	$0.64	3111	$0.20	45%

Exhibit S-1, p. 1 of 2

COMMISSARY PRICES COMPARISON TABLE

No	DESCRIPTION OF ITEM	BOP PRICE	BOP ITEM #	GEO PRICE	GEO Item #	PRICE VARIANCE	% VARIANCE
25	Mackerel Fillets	$1.15	23	$1.57	6178	$0.42	37%
26	Fish Steak W/Chillies	$0.95	24	$1.25	6190	$0.30	32%
27	Chicken Vienna Sausage	$1.70	25	$2.11	6647	$0.41	24%
28	Baby Clams	$1.85	26	$2.91	6183	$1.06	57%
29	Beef Summer Sausage	$1.60	27	$2.25	6770	$0.98	62%
30	Goya Sazon Seasoning	$1.45	28	$1.92	6663	$0.47	33%
31	Peanut Butter(3)/Per Ounce	$0.12	29	$0.21	6415	$0.09	75%
32	Grape Jelly(4) /Per ounce	$0.17	30	$0.29	6412	$0.12	71%
33	Ramen Chicken Soup	$0.30	31	$0.54	6000	$0.24	80%
34	T-Shirt (L)(XL)(2X)(3X)	$5.60	32	$7.80	4498	$2.20	40%
35	Milk of Magnesis	$2.45	33	$3.18	636	$0.73	30%
36	Maximum 300 calls/month (5)	$69.00		$1500.00		$1431.00	2074%

NOTES:

a) Footnote (1): HONEY BUN price in BOP is $1.29 for a pack of 6 / Price in GEO is $0.99 each.
b) Footnote (2): SALTINE price in BOP is $1.75 for a Box with (4) sleeves / Price in GEO is $0.64 for (1) sleeve.
c) Footnote (3): PEANUT BUTTER price in BOP is $2.20 for an 18 OZ jar / Price in GEO is $0.42 for a 2 OZ Condiment Size Packet
d) Footnote (4): GRAPE JELLY price in BOP is $2.05 for a 12 OZ Bottle / Price in GEO is $0.29 for a 1 OZ Condiment Size Packet.
e) BOP PRICE & ITEM #: Refer to EXHIBIT S-2 - Commissary Sales List for FCC Butner in North Carolina.
f) GEO PRICE & ITEM #: Refer to EXHIBIT S-3 - Commissary Sales List for GEO Rivers Correctional Institution in Winton North Carolina
g) PRICE VARIANCE: This is the difference in price between the GEO and the BOP for similar items sold in their commissaries.
h) % VARIANCE: This is the percentage difference in prices between GEO and BOP for similar items sold in their commissaries. (For example Line Item # 31 - PEANUT BUTTER is 75% higher in cost at GEO over the price in the BOP).

NOTE: All commissary items are supplied to the GEO and BOP commissaries by the KEEFE COMMISSARY GROUP.

i) Footnote (5): Inmates are permitted a maximum of 300 minutes per month. An inmate can face up to $1431.00 extra in costs at Geo Group, Inc.

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***** FCC BUTNER COMMISSARY SALES LIST *****

( ) REFERENCE BOP ITEM NUMBERS ON EXHIBIT S1 SPREADSHEET

INMATE NAME REGISTER NUMBER UNIT

VENDING CARD		$1.00
PHOTO TICKETS (1)		$1.00
STAMP'S		
Two Cent	**	$0.02
Twenty Four Cent	**	$0.24
Fourty One Cent	**	$0.41
Thirty Nine Cent Book	**	$8.20
Dollar	**	$1.00
RADIO'S / HEADPHONES		
Coby CX-9 Radio		$17.15
Sony SRF-M36FP Radio		$39.55
Koss Ear Buds		$6.10
Koss Porta Pro		$46.05
Koss KTX Headphones		$19.50
ELECTRONICS		
Norelco Beard Trimmer		$27.95
Advance Clear Clock		$9.35
Ironman Replacement Band		$6.25
Timex Ironman Watch		$36.15
Book Light Replacement Bulb		$1.85
Readers Light		$3.65
Casio Calculator		$16.80
BATTERIES		Limit 4
Panasonic AA Battery (2)		$2.10
Panasonic AAA Battery		$2.10
Watch Battery CR2016		$2.35
HAIR PRODUCTS		Limit 3
VO5 Shampoo		$1.75
VO5 Conditioner		$1.75
Head & Shoulders 6.8 oz.		$5.95
Suave 2 In 1		$2.35
Vent Hair Brush		$0.95
Ponytail Ties		$1.15
Do Rag - Black		$2.45
No Handle Brush		$2.05
Next 1 Styling Gel		$2.70
Sulpher 8 Shampoo		$3.90
Sulpher 8 Conditioner		$3.70
Royal Crown Hair Dressing		$1.85
Proline Hair Food		$2.55
Herbal African Pride		$6.30
Sports Wave Pomade		$3.50
Afro Pick		$0.75
Afro Comb		$0.85
DEODORANTS		Limit 2
Sure Deodorant (3)		$2.95
Heritage Roll On (4)		$1.45
Degree Extreme Blast		$3.45
Mennen Speed Aqua Sport		$2.40
SOAPS		Limit 2
Dial		$0.90
Dove Unscented		$1.75
Tone		$1.10
Ambi Complexion Bar		$2.20
Ambi Cocoa Butter		$2.20
Soap Dish		$0.65
SOAPS (3 & 4 pack)		Limit 1
Ivory 4-Bar Soap		$2.90
Irish Spring 3-pk w/ Aloe		$2.50
SHAVING PRODUCTS		Limit 2
Tracer FX Refills		$4.75
Mach 3 Razor Refills		$12.35
Triple Protection Razor		$4.80
Triple Protection Refills 4ct.		$3.40
Triple Protection Shave Cream		$1.95
Bic Twin Razor (10 Pack)		$2.15
Magic Shave Gold		$2.60
Magic Smooth (5)		$4.05
Alcohol Free Afta		$1.35
DENTAL HYGIENE ITEMS		Limit 3
Colgate Tarter Gel		$2.65
Colgate Regular 6.4 oz		$2.65
Colgate Baking Soda (6)		$2.65
Crest Tarter 6.4 oz.		$3.55
Angled Toothbrush Soft / Med.		$0.75
Toothbrush Holder		$0.45
Heritage Mouthwash		$2.25
Dental Floss Loops		$1.80

SKINCARE		Limit 4
Noxema Skin Cream		$2.00
Vaseline Total Moisture		$4.55
Skin Care Lotion With Aloe		$2.50
St. Ives		$5.60
Petroleum Jelly (7)		$1.60
Cocoa Butter Stick (8)		$1.65
HYGIENE ITEMS		Limit 4
Tweezers		$0.60
Toenail Clippers		$0.85
Fingernail Clippers		$0.40
Handkerchief		$0.75
Baby Powder		$1.85
New Day Cotton Swabs		$1.05
LAUNDRY PRODUCTS		Limit 2
Tide w/Bleach (9)		$5.90
Trend w/Bleach		$1.80
Downey Dryer Sheets		$3.70
MISCELLANEOUS ITEMS		Limit 6
Pilot Easy Pens Blue Black		$1.90
Playing Cards Poker		$1.55
Nylon Shaving Bag		$6.80
Ceramic Slip		$7.75
Sunglasses		$6.65
Reading Glasses #_____		$0.85
Safety Scissors		$6.45
Yellow Legal Pad		$1.35
Legal Envelope		$0.20
Wireless Notebook		$1.55
Address Book		$0.70
Penn 3-pk Racquetballs		$4.55
Tac-less Lift-off		$1.55
Brother B199 Typewriter Ribbon		$5.60
Max Lite Ear Plugs		$0.40
Grey Mess Roll Bag		$9.10
Hangers (Single)		$0.30
Cereal Bowl w/ Lid ✓ (10)		$0.65
Acrylic Mirror		$2.35
Rubbermaid Bowl		$4.45
Cutlery Set		$1.30
Cramer Squeeze Bottle		$2.95
1 Gallon Clear Thermal Jug		$7.50
16 oz. Clear Thermo Mug		$1.95
Tumbler Cup with Lid		$0.55
Combination Padlock (11)		$6.00
Sewing Kit		$1.90
COFFEE / TEA / SUGAR		Limit 4
Keefe Columbian		$2.85
Maxwell House (Select Roast) (12)		$2.65
Folgers Crystals		$6.30
Tasters Choice		$7.25
Caffeine Free Coffee		$3.30
Sugar (Bag)		$1.45
Splenda Sweetner		$3.00
Coffee Creamer		$1.80
Nestea Tea Bags		$4.20
DRINK MIX		Limit 4
Cappuccino	u	$1.55
Nestle Whipper Mix		$3.50
Carnation Dry Milk	u	$5.75
Tang		$1.95
White Rose Lemonaid		$2.55
White Rose Strawberry-Kiwi		$2.35
White Rose Passion Fruit		$2.40
INDIVIDUAL DRINK MIX		Limit 12
Lemon - Lime Gatorade		$0.85
Cystal Lite- Peach		$0.50
Cystal Lite- Orange		$0.50
Crystal Lite- Lemonade		$0.50
CAKES		Limit 4
Nutty Bars	k	$1.29
Oatmeal Cream Pies	k	$1.19
Honey Buns (6 pk) (13)		$1.29
Swiss Rolls		$1.19
COOKIES		Limit 3
Snack Legends Peanut Butter		$1.65
Chocolate Chip Cookies		$1.90
Snack Legend Vanilla Wafers	k	$1.98
Strawberry Poptarts		$1.75
Fig Bars	u	$1.50

SNACKS		Limit 3
Chocolate Chip Granola	k	$1.85
Oat & Honey Granola	k	$1.85
Peanut Butter Crackers	u	$1.15
Cheese on CheeseCrackers		$1.15
Vanilla Pudding		$1.85
NUTS		Limit 2
Salted Peanuts Bag		$1.95
Heavenly Trail		$2.80
Deluxe Nuts		$3.00
POPCORN		Limit 12
Butter Popcorn (14)		$0.45
Natural Popcorn		$0.40
CANDY		Limit 10
Hershey Bar Plain	u	$0.80
Reese Cups		$0.80
Butterscotch Buttons		$0.75
Milky Way	u	$0.80
Snickers (15)	u	$0.80
M & M Plain	u	$0.80
M & M Peanut	u	$0.80
Starlight Mints (16)		$0.80
Atomic Fireballs		$0.60
Now or Later		$0.75
Sugar Free Wild Fruit		$0.65
FRUIT ITEMS		Limit 4
Raisins	u	$1.95
Kosher Pickle	u	$0.80
Real Lemon Squeeze	u	$0.80
Spanish Olives	u	$1.40
CHIPS		Limit 6
Honey BBQ. Chips	*u	$1.00
Ripple Plain	*u	$1.00
Sour-Cream & Onion Chips	*u	$1.00
Thin Pretzels	*u	$1.00
UTZ Cheesier Nacho	*u	$1.00
C/A BBQ Corn Chips	*u	$2.10
C/A Round Tortillas		$2.00
RICE / BEANS / PASTA		Limit 15
Chili with Beans		$1.50
White Rice (17)		$0.95
Brown Rice (18)		$0.95
Refried Beans (19)		$1.65
Mac & Cheese (20)		$0.80
Marinara Sauce		$0.70
Flour Tortillas (6pk) (21)	k	$1.05
PIZZA KIT		Limit 3
Pizza Kit		$3.20
CRACKERS		Limit 3
Snack Crackers	k	$2.95
Saltine	u (22)	$1.75
Honey Graham		$1.30
CEREAL		Limit 3
Instant Rolled Oats	u	$1.75
MEATS & FISH		Limit 15
Jack Mackerel		$1.50
Mackerel (3.5oz) (23)		$1.15
Fish Steak w/ Chiles (24)		$0.95
Pink Salmon		$1.30
Chicken of the Sea Tuna 7oz	u	$1.80
Sweet Sue Chicken Breast		$3.35
Chicken Vienna Sausage (25)		$1.70
Baby Clams (26)		$1.85
Beef Summer Sausage 4.5oz (27)		$1.60
Turkey Summer Sausage		$1.60
Spam (Single Serve)		$1.45
Pepperoni Slices		$1.85
SEASONINGS		Limit 3
Adobo		$1.95
Italian		$1.20
Garlic Powder	u	$1.20
Mrs. Dash		$3.65
Goya Sazon (28)		$1.45
Salt & Pepper		$1.80

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CHEESE/PEANUT BUTTER/JELLY Limit 6

Velvetta Cheese Block	$2.75
Sharp Cheese Tub	$1.70
Jalapeno Cheese Tub	$1.70
String Cheese-6 pk	$2.65
Creamy Peanut Butter	$2.20
Grape Jelly	$2.05
Strawberry Preserves	$2.35

CONDIMENTS & SAUCES Limit 5

Picante Sauce	$1.90
Zapps Hot Sauce	$1.00
Chili Garlic Sauce	$1.95
C/A Nacho Wheels k	$1.90
Mayonnaise u	$2.80
Mustard u	$1.10
Ketchup u	$1.95
China Soy Sauce k	$1.50
Parmesan Cheese	$3.50
Honey Bear	$3.00

SOUPS Limit 24

Ramen Chicken	$0.30
Ramen Beef	$0.25
Ramen Hot & Spicy Vegetable	$0.25
Ramen Chili	$0.30
Ramen Shrimp	$0.25

SODAS Limit 12

Diet Pepsi *	$0.75
Mountain Dew *	$0.75
Coke *	$0.65
Dr. Pepper	$0.65
Diet Dr. Pepper	$0.65
Fanta Orange	$0.65
Pepsi *	$0.75

JUICES Limit 12

Minute Maid Orange Juice * k	$1.00
Hawaiian Punch Fruit Red *	$0.75
Minute Maid Apple Juice * k	$1.00

WATER Limit 24

Aqua Fina Water *	$0.75

ICE CREAM Limit 2

Pint: _____	$1.85
Pint: _____	$1.85
Specialty _____	$0.70

CLOTHING / SWEATS/SHOES

Sweat – Shirt M L XL 2X 3X 4X	$15.50
Sweat – Pants M L XL 2X 3X 4X	$18.85
Shower Shoes M / L / XL / 2X	$4.10
Athletic Supporter med lg xlg	$3.90
Fleece Shorts M L XL 2X	$14.30
Fleece Shorts 3X 4X 5X 6X	$18.85
Gray T – Shirt L XL 2X 3X	$5.60
Gray T – Shirt 4X 5X 6X	$9.10
54" Boot Lace	$1.10
Quarter Socks (3pk)	$4.25
Crew Socks (3pk)	$4.90
Mesh Shorts L XL	$15.60
Mesh Shorts 2X 3X	$16.90
Mesh Shorts 4X	$19.50
Briefs 32 34 36 38 40 42 44	$7.15
Boxer Briefs M LG XL	$8.35
Boxer Briefs 2X	$11.20
Black Shoe Polish (Paste Wax)	$2.25
Sneaker Saver (White Polish)	$3.45
Wool Gloves	$3.85
Greeting Cards	$1.65
Head Band	$1.95
Wrist Band	$1.95
White Baseball Hat	$3.85

RELIGIOUS HEADGEAR

Requires Chaplain Approval

Kufi	$5.69
Aztec Red Bandana	$1.59
Yamulka	$2.60
Rastafarian Crown	$6.84

RELIGIOUS OILS Limit 1

Name	$5.15

New or Last Chance Items

OTC MEDICAL / VITAMINS

Acetaminophen (Pain Reliever)	$2.25
Acne Treatment (Stridex Pads)	$4.25
Acne Treatment Cream	$2.40
Alum Hydroxide Liquid (Maalox)	$7.05
Alum. Hydroxide Tablet (Gaviscon)	$5.35
Analgesic Balm (Muscle Rub)	$2.15
Anesthetic Gel	$6.00
Antiacid Tablets (Tums)	$2.10
Antibiotic Ointment	$2.55
Arch Supports (Dr. Scholls)	$10.40
Artificial Tears	$2.15
Aspirin	$1.45
Benzoyl Peroxide Soap (Clearasil)	$4.10
Benzoyl Peroxide Cream	$2.35
Bug Repellent (Natrapel Plus)	$3.80
Calcium Tablets (Natural Calcium)	$2.60
Calamine Lotion	$1.40
Carbamide Peroxide (Debrox Ear Drops)	$2.10
Chlorpheniramine Maleate (Allergy Tab)	$1.50
Coal Tar Shampoo (T-Gel)	$6.00
Corn Pads (Dr. Scholl Corn Cushions)	$3.30
Cough Drops (Honey Lemon / Cherry)	$0.80
Dibucain Ointment	$2.05
Docusate	$1.70
Eye Drops	$2.10
Famotidine	$6.00
Guaifenesin Syrup (Cough Syrup)	$2.20
Hemorrhoid Ointment	$3.55
Hydrocortisone Cream	$1.50
Ibuprofen	$2.55
Fresh Foot Insoles	$2.25
Kaolin/Pectin Liquid (Kaopectate)	$4.55
Lac-Hydrin Lotion	$11.50
Lactase Enzyme Tablets (Lactaide Cap.)	$6.20
Loperamide	$1.70
Loratadine (Generic Claritin)	$1.65
Milk of Magnesia	$2.45
Naproxen Sodium (Aleve)	$5.60
Opeprazole (Prilosec)	$14.60
Psyllium Hydrophilic Mucilloid (Veg. Powder)	$5.10
Ranitidine (Zantac)	$4.25
Saline Nasal Spray	$1.80
Selenium Sulfide (Selsun Blue)	$9.35
Simethicone (Gas-X)	$7.30
Smoking Cess. (Nicoderm Patch)	$24.65
Terbinafine (Lamisil)	$13.65
Throat Lozenges (Cloraseptic)	$3.80
Tolnaftate (Anti-Fungal Cream)	$1.80
Tolnaftate (Foot Powder)	$2.45
Vitamin A & D Ointment	$2.15
Vitamin E (E400)	$3.50
Multi-Vitamin (Advanced Ultrex)	$3.90
Vitamin C (Mega C 500)	$2.80
Vitamin B (B-150)	$2.65
Garlic Tablets	$3.15
Band-Aids	$0.90
Vaseline Lip Theraphy	$1.40
Chapstick	$1.55
Blistex	$2.10
Vicks Inhaler	$6.60
Hygenic Cleansing Pads (TUCKS)	$6.60
Sensodyne Toothpaste	$6.20

Greeting Cards

English 5 Pack	$3.80
Spanish 5 Pack	$3.80

SPO For Pickup	
Shoe Order for Pickup	
Food Service Worker	

AM — Please circle whether you want to shop AM or PM — **PM**

Items marked with * Local Use Only

Items marked with ** do not Affect Spending Limit

Items marked with k or u Certified Food Items

Exhibit S-2 p. 2 of 2

RIVERS CORRECTIONAL

PRINT NAME _____ INMATE # _____ LIMIT $72.00

DATE OF BIRTH _____ CELL # _____

ITEM #	DESCRIPTION	PRICE
	** PERSONAL CARE PRODUCTS **	
30	S O SHAMPOO 7 5OZ	$4 58
44	SOFTEE COCONUT OIL COND 5 OZ	$3 08
52	AFRICAN PRIDE MAGIC GROW S 3 OZ	$2 16
56	MURRAY'S POMADE 4 OZ	$2 71
100	HERITAGE ROLL-ON DEODORANT 2 5 OZ	$2 12
102	POWER UP A/P DEOD EXTREME 2 5 OZ	$2 29
115	MENNEN A/P SPORT TALC STICK 3 OZ	$4 01
143	PROTEIN STYLING GEL 8 OZ	$2 73
144	SURE ANTI-PERSPIRANT 1 7	$3 78
201	NEW DAY BABY POWDER 15 OZ	$2 36
204	NEWDAY BABY OIL 14OZ	$3 25
214	NEXT1 COCOA BUTTER LOTION 15 OZ	$3 65
216	COCOA BUTTER STICK 1 OZ	$2 19
223	PETRO JELLY 7 5 OZ	$2 28
234	SUAVE ALOE VERA LOTION 10 OZ	$3 09
240	GREASELESS SKIN CREAM 4 OZ	$2 40
251	ATHLETES' FOOT CREAM 15 GRAMS	$1 85
270	CHAPSTICK REGULAR 15OZ	$1 76
305	TWIN BLADE DISPOSABLE RAZOR	$1 79
321	MAGIC SMOOTH SHAVE CREAM 6 OZ	$4 68
325	(10PK) BIC TWIN SELECT SHAVER	$2 41
329	CLEAR ALOE LOTION 8OZ	$2 07
340	PROTECTION SHAVE CREAM 7 OZ	$2 76
356	NEXT1 MAX BODY (HAIR) SHAMPOO 15 OZ	$2 88
356	NEXT1 MAX BODY (HAIR) COND 15 OZ	$2 88
357	NEXT1 DAILY MOIST SHAMPOO 15 OZ	$2 88
358	NEXT1 DAILY MOIST COND 15 OZ	$2 62
361	NEXT1 TOTAL CARE SHAMP & COND 15 OZ	$3 33
362	NEXT1 DANDRUFF SHAMPOO 15 OZ	$4 14
367	NEXT1 MAX STRENGTH LOTION 15 OZ	$3 84
368	PROTECTION TRIPLE BLADE RAZOR	$5 58
360	TRIPLE BLADE REPL CARTRIDGES 4 PK	$3 97
4644	BUMP STOPPER "REGULAR" 5 OZ	$3 67
392	DRAKKAR NOIR OIL 1 OZ	$4 83
402	LEVER 2000 SINGLE BAR SOAP 5 OZ	$1 98
410	IVORY BAR SOAP 3 1 OZ BAR	$0 72
420	JERGENS SINGLE BAR MILD SOAP 4 5 OZ	$0 74
490	HINGED SOAP DISH	$0 74
500	8 OZ MINT MOUTHWASH NON ALCOHOL	$1 78
522	COLGATE W/BAK SODA/PEROXD TOOTHPAST	$3 36
530	COOL WAVE TOOTHPASTE 4OZ	$1 88
535	SENSODYNE TOOTHPASTE	$7 62
540	UNWAXED DENTAL FLOSS 100 YARDS	$1 93
550	TEK (SOFT) TOOTHBRUSH	$0 69
551	TEK (MED) PRO TOOTHBRUSH	$0 69
580	TOOTHBRUSH HOLDER (TWO CLEAR PIECE)	$0 57
581	APAP (LIKE TYLENOL)	$0 63
583	IPRIN (LIKE ADVIL)	$0 49
595	EFFERGRIP CRM 2 5 OZ TUBE	$8 48
620	NEW DAY IBUPROFIN 200 MG 50 TABS	$2 89
635	MILK OF MAGNESIA 12 OZ	$3 18
640	TUMS 3PK -ROLL	$2 47
651	HEMORRHOIDAL OINTMENT 2 OZ	$3 03
662	ALLERGY TAB-CHLORP MALEATE 24 TABS	$1 73
671	CHERRY COUGH DROPS 30 CT BAG	$1 07
678	HONEY LEMON COUGH DROPS 20 COUNT	$1 07
881	1-DAY VITAMIN WITH IRON 90 CT	$2 91
685	C 500 MG 100 CT	$3 12
692	E 400 IU'S SOFTGELS 50 CT	$3 37
693	REGULAR EYE DROPS .5 OZ	$2 22
720	ANTI-FUNGAL POWDER 3 OZ	$2 89
750	NAIL CLIPPER NO FILE	$0 91
751	TOE NAIL CLIPPER NO FILE	$1 01
754	EMERY BOARDS 100/PK	$0 96
780	100 CT COTTON SWABS	$1 21
815	MILITARY HAIR BRUSH (NO HANDLE)	$3 18
828	1 00 POSTAGE STAMP	$1 00
855	BLACK TERRYCLOTH PONYTAIL HOLDER 1	$0 16
970	ACRYLIC MIRROR 6" X 4 5"	$2 90
1463	ULTRA 2 TIDE-16 LOADS - 26 OZ	$7 69
1474	ULTRA 2 TIDE 8 7OZ- 4 LOADS	$3 74
	** MISC. ITEMS & WRITING SUPPLIES **	
964	'THINKING OF YOU' CARD	$1 18
966	LOVE YOU CARD	$1 18
1013	50 CT BOXED ENVELOPES (#10 STANDARD)	$2 06
1015	NO CLASP ENVELOPS 9 1/2 X 12 5	$0 18
1049	ONE FIRST CLASS POSTAGE STAMP	$0 44
1050	BOOK OF TEN STAMPS	$4 40
4599	02 STAMP	$0 02
1060	8 1/2" X 11" WHITE 50 SHEET PAD W/LINES	$1 24
1077	#2 YELLOW PENCIL WITH ERASER	$0 18
1081	7" COLORED PENCILS (SET OF 12)	$3 04
1086	WEBSTER II POCKET DICTIONARY	$3 45
1089	BIC BLACK CRYSTAL PEN MEDIUM POINT	$0 54
1090	BIC BLUE CRYSTAL PEN MEDIUM POINT	$0 54
1100	BIRTHDAY CARD	$1 18
1101	JUVENILE BIRTHDAY CARD	$1 18
1102	BIRTHDAY CARD	$1 18
1115	ANNIVERSARY CARD	$1 18
1120	THANK YOU CARD	$1 18
1121	SEASONAL GREETING CARD	$1 18
1125	LG HARD COVER PHOTO ALBUM 24 PAGES	$3 38
1200	AAA IONT BATTERIES 4PK	$3 75
1210	AA IONT BATTERIES 4PK	$3 75
1231	KOSS PTX-9MTX-6	$13 71
1249	GPX CLEAR R2625CLR WALKMAN	$25 28
1271	CASIO F-28W-1 WATER RES WATCH	$17 47
1275	READING GLASSES 1 25	$8 54
1282	READING GLASSES 2 25	$8 54
1300	AVIATOR POKER PLAYING CARDS	$1 87
1400	CEREAL BOWL WITH LID	$0 99
1401	1 4 QT SERVIN ROUND DISH W/LID	$4 22
1412	INSULATED COFFEE MUG WITH LID	$1 69
1416	NESCAFE MUG 22OZ	$2 21
1422	CIGARETTE ROLLING MACHINE	$2 14
1976	READING GLASSES 1 50	$8 54
1977	READING GLASSES 2 0	$8 54
1978	READING GLASSES 2 5	$8 54
4567	PRIORITY MAIL STAMP	$4 80
1004	01 STAMP	$0 01
4791	TIMEX MEN'S 1440 SPORT WATCH	$25 93

ITEM #	DESCRIPTION	PRICE
	** MISC. ITEMS & WRITING SUPPLIES **	
4814	CASIO REPL BAND FOR F-28W-1	$7 56
4968	BIKE NEOPRENE ANKLE BRACE LARGE	$10 22
4972	MASTER LOCK COMBINATION LOCK-KEY	$7 92
5955	CONAIR CLEAR TRIMMER GM1700A	$21 64
6997	KOSS CLE CLEAR HEADPHONE	$10 96
7035	FLEXIBLE SPOON	$0 17
7065	SENTRY CLEAR FOLDING CALCULATOR	$10 95
7156	WATCH BATTERIES MDL #ECR2016	$3 68
7157	WATCH BATTERIES MDL #ECR2025	$3 77
7443	BIKE NEOPRENE KNEE BRACE MEDIUM	$10 02
8251	HEAD SWEATBAND	$2 35
8754	COTTON TWILL BASEBALL CAP GREY	$6 34
8272	SLEEK OVAL SUNGLASSES BLACK	$7 34
9997	PICTURE TICKET	$2 11
	** CLOTHING **	
1432	WASH CLOTH - BEIGE	$1 70
1440	BATH TOWEL BEIGE	$6 98
1462	XL WHITE VELCRO SLIP-ON SANDALS	$7 22
1537	ATHLETIC SUPPORTER LARGE	$6 04
1685	MENS WHITE BRIEFS 3/PK SMALL	$8 31
1686	MENS WHITE BRIEFS 3/PK MEDIUM	$8 31
1687	MENS WHITE BRIEFS 3/PK L (40)	$8 31
1688	MENS WHITE BRIEFS 3/PK XL(40 42)	$8 26
1689	MENS WHITE BRIEFS 3/PK 2XL(44-46)	$10 72
3821	THERMAL TOP - M	$6 42
3822	THERMAL TOP - L	$6 75
3823	THERMAL TOP- XL	$6 92
3824	THERMAL TOP-2XL	$9 01
3825	THERMAL TOP-3XL	$8 90
3826	THERMAL BOTTOMS - M	$6 42
3829	THERMAL BOTTOMS - L	$6 75
3830	THERMAL BOTTOMS -XL	$6 74
3832	THERMAL DRAWER-3XL	$9 01
3835	GREEN WAVE CAPS (DO RAG)	$2 74
3860	WHITE BOXER BRIEFS 2/PK SMALL	$10 09
3861	WHITE BOXER BRIEFS 2/PK MEDIUM	$10 09
3862	WHITE BOXER BRIEFS 2/PK LARGE	$10 03
3863	WHITE BOXER BRIEFS 2/PK XL	$12 61
3864	WHITE BOXER BRIEFS 2/PK 2XL	$13 05
4494	T-SHIRT- NO POCKET M KHAKI COLOR	$6 94
4495	T-SHIRT- NO POCKET L KHAKI COLOR	$6 94
4496	T-SHIRT - NO POCKET XL KHAKI COLOR	$6 94
4497	T-SHIRT - NO POCKET 2XL KHAKI COLOR	$7 22
4498	T-SHIRT - NO POCKET 3XL KHAKI COLOR	$7 80
4758	SWEATPANTS 4XL GREY	$19 86
5689	SWEATSHIRT 4XL GREY	$21 64
5911	SWEATPANTS M GREY	$17 10
5912	SWEATPANTS LRG GREY	$17 47
5913	SWEATPANTS XL GREY	$17 26
5914	SWEATPANTS 2XL GREY	$17 47
5915	SWEATPANTS 3XL GREY	$19 86
5916	SWEATSHIRT M GREY	$17 10
5917	SWEATSHIRT L GREY	$17 10
5918	SWEATSHIRT XL GREY	$17 47
5919	SWEATSHIRT 2XL GREY	$17 47
5920	SWEATSHIRT 3XL GREY	$21 64
6974	CREW SOCK-GREY HEEL/TOE 1 PAIR	$1 58
7323	MESH SHORTS - W DRAWSTRING GREY 2XL	$18 44
7324	MESH SHORT - W DRAWSTRING GREY 3XL	$18 44
7325	MESH SHORT - W DRAWSTRING GREY 4XL	$18 44
7946	SWEATPANTS - NO POCKETS 5XL GREY	$18 83
7947	SWEATPANTS - NO POCKETS 5XL GREY	$22 56
7949	SWEATSHIRT 5XL GREY	$23 57
8120	HANES TANK TOP T-SHIRT 3/PK S WHITE	$9 15
8121	HANES TANK TOP T-SHIRT 3/PK M WHITE	$9 15
8122	HANES TANK TOP T-SHIRT 3/PK L WHITE	$9 56
8123	HANES TANK-TOP T-SHIRT 3/P XL WHITE	$9 97
8124	HANES TANK-TOP T-SHIRT 3/P 2XL WHITE	$14 76
8125	HANES TANK-TOP T-SHIRT 3/P 3XL WHITE	$15 00
	** BEVERAGES **	
2006	TASTER'S CHOICE DECAF COFFEE PACKET	$0 19
2015	FREEZE DRIED COFFEE 3 OZ ZIP LOCK BAG	$3 77
2016	NESCAFE COFFEE 4OZ ZIP LOCK BAG	$3 79
2017	MAXWELL HOUSE COFFEE 4OZ ZIP LOCK	$3 89
2034	(100CT) TEA BAGS WITH TAG	$3 71
2048	NESTEA W/LEMON & SUGAR 11 OZ	$2 57
2070	SS HOT COCOA	$0 45
2080	SUGAR TWIN PACKET	$0 01
2081	SUGAR PACKET	$0 01
2082	SINGLE SERVE CREAMER PACKET	$0 09
2086	CARNATION MILK	$5 11
2200	SS ORANGE DRINK MIX	$0 21
2220	SS LEMONADE DRINK MIX	$0 21
2230	SS FRUIT PUNCH	$0 21
2233	APPLE JUICE 11 5 OZ	$0 92
2235	V 8 JUICE 11 5 OZ	$1 32
2238	CRANBERRY JUICE 11 5 OZ	$0 92
2355	SPRITE 20 OZ	$1 39
2380	20 OZ GRAPE MINUTE MAID	$2 06
2392	COKE 20 OZ	$1 39
2393	DIET COKE 20 OZ	$1 39
	** FOOD, CANDY & SNACKS **	
2630	BLACK BEANS 10 OZ POUCH	$1 80
2684	VELVEETA MACARONI & CHEESE 3 OZ	$1 32
2686	VELVEETA CHEESY RICE 2 OZ	$0 76
2687	VELVEETA SPICY CHEESY RICE 2 OZ	$0 76
2670	VELVEETA SPICY BEANS & RICE 4 OZ	$1 44
2775	SPICY GROUND BEEF 6 OZ POUCH	$4 02
3004	6 OZ PNUT BUTTER CREME COOKIES	$1 33
3018	FIG NEWTONS 2 OZ	$0 69
3035	CHOC CHIP COOKIES 6 OZ	$1 28
3040	6 OZ ICED OATMEAL COOKIES	$1 28
3045	6 OZ DUPLX CREME COOKIES	$1 33
3057	VANILLA WAFERS SINGLE SERVE 2 2 OZ	$1 12
3111	SALTINE CRACKERS (ONE SLEEVE)	$0 64
3114	SNACK CRACKERS (LIKE RITZ) 16 OZ	$3 83
3198	SS STRAWBERRY TOASTER PASTRY	$0 83
3200	BANANA MARSHMELLOW PIE	$1 39
3201	STRAWBERRY MOON PIE	$1 39
3205	CHOCOLATE MARSHMELLOW PIE	$1 39

ITEM #	DESCRIPTION	PRICE
	** FOOD, CANDY & SNACKS CONT **	
3225	CHOCOLATE ICED DONUT 3 9 OZ	$1 09
3246	ICED CINNAMON ROLL 4 OZ	$0 99
3261	MEGA HONEY BUN 4 75 OZ	$0 99
3270	CHOCOLATE CREME FILLED CUPCAKES 2PK	$1 18
3274	MONSTER ICED HONEY BUN 6 OZ	$1 21
3280	DELMONTE 4 PK MIXED FRUIT CUPS	$3 59
3281	DELMONTE SLICED PEACHES 8 25 OZ	$1 53
3291	BEAR CLAW PASTRY 5 OZ	$1 01
3500	BEAUTIFUL BLOSSOM HONEY 12 OZ	$4 86
4000	M & M PLAIN	$0 97
4001	M & M PEANUT	$0 97
4003	ALMOND JOY	$0 97
4004	BABY RUTH	$0 97
4010	SNICKERS BAR	$0 97
4013	MILKY WAY	$0 97
4036	HERSHEY CHOCOLATE BAR	$0 97
4037	HERSHEY W/ ALMONDS	$0 97
4040	SKITTLES	$0 97
4042	HERSEYS KISSES (1 BAG)	$1 18
4100	BUTTERSCOTCH BUTTONS CANDIES 4 25 OZ	$1 12
4110	LEMON DROPS 4 25 OZ	$0 97
4145	STAR LITE MINTS 3 75 OZ BAG	$1 12
4146	ATOMIC FIRE BALLS 3 OZ	$0 97
4151	NOW & LATERS ASSORTED 3 2 OZ BAG	$0 97
4155	SUGAR-FREE WILD FRUIT 1 7 OZ BAG	$0 97
4160	TOOTSIE ROLLS 2 75 OZ	$0 97
4391	BOX OF DELMONTE RAISINS 1 5 OZ	$0 43
6000	RAMEN - CHICKEN FLAVOR	$0 54
6001	RAMEN - SHRIMP FLAVOR	$0 54
6002	RAMEN - BEEF FLAVOR	$0 54
6003	RAMEN - CAJUN SHRIMP	$0 54
6004	RAMEN - TEXAS BEEF FLAVOR	$0 54
6005	RAMEN - CHILI FLAVOR	$0 54
6006	RAMEN - ORIENTAL FLAVOR	$0 54
6007	RAMEN - CAJUN CHICKEN FLA	$0 54
6008	RAMEN - CHICKEN & MUSHROO	$0 54
6050	INSTANT RICE 7 OZ CLEAR ZIP LOCK	$1 30
6051	BROWN RICE 6 5 OZ CLEAR ZIP LOCK	$1 48
6062	SQUEEZ BOTTL SPAGHETTI SAUCE 15 5 OZ	$2 37
6079	WHOLE SHABANG 1 5OZ	$0 57
9083	WHITE CHEDDAR POPCORN 5 OZ	$1 58
6100	POTATO CHIPS 1 5OZ — 1.07 ozs	$0 57
5111	HOT CORN CHIPS 1 5 OZ	$0 76
6114	HOT FRIES	$0 69
5117	CHEESE CRUNCHY 11 OZ	$2 57
6119	ROUND TORTILLA CHIPS 12 OZ	$2 66
6120	NACHO TORTILLA CHIPS	$0 56
6105	BBQ POTATO CHIPS 1 5OZ	$0 57
5125	HOT CHIPS 1 5OZ	$0 57
6126	SOUR CREAM & ONION 1 5OZ	$0 57
6134	CARAMEL POPCORN 3OZ	$0 87
5150	NACHO CHEESE TORTILLA CHIPS 10 OZ	$2 62
6155	CORN CHIPS 13 OZ	$1 81
6166	BBQ CORN CHIPS 12 OZ	$2 60
6173	CHILI W/BEANS 11 25 OZ	$2 22
6174	HOT CHILI W/BEANS 11 25 OZ	$2 08
5178	BEEF STEW 11 25OZ	$2 22
6178	MACKEREL FILLETS 3 53 OZ POUCH	$1 57
6179	SARDINES IN SOYBEAN OIL 3 53 OZ POUCH	$1 25
6180	CRABMEAT 3 53 OZ POUCH	$2 32
6181	SARDINES IN HOT TOMATO SAUCE 3 53 OZ	$1 19
6183	BABY CLAMS 3 53 OZ	$2 91
5190	FISHSTEAK IN GREEN CHILIES OIL 3 53OZ	$1 25
6191	SALMON FLAKES IN WATER 3 53 OZ	$1 88
6192	SMOKED OYSTERS 3 53 OZ	$2 91
6195	PREMIUM CHICKEN BREAST 4 5 OZ	$3 88
6201	EXTRA BUTTER MICROWAVE POPCORN	$0 75
6213	HEALTH MIX 3 25OZ	$2 28
6258	GARLIC POWDER 3 OZ	$1 73
5262	MAYONNAISE 12PK	$1 11
6263	12 PACK SQUEEZE MUSTARD	$0 91
6255	BOGO HOT SAUCE	$1 06
6284	EXTRA VIRGIN OLIVE OIL	$2 93
6311	SLICED PEPPERONI 3 5 OZ	$2 69
6313	SUMMER SAUSAGE 5 OZ	$2 30
5320	SIX GUN BEEF N CHEESE STICKS	$0 83
6374	RAISIN BRAN CEREAL 22 5 OZ BAG	$5 44
5395	HONEY NUT SCOOTERS CEREAL 12 OZ BAG	$3 28
6412	GRAPE JELLY 10Z	$0 29
6415	PEANUT BUTTER	$0 42
6426	SALSA 15 5 OZ SQUEEZE BOTTLE	$2 50
6428	SHARP CHEEDER CHEESE SQUEEZE	$0 74
6429	JALAPENO CHEESE SQUEEZE	$0 74
6540	STRAWBERRY CEREAL BAR 1 3 OZ	$0 37
6502	KOSHER PICKLE	$0 69
6507	JALAPENO PEPPERS SLICES 8 OZ	$0 57
6508	TOKYO DINER SOY SAUCE 4 OZ	$1 53
6538	QUAKER PLAIN OATMEAL	$3 61
6600	8CT FLOUR TORTILLA	$1 44
6606	ROASTED &SALTED PEANUTS 1 75 OZ	$0 85
6607	HOT HOT HOT PEANUTS 1 75 OZ	$0 85
6630	REALEMON PLASTIC 2 5 OZ	$1 08
6647	ARMOUR CHICKEN VIENNA 4 8 OZ	$2 11
6663	SAZON GOYA CLNTRO/ACHITOE &/BOX	$1 92
6700	REFRIED BEANS (ZIPPER BAG)	$2 33
6710	CHILI FLAVOR REFRIED BEANS & RICE	$1 26
6719	KIPPERED SNACKS 3 53 OZ	$1 48
6721	FISHSTEAKS IN LOUISIANA HOT SAUCE 3 53OZ	$1 17
6758	ROAST BEEF & GRAVY 10 OZ POUCH	$4 33
6761	OCTOPUS 3 53 OZ	$2 37
6762	BEEF STICK ORIGINAL 2OZ	$1 77
6763	BEEF STICK HIGH HEAT 2OZ	$1 71
6764	BEEF AND CHEESE SNACK 1 8OZ	$1 33
6765	BEEF AND CHEESE SNACK HIGH HEAT 1 8OZ	$1 33
6770	SUMMER SAUSAGE 5 OZ	$2 58
6826	CHUNKLIGHT TUNA/WATER 4 23 OZ	$2 18
	** TOBACCO **	
5265	BUGLAR POUCH - GA 1/EA	$3 49
5266	KITE - GA 1/EA	$3 16
5300	MARLBORO - NC 1PK	$6 07
5302	NEWPORTS - NC 1PK	$6 07
5476	SKOAL FINE CUT STRAIGHT	$5 91

** NO REFUNDS - ITEMS WILL BE REPLACED IF SHORTED

** PRICES & PRODUCTS ON OLD MENUS WILL NOT BE HONORED

NOTE

DAMAGES OR SHORTAGES MUST BE IDENTIFIED UPON DELIVERY TO YOU. IF YOU ARE RELEASED OR TRANSFERRED PRIOR TO RECEIVING YOUR ORDER, YOU WILL HAVE 72 HOURS TO CLAIM THEM ORDERS LEFT BEYOND THAT TIME WILL BE FORFEITED BY SIGNING BELOW, I ACKNOWLEDGE AND UNDERSTAND THE TERMS OF THE COMMISSARY ORDERS AND I AUTHORIZE FUNDS TO BE DEDUCTED FROM MY TRUST FUND ACCOUNT TO PAY FOR THIS ORDER

PRICES ARE SUBJECT TO CHANGE

Signature _____ DATE _____

**ALL ORDERS MUST BE SIGNED TO BE PROCESSED

Exhibit S-3

Administrative Remedy
Step 1 – Response

Inmate Name: Brown, Dale Register No. 29087-004

Date Filed: 07-10-2009 Remedy ID No. 09-130

This is in response to your Step 1 Administrative Remedy dated July 09, 2009. You are requesting e-mail access to communicate with family and the community. You state that you should be entitled the right to e-mail access just as other federal prisoners at Bureau of Prisons Institutions.

After reviewing your concerns it has been determined that Rivers Correctional Institution is a private owned institution contracted through the Federal Bureau Of Prisons. In accordance to the Statement of Work, RCI is not obligated to provide access to Electronic Mail for the inmate population.

After a thorough review of the circumstances pertaining to your requested Administrative Remedy, we find that there is no evidence to support your grievance.

Therefore, your request for Step 1 Administrative Remedy is denied.

If you are not satisfied with this response, you may obtain a Step 2 Administrative Remedy from your Counselor. As per RCI Policy 12.006, Administrative Remedies, "Step 2 forms will be completed and submitted within five (5) business days of the date the Step 1 response is returned".

7-21-09
Date

D. Farmer, A/W Programs

Exhibit T

AFFIDAVIT OF HOWARD CLAUDIO

I state that my name is Howard Claudio, that I am over the age of 18, and that I am competent to testify to the matters declared herein:

1. I suffer from Asthma and I am currently taking medication for that ailment. The name of the medication is VENTOLIN HFA 18GM.

2. Ever since my arrival here at this Rivers Correctional Institution, a private prison operated by GEO under contract with the BOP, I had to increase the use of my asthma medication because of the Second hand Smoke that is prevalent and pervasive in the atmosphere behind these prison walls. In the BOP prison where I was incarcerated before the BOP transferred me to this prison, no smoking was allowed. Smoking is banned in all BOP prisons across the United States. Tobacco is sold at this private prison. There is no way I can avoid inhalation of Second Smoke. The designated smoking areas are only a few feet from the main entrance gates that leads to the housing units. There is smoking in the units, in the middle of the recreation yard, in the outside recreation area and on the walking track.

I declare under the penalty of perjury pursuant to 28 U.S.C. 1746, that the above declaration are true and correct statements.

DATED: 7/28/09

Howard Claudio
41176-018
Rivers Correctional Institution
P.O. Box 630
Winton, NC 27986

Exhibit "LL"

U.S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Institution

1900 Simler Avenue
Big Spring, Texas 79720

November 13, 2003

MEMORANDUM FOR CONCERNED STAFF

FROM: **R. Rangel, SIS Lieutenant**

SUBJECT: **Inmate Patel, Kamal # 56496-080**

On November 12, 2003, staff became aware that inmate Patel, Kamal # 56496-080 had written to the Dallas Morning News concerning inmate David Duke # 28213-034. Inmate Patel states that inmate Duke received an incident report for abuse of the telephone and the prohibited act charges were "swept away under the table." Inmate Patel states that inmate Duke receives preferential treatment and Bureau of Prisons rules are broken for inmate Duke. Inmate Patel states that inmate Duke is assigned to desirable work details and received favorable treatment. Inmate Patel also states that the preferential treatment allegedly given to inmate Duke should be written about. Currently, inmate Duke has a CMC assignment of Broad Publicity due to his past involvement with the Ku Klux Klan and being a former member of the House of Representatives for the state of Louisiana. Since inmate Patel is writing to a newspaper, it is apparent that he is aware the newspaper may become interested in his allegations and request an interview in which he would present his allegations. Furthermore, the newspaper may want to interview inmate Duke as well. It doesn't appear inmate Duke is aware inmate Patel is mentioning his name in the allegations he (Patel) is raising. It is this investigators belief that inmate Patel's safety would be threatened if he returned to general population because inmate Duke would become aware that inmate Patel is involving him in his (Patel's) allegations again. Additionally, it is apparent inmate Patel has a personal problem with inmate Duke because he (Patel) has previously involved inmate Duke in his administrative remedies without inmate Duke's knowledge. Inmate Patel lied on the administrative remedy in which he mentions inmate Duke stated he would provide an affidavit to inmate Patel. When inmate Duke was interviewed, he stated he did not have knowledge that inmate Patel was involving him in the administrative remedies and did not tell inmate Patel he would provide an affidavit. Inmate Patel has a projected release date of October 26, 2013, and inmate Duke has a projected release date of May 16, 2004.

Exhibit "V"

U.S. Department of Justice
Office of the Inspector General

Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act

(as required by Section 1001(3) of Public Law 107-56)

March 11, 2005

Exhibit W

Section 1001 of the USA PATRIOT Act (Patriot Act), Public Law 107-56, directs the Office of the Inspector General (OIG) in the U.S. Department of Justice (DOJ or Department) to undertake a series of actions related to claims of civil rights or civil liberties violations allegedly committed by DOJ employees. It also requires the OIG to provide semiannual reports to Congress on the implementation of the OIG's responsibilities under Section 1001. This report – the sixth since enactment of the legislation in October 2001 – summarizes the OIG's Section 1001-related activities from June 22, 2004, through December 31, 2004.

I. INTRODUCTION

According to the Inspector General Act, the OIG is an independent entity within the DOJ that reports to both the Attorney General and Congress. The OIG's mission is to investigate allegations of waste, fraud, and abuse in DOJ programs and personnel and to promote economy and efficiency in DOJ operations.

The OIG has jurisdiction to review programs and personnel in all DOJ components, including the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Federal Bureau of Prisons (BOP), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the U.S. Attorneys' Offices, and other DOJ components.

The OIG consists of the Immediate Office of the Inspector General and the following divisions and offices:

- **Audit Division** is responsible for independent audits of Department programs, computer systems, and financial statements.
- **Evaluation and Inspections Division** provides an alternative mechanism to traditional audits and investigations to review Department programs and activities.
- **Investigations Division** is responsible for investigating allegations of bribery, fraud, abuse, civil rights violations, and violations of other criminal laws and administrative procedures that govern Department employees, contractors, and grantees.
- **Office of Oversight and Review** blends the skills of attorneys, investigators, and program analysts to investigate or review high profile or sensitive matters involving Department programs or employees.

- **Office of General Counsel** provides legal advice to OIG management and staff. In addition, the office drafts memoranda on issues of law; prepares administrative subpoenas; represents the OIG in personnel, contractual, and legal matters; and responds to Freedom of Information Act requests.

- **Management and Planning Division** assists the OIG by providing services in the areas of planning, budget, finance, personnel, training, procurement, automated data processing, computer network communications, and general support.

The OIG has a staff of approximately 420 employees, about half of whom are based in Washington, D.C., while the rest work from 16 Investigations Division field and area offices and 7 Audit Division regional offices located throughout the country.

II. SECTION 1001 OF THE PATRIOT ACT

Section 1001 of the Patriot Act provides the following:

> The Inspector General of the Department of Justice shall designate one official who shall –
>
> (1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;
>
> (2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and
>
> (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.

III. CIVIL RIGHTS AND CIVIL LIBERTIES COMPLAINTS

Review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice.

The OIG's Special Operations Branch in its Investigations Division manages the OIG's investigative responsibilities outlined in Section 1001.[1] The Special Agent in Charge who directs this unit is assisted by two Assistant Special Agents in Charge (ASAC), one of whom assists on Section 1001 and DEA matters and a second who assists on FBI matters. In addition, four Investigative Specialists support the unit and divide their time between Section 1001 and FBI/DEA responsibilities.

The Special Operations Branch receives civil rights and civil liberties complaints via mail, e-mail, telephone, and facsimile. The complaints are reviewed by the Investigative Specialist and an ASAC. After review, the complaint is entered into an OIG database and a decision is made concerning its disposition. The more serious civil rights and civil liberties allegations that relate to actions of DOJ employees or DOJ contractors normally are assigned to an OIG Investigations Division field office, where OIG special agents conduct investigations of criminal violations and administrative misconduct.[2] Some complaints are assigned to the OIG's Office of Oversight and Review for investigation.

Given the number of complaints received compared to its limited resources, the OIG does not investigate all allegations of misconduct against DOJ employees. The OIG refers many complaints involving DOJ employees to internal affairs offices in DOJ components such as the FBI Inspection Division, the DEA Office of Professional Responsibility, and the BOP Office of Internal Affairs for appropriate handling. In certain referrals, the OIG requires the components to report the results of their investigations to the OIG. In most cases, the OIG notifies the complainant of the referral.

Many complaints received by the OIG involve matters outside our jurisdiction. The ones that identify a specific issue for investigation are forwarded to the appropriate investigative entity. For example, complaints of mistreatment by airport security staff are sent to the Department of Homeland

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[1] This unit also is responsible for coordinating the OIG's review of allegations of misconduct by employees in the FBI and the DEA.

[2] The OIG can pursue an allegation either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, as is the case for any law enforcement agency, do not end in prosecution. When this occurs, the OIG is able to continue the investigation and treat the matter as a case for potential administrative discipline. The OIG's ability to handle matters criminally or administratively helps to ensure that a matter can be pursued administratively, even if a prosecutor declines to prosecute a matter criminally.

Security (DHS) OIG. We also have forwarded complaints to the OIGs at the Department of Veterans Affairs, Department of State, United States Postal Service, Department of Defense, Central Intelligence Agency, and the Equal Employment Opportunity Commission. In addition, we have referred complainants to a variety of police department internal affairs offices that have jurisdiction over the subject of the complaints.

When an allegation received from any source involves a potential violation of federal civil rights statutes by a DOJ employee, the complaint is discussed with the DOJ Civil Rights Division for possible prosecution. In some cases, the Civil Rights Division accepts the case and requests additional investigation by either the OIG or the FBI. In other cases, the Civil Rights Division declines prosecution.

A. Complaints Processed This Reporting Period

From June 22, 2004, through December 31, 2004, the period covered by this report, the OIG processed **1,943** complaints that were sent primarily to the OIG's Section 1001 e-mail or postal address.[3]

Of these complaints, **1,748** did not warrant further investigation or did not fall within the OIG's jurisdiction. Approximately three-quarters of the 1,748 complaints made allegations that did not warrant an investigation. For example, some of the complaints alleged that government agents were broadcasting signals that interfere with a person's thoughts or dreams or that prison officials had laced the prison food with hallucinogenic drugs. The remaining one-quarter of the 1,748 complaints in this category involved allegations against agencies or entities outside of the DOJ, including other federal agencies, local governments, or private businesses. We referred those complaints to the appropriate entity or advised complainants of the entity with jurisdiction over their allegations.

Consequently, **195** complaints involved DOJ employees or components and made allegations that required further review. Of those complaints, 170 raised management issues rather than alleged "civil rights" or "civil liberties" abuses and were referred to DOJ components for handling. For example, inmates complained about the general conditions at federal prisons, such as the poor quality of the food or the lack of hygiene products. Twelve of the 195 complaints did not provide sufficient detail to make a determination whether an abuse was alleged. We requested further information but did not receive responses from any of these 12 complainants. Finally, we requested that the BOP investigate one of the complaints and report to us on the investigation's

[3] This number includes all complaints in which the complainant makes any mention of a Section 1001-related civil rights or civil liberties violation, even if the allegation is not within the OIG's jurisdiction.

findings. That complaint involved an inmate who complained that he was sexually harassed by a correctional officer. BOP's investigation of the matter is ongoing.

Therefore, after analyzing these 195 complaints, the OIG identified **12** matters that we believed warranted opening a Section 1001 investigation or conducting a closer review to determine if Section 1001-related abuse occurred. Of the 12 new matters, the OIG retained 1 for investigation because the complainant made allegations of a potentially criminal nature. The OIG closed one because the allegations already had been addressed in a previous OIG investigation. The OIG referred the remaining ten matters, which appeared to raise largely administrative issues, to Department components for further investigation or review. For six of the ten matters, we requested that the components report their findings to us.

It is important to note that none of the complaints we processed during this reporting period alleged misconduct by DOJ employees relating to use of a provision in the Patriot Act.

The following is a synopsis of the new complaints processed during this reporting period:

Complaints processed:	**1,943**
Unrelated complaints:	**1,748**
No investigation warranted:	**(1,283)**
Outside of OIG's jurisdiction:	**(465)**
Complaints within OIG's jurisdiction warranting review:	**195**
Non-Section 1001 matters	
Management issues:	**170**
Referred to DOJ components:	**1**
OIG unsuccessfully sought further details:	**12**
Section 1001 matters warranting review:	**12**
OIG investigation:	**1**
Closed as duplicative:	**1**
Referred to DOJ components:	**10**

B. Section 1001 Cases This Reporting Period

1. Complaints Investigated by the OIG

a. New matters

During this reporting period, the OIG opened one new Section 1001-related investigation, continued four ongoing Section 1001-related cases, and closed four Section 1001 investigations. The following is a description of the new matter opened by the OIG:

- The OIG received a complaint from a Muslim inmate alleging that correctional officers at a BOP facility humiliated and abused Muslim inmates because of the officers' hatred of Muslims. Specifically, the inmate alleged that correctional officers used excessive force on him, gave other inmates permission to assault him, and then covered up the incidents. The inmate also claimed that the BOP staff improperly denied him showers, social visits, and the right to attend religious services.

b. Cases opened during previous reporting periods that the OIG continues to investigate

- The OIG continued an investigation of the FBI's conduct in connection with the erroneous identification of a latent fingerprint found on evidence from the March 2004 Madrid train bombing as belonging to Brandon Mayfield, an attorney in Portland, Oregon. As a result of the identification, the FBI had initiated an investigation of Mayfield that resulted in his arrest as a "material witness" and his detention for approximately two weeks. Mayfield was released when Spanish National Police matched the fingerprints on the evidence to an Algerian national. The OIG is examining the cause of the erroneous fingerprint identification and the FBI's handling of the matter. The Department's Office of Professional Responsibility is reviewing the conduct of the prosecutors in the case.

- The OIG is investigating allegations made by an Egyptian national that during his detention at a BOP facility he was subjected to an invasive body cavity search in the presence of numerous people, including a female officer; placed alone in a cell under severe restrictions for more than two months; and had his ability to practice his religion undermined intentionally by the prison staff. The OIG has interviewed the Egyptian national and numerous BOP employees as part of the investigation.

- The OIG is investigating allegations by a Muslim inmate that prior to his arrival at a BOP facility, correctional officers informed other inmates that he was a radical Muslim who would try to take over the leadership of other Muslim inmates. He further alleged that since his arrival at the BOP facility, he has been subjected to excessive, undocumented searches; placed in the Special Housing Unit in retaliation for "writing up" correctional officers; and verbally abused, physically threatened, and spat upon by a correctional officer.

- The OIG continues its investigation of allegations that a BOP correctional officer verbally and physically abused a Muslim inmate while the inmate was being transported to the prison's hospital and that the inmate was placed improperly in solitary confinement following the incident.

c. OIG investigations completed during this reporting period

- The OIG investigated allegations by Muslim inmates that staff at a BOP prison, including the warden, discriminated against the inmates and engaged in retaliatory actions. The OIG substantiated many of the allegations against the warden and other BOP staff. The OIG found a disturbing pattern of discriminatory and retaliatory actions against Muslim inmates by BOP officers at this facility, particularly against those who complained about poor conditions at the prison and those who cooperated with the OIG investigation.

  For example, we found that Muslim inmates meeting the criteria for bed reassignment were denied an opportunity to relocate within the unit to facilitate their prayer requirements. In contrast, non-Muslim inmates requesting bed reassignments generally were accommodated. We also found that members of the prison's executive staff, including the warden, unfairly punished Muslim inmates who complained about the conditions of confinement or who cooperated with the OIG's investigation. For instance, a Muslim inmate who had filed complaints relating to his treatment at the prison was placed in the Special Housing Unit for four months for what we determined were specious reasons. In a separate incident, our review found that 5 days after the OIG interviewed a Muslim inmate, the warden inappropriately and unjustly ordered the inmate transferred to the Special Housing Unit for more than 120 days. After prosecution of this matter was declined by the U.S. Attorney's Office, we provided our report to the BOP for administrative action.

- The OIG completed its investigation into allegations of misconduct relating to dialysis treatment of Muslim inmates at a BOP medical

center. The OIG had received letters from two inmates alleging that inmate patients were required to take injections of porcine (pork) heparin as part of their dialysis treatment, despite the patients' religious objections to pork. The OIG found several deficiencies in the medical center's management of information and communications affecting the use of heparin for the inmates' treatment. The OIG provided several recommendations to the BOP relating to these deficiencies. The BOP agreed to adopt these recommendations.

- The OIG investigated allegations by a Muslim inmate that BOP correctional officers subjected him to verbal abuse, discriminatory practices, and anti-Islamic sentiment. The inmate claimed that these abuses intensified after September 11, 2001, and that he was transferred to another BOP facility in retaliation for filing complaints against BOP correctional officers. Although the investigation revealed no evidence that BOP staff discriminated against the complainant because of his religious or political beliefs, one of the subjects admitted that he showed the complainant a photograph of a nude female and scratched his groin area before attempting to shake the hands of inmates. The OIG provided its report of investigation to the BOP for appropriate action.

- The OIG investigated allegations that four individuals of Arab descent were detained improperly by FBI agents at the U.S. port of entry in the Virgin Islands. Allegedly, the four were questioned, handcuffed, and transported to an FBI facility for further questioning without being provided an explanation for their detainment. They claimed they were fingerprinted, photographed, and subjected to humiliation. The OIG investigation did not substantiate any misconduct by the FBI agents or that the individuals were subjected to humiliation by the agents. The OIG provided its report of investigation to the FBI.

- The OIG investigated allegations from a Muslim individual who alleged that he was abused by FBI agents and immigration detention officers from the time he was arrested in March 2002 until he was deported in April 2002. The OIG investigation did not substantiate these allegations.

2. Complaints Referred to Other Components

During this reporting period, the OIG referred ten of the new complaints to internal affairs offices within DOJ components for investigation or closer review. Three of the complaints were referred to the FBI. In one of those complaints, the Council on American-Islamic Relations alleged that an FBI agent violated the civil rights of a Muslim individual when the agent questioned

the individual regarding his immigration status and knowledge of terrorist activities. The FBI's Inspection Division currently is investigating this matter.

In the second complaint, an off-duty BOP Correctional Officer of Arab descent alleged that he and another individual were victims of racial profiling when they were detained at an airport and questioned for several hours about their suspicious behavior during a flight. After we referred the complaint to the FBI Inspection Division, that office reviewed the matter and determined that the FBI agents did not violate FBI policy. The third complaint referred to the FBI involved a national security matter that was investigated by the FBI's Inspection Division and is pending resolution.

The OIG referred seven of the ten complaints to the BOP's Office of Internal Affairs (OIA). The complaints included allegations that BOP staff verbally abused Muslim inmates, placed Muslim inmates in segregation, confiscated Muslim inmates' religious articles, and denied Muslim inmates' telephone privileges and library access. Four of the complaints sent to the BOP were designated by the OIG as "Monitored Referrals," which means the BOP is required at the end of its investigation to send a report of the investigation to the OIG for its review. Of these four complaints, the BOP closed two matters as unsubstantiated, while the other two matters remain open. The BOP has an open investigation on each of the three other matters.

During this reporting period, the FBI addressed a matter that the OIG had referred to the FBI for review during the previous reporting period. The matter involved an electronic communication (EC) from one FBI field office to other FBI field offices around the country identifying the names and addresses of the proprietors and customers of a Muslim-based website. The EC listed the proprietors' and customers' names by FBI field office for the respective office to take whatever action it deemed appropriate. The OIG received a copy of the EC from an FBI employee concerned about the lack of predication or apparent basis on the face of the EC for the leads to be sent for investigation to the FBI field offices. We asked the FBI Inspection Division to review the incident and report back to us. In this reporting period, the FBI Inspection Division notified us that the FBI recognized that the EC raised First Amendment concerns. The FBI retracted the EC and directed the field offices to conduct no further investigative action based on the EC and to destroy all copies of the EC. The Inspection Division also informed us that the FBI had concluded that the EC should have been reviewed by the legal advisor for the originating field office prior to being disseminated and that in the future such an EC will be subject to legal review.

C. Other OIG Activities Related to Allegations of Civil Rights and Civil Liberties Abuses

The OIG has conducted other reviews that go beyond the explicit requirements of Section 1001 in order to implement more fully its civil rights and civil liberties oversight responsibilities. Given the multi-disciplinary nature of its work force, the OIG can extend its oversight beyond traditional investigations to include evaluations, audits, and special reviews of DOJ programs and personnel. Using this approach, the OIG has initiated or continued several special reviews that address, in part, issues relating to the OIG's duties under Section 1001.

1. Review of FBI Conduct Relating to Detainees in Military Facilities in Guantanamo Bay and Iraq

During the reporting period, the FBI began a special inquiry into FBI agents' observations of interrogation techniques used on detainees held at the U.S. military's Guantanamo Bay and Abu Ghraib prison facilities. The OIG requested materials from the FBI relating to the special inquiry and, after reviewing them, opened a review of this matter.

The OIG is examining whether any FBI staff observed or participated in non-law enforcement interrogation techniques of detainees at U.S. military detention facilities. In addition, the OIG is reviewing whether FBI employees reported their observations of these interrogation techniques and how those reports were handled.

2. Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York

An OIG special review issued in December 2003 (and described in detail in our January 2004 Section 1001 report) examined allegations that some correctional officers physically and verbally abused some detainees held in connection with the Department's terrorism investigation at the Metropolitan Detention Center (MDC) in Brooklyn, New York.[4] We concluded that certain MDC staff members abused some of the detainees, and we found systemic problems in the way detainees were treated at the MDC. In December 2003, we provided the results of our investigation to the BOP for its review and appropriate disciplinary action.

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[4] See "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" (MDC Report), issued December 18, 2003. The MDC Report supplemented an OIG report issued in June 2003 entitled, "The September 11 Detainees: A review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." Both reports can be found on the OIG's internet website (www.usdoj.gov/oig) under "Special Reports."

In response to our report and recommendations, the BOP OIA initiated an investigation based on the OIG's findings to determine whether discipline is warranted. More than a year later, the OIA review still is ongoing, and the BOP still is considering appropriate disciplinary action. The OIG continues to monitor this review and the BOP's ultimate actions with regard to disciplinary action.

In addition, during this reporting period, the BOP informed the OIG that it discovered additional videotapes from the MDC relevant to the OIG's supplemental review regarding abuse related to the September 11 detainees which had not been provided previously to the OIG – or the BOP OIA – as required. Some of the videotapes included additional instances of video- and audio-taped meetings between detainees and their attorneys at the MDC. Others concerned detainee movements. The OIG and the BOP OIA are reviewing the newly discovered videotapes. The OIG and the BOP OIA also have opened a joint investigation to determine why the MDC had not previously provided these videotapes.

With respect to the systemic problems we found at the MDC, our December 2003 Supplemental Report made seven recommendations to the BOP ranging from developing guidance for training correctional officers in appropriate restraint techniques to educating BOP staff concerning the impropriety of audio recording meetings between inmates and their attorneys. The BOP's response to the recommendations and the OIG analysis of that response can be found on the OIG's website under "Special Reports." In February 2005, the BOP provided materials to close the remaining two recommendations.

3. OIG's Analysis of the Department's Responses to Recommendations in the Detainee Report

In its June 2003 Detainee Report, the OIG made 21 recommendations related to issues under the jurisdiction of the FBI, the BOP, leadership offices at the DOJ, as well as immigration issues now under the jurisdiction of the DHS. As of this reporting period, 20 of the recommendations have been resolved. The one open recommendation calls for the Department and the DHS to enter into a memorandum of understanding (MOU) to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. This MOU has not yet been established. Negotiations between the Department and the DHS over the language of the MOU are ongoing.

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Administrative Remedy
Step 2 – Response

Date Filed: June 18, 2009 Remedy ID No.: 09-108

Inmate Name: Patel, Kamal Reg #: 56496-080

This is in response to your Step 2 Administrative Remedy dated June 15, 2009 in which you allege that Rivers Correctional Institution violates 28 C.F.R. Section 540.21(b) and BOP PS 5265.11(18)(b), which states that writing paper and envelopes are to be provided at no cost to the inmate. You state that you should not have to go to Commissary to purchase these items and that the policy does not stipulate that it is for legal needs only. Specifically, you are requesting to be provided with these materials according to the policy without restrictions as to whether they are used for legal or personal reasons.

Further investigation into this matter has revealed that this facility is not required by the Bureau of Prisons (BOP) Statement of Work to comply with PS 5265.11. You may continue to sign for your writing paper and envelopes for your legal needs with the Librarian at no cost. For all other purposes, you are advised to purchase them from the Commissary. If you are ever to become indigent, we will supply you with these materials for any purpose.

Based on the above information, your request for a Step 2 Remedy to supply you with writing paper and envelopes for any reason is denied.

You have exhausted all of your Administrative Remedies at this level.

6-29-09
Date

George Snyder, Warden

Exhibit "X"

The GEO Group, Inc.	**Rivers Correctional Institution** **POLICY and PROCEDURE MANUAL** **CHAPTER: Social Services** **TITLE: Drug Abuse Programs** **RELATED ACA STANDARDS:** **4-4438, 4-4439, 4-4440, 4-4441**	**Policy Number:** **17.002** **Effective Date:** **03/18/08** **Last Review Date:** **02/05/09**

I. PURPOSE

To establish operational and procedural guidelines for the delivery of drug abuse treatment services and to describe the general philosophy of drug abuse treatment programming.

II. AUTHORITY

BOP P.S. 5330.10 Drug Abuse Programs Manual - Inmate

III. APPLICABILITY

All Rivers Correctional Institution (RCI) employees and inmates.

IV. POLICY

The philosophy underlying RCI drug abuse programs is that individuals must assume responsibility for their behavior. Despite the influence of environmental conditions and circumstances, the primary target for change is the individual's conscious decision to engage in drug-taking and criminal behavior. The principal goal of treatment is to equip the individual with the cognitive, emotional and behavioral skills necessary to choose and maintain a drug-free and crime-free lifestyle.

A biopsychosocial model of treatment guides interventions in RCI's drug abuse programs. This holistic approach emphasizes comprehensive lifestyles change as the key to treatment success. Issues such as physical well-being, family relationships and criminality are targeted for change in addition to traditional treatment goals of relapse prevention and abstinence. The acquisition of positive life skills is viewed as the means through which participants can change the negative thinking and behavior patterns which led to their drug use and criminality in the past. Through individual and/or group counseling, participants can gain thinking/behavior patterns and can learn and develop alternative skills. (4-4438)

EXHIBIT-Y

RCI employs a five (5) component strategy which includes:

- Orientation, Screening, and Referral;
- Drug Abuse Education;
- Nonresidential Drug Abuse Treatment Services;
- Residential Drug Abuse Treatment; and
- Transitional Services.

Descriptions of the various program components and relevant procedures are detailed below.

V. PROCEDURES

A. Orientation, Screening and Referral

1. Admission and Orientation Program

The Drug Abuse Program Coordinator shall ensure that all inmates are informed during the Admission and Orientation program about RCI's drug abuse programming and treatment opportunities. This presentation should be made by a drug treatment specialist or the Drug Abuse Program Coordinator.

2. Screening and Referral

A psychologist shall interview all new admissions for drug abuse problems. A records review will be performed by a case manager in the normal course of his/her duties. Based on these reviews and interviews, psychology and/or unit staff will make an appropriate drug education/treatment referral to the Drug Abuse Program Coordinator.

Unit staff shall determine whether an inmate meets any of the criteria required for the drug abuse education course [see section (B) (1)] and enter the appropriate DRG I assignment within thirty (30) days of the inmate's arrival at the institution. Unit staff shall also conduct a review for inmates returned as failures in a community-based program, and enter the appropriate DRG I assignment based on this updated review. In this situation, inmates who receive a new DRG I RQ assignment upon return to the institution must repeat the drug abuse education course.

The Drug Abuse Program Coordinator shall ensure that information from both the central file review and the psychology screening are used to determine programming needs and recommendations for each inmate.

3. Referral and Redesignation

With the exception of the residential drug abuse treatment program, RCI's drug abuse programs are available to all RCI inmates. The residential drug abuse treatment program, however, is specifically for

EXHIBIT-Y

D.C. offenders. Non-D.C. offenders requesting residential drug abuse treatment shall be considered for a transfer to a facility with a residential drug abuse treatment program. Redesignation shall be at the discretion of the BOP Designator.

See BOP P.S. 5330.10 Drug Abuse Programs Manual - Inmate, Chapter 2, pages 2 and 3 for procedures to refer and redesignate **non-D.C. offenders** to residential drug abuse treatment programs.

B. **Drug Abuse Education Course**

The purpose of the drug abuse education course is to inform inmates of the consequences of drug/alcohol abuse and addiction and to motivate inmates in need to apply for further drug abuse treatment while incarcerated and upon release.

1. **Requirements for Drug Abuse Education Course/Participation**

a. **Mandatory Participation**

An inmate is required to participate in the drug abuse education course if he has been sentenced or returned to custody as a violator after September 30, 1991 and it is determined by unit and/or drug abuse treatment staff through a combination of interview and file review that:

- There is evidence in the Presentence Investigation that alcohol or other drug use contributed to the commission of the instant offense;
- Alcohol or other drug use was a reason for violation either of supervised release, including parole, or community status, Residential Re-entry Center (RRC) placement for which the inmate is now incarcerated; or
- The inmate was recommended for drug programming during incarceration by the sentencing judge.

b. **Voluntary participation**

Inmates who are not required by paragraph (a)(i) of this section to participate in the drug abuse education course may request to participate voluntarily in the drug abuse education course when participant space is available. Volunteers must have the approval of the Drug Abuse Program Coordinator. Priority consideration shall be given to those inmates whose participation has been recommended by psychology, unit or drug treatment staff.

EXHIBIT-Y

Kamal K. Patel
Reg. No. 56496-080
CI Moshannon Valley
555-I Cornell Drive
Philipsburg, PA 16866

November 16, 2008

FOIA/PA Mail Referral Unit
U.S. Department of Justice
Room 1070, National Place Bldg.
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

RE: FREEDOM OF INFORMATION & PRIVACY ACT REQUEST - BOP

Dear FOIA/PA Referral Unit:

I am requesting that the documents as described in this letter be provided to me pursuant to the Freedom of Informatin & Privacy Acts.

Please consture this request in the broadest possible terms and provide me the requested informaton within the time frames as provided in the Freedom of Informatin Act.

If any documents are withheld, please explain the basis for each withholding and a description of the document withheld.

Please provide me the following documents:

1. All transfer documents and related documents for transfer including those created by the Unit Team, Medical Department, and any other department for the transfer requests made to transfer me (a) from FCI Forrest City, Arkansas to FMC Butner in 2006; (b) from FMC Butner, North Carolina to Pine Prairie Correctional Facility in Louisiana in early 2008; and (c) from FMC Butner, North Carolina to CI Moshannon Valley Correctional Center in Pennsylvania in late 2008. As part of this request, any denials of such transfer applicatinos, cancellation of any transfers, etc. are also requested.

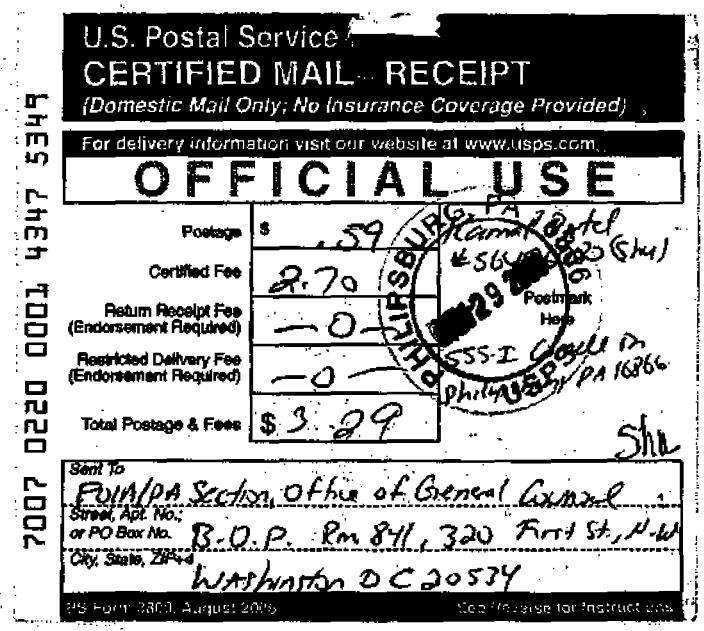
2. The property inventory receipt created by Correctional Officer Butler of the Federal Medical Center, North Carllina at the FCI II facility, in either December 2007 or Januayr 2008 in relation to an inventory of my property when I was placed in the Special Housing Unit at the FCI II facility.

Thank you for your prompt consideration of this matter. I remain,

Sincerely,

Kamal K. Patel

7007 0220 0001 4347 5349



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Kamal Patel #56[illegible] (Shu)

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555-I Cogell Dr Philipsburg, PA 16866

Shu

Sent To: FOIA/PA Section, Office of General Counsel

Street, Apt. No.; or PO Box No.: B.O.P. Rm 841, 320 First St., N.W.

City, State, ZIP+4: Washington DC 20534

PS Form 3800, August 2006 — See Reverse for Instructions

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KAMAL K. PATEL,
Reg. No. 56496-080
CI Big Spring Correctional Institution
2001 Rickabaugh Dr.
Big Spring, TX 79720

and

DALE BROWN
Reg. No. 29087-004
CI Rivers Correctional Institution
P.O. Box 630
Winton, NC 27986

Plaintiffs,

v.

THE FEDERAL
BUREAU OF PRISONS
320 First Street, N.W.
Washington, D.C. 20534

and

HARLEY LAPPIN, in official and individual capacities,
320 First Street, N.W.
Washington, D.C. 20534

Defendants.

THIRD AMENDED CLASS COMPLAINT AND DEMAND FOR JURY TRIAL

Civil Action No. 09-cv-0200-RWR

THIRD AMENDED CLASS COMPLAINT

1. Plaintiffs Kamal Patel and Dale Brown, by and through their attorneys, bring the following action arising out of the United States Constitution and the laws of the United States and allege as follows.

NATURE OF THE ACTION

2. Plaintiffs are lawful permanent residents serving criminal sentences under custody of the Federal Bureau of Prisons ("BOP"). Plaintiffs were incarcerated for many years in federal

facilities operated by the BOP, where they were treated similarly to inmates born in the United States.

3. Recently the situation changed for the worse. Defendants began treating Plaintiffs, both of whom are long time lawful permanent residents, differently than similarly-situated United States citizens. Plaintiffs were transferred based upon their national origin and/or alienage to private facilities, including Moshannon Valley Correctional Center ("MVCC"), Rivers Correctional Institution ("Rivers"), and Big Spring Correctional Institution ("Big Spring"). Plaintiffs were also told by Defendants that they would not be considered for transfer closer to their legal residences.

4. MVCC and Big Spring are operated by Cornell Companies, Inc. ("Cornell"), a for-profit corporation with annual revenues exceeding $400 million.

5. Rivers is operated by The GEO Group, Inc. ("Geo Group"), a for-profit corporation with annual revenues exceeding $1 billion.

6. Cornell and Geo Group refuse to comply with applicable constitutional and statutory standards and claim they are not bound by BOP policies and procedures governing the treatment of federal prisoners. Defendants Lappin and the BOP have failed to enforce applicable constitutional, statutory, and regulatory standards in facilities operated by private entities, including but not limited to Cornell and Geo Group. As a result of Defendants' acts and omissions, Plaintiffs have been subjected to harsher prison conditions than similarly situated United States citizen federal prisoners. The harsher treatment of Plaintiffs includes but is not limited to being required to subsidize the cost of their incarceration, substantially burdening their exercise of religion, providing fewer programming opportunities, and manifesting deliberate indifference to their exposure to harmful levels of secondhand tobacco smoke.

7. The United States Government Accountability Office (then known as the General Accounting Office) concluded in 1991 that the BOP lacks statutory authority to confine federal prisoners in such private facilities and warned Congress that if such authority were to be granted, controls should be established to preserve prisoner rights, ensure contractor accountability, and provide for effective government oversight.

8. Defendants continue to confine aliens in private facilities without statutory authority and without preserving prisoner rights. In doing so, Defendants have delegated authority to private parties in violation of their statutory and regulatory obligations.

9. Rivers is more than 500 miles from Plaintiffs' respective legal residences. Plaintiffs' family members either cannot visit Rivers or can do so only with great difficulty and at significant expense. Inmates who have eighteen consecutive months of clear conduct in a general population, as do Plaintiffs, are considered for transfer to facilities nearer to their families. United States citizen inmates with detainers or charges pending from another jurisdiction remain eligible for such transfers, although they generally are not transferred to facilities more distant from the detaining authority. In stark contrast, the BOP categorically excludes from consideration for such transfers aliens who are the subject of a notification letter from the U.S. Immigration and Customs Enforcement agency ("ICE") stating only that an investigation has been initiated to determine whether the inmate is subject to removal from the United States. It is unlawful for the BOP to treat alien federal prisoners differently for this purpose than it treats similarly situated United States citizen prisoners such as those subject to detainers or serving life sentences. Further, the BOP impermissibly assumes that aliens subject to ICE detainers for a hearing will be removed even though they have not yet been afforded a removal hearing and no order of removal has been issued.

JURISDICTION AND VENUE

10. This Court has jurisdiction under 28 U.S.C. § 1331 and the United States Constitution.

11. Venue is proper in this district under 28 U.S.C. § 1391.

12. Plaintiffs have exhausted administrative remedies and bring claims under the Fifth Amendment to the United States Constitution, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a.

PARTIES

13. Kamal K. Patel is a Plaintiff in this action. Mr. Patel is a lawful permanent resident of the United States. He previously was confined at Rivers in Winton, North Carolina, and he is presently confined at Big Spring in Big Spring, Texas. On information and belief, Mr. Patel was transferred from Rivers to Big Spring to facilitate his participation in legal proceedings in Texas, and he remains subject to transfer back to Rivers upon conclusion of such proceedings.

14. Dale Brown is a Plaintiff in this action. Mr. Brown is a lawful permanent resident of the United States and is presently incarcerated at Rivers.

15. Defendant BOP is an agency of the United States Department of Justice established in 1930 to oversee the confinement of federal prisoners. The BOP consists of 115 institutions, 6 regional offices, a Central Office, 2 staff training centers, and 28 community corrections offices. The Central Office serves as the headquarters for the BOP and is located in Washington, D.C.

16. Defendant Harley G. Lappin is Director of the BOP and is responsible for its acts and omissions. His office is located in Washington, D.C. Defendant Lappin is sued in his official and individual capacities.

CLASS ALLEGATIONS

17. Plaintiffs bring Counts One through Seven and the allegations related thereto on their own behalf and on behalf of all others similarly situated pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 23.

18. "Federal prisoner" as used in this Third Amended Complaint means a person described in § 3621(a) of Title 18. "Federal prisoner" excludes persons sentenced to incarceration under the District of Columbia Code, as described in Pub. L. 106-553, § 1(a)(2), Dec. 21, 2000, 114 Stat. 2762, 2762A-68; renumbered § 114, Pub. L. 106-554, § 1(a)(4) [Div. A, § 213(a)(2)], Dec. 21, 2000, 114 Stat. 2763, 2763A-179.

19. Plaintiffs seek certification of the following classes and subclasses:

a. CLASS ONE (injunctive and declaratory relief class pursuant to Fed. R. Civ. P. 23(b)(2)): All federal prisoners confined in facilities operated by private entities. (COUNTS ONE, TWO, THREE, AND FOUR).

i. SUBCLASS ONE-A (injunctive and declaratory relief subclass pursuant to Fed. R. Civ. P. 23(b)(2)): All federal prisoners confined in private facilities managed by Geo Group. (COUNT SIX).

ii. SUBCLASS ONE-B (injunctive and declaratory relief subclass pursuant to Fed. R. Civ. P. 23(b)(2) and damages subclass pursuant to Fed. R. Civ. P. 23(b)(3)): All Muslim inmates confined in private facilities managed by Geo Group. (COUNT FIVE).

b. CLASS TWO (injunctive and declaratory relief class pursuant to Fed. R. Civ. P. 23(b)(2)): All federal prisoners subject to a detainer for a hearing issued by the Department of Homeland Security's Immigration and Customs Enforcement agency ("ICE") or the Immigration and Naturalization Service ("INS"). (COUNT SEVEN).

20. The members of the classes and subclasses are so numerous that joinder of all members is impractical.

21. There are questions of law or fact common to the classes and subclasses.

22. The claims or defenses of the representative parties are typical of the claims or defenses of the classes and subclasses.

23. The representative parties will fairly and adequately protect the interests of the classes and subclasses.

24. With regard to all classes and subclasses, which are Rule 23(b)(2) injunctive relief classes, Defendants have acted or refused to act on grounds that apply generally to the classes and subclasses, so that final injunctive and declaratory relief are appropriate respecting the classes and subclasses as a whole.

25. With regard to Subclass One-B, also a Rule 23(b)(3) damages class, questions of law or fact common to the subclass members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and effectively adjudicating the controversy.

FACTUAL BACKGROUND

The Bureau of Prisons

26. Before federal prisons were built, federal prisoners were confined in state facilities at federal expense.

27. In states unwilling to accept federal prisoners, the First Congress permitted the federal marshal to hire a convenient place to serve as a temporary jail.

28. Later Congresses continued to authorize the marshal service to contract for temporary facilities for confinement until permanent arrangements could be made.

29. By the end of the nineteenth century, due to overcrowding in state prisons, some states stopped accepting federal prisoners convicted in other states and one refused to accept federal prisoners at all. In 1891, Congress authorized construction of the first federal penitentiaries. Congress created the BOP in 1930 to provide more progressive and humane care for federal prisoners, to professionalize the prison service, and to ensure consistent and centralized administration of the eleven Federal prisons in operation at the time.

30. Historically, federal, state, and local correctional agencies entered into contracts with the private sector to provide services such as food preparation and medical care, as well as certain pre-release programs.

31. As a result of expanded federal law enforcement and new legislation that altered sentencing, the 1980s brought a significant increase in the number of federal inmates.

32. From 1980 to 1989, the inmate population more than doubled, from just over 24,000 to almost 58,000. During the 1990s, the population more than doubled again, reaching approximately 136,000 at the end of 1999.

33. In the 1980s and 1990s, the BOP expanded its use of private sector resources in response to growing inmate populations and escalating costs. The BOP expanded beyond

contracting for goods or services within BOP-operated facilities to contracting with private corporations to operate private prisons housing federal prisoners ("private facilities" or "private prisons"). Upon information and belief, the BOP does not use such private facilities to confine United States citizen federal prisoners for its general adult inmate population, with the exception of District of Columbia offenders whose confinement is governed by unique statutory authority.

34. In 1991, the agency then known as the United States General Accounting Office ("GAO") reviewed BOP's practice of confining federal prisoners in private facilities. The GAO concluded that the BOP lacks statutory authority to confine federal prisoners in private facilities.

35. The GAO further found that even if Congress were to authorize the BOP to confine federal prisoners in private facilities, controls on contracting should be established to preserve prisoner rights, ensure contractor accountability, and provide for effective government oversight.

36. Congress has not enacted legislation authorizing the BOP to confine federal prisoners in private facilities, other than District of Columbia offenders.

37. Further, the BOP has been unable to demonstrate private facilities are more efficient or cost effective than BOP facilities.

38. Today, the BOP exercises custody over approximately 209,000 federal prisoners, including the Plaintiffs.

39. Approximately 82 percent of these federal prisoners are confined in federal facilities operated by the BOP, with the balance, including Plaintiffs, in privately-managed or community-based facilities and local jails.

40. BOP confines non-U.S. national federal prisoners (including lawful permanent residents) in these privately-operated secure facilities including but not limited to MVCC, Rivers, and Big Spring.

41. The BOP retains custody of and responsibility for all persons sentenced to a term of imprisonment under Title 18 of the U.S. Code ("United States prisoners" or "federal prisoners").

42. Congress has mandated that the BOP maintain charge over, and management and regulation of, all federal prisoners, wherever confined.

43. Congress has mandated that the BOP provide for the safekeeping, care, and subsistence of all federal prisoners, wherever confined.

44. Congress has mandated that the BOP provide for the protection, instruction, and discipline of all federal prisoners, wherever confined.

45. Congress has mandated that the BOP establish appropriate standards of health and habitability for facilities in which federal prisoners are confined.

46. Congress and BOP regulations prohibit Defendants from redelegating authority to private parties.

47. Defendants' use of private prisons results in the unlawful delegation of authority to private entities and persons through management activities such as promulgation of rules different than those applicable to BOP facilities, day-to-day management decisions, and disciplining of federal prisoners by employees of private entities.

Defendants' Transfer Policies Are Unlawful As Applied to Plaintiffs

48. Congress has mandated that the BOP consider on a case-by-case basis five factors in designating federal prisoners to serve confinement in a particular facility and in making decisions to transfer such prisoners between facilities.

49. The BOP may not disregard these statutory factors in making initial designation or transfer decisions.

50. Defendants transferred Plaintiffs to private facilities based upon their national origin and/or alienage without appropriately considering the relevant statutory factors.

51. Plaintiffs are treated differently and worse in private facilities than inmates in BOP facilities with respect to conditions as to which they are similarly situated.

Defendants Lack Authority To Designate Plaintiffs to Private Confinement Facilities

52. Plaintiffs are federal prisoners in the custody of Defendants.

53. Congress has enacted laws that constrain Defendants' authority to classify and designate the place of confinement for federal prisoners.

54. Congress has permitted federal prisoners in the custody of the BOP to be confined in federal penal or correctional institutions or in facilities operated by officials of a State, Territory, or political subdivision.

55. Congress has not authorized Defendants to confine United States prisoners in facilities operated and managed by private entities (i.e., private facilities).

56. The state of North Carolina has prohibited the operation of any correctional facility for confinement of inmates serving sentences for violation of laws of a jurisdiction other than North Carolina, except facilities owned or operated by the federal government and used exclusively for the confinement of inmates serving sentences for violation of federal law.

57. On information and belief, Rivers Correctional Institution is owned and operated by Geo Group not the federal government.

Rivers Correctional Institution

58. Rivers Correctional Institution ("Rivers") is a low-security correctional facility with a capacity of approximately 1380 males.

59. Rivers is owned, operated, and managed by the Geo Group.

60. Geo Group is a private, for-profit corporation with 2009 revenues in excess of $1 billion.

61. Defendants have initiated a practice of transferring other federal prisoners to Rivers based upon national origin and/or alienage.

62. The practice of classifying and designating federal prisoners based upon national origin and/or alienage violates the Fifth Amendment to the United States Constitution and Defendants' own regulations.

63. The practice of classifying and designating prisoners based upon national origin and/or alienage has not been subject to notice and comment in accordance with the Administrative Procedure Act.

Defendants Refuse To Require Geo Group To Abide by Applicable Constitutional, Statutory, and Regulatory Standards in the Management and Operation of Rivers

64. Plaintiffs filed numerous requests with Geo Group seeking to enforce applicable constitutional, statutory, and regulatory standards at Rivers.

65. Plaintiffs requested that Geo Group follow applicable constitutional, statutory, and regulatory standards concerning religious freedom (pertaining to diet and prayer), exposure to secondhand tobacco smoke, access to courts and counsel (including availability of writing paper and envelopes), communication with family, commissary prices, telephone charges, email,

programming opportunities, and freedom from arbitrary search and seizure of legal papers and other property.

66. Geo Group denied Plaintiffs' requests to adhere to constitutional, statutory, and regulatory standards applicable to the BOP and federal penal and correctional institutions.

67. Defendants have failed to require Geo Group to abide by applicable constitutional, statutory, and regulatory requirements.

68. Plaintiffs have exhausted their administrative remedies.

It is Unlawful for Defendants To Utilize Commissary Fund Monies To Offset the Cost of Contracts for the Management of Private Prisons

69. Defendants have directed that income received by the contractor in excess of expenses incurred for telephone usage shall offset the cost of their contracts with private entities for the management and operation of private prisons.

70. Defendants permit Geo Group and other private corporations to charge much higher rates to non-U.S. citizens in private facilities than similar-situated U.S. citizens in BOP prisons for telephone usage and other commissary items.

71. Defendants owe common law fiduciary duties to federal prisoners with respect to management of the Commissary Fund and Inmate Trust Fund. Profits from the operation of the commissary are to be deposited in the Commissary Fund and ordinarily used for purposes which benefit the inmate body as a whole.

72. Commissary Fund monies may be expended only for purposes provided by law. It is unlawful to use Commissary Fund monies to offset the cost of contracting for private prisons.

It Is Unlawful for Defendants Categorically To Refuse To Consider Plaintiffs' Requests for Transfer to Facilities Closer to Their Legal Residence

73. Federal prisoners with eighteen consecutive months of clear conduct in a general population are considered for transfer to facilities nearer to family members.

74. Federal prisoners with detainers or pending charges from another jurisdiction remain eligible for such transfer but generally are not transferred to facilities more distant from the detaining authority.

75. The BOP treats alien federal prisoners differently than similarly situated federal prisoners who will not be released from BOP custody into the community.

76. The BOP categorically excludes from consideration for such transfers aliens subject to an ICE detainer for a hearing. In categorically excluding Plaintiffs from consideration on this basis, the BOP impermissibly assumes that they will be removed before they have been afforded a removal hearing or an order of removal has actually been issued.

77. Plaintiffs were lawfully admitted to the United States more than thirty years ago and have extended families in communities that are more than 500 miles from Rivers. Many of Plaintiffs' family members are United States citizens.

78. Plaintiffs and their family members desire to engage in frequent visits, which they did when Plaintiffs were confined in facilities nearer their legal residences.

79. Plaintiffs' family members either cannot or cannot without great difficulty visit Rivers.

80. As a result, Plaintiffs receive fewer visits from family members while confined in Rivers than they did while confined in facilities closer to their legal residences.

Plaintiff Kamal K. Patel

81. Plaintiff Kamal K. Patel was born in Leicester, England, in 1969, and is a British citizen. When Mr. Patel was ten years old, he moved to the United States with his father, mother, brother, and sister. He graduated as valedictorian of Alva High School, received a degree in Accounting from the University of Texas, and was in his first semester of law school at the University of Texas when he was arrested.

82. Mr. Patel has lived in the United States for more than 30 years.

83. Mr. Patel is a lawful permanent resident of the United States and has been since 1986.

84. According to BOP records, Mr. Patel is a legal resident of Alva, Oklahoma. Mr. Patel has family members located near Alva.

85. In March 1993, Mr. Patel pled guilty and was sentenced to 293 months of incarceration and three years of supervised release on federal drug charges, and ten years (to run concurrently) for witness tampering.

86. From March 1993 until August 2008, Mr. Patel was transferred to nine different BOP facilities. Since August 2008, Mr. Patel has been confined in three private facilities, including Rivers.

87. Mr. Patel began his confinement in March 1993 in **FCI Florence**, a medium-security BOP facility in Florence, Colorado.

88. When his security level dropped in 1996 as a result of good conduct, Mr. Patel was transferred to **FCI Fort Worth**, a low-security BOP facility in Fort Worth, Texas.

89. Mr. Patel converted to Islam in 1998.

90. In 1998, Mr. Patel was transferred to **USP Beaumont**, a high-security BOP facility in Beaumont, Texas. Mr. Patel's transfer to this facility was prompted by a false charge of assault brought against him while he was confined in FCI Fort Worth. This charge was later expunged by BOP in response to a lawsuit brought by Mr. Patel, and a federal court's finding that the charge was predicated upon false testimony. Mr. Patel remained at Beaumont for two years.

91. In 2000, Mr. Patel was transferred to **FCI El Reno**, a medium-security BOP facility in El Reno, Oklahoma.

92. In 2000, Mr. Patel was again transferred to the **Federal Transfer Center** in Oklahoma City, Oklahoma. While Mr. Patel was confined in Oklahoma, his family, including his mother, who is unable to travel long distances because of her health, was able to visit him on a regular basis.

93. In July 2001, Mr. Patel was transferred to **FCI Bastrop**, a low-security BOP facility in Bastrop, Texas.

94. In late 2001, Mr. Patel was transferred to **FCI Beaumont**, a low-security BOP facility in Beaumont, Texas.

95. In 2003, Mr. Patel was transferred to **FCI Big Spring**, a low-security BOP facility in Big Spring, Texas.

96. While at FCI Big Spring in 2003, Mr. Patel met David Duke and had reason to believe that Duke was given unlawful preferential treatment.

97. Mr. Patel filed with prison officials a grievance concerning such unlawful preferences.

98. Mr. Patel contacted the Office of Inspector General for the United States Department of Justice. The Inspector General exposed a disturbing pattern of "discriminatory and retaliatory actions against Muslin inmates" at FCI Big Spring and specifically found that the Warden had unjustly ordered Mr. Patel transferred to the Special Housing Unit for more than 120 days for cooperating with the Inspector General's investigation.

99. While confined in FCI Big Spring, Mr. Patel wrote a letter to the *Dallas Morning News* informing the newspaper of his impressions regarding Duke's treatment. Mr. Patel's letter was motivated by his observation that David Duke was receiving favorable treatment based upon his notoriety and Mr. Patel's suspicion that prison officials embraced David Duke's racist ideas. Mr. Patel's suspicion is strongly supported by the findings of the Inspector General.

100. In particular, Mr. Patel observed that David Duke was given an incident report for violating regulations by promoting, while incarcerated, his book *Jewish Supremacism: My Awakening to the Jewish Question.* Rather than being given a high severity incident report—which would have required a disciplinary hearing, the mandatory loss of good-time credits, and placement in the Special Housing Unit—staff deliberately downgraded his offense and allowed him to avoid these consequences.

101. Mr. Patel's letter was properly marked as protected by the First Amendment and not to be opened by prison officials.

102. FCI Big Spring staff unlawfully opened Mr. Patel's letter, read it, and placed a memorandum in Mr. Patel's file concerning Mr. Patel's exercise of his First Amendment right to communicate with the press.

103. Mr. Patel has unsuccessfully requested that the file be removed under BOP policy and the Privacy Act.

104. In 2004, Mr. Patel was transferred to **FCI Forrest City**, a low-security BOP facility in Forrest City, Arkansas. He remained at Forrest City for two years.

105. In 2006, Mr. Patel was transferred to **FMC Butner**, a BOP medical center in Butner, North Carolina, to receive treatment for a herniated disc. This was the last federal BOP facility in which Mr. Patel was confined.

106. In August 2008, Mr. Patel was transferred for the first time to a private facility. Mr. Patel was sent to the **Moshannon Valley Correctional Center** ("MVCC"), a private, low-security facility in Philipsburg, Pennsylvania. MVCC is owned and operated by Cornell, a for-profit corporation.

107. In January 2009, Mr. Patel was transferred to **Rivers**, a private, low-security facility in Winton, North Carolina. Rivers is owned and operated by Geo Group.

108. In March 2010, Mr. Patel was transferred to **CI Big Spring**, a private, low-security facility in Big Spring, Texas, owned and operated by Cornell.

109. Mr. Patel has had more than eighteen consecutive months of clear conduct.

110. The BOP's decision to transfer Mr. Patel to private prisons has prevented him from maintaining a strong record of rehabilitation and close family and community ties.

Plaintiff Dale Brown

111. Plaintiff Dale Brown is a federal inmate currently confined in Rivers.

112. Mr. Brown is a Jamaican citizen and is a lawful permanent resident of the United States.

113. Mr. Brown was born in Jamaica in 1965. He came to the United States in 1979 with his mother, younger brother, and three younger sisters.

114. Mr. Brown's mother, stepfather, brothers, sisters, and several other relatives are U.S. citizens or lawful permanent residents.

115. Mr. Brown has been a lawful permanent resident for over 31 years. He entered the United States on May 28, 1979, and was admitted after inspection and authorization by immigration officials.

116. Mr. Brown is a practicing Jehovah's Witness.

117. Mr. Brown was awarded a college degree from the College of Arts, Kingston, Jamaica, now known as University of Technology. He graduated as a Quantity Surveyor.

118. On August 22, 1986, Mr. Brown registered with the Selective Service System.

119. Prior to his arrest in 1991, Mr. Brown was gainfully employed as an assistant construction manager for Winn-Dixie Stores.

120. As a result of his arrest, Mr. Brown was sentenced in 1992 to serve 300 months of imprisonment in federal prison (and five years of supervised release) on federal drug charges.

121. According to BOP records, Mr. Brown's legal residence is Lauderdale Lakes, Florida.

122. Mr. Brown has numerous family members in South Florida.

123. In 1992, Mr. Brown began serving his sentence at **FCI McKean**, a medium-security BOP facility in McKean, Pennsylvania.

124. While incarcerated at FCI McKean, Mr. Brown participated in several educational, vocational training, and religious programs offered by the institution. He was also a member of the Pennsylvania Jaycees. Mr. Brown participated in the college program offered by the University of Pittsburgh and excelled in the courses he took until the program was cancelled.

125. On September 25, 1992, the INS issued a Notice of Action letter ("Detainer") to determine whether he is subject to deportation from the United States. Mr. Brown has yet to be afforded any hearing pertaining to removal from the United States, to which he is entitled.

126. Mr. Brown received a monetary award for his contributions in developing Life Safety and Handicap projects while he was incarcerated at McKean. His supervisor indicated that the projects saved the BOP thousands of dollars.

127. In 1998, Mr. Brown was transferred to **FCI Coleman**, a low-security BOP facility in Coleman, Florida.

128. While at Coleman, Mr. Brown continued with his participation in the educational, vocational, recreational, and religious programs offered by the institution. At Coleman, Mr. Brown was a member of the NAACP, he joined the inmate tutoring program to teach other inmates, and he led bible studies under the religious program. Mr. Brown also continued with his college education by taking classes offered by the Lake Sumter Community College in his pursuit of a degree in Business Administration, and he earned fifteen credits with a 4.0 GPA. The cost of Mr. Brown's college tuition and books were partially funded by his family, with money he earned from his prison job and with funds from a scholarship program offered by UNICOR, Mr. Brown's employer.

129. UNICOR is a government corporation that employs inmates and provides them with training in job skills that will be useful upon release.

130. UNICOR allows lawful permanent residents to participate in their programs, even if they are subject to an ICE detainer for a hearing. UNICOR excludes only inmates with a final order of deportation.

131. Mr. Brown has an extensive work history in the Bureau of Prisons, and the vast majority of his work performance evaluations have been outstanding. For more than 12 years, Mr. Brown was employed by UNICOR.

132. While at Coleman, Mr. Brown was also able to receive regular visits from his family in nearby areas of Florida.

133. At Coleman, Mr. Brown worked as the factory manager's clerk and received favorable job reviews.

134. In 2008, Mr. Brown was transferred to **Rivers**.

135. Since his incarceration in Rivers, Mr. Brown has not been visited by his family due to the hardship of traveling to Winton, North Carolina, from South Florida.

136. Mr. Brown's transfer to Rivers interfered with his ability to complete the business degree he started at Coleman.

137. Mr. Brown has been a model prisoner.

138. Mr. Brown has not had a disciplinary infraction in the nearly two decades he has been confined.

139. Mr. Brown intends to remain in the United States following the completion of his sentence and apply for a waiver of deportation under § 212(c) of the Immigration and Nationality Act.

140. A strong record of rehabilitation and strong family and community ties are important considerations in § 212(c) waivers.

141. The BOP's decision to transfer Mr. Brown to Rivers has prevented him from maintaining a strong record of rehabilitation by foreclosing his ability to continue to participate in rehabilitative programs such as UNICOR and the college programs offered at BOP facilities.

142. The BOP's decision to transfer Mr. Brown to Rivers has also prevented him from maintaining the close family and community ties that he was able to cultivate during his time in BOP prisons.

143. On or about May 14, 2010, employees of GEO Group closed the prison library at Rivers and unlawfully seized inmates' legal papers and books, draft papers, and other materials.

144. The items seized included Plaintiff Brown's mesh bag containing a draft motion, his legal folder, his address book, and other personal items, as well as legal materials of other inmates.

145. Geo Group refused to return the seized items to the inmates, and upon information and belief, destroyed the items without affording the inmates the opportunity to reclaim the items or to contest their seizure.

146. Defendants failed to enforce applicable BOP policies concerning possession of legal materials and search and seizure of private property.

Restriction of Religious Freedoms

147. BOP regulations require prison officials to permit inmates to pray while on work detail.

148. BOP regulations accommodate religious dietary restrictions of Muslim prisoners.

149. By policy, Geo Group does not permit inmates at Rivers to pray while on work detail, nor does it adequately accommodate the religious dietary restrictions of Muslim prisoners.

150. Defendants have failed to cause these BOP policies, which are mandated by the Religious Freedom Restoration Act, to be enforced at Rivers.

Exposure to Secondhand Smoke

151. Outdoor exercise areas of Geo Group prisons have been designated for smoking.

152. Any restrictions that are imposed on smoking are not enforced, causing secondhand smoke to be prevalent throughout Rivers and impossible for federal prisoners to avoid.

153. Mr. Patel's asthma was aggravated as a result of secondhand smoke, necessitating the use of a new inhaler.

154. Mr. Brown has suffered eye irritation and an aggravation of his allergies as a result of secondhand smoke.

Additional Inequities in Rivers

155. Plaintiffs have been denied programmatic opportunities because of their status as permanent legal residents.

156. Unlike inmates in BOP facilities, Rivers does not permit inmates to make unmonitored telephone calls to legal counsel.

157. Rivers has informed federal prisoners that they must rely upon the mail system for confidential communications with attorneys. This has impeded Plaintiffs' right to communicate with their attorneys.

158. Moreover, federal prisoners in BOP prisons are provided with writing paper and envelopes free of charge. Rivers has informed federal prisoners that private prisons are not required to follow this BOP policy.

159. Further, inmates in private prisons are charged substantially higher rates for telephone calls and basic items from the commissary. Revenue generated unlawfully is applied to the contract between BOP and the private prison, causing federal prisoners in private prisons

to subsidize their incarceration in a manner different than those in BOP facilities. This practice violates applicable statutory, regulatory, and common law restrictions on the use of such funds, which are to be expended for the benefit of the inmate population.

160. Plaintiffs and other inmates in private prisons pay much more than inmates in BOP prisons for the same commissary items.

161. Federal prisoners in private prisons are not provided e-mail access like inmates in BOP facilities.

162. Plaintiffs have exhausted administrative remedies with respect to these issues.

Count One
Confinement of Federal Prisoners in Private Facilities
Administrative Procedure Act
(Injunctive and Declaratory Relief Against All Defendants)

163. Plaintiffs incorporate by reference Paragraphs 1 through 162 alleged above.

164. Defendants have adopted a practice of confining federal prisoners in private facilities on the basis of national origin and/or alienage.

165. With the exception of District of Columbia offenders, Congress has not authorized the BOP to confine federal prisoners in private facilities.

166. Without observing the procedural requirements mandated by the Administrative Procedure Act, the BOP has adopted a practice of confining federal prisoners in private facilities.

167. By confining inmates in private facilities based upon national origin and/or alienage, Defendants have failed to consider appropriate mandatory statutory factors.

168. Defendants are acting in a manner that is arbitrary, capricious, an abuse of discretion, in excess of statutory authority, and without observance of procedure required by law.

169. The confinement of federal prisoners at Rivers and other such private facilities violates applicable state laws.

Count Two
Designation Based on National Origin and/or Alienage
Equal Protection and Administrative Procedure Act
(Injunctive and Declaratory Relief Against All Defendants)

170. Plaintiffs incorporate by reference Paragraphs 1 through 169 alleged above.

171. Segregating prisoners in private facilities on the basis of national origin can only be justified if narrowly tailored to address a compelling governmental interest.

172. The BOP practice of segregating prisoners in private facilities is not narrowly tailored to address a compelling governmental interest.

173. Binding BOP regulations prohibit discrimination on the basis of national origin.

174. The BOP practice of segregating prisoners in private facilities violates BOP regulations.

175. There is no rational basis for segregating alien federal prisoners in private facilities.

176. Defendants are acting in a manner that violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment to the United States Constitution and binding BOP regulation.

Count Three
Enforcement of Constitutional, Statutory, and Regulatory Standards in Private Facilities
Equal Protection and Administrative Procedure Act
(Injunctive and Declaratory Relief Against All Defendants)

177. Plaintiffs incorporate by reference Paragraphs 1 through 176 alleged above.

178. Geo Group refuses to adhere to constitutional, statutory, and regulatory standards applicable to the treatment of federal prisoners.

179. Defendants refuse to require Geo Group to adhere to constitutional, statutory, and regulatory standards applicable to the treatment of federal prisoners in connection with inmates confined at Rivers.

180. The standards applied by Geo Group at Rivers have been adopted without observing procedural requirements mandated by the Administrative Procedure Act and constitute an unlawful designation of authority by BOP.

181. Defendants' failure to enforce applicable constitutional, statutory, and regulatory standards at Rivers violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

182. Defendants' failure to enforce applicable constitutional, statutory, and regulatory standards at Rivers is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and results in the application of standards that have been adopted without observance of procedure required by law.

Count Four
Requiring Aliens To Subsidize Incarceration at Private Prisons
Administrative Procedure Act
(Injunctive and Declaratory Relief Against All Defendants)

183. Plaintiffs incorporate by reference Paragraphs 1 through 182 alleged above.

184. With limited exceptions, Congress requires the BOP to pay the expenses of federal prisoners out of the United States Treasury.

185. Geo Group sells commissary items to inmates and requires inmates to pay for certain services such as use of telephones.

186. Geo Group charges aliens substantially more for these services and items than inmates in federal facilities are charged.

187. Profits from the sale of such items and services are applied to BOP's contracts with private entities, thereby reducing BOP's cost of incarcerating federal prisoners in private facilities. As a result, inmates in private facilities who purchase such items and services are paying expenses that Congress requires to be paid out of the United States Treasury.

188. Defendants' use of such funds violates applicable statutory, regulatory, and common law requirements.

189. Defendants are acting in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and in excess of statutory authority.

Count Five
Conditions of Confinement
Religious Freedom Restoration Act
(Injunctive and Declaratory Relief Against BOP and Defendant Lappin in his Official Capacity)
(Damages Against Defendant Lappin in his Personal Capacity)

190. Plaintiffs incorporate by reference Paragraphs 1 through 189 alleged above.

191. Plaintiff Patel is a Muslim whose sincere religious beliefs require him to pray five times each day and adhere to special dietary restrictions.

192. Mr. Patel was prohibited from praying while on work detail at Rivers, substantially burdening his exercise of religion.

193. Mr. Patel was denied a diet conforming to his religious needs while confined at Rivers.

194. The denial of Mr. Patel's requests was not the least restrictive means of furthering compelling governmental interests.

195. BOP accommodates the religious practices of Muslims like Mr. Patel by allowing them to pray while on work detail and accommodating religious dietary needs in BOP facilities.

196. Defendants refuse to require Geo Group to adhere to BOP policies concerning religious practices of Muslims.

197. By refusing to require private entities such as Geo Group to follow BOP regulations, Defendant Lappin set in motion the conditions that led to the violation of Mr. Patel's rights under RFRA.

198. Defendant Lappin is responsible for the acts and omissions of the employees and agents acting under his direction.

199. Rivers and its employees act under color of federal law with respect to confinement of federal prisoners.

200. Geo Group refuses to comply with the requirements of the Religious Freedom Restoration Act.

Count Six
Conditions of Confinement
Eighth Amendment
(Injunctive and Declaratory Relief Against All Defendants)

201. Plaintiffs incorporate by reference Paragraphs 1 through 200 alleged above.

202. Geo Group has failed to establish and enforce smoking areas at Rivers that prevent non-smoking inmates from being exposed to secondhand tobacco smoke.

203. Defendants have failed to require Geo Group to enforce smoking policies applicable to BOP facilities.

204. Plaintiffs' exposure to secondhand smoke at Rivers has caused adverse present health effects.

205. Plaintiffs' exposure to secondhand smoke at Rivers will cause adverse future health effects.

206. Defendants' and Geo Group's failure to protect federal prisoners from the effects of secondhand smoke is the result of deliberate indifference.

207. Defendants' conduct violates the Eighth Amendment to the United States Constitution.

Count Seven
Transfer Closer to Legal Residence
Equal Protection and Administrative Procedure Act
(Injunctive and Declaratory Relief Against All Defendants)

208. Plaintiffs incorporate by reference Paragraphs 1 through 207 alleged above.

209. Defendants have categorically denied Plaintiffs consideration for transfer closer to their legal residences based upon alienage.

210. Defendants permit similarly situated federal prisoners to be considered for such transfers.

211. Defendants adopted this policy without observing the procedural requirements mandated by the Administrative Procedure Act.

212. By categorically excluding Plaintiffs from consideration for transfer, Defendants have failed to consider the applicable statutory factors on a case-by-case basis, as they are required to do and therefore have acted in excess of statutory authority.

213. By assuming that Plaintiffs will be deported based upon an ICE detainer for a hearing, Defendants have abused their discretion and acted contrary to law.

214. Defendants' treatment of Plaintiffs violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment to the United States Constitution and the Administrative Procedure Act.

Count Eight
Privacy Act
(Injunctive and Declaratory Relief Against BOP)

215. Plaintiffs incorporate by reference Paragraphs 1 through 214 alleged above.

216. In 2004, while incarcerated at FCI Big Spring, Plaintiff Patel wrote a letter to the *Dallas Morning News*, communicating what Mr. Patel believed was BOP employees' favorable treatment of David Duke, also an inmate at FCI Big Spring.

217. The letter Mr. Patel wrote to the newspaper commented on the favorable treatment afforded David Duke by prison officials. Mr. Patel's letter is protected speech under the First Amendment. Mr. Patel marked the correspondence "Special Mail" to indicate that it was a protected communication.

218. BOP policy prohibits BOP employees from opening correspondence marked "Special Mail" outside the presence of inmates.

219. Contrary to BOP policy, BOP employees opened and read Mr. Patel's letter to the *Dallas Morning News*.

220. Upon opening and reading Mr. Patel's letter to the *Dallas Morning News*, BOP personnel wrote a memorandum documenting Mr. Patel's communication with the newspaper and recommending that Mr. Patel be moved from FCI Big Spring to another facility as a consequence.

221. The presence of this memorandum in Mr. Patel's files continues to be used by the BOP to discriminate against Mr. Patel.

222. Under the Privacy Act, 5 U.S.C. § 522a(e)(7), the BOP is prohibited from maintaining any record "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

223. The BOP's continued maintenance of this memorandum in its entirety, without redaction of Mr. Patel's communication with the *Dallas Morning News*, is in violation of 5 U.S.C. § 522a(e)(7).

224. Mr. Patel initiated an administrative remedy request to amend his record on February 20, 2010. This request was finally denied on April 30, 2010.

225. Under 5 U.S.C. § 522(g)(1)(A), Mr. Patel is provided a civil action against the BOP upon the Agency's "determination . . . not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection."

226. The BOP's decision to maintain the unredacted memorandum in his files violates the Privacy Act.

Count Nine
Documents Related to Office of Inspector General Report
Freedom of Information Act
(Injunctive and Declaratory Relief Against BOP)

227. Plaintiffs incorporate by reference Paragraphs 1 through 226 alleged above.

228. On November 22, 2004, Mr. Patel filed a Freedom of Information Act ("FOIA") request to the Office of the Inspector General ("OIG") for documents related to an OIG Report.

229. BOP provided Mr. Patel with 21 pages of documents, 15 of which were released in their entirety and 6 of which were redacted. None of the exhibits or witness interviews associated with the OIG report—in which the OIG determined Muslims were being discriminated against—were provided, nor was any reason provided for their withholding. BOP provided no index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) ("*Vaughn* Index").

230. Mr. Patel appealed this response. BOP responded to this appeal on November 28, 2007, affirming its denial and stating, regarding the missing documents, that BOP's action "was limited to documents that were referred to it by OIG" and recommending that he ask for documents in a separate FOIA request.

231. Mr. Patel filed similar requests with the BOP, two on February 14, 2005 and one on March 5, 2005.

232. Pursuant to these three 2005 requests, on March 24, 2005 BOP provided Mr. Patel with a total of 10 pages. No mention was made of the 40 page OIG report or the 99 exhibits attached to it. No *Vaughn* Index was provided.

233. Mr. Patel appealed this request on April 24, 2005, objecting to the missing documents. A final denial was issued on May 18, 2007.

Count Ten
Documents Related to Transfers
Freedom of Information Act
(Injunctive and Declaratory Relief Against BOP)

234. Plaintiffs incorporate by reference Paragraphs 1 through 233 alleged above.

235. Mr. Patel has been transferred multiple times to various facilities over the past decade.

236. On October 6, 2008, Mr. Patel made a request for documents relating to three separate transfers. Mr. Patel provided a revised request on November 16, 2008. That request was returned to Mr. Patel because it was missing a certificate of identity. He re-sent the letter on January 29, 2009, according to a copy of the Certified Mail receipt attached with the letter.

237. To date, Mr. Patel has not received any documents pursuant to this request.

238. On February 1, 2009, Mr. Patel made a request for documents relating to a medical transfer request.

239. The BOP denied this request on March 17, 2009.

240. Mr. Patel appealed the BOP decision on March 26, 2009.

241. To date, Mr. Patel has not received any documents pursuant to this request.

Count Eleven
Documents Related to Protection Hearing
Freedom of Information Act
(Injunctive and Declaratory Relief Against BOP)

242. Plaintiffs incorporate by reference Paragraphs 1 through 241 alleged above.

243. On April 25, 2009, Mr. Patel sent the BOP a request for documents related to a protection hearing while he was incarcerated at Moshannon Valley Correctional Center.

244. On April 19, 2010, BOP released 247 pages in their entirety to Mr. Patel, 128 pages with redactions, and withheld 46 pages in their entirety. It did not provide a *Vaughn* Index as to the withheld pages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief and a judgment against Defendants:

1. Declaring unlawful Defendants' practice of confining federal prisoners in private facilities and ordering Defendants to cease this unlawful practice;

2. Declaring unlawful Defendants' practice of designating federal prisoners on the basis of national origin and/or alienage and ordering Defendants to cease this unlawful practice;

3. Declaring that constitutional, statutory, and regulatory standards applicable to BOP facilities govern the treatment of federal prisoners in private facilities and ordering Defendants to cause such standards to be enforced;

4. Declaring unlawful Defendants' practice of using revenue generated by the sale of goods and services to federal prisoners in private prisons to offset BOP contract costs for operation and management of such facilities and ordering Defendants to cease this unlawful practice;

5. Declaring unlawful Defendants' failure to require Geo Group to comply with the Religious Freedom Restoration Act; ordering Defendants to enforce the Religious Freedom

Restoration Act in private facilities in which federal prisoners are confined; and ordering Defendant Lappin to pay an appropriate amount to be determined at trial;

6. Declaring unlawful Defendants' failure to require Geo Group to comply with the BOP regulations on smoking in federal facilities and ordering Defendants to enforce such regulations in private facilities in which federal prisoners are confined;

7. Declaring unlawful BOP's policy of categorically excluding from consideration from nearer to legal residence transfers aliens, including lawful permanent residents aliens, who are subject to an ICE or INS detainer for a hearing and ordering Defendants to consider Plaintiffs' requests for such transfers;

8. Ordering Defendants to amend records pertaining to Mr. Patel to remove reference to Mr. Patel's exercise of his First Amendment rights;

9. Ordering Defendants to produce in their entirety documents that have not been produced pursuant to Mr. Patel's Freedom of Information Act requests, to produce a *Vaughn* Index providing information for each and every withheld document, and to produce in full documents that have only been produced with redactions;

10. Determining that this is a proper class action to be certified under Rule 23;

11. Awarding Plaintiffs reasonable attorney's fees, expert witness fees, and other costs; and

12. Awarding such other relief as this Court may deem just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs hereby demand a trial by jury as to all issues so triable.

July 12, 2010

Respectfully Submitted,
WILLIAMS & CONNOLLY LLP

By: /s/ F. Greg Bowman

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KAMAL PATEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 09-200 (RDM)**
	)	
BUREAU OF PRISONS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (Dkt. 68). For the reasons stated herein, the motion is **GRANTED** in part and **DENIED** in part. An appropriate order accompanies this Memorandum Opinion.

I. BACKGROUND

Plaintiff, Kemal Patel, filed this lawsuit *pro se* in 2009. *See* Dkt. 1. Patel is a citizen of the United Kingdom; when he filed suit, he was a legal permanent resident of the United States and was incarcerated in a facility run by Defendant Bureau of Prisons ("BOP"). *Id.* ¶ 4. The original complaint alleged that Patel was subjected to unfair treatment while incarcerated based on his status as a noncitizen—specifically, he alleged that BOP denied noncitizen inmates the same transfer and prison programming opportunities provided to U.S. citizens. *Id.* ¶¶ 15-38. An amended complaint, filed on June 8, 2009, added Dale Brown as an additional plaintiff and new claims under the Freedom of Information Act ("FOIA"). Plaintiffs filed a Second Amended Complaint on September 1, 2009, which added allegations that BOP had wrongfully assigned noncitizen inmates to private prisons where they were subjected to "significantly more onerous

conditions of confinement." Dkt. 13 ¶¶ 53-69.

Plaintiffs obtained pro bono counsel in 2010. *See* Dkt. 45. On July 12, 2010, they filed a motion for leave to file a Third Amended Complaint. Dkt. 65. The Third Amended Complaint included eleven counts: challenges to the BOP's assignment and treatment of noncitizen inmates under the Equal Protection Clause and Administrative Procedure Act ("APA"); an alleged violation of the Religious Freedom Restoration Act ("RFRA"); an Eighth Amendment claim relating to exposure to second-hand smoke; a claim under the Equal Protection Clause and the APA relating to transfers of noncitizen inmates; a claim under the Privacy Act; and three FOIA claims.

Although Plaintiffs' motion for leave to amend was not granted until September 7, 2011, Dkt. 90, the instant motion was originally directed at the Third Amended Complaint. *See* Dkt. 68 at 1. Subsequently, both Patel and Brown were released from BOP custody. In order to clarify the scope of the proceedings in light of their release, the Court granted Plaintiffs leave to file a Fourth Amended Complaint (the "Complaint"). Dkt. 118. In the Fourth Amended Complaint, Brown no longer appears as a plaintiff and Patel has dropped many of his claims for injunctive relief. The Complaint includes damages claims under the Equal Protection Clause and RFRA (Counts I and II, respectively), a claim for injunctive relief under the Privacy Act (Count III), and two FOIA counts (Counts IV and V). The parties have agreed that the arguments in the instant motion may be applied to the Fourth Amended Complaint, provided that Defendants will have the opportunity to file a supplemental motion raising additional defenses particular to the Fourth Amended Complaint in the event the case is not dismissed in its entirety. *See* Dkt. 117 at 2 n.1.

II. LEGAL STANDARDS

On a motion to dismiss for failure to state a claim, the Court must "treat the complaint's factual allegations as true [and] must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Gilvin v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001). Although "detailed factual allegations" are not necessary, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). The Court need not accept as true either a "legal conclusion couched as a factual allegation" or an inference drawn by the plaintiff if such inference is unsupported by the facts set out in the complaint. *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006) (citations and quotation marks omitted). The Court may consider "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002) (citation omitted).

If a Court concludes that it is appropriate to consider additional evidence submitted by the parties, it must convert the motion to dismiss into a motion for summary judgment. Fed. R. Civ. P. 12(d). Whether to convert a motion to dismiss into a summary judgment motion is "committed to the sound discretion of the trial court." *Bowe-Connor v. Shinseki*, 845 F. Supp. 2d 77, 85 (D.D.C. 2012) (quotation marks omitted). Before deciding to convert a motion to dismiss, the "court must assure itself that summary judgment treatment would be fair to both parties," *Tele-Commc'ns of Key West, Inc. v. United States*, 757 F.2d 1330, 1334 (D.C. Cir. 1985), and that the parties are provided the opportunity to present all relevant materials, Fed. R. Civ. P. 12(d).

The Court may grant summary judgment where the evidence submitted by the parties shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the initial burden to identify the portions of the record that, in its view, "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party carries that burden, the opposing party must "designate specific facts showing there is a genuine issue for trial." *Id.* at 324 (quotation marks omitted).

III. DISCUSSION

A. Equal Protection

Plaintiff asserts his equal protection claim (Count I) against only Defendant Clark in his individual capacity. Dkt 118 at 16. At oral argument in this matter, however, the Court became aware that Clark had not yet been served. Although counsel for the United States has advanced several arguments for dismissal of the equal protection claim, counsel has also expressly stated that he lacks authorization to represent Clark. Plaintiff filed a proof of service on Clark after oral argument (Dkt. 125); however, there is no indication in the record that counsel for the United States has yet been authorized to represent him.

Because the only defendant against whom Plaintiff alleges his equal protection claim is not represented by any attorney who has appeared, it would be inappropriate for the Court to rule on the merits of the equal protection claim at this time. After an attorney for Clark notices an appearance, Clark will have an opportunity to move to dismiss the equal protection claim against him and raise any appropriate arguments in support of that motion.

B. RFRA

Plaintiff's RFRA allegations focus on his treatment at CI Rivers and CI Big Spring, two private prisons at which he was incarcerated in 2009 and 2010, respectively. Dkt. 118 ¶¶ 90-91, 119, 121. At CI Rivers, Plaintiff, who is Muslim, alleges that he was not permitted to pray while on work duty, and that, as a result, he was unable to pray "at the times required by his religious beliefs." *Id.* ¶ 95. At CI Big Spring, Plaintiff alleges he was not provided halal meals and was prohibited from choosing kosher meals. *Id.* at 97. The alternative meals that were offered to Plaintiff allegedly contained ingredients that "would be inappropriate for an inmate following a halal diet." *Id.* ¶ 98. Plaintiff also alleges that, contrary to BOP policy, the company operating CI Big Spring failed to provide menus and nutritional information to inmates before meals. *Id.* ¶¶ 99-100. Finally, he alleges that he was not allowed to take all of his meals in the evening on days on which fasting was required outside of Ramadan. *Id.* ¶ 101. Plaintiff's allegations target Defendant Lappin, the former director of BOP, as well as three John Doe defendants who were allegedly responsible for enforcing BOP policy at CI Big Spring. *Id.* ¶¶ 16-17.

Defendants argue that these allegations fail to state a claim for three reasons. First, they assert that RFRA does not authorize damages actions against federal officials in their individual capacities. Second, they claim that Plaintiff has failed to allege sufficient personal involvement by Defendant Lappin for liability to attach to him. Finally, they argue that Plaintiff's allegations are substantively insufficient to state a claim under RFRA. The Court will consider each of these arguments in turn.

1. *Individual-Capacity Damages Claims Against Federal Officials*

The parties disagree on the issue whether RFRA authorizes individual-capacity damages claims against federal officials. RFRA allows any "person whose religious exercise has been burdened in violation of [the statute]" to "assert that violation as a claim or defense in a judicial

proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). A "government" is defined to "include[] a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb-2(1).

Defendants argue that this definition does not authorize individual-capacity suits against government officials. They assert that the statute's use of the word "official" refers only to official-capacity suits, and that the interpretive canons *noscitur a sociis* and *ejusdem generis* show that the term "other person acting under color of law" should be read to authorize only official-capacity claims. Dkt. 98 at 6.

There are significant flaws in Defendants' position. It is not at all clear why a statutory term authorizing suit against "an official" should be presumed to allow only official-capacity suits. Courts routinely recognize that "'government officials may be sued in their individual capacities'" under certain circumstances, *e.g.*, *Oberwetter v. Hilliard*, 639 F.3d 545, 554 (D.C. Cir. 2011) (citation omitted)—indeed, "officials" are the only persons for whom the distinction between individual-capacity and official-capacity suits has any salience. A statutory term authorizing suits against "officials" thus sheds little light on whether and when plaintiffs may sue those officials in their individual capacities.

Defendants' argument that the phrase "other person acting under color of law" authorizes only official-capacity suits is even less persuasive. That phrase contemplates that persons "other" than "officials" may be sued under RFRA, and persons who are not officials may be sued only in their individual capacities. *See Jama v. INS*, 343 F. Supp. 2d 338, 374 (D.N.J. 2004). Defendants' interpretation would render the entire phrase surplusage: once Congress authorized official-capacity suits against "officials," adding another term that allowed only official-capacity suits would have had no effect whatsoever. Neither of the interpretive canons on which Defendants rely can overcome this deficiency in their reading of the statute. Under the canon

ejusdem generis, "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Ali v. BOP*, 552 U.S. 214, 223 (2008) (quotation marks omitted). This canon is inapplicable here. The phrase "other person acting under color of law" appears in § 2000bb-2 not as a final, "catch-all" item in a list, but instead as a parenthetical modifier that expands upon one item on the list. *See* 42 U.S.C. § 2000bb-2 ("the term 'government' includes a branch, department, agency, instrumentality, and *official (or other person acting under color of law)* of the United States . . . .") (emphasis added). The phrase "official (or other person acting under color of law)" is thus very similar to the disjunctive phrase to which *ejusdem generis* was held inapplicable in *Ali*. 552 U.S. at 225 ("The structure of the phrase 'any officer of customs or excise or any other law enforcement officer' does not lend itself to application of the canon."). The phrase at issue is intended to enlarge the category of "person[s]" subject to suit, not to refer to miscellaneous things that are "akin to" "branch[es], department[s], agenc[ies], instrumentalit[ies], and official[s]."

The argument under *noscitur a sociis* fares no better. Under that precept, "a word may be known by the company it keeps." *Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010). It is "'not an invariable rule,'" however, "'for the word may have a character of its own not to be submerged by its association.'" *Id.* (quoting *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)). Here, that the phrase "or other person acting under the color of law" has a "character of its own" is evident on the face of the statute. There is no apparent congruity between a "branch, department, agency [or] instrumentality" of the government and a "person," and the statute expressly differentiates "officials" from "*other* person[s]." By authorizing suits against "persons" who are not "officials," Congress thus envisioned at least some individual-capacity suits under RFRA.

The fact that Congress authorized individual-capacity suits against "other persons acting under color of law" at least suggests that it also intended to permit individual-capacity suits against "officials," but it does not conclusively resolve the issue. Congress could have intended to permit only official-capacity suits against officials while allowing suits against non-officials "acting under color of law." This reading of the statute, however, is implausible. First, there is no affirmative evidence that Congress intended to draw such a distinction. Given the availability of qualified immunity, it would be anomalous if actual government officials were wholly immune from personal liability for even clear RFRA violations while private citizens "acting under color of law" were subject to suit—and it would certainly do nothing to further RFRA's purpose of "provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b).

Second, similar statutory language in at least one other context has been interpreted to permit individual-capacity claims against officials. 42 U.S.C. § 1983 permits suits against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage" of a State or territory deprives a person of constitutional rights, and is uniformly interpreted to permit individual-capacity claims against government officials. *See, e.g.*, *Wesby v. District of Columbia*, 765 F.3d 13, 18, 31 (D.C. Cir. 2014) (affirming judgment under § 1983 against police officers "in their individual capacities"). Under Defendants' interpretation of RFRA, Congress's choice explicitly to include "official[s]" among the persons and entities that may be sued under the statute—a departure from the language of § 1983—would impose an additional *limitation* on plaintiffs' ability to sue officials. This is backwards: by explicitly adding a term permitting suits against officials to language familiar from the § 1983 context, RFRA contemplates, if anything, that such suits will be more available. In any event, it is safe to assume that Congress understood that it acted against the backdrop of settled § 1983 precedent when it added the similar "under

color of law" language to RFRA. *Cf. Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

Defendants have marshalled only minimal case law supporting their position. The two decisions from the Western District of Pennsylvania they cite do not analyze the relevant statutory provisions. *Ellis v. United States*, No. 08-160, 2011 WL 3290217, at *12 (W.D. Pa. June 17, 2011), simply follows, without elaboration, *Jean-Pierre v. BOP*, No. 09-266, 2010 WL 3852338, at *6 n.4 (W.D. Pa. July 30, 2010). *Jean-Pierre*, in turn, stated in a footnote without analysis that "neither RFRA nor RLUIPA [the Religious Land Use and Institutionalized Persons Act] support damages claims against government officials in their individual capacity." The cases it cites for that proposition, moreover, uniformly involve RLUIPA, not RFRA. *See Nelson v. Miller*, 570 F.3d 868, 889 (7th Cir. 2009) ("declin[ing] to read RLUIPA as allowing damages against defendants in their individual capacities"); *Rendelman v. Rouse*, 569 F.3d 182, 189 (4th Cir. 2009) ("Congress did not signal with sufficient clarity an intent to subject [a state official] to an individual capacity damages claim under RLUIPA"); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 329 (5th Cir. 2009) ("we decline to read Congress's permission to seek 'appropriate relief against a government' as permitting suits against RLUIPA defendants in their individual capacities"), *aff'd sub nom. Sossamon v. Texas*, 131 S. Ct. 1651 (2011); *Smith v. Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007) ("section 3 of RLUIPA . . . cannot be construed as creating a private right of action against individual defendants for monetary damages"); *Porter v. Beard*, No. 09-549, 2010 WL 2573878, at *6 (W.D. Pa. May 12, 2010) ("[RLUIPA] does not support damages claims against state officials in their individual capacity"); *Logan v. Lockett*, No. 07-

1759, 2009 WL 799749, at *4 (W.D. Pa. Mar. 25, 2009) ("RLUIPA does not support damage claims against state officials in their individual capacity").

The distinction between RFRA and RLUIPA is essential to the question raised here. Although RFRA by its terms authorizes lawsuits against both the federal government and the states, it was held unconstitutional as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that application of RFRA to states exceeded Congress's power under the Enforcement Clause of the Fourteenth Amendment). In response, Congress enacted RLUIPA as an exercise of its spending power. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1656 (2011).

Although "RLUIPA borrows important elements from RFRA," including virtually identical language creating a private right of action for aggrieved individuals, *id.*, the distinct constitutional bases for the two laws affect their breadth. In particular, because RLUIPA was enacted as an exercise of Congress's spending power, interpreting that statute to allow damages actions against state officials in their individual capacities would "raise serious questions regarding whether Congress had exceeded its [constitutional] authority." *Nelson*, 570 F.3d at 889. Restrictions imposed on states pursuant to the Spending Clause are essentially contractual in nature—states agree to comply with certain conditions in exchange for federal funds. *See id.* at 887-88. Applying restrictions created pursuant to the Spending Clause to persons or entities other than the recipients of the federal funds at issue would have the effect of binding non-parties to the terms of the spending "contract." *Id.* (citing *Sossamon*, 560 F.3d at 328-29; *Smith v. Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007)). Courts have thus declined to allow individual-capacity suits for damages against state officials under RLUIPA because doing so would subject those officials to Spending Clause restrictions that are properly binding only on states that receive federal funds. *See, e.g.*, *Nelson*, 570 F.3d at 889; *Smith*, 502 F.3d at 1274-75. Other courts have reached the same conclusion for the related reason that RLUIPA does not "signal with sufficient

clarity an intent to subject" state officials to individual capacity suits, applying a "clear notice requirement" that is specific to Spending Clause enactments. *Rendelman*, 589 F.3d at 188-89; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously").

Neither of these rationales applies to interpretation of RFRA. RFRA's application to federal action is not based on the Spending Clause. Rather, Congress may "carve out a religious exemption from otherwise neutral, generally applicable laws based on its power to enact the underlying statute in the first place." *Guam v. Guerrero*, 290 F.3d 1210, 1220-21 (9th Cir. 2002). There can be no question, moreover, that Congress possesses the power "to establish and maintain an effective regime of criminal law enforcement," including the power to control "the operation of federal correctional facilities." Constitutionality of 18 U.S.C. § 1120, 24 Op. O.L.C. 156, 158, 2000 WL 34475733 (2000). This Article I power carries with it the authority to require religious accommodation of federal inmates pursuant to RFRA. *See Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001); *Guerrero*, 290 F.3d at 1221.

Because Congress can create a right of action against an individual to enforce such statutory requirements, it need not satisfy the "clear notice" requirement that attaches to conditions imposed under the Spending Clause. And, as the Seventh Circuit recognized in *Nelson*, the language of RLUIPA (which closely tracks the relevant language of RFRA) "appears to authorize suit against [a defendant official] in his individual capacity." 570 F.3d at 886. In *Nelson*, that apparent meaning was overcome only by the specific constitutional concerns raised by the Spending Clause. Construing RFRA, where those concerns do not apply, the Court concludes that Congress intended to authorize both official and individual-capacity suits against federal officials.

It follows from this conclusion that Congress also intended to permit individual capacity suits *for damages*. It is unlikely that an action for injunctive or declaratory relief under RFRA would be treated as an individual-capacity suit. "Regardless of the manner by which a plaintiff designated the action, a suit should be regarded as an official-capacity suit when the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act." *Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 24 (D.D.C. 2007) (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (quotation marks and alterations omitted). All or nearly all RFRA claims for injunctive or declaratory relief against federal officials would likely satisfy those criteria. The only significant purpose for an individual-capacity claim, then, would be to seek damages—damages that are unavailable in RFRA actions against the sovereign. *See Webman v. BOP*, 441 F.3d 1022, 1025-26 (holding that RFRA does not waive federal government's sovereign immunity from suits for damages).

The language of the statute substantiates this inference. Faced with "the question of what remedies are available under a statute that provides a private right of action," courts "presume the availability of all appropriate remedies"—including, at least at times, damages—"unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 66, 76 (1992) (holding that "a damages remedy is available for an action brought to enforce Title IX" of the Civil Rights Act). RFRA expressly allows plaintiffs to "obtain appropriate relief against a government," and contains no "express[ ] indicat[ion]" that damages are prohibited. 42 U.S.C. § 2000bb-1(c); *Franklin*, 503 U.S. at 66. Thus, under the presumption articulated in *Franklin*, RFRA authorizes damages when that form of relief is "appropriate."[1]

[1] A thorough opinion from the District of New Jersey reached the same conclusion even though it concluded that the presumption in *Franklin* was inapplicable to RFRA. *See Jama*, 343 F.

The Court of Appeals' conclusion in *Webman* that damages are unavailable in RFRA suits against the government does not detract from this conclusion. That decision turned on the principle that "courts must 'strictly construe' any waiver of sovereign immunity," allowing relief against the government only when its authorization is "'unequivocal.'" *Webman*, 441 F.3d at 1025-26 (alterations omitted) (quoting *Lane v. Peña*, 518 U.S. 187, 192, 198 (1996)). But Congress need not waive sovereign immunity to permit an individual-capacity suit against a federal official. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686-87 (1949). And a reading RFRA that allows damages claims against officials in their individual capacities but not against the federal government itself is not at all self-contradictory. Because Congress did not expressly waive sovereign immunity from suits for damages, damages are not an "appropriate" remedy against the government itself. *See Webman*, 441 F.3d at 1028 (Tatel, J., concurring) ("RFRA nowhere makes clear that damages are 'appropriate' (at least against the government[])") (emphasis added). But because it did not expressly prohibit suits for damages, they may be an "appropriate" remedy against individual-capacity defendants.

Supp. 2d at 375-76. There, the court reasoned that a damages remedy was available in individual-capacity suits under RFRA because it is plausible that Congress intended that remedy to be available, prohibiting damages would conflict with the purpose of RFRA, and other courts have assumed that damages are available under the statute. *Id.* at 374-75. The Court agrees with this analysis, which further supports the conclusion that damages are available.

The *Jama* court also concluded, however, that because RFRA expressly authorizes "appropriate relief against a government," the statute is not "silent" on the issue of remedies and the presumption in *Franklin* is inapplicable. 343 F. Supp. 2d at 376. This reading of *Franklin* is too narrow. The presumption in that case obviously does apply where Congress is entirely silent on the issue of remedies. But it is also clear that the mere mention of remedies does not rebut the presumption—instead, the presumption applies unless "Congress has expressly indicated" that a remedy is unavailable. *Franklin*, 503 U.S. at 66. RFRA provides only that a plaintiff may obtain "appropriate relief." 42 U.S.C. § 2000bb-1(c). This language does nothing more than authorize what courts applying *Franklin* presume, and it falls far short of an "express[ ] indicat[ion]" that damages are prohibited.

2. Defendant Lappin's Personal Involvement

Defendants also contend that Harley Lappin—the former director of BOP—was not personally involved in any of the deprivations of religious liberty that Plaintiff asserts, and that he therefore cannot be liable under RFRA. The first step in their argument is the claim that individual-capacity suits under RFRA are "in essence . . . Free Exercise Clause *Bivens* claim[s], which courts dismiss when based on *respondeat superior* liability." Dkt. 98 at 8. If RFRA follows *Bivens* in this respect, then Plaintiff would have to allege that Defendant Lappin was directly, rather than vicariously, liable for the RFRA violations Plaintiff asserts. According to Defendants, Plaintiff has failed to do so.

Plaintiff disagrees with both of these contentions. He argues that the relief available under RFRA should be "broadly construed to incorporate well-settled theories of vicarious liability under the common law against which Congress legislated." Dkt. 100 at 11. But even if the limitations developed in *Bivens* actions apply to RFRA, Plaintiff argues that he has sufficiently alleged Defendant Lappin's personal involvement in the asserted violations. In particular, he points to the allegation in the Complaint that Defendant Lappin "refus[ed] to require private entities [that operated contract prisons] to follow BOP regulations" that protect inmates' religious exercise. Dkt. 118 ¶ 131.

The parties have identified only minimal authority addressing the viability of vicarious liability theories under RFRA. Defendants point to two cases in which RFRA counts were dismissed for failure to allege personal involvement of the individual defendants. *See* Dkt. 98 at 8-9 (citing *Curry v. Gonzales*, No. 07-0199, 2007 WL 3275298, at *1 (D.D.C. Nov. 6, 2007) and *White v. Sherrod*, No. 07-821, 2009 WL 196332, at *1 (S.D. Ill. Jan. 28, 2009)). In *Curry*, the court considered the plaintiff's RFRA count alongside his *Bivens* claim and dismissed both for failure to allege the individual defendant's personal involvement. 2007 WL 3275298, at *1. It

did not provide any discussion of the issue raised here. In *White*, the court dismissed a RFRA claim for failure to allege that the named defendant was personally involved in the alleged deprivation of religious freedom at issue, but it seems not to have separately considered the question whether the plaintiff could rely on a vicarious liability theory. 2009 WL 196332, at *2. Thus, neither of the cases cited by Defendants provides substantial guidance.

Plaintiff does only somewhat better. He relies on *Pineda-Morales v. De Rosa*, No. 03-4297, 2005 WL 1607276 (D.N.J. July 6, 2005), which declined to dismiss a RFRA count predicated on a *respondeat superior* theory simply because the defendants had "present[ed] no reason why such liability should not attach under a RFRA claim." *Id.* at *5 n.5. That conclusion is of little assistance here. He also cites *Agarwal v. Briley*, No. 02-6807, 2004 WL 1977581, at *14 (N.D. Ill. Aug. 25, 2015), in which a court declined to enter judgement for the defendant on a vicarious liability claim under RLUIPA. The plaintiff in that case was an inmate who filed a grievance requesting vegetarian meals, which he asserted were required by his Hindu faith. *Id.* at *10. A subordinate prison official to whom the warden had delegated responsibility for non-emergency inmate grievances denied the request. *Id.* Even though the warden himself had not been involved in the decision to deny the plaintiff vegetarian meals—indeed, the warden remained unaware of the request until the plaintiff filed suit, *id.*—the court concluded that he could be held liable under RLUIPA. It reasoned that RLUIPA does not incorporate the strict rule against supervisory liability applied in § 1983 actions, noting that RLUIPA (like RFRA) comprehends actions against governmental entities as well as persons. *Id.* at *14. The *Agarwal* court did not decide, however, whether pure vicarious liability is actionable under RLUIPA. It found only that the warden had "deliberate[ly] avoid[ed] any involvement in review of Plaintiff's grievance," and that this fact established "sufficient 'fault,' an adequate causal nexus to Plaintiff's injury, to support a finding of liability." *Id.* *Agarwal* thus, at most, stands for the

proposition that "negligent supervision" might be actionable under RLUIPA, not that a supervisor may be held liable for the acts of his subordinates without any independent showing of fault. *Id.*; *see Palermo v. Libby*, No. 11-557, 2012 WL 4929423 (D.N.H. Sept. 12, 2012) (distinguishing *Agarwal* and dismissing RLUIPA claim where plaintiff "made no allegation concerning an act or failure to act by [the defendant] that caused or failed to prevent any of the violations alleged").

The Court concludes that pure vicarious liability—that is, liability of supervisors based solely on the acts of their subordinates—is not sufficient to state a claim under RFRA. Neither party has directed the Court to any case expressly endorsing such a theory, and the Court has identified none. Plaintiff's arguments based on the structure and purpose of RFRA, particularly absent any direct support in the case law, are not compelling. Plaintiff assumes that RFRA was enacted against a background of "traditional common-law principles" embodied in state tort law, Dkt. 100 at 11-12, but cites no legislative history or other evidence suggesting this was so. Instead, it appears more likely that Congress legislated in relevant respects against the more relevant background of constitutional litigation under *Bivens* and § 1983. Free exercise claims before RFRA would have been brought under these theories, not the common law, and there is no indication in the statute that Congress intended to adopt common-law theories of liability that had previously been unavailable to plaintiffs. It is true that Congress expressly authorized suits against government "branch[es], department[s], [and] agenc[ies]"—entities that cannot act personally in a manner that would subject them to liability under *Bivens*. 48 U.S.C. 2000bb-2(1). But Congress did this expressly. RFRA does not by its terms authorize a further step away from the background of § 1983 and *Bivens* precedents to impose vicarious liability, and nothing before the Court on this motion suggests that it intended to do so implicitly.

When RFRA was enacted in 1993, *see* Pub. L. 103-141 (1993), the leading Supreme Court case addressing supervisory liability under § 1983 and *Bivens* was *Rizzo v. Good*, 423 U.S. 362 (1976). The Court in *Rizzo* vacated an injunction against municipal officers for failure to supervise the activities of a local police force, requiring the plaintiff to prove an "affirmative link between the occurrence of the various incidents of police misconduct [at issue in the case] and the adoption of any plan or policy by the petitioners . . . showing their authorization or approval of such misconduct." *Id.* at 371. The Court of Appeals for this Circuit "join[ed] the majority of courts" after *Rizzo* "calling for something more than mere negligence to forge the 'affirmative link' between the constitutional infringement and the supervisor's conduct." *Haynesworth v. Miller*, 820 F.2d 1245, 1261 (D.C. Cir. 1987), *abrogated in part on other grounds*, *Hartman v. Moore*, 547 U.S. 250, 266 (2006) (holding that plaintiffs must present evidence of lack of probable cause in retaliatory prosecution suits under § 1983 and *Bivens*). Under that standard, a plaintiff must show that "absent effective supervision, harm was not merely foreseeable, but was highly likely, given the circumstances of the case"—so likely that "it can be said that the supervisor acquiesced in the resulting constitutional violation." *Haynesworth*, 820 F.2d at 1261. Because this showing—or a similar one, *see id.* at 1261 n.126—was widely required in *Bivens* and § 1983 actions at the time RFRA was enacted, the Court concludes that it reflects the background state of the law against which Congress legislated. Thus, to assert a claim for supervisory liability under RFRA, Plaintiff must allege that Defendant Lappin's failure to supervise his subordinates was "highly likely, given the circumstances of the case" to give rise to a constitutional violation.

Plaintiff contends that his allegations satisfy this standard. His complaint alleges that Defendant Lappin, along with the John Doe defendants, "refus[ed] to require private entities [that operated private prisons] to follow BOP regulations" and therefore "set in motion the

conditions that led to the violation of Mr. Patel's religious rights." Dkt. 118 ¶ 131. In addition, Plaintiff directs the Court to two BOP policy statements (including one signed by Defendant Lappin, *see* Dkt. 100-3 at 23) that include significant protections for inmates' religious freedom. Dkt. 100-2; Dkt. 100-3. These policies could suggest that Defendant Lappin was aware that BOP personnel required specific oversight and guidance if they were to avoid infringing on inmates' religious liberty, and that it was thus "highly likely" that failure to provide similar oversight and guidance to private prisons would cause RFRA violations like the ones Plaintiff alleges here.

Plaintiff's argument fails to take into account, however, that BOP *did* maintain a policy requiring private prisons to comply with RFRA. In their Statement of Undisputed Facts, Defendants asserted that "The BOP specifically requires private facilities to comply with [RFRA], and to ensure the religious services programs are consistent with this Act." Dkt. 68-2 ¶ 25. Plaintiff admitted this fact, although he disputed "that BOP has ensured that Rivers comply with RFRA." Dkt. 72-1 at 7 (Defendant's Statement of Genuine Issues). Here is the problem: the only act that the Complaint alleges Defendant Lappin did that could potentially expose him to supervisory liability under *Rizzo* and *Haynesworth* is his promulgation of a policy requiring that BOP facilities take steps to comply with RFRA. Had he done that while leaving private prisons free, as a matter of policy, to violate RFRA, his failure to provide a policy might suffice to link him to the harms Plaintiff alleges. But the undisputed evidence shows that BOP "specifically require[d]" compliance with RFRA in both agency-operated and private facilities. Dkt. 68-2 ¶ 25. There is no showing that differences in policy caused Plaintiff's harm. If, on the other hand, differences in *enforcement* were the cause of that harm, Plaintiff has not alleged that Defendant Lappin was personally involved in enforcement of BOP policies such as the ones at

issue, much less that it was "highly likely" that any deficiency in his personal oversight of policy enforcement would give rise to the harm he alleges.

Finding Defendant Lappin liable under these circumstances would appear to authorize individual-capacity claims for damages against the BOP director for virtually any RFRA violation—if a violation occurred and BOP policies require compliance with RFRA, the BOP director failed to ensure that the agency's policies were enforced. But that line of reasoning, based not on evidence of the defendant's personal acts but instead on inferences about nothing more than his position, *see* Dkt. 118 ¶ 132, would create precisely the sort of vicarious liability that the Court has concluded RFRA does not provide. The evidence and the allegations in this matter show that Defendant Lappin was personally responsible for (at most) BOP's relevant policies, and that BOP's relevant policies prohibited RFRA violations in the prisons in which Plaintiff asserts they took place. Plaintiff has therefore failed to come forward with evidence of any personal involvement by Defendant Lappin in the RFRA violations he alleges, and Defendant Lappin is entitled to summary judgment on this claim.[2]

3. *Sufficiency of Plaintiff's Allegations under* Twombly *and* Iqbal

Because Defendant Lappin is entitled to summary judgment on Plaintiff's RFRA count, the Court need not consider his argument that Plaintiff's allegations are insufficient to state a claim under RFRA. If and when Plaintiff serves the Doe defendants—who are not presently participating in this action—those defendants will be afforded an opportunity to request that the

[2] The Court concludes that it is appropriate to treat BOP's motion as a motion for summary judgment with respect to this claim. Although Plaintiff, in his opposition to BOP's motion, requested an opportunity for discovery in the event the Court treats the motion as one for summary judgment, that request sought information to "test the accuracy of Defendants' testimony about the purported rational basis for their . . . policies" and did not concern Plaintiff's RFRA claim. Dkt. 72 at 44.

Court reconsider Chief Judge Roberts's conclusion that Plaintiff has sufficiently pleaded substantive RFRA violations. *See* Dkt. 90 at 4-7.

C. The Privacy Act

Plaintiff also alleges that the Bureau of Prisons has violated his rights under the Privacy Act, 5 U.S.C. § 552a. Plaintiff asserts that while he was incarcerated at FCI Big Spring in 2004, he wrote a letter to the *Dallas Morning News* in which he claimed that a fellow inmate, David Duke, was receiving preferential treatment from BOP staff as a result of his "notoriety." Dkt. 118 ¶¶ 82, 140. According to Plaintiff, prison officials improperly opened and read Plaintiff's letter; they then wrote a memorandum that documented the event and recommended that Plaintiff be transferred to a different facility. *Id.* ¶ 144. Plaintiff contends that BOP retains this memorandum in its files, and that doing so violates the Privacy Act's prohibition against maintaining records "'describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of authorized law enforcement activity.'" *Id.* ¶ 146 (quoting 5 U.S.C. § 522a(e)(7)).

BOP moves to dismiss this count on three grounds. First, it argues that the memorandum at issue falls under the "authorized law enforcement activity" exception to the Privacy Act. Dkt. 68-1 at 28-29. Next, it contends that Plaintiff's Privacy Act claim is barred by the doctrine of *res judicata*, based on Plaintiff's effort to litigate the issue in a prior action. *Id.* at 29-30. Finally, it argues that the Privacy Act claim is barred by the Act's two-year statute of limitations because Plaintiff has known of the existence of the memorandum at issue since at least 2006. *Id.* at 30-31. None of these arguments is persuasive.

1. ***The Law Enforcement Activity Exception***

As the Court of Appeals has noted, although the phrase "law enforcement activity" may "summon[ ] up images of criminal law, the legislative history of the provision makes it clear that it does not have that meaning here." *Nagel v. Dep't of Health, Educ. & Welfare*, 725 F.2d 1438, 1441 n.3 (D.C. Cir. 1984). Rather, the phrase is "liberally" construed, *Maydak v. United States*, 363 F.3d 512, 517 (D.C. Cir. 2004), to include "an authorized criminal investigation or . . . and authorized intelligence or administrative one," *Nagel*, 725 F.2d at 1441 n.3 (quotation marks omitted). In addition, it applies to "[a]n employer's determination whether an employee is performing his job adequately," *id.* at 1441, to an employer's evaluating or disciplining an employee, *id.*, and to BOP activity directed at maintaining "prison security," *Maydak*, 363 F.3d at 517.

In *Maydak*, the Court of Appeals concluded that declarations submitted by prison officials were sufficient to demonstrate that "examining photographs [of inmates arguably exercising First Amendment rights] for conduct that may threaten [prison] security is pertinent to and within the scope of the authorized law enforcement activity." *Id.* The Court also noted, however, that certain of the declarations in that case raised questions about other uses of the photographs, including what the declarants meant by terms such as "investigative or informative value." *Id.* As a result, the Court remanded the case to the district court to determine the nature of the use of the photographs on a more complete record.

Maydak is dispositive of BOP's argument at this stage of the litigation. BOP notes, for example, that a memorandum "pertaining [to] the prison staff's treatment of inmates *would* fall under this exception." Dkt. 68-1 at 28-29 (emphasis added). But BOP has not submitted any evidence regarding how the alleged memorandum was *actually* prepared, maintained, or used.

Under these circumstances, the Court concludes that Defendants cannot, on the present record, rely upon the law enforcement exception to avoid Plaintiff's Privacy Act claim.

2. Res Judicata

BOP next argues that Plaintiff's claim under the Privacy Act is *res judicata*. To establish that his claim is precluded under this doctrine, BOP must show that Plaintiff previously brought suit against the same defendant based on the same cause of action, and that that suit resulted in a final judgment on the merits of the claim he raises here. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action."); *Apotex, Inc. v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004).

The factual basis for this contention is a matter of public record. In 2004, Plaintiff brought a lawsuit in this Court that included a Privacy Act claim relating to the memorandum at issue here. *Patel v. United States*, No. 08-1168-D, 2009 WL 1377530, at *6 (W.D. Okla. May 14, 2009). The action was promptly transferred to the Eastern District of Arkansas, where the district court dismissed Plaintiff's Privacy Act claim without prejudice for failure to exhaust administrative remedies. *Id.* at *4-5. The action was subsequently transferred to the Eastern District of North Carolina and then to the Western District of Oklahoma, where Plaintiff moved for reconsideration of the Eastern District of Arkansas's dismissal of his Privacy Act claim. *Id.* at *1. The court rejected that motion, holding that Plaintiff had not shown clear error or any change in legal or factual circumstances that would justify reconsideration of the prior dismissal. The court also noted that it was "particularly reluctant to reinstate a Privacy Act claim that was dismissed without prejudice" because Plaintiff had several years in which he "could have brought a separate action and presented his additional proof of exhaustion." *Id.* at 5. In the court's view, it was "inconsistent with Congress'[s] purpose in providing civil remedies under

the Privacy Act to permit an individual to bring a private action years later under these circumstances." *Id.* The Tenth Circuit affirmed the "dismissal without prejudice." *Patel v. United States*, 399 Fed. App'x 355, 361 (10th Cir. 2010).

There was no "judgment on the merits" of Plaintiff's Privacy Act claim in the prior litigation. As the district court in Oklahoma observed, and the Tenth Circuit explicitly affirmed, Plaintiff's claim was dismissed "without prejudice" because he had not exhausted administrative remedies by petitioning BOP to remove the memorandum at issue from its files. *Id.*; *Patel*, 2009 WL 1377530, at *5. The Western District of Oklahoma's refusal to reconsider that decision did nothing to change the decision of the transferor court—indeed, the Western District of Oklahoma recognized that, because the earlier dismissal had been without prejudice, Plaintiff could have simply exhausted his administrative remedies and brought a new action. BOP relies on the language in that court's decision suggesting that the court believed Plaintiff had been dilatory in pursuing his claim, but fails to explain how that statement could have transformed the Western District of Oklahoma's decision declining to reconsider the decision of the transferor court into a decision that actually changed the earlier dismissal "without prejudice" into a disposition on the merits. Because Plaintiff's Privacy Act claim has never been adjudicated on the merits, the doctrine of *res judicata* does not bar him from asserting it in this action.

3. *The Statute of Limitations*

BOP's final argument is that Plaintiff's Privacy Act claim is barred by the applicable statute of limitations. Absent material and willful misrepresentation on the part of an agency, any "action to enforce any liability created under" the Privacy Act must be brought "within two years from the date on which the cause of action arises." 5 U.S.C. § 522a(g)(5). BOP argues that because Plaintiff "knew of the existence of the memorandum" at issue by February 9, 2006 at the latest, the statute of limitations began running on that date and expired on February 9,

2008—more than one year before he first alleged his Privacy Act claim in this action. Dkt. 68-1 at 31.

BOP misreads the statute. The Privacy Act allows a suit to be brought "[w]henever any agency makes a determination . . . not to amend an individual's record in accordance with his request." 5 U.S.C. § 522a(g)(1)(A). Plaintiff alleges that he petitioned BOP to amend his record on February 20, 2009 and that his request was denied on April 30, 2009—this denial triggered his right to bring suit. BOP has identified no case law or other authority for the counterintuitive proposition that a Privacy Act plaintiff's "cause of action arises" before the plaintiff can bring a suit. Indeed, BOP itself notes that "[t]he statute of limitations [under the Privacy Act] 'commences at the time that a person knows or has reason to know that his request had been denied.'" Dkt. 76 at 13 (quoting *Englerius v. Veterans Admin.*, 837 F.2d 895, 897 (9th Cir. 1988)).

In its reply, BOP asserts for the first time that Plaintiff in fact "was . . . aware that his request for an amendment had been denied" in 2006. Dkt. 76 at 14. Although BOP does not explain this assertion or cite to the record, it appears that the agency is referring to the fact that Plaintiff submitted documents to the Arkansas and Oklahoma district courts that, in Plaintiff's view at the time, established that in 2004 he had requested relief from BOP under the Privacy Act and that his request had been denied. These documents formed the basis for Plaintiff's requests for reconsideration of the order dismissing his Privacy Act claim. *See Patel v. United States*, No. 08-cv-1168 (W.D. Okla. 2009), Dkt. 269; *Patel v. United States*, No. 04-cv-00771 (E.D. Ark. 2006) Dkt. 77.

The Court need not independently determine whether these documents in fact show that Plaintiff adequately requested and was denied the relief he seeks here, however, because the United States has previously taken the position that they do not. *See* Response to Plaintiff's

Motion to Reconsider, *Patel v. United States*, No. 04-cv-00771 (E.D. Ark. 2006) Dkt. 78 ("It is clear that the remedy [request] submitted by the Plaintiff in support of his Motion to Reconsider addresses not the maintaining of a memo, but rather the opening of special mail and reading same outside of Plaintiff's presence."). The district court denied Plaintiff's motion. Having argued successfully to another district court that Plaintiff's 2004 request was insufficient to give rise to a right to sue, BOP cannot now assert the opposite position in order to defeat Plaintiff's claim on timeliness grounds. *See, e.g., Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) ("Courts may invoke judicial estoppel where a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, and then, simply because his interests have changed, assumes a contrary position.") (quotation marks and alterations omitted). And even if BOP were not estopped from arguing that a claim had accrued based on Patel's 2004 request and the Court concluded that one had, it is not clear that that fact would bar the subsequent accrual of a new claim based on BOP's denial of the 2009 request. The Privacy Act states that an "individual may bring a civil action" "whenever any agency . . . makes a determination . . . not to amend [the] individual's record in accordance with his request." 5 U.S.C. § 522a(g)(1). There is thus no explicit statutory bar to a Privacy Act claim predicated on a duplicative request to amend records, and BOP has not identified case law inferring that such a bar exists.

BOP argues that allowing suits, like this one, triggered by the denial of Privacy Act requests that had previously been submitted would allow "an individual . . . to maintain a Privacy Act amendment claim in perpetuity as long as he continued to submit requests for amendment and to receive adverse agency determinations." Dkt. 76 at 14. This argument is not persuasive. *Res judicata* and collateral estoppel prevent a plaintiff from pursuing successive lawsuits based on identical Privacy Act requests after an adverse judgment on the merits—there is no specter of never ending litigation. BOP's real objection is to the fact that a plaintiff who knows of the

existence of a record that allegedly violates the Privacy Act may wait as long as he pleases before requesting that the agency amend the record—or make repeated requests to the agency—without jeopardizing his right to judicial review. But there is nothing absurd about this result, which, in any event, follows directly from the statutory language. A request for amendment under the Privacy Act seeks prospective relief to remedy the government's ongoing maintenance of an improper or incorrect record. *See* 5 U.S.C. 552a(d)(2)(B); 5 U.S.C. § 552a(g)(2)(A) (in suit seeking review of denial of amendment, "the court may order the agency to amend the individual's record in accordance with his request or in any such other way as the court may direct"). As long as such an injury is ongoing, there is no reason that a plaintiff seeking relief from it should be categorically barred from doing so simply because he could have sought relief earlier.[3]

Because BOP's denial of Plaintiff's 2009 request to amend gave rise to a claim under the Privacy Act, Plaintiff's claim is timely.

D. FOIA Claims

BOP also moves for summary judgment on Plaintiff's FOIA claims. When a plaintiff alleges that an agency has improperly withheld records, the reviewing court must "determine the matter de novo." 5 U.S.C. § 552(a)(4)(B). FOIA cases are typically resolved on motions for summary judgment, which require that the moving party demonstrate that there are no genuine issues of material fact and he or she is entitled to judgment as a matter of law. *See Celotex*, 477

[3] It is possible that laches might apply to bar suits where, for example, a Privacy Act plaintiff's delay in requesting amendment has allowed the loss of evidence necessary to establish an exemption. *See generally Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (considering applicability of laches to suit under the Copyright Act). The Court need not decide whether laches or a similar doctrine can apply under the Privacy Act, however, because BOP has not argued or presented evidence showing that it would be entitled to relief under any such doctrine.

U.S. at 325; *Beltranena v. U.S. Dep't of State*, 821 F. Supp. 2d 167, 175 (D.D.C. 2011) (noting that FOIA cases are "frequently" decided on motions for summary judgment). To meet its burden, the government must generally submit "relatively detailed and non-conclusory" affidavits or declarations establishing the adequacy of its search for responsive documents, *SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991), and an index of the information withheld, *see Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973); *Summers*, 140 F.3d at 1080 (explaining that to carry its burden, agency that declines to produce a requested document "must submit a *Vaughn* index to explain why it has withheld information"). Affidavits provided by an agency are "accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Safecard Servs.*, 926 F.2d at 1200 (quotation marks omitted).

1. *Documents Related to Office of Inspector General Report*

Plaintiff's first FOIA claim arises from a 2004 request that he characterizes as seeking "documents related to a [Justice Department Office of the Inspector General ('OIG')] report." Dkt. 118 ¶ 152. Plaintiff actually filed this request with the OIG; when OIG determined that 21 pages of the records it identified as responsive "originated with" BOP, it referred those documents to BOP to be reviewed and, if appropriate, released. Dkt. 68-6 ¶ 4 & Exh. A.

Plaintiff alleges that he received all 21 pages of the materials, although six pages contained redactions. Dkt. 118 ¶ 153. He objects, however, that "[n]one of the exhibits or witness interviews associated with the OIG report . . . were provided, nor was any reason provided for their withholding." *Id.* BOP's response is simple and compelling: the agency's responsibility was limited to reviewing and releasing the documents that were referred to it. Dkt. 68-1 at 32. BOP had no obligation to search for or to provide additional information in response to Plaintiff's 2004 FOIA request to OIG.

If the 2004 request to OIG were the only one at issue in this count, BOP would be entitled to summary judgment. Plaintiff also alleges, however, that he filed three "similar requests with the BOP" in 2005. These requests are not clearly identified in the Complaint, but in his opposition to Defendants' motion (Dkt. 72 at 36-37), Plaintiff focuses on a March 24, 2005, letter to Plaintiff quoting the contents of his requests (Dkt. 68-6, Exh. G). Among other things, Plaintiff sought "[a]ll notes, memoranda, investigative documents, etc. created since September 1, 2003 and ending on February 1, 2004 pertaining to an investigation conducted into [Plaintiff's] alleged misconduct and placement in the SHU at FCI Big Spring, Texas." *Id.* BOP's declaration states that in responding to these requests the agency produced seven complete pages and three redacted pages to Plaintiff. Dkt. 68-6 ¶ 13.

Plaintiff contends, however, that BOP's search must have been inadequate because the agency did not provide any of the exhibits to the OIG report—exhibits that, in Plaintiff's view, would have been responsive to his request. Dkt. 72 at 37. For example, Plaintiff contends that "the OIG reviewed photographs, a medical assessment, memoranda, reports, and other documents regarding Mr. Patel's injuries . . . sustained in an assault at FCI Big Spring," and he cites particular exhibits to the OIG report that he believes were likely responsive to his 2005 FOIA requests. *Id.* at 37-38. It is not clear whether the exhibits Plaintiff identifies are indeed responsive. He refers to a document titled "Inmate Injury Assessment and Follow-Up for Kamal Patel," for example, and to a "SENTRY printout regarding Inmate Profile and Security/Designation for inmate Patel." *Id.* Either of those documents *might* be "notes, memoranda, investigative documents, etc. . . . pertaining to an investigation conducted into [Plaintiff's] alleged misconduct and placement in the SHU at FCI Big Spring," but Plaintiff has presented no further evidence demonstrating that they actually are. The other document he refers to that "pertain[s] directly to Mr. Patel"—a "Letter Dated November 15, 2005, from Assistant

United States Attorney Robert McRoberts to Inmate Patel"—post-dates BOP's response to his 2005 FOIA requests. Dkt. 72 at 38; *see* Dkt. 68-6 Exh. G. Plaintiff cites other exhibits to the OIG report that "appear to be responsive as well," including three affidavits, with the affiants' names redacted (dated January 15, 2004), "Photographs documenting inmate Kamal Patel's injuries," additional "SENTRY printout[s]," a memo "regarding BOP OIA interview" of a person, and an incident report regarding an assault on Plaintiff. Dkt. 72 at 38 n.20; see Dkt. 72-7 at 17-19. Once again, some of these documents might be responsive to Plaintiff's request to BOP—but his request to BOP was narrower than his request to OIG, and there is no basis in the record to conclude that all of the OIG documents relate to Plaintiff's "alleged misconduct and placement in the SHU" or the other particular topics he identified in requests to BOP.

For present purposes the critical question for the Court is whether BOP's declaration shows that the agency conducted an adequate search for the records Plaintiff requested in 2005. The Court concludes that it does not. To prevail on a motion for summary judgment where the adequacy of its search for records is challenged, BOP must provide a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Although BOP's declaration states that Plaintiff received documents in response to Plaintiff's 2005 requests, it contains no information whatsoever about what record systems the agency searched, what search criteria it used, or whether the agency reviewed the potentially responsive documents Plaintiff cites. *See* Dkt. 68-6 ¶ 13. Although it may be the case that BOP has, in fact, produced all documents in its possession that are responsive to Plaintiff's 2005 requests, BOP has not carried its burden on summary judgment to prove that it has done so. Therefore, in this respect, BOP's motion must be denied.

Plaintiff also argues that BOP failed to provide a *Vaughn* index cataloguing and justifying its redactions to the three pages he has received in response to his 2005 requests. Dkt. 72 at 38. BOP responds, in a footnote in its reply, that it "does not believe that Patel's March 24, 2005 FOIA request . . . is at issue in this litigation and [BOP] therefore has not provided a *Vaughn* index" for the pages disclosed pursuant to that request. Dkt. 76 at 18 n.8. It does appear from the parties' briefing that there has been uncertainty regarding which of Plaintiff's FOIA requests are indeed at issue. Some of this uncertainty is attributable to a lack of specificity in Plaintiff's Complaint. *See* Dkt. 118 ¶ 155 (describing 2005 requests as "similar to" 2004 request to OIG, even though they appear to have sought substantially different—but potentially overlapping—sets of documents). The Court concludes, however, that, reasonably construed, the Complaint does place the February 15, 2005 FOIA request at issue in this litigation. Accordingly, BOP must provide Plaintiff a *Vaughn* index as to those three pages before it can obtain summary judgment in its favor.

Finally, Plaintiff contests redactions to the documents referred to BOP by OIG (pursuant to Plaintiff's separate OIG request) that were "'applied to protect the statements of inmates and staff who provided information for a BOP investigation.'" Dkt. 72 at 38 (quoting Dkt. 68-6, Exh. C). BOP argues that the statements at issue satisfy the criteria for FOIA exemptions 6 and 7(C). Exemption 6 permits agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) covers "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of privacy." *Id.* § 552(b)(7)(C). To rely on these exceptions, BOP must do more than merely recite that statements were withheld to protect individuals' privacy. Instead, it must show that the "privacy

interests that would be compromised by disclosure" outweigh "the public interest in release of the requested information." *Davis v. Dep't of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992).

Here, BOP has not provided a sufficiently detailed explanation of the privacy interests that it contends would be compromised by disclosure of the witness statements. It may be that the redaction of the names of witnesses and other persons mentioned in the statements is sufficient to guarantee the anonymity of these individuals—if so, then there is no apparent privacy interest protected by withholding the substance of the statements. If, on the other hand, the subject matter of the statements is such that its disclosure would facilitate the identification of witnesses or others even if their names were redacted, it is more likely that BOP will be entitled to a finding that exemptions 6 and 7(C) apply. To prevail on summary judgment, therefore, BOP needs to provide some evidence that the subject matter of the redacted statements itself is sufficient to identify particular individuals who have a privacy interest in remaining anonymous. BOP has not met that burden at this juncture.

Because BOP has not demonstrated that it conducted an adequate search for documents responsive to Plaintiff's 2005 FOIA requests, has not provided a *Vaughn* index cataloguing its redactions to the documents produced in response to those requests, and has not shown that FOIA exemptions 6 and 7(C) cover the content of the relevant statements even though the speakers remain anonymous, BOP's motion for summary judgment on Count IV of the Complaint is denied.

2. Documents Related to Plaintiff's Protective Hearing

Plaintiff also seeks to compel production of documents related to a protection hearing that took place while he was incarcerated at Moshannon Valley Correctional Center. Dkt. 118 ¶ 159. Plaintiff alleges that he received 247 pages in their entirety in response to this request, as well as 128 pages with redactions. *Id.* ¶ 160. He also asserts that several documents were

withheld in their entirety and that the BOP did not provide a *Vaughn* index cataloguing its assertions of FOIA exemptions.[4] *Id.* When BOP moved for summary judgment, it provided a *Vaughn* index identifying the sixteen documents withheld in their entirety and the basis for withholding each document. Dkt. 68-5, Exh. 5. It also described, in general terms, the bases for the redactions made to those documents produced in part, Dkt. 68-5 ¶¶ 10-15, and provided copies of the redacted documents with exemption designations indicated for each redaction, Dkt. 76-2 ¶ 5. In his briefing, Plaintiff argues that BOP failed to demonstrate that there was no reasonably segregable non-exempt information in five of the documents that were withheld in their entirety, and that BOP erroneously asserted the deliberative process privilege to withhold a memorandum relating to Plaintiff's protective custody hearing. Dkt. 72 at 41-43.

As an initial matter, the Court concludes that BOP's *Vaughn* index was adequate for present purposes. Taken together, the measures described above allow the Court to "conduct a meaningful de novo review of [BOP's] claim of an exemption." *Brown v. FBI*, 675 F. Supp. 2d 122, 130 (D.D.C. 2009); *see Gallant v. NLRB*, 26 F.3d 168, 173 (D.C. Cir. 1994) ("the materials provided by the agency may take any form so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege") (quotation marks and alterations omitted). Although compiling a traditional *Vaughn* index would perhaps have allowed less cumbersome review of the redactions, the system employed by BOP in this case satisfied the functional requirements of *Vaughn* and its progeny.

Plaintiff's contention that BOP has failed to demonstrate that certain documents withheld in their entirety do not contain reasonably segregable non-exempt information has more merit.

[4] BOP subsequently produced four previously pages with redactions and determined that six of them were non-responsive. Dkt. 68-5 ¶ 3. Thus, to date, 16 pages have been withheld in their entirety and 132 pages have been produced with redactions. *Id.*

"[S]imply . . . showing that [a document] contains some exempt material" is not enough to "justify withholding [the] entire document." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). Instead, "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Id.* The requirement in *Mead Data* that "an agency should . . . describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document," *id.* at 261, may have been "relaxed" by "more recent decisions," *Muttit v. Dep't of State*, 926 F. Supp. 2d 284, 310 (D.D.C. 2013). But it remains the case that the government must carry its "burden of demonstrating that no reasonably segregable information exists" within withheld documents and that the Court must evaluate the agency's *Vaughn* index and declarations to determine whether the requisite showing has been made. *Loving v. Dep't of Defense*, 550 F.3d 32, 41 (D.C. Cir. 2008) (quotation marks omitted).

Here, BOP's declaration states that "[e]very effort has been made to provide plaintiff with all reasonably segregable portions of the records requested;" that "[n]o reasonably segregable non-exempt portions of these records have been withheld from Plaintiff;" and that "no further information can be segregated without releasing information properly withheld" under various exemptions. Dkt. 68-5 ¶ 16. BOP does not explain, however, *why* any of the withheld documents whose segregability Plaintiff contests cannot be further segregated. This fact distinguishes this case from *Armstrong v. Executive Office of the President*, 97 F.3d 575 (D.C. Cir. 1996), where the government justified its entire withholding of particular pages with non-conclusory, document-by-document explanations. *See, e.g.*, 97 F.3d at 579 (quoting government's assertion that note "'consists of an extensive review of numerous intelligence cables, revealing one piece of specific intelligence after another'"); *id.* at 580 (declaration asserted that specific "sensitive topics 'are discussed throughout the redacted segment and there

are no further intelligible segments which can be segregated'"). Likewise, the agency in *Soto v. U.S. Dep't of State*, ___ F. Supp. 3d ___, 2015 WL 4692415, at *11 (D.D.C. Aug. 6, 2015), submitted an affidavit explaining that "the information in each responsive document [in that case] 'pertain[ed] exclusively to the issuance or refusal of a visa to enter the United States'" and was thus entirely exempt from disclosure under FOIA. BOP has not made a similar showing that the documents at issue contain exclusively exempt information here.

The nature of the exemptions asserted to withhold the relevant documents here also cuts against a finding that BOP has met its burden. For documents 1, 2, 5, 6, and 9 on its *Vaughn* index, BOP relies either largely or exclusively on the personal privacy exemptions (b)(6) and (b)(7)(C)—exemptions that under some circumstances might require only that identified individuals' names or other identifying information be redacted. *See, e.g., Paxson v. U.S. Dep't of Justice*, 41 F. Supp. 3d 55, 57-58 (D.D.C. 2014) (exemptions (b)(6) and (b)(7)(C) invoked to redact "names and other identifying information, like telephone numbers, of FBI Special Agents and support personnel"). This circumstance makes it particularly important, in this case, for BOP to provide some level of specific explanation why further segregation is not possible.

Finally, Plaintiff argues that BOP erroneously invoked exemption (b)(5), which protects memoranda and letters over which an agency could assert a privilege in litigation (*see Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980)), to withhold page 7 of "Document 1" in its *Vaughn* index. BOP describes Document 1 as a "[m]emorandum" that was "created as a result of a hearing conducted for protective custody status." Dkt. 68-5, Exh. 5. In Plaintiff's view, BOP has "failed to establish that this document contains non-segregable pre-decisional information," which is subject to exemption (b)(5), rather than information "reporting a final decision and the reasoning of the decision maker, neither of which are exempt." Dkt. 72 at 51 (citing *Coastal States*, 617 F.2d at 866). BOP responds that it invoked exemption (b)(5)

because page 7 of Document 1 "reveal[s] pre-decisional information involved in the decision-making process that pertain[s] to protective custody of other inmates and the security of the institution." Dkt. 76-2 ¶ 6.

BOP's current showing is insufficient to establish that the document in question is privileged. When asserting the privilege to justify application of FOIA exemption (b)(5), "the agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process." *Coastal States*, 617 F.2d at 868. In a prison, there are presumably many different "decision-making process[es] that pertain to protective custody of other inmates" or "the security of the institution," and each of these processes presumably involves the creation of investigative or decisional memoranda. BOP has provided no information regarding the "role played by the" redacted discussions in the process of determining whether to hold inmates in protective custody—or, indeed, any information relating to the nature of the "deliberation" at issue. Without further detail, the Court is not in a position to determine whether exemption (b)(5) is applicable.

IV. CONCLUSION

For the reasons stated above, Defendants' motion to dismiss or, in the alternative, for summary judgment, is **GRANTED** in part and **DENIED** in part. Defendants' motion for summary judgment on the RFRA claim against Defendant Lappin is **GRANTED**. The Court defers ruling as to Plaintiff's RFRA claims against the John Doe Defendants and his Equal Protection Clause claim against Defendant Clark until those parties have had an opportunity to file dispositive motions. BOP's motion to dismiss Plaintiff's Privacy Act claim is **DENIED**. BOP's motion for summary judgment on Plaintiff's remaining FOIA claims is **DENIED**.

BOP's motion for protective order (Dkt. 82), which seeks to stay discovery pending resolution of BOP's motion to dismiss or, in the alternative, for summary judgment, is **DENIED** as moot.

The parties shall appear for a status conference on September 3, 2015, at 10:30 AM in Courtroom 21, to discuss the schedule for discovery and any additional anticipated dispositive motions.

An appropriate Order accompanies this Memorandum Opinion.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: August 21, 2015

Marli Kerrigan - Judgment Fund Payment Notification

From: Judgment Fund <Judgment.Fund@fiscal.treasury.gov>
To: "Marli.Kerrigan@usdoj.gov" <Marli.Kerrigan@usdoj.gov>
Date: 2/26/2016 1:12 PM
Subject: Judgment Fund Payment Notification
CC: "Judgment.Fund@fiscal.treasury.gov" <Judgment.Fund@fiscal.treasury.gov>
BC: Marli Kerrigan

The following payment was sent by the Judgment Fund Staff. If the payment has not been received within 7 days from the payment sent date, please contact the Judgment Fund via email at Judgment.Fund@fiscal.treasury.gov or at 202-874-6664.

Control #: 201602074
Payment ID #: 022422016
Responsible Agency File #: 09-0200
Submitting Agency File #:
Docket #: 09-0200
Total Payment Amount: $25,000.00
Date Payment Sent: 02/22/2016
Alias: OVL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KAMAL K. PATEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 09-200 (RDM)
	)	
FEDERAL BUREAU OF PRISONS, *et al.*,	)	
	)	
Defendants.	)	
	)	

STIPULATION OF SETTLEMENT

Defendants Federal Bureau of Prisons, Harley Lappin, in his official and individual capacities, and Cory Clark, in his official capacity ("Defendants") and Kamal K. Patel ("Plaintiff") (collectively "the Parties"), by and through their respective counsel, hereby stipulate and agree as follows:

1. The Parties do hereby agree to settle and compromise the above-entitled action under the terms and conditions set forth herein.

2. Defendants shall pay Plaintiff two lump sums of Twenty Five-Thousand Dollars and No cents ($25,000.00) in this matter, for a total of Fifty Thousand Dollars and No cents ($50,000.00). One lump sum of Twenty Five-Thousand Dollars and No cents ($25,000.00) will be paid to Plaintiff from the Judgment Fund of the United States to settle any claims of damages Plaintiff raised or could have raised under the Privacy Act, 5 U.S.C. § 552a. One lump sum of Twenty Five-Thousand Dollars and No cents ($25,000.00) will be paid to Plaintiff for attorneys' fees and costs incurred in this action. Additionally, Defendant Federal Bureau of Prisons shall remove and destroy the memorandum in Plaintiff's file referenced in Count Four of Plaintiff's

Fourth Amended Complaint.

3. Payment of such sums will be made by an electronic transfer of funds with payment made to an account to be designated in separate correspondence by Plaintiff. Upon the filing of this Stipulation of Settlement with the Court, the Parties will promptly cause the documentation necessary to effectuate this payment to be completed and transmitted.

4. Plaintiff agrees to forever discharge, release, and withdraw all claims presented in *Patel v. Federal Bureau of Prisons, et al.*, Civ. No. 09-200-RDM (D.D.C.). Defendant hereby agrees not to seek any costs or fees from Plaintiff in connection with its response to the Freedom of Information Act Requests at issue in Plaintiff's Fourth Amended Complaint in this action.

5. This Stipulation of Settlement shall represent full and complete satisfaction of all claims arising from the allegations set forth in the Complaint filed in this action, including full and complete satisfaction of all claims for damages, costs, attorneys' fees, search, review, or processing fees that have been, or could be, made in this case. In particular, this Stipulation of Settlement shall include all claims for attorneys' fees and costs, as well as search, review, and processing fees incurred by either Party in connection with the administrative Freedom of Information Act process, the District Court litigation process, and any other proceedings involving the claims raised in this action.

6. This Stipulation of Settlement shall not constitute an admission of liability or fault on the part of the Defendants or the United States or their agents, servants, or employees, and is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

7. This Stipulation of Settlement shall be binding upon and inure to the benefit of the

parties hereto and their respective successors and assigns.

8. Except as may be necessary to enforce this agreement, the parties agree that this Stipulation of Settlement will not be used as evidence or otherwise in any pending or future civil or administrative action against Defendants or the United States, or any agency or instrumentality of the United States.

9. Execution of this Stipulation of Settlement by Plaintiff and by counsel for Defendants shall constitute a dismissal of this action with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

10. This Stipulation contains the entire agreement between the parties hereto and supersedes all previous agreements, whether written or oral, between the parties relating to the subject matter hereof. No promise or inducement has been made except as set forth herein, and no representation or understanding, whether written or oral, that is not expressly set forth herein shall be enforced or otherwise be given any force or effect in connection herewith.

11. The terms of this Stipulation may not be modified or amended, and no provision hereof shall be deemed waived, except by a written instrument signed by the party to be charged with the modification, amendment, or waiver.

12. The parties acknowledge that the preparation of this Stipulation was collaborative in nature, and so agree that any presumption or rule that an agreement is construed against its drafter shall not apply to the interpretation of this Stipulation or any term or provision hereof.

13. The provisions of this Stipulation are severable, and any invalidity or unenforceability of any one or more of its provisions shall not cause the entire agreement to fail

or affect the validity or enforceability of the other provisions herein, which shall be enforced without the severed provision(s) in accordance with the remaining provisions of this Stipulation.

14. Each party agrees to take such actions and to execute such additional documents as may be necessary or appropriate to fully effectuate and implement the terms of this Stipulation.

15. If either Plaintiff or Defendants at any time believes that the other party is in breach of this Stipulation, that party shall notify the other party of the alleged breach. The other party shall then have thirty (30) days to cure the breach or otherwise respond to the claim. The parties shall make a good faith effort to resolve any dispute arising from or regarding this Stipulation before bringing the dispute to the Court's attention.

16. Any notice required or permitted to be given pursuant to this Stipulation shall be in writing and shall be delivered by hand, or transmitted by fax or by e-mail, addressed as follows or as each party may subsequently specify by written notice to the other:

If to Plaintiff:
Kamal K. Patel
6 Rivington Apt
Railway Terrace
Slough SL2 5FQ

with copy to:
F. Greg Bowman
Williams & Connolly, LLP
725 12th Street, N.W.
Washington, D.C. 200015
fbowman@wc.com

If to Defendant:
Marli Kerrigan, Esq.
Assistant General Counsel
Litigation Branch
Federal Bureau of Prisons

320 First St., NW
Washington, DC 20534
mkerrigan@bop.gov

with copy to: Wynne P. Kelly
Assistant United States Attorney
U.S. Attorney's Office for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 252-2545 tel
(202) 252-2599 fax
Wynne.Kelly@usdoj.gov

17. This Stipulation may be executed in two or more counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same agreement. A facsimile or other duplicate of a signature shall have the same effect as a manually-executed original.

18. This Stipulation shall be governed by the laws of the District of Columbia, without regard to the choice of law rules utilized in that jurisdiction, and by the laws of the United States.

19. Upon execution of this Stipulation by all parties hereto, this Stipulation shall be binding upon and inure to the benefit of the parties and their respective heirs, personal representatives, administrators, successors, and assigns. Each signatory to this Stipulation represents and warrants that he or she is fully authorized to enter into this Stipulation.

20. This Court may retain jurisdiction for the sole purpose of enforcing this Stipulation.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed this Stipulation on the dates shown below.

Dated: Oct. 28, 2015

Kamal K. Patel
Plaintiff

Dated: _____

F. Greg Bowman
Attorney for Plaintiff

Dated: _____

Wynne P. Kelly
Assistant United States Attorney

* * *

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IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed this Stipulation on the dates shown below.

Dated: _____

Kamal K. Patel
Plaintiff

Dated: 10-30-15

F. Greg Bowman
Attorney for Plaintiff

Dated: _____

Wynne P. Kelly
Assistant United States Attorney

* * *

Respectfully submitted,

CHANNING D. PHILLIPS, D.C. Bar #415793
United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

By: /s/
WYNNE P. KELLY
Assistant United States Attorney
555 4th Street, NW
Washington, DC 20530
(202) 252-2545
wynne.kelly@usdoj.gov

Dated: November 2, 2015

Attorneys for the Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LARRY BERKE
2602 West Languid Lane
Phoenix, AZ 85086,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,
320 First St., NW
Washington, DC 20534

Serve:
Ronald C. Machen, Jr.
United States Attorney's Office
555 4th Street, NW
Washington, DC 20530

Eric H. Holder, Jr.
U.S. Attorney General
Department of Justice
950 Pennsylvania Avenue, Room B-103
Washington, DC 20530-0001

and

CHARLES E. SAMUELS, JR.,
in his official capacity as Director of the
United States Bureau of Prisons
320 First St., NW
Washington, DC 20534

Defendants.

Case No.

COMPLAINT

1. Plaintiff Larry Berke ("Mr. Berke"), by his undersigned counsel, respectfully complains as follows against Defendants the Federal Bureau of Prisons ("BOP"), and Charles E. Samuels, Jr. ("Defendants").

NATURE OF THE ACTION

2. This lawsuit concerns impending discrimination by Defendants against Mr. Berke – a deaf individual awaiting his BOP surrender date for his criminal conviction –that will violate federal law and the United States Constitution. It seeks to preempt the deprivation of qualified American Sign Language ("ASL") interpreters and other auxiliary aids necessary to allow Mr. Berke to effectively communicate, that will inevitably occur upon his upcoming placement into the BOP's custody. Defendants' illegal and discriminatory conduct will preclude Mr. Berke's ability to participate in institution proceedings, to effectively take part in any rehabilitative, educational, or religious programs, and to communicate effectively with others within and outside the institution.

3. As of this filing, Mr. Berke is not a prisoner. Pursuant to his Third Order Amending Judgment of Conviction, Mr. Berke was "committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months" on December 19, 2011, but does not have to "surrender himself for service" "at the institution designated by the Bureau of Prisons … [until] August 23, 2012 at 12:00 p.m." Third Order Amending Judgment of Conviction, attached as Exhibit 1.

4. Mr. Berke's sentencing judge recommended that prior to his incarceration the BOP "be made aware of the defendant's hearing impaired medical condition and where he can be accommodated, … that the defendant be designated to a facility, which will abide by the American's with Disability Act [sic],"[1] and "that the defendant be designated to a facility

[1] Notwithstanding the sentencing judge's recommendation, the BOP is subject to The Rehabilitation Act of 1973, 29 U.S.C. §§ 794 *et seq.*, not the Americans with Disabilities Act. The two laws have virtually identical requirements as to provision of auxiliary aids and services to deaf individuals, but the Americans with Disabilities Act does not apply to the federal government.

geographically near his family members." Mr. Berke's Judgment of December 19, 2011, attached as Exhibit 2.

5. The BOP will incarcerate Mr. Berke at United States Penitentiary (USP) Florence ADMAX Satellite Camp ("ADX Camp" or "Camp") located in Florence, Colorado. The ADX Camp has virtually no auxiliary aids to allow effective communication with deaf prisoners. The ADX Camp has no telephone equipment (i.e. videophones) for deaf inmates, no visual safety alarms (beyond fire), or any means to facilitate communication for deaf prisoners such as visual pagers.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.§ 1331 because this action arises under the Constitution and laws of the United States.

7. Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391(e) because the Defendant Samuels resides in this district, and a substantial part of the policy decisions giving rise to Mr. Berke's claims occurred at BOP headquarters, which is located in this district.

THE PARTIES

A. Plaintiff

8. Larry Berke must "surrender himself for service" of his criminal sentence on August 23, 2012. The BOP intends to incarcerate Mr. Berke at the ADX Camp on this date.

9. Mr. Berke has been deaf since birth. He is considered "Profoundly Deaf," and while he can hear some sounds, he is unable to understand speech, and cannot hear or understand speech on a telephone.

10. Mr. Berke is the son of deaf parents, has one deaf brother, many deaf cousins and extended family members, is married to a deaf woman, and has two grown children who are

deaf. His three youngest children (ages 10, 8, and 4) are hearing, but fluent in American Sign Language. Mr. Berke's two youngest children are not yet able to read or write fluently, and therefore their only effective form of communication with their father is sign language.

11. Mr. Berke's native language is American Sign Language, a complex language that employs signs made with hands, facial expressions, and body language. ASL is not a mere translation of ASL signs to English words; it is a distinct language with distinct vocabulary, syntax, and grammar. Mr. Berke requires a qualified ASL interpreter to communicate effectively with persons who do not know and use ASL.

12. Mr. Berke does not read lips. In general, lip reading is a very difficult and unreliable form of communication. It is extremely challenging to lip-read English because only a small fraction of the sounds used in speaking are clearly visible on the mouth and many sounds appear identical on the lips. In addition to the difficulties in lip-reading, the ability to accurately lip-read is greatly affected by the speaker's accent, facial bone structure, facial musculature, facial hair, lighting, distance from the lip reader, and other external factors.

13. Mr. Berke uses videophones to communicate with friends and family around the country, including his deaf adult children, brother, and several cousins. He uses video relay service with hearing friends and acquaintances.[2] None of his friends or family own older telecommunication equipment, such as the generally outmoded telecommunication devices for the deaf (TTY's); all use videophones.

B. Defendants

14. The BOP is the federal executive agency responsible for the management and regulation of all federal penal and correctional institutions. 18 U.S.C. § 303(a)(1). The BOP is

[2] The Video Relay Service ("VRS"), is a toll-free service for deaf users that uses a videophone between an ASL user and a hearing, non-ASL user through a relay operator who is a qualified ASL interpreter.

headquartered in Washington, D.C. The ADX Camp, where Mr. Berke will serve his sentence, is a correctional facility controlled and operated by the BOP.

15. Charles E. Samuels, Jr. ("Director Samuels") is the Director of the Federal Bureau of Prisons. Director Samuels is responsible for the oversight and management of the BOP's 115 institutions and for the safety and security of the more than 200,000 inmates and detainees under the agency's jurisdiction. He is responsible for the BOP's policies and practices regarding the treatment of and services provided to disabled inmates. Director Samuels is aware of the BOP's and the ADX Camp's policies and practices regarding disabled individuals and, more specifically, the BOP's inability or unwillingness to provide Mr. Berke with effective communication in the form of qualified interpreters and other auxiliary aids. He is sued in his official capacity.

16. At all times relevant to this action, Director Samuels acted pursuant to his authority as an official, agent, or employee of the United States.

STATEMENT OF FACTS

17. Upon information and belief, the BOP has not prepared for Mr. Berke's needs and the ADX Camp has virtually no auxiliary aids to allow effective communication for deaf prisoners, including telephones useable by deaf inmates, visual alarms, or regular ASL interpreters.

18. Defendants are on notice of the needs and entitlements of deaf individuals in their care. Defendants Samuels and the BOP have been sued on at least two recent occasions for failure to provide interpreter services, videophones, and visual notifications to other prisoners and federal

detainees.[3] Decisions on installing technology, such as a dedicated DSL line for videophones, would be made at the Director level.

19. 28 C.F.R. 551.90 establishes that Bureau staff shall not discriminate against inmates on the basis of . . . disability. . . . This includes the making of administrative decisions and providing access to work, housing and programs. This regulation was published in 63Fed. Reg. 200 (Oct. 16, 1998) with remarks that, "The revised regulations make more clear the Bureau's intent that *all staff* are responsible for ensuring that their actions are in compliance."(emphasis added)

20. Mr. Berke has made his needs known to the BOP through video relay telephone calls to the ADX Camp, where he spoke with a Ms. Grisenti and a Ms. Barker in Camp Records. In addition, the court referenced his disability in the Judgment requesting the BOP to address his needs in the housing designation.

21. Defendants have not met their burden under 28 C.F.R. 39.160, to provide in writing why the request from Mr. Berke or his sentencing judge to "furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency," would "fundamentally alter the program or activity or would result in undue financial and administrative burdens." Under the CFR provision,

> [t]he agency has the burden of proving that compliance with § 39.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not

[3] *Bryant v. U.S. Bureau of Prisons,* CV CAS 11-254 (C.D.Cal. Filed Jan.7, 2011); *Heyer et al v. U.S. Bureau of Prisons,* C.A. No. 5:11-cv-318(E.D.N.C. Filed June 20, 2011).

> result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

28 C.F.R. § 39.160

A. Medical Treatment and Rehabilitation

22. Mr. Berke relies on sign language interpreters for effective communication for medical and health care services.

23. As a deaf individual reliant on American Sign Language for communication, Mr. Berke's arm and hand mobility is especially important to him. Mr. Berke has rotator cuff injuries in both shoulders, and has undergone rotator cuff surgery. He is currently undergoing physical therapy following surgery, which will need to continue into his incarceration. He also has Lateral Epicondylitis in both arms. He takes 800 milligrams of ibuprofen three times per day and uses a compression device on each forearm for the pain associated with the condition. Mr. Berke has been told by BOP employees that he will not be able to bring his compression devices or his own medications to the facility; rather, he will have to request to have these items issued or prescribed when he arrives.

24. In addition, Mr. Berke has other medical concerns, for which he will or may require medical attention during incarceration. Mr. Berke had surgery for prostate cancer in April 2012, and requires annual wellness check-ups. Mr. Berke also has a history of atypical seizures, for which he takes occasional medication. Mr. Berke wears glasses, which are exceptionally important to him as a deaf person so that he can rely upon visual cues and be observant of his surroundings.

25. Mr. Berke may need psychological counseling upon his arrival in the BOP. Mr. Berke's mother, his only remaining parent, passed away in May, 2012. In addition to the sense of loss he is feeling about her, Mr. Berke anticipates that the isolation of not being able to communicate or

interact with others during incarceration will require him to seek some psychological services in the BOP.

26. Defendants do not provide qualified ASL interpreters to effectively communication with deaf prisoners in their custody during medical appointments, including the initial medical intake, psychiatric, ophthalmology, and other health related appointments. The ADX Camp has established no means to provide effective communication for Mr. Berke at these appointments.

B. Interpretive Services for Ordinary Prison Proceedings

Orientation

27. Deaf prisoners are not provided interpreters for the registration and orientation programs upon their arrival to the BOP's custody, nor are they provided interpreters for periodic "Town Hall" or other meetings which cover rules and additional matters. As a result, Mr. Berke is at a significant disadvantage to understand and thus know how to follow the rules and regulations at the ADX Camp.

28. All prisoners entering a new facility of the BOP are provided with an "Admissions & Orientation" ("A&O") handbook outlining the rules of the facility. While Mr. Berke is able to read the handbook, because of his inability to communicate questions about the meaning of rules, many of them are rendered meaningless. For example, the disciplinary policy of the BOP lists a 307 level violation of refusing an order of any staff member carrying sanctions as severe as disciplinary segregation and loss of good time. Further clarification of these facility rules, like many others, requires the ability to communicate effectively with a facility authority.

29. Defendants are aware that the A&O handbook, on its own, is insufficient to orient incoming prisoners to the rules and procedures of ADX Camp. The handbook is just one part of

a larger Admissions and Orientation program that conveys complementary information. Without interpretive services for this orientation, Mr. Berke is at a significant disadvantage compared with hearing prisoners. Defendants' failure to provide interpretive services during orientation will set up Mr. Berke to unknowingly violate facility rules for the simple reason that there is no mechanism for him to learn them in the first place. Violation of facility rules often leads to disciplinary proceedings.

Disciplinary Proceedings

30. Deaf prisoners are not provided with interpretive services at disciplinary proceedings in most facilities of the BOP. Without interpretive services, Mr. Berke will not be able to effectively respond to questioning from the disciplinary board or otherwise communicate his defense to charges. As a result of disciplinary proceedings, prisoners' privileges, including telephone, commissary, and recreation privileges may be taken away for periods of time. As a result of disciplinary proceedings, prisoners are often placed in disciplinary segregation.

Unit Team Meetings

31. Deaf prisoners are not provided interpreters for Unit Team meetings at facilities of the BOP. Defendants' failure to provide interpreter services for unit team meetings at the ADX Camp will make meaningful participation in those meetings impossible for Mr. Berke. Team meetings are held within the first thirty days of incarceration in the facility, and thereafter every six months. Upon information and belief, the Unit Team meetings are used to discuss the prisoner's release preparation, inmate job, education, and similar issues.

Religious Programs

32. Deaf prisoners are not provided interpreters for religious programs at facilities of the BOP. Mr. Berke is a practicing Catholic. He attends religious services, on average, once per month when interpreters are available at his community parish. Defendants' failure to provide interpreter services for religious services at the ADX Camp will make meaningful participation in those services impossible for Mr. Berke.

Employment

33. Deaf prisoners are not provided interpreters for employment programs at facilities of the BOP. Defendants' failure to provide interpreter services for employment at the ADX Camp will negatively impact Mr. Berke's ability to successfully participate in his work by limiting his ability to communicate with his supervisors and co-workers. Upon information and belief, all prisoners at the Camp are assigned an inmate job.

Education

34. Deaf prisoners are not provided interpreters for educational programs at facilities of the BOP. Defendants' failure to provide interpreter services for educational courses at the ADX Camp will make meaningful participation in those courses impossible for Mr. Berke. His participation will be limited because he will not be able to ask the course assistant any questions, to hear questions of the other students, to hear answers of the instructor, or to hear or participate in any classroom discussion.

C. Communication With Those Outside The ADX Camp

35. Prisoners in BOP facilities are permitted access to telephones, per BOP Policy 5264.08.

36. Like other inmates, Mr. Berke wants to communicate by telephone with his attorneys, family, and friends while in the custody of the BOP. The BOP, however, either substantially

restricts or completely denies access to appropriate telecommunications devices for deaf prisoners in its facilities, including at the ADX Camp.

37. Mr. Berke cannot use a telephone in the same way as a hearing person. He requires a videophone to ensure effective communication.

38. A videophone is a telephone with a camera and screen for visual communication. It allows ASL speakers to sign with each other between camera screens and have real-time conversations. Communication can also be accomplished by videophone between an ASL user and a hearing, non-ASL user through a relay operator who is a qualified ASL interpreter. This process, called Video Relay Service ("VRS"), is toll free for deaf users.

39. A videophone is the most effective telecommunications auxiliary aid for deaf individuals like Mr. Berke who use ASL as a primary means of communication. It is far superior to communication through older technology such as TTYs[4], both because it depends upon ASL skills instead of written skills for communication, and because without a videophone there is no way to contact most deaf individuals outside the institution who no longer own the older technology, including most of the members of Mr. Berke's family. In particular, Mr. Berke would not be able to communicate with his younger children without a videophone as they are not able to write to him. Moreover, one cannot place a call to a videophone (his family's exclusive telephone system) through a TTY.

[4] A TTY is a sixty-year-old technology that allows people to send written messages back and forth to each other by telephone. When both users have this equipment, they can communicate directly over telephone lines. When a hearing person does not have a TTY, a Telecommunications Relay Service ("TRS") operator reads aloud the written messages from the TTY user and transcribes the non-TTY user's verbal response. The TTY ultimately is a much more time-intensive and less effective communication tool than the telephone. As a result, this old technology has been for the most part supplanted by the videophone. Most deaf individuals no longer have TTYs, and communicate on telephone solely by videophone. A TTY cannot be used to communicate with a deaf person who does not have a TTY. Most members of Mr. Berke's family, many of whom are deaf, no longer own TTY's.

40. Regular access to a videophone with relay capability would allow Mr. Berke to remain in contact with his deaf and hearing family, friends, and attorneys outside the institution.

D. Other Necessary Auxiliary Aids to Allow Effective Communication

41. Upon information and belief, the ADX Camp does not provide visual safety alarms (beyond fire), or any means to facilitate communication for deaf prisoners such as visual pagers, or other auxiliary aids such as vibrating alarm clocks, pagers, vibrating bed devices or message boards to accommodate the deaf. Mr. Berke would not hear a safety alarm or other announcement. He was informed by the BOP that he will not be permitted to bring his own vibrating alarm clock to the Camp.

42. Upon information and belief, ADX Camp has no mechanism to alert Mr. Berke to announcements made over the public address speaker system, such as meal announcements, count calls, or meetings. A vibrating pager and/or visual paging system would allow Mr. Berke to receive these messages.

43. Additionally, vibrating watches and vibrating bed devices would provide non-aural alarm notifications and permit Mr. Berke to timely attend scheduled activities at the ADX Camp. The Defendants do not provide these devices to those in their custody.

CLAIMS FOR RELIEF

COUNT I: DISCRIMINATION ON THE BASIS OF A DISABILITY IN VIOLATION OF THE REHABILITATION ACT AGAINST MR. BERKE (29 U.S.C. §§ 794 ET SEQ. AND 5 U.S.C. § 703)

44. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

45. The Rehabilitation Act of 1973, 29 U.S.C. §§ 794 *et seq.* (hereinafter "Rehabilitation Act"), provides that "[n]o otherwise qualified individual with a disability in the United States, as

defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

46. Mr. Berke is deaf and, as such, is a qualified individual with a disability within the meaning of the Rehabilitation Act, 29 U.S.C. § 705(20).

47. Mr. Berke is otherwise qualified to receive informed medical treatment and communicate with medical providers on an equal basis with other prisoners in the BOP, and is eligible to participate in commensurate educational, religious, rehabilitation, vocational, telephone, and all other programs and services provided to others at that facility.

48. The BOP is an executive agency within the meaning of 29 U.S.C. § 794(a).

49. The operations of the BOP, including the departments, agencies, programs and instrumentalities at the ADX Camp such as Health Services, Psychology Services, the Education Department and its associated programs, Vocational and Occupational Training programs, Inmate Skills Development Initiative, and work programs such as Federal Prison Industries, are "program[s] or activit[ies] conducted by an Executive Agency" within the meaning of 29 U.S.C. §§ 794(a).

50. At all times relevant to this action, the Rehabilitation Act was and remains in full force and effect in the United States, and Mr. Berke has a right to not be subjected to discrimination on the basis of his disability by Defendants. 29 U.S.C. § 794(a).

51. The purpose of the Rehabilitation Act is to ensure that no "qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . . ." 29 U.S.C. § 794(a).

52. The Department of Justice's regulations implementing the Rehabilitation Act recognize that activities of its agencies are programs or activities conducted by an Executive Agency of the United States government, and that "the agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency." 28 C.F.R. § 39.160(a)(1) (emphasis added).

53. Auxiliary aids include but are not limited to interpreters and telecommunication devices for deaf persons. 28 C.F.R. § 39.103.

54. The Department of Justice's regulations implementing the Rehabilitation Act additionally mandate that "[i]n determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person." 28 C.F.R. § 39.160(a)(1)(i).

55. Defendants' placement of Mr. Berke at the ADX Camp will discriminatorily impair his ability to communicate effectively with: medical staff and healthcare providers, including physicians; educational and vocational instructors and his fellow students; work program managers, coordinators, and his fellow employees; correctional officers; and other members of the institution staff. Furthermore, this placement will exclude Mr. Berke from religious, educational and vocational programs, telephone services, and institution-wide alarms and announcements. Defendants have done this by maintaining institutions without appropriate auxiliary aids, in violation of the Rehabilitation Act.

56. Defendants' failure to maintain an institution with qualified interpreters and appropriate auxiliary aids – in effect to ensure the availability of an effective means of communication for

deaf prisoners so Mr. Berke can be placed there – will deny Mr. Berke, on the basis of his deafness, the same access to Defendants' services, benefits, activities, programs, and privileges as is afforded to hearing individuals.

57. The failure to provide qualified interpreters and appropriate auxiliary aids and services to ensure an effective means of communication, and the failure to provide comparable access to services, benefits, activities, programs, and privileges, are policies, regular practices and/or customs of Defendants. These failures currently exist and will continue when Mr. Berke reports for his sentence without the relief requested herein.

58. Defendants failure to provide qualified ASL interpreters and other reasonable auxiliary aids for the deaf, will result in Mr. Berke being:

- unable to communicate effectively with healthcare providers, raise medical issues, understand the treatments and medications they prescribe, or discuss mental health problems;
- excluded from participating in the same religious, educational, vocational, and rehabilitation classes and work programs as hearing detainees;
- deprived of knowledge of institution-wide safety or emergency announcements;
- deprived of knowledge of institution counts, meals and other important daily activities;
- unable to communicate effectively with correctional officers and staff members;
- subject to disciplinary action stemming from Defendants' refusal to provide auxiliary aids to allow effective communication;
- deprived of meaningful participation in disciplinary proceedings;
- prevented from obtaining consistent access to new hearing aid batteries;
- prevented from obtaining consistent access to closed-captioned televisions; and
- prevented from communicating equally and effectively with family, friends, and their counsel by telephone.

59. As a proximate result of Defendants' violations of the Rehabilitation Act, Mr. Berke will suffer discrimination, unequal treatment, exclusion (including exclusion from Defendants' services, benefits, activities, programs, and privileges), financial loss, loss of dignity, frustration, humiliation, emotional pain and suffering, anxiety, trauma, embarrassment, unnecessary loss of rights and privileges, including unnecessary disciplinary measures, and serious injury to his health and mental health, including the injuries specified herein.

60. Defendants' failure to comply with the Rehabilitation Act has created an atmosphere that will result in harm to Mr. Berke, as he will be in the custody or supervision of the BOP and will seek to use the services, benefits, activities, programs and privileges provided by Defendants and to which he is entitled. This harm will occur unless and until Defendants are ordered by this Court to modify their policies, practices and procedures as demanded by the Rehabilitation Act.

COUNT II: VIOLATION OF THE CONSTITUTION OF THE UNITED STATES – DUE PROCESS AGAINST MR. BERKE (FIFTH AMENDMENT – RIGHT TO QUALIFIED INTERPRETER AT DISCIPLINARY HEARINGS)

61. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

62. Under the Fifth Amendment of the Constitution of the United States, "[n]o person … shall … be deprived of life, liberty, or property, without due process of law."

63. The Fifth Amendment guarantees Mr. Berke notice and a meaningful opportunity to be heard in connection with institution disciplinary proceedings.

64. In addition to failing to adequately inform deaf prisoners of the applicable rules when first entering the BOP's custody, in effect setting deaf prisoners up to break them, Defendants maintain an institution that does not provide deaf prisoners qualified sign language interpreters for disciplinary hearings stemming from their alleged violation of those rules. Defendants then

impose various punishments based on determinations that such rules were violated. Defendants' refusal to provide qualified interpreters at these hearings will deprive Mr. Berke notice and a meaningful opportunity to be heard in connection with his disciplinary proceedings, a particularly unfortunate deprivation considering the likelihood that violations of the rules are inadvertent and directly linked to Defendants' own failure to explain them.

65. Defendants' failure to comply with the Fifth Amendment will result in harm to Mr. Berke unless and until Defendants are ordered by this Court to modify their policies, practices and procedures pursuant to the Fifth Amendment.

COUNT III: VIOLATION OF THE CONSTITUTION OF THE UNITED STATES – CRUEL AND UNUSUAL PUNISHMENT AGAINST MR. BERKE (EIGHTH AMENDMENT – RIGHT TO ADEQUATE MEDICAL TREATMENT)

66. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

67. Under the Eighth Amendment to the Constitution of the United States, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

68. The Eighth Amendment guarantees Mr. Berke a right to reasonably adequate medical care and treatment, including the right to be seen by a person competent to examine the patient, and make diagnoses, treatments, and referrals.

69. Competent medical diagnoses require that the practitioner amass information about the patient. Competent information gathering includes questioning, discussion, and communication between the patient or patient's representative and practitioner in a language comfortable to the parties. There are no adequate means to ensure effective communication for Mr. Berke with medical personnel at the ADX Camp.

70. Treatment under certain mental health services – including group therapy and other talk therapies – are largely or entirely based on conversations between the patient and practitioner.

71. At the ADX Camp, Defendants maintain a facility that denies deaf prisoners an effective means of communication. Defendants have not established means to acquire the services of qualified ASL interpreters, which are necessary to allow Mr. Berke to understand and communicate with medical staff and healthcare providers. Without these auxiliary aids, Mr. Berke will be unable to participate in questioning regarding medical diagnoses or derive any benefit from certain mental health services to which he will be subjected by Defendants and their employees.

72. Defendants are aware of Mr. Berke's disability and need for interpretive services to converse with medical practitioners.

73. By maintaining the facility where Mr. Berke will be placed in such a way that will deprive him of a qualified interpreter during medical and mental health treatment, Defendants have acted with deliberate indifference to Mr. Berke's needs.

74. Defendants' failure to comply with the Eighth Amendment will result in harm to Mr. Berke unless and until Defendants are ordered by this Court to modify their policies, practices, and procedures pursuant to the Eighth Amendment.

COUNT IV: VIOLATION OF THE CONSTITUTION OF THE UNITED STATES – CRUEL AND UNUSUAL PUNISHMENT AGAINST MR. BERKE (EIGHTH AMENDMENT – INFORMED CONSENT TO MEDICAL TREATMENT)

75. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

76. Under the Eighth Amendment to the Constitution of the United States, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

77. Defendants are required to provide reasonably adequate medical treatment to those under their custody. Adequate medical treatment includes the Eighth Amendment guarantee of the right to be free from unwanted medical treatment, including the right to be treated only with one's informed consent.

78. At the ADX Camp, Defendants maintain a facility that denies deaf prisoners an effective means of communication. Defendants have not established means to acquire services of qualified ASL interpreters, which are necessary to allow Mr. Berke to understand and communicate with medical staff and healthcare providers. Without these auxiliary aids, Mr. Berke will be unable to understand, and thus give his informed consent to, any and all medical treatment to which he will be subjected by Defendants and their employees.

79. Defendants are aware of plaintiffs' disability and need for a qualified interpreter at medical treatments.

80. By maintaining the facility where Mr. Berke will be placed in such a way that will deprive him of a qualified interpreter during medical treatment, Defendants have acted with deliberate indifference to Mr. Berke' sneeds.

81. Defendants' failure to comply with the Eighth Amendment will result in harm to Mr. Berke unless and until Defendants are ordered by this Court to modify their policies, practices and procedures pursuant to the Eighth Amendment.

COUNT V: VIOLATION OF THE CONSTITUTION OF THE UNITED STATES – CRUEL AND UNUSUAL PUNISHMENT AGAINST MR. BERKE (EIGHTH AMENDMENT – RIGHT TO PRIVACY IN MEDICAL TREATMENT)

82. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

83. Under the Eighth Amendment to the Constitution of the United States, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

84. The Eighth Amendment guarantees Mr. Berke a constitutional right to privacy in medical treatment. Defendants' practice of using other prisoners or detainees as interpreters for deaf individuals under BOP custody during medical and mental health appointments violates the constitutional right to privacy in medical treatment. Such prisoner or detainee interpreters have no obligation to keep confidential any information communicated during medical or mental health appointments. Moreover, this breach of privacy rights is especially problematic in the institutional setting where a prisoner's or detainee's possession of confidential information about another prisoner or detainee can be used in threatening and dangerous ways.

85. Defendants are aware of Mr. Berke's disability and need for a qualified interpreter at medical treatments who will be obligated to keep this medical information confidential.

86. By maintaining the facility where Mr. Berke will be placed in such a way that will deprive him of a qualified interpreter during medical treatment, Defendants have acted with deliberate indifference to Mr. Berke's needs.

87. Defendants' failure to comply with the Eighth Amendment will result in harm to Mr. Berke unless and until Defendants are ordered by this Court to modify their policies, practices, and procedures pursuant to the Eighth Amendment.

COUNT VI: VIOLATION OF THE CONSTITUTION OF THE UNITED STATES CRUEL AND UNUSUAL PUNISHMENT AGAINST MR. BERKE (EIGHTH AMENDMENT – RIGHT TO A REASONABLY SAFE ENVIRONMENT)

88. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

89. Under the Eighth Amendment to the Constitution of the United States, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

90. The Eighth Amendment guarantees Mr. Berke the right to a reasonably safe living environment.

91. Defendants have failed to equip BOP facilities, including the ADX Camp, with adequate visual alarms, pagers, or message boards that would alert Mr. Berke to an emergency, such as a fire or lockdown. This failure violates Mr. Berke's right to a reasonably safe living environment.

92. Defendants are aware of Mr. Berke's disability and need for a these emergency alerts.

93. By maintaining the facility where Mr. Berke will be placed in such a way that will deprive Mr. Berke of these emergency alerts, Defendants acted with deliberate indifference to his rights.

94. Defendants' failure to comply with the Eighth Amendment poses an unreasonable risk of future harm to Mr. Berke and will continue to do so throughout his term of imprisonment unless and until Defendants are ordered by this Court to modify their policies, practices, and procedures pursuant to the Eighth Amendment.

COUNT VII: VIOLATION OF THE CONSTITUTION OF THE UNITED STATES FREEDOM OF SPEECH AGAINST MR. BERKE (FIRST AMENDMENT)

95. Mr. Berke realleges and incorporates by reference each and every allegation above as if fully set forth herein.

96. At the ADX Camp, Defendants maintain an institution that will impermissibly deprive Mr. Berke of his First Amendment rights of freedom of speech by failing to provide him with telecommunication equipment necessary for him to communicate with family and friends outside of the ADX Camp.

97. Hearing inmates at the ADX Camp have telecommunication equipment that allows communication with people outside of the ADX Camp.

98. Defendants' refusal to provide the necessary telecommunication equipment to ensure that Mr. Berke has the same level of telephone access as hearing prisoners serves no legitimate or compelling need and is not rationally related or narrowly tailored to any identified penological or rehabilitative need.

99. Because Mr. Berke will be housed in an area far from his family and friends, telecommunication equipment is critical to his exercise of his First Amendment right to communicate with friends and family.

100. Provision of appropriate telecommunication equipment to Mr. Berke will have negligible effects, if any, on other inmates, detainees, and prison employees at FCI Butner.

101. Defendants' failure to comply with the First Amendment of the United States Constitution will result in harm to Mr. Berke, unless and until they are ordered by this Court to modify their policies, practices and procedures.

PRAYER FOR RELIEF

WHEREFORE, Mr. Berke respectfully request:

A. The Court adjudge and decree that Defendants, by the organizations, systems, policies, practices, and conditions described above, have violated and continue to violate Section 794 of the Rehabilitation Act and the Constitution of the United States;

B. The Court enter such injunctive and/or declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Rules 57 and 65 of the Federal Rules of Civil Procedure against Defendants and in favor of Mr. Berke as it deems appropriate to remedy violations of the laws of the United

States and to prevent future violations of the same, including by ordering Defendants to make available at the ADX Camp in preparation for Mr. Berke's incarceration:

- qualified ASL interpreters to enable Mr. Berke to communicate effectively with medical and mental healthcare professionals, institution staff, educational and vocational instructors, religious clergy, work program managers and coordinators, and disciplinary officers;

- non-aural notification of emergencies or other important events and announcements, *e.g.*, a vibrating pager, visual alarms, vibrating watch, vibrating bed device, and/or message boards;

- equal and full access to appropriate and effective telecommunication devices for the deaf, including full and equal access to a videophone; and

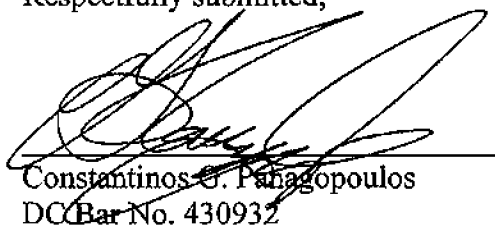
C. Judgment be entered against Defendants in favor of Mr. Berke for the costs of litigation, including reasonable attorneys' fees and costs under 28 U.S.C. § 2412(d)(1)(A).

D. The Court retain jurisdiction of this matter until Defendants demonstrate that they have fully complied with the orders of this Court, and that there is a reasonable assurance that Defendants will continue to comply in the future absent continuing jurisdiction; and

E. The Court award Mr. Berke any further relief that the Court deems appropriate, including additional attorneys' fees and costs.

Dated: August 14, 2012

Respectfully submitted,



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY BERKE, ***Plaintiff,*** **v.** **FEDERAL BUREAU OF PRISONS, *et al.*,** ***Defendants.***	**Civil Action No. 12-1347 (ESH)**

MEMORANDUM OPINION

Plaintiff Larry Berke, a deaf individual, filed suit against the Federal Bureau of Prisons ("BOP") and Charles Samuels, Jr., in his official capacity as the Director of the BOP ("Defendants"), alleging that defendants discriminated against him in violation of the Rehabilitation Act, 29 U.S.C. § 790 *et seq.*, by failing to adequately accommodate his deafness. On September 25, 2012, this Court granted in part plaintiff's motion for a preliminary injunction, ordering defendants to determine whether the videophone system requested by plaintiff could be installed without resulting in "undue financial and administrative burdens," as required by 28 C.F.R. § 39.160(d). Plaintiff now seeks to recover attorney's fees and costs pursuant to 29 U.S.C. § 794a(b) and Federal Rule of Civil Procedure 54(d). (Plaintiff's Motion for Award of Attorney's Fees and Costs, Oct. 9, 2012 [ECF No. 20] ("Mot.").) Upon consideration of plaintiff's motion, defendants' opposition thereto (Defendants' Opposition to Plaintiff's Motion for Attorney Fees and Costs, Jan. 31, 2013 [ECF No. 31] ("Opp'n")), and plaintiff's reply (Reply in Further Support of Plaintiff's Motion for Award of Attorney's Fees and Costs, Feb. 7, 2013 [ECF No. 32] ("Reply")), and for the reasons explained below, the Court will grant in part and deny in part plaintiff's motion.

BACKGROUND

In December 2011, plaintiff pled guilty to conspiracy to commit mail fraud under 18 U.S.C. § 1349. (*See* Complaint Ex. 1, Aug. 14, 2012 [ECF No. 1-1] at 2.) The indictment asserted that Mr. Berke, along with his wife, son, and other individuals,[1] submitted fraudulent claims to the United States government for reimbursement for providing telephone services for hearing-impaired individuals. He was sentenced to 24 months in prison, followed by three years of supervised release. (*See id.* at 3-4.)

On August 14, 2012, plaintiff filed a complaint alleging that defendants violated the Rehabilitation Act by planning to incarcerate him at U.S. Penitentiary Florence ADMAX Satellite Camp, a facility that he alleged did not have adequate accommodations for deaf inmates. (Mot. at 1-2.) Plaintiff initially moved for a temporary restraining order, which was later converted into a motion for a preliminary injunction.

After plaintiff filed his complaint, but before this Court ruled on the preliminary injunction, defendants reassigned plaintiff to the ADMAX Satellite Camp in Tucson, Arizona ("SPC Tucson"). (Mot. at 2 n.1; Opp'n at 3 & n.1.) They also agreed to provide Mr. Berke with various accommodations at that facility, including closed-captioning on prison telephones, the assignment of an inmate disability helper, access to a TTY phone, access to a live interpreter for certain events, visual alarms, access to inmate email, dry erase boards and pens, and appropriate medical attention. (*See* Mot. at 4.) Those accommodations were reduced to writing in a declaration by Scott Pennington, a Unit Manager at SPC Tucson. (*See* Declaration of Scott R. Pennington, Sept. 24, 2012 [ECF No. 14-2].) Plaintiff nevertheless chose to proceed with this litigation to determine whether defendants were in violation of Section 504 of the Rehabilitation

[1] Mr. Berke's wife, his son, and other co-conspirators are also hearing-impaired.

Act by failing to provide him with access to videophone technology, as opposed to a TTY phone. (*See* Preliminary Injunction Hearing Transcript [ECF No. 25] ("Tr.") at 5 ("[W]e're here on one issue and one issue only still . . . which has to do with whether they're required to provide an accommodation to the plaintiff regarding the videophone system.").)[2]

On September 25, 2012, this Court held a hearing on the preliminary injunction motion. Consistent with their written motions, defendants argued that the installation of a videophone "would result in undue financial and administrative burdens," especially given the difficulty in monitoring videophone communications, and thus they were not required to offer that accommodation in light of 28 C.F.R. § 39.160(d). (*See* Tr. at 165-66.) However, as the Court pointed out, an agency's determination that the requested accommodation would result in such burdens must be "accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. § 39.160(d). Because defendants had not done any analysis to determine whether it could reasonably comply with plaintiff's request, the Court ruled that defendants had not met their burden of proving that the installation of a videophone system would result in undue financial and administrative burdens. (*See* Tr. at 167-69.) The Court therefore granted plaintiff's motion for a preliminary injunction in part and ordered the defendants to "undertake an investigation or examination to determine whether or not [the videophone system] could be installed consistent with their security requirements." (*Id.* at 167.) However, the Court denied plaintiff's motion insofar as it sought an order requiring the installation of the videophone system. (*Id.* at 167-68.) The Court also signed off on the stipulation agreed to by the parties

[2] Using the TTY phone system, a deaf individual types a sentence into the system in English, and the system then transmits a signal through a phone land line to another TTY machine, which transcribes it into a typed English message on the other end. (*See* Tr. at 26-27.) The videophone system, on the other hand, allows deaf individuals to see each other on a screen so that they can use their native language—American Sign Language—to communicate. (*See id.* at 14.)

reflecting their agreement that the BOP would provide Mr. Berke with the above-mentioned accommodations. (Stipulation and Order, Sept. 27, 2012 [ECF No. 18] ("Stip.").)

ANALYSIS

The Rehabilitation Act provides that "[i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 29 U.S.C. § 794a(b). The Court must first determine whether, in light of the partial relief granted by this Court, plaintiff is properly considered a "prevailing party" under the Act. Then, assuming plaintiff is in fact entitled to recover costs, the Court must determine whether plaintiff's requested costs and attendant attorney's fees are reasonable under the law.

I. PREVAILING PARTY

A prevailing party is "one who has been awarded some relief by a court." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001). The Supreme Court has long held that the "touchstone" of the prevailing party inquiry is "the material alteration of the legal relationship of the parties." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). Thus, in *Buckhannon*, the Supreme Court rejected the application of the "catalyst theory," which allows an award of attorney's fees if the plaintiff's lawsuit brings about a voluntary change in the defendant's conduct.[3] 532 U.S. at 605. Instead, "for a litigant to be a 'prevailing party,' there must have been a 'judicially sanctioned change in the legal relationship of the parties.'" *Edmonds v. F.B.I.*, 417 F.3d 1319, 1322 (D.C.

[3] Although *Buckhannon* involved the Americans with Disabilities Act and the Fair Housing Amendments Act, the Supreme Court confirmed in that case that they "have interpreted these fee-shifting provisions consistently." 532 U.S. at 603 n.4; *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (noting that the standards for interpreting the meaning of "prevailing party" are consistent across "all cases in which Congress has authorized an award of fees to a 'prevailing party'").

Cir. 2005) (quoting *Buckhannon*, 532 U.S. at 605). Such changes are brought about by "enforceable judgments on the merits and court-ordered consent decrees." *Buckhannon*, 532 U.S. at 604. Following *Buckhannon*, this Circuit articulated a three-part test for determining prevailing-party status: "(1) there must be a 'court-ordered change in the legal relationship' of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." *Dist. of Columbia v. Straus*, 590 F.3d 898, 901 (D.C. Cir. 2010) (quoting *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 492-93 (D.C. Cir. 2003)).

Plaintiff argues that he is a "prevailing party" based on two factors: (1) that "Defendants agreed [by way of a stipulation] to provide him numerous necessary accommodations," and (2) that "the Court granted his preliminary injunction in part." (Mot. at 5.)

A. Transfer to SPC Tucson and Other Accommodations

Plaintiff claims that he is a prevailing party because he "secured the BOP's agreement to provide numerous accommodations requested by Mr. Berke." (Reply at 3.) He notes that "[i]t was not until after the lawsuit was filed that Defendants agreed to provide any accommodations." (*Id.* (emphasis omitted).) However, that type of "voluntary change in conduct" is precisely what is contemplated by the now-rejected "catalyst theory," *see Buckhannon*, 532 U.S. at 605, and thus, those accommodations are insufficient to render plaintiff a prevailing party.

Plaintiff does not—and cannot—claim that either his transfer to SPC Tucson or the accommodations the BOP agreed to provide him at that facility were the result of an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." *Buckhannon*, 532 U.S. at 604. The parties provided the Court with a stipulation listing the accommodations that the BOP had already agreed to provide Mr. Berke, and the Court signed off on that agreement to

acknowledge the resolution of all issues besides the one that remained for the preliminary injunction hearing—namely, the request for a videophone. (*See* Stip.) However, that order did not "entail the judicial approval and oversight involved in [a] consent decree[]," *Buckhannon*, 532 U.S. at 604 n.7, through which the Court would retain jurisdiction to ensure compliance with the terms of the stipulation. *Cf. Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Dep't of Energy*, 288 F.3d 452, 457 (D.C. Cir. 2002), *superseded by statute on other grounds*, 5 U.S.C. § 552(a)(4)(E) (holding that the Court's entering of a "Stipulation and Order" approving the parties' terms of dismissal did not amount to a "court-ordered consent decree" that would render the plaintiff the prevailing party). Thus, the Court does not find that plaintiff was a "prevailing party" because of the accommodations the BOP agreed to provide him at SPC Tucson. However, plaintiff is nevertheless entitled to recover attorney's fees based on his partial success at the preliminary injunction hearing.

B. Partial Grant of Preliminary Injunction Motion

While the Court declined to order the BOP to install videophones for plaintiff's use, (Tr. at 168), it did order, at the preliminary injunction hearing, the BOP "to comply with the regulations" by investigating by a date certain whether videophones could be installed without resulting in undue financial or administrative burdens. (*Id.* at 167.) Although plaintiff did not obtain the exact relief that he sought, this order was nevertheless sufficient to render him a "prevailing party" for purposes of recovering attorney's fees.

Defendants insist that because the Court did not order the installation of the videophone system, "Plaintiff did not get the relief he originally sought." (Opp'n at 11.) While it is true that he did not obtain the installation of a videophone system (as opposed to use of the TTY system), it is well established that a plaintiff need not obtain complete relief to be considered a prevailing

party; "a civil rights plaintiff must obtain *at least some relief* on the merits of his claim" that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) (emphasis added). Prior to the Court's ruling, defendants had not determined whether videophones could reasonably be installed for plaintiff's use, but as a result of the ruling, they will be forced to make that determination. That is undeniably a change in the legal relationship between the parties that directly benefits the plaintiff, since defendants are now legally obligated to undertake steps that at a minimum will reassure plaintiff that the BOP has adequately considered his request for accommodation, and could possibly result in the implementation of such a videophone system. The fact that plaintiff may not have obtained all the relief he sought is relevant to determining the amount of attorney's fees that plaintiff can reasonably recover, but does not alter his status as a "prevailing party." *See infra* Section II.C.

II. REASONABLE FEES

Having determined that plaintiff is a prevailing party and is therefore entitled to recover a "reasonable attorney's fee" under 29 U.S.C. § 794a(b), the Court must now decide whether plaintiff's requested attorney's fees are, in fact, reasonable. "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). There is a strong presumption that this amount—known as the "lodestar"—represents a reasonable fee. *See Bd. of Tr. of Hotel & Rest. Emp. Local 25 v. JPR, Inc.*, 136 F.3d 794, 801 (D.C. Cir. 1998) (citing *Pennsylvania. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986)).

A. Reasonable Hourly Rate

The determination of a "reasonable hourly rate" requires an analysis of at least three elements: "the attorneys' billing practices; the attorneys' skill, experience, and reputation; and the prevailing market rates in the relevant community." *Covington v. Dist. of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995). The prevailing market rates can be established either by the rates at which prior fee awards have been made or based on published surveys of prevailing rates in the community, such as the U.S. Attorney's Office's *Laffey* matrix. *Id.* at 1109.

Plaintiff in this case was represented by attorneys from the Washington Lawyers' Committee for Civil Rights and Urban Affairs (the "WLCCR") working together with attorneys from the law firm of Ballard Spahr LLP.[4]

1. WLCCR

The WLCCR does not charge its clients a regular fee for its services, so it suggests that the Court should derive the reasonable hourly rate from what is known as the "updated *Laffey* matrix."[5] (Mot. at 8-9.) Defendants respond that the "USAO *Laffey* matrix"[6] is the appropriate starting point for determining the prevailing market rates in this jurisdiction. (Opp'n at 14-15.) The Court agrees with defendants.

Although plaintiff is correct that courts in this jurisdiction have, at times, approved the use of the updated *Laffey* matrix, the USAO *Laffey* matrix is far more widely accepted. *See, e.g.*, *Heller v. Dist. of Columbia*, 832 F. Supp. 2d 32, 48 (D.D.C. 2011) ("The Court finds the frequency with which the USAO Laffey Matrix rates are applied to be strong evidence of both

[4] According to the billing records, nine attorneys worked on this case, including four from the WLCCR. This hardly seems like an efficient use of resources.

[5] The updated *Laffey* matrix is available at http://laffeymatrix.com/see.html.

[6] A copy of the USAO *Laffey* matrix is attached to defendants' Opposition as Attachment A.

their prevalence and their reasonableness."); *Miller v. Holzmann*, 575 F. Supp. 2d 18 n.29 (D.D.C. 2008) (noting the "widespread acceptance" of the USAO *Laffey* matrix); *Am. Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 150 (D.D.C. 2007) (referring to the USAO *Laffey* matrix as the "standard matrix" in this jurisdiction). One reason for this preference is that the updated *Laffey* matrix "reflects *national* inflation trends," while the USAO matrix "relies on data specific to the Washington, D.C. metropolitan area." *Miller*, 575 F. Supp. 2d at 17. Thus, courts in this jurisdiction have frequently referred to the USAO *Laffey* matrix as "the benchmark for reasonable fees in this Court." *See, e.g., id.* at 18 n.29 (quoting *Pleasants v. Ridge*, 424 F. Supp. 2d 67, 71 n.2 (D.D.C. 2006)). This Court agrees that the USAO matrix more accurately reflects the prevailing market rates in the Washington, D.C. legal market. This is particularly true here, where the hourly rates sought by the WLCCR attorneys under the updated *Laffey* matrix far exceed even the rates sought by the private attorneys at Ballard Spahr.[7]

The Court therefore finds that a "reasonable hourly rate" for the work performed by the WLCCR attorneys is the rate set out in the USAO *Laffey* matrix, as shown here:

Attorney	**USAO *Laffey* Matrix Hourly Rate**
Gardner	$505
Fornaci	$505
Golden	$445
Finkenstadt	$355

[7] For example, WLCCR attorneys Elaine Gardner and Philip Fornaci would each receive an hourly rate of $753 under the updated *Laffey* matrix based on their roughly 30 and 20 years of litigation experience, respectively. (*See* Declaration of Elizabeth Elaine Gardner, Oct. 9, 2012 [ECF No. 20-3] ("Gardner Decl.") ¶¶ 4, 6, 13.) The lead attorney on the case from Ballard Spahr, Constantinos Panagopoulos, with over 20 years of litigation experience, seeks only $550/hour. (*See* Declaration of Constantinos Panagopoulos, Oct. 9, 2012 [ECF No. 20-4] ("Paganopoulos Decl.") at 7.)

2. Ballard Spahr

With respect to the attorneys from Ballard Spahr, the Court finds that their regular billing rates are reasonable. In this Circuit, "an attorney's usual bill rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Kattan by Thomas v. Dist. of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) (quoting *Blum*, 465 U.S. at 895-96 n.11). As explained above, the USAO *Laffey* matrix is relevant evidence of the "prevailing" rates in the Washington, D.C. area. The rates charged by the five Ballard Spahr attorneys who worked on this case, though not identical to the *Laffey* rates, are very much "in line" with them. (*Compare* Paganopoulos Decl. Ex. A at 7 (showing hourly rates for each attorney) *with* Opp'n at 17 (showing USAO *Laffey* matrix rates for each attorney).) For example, although attorney Panagopolous charges an hourly rate of $550 compared to the USAO *Laffey* rate of $505, Jonathan Lippert charged only $350, far lower than the $445 allowed for in the USAO *Laffey* matrix. Altogether, two of the five Ballard Spahr attorneys charged higher rates than provided for by the USAO *Laffey* matrix, two charged lower rates, and one charged exactly the same rate. The Court therefore concludes that Ballard Spahr's standard billing rates are reasonable.

B. Reasonable Hours Expended on the Litigation

To determine the lodestar, the Court must multiply the reasonable hourly rates by "the number of hours reasonably expended on the litigation." *Blum*, 465 U.S. at 888. Both WLCCR and Ballard Spahr appear to have made a good-faith effort to eliminate hours billed for arguably duplicative or unnecessary work. Ballard Spahr claims to have excluded 101.1 billable hours from their total, resulting in 188.1 hours billed. (*See* Mot. at 10; Paganopoulos Decl. Ex. A at 7.) WLCCR has excluded 22.7 billable hours, for a total of 74.9. (*See* Mot. at 10; Gardner Decl. at

10.) Thus, the two entities eliminated roughly 35% and 23% of their hours worked, respectively. The Court therefore finds that the hours submitted by both entities are adequately documented and are "not excessive, redundant or otherwise unnecessary." *Okla. Aerotronics, Inc. v. United States*, 943 F.2d 1344, 1347 (D.C. Cir. 1991).

C. Reduction Based on Limited Extent of Plaintiff's Success

However, the inquiry does not end with the determination of the lodestar. To the contrary, that is simply the "starting point." *Pleasants*, 424 F. Supp. 2d at 73. The district court must still consider whether to adjust the award of attorney's fees in light of "the overall relief obtained by the plaintiff." *Hensley*, 461 U.S. at 435. "If the prevailing party achieved less than complete success, [the court] must reduce that base to reflect the degree of success achieved." *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 599 (D.C. Cir. 1996). The degree of success is determined by considering two questions: "(1) whether the party failed to prevail on claims that were unrelated to the claims on which he succeeded, and (2) whether the party achieved a level of success that makes the hours expended a satisfactory basis for making the fee award." *Pleasants*, 424 F. Supp. 2d at 73.

The first of those inquiries is not at issue here, because all of plaintiff's claims were "based on the same factual scenario" and "the same legal theory." *Goos v. Nat'l Ass'n of Realtors*, 68 F.3d 1380, 1384 (D.C. Cir. 1995); *see also Bolden v. J & R Inc.*, 135 F. Supp. 2d 177, 181 (D.D.C. 2001) ("The fact that Plaintiffs did not prevail on a number of other counts is of no significance because the underlying factual context . . . was the same for all claims."). Thus, the mere fact that plaintiff was not a "prevailing party" under the law with respect to the accommodations that defendants have agreed to provide him at SPC Tucson does not justify reducing the award of attorney's fees.

However, the Court concludes that the limited nature of the relief obtained by plaintiff at the preliminary injunction hearing does support a reduction in attorney's fees. The Supreme Court has noted that, where a plaintiff's legal claims are all based upon the same factual scenario or legal theory, the court should determine fees by considering "the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435. The "most critical factor is the degree of success obtained." *Id.* at 436. Thus, "if the district court determines and explains why the total hours expended were not reasonable in relation to the results obtained—regardless of the number of claims raised—the court has discretion to reduce fees." *Goos*, 68 F.3d at 1387.

Here, the majority of the work undertaken by plaintiff's counsel related to the briefing and hearing on the preliminary injunction. At the hearing, the only issue was whether defendants were in violation of the Rehabilitation Act by failing to provide plaintiff access to a videophone system. (Tr. at 5.) Although the Court found that defendants had not complied with the Act's requirement that they provide a written explanation for their assertion that such an accommodation would result in undue financial or administrative burden, the Court did not order defendants to install the videophone system. To the contrary, the Court concluded that, in light of the well-established rule that "it is not the Court's obligation to tell the Bureau of Prisons what or what not to do," the Court "cannot . . . order them to install [the videophone] upon his arrival." (*Id.* at 166-67.) Instead, the Court simply ordered defendants to investigate whether such a system could reasonably be installed. (*Id.* at 167.) The outcome of that investigation remains to be seen and was in no way predetermined by this Court's ruling. Even within that limited relief, the Court declined to force the government to move at plaintiff's desired pace; the Court noted that although plaintiff requested immediate action, because plaintiff himself had "sat on his

rights" for eight months, the BOP would have eight months in which to conduct the videophone study. (*Id.* at 167-68.) Thus, no videophone had been installed as of plaintiff's surrender date of September 27, 2012, and he has now served roughly seven months of his 24-month sentence without either the videophone system or a response from the BOP about its position as to installing such a system.

In recognition that this result can in no way be considered "full" relief, it is appropriate to significantly reduce the amount of attorney's fees that plaintiff may recover. "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Hensley*, 461 U.S. at 436. Here, the Court cannot parse the attorneys' billing records to identify particular hours to exclude, since all hours were spent in pursuit of the videophone and other accommodations. However, in light of the uncertainty as to whether plaintiff will ever gain access to his requested accommodation, and the at least eight-month window with no possibility of such an accommodation, the Court concludes that a 40% reduction in attorney's fees is appropriate. Such an award is well within this Court's discretion. *See Hensley*, 461 U.S. at 439 n. 14 (finding that district court in *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978), was well within its discretion to award payment for only 57.75 of the attorneys' 174 hours spent on the case where plaintiff had sought reinstatement, lost wages, damages, and expungement of derogatory material from her employment record, but had been awarded only lost wages and expungement); *Fisher v. Friendship Public Charter Sch.*, 880 F. Supp. 2d 149, 153-54 (D.D.C. 2012) (reducing fees by 50% because plaintiff did not succeed on three of his four claims); *Roseboro v. Billington*, 618 F. Supp. 2d 85, 88-89 (D.D.C. 2009) (finding that a one-third reduction in fees is appropriate in light of the fact that plaintiff sought extensive

damages, reinstatement, and other relief, but was awarded only expungement of certain charges from his personnel record).

Using the USAO *Laffey* matrix rates for the WLCCR's attorneys, and Ballard Spahr's standard billing rates, but reducing the hours by 40%, the Court concludes that plaintiff is entitled to recover $20,975.70 in attorney's fees for the WLCCR's work, and $48,315.90 in attorney's fees for Ballard Spahr's work.

III. REASONABLE COSTS

As a prevailing party, plaintiff is also entitled to recover reasonable costs. *See* Fed. R. Civ. P. 54(d). 28 U.S.C. § 1920 specifically enumerates several categories of costs that plaintiffs are entitled to receive, including: (1) fees of the clerk and marshal; (2) fees for printed or electronically recorded transcripts; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and the costs of making copies of any materials; (5) docket fees under § 1923; and (6) compensation of court appointed experts and compensation of interpreters.

Plaintiff seeks to recover $11,974.49 in costs, broken down as follows: (1) $122.70 for delivery service; (2) $1,028.53 for deposition transcripts; (3) $18.40 for duplicating; (4) $6,367.24 for expert witnesses; (5) $350.00 for filing fees; (6) $336.61 for Lexis research; (7) $11.60 for postage; (8) $3,267.50 for professional services, of which $1267.50 covers interpreters' fees and $2,000 is for costs incurred to produce a demonstrative video for the hearing; (9) $415.00 for service of subpoenas; (10) $28.41 for teleconferencing services; (11) $21.00 for travel expenses; and (12) $7.50 for Westlaw research. (Paganopoulos Decl. Ex. A at 8.)[8]

[8] These numbers do not line up exactly with Mr. Paganopoulos' breakdown on page 8 of his declaration. The Court has shifted the totals for each category based on a close examination of the receipts plaintiff submitted with his Reply Brief. For example, one of the bills included

Certain of plaintiff's costs are undisputedly recoverable. First, filing fees are plainly recoverable under 28 U.S.C. § 1920(1) and (5). Second, the costs of deposition transcripts and "duplicating," which apparently refers to photocopying, are recoverable under § 1920(2) and (4). Third, the costs of the American Sign Language interpreters used with plaintiff's expert are recoverable under § 1920(6).

The rest of plaintiff's requested costs, however, do not fall within any of the specifically enumerated categories of § 1920. Although it is true that Rule 54(d) allows judges some limited discretion to award costs not expressly authorized by § 1920, the statutory list "is not to be routinely expanded." *Zdunek v. Wash. Metro. Area Transit Auth.*, 100 F.R.D. 689, 692 (D.D.C. 1983). Indeed, the Supreme Court itself has declared that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Farmer v. Arabian Oil Co.*, 379 U.S. 227, 235 (1964). Moreover, Rule 54(d) itself makes clear that "costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law."

Thus, this Court has declined to award costs for many of the categories of expenses for which plaintiff now seeks reimbursement, such as: (1) the use of professional process servers, *Zdunek*, 100 F.R.D. at 692 (noting that § 1920(1) only "authorizes taxation of the service fees charged by the United States Marshals Service"); (2) postage, *id.*; *El-Fadl v. Cent. Bank of Jordan*, 163 F.R.D. 389, 390 (D.D.C. 1995); (3) telephone services, *Zdunek*, 100 F.R.D. at 692; *El-Fadl*, 163 F.R.D. at 390; (4) delivery fees, *Johnson v. Holway*, 522 F. Supp. 2d 12, 19 (D.D.C. 2007) ("Administrative fees, like delivery costs, are . . . considered ordinary business

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under the subheading "professional services" was from Dennis Cokley, whom plaintiff identifies as one of his expert witnesses. (*See* Reply Ex. A at 34.) The Court therefore shifted the $1,550.00 of that bill from the "professional services" category to the "expert witnesses" category.

expenses that cannot be recovered as costs.") (internal quotation marks omitted); *El-Fadl*, 163 F.R.D. at 390; (5) travel expenses, *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 776 F.2d 1066, 1069-70 (D.C. Cir. 1985); *Conservation Force v. Salazar*, 2013 WL 66210, at *13 (D.D.C. Jan. 7, 2013); and (6) electronic legal research fees, *El-Fadl*, 163 F.R.D. at 391 (declining to tax as costs fees paid to online legal research services because it is more properly considered part of an attorney's fee). The Court concludes that the same result is appropriate with respect to the professional services plaintiff used to prepare a demonstrative video for trial, as that expense is not specifically covered by § 1920.

Additionally, it is well-established that expert witness fees are not included in "costs." The Supreme Court recently explained that § 1920 "does not authorize an award of any additional expert fees" beyond the standard travel reimbursement and per diem authorized for all witnesses under 28 U.S.C. § 1821. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297-98 (2006); *see also Zdunek*, 100 F.R.D. at 693 (same). The Court therefore finds that plaintiff is entitled to recover the $40 per diem for expert Richard Ray's appearance at the preliminary injunction hearing and the $40 per diem for expert Dennis Cokley's appearance at his deposition, but not any additional costs for their time.[9]

Plaintiff insists that he may recover costs beyond those specifically enumerated in § 1920 because the Rehabilitation Act incorporates the remedies available under the Civil Rights Act of 1964, which permits recovery of expert fees and other reasonable litigation expenses. (Mot. at 5.) Although plaintiff is correct that the Rehabilitation Act incorporates those remedies in *some* instances, it does not do so in this case. Specifically, 29 U.S.C. § 794a incorporates Title VI

[9] Although a prevailing party can ordinarily recover travel expenses for his witnesses, those costs are only available upon production of "[a] receipt or other evidence of actual costs," *see, e.g.*, 28 U.S.C. §§ 1821(c)(1), (3), which plaintiff has not provided.

remedies for all employment discrimination cases brought under § 791 of the Rehabilitation Act, *see* § 794a(a)(1), but only for certain claims brought under § 794. Section 794 prohibits discrimination under (1) "any program or activity receiving Federal financial assistance" or (2) "any program or activity conducted by any Executive agency or by the United States Postal Service." However, § 794a(a)(2) only incorporates Title VI remedies for the first category of claims—those that are brought against a "recipient of Federal assistance or Federal provider of such assistance." It does not incorporate those remedies for claims brought against federal agencies conducting programs or activities. Indeed, the Supreme Court itself noted this distinction in a different context, where it observed that although § 794a(a)(1) plainly waives sovereign immunity for *any* complaint brought under § 791, § 794a(a)(2) is not so "far-reaching," and only covers "'Federal provider[s]' of financial assistance." *See Lane v. Pena*, 518 U.S. 187, 192-93 (1996). Thus, plaintiff cannot rely on the Civil Rights Act's remedies to recover expert fees or any other costs that are not expressly provided for in 28 U.S.C. § 1920.[10]

Accordingly, the Court awards plaintiff costs for expenses related to filing fees, photocopying, deposition transcripts, interpreter services, and the per diem rates for his expert witnesses. Plaintiff's receipts for those expenses total $2,744.43. However, the Court will reduce those costs by 40%, in line with the reduction made to attorney's fees. *See A.S. v. Dist. of Columbia*, 842 F. Supp. 2d 40, 49 (D.D.C. 2012) (reducing both attorney's fees and costs by 50% "based on plaintiffs' level of success"); *Dickens v. Friendship-Edison P.C.S.*, 724 F. Supp. 2d 113, 122 (D.D.C. 2010) (same). Thus, the Court awards plaintiff $1,646.66 in costs.

[10] Plaintiff also seeks to recover expert witness fees under 42 U.S.C. § 1988. (Mot. at 15.) However, that provision authorizes an award of expert fees "in any action or proceeding to enforce a provision of section 1981 or 1981a." § 1988(c). Because plaintiff's Rehabilitation Act claims "do not fall under either section," the Court may not rely on that section to award plaintiff expert fees. *See Mason v. Me. Dep't of Corr.*, 387 F. Supp. 2d 57, 64-65 (D. Me. 2005).

CONCLUSION

For the foregoing reasons, plaintiff's Motion for Award of Attorney's Fees and Costs is granted in part and denied in part. A separate Order accompanies this Memorandum Opinion.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: April 29, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY BERKE, ***Plaintiff,*** **v.** **FEDERAL BUREAU OF PRISONS, *et al.*,** ***Defendants.***	**Civil Action No. 12-1347 (ESH)**

ORDER

Pursuant to the conference call held this date, it is hereby **ORDERED** that plaintiff's Motion for Temporary Restraining Order (Aug. 14, 2012 [Dkt. No. 2]) will be treated as a motion for a preliminary injunction; and it is further

ORDERED that the following dates and deadlines shall apply:

- plaintiff's written discovery: August 24, 2012
- defendants' written discovery: August 29, 2012
- defendants' response to plaintiff's motion: September 4, 2012
- defendants' response to plaintiff's discovery, plaintiff's response to defendants' discovery, and plaintiff's expert identification(s) and report(s): September 10, 2012
- defendants' expert identification(s) and report(s): September 14, 2012
- plaintiff's reply in support of his motion: September 17, 2012
- joint status report, describing the status of settlement negotiations, identifying the issues remaining for the Court to decide, and listing any witnesses: September 21, 2012, 12 p.m.

SO ORDERED.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: August 24, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY BERKE, ***Plaintiff,*** **v.** **FEDERAL BUREAU OF PRISONS, *et al.*,** ***Defendants.***	**Civil Action No. 12-1347 (ESH)**

ORDER

Pursuant to the representations of the parties on a conference call held on August 16, 2012, and in light of the postponing of the date on which plaintiff must self-report, it is hereby

ORDERED that, by agreement of the parties, this matter shall be heard on the merits at a hearing set for September 25, 2012, at 9:30 a.m.; and it is further

ORDERED that a conference call to discuss a briefing schedule, discovery, and the possibility of mediation is set for August 23, 2012, at 10:00 a.m.; and it is further

ORDERED that plaintiff's Motion for a Temporary Restraining Order (August 14, 2012 [Dkt. No. 2]) is **DENIED AS MOOT**.

SO ORDERED.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: August 17, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY BERKE, ***Plaintiff,*** **v.** **FEDERAL BUREAU OF PRISONS, *et al.*,** ***Defendants.***	**Civil Action No. 12-1347 (ESH)**

ORDER

Berke filed a motion for a temporary restraining order on August 14, 2012. It was converted to a motion for a preliminary injunction after the sentencing judge in New Jersey agreed to postpone the commencement of Berke's sentence. (*See* Order, Aug. 17, 2012 [Dkt. No. 5]; Order, Aug. 24, 2012 [Dkt. No. 6].) Thereafter, the parties commenced negotiations and settled all of their disputes but one (*see* Order Approving Stipulation, Sept. 27, 2012 [Dkt. No. 18]): whether the Bureau of Prisons ("BOP") would be required to provide Berke with a videophone upon his checking-in to the BOP facility in Tucson on September 28, 2012. On September 25, 2012, the Court heard testimony from two experts for the plaintiff and Todd Craig, the Acting Chief of the BOP's Office of Security Technology. Based on the testimony and the argument of counsel, the Court granted Berke's motion in part and denied it in part for reasons stated from the bench. It ordered the BOP, by May 25, 2013, to complete an evaluation of the videophone and make a written determination, as required by 28 C.F.R. § 39.160, as to whether providing Berke with a videophone at the Tucson facility "would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative

burdens." *Id.* § 39.160(d). The Court denied without prejudice Berke's motion for an order directing the immediate provision of a videophone. Accordingly, it is hereby

ORDERED that the Court will administratively close this matter but maintain jurisdiction should Berke seek to amend his complaint in light of the BOP's decision in May 2013.

SO ORDERED.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: September 27, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LARRY BERKE, ***Plaintiff,*** **v.** **FEDERAL BUREAU OF PRISONS, *et al.*,** ***Defendants.***	**Civil Action No. 12-1347 (ESH)**

ORDER

Upon consideration of plaintiff's motion for an award of attorney's fees and costs (Oct. 9, 2012 [ECF No. 20]), defendants' opposition thereto (Jan. 31, 2013 [ECF No. 31]), and plaintiff's reply (Feb. 7, 2013 [ECF No. 32]), and for the reasons stated in the accompanying Memorandum Opinion (Apr. 29, 2013 [ECF No. 36]), it is hereby

ORDERED that plaintiff's motion is **GRANTED IN PART** and **DENIED IN PART**; and it is further

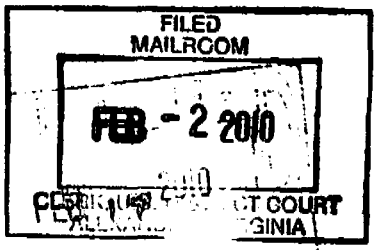
ORDERED that plaintiff is hereby awarded $69,291.60 in fees and $1,646.66 in costs.

SO ORDERED.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: April 29, 2013

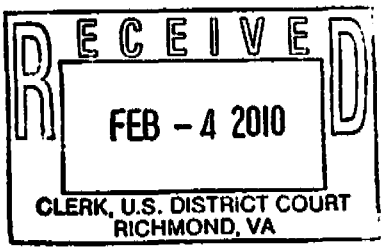
Brinkema (A)



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RANDALL TODD ROYER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 1:10cv146lmb/IDD
	)	
FEDERAL BUREAU OF PRISONS and UNKNOWN FEDERAL AGENCY,	)	
	)	
	)	
Defendants.	)	



COMPLAINT

Introduction

1. Plaintiff is a federal inmate in the custody of the Federal Bureau of Prisons ("BOP"). For years after entering the federal prison system, Plaintiff enjoyed the rights and privileges of ordinary inmates with respect to housing in the general population, communication with his family, access to religious, educational, and employment opportunities, etc.

2. The BOP has since classified Plaintiff as a "terrorist inmate," imposing harsh, atypical restrictions on his conditions of confinement relative to those of ordinary prisoners, including limitations on telephone use; a total ban on physical contact with his family, including his two elderly parents, his now-estranged wife, and his four young children; total sequestration from the general prison population and the facilities it accesses; limitations on group prayer and a total ban on group religious study; and severe limitations on his educational and employment opportunities. Plaintiff's classification, and the attendant harsh conditions of confinement, are of an indefinite duration, and are intended to remain in place until the end of his prison term.

3. The BOP's classification of Plaintiff as a "terrorist inmate," and the attendant harsh, atypical conditions of confinement, are based in substantial part on records maintained by the BOP which it knows to be inaccurate. Rather than seeking such information directly from Plaintiff, the BOP collected this information from an unknown federal agency, which itself knew the records to be inaccurate, and which failed to seek Plaintiff's consent before disclosing those records to the BOP. Moreover, the BOP refuses to amend its inaccurate records, and it refuses to provide Plaintiff with access to those records and other documents. The two agencies committed these actions, or failed to act, willfully, and in flagrant violation of Plaintiff's rights.

4. As a result of the BOP's determination to classify him or treat him as a "terrorist inmate" and impose upon him harsh, atypical conditions of confinement in substantial part on the basis of inaccurate records, Plaintiff has suffered the violation of his constitutional rights, the loss of his family's society, emotional trauma with accompanying physical symptoms, financial loss, and damage to his reputation. In light of the foregoing, the BOP and the unknown federal agency have therefore violated the Privacy Act of 1974, 5 U.S.C. § 552a, et seq., the Freedom of Information Act, 5 U.S.C. § 552, et seq., and the First and Fifth Amendments to the U.S. Constitution. Appropriate relief is requested.

Jurisdiction and Venue

5. The Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question jurisdiction), 5 U.S.C § 552 (Freedom of Information Act), and 5 U.S.C. § 552a (Privacy Act).

6. Venue in this Court is proper under 28 U.S.C. 1391(e) and 5 U.S.C. § 552a(g)(5) because Plaintiff is resident and domiciled in the

Eastern District of Virginia at 6166 Leesburg Pike in Falls Church.

Parties

7. Plaintiff Randall Todd Royer, also known as Ismail Royer, is a United States citizen and federal prisoner currently incarcerated at the Federal Correctional Institution in Greenville, Illinois ("FCI Greenville"). He is 36 years old.

8. Defendant BOP is a federal agency under the Privacy Act and is headquartered at 320 First Street, NW, Washington, DC 20534. BOP classifies prisoners to determine where and under what conditions they are to be housed, and creates and operates prisons in which prisoners are confined.

9. Defendant Unknown Federal Agency is a federal agency under the Privacy Act. This agency or a component of this agency has direct or indirect access to the information in Pre-Sentence Investigation Reports ("PSRs") prepared by the United States Probation Office ("USPO"). Upon information and belief, this agency or office is a component of the United States Department of Justice ("DOJ"). The identity of this agency will be specified in an amended complaint following discovery.

Previous Lawsuits

10. Plaintiff was a party to Royer, et al. v. Jett, et al., No. 2:09-cv-0011 (S.D. Ind.), which was filed in January 2009. Plaintiff voluntarily withdrew on advice of counsel and the case was dismissed as to him without prejudice. The case continues sub nom. Benkahla v. Federal Bureau of Prisons with a severed coplaintiff.

11. Plaintiff is currently a plaintiff in Arnaout, et al. v. Warden, No. 2:09-cv-215 (S.D. Ind.), in which he is represented by the ACLU.

Exhaustion of Administrative Remedies

12. Plaintiff has exhausted his available administrative remedies using the BOP's Administrative Remedy Program.

Facts Giving Rise to the Claims for Relief

I. Background

13. On January 16, 2004, Plaintiff pleaded guilty in the Eastern District of Virginia before Judge Leonie M. Brinkema to one count of aiding and abetting the use and discharge of a firearm during and in relation to a conspiracy to violate the Neutrality Act, and one count of aiding and abetting the carrying of an explosive during a conspiracy to violate the Neutrality Act.

14. On February 27, 2004, preparatory to Plaintiff's sentencing hearing, the USPO completed a draft PSR and then provided the draft to the judge, Plaintiff's attorney, and the attorney for the United States.

15. The draft PSR contained, inter alia, information drawn from the Statement of Facts Plaintiff had signed pursuant to his plea agreement, including his affirmation that, during the 1992-1995 war in Bosnia and Herzegovina, he had fought on the side of the Bosnians against the Serbian army as part of the "Abu Zubair" unit. This fact had no direct bearing on the offenses for which Plaintiff was indicted or convicted.

16. The Abu Zubair unit with which Plaintiff was affiliated was a detachment of the 737th Brigade of the 7th Corps of the Army of the Republic of Bosnia and Herzegovina and was dissolved at the end of the war. This unit was never designated as a terrorist organization by the government of the United States or any other government.

17. The last sentence of ¶ 42 of the draft PSR stated as follows:

> Abu Zubair (known more formally as Abu Zubair al Madani) was a member of Al Qaeda sent to Bosnia by Bin Laden to establish camps for Al Qaeda.

18. This sentence was false; moreover, it was not part of the Statement of Facts signed by Plaintiff. The source of the error was a confusion between the Abu Zubair unit with which Plaintiff was affiliated, and an individual with a similar name who had died years before Plaintiff was in Bosnia and who had no connection whatsoever with Plaintiff's unit.

19. Plaintiff's sentencing hearing was held on April 9, 2004. At the hearing, his defense attorney orally objected to the inaccurate last sentence of ¶ 42 of the draft PSR. The stated basis for that objection was that provided in ¶ 18, supra.

20. In response to the objection by Plaintiff's attorney, the AUSA acknowledged the inaccuracy of the sentence in question and did not oppose the objection.

21. Following the above exchange, Judge Brinkema ordered that the last sentence of ¶ 42 of the draft PSR be deleted. In response to other objections by Plaintiff's attorney, the judge also ordered the deletion of ¶¶ 39, 40, and 41 from the draft PSR.

22. Accordingly, the USPO deleted ¶¶ 39, 40, 41, and the last sentence of ¶ 42 from the PSR. The deleted material did not appear in the final version of the PSR (the "final adopted version"), which was completed by the USPO on April 19, 2004.

23. Per its ordinary procedures, the USPO transmitted the final adopted version of the PSR to the BOP for the agency's use in classifying Plaintiff.

24. The USPO has never provided the draft PSR to the BOP, or to anyone other than Plaintiff's attorneys, the sentencing court, and the attorney

for the United States. Neither Plaintiff, his attorneys, the USPO, nor the sentencing court have ever provided the draft PSR to the BOP.

25. The final adopted version of the PSR, redacted by the Court, is maintained by the BOP in Plaintiff's "Central File," i.e., in the BOP's Inmate Central Records System. The file is under the control of a correctional counselor assigned to Plaintiff at the institution in which he is confined. Plaintiff makes no allegation in this Complaint that the final adopted version of his PSR in his Central File is inaccurate.

26. In her Judgement and Committal Order, Judge Brinkema recommended to the BOP that Plaintiff be confined in Federal Correctional Institution Allenwood ("FCI Allenwood"), a medium-security prison located in Pennsylvania, relatively close to his Northern Virginia home.

27. From about August 2004 to December 2006, per the Court's recommendation, Plaintiff was confined in FCI Allenwood. Plaintiff was housed in the general population and his conditions of confinement were typical relative to those of ordinary inmates and prison life.

28. On April 3, 2006, the BOP published in the Federal Register a proposed regulation titled "Limited Communication for Terrorist Inmates." The regulation would have instituted a regime of severe restrictions on the conditions of confinement of inmates who, under the new policy, the BOP would classify as "terrorist inmates." The proposed regulation included limits on those inmates' telephone use, visitation, and use of the mail.

29. The BOP's proposed regulation drew strong objections from a wide range of civil liberties organizations. Subsequently, the BOP abandoned the required notice and comment procedure as to the proposed regulation, and it was never promulgated in the Code of Federal Regulations. Instead,

the BOP quietly put into practice policies and procedures substantially similar to the proposed regulation, classifying certain prisoners as "terrorist inmates" and imposing tight restrictions on their ability to communicate and other conditions of their confinement.

II. Records Violations and Agency Intent

30. The records violations committed by the Defendants in this case consist of the failure to maintain accurate records, failure to collect information directly from the subject individual, unauthorized disclosure of information, failure to amend records, and failure to provide access to records.

31. Plaintiff first became aware of the maintenance, collection, and disclosure of the records at issue by way of a February 5, 2009 response to a request form he submitted to BOP staff. The dates of the remaining records violations are discussed infra in the appropriate sections.

A. Failure to Maintain Accurate Records

1. Inaccurate Records in a Non-Exempt System of Records

32. Between April 2004 and the present date, the BOP has continuously maintained the inaccurate information that the Court had ordered deleted from the final adopted version of Plaintiff's PSR. These records comprise the contents of the draft PSR, records containing the material deleted from the PSR, or records derived or based on the deleted material.

33. The inaccurate records maintained by the BOP contain, inter alia, the following statement, which is a verbatim passage from the redacted last sentence of ¶ 42 of the draft PSR:

> Abu Zubair (known more formally as Abu Zubair al Madani) was a member of Al Qaeda sent to Bosnia by Bin Ladin to establish camps for Al Qaeda.

34. Between April 2004 and the present date, the BOP has continuously

maintained until the present date records derived from what the agency describes as "open source reporting," containing information suggesting that Plaintiff has been affiliated with Al Qaeda, a group designated by the United States as a Foreign Terrorist Organization. These records are likewise inaccurate.

35. The inaccurate records maintained by the BOP at issue in this case are identifiable, retrievable, and actually retrieved by Plaintiff's name.

36. The inaccurate records are maintained in a system of records maintained by the BOP's Counter Terrorism Unit ("CTU") or the Intelligence Section. The record system containing the inaccurate records is separate and distinct from the Inmate Central Records System, i.e., Plaintiff's Central File, and has not been exempted by the BOP from the Privacy Act pursuant to 5 U.S.C. § 552a(j) and listed at 28 C.F.R. § 16.97.

2. Willfulness

37. In maintaining the inaccurate records, the BOP knows, or should know, that its actions are unlawful; in doing so, it is flagrantly disregarding Plaintiff's rights under the Privacy Act.

38. The BOP has willfully maintained the records comprising the material deleted from Plaintiff's PSR and derived from that material, knowing that the United States has stipulated that material to be false, that it was deleted by the Court, and that by maintaining those records it was contravening a court order.

39. The BOP has willfully maintained the records comprising the material deleted by the Court, despite the agency's possession of the final adopted version of the PSR which it received from the USPO through

legitimate, authorized channels, and knowing that this was the only version of the PSR it was authorized to maintain. The BOP knew, moreover, that the USPO would not consent to its maintenance of these records had it known about it, indicative of which is that, in August 2009, an employee of the BOP with knowledge of the inaccurate records intentionally led an officer of the USPO to believe that the BOP did not possess, and had never possessed, these records.

40. Likewise, the BOP has willfully maintained the records derived from "open source reporting" suggesting that Plaintiff has been affiliated with Al Qaeda, despite the agency's knowledge that there is no basis in fact for such an assertion.

41. Indicative of the fact that the BOP has willfully maintained the inaccurate records at issue in this case is that it has failed to make any attempt to remedy the harm that has resulted to Plaintiff or amend those records, despite Plaintiff's efforts from February 2009 to the present to persuade the BOP to do so. Rather, its position is characterized by obfuscation and intransigence, as in this response Plaintiff received from a BOP staff member to a written request he submitted:

> You have pursued this issue for some time now from BOP staff and USPO staff; you have received responses previously; which have been adequately addressed to your inquiries. This issue is repetitive and needs no further response.

B. Failure to Collect Information Directly from Plaintiff

1. Collection of Information

42. The BOP has never attempted to collect directly from Plaintiff the information contained in the records at issue in this case. Instead, the BOP chose to circumvent Plaintiff and collect the information concerning him from the Unknown Federal Agency and "open source reporting."

43. The BOP knew when it collected the information contained in the records at issue in this case that had it instead chosen to first elicit the information directly from Plaintiff, he could have done nothing to destroy, alter, or conceal that information. Moreover, the BOP knew when it collected this information that no obstacles or legitimate considerations existed that would have militated against first eliciting that information directly from Plaintiff.

2. Willfulness

44. In failing to collect the information contained in the records at issue in this case directly from Plaintiff, the BOP knew, or should have known, that its actions were unlawful; in doing so, the agency flagrantly disregarded Plaintiff's rights under the Privacy Act. In support of this assertion, Plaintiff restates and incorporates by reference herein ¶¶ 38-39 and 42-43, supra.

C. Unauthorized Disclosure of Records

1. Records in a System of Records

45. The Unknown Federal Agency did not seek Plaintiff's consent prior to disclosing the records about him to the BOP.

46. Upon information and belief, the records concerning Plaintiff disclosed by the Unknown Federal Agency were identifiable, retrievable, and actually retrieved by Plaintiff's name, and were contained in a system of records. The basis for this assertion is that the records at issue are inherently identifiable by Plaintiff's name, and because records in criminal cases are typically maintained by this federal agency in a system of records.

2. Non-Exempt Disclosure

47. None of the Privacy Act's enumerated exceptions to the

prohibition of unauthorized disclosure apply in this case.

48. The BOP had no legitimate need in performing its duties for the records disclosed to it by the Unknown Federal Agency.

49. The BOP was not authorized by law to perform any activity with these records, inasmuch as the information contained therein had been deleted by court order.

50. Upon information and belief, the director of the BOP did not make a written request for these records to the Unknown Federal Agency as required by the Privacy Act. The basis for this assertion is the remoteness of the possiblity that the director of the BOP would make a formal written request in conformity with the law for a record, the possession of which would contravene a court order.

3. Willfulness

51. In disclosing the records to the BOP without Plaintiff's consent, the Unknown Federal Agency knew, or should have known, that its actions were unlawful; in doing so, the agency flagrantly disregarded Plaintiff's rights under the Privacy Act.

52. When it disclosed the records to the BOP without Plaintiff's consent, the Unknown Federal Agency well knew that the United States had stipulated the information to be false, and that by disclosing the records it was contravening a court order. The agency knew, moreover, that such records were generallyconfidential court documents unlawful to disclose to a third party.

53. When it disclosed the records to the BOP without Plaintiff's consent, the Unknown Federal Agency well knew that the BOP had already received or would receive, through legitimate, authorized channels, a copy of the final adopted version of Plaintiff's PSR from the USPO, and that

this was the only version of the PSR the BOP was authorized to receive, and the only version it needed to perform its duties. Moreover, the Unknown Federal Agency knew that the USPO would not have consented to its disclosure had it been aware of it.

D. Failure to Amend Records

1. First Record Amendment Request

54. On June 22, 2009, Plaintiff submitted a letter via U.S. mail to the BOP's FOIA/PA Section asking that the agency amend, pursuant to the Privacy Act, the inaccurate records containing the information deleted from the PSR and the information collected from "open source reporting." The amendment request specified the records system in which the records were maintained and noted that the record system was not the Inmate Central Record System or any properly exempted record system.

2. Second Record Amendment Request

55. On July 20, 2009, Plaintiff submitted a second letter via U.S. mail to the BOP's FOIA/PA Section asking that the agency amend, pursuant to the Privacy Act, all records derived from the material deleted by the Court from the PSR, including any records referencing Plaintiff's alleged association with a so-called "Bosnian terrorist group." The import of this second amendment request, Plaintiff explained therein, was to encompass all records derived from the records that were the subject of the June 22, 2009 amendment request. Like the first request, the July 20, 2009 request specified the non-exempt record system in which the subject records were maintained.

56. Plaintiff received a letter dated August 19, 2009, from Wanda M. Hunt, Chief of the BOP's FOIA/PA Section. The letter asserted that Plaintiff was not permitted to request amendment of records located in the Inmate

Central Records System. The letter was a generic form letter and contained no reference to the specific subject records of the two requests or to which of the amendment requests the letter was in response to. Nor did the letter address Plaintiff's specification that he sought amendment of records not located in the Inmate Central Records System.

57. Although the BOP failed to review his two amendment requests in conformity with the Privacy Act, Plaintiff elected to administratively appeal Ms. Hunt's letter with an August 25, 2009 letter to the DOJ's Office of Information Policy. The stated grounds of the appeal were that, in his two amendment requests, Plaintiff had specified that the records he sought amendment of were not located in the Inmate Central Records System or any other exempt records system.

58. The August 25, 2009 appeal letter further noted that Plaintiff had submitted two separate amendment requests, and that the letter from Ms. Hunt had failed to identify which of the two requests had been addressed. So, in an abundence of caution, Plaintiff wrote in his appeal letter that he deemed it an appeal from the denial of both amendment requests, but that if he were to receive a subsequent letter specifically denying the July 20, 2009 request, he would appeal that denial separately.

59. Plaintiff received a letter dated September 14, 2009, from the Office of Information Policy stating that his appeal had been forwarded to a different office for processing. The letter gave no date as to when a response to the appeal could be expected.

60. Plaintiff has received no further letters to date concerning his two amendment requests or his appeal.

E. Failure to Provide Access to Records

1. First Access Request

61. On June 2, 2009, Plaintiff submitted a letter via U.S. mail to the BOP's FOIA/PA Section requesting, pursuant to the Privacy Act and the Freedom of Information Act, access to, inter alia,

> a copy of the record derived from "open source reporting" referenced by the [BOP] Central Office employee in the February 5, 2009 response to my inmate request to staff, along with any associated documents relevant to this record...

Plaintiff requested other records in the letter but that portion of the request is not at issue here.

62. Plaintiff received a letter dated July 8, 2009, from Ms. Hunt of the BOP's FOIA/PA Section. The letter made reference to the Freedom of Information Act but no reference whatsoever to the Privacy Act. As to the relevant records, Ms. Hunt stated that "no records were located responsive" to the request.

63. On July 20, 2009, Plaintiff submitted a letter via U.S. mail to the DOJ's Office of Information Policy. Although the BOP had failed to process his request under the Privacy Act, he designated his letter as an appeal under FOIA as well as the Privacy Act. As pertains to the records at issue, Plaintiff appealed on the grounds that

> [t]he BOP knows precisely which of its employees utilized the "open source reporting" record, yet it claims it cannot find that record. The BOP merely needs to inquire of the employee whose name it redacted as to where this record is located, and it will be able to produce said record in response to my request. Clearly the agency's search was inadequate.

64. Plaintiff received a letter dated September 25, 2009, from the Office of Information Policy. In relevant part, the office wrote that it had "determined that BOP conducted an adequate, reasonable search for

records responsive to your request." The letter informed Plaintiff of his right to sue under FOIA.

2. Second Access Request

65. On July 20, 2009, Plaintiff submitted a letter via U.S. mail to the BOP's FOIA/PA Section requesting, pursuant to the Privacy Act and the Freedom of Information Act, access to

> all records maintained on me by the Counter Terrorism Unit ("CTU") section of the BOP, to include records maintained by the CTU in that section's Washington, DC location, as well as its Martinsburg, West Virginia [location].

66. In that letter, Plaintiff also requested access to all documents generated by the CTU and the BOP's Correctional Programs Division concerning the decision to place him in the Communications Management Unit, to include records concerning his transfer to that unit.

67. In that letter, Plaintiff emphasized that he was not seeking records maintained solely in his Central File, i.e., the Inmate Central Records System.

68. Plaintiff received a letter dated August 13, 2009, from the BOP's North Central Regional Office. The letter stated that the agency was extending the time limit for processing his request by 10 days and that it would respond to the request no later than August 24, 2009.

69. Plaintiff received a letter dated September 30, 2009, from Ms. Hunt of the BOP's FOIA/PA Section. In the letter, Ms. Hunt stated that Plaintiff's records request would be processed only as a FOIA request, not as a Privacy Act request, because

> [t]he information you seek is being maintained in a Privacy Act system of records that has been exempted from the access provision of the Privacy Act by the Director of this agency...Thus you have no right of access to this information under the Privacy Act.

Ms. Hunt did not state the name of the supposedly exempt records system.

70. As to the records maintained on Plaintiff by the CTU, Ms. Hunt stated that nine folders of records had been located, that one page of one folder could be released, and that the remaining eight folders were being withheld in their entirety.

71. As to these withheld records, the reasons Ms. Hunt gave for her determination were that one of the nine folders held by the CTU constituted Plaintiff's PSR, and that BOP regulations prohibit inmates from possessing their PSRs; therefore, said Ms. Hunt, Plaintiff would have to contact his correctional counselor to review the PSR in his Central File. As to the remaining folders, Ms. Hunt stated that they were being withheld under the following FOIA exemptions: (b)(2), (b)(5), (b)(7)(C), (b)(7)(E), and (b)(7)(F). Ms. Hunt did not specify which exceptions allegedly applied to which records in which folders.

72. As to Plaintiff's request for access to all documents generated by the CTU and the Correctional Programs Division concerning his placement and transfer to the CMU, Ms. Hunt stated that two pages were found and that both could be released.

73. In November 2009, Plaintiff submitted a letter via U.S. mail to DOJ's Office of Information Policy. Although the BOP had failed to process his request under the Privacy Act, Plaintiff designated his letter as an appeal under FOIA as well as the Privacy Act. As to the decision concerning the records held on him by the CTU, Plaintiff stated the following grounds for his appeal: (1) the request should have been processed under the Privacy Act because the CTU's record system is not exempt from that act; (2) the cited FOIA exemptions were not applicable; (3) the BOP should not have withheld every record in its entirety, but should have only redacted the relevant data; (4) the copy of the PSR maintained in the CTU's system of

records is a different version of his PSR than the copy held by his correctional counselor in the Inmate Central Records System, and it is the former he wished to review, not the latter; (5) the BOP should have stated the nature of the withheld records and how many were in each folder.

74. As to the records concerning his placement in the CMU, Plaintiff challenged the adequacy of the BOP's search. He noted that a similar FOIA/PA request by a fellow inmate of the Communications Management Unit had resulted in a detailed memorandum from the CTU Chief concerning the reasons for that inmate's transfer. It was this sort of document that Plaintiff sought, he wrote.

75. Plaintiff received a letter from the Office of Information Policy dated December 4, 2009, acknowledging receipt of his appeal and notifying him that the response would be delayed.

76. Plaintiff has received no further letters to date concerning this records request.

III. Adverse Determination and Effect

77. Except for brief periods of administrative or disciplinary segregation, Plaintiff was a member of the general inmate population from the time of his arrest in June 2003 until December 2006, both in the county jails he was confined in and at FCI Allenwood.

78. As a member of the general population at FCI Allenwood, Plaintiff was subject to the ordinary conditions of prison life.

79. As an ordinary inmate in the general population, Plaintiff had the run of the prison and access to its facilities, a condition that allowed him the semblance of an ordinary life. He was able to run outdoors on a lengthy track breathing fresh air. He had the opportunity to enroll in a vocational training course and earn a carpentry license, or take academic

courses for college credit. He was on the waiting list to work in the prison factory, where inmates earned up to $100 a month.

80. As an ordinary inmate in the general population, Plaintiff enjoyed up to forty hours of full contact visits a month with his wife, two elderly parents, and four young children. With the close physical contact and the substantial time afforded, Plaintiff and his wife were able to maintain their marriage relationship. He could hug her, provide her with comfort and advice, and participate in household decisions. Plaintiff was able to remain a father figure for his children, bouncing them on his knee, playing games with them, offering guidance, and mediating squabbles. He and his parents were able to draw closer than they had ever been through hours of quality time spent discussing the important things of life over coffee.

81. Sometime after his arrival at FCI Allenwood in about August 2004 and prior to December 2006, pursuant to the policies and procedures it quietly adopted after the failure of its proposed regulation, see ¶¶ 28-29, supra, the BOP classified Plaintiff as a "terrorist inmate" and determined that, for the remainder of his prison sentence, he would be subject to harsh restrictions on his ability to communicate and other conditions of his confinement.

A. Proximate Cause

82. The BOP's decision to classify Plaintiff as a "terrorist inmate" and to impose harsh, indefinite restrictions on his conditions of confinement, was based in substantial part, though not wholly, on the inaccurate records that the BOP maintained and failed to collect directly from Plaintiff, and that the Unkown Federal Agency disclosed without Plaintiff's consent.

83. Per its policies and procedures, the inaccurate records at issue

in this case are sufficient to have triggered the BOP's determination to classify Plaintiff as a "terrorist inmate," even had those records been the sole existing basis for that determination.

84. Whether the BOP's technical term for its classification of Plaintiff is "terrorist inmate," or some other term or label or euphemism, or even a de facto classification without a specific label, the effect is the same, and the agency's determination was in any event based in substantial part on the inaccurate records at issue in this case.

B. Adversity

85. The adverse effects which Plaintiff has suffered as a consequence of the actions of the BOP and the Unknown Federal Agency include the violation of his constitutional rights to due process and freedom of speech and association, loss of consortium, emotional trauma with physical symptoms, loss of income, and damage to his reputation.

1. Due Process

86. The adverse effects suffered by Plaintiff as a consequence of the BOP's determination to classify him, de facto or otherwise, as a "terrorist inmate," do not inhere solely in the place of incarceration, but in the classification itself. In other words, the classification means that the atypical conditions of confinement are applied to Plaintiff regardless of which prison or housing unit he is confined in.

87. However, due to the practical requirements of maintaining the atypical restrictions that accompany the "terrorist inmate" classification, the BOP generally houses such prisoners only in the harshest, most restrictive prisons and housing units in the federal prison system, namely: the "supermax" prison in Florence, Colorado ("ADX Florence"); the Communications Management Unit ("CMU") at Federal Correctional Institution

Terre Haute ("FCI Terre Haute") or the CMU at the federal prison in Marion, Illinois; the Special Management Unit ("SMU") at USP Lewisburg, a unit actually intended for use as a gang management program; or under heightened restrictions in a Special Housing Unit ("SHU") at a prison where an inmate is on "holdover" status, that is, pending transfer to one of the aforementioned locations. Hence, it is the classification itself that determines the "terrorist inmate's" conditions of confinement, not the particular prison or housing unit in which the BOP confines him. Regardless of his housing unit, these conditions of confinement are meant to endure indefinitely.

88. In December 2006, without warning, Plaintiff was taken from his cell in FCI Allenwood and placed in the SHU. He was given an "Administrative Detention Order" signed by a lieutenant stating the reason for his SHU placement as "pending Classification." That was Plaintiff's last day in the general population.

89. Days later, BOP officers in black suits, helmets, body armor, and tactical gear escorted Plaintiff to a waiting van guarded by similarly-outfitted men with automatic weapons. This is not the BOP's ordinary procedure for prisoner transfers.

90. Plaintiff was driven to USP Lewisburg for holdover, where he joined 15 other men -- 13 of them Muslims, all alleged by the BOP to have terrorism connections -- who had arrived from prisons across the United States. The group were held in isolation cells in the SHU.

91. The next day, Plaintiff and the other 15 men were transported to the former death row at FCI Terre Haute. They were the first inmates to be confined in what the BOP had christened the Communications Management Unit. Plaintiff was confined in this unit from December 2006 to October 2009.

92. As of September 2009, of the more than 60 current or former Terre Haute CMU inmates, all but four were alleged by the BOP to have connections to political or religious extremism or terrorism. More than 40 have been Muslims.

93. In accord with the BOP's procedures for "terrorist inmates," the CMU is completely sealed off from the rest of FCI Terre Haute, and CMU inmates are not permitted to have any contact with the general inmate population, or to use the facilities and resources that other inmates have access to.

94. While the CMU inmates are allowed out of their cells, they are not permitted to leave the tight quarters of the housing unit. Steel slats obscure the view from the windows. Recreation takes place in steel cages, far from FCI Terre Haute's large, well-equipped recreation yard and lengthy track. CMU inmates have no access to the prison chapel, and unlike inmates in the general population, they are permitted to pray in congregation only on Friday. They are not permitted to study religious topics together, even one-on-one.

95. CMU inmates have no access to college credit courses, as Plaintiff had at FCI Allenwood, and as federal regulations require. There are no prison factory jobs, as federal regulations also require, and no opportunity for vocational training like in the general population.

96. At the CMU, Plaintiff was permitted to make only one 15 minute telephone call a week, compared to the 300 minutes of telephone time that the general population inmates receive. For three years he was permitted to make telephone calls only on business days between 8:30 am and 2:30 pm, with the result that months went by when Plaintiff could not speak with his school-age children. Inmates in the general population can make phone calls

at nights and on weekends.

97. In contrast to the visits Plaintiff enjoyed as an ordinary inmate in the general population, see ¶ 81, supra, at the CMU he was permitted visits only behind glass and bars, communicating through a telephone. Visits were restricted to just two hours, just twice a month. In violation of federal regulations, visits were permitted on business days only, see 28 C.F.R. 540.42(c), and only during business hours. The practical effect of this was to render family visits a rare, logistically difficult hardship.

98. The BOP's Central Office has described the CMU as a "control unit." Title 28 C.F.R. § 541.40(c) states that control units are "intended to place into a separate unit those inmates who are unable to function in a less restrictive environment without being a threat to others or to the orderly operation of the institution."

99. The BOP has indicated that the CMUs are operated under BOP Program Statement 5270.07, a set of policies issued by the agency pursuant to 28 C.F.R. §§ 541.10-.23, titled "Inmate Discipline and Special Housing Units."

100. In October 2009 at the Terre Haute CMU, Plaintiff received an incident report for involvement in an altercation. To separate him from the other inmates involved, he was transferred to FCI Greenville pending his transfer to another facility. He was placed in the SHU.

101. As a consequence of his "terrorist inmate" classification, the BOP instructed FCI Greenville staff to impose, to the greatest extent possible, precisely the same restrictions on Plaintiff's communications and other conditions of confinement that were imposed on him at the CMU. For example, Plaintiff is isolated to a greater extent than is typical for the SHU. He is not allowed to exercise in the recreation cages at the same time as other SHU inmates, and staff have placed sandbags in front of his cell

door. Also unlike other SHU inmates, the BOP has instructed FCI Greenville staff that Plaintiff is not permitted to have contact visits.

102. Initially upon his arrival at FCI Greenville, staff told Plaintiff that he would either eventually be sent back to the Terre Haute CMU, or be transferred to the Marion CMU. In December 2009, Plaintiff was informed that the BOP intends to transfer him to ADX Florence. He was then given a psychological evaluation preparatory to that transfer, which has yet to be approved or finalized.

103. The reason that the BOP intends to transfer Plaintiff to ADX Florence is not because his disciplinary violation was particularly severe; rather, the reason is that the "terrorist inmate" classification the BOP has imposed on Plaintiff limits the agency as to where it can house him. If the transfer to ADX takes place, Plaintiff will be housed in the area of the prison reserved for "terrorist inmates," not with the inmates sent to ADX for disciplinary reasons. If the transfer to ADX does not take place, the BOP's procedures for "terrorist inmates" dictate that Plaintiff will be sent to a CMU, the SMU gang program at USP Lewisburg, or kept indefinitely in the SHU at FCI Greenville. In any event, the BOP intends to permanently maintain the same harsh, atypical conditions of confinement.

104. Hence, any hearings or other apparent procedural protections a "terrorist inmate" might be afforded regarding housing in ADX Florence or the SMU at USP Lewisburg are illusory and meaningless. This is because if an inmate is released from, or avoids transfer to, one of these units, he is merely going out of the frying pan and into the fire, as it were. The BOP keeps substantially similar conditions of confinement in place regardless of where such inmates are confined.

105. Federal regulations and BOP policies establish procedures that purport to protect inmates from the arbitrary imposition of harsh, atypical conditions of confinement like those the BOP has permanently imposed on Plaintiff. These protections include: (1) hearings held prior to or shortly after the imposition of those conditions; (2) notice to the inmate of criteria for release from those conditions; and (3) notice of the projected date of the inmate's release from those conditions. Plaintiff has never received any of these protections as to his classification as a "terrorist inmate" or the attendant conditions of confinement.

106. There is no regulatory or statutory framework or basis providing for the BOP to declare inmates to be "terrorists," permanently impose upon them the harshest conditions of confinement in the federal prison system, disqualify them from any procedural protections as to those conditions, and, for the remainder of their prison sentence, shuttle them around an archipelago of SHUs, SMUs, CMUs, and the federal supermax prison.

2. **Freedom of Speech and Association**

107. Forcing Plaintiff to "visit" with his family separated from them by a concrete wall, peering through a window of glass and bars, and audible only through a telephone, impinges on his ability to communicate and associate with them. He cannot communicate through touch: through a kiss on his daughter's cheek or by pressing his mother's hand. He cannot conduct group conversations with multiple visitors due to the limitation of the single telephone handset. And he cannot surmount the psychological and emotional barrier to communication erected by the physical barrier between him and his visiting family.

108. The sole reason the BOP gives for disallowing Plaintiff's contact visits is that his offense conduct -- in which the BOP prominently includes

the inaccurate information concerning him in its records -- necessitates monitoring of his communication.

109. There is no rational rational relationship between the goal of monitoring Plaintiff's communications and a total, permanent ban on physical contact with his family. Even if it is somehow rationally related, it is an exaggerated response to that concern.

110. The BOP has never claimed that Plaintiff committed any actions during his contact visits that posed a threat to the security of the institution or the public. The BOP has never claimed, and has no evidence to suggest, that Plaintiff has misused his visits to communicate anything of a dangerous or illicit nature.

111. In the CMU and in all of its facilities, the BOP has installed multiple cameras and hypersensitive microphones. And its officers thoroughly and expertly strip search all inmates both before and after contact visits. After exhausting his administrative remedies on this issue, and after tens of conversations with BOP staff and officials -- including the then-director of the Correctional Programs Division -- the BOP has never been able to explain why such measures would not meet its need of monitoring Plaintiff's communication.

3. Loss of Consortium

112. Incarceration does not, in itself, necessarily result in the disintegration of a prisoner's relationship with his family. On the contrary, the maintenance of such relationships is regarded as being of great penological value. Telephone calls and contact visits are two of the main avenues that the BOP provides for inmates to maintain their family relationships.

113. As previously noted, BOP inmates in the general population are afforded 300 minutes of telephone time a month, and they may call at nights and on weekends. In this way, they can speak for hours every month with their family members, even if they work or go to school.

114. Also as noted, BOP inmates in the general population have contact visits with their families for over 40 hours a month. The BOP permits contact visits for the general population because of their superiority over non-contact visits in strengthening inmates' relationships with their families. Families may visit on weekends and federal holidays and some weekdays, making possible the lengthy weekend or holiday roadtrips often necessary -- as in Plaintiff's case -- for travel to remote federal prisons.

115. In December 2006, when the BOP classified Plaintiff as a "terrorist inmate" and shipped him about 800 miles from his family, imposed a total and permanent ban on all physical contact with them, and sharply curtailed the amount of his calls and visits and the days and times they were permitted, the agency delivered a shattering blow to his relationship with his wife and children.

116. The Defendants' actions have irrevocably damaged Plaintiff's marital relationship. The dissolution of his marriage began with the loss of the hugs, kisses, and hand-holding the couple enjoyed at FCI Allenwood. The physical barrier between Plaintiff and his wife at their non-contact visits at the Terre Haute CMU laid the foundation for an emotional barrier. The great physical distance between the prison and their home in Northern Virginia became an emotional distance. His wife's visits became rarer as her desire for brief, non-contact, emotionally unsatisfying visits with her husband waned. "If we had contact visits I could stay with him," she

confided to a friend. She sought and obtained a religious divorce. They have not seen each other in over a year.

117. The Defendants' actions have likewise damaged Plaintiff's parental relationship with his children. Because they usually visit with their mother, Plaintiff has not seen the two youngest in over a year. Even when the children do visit, seeing their father behind glass and bars is a troubling, alienating experience for them. Because communication is through a telephone, Plaintiff can only speak with one child at a time, making normal family conversation impossible. Because he is forbidden to hold them, kiss them, or play with them, their rare visits do little to renew the weakening bond between them. And on top of all this, because of the BOP's rule that Plaintiff cannot use the telephone after 2:30 pm, over the past three years, months have gone by when he has not spoken to his children because they are in school at the time.

4. Emotional Trauma

118. Plaintiff's family is the most important thing to him in this world, the axis around which his worldly existence revolves. The void left by the loss of his wife, the impotence he feels in seeing his children grow up without his guidance, influence, and love -- not even to the limited extent possible under typical conditions of confinement -- have afflicted him with severe bouts of grief, anxiety, and stress. The physical manifestations of this are detailed in the next section.

5. Damaged Reputation

119. Upon information and belief, information contained in or derived from the inaccurate records at issue in this case is accessible to BOP officers and staff, and has been even before the BOP imposed the atypical

conditions of confinement on him in December 2006.

120. Examples of manifestations of the damage to Plaintiff's reputation include the following: In 2006 a BOP officer at Harrisburg International Airport in Harrisburg, Pennsylvania told Plaintiff: "I read your paperwork and I don't like it." In the same year, a guard at USP Lewisburg held a mirror up to Plaintiff's face while he was shackled and told him he would forcibly shave off his religious beard, and that he would put Plaintiff in a cell with gang members who "owed him a favor" and would beat him up. A guard at the Oklahoma City prisoner transfer center called Plaintiff "his little terrorist" and held pictures up to his cell window which he claimed he'd printed off the Internet supposedly depicting Muslim men in positions of prayer being sodomized. Guards at FCI Allenwood "stripping out" Plaintiff prior to his transportation on writ told Plaintiff in a menacing fashion to close the door of the small laundry room they were in. When Plaintiff asked why they wanted the door closed for him but not for the inmates who had gone before him, one replied, "We read your paperwork. We might have to fight you."

IV. Actual Damages

121. As a consequence of Defendants' actions and failures to act, Plaintiff has suffered actual damages, including the violation of his constitutional rights, loss of consortium, emotional trauma, damaged reputation, and loss of income.

A. Constitutional Violations

122. Plaintiff has been injured by the deprivation of his right to due process under the Fifth Amendment and his right to freedom of speech and association under the First Amendment. In support of this allegation, Plaintiff restates and incorporates herein ¶¶ 86-111, supra.

B. Loss of Consortium

123. Because of Defendants' actions, Plaintiff has lost his wife's society, companionship, fellowship, and conjugal affection. He no longer makes decisions concerning his household; he no longer has a household. Plaintiff has lost the comfort of his wife, her attention, and her love. Defendants' actions have deprived Plaintiff of his pillar of support.

124. Because of Defendants' actions, Plaintiff has lost his ability to guide and care for his children. He can no longer comfort them or be comforted by them. He cannot offer them solace and advice as they endure the challenges of growing into adolescence. Plaintiff and his children cannot share affection, attention, and love. Defendants have inflicted serious damage on the parental bond between these children and their father.

C. Emotional Trauma

125. Because of Defendants' actions in causing the loss to Plaintiff of his family's society, he has suffered emotional trauma with physical manifestations. He has experienced bouts of debilitating grief resulting in changes in his behavior and a negative impact on his conduct and lifestyle. The severity of these emotions ebbs and flows, so that for periods of weeks or months his anguish saps his motivation, confining him to his bed and causing him to withdraw from social interaction and to abandon his reading and his exercise. Plaintiff's desire for sleep and difficulty doing so leads him to rely on allergy medication for sleep during the worst of these periods.

126. As the years have passed without his family, Plaintiff's manner and attitude have become characterized by bitterness and cynicism, to the extent that BOP staff and other inmates have noticed the change in his personality. "You've changed since you first got here," one officer at

FCI Terre Haute frequently remarked during Plaintiff's last months at the unit. "If you're miserable, don't make everyone around you miserable, too," he once advised. Also, Plaintiff often experiences spontaneous tears when he sees children on television. His grief has dulled his appetite and rendered eating a tedious chore.

127. Plaintiff suffers from stress and anxiety as a result of the loss of his family connections, and has sought and received counseling and literature from prison psychologists. He suffers from headaches, a racing heart, and tightness of chest during the worst of his periods of grief and anguish. Plaintiff sought treatment for his racing heart.

D. Damaged Reputation

128. Defendants' circulation of the false claim that Plaintiff trained and fought with an Al Qaeda associate is per se defamatory. Moreover, it has resulted in threats to Plaintiff, abuse, and embarassment.

E. Financial Loss

129. Inmates in the general population have the opportunity to work in prison factories that comprise the Federal Prison Industries, also known as UNICOR. Indeed, federal regulations require that these jobs be available to such inmates.

130. As previously noted, at FCI Allenwood, inmates could make up to $100 a month working at UNICOR, and Plaintiff was on the waiting list to work there as well. In that way, Plaintiff could have earned money for commissary purchases, telephone calls, or even to buy gifts or pay bills for his family. But as a "terrorist inmate," Plaintiff is housed under conditions that provide him no opportunity to work in a prison factory.

Claims for Relief

131. The allegations contained in ¶¶ 1-130, supra, are restated and

incorporated by reference within each of the following claims for relief.

I. Count One: Failure to Maintain Accurate Records -- 5 U.S.C. § 552a (e)(5) & (g)(1)(C)

132. Between April 2004 and the present, Defendant BOP, through its officers, employees, or agents, has intentionally and willfully maintained inaccurate records pertaining to Plaintiff in a non-exempt system of records, to wit, records comprising the contents of Plaintiff's draft PSR or records derived from said contents, which records were a substantial cause of a BOP determination adverse to Plaintiff, from which he suffered actual damages.

II. Count Two: Failure to Maintain Accurate Records -- 5 U.S.C. § 552a (e)(5) & (g)(1)(C)

133. Between April 2004 and the present, Defendant BOP, through its officers, employees, or agents, has intentionally and willfully maintained inaccurate records, to wit, records containing or derived from "open source reporting" suggesting that Plaintiff has been associated with Al Qaeda, which records were a substantial cause of a BOP determination adverse to Plaintiff, from which he suffered actual damages.

III. Count Three: Failure to Collect Information Directly From Subject Individual -- 5 U.S.C. § 552a(e)(2) & (g)(1)(D)

134. Between April 2004 and December 2006, Defendant BOP, through its officers, employees, or agents, intentionally and willfully failed to elicit information directly from Plaintiff to the greatest extent practicable, to wit, the contents of Plaintiff's draft PSR; and Defendant has maintained such information, both itself and in a derivative form, in records maintained in a non-exempt system of records, which records were a substantial cause to him of adverse effects from which he suffered actual

damages.

IV. Count Four: Failure to Collect Information Directly from Subject Individual -- 5 U.S.C. § 552a(e)(2) & (g)(1)(D)

135. Between April 2004 and December 2006, Defendant BOP, through its officers, employees, or agents, intentionally and willfully failed to elicit information directly from Plaintiff to the greatest extent practicable, to wit, "open source reporting" suggesting that Plaintiff has been associated with Al Qaeda; and Defendant has maintained such information, both itself and in derivative form, in records maintained in a non-exempt system of records, which records were a substantial cause to him of adverse effects from which he suffered actual damages.

V. Count Five: Unauthorized Disclosure of Records -- 5 U.S.C. § 552a(b) & (g)(1)(D)

136. Between April 2004 and December 2006, Defendant Unknown Federal Agency, through its officers, employees, or agents, intentionally and willfully disseminated to an unauthorized agency, without Plaintiff's consent, the content of records relating to Plaintiff that are maintained by Defendant Unknown Federal Agency in a system of records, to wit, the contents of Plaintiff's draft PSR, which records were a substantial cause to him of adverse effects from which he suffered actual damages.

VI. Count Six: Failure to Amend Records -- 5 U.S.C. § 552a(g)(1)(A)

137. Despite Plaintiff's properly filed June 22, 2009 request for amendment of records pertaining to him maintained by Defendant BOP in a non-exempt system of records, to wit, the records comprising the contents of the draft PSR and the records derived from "open source reporting" suggesting that Plaintiff has been associated with Al Qaeda, the BOP has made a determination under subsection (d)(3) of the Privacy Act not to amend those records, or it has failed to review the amendment request in

conformity with that subsection.

138. With his August 25, 2009 letter of appeal from the BOP's denial of his amendment request or failure to review his request, Plaintiff has exhausted the administrative remedy process as to this claim.

VII. Count Seven: Failure to Amend Records -- 5 U.S.C. § 552a(g)(1)(A)

139. Despite Plaintiff's properly filed July 20, 2009 request for amendment of records pertaining to him maintained by Defendant BOP in a non-exempt system of records, to wit, the records derived from the contents of the draft PSR, including any reference to a so-called "Bosnian terrorist group," the BOP has made a determination under subsection (d)(3) of the Privacy Act not to amend those records, or it has failed to review the amendment request in conformity with that subsection.

140. With his August 25, 2009 letter of appeal from the BOP's denial of his amendment request, Plaintiff has exhausted the administrative remedy process as to this claim.

VIII. Count Eight: Failure to Provide Access to Records -- 5 U.S.C. §§ 552(a)(4)(B) & 552a(g)(1)(B)

141. Despite Plaintiff's properly filed June 2, 2009 request under FOIA and the Privacy Act for access to records maintained by Defendant BOP in a non-exempt system of records, to wit, the records derived from "open source reporting" suggesting that Plaintiff has been associated with Al Qaeda, the BOP failed to review that request in conformity with the Privacy Act.

142. The BOP failed to make a good faith effort to conduct a search for the records sought in the June 2, 2009 request using methods which could reasonably be expected to produce the information requested.

143. With his July 20, 2009 letter of appeal from the BOP's denial of

his records access request, and the DOJ's September 25, 2009 determination upholding the relevant portion of that denial, Plaintiff has exhausted the administrative remedy process as to this claim.

IX. Count Nine: Failure to Provide Access to Reords — 5 U.S.C. §§ 552(a)(4)(B) & 552a(g)(1)(B)

144. Despite Plaintiff's properly filed July 20, 2009 request under FOIA and the Privacy Act for access to records maintained by Defendant BOP in a non-exempt system of records, to wit, all records maintained by the agency's Counter Terrorism Unit pertaining to Plaintiff, as well as all records maintained by the CTU and the Correctional Programs Division concerning the decision to designate and transfer him to the Communications Management Unit, the BOP failed to review that request in conformity with the Privacy Act.

145. The BOP's determination to withhold all of the aforementioned records, to wit, the nine folders maintained on Plaintiff by the CTU, on the basis of various FOIA exemptions, was unjustified.

146. The BOP failed to make a good faith effort to conduct a search for the other records sought in Plaintiff's July 20, 2009 request, to wit, the records maintained by the Correctional Programs Division or CTU concerning the decision to designate and transfer him to the CMU.

147. With his November 2009 letter of appeal from the denial of his records access request, Plaintiff has exhausted the administrative remedy process as to this claim.

X. Count Ten: Violation of Due Process — Fifth Amendment to the U.S. Constitution

148. From December 2006 and continuing to the present, Defendant BOP has failed to afford Plaintiff due process with respect to its classification of him as a "terrorist inmate" and its concomitant

imposition upon him of harsh, atypical conditions of confinement for the duration of his prison sentence.

149. This claim is brought directly under the U.S. Constitution pursuant to Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

150. Defendant BOP is not immune to this claim because with it, Plaintiff seeks only injunctive relief.

XI. Count Eleven: Violation of Freedom of Speech and Association -- First Amendment to the United States Constitution

151. From December 2006 and continuing until the present, Defendant BOP's total, permanent prohibition on physical contact with his visiting family has violated Plaintiff's right to freedom of speech and association and parental and family rights, inasmuch as this prohibition does not bear a rational relationship to a legitimate government interest, or it is an exaggerated response to such an interest.

152. This claim is brought directly under the U.S. Constitution pursuant to Bivens.

153. Defendant BOP is not immune to this claim because with it, Plaintiff seeks only injunctive relief.

Prayer for Relief

WHEREFORE, Plaintiff respectfully requests that the Court:

a. Accept jurisdiction of this case and set it for a hearing;

b. Award money damages in Plaintiff's favor for the harm caused by Defendants' failure to maintain accurate records, failure to collect information directly from Plaintiff, and unauthorized disclosure of records;

c. Award equitable relief in Plaintiff's favor due to the harm

caused by Defendants' records violations;

d. Order Defendant BOP to amend its inaccurate records;

e. Order Defendant BOP to give Plaintiff access to the subject records and to undertake a reasonable, sufficient search for the relevant records;

f. Declare that Defendant BOP is violating Plaintiff's right to due process;

g. Declare that Defendant BOP is violating Plaintiff's freedom of speech and association and his family rights;

h. Enter a preliminary injunction, later to be made permanent, enjoining Defendant BOP to lift the harsh, atypical conditions of confinement that it has permanently imposed upon him;

i. Enter a preliminary injunction, later to be made permanent, enjoining Defendant BOP to permit Plaintiff to have contact visits with his family;

j. Award Plaintiff his costs and expenses;

k. Grant such other and further relief as this Court deems just and proper.

Dated this 19th day of January, 2010.

Respectfully submitted,

RANDALL TODD ROYER

Reg. No. 46812-083
Federal Correctional Institution
P.O. Box 5000
Greenville, IL 62246

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL TODD ROYER, Plaintiff, v. FEDERAL BUREAU OF PRISONS, Defendant.	Civil Action Nos. 10-1196 (RCL) 10-1996 (RCL)

STIPULATION OF SETTLEMENT AND DISMISSAL

The parties, Plaintiff Randall Todd Royer ("Royer" or "Plaintiff") and Defendant Federal Bureau of Prisons ("BOP" or "Defendant") (collectively, "the parties"), by and through their respective counsel, hereby stipulate and agree and file this Stipulation of Settlement and Dismissal ("Stipulation") as follows:

1. The parties do hereby agree to settle, compromise, and dismiss the above-entitled action under the terms and conditions set forth herein.

2. The parties agree that BOP's reasonable efforts detailed in BOP's Certification of Records Modification dated June 17, 2014, to modify records and take other actions consistent with the Memorandum dated April 7, 2014, from Frank Strada, Assistant Director, Correction Programs Division, BOP to All Staff Concerned bearing the subject "Records Correction -- Randall Royer, Reg. No. 46812-083; Instructions for BOP staff to correct BOP records of inmate Royer regarding his affiliation with a Bosnian terrorist organization," is a material inducement to this Stipulation.

3. Defendant shall pay Plaintiff a lump sum of Twelve Thousand dollars and no cents ($12,000.00) and shall pay Plaintiff's attorneys Twenty-Eight Thousand dollars and no

cents ($28,000.00) (collectively, the "Settlement Amounts") in settlement of this matter pursuant to the terms described herein.

4. Upon filing of this Stipulation, Defendant will promptly cause the documentation necessary to effectuate these payments to be completed and transmitted. Payment of sums to Plaintiff shall be made to Plaintiff's inmate trust fund account pursuant and subject to the authorities, rules, and regulations regarding such account. Payment of sums to Plaintiff's attorneys shall be made by electronic funds transfer pursuant to instructions exchanged by counsel for the parties.

5. This Stipulation provides for the full and complete satisfaction of all claims that have been or could have been asserted by Plaintiff in the above-captioned civil actions, including without limitation all claims for compensatory damages, back pay, costs, attorneys' fees, and interest or other compensation for delay, and Plaintiff agrees not to hereafter assert any claim or institute or prosecute any civil action or other proceeding against the Defendant, the United States, their agencies or officials, or their present or former employees or agents, in either their official or individual capacities, with respect to any event complained of therein, except as provided in Paragraph 6. Plaintiff hereby fully and forever releases and discharges the Defendant, the United States, their agencies or officials, and their present and former employees and agents, in their official and individual capacities, from any and all rights and claims of every kind, nature, and description, whether presently known or unknown, that Plaintiff now has or may have arising out of or in connection with any event regarding, concerning, or related to the matters alleged in the complaints in the above-captioned actions and occurring on or before the date on which he has executed this Stipulation, except as provided in Paragraph 6. In connection with this release, Plaintiff acknowledges that he is aware that he may hereafter discover rights or

claims presently unknown and unsuspected, or facts in addition to or different from those that he now knows with respect to the rights and claims released herein.

6. Notwithstanding the breadth of Paragraph 5, and for the avoidance of doubt, Paragraph 5 shall not apply to any claims premised upon any future actions to assign, designate, reassign, or re-designate Plaintiff to BOP facilities or custodial units (including, but not limited to, a Communications Management Unit), or to otherwise impose on Plaintiff new conditions of confinement. Similarly, Paragraph 5 shall not apply to any claims premised upon BOP or its agents or officials taking any potential future actions concerning Plaintiff based on or in reference to information that Plaintiff contends is false or misleading in records maintained by BOP, including but not limited to information regarding the allegedly erroneous contention that Plaintiff was affiliated with a Bosnian terrorist organization or had a connection with an alleged Al Qaeda operative named Abu Zubair Al-Madani or the allegedly erroneous claim that Plaintiff had an affiliation with Al Qaeda based on his prior association with a Bosnian military unit known as Abu Zubair. Further, Paragraph 5 shall not apply to any claims Plaintiff may have arising out of or in connection with the application of a "Greater Security" management variable to Plaintiff.

7. This Stipulation shall represent full and complete satisfaction of all claims arising from the allegations set forth in the Complaint filed in this action, including full and complete satisfaction of all claims for costs and attorneys' fees that have been, or could be, made in this case, including, but not limited to, all claims arising from any predecessor administrative processes, litigation before this Court, and any other proceedings involving the claims raised in this action.

8. This Stipulation shall not constitute an admission of liability or fault on the part of BOP or the United States or their agents, servants, or employees, and is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

9. This Stipulation shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

10. The parties agree that this Stipulation will not be used as evidence or otherwise in any pending or future civil or administrative action against Defendant or the United States or any agency or instrumentality of the United States, except to the extent such action concerns breaches of this Stipulation.

11. Execution of this Stipulation by counsel for Plaintiff and by counsel for Defendant shall constitute a dismissal of this action with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) subject to the exceptions noted above in Paragraph 6, except that the Court may retain jurisdiction to enforce the terms of this Stipulation.

12. Nothing in this Stipulation constitutes an agreement by Defendant or the United States concerning the characterization of the Settlement Amounts for purposes of the Internal Revenue laws, Title 26 of the United States Code. Plaintiff and his attorneys further acknowledge that they have not relied on any representations by Defendant or Defendant's employees or agents as to the tax consequences of this Stipulation or any payments made by or on behalf of Defendant hereunder. Plaintiff and his attorneys shall be solely responsible for compliance with all federal, state, and local tax filing requirements and other obligations arising from this Stipulation that are applicable to Plaintiff and his attorneys, respectively. Plaintiff takes the position that the $12,000 that Defendant will pay Plaintiff is in settlement of claims for

compensatory damages arising from actions of the Defendant alleged to be unlawful under federal or common law providing for the enforcement of civil rights, and the $28,000 that Defendant will pay Plaintiff's attorneys is in settlement of a claim for attorney's fees under a fee-shifting statute.

13. This Stipulation contains the entire agreement between the parties hereto and supersedes all previous agreements, whether written or oral, between the parties relating to the subject matter hereof. No promise or inducement has been made except as set forth herein, and no representation or understanding, whether written or oral, that is not expressly set forth herein shall be enforced or otherwise be given any force or effect in connection herewith.

14. The terms of this Stipulation may not be modified or amended, and no provision hereof shall be deemed waived, except by a written instrument signed by the party to be charged with the modification, amendment, or waiver.

15. The parties acknowledge that the preparation of this Stipulation was collaborative in nature, and so agree that any presumption or rule that an agreement is construed against its drafter shall not apply to the interpretation of this Stipulation or any term or provision hereof.

16. Each party agrees to take such actions and to execute such additional documents as may be necessary or appropriate to fully effectuate and implement the terms of this Stipulation.

17. This Stipulation shall be governed by the laws of the District of Columbia, without regard to the choice of law rules utilized in that jurisdiction, and by the laws of the United States.

18. This Stipulation may be executed in counterparts as if executed by all parties on the same document.

Respectfully submitted,

FOR PLAINTIFF RANDALL TODD ROYER:

By: _____ Date: 6/19/14

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SO ORDERED this ____ day of _____, 2014.

_____
HON. ROYCE C. LAMBERTH
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL TODD ROYER	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil No. 10-1996 (RCL)**
	)	
FEDERAL BUREAU OF PRISONS	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This case concerns the Federal Bureau of Prison's ("BOP") classification of federal prisoner Randall Todd Royer (aka Ismail Royer) as a "terrorist inmate." Specifically, Royer alleges that BOP has violated the federal Privacy Act by maintaining and refusing to correct records that allegedly inaccurately link him with Al Qaeda and that BOP's classification of him as a "terrorist inmate" and imposition of attendant harsh conditions of confinement has violated his Procedural Due Process and First Amendment rights.

Defendant Federal Bureau of Prisons ("BOP") has moved for summary judgment as to the Privacy Act claims and has moved to dismiss Royer's Constitutional claims for lack of jurisdiction, or alternatively, failure to state a claim. ECF No. 91.

Upon consideration of BOP's Motion, the plaintiff's Opposition [98] thereto, and the entire record in this case,[1] the Court will: (1) DENY WITHOUT PREJUDICE BOP's Motion for Summary Judgment regarding Royer's Privacy Act claims; (2) DENY BOP's motion to dismiss for lack of jurisdiction; (3) GRANT BOP's motion to dismiss Royer's First Amendment claims

[1] BOP did not file a Reply in support of its motion.

for failure to state a claim; and (4) DENY BOP's motion to dismiss Royer's Due Process claims. The Court also DISMISSES Royer's Freedom of Information Act (FOIA) claims because he states that he will no longer press them. *See* Pl.'s Mem. Supp. of Opp'n to Def.'s Mot. Dismiss or for Summ. J. 23–24, ECF No. 98-1 [hereinafter Pl.'s Opp'n].

The Court does not decide the legality of BOP's practice of classifying prisoners as "terrorist inmates" or whether Royer should or should not be deemed a "terrorist inmate." A related case in this Court considers whether BOP violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., by failing to engage in notice-and-comment rulemaking before implementing its "terrorist inmate" classification program. *See* Am. Compl., *Royer v. Fed. Bureau of Prisons*, No. 10-cv-1196 (D.D.C. Sept. 9, 2011).

I. BACKGROUND

A. Offense Conduct and Conviction

Royer is a United States citizen born in Missouri. In 2004, he and ten other men were charged in the U.S. District Court for the Eastern District of Virginia with numerous offenses including conspiracy to levy war against the United States in violation of 18 U.S.C. § 2384, conspiracy to provide military support to Al Qaeda, in violation of 18 U.S.C. § 2339B, and conspiracy to contribute services to the Taliban in violation of 50 U.S.C. § 1705. Ultimately, Royer pleaded guilty to two counts: Aiding and Abetting the Use and Discharge of a Firearm During and in Relation to a Crime of Violence (Felony) in violation of 18 U.S.C. §§ 2 and 924(c)(2), and Aiding and Abetting the Carrying of an Explosive During the Commission of a Felony in violation of 18 U.S.C. §§ 2 and 811(h)(2). According to Royer, the relevant felony was violation of the Neutrality Act, which makes it a crime to "knowingly begin[] . . . or provide[] or prepare[] a means for . . . any military or naval expedition . . . against the territory or

dominion of any foreign prince or state . . . with whom the United States is at peace." 18 U.S.C. § 960. The specific acts supporting Royer's convictions included his efforts in the summer of 2000 and fall of 2001 to assist several co-conspirators in gaining access to training camps in Pakistan run by Lashkar-e-Taiba[2] ("LET"), a group designated as a foreign terrorist organization ("FTO") in December 2001. While at those camps, his co-conspirators fired semi-automatic pistols and carried a rocket-propelled grenade. Royer was sentenced on April 9, 2004 to two consecutive ten-year terms with credit for time served.

Of relevance to this case, Royer converted to Islam in 1992 and shortly thereafter traveled to Bosnia for six months to fight on behalf of the Bosnians in the 1992–1995 war in Bosnia and Herzegovina. Compl. ¶ 15. While there, Royer trained and fought as part of the "Abu Zubair" unit against the Serbian army. *Id.* Although Abu Zubair was never designated a terrorist organization by the United States, BOP now suggests that it is or has been affiliated with a terrorist organization. Def.'s Stmt. Mat. Facts ¶ 6, ECF No. 91 [hereinafter Def.'s SMF].

B. Present Controversy

As of today, Royer has served approximately nine and a half years of his 20-year sentence. For the first three and a half years of his incarceration, Royer was housed in the general prison population. Compl. ¶ 77. However, since December 2006, when Royer was classified as a "terrorist inmate," he has been housed in various locations isolated from the general population, including the Special Housing Units ("SHUs") at FCI Allenwood and USP Lewisburg, the Communications Management Unit ("CMU") at FCI Terre Haute; the SHU at FCI Greenville; the supermax facility at Florence, Colorado ADX; and currently the CMU at USP Marion. Compl. ¶¶ 77, 88–91, 100; Def.'s SMF ¶¶ 1–2; ECF No. 14; ECF No. 104.

[2] Spelled in various documents as Laskar-e-Tabia or Lashkar-e Tayyib, LET is the military arm of a group founded to organize mujahideen in violent jihad against the Russians in Afghanistan. PSR ¶¶ 22, 42, 93. LET's primary focus after the Russians left Afghanistan was jihad against the Government of India to oust it from Kashmir. PSR ¶ 22, 93.

While in the general population, Royer asserts that he had "run of the prison and access to its facilities." Compl. ¶ 79. He could run outdoors on a track, enroll in vocational training and earn a carpentry license, take classes for college credit, and work in the prison factory for pay. *Id.* He enjoyed up to forty hours of full contact visits per month with his family, Compl. ¶ 80, and appears to have had 300 minutes of telephone time per week, Compl. ¶ 96.

In December 2006, he asserts that BOP determined that certain restrictions would apply to his confinement for the remainder of his prison term (or about 16.5 years as of that date). According to Royer, the conditions imposed as a result of his "terrorist inmate" classification require that he be housed "in the harshest conditions of confinement in the federal prison system." Compl. ¶ 106. Specifically, from December 2006 to October 2009, Royer was housed in the CMU at FCI Terre Haute. Compl. ¶ 91. There, although he was allowed out of his cell, he was not permitted to leave the "tight quarters" of the housing unit and was not permitted to have any contact with the general inmate population. Compl. ¶ 93–94. Royer could only exercise in "steel cages" and was denied access to college credit courses, jobs, or vocational training. Compl. ¶ 95. Additionally, Royer had no access to the prison chapel, was permitted group religious services only on Fridays, and was not permitted to study religious topics one-on-one with other inmates in the CMU. Compl. ¶ 94. He was permitted only one 15-minute phone call per week, and only on business days between 8:30am and 2:30pm. Compl. ¶ 96. Finally, he was allowed only two visits per month and these were limited to two-hours each and were required to be noncontact, meaning that he must speak with visitors through a telephone, separated by a concrete and glass wall. Compl. ¶ 97. When Royer was transferred to the SHU at FCI Greenville after an altercation, the prison imposed the same conditions, even when those were harsher than those for other SHU inmates. Compl. ¶ 101. After the filing of this complaint,

Royer was transferred to the supermax facility at ADX Florence in or around March 2012, ECF No. 14, and then to the CMU at USP Marion in or around November 2012, ECF No. 104.

Based on his conditions of confinement and his allegation that BOP has relied on inaccurate information to determine his "terrorist inmate" status, Royer now lodges both statutory and Constitutional claims against BOP under the federal Privacy Act, the Fifth Amendment Due Process clause and the First Amendment.[3]

Royer seeks money damages and equitable relief for the alleged violations of the Privacy Act. With respect to the alleged constitutional violations, he seeks a declaration that BOP is violating his rights to due process, freedom of speech, and freedom of association, and an order that BOP lift the conditions and allow contact visits with his family. Finally, he seeks costs and expenses.[4] Compl. 36.

This is the third dispositive motion filed by BOP in this litigation. Royer initially filed his claim in the Eastern District of Virginia and, in lieu of an Answer, BOP filed a Motion to Dismiss or for Summary Judgment. ECF No. 23. Specifically, BOP sought summary judgment on the Privacy Act claims and moved to dismiss the constitutional claims for lack of subject matter jurisdiction and failure to state a claim. That motion was fully briefed; however, after requesting additional briefing from the parties, the court *sua sponte* held that venue was improper in the Eastern District of Virginia and transferred the case to this Court. ECF No. 60. BOP filed an Answer here, ECF No. 65, and subsequently filed a second Motion to Dismiss or,

[3] As already mentioned, the Court now dismisses Royer's FOIA claims. Certain additional claims have been previously dismissed by the Court. *See* ECF Nos. 46, 54, 63.

[4] Similar litigation challenging the constitutionality of these conditions of confinement and the BOP's failure to engage in notice-and-comment rulemaking has been filed by other prisoners classified as terrorist inmates, including at least one case pending in this District. *See Aref v. Holder*, 774 F. Supp. 2d 147 (D.D.C. 2011) (holding that plaintiffs had plausibly alleged a procedural due process claim but dismissing the plaintiffs' claim that defendants violated their First Amendment right to "family integrity" and dismissing plaintiffs' APA claims as moot because BOP had resumed the rulemaking process in 2010).

in the Alternative for Transfer to the U.S. District Court for the District of Colorado. ECF No. 68. Rather than raising the defenses of lack of subject matter jurisdiction or failure to state a claim—and despite the fact that BOP had previously acknowledged that venue was proper here, Def.'s Resp. to Court's Order of Sept. 28, 2010, ECF No. 57—BOP argued that Royer's claims should be treated as a disguised habeas claim and that venue was proper in Colorado where he was then incarcerated. The Court disagreed and denied without prejudice the Motion to Dismiss or in the Alternative for Transfer. Mem. & Order, Mar. 29, 2012, ECF No. 83.

BOP now again seeks summary judgment on Royer's Privacy Act claims (Counts 1, 2, 4, and 6–8) and renews its arguments (omitted from the last dispositive motion) that Royer's Constitutional claims (Counts 9–10) should be dismissed for lack of subject matter jurisdiction or failure to state a claim.[5]

II. ANALYSIS

A. Motion for Summary Judgment Regarding Privacy Act Claims

1. Legal Standard

Summary judgment should be granted when "the movant shows that there is no *genuine* dispute as to any *material* fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material if it could affect the outcome of the case. *Id.* A dispute is genuine if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

[5] Because the motion to dismiss was filed after BOP filed its answer, it is technically one for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c). However, the standards for awarding judgment under a Rule 12(b)(6) motion to dismiss and Rule 12(c) motion for judgment on the pleadings are "virtually identical." *See Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987), *abrogated on other grounds by Hartman v. Moore*, 547 U.S. 250 (2006); *see also* Wright and Miller, Federal Practice and Procedure, § 1367 (noting that if the defenses of failure to state a claim or lack of subject matter jurisdiction are raised in a Rule 12(c) motion, "presumably the district court will apply the same standards . . . as it would have . . . under Rules 12(b)(1) [or] (6) . . . ."). Thus, the Court will apply the standard for a motion to dismiss here.

The "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. The non-movant, however, must establish more than "the existence of a scintilla of evidence" in support of his position, *id.* at 252, and may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999).

2. Privacy Act Generally

The Privacy Act requires federal agencies maintaining "systems of records" to allow individuals to review and request copies of and amendments to records pertaining to them. 5 U.S.C. § 552a(d). The Act also imposes requirements regarding the accuracy and source of information agencies maintain.

"Systems of records" under the Privacy Act are those under the control of the agency from which "information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." *Id.* § 552a(a)(5). In response to requests for amendment, agencies must either allow an individual to make corrections or inform the individual of the reason for the agency's refusal to amend and procedures for seeking review of the refusal. *Id.* § 551a(d)(2). Agencies must also, "to the greatest extent practicable," collect information "directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs." *Id.* § 551a(e)(2). Finally, agencies must "maintain all records which are used by the agency in making any determination about any individual with such accuracy . . . as is reasonably necessary to assure fairness to the individual in the determination." *Id.* § 552a(e)(5).

Judicial review is available when an agency refuses to provide access, copies, or amendments, or fails to maintain accurate records or otherwise comply with the law "in such a

way as to have an adverse effect on an individual." *Id.* § 552a(g)(1). Courts may enjoin the agency from withholding records and order production and amendment of records. *Id.* §§ 552a(g)(2)(A)–(B), 552a(g)(3)(A)–(B). They may assess reasonable attorney fees and costs against the United States. *Id.* Actual damages are available in suits for failure to maintain accurate records or failure to comply with other provisions of the law if the agency acted intentionally or willfully. *Id.* § 552a(g)(4)(A)–(B).

Causes of action under the Privacy Act may be brought in the District Court for the District of Columbia within two years from the date on which the cause of action arises. *Id.* § 552a(g)(5).

The head of an agency with the principal function of enforcing criminal laws, including correctional agencies, may exempt systems of records from Privacy Act provisions, including those provisions related to access, copying, amendment, and maintenance of accuracy of records. *Id.* § 552a(j). Federal regulations currently exempt BOP's Inmate Central Record System (ICRS) from certain Privacy Act provisions, specifically those related to access to and amendment of records, *id.* § 552a(d), collection of information directly from individuals, *id.* § 552a(e)(2), civil remedies, *id.* § 552(g), and accuracy, *id.* § 552a(e)(5). *See* 28 CFR § 16.97. Inmates may instead contest the accuracy and content of records administratively. 28 CFR §§ 16.9, 16.45; Letter from Wanda M. Hunt, Chief, FOIA/PA Section, Federal Bureau of Prisons, to Randall Royer, Aug. 19, 2009, ECF No. 91-1 at 31.

3. Summary Judgment Is Premature

Royer alleges that BOP knowingly maintained inaccurate records about him, Compl. ¶¶ 132–33 (describing Counts 1–2); that BOP has intentionally and willfully failed to elicit information directly from him, Compl. ¶ 135 (describing Count 4); that it refuses to amend the

inaccurate records, Compl. ¶¶ 137–40 (describing Counts 6–7); and that it refuses to provide him with access to these records, Compl. ¶¶ 141–47 (describing Counts 8–9). Royer seeks money damages and an order that BOP give him access to the relevant records and amend inaccurate records. Compl. 35–36.

Royer's Privacy Act claims relate primarily to his assertion that BOP continues to erroneously characterize Abu Zubair, the Bosnian group with whom he fought in 1994, as a terrorist organization with ties to Al Qaeda. Royer's complaint initially alleged that BOP obtained this erroneous information from a draft version of his PSR. That draft stated that Royer had trained and fought with "Abu Zubar," PSR ¶ 42, and that "Abu Zubair (known more formally as Abu Zubair al Madani) was a member of Al Qaeda sent to Bosnia by Bin Laden to establish camps for Al Qaeda." Compl. ¶ 33; Draft PSR ¶ 42. At his sentencing hearing, Royer objected to the latter statement and argued that it confused the Bosnian Abu Zubair military group with an individual Al Qaeda member with a similar name who had died several years before Royer's affiliation with the group. Compl. ¶¶ 15–22; Mem. Op. 3, ECF No. 59. The government acknowledged the error and the court ordered that the line be stricken from the final PSR. *Id.*

Royer does not contest the accuracy of his final PSR, which is contained in his "Central File" in BOP's Inmate Central Records System. Compl. ¶ 25. However, Royer asserts that BOP somehow obtained access to the erroneous information that had been deleted from the draft PSR.[6] Whatever the source of the information, Royer argues that it remains inaccurate, that BOP used it to classify him as a terrorist inmate, Compl. ¶¶ 32–41, that BOP has maintained similar inaccurate records they obtained from "open source reporting," *id.* ¶ 39, and that BOP has failed

[6] There is much back and forth in the record about whether BOP had the *actual* draft PSR. However, Royer does not now assert that BOP has the actual document but that BOP somehow obtained the deleted material, perhaps from an Addendum to the draft PSR which included Royer's objection to the statement.

to provide him access to the records, to collect information directly from him, or to respond to his requests that the records by amended. Compl. ¶¶ 42–44, 54–76.

BOP argues that it is "not in possession of the draft PSR as alleged by Plaintiff, nor has the Bureau ever had possession of the draft PSR . . . [or] used information from a draft PSR in the classification of Plaintiff." Def.'s SMF ¶ 4 (citing Schiavone Decl. ¶ 6). BOP does not explain why, in a letter to Royer, it used language that mirrored the deleted draft PSR language verbatim. *See* Pl.'s Opp'n, Ex. 11, ECF No. 98-2 at 23 (including a statement that mirrors the draft PSR verbatim that "Abu Zubair (known more formally as Abu Zubair al Madani) was a member of Al Qaeda sent to Bosnia by Bin Laden to establish camps for Al Qaeda").

BOP states that the "[final] PSR includes self-admissions by the Plaintiff to training and fighting with a group in Bosnia known as 'Abu Zubair, II' a group also known as Abu Zubair al Madani, which according to publicly available information, is associated with Al Qaeda, and identified as a FTO." Def.'s SMF ¶ 6. BOP goes on to list some of the "publicly available records" used to research Abu Zubair.

There are several problems with BOP's assertion. First, in the PSR, Royer only admitted to training with a group known as "Abu Zubar"; the remainder of BOP's statement appears to be based on its own research. *See* PSR ¶ 42, ECF No. 100. Second, it does not appear that Abu Zubair is now or has ever been listed as an FTO by the United States. *See* Foreign Terrorist Organizations, U.S. Dep't of State (Sept. 28, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm. Third, the public records listed by BOP in support have already been called into question by Judge Brinkema of the Eastern District of Virginia and BOP has not provided this Court with any explanation for why the records are of any value. Although Judge Brinkema transferred the case to this Court for lack of venue, her

Opinion is worth quoting at length both because she was the sentencing judge in Royer's original case and because BOP made substantially the same arguments before her that it now makes before this court. Judge Brinkema noted:

> Royer raises some very serious allegations in his Complaint. In fact, in light of arguments advanced by BOP itself, it appears that BOP may in fact be maintaining inaccurate information about Royer, in violation of this Court's oral order during Royer's sentencing hearing that Paragraph 42 of his Pre-Sentence Report be stricken as erroneous. Specifically, in its Motion to Dismiss or for Summary Judgment, BOP continues to make reference to the fact that Royer fought with a Bosnian military unit known as "Abu Zubair," and improperly confuses that group with a now deceased al Qaeda operative by that same name. . . . [T]he BOP . . . allege[s] that the Abu Zubair group with which plaintiff trained and fought in Bosnia "is associated with al Qaeda," and that "publicly available records" . . . confirm that fact. In particular BOP cites four web sites which it claims contain publicly available records tying the Bosnian Abu Zubair group to terrorism. . . . [T]he link to www.historycommons.org [is] broken and no longer connect[s] to [a] valid web site[]. Other [links], such as the links to a copy of an indictment returned by a grand jury in the Northern District of Illinois and a press release issued by the U.S. Attorney's Office in that same case, replicate the same confusion between the *group* Al Zubair and the *individual* by the same name that gave rise to Royer's original objection to his draft PSR. Thus, whether the information regarding Abu Zubair was derived from the Addendum to Royer's PSR or from open source reporting, BOP appears to be perpetuating the exact same error that the government already admitted to making during Royer's sentencing hearing. The government's demonstrated inability to learn from its own mistakes - mistakes to which it stipulated in a public hearing before this Court - is a matter of serious concern.

Royer v. Fed. Bureau of Prisons, No. 10-cv-0146, 2010 WL 4827727, at *2–3 (E.D. Va. Nov. 19, 2010).

For unknown reasons, the government continues to advance the same argument and put forth the same public sources (including a broken link) in support of its argument, despite having previously acknowledged to a federal court that the information is inaccurate.[7] If the

[7] These sources continue to include, mysteriously, the home page of the Department of Justice, www.justice.gov. The Court is unsure how citation to the Department's homepage provides any support for the contention that Abu Zubair is a terrorist organization with links to Al Qaeda. A search of the Department's website produced no additional information other than the indictment and press release already provided by the government.

government has new, reliable information suggesting that the *group* Abu Zubair had ties to terrorist organizations, such as Al Qaeda, it should provide the Court with that information.[8]

Despite the evidence that the government may be maintaining inaccurate information linking Royer to Al Qaeda, the government argues that judicial review and the protections of the Privacy Act are unavailable.

Specifically, BOP argues that the PSR, as a court document, is not within the purview of the Privacy Act, "notwithstanding its use or retention by agencies such as BOP." Def.'s Mem. 2. This argument lacks merit. First, since BOP does not even acknowledge that it has the draft PSR, its potential status as a "court document" is irrelevant. Second, Royer does not assert that BOP has the actual draft PSR but that it somehow obtained the inaccurate information that had originally been included in, *and later stricken from*, the draft document. The issue is not the source of the information, but whether the information BOP continues to use and rely on is inaccurate.

BOP also argues that its ICRS system of records has been exempted from the civil remedy and damages provisions of the Privacy Act and that BOP has no duty to amend allegedly inaccurate records. Def.'s Mem. 15. BOP thus implicitly suggests that the records at issue are housed in the ICRS, though it never states this explicitly. However, Royer does not dispute that the ICRS is exempt from the Privacy Act. Pl.'s Opp'n 5. Rather, Royer argues that the records at issue here are "separate and distinct from the ICRS," *id.* (quoting Compl. ¶ 36), and suggests that they are part of the Counter Terrorism Unit's (CTU) electronic database. He asserts that the CTU is a headquarters-level entity, that it "maintains all of the information it collects in a

[8] Royer concedes that he previously had ties to LET, an organization later classified as an FTO. The Court does not decide whether this link should qualify Royer as a "terrorist inmate." However, if the Privacy Act applies, his association with LET is irrelevant. The issue is whether BOP erroneously links him to Al Qaeda.

database of electronic records" maintained in Martinsburg, West Virginia and that its database is a separate "system of records." *Id.* at 7 (citing Tufte Decl. ¶ 11).[9]

The Court need not and cannot resolve here whether the relevant records are housed in the CTU database, whether that database constitutes a system of records, and whether that system is separate from the ICRS. BOP makes no argument regarding whether the CTU database is a system of records or is separate from ICRS. At this stage, the parties seem to dispute where the relevant information is housed and therefore whether it is exempt from Privacy Act provisions. Summary judgment is thus premature. The Court denies BOP's motion without prejudice to refile.

B. Motion to Dismiss Constitutional Claims for Lack of Subject Matter Jurisdiction

Because a lack of jurisdiction over Royer's constitutional claims would require the Court to dismiss them, the Court first considers whether it has subject matter jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Bell v. Hood*, 327 U.S. 678 (1946). The party asserting the existence of subject matter jurisdiction bears the burden of proof. *Thomson v. Gaskill*, 315 U.S. 442 (1942); *Walker v. Jones*, 733 F.2d 923, 934 (D.C. Cir. 1984). Although in deciding a motion to dismiss, all uncontroverted facts in the complaint are to be accepted as true, when determining subject matter jurisdiction, a court is not limited to considering the allegations of the complaint but has broad discretion to consider extra-pleading materials. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

[9] In support, he notes that when he requested all records located in the ICRS that referenced his name in connection with Abu Zubair, the BOP Regional Counsel responded that "no records pertaining to your request, other than your PSR, could be located." *See* Pl.'s Mem. 8 (citing Ex. 25–26). Based on this, he deduces that BOP records suggesting that he was associated with Abu Zubair and that Abu Zubair was a terrorist organization must be located in a system of records other than the ICRS.

Royer asserts that the Court has federal question jurisdiction under 28 U.S.C. § 1331, which provides for original jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the U.S." Compl. ¶ 5. Despite the fact that Royer's claims clearly arise under the constitution, BOP argues that they are precluded by sovereign immunity.[10]

Sovereign immunity is a jurisdictional issue and thus may be raised in a 12(b)(1) motion to dismiss, a 12(c) motion for judgment on the pleadings, or later in litigation. Pursuant to the doctrine, "[i]t is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). A statutory waiver of federal sovereign immunity must be unequivocally expressed, *see, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34, 37 (1992), and will not be implied, *Lane v. Pena*, 518 U.S. 187, 192 (1996).

The Administrative Procedure Act ("APA") waives the sovereign immunity of the United States for non-monetary claims against federal agencies. 5 U.S.C. § 702. Specifically, Section 702 provides that "[a]n action in a court of the United States seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States." This section applies "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701. Section 702 itself also includes a caveat that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

[10] BOP argues that Counts X and XI cannot be brought as "constitutional tort claims" under the rationale of *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that plaintiffs may sue federal officials in their individual capacities for *damages* for Fourth Amendment violations, even without a statutory cause of action like that provided under 42 U.S.C. § 1983). However, although Royer initially characterized his claims as *Bivens* claims, they are in fact for equitable, not monetary relief. It has been over a year since Royer clarified that he did not intend to characterize these as *Bivens* claims and the Court granted his motion to strike those paragraphs of his complaint. Pl.'s Opp'n 41; Mot. to Strike Paragraphs 149 & 152, ECF No. 63 (granted by Minute Order, Apr. 4, 2011). Thus, the Court need not address BOP's *Bivens* arguments.

5 U.S.C. § 702; *see also Fornaro v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005) (quoting *Transohio Savings Bank v. OTS*, 967 F.2d 598, 607 (D.C. Cir. 1993)) (noting that Section 702 excludes from the APA waiver of sovereign immunity any claims "'expressly or impliedly forbidden by another statute'"). Although Section 702 is codified in the APA, it is not limited to suits under the APA. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996).

Royer argues that Section 702 gives the Court authority to hear his constitutional claims. BOP disagrees, arguing that 18 U.S.C. § 3625 precludes judicial review of decisions regarding the imprisonment of a convicted person and designation of the place of imprisonment under 18 U.S.C § 3621. Def.'s Mem. 18 (citing 18 U.S.C. § 3625).

To resolve this dispute, the Court starts from the "strong presumption" that agency action is reviewable. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). Pre-APA cases emphasized that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs.*, 387 U.S. at 140. This was "reinforced by the enactment of the [APA], which embodies" a similar basic presumption. *Id.* The Supreme Court has held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141 (quoting *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)). Such clear and convincing evidence may include "specific [statutory] language or specific legislative history that is a reliable indicator of congressional intent," *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984), as well as "the nature of the administrative action involved." *Id.* at 345.

BOP argues that 18 U.S.C. § 3625 provides a statutory exception to the APA waiver of sovereign immunity. Section 3625 provides that the APA sovereign immunity waiver "do[es] not apply to the making of any determination, decision, or order" under 18 U.S.C. §§ 3621–3626. BOP argues that it made its determination regarding Royer's conditions of confinement pursuant to 18 USC § 3621, which provides that BOP "shall designate the place of the prisoner's imprisonment." Thus, BOP argues, review of Royer's constitutional claims is precluded. Def.'s Mem. 18.

There are several problems with BOP's argument. As an initial matter, it is not entirely clear that BOP's categorization of plaintiff as a "terrorist inmate" was made pursuant to 18 U.S.C. § 3621. First, this section requires BOP to designate the "place" of an inmate's imprisonment, not the conditions of confinement within any given facility. Moreover, Royer argues, and BOP elsewhere admits, that the decision to classify him as a "terrorist inmate" was made at least in part pursuant to 18 U.S.C. § 4081 ("Classification and treatment of prisoners"). *See* Def.'s Mem. 21–22. The provision negating the APA waiver of sovereign immunity applies only to decisions made under 18 U.S.C §§ 3621–3626, and thus, by its terms, not to decisions made under § 4081. Perhaps BOP's decision was made pursuant to both of these statutory provisions and perhaps judicial review of a decision made pursuant to both provisions could be precluded. The Court need not resolve this question because BOP's argument fails for other reasons.

Even assuming that BOP's decision was made under 18 U.S.C. § 3621, the Court is not reviewing the merits of BOP's decision as to *where* Royer is housed, but the constitutionality of the conditions of confinement it places on him regardless of where he is housed. Colorable constitutional claims are precluded from judicial review only where this has been made explicit

by Congress. Here, Congress has precluded review of BOP "determination[s], decision[s], or order[s]" as to a prisoner's place of imprisonment. However, Congress has not explicitly precluded review of *constitutional* claims based on these or similar decisions.

The Supreme Court decided a similar issue in *Webster v. Doe*, 486 U.S. 592 (1988). There, the Court held that § 102(c) of the National Security Act precluded judicial review of the Director's employment termination decisions. *Webster*, 486 U.S. at 601. However, the Court held that the National Security Act did not preclude judicial review of constitutional challenges based on those same termination decisions. *Id.* at 603–04 ("[The APA] remove[s] from judicial review only those determinations specifically identified by Congress or 'committed to agency discretion by law.' Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant to that section . . . ."). The Court noted:

> We emphasized in *Johnson v. Robison*, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.

Id. at 603 (internal citations omitted). Thus, although 18 U.S.C. § 3625 may preclude judicial review of prison officials' decisions regarding *where* a particular prisoner is housed, it does not preclude review of constitutional challenges arising out of those decisions.[11]

[11] Royer argues that sovereign immunity does not bar his claims even in the absence of a § 702 waiver. Specifically, he argues that where Congress has not clearly precluded judicial review of constitutional claims, there is a presumed right of equitable relief for constitutional violations. As Justice Harlan noted in his concurring opinion in *Bivens*, there is a "presumed availability of federal equitable relief" to enforce the Constitution. 403 U.S. at 400 (Harlan, J., concurring). Similarly, the D.C. Circuit noted in *Schnapper v. Foley* that "[w]e may also doubt whether, even in the absence of section 702, the *Larson* case would prevent a court from awarding equitable relief on the basis of appellants' constitutional claims. The *Larson* Court was at some pains to note that injunctive relief against the sovereign could be obtained when *the United States* or an officer was found to have violated the Constitution . . . ." 667 F.2d 102, 108 n.2 (D.C. Cir. 1981) (emphasis added). Finally, our Circuit has noted that "[t]he court's power to enjoin unconstitutional acts by the government . . . is inherent in the Constitution itself." *Hubbard v. U.S. EPA Adm'r*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)). This Court need not decide the question because it finds that it has subject matter jurisdiction based on the § 702

C. Motion to Dismiss for Failure to State a Claim

BOP moves to dismiss both of Royer's constitutional claims, arguing that he has failed to state a claim.[12] While, procedurally, the standard for the plaintiff's pleading requirements at the motion to dismiss stage are the same for either the Procedural Due Process or First Amendment claims, the substantive standards for what must be pled differ, as discussed in more detail below.

The Federal Rules of Civil Procedure Rule require "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 does not require "'detailed factual allegations,'" but requires more than "'labels and conclusions'" or "'naked assertion[s].'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" meaning it must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Factual allegations, although assumed to be true, must still "be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The Court need not accept legal conclusions cast as factual allegations. *Iqbal*, 556 U.S. at 678.

With respect to *pro se* plaintiffs, a complaint is "'to be liberally construed' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal

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waiver of sovereign immunity. However, even assuming the Court were wrong on its jurisdictional holding, the plaintiff could re-file his complaint to take advantage of the officer suit fiction. Our Circuit has recently reaffirmed the availability of officer suits for allegedly unconstitutional federal actions. *See Pollack v. Hogan*, 2012 WL 6216433, *2 (D.C. Cir. Dec. 14, 2012) ("[U]under the so-called *Larson–Dugan* exception to the general rule [of sovereign immunity] . . . 'suits for specific relief against officers of the sovereign' allegedly acting . . . 'unconstitutionally' are not barred by sovereign immunity.").

[12] Both BOP and Royer have introduced materials beyond the pleadings. Thus the motion could be treated as a motion for summary judgment and the merits reached. However, to convert a motion to dismiss to a motion for summary judgment the parties should be given a reasonable opportunity to present all material relevant to the motion. The Court will not convert the motion and will only consider the extra-pleading materials with respect to the summary judgment motion and not the motion to dismiss.

pleadings drafted by lawyers.'" *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *cf.* Fed. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice").

"[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). However, courts should also realize that they are "ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Procunier*, 416 U.S. at 405. As the Supreme Court noted in *Procunier*, "the problems of prisons in America are complex . . . and not readily susceptible of resolution by decree." *Id.* at 404–05. "Prison administration is, moreover, a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint." *Turner*, 482 U.S. at 84–85.

Given the competing considerations at play in prisoners' rights cases, the Supreme Court in *Turner* formulated a test to evaluate the constitutional claims of prisoners that is intended to be "responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" 482 U.S. at 85. There, the Supreme Court held that four factors are relevant to whether a prison regulation affecting a constitutional right surviving incarceration withstands constitutional challenge:

> whether the regulation has a 'valid, rational connection' to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are 'ready alternatives' to the regulation.

Overton v. Bazetta, 539 U.S. 126, 132 (2003) (quoting *Turner*, 482 U.S. at 89–91)).

1. Royer Has Failed to State a First Amendment Claim

Royer invokes the First Amendment to challenge restrictions on his contacts and communications with his family. Royer argues that his freedom of speech and association have been infringed, though his claim seems ultimately to be a freedom of association claim.

Specifically, Royer points out that, in contrast to the forty hours of full contact visits per month enjoyed by general population inmates, Compl. ¶ 80, BOP has limited him to two, two-hour noncontact visits per month. If his family visits, he must talk with them through a telephone, separated by a wall of concrete, glass, and bars. Compl. ¶ 107. Royer also notes that while inmates in the general population enjoy 300 minutes of telephone time per week, he has been limited to one 15-minute call per week and may only place it on business days between 8:30am and 2:30pm. As a result, he has been effectively precluded from speaking with his school-age children for months at a time. Compl. ¶ 96. Finally, Royer points to the "total, permanent" nature of the ban on physical contact with his family as evidence of the lack of a rational relationship between BOP's goals and its policy.

According to Royer's complaint, BOP has imposed these limitations because they need to monitor his communications. However, Royer argues that the limits do not bear a rational relation to a legitimate government interest, or that the limits are an exaggerated response to any such interest. Compl. ¶ 151. BOP responds that inmates do "not retain rights inconsistent with proper incarceration," Def.'s Mem. 22, and that "freedom of association is among the rights least compatible with incarceration," *id.* at 23. Again, BOP argues that prison administrators must be able to exercise their judgment as to the appropriate means of furthering penological goals. *Id.*

The Supreme Court has acknowledged that "the Constitution protects 'certain kinds of highly personal relationships.'" *Overton*, 539 U.S. at 131 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984)). "[O]utside the prison context, there is some discussion in

[Supreme Court] cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents." *Id.* (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

However, the Court has also stated that "freedom of association is among the rights least compatible with incarceration . . . . Some curtailment of that freedom must be expected in the prison context." *Overton*, 539 U.S. at 131 (citing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125–26 (1977); *Hewitt v. Helms*, 459 U.S. 460 (1983)). In *Jones*, the Court stated:

> First Amendment associational rights . . . must give way to the reasonable considerations of penal management. . . . [N]umerous associational rights are necessarily curtailed by the realities of confinement. They may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations, whether through group meetings or otherwise, possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment.

433 U.S. at 132.

In fact, the Supreme Court, applying the *Turner* reasonableness test, appears to have already upheld regulations substantially similar to those Royer challenges. In *Overton*, the Court reversed a Sixth Circuit decision which had invalidated Michigan prison regulations pertaining to noncontact visits. 539 U.S. at 131, 137. In addition to limiting the highest security risk inmates to noncontact visits, the regulations limited the number of total visitors an inmate could receive and restricted child visitors. *Id.* at 129–30. The regulations also provided that an inmate who had committed multiple substance abuse violations while in jail could not receive any visitors other than attorneys or clergy members for a minimum of two years. *Id.* at 130. Although the Court did not discuss at length the impact that a prohibition on physical contact has on inmates

and their families, the Court found that the regulations met the *Turner* standard in that the regulation had a valid, rational connection to a legitimate government interest, alternative means were available to inmates to exercise the asserted right, accommodating the right would cause a significant reallocation of resources and would impair the prison's ability to protect all individuals inside the prison walls, and no ready alternatives undermined the reasonableness of the regulations. *Id.* at 132–36.

Although *Overton* thus appears directly on point, the Court now applies the *Turner* factors to determine whether the federal practice challenged here is reasonable.

Applying the first *Turner* factor, there certainly appears to be a valid, rational connection between the rules applied to so-called "terrorist inmates" and a legitimate government interest.[13] The Supreme Court in *Block v. Rutherford*, 468 U.S. 576 (1984), noted many of the security challenges posed by contact visits:

> Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.

Id. at 586.

Here, Royer concedes that at least one basis for BOP's practice is the interest in monitoring his communications. Compl. ¶ 109. In his Opposition to the Motion to Dismiss, he concedes that "monitoring inmates' communication is, in the abstract, a legitimate penological

[13] The Court assumes, for the sake of this First Amendment analysis, the legality of the government's "terrorist inmate" classification scheme and the accuracy of Royer's classification. Royer separately challenges the government's failure to engage in notice-and-comment rulemaking prior to implementing this scheme. Royer also separately challenges, as discussed in more detail below, whether the scheme complies with procedural due process requirements. The question before the Court with respect to Royer's First Amendment challenge is whether, assuming the legality of the BOP's classification of him as a "terrorist inmate," the resulting conditions of his confinement violate his First Amendment rights.

goal" though he contests the legitimacy of monitoring him to a greater extent than other inmates. Pl.'s Opp'n 56. In his complaint, he also quotes BOP regulations which state that control units such as the CMUs are "intended to place into a separate unit those inmates who are unable to function in a less restrictive environment without being a threat to others or to the orderly operation of the institution." Additionally, although he notes that the majority of the inmates subject to the same conditions are Muslims (40 of the 60 current or former CMU Terre Haute inmates according to his complaint), he does not assert that BOP has implemented these regulations in bad faith or for the purpose of discriminating against a particular religious group. *See* Compl. ¶ 92. Thus, there appear to be at least two legitimate government interests at stake: the need to monitor inmate communications and the need to isolate inmates that might pose a threat to others or to the orderly operation of the institution.

Royer argues BOP has failed to put forward the "legitimate government interest" it seeks to further and that thus, it would be inappropriate to evaluate this factor or to decide the larger question on a motion to dismiss. Indeed, Royer is correct that BOP's only justification for its practice appears to be that "prison administrators must be able to reasonably exercise their judgment as to the appropriate means of furthering penological goals." Nevertheless, the Supreme Court has said that the "burden . . . is not on the [government] to prove the validity of prison regulations but on the prisoner to disprove it." *Overton*, 539 U.S. at 132 (citing *Jones*, 433 U.S. at 128). This is particularly the case at the pleading stage where Royer must present facts that plausibly state a claim. Given the state of the caselaw regarding prisoners' first amendment and visitation rights, Royer has not plausibly alleged here that there is no legitimate government interest at stake, and in fact, has conceded that there is at least one legitimate government interest. Thus, the Court now turns to the remainder of the *Turner* factors.

The second *Turner* factor considers "whether alternative means are open to inmates to exercise the asserted right." Here, Royer acknowledges that, although he is prohibited from having contact visits with his family, he still retains the right to have noncontact visits, to make phone calls during business hours, and to write letters. Nevertheless, he argues that "there is no substitute for physical contact with loved ones" and that his wife would not have divorced him if BOP had not prohibited contact visits. Compl. ¶¶ 80, 117. He also asserts that phone calls are not a viable alternative for speaking with his children because the calls are limited to business hours when the children are typically in school. Thus, he states, the "'alternatives' are so restrictive . . . that they are rendered inadequate." Pl.'s Opp'n 61.

However, although the Court must accept the facts asserted as true, it need not accept Royer's legal conclusions as to what constitutes "alternative means". The Supreme Court has identified alternative means of associating to include sending letters, making phone calls, and even sending messages through others who are allowed to visit. *Overton*, 539 U.S. at 135. "Alternatives to visitation need not be ideal . . . they need only be available." *Id.* Thus, Royer has failed to plausibly allege that no alternatives exist.

The third *Turner* consideration is the impact that accommodation of the asserted right would have on guards, other inmates, and prison resources. On this point, Royer merely asserts that there would be no "ripple effect" from accommodating his demands and that such accommodation would by "eas[y] and simpl[e]." Pl.'s Opp'n 62. However, Royer provides no facts to support this assertion. The Court assumes that prison officials, in order to effectively monitor Royer's communications during these visits, would need to institute more stringent search procedures of Royer and his visitors prior to each visit and would need to have more staff on hand to monitor the interactions between Royer and his visitors.

Finally, the Court considers whether there are "ready alternatives" which undermine the reasonableness of the regulations. On this point, Royer argues that BOP could meet its goal of monitoring his visits at "no extra cost or risk to other inmates," Pl.'s Opp'n 63, because BOP has already "installed multiple cameras and hypersensitive microphones . . . [a]nd its officers thoroughly and expertly strip search all inmates both before and after contact visits." Compl. ¶ 111. However, the Supreme Court has emphasized that the inquiry regarding this factor is not whether prisons have imposed the *least restrictive* regulation but "whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Overton*, 539 U.S. at 136. Increasing the number of inmates who must be strip searched before and after each contact visit would surely increase the cost of visitation and divert attention from other priorities. Moreover, although Royer asserts that BOP has cameras and "hypersensitive" microphones, it is not self-evident that this would obviate all security concerns that might arise from contact visits, such as the covert passing of notes, hand signals, or whispered conversations. As a result, Royer has not sufficiently pled this factor either.

In summary, the Court has little trouble concluding that the restrictions on contact visits and phone calls survive Royer's First Amendment freedom of association challenge. A more difficult question is whether the alleged permanence of the restrictions raises additional concerns. For example, in *Overton*, although the Court upheld a two-year ban on visitation from anyone other than clergy members and attorneys, the Court noted that it might reach a different conclusion regarding a "*de facto* permanent ban on all visitation for certain inmates." 539 U.S. at 134; *see also Beard v. Banks*, 548 U.S. 521, 535 (2006) ("[A]s in *Overton*, we agree that 'the restriction [denying newspapers, magazines, and photographs to specially dangerous and

recalcitrant inmates] is severe,' and 'if faced with evidence that [it were] a *de facto* permanent ban . . . we might reach a different conclusion in a challenge to a particular application of the regulation.'").

However, even though Royer's complaint alleges that the restrictions applicable to him are to last for the duration of his incarceration, they do not involve a *complete* ban on visitation or communication, but rather a ban on *contact* visits and a limit on the number of visit and phone calls and time of day. Moreover, the Court in *Overton* upheld regulations that appeared to impose an indefinite ban on contact visits for inmates classified as the highest security risks. *Id.* at 130. Finally, other courts have stated that "there is no inherent, absolute constitutional right to contact visits with prisoners," *Bazzetta v. McGinnis*, 124 F.3d 774, 779 (6th Cir. 1997), *supplemented* 133 F.3d 382 (6th Cir. 1998), and our Circuit has even upheld a permanent ban on all visitation between an incarcerated man and his wife, *Robinson v. Palmer*, 841 F.2d 1151, 1156 (D.C. Cir. 1988) (holding that permanent ban on visitation between spouses after wife was caught attempting to smuggle marijuana into prison reasonably furthered legitimate government objective).[14]

Thus, the Court finds that the restrictions on Royer's communication and interaction with his family, despite appearing to be indefinite, satisfy the requirements of the First Amendment and the test the Supreme Court has set forth for inmates' constitutional challenges.

2. Procedural Due Process Claim

The Fifth Amendment provides that no person shall be "deprived of life, liberty or property, without due process of law." U.S. Const. amend. V. "The touchstone of due process is

[14] Bans on contact visits have also been upheld under the Due Process clauses. In *Block v. Rutherford*, the Supreme Court upheld, under the Fourteenth Amendment, a ban on noncontact visits for pre-trial detainees. 468 U.S. 576, 588 (1984) (concluding the ban was a reasonable, nonpunitive response to legitimate security concerns). In *Aref v. Holder*, Judge Urbina of this court dismissed Substantive Due Process claims by other "terrorist inmates" that the same restrictions at issue here violated their First Amendment right to "family integrity." 774 F. Supp. at 162–63.

protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)).

The due process clause has both substantive and procedural aspects and only procedural due process appears to be at issue here.[15] "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (internal quotation marks omitted). Thus, to state a procedural due process claim, a plaintiff must plead that a life, liberty, or property interest was at stake, that government action resulted in a deprivation or infringement of that interest, and that the plaintiff did not receive the process he was due.

As with other prisoners' rights cases, unique concerns arise in the context of prisoners' due process claims because a prisoner has already been deprived of much of his liberty through the process of criminal conviction and incarceration. However, prisoners are "not wholly stripped of constitutional protections" upon conviction and retain Due Process protections against arbitrary deprivations of liberty. *Hatch v. Dist. of Columbia*, 184 F.3d 846, 849 (D.C. Cir. 1999) (citing *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)).

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[15] The Supreme Court's substantive due process cases interpret the Fifth and Fourteenth Amendments' guarantee of due process to forbid the government from infringing "certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (citations omitted). The Supreme Court has considered some substantive due process claims to prison regulations. *See, e.g.*, *Washington v. Harper*, 494 U.S. 210 (1990) (holding that treatment of prisoner against his will with antipsychotic drugs did not violate substantive due process if the prisoner was dangerous to himself or others and treatment was in his interest). In so doing, the Court utilized the *Turner* test to evaluate the constitutionality of the regulations at issue. *See also Aref v. Holder*, 774 F. Supp. 2d 147, 162–63 (D.D.C. 2011) (applying *Turner* test to determine whether the plaintiffs' had sufficiently alleged their substantive due process claim). However, the appropriate test for *procedural* due process challenges is not the *Turner* test, but the more typical procedural due process inquiry of whether the government has deprived plaintiff of a liberty interest without adequate process. *See Harper*, 494 U.S. at 228; *see also Aref*, 774 F. Supp. 2d at 163–67.

a. Royer Has Sufficiently Alleged a Liberty Interest

Some liberty interests flow from the Due Process Clause itself. *See Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (recognizing that a prisoner has a "significant liberty interest in avoiding unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment"). Other liberty interests may be created by state or federal laws or practices regulating the terms or conditions of a prisoner's confinement. *See Sandin v. Conner*, 515 U.S. 472, 483–84; *Wilkinson*, 545 U.S. at 221. Royer asserts that his liberty interest flows from the latter source. Compl. ¶¶ 2, 86–87, 148.

In *Sandin v. Conner*, the Supreme Court considered whether an inmate's placement in disciplinary segregation for 30 days implicated a state-created liberty interest. 515 U.S. 472. The Court held that it did not, finding that the conditions substantially mirrored those in similar, discretionary confinement such as administrative segregation. *Id.* at 486–87. In summarizing its holding, the Court noted that state-created liberty interests "will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

However, the Supreme Court has not yet defined what constitutes the "ordinary incidents of prison life" or, in other words, against what baseline courts should evaluate conditions of confinement to determine whether they are atypical and significant. *See Wilkinson*, 545 U.S. at 223 (describing the lack of agreement among the Courts of Appeals on the issue as well). Nevertheless, the D.C. Circuit has considered the question and this Court relies on its analysis.

In *Hatch v. Dist. of Columbia*, the D.C. Circuit considered whether placement of an inmate in disciplinary and administrative segregation for seven months implicated Due Process.

184 F.3d 846. During these seven months, the plaintiff was "[c]onfined to his cell for twenty-three and a half hours per day on weekdays and all forty-eight hours on weekend[s]," "had no outdoor recreation," and "was not allowed to work or visit the library, gym, health clinic, psychological services, mailroom, clothing and bedding exchange, or culinary unit." *Id.* at 848. He was denied access to legal phone calls for ninety days. *Id.* The circuit court reversed the district court's grant of summary judgment for the government and remanded for further fact-finding. The court concluded that the "ordinary incidents of prison life" should be evaluated in relation to the "most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." *Id.* at 856. The analysis requires a "factual determination of the most restrictive conditions prison officials '*ordinarily*' or '*routinely*' impose" on prisoners serving similar sentences.[16] *Id.* at 857 (emphasis added).[17]

In *Hatch*, the Circuit concluded that administrative segregation was an "ordinary incident" of life at the prison and should thus be included as part of the baseline for determining whether the segregative confinement implicated a constitutionally protected liberty interest. *Id.* at 856.

However, the court noted, in addition to considering the nature of the deprivation in relation to this baseline, that courts must also consider the length of the deprivation and whether the segregation was within the range of what would be expected in light of the length of the sentence the prisoner is serving. *Id.* Because the possibility of transfer to another prison is one

[16] The Circuit did not explicitly define what constitutes a "similar sentences" but did emphasize the need for courts to consider the *length* of the sentence.

[17] While *Sandin* and *Hatch* dealt with Fourteenth Amendment Due Process claims and state prisons, there appears no reason why the analysis should not apply to Fifth Amendment Due Process claims and federal prisons. Indeed, other circuits have applied *Sandin* to due process claims against federal officials. *See, e.g.*, *Magluta v. Samples*, 375 F.3d 1269 (11th Cir. 2004); *Jordan v. Fed. Bureau of Prisons*, 191 Fed. Appx. 639 (10th Cir. 2006) (unpublished).

of the ordinary incidents of prison life, the baseline need not be limited to conditions at the particular prison in which the inmate is confined. However, neither need it be so broad as to consider conditions in any prison nationwide, including those "especially restrictive" prisons where "all inmates are locked down almost the entire day." *Id.* at 856–57.

BOP disputes Royer's argument that his classification imposes an "atypical and significant hardship" and that it is outside what a prisoner may "reasonably expect to encounter as a result of his or her conviction in accordance with due process." Def.'s Mem. 19.

Royer suggests that the required fact-specific inquiry is not possible or appropriate at the motion to dismiss stage. Pl.'s Opp'n 36. The Court agrees that at this stage, it need not determine whether Royer's conditions of confinement actually *are* harsh and atypical in comparison with administrative segregation and other conditions ordinarily and routinely imposed. Rather, the Court need only determine whether the complaint contains sufficient factual matter, accepted as true, to *plausibly state a claim* that the conditions are harsh and atypical and thus implicate a liberty interest. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *see also Marion v. Columbia Correction Inst.*, 559 F.3d 693, 699 (7th Cir. 2009) (reversing the dismissal of a prisoner's due process claim because, without a factual record, the court could not determine whether the actual conditions of the plaintiff's confinement resulted in the implication of a liberty interest).

The Court holds that Royer has plausibly alleged harsh and atypical conditions. First, as detailed above, Royer's complaint alleges that he has been segregated from the general population for over six years and that during this time he has been subject to restrictions on the

recreational, religious, and educational opportunities normally available to prison inmates. Royer's contacts with his family have been limited to one 15-minute phone call per week during business hours, when his school-age children are in school. Finally, he is limited to two, two-hour noncontact visits per month. It is true that Royer's complaint does not specifically outline the "most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." However, Royer did note that while in the SHU at FCI Greenville, he was "isolated to a greater extent than is typical for the SHU," that he was not allowed to exercise in the recreation cages at the same time as other SHU inmates, that staff placed sandbags in front of his cell door, and that unlike other SHU inmates, he was not permitted to have contact visits. Compl. ¶ 101. He also asserted that BOP had permanently imposed upon designated "terrorist inmates" the "harshest conditions of confinement in the federal prison system." Compl. ¶ 106.

Even assuming that the conditions alleged by Royer are no more restrictive than the most restrictive conditions normally imposed, for example in administrative segregation, Royer's complaint plausibly alleges that they are "harsh and atypical" because of their duration. In numerous parts of his complaint, he alleges that the conditions are permanent and are intended to remain in place for the duration of his 20-year sentence, or for a total of about 16.5 years. *See Wilkinson*, 545 U.S. at 224 (noting that conditions in a supermax facility "likely would apply to most solitary confinement" but that unlike solitary confinement generally, placement in a supermax facility is indefinite, and relying on this in part to find that conditions were "harsh and atypical").[18]

[18] Judge Urbina also found that the conditions to which "terrorist inmates" are subject plausibly could "constitute an atypical and significant hardship" although he appears to have used conditions in the general population as the baseline for comparison. *See Aref*, 774 F. Supp. 2d at 165–66.

BOP launches several additional arguments in support of its motion to dismiss that the Court does not find persuasive. First, it argues that the Attorney General has discretion to "designate the institution of an inmate's confinement." Def.'s Mem. 19. While this is true, *see Meachum v. Fano*, 427 U.S. 215, 225 (1976) (confinement in another State is "within the normal limits or range of custody which the conviction has authorized the State to impose"); *Olim v. Wakinekona*, 461 U.S. 238, 247 (1983) ("[I]t is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced . . . ."), Royer does not challenge the *location* of his confinement. Instead he argues that the "the atypical conditions of confinement are applied to [him] regardless of" where he is confined. Compl. ¶ 86. Next, BOP argues that its regulations concerning classification, designation, and transfer do not limit its discretion so as to create a legitimate expectation that a prisoner will be assigned to a particular facility. Def.'s Mem. 20. However, this is no longer the appropriate inquiry for determining whether a prisoner has liberty interest. The Supreme Court in *Sandin* "abandon[ed] the approach" to prisoner due process claims of "search[ing] for a negative implication from mandatory language in prisoner regulations." 515 U.S. at 483 & n.5. Instead the Court adopted the "atypical and significant hardship" test discussed above.

Thus, the Court believes that Royer has stated a plausible claim that his classification as a "terrorist inmate" and the associated, indefinite conditions of confinement, are harsh and atypical and thus implicate a liberty interest.

b. Royer Has Sufficiently Alleged Denial of Process Due

Due process requirements are "flexible and call[] for such procedural protections as the particular situation demands . . . ." *Wilkinson*, 545 U.S. at 224 (internal quotation marks

omitted). Thus, in determining what process is due, courts rely not on rigid rules, but on the framework articulated in *Mathews v. Eldridge*. Under *Mathews*, courts consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

The first *Mathews* factor, the private interest at stake, is to be evaluated "within the context of the prison system and its attendant curtailment of liberties." *Wilkinson*, 545 U.S. at 225. "[T]he procedural protections to which [prisoners] are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all." *Id.* The second factor looks to the risk of erroneous deprivation through the procedures used and the value of any additional safeguards. The Supreme Court has stated that notice of the factual basis for the government's decision and a "fair opportunity for rebuttal" are "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Id.* at 226. The third factor, the government's interest and burden of additional procedures, is a "dominant consideration" in the context of prison management. *Id.* at 227. The government must ensure the safety of guards and other prison personnel, other inmates, and the public. It must be able to prevent prison violence. In the case of inmates who purportedly have links to terrorist organizations, the danger to the public is all the greater. Finally, the simple issue of time and money and the resources necessary to put in place additional procedures are relevant.

Hewitt v. Helms specifies the minimum procedures for placing an inmate in segregative conditions if he has a liberty interest in avoiding such segregation. *See Hatch*, 184 F.3d at 852 (describing *Hewitt*'s minimum procedures). Those procedures include "some notice of the

charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Hewitt* 459 U.S. at 476. "Although a hearing need not occur prior to confinement in administrative segregation, it 'must occur within a reasonable time following an inmate's transfer.'" *Hatch*, 184 F.3d at 852 (quoting *Hewitt*, 459 U.S. at 476 n.8.

The Court need not linger over the balance of these factors and the exact process required because the complaint plausibly alleges that any process provided by BOP was inadequate. Royer alleges that he was taken from his cell "without warning" and only provided with an "Administrative Detention Order" stating that he was being moved to the SHU because he was "pending classification." Compl. ¶ 88. Royer was apparently told at some point (or learned) that he had been classified as a "terrorist inmate," Compl. ¶¶ 81, 101, though it is unclear when or how this occurred. Royer states that he was never provided with a hearing, with notice of the criteria for release from the conditions, or with notice of the projected date for release from those conditions. Compl. ¶ 105.

Given these allegations, it is unclear that the prison ever directly provided him with notice of the reasons for his segregation and it appears that he has had no opportunity for a hearing. Thus, his complaint plausibly alleges that he was denied due process.

I. CONCLUSION

In summary, the Court DENIES WITHOUT PREJUDICE BOP's Motion for Summary Judgment regarding Royer's Privacy Act claims. The Court finds that it has subject matter jurisdiction to consider Royer's constitutional claims and thus DENIES BOP's motion to dismiss for lack of jurisdiction. With respect to those constitutional claims, the Court GRANTS BOP's

motion to dismiss the First Amendment claim for failure to state a claim and DENIES BOP's motion to dismiss Royer's Due Process claims.

Signed by Royce C. Lamberth, Chief Judge, on March 28, 2013.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL TODD ROYER	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil No. 10-1996 (RCL)**
	)	
FEDERAL BUREAU OF PRISONS	)	
	)	
Defendant.	)	
	)	

ORDER

Before the Court are defendant Federal Bureau of Prison's [BOP's] Motion [91] to Dismiss or for Summary Judgment and plaintiff Randall Todd Royer's Opposition [98]. Also before the Court are BOP's Motion [94] for *In Camera* Review and Royer's Opposition [96] thereto, and Royer's Motion [103] for Order Directing Clerk to Respond to Plaintiff's Inquiry.

For the reasons explained in the accompanying Memorandum Opinion issued this date, it is hereby

ORDERED that BOP's Motion [91] be DENIED as to its motion to dismiss for lack of jurisdiction; and it is further

ORDERED that BOP's Motion [91] be DENIED with respect to its motion to dismiss Royer's Due Process claims; and it is further

ORDERED that BOP's Motion [91] be GRANTED with respect to its motion to dismiss Royer's First Amendment claims and that Mr. Royer's First Amendment claims are DISMISSED; and it is further

ORDERED that BOP's Motion [91] be DENIED WITHOUT PREJUDICE as to Royer's Privacy Act claims; and it is further

ORDERED that Royer's Freedom of Information Act (FOIA) claims, are DISMISSED; and it is further

ORDERED that BOP's Motion [94] for *In Camera* Review be DENIED as MOOT; and it is further

ORDERED that Royer's Motion [103] for Order Directing Clerk to Respond be DENIED as MOOT; and it is further

ORDERED that each party shall each submit, within twenty days of the date of this Order, a proposed schedule for any additional dispositive motions and/or discovery and that the parties shall address the proposed scope of any discovery.

SO ORDERED.

Signed by Royce C. Lamberth, Chief Judge, on March 28, 2013.

Defendant: RANDALL TODD ROYER
Case Number: 1:03CR00296-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payments set out below.

Count	Special Assessment	Fine
1	$100.00	
2	$100.00	
Total	**(Paid) $200.00**	

FINE

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The special assessment is due in full immediately. If not paid immediately, the Court authorizes the deduction of appropriate sums from the defendant's account while in confinement in accordance with the applicable rules and regulations of the Bureau of Prisons.

Any special assessment, restitution, or fine payments may be subject to penalties for default and delinquency.

If this judgment imposes a period of imprisonment, payment of Criminal Monetary penalties shall be due during the period of imprisonment.

All criminal monetary penalty payments are to be made to the Clerk, United States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

Page 477 of 510

Withheld pursuant to exemption

(b)(6),(b)(7)(C)

of the Freedom of Information and Privacy Act

SO ORDERED this ____ day of _____, 2014.

_____
HON. ROYCE C. LAMBERTH
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL TODD ROYER, Plaintiff, v. FEDERAL BUREAU OF PRISONS, Defendant.	Civil Action Nos. 10-1196 (RCL) 10-1996 (RCL)

BOP'S CERTIFICATION OF RECORDS MODIFICATION

Pursuant to Federal Rules of Civil Procedure ("Rules") 26 and 33 and Section 1746 of Title 28 of the U.S. Code, I, ALMA G. OBEN on behalf of the Federal Bureau of Prisons ("BOP") hereby states as follows:

1. I am an attorney at the Litigation Branch, Office of General Counsel, BOP. I have worked for BOP since September 6, 1994, and in the Litigation Branch since January 2004.

2. I am the lead BOP attorney assigned to the above captioned matter.

3. I make this certification regarding the Memorandum dated April 7, 2014, from Frank Strada, Assistant Director, Correction Programs Division, BOP to All Staff Concerned bearing the subject "Records Correction -- Randall Royer, Reg. No. 46812-083; Instructions for BOP staff to correct BOP records of inmate Royer regarding his affiliation with a Bosnian terrorist organization" (the "Memorandum").

4. I make this certification based on communications I had with BOP staff responsible for maintaining records concerning Royer, specifically information maintained in Royer's Inmate Central File, information maintained by BOP's Special Investigative Services ("SIS"), information maintained in TruIntel (which I understand is now the name of BOP's

Prison Security and Intelligence Record System), and information maintained by offices, facilities, and other locations that BOP identified in discovery in this action as having records concerning Royer.

I hereby certify based on the efforts described above and to the best of my knowledge, information, and belief as of this date BOP staff have taken reasonable efforts to comply with the directions set forth in the Memorandum to modify records and maintain copies of the Memorandum, and that BOP has no present intent to use or rely upon the information described in the Memorandum to make any future decisions regarding Royer.

Further declarant sayeth not.

Alma G. Oben
Assistant General Counsel
Federal Bureau of Prisons

June 17, 2014
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL TODD ROYER, Plaintiff, v. FEDERAL BUREAU OF PRISONS, Defendant.	Civil Action Nos. 10-1196 (RCL) 10-1996 (RCL)

STIPULATION OF SETTLEMENT AND DISMISSAL

The parties, Plaintiff Randall Todd Royer ("Royer" or "Plaintiff") and Defendant Federal Bureau of Prisons ("BOP" or "Defendant") (collectively, "the parties"), by and through their respective counsel, hereby stipulate and agree and file this Stipulation of Settlement and Dismissal ("Stipulation") as follows:

1. The parties do hereby agree to settle, compromise, and dismiss the above-entitled action under the terms and conditions set forth herein.

2. The parties agree that BOP's reasonable efforts detailed in BOP's Certification of Records Modification dated June ___, 2014, to modify records and take other actions consistent with the Memorandum dated April 7, 2014, from Frank Strada, Assistant Director, Correction Programs Division, BOP to All Staff Concerned bearing the subject "Records Correction -- Randall Royer, Reg. No. 46812-083; Instructions for BOP staff to correct BOP records of inmate Royer regarding his affiliation with a Bosnian terrorist organization," is a material inducement to this Stipulation.

3. Defendant shall pay Plaintiff a lump sum of Twelve Thousand dollars and no cents ($12,000.00) and shall pay Plaintiff's attorneys Twenty-Eight Thousand dollars and no

cents ($28,000.00) (collectively, the "Settlement Amounts") in settlement of this matter pursuant to the terms described herein. ~~Defendant shall provide Plaintiff a declaration confirming that the corrections required by the April 7, 2014 memorandum issued by BOP's Assistant Director, Correctional Programs Division, to all staff concerned, bearing the subject "Record Correction - Randall Royer, Reg. No. 46812-083," have been made. Defendant shall provide the declaration within two weeks of the filing of this Stipulation.~~

4. Upon filing of this Stipulation, Defendant will promptly cause the documentation necessary to effectuate these payments to be completed and transmitted. Payment of sums to Plaintiff shall be made to Plaintiff's inmate trust fund account pursuant and subject to the authorities, rules, and regulations regarding such account. Payment of sums to Plaintiff's attorneys shall be made by electronic funds transfer pursuant to instructions exchanged by counsel for the parties.

5. This Stipulation provides for the full and complete satisfaction of all claims that have been or could have been asserted by Plaintiff in the above-captioned civil actions, including without limitation all claims for compensatory damages, back pay, costs, attorneys' fees, and interest or other compensation for delay, and Plaintiff agrees not to hereafter assert any claim or institute or prosecute any civil action or other proceeding against the Defendant, the United States, their agencies or officials, or their present or former employees or agents, in either their official or individual capacities, with respect to any event complained of therein, except as provided in Paragraph 5. Plaintiff hereby fully and forever releases and discharges the Defendant, the United States, their agencies or officials, and their present and former employees and agents, in their official and individual capacities, from any and all rights and claims of every kind, nature, and description, whether presently known or unknown, that Plaintiff now has or

may have arising out of or in connection with any event regarding, concerning, or related to the matters alleged in the complaints in the above-captioned actions and occurring on or before the date on which he has executed this Stipulation, except as provided in Paragraph 5. In connection with this release, Plaintiff acknowledges that he is aware that he may hereafter discover rights or claims presently unknown and unsuspected, or facts in addition to or different from those that he now knows with respect to the rights and claims released herein.

6. Notwithstanding the breadth of Paragraph 4, and for the avoidance of doubt, Paragraph 4 shall not apply to any claims premised upon any future actions to assign, designate, reassign, or re-designate Plaintiff to BOP facilities or custodial units (including, but not limited to, a Communications Management Unit), or to otherwise impose on Plaintiff new conditions of confinement. Similarly, Paragraph 4 shall not apply to any claims premised upon BOP or its agents or officials taking any potential future actions concerning Plaintiff based on or in reference to information that Plaintiff contends is false or misleading in records maintained by BOP, including but not limited to information regarding the allegedly erroneous contention that Plaintiff was affiliated with a Bosnian terrorist organization or had a connection with an alleged Al Qaeda operative named Abu Zubair Al-Madani or the allegedly erroneous claim that Plaintiff had an affiliation with Al Qaeda based on his prior association with a Bosnian military unit known as Abu Zubair. Further, Paragraph 4 shall not apply to any claims Plaintiff may have arising out of or in connection with the application of a "Greater Security" management variable to Plaintiff.

7. This Stipulation shall represent full and complete satisfaction of all claims arising from the allegations set forth in the Complaint filed in this action, including full and complete satisfaction of all claims for costs and attorneys' fees that have been, or could be, made in this

case, including, but not limited to, all claims arising from any predecessor administrative processes, litigation before this Court, and any other proceedings involving the claims raised in this action.

8. This Stipulation shall not constitute an admission of liability or fault on the part of BOP or the United States or their agents, servants, or employees, and is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

9. This Stipulation shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

10. The parties agree that this Stipulation will not be used as evidence or otherwise in any pending or future civil or administrative action against Defendant or the United States or any agency or instrumentality of the United States, except to the extent such action concerns breaches of this Stipulation.

11. Execution of this Stipulation by counsel for Plaintiff and by counsel for Defendant shall constitute a dismissal of this action with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) subject to the exceptions noted above in Paragraph 5, except that the Court ~~shall~~ may retain jurisdiction to enforce the terms of this Stipulation.

12. Nothing in this Stipulation constitutes an agreement by Defendant or the United States concerning the characterization of the Settlement Amounts for purposes of the Internal Revenue laws, Title 26 of the United States Code. Plaintiff and his attorneys further acknowledge that they have not relied on any representations by Defendant or Defendant's employees or agents as to the tax consequences of this Stipulation or any payments made by or on behalf of Defendant hereunder. Plaintiff and his attorneys shall be solely responsible for

compliance with all federal, state, and local tax filing requirements and other obligations arising from this Stipulation that are applicable to Plaintiff and his attorneys, respectively. _Plaintiff takes the position that the $12,000 that Defendant will pay Plaintiff is in settlement of claims for compensatory damages arising from actions of the Defendant alleged to be unlawful under federal or common law providing for the enforcement of civil rights, and the $28,000 that Defendant will pay Plaintiff's attorneys is in settlement of a claim for attorney's fees under a fee-shifting statute.

13. This Stipulation contains the entire agreement between the parties hereto and supersedes all previous agreements, whether written or oral, between the parties relating to the subject matter hereof. No promise or inducement has been made except as set forth herein, and no representation or understanding, whether written or oral, that is not expressly set forth herein shall be enforced or otherwise be given any force or effect in connection herewith.

14. The terms of this Stipulation may not be modified or amended, and no provision hereof shall be deemed waived, except by a written instrument signed by the party to be charged with the modification, amendment, or waiver.

15. The parties acknowledge that the preparation of this Stipulation was collaborative in nature, and so agree that any presumption or rule that an agreement is construed against its drafter shall not apply to the interpretation of this Stipulation or any term or provision hereof.

16. Each party agrees to take such actions and to execute such additional documents as may be necessary or appropriate to fully effectuate and implement the terms of this Stipulation.

17. This Stipulation shall be governed by the laws of the District of Columbia, without regard to the choice of law rules utilized in that jurisdiction, and by the laws of the United States.

18. This Stipulation may be executed in counterparts as if executed by all parties on the same document.

* * *

Respectfully submitted,

FOR PLAINTIFF RANDALL TODD ROYER:

By: _____ Date: _____

MICHAEL T. KIRKPATRICK
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Attorneys for Plaintiff Randall Todd Royer

By: _____ Date: _____

RANDALL TODD ROYER
Inmate Register No. 46812-083
Petersburg Medium FCI
1060 River Road
Hopewell, VA 23860

Plaintiff

FOR DEFENDANT FEDERAL BUREAU OF PRISONS:

RONALD C. MACHEN JR., D.C. Bar #447889
United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

By: _____ Date: _____

BRIAN P. HUDAK
Assistant United States Attorney
555 Fourth Street, NW
Washington, DC 20530
(202) 252-2549

Attorneys for the Federal Bureau of Prisons

SO ORDERED this ____ day of _____, 2014.

_____
HON. ROYCE C. LAMBERTH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEVIN C. FORD
2826 28th STREET, S.E.
APARTMENT 1
WASHINGTON, D.C. 20020

Plaintiff,

v.

THE UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20530-0001

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UNITED STATES PAROLE COMMISSION
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SAHER KHAN
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HELEN HERMAN
CASE SERVICES ADMINISTRATOR
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FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Case No.: 1:10-cv-01517

LORI GOBBLE)
CASE OPERATIONS ANALYST)
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)
JOANN KELLEY)
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633 INDIANA AVENUE, N.W.)
WASHINGTON, D.C. 20004-2902)
)
VERNA YOUNG)
SUPERVISING COMMUNITY SUPERVISION)
OFFICER)
COURT SERVICES AND OFFENDER SUPERVISION)
AGENCY FOR THE DISTRICT OF COLUMBIA)
633 INDIANA AVENUE, N.W.)
WASHINGTON, D.C. 20004-2902)
)
JOHN OR JANE DOES 1-2)
UNNAMED OFFICERS AND EMPLOYEES)
FEDERAL BUREAU OF PRISONS)
DESIGNATION & SENTENCE COMPUTATION)
CENTER)
346 MARINE FORCES DRIVE)
GRAND PRAIRIE, TX 75051)
_____)

FIRST AMENDED COMPLAINT

Plaintiff, Kevin C. Ford, by and through his attorneys, brings the following action for damages arising out of the United States Constitution and the laws of the United States and the District of Columbia, under 42 U.S.C. § 1983, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and the Federal Tort Claims Act ("FTCA"), and alleges as follows:

NATURE OF THE ACTION

1. This is an action to recover for the unlawful incarceration and supervised release of Plaintiff Kevin C. Ford. Over the course of four years, Mr. Ford was forced to endure an unconscionable cycle of wrongful incarceration and supervised release, which was caused by the erroneous and negligent acts of a host of federal government officers and employees. Mr. Ford was improperly imprisoned and subjected to unlawful supervised release beginning on July 26, 2004, when he was arrested for violations of a supervised release sentence that had already expired, and remained in a vicious cycle of unlawful incarceration and supervised release until September 10, 2009, when he obtained a writ of *habeas corpus* from the United States District Court for the District of Columbia.

2. At no point throughout Mr. Ford's cycle of wrongful incarceration and supervised release was Mr. Ford ever convicted of a new crime. The decision of the United States Parole Commission to issue an arrest warrant on February 17, 2004 was based solely on the erroneous and negligent miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

3. Because Mr. Ford's supervised release sentence expired before the arrest warrant was issued on February 17, 2004, *see Ford v. Caulfield*, 652 F. Supp. 2d 14, 20 (D.D.C.

2009), the United States Parole Commission lacked jurisdiction to issue the warrant, which rendered Mr. Ford's ensuing three incarcerations and supervised release periods unlawful.

4. As a result of Defendants' wrongful actions, Mr. Ford unjustly remained under the custody and supervision of the United States Parole Commission, the United States Bureau of Prisons, and the Court Services and Offender Supervision Agency for more than three years, enduring a hapless cycle of continuous detention and unlawful supervised release.

5. This cycle of incarceration and supervised release, which directly stemmed from the issuance of an unlawful arrest warrant by an entity that lacked jurisdiction over Mr. Ford, violated Mr. Ford's constitutional rights under the Fourth and Fifth Amendments, as well as his rights under the FTCA.

JURISDICTION AND VENUE

6. This Court has jurisdiction under 28 U.S.C. § 1331 and the U.S. Constitution.

7. Venue is proper in this district under 28 U.S.C. § 1391. A substantial part of the events or omissions alleged herein occurred within the District of Columbia.

8. Jurisdiction and venue are also appropriate before this Court pursuant to the FTCA, 28 U.S.C. § 1346(b) and 28 U.S.C. § 1402(b).

9. On April 6, 2010, Mr. Ford complied with 28 U.S.C. § 2675 by mailing a Form 95 Claim for Damage, Injury, or Death, as well as supporting materials, to the Federal Bureau of Prisons, the United States Parole Commission, and the Court Services and Offender Supervision Agency.

10. On May 24, 2010, the United States Parole Commission, through the United States Department of Justice, Civil Division, Tort Branch, notified Mr. Ford that it had received and processed his Form 95 Claim on April 19, 2010.

11. On June 22, 2010, the Bureau of Prisons acknowledged that it had received and processed Mr. Ford's Form 95 claim on May 20, 2010.

12. On August 31, 2010, the Court Services and Offender Supervision Agency notified Mr. Ford that it had received and processed his Form 95 Claim on April 20, 2010.

13. On November 20, 2010, the six month jurisdictional waiting period expired, and Mr. Ford's claims have been left without action. Consequently, the institution of this FTCA action is timely.

PARTIES

14. Plaintiff Kevin C. Ford ("Mr. Ford") is a resident of the District of Columbia.

15. Defendant United States of America is the proper defendant under the FTCA and is named as a defendant by and through the actions of the following agencies' employees and officers:

(a) United States Parole Commission ("USPC");

(b) Court Services and Offender Supervision Agency ("CSOSA");

(c) Federal Bureau of Prisons ("BOP").

16. Defendant Cranston Mitchell was, at all relevant times to this Complaint, a USPC commissioner and is named in his individual capacity.

17. Defendant Isaac Fulwood was, at all relevant times to this Complaint, a USPC commissioner and is named in his individual capacity.

18. Defendant Saher Khan was, at all times relevant to this Complaint, a CSOSA Community Supervision Officer and is named in his individual capacity.

19. Defendant Helen A. Herman was, at all times relevant to this Complaint, a USPC Case Services Department Administrator and is named in her individual capacity.

20. Defendant Lori Gobble was, at all times relevant to this Complaint, a USPC Case Services Department Administrator and is named in her individual capacity.

21. Defendant Joann L. Kelley was, at all times relevant to this Complaint, a USPC case analyst and is named in her individual capacity.

22. Defendant Jequan S. Jackson was, at all times relevant to this Complaint, a USPC case analyst and is named in her individual capacity.

23. Defendant Jessica Stigall was, at all times relevant to this Complaint, a CSOSA Community Supervision Officer and is named in her individual capacity.

24. Defendant Verna Young was, at all times relevant to this Complaint, a CSOSA Supervising Community Supervision Officer and is named in her individual capacity.

25. Defendants John or Jane Does 1-2 are persons with names currently unknown who were, at all times relevant to this Complaint, employees of the BOP, who calculated the duration of Mr. Ford's sentence of imprisonment and supervised release that resulted in the USPC's issuance of an arrest warrant on February 17, 2004. Defendants John or Jane Does 1-2 are named in their individual capacities.

26. The employees and officers of the USPC, the CSOSA, and the BOP acted under color of D.C. law pursuant to the National Capital Revitalization and Self-Government Improvement Act of 1997 ("the Revitalization Act"). *See* D.C. Code §§ 24-131, 133. The Revitalization Act transferred parole supervision functions to CSOSA and parole decision-making functions to the USPC. *Id.* The statute further provides that D.C. Code offenders "shall be designated by the Bureau of Prisons to a penal or correctional facility operated or contracted by the Bureau of Prisons. ..." *Id.*, § 24-101(a). According to the BOP Policy Statement, the BOP is responsible for conducting its own calculations of sentences for people

under its custody. In particular, a thorough review of all sentencing material must be conducted to include over-served time and jail credit for supervised release violators.

FACTUAL ALLEGATIONS

27. On September 25, 2001, Mr. Ford was arrested and charged with distribution of heroin. Mr. Ford remained in custody on this charge from September 25, 2001 until October 17, 2001. After being jailed for 23 days, Mr. Ford was released on October 17, 2001 pursuant to supervisory custody.

28. On October 31, 2001, a bench warrant was issued for Mr. Ford after he did not appear for his arraignment. Mr. Ford did not appear at the arraignment because he was in custody at the Fairfax County, Virginia jail at that time. The bench warrant was executed on May 6, 2002 and Mr. Ford was held in custody without bond.

29. On September 17, 2002, Mr. Ford pled guilty to attempted distribution of heroin and was sentenced to one year in jail plus ninety days of supervised release. The sentence was suspended to all but time already served plus twelve months of supervised probation. The first three months of the supervised probation were to be served at the halfway house where Mr. Ford was already located.

30. Mr. Ford served his first three months of supervised probation at the halfway house and was released from the halfway house on December 17, 2002 on supervised probation. As of this date, Mr. Ford had served 248 days of time on the original one year sentence, comprised of 23 days in 2001 and 225 days in 2002.

31. On May 22, 2003, an employee of CSOSA submitted a probation violation report to the Superior Court of the District of Columbia for an alleged violation of Mr. Ford's probation. On June 11, 2003, the Superior Court issued a show cause order to determine

whether Mr. Ford's probation should be revoked or modified. When Mr. Ford did not appear at the show cause hearing, a bench warrant was issued for his arrest on June 20, 2003. The bench warrant was executed on July 7, 2003, and Mr. Ford was held in the custody of the D.C. Department of Corrections without bond pending disposition of the alleged probation violation.

32. Mr. Ford's probation was revoked at a sentencing hearing on July 24, 2003, which resulted in a sentence of one year in prison with credit for time served and three months of supervised release. From July 7, 2003 until his probation was revoked on July 24, 2003, Mr. Ford was in the custody of the D.C. Department of Corrections. Part of that time was spent receiving treatment for leg ulcers at Howard University Medical Center. Including the time Mr. Ford was confined pending disposition of the probation violation, Mr. Ford had already served 265 days (23 days in 2001, 225 days in 2002, and 17 days in 2003) and should have been released on November 1, 2003, after serving an additional 100 days of prison time. However, Mr. Ford was not released from D.C. Department of Corrections custody until December 17, 2003. Defendants calculated his supervised release sentence to begin on December 17, 2003, rather than on November 1, 2003, when he should have been released from jail.

33. This miscalculation occurred notwithstanding the fact that Defendants knew or should have known of the pervasive overcrowding throughout D.C. correctional facilities, and the substandard recordkeeping practices of these facilities. Indeed, Mr. Ford spent part of his unlawful incarceration at the Montgomery Detention Center, with whom the District of Columbia had contracted to relieve some of the overcrowding pressure on its jails. The widespread crowding and poor recordkeeping practices throughout the D.C. corrections facilities have been publicized by various reports, injunctions and settlement agreements.

34. On February 17, 2004, despite the fact that Mr. Ford's sentence of supervised release had expired and Mr. Ford was no longer subject to the authority of the USPC, the USPC issued a warrant for Mr. Ford based on alleged violations of the terms of his supervised release. Mr. Ford was arrested pursuant to the February 17, 2004 warrant on July 26, 2004. Although Mr. Ford thereafter agreed to a consent disposition with the USPC under which Mr. Ford was sentenced to a new twelve-month term of imprisonment in the BOP, to be followed by 48 months of supervised release, Mr. Ford never waived his challenge to being under the jurisdiction of the USPC. After serving the new term of imprisonment, Mr. Ford was released from a BOP prison facility on June 29, 2005 and began serving his new sentence of supervised release.

35. On August 17, 2006, Mr. Ford was subsequently taken into custody for alleged violations of the terms of the supervised release. Mr. Ford and the USPC then agreed to another consent disposition under which Mr. Ford was sentenced to a new term of twelve months in prison, to be followed by thirty-six months of supervised release.

36. On March 19, 2007, while held at a BOP contract facility in North Carolina, Mr. Ford filed a *pro se* petition for a writ of *habeas corpus* in the United States District Court.

37. On August 10, 2007, Mr. Ford was released from prison and began serving his thirty-six month term of supervised release.

38. On February 26, 2008, Mr. Ford was again taken into custody for alleged violations of the terms of his supervised release. Mr. Ford was thereafter sentenced to a new term of twelve months in prison – this time without any supervised release to follow. Mr. Ford appealed this latest sentence of imprisonment, which resulted in the USPC's decision to reduce the prison sentence to nine months, to be followed by twelve months of supervised release.

39. Mr. Ford's *habeas* petition that was filed on March 19, 2007, was still pending before the District Court. On November 15, 2008, Mr. Ford was released from a BOP prison facility and began serving his twelve-month sentence of supervised release.

40. On September 10, 2009, after Mr. Ford had been released from prison, but before his term of supervised release expired, the District Court granted Mr. Ford's petition for a writ of *habeas corpus* and issued an order releasing Mr. Ford from the remainder of the supervised release imposed by the USPC. The District Court determined that "the criminal sentence the Superior Court imposed on Ford expired before February 17, 2004, and that therefore Ford was not under the jurisdiction of the Parole Commission on February 17, 2004. It necessarily follows that the Commission's February 17, 2004 arrest warrant was void, and that neither Ford's arrest on July 26, 2004 pursuant to the Commission's warrant nor anything that flowed from that arrest was duly authorized by law." *Ford*, 652 F. Supp. 2d at 22.

CLAIMS FOR CONSTITUTIONAL VIOLATIONS – 42 U.S.C. § 1983 and *Bivens*

41. Plaintiff asserts causes of action under 42 U.S.C. § 1983 because Defendants acted under color of D.C. law pursuant to the Revitalization Act. However, if the Court finds otherwise, Plaintiff asserts his constitutional claims pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

COUNT I – Unlawful Seizure Under The Fourth Amendment

Against Defendants Khan, Herman, Gobble, Kelley, Mitchell, Fulwood, Jackson, Stigall, Young, and John or Jane Does 1-2

42. Plaintiff realleges and incorporates by reference all preceding allegations.

43. Plaintiff had a right to be free from unreasonable seizures based on the Fourth Amendment to the U.S. Constitution. Defendants Khan, Herman, Gobble, Kelley, Mitchell, Fulwood, Jackson, Stigall, Young, and John or Jane Does 1-2 violated this right through conduct

that caused Mr. Ford to be arrested, imprisoned, and supervised without legal process. Mr. Ford was arrested pursuant to an invalid supervised release revocation warrant on July 26, 2004. This unlawful arrest warrant precipitated a cycle of unlawful incarceration and subsequent supervision that began on July 26, 2004, and continued until Mr. Ford obtained a writ of *habeas corpus* on September 10, 2009.

44. Defendants John or Jane Does 1-2 proximately caused and contributed to Mr. Ford's unreasonable seizure by their intentional acts and omissions, including wrongfully miscalculating the duration of Mr. Ford's original sentence of imprisonment and supervised release. This miscalculation was the basis for the USPC's issuance of an unlawful arrest warrant on February 17, 2004.

45. Defendant Khan proximately caused and contributed to Mr. Ford's unreasonable seizure by unlawfully requesting that an arrest warrant be issued for Mr. Ford on February 10, 2004 based on alleged violations of a sentence of supervised release that had expired on February 1, 2004. As Mr. Ford's Community Supervision Officer, Defendant Khan had a duty to be aware of the date on which Mr. Ford's supervised release was to expire. Upon information and belief, Defendant failed to take action in response to multiple notifications by Mr. Ford that his sentence of supervised release had expired well before Mr. Ford was arrested on July 26, 2004.

46. Defendant Herman proximately caused and contributed to Mr. Ford's unreasonable seizure by signing a warrant application on February 17, 2004 that was based on a miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

47. Defendant Mitchell proximately caused and contributed to Mr. Ford's unreasonable seizure by signing an invalid arrest warrant on February 17, 2004 that was based on a miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

48. Defendant Stigall proximately caused and contributed to Mr. Ford's unreasonable seizure by requesting that an arrest warrant be issued for Mr. Ford on December 27, 2005.

49. Defendant Young proximately caused and contributed to Mr. Ford's unreasonable seizure by supporting the request by her supervisee, Defendant Stigall, that an arrest warrant be issued for Mr. Ford on December 27, 2005.

50. Defendant Jackson proximately caused and contributed to Mr. Ford's unreasonable seizure by signing an invalid warrant application on February 1, 2006 that was based on a miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

51. Defendant Fulwood proximately caused and contributed to Mr. Ford's unreasonable seizure by signing an invalid arrest warrant on February 2, 2006 that was based on a miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

52. Defendant Gobble proximately caused and contributed to Mr. Ford's unlawful seizure by signing multiple proposals for expedited revocation determinations when she knew or should have known that Mr. Ford's sentence of supervised release had been miscalculated. Defendant Gobble was given actual notice of Mr. Ford's unlawful detention through Mr. Ford's response to Defendant's proposal for an expedited revocation determination on October 19, 2006. Mr. Ford put Defendant Gobble on notice of his unlawful detention and supervised release when he stated, "Mr. Ford is not waiving his jurisdictional challenge to being under the supervision of the Parole Commission. Mr. Ford requests a review of the time calculation and the time he has

served." In the face of this notice by Mr. Ford, Defendant Gobble failed to take any actions to secure Mr. Ford's freedom.

53. Defendant Kelley proximately caused and contributed to Mr. Ford's unlawful seizure by signing an unlawful certificate of supervised release on May 17, 2005, which imposed conditions on Mr. Ford's wrongful sentence of supervised release.

54. At all relevant times, the above-named Defendants acted under color of D.C. law or federal law.

55. As a result of the actions and omissions of the above-named Defendants, Mr. Ford suffered harm to his person, liberty, and property and to rights under the Fourth Amendment to the Constitution.

COUNT II – Overdetention Under The Fifth Amendment

Against Defendants Khan, Herman, Gobble, Kelley, Mitchell, Fulwood, Jackson, Stigall, Young, and John or Jane Does 1-2

56. Plaintiff realleges and incorporates by reference all preceding allegations.

57. Mr. Ford had a right under the Fifth Amendment to be free from any deprivation of "life, liberty, or property, without due process of law." U.S. Const. amend. Defendants Khan, Herman, Gobble, Kelley, Mitchell, Fulwood, Jackson, Stigall, Young, and John or Jane Does 1-2 deprived Mr. Ford of his fundamental liberty interest when they caused Mr. Ford to endure a cycle of wrongful detention and supervised release beginning on July 26, 2004, when he was arrested pursuant to an invalid supervised release revocation warrant, and continuing until Mr. Ford obtained a writ of *habeas corpus* on September 10, 2009.

58. Defendants John or Jane Does 1-2 proximately caused and contributed to Mr. Ford's overdetention by their intentional acts and omissions, including wrongfully miscalculating the duration of Mr. Ford's jail and supervised release sentence. This

miscalculation was the basis for the USPC's issuance of an unlawful arrest warrant on February 17, 2004.

59. This miscalculation was compounded by the failure to re-calculate Mr. Ford's sentence of supervised release in 2003 in response to Mr. Ford's direct request in 2006 to John or Jane Does 1-2 to review his sentence computation. On January 22, 2007, while incarcerated on the second unlawful "revocation" of the expired sentence of supervised release, Mr. Ford received a letter from the Chief of the Designation and Computation Center of the Bureau of Prisons crediting him for six days of jail credit from 2001, but ignoring the more significant uncounted days of custody in 2003.

60. Defendant Khan proximately caused and contributed to Mr. Ford's overdetention by wrongfully requesting that an arrest warrant be issued for Mr. Ford on February 10, 2004 based on alleged violations of a sentence of supervised release that had expired on February 1, 2004. As Mr. Ford's Community Supervision Officer, Defendant Khan had a duty to be aware of the date on which Mr. Ford's supervised release was to expire. Upon information and belief, Defendant failed to take action in response to multiple notifications by Mr. Ford that his sentence of supervised release had expired well before Mr. Ford was arrested on July 26, 2004.

61. Defendant Herman proximately caused and contributed to Mr. Ford's overdetention by signing a warrant application on February 17, 2004 that was based on a miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

62. Defendant Mitchell proximately caused and contributed to Mr. Ford's overdetention by signing an invalid warrant on February 17, 2004 that was based on a miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

63. Defendant Stigall proximately caused and contributed to Mr. Ford's overdetention by requesting that an arrest warrant be issued for Mr. Ford on December 27, 2005.

64. Defendant Young proximately caused and contributed to Mr. Ford's overdetention by approving Defendant Stigall's request for an arrest warrant on December 27, 2005.

65. Defendant Jackson proximately caused and contributed to Mr. Ford's overdetention by signing an invalid warrant application on February 1, 2006 that was based on a miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

66. Defendant Fulwood proximately caused and contributed to Mr. Ford's overdetention by signing an invalid warrant on February 2, 2006 that was based on a miscalculation of Mr. Ford's prior sentence of imprisonment and supervised release.

67. Defendant Gobble proximately caused and contributed to Mr. Ford's unlawful seizure by signing multiple proposals for expedited revocation determinations when she knew or should have known that Mr. Ford's sentence of supervised release had been miscalculated. Defendant Gobble was given actual notice of Mr. Ford's unlawful detention through Mr. Ford's response to Defendant's proposal for an expedited revocation determination on October 19, 2006. Mr. Ford put Defendant Gobble on notice of his unlawful detention and supervised release when he stated, "Mr. Ford is not waiving his jurisdictional challenge to being under the supervision of the Parole Commission. Mr. Ford requests a review of the time calculation and the time he has served." In the face of this notice by Mr. Ford, Defendant Gobble failed to take any actions to secure Mr. Ford's freedom.

68. Defendant Kelley proximately caused and contributed to Mr. Ford's overdetention by signing an unlawful certificate of supervised release on May 17, 2005, which imposed conditions on Mr. Ford's wrongful sentence of supervised release.

69. At all relevant times, the above-named Defendants acted under color of D.C. law or federal law.

70. As a result of the actions and omissions of the above-named Defendants, Mr. Ford suffered harm to his person, liberty, and property and to his rights under the Fifth Amendment to the Constitution.

CLAIMS FOR TORTIOUS CONDUCT BY EMPLOYEES OF THE UNITED STATES OF AMERICA – FEDERAL TORT CLAIMS ACT

COUNT III – Negligence

Against Defendant United States of America

71. Plaintiff realleges and incorporates by reference all preceding allegations.

72. By virtue of their position as BOP officers, Defendants Does 1-2 owed a duty of care to Mr. Ford.

73. By virtue of their position as Parole Commissioners, Defendants Mitchell and Fulwood owed a duty of care to Mr. Ford.

74. By virtue of their position as USPC employees, Defendants Herman, Gobble, Kelley, and Jackson owed a duty of care to Mr. Ford.

75. By virtue of their position as CSOSA employees, Defendants Khan, Stigall, and Young owed a duty of care to Mr. Ford.

76. Defendants Does 1-2 breached their duty of care by negligently miscalculating the duration of Mr. Ford's original sentence of imprisonment and supervised release.

77. Defendant Khan breached his duty of care by negligently submitting a supervised release violation report and requesting that an arrest warrant be issued for Mr. Ford on February 10, 2004. Upon information and belief, Defendant negligently failed to act in response to multiple notifications by Mr. Ford that his sentence of supervised release had expired well before Plaintiff was ultimately arrested on July 26, 2004.

78. Defendant Herman breached her duty of care by negligently signing a warrant application on February 17, 2004 without noticing that the USPC no longer retained jurisdiction over Mr. Ford due to the expiration of his sentence of supervised release.

79. Defendant Mitchell breached his duty of care by negligently signing an invalid arrest warrant on February 17, 2004 without noticing that the USPC no longer retained jurisdiction over Mr. Ford based on the expiration of his prior sentence of supervised release.

80. Defendant Stigall breached her duty of care by negligently submitting a supervised release violation report and requesting that an arrest warrant be issued for Mr. Ford on December 27, 2005. Upon information and belief, Defendant negligently failed to respond to repeated notifications by Mr. Ford that his original sentence of supervised release had been miscalculated.

81. Defendant Young breached her duty of care by negligently approving the request by her supervisee, Defendant Stigall, that an arrest warrant be issued for Mr. Ford on December 27, 2005.

82. Defendant Jackson breached her duty of care by negligently signing an invalid warrant application on February 1, 2006 without noticing that the USPC no longer retained jurisdiction over Mr. Ford due to the expiration of Plaintiff's original sentence of supervised release.

83. Defendant Fulwood breached his duty of care by negligently signing an invalid arrest warrant on February 2, 2006 without noticing that the USPC no longer retained jurisdiction over Mr. Ford due to the expiration of Mr. Ford's original sentence of supervised release.

84. Defendant Gobble breached her duty of care by negligently signing multiple proposals for expedited revocation determinations when she knew or should have known that Mr. Ford's sentence of supervised release had been negligently miscalculated. Defendant Gobble was given actual notice of Mr. Ford's unlawful detention through Mr. Ford's response to Defendant's proposal for an expedited revocation determination on October 19, 2006. Mr. Ford put Defendant Gobble on notice of his unlawful detention and supervised release when he stated, "Mr. Ford is not waiving his jurisdictional challenge to being under the supervision of the Parole Commission. Mr. Ford requests a review of the time calculation and the time he has served." In the face of this notice by Mr. Ford, Defendant Gobble failed to take any actions to secure Mr. Ford's freedom.

85. Defendant Kelley breached her duty of care by negligently signing an unlawful certificate of supervised release on May 17, 2005 without recognizing that Mr. Ford's original sentence of imprisonment and supervised release had been miscalculated.

86. At all relevant times, the above-named Defendants were employees of Defendant United States.

87. At all relevant times, the above-named Defendants were acting within the scope of their employment.

88. At all relevant times, the acts and omissions of the above-named Defendants were not based on discretionary policy considerations, but instead violated clear agency directives and/or constitutional mandates.

89. As a direct and proximate result of the negligent actions and omissions of the above-named Defendants, Mr. Ford suffered harm to his person and was deprived of his dignity, liberty, and property.

90. In addition, Defendants' negligent acts or omissions proximately caused Mr. Ford to incur expenses, lose employment opportunities and wages, and suffer mental pain and anguish.

COUNT IV – Negligence Per Se

Against Defendant United States of America

91. Plaintiff realleges and incorporates by reference all preceding allegations.

92. 18 U.S.C. § 3624(a) requires that a "prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment." Defendants John or Jane Does 1-2, employees of the BOP, acting within the scope of their employment, negligently miscalculated the duration of Mr. Ford's sentence of imprisonment and supervised release, which proximately caused Mr. Ford to be unlawfully arrested and subsequently imprisoned and supervised four times over the course of four years, until he obtained a writ of *habeas corpus* on September 10, 2009.

93. The violation of 18 U.S.C. § 3624(a) establishes the employees' negligence.

94. At all relevant times, the above-named Defendants were employees of Defendant United States.

95. At all relevant times, the above-named Defendants were acting within the scope of their employment.

96. At all relevant times, the acts and omissions of the above-named Defendants were not based on discretionary policy considerations, but instead violated clear agency directives and/or constitutional mandates.

97. As a direct and proximate result of the negligent actions and omissions of the above-named Defendants, Mr. Ford suffered harm to his person and was deprived of his dignity, liberty, and property.

98. In addition, Defendants' negligent acts or omissions proximately caused Mr. Ford to incur expenses, lose employment opportunities and wages, and suffer mental pain and anguish.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and a judgment against Defendants:

(1) Ordering Defendants to pay, jointly and severally, compensatory damages to Mr. Ford;

(2) Ordering Defendants to pay punitive damages to the extent permitted by law;

(3) Awarding Plaintiff pre- and post-judgment interest;

(4) Awarding Plaintiff costs, attorneys' fees, and other disbursements for this action; and

(5) Granting Plaintiff such order and further relief as this Court deems just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury as to all issues.

DATED: February 24, 2011

Respectfully submitted,

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HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-BOP-2013-01208 **Short Description:** FORD V. MITCHELL ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:10-cv-01517-RLW
Short Description	FORD V. MITCHELL ET AL
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	CENTRAL OFFICE
Current Institution	CENTRAL OFFICE
Incident Region	CENTRAL OFFICE
Incident Institution	CENTRAL OFFICE
Monetary Relief Sought	$
Estimated Amount	$
Office	Washington, DC
Jurisdiction	DISTRICT OF COLUMBIA
Responsible Legal Office	Civil Litigation - CO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	06/09/2014
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$350,000.00
Description	PAID OUT OF JUDGMENT FUND
Description	PAID OUT OF JUDGMENT FUND
Court Fee Paid ?	Yes
Pro Se ?	No

Case Initiation Dates

Date Received	02/24/2011
Date Filed	09/09/2010

Case Progress

Current Owner	MONYA PHILLIP
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983 CIVIL RIGHTS ACT
Further Case Classification	
Comments	

MARO

Mid-Atlantic Regional Office Annapolis Junction MD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON
CIVIL ACTION No. 5:07-cv-267-JBC

JANE DOE — PLAINTIFF

v. **PLAINTIFF'S FIRST VERIFIED[1] AMENDED COMPLAINT**

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, et al. — DEFENDANTS

* * * * * *

Comes the Plaintiff, Jane Doe, by counsel, pursuant to F.R.C.P. 15(a), without leave of Court (since Defendants have not yet filed a responsive pleading), and hereby files her First Amended Complaint against the Defendants, the United States Department of Justice, the Federal Bureau of Prisons, and the United States of America, as follows:

JURISDICTION AND VENUE

1. Jurisdiction over the Privacy Act claims in this action is founded upon 5 U.S.C. § 552a(g)(5) and applicable regulations and policies thereunder as well as 28 U.S.C. § 1331 and 28 U.S.C. § 1346, as these claims arise under federal statutes and regulations and do not sound in tort, but are brought against the United States of America and agencies thereof. Jurisdiction over the Federal Tort Claims Act claims in this action are founded upon 28 U.S.C. § 2675 and 28 U.S.C. § 1346.

2. Venue is proper for this action in the Eastern District of Kentucky, Central Division at Lexington, pursuant to federal statute and local rules inasmuch as the Plaintiff resides

[1] Plaintiff's Verification page is attached hereto under seal.

and works in this District and Division and a substantial part of the acts or omissions alleged in this action occurred within this District and Division.

PARTIES

3. Plaintiff Jane Doe was and is a co-Plaintiff in *Beaven, et al. v. United States Department of Justice, et al.,* Civil Action No. 5:03-cv-00084-JBC, Eastern District of Kentucky, and testified in said action on or about March 21, 2006. Plaintiff is an employee of the Federal Bureau of Prisons, serving at the Federal Medical Center ("FMC") Lexington prison located in Lexington, Kentucky.

4. Defendants United States Department of Justice, Federal Bureau of Prisons and United States of America are joined as statutorily required Defendants. The Bureau of Prisons ("BOP") is the federal agency that employs Plaintiff. The BOP is an agency separate and apart from, but which answers to the Attorney General of the United States by and through the Department of Justice ("DOJ"). The DOJ supplies legal representation of agencies such as the BOP when same are in litigation such as is involved in *Beaven, et al. v. United States Department of Justice, et al.*, Civil Action No. 5:03-cv-00084-JBC.

FACTS

5. On or about September 27, 2004, Plaintiff provided personal, private and sensitive information on an application for disability retirement benefits that was submitted on forms supplied by the United States Office of Personnel Management ("OPM") to agents and employees of the BOP.

6. The application form and supporting documentation was initially collected by the BOP for, and on behalf of the OPM, and gathered solely for purposes of determining the

eligibility of Plaintiff for disability retirement benefits under the Federal Employees Retirement System.

7. Standard Form 3112, entitled "Documentation in Support of Disability Retirement Application," explains the contents of the package of forms that applicants must complete and instructs the applicant on the manner in which to complete and ensure prompt processing of the application. Specifically, the second paragraph of Standard Form 3112 dictates how and by whom the completed package of forms are retained:

> You [the applicant] should keep one copy each of the completed forms for your own records. Your agency will send the originals of each form to the Office of Personnel Management (OPM). . . .

Nowhere in Standard Form 3112 or any of the other forms in the application package does it authorize the applicant's agency to retain and/or maintain a copy of the completed package of forms. (Standard Form 3112 is attached hereto as Exhibit 1).

8. Pursuant to 5 U.S.C. § 552a(e)(1), "[e]ach agency that maintains a system of records shall maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." Upon information and belief, despite the absence of statute or executive order requiring the BOP to retain a copy of an employee's application for disability retirement benefits, the BOP (through FMC Lexington) has stated that it routinely makes two copies of an application for disability retirement benefits when an employee submits the package of forms, "one copy for the employee to take (this allowed them to verify what information had been included) and one to be maintained in the Employee Services Department, which we maintain in our fireproof safe."[2] (Declaration of Lisa Bryant, ¶ 5; attached hereto, under seal, as

[2] On October 29, 2007, Defendants filed a Notice of Service of Motion to Dismiss or, in the alternative, Motion for Summary Judgment ("Motion") with the Court and served Plaintiff's counsel with same. Attached to the Motion,

Sealed Exhibit 2) The BOP states that it maintains a copy of the application package "in the event that the original is not received by OPM, in case OPM called with questions (which often occurs), or in case OPM reports any of the forms are missing. OPM might also have questions regard [sic] certain information or answers to questions that require explanation." (Id.)

9. Upon information and belief, Plaintiff's application for disability retirement benefits was allegedly processed by the BOP in the above-referenced manner and retained and/or maintained by the BOP in FMC Lexington's fireproof safe. The BOP has stated that it continued to retain and/or maintain a copy of Plaintiff's application package into the spring of 2006 to present, long after the time relevant and necessary to accomplish a purpose imposed on the BOP by statute or executive order of the President. (See Declaration of Lisa Bryant, ¶ 6; attached hereto, under seal, as Sealed Exhibit 2).

10. Upon information and belief, by letter dated February 9, 2005, the OPM notified the BOP (through FMC Lexington) that it had received Plaintiff's application package and was unable to approve her request for disability retirement benefits. (Letter dated February 9, 2005, attached hereto, under seal, as Sealed Exhibit 3). Through the February 9, 2005 letter, the OPM informed the BOP that "[d]ue to privacy reasons, we cannot provide you with a copy of our detailed letter [to Plaintiff]." (Id.)

11. In or about the spring of 2005, Plaintiff exercised her right to request reconsideration of the OPM's initial denial of her application for disability retirement benefits. By letter dated October 31, 2005, the OPM notified the BOP (through FMC Lexington) that it denied Plaintiff's request for reconsideration and sustained its initial denial of disability retirement benefits. (Letter dated October 31, 2005 attached hereto, under seal, as Sealed Exhibit

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under seal, are Declarations from Lisa Bryant and Daniel Bensing. Defendants did not actually file the Motion with the Court until February 7, 2008, when the Court permitted same to be filed under seal. These declarations are the basis of the "information and belief" alleged herein.

4). Again, the OPM stated to the BOP that "[d]ue to privacy reasons, we cannot provide you with a copy of our detailed denial letter to [Plaintiff]." (Id.) Plaintiff did not appeal the OPM's decision to sustain its initial denial of her application. Therefore, Plaintiff's denial of disability retirement benefits became final on October 31, 2005.

12. Upon information and belief, there is no statute or executive order of the President that authorizes the BOP to retain and/or maintain a copy of Plaintiff's disability retirement benefits application for the purpose of processing the application or responding to questions from the OPM related to the application.

13. Alternatively, if the BOP's retaining and/or maintaining a copy of Plaintiff's application package for the purposes of processing the application or responding to questions from the OPM related to the application was authorized by statute or executive order, that purpose concluded on February 9, 2005 when the OPM initially denied Plaintiff's application, or at the latest on October 31, 2005, when the Plaintiff's request for reconsideration was finally denied (and thus the initial denial sustained), especially given Plaintiff did not appeal the OPM's October 31, 2005 decision. After October 31, 2005, the copy of Plaintiff's application package retained and/or maintained by the BOP was no longer relevant and necessary to accomplish the BOP's alleged purpose for retaining and/or maintaining the Plaintiff's application (*i.e.*, to process the application or respond to the OPM's questions related to the application).

14. Upon information and belief, the BOP improperly retained and/or maintained a copy of Plaintiff's application package for disability retirement benefits and continues to do so in direct contravention of her privacy rights as protected under the Privacy Act, 5 U.S.C. § 552a(e)(1).

15. Furthermore, pursuant to Section 13 of Standard Form 3112A (the application for disability retirement benefits), in submitting the application, Plaintiff gave "permission for the release of information about [her] service and medical condition(s) (*i.e.*, disease or injury)" solely "to authorized agency and OPM officials." (Form 3112A is attached hereto as Exhibit 5).

16. She gave permission for release of her private information in accordance with the Privacy Act Statement contained on the form set out just beneath her signature. This Statement, in pertinent part, recites as follows:

> Solicitation of this information is authorized . . . by the Federal Employees' Retirement law (Chapter 84, title 5, U.S. Code). The information you furnish will be used to identify records properly associated with your application for Federal benefits, to obtain additional information if necessary, to determine and allow present or future benefits, and to maintain a uniquely identifiable claim file. The information may be shared and is subject to verification, via paper, electronic media, or through the use of computer matching programs, with national, state, local or other charitable or social security administrative agencies in order to determine benefits under their programs, to obtain information necessary for determination or continuation of benefits under this program, or to report income for tax purposes. It may also be shared and verified, as noted above, with law enforcement agencies when they are investigating a violation or potential violation of the civil or criminal law. (See Exhibit 5)

17. The above-quoted Statement was included on Form 3112A to comply with the explicit requirements of the Privacy Act of 1974, 5 U.S.C. § 552a(e)(3)(C). This provision further references that the routine uses of any system of records (such as personnel and medical information), must be publicly disclosed, including a description of the categories and purposes for each routine use, and said public disclosure is to be published periodically in the Federal Register as provided in 5 U.S.C. § 552a(e)(4)(D). Under 5 U.S.C § 552a(a)(7), "the term 'routine use' means, with respect to the disclosure of a record, the use of such record for **a purpose which is compatible with the purpose for which it was collected**." (Emphasis added.)

18. The Privacy Act Statement on Form 3112A does not provide for the disclosure of Plaintiff's personal service or medical information gathered for disability retirement application purposes to be used in civil litigation, the subject of which has nothing to do with the retirement application itself, nor an investigation into Plaintiff's violation or potential violation of the civil or criminal law.

19. As required by the Privacy Act, the OPM has published its routine uses for its Internal and Central systems of documents in the Federal Register. These routine uses describe when the OPM is authorized to disclose any record contained in its Internal and Central systems of documents. Specifically, OPM/CENTRAL-1, 64 Fed. Reg. 54930-02, covers "[c]urrent Federal employees who have: . . . (6) Filed an application for disability retirement with OPM and are waiting final decision, or whose disability retirement application has been disapproved by OPM." Id. at 54931. The categories of records contained in this system include retirement files, including medical records and other evidence submitted in support of disability claims. Id. In addition to the routine uses listed in 64 Fed.Reg. 54930-02, these records may also be used for the 10 routine purposes delineated at 60 Fed. Reg. 63075. Routine Use #4, for Judicial/Administrative Proceedings, permits the OPM to disclose "information to another Federal agency, to a court, or a party in litigation before a court . . . when the Government is a party to the judicial . . . proceeding." Id. at 63077. Similarly, Routine Use #7, for Litigation, allows the OPM to disclose "information to the Department of Justice, or in a proceeding before a court . . . when: . . . (4) the United States, . . . is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or OPM is deemed by OPM to be relevant and necessary to the litigation, provided, however, that the disclosure is compatible with the purpose for which records were collected." Id.

20. Pursuant to 5 U.S.C § 552a(a)(7), 64 Fed. Reg. 54930-02, and 60 Fed. Reg. 63075, the published routine uses for the gathering and maintaining of an applicant's personal service and medical information, which information is solicited solely for disability retirement purposes, likewise does not allow for such information to be used in litigation, the subject of which has nothing to do with the retirement application itself nor an investigation into the applicant's violation or potential violation of the civil or criminal law.

21. Upon information and belief, in the spring of 2006, the BOP continued to retain and/or maintain a copy of Plaintiff's application package, several months after the OPM's final decision to deny the application. During this time, the BOP provided its copy of Plaintiff's application packet to "the institution attorney" allegedly based upon the Warden's express authorization, even though an employee's application would not ordinarily be disclosed to another staff member. Not long after the Plaintiff's application package was disclosed, the "institution attorney" returned it, and it was placed in the FMC Lexington's fireproof safe where it supposedly remains to date. (See Declaration of Lisa Bryant, ¶ 6; attached hereto, under seal, as Sealed Exhibit 2).

22. On or about March 21, 2006 upon cross-examination during the liability phase of the *Beaven* trial, trial counsel for the United States Defendants, Daniel Bensing, employed within the DOJ, Civil Division, Programs Branch litigation division, displayed Plaintiff's application form (Standard Form 3112A) along with its supporting medical documentation and other personal information regarding Plaintiff's application for disability retirement benefits in open court, publishing same on the courtroom's electronic display system, and proceeded to cross-examine Plaintiff about such private information, all in contravention of her privacy rights as protected under the Privacy Act, 5 U.S.C. § 552a.

23. Plaintiff's Form 3112A and supporting documentation containing her personal and private information was displayed, discussed and published in such a way as to be seen by all persons sitting in the courtroom. While Plaintiff does not know all of the persons who were present in the courtroom on March 21, 2006, she believes there were approximately 25 persons, more or less, present in the courtroom at the time of publication.

24. Upon information and belief, in the spring of 2006, trial counsel for the DOJ obtained Plaintiff's application from Joe Tang, Legal Counsel for FMC Lexington, rather than the OPM, the agency to which such application and supporting documentation were allegedly forwarded. (See Declaration of Daniel Bensing, ¶6; attached hereto, under seal, as Sealed Exhibit 6). Under 5 U.S.C. § 552a(e)(1), the BOP was not authorized to retain and/or maintain a copy of Plaintiff's application package beyond the time relevant and necessary to accomplish a purpose imposed on the BOP by statute or executive order of the President. Assuming, *arguendo*, the BOP was authorized by statute or executive order to retain and/or maintain Plaintiff's application package for the alleged purpose of processing the application or responding to the OPM's questions regarding same, that purpose ceased to be relevant and necessary as of February 9, 2005, or at the latest, October 31, 2005, long before trial counsel obtained a copy of the application package from the BOP as described below:

> At some point, shortly before her testimony on March 21, 2006, in response to my routine inquiries as described in paragraph 5, supra, I recall learning from Mr. Tang that the Plaintiff in this action had submitted an application for disability retirement due to what he described as workplace-induced stress several years earlier while she was employed at FMC Lexington. Because I suspected that the plaintiff's statements about the symptoms giving rise to her disability retirement application might provide information relevant to her reliability as a witness, including her ability to accurately perceive events, I requested that Mr. Tang provide me with a copy of her disability retirement application, with the intention of utilizing that document during my cross-examination of her. I received that document from Mr. Tang by fax on the morning of March 21, 2006 at approximately 8:00 a.m. (Id.)

25. During the course of the *Beaven* trial, Plaintiff Doe, by counsel, objected to, and moved to strike, the DOJ trial counsel's publication of Plaintiff's private, personal service and medical information gathered from Plaintiff for disability application purposes on the grounds that such publication violated the requirements of the Privacy Act. The Hon. Jennifer B. Coffman, United States District Judge, Eastern District of Kentucky, presiding over the trial, sustained Plaintiff's objection and "struck" the entirety of the colloquy of cross-examination and testimony regarding Plaintiff's service and medical information from the court record unless and until the *Beaven* Defendants could demonstrate the propriety of possessing Plaintiff's Form 3112A and supporting documentation. Judge Coffman further ordered, upon request of Plaintiff Doe's counsel, that the said colloquy be "sealed." On February 8, 2007, Judge Coffman ordered this "sealed" colloquy transcribed, but subjected the distribution of the transcript to strict limitations as to whom, and under what circumstances, it could be viewed by individuals within the DOJ or BOP. This February 8, 2007 Order allowing the "sealed" colloquy to be transcribed was entered, in part, to permit the DOJ's Office of Professional Responsibility to review, discuss and prepare internal reports with respect to the violation of Plainitff's rights. Its limited distribution was required, moreover, to protect Plaintiff from further unauthorized disclosure of her privacy-protected information within the DOJ and BOP and to protect her from potential retaliation given her current employment status within the BOP. A copy of the February 8, 2007 Order (Docket Entry No. 330 in the *Beaven* action), as redacted by the Court on January 3, 2008, (Docket Entry No. 357 in the *Beaven* action) restricting access to the "sealed" colloquy contained in the March 21, 2006 transcript of the *Beaven* trial is attached hereto as Exhibit 7.

26. On May 3, 2006, after full and fair opportunity to litigate the issues between the *Beaven* litigants, the Hon. Jennifer B. Coffman issued in the *Beaven* action a "sealed" Order

making certain findings adverse to the *Beaven* Defendants regarding their possession and in-court publication of Plaintiff Doe's Form 3112A and supporting documentation. A copy of this "sealed" Order of May 3, 2006 (Docket Entry No. 309 in the *Beaven* action) is attached hereto, under seal, as Sealed Exhibit 8.

27. Prior to the start of the *Beaven* trial, on February 6, 2006, the Hon. Jennifer B. Coffman issued a non-retaliation/non-intimidation order to protect the *Beaven* Plaintiffs and certain inmate witnesses designated to testify in that action from reprisal or intimidation at the hands of the *Beaven* Defendants and their agents or employees. This non-retaliation/non-intimidation order was entered, in part, because the *Beaven* Defendants and their agents, employees, and at least one of their BOP attorneys, displayed a disregard for appropriate legal conduct and ethical considerations by attempting to dig up "dirt" on certain inmate witnesses expected to testify during the *Beaven* trial and by contacting some of the *Beaven* Plaintiffs themselves to ask questions about the inmates without prior notice to those Plaintiffs' known legal counsel. Plaintiff Doe was and continues to be a beneficiary of that pre-trial issued, non-retaliation/non-intimidation order entered in the *Beaven* action.

28. In the "sealed" Order issued May 3, 2006 (Sealed Exhibit 8), the Judge Coffman made certain additional findings pertaining to the *Beaven* Defendants' agents and employees' lack of compliance with the Court's pretrial issued, non-retaliation/non-intimidation order. See the "sealed" Order (Sealed Exhibit 8) at page 5 for a recitation of such findings.

29. Plaintiff Doe was and is a co-Plaintiff in, and testified in, *Beaven, et al. v. United States Department of Justice, et al.*, Civil Action No. 5:03-cv-00084-JBC because of improper and illegal acts done by a certain individual by the name of Walter Clint Jones ("Clint Jones" or "Jones"), an employee of the BOP employed at the FMC Lexington facility as chief of security.

In March 2001, Jones illegally and improperly disclosed the personal and private information of all staff employed at FMC Lexington in contravention of the Privacy Act when he willfully breached all known security requirements in the handling of employees' personal and private information (including social security numbers, dates of birth, home addresses, phone numbers, etc.) and allowed inmates to access such information. The *Beaven* action centered on this violation of law committed by Jones.

30. Jones was, to put it mildly, a non-exemplar employee of the BOP. Prior to his misdeeds leading up to the disclosure of all staff's personal information (which was the subject of the *Beaven* trial), Jones was involved in sexual harassment incidents against several female employees, one of whom was Plaintiff Doe. In August 2003, Plaintiff Doe settled her sexual harassment claim against the BOP based upon the improper harassing actions of Jones for a lump sum monetary figure favorable to herself. In her Settlement Agreement, the BOP "agree[d] there will be no retaliation related to this complaint or this agreement."

31. Approximately one year after settling her sexual harassment complaint, Plaintiff Doe submitted her application for disability retirement benefits, based largely upon her sense of hostility, fear, anxiety and lack of trust that she continued to experience while at work, emotions similar to those that she earlier experienced while being victimized by Jones' sexual harassment.

32. During the *Beaven* trial, Plaintiff Doe testified about her own damages stemming from the unlawful disclosure of her personal information (social security number, date of birth, home address, phone number, etc.) and her personal knowledge of the dishonest character of Jones, a key witness for the *Beaven* Defendants. Her knowledge of Jones as a person, *ergo* as a witness, stemmed from her repeated dealings with him over the years as a co-worker (which dealings, of course, were the circumstances that unfortunately led to her being victimized by his

sexual harassment). Her opinion of Jones' character for truthfulness was not, to say the least, flattering to him.

33. The in-court cross-examination of Plaintiff Doe during the *Beaven* trial and the *Beaven* Defendants' pre- and post-trial retention and use of her private information submitted by her solely for disability retirement application purposes was wholly improper and for an ulterior and illicit purpose to intimidate and retaliate against Plaintiff and other of the *Beaven* Plaintiffs and witnesses. Not only did this illicit purpose violate Judge Coffman's pre-trial, non-retaliation/non-intimidation order, but it also violated the express promise and duty agreed to by the BOP in its Settlement Agreement with Plaintiff, to wit: not to retaliate against her for having brought and settled her sexual harassment complaint against the BOP for the misconduct of Jones.

34. The foregoing actions of the employees and agents of the DOJ and BOP have caused mental upset, emotional trauma, distress and humiliation damage to Plaintiff. The BOP's unauthorized retention and/or maintenance of Plaintiff's application package violated both the Court's non-retaliation/non-intimidation Order and the express terms of the Settlement Agreement, which caused Plaintiff mental upset, emotional trauma, and distress for which she sought professional medical attention. Plaintiff has been specially damaged in her reputation in that those persons (most of whom were co-workers) that witnessed the improper actions of the Defendants in disclosing and publishing her private information in open court now know a fact that was *not* common knowledge prior to the disclosure, to wit: that Plaintiff Doe considered herself so disabled from mental stress, fear, anxiety and hostility while at work that she thought herself eligible for disability retirement. Furthermore, they now know that medical opinion supports her mental disability belief. This knowledge undermines her ability to work

successfully within a prison environment because fellow workers lose confidence and trust in her ability to perform traditional law enforcement assistance of them while they work within a dangerous environment in and around inmates.

35. Plaintiff has furthermore incurred out-of-pocket expenses in damages and in mitigation of her injuries because of Defendants' unauthorized retention and/or maintenance of her application package, improper disclosure, including lost wages, if any, and incurred past and future medical, travel and other related expenses, all as a result of the improper retention, disclosure and actions of Defendants' agents and employees.

PRIVACY ACT CLAIMS
COUNT I – VIOLATION OF 5 U.S.C. § 552a(e)(1)

36. The allegations set forth in paragraphs 1 through 35 are hereby incorporated by reference as part of this Count.

37. The Defendants, in willful and reckless disregard of Plaintiff's rights, improperly retained and/or maintained a copy of Plaintiff's application package for disability retirement benefits and continue to do so in direct contravention of her privacy rights as protected under the Privacy Act, 5 U.S.C. § 552a(e)(1).

38. Because there is no statute or executive order of the President that requires the BOP to retain and/or maintain a copy of Plaintiff's disability retirement benefits application, the BOP was never authorized to maintain such records about the Plaintiff because they were not relevant or necessary to accomplish a purpose of the BOP.

39. Alternatively, if the BOP was authorized to retain and/or maintain a copy of Plaintiff's application package for the purpose of processing the application or responding to questions from the OPM related to the application, that purpose ceased on February 9, 2005, or at the latest on October 31, 2005, after Plaintiff's application was denied and not appealed.

Accordingly, any alleged purpose for which the BOP retained and/or maintained a copy of Plaintiff's application package had long ended by the spring of 2006 when the BOP retrieved an improperly retained a copy of the application and produced it to the DOJ's trial counsel in the *Beaven* trial, who, in turn, disclosed the application package in open court.

40. The BOP willfully violated 5 U.S.C. § 552a(e)(1) by retaining and/or maintaining a copy of Plaintiff's application package beyond the time relevant and necessary to accomplish its alleged purpose for retaining and/or maintaining Plaintiff's application package.

41. Defendants' violation of 5 U.S.C. § 552a(e)(1) is actionable for statutory damages (in the sum of $1000.00) and/or actual damages (in the sum of $500,000.00) pursuant to 5 U.S.C. § 552a(g)(4), plus reasonable costs and attorneys fees in prosecuting this action and bringing the misconduct of Defendants' agents to Judge Coffman's attention in the *Beaven* trial, wherein Judge Coffman's May 3, 2006 Order mitigated some of Plaintiff's damages by "sealing" the trial record and striking the improper cross-examination therefrom.

COUNT II – VIOLATION OF 5 U.S.C. § 552(b)(3)

42. The allegations set forth in paragraphs 1 through 41 are hereby incorporated by reference as part of this Count.

43. The Defendants, in willful and reckless disregard of Plaintiff's rights, violated the conditions of disclosure embedded in the Privacy Act, 5 U.S.C. § 552a(b)(3), and regulations promulgated thereunder, by disclosing the Plaintiff's application package in violation of the routine uses requirements delineated in 5 U.S.C. § 552a(a)(7), 552a(e)(4)(D).

44. For the Defendants to have been authorized to disclose Plaintiff's application and supporting documentation during the *Beaven* trial, they were required to follow the OPM's Routine Use # 7 for litigation purposes (See 60 Fed. Reg. 63077). To comply with Routine Use

7, the disclosure must be relevant and necessary to the litigation and compatible with the purpose for which records were collected. Because the information in Plaintiff's application package is solicited solely for disability retirement purposes, Defendants were not authorized to use such information in litigation that has nothing to do with the retirement application itself nor an investigation into the applicant's violation or potential violation of the civil or criminal law because such disclosure is not compatible with the purpose for which the records were collected.

45. Defendants' misplaced reliance on Routine Use # 4 (60 Fed. Reg. 63077), for Judicial/Administrative Proceedings, ignores the compatibility requirement contained in the definition of "routine use" as set out in 5 U.S.C. § 552a(a)(7) and is thus not an applicable routine use to the case at bar for failure to meet the compatibility requirement contained in the statute's definition.

46. Assuming, however, Routine Use # 4 does not incorporate the compatibility requirement set out in the statute's definition in 5 U.S.C. § 552a(a)(7), Routine Use # 4 is overbroad and invalid on its face.

47. The Defendants' are collaterally estopped from re-litigating the issue raised in this Count as it has been fully and fairly litigated and decided against them in Judge Coffman's May 3, 2006 "sealed" Order in the *Beaven* case.

48. Defendants' violation of 5 U.S.C. § 552a(b)(3) is actionable for statutory damages (in the sum of $1000.00) and/or actual damages (in the sum of $500,000.00) pursuant to 5 U.S.C. § 552a(g)(4), plus reasonable costs and attorneys fees in prosecuting this action and bringing the misconduct of Defendants' agents to Judge Coffman's attention in the *Beaven* trial, wherein Judge Coffman's May 3, 2006 Order mitigated some of Plaintiff's damages by "sealing" the trial record and striking the improper cross-examination therefrom.

COUNT III – VIOLATION OF 5 U.S.C. § 552(e)(3)(C)

49. The allegations set forth in paragraphs 1 through 48 are hereby incorporated by reference as part of this Count.

50. The Defendants, in willful and reckless disregard of Plaintiff's rights, violated the conditions of disclosure embedded in the Privacy Act, 5 U.S.C. § 552a(e)(3)(C), and regulations promulgated thereunder, because the Privacy Act statement on Plaintiff's application did not contain a provision for disclosure for the purpose of litigation unrelated to the application itself, and thus, the Defendants' disclosure to the DOJ and then in open court violated the Privacy Act.

51. The Defendants' are collaterally estopped from re-litigating the issue raised in this Count as it has been fully and fairly litigated and decided against them in Judge Coffman's May 3, 2006 "sealed" Order in the *Beaven* case.

52. Defendants' violation of 5 U.S.C. § 552a(e)(3)(C) is actionable for statutory damages (in the sum of $1000.00) and/or actual damages (in the sum of $500,000.00) pursuant to 5 U.S.C. § 552a(g)(4), plus reasonable costs and attorneys fees in prosecuting this action and bringing the misconduct of Defendants' agents to Judge Coffman's attention in the *Beaven* trial, wherein Judge Coffman's May 3, 2006 Order mitigated some of Plaintiff's damages by "sealing" the trial record and striking the improper cross-examination therefrom.

FEDERAL TORT CLAIMS ACT ("FTCA") CLAIMS

53. The allegations set forth in paragraphs 1 through 52 are hereby incorporated by reference as part of the facts pertinent to the Federal Tort Claims Act ("FTCA") claims set out below (Counts IV through VI).

54. On or about October 3, 2006, Plaintiff submitted her Administrative Tort Claim (Form SF-95) via first class mail to the DOJ and the BOP in accordance with the FTCA. Neither the DOJ nor the BOP acknowledged receipt of such submission.

55. Shortly before November 14, 2006, Plaintiff re-submitted her SF-95 to the DOJ and BOP via certified mail, return receipt requested. A copy of her FTCA form SF-95 as re-submitted to the DOJ and the BOP is attached hereto as Sealed Exhibit 9.

56. Plaintiff received proof that the DOJ received the re-submitted SF-95 on or about November 14, 2006 when Plaintiff received the return receipt card bearing Register No. 7005 1820 0002 4499 1598. A copy of this return receipt card is attached hereto as Exhibit 10.

57. Plaintiff never received proof that the BOP received the first re-submitted SF-95, so Plaintiff re-submitted her SF-95 a third time to the BOP on or about November 30, 2006. A copy of her FTCA form SF-95 as re-submitted for a third time to the BOP is attached hereto as Sealed Exhibit 9.

58. On or about December 4, 2006, Plaintiff received proof that the BOP received the third re-submitted SF-95 when she received the return receipt card bearing Register No. 7005 1820 0002 4499 2489. A copy of this return receipt card is attached hereto as Exhibit 11.

59. By letter dated October 19, 2007, more than six months after the deadline for Defendants to respond to Plaintiff's SF-95, the DOJ denied Plaintiff's FTCA Administrative Tort Claim (Form SF-95). A copy of the October 19, 2007 letter is attached hereto, under seal, as Sealed Exhibit 12. Plaintiff's FTCA claims have therefore been fully exhausted prior to coming to this Court for adjudication. Plaintiff files this Administrative Tort Claim appeal, and files it as an original action pursuant to 28 U.S.C. §§ 1346 and 2675, within in the applicable period of limitations to bring such claims.

60. Because the Privacy Act forbids the use of Plaintiff's private and personal information submitted to the OPM on Standard Form 3112A (and its supporting documentation) for a use not disclosed to Plaintiff on the form itself or published as a routine use, neither the DOJ nor the BOP had any discretionary authority to retain, retrieve, utilize or disclose such information in open court. Because the *Beaven* Court entered a non-retaliation/non-intimidation order for the benefit, in part, of Plaintiff, neither the DOJ nor the BOP had discretion to choose to intimidate or retaliate against any of the *Beaven* Plaintiffs or their inmate witnesses by questioning Plaintiff Doe in open court about, and exposing to public view, her private and personal information submitted by her on Form 3112A (and its supporting documentation) to the OPM. Furthermore, because Plaintiff had an agreement embodied in her Settlement Agreement with the BOP not to retaliate against her for having brought and settled (favorably to herself) a sexual harassment claim against the BOP for the misconduct of Jones, neither the BOP nor the DOJ had discretion to choose to intimidate or retaliate against her by questioning her in open court about, and exposing to public view, her private and personal information submitted by her on Form 3112A (and its supporting documentation) to the OPM.

COUNT IV

INVASION OF PRIVACY

61. The allegations set forth in paragraphs 1 through 60 are hereby incorporated by reference as part of this Count.

62. As a result of the above stated actions of the Defendants, Plaintiff suffered an invasion of privacy when the Defendants intentionally, recklessly and/or negligently disclosed personal and private information of Plaintiff, which information Plaintiff had a reasonable expectation would be maintained as private, by allowing that information to be given to trial

counsel for the DOJ in the *Beaven* trial for use and disclosure during said litigation, which counsel did, in fact, display, discuss and publish in open court the personal information contained therein in such a way as to be seen and heard by all persons sitting in the courtroom, causing severe injury and damages to Plaintiff, both presently and in the future in an amount no less than $500,000.00.

COUNT V

INFLICTION OF EMOTIONAL DISTRESS (OUTRAGEOUS CONDUCT)

63. The allegations set forth in paragraphs 1 through 62 are hereby incorporated by reference as part of this Count.

64. As a result of the above stated actions of the Defendants, Plaintiff suffered the common-law torts of intentional and/or negligent infliction of emotional distress (sometimes called outrage), when the Defendants intentionally, recklessly and/or negligently disclosed personal and private service and medical information of Plaintiff, causing same to be displayed, discussed and published in open court during the Beaven trial in such a way as to be seen and heard by all persons sitting in the courtroom. Furthermore, Defendants' agents and employees were motivated by illegal or illicit purposes in retaining, using and disclosing Plaintiff's personal and private information.

65. The Defendants' conduct was outrageous and intolerable in a civilized society given they knew, or should have known, the likely propensity for Plaintiff to become embarrassed and humiliated after the privacy-protected information was displayed, discussed, and published in open court, especially considering that the information was protected by the Privacy Act, by the Settlement Agreement with respect to her sexual harassment claim, and by the *Beaven* Court's non-retaliation/non-intimidation order. The said actions of the Defendants

severely injured Plaintiff mentally, emotionally, financially and reputationally, both presently and in the future in an amount no less than $500,000.00.

COUNT VI

CONSPIRACY TO VIOLATE PLAINTIFF'S PRIVACY RIGHTS; HER RIGHT TO SUE IN COURT AS A "PLAINTIFF" AND TO TESTIFY WITHOUT FEAR OF RETALIATION/INTIMIDATION; AND HER CONTRACTUAL RIGHT NOT TO BE RETALIATED AGAINST; AND TO CONDUCT ABUSIVE LEGAL PROCEEDINGS

66. The allegations set forth in paragraphs 1 through 65 are hereby incorporated by reference as part of this Count.

67. The in-court display and publication of Plaintiff's disability application and supporting documentation, and display of same to others prior to and during open court, amount to overt and covert acts of the Defendants' agents and employees (both DOJ and BOP) evidencing a conspiracy to violate Plaintiff's Privacy Act rights, common law privacy rights, right to petition the government for redress of grievances as a "plaintiff" and to testify in support of such petition without fear of retaliation or intimidation, and contractual right not to be retaliated against as embodied in Plaintiff's Settlement Agreement with the BOP concerning her claim of sexual harassment against the misconduct of Jones. Moreover, such acts amount to abuse of legal proceedings

68. Trial counsel and other of Defendants' agents participating in the *Beaven* trial for and on behalf of the DOJ, in conjunction with BOP agents and employees, conspired together to embarrass, harass and intimidate Plaintiff in retaliation for her having joined as a co-Plaintiff and testify in court concerning an admittedly untruthful witness for the government (Clint Jones) and a previously determined sexual harasser against Plaintiff herself (as well as against other female employees at FMC Lexington). Plaintiff was contractually promised in her Settlement

Agreement of her sexual harassment complaint that she would not be retaliated against because of her sexual harassment claim against the BOP stemming from the improper actions of Jones, yet notwithstanding such, she was embarrassed and humiliated in open court based on privacy-protected information contained in her disability retirement paperwork and Jones' improper actions which led to her complaint, all for improper reasons and motivations in contravention of such Agreement's promises as well as the protections of the *Beaven* Court's pre-trial non-retaliation/non-intimidation order. Such conspiratorial acts, amount, jointly or severally, to the commission of the torts of outrage, invasion of privacy and/or abuse of legal proceedings.

69. After counsel for Plaintiff objected during the *Beaven* trial, and the Hon. Jennifer B. Coffman took a recess—in part, to allow Plaintiff to gather her composure from her obvious emotional devastation due to the public disclosure of her private information contained on Form 3112A and supporting documentation in open court—Judge Coffman returned to the courtroom and asked a telling query of DOJ trial counsel during a bench conference: how did the DOJ's litigation attorneys acquire copies of Plaintiff's privacy-protected Form 3112A along with its supporting documentation? This question was not answered immediately, but when later faced with Plaintiff Doe's sanctions motion for having violated her privacy rights and the Court's non-retaliation/non-intimidation order, DOJ's trial counsel admitted in briefs submitted to the *Beaven* Court that said counsel obtained copies *not* from the OPM which is the sole and exclusive agency to whom such information was supposed to have been gathered and retained, but from undisclosed persons within the BOP (presumably FMC Lexington employees, but perhaps other BOP employees outside of FMC Lexington). This admission by the DOJ, assuming it was truthful, reveals other overt or covert acts in furtherance of a conspiracy within the BOP itself to obtain and maintain privacy-protected information on the Plaintiff in violation of her Privacy Act

rights, her common law rights to privacy, her right to be free from retaliation and intimidation by virtue of her Settlement Agreement on her sexual harassment claim and her right to be free from retaliation or intimidation per the *Beaven* Court's pre-trial order. Moreover, these conspiratorial acts reveal a motivation to injure Plaintiff by abuse of legal proceedings, humiliation and public disgrace, all of which conduct amounts to tortious conduct toward Plaintiff.

70. These conspiratorial acts within the BOP or DOJ, or both, have injured Plaintiff mentally, emotionally, financially and reputationally. Furthermore, the overt and covert acts themselves, either jointly or severally, amount to the separate torts of outrage, invasion of privacy, abuse of legal proceedings, and/or other torts under Kentucky law with the same injuries and damages to Plaintiff as described hereinabove in an amount no less than $500,000.00.

WHEREFORE, Plaintiff Jane Doe respectfully prays for and requests a Judgment to be entered against the Defendants herein as follows:

1. That Plaintiff recover statutory damages of $1000.00 for each statutory violation of the Privacy Act committed by Defendants Department of Justice and its agents and employees, and the Federal Bureau of Prisons and its agents and employees (pursuant to Counts I, II, and III), and that this statutory damage amount be awarded for each separate and distinct violation committed of said Act;

2. That Plaintiff recover actual damages sustained, should her actual damages exceed the statutory damage amount available under the Privacy Act, in the amount no less than $500,000.00;

3. That Plaintiff recover damages for the injuries occasioned upon her under the FTCA for the tortious, unlawful and wrongful conduct of Defendants (pursuant to Counts IV, V, and/or VI), totaling $500,000.00 for mental and emotional damages, lost wages, if any, damage

to reputation, financial damages, as well as past and future medical, travel and mitigation expenses;

4. That Plaintiffs recover the costs of suit and that Plaintiff's attorneys be awarded reasonable attorneys' fees as allowed by law; and

5. That Plaintiff be awarded any and all other relief that may be just and proper; and trial by jury on any and all claims to which Plaintiff is entitled to a jury and/or an advisory jury on all claims to which Plaintiff may not be so entitled.

Respectfully submitted,

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 26TH day of February, 2008, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send a notice of electronic filing to the following:

Thomas L. Gentry, U.S. Attorney
260 West Vine Street, Suite 300
Lexington, KY 40507-1612

United States Federal Bureau of Prisons
Attn: Litigation Branch
320 1st Street, NW
Room 977
Washington, D.C. 20001

Peter D. Keisler, Asst. Attorney General
United States Department of Justice
Room B-103950
Pennsylvania Avenue NW
Washington, D.C. 20530-0001

David M. Glass, Esq.
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Rm. 7200
Washington, D.C. 20530

John R. Tyler, Esq.
U.S. Department of Justice – Civil Division
20 Massachusetts Avenue, N.W., Suite 7344
Washington, D.C. 20530

/s/ Douglas L. McSwain
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
AT LEXINGTON
CIVIL ACTION No. 5:07-cv-267-JBC

JANE DOE — PLAINTIFF

v.

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, et al. — DEFENDANTS

* * * * * *

VERIFICATION SIGNED BY PLAINTIFF FILED UNDER SEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

CIVIL ACTION NO. 07-267-JBC

JANE DOE, **PLAINTIFF,**

V. **ORDER**

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., **DEFENDANTS.**

* * * * * * * * * * *

The parties having stipulated that this action has been settled and may be dismissed with prejudice,

IT IS ORDERED that this matter is **DISMISSED WITH PREJUDICE** and this action is **STRICKEN** from the court's active docket, each party to bear its own costs and attorney's fees.

Signed on October 12, 2010

Jennifer B. Coffman

JENNIFER B. COFFMAN, CHIEF JUDGE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

JANE DOE, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, *et al.*, Defendants.	)	No. 5:07-cv-00267-JBC

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter "the Agreement") is made between the plaintiff, Sharon K. Slone, and the defendants, the United States Department of Justice, the Federal Bureau of Prisons, and the Untied States of America.

WHEREAS, the plaintiff has brought the above-captioned suit against the defendants, alleging claims under the Privacy Act and the Federal Tort Claims Act;

WHEREAS, the defendants deny any liability to the plaintiff based on the allegations in this litigation, and deny any wrongdoing whatsoever; and

WHEREAS, the parties wish to resolve the disputes that are the subject of this civil action without the expense and burden of further litigation;

NOW THEREFORE, the plaintiff and the defendants, intending to be legally bound, hereby enter into the following Agreement:

1. As soon as practicable after the full execution of this Agreement, the defendants shall pay to the plaintiff the sum of Nineteen Thousand, and Sixty-Nine Dollars and Thirteen Cents ($19,069.13) in full and final satisfaction of: (1) all claims asserted in this litigation, and (2) all claims that could have been asserted by the plaintiff with respect to the transactions or

occurrences at issue in this litigation. The parties acknowledge that this sum represents the total of One Thousand, Five Hundred and Sixty-Nine Dollars and Thirteen Cents ($1,569.13) in settlement of all claims asserted by the plaintiff in this litigation, and Seventeen Thousand, Five Hundred Dollard ($17,500.00) in settlement of all claims for costs and/or attorney's fees in connection with this litigation.

2. As soon as practicable after the full execution of this Agreement, the defendants shall return to the plaintiff the copy of a September 27, 2004, disability application, including attached medical reports, held in the possession of the Federal Bureau of Prisons ("BOP"), Lexington Medical Center, Employee Services Department. The defendants represent that no other copy of the application and/or attached reports are, or shall be, maintained by BOP. The plaintiff acknowledges that BOP is not under any obligation related to this litigation, or related to the case of *Beaven v. U.S. Department of Justice*, No. 5:03-cv-00084 (E.D. Ky.), to preserve its copy of the application and/or the attached reports. The parties acknowledge that the Civil Division of the United States Department of Justice ("DOJ") will retain a copy of the application and attached reports, and that that copy remains under seal pursuant to the Order entered February 7, 2007, in *Beaven v. U.S. Department of Justice*, No. 5:03-cv-00084 (E.D. Ky.).

3. The parties acknowledge that this agreement does not constitute a settlement or a release of the claims asserted by the plaintiff in *Beaven v. U.S. Department of Justice*, No. 5:03-cv-00084 (E.D. Ky.).

4. Within twenty-one (21) days of the performance by the defendants of their obligations under paragraphs (1) and (2) above, the parties shall sign and jointly file the attached Stipulation

of Dismissal, which provides for the dismissal of this action with prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

5. This Agreement does not constitute an admission of fact or law by any party, and shall not be admissible in any proceeding as evidence of such alleged admission.

6. This Agreement shall in no way affect any rights, claims, duties, or obligations the parties may have with respect to any other issues or claims not covered by this Agreement.

7. This Agreement constitutes a full settlement and release of all claims for costs and/or attorney's fees in this action. Apart from the sums paid pursuant to paragraph (1) above, the parties shall bear their own costs and attorney's fees, and shall waive any and all causes of action for attorney's fees, interest, or any other compensation or benefits not specifically provided for in this Agreement.

8. This Agreement binds the parties and their assigns, agents, and successors. The Agreement may not be modified except by a writing signed by each party or that party's authorized agent.

9. The defendants shall ensure the confidentiality of all copies in their possession of this Agreement, provided that they may separately maintain a non-confidential copy of this Agreement in which the name of the plaintiff is redacted.

10. Each of the undersigned represents that he has the authority to bind his respective party to the terms of this agreement.

Dated: August 25, 2010

SHARON K. SLONE
Plaintiff

Dated: August 30, 2010

STURGILL, TURNER, BARKER & MOLONEY, PLLC

By: _____
DOUGLAS L. McSWAIN
333 West Vine Street, Suite 1400
Lexington, Kentucky 40507
Counsel for Plaintiff

Dated: August 31, 2010

TONY WEST
Assistant Attorney General

By: _____
JOHN R. TYLER
Assistant Branch Director
JOEL McELVAIN
Senior Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7332
Washington, DC 20001
Counsel for Defendants

ATTACHMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

JANE DOE, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, *et al.*, Defendants.	)	No. 5:07-cv-00267-JBC STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure and the settlement agreement reached between these parties, the parties hereby stipulate to the dismissal with prejudice of this case as to all claims by the Plaintiff against the Defendants, each party to bear its own costs and attorney's fees.

Dated: August __, 2010

STURGILL, TURNER, BARKER & MOLONEY, PLLC

By: /s/ Douglas L. McSwain
DOUGLAS L. McSWAIN
333 West Vine Street, Suite 1400
Lexington, Kentucky 40507

Counsel for Plaintiff

Dated: August __, 2010

TONY WEST
Assistant Attorney General

By: /s/ Joel McElvain
JOHN R. TYLER
Assistant Branch Director
JOEL McELVAIN
Senior Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7332
Washington, DC 20001

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August __, I filed the Answer to First Verified Amended Complaint with the Clerk of Court electronically using the CM/ECF system. The CM/ECF system will mail notice of the aforementioned filing electronically to:

Douglas L. McSwain	dmcswain@sturgillturner.com
Holly Turner Curry	hcurry@sturgillturner.com

/s/ Joel McElvain

JOEL McELVAIN, DC Bar 448431
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW, Room 7332
Washington, DC 20001
Tel.: (202) 514-2988
Fax: (202) 616-8202
Email: Joel.McElvain@usdoj.gov

For Clerk's Office Use		
Judge	Recd Date	Grv.

For use by inmates in filing a complaint under **CIVIL RIGHTS ACT, 42 USC §1983**

INMATE NAME: Michael E. Montgomery

PRISONER NO.: 16672-074

PLACE OF CONFINEMENT: United States Penitentiary

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

MAR 07 2005

JOHN F. CORCORAN, CLERK
BY: DEPUTY CLERK

Michael Eugene Montgomery
Enter Full Name — Plaintiff

vs.

CIVIL ACTION NO. 7:05-CV-00131

• SFA" Johnson • Capt." Bondurant
• Lt. Shultz • Lt. Friess
Enter Full Name(s) — Defendant(s)

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

____ Yes X No

B. If your answer to A is Yes, describe the action in the space below.

1. Parties to the Action: ____
2. Court: N/A
3. Docket No.: ____
4. Judge: ____
5. Disposition: ____

(For example, is the case still pending? If not, what was the ruling? Was the case appealed?)

C. Have you filed any grievances regarding the facts of your complaint?

Yes ____ No X

1. If your answer is Yes, complete the enclosed verified statement, indicating the result. Please attach evidence of your exhaustion of all available grievance procedures.

2. If your answer is No, indicate the reason for failure to exhaust on the verified statement. You may be required to exhaust your claims through any applicable grievance procedures. Your complaint may be dismissed if you fail to exhaust all avenues of the grievance process in a timely fashion.

→ Denied Grievance process, Still Attempting Access

D. Statement of Claim - State here briefly the facts of your case. Describe how each defendant is involved. Include also the names of other persons involve, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of different claims, number and et forth each claim in a separate paragraph. Use as much space as needed. You may attach extra paper if necessary.

Claim #1 - Supporting Facts - Tell your story briefly without citing cases or law.

U.S. Mail Tampering / Excessive Force / Cruel And Unusual Punishment, violation of 8th Amendment (See Attached Statement of Facts)

Claim #2 - Supporting Facts - Tell your story briefly without citing cases or law.

8th Ammendment Cruel, Unusual Punishment. Wanton injury, physical Psychological damage.

Claim #3 - Supporting Facts - Tell your story briefly without citing cases or law.

N/A

E. State what relief you seek from the Court. Make no legal arguments, cite no cases or statutes.

One Million Dollars Compensatory Damages
10 Million Dollars Punitive Damages

SIGNED THIS 22 DAY OF Feb., 19__ 2005

Michael Eugene Montgomery

(Signature of Each Plaintiff)

VERIFICATION:

I, Michael Eugene Montgomery, state that I am the plaintiff in this action and I know the content of the above complaint, that it is true of my own knowledge, except as to those matters that are stated to be based on information and belief, and as to those matters, I believe them to be true. I further state that I believe the factual assertions are sufficient to support a claim of violation of constitutional rights. Further, I verify that I am aware of the provisions set forth in 28 USC §1915 that prohibit an inmate from filing a civil action or appeal, if the prisoner has, three or more occasions, while incarcerated, brought an action or appeal in federal court that are dismissed on the grounds that it was frivolous, malicious or failed to state a claim upon which relief may be granted, unless the prisoner is in imminent danger of serious physical injury. I understand that if this complaint is dismissed on any of the above grounds, I may be prohibited from filing any future actions without the pre-payment of filing fees.

I declare under penalty of perjury the foregoing to be true and correct.

DATED: 2/22/05 SIGNED: Michael Eugene Montgomery

All prisoners will now be required to pay a full filing fee of $150.00. Prisoners seeking to proceed in forma pauperis (without the

prepayment of fees) are now required to submit with their complaints, a certified copy of their trust fund account statement for the prior six month period. 28 USC §1915 as amended.

Michael Eugene Montgomery
(Petitioner/Plaintiff)

STATEMENT OF ASSETS

vs.

Johnson, Bondurant, Shultz, Ellis
(Respondent/Defendant)

I, Michael E. Montgomery, declare that I am the petitioner in the above-styled proceeding; that in support of my request to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding, or give security therefor; that I believe I am entitled to relief.

In support of my in forma pauperis application, I answer the following questions:

1. Are you presently employed? _____Yes __X__No

   If yes, what is your monthly income? _____

   If no, state the date of your last employment. 98

2. Have you received any money in the last twelve months from the following sources?

Business, Profession, Self-Employment:	_____Yes	X No
Rent Payments, Interest or Dividends:	_____Yes	X No
Pensions, Annuities or Life Insurance:	_____Yes	X No
Gifts or Inheritances:	_____Yes	X No
Any Other Sources:	_____Yes	X No

   If the answer to any of the above is Yes, please state the source and amount of each received during the past year.

3. Do you own any cash, or have any money on hand - Include any funds held in Prison Accounts.

   _____Yes __X__No If Yes, State the Value _____

4. Do you own any real estate, stocks, bond, notes, automobiles or other valuable property - (excluding clothing and ordinary household furnishings)?

   _____Yes __X__No If Yes, State the Value _____

5. List the persons who are dependant upon you for support. State your relationship to same and indicate how much you contribute toward their support. NONE

I declare under penalty of perjury that the foregoing is true and correct and have attached a certified copy of my inmate trust fund account statement for the last six months in support of this request to proceed without the payment of fees.

DATED: 2/22/05 **SIGNED:** Michael E. Montgomery

(K)

CLERK'S OFFICE U.S. DIST. COURT
AT ROANOKE, VA
FILED

FEB 23 2005

JOHN F. CORCORAN, CLERK
BY:
DEPUTY CLERK

2\22\05

Dear Clerk,

1. The enclosed documents are an initial Filing of A Civil Complaint, To be Construed As A Bivins Civil Action.

2. Please "if you will" Send me Post Filing.

3. A Copy of the Docket Sheet

Also is Enclosed An Informa Pauperis. I Am sorry that this isnt A professional Submission to you And your honorable office. Due to the Fact that i Am in A Position that inables me Access to A Typewriter or Copy Machine.

Thank You & You Are Greatly Appreciated.

Respectfully

" ORIGINAL COPY "

Statement of Facts

In the Weeks Preceding Aug 6th 2004 I Michael A. Montgomery (Plaintiff - Hereafter) Stopped recieving All incoming Mail. Post Weeks of Written and Verbal Complaint Inquiries To Prison Administrators Concerning the Whereabouts of Plaintiffs U.S. Mail, The discontinuance of U.S. Mail.

On Aug. 6th, 2004 Plaintiff was escorted By special housing Unit Staff to the Outdoor Recreation Area. Staff Further deposited 3 Additional inmates into the same recreation Cage to Plaintiff. Namely inmates Scott Gericke, Francis Libby, David Suazo. Plaintiff And above said inmates Agreed during the Course of the one hour Recreational Period to hold A Peaceful, Passive Resistance "Sit in" demonstrating Against the Prison administrations Refusal to provide Plaintiff's U.S. Mail. Shortly Thereafter, Staff ordered the demonstrative party to Submit to handrestraints, in Accordance with policy, For their Return trip to their Assigned Cells. The Demonstrating party All refused the Order, Countering with A request to have the "S.I.A" Special Investigations Agent Johnson Brought [illegible] U.S. Mail [illegible]

Statement of Facts

Defendant Johnson (upon Arrival) was Verbally hostile toward Plaintiff, devising All Allegations of U.S. Mail tampering. Stating that Plaintiff Mail isn't being observed before or after the fact. (Going out or Coming in) This" at A later date "proves" to be A lie. Lieutenant Shultz (Defendant Shultz - Hereafter) ordered another lieutenant "Corp" to tell Plaintiff to Submit to hand restraints. The Peaceful demonstration Continued. The defendants knowingly, deliberately Mis-interpreted the peaceful demonstration and escalated the situation recommending to Captain Bondurant (Defendant Bondurant - Hereafter) to Form a Special Operations (SORT) Response Team, In Full Riot Gear Armed With A Wide Variety of Heavy Gauge Semi-Automatic pepperspray Rifles, And high Velosity Rubber bullet Rifles (45. Cal), And Gas Guns holding Approx. 5 Cartriges. The S.O.R.T team took up several positions using ladders (Flanked on both sides and in Front of the Cage) to Achieve the most Advantageous, Vantage Points, So As to Heavily Fire upon the Peaceful demonstrators. The Rec. Cage is Approx. 15' x 15', The Sort members were in position

Statement of Facts

An opportunity to submit to hand restraints began to Open Fire upon the inmates "Unmercifully". The Rifles that were used were borrowed from the institutions gun towers and are designed to be fired in the general area of A hostile group to regain Crowd Control. Plaintiff was shot repeatedly in the excess of 20 times... In the head, Neck, and Back with hardened projectiles designed to burst open when striking Non-Human surfaces to release the gas substance. Defendant Shultz fired upon Plaintiff repeatedly, and simultaniously with yet a "different" weapon projecting Gas Cartriges into Plaintiffs Face from Approx. 1 to 2' away. The Plaintiff was shot Approx 4 times directly in the Face by Defendant Shultz with this weapon Alone, leaving Plaintiff to lose semiconsciousness and Ultimately Fall to the Concrete Surface. Plaintiff was subsequently handcuffed by S.O.R.T members and placed into 4 point restraints. Plaintiff Suffered Major Burning Sensations over 90% of his body and Asked lieutenant Shultz (Defendant Shultz-Hereafter) Repeatedly to Wash the gas from Plaintiffs Ski- Plaintiff

Statement of Facts

And Said "Deal With it". Lieutenant Corvo then Asks Lt. Shultz if he's ready to go have a beer. They both share a quiet moment and proceed out of the Plaintiffs Four pointed Cell, As the Plaintiff Pleads and beg's to be Washed From the Extremly Intense burning of ~~the~~ gas. Plaintiff remained in 4 points restraints for 18 hrs Then was Placed in Belly Chains, Black Box Cuffs & Shackles for 16 more hours Plaintiff was passive and compliant throughout the 34 hr.s of Additional Punishment.

Presently today Plaintiff Suffers From Blurred Vision, Scar tissue in Numerous places on Back, Rib's, And right Arm. He has on And off lower Nerve damage in back causing bed ridden pain. Suffers From phycological Post trauma.

Plaintiff recieved Numerous pieces of U.S. Mail upon the release of restraints that were back dated two to three Weeks. Plaintiff requested the S.H.U Leiutenant Friess (Defendant Freiss-hereafter) to Make Copies. The Leiutenant (Friess) came back to Plaintiff cell Acknowledging that he had made Copies and returned the originals to Plaintiff.

" Statement of Argument
Claim upon which relief is sought

Plaintiff contends that defendants had a moral and lawful responsibility to personally provide or appoint, designate to provide, the Plaintiff with An opportunity to submit to handcestraints, Ultimately ending Plaintiffs participation in the "sit in" peaceful demonstration. "Once the heavily Armed S.O.R.T team Arrived on the scene indicating to Plaintiff that potential physical injury was imminent. Defendants failure to do so displayed A premeditated deliberate indifference toward Plaintiffs physical Safety.

Plaintiff further contends that defendants use of force was excessive; And subsequent use of 4 point restraints; And the lack of Medical Attention to open wounds on back and the burning of the gas while 4 pointed clearly violates Plaintiffs 8th Amendment Right To BE FREE FROM CRUEL And UNUSUAL PUNISHMENT. WANTON INJURY, PHYSICAL AND PSYCHOLOGICAL SUFFERING.

Relief Sought

One Million Dollars, Compensatory Damages

to Million Dollars, Positive Damages

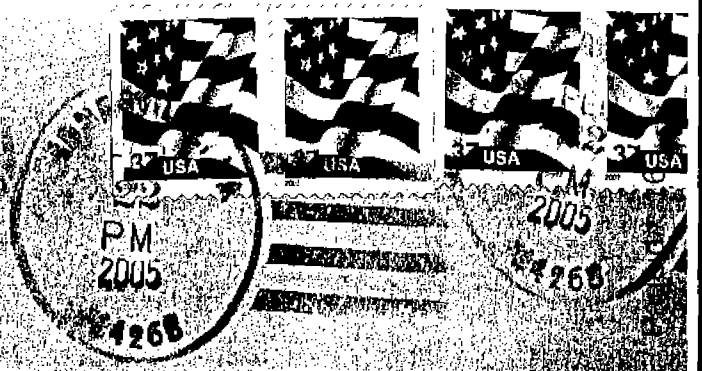
I Declare under the penalty of perjury that the above and foregoing is true and Correct. Executed this day of Feb 22nd 2005

Signature - Michael E. Montgomery

16672-074

Michael E. Montgomery
Lee County
P.O. Box 305
Jonesville VA. 24263

Michael Eugene Montgomery
United States Penitentiary
P.O. Box 305
Lee County
Jonesville VA. 24263



U. S. PENITENTIARY - LEE COUNTY
PO Box 900 - Jonesville, VA 24263
DATE 2/28/05
"Special / Legal Mail"

The enclosed letter was processed through special mailing procedures for forwarding to you. The letter has been neither opened or inspected. If the writer raises a question or problem over which this facility has jurisdiction you may wish to return the material for further information or clarification. If the writer encloses correspondence for forwarding to another addressee, please return the enclosed to the above address.

CLERK's Office
United State's District Court
Box 1234
Roanoke VA. 24006

*

Case 7:05-cv-00131-JPJ-PMS Document 2 Filed 03/07/05 Page 11 of 11 Pa

CLERK'S OFFICE U.S. DIST. COURT
AT ABINGDON, VA
FILED

MAY 24 2010

JOHN F. CORCORAN, CLERK
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

MICHAEL EUGENE MONTGOMERY,	)	
	)	
Plaintiff,	)	**Case No. 7:05CV00131**
	)	
v.	)	**FINAL ORDER**
	)	
SIA JOHNSON, ET AL.,	)	**By: James P. Jones**
	)	**Chief United States District Judge**
Defendants.	)	

This day came Plaintiff, Michael Eugene Montgomery, ("Montgomery") and Defendants, Deborah Peltier, Carlos O. Lopez, Bryan Bledsoe, Glenn Friss and David Grieve ("Defendants"), by counsel, and represented to the Court that all matters at issue in this case have been compromised and settled by the execution of a Settlement Agreement and Release.

The Court is informed that Mr. Montgomery's counsel has received a wire transfer of One Hundred Fifteen Thousand Dollars ($115,000.00), representing the consideration for the Settlement Agreement and Release. The settlement proceeds currently are deposited in Mr. Montgomery's counsel's trust account.

Mr. Montgomery has directed that Fifteen Thousand Dollars ($15,000.00) be paid to his counsel from the amount on deposit in the trust account to cover expenses incurred in this matter. As to the remaining settlement proceeds, Mr. Montgomery has instructed his counsel to draft a check for One Hundred Thousand Dollars ($100,000.00), payable to Mr. Montgomery's step-father, Glenn J. Montgomery, and to send the check by overnight mail to Glenn J. Montgomery.

In accordance with the foregoing and pursuant to this Court's Order of March 29, 2010, it appearing to the Court that nothing further remains to be done in this matter, it is therefore

Ordered that this action is dismissed from the docket of this Court with prejudice, with each party bearing their own fees, costs and expenses.

ENTERED this 21 day of May, 2010.

Chief United States District Judge

WE ASK FOR THIS:

Lonnie D. Nunley, III (VSB No. 25366)
Carrie B. Freed (VSB No. 70824)
Dustin M. Paul (VSB No. 75287)
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200 (telephone)
(804) 788-8218 (facsimile)

Counsel for Plaintiff

Sara Bugbee Winn (VSB No. 35924)
Assistant United States Attorney
United States Attorney's Office
P. O. Box 1709
Roanoke, Virginia 24008-1709
(540) 857-2254 (telephone)
(540) 857-2283 (facsimile)

Counsel for Defendants

Complaint (A)

FILED
AUG 13 2007
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

TAVERIS L. DOWNING PLAINTIFF	COMPLAINT FOR MONETARY DAMAGES PURSUANT TO THE FEDERAL TORT
VS	CLAIM ACT, 28 U.S.C. §§2671, 1346 (B)et seg.
UNITED STATES DEFENDANT	1:07cv812 LO-TRJ

RECEIVED
AUG - 7 2007
STAFF ATTORNEY
RICHMOND, VA

U.S. Department of Justice

Federal Bureau of Prisons

Beckley Consolidated Legal Center

1600 Industrial Park Road, P.O. Box 1280
Beaver, West Virginia 25813

March 27, 2007

Taveris Downing
Register No. 31050-004
FCI Memphis
P.O. Box 34550
Memphis, TN 38134

Re: Your Tort Claim No. TRT-MXR-2007-01470

Dear Mr. Downing:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et. seq.*, and authority granted under 28 C.F.R. § 0.172. You claim government liability in the amount of $2,250,00.00 for an injury that occurred on December 24, 2005. Specifically, you allege that while attempting to get back into your top bunk, you landed on the side railing, injuring your inner thigh and testicle. You allege staff at USP Lee County denied you medical treatment in retaliation.

Investigation into your claim reveals that on December 28, 2005, you were seen during sick call SHU rounds by the Clinical Director. You reported slow progressing scrotal pain and swelling since approximately December 24, 2005, and that you were vomiting. When examined by the Nurse earlier, you only reported testicle pain, denied any trauma, altercations or previous history of scrotal or inguinal surgery as the cause of your pain and swelling. You did report that your injury was possibly due to you jumping from your top bunk. An exam revealed a large swollen scrotum. You were transferred to the local emergency room for further care.

On December 29, 2005, you returned to USP Lee County, following surgery to remove your testicle due to testicular torsion. You were monitored in the observation room for about three hours and received both oral and injection pain medications and antibiotics. Approximately two hours after you were transferred back to the Special Housing Unit, you complained of nausea and vomiting. Medical staff administered medication to control your symptoms. Two hours later you received another dose of medication and approximately an hour later your vomiting subsided and you had no further complaints.

Your progress was monitored on December 31, 2005, January 1, 2006 and January 3, 2006. You made no complaints during this time. On January 4, 2006, you had a follow-up appointment with

the surgeon and had staples removed. The surgeon's report indicated that you stated on December 28, 2005, that you had injured yourself four days earlier, that it initially caused you pain, but the pain subsided. You then indicated that after 48 hours the pain increased.

As you have been provided appropriate health care and there is no evidence an act or omission of a government employee is a factor in your injury, your claim is denied. This is a final denial of your claim. If you are not satisfied with this determination, you have six months from the date of this letter to bring suit in an appropriate United States District Court, should you wish to do so.

Sincerely,

Debbie Stevens
Supervisory Attorney

for:

Michelle T. Fuseyamore
Regional Counsel

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008 EXPIRES 4-30-88

1. Submit To Appropriate Federal Agency:

MID ATLANTIC REGIONAL OFFICE
Junction Business Park, 10010
Junction Drive Suite 100K,
Annapolis Junction , Maryland 20701

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*

MR. TAVERIS L. DOWNING#31050-004
P.O. BOX 34450
Memphis, Tennessee 38134

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
[illegible]	12/16/77	Single	12/24/05	5:30 A.M.

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.)*

See Attach

5/16/07 TRT-MXR-2007-01470

PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

SEE ATTACH

10 PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

SEE ATTACH

RECEIVED
NOV - 7 2006
Bureau of Prisons
MARO Regional Counsel

11. WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
Mr. Reginald A. Falice # 13754-058	U.S.P BEAUMONT 6200 KNAUTH ROAD BEAUMONT, TEXAS 77705

12. AMOUNT OF CLAIM (in dollars) *(See instructions on reverse)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
	2,250,000.00		2,250,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
[signature]	478 935 7149	10/24/06

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000. plus double the amount of damages sustained by the United States *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

95-109
Previous editions not usable

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85), PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.2

On Dec 24, 2005 at about 5:30 Am"Claimant" Taveris L. Downing Jumped from the top bunk to use the restroom and when he finished using the restroom, he attempted to get back on the top bunk and in the process he landed partial of his inner thigh and nut sack on the side railing. Immediately he felted a sharp pain in his lower groin area. The pain was so intense that he rolled around in the bunk screaming and howling in agony. His Cellmate Reginald Falice jumped up out of his sleep and asked him what is a matter with you man? Downing screamed to him to press the emergency button. Falice immediately pressed the emergency button. After Falice had pressed the emergency button, he asked Downing again what is a matter with you man? Downing answered after taking several long deep breaths, I hit my balls on the side rail.

30 Minutes later and no assistance had come, Downing asked Falice to help him get off the top bunk: So that he could lay on the cold floor, in order to take his mind off of the pain that he was feeling. 10 Minutes later after Downing had been laid on the floor, Officer J. Fraley arrived at the door and asked Falice why is he laying on the floor? Falice answered, This man has had a bad accident and he need serious medical treatment immediately! Officer J. Fraley said, the nurse will be around during her normal rounds and then Fraley left. The Nurse came around to do her normal rounds, Falice immediately stopped her and told her that, Downing needs serious medical treatment immediately! The Nurse Mrs Duncan did not even bother to check Downing out, she just gave Falice two generic pills and told him to administer the medicine to Downing. She also stated to Falice, tell your cellmate if the pain does not subside in about two hours, have you to press the emergency button again. After about thirty minutes after Downing took the medicine the pain did seemed to have simmered down. However; after about 1½ hours later, Downing was back on fire again down in his groin area. The pain was so intense, that he screamed, cried, moaned and even tried to pour cold water down in his

groin area to try and stop the pain that he was feeling. Falice immediately pressed the emergency button several times. 30 minutes later Officer J. Fraley came to the cell and stated, "The Nurse says there is nothing wrong with you, so stop pressing the emergency button!" Downing just layed on the cold floor moaning and crying hoping the pain would go away. Finally he passed out for several hours.

At about 10:30 Am Downing woke-up. The pain was not that bad anymore, however; when he looked down towards his groin area he noticed that the front of his boxer was bulgeon out, he slowly opened his boxer and was surprise to see his testicles had swollen to the size of two huge soft balls.He immediately panick and started screaming no,no,no!!! Falice immediately asked him what is wrong? Downing responses was, My balls are going to explode any minute from now! (Downing crying oh Lord please help me please) Falice immediately pressed the emergency button again. About 30 minutes later J. Fraley came to the door again and stated, "Your not a doctor and I am not a doctor, so lay off that dam button or I am going to write both of you a shot! Falice shouted back, well you need to go get a doctor before this man die, and if he does die it will be all your fault. J. Fraley stated, he will be fine and then he left!"

At about 12:00 Pm J. Fraley came back to feed the tier again. Falice begged Fraley to get Downing some medical assistance. Fraley responses was, he will see the nurse when she makes her rounds again. Falice stated that will be another six to eight hours from now, he probably be in critical condition by then. Fraley stated, well as I already said he will see the nurse when she makes her normal rounds again.

Falice waited until 3:30 for the shift to change and then he pressed the emergency button again. Another Office came to see what was the emergency. Downing could not see the officer name tag nor did he know the officer. The officer asked Falice what is a matter with your cellmate? Falice answered, he needs serious medical treatment immediately, he injured

himself in the groin area early just morning and he has been needing medical assistance every since then. Can you please get him some medical assistance immediately? The Officer answered ok, I am going to call the nurse right now.

At about 8:00 Pm Nurse Mcintyer came to the door, Downing hobbled over to the door with his hands cuff around his entire groin area. **He asked her in tears can you please help me get some medical treatment immediately? I think my testicles are going to burst.** Nurse Mcintyer told him, she was going to call the doctor, but in the mean while take these pills and place a cold towel around your testicles to relieve some of the pain and then she left. At about 8:30 Nurse Mcintyer returned and said, the doctor will see you tommorrow. Downing keep a cold towel around his testicles all night and he took as many as deep breathes as he could, but the pain was still intense.

Dec 25th 5:30 Am The Nurse Mrs Duncan came around to make her normal rounds. Downing tried to show her that his testicles was still progressively getting bigger and bigger, she stated, let the doctor worry about that, he will see you today. She then slid some pills through the door. Before she left Downing slid her a note through the door to give to the doctor. See Exhibit "A"

It was around 11:00 Am and the doctor still had not showed up yet, so Downing got a little worried and pressed the emergency button to see what time the doctor was suppose to come. At about thirty minutes later Officer Shoemaker came to the door and surprisely stated, **We already know your problem and your not going to get any medical treatment until we decide to get you some medical treatment.**

Time continued to pass and staff members was aware that, Downing was suffering and in excruciating pain. Staff members made jokes and laughed at Downing when he requested medical assistance. On many different occassions Downing would cry out to staff members about how much pain he was in and the staff members would say to him you will be alright.

One particular staff member named Shoemaker stated to Downing, Lay down and lick your nuts. At that moment Downing knew he was in horrible situation. He wondered was this nightmare ever going to end someday. He was in so much pain, he thought, that any minute from now his testicles were going to get to big and just explode. The pain had gotten so intense, that he would have dizzy spells, blackouts, and he would wake up cold and shivering. His stomach would cramp and he would vomit, he was just barely able to maintain consciousness. Most of the time he would cry out to God wishing God would send someone to rescue him from the punishment, that the staff was deliberately, intentionally, and knowingly inflicting on him. Downing would question himself why me? I never did anything to these people. Why are these people leaving me in agony? All night Downing would just wonder why me? The pain would get so bad at times, sharp pains would hit Downing in the groin area so hard, that he would just howl and scream in agony for about 30 minutes til an Hour. Falice would hurry up and press the emergency button. Staff members would not come anymore because they already had their minds made up, that they was going to make Downing suffer until they though that he had suffered enough.

Downing continued to question himself as to why these people wanted to hurt him so bad, when he did not do anything to them. Well on the third day he got his answer as to why the staff members were intentionally, deliberately, and knowingly making him suffer. On Dec 27th 2005 6:30 Am Downing asked Officer J. Fraley, Sir why are you all denying me medical treatment? I have not done anything to you all. Why me? **J.Fraley angrily stated, tell your friend over there to stop filing them fucking liens and quit fucking with our property and maybe you will get some dam medical treatment.** Downing begin to cry because he knew, he was not going to get any medical treatment which meant in his mind, that he might die from some type of bloodcald or internal bleeding. Downing knew Falice was not going to stop fling liens on the staff members nor was Falice going to lift anyone of the liens he already had

filed against the staff members.

The Saga continued until December 28th 10:30 Am. One of the Head Aministrators made his rounds. Falice started banging and kicking on the door immediately when he heard everyone calling The Administrator. The Administrator came to door and asked Falice what do you need? Downing hobbled over to the door with his testicles cuff in his hands. The Administrator immediately send for the officers to take Downing to the doctors office. After the doctor seen Downing, he immediately had Downing rushed to the Pennington Hospital.

However; the staff did not stop their torture, they force Downing to hobble a quarter of a mile with shackles from head to toe to the transportation van. Each hobble Downing took felt like he was being set on fire alive and the sharp pains that he received in his groin almost made him faint. After the surgery and the removable of Downing right testicle, the staff members really took their torture to the extreme. The L.T. bluntly lied to the doctor. The L.T. told the doctor that there was a medical facility at the institution, where Downing could rest and heal-up. The Doctor release Downing back into their care on those grounds.

Well Downing was in for a real surprise because once they got him back into their care,they finished there torture. Once they got Downing back to the institution, they wheel chaired him around to the psychiatric ward. When Downing seen what was going on he begin to cry and scream no,no,no!! Somebody help me please!!! AH, AH, AH. Officer Jackson open the ward door and Jackson and Nurse Duncan pulled Downing out of the wheel chair and force him down on to a plastic mat that was pre-laid on the floor, then the nurse pulled down Downing pants from the rear and gave him a shot in the buttocks, everything immediately went black. Downing was later awaking several hours later from loud thunderous banging on the door. As he began to come through he heard someone screaming nigger get your

ass up we are not done with you yet! Everything was moving around and Downing barely moved, he then passed out again. He does not remember to this day whatelse happen. However; Downing does beleive he was sexually assaulted during the time he was unconscious.

CONCLUSION

For the following reasons listed above and below, Claimant Downing should be compensated.

(1) Staff Members were timely notified of the accident and decided to act on their own accord, instead of following The B.O.P requirements that are required by The B.O.P Policy during a medical emergency, (2) Staff Members Intentionally, Deliberately and Knowingly denied claimant properly and timely medical treatment which was in their power to administer to claimant, (3) Staff Members were bias towards claimant when claimant requested emergency assistance from staff members, (4) Due to the fact that claimant lost a limb because of staff members failure to comply with The B.O.P Policy and assist him timely, properly and professionally during a medical emergency, (5) Claimant may not be able to produce any offspring due to the lost of his right testicle, and (6) Claimant will have to undergo a continual psychological treatment due to the trauma, mental punishment and stress that staff member Intentionally, Deliberately and Knowingly caused.

NEGOTIABLE SETTLEMENT

(1) Government Aid, since Downing will need a continual Psychological Treatment Program.

(2) A 50% Sentence reduction, with no Supervise Release or Probation

(3) Monetary Compensation 50,000.00

Government

TAVERIS L. DOWNING Claimant

EXHIBIT-A

Downing 31050-004
Rm 117

I NEED TO SEE THE DOCTOR IMMEDIATELY!!!

MY RIGHT Testicle is still swollen. I have been taking the medicine and applying cold towel against the swelling and nothing has change. SINCE 12/24/05 I have been having this problem!!

Downing
31050-004
117

DEC 2 8 2005

Sir;

You have been added to the sick call list. I will see you as soon as possible.

DAVID K. ALLRED, DO
CLINICAL DIRECTOR
U.S.P., LEE CO. VA

CERTIFICATE OF SERVICE

I Swear under the penalty of perjury that on this 26 th day of July 2007. The foregoing is the truth.

Taveris L. Downing
31050-004
P.O. BOX 34450
Memphis, Tn 38134

LEE REGIONAL MEDICAL CENTER
PENNINGTON GAP, VA 24277

OPERATIVE PROCEDURE

PATIENT: DOWNING, TAVERIS
MED REC: 000033740
PHYSICIANHOSSEIN FAIZ,MD

DOB: 12/18/1977 28Y
PT ADMN: 2067203
LOCATION: 0409 A

31050-004

DATE OF PROCEDURE: 12-28-05

PREOPERATIVE DIAGNOSIS: Severe right testicular edema, progressive increasing pain, abnormal ultrasound of right testicle with lack of blood flow into the right testicle consistent with acute torsion of right testis associated with inflammatory changes in the epididymis and peritesticular area, suspected testicular infarction.

POSTOPERATIVE DIAGNOSIS: Right testicular infarction secondary to 360 degree torsion of testicular pedicle.

NAME OF PROCEDURE: 1. Exploration of the right scrotum, right orchiectomy for infarcted testicle. 2. Left orchiopexy.

SURGEON: Dr. Hossein Faiz

FIRST ASSISTANT: Dr. Hitesh Kaul

ANESTHESIA: General.

ANESTHETIST: Gary Saylor, CRNA

INDICATION: 28 year old gentleman, a resident of Lee Federal Penitentiary was brought to the ER with a history of hitting his right testicle and right scrotum against a metal bar 4 days ago when jumping up and down for 5 feet height. Initially, he felt pain in the right testicle but the pain stabilized. However, progressively after 48 hours, the pain became more severe associated with progressive increase in edema. He was seen in the ER. The ER physician evaluated the patient, obtained a ultrasound of testicles. I reviewed this ultrasound with the radiologist which indicated lack of any blood flow into the right testicle indicating presence of acute torsion of right testicle.

CONTINUED ON PAGE 2

DAVID K. ALLRED, DO
CLINICAL DIRECTOR
U.S.P. LEE CO. VA
DEC 29 2005
0730

LEE REGIONAL MEDICAL CENTER
PENNINGTON GAP, VA 24277

OPERATIVE PROCEDURE

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With a history of onset of symptoms 4 to 5 days ago, in case of torsion of testicle, it was expected that the patient would have already developed testicular infarction secondary to torsion and since it is 4 to 5 days old he should have been toxic, more severe pain (he described his pain severity scale of 8/10). Urgent exploration of right scrotum was indicated. The patient was advised that there is a high possibility that he would require orchiectomy for testicular infarction but if the testicle was viable, we will perform right orchiopexy and biopsy of right testicle and then perform also left orchiopexy to prevent future left testicular torsion. However, postoperative wound infection, hemorrhage, epididymoorchitis, persistent pain, atrophy of testicle and also even if we left the testicle in place there would be a chance that the patient would develop atrophy of testicle and require orchiectomy in the future. Complications of general anesthesia were all discussed as well.

The patient's urinalysis at the time of admission to the ER was normal. His comprehensive metabolic panel is normal except for creatinine of 1.2 with a top normal of 1.1 and total protein of 8.5. The rest of CMP was normal. His white count was 14,600, hemoglobin 15, neutrophils 74% with top normal of 73.

PAST MEDICAL HISTORY: Includes exploratory laparotomy for removal of penetrated sharp pointed pencil into the abdomen 15 years ago, history of involvement in MVA 17 years ago requiring ORIF of right leg fracture and repair of laceration of head. The patient's past medical history is completely unremarkable.

ALLERGIES: Denies any known allergies.

CURRENT MEDICATIONS: The patient does not take any medications.

SOCIAL HISTORY: The patient is singCONTINUEDsONnPAGEat3 in the

LEE REGIONAL MEDICAL CENTER
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Lee Federal Penitentiary for the past several years. He does not smoke.

FAMILY HISTORY: Father died at age 48 with MI. Mother is alive and well. Two brothers and 2 sisters are alive and well. There is no family history of diabetes or cancer.

PHYSICAL EXAM: Height 6', weight 170 lbs., temperature 99.8, pulse rate of 84 per minute and regular, respiration rate 18, blood pressure 134/78. Surprisingly, the patient did not appear to be in extremely severe distress. As described by the patient, the pain severity scale of only 8/10 scale. The patient was resting comfortably on the examining table, but at the time of examination of scrotum he had excruciating pain in palpation. Examination of the head, neck, lungs, heart and abdomen are unremarkable. A well healed subumbilical exploratory laparotomy scar is present. The left testicle was present in the scrotum, normal, intact. Right scrotum was severely edematous, excruciatingly painful. The testicle appeared to be located higher than normal location in the scrotum, compatible with torsion of the testicular pedicle. Examination of the extremities are normal.

With a diagnosis of suspected acute torsion of right testicle and the patient understanding about the diagnosis and nature of exploration of the scrotum and bilateral orchiopexy if the testicle is viable, otherwise right orchiectomy and left orchiopexy were described to the patient. The details, possible complications of procedure were discussed. The patient understood this very well and signed a consent form.

PROCEDURE: The patient was taken to the OR where under general endotracheal anesthesia genitalia and lower abdomen were prepped and draped in the sterile technique. An incision was made in the right scrotum along of the naturCONTINUEDrONsPAGETh4

LEE REGIONAL MEDICAL CENTER
PENNINGTON GAP, VA 24277

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incision was deepened through the subcutaneous tissue. Extensive edema of the subcutaneous tissue, cremasteric fibers and tunica vaginalis were present after these structures were incised. The testicle was identified. There was pinkish blood tinged fluid present in the scrotal sac. The right testicle was delivered into the operative field and examination revealed that completely infarcted, there was 360 degree rotation and twist of the testicular pedicle. Incision in the testicular capsule revealed that the parenchyma of the testicle was completely hemorrhagic infarcted. It was obvious that the testicle could not be salvaged and has to be resected. The base of the testicular pedicle was double clamped, transected between clamps. The transected testicle was submitted to the Pathology Department. The stump was suture ligated by 2-0 Vicryl suture. The operative field was copiously irrigated with saline solution. A 15 French Jackson-Pratt drain was placed in the scrotal sac and brought out through a small stab wound distal to the scrotal incision. The tunica layer and cremasteric fascia were approximated by interrupted 3-0 Vicryl suture. Subcutaneous tissue by interrupted 5-0 Vicryl suture and the skin by staples. The JP drain was anchored to skin by 3-0 silk suture.

Attention was made at this time towards the left scrotum and left testicle. An incision was made in the left scrotal skin along the direction of the skin crease, deepened through the subcutaneous tissue and the cremasteric fascia was incised. The scrotal sac was entered. The left testicle was completely normal. There was a small amount of yellowish fluid present in the left scrotum which was aspirated. 3-0 chromic catgut suture was placed in the most dependent portion of the left testicle. An incision was made in the cremasteric fascia which was dissected from the underlying skin of the scrotum and by pulling the suture ligature, which has been placed on the testicle, the left testicle was delivered through CONTINUEDpONiPAGEn 5he

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cremasteric fascia and placed in the subcutaneous space. The suture ligature was tied to the subcutaneous tissue transfixing the left testicle in the subcutaneous space. The cremasteric fascia was then approximated by interrupted 3-0 Dexon, subcutaneous tissue by 5-0 Dexon, skin by skin staples. A sterile dressing was applied.

The patient tolerated the procedure very well and was transferred to the Recovery Room in satisfactory condition.

cc: Dr. Allred -- Lee Federal Penitentiary Infirmary
Dr. Kaul

HOSSEIN FAIZ,MD (ES)

DD: 12/28/2005 20:19
DT: 12/28/2005 23:16
HF/ams 70171

Highlands Pathology Consultants, P.C.

Gary L. Adelson, M.D., Medical Director
130 West Ravine Road
Kingsport, Tennessee 37660
Phone: 423-224-6711 Fax: 423-224-6717

Gary L. Adelson, M.D.
Jack T. Bechtel, M.D.
Richard S. Buddington, M.D.
Landon A. Colquitt, M.D.
Theresa S. Emory, M.D.
Jere W. Ferguson, M.D.
Peter F. Gale, M.D.
Marcus C. Grimes, M.D.
Kimberly M. Helms, M.D.
David R. Hudgens, M.D.
Paul J. Sides, M.D.

SURGICAL PATHOLOGY

PATIENT: **DOWNING, TAVERIS**
DOB: **12/18/1977 (Age: 28)**
SEX: **M**
PHYSICIAN(S): **FAIZ, HOSSEIN**

COLLECTED: **12/28/05**
RECEIVED: **12/29/05**
REPORTED: **12/30/05**

S. P.#: **S05-16070**
SS#: (b)(6)
PT. ID#: **LRMC-33740**

CLINICAL DIAGNOSIS: **Right testicle torsion**
SPECIMEN:
Testicle, right

DIAGNOSIS

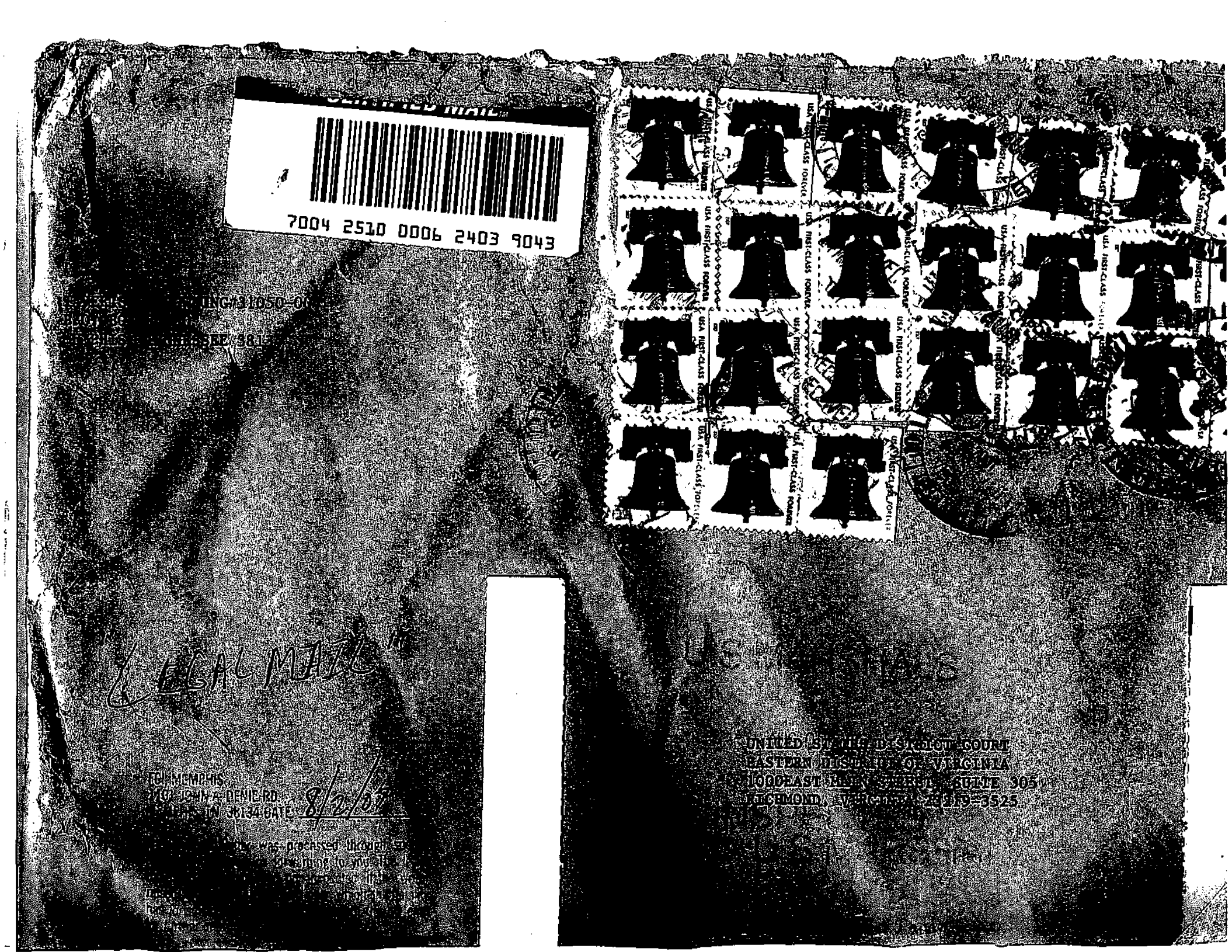
Testis and epididymis, right, orchiectomy:
Hemorrhagic infarction
(clinically, secondary to torsion).

PAUL J. SIDES, M.D.
Electronic signature

GROSS DESCRIPTION

Received in formalin and identified as "infarcted R testis" is a single dark purple-blue testis with epididymis. The dimensions of the testis are 5.3 x 3.0 x 3.0 cm. The epididymis has dimensions of 5.5 x 1.5 x 0.9 cm. The cut surface of the testis is dark burgundy-red on the inside and dark black red near the periphery of the testis close to the tunica. The cut surfaces of the epididymis are similar in appearance. Sections: representative, two cassettes. <dlc>

MICROSCOPIC: Slide(s) Examined: 2 H&E <sc>


7004 2510 0006 2403 9043
LEGAL MAIL
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
8/2/24

CLERK'S OFFICE U.S. DIST COURT
AT ROANOKE, VA
FILED

NOV 06 2008

JOHN F. CORCORAN, CLERK
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

TAVERIS L. DOWNING,	)	
	)	
Plaintiff	)	
v.	)	**Civil Action No. 7:07cv466**
	)	
UNITED STATES OF AMERICA	)	
	)	**By: Michael F. Urbanski**
Defendant	)	**United States Magistrate Judge**

REPORT

As a result of the mediation proceedings held on November 5, 2008, the undersigned hereby **REPORTS** that the parties have settled this matter upon mutually agreeable terms. The parties are to execute the customary settlement documents and, within 30 days thereof, submit an agreed order of dismissal to the Honorable Glen E. Conrad.

The Clerk of the Court hereby is directed to send a certified copy of this Report to all counsel of record.

Enter this 6th day of November, 2008.

Michael F. Urbanski
United States Magistrate Judge

CLERK'S OFFICE U.S. DISTRICT COURT
AT ROANOKE VA. - FILED
DEC 11 2008
JOHN F. CORCORAN, CLERK
BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

TAVERIS L. DOWNING	
Plaintiff,	**Civil Action No. 7:07-cv-00466**
v.	**AGREED ORDER OF DISMISSAL**
UNITED STATES OF AMERICA	BY: Hon. Glen E. Conrad United States District Judge
Defendant.	

The within action having been settled and the parties having agreed to dismiss any and all claims that were made or that could have made in this action, it is hereby ORDERED that, in accordance with Fed. R. Civ. P. 41(a), the within action shall be, and hereby is, DISMISSED WITH PREJUDICE. Costs are not to be taxed against either party and each party shall be responsible for its own attorney's fees and litigation expenses.

The clerk is directed to send copies of this Agreed Order of Dismissal to all counsel of record.

ENTER: This 11th day of December, 2008.

United States District Judge

Agreed to by:

/s/Jerry A. Lumley
Jerry A. Lumley
Attorney for Plaintiff

Sara Bugbee Winn
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

TAVERIS L. DOWNING,	:	
Plaintiff,	:	
	:	
v.	:	**Civil Action No. 7:07-CV-00466**
	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

SETTLEMENT AGREEMENT AND RELEASE OF FTCA CLAIMS

It is hereby stipulated by and between the Plaintiff, Taveris L. Downing, and the Defendant, United States of America, by and through their respective attorneys as follows:

(1) The persons signing this **Settlement Agreement and Release** warrant and represent that they possess full authority to bind to the terms of the settlement the persons on whose behalf they are signing.

(2) The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-entitled action under the terms and conditions set forth herein.

(3) This **Settlement Agreement and Release** is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the claimant or plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of litigation.

(4) The United States of America, Defendant, agrees to pay to plaintiff the sum of **EIGHTY-FIVE THOUSAND AND NO/100 DOLLARS ($85,000.00)**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and

nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter that gave rise to the above-styled lawsuit, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

(5) Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sum of **EIGHTY-FIVE THOUSAND AND NO/100 DOLLARS ($85,000.00)**, in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests which have resulted or may in the future develop from the incident giving rise to this civil action.

(6) Plaintiff and his guardians, heirs, executors, administrators or assigns hereby release and forever discharge the UNITED STATES OF AMERICA, its agents and assigns, and all other persons, firms or corporations who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages,

actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

(7) It is also agreed, by and among the parties, that the settlement amount of **EIGHTY-FIVE THOUSAND AND NO/100 DOLLARS ($85,000.00)** represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorneys fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

(8) It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

(9) Payment of the settlement amount will be made by a check drawn on the Treasury of the United States for **EIGHTY-FIVE THOUSAND AND NO/100 DOLLARS ($85,000.00)** and made payable to plaintiff, Taveris L. Downing, and Jerry A. Lumley, Esq., plaintiff's attorney. The check will be mailed by Assistant United States Attorney to plaintiff's attorney at the following address: Lumley & Howell, LLP, 350 Second Street, Macon, GA 31201. **Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff, and to execute and file with the court such documents as shall be necessary to cause the above-styled action to be dismissed with prejudice from the docket of the court**, with each party bearing its own fees, costs, and expenses.

(10) The parties agree that this **Settlement Agreement and Release**, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

(11) Determination of Plaintiff's tax liability for this payment is a matter solely between Plaintiff and the IRS and/or other state and/or local taxing authorities. Defendant makes no representation as to the Plaintiff's tax liability in regard to this payment.

(12) That the undersigned plaintiff does hereby declare that the terms of this settlement have been completely read, fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of all claims raised in this litigation.

(13) The undersigned Assistant United State Attorney agrees to submit the necessary request for payment of the settlement proceeds within five (5) business days of the execution of this **Settlement Agreement and Release**

Date of execution
11-5-08

Taveris L. Downing
Plaintiff

Date of execution
11-5-08

Jerry A. Dunlap
Attorney for Plaintiff

Date of execution
11-5-08

Sara Bugbee Winn
Assistant United States Attorney
Attorney for Defendant
VSB No. 35924

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

7:08-CV-184-ART

JOHNNY DAVIS
Plaintiff

TORT CLAIM PURSUANT TO
28 U.S.C. 2674 FEDERAL
TORT CLAIM ACT

v.

Eastern District of Kentucky
FILED
SEP 12 2008
AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; FEDERAL BUREAU OF PRISONS MID-ATLANTIC REGIONAL OFFICE-Defendants

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Plaintiff brings this action against defendant, the United States of America pursuant to the Federal Tort Claim Act (FTCA), so that this Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. 1346 (b).

1. The Plaintiff has complied with all prerequisites to a suit under the FTCA in that:

   a. On January 08, 2008 the Plaintiff timely filed an administrative claim for the matters in dispute in this action in the amount of Five Hundred Thousand Dollars ($500.000.00) with Federal Bureau Of Prisons (FBOP) Mid-Atlantic Regional Office.

   b. The Defendant, by and through it agency the FBOP Federal Medical Center, denied Plaintiff's administrative claim and on February 14, 2008 mailed its notice of denial, a copy of which is attached to complaint as Exhibit "A".

   c. The Plaintiff then after receiving the notice of denial in turned sent a letter requesting that Defendant through its agency reconsider Plaintiff's claim and explained the fact that the agency applied the wrong date that claim begin to accrued which a copy of letter is attached to complaint as Exhibit "B".

d. The Defendant, by and through its agency the FBOP Medical Center, denied Plaintiff's administrative claim a second time and on March 05, 2008 mailed its second notice of denial, a copy of which is attached to complaint as Exhibit "C".

e. This action was timely commenced following the denial of the administrative claim.

2. Plaintiff also brings this action against defendants, Ulysses Vargas, M.D., R. Ramirez, M.D., Steven Conrotto, M.D., Russell Fry, Contract Opthalmologist and Todd Diffenbaugh, Contract Optometrist., phsician assistants acting as the agents, servant, and employees of Defendant, the United States of America, in the course of their employment, who along with other agents, servants, and employees of Defendant, the United States of America, known to Defendant, the United States of America, but unknown to Plaintiff, committed the acts of negligence that are set forth more fully below.

3. As a result of the fault of the Defendants, by and through their agents, servants and employees, acting within the scope of their employment, Plaintiff suffered a dislocated IOP and left eye-extruding Vitreous and Plaintiff's left eye is injured and suffering residual injury in right eye.

4. These injuries resulted from the negligence of the agents, servants, and employees of Defendants, acting within the scope of their employment, as follows:

a. On November 03, 2004 Plaintiff was examined by Prison Contract Optometrist for reading glasses because Plaintiff's personal reading glasses had been broken.
b. At that time, Defendant, Todd Diffenbaugh (Dr. Todd) discovered Plaintiff had sustained a cataract in left eye.
c. On January 12, 2005 Plaintiff was transported to be examined by Defendant's Contract Opthalmologist Russell Fry.(Dr. Fry) Which at that time Dr. Fry agreed with Dr. Todd findings that Plaintiff had sustained a cataract in his left and Dr. Fry recommended that Plaintiff undergo cataract surgery and that he perform said surgery.

d. On February 04, 2005 Defendant, Doctor Steven Conrotto reviewed both of the Contract Doctors' findings.
e. On February 08, 2005 The Utilization Review Committee for the Prison Medical Department approved the necessary funding for the cataract surgery and all the Doctors' recommendations. The Defendant Doctor R. Ramirez signed the necessary paperwork for The Utilization Review Committee.
f. On the morning of June 27, 2005 Plaintiff was transported from USP-Big Sandy located in Inez, Kentucky to St. Mary's Medical Center (St. Mary's) in Huntington, West Virginia to have the cataract surgery performed by Dr. Fry.

G. THE DEFENDANT WAS NEGLIGENT IN FAILING TO PROPERLY AND SATISFACTORILY ADVISE DEFENDANTS AND THE AGENTS, SERVANTS AND EMPLOYEES OF THE DEFENDANT, UNITED STATES OF AMERICA HOW TO CARE FOR PRISONERS WHO HAVE UNDERGONE OUTPATIENT CATARACT SURGERY.

H. DEFENDANTS, DR. VARGAS, PA. R. RAMIREZ, AND DR. S. CONROTTO WERE NEGLIGENT ON JUNE 27, 2005 IN FAILING TO PROVIDE PLAINTIFF WITH PRESCRIBED PAIN MEDICATION. DEFENDANTS WERE FURTHER NEGLIGENT IN FAILING TO FOLLOW FEDERAL BUREAU OF PRISON POLICY FOR OUTPATIENT SURGERY INMATES AND NOT UTILIZING POST-OP INSTRUCTIONS, WHICH WAS AVAILABLE.

I. DEFENDANTS, DR. VARGAS, DR. R. RAMIREZ, AND DR. S. CONROTTO ACTIONS AND NON-ACTIONS LED TO PLAINTIFF BEING PLACED IN ADMINISTRATIVE SEGREGATION BACK AT THE PRISON WITHOUT PROPER MEDICATION AND MEDICAL ATTENTION. LATE THAT SAME NIGHT PLAINTIFF WAS SUFFERING FROM EXCRUCIATING PAIN AND ATTEMPTED TO SUMMON MEDICAL ATTENTION, BUT BECAME DIZZY AND FELL HITTING HIS HEAD ON METAL RAILING BEING KNOCKED UNCONSCIOUS ON COLD CONCRETE FLOOR.

J. ON THE MORNING OF JUNE 28, 2005 PLAINTIFF WAS TRANSPORTED TO DEFENDANT, Dr. Fry's OFFICE TO BE EXAMINED BY DR. FRY. DR. FRY'S FINDINGS INDICATED THAT IOL APPEARED DISPLACED, BUT DR. FRY STATED TO PLAINTIFF THAT THE SURGERY WENT FINE. AND THAT NO FURTHER FOLLOW-UP WAS NEEDED.

K. ON JULY 1, 2005 PLAINTIFF WENT TO HEALTH SERVICES UNIT COMPLAINING OF SEVERE EYE PAIN AND BLURRED VISION IN OPERATED EYE AND REQUESTING MEDICAL ATTENTION, BUT DEFENDANT, DR. CONROTTO STATED SICK CALL WAS OVER AND HE WAS BUSY REVIEWING MEDICAL RECORDS AND IN FACT THE SYSTOMS PLAINTIFF WAS SUFFERING WITH WAS NORMAL AFTER CATARACT SURGERY.

L. DEFENDANT, DR. VARGAS AND OTHER UNKNOWN MEMBERS OF MEDICAL STAFF AT THE PRISON WHILE ACTING AS AGENTS, SERVANTS, AND EMPLOYEES OF THE DEFENDANT, UNITED STATES OF AMERICA WAS ALSO INFORMED BY PLAINTIFF FROM JULY 02 -THRU- JULY 12, 2005 THAT OPERATED EYE WAS IN SEVERE PAIN AND VISION WAS BLURRED, BUT THEY ALL IGNORED PLAINTIFF'S REQUEST FOR MEDICAL ATTENTION.

M. On July 13, 2005 Defendant, Dr. Todd examined Plaintiff's eye and immediately discovered that was suffering from a dislocated IOL / vitreal prolapse and needed to see vitreal specialist ASAP at the University of Kentucky Medical Center (UKMC) which a copy of Dr. Todd's findings and recommendations is also attached as exhibit "D".

N. Defendant, Dr Ramirez ignored Dr. Todd's recommendations who was the contract optometrist for the Defendant, United States of America and Dr. Ramirez wrote an order that required Plaintiff to be scheduled and transported back to Dr. Fry's office. Where a copy of order is attached as exhibit "E".

O. On July 14, 2005 Plaintiff was transported to Dr. Fry's Office to be examined. After completion of the examination Dr. Fry scheduled Plaintiff to undergo a second surgery on the same eye that was previously operated on.

P. On July 27, 2005 Plaintiff was transported to Cabell-Huntington Surgery Center, located in Huntington, West Virginia. At that time Defendant, Dr. Fry performed a second surgery on Plaintiff's eye. Afterward Plaintiff was transported back to the Prison.

Q. ON JULY 28, 2005 PLAINTIFF WAS ONCE AGAIN TRANSPORTED BACK TO DEFENDANT, DR. FRY'S OFFICE FOR AN EXAMINATION. DR. FRY WAS NOT SATISFIED WITH THE RESULTS OF SECOND SURGERY AND DECIDED TO PERFORM A FORM OF MINOR LASER SURGERY.

R. AFTER THE LAST SURGICAL PROCEDURE PERFORMED BY DEFENDANT, DR. FRY PLAINTIFF'S EYE PROBLEMS ESCALATED AND REQUIRED THAT PLAINTIFF BE PLACED IN PRISON CHRONIC CARE MEDICAL PROGRAM AND RELEASED TOTALLY OUT OF THE CARE OF DR. FRY.

S. DEFENDANT, DR. TODD REMAINED PLAINTIFF ATTENDING PHYSICIAN AFTER PLAINTIFF WAS RELEASED FROM DR. FRY'S CARE

T. DEFENDANT, DR. TODD INITIATED SEVERAL PRESCRIBED COURSES OF TREATMENT AND ALSO HAD PLAINTIFF EXAMINED BY ANOTHER SPECIALIST, BUT PLAINTIFF'S EYE PROBLEMS REMAINED DESPITE DR. TODD'S EFFORTS.

U. DEFENDANT, DR. TODD EXAMINED PLAINTIFF ON OCTOBER 18, 2006 AND TOLD PLAINTIFF THE EYE PROBLEMS THAT WAS SYMPTOMATIC IN BOTH EYE AT THAT POINT WAS DUE TO A DELAY INITIAL FOLLOW-UP TREATMENT. PROBLEMS HAVE COMPOUNDED TREATMENT WILL TAKE TIME. WHICH A COPY OF DR. TODD'S FINDINGS IS ATTACHED AND IS LABELED EXHIBIT F."

V. On October 18, 2006 was when Defendant Dr. Todd informed Plaintiff he had sustained the injury and it was symptomatic in both eyes and the cause of the injury.

W. Plaintiff have been prescribed a course of medical treatment by a different specialist since being transferred to USP-Coleman II. Plaintiff is still suffering with chronic eye pain, excessive tearing, blurred vision, headaches and also been diagnosed with extreme photophobia. Plaintiff have attached a copy of findings by specialists and labeled them as exhibit "C."

X. Defendants, by their above actions, failed to follow generally accepted medical standards had they done so, the eye injury sustained could have been prevented by vitreal specialist had Dr. Todd's findings and recommendations been complied with at the time the dislocated lens was discovered on July 13, 2005.

6. As a direct and proximate result of the combined negligence of defendants, agents, servants, and employees, plaintiff has suffered the injury to left eye and resulting injury to right eye and has, therefore, become, as a direct and proximate result, disabled, unemployed, and disfigured. When injured and disabled, plaintiff was 51 years of age, with a life expectancy of 95 years.

7. As a result of the injury, plaintiff in the future will incur medical expenses, will lose earnings of approximately $250.00.00, will suffer pain of mind and body and will permanently disabled, disfigured, and suffer a substantial loss of earning capacity, all in the sum of a total of at least $500,000.00.

Prayer

Plaintiff requests that this Court render judgment against the defendants:

1. IN THE SUM TO BE SHOWN AT TRIAL, BUT IN NO EVENT LESS THAN $ 350,000.00.

2. INCLUDING WHATEVER PRE- AND POSTJUDGMENT INTEREST MAY BE ALLOWED BY LAW; AND THAT

3. PLAINTIFF BE AWARDED COSTS OF SUIT.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

RESPECTFULLY SUBMITTED THIS SEPTEMBER 02, 2008

Johnny Davis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DATE MAILED ONE COPY OF THE FOREGOING TO EACH DEFENDANT TO THE ADDRESSES LISTED BELOW BY DEPOSITING SAID COPIES IN PRISON MAIL SERVICE TO BE PROCESS BY U.S. POSTAL SERVICE WITH ADEQUATE POSTAGE AFFIXED THEREON TO ENSURE ITS DELIVERY.

THIS THE 02 DAY OF SEPTEMBER 2008

Johnny Davis

cc:

U.S. DEPARTMENT OF JUSTICE
950 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20530

FEDERAL BUREAU OF PRISONS
320 FIRST STREET, N.W.
WASHINGTON, D.C. 20534

EXHIBIT A

EXHIBIT
A

UNITED STATES GOVERNMENT
Federal Bureau of Prisons
Federal Medical Center
3301 Leestown Road
Lexington, Kentucky 40511-8799

February 14, 2008

Johnny Davis
Reg. No. 99295-071
USP Coleman II
Post Office Box 1034
Coleman, FL 33521

Re: Administrative Tort Claim No. TRT-MXR-2008-02391

Mr. Davis:

Your administrative tort claim received in this office on February 12, 2008, has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), Title 28, U.S.C., § 2672 et seg., and authority granted under 28 C.F.R. § 0.172. You allege personal injury on or about June 27, 2005, while incarcerated at USP Big Sandy. You claim government liability in the amount of $500,000.00.

In accordance with Title 28, United States Code, Section 2401(b), "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . ." In your claim you indicate your injury occurred in May 2002. Accordingly, your claim has been filed beyond the two-year statute of limitations. Therefore, your claim is denied.

This letter is a formal denial of your claim. If you are not satisfied with this determination, you have six months from the date of this letter in which to bring suit in the appropriate U.S. District Court.

Sincerely,

Michelle Fuseyamore
Regional Counsel

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO.
1105-0008
EXPIRES 5-31-05

1. Submit To Appropriate Federal Agency:

BUREAU OF PRISONS
MID-ATLANTIC REGIONAL OFFICE
10010 JUNCTION DRIVE
ANNAPOLIS JUNCTION, MD 20701

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.)* *(Number, street, city, State and Zip Code)*

JOHNNY DAVIS-09296-071
FEDERAL CORRECTIONAL COMPLEX
USP COLEMAN TWO
P.O. BOX 1034
COLEMAN, FL 33521

3. TYPE OF EMPLOYMENT MILITARY CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. OR P.M.)*
N/A	9-9-54	MARRIED	JUNE 27 - JULY 29, 05	AM - PM

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)*

ON THE MORNING OF JUNE 27, 2005 CLAIMANT WAS TRANSPORTED FROM USP-BIG SANDY LOCATED IN INEZ, KENTUCKY TO ST. MARY'S MEDICAL CENTER (ST. MARY'S) IN HUNTINGTON, WEST VIRGINIA. CLAIMANT WAS ESCORTED BY TWO (2) CORRECTIONAL OFFICERS WHO NAMES WERE R. WELLS AND N. HOLLIMAN (HEREAFTER W/ WELLS AND W/ HOLLIMAN) THIS WAS A AUTHORIZED MEDICAL TRIP FOR THE PURPOSE OF CLAIMANT HAVING CATARACT EXTRACTION SURGERY AND LENS IMPLANTATION PERFORMED BY A CONTRACTED SURGEON WHO NAME WAS DR. R. FRY.

SEE ATTACHED ADDITIONAL PAGES

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side)*

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT. CLAIMANT EYE INJURY HAD CAUSED RESIDUAL ENTROPY TO RIGHT EYE. THIS IMPAIRS CLAIMANT ABILITY TO READ NECESSITATING RIGHT EYE MAY TO COMPENSATE FOR THE LOST OF FUNCTION OF LEFT EYE WHICH CAUSE EXCESSIVE STRAINS IN BOTH EYES AT TIMES AND BLURRED VISION BECAUSE LEFT EYE IS VERY SENSITIVE TO BRIGHT LIGHTS. CLAIMANT NOW WEAR DARK SUNGLASSES INDOORS AND OUTDOORS AS PRESCRIBED TO STOP INFLAMMATION

11. WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
N/A	N/A

12. *(See instructions on reverse)* AMOUNT OF CLAIM *(in dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	LEFT EYE		$500,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
Johnny Davis	N/A	8-JAN. 08

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Imprisonment for not more than five years and shall be subject to a fine of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. *(See 18 U.S.C.A. 287.)*

UPON CLAIMANT ARRIVAL HE WAS GREETED BY THE NURSE-IN-CHARGE AND WAS TAKEN AND PLACED IN A ROOM WHILE STILL BEING ACCOMPANIED BY C/O WELLES AND C/O HOLLIMAN AT THE TIME. THE NURSE WHILE PREPARING CLAIMANT FOR SURGERY ALSO INFORMED THE TWO (2) OFFICERS THAT DR. FRY WHO WAS THE SURGEON EXPRESSED INSTRUCTIONS WAS THAT CLAIMANT REMAIN HOSPITALIZED AT ST. MARY'S FOR 24-HOURS AFTER SURGERY WAS PERFORMED. ONE OF THE OFFICERS RESPONDED BY SAYING THAT THEY WOULD HAVE TO CONTACT PRISON OFFICIALS BACK AT THE PRISON TO GET THIS MATTER APPROVED. AT THAT TIME ONE OF THE OFFICERS LEFT THE ROOM AND LATER RETURNED MOMENTS LATER STATING HE HAD CONTACTED PRISON OFFICIALS BY TELEPHONE AND WAS TOLD NOT TO COMPLY WITH THE SURGEON'S EXPRESSED INSTRUCTIONS, BUT HAVE CLAIMANT DISCHARGED IMMEDIATELY AFTER SURGERY WAS PERFORMED AND TRANSPORT CLAIMANT BACK TO THE PRISON. THIS TOTALLY DEFIED SURGEON'S INSTRUCTIONS, BUT C/O WELLES FOLLOWED THE ABOVE ORDERS OF PRISON OFFICIALS. JUST MOMENTS AFTER CLAIMANT THE OFFICERS HAD THE NURSE TO REMOVE THE IV'S THAT WAS EMBEDDED INTO CLAIMANT ARM AND INSTRUCTED THE NURSE TO BEGIN THE PAPERWORK NECESSARY FOR CLAIMANT TO BE DISCHARGED. CLAIMANT WAS IN EXCRUCIATING PAIN AND EYE WAS HEAVILY BANDAGED, BUT WAS FORCED TO GET DRESSED INTO PRISON CLOTHING AND WAS PLACED IN FULL PRISON RESTRAINTS. CLAIMANT COULD NOT WALK BECAUSE OF THE SURGICAL MEDICATION AND THEREFORE A WHEELCHAIR WAS PROVIDED FOR CLAIMANT'S DEPARTURE FROM ST. MARY'S.

BEFORE CLAIMANT WAS OFFICIALLY DISCHARGED THE NURSE-IN-CHARGE READ OUT ALOUD TO CLAIMANT AND C/O WELLS AND C/O HOLLEMAN POST-OP INSTRUCTIONS THAT WAS TO BE FOLLOWED ALSO FOR DR. FRY. CLAIMANT WAS THEN ESCORTED FROM ST. MARY'S BY C/O WELLS AND C/O HOLLIMAN IN THE WHEELCHAIR THAT WAS PROVIDED. CLAIMANT WAS THEN LOADED IN PRISON VAN AND TRANSPORTED BACK TO USP BIG SANDY. ONCE PRISON VAN ARRIVED AT PRISON BACK GATE CLAIMANT WAS ORDERED OUT OF PRISON VAN. WHICH AT THAT PARTICULAR TIME CLAIMANT REQUESTED A WHEELCHAIR. CLAIMANT TRIED TO EXPLAIN TO THE OFFICERS HE WAS STILL SUFFERING EXTREME PAIN, BUT THE OFFICER IGNORED CLAIMANT AND DEMANDED THAT CLAIMANT GET OUT OF PRISON VAN. CLAIMANT FINALLY MUSTERED UP ENOUGH STRENGTH AND SLOWLY EXITED PRISON VAN. ONCE INSIDE PRISON GATE CLAIMANT WAS FORCED TO WALK ABOUT ¼ OF MILE IN PRISON LEG IRONS AND ARM RESTRAINTS. CLAIMANT HANDS WAS SECURED CLOSELY TO HIS BODY BY BLACK BOX DEVICE AND HANDCUFFS WITH A BELLY CHAIN FASTENED TO HIS WAIST AND LEG IRONS LOCKED FIRMLY AROUND HIS ANKLES GNAWING AWAY AT HIS FLESH IN EXCRUCIATING HEAT. AFTERWARD CLAIMANT WAS ESCORTED INTO A BUILDING BY C/O WELLS AND C/O HOLLIMAN AND PLACED INTO ADMINSTRATIVE SEGREGATION WITHOUT ANY REGARD TO POST-OP INSTRUCTION THAT WAS READ TO THEM BY THE NURSE WHO ALSO PROVIDED A COPY OF SAID INSTRUCTION TO THE OFFICERS. BEFORE CLAIMANT WAS DISCHARGED FROM ST. MARY'S.

WHICH POST-OP INSTRUCTIONS OUTLINED A SPECIFIC COURSE OF PRESCRIBED TREATMENT AND SOME PRE-CAUTIONS THAT PRISON OFFICIALS MUST COMPLY WITH IN ORDER FOR CLAIMANT TO HAVE A SUCCESSFUL RECOVERY. C/O WELLS AND C/O HOLLSMAN FAILED TO TAKE THE NECESSARY STEPS TO ENSURE CLAIMANT A SUCCESSFUL RECOVERY AS OUTLINED IN SAID INSTRUCTIONS BY TOTALLY DISREGARDING THEM IN THEIR ENTIRETY. NO PAIN MEDICATION WAS ADMINISTERED AS WAS REQUIRED PER INSTRUCTIONS, NO MEDICAL ASSISTANCE AND CLAIMANT WAS NOT ACCOMPANY BY AN ADULT AND WAS PLACED IN ADMINISTRATIVE SEGREGATION CELL AND LEFT ALONE. WHICH LED TO CLAIMANT GETTING OUT OF BED IN ATTEMPT TO ACTUATE DURESS BUTTON SEEKING PAIN MEDICATION AND MEDICAL ATTENTION AFTER BEING REPEATEDLY IGNORED BY SOME UNKNOWN OFFICER WHO WAS PASSING BY ON SEVERAL OCCASIONS. AFTER CLAIMANT STOOD UP HE SUFFERED AN ACUTE PAIN IN OPERATED EYE WHICH CAUSED DIZZINESS AND CLAIMANT FELL HITTING HIS HEAD ON METAL RAILING AND WAS RENDERED UNCONSCIOUS. CLAIMANT NEVER AT NO TIME RECEIVED ANY TYPE MEDICAL ATTENTION WHILE LYING ON COLD CONCRETE FLOOR DURING THIS ORDEAL. CLAIMANT AT SOME POINT THAT NIGHT REGAINED CONSCIOUSNESS AND MANAGED TO CRAWLED BACK TO THE BED. WHERE HE REMAINED IN EXTREME PAIN AND THE FOUL ORDOR OF URINE SCENTED HIS BODY AND CLOTHING UNTIL THE NEXT MORNING.

CLAIMANT TRIED TO EXPLAIN THE OFFICERS THAT WAS PASSING OUT BREAKFAST ABOUT THE INCIDENT AND OFFICERS STATED THEY HAD TO GET BREAKFAST PASSED OUT AND FOR CLAIMANT TO WASTE IT ALL ON COP-OUT AND IT WOULD BE GIVEN TO THE OFFICER IN CHARGE. MOMENTS LATER AFTER CLAIMANT HAD FINISHED TALKING WITH THE OFFICER PASSING OUT BREAKFAST ON THE MORNING OF JUNE 28, 2005 CLAIMANT WAS TRANSPORTED BACK TO DR. FRY'S OFFICE OUTSIDE THE PRISON BY LT. FROST AND STAFF MEMBER MR. BOWLING. AFTER DR. FRY HAD CONDUCTED HIS EXAMINATION OF CLAIMANT'S EYE HE DISCUSSED THE FACT INTRAOCULAR LENS APPEARED TO BE DISPLACED, BUT CLAIMANT'S EYE WOULD BE FINE JUST CONTINUE PRESCRIBED MEDICATION AND ALSO ISSUED CLAIMANT A PAIR OF DARK SUNGLASSES TO WEAR INDOORS AND OUTDOORS AND NO FOLLOW-UP WAS NECESSARY. CLAIMANT WAS THEN TRANSPORTED BACK TO ESP-BSC SANAY. ON JULY 1, 2005 CLAIMANT WENT HEALTH SERVICE UNIT (HSU) SEEKING MEDICAL CARE BECAUSE EYE OPERATED ON BY DR. FRY WAS CAUSING SEVERE PAIN AND VISION WAS BLURRED, BUT NOBODY WAS VISIBLE WHEN CLAIMANT APPROACHED INTAKE WINDOW. HOWEVER, OFF TO THE SIDE CLAIMANT COULD SEE DR. CONROTTO STANDING AND INFORMED HIM (HIM BEING DR. CONROTTO) CONCERNING THE EXTREME PAIN AND BLURRED VISION THAT OPERATED EYE WAS CAUSING AT THE TIME. DR. CONROTTO REPLIED BY SAYING SICK CALL WAS OVER AND HE WAS BUSY AND HE KNOW CLAIMANT JUST HAD SURGERY AND IT WAS NORMAL TO HAVE PAIN IN THAT EYE.

AFTERWARD CLAIMANT CONFRONTED SEVERAL OTHER MEMBERS OF THE MEDICAL STAFF WHICH INCLUDED DR. VARGAS, RNSA LESBOL AND UNKNOWN MEDICAL PERSONNEL AT KCC-LING CONCERNING EXTREME EYE PAIN AND BLURRED VISION WHICH CLAIMANT WAS SUFFERING BETWEEN JULY 1 AND JULY 12, 2005, BUT CLAIMANT WAS REPEATEDLY TOLD EYE WAS HEALING AND NO DOCTOR WAS AVAILABLE TO EXAMINE HIM. CLAIMANT WAS FINALLY SCHEDULED TO BE EXAMINED BY OPTOMETRIST DR. DIFFENBAUGH ON JULY 13, 2005. IT WAS AT THAT TIME DR. DIFFENBAUGH DISCOVERED CLAIMANT'S IMPLANTED LENS HAD BECOME PERMANENTLY DISCONNECTED AND SOME TYPE OF FOREIGN MATTER OR BACTERIA HAD BEGIN TO FORM IN CLAIMANT'S EYE CAVITY. DR. DIFFENBAUGH AT THAT TIME RECOMMENDED THAT CLAIMANT BE TRANSPORTED TO UNIVERSITY OF KENTUCKY MEDICAL CENTER (UKMC) ASAP TO BE EXAMINED BY VITREAL SPECIALIST. DR. RAMIREZ DEFIED DR. DIFFENBAUGH'S RECOMMENDATION AND RE-WROTE CONSULT AND RE-SCHEDULED CLAIMANT TO BE SENT BACK TO DR. FRY WHO PERFORMED THE INITIAL SURGERY. DR. FRY SCHEDULED CLAIMANT TO UNDERGO SECOND SURGERY ON JULY 27, 2005. AFTER THE SURGERY ON JULY 27, 2005 CLAIMANT WAS GIVEN LASER SURGERY ON JULY 28, 2005 BECAUSE DR. FRY STATED HE WAS NOT SATISFIED STILL THE RESULT OF SECOND SURGERY. SINCE THE LATER SURGICAL PROCEDURES CLAIMANT HAVE BEEN SUFFERING CONSTANT EYE PAIN, EXCESSIVE TEARING AND NUMEROUS

OTHER EYE PROBLEMS ALONG WITH RESIDUAL INJURY.
WHICH AFFECTS CLAIMANT ABILITY TO READ AT TIMES.
SPECIALISTS STATES THAT CLAIMANT SUFFERS WITH EXTREME
PHOTOPHOBIA AND CHRONIC EYE PAIN. NOW CLAIMANT IS
PRESCRIBED TO WEAR DARK SUNGLASSES INDOORS AND OUTDOORS
TO PROTECT EYES FROM BRIGHT LIGHTS WHICH CAUSE EXCESSIVE
TEARING AND EYE PAIN. CLAIMANT IS PRESENTLY UNDERGOING
A PRESCRIBED COURSE OF TREATMENT BY A DIFFERENT SPECIALIST
IN AN ATTEMPT MINIMIZED THE DAMAGE CLAIMANT HAVE SUSTAINED.
SPECIALIST ALSO HAVE STATED THAT THE DELAY IN INITIAL FOLLOW-UP
HAVE COMPOUNDED CLAIMANT EYE PROBLEM. WHICH IS A RESULT
FROM PRISON OFFICIALS, OFFICERS AND MEDICAL STAFF NEGLIGENT
AND ARBITRARY BEHAVIOR.

Johnny Davis

EXHIBIT B

February 24, 2008

Ms/Mrs. Michelle Fuseyamore, Regional Counsel
Federal Bureau of Prisons
Federal Medical Center
3301 Leestown Road
Lexington, Kentucky 40511-8799

EXHIBIT
B

Re: Administrative Tort Claim No: TRT-MXR-2008-02391

Dear Ms/Mrs. Fuseyamore,

This letter is in reference to the Administrative Tort Claim referenced above inwhich your office denied on February 14, 2008. In your letter you stated that the claim was denied because it was not submitted to your office within the two-year statute of limitations period that is required by Federal Law. You have also stated in your letter that I had indicated in my tort claim that I sustained my injury in May 2002. After carefully reviewing my copy of the tort claim I cannot find anywhere within the four-corners of the document that I submitted to your office whereas I stated I sustained my injury on the date you alleged in your letter. Furthermore I was not even an inmate in the Federal Prison System on the date you have alleged in your letter denying my claim. This truly baffles me that you would use this particular date to deny my claim when it is irrelevant to the claim in its entirety. I would also like to take this time to clarify the matter concerning the injury which I have sustained. I was officially informed of the fact that I had suffered an eye injury on October 18, 2006 after I was examined by an Optometrist at USP-Big Sandy. (See Attached Copy Of Medical Record) Prior to this particular time I was undergoing various type of prescribed medical treatment for my eye and was told that the extrem pain and blurred vision and excessive tearing would soon stop. However, as time progressed my eye problems got worse and compounded. Therefore, the

two-year statute of limitations period would not be applicable until I was officially informed of the facts surrounding my eye problems by the Optometrist on October 18, 2006. There was no way that I could have known that my eye was not going to get better or I had sustained an injury until I was told by the Optometrist. Therefore, I respectfully ask that you please reconsider my tort claim based on the fact that the statute of limitations did not start to run until October 18, 2006. In conclusion I would ask that your office please send me it reply whether or not my claim is going to be reconsider. If I have not recieved any type of reply from your office within 15 days of the date of this letter I will proceed to the court with my claim inwhich you have denied in order that I may recieve just compensation for my injury.

Respectfully,

Johnny Davis

JOHNNY DAVIS
Register Number 99295-071

PATIENT EXAMINATION FORM

NAME Johnny Davis AGE 51 SEX M DATE 10-18-06

TECH HX
Consulted via phone c̄ a Dr Findly at Commonwealth Eye in Lex.
Explained XS pain & tearing 2° to Cat removal OS - ↓VA

DOCTOR HX
Symptomatic in both Eyes at this point.
This is due to a delay in initial follow-up Treatment.
Problems have compounded Treatment will take time

ENTRANCE TESTS

	FAR	NEAR		FAR	NEAR
UNAIDED DIST VA OD	20/ 70	20/	CURRENT Rx DATE		BC
OS	20/ 100	20/	OD	20/	ADD
OU	20/	20/	OS	20/	TYPE

PUPILS: ERRLEAD
COVER: Ø
NPC
PD
PINHOLE VA OD 20/ OS 20/
KER OD OS

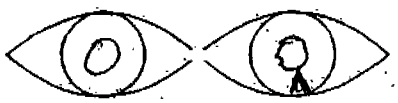
COLOR VISION OD WNL OS WNL
STEREO FUSION WNL
EOM MOTILITY WNL
BP
FIELD SCREEN CONFRONTATION WNL AMSLER WNL PERIMETRY WNL

PHOROMETRY

RETINO OR AUTOREFR	OD	20/	DIST SUBJ OD	P1	20/ 70
	OS	20/	OS	+50 - 50 x 100	20/ 100
NEAR SUBJ	OD +250	20/	AMP	PRA	ASSOC PHORIA LAT
	OS	20/		NRA	VERT

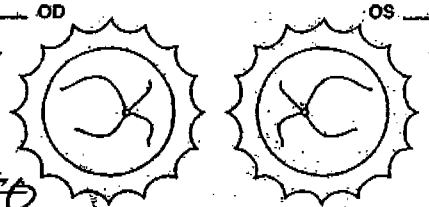
EXTERNAL (BIOMICROSCOPY) OD OS

ANGLE EST (GRADE) OD 1 2 3 4 OS 1 2 3 4



INTERNAL (OPHTMALMOSCOPY) DO 90 20 BIO 78 MIO

OD		OS		OD		OS
P	TEARS		seeing floats in OS	3/3	C/O	3/3
	LIDS/LASHES				DISC MARGINS	
	CORNEA				MACULA	
	PAL CONJ				VESSELS	
	BULB CONJ				BACKGROUND	
	ANT CHMB				MEDIA	
	LENS	IOL			VITREOUS	
	IRIS				PERIPH RET	



TONOMETRY OD 19 OS 21 TIME 7:50

DPA Tropic .25% .5% 1% Phenyl 2.5% 5% 10% Pared 1% Cyclo .5% 1% 1%
TPA Rx

ASSESSMENT
1. EE-OD / CHA-OS c̄ Presb
2. Pain, Tearing - OD/OS
3. Pseudo Phakia - OS
4. Floater - OS

RX

	Sphere	Cyl	Axis	Prism	Base	Adj
OD	+250					
OS	+300	-50	100			

RORX

PLAN
1. RORX
2. * Voltaren (Diclofenac) Ophth Soln - 1 gt OU qid - 3 refills
   * Art. Tears Ophth Soln 1 gt OU 6-10/day - 0 45 refills
3. 4. > Discussed - monitor

See me in Nov.

SIGNED [signature]
S. CONROTTO, MD
USP Big Sandy
10-23-06

EXHIBIT C

EXHIBIT

C

UNITED STATES GOVERNMENT
Federal Bureau of Prisons
Federal Medical Center
3301 Leestown Road
Lexington, Kentucky 40511-8799

March 5, 2008

Johnny Davis
Reg. No. 99295-071
USP Coleman II
Post Office Box 1034
Coleman, FL 33521

Re: Administrative Tort Claim No. TRT-MXR-2008-02391

Mr. Davis:

Your administrative tort claim received in this office on February 12, 2008, has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), Title 28, U.S.C., § 2672 et seg., and authority granted under 28 C.F.R. § 0.172. You allege personal injury on or about June 27, 2005, while incarcerated at USP Big Sandy. You claim government liability in the amount of $500,000.00.

In our first letter dated February 14, 2008, we made a mistake on the date of your injury. In accordance with Title 28, United States Code, Section 2401(b), "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . ." In your claim you indicate your injury occurred in May 2005. Accordingly, your claim has been filed beyond the two-year statute of limitations. Therefore, your claim is denied.

This letter is a formal denial of your claim. If you are not satisfied with this determination, you have six months from the date of this letter in which to bring suit in the appropriate U.S. District Court.

Sincerely,

Michelle Fuseyamore
Regional Counsel

BEC

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO.
1105-0008
EXPIRES 5-31-05

1. Submit To Appropriate Federal Agency:

BUREAU OF PRISONS
MID-ATLANTIC REGIONAL OFFICE
10010 JUNCTION DRIVE
ANNAPOLIS JUNCTION, MD 20701

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*

JOHNNY DAVIS-09296-071
FEDERAL CORRECTIONAL COMPLEX
USP-COLEMAN TWO
P.O. BOX 1034
COLEMAN, FL 33521

3. TYPE OF EMPLOYMENT MILITARY CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
N/A	9-9-54	MARRIED	JUNE 27 - JULY 29, 05	AM - PM

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)*

ON THE MORNING OF JUNE 27, 2005 CLAIMANT WAS TRANSPORTED FROM USP BIG SANDY LOCATED IN INEZ, KENTUCKY TO ST. MARY'S MEDICAL CENTER (ST. MARY'S) IN HUNTINGTON, WEST VIRGINIA. CLAIMANT WAS ESCORTED BY TWO (2) CORRECTIONAL OFFICERS WHO NAMES WERE R. WELLS AND N. HOLLIMAN (HEREAFTER R/O WELLS AND R/O HOLLIMAN) THIS WAS A AUTHORIZED MEDICAL TRIP FOR THE PURPOSE OF CLAIMANT HAVING CATARACT EXTRACTION SURGERY AND LENS IMPLANTATION PERFORMED BY A CONTRACTED SURGEON WHO NAME WAS DR. R. FRY.

SEE ATTACHED ADDITIONAL PAGES

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side)*

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT. CLAIMANT EYE INJURY HAVE CAUSED RESIDUAL INJURY TO RIGHT EYE. THIS IMPAIRS CLAIMANT ABILITY TO READ BECAUSE RIGHT EYE MAY TO COMPENSATE FOR THE LOST OF FUNCTION OF LEFT EYE. WHICH CAUSE EXCESSIVE TEARING IN BOTH EYES AT TIMES AND BLURRED VISION BECAUSE LEFT EYE IS VERY SENSITIVE TO BRIGHT LIGHTS. CLAIMANT NOW WEAR DARK SUNGLASSES INDOORS AND OUTDOORS AS PRESCRIBED TO STOP INFLAMMATION

11. WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
N/A	N/A

RECEIVED
JAN 14 2008
Bureau of Prisons
MARO Regional Counsel

12. *(See instructions on reverse)* AMOUNT OF CLAIM *(in dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	LEFT EYE		$500.000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
Johnny Davis		8-JAN. 08

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Imprisonment for not more than five years and shall be subject to a fine of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. *(See 18 U.S.C.A. 287.)*

95-108
Previous editions not usable

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

EXHIBIT D

EXHIBIT D

93

NAME Johnny Dav

DATE 7-13-05

TECH HX

Vision blurred-OS - had cataract removed 6/28/05 (6-27-05)

DOCTOR HX

PH 20/60

ENTRANCE TESTS

	FAR	NEAR		FAR	NEAR
UNAIDED OD 20/	20/		CURRENT DATE		BC
DIST OS 20/ 400	20/		Rx OD	20/ 20/	ADD
VA OU 20/	20/		OS	20/ 20/	TYPE

PUPILS | COVER | NPC | PD | PINHOLE VA OD 20/ OS 20/ | KER OD OS

COLOR VISION OD WNL OS WNL | STEREO FUSION WNL | EOM MOTILITY WNL | BP | FIELD SCREEN CONFRONTATION WNL AMSLER WNL PERIMETRY WNL

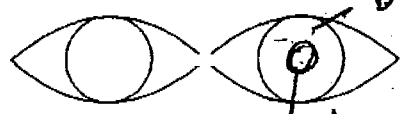
PHOROMETRY

RETINO OR AUTOREFR OD 20/ OS 20/ | DIST SUBJ OD 20/ OS 20/

NEAR SUBJ OD 20/ OS 20/ | AMP | PRA NRA | ASSOC PHORIA LAT VERT

EXTERNAL (BIOMICROSCOPY) OD OS

ANGLE EST (GRADE) OD 1 2 3 4 OS 1 2 3 4



bombe

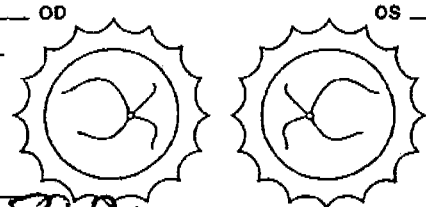
vitreal prolapse into anterior chamber

INTERNAL (OPHTMALMOSCOPY)

DO 90 20 BIO 78 MIO

OD		OS
✓	TEARS	✓
✓	LIDS/LASHES	✓
✓	CORNEA	✓
	PAL CONJ	
	BULB CONJ	
	ANT CHMB	—
	LENS	—
	IRIS	

bombé



OD		OS
	C/O	
	DISC MARGINS	
	MACULA	
	VESSELS	
	BACKGROUND	
	MEDIA	
	VITREOUS	
	PERIPH RET	

TONOMETRY OD TIME OS 25 12:50 pm

DPA			
Tropic	.25%	.5%	1%
Phenyl	2.5%	5%	10%
Pared	1%		
Cyclo	.5%	1%	1%

TPA Rx

ASSESSMENT

① Displaced IOL / Vitreal prolapse OD

RX	Sphere	Cyl	Axis	Prism	Base	Adj
OD						
OS						

PLAN

① Needs to see Vitreal specialist ASAP

* Dr that did Cat. extraction noted condition and prescribed steroid. did not do any follow-up.

UKMC

[signature] RAMOS

SIGNED [signature] S. CONRATTO MD 8-12-05

EXHIBIT E

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EXHIBET

E

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CONSULTATION SHEET**

REQUEST

TO:	FROM: (Requesting physician or activity)	DATE OF REQUEST
Huntington Eye Assoc.	R Arnold	7/13/05

REASON FOR REQUEST (Complaints and findings)

Dislocated IOP - left eye -
extruding vitreous
S/P Cataract

PROVISIONAL DIAGNOSIS

ASAP

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
		☐ BEDSIDE ☐ ON CALL	☐ ROUTINE ☐ TODAY ☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

RECORD REVIEWED ☐ YES ☐ NO PATIENT EXAMINED ☐ YES ☐ NO TELEMEDICINE ☐ YES ☐ NO

Scheduled 7/13/05.

F. TERRERO-LEIBEL, AHSA
USP Big Sandy

(Continue on reverse side)

NATURE AND TITLE		DATE

PITAL OR MEDICAL FACILITY	RECORDS MAINTAINED AT	DEPARTMENT/SERVICE OF PATIENT

TION TO SPONSOR	SPONSOR'S NAME (Last, first, middle)	SPONSOR'S ID NUMBER (SSN or Other)

NT'S IDENTIFICATION (For typed or written entries, give: Name – last, first, middle; ID no. (SSN or other); Sex; Date of Birth; Rank/Grade)	REGISTER NO.	WARD NO.
Davis, Johnny. #99295-071		

CONSULTATION SHEET
Medical Record
STANDARD FORM 513 (REV. 4-98)
Prescribed by GSA/ICMR FPMR (41 CFR) 101-11.203(b)(10)

USP BSY.

EXHIBIT F

PATIENT EXAMINATION FORM

NAME Johnny DAVIS AGE 51 SEX M DATE 10-18-06

TECH HX
Consulted via phone c̄ a Dr Findly at Commonwealth Eye in Lex.
Explained XS pain & tearing 2° to Cat removal OS - ↓VA

DOCTOR HX
Symptomatic in both Eyes at this point.
This is due to a delay in initial follow-up Treatment.
Problems have compounded Treatment will take time

ENTRANCE TESTS

	FAR	NEAR			FAR	NEAR
UNAIDED DIST VA	OD 20/ 70	20/	CURRENT Rx	DATE		BC
	OS 20/ 100	20/		OD	20/ 20/	ADD
	OU 20/	20/		OS	20/ 20/	TYPE

PUPILS: ERRLOAD
COVER: Ø
NPC
PD
PINHOLE VA OD 20/ OS 20/
KER OD OS

COLOR VISION OD WNL OS WNL
STEREO FUSION WNL
EOM MOTILITY WNL
BP
FIELD SCREEN: CONFRONTATION WNL, AMSLER WNL, PERIMETRY WNL

PHOROMETRY

RETINO OR AUTOREFR	OD	20/	DIST SUBJ	OD P1	20/ 70
	OS	20/		OS +50 - 50 x 100	20/ 100
NEAR SUBJ	OD +250	20/	AMP	PRA	ASSOC PHORIA LAT
	OS	20/		NRA	VERT

EXTERNAL (BIOMICROSCOPY) OD OS

ANGLE EST (GRADE) OD 1 2 3 4 OS 1 2 3 4

seeing floats in OS

OD		OS
D	TEARS	
	LIDS/LASHES	
	CORNEA	
	PAL CONJ	
	BULB CONJ	
	ANT CHMB	
	LENS	IOL
	IRIS	—

INTERNAL (OPHTMALMOSCOPY)

DO 90 20 BIO 78 MIO

OD		OS
3/3	C/O	3/3
↓	DISC MARGINS	↓
↓	MACULA	↓
↓	VESSELS	↓
↓	BACKGROUND	↓
↓	MEDIA	↓
↓	VITREOUS	↓
	PERIPH RET	

TONOMETRY OD 19 OS 21 TIME 7:50

DPA: Tropic .25% .5% 1%; Phenyl 2.5% 5% 10%; Pared 1%; Cyclo .5% 1% 1%
TPA Rx

ASSESSMENT
1. EE-OD / CHA-OS c̄ Presb
2. Pain, Tearing - OD/OS
3. Pseudo Phakia - OS
4. Floater - OS

RX

	Sphere	Cyl	Axis	Prism	Base	A
OD	+250					
OS	+300	-50	100			

RORX

PLAN
1. RORX
2. * Voltaren (Diclofenac) Ophth Soln - 1 gt OU qid - 3 refills
   * Art. Tears Ophth Soln 1 gt OU 6-10/day - 0 45 refills
3. 4. > Discussed - monitor

See me in Nov.

SIGNED M D Jefferson MD
S Conrotto MD
S. CONROTTO, MD
USP Big Sandy
10-23-06

EXHIBIT

EXHIBIT G

EXHIBIT

G

OCULAR HEALTH EXAM

ANGLE DEPTH

OD OS

PI

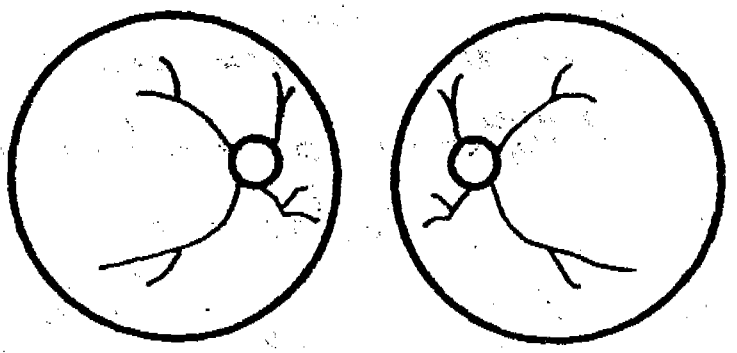
SLIT LAMP :
CORNEA cells OS
AQUEOUS ø Cells/ flare.
ANGLES open.
LENSES OD clear. OS PC IOL
PUPILS OS- irreg.
LIDS Normal
CONJUNCTIVA Quiet
GOLDMANN TONOMETRY : ____AM 12 25 PM 22 O.D. 23 O.S.
DATE : ____ ____AM ____PM ____O.D. ____O.S.

OPHTHALMOSCOPY : Defer To Ophthalmology due To Extreme photo phobia ___Phenylepherine HCl(2.5%) & ___Tropicamide(1.0%)

DIRECT :
C/D
A/V
MEDIA
FOVEAL REFLEX
PER. RET.

VOLK 78 :
C/D
A/V
MEDIA
FOVEAL REFLEX

BIO :
RETINA : FLAT ELEVATED HOLES TEARS
PER. DEGENERATION
VASCULATURE : CALIBER ____NORMAL ____ABNORMAL
DISTRIBUTION ____NORMAL ____ABNORMAL
POSTERIOR POLES : ____QUIET ____MOTTLED ____ARM
PERIPHERAL RETINAE :



COPY

S/ Sung K. Lee, MD
Sung K. Lee, M.D
3/27/07

SUMMARY : 1. Dx Pseudophakia OS ± complications : Sec. uveitis OHTN. True photophobia
2. Tx Defer To Ophthalmology ASAP
Permit for sunglasses & indoors + outdoors.
Permit for Single cell housing until seen by Ophthalmology
3. RECALL Ref. Optometry ____MINUTES
PURPOSE

Meds:
1. Vol/Terem : 1gtt qid OU - Refills : 3 (Three)
2. Artificial Tears 1 Refills : 3 1gtt q2Hrs.

Daniel D Richardson, OD
27 Mar 07 22

D. Richardson, O. D.
Contract Optometrist

NAME:
DOB:

SCREENING PERFORMED BY: _____
DATE: _____

1030

ASAP

CHIEF COMPLAINT: Photophobia/Pain OS — Hx of cataract surgery OS 2nd Implant — DATE OF OPTOMETRIC EXAM: 3/27/07

FAMILY Hx: DIABETES Parents. THYROID Neg HTN Parents.
BLINDNESS Neg GLAUCOMA Neg.

OCULAR Hx: PAIN OS DISCOMFORT Tearing Photophobia INJURIES OS Trauma.
cataract. SURGERIES OS Laser LAST EXAM 10/22/06 LAST Rx 2006 AGE: 52 1/2

GEN. HEALTH: OS cataract surgery & 2nd Implantation on ASA/Valsartan/HCTZ.
MEDS: Ibuprofen. Cyclopentolate opht. Left QID Allergies: NKA

CLD	R [illegible]	20/ 40-2		20/ J4	OS.	
NT.	L +50 -50 x 100	20/70	Add. +2.50	NEAR 20/ J8	IPD	Base Curve
ST VA no Rx	R 20/ L 20/ Binoc 20/50	NEAR VA no Rx	R J— L J—	Binoc J—	Binoc Near Pt of Accom s or e	
COVER	R or S 50' / 100 TEST	Dist	ϕ			
		Near	6 – 10 EXO			
VERSIONS	Unrestricted			CONV NP	~4"	
PUPIL REFLEXES	PERRL Reactive Irregular OS ↑ sensitivity to light.			CONFRONTATIONS	Full & Complete	

KERATOMETRY	R		L
STATIC SKIAMETRY	R	Not Able To Perform Due to Photophobia	
MONOCULAR SUBJ	R	No Useable responses	20/
BINOCULAR SUBJ 20/	R	20/	L 20/
OTHER SUBJ 20/	R	20/	L 20/

REMARKS AND METHODS

HETEROPHORIA AM	Lateral		Vertical
VERGENCES AM	Pos	Neg	R or L Supra Infra
DYN X-CYL OTHER	R		L
REL ACCOM at cm through			Neg Pos
NEAR WORKING LENS	R		L
ACCOM AMPLITUDE	R		L Binoc
NEAR RANGE through	in	Out	
HETEROPHORIA at cm	Measured AC/A	Calc AC/A	
VERGENCES at cm Pos	Neg	COLOR VISION	TEST
ADDITIONAL TESTS			
DATE ORDER - LAB	FRAME SENT	DISPENSED	

Rx	SPHERE	CYLINDER	AXIS	PRISM	ADD
OS					
OS					

Rx	SPHERE	CYLINDER	AXIS	PRISM	ADD
OD					
OD					

FRAME OR MOUNTING #3304 (SMOKE)
BRIDGE TEMPLES
LENSES SIZE AND SHAPE
DIST OS DEC OS NEAR OD DEC OD
IES OS HEIGHT OS TOT OD DEC OD
PD 72
TINT C/W PLASTIC
PDS - CONSTANT WEAR
SPECIAL PURPOSE -

FRAME OR MOUNTING #33A (CIN)
BRIDGE TEMPLES
LENSES SIZE AND SHAPE
DIST OS DEC OS NEAR OD DEC OD
SES OS HEIGHT OS TOT OD DEC OD
TINT
CLOSE APPLICATION

OD's
Davis, Johnny
99295-071
21

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION (Sign each entry)
4/16/07 1245	Sr pt. seen in s/c c̄ complaint of need refill meds. for his medical condition.
	O- Alert, oriented x3, ambulatory, NAD BP 130/85, P78, R16, Temp. 98°F.
	L-eye = redness, no vision, states has chronic pain/headaches since last surgery on 7/2005. No neurologic defficit noted
	A- S/P Hx of catarats surgery x3. R/O Headaches (Chronic)
	P- Motrin 400mg t po tid x 30 days. Pt. educated about med use/side effects and buy med. for headaches in Commissary.
	S. Fernandez, MLP. FCC Coleman, FL.
5/4/07 10/5	ADMINISTRATIVE NOTE: Patient seen by Dr. Kraut, ophthalmologist Please see consult
	P) ① Continue Voltaren oph. Soln. # 1 c̄ 5 refills 1 gtt. OS. qid
	② Motrin 400 mg p.o. qd. x 6 months
	③ F/U in 6 months, Continue meds until next visit
	④ allow him to wear Sunglasses in doors. Single cell.
	S. K. Lee, MD Sung K. Lee, MD
	DAVIS, Johnny 99295-071 USP-2-
	COPY

99295-071
DAVIS, JOHNNY
09-09-1954
FCC COLEMAN USP-2

ANDARD FORM 600 (REV. 6-97) BACK

99295-071
DAVIS, JOHNNY
09-09-1954
FCC COLEMAN USP-2

A/P ① Chronic uveitis OS

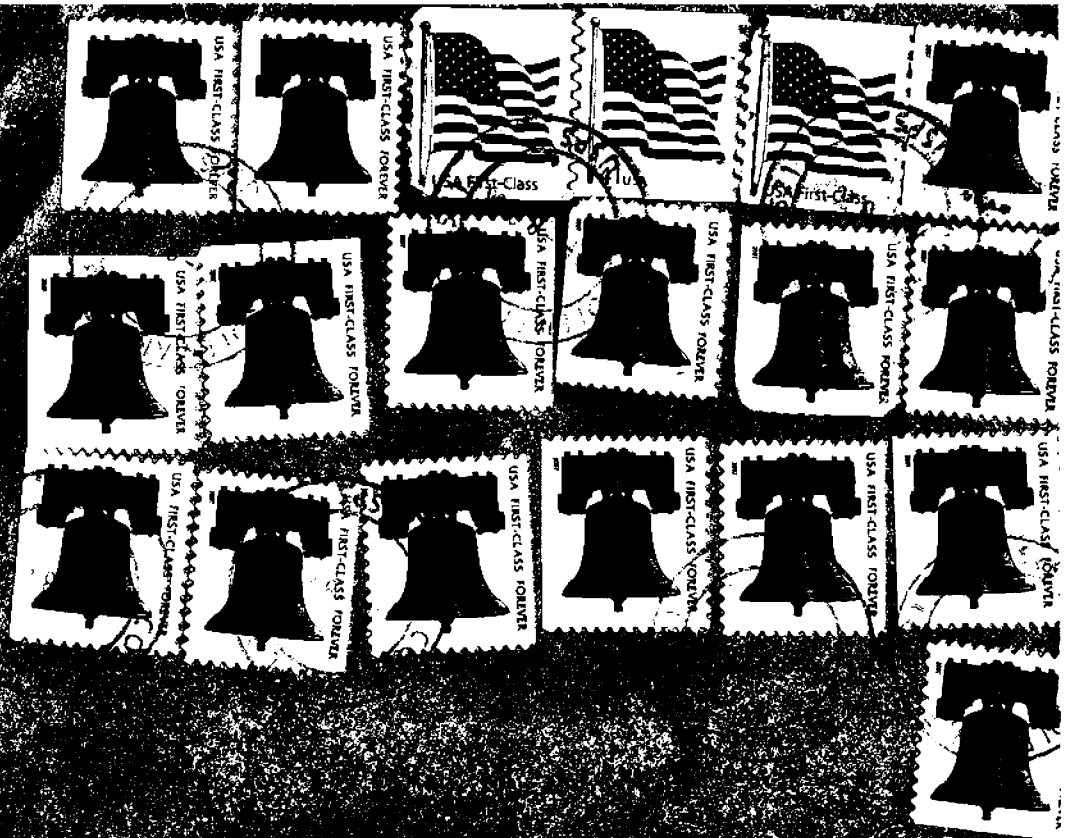
Continue Pred forte 1%, Voltaren OS qd
Artificial Tears every 4-6 hrs prn
Flu next site visit
Ibuprofen 400 mg po q 6° prn.
Single cell status

S. Lee MD [signature] MD
Sung K. Lee, MD
5/19/08

99295-071
DAVIS, JOHNNY
09-09-1954
FCC COLEMAN USP-2

5

JOHNNY DALES - 99295071
FEDERAL CORRECTIONAL C.M.
USP-COLEMAN TWO
P.O BOX 1034
COLEMAN, FL 33521



LESLIE G. WHITMER
CLERK OF COURT
110 MAIN STREET
203 FEDERAL BUILDING
PIKEVILLE, KY 41501-1110

7005 3110 0003 8092 6458

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

CERTIFIED MAIL™

Civil
Case Assignment

Case number **7:08CV-184-Judge Amul R Thapar**

Assigned on 09/12/2008

NOT FOR CITATION OR PUBLICATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

JOHNNY DAVIS,	)	
	)	
Plaintiff,	)	Civil No. 08-184-ART
	)	
v.	)	
	)	**MEMORANDUM OPINION**
UNITED STATES OF AMERICA, et al.,	)	**AND ORDER**
	)	
Defendants.	)	
	)	
	)	

*** *** *** ***

INTRODUCTION

Johnny Davis is currently in the custody of the Federal Bureau of Prisons ("BOP") and incarcerated at the United States Penitentiary-II, in Coleman, Florida. He has initiated a prisoner *pro se* civil action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2672, *et seq.*, and he has been granted permission to proceed *in forma pauperis*, R. 4. The Court is required to screen the Plaintiff's complaint before allowing it to proceed pursuant to 28 U.S.C. § 1915A(a). *McGore v. Wrigglesworth*, 114 F.3d 601, 607–08 (6th Cir. 1997). Even before screening, however, the Court must ensure that it has jurisdiction to hear this claim.

The FTCA provides a limited waiver of the United States' sovereign immunity and allows tort claims against the United States "in the same manner and to the same extent as a

private individual under like circumstances." 28 U.S.C. § 2674 (1994). In other words, "[t]he Act waives sovereign immunity to the extent that state-law would impose liability on a private individual in similar circumstances." *Young v. United States,* 71 F.3d 1238, 1241 (6th Cir. 1995). The Act first requires claims to be submitted to the appropriate agency to give the government the opportunity to settle the claim before the plaintiff may bring suit. *See Ellison v. United States*, 531 F.3d 359, 361 (6th Cir. 2008). And the Act contains a strict two-year statute of limitations. 28 U.S.C. § 2401(b). "The requirement in 28 U.S. § 2675(a) that an administrative claim be filed as a prerequisite to filing a civil action under the Federal Tort Claims Act and the two year statute of limitations prescribed by 28 U.S.C. § 2401(b) are . . . jurisdictional requirements, not capable or waiver or subject to estoppel." *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1980) (per curiam); *see Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002) ("Compliance with this statutory requirement is a jurisdictional prerequisite that cannot be waived."). To have jurisdiction over this claim, therefore, the Court must ensure that Davis complied with both the statute of limitations and the time limit to file suit after the administrative denial.

FACTUAL ALLEGATIONS

The facts recited here simply summarize the allegations contained in the Plaintiff's self-styled complaint and the exhibits attached to it and do not represent a finding by the Court of the actual facts in this case. According to the documents filed by Davis, he was initially evaluated by an ophthalmologist, a contract physician named Dr. Fry. On June 27, 2005, he was transported to a hospital where Dr. Fry performed out-patient cataract surgery on his left

eye. Davis was returned to the prison that same day and was placed in administrative segregation with no medications or after-care instructions. He claims that during the night, he suffered severe pain and tried to summon medical attention. Further, he claims that he became dizzy and fell, hitting his head on a metal railing which knocked him unconscious.

The next day, June 28, 2005, Plaintiff again saw Dr. Fry, whose "findings indicated that the IOL appeared displaced, but Dr. Fry stated to Plaintiff that the surgery went fine[and] that no further follow-up was needed." By July 1, 2005, Plaintiff went to the prison's health services department with eye pain and blurred vision, but Dr. Conrotto told him that these complaints were normal after cataract surgery. Davis alleges that he sought help from several medical staff members between July 2, 2005, and July 12, 2005, but they ignored his complaints.

On July 13, 2005, Dr. Todd Diffenbaugh examined Plaintiff, diagnosed "displaced IOL/vitreal prolapse," and wrote, "needs to see vitreal specialist ASAP. Dr. that did cat. extraction noted condition and prescribed steroid. Did not do any follow-up." Exh. D. "UKMC" is written and circled on the bottom of that page. Plaintiff complains that Dr. Ramirez sent him back to Dr. Fry the next day, July 14, 2005, rather than sending him to the University of Kentucky Medical Center.

On July 27, 2005, Dr. Fry performed a second surgery on the same eye at a surgery center, and Plaintiff was again transported back to the prison. The next day, July 28, 2005, Dr. Fry purportedly "was not satisfied with the results of the second surgery and decided to perform a form of minor laser surgery." Davis was evidently released from Fry's care at this

time.

Plaintiff contends that Dr. Diffenbaugh remained his primary physician at U.S.P.-Big Sandy as his eye condition worsened and he had to be enrolled in a chronic care program. The next date mentioned by the Plaintiff is October 18, 2006,[1] when Dr. Diffenbaugh wrote the following in Davis' medical records:

> Consulted via phone with a Dr. Findley at Commonwealth Eye in Lex.
> Explained Xs pain and tearing 2○ to cat removal OS
> Symptomatic in both Eyes, at this point; this is due to a delay in initial follow-up treatment. Problems have compounded. Treatment will take time.

Ex. F.

At some point after that October 18, 2006, examination, Plaintiff was transferred to Coleman II, where he was evaluated by different doctors. He has attached medical records from Coleman II, including what appear to be notes from his first exam after arrival. In an Ocular Health Exam, dated March 27, 2007, his eye condition is described in detail. Exh. G. Plaintiff complains that he continues to suffer eye pain, excessive tearing, blurred vision, headaches, and such extreme photophobia that he must wear sunglasses indoors.

On January 8, 2008, the Plaintiff completed a Federal Tort Claims Act Claim Form 95, giving the basic facts about his claim. In responding to the form's question about the date of the complained-of event, Davis wrote a time-frame of June 27, 2005 (first eye surgery) to July 28, 2005 (follow-up exam the day after the second surgery). He claimed severe and

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[1]Plaintiff does not provide information about whether anything happened that would have given him reason to know the cause of his injury between July 28, 2005, and October 18, 2006 – a critical period for the statute of limitations determination.

continuing problems with the left eye and valued his claim at $500,000.00.

The Plaintiff's claim was received by the BOP on February 12, 2008, and numbered TRT-MXR-2008-02391. On February 14, 2008, the BOP denied the claim, mistakenly finding that the purported injury occurred in May of 2002 and that the filing of Davis' claim was beyond the FTCA's 2-year statute of limitations. The Plaintiff wrote for reconsideration, arguing as follows:

> I was officially informed of the fact that I had suffered an eye injury on October 18, 2006. . . . Prior to this particular time I was undergoing various type of prescribed medical treatment for my eye and was told that the extreme pain and blurred vision and excessive tearing would soon stop. However, as time progressed my eye problems got worse and compounded. Therefore. . . the statute of limitations did not start to run until October 18, 2006.

Ex. B.

Though the BOP acknowledged in a March 5, 2008, letter that the 2002 date was incorrect, it nevertheless referred to Davis's report that the injury occurred in May of 2005 making the February 2008 filing beyond the 2-year statute of limitations. The BOP thus concluded that his claim was time-barred, denied the claim, and advised the Plaintiff that he had 6 months from the date of the letter to bring a lawsuit.

On September 12, 2008, Plaintiff Davis's Complaint was received by the Clerk of this Court. The envelope in which it arrived shows that Plaintiff had mailed it from his current prison by certified mail, return receipt requested, but the postal stamp showing the date of mailing is too faint for the Court to read. The Complaint seeks damages from the Defendants, the United States of America, Ulysses Vargas, M.D., R. Ramirez, M.D., Steven Conrotto,

M.D., Russell Fry, Contract Opthalmologist, and Todd Diffenbaugh, Contract Optometrist[2] for their alleged negligence in failing to provide him appropriate medical care while he was incarcerated at the United States Penitentiary("USP")-Big Sandy, in Inez, Kentucky.

PROPER DEFENDANTS

At the outset, the FTCA waives the sovereign immunity of the United States in certain tort cases and provides for original jurisdiction in the district courts only for claims brought against the United States under the FTCA. As such, the United States is the only proper defendant in an FTCA action. 28 U.S.C. §§ 1346(b), 2401(b), 2679(a); *see Allen v. Veterans Admin.*, 749 F.2d 1386, 1387 (9th Cir. 1984). Because Plaintiff filed *pro se*, the Court liberally construes his claim as one against only the United States, *see McGuckin v. Smith*, 974 F.2d 1050, 1055 (9th Cir. 1992), and dismisses the claims against the other Defendants to the extent that they were ever a party to the case.

STATUTE OF LIMITATIONS

The BOP denied Plaintiff's claim based on his failure to file the claim within the applicable statute of limitations. The FTCA provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b). As mentioned above, "the two year statute of limitations prescribed by 28 U.S.C. § 2401(b), is a jurisdictional requirement, not capable or waiver or subject to estoppel." *Garrett v. United*

[2] Davis also states that there are other employees of the government who were negligent, but their identities are currently unknown to him.

States, 640 F.2d 24, 26 (6th Cir. 1980) (per curiam).

Though state law determines *whether* any claim accrues against the government on a negligence claim, federal law determines *when* a claim accrues within the meaning of the two-year limitations period. *Chomic v. United States*, 377 F.3d 607, 610 (6th Cir. 2004). The issue in this case is when Plaintiff's claim accrued: Did it accrue when he first became aware of the injury or when he knew its cause? By Plaintiff's own account, he knew of the injury on the evening June 27, 2005, when he starting suffering pain – a period outside the statute limitations (he filed his claim with the agency on January 8, 2008). He, however, states that he did not become aware of the cause of the injury until October 18, 2006, which would put the January 8, 2008, filing date within the statue of limitations.

It appears that a plaintiff must discover both the injury and its "cause" before a claim accrues. In *United States v. Kubrick*, 444 U.S. 111 (1979), the Supreme Court seemed to indicate – albeit in dicta – that the time begins to accrue once the plaintiff is aware of the "cause" of his injury. *Id.* at 121–23. Other courts have so held. *See, e.g.*, *Robinson v. United States Dep't of the Army*, 48 Fed. App'x 970, 971 (6th Cir. 2002) (unpublished) ("Generally, a cause of action accrues and the statute of limitations begins to run in a medical malpractice action upon the patient's awareness of the injury and its cause . . . .") (emphasis added); *Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir. 1983) ("The [two year statute of limitations] does not begin to accrue until the plaintiff has 'knowledge of the factual predicate for a malpractice claim, i.e. the fact of his injury [and] its cause.'" (quoting *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980) and *Kubrick*, 444 U.S. 111)); *Stoleson v. United States*,

629 F.2d 1265, 1268 (7th Cir. 1980) ("In medical malpractice cases . . . the statute of limitations does not begin to run until after the patient discovers or in the exercise of reasonable diligence should discover his injury and its cause.").

This is because

> a patient often has little or no reason to believe his legal rights have been invaded simply because some misfortune followed medical treatment. Sometimes, a patient may remain unaware for many years that he has suffered injury or he may recognize the injury but not its cause. Indeed the facts necessary to discover the causal relation between treatment and injury may be within the exclusive control of the physician or at least very difficult to obtain.

Stoleson, 629 F.2d at 1268 (interpreting *Kubrick* to mean that a claim accrues when a plaintiff discovers or, in the exercise of reasonable diligence, should discover the critical facts of injury and cause). Thus, "[t]he plaintiff need not have knowledge of fault in the legal sense for the statute to being to run, but she must have knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between the treatment and injury." *Harrison*, 708 F.2d at 1027.

Therefore, the issue before this Court is when the Plaintiff became aware of the cause of his injury. Since this is jurisdictional, the Court does not accept Plaintiff's claim at face value, but rather will allow the United States to respond to Plaintiff's allegation. The Court further requests that the parties explain what occurred in the critical gap between July 2005 and October 2006.

TIMELINESS OF FILING

The second jurisdictional issue is whether Plaintiff's Complaint was timely filed

within 6 months of the March 5, 2008 denial. 28 U.S. § 2675(a) requires an administrative claim to be filed as a prerequisite to filing a civil action under the FTCA, and 28 U.S.C. § 2401(b) forever bars a claim under this act unless it is begun within six months after the date of mailing of the notice of final denial of the claim by the appropriate agency. These requirements are "jurisdictional requirements, not capable or waiver or subject to estoppel." *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1980) (per curiam); *see Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002) ("Compliance with this statutory requirement is a jurisdictional prerequisite that cannot be waived.").

Under *Houston v. Lack*, 487 U.S. 266 (1988), the relevant date for prisoner filings is the date on which he or she surrendered the document to prison authorities for mailing. Davis' filing on September 12, 2008, would be timely, within the 6-month deadline for filing a lawsuit, so long as it was presented to prison authorities on or before September 5, 2008. Unfortunately, the postal stamp on the filing is too faint to read and the date he submitted it to prison authorities is otherwise unknown at this time.

A district court is permitted to conduct limited discovery to resolve jurisdictional facts and determine whether it has jurisdiction over a matter. *Gentek Bldg. Prods., Inc.*, 491 F.3d at 330. Since the administrative exhaustion requirements are jurisdictional in nature, *see Garrett*, 640 F.2d at 26, the date on which Davis submitted his claim is a fact which will determine the Court's jurisdiction in this instance. As such, the United States shall provide to the Court and the defendant any information it has regarding when Plaintiff provided his complaint to the prison for mailing.

CONCLUSION

Accordingly, it is hereby **ORDERED** as follows:

(1) To the extent the Plaintiff named any Defendants other than the United States in his complaint, they are **DISMISSED** from this action.

(2) The Complaint and this Order shall be served upon the U.S. Attorney for the Eastern District of Kentucky.

(3) The U.S. Attorney shall have 60 days to respond to this order and to provide the requested information to both the Court and the Plaintiff.

(4) The Plaintiff also has 60 days to respond to this order and to provide any additional information to both the Court and the United States.

This the 7th day of November, 2008.



Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION at PIKEVILLE

CIVIL ACTION NO. 08-184-ART

JOHNNY DAVIS, PLAINTIFF,

V. **ORDER**

UNITED STATES OF AMERICA, DEFENDANT.

* * * * * * * * * * *

The Plaintiff, proceeding *pro se*, brings the present action under the Federal Tort Claims Act. [R. 2]. The Plaintiff filed his Complaint on September 12, 2008. [Id.]. On January 7, 2009, the United States filed a Motion to Dismiss [R. 10], which was ultimately denied without prejudice by presiding Judge Amul R. Thapar. [R. 16]. This matter has been referred to the undersigned to supervise discovery and other pretrial proceedings, including the entry of discovery deadlines. [R. 17].

At this stage in the proceedings, the Federal Rules of Civil Procedure ordinarily require the parties to confer and provide a proposed discovery plan. See Fed. R. Civ. P. 26(a), (d), (f). However, the rules exempt *pro se* prisoner actions from these requirements. Fed. R. Civ. P. 26(a)(1)(B)(iv). In addition to the requirements of Rule 26, Federal Rule of Civil Procedure 16(b) requires the Court to enter a scheduling order setting time limits for discovery. Rule 16(b) also provides that certain categories of cases may be exempted by local rule. Fed. R. Civ. P. 16(b)(1). The Joint Local Rules for the United States District Courts for the Eastern and Western Districts of Kentucky expressly exempts from the requirements of Rule 16 any action "brought without counsel by a person in

custody of the United States, a state, or a state subdivision." LR 16.1. As the Plaintiff in this matter is a prisoner, proceeding *pro se*, this action is exempted from the requirements of both Rule 26 and Rule 16.

The Court has reviewed the record, and is prepared to enter a scheduling order to govern the course of discovery in this case. Having considered the matter fully, and being otherwise sufficiently advised,

IT IS ORDERED HEREIN AS FOLLOWS:

(1) All pretrial discovery in this matter shall be completed on or before OCTOBER 1, 2009.

(2) Any dispositive motion shall be filed on or before NOVEMBER 2, 2009. Any responses thereto shall be filed in accordance with the Federal Rules of Civil Procedure and the local rules of the Court.

(3) This schedule shall not be modified except by leave of Court. Any motion for extension of time must be filed before the deadline expires and may be granted only for good cause.

(4) Upon filing of any dispositive motions, the undersigned will, if necessary, schedule a final pretrial conference and trial date.

Signed May 26, 2009.

Signed By:
Edward B. Atkins EBA
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

JOHNNY DAVIS	)	
	)	
Plaintiff,	)	Civil No. 08-184-ART
	)	
v.	)	
	)	**MEMORANDUM OPINION & ORDER**
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
	)	

*** *** *** ***

Johnny Davis filed a pro se civil complaint under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2672, *et seq.*, and the Court granted him permission to proceed *in forma pauperis*, R. 4. While initially screening the Complaint pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(a), the Court recognized that a question existed as to its jurisdiction. *See* R. 6. Even when the parties have not raised the issue, courts "have an independent obligation to determine subject matter jurisdiction." *Lane v. City of LaFollette, Tenn.*, 490 F.3d 410, 423 n.5 (6th Cir. 2007). Because the Court was concerned about the basis for its jurisdiction, it issued an Order allowing the action to proceed for the limited purpose of determining whether it had jurisdiction to hear the matter. *See* R. 6.[1] The Plaintiff filed a Response to the Court's Order, in which he provided an answer to the Court's question regarding jurisdiction and provided additional facts.

[1]Because the Court thoroughly recounted the factual background in its November 7, 2008, Memorandum Opinion and Order, R. 6, if will not repeat those facts here.

R. 11. For its part, the United States filed a Motion to Dismiss, arguing that the Court does not in fact have jurisdiction to hear this claim because it is untimely and alleges liability on the part of individuals who are not government employees. *See* R. 10. Specifically, the United States argues that the claim accrued, at latest, on July 28, 2005, which is well outside the two-year statute of limitations period. *See* R. 10 at 6–7. The Government also argues that the Court lacks jurisdiction because the claim was filed after September 5, 2008, more than six months after the March 5, 2008, administrative denial. *See id.* at 11. Finally, the Government argues that the named doctors are independent contractors—not government employees—for whose negligence the United States cannot be held liable under the FTCA. *See id.* at 8–10. Plaintiff filed a Response to Defendant's Motion. R. 15. Based on the documents filed by the parties, Davis has complied with the statute of limitations, and there is no evidence that the named doctors are independent contractors. Therefore, the motion to dismiss is denied.

THE STATUTE OF LIMITATIONS UNDER THE FEDERAL TORT CLAIMS ACT

The FTCA provides a limited waiver of the United States' sovereign immunity and allows tort claims against the United States "in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1994); *see also Young v. United States*, 71 F.3d 1238, 1241 (6th Cir. 1995) ("The Act 'waives sovereign immunity to the extent that state-law would impose liability on a private individual in similar circumstances.'" (quoting *Myers v. United States*, 17 F.3d 890, 899 (6th Cir. 1994))). The FTCA contains a strict statute of limitations that bars suit unless a claim is presented to the appropriate federal agency within two years of its accrual and an action is commenced within six months of the agency's denial of

the claim. *See* 28 U.S.C. § 2401(b). The Government argues that these requirements are jurisdictional, and therefore not capable of waiver or subject to estoppel, *see* R. 10 at 5. To be sure, the Sixth Circuit has found the statute of limitations to be jurisdictional. *See, e.g., Humphrey v. United States Attorney Gen.'s Office*, 279 F. App'x 328, 332 (6th Cir. 2008); *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1980) (per curiam). However, the Sixth Circuit has also indicated otherwise. *See Hogan v. United States*, 42 F. App'x 717, 722 (6th Cir. 2002); *Glarner v. United States Dep't of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994). For the purposes of this case, though, it does not matter whether the statute of limitations is jurisdictional because Davis has complied with it in any event.

A. Davis Asserted his Claim within Two Years of its Accrual

Though state law determines *whether* any claim accrues against the government on a negligence claim, federal law determines *when* a claim accrues within the meaning of the two-year limitations period. *Chomic v. United States*, 377 F.3d 607, 610 (6th Cir. 2004). A cause of action in a medical malpractice case accrues and the statute of limitations begins to run under the FTCA when the plaintiff knows of both his injury and its cause. *Robinson v. United States Dep't of the Army*, 48 F. App'x 970, 971 (6th Cir. 2002)[2]; *see also Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir. 1983) ("The [two-year statute of limitations] does not begin to accrue until the plaintiff has 'knowledge of the factual predicate for a malpractice claim, i.e. the fact of his injury [and] its cause.'" (quoting *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir.

[2]Unpublished decisions of the Sixth Circuit are not binding under the doctrine of stare decisis. *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007). Accordingly, the Court considers such decisions for their persuasive value only. *See id.*

1980))); *Stoleson v. United States*, 629 F.2d 1265, 1268 (7th Cir. 1980) ("In medical malpractice cases . . . the statute of limitations does not begin to run until after the patient discovers or in the exercise of reasonable diligence should discover his injury and its cause."); *cf. United States v. Kubrick*, 444 U.S. 111, 121–23 (1979) (stating, in dicta, that the time begins to accrue once the plaintiff is aware of the cause of his injury). This is because:

> a patient often has little or no reason to believe his legal rights have been invaded simply because some misfortune followed medical treatment. Sometimes a patient may remain unaware for many years that he has suffered injury or he may recognize his injury but not its cause. Indeed, the facts necessary to discover the causal relation between treatment and injury may be within the exclusive control of the physician or at least very difficult to obtain.

Stoleson, 629 F.2d at 1268. Thus, "[t]he plaintiff need not have knowledge of fault in the legal sense for the statute to begin to run, but she must have knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between the treatment and injury." *Harrison*, 708 F.2d at 1027. Based on the available evidence, it appears that Davis did not learn the cause of his injury—and therefore, his claim did not accrue—until October 18, 2006, which means that his claim was asserted well within the two-year limitations period.

Davis has presented evidence relevant to this inquiry in two different responses. The first, R. 11, was filed in response to the court's order of November 7, 2009, R. 6, and the second, R. 15, was filed in response to the defendant's motion to dismiss, R.10. Davis signed each response and attested under the penalty of perjury that all the information contained within them was true and accurate to the best of his knowledge. *See* R. 11 at 6; R. 15, Mem. at 10. These

verified documents are given the same weight as affidavits. *See El Bey v. Roop*, 530 F.3d 407, 414 (6th Cir. 2008) (citing *Lavado v. Keohane*, 992 F.2d 601, 605 (6th Cir. 1993)). These responses and Davis's medical records show that he neither knew nor should have known of his injury and its cause prior to October 18, 2006.

First, Davis testifies that his treating physicians repeatedly told him that he could expect severe pain in his surgical eye during the healing process. R. 15, Mem. at 4. They apparently also told him that because of his age, he could anticipate a longer healing process than a younger person. *Id.* Davis explains that one of the physicians even consoled him by recounting her mother's experience with similar problems after cataract surgery and assuring him that her mother eventually regained perfect vision. Based on the statements of his physicians, Davis claims that he thought his pain was normal given his condition, and it was only on October 18, 2006, when Dr. Todd Diffenbaugh ("Dr. Todd") told him that it was due to improper post-surgical care that he knew both his injury and its cause. Under these circumstances, a reasonable person would not have had cause to suspect that they had been injured by a medical mistake until October 18, 2006.

This conclusion is supported by Davis's medical records, which—until October 18, 2006—are completely silent on the cause of his injuries. It is true that, at one point, the records contain the notation "Displaced IOL." R. 2, Exh. D. However, this kind of notation is precisely why a claim does not accrue until the facts are such that the plaintiff or a reasonable person in the plaintiff's place would know both his injury and its cause. It is completely reasonable that Davis would not have known that a displaced IOL could have been caused by a failed surgery

or lack of after-care rather than his original condition. *See Stoleson*, 629 F.2d at 1268 (indicating that a would-be plaintiff has little or no reason to suspect that malpractice occurred simply because some misfortune followed medical treatment). Therefore, this entry would not have given Davis reason to know both his injury and its cause. In contrast, the October 18, 2006, entry clearly indicates the cause of Davis's injuries. *See* R. 2, Exh. F. This entry includes the statement: "Symptomatic in both eyes at this point. This is due to a delay in initial follow-up treatment. Problems have compounded. Treatment will take time." *Id.* This notation is the first piece of information that would have permitted a reasonable person to know of both the injury and its cause, and in fact, that is the point at which Davis claims to have become aware of both the injury and cause.

Additionally, none of the other facts presented show that Davis had reason to know of his injury and its cause before October 18, 2006. Davis indicates that he got the information, names, dates, etc., in his complaint from his records, but that his initial efforts to get these records were impeded by his incarceration in a maximum security facility which was often under lock-down. *See* R. 15 at 4–5. The United States argues that he had to be aware of the cause of his injury in 2005 because he listed specific dates and names and thoroughly described his pain and injury, *see* R. 10 at 7, but it does not follow that his knowledge of his injuries and treatment necessarily means that he had knowledge of the cause of his injuries—especially since the medical records prior to October 18, 2006 recount these other facts but not the cause of his injury, *see* R. 11, Exh. H-L.

The contents of the records also indicate that Davis acted as a reasonable person

concerned with his health would have in this situation. *See Stoleson*, 629 F.2d at 1268 (starting the clock when "the patient discovers or in the exercise of reasonable diligence should discover his injury and its cause."). On many of his files, there is a notation that he has requested copies of his medical records. *See, e.g.*, R. 11, Exh. H at 15, Exh. I at 30. As an incarcerated individual with little access to the outside world, including alternative opinions as to his injury, he did all that he could have done to ensure that the care he had received was adequate—i.e, he relied on his doctors and regularly reviewed his medical records. As discussed above, until October 18, 2006, his diligence got him nowhere.

Finally, while the United States argues that Davis should have known the cause of his injuries simply because of their intensity and duration, it has submitted no evidence supporting this contention. The United States is correct to point out that a plaintiff has an obligation to follow-up on a suspicion of malpractice and seek a second opinion when a reasonable person in the same circumstances would do so. But, a reasonable person would not presume that his injuries were caused by malpractice simply because his condition did not improve, especially when his doctors repeatedly assured him that his symptoms were a normal result of the healing process. *See Stoleson*, 629 F.2d at 1268 ("[A] patient often has little or no reason to believe his legal rights have been invaded simply because some misfortune followed medical treatment."). The position advocated by the United States would require anyone suffering from a serious injury requiring multiple procedures and causing severe pain to either file suit based on speculation and presumption alone or wait for information which might actually lead them to affirmatively know the cause of their injuries, but in doing so risk having their claims forever

barred by the statute of limitations. Prisoners already file numerous suits against the United States, and putting them in this position would clearly encourage more premature suits, a situation that is neither desirable nor intended by the limited waiver of sovereign immunity in the FTCA. Thus, the two-year statute of limitations period under the FTCA did not start to run until Davis discovered the cause of his injury on October 18, 2006. And because he filed suit in September of 2008, he complied with the two-year statute of limitations.

B. Davis Filed this Lawsuit Within Six Months of the Agency's Denial of his Claim

Davis has also complied with the second half of the statute of limitations—i.e., the requirement of filing a lawsuit within six months of the date on which the administrative agency denied his claim. *See* 28 U.S.C. § 2401(b). A prisoner's filing is deemed submitted on the day on which he submits it to the proper prison officials. *See Houston v. Lack*, 487 U.S. 266, 270-71 (1988). Here, Davis's administrative remedy was denied on March 5, 2008, R. 2, Exh. C. Therefore, he was required to file suit on or before September 5, 2008. The initial documents were unclear as to whether Davis submitted his Complaint to the appropriate prison officials before the September 5, 2008, deadline, *see* R. 6, but he has since presented evidence confirming that he timely submitted his Complaint to them on September 2, 2008, *see* R. 11.

First, he has more clearly recounted the facts surrounding his filing in his verified response. *See* R. 11 at 4. He testifies that he "surrendered the document to Correctional Officer A. Clark in a large legal size envelope bearing Article Number 7005-3110-0003-8092-6458 Certified Mail Receipt attached with all postage prepaid on September 2, 2008." R. 11 at 4. He recounts that the details surrounding his filing were memorable, in particular, because the facility

was on "lockdown" that day and he had to pass certain exhibits to Correctional Officer Clark so that he could staple them. *Id.* Second, he has submitted the Inmate Request to Staff which confirms this chain of events, includes a the statement in the disposition area "I put in office for mail," and appears to contain the signature of Correctional Officer Clark. *See* R. 11, Exh. J. Third, he submitted his certified mail receipt. *See id.* Finally, he submitted the Affidavit of Rayfield Davis, a prisoner in a nearby cell, which recounts a conversation between Correctional Officer Clark and Plaintiff Davis and confirms that Davis submitted the document on September 2, 2008. *See* R. 11, Exh. K. The United States has submitted no evidence to the contrary. Thus, the evidence in the record supports the conclusion that Davis filed his Complaint on September 2, 2008. Therefore, the available evidence indicates that Davis has complied with the FTCA statute of limitations.

CLAIMS ARISING FROM THE CONDUCT OF DRS. TODD AND FRY

Aside from the statute of limitations issue, the United States has also moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) on the basis that FTCA suits cannot be maintained for the negligent conduct of Drs. Fry and Todd since they are independent contractors. *See* R. 10 at 8–10. At this time, however, the Court cannot dismiss the case on this basis because there is no evidence that Drs. Fry & Todd were independent contractors.

The FTCA contains a limited waiver of the United States' sovereign immunity, but only for injuries resulting from the conduct of employees of the United States. *See* 28 U.S.C. § 1346(b); *Robb v. United States*, 80 F.3d 884, 887 (4th Cir. 1996). It does not authorize suits against the Unites States based on the acts of independent contractors. *See* 28 U.S.C. § 2671;

United States v. Orleans, 425 U.S. 807, 814 (1976); *Logue v. United States*, 412 U.S. 521, 527 (1973). "In determining whether an individual is a federal employee or an independent contractor, the critical question is whether the federal government has the power to control the detailed performance of the individual." *Duplan v. Harper*, 188 F.3d 1195, 1200 (10th Cir. 1999) (citing *Lilly v. Fieldstone*, 876 F.2d 857, 858 (10th Cir. 1989)); *see also Orleans*, 425 U.S. at 814 (quoting *Logue*, 412 U.S. at 528). Courts have generally applied these principles to private physicians working under contractual relationships with government owned facilities to conclude that these physicians are independent contractors, not government employees. *See, e.g.*, *Tsosie v. United States*, 452 F.3d 1161, 1163-64 (10th Cir. 2006); *Jones v. United States*, 305 F. Supp. 2d 1200, 1205-07 (D. Kan. 2004); *Robb*, 80 F.3d at 888–94; *Del Valle v. Sanchez*, 170 F. Supp. 2d 1254, 1264-68 (S.D. Fla. 2001).

In all likelihood Drs. Fry and Todd are independent contractors for which the United States is not liable, but, the United States has submitted no evidence confirming this fact. Extensive evidence is not required. In fact, other courts have accepted as little as the contract itself as sufficient evidence that physicians working under contractual relationships with government facilities were independent contractors. *See e.g.*, *Boyd v. United States*, No. 3:CV-05-2033, 2006 WL 2828843 (M.D. Pa. Sept. 29, 2006); *see also Wood v. Standard Prods. Co.*, 671 F.2d 825, 829 (4th Cir. 1982) ("[T]he contract and its terms in fixing the relationship of the offending party are critical."). Nevertheless, some evidence is needed before the Court can dismiss the claims of Davis as seeking redress for the conduct of independent contractors.

CLAIMS ARISING FROM THE CONDUCT OF OTHER PRISON EMPLOYEES

Even if the United States cannot be held liable for the conduct of Drs. Fry and Todd, it may still be liable for the conduct of other prison employees. While Davis expressly blames Drs. Todd and Fry for his injuries, he also claims that other prison employees acted negligently and caused him injury. *See* R. 11 at 2; R. 15 at 7–9. Specifically, he claims that certain prison employees/officials failed to provide him proper care because they defied the surgeon's orders both as to his location for recovery and as to his medications and supervision at the prison, *see* R. 10, Exh. B at 2, delayed medical treatment, R. 15 at 8, caused him to miss scheduled appointments, *id.*, failed to follow the doctors' orders and recommendations as to his treatment and examination by specialists, *id.*, delayed sending him to Dr. Todd when he was symptomatic, R. 11 at 2, and failed to follow BOP policy, *id.* Finally, he alleges these employees were negligent because they caused him to believe that his symptoms were the normal result of his treatment and condition instead of the result of improper treatment. R. 11 at 3.

Prior to bringing an FTCA claim in federal court, a claimant must give notice of the claim to the appropriate agency. *See* 28 U.S.C. § 2675. "Although an administrative claim need not propound every possible theory of liability in order to satisfy section 2675(a), . . . a plaintiff cannot present one claim to the agency and then maintain suit on the basis of a different set of facts." *Roma v. United States*, 344 F.3d 352, 362 (3d Cir. 2003) (quoting *Deloria v. Veterans Admin.*, 927 F.2d 1009, 1011-12 (7th Cir. 1991)). In order to be sufficient, the written notice must enable the agency to investigate the claim, *see Glarner*, 30 F.3d at 700, because "the purpose of the notice requirement is to give federal agencies the opportunity to evaluate claims

and to settle them before they evolve into federal lawsuits," *Boyd*, 2006 WL 2828843, at *4.

The claim that Davis filed in pursuit of his administrative remedy sufficiently put the United States on notice of his claims arising out of the conduct of the named doctors and the other prison officials. In the "Claim for Damages, Injury or Death" that he submitted to the BOP, Davis alleged that the prison officials "totally defied [the] surgeon's instructions" and that they placed him in "administrative segregation without any regard to post-op instruction." R. 10, Exh. B at 3–4. He further explained, "no pain medication was administered as required per instructions, no medical assistance [was given], and claimant was not accompan[ied] by an adult and was placed in administrative segregation . . . ." *Id.* at 4. In addition to causing his current complications, he alleged that because the prison officials failed to follow the instructions he fell and hit his head on metal railing and was knocked unconscious while getting out of bed to activate duress button. *Id.* Davis also elaborated on the prison officials' subsequent failures to follow the instructions of his physicians and to provide him adequate medical care. *See id.* at 5–7.

Although in his Claim Davis expressly blamed his treating physicians for his injuries, as discussed in detail above, he also claimed that other individuals at the prison were responsible for his injuries. *See* R. 10, Exh. B. He has reiterated these claims throughout this case. *See generally* R. 11; R. 15. Clearly, the conduct he alleges could have contributed to his injuries, and in fact, Davis has submitted evidence that Dr. Todd concluded that Davis's current condition was caused by a delay in his post-surgical care. *See* R. 15 at 8 (quoting October 18, 2006, medical record). Accordingly, his allegations were sufficient to put the United States on notice

that he was seeking redress for injuries he claimed were caused by the doctors and also for injuries he claimed were caused by the conduct of other prison employees/officials. Since he clearly notified the United States of the extent of his claim from the outset, the fact that he may be unable to proceed against Drs. Fry and Todd is not fatal to the remainder of his claim.

CONCLUSION

Accordingly, it is **ORDERED** as follows:

1) Defendant's Motion to Dismiss, R. 10, is **DENIED WITHOUT PREJUDICE**. The United States may file another motion to dismiss if it has evidence indicating that Drs. Fry and Todd were independent contractors rather than government employees.

This the 13th day of May, 2009.

Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

CIVIL ACTION NO. 08-CV-184-ART **ELECTRONICALLY FILED**

JOHNNY DAVIS,

PLAINTIFF

VS. **AGREED ORDER OF DISMISSAL**

UNITED STATES OF AMERICA **DEFENDANT**

****

The parties, having executed a Settlement Agreement and Release of All Claims resolving all issues raised in the instant civil action, and expressing their consent to the entry of this Agreed Order of Dismissal:

IT IS HEREBY AGREED AND ORDERED that this action is dismissed in its entirety with prejudice and stricken from the docket, with each party to bear its own costs, expenses and attorney fees.

Signed By:
Amul R. Thapar AT
United States District Judge
4/27/12

We hereby consent to the form and entry of this Agreed Order of Dismissal.

/s/ Mackenzie Mayes Walter
(permission to sign electronic signature granted by e-mail)
Dinsmore & Shohl LLP-Lexington
250 West Main Street
Suite 1400
Lexington, Kentucky 40507
Tel . No. 859-425-1000
Email: Mackenzie.walter@dinslaw.com

April 26, 2012
DATE

KERRY HARVEY
UNITED STATES ATTORNEY

/s/ Dell W. Littrell
Dell W. Littrell
Assistant United States Attorney
260 West Vine Street, Suite 300
Lexington, KY 40507-1612
Tel: 859-685-4863
Email: Dell.littrell@usdoj.gov

April 26, 2012
DATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

JOHNNY DAVIS,	)	
	)	
Plaintiff,	)	Civil No. 08-184-ART
	)	
v.	)	
	)	**ORDER**
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

*** *** *** ***

It having been reported to the Court that this matter has been settled, it is **ORDERED** that this action is discontinued with prejudice but without costs; provided, however, that **if the settlement is not consummated within thirty (30) days of the date of this Order, any party may apply by motion within the thirty-day period for restoration of the action to the calendar of the undersigned, in which event the action will be restored**. Should the parties choose to file an agreed order of dismissal, the Court will consider signing and filing it in the record, so long as it is filed within thirty days of the date of this Order and meets with the Court's approval.

Furthermore, this matter is **STRICKEN** from the Court's active docket, all pending motions are **DENIED AS MOOT**, and all scheduled hearings are **CANCELLED**.

This the 23rd day of March, 2012.

Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
EASTERN DIVISION
AT PIKEVILLE

CIVIL ACTION: 7:08-CV-00184-ART

JOHNNY DAVIS — PLAINTIFF

VS. **PARTIES SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS**

UNITED STATES OF AMERICA — DEFENDANT

* * * * * * * *

THIS AGREEMENT is made and entered into by and between Johnny Davis, Plaintiff, and the United States of America, Defendant.

WHEREAS, Plaintiff has filed the above-captioned civil action in the United States District Court of the Eastern District of Kentucky; and

WHEREAS, the parties hereto desire to make a complete and final settlement of all matters involved in, or relating to, or arising out of, the above-captioned case.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, Plaintiff and the Defendant, being separately advised by counsel, and intending to be legally bound thereby, COVENANT AND AGREE AS FOLLOWS:

1. As used in this Agreement, Defendant means the United States of America and all of its past, present, future subsidiaries, bureaus, services, agencies, divisions, departments (including the United States Bureau of Prisons), successors, assigns, directors, officers, agents, employees, attorneys and representatives.

2. In return for all of the agreements and covenants of Plaintiff set forth herein, the Defendant agrees as follows:

A. Plaintiff will be paid the amount of $125,000,.00. This payment is in full settlement and satisfaction of any and all claims of any kind that Plaintiff may have in the above-captioned case against the Defendant up to and including the date of this Agreement. This settlement is intended to avoid further litigation and to preserve judicial economy, and shall not operate as an admission of liability or fault on the part of the United States, its agents, servants, or employees. Any federal, state, or local income tax liability, or other tax liability resulting from the payment of this settlement amount of $125,000.00 shall be the sole responsibility of the Plaintiff. Neither the Defendant nor the Defendant's attorneys make any representations as to the tax treatment of this settlement amount of $125,000.00.

B. Plaintiff's settlement amount of $125,000.00 shall be paid by government electronic fund transfer. Banking information for the government electronic fund transfer will be provided by Plaintiff's attorney.

Plaintiff's attorney agrees to distribute the settlement proceeds and to obtain a dismissal order of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

C. Plaintiff, on behalf of himself, his heirs, legal representative, representatives, administrators and executors, hereby releases and forever discharges the United States of America and its employees, officers, agents, agencies, attorneys, representatives and assigns, and any other person acting by, through, under or in concert with them (collectively, "Releasees") from any and all claims, remedies, demands, debts, losses, obligations, actions, causes of actions, claims of relief, damages, costs, expenses, attorney fees, and compensation of any nature whatsoever, whether known or unknown, foreseen or unforeseen, arising out of or involving the

medical care and treatment of Plaintiff, (collectively "claim" or "claims" or "remedy" or "remedies"), including, but not limited to, legal, equitable, administrative, union or other claims or remedies of any kind whatsoever, which Plaintiff had or has against the Defendant and all other Releasees on account of, or contained in, or in any way growing out of, or which are the subject of, the allegations contained in the above-captioned civil action.

3. The Plaintiff represents and acknowledges that in executing this Agreement he does not rely and has not relied upon any representation or statement made by the Defendant or its attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

4. Nothing contained in this Agreement shall be construed as an admission of wrongdoing or liability by the Defendant with respect to any matter whatsoever, whether or not encompassed by the above-captioned civil action.

5. This Agreement comprises the entire understanding and settlement of the above-captioned action between Plaintiff and the Defendant and fully supersedes any and all prior agreements or understandings between the parties.

6. This Agreement shall be binding upon the Plaintiff and upon his heirs, administrators, legal representatives, and executors and shall inure to the benefit of the Defendant and each and all other Releasees, and to their heirs, administrators, representatives, executors, successors, assigns, and attorneys and legal representatives.

7. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. When used in this Agreement, the word "or" is a term of inclusion and not exclusion, and in no instance is the word "or" intended to limit, nor shall it limit, the rights, privileges, and or benefits of the Defendant under this Agreement.

8. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and said illegal or invalid part, term or provision shall be deemed not to be a part of the Agreement.

9. The parties agree that this Stipulation for Settlement Agreement and Release of All Claims may be subject to public disclosure in its entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. Payment by the Defendant of the settlement sum of $125,000.00 shall be without interest. Plaintiff and Defendant shall bear their own costs, expenses and attorneys' fees.

11. Plaintiff enters into this agreement knowingly and voluntarily after full consultation with his attorney, and by his signature acknowledges that he has read this Agreement and fully understands its terms. Plaintiff agrees that he has been given a reasonable period of time within which to consider this Agreement.

12. This Agreement is not assignable by the Plaintiff. The date of this Agreement is the date of the last signature to this Agreement.

IN WITNESS WHEREOF, Plaintiff and the Defendant intending to be legally bound, have set their hands to this Agreement the day and year below written.

Johnny Davis, Plaintiff

3-27-2012
DATE

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Date

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October 27, 2008

U. S. ATTORNEY

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For the United States of America

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Debbie Stevens, Supervisory Attorney
United States Department of Justice
Federal Bureau of Prisons
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1600 Industrial Park Road
P.O. Box 1280
Beaver, West Virgnia 25813

For the Bureau of Prisons
Warden of Alderson
Dr. Neal Rehberg

Re: NOTICE OF CLAIM OF DEBORAH ALBIN
TORT CLAIM NUMBER: TRT-MXR-2007-04599
PURSUANT TO W. VA. CODE §55-7B-6

Dear Counsel:

Notice is hereby given of the Claim of Deborah Albin against your respective clients for (1) Constitutional Violations; (2) Negligence by the Bureau of Prisons' Supervisors and Co-Workers; and (3) Medical Negligence by Neal Rehberg, D.O., as set forth in the Screening Certificate of Merit of Jay Goldberg, MD MSCP, under oath with report of October 15, 2008 attached thereto; and as further set forth in the Complaint attached hereto and made a part hereof.

By letter dated May 12, 2008 to Lynanne B. Wescott, Esq., Wescott Law Firm, P.C., a copy of which is also attached, Ms. Stevens informed counsel that if the claimant was unwilling to accept settlement in the amount of $50,000.00, the claimant should consider her letter a final denial of the claim and that claimant had six months after the date of the letter to file suit

the appropriate United States District Court. In order to avoid filing of the attached Complaint within that time frame, we request that the United States, the Bureau of Prisons, the Warden of Alderson and Dr. Rehberg, enter into a stipulation that the parties need not file the Complaint pursuant to Ms. Stevens letter dated May 12, 2008, while the parties attempt a resolution of this case.

If, however, you are unable to agree to such a stipulation, then we must file in a timely manner and request that you inform us as to whether you will accept service of these documents or if we should serve your clients directly.

In any event, we would still be interested in an agreed stay of the case, even after filing, while we discuss resolution.

We look forward to resolving this claim.

Very truly yours,

Paul O. Clay, Jr.

POCjr/mpr
Enclosures
c: Lynanne B. Wescott

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

DEBORAH ALBIN	
Plaintiff,	
v.	
UNITED STATES OF AMERICA FEDERAL BUREAU OF PRISONS WARDEN FPC ALDERSON NEAL REHBERG D.O.	
Defendants	

COMPLAINT

This case arises out of 1) constitutional violations, 2) negligence by the Bureau of Prisons supervisors and coworkers and 3) medical negligence by Neal Rehberg, D.O.

Parties

1. Plaintiff, Deborah Albin, is a 49 year old citizen of Kentucky residing at 927 Southview Rd., Louisville, Kentucky, 40214. She is the mother of two and the grandmother of three. She is now employed full time. The acts she complains of occurred in the Southern District of West Virginia.

2. Defendant is the United States of America with an address in care of the Department of Justice, United States Attorney's Office.

3. Defendant is the Federal Bureau of Prisons with a Federal Prison Camp facility in Alderson, West Virginia.

4. Defendant Warden FPC Alderson is the supervising warden or wardens at the time of the events set forth in this complaint.

5. Defendant, Dr. Neal Rehberg, is a doctor, and a supervising physician at the Federal Prison Camp at Alderson, West Virginia ("FPC Alderson") during all times relevant to the Complaint, with a business address of FPC Alderson, Federal Prison Camp, Glenray Rd., Box A, Alderson, WV 24910.

Jurisdiction and Venue

6. This action arises under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, the Bivens doctrine and the United States Constitution.

7. Venue is proper in this district because the actions complained of occurred in this district.

8. The plaintiff has filed and exhausted her administrative remedies.

Factual Background

9. In February of 2004, Deborah Albin was in the custody of the United States Bureau of Prisons and an inmate at the Federal Prison Camp at Alderson West Virginia.

10. At or about that time, Ms. Albin discovered that she had lump in her right breast.

11. She immediately reported it to Health Services at FPC Alderson. It is believed and therefore averred that defendant Dr. Rehberg supervises Health Services at FPC Alderson.

12. On March 16, 2004, she was examined by Health Services and a right breast mass was noted. No further action was taken

13. On August 10, 2004, Dr. Rehberg recommended an ultrasound or surgical consult with possible biopsy. That did not occur at that time.

14. On July 19, 2005, an ultrasound was again recommended. That did not occur.

15. On August 12, 2005, Ms. Albin was evaluated by Dr. Rehberg and a consultation to surgery for removal was ordered. That did not occur.

16. On August 30, 2005, both an ultrasound and biopsy were ordered.

17. Despite these orders and recommendations, and despite repeated and numerous complaints by Ms. Albin during this interval that the mass in her breast was enlarging, it was not until November 3, 2005 that an ultrasound was performed, which ultrasound indicated a high possibility of malignancy.

18. These results were not communicated to Ms. Albin by Dr. Rehberg or anyone else. It is within the scope of employment for such results to be communicated to the patient and the Bureau of Prisons.

19. Even after this alarming ultrasound finding, it was not until April 11, 2006 that a biopsy was performed, more than two years after Ms.Albin first complained of the growth in her breast.

20. On May 2, 2006 a radical modified mastectomy was performed on Ms. Albin's right breast. The cancer had advanced to Stage III.

21. By this time the cancer cells had also spread beyond the lump in Ms. Albin's breast to her lymph nodes.

22. Ms. Albin was due to be released from prison when these events transpired. Instead she was sent to Carswell, Texas to the Federal Bureau of Prisons medical facility for further treatment and her release from prison was delayed nearly a year.

23. Ms. Albin received the required chemotherapy treatment, radiation treatment and a hysterectomy/bilateral oopherectomy at Carswell prior to her release.

24. Ms. Albin's treatment for advanced cancer is ongoing, and requires that she be tested every six months. Those tests are in excess of $48,000 per year. She only recently received limited medical insurance and her cancer history is a pre-existing condition.

25. She currently takes Tamoxifen and Effexor, which treatment will continue for at least five years.

26. She is fearful every day that each ache or pain she has is the recurrence of cancer.

27. Her right arm has constant pain because of the lymph node involvement.

28. More than two years passed between the initial evaluation of Ms. Albin's right breast mass and its eventual diagnosis as a Stage III cancer, despite numerous complaints of the mass enlarging by Ms. Albin, numerous medical visits, numerous notations regarding the need for a surgical evaluation and biopsy, and abnormal breast imaging.

29. This is an unconscionable delay in treatment with a deadly result.

30. Federal law and the United States Constitution require that inmates receive adequate medical care.

31. Ms. Albin paid her debt to society through service of her prison term, but that debt should not have included endangering her life through substandard medical care.

32. Defendants failed to exercise ordinary care.

33. Defendants breached their duty to protect the health and safety of plaintiff in its custody of her.

34. It is believed and therefore averred that these failures were substantial factors and the proximate cause in bringing about the injury suffered by plaintiff.

35. It is believed and therefore averred that the Federal Bureau of Prisons has recognized that its medical care of inmates is inadequate. The General Accounting Office of the United States in 1994 cited the Federal Bureau of Prisons for failing to provide adequate medical care in its federal prisons. Little has changed since that time.

36. The five year survival rate for a patient with Stage 0 to Stage 1 cancer is 100%.

37. The five year survival rate for a patient with Stage III cancer is 49-57%.

38. One study in 1999 determined the average life span for a woman residing in Kentucky as being 79 years. Ms. Albin lives in Kentucky.

39. Statistically, the delay in treatment indicates a life span significantly shortened as detection at an earlier stage would have improved plaintiff's recovery and would have increased Ms. Albin's chance of survival by a factor of at least 43% to 51%.

40. Failing to follow the accepted standard of care deprived plaintiff of a chance or recovery at an early stage and increased the risk of harm to plaintiff, all of which was a substantial factor in bringing about the ultimate injury to plaintiff.

41. An earlier diagnosis may have avoided the need for mastectomy, chemotherapy, radiation therapy, and hysterectomy/bilateral oopherectomy.

42. Defendants breached their duty to plaintiff to provide adequate and competent medical care.

43. As a result of defendants' failure to promptly act, plaintiff has suffered severe and ongoing physical and mental injuries in excess of $1,000,000.

44. Pursuant to 28 U.S.C. § 2675(a), plaintiff presented the claim set forth herein to the Federal Bureau of Prisons requesting $25,000,000.00 in damages. The Federal Bureau of Prisons proposed a resolution in a letter dated May 12, 2008, which was declined by plaintiff. Her administrative remedies were denied.

45. Defendant has forwarded to defendants this complaint as a notice of claim along with a screening certificate of merit pursuant to West Virginia Code §55-7B-6.

COUNT 1
Against the United States of America
And the Federal Bureau of Prisons

46. Plaintiff incorporates by reference paragraphs 1-44 as though fully set forth herein.

47. Defendants' servants were acting within the scope of office or employment, under circumstances where the Defendants, if a private person, would be liable to the claimant in accordance with the law of the State of West Virginia.

48. Defendant Dr. Rehberg and his staff were federal employees at all relevant times in the complaint.

49. Defendant United States of American was on notice and failed to take action to prevent harm to plaintiff by its employees.

50. Defendants had a duty to plaintiff who was in their custody to prevent threats to her safety and to protect her from harm.

51. Dr. Rehberg's failure to act was such that co-workers and other supervisors knew or should have known what was occurring.

52. Defendants were negligent in their retention and supervision of their employee.

53. Defendants were negligent in that they failed to have procedures in place to prevent the delayed reporting of medical results to patients.

54. As a result of defendants' negligence, plaintiff has suffered physical and mental injuries in excess of the jurisdictional amount.

WHEREFORE, it is respectfully requested that judgment be entered in favor of plaintiff and against defendants in an amount in excess of the federal jurisdictional amount required to file a federal claim and for attorney fees, expert fees, other costs and expenses as allowed by statute and deemed appropriate by the court.

COUNT 2
Against the United States of America
And the Federal Bureau of Prisons

55. Plaintiff incorporates by reference paragraphs 1-53 as though fully set forth herein.

56. Dr. Rehberg's superiors and co-workers who knew or should have known of his activity were negligent in failing to report Dr. Rehberg's failure to timely cause appropriate medical care to be given based on tests and reports. No procedures were in place to avoid delay in treatment because of failure to read or react to medical tests and reports.

57. It was within the scope of their employment to make such reports.

58. Defendants' supervisors had a duty to control their employees and prevent harm to plaintiff which duty was breached.

59. Defendants' supervisors and coworkers were negligent in failing to view and timely respond to the medical tests and reports relating to plaintiff.

60. Dr. Rehberg's failure to act was such that co-workers and other supervisors knew or should have known what was occurring.

61. Defendants, if a private person, would be liable to plaintiff under the law of the State of West Virginia.

62. As a result of defendants' negligence, plaintiff has suffered physical and mental injuries in excess of the federal jurisdictional amount.

WHEREFORE, it is respectfully requested that judgment be entered in favor of plaintiff and against defendants in an amount in excess of the federal jurisdictional amount required to file a federal claim and for attorney fees, expert fees, other costs and expenses as allowed by statute and deemed appropriate by the court.

COUNT 3
Against Neal Rehberg, D.O.

63. Plaintiff incorporates by reference paragraphs 1-61 as though fully set forth herein.

64. Dr. Rehberg is a physician working at the Federal Prison Camp at Alderson, WV.

65. Dr. Rehberg did not follow the accepted standard of care in that he failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances.

66. Such failure was a proximate cause of the plaintiff's injury.

67. Dr. Rehberg has a duty to treat inmates, including plaintiff, timely, appropriately and with regard to their medical needs to keep them from harm.

68. Dr. Rehberg violated that duty.

69. Plaintiff suffered harm as a result of Dr. Rehberg's violation of his duty of care to her.

70. As a result of defendants' negligence plaintiff has suffered physical and emotional injuries in excess of the jurisdictional amount.

WHEREFORE, it is respectfully requested that judgment be entered in favor of plaintiff and against defendants in an amount in excess of the federal jurisdictional amount required to file a federal claim and for attorney fees, expert fees, other costs and expenses as allowed by statute and deemed appropriate by the court.

COUNT 4
All Defendants

71. Plaintiff incorporates by reference paragraphs 1-67 as though fully set forth herein.

72. Federal prison officials are liable under the Eighth Amendment to the United States Constitution for acting with deliberate indifference to excessive risk to inmates' health or safety.

73. Federal prison officials at FPC Alderson acted with deliberate indifference to plaintiff's health and safety because they knew that female inmates, particularly those with breast lumps, faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it all as described in this complaint.

74. As a result plaintiff has suffered harm as described herein and physical and emotional injuries in excess of the jurisdictional amount.

WHEREFORE, it is respectfully requested that judgment be entered in favor of plaintiff and against defendants in an amount in excess of the federal jurisdictional amount required to

file a federal claim and for attorney fees, expert fees, other costs and expenses as allowed by statute and deemed appropriate by the court.

COUNT 5
All Defendants except United States of America and the Federal Bureau of Prisons

75. Plaintiff incorporates by reference paragraphs 1-71 as though fully set forth herein.

76. This Count asserts a Bivens action. Bivens established that the victims of a constitutional violation by a federal official have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.

77. As a result plaintiff suffered harm as described herein and physical and mental injuries in excess of the jurisdictional amount.

WHEREFORE, it is respectfully requested that judgment be entered in favor of plaintiff and against defendants in an amount in excess of the federal jurisdictional amount required to file a federal claim and for attorney fees, expert fees, other costs and expenses as allowed by statute and deemed appropriate by the court.

Respectfully submitted,

Paul O. Clay, Jr. Esquire
101 West Maple Avenue
Fayetteville, WV 25840

Lynanne B. Wescott, Esquire
The Wescott Law Firm P.C.
239 S. Camac Street
Philadelphia, PA 19107
Phone: 215-545-0324
Fax: 215-545-0326
Lwescott@wescottlaw.net
Pending admission pro hac vice

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Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

U.S. Department of Justice

Federal Bureau of Prisons

FCI Beckley

1600 Industrial Park Road, P.O. Box 1280
Beaver, West Virginia 25813
(304) 252-9758 (304) 256-4928 Facsimile

BY FAX AND CERTIFIED MAIL
~~(215) 545-0326~~
7003 2260 0000 6782 9798

May 12, 2008

Lynanne B. Wescott, Esq.
Wescott Law Firm P.C.
239 South Camac Street
Philadelphia, PA 19107-5609

Re: Deborah Albin, Tort Claim No. TRT-MXR-2007-04599

Dear Ms. Wescott:

The BOP has been in the process of thoroughly reviewing Ms. Albin's claim for administrative settlement under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et. seq.*, and authority granted under 28 C.F.R. § 0.172. Your client claims government liability in the amount of $25,000,000.00 for personal injury arising from the medical treatment she received at FPC Alderson. Specifically, Ms. Albin alleges that she had to undergo a mastectomy as a result of the prison's failure to properly investigate a lump in her breast that was cancerous.

(b)(5)

After investigating this claim, it appears that settlement in the amount of $50,000.00 may be appropriate. This offer is in complete settlement of any claim arising from this incident, whether against the United States or any employee of the Bureau of Prisons. If you are willing to accept this offer, please contact Christopher Crews at (304) 252-9758 ext. 4139 by May 19, 2008. If you are unwilling to accept this offer, you should consider this letter a final denial of your claim.

If you are dissatisfied with this determination, you may file suit in the appropriate United States District Court not later than six (6) months after the date of this letter.

Sincerely,

Debbie Stevens
Supervisory Attorney

ENTERED
JUL 27 2009
TERESA L. DEPPNER, CLERK
U.S. District Court
Southern District of West Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD

DEBORAH ALBIN,

Plaintiff,

v. Civil Action No. 1:08-cv-01271

UNITED STATES OF AMERICA,
FEDERAL BUREAU OF PRISONS,
WARDEN FPC ALDERSON,
NEAL REHBERG, D.O.,

Defendants.

AGREED ORDER OF DISMISSAL

COME NOW plaintiff, Deborah Albin, by her counsel, and the United States of America, by its counsel, and do hereby represent to the Court that this case has been fully compromised and settled and should be dismissed with prejudice and with each party bearing their respective costs and attorneys' fees. The parties' Release is incorporated herein by reference.

NOW, THEREFORE, based upon representations of counsel, the Court does hereby **ORDER** this case be **DISMISSED** with prejudice and with each party bearing their respective costs and attorneys' fees.

The Court further **ORDERS** that a certified copy of this Order be sent to counsel of record.

ENTERED this 27th day of July, 2009.

David A. Faber

DAVID A. FABER
Senior United States District Judge

THIS ORDER PREPARED BY:

Stephen M. Horn
Assistant United States Attorney
P.O. Box 1713
Charleston, WV 25326
Phone: 304-345-2200
Fax: 304-347-5443
E-mail: steve.horn@usdoj.gov

SEEN AND APPROVED BY:

PAUL O. CLAY, JR.
P.O. Box 746
Fayetteville, WV 25840
Phone: 304-574-2182
Fax: 304-574-2183

Counsel for Plaintiff

U.S. Department of Justice

Federal Bureau of Prisons

FCI Beckley

1600 Industrial Park Road, P.O. Box 1280
Beaver, West Virginia 25813
(304) 252-9758 (304) 256-4928 Facsimile

July 28, 2009

Michelle Fuseyamore, Regional Counsel
Mid-Atlantic Regional Office
302 Sentinel Drive, Suite 200
Annapolis Junction, MD 20701

Re: Albin v. United States of America, et al., 1:08-cv-1271

Dear Ms. Fuseyamore:

The above-referenced case was settled for $985,000 after negotiations between the United States Attorney's Office and Plaintiff's counsel.

As you recall, this case involved a 2 year delay in the diagnosis and treatment of Plaintiff's breast cancer. A review of Plaintiff's medical history and the delay is outlined in the attached Armed Forces Institute of Pathology ("AFIP") report by Raymond B. Weiss, M.D.

Based upon the AFIP report, we attempted to settle this case at the administrative stage. Though the Director approved settlement for $200,000, DOJ requires their approval for settlements over $50,000. DOJ would not approve any amount over that without what amounted to significant discovery. We offered the full $50,000 at that time, though we realized it was a denial in all practical effect.

Plaintiff's counsel brought on another attorney, hired an expert, and filed the action in the United States District Court for the Southern District of West Virginia. The case was filed as both a FTCA and Bivens claim.

Steve Horn, Civil Chief for the United States Attorney's Office for the Southern District of West Virginia, personally handled this matter after the case was filed. Mr. Horn was familiar with the case because we had contacted him early in the administrative process based on his experience in these types of cases.

After negotiations with Plaintiff's counsel, the agreed $985,000 settlement was reached. The value of the case was explained in the attached letter from Mr. Horn to the BOP requesting concurrence in the settlement amount. After more than a month without a response from the BOP, Mr. Horn contacted DOJ directly and received permission to settle the case without BOP's concurrence.

The case was dismissed on July 27, 2009, based upon the attached agreed order of dismissal.

If you need any additional information regarding this matter, please contact me.

Sincerely,

Christopher Crews
Attorney-Advisor
Beckley Consolidated Legal Center

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

Joe Murdock, III

Plaintiff,

V.

The United States of America

Defendant.

SUMMONS IN A CIVIL ACTION
CIVIL ACTION NO. 5:08-1404

TO [Name and address of defendant]:

Charles T. Miller
United States Attorney
300 Virginia Street, Room 400
Charleston, WV 25301

YOU ARE HEREBY SUMMONED and required to serve on [Name and address of Attorney(s) for Plaintiff(s)]:

Arden J. Curry II
CURRY & TOLLIVER PLLC
P. O. Box 11866
Charleston, WV 25339

Susan Curry Brasselle
CURRY & TOLLIVER PLLC
P. O. Box 11866
Charleston, WV 25339

an answer to the complaint which is served on you with this summons, within 60 days of service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

TERESA L. DEPPNER, CLERK OF COURT

DATE: December 9, 2008

BY: S. Richmond
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Charleston Division

JOE MURDOCK, III,

Plaintiff,

v. **CIVIL ACTION NO.** 5:08-1404

THE UNITED STATES OF AMERICA,

Defendant.

Preface to Complaint

Pursuant to the provisions of the *West Virginia Medical Professional Liability Act*, W. Va. Code § 55-7B-1 *et seq.*, plaintiff has served, by certified mail, a Notice of Claim against each health care provider named in this Complaint. Accompanying that Notice of Claim was a Screening Certificate of Merit as required under the *West Virginia Medical Professional Liability Act*. No individual, corporation, company or limited partnership upon whom a Notice of Claim and Screening Certificate of Merit was served has requested or demanded pre-suit mediation.

COMPLAINT

1. At all times relevant to the matters alleged in this Complaint, the Plaintiff was incarcerated in federal prison in Raleigh County, West Virginia.

2. At all times relevant to the matters alleged in this Complaint, the Defendant, Joe Murdock, III, had a physician-patient relationship with the medical providers at the federal prison in Raleigh County, West Virginia.

3. The United States is vicariously liable for the negligence of the medical providers at the federal prison in Raleigh County, West Virginia.

4. On October 15, 2005, while incarcerated at the federal prison in Raleigh County, Mr. Murdock was playing football when he planted his left leg and was hit. At that time, he injured his left knee.

5. On October 15, 2005, Mr. Murdock presented to the clinic at the federal prison in Raleigh County, West Virginia, with complaints of left knee pain and swelling. He was treated with RICE therapy, given crutches and bag of ice and instructed to follow up the following Monday if there was any change in his condition.

6. On October 17, 2005, an x-ray of Mr. Murdock's left knee was taken and read as showing minimal osteoarthritis of the left knee, osteochondritis desiccans lateral femoral condyle and a free bone fragment in the medial compartment.

7. Mr. Murdock continued to return to the clinic throughout October, November and December of 2005 with complaints of left knee pain, swelling, inability to ambulate, and lack of motion. During that time, he requested an MRI be done. He was denied the MRI until January 2006.

8. On or about January 3, 2006, an MRI was done of Mr. Murdock's left knee at Appalachian Regional Hospital. The MRI showed a fracture of the lateral femoral condyle extending into the articulate surface, joint effusion, probable tear of the anterior cruciate ligament, a bone contusion involving the lateral femoral condyle and a tear of the posterior lateral meniscus and partial tear of the posterior horn of the lateral meniscus.

9. After having the MRI explained to him, Mr. Murdock was instructed that he would require knee surgery in order to repair his knee. Mr. Murdock requested that surgery, but

was refused by the federal prison system. He was told that he would be released from prison within the next month and that he could have the surgery performed after he got out of prison.

10. Mr. Murdock was released from custody in February 2006. After release, he saw Dr. Murray at Triangle Orthopedic Associates with complaints of the left knee injury. It was determined by Dr. Murray that Mr. Murdock required a total joint arthroplasty of the left knee. The surgery was performed May 4, 2006.

11. A second surgery was performed on August 9, 2006 for manipulation of the knee under anesthesia due to arthrofibrosis of the knee as a result of the first surgery.

12. The Defendant failed to provide appropriate medical care and treatment to Mr. Murdock by failing to have an MRI conducted immediately, and by failing to have an orthopedic surgery referral.

13. The Defendant was negligent in refusing to allow Mr. Murdock access to an orthopedic surgeon and refusing to allow him to have surgery on his left knee when such surgery was necessary.

14. Because of the negligence of the Defendant in failing to provide appropriate and timely care to Mr. Murdock, he was required to have a left total knee arthroplasty and a second surgery to manipulate his knee under anesthesia.

15. As a result of the negligence of the Defendant, Mr. Murdock has suffered severe emotional distress.

16. Pursuant to the provisions of West Virginia Code § 55-7B-6, a Notice of Claim and screening certificate was provided to the Defendant, including a report from Dr. Terrence Piper. In that report, Dr. Piper opined that the left knee arthroplasty undergone by Mr. Murdock in May 2006 was a direct result of the untreated femur fracture incurred on October 15, 2005.

Dr. Piper further opined that at the time of the injury, given Mr. Murdock's complaints, the mechanism of injury described by Mr. Murdock, as well as the x-ray taken October 17, 2005, Mr. Murdock should have been immediately scheduled for an MRI and referred to a qualified orthopedic surgeon for consultation for surgery. It was Dr. Piper's opinion that failure by the medical providers in the prison clinic to implement both of these measures violated the applicable standard of care. Dr. Piper opined that after receiving the MRI report in January of 2006 confirming a femoral condyle fracture, the prison medical providers' failure or refusal to have an immediate orthopedic consultation and surgery also violated the applicable standard of care. These violations proximately caused irreparable damage to Mr. Murdock's knee and caused a resultant need for a total knee replacement. It was Dr. Piper's opinion that if the prison medical providers had treated Mr. Murdock's condition in accordance with the applicable standard of care, Mr. Murdock would have had a greater than 25% chance of having his knee repaired without the necessity of a total knee arthroplasty.

17. As a result of the negligence of the Defendant as hereinabove described, the Plaintiff has incurred substantial medical expenses for the care and treatment of his condition.

18. As a result of the negligence of the Defendant, the Plaintiff has suffered severe pain and mental anguish, will in the future continue to suffer severe pain and mental anguish; has been prevented from engaging in his usual activities, and will in the future be prevented from engaging in his usual activities; has incurred permanent scarring and disfigurement, has a loss of earning capacity; will incur substantial future medical expenses and expenses for his care. He will require multiple revisions (replacements) of his artificial knee over the course of his life, each requiring hospitalization and extensive rehabilitation. Each surgery will result in severe pain and great expense.

WHEREFORE, the Plaintiff demands judgment against the Defendant for the allegations set forth in this complaint. The Plaintiff seeks recovery against the Defendant for compensatory damages, pre and post judgment interest, attorney fees, costs, expenses, and all other expenses allowed by law.

JOE MURDOCK, III
By Counsel

Arden J. Curry II, Esquire (WV Bar #907)
Susan Curry Brasselle, Esquire (WV Bar #6022)
Curry & Tolliver PLLC
P. O. Box 11866
Charleston, WV 25339
Tel: 304-343-7200
Fax: 304-353-0344
Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

JOE MURDOCK, III,

Plaintiff,

v. CIVIL ACTION NO. 5:08-cv-01404

UNITED STATES OF AMERICA,

Defendant.

ORDER OF DISMISSAL

On this date, the Court was advised by Plaintiff's counsel that the above-styled civil action has been compromised and settled. Therefore, after careful consideration, the Court does hereby **ORDER** that this action be **DISMISSED WITH PREJUDICE** and **STRICKEN** from the docket of the Court. Further the Court **ORDERS** that this civil action may be reinstated only upon written motion of one of the parties alleging good cause for such reinstatement and filed within thirty (30) days of the entry of this Order.

Lastly, the Court **DIRECTS** the Clerk of this Court to send a certified copy of this Order to any pro se party and to all counsel of record.

ENTER: March 31, 2010

Irene C. Berger

IRENE C. BERGER, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

JOE MURDOCK, III,

Plaintiff,

V. **CIVIL ACTION 5:08-01404**

UNITED STATES OF AMERICA,

Defendant,

ORDER

For reasons appearing to the court, this action is hereby **REASSIGNED** from the docket of the Honorable Thomas E. Johnston, United States District Judge, to the docket of the Honorable Irene C. Berger, United States District Judge, for all further proceedings.

The Clerk is directed to forward copies of this order to Judge Johnston, Judge Berger, all counsel of record, and any unrepresented party.

DATED: November 23, 2009

TERESA L. DEPPNER
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

JOE MURDOCK, III,

Plaintiff,

v. CIVIL ACTION NO. 5:08-cv-01404

UNITED STATES OF AMERICA,

Defendant.

ORDER OF DISMISSAL

On this date, the Court was advised by Plaintiff's counsel that the above-styled civil action has been compromised and settled. Therefore, after careful consideration, the Court does hereby **ORDER** that this action be **DISMISSED WITH PREJUDICE** and **STRICKEN** from the docket of the Court. Further the Court **ORDERS** that this civil action may be reinstated only upon written motion of one of the parties alleging good cause for such reinstatement and filed within thirty (30) days of the entry of this Order.

Lastly, the Court **DIRECTS** the Clerk of this Court to send a certified copy of this Order to any pro se party and to all counsel of record.

ENTER: March 31, 2010

Irene C. Berger

IRENE C. BERGER, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JOE MURDOCK III,

Plaintiff,

v. **Civil Action No. 5:08-CV-1404**

UNITED STATES OF AMERICA,

Defendant.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between Joe Murdock III, the undersigned Plaintiff, and the United States of America, by and through its attorney, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned civil action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of Two Hundred Forty Thousand Dollars and no cents ($240,000.00), to Joe Murdock III, the Plaintiff, as hereafter provided, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which the Plaintiff or his guardians, heirs, executors,

administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agencies, agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agrees to accept the payment of the sum set forth in this Stipulation for Compromise Settlement and Release in full and final settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforseen bodily and personal injuries, damage to property and the consequences thereof which she may have or hereafter acquire against the United States of America, its agents, agencies, servants and employees, on account of the same subject matter that gave rise to the above-captioned civil action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. It is expressly understood and agreed by the Plaintiff, Joe Murdock III, that the United States, its agencies, agents, servants, and employees are hereby **RELEASED** and **FOREVER DISCHARGED** from any and all claims demands, rights, causes of action and liability of whatsoever nature, whether foreseen or unforeseen, including claims for wrongful death, arising directly or indirectly from the subject matter of this civil action. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agencies, agents, servants, and employees, from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the Defendant in this action including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agencies, agents, servants, and employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition hereto.

6. It is also understood by and among the parties hereto that pursuant to Title 28, United States Code, Section 2678, attorneys' fees for services rendered in connection with this action shall not exceed 25% of the amount of this Compromised Settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event the Plaintiff is a minor or a legally incompetent adult, the Plaintiff must obtain Court approval of the settlement at their expense. In the event Plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for Two Hundred Forty Thousand Dollars ($240,000.00), made jointly payable to Joe Murdock III, Plaintiff and Pauley Curry, PLLC, his attorneys. The check will be mailed to Plaintiff and his attorneys at the following address: P.O. Box 2786, Charleston, West Virginia, 25330. Plaintiff agrees to dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

Executed this 19th day of November, 2009.

DANIEL W. DICKINSON, JR.
Assistant United States Attorney
Attorney for Defendant

Executed this 10TH day of NOVEMBER, 2009.

JOE MURDOCK III
Plaintiff

Executed this 4th day of November, 2009.

SUSAN CURRY BRASSELLE
Pauley Curry, PLLC
Attorney for Plaintiff

ORIGINAL

Attachment A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FILED

SEP 29 2008

U.S. DISTRICT COURT
CLARKSBURG, WV 26301

Gerard N. LOUIS 36335-019

Enter the full name of the plaintiff in this action

COMPLAINT

Civil Action No.: 5:08-151
(To be assigned by the Clerk of Court)

v.

WARDEN RICARDO MARTINEZ
UNIT MNGR. CHRIS GRINER
LT. VINCE CLEMENTS

Enter above the full name of defendant(s) in this action
(If you have additional defendants, list them on a separate sheets of paper)

I. PARTIES

In Item A below, place your name, inmate number, and address in the space provided.

A. Name of Plaintiff: G. LOUIS Inmate No.: 36335-019

Address: U.S.P. BIG SANDY, P.O. BOX 2068, INEZ, KY 41224

In Item B below, place the full name of the defendant, his or her official position, and place of employment in the space provided. Use Item C for additional defendants, if any.

B. Name of Defendant: RICARDO MARTINEZ

Position: WARDEN (ACTING)

Place of Employment: U.S.P. HAZELTON (CURRENTLY FCC ALLENWOOD)

C. Additional Defendants *(provide the same information for each defendant as listed in Item B above):*

UNIT MNGR. CHRIS GRINER (U.S.P. HAZELTON)
LIEUTENANT VINCE CLEMENTS (F.C.I. LOMPOC)

II. PLACE OF PRESENT CONFINEMENT

Name of Prison/Institution: U.S.P. BIG SANDY

A. Is this where the events concerning your complaint took place? Yes____ No✓

If you answered "no", where did the events occur? U.S.P. HAZELTON

B. Is there a prisoner grievance procedure in this institution? Yes✓ No____

C. Did you present the facts relating to your complaint in the prisoner grievance procedure? Yes✓ No____

D. If your answer is NO, explain why not:_____

E. If your answer is YES, what was the result at level one, level two, and level three (attach grievances and responses):

UNSATISFACTORY

III. PREVIOUS LAWSUITS

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise related to your imprisonment? Yes✓ No____

B. If your answer to A is Yes, describe the lawsuit in the space below. If there is more than one lawsuit, describe the additional lawsuits on another piece of paper using the same outline.

1. Parties to this previous lawsuit:

Plaintiff(s): G. LOUIS

Defendant(s): AL HAYNES, et. al.

2. Court: U.S. DISTRICT COURT FOR THE NORTHERN DISTICT OF W.V.
(If federal court, name the district; if state court, name the county)

3. Docket Number: CIVIL ACTION NO. 1:06CV177

4. Name of Judge(s) to whom case was assigned: CHIEF JUDGE IRENE KEELEY

5. Disposition: PENDING
(For example, was the case dismissed? Appealed? Pending?)

6. Approximate date of filing lawsuit: [redacted] 9/26/08

7. Approximate date of disposition: N/A

IV. STATEMENT OF CLAIM

State here, as briefly as possible, the facts of your case. Describe what each defendant did to violate your constitutional rights. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets of paper if necessary.

ON 2/7/07 I had a disagreement with my cellmate at the time, inmate Johnny Warren. Inmate Warren assaulted me, and made threats against my life. As inmate Warren is both a physically imposing person, supposedly trained in Martial Arts, and has stabbed several inmates during the service of his sentence, I feared for my life. I informed the Unit counselor that I had reason to believe I was in imminent danger of bodily harm or loss of life if I remained in the cell, or even the same Unit with inmate J. Warren. Unit Mngr. Griner was informed, and ordered an EMERGency MOVE, moving me out the Unit immediately to A-1 (201). It is noteworthy that inmate Warren was deemed such a threat to my safety that he was escorted by Correctional staff out the cell, searched, and moved to another location, and held under guard by staff while I packed my property, and was escorted by staff to another (A-1) Unit. I subsequently moved to F-2 Unit to work in UNICOR. On 3/16/07, Unit Mngr. Griner informed me he was moving me to A-2, 228. This was the same cell I was

IV. STATEMENT OF CLAIM - continued.

moved out of by Unit Mngr. Griner, where I had been living with inmate Warren. I asked Unit Mngr. Griner who my cellmate would be. He stated "Warren." I explained to Griner I felt my life would be in grave danger if I were to be moved back to A-2, especially as I had "informed" on Warren, who is serving Life, without possibility of Parole. Griner said "Move or go to the Hole." I went to the Lt's office and talked to Operations Lt. Clements. I informed him of my concerns. He told me to step out of his office while he made some calls. When Lt. Clements summoned me back in his office, he gave me a direct ORDER to move to A-2 228 with inmate Warren, fully aware Warren had previously assaulted me, and that there was a high probability I would sustain Further injury if I were to move back to A-2. I complied with Lt. Clements direct Order, as per Unit Mngr. Griners instructions, and moved to A-2 (228). A few days later, I approached Warden Martinez. I gave him the BP-9 enclosed, told him I was in imminent danger, and asked to be placed in S.H.U. on protective custody and transferred. Warden Martinez took the BP-9, but told me "We dont have room for you back there. Give me 18 months clear conduct and I will ship you." I tried my best to get along with Warren. But on 4/11/07, I was assaulted, sustaining physical injury, placed in Fear of my life, and forced to receive a penis, Warrens, in my rectum. Warren ejaculated. I informed the Chaplain and Psycologist I had been raped. I was taken to the Lt.s office, where I had an "INMATE INJURY ASSESSMENT AND FOLLOWUP" SHEET DONE ON ME BY A HAITIAN P.A. I was

IV. STATEMENT OF CLAIM - continued.

then interviewed by S.I.A. Antonelli. After this, I was taken by Van on a two hour ride to an "outside" hospital for a "Rape Kit" to be used to obtain Warrens D.N.A. from my rectum. I am claiming Unit Mngr. Griner violated my Eighth Amendment rights, as did Lt. Clemments and Warden Martinez. I can provide overwhelming subjective evidence that all three defendants were fully aware of the likelihood that I would suffer bodily harm from Warren, and were "Deliberately Indifferent". In fact, the mere fact that I was moved back to the Unit, in fact the same cell with a dangerous "Lifer" who had a documented history of assaulting me shows much more than mere "Deliberate Indifference"; it is almost certainly a Prima Facie case of malicious intent. My objective evidence will be substantiated by medical records, S.I.S. reports, and the Crime lab results from my D.N.A. test done at the (Name unknown) outside hospital, which will verify I suffered preventable PHYSICAL INJURY. Furthermore, as I stated this situation was designed in Retaliation for my litigation against top prison officials, I was placed on "Cell alone, Rec. alone" status, to prevent future retaliation by staff, and transferred. I am stating a Claim that my Constitutional Rights preventing "Cruel and Unusual" punishment were Violated. I am Further

IV. STATEMENT OF CLAIM - continued.

making the accusation that Unit Mngr Chris Griner violated my Eighth Amendment rights by placing myself in an unsafe condition that posed an unreasonable risk of serious damage to my future health. This was done when Unit Mngr. Chris Griner "forced celled" me in A-2 228 with inmate Warren, the same person Unit Mngr. Griner authorized an EMERGENCY move, moving me out of that cell, and in fact that Unit for my safety less than three months ago. I further contend and accuse Lt. Vince Clements of Violating my Eighth Amendment Rights by being deliberately indifferent to an excessive risk to my health and safety. I went to Lt. Clements, while he was employed as Operations Lt, and asked him to stop Griner from moving me back to A-2(228). I further informed Lt. Clements I was in fear for my safety if moved to A-2(228). While Lt. Clements had the authority to stop my being moved, and was fully aware of my being in danger if moved, he refused to stop the move. I then asked Lt. Clements if I could be moved to another cell in A-2. He replied "No, you are moving to 228 with Warren." As I had no choice, I moved. After two weeks of incessant sexual harassment and threats, I approached Warden (acting) Ricardo Martinez. I hand-delivered him a BP-9 stating I was in imminent danger. I asked Warden Martinez to lock me up in P.C., and transfer me. He replied "We don't have room for you back there. Give me 18 months clear conduct and I will ship you." Three days later I was assaulted and raped by Warren.

V. RELIEF

State briefly and exactly what you want the Court to do for you. Make no legal arguments. Cite no cases or statutes.

I desire financial compensation commensurate with the physical injury, mental anguish, and humiliation I endured. Also, I desire punitive damages be levied against defendants to prevent future malfeasances, I shall further state, for the record, the sum of monetary compensation I am seeking, and what I believe fair and just is $100,000.00 (ONE HUNDRED THOUSAND DOLLARS) from each of the three defendants, specifically Warden Ricardo Martinez; Unit Mngr. Chris Griner; and Lt. Clements for a total sum of $300,000.00 (THREE HUNDRED THOUSAND DOLLARS).

Signed this 3RD *day of* March, *20* 08.

G. Louis
Signature of Plaintiff

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 3RD *day of* March, *20* 08.

G. Louis
Signature of Plaintiff

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: LOUIS, Gerard N. 36335-019 A-2(228) U.S.P. HAZ.
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A- INMATE REQUEST ON 2/7/07, I HAD A VIOLENT ALTERCATION W/ INMATE WARREN, MY CELLMATE AT THE TIME, IN OUR CELL, 228 (A-2). I REPORTED THIS TO STAFF, AND UNIT MNGR. GRINER WAS INFORMED. UNIT MNGR. GRINER INITIATED AN EMERGENCY MOVE ON MY BEHALF, MOVING ME OUT OF THE UNIT TO A-1(201). ON 3/16/07 UNIT MNGR. GRINER INFORMED ME I WAS MOVING BACK TO A-2(228). I TOLD UNIT MNGR. GRINER I FEARED FOR MY LIFE IF I MOVED BACK TO A-2(228). GRINER TOLD ME "MOVE OR GO TO S.H.U." I THEN WENT TO SEE OPERATIONS LT. CLEMENS FURTHUR TRY AND CONTEST MOVING. LT. CLEMENS REFUSED TO INTERVENE. I HAVE A FEDERAL LAWSUIT (CIVIL ACTION NO. 1:06CV177) AGAINST THE WARDEN(S) AND TOP ADMINISTRATIVE STAFF HERE. AS WELL AS NOW UNIT MNGR. GRINER AND LT. CLEMENS. MY CONTENTION IS THAT STAFF IS DELIBERATELY AND MALICEOUSLY PUTTING MY LIFE IN DANGER TO RETALIATE AGAINST ME FOR INITIATING LITIGATION. PLEASE TRANSFER ME IMMEDIATELY

DATE SIGNATURE OF REQUESTER

Part B- RESPONSE

RECEIVED
APR 16 2007

ORIGINAL ADMINISTRATIVE REMEDY FORM LOST.

DATE WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: 449373-F1

Tammy R. Pitchenell
Administrative Remedy Clerk

CASE NUMBER:

Part C- RECEIPT

Return to: LOUIS, Gerard N. 36335-019 A-2(228) USP HAZ
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE RECIPIENT'S SIGNATURE (STAFF MEMBER)

REQUEST FOR ADMINISTRATIVE REMEDY
ADMINISTRATIVE REMEDY #449373-F1

You have filed a Request for Administrative Remedy in which you state staff are maliciously and deliberately placing your life in danger in retaliation for a lawsuit you have pending against the Bureau Of Prisons. You identified specific staff and stated further, you were placed in a cell with another inmate with whom you had a prior altercation with even after informing staff of the situation.

Allegations regarding the inappropriate actions of staff are of particular concern to the Bureau Of Prisons. Please be advised this matter has been forwarded to the appropriate office and/or agency for investigation. However, due to the sensitive nature of this allegation, you may not be advised of the outcome of the investigation.

If dissatisfied with this response, you may appeal to the Mid-Atlantic Regional Director, Federal Bureau of Prisons, Junction Business Park, 10010 Junction Drive, Suite 100-N, Annapolis Junction, Maryland 20701. Your appeal must be received in the Regional Office within 20 days of the date of this response.

Joe D. Driver
Warden

Date 6/18/07

ORIGINAL ADMINISTRATIVE REMEDY FORM LOST.

Tammy R. Titchenell
Administrative Remedy Clerk

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: LOUIS, Gerard N. (LAST NAME, FIRST, MIDDLE INITIAL) 36335-019 (REG. NO.) C-1(219L) (UNIT) U.S.P. BIG SANDY (INSTITUTION)

Part A - REASON FOR APPEAL Admittedly, filing this Regional Appeal is like "Closing the barn door after the cow has run away." The harm has already been done. Shortly after the attached BP-9 was personally hand-delivered to Warden Martinez by myself, I was forced to, under threat of death, submit to anal-ectal sex by inmate Warren. Please be advised that at the time I hand-delivered the attached BP-9 to Warden Martinez, I advised him I was in IMMINENT DANGER from inmate Warren. I asked Warden Martinez to "lock (in S.H.U.) me up and ship me". Warden Martinez replied "I can't, We don't have any room back there. Give me 18 months clear conduct and I will transfer you." I am now simply fulfilling P.L.R.A. requirements. Unless the B.O.P. will offer suitable financial compensation?

8/28/07 (DATE) Gerard N. Louis (SIGNATURE OF REQUESTER)

Part B - RESPONSE

SEP 0 4 2007

DATE REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: 449313-R1

Part C - RECEIPT

CASE NUMBER:

Return to: LOUIS, Gerard N. (LAST NAME, FIRST, MIDDLE INITIAL) 36335-019 (REG. NO.) C-1(219L) (UNIT) U.S.P. BIG SANDY (INSTITUTION)

SUBJECT: STAFF MISCONDUCT, RETALIATION BY STAFF.

DATE SIGNATURE, RECIPIENT OF REGIONAL APPEAL

Regional Administrative Remedy Appeal
Part B - Response

Date Filed: September 4, 2007 Remedy ID #449373-R1

You appeal the Warden's response to your Request for Administrative Remedy. You claim staff placed your life in danger in retaliation for filing a lawsuit against the Bureau of Prisons (BOP). You are requesting compensation for this alleged issue.

Our review of this matter indicated the Warden adequately and accurately addressed the issues you raised. You were advised an investigation is being conducted. Investigations are kept confidential in order to maintain the secure and orderly operation of the correctional facility. However, where there is a determination of lapse in performance by staff, appropriate action is taken. Regarding monetary damages, you may file an administrative tort claim under the Federal Tort Claims Act. You may request this form from your Unit Team.

Your appeal of the Warden's response is denied. If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534. Your appeal must be received in the General Counsel's Office within 30 days from the date of this response.

SEP 19 2007

Date

K. M. White
Regional Director
Mid-Atlantic Regional Office

U.S. Department of Justice
Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: LOUIS, Gerard N. (LAST NAME, FIRST, MIDDLE INITIAL) 36335-019 (REG. NO.) C-1(219L) (UNIT) U.S.P.BIG SANDY (INSTITUTION)

Part A - REASON FOR APPEAL I hand-delivered the enclosed BP-9 to WARDEN MARTINEZ, stating that I was in IMMINENT DANGER From inmate Warren, my cellmate (at that time). I requested Warden Martinez to place me in S.H.U. in protective custody, and ship me. Warden Martinez refused, stating "We don't have room back there For you." I had previously told UNIT MNGR. GRINER, and OPERATIONS LT. CLEMENS I feared for my safety if placed in the cell with inmate Warren. Lt. Clemens refused to intervene, and Unit Mngr. Griner is the one who ordered me to move Fully aware of pre-existant VIOLENCE between Warren and myself. I disagree with the response to my BP-10, and desire Finacial compensation EXCEEDING the amount authorized by a Federal Tort Claim.

10/10/07 (DATE) G. Louis (SIGNATURE OF REQUESTER)

Part B - RESPONSE

RECEIVED
OCT 19 2007
Administrative Remedy Section
Federal Bureau of Prisons

DATE GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE CASE NUMBER: 449373-A1

Part C - RECEIPT

CASE NUMBER:

Return to: LOUIS, Gerard N. (LAST NAME, FIRST, MIDDLE INITIAL) 36335-019 (REG. NO.) C-1(219L) (UNIT) U.S.P. BIG SANDY (INSTITUTION)

SUBJECT: EGREIOUS STAFF MISCONDUCT.

DATE SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

BP-231(13)

Administrative Remedy No. 449373-A1
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal in which you allege USP Hazelton staff deliberately and maliciously put your life in danger in retaliation for initiating litigation against the Bureau of Prisons. You request financial compensation.

Staff conduct is governed by Bureau of Prisons' Program Statement 3420.09, Standards of Employee Conduct. The Bureau of Prisons takes allegations of staff misconduct seriously. You have been informed that your allegations were referred to the appropriate authority for investigation. As to your request for financial compensation, the Administrative Remedy Program does not ordinarily provide for monetary relief. Your request for monetary compensation should be pursued through the appropriate statutorily mandated procedure such as the Federal Tort Claims Act to resolve this issue. We concur with the responses provided and find them appropriate. Records indicate that you received a close supervision transfer to USP Big Sandy on July 27, 2007.

This response is provided for informational purposes only.

December 14, 2007
Date

Harrell Watts, Administrator
National Inmate Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

GERARD N. LOUIS,

Plaintiff,

v. Civil Action No. 5:08CV151 (STAMP)

WARDEN (Acting) RICARDO MARTINEZ,
UNIT MANAGER CHRIS GRINER, and,
LIEUTENANT VINCE CLEMENTS,

Defendants.

ORDER OF DISMISSAL

On May 19, 2010, the parties appeared before this Court and notified this Court that the matters in controversy in the above-styled civil action have been compromised and settled. Therefore, it is ORDERED that this civil action be, and the same is hereby, DISMISSED WITH PREJUDICE and retired from the docket of the Court.

For good cause shown, and under the inherent authority of this Court, this Court WAIVES the payment of the unpaid balance of the plaintiff's filing fees in this civil action.

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to the plaintiff by certified mail and to counsel of record herein.

DATED: May 19, 2011

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Case Actions:

Case ID: CIV-MXR-2009-00645 **Short Description:** LOUIS V. MARTINEZ ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	5:08-cv-00151-FPS-JES
Short Description	LOUIS V. MARTINEZ ET AL
Classification	Civil
Case Type	Bivens 8th Amend
Case Sub-Type	
Current Region	MID-ATLANTIC REGIONAL OFFICE
Current Institution	Hazelton (USP)
Incident Region	MID-ATLANTIC REGIONAL OFFICE
Incident Institution	Hazelton (USP)
Monetary Relief Sought	$
Estimated Amount	$
Office	Wheeling
Jurisdiction	NORTHERN DISTRICT OF WEST VIRGINIA [LIVE]
Responsible Legal Office	MARO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	05/20/2011
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$15,000.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	04/22/2009
Date Filed	11/24/2008

Case Progress

Current Owner	ZACHARY KELTON
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1331 FEDERAL QUESTION: BIVENS ACT
Further Case Classification	
Comments	Assigned to Diana Lee; I/M Reg. No. 36335-019

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARIO A. MORALES,	*	
Plaintiff,	*	
	*	Action No.
vs.	*	
	*	Inmate Federal Tort Claim Act
UNITED STATES OF AMERICA,	*	(FTCA) 28 U.S.C. § 1346(b)
Defendant.	*	

FORMAL COMPLAINT

NOW COMES the plaintiff, Mario A. Morales, through himself, and pursuant to the Due Process Clause of the Fifth Amendment and pursuant to the Federal Tort Claims Act (FTCA) 28 U.S.C. § 1346(b). Pro-se, he Files this Formal Complaint. In support of the Complaint, the plaintiff shows the court the Following:

1. Plaintiff Morales invokes Haines v. Kerner, 92 S.Ct. 594, 404 U.S. 519 (U.S. Jan. 13, 1972), respectfully requesting this Honorable Court to hold the Foregoing Complaint to less stringent standards than a Formal pleading drafted and filed by a lawyer, based on plaintiff's pro se status, his being a layman, being unstudied in the law, and his still suffering physical, emotional and psychological injuries from the brutal assault he suffered on June 8, 2006.

2. JURISDICTION AND VENUE

This action is brought pursuant to the Federal Tort Claims Act (FTCA) 28 U.S.C. §1346(b). This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (1994) ("FTCA"). The FTCA authorizes suits against the United States For injuries caused by Federal employees acting within the scope of their employment. The events giving rise to this cause of action occurred at the Federal Correctional Institution Memphis ("FCI Memphis"), in City, State, which is located within the Western District of the state of Tennessee.

3. EXHAUSTION OF ADMINISTRATIVE REMEDY

The plaintiff timely Filed the Bureau of Prisons Form 95 "tort claim" Form on May 14, 2008. On November 20, 2008 the Bureau of Prison through Matthew M. Mellady-Mid Atlantic Regional Counsel, offered plaintiff a "Stipulation For Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2672", in the sum of $3,500.00 [TWO THOUSAND AND 500 DOLLARS]. Plaintiff rejected.

On April 27, 2009, the Bureau of Prisons again through Matthew M. Mellady offered plaintiff $3,000.00 [THREE THOUSAND DOLLARS] to settle claim. Plaintiff again rejected the BOP's offer. On April 28, 2009, about 24 hours after plaintiff Firmly rejected-He was called to the lieutenant's Office and locked-up in the Special Housing Unit ("SHU"). The lock-up order stated that plaintiff was being locked-up "Pending SIS (Special Investigation Section) Review."

4. STATEMENT OF CLAIM.

The "FTCA" allows prisoners to sue the United States for injuries they suffer while incarcerated in Federal prisons. Prison officials negligently caused or permitted injury to plaintiff Morales. An important consideration in this type of case involves holding employers (like the U.S. goverment) responsible for the injurious actions of their employees. See: Jackson v. United States, 413 F. Supp. (D.C. Ohio 1976).

The certification that the BOP employees were acting within the scope of their employment has been made in it's trying twice to unsuccessfully settle the claim. However, certification is subject to judicial review. Gutierrez de Martinez v. Lamagoo, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995); Hamrick, 931 F.2d at 1210. The certification creates a rebuttable presumption that the BOP employees were acting within the scope of their employment. Hamrick, 931 F.2d at 1211.

5. BASIS OF CLAIM

On February 6, 2006, plaintiff was escorted OFF the compound at FCI Memphis by C.O. Bryant and he was locked up in the Special Housing Unit ("SHU"). SIS Lt. Barton informed plaintiff that he was being locked up for his own protection, because word on the compound was that his cellmate, Ignacio Rodriguez-Moranchel # 06586-030 was out to harm him. (BOP records will show that in December 2005, Rodriguez was charged with posession of a Knife ("shank") and released From the "SHU" January 2006)

While Plaintiff was in the "SHU", Rodriguez was charged with damage to government property (carving with sharp object-gang signs) and was himself locked up in the "SHU". Plaintiff could have absolutely no contact

with Rodriguez. They were seperate-tees.

On June 8, 2006, plaintiff Morales was placed in "SHU" recreation yard #2 For his one hour of morning rec. BOP employees Simon, Dillard, Monix, and Williams then proceeded to place inmate Rodriguez in the same recreation cage. This was done under the supervision of Lieutenant Brantley.

Inmate Rodriguez proceeded to pull out an seven inch razor sharp ice pick From his shoe/slipper and then stabbed plaintiFF 13 times about his body, left forearm and hand. Plaintiff screamed For help and he could not run away because they were in a cage.

These United States employees violated established BOP policy and procedures, when they placed plaintiff Morales' Seperate-tee in the same recreation cage. The employees Further violated policy/procedure when they did not scan Rodriguez with metal detecting wand (used in SHU), the negligently Failed to pat him down and have him remove his shoes/slippers (as was done to all "SHU" residents), wrongfully Failed to check the clip-board - Seperate-Tee Log (done every day in "SHU"), Failed to have assigned officer in the supervision-chair, watching the goings on of the inmates in the rec. cage, and they Failed to stop the brutal assault, until plaintiFF was stabbed 13 times.

The BOP's own regulation requires its employees to "prevent any physical contact" between specified separated individuals, 28 C.F.R. § 524.72(F). Officer Simon's Affidavit stated she Knew "For some time Morales was seperated From Rodriguez."

Furthermore, Plaintiff Morales escapes the forces of the "discretionary function" exception, when the "SHU" BOP Officers failed to enforce and follow their own policy of not searching ("shaking down") Rodriguez's "SHU" cell for weapons. This also puts in question, How in the world did Rodriguez bypass the "SHU" procedure of being strip-searched and have his rectum checked (as is standard policy for all inmates entering the "SHU"), detection of any contraband being brought into the "SHU". Was policy and procedure followed then?

Elements of judgment or choice are "susceptible to policy analysis." United States v. Gaubert, 499 U.S. 315, 322, 325, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). In Palay v. United States, 349 F.3d at 431, the court concluded "that discretionary-function exception does not apply where prison officials have acted in direct contravention of BOP regulations."

In Parrot v. United States, 536 F.3d 629 (7th Cir. 2008), as in the case at bar, the duty of care owed by the Bureau of Prisons to Federal prisoners is fixed by 18 U.S.C. § 4042. That duty includes "safekeeping" and "protection" of all such persons.

Due to the BOP's negligence plaintiff Morales almost was killed by the assault with a dangerous weapon - Rodriguez was allowed to inflict upon him. Fact, he was stabbed 13 times. The lion was led and put in with the lamb, caged. Morales has never been in prison before. He has suffered irrepairable damage.

6. INJURY

It has been almost three years since plaintiff Morales was assaulted with a dangerous weapon by inmate Rodriguez. Physically, Morales' injury to his left Forearm and hand was left with nerve damage. Daily pain visits plaintiff, as he can no longer grip objects as he could before the assault. BOP provides pain medication. BOP records will show plaintiff was made to wait 8 months after he was assaulted to see a hand/nerve specialist. Dr. Kamel told plaintiff that unfortunately he has suffered nerve damage. The doctor recomended physical therapy. The BOP did not provide P.T.

Plaintiff's mental-psych injury are worse than his physical scars. He still suffers anxiety attacks, panic attacks, wakes up in cold sweats, hears voices, trust no BOP employee, cannot sleep and has daily migrane headaches. BOP psychologist have ruled plaintiff suffers from "Post Traumatic Stress Disorder". Plaintiff takes numerous psych medications that he never took before the assault.

The intentional infliction of Emotional Distress ("IIED") also cannot go without notice, after Bop Administrators had Rodriguez moved right next door to plaintiff's cell in the "SHU" after the assault occurred. Retalitory injury was also visited upon plaintiff when he was transfered further away from his family in Chicago, IL; when the BOP sent him to Edgefield, South Carolina. Now, currently plaintiff sit in the "SHU" at Forrest City, Arkansas, awaiting transfer to God Knows where?

7. CONCLUSION

WHEREFORE, the plaintiff respectfully request a jury trial for all claims triable by a jury. He prays for judgment in his favor for an amount no less than $10,000,000.00 [TEN MILLION DOLLARS] to compensate plaintiff for his injuries, additionally to cover the filing fee and costs incurred upon plaintiff for filing this cause.

I hereby certify under penalty of perjury that the above petition is true to the best of my information, knowledge, and belief. Pursuant to §1746.

Signed this 1 day of June, 2009

Thomas A Trezevant #20561-424
Federal Correctional Complex (Low)
Post Office Box 9000-Low
Forrest City, AR 72336

Exhibits Attached

Thank You

EXHIBIT-A

1. BOP Form 95 Tort Claim, Filed to the Mid-Atlantic Region (2 pages)

EHS 1320.05
Attachment A
March 28, 2001

CLAIM FOR DAMAGE, INJURY, OR DEATH

1. Submit to Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and ZIP Code)
Administrtive Office of the United States Courts One Columbia Circle NE Washington, D.C. 20544 Director of Tort Civil Division U.S. Department of Justice Washington, D.C. 20530	Mario A. Morales #20561-424 Federal Correctional Institution P.O.Box 725, Edgefield,S.C. 29824

3. Type of Employment	4. Date of Birth	5. Marital Status	6. Date and Day of Accident	7. Time (A.M. or P.M.)
☐ Military ☒ Civilian	12/29/1968	Married	June 8, 2006	7:30 A.M.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof.) (Use additional pages if necessary.)

SEE ADDITIONAL-ATTACHED PAGE

9. PROPERTY DAMAGE

Name and address of owner, if other than claimant (Number, Street, City, State, and ZIP Code)

NOT-APPLICABLE

Briefly describe the property, nature and extent of damage and the location where property may be inspected. (See instructions on the reverse side.)

NOT-APPLICABLE

10. PERSONAL INJURY/WRONGFUL DEATH

State nature and extent of each injury or cause of death, which forms the basis of the claim. If other than claimant, state name of injured person or decedent.

Claimant suffered 14 stab wounds to his back, left shoulder, and left forearm. Claimant suffered permenant nerve damage to left forearm and thumb digits on left hand. He also suffers daily psychological injury.

11. WITNESSES

Name	Address (Number, Street, City, State, and ZIP Code)
Marty Rae Miller #06745-030 -SHU, cellmate SHU Rec. Cage was also being Video Taped.	Federal Correctional Institution- MEMPHIS 1101 John Denie Road Memphis, Tennessee 38134

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. Property Damage	12b. Personal Injury	12c. Wrongful Death	12d. Total (Failure to specify may cause forfeiture of your rights.)
NOT-APPLICABLE	$10,000,000.00 Ten Million U.S.dls	NOT-APPLICABLE	Ten Million U.S.dls $10,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. Signature of Claimant (See instructions on reverse side.)	13b. Phone Number of Signatory	14. Date of Claim
Mario A. Morales	NOT-APPLICABLE	May 14, 2008

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

PRIVACY ACT NOTICE

ENG 1320.05
Attachment A
March 28, 2001

This Notice is provided in accordance with the Privacy Act, 5 U.S. C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. Authority: The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. Principal Purpose: The information is to be used in evaluating claims.

C. Routine Use: See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. Effect of Failure to Respond: Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable.

CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR EGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY AMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE ICIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCURES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency s involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

f claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should ubmit a written report by the attending physician, showing the nature and extent f injury, the nature and extent of treatment, the degree of permanent disability, if ny, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the value of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accured may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

blic reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, hering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this lection of information, including suggestions for reducing this burden,

to Director, Torts Branch Civil Division U.S. Department of Justice Washington, DC 20530	and to the Office of Management and budget Paperwork Reduction Project (1105-0008) Washington, DC 20503

INSURANCE COVERAGE

rder that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

Do you carry accident insurance? ☐ Yes, if yes, give the name and address of insurance company (Number, street, city, State, and ZIP Code) and policy number.

☐ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?	17. If deductible, state amount.

If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (It is necessary that you ascertain these facts.)

Do you carry public liability and property damage insurance? ☐ Yes, if yes, give name and address of insurance carrier (Number, street, city, State, and ZIP Code)

☐ No

(ADDITIONAL PAGE 1 of 1)

BASIS OF CLAIM

On the morning of June 8, 2006 (several months after claimant was locked up in the Special Housing Unit("SHU") for his own protection-from his cellmate-inmate Ignacio Rodriguez-Moranchel #06586-030(who was an inmate known for violence[he was locked up in December 2005 for having a knife-"shank";let out of the SHU in January 2006]) claimant suffered personal injury, caused by employee's wrongful act, negligent act, and omission of act, while the employees were acting withing the scope of their employment.

On the morning of June 8, 2006, after claimant was placed in SHU recreation yard #2, Correctional Officers Ms. Simon, C.O. Dillard, C.O. Monix, and C.O. Williams placed inmate Rodriguez-Moranchel in the same recreation cage. This was done under the supervision of SHU Lieutenant-Brantley.

The United States employees violated established Bureau of Prisons policy and procedure, when they placed claimant-Morales' Seperate-tee in the same recreation cage as he. The employees further violated policy when they omitted to scan Rodriguez with mental-detecting wand, negligently failed to pat him down and have him remove his shoes, wrongfully failed to have the assigned employee/officer check the seperate-tee log, failed to have the assigned employee/officer sit in the supervison chair-watching the goings on of the prisoners in the rec-cage, and they failed to stop the brutal assault suffered by claimant at the hands of inmate Rodriguez-Moranchel.

Due to this negligence, which had nothing to do with discretionary duties, claimant Morales almost lost his life. He suffered 14 stab wounds, which later got worse because they failed to treat him with a specialist and prefered to transfer him away to Edgefield, South Carolina. At FCI Edgefield, 8months later he was treated by a specialist who concluded that claimant had suffered permenant nerve damage. Records will show that Morales suffers psychological problems as a result of this brutal assault and currently takes several psychotropic medications.

Mario A. Morales 5-14-08

ABOVE PRESENTED UNDER PENALTY OF PERJURY PURSUANT TO § 1746.

EXHIBIT-B

1. November 20, 2008, Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2672. Offer of $2,500.00. (4 Pages)

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2672

It is hereby stipulated by and between the undersigned claimants (meaning any person, other than the United States, signing this agreement), and the UNITED STATES OF AMERICA, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the administrative claim, TRT-MXR-2008-04389, personal injury claim of Mario A. Morales, Register Number 20561-424, arising from his incarceration at the Federal Correctional Institution, Memphis, Tennessee. Specifically any and all claims arising out of an altercation with another inmate on June 8, 2006 in the recreation area of the Special Housing Unit.

2. The United States of America agrees to pay the sum of $2,500.00 [TWO THOUSAND AND 500 DOLLARS], which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, for which claimants or their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Claimants and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and

satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the administrative claims, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Claimants and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by claimants or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. This final settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the claimants will be paid out of the settlement amount and not in addition thereto.

6. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

7. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the claimants expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

_____ _____
Mario A. Morales Date

_____ _____
Matthew Mellady Date
Deputy Regional Counsel
Federal Bureau of Prisons

FMS Form 197
Department of the Treasury

AUTHORIZED FOR LOCAL REPRODUCTION

VOUCHER FOR PAYMENT

Voucher No._____

WHERE A SETTLEMENT AGREEMENT HAS NOT BEEN EXECUTED AND ATTACHED OR WHERE A FINAL JUDGMENT IS *NOT* ATTACHED

Schedule No._____

Claim No. TRT-MXR-2008-04389

A. PAYMENT DATA: *(PLEASE TYPE OR PRINT CLEARLY)*

(1) Submitting Agency/Office: Mid-Atlantic Regional Office (Attorneys use your name and institution)

(2) Agency/Office Mailing Address: 302 Sentinel Drive, Suite 200, Annapolis Junction, MD 20701

(3) Agency/Office Contact Person and Telephone No.: Michelle T. Fuseyamore, Regional Counsel 301-317-3113

(4) Payee(s): (a) Mario A. Morales, Register Number 20561-424

USP Atlanta, 601 McDonough Blvd, S.E., Atlanta, GA 30315

(5) Taxpayer Identification No., SSN, or EIN of **each Payee**: (a)_____
(b)_____

(6) Total Amount: Two Thousand and Five Hundred Dollars------ 00/100

PAID BY
For use by Treasury only

(7) Electronic Funds Transfer (EFT) Information

(a) Payee Account Name:_____ (d) Bank Name and Address:_____ (b) ABA Bank # (9 digits):_____

(c) Payee Account #:_____

(d) Checking:_____ Savings:_____

(8) Briefly Identify Claim: Personal Injury

B. ACCEPTANCE BY CLAIMANT(S). (NOTE: For use ONLY where final judgment has NOT been entered or where claimant has NOT signed another agreement. Use FMS Form 197A where final judgment has been entered or another agreement has been signed by the claimant(s).)

I, (We), the claimant(s) and beneficiaries, do hereby accept the within-stated award, compromise, or settlement as final and conclusive on me (us), on my (our) heirs, executors, administrators or assigns, and agree that said acceptance constitutes a complete release by me (us), my (our) heirs, executors, administrators or assigns of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising now or in the future from, and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries (including wrongful death), damages to property, breaches of contract or law, and any other acts or omissions, and the consequences thereof resulting, and to result, from the same subject matter that gave rise to the claim for which I (we) or my (our) heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States and against the employee(s) of the Government whose acts or omissions gave rise to the claim by reason of the same subject matter. I (We) further agree to reimburse, indemnify and hold harmless the United States, its agents, servants and employees from any and all claims or causes of action, including wrongful deaths, that arise or may arise from the acts or omissions that gave rise to the claim by reason of the same subject matter.

(SIGN ORIGINAL ONLY)

Date:_____, 2008 _____

(Claimant(s) sign above)

C. AGENCY APPROVING OFFICIAL: This claim has been fully examined in accordance with Statutory Cite 28 U.S.C. §2671 et seq and approved in the amount of $2500.00

Signed: Michelle Fuseyamore

Title: Regional Counsel Date: _____

D. OTHER ACCOUNTING INFORMATION AND CERTIFICATIONS: (For use by Treasury only.)

FMS Form 197
12-96 (PREVIOUS EDITIONS ARE OBSOLETE)

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE

EXHIBIT-C

1. April 27, 2009 letter From Mid-Atlantic Deputy Region Counsel, Matthew M. Mellady, making Final offer of $3,000.00. (2 Pages)

U.S. Department of Justice

Federal Bureau of Prisons

Mid-Atlantic Regional Office

302 Sentinel Drive, Suite 200
Annapolis Junction, MD 20701

April 27, 2009

Mario Morales
Register No. 20561-424
Federal Correctional Complex - Low
P.O. Box 9000
Forrest City, AR 72336

Re: Administrative Tort Claim No. TRT-MXR-2008-04389

Dear Mr. Morales:

We are in receipt of your letter dated January 8, 2009, received in this office on April 20, 2009, which contains a counter offer to our monetary offer of $2,500.00. We consider this letter a request for reconsideration. You state that you will accept a sum of $13,000.00; full medical and psychological treatment for your injuries; and will stipulate that the claims arose out of an assault with a dangerous weapon, not an altercation.

We have reviewed your claim, as well as your medical and psychological records in detail, and are offering you $3,000.00 in settlement of your claims. Under Tennessee law you will have the burden of proving damages. Although you state you suffered permanent nerve damage, there is no medical evidence to support your claim. In your previous lawsuit you submitted a doctor's report dated March 29, 2007, to support your claim of nerve damage. The judge in that lawsuit indicated that the report "does not appear to support Plaintiff's position," and we do not see where it indicates that you have permanent nerve damage.

Although we do not intend to minimize the assault, we must look at the available records to determine an appropriate settlement. In this case, you were examined and treated by medical personnel who contemporaneously took notes as to your medical condition. All the records indicate that you suffered fourteen superficial puncture wounds requiring no sutures, and no treatment at an outside medical facility was necessary. While you might disagree with this assessment, absent medical evidence that the assessment was incorrect, we must accord it great weight.

Based on the above, we believe that our offer of $3,000.00 is a fair settlement in this case. You have been provided, and will continue to be provided appropriate medical and psychological treatment while incarcerated within the Bureau of Prisons. Finally, because the amount being

offered will be paid through the Treasury Judgment Fund, the settlement language is dictated by them. This language is attached for your review and signature.

If you are not satisfied with our determination in this matter, you may file suit in the appropriate U.S. District Court not later than six months after the date of this letter.

Sincerely,

Matthew M. Mellady
Deputy Regional Counsel
Mid-Atlantic Regional Office

EXHIBIT-D

1. April 28, 2009, Lock-up Order, placing Morales in SHU-pending SIS Review. (1 Page)

2. 7th Cop-out to Psychology, requesting help and counseling (1 Page)

3. 10th Sick Call request seeking medical treatment From BOP. (1 Page)

[illegible] ADMINISTRATIVE DETENTION ORDER [illegible]

U. S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

[illegible] Forrest City
[illegible]
Date Time: [illegible]

Unit: [illegible]

TO: Special Housing Unit Officer

FROM: R. Hicks, Lieutenant (Name Title)

SUBJECT: Placement of Morales, Mario Reg: 20561-[illegible] in Administrative Detention

_____ (a) Is pending a hearing for a violation of Bureau regulations;
_____ (b) Is pending investigation of a violation of Bureau regulations;
_____ (c) Is pending investigation or trial for a criminal act;
XXX (d) Is to be admitted to Administrative Detention;
_____ (e) Is to be admitted to Disciplinary Segregation

_____ (1) Since the inmate has requested admission for protection;

I hereby request placement in Administrative Detention for my own protection.

Inmate Signature/Register No.: _____

Staff Witness Printed Name Signature: _____

_____ (2) Since a serious threat exists to individual's safety as perceived by staff, although person has not requested admission; referral of the necessary information will be forwarded to the UDC/DHO for appropriate hearing.

_____ (f) Is pending transfer or is in holdover status during transfer.
_____ (g) Is pending classification; or
_____ (h) Is terminating confinement in Disciplinary Segregation and has been ordered into Administrative Detention by the Warden's designee.

It is this officer's decision based on all the circumstances that the above named inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates, or to the security or orderly running of the institution because*

You have been placed in Administrative Detention pending an SIS review.

The inmate is to be placed in Administrative Detention until further notice. The inmate received a copy of this Order on (date/time 4-28-09 4:30 pm

Witnesses Signature/Printed Name J Garrett J. Garrett Date 4-28-09

*In the case of DHO action, reference to that order is sufficient. In other cases, the officer will make an independent review and decision, which is documented here.

Record Copy - Inmate Concerned (not necessary if placement is a result of holdover status); Copy - Captain; Copy - Unit Manager; Copy - Operation Supervisor - Administrative Detention Unit; Copy - Central File

(This form may be replicated via WP) Replates BP-308(52) of JAN 88

"COPY"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) PSYCHOLOGY DEPT.	DATE: May 21, 2009
FROM: Mario Morales	REGISTER NO.: 20561-424
WORK ASSIGNMENT: n/a	UNIT: SHU cell 120 u

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

This is my 7th cop-out to you. Please I need to see someone. I was stabbed 13 time in the SHU at FCI Memphis in 2006. I'm having panic attacks. I can't sleep an I'm losing touch w/ reality. I don't know why I'm in the SHU? I need to see someone before I may hurt myself.

(Do not write below this line)

DISPOSITION:

Signature Staff Member

Record Copy - File; Copy - Inmate
(This form may be replicated via WP) This form replaces BP-148.070 dated Oct 86

"COPY"

"URGENT"

10th TIME SIGNING UP FOR MEDICAL

Federal Correctional Complex
Forrest City, Arkansas

Sick Call Request/Triage and Medication Refill Form
Formulario para obtener una cita medica y para rellenar medicinas

7:00 am -7:30 am
Do not place the sick call request in the institution mail.
Failure to complete this form or follow any procedure delays processing your sick call complaint.
Llene este formulario completamente y traigalo al Servicio de Salud para ponerlo en la caja designada para sick call entre las 7:00 a.m. y 7:30 a.m. No ponga este pedido para cita medica en el correo de la institucion. No seguiendo este procedimiento o llenando este formulario incompletamente, tardara su cita medica.

(PLEASE PRINT)
NAME: Mario Morales REG. No.: 20561-424
(Nombre) *(Numero de Registro)*
Signature: [signature] UNIT: SHU cell 120 Today's Date: MAY 22, 2009
(Firma) *(Unidad)* *(Fecha de Hoy)*

What is your medical problem? (Cual es su problema medico?)
PLEASE, THIS IS MY 10th tIME SIGNING UP FOR SICK CALL. I'm having pain on my hand and forearm I was stabbed on. I need more pain medicati

When did your problem begin or how long have you had the problem? (Cuando comenzo su problema/ Cuanto tiempo ha tenido su problema?)
I was stabbed in the SHU 13+time at FCI Memphis in 2006

When were you last seen for your problem? can't remember
(Cuando fue la ultima vez que lo vieron por su problema?)

History of medical problems? (Circle) Diabetes Hypertension Cardiac Disease Asthma
Por cuanto tiempo tiene este problema? *(Circule uno)* *Diabetis Hypertencion Enfermedad Cardiaca Asthma*
Immunocompromised Mental Health Problems
Immunocomprometida Enfermedad Mental

Are you taking medicine? (Circle one) YES NO (Estas tomando medicina - Circule uno) (SI) (No)

Do you Need Refills? (Circle one) YES NO (Necesitas rellenar tus medicinas? (SI) (No)

If yes, what is the name(s) of the medication(s) you need refilled? _____

Cual es el nombre de las medicinas que necesita rellenar? _____

Have you had an injury? YES *(SI)* NO *(No)* **If YES, do you have pain? (Circle one)** YES *(SI)* NO *(No)*
(Le ha lesionado?) *(Tienes dolor?)* *(Circule Uno)*

If yes, how long have you had pain: 2006 **If YES, where is your pain?** *(Si contestes SI, donde estes su dolor?)* _____
(Por cuanto tiempo?)

If yes, rate your pain (circle one) 0 1 2 3 4 5 6 7 8 9 10
(Como quantifica su dolor (circule uno) (0- No pain, 1-2 Mild, 3-4 Discomfort, 5-6 Moderate, 7-8 Severe, 9-10 Worst pain possible)
(0- No dolor, 1-2 Poco dolor, 3-4 Leve dolor, 5-6 Dolor moderado, 7-8 Dolor severo, 9-10 Peor dolor)

All non-medical problem requests including copies of Medical Records should be sent by regular Cop-Out through the institutional mail system.
(Todos los problemas que no son de indole medicos, incluyendo copias de su record medico, seran dirigidos atravez de un Cop-Out y puesto en el correo de la institucion)

_____ Do not write below this line _____
(No escriba abajo de esta linea)

TO BE COMPLETED BY HEALTH SERVICES STAFF ONLY.

Date Scheduled to be Seen HSU Staff Signature

Mr. Mario A. Morales #20561-424
Federal Correctional Complex (Low)
Post Office Box 9000 - Low
Forrest City, AR 72336

7004 1350 0002 5965 9343

UNITED STATES POSTAL SERVICE

1000 38103

U.S. POSTAGE
PAID
FORREST CITY, AR
72335
JUN 02, '09
AMOUNT
$0.00
00046805-03



RECEIVED
09 JUN -3 PM 2:35

Office of the Clerk
United States District Court
Western District of Tennessee
242 Federal Building, 167 N. Main
Memphis, Tennessee 38103

Special Legal Mail

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARIO A. MORALES **JUDGMENT IN A CIVIL CASE**

v.

UNITED STATES OF AMERICA **CASE NO: 09-2350-A**

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Amended Memorandum Opinion entered on December 8, 2014, Judgment is entered in favor of the Plaintiff, Mario A. Morales, against Defendant, United States of America, in the amount of $105,000.00 for injuries, including pain and suffering and loss of physical and mental health. This cause is hereby dismissed.

APPROVED:

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT COURT

December 11, 2014
Date

s/ Thomas M. Gould
Clerk of Court

s/ Terry Haley
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MARIO A. MORALES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 09-2350-STA-cgc**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This is a negligence action brought against the United States of America in accordance with the Court's federal-question jurisdiction under 28 U.S.C. § 1331. Plaintiff Mario A. Morales claims that while he was in custody of the United States Bureau of Prisons ("BOP") at the Federal Correctional Institution in Memphis, Tennessee ("FCI Memphis"), the BOP breached a duty of care by failing to protect him from another prisoner. Thus, Morales argued, the United States is liable under 18 U.S.C. § 4042 and the Federal Tort Claims Act ("FTCA"). The Court tried this civil action without a jury on August 19, 2014. Following the trial, the parties filed proposed findings of facts and conclusions of law. Federal Rule of Civil Procedure 52 requires that "[i]n an action tried on the facts without a jury . . ., the court must find the facts specially and state its conclusions of law separately."[1]

[1] Fed. R. Civ. P. 52(a)(1).

FINDINGS OF FACT

I. The June 8, 2006 Attack

Plaintiff Mario Morales was in the custody of the BOP at FCI Memphis from spring 2004 to August 2006. In late 2004 or early 2005, Mr. Morales became cell mates with Mr. Ignacio Rodriguez. In December of 2005, Mr. Rodriguez was placed in the Special Housing Unit ("SHU") for possession of a knife, and Mr. Morales, who also spent time in the SHU, requested that Mr. Rodriguez be moved to another cell. Upon Mr. Morales's release into general population, he witnessed an altercation in the prison's recreation yard with Mr. Rodriguez and another inmate.[2] After the altercation, Mr. Morales, Mr. Rodriguez, and the other inmates involved were placed in SHU pending an investigation.

While in the SHU, inmates may leave their cells and go to the recreation area, or "rec cage," for one hour a day, five days a week. At the relevant time, Mr. Morales and Mr. Rodriguez were on "keep-away" status, meaning that the two inmates were to have no physical contact with each other and were not to be placed in the rec cage together. FCI Memphis policy required SHU officers to transport inmates in pairs. On the morning of June 8, 2006, SHU Officer Ann Simon escorted Mr. Morales from his cell to the rec cage alone. FCI Memphis policy also required a pat-down search and handheld-metal-detector search of inmates before they entered the rec cage. Officer Simon only performed a pat-down search of Mr. Morales. She did not check to determine if Mr. Morales and Mr. Rodriguez were in keep-away status. She then escorted and placed Mr. Rodriguez into the rec cage with Mr. Morales. It is unclear

[2] The Defendant proposes that Mr. Morales was identified as being "involved" in the altercation and states that another inmate identified him as an aggressor. Such facts are not relevant to the Court's decision.

whether Officer Simon performed a search of Mr. Rodriquez, but she did not ensure that there was an officer observing the rec cage. She then walked away.[3]

After Officer Simon left the rec area, Mr. Rodriguez attacked Mr. Morales with a 7-inch metal weapon, similar to an ice pick. Mr. Rodriguez stabbed Mr. Morales 14 times with the ice pick—in the arms, shoulders, and abdomen. Mr. Morales attempted to evade Mr. Rodriguez and feared for his life. After SHU officers finally arrived at the rec cage, they entered the area and separated Mr. Rodriguez and Mr. Morales. An investigation later determined that Mr. Rodriguez was the attacker.

II. Treatment of Physical Injuries

SHU officers then transported Mr. Morales to the SHU Medical Triage room, where he was treated by the medical staff. Mr. Morales received six or seven wounds on his left arm, which were the most severe. A Registered Nurse cleaned the scratches and puncture wounds with soap and water, administered a tetanus shot, and indicated that follow-up in the clinic would be "as needed." The medical staff described Mr. Morales's wounds as "superficial" and "scant," and they did not run any tests to determine the depth of the punctures.

By June 12, 2006, Mr. Morales began experiencing problems opening and closing his left hand and numbness and tingling in his left arm. That day, Dr. Nahem Naimey, the senior medical officer at FCI Memphis, examined Mr. Morales and determined that the deep nerves serving muscles in Mr. Morales's left arm were intact. He later recommended that Mr. Morales receive an electromyogram ("EMG") of his left arm from a specialist in order to diagnose any

[3] The Plaintiff filed a Motion in Limine for an Adverse Inference with regard to a video recording of what happened in the rec cage. ECF No. 110. The video no longer exists. The Court took the Motion under advisement. The Court is the finder of fact in this case, and, after hearing all of the evidence, the Court determines that no real dispute exists as to what took place in the rec cage during the attack. Thus, the Motion is **denied as moot**.

possible nerve damage. Dr. Naimey's recommendation was forwarded to the BOP's utilization review committee, which approved the recommendation on July 20, 2006. In the meantime, a physician's assistant at FCI Memphis examined Mr. Morales on June 23 and July 19 to address his continued complaints of numbness. Notes from this meeting indicate that Mr. Morales had full range of motion in the left arm and good grip in his left hand. A physician's assistant again saw Mr. Morales on August 16.

After his last visit with the physician's assistant on August 16, Mr. Morales was transferred to the Federal Correction Institution in Edgefield, South Carolina ("FCI Edgefield").[4] Although the BOP's utilization review committee approved an EMG for Mr. Morales on July 20, 2006, Mr. Morales did not receive an EMG until March 29, 2007, at the Aiken Regional Medical Center in Aiken, South Carolina. There, Dr. Khaled Kamel performed an EMG. An EMG is composed of two parts: nerve conduction, which tests the motor nerves, and a needle test, which determines if muscles have been affected by damage to the nerve controlling the muscle. Dr. Kamel conducted the test and determined that there was "significant damage" to Mr. Morales's ulnar sensory component and ulnar digital component, which can lead to a loss of function. When asked in his deposition whether the amount of time between the injury and the EMG was too long, Dr. Kamel only responded that there were

> too many variables to answer that for certainty. . . . [A]s far as how far after the injury are you supposed to do this test, it really varies depending on a case-by-case basis . . . . But . . . I would say, you know, the sooner obviously the better just to find out what direct damage resulted, yes.[5]

[4] Mr. Morales also spent a brief period of time in the Federal Transfer Center in Oklahoma City.

[5] Dep. of Dr. Khlaed Kamel 16:25–17:1-13.

Mr. Morales continues to suffer from numbness and loss of feeling in his left hand, although Dr. Kamel also testified that, over time, nerve damage may heal.

III. Treatment of Psychological Injuries

Mr. Morales suffered psychological trauma as a result of the attack. The Defendant presented evidence that Mr. Morales had frequent contact with psychological services during the period of his incarceration before the attack. Furthermore, a test in August 2005 concluded that Mr. Morales "exaggerated negative characteristics and psychiatric symptoms in order to appear more distressed or disturbed."[6] Five days after the attack, Mr. Morales met with Chief Psychologist Stacy Spier at FCI Memphis. A psychologist then recommended that Mr. Morales read *Anxiety for Dummies*. After his transfer from FCI Memphis to FCI Edgefield, he raised concerns about his mental condition, telling the intake psychologist that he suffered from Post-Traumatic Stress Disorder.[7] He experienced nightmares, panic attacks, and trouble breathing—all brought on by sudden memories of the attack. Some clinicians with the BOP determined that Mr. Morales was not falsely presenting any information about his condition, while others believed that he was indeed exaggerating his psychological problems. At times in the months after the attacks, Mr. Morales's condition improved;[8] at other times, Mr. Morales would complain of similar psychological problems.

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[6] Evaluation Report of Kristen Stone, M.S., Pl.'s Ex. 13.

[7] The Court does not accept Dr. De Jesus's "diagnosis" of PTSD, as she stated that she "could only testify as to [her] observations of Mr. Morales's behavior when [she] met him, and at the time he was not experiencing any symptoms of PTSD." Trial Tr. 58:24–59:9. Her "diagnosis" was based on documentation in the system from years before, and he had not received an actual diagnosis of PTSD from any psychologist.

[8] In late 2007, Dr. Jessica Seaton met three times with the Plaintiff and could not make an affirmative diagnosis. She believed that Mr. Morales was not showing signs of mental illness that merited an affirmative diagnosis.

At trial, Dr. Selma De Jesus-Zayas ("Dr. De Jesus"), the former Chief of Psychology Services at the Federal Correctional Institution in Miami, Florida ("FCI Miami") testified as to her contact with the Defendant.[9] The Court admitted Dr. De Jesus as an expert in the area of psychology and qualified Dr. De Jesus to testify as to her treatment of Mr. Morales. Dr. De Jesus testified that Mr. Morales failed to receive sufficient psychological treatment in the wake of the attack. She opined that providing literature and conducting a brief counseling session were not adequate methods of treating Mr. Morales. From her treatment of Mr. Morales at FCI Miami and experience in the profession, Dr. De Jesus testified that the anxiety, depression, and hallucinations that Mr. Morales was experiencing were consistent with symptoms associated with incidents of trauma.

CONCLUSIONS OF LAW

I. The Federal Tort Claims Act

As set forth in the Pretrial Order, Mr. Morales alleges that the Defendant was negligent and grossly negligent in failing to keep Mr. Morales from Mr. Rodriguez, in allowing Mr. Rodriguez to have the weapon, and in failing to care for Mr. Morales both physically and psychologically after the attack. Mr. Morales brings these claims under the Federal Tort Claims Act ("FTCA").[10] Under the FTCA, "the United States has consented, subject to certain exceptions, to suit for damages for personal injuries caused by the negligence of government employees acting within the course and scope of their employment."[11]

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[9] Mr. Morales was transferred to FCI Miami in 2011, where he met Dr. De Jesus.

[10] 28 U.S.C. § 1346(b), 2671–2680.

[11] *Montez v. United States*, 359 F.3d 392, 395 (6th Cir. 2004) (citing 28 U.S.C. 1346(b)). There is no contention in this case that BOP employees were not "acting within the scope of [their] office[s] or employment," as required by 28 U.S.C. § 1346(b).

The Defendant filed a Motion in Limine seeking to exclude consideration of the Plaintiff's claim that the Defendant was negligent in failing to treat Mr. Morales's psychological injuries because the Plaintiff failed to exhaust his administrative remedies under the FTCA and did not plead said claim in his Complaint. Under 28 U.S.C. § 2675, a plaintiff may not bring an action against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."[12] The Court holds that the Plaintiff's administrative claim satisfied the FTCA's notice requirements. Prior to filing this lawsuit, Mr. Morales filed a "Claim for Damage, Injury, or Death" with the Administrative Office of the Courts and the Torts Branch of the United States Department of Justice's Civil Division.[13] In that claim, in a limited text box, Mr. Morales stated that he "suffered 14 stab wounds to his back, left shoulder, and left forearm. [Mr. Morales] suffered permenant [sic] nerve damage to left forearm and thumb digits on left hand. He also suffers daily psychological injury."[14] Such a description is sufficient to serve due notice on the agency that it should investigate the events that took place and the agency's remedial actions.[15] These allegations in the Plaintiff's administrative claim are consistent with those in the Plaintiff's Complaint in this action, including his allegation that the agency failed to treat the Plaintiff in the wake of the accident described. The Motion is **denied**.

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[12] 28 U.S.C. § 2675.

[13] *See* Pl.'s Compl. 9.

[14] *Id.*

[15] *See Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 853 (10th Cir. 2005).

II. Negligence Under the FTCA

The FTCA allows a federal prisoner to sue for personal injury suffered as a result of a federal employee's negligence.[16] Here, the government's duty of care is set by 18 U.S.C. § 4042, which mandates that the BOP "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States . . . and provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States."[17] This duty is similar to the standard of ordinary care.[18]

In determining liability, "the elements of state tort law must be applied."[19] Neither party disputes that Tennessee law should apply to the claims. Under Tennessee law, a claim of negligence requires that the plaintiff prove five elements: "a duty of care owed by the defendant to the plaintiff; conduct falling below the applicable standard of care that amounts to a breach of that duty; an injury or loss; cause in fact; and proximate cause."[20] Mr. Morales was incarcerated at FCI Memphis, and therefore the Defendant owed him a duty of care.

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[16] *United States v. Muniz*, 374 U.S. 150 (1963).

[17] 18 U.S.C. § 4042; *see Friedman v. United States*, No. 99-1445, 2000 U.S. App. LEXIS 15353, at * 8 (6th Cir. June 21, 2000).

[18] *See Owens v. Haas*, 601 F.2d 1242, 1249 (2d Cir. 1979); *Strachan v. United States*, No. 08-394, 2009 U.S. Dist. LEXIS 49005, at *11 (E.D. Ky. June 5, 2009).

[19] *Flechsig v. United States*, 991 F.2d 300, 303 (6th Cir. 1993) (citing *Schindler v. United States*, 661 F.2d 552, 560 (6th Cir. 1981)).

[20] *White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998) (citing *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 894 (Tenn. 1996)).

A. Failure to Provide Safekeeping

The Defendant breached its duty of care to Mr. Morales when it allowed him to enter the recreation cage with Mr. Rodriguez. Officer Simon failed to review the keep-away status of Mr. Morales and Mr. Rodriguez before placing them in the rec cage together. She admitted in an affidavit, "I didn't review the recreation documentation to see if there were any separation concerns for inmates Morales and Rodriguez." She also stated, "I know that it was my fault concerning this incident, but at the time I was unaware Morales and Rodriguez required separation."[21] No other officers monitored the rec cage at the time, and as a result of the Defendant's failure to check the inmates' keep-away status and the Defendant's placing the inmates in the rec cage, Mr. Morales suffered 14 stab wounds. Some of the stab wounds resulted in nerve damage, continued numbness, and loss of feeling in Mr. Morales's left arm.

The Court also holds that Mr. Morales suffered psychological harm as a result of the attack. Although Mr. Morales had previous contact with psychological services and his condition seemed to improve at times, the Defendant's negligence caused at least some psychological harm. Mr. Morales testified that he had nightmares, panic attacks, trouble breathing, hallucinations, anxiety, and depression as a result of the attack. Dr. De Jesus was not present to witness Mr. Morales's symptoms shortly after the attack, but she persuasively opined at trial that the effects that Mr. Morales suffered were consistent with incidents of trauma.[22] Mr. Morales should recover damages for the harm caused by the Defendant's negligent placement of two inmates on keep-away status in the same rec cage.

[21] Aff. of Ann Simon, Pl.'s Ex. 25.

[22] Trial Tr. 58:9–13.

B. Failure to Provide Treatment for Physical Injuries

In addition to the harm that Mr. Morales suffered as a result of the attack, the Plaintiff also argued that the BOP's broad failure to treat Mr. Morales's physical and psychological injuries caused further harm. The Defendant breached its duty of care to Mr. Morales when it failed to provide Mr. Morales with access to an EMG for eight months; however, the Plaintiff did not prove that the Defendant's inaction caused any further harm. After the June 8, 2006 attack which led to Mr. Morales's arm wounds, the Chief Physician at FCI Memphis recommended that Mr. Morales have an EMG. The BOP's utilization review team approved the recommendation a month later. Nevertheless, the Defendant did not receive an EMG until March 29, 2007. The Court holds that the BOP's failure to timely treat Mr. Morales's physical injuries constitutes a breach of its duty of care to a federal inmate. Nevertheless, the Plaintiff did not prove by a preponderance of the evidence the BOP's delay in procuring an EMG for Mr. Morales caused any further injury.[23] Dr. Kamel only testified "the earlier, the better" for an EMG to determine the extent of any nerve injury, and he also testified that there were too many variables to make a determination as to whether the delay caused any injury. He testified that time was the appropriate treatment. As stated above, the Defendant is liable for its failure to keep Mr. Morales safe, and Mr. Morales should be compensated for the injuries that he incurred as a result of that failure. But the Court holds that the delay in getting an EMG did not cause any further compensable injury.

[23] Defendant's contention that Dr. Kamel's diagnosis of nerve injury could not connect the injury to the stabbings, however, is without merit. The Court draws the reasonable factual inference that Mr. Morales would not have suffered the nerve damage but for the attack.

C. Psychological Treatment

The Plaintiff introduced evidence that the BOP's broad failure to treat Mr. Morales's psychological injuries caused him additional harm.[24] The Court previously ruled that the Plaintiff was not required to file a certificate of good faith in accordance with the Tennessee Health Care Liability Act because the Plaintiff "has not alleged that any doctor treated him improperly or that the actual medical treatment he received caused him any harm. Rather, he alleges that the Government was negligent in failing to get him to the specialist he needed to see in a timely manner."[25] In making a determination on Plaintiff's "failure to provide psychological treatment," then, the Court will not analyze the adequacy or quality of treatment by psychologists who treated Mr. Morales.[26] At trial, Dr. De Jesus opined that early intervention was essential, that the treatment provided did not meet the professional standard of care, and that Mr. Morales's condition worsened as a result

. But the Plaintiff did have early contact with psychological services. Whether the actual treatment provided met the professional standard of standard of care is a claim that sounds in medical malpractice, not ordinary negligence. If the Court were to analyze the competence or adequacy of psychologists' decisions, it would allow the Plaintiff to side-step Tennessee's

[24] The Court previously ruled that the Plaintiff's claim for failure to provide medical care was not a claim for negligent medical care under the Tennessee Health Care Liability Act, Tenn. Code Ann. § 29-26-115 to -122. Order Denying Mot. J. on Pleadings 9–10, ECF No. 108.

[25] *Id.*

[26] The Defendant filed a Motion in Limine on this issue. *See* Def.'s Mot. in Limine with Respect to Dr. De Jesus's Testimony, ECF No. 109. To the extent that the Motion seeks to limit testimony on the adequacy or quality of mental health care actually provided by psychologists, the Motion is **granted**.

requirement of a certificate of good faith under Tennessee Code Annotated section 29-26-122.[27] Thus, the Plaintiff's only viable claim on this front is the BOP's broad, alleged failure to treat, rather than the sufficiency of actual treatment provided.

The Plaintiff received a prompt response from a psychologist after he requested to see one—just five days after the incident on June 13, 2006. At that meeting, Mr. Morales stated that he experienced some anxiety in the recreation yard, where he thought he saw blood on the floor. Mr. Morales explained that he conquered the anxiety and adequately faced the fear that day. Furthermore, his symptoms of anxiety soon abated. The psychologist commended Mr. Morales and stated that she could bring him some literature dealing with anxiety.[28] Soon thereafter, Mr. Morales received the infamous *Anxiety for Dummies*. He was also taking medication for depression-related symptoms.[29] On August 7, 2006, the Warden of FCI Memphis signed a response to Mr. Morales's original request for treatment for his left arm and for a visit from a psychologist.[30] The Warden granted the request but indicated that Mr. Morales had "been seen by the Psychologist and it was determined that [he] do[es] not require ongoing psychological counseling." In other words, the BOP met his request to see a psychologist by the time his request for an administrative remedy reached the Warden. Mr. Morales also saw Chief Psychologist Stacy Spier during "rounds" on August 4, 2006, and Spier told him that she "would

[27] Tenn. Code Ann. ¶ 29-26-122; *See also* Order Denying Mot. J. on Pleadings 9–10.

[28] Report of Stacy A. Spier, Pl.'s Ex. 20.

[29] Mr. Morales had also taken similar medication before the attack.

[30] Part-B Resp. to Request for Administrative Remedy, Pl.'s Ex. 22.

continue to see him on rounds, take him out of the cell for further evaluation as necessary, and to provide relevant reading materials as needed."[31]

When Mr. Morales arrived at FCI Edgefield just three months after the incident, a clinical psychologist conducted an intake screening on October 3, 2006.[32] In her report, Dr. Angela Coleman noted that Mr. Morales asked to see a psychologist, and she "advised [him] to take advantage of psychology . . . services available to him, and the means for accessing services."[33] The report indicates that a referral form about Mr. Morales's medication was sent to health services. Finally, on that date, Dr. Coleman determined that the "[n]eed for clinical intervention [was] absent." Mr. Morales later had some communication with psychological services at FCI Edgefield, and on December 28, 2007, Mr. Morales was still on medication but "report[ed] that he does not need regular contact with Psychology Services."[34] In light of these contacts with psychological services within the BOP, the Court holds that the Defendant was not broadly or systemically negligent in "failing to treat" Mr. Morales.

III. Damages

The Defendant owed a duty to the Plaintiff to act reasonably in protecting him. It breached that duty when it allowed Mr. Rodriquez to enter the rec cage with Mr. Morales. Mr. Morales suffered physical and psychological injuries that are the direct and proximate result of the Defendant's negligence. Under the FTCA, the United States may be liable "'in the same manner and to the same extent as a private individual under like circumstances,' [but] the

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[31] Brief Counseling Session Report, Pl.'s Ex. 22.

[32] Intake Screening of Dr. Angela Coleman, Pl.'s Ex. 19.

[33] *Id.*

[34] Report of Dr. Jessica Seaton, Pl.'s Ex. 17.

government is not liable for pre-judgment interest or for punitive damages."[35] FTCA claims "entail a two-step analysis. First, the district court applies local law to determine liability and to assess damages. Second, federal law is invoked to bar proscribed recoveries, such as punitive damages."[36]

The Plaintiff should recover damages in three categories. First, the Plaintiff should recover for the pain and suffering he experienced as a result of the attack. Second, the Plaintiff should receive damages for any injury to his left arm as a result of the attack. And third, the Plaintiff should recover for any psychological injury he experienced as a result of the attack. All of these awards are noneconomic,[37] and a Tennessee Court has correctly observed that "[d]amages for pain and suffering and for the loss of enjoyment of life are not easily quantified and do not lend themselves to easy valuation."[38] The judicial fact finder must award damages that are "within the range of reasonableness and not excessive."[39]

The first category of damages—pain and suffering as a result of the attack—are the most serious. Mr. Rodriguez testified that he was doing sit-ups in the corner of the rec cage when an officer placed Mr. Rodriguez in them same rec cage. When Mr. Morales looked up, Mr.

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[35] *Premo v. United States*, 599 F.3d 540, 545 (6th Cir. 2010) (citing 28 U.S.C. § 2674).

[36] *Kirchgessner v. United States*, 958 F.2d 158, 159 (6th Cir. 1992).

[37] *See* Tenn. Code Ann. § 29-39-101(2) ("'Noneconomic damages' means damages, to the extent they are provided by applicable law, for: physical and emotional pain; suffering; inconvenience; physical impairment; . . . mental anguish; emotional distress; . . . noneconomic effects of disability, including loss of enjoyment of normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; and all other nonpecuniary losses of any kind or nature."). Noneconomic damages in Tennessee are limited to $750,000. *Id* § 29-39-102(a)(2).

[38] *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 210–11 (Tenn Ct. App. 2008).

[39] *Dunn v. Davis*, No. W2006-00251-COA-R3-CV, 2007 Tenn. App. LEXIS 120, at *25 (Tenn. Ct. App. Mar. 6, 2007).

Rodriguez was standing above him with the weapon. Mr. Morales was stabbed, quickly rose, started to parry the stabbings with his left arm, ran to the gate of the rec cage, and yelled for help. No officers were present. He continued blocking and kicking Mr. Rodriguez, and he attempted to evade the attack by running in circles in the rec cage. Mr. Morales was, quite justifiably, afraid for his life in those short moments. He testified, "[A]s I was running I was like . . . I'm not getting help, I'm not going to die in here, I can't die, I can't die."[40] Mr. Morales also testified that during the attack, Mr. Rodriguez uttered, "Te voy a matarte," or, "I'm going to kill you."[41] The incident lasted under a minute. Mr. Rodriguez obviously suffered substantial physical pain from the stabbings, but his sheer terror and mental anguish during and after the brief period in the cage as a result of the Defendant's negligence warrant a substantial sum. The Plaintiff is awarded $75,000 for physical and emotional pain and suffering as a result of the attack.

The second category of damages—for continued physical injury to Mr. Morales's left arm—is less significant.[42] After the attack, Mr. Rodriguez initially experienced a problem opening and closing his thumb and fingers. He also experienced tingling and numbness. As to the continuing physical effects of the attack, the most serious stab wounds affected Mr. Morales's left forearm and hand area. Dr. Khaled Kamel testified to Mr. Morales's medical condition, as he was the doctor who saw Mr. Morales for the EMG on March 29, 2007. He determined that the "ulnar sensory component was NR, non-recordable. So that indicates that

[40] Trial Tr. 114:21–23.

[41] *Id.* 115:12–14.

[42] The second and third category of damages could rightly be classified as "noneconomic effects of disability, including loss of enjoyment of normal activities, benefits and pleasures of life and loss of mental or physical health, well-being or bodily functions; and all other nonpercuniary losses of any kind or nature." *See* Tenn. Code Ann. § 29-39-101.

there was significant damage to the sensory component of that nerve as well as the digital part of it."[43] This can lead to "primarily numbness and tingling" and loss of some feeling. Furthermore, the ulnar digital, a "smaller tributary off from the ulnar sensory," was non-recordable. Dr. Kemal stated that an "NR" reading can mean significant damage, but Mr. Morales did not testify as to any acute pain or serious loss of function. He testified that the problems with his hand

> continue[] to this day. . . . My thumb and my hand, especially in the cold weather, sometimes it will just fall asleep on me, and I'm like rubbing my fingers and my thumb, and I hold a cup or even a piece of paper in my hand, and I can't feel it on the tips of my thumb and ring finger and pinkie.[44]

Mr. Morales did not have these problems before the attack. Thus, Mr. Morales is entitled to compensatory damages for the short-term loss of closing his hand and a continued, sporadic loss of feeling in the tips of his fingers. While these damages are certainly not taken lightly by the Court, they do not represent significant loss of function or pain that seriously impairs Mr. Morales's enjoyment of life. Therefore, the Court awards the Plaintiff $5,000 for loss of physical health in his left hand.

The third category of damages recoverable is the loss of mental health that Mr. Morales suffered as a result of the attack. These damages are understandably less clear. Mr. Morales testified that after the attack he would have nightmares of the stabbing, see Mr. Rodriguez in his sleep, have panic attacks and trouble breathing, and experience hallucinations, depression, and anxiety. Dr. De Jesus confirmed that these experiences are consistent with the effects of a traumatic event such as the attack on Mr. Morales. While the consequences of the attack still manifest, by his own admission, Mr. Morales's condition has substantially improved. He

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[43] Dep. of Dr. Khaled Kamel 11:7–11.

[44] Trial Tr. 130:24–131:6.

testified that he has been "in a much better place" since 2010, and he declined treatment at some points after the attack. Mr. Morales is entitled to compensatory damages for the mental harm he suffered and occasionally continues to suffer as a result of the Defendant's negligence. The Court awards Mr. Morales $25,000 for loss of mental health.

CONCLUSION

The Plaintiff has established that the Defendant's negligence in placing him in a confined area with another keep-away-status prisoner caused him injury. For such injuries— including pain and suffering and loss of physical and mental health—the Court awards the sum of $105,000, as accounted for above. The Plaintiff has not established that the Defendant's delay in scheduling treatment for the Plaintiff's left arm caused any further injury, nor has he established that the Defendant broadly failed to treat his psychological injury after the attack. Thus, for these last two claims, the Plaintiff is not entitled to damages.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: December 8, 2014.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

JASON ROSE,	)	
	)	
Plaintiff	)	Civil No. 09-104-ART
	)	
v.	)	
	)	**JUDGMENT**
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

*** *** *** ***

In accordance with the Memorandum Opinion & Order entered contemporaneously herewith and Rule 58 of the Federal Rules of Civil Procedure, it is **ORDERED** and **ADJUDGED** as follows:

(1) **JUDGMENT** is entered in favor of the defendant with respect to all claims asserted in this action by the plaintiff.

(2) This matter is **STRICKEN** from the Court's active docket.

(3) This is a **FINAL** and **APPEALABLE** Judgment, and there is no just cause for delay.

This the 7th day of March, 2011.

Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

JASON ROSE,	)	
	)	
Plaintiff	)	Civil No. 09-104-ART
	)	
v.	)	
	)	**MEMORANDUM OPINION**
UNITED STATES OF AMERICA,	)	**& ORDER**
	)	
Defendant.	)	

*** *** *** ***

What is the right way to set a broken arm? How long should the cast stay on? Will the bone mend completely, or are some permanent deformities and range-of-motion limitations to be expected? These are some of the questions at the heart of Jason Rose's medical malpractice claim. Kentucky courts do not trust juries to answer technical medical questions like these on their own. Instead, plaintiffs in medical malpractice cases must provide expert testimony establishing negligence and causation. Rose has not done so. Accordingly, the United States' motion for summary judgment, R. 43, is granted.

BACKGROUND

Jason Rose is serving a 300-month sentence in federal prison. R. 17-1. On September 25, 2007, Rose was an inmate at the United States Penitentiary-Big Sandy in Inez, Kentucky. Because of a disciplinary violation (Rose has a long record of such violations, *see* R. 17-2), prison authorities had placed Rose in the Special Housing Unit. Shortly after lunch, Rose stuck his arms out through the food slot in his cell door to allow corrections officers Larry Miller and

Christopher Meek to remove his handcuffs. Rose claims that Miller and Meek violently pushed and twisted his outstretched arms, fracturing his left humerus bone.

Rose received basic treatment immediately after the injury. Prison medical staff gave him painkillers and immobilized his arm. R. 17-5 ¶ 2. Prison authorities arranged for Rose to see an orthopedic surgeon the very next day. *Id.* ¶ 4. The surgeon concluded that Rose's fracture did not require surgery and put a cast on his arm. *Id.* Throughout Rose's convalescence, Big Sandy medical staff performed follow-up examinations, took x-rays to make sure his arm was healing properly, and gave him pain medication. R. 17-5 ¶ 7. The cast was removed after approximately eight weeks. R. 45-1 ¶ 4.

On August 6, 2009, Rose filed a complaint against the United States under the Federal Tort Claims Act. R. 2. The United States filed a motion for summary judgment on December 10, 2009, R. 17, which the Court granted in part and denied it in part on June 7, 2010. R. 26. The Court dismissed all of Rose's claims other than his claim for medical malpractice. Rose alleged that Big Sandy officials provided him with negligent medical care after his injury. The Court allowed this claim to survive so that Rose would have an opportunity to obtain an expert witness. After eight months of discovery, the United States filed this renewed motion for summary judgment. R. 43.

ANALYSIS

The Federal Tort Claims Act conditions the United States' liability for the torts of its employees on state law. The Act waives sovereign immunity only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [tort] occurred." 28 U.S.C. § 1346(b). Rose's injury took place at USP

Big Sandy in Inez, Kentucky. Therefore, in order to prevail, Rose must establish a viable medical malpractice claim under Kentucky law. *See Rayonier Inc. v. United States*, 352 U.S. 315, 318 (1957); *see also Davis v. United States*, No. 08-184-ART, 1010 WL 3294224, at *3 (E.D. Ky. Aug. 20, 2010) (applying Kentucky law to FTCA claim brought by Big Sandy inmate). Kentucky imposes a special requirement on plaintiffs in medical negligence cases. Except in rare circumstances, "the plaintiff . . . is *required* to present expert testimony that establishes (1) the standard of skill expected of a reasonably competent medical practitioner and (2) that the alleged negligence proximately caused the injury." *Andrew v. Begley*, 203 S.W.3d 165, 170 (Ky. Ct. App. 2006) (emphasis added); *see also Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996). This requirement stems from the highly technical and complicated nature of most medical malpractice cases. *See Johnson v. Vaughn*, 370 S.W.2d 591, 597 (Ky. 1963).

The Court advised Rose of the expert witness requirement in its Memorandum Opinion and Order entered on June 7, 2010, and gave Rose an opportunity to obtain an expert. R. 26 at 8-10. *Id.* He has not done so. The only evidence in the record of Rose's attempt to locate an expert is a letter from Rose advising the Court that he had written to Dr. Kevin Pugh of the Pikeville Medical Center and had asked him to be an expert witness in his case. R. 38. Apparently, Rose's letter was not particularly persuasive. Dr. Pugh confirmed in a letter that he "do[es] not represent Jason Rose as an expert witness." R. 43-2.

Rose acknowledges that he has not been able to obtain an expert witness during the past eight months. R. 44 at 1. But he argues that he does not need an expert to prove his claim because the Big Sandy medical staff's errors were so apparent that a layman could infer negligence and causation from the evidence. *Id.* Although Kentucky law excuses the expert

witness requirement in cases where negligence and causation are "so apparent that laymen with a general knowledge would have no difficulty in recognizing" them, *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965), Rose's case does not fall within this limited exception. As the Kentucky courts have explained, this "layman exception" is very narrow. The typical case is "where the surgeon leaves a foreign object in the body" or amputates the wrong limb. *Andrew*, 203 S.W.3d at 170. In these kinds of cases, it does not take a trained physician to know that something went terribly wrong. Rose's claim, in contrast, involves questions that are far beyond a layman's ken. What is the proper way to set a broken arm? When is surgery required? How long should a cast stay on? Should the bone fully repair itself or are permanent osseous deformities to some degree normal? Answering these questions accurately requires a medical degree (or the assistance of an expert who has one). In a recent case, the Kentucky Court of Appeals rejected the plaintiff's contention that laymen could properly evaluate her claim that a doctor injured her while performing a range-of-motion exam. The court did not "believe that the average layperson knows of the appropriate manner in which to conduct a passive range of motion exam on a person with [the plaintiff's] spinal condition and other pre-existing injuries." *Andrew*, 203 S.W.3d at 171. Properly healing a broken arm is at least as complicated, if not more so, than performing a range-of-motion exam. Accordingly, the "layman exception" to Kentucky's medical expert requirement does not apply in Rose's case.

In contrast to the total dearth of expert evidence from Rose, the United States has provided several affidavits from Dr. Richard Ramirez, the Bureau of Prisons' Regional Medical Director. Based on a review of Rose's medical records and x-rays, Dr. Ramirez believes that Rose "received medical care consistent with the standard of a reasonable medical practitioner."

R. 17-5 ¶ 2; R. 43-3 ¶ 2; R. 45-1 ¶ 2. Dr. Ramirez further believes that Rose's "broken arm has healed normally, without any alignment problems or abnormalities." R. 43-3 ¶¶ 3, 5. And, in response to Rose's unsupported contention that Big Sandy medical staff removed his cast prematurely, R. 44 at 2, Dr. Ramirez states that Rose had his cast on for approximately eight weeks—the average amount of time for a patient with a broken upper arm. R. 45-1 ¶¶ 3-4. Dr. Ramirez believes that removing the cast after eight weeks was "medically appropriate." *Id.* ¶ 4.

Because he has not produced expert evidence establishing either the applicable standard of care or causation, Rose has failed to make a sufficient showing as to elements that are essential to his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Accordingly, there is "no genuine issue [of] material fact" as to these elements and the United States is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court recognizes, of course, that securing an expert witness is not particularly easy for a prisoner. But it is far from impossible. Indeed, just a few months ago, this Court reopened a prisoner's FTCA case after he obtained affidavits from two different doctors stating that the negligence of prison medical staff had exacerbated an eye injury. *Davis v. United States*, No. 08-184-ART, 2010 WL 5014533, at *4 (E.D. Ky. Dec. 3, 2010). Rose has had eight months to locate an expert witness. He has not done so. Nor has he filed a Rule 56(f) affidavit asking for more time. Summary judgment in favor of the United States is appropriate now.

CONCLUSION

Accordingly, it is **ORDERED** that the United States' motion for summary judgment, R. 43, is **GRANTED**. A separate judgment shall issue.

This the 7th day of March, 2011.

Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

JASON ROSE,	)	
	)	
Plaintiff,	)	Civil No. 09-104
	)	
v.	)	
	)	**ORDER**
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

*** *** *** ***

On March 28, 2013, the parties filed an agreed order of dismissal with prejudice. R. 91. Under Federal Rule of Civil Procedure 41(a)(1)(A)(ii), a "plaintiff may dismiss an action without a court order by filing: . . . a stipulation of dismissal signed by all parties who have appeared." Dismissal is without prejudice unless the stipulation states otherwise. Fed. R. Civ. P. 41(a)(1)(B). Here, the agreed order was for dismissal with prejudice, and was signed by both the plaintiff and the defendant in this case. *See* R. 91.

Accordingly, it is **ORDERED** that:

(1) The plaintiff's request for voluntary dismissal with prejudice, R. 91, is **GRANTED**. This matter is **DISMISSED WITH PREJUDICE**.

(2) This matter is **STRICKEN** from the Court's active docket.

This the 29th day of March, 2013.

Signed By:
Amul R. Thapar AT
United States District Judge

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Kentucky - Pikeville

USAO EDKY
LEXINGTON, KY
2009 SEP 25 AM 11:29

JASON ROSE
Plaintiff

v.

UNITED STATES OF AMERICA
Defendant

Civil Action No. 7:09-cv-104-ART

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

UNITED STATES OF AMERICA
SERVE: UNITED STATES ATTORNEY
EASTERN DISTRICT OF KENTUCKY
260 W. Vine Street, Suite 300
Lexington, KY 40507

U. S. Attorney General
5137 Robert F. Kennedy Blvd.
10 St. & Constitution Ave. NW
Washington, DC 20530

Federal Bureau of Prisons
320 First St., NW
Washington, DC 20534

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Served via Certified Mail
Received by:
B. Jennings 9-25-09
Signature Date

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT: LESLIE G. WHITMER

Date: Sep 18, 2009

By: MALINDA C. BEVINS MCB
Signature of Clerk or Deputy Clerk

CERTIFIED MAIL



7008 3230 0000 7157 4173

Eastern District of Kentucky
FILED
SEP 18 2009
AT PIKEVILLE
LESLIE G. WHITMER
CLERK U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

JASON ROSE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 09-CV-104-ART

ORDER

USAO EDKY
LEXINGTON, KY
2009 SEP 25 AM 11:29

*** *** *** ***

Jason Rose, who is currently in the custody of the Federal Bureau of Prisons ("BOP") and incarcerated at the United States Penitentiary ("USP") Lee, in Jonesville, Virginia, has submitted a *pro se* complaint. *See* R. 2. Rose seeks relief due to an injury he allegedly suffered while he was incarcerated at the USP Big Sandy, in Inez, Kentucky. *See* R. 2. He claims that the negligence of certain personnel there has caused him permanent injury. *See id.* Additionally, he alleges that this Court has jurisdiction over this case under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2672, *et seq.* For the reasons stated below, his complaint meets the requirements of its initial screening. *See* 28 U.S.C. §1915A. Thus, the Court will now issue summons on his complaint.

BACKGROUND

The Court has liberally construed, in Rose's favor, the following factual allegations from his complaint. *See Urbina v. Thoms*, 270 F.3d 292, 295 (6th Cir. 2001). He alleges the following:

On September 25, 2007, Rose was in the Special Housing Unit at USP Big Sandy. R. 2 at 1. At around 2 p.m. that day, he placed his arms through his cell's food slot to have his handcuffs

removed. *Id.* Then, two BOP officers applied pressure to his arms and eventually broke his left arm. *Id.* He was treated for his broken arm; however, the medical care was negligent. R. 2, Ex. 6 at 3. Because of the negligent medical care, Rose now has a deformed left arm. *Id.* This deformity limits his ability to do things like picking up heavy objects. *Id.*

Rose initiated an administrative claim to recover damages for the alleged negligent acts of the BOP officers and prison medical staff. *See* R. 2, Ex. 6. On March 25, 2009, BOP denied his claim. R. 2, Ex. 6 at 5-6. He was informed that he had six months from that date to file suit, if he chose to do so. *Id.* at 6. On August 6, 2009, Rose filed his complaint. *See* R. 2.

DISCUSSION

Since Rose is a prisoner, the Court must screen his complaint if it is brought against a governmental entity or the officers or employees of a governmental entity. 28 U.S.C. § 1915A(a). Here, Rose has brought an action against the United States. Thus, the Court must review his complaint to identify cognizable claims or dismiss claims (or the entire complaint if appropriate) where the claims are: (1) frivolous, malicious, or fail to state a claim upon which relief may be granted or (2) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. 1915A(b).

He has properly named the United States as the sole defendant for the allegedly negligent acts of the BOP officers and prison medical staff. *See Allgeier v. United States*, 909 F.2d 869, 871 (6t h Cir. 1990) ("The FTCA clearly provides that the United States is the only proper defendant in a suit alleging negligence by a federal employee." (citing 28 U.S.C. § 2679(a))). He has cognizable negligence claims under the FTCA for the acts of the BOP officers and the prison medical staff at USP Big Sandy. Additionally, he has exhausted his administrative remedies. *See*

R. 2, Ex. 6. Therefore, the Court will issue summons on his complaint.

As Rose has been granted *pauper* status, *see* R. 5, an officer of the Court will serve process on his behalf. *See* Fed. R. Civ. P. 4(c)(2); 28 U.S.C. § 1915(d). The clerk's office and the Office of the United States Marshal ("USM Office") will be directed to serve the summons and complaint as set forth below.

Accordingly, it is **ORDERED** as follows:

(1) A Deputy Clerk in the division in which this case lies shall prepare the documents necessary for service of process upon the sole Defendant, the United States of America.

(2) The Deputy Clerk shall prepare 3 "Service Packets," each consisting of copies of the following documents:

a. summons for the United States of America;

b. a completed USM Form 285;

c. the Complaint [Record No. 2]; and

d. this Order.

If the Clerk is unable to fully and accurately complete any of the documents described above, the Clerk shall set forth the reason in a docket entry.

(3) The Deputy Clerk shall send the three (3) Service Packets to the USM Office in Lexington, Kentucky, by certified or registered mail.

(4) Service of process upon the United States of America shall be made by the USM by sending a Service Packet by certified or registered mail, return receipt requested to:

i. the Civil Process Clerk at the Office of the United States Attorney for the Eastern District of Kentucky; and

ii. the Office of the Attorney General of the United States in Washington, D.C.; and

iii. the Central Office of the Federal Bureau of Prisons in Washington, D.C.

(5) The USM Office shall serve a Service Packet upon Defendant United States in the manner described in Step 4 above. The USM Office is responsible for ensuring that each Defendant is successfully served with process. In the event that an attempt at service upon a Defendant is unsuccessful, the USM Office shall make further attempts and shall ascertain such information as is necessary to ensure successful service.

(6) Within 40 days of the date of entry of this Order, the USM Office shall send a Service Report to the Clerk's Office, which the Deputy Clerk shall file in the record, as to whether service has been accomplished. The Service Report shall include the green card showing proof of service or a statement that the green card was not returned from the U.S. Postmaster, along with a "Track-and-Confirm" report from the U.S. Postal Service showing that a proof of delivery does not exist.

(7) The Plaintiff shall immediately advise the Clerk's Office of any change in his current mailing address. **Failure to do so may result in dismissal of this case.**

(8) The Plaintiff must communicate with the Court ***solely*** through notices or motions filed with the Pikeville Clerk's Office. ***The Court will disregard correspondence sent directly to the judge's chambers.***

(9) With every notice or motion filed with the Court, the Plaintiff ***must***:

a. mail a copy to each Defendant (or his or her attorney); and

b. at the end of the notice or motion, certify that he has mailed a copy to each Defendant (or his or her attorney) and the date on which this was done. ***The Court will disregard any notice or motion which does not include this certification.***

This the 18th day of September, 2009.

Signed By:
Amul R. Thapar AT
United States District Judge

A True Copy Attest
[illegible] Clerk
[illegible] District Court
By: MA D.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF DENTUCKY

JASON ROSE
PLAINTIFF

vs.

UNITED STATES OF AMERICA
DEFENDANT

7:09-CV-104-ART

Eastern District of Kentucky
FILED
AUG 06 2009
AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

A FEDERAL TORT CLAIMS ACT "claim"

Now comes, Jason Rose, Plaintiff, pro se, and in forma pauperis, under the Federal Tort Claims Act (28 USC§ 1346, 2671-2680); complaining of the United States for the following:

Claims:

1). This claim is for the negligence of the United States in failing to supervise its employees in their duty to exercise a duty of care in their handling of the Plaintiff while handcuffed.

2). On 9/25/2007, while being housed at U.S.P. Big Sandy on D-range in the special housing unit two officers disregard their duty of care by negligently braking the Plaintiff's left arm (my humerus bone).

3). On 9/25/07 at or about 2pm. officers L.R. Miller and C. Meek applyied extreme presure to the Plaintiff's handcuffed arms that were extended out through the food slot for their removel.

4). As a result of that extreme presure to the Plaintiff's arms the Plaintiff suffer a broken arm (the left humerus) causing sever physical and mental pains and anguishes.

5). Do to the broken bone the Plaintiff now suffers a permanent physical deformity.

6). This physical deformity dose not allow me to pick-up heavy items as I once did.

7). Resulting in a limited chose in future activities and work/job chooses for me.

Summary of Damages:

8. The particulars of the Plaintiff's damages are:

a. A broken left humerus bone (arm)

b. Sever physical pain and suffering

c. a deformity of the arm

d. with limitations of what can be done, like not being able to lift heavy items any longer

e. Limitiations on my future activities such as work or job chooses

f. and lastly the sever physical and mental pains with their auguish and sufferings.

This claim is filed within the two years after the incident accrued as required and all the administrative remedies have been done.

Therefore the under signed (the Plaintiff) respectfully request a judgment against the defendant (the United States of America) in the sum of $250,000.00 dollars and expenses in relation with this matter.

RESPECTFULLY SUBMITTED BY
THE PLAINTIFF

Jason Rose 7/29/09

JASON ROSE, inmate # 55913-054
U.S.P LEE
P.O. BOX 305
Jonesville, Va. 24263.

By: MCe D.C.

CERTIFICATE OF SERVICE

I, Jason Rose 55913-054 hereby certify that I have served a true and correct copy of the following:

To: Clerk of Court Eastern District of Kentucky
102 main street, Pikeville, Ky 41501
2 copies of plaintiff complaint
2 copies of plaintiff medical reports
2 copies of Institution Tort claim Remedies and response Administrative
1 copies of motion to proceed informa paupeis and A copy of my prisoner trust fund account statement for the past 6 month period immediately preceding the filling of the complaint.

Which is deemed filed at the time it was delivered to prison authorities for forwarding to the court, *Houston v Lack* 101 L.Ed.2d 245 (1988), upon the court and parties to litigation and or his/her attorney(s) of record, by placing same in a sealed, postage prepaid envelope addressed to:

and deposited same in the United States Postal Mail at the United States Penitentiary, Lee County, Virginia, on this: 29 day of: July 2009

Jason Rose 55913054
USP Lee County
P.O. Box 305
Jonesville, VA 24263

DIANAssociates

UNIVERSITY OF MARYLAND
RADIOLOGY REPORT

PATIENT NAME: Rose Jason
DATE OF BIRTH: 19820703
PATIENT NUMBER: 202#BOP55913-054
REF. PHYSICIAN:
INSTITUTION NAME: US Penitentiary Lee County
EXAM DATE: 2008/01/17 16:39
EXAM TYPE: left elbow
READING RADIOLOGIST: Thu Nguyen , MD

HISTORY and STUDY COMMENTS

more penetratrion of humerus///END-OF-NOTE///more penetratrion of humerus

FINDINGS AND CONCLUSION

Negative except for: old fx deformity of distal humerus

Reply Close Case

David K, Allred, DO, CD
USP LEE
DEA #BU7504687-001

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

INMATE INJURY ASSESSMENT AND FOLLOWUP
(Medical)

1. Institution	2. Name of Injured	3. Register Number
USP BSY	Rose Jason	55913-054
4. Injured's Duty Assignment	**5. Housing Assignment**	**6. Date and Time of Injury**
SHU	SHU	9-25-07 14:20
7. Where Did Injury Happen (*Be specific as to location*)	*Work Related?* ☐ Yes ☒ No	**8. Date and Time Reported for Treatment**
—		9-25-07 14:45

9. Subjective: (*Injured's Statement as to How Injury Occurred*)(*Symptoms as Reported by Patient*)

In SHU

Hx @ yesterday was involved in another incident

Signature of Patient

10. Objective: (*Observations or Findings from Examination*)

Extremity:

X-Rays Taken ✓ Not Indicated ____
X-Ray Results ____

(L) Elbow + Arm Distal Region Deformity swollen, painfull scale 10/10 unable to extended. Pulses 2(+)

11. Assessment: (*Analysis of Facts Based on Subjective and Objective Data*)

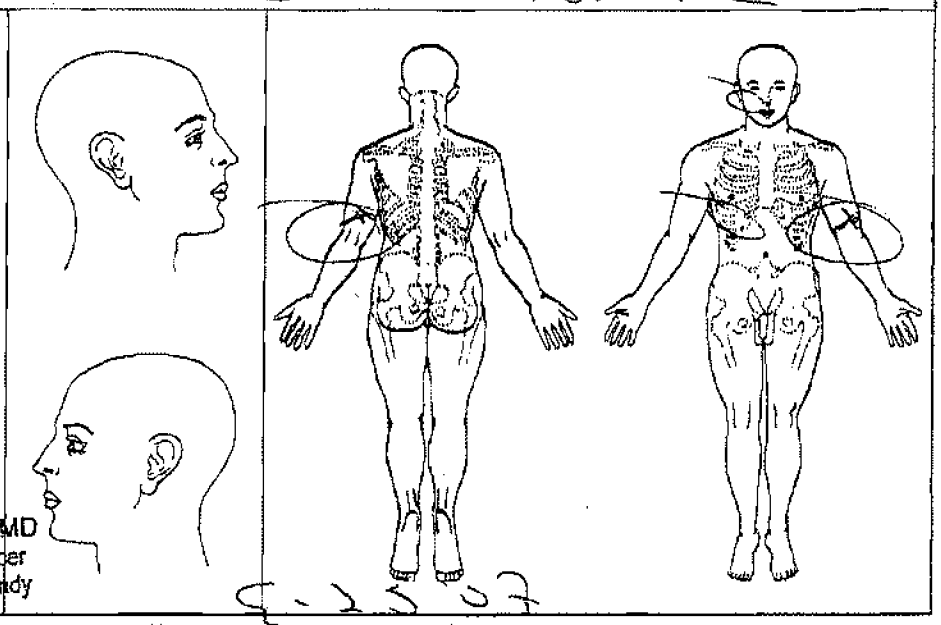
(L) Distal Humerus displaced fracture X-Ray seen and examined by Dr. P. Cruz, Dr. Ramirez

12. Plan: (*Diagnostic Procedures with Results, Treatment and Recommended Follow-up*)

Immobilization of (L) Upper Extremities, Toradol 60 mg IM - done (NA)
Referred to Medical Institution

13. This Injury Required:

- ☐ a. No Medical Attention
- ☐ b. Minor First Aid
- ☐ c. Hospitalization
- ☒ d. Other (*explain*) Transferred
- ☐ e. Medically Unassigned
- ☐ f. Civilian First Aid Only
- ☐ g. Civilian Referred to Community Physician



P. CRUZ, MD
Medical Officer
USP Big Sandy

Signature of Physician or Physician Assistant

9-25-07

Self Carboned Form – If ballpoint pen is used, PRESS HARD

Original – Medical File
Canary – Safety
Pink – Work Supervisor (*Work related only*)
Gold – Correctional Supervisor

USP BIG SANDY MEDICAL RECORD

CONSULTATION REQUEST SHEET

Scott

Request for: Orthopedic ; Rush

From: Dr. Pablo Cruz **Date:** 9-25-07

Reason for Request: Provide detailed information. Please include duration of condition, if prior to incarceration, prior evaluation and treatments done, degree of disability, degree of compliance with treatment. Include any lab or x-ray exam date that you are referencing. If applicable, copy of such.

Inmate Ob 25 Yr with a (L) Humeral distal 1/3 displaced fracture involving most probable the Radial Nerve Anatomically due to lesion is in the torsion cana

Consultant's notes: **Date of Consult:**

Plus important Inmate was involved in an Incident yesterday were he suffered (R) side Face + (R) side Neurithorax need to Rule out Rib + face fracture

Use BACK of paper for continuation

URC: Consult reviewed by the Utilization Review Committee on _____

___Approved ___Disapproved ___Deferred ___Approved with modifications

___Denied: Referred to CD or MD for eval. ___Incomplete; returned for new submission

Reason:

Signed: CD P. CRUZ, MD Medical Officer USP Big Sandy AW-O HSA

*Priority: 1 -Mandatory (1-30 days) 2 -Necessary (30-60 days) 3- Acceptable (3-6 months) 4 -Convenience (6-12 months) 5 -Special Issues

This is a guide for the processing of the Approved consults

USP BSY

NAME: Rose Jason

REG. NO. 55913-054 Date Of Birth: 7-3-82

Release Date: _____

+ Fund Control # _____

PREVIOUS EDITION IS USABLE

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)
9-24-07	- Adm. Note -
2320	See Injury Report — N. Helton N. HELTON, RN USP Big Sandy
9-25-07	Admin Note
14:45	See Injury Report in SHU
	Offered Tylenol #3
	but he refuse
	and medication P. CRUZ, MD Medical Officer USP Big Sandy
1600	V.O. per Dr. Ramirez (Headback & verified)
	- Torodal 60 mgs. IM at bedtime
	- NPO after midnight
	I/m reports pain (8/10) scale. Injection @ buttock (2315)
	tolerated well. I/m given a arm sling for support.
	Surgery scheduled for AM — N. Helton N. HELTON, RN USP Big Sandy
	Ramirez 9/26/07

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: (For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)

REGISTER NO.	WARD NO.

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record

STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR (41 CFR) 201-9.202-1

ROSE, JASON 55913-054
USP-BSY

PREVIOUS EDITION IS USABLE

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)
9/26/09 1000	Returned from town trip Placed in cast - hanging; Pain - minimal no surgery indicated - Neuro vascular intact good capillary filling A: Fx distal humerus P: F/u to be scheduled c̄ ortho E: Advised of follow-up Richard Ramirez, M.D. Clinical Specialty Consultant
9/22/09 1000	S: F/u from ortho - having discomfort O: Arm in cast - No problems A: Fx humerus P: Ibuprophen 500 g abpo tid prn pain x 14 days Tylenol 500 g T-II q.i.d. prn pain x 14 days E: Advised about pain management Richard Ramirez, M.D. Clinical Specialty Consultant

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: (For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)	REGISTER NO.	WARD NO.

Rose, Jason
55913-054
HEALTH SERVICES DEPARTMENT
USP Big Sandy, KY

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record
STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR (41 CFR) 201-9.202-1

Patient: ROSE, JASON
DOB: 07/02/1982 **Age:** 25 Y **Sex:** Male
Phone: 606-433-2400
Address: 1197 AIRPORT RD, INEZ, KY-41224
Chart No: 4022933
Claim #:

Provider: Earl Foster, MD 8
Date: 09/26/2007
Ref Provider: NON-REFERRING NON-REFERRING

Subjective:

CC:
1. Left humerus/tls. 2. Referral: Big Sandy Correctional.

HPI:
Injury Details:
Injury: Left numerus. DOI: 9/25/07. How: left arm was twisted by an officer. Where: Big Sandy Correctional. Initially treated at x-rayed at Big Sandy, did not bring films. Dominant hand: Right.

Surgical History: gun shot wound back 1997.

Family History:

Social History: Smoking: none. Marital status: married. Alcohol use: none. Occupation: Inmate, Big Sandy Correctional.

Medications: None

Allergies: N.K.D.A.

Objective:

Examination:
General examination:
Status: WD, Oriented x3. Peripheral pulses: vascular intact. Neurologic sensory intact, Normal gait, Normal affect, Normal coordination.

Therapeutic Interventions:

Assessment:

Diagnosis:
1. Fracture Shaft (closed) - 812.21 (Primary), ejf, left

Plan:

1. Fracture Shaft (closed)
x-ray left distal humerus in cast

Procedures:
1. Casting
Long arm cast (LAC): : applied in the usual fashion, left



Injected Medicines:

Procedure Codes: HUMERUS

Preventive:

Summary View

Provider: Earl Foster, MD 8
Patient: ROSE, JASON **DOB:** 07/02/1982 **Date:** 09/26/2007

Jason Rose (4022933)
09/26/07

Jason suffered an injury to the left elbow on September 25, 2007, when apparently involved in an altercation with an officer. A sling was applied and he was referred to the office.

Physical Examination: On exam, he has tenderness involving the left elbow with limited motion, and the neurovascular to the hand is intact. There are no skin lesions or instability.

X-Ray Examination: An x-ray of the left elbow demonstrates a comminuted fracture involving the very distal shaft of the humerus. It is essentially a Holstein fracture and the alignment looks acceptable.

A long arm cast was applied and a followup x-ray after cast application again verified acceptable position.

Followup cast check and x-ray in 3 weeks. We will probably plan on 6 weeks immobilization, followed by an elbow brace.

Earl J. Foster, M.D./rla
*

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code)
Beckley Legal Center F.C.I, Beckley P.O. Box 1280 Beaver, WV 25813	Jason Rose # 55913-054 USP Lee County P.O. Box 305 Jonesville, VA 24263

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	7/3/82	-Select- Singl	9/25/07 -Select Day-	

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.) On 9/25/07, while incarcerated at USP Big Sandy, P.O.Box 2068, Inez KY. Two correctional offecers,breached there duty of care, by breaking my left humerus. This incident took place in the special housing unit, on D-Range, in cell 204 237 at 2:10 PM. The two officers names are, Larry R Miller, and C.Meek. The nature of the incident was, while I was hand-cuffed, and locked in a SHU *See attech*

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

None

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See Instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT. The nature of my injury is excessive force and police brutality. The extent of my injury is the fact that my left arm is deformed, and I suffered a broken humerus, which was unjustified. The next fact is it was caused by my would be protecters, which *See attach*

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
See attach	U.S.P Big Sandy P.O. Box 2068 Inez KY 41224 D-Range, cell 204-237, special housing unit

12. (See instructions on reverse.) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
none	see attach	none	$250,000.00 $0.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
Jason Rose		9/29/08

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046 STANDARD FORM 95 PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.2

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☑ No

16. Have you filed a claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?
☐ Yes ☑ No
Full Coverage ☐
Deductible ☐

17. If deductible, state amount.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts.)

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☑ No

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item #12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) **Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

CONTINUE

(8) holding cell. The two officers mention, bended my arms in the feeding slot of the holding cell door, till my left humerus broke. I was then taken to medical where medical was also negligent in my care, because now I have a deformed left arm.

(10) violated the jails duty of care. The other extent of my injury is the fact that I suffer from picking up heavy thing, so now in the future I have to limit my job option around my injury, and as a result of my injury, everytime I workout I recall that dreadful day, and that discomfort affect my heart.

(11) Their is a camera where the incident took place. And I also had a cellmate at the time of the incedent. His name should be in a log book, for the date of 9/25/07.

(12b) Left humerous broken and was immobilized and deformed. $250.000.00

UNITED STATES GOVERNMENT
Federal Bureau of Prisons
Federal Medical Center
3301 Leestown Road
Lexington, Kentucky 40511-8799

October 9, 2008

Jason Rose
Reg. No. 55913-054
USP Lee
P O Box 305
Jonesville, VA 24263

Re: Administrative Tort Claim Number 2009-00066

Mr. Rose:

This will acknowledge receipt on October 9, 2008, of your administrative tort claim for alleged personal injury at USP Big Sandy. You claim a sum certain of $250,000.00.

Under the provisions of the Federal Tort Claims Act, 28 U.S.C.§2675, we have six months from the date of receipt of your claim in this office, to review, consider, and adjudicate your claim.

Should your claim include an allegation of loss of or damage to personal property, pursuant to 28 C.F.R., §14.4(c), you are required to include with your claim an itemized list of the property lost or damaged. If possible, for each item, please state its value, date and place of purchase. If the property was purchased in a Federal institution, submit the commissary receipt. If the property was not purchased in a Federal institution, submit a copy of the receipt of purchase. If you do not have a receipt please state as such, and list the place purchased, for example: name of store, address, state, date and cost for each item alleged lost or damaged. Failure to respond within 30 days of this letter will delay the investigation of your claim. ***If you have already included these items do not re-submit.***

All correspondence regarding this claim should be addressed to Supervisory Attorney, Lexington Legal Center, Federal Medical Center, 3301 Leestown Road, Lexington, Kentucky 40511-8799. When corresponding with this office regarding this tort claim please refer to the above tort claim number. If you have any questions about the status of your claim or if the circumstances surrounding this claim change in any fashion, contact this office immediately. **Also, should your address change, please advise accordingly**.

Sincerely,

Michelle T. Fuseyamore
Regional Counsel

UNITED STATES GOVERNMENT
Federal Bureau of Prisons
Federal Medical Center
Consolidated Legal Center
3301 Leestown Road
Lexington, Kentucky 40511-8799

March 25, 2009

Rose, Jason
Reg #55913-054
USP Lee
P.O. Box 900
Jonesville, VA 24263

Re: Investigation of Administrative Tort Claim No. TRT-MXR-2009-00066

Mr. Rose:

Your administrative tort claim has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), Title 28 U.S.C. § 2672, et seq., and the authority granted under 28 C.F.R. § 0.172. You allege you suffered a fractured left arm while housed in the Special Housing Unit at USP Big Sandy on September 25, 2007. You state the injury resulted in permanent deformity and disability to your arm. You claim a sum certain of $250,000.00.

The Federal Tort Claims Act, which is presented to the agency via an administrative tort claim is based upon the legal theory of negligence. The FTCA waives sovereign immunity and allows suits against the United States for personal injuries caused by governmental employees acting within the scope of their employment. See 28 U.S.C. § 1346(b). Under the FTCA, a plaintiff may recover monetary awards from the United States for injury, property loss, or death "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope...of employment." 28 U.S.C. § 1346(b). The United States may be held liable only if the conduct complained of amounts to negligence "in accordance with the law of the place where the act or omission occurred." Id.

Our investigation reveals you did suffer a broken left humerus on September 25, 2007. Following the injury, you had an x-ray of the arm, received an injection for pain, and the physician immobilized your arm until you could be evaluated by an orthopedic surgeon the following day. You were then transported to an appointment with an orthopedic surgeon on September 26, 2007. Upon assessment of your injuries and review of your x-rays, the surgeon did not believe surgery was indicated, but went ahead and placed a true cast on your arm. Follow-up x-ray after the cast was placed indicated acceptable bone alignment. You were followed through Health Services for your injury until the cast was removed.

It is evident from the above information Health Services acted appropriately in treating your fractured arm. There is no evidence indicating lack of or inappropriate medical treatment resulted in any residual disability to your arm.

There is no indication that any negligent act or omission on the part of a Bureau of Prisons' employee was a factor in any loss you may have incurred. Accordingly, your claim is denied.

This letter constitutes a formal denial of your claim. If you are not satisfied with our determination in this matter, you may file suit in the appropriate U.S. District Court no later than six months from the date of this letter.

Sincerely,

Michelle Fuseyamore
Regional Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

CIVIL ACTION NO. 7:09-CV-104-ART

JASON ROSE PLAINTIFF

V.

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

UNITED STATES OF AMERICA DEFENDANT

* * * * *

THIS AGREEMENT is made and entered into by and between Jason Rose, Plaintiff and the Defendant, the United States of America.

WHEREAS, Plaintiff has filed the above-captioned civil action in the U.S. District Court of the Eastern District of Kentucky under the Federal Torts Claim Act ("FTCA"); and

WHEREAS, the parties hereto desire to make a complete and final settlement under the Federal Torts Claims Act of matters involved in, or relating to, or arising out of, the above-captioned case.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, Plaintiff and the United States, being well advised and intending to be legally bound thereby, COVENANT AND AGREE AS FOLLOWS:

1. As used in this Agreement, Defendant means the United States of America and all of its past, present, future subsidiaries, bureaus, services, agencies, divisions,

departments (including Bureau of Prisons), successors, assigns, directors, officers, agents, employees, attorneys and representatives.

2. In return for all of the agreements and covenants of Plaintiff set forth herein, the Defendant agrees as follows:

A. Plaintiff will be paid the amount of $12,000. This payment is in full settlement and satisfaction of any and all claims of any kind that Plaintiff may have in the above-captioned case against the Defendant up to and including the date of this Agreement. This settlement is intended to avoid further litigation and to preserve judicial economy, and shall not operate as an admission of liability or fault on the part of the United States, its agents, servants, or employees. Any federal, state, or local income tax liability, or other tax liability resulting from the payment of this settlement amount of $12,000.00 shall be the sole responsibility of Plaintiff. The Defendant makes no representations as to the tax treatment of this settlement amount of $12,000.

B. Plaintiff's settlement amount of $12,000 shall be paid by government check to Plaintiff's attorney of record. Plaintiff agrees to the settlement proceeds in full satisfaction of his legal claims against the Defendant and further agrees to obtain a dismissal order of the above-captioned FTCA action with prejudice, with each party bearing its own fees, costs, and expenses.

C. Plaintiff, on behalf of himself, his heirs, legal representatives, administrators and executors, hereby releases and forever discharges the United States of

America and its employees, officers, agents, agencies, attorneys, representatives and assigns, from any and all claims, remedies, demands, debts, losses, obligations, actions, causes of actions, claims of relief, damages, costs, expenses, attorney fees, and compensation of any nature whatsoever, whether known or unknown, foreseen or unforeseen, arising out of or involving the injury of Plaintiff, (collectively "claim" or "claims" or "remedy" or "remedies"), including, but not limited to, claims under the Federal Tort Claims Act, civil rights or *Bivens* claims, legal, equitable, administrative, or other claims or remedies of any kind whatsoever, which Plaintiff had or has against the Defendant on account of, contained in, or in any way growing out of, or which are the subject of, the allegations contained in the above-captioned civil action.

3. Nothing contained in this Agreement shall be construed as an admission of wrongdoing or liability by the Defendant with respect to any matter whatsoever, whether or not encompassed by the above-captioned civil action.

4. This Agreement comprises the entire understanding and settlement of the above-captioned action between Plaintiff and the Defendant and fully supersedes any and all prior agreements or understandings between the parties.

5. This Agreement shall be binding upon Plaintiff and upon his heirs, administrators, legal representatives, and executors.

6. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.

When used in this Agreement, the word "or" is a term of inclusion and not exclusion, and in no instance is the word "or" intended to limit, nor shall it limit, the rights, privileges, and or benefits of the Defendant under this agreement.

7. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and said illegal or invalid part, term or provision shall be deemed not to be a part of the Agreement.

8. The parties agree that this Stipulation for Settlement Agreement and Release of All Claims may be made public in its entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

9. Payment by the Defendant of the settlement sum of $12,000 shall be without interest. Plaintiff and the Defendant shall bear their own costs, expenses and attorney's fees.

10. Plaintiff enters into this agreement knowingly and voluntarily, and by his signature acknowledges that he has read this Agreement and fully understands its terms. Plaintiff agrees that he has been given reasonable period of time within which to consider this Agreement.

11. This Agreement is not assignable by Plaintiff. The date of this Agreement is the date of the last signature of this Agreement.

IN WITNESS WHEREOF, Plaintiff and the Defendant intending to be legally bound, have set their hands to this Agreement the day and year below written.

Jason Rose
Plaintiff

01-25-13
Date

Gregory A. Belzley
P.O. Box 278
Prospect, Kentucky 40059
(502) 494-6186
Counsel for Jason Rose

1/31/13
Date

KERRY B. HARVEY
UNITED STATES ATTORNEY

Robin Gwinn
Assistant United States Attorney
US Attorney's Office
260 W. Vine Street, Suite 300
Lexington, KY 40507

2/4/13
Date

BelzleyBathurst ATTORNEYS
Box 278 Pospect, KY 40059 502.292.2452 gbelzley@aol.com

January 31, 2013

Robin Gwinn
U.S. Attorney's Office, EDKY
260 W. Vine Street, Suite 300
Lexington, KY 40507-1612

Re: Rose v. USA

Robin:

I am enclosing the Settlement Agreement in this matter signed by me and Mr. Rose. When will you be able to get us a check?

Sincerely,

Gregory A. Belzley

USAO-EDKY-LEX FEV 4 '13 PM 1 45

DEC 0 7 2009

EDKy 520 (Rev 02/07) Complaint under §1983 or Bivens Action

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
_____ DIVISION at _____

Eastern District of Kentucky
FILED
DEC 0 7 2009
AT LEXINGTON
LESLIE G. WHITMER
CLERK U.S. DISTRICT COURT

CIVIL ACTION NO. 7:09-145 (Court Clerk will supply)

MICHAEL L. TAYLOR JR
PLAINTIFF

VS:

Demand for Jury Trial:
Yes (✓) No (__)

Correctional Officers
Miller, Meek, Fallon,
Patrick and Price
Individual and official
capicity
DEFENDANTS

(do not use "et al.", enter full names)

I. Plaintiff:

A. Name (list any aliases): Michael L. Taylor JR - 40467-037

B. Prisoner ID #: 40467-037 Check one: Convicted ✓ Pretrial Detainee ___

C. Place of present confinement: U S P LEE

D. Address: P.O Box 305 Jonesville VA. 24263

II. Defendant(s): (additional defendants may be listed on a separate sheet of paper)

A. Defendant's Name: Larry Miller
Title or Position: Correctional Officer
Place of Employment: Big Sandy U S P

B. Defendant's Name: Meek
Title or Position: Correctional Officer
Place of Employment: Big Sandy U.S.P

C. Defendant's Name: Fallon
Title or Position: Correctional Officer
Place of Employment: Big Sandy U.S.P

D. Defendant's Name: Patrick
Title or Position: Correctional Officer
Place of Employment: Big Sandy U.S.P

E. Defendant's Name: Price
Title or Position: Correctional Officer
Place of Employment: U.S.P Big Sandy

III. Statement of Claim:

Below you should state the **FACTS** of your case. You don't need to make legal arguments or refer to any cases or statutes.

If you wish to allege a number of related claims, write out each claim in a separate numbered paragraph. (If you need more space, you may attach extra sheets).

A. What happened? Explain specifically what each Defendant did or failed to do.

"See Attached Statement of Claim"

B. When did these events happen?

On December 29th and 30th of 2007

C. Where did these events happen?

U.S.P Big Sandy

D. What rights under the Constitution, federal law, federal regulations, state law, or state regulations do you allege the Defendant(s) violated? State the specific constitutional provision or law if you know it.

1st 8th and 14th amendments of the U.S Constitution.

IV. Exhaustion of Administrative Remedies

A prisoner must complete all steps of the prison's grievance process before filing any lawsuit that relates to prison conditions.

A. **Federal Prisoners** answer the following:

1. Did you file a grievance regarding the facts in this Complaint under Bureau of Prisons regulations? YES (✓) NO (___)

2. If so, did you (check **ALL** that apply):

___ file a request or appeal to the Warden _____ date

___ appeal to the Regional Director _____ date

___ appeal to the Office of General Counsel _____ date

3. **ATTACH** a copy of each grievance or appeal form you filed and the prison's response(s) to each grievance or appeal.

4. What was the result? I was transferred from Big Sandy to U.S.P Lee on the same night of this incident.
"See continued response attached"

5. If you did not file a grievance, why not? _____

B. **State Prisoners** answer the following:

1. Did you file a grievance regarding these facts under Kentucky Department of Corrections CPP 14.6 or an appeal of a disciplinary decision to the warden under CPP 15.6? YES (____) NO (____)

2. If you filed a grievance under CPP 14.6, did you (check **ALL** that apply):

_____ file a grievance and seek an informal resolution _____ date
_____ request a hearing from the Grievance Committee _____ date
_____ appeal to the Warden _____ date
_____ appeal to the Commissioner _____ date

Did you file an appeal of a disciplinary decision to the warden under CPP 15.6?
YES (____) NO (____) _____ date

3. **ATTACH** a copy of each grievance or appeal form you filed and the prison's response(s) to each grievance or appeal.

4. What was the result? _____

5. If you did not file a grievance, why not? _____

C. **County or City Prisoners** answer the following:

1. Is there a grievance/appeal policy at your jail? YES (___) NO (___)
2. **ATTACH** a copy of the grievance/appeal policy to your Complaint, if available. If not, briefly describe the grievance/appeal policy below.

_____

_____

3. Did you file a grievance regarding these facts? YES (___) NO (___)
4. If you filed a grievance:

a. What steps did you take to use the grievance process? _____

_____

_____

_____

_____

b. What was the result? _____

_____

_____

c. If unsuccessful, did you file an appeal? YES (___) NO (___)

d. What was the result? _____

_____

_____

e. Did you take any further steps in the grievance process?

YES (___) NO (___) NO MORE AVAILABLE (___)

f. What was the result? _____

_____

_____

5. If you did not file a grievance, why not?: _____

_____

_____

_____

_____

V. OTHER LAWSUITS

A. Have you filed any other lawsuit **dealing with the same facts** raised in this action?
YES (___) NO (___)

B. If your answer to question A is **YES**, describe the lawsuit in the space below.
If you filed more than one other lawsuit, provide the same information for each other lawsuit on additional sheets of paper.

1. PARTIES:

Plaintiff: _____

Defendant(s): _____

_____

_____

2. COURT: (name the district for a federal court, or the county for a state court)

_____

3. CASE NO.: _____ DATE FILED: _____

4. OUTCOME: (is the case still pending? was it dismissed? being appealed?)

_____

_____

5. DATE OF JUDGMENT, DISMISSAL, or APPEAL: _____

C. List any other lawsuits that you have filed in any state or federal court:

1. Plaintiff _____ vs. Defendant(s) _____

Court Name: _____ Case No.: _____

Nature of Claim: _____ Date Filed: _____

Outcome: _____ Date: _____

2. Plaintiff _____ vs. Defendant(s) _____

Court Name: _____ Case No.: _____

Nature of Claim: _____ Date Filed: _____

Outcome: _____ Date: _____

3. Plaintiff _____ vs. Defendant(s) _____

Court Name: _____ Case No.: _____

Nature of Claim: _____ Date Filed: _____

Outcome: _____ Date: _____

VI. Relief:

State exactly what you want the Court to do for you. You don't need to make legal arguments or refer to any cases or statutes, just explain what you want to happen if you prevail on your claim.

I want the court to award me Compensatory and Punitive damages as a result of my physical and emotional/mental trama in the amount of $ 500,000 For each defendant

VII. Review this Form

Please take a moment to go back and review your responses to each of the questions. Immediately below you are required to certify under penalty of perjury that the information you have provided in this form is correct to the best of your knowledge, so please make sure that your responses fully and accurately explain your claim.

CERTIFICATION

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Michael L Taylor Jr — Signature of Plaintiff

40467-037 — Prison ID#

12-1-09 — Date

Plaintiff's Address: U.S.P Lee P.O Box 305 Jonesvill VA. 24263

UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF KENTUCKY

MICHAEL L. TAYLOR JR.
Plaintiff,

- against -

Complaint
Jury Trial Demanded
DKT. NO.

Correctional officers.
Miller, Meek, Fallon
Patrick and Price sued in
there individual and official
capicity
Defendants.

Preliminary Statement

This is a civil rights action by Michael L. Taylor JR. a Federal prisoner who was confined at U.S.P. Big Sandy. Plaintiff is seeking damages and injunctive relief via Bivens v. Six Unknown Agents of the Fed Bureau OF Narcotics, 403 U.S. 388 (1971), alleging inter alia, conspiracy to use excessive force, excessive use of force, deplorable conditions of confinement, denial of right to seek redress. A violation of the 1st, 8th, 14th amendments to the U.S Constitution. The plantiff also alleges the torts of assault and battery.

Jurisdiction

1. The court has jurisdiction over the plantiffs claims of violations of Constitutional violations under 28 USC 1331 and Federal questions statutes.
2. The court has supplemental jurisdiction over the plantiffs State law tort claims under 28 USC 1367.

III Statement of Claim:

1. On December 29th Myself, MR. Johnson and MR. Hammond were being housed in a two man cell in Big Sandy Special Housing Unit (here and after S.H.U) for seperate incidents which occured prior to this date.

2. At or around 8:30-9:00 A.M we were let out of our cell for our hourly recreation, when we returned to our cell immediately before entering we noticed the cell in disarray, our wash clothes were thrown around the floor with what appeared to be dirt on them and water around the toilet.

3. Upon seeing this I asked C.O John Doe who had exscorted me back in from rec, "did he search our cell?" he stated that, "he did not." I told C.O John Doe as he was uncuffing me that, "we needed some clean wash clothes," he didn't respond.

4. Maybe about 15 minutes later C.O John Doe returned to the tier to conduct "Afternoon chow" whe he got to our cell I asked him, "did he have the clean wash clothes?" he didn't respond. Once we received our food trays before he could secure the food slot I stuffed my mattress into the slot preventing him from closing it. I told him that, "I wanted to see a Lieutenant (here and after Lt.) C.O John Doe continued conducting chow then left the tier.

5. Moments later C.O Crunkler returns to the cell and asked, "what was the problem?" I told him that, "someone used our wash clothes first dipping them into the toilet and then wiping the wall trying to get rid of some graffiti."

6. C.O Crunkler stated that, "he was the one that came into the cell and tried to remove the graffiti but he didn't use toilet water he used Cleaner.

7. It was at this time that Lt. John Doe arrived at the cell door aggressively ordering me, "to take the mattress out of the slot. I began trying to explain the problem, but he began trying to forcefully pull the mattress out the slot along with C.O John Doe and Crunkler. Myself, Johnson and Hammond began pulling it back towards us. Lt John Doe stop pulling on the mattress and left the tier stating that, "he would be back." I then covered up the window.

8. Shortly after these events Lt. John Doe returned informing us that," he had the tactical team with him and that if we didn't remove the mattress and cuff up the tactical team would enter the cell." We didn't respond.

9. It was then that Assistant Warden John Doe made his presence known asking us," what was the problem?" I began to state what transpired and that," all we're asking for is some clean wash clothes, and that if they are provided this situation is over." Assistant Warden John Doe said," O-k I will get yall some clean wash clothes."

10. At this time Lt. John Doe informed us to," cuff up," I asked," where were the wash clothes?" Lt. John Doe and the rest of the tactical team then began pulling the mattress this time successfully pulling it out of the slot.

11. Lt. John Doe then informed us to," cuff up again and that if we didn't he was going to spray us with pepper spray." We didn't respond.

12. Lt. John Doe then proceeded to spray us with a whole can of pepper spray, then told us to," cuff up again." Once we didn't respond he then sprayed two more cans of pepper spray into the cell before shooting us with a pepper ~~spray~~ ball gun several times. He then gave the order for the tactical team to enter the cell.

13. When the tactical team entered the cell a brief struggle ensued with myself and Mr. Johnson being pinned in the shower, and Mr. Hammond off to the side. It was then that someone shot me in the head with the pepper ball gun.

14. We were then cuffed, shackled and escorted down stairs into the receiving area of the S.H.U and placed into the shower one at ~~at~~ a time to wash off the pepper spray. While I was in the shower C.O Crunkler came and punched me.

15. Once we were taking out of the shower we were then taken back up front where we were stripped issued a dry T-shirt and boxers then restrained in belly chain, black box and shackles.

16. We were then placed in a holding cell where Lt. Pennelton would come every 2 hours to search the cell and secure our restraints.

17. On one of these later visits we complained to Lt. Pennelton that," our restraints

were cutting off the circulation in both our wrist and ankles, and that we hadn't received our "Evening Chow".

18. He then checked our hand and feet restraints and immediately began making the proper adjustments, he then asked C.O Fallon who was in the cell with him at the time, "what was up with our food?" C.O Fallon stated that, "he would look into it." On Lt. Pennellons next visit we again inquired about our "Evening meal" when asked this time by Lt. Pennelton C.O Fallon stated that, "he thought we had already been fed." We never did receive our "Evening Meal".

19. All throughout the remainder of the evening untill about 11:30 p.m Lt. Pennelton checket our restraints and searched the cell. Lt. Thompson who was working the midnight shift completed this task untill the morning.

20. On December 30th at or around 7:30-8:00 a.m Lt. Adams came and informed us that, "we would be taken out of our restraints and placed back in our original cell." We were brought out of the holding cell one at a time: Johnson, Hammond and then myself, taken out of the restraints and issued a pair of socks.

21. When it came time to go back up to the cell I was placed back into the holding cell. Lt. Adams asked C.O Crunkler, "Isn't he going back into his original cell?" C.O Crunkler said that, "I would be placed back in the cell later." After being on the floor all night in restraints as soon as I was placed back in the holding cell I quickly fell into a deep sleep.

22. At or around 3:30-4:00 p.m I was startled out of my sleep by a very loud bang against the window of the holding cell.

23. I jumped up and seen C.O Miller, I asked him, "what the fuck was he banging on the window for?" He then stated, "motherfucker you aint getting no sleep you put your hands on my boy we're going to get your ass." (his boy being C.O Stevens who was apart of the tactical team cell extraction the day before)

24. Once he said that me realizing his intentions I laid back down and pulled the covers over my head beliving that if I ignored him he would go about his business.

25. Upon me doing that he began to repeatedly bang on the window screaming. Once he seen that I wasn't responding he stopped banging and walked off.
26. He returned minutes later pouring a whole bucket of water under the door into the holding cell. I immediately picked my mattress and blanket off the floor and asked C.O Miller, "what the fuck was wrong with him?" He stated, "you know what you did were going to get your ass."
27. I began trying to figure out a way to diffuse this situation before it got any further out of control. I began cleaning up the water with my blanket while stating to C.O Miller that, "this was some stupid shit he just did because it's all caught on camera, and if I wanted to get him in trouble all I had to do was leave the water on the floor and notify a Lt., Captain or the Warden when they made their rounds.
28. But I told him that, "I wasn't going to do that, and that if he chill I could forget about it." I then went on to say that, "the situation from yesterday with me and his boy is over and that me and him (C.O Stevens) had already talked and there were no hard feelings."
29. Me saying that only infuriated him more, he began to state that, "he was GOD around here, it didn't matter if I told or not nothing would happen because he's been told on before and he's still here, and that this situation is far from being over.
30. Once I seen that didn't work I tried a different approach and stated to him, "that since you don't seem to care about yourself you need to think about your family and how they would be affected if you lost your job."
31. I proceeded along those lines and the conversation seemed to be turning around untill C.O Meek walked up. An exchange of words took place between them with a few comments directed towards me.
32. It is then that C.O Miller pulls a "Buck knife" from his pocket and began picking his nails with it. He went on to tell me that," I was

nothing and he could get me hit (stabbed) for a carton of cigarrets on the compound and I better ask my boy because he knows."

33. At this time C.O Fallon walks up into the conversation with C.O price and Patrick standing a little of to the side. C.O Fallon sarcastically states, "I already fed you right?" I told him that, "he did not." Again I didn't receive "Evening - Chow.

34. Once again I tried steering the conversation away from me being threatend at the sametime trying to get a feel for where these guys heads were at by asking, "If I could receive a pair of boxers that fit," because the ones that they gave me the day before didn't fit.

35. C.O miller stated that, "he would not get them because he liked watching my ass."

36. At this time C.O Fallon walks OFF towards the back, when he returns he has a pair of boxers in his hand walking towards the front door of the holding cell.

37. I then stepped to the back of the cell and turned my back to the door so he could see that I didn't want any problems.

38. I heard C.O Fallon call for another C.O I believe it was C.O Patrick, they began quietly talking outside the door.

39. I then heard a key being inserted into the lock, I thought it was the food slot because I knew it was against B.O.P policy for a C.O to open any cell doors without the inmate being properly restrained while in the S.H.U, but when I turned around the door to the holding cell was open.

40. C.O Fallon then enters the cell alone, I took a few steps forward meeting him in the middle of the holding cell.

41. It is then that I notice he has the boxers in one hand which he drops to the floor and a "Buck knife" (different in size and color from the one C.O miller had) in his other hand.

~~42. Trying to remain calm I asked him~~

42. C.O Fallon is just giving me this blank stare with a crazy smirk on his face not saying anything.
43. Trying to remain calm I asked him, "man whats up, whats going on?" He didnt respond. I thought that by me calling attention to the knife in C.O Fallons hand he would realize the situation he was creating inside that holding cell. I then commented on the knife by saying, "man that joint (knife) looks pretty nice," holding out my hand asking him, "to let me see it."
44. C.O Fallon takes a quick glance around at the other C.O's and hands me the knife.
45. Seconds after this knife touched my hands I noticed the other C.O's that were outside the holding cell began moving rapidly towards the front of the door to enter the cell.
46. At the sametime I began to push forward in order to get out the cell, with C.O Fallon blocking my exit I thrust forward with the knife pushing him out the door.
47. Once outside the holding cell C.O Patrick, Meek and Price began attacking me, anytime anyone of them got within reach to grab me I would thrust forward with the knife in order to keep them away from me.
48. This went on for a few minutes until I seen C.O Miller dash towards the exchange cages bent over slightly as if reaching for something, realizing he was in possession of this other knife I ran behind him.
49. When I got to the exchange cage I seen C.O Miller stooped down opening his knife. I thrust forward with the knife in my hand, he dropped his knife and began grabbing at me.
50. At the sametime I was rushed from behind by C.O Patrick, Meek, Price and I believe Fallon.
51. C.O Price, Meek and Fallon are on my arm trying to wrestle the knife out of my hand, C.O Patrick is punching and kneeing me in the face because Im still bent over trying to keep C.O Miller away from his knife.
52. Once C.O Miller does recovers his knife he passes it back to either C.O

Fallon or Price and yelled for them, "to get rid of it."

53. C.O Miller then began trying to grab my penis which causes me to lose possesion of the knife that was in my hand.

54. Once I lost possesion of the knife C.O Patrick, Meek and Price began pounding on me forcing me to drop to the ground beating an exhausted.

55. It was then that I finally heard one of the C.O's yell for someone to, "call for assistance," once I heard that I completely stop resisting knowing help was on the way.

56. I was then cuffed with my hands stretched out in front of me with C.O Patrick continuing to strike me in the head yelling for me to, "stop resisting

57. Assistance arrived seconds later with Lt. John Doe (This is not the same Licutenant John Doe from the 29th) ordering all the CO's that were present to, "move away and not to say anything."

58. I was then put on a gurney where the enormity of this situation began settling in I became hysterical fearing for my life at the hands of these C.O's. I was wheeled to medical where I received 21 stitches for severe lacerations between the both of my hands.

59. On or around 10:00- 11:00 P.M I was driven to U.S.P Lee county VA. where I currently reside.

60. I was immediately placed in the S.H.U here at Lee county in an isolation cell with a camera in the ceiling and the lights stayed on 24 hrs a day. I believe that the staff and S.H.U orderlies were informed not to communicate with me.

61. Upon me noticing different case managers and counselors making rounds in the S.H.U I began asking for BP eights and nines (Inmate Grievance Forms) these different staff members would not give me anything. They kept telling me that, "I had to get these forms from my unit team."

62. Being as though I had only been at Lee county for a few days, I had no idea as to who my unit team was.

63. Well upon me continuously asking the staff for these forms I finally came across Counselor Bouric who was from my unit team.

64. I asked Counselor Bouric," for a BP eight and nine explaining to him that I was unable to write due to the injuries I received to my hands from the incident I was involved in at Big Sandy.

65. I then asked Counselor Bouric," If I could orafate my issues to him and he write them down for me because I was unable to do it myself," he laughed stating that," he wasn't going to help me write up another staff member," and walked off without even given me the forms so that I could try to receive other assistance.

66. I then tried getting assistance from other inmates, but because of all the different restrictions and harrasment I was receiving from the C.O's at Lee County I was unsucessful.

67. I have since then tried repeatedly to obtain these grievance forms to no avail.

68. Sometime between the 5th and 13th of January I received a visit from Agent Shoemaucher of the F.B.I Internal Affairs division who was investigating the incident at Big Sandy.

69. I spoke with him explaining the incident as I have done throughout these pages.

70. On March 4th I received another visit from A.U.S.A Malloy and another F.B.I agent who informed me that they wanted my help in prosecuting C.O Miller and Fallon for violation of my 1983 Civil rights. I agreed and gave them the same statement as I have done throughout these pages.

4. What was the result

CONTINUED RESPONSE

I tried to obtain the proper grievance forms at Lee U.S.P but was unsuccessful at first (statement of claim 61-67). Eventually I was able to obtain the proper form and immediately proceeded to file my grievance to the Regional Director because of the sensitive nature of my case and also because I wasn't being housed at Big Sandy U.S.P where this incident took place. When I mailed this grievance form straight to the Regional Director before it left the institution at U.S.P Lee it was intercepted by Lieutenant Pitt of special Investigative service at U.S.P Lee. When I initially mailed this grievance form to the Regional Director I attached certified and return receipts on the envelope to ensure that it was mailed and received by the intended person. When I didn't receive a response in a reasonable amount of time I began inquiring about my mail. I had the serial numbers tracked (see attached track and confirm document) and there was no record of my mail ever being received by the U.S Post office. I left U.S.P Lee maybe a week later and met with Patrick J. Schumacher from the office of the Inspector General office (Kentucky Area office) who was investigating the incident that happened at Big Sandy U.S.P. I expressed to him my concerns I had with this

Continued response

grievance Form I mailed to the Regional Director being intercepted by the officials at Lee U.S.P. He not only confirmed my suspicion but later on gave me a copy of the same grievance Form (see attached Inmate Request) that I mail to the Regional Director which was forwarded to him after it's interception by Lieteanant Pitt at Lee U.S.P. I was given no further explaination as to why my mail was intercepted and not forwarded to the Regional Director.

Michael L. Taylor Jr. 40467-039

UNITED STATES POSTAL SERVICE

Track & Confirm

Search Results

Label/Receipt Number: **7007 2680 0000 8285 3033**

There is no record of this item.

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2. The number was entered incorrectly. Be sure to enter all of the letters and numbers as they appear on your mailing label or receipt.

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LEEC5 * ADMINISTRATIVE REMEDY INMATE NOTICES * 06-10-2009
PAGE 001 OF 001 RECEIPTS/DISREGARD RECEIPTS/EXTENSIONS 18:50:13

SELECTION CATEGORY: EQ -- OR -- REGNO: 40467-037
FUNC TYPE DT/TIME PRINTED PD REMEDY-ID REGNO NAME DT/TIME CREATED

G5152 NO REMEDY DATA EXISTS FOR THIS INMATE

Taylor-

According to this. nothing was ever sent to Region-

I will see what else I can find out for you.

6/10/09

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Taylor, Michael L. (LAST NAME, FIRST, MIDDLE INITIAL) 40467-037 (REG. NO.) S.H.U (UNIT) U.S.P Lee (INSTITUTION)

Part A– INMATE REQUEST On dec. 30th around 3:30-4:00 P.M I was startled out of my sleep by a loud bang against the window of the holding cell I was sleeping in. I jumped up and seen C.O miller. I asked, "why was he banging on the window?" He stated that, "your not getting any sleep, you put your hands on my boy we're going to get you." I then laid back down with C.O miller repeatedly banging on the window. C.O Miller stop banging left, returning pouring a whole bucket of water under the door into the holding cell stating, "you know what you did we're going to get your a.ss." I began talking to C.O miller trying to diffuse the situation by saying that, "the situation from yesterday was over, and that if he chill I wouldn't report what he just done." This only infuciated him more, he began to state that he was GOD around here, it dont matter if I told or not, and this situation is far from being over." I then tried a different approach telling C.O miller, "that since he didn't seem to care about hisself he needed to think about his family and how they would be affected if he lost his Job. This seemed to be workin

DATE — See attached — Michael L Taylor Jr. SIGNATURE OF REQUESTER

Part B– RESPONSE

DATE WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER:

CASE NUMBER:

Part C– RECEIPT

Return to: LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP LVN BP-229(13) APRIL 1982

cell and turned my back to the door so he could see that I didn't want any problems. I hear C.O Fallon call for another C.O I believe it was C.O Patrick, they began quietly talking outside the door. I then heard a key being inserted into the lock, I thought it was the food slot because I knew it was against B.O.P policy for a C.O to open any cell doors without the inmate being properly restrained while in the S.H.U, but when I turned around the door to the holding cell was open.

C.O Fallon then enters the cell alone, I took a few steps forward meeting him in the middle of the holding cell. It is then that I notice he has the boxers in one hand which he drops to the floor and a "Buck knife" (different in size and color from the one C.O miller had) in his other hand. C.O Fallon is just giving me this blank stare with this crazy smirk on his face not saying anything. Trying to remain calm I asked him, "man what's up, what's going on?" He didn't respond. I thought that me calling attention to the knife in his hand C.O Fallon would realize the situation he was creating inside that holding cell. I commented on the knife by saying, "man that joint (knife) looks pretty nice," holding out my hand asking him, "to let me see it." C.O Fallon takes a quick glance around at the other C.O's and hands me the knife.

Seconds after this knife touched my hands I noticed the other C.O's that were outside the holding cell began moving rapidly towards the front door to enter the cell. At the same time I began to push forward in order to get out the cell, with C.O Fallon blocking my exit I thrust forward with the knife pushing him out the door. Once outside the holding cell C.O Patrick, Meek and Price began attacking me, anytime any-one of them got within reach to grab me I would thrust forward with the knife to keep them away from me. This went on for a few minutes until I seen C.O miller dash towards the exchange cages bent over slightly as if reaching for something, realizing he was in possesion of this other knife I ran behind him. When I got to the exchange cage I seen C.O Miller stooped down opening his knife. I thrust forward with the knife in my hand, he dropped his knife and began grabbing at me.

At the same time I was rushed from behind by C.O Patrick, Meek, Price and I believe Fallon. C.O Price Meek and Fallon are on my arm trying to wrestle the knife out of my hand, C.O Patrick is punching and kneeing me in the face because I'm still bent over trying to keep C.O Miller away from his knife. Once C.O miller does recovers his knife he passes it back to either C.O Fallon or Price I believe and yelled for them, "to get rid of it." C.O Miller then began grabbing for my penis which causes me to lose possesion of the knife that was in my hand.

Upon me doing that he began to repeatedly bang on the window screaming, once he seen that I wasn't responding he stopped and walked off only to return seconds later pouring a whole bucket of water under the door into the holding cell. I immediately picked my mattress and blanket off the floor and asked C.O Miller, "What the fuck was wrong with him?" He stated, "You know wh you did were going to get your ass."

I began trying to figure out a way to diffuse this situation before it got any further out of control. I started cleaning up the water with my blanket while stating to C.O Miller that, "this was some stupid shit he just did because it's all caught on camera, and if I wanted to get him in trouble all I had to do was leave the water on the floor and notify a Lieutenant, Captain or the Warden when they made their rounds, but I told him that, "I wasn't going to do that and that if he chill I could forget about it." I then went on to say that, "the situation from yesterday was over, and that me and C.O Stevens had already talked and there were no hard feelings." Me saying that only infuriated him more, he began to state that, "he was God around here, it didn't matter if I told or not nothing would happen because he's been told on before and he's still here, and that this situation is far from being over." Once I seen that didn't work I tried a different approach and stated to him, "that since you don't seem to care about yourself you need to think about your family and how they would be affected if you lost your job."

I proceeded along those lines and the conversation seemed to be turning around until C.O Meet walked up. An exchange of words took place between them with a few comments directed towards me. It is then that C.O Miller pulls a "butt knife" from his pocket and began picking his nails with it. He went on to tell me that, "I was nothing and he could get me hit (stabbed) for a carton of cigarettes on the compound and I had better ask my boy about him because he knows."

At this time C.O Fallon walks up into the conversation with C.O Price and Patrick standing a little of to the side. C.O Fallon sarcastically states, "I already fed you right?" I told him, "No he did not" once again I tried steering the conversation away from me being threatened at the same time trying to get a feel for where these guys heads were at by asking, "If I could get a pair of boxers that fit, because the ones that they gave me the day before were to big. C.O Miller stated that, "he would not get them because he liked watching my ass."

At this time C.O Fallon walks off towards the back, when he returns he has a pair of boxers in his hand walking towards the front door of the holding cell. I stepped to the back of the

Office of the United States Attorney
Eastern District of Kentucky
James A. Zerhusen, United States Attorney

Former USP Big Sandy Corrections Officer Indicted for Civil Rights Violation, Wanton Endangerment, Providing Prohibited Item to Inmate

FOR IMMEDIATE RELEASE
April 16, 2009
www.usdoj.gov/usao/kye

For information contact
Kyle Edelen (859) 685-4811
E-Mail: Kyle.Edelen@usdoj.gov

Inez, Ky. —Larry Ray Miller, Jr., 33, of Hazard, Kentucky, a correctional officer at the United States Penitentiary, Big Sandy, in Martin County, was indicted today for violating an inmate's civil rights, a Kentucky state law violation of first degree wanton endangerment, and aiding and abetting providing a prohibited item to an inmate.

The Superseding Indictment alleges that on December 30, 2007, Miller, then employed as a corrections officer at USP Big Sandy, and acting under the color of laws of the United States, did injure, oppress, intimidate, and threaten inmate M.L.T., in inmate confined in the prison's special housing unit. In so doing, Miller deprived inmate M.L.T. of the free exercise and enjoyment of his Constitutional right not to be subjected to cruel and unusual punishment.

The Superseding Indictment also alleges that Miller committed the Kentucky crime of First Degree Wanton Endangerment. The Superseding Indictment alleges Miller, while acting under circumstances manifesting an extreme indifference to the value of human life, opened inmate M.L.T.'s cell door and allowed fellow corrections officer Kevin Christopher Fallen to enter the cell with a folding pocket knife. The Superseding Indictment alleges that Miller in so acting created a substantial danger of death or serious physical injury to inmate M.L.T., Fallen, and others.

Finally, the Superseding Indictment alleges that Miller, aided and abetted by Fallen, provided a folding pocket knife to inmate M.L.T. in violation of Bureau of Prisons policy.

In March 2009, Fallen pleaded guilty to providing the pocket knife to inmate M.L.T.

James A. Zerhusen, United States Attorney for the Eastern District of Kentucky, J. C. Zurcher, Warden, USP Big Sandy, John F. Oleskowicz, Special Agent in Charge, United States Department of Justice, Office of the Inspector General, (DOJ-OIG) Chicago Field Office, and Timothy D. Cox, Special Agent in Charge, Federal Bureau of Investigation, jointly made the announcement today after a federal grand jury in Ashland, Ky., returned the Superseding Indictment.

Once I lost possession of the knife C.O. Patrick, Meek and Price began pounding on me forcing me to drop to the ground beaten and exhausted. It was then that I finally heard one of the C.O's yell for someone to, "Call for assistance," once I heard that I completely stop resisting because I knew help was on the way. I was then cuffed with my hands stretched out in front of me with C.O Patrick continuing to strike me in the head yelling for me, "to stop resisting."

Assistance arrived seconds later with the lieutenant ordering all the C.O's that were present to, "move away and not to say anything." I was then put on a gurney where the enormity of this situation began setting in I became hysterical fearing for my life at the hands of these C.O's. I was wheeled to medical where I received 21 stitches for severe lacerations between the both of my hands.

Maybe about 10:00 – 11:00 P.M I was driven to U.S.P Lee County where I currently reside. I was immediately placed in the S.H.U here at Lee County in an isolation cell with a camera in the ceiling restricted from doing anything.

I request that I immediately be placed in a medium Security prison closer to Maryland with all my privileges restored, and that Big Stanley be ordered to turn over my property. Thanks!!!

Michael L. Taylor JR. 40467-037
U.S.P LEE
P.O Box 305
Jonesville VA. 24263

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

EASTERN DISTRICT OF KENTUCKY

MICHAEL L. TAYLOR JR.
Plaintiff

v.

PRICE
Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

PRICE

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

MICHAEL L. TAYLOR JR 40467-037 U.S.P LEE
P.O BOX 305
Jonesville VA. 24263

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 12-1-09

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

EASTERN DISTRICT OF KENTUCKY

MICHAEL L. TAYLOR JR.
Plaintiff

v.

SAMUEL PATRICK
Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

SAMUEL PATRICK

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

MICHAEL L. TAYLOR JR.
40467-037
U.S.P Lee
P.O Box 305
Jonesville VA. 24263

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 12-1-09

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

EASTERN DISTRICT OF KENTUCKY

MICHAEL L. TAYlor JR.
Plaintiff

v.

KEVIN FALLON
Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

KEVIN FALLON

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

MICHAEL L. TAYlor JR.
40467-037

U.S.P LEE
P.O BOX 305
Jonesville VA. 24263

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 12-1-09

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

EASTERN DISTRICT OF KENTUCKY

Michael L. Taylor JR.
Plaintiff

v.

DAVID MEEK
Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

DAVID MEEK

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

MICHAEL L. Taylor JR.
40467-037

U.S.P Lee
P.O Box 305
Jonesville VA. 24263

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 12-1-09

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

EASTERN DISTRICT OF KENTUKY

MICHAEL L. TAYlor JR
Plaintiff

v.

LARRY MILLER
Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

LARRY MILLER

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Michael L. Taylor JR.
40467-037

U.S.P Lee
P.O Box 305
Jonesville VA. 24263

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

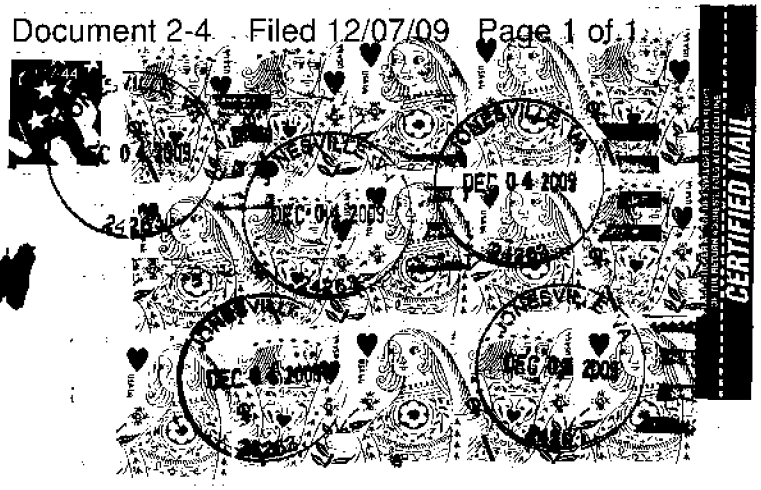
CLERK OF COURT

Date: 12-1-09

Signature of Clerk or Deputy Clerk

Michael L. Taylor JR. 40467-037
U.S.P LEE
P.O Box 305
Jonesville VA 24263

[redacted]



7009 0080 0000 2673 4619

U.S. PE... - LEE COUNTY
PO Box ... Jonesville, VA 24263
DATE 12/4/09

Leslie G. Whitmer, Clerk
101 Barr St. Room 206
P.O. Drawer 3074
Lexington Ky 40588

Civil
Case Assignment

Case number **7:09CV-145**

Assigned : Judge Amul R Thapar
Judge Code : 4317

Assigned on 12/07/2009

Request New Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

MICHAEL L. TAYLOR, JR.,	)	
	)	
Plaintiff,	)	Civil Action No. 09-145-ART
	)	
v.	)	
	)	**ORDER**
LARRY MILLER, et al.,	)	
	)	
Defendants.	)	

*** *** *** ***

The plaintiff, Michael Taylor, submitted a letter informing the Court that he has settled his claims against the defendants John Price, David Meek, and Samuel Patrick. R. 70. Accordingly, it is **ORDERED** that this action is **DISCONTINUED** with prejudice but without costs as to defendants Price, Meek, and Patrick in their individual capacities; provided, however, that if the settlement is not consummated within thirty (30) days of the date of this Order, **any party may apply by motion within the thirty-day period for restoration of the action to the calendar of the undersigned, in which event the action will be restored**.

The only remaining defendants in this case are Larry Miller (against whom the Court entered default judgment on October 13, 2010, R. 64), and Kevin Fallon.

This the 25th day of January, 2011.

Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

MICHAEL L. TAYLOR, JR.,	)	
	)	
Plaintiff,	)	Civil Action No. 09-145-ART
	)	
v.	)	
	)	**ORDER**
LARRY MILLER, et al.,	)	
	)	
Defendants.	)	
	)	

*** *** *** ***

Michael L. Taylor, Jr., an individual currently incarcerated at the United States Penitentiary-Lee ("USP-Lee"), in Jonesville, Virginia, filed a *pro se* civil rights complaint, pursuant to 28 U.S.C. § 1331 and the doctrine announced in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See* R. 2. Because the complaint states cognizable claims, the Court will issue summons on the defendants in this case. *See* 28 U.S.C. § 1915A.

BACKGROUND

A *pro se* pleading is held to less stringent standards than those drafted by attorneys. *Urbina v. Thoms*, 270 F.3d 292, 295 (6th Cir. 2001) (citing *Cruz v.* Beto, 405 U.S. 319 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972)). For the purposes of this initial screening, the Court liberally construes the allegations from the complaint, R. 2, (unless another source is cited). Moreover, for the purposes of screening, the allegations are accepted as true and are summarized as follows:

In December 2007, the plaintiff, Taylor, was incarcerated at USP-Big Sandy, in Inez, Kentucky. On December 29, 2007, Taylor returned to his cell along with his two cell-mates to find that their clean clothes were wet and dirty. Upset with this, Taylor inserted his mattress into the cell's food slot and demanded to see a lieutenant. Eventually, Lieutenant ("Lt.") John Doe along with the tactical team pulled the mattress out.[1] He repeatedly asked the inmates to "cuff up" and threatened to use pepper spray if they did not. The inmates did not respond to his requests. Lt. Doe sprayed the inmates with three cans of pepper spray and shot them with a pepper ball gun several times. The tactical team then entered the cell. There was a struggle with the inmates and someone allegedly shot Taylor with the pepper ball gun. The inmates were cuffed, shackled, and taken to the shower to wash off the pepper spray. While Taylor was showering, C.O. Crunkler allegedly punched him.

Taylor and his cell-mates were put into a SHU holding cell. Several hours later, they complained to Lt. Pennelton and C.O. Kevin Christopher Fallen that they did not get their evening meal and that the restraints were cutting off their circulation. Taylor and his cell-mates never received their evening meal.

The next morning, Taylor's cell-mates were taken back to their original SHU cell, but Taylor remained in the holding cell. At around 3:30 or 4:00 p.m., C.O. Larry Miller beat on the observation window to the holding cell. C.O. Miller was upset since Taylor had apparently put

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[1]The complaint sometimes refers to individuals by their last name only or "John Doe." This order refers to the officers as alleged in the complaint unless there is evidence of their complete, correct names from the criminal case brought against two of the officers. *See United States v. Miller*, No. 08-CR-017, R. 1 (E.D. Ky. Feb. 24, 2010).

his hands on C.O. Stevens, a member of the tactical team. Taylor claims that C.O. Miller also threatened him twice, saying, "we're going to get your a—." C.O. Miller proceeded to pour a bucket of water into the holding cell.

After that exchange, C.O. Meek walked up and spoke with C.O. Miller about Taylor. C.O. Miller pulled out a pocket knife and picked his nails with it. He allegedly told Taylor that he could get Taylor "hit (stabbed)" for a carton of cigarettes on the compound. He suggested Taylor "ask [his] boy because he knows." At that point, Officers Fallen, Price, and Patrick approached the holding cell. Taylor asked for a pair of boxers that fit. C.O. Miller said that he would not give him different boxers. Taylor claims Miller said that he liked "watching [Taylor's] a—."

C.O. Fallen walked off and returned with a pair of boxers. Taylor moved to the back of his cell with his back to the door. C.O. Fallen called for C.O. Patrick. Taylor turned around and saw the cell door was now open. He thought it was against BOP policy to open a cell door in the SHU without the inmate restrained. C.O. Fallen entered. He had boxers in one hand and a pocket knife in the other. The knife looked different than C.O. Miller's. Taylor asked if he could see the knife. C.O. Fallen handed the knife to Taylor. Almost immediately after Taylor got the knife, a group of officers gathered and approached as if to enter the cell. Taylor tried to get out of the cell and pushed C.O. Fallen out of the way. Outside the cell, Officers Price, Meek, and Price allegedly began attacking Taylor. Taylor states that he used C.O. Fallen's knife to keep the officers away from him.

Then, Taylor saw C.O. Miller go towards his own knife. As C.O. Miller was opening his

knife, Taylor thrust forward with the knife and got C.O Miller to drop his knife. But C.O Miller was able to grab Taylor. The other officers got hold of Taylor from behind. Some were trying to get the knife out of his hand. C.O. Patrick punched and kneed Taylor in the face. C.O. Miller recovered his knife and gave it to an officer with instructions to "get rid of it." C.O. Miller purportedly tried to grab Taylor's penis which caused him to drop the knife. Officers Patrick, Meek, and Price allegedly began beating Taylor who fell to the ground from the blows. Taylor heard someone call for assistance and then stopped trying to resist.

As Taylor was being cuffed, C.O. Patrick allegedly continued to strike him and yelled at Taylor to stop resisting. A lieutenant arrived and ordered the officers to move away. Taylor received 21 stitches for lacerations to his hands. That night, prison authorities drove Taylor to his current facility, USP-Lee, and placed him in its SHU section.

On July 15, 2008, Officers Miller and Fallen were indicted for their treatment of an inmate, M.L.T., on December 30, 2007, at USP-Big Sandy. *See Miller*, No. 08-CR-017, R. 1. Taylor alleges that he was M.L.T and that he helped with the prosecution. In March 2009, C.O. Fallen plead guilty to providing a pocket knife to Taylor. The other charges against C.O. Fallen were dismissed. *Id.* at R. 95. On April 16, 2009, the government alleged in a superseding indictment that C.O. Miller: violated the civil rights of M.L.T., violated Kentucky state law of first degree endangerment, and aided and abetted C.O. Fallen in providing a prohibited item to M.L.T. *Id.* at R. 56. On October 27, 2009, the trial for C.O. Miller began. *Id.* at R. 81. However, the next day, he pled guilty. *Id.* at R. 85. Officers Fallen and Miller were subsequently sentenced for their crimes.

At some time after Taylor was moved to USP-Lee on December 30, 2007, he asked prison officers there for inmate grievance forms. He allegedly was unable to get the forms for some time. He also asked Counselor Bouric to help him fill out the forms since Taylor's hands were injured. Counselor Bouric refused to help fill out the form or give them to him. Eventually, on an unspecified date, he got the inmate grievance forms, but Lt. Pitt of the Special Investigative Service at USP-Lee apparently intercepted his grievance before it was sent to the regional director.

On December 7, 2009, Taylor filed his complaint against Officers Miller, Meek, Fallen, Patrick, and Price in their individual and official capacities. He claims that their conduct violated his rights under the First, Eighth, and Fourteenth Amendments when they: conspired to use excessive force, used excessive force, provided deplorable conditions for confinement, and denied him the "right to seek redress." He also alleges that the defendants committed assault and battery. Taylor seeks $500,000 in damages from each defendant.

On December 15, 2009, the Court granted Taylor's motion to proceed *in forma pauperis*. R. 4. On January 4, 2010, Taylor filed a motion for subpeona of records. R. 5. On January 13, 2010, Taylor filed a motion to appoint counsel. R. 7.

DISCUSSION

Because Taylor is a prisoner, the Court must identify his cognizable claims and dismiss claims that: (1) are frivolous, malicious, or fail to state a claim upon which relief can be granted or (2) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Taylor's individual capacity claims will survive this initial screening but his official

capacity claims will not because of sovereign immunity.

I. Individual capacity claims

Under *Bivens,* private citizens may "recover money damages for any injuries [they have] suffered as a result of [a federal agents's] violation of the [Constitution]." *Harris v. United States*, 422 F.3d 322, 331 (6th Cir. 2005) (quoting 403 U.S. at 397). Taylor describes in detail the treatment he received at USP-Big Sandy and USP-Lee from December 29, 2007, until he filed this case on December 7, 2009. He claims that correctional officers in their individual capacities violated his rights under the First, Eighth, and Fourteenth Amendments. On their face, those claims are not frivolous or malicious nor has he failed to state a claim upon which relief can be granted. 28 U.S.C. § 1915A. Moreover, the officers are not immune from such an action under *Bivens*. *Id.* Thus, the constitutional claims against the officers in their individual capacities survive this initial screening.

Taylor further alleges that the officers committed the torts of assault and battery in their individual capacities. R. 2, Ex. 1 at 1. Those claims survive this initial screening for the same reasons that his constitutional claims. As Taylor has properly alleged claims under *Bivens*, the Court will exercise supplemental jurisdiction over these state law claims. 28 U.S.C. 1367(a).

II. Official capacity claims

Taylor also filed his claims against the officers in their official capacity. "The doctrine of sovereign immunity not only bars suits against the United States when the plaintiff seeks monetary damages but also extends to suits for money damages against officers and agents of the United States in their official capacities." *Blakely v. United States*, 276 F.3d 853, 870 (6th Cir.

2002) (citing *Reed v. Reno*, 146 F.3d 392, 397-98 (6th Cir. 1998)). Therefore, the official capacity claims will be dismissed.

As Taylor is proceeding *in forma pauperis*, an officer of the Court will serve process on his behalf. *See* Fed. R. Civ. P. 4(c)(2); 28 U.S. C. § 1915(d). The Clerk's Office and the Office of the United States Marshal ("USM Office") will be directed to serve the summons and the complaint.

III. Motion for subpeona of records

Taylor filed a motion for subpeona of records. R. 5. He believes the defendants will argue that a statute of limitations bars his claims. *Id.* To prepare for this argument, he would like the U.S. Marshals to provide any writ or order issued for him to appear in court or to have him transferred between May and December 2008. *Id.* The defendants have yet to make such an argument so the records request will be denied as it is premature. Further, an order compelling discovery at this time is not appropriate since Taylor has not shown that he has attempted to get these records without court action. *See* Fed. R. Civ. P. 37(a)(1) ("On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."). The Court will deny this motion without prejudice so he may file another motion at a later, more appropriate time.

IV. Motion for appointment of counsel

In addition, Taylor filed a motion for appointment of counsel, R. 7. *See* 28 U.S.C. §

1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel."). He points out that he cannot afford counsel and provides evidence that he has attempted to contact counsel. Also, he notes that the law library at the SHU in USP-Lee is inadequate. He claims the library doubles as a cell because of overcrowding. He also asserts that the case will be complex. However, the defendants have yet to be served with the complaint. They have not had an opportunity to provide a response. For now, the Court will deny this motion without prejudice.

CONCLUSION

For the reasons stated above, it is **ORDERED** as follows:

1. The defendants in this action are USP-Big Sandy correctional officers: Larry Ray Miller, Jr.; Meek; Kevin Christopher Fallen; Patrick; and Price.

2. A Deputy Clerk of the Court shall prepare the documents necessary for service of process upon the defendants in their individual capacities:

   a. C.O. Larry Ray Miller, Jr.
   b. C.O. Meek
   c. C.O. Kevin Christopher Fallen
   d. C.O. Patrick
   e. C.O. Price

3. For each defendant, the Deputy Clerk in Pikeville shall prepare a "Service Packet" consisting of the following documents:

   a. the necessary completed summons forms, pursuant to Fed. R. Civ. P. 4;
   b. the complaint and all attachments, R. 2;
   c. this order; and
   d. a completed USM Form 285.

If the Clerk is unable to fully and accurately complete any of the documents described above, the Clerk shall set forth the reason in a docket entry.

4. The Clerk shall make three sets of copies of the above-described documents, each set containing the following

   a. copies all completed summons forms issued for the defendants;
   b. copies of all completed USM Forms 285;
   c. one copy of the complaint and all attachments, R. 2; and
   d. one copy of this order.

5. Service of process upon the defendants shall be made by providing the U.S. Marshals ("USM") Office in Lexington, Kentucky with a Service Packet. Each defendant shall be ***personally*** served through the Federal Bureau of Prisons.

6. Service of the named defendants must be completed by serving the copies described in above paragraph 4 ***by certified or registered mail*** to:

   a. one set of the copies to the Civil Process Clerk at the Office of the United States Attorney for the Eastern District of Kentucky;
   b. one set to the Office of the Attorney General of the United States in Washington, D.C.; and
   c. one set to the Office of the Federal Bureau of Prisons in Washington, D.C.

7. The deputy clerk shall deliver the Service Packets for each defendant and the three sets of copies to the USM Office in Lexington, Kentucky, and shall obtain a delivery receipt from the USM Office.

   The Deputy Clerk shall enter the delivery receipt into the record and note in the docket the date that the Service Packets and copies was delivered to the USM Office.

8. The USM Office shall serve a Service Packet upon each defendant in the manner described in Step 5 and shall serve the three sets of copies in the manner described in Step 6.

The USM Office is responsible for ensuring that each defendant is successfully served with process. In the event that an attempt at service upon a defendant is unsuccessful, the USM Office shall make further attempts and shall ascertain such information as is necessary to ensure successful service.

9. Within 40 days of the date of entry of this Order, the USM Office shall send a Service Report to the Clerk's Office, which the Deputy Clerk shall file in the record, that states whether each defendant has been served.

For each defendant to be personally served, the Service Report shall indicate:

i. that the defendant was successfully served personally, or
ii. a statement explaining what efforts are being taken to locate the defendant and accomplish personal service.

10. The plaintiff shall immediately advise the Clerk's Office of any change in his current mailing address. ***Failure to do so may result in dismissal of this case.***

11. The plaintiff must communicate with the Court ***solely*** through notices or motions filed with the Pikeville Clerk's Office. ***The Court will disregard correspondence sent directly to the judge's chambers.***

12. With every notice or motion filed with the Court, the plaintiff ***must***:

a. mail a copy to each defendant (or his or her attorney); and

b. at the end of the notice or motion, certify that he has mailed a copy to each

defendant (or his or her attorney) and the date on which this was done. ***The Court will disregard any notice or motion which does not include this certification.***

13. The plaintiff's motion for subpoena of records, R. 5, and motion for appointment of counsel, R. 7, are **DENIED WITHOUT PREJUDICE**.

14. The plaintiff's official capacity claims are **DISMISSED**.

This the 15th day of March, 2010.

Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

MICHAEL L. TAYLOR, JR.,	)	
	)	
Plaintiff,	)	Civil Action No. 7:09-CV-145-ART
	)	
v.	)	
	)	**ORDER**
LARRY MILLER, *et al.*,	)	
	)	
Defendants.	)	
	)	

** ** ** ** **

Michael L. Taylor, Jr., an individual currently confined in the United States Penitentiary-Lee, filed a motion to proceed *in forma pauperis*. *See* R. 3. In light of the plaintiff's affidavit of assets and an institutional certificate of income to his inmate account, the Court will grant his motion.

Accordingly, it is **ORDERED** as follows:

(1) The plaintiff's motion to proceed *in forma pauperis*, R. 3, is **GRANTED**.

(2) Based on the plaintiff's supporting institutional statement in this case, in the 6-month period preceding his filing of this action, his average deposits have been $53.71 per month. *See* R. 3. Pursuant to 28 U.S.C. § 1915(b)(1)(B), he is assessed an initial partial filing fee of 20 percent of $53.71, or $10.74.

(3) Pursuant to 28 U.S.C. § 1915(b)(2), after payment of the initial partial filing fee, the plaintiff's custodian shall submit monthly payments which are twenty percent (20%) of the plaintiff's income the preceding month, when the amount in the account exceeds ten dollars ($10), until the full filing fee of three hundred fifty dollars ($350.00) has been paid to the Clerk of this Court. *McGore v. Wrigglesworth*, 114

F.3d 601, 605 (6th Cir. 1997), *overruled on other grounds by Jones v. Bock*, 127 S. Ct. 910, 918-19 (2007).

(4) The Clerk of the Court shall open an account in the prisoner's name for receipt of the filing fee.

(5) The Clerk is directed to serve a copy of this Order and a notice of payment form (EDKy 525), complete with the name of the prisoner, inmate number, and case number, upon the Jailer/Warden of the institution in which the prisoner is currently confined.

(6) This matter stands submitted for the Court's initial screening of the complaint.

This the 15th day of December, 2009.

Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE

CIVIL ACTION NO. 09-CV-00145-ART

MICHAEL L. TAYLOR, JR.

PLAINTIFF

VS. SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

LARRY MILLER, ET AL.
DEFENDANT

* * * * * * * *

THIS AGREEMENT is made and entered into by and between Michael L. Taylor, Jr., Plaintiff, and Defendants, the United States of America, David Meek, Samuel Patrick, and John Price.

WHEREAS, Plaintiff has filed the above-captioned civil action in the U.S. District Court of the Eastern District of Kentucky for civil rights claims; and

WHEREAS, the parties hereto desire to make a complete and final settlement under the Federal Torts Claims Act of all matters involved in, or relating to, or arising out of, the above-captioned case.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, Plaintiff and named Defendants, being well advised and intending to be legally bound thereby, COVENANT AND AGREE AS FOLLOWS:

1. As used in this Agreement, Defendants mean the United States of America and all of

its past, present, future subsidiaries, bureaus, services, agencies, divisions, departments (including Bureau of Prisons), successors, assigns, directors, officers, agents, employees, attorneys and representatives; and David Meek, Samuel Patrick and John Price, and their successors, assigns and attorneys.

2. In return for all of the agreements and covenants of Plaintiff set forth herein, Defendants agree as follows:

A. Plaintiff will be paid the amount of $25,000.00. This payment is in full settlement and satisfaction of any and all claims of any kind that Plaintiff may have in the above-captioned case against named Defendants up to and including the date of this Agreement. This settlement is intended to avoid further litigation and to preserve judicial economy, and shall not operate as an admission of liability or fault on the part of the United States, its agents, servants, or employees, or David Meek, Samuel Patrick and John Price. Any federal, state, or local income tax liability, or other tax liability resulting from the payment of this settlement amount of $25,000.00 shall be the sole responsibility of Plaintiff. Neither Defendants nor Defendants' attorneys make any representations as to the tax treatment of this settlement amount of $25,000.00.

B. Plaintiff's settlement amount of $25,000.00 shall be paid by government electronic fund transfer. Banking information for the electronic fund transfer will be provided by Plaintiff. Plaintiff agrees to the settlement proceeds in full satisfaction of his legal claims against the named Defendants and further agrees to obtain a dismissal order of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

C. Plaintiff, on behalf of himself, his heirs, legal representatives, administrators and executors, hereby releases and forever discharges the United States of

America and its employees, officers, agents, agencies, attorneys, representatives and assigns, and David Meek, Samuel Patrick, and John Price (collectively "Releasees") from any and all claims, remedies, demands, debts, losses, obligations, actions, causes of actions, claims of relief, damages, costs, expenses, attorney fees, and compensation of any nature whatsoever, whether known or unknown, foreseen or unforeseen, arising out of or involving the injury of Plaintiff, (collectively "claim" or "claims" or "remedy" or "remedies"), including, but not limited to, claims under the Federal Tort Claims Act, civil rights or *Bivens* claims, legal, equitable, administrative, union or other claims or remedies of any kind whatsoever, which Plaintiff had or has against named Defendants and all other Releasees on account of, or contained in, or in any way growing out of, or which are the subject of, the allegations contained in the above-captioned civil action.

3. This Settlement Agreement and Release does not cover Plaintiff's claims against Defendants Larry Miller and Kevin Fallen, who are named in the above-styled action.

4. Nothing contained in this Agreement shall be construed as an admission of wrongdoing or liability by Defendants with respect to any matter whatsoever, whether or not encompassed by the above-captioned civil action.

5. This Agreement comprises the entire understanding and settlement of the above-captioned action between Plaintiff and Defendants and fully supersedes any and all prior agreements or understandings between the parties.

6. This Agreement shall be binding upon Plaintiff and upon his heirs, administrators, legal representatives, and executors and shall inure to the benefit of Defendants and each and all other Releasees, and to their heirs, administrators, representatives, executors, successors, assigns, and attorneys and legal representatives.

7. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. When used in this Agreement, the word "or" is a term of inclusion and not exclusion, and in no instance is the word "or" intended to limit, nor shall it limit, the rights, privileges, and or benefits of Defendants under this Agreement.

8. Should any provision of this Agreement be declared or be determined by any court

to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and said illegal or invalid part, term or provision shall be deemed not to be a part of the Agreement.

9. The parties agree that this Stipulation for Settlement Agreement and Release of All Claims may be made public in its entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. Payment by Defendants of the settlement sum of $25,000.00 shall be without interest. Plaintiff and Defendants shall bear their own costs, expenses and attorneys' fees.

11. Plaintiff enters into this agreement knowingly and voluntarily, and by his signature acknowledges that he has read this Agreement and fully understands its terms. Plaintiff agrees that he has been given a reasonable period of time within which to consider this Agreement.

12. This Agreement is not assignable by Plaintiff. The date of this Agreement is the date of the last signature to this Agreement.

IN WITNESS WHEREOF, Plaintiff and Defendants intending to be legally bound, have set their hands to this Agreement the day and year below written.

Michael L. Taylor, Jr.
Plaintiff

Date

Jonathan C. Shaw
Porter, Schmitt, Banks & Baldwin
327 Main Street
Paintsville, KY 41240
Counsel for Defendants
David Meek
Samuel Patrick
John Price

12-14-2010
Date

KERRY B. HARVEY
UNITED STATES ATTORNEY

BY: Robin Gwinn

Robin Gwinn
Assistant United States Attorney
U.S. Attorney's Office
260 West Vine Street, Suite 300
Lexington, Kentucky 40507-1612
Counsel for the United States

12-14-10
Date

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE

CIVIL ACTION NO. 09-145 ART

MICHAEL L. TAYLOR, JR. PLAINTIFF

V. **AGREED ORDER OF DISMISSAL**

LARRY MILLER, ET AL. DEFENDANTS

* * * * * * * * * *

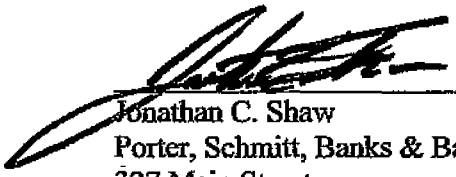
The Defendants, United States of America, David Meek, Samuel Patrick, and John Price, and Plaintiff, Michael L. Taylor, having executed a Settlement Agreement and Release of Federal Tort Claims Act claims, pursuant to 28 U.S.C. § 2677, resolving all issues raised in the instant civil action, including *Bivens* and civil rights claims, and expressing their consent to the entry of this Agreed Order of Dismissal;

IT IS HEREBY AGREED AND ORDERED that this action is dismissed with prejudice as to claims against the United States of America, John Price, Samuel Patrick, and David Meek with each party to bear its own costs, expenses and attorney fees.

We hereby consent to the form and entry of this Agreed Order of Dismissal.

Michael L. Taylor
Plaintiff

Date



12-14-2010
Date

Jonathan C. Shaw
Porter, Schmitt, Banks & Baldwin
327 Main Street
Paintsville, KY 41240

COUNSEL FOR DEFENDANTS
David Meek
Samuel Patrick
John Price

KERRY B. HARVEY
UNITED STATES ATTORNEY

By: Robin Gwinn

12-14-2010
Date

Robin Gwinn
Assistant United States Attorney
260 West Vine St., Suite 300
Lexington, KY 40507-1612
Counsel for the United States

IN WITNESS WHEREOF, Plaintiff and Defendants intending to be legally bound, have set their hands to this Agreement the day and year below written.

Michael L. Taylor, Jr.
Plaintiff

12-14-2010
Date

Jonathan C. Shaw
Porter, Schmitt, Banks & Baldwin
327 Main Street
Paintsville, KY 41240
Counsel for Defendants
David Meek
Samuel Patrick
John Price

12-14-2010
Date

KERRY B. HARVEY
UNITED STATES ATTORNEY

BY: Robin Gwinn

Robin Gwinn
Assistant United States Attorney
U.S. Attorney's Office
260 West Vine Street, Suite 300
Lexington, Kentucky 40507-1612
Counsel for the United States

12-14-10
Date

United States District Court
Eastren District of Tennessee

Jeremy A. Brown
Plaintiff,

V.

(F N U) Snead, Officer
(F N U) Purta, Officer
(F N U) Dietz, Officer
(F N U) Laing, Lieutenant
(F N U) Jones, Lieutenant
(F N U) Halloren, Captain
(F N U) Harvell, S.I.S -Tech
Defendants,

Case No. 3:09-CV-500
Phillips/Shirley

Jury Trial Demanded

CIVIL RIGHTS COMPLAINT

A. Parties

1. The Plaintiff, Jeremy A. Brown #31123-074, is an inmate confined at FCI Talladega, P.O. Box 1000, Talladega, AL 35160.

2. The Defendant, (First Name Unknown) Snead, is employed as Officer of the United States Penitentiary McCreary, 330 Federal way, Pine Knot, Kentucky 42635. Is being sued in his individual capacity.

3. The Defendant, (First Name Unknown) Purta, is employed as officer of the United States Penitentiary McCreary, 330 Federal way, Pine Knot, Kentucky 42635. Is being sued in his individual capacity.

4. The Defendant, (First Name Unknown) Dietz, is employed as officer of the United States Penitentiary McCreary, 330 Federal Way, Pine Knot, Kentucky 42635. Is being sued in his individual Capacity

5. The Defendant, (First Name Unknown) Laing, is employed as Lieutenant of the United States Penitentiary McCreary, 330 Federal Way, Pine Knot, Kentucky 42635. Is being sued in his individual Capacity.

6. The Defendant, (First Name Unknown) Jones, is employed as Lieutenant of the United States Penitentiary McCreary, 330 Federal way, Pine Knot, Kentucky 42635. Is being sued in his individual Capacity.

7. The Defendant, (First Name Unknown) Halloren, is employed as Captain of the FCI Talladega, 565 E. Renfroe Road, Talladega, Alabama 35160. Is being sued in his individual Capacity.

8. The Defendant, (First Name Unknown) Harvell, is employed as S.I.S-Tech of the FCI Talladega, 565 E. Renfroe Road, Talladega, Alabama 35160. Is being sued in his individual Capacity.

B. Jurisdiction

1. Jurisdiction is asserted pursuant to 28 U.S.C. 1331 and Bivens V. Six Unknown Named Agents, 403 U.S. 388 (1971).

Claim One

1. Plaintiff on 3-20-2009 was confind at U.S.P. McCreary, and

Was place in a holding cage that is use to strip and dress inmates out thats coming and going from the Compound to the Special Housing Unit.

2. Plaintiff, was already "housed" in the Special Housing Unit, but was taken from his cell-location an place in this small holding cage.

3. Plaintiff, was made to sleep in this small holding cage from 3-20-2009 until 3-23-2009, were he could not sleep properly.

4. Plaintiff, was made to utilize the bathroom in bags an a urinal during this time.

5. Plaintiff, was told by defendant, Jones on 3-22-2009 the day before the transfer, that "he" the Plaintiff should be aware of tomorrow because "we" have a long trip with no camera's together.

6. The Plaintiff, was deprived of sleep from the night of 3-20-2009 until the morning of 3-23-2009.

7. The Plaintiff, suffering from exhaustion, and cramping - stiffness in his legs, Back, and Neck from being confinded in such a small space for days.

8. On the morning of 3-23-2009 the Plaintiff, was startled

a-wake with a gun that shoots projectiles that contain a chemical agents, was pointed in the plaintiff's face in aggressive maner that was use to frighten the Plaintiff.

9. The Plaintiff, was then place in steel hand restraints behind his back and forcible malice was use to escort the Plaintiff to R?D.

10. The Plaintiff, was "strip down" and was instructed to dress in other clothes for the transfer. Then the Plaintiff was place in Steel hand restraints which were connected to a martin chain which encircled Plaintiff's waist via a device known as a "black box", then Plaintiff's legs were restrained by shackles secured to his ankles.

11. The Plaintiff, was place in a R?D holding cell.

12. The Defendants, Jones, Snead, Purta, Dietz, and Laing, were conducting the transfer was also the one's wakeing inmates up and bring them to R?D to be transfered.

13. The Defendants, Snead, Purta, Dietz, Jones, Laing, were observe by the Plaintiff escorting another un-Named inmate in the same aggessive maner as the un-Named inmate was brought into R?D.

14. The Defendants, Snead, Purta, Dietz, Jones, Laing, went into the holding cell with the un-Name inmate and was talking

Very aggressive to the un-Named inmate.

15. The Defendant's, Snead, Purta, Dietz, Jones, Laing, had place the un-Named inmate in the holding cell next to Plaintiff.

16. Plaintiff, could not hear what was being said, but the Plaintiff Knew something was not right about that situation.

17. Five more un-Named inmates were brought to R&D by the same (5) defendants, Snead, Purta, Dietz, Jones, Laing, and these un-named inmates was placed in the same holding cell with Plaintiff.

18. On 3-23-2009 the Plaintiff was being transported from the United States Penitentiary McCreary (Pine Knot, Ky) to the Talladega Special Managment Unit (FCI Talladega, AL).

19. Defendant, Snead, Purta, Dietz, Jone, Laing, were present and executing Plaintiff's transfer.

Claim Two

1. The Defendant executing the transfer stopped the transport vehicles at a Pilot Travel Center on Highway I-75 going South within the Eastern District of Tennessee.

2. While at the Pilot Travel Center (here-in-after "Center") Defendant executing the transfer exited the transport bus and" van that followed, to purchase refreshments for themselves and to use the restroom.

3. Defendants, Snead, Laing, Purta exited the bus, and Defendants Dietz, Jones exited the van.

4. Defendants, Snead, Laing, Purta exited the bus, defendant Jones got on the bus.

5. A unknown liquid substance got thrown onto one of the defendants seats or around about.

6. When defendants returned to the bus they noticed the dampness upon the seat or there about and became angery. At this point the defendants, Snead, Laing, Purta got on the bus and defendants, Dietz, Jones got into the van and relocated the bus an van to the rear right side of the Center.

7. All defendants departed from there vehicle's to hold a intence conversation of conspiracy in which was conspired.

8. Upon return to the bus defendant, Laing retrieved a gun which shot projectiles loaded with chemical agent and pointed it towards Plaintiff once back on the bus, and other inmates.

9. The Defendants Snead, Jones, Laing, ordered Plaintiff and the other un-Named inmates to stand and face the inmates Left side of the bus.

10. Defendants Snead, Jones unlock the cage that held the Plaintiff and the other un-Name inmate secured on the bus. Defendants Snead, Jones then walked onto the back of the bus were the Plaintiff was standing face his left in full restraints.

11. Defendants, Snead, Jones ordered the Plaintiff to come with them off the bus at which time defendant Laing pointed the gun that shot chemical agent projectiles at the Plaintiff in a threating manner.

12. Once Plaintiff and defendants Snead, Jones were off the bus Plaintiff was led to the right back side of the bus, were Plaintiff and defendants Snead, Jones, Purta behind the bus.

13. Defendant Dietz, Purta Stood by with there presence and possession of fire-arms to prevent any defence or escaping the attackers Plaintiff may of had.

14. Defendants Laing held the Chemical agent projectile gun upon other un-named inmates that were left behind on the bus.

15. Defendant Jones held Plaintiff's restraints so that Plaintiff could not cover him self once the attack started.

16. Defendant Jones, Snead were the assualtance that attack Plaintiff.

17. Defendant Snead grab Plaintiff face an push Plaintiff's head back an spit saliva onto Plaintiff face and was threating Plaintiff.

18. While defendant Jones held Plaintiff by his restraints and defendant Snead spat upon and threatin Plaintiff, Plaintiff was hit with what appeared an felt like a blunt instrument which caused a laceration and edema upon the scalp.

19. Plaintiff was struck in the face, torso, head with fists while held by his restraints.

20. Plaintiff was secured in steel hand restraints which were connected to a martin chain which encircled Plaintiff's waists via a device known as a "black box" which prevented Plaintiff from moving his hands or arms from his waist. Plaintiff's leg's were restrained by shackles secured to his ankles.

21. Defendant Snead struck Plaintiff with such force as to cause Plaintiff to be thrown into the bus exterior even though defendant Jones held Plaintiff restraints firmly in place.

22. Following the assualt defendants Snead, Jones force Plaintiff with threats of more bodly harm to clean blood from the bus exterior and Plaintiff own face, with a blanket.

23. As Plaintiff was escorted back to get on the bus the defendants threatin Plaintiff by stating "If you tell anyone or try too we the defendants will make sure you can not talk again."

24. The Plaintiff suffered a laceration, contusions and still suffers severe emotional distress and trauma due to the defendants action.

(All defendants acted with deliberate indifference)

Claim Three

1. Upon arrival to FCI Talladega Plaintiff made numerous request to see medical for his injuries.

2. Plaintiff also on video camera that defendant Harvell was carrying and said to be recording Plaintiff exit of the bus, Plaintiff request that the evidence be colected from the bus. Such as blood ect...

3. Defendant Harvell acted with deliberate indifference because he new and seen Plaintiff injuries and also did not act acording to colect evidance.

4. Defendant Halloren seen and took pictures of Plaintiff injuries.

5. Defendant Halloren acted with deliberate indifferecnce to Plaintiff injuries by seeing and knowing that injuries exist and not allowing Plaintiff to be seen properly by medical.

6. Defendants Halloren, Harvell both are not medical staff and did not know the exstent of Plaintiff injuries.

7. Defendant Halloren sent Plaintiff an a un-name inmate to (S.Hill) and told Plaintiff he need to lay down and to Sign up on Sick call.

8. Upon arrival to FCI Talladega Plaintiff made numerous reports to Bureau of Prisons officials regarding the conduct of defendants, Plaintiff received no medical attention from any of the defendants.

9. Plaintiff has suffered pain, anxiety, psychological trauma, sleeplessness and nightmares as a result of defendants action.

10. The Defendants, knew thier actions to be illegal, immoral, unethical yet conspired to assualt and injure the Plaintiff then carried such into execution.

D. Cause of Action

1. Claim One & Two - Violation of U.S. Const. Amend. VIII - Excessive use of force's

2. Claim Three - Violation of U.S. Const. Amend. VIII - Deliberate indifference to Serious Medical Need.

E. Requested Relief

1. Compensatory Damages of $25.000 per defendant.

2. Punitive Damages of $ 1,500,000.00 as to defendants Snead and Jones, per defendant.

3. Punitive Damages of $500,000 as to defendants Laing, Purta, Dietz, Halloren, Harvell, per defendant.

4. Declaratory Relief citing defendants' actions to have been unconstitutional.

It is so Prayed.

Respectfully,

Jeremy Brown

Jeremy A. Brown #31123-074
FCI Talladega (S.M.U)
P.O. Box 1000
Talladega, AL 35160

Declaration

I declare the aforegoing is true and correct under Penalty of perjury pursuant to 28 U.S.C. 1746 this 9th day of November

Jeremy Brown

Jeremy A. Brown

United States District Court for the
Eastern District of Tennessee
800 Market Street, Suite 130
Knoxville, TN 37902

FILED
NOV 18 2009
Clerk, U. S. District Court
Eastern District of Tennessee
At Knoxville

RE: Bivens Actions (Violation of U.S. Const. Amend. VIII - Excessive Force) (U.S. Const. Amend. VIII Deliberate indifference to medical Need.

Dear Sir/Madam:

I seek to file this Bivens Actions in the Eastern District of Tennessee, if all is appropriate to do so. To seek a docket NO# And if all possible what is my next step?

Respectfully
Jeremy Brown

Jeremy A. Brown #31123-074
FCI Talladega (S.H.U)
P.O. Box 1000
Talladega, AL 35160

Jeremy
FCI Ta
P.O. Box 1000
Talladega, AL 35160



RECEIVED
NOV 18 2009
Clerk, U.S. District Court
Eastern District of Tennessee

Legal Mail
Nov. 12, 2009

United States District Court for t
Eastern District of Tennessee
800 Market Street, Suite 130
Knoxville, TN 37902

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

JEREMY A. BROWN,	)	
	)	
Plaintiff,	)	Civil Action No. 09-392-GFVT
	)	
v.	)	
	)	
SNEAD, ET AL.,	)	**ORDER**
	)	
Defendants.	)	

***** ***** ***** *****

On June 7, 2010, Plaintiff Jeremy A. Brown filed a motion to reconsider his request for the appointment of counsel. [R. 11] The Court will deny this motion for the same reasons set forth in its May 26, 2010, Order denying his first motion seeking such appointment. [R. 9] This case does not present the exceptional circumstances necessary to warrant the appointment of counsel at the expense of federal taxpayers. *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir. 1993).

Brown has also filed a request that the Court arrange for service of summons upon the defendants. [R. 12.] Because Brown is currently incarcerated and because the Court has granted his motion to proceed *in forma pauperis*, the Court will direct service of summons on his behalf. Federal Rule of Civil Procedure 4(c)(3); 28 U.S.C. § 1915(d). The London Clerk's Office and the Office of the United States Marshal ("USM Office") will be directed to serve the summons and Complaint as set forth below.

However, Plaintiff's Complaint indicates that defendants Halloren and Harvell are employed at the Federal Correctional Institution in Talladega, Florida. [R. 2 at 2] Plaintiff alleges that upon his arrival at F.C.I.-Talledega, Harvell failed to collect evidence of the assault described in the

Complaint and that Halloren failed or refused to ensure that Plaintiff receive proper medical attention. [R. 2 at 9-10] Because these defendants reside in Florida and all of their alleged conduct occurred in that state, these defendants do not have any, let alone minimum, contacts with Kentucky required to establish personal jurisdiction under the Due Process Clause. *Turner v. Ramirez*, 194 F.3d 1314 (6th Cir. 1999) (*citing Theunissen v. Matthews*, 935 F.2d 1454, 1460 (6th Cir. 1991)); *see also Thomas v. Ashcroft*, 470 F.3d 491, 495-96 (2nd Cir. 2006) (district court in New York lacked personal jurisdiction over DEA agents in California for *Bivens* claims arising from their conduct during arrest in Los Angeles); *Bailey-El v. Federal Bureau of Prisons*, 246 Fed. App'x 105, 108 (3rd Cir. 2007) (affirming dismissal of individual out-of-state BOP defendants for lack of personal jurisdiction). The *Bivens* claims against these defendants must therefore be dismissed without prejudice for lack of personal jurisdiction.

Accordingly, it is **ORDERED** as follows:

1. Plaintiff's motion to reconsider his request for the appointment of counsel [R. 11] is **DENIED**.

2. The claims set forth in Plaintiff's Complaint [R. 2] against Defendants Halloren and Harvell are **DISMISSED WITHOUT PREJUDICE** for lack of personal jurisdiction.

3. Plaintiff's motion for service of summons [R. 12] is **GRANTED IN PART** and **DENIED IN PART** as set forth in this Order.

4. A Deputy Clerk in the London Clerk's Office shall prepare a "Service Packet" consisting of the following documents for service of process upon defendants Snead; Purta; Dietz; Laing; and Jones, and upon the United States of America and the United States Attorney for the Eastern District of Kentucky:

a. a completed summons form;

b. the Complaint [R. 2];
c. the Order granting Plaintiff *in forma pauperis* status [R. 3];
d. this Order; and
e. a completed USM Form 285.

If the Clerk is unable to fully and accurately complete any of the documents described above, the Clerk shall set forth the reason in a docket entry.

5. Service of process shall be directed as follows:

a. Service upon the United States of America shall be made by sending a Service Packet by certified or registered mail to:

i. the Civil Process Clerk at the Office of the United States Attorney for the Eastern District of Kentucky; and

ii. the Office of the Attorney General of the United States in Washington, D.C.

b. Service upon defendants Snead; Purta; Dietz; Laing; and Jones shall be made by providing the USM Office in Lexington, Kentucky with Service Packets to be personally served upon each of the named defendants at the United States Penitentiary-McCreary in Pine Knot, Kentucky through arrangement with the Federal Bureau of Prisons.

6. The London Deputy Clerk shall send the necessary Service Packets by certified mail to USM Office in Lexington, Kentucky. The Deputy Clerk shall enter the certified mail receipt into the record and note in the docket the date that the Service Packet was delivered to the USM Office.

7. The USM Office shall serve a Service Packet upon the United States of America and upon each named defendant in the manner described in Step 4 above. The USM Office is responsible for taking reasonable steps to ensure that each defendant is successfully served with process. If the information provided by the Plaintiff is not sufficient to enable service upon one or more defendants, the USM Office shall advice the London Deputy Clerk of this fact, which shall be noted in the docket.

8. The Plaintiff shall immediately advise the London Clerk's Office of any change in

his or her current mailing address. **Failure to do so may result in dismissal of this case.**

9. The Plaintiff must communicate with the Court ***solely*** through notices or motions filed with the London Clerk's Office. ***The Court will disregard correspondence sent directly to the judge's chambers.***

10. With every notice or motion filed with the Court, the Plaintiff ***must***:

a. mail a copy to each Defendant (or his or her attorney); and

b. at the end of the notice or motion, certify that he has mailed a copy to each Defendant (or his or her attorney) and the date on which this was done. ***The Court will disregard any notice or motion which does not include this certification.***

This the 12th day of July, 2010.

Signed By:
Gregory F. Van Tatenhove
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL ACTION NO. 6:09-CV-392-GFVT ***ELECTRONICALLY FILED***

JEREMY A. BROWN PLAINTIFF

V.

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

SNEAD, ET AL. DEFENDANTS

* * * * *

THIS AGREEMENT is made and entered into by and between Jeremy A. Brown, Plaintiff and Defendants, the United States of America, Wayne Dietz and Joseph Purta.

WHEREAS, Plaintiff has filed the above-captioned civil action in the U.S. District Court of the Eastern District of Kentucky for civil rights claims; and

WHEREAS, the parties hereto desire to make a complete and final settlement[1] under the Federal Torts Claims Act of matters involved in, or relating to, or arising out of, the above-captioned case.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, Plaintiff and named Defendants, being well advised and intending to be legally bound thereby, COVENANT AND AGREE AS FOLLOWS:

1. As used in this Agreement, Defendants mean the United States of America and all of its past, present, future subsidiaries, bureaus, services, agencies, divisions, departments (including Bureau of Prisons), successors, assigns, directors, officers, agents,

[1] This Agreement does not constitute an Administrative Adjustment of a Federal Tort Claims Act claim under 28 U.S.C. § 2672 and this Agreement does not have any effect on Plaintiff's remaining claims against Defendants David

employees, attorneys and representatives; and Wayne Dietz and Joseph Purta, and their successors, assigns and attorneys.

2. In return for all of the agreements and covenants of Plaintiff set forth herein, Defendants agree as follows:

A. Plaintiff will be paid the amount of $9,000. This payment is in full settlement and satisfaction of any and all claims of any kind that Plaintiff may have in the above-captioned case against named Defendants up to and including the date of this Agreement. This settlement is intended to avoid further litigation and to preserve judicial economy, and shall not operate as an admission of liability or fault on the part of the United States, its agents, servants, or employees, or Wayne Dietz and Joseph Purta. Any federal, state, or local income tax liability, or other tax liability resulting from the payment of this settlement amount of $9,000.00 shall be the sole responsibility of Plaintiff. Neither Defendants nor Defendants' attorneys make any representations as to the tax treatment of this settlement amount of $9,000.

B. Plaintiff's settlement amount of $9,000 shall be paid by government electronic fund transfer. Banking information for the electronic fund transfer will be provided by Plaintiff.

Plaintiff agrees to the settlement proceeds in full satisfaction of his legal claims against the named Defendants and further agrees to obtain a dismissal order of the

Sneed, Jeffrey Jones, and John Laing.

above-captioned *Bivens* action with prejudice, with each party bearing its own fees, costs, and expenses.

C. Plaintiff, on behalf of himself, his heirs, legal representatives, administrators and executors, hereby releases and forever discharges the United States of America and its employees, officers, agents, agencies, attorneys, representatives and assigns, Wayne Dietz and Joseph Purta (collectively "Releases") from any and all claims, remedies, demands, debts, losses, obligations, actions, causes of actions, claims of relief, damages, costs, expenses, attorney fees, and compensation of any nature whatsoever, whether known or unknown, foreseen or unforeseen, arising out of or involving the injury of Plaintiff, (collectively "claim" or "claims" or "remedy" or "remedies"), including, but not limited to, claims under the Federal Tort Claims Act,[2] civil rights or *Bivens* claims, legal, equitable, administrative, or other claims or remedies of any kind whatsoever, which Plaintiff had or has against named Defendants and all other Releasees on account of, or contained in, or in any way growing out of, or which are the subject of, the allegations contained in the above-captioned civil action.

3. This Settlement Agreement and Release does not cover Plaintiff's claims against Defendants David Sneed, Jeffrey Jones, and John Laing, who are named in the above-styled action.

[2] This Agreement does not constitute an Administrative Adjustment of a Federal Tort Claims Act claim under 28 U.S.C. § 2672 and does not have any effect on Plaintiff's remaining claims against Defendants David Sneed, Jeffrey Jones, and John Laing.

4. Nothing in this Settlement Agreement shall be construed to constitute an award, compromise or settlement of Plaintiff's claims as provided in Section 2672 of the Federal Tort Claims Act; nor shall this Settlement Agreement have any effect on Plaintiff's still pending claims before this Court against remaining Defendants David Sneed, Jeffrey Jones, and John Laing.

5. Nothing contained in this Agreement shall be construed as an admission of wrongdoing or liability by Defendants with respect to any matter whatsoever, whether or not encompassed by the above-captioned civil action.

6. This Agreement comprises the entire understanding and settlement of the above-captioned action between Plaintiff and Defendants and fully supersedes any and all prior agreements or understandings between the parties.

7. This Agreement shall be binding upon Plaintiff and upon his heirs, administrators, legal representatives, and executors and shall insure to the benefit of Defendants and each and all other Releasees, and to their heirs, administrators, representatives, executors, successors, assigns, and attorneys and legal representatives.

8. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. When used in this Agreement, the word "or" is a term of inclusion and not exclusion, and in no instance is the word "or" intended to limit, nor shall it limit, the rights, privileges, and or benefits of Defendants under this agreement.

9. The parties agree that this Stipulation for Settlement Agreement and Release of All Claims may be made public in its entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. Payment by Defendants of the settlement sum of $9,000 shall be without interest. Plaintiff and Defendants shall bear their own costs, expenses and attorney's fees.

11. Plaintiff enters into this agreement knowingly and voluntarily, and by his signature acknowledges that he has read this Agreement and fully understands its terms. Plaintiff agrees that he has been given reasonable period of time within which to consider this Agreement.

12. This Agreement is not assignable by Plaintiff. The date of this Agreement is the date of the last signature of this Agreement.

IN WITNESS WHEREOF, Plaintiff and Defendants intending to be legally bound, have set their hands to this Agreement the day and year below written.

Jeremy A. Brown
Plaintiff

8-20-2012
Date

Mark Flores
Frost Brown Todd, LLC
250 W. Main Street, Suite 2800
Lexington, KY 40507
Attorney for Plaintiff

8/24/12
Date

KERRY B. HARVEY
UNITED STATES ATTORNEY

Robin Gwinn

9-21-12
Date

Robin Gwinn
Assistant United States Attorney
US Attorney's Office
260 W. Vine Street, Suite 300
Lexington, KY 40507
Attorney for the United States, Wayne Dietz
and Joseph Purta

Judgment Fund Voucher for Payment

1. **Total Amount:** $9,000.00

2. **Submitting Agency Contact Name:** Robin Gwinn, AUSA
   Telephone Number: 859-685-4869

3. **Electronic Funds Transfer (EFT) Information:**
   a) Payee Account Name: _____
   b) American Banking Association (ABA) Routing Number (9 digits): _____
   c) Payee Account Number: _____
   d) Checking: ☐ Savings: ☐
   e) Financial Institution Name, City, State: _____

4. **Interagency Payment System Information:**
   a) Agency Name: _____
   b) Agency Location Code (ALC) Number (8 digits): _____
   c) Standard General Ledger (SGL) Number (4 digits): _____
   d) Treasury Account Symbol (TAS) _____

5. **Mailing Address for Check:** *(Payee name not to exceed 32 characters.)*
   a) Payee Name: Federal Bureau of Prisons
   b) Payee Name: Jeremy A. Brown, Inmate #31123-074
   c) Address Line 1: PO Box Office 474701
   d) Address Line 2: _____
   e) City: Des Moines State: IA Zip Code: 50947

6. **Taxpayer Identification Number (s):**
   a) _____ b) _____

7. **Reimbursement Information for Contract Disputes Act, No FEAR Act and Firefighters Fund:**
   a) Agency Name: _____
   b) Contact Name: _____
   c) Contract Number (CDA cases): _____
   d) Telephone Number: ___-___-_____
   e) Address: _____
   f) City: _____ State: _____ Zip Code: _____

8. **If payment will be made in a Foreign Currency, please provide the following information:**
   Country: _____ Currency: _____

9. **FOR USE BY JUDGMENT FUND BRANCH ONLY:**
   Z Number: _____ J/D Number: _____ GLOWS Code/Agency: _____

   _____ _____ _____
   Claim Analyst *Signature and Date* Amount to Pay Appropriation Code

   _____
   Claims Reviewer *Initials and Date*

Judgment Fund Award Data Sheet

ITEMIZATION OF AMOUNT PAYABLE FROM THE JUDGMENT FUND	AMOUNT TO BE PAID	CITATION TO LEGAL AUTHORITY
1. Principal	$9,000.00	FTCA, 28 USC 2677
2. Attorney Fees		
3. Costs		
4. Interest		
Starting and Ending Dates for Interest Accrual	Start Date	End Date
5. Total Amount Payable from the Judgment Fund	$9,000.00	
COMPLETE ONLY IF DEDUCTIONS ARE TO BE MADE FROM THE AMOUNT PAYABLE FROM THE JUDGMENT FUND*		
6. Agency Name and Agency Location Code (ALC) to Receive Offset	Amount to be Deducted	Reasons for Deductions, and Entity to Receive Deductions
	a.	
	b.	
	c.	
7. Total Amount to be Deducted		
8. Net Amount Payable to Claimant		

If amount for fees, costs, or interest was included in the principal amount (stated on line 1) as part of a "lump sum award," enter "INCLUDED ABOVE" on lines 2 through 4. Enter "NONE" for any of those items (principal, fees, costs, or interest) for which no amount was awarded/included.

1. Enter the principal amount payable (excluding attorney fees, costs, and interest) and cite the legal authority for that award (for instance, "FTCA, 28 U.S.C. 2672" or "5th Amendment Taking").
2. Enter the attorney fees payable (if any) and cite legal authority for that award [for instance, "Freedom of Information Act, 5 U.S.C. 552(a)(4)(E)"].
3. Enter the costs payable (if any) and cite the legal authority for that award [for instance, "28 U.S.C. 2412(a)"].
4. If the interest was calculated by the submitting agency, enter the amount and cite the legal authority for that award [for instance, "Back Pay Act, 5 U.S.C. 5596(b)(2)"]. If the Judgment Fund is to calculate the interest, list only the dates that interest accrual starts and ends.
5. Total the amounts shown in lines 1 through 4 and enter.
6. Enter any deduction specified in the judgment or settlement agreement, or debts to be set off under 31 U.S.C. 3728. Indicate the reason for the deduction (for instance, "FTCA withholding" or "debt setoff pursuant to 31 U.S.C. 3728") and the payee agency's name and ALC. If this deduction is a "debt setoff" pursuant to 31 U.S.C. 3728, you must attach a copy of the judgment or the plaintiff's agreement to the debt setoff. Otherwise, FMS must seek the claimant's consent to the setoff and may only withhold from payment an amount sufficient to pay the debt plus the cost of litigation. Litigation will be required to effect the setoff if there is no judgment of debt, or if the claimant declines consent to the setoff. If there are more than three deductions, attach additional copies of this form. If there are no deductions, enter "NONE." ***Administrative debts that have been certified to the Secretary of the Treasury through the Treasury Offset Program will be set off automatically.**
7. Total the amounts shown in all columns of line 6 (a, b and c) and enter.
8. Subtract the amount in line 7 from that in line 5. If greater than zero, enter the difference. If the difference is zero or less, enter "NONE."

Long, Cindy (USAKYE)

From: Gwinn, Robin (USAKYE)
Sent: Wednesday, November 28, 2012 9:37 AM
To: Long, Cindy (USAKYE)
Subject: FW: Judgment Fund Payment Notification

For the file

Robin Gwinn
Assistant United States Attorney
U.S. Attorney's Office
Eastern District of Kentucky
260 W. Vine Street, #300
Lexington, Kentucky 40507-1612
(859) 685-4869

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From: Judgment Fund [mailto:Judgment.Fund@fms.treas.gov]
Sent: Tuesday, November 27, 2012 1:15 PM
To: Gwinn, Robin (USAKYE)
Subject: Judgment Fund Payment Notification

The following payment was made by the Judgment Fund Staff. If the payment has not been received within 7 days from the payment sent date, please contact the Judgment Fund at 202-874-6664.

Control #: 201300451

Payment ID #: 004232013

Responsible Agency File #: 2010V00658

Submitting Agency File #: 2010V00658

Docket #: 6:09-CV-392-GFVT

Total Payment Amount: $9,000.00

Date Payment Sent: 11/23/2012

Alias: TLJ

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

Page 369 of 867

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

CIV-MXR- 2010-01509

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

MELISSA HICKS, #20271-068

Plaintiff

v. Docket No.:

Due Date: 9/20/10

UNITED STATES OF AMERICA,
(Federal Bureau Of Prisons, an Agency
of the United States Department of Justice)

Defendant.

COMPLAINT

The Plaintiff makes the following representations to this Court against the named Defendant as follows:

PARTIES

1. Plaintiff, Melissa Hicks, is an adult individual who currently resides at 451 Fullerton Avenue, Cambridge Springs, Pennsylvania, 16043.

2. Defendant, the United States of America, operates the Federal Bureau of Prisons, an agency of the Unites States Department of Justice, existing under the laws of the United States of America, which maintains and operates federal correctional facilities located in the State of West Virginia. In particular, the Federal Correctional Institution located at Alderson, West Virginia, commonly referred to as FPC Alderson is germane to the instant action. The Defendant, The United States of America, is the proper party to this action brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq. At all times relevant to this matter, the Defendant acted and carried on its business by and through its agents, servants and/or employees who were acting within the course and

scope of their officially assigned and/or compensated duties.

JURISDICTION

3. Jurisdiction is conferred upon this Court under the provisions of 28 U.S.C. §§ 2675(a) and1346(b), in that the present action is brought pursuant to the Federal Tort Claims Act as set forth at 28 U.S.C. § 2671, et seq.

4. Subject matter jurisdiction is conferred upon this Court by 28 U.S.C § 1331. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391 and 1402.

5. An administrative claim on Form 95 was submitted shortly after the accident occurred which is the subject matter of this action to the Federal Bureau of Prisons by the Plaintiff. While the Federal Bureau of Prisons did acknowledge the occurrence of the accident which caused injury and harm to the Plaintiff, an offer to resolve the same was tendered to the Plaintiff in December of 2009, but was rejected by the Plaintiff as being inadequate. Thereafter no response or counter-offer was made by the Federal Bureau of Prisons to resolve the claim of the Plaintiff. As such, the Plaintiff has exhausted her administrative remedies prior to the institution of the within action.

FACTS COMMON TO ALL COUNTS

6. The Federal Bureau of Prisons is an agency of the United States Department of Justice and is an agency of the Defendant. The federal Bureau of Prisons operates correctional facilities across the United States, with a number of correctional facilities located in the State of West Virginia.

7. In particular, the Federal Bureau of Prisons operates a correctional facility commonly known as FPC Alderson which is located on Glen Ray Road, Alderson, WV 24910. FPC Alderson is a minimum security facility operated by the Federal Bureau of

Prisons housing female offenders.

8. At all times relevant to this matter, the named Defendant was acting by and through their agents, servants and employees who were going in and about the business of the Defendants and who were acting within the scope of their authority.

9. In March of 2008, Melissa Hicks was confined at FPC Alderson serving a sentence imposed upon her as a result of her conviction within the federal court system. She was subsequently released from the custody of the Federal Bureau of Prisons on September 8, 2009, upon her completion of the period of incarceration which had been imposed upon her.

10. On or about March 23, 2008, Melissa Hicks was proceeding from her place of employment at FPC Alderson to the cafeteria located thereon and was passing behind a truck parked next to a dumpster. The subject truck was under the operation and control of an agent, servant and/or employee of the Defendant; and, who was going in and about the business of the Defendant and who was acting within the scope of his authority.

11. Then and there the operator of the subject truck was operating his vehicle in such a reckless, careless and negligent manner in that he suddenly, without warning and without proper clearance, placed the truck into a reverse motion and struck Melissa Hicks with great force and violence causing her to be thrown violently to the ground thereby causing the injuries and damages to Melissa Hicks as hereinafter set forth.

12. All of the resultant injuries and damages sustained by Melissa Hicks were the direct and proximate result of the negligence and recklessness of the Defendant's agent, servant and/or employee who was going in and about the business of the

Defendant and who were acting within the scope of his authority acting as aforesaid; and, in one or more of the following particulars:

a. in operating his vehicle at a high, excessive and dangerous rate of speed under the circumstances;

b. in failing to maintain a proper lookout;

c. in failing to keep his vehicle under proper and adequate control;

d. in failing to keep a careful, diligent and alert watch on the road;

e. in striking Melissa Hicks with his vehicle;

f. in backing up without insuring that it was safe to do so;

g. in failing to avoid striking Melissa Hicks when placing the subject vehicle in reverse;

h. in failing to give Melissa Hicks any warning that the subject vehicle was going to backup;

i. in failing to have visual and auditory warning devices to indicate that the vehicle was in operation and had been placed in reverse; and,

j. in otherwise failing to exercise that degree of care due and owing to Melissa Hicks under the circumstances.

13. As a direct and proximate result of the negligence of Defendant's agents servants, agents and/or employees as aforesaid, Melissa Hicks was struck by the truck in question being thrown violently to the ground; she was bruised and battered about her person; she sustained shock and injury to her nerves and her nervous system; she sustained injuries to her cervical and lumbar spine; she suffered cervical and lumbar sprain and strain; she suffered injuries, bruising and lacerations to her head, neck, arms

shoulders, back, hands, legs and other parts of her body; she suffered a concussion and a closed head injury; she has developed chronic headaches; she has experience cognitive deficits; she has been subjected to and may hereafter be subject to great pain, suffering and inconvenience; she was physically thrown into an abnormal posture; her head, neck shoulders, arms, legs and back snapped upon impact; she sustained great pain to her head, neck and back; she has chronic headaches, she has radiation of her cervical and lumbar pain into her extremities; she has cervical and lumbar radiculopathy into the extremities; she had to undergo and in the future may be required to undergo painful treatment, surgery and therapy; she was required to undergo and in the future may be required to undergo painful diagnostic tests, treatment and therapy for her injuries; she may have sustained an aggravation of pre-existing injuries or conditions; she sustained a loss of earnings and her earning power may have been permanently impaired. She sustained other injuries, losses and damages. All of the foregoing may be of a permanent and continuing nature and character. She has incurred and may hereafter incur expenditures for medical care, nursing, drugs, appliances and kindred expenditures.

FIRST CAUSE OF ACTION

FEDERAL TORT CLAIMS ACT-NEGLIGENCE

14. The averments set forth in paragraphs Nos. 1 through 13 are incorporated by reference thereto as if more fully set forth herein.

15. Melissa Hicks has been informed and therefore believes that the Defendant, through its agents, servants and employees, was negligent at the times and

places hereinabove mentioned in the following manner:

16. All of the resultant injuries and damages sustained by Melissa Hicks were the direct and proximate result of the negligence and recklessness of the Defendant's agent, servant and/or employee who was going in and about the business of the Defendant and who were acting within the scope of his authority acting as aforesaid; and, in one or more of the following particulars:

a. in operating his vehicle at a high, excessive and dangerous rate of speed under the circumstances;

b. in failing to maintain a proper lookout;

c. in failing to keep his vehicle under proper and adequate control;

d. in failing to keep a careful, diligent and alert watch on the road;

e. in striking Melissa Hicks with his vehicle;

f. in backing up without insuring that it was safe to do so;

g. in failing to avoid striking Melissa Hicks when placing the subject vehicle in reverse;

h. in failing to give Melissa Hicks any warning that the subject vehicle was going to backup;

i. in failing to have visual and auditory warning devices to indicate that the vehicle was in operation and had been placed in reverse; and,

j. in otherwise failing to exercise that degree of care due and owing to Melissa Hicks under the circumstances.

17. As a direct and proximate result of the negligence of Defendant's agents servants, agents and/or employees as aforesaid, Melissa Hicks was struck by the truck in

question being thrown violently to the ground; she was bruised and battered about her person; she sustained shock and injury to her nerves and her nervous system; she sustained injuries to her cervical and lumbar spine; she suffered cervical and lumbar sprain and strain; she suffered injuries, bruising and lacerations to her head, neck, arms shoulders, back, hands, legs and other parts of her body; she suffered a concussion and a closed head injury; she has developed chronic headaches; she has experience cognitive deficits; she has been subjected to and may hereafter be subject to great pain, suffering and inconvenience; she was physically thrown into an abnormal posture; her head, neck shoulders, arms, legs and back snapped upon impact; she sustained great pain to her head, neck and back; she has chronic headaches, she has radiation of her cervical and lumbar pain into her extremities; she has cervical and lumbar radiculopathy into the extremities; she had to undergo and in the future may be required to undergo painful treatment, surgery and therapy; she was required to undergo and in the future may be required to undergo painful diagnostic tests, treatment and therapy for her injuries; she may have sustained an aggravation of pre-existing injuries or conditions; she sustained a loss of earnings and her earning power may have been permanently impaired. She sustained other injuries, losses and damages. All of the foregoing may be of a permanent and continuing nature and character. She has incurred and may hereafter incur expenditures for medical care, nursing, drugs, appliances and kindred expenditures.

18. As a further direct and proximate result of Defendant's, above stated acts of negligence and carelessness, Melissa Hicks has suffered and the Defendant is liable for the following damages:

a. Past, present and future physical pain and suffering;

b. Past, present and future mental anguish;

c. Past, present and future humiliation and embarrassment;

d. Past, present and future inconvenience;

e. Past, present and future impairment of his ability to enjoy life;

f. Past, present and future impairment of his ability to enjoy hobbies and recreational pursuits; and,

g. Past, present and future impairment of his employment.

19. Melissa Hicks is informed and believes that in this case, if the United States were a private person, liability would be imposed under the laws of the Commonwealth of Pennsylvania and/or the State of West Virginia upon the United States and its agents, servants and employees.

20. The exclusive remedy against these agents, employees and servants of the government for the negligence of employees , servants or agents of the United States is under the Federal Tort Claims Act pursuant to 28 U.S.C. § 1346 et seq.

WHEREFORE, Melissa Hicks asks for the entrance of judgment against the Defendant, for:

a. compensatory damages in an amount to be determined by this Court to be just, fair and reasonable;

b. prejudgment and post judgment interest;

c. the costs incurred in the prosecution of this matter;

d. reasonable counsel fees; and,

e. such other and further relief as the Court deems just and appropriate.

SECOND CAUSE OF ACTION

FEDERAL TORT CLAIMS ACT-VICARIOUS LIABILITY

21. The averments set forth in paragraphs Nos. 1 through 20 are incorporated by reference thereto as if more fully set forth herein.

22. At all times material, Defendant was acting through its agents, servants or employees in the operation of the said vehicle, were going in and about the Defendant's business and was acting within the scope of their authority. Said vehicle was under the management and control of Defendant's agents, servants, workmen or employees who were at that time engaged in the Defendant's business and acting within the scope of their authority.

23. By reason of the aforesaid agency relationship, the aforesaid negligence of the Defendant's employees, agents. servants or workmen are imputed to the Defendant.

24. Defendant was further negligent in failing to properly train its employees, servants, agents or workmen in the safe operation of the said vehicle, in allowing an incompetent driver to operate his vehicle and in otherwise failing to exercise that degree of care due and owing to Melissa Hicks under the circumstances.

25. All the foregoing injuries and damages sustained by Melissa Hicks as aforesaid were the direct and proximate result of the aforesaid negligence of Defendant .

26. Melissa Hicks is informed and believes that in this case, if the United States were a private person, liability would be imposed under the laws of the Commonwealth of Pennsylvania and/or the State of West Virginia upon the United States

and its agents, servants and employees.

27. The exclusive remedy against these agents, employees and servants of the government for the negligence of employees , servants or agents of the United States is under the Federal Tort Claims Act pursuant to 28 U.S.C. § 1346 et seq.

WHEREFORE, Melissa Hicks asks for the entrance of judgment against the Defendant, for:

a. compensatory damages in an amount to be determined by this Court to be just, fair and reasonable;

b. prejudgment and post judgment interest;

c. the costs incurred in the prosecution of this matter;

d. reasonable counsel fees; and,

e. such other and further relief as the Court deems just and appropriate.

Respectfully submitted by:

/s/ Monte J. Rabner
Monte J. Rabner, Esquire
PA. ID No. 68251

Rabner Law Offices, P.C.
800 Law & Finance Building
429 Fourth Avenue
Pittsburgh, Pa 15219

(412) 765-2500
(412) 765-3900 Fax.

U.S. Department of Justice

Federal Bureau of Prisons

Beckley Consolidated Legal Center

1600 Industrial Park Road, P.O. Box 1280
Beaver, West Virginia 25813
(304) 252-9758 (304) 256-4928 Facsimile

July 2, 2009

Melissa Hicks
Reg. No. 20271-068
FPC Alderson
P.O. Box A
Alderson, West Virginia 24910

Re: Administrative Tort Claim Number TRT-MXR-2009-04693

Dear Ms. Hicks:

This will acknowledge receipt on July 1, 2009, of your administrative tort claim for personal injury at FPC Alderson on March 23, 2008. You claim a sum certain of $100,000.00.

Under the provisions of the Federal Tort Claims Act, 28 U.S.C.§2675, we have six months from the date of receipt of your claims in this office, to review, consider, and adjudicate your claims.

Should your claims include an allegation of loss of or damage to personal property, pursuant to 28 C.F.R., §14.4(c), you are required to include with your claim an itemized list of the property lost or damaged. If possible, for each item, please state its value, date and place of purchase. If the property was purchased in a Federal institution, submit the commissary receipt. If the property was not purchased in a Federal institution, submit a copy of the receipt of purchase. If you do not have a receipt please state as such, and list the place purchased, for example: name of store, address, state, date and cost for each item alleged lost or damaged. Failure to respond within 30 days of this letter will delay the investigation of your claim. ***If you have already included the above information and receipts, please do not re-submit.***

All correspondence regarding this claim should be addressed to: Beckley Legal Center, P.O. Box 1280, Beaver, WV 25813. When corresponding with this office regarding this tort claim please refer to the above tort claim number. If you have any questions about the status of your claim or if the circumstances surrounding this claim change in any fashion, contact this office immediately. **Also, should your address change, please advise accordingly**.

Sincerely,

Debbie Stevens
Supervisory Attorney
Consolidated Legal Center, Beckley

U.S. Department of Justice

Federal Bureau of Prisons

Beckley Consolidated Legal Center

1600 Industrial Park Road, P.O. Box 1280
Beaver, West Virginia 25813

July 2, 2009

Amber L. Nelson, Warden
FPC Alderson

REQUEST FOR INVESTIGATION OF TORT CLAIM # TRT-MXR-2009-04693
CLAIMANT: Melissa Hicks, Reg. No. 20271-068

The above-referenced tort claim has been received in this office for review and possible settlement pursuant to the Federal Tort Claims Act, 28 U.S.C. §2675, and authority granted by 28 C.F.R. §543.30.

As it appears that some, if not all, of the events which are the basis of this claim occurred at FPC Alderson, we are directing our request for investigation and response to you. If it is necessary to gather information from other locations to determine whether the Bureau of Prisons should be liable for this claim, please gather this information and include it as part of the investigation. The investigation should include, but not be limited to, all records pertaining to this claim: Form 40's, medical records, injury reports, staff memoranda, and other documents as appropriate. Should the initial investigation indicate that the claim requires transfer to another office, or to another agency, please notify me immediately.

Please forward the results of the investigation and your recommendation to the Beckley Legal Center on or before:

July 23, 2009

Your prompt attention to this request is appreciated. If you have any questions about this request, or wish to discuss the matter with me, do not hesitate to call.

Sincerely,

Debbie Stevens
Supervisory Attorney
Consolidated Legal Center, Beckley

Enclosure: copy of standard Form 95 w/attachments

U. S. Department of Justice
Federal Bureau of Prisons
Mid-Atlantic Region
Federal Prison Camp
Box A

Alderson, WV 24910-0700

July 9, 2009

MEMORANDUM FOR DEBBIE STEVENS, ATTORNEY ADVISOR, FCI BECKLEY

FROM: Amber L. Nelson
Warden

SUBJECT: Request for Investigation of Administrative Tort Claim
Tort Claim Number: TRT-MXR-2009–04693
RE: HICKS, Melissa
Reg. No: 20271-068

An investigation was conducted into the claim of inmate Hicks, Melissa, Reg. No: 20271-068. The investigation was conducted by (b)(6),(b)(7)(C) Inmate Hicks claims that she is suffering chronic pain and musculoskeletal problems due to being hit by an institution vehicle. She is requesting compensation in the amount of $ 100,000.00.

A review of inmate Hicks' medical records indicates she has received appropriate medical care. We recommend (b)(5)

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 386 of 867

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

From: Sharon Wahl
To: Adams, Samuel
Date: 7/10/2009 10:10 AM
Subject: Tort Claim
Attachments: 2009-04693.pdf; Sharon Wahl.vcf

Hey Sam:

We have a tort claim from inmate Melissa Hicks, Reg. 20271-068 where she alleges she was hit by a BOP Truck on March 23, 2008. I have the medical side of the investigation but Debbie would like for you to do an investigation regarding the accident. Her Injury Assessment indicates that the yard officer backed into her but I don't see anywhere that indicates who was driving the truck. Debbie would like you to get a statement from that person as well, indicating whether he knows for sure that he backed into her or what. Let me know if this doesn't make any sense or if you have questions.

Thanks Sharon

"This message is intended for official use and may contain SENSITIVE information. If this message contains SENSITIVE information, it should be properly delivered, labeled, stored, and disposed of according to policy."

Sharon M. Wahl
Paralegal
FCI Beckley Consolidated Legal Center
(304) 252-9758 X4132
(304) 256-4928 Fax

E-mail: swahl@bop.gov

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

U.S. Department of Justice

Federal Bureau of Prisons

Beckley Consolidated Legal Center
1600 Industrial Park Road, P.O. Box 1280
Beaver, West Virginia 25813

December 9, 2009

Melissa Hicks
State Register No. 0G5676
451 Fullerton Ave.
Cambridge Springs, Pennsylvania 16403

Re: Your Tort Claim No. TRT-MXR-2009-04693

Dear Ms. Hicks:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et. seq.*, and authority granted under 28 C.F.R. § 0.172. You claim government liability in the amount of $100,000 for personal injury at FPC Alderson. Specifically, you allege that on March 23, 2008, you were injured while walking to the dining hall when an officer backed into you with a government vehicle. You allege that you have experienced pain in your left shoulder, neck, and upper back since the accident.

Following the accident on March 23, 2008, you were evaluated by FPC Alderson Health Services staff and sent to the emergency room for evaluation and x-rays. The Cat Scan and x-rays were normal. You were diagnosed with a head contusion and contusion to the left thigh, given medication for pain, and released.

Settlement in the amount of $ 8,500 for pain and suffering for your injuries is appropriate. Based on established regulations, the United States must apply the $ 8,500 towards any court ordered obligations, including restitution. Records reflect you owe restitution in the amount of $15,474.84 for Case No. 05-00019E-001, arising out of the United States District Court for the Western District of Pennsylvania. Because the settlement amount is less than the amount owed as restitution, the amount will be applied directly to your restitution balance.

This offer is in complete settlement of any claim arising from this incident, whether against the United States or any employee of the Bureau of Prisons. ***If you are willing to accept this offer, please sign the attached voucher for payment form and return it to the Beckley Legal Center, P.O. Box 1280, Beaver, WV 25813.*** If you are unwilling to accept this offer, you should consider this letter a final denial of your claim. If you are dissatisfied with this determination, you may file suit in the appropriate United States District Court not later than six months after the date of the mailing of this letter.

Sincerely,

for

Michelle T. Fuseyamore
Regional Counsel

U.S. Department of Justice

Federal Bureau of Prisons

Beckley Consolidated Legal Center

1600 Industrial Park Road, P.O. Box 1280
Beaver, West Virginia 25813
(304) 252-9758 (304) 256-4928 Facsimile

July 2, 2009

Melissa Hicks
Reg. No. 20271-068
FPC Alderson
P.O. Box A
Alderson, West Virginia 24910

Re: Administrative Tort Claim Number TRT-MXR-2009-04693

Dear Ms. Hicks:

This will acknowledge receipt on July 1, 2009, of your administrative tort claim for personal injury at FPC Alderson on March 23, 2008. You claim a sum certain of $100,000.00.

Under the provisions of the Federal Tort Claims Act, 28 U.S.C.§2675, we have six months from the date of receipt of your claims in this office, to review, consider, and adjudicate your claims.

Should your claims include an allegation of loss of or damage to personal property, pursuant to 28 C.F.R., §14.4(c), you are required to include with your claim an itemized list of the property lost or damaged. If possible, for each item, please state its value, date and place of purchase. If the property was purchased in a Federal institution, submit the commissary receipt. If the property was not purchased in a Federal institution, submit a copy of the receipt of purchase. If you do not have a receipt please state as such, and list the place purchased, for example: name of store, address, state, date and cost for each item alleged lost or damaged. Failure to respond within 30 days of this letter will delay the investigation of your claim. ***If you have already included the above information and receipts, please do not re-submit.***

All correspondence regarding this claim should be addressed to: Beckley Legal Center, P.O. Box 1280, Beaver, WV 25813. When corresponding with this office regarding this tort claim please refer to the above tort claim number. If you have any questions about the status of your claim or if the circumstances surrounding this claim change in any fashion, contact this office immediately. **Also, should your address change, please advise accordingly**.

Sincerely,

Debbie Stevens
Supervisory Attorney
Consolidated Legal Center, Beckley

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MELISSA HICKS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 10-69E
	)	
UNITED STATES OF AMERICA,	)	THE HON. SEAN J. McLAUGHLIN
	)	U.S. DISTRICT JUDGE
Defendant.	)	
	)	ELECTRONICALLY FILED

ORDER

AND NOW, this 21st day of April, 2011, upon consideration of the "Stipulation of Dismissal With Prejudice" filed by the parties,

IT IS HEREBY ORDERED that the above-captioned case is dismissed with prejudice.

Honorable Judge Sean J. McLaughlin

Digitally signed by Honorable Judge Sean J. McLaughlin
DN: cn=Honorable Judge Sean J. McLaughlin, o, ou, email=Judge_Sean_J_McLaughlin@pawd.uscourts.gov, c=US
Date: 2011.04.21 13:20:43 -04'00'

UNITED STATES DISTRICT JUDGE

cc: All Parties

Westlaw.

JVR No. 441448 (Unknown State Ct. (W.Va.)), 2004 WL 3825543

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Unknown West Virginia State Ct.

ANDERSON v. WESTFALL

N/A

DATE OF INCIDENT: August, 2004

TOPIC:
LIABILITY:
General: **PEDESTRIAN**
Specific: On Sidewalk

SUMMARY
Outcome: Settlement
Non Verdict Award: $10,500
Total Verdict:
Judge Reduced Award To:
Claimed Past Medical:
Claimed Future Medical:
Claimed Past Wage Expense:
Claimed Future Wage Expense:
Plaintiff's Economist:
Defendant's Economist:

EXPERT-WITNESSES:

ATTORNEY:
Plaintiff: Michael Glasser, Charlestown, WV

RANGE AMOUNT: $1 - 49,999

STATE: West Virginia
COUNTY: Kanawha

PRIMARY INJURY: Scapula Fracture

SUMMARY
SETTLEMENT TIME:
PLAINTIFF:
Sex: Male

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Age: 74
Race: White

DECEDENT:
Funeral Expense:
Other Expenses:

DEFENDANT:
Type: Single Individual
Sex: Female
Race: White
Policy Limit:

DAMAGES:
Past Medical:
Future Medical:
Past Wage:
Future Wage:
Pain and Suffering:
Other: $10,500
Total: $10,500
Punitive:
Hedonic:
Property:
Other:
Interest:
Loss of Services:

DEFENDANT ADMITTED LIABILITY: Yes

FACTS:

A 74-year-old male **suffered** a scapula fracture, **shoulder** and knee contusions, and a cervical strain when he was **struck** by the 29-year-old female defendant as she turned right into a parking lot. The plaintiff contended that the defendant operated her **vehicle** in a negligent manner, failed to keep a proper lookout, and failed to yield the right-of-way to a **pedestrian**. The defendant admitted liability.

LRP Publications

COURT:

JVR No. 441448 (Unknown State Ct. (W.Va.)), 2004 WL 3825543

END OF DOCUMENT

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Westlaw

JVR No. 173763 (W.Va.Cir.Ct.), 1996 WL 152276

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Circuit Court of West Virginia, Thirtieth Judicial Circuit, Mingo County.

HAIRSTON, PRO AMI v. DILLARD

95-C-345

DATE OF INCIDENT: October, 1994

DATE OF FILING: January, 1995

TOPIC:
LIABILITY:
General: **PEDESTRIAN**
Specific: On roadway

SUMMARY
Outcome: Settlement
Non Verdict Award: $15,000
Total Verdict: $15,000
Claimed Past Medical: $3687

EXPERT-WITNESSES:

ATTORNEY:

JUDGE:

RANGE AMOUNT: $1-49,999

STATE: West Virginia
COUNTY: Mingo

PRIMARY INJURY: Knee Contusion

SUMMARY
SETTLEMENT TIME: Before Trial
PLAINTIFF:
Sex: Female

DECEDENT:
DEFENDANT:
Type: Single Individual

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Sex: Male

DAMAGES:
Other: $15,000
Total: $15,000

FACTS:

A minor female **suffered** a contusion to the left knee and soft tissue injuries to the **neck** and the right, nondominant wrist, **shoulder**, elbow, and forearm when she was **struck** by the male defendant's **vehicle** as she walked down a roadway. The plaintiff contended that the defendant failed to yield the right of way to a **pedestrian** and failed to control his **vehicle**. The defendant contended that the plaintiff was negligent for walking in front of his **vehicle**.

LRP Publications

COURT: Circuit

JVR No. 173763 (W.Va.Cir.Ct.), 1996 WL 152276

END OF DOCUMENT

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JVR No. 457797 (Unknown State Ct. (W.Va.)), 2002 WL 34141030

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Unknown West Virginia State Ct.

MCGHEE v. MCGRAW

04-C-189-R

DATE OF INCIDENT: September, 2002

TOPIC:
LIABILITY:
General: **PEDESTRIAN**
Specific: In Parking Lot

SUMMARY
Outcome: Settlement
Non Verdict Award: $2000
Total Verdict:
Judge Reduced Award To:
Claimed Past Medical:
Claimed Future Medical:
Claimed Past Wage Expense:
Claimed Future Wage Expense:
Plaintiff's Economist:
Defendant's Economist:

EXPERT-WITNESSES:

ATTORNEY:
Plaintiff: Larry O. Ford, Charleston, WV
Defendant: Teresa D. Daniel, Beckley, WV

RANGE AMOUNT: $1 - 49,999

STATE: West Virginia
COUNTY: Greenbrier

PRIMARY INJURY: Hand Nerve Damage

SUMMARY
SETTLEMENT TIME: After Filing
PLAINTIFF:

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Sex: Female
Age: 40

DECEDENT:
Funeral Expense:
Other Expenses:

DEFENDANT:
Type: Single Individual
Sex: Female
Policy Limit:

DAMAGES:
Past Medical:
Future Medical:
Past Wage:
Future Wage:
Pain and **Suffering**:
Other: $2000
Total: $2000
Punitive:
Hedonic:
Property:
Other:
Interest:
Loss of Services:

FACTS:

A 40-year-old female **suffered** left hand paresthesia, lumbar and thoracic strains, and a left elbow laceration when she was **struck** by the female defendant's **vehicle** as the plaintiff attempted to walk across a nonparty parking lot. The plaintiff contended that the defendant operated her **vehicle** in a negligent manner, failed to keep a proper lookout, and failed to yield the right-of-way to a **pedestrian**. The defendant denied liability and disputed the extent of the plaintiff's injuries. The defendant contended that the plaintiff negligently stepped into the path of the defendant's **vehicle** and failed to use due care for her own safety.

LRP Publications

COURT:

JVR No. 457797 (Unknown State Ct. (W.Va.)), 2002 WL 34141030

END OF DOCUMENT

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Westlaw

08 ACTR 7-21 (Ala.Cir.Ct.), 2008 WL 3833653

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Circuit Court of Alabama, Tenth Judicial Circuit, Jefferson County.

COTTRELLE BELL, individually and as the guardian and next friend of CHANTERA BELL, a **minor** vs. MICHAEL CARRAWAY

CV-07-3027

DATE OF VERDICT/SETTLEMENT: January 7, 2008

TOPIC: Motor **Vehicle** Accident/ **Pedestrian Struck**

SUMMARY:
JUDGMENT: $8,500 for Plaintiffs on January 7, 2008 (consent judgment).

EXPERT-WITNESSES:
n/a
n/a

ATTORNEY(S):
Plaintiff's: Samuel E. Wiggins III, Birmingham
Defendant's: Hunter C. Carroll of Stockham, Carroll & Smith, P.C., Birmingham

JUDGE: Michael G. Graffeo

RANGE AMOUNT: $1-49,999

STATE: Alabama
COUNTY: Jefferson

NATURE OF INJURY: Lacerations to upper left arm; chest, arm, **shoulder** and **neck** injuries; **back pain**; medical expenses. Dr. Donald Slappey treated **minor** Plaintiff Chantera for her **back pain**.

SUMMARY:
Plaintiff Information:
Age: 15
Sex: F
Occupation: n/a

FACTS:

Cause of Injury: Plaintiffs alleged that on July 11, 2006, Defendant **struck minor** Plaintiff Chantera, a **pedestrian** in the crosswalk at the intersection of 1st Avenue North and 54th Street N. in Birmingham. Plaintiffs claimed

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that Chantera was thrown onto the **vehicle** and her left upper arm **struck** the windshield.

Florida Legal Periodicals, Inc.

Alabama Circuit Courts

PUBLISHED IN: Alabama Civil Trial Reporter

08 ACTR 7-21 (Ala.Cir.Ct.), 2008 WL 3833653

END OF DOCUMENT

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2009 WL 2515596 (Nev.Dist.Ct.)

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WEST'S JURY VERDICTS - NEVADA REPORTS

Pedestrian Awarded $11K after Being **Struck** by **Vehicle**

District Court of Nevada, Eighth Judicial District, Clark County.

Begay v. Chavez

Type of Case:
Vehicle Negligence • **Pedestrian**
Vehicle Negligence • Crosswalk
Vehicle Negligence • Intersection

Specific Liability: Driver failed to stop, **struck pedestrian**

General Injury: Head injury, cuts and bruises, head **pain**, dizziness, confusion, left leg **pain** and bruises, right hip **pain** and tenderness, **neck pain**, **shoulder pain**, upper **back pain**, tenderness and tightness in the **neck**, **shoulders**, and mid-**back**, insomnia, medical expenses

Jurisdiction:
State: Nevada
County: Clark

Related Court Documents:
Plaintiff's complaint: 2006 WL 6336090
Defendant's answer: 2006 WL 6336089
Verdict form: 2008 WL 6654907

Case Name: Elsie Begay v. Margarita Chavez, individually, Doe individuals I-X, inclusive, Roe business entities I-X, inclusive
Docket/File Number: A520664

Verdict: Plaintiff, $11,455.00

Verdict Range: $1 - 49,999

Verdict Date: April 10, 2009

Judge: Rebecca L. Mastrangelo

Attorneys:
Plaintiff: Marina E. Kolias, Kolias Law Offices, Las Vegas, Nev.

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Defendant: Jane Eberhardy, Kravitz, Schnitzer, Sloane, Johnson & Eberhardy, Henderson, Nev.

Trial Type: Jury

Experts:
Plaintiff: Michael Karagiozis, DO, family medicine, Las Vegas, Nev.
Defendant: Steven M. Sanders, MD, orthopedic surgeon, Bone & Joint Specialists, Las Vegas, Nev.
Unspecified: Dale H. Boam, JD, ASL linguistics, Salt Lake City, Utah

Breakdown of Award:
$10,000.00 to plaintiff for past **pain** and suffering
$1,455.00 to plaintiff for medical bills

Summary of Facts:

Elise Begay, a hearing-impaired woman, was a **pedestrian** in a crosswalk at the intersection of Valley View and Sahara Avenue in Las Vegas, Nev. in May 2004. According to Begay, Margarita Chavez, driving a 1993 Ford **vehicle**, **struck** Begay.

Begay filed a complaint in the Clark County District Court against Chavez in April 2006. Begay claimed Chavez failed to pay full attention and failed to keep a safe lookout.

Chavez answered Begay's complaint and denied the allegations of negligence. The defendant reported the plaintiff stepped off of the curb and ran into the passenger side of her **vehicle**. The defendant said she was driving 2 miles per hour at the time of the collision.

A jury found in favor of Begay and against Chavez in April 2008. The jury awarded Begay $11,455.

Court: District Court of Nevada, Eighth Judicial District, Clark County.

2009 WL 2515596 (Nev.Dist.Ct.)

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2007 WL 4934742 (Mo.Cir.)
For Opinion See 2007 WL 4742292 (Trial Order)

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WEST'S JURY VERDICTS - MISSOURI REPORTS

Pedestrian Receives $6.5K for Parking Lot Collision

Circuit Court of Missouri, Seventh Judicial Circuit, Clay County.

Woodward v. Dickerson

Type of Case:
Vehicle Negligence • **Pedestrian**
Vehicle Negligence • Parking Lot
Vehicle Negligence • Excessive Speed
Vehicle Negligence • Inattention
Vehicle Negligence • Right-of-Way

Specific Liability: Motorist **struck** a **pedestrian** in a parking lot

General Injury: Injuries to the head, **neck**, upper and lower **back**, **shoulders**, and left knee; cuts; scrapes; bruises; contusions; sprains; medical expenses; lost income

Jurisdiction:
State: Missouri
County: Clay

Related Court Documents:
Plaintiff's petition: 2005 WL 6015128
Defendant's answer: 2005 WL 6015135
Verdict form: 2007 WL 4749088
Judgment: 2007 WL 4742292

Case Name: Christopher Woodward v. Steve Dickerson
Docket/File Number: CV105-007691

Verdict: Plaintiff, $6,500.00

Verdict Range: $1 - 49,999

Verdict Date: Oct. 29, 2007

Judge: Donald T. Norris

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Attorneys:
Plaintiff: James H. Worthington, Aull, Sherman, Worthington, Giorza & Hamilton, Lexington, Mo.
Defendant: Michael T. Halloran, The Halloran Law Firm, Overland Park, Kan.; Jill Galbreath Smith, Law Offices of Jill Galbreath Smith, Leawood, Kan.

Trial Type: Jury
Breakdown of Award:
$6,500.00 to plaintiff for total damages
Defendant was 100 percent at fault.
Plaintiff was not at fault.

Summary of Facts:

On his way to work, Christopher Woodward walked in the parking lot of the Ford Motor Co. plant in Claycomo, Mo., May 1, 2003. He said Steve Dickerson turned a corner or row of cars in a 2001 Ford F-150 pickup truck and **struck** him.

Woodward reportedly sustained injuries to his head, **neck**, upper and lower **back**, **shoulders**, and left knee when the **vehicle struck** him. In addition, he said he suffered from cuts, scrapes, bruises, contusions and sprains.

He sued Dickerson in 2005 in the Clay County Circuit Court, alleging Dickerson caused his damages by driving negligently. The defendant's negligence included driving too fast, failing to keep a proper lookout, failing to sound a warning of his approach, and failing to yield the right-of-way to **pedestrians**, Woodward alleged.

The plaintiff sought damages for past and future physical **pain** and mental anguish; impairment of his health, strength and vitality; past and future medical expenses; loss of sleep and rest; and lost income.

Dickerson denied Woodward's account of the encounter, as well as the allegation of negligence. He also disputed Woodward's injury claims. By way of affirmative defense, the defendant argued Woodward was negligent in his failure to act when the collision was apparent, and his failure to keep a careful lookout. Woodward also assumed the risk of injury, Dickerson submitted.

Judge Donald Norris instructed a jury to deliberate on the evidence and apportion fault between the two drivers.

Having found Dickerson 100 percent at fault for the collision, the jury returned a verdict in favor of the plaintiff Oct. 29, 2007, and awarded Woodward $6,500.

Court: Circuit Court of Missouri, Seventh Judicial Circuit, Clay County.

2007 WL 4934742 (Mo.Cir.)

END OF DOCUMENT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION at PIKEVILLE

[Filed Electronically]

TIMOTHY U. BELL,

Plaintiff

v.

M. ZUERCHER, acting in his individual capacity
USP Big Sandy
1197 Airport Road
Inez, KY 41224

-and-

P. HEFFINGTON, acting in his individual capacity
Camp Administrator of USP Big Sandy
1197 Airport Road
Inez, KY 41224

-and-

C. LINAWEAVER, acting in her individual capacity)
Associate Warden of USP Big Sandy
1197 Airport Road
Inez, KY 41224

-and-

M. BATTS, acting in his individual capacity
Associate Warden of USP Big Sandy
1197 Airport Road
Inez, KY 41224

-and-

A. EVANS, acting in his individual capacity
Correctional Counselor at USP Big Sandy
1197 Airport Road
Inez, KY 41224

CIVIL ACTION NO. _____

-and-

NORBERT ROSARIO, MD, acting in his individual capacity
USP Big Sandy
1197 Airport Road
Inez, KY 41224

-and-

P. CURZ, MD, acting in his individual capacity
USP Big Sandy
1197 Airport Road
Inez, KY 41224

-and-

S. SLONE, RN, acting in her individual capacity
USP Big Sandy
1197 Airport Road
Inez, KY 41224

-and-

DANIEL DeOLIVEIRA, MD, acting in his individual capacity
USP Big Sandy
1197 Airport Road
Inez, KY 41224

-and-

CHERYL COTHREN, acting in her individual Capacity
USP Big Sandy
1197 Airport Road
Inez, KY 41224

Defendants.

COMPLAINT

Plaintiff Timothy U. Bell, for his complaint against Defendants identified above, would respectfully allege the following:

I. Jurisdiction and Venue

1. Plaintiff seeks damages from Defendants under the Civil Rights Act of 1871, 42 U.S.C. § 1983, for gross and unconscionable violations of the rights, privileges and immunities guaranteed him by the Eighth Amendment to the Constitution of the United States. Accordingly, this Court has jurisdiction of this case pursuant to the provisions of 38 U.S.C. §§ 1331 and 1343. Plaintiff also seeks damages for negligence and gross negligence under the supplemental jurisdiction of this Court. Martin County, Kentucky is the location of all acts pertinent to this suit, and venue is therefore proper in this Court.

II. Parties

2. Plaintiff is a resident of Detroit, Michigan.

3. Defendants M. Zuercher, P. Heffington, C. Linaweaver, M. Batts, and A. Evans, first names presently unknown, acting in their individual capacities, were at all times mentioned herein wardens, deputy wardens, administrators and correctional officers at USP Big Sandy in Inez, Kentucky ("the Prison"), and as such (a) established policies either formally or by custom for, and were responsible for the employment, training, supervision and conduct of, the officers and employees of the Prison, including Defendants identified below; (b) were personally responsible for the medical care of inmates of the Prison like Plaintiff; and (c) personally participated in the mistreatment and abuse of Plaintiff and were personally deliberately

indifferent to his medical needs, and neglected and grossly neglected such needs, as further described below.

4. Defendants Norbert Rosario, MD, P. Curz, MD (first name presently unknown), S. Slone, RN (first name presently unknown), Daniel DeOliveira, MD, and Cheryl Cothren, acting in their individual capacities, were at all times mentioned herein medical professionals employed and/or working at the Prison, and as such (a) established policies either formally or by custom for the medical care of inmates like Plaintiff; (b) were personally responsible for the medical care of inmates of the Prison like Plaintiff; and (c) personally participated in the mistreatment and abuse of Plaintiff and were personally deliberately indifferent to his medical needs, and neglected and grossly neglected such needs, as further described below.

III. Nature of Defendants' Conduct

5. Defendants, individually, jointly and/or in conspiracy with one another, engaged in the conduct described below under color of the law of the United States. The individual Defendants named above knowingly participated or acquiesced in, contributed to, encouraged, implicitly authorized or approved the conduct described below. The offenses described below resulted from, among other things, Defendants' failure to employ qualified persons for positions of authority, and/or to properly or conscientiously train and supervise the conduct of such persons after their employment, and/or to promulgate appropriate operating policies and procedures either formally or by custom to protect Plaintiff's constitutional rights. Defendants' conduct was intentional and grossly negligent, indicated active malice toward Plaintiff and a total, deliberate and reckless disregard for and indifference to his life and his constitutional and common law rights, and justifies an award of punitive damages in addition to the actual damages Plaintiff is entitled to recover.

IV. Facts

6. On July 3, 2008, Plaintiff, while an inmate at USP Big Sandy, reported swelling, redness and tenderness in the area of his right armpit. On July 10, 2008, Plaintiff was examined by Defendant Rosario. On July 16, 2008, Defendant Rosario requested that a mass in Plaintiff's right armpit be biopsied to rule out any malignancy, and designated his request as "Priority!!!"

7. The mass in Plaintiff's armpit was not biopsied until October 8, 2009, almost 15 months after Defendant Rosario had assigned such a biopsy a "Priority!!!" status. The biopsy was positive for malignant, diffuse non-Hodgkins large B-cell lymphoma, T-cell rich, and the cancer had by then progressed to the point that Plaintiff was diagnosed at Stage III to IV. Plaintiff is still alive, but his prognosis is understandably poor.

8. In the almost 15 months between Defendant Rosario's request for a "Priority!!!" biopsy of the mass in Plaintiff's right armpit, and performance of the biopsy, Plaintiff was seen repeatedly by Defendant Rosario, who was aware that the biopsy he had requested had still not been performed, and that the mass in Plaintiff's armpit continued to grow and become increasingly painful and worrisome.

9. On August 19, 2008, Defendants Cruz and Slone approved Defendant Rosario's request for a "Priority!!!" biopsy, specifically designated it a "Priority 1 – Mandatory (1-30 days)" procedure, but then did nothing to see that it was performed.

10. On December 10, 2008, Plaintiff met with Defendant Evans to attempt an informal resolution of his complaint that the mass in his right armpit still had not been biopsied, and requested as an administrative remedy that the mass be biopsied and removed. Defendant Evans, however, did nothing to investigate Plaintiff's complaint or to satisfy his request that his complaint be administratively remedied.

11. On May 8, 2009, Plaintiff was examined by Defendant DeOliveira, who recommended that a CT and biopsy of the mass in Plaintiff's right armpit be performed to rule out possible lipoma, but then did nothing to follow up on his diagnosis, his treatment plan, or his recommendation.

12. On July 16, 2009, Plaintiff prepared an Inmate Request to Staff form, to which he attached a letter to Defendants Zuercher, Heffington, Linaweaver and Batts, in which he stated:

> I have irregular growth on my chest and medical staff could not determine what it is. I was told they would be sending me to the hospital for surgery. .... I was told I was Priority One and would be seen in 30 days. That was 1-1/2 years ago. I still don't know what it is and it's getting bigger, hurting more and keeps me up thoughout the night (can't sleep with the pain) and I am scared.
>
> My family thinks it could be cancer spreading .... I would like to have samples of the growth to find out exactly what it is and possibly have it removed. ....

Defendants Zuercher, Heffington, Linaweaver and Batts did nothing to address the problem identified by Plaintiff in his letter. Instead, on July 26, 2009, and for reasons that will be determined in discovery, Plaintiff was transferred from USP Big Sandy to Ashland Federal Prison, necessarily delaying further the "Priority!!!" biopsy that had been ordered more than a year before.

13. As a consequence of the above, Plaintiff did not discover until October 8, 2009 that he had cancer, or that it was so severe. Until then, Plaintiff could not reasonably have been expected to know that Defendants had deviated from the standard of care, or had been deliberately indifferent to his medical needs, or that he had suffered injury as a consequence of such neglect and indifference. Had the mass in Plaintiff's right armpit been biopsied on or before September 19, 2008, pursuant to the "Priority!!!" request for the biopsy and the "Priority 1 – Mandatory (1-30 days)" status it was assigned on August 19, 2008. Plaintiff's cancer would have been discovered and properly treated over a year before it actually was, and Plaintiff's

staging would have been much lower, the likelihood of recurrence would have been reduced, and the chances of Plaintiff's survival would have been greatly increased. Instead, his death is now a certainty.

V. Causes of Action

A. Count I

14. Paragraphs 1-13 above are incorporated herein by reference and made this Paragraph 14.

15. Defendants' conduct was intentional, reckless, deliberate, wanton and/or malicious, and was indicative of their total, deliberate and reckless disregard of and indifference to Plaintiff's life as well as his rights and the risk of harm to him occasioned by such conduct.

16. Plaintiff, through Defendants' deliberate indifference and grossly negligent -- if not reckless, intentional and/or malicious -- conduct, was subjected to cruel and unusual punishment and will likely ultimately be deprived of his life without due process of law in violation of the Eighth Amendment of the Constitution of the United States and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

B. Count II

17. Paragraphs 1-16 above are incorporated herein by reference and made this Paragraph 17.

18. By virtue of the foregoing, Defendants were negligent and grossly negligent in their treatment of Plaintiff, and in their hiring, training and supervision of those entrusted with his care.

VI. Damages

19. Paragraphs 1-18 above are incorporated herein by reference and made this Paragraph 19.

20. Plaintiff's has experienced wanton and unnecessary physical and mental pain and suffering, past and future medical and hospital expenses, past and future wage loss, loss of enjoyment of life, and future impairment of his ability to work and earn money, all as a result of Defendants' conduct, and for which he is entitled to recover damages in excess of the jurisdictional limits of this Court. Finally, Defendants' violations of his constitutional and common law rights were cruel, malicious, and evinced a total and reckless disregard for his life and those rights, entitling Plaintiff to recover punitive damages from Defendants in order to deter such conduct in the future.

WHEREFORE, Plaintiff requests a trial by jury, and further requests that he be awarded actual and punitive damages, pre- and post-judgment interest, costs, attorneys' fees and all other relief to which he is entitled under law or in equity.

Respectfully submitted,

/s/ Sheila P. Hiestand
Sheila P. Hiestand
Bubalo, Hiestand & Rotman, PLC
9300 Shelbyville Road, Suite 215
Louisville, KY 40222
(502) 753-1606
shiestand@bhtriallaw.com

Gregory A. Belzley
P.O. Box 278
Prospect, KY 40059
(502) 494-6186
gbelzley@aol.com
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

MARY BELL, Mother and Personal Representative of the Estate of Timothy U. Bell,	)	Nos. 7:10-CV-72-ART-REW & 7:12-CV-17-KKC
Plaintiff,	)	ORDER
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

*** *** *** ***

On Monday, the Court conducted a settlement conference in this matter. The conference resolved the dispute in its entirety.

This the 23rd day of August, 2012.

TIC: 7 hours, 15 minutes

Signed By:
Robert E. Wier REW
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
PIKEVILLE

MARY BELL, Mother and Personal Representative of the Estate of Timothy U. Bell, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	)	Civil Action No. 10-72-ART ~~Civil Action No. 12-17~~ 12-17 **ORDER**

*** *** *** ***

The plaintiff and four defendants entered an agreed order of dismissal informing the Court that they had settled this matter, R. 109. The plaintiff and the remaining defendant entered an agreed order of *partial* voluntary dismissal. R. 108. The second motion appears to conflict with Magistrate Judge Wier's minute entry order, which reports that the settlement conference "resolved the dispute in its entirety," R. 107. The Court will, in an abundance of caution, give the parties a thirty-day period to ensure that no parties' rights are affected by this potential conflict.

It is therefore **ORDERED** that this action is discontinued with prejudice but without costs; provided, however, that **if the settlement is not consummated within thirty (30) days of the date of this Order, or does not represent an agreed resolution to a party's interest in this matter, any party may apply by motion within the thirty-day period for restoration of the action to the calendar of the undersigned, in which event the action will be restored.**

Furthermore, this matter is **STRICKEN** from the Court's active docket, all pending motions are **DENIED AS MOOT**, and all scheduled hearings are **CANCELLED**.

This the 22nd day of October, 2012.

Signed By:
Amul R. Thapar AT
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION AT PIKEVILLE

~~CIVIL ACTION NO. 10-72-ART~~

MARY BELL, Mother and Personal Representative of TIMOTHY U. Bell, Deceased, PLAINTIFF

V.

JOHN C. ZUERCHER, ET AL. DEFENDANTS

And

CIVIL ACTION NO. 12-17-KKC

THE ESTATE OF TIMOTHY U. BELL, by and THROUGH THE Administratrix of his Estate, MARY BELL, PLAINTIFF

V.

UNITED STATES OF AMERICA DEFENDANT

****

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

****

THIS AGREEMENT is made and entered into by and between Mary Bell in her capacities as Mother and Personal Representative of Timothy U. Bell and as Adminstratrix of the Estate of Timothy U. Bell (hereinafter "Plaintiff") and Defendants, the United States of America, Jerome Zuercher (incorrectly named as John C. Zuercher in the Complaint), Philip W.

Heffington, and Norbert Rosario (hereinafter "Defendants").

WHEREAS, Plaintiff has filed the above-captioned civil actions in the U.S. District Court of the Eastern District of Kentucky; and

WHEREAS, the parties hereto desire to make a complete and final settlement under the Federal Tort Claims Act of all matters involved in, or relating to, or arising out of, the above captioned cases.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, Plaintiff and the named Defendants, being separately advised by counsel, and intending to be legally bound thereby, COVENANT AND AGREE AS FOLLOWS:

1. As used in this agreement, Defendants mean the United States of America and all of its past, present, future subsidiaries, bureaus, services, agencies, divisions, departments (including the Bureau of Prisons), successors, assigns, directors, officers, agents, employees, attorneys and representatives; and Jerome Zuercher, Philip Heffington, and Norberto Rosario.

2. In return for all of the agreements and covenants of Plaintiff set forth herein, Defendant United States agrees to pay Plaintiff the total sum of $975,000.00. This payment is in full settlement and satisfaction of any and all claims of any kind that Plaintiff may have in the above captioned-case against Defendant United States and for the dismissal, with prejudice, by Plaintiff of any and all claims of any kind against Defendants Jerome Zuercher, Phillip Heffington, and Norberto Rosario. Payment by Defendant United States of the settlement amount of $975,000.00 shall be without interest. Plaintiff will satisfy all outstanding liens of any kind, including Medicare and Medicaid liens, from the settlement proceeds. Plaintiff will hold Defendant United States harmless for such liens. Plaintiff's counsel agree not to disburse

settlement proceeds until all liens are paid or satisfied and the United States has the right to require appropriate documentation of the same.

This settlement is intended to avoid further litigation and to preserve judicial economy, and shall not operate as an admission of liability or fault on the part of the United States, its agents, servants, or employees, or Jerome Zuercher, Philip Heffington and Norberto Rosario. Any federal, state, or local income tax liability, or other tax liability resulting from the payment of this settlement amount of $975,000.00 shall be the sole responsibility of Plaintiff. Neither Defendants nor Defendants' attorneys make any representations as to the tax treatment of this settlement amount of $975,000.00.

Plaintiff and Defendants shall bear their own costs, expenses and attorneys= fees.

3. Plaintiff=s settlement amount of $975,000.00 shall be paid by government electronic funds transfer. Said payment shall be made no later than six (6) to eight (8) weeks from the date the settlement agreement is transmitted to the United States Department of Treasury. Banking information for the electronic funds transfer will be provided by Plaintiff's attorneys. Plaintiff's attorneys agree to distribute the settlement proceeds and to obtain a dismissal order of the above-captioned actions with prejudice, with each party bearing its own fees, costs, and expenses.

4. Plaintiff agrees that the settlement amount of $975,000.00 is in full satisfaction of the legal claims against the named Defendants. Plaintiff hereby releases and forever discharges the United States of America and its employees, officers, agents, agencies, attorneys, representatives and assigns, and Jerome Zuercher, Philip Heffington and Norberto Rosario (collectively AReleasees@) from any and all claims, remedies, demands, debts, losses, obligations, actions,

causes of actions, claims of relief, damages, costs, expenses, attorney fees, and compensation of any nature whatsoever, whether known or unknown, foreseen or unforeseen, arising out of or involving or leading to the death of Timothy Bell (collectively Aclaim@ or Aclaims@ or Aremedy@ or Aremedies@) including, but not limited to, claims under the Federal Tort Claims Act, civil rights, *Bivens* claims, legal, equitable, administrative, union or other claims or remedies of any kind whatsoever or from any source, which Plaintiff had or has against named Defendants and all other Releasees on account of, or contained in, or in any way growing out of, or which are the subject of, the allegations contained in the above-captioned civil actions and/or from any fact existing or occurring prior to or as of the date of this Agreement. The named Defendants further release Plaintiff and Plaintiff's counsel from any claim or cause of action related to the above-captioned civil actions, including any claims related to the initiation of the civil actions, which existed as of the date of this Agreement.

5. This Settlement Agreement and Release does not cover Plaintiff's claims against Defendant Daniel DeOliveira, M.D.

6. Plaintiff represents and acknowledges that in executing this Agreement she did not rely and has not relied upon any representation or statement made by Defendants or their attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

7. Nothing contained in this Agreement shall be construed as an admission of wrongdoing or liability by Defendants with respect to any matter whatsoever, whether or not encompassed by the above-captioned civil actions.

8. This Agreement comprises the entire understanding and settlement of the above-captioned actions between Plaintiff and Defendants and fully supersedes any and all prior

agreements or understandings between the parties.

9. This Agreement shall be binding upon Plaintiff and upon the Estate and the heirs of Timothy U. Bell and shall inure to the benefit of the Defendants and each and all other Releasees, and to their heirs, administrators, representatives, executors, successors, assigns, and attorneys and legal representatives.

10. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. When used in this Agreement, the word Aor@ is a term of inclusion and not exclusion and in no instance is the word Aor@ intended to limit, nor shall it limit, the rights, privileges, and/or benefits of Defendants under this Agreement.

11. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and said illegal or invalid part, term or provision shall be deemed not to be a part of the Agreement.

12. The parties agree that this Stipulation for Settlement Agreement and Release of All Claims may be made public in its entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. ' 552a(b).

13. Plaintiff shall promptly secure any state probate court approval reasonably required to effectuate this settlement, in a form reasonably satisfactory to the Defendant United States.

14. Plaintiff enters into this agreement knowingly and voluntarily after full consultation with her attorneys, and by her signature acknowledges that she has read this Agreement and fully

understands its terms. Plaintiff agrees that she has been given a reasonable period of time within which to consider this Agreement.

15. This Agreement is not assignable by Plaintiff. The date of this Agreement is the date of the last signature to this Agreement.

IN WITNESS WHEREOF, Plaintiff and Defendants intending to be legally bound, have set their hands to this Agreement the day and year below written.

CONTINUED ON NEXT PAGE

Mary Bell
MARY BELL, PLAINTIFF, as Mother and
Personal Representative of Timothy U. Bell and as
Adminstratrix of the Estate of Timothy U. Bell

09-07-12
Date

SHEILA HIESTAND
Hughes & Coleman-Louisville
9300 Shelbyville Road
Suite 110
Louisville, Kentucky 40222

9-10-12
Date

Gregory Belzley
GREGORY BELZLEY
P. O. Box 278
Prospect, Ky. 40059

9-10-12
Date

PLAINTIFFS' COUNSEL

CONTINUED ON NEXT PAGE



JEROME ZUERCHER, DEFENDANT

8/24/2012
Date

CONTINUED ON NEXT PAGE

PHILLIP HEFFINGTON, DEFENDANT — Date: 8/24/12

NORBERT ROSARIO, MD, DEFEFNDANT — Date: 8/24/2012

KERRY B. HARVEY
UNITED STATES ATTORNEY

BY: _____ — Date: 9/13/2012
DELL W. LITTRELL
Assistant United States Attorney
U.S. Attorney=s Office
260 West Vine Street, Suite 300
Lexington, Kentucky 40507-1612

END OF DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TERRY JONES
FCI Petersburg
1060 River Road
Hopewell, VA 23860

Plaintiff

v.

UNITED STATES OF AMERICA
Serve:

United States Attorney General
U.S. Department of Justice
Room B-103
950 Pennsylvania Ave. NW
Washington, DC 20530-0001

and

U.S. Attorney for the District of Columbia
555 4th Street, NW
Washington, DC

Defendant

Case No.: 1:11-cv-1158 (ESH)

FIRST AMENDED COMPLAINT

Plaintiff, Terry Jones, through undersigned counsel, files this complaint against Defendant United States of America to recover under the Federal Tort Claims Act ("FTCA") for negligent failure to protect Mr. Jones from attack by prison inmates, medical malpractice, and negligent treatment of a prisoner, which occurred while Mr. Jones was incarcerated within the federal prison system.

Nature of the Case

1. This case is to recover for the negligent acts of federal Bureau of Prisons ("BOP") employees who directly permitted Mr. Jones to be injured in a riot on his unit when he slipped on another inmate's blood and fell on his back; for acts of federal employees who provided negligent medical treatment of Mr. Jones's resulting back injuries (at multiple institutions); and for acts of federal employees who negligently contributed to the exacerbation of Mr. Jones's back pain and injuries by forcing him to ride a bus for seventeen (17) hours with insufficient breaks.

2. Mr. Jones was a healthy, physically fit, and capable individual until December, 2007 when Defendant's agents at USP Hazelton, West Virginia, negligently permitted a riot to occur on his unit. After being injured by slipping on another inmate's blood on the metal staircase in the unit, Mr. Jones sought medical attention for numbness and tingling in his fingers. He was told simply to stop doing sit-ups.

3. Over the course of the next ten (10) months, at USP Hazelton, Mr. Jones repeatedly sought medical attention, asked for and was denied an MRI, asked for and was denied an orthopedic or other specialist consultation, and was never treated for his back injury.

4. Upon his own insistence, Mr. Jones was finally scheduled for an orthopedic consultation for November 4, 2008. But, on that very day, with no prior notice, the BOP transferred him out of the institution. After flying to the Federal Transfer Center in Oklahoma City, Oklahoma, Mr. Jones then endured an excruciating seventeen-hour (17-hour) bus ride from Oklahoma to USP Tucson, Arizona, in leg and hand restraints, and without sufficient breaks. When he arrived at USP Tucson, Mr. Jones was unable to walk and could not exit the bus under his own power.

5. For the next four months at USP Tucson, Mr. Jones's condition continued to deteriorate. Despite numerous requests to be treated for his back pain, he was denied a timely orthopedic consultation -even though he would have had one on November 4, 2008 in Hazelton, and was given only short-term pain medication.

6. Then, on March 11, 2009, fourteen (14) months after his original injury, Mr. Jones experienced lightning-like, shooting pain in his back and collapsed on the recreation yard. He was sent immediately to an outside hospital where, within two days, he had cervical spine surgery.

7. Mr. Jones remains unable to walk without the use of a walker, cannot sit for long periods of time, has muscular atrophy in his upper arms, and daily experiences pain in his back and left leg.

Jurisdiction and Venue

8. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1346(b)(1) as this claim is brought against the United States of America under the FTCA.

9. Venue is appropriate in this Court since, pursuant to 28 U.S.C. § 1402(b), Mr. Jones is a resident of the District of Columbia.

Parties

10. The Plaintiff, Terry Jones, is a 39-year-old District of Columbia resident who was convicted pursuant to the D.C. Code and is a prisoner in the custody of the BOP. Mr. Jones is currently incarcerated in FCI Petersburg in Petersburg, Virginia.

11. The Defendant United States of America is a sovereign entity named herein pursuant to the FTCA.

Exhaustion of Administrative Remedies

12. Pursuant to 28 U.S.C. § 2675, Mr. Jones exhausted his administrative remedies by presenting to the BOP four administrative claims (Standard Form 95) based upon the same facts underlying this action on June 21, 2009. The North Central Regional Office of the BOP apparently consolidated at least two of the claims prior to forwarding one administrative remedy claim to the Western Regional Office and two claims to the Mid-Atlantic Regional Office. The BOP's Western Regional Office denied one of these claims by a letter dated August 31, 2010. Through counsel, Mr. Jones filed a reconsideration letter with the Western Regional Office on February 25, 2011, pursuant to 28 C.F.R. 14.9, and that request was denied on June 15, 2011. The Mid-Atlantic Regional Office of the BOP denied Mr. Jones's administrative complaint on May 12, 2011.

Notice and Certifications

13. Pursuant to W. Va. Code § 55-7B-6 (2010), on June 11, 2011 Mr. Jones served on the Health Services Administrator of USP Hazelton, by certified mail, return receipt requested, a notice of claim and a screening certificate of merit related to the claims in Count II (below).

14. Pursuant to Ariz. Rev. Stat. § 12-2603, Mr. Jones files and serves with this First Amended Complaint a certificate that expert testimony is necessary to prove the claim in Count III (below), attached as Exhibit A to this First Amended Complaint.

Factual Background

Events at USP Hazelton, WV, December 20, 2007 through November 4, 2008 precipitate Mr. Jones's injuries

15. Mr. Jones is incarcerated by order of the D.C. Superior Court for an offense under the D.C. Code. In 2001, by passage of the National Capital Revitalization and Government Self Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 712-87 (1997), the D.C. prison

complex in Lorton, Virginia was closed and all inmates were transferred to the authority of the BOP, which is authorized to house D.C. Code offenders in any facility in the country.

16. In or around December 2007, Mr. Jones was housed at USP Hazleton, in Bruceton Mills, West Virginia.

17. At that time, Mr. D. LeMaster was the Unit Manager for Mr. Jones's housing unit, the B-2 unit. The Unit Manager is the administrative head of the general unit and oversees all unit programs and activities. He is a department head at the institution and has a close working relationship with other departments and personnel.

18. On information and belief, inmate Donte Evans, from Baltimore, Maryland, was housed on the B-2 unit for all or a portion of 2007.

19. On information and belief, Evans had been removed from the B-2 Unit for a period of disciplinary segregation some time prior to December 20, 2007. During his absence from the unit, Mr. Evans's tennis shoes went missing.

20. On or about December 20, 2007, Mr. Evans returned to the unit and told an inmate from Washington, D.C. that Evans would kill whoever had taken his shoes. During the day, there was a lot of talk back and forth between D.C. and Baltimore inmates because Evans suspected it was a D.C. inmate who took his shoes.

21. On or about the afternoon of December 20, 2007, Evans left the unit during a scheduled move time. Inmates are allowed to go from one area to another in the facility only at certain scheduled times.

22. Upon information and belief, the final scheduled move before the afternoon count is from 3:30 p.m. to 3:45 p.m. At all other times, inmates are not permitted in unauthorized areas

such as hallways, and inmates found in the hallway outside of a scheduled move can be sent to the Lieutenant's office to face discipline.

23. On or about December 20, 2007, Mr. Jones was in the B-2 housing unit awaiting the 4:00 p.m. count. Count is an activity conducted several times per day in which BOP employees confirm the whereabouts of all inmates and ensure that all inmates in the facility are present and accounted for. During count, inmates are required to be in their assigned housing unit. Upon information and belief, the 10:00 a.m. and 4:00 p.m. counts are mandatory stand-up counts where the inmate is required to stand next to his bed to be observed and counted.

24. After the 4:00 p.m. count had been called by the officer on duty in unit B-2, and the officer had begun to close cell doors on the lower tier, inmate Evans returned to the B-2 unit and rang the doorbell. Mr. LeMaster let Evans in the door.

25. Immediately thereafter, prior to the door closing, Evans motioned to two inmates waiting outside the door to enter and called to them, "Come on." As the two inmates entered, Mr. LeMaster yelled out to the block, "They've got knives," and he ran and hid from the armed inmates, slipping and falling as he ran.

26. Upon information and belief, pursuant to BOP policy and protocol, the two inmates who entered the B-2 unit with Evans were not housed in the B-2 unit and were not authorized to be in the B-2 unit at any time. Mr. LeMaster violated BOP policy by permitting inmate movement at an unauthorized time, and by unlocking the door to the unit and admitting Evans late as well as admitting the inmates who did not live in the B-2 unit.

27. Upon information and belief, Mr. LeMaster further violated BOP policy and protocol by opening the unit door during count, even for an inmate who lived in the unit.

28. Upon information and belief, Mr. LeMaster and/or other unknown officers further violated BOP policy and protocol by failing to stop inmates who did not live in the unit while they were in the hallway after count had been called and before they could access the unit. Instead, Mr. LeMaster and/or other officers should taken immediate disciplinary action against inmates out of place during the count. Movement during count is prohibited. Policy dictates that staff will take disciplinary action if an inmate is not in his assigned area during a count. Disciplinary action will also be taken against an inmate for leaving an assigned area before the count has cleared or for interfering with the count process.

29. Upon entry into the unit, the three inmates produced knives and began attacking inmates in Mr. Jones's housing unit.

30. Unit Manager Lee LeMaster ran and hid from the intruders—failing to abide by the employee standards requiring him to respond immediately and effectively to an emergency situation, and failing to protect the unit from the armed inmates.

31. A melee began on the tier. Prior to Evans and the intruders' entry into the unit, only a few cell doors had been locked, meaning most of the inmates could enter and exit cells at will in B-2. One of the armed inmates began chasing Mr. Jones, who was not locked into his cell, in an effort to stab him.

32. While running from the armed inmate, Mr. Jones slipped on a pool of blood from another injured inmate. Mr. Jones fell, hitting his neck and back on a metal stairwell and injuring his left knee. Mr. Jones was not stabbed by the inmate chasing him.

33. After the fall, Mr. Jones was taken by an officer to the shower area to be placed out of the way and for protection. He was not offered medical attention.

34. On or after December 20, 2007, Mr. Jones began feeling numbness, tingling, and burning sensations in his right hand. Prior to his fall, Mr. Jones had never experienced these symptoms.

35. On or about December 26, 2007, Mr. Jones went to the prison's Health Services center for an unscheduled appointment due to back pain as well as the numbness, tingling, and burning in his hand, and was examined by Richard Dennison, RN. Nurse Dennison indicated that he could not find any abnormalities or injuries which were causing Mr. Jones's symptoms, instead attributing the pain to a possible pinched nerve from an "old back injury." His medical treatment/advice was to have Mr. Jones "stop sit-ups" and follow up if the pain continued.

36. Mr. Jones did not have a prior back injury and did not indicate such to Nurse Dennison. Instead, Mr. Jones described the fall during the disturbance on the unit six days earlier.

37. Mr. Jones continued to feel back pain, numbness and increasing pain in his hands, arms, and legs. Over the course of approximately the next fifteen (15) weeks, Mr. Jones continued to make multiple formal and informal requests to prison officials and prison medical staff, including submitting Inmate Request to Staff forms and speaking to the Warden and the Health Services Administrator in the main dining hall (called "Main Line"), for further medical testing and treatment.

38. On or about March 7, 2008, Mr. Jones was seen by Physician's Assistant ("PA") Patricia Corbin. She noted his complaint of a "pinched nerve" in his back, and "nerve pain in R[ight] arm with tingling in 3-5th fingers," but no follow-up or treatment was ordered for his back and extremity pain. Instead, PA Corbin prescribed medication and follow-up exclusively related to Mr. Jones's hypertension.

39. On or about March 23, 2008, Mr. Jones was seen in an unscheduled appointment by an unidentified Medical Doctor where he complained of "weakness, shortness of breath, back pain," and the doctor noted "There was no assault." Rather than treating him for his complaints, or noting in his medical chart his health conditions, the doctor accused Mr. Jones of "possible narcotic ingestion," and subjected him to a dry cell for observation. He received no treatment for his back pain, weakness, or shortness of breath; instead, he was again treated only for high blood pressure.

40. On or about April 7, 2008, Mr. Jones was again seen by PA Corbin for complaints of "pain in R[ight] arm and L[eft] leg." The assessment in the medical chart was "L[eft] sciatica" and "[R] arm pain/paraesthesea?" In this encounter, she refused a request by Mr. Jones for an MRI, writing in the medical record, "Pt. wanting MRI- I told him no." Instead of an MRI, PA Corbin ordered plain film x-rays. She also prescribed fifteen (15) days of Naproxen, a pain reliever and anti-inflammatory medication.

41. On or about April 9, 2008, Mr. Jones's x-rays were taken. The results showed "degenerative joint disease/disc disease."

42. Mr. Jones was not provided a follow-up appointment to discuss the results of the plain film x-rays, nor was he given any treatment for his degenerative joint disease/disc disease.

43. Over the course of approximately the next twenty-nine (29) weeks, Mr. Jones continued to make multiple formal and informal requests for further medical testing and treatment, including submitting Administrative Remedy Requests, Inmate Request to Staff forms, and speaking to the Warden and the Health Services Administrator in Main Line.

44. In addition to his requests, Mr. Jones sent a certified letter dated June 5, 2008 to Dr. Velasquez, the Acting Clinical Director at USP Hazelton, in which he described his

continuing back and knee pain to be "so severe that I cannot sit, lie down, or move about in any normal fashion." He did not receive a response to this request and no medical appointments were scheduled for him on the basis of this letter.

45. On or about July 10, 2008, Mr. Jones sought unscheduled urgent care due to pain in his left leg and back and was seen by M. Azumah, a Mid-Level Practitioner ("MLP"). He was prescribed a ten-day (10-day) course of ibuprofen, and was told to increase his fluid intake. No other treatment was prescribed or recommended. No mention was made to Mr. Jones or in the medical record of the degenerative joint and disc disease.

46. Mr. Jones continued to experience numbness, pain, muscle spasms, and muscle weakness in his hands, arms, legs, back, and neck. He also developed difficulty walking.

47. On or about October 31, 2008, Mr. Jones submitted a Request for Administrative Remedy to a staff member at Main Line and received a written response that he would be seeing Dr. Alacron on November 3, 2008.

48. On or about November 3, 2008, Mr. Jones had a medical appointment with Dr. Irenio Alacron, MD, but was again only treated for his high blood pressure, even though his primary complaint was his back pain and loss of movement in his legs and feet. Dr. Alacron ordered an orthopedic consult for November 4, 2008, "At inmate's request."

49. From December 26, 2007 through November 4, 2008, Mr. Jones never saw an orthopedic specialist at USP Hazelton. Though his appointment was scheduled for November 4, that very day, on November 4, 2008, Mr. Jones was transferred from USP Hazleton. Upon information and belief, inmates are not told in advance of their travel the date or destination of a transfer; however, BOP employees would have known in advance that he was going to be transferred.

50. In or about later 2007 or 2008, Mr. Jones was talked to and was observed by Warden Joe Driver who told him, "What, are you an old man or something?" and expressed concern for his problem, but did not follow up.

51. From December 26, 2007 through November 4, 2008, Mr. Jones never had an MRI to evaluate the source of his back pain, knee pain, weakness, loss of movement, and loss of feeling in his extremities.

52. Between December 26, 2007 and November 4, 2008, Mr. Jones suffered daily and deterioration of his ability to write, hold objects, stand for long periods, sit for long periods, or even lie down for extended periods. He was unable to sleep at night nearly every night. He was cut off from written communication from his family and friends due to his inability to hold a pen properly.

Mr. Jones's medical condition is worsened by transfer to USP Tucson, AZ

53. Upon information and belief, the BOP was aware of Mr. Jones's medical condition prior to his transfer because BOP requires inmates to inform them in writing of any known medical conditions.

54. On or about November 4, 2008, Mr. Jones was transported by airplane from USP Hazleton to FTC Oklahoma City in Oklahoma City, Oklahoma. The duration of this trip was approximately two (2) hours, during which Mr. Jones was held in ambulatory restraints linking his hands and feet to a lock at the belly. He required assistance in walking onto and off of the plane by U.S. Marshals because of his extreme pain and weakness.

55. Upon arrival, he was screened at the FTC Oklahoma City, and indicated on his Health Intake Assessment/History, "currently suffer[ing] from any painful condition" of "Back/Legs."

56. BOP staff had a duty to ensure Mr. Jones's health and safety during transfer by accommodating his medical needs.

57. On or about November 7, 2008, Mr. Jones was transported from FTC Oklahoma City to USP Tucson by bus.

58. Upon information and belief, the bus ride lasted approximately seventeen (17) hours without a break. During the ride, Mr. Jones was again chained in ambulatory restraints by the hands and feet, and was unable to stand or move.

59. Over the course of the bus ride, Mr. Jones experienced increasing pain and muscle stiffness due to the lengthy nature of the ride, his uncomfortable positioning on the bus, and his inability to move, stand, or place himself in a new position.

60. When the bus arrived at USP Tucson, Mr. Jones was unable to walk off the bus and had to be supported under the arms by BOP personnel.

Events at USP Tucson, AZ, November 7, 2008 through March 11, 2009 fail to alleviate Mr. Jones's injuries

61. On or about November 7, 2008, upon his arrival at USP Tucson, Mr. Jones asked for immediate medical attention, including a wheelchair. His request for a wheelchair was denied.

62. USP Tucson conducted routine medical intake of Mr. Jones upon his arrival at USP Tucson on or about November 7, 2008, but no treatment was provided nor even a note taken regarding his back pain, extremity pain, loss of movement, or request for a wheelchair.

63. Upon information and believe all medical records of inmates are transferred with the inmates, and USP Tucson medical staff knew or should have known from the time of intake on that Mr. Jones had been scheduled for an orthopedic consultation immediately prior to his transfer to USP Tucson.

64. During the Admission and Orientation presentation, Mr. Jones was standing with the support of another inmate, when he tried to speak with Assistant Warden Hallenback about his medical condition. Rather than listen to his concerns, she told him, "It looks like you're walking fine to me." She made no further inquiry into his condition and provided no referral to the Health Services Division.

65. Over the course of approximately eighteen (18) weeks following his arrival at USP Tucson, Mr. Jones continued to make multiple formal and informal requests for further medical testing and treatment.

66. Mr. Jones continued to experience worsening numbness, pain, muscle spasms, and muscle atrophy in his hands, arms, legs, back, and neck. Mr. Jones also experienced further difficulty in walking.

67. On or about November 24, 2008, Mr. Jones reported to Health Services for unscheduled urgent care treatment and saw Dr. Merlyn Smith, D.O. He complained of left sciatica, left knee pain, and right arm numbness and weakness. He also requested a wheelchair. Dr. Smith denied his request for a wheelchair. Dr. Smith requested an orthopedic consultation for Mr. Jones for February 24, 2009 listing the reason for the consultation as "inmate request."

68. Mr. Jones never had the February 24, 2009 orthopedic consultation—even though it had been approved by the facility's Utilization Committee on December 17, 2008. Records indicate that Utilization Committee later disapproved the appointment.

69. Upon information and belief, Mr. Jones was never provided with the Utilization Committee's December 17, 2008 decision and was unaware that Dr. Smith had requested the appointment be set three (3) months after his appointment with her.

70. On or about December 14, 2008, Mr. Jones saw Guillermo Dias, a MLP in Health Services, for his back pain. Mr. Jones was treated with temporary pain medication, but no other follow-up was ordered. In this appointment, MLP Diaz sympathized with Mr. Jones and told him that he badly needed an operation, but that MLP Diaz was not able to order one. Mr. Jones was sent back to his dormitory.

71. On or about December 15, 2008, Mr. Jones was treated in Health Services for his hypertension only.

72. On or about February 12, 2009, Mr. Jones saw Registered Nurse, Jamie Criswell, in Health Services, with a complaint of numbness in his left arm, but Mr. Jones was again only treated for hypertension.

73. At an unspecified time between December 2008 and March 11, 2009, Mr. Jones spoke to Ms. Hallenback, the Assistant Warden in charge of medical services, during Main Line. Ms. Hallenback was aware of his condition. Mr. Jones told her that his condition was getting worse, that he could not walk and his hands and legs were burning and numb, and that he could not feel them. Ms. Hallenback said, "I don't think your injuries are bad enough to warrant spending tax payers' money on." She continued, "If you can't use [your hands] cut them off since you don't need them." She smiled and walked away from Mr. Jones.

74. On or about March 11, 2009, while on the prison recreation yard, Mr. Jones felt a shooting pain through his body. He fell to the ground and was unable to move.

75. On or about March 11, 2009, after he fell, Mr. Jones was examined in Health Services by PA Anthony Walker. PA Walker ordered that Mr. Jones "transfer to a local hospital."

76. On or about March 11, 2009, Mr. Jones was transported to St. Mary's Hospital where he underwent testing and consultations, including an MRI and an orthopedic consultation.

The testing revealed that Mr. Jones suffered from extensive spinal damage, including severe spinal stenosis, degeneration of the spinal discs, and disk protrusion. Dr. Marco N. Marsella, M.D. gave his impression on March 12, 2009 as "evidence of spinal cord signal changes in the T2 MRI sequences and corresponding severe cervical myelopathy with possibly irreversible spinal cord damage."

77. From November 7, 2008 through March 11, 2009, Mr. Jones never received an orthopedic consultation or an MRI for his extensive back injury while housed at USP Tucson.

78. Between November 7, 2008 and March 11, 2009, Mr. Jones suffered daily and experienced deterioration of his ability to write, hold objects, stand for long periods, sit for long periods, or even lie down for extended periods. He was unable to sleep at night nearly every night. He was cut off from written communication from his family and friends due to his inability to hold a pen properly.

79. On or about March 13, 2009, Mr. Jones underwent a cervical laminectomy and decompression surgery. The surgery was expected to prevent further worsening of Mr. Jones's spinal injuries, but the damage already done, due to the length of time between onset of the injury and the surgery, and was irreversible.

80. Mr. Jones continues to experience pain, numbness, stiffness, and muscle atrophy throughout his body, as well as limited mobility. He uses a walker to stabilize himself and to walk. He also suffers mental repercussions from enduring more than fourteen months of these symptoms without any regard for his worsening condition.

81. Mr. Jones will be unable to work in physical labor positions as he has in the past and is severely limited in everyday life activities such as gripping objects, walking, standing or sitting for long periods of time.

Count I

Negligence (Failure to Protect)

82. Mr. Jones realleges and incorporates by reference the allegations of paragraphs 1 through 80 above.

83. Defendant United States of America is responsible for the oversight of its agents, servants, and/or employees, who include officials and staff at federal correctional institutions. Pursuant to the Federal Tort Claims Act, the United States is liable for damages caused by the negligent or wrongful acts of its agents, servants, and/or employees acting within the scope of their employment, under circumstances where the United States, if a private person, would be liable in accordance with the laws of the state where the negligent or wrongful acts occurred.

84. Prison officials and staff have a duty to protect inmates from harm caused by other inmates. The officials and staff of the USP Hazleton owed this duty to Mr. Jones.

85. Prison staff and officials knew or should have known that Mr. Jones faced a risk to his health and safety from attack by other inmates.

86. Moreover, prison staff and officials knew or should have known that allowing inmates into Mr. Jones's housing unit when they were not authorized to be there created an excessive risk to Mr. Jones's health and safety.

87. Prison officials breached their duty to protect Mr. Jones from harm by failing to take any actions to protect him from these risks to his safety.

88. As a result of these actions and inactions by prison staff and officials, Mr. Jones suffered serious personal injuries, pain and suffering, loss of life's pleasures, and emotional distress.

Count II

Medical Malpractice (USP Hazelton, West Virginia)

89. Mr. Jones realleges and incorporates by reference the allegations of paragraphs 1 through 87 above.

90. During the course of Mr. Jones's incarceration at USP Hazleton, Mr. Jones was at all relevant times in the custody and under the exclusive care and medical management of agents, servants, and/or employees of the United States of America.

91. These agents, servants, and/or employees of the United States of America owed Mr. Jones a duty of ordinary diligence in providing medical care and treatment.

92. These agents, servants, and employees of the United States of America breached this duty by negligently, carelessly, and unskillfully rendering medical care and services to Mr. Jones, by failing to diagnose and identify Mr. Jones's injuries, by failing to treat Mr. Jones's injuries, by ignoring Mr. Jones's repeated requests for testing and treatment, and by placing Mr. Jones in conditions which exacerbated and worsened his injuries.

93. As a result of this breach of duty to provide medical care and treatment, Mr. Jones was deprived of the possibility of early diagnosis and treatment of his injuries and suffered serious personal injuries, worsening of injuries, pain and suffering, loss of life's pleasures, and emotional distress.

Count III

Medical Malpractice (USP Tucson, Arizona)

94. Mr. Jones realleges and incorporates by reference the allegations of paragraphs 1 through 92 above.

95. During the course of Mr. Jones's incarceration at USP Tucson, Mr. Jones was at all relevant times in the custody and under the exclusive care and medical management of agents, servants, and/or employees of the United States of America.

96. These agents, servants, and/or employees of the United States of America owed Mr. Jones's a duty of ordinary diligence in providing medical care and treatment.

97. These agents, servants, and employees of the United States of America breached this duty by negligently, carelessly, and unskillfully rendering medical care and services to Mr. Jones, by failing to diagnose and identify Mr. Jones's injuries, by failing to treat Mr. Jones's injuries, by ignoring Mr. Jones's repeated requests for testing and treatment, and by placing Mr. Jones in conditions which exacerbated and worsened his injuries.

98. As a result of this breach of duty to provide medical care and treatment, Mr. Jones was deprived of the possibility of early diagnosis and treatment of his injuries and suffered serious personal injuries, worsening of injuries, pain and suffering, loss of life's pleasures, and emotional distress.

Count IV

Negligence (Mistreatment During Transport from West Virginia to Arizona)

99. Mr. Jones realleges and incorporates by reference the allegations of paragraphs 1-97 above.

100. During his November 4 - 7, 2008 transfer from USP Hazelton to USP Tucson, Mr. Jones was at all relevant times in the custody and under the exclusive care of agents, servants, and/or employees of the United States of America.

101. These agents, servants, and/or employees of the United States of America owed Mr. Jones a duty of ordinary diligence in providing for his basic human needs, care and treatment during the transfer and were aware of his particular medical needs.

102. These agents, servants, and employees of the United States of America breached this duty by negligently, carelessly, and unskillfully rendering care and services to Mr. Jones, by failing to accommodate his pain during transfer and by placing Mr. Jones's in conditions which exacerbated and worsened his injuries.

103. As a result of this breach of duty to provide for his basic human needs, care, and treatment during transfer, Mr. Jones's injuries were exacerbated, and he suffered serious personal injuries, worsening of injuries, pain and suffering, loss of life's pleasures, and emotional distress.

Request for Relief

104. WHEREFORE, Mr. Jones requests that this Honorable Court grant him judgment against the United States of America and relief in the form of:

a. compensatory damages;

b. economic damages;

c. costs of this suit, including attorneys' fees to the extent allowed by law; and

d. such other and further relief as this Honorable Court deems just and proper.

Dated: June 27, 2011

Respectfully submitted,



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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 27th day of June, 2011, the foregoing *First Amended Complaint* has been filed by e-mail to the Court (dcd_cmecf@dcd.uscourts.gov) and served by first-class mail on attorneys for Defendant:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TERRY JONES Plaintiff **v.** **UNITED STATES OF AMERICA** Defendant	**Case No. 1:11-cv-01158 (ESH)**

CERTIFICATE REGARDING EXPERT TESTIMONY

Plaintiff Terry Jones, through undersigned counsel, hereby certifies that expert opinion testimony in necessary to prove the standard of care or liability for Count III of the Complaint, pursuant to Ariz. Rev. Stat. § 12-2603.

Dated: June 27, 2011

Respectfully submitted,



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Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR HE NORTHERN DISTRICT OF WEST VIRGINIA
Elkins

TERRY JONES,

Plaintiff,

v.

Civil Action No. 2:11-CV-94
Judge Bailey

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND MEMORANDUM ORDER

This is an action brought by plaintiff Terry Jones pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680. The First Amended Complaint ("Complaint") [Doc. 2], filed with the Court on June 27, 2011, stated four causes of action. Count I, styled as Negligence (Failure to Protect), alleged that staff at USP Hazelton in Bruceton Mills, West Virginia negligently failed to protect plaintiff from harm which occurred while he was fleeing an inmate fight within his housing unit. Counts II and III alleged medical malpractice against health care providers at Bureau of Prisons ("BOP") institutions USP Hazelton and USP Tucson, respectively. Count IV alleged negligence and mistreatment of Plaintiff by BOP staff during Jones's transport from USP Hazelton to USP Tucson.

On July 31, 2013, the parties jointly entered a stipulation dismissing Count IV from the case [Doc. 123].

On January 14–15, 2014, the parties appeared before this court for a bench trial as to the three remaining counts. The plaintiff was represented by Andrew R. Sommer, Brian M. Serafin, Eric M. Goldstein, Kimberly L. Paschall, and William D. Wilmoth. The Government was represented by Erin K. Reisenweber, Alan G. McGonigal, and Diana Jacobs Lee. This Court received testimony from the plaintiff, Dr. Gregory Przybylski, Dr. Gregory Rosencrance, Nancy Bond, Robert Jackson (by video), Dr. Jack Wilberger, Dr. Inerio Alarcon (by video), Patricia Corbin, Anndreea Shorter, William Holzapfel, Jr., Jason Shaw, Erik Smith, and Hiromichi Kobayashi, and reviewed the deposition testimony of Michael Lynch, David LeMaster, Joseph Micieli, and Dr. Rasim Oz.

Having heard and reviewed the testimony and evidence presented by the parties and having reviewed the briefing submitted by the parties, this Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. As of December 2007, Mr. Jones was incarcerated at USP Hazelton in Bruceton Mills, West Virginia. Mr. Jones was assigned to live in the B-2 housing unit.

2. As of December 2007, Donte Evans, an inmate from Baltimore, Maryland, was incarcerated at USP Hazelton in Bruceton Mills, West Virginia. Evans was assigned to live in the B-2 housing unit.

3. During December 2007, Donte Evans was placed in USP Hazelton's Special Housing Unit (solitary confinement, the "SHU") for possession of a knife. Evans was released from the SHU on December 20, 2007, and was returned to the general population in the B-2 housing unit.

4. While Evans was in the SHU, his shoes went missing. Although Evans

suspected that a Washington, D.C. inmate had stolen them, it was later discovered that BOP staff had misplaced them.

5. After accusing several D.C. inmates of taking his shoes, Evans recruited two other Baltimore inmates and orchestrated an attack against D.C. inmates in the B-2 housing unit, using homemade weapons.

6. The attack occurred as the inmates housed in B-2 unit were preparing for the 4:00 p.m. "stand-up count," a daily, prison-wide procedure during which every inmate is required to return to his housing unit, enter his cell, and stand by his bed so that USP Hazelton employees can account for the whereabouts of all inmates in the facility.

7. At USP Hazelton, preparation for the 4:00 p.m. count begins at approximately 3:50 p.m. At that time, the officer on duty in each housing unit will verbally announce that it is time for count; the inmates then make their way into their cells. The officer on duty then manually locks all inmates into their cells, a process that takes approximately ten to fifteen minutes. After all cell doors are locked, "the official stand-up count" begins.

8. While it is rare for the BOP to receive warning of an attack, the BOP received such a warning in this case.

9. On December 21, 2007, at approximately 3:40 p.m., Anndreea Shorter, Unit Secretary for Hazelton's "Bravo" (B-1 and B-2) housing units, was in her office off of the secure hallway dividing those two units. As she was posting callouts (inmate appointments), Shorter heard an unidentified inmate knocking at the door between the hallway and the B-1 unit. Shorter first posted callouts in the B-2 unit, and when she returned to the hallway, the inmate was gone.

10. The inmate had, however, left a note, which Shorter read at 3:41 p.m. The

note stated:

> Ms. Shorter, give this to SIS or the LT[1] ASAP. Donte Evans in B2 that just got caught with a knife has another one. He is about to start a DC Baltimore beef so you need to get him off the compound ASAP. He is beefing with a dude in his block. They tried to stop him but he don't listen to nobody.

11. Under the BOP Standards of Employee Conduct, "it is mandatory that employees respond immediately and effectively to all emergency situations." As Shorter admitted, BOP employees do not have discretion to ignore this provision. This mandate is grounded in the reality that "failure to respond to an emergency situation may jeopardize the security of the institution, as well as the lives of staff or inmates[.]"

12. As Shorter also admitted, an inmate with a knife is an emergency situation, "something [BOP staff] would act on right away." The warning note "definitely" should have caused concern for the safety and security of the institution.

13. Shorter testified that, after reading the note, she first attempted unsuccessfully to contact the SIS office by phone. She testified that she then reached out by radio, seeking SIS's phone extension. Upon receiving that information, Shorter testified that she phoned SIS and read the warning note word-for-word to an unidentified individual whom she believed was with the SIS department.

14. Shorter did not use the radio because the transmission would be overheard by inmates in proximity to guards.

15. Shorter does not recall who answered the phone. None of the staff members working in, or with access to, the SIS office at the time of Shorter's alleged call had any

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[1] Special Investigative Services, or SIS, acts as the prison's internal affairs, responsible for, among other things, investigating offenses committed by inmates. LT refers to Lieutenant.

recollection or knowledge of Shorter calling SIS about the note. Nor does the official BOP report regarding the attack mention Shorter's alleged call to the SIS offices, or that she ever told anyone about the warning note. Even Shorter's own contemporaneous statement regarding the incident fails to mention this alleged call to SIS, or even to describe the note.

16. According to Shorter, she was instructed to hand-carry the note to the SIS office, even though that office was an eighth of a mile away, and the walk would have taken about 15 minutes at that time of day.

17. At trial, two SIS staff members testified that their response to having been read the warning note would have been immediately to call the Lieutenant on shift and/or have Evans separated from the other inmates for questioning. No one in SIS took any such action.

18. Members of the SIS staff testified that they would have wanted to see the note in person and that they did not know whether the note was credible.

19. The receipt of "drop notes" is not uncommon, and the notes are sometimes used to cause unwarranted trouble for other inmates or to provide a distraction or misdirection for other nefarious activities.

20. SIS officers stated that they would have pulled Evans in for questioning. With the 4:00 count imminent and not knowing exactly where Evans was at that point in time, however, the officers stated that they would have waited until Evans was in his cell for count in order to bring him in for questioning.

21. To get to the SIS office, Shorter had to walk through the B-1 housing unit. While she was doing so, an inmate told her that it was "too late," which she understood to mean that the attack was starting "now." As she continued to walk away from the B-2 unit

and toward the SIS offices, the body alarm sounded, indicating that the attack was underway.

22. Shorter admitted that the actions she took were not "effective" in preventing the violence. Nor were those of the identified person who took her call.

23. While Shorter was carrying the warning note to the SIS office, Evans rang the buzzer at the B-2 unit door for someone to unlock the door. Unit Manager David LeMaster answered the door.

24. LeMaster was not aware of impending danger, and admitted that "[i]f I kn[e]w Donte Evans was going to assault anybody, I would have notified our operations lieutenant and/or the captain, if necessary. And then I would've—if I kn[e]w Donte Evans was going to do what he did, I would never have opened up the door."

25. At 3:52 p.m., when LeMaster unlocked and opened the door, Evans and two other Baltimore inmates pushed past him into B-2, and began stabbing other inmates—particularly those whom Evans identified as being from Washington, D.C. It was "chaos."

26. When the attack began, Jones was standing on the top tier (second level) of B-2. Jones saw Evans and two other inmates enter the unit with knives. Evans ran up one of the two sets of stairs to the top tier and headed toward Jones, who ran from him.

27. As Jones reached a set of stairs leading back down to the main level, he slipped and fell on blood from one of the inmates who had been stabbed. Jones struck his neck and back on the metal staircase.

28. When a patient complains of pain and neurological symptoms such as numbness, tingling, weakness, and gait and limb impairment, as Jones did here, the

standard of care requires a complete medical history and a full neurological exam:

> [Y]ou have to get an accurate history, a thorough history. You listen to what the patient tells you, but then you have to ask a sequence of questions, a series of questions, to try to determine what it is that's going on in your mind so that you have a full understanding, and then you have to obtain a physical examination. It needs to be a thorough examination, but it also can be focused on the areas in question. If you're complaining of right arm pain, it ought to focus on the right arm, both the neurologic piece, as well as the musculoskeletal. If it's focused on the low back and lower extremity, it ought to focus there.

29. Further, when a patient presents with pain and neurological symptoms, the standard of care allows for only 8–12 weeks of "conservative management" of the condition before imaging studies, such as an MRI, are required. The standard of care requires further evaluation of symptoms after an 8–12 week period of conservative management. The standard of care is to treat conservatively, then refer for an MRI, as opposed to an X-ray, for persistent pain that doesn't resolve despite conservative measures such as physical therapy and medication.

30. If a physician reasonably refers a patient for a consult with a specialist, the standard of care requires follow-through to ensure that the patient receives that consult. Dr. Wilberger, the Government's own expert, admitted that "[i]f there wasn't follow-through [on a consult referral], I would be very concerned about that[.]" Tr. 428:1-2.[2]

31. Before December 21, 2007, Jones engaged in normal physical activities, including walking, running, using the gym, playing sports such as basketball, and taking his son to the park. Jones's May 2, 2006 USP Hazelton intake screening noted no pain or

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[2] At trial, Dr. Wilberger admitted that it was his understanding that an orthopedic surgeon actually saw Jones as a result of BOP's recommendation. The record is undisputed that Dr. Wilberger's understanding was wrong.

disabilities, though Jones did have hypertension (high blood pressure).

32. When he fell on December 21, 2007, Jones likely had preexisting cervical spondylosis with stenosis.

33. Cervical spondylosis involves narrowing of the spinal canal and normally progresses slowly over time. It may remain asymptomatic, but can turn into cervical myelopathy as a proximate result of a physically traumatic event—such as the fall that Jones suffered on December 21, 2007.

34. Cervical myelopathy is a condition where the spinal canal narrows to the point of compressing the spinal cord and damaging the interior nerves. It can cause symptoms such as pain, numbness, tingling sensation in the extremities, weakness, and gait and limb impairment.

35. Cervical myelopathy may not present immediately when someone with stenosis, such as Jones, suffers a traumatic fall; instead, the swelling that causes myelopathy may take days to manifest, similar to why, when you have a great workout, you feel okay that day, but maybe the next day you start to hurt. This delay is not atypical and a five-day delay before symptoms manifest is not unreasonable.

36. Due to the chronic nature of the condition, it is common for a patient suffering from cervical myelopathy, such as Jones, not to complain about his neurological symptoms at each clinical encounter.

37. It is quite common for the medical record of a patient suffering from progressive myelopathic symptoms, such as Jones, to reflect gaps between periods of complaints. This is because the progression of myelopathy related to spondylosis is not typically rapid, and typically occurs over months to a year or years.

38. As Dr. Przybylski testified, to a reasonable degree of medical certainty, Jones's fall on December 21, 2007, triggered his cervical myelopathy.

39. On December 26, 2007—five days after he fell and while the prison was on lockdown—Jones triggered an emergency alarm in his cell and ultimately presented to BOP medical services complaining of numbness and burning in the third and fourth fingers of his right hand.

40. Numbness and burning in the third and fourth fingers of the right hand can indicate a spinal cord problem.

41. At the time of the December 26, 2007 visit, the standard of care required BOP medical staff to obtain a full medical history, including asking questions such as "when did the symptoms start, how have they evolved, are other areas of the body affected, what makes those symptoms worse or better." The standard of care also required a neurologic examination referable to Jones's neurological symptoms. That examination would include testing the muscle strength in the upper limbs as well as the lower limbs, looking for muscular atrophy, examining the sensation of the upper limbs as well as lower limbs, watching the gait or ambulation of the patient, and checking the patient's dexterity as part of what the standard of care requires in evaluating an acute neurologic symptom.

42. BOP medical staff's treatment of Jones fell below the standard of care by obtaining only a very brief history, and by conducting a substandard examination, resulting in a diagnosis of a pinched nerve and an instruction to stop doing sit-ups.

43. On March 7, 2008, Jones complained of a pinched nerve, nerve pain in his right arm, and tingling in his third through fifth fingers. These complaints represented a progression from what was described in the December 26th, 2007 visit. In other words,

Jones's symptoms were getting worse.

44. The involvement of the fifth finger on the right hand represents a broader distribution of symptoms, making a spinal cord problem, as opposed to a nerve problem, more likely. Moreover, the nerve supplying the fifth digit is very rarely symptomatic in people, so involvement of the fifth digit at this point, viewed alongside Jones's December 26 complaints, confirmed that he had a spinal cord problem.

45. By Jones's March 7, 2008 visit to BOP health services—nearly three months after his initial complaint—the standard of care required not only a thorough history and physical and neurologic exam, but also an MRI.

46. No such MRI or similar diagnostic test was obtained, however, and the history and examination performed were substandard, falling below the standard of care. Instead of focusing on Jones's neurological symptoms, Physician Assistant Corbin chose to focus on his hypertension.[3]

47. The care during the March 7, 2008 visit fell below the standard of care because there was really no assessment of Jones's ongoing and progressive neurologic complaint. While treating hypertension is appropriate, it was inappropriate and fell below the standard of care not to address the other complaint, particularly given the fact that it then had been present for more than two months and was progressive.

48. On March 24, 2008, Jones presented to BOP medical staff complaining of back pain and weakness, which also can be symptomatic of a spinal injury. Jones was given pain and hypertension medication, but the record of this visit does not reflect any

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[3] Although Jones suffered from hypertension, Drs. Przybylski and Rosencrance testified in no uncertain terms that Jones's neurologic symptoms were unrelated to hypertension.

neurologic testing at all.

49. On April 6, 2008, Jones submitted an administrative request form explaining that his hands, feet, and legs were numb and "lock up every day" and that "the pain is at the extreme." The request form indicated prior complaints to the Warden and requested immediate medical attention.

50. As Dr. Przybylski testified, the complaints in the April 6, 2008 letter showed further progression of Jones's symptoms: "[T]his is the first time that I'm seeing . . . both sides and both upper and lower limbs . . . . And [Jones's] symptoms at this point in time again demonstrate a progression since the previous month and, because multiple limbs are involved, is consistent with a spinal cord problem."

51. On April 7, 2008, Jones was again seen by Corbin. Jones told her he had fallen in the B-2 unit in December, 2007, after which his symptoms "flared." During this visit, Jones complained of pain in his right arm and left leg, and requested an MRI. The record of this visit shows that although Jones demonstrated 5/5 (normal) strength, Corbin believed Jones could be suffering from left sciatica (radiating leg pain) and possible right arm paresthesia (numbness or tingling feeling). Corbin ordered spinal X-rays, establishing her belief Jones was likely suffering from a spinal injury.

52. By the time of this April 7, 2008 visit, the standard of care required a recognition that this was a progressive complaint referable to the cervical spine and spinal cord which needed to be investigated in a prompt way. Corbin knew that Jones had a history of such complaints dating back approximately four months, and knew that this was a progressive problem, as she had seen Jones over a one-month period of time where his symptoms went from one limb (the right arm) to two limbs (the right arm and left leg). The

standard of care required a thorough history to get more details about what else might be involved, a neurologic examination that involved a motor examination, sensory examination, and reflex, gait, and coordination examination, and the appropriate diagnostic studies.

53. By the time of the April 7, 2008 visit, a cervical MRI was necessary. The standard of care requires that imaging studies are done after conservative management for 8–12 weeks. An MRI was indicated, as opposed to an X-ray, for persistent pain that had not resolved despite conservative measures. An MRI would have been required even in the absence of an abnormal full neurologic exam.

54. Plain X-rays are inadequate to evaluate a spinal injury consistent with Jones's symptoms. They simply show you what the structure of the bones are like and what the alignment of the spine is like. An X-ray tells you nothing about the condition of the spinal cord, the nerve roots, or any compression of the spinal cord or nerve roots, which are the likely causes of the symptoms that Jones was describing. The soft tissues of the spine should have been imaged using an MRI or EMG.

55. Corbin's decision to order X-rays, instead of an MRI, fell below the standard of care.

56. The BOP's treatment regarding the X-ray results was also substandard. The X-ray report came back as "negative, except for degenerative disc disease." But in reality, the test was not negative. In fact, it was positive: it diagnosed cervical spondylosis.

57. Following the X-ray, the standard of care required the cervical MRI that should have been done in the first place. The X-ray finding was consistent with cervical spondylosis and should have empowered the health care provider to obtain a higher-level

imaging study [MRI], because the X-ray was one more piece of evidence that showed that there was a compressive problem going on affecting Jones's nervous system. The X-ray report's notation of Jones's degenerative disc disease, coupled with the numbness, tingling and the problems that Jones described, warranted an MRI.

58. Contrary to what the standard of care required, BOP evidently took no action in response to this X-ray, and the record of Jones's visit with Corbin shows the prescription of more medication—a conservative-management measure—now 15 weeks after Jones first presented with these symptoms.

59. On June 5, 2008—23 weeks after he first experienced neurological symptoms—Jones wrote a letter to Dr. Velasquez, Hazelton's Acting Clinical Director of Medical Services. He identified severe pain in his back, numbness in his legs, that he could neither sit nor lie down normally, that he had trouble sleeping due to his pain, and that he had trouble walking.[4] Jones requested an MRI and an appointment with a neurologist.

60. The complaints in the June 5 letter clearly reflected a spinal cord problem that should have been diagnosed by this point in time. Even Dr. Wilberger admitted that these symptoms required further investigation, should not have been ignored, and reflected severe cervical myelopathy. Yet Dr. Velasquez apparently just filed the letter away, and took no action whatsoever.[5]

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[4] Although some of Jones's June 5 complaints were not medically accurate, Dr. Przybylski explained that Jones was doing the best he could to try to describe where he felt things based on what he'd been told.

[5] *See infra* n.6.

61. The June 5 letter triggered a duty to look back at previous records to see what health care providers had evaluated in terms of history and examinations, note what diagnostic studies had been obtained, and then determine whether Jones's requests to be seen by a specialist with knowledge of the nervous system and to obtain an MRI were reasonable.

62. On July 10, 2008, Jones presented to BOP medical staff with lower back and left leg pain, and muscle spasms and tenderness in his back.[6] BOP medical staff saw Jones and noted that his left leg was tight and tender, that he was having back spasms, and that his back was tender.

63. BOP medical staff failed to obtain a proper medical history or diagnostic imaging studies on July 10, 2008, as the standard of care required. Instead, BOP medical staff simply prescribed ibuprofen, thus bringing the conservative management of Jones's spinal condition to 27 weeks.

64. On August 25, 2008, Jones submitted an administrative request form again identifying his back pain, his difficulty walking or moving, and his inability to sleep due to pain. He asked to see a specialist. The record reflects no response to Jones's August 25 request.

65. On October 31, 2008, Jones submitted another administrative request form seeking medical treatment and identifying his medical issues. In response, the BOP

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[6] The July 10, 2008 visit refutes the Government's implication at trial that Jones "never went to health services" between May and September 2008. Not only did Jones write to Hazelton's Acting Clinical Director in June 2008, complaining of an inability to walk and numbness in the hands and legs, Jones did in fact go to health services in July, and submitted requests for medical treatment in August.

scheduled Jones for a doctor's appointment.

66. On November 3, 2008, Jones saw Dr. Inerio Alarcon and told him about the fall in December 2007. Dr. Alarcon noted Jones's decreased range of motion, right shoulder pain and lower back pain running down to Jones's left leg and foot. The record shows that Jones told Dr. Alarcon that he had been experiencing back pain since December 2007. A partial neurologic exam of Jones's cranial nerve was performed, even though this was not the part of the body that Jones was complaining about. Dr. Alarcon also performed a straight-leg test, but testified that this was an "old" test that, "now with technology, the MRI and the CT," physicians "don't do[.]"

67. There is no evidence that Jones's earlier medical records were reviewed, even though the standard of care required such a review.

68. After indicating that Jones suffered from chronic lumbago (lower back pain), Dr. Alarcon prescribed painkillers. After 45 weeks of conservative management of Jones's symptoms, Dr. Alarcon recommended an orthopedic consult.

69. It is undisputed that Jones never received the consult Dr. Alarcon believed was warranted on November 3, 2008.

70. Instead, on November 5, 2008, Jones was transferred to USP Tucson in Arizona.

71. On November 4, 2008, as part of the transfer, USP Hazelton's medical staff prepared a health summary report. The report noted that Jones had lumbago (back pain) and was receiving pain medication. Yet, despite listing some of Jones's upcoming medical appointments, the report did not include any mention of the orthopedic consult, and made no effort to reschedule it.

72. It fell below the standard of care for the BOP to fail to provide Jones with the specialist consult that its medical professional had recommended.

73. If Jones had received timely and proper treatment while at USP Hazelton between December 26, 2007, and November 4, 2008, he likely would have made a full recovery.

74. Jones arrived at USP Tucson on November 7, 2008, and received a health intake screening. BOP medical staff noted that he was taking daily prescription pain medication ("Indocin") for his lumbago and renewed his prescription. The document's notation that "[c]urrent painful condition is denied" is internally inconsistent with its statement that Jones was receiving pain medication. Further, Jones testified—consistent with the renewal of his prescription painkillers—that he told the person handling intake at USP Tucson that he had a spinal injury. The orthopedic consult request is not mentioned and no review of Jones's prior medical files is indicated.

75. Jones was in considerable pain and was deteriorating while at USP Hazelton. Yet early medical examinations at USP Tucson indicate that his spinal condition was still in its earlier stages. Brisk reflexes had not yet fully developed, but they would be noted after his March, 2009 collapse in the recreation yard.

76. On November 14, 2008, Jones complained to BOP staff that he was having trouble walking, and noted that an earlier request for a wheelchair had been denied.

77. On November 24, 2008, Jones presented to BOP medical staff with left sciatica, left knee pain, and right arm numbness and weakness that had existed for about a year. BOP medical staff observed that although Jones had normal reflexes, he exhibited "2/4" muscle-strength weakness in his right upper extremity, and walked with a limp—*i.e.*,

he had an impaired gait. These are symptoms of neurologic injury. Dr. Wilberger admitted as much by describing another patient exhibiting "weak grips," and experienced gait impairment, fatigue, and insomnia as having "significant signs of myelopathy."

78. The standard of care during the November 24, 2008 visit required the BOP to attempt to identify the etiology of Jones's condition by asking questions and reviewing his medical records. It also required a complete neurological examination.

79. The care during the November 24, 2008 visit fell below the standard of care, and the physical and neurologic exam performed at this appointment was incomplete and substandard.

80. At the November 24, 2008 visit, with Jones's condition entering its 47th week, BOP medical staff again recommended referring Jones for a specialist consult, designated as "routine."

81. This referral was not sufficient, as Jones needed to have an imaging study and a fairly immediate referral at that point to a neurologist or a neurosurgeon for a delineation of what was going on—particularly given the long-standing nature of his complaints.

82. Although BOP medical staff recommended that Jones see a specialist, BOP had not even scheduled that consult as of February 27, 2009. In fact, Jones never received this consult. Once again, Jones's treatment fell below the standard of care.

83. On December 14, 2008, Jones presented to BOP medical staff with pain in his back radiating down his left leg, and numbness. A limited musculoskeletal exam revealed his limited range of motion and tenderness. The BOP's response was to prescribe an even more potent painkiller that would do nothing to treat Jones's spine.

84. The standard of care at this appointment required a thorough history and an adequate and thorough neurologic exam. Further, Jones should have had imaging studies done at this visit. The standard of care requires that those are done after conservative management for eight to 12 weeks.

85. At this point, a cursory review of nearly a year's worth of medical records would have revealed that Jones had been suffering for over 50 weeks with these symptoms. Yet no MRI or CT was performed, no specialist consult was held, and the conservative management continued. The failure to obtain a discernible medical history, to perform a neurologic exam, or to order proper imaging studies at this appointment fell below the standard of care.

86. Between December 2008 and January 2009, Jones submitted two administrative remedy request forms that described his back pain, numbness, and burning sensation in his hands and feet. He also described difficulty in sitting or moving normally, as well as trouble walking. Jones noted further that his symptoms dated back a year.

87. The BOP responded that Jones had been approved for the outside consult following his appointment in late November 2008, but that BOP had not yet scheduled it. Once again, it is undisputed that the consult never took place.

88. On February 12, 2009, Jones saw BOP medical staff at Tucson and told them that he had been experiencing numbness in his left arm for 14 months. Numbness is a neurologic symptom. Jones was given only medicine for hypertension.

89. Each of BOP medical staff's failures—to take a full history, perform a full neurologic exam, obtain an MRI or refer Jones to a neurologist or neurosurgeon—fell below the standard of care. Simply addressing Jones's hypertension, without more, likewise fell

below the standard of care.

90. On March 11, 2009, Jones was trying to walk in the USP Tucson prison yard when he felt a "lightning bolt come up from the bottom of [his] back all the way up [his] neck." He collapsed to the ground, unable to move and having trouble breathing.

91. Jones was then taken to a local hospital. Based on a full medical history, physical and neurological examinations, and imaging including MRI and CT scans, a neurosurgeon determined that Jones suffered from severe cervical myelopathy with possibly irreversible spinal cord damage. The neurosurgeon also noted muscle wasting in Jones's hands.

92. Dr. Przybylski testified that "probably the most compelling physical examination evidence that this was a long-standing problem was the description of the wasting of [Jones's] interossei muscles bilaterally . . . . That is something that takes a fairly long time to occur. That would be measured in months to years," "so the simple fact that muscle wasting is seen within the hands on both sides tells us that myelopathy has been present for many months preceding this exam."

93. At trial Dr. Wilberger presented a theory of an "acute event" occurring on March 11, 2009, and his report stated that "there is no indication whatsoever that Mr. Jones was suffering any progressive myelopathy between December 2007 and March 2009." But Dr. Wilberger admitted that if he saw evidence of muscle wasting in the hands, cervical myelopathy "would have progressed already," and that it would have existed for some time prior to the observation of muscle wasting. Dr. Wilberger evidently overlooked that evidence of muscle wasting in rendering his opinions. Moreover, Dr. Przybylski testified that there were other signs, such as spondylosis (a bony compression), which "tells

us that condition has been around for some time." In addition, he testified that there was evidence of "brisk reflexes," which "typically take[] time to develop," and thus typically do not exist in acute injury situations.

94. In March 2009, Jones underwent laminectomy surgery (removal of some vertebral bone to widen the spinal canal). Laminectomy serves to relieve spinal cord compression; it does not treat neck pain. That Jones went from being unable to walk before his surgery to being able to walk during his rehabilitation period shows that the surgery was successful.

95. As Dr. Rosencrance testified, "this is one of the most clear-cut cases of negligence that I've actually seen in the last 25 years." Dr. Przybylski likewise found no ambiguity in the evidence establishing that the standard of care was not followed in this case.

96. Since his emergency laminectomy surgery in March 2009, Jones continues to experience pain in his back, neck, arms, legs, hands, and feet, muscle atrophy, muscle stiffness, weakness, and neurological deficits such as numbness, tingling, and burning sensations.

97. Jones requires a walker to walk and has difficulty with his balance.

98. Symptoms and deficits like these, which Jones continues to experience 18–24 months following his surgery, are permanent.

99. Although Jones eventually received the "maximum benefit" from physical therapy following his surgery, that therapy was unable to overcome his now-permanent disability. Indeed, early physical therapy is really primarily focused upon accommodating the nervous system deficits so that you can perform activities of daily living, not on

recovery. Consequently, any missed appointments not only did not have an impact on how soon Jones would get better, but also did not have an impact on the extent to which he would get better.

100. Nor did Jones's May 2013 cervical fusion surgery change the permanency of his condition. In fact, in five to ten years, Jones will likely require further treatment for adjacent-level disease or progression of arthritis at levels that were not fused that can become symptomatic.

101. Jones will experience a further decline in function, most likely around his mid-50s.

102. Jones is a 41-year-old black male. Based on the vital statistics reports published by the Centers for Disease Control, Jones has a life expectancy of 74 years of age, or 33.3 more years. His current life expectancy is not expected to be reduced from his spinal injury.

103. Jones is scheduled to be released from prison on July 19, 2015, when he will be 43 years old.

104. Jones will need lifelong medical attention, spinal treatments, and ongoing medical evaluation by a neurologist, physiatrist, and/or spine surgeon. During trial, Ms. Bond, a qualified life-care planner, conservatively calculated, based on the present median cost of physiatry services and pain management, that these services will cost Jones $1,708.10 annually.

105. Jones will also need lifelong medication to manage: daily nerve pain (gabapentin, acetaminophen with codeine); exacerbations of pain (acetaminophen); and additional pain at night (Elavil). During trial, Bond calculated that these medications, which

Jones has already been prescribed, will cost Jones $4,915.34 annually.

106. Jones will also need rehabilitative physical therapy to help manage pain and avert further disability. During trial, Bond conservatively calculated that this service will cost Jones $2,400 annually.

107. Jones will also need certain medical and therapeutic equipment. He currently has access to several adaptive devices—*i.e.*, a rolling walker, shower chair, and mattress overlay—which he will continue to need. In the future, he will require additional equipment, including a wheelchair, motorized scooter, and home adaptations. During trial, Bond calculated that this equipment will cost Jones $483.37 annually before age 55, and $1,433.21 each year thereafter.

108. Jones will continue to be impaired in physical tasks, such as those requiring balance, climbing, repeated reaching or lifting, prolonged sitting, prolonged walking, and fine hand dexterity. Consequently, he will require assistance with tasks such as heavy cleaning, lifting, and interior maintenance. As he ages, his need for such assistance will increase. During trial, Bond conservatively calculated that these additional services and assistance will cost Jones $1,357.56 annually before age 55, and $2,564.28 each year thereafter.

109. In the aggregate, these future medical expenses total $405,583.04 over Jones's lifetime.

110. Mr. Jones has rarely, if ever, held steady employment. In addition, the fact that he must register as a sex offender and disclose that he has been convicted of first degree sexual abuse militates against his being able to obtain employment, as do his convictions for theft, car theft, narcotics violations, and assault.

Conclusions of Law

1. Generally, the United States is immune from suit except as it consents to be sued. A suit against the Government cannot proceed absent a waiver of sovereign immunity. The Federal Tort Claims Act provides a judicial remedy to those who suffer injury or damages as the result of the negligence of employees of the federal agencies of the United States government. It permits recovery on claims for money damages "for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§ 1346(b), 2671–2680; ***Bellomy v. United States***, 888 F. Supp. 760 (S.D. W.Va. 1995) (Haden, C.J.).

2. The Federal Tort Claims Act is a limited waiver of the sovereign immunity of the United States; it exposes the federal government to liability for certain torts committed by federal employees acting within the scope of their employment. 28 U.S.C. § 2674; ***United States v. Orleans***, 425 U.S. 807, 814 (1976).

3. The FTCA's waiver of immunity, however, is not absolute; Congress excepted several important classes of tort claims from its purview, including "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . , whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

4. The exception is designed to "prevent judicial 'second-guessing' of . . .

administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." ***United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)***, 467 U.S. 797, 814 (1984).

4. In other words, the exception insulates the government from liability only if the challenged action involves a permissible exercise of policy judgment. ***Berkovitz v. United States***, 486 U.S. 531, 537 (1988).

5. A two-pronged test governs application of the exception. First, the court must determine whether the government action at issue "involves an element of judgment or choice." ***Id.*** at 536. A government employee's conduct cannot involve judgment or choice where a federal statute, regulation, or policy specifically prescribes a course of action; in that situation, the employee has "no rightful option but to adhere to the directive," and if the plaintiff can show that the employee failed to do so, the discretionary function exception does not apply. ***Baum v. United States***, 986 F.2d 716, 720 (4th Cir. 1993) (citing ***Berkovitz***, 486 U.S. at 536).

6. If an element of judgment or choice is present, however, the court must then decide whether the discretion given to the government actor is of the type the exception is designed to shield—that is, discretion grounded in considerations of public policy. ***United States v. Gaubert***, 499 U.S. 315, 322–23 (1991). This means that certain "obviously discretionary acts" will fall *outside* the discretionary function exception, where the discretion given is not "based on the purposes that the regulatory regime seeks to accomplish." ***Id.*** at 325 & n.7.

7. If the discretionary function exception applies, the United States retains its

sovereign immunity and this Court lacks subject matter jurisdiction over the excepted claim.

8. If resolution of the jurisdictional question is bound up with resolution of the merits, however, the proper course is for the district court to assume jurisdiction and assess the merits of the claim. ***Kerns v. United States***, 585 F.3d 187, 195 & n.6 (4th Cir. 2009); ***United States ex rel. Vuyyuru v. Jadhav***, 555 F.3d 337, 348 (4th Cir. 2009) (quoting ***Adams v. Bain***, 697 F.2d 1213 (4th Cir. 1982)).

9. The plaintiff relies upon paragraph 10.b. of the BOP's Standards of Employee Conduct Program Statement. Paragraph 10.b. provides as follows:

> Because failure to respond to an emergency may jeopardize the security of the institution, as well as the lives of staff or inmates, it is mandatory that employees respond immediately and effectively to all emergency situations.

10. In its Order Denying Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion to Dismiss and Motion for Summary Judgment [Doc. 144], this Court held that the plaintiff should be afforded the opportunity to prove that USP Hazelton officials did not respond immediately to the so-called warning note found by Ms. Shorter. This Court further held that the plaintiff should be afforded the opportunity to prove that USP Hazelton officials did not respond effectively to the warning note. Stated succinctly, the plaintiff is charged with proving that the BOP breached the duty to respond immediately and effectively.

11. The word "immediately" is not defined in paragraph 10.b. The Court finds that the meaning of "immediately" is unambiguous. This Court will construe the term "immediately" as meaning "without delay."

12. At trial, Anndreea Shorter testified that she found the warning note at the door

to the B-1 housing unit at approximately 3:41 p.m. Ms. Shorter read the note as soon as she found it. Ms. Shorter testified that she considered the warning note to be "very important" and "something you would act on right away."

13. According to Ms. Shorter, she returned to her office immediately after finding and reading the warning note and called the SIS office for the express purpose of reporting the information in the note. Ms. Shorter's call to the SIS office was not answered, so she took direct steps to identify a telephone extension where she could reach an SIS officer. Ms. Shorter testified that she wasted no time in calling the extension provided, spoke with an SIS officer, explained that she found the warning note, and read the note to him.

14. According to Ms. Shorter, the SIS officer to whom she spoke directed her to hand-carry the warning note to the USP Hazelton SIS office. Ms. Shorter testified that she left her office as soon as the telephone conversation with the SIS officer concluded and began walking the warning note to the SIS office, without delay or detour. Before Ms. Shorter could reach the SIS office, and within minutes of finding the warning note, Ms. Shorter heard a body alarm and was notified by radio that the fight in the B-2 housing unit had already commenced.

15. There can be no question that Ms. Shorter acted immediately after she found the warning note outside the door to the B-1 housing unit. The plaintiff did not offer any evidence that Ms. Shorter was dilatory in reacting to the information in the warning note.

16. Of course, the plaintiff contends that Ms. Shorter's actions were not appropriate or effective. However, claiming that a person's actions are not appropriate or effective is not the equivalent of claiming that the actions were not taken immediately. The plaintiff bears the burden of proving that Ms. Shorter's actions were not immediate. He has

failed to do so.

17. Similarly, the plaintiff has failed to prove that any other USP Hazelton employee did not act immediately. Ms. Shorter testified that she was able to reach an unidentified SIS officer almost immediately after discovering the warning note. Ms. Shorter's initial call to the SIS office was not answered. When she radioed the appropriate personnel to obtain an extension where she might be able to reach an SIS officer, the information was provided to her immediately. According to Ms. Shorter, she called the extension and was able to speak with an SIS officer without delay. The SIS officer instructed Ms. Shorter to leave her office and bring the warning note to the SIS office.

18. Once again, the plaintiff may contend that the SIS officer's decision to have Ms. Shorter bring the note to the SIS office was not effective or reasonable under the circumstances. Even if one accepts this as true, *arguendo*, it does not establish that the unidentified SIS officer did not act immediately. In fact, the SIS officer took immediate action by directing a BOP staff member to bring him the only available evidence regarding the warning note.

19. The plaintiff's burden to prove that the USP Hazelton employees did not respond "effectively" to the warning note is a decidedly heavier and more difficult burden. The plaintiff has not identified any statute, regulation or BOP policy which delineates what constitutes an "effective" response to an emergency situation. In other words, available sources of information do not offer any guidance on what comprises an effective response to a generic emergency or the particular facts of this case.

20. Two experienced correctional officers, William Holzapfel and Hiromichi Kobayashi, testified that the manner in which USP Hazelton employees responded to the

warning note was entirely appropriate. Mr. Holzapfel testified that he has been a correctional officer for 17 years. He also testified that there is nothing in BOP regulations or policy that directs or mandates how a BOP employee is to respond to or address a warning note such as the one at issue in this case.

21. Furthermore, Mr. Holzapfel testified that it was entirely reasonable for the SIS officer who took the call from Ms. Shorter, to direct her to bring the note to the SIS office for investigation and further action. Mr. Holzapfel further clarified that the information in the note had to be investigated before anyone could take definitive action. According to Holzapfel, an investigation of such a note is necessary because there is a significant possibility that the information in the note is false, inaccurate, or misleading.

22. Mr. Holzapfel testified that there are many times when warning notes or other allegations made by inmates give rise to a concern that the information is an effort at misdirection, so that prison resources will be deployed in one direction while a security threat is actually aimed in another direction.

24. Similarly, Mr. Kobayashi testified that he has been a correctional officer for 12 years. Kobayashi also testified that there is nothing in BOP regulations or policy that specifies or mandates how a BOP employee is to respond to or address a warning note such as the one at issue here.

25. He also testified that it was reasonable and appropriate for the SIS officer who took Ms. Shorter's call to direct her to bring the note to the SIS office for further investigation. Like Mr. Holzapfel, Mr. Kobayashi testified that the information in a note, like the one in this case, has to be investigated before anyone can take definitive action, because there is a possibility that the information in the note is false, inaccurate, or

misleading. Mr. Kobayashi testified that there are times when warning notes or other allegations made by inmates contain information intended as misdirection, so that prison resources will be deployed in one direction while a security threat is actually aimed elsewhere.

25. In addition, the officers did not know exactly where Mr. Evans was at the time. At the 4:00 count, in contrast, they would know exactly where Mr. Evans was, enabling the SIS to bring him in for questioning.

26. With respect to Ms. Shorter's response to the warning note, there is no evidence that it was not effective. During the trial, that plaintiff seemed to suggest that she should have gone to the B-2 housing unit with the note instead of calling the SIS office. However, there is no evidence that this would have been a better or more effective response. In fact, Ms. Shorter testified that if she had taken the warning note to someone else, he/she would have found it necessary to direct the note to the SIS office. The warning note had to be taken to the SIS office because SIS had to investigate and verify the information therein. Consequently, calling SIS was the quickest way to address the potential threat.

27. Finally, it cannot be overlooked that the note itself directed Ms. Shorter to "give this to SIS or the LT ASAP." Even the author of the note seems aware that the note would have to be investigated by the SIS.

28. The evidence shows that there was not a mandated non-discretionary way to deal with the warning note. More importantly, the evidence reveals that the actions taken in this case were both appropriate and reasonable. In addition, plaintiff did not demonstrate that the actions of Ms. Shorter and the SIS officer were careless, inattentive

or lazy.

29. Even if one thinks they could have handled things differently, they were not thoughtless or languid with regard to the note. The evidence shows that USP Hazelton employees responded immediately and as effectively as possible to the information in the warning note.

30. One must also consider the brief amount of time between the receipt of the note and the attack itself. It appears that the time period was simply too short for BOP personnel to thwart the attack.

31. A number of cases from other jurisdictions support the discretionary aspect of the situation presented by the facts of this case. In ***Calderon v. United States***, 123 F.3d 947 (7th Cir. 1997), the Seventh Circuit held that the discretionary function exception to the FTCA precluded recovery in an inmate-on-inmate assault case, where the plaintiff had earlier informed the BOP employees about pre-assault threats and the BOP employees took no steps to protect the plaintiff or discipline the inmate. The Circuit rejected reliance on 18 U.S.C. § 4042, noting that "[w]hile it is true that this statute sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates." 123 F.3d at 950.

32. In ***Cohen v. United States***, 151 F.3d 1338 (11th Cir. 1998), the Eleventh Circuit considered a case of a prisoner-on-prisoner attack. The plaintiff alleged that the BOP had negligently assigned the attacker to a minimum security prison, relying on 18 U.S.C. § 4042. The Eleventh Circuit held that "even if § 4042 imposes on the BOP a

general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception." 151 F.3d at 1342.

33. The ***Cohen*** Court further stated that

> [t]he Seventh Circuit's reasoning in ***Calderon*** also convinces us that § 4042 leaves BOP personnel sufficient discretion about how their § 4042 duty of care is to be accomplished to warrant application of the discretionary function exception. ***Calderon*** rejected the argument that the general duty to protect prisoners set forth in § 4042 prevents the Government from invoking the discretionary function exception in an FTCA case arising from a prisoner-on-prisoner attack. The Seventh Circuit reasoned persuasively that "[w]hile it is true that [§ 4042] sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates." ***Calderon***, 123 F.3d at 950. We agree.

151 F.3d at 1342–43.

34. In ***Buchanan v. United States***, 915 F.2d 969 (5th Cir. 1990), the Fifth Circuit found that the discretionary function exception shielded the Government from liability, where American prisoners were taken hostage by Cuban nationals in the prison, noting that "'a prison's internal security is peculiarly a matter normally left to the *discretion* of prison administrators.' ***Rhodes v. Chapman,*** 452 U.S. 337, 349 n.14 (emphasis added). When the potential for violence ripens into actual unrest and conflict, this principle carries special weight. *See* ***Whitley v. Albers***, 475 U.S. 312, 321 (1986)." 915 F.2d at 971.

35. The ***Buchanan*** Court added "'Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' ***Bell v. Wolfish***, 441 U.S. 520, 547 (1979). That deference 'requires that neither

judge nor jury freely substitute their judgment for that of officials who have made a considered choice.' ***Whitley***, 475 U.S. at 322." 915 F.2d at 972.

36. In ***Santana-Rosa v. United States***, 335 F.3d 39, 43 (1st Cir. 2003), the First Circuit considered another case of prisoner-on-prisoner violence. The Court found that the action was barred by the discretionary function exception, noting that "[t]o demonstrate that its conduct was discretionary, the Government need only show that there was 'room for choice' in making the allegedly actionable decision or decisions," quoting ***Attallah v. United States***, 955 F.2d 776, 783 (1st Cir. 1992).

37. The First Circuit in ***Santana-Rosa*** also held that

> [t]he management of large numbers of potentially dangerous individuals within a penal facility inevitably requires not only the exercise of discretion but decision-making within the context of various difficult policy choices. In many, if not most, instances where an inmate is unfortunately injured by another inmate, it will be possible to argue that a different exercise of discretion or a different policy choice might well have forestalled the injury. Nevertheless, decisions with regard to classification of prisoners, assignment to particular institutions or units, and allocation of guards and other correctional staff must be viewed as falling within the discretionary function exception to the FTCA, if penal institutions are to have the flexibility to operate. In this case, as in ***Cohen*** and ***Calderon***, the facts viewed in the light most favorable to the plaintiff 'exemplif[y] the type of case Congress must have had in mind when it enacted the discretionary function exception.'

335 F.3d at 44.

38. In ***Montez ex rel. Estate of Hearlson v. United States***, 359 F.3d 392 (6th Cir. 2004), the Sixth Circuit applied the discretionary function exception and rejected an action brought on behalf of an inmate murdered by another inmate. As in the cases above, the court rejected reliance on 18 U.S.C. § 4042, stating:

> The statute imposes a mandatory duty upon the Bureau of Prisons (BOP) through the use of the word "shall." ***Calderon v. United States***, 123 F.3d

> 947, 950 (7th Cir. 1997) (holding that § 4042(a) "sets forth a mandatory duty of care"). But the duty imposed by § 4042(a) is of a general nature, broadly requiring that the BOP "provide for the safekeeping" and "provide for the protection" of federal inmates. BOP officials are given no guidance, and thus have discretion, in deciding how to accomplish these objectives.
>
> The two other circuits that have previously considered this issue have both decided that § 4042(a) does not specifically prescribe a course of action for prison officials to follow. *See* ***Cohen v. United States***, 151 F.3d 1338, 1342 (11th Cir. 1998) ("[E]ven if § 4042 imposes on the BOP a general duty of care to safeguard prisoners, the BOP retains sufficient discretion in the means it may use to fulfill that duty to trigger the discretionary function exception."); ***Calderon***, 123 F.3d at 950 ("While it is true that this statute sets forth a mandatory duty of care, it does not, however, direct the manner by which the BOP must fulfill this duty. The statute sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates."). We believe that ***Cohen*** and ***Calderon*** are persuasive on this point, and we therefore adopt their conclusion.

359 F.3d at 396.

39. Paragraph 10.b. of the BOP's Standards of Employee Conduct Program Statement is similar. The provision requires that the BOP act immediately and effectively, but provides no guidance as to how the BOP staff is to meet those goals.

40. Having now heard the testimony of all the witnesses and having found that the BOP staff acted immediately, it is this Court's conclusion that the discretionary function exception applies, depriving this Court of jurisdiction to consider Count I of the plaintiff's Amended Complaint.

41. In the event that it is too late to apply the discretionary function exception, this Court also finds that the plaintiff has failed to meet his burden of demonstrating that the BOP staff failed to act immediately or effectively in attempting to prevent the attack upon the plaintiff.

42. Accordingly, Count I is dismissed with prejudice.

43. With respect to Counts II and III, the medical malpractice counts, the government's liability under the FTCA is determined by applying the law of the state where the alleged tort occurred. 28 U.S.C. § 1346(b)(1).

44. Count II and Count III of plaintiff's complaint allege that Bureau of Prisons officials in West Virginia and Arizona, respectively, were medically negligent in their treatment of plaintiff. This Court must therefore apply West Virginia and Arizona law in adjudicating plaintiff's claims.

45. As described below, the applicable statutes and case law of both states are functionally identical, and will be treated as such unless otherwise noted.

46. To successfully raise a medical malpractice claim, the plaintiff must establish the familiar elements common to all claims of negligence: duty, breach, causation, and damages.

47. Mapped onto the medical environment, this means that the plaintiff must prove, by a preponderance of the evidence, (1) the applicable medical standard of care; (2) that, in treating the plaintiff, the defendant failed to meet that standard of care; and (3) that the defendant's negligence was a proximate cause of plaintiff's injury. W.Va. Code § 55-7B-3(a)(1)–(2); A.R.S. § 12-563; ***Bellomy***, 888 F. Supp. at 764 (applying West Virginia law); ***Seisinger v. Siebel***, 220 Ariz. 85, 94, 95, 203 P.3d 483, 492, 493 (2009) (en banc).

48. The applicable standard of care and the defendant's failure to meet it must ordinarily be proven by expert testimony. W.Va. Code § 55-7B-7; ***Estate of Fout-Iser ex rel. Fout-Iser v. Hahn***, 220 W.Va. 673, 676–77, 649 S.E.2d 246, 249–250 (2007) (citing

Roberts v. Gale, 149 W.Va. 166, 139 S.E.2d 272 (1964)); ***Seisinger***, 220 Ariz. at 94, 203 P.3d at 492.

49. A proximate cause is one "which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred." ***Mays v. Chang***, 213 W. Va. 220, 224, 579 S.E.2d 561 (W. Va. 2003) (citing ***Webb v. Sessler***, 135 W. Va. 341, 63 S.E.2d 65 (1950)). The plaintiff need only show that defendant's failure to meet the standard of care was *a* proximate cause of plaintiff's injury, not the *sole* proximate cause. ***Id.*** Expert testimony is normally required to establish proximate cause in medical negligence cases, but where a causal relationship is readily apparent to the trier of fact, proximate cause may be inferred. ***Sexton v. Grieco***, 216 W.Va. 714, 719–20, 613 S.E.2d 81 (2005); ***Pruitt v. Zeiger***, 590 So.2d 236, 237–38 (Ala. 1991).

50. The United States does not dispute that it owed plaintiff a duty, or that plaintiff has suffered an injury; breach of duty and causation are the only elements of plaintiff's medical negligence claims the parties have placed in issue.

51. This Court finds the testimony of Drs. Rosencrance and Przybylski to be more credible, persuasive and useful than that of the other testifying physicians, particularly with respect to their testimony concerning the standard of care and the breaches thereof.

52. Both Drs. Rosencrance and Przybylski testified that the medical personnel at USP Hazelton and USP Tucson repeatedly breached the standard of care, causing permanent injury to the plaintiff. This Court agrees.

53. Had the plaintiff received appropriate treatment and care, the plaintiff would

have recovered. Due to the failure to provide appropriate care and treatment, the plaintiff has suffered permanent, debilitating injuries.

54. Accordingly, the plaintiff prevails on both Counts II and III.

55. This Court will award the plaintiff the sum recommended by his life planner for future medical costs and therapeutic equipment in the amount of $405,583.04.

56. Due to the lack of a significant employment history and the plaintiff's criminal history, this Court finds that any award for lost wages would be speculative. Accordingly, no lost wage award will be made.

57. With regard to non-economic damages, such as pain and suffering and the loss of the ability to enjoy life:

> It is well settled that an injured plaintiff may recover damages for pain and suffering caused by the negligence of the defendant. ***Keiffer v. Queen***, 155 W.Va. 868, 189 S.E.2d 842 (1972). In addition, "[a] plaintiff may recover the cost of reasonable and necessary future medical and hospital services and for future pain and suffering when the evidence shows it is reasonably certain that such future expenses will be incurred and are proximately related to the negligence of the defendant." Syllabus Point 1, ***Ellard v. Harvey***, 159 W.Va. 871, 231 S.E.2d 339 (1976). *See also* ***Keiffer v. Queen***, *supra;* ***Hall v. Groves***, 151 W.Va. 449, 153 S.E.2d 165 (1967); ***Shreve v. Faris***, 144 W.Va. 819, 111 S.E.2d 169 (1959).

Delong v. Kermit Lumber & Pressure Treating Co., 175 W.Va. 243, 244–45, 332 S.E.2d 256, 257 (1985).

58. In an action for personal injuries, the damages are unliquidated and indeterminate in character, and the assessment of such damages is the peculiar and exclusive province of the jury. Syl. Pt. 6, ***Crum v. Ward***, 146 W.Va. 421, 122 S.E.2d 18 (1961) (quoting Syl. Pt. 3, ***Yuncke v. Welker***, 128 W.Va. 299, 36 S.E.2d 411 (1945)).

59. The Fourth Circuit has recognized that

> "[t]he trial court, as a fact-finder, possesses considerable discretion in fixing damages, and its decision will be upheld absent clear error." ***Little Beaver Enters. v. Humphreys Rys.***, 719 F.2d 75, 79 (4th Cir. 1983); *see also* ***United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.***, 86 F.3d 332 (4th Cir. 1996) ("The calculation of damages is a finding of fact and therefore is reviewable only for clear error, but to the extent those calculations were influenced by legal error, review is *de novo*."); ***Scott v. Vandiver***, 476 F.2d 238, 243 (4th Cir. 1973) ("Ascertainment of damages arising from personal injuries involves questions that are essentially factual, and an award by a district judge will not be upset unless it is clearly erroneous."). "A finding is clearly erroneous when, although there is evidence to support it, on the entire evidence the reviewing court is left with the definite and firm conviction that a mistake has been committed." ***Front Royal v. Town of Front Royal***, 135 F.3d 275, 284 (4th Cir. 1998) (quoting ***Faulconer v. Commissioner***, 748 F.2d 890, 895 (4th Cir. 1984)); *see* Fed. R. Civ. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses").

Park v. Shiflett, 250 F.3d 843, 855 (4th Cir. 2001) (Traxler, J., concurring in part and dissenting in part).

60. This Court finds that the plaintiff has suffered pain and suffering from the time of his injury, which remained untreated until his collapse in 2009, and will continue having back pain throughout the remainder of his life, expected to be 33 years. In addition, the plaintiff has been reduced from an active person to a person who is incapacitated for the remainder of his life. Accordingly, this Court will award non-economic damages of $250,000 on Count II and $250,000 on Count III.

The Clerk is directed to enter judgment in favor of the plaintiff in the amount of $905,583.04.

It is so **ORDERED**.

The Clerk is hereby directed to transmit copies of this Order to counsel of record herein.

DATED: April 7, 2014.

JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of West Virginia

TERRY JONES	)		
Plaintiff	)		
v.	)	Civil Action No.	2:11CV94
UNITED STATES OF AMERICA	)		
Defendant	)		

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* recover from the defendant *(name)* the amount of dollars ($), which includes prejudgment interest at the rate of %, plus post judgment interest at the rate of % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* recover costs from the plaintiff *(name)* .

☒ other: Count 1 of Plaintiff's [1] Complaint is dismissed with prejudice; the Plaintiff prevails on Counts 2 and 3; Plaintiff is awarded future medical costs and therapeutic equipment in the amount of $405,583.04; Plaintiff is not awarded lost wages; Plaintiff is awarded non-economic damages of $250,000.00 on Count 2 and $250,000.00 on Count 3; and judgment is entered in favor of the Plaintiff in the amount of $905,583.04.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☐ decided by Judge on a motion for

Date: 04/07/2014 *CLERK OF COURT*

CHERYL DEAN RILEY
By: C. Daniels, Deputy Clerk
Signature of Clerk or Deputy Clerk

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Kentucky
Southern Division London

SUSAN MARY HARRIS

Plaintiff

v.

UNITED STATES GOVERNMENT
FEDERAL BUREAU OF PRISONS

Defendant

Civil Action No. 6:12-cv-60-GFVT

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Government
Federal Bureau of Prisons
Serve: Kerry B. Harvey, United States Attorney
260 W. Vine Street, Suite 300
Lexington, KY 40507

Served via Certified Mail
Received by:
B. Merriman 4-10-12
Signature Date

USDC-EDKY-LEX APR 10 '12 PM 11:33

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Vincent E. Johnson, Esq.
Siebert & Johnson, PLLC
500 W. Jefferson St., Suite 1500
Louisville, KY 40202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 03/23/2012

Robert R. Carr, Clerk
Signature of Clerk or Deputy Clerk

kja

CERTIFIED MAIL™

7011 2000 0002 4827 8482

Civil Action No. **6:12-cv-60-GFVT**

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ **for travel and $** _____ **for services, for a total of $** **0.00** .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
SUSAN MARY HARRIS

(b) County of Residence of First Listed Plaintiff Whitley
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Vincent E. Johnson, Siebert & Johnson, PLLC
500 W. Jefferson St., Suite 1500, Louisville, KY 40202

DEFENDANTS
UNITED STATES GOVERNMENT
FEDERAL BUREAU OF PRISONS

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff) and One Box for Defendant) (For Diversity Cases Only)*

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☒ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☒ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

V. ORIGIN *(Place an "X" in One Box Only)*
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
Federal Tort Claims Act, 28 U.S.C.A. § 1346(b) and 28 U.S.C.A. § 2671 et seq.
Brief description of cause:
Federal Bureau of Prisons employee driving recklessly and negligently caused motor vehicle accident

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE 03/23/2012

SIGNATURE OF ATTORNEY OF RECORD /s/ Vincent E. Johnson

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LONDON
CIVIL ACTION NO. _____

SUSAN MARY HARRIS **PLAINTIFF**

v. **COMPLAINT**

UNITED STATES GOVERNMENT
FEDERAL BUREAU OF PRISONS **DEFENDANT**
Serve: Eric H. Holder, Jr.
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

USDC-EDKY-LEX APR 10 '12 AM 11:33

* * * * *

Comes the Plaintiff, Susan Mary Harris, by counsel, and for her Complaint against the Defendant alleges as follows:

1. This action is brought pursuant to the Federal Tort Claims Act, 28 U.S.C.A § 1346(b) and 28 U.S.C.A § 2671 et seq., against Defendant, United States Government Federal Bureau of Prisons.

2. At all times mentioned, Plaintiff resided, and still resides, in Williamsburg, Whitley County, Kentucky.

3. On July 29, 2010, Loren Rose, and employee of the United States Government Federal Bureau of Prisons, at its office located at USP McCreary, 330 Federal Way, Pine Knot, McCreary County, Kentucky was driving a Bureau of Prison's vehicle during the course and scope of his employment with the United States Government Federal Bureau of Prisons.

4. On July 29, 2010, at the intersection of KY 92 West and Main Street, in Williamsburg, Whitley County, Kentucky, Loren Rose who was traveling east at a high rate of speed on KY 92 West, passed the Plaintiff in the westbound lane of KY 92. Plaintiff was traveling East on KY 92 and was stopped awaiting a left-turn onto Main Street.

5. Prior to and at the time of the accident, Plaintiff was proceeding in a careful and cautious fashion.

6. Prior to and at the time of the accident, Loren Rose was driving in a careless and negligent manner, at an excessive rate of speed, and otherwise driving in a reckless and dangerous fashion.

7. As a direct and proximate result of the negligence of Loren Rose and Defendant, Plaintiff suffered severe physical, mental, and emotional injuries, distress, and pain and suffering, as follows: loss of consciousness, neck, hip, back, left knee, anxiety and memory problems.

8. As a further direct and proximate result of the negligence of Loren Rose and Defendant, Plaintiff's automobile, a 1996 Mercury Sable, suffered severe damage and Plaintiff had the loss of the use of her vehicle.

9. On October 11, 2011, Plaintiff filed a claim for damages suffered as a result of the described accident with the United States Government Federal Bureau of Prisons at their office located at Federal Medical Center, Consolidated Legal Center, 3301 Leestown Road, Lexington, Fayette County, Kentucky. This claim was denied on October 12, 2011.

WHEREFORE, Plaintiff requests:

1. Compensatory damages in an amount within the jurisdiction of this court and to be proved at trial to include:

   a. Past and future medical expenses; and

   b. Past and future lost wages; and

   c. Pain and suffering; and

   d. Property damage and loss of the use of her vehicle.

2. Costs; and

3. Such other and further relief as the court deems just and proper.

/s/ Vincent E. Johnson
Siebert & Johnson, PLLC
1500 PNC Plaza
500 West Jefferson
Louisville, KY 40202
(502) 589-2246
(502) 589-4488 Fax
Counsel for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

SUSAN MARY HARRIS, Plaintiff, v. UNITED STATES GOVERNMENT FEDERAL BUREAU OF PRISONS, Defendant.	)	No. 6:12-CV-60-HAI ORDER OF DISMISSAL

*** *** *** ***

The parties, having executed a Settlement Agreement and Release of All Claims, resolving all issues raised in the instant civil action, and expressing their consent to the entry of an Order of Dismissal as reflected in a tendered Agreed Order of Dismissal (D.E. 18), **IT IS HEREBY ORDERED THAT** this action is dismissed in its entirety, with prejudice, and stricken from the docket, with each party to bear its own costs, expenses, and attorney's fees.

This the 23rd day of April, 2013.



Signed By:
Hanly A. Ingram
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

CIVIL ACTION: 12-CV-60-GFVT

SUSAN MARY HARRIS PLAINTIFF

VS. **SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS**

UNITED STATES OF AMERICA DEFENDANT

* * * * * * * *

THIS AGREEMENT is made and entered into by and between Susan Mary Harris, Plaintiff, and the United States of America, Defendant.

WHEREAS, Plaintiff has filed the above-captioned civil action in the U.S. District Court of the Eastern District of Kentucky; and

WHEREAS, the parties hereto desire to make a complete and final settlement of all matters involved in, or relating to, or arising out of, the above-captioned case.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, Plaintiff and the Defendant, being separately advised by counsel, and intending to be legally bound thereby, COVENANT AND AGREE AS FOLLOWS:

1. As used in this Agreement, Defendant means the United States of America and all of its past, present, future subsidiaries, bureaus, services, agencies, divisions, departments

(including the Federal Bureau of Prisons), successors, assigns, directors, officers, agents, employees, attorneys and representatives.

2. In return for all of the agreements and covenants of Plaintiff set forth herein, the Defendant agrees as follows:

A. Plaintiff will be paid the amount of $10,000.00. This payment is in full settlement and satisfaction of any and all claims of any kind that Plaintiff may have in the above-captioned case against the Defendant up to and including the date of this Agreement. This settlement is intended to avoid further litigation and to preserve judicial economy, and shall not operate as an admission of liability or fault on the part of the United States, its agents, servants, or employees. Any federal, state, or local income tax liability, or other tax liability resulting from the payment of this settlement amount of $10,000.00 shall be the sole responsibility of the Plaintiff. Neither the Defendant nor the Defendant's attorneys make any representations as to the tax treatment of this settlement amount of $10,000.00.

B. Plaintiff's settlement amount of $10,000.00 shall be paid by government electronic fund transfer. Banking information for the government electronic fund transfer will be provided by Plaintiff's attorney.

Plaintiff's attorney agrees to distribute the settlement proceeds and to obtain a dismissal order of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

C. Plaintiff, on behalf of herself, her heirs, legal representative, representatives, administrators and executors, hereby releases and forever discharges the United States of

America and its employees, officers, agents, agencies, attorneys, representatives and assigns, and any other person acting by, through, under, or in concert with them (collectively "Releasees") from any and all claims, remedies, demands, debts, losses, obligations, actions, causes of actions, claims of relief, damages, costs, expenses, attorney fees, and compensation of any nature whatsoever, whether known or unknown, foreseen or unforeseen, arising out of or involving the car accident that occurred on or about July 29, 2010 in Williamsburg, Kentucky (collectively "claim" or "claims" or "remedy" or "remedies"), including, but not limited to, legal, equitable, administrative, union or other claims or remedies of any kind whatsoever, which Plaintiff had or has against the Defendant and all other Releasees on account of, or contained in, or in any way growing out of, or which are the subject of, the allegations contained in the above-captioned civil action.

3. The Plaintiff represents and acknowledges that in executing this Agreement she does not rely and has not relied upon any representation or statement made by the Defendant or its attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

4. Nothing contained in this Agreement shall be construed as an admission of wrongdoing or liability by the Defendant with respect to any matter whatsoever, whether or not encompassed by the above-captioned civil action.

5. This Agreement comprises the entire understanding and settlement of the above-captioned action between Plaintiff and the Defendant and fully supersedes any and all prior agreements or understandings between the parties.

6. This Agreement shall be binding upon the Plaintiff and upon her heirs, administrators, legal representatives, and executors and shall inure to the benefit of the Defendant and each and all other Releasees, and to their heirs, administrators, representatives, executors, successors, assigns, and attorneys and legal representatives.

7. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. When used in this Agreement, the word "or" is a term of inclusion and not exclusion, and in no instance is the word "or" intended to limit, nor shall it limit, the rights, privileges, and or benefits of the Defendant under this Agreement.

8. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and said illegal or invalid part, term or provision shall be deemed not to be a part of the Agreement.

9. The parties agree that this Stipulation for Settlement Agreement and Release of All Claims may be made public in its entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. Payment by the Defendant of the settlement sum of $10,000.00 shall be without interest. Plaintiff and Defendant shall bear their own costs, expenses and attorneys' fees.

11. Plaintiff enters into this agreement knowingly and voluntarily after full consultation with her attorney, and by her signature acknowledges that she has read this Agreement and fully

understands its terms. Plaintiff agrees that she has been given a reasonable period of time within which to consider this Agreement.

12. This Agreement is not assignable by the Plaintiff. The date of this Agreement is the date of the last signature to this Agreement.

IN WITNESS WHEREOF, Plaintiff and the Defendant intending to be legally bound, have set their hands to this Agreement the day and year below written.

Susan Mary Harris — 3-19-13
SUSAN MARY HARRIS — Date

David M. Scott for — 3/22/13
Vincent E. Johnson, Esq. — Date
Siebert & Johnson, PLLC
500 W. Jefferson Street
PNC Plaza, Suite 1500
Louisville, KY 40202

KERRY B. HARVEY
UNITED STATES ATTORNEY

BY: Cheryl D. Morgan — 3/22/13
Cheryl D. Morgan — Date
Assistant United States Attorney
U.S. Attorney's Office
260 West Vine Street, Suite 300
Lexington, Kentucky 40507-1612

Sensitive but Unclassified

Judgment Fund
Document Submission Cover Sheet

To: Judgment Fund Branch

Fax #: 866-920-0879 or 866-814-1516

Telephone #: 202-874-6664 or 866-277-1046

****

From: Cheryl D. Morgan

Telephone: 859-685-4870

Email Address: (b)(6),(b)(7)(C) @usdoj.gov

Fax #: 859-233-2533

********** **Claim Information** **********

Claim Submission Type: (Please Check One) ☐ JFICS ☒ Paper

Control No. or Agency Reference No. : 2012V00289

Case Name: Susan Mary Harris v. United States

Claimant Last Name: Harris

Claimant First Name: Mary

Submitting Agency: Federal Bureau of Prisons

Amount: $10,000.00

Document Inventory: (Please check all that apply)

- ☒ Judgment Fund Form 194
- ☒ Judgment Fund Form 196
- ☒ Judgment Fund Form 197
- ☐ Administrative Settlement Agreement
- ☒ Court Judgment or Settlement
- ☐ Letter to Preserve Interest
- ☐ Other (Please specify)

Revised 11-2012

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	1827
RECIPIENT ADDRESS	918669200879
DESTINATION ID	
ST. TIME	03/25 12:18
TIME USE	01'39
PAGES SENT	10
RESULT	OK

Sensitive but Unclassified

Judgment Fund
Document Submission Cover Sheet

To: Judgment Fund Branch

Fax #: 866-920-0879 or 866-814-1516

Telephone #: 202-874-6664 or 866-277-1046

****

From: Cheryl D. Morgan

Telephone: 859-685-4870

Email Address: (b)(6),(b)(7)(C) @usdoj.gov

Fax #: 859-233-2533

********** **Claim Information** **********

Claim Submission Type: (Please Check One) ☐ JFICS ☒ Paper

Control No. or Agency Reference No. : 2012V00289

Case Name: Susan Mary Harris v. United States

Claimant Last Name: Harris

Claimant First Name: Mary

Submitting Agency: Federal Bureau of Prisons

$10,000.00

Judgment Fund Transmittal

Date: 03/25/2013

Department of the Treasury
Financial Management Service
Judgment Fund Branch
3700 East-West Highway, Room 6E15
Hyattsville, Maryland 20782
Telephone: (202) 874-6664

Claimant/Plaintiff Name : Susan Mary Harris

Address (b)(6),(b)(7)(C)

Claimant/Plaintiff Counsel's Name: Vincent E. Johnson, Siebert & Johnson, PLLC

Telephone Number: 502 - 589 - 2246

Name of Agency Subject to Claim : Federal Bureau of Prisons

E-mail Address (required for electronic payment confirmation) (b)(6),(b)(7)(C) @usdoj.gov

Telephone Number: 859 - 685 - 4870

Brief Description of Facts Giving Rise to Claim: Vehicle being driven by Federal employee collided with Plaintiff's vehicle causing alleged injuries to Plaintiff's body and damage to her vehicle

Check one if applicable:

☐ Contract Disputes Act ☐ No FEAR Act ☐ Firefighters Fund

Dear Sir or Madam:

I am an authorized representative of the United States in the above-captioned matter. As described in the enclosed documentation, I certify that all pertinent criteria required by law for the approval of this claim has been satisfied. If this is an administrative claim, the settlement was made with the United States in this matter and any portions of the agreement required to be paid from agency funds will be or have been paid from those funds. If this is a litigative claim, the award made in the enclosed judgment or settlement is payable by the United States and any portions of the award required to be paid from other parties or sources will be or have been paid from those parties or sources. The United States will not seek further judicial review of this award and I have obtained all approvals necessary for its referral for payment.

I believe that this award qualifies for payment pursuant to 31 U.S.C. § 1304. Accordingly, I request that you certify this award for payment from the Judgment Fund established by that law. Enclosed are completed copies of **FMS Form 196:** *Judgment Fund Award Data Sheet*, **FMS Form 197:** *Judgment Fund Voucher for Payment*, the judgment or settlement agreement; and any other enclosures required by FMS. Unless payment by electronic funds transfer is indicated, please have the check sent to the check address provided on **FMS Form 197**.

Submitting Agency Authorized Signature

Chery D. Morgan, Assistant United States Attorney
Name and Title (*print or type*)

(b)(6),(b)(7)(C) @usdoj.gov
Submitting Agency E-mail Address (*required for electronic payment confirmation*)

2012V00289
Agency File Number

260 W. Vine Street, Suite 300
Street Address

Lexington, KY 40507-1612
City, State and Zip Code

General Instructions: Use this form, FMS 194, to transmit a request to certify an administrative or litigative award against the United States for payment from the Judgment Fund, under 31 U.S.C. § 1304.
Enclosures: **FMS Form 196** and **FMS Form 197.** *Incomplete submissions will be returned to the submitter without action.*

Judgment Fund Voucher for Payment

1. **Total Amount:** $10,000.00

2. **Submitting Agency Contact Name:** Carlos J. Martinez
   Telephone Number: 859-255-6812 x 5710

3. **Electronic Funds Transfer (EFT) Information:**
   a) Payee Account Name: Siebert & Johnson Escrow Account
   b) American Banking Association (ABA) Routing Number (9 digits): (b)(6),(b)(7)(C)
   c) Payee Account Number: (b)(6),(b)(7)
   d) Checking: X Savings: ☐
   e) Financial Institution Name, City, State: Stockyards Bank & Trust, Louisville, KY

4. **Interagency Payment System Information:**
   a) Agency Name: _____
   b) Agency Location Code (ALC) Number: (8 digits): _____
   c) Standard General Ledger (SGL) Number (4 digits): _____
   d) Treasury Account Symbol (TAS): _____

5. **Mailing Address for Check:** (Payee name not to exceed 32 Characters.)
   a) Payee Name: _____
   b) Payee Name: _____
   c) Address Line 1: _____
   d) Address Line 2: _____
   e) City: _____ State: _____ Zip Code: _____

6. **Taxpayer Identification Number (s):**
   a) Susan Mary Harris (b)(6),(b)(7)(C) b) Siebert & Johnson PLLC (62-1750308)

7. **Reimbursement Information for Contract Disputes Act (CDA), No FEAR Act, and Firefighters Fund:**
   a) Agency Name: _____
   b) Contact Name: _____
   c) Contract Number (CDA cases): _____
   d) Telephone Number: _____-_____-_____
   e) Address: _____
   f) City: _____ State: _____ Zip Code: _____

8. **If payment will be made in a foreign currency please provide the following information:**
   Country: _____ Currency: _____

9. **FOR USE BY JUDGMENT FUND BRANCH ONLY:**
   Z Number: _____ J/D Number: _____ GLOWS Code/Agency: _____

   _____ _____ _____
   Claim Analyst *Signature and Date* Amount to Pay Appropriation Code

   _____
   Claim Reviewer *Initials and Date*

Judgment Fund Voucher for Payment

10. Acceptance by Claimants:

NOTE: For use ONLY where the settlement is (i) for cash, (ii) in an amount that does not exceed $200,000, and (iii) a court order approving the settlement is not warranted. For all other situations, a final judgment or a standard Department of Justice *Stipulation For Compromise Settlement And Release* must be attached.

Each claimant/plaintiff and his/her guardians, heirs, executors, administrators, and assigns agree to and do accept this settlement in full settlement and satisfaction and release of any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation any claims for fees, costs, expenses, survival, or wrongful death, arising from any and all known or unknown, foreseen or unforeseen bodily injuries, personal injuries, death, or damage to property, which they may have or hereafter acquire against the United States of America, its agents, servants, or employees, on account of the subject matter of the administrative claim or suit, or that relate or pertain to or arise from, directly or indirectly, the subject matter of the administrative claim or suit. Each claimant/plaintiff and his/her guardians, heirs, executors, administrators, and assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its agents, servants, and employees, from and against any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation claims for subrogation, indemnity, contribution, or lien of any kind, or for fees, costs, expenses, survival or wrongful death that relate or pertain to or arise from, directly or indirectly, any act or omission that relates to the subject matter of the administrative claim or suit.

(SIGN ORIGINAL ONLY)

Date _____ _____

_____

(Claimant(s) sign above)

11. AGENCY APPROVING OFFICIAL: This claim has been fully examined in accordance with Statutory Citation _____ and approved in the amount of $ _____

Authorized Signature: _____

Title: _____

Date: _____

Judgment Fund Award Data Sheet

ITEMIZATION OF AMOUNT PAYABLE FROM THE JUDGMENT FUND	AMOUNT TO BE PAID	CITATION TO LEGAL AUTHORITY
1. Principal	10,000.000	FTCA, 28 USC 2677
2. Attorney Fees	0.00	
3. Costs	0.00	
4. Interest	0.00	
Starting and Ending Dates for Interest Accrual	Start Date	End Date
5. Total Amount Payable from the Judgment Fund		
COMPLETE ONLY IF DEDUCTIONS ARE TO BE MADE FROM THE AMOUNT PAYABLE FROM THE JUDGMENT FUND *		
6. Agency Name and Agency Location Code (ALC) to Receive Offset	Amount to be Deducted	Reason(s) for Deduction(s) and Entity to Receive Deduction(s)
	a.	
	b.	
	c.	
7. Total Amount to be Deducted		
8. Net Amount Payable to Claimant		

If amount for fees, costs, or interest was included in the principal amount (stated on line 1) as part of a "lump sum award," enter "INCLUDED ABOVE" on lines 2 through 4. Enter "NONE" for any of those items (principal, fees, costs, or interest) for which no amount was awarded/included.

1. Enter the principal amount payable (excluding attorney fees, costs, and interest) and cite the legal authority for that award (for instance, "FTCA, 28 U.S.C. 2672"or "5th Amendment Taking").
2. Enter attorney fees payable (if any) and cite legal authority for that award [for instance, "Freedom of Information Act, 5 U.S.C. 552(a)(4)(E)"].
3. Enter the costs payable (if any) and cite legal authority for that award [for instance, " 28 U.S.C. 2412(a)"].
4. If the interest was calculated by the submitting agency, enter the total amount and cite the legal authority for that award [for instance, "Back Pay Act, 5 U.S.C. 5596(b)(2)"]. If the Judgment Fund is to calculate the interest, list only the dates that interest accrual starts.
5. Total amounts shown in lines 1 through 4 and enter.
6. Enter any deductions specified in the judgment or settlement agreement, or debts to be setoff under 31 U.S.C. 3728. Indicate the reason for the deduction (for instance, "FTCA withholding" or "debt setoff pursuant to 31 U.S.C. 3728") and the payee agency's name and ALC. If this deduction is a "debt setoff" pursuant to 31 U.S.C. 3728, you must attach a copy of the judgment or the plaintiff's agreement to the debt setoff. Otherwise, FMS must seek the claimant's consent to the setoff and may only withhold from payment an amount sufficient to pay the debt plus the costs of litigation. Litigation will be required to effect the setoff if there is no judgment of debt or if the claimant declines consent to the setoff. If there are more than three deductions, attach additional copies of this form. If there are no deductions, enter "NONE."
   *** Administrative debts that have been certified to the Secretary of the Treasury through the Treasury Offset Program will be setoff automatically.**
7. Total amounts shown in all columns of line 6 (a, b and c) and enter.
8. Subtract the amount in line 7 from that in line 5. If greater than zero, enter the difference. If the difference is zero or less, enter "NONE."

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 527 of 867

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of the Freedom of Information and Privacy Act

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Page 529 of 867

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Page 530 of 867

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Page 531 of 867

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 532 of 867

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

FILED
APR 7 2011
DENNIS P. IAVARONE, CLERK
US DISTRICT COURT, EDNC
BY DEP CLK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISON

William Daniel,
(Plaintiff)

v.

United States of America,
(Defendant)

Civil Suit, Title 28 U.S.C. § 2671
(FTCA)

Case No.: _____

Pursuant to the Federal Tort Claims Act (FTCA), Title 28 USC § 2671, and the authority granted under 28 CFR. §0-172, Plaintiff, William Daniel, acting in Pro-Se, now seeks compensation for the alleged personal injury as stated in his Tort Claim as filed on October 20, 2010, for the total sum of $3,000,000.00 (3 million dollars).

Power of the Court to adjudicate a prisoners complaint requires that a Federal Right be involved and that the prisoners rights have been violated. Plaintiff, hereby alleged, that, his rights under the 5th, 8th, and 14th Amendments to Due Process, and Cruel and Unusual Punishment have been violated by federal employees, acting under the color and in behalf of the United States of America.

Plaintiff also alleges, that, under the Federal Tort Claims Act, employees of the United States have acted

with Negligence, Omissions, and wrongful acts.

Basis of Claim

In December of 2009, Plaintiff was diagnosised with Wet Macular Degeneration with active choroidal neovascular membrane growth in the left eye, and dry Macular Degeneration in the right eye. At this time, a treatment of intravitreal Lucentis injections into the left eye was started. The diagnosis and treatments were all handled by an outside specialist, Dr. Jindal. Dr. Jindal requested in his reports that I be seen again in 6 weeks from the 12/14/09 date of the frist injection, stateing that the time set between injections were very time senitive. However, I was not taken to see Dr. Jindal for the second injection until 2/10/10, eight weeks instead of the 6 weeks as requested by Dr. Jindal. On 2/10/10, the date of my second injection, Dr. Jindal again requested that I be seen again in 6 weeks, I did not recieve my third injection until 4/7/10. At that time it was found that the injections were helping, but, as Dr. Jindal stated in his report, a continuous treatment is required to prevent recurrence and that I should be returned to see him in 6 weeks. However, in about 3 to 4 weeks, my left eye started to become very blurry again and as instructed by Dr. Jindal, I informed the medical dept. here and it's employees, all of which already knew of the disease I had in my eyes and the effect that would occur if I did not recieve the care and treatments

which were ordered and prescribed by Dr. Jindal. I continued to complain about losing the vision from my left eye for 7 months. Despite the knowledge of the outcome of their negligence, the employee's of the United States (Bureau of Prisons), continued to neglect their duties of providing medical care. Negligence is defined as; failure to exercise that degree of care which a person of ordinary prudence would exercise under the same circumstances. Any ordinary person would have prudently followed the written request and any other prescribed recommendations of a medical specialist, knowing that the failure to do so would result in substantial loss of vision that would be unrepairable. Plaintiff complained for 7 months, and only after filing his Tort Claim did he start to see the eye specialist again and recieve the injections again. However, Dr. Jindal then told the Plaintiff that had he been seen when requested, the damage which has been caused by the negligence would not have been anywhere as near as bad as it is now.

The following persons, as employee's of the United State (Bureau of Prisons), thru their Negligence, Omission, and wrongful acts, with deliberate indifference were the direct cause of a known disease to reach a point that could have been prevented or stopped as shown by the progress caused by the shots

1. D.R. Stephens, Warden
2. Mr. Kilpatrick, Asst. Hosp. Administrator
3. Pushp K. Claudius, M.D.
4. Mr. Derry, Phy. Asst.
5. C. Duchesne, M.D., Clinical Director

Although, the afore mentioned names were not the cause of the disease, their actions or lack of actions were the direct cause of the further degeneration of the disease and therefore the cause of personal injury to the Plaintiff.

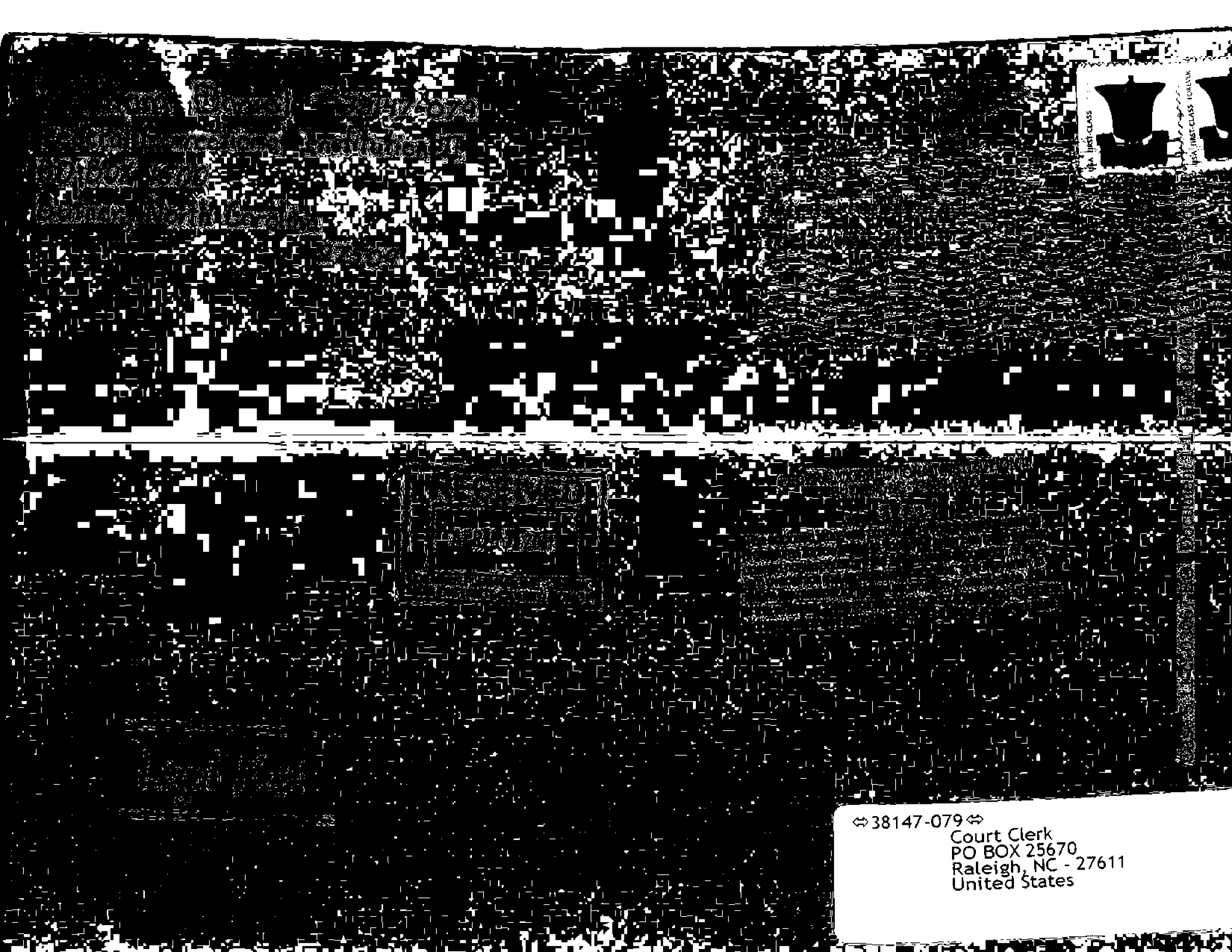
For these reasons, the Plaintiff prays that this Honorable Court grant Plaintiff his day in Court and to have the Defendants answer as to why they should not beheld as negligent in their duties to provide the medical care and treatment as Plaintiff is entitled under his civil rights.

Respectfully,

3/21/11
Date

William Daniel

William Daniel #38147-079
Federal Correctional Institution II
P.O. Box 1500
Butner, North Carolina
27509



⇔38147-079⇔
Court Clerk
PO BOX 25670
Raleigh, NC - 27611
United States

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-CT-3067-BO

WILLIAM DANIEL, Plaintiff,	)	
v.	)	**ORDER**
UNITED STATES OF AMERICA, Defendant.	)	

William Daniel ("plaintiff"), a federal inmate, filed this suit pursuant to the Federal Torts Claim Act ("FTCA"), 28 U.S.C. § 2672, et seq. The United States of America filed a motion to dismiss the FTCA claim pursuant to 12(b)(6) [D.E. 20]. Plaintiff has responded to the pending motion [D.E. 25], and the matter is properly before the court.

A motion pursuant to 12(b)(6) determines whether a claim is stated, not the resolution of factual contests, the merits of a claim, or the applicability of defenses. Republican Party v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). A claim is stated if the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. ----, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The "court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff," but does not consider "legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted). In other words, the standard requires a plaintiff to articulate facts, that, when accepted as true, demonstrate the plaintiff has stated a claim that makes it plausible he is entitled to relief. Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (quoting

Iqbal, 129 S.Ct. at 1949, and Twombly, 550 U.S. at 557).

Plaintiff alleges that he has been diagnosed with Macular Degeneration. The Bureau of Prison staff at the Federal Correctional Complex at Butner, North Carolina, has continually failed to facilitate treatment for his condition and his eye sight continues to deteriorate. Plaintiff specifically alleges that a delay in receiving "intravitreal Lucentis injections" and other medical care including follow-up medical visit to his medical doctor constitutes negligence on the part of BOP staff. See Complaint at 2-3.

An individual may seek relief from the United States under the FTCA only where the same relief sought is available against a private person in the state where the cause of action arose. See, e.g., United States v. Muniz, 374 U.S. 150, 152–53 (1963); Miller v. United States, 932 F.2d 301, 303 (4th Cir. 1991). "State law determines whether there is an underlying cause of action; but federal law defines the limitations period and determines when that cause of action accrued." Miller, 932 F.2d at 303. "[F]ederal courts apply the substantive law of the state in which the act or omission giving rise to the action occurred." Myrick v. United States, 723 F.2d 1158, 1159 (4th Cir. 1983); Frazier v. Angel Med. Ctr., 308 F. Supp. 2d 671, 676 (W.D.N.C. 2004).

In this case, plaintiff was incarcerated in North Carolina throughout the relevant time period. Thus, North Carolina is the state in which the alleged act or omission giving rise to the action occurred, and the court examines North Carolina substantive law. Defendant asserts that North Carolina imposes substantive legal requirements that a person must follow to pursue a medical malpractice claim which plaintiff has failed to do. See N.C. R. Civ. P. 9(j).

Under North Carolina Rule of Civil Procedure 9(j), a plaintiff's medical malpractice complaint must assert that the medical care has been reviewed by a person who is reasonably

expected to qualify (or whom the plaintiff will move to qualify) as an expert witness and who is willing to testify that the medical care received by the plaintiff did not comply with the applicable standard of care. See N.C. R. Civ. P. 9(j)(1), (2); see, e.g., Frazier v. Angel Med. Ctr., 308 F. Supp. 2d 671, 676 (W.D.N.C. 2004); Moore v. Pitt County Mem'l Hosp., 139 F. Supp. 2d 712, 713 (E.D.N.C. 2001); Acosta v. Byrum, 180 N.C. App. 562, 572, 638 S.E.2d 246, 253 (2006). Alternatively, the complaint must allege facts establishing negligence under the common-law doctrine of res ipsa loquitur. See N.C. R. Civ. P. 9j(3). Failure to comply with Rule 9(j) is grounds for dismissal of a state medical malpractice claim brought in federal court. See, e.g., Estate of Williams-Moore v. Alliance One Receivables Mgmt., Inc., 335 F. Supp. 2d 636, 649 (M.D.N.C. 2004); Frazier, 308 F. Supp. 2d at 676–77; Moore, 139 F. Supp. 2d at 713.

In this case, however, plaintiff's complaint does not appear to allege a claim for medical malpractice, but that prison officials failed to provide him with timely and necessary medical care as required by his medical condition. Thus, as stated in plaintiff's response and as understood by this court, plaintiff asserts ordinary negligence. Response, "The defendant keeps referring the action to a complaint of malpractice rather than the negligence plaintiff asserts . . ."; and "Plaintiff never complained of the treatment he received from the medical specialist. Plaintiff's complaint concerned the fact that the administration failed to follow the medical decisions concerning the need for treatment to prevent further and present damage to his eyes." Because plaintiff's action does not appear to be based upon medical malpractice, plaintiff is not required to meet the requirements of Rule 9(j). Thus, plaintiff may proceed with his FTCA claim, and defendant's motion to dismiss is DENIED.

Accordingly, defendant's motion to dismiss is DENIED [D.E. 20]. Having so determined, the matter shall be referred to United States Magistrate Judge William A. Webb for the entry of a scheduling order to include a period of limited discovery.

SO ORDERED, this the 31 day of January 2013.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:11-CT-3067-BO

WILLIAM DANIEL, Plaintiff,	)	
v.	)	STIPULATION OF DISMISSAL
UNITED STATES OF AMERICA, Defendant.	)	

Plaintiff and Defendant do hereby stipulate and agree pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure that all matters giving rise to this action have been settled and that this action as to the United States of America be dismissed with prejudice.

10-1-13
DATE

William Daniel
WILLIAM DANIEL
#38147-079
FCI Butner, PO Box 1000
Butner, NC 27509
Plaintiff

THOMAS G. WALKER
United States Attorney

10/18/13
DATE

/s/ R. A. Renfer, Jr.
R. A. RENFER, JR.
Assistant United States Attorney
Chief, Civil Division
310 New Bern Avenue
Suite 800 Federal Building
Raleigh, NC 27601-1461
Telephone: (919) 856-4530
Facsimile:(919) 856-4821
Email: rudy.renfer@usdoj.gov
N.C. Bar # 11201
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Stipulation of Dismissal has this the 28th day of March, 2014, been served upon the below party by placing a copy in the U.S. Mail, postage paid, addressed as follows:

William Daniel
#38147-079
FCI, Butner
PO Box 1000
Butner, NC 27509

/s/ R. A. Renfer, Jr.

R.A. RENFER, JR.
Assistant United States Attorney
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Attorney for Defendant

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

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HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results **Case Actions:**

Case ID: CIV-MXR-2012-00747 **Short Description:** DANIEL V. UNITED STATES OF AMERICA

CASE DETAILS **CASE DOCS** **CASE PERSONS** **CASE DATES** **CASE SUMMARY** **CASE BLOG**

Case Login Information

Reference Number	5:11-ct-03067-BO
Short Description	DANIEL V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	MID-ATLANTIC REGIONAL OFFICE
Current Institution	Butner II (FCI)
Incident Region	MID-ATLANTIC REGIONAL OFFICE
Incident Institution	Butner II (FCI)
Monetary Relief Sought	$3,000,000.00
Estimated Amount	$
Office	Western Division
Jurisdiction	EASTERN DISTRICT OF NORTH CAROLINA
Responsible Legal Office	FMC Butner

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	03/28/2014
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$
Total Amount Paid	$230,003.00
Description	SETTLED FOR $15,000 IN COMPENSATORY DAMAGES, AND $8,003 TO PAY OUTSTANDING RESTITUTION AND FEES
Description	SETTLED FOR $15,000 IN COMPENSATORY DAMAGES, AND $8,003 TO PAY OUTSTANDING RESTITUTION AND FEES
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	06/08/2012
Date Filed	04/07/2011

Case Progress

Current Owner	CHRISTINA KELLEY
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	NEW CASES
Private Case	No

Additional Case Information

Long Description	28:2671 FEDERAL TORT CLAIMS ACT
Further Case Classification	
Comments	

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AITHEN MUNDO,

AKA ANTHONY MUNDO

Plaintiff,

v.

Civil Action No. 1:12-cv-184
(Judge Keeley)

LIEUTENANT DANNY SHAW, individually as an Employee of the Federal Bureau of Prisons;

LIEUTENANT RONALD FETSCO, individually as an Employee of the Federal Bureau of Prisons;

OFFICER RACHEL GARDNER, individually as an Employee of the Federal Bureau of Prisons;

OFFICER JAMES HILLBERRY, individually as an Employee of the Federal Bureau of Prisons;

W. MORENO, individually as an Employee of the Federal Bureau of Prisons;

Defendants

AMENDED COMPLAINT PURSUANT TO
***BIVENS v. SIX UNKNOWN AGENTS*, 403 U.S. 388, 390-97 (1971)**

COMES NOW the Plaintiff, Aithen Mundo, AKA Anthony Mundo, by and through his attorney, Robert J. Frank, The Law Firm of Robert J. Frank & Assoc., LLC, and for cause to complain (as amended herein) against the Defendants states and alleges as follows:

I. Nature of Action

1. At all times pertinent hereto, the term "Plaintiff" shall refer to the Plaintiff named herein, Aithen Mundo, AKA Anthony Mundo.
2. The Plaintiff is an Observant Jew who as a matter of conscience adheres to the laws and requirements of his faith. Plaintiff's faith is sincere.
3. For the period of time from on or around June 15, 2012 until April 13, 2012, the Plaintiff was incarcerated in the Federal Bureau of Prisons at the Federal Correctional Institution, Morgantown, West Virginia (hereinafter "FCI Morgantown"). Plaintiff was released from incarceration prior to the filing of this subject law suit.
4. During his incarceration, Plaintiff was subjected to a pattern and practice of religious assaults, intimidation, physical and verbal abuse, threats of violence, invasions of privacy, and other violations of law by Defendants, and was retaliated against by Defendants for his complaints regarding this unlawful conduct, as set forth herein.
5. This action is brought pursuant to *Bivens v. Six Unknown Agents*, 403 U.S. 388, 390-97 (1971), for: a) violation of the Plaintiff's right to Free Exercise of Religion under the First Amendment to the United States Constitution; and b) violation of Plaintiff's right of Equal Protection under the Fifth Amendment to the United States Constitution.
6. At all times pertinent hereto it was clearly established federal law that a prisoner of the United States Bureau of Prisons, including the Plaintiff, maintained his fundamental First Amendment right to freely practice his religion. and that Defendants could not impinge on this right unless said impingement is reasonably related to a legitimate penological interest. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Defendants violated this clearly established law; impermissibly denying Plaintiff his First Amendment right to freely exercise his religion.

7. At all times pertinent hereto, it was clearly established federal law that a prisoner, including Plaintiff, maintained his fundamental Fifth Amendment right to be free from deprivations of "life, liberty, or property" without due process of law, and that implicit in that guarantee is the right to receive equal protection of the laws. Defendants violated this clearly established law; impermissibly subjecting Plaintiff to punishment and humiliation and other adverse acts based on his status as a religious minority.
8. The claims in this complaint are cognizable under *Bivens* and the First and Fifth Amendments to the United States Constitution.

II. Jurisdiction and Venue

9. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.
10. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331, as this action arises under the First and Fifth Amendments to the United States Constitution; under 28 U.S.C. § 1343(a)(3), in that Plaintiff seeks redress for deprivations made under color of state law of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that Plaintiff seeks damages under *Bivens v. Six Unknown Agents*, 403 U.S. 388, 390-97 (1971) in the nature of those provided for under 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; and under 42 U.S.C. § 1988(b) for an award of attorney's fees.
11. Venue is proper in the United States District Court for the Northern District of West Virginia under 28 U.S.C. § 1391(b), because the events giving rise to the claims described in this Complaint occurred within the jurisdiction of this court.

III. Parties

12. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

13. The Plaintiff, Aithen Mundo, AKA Anthony Mundo, ["Plaintiff"] is a United States citizen and a resident of the State of Pennsylvania. He was previously incarcerated at the Federal Bureau of Prisons FCI Morgantown facility. At all times pertinent hereto he was under the direct control of supervision of the Bureau of Prisons and the Defendants named herein.

14. Defendant, Lieutenant Danny Shaw (hereinafter "Shaw") was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

15. Defendant, Lieutenant Ronald Fetsco (hereinafter "Fetsco") was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

16. Defendant Officer Rachel Gardner (hereinafter "Gardner") was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto she was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. She is being sued in her individual capacity for actions taken within the scope of her employment with BOP.

17. Defendant Officer James Hillberry (hereinafter "Hillberry") was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

18. Defendant W. Moreno (hereinafter "Moreno") was at all times relevant herein a religious services worker employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto Moreno was acting under color of federal law. Defendant Moreno was responsible for advising the other officers in their responsibilities to protect the Plaintiff's First Amendment rights while incarcerated. Moreno is being sued in an individual capacity for actions taken within the scope of employment with BOP.

19. Plaintiff is informed and believes, and on that basis alleges, that at all times relevant herein, Defendants, and each of them, were employees and agents of the government of the United States of America, employed by the Federal Bureau of Prisons.

20. Plaintiff alleges that at all times relevant to this action, Defendants, and each of them, acted in the course and scope of their employment and under color of federal law.

21. While acting and failing to act as alleged herein, Defendants, and each of them, had complete custody and total control of Plaintiff. Plaintiff was dependent upon Defendants, and each of them, for their personal security.

22. In performing the acts and/or omissions complained of herein, Defendants, and each of them, acted under color of federal law, and Plaintiff is informed and believes each acted maliciously, callously, intentionally, recklessly, with gross negligence, and with deliberate indifference to the rights and personal security of Plaintiff. Each of them knew or should have known that their conduct, attitudes, actions and/or omissions were, and are, a threat to Plaintiff and to his Constitutionally-protected rights. Despite this knowledge, Defendants, and each of them, failed to take steps to protect, Plaintiff, and to ensure Plaintiff's Constitutional rights while he was in Defendants' care and custody.

IV. Factual Allegations

23. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

24. Plaintiff is an observant Jew who as a matter of conscience adheres to the primary laws and requirements of Judaism.

25. Plaintiff's faith is sincere. Plaintiff practiced the tenants of Judaism for a long period of time prior to his incarceration. To the extent he was permitted to do so, Plaintiff

practiced the primary tenants of Judaism during his incarceration. Plaintiff (post incarceration) continues to practice the primary tenants of Judaism, and intends to do so as a lifelong commitment. Plaintiff's commitments as an Observant Jew are important to him, and are essential to who he is and how he lives his life.

26. Upon incarceration, Plaintiff informed the Federal Bureau of Prisons of his religious faith.

27. Among the practices to which Plaintiff adhered as an Observant Jew were the following:

    a. At all times Plaintiff would wear a four-cornered fringed/tasseled garment/shawl called a Tzitzits or Tallis Katan, under his shirt. This garment covered his shoulders, chest and back. Plaintiff wore this garment daily, with the full knowledge and approval of the Federal Bureau of Prisons, and Plaintiff could not have had possession of the garment without the approval of the Federal Bureau of Prisons. Prior to the incidents reflected in this complaint, no agent of the Federal Bureau of Prisons ever suggested this garment posed any security or other risk.

    b. On a daily basis, Plaintiff would wear Tefillin, which consists of two small black leather boxes. Inside the boxes are pieces of handwritten parchment containing Biblical passages. Attached to the boxes are leather straps two or three feet in length, so designed as to enable one to be bound upon the hand and for the other to be worn on the head. Plaintiff wore Tefillin daily, with the full knowledge and approval of the Federal Bureau of Prisons, and could not have had possession of Tefillin without the approval of the Federal Bureau of Prisons. Prior to the incidents reflected in this complaint, no agent of the Federal Bureau of Prisons ever suggested Plaintiff's Tefillin posed any security or other risk.

c. Plaintiff would daily pray from the Siddur, a Jewish prayer book containing a set order of daily prayers. Plaintiff had possession of his Siddur with the full knowledge and approval of the Federal Bureau of Prisons, and could not have had possession of his Siddur without the approval of the Federal Bureau of Prisons. Prior to the incidents reflected in this complaint, no agent of the Federal Bureau of Prisons ever suggested Plaintiff's Siddur posed any security or other risk.

d. As an Observant Jew, it was required that Plaintiff have no physical contact with a member of the opposite sex, excepting his wife. The Federal Bureau of Prisons clearly recognized this tenant of faith. Prior to the incidents reflected in this complaint, no agent of the Federal Bureau of Prisons ever suggested that the prohibition of contact with the opposite sex posed any security or other risk.

28. At all times pertinent hereto it was clearly established federal law that a prisoner of the United States Bureau of Prisons, including the Plaintiff, maintained his fundamental First Amendment right to freely practice his religion, and that Defendants could not impinge on this right unless said impingement is reasonably related to a legitimate penological interest. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

29. U.S. Department of Justice / Federal Bureau of Prisons must, as a matter of clearly established law, appropriately facilitate the religious beliefs and practices of inmates within a correctional environment, and has promulgated guidelines and standards relating to religious observances in a correctional setting. These guidelines and standards are set forth in *Practical Guidelines for Administration of Inmate Religious Beliefs and Practices*; Technical References No. T5360.01, date 3/27/2002, and in subsequent

relevant documents. Said guidelines include, but are not limited to, the following guidelines relating to Observant Judaism:

a. "For an observant, traditional Jew, the struggle to maintain sacred traditional values and standards is one of his greatest challenges and spiritual struggles. Observant Jews **have no physical contact with the opposite sex**. When feasible, **opposite sex physical contact between staff and observant inmates should be avoided**." T5360.01, Judaism, Page 30 [emphasis added].

b. "The daily observance of the commandment to wear tefillin cannot be overemphasized. It is one of the cornerstones of the Jewish faith. **No inmate should be denied access to tefillin, even for one day.** Because of the supreme importance of tefillin observance, it is highly recommended that Chaplaincy Services retain a pair of tefillin to ensure their availability if the need arises." T5360.01, Judaism, Page 4 [emphasis added].

c. "In addition to the prayer tallis, an observant Jew wears at all times a smaller four-cornered garment (tallis katan), with similar tassels, under his shirt. This garment covers the shoulders, chest and back. Inmates in transit should be permitted to maintain these articles in their conveyance." T5360.01, Judaism, Page 3.

d. These religious items are so important the Federal Bureau of Prisons recognizes they should even be provided during prisoner transit, a circumstance posing significant security risk: "Inmates in transit are permitted by Bureau policy (**P.S. 5800**) to have their essential daily prayer items (tallis, tefillin, yarmulke, prayer book) transported on the same conveyance (bus, van, aircraft). Inmate will have

access to these items for daily use at all holdover points." T5360.01, Religious Property, Page 3.

30. The policies and guidelines of the Federal Bureau of Prisons recognize the First Amendment constitutional requirements and are co-extant with such requirements. Violation of said policies constitutes a violation of clearly recognized constitutional rights.

31. Each of the defendants herein either knew, or should have known, of the policies and guidelines of the Federal Bureau of Prisons relating to the religious practices and requirements of Observant Jews.

32. For the period of time Plaintiff was incarcerated he was exposed to constant harassment by Defendant Shaw. Defendant Shaw would interrupt prayer and religious study, including Sabbath services, for no other apparent reason than to harass the Jewish participants.

33. On or about September 16, 2011, Plaintiff had a visit from his wife and two other parties.

34. Plaintiff witnessed his wife and the two other parties talking to Defendant Officer Tennant. Plaintiff was approached by a party advising that Defendant Officer Tennant would not allow Plaintiff's wife to enter the visiting room because she had a slit on the bottom of her skirt. Plaintiff was able to visit with his wife and the two other parties within fifteen minutes of this situation.

35. Plaintiff was called to the front desk by Defendant Officer Tennent, by orders from Defendant Lieutenant Shaw, ten minutes after his visitation began. Upon reaching Defendant Lieutenant Shaw, Plaintiff was asked by Defendant Lieutenant Shaw what his tzitzit was.

36. That, Plaintiff advised Defendant Lieutenant Shaw that it was a religious garment he wears every day. The importance of Plaintiff's tzitzit and its role in Plaintiff's observance of his faith was easily ascertainable to Defendants, including Defendant Shaw, and was clearly stated in the policy and guidelines of the Federal Bureau of Prisons. There is no reason Defendant Shaw, and the other Defendants present, should have not known what the tzitzit was, or of its importance to Plaintiff.
37. Defendant Shaw, and other Defendants present, failed to undertake even minimal efforts to determine the significance of this garment or how it should be treated.
38. Defendant Lieutenant Shaw advised Plaintiff he had never seen him wear his tzitzit at mainline.
39. Plaintiff proceeded to explain to Defendant Lieutenant Shaw that he keeps his tzitzit tucked in his clothing when working the mainline, so that it did not get dirty with food particles.
40. Defendant Lieutenant Shaw did not give Plaintiff time to explain about his tzitzit before interrupting him with a "shut up before I put you in the SHU (Special Housing Unit)." Defendant Shaw demonstrated no interest in determining the religious significance of the garment, what it meant, or why it was worn. Defendant Shaw made no attempt to contact the chaplaincy staff or to review guidelines as to the nature or import of the garment. Defendant Shaw threatened Plaintiff with discipline for even attempting to explain what the garment was, or what its significance was.
41. Defendant Lieutenant Shaw then relocated Plaintiff, along with Defendant Officer Tennent to the search room, asking Plaintiff to remove his tzitzit.

42. There was no legitimate penological interest requiring Plaintiff remove his tzitzit, or in taking it from him. Plaintiff had permission to have and to wear the tzitzit. He wore it daily throughout the facility. The tzitzit was never previously considered a security hazard, nor was Plaintiff ever subject to search for wearing it. Plaintiff was proceeding from a secure area to a visit. There was no reason to believe Plaintiff was secreting contraband in his tzitzit, or that it was even possible to do so. There was no reason to believe Plaintiff had violated any rule in wearing the tzitzit, which he had express permission to possess and to wear.
43. Inmates of other faiths, such as Native American inmates were permitted to wear, without being searched, ritualistic clothing include headbands.
44. Plaintiff was instructed to remove his tzitzits despite an utter lack of any legitimate security or other penological interest to do so. Plaintiff's tzitzit was removed as punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to removal of religious clothing or artifacts for asserting their First Amendment rights.
45. That, Plaintiff felt emotionally "crushed" because he had always worn his tzitzit.
46. That, Defendant Lieutenant Shaw grabbed Plaintiff's tzitzit and treated it as if it were a piece of rag by throwing it on a desk. There was no legitimate penological interest to treating this garment with disrespect.
47. Defendant Lieutenant Shaw vacated the search room leaving Plaintiff undressed from the waist up and leaving his visitors in the visiting room for a period longer than ten (10)

minutes. There was no legitimate penological interest in leaving Plaintiff undressed from the waist up for an extended period of time.

48. Defendant Lieutenant Shaw returned to the search room advising Plaintiff to redress and return to the visiting room to complete his visit. Plaintiff was not allowed to wear his tzitzit during this visit, despite the fact that it was searched and no contraband was found. There was no apparent reason, other the antipathy of Defendant Shaw, for failing to allow Plaintiff to wear his Tzitzit during the visit. There was no legitimate penological interest in denying the Plaintiff his tzitzit during this visit.

49. Plaintiff, while exiting the visiting room was pulled out of line from a pat down and into a strip search room by Officer Belloti. Plaintiff asked why he was being strip-searched and was advised by Officer Belloti that it was "orders per Lieutenant Shaw."

50. There was no reason or legitimate penological rational for strip searching Plaintiff. There was no reason to believe Plaintiff was secreting contraband or otherwise violating any rule. Plaintiff was searched merely because he had been wearing a religious garment he had the right and permission to wear, and had attempted to stand up to Defendant Shaw in an attempt to exercise his religious rights. Plaintiff was strip searched in retaliation for asserting his First Amendment rights. The strip searching of Plaintiff was punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to strip search for asserting their First Amendment rights.

51. Plaintiff was given his tzitzit back after the strip search and sent back to his unit (Alexander).

52. While entering his unit, Plaintiff was waved over to an office by Officer King where he and Defendant Lieutenant Shaw were located.

53. Plaintiff stuck his head in the office to get his mail from Officer King when Defendant Lieutenant Shaw looked at him and said "What? Don't you see I'm here!"

54. Plaintiff remained in his cubicle for the remainder of the night to avoid any further harassment from Defendant Lieutenant Shaw. Plaintiff altered his daily activities to avoid harassment by Defendant Shaw.

55. On or about December 30, 2011, at 9:00 p.m., Plaintiff entered the visiting area at FCI Morgantown to log in and be patted-down to commence his visit.

56. Defendant Officer Rachel Gardner, a female officer, stood in front of Plaintiff to initiate the pat down when Plaintiff advised her in a mild voice that it was against his religious beliefs to be touched by a female other than his wife.

57. The requirement that male Observant Jews be searched by male corrections officers is clearly and unambiguously stated in the policies and guidelines of the Bureau of Prisons.

58. Defendant Officer Gardner smiled at Plaintiff and then waved Defendant Officer Hillberry over to them. Defendant Officer Hillberry asked Plaintiff if he was giving Defendant Officer Gardner a hard time at which time he responded with a "no sir".

59. Defendant Officer Hillberry proceeded with the pat-down to allow Plaintiff his visit. Plaintiff was pulled out of the pat-down line and asked to sit to the side by Defendant Officer Kuntzman. Plaintiff asked Officer Kuntzman if he was being strip-searched and was advised yes.

60. Plaintiff was strip searched. There was no reason or legitimate penological rational for strip searching Plaintiff. Plaintiff was strip searched in retaliation for asserting his First

Amendment right to not be searched by a person of the opposite sex. Defendants Gardner, Hillberry, and Fetsco caused Plaintiff to be strip searched.

61. The strip searching of Plaintiff was punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to strip search for asserting their First Amendment rights.

62. Plaintiff and was advised by Officer Kuntzman that Plaintiff was going to the Special Housing Unit (SHU) an administrative segregation used to punish inmates. Defendants Gardner, Hillberry, and Fetsco caused Plaintiff to be placed in the SHU. Placement in the SHU was specifically because Plaintiff asserted his First Amendment rights and requested his search be conducted by a male officer.

63. Officer Cook entered the visiting room to transport Plaintiff to Defendant Lieutenant Fetsco's office where he was advised of his rights and further asked if Plaintiff wanted to tell him about the events of that morning.

64. Plaintiff advised Defendant Lieutenant Fetsco of what he had informed Defendant Officer R. Gardner and was called a liar in front of Officer Cook and several other officers. This is despite the fact that the BOP policies clearly state that when dealing with an Observant Jew, "**opposite sex physical contact between staff and observant inmates should be avoided.**" T5360.01, Judaism, Page 30 [emphasis added].

65. Plaintiff was humiliated, degraded, belittled, disrespected, and embarrassed during and after this incident.

66. The sole reason Plaintiff was placed in the SHU was his assertion of his First Amendment right to request a search by a same sex corrections officer. No other reason was asserted for the placement of Plaintiff in the SHU and the accompanying strip search.

67. Defendant Gardner filed the incident report which caused Plaintiff to be strip searched and placed in the special housing unit. Defendant Gardner made false or misleading statements within said report, which caused Plaintiff to be strip searched and placed in the SHU for no other reason than the assertion of his clearly recognized First Amendment rights.

    a. Defendant Gardner reported Plaintiff refused to be pat searched by her because of his religious beliefs;

    b. Defendant Gardner completed and signed, or caused to be completed and signed, an incident report, alleging the following conduct on the part of Plaintiff: 1) interfering with any security procedure; 2) refusing to obey an order of any staff member; 3) lying or providing false information to staff.

    c. The only facts stated in support of the incident report stemmed directly from Plaintiff's assertion of his First Amendment rights. Specifically, the description of the incident on which the incident report was based was identified as "refused a pat down search, stating to me that it was against his religion for a female to touch him" and further stating "upon contacting religious services, W. Moreno, advised there was nothing in his religious beliefs staring that a female staff member could not conduct a pat search."

    d. No other grounds were given for the filing of the incident report, or the strip search and placement of Plaintiff in the SHU.

e. Defendant Gardner's statement, as set forth in the incident report, that Plaintiff refused a pat down search was false when made. Plaintiff properly informed Defendant Gardner of his sincerely held religious beliefs, and requested the pat search be conducted by a male corrections officer.

f. Defendant Gardner's statement, as set forth in the incident report, that she communicated with W. Moreno of religious services prior to signing her report was false. Defendant Gardner had no contact with W. Moreno.

g. Defendant Gardner's statement, as set forth in the incident report, that Plaintiff's religious beliefs did not prohibit contact with a female corrections officer was false, and was contrary to the clearly stated guidelines promulgated by the Bureau of Prisons.

h. But for this incident report Gardner completed and signed, or caused to be completed and signed the Plaintiff would not have been strip searched and placed in the SHU for asserting his First Amendment Rights.

68. Defendant Fetsco purportedly undertook an investigation of the incident and prepared an investigation report regarding the incident. In this "investigation" Defendant Fetsco was told by Mr. Mundo "I want a male to PAT [sic] search me. I am a conservative Jew and it is against my religious beliefs." Fetsco made no attempt to independently seek guidance from religious services staff, nor did he act in conformity with Federal Bureau of Prisons guidelines stating: "Observant Jews **have no physical contact with the opposite sex. When feasible, opposite sex physical contact between staff and observant inmates should be avoided.**" T5360.01, Judaism, Page 30 [emphasis added]. Defendant Fetsco's specifically entered the order placing Plaintiff in the Special

Housing Unit and causing him to be strip searched for exercising his First Amendment rights.

69. Defendant Hillberry advised Defendant Gardner to file the incident report which resulted in Plaintiff being strip searched and placed in the Special Housing Unit for exercising his First Amendment Rights.

70. Defendant Hillberry filed a memorandum relating to alleged communications with religious services personnel. Defendant Gardner, in filing a memorandum, and in making false or misleading statements within said memorandum, caused Plaintiff to be strip searched and placed in the SHU for no other reason than the assertion of his clearly recognized First Amendment rights.

    a. Defendant Hillberry's statement, as set forth in his memorandum, that he communicated with W. Moreno of religious services regarding this matter was either untrue; or

    b. Defendant Hillberry falsely represented that W. Moreno of religious services indicated that Plaintiff's religious beliefs did not prohibit contact with a female corrections officers.

    c. But for the false and misleading statements by Defendant Hillberry regarding statements allegedly made by W. Moreno of religious services Plaintiff would not have been strip searched and placed in the SHU for asserting his First Amendment Rights.

71. If the statements made by Defendant Hillberry regarding communications with Defendant Moreno are true, Defendant Moreno, contrary to clearly stated Federal Bureau of Prisons policy, informed other defendants named herein that there were no restrictions within

Observant Judaism which would preclude a female corrections officer from pat searching a male Observant Jew. Such a statement, if made, was clearly false, and is in direct conflict with the stated policy and guidelines of the BOP. So advising other officers would require an intentional, reckless, or grossly negligent act. Said statements were a direct and proximate cause of Plaintiff being strip searched and placed in the Special Housing Unit for exercising his First Amendment Rights.

72. There was no reason or legitimate penological rational for Placing Plaintiff in the SHU. Plaintiff did not threaten any officer, or otherwise act in an insubordinate manner in requesting he be searched by a male officer. There was no legitimate reason the search must have been conducted by a female, as opposed to male officer. Male officers were present to perform a pat down search immediately after Plaintiff requested a male officer perform the search, and indeed, such a search was immediately conducted. No delay occurred in the conduct of the search. No security or other breaches were noted during the search. Plaintiff was correct in stating the tenants of his belief, and this particular tenant of his belief was recognized by the Bureau of Prisons. Plaintiff did not lie or otherwise fabricate a belief in order to avoid a search. There was absolutely no reason to place Plaintiff in the SHU other than the negative and hostile reaction of Defendants Gardner, Hillberry and Fetsco to Plaintiff's assertion of his constitutionally guaranteed rights, and there was no countervailing penological interest implicated.

73. The strip search and placement of Plaintiff in the SHU was punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other

religious groups were not subject to placement in the SHU for asserting their First Amendment rights.

74. When Plaintiff was first placed in the SHU, he requested access to his Tefillin and Siddur. He was told "we will get to that...." Despite his request, the religious items were never provided. This was despite the clear policy and guidelines of the BOP that "[n]o **inmate should be denied access to tefillin, even for one day.**" T5360.01, Judaism, Page 4 [emphasis added].

75. At the time Plaintiff was placed in the SHU he was expecting, and had been approved for early release. He was concerned that the incident which caused him to be placed in the SHU would cause him to miss early release and be incarcerated for a longer period of time. Plaintiff had just been strip searched and thrown into the SHU for asserting a religious right. Plaintiff was justifiably concerned that additional or repeated requests to freely practice his religion, including additional or repeated requests for his religious items, would expose him to additional punishment, additional time in the SHU and further jeopardize his early release from incarceration.

76. Plaintiff was denied his religious items (including his Tefillin and Siddur) required to practice his religion during his twenty-one (21) days in the SHU. But for the conduct of Defendants Gardner, Hillberry, Fetsco, and Moreno, Plaintiff would not have been placed in the SHU, thereby losing access to his Tefillin and Siddur.

77. There was no reason or legitimate penological rational for denying Plaintiff access to his religious items while in the SHU. The denial of access to religious items while in the SHU was in retaliation for asserting his First Amendment rights. The denial of access to religious items while in the SHU was punishment for asserting his First Amendment

rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to the denial of access to religious items while in the SHU for asserting their First Amendment rights.

78. That, Plaintiff was released from the SHU after the twenty-one (21) days and his charges dismissed.

79. Defendants, each of them, failed to take action to prevent other Defendants from committing the illegal acts complained of by the Plaintiffs herein. By permitting such activity to continue unabated, Defendants, and each of them, adopted a de facto policy of deliberate indifference to the wrongful acts complained of herein and adopted, authorized, ratified and approved a policy and practice of permitting religious assault.

80. The actions, conduct and inactions of Defendants, and each of them, demonstrates a practice, custom ,or policy of reckless and deliberate indifference to instances of known or suspected denial of religious expression, intimidation, abuse, threats of violence, retaliation and other violations of law violating Plaintiffs' Constitutional rights.

81. An actual controversy exists between Plaintiff and Defendants concerning their rights, privileges and obligations.

V. First Claim for Relief: First Amendment – Free Exercise

82. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

83. At all times pertinent hereto it was clearly established federal law that a prisoner of the United States Bureau of Prisons, including the Plaintiff, maintained his fundamental First Amendment right to freely practice his religion, and that Defendants could not impinge

on this right unless said impingement is reasonably related to a legitimate penological interest. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

84. Defendants knew, or should have known, of this clearly established federal law.

85. The Federal Bureau of Prisons had policies and guidelines specific to Observant Jews which clearly and unambiguously identified and addressed the importance of certain religious articles and practices. Defendants knew, or should have known of these clearly defined guidelines.

86. There was no penological interest which necessitated, or was related to the conduct undertaken by Defendants as alleged herein.

87. Defendants knew, or reasonably should have known, that their conduct as stated herein would negatively impact or impinge the Plaintiff's exercise of his fundamental First Amendment right to freely practice his religion.

88. Defendants were aware of the consequences their conduct would have on the Plaintiff, and on the Plaintiff's exercise of his fundamental First Amendment right to freely practice his religion. Defendants' conduct as stated with specificity herein, negatively impacted or impinged the Plaintiff's exercise of his fundamental First Amendment right to freely practice his religion.

89. Defendants intended that their conduct negatively impact or impinge the Plaintiff's exercise of his fundamental First Amendment right to freely practice his religion.

90. Defendants' conduct demonstrates that they acted with animus toward Plaintiff due to his religious affiliation, identification, practices and beliefs.

91. Plaintiff sustained injuries, damages, and losses, as a result of the Defendants' violation of Plaintiff's First Amendment Rights. Plaintiff alleges he is entitled to compensatory damages as stated herein for Defendants' violation of his constitutional rights.

VI. Second Claim for Relief: Fifth Amendment - Equal Protection

92. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

93. At all times pertinent hereto, it was clearly established federal law that a prisoner, including Plaintiff, maintained his fundamental Fifth Amendment right to be free from deprivations of "life, liberty, or property" without due process of law, and that implicit in that guarantee is the right to receive equal protection of the laws.

94. At all times pertinent hereto it was clearly established law that pursuant to the equal protection guarantees implicit in the Fifth Amendment, the government, including the Defendants must treat similarly-situated persons equally, and may not discriminate against a group based on religious identity.

95. At all times pertinent hereto, it was clearly established federal law that the free exercise of religion is a fundamental right, and that classification by religious group, including Judaism, is a suspect classification, requiring the Defendants demonstrate a compelling state interest to impinge the fundamental right, or to enforce regulations in a manner discriminator to a discrete religious

96. Defendants knew or should have known of this clearly established federal law.

97. At all times pertinent hereto, Plaintiff is, and was, an Observant Jew.

98. Defendants knew, or should have known, that at all times pertinent hereto, Plaintiff is, and was, an Observant Jew.

99. Defendants' conduct as alleged herein was directed toward the particularized religious practices of a discrete group, i.e. Observant Judaism, of which Plaintiff was an adherent.

100. Defendants' conduct taken against Plaintiff, which violated Plaintiff's First Amendment rights of free exercise of religion, discriminates against this Plaintiff while allowing similarly situated prisoners to enjoy their constitutional rights without interference. Specifically, inmates of other faiths, such as Native Americans, were allowed to wear religiously significant garments without being subject to additional search, including strip search. Inmates of other faiths, including, by information and belief, Christians were not prohibited access to articles necessary for daily practice of one's faith.

101. By treating Plaintiff in a discriminatory manner, Defendants have violated Plaintiffs fundamental rights.

102. Defendants have no rational justification or basis for their discrimination or actions which violate the First Amendment rights of Plaintiff.

103. Therefore, Defendants' conduct violates the equal protection provisions implicit in the Fifth Amendment to the United States Constitution.

104. Plaintiff suffered injuries, damages and losses as a result of Defendants violation of Plaintiff's right to equal protection under the law, including but not limited to an impingement of his right to freely exercise his religion, loss of liberty, humiliation, stigmatization, and threat of future discipline. Plaintiff alleges he is entitled to compensatory damages as stated herein for Defendants' violation of his constitutional rights.

VII. Damages

105. As a result of the actions of Defendants as defined above, the Plaintiff has sustained past and future injuries, damages and losses including, but not limited to:

a. Bodily Injury

b. Physical pain and suffering

c. Mental and emotional suffering

d. Medical expenses

e. Permanent injury, disability, impairment and disfigurement

f. Loss of enjoyment of life

g. Any other relief the court deems just and proper

106. Plaintiff is also entitled to recover the following:

a. Cost of court expended herein, specifically including deposition expenses and expert witness fees.

b. Pre-judgment, moratory judgment, and post-judgment interest at the highest lawful rate.

c. Award of reasonable attorney fees and costs incurred in this action.

d. Such other and further awards as the Court deems just and proper under the circumstances.

WHEREFORE, Plaintiff respectfully requests this Court enter judgment against the Defendants for compensatory, and general damages in an amount to be proven at trial, together with costs of suit and reasonable attorney's fees as provided by law, and for such other relief as this Court deems just and proper.

WHEREFORE, Plaintiff respectfully prays that judgment be entered against the Defendants herein upon each and every claim for relief asserted herein.

PLAINTIFF HEREBY REQUESTS A TRIAL BY JURY ON ALL ISSUES HEREIN.

Respectfully submitted this 19th day of September, 2013.

Robert J. Frank
WV Bar No. 10654
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& Assoc. LLC
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UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF WEST VIRGINIA

AITHEN MUNDO AKA ANTHONY MUNDO)
)
Plaintiff)
v.) CIVIL ACTION NO. 1:12-cv-184
)
LIEUTENANT SHAW, individually as an)
Employee of the Federal Bureau of Prisons;)
LIEUTENANT D. FETSCO, individually as)
An Employee of the Federal Bureau of Prisons;)
OFFICER TENNENT, individually as an)
Employee of the Federal Bureau of Prisons;)
OFFICER R. GARDNER, individually as an)
Employee of the Federal Bureau of Prisons;)
OFFICER BELLOTI, individually as an)
Employee of the Federal Bureau of Prisons;)
OFFICER KUNTZMAN, individually as an)
Employee of the Federal Bureau of Prisons;)
OFFICER HILLBERRY, individually as an)
Employee of the Federal Bureau of Prisons;)

Defendant

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* OFFICER KUNTZMAN
MORGANTOWN FEDERAL CORRECTIONAL INSTITUTION
446 GREENBAG RD. RTE. 857
MORGANTOWN, WV 26501

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) – or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: ROBERT J. FRANK, ESQ.
ROBERT J. FRANK & ASSOCIATES, LLC
205 W. WASHINGTON STREET, STE 1
LEWISBURG, WV 24901

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Cheryl Dean Riley, Clerk of Court

Date: 1/28/2013

K Dennis
Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Civil Action No.

AITHEN MUNDO,
AKA ANTHONY MUNDO

Plaintiff,

v.

LIEUTENANT SHAW, individually as an Employee of the Federal Bureau of Prisons;
LIEUTENANT D. FETSCO, individually as an Employee of the Federal Bureau of Prisons;
OFFICER TENNENT, individually as an Employee of the Federal Bureau of Prisons;
OFFICER R. GARDNER, individually as an Employee of the Federal Bureau of Prisons;
OFFICER BELLOTI, individually as an Employee of the Federal Bureau of Prisons;
OFFICER KUNTZMAN, individually as an Employee of the Federal Bureau of Prisons;
OFFICER HILLBERRY, individually as an Employee of the Federal Bureau of Prisons;

Defendants

Civil Action No.1:12-cv-184 (Keeley)
Electronically Filed: December 28, 2012

COMPLAINT PURSUANT TO
***BIVENS v. SIX UNKNOWN AGENTS*, 403 U.S. 388, 390-97 (1971)**

COMES NOW the Plaintiff, Aithen Mundo, AKA Anthony Mundo, by and through his attorney, E. Lavoyd Morgan Jr. of E. Lavoyd Morgan Jr. and Associates, and for cause to complain against the Defendants states and alleges as follows:

I. Nature of Action

1. At all times pertinent hereto, the term "Plaintiff" shall refer to the Plaintiff named herein, Aithen Mundo, AKA Anthony Mundo.
2. The Plaintiff is an Orthodox Jew who as a matter of conscience adheres to the laws and requirements of his faith.
3. For the period of time from on or around June 15, 2012 until April 13, 2912, the Plaintiff was incarcerated in the Federal Bureau of Prisons at the Federal Correctional Institution, Morgantown, West Virginia (hereinafter "FCI Morgantown"). Plaintiff was released from incarceration prior to the filing of this subject law suit.
4. This action is brought pursuant to *Bivens v. Six Unknown Agents*, 403 U.S. 388, 390-97 (1971), for: a) violation of the Plaintiff's right to Free Exercise of Religion under the First Amendment to the United States Constitution; b) violation of Plaintiff's right of Equal Protection under the Fifth Amendment to the United States Constitution; and c) violation of the Plaintiff's right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.
5. At all times pertinent hereto it was clearly established federal law that a prisoner of the United States Bureau of Prisons, including the Plaintiff, maintained his fundamental First Amendment right to freely practice his religion, and that

Defendants could not impinge on this right unless said impingement is reasonably related to a legitimate penological interest. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Defendants violated this clearly established law; impermissibly denying Plaintiff his First Amendment right to freely exercise his religion.

6. At all times pertinent hereto, it was clearly established federal law that a prisoner, including Plaintiff, maintained his fundamental Fifth Amendment right to be free from deprivations of "life, liberty, or property" without due process of law, and that implicit in that guarantee is the right to receive equal protection of the laws. Defendants violated this clearly established law; impermissibly subjecting Plaintiff to punishment and humiliation and other adverse acts based on his status as a religious minority.

7. At all times pertinent hereto, it was clearly established federal law that it is a violation of the Eighth Amendment to use a form and severity of punishment which is degrading to human dignity, inflicted in an arbitrary fashion, or which is patently unnecessary under the totality of the circumstances. Defendants violated this clearly established law; impermissibly subjecting Plaintiff to degrading, arbitrary, and severe punishment for exercising or attempting to exercise his First Amendment right to freely exercise his religion.

8. The claims in this complaint are cognizable under *Bivens* and the First, Fifth and Eighth Amendments to the United States Constitution.

II. Jurisdiction and Venue

9. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

10. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331, as this action arises under the First, Fifth, and Eighth Amendments to the United States Constitution; under 28 U.S.C. § 1343(a)(3), in that Plaintiff seeks redress for deprivations made under color of state law of rights, privileges, and immunities secured by the United States Constitution; under 28 U.S.C. § 1343(a)(4), in that Plaintiff seeks damages under *Bivens v. Six Unknown Agents*, 403 U.S. 388, 390-97 (1971) in the nature of those provided for under 42 U.S.C. § 1983, which provides a cause of action for the protection of civil rights; and under 42 U.S.C. § 1988(b) for an award of attorney's fees.

11. Venue is proper in the United States District Court for the Northern District of West Virginia under 28 U.S.C. § 1391(b), because the events giving rise to the claims described in this Complaint occurred within the jurisdiction of this court.

III. Parties

12. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

13. The Plaintiff, Aithen Mundo, AKA Anthony Mundo, ["Plaintiff"] is a United States citizen and a resident of the State of Pennsylvania. He was previously incarcerated at the Federal Bureau of Prisons FCI Morgantown facility. At all

times pertinent hereto he was under the direct control of supervision of the Bureau of Prisons and the Defendants named herein.

14. Defendant, Lieutenant Shaw was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

15. Defendant, Lieutenant D. Fetsco was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

16. Defendant, Officer Tennent was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP

facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

17. Defendant Officer R. Gardner was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto she was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. She is being sued in her individual capacity for actions taken within the scope of her employment with BOP.

18. Defendant Officer Belloti was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

19. Defendant Officer Kuntzman was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown

facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

20. Defendant Officer Hillberry was at all times relevant herein a correctional officer employed by the Federal Bureau of Prisons at the FCI Morgantown facility. At all times pertinent hereto he was acting under color of federal law. Defendant was responsible for the security and safety of persons incarcerated within BOP facilities, including Plaintiff, and was responsible for ensuring the constitutional rights of inmates were properly safeguarded during their incarceration. He is being sued in his individual capacity for actions taken within the scope of his employment with BOP.

21. Plaintiff is informed and believes, and on that basis alleges, that at all times relevant herein, Defendants, and each of them, were employees and agents of the government of the United States of America, employed by the Federal Bureau of Prisons.

22. Plaintiff alleges that at all times relevant to this action, Defendants, and each of them, acted in the course and scope of their employment and under color of federal law.

23. While acting and failing to act as alleged herein, Defendants, and each of them, had complete custody and total control of Plaintiff. Plaintiff was dependent upon Defendants, and each of them, for their personal security.

24. In performing the acts and/or omissions complained of herein, Defendants, and each of them, acted under color of federal law, and Plaintiff is informed and believes each acted maliciously, callously, intentionally, recklessly, with gross negligence, and with deliberate indifference to the rights and personal security of Plaintiff. Each of them knew or should have known that their conduct, attitudes, actions and/or omissions were, and are, a threat to Plaintiff and to his Constitutionally-protected rights. Despite this knowledge, Defendants, and each of them, failed to take steps to protect, Plaintiff, and to ensure Plaintiff's Constitutional rights while he was in Defendants' care and custody.

IV. Factual Allegations

25. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

26. Plaintiff Anthony Mundo was a male inmate incarcerated in the custody of the Federal Bureau of Prisons and housed at the FCI Morgantown facility, who was subjected to a pattern and practice of religious assaults, intimidation, physical and verbal abuse, threats of violence, invasions of privacy, and other violations of law by Defendants, and was retaliated against by Defendants for his complaints regarding this unlawful conduct, as set forth herein.

27. On or about September 16, 2011, Plaintiff had a visit from his wife and two other parties.

28. Plaintiff witnessed his wife and the two other parties talking to Defendant Officer Tennant. Plaintiff was approached by a party advising that Defendant Officer Tennant would not allow Plaintiff's wife to enter the visiting room because she had a slit on the bottom of her skirt. Plaintiff was able to visit with his wife and the two other parties within fifteen minutes of this situation.

29. Plaintiff was called to the front desk by Defendant Officer Tennent, by orders from Defendant Lieutenant Shaw ten minutes after his visitation began. Upon reaching Defendant Lieutenant Shaw, Plaintiff was asked by Defendant Lieutenant Shaw what his tzitzit was.

30. That, Plaintiff advised Defendant Lieutenant Shaw that it was a religious garment he wears every day. The importance of Plaintiff's tzitzit and its role in Plaintiff's observance of his faith was easily ascertainable to Defendants. Defendants failed to undertake even minimal efforts to determine the significance of this garment or how it should be treated.

31. Defendant Lieutenant Shaw advised Plaintiff he had never seen him wear his tzitzit at mainline.

32. Plaintiff proceeded to explain to Defendant Lieutenant Shaw that he keeps his tzitzit tucked in his clothing when working the mainline, so that it did not get dirty with food particles.

33. Defendant Lieutenant Shaw did not give Plaintiff time to explain about his tzitzit before interrupting him with a "shut up before I put you in the SHU (Special Housing Unit)."

34. Defendant Lieutenant Shaw then relocated Plaintiff, along with Defendant Officer Tennent to the search room, asking Plaintiff to remove his tzitzit.

35. There was no legitimate penological interest requiring Plaintiff remove his tzitzit, or that it be taken from him. Plaintiff's tzitzit was removed in retaliation for asserting his First Amendment rights. Plaintiff's tzitzit was removed as punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to removal of religious clothing or artifacts for asserting their First Amendment rights.

36. That, Plaintiff felt emotionally "crushed" because he had always worn his tzitzit.

37. That, Defendant Lieutenant Shaw grabbed Plaintiff's tzitzit and treated it as if it were a piece of rag by throwing it on a desk. There was no legitimate penological interest to treating this garment with disrespect.

38. Defendant Lieutenant Shaw vacated the search room leaving Plaintiff undressed from the waist up and leaving his visitors in the visiting room for a period longer than ten (10) minutes. There was no legitimate penological to leaving Plaintiff undressed from the waist up, particularly in view of Defendant Gardner, a female officer.

39. That, Defendant Lieutenant Shaw returned to the search room advising Plaintiff to redress and return to the visiting room to complete his visit.

40. That, Plaintiff, while exiting the visiting room was pulled out of line from a pat down and into a strip search room by Officer Belloti. Plaintiff asked why he was being strip-searched and was advised by Officer Belloti that it was "orders per Lieutenant Shaw."

41. There was no reason or legitimate penological rational for strip searching Plaintiff. Plaintiff was strip searched in retaliation for asserting his First Amendment rights. The strip searching of Plaintiff was punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to strip search for asserting their First Amendment rights.

42. Plaintiff was given his tzitzit back after the search and sent back to his unit (Alexander).

43. That, while entering his unit, Plaintiff was waved over to an office by Officer King where he and Defendant Lieutenant Shaw were located.

44. Plaintiff stuck his head in the office to get his mail from Officer King when Defendant Lieutenant Shaw looked at him and said "What? Don't you see I'm here!"

45. Plaintiff remained in his cubicle for the remainder of the night to avoid any further harassment from Defendant Lieutenant Shaw.

46. That, on or about December 30, 2011, at 9:00 p.m., Plaintiff entered the visiting area at FCI Morgantown to log in and be patted-down to commence his visit.

47. That, Defendant Officer R. Gardner, a female officer stood in front of Plaintiff to initiate the pat-down when Plaintiff advised her in a mild voice that it was against his religious beliefs to be touched by a female other than his wife.

48. Defendant Officer R. Gardner smiled at Plaintiff and then waved Defendant Officer Hillberry over to them. Defendant Officer Hillberry asked Plaintiff if he was giving Defendant Officer R. Gardner a hard time at which time he responded with a "no sir".

49. Defendant Officer Hillberry proceeded with the pat-down to allow Plaintiff his visit. Plaintiff was pulled out of the pat-down line and asked to sit to the side by Defendant Officer Kuntzman. Plaintiff asked Officer Kuntzman if he was being strip-searched and was advised yes.

50. Plaintiff was strip searched. There was no reason or legitimate penological rational for strip searching Plaintiff. Plaintiff was strip searched in retaliation for asserting his First Amendment rights. The strip searching of Plaintiff was punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to strip search for asserting their First Amendment rights.

51. That, a strip-search was conducted on Plaintiff and was advised by Officer Kuntzman that Plaintiff was going to the Special Housing Unit (SHU) an administrative segregation used to punish inmates.

52. There was no reason or legitimate penological rational for Placing Plaintiff in the SHU. Plaintiff was placed in the SHU in retaliation for asserting his First Amendment rights. The placement of Plaintiff in the SHU was punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to placement in the SHU for asserting their First Amendment rights.

53. Defendant Officer Cook entered the visiting room to transport Plaintiff to Defendant Lieutenant Fetsco's office where he was advised of his rights and further asked if Plaintiff wanted to tell him about the events of that morning.

54. Plaintiff advised Defendant Lieutenant Fetsco of what he had informed Defendant Officer R. Gardner and was called a liar in front of Officer Cook and several other officers. This is despite an absolute failure on the part of Defendant Lieutenant Fetsco or other Defendants to determine and understand the tenants and requirements of Plaintiff's faith, or how that faith could be protected while still properly completing their assigned duties as corrections officers.

55. That, Plaintiff was humiliated, degraded, belittled, disrespected, and embarrassed during and after this incident.

56. That, Plaintiff was denied his religious items (including his Tefflin and Siddur) required to practice his religion during his twenty-one (21) days in the SHU. There was no reason or legitimate penological rational for denying Plaintiff access to his religious items while in the SHU. The denial of access to religious items while in the SHU was in retaliation for asserting his First Amendment rights. The denial of access to religious items while in the SHU was punishment for asserting his First Amendment rights, was arbitrary in nature, degrading, and severe in proportion to the reasons for the punishment. Other similarly situated persons, belonging to other religious groups were not subject to the denial of access to religious items while in the SHU for asserting their First Amendment rights.
57. That, Plaintiff was released from the SHU after the twenty-one (21) days and his charges dismissed.
58. Defendants, each of them, failed to take action to prevent other Defendants from committing the illegal acts complained of by the Plaintiffs herein. By permitting such activity to continue unabated, Defendants, and each of them, adopted a de facto policy of deliberate indifference to the wrongful acts complained of herein and adopted, authorized, ratified and approved a policy and practice of permitting religious assault.
59. The actions, conduct and inactions of Defendants, and each of them, demonstrates a practice, custom ,or policy of reckless and deliberate indifference to instances of known or suspected denial of religious expression, intimidation,

abuse, threats of violence, retaliation and other violations of law violating Plaintiffs' Constitutional rights.

60. An actual controversy exists between Plaintiff and Defendants concerning their rights, privileges and obligations.

V. First Claim for Relief: First Amendment – Free Exercise

61. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

62. At all times pertinent hereto it was clearly established federal law that a prisoner of the United States Bureau of Prisons, including the Plaintiff, maintained his fundamental First Amendment right to freely practice his religion, and that Defendants could not impinge on this right unless said impingement is reasonably related to a legitimate penological interest. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

63. Defendants knew, or should have known, of this clearly established federal law.

64. There was no penological interest which necessitated, or was related to the conduct undertaken by Defendants as alleged herein.

65. Defendants knew, or reasonably should have known, that their conduct as stated herein would negatively impact or impinge the Plaintiff's exercise of his fundamental First Amendment right to freely practice his religion.

66. Defendants were aware of the consequences their conduct would have on the Plaintiff, and on the Plaintiff's exercise of his fundamental First Amendment right to freely practice his religion. Defendants' conduct negatively impacted or

impinged the Plaintiff's exercise of his fundamental First Amendment right to freely practice his religion.

67. Defendants intended that their conduct negatively impact or impinge the Plaintiff's exercise of his fundamental First Amendment right to freely practice his religion.

68. Defendants' conduct demonstrates that they acted with animus toward Plaintiff due to his religious affiliation, identification, practices and beliefs.

69. Plaintiff sustained injuries, damages, and losses, as a result of the Defendants' violation of Plaintiff's First Amendment Rights. Plaintiff alleges he is entitled to compensatory damages as stated herein for Defendants' violation of his constitutional rights.

VI. Second Claim for Relief: Fifth Amendment - Equal Protection

70. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

71. At all times pertinent hereto, it was clearly established federal law that a prisoner, including Plaintiff, maintained his fundamental Fifth Amendment right to be free from deprivations of "life, liberty, or property" without due process of law, and that implicit in that guarantee is the right to receive equal protection of the laws.

72. At all times pertinent hereto it was clearly established law that pursuant to the equal protection guarantees implicit in the Fifth Amendment, the government,

including the Defendants must treat similarly-situated persons equally, and may not discriminate against a group based on religious identity.

73. At all times pertinent hereto, it was clearly established federal law that the free exercise of religion is a fundamental right, and that classification by religious group, including Judaism, is a suspect classification, requiring the Defendants demonstrate a compelling state interest to impinge the fundamental right, or to enforce regulations in a manner discriminator to a discrete religious

74. Defendants knew or should have known of this clearly established federal law.

75. At all times pertinent hereto, Plaintiff is, and was, an Orthodox Jew.

76. Defendants knew, or should have known, that at all times pertinent hereto, Plaintiff is, and was, an orthodox Jew.

77. Defendants' conduct as alleged herein was directed toward the particularized religious practices of a discrete group, i.e. Orthodox Judaism, of which Plaintiff was an adherent.

78. Defendants' conduct taken against Plaintiff, which violated Plaintiff's First Amendment rights of free exercise of religion, discriminates against this Plaintiff while allowing similarly situated prisoners to enjoy their constitutional rights without interference.

79. By treating Plaintiff in a discriminatory manner, Defendants have violated Plaintiffs fundamental rights.

80. Defendants have no rational justification or basis for their discrimination or actions which violate the First Amendment rights of Plaintiff.

81. Therefore, Defendants' conduct violates the equal protection provisions implicit in the Fifth Amendment to the United States Constitution.

82. Plaintiff suffered injuries, damages and losses as a result of Defendants violation of Plaintiff's right to equal protection under the law, including but not limited to an impingement of his right to freely exercise his religion, loss of liberty, humiliation, stigmatization, and threat of future discipline. Plaintiff alleges he is entitled to compensatory damages as stated herein for Defendants' violation of his constitutional rights.

VII. Third Claim for Relief: Eighth Amendment – Cruel and Unusual Punishment

83. Each and every allegation set forth in the preceding paragraphs is incorporated herein by this reference with the same effect as if re-alleged herein.

84. At all times pertinent hereto, it was clearly established federal law that it is a violation of the Eighth Amendment to use a form and severity of punishment which is degrading to human dignity, inflicted in an arbitrary fashion, or which is patently unnecessary under the totality of the circumstances.

85. Defendants knew, or should have known, of this clearly established federal law.

86. The punishment used against Plaintiff as stated herein, (i.e. strip searches, administrative segregation, etc.) was degrading to human dignity, was inflicted in a completely arbitrary fashion, and was patently unnecessary under the

totality of the circumstances then existing. Said punishment constituted a Violation of Plaintiff's Eighth Amendment Rights.

VIII. Damages

87. As a result of the actions of Defendants as defined above, the Plaintiff has sustained past and future injuries, damages and losses including, but not limited to:

a. Bodily Injury

b. Physical pain and suffering

c. Mental and emotional suffering

d. Medical expenses

e. Permanent injury, disability, impairment and disfigurement

f. Loss of enjoyment of life

g. Any other relief the court deems just and proper

88. Plaintiff is also entitled to recover the following:

a. Cost of court expended herein, specifically including deposition expenses and expert witness fees.

b. Pre-judgment, moratory judgment, and post-judgment interest at the highest lawful rate.

c. Award of reasonable attorney fees and costs incurred in this action.

d. Such other and further awards as the Court deems just and proper under the circumstances.

WHEREFORE, Plaintiff respectfully requests this Court enter judgment against the Defendants for compensatory, and general damages in an amount to be proven at trial, together with costs of suit and reasonable attorney's fees as provided by law, and for such other relief as this Court deems just and proper.

WHEREFORE, Plaintiff respectfully prays that judgment be entered against the Defendants herein upon each and every claim for relief asserted herein.

PLAINTIFF HEREBY REQUESTS A TRIAL BY JURY ON ALL ISSUES HEREIN.

AITHEN MUNDO
By Counsel

Respectfully submitted this 28th day of December, 2012.

E. Lavoyd Morgan Jr. Esq. WVSB No. 6985
E. Lavoyd Morgan Jr. and Associates
PO Box 1847
Lewisburg, WV 24901
Telephone: (304) 645-7120
Fax: (304) 645-0118

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HOME ALERTS MY WORK NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Case Actions:

Case ID: CIV-MXR-2013-00785 **Short Description:** MUNDO V. SHAW ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:12-cv-00184-IMK
Short Description	MUNDO V. SHAW ET AL
Classification	Civil
Case Type	Bivens 1st Amend
Case Sub-Type	
Current Region	MID-ATLANTIC REGIONAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$
Estimated Amount	$
Office	Clarksburg
Jurisdiction	NORTHERN DISTRICT OF WEST VIRGINIA
Responsible Legal Office	MARO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	07/15/2014
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$20,000.00
Total Amount Paid	$20,000.00
Description	SETTLED BY TORT CLAIM
Description	SETTLED BY TORT CLAIM
Court Fee Paid ?	Yes
Pro Se ?	No

Case Initiation Dates

Date Received	05/13/2013
Date Filed	12/28/2012

Case Progress

Current Owner	CRISTINA HILLYER
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	NEW CASES
Private Case	No

Additional Case Information

Long Description	28:1331 FED. QUESTION: CIVIL RIGHTS VIOLATION
Further Case Classification	BIVENS CASE ALLEGING VIOLATION OF FREE EXERCISE OF RELIGION
Comments	

Home | Alerts | My Work | New Case | Search Main | Email

United States Department of Justice - Office of General Counsel & Review

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2672

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys. signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to administrative claim no. TRT-MXR-2014-01641 under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of Twenty Thousand Dollars ($20,000.00) which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which claimant or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Claimant and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property

and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the administrative claims, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Claimant and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by claimant or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the claimant will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys fees for services rendered in connection with this matter shall not exceed 20 per centum of the amount of the compromise settlement.

7. The persons signing this Stipulation warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any claimant is a minor or legally incompetent adult, the claimant must obtain State Court approval of the settlement at their expense. Claimant agrees to obtain such approval in a timely manner: time being of the essence. Claimant further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event claimant fails to obtain such State Court approval, the entire Stipulation For Compromise Settlement and Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer to the following:

A. Name of Bank: First National Bank, West Virginia
B. Street Address of Bank: US Route 219 North
C. City, State and Zip Code of Bank: Lewisburg, WV 24901
D. Routing Number: 121042484
E. Name of Account: The Law Firm of Robert J. Frank & Associates
F. Account Number (b)(6)

9. The parties agree that the fact of this Stipulation for Compromise Settlement and Release may be made public by the United States, and the claimant expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. Claimant agrees not to discuss or publicize the facts and allegations raised in the underlying administrative tort claim without the express authorization of the United States, outside of any judicial filings necessary to ensure appropriate enforcement of this Stipulation for Compromise Settlement and Release.

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 6th day of January, 2014.

Matthew W. Mellady, Regional Counsel
Federal Bureau of Prisons
Attorney for United States of America

Executed this 3rd day of January, 2014.

Tony Aithen Mundo
Claimant

Robert J. Frank, Attorney
The Law Firm of Robert J. Frank & Associates, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GARY COULTER, Plaintiff	:	
v.	:	
UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS Defendant	:	CIVIL ACTION NO: 14-30 ERIE

COMPLAINT

AND NOW, comes the Plaintiff, Gary Coulter, by and through his attorneys, **Nicholas, Perot, Smith, Koehler & Wall, P.C.,** and files the following Complaint as follows:

1. That Plaintiff Gary Coulter is an adult individual presently residing at a Federal Correctional Institution at P.O. Box 15330 Fort Worth, Texas 76119.

2. That Defendant United States of America, Department of Justice, Federal Bureau of Prisons (hereinafter "United States of America"), is a Federal Agency, which has a principal place of operation for the Mid- Atlantic Region at 10010 Junction Drive, Suite 100-N Annapolis Junction, Maryland 20701.

3. That a claim was timely filed under the Federal Tort Claims Act, 28 U.S.C. §2671, and denied by letter dated August 13, 2013. As such, this action is timely filed.

4. That this Honorable Court has concurrent jurisdiction under 28 U.S.C. §1346 (b)(1).

5. That on or about March 1, 2011, Plaintiff Gary Coulter was an incarcerated individual, inmate # 20502068, who was being transferred to FCI Forthworth, TX under the legal custody, control and supervision of the Defendant U.S. of A. and was being

transported via bus from Morgantown, West Virginia to Pittsburgh International Airport, Pittsburgh, Pennsylvania.

6. That on Plaintiff's bus there were members of the Federal Marshalls responsible for the transport of prisoners.

7. That at all times relevant, the members of the Federal Marshalls were acting as employees of the Defendant United States of America.

8. That at all times relevant, Defendant United States of America had a duty to supervisor and control their Federal Marshalls while transferring prisoners on March 1, 2011.

9. That at all times relevant, Plaintiff was a left below the knee amputee and was restrained with handcuffs around his wrists attached at his waist and without his prosthesis.

10. That at the above time and place, while the bus was parked, Plaintiff requested to use the restroom facilities on the bus with the Federal Marshalls' assistance.

11. That the Federal Marshalls, while allowing Plaintiff to use the restroom, failed to assist Plaintiff to the restroom facilities, nor did they provide him with his prosthesis or cane in order for him to support himself.

12. That Plaintiff was attempting to return from using the restroom facilities when he fell straight down onto the end of his amputated left leg.

13. That as a result of the violent impact with bus floor, Plaintiff Gary Coulter was violently shaken and suffered severe, serious and permanent injuries and permanent impairment of bodily functions including:

a. Blunt force trauma to left amputated leg, right knee, left elbow, and right 5th finger;

b. Fractured supracondylar of left femur;

c. Fractured left distal femur with mal-alignment;

d. Lacerations on left arm and right 5th finger;

e. Open Reduction Internal fixation surgery to left leg amputation;

f. Revision surgery to above- left knee amputation;

g. Contusions on left knee, left elbow, right hand;

h. Constant pain in left leg residual stump; and

i. Shock to nerves and nervous system;

14. That as a direct and proximate result of the aforementioned injuries suffered by Plaintiff Gary Coulter, he has the following damages:

a. Plaintiff has suffered and will suffer great pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life's pleasures;

b. Plaintiff has been and will be required to expend large sums of money for surgical and medical attention, inmcluding physical therapy, hospitalization, medical supplies, surgical appliances, medicines and attendant's services;

c. Plaintiff's general health, strength, and vitality have been impaired.

15. That Defendant United States of America, breached its duty to set proper standards for transporting prisoners with disabilities and supervise and control the Federal Marshalls in the following respects:

a) In failing to provide adequate medical care and/ or medical supplies or devices;

b) In allowing the Federal Marshalls to be deliberately indifferent to

Plaintiff's serious medical needs;

c) In not physically assisting Plaintiff to and from the restroom given his amputation and disability;

d) In not providing Plaintiff with his prosthetic or a cane;

e) In failing to establish proper procedures for Plaintiff to use the restroom facilities safely;

f) In failing to make existing facilities readily accessible to and usable by individuals with disabilities such as Plaintiff;

g) In negligently caring, controlling and/ or assisting Plaintiff in moving to and from the restroom facilities while on the bus;

h) In failing to properly train and/or supervise members on Plaintiff's bus;

i) In failing to comply with the Rehabilitation Act of 1973, 29 U.S.C. §794(a) and Title II of the Americans with Disabilities Act, 42 U.S.C. §12131.

16. That Defendant United States of America is responsible for the setting of proper standards for transporting prisoners with disabilities and the negligent actions of the members of the Federal Prison Guard, as set forth above, and their negligence was the proximate cause of Plaintiff's injuries set forth above.

WHEREFORE, Plaintiff, Gary Coulter demands judgment against the Defendant United States of America, Department of Justice, Federal Bureau of Prisons in an amount of $500,000.00, plus interest and costs of suit.

A JURY TRIAL OF TWELVE (12) IS DEMANDED.

Respectfully submitted,

NICHOLAS, PEROT, SMITH, KOEHLER & WALL

BY S/Michael J. Koehler, Esquire

Michael J. Koehler, Esquire
Pa. I.D. 56195
2527 West 26th Street
Erie, Pennsylvania 16506
(814) 833-8851
Attorney for the Plaintiff

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
GARY COULTER

(b) County of Residence of First Listed Plaintiff Crawford
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Nicholas, Perot, Smith, Koehler, & Wall, P.C.
2527 West 26th Street
Erie, PA 16506

DEFENDANTS
UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
Matthew W. Mellady, Esquire: Mid-Atlantic Regional Counsel
David J. Hickton, Esquire: U.S. Attorney Western District of PA
Eric H. Holder, Jr., Esquire: U.S. Attorney General

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☒ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/ Disabilities - Employment
- ☐ 446 Amer. w/ Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(Specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*
29 U.S.C. §794(a), 42 U.S.C. §12131
Brief description of cause
Personal injury resulting from inadequate and/or negligent care for disabled prisoner on transport bus.

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND $ 500,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)* JUDGE N/A DOCKET NUMBER N/A

DATE 01/30/2014

SIGNATURE OF ATTORNEY OF RECORD /S/ Michael J. Koehler, Esquire Pa. I.D. 56195

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

JS 44ASREVISED June, 2009
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
THIS CASE DESIGNATION SHEET MUST BE COMPLETED

PART A

This case belongs on the (◉ Erie ○ Johnstown ○ Pittsburgh) calendar.

1. **ERIE CALENDAR** - If cause of action arose in the counties of Crawford, Elk, Erie, Forest, McKean, Venang or Warren, OR any plaintiff or defendant resides in one of said counties.

2. **JOHNSTOWN CALENDAR** - If cause of action arose in the counties of Bedford, Blair, Cambria, Clearfield or Somerset OR any plaintiff or defendant resides in one of said counties.

3. Complete if on **ERIE CALENDAR**: I certify that the cause of action arose in Allegheny County and that the Plaintiff resides in Crawford County.

4. Complete if on **JOHNSTOWN CALENDAR**: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.

PART B (You are to check ONE of the following)

1. ○ This case is related to Number _____. Short Caption _____
2. ◉ This case is not related to a pending or terminated case.

DEFINITIONS OF RELATED CASES:

CIVIL: Civil cases are deemed related when a case filed relates to property included in another suit or involves the same issues of fact or it grows out of the same transactions as another suit or involves the validity or infringement of a patent involved in another suit EMINENT DOMAIN: Cases in contiguous closely located groups and in common ownership groups which will lend themselves to consolidation for trial shall be deemed related.

HABEAS CORPUS & CIVIL RIGHTS: All habeas corpus petitions filed by the same individual shall be deemed related. All pro se Civil Rights actions by the same individual shall be deemed related.

PARTC

I. CIVIL CATEGORY (Place **x** in only applicable category).

1. ○ Antitrust and Securities Act Cases
2. ○ Labor-Management Relations
3. ○ Habeas Corpus
4. ○ Civil Rights
5. ○ Patent, Copyright, and Trademark
6. ○ Eminent Domain
7. ○ All other federal question cases
8. ◉ All personal and property damage tort cases, including maritime, FELA, Jones Act, Motor vehicle, products liability, assault, defamation, malicious prosecution, and false arrest
9. ○ Insurance indemnity, contract and other diversity cases.
10. ○ Government Collection Cases (shall include HEW Student Loans (Education), V A Overpayment, Overpayment of Social Security, Enlistment Overpayment Army, Navy, etc., HUD Loans, GAO Loans (Misc. Types), Mortgage Foreclosures, SBA Loans, Civil Penalties and Coal Mine Penalty and Reclamation Fees.

I certify that to the best of my knowledge the entries on this Case Designation Sheet are true and correct

Date: 1/30/2014 /S/ Michael J. Koehler, Esquire Pa. I.D. 56195

ATTORNEY AT LAW

NOTE: ALL SECTIONS OF BOTH FORMS MUST BE COMPLETED BEFORE CASE CAN BE PROCESSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GARY COULTER,	)	
	)	
Plaintiff,	)	Civil Action No. 1:14-cv-00030
	)	
v.	)	Judge Mark R. Hornak
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Plaintiff's Complaint was received by the Clerk of Court on January 30, 2014, and was referred to United States Magistrate Judge Susan Paradise Baxter for Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. The Defendant thereafter moved to dismiss the actions on various grounds. The Magistrate Judge's Report and Recommendation, issued on February 13, 2015, recommended that the Motion to Dismiss by Defendant [ECF No. 8] be denied. The parties were allowed fourteen (14) days from the date of service to file objections. Service was made on all parties by ECF. Objections were filed by Defendant on February 26, 2015. Plaintiff filed a response to the Objections on March 6, 2015.

After a *de novo* review of the pleadings and documents in the case, together with the Report and Recommendation and the Objections/Response to Objections, it is ORDERED that the Motion to Dismiss by Defendant [ECF No. 8] is DENIED. The Report and Recommendation

of Magistrate Judge Baxter, issued February 13, 2015, as modified by this Order[1], is adopted as the Opinion of the Court.

In its Objections, the Defendant for the first time asserted that the Plaintiff's claim under the Americans with Disabilities Act ("ADA") should be dismissed on jurisdictional grounds, in that by its terms that statute is inapplicable to the United States as a defendant. The Court does not believe that the argument made by the United States goes to the decisional power of this Court, the *sine qua non* of subject matter jurisdiction, but instead makes a classic Rule 12(b)(6) argument, *e.g.* the "claim" fails to state a claim. *See Scheidt v. Donahoe*, No. 13-cv-836-JAP, 2014 WL 6991982, at *2 (D. N.J. Dec. 10, 2014) (dismissing ADA claim against federal government for failure to state a claim). The Court notes that the United States appears to be correct on the law, that is that an ADA claim may not be pursued by the Plaintiff against the United States on the facts alleged. The United States will now have an opportunity to file an Answer pursuant to Fed. R. Civ. P. 12(a), and once having done that, it may raise this issue with the Magistrate Judge at the first procedural juncture available, perhaps in a Motion for Judgment on the Pleadings, Fed. R. Civ. P. 12(c), as to that claim.

Second, the Court concludes that the analysis of the Magistrate Judge relative to the issue of exhaustion of administrative remedies in regard to the Plaintiff's Rehabilitation Act claim in the context of the Plaintiff's surgical hospitalization was fairly raised by the record in the case, and it was not, as the United States seemingly contends, the Magistrate Judge engaging in an impermissible analytical detour in recommending that the Motion to Dismiss on "failure to exhaust" grounds be denied. Such denial is without prejudice in any event, and the United States

[1] The citations to *Turicentro, S.A. v. American Airlines, Inc.* and *Carpet Grp. Int'l v. Oriental Rug Importers Ass'n, Inc.* at page 3 of the Report and Recommendation are each modified to add "*overruled on other grounds by Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F. 3d 462 (3d Cir. 2011)."

will be free to raise such matters in a subsequent Motion for Summary Judgment, if the record at that time supports such a position.

Third, the Court finds no merit in the Objection of the United States to the portion of the Report and Recommendation declining to recommend dismissal at this time based on the "discretionary function" doctrine. The declarations submitted by the United States in those regards are so narrowly crafted in terms of their assertions regarding what is not in the applicable rules and regulations relative to the transportation of inmates so as to perhaps dodge (or at least overly parse) what is the relevant inquiry, namely do the regulations, rules and policies applicable to such matters otherwise or in a more general fashion set a non-discretionary standard applicable to such matters. It may turn out, after the appropriate discovery, that the United States is correct, and that the means and manner of accomplishing such matters as are relevant here are discretionary. Perhaps not.[2] Either way, this Court does not read the Report and Recommendation as supporting the argument of the United States that this disposition would generate the much-maligned discovery "fishing expedition," a position that is often the argument *du jour* whenever a party wants to end a case prior to any discovery. The Court has faith in the ability of the Magistrate Judge to manage pretrial matters, including such discovery, so as to foster the "just, speedy, and inexpensive" disposition of this civil action.

3/25/15

Mark R. Hornak
United States District Judge

cc: Susan Paradise Baxter, U.S. Magistrate Judge
All counsel of record

[2] The Court finds that intimation of the United States that disclosure and consideration of any generalized policy statement that would direct the method by which Deputy United States Marshals are to assist (or not) inmates with amputations or other lower extremity impairments to go to the bathroom would necessarily raise "sensitive issues involving prison safety and security," ECF No. 14 at 7, to be a bit overheated.

From:	ecf_intake_pawd@pawd.uscourts.gov
To:	pawd_ecf@pawd.uscourts.gov
Subject:	Activity in Case 1:14-cv-00030-MRH-SPB COULTER v. UNITED STATES OF AMERICA Order
Date:	Wednesday, February 24, 2016 4:02:44 PM

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

Western District of Pennsylvania

Notice of Electronic Filing

The following transaction was entered on 2/24/2016 at 4:01 PM EST and filed on 2/24/2016
Case Name: COULTER v. UNITED STATES OF AMERICA
Case Number: 1:14-cv-00030-MRH-SPB
Filer:
WARNING: CASE CLOSED on 02/24/2016
Document Number: 34(No document attached)

Docket Text:
ORDER OF COURT. This action has been resolved and the only matter remaining to be completed is the submission of a stipulation for dismissal. IT IS HEREBY ORDERED that the Clerk mark the above-captioned action CLOSED. IT IS FURTHER ORDERED that the Court expressly retains jurisdiction of this matter to consider any issue arising during the period when such stipulation is being finalized, including but not limited to enforcing any settlement. Signed by Judge Mark R. Hornak on 2/24/16. Text-only entry; no PDF document will issue. This text-only entry constitutes the Order of the Court or Notice on the matter. (bdb)

1:14-cv-00030-MRH-SPB Notice has been electronically mailed to:

Michael J. Koehler mkoehler@npslaws.com, khaley@npslaws.com

Paul D. Kovac paul.kovac@usdoj.gov, CaseView.ECF@usdoj.gov, carol.friedrich@usdoj.gov, usapaw.ecfcivil@usdoj.gov

1:14-cv-00030-MRH-SPB Filer must deliver notice by other means to:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GARY COULTER	)	
	)	
	)	
	)	
Plaintiff(s)	)	
v.	)	Civil Action No. 14-30
UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
Defendant(s)	)	

REPORT OF NEUTRAL

A mediation session was held in the above captioned matter on February 24, 2016.

The case (please check one):

X has resolved
____ has resolved in part (see below)
____ has not resolved.

The parties request that a follow up conference with the Court should be scheduled within ____ days.

If the case has resolved in part, please indicate the part that has resolved and/or the claim(s)/parties that remain.

Dated: February 24, 2016

/s/Philip B. Friedman
Signature of Neutral

Rev. 09/11

Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

[redacted]

Back to Case Results **Case Actions:**

Case ID: CIV-MXR-2014-00235 **Short Description:** COULTER V. UNITED STATES OF AMERICA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:14-cv-00030-SPB
Short Description	COULTER V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	MID-ATLANTIC REGIONAL OFFICE
Current Institution	Morgantown (FCI)
Incident Region	MID-ATLANTIC REGIONAL OFFICE
Incident Institution	Morgantown (FCI)
Monetary Relief Sought	$500,000.00
Estimated Amount	$
Office	Erie
Jurisdiction	WESTERN DISTRICT OF PENNSYLVANIA
Responsible Legal Office	MARO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	02/24/2016
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$115,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	03/13/2014
Date Filed	01/30/2014

Case Progress

Current Owner	DIANA LEE
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	42:1983PR PRISONER CIVIL RIGHTS
Further Case Classification	
Comments	

Home | Alerts | My Work | New Case | Search Main | Email

[redacted] United States Department of Justice - Office of General Counsel & Review

FILED
JAN 25 2013
CLERK, US DISTRICT COURT
NORFOLK, VA

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

WAYNE CARREL, Plaintiff

v.

UNITED STATES, Defendant

Civil Action No. 2:13-cv-44

VERIFIED COMPLAINT

I. JURISDICTION & VENUE

1. Plaintiff Wayne Carrel, *pro se*, brings this civil action pursuant to the Federal Tort Claims Act (hereinafter "FTCA"). 28 U.S.C. §1346(b). 2671-80. This Court has jurisdiction under 28 U.S.C. §§1331 and 1343(a)(3).

2. The Eastern District of Virginia is an appropriate venue under 28 U.S.C. §1391(b)(2) because it is where a substantial amount of the events giving rise to the claims occurred.

II. PLAINTIFF

3. Plaintiff, Wayne Carrel, is and was at all times relevant to this action a prisoner in the custody of the Federal Bureau of Prisons (hereinafter "BOP"). Mr. Carrel is currently confined in the medium security facility at the Federal Correctional Complex at Petersburg, Virginia (hereinafter "PEM") which is located in the Eastern District of Virginia. Mr. Carrel's mailing address is: Wayne Carrel, 05811-028, PO Box 1000, Petersburg, VA 23804-1000.

III. DEFENDANT

4. Defendant, United States, is the only appropriate defendant in this FTCA action. For the purposes of this action, Defendant is presumed to reside at the office of the United States Attorney for the Eastern District of Virginia, Justin W. Williams United States Attorney's Building, 2100 Jamieson Ave., Alexandria, VA 22314

RECEIVED
JAN 16 2013
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

IV. FACTUAL ALLEGATIONS

5. On July 13, 2009, Plaintiff reported to Sick Call[1] to seek medical attention for a persistent cough lasting more than eight weeks, as well as recently-developed symptoms of tingling and numbness in the pinky and ring fingers of Plaintiff's left hand. Plaintiff described these symptoms, in writing, via Sick Call Complaint Form (hereinafter "SCF"), and said form was collected by the attending Physician's Assistant (hereinafter "PA").

6. Upon information and belief, the SCFs completed by inmates and collected by medical staff are and were routinely destroyed by medical staff rather than being filed or archived.

7. Within approximately thirty minutes of submitting the SCF referenced in paragraph 5, Plaintiff was taken into an examination room by the PA. At this time, Plaintiff reiterated the symptoms he had presented in writing on the SCF and also verbally described an odd sensation, similar to an electric shock, that Plaintiff would experience every time he coughed.

8. Subsequent to the events described in paragraph 6, the PA took readings of Plaintiff's vital signs and set an appointment for Plaintiff to return to medical on July 23, 2009. A copy of the appointment slip is attached as Exhibit "A". The PA made no comment to Plaintiff regarding Plaintiff's complaint.

9. On July 23, 2009, Plaintiff reported to medical as scheduled. At this time, Plaintiff was taken into an examination room by the attending PA. Plaintiff reiterated, to the PA, the symptoms described in paragraphs 5 and 7. The PA listened to Plaintiff's lungs, and declared the lungs were clear. Plaintiff asked the PA about the tingling and numbness in Plaintiff's hands, to which the PA replied that it was unrelated to the cough. The PA then told Plaintiff to expect to be called to medical for an x-ray.

10. On July 28, 2009, Plaintiff was called to medical for an x-ray appointment. Plaintiff reiterated to the x-ray technician the symptoms described in paragraphs 5 and 7. The x-ray technician told Plaintiff, "We handle only one problem at a time," and that these x-rays were "for the cough."

11. During the appointment described in paragraph 10, the x-ray technician took two frontal images and one side view of Plaintiff's chest. She then told Plaintiff to return to Sick Call in two weeks to obtain the x-ray results.

---

[1] Sick Call refers to the system used at the time whereby inmates could seek medical attention. The procedure was for an inmate to wait until "Sick Call" was announced (usually around 6:30 a.m.), report to medical, complete a Sick Call Complaint Form describing the symptoms, and submit the form to the attending PA. The inmate would then wait to be seen by the attending PA.

12. On August 11, 2009, Plaintiff reported to Sick Call as directed. Plaintiff submitted a new SCF, on which he requested the x-ray results. Plaintiff also stated, in writing on the SCF, that his symptoms were worsening, and that his right hand was now also beginning to experience tingling and numbness. The attending PA gave Plaintiff an appointment to return on August 27, 2009. A copy of the appointment slip is attached as Exhibit "B".

13. On August 27, 2009, Plaintiff returned to medical as scheduled. At this time, the attending PA told Plaintiff that the x-ray results weren't in yet, and gave Plaintiff an appointment to return to medical the next day, August 28, 2009. A copy of the appointment slip is attached as Exhibit "C".

14. Plaintiff returned to medical on August 28, 2009, as scheduled. Two attendant PAs told Plaintiff that there were no x-ray results for the frontal images, but that the side view image was negative.

15. Plaintiff told both PAs that the numbness had now progressed into both hands, both arms, and was beginning to affect his legs and even his trunk.

16. Plaintiff also told both PAs that he was now having difficulty performing such ordinary tasks as buttoning his clothes, and that he was frequently dropping objects.

17. As to the claims in paragraphs 15 and 16, the PAs only said to Plaintiff that when the x-ray results came in, Plaintiff would be notified.

18. On September 1, 2009, Plaintiff filed a Request For Informal Resolution[2] (hereinafter "RFIR") against medical.

19. In the RFIR referenced in paragraph 18, Plaintiff requested prompt medical attention due to a six-month cough and numbness in both hands. Plaintiff also asked for the x-ray results and radiology report.

20. Two weeks later, on September 14, 2009, Plaintiff received a response to his RFIR. The response did not address Plaintiff's request for medical attention, but only stated, "We have resolve [sic] any problem with the machine and all films have been sent to be read today, 9/11/09. Please visit Sick

[2] A Request For Informal Resolution ("RFIR") is the first step in the grievance process used by inmates who wish to seek administrative remedy. The RFIR is completed by the inmate and presented to his Correctional Counselor, who in turn contacts the individuals responsible for the matter at hand. After the responsible individuals reply to the RFIR, the Counselor then returns the RFIR, complete with the response, to the inmate. At this point, if the inmate is not satisfied, he may proceed with the first step in the formal grievance process, the Request For Administrative Remedy.

Call in two weeks to see your films results and further treatment." A copy of the RFIR and response is attached as Exhibit "D".

21. On September 25, 2009, Plaintiff reported to Sick Call as directed and completed a new SCF. The attending PA, B. Katta, collected the SCF. Once inside the examination room, Plaintiff pleaded with PA Katta to do something besides just schedule another appointment.

22. As to the claims in paragraph 21, PA Katta scheduled another appointment for Plaintiff. The appointment was set for October 6, 2009. A copy of the appointment slip is attached as Exhibit "E".

23. Plaintiff reiterated his symptoms to PA Katta, and explained that even simply walking had become difficult.

24. As to the claim in paragraph 23, PA Katta replied, "Well, you're vertical -- it looks like you are walking okay to me."

25. Plaintiff expressed his concern to PA Katta that nerve compression, perhaps involving the brachial plexus, might be causing Plaintiff's symptoms.

26. As to the claim in paragraph 25, PA Katta told Plaintiff, "I'm not interested in your diagnosis," and dismissed Plaintiff.

27. Prior to exiting the examination room, Plaintiff asked PA Katta for the correct spelling of his name. PA Katta then used a rubber stamp to imprint "B. Katta, MLP" on the back of Plaintiff's appointment slip.

28. As Plaintiff was leaving, he said, "Thank you," to PA Katta, who then replied, "Thank you -- no!"

29. On September 28, 2009, Plaintiff initiated a new RFIR against PA Katta for unprofessional conduct. A copy of this RFIR is attached as Exhibit "F".

30. Also, on September 28, 2009, Plaintiff appealed to the Warden the RFIR referenced in paragraphs 18 through 20. In the appeal, Plaintiff pleaded for medical attention, citing (among other things) loss of feeling and dexterity in both hands, numbness progressing into both legs and trunk, and difficulty walking. A copy of this appeal is attached as Exhibit "G".

31. Upon information and belief, when a prisoner files a RFIR, the grievance staff calls the matter to the attention of those individuals responsible for the matter that the RFIR concerns.

32. On October 6, 2009, Plaintiff had a medical appointment scheduled for 10:00 a.m. However, due to foggy conditions, a census count was conducted at 9:50 a.m., and Plaintiff was prevented from going to his appointment by the housing unit officer.

33. At about 11:50 a.m. that morning, Plaintiff's housing unit was released for the midday meal. At that time, Plaintiff reported directly to medical and explained to the lady in charge what had happened. She told Plaintiff that medical had radioed all unit officers earlier, and told them to release the 10:00 a.m. medical appointments to medical. She then told Plaintiff to report to Sick Call to obtain a new appointment.

34. As to the claims in paragraphs 32 and 33, Plaintiff asked his Correctional Counselor for assistance. The counselor called medical and asked what could be done. Upon hanging up, the counselor told Plaintiff that medical said to send Plaintiff to Sick Call to obtain a new appointment.

35. On October 27, 2009, Plaintiff received written notice that the grievance appeal he had submitted on September 28, 2009, had been received by the Warden's office on October 20, 2009, and that a reply was due to Plaintiff by November 9, 2009. A copy of this notice is attached as Exhibit "H".

36. On November 13, 2009, Plaintiff received the Warden's response to Plaintiff's RFIR submitted on September 28, 2009. This response essentially stated that Plaintiff had never presented with symptoms of numbness, that the x-ray machine had been repaired, that Plaintiff had failed to appear for his appointment on October 6, 2009, and that Plaintiff should report to Sick Call if he should need further medical assistance. A copy of this response is attached as Exhibit "I".

37. On November 16, 2009, Plaintiff again reported to Sick Call. On the SCF, Plaintiff specifically requested to be seen by a doctor, rather than just another PA. Upon review of the SCF, PA Yirga told Plaintiff that an x-ray of Plaintiff's neck would be scheduled.

38. At about 12:40 p.m. on November 18, 2009, medical took an x-ray image of Plaintiff's neck. Plaintiff was given an appointment to return to medical at 10:00 a.m. on December 8, 2009, to obtain the x-ray results. A copy of the appointment slip is attached as Exhibit "J".

39. Plaintiff reported to medical at 10:00 a.m. on December 8, 2009, as directed, and requested the x-ray results from the attending PA.

40. As to the claim in paragraph 39, the PA told Plaintiff, "Oh, yeah, okay... we got the results back. Says here you've got a mild degenerative disk disease. Basically, just, you know, keep exercising it, and, you know, work your neck a lot." The PA then demonstrated a large rolling motion of his neck as an example.

41. In addition to the claims in paragraph 40, the PA also told Plaintiff that Plaintiff would be placed on the waiting list to see the orthopedic doctor.

42. The orthopedic doctor came to the institution and saw patients on numerous occasions during the months of December, 2009, and January, 2010.

43. As to the claim in paragraph 42, Plaintiff was not one of the patients seen by the orthopedic doctor during that time.

44. Near the end of February, on February 22, 2010, Plaintiff was called-out to medical for an appointment with the orthopedic doctor, Dr. K. Prakash.

45. During the appointment referenced in paragraph 44, Plaintiff once again reiterated his symptoms to Dr. Prakash. The doctor performed a few simple reflex checks on Plaintiff, and subsequently declared to Plaintiff, "Well, you are hyper-reflexive."

46. As to the claims in paragraph 45, Plaintiff then asked Dr. Prakash for his diagnosis, to which the doctor replied, "Hyperreflexia indicates that there is some nerve compression going on in your spine. So, I'm going to recommend an MRI of your spine. I'm also going to mark it 'Urgent Care,' but you must understand that it's up to them to do it -- I can only make the recommendation." A copy of the notes made by Dr. Prakash during this encounter is attached as Exhibit "K".

47. Three days later, on February 25, 2010, in the middle of the night, Plaintiff was transported to the Federal Medical Center in Butner, North Carolina. At this time, an MRI of Plaintiff's spine was performed, and then Plaintiff was returned to PEM that afternoon.

48. The next day, February 26, 2010, Plaintiff was called to medical by the institution's Clinical Director, Dr. Shah. She told Plaintiff that he would likely require surgery, and that Plaintiff would be scheduled to meet with a surgeon. Dr. Shah also prescribed a cane to help Plaintiff walk, as well as a lower bunk to eliminate the need for Plaintiff to climb. Lastly, Dr. Shah instructed Plaintiff to avoid any lifting and to be careful in all movement to help minimize the danger that Plaintiff might become quadriplegic.

49. Ten days later, on March 8, 2010, Plaintiff was transported to Colonial Heights, Virginia, to meet with Dr. Kalluri, a surgeon.

50. During the appointment referenced in paragraph 49, Dr. Kalluri told Plaintiff that, even though the images from Plaintiff's MRI had not been made available to the doctor, the MRI report had been.

Dr. Kalluri told Plaintiff that the report clearly indicated that Plaintiff was suffering from compression of the spinal cord. A copy of the MRI report is attached as Exhibit "L"

51. As to the claims in paragraph 50, Dr. Kalluri explained the serious nature of Plaintiff's condition, and prescribed emergency surgery (anterior discectomy and fusion) to relieve the compression of Plaintiff's spinal cord.

52. Two days later, on March 10, 2010, Plaintiff was transported to Southside Regional Medical Center, where Dr. Kalluri performed Plaintiff's surgery. A copy of Dr. Kalluri's post-surgical dicta is attached as Exhibit "M".

53. Plaintiff has suffered permanent spinal cord damage resulting from spinal cord compression which was left untreated for approximately eight months from the time Plaintiff first presented his symptoms to medical staff.

54. As a result of the injury claimed in paragraph 53, Plaintiff now has difficulty walking, can no longer run at all, has loss of sensation and dexterity in both hands and arms, and suffers a constant unpleasant sensation affecting the skin of his torso.

55. As to the claims in paragraph 54, Plaintiff's quality of life has been greatly diminished. Plaintiff has difficulty performing mundane tasks such as walking, buttoning his clothes, or identifying and removing an object from his pocket. Plaintiff frequently drops objects, and can no longer participate in activities which used to bring Plaintiff happiness, such as playing musical instruments or tennis.

56. On July 12, 2011, Plaintiff filed a tort claim with the BOP, seeking damages in the amount of $300K for permanent injury suffered by Plaintiff due to medical negligence by BOP medical staff. A copy of the tort claim is attached as Exhibit "N".

57. On January 19, 2012, the BOP denied Plaintiff's tort claim. A copy of the denial letter is attached as Exhibit "O".

58. On May 16, 2012, pursuant to the FTCA and Virginia law, Plaintiff obtained a written opinion from an expert witness. Plaintiff reasonably believes this expert witness would qualify as an expert witness pursuant to Virginia Code §801-581.20, Subsection A.

59. As to the claim in paragraph 58, the expert witness, who is a medical professional, declared, in writing, that, "... the defendant in this matter deviated from the applicable standard of care, and the deviation was a proximate cause of the injuries claimed by the plaintiff."

60. As to the claim in paragraph 58, and pursuant to Virginia Code §8.01-20.1, neither the identity nor qualifications of the certifying expert, nor the nature of his or her opinions, are subject to discovery by any defendant. Therefore, Plaintiff has submitted a copy of the certifying expert's opinion separately to the Court and has withheld delivery of a copy to Defendant.

61. On June 8, 2012, pursuant to the FTCA, Plaintiff requested reconsideration of his tort claim by the BOP. A copy of Plaintiff's request letter is attached as Exhibit "P".

62. On July 13, 2012, the BOP denied Plaintiff's tort claim for the second time. A copy of this denial letter is attached as Exhibit "Q".

63. Plaintiff has obtained the written medical opinion of Raymond P. Mooney, PA-C, dated November 16, 2012. A copy of Mr. Mooney's expert opinion is attached as Exhibit "R".

64. As to the claim in paragraph 63, Mr. Mooney iterates five distinct ways in which Defendant breached the duty of care owed to Plaintiff by Defendant.

V. CLAIMS FOR RELIEF

65. Defendant owed Plaintiff a duty of care pursuant to 28 CFR §§0.95(b) and 0.96(a), as implemented in BOP Program Statement 6010.02.

66. As to the claim in paragraph 65, Defendant breached that duty as described in paragraphs 5 through 64 of this complaint.

67. Plaintiff has suffered permanent injury as described in paragraphs 53 through 55 of this complaint.

68. As to the claims in paragraph 67, Plaintiff's injury was proximately caused by the breach of duty owed to Plaintiff by Defendant.

VI. RELIEF REQUESTED

WHEREFORE, Plaintiff requests that this Court:

A. Order Defendant to pay compensatory damages to Plaintiff in the amount of $300,000;

B. Order Defendant to pay all costs associated with this action; and

C. Grant any other relief as this Honorable Court may deem proper in this matter.

Respectfully submitted this 9th day of JANUARY, 2013.

Wayne Carrel, Plaintiff
05811-028 FCC-MED A/S
PO Box 1000
Petersburg, VA 23804-1000

VII. VERIFICATION

Pursuant to U.S.C. §1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 9th day of JANUARY, 2013.

Wayne Carrel, Plaintiff

Jan 9, 2013

To the Clerk of the District Court,

Please accept this Complaint for filing. By now, you should have received the $350 filing fee, which was sent separately.

Enclosed please find the following:

5 ea. Verified Complaint (9 pages)
5 ea Exhibits A thru R (24 pages)
1 ea Expert Medical Opinion (1 page, Under Seal)

Please let me know if you need anything else from me.

Thank you,

Wayne Carroll

WAYNE CARROLL 05811-028
FCC-MED A/S
PO BOX 1000
PETERSBURG, VA 23804-1000

RECEIVED
JAN 16 2013
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

The enclosed check in the amount of $350.00 is to pay the filing fees for a tort complaint to be filed within the next two to five days by Wayne Carrel, a federal prisoner.

Wayne Carrel, Plaintiff
05811-028 FCC-MED A/S
PO Box 1000
Petersburg, VA 23804-1000

Remitter is

S. Wayne Carrel
8219 South Fillmore Circle
Centennial, CO 80122
720-202-5289
wayne@waynecarrel.com

Thank you

• A WATERMARK IS PRESENT ON THE BACK. HOLD AT AN ANGLE TO VIEW. • VERIFY COLOR CHANGES ON FACE LEFT TO RIGHT. • THE BACK OF THIS DOCUMENT HAS A HEAT-REACTIVE INK THAT CHANGES FROM ORANGE TO YELLOW WHEN HEAT IS APPLIED.

BANK OF THE WEST
1-800-488-2265

1000506329
90-78/1211
21124

DATE 01/07/2013

PAY ONLY $350.00 CTS/CTS

PAY TO THE ORDER OF ***CLERK US DISTRICT COURT*** $350.00

Three Hundred Fifty and 00/100ths Dollars

Memo FOR WAYNE CARREL, PLAINTIFF

PURCHASER SIGNATURE

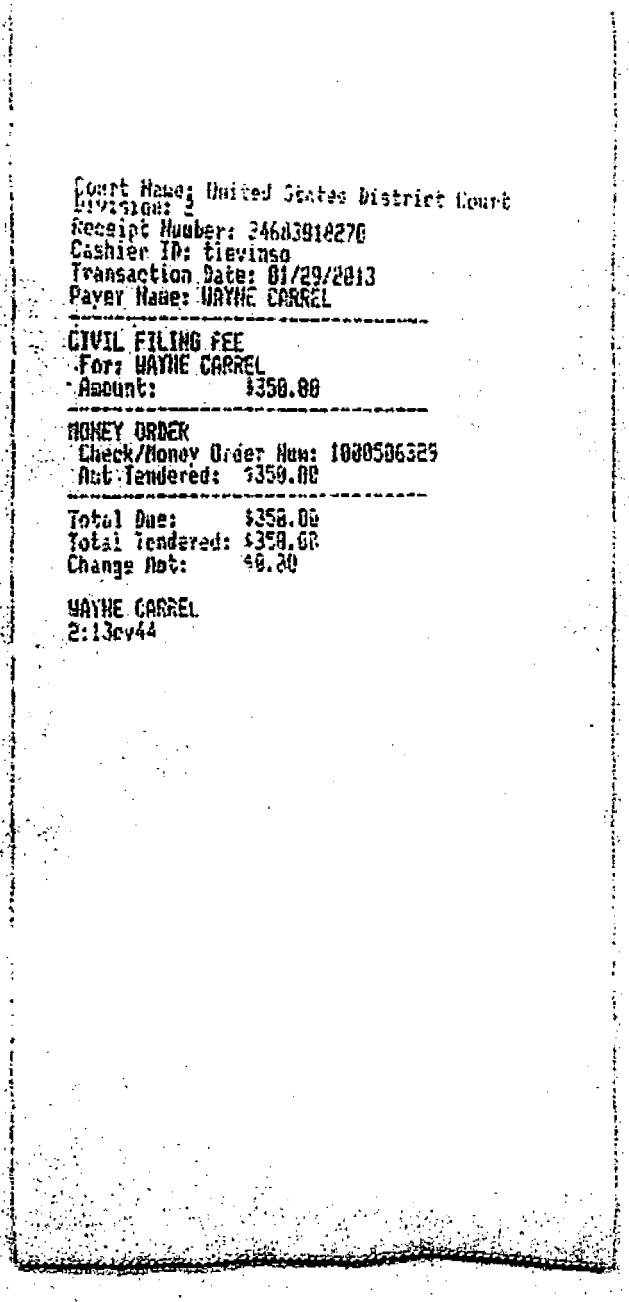
NOT VALID OVER ONE THOUSAND DOLLARS

PERSONAL MONEY ORDER VOID OVER $350.00

8219 S Fillmore Cir Centennial CO 80122

PURCHASER ADDRESS

⑈1000506329⑈ ⑆121100782⑆ 041000472⑈



Court Name: United States District Court
Division: 2
Receipt Number: 246038018270
Cashier ID: tievinso
Transaction Date: 01/29/2013
Payer Name: WAYNE CARREL

CIVIL FILING FEE
For: WAYNE CARREL
Amount: $350.00

MONEY ORDER
Check/Money Order Num: 1000506329
Amt Tendered: $350.00

Total Due: $350.00
Total Tendered: $350.00
Change Amt: $0.00

WAYNE CARREL
2:13cv44

Case 2:13-cv-00044-MSD-DEM Document 1-3 Filed 01/25/13 Page 1 of 1 PageID# 13

EXHIBIT A

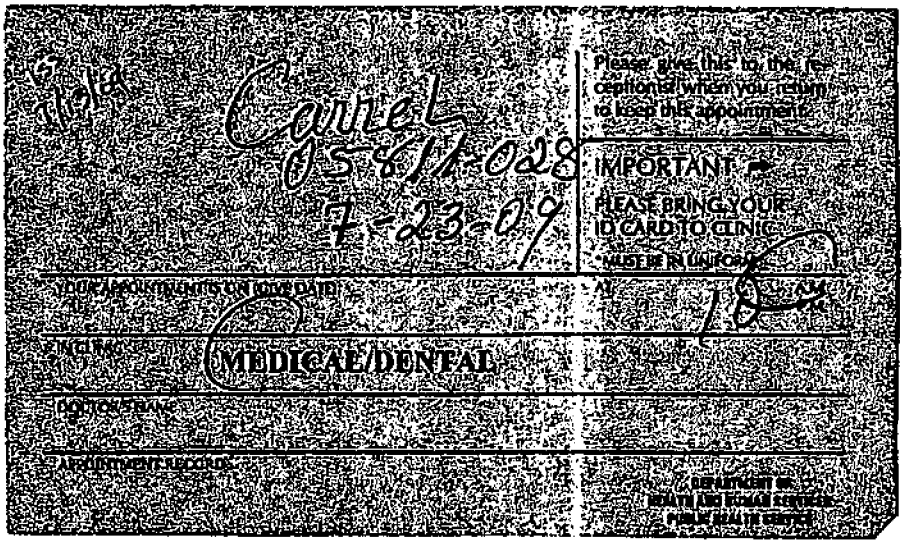
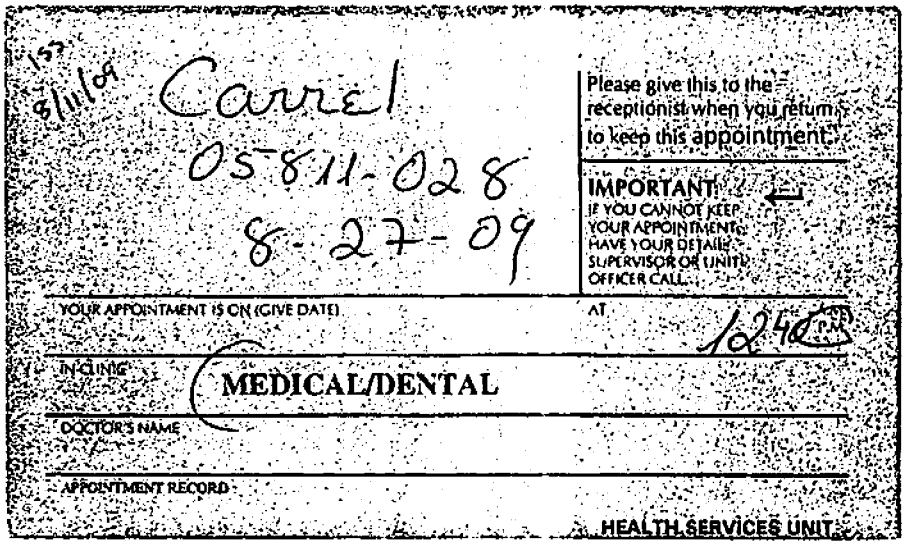

Please give this to the receptionist when you return to keep this appointment
IMPORTANT
PLEASE BRING YOUR ID CARD TO CLINIC
MUST BE IN UNIFORM
MEDICAL/DENTAL

EXHIBIT B



8/11/09 Carrel
05-811-028
8-27-09

Please give this to the receptionist when you return to keep this appointment.

IMPORTANT
IF YOU CANNOT KEEP YOUR APPOINTMENT, HAVE YOUR DETAIL SUPERVISOR OR UNIT OFFICER CALL.

YOUR APPOINTMENT IS ON (GIVE DATE) AT 1240 P.M.

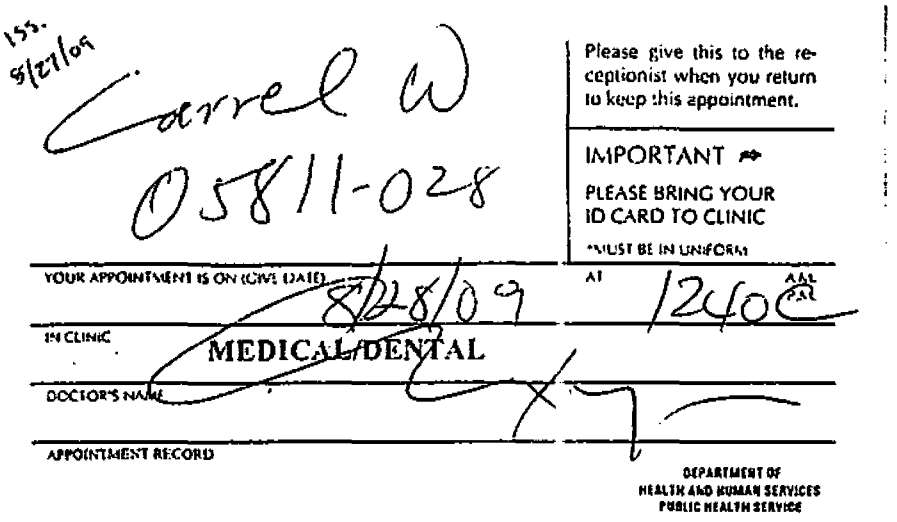
IN CLINIC MEDICAL/DENTAL

DOCTOR'S NAME

APPOINTMENT RECORD

HEALTH SERVICES UNIT

EXHIBIT C



155.
5/27/09

Carrel W
05811-028

Please give this to the receptionist when you return to keep this appointment.

IMPORTANT
PLEASE BRING YOUR ID CARD TO CLINIC
*MUST BE IN UNIFORM

YOUR APPOINTMENT IS ON (GIVE DATE) 8/28/09 AT 1240 AM PM

IN CLINIC MEDICAL/DENTAL

DOCTOR'S NAME

APPOINTMENT RECORD

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE

Attachment A
PEX-1330.13
July 15, 2004

EXHIBIT D

Date/Time Issued: 9/1/09
To: W. CARREL (Name) 05811-028 (Reg. No.)
By: C. BLACKBURN (Staff)

FEDERAL CORRECTIONAL COMPLEX
PETERSBURG, VIRGINIA
ADMINISTRATIVE REMEDY ATTEMPT AT INFORMAL RESOLUTION

Program Statement 1330.13, Administrative Remedy Procedures for Inmates, requires an inmate, in most cases, to make an attempt at informal resolution prior to filing an administrative remedy. An inmate with a complaint should complete the first three sections below and submit the form to his Correctional Counselor.

1. CARREL 9/1/09 — Name & Date
05811-028 — Reg. No.
A/S — Housing Unit
7/13/09 — Date Complaint Occurred

2. NATURE OF THE COMPLAINT (state briefly what the problem is and what you have done to resolve problem: 7/13: Went to sick call requested chest x-ray due to 4-month chronic cough and tingling in fingers. Rec'd appt for 7/23. 7/23: Once again requested x-ray. 7/28: callout for x-ray. Told to come back in 2 weeks for results. 8/11: Came back for results. Told to come back in 16 days, 8/27. 8/27: Results not here, come back tomorrow. 8/28: Partial results here, don't have the rest.

3. WHAT RESOLUTION DO YOU WANT?: I want prompt medical attention. I may have a tumor or nerve impingement. I have a 6-month chronic respiratory problem and I am now numb in both hands. I also want the results from my x-ray and the radiology report.

TO BE COMPLETED BY STAFF

THERE IS NO PROBLEM WHICH CANNOT BE INFORMALLY RESOLVED

4. EFFORTS MADE BY STAFF TO RESOLVE PROBLEM (Include discussion of policy or problem with Inmate, contact with staff, etc.) We have resolved our problem with the machine and all films have been sent to be read today 9/11/09. Please make sick call in two weeks to see your films results & further [illegible].

5. COUNSELOR'S COMMENTS (Was problem Informally resolved, If not why?): _____

_____
Correctional Counselor/Date

UNIT MANAGER REVIEW (If problem not informally resolved by Counselor, did you discuss problem with inmate in effort to resolve): _____YES _____NO
IF ANSWER YES (Was problem resolved?): _____YES _____NO

_____
Unit Manager/Date

Date Informal received from Inmate: _____ **Date BP-9 Issued to Inmate:** _____

EXHIBIT E

155-
9/25/09

05811

Conf

Please give this to the receptionist when you return to keep this appointment.

IMPORTANT ➨

PLEASE BRING YOUR ID CARD TO CLINIC

*MUST BE IN UNIFORM

YOUR APPOINTMENT IS ON (GIVE DATE) 10-6-09 AT 1000 A.M. P.M.

IN CLINIC MEDICAL/DENTAL

DOCTOR'S NAME

APPOINTMENT RECORD

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE

EXHIBIT F

Attachment A
PEX-1330.13
July 15, 2004

Date/Time Issued: 9/28/09
To: CARREL (Name) 05811-026 (Reg. No.)
By: C. MACKWING (Staff)

Returned For Medical 10/9/09 SB

FEDERAL CORRECTIONAL COMPLEX
PETERSBURG, VIRGINIA
ADMINISTRATIVE REMEDY ATTEMPT AT INFORMAL RESOLUTION

Program Statement 1330.13, Administrative Remedy Procedures for Inmates, requires an inmate, in most cases, to make an attempt at informal resolution prior to filing an administrative remedy. An inmate with a complaint should complete the first three sections below and submit the form to his Correctional Counselor.

1. CARREL 9/28/09
Name & Date

05811-026
Reg. No.

A/S
Housing Unit

9/25/09
Date Complaint Occurred

2. NATURE OF THE COMPLAINT (state briefly what the problem is and what you have done to resolve problem: When I went to sick call on 9/25/09 Mr. B. Katta treated me with disdain, belligerence, and disrespect. Mr Katta should realize that we are the patients and deserve a professional attitude. Even as I was leaving, I said "Thank you" and he replied "Thank you - NO!"

3. WHAT RESOLUTION DO YOU WANT?: I want to be treated fairly and professionally by Mr. Katta, and to receive the respect due a human being.

TO BE COMPLETED BY STAFF
THERE IS NO PROBLEM WHICH CANNOT BE INFORMALLY RESOLVED

4. EFFORTS MADE BY STAFF TO RESOLVE PROBLEM (Include discussion of policy or problem with Inmate, contact with staff, etc.) Allegations of Staff Misconduct are Taken Seriously and thoroughly investigated. Your complaint has been Forwarded to the Appropriate department for Investigation.

5. COUNSELOR'S COMMENTS (Was problem informally resolved, If not why?): Not Satisfied

10/1/09
Correctional Counselor/Date

UNIT MANAGER REVIEW (If problem not informally resolved by Counselor, did you discuss problem with inmate in effort to resolve): ___ YES ___ NO
IF ANSWER YES (Was problem resolved?): ___ YES ___ NO

Unit Manager/Date

Date Informal received from Inmate: _____ Date BP-9 Issued to Inmate: 10/11/09

EXHIBIT G

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: CARREL, WAYNE (LAST NAME, FIRST, MIDDLE INITIAL) 05811-025 (REG. NO.) A/S (UNIT) PEM (INSTITUTION)

Part A- INMATE REQUEST

I first went to sick call on July 13, 2009 because of tingling/numbness in my left hand as well as a cough persisting for 4 months. Since then I have been back to medical for scheduled appointments and instructions to come to sick call six more times. I was given an x-ray on July 26, but as of today there are no results. I now cannot feel my hands, have lost all fine motor control in them, my trunk and legs are becoming numb, and I am having difficulty walking - I fell down the stairs when my legs buckled under. I need competent medical attention, but all I have is another appointment for next month - October! Please help me - my symptoms are worsening. It has been months and I have received no treatment. I need help now!

9/28/09
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

CASE NUMBER: 51223-F1

Part C- RECEIPT

Return to:
(LAST NAME, FIRST, MIDDLE INITIAL) (REG. NO.) (UNIT) (INSTITUTION)

10-20-09
DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

EXHIBIT H

RECEIPT - ADMINISTRATIVE REMEDY

DATE: OCTOBER 27, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
PETERSBURG MED FCI

TO : WAYNE CARREL, 05811-028
PETERSBURG MED FCI UNT: A QTR: A02-078U

THIS ACKNOWLEDGES THE RECEIPT OF THE ADMINISTRATIVE REMEDY REQUEST IDENTIFIED BELOW:

REMEDY ID : 561223-F1
DATE RECEIVED : OCTOBER 20, 2009
RESPONSE DUE : NOVEMBER 9, 2009
SUBJECT 1 : MEDICAL CARE - DELAY OR ACCESS TO
SUBJECT 2 :
INCIDENT RPT NO:

EXHIBIT I

Response to Request for Administrative Remedy
Remedy ID: 561223-F1

This is in response to your Request for Administrative Remedy, #561223-F1, receipted in this office on October 20, 2009, in which you request the results of your chest x-ray and treatment for the numbness in your hands and legs.

Your complaints have been investigated and it was found that you were seen in sick call on July 23, 2009, with complaints of chest congestion and cough. You were diagnosed with Bronchitis and a chest x-ray was ordered. The chest x-ray was taken on July 28, 2009. Due to problems with the machine, the x-ray films and readings were late getting back to us. The results of your chest x-ray is in your file at this time. You may report to sick call as a follow-up visit to receive the results of the x-ray.

You have not reported to sick call with complaints of numbness in your hands or legs. You had a sick call appointment on October 6, 2009, of which you were a no show. If you need further medical assistance, you should follow-up in sick call.

Your Request for Administrative Remedy is partially granted in that the x-ray results are now in your file.

If you are dissatisfied with this response, you may appeal to the Regional Director, Bureau of Prisons, 302 Sentinel Drive, Suite 200, Annapolis Junction, MD 20701. Your appeal must be received in the Regional Office within 20 calendar days of this response.

11/07/2009
Date

Patricia R. Blanchard
Patricia R. Blanchard, Warden

EXHIBIT J

CARROL
0 5811 - 028

155 4/14/09

Please give this to the receptionist when you return to keep this appointment.

IMPORTANT

PLEASE BRING YOUR ID CARD TO CLINIC

*MUST BE IN UNIFORM

YOUR APPOINTMENT IS ON (GIVE DATE) 12-8-09 TUES AT 1000 A.M. P.M.

IN CLINIC MEDICAL/DENTAL

DOCTOR'S NAME

APPOINTMENT RECORD

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE

EXHIBIT K

Bureau of Prisons
Health Services
Consultation Request

Inmate Name: CARREL, WAYNE **Reg #:** 05811-028 **Complex:** PEX
Date of Birth: 11/25/1962 00:00 **Sex:** M

Consultation/Procedure Requested: Orthopedist
Reason for Request:
47 y/o male with chronic neck pain with numbness and tingling fingers for the last six month. No radiation pain. X-ray showed DJD/DDD. Evaluate.
Provisional Diagnosis:
DJD with possible impingement syndrome.
Medications (As of 02/17/2010)

Allergies (As of 02/17/2010)
No Known Allergies
Health Problems (As of 02/17/2010)
Osteoarthrosis, unspec generalized or localized, ^Chronic periodontitis, Bronchitis, not specified as acute or chronic
Inmate Requires Translator: No **Language:**
Additional Records Required:

Comments:

Requested By: Yirga, Andarge D. MLP
Due Date: 05/28/2010 00.00
Priority: Routine

2/22/10

(5) Since July 2009 c̄ neck pain
c̄ tingling ⊻, ⊻ & gr. loss of dexterity, drops object. PMHx ∅
- giving out of legs - stumbles when he wal All ∅.
feels weak. , ∅ electric shock goes down legs when coughing.
no headaches, no eye problems.
no bowel or bleeds

(0). : Power 4 T/5 ULE + LE
- rank mild stiff
Hoffman ⊕
+T +T
clonus clonus

Imp upper motor nerve signs c̄ cord compression

Pls - urgent MRI Cervical Spine -
- Neurology Eval
- Bottom B mule

Suhasini Shah, MD
Clinical Director
FCC Petersburg, Virginia

EXHIBIT L

BP-S622.060 RADIOLOGIC CONSULTATION REQUEST/REPORT CDFRM
JUL 99
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

Patient Identification: Name, Reg #, Date of Birth, Institution	Age: 47	Sex: M	Exam(s) Requested:
CARREL, Wayne 05811-028 11-25-62 FCC Petersburg	Diabetic:		
	Unit:		
	Requested By: SHAH MD		Accession #(s): 27709
Reasons for Study/Provisional Diagnosis as per Referring Clinician *(per request form)*:			
Date of Study: 02-25-10 [Thursday]	Date of Dictation: 02-25-10 [Thursday]	Date Dictation Received: 02-26-10 [Friday]	Date of Transcription: 02-26-10 [Friday]

RADIOLOGIC REPORT

Study: MRI cervical spine without contrast
Indications: neck and back pain, numbness and tingling of the fingers, leg weakness
Technique: multiple MR images of the cervical spine
Comparison: none

FINDINGS

Incidental imaging of the inferior posterior fossa demonstrates no definite abnormalities. There are some degenerative changes of the C1-2 articulation. The craniocervical interface is roughly normal.

No abnormalities are noted at C2-3, C3-4, C4-5, C5-7 or C7/T1.

At C5-6 there is disc space narrowing and endplate osteophyte. There is a posterior central disc herniation which results in moderate to severe spinal canal narrowing and compresses the spinal cord. There is mild elevation of T2 weighted signal within the cord at this point that likely represents a small amount of spinal cord edema or gliosis. There is moderate left neuroforaminal narrowing and mild right neuroforaminal narrowing secondary to more broad-based bulging of the disc.

There is straightening of the cervical lordosis which may be positional or related to paraspinal muscle spasm.

IMPRESSION

Posterior central disc herniation at C5-6 which compresses the spinal cord and results in either minimal edema or gliosis at this level. No additional significant abnormalities of the cervical spine are noted.

Addendum - No acute fracture or subluxation of the cervical spine is noted. No definite abnormality of the visualized paravertebral soft tissues is noted.

Signature:	Location of Radiologic Facility:
ASHLEY MERRITT, M.D.	

Original - Medical Record; Copy - Physician; Copy - Radiology
(This form may be replicated via WP) This form replaces BP-S622 dtd AUG 96

3/09/11

EXHIBIT M - PAGE 1 OF 4

SOUTHSIDE REGIONAL MEDICAL CTR
200 MEDICAL PARK BOULEVARD
PETERSBURG, VA 23805 05811-028

Name: CARREL, WAYNE		Exam: OPERATIVE REPORT
Room: 2E-226 W	DOB: 11/25/1962	Adm Dr: KALLURI, PRAKASAM
MR#: 580809	Age: 47 Y	Dict Dr: KALLURI, PRAKASAM
Pat#: 7434084	Sex: M	Transcribed: 03/11/2010 03:25
		Dictated: 03/10/2010 20:05
Adm Date: 03/10/2010	Dis Date:	

*** Final ***

PREOPERATIVE DIAGNOSIS: C5-6 herniated nucleus pulposus with myelopathy.

POSTOPERATIVE DIAGNOSIS: C5-6 herniated nucleus pulposus with myelopathy.

PROCEDURE PERFORMED:
1. C5-6 anterior cervical diskectomy and fusion with structural allograft and plating.
2. Intraoperative use of microscopy.
3. Intraoperative use of fluoroscopy.

SURGEON: Prakasam Kalluri, MD

ANESTHESIA: General endotracheal.

ESTIMATED BLOOD LOSS: Less than 50 cc.

INTRAOPERATIVE FLUIDS: Crystalloid only.

COMPLICATIONS: None.

DISPOSITION: Stable to recovery room.

IMPLANTS: DePuy EAGLE Plus 14 mm plate with 14 mm screws x4, and musculoskeletal transplant foundation convex cortical cancellous allograft measuring 6 mm height.

DRAINS: No Drain.

COUNTS: Sponge and needle counts were correct x3 at the end of the case.

Neurologic monitoring revealed no perturbations throughout the procedure in free-running EMGs, somatosensory evoked potentials, and frequent repeated motor evoked potentials, which were stable to baseline.

INDICATION FOR PROCEDURE: The patient is a 47-year-old inmate who

EXHIBIT M - PAGE 2 OF 4

SOUTHSIDE REGIONAL MEDICAL CTR
200 MEDICAL PARK BOULEVARD
PETERSBURG , VA 23805 05811-028

Name: CARREL, WAYNE
Room: 2E-226 W
MR#: 690809
Pat#: 7434084

DOB: 11/25/1962
Age: 47 Y
Sex: M

Exam: OPERATIVE REPORT
Adm Dr: KALLURI, PRAKASAM
Dict Dr: KALLURI, PRAKASAM
Transcribed: 03/11/2010 03:25
Dictated: 03/10/2010 20:06

Adm Date: 03/10/2010
Dis Date:

*** Final ***

developed cervical myelopathy associated with a large disk herniation, who was diagnosed by MRI. He had symptoms that were progressively worsening over 6 months before presenting to me. I recommended surgical intervention upon seeing his MRI, which demonstrated significant disk herniation.

After a thorough discussion of the attendant benefits and risks of the procedure, the patient consented freely to the procedure and elected to proceed.

DETAILS OF OPERATIVE REPORT: The patient was identified in the holding area and the operative site marked. He was taken to the OR, placed in supine position, and the neck was prepped and draped in the usual sterile fashion after intubation. The baseline somatosensory and motor evoked potentials were obtained and were present in all 4 extremities.

The time-out procedure was called and carried out appropriately. The patient received Ancef 1 g IV prior to the start of the case.

A left approach Smith-Robinson incision was taken through skin and subcutaneous tissue down to the platysma layer at the level of the cricoid cartilage. The platysma was incised in line with the skin incision, and blunt dissection was then carried out adjacent to the sternocleidomastoid muscle to expose the C5-6 disk space. Retractors were then applied and then the longus coli muscles were elevated after confirming the C5-6 disc level with a needle and lateral fluoroscopy.

Once deep retractors were applied deep to the longus coli muscles, and diskectomy was carried out with a Bovie electrocautery to create the annulotomy, followed by a Cobb elevator to elevate the cartilaginous endplates off the bony endplate cranially and caudally. The debris was cleared down to the posterior longitudinal ligament, and then the PLL was taken down its entirety from left to right using a 1 mm Kerrison punch. The posterior aspect of the vertebral bodies of C5 and C6 were undercut until adequate decompression was achieved. The fragments of disk material that had

SOUTHSIDE REGIONAL MEDICAL CTR
200 MEDICAL PARK BOULEVARD
PETERSBURG , VA 23805 05811-028

Name: **CARREL, WAYNE**
Room: 2E-226 W
MR#: 560809
Pat#: 7434084

DOB: 11/25/1962
Age: 47 Y
Sex: M

Exam: **OPERATIVE REPORT**
Adm Dr: KALLURI, PRAKASAM
Dict Dr: KALLURI, PRAKASAM
Transcribed: 03/11/2010 03:25
Dictated: 03/10/2010 20:05

Adm Date: 03/10/2010 Dis Date:

*** Final ***

extended behind the C5 vertebral bodies were easily removed with sweeping maneuvers using both a nerve hook and an angled 6-0 microcurette. Once adequate decompression of the thecal sac was achieved, foraminotomies were completed bilaterally with a 1 mm Kerrison punch until a nerve hook could be easily inserted into each neuroforamen. Once this was completed, the endplates were burred to decorticate the endplates appropriately and a sizer was used to select the 6 mm MTF convex allograft spacer, which was impacted into place.

Once the spacer was impacted into place, motor evoked potentials were repeated and demonstrated no change from baseline.
A plate was applied and provisionally secured to the bone. The lateral x-ray confirmed the appropriate position and length of the plate. A drill was used to create the holes and four 14 mm screws were applied and locked into the plate. Final tightening was carried out in the plate, and AP and lateral x-rays confirmed acceptable placement of the plate. The wound was irrigated with sterile saline. Motor evoked potentials were repeated. The irrigant fluid was evacuated. The wound was then closed without a drain because of excellent hemostasis. The wound was closed with 3-0 Vicryl for the platysma layer, followed by 3-0 Vicryl for the subcutaneous tissue, and 4-0 Monocryl running subcuticular stitch for skin closure. Steri-Strips and sterile dressing were applied. The patient was then awakened and extubated without incident and transported to the recovery in stable condition. He tolerated the procedure well. No complications were encountered.

Signed: _____
Prakasam Kalluri, MD
Print CC:

Fax CC:

EXHIBIT M - PAGE 4 OF 4

SOUTHSIDE REGIONAL MEDICAL CTR
200 MEDICAL PARK BOULEVARD
PETERSBURG, VA 23805

05811-028

Name: CARREL, WAYNE		**Exam: OPERATIVE REPORT**
Room: 2E-228 W	DOB: 11/25/1962	Adm Dr: KALLURI, PRAKASAM
MR#: 580608	Age: 47 Y	Dict Dr: KALLURI, PRAKASAM
Pat#: 7434084	Sex: M	Transcribed: 03/11/2010 03:25
		Dictated: 03/10/2010 20:05
Adm Date: 03/10/2010	Dis Date:	

*** Final ***

Spheris Job#: 33524850
Dictation Job#: 101775
MT ID: 157776
Dictation Date and Time: 03/10/2010 20:05
Transcription Date and Time: 03/11/2010 03:25

3/24/10

Suhasini Shah, MD
Clinical Director
Petersburg, Virginia

EXHIBIT N - PAGE 1 OF 2

7002 2030 0000 2919 7165

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit to Appropriate Federal Agency:	2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.
Mid-Atlantic Regional Office Consolidated Legal Center 302 Sentinel Drive, Suite 200 Annapolis Junction, MD 20701	WAYNE CARLEL 05811-028 FCC PETERSBURG MED A/S PO BOX 1000 PETERSBURG, VA 23804-1000

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	11-25-62	DIVORCED	JULY 13, 2009	6:30 AM

8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).

MEDICAL STAFF AT FCC PETERSBURG FAILED TO PROPERLY DIAGNOSE AND TREAT ME FOR SPINAL CORD COMPRESSION IN A TIMELY MANNER (SEE ATTACHED SEQUENCE OF EVENTS) RESULTING IN LONG-TERM SUFFERING AND INJURY.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

NONE

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).

NONE

10. PERSONAL INJURY/WRONGFUL DEATH

STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.

DAMAGE TO SPINAL CORD DUE TO PROLONGED COMPRESSION, RESULTING IN DIMINISHED CAPACITY WITH RESPECT TO MANUAL DEXTERITY, BALANCE, SENSE OF TOUCH, AND OTHER DISABILITY.

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
NONE	

12. (See instructions on reverse). AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).
NONE	$300,000	NONE	$300,000

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side).	13b. PHONE NUMBER OF PERSON SIGNING FORM	14. DATE OF SIGNATURE
Wayne Carlel	NONE	JULY 5, 2011

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).	Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

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95-109

NSN 7540-00-634-4046

STANDARD FORM 95 (REV. 2/2007)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

EXHIBIT O

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
Mid - Atlantic Region

Butner Legal Center
P.O. Box 1600
Butner, North Carolina 27509

January 19, 2012

Wayne Carrel
Reg. No. 05811-028
FCC Petersburg
P.O. Box 1000
Petersburg, VA 23804

Re: Administrative Tort Claim Number: TRT-MXR-2011-05260

Dear Mr. Carrel:

Your administrative claim filed under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, has been considered for administrative settlement. You alleged Bureau of Prisons medical staff failed to properly diagnose you in a timely manner resulting in disability. You seek a sum certain of 300,000.

The Federal Tort Claims Act only provides compensation for injuries resulting from the negligence, omission, or wrongful act of Bureau of Prisons employees acting within the scope of their employment. We do not find that your alleged injuries resulted from the negligence of any Bureau of Prisons staff member. Furthermore, the evidence reveals you received appropriate treatment by staff in a professional and appropriate manner at all times.

Therefore, in view of the above, your claim is denied. If you are dissatisfied with this determination, you may file suit in the appropriate United States District Court not later than six (6) months after the date of mailing of this notification.

Sincerely,

Christina Kelley
for Michelle T. Fuseyamore
Regional Counsel

EXHIBIT P



WAYNE CARREL 05811-028
FCC Petersburg Medium
PO Box 1000
Petersburg, VA 23804-1000

June 8, 2012
FEDERAL BUREAU OF PRISONS
Butner Legal Center
P.O.Box 1600
Butner, NC 27509

Re: Administrative Tort Claim Number TRT-MXR-2011-05260

I am writing to request reconsideration of the above-referenced tort claim, which was denied by your office on January 19, 2012. For your convenience, I have enclosed copies of the tort claim, the sequence of events leading to my disability, and the denial letter from your office.

My claim is not without merit, and deserves to be reconsidered in a fair and just manner.

At this time, I am willing to enter into settlement negotiations. I'm confident you'll agree that settlement would be preferable to litigation, for all parties involved.

Also, please be advised that I have obtained a signed, written statement, from a qualified medical expert, which affirms that the medical care provided to me in this matter was clearly substandard and negligent and was a proximate cause of the injuries I suffered.

I look forward to your reply.

Sincerely,

Wayne Carrel

EXHIBIT Q

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
Mid - Atlantic Region

Butner Legal Center
P.O. Box 1600
Butner, North Carolina 27509

July 13, 2012

Wayne Carrel
Reg. No. 05811-028
FCC Petersburg - Medium
P.O. Box 1000
Petersburg, VA 23804

Re: Administrative Tort Claim Number TRT-MXR-2011-05260 (Reconsideration)

Dear Mr. Carrel:

Your administrative claim filed on July 13, 2011, under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, has been reconsidered for administrative settlement. You allege Government liability in the amount $300,000.00.

You claim you have a written statement from a medical expert which affirms that the medical care provided to you was substandard and negligent. You did not provide a copy of the statement nor did you provide any additional information warranting a change in our original determination. Therefore, your claim is denied.

If you are dissatisfied with our determination, you may file suit in the appropriate United States District Court not later than six (6) months after the date of mailing of this notification.

Sincerely,

Michelle T. Fuseyamore
Regional Counsel

EXHIBIT R - PAGE 1 OF 4

November 16, 2012

To Whom It May Concern:

My name is Raymond P. Mooney, PA-C. I am a board certified physician assistant with thirty eight years of experience. My areas of clinical practice include family practice, emergency medicine, urgent care medicine and correctional medicine. I am and always have been licensed in the State of Michigan. Further details concerning my education and employment history can be found on my resume.

Thank you for requesting my review of the medical records of Wayne Carrel while incarcerated and under the direction of the Federal Bureau of Prisons.

This expert opinion will deal exclusively with the care rendered by PA Yirga, any deviations in the standard of care and requirements needed for the standard of care to have been fulfilled.

According to the records submitted Mr. Carrel was initially seen in a heath care visit on 7/23/2009 by PA Andarge Yirga with complaints of chronic chest congestion of four month's duration. He was diagnosed as having Bronchitis and a chest x-ray was ordered.

After the above noted visit of 7/23/2009 I have no further records other than those outlined below and detailed in chronological order.

On 9/28/2009 Mr. Carrel filed a Request for Administrative Remedy detailing his symptoms. This written statement classically details the symptoms of a patient experiencing signs indicating central cord impingement or upper motor neuron disease and as such requiring specialty consultation.

A two view cervical spine film was ordered by PA Ignatius Hall on 11/17/2009 for a complaint of neck pain. Further information as to what transpired prior to this order is not apparent in the records in my possession.

On 12/8/2009 Mr. Carrel was seen for a Clinical Encounter by PA Andarge Yirga with complaints of chronic neck pain. It is documented that the prior radiographic examination done on 11/17/2009 demonstrated degenerative joint disease and degenerative disc disease.

The patient was complaining in tingling and numbness of both hands all the time which was worse in the morning. He reported his pain scale of ten. There was no history of

EXHIBIT R - PAGE 2 OF 4

trauma. Physical examination demonstrated reduced range of motion and tenderness on palpation. No neurological examination is documented on this patient encounter. It appears that an orthopedic consultation was scheduled for 5/28/2010 for a "routine consultation". The diagnosis was degenerative disc disease with possible impingement syndrome.

Mr. Carrel was seen on 2/22/2010 by a contracted Orthopedist, Dr. Prakash, and diagnosed with upper motor nerve signs with cord compression. He ordered an urgent MRI of the cervical spine and neurology evaluation.

The next EMR entry that I have is dated 2/25/2010 by PA Andarge Yirga which is designated as a Clinical Encounter - Administrative Note indicating MRI findings demonstrating a Herniated Nucleus Pulposus at C5-C6 which is compressing the spinal cord.

A clinical Encounter – Administrative Note from Dr. Shah on 3/8/10 documents that Mr. Carrel was seen by Dr. Kalluri and surgery was needed as soon as possible to relieve the cord compression. The history and physical dictated by Dr. Kalluri accurately documents the history and complaints over the course of this illness.

On 3/10/2010 Mr. Carrel underwent a C5-6 anterior cervical discectomy and fusion with structural allograft and plating due to cervical myelopathy.

Deviation in the Standard of Care:

Mr. Carrel was seen on 12/8/2009 with tingling and numbness in both hands. The diagnosis on that date was degenerative disc disease with possible impingement syndrome. No neurological examination was performed on this date. The record indicates an orthopedic consult was scheduled for 5/28/10 approximately five months in the future.

The cervical spine films dated 11/17/2009 demonstrated degenerative joint disease and degenerative disc disease. Mr. Carrel was seen by Dr. Prakash, a contracted orthopedist on 2/22/2010 with symptoms consistent with potential upper motor neuron disease. Dr. Prakash recommended an urgent MRI of the cervical spine which was completed on 2/25/2010 and subsequent surgery was performed on 3/10/2010.

A Clinical Encounter - Administrative Note was generated by PA Yirga on 2/25/2010 that indicated "significant HNP which is compressing the spinal cord".

EXHIBIT R - PAGE 3 OF 4

Deviations in the Standard of Care:

PA Yirga failed to fulfill his duty to provide Mr. Carrel with the care required to meet the standard of care in the following ways:

1. Failure to perform a neurological examination on the patient encounter of 12/8/2009 to evaluate for signs of cervical cord compression.
2. Failure to evaluate for the presence of Lhermitte's sign in a patient with complaints of numbness and tingling in both hands on the Clinical Encounter of 12/8/2009.
3. Failure to arrange for an MRI of the cervical spine with and without contrast to evaluate the integrity of the spinal cord.
4. Failure to order an EMG which would have been of assistance in determining if the patients symptoms were due to a peripheral or central process.
5. Failure to arrange for Mr. Carrel to be seen urgently/emergently by Dr. Kalluri for his impression concerning the urgency of surgical intervention on 2/25/2010 when he reviewed the results of the MRI of that date.

Requirements for the Standard of Care to have been met:

1. Perform a complete neurological examination on the Clinical Encounter of 12/8/2010.
2. Evaluate for the presence of Lhermitte's sign in a patient with complaints of numbness and tingling in both hands on the Clinical Encounter of 12/8/2009.
3. Arrange for an MRI of the cervical spine with and without contrast to evaluate the integrity of the spinal cord.
4. Order an EMG which would have been of assistance in determining if the patient's symptoms were due to a peripheral or central process.
5. Arrange for Mr. Carrel to be seen urgently/emergently by Dr. Kalluri for his for her impression concerning the urgency of surgical intervention on 2/25/2010 when he reviewed the results of the MRI of that date.

It is my Expert Opinion that Mr. Carrel presented with symptoms consistent with potential cervical cord compression on his initial presentation of 12/8/2009. The failure of PA Yirga to institute an appropriate treatment plan within a reasonable timeframe to confirm or disprove this possibility was below the standard of care. Further, his incomplete history, physical examination and inappropriate patient disposition demonstrated an absence of appropriate concern and an attitude of obvious neglect for a person under the control of the United States Government, and as such, an individual lacking the ability to obtain reasonable and appropriate healthcare at an institution and by a provider of his choice.

EXHIBIT R - PAGE 4 OF 4

I believe the statements to be accurate and true beyond a reasonable degree of medical probability and reserve the right to amend or alter this report should additional information become available to me.

Respectfully submitted,

Raymond P. Mooney, PA-C

Case 2:13-cv-00044-MSD-DEM Document 1-2 Filed 01/16/13 Page 1 of 1 PageID# 38

⇔05811-028⇔
Wayne Carrel
05811028 Fcc-Med A/S
PO Box 1000
Petersburg, VA 23804-1000
United States

7010 2780 0002 3277 5164

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RICHMOND, VA

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United States

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

WAYNE CARREL,

Plaintiff,

v. **CASE NO. 2:13-CV-44**

UNITED STATES,

Defendants,

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by the Court.** This action came for decision by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action, and the claim of Plaintiff, Wayne Carrel, is **DISMISSED WITH PREJUDICE** and without costs, expenses, or interest. It is **FURTHER ORDERED** that this Court retains jurisdiction to enforce the settlement.

DATED: December 22, 2015

FERNANDO GALINDO
Clerk of Court

/s/
By_____
Jaime Meyers
Deputy Clerk

FILED
DEC 22 2015
CLERK, US DISTRICT COURT
NORFOLK, VA

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

WAYNE CARREL,

Plaintiff,

v. **CIVIL ACTION NO. 2:13CV44**

UNITED STATES,

Defendant.

DISMISSAL ORDER

On this day, the parties appeared by counsel representing that this matter has been resolved and that the parties have entered into a Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677.

IT IS THEREFORE ORDERED that this action, and the claim of Plaintiff, Wayne Carrel, is **DISMISSED WITH PREJUDICE** and without costs, expenses, or interest.

IT IS FURTHER ORDERED that this Court retains jurisdiction to enforce the settlement.

/s/
Mark S. Davis
United States District Judge

UNITED STATES DISTRICT JUDGE

At Norfolk, Virginia

This 22nd day of December, 2015

WAYNE CARREL
PLAINTIFF



11/30/15
Date

S.W. Dawson, Esq.
Virginia State Bar No. 83166
Counsel for Plaintiff
Dawson, P.L.C.
P.O. Box 58
Norfolk, Virginia 23501
Phone: 757-282-6601
Fax: 757-282-6617
Email: swd@dawsonple.com

UNITED STATES OF AMERICA
DEFENDANT

DANA J. BOENTE
UNITED STATES ATTORNEY



11/30/2015
Date

Daniel P. Shean, Assistant U.S. Attorney
Virginia State Bar No. 84432
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United States Attorney's Office
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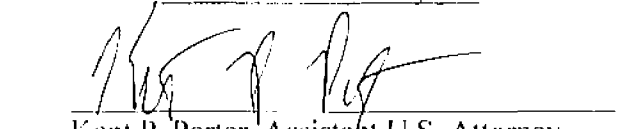

11/30/2015
Date

Kent P. Porter, Assistant U.S. Attorney
Virginia State Bar No. 22853
Counsel for United States of America
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
Phone: 757-441-6331
FAX: 757-441-6689
Email: Kent.Porter@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

WAYNE CARREL,

Plaintiff,

v. **CIVIL ACTION NO. 2:13CV44**

UNITED STATES,

Defendant.

NOTICE OF SETTLEMENT

Pursuant to Paragraph 11 of the Court's Rule 16(b) Scheduling Order, *see* ECF No. 24, the United States of America hereby submits this Notice of Settlement to notify the Court that this lawsuit has been settled. An electronic copy of a proposed Dismissal Order is attached hereto as Exhibit 1. The original copy of the proposed Dismissal Order will be hand-delivered to the Court under separate cover.

Respectfully submitted,

UNITED STATES OF AMERICA

DANA J. BOENTE
United States Attorney

By: /s/

Daniel P. Shean, Assistant U.S. Attorney
Virginia State Bar No. 84432
Counsel for United States
Office of the United States Attorney
101 West Main Street, Suite 8000
Norfolk, Virginia 23510-1671
Phone: (757) 441-6331
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Email: Daniel.Shean@usdoj.gov

By: /s/

Kent P. Porter, Assistant U.S. Attorney
Virginia State Bar No. 22853
Counsel for United States
Office of the United States Attorney
101 West Main Street, Suite 8000
Norfolk, Virginia 23510-1671
Phone: (757) 441-6331
Fax: (757) 441-6689
Email: Kent.Porter@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that, on the 21st day of December, 2015, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to the following filing user:

S.W. Dawson, Esq.
Virginia State Bar No. 83166
DAWSON, P.L.C.
P.O. Box 58
Norfolk, Virginia 23501
Email: swd@dawsonplc.com

/s/
Daniel P. Shean, Assistant U.S. Attorney
Virginia State Bar No. 84432
Counsel for United States of America
Office of the United States Attorney
101 West Main Street, Suite 8000
Norfolk, Virginia 23510-1671
Phone: (757) 441-6331
Fax: (757) 441-6689
Email: Daniel.Shean@usdoj.gov

Executed this 30th day of November, 2015.

S.W. Dawson, Esq.
Virginia State Bar No. 83166
Counsel for Plaintiff
Dawson, P.L.C.
P.O. Box 58
Norfolk, Virginia 23501
Phone: 757-282-6601
Fax: 757-282-6617
Email: swd@dawsonplc.com

Executed this 21st day of December, 2015.

Wayne Carrel, Plaintiff

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

WAYNE CARREL,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 2:13CV44**
	)	
UNITED STATES,	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States agrees to pay the sum of twenty-five thousand dollars ($25,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement,

including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agrees to accept the sums set forth in this Stipulation for Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which he may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to plaintiff. This

settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at his or her expense. If necessary, plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank: Bank of America

B. City, State of Bank: Norfolk, Virginia

C. Routing Number: 051000017

D. Name of Account: DAWSON P.L.C.

E. Account Number: (b)(6)

Plaintiff's attorney agrees to distribute the settlement proceeds to plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. Plaintiff agrees and acknowledges that notwithstanding the United States' payment of the settlement amount of twenty-five thousand dollars ($25,000.00), plaintiff is subject to any outstanding fines, restitution and debts owed to the United States, including the outstanding balance of the fine imposed against plaintiff in Criminal Case No. 1:98-CR-39 in the U.S. District Court for the Southern District of Indiana, and that any and all such amounts will be deducted from the settlement amount. The payment of the outstanding balance of plaintiff's fine from Criminal Case No. 1:98-CR-39 will be deducted from the settlement amount and sent by the United States to the Clerk of the U.S. District Court for the Southern District of Indiana at the address of: U.S. District Clerk, Attn: Financial Administrator, 46 E. Ohio Street, Room #105, Indianapolis, IN 46204.

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 30th day of November, 2015.

Daniel P. Shean, Assistant U.S. Attorney
Virginia State Bar No. 84432
Counsel for United States of America
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, Virginia 23510
Phone: 757-441-6331
FAX: 757-441-6689
Email: Daniel.Shean@usdoj.gov

Kent P. Porter, Assistant U.S. Attorney
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United States Attorney's Office
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Phone: 757-441-6331
FAX: 757-441-6689
Email: Kent.Porter@usdoj.gov

Executed this 30th day of November, 2015.

S.W. Dawson, Esq.
Virginia State Bar No. 83166
Counsel for Plaintiff
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P.O. Box 58
Norfolk, Virginia 23501
Phone: 757-282-6601
Fax: 757-282-6617
Email: swd@dawsonplc.com

Executed this 21st day of December, 2015.

Wayne Carrel, Plaintiff

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Page 689 of 867

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FEB 12 2014
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

FILED
FEB 19 2014
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

FRANK SOWERS,
Plaintiff

v.

UNITED STATES OF AMERICA, AND ITS EMPLOYESS BHAGYA KATTA AND ASSISTANT HEALTH SERVICES ADMINISTRATOR LaROCK,
Defendants

COMPLAINT FOR MONEY DAMAGES UNDER FEDERAL TORT CLAIMS ACT

Civil Action No. 1:14CV177 TSE/JFA

NOW COMES Frank Sowers, the plaintiff pro se, complaining of the defendants United States of America and its employees, agents or servants Bhagya Katta and AHSA LaRock, and avers the following:

I. JURISDICTION

1. Plaintiff Frank Sowers brings this civil action under The Federal Tort Claim Act, 28 USC 2671 et seq., and this Court has subject matter jurisdiction under 28 USC 1346(b).

II. VENUE

2. The Eastern District of Virginia is an appropriate venue under 28 USC 1391(e)(1) because all of the acts and omissions giving rise to the claim occurred in this District.

III. PARTIES

3. Plaintiff Frank Sowers was at all times relevant to this action a federal prisoner incarcerated at FCC Petersburg, which is located in the Eastern District of Virginia.

4. Defendant United States of America and its agency the Federal Bureau of Prisons have legal custody of Plaintiff pursuant to a criminal judgment, and is being sued for the acts and omissions of its employees, agents or servants,done within the scope of their employment and official duties, which constitute the tort of negligence and which have caused personal injury to Plaintiff.

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The United States of America and its agency the Federal Bureau of Prisons are required to provide for the safekeeping, care and subsistence of all persons convicted of offenses against the United States, including Plaintiff, pursuant to 18 US Code 4042(a)(2).

5. Defendant Bhagya Katta was in the service of employ of the defendant United States of America, specifically its agency the Federal Bureau of Prisons, and was acting within the scope of his employment or office at all times relevant to this action. Defendant Katta was employed by the Health Services Department of FCC Petersburg Medium as an MLP(Mid Level Practitioner). The MLP is the initial contact with the inmate who seeks treatment from Health Services and makes the initial triage decision as to what treatment is necessary for medical problems presented by the inmate, whether the problem is an emergency, and if referral to other medical providers,including providers outside the prison is necessary or warranted.

6. Defendant LaRock, first name unknown, was in the service or employ of the defendant United States of America, specifically its agency the Federal Bureau of Prisons, and was acting within the scope of her employment or office at all times relevant to this action. Defendant LaRock was employed by the Health Services Department of FCC Petersburg as the Assistant Health Services Administrator (AHSA) The AHSA is responsible for maintaining and prioritizing waiting lists of inmates at Petersburg Medium who have been referred to see specialists by the MLP and has supervisory responsibilitry over treatment decisions made by the MLP and other providers in the Health

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Services Department.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

7. Plaintiff has exhausted his administrative remedies, as required by 28 USC 2675. Plaintiff filed a Form 95 Claim for damageinjury,or death on April 17,2012.Exhibit A. The claim was accepted as timely and the request for sum certain in damages of $500,000.00 noted on May 2,2012 by the BOP Regional Counsel Exhibit B. Plaintiff's administrative tort claim was denied on September 11,2012.Exhibit C. Plaintiff filed a request for re-consideration of his administrative claim on February 25,2013. Exhibit D, which was accepted as timely on April 2,2013,Exhibit E The request for reconsideration was denied on August 12,2013. Exhibit F. This action is timely filed within 6 months of the final denial of Plaintiff's claim.

V. FACTUAL ALLEGATIONS

8. Plaintiff seeks money damages for personal injury, damage and permanent loss of vision in his left eye, which was directly and proximately caused by the negligent or wrongful acts or omissions of defendants Katta and LaRock, while acting within the scope of their employment or office by the defendant United States of America, under circumstances where defendant United States of America if a private person would be liable in tort to the Plaintiff in accordance with the statutes and common law of the place where such act or omission ocurred, namely the Commonwealth of Virginia.

9. Plaintiff alleges the tort of negligence, and does not allege the tort of malpractice. Plaintiff alleges that the

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negligence of the Defendants in delaying examination of his eye by an opthalmologist and a retinal specialist for 9 to 10 months caused personal injury to his eye, future economic damages and psychological, mental and emotional suffering and injury. Plaintiff does not allege that the treatment provided by the opthalmologist or the retinal specialist constituted the tort of malpractice, his injuries were solely caused by the delay in treatment, not the treatment itself, and if Plaintiff had been treated forthwith in accordance with the duty of care owed him by Defendants, he would not have suffered the personal injury complained of herein

10 Plaintiff noticed a sudden loss of vision in his left eye in August of 2009. Plaintiff's left eye was bloodshot and appeared to be bleeding internally. Plaintiff had a blurred spot in the center of his field of vision in his left eye Plaintiff reported his sudden loss of vision at sick call according to BOP procedures for inmate request of emergency medical care.

11 On September 18,2009 Plaintiff was examined by his assigned MLP, defendant Katta. Katta noticed that Plaintiff had a pair of non-prescription reading glasses in his shirt pocket and commented that Plaintiff probably needed a stronger prescription for his eyeglasses Plaintiff informed MLP Katta that he did not wear prescription corrective lens and the glasses were just magnifying glasses from commissary. Plaintiff made it clear to MLP Katta that the vision in his right eye was good, but he had a sudden loss of vision and bleeding in his left eye Plaintiff informed MLP Katta that he had a blurred blind spot in the center of the field of vision of his left eye and that he could not recognize faces when looking straight ahead. Plaintiff

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told MLP Katta that he feared he was going blind in the left eye and that he needed some type of emergency treatment from an eye doctor. Plaintiff told MLP Katta that his complaint at sick call was a sudden and unexplained loss of vision in one eye, not a need for corrective lens eyeglasses

12. MLP Katta told Plaintiff he would be placed on a waiting list to see a opthalmologist and for Plaintiff to watch the callout, which is a posted list of medical appointments given to inmates daily to apprise them of appointments for the next day Plaintiff believed this meant he would be examined by an opthalmologist with a few days. However, defendant Katta completed a consultation report and clinical encounter notes which priority coded the request for examination bv an opthalmologist as "routine" with a due date of 12/18/2009, 90 days from the date Plaintiff reported a sudden loss of vision. MLP Katta wrote down that Plaintiff "needs new prescription, old glasses prescription having problems" as the reason for referral to the eye specialist, and did not mention a loss of vision or blurred vision as a reason for the referral to the opthalmologist. MLP Katta also wrote in the Clinical Encounter report of 9/18/2009 Plaintiff's vision was OD 20/70 OS 20/70 corrected to 20/50, but he did not test vision using a "E" type eye chart on that date and these visual acuity results are completely false and fabricated by Defendant Katta.

13 18 USC 4042(a)(2) required all defendants to provide for Plaintiff's care", which includes medically necessary health care and treatments. The Bureau of Prisons has a written policy

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entitled Patient Care, Program Statement PS6031.03 which defines the standard of care that must be followed by all Bureau of Prisons health care staff, such as defendants LaRock and Katta. The policy uses mandatory language, that the policy objective is "health care will be delivered to inmates in accordance with proven standards of care" Section 7 of this policy is titled "Scope of Services-Categories of Care" and defines five care categories in the order that treatment should be prioritized and delivered. The highest care category is "Medically Necessary-Acute or Emergent" which includes "medical conditions that are of an immediate, acute or emergent nature, which without care would cause.. irreversible loss of function", including the function of vision. Sudden loss of vision and hemmorhage are both specifically listed as medical conditions in the Medically Necessary-Acute or Emergent category Conditions in this category "warrant immediate attention" because "treatment for conditions in this category is essential to sustain life or function", such as the function of the eye and vision.

14. Defendant Katta had a duty to know and follow BOP policy on the priority given to various medical conditions when scheduling treatment by specialists such as opthalmologists and had a duty to follow the standard of care required by PS6031.03 section 7, which states that sudden loss of vision or hemmorhage are emergent or acute conditions which warrant immediate attention to prevent loss of function of the eye and vision. Failure to follow an administrative policy defining the standard of care that a reasonable and prudent MLP owed to Plaintiff is per se negligence.

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15. Defendant Katta violated PS6031.03 and breached the duty or standard of care mandated by that policy when he did not arrange for immediate diagnosis and treatment of Plaintiff's sudden loss of vision and hemmorhage of the eye, which are acute or emergent medical conditions, and when he coded the referral to the opthalmologist as a routine referral for provision of corrective lens eyeglassese, rather than an emergency referral to diagnose sudden loss of vision and hemmorhage suffered by Plaintiff.

16. Plaintiff became very distressed when he was not treated within a few days, as his vision was becoming slowly but progressively worse and the blind spot in his left eye's field of vision was becoming larger and more blurred.

17. Defendant LaRock as the Assistant Health Services Administrator was responsible for monitoring and scheduling the list of inmates who had been referred to the contract opthalmologist that visited the prison monthly and who were waiting for appointments. Defendant LaRock had authority to expedite the scheduling of opthalmologist appointments for an inmate like Plaintiff who reported a sudden loss of vision and had authority to change and prioritize the order the inmates on the waiting list would receive appointments. When prioritizing the waiting lists, Defendant LaRock had the duty of care to follow the care categories established by PS6031 03 section 7, as described in paragraph 14 above

18. Plaintiff sent AHSA LaRock a request to staff form on September 27,2009, asking when he would see the opthalmologist. Her response was "December of 2009 Plaintiff's loss of vision

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increased from week to week as he waited for treatment, the blind spot in his left visual field became larger and larger, and objects in the centerof his left eye visual field became more and more blurred and indistinct. BOP policy requires defendant LaRock and other management level officials to stand in the front of the dining hall while inmates are eating the noon meal, so that inmates can speak informally with them about questions or concerns Plaintiff begin asking AHSA LaRock about once a week when he would be seen by the opthalmologist when she was in the dining hall, and Plaintiff explained that his loss of vision was getting worse and he feared he was going blind in his left eye. Defendant LaRock appeared to be annoyed and angry that Plaintiff kept inquiring about his medical problem and told him there was a long waiting list and he would have to wait his turn like all other inmates. After a few weeks AHSA LaRock began actively avoiding Plaintiff, she would walk into an office or leave the dining hall when she saw Plaintiff so he could not ask her about his loss of vision. At no time did defendant LaRock change Plaintiff's place on the waiting list for the opthalmologist and at no time did she correct defendant Katta's miscoding of the referral as "routine".

19. On December 17,2009 Plaintiff signed up for sick call and was seem by defendant Katta. Plaintiff explained that his loss of vision and bleeding in his eye was now much worse than when he was referred to the opthalmologist in September, and Plaintiff asked MLP Katta to obtain treatment for his eye as soon as possible. Defendant Katta refused to expedite the opthalmologist appointment, and wrote on his Clinical Encounter

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notes for that day "asking to be seen sooner. Has to wait for his turn.".

20. Plaintiff begin to file BOP administrative remedy requests asking for medical treatment for his increasing loss of vision in his left eyer. Plaintiff filed a Informal Resolution form on November 27,2009, a BP9 form to the Warden on February 11, 2010 and a BP10 appeal to the Regional Director on February 11, 2010. None of these remedy requests expedited treatment of Plaintiff's eye, the response in each case was to inform Plaintiff that he was on the waiting list and he had to wait for his turn to be examined by an opthalmologist.

21 Plaintiff spoke with Assistant Warden Engel in the dining hall around March 24,2010, and AW Engel spoke with defendant LaRock to find out why Plaintiff had not been treated for a sudden loss of vision reported six months earlier. Because of AW Engel's intervention, Plaintiff was examined by an opthalmologist on April 23,2010.

22 The opthalmologist determined that there was active bleeding and a discharge from Plaintiff's left eye, and that Plaintiff's vision had become progressively worse and more blurred since he first reported a sudden loss of vision to defendant Katka 7 months earlier The opthalmologist made a tentative diagnosis that Plaintiff was infected with histoplasmosis, a fungal infection, and referred Plaintiff to a retinal specialist for a final diagnosis, evaluation of damage to vision or the eye, and treatment.

23. Histoplasmosis is a fungal infection which progressively destroys vision when the fungus spores spread to the

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eye and begin growing in the choroid layer of blood vessels that provides blood and nutrients to the retina in the eye. The fungus causes abnormal growth of blood vessels that are fragile, and as they burst and bleed scar tissue forms and replaces retinal tissue in the macula, the part of the retina that provides the sharp central vision that allows a person to read or drive a car. As this damage progresses while the histoplasmosis fungus grows, all straight ahead vision may be lost. Early treatment of histoplasmosis is essential, because the infection can often be arrested or cured,but the damage done to the retina and macula can not be reversed. Whatever vision loss occurs during the progressive loss of vision due to histoplasmosis is permanent after the fungus infection is cured The treatment for histoplasmosis affecting the eye is to use laser light to burn up abnormal blood vessels and stop their growth, or a newer treatment is a cancer chemotherapy drug called Avastin, which stops abnormal growth of blood vesels feeding tumors and can often stop abnormal blood vessel growth in the eye.

24. Plaintiff was examined by a retinal specialist at the Virginia Eye Institute on May 19,2010. The diagnosis of ocular histoplasmosis was confirmed and an injection of Avastin directly into the eye was administered. The retinal specialist administered a second injection of Avastin on December 1,2010. Subsequent followup examinations show that the progression of the fungus infection was stopped after the second injection, but the vision lost during the 8-9 months Plaintiff waited for treatment has not been reversed and will not be reversed.

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25. If defendants Katta and LaRock had allowed Plaintiff to be treated with the Avastin injections in September of 2009, when he first reported the acute and emergent medical condition of a sudden loss of vision and hemmorhage in his left eye, instead of forcing Plaintiff to wait 9 months to be treated, the damage to his eye would have been far less. Histoplasmosis is a progressive disease, and every day it goes untreated the damage to vision and the tissues of the inner eye increases. The medical treatment plaintiff received was appropriate and effective. The delay in obtaining treatment caused by the negligent acts and omissions of the defendants Katta and LaRock is the tortious conduct which is the direct and proximate cause of personal injury and other damages suffered by the Plaintiff.

26. Plaintiff suffers from physical injury caused by the defendants negligence. Plaintiff has permanently lost central vision in his left eye and can only see objects in the peripheral or side field of vision from his left eye Corrective lens do not improve this lost vision because it results from damage to the retina, not the lens of the eye Lines and faces appear blurred when viewed from Plaintiff's left eye. This damage is not reversible by any known treatment and the loss of vision has not improved since December 2010, a period of 3 years or more.

27. Plaintiff has suffered from pain and aching in his eye since the onset of the histoplasmosis and must wear protective eyewear.

28 The injury to Plaintiff's eye has damaged his future earning ability and caused future economic damage upon his release from prison. Before his incarceration Plaintiff worked at various construction trades and at jobs requiring him to drive a motor

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vehicle. Plaintiff will not be able to perform these jobs now. On information and belief Plaintiff will not be able to get a drivers license due to his loss of vision, which will limit his earnings ability and ability to conduct daily living activities. Plaintiff will not be able to work a job requiring prolonged viewing of a computer screen because this activity causes him eye pain, and most jobs require intensive use of computers in today's economy.

29 Plaintiff has suffered and still suffers mental and emotional injury and distress caused by the negligence of the defendants. As a prisoner, Plaintiff could not obtain his own healthcare and was totally dependent on the staff of the prison healthcare department to provide treatment for his loss of vision. Defendants Katta and Larock callously, wantonly and maliciously refused Plaintiff's repeated requests for treatment to stop the ever progressing blindness in his left eye during the 9 month period before Plaintiff was seen by the opthalmologist and the retinal specialist. Having to stand by helplessly and watch his vision be destroyed because of the negligent and intentional acts and omissions of the Defendant's caused Plaintiff to become anxious, strssed depressed and paranoid that the defendants had some hidden animus against him and were deliberately trying to cause him to go blind. Plaintiff to this day is suffering mental and emotional trauma from this inhumane treatment,similar to post-traumatic stress disorder.

30. Defendant United States of America is liable for these negligent acts done in the scope of employemnt of defendants Katta and LaRock

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VI CAUSES OF ACTION

Count One

The Defendant's negligence resulted in personal, physical,mental and economic injury to Plaintiff and constitutes the tort of negligence under the law of the Commonwealth of Virginia

31 Plaintiff incorporates paragraphs 1 through 30 as though they were stated fully herein.

32. Defendant Unied States of America, its agency the Bureau of Prisons, and its employees, agents and servants MLP Katta and AHSA LaRock had a legal duty to provide for Plaintiff's care, a duty which includes provision of necessary medical care and treatment, pursuant to 18 USC 4042(b), because Plaintiff is a federal prisoner. Defendants had a more specific legal duty to follow the standards of care regarding medical treatment of federal inmates set forth by BOP official policy Patient Care, PS6031 03, section 7. This policy mandated a duty to provide immediate attention and treatment of emergent or acute medical conditions which could cause loss of function of a body part, such as Plaintiff's eye. PS 6031 03 section 7(a) specifically defines both "sudden loss of vision" and "hemmorhage" as emergent conditions which require immediate attention and treatment. This official policy limited the discretion of defendants Katta and LaRock concerning delay in treating loss of vision and hemmorhage of the eye.

33. Defendant Katta breached the legal duty of care owed Plaintiff when he did not provide immediate attention or treatment when Plaintiff presented a emergent medical condition of sudden loss of vision in his left eye and bleeding in his left eye. Defendant Katta breached the legal duty to Plaintiff when he made a "routine priority" referral to an opthalmologist and did

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not reference sudden loss of vision or bleeding inside Plaintiff's eye as the reason for this referral. Defendant LaRock breached the legal duty of care owed Plaintiff when she refused to expedite his examination by the opthalmologist after he repeatedly informed her he was suffering progressive blindness in his left eye.

34. The breach of the legal duty owed Plaintiff by the defendants caused a 9 month delay in Plaintiff's treatment for ocular histoplasmosis ,which was the proximate cause of physical, personal, mental, emotional ,psychological and economic injury and damages to the Plaintiff. But for the nine month delay in diagnosis and treatment of histoplasmosis caused by the breach of the legal duty owed Plaintiff by the defendants, the injuries would not have been inflicted on Plaintiff or their severity would have been less.

Count Two

The Defendant s per se negligence resulted in personal, physical mental and economic injury to Plaintiff and constitutes the tort of per se negligence under the law of the Commonwealth of Virginia

35 Plaintiff incorporates paragraphs 1 though 34 as though they were stated fully herein

36 Defendants violated BOP policy PS6031.03 and 18 USC 4042(b) by delaying Plaintiff's treatment for a sudden loss of vision and bleeding of his left eye for nine months

37 Plaintiff as a federal prisoner belongs to the class of persons whom the statute and the policy intended to protect from harm by mandating a duty and a standard of care

38 The violation of the statute and the policy were the proximate cause of physical, personal,mental,emotional and economic injury to Plalintiff

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VII PRAYER FOR RELIEF

WHEREFORE Plaintiff Frank Sowers prays that this Court.

A. Declare and adjudge that the acts and omissions of the Defendants described herein constitute the torts of negligence and engligence per se as defined by the law of the Commonwealth of Virginia

B. Order the Defendants to pay Plaintiff the sum certain of $500 000 00 as compensatory damages for physical, mental and economic injury and damage caused the Defendant's tortious conduct

C. Order the Defendants to pay the costs incurred by Plaintiff in filing this action, including filing fee and costs for copying.

D Grant other just and equitable relief trhat this honorable Court deems necessary.

Respectfully submitted on February 7,2014.

Frank Sowers

Frank Sowers
Plaintiff pro se
#09301-002
FCI Petersburg Low
PO Box 1000
Petersburg, VA 23804

VERIFICATION

I declare under penalty of perjury, pursuant to 28 USC 1746, that I have read the foregoing Complaint and all facts stated herein are true and correct within my personal knowledge and I am of age and competent to testify to same, and I further declare that I filed this Compalint pursuant to the prison mail-box rule by delivering it with postage prepaid to the legal mail

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officer of FCI Petersburg Low on February 7, 2014 for mailing to the Clerk of the US District Court. Executed on February ___, 2014

Frank Sowers

Frank Sowers

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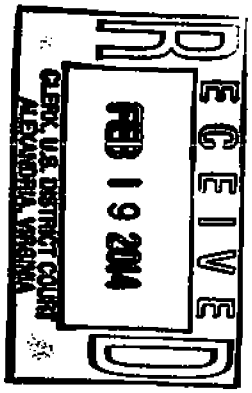
Report Prisoner Data (No Middle Name)

ID#	*Last*	*First*	*Middle*	*FileDate*	*Judge*	*RecDate*	*Ofc*	*Year*	*cv*	*Num*	*Action*	*threeStrike*
9301002	Sowers	Frank		02/18/2014	103 Judge Ellis	02/12/2014			cv		28:2671	



Frank Sowers
Reg No. 09301-002
FCI Petersburg Low
PO Box 1000
Petersburg, VA 23804

February 7,2014

CLerk of the US District Court

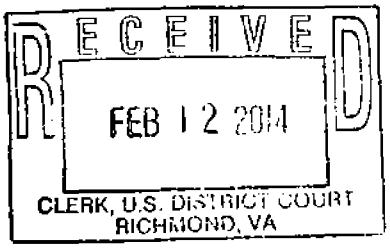
Dear Sirs:

I enclose for filing two copies of a complaint for money damages under the Federal Tort Claims Act, 28 USC 2671 et seq. and an application to proceed in forma pauperis. I am requesting that the US Marshal serve my complaint on the defendants and I will complete any summons forms that you need me to fill out once you send them. Please send me any other forms I need to fill out to commence my civil action. Please return a copy of the front page of my complaint stamped as filed. Thanks for your assistance in this matter.

Sincerely,

Frank Sowers

Frank Sowers



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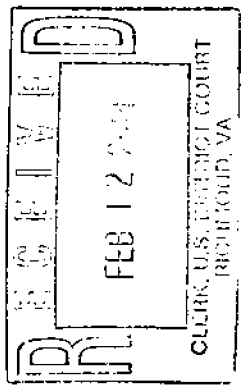

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EXHIBIT A

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency	2. Name, Address of claimant and claimant's personal representative, if any (See instructions on reverse.) (Number, Street, City, State and Zip Code)
BOP MidAtlantic Region 302 Sentinel Dr. Suite 200 Annapolis Junction, MD 20701	Frank Sowers #09301-002 FCI Petersburg Low PO Box 1000 Petersburg,VA 23804

3. TYPE OF EMPLOYMENT MILITARY / CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
	3/28/1959	Single	May 19,2010 (accrued)	na

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.) This is a claim for damage to my left eye and permanent partial loss of vision which was caused by the negligence of BOP medical staff acting within the scope of their employment. The claim does not allege malpractice, claim alleges negligence by waiting 9-10 months to have histoplasmosis evaluated and treated by a retinal specialist, damage occured while waiting for evaluation See attached pages for full statement of basis of claim

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code) NA

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED (See Instructions on reverse side.) NA

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT I have suffered permanent irreversible damage to my left eye, which went undiagnosed and untreated for 9-10 months because of staff negligence in scheduling examinaton by a opthamologist and retinal specialist. I have a blind spot in central vision,20/80 peripheral

11. **WITNESSES**

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
NA	

12. (See instructions on reverse.) **AMOUNT OF CLAIM (in dollars)**

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
0	$500,000.00	0	$ 500,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
Frank Sowers	NA no phone	4/17/2012

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for the civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

NSN 7540-00-634-4046

STANDARD FORM 95
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

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8. Basis of Claim- This claim alleges that I have suffered permanent damage to my left eye, a loss of vision due to a blind spot in the center of my visual field and degeneration of my peripheral vision to 20/80, as a direct result of the acts and omissions of BOP medical staff, MLP Katta and AHSA LaRock at FCC Petersburg Medium, which constitute the tort of negligence. Katta and LaRock were acting within the scope of their employment as medical care providers at FCC Petersburg and under color of federal law at all times relevant to this claim. This claim does not allege malpractice, and does not require expert testimony as proof of the tortious conduct under the common or statutory law of the Commonwealth of Virginia governing tort liability. This claim accrued on May 19,2010, when I was conclusively diagnosed with histoplasmosis by Virginia Eye Institute Retina Specialists. The damage to my eye was caused by the negligence of MLP Katta and AHSA LaRock in delaying an examination by an opthalmologist and a retinal specialist for for 8 months, after I reported a sudden loss of vision and a hemmorhage in my left eye on September 18,2009, but the personal injury or damage from the negligence was not discoverable by myself until I was actually evaluated by the retinal specialist on May 19,2010. This claim is timely filed within two years of the date my personal injury became known. The suporting facts proving negligence by failing to follow triage policy and failure to schedule evaluation for an emergency eye disorder in a reasonable time period are presented in the following two sections.

A. MLP Katta had a duty to know and apply relevant BOP policy, PS6031.01 requiring immediate treatment of medically necessary emergent problems, he breached this duty by placing me on a "routine priority" waiting list for evaluation by a opthalmologist after I reported a sudden loss of vision and ocular hemmorhage rather than obtaining immediate emergency treatment, and the breach of duty was the direct and proximate cause of permanent damage to my eye and vision by progressive untreated histoplasmosis.

In August of 2009 I notice a blurred spot in the center of the field of vision of my left eye. The blurring slowly got worse instead of clearing up, and I notice my left eye was bloodshot like it was bleeding internally, so I went to sick call to seek medical treatment. I was examined by MLP Bhagya Katta on 9/18/2009. MLP Katta noticed I had some reading glasses in my shirt pocket, which I had been given in March of 2007, and he told me "you must need a stronger prescription for your glasses". I told MLP Katta that my glasses were not the problem, that my right eye was fine, but that it looked like to me that my left eye was bleeding internally and that I had a blurred blind spot in the center of my field of vision in my left eye, that I could not recognize faces when I was looking straight ahead. MLP Katta told me he would put me on the list to see the opthalmologist,watch the callout, he said. The clinical encounter notes from this date show that MLP Katta referred me for an optometry consultation with the priority coded as "routine".,with a due date of 12/18/2009, 90 days away. MLP

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Katta put down that I "need new prescription" for glasses as the reason for the optometry referral. He did not mention my loss of central vision or ocular bleeding. MLP Katta did not test my vision by having me look at an "E"type eye chart, but he noted in his report that my vision was 20/70 in both eyes. This information was fabricated, as no vision testing was performed on this date. MLP Katta had a duty of care to provide medical treatment to me as needed under 18 USC 4042. BOP policy on Patient Care, PS6031.01 at section 7 creates five Care Categories, each with increasing priority of time for provision of treatment. The highest priority category which requires immediate evaluation and treatment, is Medically Necessary-Emergent, defined as "medical conditions that are of an immediate, acute or emergent nature, which without care would cause...irreversible loss of function", such as vision. Sudden loss of vision and hemmorhage are both listed as examples of medical conditions in this category of care, and when I reported these conditions MLP Katta should have arranged for immediate emergency evaluation and treatment by an opthalmologist. MLP Katta had a duty to know and follow BOP policy on Patient care and prioritization or triage of acute conditions. Falure to follow an administrative policy which sets forth the standard of care that a reasonable MLP should follow, such as PS6031.01, is per se negligence. MLP Katta breached this duty of care when he did not obtain an immediate emergency evaluation to determine the cause of my sudden loss of vision and ocular hemorrhage, and by coding the optometry referral as "routine" priority status, the status accorded inmates who merely need a slight change toa glasses prescription. I was not evaluated by an opthalmologist until April 23,2010, because of the"routine" priority coding. The opthalmologist noted that my vision in my right eye was 20/20, left eye 20/60, not 20/70 in both eyes as reported by MLP Katta. It was also noted that there was active bleeding and a discharge from my left eye, and that my vision had gotten progressive worse during the 8 months I had been waiting for evaluation. The opthalmologist made a tentative diagnosis of histoplasmosis and referred me to a retinal specialist for final diagnosis, evaluation of damage to the eye, and treatment. I was examined by a retinal specialist at Virginia Eye Institute on 5/19/2010. I was diagnosed with histoplasmosis, which is a fungal infection that slowly and progressively destroys the retina by producing abnormal blood vessel growth and bleeding inside the eye. Total blindness can result from histoplasmosis if it is not treated promptly. I was treated by an interoccular injection of Avastin, which shrinks the blood vessels inside the eye to stop bleeding. I received another Avastin injection on 12/1/2010. These injections stopped the histoplasmosis from getting worse, but once damage is done to the retina from this disease, the damage can not be repaired or reversed by any means. If these injections had been given shortly after I saw MLP Katta on 9/18/2009, instead of 8 months later, the permanent damage and loss of vision to my left eye would have been much less. I now have a blind spot, a circle in my center field of vision of my left eye where I cannot read or recognize faces and objects. This damage is permanent and untreatable, and is the direct result

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of MLP Katta's breach of the duty of care to follow BOP policy and order prompt evaluation and treatment for any sudden loss of vision or hemmorhage on 9/18/2011.

B. AHSA La Rock had a duty to schedule evaluation and treatment by a contract opthalmologist within a reasonable time that is appropriate for the nature of my medical problem, AHSA LaRock breached this duty of care by refusing my repeated requests to be evaluated by the opthalmologist in a timely manner, although I informed her my vision was rapidly getting worse and I had bleeding inside my eye, and AHSA LaRock's failure to schedule evaluation until 8 months after I reported sudden loss of vision and ocular hemmorhage was the direct and proximate cause of permanent damage and personal injury to my eye.

Ms. LaRock was the Assistant Health Services Administrator with charge over Medical Dept at Petersburg-Medium. The AHSA is responsible for scheduling and prioritizing waiting lists of inmates referred to the contract opthalmologist. I sent AHSA La Rock a cop out on 9/27/2009 asking when I would see the "eye doctor" and she responded "December 2009". I spoke with AHSA LaRock at least 8-12 times at mainline and on the compound and told her I feared I was going blind in my left eye, that I had bleeding and a blind spot that was getting worse. At no time did AHSA La Rock change the priority of my referral from "routine" to emergency or urgent. AHSA LaRock appeared to get mad or upset when I kept asking her about my eye condition. On 12/17/2009 I went to sick call again and saw MLP Katta. In his Clinical Encounter Administrative Note of that date he stated I was asking to see the eye doctor sooner but the response noted was "he has to wait for his turn". There was no change of priority from "routine". I filed a BP 8 informal resolution request on 11/27/2009, a BP9 on 2/11/2010, see Remedy ID #577915 a BP10 on March 24,2010. None of these filings resulted in evaluation by an opthalmologist. I finally sppealed to AW Engel at mainline around 3/24/2010 and told him I was going blind in one eye and medical refused to provide treatment. AW Engel spoke with AHSA LaRock and I was then evaluated by the opthalmologist on 4/23/2010 only becagse he intervened. AHSA LaRock owed me a duty of care to prioritize my wait time for evaluation on the basis on the severity of my eye condition, classified as Medically Necessary-Emergent by PS6031.01. AHSA LaRock breached this duty by refusing my repeated request to change the priority status of my referral from 'routine". The failure to obtain a timely evaluation resulted in permanent damage and loss of vision to my left eye, which would not have occurred had I been treated shortly after 9/18/2009, instead of 8 months later. I suffered further damage through mental and emotional damage and distress. The helpless feeling of needing medical care to prevent blindness and being repeatedly refused care by AHSA LaROck has caused depression, anxiety, paranoia and other serious mental/emotional damage. This type of of cruel

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treatment and torment violated my constitutional right to be free of cruel or unusual punishment for my mycrime, guaranteed by Amendment 8,US Constitution.

I declare under penalty of perjury, pursuant to 28 USC 1746, that all facts stated in this tort claim are true within my personal knowledge, and that I mailed this claim on April 18, 2012 with firstclass postage prepaid addressed to BOP MidAtlantic Regional Office, 302 Sentinel Dr.Suite 200 Annapolis Junction,MD 20701.

Frank Sowers

Frank Sowers

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EXHIBIT B

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
Mid - Atlantic Region

Butner Legal Center
P.O. Box 1600
Butner, North Carolina 27509

May 2, 2012

Frank Sowers
Reg No 09301-002
FCC Petersburg-Low
P.O. Box 1000
Petersburg, VA 23804

Re: Administrative Tort Claim Received 04-23-2012
Claim No. TRT-MXR-2012-03744

Dear Mr. Sowers:

This will acknowledge receipt of your administrative tort claim for alleged loss of personal property or personal injury suffered at FCC Petersburg on or about 05/19/2010. You seek the sum certain of $500,000.00.

The above-referenced claim has been accepted and considered for administrative settlement under 31 U.S.C. § 3723. This statute provides for the settlement of claims which are small claims for private property damage or loss. We anticipate six months from the date of this letter, to review, consider, and adjudicate your claim.

If possible, for each item, please state its value, date and place of purchase. If the property was purchased in a Federal institution, submit the commissary receipt and property form. If the property was not purchased in a Federal institution, submit a copy of the receipt of purchase. If you do not have a receipt please state as such, and list the place purchased, for example: name of store, address, state, date and cost for each item alleged lost or damaged. Failure to respond within 30 days of this letter will delay the investigation of your claim. ***If you have already included these items do not re-submit.***

All correspondence regarding this claim should be addressed to: Butner Legal Center, P.O. Box 1600, Butner, North Carolina 27509. When corresponding with this office regarding this claim please refer to the above claim number. If you have any questions about the status of your claim or if the circumstances surrounding this claim change in any fashion, contact this office immediately. **Also, should your address change, please advise accordingly.**

Sincerely,

Michelle Fusey-Amore
Regional Counsel

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U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
Mid · Atlantic Region

Butner Legal Center
P.O. Box 1600
Butner, North Carolina 27509

September 11, 2012

Frank Sowers
Reg. No. 09301-002
FCC Petersburg - Low
P.O. Box 1000
Petersburg, VA 23804

Re: Administrative Tort Claim Number: TRT-MXR-2012-03744

Dear Mr. Sowers:

Your administrative claim filed under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, has been considered for administrative settlement. You allege government liability in the amount of $500,000.00 for alleged personal injury related to a partial loss of vision in your left eye.

Our investigation reveals that you have not provided any evidence that Bureau of Prisons staff are responsible for any of your alleged injuries. Furthermore, our records indicate you were seen in health services on December 21, 2010, for a bump on your right eye. You indicated there were no problems with your left eye. You also failed to report to your Ophthalmology appointments on July 11, 2011, October 25, 2011, March 2, 2012, and March 8, 2012. The Federal Tort Claims Act only provides compensation for loss of property or injuries resulting from the negligence, omission, or wrongful act of Bureau of Prisons employees acting within the scope of their employment. We do not find that your alleged injuries resulted from the negligence of any Bureau of Prisons staff member.

Therefore, your claim is denied. If you are dissatisfied with our determination, you may file suit in the appropriate United States District Court not later than six (6) months after the date of mailing of this notification.

Sincerely,

Michelle T. Fuseyamore
Regional Counsel

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EXHIBIT D

Frank Sowers
#09301-002
FCI Petersburg Low
PO Box 1000
Petersburg, VA 23804

February 25,2013

Butner Legal Center
Ms. Michelle Fuseyamore
PO Box 1600
Butner, NC 27509

RE:Reguest for reconsideration of FTCA administrative claim #TRT-MXR-2012-03744, pursuant to 28 CFR 14.9(b)

Dear Ms. Fuseyamore:

Pursuant to 28 CFR 14.9(b), I am making a formal request for reconsideration of my administrative claim under the Tort Claim Act. This request is timely filed within six months of the date my claim was denied, September 11,2012. Reconsideration is warranted because the decision to deny my claim was based on a failure to consider and weigh all evidence presented and on an erroneous interpretaton of a BOP Clinical Encounter Report from 12/21/2012.

I. My administrative claim provided undisputed and uncontroverted evidence that the negligence of BOP employees Katta and LaRock was the direct cause of a nine month delay in treatment of histoplasmosis in my left eye, a delay which was the direct cause of permanent irreversible loss of vision in my left eye

The letter denying my claim states that I did not provide any evidence that BOP staff were responsible for the injury to my left eye. The facts about the delay in treatment of histoplasmosis in my left eye stated in my claim are all corroborated by medical records in my BOP file. The instructions provided with the tort claim form state that your office will examine all relevant BOP medical records and that I did not need to attach copies of any medical records to my administrative claim.

BOP medical records prove beyond question that decisions made by MLP Katta and AHSA LaRock caused a nine month delay in the treatment of histoplasmosis in my left eye. I reported a sudden loss of vision in my left eye to MLP Katta on 9/18/2009. BOP Policy PS6031.03 categorizes a sudden loss of vision as an "acute, immediate or emergent medical condition", which requires

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"immediate evaluation and treatment". MLP Katta breached the duty of care defined by this BOP policy when he misclassfied my request for treatment of a sudden loss of vision in the left eye as a routine non-emergency request for a stronger eyeglasses prescription, rather than as an acute, immemdiate or emergent medical condition as required by PS6031.03, and when he placed me on the "routine priority" waiting list to see the opthamologist. The misclassification of my vision loss as "routine caused me to have to wait nine months to see the opthamologist. AHSA LaRock also caused the nine month delay in evaluation and treatment of my vision loss by ignoring and failing to act on my repeated oral and written requests to change the priority for evaluation of my sudden vision loss from routine to emergency status and to have my eye evaluated by the opthamologist sooner than nine months. I was not seen by the opthamologist until 4/23/2010. I was referred to a retinal specialist, who examined me on 5/19/2010, diagnosed my loss of vision as being caused by histoplasmosis, and treated me with an injection of Avastin to stop the progression of damage to my left eye caused by histoplasmosis. a follow up injection of Avastin was administered to my left eye on 12/1/2010. The dates of my treatments and the date I first reported a sudden loss of vision to MLP Katta are stated in BOP medical records, and prove that acts and omission of both MLP Katta and AHSA LaRock caused a nine month delay in evaluation and treatment of loss of vision in my left eye.

The BOP medical records also prove that the nine month delay in treatment caused by MLP Katta and AHSA LaRock was the direct and sole cause of irreversible permanent damage to my left eye Histoplasmosis is a fungus infection of the eye which slowly but progressively destroys the retina within the eye, which causes a permanent and irreversible loss of vision. Histoplasmosis causes abnormal growth of blood vessels and bleeding within the eye, which damages the retina. The Avastin injections used to treat histoplasmosis shrink the abnormal blood vessels and stop the bleeding, which prevents further damage to the retina, but Avastin does not repair or reverse any damage already done to

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the retina prior to the infection. Consequently, any loss of vision from histoplasmosis incurred prior to injection of Avastin is permanent, and the earlier after a change in vision is noticed that treatment with Avastin is given, the less permanent vision loss will be incurred. If my sudden loss of vision had been treated as an emergency by MLP Katta and AHSA LaRock, I would have received an Avastin injection which would have stopped the progressive damage to my retina within a week, instead of nine months later, and the permanent vision loss I now suffer would not have occurred. The amount of vision loss I now have due to the nine month delay in treatment is much greater than the amount of vison loss I would have,had MLP Katta and AHSA LaRock arranged for immediate evaluation and treatment. Subsequent to the denial of my claim, I was examined again by Dr Gupta, the contract opthamologist, on 11/8/2012. Dr. Gupta told me that my left eye was "down" and that the central visual field blind spot and loss of visual acuity in that eye were going to be permanent. Dr. Gupta advised that I wear protective lenses to guard against injury to my right eye, since it is the only one I can see with.

II. The Clinical Encounter Report of 12/21/2010 does not admit or prove that no damage to my left eye resulted from negligent nine month delay in treatment of histoplasmosis

The letter denying my administrative claim states that when I was seen by MLP Panaguiton on 12/21/2010 for evaluation of a bump and irritation to my RIGHT eye,(not the LEFT eye which is damaged and which is the subject of my tort claim) that I told MLP Panaguiton that there was "no problem with my left eye", and that this proves that I was not injured by the negligence of MLP Katta and AHSA LaRock in delaying treatment of my left eye for nine months. I was there at sick call because I was concerned about a bump on my right eye. I told MLP Panaguiton that I did not have a similar bump on my left eye, but I certainly did not tell MLP Panaguiton that the damage and loss of vision in my left eye had miraculously reversed itself. Dr. Gupta's examination of 11/8/2012 confirms that I still can not see from my left eye The words "no problem with left eye" I spoke to MLP Panaguiton meant no NEW problem such as the bump that was irritating my

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right eye, which was the subject of my visit to Medical on 12/21/2012. Your denial rests on an erroneous interpretation of the 12/21/2010 report and an unwarranted inference that my left eye was not damaged.

III. The fact that I missed opthamologist appointments set up outside of the normal inmate triage request process, because I did not know an appointment had been scheduled, is not relevant or material to the decision of my claim for damage.

The letter of denial states I failed to report for Opthamology appointments in July and October of 2011 and March of 2012. I was not aware of these appointments, because Dr. Gupta scheduled them on his own initiative. Normally, inmates have to fill out a triage form and see the MLP first before they can see the opthamologist, which is why I had no idea I was set up for these exams. Now that Dr. Gupta has told me because of the scarring in the right eye he intends to follow up and monitor any change of histoplasmosis developing in the right eye, I have not missed any more appointments with him. The denial letter seems to draw an inference that I missed these appointments because there is no damage to my left eye, but this is simply not true, I missed them because I did not know they had been scheduled. I am actually apprehensive about further loss of vision in either eye and am happy to take time for whatever eye exams BOP is willing to provide.

CONCLUSION

I request that you review the records and facts, and ask MLP Katta and AHSA LaRock why it took nine months to have my sudden loss of vision evaluated and treated. I request that you make a reasonable settlement offer. I am serving a 360 month sentence and would be open to a sentence reduction as compensation in lieu of financial compensation. The permanent loss of vision has reduced my earning ability in prison and after release, increased risk of accidents due to loss of binocular vision and caused both physical and mental pain and suffering. I look forward to your offer in settlement of my claim.

Submitted on February 26, 2013

Frank Sowers

Frank Sowers

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I declare under penalty of perjury, pursuant to 28 USC 1746, that all facts stated in this request for reconsideration are true within my personal knowledge.

Frank Sowers

Frank Sowers,

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EXHIBIT E

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
Mid - Atlantic Region

Butner Legal Center
P.O. Box 1600
Butner, North Carolina 27509

April 2, 2013

Frank Sowers
Reg. No. 09301-002
FCC Petersburg – Low
P.O. Box 1000
Petersburg, VA 23804

Re: Administrative Tort Claim Received 03/07/2013
Claim No. TRT-MXR-2012-03744 (reconsideration)

Dear Mr. Sowers:

This will acknowledge receipt of your administrative tort claim reconsideration for alleged personal injury related to a partial loss of vision in your left eye. You seek a sum certain of $500,000.00.

The above-referenced claim has been accepted and will be reconsidered for administrative settlement under 28 U.S.C. § 2675. We anticipate six months from the date of this letter, to review, reconsider, and adjudicate your claim.

All correspondence regarding this claim should be addressed to: Butner Legal Center, P.O. Box 1600, Butner, North Carolina 27509. When corresponding with this office regarding this claim please refer to the above claim number. If you have any questions about the status of your claim or if the circumstances surrounding this claim change in any fashion, contact this office immediately. **Also, should your address change, please advise accordingly.**

Sincerely,

Matthew W. Mellady
Regional Counsel

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U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons
Mid - Atlantic Region

Butner Legal Center
P.O. Box 1600
Butner, North Carolina 27509

August 12, 2013

Frank Sowers
Reg. No. 09301-002
FCC Petersburg - Low
P.O. Box 1000
Petersburg, VA 23804

Re: Administrative Tort Claim Number: TRT-MXR-2012-03744 (Reconsideration)

Dear Mr. Sowers:

Our adjudication of your administrative claim filed under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, referenced above has been reconsidered per your request. You allege government liability in the amount of $500.000.00 for alleged personal injury related to a partial loss of vision in your left eye.

Our investigation reveals no evidence that your alleged injuries resulted from the negligence of any Bureau of Prisons staff member. According to your medical records, your requests for eye exams indicated routine eye care, as opposed to the sudden loss of vision that you now claim. Additionally, you failed to provide any additional evidence in your request for reconsideration. We find no reason to depart from our previous denial.

Therefore, this letter constitutes a final denial of your claim. If you are dissatisfied with our determination, you may file suit in the appropriate United States District Court not later than six (6) months after the date of mailing of this notification.

Sincerely,

Matthew W. Mellady
Regional Counsel

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FRANK SOWERS,	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:14-cv-177**
	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This is an FTCA[1] medical malpractice claim brought by a federal inmate who alleges that the medical care he received while incarcerated at FCC Petersburg failed to meet the requisite standard of care. Plaintiff filed this action *pro se*, and following service of the initial complaint, defendant requested that plaintiff provide certification that he had obtained a written expert opinion pursuant to the Virginia Medical Malpractice Act ("VMMA). When plaintiff responded that he had not yet obtained such a certification, defendant filed a motion for summary judgment. An Order issued on February 25, 2015, denying the motion for summary judgment without prejudice, but allowing plaintiff to file "an amended complaint, including the expert certification required by Virginia Code § 8.01-20.1." *Sowers v. United States*, 1:14:cv-177 (E.D. Va. Feb. 25, 2015) (Order) (Doc. 21). Following the filing of the amended complaint, defendant moved to dismiss on the grounds that, *inter alia*, the amended complaint did not comply with the February 25 Order and the VMMA. This memorandum opinion records and elucidates the reasons for denying defendant's motion to dismiss.

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[1] Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq*.

I.

The pertinent facts may be succinctly summarized. Plaintiff, Frank Sowers, is a federal inmate currently housed at FCC Petersburg, which is located in the Eastern District of Virginia. Plaintiff is in custody of the Federal Bureau of Prisons ("BOP"), an agent of the defendant, United States of America.

In August 2009, plaintiff noticed a sudden loss of vision in his left eye, which was bloodshot and appeared to be bleeding internally. Plaintiff then promptly reported his sudden loss of vision at sick call in accordance with the BOP procedures for inmate requests for emergency medical care.

On September 18, 2009, plaintiff was examined by his assigned Mid-Level Practitioner ("MLP"), Bhagya Katta, an employee of the United States and the BOP.[2] MLP Katta was the initial contact for plaintiff and the person who initially determined whether treatment, if any, was necessary. Plaintiff told MLP Katta that he sought care for the sudden loss of vision in his left eye, explaining that a blurred blind spot in the center of his field of vision made it difficult to recognize faces when looking straight ahead. Plaintiff also told MLP Katta that he feared going blind and needed some type of emergency treatment from an eye doctor.

Despite learning this information, MLP Katta concluded that plaintiff needed nothing more than a stronger prescription for his eyeglasses. It appears that MLP Katta reached this conclusion on noticing that plaintiff possessed a pair of non-prescription reading glasses. MLP Katta further stated that plaintiff would be placed on a waiting list to see an ophthalmologist. Rather than treating his eye condition as an emergency, MLP Katta's consultation report described the request for an ophthalmologist examination as "routine" with a due date of

[2] The nature and extent of MLP Katta's training and expertise is unclear from the record.

December 18, 2009, approximately four months after plaintiff reported his sudden loss of vision. MLP Katta's report further indicated that plaintiff's need for a new glasses prescription was the reason for the referral.

When plaintiff was not treated within a few days of his appointment with MLP Katta, he became distressed, as the blind spot in his left eye was growing larger and more blurred. Accordingly, on September 27, 2009, plaintiff sent a request to Administrator LaRock, the Assistant Health Services Administrator responsible for scheduling inmate appointments with the ophthalmologist, asking when plaintiff would be seen by an ophthalmologist. The amended complaint does not reflect that LaRock responded to this request, and in any event, the amended complaint makes clear that plaintiff waited eight months for an ophthalmologist appointment. During this period, the blurred spot in his left eye worsened and grew. While he waited, plaintiff repeatedly asked LaRock about his ophthalmologist appointment, causing LaRock to become annoyed with plaintiff and to avoid and ignore plaintiff's repeated requests.

On December 17, 2009, plaintiff signed up for sick call and was again seen by MLP Katta. Plaintiff explained that both the vision loss and the bleeding in his eye had worsened and asked to receive treatment as soon as possible. MLP Katta refused plaintiff's request to expedite his ophthalmologist appointment and wrote in her Clinical Encounter notes that, despite plaintiff's requests, he must await his turn. Plaintiff also filed BOP administrative remedy requests asking for medical treatment. The responses to each request—dated November 27, 2009, and February 11, 2010—were the same: Plaintiff must await his turn on the waiting list.

On or about March 24, 2010, plaintiff told Assistant Warden Engel in the prison dining hall about the delay in treatment. Engel apparently intervened, and on April 23, 2010, approximately eight months after plaintiff's initial request for emergency treatment, an

ophthalmologist examined plaintiff. The ophthalmologist determined that there was active bleeding and a discharge from plaintiff's left eye and that plaintiff's vision had progressively worsened since he first reported his loss of vision to MLP Katta. The ophthalmologist tentatively diagnosed plaintiff as suffering from a fungal eye infection and referred plaintiff to a retinal specialist.

Approximately two weeks later, on May 9, 2010, a retinal specialist examined plaintiff and diagnosed him with ocular histoplasmosis, a fungal infection that progressively destroys vision as the fungal spores spread in the eye. Plaintiff was treated with two injections of a drug called Avastin, which stopped the fungal infection's progress. Nevertheless, the damage plaintiff suffered during the eight months he awaited treatment is irreversible. Plaintiff has permanently lost central vision in his left eye and can see objects in that eye only in his peripheral vision.

After exhausting his administrative remedies, as required by 28 U.S.C. § 2675, plaintiff brought this action *pro se* pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671, alleging that medical staff at FCC Petersburg were negligent in (i) failing to diagnose his eye condition promptly, (ii) failing to recognize that emergency treatment was required, and (iii) failing to provide timely specialist treatment to prevent plaintiff's permanent loss of vision.

Following service of the complaint, defendant requested that plaintiff provide a certification form indicating that plaintiff had obtained a written expert opinion pursuant to the VMMA. Shortly thereafter, plaintiff responded that he had not as yet obtained a supporting expert opinion. Defendant then moved for summary judgment, *inter alia*, on the ground that plaintiff had not complied with the expert certification required by the VMMA. On February 25, 2015, an Order issued, denying defendant's motion for summary judgment without prejudice,

and allowing plaintiff to file an amended complaint to satisfy the requisite expert certification. *Sowers*, 1:14-cv-177 (E.D. Va. Feb. 25, 2015) (Order) (Doc. 21). This was done in recognition that "it is impracticable, if not impossible, for a *pro se* prisoner to obtain such an expert certification." *Id.* Accordingly, counsel was appointed for plaintiff, and plaintiff was directed to file "an amended complaint, including the expert certification required by Virginia Code § 8.01-20.1," and to do so within thirty days of the Order. *Id.* A subsequent Order extended the deadline to April 9, 2015. *Sowers,* 1:14-cv-177 (E.D. Va. March 25, 2015) (Order) (Doc. 23).

On April 30, 2015, plaintiff filed an amended complaint, which included a "certification of expert witness opinion," alleging two counts. Count I alleges that defendant's negligence resulted in personal, physical, mental, and economic injury to plaintiff and constitutes a tort of negligence under Virginia law. Count II alleges that defendant's failure to provide medical care was negligence per se under Virginia law that resulted in personal, physical, mental, and economic injury to plaintiff.

Thereafter, on May 18, 2015, defendant moved to dismiss the amended complaint for failure to state a claim on grounds that (i) plaintiff failed to file his amended complaint by the ordered deadline, April 9, 2015, (ii) the amended complaint did not comply with the February 25 Order and the VMMA certification requirement, and (iii) the amended complaint failed to state a claim upon which relief can be granted because the negligence claims were based on defendant's failure to comply with an internal BOP Program Statement. Alternatively, defendant requests in camera inspection to ensure that the VMMA certification requirement has been met.

On July 31, 2015, an Order issued, granting in part and denying in part defendant's motion to dismiss. *Sowers,* 1:14-cv-177 (E.D. Va. July 31, 2015) (Order) (Doc. 41). Specifically,

defendant's motion was granted with respect to Count II, plaintiff's negligence per se claim. The motion was denied in all other respects.

II.

At the threshold, defendant argues that plaintiff's amended complaint should be dismissed because plaintiff failed to comply with the April 9, 2015 filing deadline that was set by an Order that issued on March 25, 2015. *Sowers*, 1:14-cv-177 (E.D. Va. Mar. 25, 2015) (Order) (Doc. 23). As defendant correctly notes, plaintiff did not file the amended complaint until April 30, 2015. Yet, defendant makes no showing that this three-week delay resulted in any prejudice to the defendant. In the absence of prejudice, defendant fails to persuade, especially given that a failure to allow plaintiff to proceed in this dispute would amount to significant prejudice to plaintiff. Although Rule 15, Fed. R. Civ. P., was not specifically invoked by plaintiff or the March 25 Order, the spirit and rationale of that Rule are applicable. As Rule 15 provides that a plaintiff should be allowed to amend as "justice so requires," so, too, is it appropriate to allow plaintiff to proceed with his amended complaint as justice plainly requires that he be allowed to do so. Rule 15(a)(2), Fed. R. Civ. P. Accordingly, defendant's motion to dismiss is properly denied on this ground.

III.

As Virginia medical malpractice law is the source of liability in this FTCA dispute,[3] the first question to address is whether the VMMA certification requirement applies in an FTCA

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[3] The FTCA looks to state tort law as the source of liability. *See* 28 U.S.C. § 2674 (stating that the Government is "liable in the same manner and to the same extent as a private individual in like circumstances"). Because this medical malpractice claim arises from activities in Virginia, Virginia law governs. *See Starns v. United States*, 923 F.2d 34, 37 (4th Cir. 1991). Specifically, the VMMA governs, as it applies to "any tort action ... for personal injuries or wrongful death based on health care or professional services rendered, by a health care provider to a patient." Va. Code § 8.01-581.1.

case. Although the Fourth Circuit has not yet squarely addressed this issue,[4] it is now well-settled that the VMMA certification requirement applies in a diversity medical malpractice action. *See Keitz v. Unnamed Sponsors of Cocaine Research Study*, 510 F. App'x 254, 256 (4th Cir. 2013). This follows directly from the FTCA's limited waiver to sovereign immunity, which renders the government "liable in the same manner and to the same extent as a private individual in like circumstances" for the wrongful acts of a government employee acting within the scope of his employment. 28 U.S.C. § 2674; *see also Medina v. United States*, 259 F.3d 220, 223 (4th Cir. 2001) (holding that the government is liable under the FTCA "in the same respect as a private person under the law of the place where the act occurred"). Importantly, the Fourth Circuit has held that, in an FTCA dispute, "courts should not engage in traditional *Erie* analysis" because "the FTCA contains an explicit instruction by Congress regarding which law to use" insofar as it instructs that the government should be held liable "'in the same manner and to the same extent as a private individual under like circumstances.'" *Cibula v. United States*, 551 F.3d 316, 321-22 (2009) (quoting 28 U.S.C. § 2674). This statutory language points persuasively to the conclusion that the entire VMMA, including the certification requirement, applies. Just as a private party in

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[4] The Fourth Circuit has not squarely addressed this issue, but district courts in this district have consistently applied the VMMA certification requirement to medical malpractice actions brought under the FTCA. *See, e.g., Brondas v. Corizon Health, Inc.*, No. 7:14-cv-00369, 2015 WL 3491130, *7 (E.D. Va. June 3, 2015); *Reed v. United States*, No. 1:14cv247, 2015 WL 1402127, *4 (E.D. Va. March 25, 2015); *Bell v. United* States, No. 4:11cv60, 2011 WL 3734458, at *2 (E.D. Va. Aug. 24, 2011); *Bond v. United States*, No. 08-0324, 2008 WL 4774004, at *3 (E.D. Va. Oct. 27, 2008); *Parker v. United States*, 375 F.Supp.2d 594, 596-97 (E.D. Va. 2007). Significantly, none of these courts explains the reason for applying the VMMA certification requirement to an FTCA cause of action. One district court has raised the issue, but did not provide an answer, deciding the case on other grounds. *See Sanchez-Angeles v. United States*, No. 7:07-cv-00596, 2008 WL 2704309, *5 (E.D. Va. July 10, 2008) (asking "whether the expert certification [of merit] requirement, a Virginia *procedural* law, should be applied in [a federal] court" but not resolving the issue because plaintiff's claim failed for other reasons).

Virginia would not be liable if a plaintiff failed to meet the VMMA certification requirement, so, too, would the government not be liable if an FTCA plaintiff failed to meet that requirement.

IV.

The next question presented is whether plaintiff in this case has met the VMMA certification requirement. Defendant appears to take the position that the VMMA and the February 25 Order required plaintiff to file a certification from an expert physician in addition to the amended complaint. This is a misreading of the VMMA and the February 25 Order.

Under the VMMA, every complaint that asserts a medical malpractice claim "shall be deemed a certification that the plaintiff has obtained from an expert ... a written opinion signed by an expert witness." Va. Code § 8.01-20.1. By its plain terms, the VMMA certification requirement provides that the complaint itself functions as a certification that a plaintiff has obtained the requisite expert opinion. Specifically, the complaint certifies that that the expert opinion states that "based upon a reasonable understanding of the facts, the defendant ... deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed." *Id.* Importantly, a plaintiff need not also file the expert opinion or a separate certification together with the complaint in order to comply with the certification requirement. Nor is defendant correct in assuming that the February 25 Order required the filing of an expert opinion. Instead, the Order merely incorporated the VMMA certification requirement by requiring plaintiff to file "an amended complaint, including the expert certification required by Virginia Code § 8.01-20.1." *Sowers*, 1:14-cv-177 (E.D. Va. Feb. 25, 2015) (Order) (Doc. 21). In other words, the Order only required compliance with the VMMA certification requirement, no more and no less.

Here, plaintiff's amended complaint complied with the VMMA certification requirement and the February 25 Order. The filing of the amended complaint certified "that plaintiff ha[d] obtained from an expert witness ... a written opinion," and therefore complied with the certification requirement. Va. Code § 8.01-20.1.[5] In an abundance of caution, plaintiff also included in his amended complaint a "certification of expert witness opinion," which stated that "certification was obtained from an expert witness who Plaintiff reasonably believes would qualify as an expert witness in this matter." Pl.'s Am. Compl., at 2.

It is worth noting that the VMMA provides a mechanism for a defendant to ensure that a plaintiff has obtained an expert opinion. Once a plaintiff has requested service of the complaint, the statute entitles a defendant to ask the plaintiff to provide a "certification form" indicating that the requisite expert opinion has been obtained. Va. Code § 8.01-20.1. The VMMA defines the "certification form" as "an affirm[ation] that the plaintiff had obtained the necessary certifying expert opinion at the time service was requested." *Id.* If a plaintiff fails to provide the certification within "10 business days after receipt of [defendant's] request," a court may dismiss plaintiff's complaint with prejudice. *Id.* Importantly, even at this stage, a plaintiff need not provide the expert opinion itself in order to comply with the request; rather, plaintiff must simply provide assurance that he has obtained the expert opinion. Indeed, the VMMA states that no defendant "shall ... be entitled to discover the identity or qualifications of the certifying expert or the nature of the certifying expert's opinions." *Id.* Here, defendant did not request a "certification form" under the VMMA upon receipt of plaintiff's amended complaint. Thus, defendant was not entitled to a "certification form." Moreover, even if defendant had requested a "certification form," plaintiff has satisfied this requirement because he included in his amended complaint a

[5] Plaintiff's filing of the original complaint failed to comply with the VMMA certification requirement because plaintiff, when queried, admitted that he had not obtained an expert opinion.

"certification of expert witness opinion," which affirmed that a "certification was obtained from an expert witness who Plaintiff reasonably believes would qualify as an expert witness in this matter." Pl.'s Am. Compl., at 2. In accordance with the VMMA , this "provide[d] the defendant with a certification form that affirms that the plaintiff had obtained the necessary certifying expert opinion" from "an expert witness whom the plaintiff reasonably believes would qualify as an expert witness." Va. Code § 8.01-20.1.

In sum, plaintiff's amended complaint complies with the February 25 Order and the VMMA. Accordingly, defendant's motion to dismiss is properly denied on this ground.

V.

Analysis of defendant's motion to dismiss next properly considers whether in camera review of the expert opinion is appropriate. Under the VMMA, a court "*may* conduct an in camera review of the certifying expert opinion obtained by the plaintiff as the court *may* deem appropriate." Va. Code § 8.01-20.1 (emphases added). This language plainly leaves the decision to a court's discretion; a defendant has no right to in camera review. In cases where there is reason to doubt whether a physician would certify that the facts alleged support a medical malpractice claim, in camera review may be appropriate. But where, as here, the alleged facts clearly support a medical malpractice claim, there is no reason to question the legitimacy of a plaintiff's certification that he has obtained an expert certification. Although plaintiff had not obtained an expert when he filed his initial complaint as a *pro se* litigant, plaintiff failed to do so as a result of practical impediments to obtaining an expert opinion, not for any reason that raises suspicions about the legitimacy of the amended complaint's certification. *See Sowers*, 1:14-cv-177 (E.D. Va. February 25, 2015) (Order) (Doc. 21). Thus, in camera review is not appropriate here.

VI.

Based on the facts alleged, there is no basis in law for applying the negligence per se principle. Therefore, defendant's motion to dismiss on this ground is granted.

But a contrary conclusion is appropriate with respect to the negligence claim, as the amended complaint sets forth a plausible claim of medical malpractice under Virginia law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

VII.

For the reasons stated here, and for the reasons stated from the bench, defendant's motion to dismiss is granted with respect to plaintiff's claim for negligence per se and is denied in all other respects.

An appropriate Order has already issued.

Alexandria, Virginia
September 28, 2015

T. S. Ellis, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FRANK SOWERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:14-cv-0177
	)	(TSE/JFA)
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

STIPULATION OF DISMISSAL

The parties to the above-captioned action having reached a settlement of this matter, it is hereby stipulated and agreed that the action be dismissed with prejudice.

Respectfully submitted,

/s/
Robert L. Jenkins, Jr.
Bynum & Jenkins
1010 Cameron St.
Alexandria, VA 22314
Telephone: 703 309 0899
Fax:703 549 7701
RJenkins@BynumAndJenkinsLaw.com
Attorney for Plaintiff

DANA J. BOENTE
UNITED STATES ATTORNEY

By: /s/
Agatha M. Swick
Special Assistant United States Attorney
Dennis C.Barghaan, Jr.
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3845 (direct)
(703) 299-3983 (fax)
david.moskowitz@usdoj.gov
Attorney for Defendants

DATED: December 23, 2015

So Ordered
12/23/15
T. S. Ellis, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FRANK SOWERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:14-cv-0177
	)	(TSE/JFA)
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

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Robert L. Jenkins, Jr.
Bynum & Jenkins
1010 Cameron St.
Alexandria, VA 22314
Telephone: 703 309 0899
Fax:703 549 7701
RJenkins@BynumAndJenkinsLaw.com
Attorney for Plaintiff

DANA J. BOENTE
UNITED STATES ATTORNEY

By: /s/
Agatha M. Swick
Special Assistant United States Attorney
Dennis C.Barghaan, Jr.
Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3845 (direct)
(703) 299-3983 (fax)
david.moskowitz@usdoj.gov
Attorney for Defendants

DATED: December 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record.

Date: December 23, 2015

/s/
AGATHA SWICK
Special Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, VA 22314
Telephone: (703) 299-3831
Fax: (703) 299-3983
Email: agatha.swick@usdoj.gov

ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FRANK SOWERS, Plaintiff,	)	
v.	)	Civil Action No. 1:14cv0177 (TSE/JFA)
UNITED STATES OF AMERICA, Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of **Six Thousand Five Hundred Dollars ($6,500.00)**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or

his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agrees to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at his expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer to plaintiff's attorney based on bank account information to be provided by plaintiff's attorney. Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional

agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this _____ day of December, 2015.

_____

Attorney for Defendant,
United States of America

Executed this 16th day of December, 2015.

_____

Attorney for Plaintiff

Executed this _____ day of December, 2015.

_____

Plaintiff

Christina Kelley - Re: Fwd: Request for medical review - Sowers v. United States, 1:14cv177 (EDVa)

From: Christina Kelley
To: Kelton, Zachary
Date: 6/23/2015 8:28 AM
Subject: Re: Fwd: Request for medical review - Sowers v. United States, 1:14cv177 (EDVa)
Attachments: Sowers - Settlement Memorandum.pdf

Zach,

Attached is the settlement memo. Let me know if you need anything else. I'm sure the AUSA will be calling again either today or tomorrow. Thanks!

Christy

>>> Zachary Kelton 6/22/2015 11:12 AM >>>
Sounds good. (b)(5)

Zach

>>> Christina Kelley 6/22/2015 11:08 AM >>>
Thanks. I'll start drafting the request for authority. (b)(5)
(b)(5)

>>> Zachary Kelton 6/22/2015 11:03 AM >>>
Hi Christy,

(b)(5)

Zach

>>> Christina Kelley 6/22/2015 10:42 AM >>>
Zach,

I don't think Matthew read this before he went on leave. Would you be able to help with the below? The AUSA

has called again asking for our position, and there's a hearing scheduled for this Friday.

Give me a call if you have questions. Thanks!

Christy

Christina A. Kelley, Attorney
Butner Legal Center
Federal Correctional Complex
Old Highway 75, P.O. Box 1600
Butner, North Carolina 27509
(919) 575-3900 x 6079
Fax: (919) 575-4813
(b)(5),(b)(6), (b)(7)(C) @bop.gov

>>> Christina Kelley 6/17/2015 4:18 PM >>>
Matthew,

(b)(5)

I'll be at the USAO in Raleigh tomorrow morning, but should be back in the office around lunch if you want to talk.

Thanks!

Christy

>>> Marli Kerrigan 5/1/2015 3:50 PM >>>
We will send it to OQM.

Have a nice weekend,
Marli

>>> Matthew W. Mellady 5/1/2015 2:33 PM >>>
(b)(5)

Let us know if you need anything further.

Thanks.

MM

Matthew W. Mellady
Regional Counsel
Mid-Atlantic Region
Federal Bureau of Prisons
302 Sentinel Dr., Ste. 200
Annapolis Junction, MD 20701
ph 301-317-3120
bb 301-787-2339

SENSITIVE/PRIVILEGED COMMUNICATION
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Christina Kelley - Re: Fwd: Request for medical review - Sowers v. United States, 1:14cv177 (EDVa)

From: Zachary Kelton
To: Kelley, Christina
Date: 6/23/2015 12:02 PM
Subject: Re: Fwd: Request for medical review - Sowers v. United States, 1:14cv177 (EDVa)
CC: Mellady, Matthew W.

Christy,

(b)(5)

Zach

Zachary J. Kelton
Deputy Regional Counsel
Mid-Atlantic Region
Federal Bureau of Prisons
302 Sentinel Dr., Ste. 200
Annapolis Junction, MD 20701

SENSITIVE BUT UNCLASSIFIED/PRIVILEGED COMMUNICATION
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>>> Christina Kelley 6/23/2015 8:28 AM >>>
Zach,

Attached is the settlement memo. Let me know if you need anything else. I'm sure the AUSA will be calling again either today or tomorrow. Thanks!

Christy

Page 745 of 867

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 746 of 867

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 747 of 867

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 748 of 867

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 749 of 867

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Page 750 of 867

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 751 of 867

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Eastern District of Kentucky
FILED

APR 25 2005

AT LEXINGTON
LESLIE G WHITMER
CLERK U S DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
~~LEXINGTON~~ LONDON DIVISION

EHA AND MICHAEL DASCENZO, Parents and Administrator of the Estate of CHRISTOPHER DASCENZO,	)	
Plaintiff,	)	
V.	)	**CIVIL ACTION NO.** 05-198-DCR
UNITED STATES OF AMERICA	)	
Defendant.	)	

COMPLAINT

I. INTRODUCTION

1. This is a claim for damages under the Federal Tort Claims Act against the United States after corrections officers at Federal Correctional Institution in Manchester, Kentucky refused to provide Christopher Dascenzo basic cardio-pulmonary resuscitation (hereinafter "CPR") or any other emergency medical care after he suffered a seizure, thereby causing his death.

2. Christopher Marcus Dascenzo was a healthy twenty-five-year-old male incarcerated at the Federal Correctional Institution in Manchester, Kentucky (hereinafter "FCI Manchester"). On April 1, 2000, he died after federal correctional officers failed to administer basic resuscitative services to Mr. Dascenzo after he suffered a seizure.

3. Seizures may stop a victim's heart and breathing, but timely administering CPR will typically restart the heart and breathing without serious complications. The correctional officers were required to be trained in CPR and Bureau of Prisons and FCI

Manchester policies mandated that the officers administer CPR to all inmates in Mr. Dascenzo's condition.

4. Rather than administer CPR as trained and required by prison policy, the correctional officers did nothing to assist Mr. Dascenzo. They simply stood by and watched Mr. Dascenzo suffer. Eventually an ambulance was called and it arrived approximately half an hour after he suffered the cardiac arrest. Emergency Medical technicians and hospital doctors attempted to save Christopher Dascenzo, but the denial of CPR by the prison officials for such a long period of time precluded resuscitation and Christopher was pronounced dead shortly after arrival at the hospital.

II. JURISDICTION AND VENUE

5. Jurisdiction is conferred upon this Court by 28 U.S.C. §1331 because of the federal questions presented and 28 U.S.C. § 1346 because the United States is a Defendant. Plaintiff's administrative claim has not been denied nor has the Bureau of Prisons taken action for over six months, permitting this suit to be filed without final action on the claim. 28 U.S.C. 2675.

6. Venue in the Eastern District of Kentucky is proper pursuant to 28 U.S.C. §§ 1391 and 1402(b) because the act complained of occurred in this district.

III. PARTIES

7. Eha and Michael Dascenzo are the parents of Christopher Dascenzo. Eha and Michael Dascenzo were appointed personal representatives of the estate of Christopher Dascenzo by the Superior Court of Alamance County in the state of North

Carolina. (For simplicity's sake, the Dascenzos and the estate are also referred to in this complaint as "Dascenzo.")

8. The defendant, United States of America, is the employer of correctional officers Watterson, Pell and others at the time of the events at issue. The United States has waived its immunity from this lawsuit pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

IV. FACTS

Wrongful Death of Christopher Dascenzo

9. Prior to his death, Christopher Dascenzo had been diagnosed with seizure disorder, and the FCI Manchester staff was notified of his condition. He had been treated and his occasional seizures did not deter his daily activities.

10. Although he was serving a thirty year sentence, he maintained his innocence and his attorney had filed a 28 U.S.C. Section 2255 Petition to overturn his conviction and was hoping to be released soon.

11. On April 1, 2000, Christopher Dascenzo suffered a seizure and went without basic medical assistance for approximately thirty minutes. Shortly before 5 a.m., Lee Summers, Mr. Dascenzo's roommate heard him yell out in pain and felt the upper bunk shaking. Mr. Summers immediately pushed the emergency button located in the cell to notify the prison staff.

12. A correctional officer from the unit, S. Watterson, quickly arrived and Mr. Summers notified him that Mr. Dascenzo was suffering a seizure.

13. Officer Watterson did not enter the cell to check on him and provided no medical assistance to Mr. Dascenzo.

14. Instead, Officer Watterson called for another officer and waited outside the cell for that officer to arrive.

15. At 4:55 a.m. Lieutenant J. Pell received the call for help from Officer Watterson and proceeded to Christopher Dascenzo's cell.

16. Lieutenant Pell performed a cursory check of Christopher's vital signs, and determined that Christopher was in need of emergency medical treatment.

17. Prison policy requires correctional officers to administer CPR in this situation, but Lt. Pell did nothing. None of the correctional officers attempted to resuscitate Mr. Dascenzo, or administer any type of medical assistance.

18. Allegedly no medical staff was present at the prison, however, the Clay County Emergency Medical Services was not called until 5:21 a.m.. The correctional officers simply stood by and watched Christopher Dascenzo suffer for nearly thirty minutes until ambulance personnel were admitted to the prison at 5:22 a.m..

19. Bureau of Prisons and FCI Manchester policies are unequivocally clear that prison staff was to have administered CPR to Mr. Dascenzo.

20. Bureau of Prisons national policy requires its staff "to be committed to preserving and extending life." Health Services Manual, PS 6000.05, chapter VI, page 12. The Health Services Manual requires that all necessary resuscitative services shall be provided to inmates in need of such services. At the time of Mr. Dascenzo's death, FCI Manchester had a policy specifically entitled CPR Standards & Procedures requiring staff to "preserve or extend life by providing resuscitative services." MAN-6000.5 CHPT 6800a. This policy requires all Correctional Supervisors, or Lieutenants, to be certified in basic CPR and all other institutional staff are encouraged to obtain CPR certification. Id.

The CPR training shall be renewed annually. Id. Finally, the policy requires all qualified staff to initiate CPR when responding to "any inmate who sustains cardiopulmonary arrest within the institution." Id.

21. In violation of all these clear policy directives, none of the correctional officers administered CPR to Mr. Dascenzo.

22. The correctional officers' inaction left Mr. Dascenzo without these mandated lifesaving services for over 25 minutes and Mr. Dascenzo died.

23. The ambulance left the prison at 5:35 a.m.. Ambulance personnel started CPR and Memorial Hospital staff continued resuscitative efforts. At 6:17 a.m. Mr. Dascenzo was pronounced dead.

24. Defendant failed to provide access to basic resuscitative services.

25. Defendant failed to maintain a defibrillator at FCI Manchester for the use on inmates.

26. Defendant failed to provide access to sufficient emergency medical services at FCI Manchester.

27. Defendant failed to promptly notify the local Emergency Medical Services of Plaintiff's need for treatment.

28. Defendant failed to properly train, maintain training, and test correctional officers regarding CPR.

29. The Institutional Mortality Review Committee reviewed the facts surrounding Mr. Dascenzo's death and recognized the negligence and policy violations of the correctional officers involved. The Institutional Mortality Review Committee admitted the violation of policy by correctional officers failure to provide emergency

resuscitative services to Mr. Dascenzo and "acknowleged [a] weakness" in not initiating CPR.

Administrative Claim and Settlement

30. On March 29, 2002, Plaintiff filed an administrative claim pursuant to the Federal Tort Claims Act with the United States Bureau of Prisons regarding the torts committed against him by the correctional officers.

31. Plaintiff and Defendant then engaged in lengthy settlement negotiations.

32. On July 24, 2003, Bureau of Prisons offered to settle this claim for $125,000.

33. The $125,000 offer had been authorized by the Torts Branch, Department of Justice.

34. By letter of April 1, 2004, Bureau of Prisons again offered to settle the claim for $125,000, stating "the settlement authority designated by Torts Branch, Department of Justice remains at $125,000" and offering to settle the claim for that amount.

35. On September 17, 2004, Plaintiff accepted the government's offer of $125,000. Plaintiff believed the amount offered significantly undervalued Mr. Dascenzo's wrongful death claim, but sought closure to this litigation.

36. On September 23, 2004, counsel for Defendant sent a letter indicating, "I am in receipt of your letter dated September 17, 2004, accepting the Bureau of Prison's offer to settle the above claim for $125,000. This letter is to provide confirmation of the acceptance." The letter also indicating counsel for the Department of Justice would coordinating the payment of the settlement amount.

37. On October 5, 2004, Plaintiffs sent counsel for the government a document entitled "Stipulation for Compromise Settlement and Release of Federal Tort Act Claims Pursuant to 28 U.S.C. § 2672. The document had been written by the Defendant.

38. On November 22, 2004, counsel for the government informed undersigned Plaintiff's counsel that Department of Justice was refusing to pay the agreed settlement. Defendant's counsel stated he was embarrassed, shocked and disappointed by the actions of the officials at the Department of Justice in refusing to pay this settlement. Defendant's counsel indicated that Department of Justice officials were willing to pay Plaintiff $75,000.

39. Plaintiff considers this claim settled and seeks enforcement of that settlement agreement. Bureau of Prisons has indicated that it considers negotiations ongoing and has yet to issue a letter constituting a formal final denial of Plaintiff's claim.

V. CLAIMS

Claim Against the United States for Wrongful Death

40. The aforementioned acts and omissions of the correctional officers at FCI Manchester, including Officer Watterson and Lieutenant Pell were negligent, reckless or wanton and occurred while they were acting in the scope of their employment.

41. The acts and omissions described above were a substantial factor in bringing about Christopher Dascenzo's death.

42. As a result, Dascenzo has suffered the destruction of his power to labor and earn money, endured pain and suffering, lost his life and incurred funeral expenses.

43. Defendant has deprived Dascenzo of rights secured by Kentucky tort law.

44. Defendant United States is liable for the tortuous conduct of Officer Watterson, Lieutenant Pell, and other unknown correctional officers under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq.

Claim Against the United States for Breach of Contract for Failure to Pay Agreed Settlement Amount

45. The settlement agreement reached between the Plaintiff and Defendant on September 17, 2004 constituted a legal contract.

46. Defendant's refusal to pay the agreed settlement amount of $125,000 on Administrative Tort Claim Number TRT-MXR-2002-09010 constitutes a breach of contract by the United States government.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Enter an order compelling the United States to pay Plaintiff $125,000, as agreed to by all parties in the settlement agreement, plus interest, costs and fees, including attorney fees, associated with collecting this amount;
2. Grant Plaintiff a trial on all issues so triable;
3. Enter judgment awarding him compensatory damages against the defendant in an amount appropriate to the evidence adduced at trial;
4. Enter judgment awarding Plaintiff costs and reasonable attorneys' fees;
5. Grant any and all further relief to which Plaintiff may be entitled.

Respectfully submitted,

MICHAEL L. GOODWIN
CHRISTOPHER N. LASCH
GOODWIN & LASCH, P.S.C.
607 West Main Street, Suite 500
Louisville, Kentucky 40202
(502) 584-7622
COUNSEL FOR THE PLAINTIFF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

EHA and MICHAEL DASCENZO, Parents and Administrator of the Estate of CHRISTOPHER DASCENZO,	)	Civil Action No. 6: 05-198-DCR
Plaintiffs,	)	
V.	)	**ORDER**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

*** *** *** ***

Counsel having informed the Court that they have settled this litigation to their and their clients' mutual satisfaction, and the Court being sufficiently advised, it is hereby

ORDERED that this matter is **DISMISSED**, with prejudice, and **STRICKEN** from the Court's docket. The parties shall bear their respective costs, expenses and attorney fees.

This 17th day of June, 2005.

Signed By:
Danny C. Reeves DCR
United States District Judge

U.S. Department of Justice

United States Attorney's Office
Eastern District of Kentucky

110 West Vine Street, Suite 400
Lexington, Kentucky 40507-1671

Phone: (859) 233-2661
Fax: (859) 233-2553

May 24, 2005

Michael L. Goodwin, Esq.
607 West Main Street
Suite 500
Louisville, KY 40202

Re: *Eha Dascenzo, et al. v. United States of America*
London Civil Action No. 05-198

Dear Mr. Goodwin:

Enclosed please find a settlement agreement and agreed order of dismissal disposing of the above-styled case. Upon receipt, I will file the order with the court and send the agreement off for payment.

Also enclosed is a FMS Form 197 which will be sent with the agreement to effect payment. Please fill out Sections 3, 5 and 6 and return to me with the agreement. It is not necessary to sign Section 10 since we have a written agreement.

I am advised that it takes approximately 4-6 weeks from the date we request payment for the funds to be released to your clients.

If you have any questions, please let me know at (859) 233-2661 extension 105.

GREGORY F. VAN TATENHOVE
UNITED STATES ATTORNEY

BY: Marianna Jackson-Clay
Marianna Jackson-Clay
Assistant United States Attorney

MJC/pr

Enclosures

Judgment Fund Voucher for Payment

1. **Total Amount:** $125,000.00

2. **Submitting Agency Contact Name:** Marianna Jackson-Clay, Assistant United States Attorney
   Telephone Number: (859) 233-2661

3. **Electronic Funds Transfer (EFT) Information:**
   a) Payee Account Name: _____
   b) American Banking Association (ABA) Routing Number (9 digits): _____
   c) Payee Account Number: _____
   d) Checking: ☐ Savings: ☐
   e) Financial Institution Name, City, State: _____

4. **Interagency Payment System Information:**
   a) Agency Name: _____
   b) Agency Location Code (ALC) Number: (8 digits): _____
   c) Standard General Ledger (SGL) Number (4 digits): _____
   d) Treasury Account Symbol (TAS): _____

5. **Mailing Address for Check:**
   a) Payee Name: _____
   b) Payee Name: _____
   c) Address Line 1: _____
   d) Address Line 2: _____
   e) City: _____ State: _____ Zip Code: _____

6. **Taxpayer Identification Number (s):**
   a) _____ b) _____

7. **Reimbursement Information for Contract Disputes Act (CDA), No FEAR Act, and Firefighters Fund:**
   a) Agency Name: _____
   b) Contact Name: _____
   c) Contract Number (CDA cases): _____
   d) Telephone Number: _____-_____-_____
   e) Address: _____
   f) City: _____ State: _____ Zip Code: _____

8. **If payment will be made in a foreign currency please provide the following information:**
   Country: _____ Currency: _____

9. **FOR USE BY JUDGMENT FUND BRANCH ONLY:**		
Z Number: _____ J/D Number: _____ GLOWS Code/Agency: _____		
_____ Claim Analyst *Signature and Date*	_____ Amount to Pay	_____ Appropriation Code
_____ Claim Reviewer *Initials and Date*		

Judgment Fund Voucher for Payment

10. Acceptance by Claimants:

NOTE: For use ONLY where the settlement is (i) for cash, (ii) in an amount that does not exceed $200,000, and (iii) a court order approving the settlement is not warranted. For all other situations, a final judgment or a standard Department of Justice *Stipulation For Compromise Settlement And Release* must be attached.

Each claimant/plaintiff and his/her guardians, heirs, executors, administrators, and assigns agree to and do accept this settlement in full settlement and satisfaction and release of any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation any claims for fees, costs, expenses, survival, or wrongful death, arising from any and all known or unknown, foreseen or unforeseen bodily injuries, personal injuries, death, or damage to property, which they may have or hereafter acquire against the United States of America, its agents, servants, or employees, on account of the subject matter of the administrative claim or suit, or that relate or pertain to or arise from, directly or indirectly, the subject matter of the administrative claim or suit. Each claimant/plaintiff and his/her guardians, heirs, executors, administrators, and assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its agents, servants, and employees, from and against any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation claims for subrogation, indemnity, contribution, or lien of any kind, or for fees, costs, expenses, survival or wrongful death that relate or pertain to or arise from, directly or indirectly, any act or omission that relates to the subject matter of the administrative claim or suit.

(SIGN ORIGINAL ONLY)

Date _____ _____

_____

(Claimant(s) sign above)

11. AGENCY APPROVING OFFICIAL: This claim has been fully examined in accordance with Statutory Citation _____ and approved in the amount of $ _____

Authorized Signature: _____

Title: _____

Date: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 05-198 DCR **ELECTRONICALLY FILED**

EHA AND MICHAEL DASCENZO,
Parents and Administrator of the Estate of
CHRISTOPHER DASCENZO PLAINTIFFS

VS. SETTLEMENT AGREEMENT
AND RELEASE OF ALL CLAIMS

UNITED STATES OF AMERICA DEFENDANT

* * * * * * *

THIS AGREEMENT is made and entered into by and between Eha Dascenzo and Michael Dascenzo ("plaintiffs") and the United States of America ("defendant").

WHEREAS, the plaintiffs have filed the above-captioned civil case in the United States District Court in the Eastern District of Kentucky, and

WHEREAS, plaintiffs and the defendant desire to make a complete and final settlement of all matters involved in, or relating to or arising out of, the above-captioned case.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth herein, plaintiffs and the defendant, being separately advised by counsel, and intending to be legally bound thereby, COVENANT AND AGREE AS FOLLOWS:

1. As used in this Agreement, "defendant" means the United States Department of Justice and all of its past, present and future subsidiaries, bureaus, services (including the Bureau of Prisons), agencies, divisions, departments, successors, assigns, directors, officers, agents, employees, attorneys, and representatives including, but not limited to the Attorney General of the United States Department of Justice. The term "defendant" also includes any future independent government corporation, subsidiary, division, department or agency that may be formed from the operations of the defendant.

2. In return for all of the agreements and covenants of plaintiff set forth herein, the defendant agrees as follows:

A. Plaintiffs will be paid the amount of $125,000.00. This payment is in full settlement and satisfaction of any and all claims of any kind that plaintiffs may have against the defendant up to and including the date of this Agreement, is intended to avoid further litigation and to preserve judicial economy, and shall not operate as an admission of wrongdoing or of the value of the claim on the part of anyone. Any federal, state, or local income tax liability, or other tax liability resulting from the payment of this settlement amount of $125,000.00 shall be the sole responsibility of the plaintiffs. Neither the defendant nor

the defendant's attorneys make any representations as to the tax treatment of this settlement amount of $125,000.00. Plaintiffs' settlement amount of $125,000.00 shall be paid from the Judgment Fund created by 31 U.S.C. § 1304, by _____ payable to: Eha and Michael Dascenzo, Parents of and Administrators of the Estate of Chris Dascenzo and Michael Goodwin. Plaintiffs' settlement amount of $125,000.00 shall be sent for processing and payment following defendant's receipt of the order dismissing the above case.

B. Plaintiffs on behalf of themselves, their heirs, legal representatives, administrators and executors, hereby releases and forever discharges the United States of America and their employees, officers, agents, agencies, attorneys, representatives and assigns, and any person acting by, through, under or in concert with them (collectively "Releasees") from any and all claims, remedies, demands, debts, losses, obligations, actions, causes of action, claims for relief, damages, costs, expenses, attorney fees, and compensation of any nature whatsoever, whether known or unknown, foreseen or unforeseen, (collectively "claim" or "claims" or "remedy" or "remedies"), including, but not limited to, legal, equitable, administrative, union or other claims or remedies of any kind whatsoever, which plaintiffs had or have against the defendant and all other Releasees on account of, or contained in, or in

any way growing out of, or which are the subject of, the allegations contained in the above-captioned civil action.

3. The plaintiffs represent and acknowledge that in executing this Agreement they do not rely and have not relied upon any representation or statement made by the defendant, its representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

4. Nothing contained in this Agreement shall be construed as an admission of wrongdoing or libality by the defendant with respect to any matter whatsoever, whether or not encompassed by the above-captioned civil action.

5. This Agreement comprises the entire understanding and settlement of the dispute between plaintiffs and the defendant and fully supersedes any and all prior agreements or understandings between the parties. There are no benefits or terms not described herein.

6. This Agreement shall be binding upon the plaintiffs and upon their heirs, administrators, legal representatives, and executors and shall inure to the benefit of the defendant and each and all other Releasees, and to their heirs, administrators, representatives, executors, successors, assigns, and attorneys and legal representatives.

7. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair

meaning, and not strictly for or against any of the parties. When used in this Agreement, the word "or" is a term of inclusion and not exclusion, and in no instance is the word "or" intended to limit, nor shall it limit, the rights, privileges, or benefits of the defendant under this Agreement.

8. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

9. Payment by the defendant of the settlement sum of $125,000.00 shall be without interest. Plaintiffs and defendant shall bear their own costs, expenses and attorney fees.

10. Plaintiffs enter into this Agreement knowingly and voluntarily after full consultation with their attorney, and by their signature acknowledge that they have read this Agreement and fully understand its terms. Plaintiffs agree that they have been given a reasonable period of time within which to consider this Agreement.

11. This Agreement is not assignable by the plaintiffs.

12. The date of this Agreement is the date of the last signature to this Agreement.

IN WITNESS WHEREOF, plaintiffs and the defendant, intending to be legally bound, have set their hands to this Agreement the day and year below written.

_____
MICHAEL L. GOODWIN
GOODWIN & LASCH, P.S.C.
607 West Main Street
Suite 500
Louisville, KY 40202
(502) 584-7622
COUNSEL FOR THE PLAINTIFFS

Date: _____

_____
EHA DASCENZO

Date: _____

_____
MICHAEL DASCENZO

Date: _____

GREGORY F. VAN TATEHNOVE
UNITED STATES ATTORNEY

BY: Marianna Jackson-Clay
MARIANNA JACKSON-CLAY
Assistant U.S. Attorney
110 West Vine Street
Suite 400
Lexington, KY 40507
(859) 233-2661 ext. 105
COUNSEL FOR DEFENDANT

Date: 5-24-05

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 05-198 DCR

EHA AND MICHAEL DASCENZO,
Parents and Administrator of the Estate of
CHRISTOPHER DASCENZO PLAINTIFFS

VS. AGREED ORDER OF DISMISSAL

UNITED STATES OF AMERICA DEFENDANT

* * * * * * *

Counsel having informed the Court that they have settled this litigation to their and their clients' mutual satisfaction, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE and STRICKEN from the active docket with each party's costs and attorneys fees to be borne by the incurring party.

This the _____ day of _____, 2005.

_____
DANNY C. REEVES
UNITED STATES DISTRICT JUDGE

SEEN AND AGREED TO:

MICHAEL L. GOODWIN
GOODWIN & LASCH, P.S.C.
607 West Main Street
Suite 500
Louisville, KY 40202
(502) 584-7622
COUNSEL FOR THE PLAINTIFFS

GREGORY F. VAN TATEHNOVE
UNITED STATES ATTORNEY

BY: Marianna Jackson-Clay
MARIANNA JACKSON-CLAY
Assistant U.S. Attorney
110 West Vine Street
Suite 400
Lexington, KY 40507
(859) 233-2661 ext. 105
COUNSEL FOR DEFENDANT

GOODWIN & LASCH
ATTORNEYS AT LAW

607 WEST MAIN STREET, SUITE 500
LOUISVILLE, KY 40202
(502) 584-7622
(502) 584-0797 (FAX)

MICHAEL L. GOODWIN
CHRISTOPHER N. LASCH*

*ALSO LICENSED IN NEW YORK

October 5, 2004

Kevin J. Walasinski, Esq.
Senior Attorney-Advisor
Federal Bureau of Prisons
Consolidated Legal Center
3301 Leestown Road
Lexington, KY 40511

RE: Wrongful Death Claim of Estate of Christopher Dascenzo
Federal Tort Claim Number TRT-MXR-2002-09010

Dear Mr. Walasinski:

Enclosed please find the settlement papers signed by me and my client. Thank you for your efforts to quickly obtain the settlement proceeds for my clients. Please note my correct address above, as your last correspondence was to my old address. Thanks.

Sincerely,

MICHAEL L. GOODWIN

Judgment Fund Transmittal

Date: October 8, 2004

Department of the Treasury
Financial Management Service
Judgment Fund Branch
3700 East-West Highway, Room 6E15
Hyattsville, Maryland 20782
Telephone: (202) 874-6664

Claimant/Plaintiff Name : Michael & Eha Dascenzo

Address: 125 South Sixth Street, Louisville, KY 40202

Claimant/Plaintiff Counsel's Name: Michael L. Goodwin, Esq.

Telephone Number: 502 . 584 . 7622

Name of Agency Subject to Claim : Department of Justice/Federal Bureau of Prisons

E-mail Address (required for electronic payment confirmation): mmellady@bop.gov

Telephone Number: 301 . 317 . 3122

Brief Description of Facts Giving Rise to Claim: Wrongful death claim for failure to timely perform CPR on inmate suffering a seizure.

Check one if applicable:

☐ Contract Disputes Act ☐ No FEAR Act ☐ Firefighters Fund

Dear Sir or Madam:

I am an authorized representative of the United States in the above-captioned matter. As described in the enclosed documentation, I certify that all pertinent criteria required by law for the approval of this claim has been satisfied. If this is an administrative claim, the settlement was made with the United States in this matter and any portions of the agreement required to be paid from agency funds will be or have been paid from those funds. If this is a litigative claim, the award made in the enclosed judgment or settlement is payable by the United States and any portions of the award required to be paid from other parties or sources will be or have been paid from those parties or sources. The United States will not seek further judicial review of this award and I have obtained all approvals necessary for its referral for payment.

I believe that this award qualifies for payment pursuant to 31 U.S.C. § 1304. Accordingly, I request that you certify this award for payment from the Judgment Fund established by that law. Enclosed are completed copies of **FMS Form 196**: *Judgment Fund Award Data Sheet*; **FMS Form 197**: *Judgment Fund Voucher for Payment*; the judgment or settlement agreement; and any other enclosures required by FMS. Unless payment by electronic funds transfer is indicated, please have the check sent to the check address provided on **FMS Form 197**.

Submitting Agency Authorized Signature

Matthew W. Mellady, Esq.
Name and Title *(print or type)*

Acting Regional Counsel, MARO/FBOP
Submitting Agency E-mail Address *(required for electronic payment confirmation)*

T-MXR-2002-09010
Agency File Number

10010 Junction Drive, Suite 100-N
Street Address

Annapolis Junction, Maryland, 20701
City, State and Zip Code

General Instructions: Use this form, FMS 194, to transmit a request to certify an administrative or litigative award against the United States for payment from the Judgment Fund, under 31 U.S.C. § 1304.
Enclosures: **FMS Form 196** and **FMS Form 197**. *Incomplete submissions will be returned to the submitter without action.*

Judgment Fund Award Data Sheet

ITEMIZATION OF AMOUNT PAYABLE FROM THE JUDGMENT FUND	AMOUNT TO BE PAID	CITATION TO LEGAL AUTHORITY
1. Principal	$125,000.00	28 U.S.C. 2672, et seq.
2. Attorney Fees	n/a	n/a
3. Costs	n/a	n/a
4. Interest	n/a	na/
Starting and Ending Dates for Interest Accrual	Start Date n/a	End Date n/a
5. Total Amount Payable from the Judgment Fund		
COMPLETE ONLY IF DEDUCTIONS ARE TO BE MADE FROM THE AMOUNT PAYABLE FROM THE JUDGMENT FUND *		
6. Agency Name and Agency Location Code (ALC) to Receive Offset	Amount to be Deducted	Reason(s) for Deduction(s) and Entity to Receive Deduction(s)
	a.	
	b.	
	c.	
7. Total Amount to be Deducted	$0.00	
8. Net Amount Payable to Claimant	$125,000.00	

If amount for fees, costs, or interest was included in the principal amount (stated on line 1) as part of a "lump sum award," enter "INCLUDED ABOVE" on lines 2 through 4. Enter "NONE" for any of those items (principal, fees, costs, or interest) for which no amount was awarded/included.

1. Enter the principal amount payable (excluding attorney fees, costs, and interest) and cite the legal authority for that award (for instance, "FTCA, 28 U.S.C. 2672"or "5th Amendment Taking").
2. Enter attorney fees payable (if any) and cite legal authority for that award [for instance, "Freedom of Information Act, 5 U.S.C. 552(a)(4)(E)"].
3. Enter the costs payable (if any) and cite legal authority for that award [for instance, " 28 U.S.C. 2412(a)"].
4. If the interest was calculated by the submitting agency, enter the total amount and cite the legal authority for that award [for instance, "Back Pay Act, 5 U.S.C. 5596(b)(2)"]. If the Judgment Fund is to calculate the interest, list only the dates that interest accrual starts.
5. Total amounts shown in lines 1 through 4 and enter.
6. Enter any deductions specified in the judgment or settlement agreement, or debts to be setoff under 31 U.S.C. 3728. Indicate the reason for the deduction (for instance, "FTCA withholding" or "debt setoff pursuant to 31 U.S.C. 3728") and the payee agency's name and ALC. If this deduction is a "debt setoff" pursuant to 31 U.S.C. 3728, you must attach a copy of the judgment or the plaintiff's agreement to the debt setoff. Otherwise, FMS must seek the claimant's consent to the setoff and may only withhold from payment an amount sufficient to pay the debt plus the costs of litigation. Litigation will be required to effect the setoff if there is no judgment of debt or if the claimant declines consent to the setoff. If there are more than three deductions, attach additional copies of this form. If there are no deductions, enter "NONE."
   *** Administrative debts that have been certified to the Secretary of the Treasury through the Treasury Offset Program will be setoff automatically.**
7. Total amounts shown in all columns of line 6 (a, b and c) and enter.
8. Subtract the amount in line 7 from that in line 5. If greater than zero, enter the difference. If the difference is zero or less, enter "NONE."

Judgment Fund Voucher for Payment

Total Amount: 125,000.00

2. **Submitting Agency Contact Name:** Matthew Mellady, Acting Regional Counsel
Telephone Number: 301 [redacted]-317 [redacted]-3120 [redacted]

3. **Electronic Funds Transfer (EFT) Information:**
a) Payee Account Name: Goodwin & Lasch IOLTA Account
b) American Banking Association (ABA) Routing Number (9 digits): (b)(6)
c) Payee Account Number (b)(6) [redacted]
d) Checking: ☑ Savings: ☐
e) Financial Institution Name, City, State: Republic Center Bank Louisville, Kentucky

4. **Interagency Payment System Information:**
a) Agency Name: _____
b) Agency Location Code (ALC) Number: (8 digits): _____
c) Standard General Ledger (SGL) Number (4 digits) _____
d) Treasury Account Symbol (TAS): _____

5. Mailing Address for Check: (Payee name not to exceed 27 characters)
a) Payee Name _____
b) Payee Name _____
c) Address Line 1 _____
d) Address Line 2 _____
e) City _____ State _____ Zip Code _____

6. **Taxpayer Identification Number (s):**
a) ___ ___ ___ b)

7. **Reimbursement Information for Contract Disputes Act (CDA), No FEAR Act, and Firefighters Fund:**
a) Agency Name: _____
b) Contact Name: _____
c) Contract Number (CDA cases) _____
d) Telephone Number: _____
e) Address: _____
f) City: _____ State: _____ Zip Code: _____

8. If payment will be made in a foreign currency please provide the following information
Country _____ Currency _____

9. **FOR USE BY JUDGMENT FUND BRANCH ONLY:**
Z Number: _____ J/D Number: _____ GLOWS Code/Agency: _____

Claim Analyst *Signature and Date*	Amount to Pay	Appropriation Code

Claim Reviewer *Initials and Date*

Judgment Fund Voucher for Payment

10. Acceptance by Claimants:

NOTE: For use ONLY where the settlement is (i) for cash, (ii) in an amount that does not exceed $200,000, and (iii) a court order approving the settlement is not warranted. For all other situations, a final judgment or a standard Department of Justice *Stipulation For Compromise Settlement And Release* must be attached

Each claimant/plaintiff and his/her guardians, heirs, executors, administrators, and assigns agree to and do accept this settlement in full settlement and satisfaction and release of any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation any claims for fees, costs, expenses, survival, or wrongful death, arising from any and all known or unknown, foreseen or unforeseen bodily injuries, personal injuries, death, or damage to property, which they may have or hereafter acquire against the United States of America, its agents, servants, or employees, on account of the subject matter of the administrative claim or suit, or that relate or pertain to or arise from, directly or indirectly, the subject matter of the administrative claim or suit. Each claimant/plaintiff and his/her guardians, heirs, executors, administrators, and assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its agents, servants, and employees, from and against any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation claims for subrogation, indemnity, contribution, or lien of any kind, or for fees, costs, expenses, survival or wrongful death that relate or pertain to or arise from, directly or indirectly, any act or omission that relates to the subject matter of the administrative claim or suit.

(SIGN ORIGINAL ONLY)

Date _____

(Claimant(s) sign above)

11. AGENCY APPROVING OFFICIAL: This claim has been fully examined in accordance with Statutory Citation 28 U.S.C. 2672 and approved in the amount of $ 125,000.00

Authorized Signature: _____

Title: Acting Regional Counsel

Date: _____

Judgment Fund

Instructions for FMS Form 197: Voucher for Payment

Please note that FMS Form 197 is a two page form

Item 1: Provide the amount due to payee (requests for separate payments require separate FMS Forms 197).

Item 2: Provide the name and telephone number for the Federal agency or office that submitted the claim(s).

Item 3: Provide information to enable the payment by means of Electronic Funds Transfer (EFT). This information should be provided unless the payment is to be made by check. **Note: 31 C.F.R. § 206.4 directs agencies to make payments by EFT whenever cost-effective, practical, and consistent with the law, and adds that the Treasury Department may require agencies to justify the use of non-EFT payment mechanisms. All fields in item 3 must be completed.**

Item 4: Provide the name of the Federal agency, Agency Location Code (ALC), Standard General Ledger (SGL) code, and Treasury Account Symbol (TAS).

Item 5: Provide information to enable the payment to be issued by check and to be mailed by the U.S. Postal Service either to the Submitting Agency or directly to the claimant/plaintiff. Do not exceed 32 characters per line for the payee name(s) and address.

Item 6: Provide the Taxpayer Identification Number (TIN) for each payee.

Item 7: Provide this item for Contract Disputes Act (CDA), No FEAR Act, and Firefighters Fund payments.

Item 8: Provide this item only if the payment is to be made in foreign currency.

Item 9: To be completed by the Judgment Fund Branch.

Item 10: This part need not be completed when another, separate, legally sufficient settlement agreement is signed by the claimant and a copy is submitted with the payment request.

Item 11: To be completed by the agency approving official, if FMS Form 197 is used as the settlement agreement.

GOODWIN & LASCH
ATTORNEYS AT LAW

607 WEST MAIN STREET, SUITE 500
LOUISVILLE, KY 40202
(502) 584-7622
(502) 584-0797 (FAX)

MICHAEL L. GOODWIN
CHRISTOPHER N. LASCH*

*ALSO LICENSED IN NEW YORK

October 5, 2004

Kevin J. Walasinski, Esq.
Senior Attorney-Advisor
Federal Bureau of Prisons
Consolidated Legal Center
3301 Leestown Road
Lexington, KY 40511

RE: Wrongful Death Claim of Estate of Christopher Dascenzo
Federal Tort Claim Number TRT-MXR-2002-09010

Dear Mr. Walasinski:

Enclosed please find the settlement papers signed by me and my client. Thank you for your efforts to quickly obtain the settlement proceeds for my clients. Please note my correct address above, as your last correspondence was to my old address. Thanks.

Sincerely,

MICHAEL L. GOODWIN

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2672

It is hereby stipulated by and between the undersigned claimants (meaning any person, other than the United States, signing this agreement), and the UNITED STATES OF AMERICA, by and through their respective attorneys, as follows:

The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the administrative claims, e.g., [administrative tort claim TRT-MXR-2002-09010, the wrongful death and property claim of the Estate of Christopher Dascenzo, Register Number 03883-017, arising from his incarceration with the Federal Bureau of Prisons, and any claims arising out of such incarceration by the personal representative(s) of the estate of Christopher Dascenzo], under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of $125,000.00 [ONE HUNDRED TWENTY-FIVE THOUSAND DOLLARS], which sum shall be in full settlement and satisfaction of any and all claims, demands rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which claimants or their guardians

heirs, executors, administrators, or assigns, and each of them, have or may hereafter acquire against the United States of America its agents, servants, and employees.

3. Claimants and their guardians, heirs, executors administrators or assigns hereby agree to accept the sum set forth in this Stipulation of Compromise Settlement in full settlement satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the administrative claims, including future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages Claimants and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify hold harmless the United States of America, its agents, servants and employees from and against any and all such causes of action claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by claimants or their guardians, heirs, executors administrators or assigns against any third party or against United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents servants, or employees, and it is specifically denied that they liable to the plaintiffs. This final settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, expenses and that any attorney's fees owed by the claimants will be paid out of the settlement amount and not in addition thereto

6 It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this matter shall exceed 20 per centum of the amount of the compromise settlement.

7 The persons signing this Settlement Agreement warrant represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement

8 Payment of the settlement amount will be made by government wire transfer as per the following

A. Name of Bank: Republic Bank

B. Street Address of Bank: Republic Bank Center

C. City, State and Zip Code of Bank: 601 West Market Street, Louisville, Ky 40202

D Federal Reserve Number 083001314-53431103

E Routing Number: 083001314

F. Name of Account: Goodwin & Lash IOLTA Account

G. Account Number: (b)(6)

Claimants' attorney agrees to distribute the settlement proceeds among the claimants

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the claimants expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b)

Eha Dascenzo
Administrator

10/4-2004
Date

Michael Dascenzo
Administrator

10/4/2004
Date

Michael L. Goodwin
Attorney for Claimant

10/5/04

Kathleen M. Kenney
General Counsel
Federal Bureau of Prisons
Attorney for the United
States of America

Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Howard Bryan Harmon, Jr. #281113

FILED

NOV 16 2000

(Enter above the full name of the plaintiff or plaintiffs in this action).

(Inmate Reg # of each Plaintiff)

VERSUS

CIVIL ACTION NO. 5:00-1072
(Number to be assigned by Court)

Federal Bureau of Prisons
① Kathern Hawks, ② Dr. Robert Hazelwood
③ Joyce Conley ④ Miles Matthews
⑤ L. Negron-Rivera ⑥ E.J. Chipi, P.A.
⑦ J. Kirkland, RN.

(Enter above the full name of the defendant or defendants in this action).

Jury Trial Demanded

COMPLAINT

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes ____ No ✓

(1)

II. **Place of Present Confinement:** Lawrenceville Correctional Center 1607 Planters Rd., Lawrenceville, VA 23868

A. Is there a prisoner grievance procedure in this institution?

Yes ✓ No ____

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

Yes ____ No ✓

C. If your answer is YES:

1. What steps did you take?_____

_____

2. What was the result?_____

_____

D. If your answer is NO, explain why not: My grievance is with the federal B.O.P. I did file a tort claim which was denied. I was released from federal custody 4/4/00.

III. **Parties**

(In item A below, place your name and inmate registration number in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff: Howard Bryan Harmon, Jr. #28113

Address: 1607 Planters Rd., Lawrenceville, VA 23868

B. Additional Plaintiffs and Address:_____

_____

_____

_____

(In item C below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item D for the names, positions, and places of employment of any additional defendants.)

C. Defendant ① Kathern Hawks

is employed as Director, B.O.P. Mid-Atlantic Regional

at c/o Regional Counsel, Mid-Atlantic Regional Office, 10010 Junction Drive, Annapolis, MD 20701

D. Additional defendants: ② Robert Hazelwood, M.D., doctor at U.S.P. Terre Haute, IN 47808 / ③ Joyce Conley, Warden / ④ Miles Matthews, Health Service Administrater / ⑤ L. Negron-Rivera, M.D. / ⑥ E.J. Chipi, physician's asst. / ⑦ J. Kirkland, R.N. (# 3-7 all at F.C.I. Beckley, P.O. Box 1280, Beaver, WV 25813)

IV. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary).

I was disabled when I began service of a federal sentence back in March, 1993. Regardless of the documentation of my disability and my insistence, I was coerced into working by threats of disciplinary action.

On Jan. 14, 1999 I began having severe back and leg pain. On 1/19/99 I saw P.A. Chipi at F.C.I. Beckley. He told me that he

IV. Statement of Claim (continued):

had back trouble and came to work every day. He said he was damn tired of lazy-ass inmates coming to sick-call to get out of work. I had arrived at sick-call in a wheelchair. He physically took the wheel chair and said I was not getting a work idle. He prescribed only Indocin, 50mg. X3, per day and told me to go to work. On 1/26/99 I was evaluated by Dr. Robert Bateman, an orthopedic surgeon. I was told that surgery would probably be necessary to relieve the serious pain I was having. He recommended a M.R.I, A.S.A.P., and he would see me again after the M.R.I. The M.R.I took four months, until 5/25/99. (Continued)

V. RELIEF

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes. (response to tort claim attached)

In the Federal Tort Claim, I ask for $1,000^{00} per day for my last 445 days of my federal incarceration. I suffered not only severe back and leg pain for that period of time but I also developed major depression from that pain and the fact that I was at risk if I had to defend myself at a maximum security prison. I could not see any family members at Terre Haute due to the distance. I ask this Court order the defendants, as

V. Relief (continued)

a group to pay me $1,000^{00}$ a day for my pain and suffering to include the mental anguish. I ask an equal amount as punitive damages. I ask the defendants pay all cost and attorney fees. I ask this Court to assess the amount per defendant as it sees fit and proper, to reach the total amount requested. (From 1/14/99 through 4/4/00)

VII. Counsel

A. If someone other than a lawyer is assisting you in preparing this case, state the person's name:

_____

B. Have you made any effort to contact a private lawyer to determine if he or she would represent you in this civil action?

Yes ✓ No ____

If so, state the name(s) and address(es) of each lawyer contacted:

See response letters attached.

_____

If not, state your reasons: _____

_____

C. Have you previously had a lawyer representing you in a civil action in this court?

Yes ____ No ✓

If so, state the lawyer's name and address:

_____

_____

Signed this 8th day of November, 19 2000

Howard B. Harmon, Jr.

_____

_____

_____

Signature of Plaintiff or Plaintiffs

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 8, 2000
(Date)

Howard B. Harmon, Jr.
Signature of Movant/Plaintiff

_____

Signature of Attorney
(if any)

Defendant's Role In This Action (page #1)

1. Kather Hawks, the director of the Mid-Atlantic Region is sued for B.O.P. policy that requires a violation of the rights of an American With Disabilities. (A.D.A.)

2. Dr. Robert Hazelwood is sued for medical negligence for the denial of the surgery recommend by a specialist who was contract by the B.O.P., and doing so without so much as an examination or a conversation with the Plaintiff. Also for discrimination under the A.D.A of 1990.

3. Joyce Conley is sued for malicious deliberate indifferance for ordering the transfer of this Plaintiff without good cause, and total disregard to his physical condition. Also for malicious intent to cause plaintiff more pain and mental anguish by sending him to a maximum security prison hundreds of miles from his family.

4. Miles Matthews is sued for not adequately responding to the Plaintiff's medical needs, or seeing that the Plaintiff would have a follow-up with the orthopedic surgeon. Also showing medical negligence or deliberate indifferance.

IV Statement of Claim (continued) page # 1

I continued going to sick-call to get work idles, asking about the M.R.I. results and the follow-up with Dr. Bateman.

Although the M.R.I. results, as shown by the records, were received back on 6/1/99 and reviewed by Dr. Negron-Rivera, the results did not appear in my medical file until 7/6/99. I was told to watch the call-out for my next appointment with Dr. Bateman. After not seeing Dr. Bateman again for over two months of the M.R.I., during the first week of August, 1999, I spoke with Warden Conley during mainline (lunch) and ask her why I did not have the follow-up with the orthopedic surgeon. She said she would look into it. I had now had to use a wheelchair for more than six months and my pain continued at a severe level. I never saw Dr. Bateman again.

IV Statement of Claim (continued) page #2

On 8/10/99 I was placed in administrative detention. This was only a few days after I spoke with the warden. I ask to put my back brace on and was denied. I was told my property would be sent over to the 'hole' and I could get it then. I did not see my property for the next six weeks. Later that day I was told I was in detention for allegedly participating in a demonstration which had allegedly taken place a week before. I denied any participation in any demonstration. Around 5:00 AM on 8/11/99, the following day, I was taken along with seven other inmates, shackled, hand-cuffed to a belly-chain and transported by van to a maximum security penitentiary in Terre Haute, IN. I was charged with nothing. The only thing I had

IV. Statement of Claim (continued) page #3

done was to threaten a law suit about my medical treatment. That can be the only explanation. I did nothing else.

I spent nearly twelve hours in that van and after the first hour the severe and constant pain was worse than any I had ever experianced. It got so bad that I cried, prayed, and urinated on myself and the other inmate in the seat with me.

When I got to U.S.P. Terre Haute I was placed in the 'hole' for a month. Regional Office, B.O.P. had to somehow make my custody level high enough to warrant my being housed at a maximum security penitentiary which had a much more violent atmosphere than the medium

IV. Statement of Claim (continued) page #4

security institutions I had been housed at.

With only eight and a half months left on a ninty-six month sentence, they placed a greatest severity public safety factor against me where had been no public safety factor before. A greatest security management varible where there had been none before, and finally, the severity of my offense went from moderate to the greatest severity. My offense was both nonviolent and victimless. But since I did nothing to be charged with, my custody and security level had to be alterred. Once I was put into population at U.S.P. Terre Haute I went to sick-call where I received tylenol, a work idle and was scheduled to be, once again, evaluated by

IV. Statement of Claim (continued) page #5

an orthopedic surgeon.

On 10/14/99 I was examined by Dr. Robert Burkle, an orthopedic surgeon. The doctor recommended surgery to relieve the serious and constant pain I was in. He further explained that I now had nerve damage in my lower left leg and foot that could not now, nine months later, be repaired. But the surgery would relieve most of my pain. I agreed to have the surgery. While waiting for the surgery and suffering severe pain, I continued to go to sick-call for work idles and receiving (56) tylenol a week. Every night I would pray that I would have the surgery the next day.

On 12/28/99, ten weeks after the surgery had been

U.S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Institution, Beckley
P. O. Box 1280
Beaver, West Virginia 25813
Telephone: (304) 252-9758

CERTIFIED

July 18, 2000

RECEIVED
AUG 2 1 2000
INTAKE & LEGAL SERVICE

Howard Bryan Harmon Jr. [illegible]
Former Federal Reg. No. 04006-084
Virginia Dept. of Corrections
PO Box 26963
Richmond, Virginia 23261

Re: Your Tort Claim No. T-MXR-00-641

Dear Mr. Harmon:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et. seq.*, and authority granted under 28 C.F.R. § 0.172. You claim government liability in the amount of $1,335,000 for injury that occurred at FCI Beckley. Specifically, you state that on or about January 14, 1999, you were denied surgery recommended by an orthopedic surgeon, there was a delay in having an MRI completed, there were medical record delays, and you were transferred to a more secure facility based on your medical complaints.

A review of your medical file revealed you were treated on numerous occasions by the Health Services Department for your back pain from the time you arrived at FCI Beckley in January 1996 until you transferred to USP Terre Haute in August 1999. In addition to all of the examinations conducted during that time, you were referred to an Orthopedic Specialist on January 21, 1999.

The Orthopedic Surgeon evaluated you on January 26, 1999, and recommended an MRI be completed. The MRI was conducted on May 24, 1999. The results of the MRI were received on June 1, 1999. The MRI showed disc herniation at L5-S1. The Clinical Director reviewed the results on June 8, 2000. When you reported to the Health Services Department to obtain the results of the MRI, the staff member looking for the results must have overlooked the results in your file. When you presented to the Health Services Department on July 6, 1999, you were provided the results.

Due to your involvement in a group demonstration at FCI Beckley in August 1999, you were transferred to a more secure facility. The transfer occurred on August 11, 1999. You were not transferred with any medication as your medication had expired on August 5, 1999, and you had not returned to Health Services to have the prescription renewed. The transfer paperwork did

identify you as essentially healthy and did not list your back problem as a current medical condition. However, when inmates are transferred, the medical record accompanies the inmate. Accordingly, there was medical documentation of your condition in the event information was needed.

Based on this review, it is evident your back condition was a preexisting condition. Additionally, your condition did not warrant surgery. You were provided appropriate medical treatment and medication to alleviate any discomfort. Although you feel the MRI was not completed in a timely manner, the wait for the MRI was not outside of the community standard. Finally, you were not transferred to a more secure facility due to your complaints against the Health Services Department but for your involvement in a group demonstration. Accordingly, your claim is denied. This is a final denial of your claim. If you are not satisfied with this determination, you have six months from the date of the mailing of this notification to bring suit in an appropriate United States District Court, should you wish to do so.

Sincerely,

W. Stevens

for Bill Burlington
Regional Counsel

GIBSON, LEFLER & ASSOCIATES
ATTORNEYS AND COUNSELLORS AT LAW
1345 MERCER STREET
PRINCETON, WEST VIRGINIA 24740-3033

MICHAEL FIELDING GIBSON *
DERRICK W. LEFLER
* ALSO ADMITTED IN VIRGINIA

CONSULTANT:
MELODY R. LAMBERT, R.N., C.L.N.C.

AREA CODE (304)
425-8276
800-742-3545
TELEFAX 487-1574

October 9, 2000

Howard Bryan Harmon, Jr.
Inmate #281113 (41-103)
CCA/Lawrenceville Correctional Center
1607 Planters Road
Lawrenceville, VA 23868

Dear Mr. Harmon:

Thank you for your letter of September 27, 2000. Please be advised that while I am flattered that you thought of this office to be of service to you in your potential case, I regret that I will be unable to represent you in that matter. This firm's current case load is such at we are not taking on any new cases until we resolve some of those currently pending.

Very truly yours,

Michael Gibson

MICHAEL F. GIBSON
kcr

ACLU
American Civil Liberties Union of Virginia
6 N. Sixth Street, Suite 400, Richmond, VA 23219 (804)644-8022

July 11, 2000

Mr. Howard B. Harmon, Jr. #281113
PRCC
State Farm, VA 23160

Dear Mr. Harmon:

Thank you for writing the ACLU of Virginia.

We have carefully reviewed your letter and regret that the ACLU of Virginia will not be able to assist you in this matter. Unfortunately, there are many cases of unfairness and injustice that the ACLU is simply unable to handle due to our limited staff and resources.

Please do not interpret this as a comment on the merits of your case. If you need legal advice, you should contact the attorney who is assigned to the institution. The library at your institution might also offer useful assistance.

I am sorry our response could not be more favorable and wish you the best of luck.

Sincerely,

Richard W. Ferris, Esq.
Associate Director

ALLEN, ALLEN,
ALLEN & ALLEN
Attorneys for Injured Persons since 1910

Writer's Direct Dial (804) 257-
File No.

June 20, 2000

Mr. Howard B. Harmon, Jr.
#281113 - C4-211a
Powhatan Receiving & Classification Center
State Farm, VA 23160

Dear Mr. Harmon:

First of all, I want to thank you on behalf of the firm for considering us in the handling of this matter. It is with regret, however, that I must inform you that we do not handle this type of case. It is for this reason that I recommend you write the American Civil Liberties Union in Richmond, Virginia. Their address and phone number is 6 N. 6th Street, Richmond, VA 23219, (804) 644-8022.

You are, of course, permitted to employ any attorney of your own choosing. In the state of Virginia, you have two years in which to either settle your claim or file a law suit. If you fail to do either, then you will be forever barred by the Statute of Limitations from pursuing this matter any further.

We wish you the best of luck and a complete recovery from your injuries.

With kindest regards, I remain

Very truly yours,

Coleman Allen | rwa

W. Coleman Allen, Jr.
President

WJR/rwa

19902 1

DUDLEY, GALUMBECK, NECESSARY AND DENNIS
Attorneys at Law
104 West Main Street
Post Office Box 626
Tazewell, Virginia 24651
(540) 988-6561
FAX # (540) 988-2921

James W. Dudley
Robert M. Galumbeck
Kelly Combs Necessary
Michael L. Dennis

Charles A. Stacy
Clinton S. Kegley

Bluefield Office
728 Virginia Ave.
P.O. Box 468
Bluefield, VA 24605

(540) 322-3454
(800) 580-6590

September 17, 2000

Mr. Howard Bryan Harmon, Jr.
Inmate #28113 C3-206a
PRCC
State Farm, Virginia 23160

Dear Mr. Harmon:

Thank you for your letter of September 13, 2000. Please be advised that I do not practice in the federal courts in West Virginia and am not qualified to do so. Please also be advised that I no longer handle lawsuits, such as yours, in the federal court system even were we able to file the lawsuit in the federal courts in the Western District of Virginia.

I would suggest to you that you contact a lawfirm such as Michael Gibson's, whose phone number is (304) 435-8276. Mr. Gibson is a very good attorney who practices in West Virginia, both in the state and federal courts.

Please also be advised that there are statutes of limitations and certain administrative actions which must be taken regarding your claim, or your claim will be forever lost.

I would suggest that you immediately contact counsel who practices in these areas in order to make sure that the statute of limitations and the like do not result in a bar to your action.

Thank you for considering my lawfirm.

Yours truly,

Robert M. Galumbeck

ENTERED
MAR 31 2004
TERESA L. DEPPNER, CLERK
U.S. District & Bankruptcy Courts
Southern District of West Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

HOWARD BRYAN HARMON, JR., **Plaintiff,**	)	
v.	)	**CIVIL ACTION NO. 5:00-1072**
UNITED STATES OF AMERICA, **Defendant.**	)	

JUDGMENT ORDER

This action under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) and 28 U.S.C. §§ 2671, *et seq.*, was tried to the Court on March 17 and 18, 2004. The Court, having made its findings of fact and stated its conclusions of law, it hereby is **ORDERED** and **ADJUDGED** that Plaintiff shall recover from the Defendant, the United States of America, the sum of $2,500.00, with interest thereon as provided by law, and his costs of this action, as will be determined by the Court. The Government shall submit to the Court a check in the amount of $2,500.00, made payable to the Court pursuant to Rule 6.02 of the Local Rules of General Practice and Procedure. Rule 6.02 provides in part as follows:

> In all cases initiated without payment of fees and costs, the affiant shall stipulate in his or her affidavit that any recovery in the action shall be paid to the clerk, who shall pay therefrom any remaining unpaid costs taxed against the plaintiff and remit the balance to the plaintiff or to his or her attorney.

To properly assess the costs and fees in this action, the Court requires additional information from the parties. Accordingly, it is further **ORDERED** that pursuant to 28 U.S.C. § 2412(d)(1)(B), Plaintiff's counsel shall file within thirty days from the entry of this Judgment Order, his application for fees and other expenses, including attorney's fees and any costs associated with Plaintiff's expert witness. Following service of Plaintiff's application, the Government shall have ten (10) business

days within which to file a response. After passage of this time, the Court will assess costs and fees in this matter accordingly.

The Clerk is directed to retire this action from the active docket and mail a copy of this Judgment Order to counsel of record.

ENTER: March 31, 2004.

R. Clarke VanDervort
United States Magistrate Judge

ENTERED
MAR 17 2004
TERESA L. DEPPNER, CLERK
U.S. District & Bankruptcy Courts
Southern District of West Virginia

243 140

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION

HOWARD BRYAN HARMON, Jr.,

Plaintiff,

v. **CIVIL ACTION NO. 5:00-1072**

UNITED STATES OF AMERICA,

Defendant.

PRETRIAL ORDER

Plaintiff Howard Bryan Harmon, Jr. ("Mr. Harmon"), by and through counsel, and Defendant United States of America by and through counsel, Michael L. Keller, Assistant United States Attorney for the Southern District of West Virginia submits the following information pursuant to Local Rule 2.04 and Rule 16 of the Federal Rules of Civil Procedure:

I. Statement of Jurisdiction

Plaintiff

Jurisdiction of this action is based upon 28 U.S.C. § 1346.

Defendant

Jurisdiction of this action is predicated on the Federal Tort Claims Action ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671 et seq.

The FTCA provides a judicial remedy to those who suffer injury or damage as a result of the negligence of employees of the federal agencies of the United States Government. It permits recovery on claims for money damages "for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be

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liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1291, 1346(b), 1402, 1504, 2110, 2401(b), 2411, 2412, 2671 through 2680. Osborne v. U.S., 166 F. Supp. 2d 478, 486 (S.D. W.Va. 2001); Rubin v. United States, 88 F. Supp. 2d 581 (S.D. W. Va. 1999); Bellomy v. United States, 888 F. Supp. 760 (S.D. W.Va. 1995); Jayson: Personal Injury - Handling Federal Tort Claims, Vol. 1, pages 1-7 and 1-14 (1968).

The substantive elements of a negligence action brought under the Federal Tort Claims Act, 28 U.S.C. § 2674, are generally governed by the law of the state in which the negligence occurred. United States v. Muniz, 374 U.S. 150 (1963); Doganieri v. United States, 520 F. Supp. 1093, 1095 (N.D. W. Va. 1981). State law then effectively becomes federal law by incorporation. Young v. United States, 149 F.R.D. 199 (S.D. Cal. 1993) (discussing incorporation of state law in the context of FRE 501). Accordingly, the Court must apply the law as it exists and must not surmise or suggest a substantial extension, which is forbidden by analogous circuit precedent. Burris Chemical, Inc. v. USX Corp., 10 F.3d 243, 246 (4th Cir. 1983) (refusing to permit an expansion of the Common Law of Florida); Ball v. Joy Technologies, Inc., 958 F.2d 36, 39 (4th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (declining to extend damages for emotional distress to exposure to toxic chemicals where such damages were not recognized by state law); Washington v. Union Carbide Corp., 870 F.2d 957, 962 (4th Cir. 1989) (declining to recognize a new cause of action for retaliatory damages not recognized by state law); Guy v. Travenol Laboratories, Inc., 812 F.2d 911, 917 (4th Cir. 1987) (declining to recognize an anti-retaliation cause of action to protect employees who refuse to violate the pure food laws which was not recognized by state law).

II. Contested issues of law requiring decision prior to trial

Plaintiff

Plaintiff is unaware of any contested issues of law at the present time. However, at the pre-trial hearing on March 2, 2004, counsel for defendant indicated that he may raise the issue of collateral estoppel against the plaintiff for a second time. Previously, in defendant's memorandum in support of its renewed motion for summary judgment, defendant contended that Mr. Harmon had litigated the adequacy of his medical care in an appropriate federal forum and received a decision upon that issue from the United States District Court for the Southern District of Indiana. In that proceeding, the United States motion for summary judgment was granted with regard to the claims raised under the Federal Tort Claims Act by Mr. Harmon. In denying defendant's motion for renewed summary judgment, Chief Judge David Faber examined the five factors in Parklane Hosiery Co. Inc. v. Shore, 439 U.S. 322, 331 (1979). Chief Judge Faber found that the Indiana court's decision was based solely upon the adequacy of Mr. Harmon's medical care while incarcerated in Indiana. The court held that the fifth and most important element, which mandates that the issues in the prior litigation be identical to the issues sought to be estopped, was missing. Therefore, defendant's renewed motion for summary judgment and its contention that Mr. Harmon is collaterally estopped from asserting his claims under the FTCA in West Virginia was denied. See Memorandum Opinion Order entered on September 25, 2003, by Chief Judge David Faber.

Since then, no new information has surfaced which would indicate that the Indiana court's decision was based upon anything other than Mr. Harmon's medical care while incarcerated at U.S.P. Terre Haute. Regardless, this issue has been ruled upon by Chief Judge Faber and it is defendant who should be collaterally estopped from relitigating this issue. Mr. Harmon would

request that this Court enter an order prohibiting defendant from raising an issue previously decided by Chief Judge Faber.

Defendant

There are no motions formally pending before the Court. Plaintiff Harmon's portion of this Order, however, requests that the United States be barred from introducing any evidence concerning Plaintiffs unsuccessful FTCA case decided in the Southern District of Indiana, Harmon v. United States, Case No. TH 01-0005-L (S.D. Ind. Sept. 26, 2002) . Plaintiff argues that the Order by United States District Judge Faber denying the United States renewed Motion for Summary Judgment effectively precludes any reliance by the United States upon the Indiana Court decision. The United States disagrees.

In his Order, Judge Faber held that the grant of Summary Judgment by the Indiana Court in a medical malpractice action arising from Plaintiff's medical care at the United States Penitentiary in Terre Haute did not fully resolve the issues of Plaintiff's care at FCI Beckley. Judge Faber's Order did not consider or address, however, the separate question of issue preclusion on the grounds of estoppel. See Restatement (Second) of Judgments § 27; Juarez v. Camden County Board of Chosen Freeholders, 972 F. Supp. 269 (U.S. DC D. NJ) (1997).

Although Plaintiff ultimately filed two separate civil actions complaining of his medical care by the Bureau of Prisons, first at FCI Beckley and then at the Terre Haute institution, there was clearly a factual overlap of issues relevant to present case decided by the Indiana District Court. Specifically the Court found:

(1) Plaintiff was examined within an hour of his transfer from FCI Beckley to Terre Haute and made no claims of pain although he was taking no medication at that time.

(2) Plaintiff did not seek medical attention until four (4) days after his arrival at Terre Haute when he first complained of pain caused by his concrete bed.

(3) Plaintiff's back condition pre-existed his federal custody and has not materially changed since 1993.

(4) The decision by medical practitioners at Terre Haute not to perform surgery on Plaintiff's back was not a departure from the appropriate standard of medical care.

(5) Conservative treatment of Plaintiff's back condition by medications such as Tylenol was both a continuation of treatment previously applied and within the standard of appropriate medical care.

Even assuming that the decision by the Indiana District Court did not fully foreclose Plaintiff's claims as Judge Faber has held, the Indiana litigation clearly decided certain factual issues relevant to the present case. To that end the United States expects to introduce certified copies of the decision as evidence in this case. The United States further submits that this Court should reject any attempt by Plaintiff to relitigate those issued already judicially resolved by the decision of Indiana District Court.

III. Statement of the case

Plaintiff

Plaintiff filed this action under the FTCA, 28 U.S.C. § 2671, et. seq. Plaintiff claims that while at FCI Beckley from January, 1999, until his unwarranted transfer to a federal institution in Terre Haute, Indiana on or about August, 11, 1999, that prison officials negligently failed to give him adequate medical care which resulted in severe pain and consequent mental and emotional distress. Plaintiff alleges that the four months it took for him to get an MRI was unreasonable, the misplacement of his medical records caused delay in his treatment, the pain medication he received

was inadequate, that his transfer without his back brace was contrary to his medical needs, the disallowance of the use of a wheelchair was contrary to the standard of care applicable to his situation and that he was not appropriately evaluated by a physician with regard to his follow up appointment after his MRI. Succinctly, plaintiff alleges that the standard of care he received fell outside of the range of acceptable medical care warranted for his condition.

Mr. Harmon entered the penal system in March of 1993. Reports show that he was disabled at that time having suffered an injury to his back while working at Appalachian Power Co. Mr. Harmon was receiving total permanent disability and social security benefits prior to being incarcerated. Mr. Harmon's disability and inability to work were well documented and he verbally informed prison officials of his situation. Despite the warnings, while at FCI Beckley, prison officials assigned Mr. Harmon to work duty and refused to give him adequate pain medication.

On or about January, 19, 1999, after complaining of constant back pain, Mr. Harmon was examined by Physician Assistant E.J. Chipi at FCI Beckley. Mr. Chipi advised Mr. Harmon to return to work and rescinded the use of the wheelchair. One week later, on January 26, Mr. Harmon was examined by Dr. Bateman, an orthopedic surgeon under contract with the Bureau of Prisons. During that examination, Mr. Chipi prescribed Mr. Harmon 50 mg of Indocin to be taken three times a day and suggested he do back strengthening exercises. Dr. Bateman gave Mr. Harmon an injection in his lower back and ordered that Mr. Harmon have an MRI "as soon as possible." Mr. Harmon eventually received the "as soon as possible" MRI on May 25, 1999, some four months later.

During the four month wait, prison officials failed to issue Mr. Harmon a work idle, refused to give him adequate pain medication and would not allow him the use of his wheelchair for a period of time. On January 29, 1999, Mr. Harmon requested that Warden Conley intervene and ensure that

he receive adequate pain medication. Warden Conley finally had Miles Matthews respond to Mr. Harmon's Inmate Request on February 11, 1999. Mr. Matthews advised Mr. Harmon that he would receive an appointment with an orthopedic surgeon, however, Mr. Harmon had already seen Dr. Bateman two weeks and three days prior to this response. In short, Warden Conley failed to respond to Mr. Harmon's inmate request.

Mr. Harmon expected to have a follow up visit with Dr. Bateman to discuss the results and determine the course of treatment after his MRI on May 25, 1999. His results were received on or about June 1, 1999, but were misplaced until July 6, 1999. The follow up appointment with Dr. Bateman never happened and Mr. Harmon's course of treatment remained unchanged.

On August 10, 1999, after making numerous complaints concerning the medical care he was receiving, Mr. Harmon was taken from his cell in his wheelchair and placed in administrative detention. He was not allowed to wear his back brace. Prison officials alleged that Mr. Harmon participated in a demonstration that occurred at FCI Beckley. The very next day, on August 11, 1999, Mr. Harmon was stripped of his wheelchair, shackled, handcuffed and loaded in a van. For the next ten to twelve hours, Mr. Harmon was transported without the aid of his back brace to a federal institution in Terre Haute, Indiana. During the trip, Mr. Harmon experienced intense pain causing him to lose control of his faculties. Subsequent to his arrival at the institution in Indiana, Mr. Harmon was evaluated by a physician, declared medically unable to work and it was suggested that surgery be performed on his herniated disc.

Although Mr. Harmon's condition was well documented, his complaints were not taken seriously while at FCI Beckley, he was forced to work despite his pain and the medication he received was not adequate to relieve his discomfort. Prison officials turned a blind eye to his condition and took an unreasonable amount of time in scheduling an MRI which was ordered "as

soon as possible" by its own physician. Furthermore, the misplacement of Mr. Harmon's MRI results and the failure to schedule a follow up visit with an orthopedic surgeon indicate that prison officials were not too concerned with his condition. As further evidence, prison officials refused to allow Mr. Harmon the use of a supportive back brace and the aid of a wheelchair at times. In essence, Mr. Harmon's medical care while at FCI Beckley fell outside acceptable community standards.

Defendant

Plaintiff Howard Bryan Harmon, Jr. was an inmate at FCI Beckley from January 1996 until August 11, 1999 when he was transferred to the United States Penitentiary in Terre Haute, Indiana. On March 17, 2000 he filed an administrative claim seeking damages pursuant to the FTCA based upon his purported mistreatment at FCI Beckley. Plaintiff's claim was denied by the Bureau of Prisons on July 18, 2000 and he filed the present civil action on January 22, 2001.

In his complaint Plaintiff alleged that he was suffering back pain in January 1999. Bureau of Prisons Physician Assistant, Ernesto Chipi, prescribed 50 milligrams of Indocin three times a day and Plaintiff was subsequently examined by Robert Bateman, M.D. Dr. Bateman recommended that an MRI be done. Subsequently, an MRI was performed at Appalachian Regional Hospital on May 24, 1999. The MRI found no fracture an minimal degenerative changes but did identify a herniated disc.

Plaintiff was dissatisfied with the BOP medical response and maintained that the medication provided to him was insufficient to remedy his back pain. He complained directly to the Warden and receive a response on her behalf by Health Services Administrator, Miles Matthews, that he deemed unsatisfactory.

On August 10, 1999, Plaintiff was placed on administrative detention based upon his alleged involvement in an unlawful group demonstration. Thereafter, on August 11, 1999, Plaintiff was transferred by van to the United States Penitentiary at Terre Haute, Indiana.

At the Terre Haute institution, Plaintiff was examined by Dr. Robert Bunkle who recommended surgery on his ruptured disc. The reviewing BOP physician rejected the recommendations on the grounds that the disc problem was a pre-existing condition noted at the time of Plaintiff's original incarceration. Plaintiff has since completed his sentence and has been released from federal custody. He is presently incarcerated in state prison in Virginia.

Under the dictates of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), an inmate must exhaust his administrative remedies before filing a civil action based on prison conditions. In Plaintiff's case, the only administrative avenue that he has adequately pursued is that provided by the FTCA. Accordingly, his cause of action can only succeed if his claims meet the requirements of the FTCA.

The FTCA is a limited waiver of the United States sovereign immunity. The statute allows for civil suits against the United States based upon a

> negligent or wrongful act or omission of any employee . . . [at an agency of the United States] while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2672, 28 U.S.C. § 1346(b)(1).

The statutory reference to the "law of the place" exerts a controlling impact on an FTCA action. Under that provision, the source of substantive liability must be found in the law of the state where the allegedly tortuous activity occurred. Violations of federal law or regulation do not support a claim under the FTCA. FDIC v. Meyer, 510 U.S. 471, 478 (1994).

Similarly, the FTCA cannot be employed to rains constitutional claims. The United States has not waived its immunity with regard to constitutional torts. FDIC v. Meyer, 510 U.S. 471, 478 (1994). Although constitutional claims may be asserted against specific federal employees pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1997), such claims will not lie against the United States. Burford v. Runyon, 100 F.3d 1199, 1203 (8th Cir. 1998). In any event, Bivens constitutional claims are subject to the administrative exhaustion requirements of the Prison Litigation Reform Act.

To prevail in the instant litigation Plaintiff must demonstrate a breach of duty derived from West Virginia law where the events at issue occurred. To the extent that Plaintiff suggests that under Bureau of Prisons policy regulations and basic constitutional safeguards the Bureau of Prisons employees at FCI Beckley were required to do more to respond to his subjective complaints of pain that was, in fact, done that assertion cannot state an FTCA claim. It is not predicated upon any breach of state law duty under the "law of place" requirement necessary to invoke the waiver of sovereign immunity provided by the FTCA.

In any event, it is clear that while at FCI Beckley Plaintiff received medical attention with regard to his back problems. That medical attention included examination, testing, and the prescription of medication specifically intended to alleviate his pain. No physician recommended surgery while Plaintiff was at FCI Beckley. Plaintiff disagrees with the treatment provided as well as with other actions taken by FCI Beckley employees including his administrative detention and transfer. That disagreement does not, however, justify relief under the legal mechanism Plaintiff has chosen in invoke.

IV./V. Contested issues of fact

Plaintiff

Plaintiff and defendant dispute that the standard of care Mr. Harmon received was within the accepted community standards. It is obvious that the defendant cannot dispute that it owed a duty to provide Mr. Harmon with adequate medical care while he was incarcerated at FCI Beckley. Defendant does, however, dispute that it breached that duty, that its breach was the proximate cause of Mr. Harmon's injury and that any harm resulted. Thus, all facts used to support Mr. Harmon's claims are in dispute.

Defendant

Inasmuch as Plaintiff is proceeding upon a theory of medical malpractice, the central factual issue is whether the health care providers at FCI Beckley exercised the appropriate standard of care by demonstrating the degree of care, skill and learning required or expected of a reasonably prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstance. W. Va. Code § 55-7B-3(a).

More specifically the factual questions before the Court are:

(1) Whether the United States treatment of Howard Bryan Harmon, Jr., at FCI Beckley was negligent within the meaning of W.Va. Code § 55-7B-3(a).

(2) Whether any negligence of the United States was a proximate cause of Plaintiff's injuries and damages.

(3) What are Plaintiff's injuries and damages, if any, and how should they be calculated?

VI. Depositions and exhibits

Plaintiff

1. Plaintiff's medical records.

2. Documents contained in plaintiff's prison file.

3. Bureau of Prisons Regulations Handbook.

4. Administrative detention order of August 10, 1999, for plaintiff.

5. Progress report of August 10, 1999, for plaintiff.

6. Custody classification forms of September 7, 1997, and October 1, 1999, for plaintiff.

7. Any documents or exhibits used by defendant.

Defendant

1. The United States does not anticipate presenting any evidence in the form of depositions.

2. The United States expects to introduce all of the records of Plaintiff's medical treatment at FCI Beckley.

3. The United States expects to introduce a copy of Plaintiff's administrative claim and denial letter for jurisdictional purposes.

4. The United States intends to introduce a certified copy of the decision of the United States District Court for the Southern District of Indiana in Howard Bryan Harmon, Jr., v. United States of America, Case No. TH 01-0005-C-Y/H.

5. The United States reserves the right to introduce any document or exhibit used by Plaintiff as well as any document or exhibit required for rebuttal.

VII. Witnesses

Plaintiff

A. Those whom Mr. Harmon expects to present:

1. Mr. Howard Harmon, Plaintiff
2. Dr. Andrew E. Landis
   Beckley Bone & Joint Clinic
   417 Carriage Drive
   Beckley, WV 25801

B. Those whom Mr. Harmon may call if the need arises:

1. Dr. Robert O. Bateman
   FCI Beckley, Medical Department

2. Ms. Joyce Conley, Warden
FCI Beckley

3. Mr. Miles Matthews, Health Service Administrator
FCI Beckley

4. Dr. L. Negron-Rivera
FCI Beckley, Medical Department

5. Such other witnesses as may be necessary to facilitate the introduction of exhibits at trial.

6. Such other witnesses as may be necessary to rebut the defendant's evidence.

Defendant

1. Dr. Dominick McLain
2114 Willow Wood Road
Oak Hill, WV 25901

2. Dr. Robert H. Hazelwood, M.D.
Chief Medical Officer
USP
Terra Haute, Indiana

3. Dr. Robert Bunkle, M.D.

4. The United States reserves the right to call any witnesses listed by Plaintiff as well as any witness needed for rebuttal.

VIII./IX. Stipulation and avoidance of unnecessary proof

Plaintiff

Counsel for the plaintiff is prepared to meet with counsel for the defendant prior to trial to discuss possible stipulations and other means of avoiding unnecessary proof.

Defendant

Counsel for the United States is prepared to meet with counsel for Plaintiff and consider any reasonable stipulations that will facilitate the trial process.

XII. Voir dire

Plaintiff

The Court indicated at the hearing on February 6, 2004, that this matter will be tried without an advisory jury. Therefore, no voir dire questions are necessary at this time.

XIII. Estimate of trial days

Plaintiff

Plaintiff estimates that the trial of this action will require one to two days.

Defendant

The United States agrees that this action should require no more than two days.

Enter this 17th day of March, 2004.

HONORABLE R. CLARKE VANDERVORT
United States ~~District~~ Judge

United States of America
By Counsel

Michael L. Keller
Assistant United States Attorney
P.O. Box 1713
Charleston, WV 25326

Howard Bryan Harmon, Jr.,
By: Spilman Thomas & Battle, PLLC

Scott Palmer Mason, Esq. (WV State Bar No. 9086)
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FILED
JAN 20 2006

Melvin D. Johnson, Jr.,

Plaintiff, pro se,

against

UNITED STATES GOVERNMENT, "a.k.a." DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRIONS, and, DORIS WILLIAMS, Clinical Director, SCOTT STARCHER, RN, MARY BETH LICHTY, PA, TERESA PUCKETT, RN, J. MULLER, Mailroom Officer, M. ARNOLD, Captain, D. HEADY, Unit Manager, D. LIVINGSTON, Disciplinary Hearing Officer, K.J. WENDT, Warden, J.D. HILL, Assistant Warden, JANET BUNTS, Health Services Administrator, and ELIZABETH MASTELLER, PA.
Defendants.

Civil Action No. 2:06cv6

Maxwell / Kaull

42:1983

JURY DEMAND

COMPLAINT FOR DAMAGES

PRELIMINARY STATEMENT

Comes now the Plaintiff, Melvin D. Johnson, Jr., pro se pursuant to both the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 et. seq. and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, and sues the Defendants, United States Government, aka Department of Justice, Federal Bureau of Prisons, K.J. Wendt, Warden, J.D. Hill, Assistant Warden, Doris Williams, Clinical Director, Janet Bunts Health Services Administrator, Scott Starcher RN, Teresa Puckett, RN, Mary Beth Lichty, PA, Elizabeth Masteller, PA, M. Arnold, Captain, J. Muller, Mailroom Officer, D. Heady, Unit Manager, and D. Livingston, Disciplinary Hearing Officer, and for cause of action states as follows:

JURISDICTION

1. The court has jurisdiction of this matter by virtue of Title 28 U.S.C. §§1331(a), 1346, 1343, and 1361.

PARTIES

2. The Plaintiff, Melvin D. Johnson, Jr., is a prisoner committed to the custody of the U.S. Government a.k.a. Attorney General, who at all times relevant to this action was an inmate housed by the Federal Bureau of Prisons ("B.O.P."), at Federal Correctional Institution Gilmer, P.O. Box 6000, Glenville, West Virginia, 26351 ("FCI Gilmer").

3. The Defendant, United States Government is a federal corporation that includes within its organizational structure the United States Department of Justice. The Department of Justice consists of principal organizational units which include among others, the Federal Bureau of Prions ("BOP"). The Office of the United States Attorney General at the United States Department of Justice supervises and directs the administration and operation of the United States Department of Justice including the offices of the BOP. The United States Attorney General has charge of the management and regulation of all federal penal and correctional institutions. In respect to the activities of incarcerating prisoners, the Defendant shall provide suitable quarters, provide for safe-keeping, care and subsistence of all persons charged with or convicted of offenses against the United States. The Defendant shall provide for the protection, instruction, and discipline

of all persons in its custody "including the Plaintiff." The Defendant, United States, its servants, agents, and employees, Doris Williams, Steven Starcher, Mary Beth Lichty, Elizabeth Masteller, Teresa Puckett, and Janet Buntz at FCI Gilmer have violated their duties as announced within Title 18 U.S.C. §4042 and is sued for damages pursuant to the Federal Tort Claim Act.

4. The Defendant, Doris Williams, was at all times relevant to this cause of action, the Clinical Director at FCI Gilmer. She was the chief medical doctor at FCI Gilmer. She was in charge with insuring that appropriate medical care is provided and when such care cannot be provided within the prison she has the duty to recommend and insure that the appropriate medical care/treatment is delivered without unnecessary delay. She was responsible for providing adequate medical care and treatment for all FCI Gilmer's inmate pursuant to Title 18 U.S.C. §4042 and the Constitution for the united States of America. She was an agent and employee of the Federal Bureau of Prisons. She is sued for damages in her individual capacity while acting under color of federal law. Defendant Williams has since transferred to FCI Terre Haute, Indiana, 4200 Bureau Road, Terre Haute, Indiana, 47808.

5. Defendant Scott Starcher, was at all times relevant to this cause of action employed as an RN at FCI Gilmer. He was responsible for providing adequate medical care and treatment for all of FCI Gilmer's inmates pursuant to Title 18 U.S.C. §4042 and the Constitution for the united States of America. He was an agent and employee of the Federal Bureau of Prisons. He is sued for damages in his

individual capacity while acting under the color of federal law. Defendant Starcher has since transferred from FCI Gilmer. Defendant's current address is unknown at this time.

6. Defendant, Mary Beth Lichty, was at all times relevant to this cause of action employed as a physician's assistant at FCI Gilmer. She was responsible for providing adequate medical care and treatment for all of FCI Gilmer's inmates pursuant to Title 18 U.S.C. §4042 and the Constitution for the united States of America. She was an agent and employee of the Federal Bureau of Prisons. She is sued for damages in her individual capacity while acting under color of federal law. Defendant Lichty has since transferred to FCI Ashland, P.O. Box 888, Ashland, Kentucky, 41105-0888.

7. Defendant, Elizabeth Masteller, was at all times relevant to this cause of action employed as a physician's assistant at FCI Gilmer. She was responsible for providing adequate medical care and treatment for all of FCI Gilmer's inmates pursuant to Title 18 U.S.C. §4042 and the Constitution for the united States of America. She was an agent and employee of the Federal Bureau of Prisons. She is sued for damages in her individual capcity while acting under color of federal law.

8. Defendant, Teresa Puckett, was at all times relevant to this cause of action employed as an RN at FCI Gilmer. She was responsible for providing adequate medical care and treatment for all of FCI Gilmer's inmates pursuant to Title 18 U.S.C. §4042 and the Constitution for the united States of America. She was an agent and employee of the Federal Bureau of Prisons. She is

sued for damages in her individual capacity while acting under color of federal law. Defendant Puckett has since transferred to FMC Butner, P.O. Box 1000, Butner, North Carolina 27509-1000.

9. Defendant, Janet Bunts, was at all times relevant to this cause of action employed as Health Service Administrator at FCI Gilmer. She was responsible for the administrative functions of the FCI Gilmer's Health Services. She is also responsible for providing adequate medical care and treatment in a timely manner for all of FCI Gilmer's inmates pursuant to Title 18 U.S.C. §4042 and the Constitution for the united States of America. She was an agent and employee of the Federal Bureau of Prisons. She is sued for damages in her individual capacity while acting under color of federal law.

10. Defendant, J. Muller, was at all times relevant to this cause of action employed as a correctional officer working in the FCI Gilmer mailroom. He was an agent and employee of the Federal Bureau of Prisons. He is sued for damages in his individual capacity while acting under color of federal law.

11. Defendant, M. Arnold, was at all times relevant to this cause of action employed as Captain of the FCI Gilmer institution. He was the chief of security, and is responsible for the safe and orderly running of the institution. He was in charge of all correctional officers at FCI Gilmer. He was an agent and employee of the Federal Bureau of Prisons. He is sued for damages in his individual capacity while acting under color of federal law.

12. Defendant, D. Heady, was at all times relevant to this cause of action employed as a unit manager. He is responsible

for the control, management and operation of the C-units housing complex. He was also in charge of the Unit Disciplinary Committee. He was an agent and employee of the Federal Bureau of Prisons. He is sued in his individual capacity while acting under color of federal law.

13. Defendant, D. Livingston, was at all times relevant to this cause of action, employed as Disciplinary Hearing Officer at FCI Gilmer. She was responsible for controlling and maintaining proper disciplinary hearings for FCI Gilmer's inmates. She has a duty to uphold the Constitution as it pertains to prisoners' rights. She was an agent and employee of the Federal Bureau of Prisons. She is sued for damages in her individual capacity while acting under color of federal law.

14. Defendant, K.J. Wendt, was at all times relevant to this cause of action employed as Warden of FCI Gilmer. He was the Chief Executive Officer in charge of all management of the institution. He is responsible for operating the institution, supervising and managing its employees, servants, and agents who were all acting under the color of law in respect to the incarceration and treatment of prisoners at the FCI Gilmer facility. He was an agent, employee of the B.O.P. He must enforce B.O.P. policies and regulations and has a duty to exercise diligence to keep Plaintiff safe and free from harm. He is sued for damages in his individual capacity while acting under color of federal law.

15. Defendant, J.D. Hill, was at all times relevant to this cause of action employed as Assistant Warden of FCI Gilmer. He

was the Chief Executive Officer in charge of security and all programs at FCI Gilmer. He was responsible for the operation, supervising and managing its employees, servants, and agents who were all acting under the color of federal law in respect to security and programs. He must enforce B.O.P. policies and regulations and has a duty to exercise diligence to keep Plaintiff safe and free from harm. He is sued for damages in his individual capacity while acting under color of federal law.

EXHAUSTION OF REMEDIES

16. The Prison Litigation Reform Act ("PLRA"), 42 U.S.C. §1997e(A) provides the necessary elements for exhaustion of remedies with respect to prison conditions. Plaintiff has met this requirement by presenting the issues of concern mentioned herein, informally to Defendants and thereafter through the use of the appropriate form (BP-9), (BP-10) and (BP-11) in accordance with title 28 CFR, §§542.10 through 542.19. Plaintiff further submitted a tort claim (Form 95) to the proper agency (B.O.P.) in accordance with title 28 CFR, part 14 et. seq. and was denied on October 25, 2005. Defendants may not argue failure to exhaust.

FACTS AND HISTORY

17. The Defendants, including individual defendants, must operate and maintain a standard of care and discipline, must insure and maintain that all inmates therein are treated equitably and at all times retain the duty and responsibility to ensure the prisoners committed to the custody of the United States Attorney

are held safely in a manner consistent with rights secured by the Constitution and other laws.

18. On information and belief, the staff at FCI Gilmer, including the individual defendants are not vested with powers to change the Constitution for the united States of America, B.O.P. management procedures or any regulation/duties deemed necessary to insure that suitable quarters are provided, safekeeping is provided, proper care, protection and instruction. The Defendants cannot act arbitrarily.

19. On or about Feb/Mar. 1999, Plaintiff entered the Federal Bureau of Prisons at U.S.P. Terre Haute, Indiana. At this time Plaintiff had an existing thyroid condition (thyroiditis) as was indicated in his presentence report. The thyroid gland, located in the front of the neck just below the larynx, secretes hormones that control metabolism. These hormones are thyroxine (T4) and triodothyronine (T3). Thyroid hormones act upon receptors in tissues throughout the body. They also control the rate at which various things happen, such as the speed of chemical reactions, the rate of tissue growth, and the rate at which electrical impulses travel in your nerves and muscles. When the thyroid gland fails to produce a normal amount of thyroid hormone, a condition known as hypothyroidism occurs. The most common cause of hypothyroidism is thyroiditis, a disease of the thyroid gland where the body's immune system attacks the gland. Failure of the pituitary gland to secrete a hormone to stimulate the thyroid gland is a less common cause of hypothyroidism. Symptoms consist of feeling tired and worn out. You may have general aches and pains and move more

slowly than usual. Your heart rate may slow down, which leads to constipation. Your hair becomes thin, dry, and lifeless. Your skin becomes dry and thickens. You may also notice some memory loss. Some patients experience tingling in their fingers, or loss of balance and difficulty in walking. If untreated, hypothyroidism/ thyroiditis can eventually cause anemia, a low body temperature, and heart failure. This situation may progress to confusion, stupor, or coma (myxedema coma), a life threatening complication in which breathing slows, seizures occur, and bloodflow to the brain decreases. Treatment consists of Levothyroxine, used to replace the deficient thyroid hormone. Plaintiff was not placed on chronic care and no other treatment was given concerning this condition. Defendants had knowledge of the Plaintiff's serious medical need and recklessly disregarded the excessive risk to Plaintiff's health and safety. As a direct and proximate result of not properly treating and caring for Plaintiff's serious medical needs, Plaintiff suffered further injury and hospitalization.

20. On or about February 17, 2000, Plaintiff's medical records revealed that bloodwork was taken and showed a TSH (thyroid stimulating hormone) level of 12.77, approximately 45% above the normal range. Despite this critical knowledge and information, B.O.P. staff neglected to treat and monitor Plaintiff's condition. This continued for 3 years.

21. On or about June 10, 2003, Plaintiff arrived at FCI Gilmer with medical records indicating an existing thyroid condition. Defendants continued to neglect treatment, monitoring, or providing any care for Plaintiff's condition.

22. On or about June 22, 2003, Plaintiff "passed out" in the unit common area. After this incident, Plaintiff went to the Health Services to seek medical attention. Plaintiff complained of having symptoms of dizziness, headaches, and a fever of 100 degrees. Plaintiff was examined and evaluated by duty nurse, Scott Starcher. At this time Defendant Starcher noted that, "nothing was visibly wrong," administered no medication, ordered no blood work or other diagnostic testing and sent Plaintiff back to his unit. Defendant Scott Starcher told Plaintiff to return if symptoms persisted. As a result, Plaintiff's immediate serious medical need was ignored and treatment was delayed.

23. On or about June 23, 2003, Plaintiff went to sick call complaining about the same existing symptoms. Plaintiff's fever was elevated to 101 degrees. Plaintiff was seen by PA Mary Beth Lichty. PA Lichty performed a visual checkup, administered 500 mg. of Tylenol, and told Plaintiff "to return in 24 hours if no improvements." PA Lichty ordered some blood work to be done and also noted that "a chart review indicates a high level of TSH in 2/00 of 12.7 (0.3-7) but no indication of treatment; and a follow up was to be done to consider treatment plans after labwork." However, this was not done and treatment continued to be delayed.

24. On or about June 24, 2003, Plaintiff was scheduled for chronic care concerning a history of asthma. Plaintiff still maintained a temperature of 100 degrees. Plaintiff was seen by PA Masteller. PA Masteller noted that blood work was scheduled for June 30, 2003. No other treatment was given and Plaintiff's

thyroid condition was ignored.

25. On or about June 30, 2003, blood work was drawn from Plaintiff. Medical records reveal that on on or about July 10 or 15, 2003, the blood work was returned. The results were received and reviewed by Doris Williams, Clinical Director on July 16, 2003. Results indicate: WBC 2.8 LO (4.0-11.0), RBC 2.52 LO (4.50-5.50), Hgb 9.3 LO (12.0-17.0), Hematocrit 27.9 LO (36.0-50.0), MCV 111.0 HI (83.0-95.0), MCH 37.2 HI (27.0-34.0), RDW 23.6 HI (11.0-15.0), Neotrophils% 37.9 LO (40.0-75.0%), Lymphocytes% 48.3 HI (15.0-45.0%), Monocytes% 2.6 LO (6.0-15.0%), Eosinophils% 10.9 HI (0.0-7.0%), Neutrophils% #1.1 LO (1.5-7.1), and Monocytes # 0.1 LO (0.3-1.1). Thirteen (13) different levels were abnormal, either high or low. However, despite this indication, Plaintiff was never given an appointment for further consultation or diagnosis, follow-up review, nor treatment plan for these abnormal levels. Defendant(s) knew or should have known of these flagged levels, instead, Plaintiff was forced to endure this condition until symptoms evolved to a higher degree, causing injury and hospitalization.

26. Between November 2003, and January 2004, Plaintiff's symptoms evolved to a more serious degree. Plaintiff now experienced constipation, chills, fatigue, shortness of breath, numbness in fingers and feet, decrease in apetite, weight loss, as well as other symptoms.

27. On or about January 21, 2004, Plaintiff went to sick call complaining of the same symptoms in addition to dizzy spells. Plaintiff had a temperature of 99.3 degrees. Plaintiff was seen by Teresa Puckett and was prescribed Motrin 400 mg. No other treatment was provided.

28. On or about January 23, 2004, Plaintiff went to sick call again complaining about feeling lethargic, having no apetite, weight loss, abdominal pain, fever, chills, dizziness, headaches, and numbness in hands and feet. Plaintiff was seen by PA Matthew Maida. Plaintiff told PA Maida that "something is wrong and I need help!" PA Maida ordered blood work to be drawn again on January 28, 2004, as well as follow-up treatment once results were obtained. PA Maida also noted that, "on review of chart no evidence of hep/hiv infection. Last BW of 7-16-03 shows low Hgb/Hct & T liver enzymes. BW from Terre (Terre Haute) shows TSH of 12.77."

29. On or about January 29, 2004, blood work was returned with panic values of WB 1.6 (4.0-01.5), Hgb 4.0 (12.0-17.0), HcT 12.1 (36-50), platelets 43 (140-415), TSH 9.7 (0.3-5.5). Plaintiff was then ordered to be transported to West Virginia University Hospital, Morgantown, West Virginia.

30. Plaintiff was diagnosed with pancytopenia, neutropenic fever, B-12 deficiency, hypothyroidism, iron deficiency anemia, and lymphadenopathy. Plaintiff was hospitalized from January 29 to February 10, 2004. The "Reason For Hospitalization Course" from the WVU hospitals' discharge summary reports: "This is a 34 year old who has complained of a three-week history of fatigue, shortness of breath, and lightheadness. He was evaluated at Ruby Hospital for pancytopenia of unknown etiology. On admission, his blood counts were white blood cells 1900, hemaglobin 4.2, hematocrit 11.6, platelets 40,000. The patient was transfused with four units of packed red blood cells. His hemaglobin went

from 4.2 to 8.3. He was febrile on admission and was started on Ceftazidime IV. Blood cultures were subsequently negative. The patient had an atypical Wenkebach heartblock on the evening of transfusion. He was monitored in the stepdown overnight and converted back to normal sinus rhythm. He had multiple episodes of this heartblock throughout his admission. This was worked up by cardiology who thought that it was a stable rhythm and required no further treatment at that time. The etiology of the rhythm is unknown. The patient had a bone marrow biopsy on January 30, 2004, which showed hypercellularity with no organisms. Viral titers were done, which were negative. Hematology oncology was consulted. The patient was found to have a low B-12 level of 57 and he was started on B-12 replacement. The bone marrow also showed evidence of iron deficiency. After several days of subcutaneous B-12 replacement, his reticulocyte count began to respond and his counts recovered. Staining of the bone marrow core biopsy also revealed some iron deficiency and he was started on oral iron as well as folic acid. TSH was tested and he was elevated at 15.88. The patient was started on Synthroid 25 mcg. per day. He was noted to have generalized lymphadenopathy. A lymph node biopsy was done to rule out lymphatic malignancy. At this time, preliminary reports from pathology are that this is a reactive lymphadenopathy. However, a malignancy cannot yet be excluded. Additional studies are underway. The patient is discharged in stable condition and will follow up with hematology oncology in two to three weeks. At this time, they are planning to do a repeat bone marrow biopsy." Based on information and education

provided by WVU specialists during this hospitalization, Plaintiff became aware that his anemic condition was caused by the untreated thyroid condition, and that his thyroid condition would require treatment for the duration of Plaintiff's life.

31. As a direct and proximate result of Defendant(s) action and inactions as alleged in paragraphs 19 through 30, Plaintiff suffered undue pain and suffering, mental anguish, paranoid feelings, difficulty in getting to sleep, difficulty in staying asleep, loss of earning capacity, the inability to perform his normal and usual activities, all requiring hospitalization, as well as other injuries and damages that at this time are not fully known.

32. After Plaintiff was discharged WVU hospital prescribed oral iron pills to be taken daily as well as B-12 injections to be administered monthly for an indefinite period of time.

33. During the months of January and February 2005, Plaintiff was not scheduled to receive his monthly B-12 injections. On February 6, 2005, Plaintiff notified Health Services about this deficiency through an institutional "Inmate Request to Staff." (cop-out) This request was not answered.

34. On or about February 22, 2005, during the lunch meal, Plaintiff approached Defendant Bunts asking why he wasn't scheduled to receive the monthly injections and why his "Request" was not answered. Defendant Bunts replied,"You were not scheduled for your injections? I personally put in the order myself." Plaintiff still never received his monthly injections after two (2) months.

35. On or about March 3, 2005, Plaintiff initiated an admini-

strative grievance concerning the issue of being denied treatment and timely medical care.

36. On or about March 11, 2005, after submitting an administrative complaint, Plaintiff was given his monthly injection.

37. Defendant(s) breached their duty to provide medication in a timely manner as prescribed by title 18 U.S.C. §4042, the Constitution for the united States of America and elsewhere.

38. As a direct and proximate result of Defendant(s) actions and inactions as alleged in paragraphs 32 through 37, Plaintiff suffered low B-12 levels, fatigue, mental sluggishness, mental anguish, undue stress, as well as other injuries and damages that at this time are not fully known.

39. On or about March 8, 2005, at approximately 12:15 pm, Plaintiff effected a third party service of process on behalf of another inmate, Michael Hornes #10847-007 concerning a private adminsitrative process to Defendant Arnold. On the front of the envelope was typed: "Melvin Johnson, in the nature of: [Process Server] - Service of Process per: F.R.CV.P.4; Benny v. Pipes, 799 F.2d 489 - M. Arnold, F.C.I. Gilmer." Defendant Arnold knew or should have known the Plaintiff's statutory right to effect a third party service.

40. On or about March 8, 2005, at approximately 12:30 pm, Plaintiff again effected a third party service on behalf of another inmate, Michael Hornes #10847-007 concerning a private administrative process to Defendant J. Muller. On the front of the envelope was typed: "Melvin Johnson - Service of Process in the nature of: F.R.Cv.P.4; and Benny v. Pipes, 799 F.2d 489 - J. MULLER,

Mailroom officer." Defendant Muller knew or should have known the Plaintiff's statutory right to effect a third party service.

41. On or about March 8, 2005, at approximately 1:15 pm, Plaintiff was called to the lieutenant's office. At this time the acting lt. (Nerdstad) informed Plaintiff that he was going to be placed in Special Housing Unit ("S.H.U.") a.k.a. adminsitrative segregation. Upon asking for an explanation as to why he was going to the SHU and what he had done wrong, Plaintiff was given no explanation. Plaintiff was then escorted to the SHU. Later, Plaintiff was given an Administrative Detention Order stating, "...Is pending investigation of a violation of Bureau regulations."

42. On or about March 9, 2005, at approximately 12:55 pm, Plaintiff was given two (2) incident reports by Lt. Whinery. The incident reports were for "Possession of anything unauthorized (code 305)." One incident report was written by Defendant Arnold, and the other written by Defendant Muller. The incident report written by Defendant Muller stated, "I was giving legal mail to counselor Reed through the mailroom half window. Inmate Johnson #52966-060 walked in and handed me an envelope. I asked what it was. He told me he was serving papers on behalf of Inmate Hornes #10847-007. I asked Inmate Johnson if Hornes gave him the papers he said yes. On the envelope it said M. Johnson (Process Server)." The incident report written by Defendant Arnold stated, "On 3-8-05 at 12:10 pm., while standing mainline Inmate Johnson #52966-060 walked up to me and handed me an envelope and he stated he was giving me a copout. When I looked at the outside of the envelope, I discovered he had printed the following statement

on it 'Melvin Johnson, in the nature of Process Server.' When I opened the envelope, I discovered the envelope contained an Inmate Request to Staff addressed to me from Inmate Michael Eric Hornes #10847-007. Inmates are not permitted to possess 'Legal Mail or Inmate Request to Staff' of another inmate in any area of the institution other than the law library."

43. On or about March 11, 2005, at approximately 1:20 pm, Plaintiff was seen by Unit Disciplinary Committeee (U.D.C.) which consisted of D. Heady and L. Smith. Plaintiff informed Unit Manager, D. Heady of his statutory right to effect service of process as a third party. Defendant Heady ignored Plaintiff's rights, found Plaintiff guilty of possession of anything unauthorized and sanctioned him to 60 days loss of phone and commissary privileges on one incident report (#1319633), and referred the other incident report (#1319637) to the Disciplinary Hearing Officer (D.H.O.) for more serious sanctions. Defendant Heady knew or should have known of Plaintiff's statutory right to effect third party service.

44. On or about March 24, 2005, Plaintiff was scheduled for a disciplinary hearing in front of Defendant, D. Livingston for the remaining incident report (#1319637). During this hearing Plaintiff submitted an Affidavit of Truth notifying Defendant Livingston amongst other things, that during his research he discovered a U.S. Court of Appeals case and the Federal Rules of Civil Procedures, Rule 4, on the principle of serving process, that it was the Plaintiff's belief that he was acting morally within the law, that Plaintiff was not engaged in business activities, that he did not receive anything of enumeration or compensation,

and that he acted independent with no conflict between Defendant Muller or Arnold. In addition to Plaintiff's Affidavit, Plaintiff requested Inmate Hornes as a witness to testify on Plaintiff's behalf. Inmate Hornes presented a copy of the U.S. Court of Appeals case, Benny v. Pipes, 799 F.2d 489, which expounds on the principle of service of process. Benny v. Pipes states that service of process was valid for a prisoner on behalf of another prisoner in accordance with Rule 4. While Defendant Livingston was reading this case and Mr. Hornes was explaining the situation and facts at hand, Defendant Livingston became hostile/retaliatory and started talking in a very condescending manner. As a result of this conflict, Defendant Livingston stated that, "This is a state case and does not apply to federal prisoners," she ultimately dismissed Plaintiff's witness before he was done with his conclusion of testimony. Plaintiff then responded that, "although the case involved state prisoners, the case was held in federal court involving federal law and statutory principles, and that policy doesn't supersede the CFR, and CFR doesn't supersede statutes, along with the fact that case law interprets statutes, it was my belief that I was operating morally under the principles of law." Defendant Livingston then replied, "B.O.P. policy does supersede the law in some way," and was about to give a finding of guilt and impose sanctions without due process of law. Before Defendant Livingston imposed a finding of guilt and sanctions there was an apparent conflict about which incident report was being discussed and a postponement was scheduled.

45. On or about March 24, 2005 after this hearing, Plaintiff

then sent a "Inmate Request to Staff" to Defendant Livingston a/k/a conflict resolution." In the body of this Request Plaintiff asked several questions concerning the disciplinary hearing, and asked that she respond in writing and detail. This was constructive notice that Defendant Livingston was infringing upon Plaintiff's rights. Defendant Livingston failed to respond or answer Plaintiff's request.

46. On or about March 30, Plaintiff was scheduled for another disciplinary hearing. Despite being aware of Plaintiff's rights, Defendant Livingston found Plaintiff guilty and imposed sanctions of 14 days segregation, 14 days loss of good time, and 60 days loss of visiting priviliges for possession of anything unauthorized. It is the belief of Plaintiff that staff at FCI Gilmer, including the individual defendant(s), may not infringe on prisoner's liberty through disciplinary proceedings, including but not limited to acts of retaliation.

47. On or about March 31, 2005, Plaintiff mailed a letter to the Federal Bureau of Prisons, Mid-Atlantic Regional Office because he was separated from his legal work, and requested an extension of time to appeal a previous administrative remedy appeal since he faced an imminent deadline.

48. On or about April 4, 2005, Plaintiff received an order from the U.S. District Court, dated March 30, 2005, denying Plaintiff's §2255 motion. It was Plaintiff's belief that he had sixty (60) days to submit a Notice of Appeal and a Certificate of Appealability (COA).

49. On or about April 12, 2005, Plaintiff was released from

SHU after completing his disciplinary segregation.

50. On or about April 15, 2005, Plaintiff was called to the Lieutenant's office by Lt. Nash. Plaintiff was informed by Lt. Nash that he had a "separatee" on the compound and that he would have to be placed back into the SHU. The Defendant(s) and each of them did, with the bad purpose and evil motive, embark upon a campaign of reprisal by transferring the Plaintiff from his living quarters in the general population, to a locked cell wherein Plaintiff was locked up for 23 hours a day. As a result, Plaintiff was separated from his personal property and legal work, therefore hindering his ability to exhaust his administrative remedies, and research and complete his post conviction appeal. Plaintiff was given an Administrative Detention Order stating, "I/M JOHNSON is being placed in Special Housing pending CLASSIFI-CATION."

51. On or about April 15, 2005, Plaintiff went on a hunger strike objecting and challenging the contentions of staff that Plaintiff had an alleged separatee on the compound. Based on information and belief the alleged separatee and placement into SHU was retaliation by Defendant(s) because Plaintiff exercised his right to petition for redress of grievance and to effect service of process.

52. On or about April 15, 2005, Plaintiff submitted a Request to Staff to attend the SHU's law library. Plaintiff informed staff that he had a deadline to meet. Plaintiff continued requesting verbally and in writing to staff to utilize the law library throughout his stay in SHU.

53. On or about April 17, 2005, Plaintiff submitted an "Inmate Request to Staff" to Defendant K.J. Wendt, Warden of the institution. This request questioned the Warden concerning the alleged separtee, as well as informing him that Plaintiff had a court deadline to meet and that being in the SHU hinders Plaintiff's ability to meet this deadline, and other things. Defendant Wendt ignored this request, failed to assist Plaintiff in meeting his deadline, thereby acquiescing in the retaliatory SHU placement.

54. On April 18, 2005, Plaintiff was placed into an observation cell while in the SHU related to the hunger strike. Correctional officers who worked in the SHU then confiscated Plaintiff's personal property, including personal hygiene items, mail, stamps, etc., and all legal work that was in his possession at that time, including all documents relating to pending case. Pursuant to BOP policies 28 C.F.R. §549.64 and Program Statement 5562.04, only commisary and food items are to be removed during a hunger strike. Plaintiff was not in possession of any commissary or food items. Based on information and belief, Defendant Arnold ordered the confiscation without any penological justification. Nevertheless, Defendant(s) knew or should have known that BOP policy prohibits such actions. This action caused Plaintiff unecessary grief, avoidable stress, mental anguish, loss of sleep, the inability to communicate with family and loved ones, the inability to seek access to the courts, the inability to maintain proper personal hygiene, and the inability to redress of grievances. This continued for approximately (10) days.

55. In addiion, while Plaintiff was being retained in the

SHU his personal property from his locker in general population were also either lost or confiscated as well as legal material Plaintiff had prepared for grievances and a challenge to his criminal conviction, other materials including but not limited to, inadequate medical care appeal (BP-11), disciplinary hearing appeal (BP-10), and post conviction pleadings. Defendant(s) retention of these items delayed Plaintiff in exhaustion of available remedies, denied access to the courts, and subjected him to enormous amounts of extra work while he attempts to reconstruct them.

56. On or about April 24, 2005, Plaintiff wrote another request to Defendant Wendt concerning the alleged separatee, his placement into SHU, the hunger strike, and confiscation of his property.

57. On or about April 25, 2005, Defendant Arnold ordered SHU staff to confiscate Plaintiff's property again without any penological justification.

58. On or about April 28, 2005, Defendant Hill answered Plaintiff's Inmate Request to Staff on behalf of Defendant Wendt. In his response, Defendant Hill stated, "You were placed in SHU pending classification issues. Once those classification issues have been addressed, you will either be returned to the general population or transferred to another facility. As stated in the Notification of Central Inmate Monitoring, BP-S340.051, dated March 2, 1999, you were notified of a need to keep you separated from another individual(s) located within the Federal Prison System, for your mutual protection. As such, this classification has not changed." "Your claim of retaliation has been reviewed

and determined to be unfounded." However, based on information and belief, there was no legitimate separatee at FCI Gilmer.

59.On or about May 1, 2005, Plaintiff was permitted to attend the SHU law library. It is the policy of FCI Gilmer that SHU inmates are allowed 1 hour of time per request to utilize the SHU law library while confined in the SHU. At this time, the typewriter and computer (which accesses WestLaw and Lexis Nexis programs) were not functioning. The only other available research materials were the U.S.C.A , policy statements, and a few secondary research materials (i.e. Black's Law Dictionary, Constitutional Rights of Prisoner's, etc.) As a direct and proximate result, Plaintiff was denied access to the courts, retaliated against, and causing delays in his attempt to successfully appeal his post conviction denial.

60. On or about May 1, 2005, immediately after this incident, Plaintiff submitted another request to use the law library.

61. On or about May 2, 2005, Plaintiff received a rejection notice concerning Administrative Remedy #365107-A1. Since Plaintiff was separated from his property, he was unable to adequately appeal this rejection. Plaintiff made several verbal and written requests to staff for assistance concerning this issue.

62. On or about May 5, 2005, Plaintiff wrote a Request to Staff to A.W. Hill in an attempt to resolve the previously asserted complaints. In addition, Plaintiff requested assistance on getting his property and an extension of time for his appeals.

63. On or about May 5, 2005, Plaintiff submitted a grievance concerning his denial of access to the courts.

64. Also sometime in May, 2005, Plaintiff submitted a grievance concerning the confiscation of his proerty. This grievance was not answered and Plaintiff submitted an appeal accordance with policy.

65. On or about May 14, 2005, Plaintiff was taken to inventory and receive his personal property. However, the only property that the SHU officer had in his possession was the legal work that Plaintiff had in his possession upon being admitted to the SHU and which was subsequently confiscated from his SHU cell on April 18 and 25, 2005. Plaintiff's other legal material and personal property from his locker in general population were continued to be confiscated, lost or intentionally withheld without penological justification. This caused Plaintiff further delays, hinderance, obstructed his access to the court by preventing Plaintiff from meeting his legal deadlines.

66. On or about May 18, 2005, Plaintiff verbally spoke with SHU Lt Profitt about his property and the opportunity to use the law library in order to prepare his legal work. Lt. Proffit allowed Plaintiff to use the law library at this time. Plaintiff was permitted an hour of use of the library.

67. Also during this time while Plaintiff was being held in the SHU, Plaintiff spoke with Unit Manager D. heady about his property and legal deadlines. Defendant Heady also ignored Plaintiff's request for assistance thereby acquiescing the retaliation.

68. On or about May 20, 2005, Plaintiff's administrative remedy appeal #376316 was rejected as being untimely by the Regional Director. The rejection was caused by Plaintiff's separation from his property which was facilitated by the Defendants con-

fiscation and losing Plaintiff's property/legal work. As a result, Plaintiff was obstructed, hindered and denied his access to the court and his First Amendment right to grievance.

69. Plaintiff showed this rejection to Defendant Heady requesting assistance in this matter. However, Plaintiff again was denied any assistance in getting an extension of time.

70. On or about May 22, 2005, Plaintiff submitted an adminsitrative remedy grievance concerning his placement in SHU and the alleged separatee. This grievance was ignored, and not answered in accordance with BOP policy. After not receiving a response, Plaintiff submitted an appeal to the Warden in accordance with 28 CFR §542.18 which states,"If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level." Plaintiff then appealed to the regional level on June 26, 2005. After being rejected on July 1, 2005, Plaintiff exhausted his remedies to the BOP Central Office.

71. On or about June 2, 2005, Plaintiff was taken to the law library again. At this time, the computer system was broken again. Plaintiff wrote another Request to Staff concerning the issue and requested to be able to utilize the law library during the day hours since no one used it at that time.

72. On or about June 3, 2005, Plaintiff was taken to the law library. At this time Plaintiff was given the standard 1 hour usage. This one hour was also the last opportunity/make up time Plaintiff was given to utilize the SHU law library while being detained in the SHU. The total hours given were three (3).

73. On or about June 22, 2005, Plaintiff's personal property was returned including his legal work.

74. On or about June 29, 2005, after obtaining his legal work, Plaintiff mailed Adminsitrative Remedy #381643 to the Regional Director. As a result of confiscating Plaintiff's personal property, this appeal was rejected as untimely on July 7, 2005, despite BOP regulation and his letters of inquiries and requests for assistance.

75. On or about July 13, 2005, Plaintiff wrote a letter to the Regional Director. Plaintiff informed the Region that he was told by unit team that an extension of time was granted for this matter and his appeal should be accepted.

76. On or about July 19, 2005, this appeal was rejected again. A remark was included which stated, "You may get a staff member to write a memo stating that you could not get your DHO packet until your release from SHU."

77. On or about July 20, 2005, Plaintiff was released from the SHU.

78. On information and belief, inmate Michael Hornes #10847-007 was also transferred on this day, which allowed Plaintiff to be released.

79. On or about July 20, 2005, and continuing through August 18, 2005, Plaintiff made several attempts with Defendants Heady, Arnold and Hill to acknowledge the Regional Director's July 19, 2005 correspondence concerning writing a memo verifying that Plaintiff didn't have his DHO packet while he was in the SHU. Defendants failed to acknowledge this letter. As a result Plaintiff

was refused assistance by staff and was forced to exhaust his administrative complaint without review by the BOP.

80. On or about August 18, 2005, Plaintiff mailed Administrative Remedy #381643 to the BOP Central Office in order to exhaust his administrative remedy. This appeal was rejected August 29, 2005.

COUNT I
FEDERAL QUESTION/BIVENS

81. Defendants Doris Williams, Scott starcher, Mary Beth Lichty, Teresa Puckett, and Elizabeth Masteller, under color of federal law, as is stated in paragraphs 19 through 31, were deliberately indifferent to Plaintiff's serious medical needs and deprived Plaintiff rights, privileges and immunities as secured by the Eighth Amendment to the Constitution for the united States of America, including but not limited to the right to be free of cruel and unusual punishment.

COUNT II
NEGLIGENCE/F.T.C.A.

82. Defendants, United States Government a/k/a Department of Justice, Bureau of Prisons, its servants and employees, Doris William, Scott Starcher, Mary Beth Lichty, Teresa Puckett, and Elizabeth Masteller, as stated in paragraphs 19 through 31 have breached their duty to hold the Plaintiff safely, harmless, free from harm, and have failed to properly provide care for the Plaintiff, as stated in title 18 U.S.C. §4042, and the Constitution for the united States of America, and this has caused significant

injuries and damages to the Plaintiff.

COUNT III
FEDERAL QUESTION/BIVENS

83. Defendant Janet Bunts, under color of federal law, as stated in paragraphs 32 through 38, was deliberately indifferent to Plaintiff's serious medical needs and deprived Plaintiff rights, privileges and immunities as secured by the Eighth Amendment to the Constitution for the united States of America, including but not limited to the right to be free of cruel and unusual punishment.

COUNT IV
NEGLIGENCE/F.T.C.A.

84. Defendant, United States Government a/k/a Department of Justice, Bureau of Prisons, its servants, and employess, Janet Bunts, as stated in paragraphs 32 through 38 have breached their duty to provide medication and treatment in a timely manner as stated in 18 U.S.C. §4042 and elsewhere, and this has caused the Plaintiff damages and injury.

COUNT V
FEDERAL QUESTION/BIVENS

85. Defendants, J. Muller, M. Arnold, D. Heady, D. Livingston, K.J. Wendt, and J.D. Hill, under color of federal law, as stated in paragraphs 39 to 80, retaliated, acquiesced in retaliation against Plaintiff, invoked fear and intimidation, prevented Plaintiff from exercising statutory and constitutional rights, hindered and obstructed Plaintiff from exercising these rights, privileges and immunities as secured by the First Amendment to the Constitution

including but not limited to the right to petition the government for a redress of grievance without retaliation and punishment.

COUNT VI
NEGLIGENCE/F.T.C.A.

86. Defendants, J. Muller, M. Arnold, D. Heady, D. Livingston, K.J. Wendt, and J.D. Hill, as stated in paragraphs 39 to 80 have breached their duty to uphold the Constitution as stated in Title 5 U.S.C. §§3331-3333.

PRAYER

WHEREFORE, Plaintiff prays that this court:

A. Enter judgement in his favor against each Defendant, separately in some instances, but hold them jointly and severally liable to the Plaintiff in other instances as listed below:

B. In respect to Count I with all Defendants listed in paragraphs 19 through 31, award Plaintiff compensatory damages jointly and severally in the sum of Five Hundred Thousand Dollars ($500,000.00). Also, in respect to Count I with all Defendants listed in paragraphs 19 through 31, award Plaintiff exemplary/punitive damages separately in respect to each of those Defendants in the sum of Fifteen Thousand Dollars ($15,000.00) per Defendant and/or award Plaintiff exemplary/punitive damages in a discretionary amount as to each Defendant.

C. In respect to Counts II and IV pursuant to the F.T.C.A. Plaintiff asks this court to enter judgement in his favor against the Defendant United States government a/k/a U.S. Department of Justice (BOP) awarding Plaintiff compensatory damages in the amount of Fifty

Thousand Dollars ($50,000.00).

D. In respect to Count III with Defendant listed in paragraphs 32 through 38, award Plaintiff compensatory damages in the sum of Fifty Thousand Dollars ($50,000.00). Also, in respect to count III with Defendant listed in paragraphs 32 through 38, award Plaintiff exemplary/punitive damages in the sum of Fifteen Thousand ($15,000.00) and/or award Plaintiff exemplary/punitive damages in a discretionary amount.

E. In respect to Count V with all Defendants listed in paragraphs 39 to 80, award Plaintiff compensatory damages jointly and severally in the sum of One Hundred Thousand Dollars ($100,000.00). Also, in respect to Count V with all Defendants listed in paragraphs 39 to 80, award Plaintiff exemplary/punitive damages separately in respect to each of those Defendants in the sum of Twenty Five Thousand Dollars ($25,000.00) per Defendant and/or award Plaintiff exemplary/punitive damages in a discretionary amount as to each Defendant..

F. In respect to Count VI pursuant to F.T.C.A. Plaintiff asks this court to enter judgement in his favor with all Defendants listed in paragraphs 39 to 80, and award Plaintiff compensatory damages jointly and severally in the sum of Fifty Thousand Dollars ($50,000.00) to each Defendant.

G. Award Plaintiff reasonable attorney fees and costs.

H. Order such further relief as this court may deem just and proper.

Respectfully submitted,

Melvin D. Johnson [#52966-060]
FCI Gilmer, P.O. Box 6000
Glenville, West Virginia 26351

JURY DEMAND

The Plaintiff demands a trial by jury on all issues properly so triable.

Melvin D. Johnson, Jr.
FCI Gilmer, P.O. Box 6000
Glenville, West Virginia 26351

AFFIDAVIT OF VERIFICATION

In The
State of West Virginia
County of Gilmer

Melvin D. Johnson, Jr.,
Plaintiff,

v.

Federal Bureau of Prisons, et al
Defendants.

Affidavit
of
Melvin D. Johnson, Jr.

Civil Action No. _____

The affiant, Melvin D. Johnson, Jr., verify that the facts stated in the attached complaint for relief pursuant to 28 U.S.C. §11331(A), 1361, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971) and the Federal Tort Claims Act, are true, correct and certain according to Affiant/Plaintiff's knowledge and belief, and that the facts stated on information and belief are true, correct and certain to the best of Affiant/Plaintiff's knowledge and belief.

I declare under the penalty of perjury pursuant to the provisions of 28 U.S.C. §1746(1) that the foregoing is true and correct.

Sworn to before me this 17 day of January, 2006.

Lori Smith
Notary Public
In and for the State of
West Virginia. My Commission
Expires: August 29, 2013

M D J
Melvin Johnson
"Without Recourse"

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LORI SMITH
201 FCI LANE
GLENVILLE, WV 26351
My commission expires August 29, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MELVIN D. JOHNSON, JR.,

Plaintiff,

v. **Civil Action No. 2:06cv6**
(Maxwell)

UNITED STATES OF AMERICA,
DORIS WILLIAMS, SCOTT STARCHER,
MARY BETH LICHTY, TERESA PUCKETT,
J. MULLER, M. ARNOLD, D. HEADY, D.
LIVINGSTON, K. J. WENDT, J. D. HILL,
JANET BUNTS AND ELIZABETH MASTELLER,

Defendants.

ORDER OF DISMISSAL

The Court, having been verbally notified by the United States Attorney's Office that the above-styled cause has been settled, it is hereby

ORDERED that this cause be **DISMISSED**, subject to the right of any party to move within 60 days of the date of entry of this Order, to reopen the action, upon good cause shown, or to submit a stipulated form of final order or judgment. It is further

ORDERED that the Clerk shall transmit electronic copies of the this Order to all counsel of record and to mail a copy of this Order to the pro se plaintiff.

ENTERED: April 20, 2007.

/s/ Robert E. Maxwell
UNITED STATES DISTRICT JUDGE

FORM 1

28 CFR Pt. O, Subpt. Y, App. § 1(b)(2)(b)

(b)(5)

TO: Betsy Steinfeld Jividen,
Civil Chief

FROM: Daniel W. Dickinson, Jr.,
Assistant United States Attorney

RE: Melvin Johnson v. UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS,DORIS WILLIAMS, SCOTT STARCHER,MARY BETH LICHTY, TERESA PUCKETT, J. MULLER, M. ARNOLD, D. HEADY, D. LIVINGSTON, K.J. WENDT, J.D. HILL, JANET BUNTS, ELIZABETH MASTELLER,
Civil Action No. 2:06-CV-6

NATURE OF CASE AND FACTS: SEE ATTACHED

CONTESTED ISSUES AT TRIAL: SEE ATTACHED

RECOMMENDATION OF AUSA: (b)(5)

SYNOPSIS OF REASONS FOR RECOMMENDATION (Settlement Memorandum attached):

HISTORY OF SETTLEMENT NEGOTIATIONS: (b)(5)

(b)(5)

I ( ) authorize ( ) deny the above request for compromise and close of this case/claim.

DATE: _____

_____
BETSY STEINFELD JIVIDEN
Chief, Civil Division

Welcome WILSON J MOORER | **Logout**

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results **Case Actions:**

Case ID: CIV-MXR-2016-00227 **Short Description:** JOHNSON V. UNITED STATES GOVERNMENT ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	2:06-cv-00006-REM-JSK
Short Description	JOHNSON V. UNITED STATES GOVERNMENT ET AL
Classification	Civil
Case Type	Bivens
Case Sub-Type	
Current Region	MID-ATLANTIC REGIONAL OFFICE
Current Institution	Gilmer (FCI)
Incident Region	MID-ATLANTIC REGIONAL OFFICE
Incident Institution	Gilmer (FCI)
Monetary Relief Sought	$800,000.00
Estimated Amount	$
Office	Elkins
Jurisdiction	NORTHERN DISTRICT OF WEST VIRGINIA
Responsible Legal Office	FCI Beckley

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	04/05/2007
Type	Settled
Reason	
Sought	
Amount offered	$30,000.00
Total Amount Paid	$30,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	Yes

Case Initiation Dates

Date Received	01/20/2006
Date Filed	01/20/2006

Case Progress

Current Owner	SHARON WAHL
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	
Comments	

AO 240 (1/94)

United States District Court

DISTRICT OF

Plaintiff

V.

Defendant

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF FEES AND AFFIDAVIT

CASE NUMBER:

RECEIVED
2003 MAY -7 A 11:27
CLERK'S OFFICE
ACCOUNTING

I, Dwayne Manning declare that I am the (check appropriate box)

☒ petitioner/plaintiff/movant ☐ other

in the above-entitled proceeding; that in support of my request to proceed without prepayment of fees or costs under 28 USC. §1915 I declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief sought in the complaint/petition/motion.

In support of this application, I answer the following questions under penalty of perjury:

1. Are you currently incarcerated?: ☒ Yes ☐ No (If "No" go to Part 2)

   If "Yes" state the place of your incarceration FCI Cumberland, MD

   Are you employed at the institution? Yes Do you receive any payment from the institution? Yes

   Have the institution fill out the Certificate portion of this affidavit and attach a ledger sheet from the institution(s) of your incarceration showing at least the past **six** months' transactions.

2. Are you currently employed? N/A ☐ Yes ☐ No

   a. If the answer is "Yes" state the amount of your take-home salary or wages and pay period and give the name and address of your employer. N/A

   b. if the answer is "No" state the date of your last employment, the amount of your take-home salary or wages and pay period and the name and address of your last employer. N/A

3. In the past 12 twelve months have your received any money from any of the following sources?

a.	Business, profession or other self-employment	☐ Yes	☐ No
b.	Rent payments, interest or dividends	☐ Yes	☐ No
c.	Pensions, annuities or life insurance payments	☐ Yes	☐ No
d.	Disability or workers compensation payments	☐ Yes	☐ No
e.	Gifts or inheritances	☐ Yes	☐ No
f.	Any other sources	☐ Yes	☐ No

N/A

If the answer to any of the above is "Yes" describe each source of money and state the amount received and what you expect you will continue to receive.

4. Do you have **any** cash or checking or savings accounts? ☐ Yes ☒ No

If "Yes" state the total amount. _____

5. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles or othe valuable property? ☐ Yes ☒ No

If "Yes" describe the property and state its value.

6. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support.

N/A

I declare under penalty of perjury that the above information is true and correct.

5-15-03
DATE

SIGNATURE OF APPLICANT

CERTIFICATE

(Incarcerated applicants only)
(To be completed by the institution of incarceration)

I certify that the applicant named herein has the sum of $ 62.82 on account to his/her credit at (name of institution) FCI Cumberland . I further certify that the applicant has the following securities to his/her credit: None _____ . I further certify that during the past six months the applicant's average balance was $ 40.92 .

5/22/03
DATE

Maria K. Cook

Maria K. Cook, Acting Controller
SIGNATURE OF AUTHORIZED OFFICER

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Account # 160'3050

MANNING, DWAYNE PMI
A1

INVOICE	TIME	DATE	TRANSACTION DESCRIPTION	AMOUNT	[illegible]
000033	11:38	01-17-03	SALE / REGULAR	1.25-	87.38
4DFC6B	19:23	01-18-03	DEPOSIT ITS FUNDS	2.00-	85.38
4E0228	22:06	01-19-03	DEPOSIT ITS FUNDS	2.00-	83.38
4E2749	21:30	01-20-03	DEPOSIT ITS FUNDS	2.00-	81.38
000033	17:24	01-22-03	SALE / REGULAR	38.70-	42.68
4E5BA1	21:44	01-23-03	DEPOSIT ITS FUNDS	2.00-	40.68
4E79A2	19:04	01-25-03	DEPOSIT ITS FUNDS	2.00-	38.68
000060	18:16	01-29-03	SALE / REGULAR	14.20-	24.48
4EC88A	22:43	01-30-03	DEPOSIT ITS FUNDS	2.00	22.48
4F2CD5	21:45	02-03-03	DEPOSIT ITS FUNDS	2.00-	20.48
000026	17:16	02-05-03	SALE / REGULAR	18.30-	2.18
000029	17:21	02-05-03	SALE / REGULAR	.85-	1.33
JAN03U	8:01	02-07-03	UNICOR PAY	209.72	211.05
4F8D9F	19:13	02-07-03	DEPOSIT ITS FUNDS	2.00-	209.05
4F8300	17:30	02-08-03	DEPOSIT ITS FUNDS	2.00-	207.05
5011AF	21:28	02-11-03	DEPOSIT ITS FUNDS	2.00-	205.05
000105	18:49	02-12-03	SALE / REGULAR	69.90-	135.15
000106	18:51	02-12-03	SALE / REGULAR	4.00-	131.15
507570	17:39	02-15-03	DEPOSIT ITS FUNDS	2.00-	129.15
50A7C0	19:37	02-17-03	DEPOSIT ITS FUNDS	2.00-	127.15
50B262	16:40	02-18-03	DEPOSIT ITS FUNDS	3.00	124.15
000041	17:17	02-19-03	SALE / REGULAR	30.15-	94.00
50CD89	21:30	02-19-03	DEPOSIT ITS FUNDS	2.00-	92.00
513859	19:50	02-25-03	DEPOSIT ITS FUNDS	2.00-	90.00
000076	18:20	02-26-03	SALE / REGULAR	54.20-	35.80
51D535	21:43	03-02-03	DEPOSIT ITS FUNDS	1.00-	34.80
000072	17:05	03-05-03	SALE / REGULAR	29.70-	5.10
52022F	21:36	03-05-03	DEPOSIT ITS FUNDS	2.00-	3.10
FC003U	7:29	03-07-03	UNICOR PAY	188.64	191.74
52B6A8	21:24	03-11-03	DEPOSIT ITS FUNDS	1.00-	190.74
000118	17:50	03-12-03	SALE / REGULAR	59.15-	131.59
000110	19:16	03-13-03	SALE / REGULAR	.50	132.09
52E849	21:24	03-13-03	DEPOSIT ITS FUNDS	1.00	131.09
53161F	16:55	03-15-03	DEPOSIT ITS FUNDS	2.00-	129.09
531F4F	22:03	03-15-03	DEPOSIT ITS FUNDS	2.00	127.09
534703	21:26	03-17-03	DEPOSIT ITS FUNDS	2.00-	125.09
000076	18:31	03-19-03	SALE / REGULAR	44.00-	81.09
538917	19:38	03-23-03	DEPOSIT ITS FUNDS	2.00-	79.09
PF1331	15:06	03-25-03	COMMISSARY FORM	40.00-	39.09
53E04F	22:57	03-25-03	DEPOSIT ITS FUNDS	2.00-	37.09
000120	12:04	03-28-03	SALE / REGULAR	3.00	34.09
543007	19:28	03-30-03	DEPOSIT ITS FUNDS	1.00-	33.09
543F40	20:38	03-31-03	DEPOSIT ITS FUNDS	2.00-	2[illegible].09
000087	19:34	04-01-03	SALE / REGULAR	96.70-	4.39

FPI CUMBERLAND LIMITED SPECIAL USE

ACCOUNT
STATEMENT
DATE 05/21/03
PAGE No.03

Account # 160170M6

MANNING, DWAYNE NMI
A1

INVOICE	TIME	DATE	TRANSACTION DESCRIPTION	AMOUNT	
54D487	21:17	04-05-03	DEPOSIT ITS FUNDS	2.00-	2.75
MAR03U	8:54	04-07-03	UNICOR PAY	277.91	280.32
000079	18:14	04-08-03	SALE / REGULAR	111.00	169.32
55979B	20:02	04-12-03	DEPOSIT ITS FUNDS	2.00-	167.30
000058	19:09	04-15-03	SALE / REGULAR	50.10-	117.20
5649F6	19:25	04-20-03	DEPOSIT ITS FUNDS	2.00-	115.20
564PCF	19:57	04-20-03	DEPOSIT ITS FUNDS	3.00-	112.20
000024	17:12	04-21-03	SALE / REGULAR	42.30-	69.90
000025	17:14	04-21-03	SALE / REGULAR	3.75-	66.15
58C4E8	21:46	04-26-03	DEPOSIT ITS FUNDS	2.00-	64.15
58D108	20:01	04-27-03	DEPOSIT ITS FUNDS	2.00	62.15
000016	16:49	04-29-03	SALE / REGULAR	47.80-	14.35
5753E1	21:33	05-03-03	DEPOSIT ITS FUNDS	2.00-	12.35
576EE9	21:53	05-04-03	DEPOSIT ITS FUNDS	2.00-	10.35
000061	17:54	05-06-03	SALE / REGULAR	9.00	1.35
APR03U	9:58	05-07-03	UNICOR PAY	165.32	166.67
581612	19:54	05-10-03	DEPOSIT ITS FUNDS	2.00	164.67
503A5F	19:00	05-11-03	DEPOSIT ITS FUNDS	2.00-	162.67
000095	18:43	05-13-03	SALE / REGULAR	69.40	93.27
58CA1D	22:15	05-17-03	DEPOSIT ITS FUNDS	2.00-	91.27
000003	17:01	05-20-03	SALE / REGULAR	16.45	74.82
PF1805	9:28	05-21-03	COMMISSARY FORM	12.00-	62.82

**** TRANSACTION TOTAL **** 18.18

Nov.-Apr.

ENDING	AVAILABLE BALANCE	ENCUMBRANCE BALANCE	OUTSTANDING BALANCE	SPECIAL BALANCE	ACCOUNT BALANCE
	62.82	.00	.00	.00	[illegible]

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

Dwayne Manning,

Plaintiff,

vs

Lambert, Reid, Dula, Rogers, Green, Cutter, Brenize, Gray, Smith(nurse), Borroc, Gourioux, Andrews, Cox, Crump, Johnson, Leap, Most, Hollier, Navalaney, Sines, Hart, Bernazolli, Lewis, Ezekiel, Finger, Bogdan, Asbourn, Shearin, United States Department of Justice, Bureau of Prisons, John Does, and Jane Does,

Defendants.

CIVIL CASE NO. AW-03 3007

JURY TRIAL DEMANDED

TORT NO. T-MXR-2003-00001

Preliminary Statement

This is a civil rights action filed by Dwayne Manning, a federal prisoner, pro se, for damages and injunctive relief under Bivens vs Six Unknown Narcotic Agents. 403 U.S. 388. 91 S. Ct. 1999(1971) and compensatory damages under tort action 28 U.S.C. § § 1346 (b), alleging that the defendants violated the smoking policy by breaking it and not enforcing it, and that the defendants exposed the plaintiff to dangerous Enviromental Tobacco

1

Smoke (ETS) for years and did nothing about it causing health problems to the plaintiff which violates the Eight Amendment of the United States Constitution.

Jurisdiction

1. The court has jurisdiction over the plaintiff's claims of federal constitutional rights under Bivens vs Six Unknown Federal Narcotic Agents. 403 U.S. 388. 91 S. Ct. 1999(1971).

2. The court has supplemental jurisdiction over the plaintiff's federal tort claim under 28 U.S.C. § § 1346(b).

Parties

3. The plaintiff, Dwayne Manning, was incarcerated at F.C.I. Cumberland during the events described in this complaint.

4. Defendant Lambert was a laundry staff member at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

5. Defendant Reid was a laundry staff member at F.C.I. Cumberland during this complaint. She is sued in her individual and official capacities.

6. Defendant Dula was a correctional officer at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

7. Defendant Rogers was a correctional officer at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

8. Defendant Green was a laundry staff member at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

9. Defendant Cutter was a correctional officer at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

10. Defendant Brenize was a correctional officer at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

11. Defendant Gray was a lieutenant at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

12. Defendant Smith was a nurse at F.C.I. Cumberland during this complaint

She is sued in her individual and official capacities.

13. Defendant Borroc was a medical staff member at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacites.

14. Defendant Courioux was a medical staff member at F.C.I. Cumberland during this complaint. She is sued in her individual and official capacities.

15. Defendant Andrews was a medical staff member at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

16. Defendant Cox was head recreation member at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

17. Defendant Crump was unit manager at F.C.I. Cumberland during this complaint. She is sued in her individual and official capacities.

18. Defendant Johnson was unit counselor at F.C.I. Cumberland during this complaint. She is sued in her individual and official capacities.

19. Defendant Leap was an education staff member at F.C.I. Cumberland during this complaint. She is sued in her individual and official capacities.

20. Defendant Most was a food service staff member at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

21. Defendant Hollier was case manager at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

22. Defendant Navalaney was counselor at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

23. Defendant Sines was counselor at F.C.I. Cumberland during this complaint. She is sued in her individual and official capacities.

24. Defendant Hart was unit manager at F.C.I. Cumberland during this complaint. She is sued in her individual and official capacities.

25. Defendant Bernazolli was a lieutenant at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

26. Defendant Lewis was a lieutenant at F.C.I. Cumberland during this

complaint. He is sued in his individual and official capacities.

27. Defendant Ezekiel was captain at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

28. Defendant Finger was administrator at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

29. Defendant Bogdan was associate warden at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

30. Defendant Asbourn was associate warden at F.C.I. Cumberland during this complaint. She is sued in her individual and official capacities.

31. Defendant Shearin was warden at F.C.I. Cumberland during this complaint. He is sued in his individual and official capacities.

32. Defendants John Does were staff members at F.C.I. Cumberland during this complaint. They are sued in their individual and official capacities.

33. Defendants Jane Does were staff members at F.C.I. Cumberland during this complaint. They are sued in their individual and official capacities.

Facts

34. The plaintiff is being exposed to dangerous Environmental Tobacco Smoke (ETS) at a high level to date and for more than two years.

35. The plaintiff, a non-smoker, is being housed in a housing unit at F.C.I. Cumberland with chain smokers.

36. Inmates smoke in cells with the doors open exposing second-hand smoke to non-smokers in the housing units.

37. Inmates smoke in shower stalls and the plaintiff is exposed to ETS while showering on a daily basis.

38. Inmates light tobacco products and walk around the housing units leaving dangerous trails of ETS.

39. Inmates smoke heavily in television viewing rooms exposing the plaintiff to dangerous levels of ETS.

40. Television viewing rooms have very poor ventilation systems causing

42. The plaintiff has a tough time washing and drying his clothes due to the heavy levels of ETS hovering in the laundry room.

43. Inmates smoke right in front of the entrance to the housing unit as the officers do nothing on a daily basis.

44. The inmates are the only ones smoking in front of the entrances to the housing as the officers smoke and expose the plaintiff to dangerous ETS.

45. Inmates smoke in the utilities closets on a daily basis releasing long clouds of ETS exposing the plaintiff on a daily basis.

46. During night hours all inmates are locked down and the smoke drifts into the plaintiff's cell though air vents and under the door.

47. The plaintiff a non-smoker is forced to inhale dangerous ETS all night causing the plaintiff to suffer from burning eyes, shortness of breathe, nose bleeds, dizziness, and nightly coughs.

48. The plaintiff also suffers from chest pains and severe headaches due to dangerous ETS.

49. Staff members do not enforce smoking policy because the majority of the staff smoke with the inmates.

50. Smoking policies are violated everyday by staff and inmates and non-smokers are made to suffer while violations are ignored.

51. Smoking was permitted in the housing units that housed non-smoking inmates with no barriers or designated smoking area.

52. On October 30, 2002 defendant Shearin issued a statement that all smoking policies are being followed and that no one is in violation.

53. On the same memorandum defendant Shearin stated that if the plaintiff had a list of incidences to provide it to the unit team to help them enforce the smoking policies.

54. But on August 30, 2002 defendant Bogdan issued a statement that the smoking policies are not being followed.

55. While on staff member says policy is being followed and another says policy is not being followed non-smokers are being exposed to second-hand smoke.

56. The plaintiff tried to seek medical attention for symptoms caused by exposure to second-hand smoke.

57. Defendant Gourioux told the plaintiff there was nothing she can do and she could not provide the plaintiff with a mask for night use so that the plaintiff could breathe.

58. Defendant Andrews told the plaintiff there was nothing he could do and he could not provide the plaintiff with a mask for night use.

59. F.C.I. Cumberland is the only prison in the state of Maryland that allows smoking. All other prisons have banded smoking due to the exposure of second-hand smoke to non-smokers.

60. All federal buildings are non-smoking unless otherwise posted and while not violating the rights of non-smokers.

Relief Requested

WHEREFORE, plaintiff urges that the court issue the following relief:

A. Issue a declaratory judgment stating that:

1. The defendants named in this complaint did expose the plaintiff to dangerous Environmental Tobacco Smoke by forcing him into smoke filled places on a daily basis.
2. The defendants named in this complaint ignored policy and by not enforcing the policy did violate the plaintiff's Eighth Amendment Right.
3. The plaintiff a non-smoker was indeed exposed to dangerous levels of ETS on a daily basis which violated his Eighth Amendment Right.

B. Issue an injunction ordering defendants Shearin, U.S. Department of Justice, and Bureau of Prisons to:

1. Declare F.C.I. Cumberland Maryland as a hazzard to non-smokers and make it a non-smoking prison.
2. Enforce the smoking policy to the fulliest extent of what the policy requires.

C. Award compensatory damages in the following amounts:

1. $4,000,000.00 jointly and severally against defendants Shearin, Bureau of Prisons, and United States Department of Justice for health problems suffered during the plaintiff's exposure to second-hand smoke and the defendants not enforcing the policy.

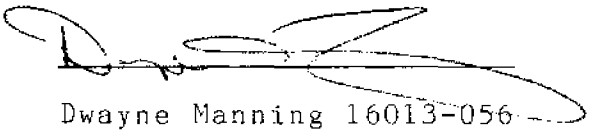
D. Award punitive damages in the following amounts:

1. $10,000.00 each against defendants Lambert, Reid, Dula, Rogers, Green, Cutter, and Brenize, John Does and Jane Does.
2. $20,000.00 each against defendants Gray, Smith, Borroc, Gourioux, Andrews, Cox, Crump, Johnson, Leap, Most, Hollier, Navalaney, Sines, and Hart.
3. $30,000.00 each against defendants Bernazolli, Lewis, and Ezekiel.
4. $50,000.00 each against defendants Finger, Bogdan, Asbourn, and Shearin.

E. Grant any other such relief as it may appear that the plaintiff is entitled.

Respectfully Submitted

Date 7-3-23



Dwayne Manning 16013-056

P.O. Box 1000

Cumberland, Maryland 21501-1000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DWAYNE MANNING, *
Plaintiff
*
vs. Civil Action No.: WGC 04cv1486
*
UNITED STATES OF AMERICA,
Defendant *

******

SETTLEMENT ORDER
(LOCAL RULE 111)

This Court has been advised by the parties that the above action has been settled, including all counterclaims, cross-claims and third-party claims, if any. Accordingly, pursuant to Local Rule 111 it is ORDERED that:

This action is hereby dismissed and each party is to bear its own costs unless otherwise agreed, in which event the costs shall be adjusted between the parties in accordance with their agreement. The entry of this Order is without prejudice to the right of a party to move for good cause within 60 days to reopen this action if settlement is not consummated. If no party moves to reopen, the dismissal shall be with prejudice.

IT IS FURTHER ORDERED that:

The Clerk of the Court shall mail copies of this Order to counsel of record.

Date: February 24, 2006

/s/
WILLIAM CONNELLY
United States Magistrate Judge

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-MXR-2004-02501 Short Description: MANNING V. U.S (FTCA)(CUM)

CASE DETAILS CASE DOCS CASE PERSONS CASE DATES CASE SUMMARY CASE BLOG

Case Login Information

Reference Number	AW-04-1486
Short Description	MANNING V. U.S (FTCA)(CUM)
Classification	Civil
Case Type	fromLP
Case Sub-Type	TORT
Current Region	MID-ATLANTIC REGIONAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$65,000.00
Estimated Amount	$
Office	
Jurisdiction	DISTRICT OF MARYLAND
Responsible Legal Office	MARO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	11/09/2006
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$3,000.00
Total Amount Paid	$3,000.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	05/20/2004
Date Filed	05/10/2004

Case Progress

Current Owner	ZACHARY KELTON
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	
Further Case Classification	
Comments	86428

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United States Department of Justice Office of General Counsel & Review

NCRO

North Central Regional Office Kansas City KS

 51 pgs

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ROBERT MERRIWEATHER,
PLAINTIFF,PRO SE,

VS.

T.A.ZAMORA,UNKNOWN MAILROOM EMPLOYEE(S),
JOHN HEMINGWAY,H.J.MARBERRY(WARDEN);
G.L.HERSHBERGER,HARRELL WATTS,
DEFENDANTS.

No. 04-71706

GERALD E. ROSEN
HON.JUDGE

MAGISTRATE JUDGE R. STEVEN WHALEN

FILED
MAY 12 2004
CLERK'S OFFICE-DETROIT-PSG
U.S. DISTRICT COURT

RECEIVED
MAY 4 2004
CLERK'S OFFICE
U.S. DISTRICT COURT

THIS IS A BIVENS CIVIL AND CONSTITUTIONAL RIGHTS COMPLAINT WITH A JURY DEMAND

1. This cause of action is brought by plaintiff, a federal prisoner,through pro se assistance, against the named defendants in their individual and official capacities for violating his civil and constitutional rights under the color of federal authority.

2. This honorable court has jurisdiction under 28 USC sec 1346(b); 28 USC sec 1331(a), and Bivens v.Six unknown agents of the federal bureau of narcotics, 403 U.S.388,404(1971). This civil suit is also brought under 42 USC sec 1985 and 1986, and arising under U.S.Const.Amend.V,VI, and 28 CFR sec 540.19(a), 18 USC sec 2, and sec 242. The evidence of this complaint shows that the defendants knowingly aided and abetted one another to conspire to violate plaintiff's attorney-client communication privilege and legal mail correspondence right. See Sallier v.Brooks, 343 F.3d 868(6th cir 2003).

3. Defendant T.A.Zamora is the Mailroom Manager here in FCI-Milan,Michigan. Defendant(s) unknown mailroom employee(s) are mailroom employees here in FCI-Milan, Michigan.Defendants John Hemingway and H.J.Marberry are Wardens of FCI-Milan, Michigan. Defendant G.L.Hershberger is the BOP Regional Director. Defendant Harrell Watts is the BOP National Administrator of inmate appeals. They all have

personal knowledge of the complained violations in their individual and official capacities.

4. Plaintiff is a federal prisoner currently housed at FCI-Milan,Michigan.

5. The evidence shows that upon plaintiff's arrival at FCI-Milan,Michigan on 9-21-01, he had diligently and continously complained to defendant Zamora about the violation of opening his legal mails from his attorney and the courts in his absence or outside his presence and read them by staff. But, defendant Zamora have sarcastically stated that "this is Milan and we do it our way here". See 28 USC sec 1746.

6. After the Sixth Circuit announced Sallier v.Brooks,343 F.3d 868(6th cir 2003), on 10-19-03, plaintiff sent a request letter to defendant Zamora requesting that his legal mails be opened in his presnce. On 10-20-03, at about 8:00 AM, plaintiff was called to the mailroom about the request letter. Plaintiff then gave the mail room clerk a copy of Sallier v.Brooks to support his claim that his legal mails can only be opened in his presence by staff, but defendant Zamora showed up, read the first page of Sallier v.Brooks and sarcastically stated "we donot follow case laws,we only follow BOP policy" and ordered plaintiff to go back to his Unit. At launch time, plaintiff approached defendant Hemingway with Sallier v.Brooks, and defendant Hemingway indicated that said law"is a state case and doesnot apply to federal prisoners". 28 USC sec 1746. The violation continues.

7. Effective 10-12-01, the defendants have opened the following legal mails outside plaintiff's presence and read them all: This court is directed to see attached

Exhibit-1-U.S.Court of appeals 7th cir dated 10-12-01.
Exhibit-2-U.S.Court of appeals 7th cir dated 10-15-01.
Exhibit-3-Attorney Robinson Brandt dated 12-7-01.
Exhibit-4-U.S.Court of appeals 7th cir dated 1-24-02.
Exhibit-5-Fed.Public defender Atty dated 1-25-02.
Exhibit-6- Fed.Public defender Atty dated 7-19-02.

Exhibit-7-Attorney Jerome Flynn dated 7-29-02
Exhibit-8-Attorney Jerome Flynn dated 8-9-02.
Exhibit-9-Attorney Jerome Flynn dated 8-12-02.
Exhibit-10- Attorney Jerome T.Flynn dated 8-13-02.
Exhibit-11- Attorney Robinson Brandt dated 5-31-02.
Exhibit-12- Fed.Public defender atty dated 7-26-02.
Exhibit-13-Attorney Jerome Flynn dated 6-16-03.
Exhibit-14-Attorney Jerome Flynn dated 6-17-03.
Exhibit-15-U.S.Court of appeals 7th cir dated 6-26-03.
Exhibit-16-U.S.Court of appeals 7th cir dated 6-27-03.
Exhibit-17-Attorney Jerome Flynn dated 7-2-03.
Exhibit-18-Attorney Jerome Flynn dated 7-11-03.
Exhibit-19-Fed.Public defender atty dated 7-14-03.
Exhibit-20-U.S.Court of appeals 7th cir dated 7-16-03.
Exhibit-21-Attorney Jerome Flynn dated 7-21-03.
Exhibit-22-Attorney Jonathan E.Hawley dated 7-21-03.
Exhibit-23-U.S.Court of appeals 7th cir dated 7-23-03.
Exhibit-24-Attorney Jerome Flynn dated 7-25-03.
Exhibit-25-U.S.Court of appeals 7th cir dated 7-23-03.
Exhibit-26-Attorney Eric M.Schwing dated 7-29-03.
Exhibit-27-Attorney Eric M.Schwing dated 8-11-03.
Exhibit-28-Attorney Eric M.Schwing dated 8-14-03.
Exhibit-29-U.S.Court of appeals 7th cir dated 11-4-03.
Exhibit-30-Attorney Eric M.Schwing dated 11-17-03.
Exhibit-31-Attorney Eric Schwing dated 11-19-03.
Exhibit-32-Noll law office atty dated 10-21-03
Exhibit-33-Attorney Jon Gray Noll dated 10-27-03.
Exhibit-34-U.S.Court of appeals 7th cir dated 11-21-03.
Exhibit-35-Attorney Eric Schwing dated 11-24-03.
Exhibit-36-Attorney Eric Schwing dated 1-15-04.
Exhibit-37- U.S.Attorney dated 2-5-04.
Exhibit-38-U.S.District court,Hammond,IN dated2-12-04.
Exhibit-39-U.S.District court,Hammond,IN dated 3-18-04.
Exhibit-40-U.S.Attorney dated 3-5-04.
Exhibit-41-U.S.District court dated 3-11-04.

8. On 10-31-03, plaintiff began his administrative remedy process by filing a BP 811/2 to his Unit-Team, but Mrs B.Brewington orally denied it and gave plaintiff a BP-9 form to appeal to the Warden. On 11-4-03,plaintiff filed his BP-9. On 11-10-03, he was called to the mail room, along with inmate Ralphael Okoro, and in the presence of inmate Ralphael Okoro, the mail room staff had plaintiff's BP-9 in his hands and said his boss(defendant Zamora) gave it to him to resolve informally and he asked plaintiff what he wanted to do with the BP-9, and plaintiff told said staff that he wanted his BP-9 to go through the regular procedure and that he would not withdraw said BP-9.as requested by the mailroom staff. On 12-5-03, defendant Hemingway responed to the BP-9 and referred plaintiff to the Regional Director. See (Append.A). On 12-10-03,plaintiff filed his BP-10 to BOP Regional Director on his legal mail issue. On 1-12-04, plaintiff received a response from defendant Hershberger denying the BP-10. See (Append.B). On 1-19-04, plaintiff filed his BP-11 to the Central Office in Washington,DC, but on 4-7-04, he received a denial response from defendant Watts. See (Append.C). Plaintiff properly exhausted administrative remedy with negative results.

9. Plaintiff hereby states the claim that defendants Zamora,Unknown mailroom employee(s),Hemingway,Marberry, did conspire to violate plaintiff's rights complained of,and defendants Hershberger and Watts knowingly aided, abetted, and encouraged the conspiratorial violation of plaintiff's civil and constitutional rights complained of in direct contravention to 42 USC sec 1985 and 1986.

10. Pursuant to Harlow v.Fritzgerald,457 U.S.800,818(1982), the defendants are not entitled to qualified immunity in any way.

11. The complaint, liberally construed under Haines v.Kerner,404 U.S.519(1972), clearly shows that there exist a set of facts that shows that the defendants violated plaintiff's legal mail privilege and Attorney-client communication privilege under the color of federal authority. Pursuant to Estelle v.Gamble,429 U.S.97,104(1976),

this honorable court is obligated to accept plaintiff's allegation as true in evaluating the complaint.

12. Plaintiff prays that pursuant to Fed.R.Civ.P.4, this court order the U.S. Marshal to serve the defendants with process because he is indigent, and for the U.S.Marshal to notify plaintiff of served notices.

13. Plaintiff prays that this court grant the following requested relief: [a] issue an injunction barring the defendants from violating prisoners' legal mail rights and attorney-client communication privilege, and for the defendants not to retaliate against plaintiff and the pro se assistant in any way;[b] grant a compensatory damages of $1,000,000.00 against each defendant in his or her individual and official capacities;[c] grant a punitive damages of $4,000,000.00 against each defendant in his or her individual and official capacities.

Dated 26th day of April,2004.

Respectfully submitted,

Robert Merriweather

Robert Merriweather,#04615-027,
P.o.box 1000,
FCI-Milan,Michigan 48160

ASSISTED PRO SE BY: RALPHAEL OKORO,PRO SE

DEFENDANTS ADDRESSES

1. T.A.Zamora,John Hemingway,H.J.Marberry,unknown mailroom employee(s), c/o Federal Correctional Institution,4000 Arkona Road,Milan,Michigan 48160.

2. G.L.Hershberger,Regional Director,Federal Bureau of prison,North Central Regional office,Gateway complex Tower II,8th floor, 400 State ave.,Kansas city, Kansas 66101-2492.

3. Harrell Watts,Aministrator National inmate appeals,Federal Bureau of prisons, 320 First street,N.W.,Washington,DC 20534.

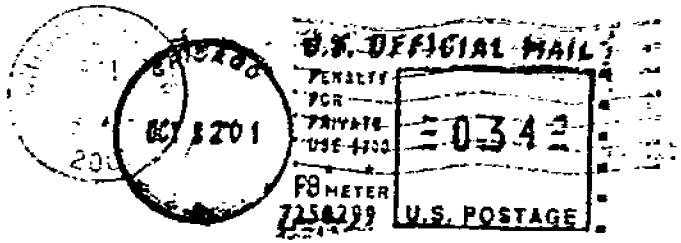
PLAINTIFF:

Robert Merriweather,#04615-027,
P.o.box 1000,
FCI-Milan,Michigan 48160

Exhibit-1

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS



Sent 10/17/01 mail.

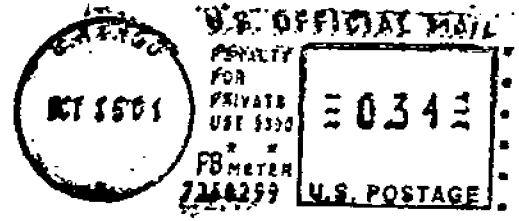
Robert E. Merriweather
04615-027
Milan FCI
Arkona Road
P. O. Box 9999
Milan, MI 48160

48160+0090

Exhibit-2

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS



10/19/01
Friday

Robert E. Merriweather
FEDERAL CORRECTIONAL INSTITUTION
#04615-027
P.O. Box 9999
Milan, MI 48160

01-3346

48150400090 30

Exhibit 3

ROBINSON BRANDT
Attorneys & Counselors at Law
11331 GROOMS ROAD, SUITE 3000
CINCINNATI, OHIO 45242



USA 22 USA 22

LEGAL MAIL ..... CONFIDENTIAL
PEN ONLY IN THE PRESENCE
OF THE INMATE / ADDRESSEE

Mr. Robert Merriweather
04615-027
FCI
P.O. Box 1000
Milan, MI 48160

48160+0130 50

Exhibit-4

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS

CHICAGO JUL 24 02

U.S. OFFICIAL MAIL
PENALTY FOR PRIVATE USE $300
FB METER
0.34
U.S. POSTAGE

1/29/02
Jma,

Robert Merriweather
04615-027
P.O. Box 1000
Milan, MI 48160-0190

48160+0190 50

Exhibit -5

Federal Public Defenders
600 E. Adams, 2nd Floor
Springfield, IL 62701

U.S. OFFICIAL MAIL
SPRINGFIELD JAN 25 '02 IL
PENALTY FOR PRIVATE USE $300
PB METER 6503408
0.34
U.S. POSTAGE

2/2/02
Friday

Mr. Robert E. Merriweather
Reg. No. 04615
FCI Milan
P.O. Box 9999
Milan, MI 48160

LEGAL MAIL

Exhibit-6

Federal Public Defender
600 East Adams St.
Second Floor
Springfield, Illinois 62701

U.S. OFFICIAL MAIL
SPRINGFIELD IL JUL 15 '02
PENALTY FOR PRIVATE USE $300
0.60
PB METER 8503408
U.S.POSTAGE

7/24/02
Wed.

Mr. Robert Merriweather
Reg. No. 04615-027
FCI Milan
Box 1000
Milan, MI 48160

LEGAL MAIL - OPEN IN PRESENCE OF ADDRESSEE

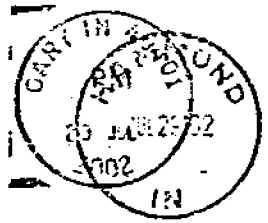
48160+0190

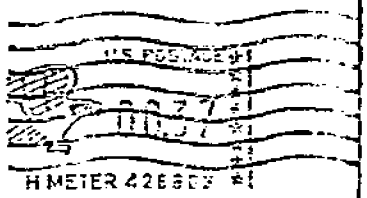
Exhibit-7

Case 2:04-cv-71706-GER-RSW Document 3 Filed 05/12/2004 Page 13 of 50

Attorney Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders
219 Russell Street, 6th Floor
P.O. Box 667
Hammond, IN 46325-0667

2:98 CR 182
Clerk of Court
Number 219-





FI

SPECIAL MAIL
OPEN ONLY IN PRESENCE OF ADDRESSEE

Robert Merriweather, #04615-027
c/o MILAN FCI
P.O. Box 9999, Arkona Road
Milan, MI 48160

8/2/02
Friday

48160+0999 50

Exhibit-8

Attorney Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders
219 Russell Street, 6th Floor
P.O. Box 667
Hammond, IN 46325-0667

HAMMOND IN AUG 09 '02

U.S. POSTAGE 00.37 H METER 426303

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F1

Robert Merriweather, #04615-027
c/o MILAN FCI
P.O. Box 9999, Arkona Road
Milan, MI 48160

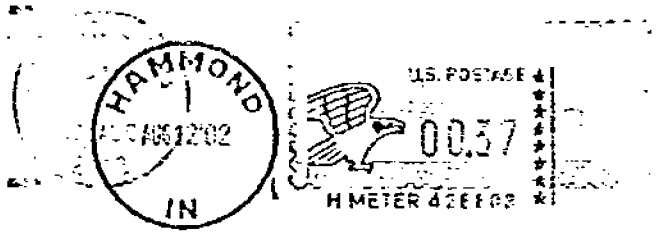
8/14/02
Wed.

48160+0090 50

Exhibit-9

Case 2:04-cv-71706-GER-RSW Document 3 Filed 05/12/2004 Page 15 of 50

Attorney Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders
219 Russell Street, 6th Floor
P.O. Box 667
Hammond, IN 46325-0667



8/19/02
Monday

Robert Merriweather, #04615-027
c/o MILAN FCI
P.O. Box 9999, Arkona Road
Milan, MI 48160

Exhibit-10

Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders, Inc.
219 Russell Street, 6th Floor
PO Box 667
Hammond, IN 46325-0667

HAMMOND IN AUG 13 '02

U.S. POSTAGE 00.37 H METER 426803

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Robert Merriweather, #04615-027
c/o MILAN FCI
P.O. Box 9999, Arkona Road
Milan, MI 48160

8/19/02
mw

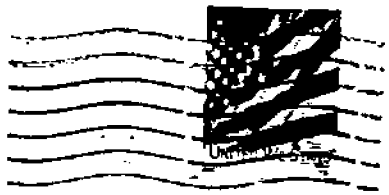
48160+0090 50

Exhibit-11

ROBINSON BRANDT
Attorneys & Counselors at Law
11331 GROOMS ROAD, SUITE 3000
CINCINNATI, OHIO 45242

CINCINNATI OH 452
PM
31 MAY
2002





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OPEN ONLY IN PRESENCE
OF THE INMATE/ ADDRESSEE

Robert Merriweather
04615-027
FCI
P.O. Box 1000
Milan, MI 48160

F-1

6/5/02
Wed.

48160+0130 50

Exhibit-12

U.S. OFFICIAL MAIL
1.75
U.S. POSTAGE

Federal Public Defender
600 East Adams St.
Second Floor
Springfield, Illinois 62701

F1

Mr. Robert E. Merriweather
Reg. No. 04615
FCI Milan
P.O. Box 9999
Milan, MI 48160

LEGAL MAIL - OPEN IN PRESENCE OF ADDRESSEE

7/2/02 [illegible]

"Case" [illegible] in trial

Exhibit-13

Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders, Inc.
219 Russell Street, 6th Floor
P.O. Box 667
Hammond, IN 46325-0667

MIL

HAMMOND IN

U.S. POSTAGE 0.60 H METER 425500

ATTORNEY-CLIENT COMMUNICATION
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Robert Merriweather. #04615-027

FCI MILAN
MAILROOM
P.O. BOX 9999, ARKONA RD.
MILAN, MI 48160

48160+[redacted]30 50

6/20/03 Friday

Exhibit-14

Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders, Inc.
219 Russell Street, 6th Floor
P.O. Box 667
Hammond, IN 46325-0667

MIL

HAMMOND IN

U.S. POSTAGE 00.60 H METER 42[illegible]

ATTORNEY-CLIENT COMMUNICATION
OPEN IN PRESENCE OF INMATE ONLY

Robert Merriweather, #04615-027

MAIL ROOM
F.C.I. MILAN
P.O. BOX 999
MILAN, MI 48160

6/23/03 Monday

[redacted]

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874
OFFICIAL BUSINESS

TO:

Chicago, Illi

NOTICE OF DOC

Appeal No.: 03 2696

TO: Robe.. E. Merriweather
FEDERAL CORRECTIONAL INSTITUTION
#04615 027
P.O. Box 1000
Milan, MI 48160-0

Jet
7/1/03
Jwo
7/1/03

Copy of letter from J.E. Hanley
Appellate Opinion Chief
to 7th Circuit Court
Illinois note 7/24/03

Tuesday note
7/1/03 - mailed to 7th Circuit Court
Motion to Withdraw
Motion to dismiss only notes of Appeal (letter)
+ Docket Statement
Statement of Issues

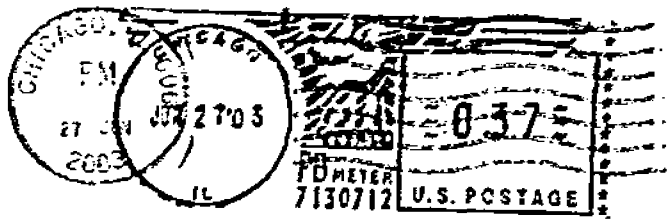
CHICAGO
JUL 2 2003
PB METER 7130712
152
U.S. POSTAGE

Exhibit-15

Exhibit-16

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS



CHICAGO, ILL. FM 27 JAN 2003 JUL 27 '03 IL
0.37
PB METER 7130712 U.S. POSTAGE

7/2/03 ind.

Robert E. Merriweather
FEDERAL CORRECTIONAL INSTITUTION
#04615-027
P.O. Box 1000
Milan, MI 48160
3-2696

48160+0130 50

Exhibit-17

Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders, Inc.
219 Russell Street, 6th Floor
P.O. Box 667
Hammond, IN 46325-0667

HAMMOND IN JUL 02 '03

U.S. POSTAGE 00.37 H METER 425609

Fl

MIL

7/9/03 Lucd.

ATTORNEY-CLIENT COMMUNICATION
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Robert Merriweather, #04615-027

MAIL ROOM
F.C.I. MILAN
P.O. BOX 9999
MILAN, MI 48160

48160+[redacted]

Exhibit-18

Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders, Inc.
219 Russell Street, 6th Floor
P.O. Box 667
Hammond, IN 46325-0667

HAMMOND IN

U.S. POSTAGE 00.60 H METER 42E8

F1

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Robert Merriweather, #04615-027

MAIL ROOM
F.C.I. MILAN
P.O. BOX 9999
MILAN, MI 48160

7/16/03 wed.

Exhibit-19

HAMMOND
IN

NORTHERN DISTRICT OF INDIANA
FEDERAL COMMUNITY DEFENDERS, INC.
219 Russell Street, 6th Floor
P.O. BOX 667
HAMMOND, INDIANA 46325-0667

Robert Merriweather, #04615-027

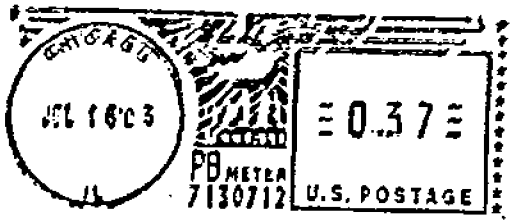
MAIL ROOM
F.C.I. MILAN
P.O. BOX 9999
MILAN, MI 48160



Exhibit-20

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS



7/22/03
2 cop.

Robert E. Merriweather
FEDERAL CORRECTIONAL INSTITUTION
#04615-027
P.O. Box 1000
Milan, MI 48160

03-2696

48160+0130 30

Exhibit-21

Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders, Inc.
219 Russell Street, 6th Floor
PO Box 667
Hammond, IN 46325-0667

HAMMOND IN JUL 21 '03

U.S. POSTAGE 00.37 H METER 4 2 6 5 0

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MIL

Robert Merriweather, #04615-027

MAIL ROOM
F.C.I. MILAN
P.O. BOX 9999
MILAN, MI 48160

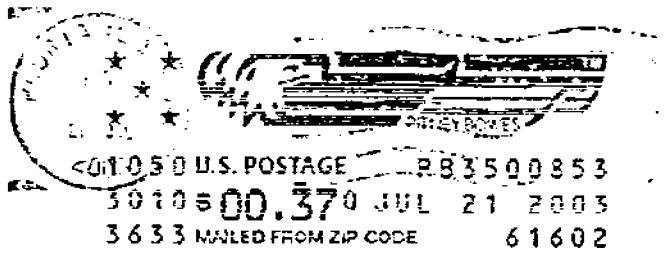
RECEIVED JUL 23 2003

7/25/03 Friday

[redacted]

Exhibit -22

JONATHAN E. HAWLEY, Appellate Division Chief
Federal Public Defender's Office
401 Main Street, Suite 1500
Peoria, IL 61602



MR ROBERT MERRIWEATHER
REG NO 04615-027
FCI MILAN
PO BOX 1000
MILAN MI 48160

7/30/03
mwd

LEGAL MAIL - OPEN IN PRESENCE OF ADDRESSEE

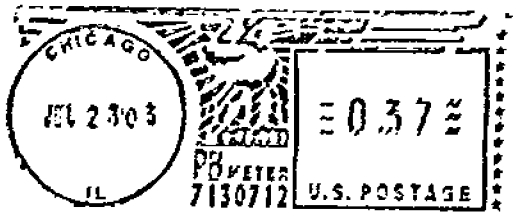
4816040130 50

Case 2:04-cv-71706-GER-RSW Document 3 Filed 05/12/2004 Page 29 of 50

Exhibit-23

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS



7/29/03
Inmate

Robert E. Merriweather
FEDERAL CORRECTIONAL INSTITUTION
#04615-027
P.O. Box 1000
Milan, MI 48160

48160+0130 50

Exhibit-24

Jerome T. Flynn
Northern District of Indiana
Federal Community Defenders, Inc.
219 Russell Street, 6th Floor
P.O. Box 667
Hammond, IN 46325-0667

HAMMOND IN JUL 25 '03

U.S. POSTAGE 00.57 H METER 4288

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ATTORNEY-CLIENT COMMUNICATION
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Robert Merriweather, #04615-027
c/o Federal Correctional Institution
Box 1000
Milan, MI 48160

7/29/03
2 ...

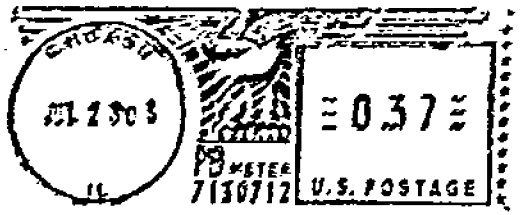
48160+0190 50

Case 2:04-cv-71706-GER-RSW Document 3 Filed 05/12/2004 Page 31 of 50

Exhibit-25

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS



7/29/03

Robert E. Merriweather
FEDERAL CORRECTIONAL INSTITUTION
#04615-027
P.O. Box 1000
Milan, MI 48160

481604013O 50

Exhibit-26

Eric M.Schwing
Attorney at Law
802 South Second Street
Springfield, IL 62704

SPRINGFIELD JUL2303 IL

SPRINGFIELD IL PM 2003 METER 165810

Robert Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 41860

8/4/03 Monday

Hunter 8/31/03

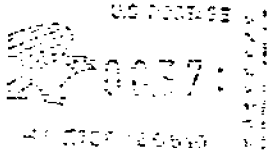
48160+0130

Exhibit-27

Eric M. Schwing
Attorney at Law
802 South Second Street
Springfield, IL 62704

217-544-8441 Atty. Eric M. Schwing
Secretary - "Wanda Jones"





Monday
jot 8/18/03

Attorney/Client Privilege

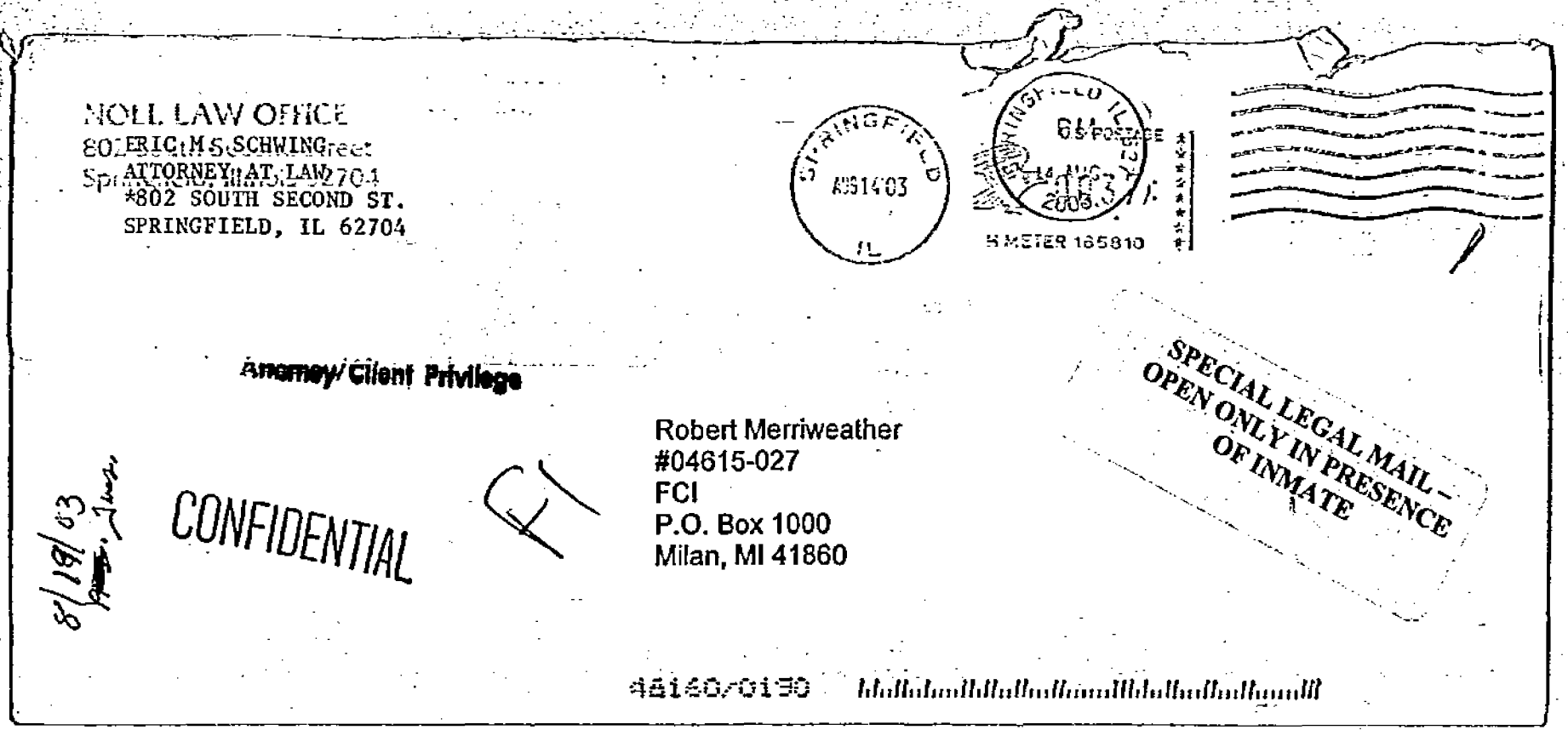
CONFIDENTIAL

Robert Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 41860

SPECIAL LEGAL MAIL - OPEN ONLY IN PRESENCE OF INMATE

48160+0130 50

Exhibit -28



NOLL LAW OFFICE
ERIC M. SCHWING
ATTORNEY AT LAW
*802 SOUTH SECOND ST.
SPRINGFIELD, IL 62704

SPRINGFIELD IL AUG 14 '03

SPRINGFIELD IL 62704 U.S. POSTAGE 14 AUG 2003 H METER 165810

Attorney/Client Privilege

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8/19/03

CONFIDENTIAL

FI

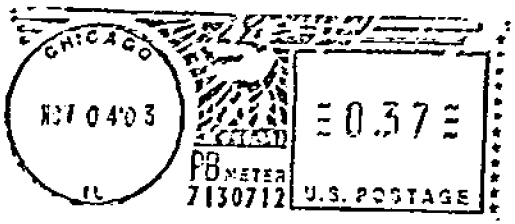
Robert Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 41860

48160/0130

Exhibit-29

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS



CHICAGO
NOV 04 '03
IL
PB METER
7130712
0.37
U.S. POSTAGE

Sent 11/7/03 opened
Findings

48160+0190 50

Exhibit-30

Eric M. Schwing
802 South Second Street
Springfield, IL 62704

SPRINGFIELD IL 62 IL

Happy Holiday

H METER 169510

Attorney/Client Privilege

received 11/21/03 Friday

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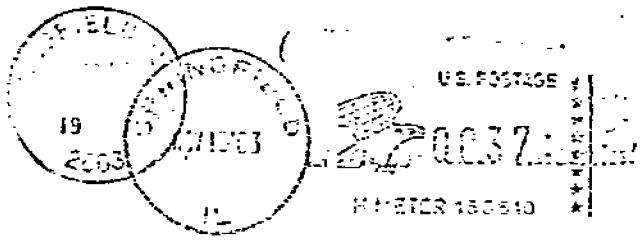
Robert E. Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 48160

SPECIAL LEGAL MAIL – OPEN ONLY IN PRESENCE OF INMATE

48160+0190

Exhibit-31

Eric M. Schwing
802 South Second Street
Springfield, IL 62704



Attorney/Client Privilege

Sent 11/24/03 Mon

CONFIDENTIAL

Robert E. Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 48160

SPECIAL LEGAL MAIL – OPEN ONLY IN PRESENCE OF INMATE

48160401 90

Exhibit - 32

Noll Law Office
602 SOUTH 2ND STREET
SPRINGFIELD, IL 62704

U.S. POSTAGE
PAID
SPRINGFIELD, IL
62701
OCT 21 '03
AMOUNT
$3.85
00030759-11

48160

SPRINGFIELD IL 62701 DTS
USPS
OCT 21
9262

Robert E. Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 48160

F1

PRIORITY MAIL
UNITED STATES POSTAL SERVICE
LABEL 107, JUNE 2000
www.usps.com

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SPECIAL LEGAL MAIL –
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INMATE

Attorney/Client Privilege

Exhibit-33

SPRINGFIELD USPS

UNITED STATES POSTAL SERVICE

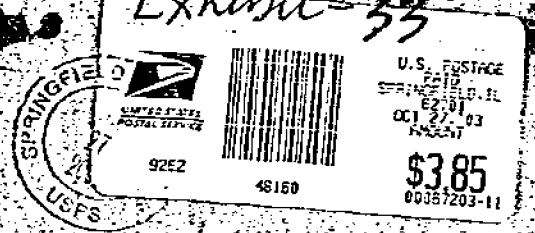
9252

48160

U.S. POSTAGE PAID SPRINGFIELD, IL 62701 OCT 27 '03 AMOUNT

$3.85

00067203-11



JON GRAY NOLL
NOLL LAW OFFICE
602 SOUTH SECOND STREET
SPRINGFIELD, ILLINOIS 62704

TO:

Robert E. Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 48160

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Attorney/Client Privilege

PRIORITY MAIL

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Received on Thursday 10/30/03 opened regular mail

Exhibit-34

OFFICE OF THE CLERK
United States Court of Appeals
For the Seventh Circuit
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604-1874

OFFICIAL BUSINESS



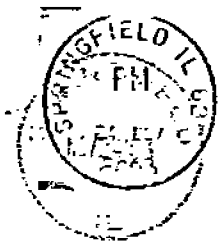
sent 11/24/03

Robert E. Merriweather
FEDERAL CORRECTIONAL INSTITUTION
#04615-027
P.O. Box 1000
Milan, MI 48160
3-2697

48150-0190

Exhibit-35

Eric M. Schwing
Attorney at Law
802 South Second Street
Springfield, IL 62704



SPECIAL LEGAL MAIL –
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INMATE

CONFIDENTIAL

Attorney/Client Privilege

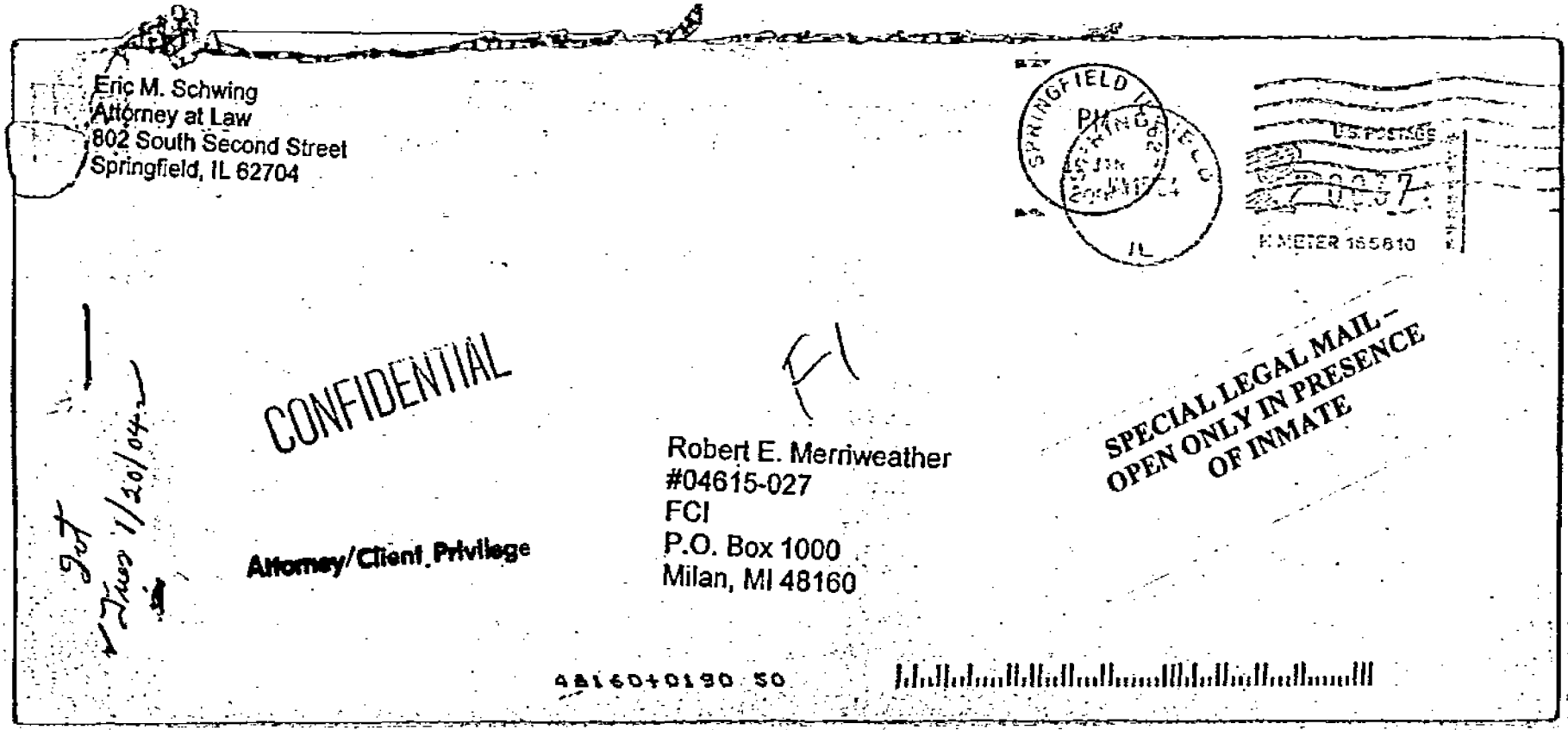
Sent Friday 11/28/03

Robert Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 41860

Attorney/Client Privilege

48160+0130

Exhibit-36



Eric M. Schwing
Attorney at Law
802 South Second Street
Springfield, IL 62704

SPRINGFIELD IL 62
PM
JAN 2004
IL

U.S. POSTAGE
7 0 0 3 7
K METER 165810

CONFIDENTIAL

Attorney/Client Privilege

Robert E. Merriweather
#04615-027
FCI
P.O. Box 1000
Milan, MI 48160

SPECIAL LEGAL MAIL – OPEN ONLY IN PRESENCE OF INMATE

48160+0190 50

Exhibit-37

U.S. Department of Justice
United States Attorney
Northern District of Indiana
5400 Federal Plaza, Suite 1500
Hammond, Indiana 46320

Official Business
Penalty for Private Use $300

HAMMOND IN FEB-5'04 U.S. OFFICIAL MAIL $ 0.37 U.S.POSTAGE

got on 2/9/04 Monday

Robert Merriweather
04615-027
FCI
Box 1000
Milan, MI 48160

48160+0190 50

Exhibit-38

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
5400 FEDERAL PLAZA
HAMMOND, INDIANA 46320

OFFICIAL BUSINESS

Neopost
N046J81008950
$00.370
02/12/2004
Mailed From 46320
00030165
US POSTAGE

Robert Merriweather
#04615-027
P.O. Box 1000
Milan, MI 48160

received on 2/18/04
Wednesday

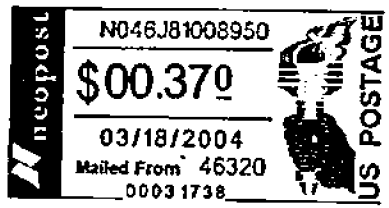
Robert E. Merriweather
FEDERAL CORRECTIONAL INSTITUTION
#04615-027
P.O. Box 1000
Milan, MI 48160
3-2697

$48160+0190 50

Exhibit-39

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
5400 FEDERAL PLAZA
HAMMOND, INDIANA 46320

OFFICIAL BUSINESS



Received Monday
3/22/04

Robert Merriweather
#04615-027
P.O. Box 1000
Milan, MI 48160

46160+0190 50

Case 2:04-cv-71706-GER-RSW Document 8/04 Filed 05/12/2004 Page 48 of 50

U.S. Department of Justice
United States Attorney
Northern District of Indiana
5400 Federal Plaza, Suite 1500
Hammond, Indiana 46320

Official Business
Penalty for Private Use $300

U.S. OFFICIAL MAIL
0.83
U.S. POSTAGE

Exhibit-40

Robert Merriweather
04615-027
FCI
Box 1000
Milan, MI 48160

Received Monday
3/15/04

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
5400 FEDERAL PLAZA
HAMMOND, INDIANA 46320
OFFICIAL BUSINESS

TO:

CM/ECF Northern District o
CRIMINAL DOCKET FOR CASE #
Internal Use

Case title: USA v. Merriweather
Other court case number(s): None
Magistrate judge case number(s): None

Assigned to: Judge Rudy Lozano

Fl

Robert Merriweather
04615-027
P.O. Box 1000
Milan, MI 48160

neopost
$00.60
03/11/2004
Mailed From 46320
US POSTAGE

Exhibit-41

Append. A

BP-229 RESPONSE **CASE NUMBER 316265-F1**
MERRIWEATHER, Robert
Reg. No.: 04615-027

Your Request for Administrative Remedy (BP-229), dated November 4, 2003, and received in this office on November 10, 2003, has been reviewed. Specifically, you allege correspondence received from your attorney has not been treated as legal mail.

A review of the issue raised in your BP-229 has been conducted. Bureau of Prisons' Program Statement 5265.11, Correspondence, provides the opportunity for attorneys to request qualified attorney/client correspondence be opened in the presence of the inmate. In order for your incoming mail to be processed as special mail, the sender must be clearly identified as an attorney along with placing a notation on the envelope stating "Special Mail, Open Only in the Presence of the Inmate". The attorney mail you received did not meet all of these requirements, which resulted in its opening. Please inform your attorney of these requirements to prevent this from occurring in the future. The case you reference concerns legal mail procedures in the Michigan state prison system and the issue of requiring special markings for attorney correspondence was not raised. The Bureau of Prisons' special mail marking requirements are not burdensome or unreasonable and have always been upheld.

Accordingly, this response to your Request for Administrative Remedy is for informational purposes only. In the event you are not satisfied with this response and wish to appeal, you may do so within 20 calendar days of the date of this response by submitting a BP-230(13) to the Regional Director, Federal Bureau of Prisons, North Central Regional Office, Gateway Complex Tower II, 8th Floor, 400 State Avenue, Kansas City, Kansas 66101-2492.

John R. Hemingway, Warden Date 12/5/03

Append. B

Department of Justice
Federal Bureau of Prisons
North Central Regional Office

Regional Administrative Remedy Appeal
Part B - Response

Name: MERRIWEATHER, Robert
Register Number: 04615-027
Administrative Remedy ID Number: 316265-R1

This is in response to your Regional Administrative Appeal, wherein you state your legal mail is being opened outside of your presence.

We have reviewed your appeal. As stated by the Warden, Program Statement 5265.11, Correspondence, provides the guidelines for treating correspondence as special mail. Pursuant to P.S. 5265.11, the sender must be clearly identified as an attorney and the envelope must contain a notation stating, "Special Mail, Open Only in the Presence of the Inmate." The mail you received did not meet the criteria defined by P.S. 5265.11, therefore, it was treated as general mail.

Your Administrative Remedy Appeal includes an attached letter addressed to the Regional Director, dated December 10, 2003. Your correspondence raises several additional complaints regarding staff members at FCI Milan. Pursuant to P.S. 1330.13, Administrative Remedy Process, "An inmate may not raise in an Appeal issues not raised in the lower level filings." The complaints raised in your letter were not included in your lower level filing, therefore, this office will not review these issues.

You do not make a specific request for relief, therefore, this response is for informational purposes only.

1/6/04
Date

G. L. HERSHBERGER, Regional Director

Append. C

Administrative Remedy No. 316265-A1
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal in which you claim your legal mail is being improperly handled, in violation of your Constitutional rights. You request mail room staff stop opening your legal mail outside your presence and treating it as general correspondence.

Our review reveals the Warden and Regional Director adequately responded to the issues raised in your appeal. Program Statement (P.S.) 5265.11, Correspondence, states the Warden shall open incoming special mail only in the presence of the inmate for inspection for physical contraband and the qualification of any enclosures as special mail. P.S. 5265.11 stipulates incoming correspondence will be treated as "special mail" if the sender is adequately identified on the envelope and the envelope is marked "Special Mail - open only in the presence of the inmate." In the absence of either adequate identification or the "special mail" marking appearing on the envelope, staff may treat the mail as general correspondence and may open, inspect, and read the mail.

Since your incoming mail did not satisfy the requirements for processing as legal mail as required by policy, it was appropriately treated as general correspondence. We do not find any evidence that staff improperly processed your mail or that your Constitutional rights have been violated.

This response is provided for informational purposes only.

March 24, 2004
Date

Harrell Watts, Administrator
National Inmate Appeals

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT MERRIWEATHER,

Plaintiff,

v.

T. A. ZAMORA, et al.,

Defendants.
_____/

Case No. 04-71706

Hon. Gerald E. Rosen
Magistrate Judge R. Steven Whalen

ORDER ALLOWING EXTENSION OF DISCOVERY
AND ORDER AMENDING SCHEDULING ORDER

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on September 2, 2010

PRESENT: Honorable Gerald E. Rosen
United States District Chief Judge

The parties having jointly filed a motion for extension of time for discovery and to adjust the dispositive motion deadline, and the Court having fully considered the matter,

NOW, THEREFORE,

IT IS HEREBY ORDERED that the parties' Joint Motion for Extension of Discovery is **GRANTED**. Accordingly, the discovery deadline and other deadlines are hereby extended as follows:

Preliminary non-expert and Final expert witness lists due:	**September 30, 2010**
Discovery cut-off:	**October 15, 2010**
Final non-expert witness lists due:	**October 29, 2010**

Dispositive motion deadline	**November 12, 2010**
Final Pretrial/Settlement Conference (A proposed Joint Final Pretrial Order will be due one week before the conference)	**January 20, 2011 at 11:00 a.m.**
Trial	**February 2011 Civil Trailing Docket**

IT IS SO ORDERED.

s/Gerald E. Rosen
Chief Judge, United States District Court

Dated: September 2, 2010

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 2, 2010, by electronic and/or ordinary mail.

s/Ruth A. Gunther
Case Manager

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Southern Division

ROBERT MERRIWEATHER,

Plaintiff,

-V-

T.A.ZAMORA, et al.,

Defendant.

/

No. 04-71706
Hon. GERALD E. ROSEN
Mag. Judge R. Steven Whalen

STIPULATION AND ORDER FOR USE AT TRIAL

The parties have stipulated that the following envelopes met the criteria for special mail handling under the Bureau of Prison Regulations. The exhibit numbers are in reference to the marking placed on these exhibits by Plaintiff.

Envelope postmarked July 29, 2002, marked as Exhibit 7

Envelope postmarked August 9, 2002, marked as Exhibit 8

Envelope postmarked August 11, 2003, marked as Exhibit 27

Envelope postmarked November 24, 2003, marked as Exhibit 35

Envelope postmarked January 15, 2004, marked as Exhibit 36.

/s/ Daniel E. Manville
Daniel E. Manville (P39731)
Counsel for the Plaintiff
daniel.manville@gmail.com

/s/ Susan K. DeClercq (signed w/ permission)
Susan K. DeClercq (P60545)
Counsel for the Defendants
susan.declercq@usdoj.gov

ORDER

IT IS SO ORDERED.

s/Gerald E. Rosen
Chief Judge, United States District Court

Dated: October 14, 2010 October 14, 2010

I hereby certify that a copy of the foregoing document was served upon counsel of record on October 14, 2010, by electronic and/or ordinary mail.

s/Felicia Moses for Ruth A. Gunther
Alternate Case Manager

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT MERRIWEATHER,

Plaintiff,

v.

T.A.ZAMORA, et al.,

Defendants.

No. 04-71706
Hon. GERALD E. ROSEN
Mag. Judge R. Steven Whalen

/

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

The parties to this Stipulation For Compromise Settlement And Release [hereinafter sometimes referred to as "Settlement Agreement," "Settlement" or "Agreement"] stipulate and agree that the above-captioned action and any and all present or future claims of the undersigned plaintiff and his beneficiaries, or their heirs, executors, administrators, or assigns, against T.A. Zamora, Steven Culver, and Donald Vroman, individually; all other previously named individual defendants to this action; and the United States of America and its agencies, agents, servants and employees [hereinafter sometimes referred to collectively as the "defendants"]; be and hereby are settled and compromised based on the terms and conditions set forth below:

1. It is understood and agreed by all parties hereto that this Stipulation For Compromise Settlement And Release represents a compromise of doubtful and disputed claims and that the payments and other consideration being exchanged are being made and provided by way of an accord and satisfaction of claims which are denied by the defendants and is not an admission of any liability, responsibility, wrongful or negligent conduct or bad faith by any of the parties hereto. Accordingly, this Stipulation For Compromise Settlement And Release shall not

constitute an admission of liability or fault on the part of T.A. Zamora, Steven Culver, and Donald Vroman, individually; any other previously named individual defendant to this action; or the United States of America and its agencies, agents, servants and employees. On the contrary, T.A. Zamora, Steven Culver, and Donald Vroman, individually; all other previously named individual defendants to this action; and the United States of America and its agencies, agents, servants and employees, deny the allegations in the pleadings in this action and otherwise, but enter into this Stipulation For Compromise Settlement And Release for the purpose of compromising all disputed claims and avoiding the expenses and risks of litigation. The parties to this Settlement Agreement stipulate and agree that the purpose of this Stipulation For Compromise Settlement And Release is to bring the above-captioned action to a final and conclusive resolution.

2. For and in consideration of the mutual promises herein contained, and other consideration, the receipt and sufficiency of which is hereby acknowledged, defendants shall cause to be paid to plaintiff, upon the terms indicated below, the sum of TWENTY-SEVEN THOUSAND DOLLARS ($27,000). None of said $27,000.00 constitutes punitive damages or damages punitive in nature.

Payment of the settlement amount will be made by government wire transfer to plaintiff's counsel, Daniel E. Manville, as per the following:

A. Name of Bank: Chase Bank
B. Address of Bank: 26363 Woodward Ave., Huntington Woods, MI 48070
C. Federal Reserve Number: 0021
D. Routing Number: (b)(6)
E. Name on Account: Daniel E. Manville, P.C.
F. Account Number: (b)(6)

Upon receipt of the funds, plaintiff's attorney, Daniel E. Manville, agrees to distribute the settlement proceeds to plaintiff, and to obtain a dismissal of the above-captioned action with

prejudice, with each party bearing its own fees, costs, and expenses.

3. Plaintiff and his heirs, executors, administrators or assigns do hereby accept the cash sum set forth in paragraph 2, above, in full release, settlement, and satisfaction of any and all claims, demands, rights, liens and causes of action of whatsoever kind and nature, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, and the consequences thereof, which the plaintiff or his heirs, executors, administrators, or assigns may have or hereafter acquire against: T.A. Zamora, Steven Culver, and Donald Vroman, individually, and each of their heirs, successors, assigns, insurers (and their affiliates, successors, officers and directors), administrators, executors, agents, employees, representatives, attorneys and any or all other persons, firms or corporations (whether or not herein named), acting on their behalf; all other previously named individual defendants to this action; or the United States of America and its agencies, agents, servants and employees; on account of the same subject matter that gave rise to the above-captioned action, including any future claims and any claims for fees, costs and expenses; and do hereby agree to indemnify and hold harmless T.A. Zamora, Steven Culver, and Donald Vroman, individually, and each of their heirs, successors, assigns, insurers (and their affiliates, successors, officers and directors), administrators, executors, agents, employees, representatives, attorneys, and any or all other persons, firms or corporations (whether or not herein named), acting on their behalf; all other previously named individual defendants to this action; and the United States of America and its agencies, agents, servants and employees; from any and all such claims, causes of action, liens, rights, or subrogated or contribution interests incident to, resulting or arising from the acts or omissions that gave rise to the above-captioned action.

4. It is also agreed, by and among the parties, that the respective parties will each bear

their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

5. This Stipulation For Compromise Settlement And Release is specifically subject to each of the following conditions:

(a) An agreement by the parties on the terms, conditions, and requirements of this Stipulation For Compromise Settlement And Release. The parties stipulate and agree that the Stipulation For Compromise Settlement And Release and the compromise settlement are null and void in the event the parties cannot agree on the terms, conditions and requirements of this Stipulation For Compromise Settlement And Release. The terms, conditions and requirements of this Stipulation For Compromise Settlement And Release are not severable and the failure by the parties to agree, fulfill or comply with any term, condition, or requirement renders the entire Stipulation For Compromise Settlement And Release and the compromise settlement null and void. Any authorization to negotiate and consummate a settlement for the amount agreed upon by the parties does not make the settlement binding unless and until the other terms, conditions and requirements of this Stipulation For Compromise Settlement And Release have been completely agreed upon in writing.

(b) Prior approval of the Settlement by a court of competent jurisdiction, if required by law. In the event a claimant or state or federal law or rule requires court approval of this Settlement, the plaintiff has the obligation to obtain such approval. The plaintiff agrees to obtain such approval in a timely manner, time being of the essence. The plaintiff further agrees that the defendants may void this Settlement at their option in the event the plaintiff fails to obtain such approval in a timely manner. In the event the plaintiff or applicable law requires court approval of this Settlement and such approval is not obtained, this Stipulation For Compromise Settlement

And Release and the compromise Settlement are null and void.

6. The parties hereto represent and warrant to each other that (a) they have authority and capacity to make the agreements and releases set forth in this Settlement Agreement, (b) they are the sole owners of and have not transferred, assigned or hypothecated any of the claims, rights, demands and causes of action they have asserted or released herein, and (c) no other person or entity owns, holds or has any interest in the claims, rights or causes of action that have been released herein.

7. The parties agree that if any term, provision, covenant, or condition of this Settlement Agreement shall, to any extent, be or be declared to be invalid and unenforceable, the remainder of this Settlement or the application of such provision, term, covenant, or condition of this Settlement Agreement shall be valid and enforceable to the full extent permitted by law.

8. This Settlement Agreement embodies the entire agreement between the parties. There are no promises, terms, conditions, or obligations other than those contained herein. All prior negotiations, understandings, conversations, and communications are merged into this Agreement and have no force and effect other than as expressed in the body of this Agreement. The parties to this Agreement agree that a copy of the fully executed Agreement shall have the same legal effect and shall be equally enforceable in law and/or in equity as the original fully executed Agreement.

9. The terms of this Settlement Agreement are contractual and are not merely a recital, and shall be binding upon and inure to the benefit of the parties hereto. This Agreement shall be fully enforceable by the parties in an action at law or at equity, and nothing contained herein shall preclude or be construed to preclude an action in law or equity by the parties against each other to enforce the provisions of this Agreement.

10. It is contemplated by the parties that this Agreement may be executed by separate signature pages, each of which constitutes an original and all of which constitute one and the same Agreement.

<< END OF STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE >>
<< **SIGNATURES FOLLOWING IMMEDIATELY BELOW** >>

Date: 12-22-10

Robert Merriweather
ROBERT MERRIWEATHER
Plaintiff

Date: 12-23-10

DANIEL E. MANVILLE
Attorney for Plaintiff

Date: _____

_____
T.A. ZAMORA
Defendant

Date: _____

_____
STEVEN CULVER
Defendant

Date: _____

_____
DONALD VROMAN
Defendant

Date: _____

_____
SUSAN K. DeCLERCQ
Assistant United States Attorney
Attorney for Defendants and United States of America

10. It is contemplated by the parties that this Agreement may be executed by separate signature pages, each of which constitutes an original and all of which constitute one and the same Agreement.

<< END OF STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE >>
<< **SIGNATURES FOLLOWING IMMEDIATELY BELOW** >>

Date: _____

_____
ROBERT MERRIWEATHER
Plaintiff

Date: _____

_____
DANIEL E. MANVILLE
Attorney for Plaintiff

Date: 12-16-10

_____
T.A. ZAMORA
Defendant

Date: _____

_____
STEVEN CULVER
Defendant

Date: _____

_____
DONALD VROMAN
Defendant

Date: _____

_____
SUSAN K. DeCLERCQ
Assistant United States Attorney
Attorney for Defendants and United States of America

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<< END OF STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE >>
<< SIGNATURES FOLLOWING IMMEDIATELY BELOW >>

Date: _____

_____
ROBERT MERRIWEATHER
Plaintiff

Date: _____

_____
DANIEL E. MANVILLE
Attorney for Plaintiff

Date: _____

_____
T.A. ZAMORA
Defendant

Date: 12-15-2010



STEVEN CULVER
Defendant

Date: _____

_____
DONALD VROMAN
Defendant

Date: _____

_____
SUSAN K. DeCLERCQ
Assistant United States Attorney
Attorney for Defendants and United States of America

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<< END OF STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE >>
<< SIGNATURES FOLLOWING IMMEDIATELY BELOW >>

Date: _____

_____
ROBERT MERRIWEATHER
Plaintiff

Date: _____

_____
DANIEL E. MANVILLE
Attorney for Plaintiff

Date: _____

_____
T.A. ZAMORA
Defendant

Date: _____

_____
STEVEN CULVER
Defendant

Date: 12-16-2010

_____
DONALD VROMAN
Defendant

Date: _____

_____
SUSAN K. DeCLERCQ
Assistant United States Attorney
Attorney for Defendants and United States of America

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<< END OF STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE >>
<< SIGNATURES FOLLOWING IMMEDIATELY BELOW >>

Date: _____

_____
ROBERT MERRIWEATHER
Plaintiff

Date: _____

_____
DANIEL E. MANVILLE
Attorney for Plaintiff

Date: _____

_____
T.A. ZAMORA
Defendant

Date: _____

_____
STEVEN CULVER
Defendant

Date: _____

_____
DONALD VROMAN
Defendant

Date: 12-28-10



SUSAN K. DeCLERCQ
Assistant United States Attorney
Attorney for Defendants and United States of America

Arboleda Ortiz #11581-045
USP/Terre Haute / P.O. Box 33
Terre Haute, Indiana 47808

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

Arboleda Ortiz,
Plaintiff,

vs.

Mark A. Bezy, Warden/Terre Haute
Maryellen Thomas,
Assistant Director Central Office BOP
Sharon Seanez,
Facility Health Service Administrator
Thomas Webster, MD,
Clinical Director Health Services,
Defendants.

2 05-CV- 246 LJM WTL
Case No. _____

JURY TRIAL DEMAND

CIVIL RIGHTS COMPLAINT

PRELIMINARY STATEMENT

COMES NOW Arboleda Ortiz ("Ortiz"), plaintiff, in propria persona, a thirty-five year old Columbian Nationalist who is a federal death row inmate housed in the Special Confinement Unit ("SCU") at the United States Penitentiary, Terre Haute, Indiana. Mr. Ortiz brings this lawsuit under **Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics**, 403 U.S. 388 (1971), to redress the deprivation under color of Federal Law of his rights, privileges, and immunities secured by the Constitution of the United States. Mr. Ortiz seeks money damages to redress and remedy the deprivation of his constitutional and other rights for the defendants' obstinate deliberate indifference to his serious medical needs. The defendants have denied and continue to deny Mr. Ortiz recommended medical

treatment for the surgical removal of pterygiums. Pterygium is a triangular fleshy mass of thickened conjunctiva at the inner side of the eyeball, which Ortiz suffers in both eyes that covers part of the cornea causing substantial vision impairment, associated with tremendous headackes, burning of the eyes and results in a continual deterioration of vision if not corrected through surgery. This condition has persisted and was initially diagnosed by a qualified physician while Ortiz was housed under pretrial status at the Correction Corporation of America, Leavenworth, Kansas in earlier 1999. Arriving at USP/Terre Haute Ortiz immediately brought his eye(s) problem and pain to the attention of applicable medical personnel. He was later seen and examined by a qualified physician who reached the same conclusion as that found at the Correction Corporation of America and recommended surgical removal of the pterygium, explaining to Ortiz that his pain/excruciating headackes and constant burning of the eyes would persist until this condition was alleviated. Other qualified physicians would examine Ortiz through a three year period making the same diagnosis and reiterating the recommended surgery. The defendants denied and continue to deny Ortiz the recommended surgery based on his death row status, whereas the only reason enumerated for the denial is through the imperative of **"No-Town Trips"**. Besides seeking redress of compenatory and punitive damages, Ortiz seeks injunctive relief and a declaratory judgment to alleviate the ongoing constitutional violations visited upon him by the defendants deliberate indifference shown to his serious medical needs.

Jurisdictional Statement

1. **Jurisdiction** of this Court is authorized under **Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra.** Plaintiff also invokes jurisdiction of this Court under **28 U.S.C. §§§§ 1331,**

1332(a)(1), 1361 and 2241(c)(3).

2. **All of the actions**, ommissions and events complained of herein took place within the venue of this Court at the United States Penitentiary, Terre Haute, Indiana ("USP/Terre Haute").

Ortiz Has Availed Himself Of All Administrative Remedies

3. **The plaintiff** has availed himself off applicable administrative remedies in regards to all issues herein listed pursuant to the applicable **CFR § 542.14 seq et.,** as demonstrated through the documents attached and marked in the Appendix (1) thr (3). Thereby satisfying requirements under **42 U.S.C. § 1997e** and thereby process should issue forth.

History Of Civil Rights Filings

4. This is Mr. Ortiz's first Civil Rights Complaint filed into this United States District Court or for that matter any other United States District Court.

Identification of The Parties

5. Arboleda Ortiz, is the plaintiff in this action, who is a Federal Death Row prisoner housed in the Special Security Unit at the United States Penitentiary, Terre Haute, Indiana. His mailing address is:

Arboleda Ortiz #11581-045
USP/Terre Haute
P.O. Box 33
Terre Haute, Indiana 47808

6. Maryellen Thomas, hereinafter referred to as ("defendant Thomas"), is a defendant in this action and is the Assistant Director of the Health Service Division for the Central Office of the BOP. For the purposes of this action she is responsible for responding to prisoners' correspondence and more so for investigating and answering prisoners' grievances filed pretaining to medical issues. Her mailing address is:

Maryellen Thomas
Assistant Director Central Office/BOP
Health Service Division
320 First Street, N.W.
Washington, D.C. 20534

7. Mark A. Bezy, hereinafter referred to as ("Warden Bezy"), is a defendant in this action and is the Warden at the United States Penitentiary, Terre Haute, Indiana. In that capacity he oversees and is in ultimate control of all issues of security and administrative matters, including those of medical issues pretaining to approving or disapproving prisoners' **Town Trips** when particular medical treatment cannot be provided at the institution, and further he responds to all grievances filed by prisoners through available administrative grievance remedies.

8. Sharon Seanez, hereinafter referred to as ("defendant Seanez"), is a defendant in this action and is the facility Health Care Administrator. She plan and controls all aspects of the health services at the facility in that capacity. In cases where an inmate requires medical treatment that cannot be provided at the institution the Health Care Administrator in conjunction with the Clinical Director makes arrangement for **"outside"** medical services to be performed at local hospital or clinics or transfers to BOP Medical Facilities. The Health Care Administrator also ~~services~~ Serves as the "direct avenue of communications between the facility health services and the CEO, designee, Regional and Central Offices, and reports directly to the Warden of the facility."

9. Thomas Webster, MD hereinafter referred to as ("Dr. Webster"), is a defendant in this action and bears ultimate responsibility for the daily clinical care at the facility. In that capacity he also advises and makes recommendations to the Health Care Administrator pretaining to prisoners' who need medical treatment that cannot be provided at the facility. Both the Clinical Director and Health Care Service Administrator

report directly to the Warden or Assistant Warden at the BOP Facility.

10. **All of the defendant(s)** herein listed through paragraphs (7) & (9) can be served summons at:

USP/Terre Haute
Hiway 63 South
Terre Haute, Indiana 47808

11. **All the defendant(s) listed herein** are being sued in their individual capacities, as well as in their official capacities.

Concise Statement Of Facts

12. Arriving at USP/Terre Haute, January 19th, 2001 Mr. Ortiz informed the applicable medical personnel that he was having significant problems with his eyes and explained the diagnosis made of his eye condition while he was at the Correction Corporation of America. He also explained that he was experiencing tremendous headackes and constant burning of the eyes because of such, and that his vision was severely impaired because of such. See attached and marked as Appendix (4). He further explained to them that a qualified physician at CCA had diagnosed him with pterygiums and recommended surgery, but that due to his pretrial status CCA told him that he would have to wait until he was in the custody of the BOP before surgery could be provided.

13. On April 30th, 2001 Ortiz was seen and examined by Dr. McGlothan who diagnosed Ortiz with pterygiums and determined that he would require surgery for removal of such. See attached and marked as Appendix (5). Dr. McGlothan explained to Mr. Ortiz at that time that the headackes were the direct result of his impaired vision, as well as the constant burning of his eyes and would continue until the surgical removal of the pterygiums. Dr. McGlothan clarified also that Ortiz's vision would continue to deteriorate as the pterygium ~~because~~ became more enhanced with time and could only be reversed through surgery.

Deliberate Indifference Shown To Ortiz's Serious Medical Needs

14. On October 10th, 2001 the recommended surgery was summarily denied by an unidentified party, supposedly from the BOP/Central Office, with the enumerated reason of **"No Town Trips"**. See attached and marked as Appendix (6).

15. After seven months of assiduously trying to obtain written confirmation why the recommended surgery was denied based on the **No Town Trip** reasoning and by whom Ortiz was seen by the Assistant Hospital Adminstrator, Mr. Andrew Rupska, on December 5th, 2001. Mr. Rupska informed Ortiz that the recommended surgery had been denied by the Central Office because he would not be allowed **Town Trips**. See attached and marked as Appendix (7). When Ortiz questioned Mr. Rupska in regards with exactly who from the Central Office had made that determination that his recommended surgery was denied based totally on town trips not being allowed , Mr. Rupska became immediately irate and evasive. He told Ortiz that "he did not know who from the Central Office denied the surgery or why he would not be allowed town trips.""When Ortiz told Mr. Rupska that he did not understand exactly what he was being told, because he had assumed that his recommended surgery would be reviewed concerning his medical condition and not his death row status, and further that if you knew that the Central Office had denied the surgery that you would also know who from the Central Office had made that denial. "Look' I am telling you exactly what I was told to tell you. Your surgery has been denied, because you will not be allowed treatment **outside the facility**," Mr. Rupska said.

16. After filing numerous medical request forms/Cop Out(s) complaining of the excruciating headackes, vision impairment and burning of the eyes Ortiz was seen and examined by another ophtlalmolist, Dr. Cris

Radanaeta. Dr. Radanaeta diagnosed Ortiz with severe pterygiums and recommended surgical removal of such. This recommendation was denied by the defendants' again asserting that Ortiz will not be allowed any **Town Trips**. See attached and marked as Appendix (8).

17. After continuous filing of medical request for treatment Ortiz was seen by medical personnel on November 7th and December 13th, 2002. Medical personnel noted the redness of Ortiz's eyes and prescribed eye drops. See attached and marked as Appendix (9)&(9)(A).

18. Several months later Ortiz was seen and examined by Pam Swain, PA-C on April 24th, 2003 and a RN Request was made that Ortiz again be seen by the ophthalomist, Dr. Connor for possible "cataracts". See attached and marked as Appendix (9)(B) & (9)(C).

19. On May 14th, 2003 Ortiz was seen by Dr. Connor who examined Ortiz and found severe pterygium in both eyes. He receommded surgical removal of the pterygium. He also told Ortiz that the headackes, burning of his eyes would continue until surgery was performed removing the pterygiums, as his vision would continue to deteriorate also. See attached and marked as Appendix (10) & (10)(A).

20. On May 21st, 2004 the Facility Utalization Review Committee, "URC" meet to consider Ortiz's recommended surgery. See attached and marked as Appendix (10) & (10)(A). The URC referred a follow-up review and recommendation by Dr. Webster. See attached and marked as Appendix (10)(A).

21. On May 21st, 2003 the URC after reviewing Dr. Webster's recommendation denied Ortiz the recommended surgery, without identifying who actually made such denial. See attached and marked as Appendix (11).

22. Dr. Webster without explanatition to why he recommended that Ortiz's surgery be denied noted that the surgery might be necessary

within the next two years. See attached and marked at Appendix (10)(A).

23. Because of the denied surgery for removal of the ptertgium Ortiz continue to suffer excruciating headackes, constant burning of the eyes and severe deterioration of vision. No treatment has been provided to him with the exception of eye drops which only helps resolve the redness in his eyes.

Claims for Relief

23. The failure of defendants Thomas, Bezy, Seanez and Webster to provide the recommended surgery for the removal of the pterygium based on non/medical consideration, i.e. **No Town Trips** because of Ortiz's Death Row status, constitutes deliberate indifference to his serious medical needs in violation of the Eighth Amendment to the United States Constitution.

24. The action of defendants Thomas, Bezy, Seanez and Webster denying Ortiz treatment for his excruciating headackes, burning of his eyes and continuing deterioration of his vision, constitutes deliberate indifference to his medical needs in violation of the Eighth Amendment to the United States Constitution.

Relief Requested

WHEREFORE, plaintiff requests that the Court grant the following relief:

A. Issue a declaratory judgment stating that:

1. Defendant(s) Thomas, Bezy, Seanez and Webster's actions in failing to provide adequate medical care for the plaintiff violated, and continues to violate, the plaintiff's rights under the Eighth Amendment to the United States Constitution.

2. Defendant(s) Thomas, Bezy, Seanez and Webster's actions subjecting the plaintiff to excruciating pain and suffering through

their failure to provide adequate medical treatment violated, and continues to violate plaintiff's rights under the Eighth Amendment to the United States Constitution.

B. Issue an injunction ordering Thomas, Bezy, Seanez, Webster or their agents to:

1. Immediately provide the plaintiff with the recommended surgery for the removal of the pterygium and follow-up medical treatment as determined by a medical practitor with expertise after the surgical removal of the ptergiums.

C. Award compensatory damages in the following amounts:

1. $100,000 jointly and severally against defendant(s) Thomas, Bezy, Seanez and Webster for their obstinate refusal to provide the recommended surgery and for their ongoing deliberate indifference shown to the plaintiff's serious medical needs.

D. Award punitive damages in the following amounts:

1. $25,000 against each of the defendants, Thomas, Bezy, Seanez and Webster for their palpable obstinacy shown to the plaintiff's physical pain and suffering, and permanent and irreversible damage to his eyes.

E. Grant such other relief as this honorable court may find find the plaintiff is entitled under law.

Mr. Ortiz's Certification, Submission, and Jury Trial Request

I, Arboleda Ortiz, does hereby request trial by jury, and does hereby attest, under penalty of perjury, pursuant to 28 U.S.C. § 1746 that all claims and allegations made in the foregoing complaint are true and correct to the best of my knowledge and beliefs. I submit this Civil Rights Complaint this 1st day of October, 2005.

Respectfully Submitted,

ARBOLEDA ORTIZ

Arboleda Ortiz

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

PLAINTIFF'S EXHIBIT #1

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Ortiz, Arboleda	11581-045	SCU/DEATH ROW	USP/TERRE HAUTE
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A- INMATE REQUEST THIS REQUEST FOR ADMINISTRATIVE REMEDY IS BEING PREPARED BY INMATE DAVID HAMMER #24507-077 FOR I/M ORTIZ BECAUSE MR. ORTIZ DOES NOT READ OR WRITE ENGLISH..... Immediate upon arrival at USP/TH on 1/19/01 I advised medical staff that I had problems with my eyes. SeeS.D.#1. On April 30, 2001 I was examined by Dr. John McGlothan, MD who determined that I need eye surgery to remove pterygium (A triangular fleshy mass of thickened conjunctiva occurring at the inner side of the eyeball covering part of the cornea causing siginificent impaired vision and pain.) See S.D.#2.This needed and recommended treatment was denied by some unknown and un specified person in the BOP Central Office according to an entry in my medical records dated 10/01. See S.D.#3. That entry sates at the top of the page"NO TOWN TRIP". I made numerous requests/inquiries about the surgery and seven months after the surgery was recommende I was informed by the Assistant Hospital Administrator Mr. Andrew Rupska that the surgery had been denied by the BOP Central Office. See S.D.#4(12/05/01 entry).On 2/11/02 I was again examined by the contract ophthalmolist Dr. Cris Radanaeta who noted the serious pterygium on my eye: See S.D.#5. That document also has the heading of "NO TOWN TRIP" at the top of the page. On 11/7/02 and 12/13/02 I was examined by institutional Medical Staff for problems with my eyes caused by the pterygium.See S.D.#5&6.On 4/24/03 Pam Swain, PA-C, RN requested that I be seen by the contract Ophthalmoist Dr. Connor for "possible cataracts". See S.D.#8 & #9. On 5/14/03 Dr. Connor again made a diagnosis of Pterygium OU and referred me to Dr. McGlothan for removal. See S.D.#9

Continued on attached page

March 16, 2004 — DATE

ARBOLEDA ORTIZ — SIGNATURE OF REQUESTER

Part B- RESPONSE

SEE ATTACHED

DATE — WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE — CASE NUMBER: 327891-F1

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

March 17, 2004 — DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP I VN

Printed on Recycled Paper

BP-229(13)
APRIL 1982

REQUEST FOR ADMINISTRATIVE REMEDY (CONTINUED) **ATTACHMENT PAGE**

FROM: ORTIZ, ARBOLEDA #11581-045 SCU/DEATH ROW USP/TERRE HAUTE
DATE: MARCH 16, 2004

and #10.
On 5/21/03 the Utalization Review Committee at USP/Terre Haute met to decide about me having the recommended surgery. See S.D.# 11 and #12. The Administrative entry into my medical records regarding that meeting states:

"URC meets, defers eye surgery, F/U (follow up) with C D (clinical director)" dated 5/21/03 1300 H.

There is a Medical Records Consultant Sheet date 5/21/03 relating to the recommended eye surgery which has the word **"denied"** written in the center of the page with no signature or idenity of the person making the entry. See S.D.#13.
Thereafter there is an out of sequence administrative note made by USP/TERRE HAUTE's Clinical Director Dr. Thomas Webster,MD in my medical records which states:

"Admin Note: I/M was 20/100 each eye will f/u (follow up) w (with) eye clinic may need eye surgery (within) next two years." Dated 5/22/03 0900 H See S.D.# 12 (last entry).

There can be no doubt that medical personnel at this institution and perhaps at the Central Office of the BOP have denied me medical treatment recommended by at least two Ophthalmolists. The current Hospital Administrator is also part of the group of medical staff who have denied me medical attention recommended by the contract Ophthalmolists. She stated in her recent response to my informal request for medical treatment that the treatment was denied by the Central Office at the BOP. However the medical records attached hereto clearly demonstrate that since at least February 2002 it has been staff at this institution who have made the decisions to deny me the recommended surgery.
Likewise there can be no doubt that in 2001 the reason the recommended surgery was denied because of my status as a death row inmate. The **No Town Trip** heading on my medical records is proof of this fact. There can be no other logical reason to disallow me a medical trip to a facility here in town for the surgery.
I am a diabetic and my eye problems have only gotten worse during the past three years since the eye surgery was recommended. I have suffered extreme pain and suffering because of this denial of medical treatment. My vision is now almost completely blurred and my eyes are constantly blood shot and swollen, puffy, red, irritated, dry and it's causing me constant pain. Medical staff at this institution have shown a deleberate indifference to my eye problems in direct contradiction of the recommended treatment perscribed by the doctors who have examined me.
I request that I be scheduled for the Pterygium ou surgery as soon as possible and without any further delay. I also request any and all other relief to which I may be entitled.

----------**END OF TEXT**----------**END OF TEXT**----------

Remedy ID #327891-F1

PART B - RESPONSE

This is in response to your Request for Administrative Remedy, receipted March 17, 2004, in which you request to be scheduled for surgical removal of Pterygium in both eyes.

A review of your complaint and a review of your Medical Record reveals that you are scheduled to be medically evaluated by the contract Optometrist in May 2004. This follow-up date was scheduled by the Utilization Review Committee based on the fact that your medical condition is not considered life threatening and there is not a risk of permanent damage to your eyes. If the Optometrist diagnoses you with bilateral Pterygium, then your case will be taken in front of the Utilization Review Committee again.

Based on these facts, your Request for Administrative Remedy is addressed.

If you are dissatisfied with this response, you may appeal to the Regional Director, Federal Bureau of Prisons, Gateway Complex, Tower II, 8th Floor, 4th & State Avenue, Kansas City, Kansas 66101. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

April 1, 2004

Keith E. Olson, Warden

PLAINTIFF'S EXHIBIT #2

Department of Justice
Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From:	LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION
	ORTIZ, ARNOLFDA	11581-045	SCU/DEATH ROW	USP/TERRE HAUTE

Part A—REASON FOR APPEAL THIS REQUEST FOR ADMINISTRATIVE REMEDY IS BEING PREPARED BY INMATE DAVID HAMMER 324507-077 ON I/M ORTIZ'S BEHALF BECAUSE MR. ORTIZ DOES NOT READ OR WRITE ENGLIS

The Warden's response does not address the issues raised in my BP9. I have been denied eye su gery for over three years. It is undisputed that I have pterygiums (a triangular fleshy mass thickened conjuctiva occuring at the inner side of my eyeballs covering part of the cornea ca sing siginificently impaired vision and pain). On three seperate occasions the contract Ophth almoists have recommended that I receive treatment for thiscondition. See S.D's #2,#5,#9. I have beeb denied surgery because of my status a a death row inmate see the "no town trip" not ions on S.D.'s #3,#5.The recommended treatment was denied see S.D's #3,#8,#11, #12,#13 by USP T.H. medical personnel and by some unknown person in the centeral office of the BOP.The warde response only says that I will once again be evaluated by a contract Optometrist in May, 2004 At least three other doctors have stated the same diagnoses for the past three years and the institutional URC has refused to abide by the doctors' recommendation for surgery to remove t pterygiums from my eyes. I believe that permanent damage has been done to my eyes. My vision almost completely blurred, I can not see very well, my eyes remain constantly red, irritated, dry, burring, and pain shoots through my eyeballs and causes head aches. Noone has said why I I have beeb denied the surgery for over three years. I request that I be scheduled for surger

4-04-04 immediately before I go blind! [signature]
DATE SIGNATURE OF REQUESTER

Part B—RESPONSE

DATE REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

THIRD COPY: WARDEN'S ADMINISTRATIVE REMEDY FILE CASE NUMBER: _____

Part C—RECEIPT

CASE NUMBER: _____

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT: _____

BP-230(13)

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

Regional Administrative Remedy Appeal
Part B - Response

Name: ORTIZ, Arboleda
Register Number: 11581-045
Admin Remedy Number: 327891-R1

This is in response to your Regional Administrative Remedy Appeal, in which you allege insufficient medical care for your bilateral pterygiums. You expressed the opinion that this decision is due to your designation to the Special Confinement Unit. For relief, you request immediate surgery.

We have reviewed the documentation related to your appeal, to include your history of BOP medical encounters. Based on our review, we found no basis to substantiate your allegation. Your records reflect staff have been attentive to your needs by ensuring timely specialty evaluations. Although the Utilization Review Committee carefully considered the recommendation for surgery, deference was given to the guidelines of the BOP's Health Services Manual (Program Statement 6000.05). Based on your consistent and adequate visual acuity scores (since your 2001 admission), their decision would be the same if you were not designated to the Special Confinement Unit. We endorse their decision and assure you consideration for surgery will be given following your regularly scheduled evaluations. Of interest during our review, was the lack of evidence to support your claim of having diabetes. For the sake of your health, we encourage you promptly address this belief with your medical provider. You are receiving essential medical care. Your cooperation with staff is imperative.

Based on the above information, your Regional Administrative Remedy Appeal is denied. If you are dissatisfied with this response, you may appeal to the Office of General Counsel, Federal Bureau of Prisons, 320 First Street, NW, Washington, DC 20534. Your appeal must be received in the Office of General Counsel within 30 days from the date of this response.

JUN - 2 2004
Date

G. L. HERSHBERGER, Regional Director

PLAINTIFF'S EXHIBIT #5

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attach... ...our copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From: ORTIZ, ARBOLEDA (LAST NAME, FIRST, MIDDLE INITIAL) 11581-045 (REG. NO.) SCU (UNIT) USP/TH (INSTITUTION)

Part A—REASON FOR APPEAL THIS BP 11 IS BEING PREPARED BY I/M DAVID HAMMER #24507-077 FOR I/M ORTIZ AS HE CANNOT READ OR WRITE ENGLISH. THE WARDEN AND THE REGIONAL DIRECTOR HAVE FAILED TO ADEQUATELY ADDRESS WHY I HAVE BEEN DENIED EYE SURGERY FOR OVER THREE YEARS WHEN THAT SURGERY HAS BEEN RECOMMENDED BY THREE SEPERATE CONTRACT OPTHAMOLOGISTS. SEE: S.D.'S 2, 5, + 9. I HAVE BEEN DENIED THIS SURGERY BECAUSE OF MY STATUS AS A DEATH ROW I/M. SEE: "NO TOWN TRIP" NOTATIONS ON S.D.'S # 3 + 5. MY TREATMENT OR THE LACK THEREOF HAS CAUSED ME TO SUFFER INTENSE + SEVERE PAIN, BLURRED VISION, HEAD ACHES, SWOLLEN PUFFY, RED IRRITATION IN BOTH EYES AND MY EYE SIGHT IS DETERORATING, PERMANENT DAMAGE HAS ALREADY OCCURRED DUE TO THE DENIAL BY BOP STAFF OF THE RECOMMENDED SURGERY. I WAS NOT EVALUATED IN MAY OF 2004 (AS STATED BY WARDEN IN HIS APRIL 1, 2004 RESPONSE TO MY BP 9) TO DETERMINE THE CURRENT STATUS OF MY EYES. I WILL LIKELY BE BLIND BEFOR THE BOP STAFF ACTUALLY ALLOWS ME TO HAVE THE EYE SURGERY I NEED NOW.

JUNE 14, 2004 (DATE) ARBOLEDA ORTIZ (SIGNATURE OF REQUESTER)

Part B—RESPONSE

2004

DATE GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE CASE NUMBER: 327891-A1

Part C—RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN BP-231(13)

Administrative Remedy No. 327891-A1
Part B - Response

This is in response to your Central Office Administrative Remedy in which you allege insufficient medical care for your bilateral pterygiums. You state that this decision is due to your designation to the Special Confinement Unit. As relief, you request immediate surgery.

Discussion with USP Terre Haute medical staff reveals the Utilization Review Committee (URC) reviewed your case and deferred you for surgery pending an evaluation by an Optometrist. On June 29, 2004, you were evaluated by the contract Optometrist for complaints of pterygium. The specialist diagnosed you with bilateral pterygiums and recommended no surgical intervention. You were prescribed medication, educated on the importance of being in compliance with taking the medication, and scheduled for a follow-up visit in six months. The Clinical Director determined surgery for your condition is not medically necessary at this time, however, he will submit a referral for you to be evaluated by an Ophthalmologist to the Utilization Review Committee. Health Services staff will continue to monitor your condition and provide you essential healthcare.

You present no evidence to support your allegation that you were provided insufficient medical care as a result of being designated to the Special Confinement Unit.

The record reflects you are receiving medical care and treatment in accordance with Bureau policy. Should there be a significant change in your condition, you are encouraged to attend sick call to be re-evaluated.

Your appeal is denied.

July 29, 2004
Date

Harrell Watts, Administrator
National Inmate Appeals

PLAINTIFF'S EXHIBIT 4

U.S. Department of Justice
Federal Bureau Of Prisons

MEDICAL HISTORY REPORT

(THIS INFORMATION IS FOR OFFICIAL AND MEDICALLY CONFIDENTIAL USE ONLY AND WILL NOT BE RELEASED TO UNAUTHORIZED PERSONS)

1. LAST NAME—FIRST NAME—MIDDLE NAME	2. REGISTER NUMBER
ORTIZ ANBOLADA	11581-095

3. PURPOSE OF EXAMINATION	4. DATE OF EXAMINATION	5. EXAMINING FACILITY
INTAKE SCREEN	1-19-01	U.S. PENITENTIARY TERRE HAUTE, INDIANA 47808

6. STATEMENT OF EXAMINEE'S PRESENT HEALTH AND MEDICATIONS CURRENTLY USED *(Follow by description of past history, if complaint arises)*

7. HAVE YOU EVER *(Please check each item)*

YES	NO	(Check each item)
	✓	Lived with anyone who had tuberculosis
	✓	Coughed up blood
	✓	Bled excessively after injury or tooth extraction
	✓	Attempted suicide
	✓	Been a sleepwalker

8. DO YOU *(Please check each item)*

YES	NO	(Check each item)
	✓	Wear glasses or contact lenses
✓		Have vision in both eyes
	✓	Wear a hearing aid
	✓	Stutter or stammer habitually
	✓	Wear a brace or back support

9. HAVE YOU EVER HAD OR HAVE YOU NOW *(Please check at left of each item)*

YES	NO	DON'T KNOW	(Check each item)	YES	NO	DON'T KNOW	(Check each item)	YES	NO	DON'T KNOW	(Check each item)
	✓		Scarlet fever		✓		Adverse reaction to serum drug		✓		Epilepsy or fits
	✓		Rheumatic fever		✓		or medicine		✓		Car, train, sea or air sickness
	✓		Swollen or painful joints		✓		Broken bones		✓		Frequent trouble sleeping
	✓		Frequent or severe headache		✓		Tumor, growth, cyst, cancer		✓		Depression or excessive worry
	✓		Dizziness or fainting spells		✓		Rupture/hernia		✓		Loss of memory or amnesia
✓			Eye trouble Cataracts		✓		Piles or rectal disease		✓		Nervous trouble of any sort
	✓		Ear, nose, or throat trouble		✓		Frequent or painful urination		✓		Periods of unconsciousness
	✓		Hearing loss		✓		Bed wetting since age 12		✓		Have you ever had
	✓		Chronic or frequent colds		✓		Kidney stone or blood in urine				homosexual contact?
	✓		Severe tooth or gum trouble		✓		Sugar or albumin in urine		✓		Been exposed to AIDS
	✓		Sinusitis		✓		VD—Syphilis, gonorrhea, etc.		✓		Alcohol Use (Excessive)
	✓		Hay Fever		✓		Recent gain or loss of weight		✓		Drug Use/Addiction
	✓		Head injury		✓		Arthritis, Rheumatism, or Bursitis				Marijuana
	✓		Skin diseases		✓		Bone, joint or other deformity				Cocaine
	✓		Thyroid trouble		✓		Lameness				Heroin
	✓		Tuberculosis		✓		Loss of finger or toe				L.S.D.
	✓		Asthma		✓		Painful or "Trick"shoulder or elbow				Amphetamines
	✓		Shortness of breath		✓		Recurrent back pain				Others: (Specify)
✓			Pain or pressure in chest at times		✓		"Trick" or locked knee				
	✓		Chronic cough		✓		Foot trouble				Alcohol or drug
	✓		Palpitation or pounding heart		✓		Neuritis		✓		Withdrawal Problems
	✓		Heart trouble		✓		Paralysis (include infantile)				
	✓		High or low blood pressure								
	✓		Cramps in your legs					10. FEMALES ONLY HAVE YOU EVER			
	✓		Frequent indigestion								Been treated for a female disorder
✓			Stomach, liver, or intestinal trouble								Had a change in menstrual pattern
	✓		Gall bladder trouble or gallstones								ARE YOU PREGNANT
	✓		Jaundice or hepatitis								SUSPECT YOU ARE PREGNANT

11. WHAT IS YOUR USUAL OCCUPATION?

12. ARE YOU (Check one)
☑ Right handed ☐ Left handed

PLAINTIFF'S EXHIBIT 4 p. 2

PENGAD-Bayonne, N. J.

CHEC[illegible]ERY ITEM CHECKED YES MUST BE FULLY EXPLAINED IN BLANK SPACE BELOW

YES	NO		YES	NO	
✓		13. Have you been refused employment or been unable to hold a job or stay in school because of: A. Sensitivity to chemicals, dust, sunlight, etc.		✓	18. Have you ever had any illness or injury other than those already noted? *(If yes, specify when, where, and give details.)*
	✓	B. Inability to perform certain motions.		✓	19. Have you consulted or been treated by clinics, physicians, healers, or other practitioners within the past 5 years for other than minor illnesses? *(If yes, give complete address of doctor, hospital, clinic, and details.)*
	✓	C. Inability to assume certain positions.			
	✓	D. Other medical reasons *(If yes, give reasons.)*		✓	20. Have you ever been rejected for military service because of physical, mental, or other reason? *(If yes, give date, and reason, for rejections.)*
	✓	14. Have you ever been treated for a mental condition? *(If yes, specify when, where, and give details).*		✓	21. Have you ever been discharged from military service because of physical, mental, or other reasons? *(If yes, give date, reason, and type of discharge whether honorable, other than honorable, for unfitness or unsuitability.)*
	✓	15. Have you ever been denied life insurance? *(If yes, state reason and give details.)*			
	✓	16. Have you had, or have you been advised to have, any operations? *(If yes, describe and give age at which occured.)*		✓	22. Have you ever received, is there pending, or have you applied for pension, or compensation for existing disability? *(If yes, specify what kind, granted by whom, and what amount, when, why.)*
✓		17. Have you ever been a patient in any type of hospital? *(If yes, specify when, where, why, and name of doctor and complete address of hospital.)*			

EXPLANATION: (#13-22 ABOVE)

Stabbing in left arm 1995

NKDA

Insomnia — Trazadone 25 mg
ASA 4 TID
Prevacid 30 mg QD
Tigan 200 TID

I certify that I have reviewed the foregoing information supplied by me and that it is true and complete to the best of my knowledge. I authorize any of the doctors, hospitals, or clinics mentioned above to furnish the Government a complete transcript of my medical record.

TYPED OR PRINTED NAME OF EXAMINEE: [illegible]

SIGNATURE: X [illegible]

INTAKE SCREENING:

INMATE RECEIVED FROM: COURT ____ TRANSFER ____ P.V. ____

OTHER ____

MEDICAL STAFF'S COMMENTS AND OBSERVATIONS: PLEASE DIRECT YOUR ANSWERS TO MENTAL STATUS, POTENTIAL SUICIDE, APPEARANCE, CONDUCT, STATE OR CONSCIOUSNESS, RASHES, JAUNDICE, BRUISES AND/OR MARKS, SWEATING, BODY DEFORMITIES, ETC. NOTE OBSERVATIONS IN BLOCK 23 BELOW.

IF DRUGS HAVE BEEN USED, NOTE TYPE, HOW LONG, HOW MUCH, HOW OFTEN, HOW USED, WHEN WERE THEY LAST USED: HAVE THERE BEEN ANY PROBLEMS SINCE STOPPING THE USE OF DRUGS OR ALCOHOL? ____

DOES PATIENT NEED TO BE SEEN IMMEDIATELY BY THE MEDICAL STAFF YES ____ NO ____

WHAT ARRANGEMENTS HAVE BEEN MADE? ____

DUTY STATUS: TEMPORARY WORK ____ RESTRICTED ____

GENERAL POPULATION ____ YES ____ NO ____

TYPE AND EXTENT OF LIMITATION ____

23. Physician's summary and elaboration of all pertinent data *(Physician shall comment on all positive answers in item 6 through 22. Physician may develop by interview any additional medical history he deems important, and record any significant findings here.)*

PPD DATE: 1-25-01 28 MM
SMOKE: YES/NO
LICE: YES/NO
ALLERGIES: NKDA/
MEDICATIONS: NONE/SEE 600
MEDICAL COMPLAINTS: NONE/
SURGERIES: NONE/
MEDICAL RESTRICTIONS: YES/NO
DIABETIC: YES/NO
FUNCTIONAL ASSESSMENT: NORMAL/

NKDA

G.C. [illegible] M.D. Director

PED OR PRINTED NAME OF PHYSICIAN OR AMINER	DATE	SIGNATURE	NUMBER OF ATTACHED SHEETS
S.SWABY RN D.FARRIS RN [illegible] RN D.LAMBING RN	1-19-01	[illegible]	

PLAINTIFF'S EXHIBIT 5

S.D. #2

MEDICAL RECORD

PATIENT NAME:

CONSULTATION SHEET

Date:

uncorrected OD 20/ corrected OS 20/ (circle one)	SIGNIFICANT PAST OCULAR HISTORY (reason for visit): Hx of Cataract OU, presents for Cataract evaluation	AGE:
PROVISIONAL DIAGNOSIS:		

PA/MD SIGNATURE:

APPROVED:

CONSULTATION REPORT

OLD PRESCRIPTION:

	SPHERE	CYLINDER	AXIS
OD:			
OS:			

1/A 20/80 PH NT
20/80 NT

PATHOLOGY: Pterygium nasal OU
TAP 13 A/c D+4, lens clear
16
lens clear

NEW PRESCRIPTION:

	SPHERE	CYLINDER	AXIS	ADD	PRISM	PD D	PD N	SEG HT	EYE SIZE	SEG TYPE	CORRECTED VISION
OD:	+100	-150	180								OD 20/50
OS:	+100	-150	180								OS 20/50

MATERIAL BRIDGE TEMPLE

CR-39 POLYCARB HIGH-INDEX 1.60 ASL

IMPRESSION
1) Pterygium OU - visually significant, causing astigmatism OU

PLAN:
1) Excision of pterygium OU

OPHTHALMOLOGIST: ~~ANDREW S. FARBER, MD~~ Jonathan McGlothan

David George, D.O.
Physician

DATE: 4/30/11

COMMENTS/OTHER:

PATIENT IDENTIFICATION: Ondie Arturleda

REGISTER NUMBER:

US PENITENTIARY
TERRE HAUTE, INDIANA

PLAINTIFF'S EXHIBIT 6

TOWNSHIP

SA#3

510-110

NSN 7540-00-634-4127

MEDICAL RECORD

CONSULTATION SHEET

REQUEST

TO	FROM (Requesting physician or activity)	DATE OF REQUEST
Dr McGlath / Opthm	[signature] HSS	4-30-01

REASON FOR REQUEST (Complaints and findings)

Recommend Excision of pterygium OU.

PROVISIONAL DIAGNOSIS

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION		
	[signature]	☐ BEDSIDE	☒ ON CALL	☒ ROUTINE ☐ TODAY ☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

RECORD REVIEWED ☐ YES ☐ NO PATIENT EXAMINED ☐ YES ☐ NO

10/01 Surgical request denied by Central Office at this time. [signature] HSS

(Continue on reverse side)

SIGNATURE AND TITLE			DATE
IDENTIFICATION NO.	ORGANIZATION	REGISTER NO.	WARD NO.

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; rank; rate; hospital or medical facility)

*U.S.GPO:1994-362-955

Ordig, Arthur Leda

11581-0 4S

CONSULTATION SHEET

Medical Record

STANDARD FORM 513 (REV. 8-92)
Prescribed by GSA/ICMR, FIRMR (41 CFR) 201-9.202-1

PLAINTIFF'S EXHIBIT 7

DATE ... TONS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)

10-23-01 Clear to ascultation —
CONT'D (A) Chondromylacia - non compliance c̄ Rx or Rec. therapy / completion of INH therapy c/o's Ribs (L) dorsal back c̄ swelling
(B) Rx (1) X-ray of (L) ↑ rib - post - FLU results PRN
(2) Pt given a flu shot - stat -
(3) Patient Educated on eval - switch to yearly CXR & to take meds @ issued on 3-12 & reeduc to therapy plan - understands — JSmith PA
John W. Smith PA

11-6-01 Pts X-ray results back - of back ribs - posterior
0800 wnl - ∅ fxs ∅ pneumothorax - pt educ on latter -
NOTE understands — JSmith PA
John W. Smith PA

12/5/01 Adm Note: Inmate Request Information Regarding
1445 Surgical Removal of Pleurisy OU. That was Recommended on 4/30/01. As Per Consultant Sheet Sugi off 10/01. Pt was Denied Surgery per Central Office. Documented By D. Lampy RS. Inmate was Verbally Notified. — [signature]
Andrew Rupeka, AHSA

1-29-02 (S) pt c/o's of awakening c̄ ↓ back pain x last wk -
0630 denies trauma -
D-44 (O) pt NAD - From of ↓ back c̄ pain / spasms -

PLAINTIFF'S EXHIBIT 8

513-110

NSN 7540-00-634-4127

MEDICAL

CONSULTATION SHEET

REQUEST

TO	FROM: (Requesting physician or activity)	DATE OF REQUEST
Dr McGlath Opthm	Dr Lingy HSS	4-30-01

REASON FOR REQUEST (Complaints and findings)

Recommend Excision of pterygium OU.

PROVISIONAL DIAGNOSIS

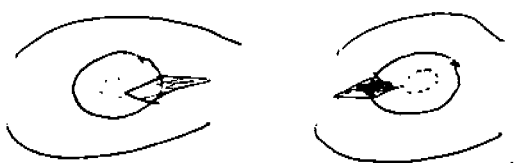
DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
		☐ BEDSIDE ☒ ON CALL	☒ ROUTINE ☐ TODAY ☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

RECORD REVIEWED ☐ YES ☐ NO PATIENT EXAMINED ☐ YES ☐ NO

D VA 2 | 25 / 25

SLE bilateral pterygium



2.5 mm corneal encroachment.

2.0 mm from pupillary scotopic margin.

A1) bilateral pterygium.

P1) Prednisolone mild (0.125%) 1 gtt OU tid x 3 dg

2) Artificial tears prn.

(Continue on reverse side)

SIGNATURE AND TITLE: 5789TG Cris Radaneata OD

DATE: 2-11-02

IDENTIFICATION NO. | ORGANIZATION | REGISTER NO. | WARD NO.

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; rank; rate; hospital or medical facility)

Dunit

*U.S.GPO:1994-362-955

Arthy, Arthur Lida

11581-045

CONSULTATION SHEET

Medical Record

STANDARD FORM 513 (REV. 8-92)
Prescribed by GSA/ICMR, FIRMR (41 CFR) 201-9.202-1

PLAINTIFF'S EXHIBIT 9

NSN 7540-00-634-4176

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD — CHRONOLOGICAL RECORD OF MEDICAL CARE

DATE	SYMPTONS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)
2-11-02 0915	Adm Stuj Pt seen by Dr Rabenecta today Ordered the following: 1) Pred forte 0.125% OU TID x 3 days. Only use when eyes are irritated. 2) Artificial tears PRN #1 Ø refill

Dr Lang FNP-C

Dr Lang FNP-C

Ord.Date 02/11/02 Exp.Date 05/11/02 Rx # 44850 — ORTIZ, ARBOLEDA A 11581-045 — T. WEBSTE (0)Refills — INSTILL AS DIRECTED IN BOTH EYES THREE TIMES DAILY FOR 3 DAYS (USE ONLY WHEN EYES ARE IRRITATED) PREDNISOLONE SOD PH 0.125% SOLN #1

Ord.Date 02/11/02 Exp.Date 05/11/02 Rx # 44851 — ORTIZ, ARBOLEDA A 11581-045 — T. WEBSTE (0)Refills — USE AS DIRECTED AS NEEDED — TEARS, ARTIFICIAL (TEARGEN) ML #1

E. Sievers
Pharm D, RPH

7-26-02 0600 D-49	(S) pt c/o of flare of back pain after exercising (O) pt ambl - has Fx hx of L back S/ pain on spasms elevated - (A) c/o L back pain (P) Rx'd Salsalate 500mg TID #21 (2) Patient Educated on Rx per c/o & to F/U PRN on daily SC - understands

John W. Smith PA

GNEASE RPh.

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: (For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)

REGISTER NO. | WARD NO.

Ortiz, Arboleda
#11581-045

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record
STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR (41 CFR) 201-9.202-1

SO# 7

Ex. 9-A

DATE	SYMPTONS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)
11-7-02	(S) pt demanding to see eye MD about his "cataracts
0600	wants them removed -
D-47	(O) pt has Ø cataracts - just pterygiums bilat - size unchanged since exam of 4-30-01 - eyes quiet
	(A) pterygiums - bilat
	(P) Rx(1) Pt educ. Ø Rx indicated & that growths are not cataracts - pt upset/angry - states they are cataracts & I'm denying him medical care - pt will be FIU PRN
	John W. Smith P.A.
11-25-02	S - sinus problem
1307	O - Pt NAD coherent oriented x3 to examination show sinus congestion
	- A - nasal congestion
	- P - Ctmyg TPD TID #15
	Pt educated - Abt rx wl to Pt verbalized understanding
	Pladded P.A.
PRESPECTIVE REVIEW DONE PT. EDUCATION SHEET GIVEN YES NO COMMENTS	E. [illegible] Pharm D. [illegible]
12-13-02	S - My Eyes are irritate
1111	O - Pt NAD coherent oriented x3 to examination show Eyes:
D unit	B/L Pterigium red irritate conjunctiva dry.
	- A - Pterygium
	- P - Artificial tears 1-2 drops in each Eyes QID #1 x II Refill
	Pt educated about ↑ H2O/fluid intake Pt verbalized understanding
PRESPECTIVE REVIEW DONE PT. EDUCATION SHEET GIVEN YES NO COMMENTS	Pladded P.A.

Ex-9-C

513-111 AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CONSULTATION SHEET**

REQUEST

TO:	FROM: (Requesting physician or activity)	DATE OF REQUEST
Dr. Connor (opth.)	R. Twaim	4/24/03

REASON FOR REQUEST (Complaints and findings)

This is a 33 y.o. Hispanic male who is having difficulty seeing up close and at a distance in both eyes.

OD 20/100 OS 20/100 Pterigium bil.

PROVISIONAL DIAGNOSIS Possible cataracts

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
		☐ BEDSIDE ☐ ON CALL	☐ ROUTINE ☐ TODAY ☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

RECORD REVIEWED ☐ YES ☐ NO PATIENT EXAMINED ☐ YES ☐ NO TELEMEDICINE ☐ YES ☐ NO

pterygium - nasal OU, causing corneal distortion. Refer to Dr McClothan for removal

IOP Tp 12/12 Rx -25 -25

Hold Rx for glasses until post. OP.

(Continue on reverse side)

SIGNATURE AND TITLE	DATE
Dr Connor	5-14-03

HOSPITAL OR MEDICAL FACILITY	RECORDS MAINTAINED AT	DEPARTMENT/SERVICE OF PATIENT

RELATION TO SPONSOR	SPONSOR'S NAME (Last, first, middle)	SPONSOR'S ID NUMBER (SSN or Other)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; ID no. (SSN or other); Sex; Date of Birth; Rank/Grade)	REGISTER NO.	WARD NO.
Ortiz, Arboleda	11581-045	

U.S. PENITENTIARY
TERRE HAUTE, IN 47808

CONSULTATION SHEET
Medical Record

STANDARD FORM 513 (REV. 4-98)
Prescribed by GSA/ICMR FPMR (41 CFR) 101-11.203(b)(10)

PLAINTIFF'S EXHIBIT 10

513-111 AUTHORIZED FOR LOCAL REPRODUCTIO

MEDICAL RECORD

CONSULTATION SHEET

REQUEST

TO:	FROM: (Requesting physician or activity)	DATE OF REQUEST
DR MCGLOTHAN	DR CONNER	5/14/03

REASON FOR REQUEST (Complaints and findings)

Pterygium NASAL O.U. Causing Corneal distortion - Refer to Dr McGlothan for removal per Dr Conner

PROVISIONAL DIAGNOSIS

Pterygium

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
[signature] PAC		☐ BEDSIDE ☐ ON CALL	☐ ROUTINE ☐ TODAY ☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

RECORD REVIEWED ☐ YES ☐ NO PATIENT EXAMINED ☐ YES ☐ NO TELEMEDICINE ☐ YES ☐

deferred S.D. #11

D

(Continue on reverse side)

SIGNATURE AND TITLE	DATE

HOSPITAL OR MEDICAL FACILITY	RECORDS MAINTAINED AT	DEPARTMENT/SERVICE OF PATIENT

RELATION TO SPONSOR	SPONSOR'S NAME (Last, first, middle)	SPONSOR'S ID NUMBER (SSN or Other)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; ID no. (SSN or other); Sex; Date of Birth; Rank/Grade)	REGISTER NO.	WARD NO.
ORTIZ, ARboleda 11581-045 U.S. PENITENTIARY		

EX. 10(A)

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION (Sign each entry)
5-21-03	Admn Note: URC meets
1300H	defers eye surgery
	f/u with CO

THOMAS WEBSTER MD
CLINICAL DIRECTOR
USP/FCI TERRE HAUTE

DATE 6/3/03 CONSULTANT VISIT Burkle
TIME ~~1002~~ S: Patient seen on consultation for C/O:

O: See Consultation sheet

A:

P:

5-22-03	Admn Note: I/M
0900H	has 20/100 each eye
	will f/u in eye clinic
	may need cataract surgery in
	next 2 years.

THOMAS WEBSTER MD
CLINICAL DIRECTOR
USP/FCI TERRE HAUTE

PLAINTIFF'S EXHIBIT 11

AUTHORIZED FOR LOCAL REPRODUCTION

AL RECORD | CONSULTATION SHEET

EQUEST

TO:	FROM: (Requesting physician or activity)	DATE OF REQUEST
DR. MCGLOTHAN	T. WEBSTER	5-21-03

REASON FOR REQUEST (Complaints and findings)

surgical removal of pterygium

PROVISIONAL DIAGNOSIS

see notes

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
		☐ BEDSIDE ☐ ON CALL	☐ ROUTINE ☐ TODAY ☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

RECORD REVIEWED ☐ YES ☐ NO PATIENT EXAMINED ☐ YES ☐ NO TELEMEDICINE ☐ YES ☐ NO

denied

(Continue on reverse side)

SIGNATURE AND TITLE	DATE

HOSPITAL OR MEDICAL FACILITY	RECORDS MAINTAINED AT	DEPARTMENT/SERVICE OF PATIENT

RELATION TO SPONSOR	SPONSOR'S NAME (Last, first, middle)	SPONSOR'S ID NUMBER (SSN or Other)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name–last, first, middle; ID no. (SSN or other); Sex; Date of Birth: Rank/Grade)	REGISTER NO.	WARD NO.
ORTIZ ARBOLEDA 11581-045		

CONSULTATION SHEET
Medical Record

STANDARD FORM 513 (REV. 4-90)
Prescribed by GSA/ICMR FPMR (41 CFR) 101-11 .203(b)(10)

USP TERRE HAUTE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-WTL
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

J U D G M E N T

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that judgment is entered for the defendants and against the plaintiff, and that this cause of action is dismissed with prejudice.

The costs of this action are assessed against the plaintiff.

Date: 10/18/2006

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
UNITED STATES ATTORNEY'S OFFICE
jeff.hunter@usdoj.gov

Arboleda Ortiz Reg No 11581-045
U S. Penitentiary
P O Box 12015
Terre Haute, IN 47801

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-WTL
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

J U D G M E N T

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that judgment is entered for the defendants and against the plaintiff, and that this cause of action is dismissed with prejudice.

The costs of this action are assessed against the plaintiff.

Date: 09/25/2007

Laura Briggs, Clerk
United States District Court

By: Deputy Clerk

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
UNITED STATES ATTORNEY'S OFFICE
jeff.hunter@usdoj.gov

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U S. Penitentiary
P O Box 12015
Terre Haute, IN 47801

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-JMS
	)	
DR. THOMAS WEBSTER,	)	
	)	
Defendant.	)	

J U D G M E N T

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the defendant's motion for summary judgment is granted, that judgment is entered for the defendant and against the plaintiff, and that the plaintiff take nothing by his complaint.

Date: 03/30/2010

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Laura Briggs, Clerk
United States District Court

By: Deputy Clerk

Distribution:

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UNITED STATES ATTORNEY'S OFFICE
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Vilda Samuel Laurin III
BOSE MCKINNEY & EVANS, LLP
slaurin@boselaw.com

Marisol Sanchez
BOSE MCKINNEY & EVANS, LLP
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-JMS
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

E N T R Y

The plaintiff's request to proceed on appeal *in forma pauperis* (dkt 155) is **granted.**

IT IS SO ORDERED.

Date: 05/26/2010

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
UNITED STATES ATTORNEY'S OFFICE
jeff.hunter@usdoj.gov

Arboleda Ortiz
Reg No. 11581-045
U S. Penitentiary-Federal Correctional Complex
Special Confinement Unit
P O Box 33
Terre Haute, IN 47808

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-WTL
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

E N T R Y

The plaintiff's motion for an extension of time in which to pay the initial partial filing fee of $1.65 is **granted.** He shall have **through January 6, 2006** in which to do so.

IT IS SO ORDERED.

Date: 12/02/2005

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Copies to:

ARBOLEDA ORTIZ
Reg. No. 11581-045
U S. Penitentiary
P O Box 12015
Terre Haute, IN 47808

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-WTL
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

Entry Discussing Motion for Enlargement of Time

The motion for enlargement of time, filed on April 27, 2006, by defendant Maryellen Thoms, seeks a 30-day enlargement of time to respond to the plaintiff's complaint. The motion for time is **granted to the extent** that defendant Thoms shall have **through May 31, 2006**, in which to file an answer or other responsive pleading.

IT IS SO ORDERED.

Date: 05/01/2006

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution:

Arboleda Ortiz
Reg. No. 11581-045
U S. Penitentiary
P O Box 12015
Terre Haute, IN 47801

Jeffrey Hunter
Office of the United States Attorney
10 West Market Street Suite 2100
Indianapolis, IN 46204-3048

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-WTL
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

ENTRY

The plaintiff's request for the appointment of counsel is **denied** to the extent that the court will not make an outright request that counsel represent the plaintiff at this juncture. The court will, however, be alert to the possibility of recruiting representation for the plaintiff at trial or at other points in the case where the plaintiff's incarceration and *pro se* status would make it particularly difficult for him to proceed without representation and to the possibility at those points where the assistance of counsel would be a benefit of both the plaintiff and the court in the presentation of the case.

IT IS SO ORDERED.

Date: 06/29/2006

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
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jeff.hunter@usdoj.gov

Arboleda Ortiz
Reg No 11581-045
U S. Penitentiary
P O Box 12015
Terre Haute, IN 47801

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-WTL
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

E N T R Y

The plaintiff's discovery request filed on November 30, 2006, has been docketed as a motion. Whether a motion or simply a request for discovery, the matter is untimely and is **denied.** Based on the Entry issued on August 25, 2006, the parties were to complete written discovery by September 20, 2006. The defendants have no obligation to respond to the request for production filed on November 30, 2006, and **the December 15, 2006,** deadline for the plaintiff to respond to the motion for summary judgment **remains in effect.**

IT IS SO ORDERED.

Date: 12/01/2006

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
UNITED STATES ATTORNEY'S OFFICE
jeff.hunter@usdoj.gov

Arboleda Ortiz Reg No 11581-045
U S. Penitentiary
P O Box 12015
Terre Haute, IN 47801

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 2:05-CV-246-LJM-WTL
	)	
MARK BEZY, et, al.,	)	
	)	
Defendants,	)	

ORDER

This cause is before the Court on the Motion For Extension Of Time filed by defendants Mark A. Bezy, Sharon Seanez and Dr. Thomas Webster, seeking an extension of time to January 19, 2007, to reply to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment. The Court, being duly advised, now GRANTS the Motion. The Defendants Mark A. Bezy, Sharon Seanez and Dr. Thomas Webster shall have until on or before January 19, 2007, in which to file their reply to the Plaintiff's Response in Oppositon to Defendants' Motion for Summary Judgment.

IT IS SO ORDERED

Southern District of Indiana

Distribution:

Jeffrey L. Hunter
Assistant United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

ARBOLEDA ORTIZ
REG NO 11581-045
U S. Penitentiary
P O Box 12015
Terre Haute, IN 47801

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 2:05-CV-246-LJM-WTL
	)	
MARK BEZY, et, al.,	)	
	)	
Defendants,	)	

ORDER

This cause is before the Court on the Second Motion For Extension Of Time filed by defendants Mark A. Bezy, Sharon Seanez and Dr. Thomas Webster, seeking an extension of time to January 31, 2007, to reply to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment. The Court, being duly advised, now GRANTS the Motion. The Defendants Mark A. Bezy, Sharon Seanez and Dr. Thomas Webster shall have until on or before January 31, 2007, in which to file their reply to the Plaintiff's Response in Oppositon to Defendants' Motion for Summary Judgment.

IT IS SO ORDERED 01/22/20

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

DISTRIBUTION:

Jeffrey L. Hunter
Assistant United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

ARBOLEDA ORTIZ
REG NO 11581-045
U S. Penitentiary
P O Box 12015
Terre Haute, IN 47801

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-JMS
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

Entry Concerning Selected Matters

The court, having considered the above action and the matters which are pending, makes the following rulings:

1. The plaintiff's request for the appointment of counsel (dkt 80) is **denied** to the extent that the court will not make an outright request that counsel represent the plaintiff at this juncture. The court will, however, be alert to the possibility of recruiting representation for the plaintiff at trial or at other points in the case where the plaintiff's incarceration and *pro se* status would make it particularly difficult for him to proceed without representation and to the possibility at those points where the assistance of counsel would be a benefit of both the plaintiff and the court in the presentation of the case.

2. The plaintiff shall have **through November 5, 2008,** in which to report the existence and nature of any ongoing need for medical care within the scope of the claims asserted in this case.

IT IS SO ORDERED.

Date: 10/20/2008

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
UNITED STATES ATTORNEY'S OFFICE
jeff.hunter@usdoj.gov

Arboleda Ortiz Reg No. 11581-045
U S. Penitentiary - Federal Death Row Unit
P O Box 33
Terre Haute, IN 47808

FILED
U.S. DISTRICT COURT
TERRE HAUTE DIVISION
2008 NOV -3 AM 9:23
SOUTHERN DISTRICT OF INDIANA
LAURA A. BRIGGS
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,
Plaintiff,

v. Case No. 2:05-cv-0246-LJM-JMS

MARK BEZY, et. al.,

Defendants,

PLAINTIFF'S RESPONSE TO COURT'S ENTRY OF OCTOBER 20, 2008

Comes Now, Arboleda A. Ortiz, Plaintiff Pro Se (with assistance provided by fellow death row inmate David Paul Hammer, due to Mr. Ortiz's illiteracy) and respectfully submits the following information and response to this Court's Entry of October 20, 2008.

1. On October 23rd, 2008 the Plaintiff was provided with some of his medical records maintained by the defendant in this case. Those records had first been requested in June, 2008.

2. In correspondence from Robert D. Deitch, Jr., M.D. dated August 28, 2008 in which he discusses Mr. Ortiz's recent eye surgery (pterygium resection with conjunctival autograph placement on both eyes) Dr. Deitch concludes as follows: "In summary, Mr. Ortiz has done well following his pterygium surgery OU two months ago. There is no evidence of recurrence. No further treatment is indicated." See: Attachment #1.

3. Based upon the medical records and information available to him at this time, the plaintiff would submit to the court that he is in need of no further medical treatment for his pterygia at this time.

4. It should be noted that the plaintiff is in need of counsel to represent him

him in this case. This Court's Entry denying the recrucitment of counsel for Mr. Ortiz, dated October 20, 2008 is contrary to the suggestions of the Seventh Circuit in its Remand Order Of June 13, 2008. See: Ortiz v. Bezy, (7th Cir. 2008) 2008 U.S. App. LEXIS 12885. Additionally, this Court has failed to undertake the appropriate analysis as required by Pruitt v. Mote, 503 F.3d 647 (7th Cir. 2007 (En Banc). This Court must determine if the plaintiff has attempted to obtain counsel on his own and if not that he has been precluded from doing so. Mr. Ortiz's Motion for the Recruitment of Counsel explains via his Sworn Declaration that he is illiterate and cannot contact any attorneys on his own. Further Mr. Ortiz's Declarartion as well as that of his inmate legal aid demonstrates the attempt made on the Plaintiff's behalf to recruit counsel . Therefore the plaintiff has met the threshode inquiry requirement for the recritment of counsel. This Court has not addressed this issue in considering whether to recruit counsel for Mr. Ortiz. This Court has also failed to analyze the Plaintiff's abilities related to "the tasks that normally attend litigation: evidence gathering, preparing and responding to motions and other court filings, and trial." Pruitt v. Mote, 503 F.3d 654-655. When a court fails to undertake such an analysis it abuses its discretion. See: Ortiz v. Bezy, 2008 U.S. App. LEXIS 12885. There can be no doubt that failure to recruit counsel for the plaintiff in this case will result in prejudice and a miscarrige of justice. The plaintiff is illiterate, he can speak only limited English, he has absolutely no ability to litigate or try this case himself. Pursuant to the Lcoal Rules of this Court Mr. Ortiz requests that this Court conduct a limited hearing on this Motion via Video-Conferencing where the court can engage in a colloquy with Mr. Ortiz and determine for itsself on the record the need for the recruitment of counsel in this case. Anything short of the immediate appointment/recrucitment of counsel in this case will prevent the plaintiff from taking dep-

ositions, conducting discovery and preparing for trial. He cannot do thes things on his own because of his illiteracy and his incarceration. This Court has not addressed these issues in its Entry denying the plaintiff's motion for the recruitment of counsel. Pursuant to Fed. Rules of Civil Procedure 60(b)(6) this Court is urged to reconsider plaintiff's Motion for the Recruitment of Counsel because it has not applied the legal standards mandated by Pruitt v. Mote, 503 F.3d 647 (7th Cir. 2007) (En Banc) and the Seventh Circuit's Order remanding this case.

5. The plaintiff would respectfully advise this Honorable Court that unless counsel is recrucited by the Court as suggested by the Seventh Circuit, he intends to seek a Writ of Mandamus from the Seventh Circuit directing that Counsel be recruited for him in this case.

Respectfully Submitted,

October 28, 2008

Arboleda A. Ortiz, Pro Se
Plaintiff, Reg. No. 11581-045
Federal Correctional Complex
Special Confinement Unit
Post Office Box 33
Terre Haute, In 47808-0033

Prepared for Arboleda A. Ortiz by:
David Paul Hammer, Paralegal
Reg. No. 24507-077
Federal Correctional Complex
Special Confinement Unit
Post Office Box 33
Terre Haute, IN 47808-0033

CERTIFICATE OF MAILING

I Arboleda A. Ortiz do herby state, declare and certify pursuant to 28 U.S.C. § 1746 that on this 29th day of October, 2008 a true and correct copy of this Response to the Court's Entry of October 20, 2008 was sent by Firt Class prepaid Mail to the following: Jeffrey L. Hunter, Assistant U.S. Attorney, Office of the U.S. Attorney, 2100 West Market Street, Suite 2100, Indianapolis, IN 46204-3048. The Original was sent via Prepaid First Class Mail to the Clerk of the Court for filing.

Arboleda A. Ortiz, Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:05-cv-0246-LJM-JMS
	)	
MARK A. BEZY, et al.,	)	
	)	
Defendants	)	

ORDER

This cause is before the Court on the Defendant's Motion For Extension of Time to file his Motion for Summary Judgment, and

The Court, being duly advised in the premises, now GRANTS said Motion. The Defendant shall file his Motion for Summary Judgment on or before December 30, 2008.

IT IS SO ORDERED this 12/24/2008

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
Assistant United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

Arboleda A. Ortiz
Reg. No. 11581-045
Federal Correctional Complex
Special Confinement Unit
P.O. Box 33
Terre Haute, IN 47808-0033

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ	)	
Plaintiff,	)	
v.	)	CASE NO. 2:05-cv-0246-LJM-JMS
	)	
MARK A. BEZY, et al.,	)	
Defendants.	)	

ORDER

This cause is before the Court on the Defendant's Motion For Extension of Time to file his Response to Plaintiff's Motion for the Appointment of Expert, and

The Court, being duly advised in the premises, now GRANTS said Motion. The Defendant is granted an extension of time to and including January 30, 2009, within which he may file a response to Plaintiff's Motion for Appointment of Expert.

IT IS SO ORDERED this 01/12/2009

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
Assistant United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

Arboleda A. Ortiz
Reg. No. 11581-045
Federal Correctional Complex
Special Confinement Unit
P.O. Box 33
Terre Haute, IN 47808-0033

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 2:05-CV-246-LJM-JMS
	)	
MARK BEZY, et, al.,	)	
	)	
Defendants,	)	

ORDER

This cause is before the Court on the Motion For Extension Of Time To Respond to the Plaintiff's Motion to Compel Discovery, Plaintiff's Certification Pursuant to Federal Rules of Civil Procedure 37(A)(1) and Rule 37.1 of the Local Rules, and Plaintiff's Motion to Strike Expert Witness.

The Court, being duly advised, now GRANTS the Motion. The Defendant is granted an extension to and including February 6, 2009 to respond to the above matters.

IT IS SO ORDERED this 01/16/2009

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
Assistant United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

ARBOLEDA ORTIZ
REG NO 11581-045
Federal Correction Complex
Special Confinement Unit
P.O. Box 33
Terre Haute, IN 47808-0033

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ	)	
Plaintiff,	)	
v.	)	CASE NO. 2:05-cv-0246-LJM-JMS
	)	
MARK A. BEZY, et al.,	)	
Defendants.	)	

ORDER

This cause is before the Court on the Defendant's Motion For Extension of Time to Reply to Plaintiff's Response in Opposition to Summary Judgment, and

The Court, being duly advised in the premises, now GRANTS said Motion. The Defendant shall file his reply to Plaintiff's Response in Opposition to Summary Judgment on or before March 9, 2009.

IT IS SO ORDERED this 02/24/2009

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
Assistant United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

Arboleda A. Ortiz
Reg. No. 11581-045
Federal Correctional Complex
Special Confinement Unit
P.O. Box 33
Terre Haute, IN 47808-0033

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
vs.	)	2:05-cv-246-LJM-JMS
	)	
MARK BEZY, et al.,	)	
	)	
Defendants.	)	

E N T R Y

The plaintiff's motion for enlargement of time (dkt 116) is **granted.** The plaintiff shall have through **March 9, 2009**, in which to file his reply to the defendant's response to the plaintiff's motions to strike and to file his reply to the defendant's response to the plaintiff's motion to compel and to plaintiff's certification.

IT IS SO ORDERED.

Date: 02/25/2009

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
UNITED STATES ATTORNEY'S OFFICE
jeff.hunter@usdoj.gov

ARBOLEDA ORTIZ
REG NO 11581-045
U S. Penitentiary-Federal Correctional Complex
Special Confinement Unit
P O Box 33
Terre Haute, IN 47808

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
v.	)	**CAUSE NO.: 2:05-CV-246-LJM-JMS**
	)	
THOMAS WEBSTER, MD,	)	
Clinical Director Health Services,	)	
	)	
Defendant.	)	

ORDER ON UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Arboleda A. Ortiz, by counsel, having filed his Unopposed Motion for Extension of Time to File Response in Opposition to Defendant's Motion for Summary Judgment, and the Court having considered same and being otherwise duly advised in the premises, now finds that said Motion should be GRANTED.

IT IS THEREFORE ORDERED that the time within which the Plaintiff has to file his Response in Opposition to Defendant's Motion for Summary Judgment is hereby extended to and including **August 31, 2009**.

DATED

07/10/2009

Jane Magnus-Stinson
United States Magistrate Judge
Southern District of Indiana

DISTRIBUTION TO:

V. Samuel Laurin, III
Marisol Sanchez
BOSE McKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, Indiana 46204
slaurin@boselaw.com
msanchez@boselaw.com

Jeffrey L. Hunter
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204
jeff.hunter@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
v.	)	**CAUSE NO.: 2:05-CV-246-LJM-JMS**
	)	
THOMAS WEBSTER, MD,	)	
Clinical Director Health Services, et al.	)	
	)	
Defendants.	)	

ORDER

This matter came before this Court on Plaintiff's, Arboleda A. Ortiz, Unopposed Motion for Extension of Time to File Response in Opposition to Defendant's Motion for Summary Judgment, and the Court having considered the motion, and being duly advised,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that: Plaintiff Arboleda A. Ortiz's Motion shall be GRANTED and Plaintiff shall have thirty (30) days, to and including September 30, 2009, within which to file his Response in Opposition to Defendant's Motion for Summary Judgment.

Dated: 09/04/2009

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

DISTRIBUTION:

V. Samuel Laurin, III
Marisol Sanchez
BOSE McKINNEY & EVANS LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204
slaurin@boselaw.com
msanchez@boselaw.com

Jeffrey L. Hunter
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204
jeff.hunter@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
v.	)	**CAUSE NO.: 2:05-CV-246-LJM-JMS**
	)	
THOMAS WEBSTER, MD,	)	
Clinical Director Health Services,	)	
	)	
Defendant.	)	

ORDER

This matter came before this Court on Plaintiff's, Arboleda A. Ortiz, Unopposed Motion for Extension of Time to File Response in Opposition to Defendant's Motion for Summary Judgment, and the Court having considered the motion, and being duly advised,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that: Plaintiff Arboleda A. Ortiz's Motion shall be GRANTED and Plaintiff shall have fifteen (15) days, to and including October 15, 2009, within which to file his Response in Opposition to Defendant's Motion for Summary Judgment.

Dated: 10/01/2009

Jane Magnus-Stinson
United States Magistrate Judge
Southern District of Indiana

DISTRIBUTION:

V. Samuel Laurin, III
Marisol Sanchez
BOSE McKINNEY & EVANS LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204
slaurin@boselaw.com
msanchez@boselaw.com

Jeffrey L. Hunter
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204
jeff.hunter@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
v.	)	**CAUSE NO.: 2:05-CV-246-LJM-JMS**
	)	
THOMAS WEBSTER, MD,	)	
Clinical Director Health Services,	)	
	)	
Defendant.	)	

ORDER

This matter came before this Court on Plaintiff's, Arboleda A. Ortiz, Unopposed Motion for Extension of Time to File Response in Opposition to Defendant's Motion for Summary Judgment, and the Court having considered the motion, and being duly advised,

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that: Plaintiff Arboleda A. Ortiz's Motion shall be GRANTED and Plaintiff shall have fifteen (15) days, to and including October 30, 2009, within which to file his Response in Opposition to Defendant's Motion for Summary Judgment.

Dated: 10/14/2009

Jane Magnus-Stinson
United States Magistrate Judge
Southern District of Indiana

DISTRIBUTION:

V. Samuel Laurin, III
Marisol Sanchez
BOSE McKINNEY & EVANS LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204
slaurin@boselaw.com
msanchez@boselaw.com

Jeffrey L. Hunter
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204
jeff.hunter@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 2:05-CV-246-LJM-JMS
	)	
MARK BEZY, et, al.,	)	
	)	
Defendants,	)	

ORDER

This cause is before the Court on the Defendant's Motion For Extension of Time to reply to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment.

The Court, being duly advised, now GRANTS the Motion. The Defendant is granted an extension to and including November 24, 2009 to reply to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment.

IT IS SO ORDERED

11/13/2009

Jane Magnus-Stinson
United States Magistrate Judge
Southern District of Indiana

Distribution:

Jeffrey L. Hunter
jeff.hunter@usdoj.gov

Marisol Sanchez
msanchez@boselaw.com

Vilda Samuel Laurin, III
slaurin@boselaw.com

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
v.	)	**CAUSE NO.: 2:05-CV-246-LJM-JMS**
	)	
THOMAS WEBSTER, MD,	)	
Clinical Director Health Services,	)	
	)	
Defendant.	)	

ORDER WITHDRAWING APPEARANCE

This matter having come before the court on the Motion of V. Samuel Laurin, III and Marisol Sanchez of the law firm of Bose McKinney & Evans LLP to withdraw their Appearance on behalf of Plaintiff, Arboleda A. Ortiz, and the Court being duly advised finds that said Motion should be granted;

IT IS THEREFORE ORDERED that the Appearance of V. Samuel Laurin, III and Marisol Sanchez of the law firm of Bose McKinney & Evans LLP on behalf of Plaintiff, Arboleda A. Ortiz, be, and hereby is, withdrawn.

All of which is ordered

04/19/2010

Jane Magnus-Stinson
United States Magistrate Judge
Southern District of Indiana

Distribution:

V. Samuel Laurin, III
Marisol Sanchez
BOSE McKINNEY & EVANS LLP
111 Monument Circle
Suite 2700
Indianapolis, Indiana 46204
slaurin@boselaw.com
msanchez@boselaw.com

Jeffrey L. Hunter
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204
jeff.hunter@usdoj.gov

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 17, 2011

By the court:

ARBOLEDA ORTIZ, Petitioner-Appellant, No. 10-2012 v. THOMAS WEBSTER, Doctor, Respondent-Appellee.	] Appeal from the United] States District Court] for the Southern District] of Indiana, Terre Haute] Division.]] No. 2:05-cv-00246-LJM-JMS]] Larry J. McKinney,] Judge.

Pursuant to this court's order of September 27, 2010, **IT IS ORDERED** that attorney Christopher Keleher, Querrey & Harrow, 175 W. Jackson Boulevard, Chicago, IL, 60604, is appointed to represent petitioner-appellant Arboleda Ortiz in this appeal. Counsel is directed to contact the petitioner-appellant immediately.

Briefing shall proceed as follows:

1. Petitioner-appellant shall file his brief and required short appendix on or before April 8, 2011.

2. Respondent-appellee shall file its brief on or before May 9, 2011.

3. Petitioner-appellant shall file his reply brief, if any, on or before May 23, 2011.

Note: Circuit Rule 31(e) (amended Dec. 1, 2001) requires that counsel tender a digital copy of a brief, from cover to conclusion, at the time the paper copies are tendered for filing. The file must be a text based PDF (portable document format), which contains the entire brief from cover to conclusion. Graphic based scanned PDF images do not comply with this rule and will not be accepted by the clerk.

Rule 26(c), Fed. R. App. P., which allows three additional days after service by mail, does not apply when the due dates for briefs are specifically set by order of this court. All briefs are due by the dates ordered.

Important Scheduling Notice !

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http://www.ca7.uscourts.gov/cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ARBOLEDA A. ORTIZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 2:05-cv-246-LJM-MJD
	)	
MARK BEZY, ET AL.,	)	
	)	
Defendants.	)	

STIPULATION AND ORDER OF DISMISSAL

Pursuant to Fed. R. Civ. P. 41(a)(1) and (2), the parties, by their respective counsel, stipulate that this action is dismissed with prejudice and that each party shall bear its own attorneys' fees and costs.

Respectfully submitted,

JOSEPH H. HOGSETT
United States Attorney

By: s/ Jan Michelsen
Jan Michelsen
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Attorney for Plaintiff

By: s/Jeffrey L. Hunter
Jeffrey L. Hunter
Assistant United States Attorney
Attorney for Defendants

IT IS SO ORDERED this _____ day of _____, 2013.

_____
JUDGE, United States District Court
Southern District of Indiana

Distribution to all registered counsel of record

RECEIVED
AUG - 8 2005
CLERK'S OFFICE
U.S. CLERK'S OFFICE
PEORIA, ILLINOIS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

06-16-6PM

JOHN R. CLARK
Plaintiff

vs.

UNITED STATES,
(FNU) NEUSUM,
(FNU) GORDON,
(FNU) LARS,
Defendants

05 1228

COMPLAINT

28 U.S.C. §1331 (suit against federal officials for constitutional violations)

BIVENS ACTION (suit against federal officials in their individual capacity)

FILED
JAN - 9 2006
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

Now comes the plaintiff, John R. Clark, and states as follows:

A. My current address is: John R. Clark
Reg. No. 05406-090
FCI Pekin
PO BOX 5000
Pekin, IL 61555-5000

B. The defendant Neusum, is employed as a correctional officer at Greenville Correctional Institutions

C. The defendant Gordon, is employed as a correctional officer at Greenville Correctional Institution.

D. The defendant Lars, is employed as a correctional officer at Greenville Correctional Institution.

LITIGATION HISTORY

A. I have not brought any other lawsuits in State or Federal Court while incarcerated, dealing with this or any other case.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. There is a grievance procedure available at the institution.

B. I have filed a sensitive complaint and claim for money damages concerning the facts related to this complaint.

C. The grievance procedure is complere.
(see attached Administrative Remedy Appeal Response and Final Denial of Claim)

STATEMENT OF CLAIM

PLACE OF OCCURRENCE: Greenville Federal Correctional Institution

DATE OF OCCURRENCE: September 29, 2004

WITNESSES TO THE OCCURRENCE: *see B.O.P. records and O.I.G. investigative reports.

1. On September 29, 2004 at approximately 12:00 pm, Correctional Officer Gordon approached my cell in the special housing unit, cell A-10, and informed me that I would be moved to another cell and to pack my property.

2. Shortly thereafter, C/O Washington came to my cell and asked if I was ready to be moved. I asked him who the] Officer in Charge was. He replied that all he wanted to know was whether or not I was ready to move. I then stated "In that case no." C/O Washington then left.

3. A few moments later C/O Gordon, C/O nEUSUM, AND c/O Lars approached my cell.

4. C/O Gordon asked me to move. I informed him that I had just moved the day before and asked him if there was any way that I could remain where I was.

5. At that point one of the officers opened my cell door and tossed a pair of handcuffs onto my cell floor, I kicked them back into the hallway.

6. At no time prior to the officers entry of my cell was I placed in handcuffs.

7. Officer Neusum them charged into my cell.

8, I put my hands up defensively, walked to the back of my cell, went to my kneed, and covered my head with my hands.

9, The officers grabbed my arms and held me to the floor.

10. Officer Neusum then struck me in the back of my head with a pair of black handcuffs. My head began to blead.

11. I began yelling to get the attention of the inmates across the hall from me. C/O Neusum then told me to shut up and hit me in the left eye with the handcuffs.

12. During the assault my hands were being restrained by the other two officers.

13. I was then placed in handcuffs.

14. One of the officers began yelling for everyone to exit my cell and to leave me alone.

15. Someone told C/O Neusum to return for the items that had been left in my cell.

16. C/O Neusum returned for those items.

17. As C/O Neusum left my cell, he turned and kicked me in the face.

18. One of the officers left their radio in my cell.

19. To get help I began yelling into the radio and pushed the panic button.

20. I then returned the radio.

21. The assistant warden and others arrived shortly.

22. I was then taken to have pictures taken of my wounds and to receive medical attention.

23. I received 13 stitches in my scalp and left eye.

24. After receiving medical attention I gave my statement to S.I.S.

25. I was then given an emergency transfer to FCI Pekin.

26. More pictures were taken upon my arrival.

27. 35mm pictures were also taken on October 3rd and twice on October 7th.

28, I spoke to the O.I.G.s office on October 5th.

29. A camera was not present as is usually required for any cell insert, nor were the officers wearing the required safety gear used for routine cell entries, during the incident described above.

30. There was a video camera in the hallway monitoring the hall.

INJURIES SUSTAINED

A. Three lacerations on scalp requiring 10 stitches.

B. Two lacerations on left eye requiring three stitches.

C. Miscellaneous brusing.

D. Mental and Emotional trauma.

E. Scarring

RELIEF REQUESTED

A. PUNITIVE DAMAGES: $50,000 or more, per defendant.

B. COMPENSATORY DAMAGES: $50,000 or more.

C. Tax and attorny fees

JURY DEMAND: YES

Signed this 14 day of July, 2005.

John R. Clark

JOHN R. CLARK
REG. NO.05406-090
FCI PEKIN
PO BOX 5000
PEKIN, IL 61555-5000

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR AD NISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: CLARK, JOHN, R. (LAST NAME, FIRST, MIDDLE INITIAL) 05406-090 (REG. NO.) SHU-238 (UNIT) PEKIN FCI (INSTITUTION)

Part A- INMATE REQUEST (THIS IS A SENSITIVE COMPLAINT, AS I HAVE BEEN INFORMED BY SEVERAL INDIVIDUALS IN AUTHORITY TO REFRAIN FROM SPEAKING TO OTHER STAFF, OFFICERS, OR INMATES REGARDING THE FOLLOWING INCIDENT)

ON SEPT. 29, 2004 AT APPROXIMATELY 12:00PM AT THE FCI GREENVILLE, AN OFFICER DID, WHILE I WAS BEING HELD TO THE FLOOR BY TWO OTHER OFFICERS, STRIKE ME IN THE HEAD AND FACE WITH A PAIR OF BLACK HANDCUFFS, BEFORE KICKING ME IN THE FACE WHILE I LAYED HANDCUFFED ON MY CELL FLOOR. THIS INCIDENT CAUSED 'SERIOUS' DAMAGE AND REQUIRED MEDICAL ATTENTION FOR 3 LACERATIONS OF THE SCALP REQUIRING 10 STITCHES, 2 LACERATIONS TO THE EYE REQUIRING 3 STITCHES, SWELLING, MULT. BRUSES, AND A BLACK EYE.

- I REQUEST A THOROUGH INVESTIGATION OF INCIDENT, RELEASE FROM S.H.U. (REGARDING HOLDS DUE TO THE ABOVE INCIDENT, NOT OTHER DISCIPLINARY REASONS THAT I CURRENTLY HAVE PENDING), EXHAUSTION OF ADMINISTRATIVE REMEDY, COMPENSATORY AND PUNITIVE DAMAGES TO THE AMOUNT OF 50,000$ + TAXES, AND THAT NO RETALITORY MEASURES BE TAKEN DUE TO THIS COMPLAINT OR CLAIM OF THIS INCIDENT.

Oct. 12, 2004 (DATE)

John R. Clark (SIGNATURE OF REQUESTER)

Part B- RESPONSE

OCT 25 2004

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 357112-R1

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

Regional Administrative Remedy Appeal
Part B - Response

Name: CLARK, John
Register Number: 05406-090
Admin Remedy Number: 357112-R1

This is in response to your Regional Administrative Remedy Appeal receipted October 25, 2004, wherein you claim you were assaulted by staff on September 29, 2004. You request monetary damages, and that an investigation be conducted.

We have reviewed your complaint. Our review of your allegations indicate that your complaint was referred to the Office of Internal Affairs for further review. However, information regarding staff investigations is non-disclosable. Accordingly, any actions taken against staff will not be disclosed to you. If you wish to pursue monetary damages you may refer to P.S. 1320.06, Federal Tort Claims Act, for guidance.

Based on the above information, this response is for informational purposes only. If you are dissatisfied with this response, you may appeal to the Office of General Counsel, Federal Bureau of Prisons, 320 First Street, NW, Washington, DC 20534. Your appeal must be received in the Office of General Counsel within 30 days from the date of this response.

11/9/04
Date

for MICHAEL K. NALLEY, Regional Director

RECEIPT - ADMINISTRATIVE REMEDY

DATE: NOVEMBER 9, 2004

FROM: ADMINISTRATIVE REMEDY COORDINATOR
NORTH CENTRAL REGIONAL OFFICE

TO : JOHN R CLARK, 05406-090
PEKIN FCI UNT: ILLINOIS QTR: Z02-236LDS

THIS ACKNOWLEDGES THE RECEIPT OF THE REGIONAL APPEAL IDENTIFIED BELOW:

REMEDY ID : 357112-R1
DATE RECEIVED : OCTOBER 25, 2004
RESPONSE DUE : NOVEMBER 24, 2004
SUBJECT 1 : ASSAULT BY STAFF
SUBJECT 2 :
INCIDENT RPT NO:

Hand written copy Sent Original

Regional Legal Advisor
North Central Regional Office
Tower II- 8th Floor
400 State Street
Kansas City, Kansas 66101

John R. Clark
Reg. No. 05406-090
Federal Correctional Institution
PO Box 5000
Pekin, IL 61555-5000

October 12, 2004

Re: Claim For Damage, Injury, Or Death

The following enclosures contain information pertaining to an incident which recently occurred at the Federal Correctional Institution in Greenville, IL. on September 29, 2004. This incident resulted in the personal injury of the claimant and certain civil rights violations. If you have any questions regarding the following claim, or wish to discuss a settlement, please feel free to contact the claimant at the address above.

John R. Clark pro se

Notification of Incident and Claim for Money Damages

Regional Legal Advisor
North Central Regional Office
Tower II - 8th Floor
400 State Street
Kansas City, Kansas 66101

John R. Clark
Reg. No. 05406-090
Federal Correctional Institution
P.O. Box 5000
Pekin, IL 61555-5000

Date of Incident: September 29, 2004

Time of Incident: 12:00 pm

Statement of Facts

1. ON SEPTEMBER 29, 2004 AT APPROXIMATELY 12:00 PM, CORRECTIONAL OFFICER GORDON APPROACHED MY CELL IN THE SPECIAL HOUSING UNIT, CELL A-10, AND INFORMED ME THAT I WOULD BE MOVED TO ANOTHER CELL SHORTLY AND TO PACK MY BELONGINGS.

2. SHORTLY THEREAFTER, C/O WASHINGTON CAME TO MY CELL AND ASKED IF I WAS READY TO BE MOVED. I ASKED HIM WHO THE OFFICER IN CHARGE WAS HE REPLIED THAT ALL HE WANTED TO KNOW WAS WHETHER OR NOT I WAS READY TO MOVE. I THEN STATED, "IN THAT CASE NO." C/O WASHINGTON THEN LEFT.

3. A FEW MOMENTS LATER C/O NEUSUM, C/O GORDON, AND C/O LARS APPROACHED MY CELL.

4. C/O GORDON ASKED ME TO MOVE. I INFORMED HIM THAT I HAD JUST MOVED THE DAY BEFORE AND ASKED HIM IF THERE WAS ANY WAY THAT I COULD REMAIN WHERE I WAS.

5. AT THAT POINT ONE OF THE OFFICERS OPENED MY CELL DOOR AND TOSSED A PAIR OF HANDCUFFS ONTO MY CELL FLOOR. I KICKED THEM BACK INTO THE HALLWAY.

6. AT NO TIME PRIOR TO THE OFFICERS ENTRY OF MY CELL WAS I PLACED IN HANDCUFFS

7. OFFICER NEUSUM THEN CHARGED INTO MY CELL.

8. I PUT MY HANDS UP DEFENSIVELY, WALKED TO THE BACK OF MY CELL, WENT TO MY KNEES, AND COVERED MY HEAD WITH MY HANDS.

9. THE OFFICERS GRABBED MY ARMS AND HELD ME TO THE FLOOR.

Injuries Sustained

1. 3 LACERATIONS ON SCALP REQUIRING 10 STITCHES.
2. 2 LACERATIONS ON LEFT EYE REQUIRING 3 STITCHES.
3. MISCELLANEOUS BRUSING.
4. MENTAL AND EMOTIONAL TRAUMA.

Witnesses

1. INMATES WHO WERE HOUSED NEAR INCIDENT.*
2. ANY STAFF, OFFICERS, OR OTHERS WITH KNOWLEDGE OF INCIDENT.*

*SEE B.O.P. RECORDS AND O.I.G. INVESTIGATIVE REPORTS.

Evidence

1. O.I.G. INVESTIGATIVE REPORTS.
2. S.I.S. INVESTICATIVE REPORTS.
3. INMATE MEDICAL FILE.
4. MISCELLANEOUS PHOTOGRAPHS
   - SEPT. 29 (DIGITAL) AT GREENVILLE FCI
   - SEPT. 29 (DIGITAL) AT PEKIN FCI.
   - Oct. 3 (35mm) AT PEKIN FCI.
   - Oct. 7 (AM) (35mm) AT PEKIN FCI.
   - Oct. 7 (PM) (35mm) AT PEKIN FCI.
5. ANY OTHER DOCUMENTATION OR PHOTOGRAPHS RELATING TO INCIDENT RETAINED BY THE B.O.P. OR OTHER GOVERNMENT AGENCIES.

Amount of Claim

1. ——50,000$——
2. TAX AND ATTORNEY FEES

*THIS INFORMATION IS DEEMED TO BE TRUE AND CORRECT UNDER PENALTY OF PERJURY.

John R. Clark
CLAIMANT

DATE OF CLAIM: OCTOBER 9, 2004

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101

October 26, 2004

John Clark
05406-090
FCI Pekin

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2005-00282 $ 50,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on October 18, 2004. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such proper claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until April 16, 2005.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et. seq., and §543.30.

Sincerely,

Daryl Kosiak
Regional Counsel

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101-2492

APR 14 2005

MEMORANDUM FOR JOHN CLARK, Reg. No. 05406-090
FCI Pekin
FCI Greenville (Former Designation)

FROM: Daryl Kosiak, Regional Counsel

SUBJECT: Tort Claim T-NCR-2005-00282
Alleged Personal Injury: $50,000.00

CERTIFIED RECEIPT 7003 3110 0004 2337 5122

Your above referenced tort claim has been considered for administrative review pursuant to 28 CFR § 0.172, Authority: Federal Tort Claims and 28 CFR Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal that you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 CFR § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than 6 months after the date of mailing of this notification.

Initial Civil Case Assignment (Direct)

Case 1:05-cv-01228 has been directly assigned to:
presiding Judge Harold A. Baker from deck Peoria Civil - Article III Judges
referral Judge John A. Gorman from deck Peoria Civil - Magistrate Judges

Assign another case (Direct)?

Process Assignment Labels

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN R. CLARK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 06-16-GPM**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

JUDGMENT IN A CIVIL CASE

This action came before the Court, District Judge G. Patrick Murphy presiding, and the parties have advised that the action has been settled in its entirety.

IT IS ORDERED that this action is **DISMISSED with prejudice**. The parties shall bear their own costs.

DATED: May 29, 2009

JUSTINE FLANAGAN, ACTING CLERK

By: s/ Linda M. McGovern
Deputy Clerk

APPROVED: S/G. Patrick Murphy
G. Patrick Murphy
United States District Judge

CASREF,CJRA_A,CLOSED,KTC

U.S. District Court
Southern District of Illinois (East St. Louis)
CIVIL DOCKET FOR CASE #: 3:06-cv-00016-GPM-DGW

Clark v. United States of America et al
Assigned to: Judge G. Patrick Murphy
Referred to: Magistrate Judge Donald G. Wilkerson
Demand: $250,000
Cause: 28:1331 Federal Question: Bivens Act

Date Filed: 01/09/2006
Date Terminated: 05/29/2009
Jury Demand: None
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

John R Clark

represented by **Brian R. Plegge**
Brown & James, P.C.
Generally Admitted
800 Market Street
Suite 1100
St. Louis, MO 63101-2501
314-421-3400
Email: bplegge@bjpc.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Margaret L. Fowler
HeplerBroom LLC-St. Louis
One Metropolitan Square
211 North Broadway, Ste. 2700
St. Louis, MO 63102
314-241-6160
Fax: 314-241-6116
Email: mlf@heplerbroom.com
ATTORNEY TO BE NOTICED

V.

Defendant

USA

represented by **Gerald M. Burke**
Assistant U.S. Attorney - Fairview Heights
9 Executive Drive
Suite 300
Fairview Heights, IL 62208
618-628-3710
Email: gerald.burke@usdoj.gov

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/09/2006		Case transferred in from District of Central District of Illinois - Peoria Division; Case Number 05-1228. Original file, certified copy of transfer order and docket sheet received., filed by John R Clark.(jao) (Entered: 01/24/2006)
01/09/2006	1	COMPLAINT against all defendants , filed by John R Clark.(jao) (Main Document 1 replaced on 10/16/2013) (kad). Modified on 10/16/2013 (kad). (Entered: 01/24/2006)
01/09/2006		USM 285 forms received from Plaintiff as to all Defendants (jao) (Entered: 01/24/2006)
01/09/2006	2	MOTION for Leave to Proceed in forma pauperis by John R Clark. (jao) (Entered: 01/24/2006)
01/09/2006	3	MOTION to Appoint Counsel by John R Clark. (jao) (Entered: 01/24/2006)
01/09/2006	4	PREPAYMENT ORDER directing partial fee of $5.70 to be paid or case wil be dismissed. Prisoner prepayment due by 9/8/05. Entered by Judge John A. Gorman, CDIL. (jao) (Entered: 01/24/2006)
01/09/2006	5	Letter from Plaintiff to Clerk's Office RE: status of case. (jao) (Entered: 01/24/2006)
01/09/2006	6	MOTION TO EXTEND TIME FOR PAYMENT OF PREPAYMENT ORDER by John R Clark. (jao) (Entered: 01/24/2006)
01/09/2006		Partial Filing fee: $ 5.70, receipt number P13774 received in Central District of Illinois, Peoria Division. (jao) (Entered: 01/24/2006)
01/09/2006		MERIT REVIEW ORDER entered by Judge Harold A. Baker, CDIL. This case is set for merit review. The court is required by 28 USC Section 1915A to "screen" the plaintiff's complaint and through such process, to identify and dismiss any legally insufficient claim, or the entire action if warranted. A claim is legally insufficient if it "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." The plaintiff must tbe prepared to identify each of his claims and defendants during the hearing. The clerk is to notify the plaintiff's place of incarceration and to issue a writ for the plaintiff's participation in the video/telephone conference call. Merit Review Hearing set for 1/4/2006 at 10:00 am by telephone before Judge Harold A. Baker. Clerk to issue writ. (jao,) (Entered: 01/24/2006)
01/09/2006	7	TELEPHONE WRIT, IDOC and the Warden of FCI - PEKIN shall arrange to have John R. Clark, #05406-090 available on January 4, 2006 for a telephone conference call in the Central District of Illinois. (jao) (Entered: 01/25/2006)
01/09/2006		TEXT ORDER entered by Judge Harold A. Baker, CDIL, on 1/3/6. This cause is before the Court for case management. The plaintiff's motion for

		appointment of counsel is denied. The plaintiff has no constitutional or statutory right to be represented by an attorney. The plaintiff appears capable of representing himself at this stage of the litigation. The plaintiff's motion to continue the prepayment order deadline is granted. The Court notes the plaintiff has now paid the initial partial filing fee. The merit review hearing scheduled for January 4, 2006 at 10:00 am is cancelled and the writ is recalled. The clerk is to notify the plaintiff and the pekin Feeral Correctional Institution. (jao) (Entered: 01/25/2006)
01/09/2006	8	ORDER DISMISSING CASE entered by Judge Harold A. Baker, CDIL, on 1/4/06. It is therefore ordered that this action is transferred to the United States District Court for the Southern District of Illinois, pursuant to 28 USC 1404(a). (jao) (Entered: 01/25/2006)
01/24/2006	9	Letter from USDC - SDIL to plaintiff and FCI - PEKIN informing same of new case number and filing fee requirements. (jao) (Entered: 01/25/2006)
06/12/2006	10	MOTION to Appoint Counsel by John R Clark. (dlr) (Entered: 06/13/2006)
06/12/2006	11	MEMORANDUM in Support re 10 MOTION to Appoint Counsel filed by John R Clark. (dlr) (Entered: 06/13/2006)
08/22/2006	12	ORDER REFERRING CASE to Magistrate Judge Donald G. Wilkerson. Signed by Judge G. Patrick Murphy on 8/21/06. (hbs) (Entered: 08/22/2006)
08/24/2006	13	REQUEST FOR WAIVER of Service as to defendants Neusum, Gordon and Lars. (trb) (Entered: 08/24/2006)
08/25/2006	14	Summons Issued as to United States of America, (trb) (Entered: 08/25/2006)
08/28/2006	15	ORDER DENYING 10 Motion to Appoint Counsel. Signed by Judge Donald G. Wilkerson on 8/28/06. (sgp) (Entered: 08/28/2006)
09/15/2006	16	WAIVER OF SERVICE Returned Executed C/O Neusum waiver sent on 8/29/2006, answer due 10/30/2006. (trb) (Entered: 09/19/2006)
09/19/2006	17	SUMMONS Returned Executed United States of America served on 9/5/2006, answer due 11/6/2006. (trb) (Entered: 09/19/2006)
09/20/2006	18	RETURN OF SERVICE of Summons and Complaint EXECUTED as to US Attorney on 9/11/06. (dmw) (Entered: 09/21/2006)
10/02/2006	19	WAIVER OF SERVICE Returned Executed C/O Gordon waiver sent on 8/29/2006, answer due 10/30/2006. (trb) (Entered: 10/03/2006)
10/24/2006	20	ANSWER to Complaint by C/O Gordon.(car) (Entered: 10/24/2006)
11/01/2006	21	ANSWER to Complaint by C/O Neusum.(jmp) (Entered: 11/02/2006)
11/06/2006	22	MOTION for Order to obtain address for the following defendant c/o Lars. (trb) (Entered: 11/07/2006)
11/15/2006	23	MOTION for Extension of Time to File Answer re 1 Complaint by United States of America. (Burke, Gerald) Modified on 1/25/2007 (trb,). (Entered: 11/15/2006)

12/07/2006	24	ORDER GRANTING 22 MOTION for Order of U.S. Marshals Service to IDOC to provide last known address. Signed by Judge Donald G. Wilkerson on 12/7/06. (Attachments: # 1 Notice of Compliance)(rmb) (Entered: 12/07/2006)
12/11/2006	25	NOTICE of Change of Address by John R Clark. (trb) (Entered: 12/11/2006)
12/11/2006	26	Letter construed as Request/Motion for Status by John R Clark. (trb) (Main Document 26 replaced on 10/16/2013) (kad). Modified on 10/16/2013 (kad). (Entered: 12/13/2006)
12/14/2006	27	MOTION for Entry of Default by John R Clark. (trb) (Entered: 12/14/2006)
12/14/2006	28	ORDER denying 27 Motion for Entry of Default on 12/14/06. (trb) (Entered: 12/14/2006)
12/14/2006	29	MOTION to Amend/Correct 1 Complaint by John R Clark. (trb) (Entered: 12/14/2006)
12/15/2006	30	ORDER STAYING CASE: 23 MOTION for Extension of Time to File Answer re 1 Complaint is GRANTED. This matter is STAYED until final disposition of the criminal matter in case number 3:06-cr-30096-MJR. Defendant United States SHALL file a Status Report by 2/15/2007, and every 90 days thereafter, informing Court of the status of the criminal proceedings in 3:06-cr-30096-MJR. Defendant United States SHALL inform this Court within 10 days of the final disposition of the 3:06-cr-30096-MJR by phone and by filing such a notice with the Court. Answers SHALL be served on opposing parties and filed with the Court within 30 days after the final disposition of 3:06-cr-30096-MJR.Signed by Judge Donald G. Wilkerson on 12/15/2006. (jrw) (Entered: 12/15/2006)
12/21/2006	31	NOTICE OF COMPLIANCE re 24 Order. Copy of Letter and this Notice have been forwarded to US Marshal Office. Letter has been placed in sealed envelope and placed on the lefthand side of file. (rmb) (Entered: 12/21/2006)
01/03/2007	32	Mail Returned as Undeliverable. Mail sent to John R. Clark document # 24. (trb) (Entered: 01/03/2007)
01/03/2007	33	Waiver of Service Returned Unexecuted as to (FNU) Lars. (trb) (Entered: 01/08/2007)
02/14/2007	34	STATUS REPORT by United States of America. (Burke, Gerald) (Entered: 02/14/2007)
03/15/2007	35	STATUS REPORT by United States of America. (Burke, Gerald) (Entered: 03/15/2007)
05/14/2007	36	STATUS REPORT *Third* by United States of America. (Burke, Gerald) (Entered: 05/14/2007)
05/18/2007	37	Mail Returned as Undeliverable. Mail sent to John R. Clark (trb) (Entered: 05/18/2007)
07/09/2007	38	NOTICE of Change of Address by John R Clark (Re: Request for Documents and Status Report) (car) (Entered: 07/16/2007)

07/16/2007	39	Letter to John Clark regarding document request and status of case. (car) (Entered: 07/16/2007)
07/19/2007	40	MOTION requesting waiver of costs and fees by John R Clark. (trb) (Main Document 40 replaced on 10/16/2013) (kad). Modified on 10/16/2013 (kad). (Entered: 07/20/2007)
08/01/2007	41	STATUS REPORT *Fourth* by United States of America. (Burke, Gerald) (Entered: 08/01/2007)
08/03/2007	42	ORDER: 40 Motion To Waive Costs is GRANTED. The Clerk's office is directed provide a copy of this case file to Plaintiff. 26 Motion for Status is MOOT in light of this Order and the 7/16/2007 letter to Plaintiff. Signed by Judge Donald G. Wilkerson on 8/3/2007. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 08/03/2007)
08/10/2007	43	ORDER LIFTING STAY: The stay in this case is hereby VACATED. Defendant United States of America responsive pleading due 9/10/2007. Discovery Orders to issue. Signed by Judge Donald G. Wilkerson on 8/10/2007. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 08/10/2007)
08/17/2007	44	ORDER: 29 Motion to Amend/Correct is DENIED WITHOUT PREJUDICE. Plaintiff has failed to comply with SDIL-LR 15.1 as the Court has not received Plaintiff's proposed amended complaint with any proposed additions underlined as required. Signed by Judge Donald G. Wilkerson on 8/17/2007. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 08/17/2007)
09/10/2007	45	MOTION for Extension of Time to File Response/Reply as to 43 Order, Set Deadlines,, by United States of America. (Burke, Gerald) (Entered: 09/10/2007)
09/14/2007	46	ORDER: 45 MOTION for Extension of Time to File Response/Reply as to 43 Order, Set Deadlines, filed by United States of America is GRANTED. United States of America responsive pleading due 10/10/2007. Signed by Judge Donald G. Wilkerson on 9/14/2007. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 09/14/2007)
10/01/2007	47	MOTION for Extension of Time, MOTION to Stay by John R Clark. (trb) (Entered: 10/01/2007)
10/01/2007	48	MOTION to Clarify claims and counts intended to be brought before the Court in the original complaint by John R Clark. (trb) (Entered: 10/01/2007)
10/04/2007	49	ORDER Denying 48 MOTION to Clarify filed by John R Clark; denying 47 MOTION for Extension of Time; denying 47 MOTION to Stay filed by John R Clark; and APPOINTING attorney Brian Plegge to represent Plaintiff. Telephonic Status Conference SET for 11/5/2007 02:00 PM before Mag/Judge Donald G. Wilkerson. Plaintiff's counsel to initiate the call. The Court's conference line is (618) 482-9004. Signed by Judge Donald G. Wilkerson on

		10/4/2007. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 10/04/2007)
10/10/2007	50	Third MOTION for Extension of Time to File Answer re 1 Complaint by United States of America. (Burke, Gerald) (Entered: 10/10/2007)
10/10/2007	51	ORDER: 50 Third MOTION for Extension of Time to File Answer re 1 Complaint filed by United States of America is GRANTED. United States of America responsive pleading due 10/30/2007. Signed by Judge Donald G. Wilkerson on 10/10/2007. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 10/10/2007)
10/30/2007	52	MOTION to Dismiss for Lack of Jurisdiction by United States of America.Responses due by 12/3/2007 (Burke, Gerald) (Entered: 10/30/2007)
10/30/2007	53	MEMORANDUM in Support re 52 MOTION to Dismiss for Lack of Jurisdiction filed by United States of America. (Burke, Gerald) (Entered: 10/30/2007)
11/05/2007	54	Minute Entry: Telephonic Status Conference held before Judge Donald G. Wilkerson on 11/5/2007. Gerald Burke, C/O Gordon, and Brian Plegge, participating. Telephonic Status Conference SET for 12/5/2007 02:30 PM before Mag/Judge Donald G. Wilkerson. Plaintiff to initiate the call. The Court's conference line is (618) 482-9004. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 11/05/2007)
11/15/2007	55	Stricken per Order at document # 62-AMENDED COMPLAINT against all defendants, filed by John R Clark. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(Plegge, Brian) Modified on 12/13/2007 (trb,). (Entered: 11/15/2007)
11/29/2007	56	MOTION to Strike 55 Amended Complaint by United States of America. (Burke, Gerald) (Entered: 11/29/2007)
12/03/2007	57	RESPONSE to Motion re 56 MOTION to Strike 55 Amended Complaint filed by John R Clark. (Plegge, Brian) (Entered: 12/03/2007)
12/05/2007	58	REPLY to Response to Motion re 56 MOTION to Strike 55 Amended Complaint filed by United States of America. (Burke, Gerald) (Entered: 12/05/2007)
12/05/2007	59	ORDER: Telephonic Status Conference set for 12/5/2007 at 2:30 PM is hereby CANCELED and RESET for 12/11/2007 at 2:30 PM before Mag/Judge Donald G. Wilkerson. Plaintiff shall initiate call to Court's teleconference line 618/482-9004. Signed by Judge Donald G. Wilkerson on 12/5/2007. (hbs) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 12/05/2007)
12/06/2007	60	Summons Issued as to C/O Lars. (dkd) (Entered: 12/06/2007)
12/11/2007	61	Minute Entry: Telephonic Status Conference held on 12/11/2007 before Judge Donald G. Wilkerson. Meg Fowler for Plaintiff John Clark, Gerald Burke for

		Defendant United States, participating. Plaintiff to attempt service on Defendant C/O Lars. Court to set another status conference in person in January. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 12/12/2007)
12/12/2007	62	ORDER: 56 MOTION to Strike 55 Amended Complaint filed by United States of America is GRANTED for failure to comply with SDIL-LR 15.1. 55 Amended Complaint is ORDERED STRICKEN. If Plaintiff wishes to amend, a motion for leave to amend must be filed, and a proposed amended complaint e-mailed with changes underlined, to DGWpd@ilsd.uscourts.gov and sent to all parties at the time the motion is filed. This Court hereby SETS an in-person Status Conference for 1/15/2008 02:00 PM in East St. Louis Court House before Mag/Judge Donald G. Wilkerson. Due to the distance, should Defendant C/O Lars be served prior to the conference, C/O Lars may contact the Court to arrange an appearance by telephone. Signed by Judge Donald G. Wilkerson on 12/12/2007. (jrw,)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 12/12/2007)
12/12/2007	63	NOTICE of Appearance by Margaret L. Fowler on behalf of all plaintiffs (Fowler, Margaret) (Entered: 12/12/2007)
12/12/2007	64	MOTION for Leave to File *First Amended Complaint* by John R Clark. (Fowler, Margaret) (Entered: 12/12/2007)
01/03/2008	65	SUMMONS Returned Executed by John R Clark. C/O Lars served on 12/19/2007, answer due 1/8/2008. (Fowler, Margaret) (Entered: 01/03/2008)
01/08/2008	66	NOTICE of Appearance by William D. Stiehl, Jr on behalf of C/O Neusum (Stiehl, William) (Entered: 01/08/2008)
01/11/2008	67	NOTICE of Appearance by Christopher A. Koester on behalf of C/O Gordon (Koester, Christopher) (Entered: 01/11/2008)
01/15/2008	68	Minute Entry: Status Conference held on 1/15/2008 before Judge Donald G. Wilkerson: Margaret Fowler, Gerald Burke, William Stiehl, Jr., and Christopher Koester participating. Counsel for Defendant Neusum informed the Court that his client recently filed for Chapter 13 bankruptcy, and would be filing a suggestion of bankruptcy. Court to set a status conference for 2/22/2008 at 2:00 PM. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 01/16/2008)
01/16/2008	69	ORDER: Telephonic Status Conference SET for 2/22/2008 at 02:00 PM before Mag/Judge Donald G. Wilkerson. Plaintiff responsible for initiating the call. The Court's conference number is (618) 482-9004. Plaintiff's counsel to notify Defendant Lars about the conference well in advance of the conference date. Signed by Judge Donald G. Wilkerson on 1/16/2008. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 01/16/2008)
01/17/2008	70	MOTION for Order to *Stay Discovery* by United States of America. (Attachments: # 1)(Burke, Gerald) (Entered: 01/17/2008)

01/23/2008	71	RESPONSE to Motion re 70 MOTION for Order to *Stay Discovery* filed by John R Clark. (Attachments: # 1 Exhibit 1 - Voluntary Petition# 2 Exhibit 2 - Proposed Court Order-deleted by clerk's office)(Fowler, Margaret) Additional attachment(s) added on 1/24/2008 (trb,). (Entered: 01/23/2008)
01/24/2008	72	NOTICE OF ERRORS AND/OR DEFICIENCIES re 71 Response to Motion, filed by John R Clark. See attached document for specifics (trb) (Entered: 01/24/2008)
02/19/2008	73	MOTION to Dismiss by C/O Lars. Responses due by 3/24/2008 (Burke, Gerald) (Entered: 02/19/2008)
02/19/2008	74	MEMORANDUM in Support re 73 MOTION to Dismiss filed by C/O Lars. (Attachments: # 1 Affidavit)(Burke, Gerald) (Entered: 02/19/2008)
02/22/2008	77	MINUTE ENTRY: Telephonic Status Conference held on 2/22/2008 before Magistrate Judge Donald G. Wilkerson. Brian Plegge, Margaret Fowler, Gerald Burke, William Stiehl, Jr., and Christopher Koester, participating. Defendant Nuessom to file suggestion of bankruptcy, after which time the Court will enter an order staying discover as to Defendant Nuessom. Court to enter scheduling order. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 02/25/2008)
02/25/2008	75	SCHEDULING ORDER (Discovery due by 10/1/2008. Dispositive Motions due by 10/15/2008). Signed by Magistrate Judge Donald G. Wilkerson on 2/25/2008. (jrw) (Entered: 02/25/2008)
02/25/2008	76	ORDER: 64 MOTION for Leave to File *First Amended Complaint* filed by John R Clark is GRANTED. Plaintiff SHALL file the proposed First Amended Complaint by 2/29/2008. Because the Court has granted Plaintiff's 64 Motion to Amend, the 52 MOTION to Dismiss for Lack of Jurisdiction and the 73 MOTION to Dismiss are DENIED AS MOOT as they are based on the original complaint. Defendants may refile motions to dismiss after Plaintiff files his First Amended Complaint. 70 MOTION for Order to *Stay Discovery* is GRANTED; discovery previously propounded need not be responded to before 3/25/2008. Signed by Magistrate Judge Donald G. Wilkerson on 2/25/2008. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 02/25/2008)
02/28/2008	78	AMENDED COMPLAINT against all defendants, filed by John R Clark. (Fowler, Margaret) (Entered: 02/28/2008)
02/29/2008	79	SUGGESTION OF BANKRUPTCY Upon the Record as to Eric Newsome by C/O Neusum. (Stiehl, William) (Entered: 02/29/2008)
03/13/2008	80	MOTION to Dismiss *First Amended Complaint and For Protective Order* by United States of America, C/O Lars. Responses due by 4/15/2008 (Burke, Gerald) (Entered: 03/13/2008)
03/13/2008	81	MEMORANDUM in Support re 80 MOTION to Dismiss *First Amended Complaint and For Protective Order* filed by United States of America, C/O Lars. (Burke, Gerald) (Entered: 03/13/2008)
03/14/2008	82	

		NOTICE of Voluntary Dismissal by John R Clark (Fowler, Margaret) (Entered: 03/14/2008)
03/21/2008	83	ORDER: The Court construes 82 Notice of Voluntary Dismissal filed by Plaintiff John R Clark as a motion for voluntary dismissal without prejudice; as such, the motion is GRANTED, and Plaintiff's claims against C/O Newsome, C/O Gordon, and C/O Lohr are DISMISSED without prejudice. Defendants Newsome, Gordon, and Lohr are DISMISSED without prejudice from this action. Signed by Judge G. Patrick Murphy on 3/21/2008. (ssd)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 03/21/2008)
03/21/2008	84	NOTICE of Hearing on 80 MOTION to Dismiss First Amended Complaint and For Protective Order: Motion Hearing set for 5/12/2008 at 08:00 AM in East St. Louis Court House before Judge G. Patrick Murphy. Plaintiff need not attend this hearing as he is represented by counsel.(lmm)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 03/21/2008)
03/27/2008	85	RESPONSE in Opposition re 80 MOTION to Dismiss *First Amended Complaint and For Protective Order* filed by John R Clark. (Fowler, Margaret) (Entered: 03/27/2008)
03/27/2008	86	MEMORANDUM in Opposition re 80 MOTION to Dismiss *First Amended Complaint and For Protective Order* filed by John R Clark. (Fowler, Margaret) (Entered: 03/27/2008)
04/03/2008	87	REPLY to Response to Motion re 80 MOTION to Dismiss *First Amended Complaint and For Protective Order Reply to Plaintiff's Opposition* filed by United States of America. (Burke, Gerald) (Entered: 04/03/2008)
04/04/2008	88	NOTICE OF ERRORS AND/OR DEFICIENCIES re 87 Reply to Response to Motion filed by United States of America. See attached document for specifics (trb) (Entered: 04/04/2008)
05/12/2008	89	Minute Entry for proceedings held before Judge G. Patrick Murphy: Motion Hearing held on 5/12/2008. DENYING 80 MOTION to Dismiss First Amended Complaint and For Protective Order filed by C/O Lars, United States of America. (Court Reporter Molly Clayton.) (lmm)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 05/12/2008)
05/12/2008	90	ORDER re 89 Motion Hearing: During the hearing, the Court questioned the parties regarding the intentional tort exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h), and inquired whether there are any Seventh Circuit cases on point. Defendant responded that the "Copeland" case is right on point. If Defendant was referring to Copeland v. County of Macon, Illinois, 403 F.3d 929 (7th Cir. 2005), that case is not a FTCA case at all. In any event, the Court remains convinced that issues regarding the Government's sovereign immunity must be left for summary judgment. The motion to dismiss is denied for all the reasons stated on the record during the hearing. Signed by Judge G. Patrick Murphy on 5/12/2008. (ssd)THIS TEXT ENTRY IS AN ORDER OF THE

		COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 05/12/2008)
06/11/2008	91	OBJECTION to 71 Response to Motion, by United States of America *First Set of Interrogatories*. (Burke, Gerald) (Entered: 06/11/2008)
07/31/2008	92	MOTION to Compel *Production of Documents directed to Defendant* by John R Clark. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Fowler, Margaret) (Entered: 07/31/2008)
07/31/2008	93	MEMORANDUM in Support re 92 MOTION to Compel *Production of Documents directed to Defendant* filed by John R Clark. (Fowler, Margaret) (Entered: 07/31/2008)
07/31/2008	94	MOTION to Compel *directed to Federal Bureau of Prisons* by John R Clark. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Fowler, Margaret) (Entered: 07/31/2008)
07/31/2008	95	MEMORANDUM in Support re 94 MOTION to Compel *directed to Federal Bureau of Prisons* filed by John R Clark. (Fowler, Margaret) (Entered: 07/31/2008)
08/14/2008	96	MOTION for Extension of Time to File Response/Reply as to 92 MOTION to Compel *Production of Documents directed to Defendant*, 94 MOTION to Compel *directed to Federal Bureau of Prisons* by United States of America. (Burke, Gerald) (Entered: 08/14/2008)
08/19/2008	97	ORDER: 96 Motion for Extension of Time to File Response/Reply re 94 MOTION to Compel *directed to Federal Bureau of Prisons*, 92 MOTION to Compel *Production of Documents directed to Defendant* is GRANTED. Responses due by 8/28/2008. Signed by Magistrate Judge Donald G. Wilkerson on 8/19/2008. (jrw) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 08/19/2008)
08/28/2008	98	RESPONSE to Motion re 92 MOTION to Compel *Production of Documents directed to Defendant*, 94 MOTION to Compel *directed to Federal Bureau of Prisons* filed by United States of America. (Burke, Gerald) (Entered: 08/28/2008)
10/15/2008	99	MOTION for Extension of Time to File *Dispositive Motion* by United States of America. (Burke, Gerald) (Entered: 10/15/2008)
11/14/2008	100	ENTRY STRICKEN - MOTION for Summary Judgment *or Motion to Dismiss* by United States of America. Responses due by 12/17/2008 (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Burke, Gerald) Modified on 11/14/2008 (myz). (Entered: 11/14/2008)
11/14/2008	101	NOTICE STRIKING ELECTRONICALLY FILED DOCUMENTS striking 100 Motion for Summary Judgment filed by United States of America. See attached document for specifics (myz) (Entered: 11/14/2008)
11/14/2008	102	MOTION to Dismiss, MOTION for Summary Judgment by United States of America. Responses due by 12/17/2008 (Burke, Gerald) (Entered: 11/14/2008)

11/14/2008	103	ENTRY STRICKEN: REPLY to Response to Motion re 102 MOTION to Dismiss MOTION for Summary Judgment filed by United States of America. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D) (Burke, Gerald) (Entered: 11/14/2008)
11/17/2008	104	NOTICE STRIKING ELECTRONICALLY FILED DOCUMENTS striking 103 Reply to Response to Motion filed by United States of America. See attached document for specifics (trb) (Entered: 11/17/2008)
11/17/2008	105	MEMORANDUM in Support re 102 MOTION to Dismiss MOTION for Summary Judgment filed by United States of America. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Burke, Gerald) (Entered: 11/17/2008)
11/19/2008	106	ORDER granting 99 Defendant's Motion for Extension of Time to File Dispositive Motion. Signed by Magistrate Judge Donald G. Wilkerson on 11/19/08. (klb)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 11/19/2008)
11/19/2008	107	NOTICE of Hearing on Motion 102 MOTION to Dismiss or for Summary Judgment : Motion Hearing set for 3/2/2009 at 08:00 AM in East St. Louis Court House before Judge G. Patrick Murphy. (dmw)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 11/19/2008)
12/16/2008	108	RESPONSE in Opposition re 102 MOTION to Dismiss MOTION for Summary Judgment filed by John R Clark. (Fowler, Margaret) (Entered: 12/16/2008)
12/16/2008	109	Sealed Document. (Attachments: # 1 Exhibit 2, # 2 Exhibit 3, # 3 Exhibit 4, # 4 Exhibit 5, # 5 Exhibit 6, # 6 Exhibit 6A, # 7 Exhibit 6B, # 8 Exhibit 7, # 9 Exhibit 7A, # 10 Exhibit 7B, # 11 Exhibit 8, # 12 Exhibit 8A, # 13 Exhibit 9, # 14 Exhibit 9A, # 15 Exhibit 10, # 16 Exhibit 11, # 17 Exhibit 12, # 18 Exhibit 12A, # 19 Exhibit 12B)(Fowler, Margaret) (Entered: 12/16/2008)
12/31/2008	110	MOTION for Extension of Time to File Response/Reply as to 108 Response in Opposition to Motion *for Summary Judgment* by United States of America. (Burke, Gerald) (Entered: 12/31/2008)
01/05/2009	111	NOTICE OF ERRORS AND/OR DEFICIENCIES re 110 Motion for Extension of Time to File Response/Reply filed by United States of America. See attached document for specifics (trb) (Entered: 01/05/2009)
02/02/2009	112	NOTICE TO COUNSEL: A telephonic discovery conference regarding motions 92 and 94 is set for 2/10/2009 at 03:30 PM in the East St. Louis Courthouse before Magistrate Judge Donald G. Wilkerson. Counsel for United States will initiate the conference call, with all parties on the line, to 618-482-9004. Signed by Magistrate Judge Donald G. Wilkerson on 2/2/09. (klb)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 02/02/2009)
02/02/2009	113	ORDER granting 110 Defendant United States of America's request for extension of time to reply to Plaintiff's Opposition to Defendant's motion to

		dismiss or for summary judgment. Defendant will file reply by 2-2-09. Signed by Magistrate Judge Donald G. Wilkerson on 2/2/09. (klb)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 02/02/2009)
02/02/2009	114	Second MOTION for Extension of Time to File Response/Reply as to 108 Response in Opposition to Motion by United States of America. (Burke, Gerald) (Entered: 02/02/2009)
02/03/2009	115	ENTRY STRICKEN: RESPONSE in Opposition re 110 MOTION for Extension of Time to File Response/Reply as to 108 Response in Opposition to Motion *for Summary Judgment*, 114 Second MOTION for Extension of Time to File Response/Reply as to 108 Response in Opposition to Motion filed by John R Clark. (Fowler, Margaret) Modified on 2/4/2009 (lmb). (Entered: 02/03/2009)
02/04/2009	116	NOTICE STRIKING ELECTRONICALLY FILED DOCUMENTS striking 115 Response in Opposition to Motion, filed by John R Clark. See attached document for specifics (lmb) (Entered: 02/04/2009)
02/04/2009	117	RESPONSE in Opposition re 110 MOTION for Extension of Time to File Response/Reply as to 108 Response in Opposition to Motion *for Summary Judgment*, 114 Second MOTION for Extension of Time to File Response/Reply as to 108 Response in Opposition to Motion filed by John R Clark. (Fowler, Margaret) (Entered: 02/04/2009)
02/06/2009	118	REPLY to Response to Motion re 114 Second MOTION for Extension of Time to File Response/Reply as to 108 Response in Opposition to Motion *to Dismiss or for Summary Judgment* filed by United States of America. (Attachments: # 1 Affidavit)(Burke, Gerald) (Entered: 02/06/2009)
02/10/2009	119	ORDER granting Defendant's second motion for an extension of time to file reply 114 . Defendant United States will reply to Plaintiff's opposition to Defendant's motion to dismiss/summary judgment by February 13, 2009. Signed by Magistrate Judge Donald G. Wilkerson on 2/10/2009. (klb)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 02/10/2009)
02/12/2009	120	Minute Entry for proceedings held before Magistrate Judge Donald G. Wilkerson. Telephonic Status Conference held on 2/10/2009. Margaret L. Fowler participated on behalf of the Plaintiff. Gerald M. Burke participated on behalf of the United States and Paul Pepper on behalf of the Bureau of Prisons. Counsel advised the Court that the parties have resolved the discovery issues contained in docs. 92 and 94. Motions at doc. 92 MOTION to Compel *Production of Documents directed to Defendant* filed by John R Clark and 94 MOTION to Compel *directed to Federal Bureau of Prisons* filed by John R Clark TERMINATED. (jmp)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 02/12/2009)
03/02/2009	121	Minute Entry for proceedings held before Judge G. Patrick Murphy: Motion Hearing held on 3/2/2009. GRANTING in part, DENYING in part 102

		MOTION to Dismiss/MOTION for Summary Judgment filed by United States of America. The claims for negligent hiring and for intentional infliction of emotional distress are dismissed on the merits. The only remaining claims are for assault, battery, and negligent supervision/retention. (Court Reporter Molly Clayton.) (lmm)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 03/02/2009)
03/16/2009	122	ORDER AND NOTICE OF SETTLEMENT CONFERENCE: Settlement Conference set for 3/30/2009 at 10:30 AM in East St. Louis Courthouse before Magistrate Judge Donald G. Wilkerson.(jmp) (Entered: 03/16/2009)
03/25/2009	123	NOTICE of Hearing: Bench Trial set for 6/2/2009 at 08:00 AM in East St. Louis Courthouse before Judge G. Patrick Murphy. (lmm)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 03/25/2009)
03/30/2009	124	Minute Entry for proceedings held before Magistrate Judge Donald G. Wilkerson. Settlement Conference held on 3/30/2009. Brian R. Plegge and Margaret L. Fowler appeared for Plaintiff. Plaintiff John R. Clark appeared by telephone. Gerald M. Burke appeared on behalf of the United States. The parties reached a settlement agreement. A 60 day order to issue. (Court Reporter Daveanna Ramsey.) (jmp)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 03/30/2009)
03/30/2009	125	60 DAY ORDER. Judgment to enter 5/29/2009. Signed by Judge G. Patrick Murphy on 3/30/2009. (lmm) (Entered: 03/30/2009)
04/01/2009	126	MOTION for Attorney Fees */Reimbursement of Expenses by Moser & Marsalek, P.C.* by John R Clark. (Plegge, Brian) (Entered: 04/01/2009)
05/29/2009	130	JUDGMENT. Signed by Judge G. Patrick Murphy on 5/29/2009. (lmm) (Entered: 05/29/2009)
07/07/2009	131	ORDER GRANTING in part and DENYING in part 126 MOTION for Attorney Fees and/or Reimbursement of Expenses by Moser & Marsalek, P.C., filed by John R. Clark. Per District Court Fund Order No. 09-29 dated 6/24/2009, counsel's request for reimbursement of expenses in the amount of $2,049.51 is granted and has been paid. The request for attorney fees is denied. The Court appreciates appointed counsel's efforts in this matter. Signed by Judge G. Patrick Murphy on 7/7/2009. (ssd)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 07/07/2009)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN R. CLARK	)	
	)	
Plaintiff	)	
	)	
vs.	)	Civil No. 06-16-GPM
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FTCA CLAIM PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the plaintiff John Clark and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of eight thousand dollars and no cents ($8,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to

accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by plaintiff John Clark will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States

Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the person on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for eight thousand dollars and no cents ($8,000.00) and made payable to "Brian Plegge, for John Clark." Mr. Plegge agrees to distribute the settlement proceeds to plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

Executed this _____ day of April, 2009.

A. COURTNEY COX
United States Attorney

Brian R. Plegge
Moser & Marsalek
200 N. Broadway, Site 700
St. Louis, MO 63102-2730
(314) 421-5364
Attorney for Plaintiff

Gerald M. Burke
Assistant United States Attorney
9 Executive Drive
Fairview Heights, IL 62208
(618) 628-3700
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN R. CLARK	)	
	)	
Plaintiff	)	
	)	
vs.	)	Civil No. 06-16-GPM
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

JOINT MOTION TO DISMISS CLAIM

Comes now the plaintiff, John R. Clark, by and through his attorney Brian R. Plegge, and the defendant, United States of America, by and through its attorney Gerald R. Burke, and state the following:

1. On the _____ day of April, 2009, plaintiff John R. Clark and the defendant, United States of America, agreed to a Stipulation for Compromise Settlement.

2. Pursuant to the Stipulation for Compromise Settlement, defendant will furnish plaintiff a check in the amount of eight thousand dollars and no cents ($8000.00), in accordance with the Stipulation of Settlement and Dismissal.

3. Plaintiff moves to dismiss with prejudice all claims which the plaintiff has against the defendant, United States of America, arising out of the incidents or circumstances giving rise to this suit.

WHEREFORE, the plaintiff, John R. Clark, and the defendant, United States of America, respectfully request this court to dismiss with prejudice plaintiff's claims.

Executed this _____ day of April, 2009.

A. COURTNEY COX
United States Attorney

Brian R. Plegge
Moser & Marsalek
200 N. Broadway, Site 700
St. Louis, MO 63102-2730
314-421-5364
Attorney for Plaintiff

Gerald M. Burke
Assistant United States Attorney
9 Executive Drive
Fairview Heights, IL 62208
(618) 628-3700
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN R. CLARK	)	
	)	
Plaintiff	)	
	)	
vs.	)	Civil No. 06-16-GPM
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

G. Patrick MURPHY, U.S. District Judge:

This cause is before the Court on the parties' Stipulation for Compromise Settlement and Joint Motion to Dismiss.

IT IS ORDERED that the parties' Joint Motion to Dismiss is GRANTED. Plaintiff's claims against defendant United States of America are dismissed with prejudice and without costs, fees, or interest.

DATED: _____, 2009.

G. PATRICK MURPHY

UNITED STATES DISTRICT JUDGE

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Hakeem Shaheed,	)	
	)	
Plaintiff,	)	
	)	**No. 07-679-MJR**
vs.	)	
	)	**Judge Michael J. Reagan**
United States of America, Michael K. Nalley, Regional Director of the North Central Region of the U.S. Bureau of Prisons, Randy Davis, Warden of United States Penitentiary Marion, Associate Warden Rau, Lieutenant Sample, Lieutenant Barry, Lieutenant Mash, Captain Gomez, Dr. Lyle, Officer Huckleberry, Officer Thomas, Officer P. Trovillion, Officers John Doe 1-9, Mr. Rivas, Mr. Shawdoen, Physician's Assistants Castillo and Welch,	)	
	)	
Defendants.	)	

FIRST AMENDED COMPLAINT

JURISDICTION AND VENUE

1. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343(a), and 28 U.S.C. § 1346(b).

PARTIES

2. Plaintiff Hakeem Shaheed is a resident of Atlantic City, New Jersey.

3. Defendant United States of America was the employer of all of the individual employees in this case.

4. Defendant Michael K. Nalley was at all times relevant to this case the Regional Director, North Central Region, for the Federal Bureau of Prisons.

5. Defendants Warden Randy Davis and Associate Warden Rau were at all times relevant to this complaint the Warden and Associate Warden of the United States Penitentiary at Marion.

6. Defendants Lieutenant Sample, Lieutenant Barry, Lieutenant Mash, Captain Gomez, Dr. Lyle, Officer Huckleberry, Officer Thomas, Officer P. Trovillion, Officers John Doe 1-9, Mr. Rivas, Mr. Shawdoen, Physician's Assistant Welch, Physician's Assistant Castillo were at all relevant times employees and/or agents of the United States government who were employed at the United States Penitentiary in Marion, Illinois. Plaintiff is currently unaware of the actual names of the John Doe defendants 1-9, who concealed their identities and were persons who were otherwise unknown to him.

7. Plaintiff has identified some of the John Doe defendants from photo lineups conducted by the agents of the United States government, but the government has so far refused to inform plaintiff of the names of the persons he has identified. Further, agents of the United States government are in possession of video tapes which would identify some or all of the John Doe defendants, but the government has not made those video tapes available to plaintiff.

8. Each of the individual defendants in this case was at all relevant times an investigative or law enforcement officer of the United States Government within the meaning of 28 U.S.C. § 2680.

FACTS

9. Hakeem Shaheed is a practicing Muslim who was a prisoner at the United States penitentiary in Marion from April 5, 1996 until October 4, 2005.

10. After September 11, 2001, Muslims at U.S.P. Marion suffered much mistreatment by

guards and employees at the prison.

11. This abuse included Marion employee Simmons abusing plaintiff by intentionally placing his Holy Qur'an on a floor stained with spit.

12. Plaintiff Shaheed reported some of these acts of mistreatment to various authorities, including meeting with a Mr. Literal from the Chaplain department of BOP in October 2004.

13. In May of 2005 agents from the Office of Inspector General of the United States Department of Justice came to the prison to investigate the allegations of mistreatment and met with plaintiff Shaheed.

14. Defendant Officer Huckleberry was one of the persons who took plaintiff to the interview with the OIG in May 2005.

15. In August of 2005, an OIG agent again interviewed plaintiff at USP Marion, concerning allegations of mistreatment and retaliation against him.

16. On September 6, 2005, Lieutenant Mash intentionally humiliated plaintiff by telling him to put his arms out and then violently put his hands on plaintiff's head, where he was wearing his Kufi, his religious head-covering, and Mash squeezed his Kufi in an obvious attempt to insult plaintiff's religion.

17. Plaintiff reported this abuse to the officials within the prison, including defendant Associate Warden Rau, and to the OIG and the Bureau of Prisons, including to defendant Regional Director Nalley.

18. Defendant Warden Davis was aware of the abuse which had been reported by plaintiff Shaheed.

19. Prior to October 3, 2005, defendants Nalley, Davis and Rau were aware that plaintiff had reported that he had been abused by guards at Marion on account of his religion and because Marion guards and/or staff believed that he was cooperating in OIG and/or BOP investigations into the conduct of guards and staff at Marion.

20. Prior to October 3, 2005, defendants Nalley, Davis and Rau knew that plaintiff Shaheed faced a serious risk of harm and failed to take reasonable steps to protect him, even though each of them had a duty to do so.

21. On and before October 3, 2005 the defendants described in paragraph 5 above were aware that plaintiff had reported to the OIG and to other governmental officials and agencies the mistreatment of Muslims generally and that he had been mistreated, and that he had met with agents of the OIG and was cooperating with the investigation by the OIG into the harassment, mistreatment and abuse of Muslim prisoners.

22. On October 3, 2005, in retaliation for plaintiff's cooperation with the investigation by the OIG and to punish him for complaining about the various abuses committed on him and other Muslims, various Marion prison guards and employees determined to torture and otherwise physically and mentally abuse plaintiff.

23. On that day, several guards came to plaintiff's cell, seized him, struck him, handcuffed plaintiff's hands behind his back, shackled his ankles and took him to the prison hospital.

24. At the hospital, Marion prison employees threw plaintiff onto a gurney.

25. Defendants Lieutenant Sample and Lieutenant Barry then punched plaintiff in the

face multiple times and left.

26. John Doe 1 then came over to plaintiff, placed a baton on his facial bones, and began to grind the baton into the side of his head with all his weight while John Does 2, 3 and 4 held plaintiff down.

27. During this abuse, PA Welch assisted John Does 1, 2, 3 and 4 by indicating areas on plaintiff's body that they should target.

28. During this abuse, plaintiff involuntarily screamed, and Dr. Lyle came over to examine him.

29. Plaintiff requested that Dr. Lyle intervene to stop the abuse, but Dr. Lyle refused to do so and walked away even though he knew about the abuse and had the duty and ability to stop it.

30. Defendant Trovillion then came over and said to plaintiff, "If you don't shut up we're going to kill you."

31. John Doe 1 continued to grind the baton into plaintiff's head and face, hit him with the baton, and shoved the baton into plaintiff's mouth, ripping his gums and causing him to gag.

32. PA Welch then lifted plaintiff's T-shirt, and an unidentified person hit plaintiff in that area with a baton.

33. PA Welch had a duty and the ability to intervene to stop the abuse of plaintiff but he failed to do so.

34. John Doe 1 then ordered John Does 2, 3, and 4 to turn plaintiff over, and John Doe 1 began to grind the baton into his head and face on the other side.

35. When plaintiff again screamed with pain, Dr. Lyle again came over but again refused

to intervene, despite plaintiff's pleas to him to do so.

36. Various persons, including John Does 1, 2, 3 and 4 then turned plaintiff face down and began to grind the baton into his spine and ram the stick into his rectal area, over his pants.

37. Captain Gomez came over to plaintiff who pleaded for help, but Gomez just shouted, "fuck you," and walked away.

38. Captain Gomez had a duty and the ability to intervene to stop the abuse of plaintiff but he failed to do so.

39. Mr. Rivas was also in the area and was aware that various guards were abusing plaintiff, but he failed to intervene to stop the abuse, even though he had a duty and the ability to do so.

40. Various guards, including John Does 1, 2, 3, and 4, then turned plaintiff onto his back and continued to beat and abuse him.

41. John Does 3 and 4 began to bend and twist plaintiff's toes, and John Doe 3 put a chain over one of plaintiff's toes and yanked it extremely hard, but the chain slipped off.

42. Defendant Huckleberry then came over and struck plaintiff with a baton.

43. Defendant officer Thomas then came over but refused to intervene to stop the physical abuse of plaintiff.

44. Defendant Trovillion then took plaintiff's blood pressure, and PA Welch and others took him to the dentist's office to x-ray his jaw.

45. Plaintiff was then taken to another room where officer Thomas and Mr. Shawdoen bent him over a gurney. Shawdoen then stuck him with something that felt like a needle, said "I

bet he likes this position," and Thomas placed a baton between plaintiff's cuffed arms and twisted it, causing plaintiff to lift up.

46. Shawdoen then stamped on the ankle shackles, causing the metal to cut into plaintiff's ankles, and then both Shawdoen and Thomas threw plaintiff face down on the gurney.

47. Shawdoen and Thomas then observed that plaintiff's wrists were bloody from the cuffs which had been placed tightly around his wrists.

48. Thomas then slapped his stick into his open palm, saying, "Shaheed, you're lucky I wasn't there; you don't want to mess with these rednecks around here, they'll kill you."

49. Thomas then picked up a telephone and said, "send me some guys with no hearts," and said to plaintiff, "This is going to be the longest walk of your life."

50. Five persons, John Does 5, 6, 7, 8 and 9, their identities completely concealed and not wearing name tags, then appeared in dark blue jumpsuits with helmets and led plaintiff out of that area and down the hall. As they did so John Doe 5 choked plaintiff from behind, while John Doe 6 grabbed plaintiff's head and pushed it down, and John Doe 7 was behind plaintiff, stamping on his ankle shackles, while John Does 8 and 9 failed to intervene.

51. John Does 5, 6, 7, 8 and 9 took plaintiff to the special housing unit, taking turns hitting him and otherwise abusing him, and then placed him on a concrete pad with his hands cuffed over his head while they continued to abuse him.

52. PA Castillo was present during this abuse in the special housing unit and failed to intervene to prevent or stop it, despite having a duty and the ability to do so.

53. John Does 5, 6, 7, 8 and 9 and PA Castillo left plaintiff in this position for an

extended period of time, causing him to lose all sensation in his hands, and his feet to swell up.

54. During this time plaintiff continually cried out that he was in pain and that the handcuffs had been deliberately closed too tightly, cutting into his wrists.

55. Defendants Sample and Trovillion eventually came to inspect plaintiff and repositioned his handcuffs and ankle shackles. Sample punched plaintiff a few times, and left the cell, leaving plaintiff shackled and unable to move.

56. Next day, plaintiff was taken out of the cell by guards who said they were going to take him back to the hospital.

57. Plaintiff was terrified that the guards were going to torture him again. He was placed in a room in the basement of the hospital, where Marion staff members kept walking past the cell, staring at plaintiff, and saying that certain unidentified persons would be there soon.

58. Eventually, a lieutenant whom plaintiff had never seen before, came up to plaintiff's cell and said he was from U.S.P. Terre Haute.

59. Plaintiff was removed from Marion in a wheelchair because he was unable to walk properly because of the pain from the torture and abuse.

60. Plaintiff was then taken to Terre Haute prison, where he was housed on death row so as to place him in a highly secure environment where he would be protected from attacks by guards.

61. The defendants set forth in paragraph 5 above, acting jointly and with other currently unknown persons, reached an understanding, engaged in a course of conduct, engaged in joint action, and otherwise conspired among and between themselves to deprive Mr. Shaheed of his

constitutional rights, and did deprive him of those rights, including his right to free speech and to practice his religion under the first amendment to the United States Constitution, and his right not to be subjected to cruel and unusual punishment under the eighth amendment to the United States Constitution. Because said actions were done with the knowledge and purpose of depriving Mr. Shaheed, who is a practicing Muslim, of the equal protection of the laws and/or of equal privileges and immunities under the law, they also deprived him of his right to equal protection of the laws under the fifth amendment to the United States Constitution.

62. One purpose of this conspiracy was to retaliate against plaintiff for the complaint that he had filed against Lieutenant Mash in relation to the September 6, 2005 incident as set forth above.

63. As a direct and proximate result of these defendants' actions, as detailed above, plaintiff Hakeem Shaheed suffered serious physical injuries, as well as great physical pain and mental distress which continues to this day.

64. On or about September 25, 2007, plaintiff filed a Notice of Claim with the Federal Bureau of Prisons and the United States Justice Department.

65. On May 1, 2007 the Federal Bureau of Prisons denied plaintiff's claim.

COUNT I
[Eighth Amendment and 42 U.S.C. § 2000dd-0 Claim]

66. Plaintiff realleges paragraphs 1-65.

67. The actions of the defendants named in paragraph 5 above, in torturing, beating and abusing plaintiff and/or failing to intervene to prevent the torture, beating and abuse by others violated plaintiff's eighth amendment right to be free from cruel and unusual punishment and 42

U.S.C. § 2000dd-0.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth in paragraph 5 above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action, attorney fees and such other relief as this Court deems equitable and just.

COUNT II
[Eighth Amendment and 42 U.S.C. § 2000dd-0 Failure to Protect Claim]

68. Plaintiff realleges paragraphs 1-67.

69. The defendants named in paragraphs 3 and 4 above were aware prior to October 3, 2005 that plaintiff Shaheed had reported abuse against Muslim prisoners and abuse against him, were aware that he had been the subject of retaliation by various prison guards and/or staff at Marion, and were aware that he faced a serious risk of harm but were deliberately indifferent to this harm and failed to take reasonable steps to protect him although they had a duty to do so.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth in paragraphs 3 and 4 above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT III
[First Amendment Claim, Freedom of Speech and to Petition for Redress of Grievances]

70. Plaintiff realleges paragraphs 1-69.

71. The actions of the defendants named in paragraph 5 above in torturing, beating and abusing plaintiff in retaliation for his making complaints about the treatment of Muslim prisoners at Marion and talking to governmental agents about the abuse of Muslim prisoners violated

plaintiff's first amendment right to freedom of speech and to petition the government for redress of grievances.

Wherefore, plaintiff requests compensatory damages against all the defendants named in paragraph 5 above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT IV
[First Amendment Claim, Freedom of Religion]

72. Plaintiff realleges paragraphs 1-72.

73. The actions of the defendants named in paragraph 5 above in torturing, beating and abusing plaintiff and/or failing to intervene to stop the torture, beating and abuse by others, because plaintiff was a Muslim violated plaintiff's first amendment right to freedom of religion.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth above in paragraph 5, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT V
[Violation of 42 U.S.C. § 2000cc-1]

74. Plaintiff realleges paragraphs 1 through 73.

75. The actions of the defendants named in paragraphs 3, 4 and 5 above imposed a substantial burden on plaintiff's right to practice his religion, in violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth

above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action, attorney fees and such other relief as this Court deems equitable and just.

COUNT VI
[Fifth Amendment Equal Protection Claim]

76. Plaintiff realleges paragraphs 1 through 75.

77. The actions of the defendants named in paragraph 5 above in torturing, beating and abusing plaintiff and/or failing to intervene to stop the torture, beating and abuse by others were done because the plaintiff was a Muslim and because he had complained about the mistreatment of Muslim prisoners on account of their religion, and these actions thereby violated plaintiff's right to equal protection of the laws, as set forth in the fifth amendment to the United States Constitution.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT VII
[Claim under the Federal Tort Claims Act for Hate Crimes]

78. Plaintiff realleges paragraphs 1 through 77.

79. The actions of the individual defendants set forth above constitute hate crimes under the laws of the State of Illinois (720 ILCS 5/12-7.1).

80. The acts of the defendants which constituted hate crimes were performed by each of the individual defendants in the course and scope of his or her employment.

Wherefore, plaintiff requests compensatory damages against the United States, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT VIII
[Claim under the Federal Tort Claims Act for Battery]

81. Plaintiff realleges paragraphs 1 through 80.

82. The actions of the individual defendants set forth above constitute battery under the laws of the State of Illinois.

83. The acts of the defendants which constituted battery were performed by each of the individual defendants in the course and scope of his or her employment.

Wherefore, plaintiff requests compensatory damages against the United States, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT IX
[Claim under the Federal Tort Claims Act for Assault]

84. Plaintiff realleges paragraphs 1 through 83.

85. The actions of the individual defendants set forth above constitute assault under the laws of the State of Illinois.

86. The acts of the defendants which constituted assault were performed by each of the individual defendants in the course and scope of his or her employment.

Wherefore, plaintiff requests compensatory damages against the United States, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT X
[Claim under the Federal Tort Claims Act for Intentional Infliction of Emotional Distress]

87. Plaintiff realleges paragraphs 1 through 86.

88. The actions of the individual defendants set forth above constitute intentional infliction of emotional distress under the laws of the State of Illinois.

89. The acts of the defendants which constituted intentional infliction of emotional distress were performed by each of the individual defendants in the course and scope of his or her employment.

Wherefore, plaintiff requests compensatory damages against the United States, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT XI
[Claim under the Federal Tort Claims Act for Conspiracy]

90. Plaintiff realleges paragraphs 1 through 89.

91. The actions of the individual defendants set forth above constitute conspiracy under the laws of the State of Illinois.

92. The acts of the defendants which constituted conspiracy were performed by each of the individual defendants in the course and scope of his or her employment.

Wherefore, plaintiff requests compensatory damages against the United States, plus the costs of this action and such other relief as this Court deems equitable and just.

Dated: June 10, 2008

Respectfully Submitted,

/s/ John L. Stainthorp
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Attorney for Plaintiff

Plaintiff Demands Trial by Jury on All Counts Except FTCA Claims

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Hakeem Shaheed,	)	
	)	
Plaintiff,	)	
	)	**No. 07-679-MJR**
vs.	)	
	)	**Judge Michael J. Reagan**
Michael K. Nalley, et al.	)	
	)	**Magistrate Judge Donald Wilkerson**
Defendants.	)	

CERTIFICATE OF SERVICE

To: Counsel of Record

Please take notice that on July 23, 2008 I filed with the Clerk of the United States District Court for the Southern District of Illinois the attached First Amended Complaint, a copy of which is hereby served upon you via the court's ECF system.

/s/ John L. Stainthorp
John L. Stainthorp

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Hakeem Shaheed,	)	
	)	
Plaintiff,	)	
	)	**No. 07-679**
vs.	)	
	)	**Judge**
Michael K. Nalley, Regional Director of the North Central Region of the U.S. Bureau of Prisons, Randy Davis, Warden of United States Penitentiary Marion, Associate Warden Rau, Lieutenant Sample, Lieutenant Barry, Lieutenant Mash, Captain Gomez, Dr. Lyle, Officer Huckleberry, Officer Thomas, Officer P. Trovillion, Officers John Doe 1-9, Mr. Rivas, Mr. Shawdoen, Physician's Assistant Castillo and Physician's Assistant Welch,	)	**Magistrate Judge**
	)	
Defendants.	)	

COMPLAINT

JURISDICTION AND VENUE

1. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343(a).

PARTIES

2. Plaintiff Hakeem Shaheed is a resident of Atlantic City, New Jersey.

3. Defendant Michael K. Nalley was at all times relevant to this case the Regional Director, North Central Region, for the Federal Bureau of Prisons.

4. Defendants Warden Randy Davis and Associate Warden Rau were at all times relevant to this complaint the Warden and Associate Warden of the United States Penitentiary at Marion.

5. Defendants Lieutenant Sample, Lieutenant Barry, Lieutenant Mash, Captain Gomez, Dr. Lyle, Officer Huckleberry, Officer Thomas, Officer P. Trovillion, Officers John Doe 1-9, Mr. Rivas, Mr. Shawdoen, Physician's Assistant Welch, Physician's Assistant Castillo were at all relevant times employees and/or agents of the United States government who were employed at the United States Penitentiary in Marion, Illinois. Plaintiff is currently unaware of the actual names of the John Doe defendants 1-9, who concealed their identities and were persons who were otherwise unknown to him.

6. Plaintiff has identified some of the John Doe defendants from photo lineups conducted by the agents of the United States government, but the government has so far refused to inform plaintiff of the names of the persons he has identified. Further, agents of the United States government are in possession of video tapes which would identify some or all of the John Doe defendants, but the government has not made those video tapes available to plaintiff.

FACTS

7. Hakeem Shaheed is a practicing Muslim who was a prisoner at the United States penitentiary in Marion from April 5, 1996 until October 4, 2005.

8. After September 11, 2001, Muslims at U.S.P. Marion suffered much mistreatment by guards and employees at the prison.

9. This abuse included Marion employee Simmons abusing plaintiff by intentionally placing his Holy Qur'an on a floor stained with spit.

10. Plaintiff Shaheed reported some of these acts of mistreatment to various authorities, including meeting with a Mr. Literal from the Chaplain department of BOP in October 2004.

11. In May of 2005 agents from the Office of Inspector General of the United States Department of Justice came to the prison to investigate the allegations of mistreatment and met with plaintiff Shaheed.

12. Defendant Officer Huckleberry was one of the persons who took plaintiff to the interview with the OIG in May 2005.

13. In August of 2005, an OIG agent again interviewed plaintiff at USP Marion, concerning allegations of mistreatment and retaliation against him.

14. On September 6, 2005, Lieutenant Mash intentionally humiliated plaintiff by telling him to put his arms out and then violently put his hands on plaintiff's head, where he was wearing his Kufi, his religious head-covering, and Mash squeezed his Kufi in an obvious attempt to insult plaintiff's religion.

15. Plaintiff reported this abuse to the officials within the prison, including defendant Associate Warden Rau, and to the OIG and the Bureau of Prisons, including to defendant Regional Director Nalley.

16. Defendant Warden Davis was aware of the abuse which had been reported by plaintiff Shaheed.

17. Prior to October 3, 2005, defendants Nalley, Davis and Rau were aware that plaintiff had reported that he had been abused by guards at Marion on account of his religion and because Marion guards and/or staff believed that he was cooperating in OIG and/or BOP investigations into the conduct of guards and staff at Marion.

18. Prior to October 3, 2005, defendants Nalley, Davis and Rau knew that plaintiff

Shaheed faced a serious risk of harm and failed to take reasonable steps to protect him, even though each of them had a duty to do so.

19. On and before October 3, 2005 the defendants described in paragraph 5 above were aware that plaintiff had reported to the OIG and to other governmental officials and agencies the mistreatment of Muslims generally and that he had been mistreated, and that he had met with agents of the OIG and was cooperating with the investigation by the OIG into the harassment, mistreatment and abuse of Muslim prisoners.

20. On October 3, 2005, in retaliation for plaintiff's cooperation with the investigation by the OIG and to punish him for complaining about the various abuses committed on him and other Muslims, various Marion prison guards and employees determined to torture and otherwise physically and mentally abuse plaintiff.

21. On that day, several guards came to plaintiff's cell, seized him, struck him, handcuffed plaintiff's hands behind his back, shackled his ankles and took him to the prison hospital.

22. At the hospital, Marion prison employees threw plaintiff onto a gurney.

23. Defendants Lieutenant Sample and Lieutenant Barry then punched plaintiff in the face multiple times and left.

24. John Doe 1 then came over to plaintiff, placed a baton on his facial bones, and began to grind the baton into the side of his head with all his weight while John Does 2, 3 and 4 held plaintiff down.

25. During this abuse, PA Welch assisted John Does 1, 2, 3 and 4 by indicating areas on

plaintiff's body that they should target.

26. During this abuse, plaintiff involuntarily screamed, and Dr. Lyle came over to examine him.

27. Plaintiff requested that Dr. Lyle intervene to stop the abuse, but Dr. Lyle refused to do so and walked away even though he knew about the abuse and had the duty and ability to stop it.

28. Defendant Trovillion then came over and said to plaintiff, "If you don't shut up we're going to kill you."

29. John Doe 1 continued to grind the baton into plaintiff's head and face, hit him with the baton, and shoved the baton into plaintiff's mouth, ripping his gums and causing him to gag.

30. PA Welch then lifted plaintiff's T-shirt, and an unidentified person hit plaintiff in that area with a baton.

31. PA Welch had a duty and the ability to intervene to stop the abuse of plaintiff but he failed to do so.

32. John Doe 1 then ordered John Does 2, 3, and 4 to turn plaintiff over, and John Doe 1 began to grind the baton into his head and face on the other side.

33. When plaintiff again screamed with pain, Dr. Lyle again came over but again refused to intervene, despite plaintiff's pleas to him to do so.

34. Various persons, including John Does 1, 2, 3 and 4 then turned plaintiff face down and began to grind the baton into his spine and ram the stick into his rectal area, over his pants.

35. Captain Gomez came over to plaintiff who pleaded for help, but Gomez just shouted,

"fuck you," and walked away.

36. Captain Gomez had a duty and the ability to intervene to stop the abuse of plaintiff but he failed to do so.

37. Mr. Rivas was also in the area and was aware that various guards were abusing plaintiff, but he failed to intervene to stop the abuse, even though he had a duty and the ability to do so.

38. Various guards, including John Does 1, 2, 3, and 4, then turned plaintiff onto his back and continued to beat and abuse him.

39. John Does 3 and 4 began to bend and twist plaintiff's toes, and John Doe 3 put a chain over one of plaintiff's toes and yanked it extremely hard, but the chain slipped off.

40. Defendant Huckleberry then came over and struck plaintiff with a baton.

41. Defendant officer Thomas then came over but refused to intervene to stop the physical abuse of plaintiff.

42. Defendant Trovillion then took plaintiff's blood pressure, and PA Welch and others took him to the dentist's office to x-ray his jaw.

43. Plaintiff was then taken to another room where officer Thomas and Mr. Shawdoen bent him over a gurney. Shawdoen then stuck him with something that felt like a needle, said "I bet he likes this position," and Thomas placed a baton between plaintiff's cuffed arms and twisted it, causing plaintiff to lift up.

44. Shawdoen then stamped on the ankle shackles, causing the metal to cut into plaintiff's ankles, and then both Shawdoen and Thomas threw plaintiff face down on the gurney.

45. Shawdoen and Thomas then observed that plaintiff's wrists were bloody from the cuffs which had been placed tightly around his wrists.

46. Thomas then slapped his stick into his open palm, saying, "Shaheed, you're lucky I wasn't there; you don't want to mess with these rednecks around here, they'll kill you."

47. Thomas then picked up a telephone and said, "send me some guys with no hearts," and said to plaintiff, "This is going to be the longest walk of your life."

48. Five persons, John Does 5, 6, 7, 8 and 9, their identities completely concealed and not wearing name tags, then appeared in dark blue jumpsuits with helmets and led plaintiff out of that area and down the hall. As they did so John Doe 5 choked plaintiff from behind, while John Doe 6 grabbed plaintiff's head and pushed it down, and John Doe 7 was behind plaintiff, stamping on his ankle shackles, while John Does 8 and 9 failed to intervene.

49. John Does 5, 6, 7, 8 and 9 took plaintiff to the special housing unit, taking turns hitting him and otherwise abusing him, and then placed him on a concrete pad with his hands cuffed over his head while they continued to abuse him.

50. PA Castillo was present during this abuse in the special housing unit and failed to intervene to prevent or stop it, despite having a duty and the ability to do so.

51. John Does 5, 6, 7, 8 and 9 and PA Castillo left plaintiff in this position for an extended period of time, causing him to lose all sensation in his hands, and his feet to swell up.

52. During this time plaintiff continually cried out that he was in pain and that the handcuffs had been deliberately closed too tightly, cutting into his wrists.

53. Defendants Sample and Trovillion eventually came to inspect plaintiff and

repositioned his handcuffs and ankle shackles. Sample punched plaintiff a few times, and left the cell, leaving plaintiff shackled and unable to move.

54. Next day, plaintiff was taken out of the cell by guards who said they were going to take him back to the hospital.

55. Plaintiff was terrified that the guards were going to torture him again. He was placed in a room in the basement of the hospital, where Marion staff members kept walking past the cell, staring at plaintiff, and saying that certain unidentified persons would be there soon.

56. Eventually, a lieutenant whom plaintiff had never seen before, came up to plaintiff's cell and said he was from U.S.P. Terre Haute.

57. Plaintiff was removed from Marion in a wheelchair because he was unable to walk properly because of the pain from the torture and abuse.

58. Plaintiff was then taken to Terre Haute prison, where he was housed on death row so as to place him in a highly secure environment where he would be protected from attacks by guards.

59. The defendants set forth in paragraph 5 above, acting jointly and with other currently unknown persons, reached an understanding, engaged in a course of conduct, engaged in joint action, and otherwise conspired among and between themselves to deprive Mr. Shaheed of his constitutional rights, and did deprive him of those rights, including his right to free speech and to practice his religion under the first amendment to the United States Constitution, and his right not to be subjected to cruel and unusual punishment under the eighth amendment to the United States Constitution. Because said actions were done with the knowledge and purpose of

depriving Mr. Shaheed, who is a practicing Muslim, of the equal protection of the laws and/or of equal privileges and immunities under the law, they also deprived him of his right to equal protection of the laws under the fifth amendment to the United States Constitution.

60. One purpose of this conspiracy was to retaliate against plaintiff for the complaint that he had filed against Lieutenant Mash in relation to the September 6, 2005 incident as set forth above.

61. As a direct and proximate result of these defendants' actions, as detailed above, plaintiff Hakeem Shaheed suffered serious physical injuries, as well as great physical pain and mental distress which continues to this day.

COUNT I
[Eighth Amendment and 42 U.S.C. § 2000dd-0 Claim]

62. Plaintiff realleges paragraphs 1-61.

63. The actions of the defendants named in paragraph 5 above, in torturing, beating and abusing plaintiff and/or failing to intervene to prevent the torture, beating and abuse by others violated plaintiff's eighth amendment right to be free from cruel and unusual punishment and 42 U.S.C. § 2000dd-0.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth in paragraph 5 above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action, attorney fees and such other relief as this Court deems equitable and just.

COUNT II
[Eighth Amendment and 42 U.S.C. § 2000dd-0 Failure to Protect Claim]

64. Plaintiff realleges paragraphs 1-63.

65. The defendants named in paragraphs 3 and 4 above were aware prior to October 3, 2005 that plaintiff Shaheed had reported abuse against Muslim prisoners and abuse against him, were aware that he had been the subject of retaliation by various prison guards and/or staff at Marion, and were aware that he faced a serious risk of harm but were deliberately indifferent to this harm and failed to take reasonable steps to protect him although they had a duty to do so.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth in paragraphs 3 and 4 above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT III
[First Amendment Claim, Freedom of Speech and to Petition for Redress of Grievances]

66. Plaintiff realleges paragraphs 1-65.

67. The actions of the defendants named in paragraph 5 above in torturing, beating and abusing plaintiff in retaliation for his making complaints about the treatment of Muslim prisoners at Marion and talking to governmental agents about the abuse of Muslim prisoners violated plaintiff's first amendment right to freedom of speech and to petition the government for redress of grievances.

Wherefore, plaintiff requests compensatory damages against all the defendants named in paragraph 5 above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT IV
[First Amendment Claim, Freedom of Religion]

68. Plaintiff realleges paragraphs 1-67.

69. The actions of the defendants named in paragraph 5 above in torturing, beating and abusing plaintiff and/or failing to intervene to stop the torture, beating and abuse by others, because plaintiff was a Muslim violated plaintiff's first amendment right to freedom of religion.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth above in paragraph 5, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action and such other relief as this Court deems equitable and just.

COUNT V
[Violation of 42 U.S.C. § 2000cc-1]

70. Plaintiff realleges paragraphs 1 through 69.

71. The actions of the defendants named in paragraphs 3, 4 and 5 above imposed a substantial burden on plaintiff's right to practice his religion, in violation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action, attorney fees and such other relief as this Court deems equitable and just.

COUNT VI
[Fifth Amendment Equal Protection Claim]

72. Plaintiff realleges paragraphs 1 through 70.

73. The actions of the defendants named in paragraph 5 above in torturing, beating and abusing plaintiff and/or failing to intervene to stop the torture, beating and abuse by others were done because the plaintiff was a Muslim and because he had complained about the mistreatment of Muslim prisoners on account of their religion, and these actions thereby violated plaintiff's right to equal protection of the laws, as set forth in the fifth amendment to the United States Constitution.

Wherefore, plaintiff requests compensatory damages against all the defendants set forth above, and because these defendants acted maliciously, willfully, wantonly, and/or with reckless disregard for plaintiff's constitutional rights, for punitive damages, plus the costs of this action and such other relief as this Court deems equitable and just.

Dated: September 24, 2007

Respectfully Submitted,

/s/ John L. Stainthorp

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Attorneys for Plaintiff

Plaintiff Demands Trial by Jury on All Counts

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Hakeem Shaheed,	)	
	)	
Plaintiff,	)	
	)	**CAUSE NO. 07-CV-0679-MJR**
v.	)	
	)	
Michael K. Nalley, et al.,	)	
	)	
Defendants.	)	

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT.

IT IS ORDERED AND ADJUDGED that this cause of action is dismissed with prejudice.

DATED this 14th Day of September, 2009.

JUSTINE FLANAGAN, ACTING CLERK

BY: s/Annie McGraw
Deputy Clerk

Approved:

s/Michael J. Reagan
MICHAEL J. REAGAN
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 07-cv-679-MJR**
	)	
MICHAEL K. NALLEY, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

REAGAN, District Judge:

Plaintiff, formerly an inmate in the United States Penitentiary in Marion, Illinois, brings this action for alleged violations of his constitutional rights by persons acting under the color of federal authority. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). He sets forth six separate claims involving use of excessive force, failure to protect him from harm, retaliation for exercising his First Amendment rights to complaint about treatment of Muslim inmates, interference with his right to practice his religion, violations of the Religious Land Use and Institutionalized Persons Act, and violations of this Fifth Amendment right to equal protection. At this point, the Court is unable to dismiss any portion of the complaint. *See* 28 U.S.C. § 1915(e)(2).

It appears that summons has already issued for all named defendants. Furthermore, Defendants Trovillion, Rivas, Castillo, Welch, Nalley and Mash have already filed an answer to the complaint (*see* Doc. 24). Accordingly, their motions for additional time to answer (Docs. 21, 22) are now **MOOT**.

Plaintiff is **ORDERED** to serve upon Defendants or, if appearance has been entered by

counsel, upon that attorney, a copy of every further pleading or other document submitted for consideration by this Court. He shall include with the original paper to be filed with the Clerk of the Court a certificate stating the date that a true and correct copy of any document was mailed to defendant or his counsel. Any paper received by a district judge or magistrate judge which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

All other Defendants are **ORDERED** to timely file an appropriate responsive pleading to the complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

Pursuant to Local Rule 72.1(a)(2), this cause is **REFERRED** to a United States Magistrate Judge for further pre-trial proceedings.

Further, this entire matter is hereby **REFERRED** to a United States Magistrate Judge for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *should all the parties consent to such a referral.*

IT IS SO ORDERED.

DATED this 22nd day of February, 2007.

s/ Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 07-cv-679-MJR
	)	
MICHAEL K. NALLEY, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff, a former inmate at the United States Penitentiary at Marion, Illinois, brings this *Bivens* action for alleged use of excessive force in violation of his constitutional rights. The Court has been informed by counsel for the government that defendants Randy Davis (former warden), Rau (former associate warden), and Dr. Lyle are no longer employed by the Federal Bureau of Prisons.

IT IS ORDERED that, for good cause shown, on or before April 25, 2008, the Federal Bureau of Prisons shall provide the U.S. Marshals Service with the last known addresses of defendants Randy Davis (former warden), Rau (former associate warden), and Dr. Lyle. The U.S. Marshals can be contacted at 618-482-9336 to arrange for the orderly conveyance of this information.

IT IS FURTHER ORDERED that a written Notice of Compliance shall be filed with the Court indicating conveyance of information from the Bureau of Prisons to the Marshals Service.

IT IS FURTHER ORDERED that the Marshals Service shall reveal the addresses to the

Clerk of Court as necessary only to effect service and to conduct the usual business of the Court. Otherwise defendants' addresses will be kept in confidence by both the Marshals Service and the Clerk of Court. *The addresses shall not become part of the public file and shall not be disclosed to plaintiff or plaintiff's attorney*.

The Clerk of Court is **DIRECTED** to prepare an original summons for defendants Randy Davis (former warden), Rau (former associate warden), and Dr. Lyle.

The Clerk of Court is further **DIRECTED** to serve a copy of this order on the U.S. Marshal for the Southern District of Illinois.

The United States Marshal is **DIRECTED** to serve the summons, a copy of the complaint, and a copy of this order upon defendants Randy Davis (former warden), Rau (former associate warden), and Dr. Lyle.

IT IS SO ORDERED.

DATED: March 27, 2008

s/ *Donald G. Wilkerson*
DONALD G. WILKERSON
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. 3:07-cv-679-MJR
	)	
MICHAEL K. NALLEY, et al.,	)	
	)	
Defendants.	)	

ORDER AND NOTICE OF SETTLEMENT CONFERENCE

TO ALL PARTIES AND COUNSEL OF RECORD:

A settlement conference in the above case has been set before the **Honorable Donald G. Wilkerson, U.S. Magistrate Judge, on May 26, 2009 at 9:00 a.m., in Court Room, Third Floor, Melvin Price Federal Bldg. and U. S. Courthouse, East St. Louis, Illinois.**

The purpose of the settlement conference is to permit an informal discussion of every aspect of the lawsuit bearing on its settlement value and to discuss, propose and consider, and, in appropriate instances, to enter into settlement agreements. **For these purposes it is essential that all necessary parties be present in person. This includes, but is not limited to, trial counsel and the individual parties. In the case of corporate parties and insurance carriers, a representative executive SHALL be present who has unrestricted authority to discuss, consider, propose and agree, or disagree, to any settlement proposal or offer.**

The parties are directed to submit ex parte and under seal to Judge Donald G. Wilkerson a settlement conference statement, **on or before 7 days prior to settlement conference,** setting forth, among other things, each party's position concerning factual issues, issues of law, damages or relief requested and the party's settlement position and grounds therefor. Such settlement statement shall be addressed and mailed to **Judge Wilkerson, U.S. Courthouse, 750 Missouri Avenue, East St. Louis, Illinois 62201**, in an envelope marked **"Confidential - Submitted Under Seal".** Settlement statements may also be faxed directly to the Chambers of Judge Wilkerson at **618-482-9277** or e-mailed to chambers at

DGWpd@ilsd.uscourts.gov. Neither the settlement statement nor the contents thereof shall be disclosed to any other party and the same shall remain under seal to be opened only by the Court. The parties are directed to this court's webpage, http://www.ilsd.uscourts.gov/Judges/wilkersonpretrial.html , for additional information and requirements.

Pertinent evidence to be offered at trial, documents or otherwise, should be brought to the settlement conference for presentation to the settlement judge if thought particularly relevant.

Neither the settlement conference statements nor communications during the settlement conference with the settlement judge can be used by either party in the trial of the case.

Prior to the settlement conference, the parties should discuss settlement with their respective clients, and opposing parties should discuss settlement with each other so the parameters of settlement have been explored in advance of the settlement conference. If either party believes that a settlement conference would be futile, then that party shall contact opposing counsel and file a motion with the Court in a reasonable time prior to the scheduled settlement conference.

THE PARTIES ARE CAUTIONED THAT FAILURE TO BRING ALL NECESSARY PARTIES TO THE SETTLEMENT CONFERENCE COULD RESULT IN THE CONFERENCE BEING RESCHEDULED WITH SANCTIONS IMPOSED UPON THE OFFENDING PARTY.

DATED: April 30, 2008

NORBERT G. JAWORSKI, Clerk of the Court

By: s\ Robin M. Butler
Deputy Clerk

A copy of a settlement statement can be obtained from the Court's Website at www.ilsd.uscourts.gov.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:07-cv-679 MJR
	)	
MICHAEL K. NALLEY, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER REGARDING DISCOVERY

In the interest of reducing delay and expense, it is **ORDERED** that discovery disputes that cannot be resolved through informal means pursuant to Federal Rule of Civil Procedure 37 shall be handled in the following manner:

The party with the discovery dispute shall contact Holly Stone, Law Clerk to Judge Wilkerson, at (618) 482-9382, to schedule a telephonic conference call with the Court and opposing counsel. If the dispute involves written discovery, the disputed portion(s) shall be submitted to the Court by e-mail (holly_stone@ilsd.uscourts.gov) or faxed to the Court (if less than twenty pages) at (618) 482-9277, prior to the telephonic conference. The party with the discovery dispute shall be responsible for initiating the conference call. The Court's teleconference number is (618) 482-9004. Written motions to compel or legal memoranda will not be accepted unless specifically requested by the Court. Expense of the call will be borne by the non-prevailing party. The parties are directed to this court's webpage, http://www.ilsd.uscourts.gov/Judges/wilkersonpretrial.html, for additional information and specific procedures regarding discovery disputes. **Consult this Court's webpage BEFORE contacting chambers with questions.**

DATED: April 30, 2008

s/ *Donald G. Wilkerson*
DONALD G. WILKERSON
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 07-cv-679-MJR
	)	
MICHAEL K. NALLEY, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff, a former inmate at the United States Penitentiary at Marion, Illinois, brings this *Bivens* action for alleged use of excessive force in violation of his constitutional rights. One of the defendants--Lieutenant Sample--has yet to be served in the matter. The Court has been informed by counsel for the government that Defendant Sample is on extended leave from the Federal Bureau of Prisons. Plaintiff has filed a motion (Doc. 40) requesting that the Court enter an order directing the Federal Bureau of Prisons to provide the United States Marshal Service with the last known address of Defendant Lieutenant Sample. This motion is **GRANTED**. Defendant Sample's address will be kept in confidence by both the Marshals Service and the Clerk of Court, and will only be used to effect service and to conduct the usual business of the Court.

IT IS HEREBY ORDERED that, for good cause shown, and in accord with Graham v. Satoski, 51 F.3d 710 (7th Cir. 1995), on or before June 6, 2008, the Federal Bureau of Prisons shall provide the U.S. Marshals Service with the last known addresses of Defendant Lieutenant Sample. The U.S. Marshals can be contacted at 618-482-9336 to arrange for the orderly

conveyance of this information. A written Notice of Compliance shall be filed with the Court indicating conveyance of the information to the Marshal Service.

IT IS FURTHER ORDERED that the Marshal Service shall reveal the address to the Clerk of Court as necessary for the conduct of routine business, otherwise Defendant's address shall be retained by the Marshal Service.

IT IS FURTHER ORDERED that the Clerk of Court shall serve copies of this order on the United States Marsh for the Southern District of Illinois, as well as the Director of the Federal Bureau of Prisons and the Human Resources Office of the Federal Bureau of Prisons, both at 320 First Street NW, Washington, DC 20534.

IT IS SO ORDERED.

DATED: May 9, 2008

s/ Donald G. Wilkerson
DONALD G. WILKERSON
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 07-cv-679-MJR
	)	
MICHAEL K. NALLEY, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff, a former inmate at the United States Penitentiary at Marion, Illinois, brings this *Bivens* action for alleged use of excessive force in violation of his constitutional rights. Plaintiff now moves for an order directing the Bureau of Prisons to provide the last known addresses of defendants Rau, Sample, and Barry to the United States Marshals Service, and directing the Marshals Service to effect service upon them (Doc. 70). This motion is **GRANTED**.

Counsel for the government informed the Court that the Bureau of Prisons provided last known addresses for Defendants Rau and Sample. The Marshals Service attempted but was unable to effect service on Defendant Rau because he was out of the country for an extended period of time (Doc. 52). The Bureau of Prisons filed a "Notice of Compliance" with the Court on May 12, 2008 (Doc. 46), indicating that they had provided the Marshals Service with the last known address of Defendant Sample. To date, there is no indication in the docket that summons was issues or service attempted on Defendant Sample. Counsel for the government informed the Court that Defendant Barry is on extended leave from his position with the Bureau of Prisons.

Accordingly, **IT IS ORDERED** that, for good cause shown, on or before **February 27,**

2009, the Federal Bureau of Prisons shall provide the U.S. Marshals Service with the last known addresses of Defendant Barry. The U.S. Marshals may be contacted at 618-482-9336 to arrange for the orderly conveyance of this information.

IT IS FURTHER ORDERED that a written Notice of Compliance shall be filed with the Court indicating conveyance of information from the Bureau of Prisons to the Marshals Service.

IT IS FURTHER ORDERED that the Marshals Service shall reveal the address to the Clerk of Court as necessary only to effect service and to conduct the usual business of the Court. Otherwise defendant's addresses will be kept in confidence by both the Marshals Service and the Clerk of Court. *The addresses shall not become part of the public file and shall not be disclosed to plaintiff or plaintiff's attorney*.

The Clerk of Court is **DIRECTED** to prepare original summonses for Defendants Sample and Barry and to prepare a second summons for Defendant Rau.

The Clerk of Court is further **DIRECTED** to serve a copy of this order on the U.S. Marshal for the Southern District of Illinois.

The United States Marshal is **DIRECTED** to serve the summonses, copies of the complaint, and a copy of this order upon Defendants Sample and Barry, and to attempt to serve again the summons, a copy of the complaint, and a copy of this order on Defendant Rau.

IT IS SO ORDERED.

DATED: February 2, 2009

s/ *Donald G. Wilkerson*
DONALD G. WILKERSON
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED
MAY 04 2009
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

Hakeem Shaheed	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. __07-cv-679-MJR___
Michael K. Nalley, et al.	)	
	)	
Defendant.	)	

ORDER

IT IS ORDERED that, the fee having been paid,

(Movants(s) Michael E. Deutsch

(Firm) People's Law Office

(Address)1180 N. Milwaukee, Chicago, Il 60622

(Telephone #)773 235 0070 (Fax #) 773 235 6699

is admitted to practice pro hac vice (for this case only) before the United States District Court for Southern District of Illinois, as attorney for: Hakeem Shaheed

DATED: 5/4/09

BY ORDER OF COURT:

Norbert G. Jaworski, Clerk

By: Lisa Tidwell
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED
MAY 04 2009
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

Hakeem Shaheed,
Plaintiff,

vs.

Michael K. Nalley, et al.

Defendant.

CIVIL NO. 07-cv-679-MJR

MOTION TO APPEAR PRO HAC VICE
(For This Case Only)

Comes now Michael E. Deutsch, pursuant to Local Rule 83.1(b) of the United States District Court for the Southern District of Illinois, and moves this Court to allow said movant to appear of record in the above-entitled cause and participate pro hac vice (for this case only) on behalf of Hakeem Shaheed, and in support thereof states and certifies to the Court:

1. That movant is an attorney licensed to practice law in the State(s) of Illinois.

2. That movant is a member in good standing in the Bar(s) as set forth above.

3. That movant does not wish to be admitted generally, but for the purpose of this case only.

4. That movant is familiar with the law, facts and procedures relating to the subject matter of this litigation.

THEREFORE, movant respectfully requests permission to appear of record and participate pro hac vice before the United States District Court for the Southern District of Illinois.

Michael Deutsch
Signature of Movant

CERTIFICATE OF SERVICE

The following persons were served with a copy of Michael Deutsch's Notice of Appearance electronically and bty U.S. mail

James A. Lewis
United States Attorney's Office
318 South Sixth Street
Springfield, IL 62701

Telephone: 217-492-4450
Fax: 217-492-4888

email: jim.lewis2@usdoj.gov

William D. Stiehl Jr.
2 Park Place Professional Center
Belleville, IL 62226

Re: Shaheed v. Nalley et al. 07-679

bstiehl@peaknet.net
618 234 9900
cell 618 660 7857

Date: May 5, 2009

s/s Michael Deutsch

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:07-cv-679 MJR
	)	
MICHAEL K. NALLEY, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

ORDER

Currently pending before the Court is Plaintiff's Motion for Entry of HIPAA Protective Order (Doc. 86). Pursuant to SDIL-LR 7.1(g), Defendants had ten days in which to respond to Plaintiff's motion. That ten-day period has expired, and Defendants have not filed a response in opposition to the motion.[1]

Rule 26 of the Federal Rules of Civil Procedure permits litigants to seek an order to protect discoverable, yet confidential, material from public disclosure. The parties stipulate that confidential information in this case will be used only for the purposes of this litigation, and that a protective order will secure protected information from unauthorized disclosure. The Court finds that good cause exists for issuance of an order permitting limited disclosure of such information, and that entry of the proposed protective order is appropriate pursuant to Federal Rules of Civil Procedure 26(c). The Court, being fully advised and having determined that good cause exists for entry of a protective order, **GRANTS** the motions.

---

[1]Under the local rule, the Court, in its discretion, may consider failure to respond to a motion an admission of its merits.

THEREFORE, IT IS HEREBY STIPULATED AND ORDERED:

A. The following words and terms are defined as follows for purposes of this Agreed Protective Order:

1. "Parties" shall mean the plaintiff and the defendants in this action and any additional party that this Court may subsequently recognize as subject to this protective order, and their attorneys.

2. "HIPAA" shall mean Health Insurance Portability and Accountability Act of 1996, codified primarily at 18, 26 & 42 U.S.C. (2002).

3. "Privacy Standards" shall mean the Standards for Privacy of Individually Identifiable Health Information. *See* 45 C.F.R. §§ 160 & 164 (2000).

4. "PHI" shall mean Protected Health Information, as that term is used in HIPAA and the Privacy Standards. "PHI" includes, but is not limited to, health information, including demographic information, relating to either: (a) the past, present, or future physical or mental condition of an individual; (b) the provision of care to an individual; and/or c) the payment for care provided to an individual, which identifies the individual or which reasonably could be expected to identify the individual.

5. Further, this Order is intended by the parties to be applicable to, and to protect, any document or information already disclosed by any party which falls within the above definition of PHI.

B. This Order governs all discovery related to the exchange or dissemination of information or the production of documents designated as PHI.

1. The signatories shall be familiar with HIPAA and the Privacy Standards.

2. The signatories recognize that it may be necessary during the course of this proceeding to produce, disclose, receive, obtain, subpoena, and/or transmit PHI to or from other parties and non-parties.

C. The signatories will abide by the following terms and conditions:

1. The signatories will not use or disclose the PHI released in this proceeding for any other purpose or in any other proceeding.

2. The signatories will store all PHI while it is in their possession according to the Privacy Standards.

3. The signatories shall, at the termination of this proceeding and upon written request, return all PHI obtained during the course of this proceeding to the attorney representing the person whose PHI was released during the course of this proceeding, and/or dispose of any PHI retained thereafter pursuant to the Privacy Standards.

4. The signatories shall assist each other in the release of PHI by waiving all notice requirements that may otherwise be necessary under HIPAA and the Privacy Standards.

5. Before disclosing PHI documents to any persons involved in the litigation, including but not limited to: counsel, co-counsel, counsel's staff, expert, or consulting expert witnesses retained in connection with the litigation, counsel will be responsible for informing each such person that the documents or information containing PHI to be disclosed are confidential, to be held in confidence, are to be used solely for the purpose of preparing for this litigation and further, that these restrictions are imposed by a court order.

6. No document containing PHI is to be filed with the Clerk of Court unless leave of court to file the particular document(s) is specifically granted by the Court.

IT IS SO ORDERED.

DATED: June 3, 2009

s/ *Donald G. Wilkerson*
DONALD G. WILKERSON
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 07-CV-0679-MJR**
	)	
MICHAEL K. NALLEY, RANDY DAVIS, ASSOCIATE WARDEN RAU, LIEUTENANT SAMPLE, LIEUTENANT BARRY, LIEUTENANT MASH, CAPTAIN GOMEZ, DR. LYLE, OFFICER HUCKLEBERRY, OFFICER THOMAS, P. TROVILLION, JOHN DOES, MR. RIVAS, MR. SHAWDOEN, PHYSICIAN ASST. CASTILLO, PHYSICIAN ASST. WELCH, and the UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	

ORDER

REAGAN, District Judge:

On September 26, 2007, Plaintiff Hakeem Shaheed filed a six-count complaint against the Defendants, including Michael Nally, alleging violations of his civil rights while imprisoned at the United States Penitentiary in Marion, Illinois (Doc. 23). On June 2, 2009, Plaintiff filed a "stipulation to voluntarily dismiss" the action with respect to Defendant Nalley (Doc. 98), which the Court construes as a motion for voluntary dismissal pursuant to Rule 41(a)(2) (Doc. 99). The Court then set a deadline requiring any party wishing to object to the motion to file any such response no later than June 15, 2009. No objections were filed.

FEDERAL RULE OF CIVIL PROCEDURE 41(a)(2) provides that where the defendant has answered the complaint or filed a motion for summary judgment, "an action may be dismissed

at the plaintiff's request only by court order, on terms that the court considers proper." Having fully considered the matter, the Court now **GRANTS** plaintiffs' motion to voluntarily dismiss (Doc. 98) and **DISMISSES** the action against Michael K. Nalley **without prejudice**.

Consequently, the Court also **DENIES AS MOOT** Defendant Nalley's motion for summary judgment (Doc. 93). All claims against all other Defendants remain pending.

IT IS SO ORDERED.

DATED this 16th day of June 2009.

s/ Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 07-CV-0679-MJR**
	)	
RANDY DAVIS, ASSOCIATE WARDEN RAU, LIEUTENANT SAMPLE, LIEUTENANT BARRY, LIEUTENANT MASH, CAPTAIN GOMEZ, DR. LYLE, OFFICER HUCKLEBERRY, OFFICER THOMAS, P. TROVILLION, JOHN DOES, MR. RIVAS, MR. SHAWDOEN, PHYSICIAN ASST. CASTILLO, PHYSICIAN ASST. WELCH, and the UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	

ORDER

REAGAN, District Judge:

On June 22, 2009, this Court gave Plaintiff notice that the John Doe defendants and Associate Warden Rau would be dismissed for failure to properly prosecute "unless action is implemented within twenty (20) days to effectuate service, or if properly served, proceed to default followed by default judgment" (Doc. 105). That deadline has passed, and the docket sheet does not reveal any action taken with respect to these defendants. Accordingly, the Court hereby **DISMISSES** Plaintiff's claims against Rau and John Doe 1-9 **without prejudice**.

IT IS SO ORDERED.

DATED this 14th day of July 2009.

s/ Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 07-CV-0679-MJR**
	)	
RANDY DAVIS, LIEUTENANT SAMPLE, LIEUTENANT BARRY, CAPTAIN GOMEZ, DR. LYLE, OFFICER HUCKLEBERRY, OFFICER THOMAS, P. TROVILLION, PHYSICIAN ASST. WELCH, and the UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	

ORDER REGARDING SETTLEMENT AND IMPENDING DISMISSAL

REAGAN, District Judge:

Having been advised by the parties that the above-captioned action has been settled, but additional time is needed to finalize the settlement documents, the undersigned District Judge hereby **DIRECTS** the Clerk of Court, 60 days after this Order is docketed, to **ENTER JUDGMENT OF DISMISSAL** with prejudice. Each party shall bear his or its own costs, unless otherwise provided in the settlement documents.

If the parties fail to finalize the settlement within the 60-day period, they may – before that period expires – move to postpone entry of judgment to a later date. Due to the settlement, the Court **CANCELS** all settings herein, including the September 4, 2009 Final Pre-Trial Conference and the September 14, 2009 Jury Trial.

IT IS SO ORDERED.

ENTERED this 5th day of August 2009.

s/ Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

U.S. Department of Justice

United States Attorney
Southern District of Illinois

Nine Executive Drive
Fairview Heights, Illinois 62208

(618) 628-3700
FAX (618) 622-3810
TTY (618) 628-3826

October 27, 2008

John L. Stainthorp
Peoples Law Office
1180 North Milwaukee
3rd Floor
Chicago, IL 60622-4019

RE: *Shaheed v. Nalley, et al.*
Case No. 07-CV-679

Dear Mr. Stainthorp:

I am authorized to offer a $20,000.00 cash payment to settle Mr. Shaheed's case against the United States. This offer is contingent upon the parties agreeing to the terms of a written settlement agreement. In exchange for this aforementioned cash payment, the United States would require a stipulated dismissal of the above-captioned lawsuit, as well as a full waiver and release by Mr. Shaheed of all claims against the United States, its agents, and employees (both current and former). A draft agreement is enclosed with this letter. If your client intends to accept this offer, please notify me prior to November 13, 2008 at 4:30 p.m. C.S.T. The offer will expire at that time.

As a reminder, I am still waiting for you to provide dates for Mr. Shaheed's deposition. I requested dates in my letter of September 4, 2008.

Very truly yours,

A. COURTNEY COX
United States Attorney

NATHAN E. WYATT
Assistant United States Attorney

NEW/ck
Enclosures
cc: Tracy Knutson
William D. Stiehl

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 07-cv-679-MJR
	)	
MICHAEL K. NALLEY, et al.,	)	
	)	
Defendants.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of **twenty-thousand dollars ($20,000.00)**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiffs or their guardians, heirs, executors,

administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees (both current and former) on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees (both current and former) from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

DRAFT

4. The parties intend to hereby settle each every claim in the above-captioned lawsuit, including but not limited to claims brought against agents, servants and employees of the United States. This settlement agreement shall act as a complete bar to any action by the plaintiff arising on account of the subject matter that gave rise to the above-captioned action against current or former agents, servants and employees of the United States.

5. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

6. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

7. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

8. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiffs must obtain Court approval of the settlement at their expense. Plaintiffs agree to obtain such approval in a timely manner: time being of the essence. Plaintiffs further agree that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiffs fail to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

9. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for twenty-thousand dollars ($20,000.00) and made payable to Hakeem Shaheed, and The People's Law Office, plaintiff's attorney. The check will be mailed to plaintiffs' attorney

at the following address: People's Law Office; 1180 N. Milwaukee; Chicago, IL 60622. Plaintiffs' attorney agrees to distribute the settlement proceeds among the plaintiffs, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

DRAFT

Executed this _____ day of _____, 2008.

_____
NATHAN E. WYATT
Assistant United States Attorney
United States Attorney's Office
Nine Executive Drive
Fairview Heights, Illinois 62208-1344

Executed this _____ day of _____, 2008.

_____
John L. Stainthorp
People's Law Office
1180 N. Milwaukee
Chicago, IL 60622

Executed this _____ day of _____, 2008.

_____
Hakeem Shaheed

DRAFT

Judgment Fund Transmittal

COPY

Date: August 17, 2009

Department of the Treasury
Financial Management Service
Judgment Fund Branch
3700 East-West Highway, Room 6E15
Hyattsville, Maryland 20782
Telephone: (202) 874-6664

Claimant/Plaintiff Name : Hakeem Shaheed

Address: c/o John Stainthorp, 1180 N. Milwaukee, Chicago, IL 60642

Claimant/Plaintiff Counsel's Name: John Stainthorp

Telephone Number: 773 - 235 - 0070

Name of Agency Subject to Claim : Bureau of Prisons

(b)(6),(b)(7)(C) E-mail Address (required for electronic payment confirmation): [redacted]bop.gov

Telephone Number: 314 - 539 - 2383

Brief Description of Facts Giving Rise to Claim: Alleged beating in prison

Check one if applicable:

☐ Contract Disputes Act ☐ No FEAR Act ☐ Firefighters Fund

Dear Sir or Madam:

I am an authorized representative of the United States in the above-captioned matter. As described in the enclosed documentation, I certify that all pertinent criteria required by law for the approval of this claim has been satisfied. If this is an administrative claim, the settlement was made with the United States in this matter and any portions of the agreement required to be paid from agency funds will be or have been paid from those funds. If this is a litigative claim, the award made in the enclosed judgment or settlement is payable by the United States and any portions of the award required to be paid from other parties or sources will be or have been paid from those parties or sources. The United States will not seek further judicial review of this award and I have obtained all approvals necessary for its referral for payment.

I believe that this award qualifies for payment pursuant to 31 U.S.C. § 1304. Accordingly, I request that you certify this award for payment from the Judgment Fund established by that law. Enclosed are completed copies of **FMS Form 196**: *Judgment Fund Award Data Sheet*; **FMS Form 197**: *Judgment Fund Voucher for Payment*; the judgment or settlement agreement; and any other enclosures required by FMS. Unless payment by electronic funds transfer is indicated, please have the check sent to the check address provided on **FMS Form 197**.

James A. Lewis

Submitting Agency Authorized Signature

James A. Lewis, Chief, Civil Division

Name and Title (*print or type*)

(b)(6) [redacted]@usdoj.gov

Submitting Agency E-mail Address (*required for electronic payment confirmation*)

2009V00361

Agency File Number

318 South Sixth Street

Street Address

Springfield, IL 62701

City, State and Zip Code

General Instructions: Use this form, FMS 194, to transmit a request to certify an administrative or litigative award against the United States for payment from the Judgment Fund, under 31 U.S.C. § 1304.

Enclosures: **FMS Form 196** and **FMS Form 197.** *Incomplete submissions will be returned to the submitter without action.*

Judgment Fund Award Data Sheet

ITEMIZATION OF AMOUNT PAYABLE FROM THE JUDGMENT FUND	AMOUNT TO BE PAID	CITATION TO LEGAL AUTHORITY
1. Principal	$48,000.00	28 U.S.C. Section 1346(b)(1)
2. Attorney Fees	None	
3. Costs	None	
4. Interest	None	
Starting and Ending Dates for Interest Accrual	Start Date	End Date
5. Total Amount Payable from the Judgment Fund	$48,000.00	

COMPLETE ONLY IF DEDUCTIONS ARE TO BE MADE FROM THE AMOUNT PAYABLE FROM THE JUDGMENT FUND *

6. Agency Name and Agency Location Code (ALC) to Receive Offset	Amount to be Deducted	Reason(s) for Deduction(s) and Entity to Receive Deduction(s)
	a.	
	b.	
	c.	
7. Total Amount to be Deducted	None	
8. Net Amount Payable to Claimant	$48,000.00	

If amount for fees, costs, or interest was included in the principal amount (stated on line 1) as part of a "lump sum award," enter "INCLUDED ABOVE" on lines 2 through 4. Enter "NONE" for any of those items (principal, fees, costs, or interest) for which no amount was awarded/included.

1. Enter the principal amount payable (excluding attorney fees, costs, and interest) and cite the legal authority for that award (for instance, "FTCA, 28 U.S.C. 2672" or "5th Amendment Taking").
2. Enter attorney fees payable (if any) and cite legal authority for that award [for instance, "Freedom of Information Act, 5 U.S.C. 552(a)(4)(E)"].
3. Enter the costs payable (if any) and cite legal authority for that award [for instance, " 28 U.S.C. 2412(a)"].
4. If the interest was calculated by the submitting agency, enter the total amount and cite the legal authority for that award [for instance, "Back Pay Act, 5 U.S.C. 5596(b)(2)"]. If the Judgment Fund is to calculate the interest, list only the dates that interest accrual starts.
5. Total amounts shown in lines 1 through 4 and enter.
6. Enter any deductions specified in the judgment or settlement agreement, or debts to be setoff under 31 U.S.C. 3728. Indicate the reason for the deduction (for instance, "FTCA withholding" or "debt setoff pursuant to 31 U.S.C. 3728") and the payee agency's name and ALC. If this deduction is a "debt setoff" pursuant to 31 U.S.C. 3728, you must attach a copy of the judgment or the plaintiff's agreement to the debt setoff. Otherwise, FMS must seek the claimant's consent to the setoff and may only withhold from payment an amount sufficient to pay the debt plus the costs of litigation. Litigation will be required to effect the setoff if there is no judgment of debt or if the claimant declines consent to the setoff. If there are more than three deductions, attach additional copies of this form. If there are no deductions, enter "NONE."
   *** Administrative debts that have been certified to the Secretary of the Treasury through the Treasury Offset Program will be setoff automatically.**
7. Total amounts shown in all columns of line 6 (a, b and c) and enter.
8. Subtract the amount in line 7 from that in line 5. If greater than zero, enter the difference. If the difference is zero or less, enter "NONE."

Judgment Fund Voucher for Payment

1. **Total Amount:** $48,000.00

2. **Submitting Agency Contact Name:** James A. Lewis
   Telephone Number: 217 - 492 - 4459

3. **Electronic Funds Transfer (EFT) Information:**
   a) Payee Account Name: Peoples Law Firm
   b) American Banking Association (ABA) Routing Number (9 digits): (b)(6)
   c) Payee Account Number: 000633984
   d) Checking: ☑ Savings: ☐
   e) Financial Institution Name, City, State: Northern Trust, 50 S. LaSalle Street, Chicago, IL 60603

4. **Interagency Payment System Information:**
   a) Agency Name: Bureau of Prisons
   b) Agency Location Code (ALC) Number: (8 digits):
   c) Standard General Ledger (SGL) Number (4 digits):
   d) Treasury Account Symbol (TAS):

5. **Mailing Address for Check:** (Payee name not to exceed 32 Characters.)
   a) Payee Name: John Stainthorp
   b) Payee Name: Hakeem Shaheed
   c) Address Line 1: 1180 N. Milwaukee
   d) Address Line 2:
   e) City: Chicago State: IL Zip Code: 60642

6. **Taxpayer Identification Number (s):**
   (b)(6) b)

7. **Reimbursement Information for Contract Disputes Act (CDA), No FEAR Act, and Firefighters Fund:**
   a) Agency Name:
   b) Contact Name:
   c) Contract Number (CDA cases):
   d) Telephone Number: - -
   e) Address:
   f) City: State: Zip Code:

8. **If payment will be made in a foreign currency please provide the following information:**
   Country: Currency:

9. **FOR USE BY JUDGMENT FUND BRANCH ONLY:**
   Z Number: J/D Number: GLOWS Code/Agency:

   Claim Analyst *Signature and Date* | Amount to Pay | Appropriation Code

   Claim Reviewer *Initials and Date*

Judgment Fund Voucher for Payment

10. Acceptance by Claimants:

NOTE: For use ONLY where the settlement is (i) for cash, (ii) in an amount that does not exceed $200,000, and (iii) a court order approving the settlement is not warranted. For all other situations, a final judgment or a standard Department of Justice *Stipulation For Compromise Settlement And Release* must be attached.

Each claimant/plaintiff and his/her guardians, heirs, executors, administrators, and assigns agree to and do accept this settlement in full settlement and satisfaction and release of any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation any claims for fees, costs, expenses, survival, or wrongful death, arising from any and all known or unknown, foreseen or unforeseen bodily injuries, personal injuries, death, or damage to property, which they may have or hereafter acquire against the United States of America, its agents, servants, or employees, on account of the subject matter of the administrative claim or suit, or that relate or pertain to or arise from, directly or indirectly, the subject matter of the administrative claim or suit. Each claimant/plaintiff and his/her guardians, heirs, executors, administrators, and assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its agents, servants, and employees, from and against any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation claims for subrogation, indemnity, contribution, or lien of any kind, or for fees, costs, expenses, survival or wrongful death that relate or pertain to or arise from, directly or indirectly, any act or omission that relates to the subject matter of the administrative claim or suit.

(SIGN ORIGINAL ONLY)

Date _____

_____
(Claimant(s) sign above)

11. AGENCY APPROVING OFFICIAL: This claim has been fully examined in accordance with Statutory Citation 28 U.S.C. Sec.1346(b)(1) and approved in the amount of $ 48,000.00

Authorized Signature: _____

Title: Assistant United States Attorney

Date: August 17, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

HAKEEM SHAHEED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 07-cv-679-MJR
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of **FORTY-EIGHT THOUSAND DOLLARS AND NO CENTS ($48,000.00),** which sum and waiver shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any future claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators,

or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees stemming from the events described in the complaint.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the

plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank Northern Trust Co.

B. Bank Address 50 S. LaSalle St., Chicago, IL 60603

C. ABA Routing Number 071000152

D. Payee Account : Law Office Clients Funds Account

E. Payee Account Number: (b)(6)

F. Taxpayer Identification Number:

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to Title 5, United States Code, Section 552a(b).

10. With respect to the settlement amount, the United States will not sign any annuity applications or uniform qualified settlement forms or any equivalent forms. The United States will not pay the settlement amount into a qualified settlement fund or its equivalent. Plaintiff and his attorneys and their representatives, including any structured settlement annuity broker, stipulate and agree that they will not attempt to structure the settlement amount in any way or manner, including by placing any of the settlement amount into any qualified settlement fund or its equivalent. Nothing in this paragraph precludes the plaintiff from purchasing standard, non-structured settlement annuities after the plaintiff has received the settlement proceeds or from depositing any portion of the settlement amount into a special needs trust or supplemental needs trust, but they agree that they will not represent to any person, entity, or agency that they are purchasing structured settlement annuities and they agree they will not attempt to purchase such structured settlement annuities.

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

12. The parties further agree that the plaintiff will dismiss this cause of action against all defendants with prejudice within seven days after receipt of this fully-signed settlement agreement. The Court shall have jurisdiction to enforce the terms of this settlement agreement, as a contract.

Executed this 14th day of August, 2009.

BY: _____
JAMES A. LEWIS
Attorney for Defendant United States

Executed this 5th day of August, 2009.

_____
Attorney for Plaintiff

Executed this 12th day of August, 2009.

_____
HAKEEM SHAHEED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-1011-DME-KMT
(To be supplied by the court)

Roy Allen Green, Plaintiff,

v.

Federal Bureau of Prisons,

Ronnie Wiley,

Lawrence Leyba, D.O.,

Steven Nafziger, M.D.,

Harley Lappin,

Michael Nalley,

Harrell Watts,

United States of America, Defendant(s).

RECEIVED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
MAY -2 2008
GREGORY C. LANGHAM
CLERK

(List each named defendant on a separate line.)

PRISONER COMPLAINT
(AMENDED)

(Rev. 1/30/07)

A. PARTIES

1. Roy Allen Green #03327-063 - United States Penitentiary

(Plaintiff's name, prisoner identification number, and complete mailing address)

P.O. Box 5500, Adelanto, CA, 92301

2. Federal Bureau of Prisons - 320 First Street, N.W. Room 841

(Name, title, and address of first defendant)

Washington, D.C., 20534.

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? ___ Yes _x_ No (CHECK ONE). Briefly explain your answer:

Not applicable - Federal Agency

3. Ronnie Wiley - Warden USP-Administrative Maximum - P.O. Box

(Name, title, and address of second defendant)

8500, Florence, CO, 81226-8500.

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? ___ Yes _x_ No (CHECK ONE). Briefly explain your answer:

Acted under color of federal law.

4. Lawrence Leyba, D.O. - Doctor - Adress Unknown (No longer

(Name, title, and address of third defendant)

employed by Federal Bureau of Prisons).

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? ___ Yes _x_ No (CHECK ONE). Briefly explain your answer:

Acted under color of federal law.

(If you are suing more than three defendants, use extra paper to provide the information requested above for each additional defendant. The information about additional defendants should be labeled "A. PARTIES.")

B. JURISDICTION

1. I assert jurisdiction over my civil rights claim(s) pursuant to: (check one if applicable)

___ 28 U.S.C. § 1343 and 42 U.S.C. § 1983 (state prisoners)

_X_ 28 U.S.C. § 1331 and ***Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics***, 403 U.S. 388 (1971) (federal prisoners)

2. I assert jurisdiction pursuant to the following additional or alternative statutes (if any):

28 U.S.C. 1361; 28 U.S.C. 2671 et seq.,

C. NATURE OF THE CASE

BRIEFLY state the background of your case. If more space is needed to describe the nature of the case, use extra paper to complete this section. The additional allegations regarding the nature of the case should be labeled "C. NATURE OF THE CASE."

Beginning in Late May of 2005 the defendant's through the delay, denial, and obstruction of Plaintiff's access to treat--ment for his Hepatitis C infection resulted in irreparable harm to the Plaintiff in addition to pain, discomfort, mental and emotional anguish, and caused the Plaintiff to develop such life--threatening illnesses as cirhosis of the liver, extensive fibrosis of the liver and other maladies. The defendants knowingly and will--fully denied the treatment, the defendant's knew or should have known of the consqequences of a delay in treatment, their actions were malicious and were cause of deliberate indifference to the Plaintiff's medical needs.

Plaintiff now sues for compensatory, punitive damages, injunctive relief, declaratory relief, and other such relief as this Court deems necessary.

D. CAUSE OF ACTION

State concisely every claim that you wish to assert in this action. For each claim, specify the right that allegedly has been violated and state all supporting facts that you consider important, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific cases to support your claim(s). If additional space is needed to describe any claim or to assert more than three claims, use extra paper to continue that claim or to assert the additional claim(s). The additional pages regarding the cause of action should be labeled "D. CAUSE OF ACTION."

1. Claim One: Violation of the Eigth Amendment (U.S. Const.)

Supporting Facts:

1. The Plaintiff, on or about May 25, 2005, submitted an Inmate Request to Staff Member form requesting evaluation and treat--ment of his Hepatitis C, to then Clinical Director Dr. Lawrence Leyba at the U.S. Penitentiary Administrative Maximum.

2. Dr. Leyba never responded to Plaintiff's request.

3. On or about June 29, 2005 the Plaintiff initiated the Adminis--trative Remedy process to compel medical personnel at the prison to provide treatment of his Hepatitis C. (See Exhibit A).

4. On or about June 29th, 2005 the Plaintiff requested medical treatment from the Warden of the institution, Ronnie Wiley, via the Administrative Remedy Program.(See Exhibit B).

5. On or about July 18th, 2005 the defendant, (Wiley), responded and stated as a remedy that the Plaintiff was receiving adequate treatment but provided no additional information as to any pros--pective future treatments.(See Exhibit C).

6. On or about July 22nd, 2005 the Plaintiff appealed the Warden's (Wiley's) response to the North Central Regional Director of the Federal Bureau of Prisons.

7. On or about September 22, 2005 the Defendant, Michael Nalley, denied the Plaintiff's appeal, stating the Plaintiff's care was within compliance with BOP Policy.

8. On or about October 6, 2005 the Plaintiff appealed to the BOP Director, who is named as a defendant, Harley Lappin. On Jan. 12, 2006 the Plaintiff's final appeal was reviewed and neither granted nor denied following a review by defendant Watts. No substantially alternative treatment was provided following the appeal.

9. On November 7, 2006 Defendant Wiley in response to a Request filed to him, stated the Plaintiff would receive treatment for his medical condition.

CONTINUED ON PAGE 10

2. Claim Two: Violation of the Fifth Amendment

Supporting Facts:

1. The actions of the defendant's which constitute the Plaintiff's First claim, were done by their authority as his custodians.

2. The actions of the defendant's were in violation of Plaintiff's constitutional rights and were done without due process of law.

3. The defendant's deprived the Plaintiff of his ability to function without physical ailment, in violation of the constitution.

3. Claim Three: N/A

Supporting Facts:

N/A

E. PREVIOUS LAWSUITS

Have you ever filed a lawsuit, other than this lawsuit, in any federal or state court while you were incarcerated? _x_ Yes ___ No (CHECK ONE). If your answer is "Yes," complete this section of the form. If you have filed more than one lawsuit in the past, use extra paper to provide the necessary information for each additional lawsuit. The information about additional lawsuits should be labeled "E. PREVIOUS LAWSUITS."

1. Name(s) of defendant(s) in prior lawsuit: Jeff York

2. Docket number and court name: U.S.D.C. D.Colo. 05-cv-1179-PSF-CBS

3. Claims raised in prior lawsuit: 8th Amendment

4. Disposition of prior lawsuit (for example, is the prior lawsuit still pending? Was it dismissed?): Settled prior to trial

5. If the prior lawsuit was dismissed, when was it dismissed and why? N/A

6. Result(s) of any appeal in the prior lawsuit: N/A

F. ADMINISTRATIVE RELIEF

1. Is there a formal grievance procedure at the institution in which you are confined?

   xx Yes ___ No (CHECK ONE).

2. Did you exhaust available administrative remedies? xx Yes ___ No (CHECK ONE).

G. REQUEST FOR RELIEF

State the relief you are requesting. If you need more space to complete this section, use extra paper. The additional requests for relief should be labeled "G. REQUEST FOR RELIEF."

Against Defendants Wiley, Leyba, Nafziger, Watts, Lappin, and Nalley in their individual capacities - $1,000.000 Compensatory Damages, and $2,000,000 Punitive Damages.

Against Defendants in their official capacities - declaratory relief stating their actions were and continue to be unconstitutional.

Against Defendants in their official capacities - injunctive relief barring defendants from any act or ommission which would hinder, obstruct, delay or impede the Plaintiff's access to Interferon, Riba--virin, or other such necessary treatment's for Plaintiff's medical conditions.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I am the plaintiff in this action, that I have read this complaint, and that the information in this complaint is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed on April 6, 2008
(Date)

Roy Allen Green
(Prisoner's Original Signature)

A. PARTIES (Continued)

5. Steven Nafziger, M.D. - Doctor - Address Unknown (No longer employed by Bureau of Prisons.
Not acting under color of state law - Federal employee at time of conduct and omissions.

6. Harley Lappin - Director - 320 First Street, N.W., Room 841 Washington, D.C. 20534.
Not acting under color of state law - Federal employee.

7. Michael Nalley - Regional Director - 400 State Avenue, Tower II, Suite 800, Kansas City, KS, 66101-2421.
Not acting under color of state law - Federal employee.

8. Harrell Watts - National Appeals Administrator - 320 First Street N.W., Room 841, Washington, D.C., 20534.
Not acting under color of state law - Federal employee.

9. United States of America - (through) Office of the United States Attorney - 1225 17th Street, Suite 700, Denver, CO, 80202.
Not acting under color of state law.

10. All defendants were acting under color of federal law.

11. Defendant Wiley is sued in his individual capacity and his official capacity.

12. Defendant Leyba is sued in his individual capacity.

13. Defendant Nafziger is sued in his individual capacity.

14. Defendant Lappin is sued in his individual and official capacities.

15. Defendant Watts is sued in his individual and official capacities.

16. Defendants Bureau of Prisons and United States are sued in their official capacities only.

CLAIM ONE (CONTINUED)

10. As an approximate result of the denial and delay in treatment for his disease, the Plaintiff developed cirhosis of the liver and extensive fibrosis of the liver.

11. At all times relevant to this Complaint the defendants (Leyba and Nafziger), could have, and should have ordered and provided Interferon and Ribavirin treatments.

12. The treatments as requested would have abated or held in abeyance the severe medical complications which Plaintiff developed as a result of Defendant's Leyba and Nafziger's failure to provide and deliberate indifference to a serious medical need of the Plaintiff.

13. The Defendants (BOP, Wiley, Nalley, Lappin, Watts) had a pre--existing duty fixed by statute, 18 U.S.C. § 4042 et seq., to provide necessary, adequate, and effective treatment of the Plain--tiff's disease.

14. The failure to provide treatment was in violation of the Plain--tiff's rights under the U.S. Constitution, Amend. VIII.

15. The actions of the defendants were and are negligent in every respect.

16. The defendants did not perform their functions as government officials with due diligence.

17. The Plaintiff is entitled to relief as a result of the defendant's acts or ommissions.

CERTIFICATE OF SERVICE

I, Cynthia Castro, do certify that I mailed a true and correct copy of the foregoing to the following parties on this 16th day of April 2008:

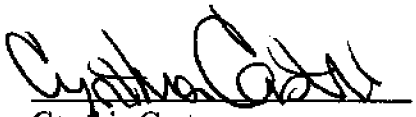
Terry Fox
Asst. U.S. Attorney
1225 17th Street, Suite 700
Denver, CO 80202

Clerk, U.S. District Court
901 19th Street
Room A-105
Denver, CO 80294

by placing it into a properly addresses, sealed envelope, with postage affixed into the mailbox at the United States Post Office in Mill Valley, CA.

I declare under penalty of perjury the above is true and correct.

Executed this 16th day of April, 2008, at Mill Valley, California.



Cynthia Castro
635 Northern Avenue
Mill Valley, CA 94941

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-1011-DME-KMT

ROY ALLEN GREEN,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS, WARDEN WILEY, DR. LAWRENCE LAYVA (sic) (LEBYA), and DR. NAFZIGER,

Defendants.

ORDER RE: PLAINTIFF'S UNOPPOSED MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE

The Court, having considered the UNOPPOSED MOTION TO DISMISS BY PLAINTIFF, filed by the Plaintiff, and finding good cause therefor, hereby orders:

That: the above-entitled matter is dismissed with prejudice;

That: all claims against the United States and the previously asserted claims against Defendants Ron Wiley, Dr. Lawrence Lebya, and Dr. Steven Nafzinger, are hereby dismissed, with prejudice.

That: each party shall bear its own attorney's fees and costs.

Dated this 7th day of July, 2009.

By the Court:

s/ David M. Ebel

David M. Ebel
U. S. Circuit Court Judge

Chris

U.S. Department of Justice

David M. Gaouette
Acting United States Attorney
District of Colorado
Civil Division

JUL 15 2009
COLORADO CLC

1225 Seventeenth Street, Suite 700 (303) 454-0158
Seventeenth Street Plaza (FAX) (303) 454-0404
Denver, Colorado 80202

July 17, 2009

Via U.S. Mail

Roy Allen Green, # 03327-063
USP Lewisburg
P.O. Box 1000
Lewisburg, PA 17837

Re: *Green v. United States,* 07-cv-01011-DME-KMT

Dear Mr. Green:

Enclosed please find a copy of the signatures for the Settlement Agreement. I also enclose a copy of the Order of Dismissal recently entered.

Now that I have the Order of Dismissal, I have made a request for the funds to pay this settlement as the Agreement directs. Please have patience, as the Judgment Fund process can take some time. I do promise to check in with them periodically and I will certainly notify you once payment has been forwarded.

Thank you for your cooperation and I wish you the best Mr. Green.

Cordially,

/s Terry Fox
TERRY FOX
Assistant United States Attorney

Enclosures: Signed Settlement Agreement and Order of Dismissal

cc: Deborah Locke, Esq.
Chris Synsvoll, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-1011-DME-KMT

ROY ALLEN GREEN,

Plaintiff,

v.

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Dated this 7th day of July, 2009.

By the Court:

s/ David M. Ebel

David M. Ebel
U. S. Circuit Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01011-DME-KMT

ROY ALLEN GREEN,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS
WARDEN WILEY,
DR. LAWRENCE LARVA [sic DR. LEYBA], and
DR. NAFZIGER,

Defendants.

STIPULATION FOR COMPROMISE SETTLEMENT

---

1. This agreement is made by the parties to resolve and terminate any and all current or potential claims of Roy Allen Green, plaintiff, against the United States of America, the Federal Bureau of Prisons (hereinafter "BOP"), and their current and former employees (including defendants in the actions noted above, hereafter "defendants"), arising out of or related to Mr. Green's federal incarceration to date. This agreement encompasses: (1) constitutional claims concerning Plaintiff's medical treatment for Hepatitis C; (2) all tort claims concerning Plaintiff's medical treatment for Hepatitis C, including but not limited to Administrative Claim No. TRT-WXR-2008-06108 and including the acts or omissions of medical staff at the BOP's Victorville facility; (3) the tort claim asserted in the Third Amended Complaint; and (4) any claims against Lawrence

Leyba, M.D., Steven Nafziger, M.D., and Ron Wiley.

2. This agreement resolves the above-captioned case, which at times encompassed: (1) constitutional claims concerning Plaintiff's medical treatment for Hepatitis C; (2) all tort claims concerning Plaintiff's medical treatment for Hepatitis C, including but not limited to Administrative Claim No. TRT-WXR-2008-06108 and including the acts or omissions of medical staff at the BOP's Victorville facility; (3) the tort claim asserted in the Third Amended Complaint; and/or (4) any claims against Lawrence Leyba, M.D., Steven Nafziger, M.D., and Ron Wiley.

3. The parties hereto, without admitting any wrongdoing or violations, wish to avoid the uncertainty, expense and delay of litigation, and are thus willing to compromise the above-referenced case and claims. This settlement agreement shall not constitute an admission of liability or fault on the part of the entities referenced herein, the parties hereto, or any of the United States' agencies, instrumentalities, officers, employees, agents or servants.

4. In consideration of the following, Mr. Green agrees to dismiss with prejudice the above-captioned case, and all administrative claims that he has or had with the BOP up to the date of this agreement, in so far as the administrative claims concern: (1) constitutional claims concerning Plaintiff's medical treatment for Hepatitis C; (2) all tort claims concerning Plaintiff's medical treatment for Hepatitis C, including but not limited to Administrative Claim No. TRT-WXR-2008-06108 and including the acts or

omissions of medical staff at the BOP's Victorville facility; (3) the tort claim asserted in the Third Amended Complaint; or (4) any claims against Lawrence Leyba, M.D., Steven Nafziger, M.D., and Ron Wiley.

5. Plaintiff also agrees to release the United States and any other entity of the federal government and its current and former employees from any and all claims of whatever nature, known or unknown, which have been or could have been brought, which have or may have arisen on or before the date of this agreement or the date any money is paid here in compromise settlement, whichever date is later, if those claims involve: (1) constitutional claims concerning Plaintiff's medical treatment for Hepatitis C; (2) all tort claims concerning Plaintiff's medical treatment for Hepatitis C, including but not limited to Administrative Claim No. TRT-WXR-2008-06108 and including the acts or omissions of medical staff at the BOP's Victorville facility; (3) the tort claim asserted in the Third Amended Complaint; or (4) any claims against Lawrence Leyba, M.D., Steven Nafziger, M.D., and Ron Wiley.

6. Upon the signing of this agreement, Mr. Green agrees to execute in conformance with Federal Rule of Civil Procedure 41(a) a Stipulated Motion to Dismiss the above-referenced district court case in its entirety with prejudice, with each party to bear his own costs and attorney's fees.

7. Upon dismissal of the above-referenced case, plaintiff agrees not to file any motion pursuant to Federal Rule of Civil Procedure 60 or any other motion to reopen

these case.

8. Upon dismissal of the above-referenced case, plaintiff further agrees thereafter not to file any administrative claims under the Federal Tort Claims Act or other administrative remedy or bring further litigation concerning any aspect of the following: (1) constitutional claims concerning Plaintiff's medical treatment for Hepatitis C; (2) all tort claims concerning Plaintiff's medical treatment for Hepatitis C, including but not limited to Administrative Claim No. TRT-WXR-2008-06108 and including the acts or omissions of medical staff at the BOP's Victorville facility; (3) the tort claim asserted in the Third Amended Complaint; or (4) any claims against Lawrence Leyba, M.D., Steven Nafziger, M.D., and Ron Wiley, which are based on acts that occurred prior to the date any money is paid here in this compromise settlement.

9. In settlement of the claims alleged here or claims known or unknown prior to the date of this agreement, the United States of America will pay Roy Allen Green the sum of $2,100 ($___ of which is to cover court fees and $____ to cover other documented costs) in settlement of his Federal Tort Claim Act action as set forth in the above-captioned case. This sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which

plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees, in so far as they concern: (1) constitutional claims concerning Plaintiff's medical treatment for Hepatitis C; (2) all tort claims concerning Plaintiff's medical treatment for Hepatitis C, including but not limited to Administrative Claim No. TRT-WXR-2008-06108 and including the acts or omissions of medical staff at the BOP's Victorville facility; (3) the tort claim asserted in the Third Amended Complaint; or (4) any claims against Lawrence Leyba, M.D., Steven Nafziger, M.D., and Ron Wiley.

10. This settlement is specifically conditioned upon the Court's dismissal of the above-referenced suit in its entirety with prejudice.

11. Mr. Green agrees not to petition any court for attorney's fees or costs as a prevailing party or otherwise.

12. Plaintiff agrees that the consideration given herein shall be in full settlement and satisfaction of any and all claims and demands plaintiff has concerning Plaintiff's medical treatment for Hepatitis C that have been brought or could have been brought prior to the date any money is paid here in compromise settlement and related to (1) constitutional claims concerning Plaintiff's medical treatment for Hepatitis C; (2) all tort claims concerning Plaintiff's medical treatment for Hepatitis C, including but not limited to Administrative Claim No. TRT-WXR-2008-06108 and including the acts or omissions of medical staff at the BOP's Victorville facility; (3) the tort claim asserted in the Third

Amended Complaint; or (4) any claims against Lawrence Leyba, M.D., Steven Nafziger, M.D., and Ron Wiley, whether known or unknown, or whether formally initiated against the entities referenced herein or parties hereto and any of their former or present agencies, instrumentalities, officers, employees, agents and servants in either their official or individual capacities as a result of plaintiff's incarceration and/or without limitation on account of the incidents or circumstances giving rise to the above-entitled actions or claims as more particularly set forth in the pleadings filed in the above-referenced case.

13. Plaintiff and his guardians, heirs, executors, administrators, or assigns further agree to reimburse, indemnify and hold harmless the United States of America and any component thereof, and its agents, servants, and employees (including the defendants) from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States related to (1) constitutional claims concerning Plaintiff's medical treatment for Hepatitis C; (2) all tort claims concerning Plaintiff's medical treatment for Hepatitis C, including but not limited to Administrative Claim No. TRT-WXR-2008-06108 and including the acts or omissions of medical staff at the BOP's Victorville facility; (3) the tort claim asserted in the Third Amended Complaint; or (4) any claims against Lawrence Leyba, M.D., Steven Nafziger, M.D., and Ron Wiley.

14. Plaintiff acknowledges that he has thoroughly reviewed the terms of this

agreement and enters into this stipulation voluntarily and agrees to all of its provisions. Except to the extent permitted by law and referenced herein, the terms of this settlement are not intended to alter, waive or amend any other provisions of law or legal obligations which would otherwise apply to the parties hereto, provided, however, that the United States shall not apply this settlement payment towards any past restitution order in favor of the United States Bureau of Prisons only.

15. This agreement is not intended to limit the authority or actions of the United States Federal Bureau of Prisons concerning the Plaintiff's incarceration.

16. The parties agree that any breach of the provisions of this settlement agreement will not entitle any party to reopen the underlying actions. A party may, however, pursue any appropriate administrative or judicial remedies that may be available to seek enforcement of the terms of this settlement agreement.

17. Upon payment of the aforementioned sum, Plaintiff shall supply the attorneys for the defendants with an executed receipt and satisfaction of settlement on a form that the defendants will provide.

18. Fax signatures may serve as originals.

19. This agreement consists of seven pages, including the signature page.

20. The present settlement agreement does not, however, prevent Plaintiff from seeking administrative or court relief for alleged future violations of his Constitutional rights.

DATED this 1st day of July, 2009.

DAVID M. GAOUETTE
Acting United States Attorney

By: M. Terry Fox
Assistant United States Attorneys
1225 Seventeenth Street, Suite
700Denver, Colorado 80202
(303) 454-0100
Defendant's Counsel, as to form

By: Roy Allen Green, # # 03327-063
Plaintiff, for himself

By: Deborah Locke or Chris Sysnvoll
for the United States Bureau of Prisons, an agency of the United States of America

BP-A362.060 **INMATE INJURY ASSESSMENT AND FOLLOWUP (Medical)** CDFRM
SEP 05

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

1. Institution: MCC-chicago	2. Name of Injured: Chess, Joseph	3. Register Number: 22273-424
4. Injured's Duty Assignment: N/A	5. Housing Assignment: U-13	6. Date and Time of Injury: 2-6-07 2190
7. Where did Injury Happen (Be specific as to location): Sec. 2 - U13	Work Related? ☐ Yes ☒ No	8. Date & Time Reported for Treatment: 2-6-07 2132

(b)(6)

a. No Medical Attention (Check applicable)

- ☐ a. No Medical Attention
- ☒ b. Minor First Aid
- ☐ c. Hospitalization
- ☐ d. Other (Explain)

_____

_____

☐ e. Pain assessment: (Optional)

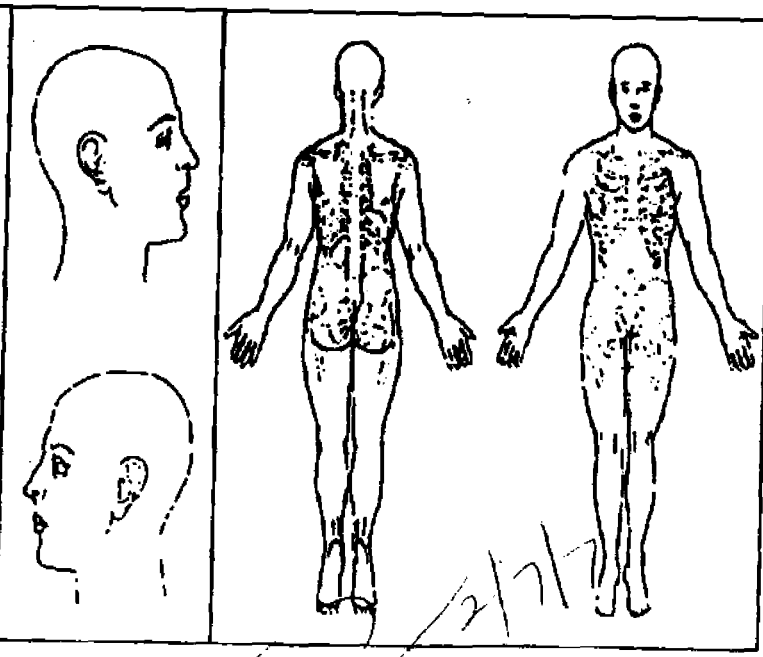
Mild Moderate Severe

1--2--3--4--5--6---7--8--9--10

...L.r
...ractitioner

MVElasquez, MLP

Signature of Physician or Physician Assistant



2/7/7

Original - Medical File; Canary - Safety; Pink - Supervisor; Goldenrod - Correctional Supervisor

(This form may be replicated via WP) Supersedes BP-A362.060 of FEB 05

DR. B. NOWAROWSKI
Staff Physician
MCC Chicago, IL

METROPOLITAN CORRECTIONAL CENTER
CHICAGO, IL

INVESTIGATIVE PHOTO SPREAD SHEET

INCIDENT: ASSAULT UNIT 13

REVIEWED AND RELEASED BY
MAR 2 6 2007
NCRO LEGAL OFFICE

VICTIM: CHESS, JOSEPH (Inmate) 22273-424 (Register Number)

PHOTOGRAPHER: (b)(6),(b)(7)(C)

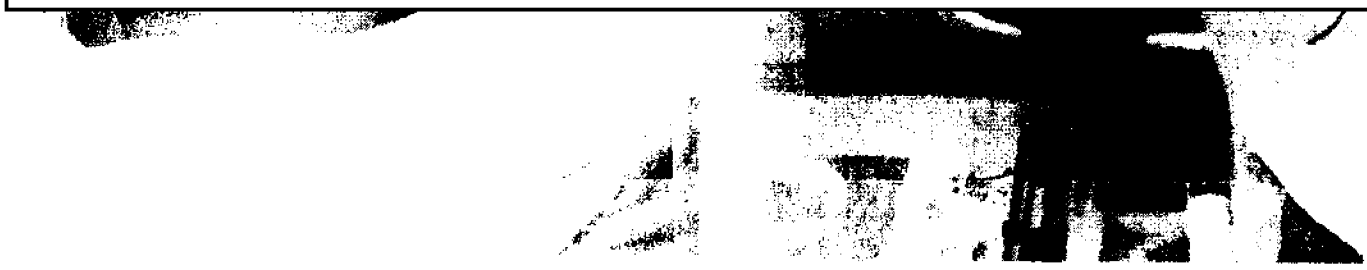
LOCATION OF PHOTOS: 7TH FLOOR - HOSPITAL

DATE AND TIME OF PHOTOS: 02/06/2007 9:55PM

LIST ALL AREAS OF INTEREST INDICATED IN PHOTOS, (INDICATE INJURIES):

FACIAL BURNS TO RIGHT SIDE OF FACE AND NECK

(b)(6)



METROPOLITAN CORRECTIONAL CENTER
CHICAGO, IL

INVESTIGATIVE PHOTO SPREAD SHEET

INCIDENT: ASSAULT UNIT 13

VICTIM: CHESS, JOSEPH (Inmate) 22273-424 (Register Number)

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MAR 26 2007
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LIST ALL AREAS OF INTEREST INDICATED IN PHOTOS, (INDICATE INJURIES):

FACIAL BURNS TO RIGHT SIDE OF FACE AND NECK



Referral of an Inmate Criminal Matter for Investigation

P. S. 1330.0
DRAFT 12/11/9
Attachment

Agency referred to: SIS | Referral Date: 02/10/2007 | Referral Time: 4:00 PM

Agent/Deputy: (b)(7)c | SIS name: William Lee

BOP Case # (b)(2)Low | Incident Date: 02/08/2007

Incident location: Unit-13

Reason for referral (class of incident) Assault_Inmate

Primary Victim/Suspects

	Last name	First name	Register #	Suspect	Victim
1.	(b)(7)c				
2.	Chess	Joseph	22273-424		✔
3.					
4.					

If additional inmates are involved you may enter that information in the synopsi

Brief synopsis of offense (b)(7)c walked past inmate Chess, J. 22273-424, approached the hot water dispenser on the unit. Began to walk back towards inmate Chess. As (b)(7)c got closer he threw the hot water on inmate Chess and began to push him.

Law Enforcement Action

Please return (or Fax) this form to the above noted SIS, indicating as appropriat

1. Actions by FBI/USM/DEA/(other):

(examples:

case opened, surveillance initiated, monitoring requested, etc .

2. Case presented to AUSA: (b)(7)c Date: 2/20/07

Presented by: (b)(7)c Case control #

Case accepted, notify:

Case declined, reason: (b)(2)High

Decision deferred pending further investigatio

(FOR SIS USE ONLY)

REVIEWED, EXCISED AND RELEASED BY NCRO LEGAL OFFICE MAR 2 0 2007

-Referral logged:_____ SIS investigative case file. _____ Database by: _____

-Referral follow-up inquiries (every 30 days): Date: _____ Date: _____

-Decision logged:_____ SIS investigative case file. _____ Database by: _____

-Information copy provided to institution paralegal/attorney advisor: _____

MEDICAL RECORD	CONSULTATION SHEET

REQUEST

TO: OPHTHO / Dr. Bai	FROM: Dr. B. Nowakowski	DATE: 2/07/07

(b)(6)

PLEASE EVALUATE POST INJURY

PROVISIONAL DIAGNOSIS:
Facial burn with possible OD involvement

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	
DR B NOWAKOWSKI Staff Physician MCC Chicago, IL		☐ BEDSIDE ☐ ON CALL	☐ ROUTINE ☐ TODAY ☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

Please provide a brief SOAP NOTE below for MCC Chicago physician review, including treatment and follow-up recommendations. ***** PLEASE DO NOT DISCUSS RETURN DATE OR PLANS WITH INMATE FOR SECURITY REASONS***** Fax Reports to: (312) 353 - 2252, or Contact MCC Chicago Health Services @ (312) 353 - 2251.

(b)(6)

SIGNATURE AND TITLE		DATE
Grace Bai, MD		2/9/07
IDENTIFICATION NO.	ORGANIZATION: MCC Chicago, Illinois	REGISTER NO. 22273 -424	WARD NO.

PATIENT'S IDENTIFICATION (*For typed or written entries give: Name – last, first, middle; grade; rank; rate; hospital or medical facility*)

DR B NOWAKOWSKI Staff Physician MCC Chicago, IL

CONSULTATION SHEET
STANDARD FORM 513 (Rev 8-77)
Prescribed by GSA/ICMR

(b)(6)

CHESS, JOSEPH 03 - 12 - 67

(b)(6)

V01284921 M0574585
CHESS, JOSEPH
M/39 DOB 03/12/67 SB
SERVICE DATE: 02/09/07
Bai, Grace

CONSULTATION REPORT

Referring Doctor

Patient

Dr. G. Bai

FAX

Date of Visit

Time

REASON FOR VISIT

ACUTE PROB: ☐
F/U ACUTE PROB: ☐
CHRONIC PROB. F/U: ☐
SURGERY F/U: ☐
EXAM: ☐
OTHER: ☐

Previous Eye Surgery:

(b)(6)

Eye Meds

Systemic Meds.:

Allergies: Ø

Family Hist. (Eye): 0

PRESENT VISION

VISION W/O CORRECTION		VISION W PRESENT CORRECTION		PRESENT GLASSES (AGE OF REFRACTION ____)	
RIGHT 20/45 +2	NEAR ____	RIGHT ____	NEAR ____	R. ____	R. ____
LEFT ____	NEAR ____	LEFT ____	NEAR ____	L. ____	L. ____

	WNL
PUPILS	☐
EOM	☐
MB	☐
CONF./ FIELDS	☐

TONOMETRY
R ____
L ____

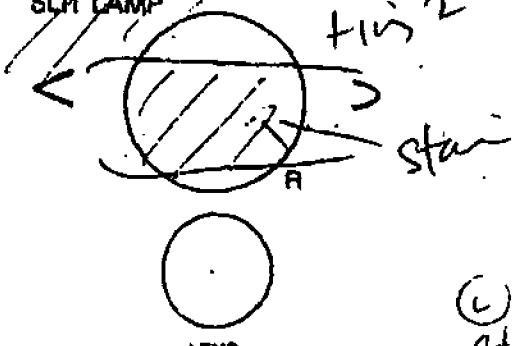
REFRACTION ☐M ☐C

BEST VISION

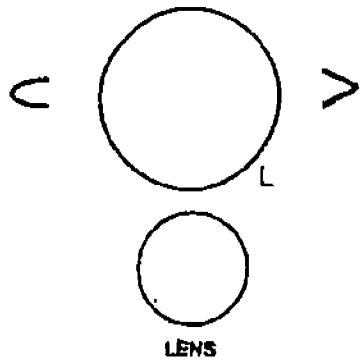
R. ____ (K ____) ____ R. ____

L. ____ (K ____) ____ L. ____

SLIT LAMP



R WNL		L WNL
☐	LIDS	☐
☐	CONJ	☐
☐	CN	☐
☐	AC	☐
☐	IRIS	☐
☐	LENS	☐
☐	ANT.VIT.	☐



FUNDUS:



☐ UNCHANGED FROM____

☐ UNCHANGED FROM____

DIAGNOSIS:

MANAGEMENT:

(b)(6)

(b)(6)

V01286568 M0574585
CHESS, JOSEPH
M/39 DOB 03/12/67 SB
SERVICE DATE: 02/16/07

CONSULTATION REPORT

Referring Doctor _____ ☐ N = _____ Patient

Dr. G. Bai

☒ E = _____ Date of Visit _____ Time

REASON FOR VISIT

ACUTE PROB: ☐
F/U ACUTE PROB: ☐
CHRONIC PROB. F/U: ☐
SURGERY F/U: ☐
EXAM: ☐
OTHER: ☐

(b)(6)

Previous Eye Surgery:
Eye Meds.:
Systemic Meds.:
Allergies: Ø
Family Hist. (Eye): Ø

(b)(6)

PRESENT VISION

VISION W/O CORRECTION		VISION W PRESENT CORRECTION		PRESENT GLASSES (AGE OF REFRACTION _____)	
RIGHT 20/100	NEAR	RIGHT	NEAR	R.	R.
LEFT	NEAR	LEFT	NEAR	L.	L.

	WNL
PUPILS	☐
EOM	☐
MB	☐
CONF./ FIELDS	☐

TONOMETRY
R _____
L _____

REFRACTION ☐ M ☐ C
R. _____ (K _____)
L. _____ (K _____)

BEST VISION
R. _____
L. _____

SLIT LAMP

R

SPK

LENS

R WNL		L WNL
☐	LIDS	☐
☐	CONJ	☐
☐	CN	☐
< = ☐	AC	☐ < =
☐	IRIS	☐
☐	LENS	☐
☐	ANT./VIT.	☐

L

+3 cat cat

LENS

healed nicely

lid healed nicely

DR. B. NOWAKOWS
Staff Physician
MCC Chicago, IL

FUNDUS:

☐ UNCHANGED FROM _____

☐ UNCHANGED FROM _____

(b)(6)

DIAGNOSIS:

MANAGEMENT:

(b)(6)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH CHESS	)
Plaintiff	)
v.	)
BUREAU OF PRISONS	)
JOHN PINDELSKI	)
JASON DANA	)
RICHARD NIEBERDING	)
DANIEL GREENSTEIN	)
JEROME ADAMS	)
Defendants	)

07C 5333

JUDGE ANDERSEN

MAGISTRATE JUDGE VALDEZ

UNITED STATES ... 2007 DEC ... ADMINISTRATIVE ...

COMPLAINT

JOSEPH CHESS, the Plaintiff for his Complaint against the Defendants, THE BUREAU OF PRISONS (B.O.P.), JOHN PINDELSKI (PINDELSKI), JASON DANA (DANA), RICHARD NIEBERDING (NIEBERDING), DANIEL GREENSTEIN (GREENSTEIN), and JEROME ADAMS (ADAMS) states:

1. This Court has jurisdiction of the claims asserted in this Complaint under 28 USC § 1331 because at least one of the claims arises under the Constitution and laws of the United States Of America, and 28 USC § 1346 because at least one of the claims is a claim against The United States Of America.

2. On February 28, 2007, the Plaintiff mailed to the Department Of Justice his claim for personal injury. Such claim was sent in order to comply with the provisions of the Federal Tort Claims Act. On July 2, 2007, the Plaintiff's claim was denied.

3. At all times relevant, the Plaintiff was an inmate at the Metropolitan Correctional Center, Chicago, Illinois (M.C.C.). The M.C.C. was and is a correctional institution which was and is under the management, regulation, and control of the B.O.P. The B.O.P. is part of the Justice Department Of The

United States Of America.

4. The B.O.P. had and has a duty under 18 USC § 4042 to provide for the safe keeping and protection of all persons charged with an offense against The United States. The B.O.P.'s duty under 18 USC § 4042 was and is owed to the Plaintiff, among other persons.

5. The Defendant JOHN PINDELSKI (PINDELSKI) was and is the Chief Psychologist at the M.C.C. 71 W. Van Buren, Chicago, IL 60605.

6. The Defendants, JASON DANA (DANA), RICHARD NIEBERDING (NIEBERDING), DANIEL GREENSTEIN (GREENSTEIN) was and are psychologist working under the direction and control of PINDELSKI at the M.C.C. 71 W. Van Buren Chicago, IL 60605.

7. JEROME ADAMS (ADAMS) was and is an inmate at the M.C.C. 71 W. Van Buren Chicago, IL 60605.

8. On February 6, 2007, JEROME ADAMS (ADAMS) threw scalding hot water on the Plaintiff. The attack on the Plaintiff was unprovoked. As a result of the attack, the Plaintiff's face, ear, neck, and eye were severely burned.

9. ADAMS should have never been in the general population of the M.C.C. ADAMS, to the knowledge of the B.O.P., PINDELSKI, DANA, NIEBERDING, and GREENSTEIN was emotionally and mentally disturbed and from time to time displayed fits of uncontrolled rage and anger.

10. The B.O.P., PINDELSKI, DANA, NIEBERDING, and GREENSTEIN knew or should have known that ADAMS was a threat to the health and safety of fellow inmates. Despite this knowledge, the Defendants acting with a reckless disregard for their duty not to subject the Plaintiff to cruel and unusual punishment and in violation of their duty under 18 USC § 4042 to safeguard and protect the Plaintiff, placed ADAMS in the general population and thereby put ADAMS in a position to injure the Plaintiff.

11. The aforesaid conduct of the B.O.P., PINDELSKI, DANA, NIEBERDING, GREENSTEIN, and ADAMS directly and proximately caused the Plaintiff injuries.

12. In addition to the physical pain caused by the scalding hot water thrown by ADAMS, the Plaintiff has suffered and will continue to suffer severe emotional distress.

Wherefore, the Plaintiff asks that judgement be entered for him and against the Defendants B.O.P., PINDELSKI, DANA, NIEBERDING, GREENSTEIN, and ADAMS and each of them in the amount of $2,000,000. The Plaintiff also asks that he be awarded attorney fees and Court costs and be granted such other and further relief as is just and equitable.

Respectfully submitted

Joseph Chess

JOSEPH CHESS

CERTIFICATION

By signing this Complaint, I certify that the facts stated in this Complaint are true to the best of my knowledge, information, and belief. I understand that if this certification is not correct, I may be subject to sanctions by the Court.

Signed this 16th day of September, 2007

Joseph Chess

JOSEPH CHESS, Plaintiff
Reg# 22273-424
Metropolitan Correctional Center
71 West Van Buren St.
Chicago, Illinois 60605

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH CHESS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 07 C 5333

Judge Wayne Andersen

SECOND AMENDED COMPLAINT

NOW COMES the Plaintiff, JOSEPH CHESS, by and through his attorneys, Querrey & Harrow, for his Second Amended Complaint.

INTRODUCTION

1. Doused with scalding water by a fellow inmate, Joseph Chess suffered severe burns on his face and ears. Because Chess' psychologically disturbed assailant should never have been in the general population, he sues.

JURISDICTION

2. The Court has jurisdiction under 28 U.S.C. § 1331 because at least one of the counts arises under 28 U.S.C. § 1346(b) against the United States. Venue is proper because all of the events alleged herein occurred at the Metropolitan Correctional Center, Chicago, Illinois.

PARTIES

3. Joseph Chess is currently imprisoned at Leavenworth Federal Prison, Leavenworth, Kansas. At all relevant times, Chess was an inmate at the Metropolitan Correctional Center in Chicago, Illinois (MCC).

4. Defendant, United States of America, operates the Metropolitan Correctional Center (MCC) via the United States Bureau of Prisons (BOP). The BOP is responsible for the safety and welfare of inmates incarcerated in the MCC.

BACKGROUND

5. The BOP has a duty under 18 U.S.C. § 4042 to provide for the safekeeping and protection of all persons charged with federal offenses. The BOP owed this duty to Chess.

6. John Pindelski is employed by the Defendant as the Chief Psychologist at the MCC.

7. Jason Dana, Richard Nieberding, and Daniel Greenstein are psychologists working at the MCC under the direction of Pindelski.

8. Jerome Adams is an inmate at the MCC. Adams had a history of violent behavior and took anti-psychotic medication, yet was placed in Unit 13, a general population section.

9. Unit 13 housed 88 inmates, including mentally ill and psyche-evaluation inmates.

10. One correctional officer monitored the unit.

11. Every inmate on Unit 13 had access to the unit's iron, microwave, cleaning sprays, and the hot water dispenser.

12. Upon information and belief, the hot water dispenser heats water up to 190 degrees.

13. The Defendant, through its employees, Pindelski, Dana, Nieberding, and Greenstein, knew Adams was mentally disturbed and displayed fits of uncontrolled rage.

14. These attributes were manifested on February 6, 2007.

15. That evening, Chess was preparing for the night lockdown. While, walking to his cell, Adams approached Chess and threw a cup of scalding hot water in Chess' face.

16. Adams then punched Chess for several minutes before an officer intervened.

17. The attack on Chess was unprovoked.

18. The attack on Chess occurred within eyesight of the officer, but he was reading a newspaper and did not see the attack.

19. Not until the officer had been summoned by other inmates did he become aware of the attack.

20. Chess was taken to Northwestern Hospital. He was treated for second degree burns to his face, neck, ear, and eye.

21. A doctor's report, attached as Exhibit A, notes the skin of Chess' forehead, eyelids, cheeks, and ear were peeled.

22. The burns suffered by Chess are captured in the photos taken after the accident. Those photos are attached as Exhibit B.

23. Along with the physical pain of being burned by scalding water, Chess suffers severe emotional distress.

24. On February 10, 2007, an MCC official referred an inmate criminal matter for investigation to the FBI. The referral is attached as Exhibit C.

25. The case was presented to federal prosecutors. On information and belief, on February 20, 2007, prosecution was declined because Adams was unfit to stand trial. See Exhibit C.

26. Chess mailed his claim for personal injury to the Department of Justice, attached as Exhibit C. This was pursuant to the Federal Tort Claims Act.

27. Chess' claim was denied on July 2, 2007.

COUNT I
Violation of 18 U.S.C. § 1346(b)
FTCA (failure to screen detainees)

28. Chess restates and reallages by reference paragraphs 1 through 28 as if fully set forth herein.

29. Based upon his mental condition, Adams should have been in special custody.

30. Defendant knew or should have known that Adams was a threat to his fellow inmates.

31. Adams had a history of violent behavior and took anti-psychotic medication.

32. Defendant has a course of action in place to evaluate inmates' mental health upon intake and on an ongoing basis. BOP Program Statements provide mandatory procedures regarding the classification and housing of inmates.

33. Program Statement 5290.15, Intake Screening, states:

> Immediately upon an inmate's arrival, staff shall interview the inmate to determine if there are non-medical issues for housing the inmate away from the general population. Staff shall evaluate both the general physical appearance and emotional condition of the inmate.

34. To make this determination, "the interviewer shall also review SENTRY information and the Inmate Central File or Presentence Investigation Report." P.S. 5290.15(1).

35. Policy Statement 7331.04 for Pretrial Detainees further provides, "within the first 48 hours of admission, an initial risk/needs assessment must be made."

36. Finally, per Policy Statement 7331.04(10)(b), "unit staff must actively seek information which may reflect on the inmate's behavior or offense severity, thereby helping to determine the inmate's security, medical, psychological, and/or other special needs."

37. Defendant failed to act in accordance with these regulations.

38. In doing so, the Defendant acted with a reckless disregard for its duty under 18 U.S.C. § 4042 to safeguard Chess.

39. As a direct and proximate cause of Defendant's failure to follow its policies and procedures, Chess suffered and will continue to suffer physical, psychological, and emotional injuries.

COUNT II
Violation of 28 U.S.C. § 1346(b)
FTCA (failure to monitor)

40. Chess restates and reallages by reference paragraphs 1 through 40 as if fully set forth herein.

41. The correctional officer, an employee of Defendants, monitoring Unit 13 at the time of the attack acted negligently.

42. Upon information and belief, the BOP has policies and procedures governing the monitoring of detainee living units in the MCC.

43. The correctional officer monitoring Chess's living unit failed to do so in accordance with said policies and procedures.

44. Upon information and belief, the BOP has policies and procedures prohibiting contraband and weapons from detainee living units in the MCC.

45. At the time of the attack on Chess, the correctional officer failed to ensure that there was no contraband or weapons on Chess's living unit in violation of the BOP's policies and procedures.

46. As a direct and proximate cause of Defendant's failure to follow its policies and procedures, Chess suffered and will continue to suffer physical, psychological, and emotional injuries.

WHEREFORE, the Plaintiff, JOSEPH CHESS, asks that judgment be entered for him and against the Defendant an amount in excess of $100,000. Chess also requests attorney's fees, costs and any other relief deemed just.

Respectfully submitted,

PLAINTIFF, JOSEPH CHESS

BY: /s/ Dominick L. Lanzito
One of his attorneys

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IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Joseph Chess (#22273-424),	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 07 C 5333**
	)	
John Pindelski,	)	**Judge Wayne R. Andersen**
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Joseph Chess, a federal prisoner incarcerated at the Metropolitan Correctional Center (MCC), filed this civil rights action against MCC officers and psychologists John Pindelski, Jason Dana, Richard Nieberding, and Daniel Greenstein. Plaintiff also named as Defendants Jerome Adams, a fellow inmate, and either the Bureau of Prisons or the United States of America. Summonses were issued and served on only the individual MCC officers and psychologists. Plaintiff alleges that, on February 6, 2007, Adams poured scalding water on Plaintiff; Plaintiff suffered severe burns to his face, neck, eye, and ear; and the MCC Defendants knew that Adams was mentally unstable and dangerous, yet allowed him to be housed in general population. On August 20, 2008, the Court denied Defendants' motion to dismiss the complaint for failure to exhaust administrative remedies, noting that a Fed. R. Civ. P. 12(b) dismissal was improper in light of *Jones v Brock*, 549 U.S. 199 (2007), and because the failure-to-exhaust issue required consideration of materials outside the complaint. The Defendants have since filed a motion for summary judgment, again arguing that Plaintiff failed to exhaust administrative remedies. Plaintiff has filed a response, and the Defendants have replied.

For the following reasons, the motion for summary judgment is granted; however, the case is not dismissed. The MCC Defendants are dismissed, but the Court construes Plaintiff's claims against the BOP and the United States as naming the United States as a Defendant. Plaintiff may proceed with his claim against the United States of America, and the clerk shall issue summons for this Defendant.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). In determining the existence of a genuine issue of material fact, the Court construes all facts in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). When addressing a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

If the moving party meets its burden, the nonmoving party has the burden "to go beyond the pleadings and affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact." *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006) (internal quotation marks and citations omitted); *Celotex*, 477 U.S. at 322-26; *Johnson v. City of Fort Wayne*, 91 F.3d 922, 931 (7th Cir. 1996). A genuine issue of material fact is not demonstrated by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if a reasonable finder of fact could return a decision for the nonmoving party based upon the record. *Anderson*, 477 U.S. at 252; *Insolia v. Phillip Morris Inc.*, 216 F.3d 596 (7th Cir. 2000). With respect to whether an inmate exhausted administrative remedies, the Court, and not a jury, must resolve factual issues. *See Pavey v. Conley*, 544 F.3d 739 (7th Cir. 2008).

FACTS

The summary judgment evidence demonstrates the following. On February 6, 2007, Metropolitan Correctional Center (MCC) inmate Jerome Adams, allegedly unprovoked, threw scalding hot water on Plaintiff, causing severe burns on Plaintiff's face, ear, neck and eye. *See* Complaint, Docket Entry 1, p.2. According to Plaintiff, Adams is emotionally and mentally disturbed and previously exhibited fits of uncontrollable rage. *Id.* Defendants Pindelski, Dana, Nieberding, and Greenstein, psychologists at the MCC, allegedly knew of Adams' potential for violence, yet did nothing to protect inmates from Adams. *Id.*

On February 28, 2007, Plaintiff mailed an administrative tort claim to the Department of Justice in accordance with the requirements for filing a federal tort claim. The Department of Justice denied Plaintiff's claim on July 2, 2007. Complaint at 1; *see also* Defendants' Rule 56.1 Statement of Uncontested Facts, Docket Entry (DE) 31, Exhibits C and D. Between April 20, 2007, and May 7, 2008, Plaintiff submitted four requests for administrative remedies. According to MCC Attorney Advisor Richard Hansford, one grievance was returned for not being properly filed; the other three did not involve claims against the Defendants concerning the February 6, 2007, incident. Plaintiff filed three intermediate appeals with the BOP's regional office; but he filed no appeals with the BOP general counsel in Washington, D.C. *See* Defendants' Rule 56.1 Statement, DE 31, Exhibit B ¶¶ 7, 8.

Plaintiff admits that he did not file an MCC grievance for two and half months following the February 6, 2007, incident, but states that he filed an administrative tort claim with the Bureau of Prisons in accordance with the Federal Tort Claim Act, which was denied on July 2, 2007. *See* Plaintiff's Request for Summary Judgment, DE 40, p.1; Defendants' Rule 56.1 Statement, DE 31, Exhibits C and D.

Although the documents submitted with Hansford's affidavit do not indicate the subject of the MCC grievances filed by Plaintiff, his response to the motions to dismiss and for summary judgment concede that the only administrative complaint he filed with respect to the Defendants' involvement

with the February 6, 2007, incident was the claim for damages submitted to the Attorney General in Washington, D.C., for a federal tort claim. *See* Plaintiff's Answer to Motion to Dismiss, DE 24; Plaintiff's Memorandum Opposing Summary Judgment, DE 40; *see also* Defendants' Rule 56.1 Statement, DE 31, Exh. C. Plaintiff signed that administrative complaint on February 28, 2007; it was denied on July 2, 2007; and Plaintiff filed the complaint in the instant case in September 2007. *See* Defendants' Rule 56.1 Statement, DE 31, Exhs. A, C, and D.

ANALYSIS

The Prisoner Litigation Reform Act requires that "[n]o action shall be brought with respect to prison conditions under section 1983 ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e. This exhaustion requirement applies to federal prisoners seeking to bring a civil rights suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See Massey v. Helman*, 259 F.3d 641, 645-46 (7th Cir. 2001). The requirement to exhaust provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) (citation omitted). Exhaustion is necessary, contrary to Plaintiff's contentions, even if the prisoner is requesting relief that the relevant administrative review board has no power to grant, such as monetary damages. *Dole v. Chandler*, 438 F.3d 804, 808-09 (7th Cir. 2006).

Exhaustion of available administrative remedies "'means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).'" *Woodford*, 548 U.S. at 90 (*quoting Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). Proper use of the prison grievance system requires a prisoner "to file complaints and appeals in the place, and at the time [as] the prison's administrative rules require." *Pozo*, 286 F.3d at 1025; *Dole v. Chandler*, 438 F.3d at 809. If the prisoner fails to properly use the prison's grievance process, the prison administrative authority can refuse to hear the case, and the prisoner's claim can be considered indefinitely unexhausted. *Pozo*, 286 F.3d at 1025; *see also Woodford*, 548 U.S. at 89-90. The grievance procedures

applicable to Plaintiff before filing a *Bivens* action included an initial informal resolution stage and a three-step grievance process to the prison's warden, to the Regional Director, and finally to the General Counsel. *See* 28 C.F.R. § 542.13-15.

The summary judgment evidence indicates that Plaintiff did not exhaust administrative remedies with respect to his *Bivens* claim against the individual MCC Defendants. Plaintiff concedes that he did not seek administrative relief under the procedures set out under § 542.13-15. *See* Plaintiff's Memorandum Opposing Defendants' Summary Judgment Motion, DE 40. However, the exhaustion requirement for a claim under the Federal Tort Claim Act (FTCA) requires that Plaintiff file an administrative claim with the appropriate federal agency before filing suit. *See* 28 U.S.C. § 2675(a); *McNeil v. United States*, 508 U.S. 106, 113 (1993); *Palay v. U.S.*, 349 F.3d 418, 425 (7th Cir. 2003); *Bontkowski v. U.S.*, 2003 WL 21281763, *4 (N.D. Ill. 2003). Plaintiff complied with this requirement by filing a claim with the BOP and the Attorney General, who denied the claim on July 2, 2007, and by filing suit in a federal district court within six months after the BOP's decision. *See* Defendant's Rule 56.1 Statement, DE 31, Exh. C & D.

Lawsuits complaining about unconstitutional actions by federal employees are governed by *Bivens* if the suit is against the employees, and by the Federal Tort Claims Act if the suit is against the United States. *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003). Plaintiff's complaint, in addition to listing MCC officials as Defendants, states that "one of the claims is against the United States of America." The complaint also asserts claims against the BOP as a division of the United States. *See* Complaint, ¶¶ 1, 3, 4,10, 11. Liberally construed, Plaintiff's complaint names the United States as a Defendant.

CONCLUSION

Accordingly, the motion for summary judgment filed by the MCC Defendants is granted, and Plaintiff's claims against them are dismissed for failure to exhaust administrative remedies. Plaintiff's complaint, however, is not dismissed. Plaintiff's complaint, liberally construed, names the United

States as a Defendant, and Plaintiff may proceed with his claim against the United States. The clerk shall issue summons to serve the United States and shall change the caption of the case to "Chess v. United States."

ENTER: Wayne Andersen

Wayne R. Andersen
United States District Court Judge

DATE: January 23, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH CHESS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 07 C 5333
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

On February 6, 2007, Joseph Chess, then an inmate at the Metropolitan Correctional Center Chicago ("MCC"), suffered second-degree burns when another inmate, Jerome Adams, threw a cup of scalding water onto Chess's face and then physically assaulted him by hitting him with the cup and punching him. In September of 2007 Chess brought this action to recover for the injuries he sustained as a result of the attack. Plaintiff asserts a claim for relief against the United States ("defendant" or "Government") pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* ("FTCA"). Chess's second amended complaint asserts that the United States failed to properly screen Adams upon intake and also failed to monitor him afterward, both on and before February 6, 2007. Chess and the United States have brought cross-motions for summary judgment. For the reasons stated below, plaintiff's motion for summary

judgment is denied, and defendant's cross-motion for summary judgment is granted in part and denied in part.

I.

Joseph Chess entered the MCC in September of 2006. Chess was housed in general population unit 13 ("Unit 13"). Jerome Adams had entered the MCC as a pre-trial inmate in January 2006. He was supposed to stand trial for bank robbery the next month but was found incompetent. Adams was tranferred to the Federal Medical Center in Butner, North Carolina ("FMC Butner") for treatment and restoration of competency. During his treatment at FMC Butner, Adams was diagnosed with Schizoaffective Disorder, Bi-Poler Type. On September 13, 2006, Adams returned to the MCC after BOP medical staff at FMC Butner determined that he was stable, receiving medication, and competent to stand trial. When Adams returned to the MCC, he was housed in Unit 13.

On September 28, 2006, Adams requested protective custody because he felt threatened by other detainees. Adams was placed in administrative detention in the special housing unit ("SHU"). BOP staff later determined that Adams did not want to be in the general population unit because he did not like being around gang members, though no specific threat had been made against him. On November 3, 2006, Dr. John Pindelski, chief psychologist at MCC, met with Adams to discuss the need for Adams to return to the

general population.[1] Adams reiterated his concern about gang members and stated that he would refuse placement in the general population. During the meeting, Adams was insolent toward Dr. Pindelski and refused to comply when Dr. Pindelski instructed him to remain in his chair. As a result, Adams was issued an incident report for his conduct. Adams was subsequently issued another incident report for failing to comply with an order to return to the general population on November 20, 2006.

Adams did return to the general population on December 4, 2006, and remained there until December 22, 2006. On December 23, 2006, BOP psychologist Dr. Dan Greenstein entered a progress note on Adams, stating that he had been placed in the SHU the prior evening. The progress note stated that the operations lieutenant who moved Adams to the SHU reported that Adams "appeared on the verge of striking out [at] him" and that the reason for the SHU placement was "protection of inmate and of staff." Dr. Greenstein also noted that during the interview on December 23, Adams "stared intensely at [him] in a menacing manner" and "failed to reply about whether he has been medication compliant." The December 23 review was the last documented review until February 16, 2007, after the attack on Chess. On December 28, 2006, Adams was returned to Unit 13.

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[1] This was not the first time Adams had undergone review by the MCC psychology staff. He was reviewed a number of times while he was in the SHU.

At around 9:30 p.m. on February 6, 2007, Officer DePaul, the correctional officer assigned to Unit 13, began his lockup routine. This included DePaul telling the inmates to get their water and ice and instructing them to get ready for the lock-down. DePaul also collected his personal items and packed them away in his duffle bag. The call for the inmates to prepare for lock-down prompted Chess to go downstairs to collect the rags that he previously used to clean the dayroom. While Chess was descending the stairs, Adams threw a cup of scalding hot water in Chess's face, slammed the cup in Chess's face, and proceeded to punch Chess in the face repeatedly. After the attack was quelled, Chess was taken to Northwestern Hospital, where he was treated for second-degree burns to his face, neck, ear, and eye.

After the attack, DePaul was disciplined by the BOP for inattention to duty and received a five-day suspension.[2] Chess submitted an administrative tort claim to the BOP under the FTCA, but the claim was denied on July 2, 2007.

II.

Summary judgment is appropriate where the record shows that "there is no genuine dispute as to any material fact and the

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[2] It is unclear from the record whether DePaul was disciplined for reading a newspaper approximately fifteen minutes before the attack, in violation of BOP regulations, or for packing his personal belongings during the lockup.

movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue for trial exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On cross-motions for summary judgment, I construe all facts and inferences "in favor of the party against whom the motion under consideration is made." *In re. United Air Lines, Inc.*, 453 F.3d 463, 468 (7th Cir. 2006) (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 536 (7th Cir. 2005)). Because the defendant has raised the discretionary function exception as a defense, I will start with a consideration of its motion.

A. Discretionary Function Exception

The United States argues that it is immune from suit because the discretionary function exception to the FTCA applies to this case. The United States typically enjoys sovereign immunity from suits for damages. The FTCA, however, waives this immunity in actions "for money damages ... for ... personal injury ... where the United States, if a private person, would be liable" under the applicable state tort law. 28 U.S.C. § 1346(b)(1); *Parrott v. United States*, 536 F.3d 629, 635 (7th Cir. 2008). Waiver under the FTCA is not absolute, and the discretionary function exception is one limit on the FTCA's waiver. *Calderon v. United*

States, 123 F.3d 947, 948 (7th Cir. 1997). Specifically, the discretionary function exception bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Calderon*, 123 F.3d at 949 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984)). "It is the Government's burden to assert [this] exception[] if and when it seeks to defeat a claim because of [it]." *Parrott*, 536 F.3d at 634-35.

Two factors must be present for the exception to apply: "(1) the action complained of must involve an element of judgment or choice; and (2) the action must relate to considerations of public policy." *Bailor v. Salvation Army*, 51 F.3d 678, 685 (7th Cir. 1995) (citing *United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991); *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S.Ct. 1945, 100 L.Ed.2d 531 (1988)).

The Government cannot satisfy the first prong if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because there is no "element of judgment or choice" involved. *Calderon*, 123 F.3d at 949 (quoting *Gaubert*, 499 U.S. at 322). With respect to the second prong, the decision at issue in the FTCA claim must involve a public policy concern, but the exception is not limited to decisions by those in "the policymaking or planning ranks of government." *Palay v. United States*, 349 F.3d 418, 428 (7th Cir. 2003). Thus, even day-to-day discretionary decisions may satisfy the second prong if they are "susceptible to policy analysis." *Id.* Further, I must presume that an action is grounded in public policy "where the statute or regulations allow the government agent to exercise discretion." *Id.* at 950 (citing *Gaubert*, 499 U.S. at 323); *see also Palay*, 349 F.3d at 428.

The Government makes several arguments for why the discretionary function exception should apply in this case. First, it argues that under *Calderon*, Chess's claim that defendant violated its duty of care, as set forth in 18 U.S.C. § 4042, is barred. Section 4042 states that the BOP "shall ... provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2). In *Calderon*, the Seventh Circuit found that while the duty to protect inmates under § 4042 is not

discretionary, that statute does not "direct the manner by which the BOP must fulfill this duty." 123 F.3d at 950. Because the plaintiff in that case could not dispute the fact that § 4042 "sets forth no particular conduct the BOP personnel should engage in or avoid while attempting to fulfill their duty to protect inmates," he was unable to get around the discretionary function exception based on invocation of that statute alone. *Id.*

The Seventh Circuit has since clarified its holding in *Calderon*. In *Palay*, the court revisited the duty to protect, noting that "[u]nstated but implicit in *Calderon* is the assumption that prison officials in that case had taken note of the threats against the plaintiff in that case and weighed the relevant considerations in deciding how best to act (or not) in response." *Palay*, 349 F.3d at 432. In other words, while § 4042 leaves room for discretionary actions, analysis under the second prong of the discretionary function exception test is still required. Furthermore, in *Calderon*, the court relied on the fact that the other statute invoked by the parties also fell within the discretionary function exception. 123 F.3d at 949-50. Therefore, in the case before me, the government's argument that it cannot be liable under § 4042 because of the Seventh Circuit's decision *Calderon* reaches too far. I am required to consider whether the challenged actions at issue here are based on policy considerations.

Where to house an inmate within an institution is a decision that is subject to policy analysis. So, the Government would be protected under the discretionary function exception where Chess argues, generally, that the Government is liable because it violated the broad duty articulated in § 4042. However, Chess's argument is more nuanced. Namely, Chess alleges that the Government is liable under § 4042 because it violated certain non-discretionary BOP program statements. While I agree with the Government that it cannot be liable generally under § 4042, it may be liable under § 4042 in limited circumstances where the Government has taken some non-discretionary action that causes it to violate the mandate to protect inmates.

The Government argues that its decision to place Adams in the general population was discretionary, thereby satisfying the first prong of the discretionary function exception test. The Government claims, and Chess does not dispute, that the applicable regulations and directives reflect that federal prisoners may be placed into administrative detention at the discretion of the BOP. Indeed, the regulations state that "[t]he Warden *may* ... place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to ... other inmates or to the security or orderly running of the institution." 28 C.F.R. § 541.22 (2007) (emphasis added); P.S. 5270.07 (utilizing the same language). The

permissive language in the statute suggests that placing a federal prisoner in administrative detention is a discretionary act, and, again, housing decisions are subject to policy analysis. Because administrative detention is not punitive in nature, P.S. 5270.07, the regulations may be viewed as governing housing decisions. However, whether a federal prisoner may be placed in administrative detention does not necessarily answer the question of whether he can be placed in the general population. It is the latter type of action, here, BOP's decision to place Adams in the general population, that Chess is challenging.

The Government also points to the BOP program statement governing initial housing assignments for pretrial inmates. The statement calls for "[t]horough screening and good professional judgment" in making housing assignments to "ensure pretrial inmates' safety and security." P.S. 7331.04. Again, the language here suggests, and in fact almost demands, that BOP officials engage in discretionary decision-making in assigning housing units. But the directive on pretrial inmates only tells part of the story, since, as Chess points out, P.S. 7331.04 contains several mandatory procedures and, further, is intended to supplement and not replace P.S. 5290, which is the directive governing screening of all newly arrived inmates. P.S. 7331.04

("Procedures specified in this section are to augment those in the Program Statement on Intake Screening").

In fact, Chess persuasively argues that the BOP officials handling Adams' intake failed to comply with at least one mandatory procedure in P.S. 5290, making the discretionary function exception inapplicable to his claim that the Government failed to properly screen Adams when he entered the MCC. Chess claims that the BOP official conducting Adams' intake screening failed to review Adams' Inmate Central File as required. The BOP directive states that the BOP "interviewer *shall* also review SENTRY information and the Inmate Central File *or* Presentence Investigation Report (PSI), *if available*, and make a decision whether the inmate is suitable for placement in general population." P.S. 5290 (1999) (emphasis added).

The Government responds to this argument not by showing that it did comply with the directive, but by stating that Adams had no PSI and that Chess fails to cite any evidence tending to show that Adams' central file was in fact available. However, because the discretionary function exception is the Government's defense to raise, it is not sufficient to counter Chess's allegation by trying to circumvent having to show that it did in fact comply with the directive. *See Parrott*, 536 F.3d at 634-35 (finding that "it is the Government's burden to assert [the discretionary function exception] if and when it seeks to defeat a claim

because of [it]"); *see also William v. Fleming*, 597 F.3d 820, 824 (7th Cir. 2010) (taking the position that "the proper inquiry is not one of jurisdiction, but whether the United States has a defense to suit"). The government has failed to show that it complied with P.S. 5290 and that, as a matter of law, its actions fall under the discretionary function exception. *See Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 542-43, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) (finding that the exception did not apply where defendant did not comply with a statutorily mandated prerequisite to issuing a license to a vaccine manufacturer); *Alfrey v. United States*, 276 F.3d 557, 562 (9th Cir. 2002) (finding issues of material fact existed where plaintiff argued that defendant had not completed a mandatory component of the cell-assignment process).

Chess further alleges that the Government failed to comply with certain directives aimed at monitoring federal prisoners suffering from mental illness. According to Chess, there are three relevant components to the directives regulating the monitoring of prisoners with a mental illness. First, P.S. 5310.13(9) requires that the BOP Program Coordinator meet with certain mentally ill inmates on a monthly basis to assess treatment compliance. These monthly assessments, however, are only required for an inmate "placed in a special housing assignment for mental health reasons, deemed to need special

attention as a result of a *significant mental impairment*, or *receiving psychoactive medication for a significant psychiatric problem* (for example, psychosis, severe depression, or *bipolar disorder*)." P.S. 5310.13(9) (emphasis added). Defendants do not address the issue of whether Adams fit into any of these categories, but the record shows that he had been diagnosed with Schizoaffective disorder, Bipolar type and that he had been prescribed antipsychotic medication. Taken in the light most favorable to Chess, the facts show that Adams would have been covered by P.S. 5310.13(9).

Further, assuming the directive applied to Adams, the language of the directive indicates that these monthly meetings were non-discretionary. Defendant responds that "the record is replete with evidence" showing adequate monitoring, but the evidence shows no documented meeting from December 23, 2006 up to the attack on February 6, 2007. One of the stated purposes of the monthly meetings is to ensure treatment compliance, and Chess argues that Adams was not compliant with his treatment. Defendant, though, has submitted evidence showing that Adams was, in fact, complying with the treatment plan. Chess has not disputed that evidence with properly supported facts. The monthly meetings are also held "to assess [the inmate's] level of functioning and need for changes in treatment strategy." P.S. 5310.13(9). The record indicates that BOP staff adjusted Adams'

treatment a number of times prior to the last documented meeting on December 23, 2006, suggesting that his treatment needs were, at times, in flux. By failing to show that Adams was exempt from the requirement of monthly meetings, the Government has not shown that there is no disputed fact as to whether it is entitled to the discretionary function exception on Chess's claims arising from a failure to monitor Adams on a monthly basis.

The second component of the directive that Chess contends regulated the BOP's course of action regarding Adams simply allows the Program Coordinator to recommend changes in housing, work, and program assignments for mentally ill inmates. P.S. 5310.13(10). The language of the program statement is suggestive, and indicates that Program Coordinators were to have discretion in making recommendations. Of course, non-compliance with other, mandatory, portions of the directive might poorly equip a Program Coordinator to make any recommendations, but the language of this particular section is a grant of discretion to the Program Coordinator. The mandatory language stating that the Program Coordinator "shall serve as the institution's contact person" merely supports the Government's position that the housing and program assignments, even for mentally ill inmates, are discretionary and are to be made in consultation with BOP officials who are concerned with public policy issues.

The last component of P.S. 5310.13 with which Chess argues the Government failed to comply requires further monitoring of mentally ill inmates and consultation among BOP staff. P.S. 5310.13(12) requires regular, "at least quarterly, but preferably monthly," case consultation meetings among certain BOP staff regarding mentally ill inmates. Treatment recommendations that result from these meetings are to be documented. Further, this section requires that the Program Coordinator make monthly notes on any mentally ill patient who is "receiving psychoactive medication for a significant psychiatric problem," "involved in a current treatment or special housing program," or "returned within the last six months from a psychiatric treatment facility after completion of treatment for a significant psychiatric impairment." As discussed above, there was an absence of any documentation by BOP staff regarding Adams' mental illness or treatment from December 23, 2006 until after the attack on Chess. And, again, the Government has not asserted, nor submitted evidence showing, that Adams was exempt from these requirements. Therefore, as with section 9 of P.S. 5310.13, the Government has not shown that the discretionary function exception protects it from Chess's claims arising from a failure to monitor Adams as required in section 12 of the directive.

Chess also seems to argue that BOP officials had a duty to "clear" Adams to reenter the general population after he had been

placed in the SHU. However, Chess points to no statute, regulation, or directive to support his claim that the BOP had a duty to "enforce its own classification decision" by documenting its process for shifting Adams from the SHU back to the general population. In fact, former Associate Warden Janet Perdue testified in detail about the procedures at the MCC for transferring inmates out of administrative detention in the SHU and back into the general population. Perdue explained that MCC staff held weekly segregation meetings where they discussed each inmate housed in the SHU for non-disciplinary reasons, and that during these meetings staff made a determination about whether it was appropriate to transfer an inmate back to the general population. Perdue also explained that no formal documentation was generated as a result of these meetings, nor was any required by any policy or procedure. Chess does not dispute Purdue's testimony on this point. This is the type of decision-making process that the discretionary function exception is intended to protect. First, the decision to return an inmate to the general population from administrative detention involves "an element of judgment and choice" and is not constrained by any statute or policy. Further, given the breadth of the staff who attended these weekly meetings—everyone from the warden and associate wardens to representatives from the psychology department—it is clear that the decision to move an inmate from the SHU back to

the general population is based on public policy considerations, such as costs to the institution, constraints on space, and the orderly functioning of the MCC.

Finally, Chess argues that the discretionary function exception does not apply to Officer DePaul's conduct on February 6, 2007, the day Adams attacked Chess. Specifically, Chess alleges that DePaul failed to take action after Adams' cell mate told DePaul of Adams' strange behavior and requested to change cells, and that DePaul violated BOP regulations by reading a newspaper and packing up his belongings during his shift. As to the first allegation, the Seventh Circuit has made clear that the relevant regulations have vested discretion in BOP officials to determine how to respond to threats and when or if disciplinary action is required. *Calderon*, 123 F.3d at 949-50 (citing 28 C.F.R. § 541).

The second allegation, that DePaul was not performing his duties right before the attack, is a closer call. The Government has admitted that BOP regulations prohibit a correctional officer from reading a newspaper while on duty. However, the Government contends that DePaul did not violate BOP regulations when he began to put his personal belongings in his bag prior to lock-down and the end of his shift. Chess points to no BOP regulation or program statement prohibiting DePaul's actions or specifying the lockup routine to be followed. Chess relies solely on the

deposition testimony of Lieutenant Cleveland Swan, but the line of questioning asks for Lieutenant Swan's subjective opinion about what officers are allowed to do, not what the BOP regulations require. Without any mandatory regulation, I assume that officers are allowed a certain amount of discretion in how they decide to implement the lockup routine.

However, I find that DePaul's actions fail at the second prong of the discretionary function test. The decision to pack up one's belongings prior to the end of a shift is not based on public policy and is not subject to policy analysis. While day-to-day decisions are often protected by the discretionary function exception, the decision to pack up while still on duty, even if discretionary, is based on personal interest. *See Palay*, 349 F.3d at 432 ("Perhaps the corrections officer monitoring the ... unit at the time ... was simply asleep ... [o]r perhaps he left the unit unattended in order to enjoy a cigarette or a snack. That type of carelessness would not be covered by the discretionary function exception as it involves no element of choice or judgment grounded in public policy considerations."). Therefore, Chess's claims relating to DePaul's alleged failure to monitor inmates during lockup are not barred by the discretionary function exception.

B. Negligence Under the FTCA

The Government argues that even if the discretionary function exception does not bar all of Chess's claims, there is no genuine dispute as to any material fact that would allow Chess to recover under the FTCA. Chess, on the other hand, argues that he is entitled to judgment in his favor as a matter of law.

The FTCA requires a plaintiff to show that the defendant is liable in tort under the applicable state law. 28 U.S.C. § 1346. In an action for negligence under Illinois law, a plaintiff must show "that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach was the proximate cause of the plaintiff's injuries." *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 256, 720 N.E.2d 1068, 242 Ill.Dec. 113 (Ill. 1999). Proximate cause, under Illinois law, may be cause in fact or legal cause. *Palay*, 349 F.3d at 432 (citing *Evans v. Shannon*, 201 Ill.2d 424, 267 Ill.Dec. 533, 776 N.E.2d 1184, 1190 (Ill. 2002)). Cause in fact requires that the injury would not have occurred absent defendant's conduct, and legal cause is a question of foreseeability. *Id.* Claims involving a failure to protect require a plaintiff to show that the defendant "knew or reasonably should have known" of a potential problem with an inmate. *Parrott*, 536 F.3d at 637 (citing *Brown v. United States*, 486 F.2d 284, 288-89 (8th Cir. 1973)). In the context of summary judgment, "[w]hether or not the defendant's conduct proximately caused the plaintiff's injury

ordinarily is a question for the finder of fact to decide; only rarely are the facts so clear that the court can resolve the issue as a matter of law." *Palay*, 349 F.3d at 432-33.

Chess argues that because the BOP failed to adhere to the regulations and program statements discussed above, the BOP has violated its duty of care under § 4042. Indeed, the Supreme Court has recognized that § 4042 describes a "duty of care owed by the [BOP] to federal prisoners." *United States v. Muniz*, 374 U.S. 150, 164-65, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); *see also Parrott*, 536 F.3d at 636-37. However, as stated above, the discretionary function exception necessarily limits Chess's allowable claims under § 4042. In light of the discussion above, then, in order to proceed, Chess must show there is an issue for trial as to (1) whether the Government, in failing to comply with certain BOP regulations and program statements, breached its duty to protect Chess such that it knew or reasonably should have known that Adams should have been segregated from the general population, and that Adams' placement in the general population proximately caused Chess's injuries; and (2) whether DePaul negligently failed to monitor Unit 13 on the night of the attack in breach of the duty to protect, and that such negligence proximately caused Chess's injuries.

Although I concluded that there is a genuine dispute of material fact as to whether BOP officials complied with

requirements to review Adams' Inmate Central File upon intake and to review Adams' mental health on a monthly basis, Chess has failed to allege or present any admissible evidence tending to show that there was information in the Inmate Central File, if the file was even available, that would indicate Adams was unsuitable for placement in the general population upon intake at the MCC in September 2006. Therefore, Chess has failed to raise an issue for trial as to whether the BOP's failure to review Adams' Inmate Central File proximately caused Chess's injury.

While Chess may not proceed on his claim that the BOP negligently placed Adams in Unit 13 when he was returned to the MCC in September of 2006, I find that Chess has raised an issue for trial as to whether, after December 23, 2006, BOP officials knew or reasonably should have known that Adams should have been segregated from the general population. As explained above, there is a genuine dispute as to whether Adams' psychological treatment and needs were properly monitored after his meeting with Dr. Greenstein on December 23, 2006. Taken in the light most favorable to Chess, the facts show that BOP officials failed to monitor Adams, Adams had recently been in the SHU for protection of inmate and staff, and there had been changes to his medication in the months prior to his placement in the SHU in December 2006. A fact finder could conclude that a failure to properly monitor Adams, as required by the BOP program statement,

proximately caused Chess's injury in that such an attack should have been foreseeable by defendants. However, while Chess has survived summary judgment on this issue, he is not entitled to summary judgment. Chess has not presented enough evidence to show that, as a matter of law, a breach proximately caused his injuries. This is a question for the finder of fact.

Finally, I also find that there are triable issues as to whether DePaul's alleged failure to monitor the unit at the time of the attack constituted negligence and proximately caused Chess's injuries. Chess has shown that DePaul was packing his personal belongings right before the attack and reading a newspaper shortly before that. Chess has, therefore, raised at least one issue for the finder of fact regarding his claim that DePaul negligently failed to monitor the unit. Again, while this claim survives summary judgment, Chess has not shown that he is entitled to summary judgment.

III.

For the foregoing reasons, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted in part and denied in part. To summarize, plaintiff may proceed on his claims that under the FTCA, the government negligently failed to monitor Adams' psychological condition

after December 23, 2006 and negligently failed to monitor Unit 13 on the night of the attack.

ENTER ORDER:



Elaine E. Bucklo
United States District Judge

Dated: December 1, 2011

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.2
Eastern Division

Joseph Chess

Plaintiff,

v.

Case No.: 1:07–cv–05333
Honorable Wayne R. Andersen

Bureau of Prisons, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, January 23, 2009:

MINUTE entry before the Honorable Wayne R. Andersen:Enter MEMORANDUM, OPINION AND ORDER: Accordingly, the motion for summary judgment [29] filed by the MCC Defendants is granted, and Plaintiffs claims against them are dismissed for failure to exhaust administrative remedies. Plaintiffs complaint, however, is not dismissed. Plaintiffs complaint, liberally construed, names the United States as a Defendant, and Plaintiff may proceed with his claim against the United States. The clerk shall issue summons to serve the United States and shall change the caption of the case to Chess v. United States."Mailed notice(tsa,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 5.1.1
Eastern Division

Joseph Chess

Plaintiff,

v.

Case No.: 1:07–cv–05333
Honorable Elaine E. Bucklo

United States of America, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, June 20, 2013:

MINUTE entry before Honorable Elaine E. Bucklo: Status hearing held. Parties report a settlement. Case is dismissed without prejudice and with leave to reinstate by 9/19/2013. Civil case terminated. Mailed notice(meg,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH CHESS, Plaintiff,	)	No. 07 C 5333
v.	)	Judge Bucklo
THE UNITED STATES OF AMERICA, Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of twenty-five thousand dollars ($25,000), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which he may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event the plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for twenty-five thousand dollars ($25,000) and made payable to Joseph Chess. The check will be mailed to the following address:

Federal Bureau of Prisons
Joseph Chess
#22273-424
Post Office Box 474701
Des Moines, Iowa 50947-0001

9. Plaintiffs' attorney agrees to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 10th day of September, 2013.

Attorney for Defendant,
United States of America

Executed this 10th day of September, 2013.

Attorneys for Plaintiff

Executed this 6 day of September, 2013.

Plaintiff Joseph Chess

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

FILED

FEB 25 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL

32648-044

Plaintiff/Petitioner(s).

-vs-

UNITED STATES OF AMERICA

Defendant/Respondent(s).

Docket No. 08-132-MJR
(To be supplied by the Clerk)

☐ **CIVIL RIGHTS COMPLAINT pursuant to 42 U.S.C. §1983 (State Prisoner)**

☐ **CIVIL RIGHTS COMPLAINT pursuant to 28 U.S.C. §1331 (Federal Prisoner)**

☒ **CIVIL COMPLAINT pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346, 2671-2680**

JURY TRIAL, DEMAND RULE #38 38 FEDERAL RULES CIVIL PROCEDURE

I. JURISDICTION

A. Plaintiff's mailing address and/or register number and present place of confinement.
U.S. PENITENTIARY HAZELTON P.O. BOX 2000 BRUCETON MILLS W.VA. 26525

B. Defendant UNITED STATES OF AMERICA is employed as
(Name of First Defendant)
FEDERAL BUREAU OF PRISONS
(Position/Title)
with 320 FIRST ST. WASHINGTON, D.C. 20530
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes (X) No ( )

If your answer is "yes", briefly explain:

SEE ABOVE

C. Defendant N/A is employed as
(Name of Second Defendant)

(Position/Title)

with N/A
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes (X) No ( )

If your answer is "yes", briefly explain: SAME AS ABOVE

D. Using the outline of the form provided, include the above information for any additional defendant(s). N/A

II. PREVIOUS LAWSUITS

A. Have you begun any other lawsuits in state or federal court relating to your imprisonment?

Yes ( ) No (X)

B. If your answer to "A" is "yes", describe the lawsuit(s) in the space below. (If there is more than one (1) lawsuit, you must describe the additional lawsuits on another sheet of paper, using the same outline.) Failure to comply with this provision may result in summary denial of your complaint. N/A

1. Parties to previous lawsuits:
Plaintiff(s) N/A

Defendant(s) N/A

2. Court (if Federal Court, name the District; if State Court, name the County)
N/A

3. Docket number N/A

4. Name of Judge to whom case was assigned N/A

5. Type of case (for example: Was it a Habeas Corpus or Civil Rights action?)
N/A

6. Disposition of case (for example: Was the case dismissed? Was it appealed? Is it still pending?)
N/A

7. Approximate date of filing lawsuit N/A

8. Approximate date of disposition N/A

III. GRIEVANCE PROCEDURE

A. Is there a prisoner grievance procedure in the institution? AFFIRMATIVE
28 (C.F.R.) 542.10 ET. SEQ.

B. Did you present the facts relating to your complaint in the prisoner grievance procedure?
Yes (X) No ( )

C. If your answer is "yes",
1. What steps did you take? SUBMITTED BP-8-9-10 levels. AND TORT CLAIM

2. What was the result? DENIED BASED ON A PRACTICE AND CUSTOM OF DISSEMBLING THEIR RESPONSES.

D. If your answer is "no", explain why not. N/A

E. If there is no prisoner grievance procedure in the institution, did you complaint to prison authorities? Yes ( ) No ( ) N/A

F. If your answer is "yes",
1. What steps did you take? N/A SEE ABOVE

2. What was the result? N/A (SAME)

G. If your answer is "no", explain why not. N/A (SAME)

H. Attach copies of your request for an administrative remedy and the response(s) you received. If you cannot do so, explain why not:
UNABLE TO AT THIS TIME DUE TO RETALIATORY CONDUCT THAT MAKES COMPLIANCE IMPRACTIBLE WITH THE COURT RULES.

IV. STATEMENT OF CLAIM

State here, as briefly as possible, the FACTS of your case. State who, what, when, where and how you feel your constitutional rights were violated. Do not cite cases or statutes. If you choose to submit legal arguments or citations, you must do so in a separate memorandum of law. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. If your claims relate to prison disciplinary proceedings, attach copies of the disciplinary charges and any disciplinary hearing summary as exhibits.

Only two (2) extra pages (8½ x 11") are permitted, if necessary, to complete your statement of claim. Additionally, attach any relevant, supporting documentation.

DEFENDANTS medical and EXECUTIVE DEPARTMENTAL employees are INTENTIONally disregarding basic mandatory medical bio hazard CONTAINMENT quarantine and decontamination procedures of INFECTIOUS DISEASES besides The public Health Threats IN Favor OF Agency COST CUTTING projects directed only at prisoner programs when mr. "JOE HANSON" AN INMATE AT Federal Correctional INSTITUTION IN Greenville, Illinois, was allowed to return to his Job assignment in ("cms") after being diagnosed with The "STAPH INFECTION virus" That ended up being TRANSMITTED to plaintiff during a mechanical operation on a Laundry UNIT which [HANSON] and The plaintiff were passing Tools between each other and right

afterword's plaintiff scratched his backside while using the restroom that resulted into a pimple size boil appearing on plaintiff's lower left buttocks within less than (<24") hours which forced him to report to medical services of the institution the next day after of being exposed to the infectious agent were the chief medical officer performed an unorthodox culturing procedure upon the plaintiff by cutting into the infected area with a surgical scapal and squeezing the wound as hard as possible to the point it became to unbearable to stand that was the approximate cause of the ("staph") pathogen to enter into the plaintiff's blood stream during an incubation period of approximatly ("24") days (or) less.

Plaintiff collasped into a semi-comatose daze and was transported to Greenville Regional City Hospital who was [NOT] informed of plaintiff's previous diagnose's with "staph" infection that mislead Emergency room doctors to assume that plaintiff only suffered from " acute respiratory distress syndrome " in the form of ("pneumonia") despite medical alarts issued from state and federal Health Departments and the center for Disease control Agency informing all Hospitals (or) other medical med-center's that ("staph") and ("influenzas") exhibit the same symptoms and allowed plaintiff to be taken from their care in violation of Hospital Policies and re transported back to ("FCI") Greeville over ovious false security concerns three hours after to have been admitted that resulted in plaintiff being taken back to Regional Hospital the very next day because the plaintiff's body temperature elavated to " one hundred-five point-five and would [NOT] come down and even medical officials at Regional Hospital realize they were unable to deal with the situation after a day and an hoff of desparately attempting to stabalize plaintiff's vital signs that forced them to have plaintiff transported by ambulance to the larger Saint-Lukes medical Hospital in Missouri because they failed to pay attention to ("CDC") alarts were again ("FCI") Greenville did [NOT] make the second Hospital aware of the ("staph infection") history and operated on the same false assumption until an intensive care nurse notice another " pimple size boil on the left side of the plaintiff's pimple and brought this to the attention to the physician in charge who ordered a proper culturing test that came back positive for the " Category two deadly staph virus agent " that despite

door posting NOTICES and direct warnings issued From hospital STAFF, CORRECTIONAL OFFICERS REFUSED TO abide by quarantine safety and health protocals IN WEARING disposable biohazard gear and leaving PLAINTIFF'S room To other areas OF The TWO HOSPITALS That became a CONTENTION between The parties over ("BOP") OFFICERS dangers To The public and other hospital PATIENTS and employees That could have resulted IN PLAINTIFF'S death.

AFTER Three CONSECUTIVE weeks IN SAINT-LUKES medical Hospital PLAINTIFF was moved back To Greenville Regional hospital over ("SAINT-LUKES") STAFF COMPLAINTS To ("FCI") Greenville Warden's OFFICE OF The INAPPROPRIATE CONDUCT OF CORRECTIONAL OFFICERS That even Greenville Regional ISSUED The Same exact COMPLAINTS which The defendant and ITS EXECUTIVE STAFF TOOK [NO] disciplinary ACTION ON because OF illegal collective bargaining agreements between The agency and The "American Federation OF GOVERNMENT Employees UNION based ON TOLITARIAN MOVEMENTS and CORRUPT INFLUENCE That PROTECTS government employees From being punished For either UNETHICAL (or) CERTAIN TYPES OF CRIMINAL behavior authorized and SANCTION by The defendant.

V. REQUEST FOR RELIEF

State exactly what you want the Court to do for you. If you are a state or federal prisoner, and seek relief which affects the fact or duration of your imprisonment (for example: illegal detention, restoration of good time, expungement of records or parole release), you must file your claim on a Habeas Corpus form, pursuant to 28 U.S.C. §2254, 28 U.S.C. §2255, or 28 U.S.C. §2241.

TWO-HALF MILLION DOLLORS FOR PAIN AND SUFFECING IN THE PAST AND FUTURE AS WELL AS PHYSICAL IMPAIRMENT IN THE FUTURE BESIDES THE LOSS OF CONSORTIUM IN THE FUTURE THAT PREVENTS PLAINTIFF FROM HAVING ANY MORE CHILDREN THAT INCLUDES BUT DOES NOT EXCLUDE COURT-COST AND legal FEES.

VI. JURY DEMAND *(check one box below)*

The plaintiff does ☒ does not ☐ request a trial by jury. (*See* Fed.R.Civ.P. 38.)

DECLARATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 11

I, the undersigned, certify to the best of my knowledge, information, and belief, that this complaint is in full compliance with Rule 11(a) and 11(b) of the Federal Rules of Civil Procedure. The undersigned also recognizes that failure to comply with Rule 11(a) and (b) may result in sanctions, monetary or non-monetary, pursuant to Federal Rule of Civil Procedure 11(c).

The plaintiff hereby requests the Court issue all appropriate service and/or notices to the defendant(s).

Signed this 9 day of February 2008.

Joseph W Buechel
Signature of Plaintiff

Signature of attorney, if any

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-cv-132-JPG
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

JUDGMENT

This matter having come before the Court, the issues having been heard, and the Court having rendered a decision,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered on Count 1 (Federal Tort Claims Act for negligence based on the conditions leading to the possible transmission of a staphylococcus infection in the laundry facility) in favor of defendant United States of America and against plaintiff Joseph W. Buechel; and

IT IS FURTHER ORDERED AND ADJUDGED that Count 2 (Federal Tort Claims Act for medical malpractice) is dismissed with prejudice.

DATED: May 13, 2013 **NANCY J. ROSENSTENGEL, Clerk of Court**

s/Jina Hoyt, Deputy Clerk

Approved: s/J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**NO. 08-cv-132 JPG/PMF**
	)	
USA,	)	
	)	
Defendant.	)	

JUDGMENT

The Court having been advised by counsel for the parties that the above action has been settled;

IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed with prejudice and without costs.

Dated: December 3, 2014

JUSTINE FLANAGAN, Acting Clerk of Court
Stacie Hurst, Deputy Clerk

Approved: ***s/ J. Phil Gilbert***
J. PHIL GILBERT
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL, Inmate #32648-044,	)	
	)	
Plaintiff,	)	
	)	**CIVIL NO. 08-cv-132-JPG**
vs.	)	
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.		

MEMORANDUM AND ORDER

GILBERT, District Judge:

This action is before the Court on Plaintiff's motion to proceed *in forma pauperis* (Doc. 2). The Court finds that Plaintiff, an inmate currently incarcerated in the United States Penitentiary located in Bruceton Mills, West Virginia ("USP-Hazelton"), is indigent and unable to pay the full filing fee in advance; therefore, leave to proceed *in forma pauperis* is **GRANTED**. Pursuant to 28 U.S.C. § 1915(b), **IT IS HEREBY ORDERED** that Plaintiff shall pay the **$350.00 filing fee** applicable to this civil action as follows:

1. Plaintiff shall pay an initial partial filing fee of **$ 1.22**. *See* 28 U.S.C. §1915(b)(1). The agency having custody of Plaintiff is **DIRECTED** to transmit this amount from Plaintiff's prison trust fund account to the Clerk of Court upon receipt of this Memorandum and Order.

2. Plaintiff shall make monthly payments of 20% of the preceding month's income credited to Plaintiff's prison trust fund account until the filing fee is paid in full.

3. The agency having custody of Plaintiff shall forward payments from Plaintiff's account to the Clerk of this Court each time the amount in the account exceeds $10 until the filing fee is paid. Payments shall be mailed to: Clerk of the Court, United States District Court for the Southern District of Illinois, P.O. Box 249, East St. Louis, Illinois 62202.

To enable the Bureau of Prisons to remit these payments to the Clerk of Court as required

by 28 U.S.C. § 1915, **IT IS FURTHER ORDERED** that Plaintiff shall complete, sign and return one "Consent Form -- *In Forma Pauperis* Proceedings" to the Clerk of this Court in the envelope provided, within **FIFTEEN (15) DAYS** of the date of entry of this order. The Clerk is **DIRECTED** to provide two copies of the appropriate form to Plaintiff with his copy of this Order, along with a pre-addressed return envelope. Failure to provide the Bureau of Prisons with this authorization shall be grounds for dismissal of this case. FED.R.CIV.P. 41(b); *see generally Ladien v. Astrachan,* 128 F.3d 1051 (7th Cir. 1997); *Johnson v. Kamminga,* 34 F.3d 466 (7th Cir. 1994). However, Plaintiff will still be liable for the full filing fee for this action.

IT IS FURTHER ORDERED that if judgment is rendered against Plaintiff, and the judgment includes the payment of costs under Section 1915, Plaintiff will be required to pay the full amount of the costs, notwithstanding that his application to proceed *in forma pauperis* has been granted.

The Clerk of Court is **DIRECTED** to mail a copy of this Memorandum and Order to Plaintiff. Upon receipt of Plaintiff's signed consent form, the Clerk shall mail a copy of this Memorandum and Order to the Warden at USP-Hazelton, with an executed copy of the consent form.

IT IS SO ORDERED.

Dated: July 9, 2008.

s/ J. Phil Gilbert
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 08-cv-132-JPG**
	)	
UNITED STATES OF AMERICA, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

Plaintiff, an inmate at USP-Hazelton, brings this pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq.* Plaintiff seeks damages for alleged medical practice and negligence. This case is now before the Court for a preliminary review of the complaint pursuant to 28 U.S.C. § 1915A, which provides:

> (a) **Screening.**– The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
> (b) **Grounds for Dismissal.**– On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint–
>
> > (1) is frivolous, malicious, or fails to state a claim on which relief may be granted; or
> > (2) seeks monetary relief from a defendant who is immune from such relief.

28 U.S.C. § 1915A. An action or claim is frivolous if "it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). An action fails to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

THE COMPLAINT

Briefly, while confined at FCI-Greenville, Plaintiff alleges that he contracted a severe staphylococcus infection due to negligent and improper sterilization and hygiene practices in the prison laundry where he works. Plaintiff further claims that his infection was made worse through negligent diagnosis and treatment. As a result, Plaintiff spent three weeks in a hospital.

DISCUSSION

Upon careful review of the complaint, the Court finds that Plaintiff's claims against the United States of America should not be dismissed at this point in the litigation. The United States is the proper defendant in a FTCA action. *See* 28 U.S.C. § 2679(b).

Plaintiff's claims against the Bureau of Prisons, however, should be dismissed pursuant to 28 U.S.C. § 1915A. The Bureau of Prisons, as a federal agency, is not amenable to suit. *See FDIC v. Meyer*, 510 U.S. 471, 483-486 (1994).

DISPOSITION

IT IS HEREBY ORDERED that the Bureau of Prisons is **DISMISSE**D from the action, with prejudice.

The Clerk is **DIRECTED** to prepare a summons for the **UNITED STATES OF AMERICA**. The Clerk shall forward the summons, USM-285 forms submitted by Plaintiff, and sufficient copies of the complaint to the United States Marshal for service.

The Clerk is **FURTHER DIRECTED** to prepare a copy of the summons, a copy of the complaint, and a copy of this Order to be served by the United States Marshal on the **ATTORNEY GENERAL of the UNITED STATES**.

The United States Marshal is **DIRECTED** to serve the original summons and complaint on

the **UNITED STATES ATTORNEY for the SOUTHERN DISTRICT OF ILLINOIS**, and a copy of the summons and complaint on the **ATTORNEY GENERAL of the UNITED STATES**.

IT IS FURTHER ORDERED that Plaintiff shall serve upon the United States Attorney for the Southern District of Illinois, a copy of every further pleading or other document submitted for consideration by this Court. He shall include, with the original paper to be filed with the Clerk of the court, a certificate stating the date that a true and correct copy of any document was mailed to the United States Attorney. Any paper received by a district judge or magistrate which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

IT IS FURTHER ORDERED that pursuant to Local Rule 72.1(a)(2), this cause is referred to a United States Magistrate Judge for further pre-trial proceedings.

IT IS FURTHER ORDERED that this entire matter be referred to a United States Magistrate Judge for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *should all the parties consent to such a referral.*

IT IS SO ORDERED.

Dated: July 9, 2008.

s/ J. Phil Gilbert
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 08-cv-132-JPG-CJP
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Joseph W. Buechel's motion and notice to appointed counsel. Buuchel filed this document *pro se*, although he is represented by counsel. A litigant does not have a right to file his own documents when he is represented by counsel. *See Hayes v. Hawes*, 921 F.2d 100, 102 (7th Cir. 1990) (*per curiam*). "Representation by counsel and self-representation are mutually exclusive." *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992). So-called "hybrid representation" confuses and extends matters at trial and in other proceedings and, therefore, it is forbidden. *See United States v. Oreye*, 263 F.3d 669, 672-73 (7th Cir. 2001). The Court may strike as improper any such *pro se* filings. *See, e.g., United States v. Gwiazdzinski*, 141 F.3d 784, 787 (7th Cir. 1998). The Court hereby **ORDERS** that Buechel's motion/notice (Doc. 43) be **STRICKEN**.

IT IS SO ORDERED.
DATED: October 8, 2009

s/ J. Phil Gilbert
J. PHIL GILBERT
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 08-cv-132-JPG-CJP
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Joseph W. Buechel's appeal of Magistrate Judge Clifford J. Proud's July 16, 2009, order denying appointment of counsel (Doc. 38). The Court also considers two of Buechel's other filings (Docs. 39 & 41) which also address the appointment issue, and his motion for leave to appeal *in forma pauperis* (Doc. 40).

A district court reviewing a magistrate judge's decision on nondispositive issues should only modify or set aside that decision if it is clearly erroneous or contrary to law. See Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Accordingly, the Court will affirm Magistrate Judge Proud's decision unless his factual findings are clearly erroneous or his legal conclusions are contrary to law. *Id.* The Court may, however, *sua sponte* reconsider any matter determined by a magistrate judge. *Schur v. L.A. Weight Loss Ctrs., Inc.*, No. 07-3761, 2009 WL 2477642, * 5 (7th Cir. Aug. 14, 2009).

The Court has reviewed Magistrate Judge Proud's order and finds that it is not clearly erroneous or contrary to law. However, the Court finds that appointment of counsel is advisable in light of Buechel's limited abilities, his attempts to find counsel and the impediments that prevent him from doing so, and the requirement he obtain a physician's certificate of merit before proceeding on Count 2. Accordingly, the Court **VACATES** Magistrate Judge Proud's

July 16, 2009, order (Doc. 29) and **APPOINTS** J. Kevin McCall, Jenner & Block, LLC, 330 North Wabash Avenue, One IBM Plaza, 43d Floor, Chicago, Illinois 60611-7603, to represent Buechel in this action. Buechel's appeal of Magistrate Judge Proud's order (Doc. 38) and his two other filings (Docs. 39 & 41) are rendered **MOOT** by this order.

The Court further **ORDERS** that Buechel shall have up to and including October 23, 2009, to respond to the pending motion to dismiss (Doc. 33) and shall have up to and including December 11, 2009, to file an amended complaint adequately pleading Count 2, his medical negligence/malpractice claim. If the plaintiff fails to amend his pleading to adequately plead Count 2, the Court will dismiss Count 2 with prejudice.

Finally, Buechel's motion for leave to appeal *in forma pauperis* (Doc. 40) is **MOOT** in light of the Court of Appeals' September 14, 2009, order dismissing the appeal and waiving the appellate filing fee.

IT IS SO ORDERED.
DATED: September 22, 2009

s/ J. Phil Gilbert
J. PHIL GILBERT
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil No. **08-132-JPG**
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

ORDER

PROUD, Magistrate Judge:

Before the Court is plaintiff's motion to cancel the final pretrial conference set for May 10, 2010, and to reopen discovery to permit appointed counsel to secure expert testimony and pursue other information not gathered by plaintiff while he was proceeding pro se. **(Doc. 60).** The defendants have not filed an objection and, according to plaintiff, defense counsel has been cooperating with discovery efforts.

In recognition of the medical claim(s) at issue in this case and plaintiff's previous *pro se* status, and consistent with *Santiago v. Walls*, 2010 WL 1170654 (7th Cir. Mar. 29, 2010), reopening discovery is appropriate.

Plaintiff has submitted a proposed revised pretrial schedule, which is based on a distinction between "fact discovery" and "expert discovery"– a distinction not wholly recognized by Federal Rule of Civil Procedure 26. Nevertheless, resolution of discovery by October 29, 2010, is acceptable to the Court, in light of the fact that no additional dispositives are contemplated.

IT IS THEREFORE ORDERED that the subject motion **(Doc. 60)** is **GRANTED**. The final pretrial conference set for **May 10, 2010**, is **CANCELLED**., and the pretrial scheduling and discovery order controlling this case is amended as follows:

1. All discovery shall be completed by **October 29, 2010**; the parties should attempt to agree on interim discovery deadlines as necessary; any such agreement must be in writing if it is to be enforced by the Court.;

2. Expert witnesses should be identified and expert reports exchanged by **August 31, 2010**; any rebuttal experts and their respective reports shall be exchanged by **September 30, 2010**; and all experts shall be deposed by **October 29, 2010**;

3. The parties shall jointly submit a final pretrial order to the Court by **December 1, 2010**;

6. A final pretrial conference is set before U.S. Magistrate Judge Clifford J. Proud on **December 8, 2010, at 11:00 a.m.**

No further extensions will be granted.

IT IS SO ORDERED.

DATED: April 28, 2010

s/ Clifford J. Proud
CLIFFORD J. PROUD
U. S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil No. **08-132-JPG**
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

ORDER

PROUD, Magistrate Judge:

Before the Court is the parties joint "Agreed Protective Order." **(Doc. 64.)** According to the motion, the parties desire to protect "medical records and other documents of a confidential nature, " related to plaintiff and other inmates in the custody of the Bureau of Prisons. The proposed protective order is aimed at "material that is confidential, proprietary, or is otherwise to be protected from Public dissemination." The parties propose that they each be free to, in good faith, designate any matter as "confidential" during pretrial proceedings, subject to a subsequent court challenge.

The proposed protective order is problematic in several respects. In accordance with Federal Rule of Civil Procedure 26(c) and the dictates of *Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*, 178 F.3d 943 (7th Cir. 1999), and *Union Oil Company of California v. Leavell*, 220 F.3d 562 (7th Cir. 2000), the proposed protective order cannot be sanctioned by the Court.

As the Court of Appeals for the Seventh Circuit bluntly stated in *Union Oil Company of California v. Leavell:* "People who want secrecy should opt for arbitration. When they call on

the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. **220 F.3d at 567-568.** Nevertheless, in *Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*, it was recognized that the public's right to know "does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case." **178 F.3d 943, 945 (7th Cir. 1999).**

In the case at bar, plaintiff has placed his medical condition at issue, so it is not readily apparent why confidentiality is sought relative to plaintiff's medical records. However, the Court does appreciate that inmates who are not parties to this action should not be subjected to annoyance and embarrassment merely because their medical records may be relevant to plaintiff's case. With that said, the proposed protective order is drafted far too broadly, and the Court prefers to leave revision and redrafting to counsel of record. Furthermore, the parties may prefer to seek a qualified protective order, consistent with the provisions of the Health Insurance Portability and Accountability Act of 1996. ***See* 45 C.F.R. §§ 160.103 and 164.512(e).**

In any event, the Court notes that the subject motion was filed jointly and the proposed protective order was agreed to by all parties. The parties are free to agree to whatever protective measures they deem appropriate relative to information *not* destined to become a part of the judicial record– *without* the Court"s imprimatur. Federal Rule of Civil Procedure 29 permits parties to stipulate to such agreements without obtaining judicial approval. This Court's analysis and ruling only pertains to information slated for "umbrella" protection, *with* the Court's imprimatur.

IT IS THEREFORE ORDERED that the subject motion **(Doc. 64)** is **DENIED**.

IT IS SO ORDERED.

DATED: June 24, 2010

s/ Clifford J. Proud
CLIFFORD J. PROUD
U. S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil No. **08-132-JPG**
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

ORDER

PROUD, Magistrate Judge:

Before the Court is plaintiff Joseph W. Buechel's motion to compel the defendant to produce:

1. Meeting minutes, reports and other documents from FCI-Greenville's Infection Control meetings;

2. Meeting minutes, reports and other documents from FCI-Greenville's Quality Improvement Program regarding infection control policies; and

3. Documents relating to evaluations of FCI-Greenville's infection control or sanitation measures made by the Bureau of Prisons (BOP).

(Doc. 69.) Plaintiff contends the requested information is relevant to his claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, that plaintiff contracted Methicillin-resistant Stahylococcus Aureus infection (MRSA) due to the defendant's negligence.

The defendant asserts that:

1. The requested information and documents fall beyond the claims as framed by the administrative claim and the complaint, which has not been amended by newly appointed counsel;

2. The requested information and documents are privileged under the Illinois Medical Studies Act, 735 ILCS 5/8-2101 *et seq.*;

3. Barring consent or a court order, the Privacy Act, 5 U.S.C. § 552a, forbids disclosure of the requested information and documents; and

4. Institutional security concerns militate against disclosure.

(Doc. 73.)

Plaintiff counters that the requested information and documents are relevant to the negligence claim; and the Illinois Medical Studies Act is inapplicable to a FTCA claim. (Docs. 69 and 74.)

As a preliminary matter, the defendant's view of discovery is too narrow and inconsistent with Federal Rule of Civil Procedure 26(b)(1). The Supreme Court has interpreted relevance broadly to include any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. *Oppenheimer Fund, Inc., v. Sanders*, 437 U.S. 340, 351 (1978). Furthermore, in accordance with *Santiago v. Walls*, 599 F.3d 749 (7th Cir. 2010), counsel was appointed to ensure that this action was properly litigated because plaintiff was found incapable of adequately representing himself; therefore, plaintiff's appointed counsel will not now be strictly constrained by the original pleadings. With that said, the fact that information may be discoverable does not necessarily mean that it will ultimately be admissible, or that the scope of the complaint is being broadened. Consistent with the broad view of relevance for purposes of discovery, the relevant time period is 2005-2007, capturing the year before and the year following plaintiff's infection with MRSA. Plaintiff has not exceeded the parameters described in *Oppenheimer Fund, Inc., v. Sanders*, and it is axiomatic that BOP and FCI-Greenville's infection control programs and monitoring are relevant to whether plaintiff contracted MRSA due to defendant's negligence, and the applicable infection control standards.

Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The FTCA makes the United States liable for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, *if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred*." 28 U.S.C. s 1346(b) (emphasis added); *see also*, 28 U.S.C. § 2672. Thus, at first blush it would appear that state law would appear to control the privilege issue. However, the legislative history of Rule 501 specifically addresses the characterization of state law in such a situation:

> In nondiversity jurisdiction civil cases, federal privilege law will generally apply. In those situations where a federal court adopts or incorporates state law to fill interstices or gaps in federal statutory phrases, the court generally will apply federal privilege law .... When a federal court chooses to absorb state law, it is applying the state law as a matter of federal common law. Thus, state law does not supply the rule of decision (even though the federal court may apply a rule

derived from state decisions), and state privilege law would not apply.

Fed.R.Evid. 501, Committee Notes re 1974 Enactment, Conf.Rep. No. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7101. Therefore, federal, not state law controls the privilege issue. Nevertheless, " '[a] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.'" *Memorial Hospital for McHenry County v. Shadur,* 664 F.2d 1058, 1061 (7th Cir.1981) (quoting *U.S. v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976)).

In doing so, the following principles should be considered:

> First, because evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact-finding function, they are not favored and, where recognized, must be narrowly construed. Second, in deciding whether the privilege asserted should be recognized, it is important to take into account the particular factual circumstances of the case in which the issue arises. The court should "weigh the need for truth against the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case."

Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058, 1061-1062 (7th Cir. 1981) (quoting *Ryan v. Commissioner of Internal Revenue*, 568 F.2d 531, 543 (7th Cir. 1977); other internal citations omitted).

The Illinois Medical Studies Act (MSA), 735 ILCS 5/8-2101 *et seq.*, protects the records, reports, notes, and the like, of hospitals, hospital committees, medical societies, and other review groups used in the course of internal quality control or medical study for the purpose of improving morbidity and mortality, or for improving patient care. 735 ILCS 5/8-2101. However, original records pertaining to patients are not covered under the Act. 735 ILCS 5/8-2101. Defendant's Privilege Log relative to Infection Control meetings, and Quality Improvement Program matters (Doc. 69-6) is inadequate to enable the Court to discern the applicability of the privilege. Federal Rule of Civil Procedure 26(b)(5)(A)(ii) requires that the nature of the documents not produced be described in a manner that, without revealing the purportedly privileged matter, will enable others to assess the claim of privilege. Defendant offers no such description, and the Court will not assume that the information and documents withheld fall under the ambit of the act. Therefore, in the interest of expedience, the Court will conduct an in camera review of the information and documents listed in defendant's Privilege Log relative to Infection Control meetings, and Quality Improvement Program matters (Doc. 69-6).

Defendant's Privilege Log 4 relative to FCI-Greenville's infection and sanitation measures for 2006 does indicate that the records relate to "operational review," and are protected

primarily by the "Deliberative Process & Self Critical Analysis" privilege. (Doc. 69-7.) Plaintiff observes that the Court of Appeals for the Seventh Circuit has not recognized this novel privilege. *See Burden-Meeks v. Welch*, 319 F.3d 897, 901 (7th Cir. 2003). The Supreme Court has stated that privileges are "not lightly created nor expansively construed, for they are in derogation of the search for truth." *U.S. v. Nixon*, 418 U.S. 683, 709 (1974). In support of applying a self-critical analysis privilege the defendant has only cited a non-precedential District Court order, *Tice v. American Airlines, Inc.*, 192 F.R.D. 270 (N.D.Ill. 2000). In *Tice*, the analysis was specifically premised upon an assumption that the federal common law recognized such a privilege. Given that the privilege is not recognized in the Seventh Circuit, and that defendant did not make any argument for the adoption of such a privilege, the Court will decline this opportunity to expand the federal common law. Therefore, the "Deliberative Process & Self Critical Analysis" privilege will not protect the information and documents listed in defendant's Privilege Log 4 relative to FCI-Greenville's infection and sanitation measures for 2006.

Relative to defendant's Privilege Log 4 relative to FCI-Greenville's infection and sanitation measures for 2006 (Doc. 69-7), defendant claims protection under the Privacy Act and due to security concerns. By separate order, and pursuant to the Privacy Act, the Court has authorized a protective order covering:

> (1) the log created by the Health Services department at FCI-Greenville containing the names of all inmates who testified positive for MRSA in the year 2006;
>
> (2) the complete medical records of inmate Joseph Hansen for the relevant time period; and
>
> (3) records relating to the work history and cell assignments of non-party inmates at FCI-Greenville during the relevant time period

Based on the information before the Court, it does not readily appear that there is any overlap with the information and documents defendant claims are privileged, but it is entirely possible. Therefore, the Court is prepared to issue a similar protective order to protect the information and documents listed in defendant's Privilege Log 4 relative to FCI-Greenville's infection and sanitation measures for 2006 (Doc. 69-7).

Insofar as the defendant argues that institutional safety militates against disclosure of information regarding exposure to MRSA within FCI-Greenville, the aforementioned protective order should keep such information confidential. Similarly, the use of pseudonyms or other identifiers can be used to minimize the possibility of conflict within the institution. At this juncture, the Court is not persuaded that the defendant's fears relating to institutional security and non-party privacy issues should trump plaintiff's need to conduct discovery in this case.

IT IS THEREFORE ORDERED that plaintiff Joseph W. Buechel's motion to compel the defendant to produce:

1. Meeting minutes, reports and other documents from FCI-Greenville's Infection Control meetings;

2. Meeting minutes, reports and other documents from FCI-Greenville's Quality Improvement Program regarding infection control policies; and

3. Documents relating to evaluations of FCI-Greenville's infection control or sanitation measures made by the Bureau of Prisons.

(Doc. 69) is **GRANTED IN PART AND RULING IS RESERVED IN PART**. More specifically, the motion is **GRANTED** with respect to the third enumerated category, defendant's Privilege Log 4 relative to documents relating to evaluations of FCI-Greenville's infection control or sanitation measures made by the Bureau of Prisons (Doc. 69-7). A protective order in accordance with the Privacy Act will issue by separate order. Ruling on the other two categories, Infection Control meetings and the Quality Improvement Program, is **RESERVED**.

IT IS FURTHER ORDERED that on or before **September 3, 2010**, the defendant shall produce to the Court for in camera inspection all information and documents listed in defendant's Privilege Log relative to Infection Control meetings, and Quality Improvement Program matters (Doc. 69-6). The information and documents shall be produced in paper form,

not via the CM-ECF system. After reviewing the information and documents, the Court will issue a final ruling on the remaining aspects of plaintiff's motion to compel (Doc. 69).

IT IS SO ORDERED.

DATED: AUGUST 18, 2010

s/ Clifford J. Proud

CLIFFORD J. PROUD
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil No. **08-132-JPG**
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

ORDER

PROUD, Magistrate Judge:

Before the Court is the parties' "Agreed Motion to Extend the Date by Which All Discovery Must be Completed." (Doc. 71.) The parties are concerned that a pending discovery dispute over the disclosure of certain information will stall discovery, particularly expert discovery. The current deadline for exchanging expert reports is August 31, 2010; the discovery cutoff is October 29, 2010; and a final pretrial conference is set December 8, 2010. The parties request that all of the deadlines and settings be extended by approximately one month.

By separate order the Court has partially resolved the parties' discovery dispute. The remaining documents in dispute will be reviewed in camera and the remaining issues resolved by approximately September 10, 2010. Although the Court is of the opinion that the parties could complete all discovery and by October 29, 2010, in appreciation of the scheduling difficulties involved with expert witnesses, the pretrial deadlines and settings will be extended as requested.

The parties are reminded that, without Court approval, they may modify the discovery deadlines set in the Joint Report by written stipulation, except that they may *not* modify a date if such modification would impact the deadline for filing dispositive motions, or the date of any

court appearance. Fed.R.Civ.P. 29.

IT IS THEREFORE ORDERED that the subject motion (Doc. 71) is **GRANTED**; the following schedule shall control:

1. Expert witnesses shall be identified and reports exchanged by **October 5, 2010**;
2. Rebuttal experts shall be identified and their reports exchanged by **November 9, 2010**;
3. All discovery shall be completed by **December 8, 2010**;
4. All dispositive motions shall be filed on or before **January 10, 2011**;
5. A final pretrial conference is set for **January 27, 2011, at 10:00 a.m.**; the parties shall submit a joint proposed final pretrial order on or before **January 20, 2011**.

IT IS SO ORDERED.

DATED: AUGUST 18, 2010

s/ Clifford J. Proud

CLIFFORD J. PROUD
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-CV-00132-JPG-CJP
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

By separate order the Court has ruled that documents relating to evaluations of FCI-Greenville's infection control or sanitation measures made by the Bureau of Prisons is not privileged or otherwise protected from disclosure, and that defendant must produce said information to plaintiff Joseph W. Buechel. Therefore, in accordance with the Privacy Act, 5 U.S.C. § 552a, a protective order is warranted.

IT IS THEREFORE ORDERED that, in accordance with the Privacy Act, 5 U.S.C. § 552a, for good cause shown, and to ensure that material is kept confidential and is not used for any purpose other than discovery and trial preparation in this case, the parties shall comply with the following:

1. This Order shall apply to and govern the handling of all documents/electronic documents, deposition testimony and other information, including all copies, excerpts, and summaries thereof (hereinafter referred to as "Material") that is designated "Confidential" in accordance with paragraph 2 of this Order, and is produced, given or filed during discovery and other proceedings prior to trial of this action. This Order shall not apply at any trial of this

matter and for that purpose, to the extent necessary, issues of confidentiality at trial will be addressed separately.

2. The following Material shall be designated "Confidential":

Documents relating to evaluations of FCI-Greenville's infection control or sanitation measures made by the Bureau of Prisons (see Defendant's Privilege Log 4 (Doc. 69-7)).

3. Material designated "Confidential" shall be maintained in confidence by the attorneys for the party to whom such Material is produced and shall not be produced to Plaintiff or disclosed in writing to Plaintiff, and will not be disclosed to any other person except:

(a) the Court and its officers;

(b) counsel;

(c) employees of counsel; and

(d) third parties engaged by counsel of the parties to assist in this litigation, deponents, or hearing witnesses, provided that any such third party, deponent, or hearing witness has (i) read this order and (ii) first been requested to sign an undertaking to comply with this Order, which counsel will use all good faith efforts to obtain; such third parties do not include family members of the parties. In the event that a third party witness refuses to sign such undertaking, the third party witness will not be allowed to take custody or maintain any such document or copy thereof, except for purposes of reviewing a deposition transcript prior to signature.

4. Any deposition testimony or written discovery related to the records designated "Confidential" pursuant to Paragraph 2 shall also be designated "Confidential."

5. Material produced without the designation of "Confidential" may be so designated subsequent to production when the producing party failed to make such designation at the time of production through inadvertence or error, provided correction occurs within thirty days of discovery of the inadvertence or error and the party making the correction notifies the recipient of said material by specifying, by document number, which documents are now deemed to be covered by this Order.

6. Nothing herein shall prohibit either party from seeking an Order that designated Material is not entitled to "Confidential" treatment or that otherwise affects the treatment of Material.

7. Other than as provided in paragraph 5 above, no designation of "Confidential" shall be effective unless there is placed or affixed on such Material a "CONFIDENTIAL" marking. To the extent necessary, the parties may file redacted copies eliminating the confidential material with the Court.

8. All Material designated as "Confidential" shall be used solely for the prosecution or defense of the claims in this action and shall not be used for any business, commercial, competitive, personal or other purpose, except in response to a court order, order of an administrative tribunal of competent jurisdiction, valid subpoena, or search warrant. The parties will notify each other of receipt of such orders, subpoenas, or warrants within two business day's receipt by counsel of same by forwarding a copy by electronic or facsimile means and by U.S. Mail to the counsel listed below. With respect to any such order, subpoena or warrant, no party shall respond to such order, subpoena or warrant in a time frame that is earlier than the time frame for compliance set forth in the order, subpoena or warrant.

9. At the final conclusion of this case (including exhaustion of appeals) all Material designated as "Confidential" produced pursuant to discovery, and all copies thereof, shall within 60 days of the conclusion of the case, including by settlement and after the time for all appeals have expired, be returned or, if the other party shall consent, be destroyed (by shredding or other similar means) and opposing counsel shall certify in writing that such Material has been destroyed. After this return, destruction and certification, or the time period referred to in this period has expired, the notice obligations contained in paragraph 8 will expire.

10. If counsel for a party desires to file in the public record in this action any "Confidential" Material, that counsel must, reasonably in advance of the date for filing, attempt to confer with counsel for all other parties and, if unsuccessful in so conferring, certify that he or she made such attempt and the details of such attempt. The purpose of such advance consultation is to permit any party to move to file such Material under seal; absent such a motion, this Order does not prohibit the filing of such Material with the Court.

11. The restrictions set forth in any of the preceding paragraphs shall not apply to Material that:

(a) was, is, or became public knowledge in a lawful manner other than by violation of this Order;

(b) is acquired by the non-designating party from a third party having the right to disclose such Material; or

(c) was lawfully possessed by the non-designating party prior to the entry by the Court of this Order.

12. This Order shall remain in full force and effect after the termination of this litigation, or until canceled or otherwise modified by order of the Court.

IT IS SO ORDERED.

DATED: AUGUST 18, 2010

s/ Clifford J. Proud

CLIFFORD J. PROUD
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-CV-00132-JPG-CJP
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

Before the Court is plaintiff's motion to extend the protective order previously entered in this case to cover additional information and materials. (Doc. 86.) For good cause shown, the subject motion is **GRANTED**.

IT IS THEREFORE ORDERED that, to ensure that such material is kept confidential and is not used for any purpose other than discovery and trial preparation in this case, the parties shall comply with the following Protective Order:

1. This Order shall apply to and govern the handling of all documents/electronic documents, deposition testimony and other information, including all copies, excerpts, and summaries thereof (hereinafter referred to as "Material") that is designated "Confidential" in accordance with paragraph 2 of this Order, and is produced, given or filed during discovery and other proceedings prior to trial of this action. This Order shall not apply at any trial of this matter and for that purpose, to the extent necessary, issues of confidentiality at trial will be addressed separately.

2. The following Material shall be designated "Confidential": (1) the log created by the Health Services department at FCI-Greenville containing the names of all inmates who testified positive for MRSA in the year 2006; (2) the medical records of inmate Joseph Hansen; (3) records relating to the work history and cell assignments of non-party inmates at FCI-Greenville; (4) for all FCI-Greenville inmates who tested positive for a Methicillin-resistant *Staphylococcus aureus* ("MRSA") infection in 2006, all documents showing the antibiotic susceptibilities of the inmates' MRSA infection; (5) for all FCI-Greenville inmates who tested positive for a MRSA infection in 2006 and lived in the same housing unit as Joseph Buechel, all appointment notes or records of examination relating to treatment the inmate received at FCI-Greenville in 2006 for MRSA or wounds later determined to be infected with MRSA bacteria.

3. Material designated "Confidential" shall be maintained in confidence by the attorneys for the party to whom such Material is produced and shall not be produced to Plaintiff or disclosed in writing to Plaintiff, and will not be disclosed to any other person except:

(a) the Court and its officers;

(b) counsel;

(c) employees of counsel; and

(d) third parties engaged by counsel of the parties to assist in this litigation, deponents, or hearing witnesses, provided that any such third party, deponent, or hearing witness has (i) read this order and (ii) first been requested to sign an undertaking to comply with this Order, which counsel will use all good faith efforts to obtain; such third parties do not include family members of the parties. In the event that a third party witness refuses to sign such undertaking, the third party witness will not be allowed to take custody or maintain any such document

or copy thereof, except for purposes of reviewing a deposition transcript prior to signature.

4. Any deposition testimony or written discovery related to the records designated "Confidential" pursuant to Paragraph 2 shall also be designated "Confidential."

5. Material produced without the designation of "Confidential" may be so designated subsequent to production when the producing party failed to make such designation at the time of production through inadvertence or error, provided correction occurs within thirty days of discovery of the inadvertence or error and the party making the correction notifies the recipient of said material by specifying, by document number, which documents are now deemed to be covered by this Order.

6. Nothing herein shall prohibit either party from seeking an Order that designated Material is not entitled to "Confidential" treatment or that otherwise affects the treatment of Material.

7. Other than as provided in paragraph 5 above, no designation of "Confidential" shall be effective unless there is placed or affixed on such Material a "CONFIDENTIAL" marking. To the extent necessary, the parties may file redacted copies eliminating the confidential material with the Court.

8. All Material designated as "Confidential" shall be used solely for the prosecution or defense of the claims in this action and shall not be used for any business, commercial, competitive, personal or other purpose, except in response to a court order, order of an administrative tribunal of competent jurisdiction, valid subpoena, or search warrant. The parties will notify each other of receipt of such orders, subpoenas, or warrants within two business day's receipt by counsel of same by forwarding a copy by electronic or facsimile means and by U.S.

Mail to the counsel listed below. With respect to any such order, subpoena or warrant, no party shall respond to such order, subpoena or warrant in a time frame that is earlier than the time frame for compliance set forth in the order, subpoena or warrant.

9. At the final conclusion of this case (including exhaustion of appeals) all Material designated as "Confidential" produced pursuant to discovery, and all copies thereof, shall within 60 days of the conclusion of the case, including by settlement and after the time for all appeals have expired, be returned or, if the other party shall consent, be destroyed (by shredding or other similar means) and opposing counsel shall certify in writing that such Material has been destroyed. After this return, destruction and certification, or the time period referred to in this period has expired, the notice obligations contained in paragraph 8 will expire.

10. If counsel for a party desires to file in the public record in this action any "Confidential" Material, that counsel must, reasonably in advance of the date for filing, attempt to confer with counsel for all other parties and, if unsuccessful in so conferring, certify that he or she made such attempt and the details of such attempt. The purpose of such advance consultation is to permit any party to move to file such Material under seal; absent such a motion, this Order does not prohibit the filing of such Material with the Court.

11. The restrictions set forth in any of the preceding paragraphs shall not apply to Material that:

(a) was, is, or became public knowledge in a lawful manner other than by violation of this Order;

(b) is acquired by the non-designating party from a third party having the right to disclose such Material; or

(c) was lawfully possessed by the non-designating party prior to the entry by the Court of this Order.

12. This Order shall remain in full force and effect after the termination of this litigation, or until canceled or otherwise modified by order of the Court.

IT IS SO ORDERED.

DATED: November 30, 2010

s/ Clifford J. Proud
CLIFFORD J. PROUD
U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL	)	
	)	
Plaintiff,	)	
	)	**Case No. 08-cv-132-JPG-PMF**
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

FRAZIER, Magistrate Judge:

Before the Court is plaintiff's motion to strike affidavits of Melvin A. Barbee, Dr. Paul Harvey, and Mary K. Hueter (Doc. No. 93). These affidavits were offered in support of the United States of America's motion for summary judgment (Doc. No. 90-1, pp. 23-30; 46-47). The motion is opposed (Doc. No. 104). A reply is on file (Doc. No. 105).

Plaintiff Joseph W. Buechel has been represented by counsel since October, 2009. Initial disclosures served and supplemented in April, 2010, did not mention Melvin A. Barbee, Dr. Paul Harvey, or Mary K. Hueter as potential witnesses (Doc. Nos. 93-5, 93-6). Pursuant to Rule 37, information from these witnesses may not be used as evidence in support of the summary judgment request unless the failure to disclose was substantially justified or is harmless. Fed. R. Civ. P. 37(c)(1). In addition to or instead of this sanction, the Court may order payment of reasonable expenses resulting from the failure to disclose or impose other appropriate sanctions. *Id.*

Defendant suggests that the failure to disclose Barbee, Harvey and Hueter as potential witnesses is harmless. The sanction of exclusion is automatic and mandatory unless the harmless nature of the omission is demonstrated. *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996).

This tort claim litigation is based on acts and omissions allegedly causing Joseph W. Buechel to contract a staph infection from inmate Hanson during their confinement at FCI-Greenville. In particular, Buechel claims that Hanson was allowed to return to his job assignment after being diagnosed with a staph infection. Buechel's theory is that infection was transmitted when Hanson shared tools with Buechel in the course of a shared work assignment in the prison laundry. Buechel alleges that he was diagnosed and treated for a form of staph infection known as MASA (Doc. No. 1).

Discovery was extensive. Defense counsel did not formally or informally disclose Barbee, Harvey, or Hueter as potential witnesses. Barbee manages safety and occupational health issues for facilities in the Bureau of Prisons' north-central region. He is responsible for planning, organization, and coordination of programs. He also provides staff assistance, technical advice, and evaluates the adequacy and effectiveness of occupational and environmental health practices and procedures. In his affidavit, Barbee describes bureau policies and practices on topics of sanitation, housekeeping, cleaning, and hygiene. He also relates that FCI-Greenville met mandatory sanitation and hygiene standards set by the American Corrections Association for the years 2005-2008, and again in 2010.

Harvey is the medical director for the bureau's north-central region. He identifies regulations and policies deemed generally applicable to management of infectious diseases, and offers his opinion that more specific provisions would be impracticable. Harvey defends as sensible the BOP's policy of not specifically addressing each type of infectious disease. He outlines clinical practice guidelines developed by the bureau but not adopted as official policy, and opines that certain work/housing/programming restrictions are clinical decisions requiring the exercise of

medical judgment. He also describes MASA colonization, symptoms, transmission, and infection, as well as the effect of isolation. Harvey reviewed microbiology reports for the plaintiff and inmate James Hanson, and offers his opinions about cultures, carrier status, contraction, and causation.

Hueter is a former FCI-Greenville records office supervisor. She reviewed entries into the SENTRY database and drew conclusions regarding particular inmate housing and work assignments.

The Court finds that the defendant's failure to disclose Barbee, Harvey, and Hueter as potential witnesses is not harmless. Suggestions that their testimony is commonly known or tangential to the facts are not persuasive. Discovery closed in December, 2010, before information and opinions from these witnesses were tendered as evidence. Plaintiff had no meaningful opportunity to explore the motive, background, or qualifications of these witnesses or to evaluate the grounds supporting their testimony, opinions, and conclusions. For these reasons, the motion to strike (Doc. No. 93) is GRANTED. The undersigned has not considered evidence from Melvin A. Barbee, Dr. Paul Harvey, or Mary K. Hueter in evaluating the summary judgment motion.[1]

SO ORDERED: November 15, 2011 .

S/Philip M. Frazier
PHILIP M. FRAZIER
UNITED STATES MAGISTRATE JUDGE

[1] In a reply filed on May 23, 2011, defendant suggested that certain portions of Buechel's affidavit should be stricken (Doc. No. 113, pp. 2-3). Because sur-reply briefs are not allowed, Buechel did not have a fair opportunity to respond to this request. It is not considered. SDIL-LR 7.1(c).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 08-cv-132-JPG-PMF
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the Court on the Report and Recommendation ("Report") (Doc. 116) of Magistrate Judge Philip M. Frazier recommending that the Court deny the defendant United States of America's motion for summary judgment (Doc. 90) and on the defendant's appeal (Doc. 123) of Magistrate Judge Frazier's order granting plaintiff Joseph W. Buechel's motion to strike three affidavits offered in support of the summary judgment motion (Doc. 115). The Court also considers the United States' motion for leave to amend its answer (Doc. 124).

This action stemmed from Buechel's diagnosis of methicillin-resistant *Staphylococcus aureus* ("MRSA") after being housed at the Federal Correctional Institute at Greenville, Illinois ("Greenville"). In his complaint, Buechel believes the defendant was negligent in its biohazard safety practices at Greenville (Count 1). He believes those practices allowed inmate Joe Hansen, who had been diagnosed with a staph infection, to return to his job with Buechel and pass him tools that Buechel believes were contaminated with a staph virus. He believes that his exposure to the staph virus on the tools caused him to contract MRSA. The Court has dismissed Buechel's medical malpractice claim (Count 2) based on his diagnosis and treatment, but his negligence claim under the Federal Tort Claims Act ("FTCA") remains. The United States has moved for summary judgment on that claim.

I. Appeal of Order Striking Affidavits

In conjunction with issuing the Report, Magistrate Judge Frazier granted Buechel's motion to strike the affidavits of (1) Melvin A. Barbee, a Bureau of Prisons' ("BOP") safety and occupational health manager for the BOP's north-central region, the geographical area covering the prison in which Buechel was incarcerated at the relevant time, (2) Dr. Paul Harvey, the BOP medical director for the north-central region, and (3) Mary K. Hueter, the records office supervisor at Greenville, which the United States offered in support of its motion for summary judgment (Doc. 93). Magistrate Judge Frazier found that, since these witnesses were not disclosed in the United States' initial disclosures pursuant to Federal Rule of Civil Procedure 26, they could not be used as evidence in support of summary judgment unless the failure to disclose them was substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1). Magistrate Judge Frazier found the United States had not shown the failure to disclose these witnesses was harmless in light of the fact that their testimony was not commonly known or tangential to the relevant facts and Buechel had no meaningful opportunity to conduct discovery on these witnesses before the discovery deadline (Doc. 115).

The United States appeals (Doc. 123) Magistrate Judge Frazier's order, arguing that Rule 26 did not require initial disclosure of the three undisclosed witnesses because they did not have any personal knowledge of Buechel's specific situation and were giving testimony about general BOP policies and interpretation of BOP documents previously provided to Buechel. The United States believed they where not therefore "likely to have discoverable information." *See* Fed. R. Civ. P. 26(a)(1)(A)(i). It argues that the disclosure standard used by Magistrate Judge Frazier would require disclosure of every employee with knowledge of BOP practices, an impracticable

or impossible requirement. It further argues the sanction imposed by Magistrate Judge Frazier was overly harsh and that he should have instead allowed the plaintiff to conduct the additional discovery he needed.

In response to the United States' objection (Doc. 126), Buechel argues that the failure to disclose the three witnesses was clearly not harmless in light of the fact that their testimony comprises a substantial part of the evidentiary support for the summary judgment motion. He also points out that, although the United States claims the undisclosed witnesses do not have personal knowledge of Buechel's situation, they offer testimony about issues relevant to Buechel's specific situation. He further notes that Rule 26(a)(1)(A)(i) does not require disclosure of every person likely to have discoverable knowledge but only those a party may use to support his claim. Buechel also argues the affidavits should have been stricken for reasons not given in the Report.

A district court reviewing a magistrate judge's decision on nondispositive issues should only modify or set aside that decision if it is clearly erroneous or contrary to law. See Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Accordingly, the Court may affirm Magistrate Judge Frazier's decision unless his factual findings are clearly erroneous or his legal conclusions are contrary to law. *Id.* The Court may also *sua sponte* reconsider any matter determined by a magistrate judge. *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 760 (7th Cir. 2009).

Magistrate Judge Frazier's decision to strike the affidavits of the three undisclosed witnesses was not clearly erroneous or contrary to law. Rule 26(a)(1)(A)(i) requires disclosure of witnesses with discoverable information that a party may use to support its case. The United States has used the witnesses to support its case, and they have given testimony relevant to

Buechel's claims. Thus, Rule 26(a)(1)(A)(i) requires disclosure. Furthermore, the United States has failed to show Buechel has not been harmed by the non-disclosure. Because the witnesses were not disclosed, Buechel was unable to conduct discovery about their testimony and was unprepared to counter certain aspects of the United States' summary judgment motion. Finally, the Court will not *sua sponte* reconsider this matter. However, in the interest of resolving cases on the merits rather than on technical issues and pursuant to its authority under Rule 37(c)(1)(A) and (C), the Court would entertain a motion by the United States for leave to supplement its disclosures out of time and a motion by Buechel to reopen discovery at the defendant's expense as to the three witnesses so that they may be used as witnesses at trial.

For these reasons, the Court will affirm Magistrate Judge Frazier's order (Doc. 115) granting Buechel's motion to strike (Doc. 93) and will overrule the United States' objection to that order (Doc. 123).

II. Report and Recommendation

In the Report, Magistrate Judge Frazier makes a number of discrete recommendations underlying his final recommendation to deny summary judgment:

- Reject as premature the United States' assertion that it is entitled to summary judgment on the grounds that Buechel failed to exhaust his administrative remedies before filing suit. The United States has not pled the failure to exhaust as an affirmative defense in its answer;

- Reject the United States' suggestion that allegations regarding the restrictions on Hansen in light of his medical condition should be stricken from consideration of the remaining negligence claim;

- Reject the United States' contention that there is no evidence from which a reasonable jury could find Buechel contracted MRSA from Hansen through their work contact. The testimony of Robert B. Greifinger, M.D., Buechel's expert witness, is sufficient to create a genuine issue of material fact and is not without sufficient foundation or patently incredible; and

- Reject as premature the United States' assertion that it is entitled to summary judgment on the grounds that the discretionary function exception to the FTCA's waiver of sovereign immunity deprives the Court of jurisdiction. The United States has not pled the discretionary function exception as an affirmative defense in its answer;

The United States has objected (Doc. 120) to each of Magistrate Judge Frazier's discrete recommendations as well as to his final recommendation to deny the summary judgment motion. Buechel has responded to the United States' objection (Doc. 125).

The Court may accept, reject or modify, in whole or in part, the findings or recommendations of the magistrate judge in a report and recommendation. Fed. R. Civ. P. 72(b)(3). The Court must review *de novo* the portions of the report to which objections are made. *Id.* "If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error." *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999). The Court addresses each recommendation in turn.

A. Failure to Exhaust

The United States faults the Report for finding the United States had waived the defense of failure to exhaust administrative remedies. It argues that Buechel was on notice it was asserting this defense because it had done so in a motion to dismiss, which was denied as an improper successive motion, and because Buechel pursued facts relevant to the issue in discovery and suffered no prejudice from the United States' failure to plead the defense. It notes that the failure to plead an affirmative defense works a forfeiture only if the plaintiff is harmed by the delay in asserting the defense. *Matthews v. Wisconsin Energy Corp.*, 642 F.3d 565, 570 (7th Cir. 2011).

Magistrate Judge Frazier did not make that recommendation that the Court find the

United States waived the defense of failure to exhaust. Instead, he found the defense was premature because it was not pled in the answer. The United States was clearly aware of the defense at the time it filed its answer because it had already filed a motion to dismiss based on that defense, yet it did not include it. It was also made aware of this deficiency in the Report issued November 15, 2011. However, instead of acting immediately to cure the omission, the United States waited until January 18, 2012, to seek leave to amend the answer to add exhaustion as an affirmative defense. This did not satisfy the United States' duty to raise the defense in a timely manner once the defense became reasonably apparent by promptly moving for leave to amend its answer. *See Venters v. City of Delphi*, 123 F.3d 956, 967-68 (7th Cir. 1997) (citing *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987); *Home Depot, Inc. v. Guste*, 773 F.2d 616, 621 n. 4 (5th Cir. 1985)).

The Report's decision not to address this affirmative defense in the summary judgment context before it was raised in the answer was correct and in line with *Jackson v. Rockford Housing Authority*, 213 F.3d 389 (7th Cir. 2000), a case cited by the United States in support of its position. In *Jackson*, the defendant moved for summary judgment on the grounds that the statute of limitations had expired, but it had not pled the statute of limitations as an affirmative defense in its answer. *Id.* at 392. There, the court allowed the defendant to amend its answer to assert the defense, then granted the summary judgment motion. *Id.* The Court of Appeals praised the district court judge for protecting the plaintiff's rights by implementing this two-step procedure:

> [T]he district court here was scrupulous in protecting [the plaintiff's] rights. It did not . . . accept a summary judgment motion at odds with the answer. It forced [the defendant] to request leave to amend the complaint. It forced [the defendant] to brief that motion. It gave [the plaintiff] several days to respond to [the

> defendant's] motion. And it gave [the plaintiff] the opportunity to conduct additional discovery in order to produce facts in support of his opposition to the motion.

Id. at 393. Here, the United States has moved for leave to amend its complaint to add the affirmative defense, the motion has been fully briefed, and it appears the parties have done sufficient discovery to adequately address the issue, which they have briefed at least twice already. It is perfectly appropriate to require the defendant to amend the answer before the Court addresses the issue on summary judgment.

Even if the Court were to consider the exhaustion issue in the summary judgment context, it would not enter summary judgment on that basis. An FTCA plaintiff must first present his claim to the appropriate federal agency and cannot file a suit until the agency has made a final disposition of the claim. 28 U.S.C. § 2675(a); *see McNeil v. United States*, 508 U.S. 106, 113 (1993); *Palay v. United States*, 349 F.3d 418, 425 (7th Cir. 2003). In the case of a personal injury of the kind Buechel alleges, "a claim shall be deemed to have been presented when a Federal agency receives from a claimant . . . an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for . . . personal injury . . . alleged to have occurred by reason of the incident." 28 C.F.R. § 14.2(a). The claim form need not specify the legal theory upon which it rests, but it must set forth enough facts to alert a legally sophisticated reader to the presence of the claim. *Palay*, 349 F.3d at 425 (citing *Murrey v. United States*, 73 F.3d 1448, 1452 (7th Cir. 1996)). A claim form is considered to have presented "any cause of action fairly implicit in the facts." *Murrey*, 73 F.3d at 1452; *accord Palay*, 349 F.3d at 426. In deciding what claims were presented in the claim form, the Court must construe the claim form generously in favor of the claimant. *Palay*,

349 F.3d at 425-26 (citing *Murrey*, 73 F.3d at 1451-52).

Liberally construing the complaint, Buechel alleges in Count 1 that Greenville personnel are not implementing sufficient measures to prevent the spread of infectious disease and that, as a consequence, Hansen was allowed to work while ill with a staph infection and to transmit the pathogen to Buechel by passing tools to him. This cause of action may rely on a number of theories about why Greenville personnel were negligent including, but not limited to, the fact that Hansen was allowed to work while sick and that the tools used by Hansen were not cleaned sufficiently.

In the section of Buechel's administrative claim form designated for describing the "nature and extent" of his injury, he complained that he had:

> Caught Staph Infestion [sic] from an INMATE JOE HANSON [sic] who works in CMS, wherein the institution failed to quaratine [sic] Hanson to prevent tranmittal [sic] of disease. Staph subsequently got into my blood.

Despite the fact that this paragraph was not included in the section of the administrative complaint form designated for describing the "basis of claim," this paragraph was sufficient to alert a legally sophisticated reader that Buechel was complaining about the inadequacy of measures to prevent Hansen from transmitting staph to him. A legally sophisticated reader would have known that such a claim encompassed the practice of allowing sick inmates like Hansen to come into contact with Buechel – which is explicit in the administrative claim form in the allegation of "failed to quara[n]tine" – as well as the failure to ensure those sick inmates do not transmit their diseases to those with whom they come in contact – which is implicit in the allegation of failure to "prevent tran[s]mittal." Because Buechel's administrative claim form sets forth enough facts to alert a legally sophisticated reader to the presence of both aspects of his

claim, it satisfies the presentment requirement.[1] Thus, the United States is not entitled to summary judgment on the grounds that Buechel failed to exhaust his administrative remedies. The Court notes, however, that Buechel's remaining claim in this case is limited to negligence that allowed Hansen to transmit pathogens to him and does not include a general claim about prison hygiene practices unconnected to Hansen.

B. Allegations of Failure to Quarantine

The United States believes the Report was incorrect in declining to strike Buechel's allegations that Greenville personnel should have quarantined Hansen. It argues that quarantine is a medical decision and Buechel's medical malpractice claim has been dismissed.

This objection does not make sense. The Court has dismissed Buechel's medical malpractice *claim* based on his own diagnosis and treatment. However, it did not dismiss *allegations* simply because they might also touch on an issue of medical judgment. If any allegations in the complaint are relevant to Buechel's non-medical negligence claim, he may continue to support them as this litigation progresses. To the extent the United States believes Count 1 is actually a medical malpractice claim requiring a physician's certificate under 735

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[1]Magistrate Judge Proud's Report and Recommendation (Doc. 54), which was adopted in its entirety by the Court (Doc. 57), recognized as much. There, Magistrate Judge Proud stated,

> The Court's [July 9, 2008] three sentence synopsis of the seven-page complaint "cut too close to the bone." Clearly, plaintiff has claimed that his exposure to the staph infection was due to prison officials' and medical personnel's negligent handling, i.e. quarantine, of inmate Hans[e]n and his staph infection, thereby allowing Hans[e]n to work with plaintiff in a manner that allowed Hans[e]n to transmit the staph infection to plaintiff as the two worked together.

Report & Recommendation, 5-6. He also found Buechel's administrative claim contained the essential facts – the causal chain – that are at the heart of Count 1 and was sufficient to exhaust his remedies as to that claim. *Id.* at 7.

ILCS § 5/2/622, it should have argued that in its summary judgment motion and should not have waited to raise the issue until its reply brief and its objection to the Report. The Report was completely correct in its recommendation to deny summary judgment on this basis.

C. Causation

The United States argues that Magistrate Judge Frazier incorrectly found there was evidence from which a reasonable jury could find Buechel contracted MRSA because of exposure to Hansen. It asserts that Hansen does not have MRSA so could not possibly have transmitted it to Buechel. However, the United States has only supported this assertion with affidavit testimony that has been stricken. Thus, the Court does not consider that statement.

The United States further objects to Magistrate Judge Frazier's decision to credit the expert testimony of Dr. Greifinger to find support for the proposition that Hansen contaminated Buechel. It argues Dr. Greifinger's testimony is without foundation and is not admissible as expert testimony under the standards set forth in Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-95 (1993).

Magistrate Judge Frazier is correct that Dr. Greifinger's testimony is sufficient to create a genuine issue of material fact regarding causation for the purposes of this motion. Dr. Greifinger states in his report that it is his opinion to a reasonable degree of medical certainty, "the timing, physical proximity at work, and exchange of hand tools is epidemiologically sufficient to conclude that Mr. Buechel contracted his infection from Mr. Hansen." He also opined that Buechel's infection can be attributed to Greenville's failure to comply with mandatory BOP policies regarding containing infections. The United States' attack on Dr. Greifinger's testimony in its summary judgment briefing consists primarily of labeling that testimony "outrageous and

unsupported," Pl.'s Summ. J. Reply Br. 2, and "utter nonsense," Pl.'s Summ. J. Reply Br. 3. These arguments do not persuade the Court that Dr. Greifinger's testimony is inadmissible. In its objection, the United States refers to *Daubert* for the first time but still does not paint a convincing picture that Dr. Greifinger's testimony is inadmissible expert testimony. While the United States is correct that the Court may find evidence inadmissible and disregard it at the summary judgment stage, *Lewis v. CITGO Petrol. Corp.*, 561 F.3d 698, 704 (7th Cir. 2009), it is not appropriate here. That question is better resolved in connection with the United States' pending motion to exclude Dr. Greifinger's testimony from the trial (Doc. 127).

D. Discretionary Function Exception

Finally, the United States faults the Report for finding the United States had waived the defense of the discretionary function exception to the FTCA. As with the failure to exhaust defense, Magistrate Judge Frazier recommended the Court find the defense premature because the United States had not pled the discretionary function exception in its answer. The discretionary function exception is "available to the government as a defense only when aptly pleaded and proven," *Stewart v. United States*, 199 F.2d 517, 519 (7th Cir. 1952); *accord Parrott v. United States*, 536 F.3d 629, 634-35 (7th Cir. 2008), and it has not yet been pled in this case or raised in a pre-answer motion to dismiss. The United States' contention that it has come "well within what the Seventh Circuit allows" as to pleading the discretionary function exception is simply not accurate. It omitted the defense from its October 2008 and July 2009 motions to dismiss (Docs. 12 & 33), its March 2010 answer (Doc. 58) and its response to an interrogatory that specifically asked the United States to identify the affirmative defenses it would assert. In fact, the United States raised this defense for the first time in its summary

judgment motion filed in January 2011, after the close of discovery in December 2010, and waited until January 2012 to move for leave to add the defense to its answer. This is hardly "well within" the Seventh Circuit's requirement in *Stewart* that the defense be pled or contained within a pre-pleading motion to dismiss. The discretionary function exception simply does not provide a basis for granting summary judgment in light of the pleadings.

For the foregoing reasons, the Court will adopt the Report (Doc. 116) in its entirety as supplemented by this order and will overrule the United States' objection (Doc. 120

III. Motion for Leave to Amend Answer

The United States asks the Court to allow it to amend its answer to include the defenses of failure to exhaust administrative remedies and the discretionary function exception (Doc. 124). It argues the Court should allow amendment because Buechel has suffered no harm from its inadvertent failure to plead these defenses in its original answer since Buechel was on notice it would assert the defenses.

In response (Doc. 128), Buechel argues's that he would be prejudiced by the late addition of these affirmative defenses in this case since discovery closed more than a year ago. He argues that had he known the United States was intending to pursue these defenses, he would have pursued additional discovery relevant to those defenses. Specifically, Buechel asserts he would have sought discovery of Barbee and Dr. Harvey, two of the witnesses whose affidavits were stricken from the summary judgment briefing, regarding the discretionary nature of certain BOP policies if he had known the discretionary function exception was in issue and if he had known about those witnesses. He also states he would have deposed other witnesses in connection with the administrative claims process had he known the United States had not abandoned the failure

to exhaust affirmative defense when it failed to include it in its March 2010 answer.

Federal Rule of Civil Procedure 15(a) governs amendments to pleadings. Rule 15(a)(1) allows amendment of an answer once as a matter of course within 21 days of service. That time has passed, so whether the United States should be allowed to amend its answer is governed by Rule 15(a)(2). Rule 15(a)(2) provides that a plaintiff may amend its pleading only with the opposing party's written consent, which the United States has not obtained, or leave of court, which the Court should freely give when justice requires. Although the text of the rule has changed in recent years, the rule still "reflects a policy that cases should generally be decided on the merits and not on the basis of technicalities." *McCarthy v. Painewebber, Inc.*, 127 F.R.D. 130, 132 (N.D. Ill. 1989); *see Stanard v. Nygren* 658 F.3d 792, 800-01 (7th Cir. 2011) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Generally, the decision whether to grant a party leave to amend the pleadings is a matter left to the discretion of the district court. *Stanard*, 658 F.3d at 796-97. A court should allow amendment of a pleading except where there is undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir. 2010) (citing *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 666 (7th Cir. 2007)).

The Court will deny the motion for leave to amend to the extent it requests permission to add the defense of failure to exhaust administrative remedies. As Magistrate Judge Proud explained in his Report and Recommendation (Doc. 54), which was adopted in its entirety by the Court (Doc. 57), and as this Court has again explained above, Buechel has exhausted his

administrative remedies with respect to Count 1. Thus, amendment to add this defense would be futile.

The Court also declines to allow the United States to amend its answer to plead the discretionary function exception affirmative defense. As noted above, the United States should have known about the availability of this affirmative defense since early in the case, yet it did not plead it in its answer or disclose it in response to an interrogatory question expressly requesting the United States' affirmative defenses. It waited until a month after discovery closed, leaving Buechel no opportunity to pursue discovery on matters relating to that defense. Even then, it waited another year before moving for leave to amend its answer to include the defense. The United States has offered no good reason for this delay. Furthermore, Buechel has been prejudiced by this delay. During discovery, he had no motivation to explore discovery issues relevant to the defense (e.g., the mandatory nature of relevant rules and policies, the policy reasons – if any – behind those rules and policies) and had no opportunity to seek discovery from the witnesses the United States now offers in support of that defense. In light of the United States' undue delay in raising this discretionary function affirmative defense and the resulting prejudice to Buechel, the Court declines to allow the United States to add the defense at this late date.

IV. Conclusion

For the foregoing reasons, the Court:

- **AFFIRMS** Magistrate Judge Frazier's order (Doc. 115) granting Buechel's motion to strike (Doc. 93) and **OVERRULES** the United States' objection to that order (Doc. 123);
- **ADOPTS** Magistrate Judge Frazier's Report (Doc. 116) in its entirety as supplemented by this order and **OVERRULES** the United States' objection (Doc. 120);

- **DENIES** the United States' motion for summary judgment (Doc. 90); and
- **DENIES** the United States' motion for leave to amend its answer (Doc. 124).

IT IS SO ORDERED.
DATED: March 20, 2012

s/ J. Phil Gilbert
J. PHIL GILBERT
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 08-cv-132-JPG-PMF
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter comes before the Court for case management purposes. At the August 14, 2012, Final Pretrial Conference, there was disagreement as to the scope of the claim to be tried in this case. The parties submitted briefing on the issue (Docs. 138 & 139), which the Court has reviewed. In light of the language in plaintiff's complaint and the scope of his administrative tort claim, the Court finds that the issues in this case are limited to the conditions leading to the possible transmission of a staphylococcus infection in the laundry facility but not necessarily limited to contamination from Joseph Hanson.

IT IS SO ORDERED.
DATED: September 13, 2012

s/ J. Phil Gilbert
J. PHIL GILBERT
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-cv-132-JPG
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

This matter comes before the Court on the bill of costs filed by the defendant United States of America (Doc. 164). Plaintiff Joseph W. Buechel has objected to the taxation of costs as requested (Doc. 166), and the United States has responded to that objection (Doc. 167). The United States requests costs in the amount of $3,240.69 attributable to expenses incurred to obtain deposition transcripts necessary to the defense of this case. Buechel asks the Court to decline to award costs because of his indigence. In response, the United States notes that, since trial, Buechel has been arrested for possession of marihuana. It argues that if he had sufficient disposable income to purchase a quantity of marihuana, he should be able to pay the costs of this suit.

Ordinarily the Clerk of Court taxes costs in favor of the prevailing party on fourteen days' notice. Fed. R. Civ. P. 54(d)(1). The Court may then review the Clerk's action within the following seven days. *Id.* The Court presumes that a prevailing party is entitled to costs as a matter of course, *Krocka v. City of Chicago*, 203 F.3d 507, 518 (7th Cir. 2000), but has the discretion to deny or reduce costs where warranted, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987). A reduction or denial of costs may be appropriate, for example, where a non-prevailing party is indigent and his suit is not frivolous. *See Rivera v. City of Chi.*,

469 F.3d 631, 634-35 (7th Cir. 2006) (citing *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983)). In deciding whether to hold an indigent party liable for costs, the Court should examine the party's income, assets and expenses and make a threshold finding whether the losing party is incapable of paying the costs at the present time or in the future. *Rivera*, 469 F.3d at 635. The Court should also consider "the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by a case when using its discretion to deny costs." *Id.* The exception to the cost-shifting presumption for indigent losing parties is narrow, and the burden is on the losing party to show he fits within the exception. *Id.* at 636. If the Court reduces or denies costs, it must explain its decision. *Krocka*, 203 F.3d at 518.

A denial of the costs award is warranted in this case based on Buechel's indigence and the nature of his claim. As a preliminary matter, Buechel is financial incapable of paying the requested costs now or in the future. He currently has no earned income, and his income from the past seven years was paltry. He relies on public assistance and gifts to cover his living expenses, and his only asset is a vehicle worth less than $800. He continues to suffer debilitating effects from the Methicillin-Resistant *Staphylococcus aureus* infection that was the subject of this case, and is now recovering from back surgery. It further appears his prospects for future substantial gainful employment are dim in light of his health problems. There is simply no way he can realistically be expected to pay costs of $3,240.69.[1] On the other hand, while presenting an insurmountable barrier to Buechel, $3,240.69 is an amount small enough to be absorbed without much pain by the United States. The Court further finds that this suit involved difficult issues and that Buechel brought this suit in good faith.

[1] The Court does not regard Buechel's arrest for possession of marihuana as competent evidence that he has disposable income to purchase marihuana. Until he is convicted, he is presumed to be innocent of the possession charge, which may or may not even be related to an actual purchase.

For these reasons, the Court **SUSTAINS** Bucchel's objection (Doc. 166) and **DECLINES** to tax costs in this case.

DATED: June 17, 2013
SO ORDERED.

s/J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W BUECHEL,

Plaintiff,

v.

USA,

Defendant.

Case No. 08-cv-132 JPG/PMF

ORDER

GILBERT, Judge:

Having been advised by counsel for the parties that the above action has been settled but that additional time is needed to consummate the settlement, the Court **DIRECTS** the Clerk of Court to enter judgment of dismissal with prejudice and without costs 60 days from the date of this order. Should the parties fail to consummate settlement within 60 days, they may petition the Court to delay entry of judgment until a later date. In light of the settlement, the Court **DENIES** all motions pending in this case **as moot** and **VACATES** all court dates in this case.

IT IS SO ORDERED.
DATED: August 19, 2014

s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 08-cv-132-JPG-PMF
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

Upon review of the Parties' motion seeking an extension of time for entry of judgment (Doc. 194), the Court finds that the motion is well taken, **GRANTS** the Parties' motion (Doc. 194) and extends the deadline for entry of dismissal to December 23, 2014.

Dated: October 7, 2014

s/J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil No. **08-132-JPG-CJP**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

PROUD, Magistrate Judge:

Before the Court is plaintiff Joseph W. Buechel's motion for appointment of counsel. **(Doc. 8).** Plaintiff argues that, although he is being assisted by another inmate, counsel is necessary because he is functionally illiterate and dyslexic, the medical issues and discovery are beyond a layman's ken, and his efforts to secure counsel and litigate this action have been impeded by prison officials, who have now transferred him to another prison.

There is no constitutional or statutory right to appointment of counsel in a civil case, although the Court may in its discretion appoint counsel to represent indigent civil litigants. ***Jackson v. County of McLean*, 953 F.2d 1070, 1071 (7th Cir. 1992); *see also* 28 U.S.C. § 1915(d).** Nevertheless, the Court also has inherent authority to appoint counsel to ensure the orderly prosecution of litigation in the district. The Court must inquire whether, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" ***Farmer v. Haas,* 990 F.2d 319, 322 (7th Cir. 1993); *see also Greeno v. Daley*, 414 F.3d 645, 658(7th Cir. 2005); *see also Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007).** The Court of Appeals for the Seventh Circuit

clarified in *Pruitt v. Mote* that relevant inquiry is whether the difficulty of the case exceeds the particular plaintiff's capacity as a layperson to coherently litigate the case– pretrial and at trial. ***Id.***

Plaintiff has substantiate a single, unsuccessful attempt to secure representation, from the Illinois Bar Association. The Bar Association does not represent individuals, it is a professional organization. The Bar Association forwarded plaintiff's request to The Lawyer Finder Service, which informed plaintiff that none of its attorneys would take on the case since plaintiff was in West Virginia and could not meet with them. Therefore, the Court considers plaintiff to have reasonably attempted to secure counsel, to no avail.

Plaintiff, who is in federal custody, has filed a Federal Tort Claim Action (28 U.S.C. § 2671, et seq.) alleging medical malpractice and negligence related to a staph infection he contracted while housed at FCI-Greenville, in the Southern District of Illinois. After this action was filed, plaintiff was transferred to an institution in West Virginia, and he has most recently been transferred to an institution in Pennsylvania. Therefore, plaintiff's current ability to proceed pro se is unknown, with respect to legal research and whether he is being assisted in any manner now that he is in a new institution.

Insofar as plaintiff asserts that he is functionally illiterate and dyslexic, the Court notes that those facts were not made apart of the affidavits submitted in support of the motion. Plaintiff's affidavit does not indicate his level of education, whether he was in special education classes, and whether he has been formally diagnosed with dyslexia or other learning disability, or whether he is self-diagnosed. To date, plaintiff's pleadings have all been very cogent and well drafted, complete with citations to authority and analysis. However, the Court does note that

there appears to be a pleading defect regarding the absence of a certificate of merit (currently the subject of a motion to dismiss), that cannot necessarily be remedied by the appointment of counsel. In any event, all that the Court can discern at this juncture is that, as of the date of his transfer from West Virginia, his need for assistance of counsel was not evident.

IT IS THEREFORE ORDERED that plaintiff's motion for appointment of counsel **(Doc. 8)** is **DENIED**. In accordance with *Pruitt v. Mote*, the Court always remains open to appointing counsel, as circumstances change and upon the filing of another motion for appointment of counsel.

IT IS SO ORDERED.

DATED: December 11, 2008

s/ Clifford J. Proud
CLIFFORD J. PROUD
U. S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil No. **08-132-JPG-CJP**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

PROUD, Magistrate Judge:

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Plaintiff, who is in federal custody, has filed a Federal Tort Claim Action (28 U.S.C. § 2671, et seq.) alleging medical malpractice and negligence related to a staph infection he contracted while housed at FCI-Greenville, in the Southern District of Illinois. After this action was filed, plaintiff was transferred to an institution in West Virginia, and he has most recently been transferred to an institution in Pennsylvania. Therefore, plaintiff's current ability to proceed pro se is unknown, with respect to legal research and whether he is being assisted in any manner now that he is in a new institution.

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there appears to be a pleading defect regarding the absence of a certificate of merit (currently the subject of a motion to dismiss), that cannot necessarily be remedied by the appointment of counsel. In any event, all that the Court can discern at this juncture is that, as of the date of his transfer from West Virginia, his need for assistance of counsel was not evident.

IT IS THEREFORE ORDERED that plaintiff's motion for appointment of counsel **(Doc. 8)** is **DENIED**. In accordance with *Pruitt v. Mote*, the Court always remains open to appointing counsel, as circumstances change and upon the filing of another motion for appointment of counsel.

IT IS SO ORDERED.

DATED: December 11, 2008

s/ Clifford J. Proud
CLIFFORD J. PROUD
U. S. MAGISTRATE JUDGE

Welcome WILSON J MOORER | Logout

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2008-01348 **Short Description:** BUECHEL V. UNITED STATES OF AMERICA ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	3:08-cv-00132-JPG-CJP
Short Description	BUECHEL V. UNITED STATES OF AMERICA ET AL
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	NORTH CENTRAL REGIONAL OFFICE
Current Institution	Greenville (FCI)
Incident Region	NORTH CENTRAL REGIONAL OFFICE
Incident Institution	Greenville (FCI)
Monetary Relief Sought	$2,500,000.00
Estimated Amount	$
Office	East St. Louis
Jurisdiction	SOUTHERN DISTRICT OF ILLINOIS
Responsible Legal Office	St. Louis, MO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	11/26/2014
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$14,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	07/14/2008
Date Filed	02/25/2008

Case Progress

Current Owner	HEATHER MACCONNELL
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	
Further Case Classification	COMPLAINS THAT HE CONTRACTED MRSA - ALLEGES FAILURE TO QUARANTINE - IMPROPER TREATMENT
Comments	

Tracy Knutson - Fwd: Bucchel v. United States - SD Ill.

From: Richard Schott
To: Knutson, Tracy; Pepper, Paul
Date: 7/28/14 8:34 AM
Subject: Fwd: Bucchel v. United States - SD Ill.
CC: Winter, Rick

Received this on Friday night, but wanted to make sure the RD was aware of this before I forwarded....just spoke with him.....

Rick Schott
Regional Counsel
North Central Region
Federal Bureau of Prisons
(913) 551-1004

SENSITIVE/PRIVILEGED COMMUNICATION
The information contained in this electronic message and any and all accompanying documents constitutes sensitive information. This information is the property of the U.S. Department of Justice. If you are not the intended recipient of this information, any disclosure, copying, distribution, or the taking of any action in reliance of this information is strictly prohibited. If you received this message in error, please notify us immediately at the above number to make arrangements for its return to us.>> "Kathleen M. Kenney" <KKenney@bop.gov> 7/25/2014 5:33 PM >>>
Good evening folks - I have received approval to settle this matter for up to $140,000. Please let me know if you have any questions.

Take Care -
Kathy

Page 0383 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0384 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0385 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0386 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT

District of Minnesota

RESPOND TO:

x	U.S. District Court, 700 Federal Building, 316 N. Robert St., St. Paul, MN 55101	Phone (651) 848-1100
___	U.S. District Court, 202 U. S. Courthouse, 300 S. Fourth St., Minneapolis., MN 55415	Phone (612) 664-5000
___	U.S. District Court, 417 Federal Building, 515 W. First St., Duluth, MN 55802	Phone (218) 529-3500
___	U.S. District Court, 212 U. S. Post Office, 118 South Mill St., Fergus Falls, MN 56537	Phone (218) 739-5758

DATE: August 4, 2006		**CIVIL FILE NUMBER:** 06-2251 JRT/JJG
CASE TITLE: Vandersteen v Wessberg et al		
	The above entitled action was:__ removed from county court, __ transferred from another district, and filed in __ Minneapolis___ St. Paul __ Duluth, on _____, and assigned to Judge _____ and to Magistrate _____ Please direct future filings to the office indicated at the top of this form.	
	The above entitled action was filed in this court on _____, and assigned to Judge _____ and referred to Magistrate Judge _____ The file will be maintained at the Clerk's office in the District of Minnesota in _____ Please note for future reference. cc to:	
	Discovery documents are returned pursuant to Federal Rule of Civil Procedure 5(d).	
	A certified copy of the Order of Remand is enclosed.	
	The above entitled action is being transferred to your court pursuant to Order of Judge _____ filed on _____ A certified copy of the order and the docket sheet are included. You can obtain the original record by accessing CM/ECF through PACER. Please acknowledge receipt by returning a date-stamped copy of this notice indicating the filing date and civil case number assigned in your court.	
	A Bill of Costs is to be submitted on Form AO133. The form, and a guide entitled "Taxation of Costs in a Civil Case in the United States District Court for the District of Minnesota" for use by attorneys and legal staff are available on our website: www.mnd.uscourts.gov.	
	Your original documents are returned as copies of state court documents were submitted upon removal of the action to federal court.	
	The above entitled action was filed with an in forma pauperis (IFP) application from __. Each plaintiff must submit an IFP application of his/her own. We did not receive an IFP application from __ so we have enclosed an IFP application for each to complete and file with the court. Any delay in filing the required IFP application(s) may delay the resolution of this case.	
	Your in forma pauperis application was approved. Please complete the enclosed Marshal Service Form(s) (one per defendant) and return to the office indicated at the top of this form. Service cannot be performed until these completed forms have been received by the clerk's office.	
x	OTHER:	The U.S. Marshal's require the 5 part Marshal service form to accomplish service. I am returning your recent submissions, with the needed forms to be resubmitted for service. Enclosed is Document #5 the Order regarding service.

Deputy Clerk: Vickie

Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Russell A. Vandersteen,

Plaintiff,

v.

United States of America,

Defendant.

Civil No. 06-2251 (JRT/JJG)

ORDER SETTING SETTLEMENT CONFERENCE

A settlement conference will be held on **Monday, January 25, 2010, at 9:30 a.m.,** in Courtroom 3B, Warren E. Burger Federal Building and U.S. Courthouse, 316 North Robert Street, **SAINT PAUL,** Minnesota before the undersigned United States Magistrate Judge.

Plaintiff shall make arrangements to be available at all times during the business day on January 25, 2010 to appear by telephone from the Federal Prison Camp-Duluth. Plaintiff shall also provide chambers with a telephone number where he can be reached during the hours of the settlement conference.

In order to encourage the parties to address the issue of settlement on their own, counsel must confer in person at least ten (10) days prior to the date of the settlement conference, to engage in a full and frank discussion of settlement. If the case does not settle, each attorney shall submit to the undersigned, **on or before January 15, 2010**, a confidential letter (not to exceed ten (10) pages, including exhibits) setting forth the parties' respective settlement positions before the meeting, their respective positions following the meeting and a reasoned, itemized analysis justifying their client's last stated settlement position. **This letter shall be submitted to the undersigned by e-mail to the following address: graham_chambers@mnd.uscourts.gov OR mailed to Magistrate Judge Jeanne J. Graham, U.S. District Court, 316 North Robert Street, Room 342, Saint Paul, Minnesota 55101.**

Failure of any lawyer to submit this letter will result in the settlement conference being rescheduled and the imposition of an appropriate sanction on the attorney whose failure caused the conference to be postponed. Additional sanctions may be imposed for failure to comply with any of the other foregoing instructions.

Dated: December 10, 2009

s/ Jeanne J. Graham
JEANNE J. GRAHAM
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Russell A. Vandersteen,

Plaintiff,

v.

United States of America,

Defendant.

Civil No. 06-2251 (JRT/JJG)

AMENDED ORDER SETTING SETTLEMENT CONFERENCE

The settlement conference, originally scheduled for January 25, 2010, will now be held on **Wednesday, March 17, 2010, at 9:30 a.m.,** in Courtroom 3B, Warren E. Burger Federal Building and U.S. Courthouse, 316 North Robert Street, **SAINT PAUL,** Minnesota before the undersigned United States Magistrate Judge.

Plaintiff shall make arrangements to be available at all times during the business day on March 17, 2010 to appear by telephone from the Federal Prison Camp-Duluth. Plaintiff shall also provide chambers with a telephone number where he can be reached during the hours of the settlement conference.

In order to encourage the parties to address the issue of settlement on their own, counsel must confer in person at least ten (10) days prior to the date of the settlement conference, to engage in a full and frank discussion of settlement. If the case does not settle, each attorney shall submit to the undersigned, **on or before March 8, 2010**, a confidential letter (not to exceed ten (10) pages, including exhibits) setting forth the parties' respective settlement positions before the meeting, their respective positions following the meeting and a reasoned, itemized analysis justifying their client's last stated settlement position. **This letter shall be submitted to the undersigned by e-mail to the following address: graham_chambers@mnd.uscourts.gov OR mailed to Magistrate Judge Jeanne J. Graham, U.S. District Court, 316 North Robert Street, Room 342, Saint Paul, Minnesota 55101.**

Failure of any lawyer to submit this letter will result in the settlement conference being rescheduled and the imposition of an appropriate sanction on the attorney whose failure caused the conference to be postponed. Additional sanctions may be imposed for failure to comply with any of the other foregoing instructions.

Dated: January 22, 2010

s/ Jeanne J. Graham
JEANNE J. GRAHAM
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-2251 JRT/JJG

RUSSELL A. VANDERSTEEN,	)	
	)	**MEMORANDUM IN SUPPORT**
Plaintiff,	)	**MOTION TO EXTEND TIME**
	)	**TO FILE DISPOSITIVE MOTIONS**
v.	)	
	)	
BUREAU OF PRISONS SAFETY DIRECTOR WESSBERG, et al,	)	
	)	
Defendants.	)	

June 1, 2008, was the scheduled time for filing dispositive motions. The undersigned, however, missed the filing deadline. He confused the deadline with one for a different but similar case. The case involved a pro se prisoner bringing an action under the Federal Tort Claims Act. The instant case raises the same claims and is subject to summary judgment.

Plaintiff's deposition was taken. He admitted crossing about 25 yards of the same slippery and ice covered parking lot before falling. When he fell, crews were elsewhere sanding and salting on the prison compound as the storm continued to deposit freezing rain. The storm began at night. A crew was released and began salting and sanding walkways and parking lots. The storm, salting and sanding continued throughout the day, both before and after Plaintiff fell.

Plaintiff was familiar with the conditions. He grew up in Wisconsin. Before leaving for work, the morning radio broadcasts announced the slippery conditions. Plaintiff was

listening. Moreover, he waited until the last minute because of the bad weather. Furthermore, he crossed walkways that were sanded and noticed the surface became progressively more slippery as he approached his destination. Regretfully, he fell ten feet from his destination.

It was out of habit that Plaintiff crossed the parking lot. He usually took that route to enter the building where he worked. There were other entrances to the building. One of the entrances would have allowed him to avoid the parking lot where he fell. Albeit, the alternative route and entrance was less convenient but it was also partially indoors and avoided the very slippery parking lot.

Good grounds exist to grant a motion for summary judgment because, as the incorporated memorandum argues, there is no duty to prevent all slips and falls, particularly, when the Defendant is preparing the surface during a storm and either has not gotten to the place where Plaintiff fell or the freezing rain covered the efforts that were previously taken. In such a situation, summary judgment is appropriate to avoid imposing a standard of strict liability.

Although the motion and supporting documents can be filed within less than three days, there is always the prospect of an uncontrollable and unexpected event preventing compliance with a shorter period of time.

Good cause exists to grant Defendants motion to extend the time.

Dated this 17 day of June 2008.

FRANK J. MAGILL, JR.
Acting United States Attorney

s/ Lonnie F. Bryan

BY: LONNIE F. BRYAN
Assistant U.S. Attorney
Attorney ID Number 206635
600 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415
(612) 664-5600
lonnie.bryan@usdoj.gov
Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-2251 JRT/JJG

RUSSELL A. VANDERSTEEN,	)	
	)	
Plaintiff,	)	
	)	**CERTIFICATE OF**
v.	)	**COMPLIANCE**
	)	
	)	
BUREAU OF PRISONS SAFETY DIRECTOR WESSBERG, et al,	)	
	)	
	)	
Defendants.	)	

The undersigned attorney for the United States certifies this memorandum complies with the type-volume limitation of D. Minn. LR 7.1(c) and the type size limitation of D. Minn. LR 7.1(e). The memorandum has 387 words of type, font size 13. The memorandum was prepared using WordPerfect X3, which includes all text, including headings, footnotes and quotations in the word count.

Dated: 6-17-08

FRANK J. MAGILL, JR.
Acting United States Attorney

s/ Lonnie F. Bryan

BY: LONNIE F. BRYAN
Assistant U.S. Attorney
Attorney ID Number 206635
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600
lonnie.bryan@usdoj.gov
Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-2251 JRT/JJG

RUSSELL A. VANDERSTEEN, Plaintiff, v. BUREAU OF PRISONS SAFETY DIRECTOR WESSBERG, et al, Defendants.	)	**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO TAKE DEPOSITION**

The United States has moved for leave to take Plaintiff's deposition. Although such a motion is unusual, F. R. Civ. P. 30(a)(2)(B) requires either a stipulation or order to take the deposition of a person confined to prison.[1] Plaintiff is confined at FPC Duluth, where his deposition will occur and be conducted in accordance to the facilities policies and the Federal Rules of Civil Procedure. Where the deponent is the Plaintiff, courts have *sua sponte* granted leave to take the deposition of a prisoner. Miller v. Bluff, 131 F.R.D. 698, 699 (M.D.Pa.

[1] Although Plaintiff may have stipulated to his deposition, because this suit alleges negligence against the Bureau of Prisons, his jailers, and Plaintiff is *pro se*, in the abundance of caution to avoid any appearance of coercion, the United States has not requested a stipulation and instead seeks an order.

1990). Here, the deponent is the Plaintiff and his deposition is necessary for defense of this tort case. Therefore, the Court should grant the United States motion.

Dated this 13 day of December 2007.

RACHEL K. PAULOSE
United States Attorney

s/ Lonnie F. Bryan

BY: LONNIE F. BRYAN
Assistant U.S. Attorney
Attorney ID Number 206635
600 U.S. Courthouse
300 S. Fourth Street
Minneapolis, MN 55415
(612) 664-5600

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-2251 JRT/JJG

RUSSELL A. VANDERSTEEN,	)	
	)	
Plaintiff,	)	
	)	**CERTIFICATE OF**
v.	)	**COMPLIANCE**
	)	
	)	
BUREAU OF PRISONS SAFETY DIRECTOR WESSBERG, et al,	)	
	)	
	)	
Defendants.	)	

The undersigned attorney for the United States certifies this memorandum complies with the type-volume limitation of D. Minn. LR 7.1(c) and the type size limitation of D. Minn. LR 7.1(e). The memorandum has 172 words of type, font size 13. The memorandum was prepared using WordPerfect X3, which includes all text, including headings, footnotes and quotations in the word count.

Dated: 12-13-07

RACHEL K. PAULOSE
United States Attorney

s/ Lonnie F. Bryan

BY: LONNIE F. BRYAN
Assistant U.S. Attorney
Attorney ID Number 206635
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-2251 JRT/JJG

RUSSELL A. VANDER STEEN, Plaintiff, v. BUREAU OF PRISONS SAFETY DIRECTOR WESSBERG, et al., Defendants.	PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO MODIFY PRETRIAL SCHEDULE

Plaintiff Russell A. Vander Steen ("Vander Steen" or "plaintiff") opposes the defendants' untimely motion to modify this Court's F.R.Civ.P. 16 pretrial order. Rather than demonstrating the good cause required by F.R.Civ.P. 16(b)(4), defendants have shown only their own carelessness. Vague assertions of confusion by defendants' counsel and ambiguous references to a phantom declaration fall so dramatically short of "good cause" that it leaves the reader with the unescapable conclusion that defendants are not genuinely serious in their assertions. Finally, defendants' objective is befuddling. The remedy that defendants seek is the right to file an untimely motion for summary judgment - a motion that asks to the Court to determine disputed factual issues as a matter of law and apply Minnesota "guest" principles to an incarcerated inmate who defendants required to venture out into hazardous conditions on a compound that defendants alone controlled. Even assuming the factual accuracy of defendants' assertions (an act that this Court cannot do under F.R.Civ.P. 56), the proposed motion asks the Court to rule as a matter of law that a plaintiff's choice of two alternative paths, one of which allegedly turned out to be less hazardous than the other, immunizes the defendants from liability, despite their control over the premises and plaintiff's required reporting to work. In summary, the defendants' motion is presumptuous and unfounded.

SCANNED
JUL 02 2008
U.S. DISTRICT COURT MPLS

Pursuant to F.R.Civ.P. 16(d), this Court's pretrial order "controls the course of the action unless the court modifies it." In fact, and at defendants' instance, the Court did modify the schedule to accommodate defendants and their counsel. They proposed and acceded to the June 1, 2008 deadline for filing dispositive motions. Under F.R.Civ.P. 16(b)(4), a "schedule may be modified only for good cause and with the judge's consent." Thus, defendants' motion must be denied unless defendants have made a proper showing of "good cause."

Defendants' good cause showing consists of:

1. Counsel's confusing of this case with the pretrial schedule in another "similar tort action"; and

2. Counsel's taking longer than expected in obtaining "longer than expected to obtain a declaration" from one of defendants' employees, a declaration that the motion sates is "incorporated herein," but which is nowhere to be found.

Plaintiff is mystified as to how this "showing" could ever arise to the level of "good cause." Indeed, because the deadline for the dispositive motion filing has passed, it appears that in addition to "good cause" under F.R.Civ.P. 16(b)(4), defendants would also be required to demonstrate "excusable neglect" under F.R.Civ.P. 6(b)(2) (enlargement of time). Nothing in defendants' papers comes remotely close to either standard.

While plaintiff is sympathetic to counsel's "confusion," there is nothing in defendants' moving papers that would demonstrate that this "confusion" was anything other than carelessness. This Court has been absolutely clear and consistent in holding that carelessness is never a satisfactory basis for finding good cause. Scheidecker v. Arvig Enterprises, Inc., 193 F.R.D. 630, 631-32 (D.Minn. 2000), quoting Archer Daniels Midland Co. v. Aon Risk Services, 187 F.R.D. 578, 581 (D.Minn. 1999) ("It hardly bears mention, therefore, that 'carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992)."); Metro Produce Distributors v. City of Minneapolis, 473 F.Supp.2d 955,

964 (D.Minn. 2007); Rosati v. Cleveland-Cliffs, Inc., 259 F.Supp.2d 861, 875 (D.Minn. 2003). Plaintiff submits that counsel's "confusion" cannot be a basis for good cause - certainly not without a detailed basis to determine that the "confusion" is not just another word for "carelessness."

Defendants' motion seems to be based on the now-discarded practice of treating pretrial scheduling orders was less than serious time requirements. This Court and the Eighth Circuit served notice long ago that such an antiquated practice would no longer be observed. For example, in Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001), the court stated:

> It is true that the Federal Rules are usually liberally construed to permit parties to amend pleadings, add additional parties and to similarly control the pace of litigation. . . . As regards case management orders, however, the Federal Rules set a less forgiving standard. Federal Rule of Civil Procedure 16(b) specifies that such an order "shall not be modified except upon a showing of good cause and by leave of the district judge." Thus, a moving party must first make the requisite showing. Even then the district court retains discretion as to whether to grant the motion. As a vehicle designed to streamline the flow of litigation through our crowded dockets, we do not take these case management orders lightly, and will enforce them. In re Milk Prods. Antitrust Litig., 195 F.3d 430, 437 (8th Cir. 1999), cert. denied sub nom. Rainy Lake One Stop, Inc. v. Marigold Foods, Inc., 529 U.S. 1038 . . . (2000).

This Court has frequently - and consistently - noted that the good cause standard of F.R.Civ.P. 16(b)(4) is an exacting one. Scheidecker at 631-32; Aon Risk Services at 581; Metro Produce Distributors at 964. The obvious reason for this "exacting" standard is that the Court's schedule and deadlines are essential components of its efficiency and integrity. North Stat Mut. Ins. Co. Zurich Ins. Co., 269 F.Supp.2d 1140, 1144 (D.Minn. 2003):

> Accordingly, "[w]e doubt that it can be seriously questioned that '[a]dherence to reasonable deadlines is * * * critical to maintaining integrity in court proceedings.'" Alholm v. American Steamship Co., 167 F.R.D. 75, 79 (D.Minn. 1996. . . .

The key to determining the existence of "good cause" is the moving party's due diligence. Scheidecker at 631-32, quoting Aon Risk Services at 581:

> The "good cause" standard is an exacting one, for it demands a demontration that the existing schedule "cannot reasonably be met despite the diligence of the party seeking the extension."

In this instance, there is nothing in defendants' papers that would demonstrate anything such thing, much less defendants' diligence. Indeed, unfortunately all that defendants' moving papers demonstrate is their lack of diligence. Not only do those moving papers not explain anything about counsel's "confusion," they leave the reader completely in the dark as to why the phantom declaration could not be obtained last month, last year or at any time in the past. The causes of what took "longer than expected" and what amount of time was "expected" is a mystery. Plaintiff can only assume that defendants declined to elaborate on these factors because they demonstrated carelessness rather than good cause.

Having failed to make any adequate showing of good cause for modifying this Court's pretrial scheduling order, defendants do assert that plaintiff will not be prejudiced. Plaintiff submits that a party who has to respond to an untimely motion is always, to some degree, prejudiced by such an enlargement motion. Notwithstanding, however, the prejudice to plaintifff is not the touchstone for deciding this motion - especially where defendants have completely failed to demonstrate the existence of good cause. Metro Produce Distributors at 964 ("Rule 16(b) analysis does not focus on prejudice to the non-moving party, but on the showing of good cause and diligence of the moving party"); Luigino's Inc. v. Pezrow Companies, 178 F.R.D. 523, 525 (D. Minn. 1998); Rosati at 876 (court need not explore issue of non-moving party's prejudice where moving party fails to demonstrate good cause and diligence); Scheidecker at 631-32 ("the question of good cause [does not] turn on the existence or absence of prejudice to the non-moving party").

Finally, defendants urge the Court to conclude that its summary judgment motion is of sufficient merit to bypass the issues of good cause and diligence.

While this is not the law, the argument is also specious. The centerpiece of defendants' legal argument is that plaintiff, an incarcerated inmate at defendants' prison camp, is in the nature of a "guest" or "invitee." In essence, defendants argue that this Court should immunize defendants from the hazards they required plaintiff to undergo because he had, allegedly, a choice of paths to take from his dormitory to his work place. Even if such a choice existed, there is simply no basis for summary judgment where one path allegedly turns out not to present the hazards that the other path posed. Nothing in defendants' argue would indicate that plaintiff's choice was unreasonable, unwise, or improper - other than the end result: One path was a serious risk of injury to plaintiff and other inmates, and the other was, or so defendants' claim, was not. In short, the issue posed by defendants' motion is absolutely fraught with determinations of fact, a province exclusively reserved for the jury.

Were the foregoing not fully dispositive of the faults in defendants' argument, one further observation deserves mention because it also bears on the bona fides of defendants' motion. Defendants attached their proposed Memorandum in Support of Motion for Summary Judgment to their Motion to Extend. That Memorandum is premised on the core notion that snow and ice are open and obvious hazards that defendants, as landowners, had no duty to address, warn of, or remove until after the storm was over. Plaintiff can hardly imagine a more preposterous theory. In none of the cases that defendants cite for this principle was the plaintiff required, under penalty of discipline up to and including transfer to a more restrictive facility, to encounter the hazards of ice and snow during the storm. If this is the basis for the defense, the Court would be well served by disposing of it now - in plaintiff's favor. Thus, this proposed motion could never be granted in defendants' favor because of the factual issues that a jury would have to resolve. On the other hand, the Court could

rule as a matter of law that the so-called after-the-storm rule simplies does not apply to a landowner who requires the plaintiff to encounter the hazards during the storm.

Based on the foregoing, plaintiff respectfully requests that the Court deny defendants' motion to modify the pretrial schedule because defendants have not demonstrated good cause, have not demonstrated diligence, and have posited a legal theory that has no foundation in this case. Plaintiff understands that because the deadline for summary judgment has passed, and because no motion for summary judgment has been filed, plaintiff is not required to file a response to the summary judgment memorandum until and unless the Court modifies the schedule and defendants actually serve and file such a motion.

Dated: June 26, 2008.

Russell A. Vander Steen
06629-089
Federal Prison Camp
P.O. Box 1000
Duluth, MN 55814

CERTIFICATE OF SERVICE

The undersigned states and certifies under penalty of perjury that he caused the foreoing Plaintiff's Memorandum in Opposition to Defendants' Motion to Modify Pretrial Schedule to be delivered to Legal Mail, Federal Prison Camp, Duluth, Minnesota, on June 23, 2008, for deposit in the U.S. Mail addressed to the following (original to the Court; copy to the U.S. Attorney for the District of Minnesota):

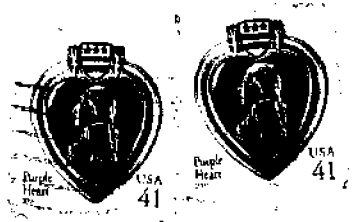
Clerk of Court
U.S. District Court for the
District of Minnesota
250 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Frank J. Magill, Jr.
Acting United States Attorney
Lonnie F. Bryan
Assistant U.S. Attorney
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Dated: June 26, 2008.

Russell A. Vander Steen

Russell A. Vander Steen
06629-089
Federal Prison Camp
P.O. Box 1000
Duluth, MN 55814



Clerk of Court
United States District Court for
the District of Minnesota
250 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

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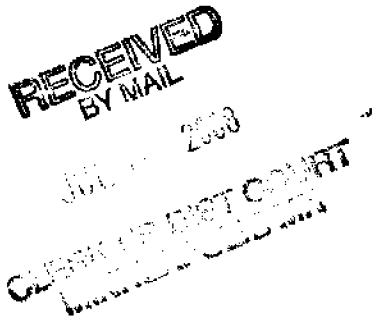

Russell A. Vander Steen
#06629-089
Federal Prison Camp
P.O. Box 1000
Duluth, Minnesota 55814

June 26, 2008

Clerk of Court
United States District Court for
the District of Minnesota
250 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Re: Russell A. Vander Steen v. Bureau of Prisons Safety Director, et al.
Court File No. 06-2251 JRT/JJG

Dear Sir or Madam:

Enclosed herewith for filing, please find Plaintiff's Memorandum in Opposition to Defendants' Motion to Modify Pretrial Schedule. I am filing this pursuant to Supreme Court and Eighth Circuit precedent by delivery to Legal Mail, Federal Prison Camp, Duluth, Minnesota. By the same method, I am serving a copy of the foregoing on the United States Attorney representing the defendants. Thank you for your attention to this matter.

Very truly yours,

Russell A. Vander Steen

cc: Frank J. Magill, Jr. (w/encl)
Lonnie F. Bryan

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Russell A. Vandersteen,

Plaintiff,

v.

United States of America,

Defendant.

Civil No. 06-2251 (JRT/JJG)

ORDER

The above-entitled matter comes before the undersigned on the Government's motion to modify the pretrial scheduling order (Doc. No. 53). Plaintiff Russell Vandersteen is proceeding on his own behalf. The Government is represented by Lonnie F. Bryan, Assistant U.S. Attorney. In its motion, the Government seeks an extension of the time for filing dispositive motions.

The original pretrial scheduling order in this matter, which issued on September 6, 2007, provided that dispositive motions be filed on or before February 15, 2008. Then by a motion on November 19, 2007, the Government moved for more time to conduct discovery. In an order on November 20, 2007, this Court granted the motion and extended the dispositive motion deadline to May 1, 2008.

More than six weeks beyond this deadline, the Government seeks to modify the pretrial scheduling order again, asking for more time to file a dispositive summary judgment motion. To support its motion, the Government offers two arguments. One is that it simply made a mistake, confusing the deadlines in this action with those in another unrelated action. The other is that, because it will prevail on summary judgment, it should be allowed to move for this relief.

When a party seeks an extension of the deadlines in the pretrial scheduling order, a party must show good cause under Rule 16(b) and Local Rule 16.3(a). For good cause to be present, a party must establish that its actions are consistent with due diligence. As Vandersteen correctly notes, where a party is careless or negligent, its actions are inconsistent with due diligence and there is no good cause. *See Rahn v. Dawkins*, 464 F.3d 813, 822 (8th Cir. 2006); *Metro Produce Distributors, Inc. v. City of Minneapolis*, 473 F.Supp.2d 955, 963 (D.Minn. 2007).

Because the Government admits its lack of diligence was due to its carelessness, there is no good cause justifying modification of the pretrial scheduling order here. Being advised of the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT** the Government's motion to modify the pretrial scheduling order (Doc. No. 53) is **DENIED.**

Dated this 10th day of July, 2008.

s/ *Jeanne J. Graham*

JEANNE J. GRAHAM
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Russell A. Vandersteen,

Plaintiff,

v.

United States of America,

Defendant.

Civil No. 06-2251 (JRT/JJG)

ORDER

The above-entitled matter comes before the undersigned on a motion, by plaintiff Russell Vandersteen, for the appointment of counsel (Doc. No. 32). Mr. Vandersteen is proceeding on his own behalf. The Government is represented by Lonnie F. Bryan, Assistant U.S. Attorney.

In his motion, Mr. Vandersteen asserts that he cannot afford counsel and, because of his imprisonment and lack of access to legal resources, the appointment of counsel is appropriate here. He adds that he needs the assistance of counsel in order to pursue discovery.

For a party proceeding in forma pauperis, a court has discretion to appoint counsel for that party. 28 U.S.C. § 1915(e). When deciding whether appointment is appropriate, relevant factors include the complexity of the legal and factual issues; the ability of the party to present the claims; and whether the party or the court may benefit from the appointment of counsel. *In re Lane*, 801 F.2d 1040, 1043-44 (8th Cir. 1986); *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984).

Briefly put, Mr. Vandersteen has a slip-and-fall case. So the issues in this litigation are not particularly complex. *Cf. Plummer v. Grimes*, 87 F.3d 1032, 1033 (8th Cir. 1996) (upholding decision to defer appointment of counsel, in case involving prison fight, until trial); *Lane*, 801

F.2d at 1043-44 (concluding appoint of counsel was not required in case involving multiple assaults). And Mr. Vandersteen has capably presented his claim. It is not evident, at this point, that appointment of counsel will materially benefit Mr. Vandersteen or this Court. *Cf. Larson v. United States*, 192 Fed.Appx. 566, 566 (8th Cir. 2006). Being advised of all the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT** Mr. Vandersteen's motion for the appointment of counsel (Doc. No. 32) is **DENIED.**

Dated this 1st day of February, 2008.

s/ Jeanne J. Graham

JEANNE J. GRAHAM
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-2251 JRT/JJG

RUSSELL A. VANDERSTEEN, Plaintiff, v. BUREAU OF PRISONS SAFETY DIRECTOR WESSBERG, et al, Defendants.	)	**ORDER**

Pursuant to the Motion for Leave to Take Deposition (Doc. #43) filed by the United States for leave to take a deposition, and for good cause shown, it is hereby

ORDERED that the United States may take the deposition of Plaintiff, who is confined at FPC Duluth in accordance with the policies of that facility and the Federal Rules of Civil Procedure.

Dated: December 18, 2007.

s/ Jeanne J. Graham
JEANNE J. GRAHAM
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-2251 JRT/JJG

RUSSELL A. VANDERSTEEN, Plaintiff, v. BUREAU OF PRISONS SAFETY DIRECTOR WESSBERG, et al, Defendants.	)	**ORDER**

Upon the Motion of Enlargement of Time (Doc. #39) of Defendant United States, no hearing hereon being deemed necessary, and for good cause shown, it is hereby

ORDERED that the September 6, 2007 scheduling order is amended to provided as follows:

a. Discovery is due by March 1, 2008,

b. Non dispositive Motions are due March 1, 2008 and

c. Dispositive Motions are due by May 1, 2008.

Dated: November 20, 2007

s/ Jeanne J. Graham
JEANNE J. GRAHAM
United States Magistrate Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

RUSSELL A. VANDERSTEEN, Plaintiff, v. BUREAU OF PRISONS SAFETY DIRECTOR WESSBERG, UNITED STATES OF AMERICA, and THREE JOHN DOES, Defendants.	Civil No. 06-2251 (JRT/JJG) **ORDER ADOPTING IN PART AND REJECTING IN PART RECOMMENDATION OF MAGISTRATE JUDGE**

Russell A. Vandersteen, # 06629-089 (209-U), Federal Prison Camp, P. O. Box 1000, Duluth, MN 55814, plaintiff *pro se*.

Patricia R. Cangemi, Assistant United States Attorney, **OFFICE OF THE UNITED STATES ATTORNEY**, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, for defendants.

Russell A. Vandersteen, a federal prisoner, filed this lawsuit *pro se* against the United States and Bureau of Prisons officials claiming the failure to remove ice or to warn him of conditions at the prison violated the Constitution and the Federal Tort Claims Act ("FTCA"). Defendants moved for dismissal of the complaint, and United States Magistrate Judge Jeanne J. Graham issued a Report and Recommendation recommending the Court grant the motion in part and deny it in part. The defendants filed objections. For the reasons set forth below, the Court adopts in part and rejects in part the Report and Recommendation.

BACKGROUND

Vandersteen is an inmate at the Federal Prison Camp ("FPC") in Duluth, Minnesota. On the morning of December 6, 2004, he slipped on any icy sidewalk as he was on his way to work. He suffered severe arm injuries as a result of the fall, including dislocated and broken bones as well as torn tendons and ligaments. Doctors performed surgery on the injuries, and Vandersteen's arm was immobilized for approximately six months. Following the accident Vandersteen filed complaints seeking administrative relief based on his claims that officials knew about the icy conditions and failed to "ensure safety" for inmates. Those claims were denied.

Vandersteen filed his complaint in this case on May 31, 2006. The complaint contains two claims—one against three J. Does and the Director of Safety at FPC, Charles Wessberg, and the other against the United States. Vandersteen alleges the individual defendants forced inmates to go from one building to another without providing warnings of icy conditions or taking precautions to make it safe to travel. This conduct, according to Vandersteen, amounts to deliberate indifference to the safety needs of inmates in violation of the Eighth Amendment. Based on the same conduct, Vandersteen alleges negligence against the United States in the second claim, which was brought under the FTCA.

Defendants filed a motion entitled "Federal Defendants' Motion To Dismiss, Alternatively For Summary Judgment." Defendants argued that Vandersteen failed to exhaust administrative remedies prior to filing suit, that the FTCA claim was barred by the statute of limitations, and that Wessberg was not properly served. They also claimed

the complaint did not state the claims with sufficient specificity to survive the motion to dismiss and that Vandersteen did not suffer a cognizable injury. Attached to the motion defendants included copies of Vandersteen's administrative complaints and a declaration by a Bureau of Prisons attorney stating that those were the only complaints filed.

The Magistrate Judge issued a Report and Recommendation recommending the defendants' motion be denied in part and granted in part. The Magistrate Judge recommended the Court dismiss the Eighth Amendment claim because Vandersteen had conceded in his memorandum that the claim was not viable. As to the FTCA claim, the Magistrate Judge recommended that Vandersteen could proceed against Defendant Wessberg, finding that Vandersteen had pled all the elements of a claim for negligence. The Magistrate Judge declined to convert the motion to dismiss into one for summary judgment on the basis that the motion, which failed to set forth the applicable summary judgment standard, failed to give Vandersteen sufficient notice of the need to respond to a motion for summary judgment or the need to conduct discovery. The defendants filed objections to the Report and Recommendation.

ANALYSIS

The defendants raise three objections to the Report and Recommendation: (1) that the Magistrate Judge erred by permitting the FTCA claim to proceed against Wessberg, (2) that the motion to dismiss the FTCA claim as to all defendants should have been granted, and (3) that the Magistrate Judge erred by declining to consider the merits of a summary judgment motion. This Court has conducted a *de novo* review of the objections pursuant to 28 U.S.C. § 636(b)(1)(C) and Local Rule 72.2(b).

I. THE FTCA CLAIM AGAINST WESSBURG

The Magistrate Judge determined that Vandersteen could proceed on an FTCA claim against Wessberg. Although noting "the actual party in interest, for a claim under the FTCA, is the United States," the Magistrate Judge determined that Wessberg should remain a defendant "until the defendants move to substitute the United States." In the FTCA portion of the complaint, however, Vandersteen avers that the "United States . . . is liable for damages" and that "[t]he USA must be held to account." The defendants maintain based on this language that the United States is already the named defendant for the FTCA claim and that Wessberg, who is not named in this portion of the complaint, should be dismissed. The Court agrees with the position of the United States and rejects this portion of the Report and Recommendation. Any remaining FTCA claim against Wessberg is dismissed.[1]

II. THE FTCA CLAIM AGAINST THE UNITED STATES

The remaining defendant, the United States, argues that the FTCA claim should be dismissed under Federal Rule of Procedure 12(b)(6) because Vandersteen failed to state all the elements of a claim for relief and under Rule 12(b)(1) because Vandersteen failed to exhaust administrative remedies prior to filing suit. The Court will address each argument in turn.

---

[1] Even had Wessberg been named in this portion of the complaint, the Court would grant his motion to dismiss because individuals cannot be liable under the FTCA. *See Knowles v. United States*, 91 F.3d 1147, 1150 (8th Cir. 1996) (noting that while the government can be sued under the FTCA "[t]he employees of the United States . . . may not be sued").

When reviewing a motion to dismiss under Rule 12(b)(6), courts take all factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1060 (8th Cir. 2006). A motion to dismiss should be granted only if it appears beyond doubt the plaintiff can prove no set of facts to warrant a grant of relief. *Id.* Where, as here, the plaintiff was not represented by counsel at the time the complaint was filed, courts are to review the complaint more liberally than if it were a counseled pleading. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The FTCA permits private parties to bring suits against the United States for torts committed by government employees while acting within the scope of their employment. 28 U.S.C. § 1346(b)(1). The United States is liable "in the same manner and to the same extent as are private individuals under like circumstances," and the law of the state in which the tortious conduct is alleged to have occurred governs the dispute. *Lafond v. United States*, 781 F.2d 153, 154 (8th Cir. 1986).

Vandersteen states in his complaint that his injuries were caused by the negligence of FPC employees in Duluth. In the State of Minnesota there are four elements to a negligence claim: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of duty was the proximate cause of the injury. *See Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). In relation to disputes over the safety of property conditions, Minnesota courts have found property owners have a duty to provide "safe access" to buildings, *Strong v. Richfield State Agency, Inc.*, 460 N.W.2d 106, 108 (Minn. Ct. App. 1990), and breach that duty when they fail to exercise "reasonable care under the existing circumstances." *See Adee v. Evanson*, 281 N.W.2d 177, 179 (Minn.

1979). Minnesota courts also recognize, however, that property owners are afforded "a reasonable time" following a storm to make the premises safe. *Nieman v. Northwestern College*, 389 N.W.2d 260, 262 (Minn. Ct. App. 1986).

Vandersteen alleges FPC staff had a duty to remedy "unsafe conditions" and breached that duty by failing to warn inmates about the slippery conditions and by not salting the paths before the inmates went outside. The failure to do either of these things, Vandersteen complains, resulted in the severe injuries to his arm. These allegations set forth (1) a duty to maintain safe conditions, (2) a breach of that duty by the failure of officials to exercise reasonable care, (3) an injury to Vandersteen's arm, and (4) a causal link between the breach and the resultant injury. The Court concludes as a result that these allegations, especially as set forth in a *pro se* pleading, are sufficient to state a claim for negligence in the State of Minnesota, *see Lubbers*, 539 N.W.2d at 401, and are therefore sufficient to state a claim under the FTCA. *See Lafond*, 781 F.2d at 154. The motion to dismiss the complaint on this basis is denied.

The United States next maintains that Vandersteen failed to exhaust administrative remedies on one of the theories of liability asserted in the complaint. According to the government, Vandersteen is seeking relief based on two arguments: (1) that employees were negligent because they failed to warn him about the icy conditions and (2) that employees were negligent because they failed to make the sidewalk safe before inmates were allowed to walk on it. It concedes Vandersteen sought administrative relief on the failure to warn claim but argues he did not seek administrative relief on the claim that employees should have removed the ice or snow. The failure to exhaust is jurisdictional,

the government contends, and the Court must dismiss Vandersteen's claim that the government is liable for failing to salt the ice or otherwise make it safer for travel for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

Congress requires that a plaintiff seeking to proceed against the government under the FTCA must first file an administrative claim. *See* 28 U.S.C. § 2675(a); *Farmers State Sav. Bank v. Farmers Home Admin.*, 866 F.2d 276, 277 (8th Cir. 1989). If a complainant fails to meet that requirement, the claim is subject to dismissal for lack of jurisdiction. *See, e.g., Norman v United States*, 467 F.3d 773, 775 (D.C. Cir. 2006). A plaintiff fulfills the requirement that administrative remedies be exhausted by providing to the government in writing sufficient information for the agency to investigate the claim, including details of the amount of damages sought, the identity of the claimant, and the nature of the injuries. *See Farmers State Sav. Bank*, 866 F.2d at 277; *Melo v. United States*, 505 F.2d 1026, 1029 (8th Cir. 1974).

Vandersteen filed an administrative claim under the FTCA to recover damages based on the government's failure to "ensure safety" on August 15, 2005. The claim states that the December 6, 2004 "work call was issued negligently without regard to the build-up of ice overnight due to freezing rain" and that FPC staff members were aware of the hazardous conditions. Vandersteen sought damages in the amount of $150,000, the same amount sought in this action, to compensate him for his dislocated elbow, broken arm bone, and torn ligaments.

The administrative claim put the government on notice of Vandersteen's claim that it failed to "ensure safety" for workers. According to Minnesota law, the duty

required of a landowner is to use "reasonable care" for the safety of all persons on the premises. *See Olmanson v. LeSueur County*, 693 N.W.2d 876, 880 (Minn. 2005). Vandersteen's administrative claim that the government failed to ensure the safety of workers and his negligence claim in these proceedings are no different. The government asserts that the administrative claim only alleges a failure to warn. Even if Vandersteen intimated in the claim that a way it could have ensured the safety of workers was to warn them about the icy conditions, however, that specific language does not negate his general notice that the failure to exercise reasonable care by not ensuring the safety of workers in regard to the icy conditions on December 6 caused an injury to his arm. The administrative claim, therefore, was sufficient to put the government on notice of all the claims asserted in this action.

Based on the facts as alleged in the complaint and the laws of the State of Minnesota applied to this case, the Court finds that the complaint sets forth all the elements of a claim for negligence and that Vandersteen exhausted all administrative remedies prior to filing suit. The motion to dismiss is denied.

III. THE MOTION TO DISMISS

Even if the motion to dismiss is denied, the government maintains judgment in its favor is still appropriate. It argues the Magistrate Judge erred by declining to rule on the merits of its summary judgment motion and that the facts of this case warrant summary judgment in its favor because it breached neither a duty to warn nor a duty to remove snow or ice.

The motion filed by the government is entitled, "Motion to Dismiss, Alternatively for Summary Judgment." In the supporting memorandum the government repeatedly asks that the Court dismiss the complaint but only asks on one occasion that summary judgment be granted in its favor and nowhere in the memorandum does the government cite the standard of review for a summary judgment motion. That Court finds under these circumstances, especially considering that plaintiff is not represented by counsel, the motion is best treated as one for dismissal under Rule 12. That rule permits a court to convert a motion to dismiss into a summary judgment motion where "matters outside the pleadings are presented to and not excluded by the court," but that determination is discretionary and should not be made unless the nonmoving party has notice and an opportunity to respond to the summary judgment motion. *See, e.g., Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992). Since Vandersteen has had no such notice in this case, the Court will treat this motion only as one to dismiss.

ORDER

Based on the foregoing, all the files, records, and proceedings herein, the Court **SUSTAINS** defendants' objection as it relates to defendant Wessberg and **OVERRULES** defendants' objections in all other respects [Docket No. 26]. Therefore, the Court **ADOPTS in part** and **REJECTS in part** the Report and Recommendation [Docket No. 24]. **IT IS HEREBY ORDERED** that:

1. Defendants' motion to dismiss the claims against Defendant Wessberg and J. Does (1-3) [Docket No. 16] is **GRANTED**. Defendant Wessberg and J. Does (1-3) are **DISMISSED** from this case.

2. Defendants' motion to dismiss the claim brought under the FTCA against the United States [Docket No. 16] is **DENIED**.

DATED: August 31, 2007
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 06-2251 JRT/JJG

RUSSELL A. VANDERSTEEN, Plaintiff,	)	
v.	)	STIPULATION FOR COMPROMISE SETTLEMENT
UNITED STATE OF AMERICA, Defendant.	)	

It is hereby stipulated by and between Russell Vandersteen, Plaintiff, and the United States of America, Defendant, as follows:

1. The parties do hereby agree to settle and compromise the above-entitled action under the terms and conditions set forth herein.

2. The United States of America, Defendant, agrees to pay to the Plaintiff the sum of Ten Thousand dollars ($10,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the same subject matter that gave rise to the above-captioned

lawsuit, including any claims for wrongful death, for which Plaintiff or his heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his heirs, executors, administrators or assigns hereby agree to accept the sum of Ten Thousand dollars ($10,000.00), in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which you may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, including any future claim for wrongful death. Plaintiff and his heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such causes

of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of the United States, its agents, servants, or employees, and is entered into by both parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

5. It is also agreed, by and among the parties, that the settlement amount of Ten Thousand dollars ($10,000.00) dollars represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorneys fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. Payment of the settlement amount will be made by a check drawn on the Treasury of the United States for Ten Thousand dollars ($10,000.00) and made payable to Russell Vandersteen, Plaintiff. The check will be mailed to Plaintiff at the following address:

Russell A. Vandersteen
#06629-089
FPC Duluth
P. O. Box 1000
Duluth, MN 55814-1000

7. In consideration of the payment of Ten Thousand dollars ($10,000.00) as set forth above, Plaintiff agrees that he will execute and file with the court such documents as shall be necessary to cause the above-styled action to be dismissed with prejudice from the docket of the court.

Executed this 19 day of March, 2010.

B. TODD JONES
United States Attorney

Russell A Vandersteen
RUSSELL A. VANDERSTEEN
Plaintiff

L. Bryan
BY: LONNIE F. BRYAN
Assistant U. S. Attorney
Attorney ID No. 206635
600 U.S. Courthouse
300 South Fourth Street
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(612) 664-5600
Attorneys for Defendant,
United States of America

LAW OFFICES OF ROBERT C. MOEST
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2530 Wilshire Boulevard, Second Floor
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(310) 915-6628 (voice)
(310) 915-9897 (fax)

Attorneys for Plaintiff
William D. Chatman

FILED
2008 MAY -6 AM 10:41
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

WILLIAM D. CHATMAN,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Case No.

COMPLAINT FOR DAMAGES

Plaintiff William D. Chatman alleges:

1. This is an action under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. The Court has jurisdiction under 28 U.S.C. § 1346.

2. Plaintiff resides in the County of Los Angeles, State of California, which is located in the Central District of California, Western Division.

3. Beginning in 2003, when plaintiff was imprisoned by the United States Bureau of Prisons, he suffered medical symptoms that were mis-diagnosed. Instead of receiving required medical treatment, he was placed in solitary confinement, presumably left there to die. Only because a random visit by superiors was made to his cell was his condition discovered and proper treatment begun.

4. During the period of plaintiff's incarceration in the Federal Bureau of

Prisons system, he contracted a disease that was eventually diagnosed by the Mayo Clinic at Parkview Medical Center of Pueblo Colorado. Their microbiology test came back positive for "coccidioidomycosis", an infection of his lumbar spine. He is now, after numerous surgeries, reliant upon a wheelchair or walker for the rest of his life. This is all due to the negligence and misdiagnosis of the Federal Bureau of Prison's medical staff members. Defendant's employees, had they been private persons, would be liable to the plaintiff for his damages resulting from the errors in medical diagnosis and treatment.

5. As a legal and proximate result of the injuries, plaintiff has incurred medical expenses, including the fees of physicians who performed surgery upon him, and the cost of hospitalization. Plaintiff has been, and will continue to be, in great physical, mental and emotional pain and distress, all to his damage in the amount of $3,500,000.

6. On or about July 27, 2007, plaintiff presented his claim in writing to the United States Postal Service for damages resulting from the negligence in medical diagnosis and treatment in the amount of $300,000. The claim wsa denied by letter dated and mailed on November 7, 2007.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of $3,500,000, together with costs and disbursements of this action.

Dated: May 5, 2008

RESPECTFULLY SUBMITTED

LAW OFFICES OF ROBERT C. MOEST
Robert C. Moest

By: _____
Robert C. Moest
Attorneys for Plaintiff
William D. Chatman

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge A. Howard Matz and the assigned discovery Magistrate Judge is Charles Eick.

The case number on all documents filed with the Court should read as follows:

CV08- 2946 AHM (Ex)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

[X] **Western Division**
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

[ ] **Southern Division**
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

[ ] **Eastern Division**
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM D. CHATMAN, PLAINTIFF(S) v. THE UNITED STATES OF AMERICA, DEFENDANT(S).	CASE NUMBER CV08-02946 AHM (Ex) **SUMMONS**

TO: DEFENDANT(S): THE UNITED STATES OF AMERICA

A lawsuit has been filed against you.

Within 60 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☑ complaint ☐ _____ amended complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Robert C. Moest, whose address is 2530 Wilshire Boulevard, Second Floor, Santa Monica, CA 90403. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: MAY - 6 2008

By: _____
Deputy Clerk

(Seal of the Court)

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself ☐)
WILLIAM D. CHATMAN

DEFENDANTS
THE UNITED STATES OF AMERICA

(b) County of Residence of First Listed Plaintiff (Except in U.S. Plaintiff Cases):
Los Angeles

County of Residence of First Listed Defendant (In U.S. Plaintiff Cases Only):

(c) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)
Robert C. Moest, Esq.
2530 Wilshire Boulevard, Second Floor
Santa Monica, California 90403
(310) 915-6628; (310) 915-9897 (fax)

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.)

☐ 1 U.S. Government Plaintiff
☐ 3 Federal Question (U.S. Government Not a Party)
☑ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only
(Place an X in one box for plaintiff and one for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in this State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. ORIGIN (Place an X in one box only.)

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify): ☐ 6 Multi-District Litigation ☐ 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: ☐ Yes ☐ No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: ☐ Yes ☐ No ☐ **MONEY DEMANDED IN COMPLAINT: $** 3,500,000

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
28 U.S.C. section 2671 et seq.

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES
☐ 400 State Reapportionment
☐ 410 Antitrust
☐ 430 Banks and Banking
☐ 450 Commerce/ICC Rates/etc.
☐ 460 Deportation
☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 480 Consumer Credit
☐ 490 Cable/Sat TV
☐ 810 Selective Service
☐ 850 Securities/Commodities /Exchange
☐ 875 Customer Challenge 12 USC 3410
☐ 890 Other Statutory Actions
☐ 891 Agricultural Act
☐ 892 Economic Stabilization Act
☐ 893 Environmental Matters
☐ 894 Energy Allocation Act
☐ 895 Freedom of Info. Act
☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 950 Constitutionality of State Statutes

CONTRACT
☐ 110 Insurance
☐ 120 Marine
☐ 130 Miller Act
☐ 140 Negotiable Instrument
☐ 150 Recovery of Overpayment & Enforcement of Judgment
☐ 151 Medicare Act
☐ 152 Recovery of Defaulted Student Loan (Excl. Veterans)
☐ 153 Recovery of Overpayment of Veteran's Benefits
☐ 160 Stockholders' Suits
☐ 190 Other Contract
☐ 195 Contract Product Liability
☐ 196 Franchise

REAL PROPERTY
☐ 210 Land Condemnation
☐ 220 Foreclosure
☐ 230 Rent Lease & Ejectment
☐ 240 Torts to Land
☐ 245 Tort Product Liability
☐ 290 All Other Real Property

TORTS PERSONAL INJURY
☐ 310 Airplane
☐ 315 Airplane Product Liability
☐ 320 Assault, Libel & Slander
☐ 330 Fed. Employers' Liability
☐ 340 Marine
☐ 345 Marine Product Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle Product Liability
☐ 360 Other Personal Injury
☑ 362 Personal Injury-Med Malpractice
☐ 365 Personal Injury-Product Liability
☐ 368 Asbestos Personal Injury Product Liability

TORTS PERSONAL PROPERTY
☐ 370 Other Fraud
☐ 371 Truth in Lending
☐ 380 Other Personal Property Damage
☐ 385 Property Damage Product Liability

BANKRUPTCY
☐ 422 Appeal 28 USC 158
☐ 423 Withdrawal 28 USC 157

CIVIL RIGHTS
☐ 441 Voting
☐ 442 Employment
☐ 443 Housing/Accommodations
☐ 444 Welfare
☐ 445 American with Disabilities - Employment
☐ 446 American with Disabilities - Other
☐ 440 Other Civil Rights

PRISONER PETITIONS
☐ 510 Motions to Vacate Sentence Habeas Corpus
☐ 530 General
☐ 535 Death Penalty
☐ 540 Mandamus/ Other
☐ 550 Civil Rights
☐ 555 Prison Condition

FORFEITURE / PENALTY
☐ 610 Agriculture
☐ 620 Other Food & Drug
☐ 625 Drug Related Seizure of Property 21 USC 881
☐ 630 Liquor Laws
☐ 640 R.R. & Truck
☐ 650 Airline Regs
☐ 660 Occupational Safety /Health
☐ 690 Other

LABOR
☐ 710 Fair Labor Standards Act
☐ 720 Labor/Mgmt. Relations
☐ 730 Labor/Mgmt. Reporting & Disclosure Act
☐ 740 Railway Labor Act
☐ 790 Other Labor Litigation
☐ 791 Empl. Ret. Inc. Security Act

PROPERTY RIGHTS
☐ 820 Copyrights
☐ 830 Patent
☐ 840 Trademark

SOCIAL SECURITY
☐ 861 HIA (1395ff)
☐ 862 Black Lung (923)
☐ 863 DIWC/DIWW (405(g))
☐ 864 SSID Title XVI
☐ 865 RSI (405(g))

FEDERAL TAX SUITS
☐ 870 Taxes (U.S. Plaintiff or Defendant)
☐ 871 IRS-Third Party 26 USC 7609

VIII(a). IDENTICAL CASES: Has this action been previously filed and dismissed, remanded or closed? ☑ No ☐ Yes

If yes, list case number(s):

FOR OFFICE USE ONLY: Case Number: _____

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

VIII(b). RELATED CASES: Have any cases been previously filed that are related to the present case? ☑ No ☐ Yes

If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

(Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or

☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or

☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or

☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: List the California County, or State if other than California, in which **EACH** named plaintiff resides (Use an additional sheet if necessary)

☐ Check here if the U.S. government, its agencies or employees is a named plaintiff.

Los Angeles

List the California County, or State if other than California, in which **EACH** named defendant resides. (Use an additional sheet if necessary).

☑ Check here if the U.S. government, its agencies or employees is a named defendant.

List the California County, or State if other than California, in which **EACH** claim arose. (Use an additional sheet if necessary)

Note: In land condemnation cases, use the location of the tract of land involved.

Colorado, South Carolina

X. SIGNATURE OF ATTORNEY (OR PRO PER): _____ **Date** May 5, 2008

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
KATHERINE M. HIKIDA
Assistant United States Attorney
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300 North Los Angeles Street
Room 7516, Federal Building
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katherine.hikida@usdoj.gov
Attorneys for Federal Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

WILLIAM D. CHATMAN, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. CV 08-2946-AHM(Ex) ORDER RE: DISMISSAL OF ACTION WITH PREJUDICE Honorable A. Howard Matz

Pursuant to the Stipulation for Compromise Settlement that was filed with the Court on August 5, 2010, Plaintiff's action is hereby dismissed with prejudice in its entirety. Each party shall bear his or its own costs and attorneys fees.

DATED: August 5, 2010.

A. HOWARD MATZ
UNITED STATES DISTRICT JUDGE

JS-6

PRESENTED BY:

LAW OFFICES OF ROBERT C. MOEST

/s/
ROBERT C. MOEST

Attorney for Plaintiff
WILLIAM D. CHATMAN

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/
KATHERINE M. HIKIDA
Assistant United States Attorney

Attorneys for Federal Defendant
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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

WILLIAM D. CHATMAN, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. CV 08-2946-AHM(Ex) STIPULATION FOR COMPROMISE SETTLEMENT AND DISMISSAL OF ACTION WITH PREJUDICE [Proposed Order Filed Concurrently Herewith] Honorable A. Howard Matz

IT IS HEREBY STIPULATED by and between Plaintiff WILLIAM D. CHATMAN ("Plaintiff") and Defendant UNITED STATES OF AMERICA ("Defendant"), by and through their respective counsel, as follows:

1. Plaintiff and Defendant do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement.

2. Defendant agrees to pay the sum of ONE HUNDRED THOUSAND dollars ($100,000), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, foreseen and unforeseen, arising from the incident or circumstances giving rise to this suit, for which the Plaintiff and his heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against Defendant, its agents, servants, and employees.

3. Plaintiff and his heirs, executors, administrators or assigns hereby execute a general release of Defendant and agree to accept the sum set forth in this Stipulation for Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, foreseen and unforeseen, arising from the incident or circumstances giving rise to this suit, which they may have or hereafter acquire against Defendant, its agents, servants, and employees.

4. This Stipulation for Compromise Settlement constitutes a general release. As additional consideration for this Stipulation for Compromise Settlement, Plaintiff, his heirs, executors, administrators, and assigns specifically waive and release any and all known and unknown rights, claims, causes of action or demands which might otherwise be preserved or accrue under Section 1542 of

the California Civil Code. Plaintiff understands that Section 1542 of the California Civil Code provides as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which, if known by him or her must have materially affected his or her settlement with the debtor."

Therefore and notwithstanding anything to the contrary herein, Plaintiff, his heirs, executors, administrators, and assigns explicitly release any and all claims against Defendant, its agents, servants, and employees, which Plaintiff does not know or suspect to exist in his favor at the time he executes this Stipulation for Compromise Settlement, which if known to Plaintiff, would have materially affected this settlement.

5. Plaintiff and his heirs, executors, administrators, or assigns further agree to reimburse, indemnify, and hold harmless Defendant, its servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff and his heirs, executors, administrators, or assigns against any third party or against Defendant, arising out of the incident or circumstances giving rise to this lawsuit.

6. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of Defendant, and it is specifically denied that Defendant is liable to Plaintiff. This settlement is entered into by Plaintiff and Defendant for the purpose of compromising disputed claims and avoiding the expenses and risks of future litigation.

7. It is also agreed, by and among Plaintiff and Defendant that the settlement amount of ONE HUNDRED THOUSAND dollars ($100,000)

represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

8. It is also understood by and among the parties that pursuant to 28 U.S.C. § 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

9. Plaintiff and his counsel further represent that Plaintiff's counsel fully explained each and every term and condition of this agreement to Plaintiff and Plaintiff understood his counsel's explanation.

10. Payment of the settlement amount by the United States of America will be made by check in the amount of ONE HUNDRED THOUSAND dollars ($100,000) and made payable to WILLIAM D. CHATMAN AND LAW OFFICES OF ROBERT C. MOEST. Upon receipt of the check by the U.S. Attorney's Office, the check will be delivered to Plaintiff's counsel's office. Plaintiff's counsel agrees to distribute the settlement proceeds to Plaintiff.

11. The parties agree that this Stipulation for Compromise Settlement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

12. In consideration of this settlement, Plaintiff agrees that the above captioned action may be dismissed in its entirety with prejudice. Upon the Court's receipt of this Stipulation for Compromise Settlement, the Court will dismiss this action in its entirety, with prejudice, and with each party bearing its own fees, costs, and expenses.

13. Plaintiff, his heirs, executors, administrators, and assigns agree that

Plaintiff is solely responsible for paying any and all outstanding liens not withdrawn by the lienholder, from any and all insurance companies, health care providers, attorneys, and any and all other persons or organizations who have or claim to have subrogated assigned claims arising out of or related to the subject matter of this suit.

14. Any and all individual taxation consequences as a result of this Stipulation are the sole and exclusive responsibility of Plaintiff. Defendant does not warrant any representation of any tax consequences of this Stipulation. Nothing contained herein shall constitute a waiver by Plaintiff of any right to challenge any tax consequences of this Stipulation.

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15. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether

written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

DATED: August 4, 2010.

LAW OFFICES OF ROBERT C. MOEST

/s/
ROBERT C. MOEST

Attorney for Plaintiff
WILLIAM D. CHATMAN

DATED: August 4, 2010.

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/
KATHERINE M. HIKIDA
Assistant United States Attorney

Attorneys for Federal Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARY ANN KUYKENDOLL, As Independent Administrator of the Estate of JESSE KUYKENDOLL, Deceased,	)	
Plaintiff,	)	
vs.	)	Case No.
UNITED STATES OF AMERICA and U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS (METROPOLITAN CORRECTION CENTER),	)	FILED: AUGUST 28, 2008 08CV4932 JUDGE LEFKOW MAGISTRATE JUDGE SCHENKIER
Defendants.	)	AO

COMPLAINT AT LAW

NOW COMES the Plaintiff, **MARY ANN KUYKENDOLL, as Independent Administrator of the Estate of JESSE KUYKENDOLL, Deceased,** by and through her attorneys, KRALOVEC, JAMBOIS & SCHWARTZ, and complaining of the Defendants, **UNITED STATES OF AMERICA** (hereinafter **"USA"**) and the **DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS** (hereinafter **"FEDERAL BUREAU OF PRISONS"**), and the **METROPOLITAN CORRECTIONAL CENTER** (hereinafter "**MCC**") states as follows:

I. Preliminary Statement

1. Plaintiff, **MARY ANN KUYKENDOLL**, files this action against the **USA** and the **FEDERAL BUREAU OF PRISONS** for the medical negligence/general negligence of its agents and/or employees at the **MCC (CHICAGO, ILLINOIS)** which proximately caused the death of **JESSE KUYKENDOLL.**

2. On or about February 2, 2006, Plaintiff presented a medical negligence/general negligence claim to the **FEDERAL BUREAU OF PRISONS** pursuant to the provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671-2680, alleging liability of the United States Government. See Attached Exhibit A.

3. On May 1, 2008, the United State Government rejected the claim of Mary Ann

Kuykendoll in a letter which is attached hereto as Exhibit B.

4. That **MARY ANN KUYKENDOLL** has been appointed as Independent Administrator of the Estate of **JESSE KUYKENDOLL**, Deceased, by the Circuit Court of Cook County, Illinois, evidencing her right and standing to sue. A copy of the order is Attached hereto as Exhibit C.

5. The cause of action in this Complaint is the same cause of action contained in the claim to the **FEDERAL BUREAU OF PRISONS.**

II. Jurisdiction & Venue

6. This Court has jurisdiction of the action pursuant to 28 U.S.C. Section 1346 and 2671, et seq.

7. Venue is proper under 28 U.S.C. Section 1402(b).

III. The Parties

8. Plaintiff, **MARY ANN KUYKENDOLL,** is bringing this action in her capacity as Independent Administrator of the Estate of JESSE KUYKENDOLL, Deceased.

9. **MARY ANN KUYKENDOLL**, at all relevant times, was a resident of the State of Illinois.

10. **JESSE KUYKENDOLL, Deceased** at all relevant times, was a resident of the State of Illinois.

11. **USA**, through the **FEDERAL BUREAU OF PRISONS**, maintains the **MCC**, located in Chicago, Illinois.

IV. Factual Allegations

12. At all relevant times hereto, the **MCC** by and through its agents, servants and/or employees, was a correctional facility located in the City of Chicago, State of Illinois, housing and providing for the basic needs of inmates, including **JESSE KUYKENDOLL.**

13. On and before December 18, 2003, **JESSE KUYKENDOLL**, was accepted by the Defendants, **USA, FEDERAL BUREAU OF PRISONS**, and **MCC** by and through its agents, servants and/or employees in its custody and undertook to provide him with access to proper medical

treatment and necessary prescription medications.

14. On and before December 18, 2003, **JESSE KUYKENDOLL,** was suffering from HIV/AIDS and was being treated with medications for that condition.

15. On and before December 18, 2003, the Defendants, **USA , FEDERAL BUREAU OF PRISONS**, and **MCC**, by and through its agents, servants and/or employees, accepted **JESSE KUYKENDOLL** as an inmate and undertook to provide for his basic physical and medical needs, including the administration of his proper HIV/AIDS medications.

16. On December 18, 2003, Defendants, **USA, FEDERAL BUREAU OF PRISONS,** and **MCC**, by and through its agents, servants and/or employees, performed a medical intake screening on **JESSE KUYKENDOLL** and documented that he had a medical history of HIV/AIDS and was being treated with medications for that condition.

17. Upon **JESSE KUYKENDOLL'S** intake at **MCC**, his medications were not initiated.

18. On or about December 24, 2003, **JESSE KUKYENDOLL** presented to the **MCC** clinic where, upon examination, it was noted that he had thrush throughout the oropharynx region.

19. On and after December 24, 2003, **MCC** failed to provide any follow-up care or treatment for this condition.

20. On and after December 24, 2003, **JESSE KUYKENDOLL'S** condition rapidly deteriorated in the absence of any medical intervention or medications.

21. On February 24, 2004, **JESSE KUYKENDOLL** died of cryptococcal meningitis due to Acquired Immune Deficiency Syndrome.

22. At all times relevant hereto, there existed a duty on the part of the Defendants, **USA, FEDERAL BUREAU OF PRISONS,** and **MCC**, by and through its agents, servants and/or employees, to provide access to medical care and prescribed medications for an inmate such as **JESSE KUYKENDOLL.**

23. Disregarding its duty, Defendants, **USA, FEDERAL BUREAU OF PRISONS,** and **MCC**, by and through its agents, servants and/or employees, were guilty of one or more of the

following acts or omissions:

a. Caused the abrupt cessation of **JESSE KUYKENDOLL'S** previously prescribed HIV/AIDS medications;

b. Failed to perform a proper and sufficient follow up evaluation or treatment after the finding of thrush during the examination of **JESSE KUYKENDOLL'S** oropharynx on December 24, 2003;

c. Failed to initiate and/or continue medical therapy for **JESSE KUYKENDOLL'S** condition of HIV/AIDS;

d. Failed to provide proper management of **JESSE KUYKENDOLL'S** condition of HIV/AIDS;

e. Negligently and with deliberate indifference failed to obtain **JESSE KUYKENDOLL'S** necessary prescribed medication;

f. Prevented **JESSE KUYKENDOLL** from obtaining proper medical care or necessary medications; and

g. Displayed deliberate indifference to **JESSE KUYKENDOLL'S** serious medical needs.

24. As a direct and proximate result of one or more of the foregoing careless and negligent acts or omissions on the part of the Defendants, **USA, FEDERAL BUREAU OF PRISONS,** and **MCC,** by and through its agents, servants and/or employees, **JESSE KUYKENDOLL'S** medical condition was left untreated, allowed to progress, and resulted in his premature death.

25. Plaintiff attaches hereto, as Exhibit D, a copy of a report from a physician which states that **JESSE KUYKENDOLL** was provided negligent treatment which caused his premature death and that there is a meritorious claim against the **Metropolitan Corrections Center** for negligence.

WHEREFORE, the Plaintiff, **MARY ANN KUYKENDOLL, as Special Administrator of the Estate of JESSE KUYKENDOLL, Deceased,** prays for judgment against the Defendants,

USA, FEDERAL BUREAU OF PRISONS, and **MCC**, in such an amount in excess of this Court's jurisdictional requisite as will fairly and adequately compensate him for the losses alleged above.

s/Laurie A. Niego
Laurie A. Niego
ARDC#: 6293475
Attorney for Plaintiff
KRALOVEC, JAMBOIS & SCHWARTZ
60 West Randolph Street
Chicago, Illinois 60601
Telephone: (312) 782-2525
Fax: (312) 855-0068
lniego@kjs-law.com

I hereby certify that on August 28, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

s/Laurie A. Niego
Laurie A. Niego
ARDC#: 6293475
Attorney for Plaintiff
KRALOVEC, JAMBOIS & SCHWARTZ
60 West Randolph Street
Chicago, Illinois 60601
Telephone: (312) 782-2525
Fax: (312) 855-0068
lniego@kjs-law.com

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*

MARY ANN KUYKENDOLL, As Special Administrator of the Estate of JESSE KUYKENDOLL, Deceased
12200 S. Emerald
Chicago, Illinois 60628

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. OR P.M.)*
☐ MILITARY ☑ CIVILIAN	1/5/65	Married	Deceased on February 24, 2004	

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)*

SEE ATTACHED

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

SEE ATTACHED

11. WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
N/A	

12. *(See instructions on reverse)* AMOUNT OF CLAIM *(In dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
	$2,000,000.00	$2,000,000.00	$4,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
See Exhibit A	(312) 782-2525	01/26/06

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

95-109 *NSN 7540-00-634-4046* STAND
Previous editions not usable. PRESC
This form was electronically produced by National Production Services Staff 28 CFR

EXHIBIT
A

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to

Director, Torts Branch
Civic Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☐ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

17. If deduction, state amount

18. If claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? *(It is necessary that you ascertain these facts)*

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☐ No

BASIS OF CLAIM
JESSE KUYKENDOLL
DOB 1/5/65

On December 18, 2003, Mr. Kuykendoll arrived at the Metropolitan Correctional Center ("MCC") at which time he underwent intake screening. At this time, it was documented that Mr. Kuykendoll had a medical history for HIV/AIDS and that he was being treated with medications for that condition. Upon intake, no medications were initiated. Additionally, no labs including CD4 count, viral load and resistance testing were performed.

On December 24th, 2003, Mr. Kuykendoll presented to the MCC clinic where it was noted that he had thrush on his examination of the oropharynx. Again, it was noted that no treatment was initiated.

Without receiving any medications for his HIV/AIDS, Mr. Kuykendoll's condition deteriorated quickly.

On February 24, 2004, Jesse Kuykendoll died of cryptococcal meningitis due to Acquired Immune Deficiency Syndrome.

The abrupt cessation of treatment, lack of follow up, and lack of initiation of medical therapy for HIV/AIDS and the opportunistic infections was the cause of Mr. Kuykendoll's rapid and precipitous clinical deterioration and death. A copy of the Reviewing Health Professional's Report is attached hereto as Exhibit B.

Mr. Kuykendoll is survived by his widowed wife Mary Ann Kuykendoll, daughter Petcie Anthly, daughter Jessica Anthly, and Caprice Kuykendoll.

AFFIDAVIT

I, **ALEXANDER M. SUKHMAN**, under the penalties of perjury hereby state that I am an attorney licensed to practice law in Illinois. Further stating:

I sign this form in official capacity as the attorney retained by the Estate of Jesse Kuykendoll, Deceased, by his spouse, Mary Ann Kuykendoll.

Alexander M. Sukhman
Attorney for the Plaintiff

Subscribed and sworn to before me
this 27 day of January, 2006.

NOTARY PUBLIC
KRALOVEC, JAMBOIS & SCHWARTZ
60 West Randolph Street -4th Floor
Chicago, Illinois 60601
(312) 782-2525
FIRM ID: 24797

"OFFICIAL SEAL"
Noelle Romano
Notary Public, State of Illinois
My Commission Exp. 07/14/2009

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

MAY 01 2008

Alexander M. Sukhman
Attorney at Law
Kralovec, Jambois & Schwartz
60 W. Randolph Street 4th Floor
Chicago, Illinois 60601

Re: Administrative Claim Number TRT-NCR-2006-01883
(Mary Ann Kuykendoll; Estate of Jesse Kuykendoll; Personal Injury)

CERTIFIED NUMBER 7005 1820 0002 3373 0986

Dear Mr. Sukhman:

The above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. We have completed our investigation of your client's claim alleging the negligent treatment of her husband's medical condition by employees of the Bureau of Prisons during his incarceration led to his rapid clinical deterioration and death. Our investigation revealed Mr. Kuykendoll did not suffer any personal injury as a result of negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your client's claim is denied. This letter serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If your client is dissatisfied with our agency's action, she may file suit in the appropriate U.S. District Court no later than six months after the date of mailing of this notification.

Sincerely,

Richard W. Schott
Regional Counsel

EXHIBIT
B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

ORIGINAL

Estate of
JESSE KUYKENDOLL
Deceased

No. 2007 P 002620
Docket
Page

LETTERSOFOFFICE - DECEDENT'SESTATE

MARY ANN KUYKENDOLL has been appointed

Independent Administrator of the estate of

JESSE KUYKENDOLL, deceased,

who died Saturday, February 24, 2007, and is authorized to to take possession of and collect the estate of the decedent and to do all acts required by law.

SEAL

WITNESS, March 25, 2008

Dorothy Brown
Clerk of the Circuit Court

CERTIFICATE

I certify that this is a copy of the letters of office now in force in this estate.

WITNESS, March 25, 2008

AMW

Clerk of Court

EXHIBIT
C

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MICHAEL [illegible], M.D.
Board Certified Family Practice

5660 W. [illegible] Street
Oak Lawn, IL 60453
(708) 499-4190 FAX (708) 857-4420

Kralovec, Jambois, & Schwartz
4th Floor, Goodman Theatre Building
60 W. Randolph Street
Chicago, IL 60601

RE: **Jesse Kuykendoll**

August 9th, 2005

Dear Mr. Alexander Sukhman,

This correspondence is in regard to the medical record review of deceased patient, Jesse Kuykendoll. Mr. Kuykendoll was a 44 year old man who died on February 24, 2004 at University of Illinois at Chicago Hospital from cryptococcal meningitis secondary to HIV/AIDS. He was admitted to the hospital directly from MCC Chicago on February 6th, 2004. On that date he was urgently seen by a staff physician at MCC Chicago for mental status changes which prompted his admission to the hospital. Subsequent work up revealed cryptococcal meningitis. Mr. Kuykendoll did poorly during the admission and subsequently expired.

Pertinent history from this admission begins on December 18th, 2003 at which time he underwent intake screening at MCC Chicago medical services. At the time of his detention, a history of HIV/AIDS was noted, as was his prior treatment for the disease. Upon his intake at MCC Chicago, no medications were reinitiated at that time. Additionally, no labs including CD4 count, viral load and resistance testing were performed.

At the December 24th, 2003 clinic visit he was noted to have thrush on his examination of the oropharynx. Thrush in the setting of HIV/AIDS is a marker of severe immunodeficiency and clearly an indication for medical prophylaxis for opportunistic infections and antiretoviral therapy for HIV. Again, it was noted at this time that no treatment was initiated. Over time, his clinical deterioration progressed prompting his admission to the hospital and subsequent death.

The abrupt cessation of treatment, lack of follow up, and lack of initiation of medical therapy for HIV/AIDS and the opportunistic infections was the cause of his rapid and precipitous clinical deterioration and death. This omission and delay of treatment is clearly a deviation from the standard of care.

EXHIBIT
D

MICHAEL J. OLIVIERI, M.D.
Board Certified Family Practice

5660 W[illegible] Street
Oak Lawn, IL 60453
(708) 499-4190 FAX (708) 857-4420

If you have any further concerns or questions regarding this matter, please contact me at your convenience.

Sincerely,

MICHAEL J. OLIVIERI, M.D.

MJO:gb

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.3
Eastern Division

Mary Ann Kuykendoll

Plaintiff,

v.

Case No.: 1:08–cv–04932
Honorable Joan H. Lefkow

United States of America, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, September 29, 2009:

MINUTE entry before the Honorable Joan H. Lefkow:No one appeared in court on 9/29/2009 when case was called for status. Based on prior representations that settlement has been reached, case is hereby dismissed with prejudice. Civil case terminated. Mailed notice(mad,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARY ANN KUYKENDOLL, As Independent Administrator of the Estate of JESSE KUYKENDOLL, Deceased,	)	
Plaintiff,	)	
vs.	)	Case No. 08 C 4932
UNITED STATES OF AMERICA	)	Judge Lefkow
Defendant.	)	

PETITION FOR ORDER OF DEPENDENCY AND APPROVAL OF SETTLEMENT

NOW COMES the Plaintiff, **MARY ANN KUYKENDOLL, As Independent Administrator of the Estate of JESSE KUYKENDOLL, Deceased,** by and through her attorneys, **KRALOVEC, JAMBOIS & SCHWARTZ,** and petitions this Court to make the following findings relative to the settlement with Defendant, **UNITED STATES OF AMERICA:**

1. Petitioner has been properly appointed as Independent Administrator of the Estate of **JESSE KUYKENDOLL**, deceased by the Probate Court in Cook County, IL (See attached Exhibit A).

2. Plaintiff has alleged that **JESSE KUYKENDOLL's** life was shortened as a result of the alleged negligent acts and/or omissions of the Defendant, UNITED STATES OF AMERICA. Specifically, it is alleged that **JESSE KUYKENDOLL** who had AIDS when he was taken into custody at the **MCC,** was denied his AIDS medications thereby shortening his life.

3. **JESSE KUYKENDOLL,** died on February 24, 2004.

4. As a result of this occurrence, Plaintiff made a claim against UNITED STATES OF AMERICA.

5. The Estate of **JESSE KUYKENDOLL** is comprised of Spouse, MARY ANN KUYKENDOLL, and children, CAPRICE G. KUYKENDOLL, PEPCIE SMALLS, JESSICA ANTHLY and MARTIN LUCKES.

6. An offer to settle the claim of **JESSE KUYKENDOLL** has been made on behalf of the Defendant, UNITED STATES OF AMERICA, in the amount of SIX HUNDRED EIGHTY-SEVEN THOUSAND FIVE HUNDRED and 00/100 ($687,500.00) DOLLARS.

7. Your petitioner has retained the legal service of Alexander M. Sukhman and KRALOVEC, JAMBOIS & SCHWARTZ to represent **the Estate of JESSE KUYKENDOLL** in the aforesaid claim and it is his opinion that the settlement offer is fair, reasonable and proper for this cause, it is in the best interest of **the Estate of JESSE KUYKENDOLL,** that the settlement offer be accepted and that UNITED STATES OF AMERICA, the entities against whom a claim has been made for damages, be released from any and all further liability.

8. That **MARY ANN KUYKENDOLL, as Independent Administrator of the Estate of JESSE KUYKENDOLL, Deceased,** is authorized to settle this claim, and that said **MARY ANN KUYKENDOLL**, is authorized to execute a Release or any other documents necessary to effect said settlement and dismissal.

9. Pursuant to 28 U.S.C.A. 2678, "No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25% of... any settlement made pursuant to section 2677 of this title" (after suit is filed). Accordingly, your Petitioner has agreed to

pay attorney fees in the amount of ONE HUNDRED SEVENTY-ONE THOUSAND, EIGHT HUNDRED SEVENTY-FIVE and 00/100 ($171,875.00) DOLLARS.

10. Service is being attempted on all parties of interest that may be affected by this Petition and/or this Court's order.

11. Advanced Case Loans is asserting a reimbursement or debt interest in the proceeds of this case. Advanced Case Loans has advanced $30,000.00 to **MARY ANN KUYKENDOLL** in principal. Advanced Case Loans is claiming a reimbursement interest in the approximate amount of $41,000.00, which includes interest (exact amount depends on date of disbursement). A copy of the payoff letter is attached hereto as Exhibit B.

12. Petitioner requests an Order of Dependency from the Court, at this time, as follows:

a. 66 and 2/3% dependency to the spouse **MARY ANN KUYKENDOLL;**

b. 33 and 1/3% dependency to the children CAPRICE G. KUYKENDOLL, JESSICA ANTHLY, PEPCIE SMALLS, MARTIN LUCKES;

13. Upon receipt of the total settlement of SIX HUNDRED EIGHTY-SEVEN THOUSAND FIVE HUNDRED ($687,500.00) DOLLARS, Plaintiff's Counsel proposes that **MARY ANN KUYKENDOLL**, shall distribute the funds as follows:

a) To KRALOVEC, JAMBOIS & SCHWARTZ, the sum of ONE HUNDRED SEVENTY-ONE THOUSAND, EIGHT HUNDRED SEVENTY-FIVE and 00/100 ($171,875.00) DOLLARS, as full and final payment of all attorney fees owed.

b) To KRALOVEC, JAMBOIS & SCHWARTZ, reimbursement of expenses incurred in the prosecution of this cause in the amount of FOUR THOUSAND, ONE HUNDRED EIGHT and 87/100 ($4,108.87) DOLLARS as identified in Exhibit C (expenses due to service and post-settlement issues may rise. If the expenses become greater, a complete accounting will be provided to the client).

14. That the balance of the settlement, namely FIVE HUNDRED ELEVEN THOUSAND, FIVE HUNDRED SIXTEEN and 13/100 ($511,516.13) DOLLARS will be distributed as follows:

a) To MARY ANN KUYKENDOLL, TWO HUNDRED NINETY-EIGHT THOUSAND, TEN and 75/100 ($298,010.75) DOLLARS.

b) To CAPRICE G. KUYKENDOLL, a minor FORTY-TWO THOUSAND, THREE HUNDRED SEVENTY-SIX and 34/100 ($42,376.34) DOLLARS, will be put in to an annuity (details of the annuity will be available at the hearing).

c) To PEPCIE SMALLS, FORTY-TWO THOUSAND, THREE HUNDRED SEVENTY-SIX and 34/100 ($42,376.34) DOLLARS.

d) To JESSICA ANTHILY, FORTY-TWO THOUSAND, THREE HUNDRED SEVENTY-SIX and 34/100 ($42,376.34) DOLLARS.

e) FORTY-TWO THOUSAND, THREE HUNDRED SEVENTY-SIX and 34/100 ($42,376.34) DOLLARS to be held in escrow account for MARTIN LUCKES. If and when, Mr. Luckes is found, the matter of his share shall be brought before the Court or there will be an agreement

among the next of kin. Unused portions of this $42,376.34 will be split in equal shares among the 3 other children.

f) Kralovec, Jambois & Schwartz trust account the amount of $3,000.00 to be held for additional costs.

g) To Advanced Case Loan the amount of approximately $41,000.00 (exact amount to be determined – if a different amount, then it will come out of, or be credited to, MARY ANN KUYKENDOLL's share).

WHEREFORE, your Petitioner, **MARY ANN KUYKENDOLL, as Independant Administrator of the Estate of JESSE KUYKENDOLL, Deceased,** request that this court enter an Order of Dependency as stated herein, for an order approving the proposed settlement with the Defendant, UNITED STATES OF AMERICA and for distribution of funds consistent with this Petition.

Respectfully Submitted,

Alexander Sukhman
Attorney for Plaintiff

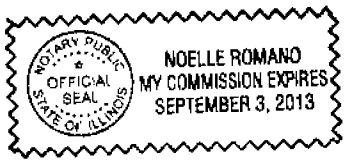
KRALOVEC, JAMBOIS & SCHWARTZ
60 W. Randolph Street, 4th Floor
Chicago, IL 60601
(312) 782-2525

The undersigned hereby agrees to the above foregoing Petition.

MARY ANN KUYKENDOLL

Subscribed and Sworn to before me this 30th day of November, 2009.

Notary Public.



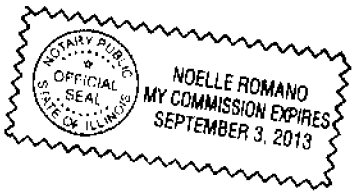
KRALOVEC, JAMBOIS & SCHWARTZ
60 W. Randolph Street, 4th Floor
Chicago, IL 60601
(312) 782-2525

The undersigned hereby agrees to the above foregoing Petition.

JESSICA ANTHLY

Subscribed and Sworn to before me this 30 day of November, 2009.

Notary Public.



KRALOVEC, JAMBOIS & SCHWARTZ
60 W. Randolph Street, 4th Floor
Chicago, IL 60601
(312) 782-2525

The undersigned hereby agrees to the above foregoing Petition.

Pepcie N. Smalls
PEPCIE SMALLS

Subscribed and Sworn to before me
this 30 day of November, 2009.

Noelle Romano
Notary Public.



KRALOVEC, JAMBOIS & SCHWARTZ
60 W. Randolph Street, 4th Floor
Chicago, IL 60601
(312) 782-2525

The undersigned hereby agrees to the above foregoing Petition.

Maryann Kuykendall
MARY ANN KUYKENDOLL, as GUARDIAN OF CAPRICE G. KUYKENDOLL, a minor

Subscribed and Sworn to before me this 30th day of November, 2009.

Noelle Romano
Notary Public.



KRALOVEC, JAMBOIS & SCHWARTZ
60 W. Randolph Street, 4th Floor
Chicago, IL 60601
(312) 782-2525

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

ORIGINAL

Estate of
JESSE KUYKENDOLL
Deceased

No. 2007 P 002620
Docket
Page

LETTERSOFOFFICE - DECEDENT'SESTATE

MARY ANN KUYKENDOLL has been appointed

Independent Administrator of the estate of

JESSE KUYKENDOLL, deceased,

who died Saturday, February 24, 2007, and is authorized to to take possession of and collect the estate of the decedent and to do all acts required by law.

SEAL

WITNESS, March 25, 2008

Dorothy Brown
Clerk of the Circuit Court

CERTIFICATE

I certify that this is a copy of the letters of office now in force in this estate.

AMW

WITNESS, March 25, 2008

Dorothy Brown
Clerk of Court

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

EXHIBIT
A

ADVANCE CASE LOANS, L.L.C.
205 W. WACKER DRIVE, #901
CHICAGO, IL 60606
312-332-4100

10/21/2009

MARY ANN KUYKENDOLL
12200 S. EMERALD AVE
CHICAGO, IL 60628

Re: Pay-off for open loans with ADVANCE CASE LOANS, L.L.C.

Date of Loan	Loan Number	Principal	Interest	Per Diem
09/19/2006	WW001409-00	$3,500.00	$6,273.53	$5.56
04/09/2007	WW002256-00	$500.00	$786.47	$.85
12/13/2007	WW003432-00	$1,000.00	$1,207.40	$1.78
10/21/2009	WW008087-00	$25,000.00	$.00	$57.53
Total Pay-off	$38,292.40	$30,000.00	$8,267.40	$65.72

Dear MARY ANN KUYKENDOLL:

Pursuant to your request the following is a Pay-Off letter for the above referenced loans valid if payment is received by 10/21/2009:

Total Pay-off as of 10/21/2009: $38,292.40

For each day after 10/21/2009 the total daily interest for the loans is: $65.72 per day. Please add two days of interest when mailing by regular mail. You can also call our office to pick up the checks if you wish.

Thank you for your anticipated cooperation in this matter and do not hesitate to contact us if you have any questions.

Sincerely,

Advance Case Loans LLC
205 W Wacker Dr. Suite 901
Chicago, IL 60606

EXHIBIT
B

ITEMIZATION OF COSTS EXPENDED

RE: Kuykendoll

DATE	PAYEE	EXPENDED FOR	AMOUNT
08/04/09	Ryan E. Yagoda	Parking for CMConf.	$30.00
06/25/09	Lisit Court Reporting Service	Court Reporter-Deposition of Mary Ann Kuykendoll	$177.50
06/09/09	Laurie Niego	Deposition of Plaintiff	$15.00
03/19/09	Law Bulletin	Article	$120.00
09/24/08	Alexander Sukhman	Filing Fees	$350.00
05/02/08	Kogut & Associates	Professional Fees	$1,655.00
04/12/07	Clerk of Court-Cook County	Filing Fees	$279.00
04/20/09	FedEx	Delivery	$89.91
09/15/05	Michael Oliveri, M.D.	Expert Fees-Review	$700.00
11/13/09	John Edward Byrne	Investigator-search for children	$750.00
		Total	**$4,108.87**

EXHIBIT
C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DIEGO GIL, Plaintiff,	)	
v.	)	Case Number 00-cv-00724-bbc
UNITED STATES OF AMERICA, Defendant.	)	

ORDER OF DISMISSAL

Pursuant to the Stipulation of Dismissal of the parties,

IT IS HEREBY ORDERED that this action is dismissed with prejudice in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

Executed this 8th day of May, 2009.

BY THE COURT:

Barbara B. Crabb

BARBARA B. CRABB
Chief United States District Judge
Western District of Wisconsin

Copy of this document has been provided to: Atty Levin
USA via ACF
this 8 day of May, 2009
by [signature]
M. Hardin, Secretary to
Judge John C. Shabaz

Page 0467 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0468 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0469 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0470 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0471 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Welcome WILSON J MOORER | Logout

HOME | ALERTS | MY WORK | NEW CASE | SEARCH MAIN | EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2009-00105 **Short Description:** GIL, DIEGO V. REED, JAMES

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Legal Information

Reference Number	3:00-cv-00724-bbc
Short Description	GIL, DIEGO V. REED, JAMES
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	NORTH CENTRAL REGIONAL OFFICE
Current Institution	
Incident Region	NORTH CENTRAL REGIONAL OFFICE
Incident Institution	Oxford (FCI)
Monetary Relief Sought	$40,000.00
Estimated Amount	$
Office	Madison
Jurisdiction	WESTERN DISTRICT OF WISCONSIN
Responsible Legal Office	St. Louis, MO

Legal Liability Information

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

C

Date	05/08/2009
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$20,000.00
Total Amount Paid	$20,000.00
Description	BIVENS DEFENDANTS DISMISSED AND FTCA CASE CLOSED PURSUANT TO A STIPULATION OF DISMISSAL BETWEEN PARTIES.
Description	BIVENS DEFENDANTS DISMISSED AND FTCA CASE CLOSED PURSUANT TO A STIPULATION OF DISMISSAL BETWEEN PARTIES.
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	11/22/2000
Date Filed	12/21/2000

Current Owner	AMY J STANDEFER MALOTT
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	NO CAUSE CODE ENTERED
Further Case Classification	
Comments	

FILED
OCT 22 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON OFFICE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DEVERON MURPHY,)
)
Plaintiff,)
)
v.) Case No. 08-745-JPG
)
UNITED STATES OF AMERICA,)
)
Defendant.)

COMPLAINT

I. INTRODUCTION

1. This action is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2761 et seq., to seek redress for injuries suffered by Plaintiff Deveron Murphy ("Murphy"), an inmate incarcerated at the United States Penitentiary located in Marion, Illinois, as the result of the negligent acts or omissions of the Defendant United States of America, its officers and/or employees.

II. JURISDICTION

2. Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §§ 1331 and 1346(b).

III. PARTIES

3. At all relevant times, Plaintiff Murphy was, and still is, a citizen of the United States residing in the State of Illinois.

4. At all relevant times, Plaintiff Murphy was, and still is, a prisoner incarcerated at the United States Penitentiary located in Marion, Illinois ("USP-Marion").

5. At all relevant times, Plaintiff Murphy was, and still is, in the custody and control of the Bureau of Prisons ("BOP"), its agents, servants and employees. The BOP is an agency of the

Defendant United States of America ("USA").

IV. CLAIM FOR RELIEF

COUNT ONE (FEDERAL TORT CLAIMS ACT)

6. On or about June 18, 2007, Murphy was jogging around the recreation yard ("the yard"), located at the eastern side of the perimeter of USP-Marion when he was caused to fall as the result of a dangerous and defective posthole which had been excavated in the yard and negligently left unmarked and fully open to pedestrian traffic.

7. As a result of this fall, Murphy suffered permanent injuries to his left ankle, including a fracture to his medial malleolus which the treating physician determined was not surgically reparable and which would permanently disable Murphy's ankle.

8. As a further result of this fall and subsequent ankle injury, Murphy suffered and continues to suffer pain in his left ankle, left foot and left leg, has impaired motion and decreased strength in his ankle support, and is permanently disfigured.

9. As a further result of this fall and subsequent injury, Murphy suffered from serious and constant pain and suffering when USP-Marion medical staff failed with deliberate indifference to Murphy's suffering to prescribe sufficient pain medications.

10. USP-Marion, its agents, servants and/or employees had notice of the defective and dangerous conditions posed by the deep posthole excavations, as USP-Marion staff and recreation administrators ordered the excavations to be performed, were present during the actual excavations, and left the excavated holes unmarked and open to regular, daily foot traffic for a period of weeks prior to

Murphy's fall and injuries, even though many inmates informed these BOP agents and employees of the dangerous conditions posed by the unmarked postholes prior to June 18, 2007.

11. USP-Marion, its agents, servants and/or employees were negligent in that they actively caused the excavation of the deep postholes on the yard, which was then open on a daily basis for inmates seeking recreation, left these postholes unmarked and open to all foot traffic, allowed this dangerous and defective condition to exist for an unreasonable amount of time, failed to perform reasonable safety inspections of the area, and failed to warn inmates, including Murphy, of the dangerous and defective condition of the yard area and the postholes in question, resulting in the above-described injuries to Murphy.

12. Plaintiff has satisfied the prerequisites for filing a claim as set forth under 28 U.S.C. § 2675 in that he filed an administrative complaint ("Form 95") with the BOP in a timely fashion and received a release to sue dated May 30, 2008. (See Exhibit A, attached hereto.)

13. Plaintiff seeks a trial by jury.

14. Plaintiff seeks one hundred thousand dollars and no cents ($100,000.00) as damages for the above referenced injuries and tortious acts of Defendant.

WHEREFORE the Plaintiff claims:

A. Damages; and

B. Such other releif as this Court deems just and resonable.

Respectfully submitted by
THE PLAINTIFF, DEVERON MURPHY,
pro se

Deveron Murphy

Deveron Murphy
Reg. No. 06682-025
U.S. Penitentiary
P.O. Box 1000
Marion, Illinois 62959

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

MAY 30 2008

Deveron Murphy
Register No. 06682-025
United States Penitentiary
Post Office Box 1000
Marion, Illinois 62959

Re: Administrative Claim Number TRT-NCR-2008-03787
Personal Injury: $100,000.00

CERTIFIED NUMBER 7005 1820 0002 3373 1464

Dear Mr. Murphy:

The above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six months after the date of mailing of this notification.

Sincerely,

Richard W. Schott
Regional Counsel

Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

DEVERON MURPHY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 08-cv-745-JPG**
	)	
UNITED STATES of AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

Plaintiff is an inmate currently in the United States Penitentiary at Marion, Illinois; he filed this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680. Plaintiff alleges that on or about June 18, 2007, he was jogging in the recreation yard at Marion. He tripped and fell due to a large pothole, causing permanent damage to his left ankle. Plaintiff alleges that the pothole was the result of excavations performed in the yard, and the pothole was not marked or covered. He further alleges that he received insufficient medical treatment for his injury.

> The FTCA permits an individual to bring suit in federal court against the United States for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1). Pursuant to this provision, federal inmates may bring suit for injuries they sustain while incarcerated as a consequence of the negligence of prison officials. *United States v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). However, the plaintiff may not bring such a suit unless he has first presented his claim to the appropriate federal agency and that agency has denied the claim. 28 U.S.C. § 2675(a).

Palay v. United States, 349 F.3d 418, 425 (7th Cir. 2003). With his complaint, Plaintiff has submitted a copy of a denial of his claim filed with the Bureau of Prisons; thus, it appears that he has exhausted his administrative remedies with respect to this claim.

IT IS HEREBY ORDERED that Plaintiff shall complete and submit a USM-285 form for the **ATTORNEY GENERAL of the UNITED STATES** and the **UNITED STATES ATTORNEY for the SOUTHERN DISTRICT OF ILLINOIS** within **THIRTY (30) DAYS** of the date of entry of this Memorandum and Order. The Clerk is **DIRECTED** to send Plaintiff **TWO (2)** USM-285 forms with Plaintiff's copy of this Memorandum and Order. **Plaintiff is advised that service will not be made on a defendant until Plaintiff submits a properly completed USM-285 form for that defendant.**

The Clerk is **DIRECTED** to prepare a summons for the **UNITED STATES OF AMERICA**. The Clerk shall forward the summons, USM-285 forms submitted by Plaintiff, and sufficient copies of the complaint to the United States Marshal for service.

The Clerk is **FURTHER DIRECTED** to prepare a copy of the summons, a copy of the complaint, and a copy of this Order to be served by the United States Marshal on the **ATTORNEY GENERAL of the UNITED STATES**.

The United States Marshal is **DIRECTED** to serve the original summons and complaint on the **UNITED STATES ATTORNEY for the SOUTHERN DISTRICT OF ILLINOIS**, and a copy of the summons and complaint on the **ATTORNEY GENERAL of the UNITED STATES**.

IT IS FURTHER ORDERED that Plaintiff shall serve upon the United States Attorney for the Southern District of Illinois, a copy of every further pleading or other document submitted for consideration by this Court. He shall include, with the original paper to be filed with the Clerk of

the court, a certificate stating the date that a true and correct copy of any document was mailed to the United States Attorney. Any paper received by a district judge or magistrate which has not been filed with the Clerk or which fails to include a certificate of service will be disregarded by the Court.

IT IS FURTHER ORDERED that pursuant to Local Rule 72.1(a)(2), this cause is referred to a United States Magistrate Judge for further pre-trial proceedings.

IT IS FURTHER ORDERED that this entire matter be referred to a United States Magistrate Judge for disposition, as contemplated by Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *should all the parties consent to such a referral.*

Plaintiff is under a continuing obligation to keep the Clerk and each opposing party informed of any change in his whereabouts. This shall be done in writing and not later than seven (7) days after a transfer or other change in address occurs.

IT IS SO ORDERED.

Dated: April 22, 2009.

s/ J. Phil Gilbert
U. S. District Judge

Welcome WILSON J MOORER | Logout

HOME | ALERTS | MY WORK | NEW CASE | SEARCH MAIN | EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2009-00663 **Short Description:** MURPHY V. USA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Log.n Information

Reference Number	08-cv-00745
Short Description	MURPHY V. USA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	NORTH CENTRAL REGIONAL OFFICE
Current Institution	Marion (USP)
Incident Region	NORTH CENTRAL REGIONAL OFFICE
Incident Institution	Marion (USP)
Monetary Relief Sought	$100,000.00
Estimated Amount	$
Office	East St. Louis
Jurisdiction	SOUTHERN DISTRICT OF ILLINOIS
Responsible Legal Office	St. Louis, MO

[redacted]

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

[redacted]

Date	11/30/2011
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$5,000.00
Total Amount Paid	$5,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

[redacted]

Date Received	04/27/2009
Date Filed	10/22/2008

[redacted]

Current Owner	HEATHER MACCONNELL
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Add Neutral Case Information

Long Description	28:2671 FEDERAL TORT CLAIMS ACT
Further Case Classification	
Comments	

lv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased,	)	
Plaintiff,	)	
-vs-	)	No.09CV2287
THE UNITED STATES OF AMERICA, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO,	)	Judge Hibbler Magistrate Judge Denlow
Defendants.	)	

FOURTH AMENDED COMPLAINT AT LAW

NOW COMES the Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, by her attorneys, GOLDSTEIN, FLUXGOLD & BARON, P.C., having first duly obtained leave of court, for her Fourth Amended Complaint at Law against the Defendants, THE UNITED STATES OF AMERICA, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, and each of them, states as follows:

JURISDICTION

That this is an action against the United States of America by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its doctors, nurses, correctional officers, staff, supervisors, employees, agents and apparent agents, including but not limited to, Dr. Arthur Hoffman, Unknown Correctional Officer One and Unknown Correctional Officer Two, for negligence brought pursuant to Federal Tort Claims Act, 28 U.S.C., Section 2761, et seq., and 28 U.S.C.S. § 1346(b). That the Plaintiff DOMINIQUE FORD-SHOLEBO, individually and as

Administrator of the Estate of HABIB SOLEBO, deceased, filed a Standard Form 95, a Claim for Damage, Injury or Death, with the Federal Bureau of Prisons and the Metropolitan Correctional Center in the amount of forty million dollars ($45,000,000.00), which was received on April 28, 2008; and that the Plaintiff never received a denial letter prior to the expiration of the six month statute and therefore the claim is deemed denied.

PARTIES

That on May 1, 2007, and at all times relevant herein, the Plaintiff's decedent, HABIB SOLEBO, was a resident of the United States, and was imprisoned at the Metropolitan Correctional Center in the State of Illinois. That the Plaintiff, DOMINIQUE FORD-SHOLEBO, was at all times relevant herein, a citizen of the United States and of the State of Illinois and was a resident of the County of Cook and the City of Chicago. The Plaintiff, DOMINIQUE FORD-SHOLEBO, was appointed by Circuit Court of Cook County Judge Susan M. Coleman as the Independent Administrator of the Estate of Habib Solebo and was granted leave to pursue causes of action on behalf of the decedent, Habib Solebo on January 22, 2009. (See attached Order Appointing Representative of Decedent's Estate- Intestate and Order granting leave, attached hereto as Exhibit "A" and "B" respectively.)

The United States of America owns and operates the Metropolitan Correctional Center. That on May 1, 2007, and at all times relevant herein, the Defendants, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER TWO, and the correctional officers, physicians, staff, supervisors, employees, agents and apparent agents of Metropolitan Correctional Center were employees, agents and apparent agents of the Unites States of America. That on May 20, 2009, the United States Attorney for the Northern District of Illinois certified that Dr. Arthur Hoffman was acting within the scope of his employment as an employee of the United States at all times relevant herein.

COUNT I
Negligence Claim

1. That in May 2007, and for some time prior and subsequent thereto, the Plaintiff's decedent, HABIB SOLEBO, was imprisoned at the Metropolitan Correctional Center and was placed under the custody, ward, care and supervision of the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its physicians, staff, supervisors, employees, agents and apparent agents, including but not limited to, Dr. Arthur Hoffman, as aforesaid; that the Plaintiff's decedent possessed no medical or professional medical knowledge, nor did he have the facilities to care for, mend or cure himself.

2. That at all times material herein, the Plaintiff's decedent, HABIB SOLEBO, was a federal inmate and dependent upon and under the control of Defendant's, THE UNITED STATES OF AMERICA, prison and/or correctional facility, Metropolitan Correctional Center, and its its physicians, staff, supervisors, employees, agents and apparent agents, including but not limited to, Dr. Arthur Hoffman, and that the Plaintiff's decedent, as a prisoner, was deprived of his normal opportunities for treatment and care.

3. That at all times material herein, the Plaintiff's decedent, HABIB SOLEBO, cooperated fully with the Defendant, THE UNITED STATES OF AMERICA, and its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, physicians, supervisors, servants, and/or employees, including but not limited to, Dr. Arthur Hoffman.

4. That at all times material herein, and for some time prior to, the Plaintiff's decedent, HABIB SOLEBO, was diagnosed with and experiencing symptoms of seizure disorder associated with loss of consciousness prior to and during his incarceration at the facilities of the Defendant, THE UNITED STATES OF AMERICA.

5. That at all times mentioned herein, Dr. Arthur Hoffman, was an employee, physician, agent and/or apparent agent, of the Defendant, THE UNITED STATES OF AMERICA, and as such practiced his profession in the medical facilities of the Metropolitan Correctional Center pursuant to his employment.

6. That in May 2007, and for some time prior and subsequent thereto, Dr. Arthur Hoffman, as agent, apparent agent, physician, correctional officer, supervisor, servant, and/or employee, of the Defendant, THE UNITED STATES OF AMERICA, in his professional capacity as aforesaid, while acting in the scope of his employment and/or agency as aforesaid, did then and there have come under his care and did attend to and treat the Plaintiff's decedent, HABIB SOLEBO, while the Plaintiff's decedent was a prisoner at Metropolitan Correctional Center.

7. That it then and there became and was the duty of the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, physicians, supervisors, servants, and/or employees, including but not limited to, Dr. Arthur Hoffman, to render medical services consistent with the constitutional necessities of the prisoners therein, so as not to cause injury to said prisoners therein who are under their control and dependent upon for care and treatment, including the Plaintiff's decedent, and so as not to negligently cause injury to said prisoners.

8. That not regarding their aforesaid duty, the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, physicians, supervisors, servants, and/or employees, including but not limited to, Dr. Arthur Hoffman, was then and there guilty of one or more of the following wrongful acts and/or omissions:

(a) Failed to provide for the safekeeping, care, and subsistence of all persons in their

custody, including the Plaintiff's decedent, HABIB SOLEBO, pursuant to 18 U.S.C. § 4042(a)(2); or

(b) Failed to exercise reasonable care in protecting inmates', namely the Plaintiff's decedent's, health and safety when the Defendant knew or should have known the Plaintiff's decedent was ill and/or injured, including but not limited to seizure disorder; or

(c) Failed to provide proper and adequate medical attention to the Plaintiff's decedent when the Defendant knew or should have known the Plaintiff's decedent was ill and/or injured, including but not limited to seizure disorder; or

(d) Failed to administer to Plaintiff's decedent proper and adequate medication when the Defendant knew medication was necessary to treat the Plaintiff's decedent's seizure disorder and knew the failure to take medication could result in a danger to Plaintiff's decedent's life and/or result in serious permanent injury to the Plaintiff's decedent; or

(e) Failed to timely provide proper and adequate medical attention to the Plaintiff's decedent when the Defendant knew or should have known the Plaintiff's decedent was ill and/or injured, including but not limited to seizure disorder; or

(f) Failed to provide proper and adequate medical attention to the Plaintiff's decedent until the time that Plaintiff's decedent could be cared and/or treated by others; or

(g) Failed to monitor the condition of the Plaintiff, decedent, HABIB SOLEBO, under circumstances which they knew or should have known, required constant monitoring, namely that of a seizure disorder associated with loss of consciousness; or

(h) Failed to intervene on behalf of the Plaintiff's decedent to see that proper and adequate medical care and attention was being given for the Plaintiff's decedent's condition, including but not limited to seizure disorder; or

(i) Failed to properly and adequately follow Defendant's policies, procedures, rules and regulations for administering medication to prisoners in the custody of the Defendant, including the Plaintiff's decedent, when the failure to take medication could result in a danger to Plaintiff's decedent's life and/or result in serious permanent injury to the Plaintiff's decedent.

9. That as a direct and proximate result of one or more of the foregoing wrongful acts and omissions of the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, physicians, supervisors, servants, and/or employees, including but not limited to,

Dr. Arthur Hoffman, the Plaintiff's decedent, HABIB SOLEBO, was deprived necessary medical treatment and was thereby injured and ultimately died on May 1, 2007 after a seizure in his cell.

10. That as a direct and proximate result of one or more of the foregoing wrongful acts and omissions of the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, physicians, supervisors, servants, and/or employees, including but not limited to, Dr. Arthur Hoffman, the Plaintiff's decedent, HABIB SOLEBO, was then and there injured both internally and externally; that he suffered severe and permanent injuries, including but not limited to, the worsening of medical condition and seizure disorder leading to death; that he suffered acute and prolonged physical and mental pain and suffering and death, and wage loss; and that the Administrator of the decedent's Estate, DOMINIQUE FORD-SHOLEBO, became liable for great sums of money for medical, hospital care and treatment, and attendant care, as well as incurring other expenses, including wage loss.

11. That the Plaintiff DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, filed a Standard Form 95, a Claim for Damage, Injury or Death, with the Federal Bureau of Prisons and the Metropolitan Correctional Center in the amount of forty million dollars ($45,000,000.00), which was received on April 28, 2008; and that the Plaintiff never received a denial letter prior to the expiration of the six month statute and therefore the claim is deemed denied.

12. That the Plaintiff is entitled to her costs and reasonable attorneys fees incurred herein pursuant to 42 United States Code, Section 1988.

WHEREFORE, the Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, prays judgment against the Defendant, THE UNITED STATES OF AMERICA, for said sum for medical, drug, and incidental expenses and

for general damages according to proof, and for such other and further relief as this court deems just and proper.

COUNT II
Negligence Claim

1. That in May 2007, and for some time prior and subsequent thereto, the Plaintiff's decedent, HABIB SOLEBO, was imprisoned at the Metropolitan Correctional Center and was placed under the custody, ward, care and supervision of the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its correctional officers, staff, supervisors, employees, agents and apparent agents, including but not limited to, Defendants, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, as aforesaid; that the Plaintiff's decedent possessed no medical or professional medical knowledge, nor did he have the facilities to care for, mend or cure himself.

2. That at all times material herein, the Plaintiff's decedent, HABIB SOLEBO, was a federal inmate and dependent upon and under the control of Defendant's, THE UNITED STATES OF AMERICA, prison and/or correctional facility, Metropolitan Correctional Center, and its correctional officers, staff, supervisors, employees, agents and apparent agents, including but not limited to, Defendants, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, and that the Plaintiff's decedent, as a prisoner, was deprived of his normal opportunities for protection, treatment and care.

3. That at all times material herein, the Plaintiff's decedent, HABIB SOLEBO, cooperated fully with the Defendant, THE UNITED STATES OF AMERICA, prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, correctional officers, supervisors, servants, and/or employees, including but not limited to, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER

TWO.

4. That at all times material herein, and for some time prior to, the Plaintiff's decedent, HABIB SOLEBO, was diagnosed with and experiencing symptoms of seizure disorder associated with loss of consciousness prior to and during his incarceration at the facilities of the Defendant, THE UNITED STATES OF AMERICA.

5. That at all times mentioned herein, the Defendants, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, and were duly appointed, qualified and acting correctional officers employed by Defendant, THE UNITED STATES OF AMERICA. That said Defendants are herein sued in their official capacity.

6. That at all times material herein, the Defendant, THE UNITED STATES OF AMERICA, provided their correctional officers and supervisors, including but not limited to the Defendants, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, with official badges and credentials which designated and described them as correctional officers and supervisors of the Defendant, THE UNITED STATES OF AMERICA.

7. That in May 2007, and for some time prior and subsequent thereto, the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, correctional officers, supervisors, servants, and/or employees, including but not limited to, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER TWO, in their professional capacity as aforesaid, while acting in the scope of their employment and/or agency as aforesaid, did then and there have come under their ward the Plaintiff's decedent, HABIB SOLEBO, while the Plaintiff's decedent was a prisoner at Metropolitan Correctional Center.

8. That it then and there became and was the duty of the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan

Correctional Center, and its duly authorized agents, apparent agents, correctional officers, supervisors, servants, and/or employees, including but not limited to, Defendants, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER TWO, to provide prison services consistent with the constitutional necessities of the prisoners therein, so as not to cause injury to said prisoners, including the Plaintiff's decedent, and so as not to negligently cause injury to said patients.

9. That not regarding their aforesaid duty, the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, correctional officers, supervisors, servants, and/or employees, including but not limited to, Defendants, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER TWO, was then and there guilty of one or more of the following wrongful acts and/or omissions:

(a) Failed to provide for the safekeeping, care, and subsistence of all persons in their custody, including the Plaintiff's decedent, HABIB SOLEBO, pursuant to 18 U.S.C. § 4042(a)(2); or

(b) Employed and engaged incompetent and unskilled personnel, including but not limited to, Defendants, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER TWO, and its other correctional officers and supervisors, and each of them; or

(c) Failed to exercise reasonable care in protecting inmates', namely the Plaintiff's decedent's, health and safety; or

(d) Failed to request, order, and/or procure proper and adequate medical attention to the Plaintiff's decedent when the Defendants knew or should have known the Plaintiff's decedent was ill and/or injured, including but not limited to seizure disorder; or

(e) Failed to request, order, and/or procure proper and adequate medical attention to the Plaintiff's decedent until the time that Plaintiff's decedent could be cared and/or treated by others; or

(f) Failed to monitor the condition of the Plaintiff, decedent, HABIB SOLEBO, under circumstances which they knew or should have known, required constant monitoring, namely that of a seizure disorder associated with loss of consciousness; or

(g) Failed to intervene or timely intervene on behalf of the Plaintiff's decedent to see that proper and adequate care, attention and monitoring was being given for the Plaintiff's decedent's condition, including but not limited to seizure disorder; or

(h) Failed to properly and adequately supervise their correctional officers and employees to follow Defendant's policies, procedures, rules and regulations for monitoring prisoners receiving medical care and treatment; or

(i) Failed to train their correctional officers and employees in the proper and adequate procedure, technique and discipline for monitoring physical conditions, including but not limited to seizure disorders, of the prisoners therein, including the Plaintiff's decedent; or

(j) Failed to train their correctional officers and employees in the proper and adequate procedure, technique and discipline for requesting and seeking medical care and treatment for prisoners therein, including the Plaintiff's decedent; or

(k) Failed to properly and adequately supervise their correctional officers and employees in the proper and adequate procedure, technique and discipline for monitoring physical conditions, including but not limited to seizure disorders, of the prisoners therein, including the Plaintiff's decedent; or

(l) Failed to properly and adequately supervise their correctional officers and employees in the proper and adequate procedure, technique and discipline for requesting and seeking medical care and treatment for prisoners therein, including the Plaintiff's decedent.

10. That as a direct and proximate result of one or more of the foregoing wrongful acts and omissions of the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents, apparent agents, correctional officers, supervisors, servants, and/or employees, including but not limited to, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER TWO, the Plaintiff's decedent, HABIB SOLEBO, was deprived necessary medical treatment and was thereby injured and ultimately died on May 1, 2007 after a seizure in his cell.

11. That as a direct and proximate result of one or more of the foregoing wrongful acts and omissions of the Defendant, THE UNITED STATES OF AMERICA, by and through its prison and/or correctional facility, Metropolitan Correctional Center, and its duly authorized agents,

apparent agents, correctional officers, supervisors, servants, and/or employees, including but not limited to, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER TWO, the Plaintiff's decedent, HABIB SOLEBO, was then and there injured both internally and externally; that he suffered severe and permanent injuries, including but not limited to, the worsening of medical condition and seizure disorder leading to death; that he suffered acute and prolonged physical and mental pain and suffering and death, and wage loss; and that the Administrator of the decedent's Estate, DOMINIQUE FORD-SHOLEBO, became liable for great sums of money for medical, hospital care and treatment, and attendant care, as well as incurring other expenses, including wage loss.

12. That the Plaintiff DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, filed a Standard Form 95, a Claim for Damage, Injury or Death, with the Federal Bureau of Prisons and the Metropolitan Correctional Center in the amount of forty million dollars ($45,000,000.00), which was received on April 28, 2008; and that the Plaintiff never received a denial letter prior to the expiration of the six month statute and therefore the claim is deemed denied.

13. That the Plaintiff is entitled to her costs and reasonable attorneys fees incurred herein pursuant to 42 United States Code, Section 1988.

WHEREFORE, the Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, prays judgment against Defendant, THE UNITED STATES OF AMERICA, and their duly authorized agents, apparent agents, correctional officers, supervisors, servants, and/or employees, including but not limited to, UNKNOWN CORRECTIONAL OFFICER ONE and UNKNOWN CORRECTIONAL OFFICER TWO, and each of them, for a fair and reasonable sum in excess of SEVENTY-FIVE THOUSAND DOLLARS ($75,000.00), for attorneys fees and costs, and for such other relief as is just and proper.

COUNT III

1-25. Plaintiff DOMINIQUE FORD-SHOLEBO, restates and realleges paragraphs one (1) through twelve (12) inclusive of Count I hereof, restates and realleges paragraphs one (1) through thirteen (13) inclusive of Count II hereof, as and for paragraphs one (1) through twenty-five (25) of this Count III, as though specifically realleged herein and hereby incorporates the same by this reference.

26. At all times mentioned herein, Plaintiff's decedent, HABIB SOLEBO, was the husband of the Plaintiff DOMINIQUE FORD-SHOLEBO, and during all such times, the Plaintiff DOMINIQUE FORD-SHOLEBO, and the Plaintiff's decedent, HABIB SOLEBO, were living together as husband and wife.

27. That by reason of the injury and death of the Plaintiff's decedent, HABIB SOLEBO, as aforementioned in the Complaint, the Plaintiff DOMINIQUE FORD-SHOLEBO, was caused to and did suffer a loss of consortium, goods, services and companionship of the Plaintiff's decedent, HABIB SOLEBO.

28. That the Plaintiff DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, filed a Standard Form 95, a Claim for Damage, Injury or Death, with the Federal Bureau of Prisons and the Metropolitan Correctional Center in the amount of forty million dollars ($45,000,000.00), which was received on April 28, 2008; and that the Plaintiff never received a denial letter prior to the expiration of the six month statute and therefore the claim is deemed denied.

WHEREFORE, the Plaintiff DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, prays judgment against Defendants, THE UNITED STATES OF AMERICA, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, and each of them, for medical, drug, and

incidental expenses and for general damages according to proof, and for such other and further relief as this Court deems just and proper.

COUNT IV

1-25. Plaintiff DOMINIQUE FORD-SHOLEBO, restates and realleges paragraphs one (1) through twelve (12) inclusive of Count I hereof, restates and realleges paragraphs one (1) through thirteen (13) inclusive of Count II hereof, as and for paragraphs one (1) through twenty-five (25) of this Count IV, as though specifically realleged herein and hereby incorporates the same by this reference.

26. That on or about May 1, 2007, and at all times relevant and subsequent thereto, the Plaintiff, DOMINIQUE FORD-SHOLEBO, individually, did then and there become liable for large sums of money for the medical costs of the Plaintiff's decedent, HABIB SOLEBO, pursuant to the Family Expense Act, 750 ILCS 65/15.

27. That the Plaintiff DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, filed a Standard Form 95, a Claim for Damage, Injury or Death, with the Federal Bureau of Prisons and the Metropolitan Correctional Center in the amount of forty million dollars ($45,000,000.00), which was received on April 28, 2008; and that the Plaintiff never received a denial letter prior to the expiration of the six month statute and therefore the claim is deemed denied.

WHEREFORE, the Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, prays judgment against Defendants, THE UNITED STATES OF AMERICA, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, and each of them, for medical costs according to proof and for such other and further relief as this Court deems just and proper.

COUNT V

1-28. Plaintiff DOMINIQUE FORD-SHOLEBO, restates and realleges paragraphs one (1) through twelve (12) inclusive of Count I hereof, restates and realleges paragraphs one (1) through thirteen (13) inclusive of Count II hereof, restates and realleges paragraphs twenty-six (26) through twenty-eight (28) inclusive of Count III hereof, as and for paragraphs one (1) through twenty-eight (28) of this Count V, as though specifically realleged herein and hereby incorporates the same by this reference.

29. That as a direct and proximate result of one or more of the foregoing wrongful acts and omissions of the Defendants, THE UNITED STATES OF AMERICA, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, and each of them, the condition of ill-being suffered by the Plaintiff's decedent was exacerbated and resulted in his death.

30. That the Plaintiff's decedent, HABIB SOLEBO, left surviving him, his wife, DOMINIQUE FORD-SHOLEBO, and his child, Jadesola Sholebo, as his only heirs-at-law and next of kin.

31. That by reason of the death of Plaintiff's decedent, HABIB SOLEBO, as aforesaid, the aforesaid individuals have been deprived of large sums of money and valuable services which the Plaintiff's decedent would have performed but for his untimely death, as well as suffering loss of society and companionship, loss of consortium, losses for attendant care, and grief, sorrow and mental suffering as a result of the death of Plaintiff's decedent, HABIB SOLEBO.

32. That on or about May 1, 2007, and at all times relevant and subsequent thereto, the Plaintiff DOMINIQUE FORD-SHOLEBO, individually, did then and there become liable for large sums of money for the medical costs of the Plaintiff's decedent, HABIB SOLEBO, pursuant to the Family Expense Act, 750 ILCS 65/15.

33. That this cause of action is brought pursuant to the Wrongful Death Act, 740 ILCS 180/0.01, et seq.

34. That this cause of action is brought within two years of the death of HABIB SOLEBO.

35. That the Plaintiff DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, filed a Standard Form 95, a Claim for Damage, Injury or Death, with the Federal Bureau of Prisons and the Metropolitan Correctional Center in the amount of forty million dollars ($45,000,000.00), which was received on April 28, 2008; and that the Plaintiff never received a denial letter prior to the expiration of the six month statute and therefore the claim is deemed denied.

WHEREFORE, the Plaintiff DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, prays judgment against Defendants, THE UNITED STATES OF AMERICA, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO, and each of them, for medical, drug, and incidental expenses and for general damages according to proof, and for such other and further relief as this Court deems just and proper.

DOMINIQUE FORD-SHOLEBO, individually, and as Administrator of the Estate of HABIB SOLEBO, deceased

By: /s/ Cindy G. Fluxgold
One of Plaintiff's Attorneys

GOLDSTEIN, FLUXGOLD & BARON, P.C.
33 North Dearborn Street, Suite 1930
Chicago, IL 60602
(312) 726-7772

Slip Copy, 2013 WL 4733998 (N.D.Ill.)
(Cite as: 2013 WL 4733998 (N.D.Ill.))

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
Dominique FORD– SHOLEBO, individually and as administrator of the estate of Habib Solebo,
Plaintiff,
v.
The UNITED STATES of America, Defendant.

No. 09 C 2287.
Sept. 3, 2013.

Cindy Gale Fluxgold, Lorenzo Valladolid, Michael James Baron, Scott G. Goldstein, Goldstein, Fluxgold & Baron, P.C., Chicago, IL, for Plaintiff.

Jonathan C. Haile, United States Attorney's Office, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

RUBEN CASTILLO, Chief Judge.

***1** Plaintiff Dominique Ford–Sholebo, individually and as administrator of the estate of her deceased husband, Habib Solebo ("Solebo"), brings this wrongful death action against the United States pursuant to the Federal Tort Claims Act (the "Act" or "FTCA"), 28 U.S.C. §§ 1346, 2671 *et seq.* (R. 101, Fifth Am. Compl. at 2–8.) Solebo, Plaintiff's decedent, died on May 1, 2007, while incarcerated at the Metropolitan Correctional Center (the "MCC") pending criminal trial proceedings. Plaintiff alleges that the United States, by and through the MCC and MCC physicians, staff, supervisors, employees, agents, and apparent agents, negligently failed to provide Solebo with proper and adequate medical attention, thereby proximately causing Solebo's death. (*Id.* at 2–8.) Plaintiff seeks a total of $1,650,000.00 in wrongful death damages for loss of consortium, loss of society, companionship, money, benefits, goods, services, grief, sorrow, and mental suffering. (R. 93, Proposed Pretrial Order, Ex. G: Statement of Damages at 1.)

In February 2012, this Court voluntarily accepted the transfer of this lawsuit to its docket during the unfortunate illness of its friend and judicial colleague, the Honorable William J. Hibbler, who prematurely passed away on March 19, 2012, at the age of 65. Thereafter, it was brought to this Court's attention that it had also presided over Solebo's criminal proceedings and the less than successful criminal prosecution of Solebo's co-defendant in those proceedings. Nevertheless, this Court is confident that it approached these trial proceedings from a neutral standpoint; not favoring one side or the other. Unfortunately, the bottom line is that this Court must conclude that the repeated negligence of officials at the MCC caused Solebo's premature death.

After bifurcating the proceedings, this Court conducted a five-day bench trial on liability beginning in late February 2012. (R. 102, Min. Entry; R. 103, Min. Entry; R. 104, Min. Entry; R. 105, Min. Entry; R. 106, Min. Entry.) On March 15, 2012, this Court ruled that Plaintiff established by a preponderance of the evidence that the United States negligently violated the appropriate standard of care for treating Solebo's seizure disorder and that its negligence proximately caused his death in a reasonably foreseeable manner during his ongoing treatment for seizure disorder. (R. 109, Order on Liability at 1; R. 108, Min. Entry.) On May 16, 2012, this Court issued an order on comparative fault, finding that the United States bore 67% of the responsibility for Solebo's death and that Solebo's contributory fault was 33%. (R. 117, Order on Comparative Fault at 1.) On June 4, 2012, this Court held the damages phase of the trial. (R. 118, Min.Entry.) That same day, the case was referred to the Honorable Morton Denlow for one final settlement conference, which proved to be unsuccessful, and on July 16, 2012, the case was referred back to this Court for a ruling. (R. 125, Min.Entry.)

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*2 In this memorandum opinion and order, this Court explains its findings of fact and conclusions of law. Pursuant to Federal Rule of Civil Procedure 52, this Court hereby enters the following written Findings of Fact and Conclusions of Law, which are based upon consideration of all the admissible evidence as well as this Court's own assessment of the credibility of the trial witnesses. To the extent, if any, that Findings of Fact, as stated, may be considered Conclusions of Law, they shall be deemed Conclusions of Law. Similarly, to the extent that matters expressed as Conclusions of Law may be considered Findings of Fact, they shall also be deemed Findings of Fact.

FINDINGS OF FACT

This Court concludes that Plaintiff established through both direct and circumstantial evidence, as well as reasonable inferences drawn therefrom, the following facts by a preponderance of the evidence:

I. General Background

1. Habib Solebo was born on June 10, 1983. (Pl.'s Ex. A at 84; June 4, 2012 Tr. 9, June 4, 2012.) [FN1] He and Plaintiff were married on October 4, 2005. (June 4, 2012 Tr. 2.) On October 8, 2006, while Solebo was incarcerated at the MCC, their daughter, Jadesola Sholebo was born. (June 4, 2012 Tr. 5–6.)

> FN1. The parties' exhibits that were admitted and received into evidence at trial are cited as "Pl.'s Ex. ___," "Def.'s Ex. ___," or "Jt. Ex. ___." Witness depositions that were admitted and received into evidence are cited as "[last name of deponent] ___, [date of deposition]," in the first instance, and thereafter as "[last name of deponent] ___." Per an agreement with Plaintiff's counsel, the Government also submitted exhibits and a stipulation in advance of the damages phase of the trial on June 1, 2012; such exhibits are cited as "Stip. Ex. ___," and the stipulation is cited as "Damages Hr'g Stip. ¶ ___." Finally, as the trial transcript for the damages phase of the trial is only available in rough form, this Court cites that transcript by the date of the proceeding, as "June 4, 2012 Tr. ___."

2. Solebo was arrested on January 25, 2006. (Stip. Ex., *United States v. Mustapher*, No. 06 CR 61–2, Excerpt of Trial Tr. 61–62 (Jan. 24, 2007, J. Castillo); Stip. Ex., Arrest and Interview of Habib Solebo Jan. 25, 2006.) The next day, he was taken to the Kankakee County Detention Center/Jerome Combs Detention Center ("Kankakee"). (*See* Jt. Ex. 3 at 1–3.) On August 28, 2006, Solebo was transferred to the MCC in Chicago, Illinois. (Def.'s Ex. 22 at 1.) Following his arrest, he was indicted for conspiracy to distribute and to possess with intent to distribute 100 grams or more of a substance containing heroin in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2 (Count I), and distribution of a substance containing .33 grams of heroin in violation of 21 U.S.C. § 841(a) (1) and 18 U.S.C. § 2 (Count II), and possession with the intent to distribute and distribution of 99.4 grams of a substance containing heroin in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count III). (Def.'s Ex. 8, Indictment at 1–3, *United States v. Solebo and Mustapher*, No. 06 CR 61 (N.D.Ill. Feb. 23, 2006).) [FN2]

> FN2. A copy of the indictment was admitted and received into evidence on June 4, 2012. (June 4, 2012 Tr. 38.) Although counsel for the Government stated that the indictment was Defendant's Exhibit 11, the indictment is actually labeled Defendant's Exhibit 8. (*See* June 4, 2012 Tr. 38.)

3. Solebo was found dead in his cell at the MCC in the early morning of May 1, 2007. (R. 93, Proposed Pretrial Order, Ex. A: Stip. of Uncontested Facts ¶¶ 1–2.) At the time of his death, he was 23 years old. (Pl.'s Ex. A at 58.) He is survived by his wife and his minor daughter, (R. 93, Proposed Pretrial Order, Ex. A: Stip. of Uncontested Facts ¶ 3), who was six months old at the time of his death, (June 4, 2012 Tr. 17).

II. Solebo's time at the Kankakee County Deten-

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tion Center: January 2006 to August 2006

4. On January 26, 2006, Solebo was incarcerated at Kankakee. (*See* Jt. Ex. 3 at 1–2.) At this time, Solebo reported that he did not have an individual or family history of seizures and that he was not taking any medications. (*Id.*) A report of Solebo's past medical history indicated that Solebo had a history of smoking and that he did not have a history of seizures. (*Id.* at 3.)

***3** 5. On February 17, 2006, Solebo experienced his first episode of loss of consciousness and was admitted to the emergency room at Provena St. Mary's Hospital ("Provena"). (*Id.* at 24, 41–43.) Although Solebo's chief complaint was described as a fall, the medical note from the emergency room visit provides, "? [seizure] prior to fall ?" (*Id.* at 45.) A February 23, 2006 progress note from Solebo's Kankakee medical records describing this episode states: "In ER on 2/17. Was laying in bed sleeping. Next thing he knew he was being brought to hospital. The roommate says he was shaking. No incontinence. No personal or [family] history of [seizures]. Stated head injury ... [with] blowout [fracture]." (*Id.* at 24; *see also* Trial Tr. 578–79.)

6. While at Provena, Solebo underwent a Computed Tomography scan ("CT scan"). (Jt. Ex. 3 at 39.) The CT scan impression stated, in part: "No hemorrhage, mass effect or contusion in the brain. Blow out fracture of the left lamina papyracea of indeterminate age. Minimally displaced fracture of the nasal bones." (*Id.* at 39 .) This was not a normal CT scan in that there were some findings. (Trial Tr. 365.)

7. On February 23, 2006, Dr. Jeffrey Long of the Medical Group of Kankakee County ("Kankakee Medical") saw Solebo after he returned to Kankakee. (Jt. Ex. 3 at 24.) Dr. Long's assessment at this time was "loss of consciousness [with] shaking activity." (*Id.*; Trial Tr. 271.) Dr. Long's recommendations and treatment plan provided that if Solebo had "further [seizures] empiric RX [with] Dilantin or phenobarbital" should be commenced. (Jt. Ex. 3 at 24; *see also* Trial Tr. 271–72, 578.) Dr. Long also ordered that Solebo undergo an electroencephalogram ("EEG") test for possible seizures. (Jt. Ex. 3 at 24, 36; Trial Tr. 364.)

8. On February 24, 2006, Solebo underwent an EEG at Provena. (Jt. Ex. 3 at 38.) The EEG results state: "[t]his is a case of a patient with possible seizures." (*Id.*) The EEG was "within normal limits," and no epileptiform activity was detected. (*Id.*)

9. On April 17, 2006, Dr. Abigail Martinez of Provena prescribed Solebo 100 milligrams of Dilantin to be taken twice a day. (Jt. Ex. 3 at 14, 40.) Dilantin, also known as Phenytoin, (Trial Tr. 409), is an anti-seizure medication that lowers the risk of having seizures, (Trial Tr. 497, 504; Trial Tr. 758), and is customarily administered in the form of pills, (Trial Tr. 223).

10. Three days later, on April 20, 2006, Physician Assistant K. Patterson of Kankakee Medical saw Solebo to follow up on an emergency room visit and discontinued his Dilantin. (Jt. Ex. 3 at 14, 20, 31.) A progress note for this visit provided: "Habib states woke up in am with correctional officers standing over him, they had called ambulance. He has no other recollection of event and I have no history from [correctional officers]. I have no ER paperwork. Came back [with prescription] for Dilantin. Habib refuses [medications], states he does [not] have seizures. Does not want to be housed in this building, wants to return to old jail." (*Id.* at 20; *see also* Trial Tr. 582.) The progress note also stated that Solebo did not have a history of seizures. (Jt. Ex. 3 at 20.) The assessment at this time was "Questionable episode [loss of consciousness]/seizure. Normal EEG." (Jt. Ex. 3 at 20; *see also* Trial Tr. 582.)

***4** 11. On May 24, 2006, Solebo experienced an episode that he described as a seizure with violent shaking of his whole body. (Jt. Ex. 3 at 15, 18, 56–57.) During this episode, Solebo fell out of his bunk. (*Id.* at 57.) The very day of this episode, Solebo submitted a request to a Kankakee nurse and requested that his Dilantin be resumed. (*Id.* at 18,

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58.) In his request, Solebo wrote, "I was previously on Dilantin medication and was taken off prescription and believe I may have suffered a seizure because of discontinuation of Dilantin. I want to be put back on the medication Dilantin." (*Id.* at 58.)

12. On May 25, 2006, Physician Assistant Patterson saw Solebo for his episode the day prior. (*Id.* at 18.) The progress note for this visit stated that Solebo "woke up on [the] floor, near incontinent of urine," and that his "cellmate told him he was shaking on the floor." (*Id.* at 18.) The assessment at this time was "Questionable seizures." (*Id.* at 18.) During this visit, Physician Assistant Patterson resumed Solebo's Dilantin. (*Id.* at 14, 18, 32.) Solebo continued to take 100 milligrams of Dilantin twice a day until August 28, 2006. (*Id.* at 33–35.)

13. On August 22, 2006, Physician Assistant Patterson noted that Solebo "refuse[d] follow-up today for seizure management." (*Id.* at 27, 29.) That same day, this Court entered an order, as the presiding trial judge in Solebo's pending criminal case, requiring Solebo to undergo a forensic evaluation to assess his competency to stand trial. (*See* Def.'s Ex, 22 at 1; *see also* Trial Tr. 158, 160.)

III. The Metropolitan Correctional Center

14. On August 29, 2006, Solebo was transferred to the MCC. (Jt. Ex. 3 at 35; *see also* Def.'s Ex. 22 at 1.) In the early morning of May 1, 2007, Solebo was found dead in his cell. (R. 93, Proposed Pretrial Order, Ex. A: Stip. of Uncontested Facts ¶ 2.) This Court refers to the time period during which Solebo was at the MCC as "the relevant time period."

A. MCC personnel

1. The MCC warden

15. At the time of Solebo's transfer to the MCC, there was no official warden at the MCC; instead, Associate Wardens Janet Purdue and James Henry were acting as interim wardens. (Trial Tr. 694–95.) Eric Wilson became the warden of the MCC on April 1, 2007, and was the warden of the MCC at the time of Solebo's death. (Trial Tr. 694 .) As warden, Wilson was the person who was ultimately in charge of running the MCC. (Trial Tr. 695.)

16. Warden Wilson testified at trial. (Trial Tr. 694–720.) He testified that he was responsible for ensuring that inmates received medical care and treatment that was necessary for their medical conditions. (Trial Tr. 695.) He was responsible for overseeing that medications were administered to inmates in accordance with the MCC's rules and regulations and that the MCC's rules were generally followed. (Trial Tr. 696.) Warden Wilson was also responsible for ensuring that the MCC personnel followed the Bureau of Prisons ("BOP") program statements, procedural statements, and technical reference manuals. (Trial Tr. 696; *see also* Trial Tr. 702–03.)

*5 17. Warden Wilson also testified that he had to ensure that there was an adequate medical staff at the MCC to care for the inmates. (Trial Tr. 699–700.) He testified that he had a thorough knowledge of BOP regulations in effect to protect the lives of the MCC's inmates. (Trial Tr. 698.) Warden Wilson also testified that if he knew an inmate was acting in a way that could cause the inmate's own death, he had a duty to protect the inmate from killing himself. (Trial Tr. 698.)

2. The MCC Physicians

18. During the relevant time period, only two physicians practiced at the MCC: Dr. Arthur Hoffman and Dr. Bonnie Nowakowski (the "Physicians" or the "MCC Physicians"). (Trial Tr. 481–82.) Dr. Hoffman and Dr. Nowakowski each testified at trial. (Trial Tr. 387–474, 479–560.) Dr. Hoffman was evasive and combative during questioning, and his testimony was generally not credible.

19. Dr. Hoffman was the MCC's Clinical Director from November 2005 until about November 2007. (Trial Tr. 390–91; 481). Dr. Nowakowski was a staff physician who worked under the super-

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vision of Dr. Hoffman. (Trial Tr. 481, 487.) The Physicians' regular hours were 7:45 a.m. to 4:15 p.m., Monday through Friday. (Pl.'s Ex. Y at 1; Trial Tr. 482.) Beginning in approximately the second half of March 2007, Dr. Hoffman went on leave and did not return to his role as Clinical Director at the MCC at any point in time prior to Solebo's death. (Trial Tr. 402–03.) In Dr. Hoffman's absence, Dr. Nowakowski was the Acting Clinical Director, (Trial Tr. 144, 482–83), and was the only physician on the MCC's premises from mid-March through the Fall of 2007, (Trial Tr. 487–88.)

20. Dr. Hoffman, as the Clinical Director, oversaw the clinical care provided at the MCC and was responsible for all health care delivered at the MCC. (Pl.'s Ex. C at 3.) Dr. Hoffman also supervised MCC health care providers, such as physician assistants. (Trial Tr. 392, 396; Pl.'s Ex. C at 5.) Specifically, Dr. Hoffman testified that it was his job, as Clinical Director, to ensure that the Physicians and physician assistants provided medical care and treatment to the inmates at the MCC in a proper manner. (Trial Tr. 393–95.) The Clinical Director also had a duty and responsibility to be directly involved in the evaluation and treatment of patients with medically complex problems. (Trial Tr. 397; Pl.'s Ex. C at 3.)

21. As a staff physician, Dr. Nowakowski's duties included providing patient care, either directly through patient visits or by supervising physician assistants. (Trial Tr. 481.) Dr. Hoffman and Dr. Nowakowski shared the responsibility of treating the MCC's inmates, including Solebo. (Trial Tr. 545.)

22. Dr. Nowakowski testified that when she was out, she provided the physician assistants with a contact number at which they could call her if there was an urgent medical problem. (Trial Tr. 491–92.) When the Physicians were not physically present at the MCC, a BOP regional medical director or a physician from a different BOP institution was designated to be available to provide clinical guidance to a physician assistant or nurse telephonically. (Trial Tr. 168.)

3. The MCC physician assistants

***6** 23. In 2007, the MCC physician assistants, also known as mid-level practitioners, included Albert Iskandar, (Trial Tr. 28), Maria Velasquez, (Trial Tr. 66), Victoria Carrera, (Trial Tr. 99), and Roberto Aruiza, (Aruiza Dep. 7, Mar. 10, 2010). Iskandar, Velasquez, and Carrera each testified at trial. (Trial Tr. 28–140.) Aruiza's deposition was admitted into evidence. (*See* Trial Tr. 721, 788.) Each MCC physician assistant was a physician in another country who was not licensed to practice medicine in the United States. (Trial Tr. 100, 395–96.) The Physicians supervised the physician assistants. (Sample Dep. 24, Jan. 25, 2011.) Dr. Hoffman testified that he regularly had contact with the physician assistants and discussed medical care and treatment with them. (Trial Tr. 396.)

24. During the relevant time period, physician assistants were on the premises at the MCC from 7:30 a.m. until 11:00 p.m. (Trial Tr. 33, 484.) Medical personnel were not physically present between 11:00 p.m. and 6:00 a.m., (Trial Tr. 33), and all emergencies during those hours would be called out to 911, (Trial Tr. 483–84). Physician assistants who worked the night shift in 2007 overlapped with the Physicians' day shift. (Trial Tr. 131.) Thus, if physician assistants who worked the night shift at the MCC had a concern about an inmate missing his medication, they could tell the Physicians about this during the overlapping time. (Trial Tr. 131.)

25. The physician assistants' duties included, in part, administering medication on the pill line. (Trial Tr. 29; Aruiza Dep. 28.) Physician assistants were responsible for working with the Physicians, (Trial Tr. 100), and assisting the Physicians with managing chronic health problems, such as seizure disorders, (Aruiza Dep. 14–15). Physician assistants were also responsible for making decisions, in conjunction with the Physicians, concerning the patients' medical care and special needs. (Aruiza Dep. 15–16.) Because the physician assistants had daily contact with the inmates, they were in essence the

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Physicians' eyes and ears on the ground regarding the medications inmates were and were not receiving. (Trial Tr. 36–37, 89–90.)

4. Health Services Administration

26. At all times relevant to this action, Ken Sample was the Health Services Administrator ("HSA") at the MCC. (Sample Dep. 20, 23.) He managed the MCC's Health Services Unit. (Trial Tr. 768 .) Although Sample did not testify at trial, his deposition was admitted into evidence. (*See* Trial Tr. 721, 788.) In his capacity as HSA, Sample managed and directed the MCC Laboratory, the MCC Pharmacy, and the Medical Records departments. (Sample Dep. 24, 32; Trial Tr. 436.) In managing the MCC Laboratory, for example, Sample relied on a BOP Program Statement on Laboratory Services ("Lab Services Statement") that was in effect during the relevant time period to perform his job as the HSA. (Sample Dep. 84.) As the HSA, Sample was responsible for formulating and implementing administrative policies and programs essential to medical and dental operations. (Sample Dep. 31.) In addition, he was responsible for coordinating and controlling MCC programs and resources to achieve a balance between patient care and the inmate population. (Sample Dep. 31–32.)

*7 27. Sample also evaluated MCC employees, with the exception of the Physicians. (Sample Dep. 24.) Although Sample was the physician assistants' administrative supervisor, they were under the medical and clinical supervision of the Physicians. (Sample Dep. 24, 29.) Therefore, when evaluating the physician assistants on those areas that involved the clinic, Sample sought input from the Physicians and others. (Sample Dep. 29–30.)

28. From January 2007 through May 2007, Deborah Lamping was the Assistant HSA and was supervised by Sample. (Trial Tr. 141–43.) Lamping testified at trial. (Trial Tr. 141–175.) In her role as the Assistant HSA, Lamping had direct contact with the inmates. (Trial Tr. 144.) Nevertheless, she never had any conversations with Solebo about his medical care and treatment. (Trial Tr. 144–45 .)

a. Medical Records

29. Sample was in charge of the Medical Records department. (Sample Dep. 24.) In that capacity, Sample provided overall management reporting, and the two medical records clerks reported to him. (Sample Dep. 41.) Sample required the medical records clerks to stay current with their filing, their audits, and any other required tasks that were outlined in their program statement. (Sample Dep. 41.) In short, Sample was responsible for ensuring that the medical records clerks followed their job descriptions as defined in their program statement. (Sample Dep. 42.)

30. Medical records were maintained in an inbox ("Medical Records Inbox"). (Sample Dep, 42.) Sample did not have any input or control over the types of documents that were contained in the Medical Records Inbox, and a program statement directed where each one of those documents was placed. (Sample Dep. 42.)

b. MCC Laboratory

31. The MCC Laboratory was in a separate office from the Medical Records department. (S. Wilson Dep. 34, Sept. 27, 2010.) From 2006 through March 2007, the only nurse at the MCC was Duane Wagner. (Trial Tr. 501, 767–68.) He worked from Monday through Friday and oversaw the MCC Laboratory. (Trial Tr. 768–69.) Wagner was called to testify at trial. (Trial Tr. 767–88.) The MCC Laboratory also employed a phlebotomist, Sandra Wilson, through a staffing agency. (S. Wilson Dep. 9, 14.) The phlebotomist worked a morning shift from Monday through Friday. (S. Wilson Dep. 10, 14, 19.) Although the phlebotomist did not testify at trial, her deposition was admitted into evidence. (*See* Trial Tr. 721, 788.)

32. HSA Sample supervised Nurse Wagner. (Sample Dep. 24, 27; Trial Tr. 393–94, 502–03.) Sample also supervised the phlebotomist, as he was the Contracting Officer's Technical Representative ("COTR") for her position and was administratively responsible for her. (Sample Dep. 25, 27, 48; S. Wilson Dep. 21.) In that capacity, Sample was re-

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sponsible for scheduling her hours and ensuring that she showed up on time and performed blood draws. (Sample Dep. 25–26; S. Wilson Dep. 21.) The phlebotomist also reported to Wagner, who directed her work and answered her questions. (S. Wilson Dep. 23, 33; Sample Dep. 33.)

***8** 33. In March 2007, Wagner permanently left the MCC. (Trial Tr. 779, 787.) Wagner's duties as the staff nurse included, among other things, processing the Physicians' and physician assistants' orders for laboratory tests requiring blood draws, drawing inmates' blood, and following up on laboratory tests to ensure that the Physicians received test results. (Trial Tr. 502–03, 768–69, 773.) On a day-to-day basis, the phlebotomist drew inmates' blood for lab requisitions. (S. Wilson Dep. 27–28; Trial Tr. 132–33, 769, 774.) Unless the phlebotomist needed a patient's medical chart to see a blood test, or unless Sample asked her to pull a chart, the phlebotomist did not pull patients' medical charts on a daily basis. (S. Wilson Dep. 35.)

34. At the MCC, the process for ordering laboratory tests and following up on the results of those tests worked as follows: Physicians ordered laboratory tests that required blood draws by placing the orders on a patient's medical chart. (*See* Trial Tr. 768–69.) Nurse Wagner then transcribed the order onto a requisition form. (Trial Tr. 768–69, 782–83.) If a Physician ordered multiple laboratory tests, Wagner listed all of the tests on a single requisition form. (Trial Tr. 769.) The requisition forms were then sent to a testing laboratory along with the specimens that were collected. (Pl.'s Ex. V at 28.) The Lab Services Statement that was in effect during the relevant time period instructed that the MCC Laboratory was to "maintain a daily accession record of specimens collected, specimens processed, and an appropriate identification system for each." (Pl.'s Ex. E at 5; Trial Tr. 783.) Inmates' blood draws and the laboratory results for those blood draws were tracked in a logbook ("MCC Laboratory Logbook"); this was the only system in place at the MCC for tracking laboratory results. (Trial Tr. 120–22, 769–73; *see also* Pl.'s Ex. A at 636, 845.) The MCC Laboratory Logbook consisted of a chart with the following information: the date of a blood draw, an inmate's name and number, the laboratory tests that were ordered and the ordering practitioner, the date that the results were returned, and the signature of the person who drew the blood. (Pl.'s Ex. A at 636, 845; Trial Tr. 133, 769–70; Sample Dep. 81–82.) The primary purpose of the MCC Laboratory Logbook was to document the return of laboratory results to the MCC. (Sample Dep. 82–83.)

35. HSA Sample was responsible for implementing policies for the MCC Laboratory regarding the types of containers to be used for specific blood draws. (Sample Dep. 46–47.) Sample's role was limited to informing the MCC personnel that the blood specimens had to go out in a timely manner and that they had to be placed in the proper containers. (Sample Dep. 45–46.)

36. During the relevant time period, all routine blood draws were packaged and sent to the Federal Medical Center in Rochester, Minnesota ("Rochester Lab") for processing. (Trial Tr. 509, 769–70.) The Rochester Lab then faxed or mailed the results back to the MCC. (Trial Tr. 769–70; Sample Dep. 50–5) HSA Sample testified that if the results of a specimen had a panic value, meaning that the results were significant, the Rochester Lab called the MCC in advance. (Sample Dep. 50–51.) Other than laboratory results containing panic values, however, Sample did not have any knowledge of other types of laboratory results that warranted a telephone call from the Rochester Lab prior to sending the fax to the MCC. (Sample Dep. 51.)

***9** 37. The phlebotomist testified that after laboratory results were faxed to the MCC, either the nurse or the Physicians received the results and reviewed them. (S. Wilson Dep. 58.) Nurse Wagner testified that upon receiving laboratory results, he or the phlebotomist logged the date that the results were received in the MCC Laboratory Logbook, but they did not log the actual test results that were re-

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turned. (Trial Tr. 770, 772–73.) Laboratory results logged by the phlebotomist were given to her by Nurse Wagner after he reviewed them. (S. Wilson Dep. 84–85.) While it was possible that laboratory results could be placed on the phlebotomist's desk by someone other than Nurse Wagner, the phlebotomist testified that if a Physician had done so after reviewing the results, then the laboratory results would have been stamped. (S. Wilson Dep. 85–86, 102–04.) When multiple laboratory tests were ordered, the results of the tests were not normally returned to the MCC on the same day. (S. Wilson Dep. 56.) Despite this fact, there was no system in place for noting which specific laboratory test results were returned and which ones were outstanding. (Trial Tr. 772–73; S. Wilson Dep. 77–78.)

38. Afer laboratory results were logged in the MCC Laboratory Logbook, Nurse Wagner testified that the results were sent to the MCC Physicians for their review. (Trial Tr. 771, 773.) Sandra Wilson, the phlebotomist, however, could not remember what she did with laboratory results after logging them. (S. Wilson Dep. 84.) The Physicians were required to review the laboratory results pursuant to an internal MCC policy. (Trial Tr. 499.) After the Physicians reviewed the laboratory results, all such results were supposed to be timely filed into the inmates' medical charts. (Trial Tr. 500, 773; Sample Dep. 45.) Dr. Nowakowski testified that different patients' laboratory results were viewed at the same time and then signed. (Trial Tr. 500.) The laboratory results were then placed in a to-be-filed pile that was known as "the black hole ." (Trial Tr. 548.) The to-be-filed pile contained documents that were supposed to be filed in the inmates' medical charts. (Trial Tr. 500, 548.) The purpose of placing laboratory results in an inmate's medical chart was to ensure that there was a history of blood draws and the corresponding laboratory test results, and that the Physicians were aware of an inmate's blood levels for a particular laboratory test. (Trial Tr. 125–26, 500, 773.) Nurse Wagner did not make entries in the inmates' medical charts to note that laboratory results were returned. (Trial Tr. 771.) Nurse Wagner testified that he had an obligation to timely follow up on all laboratory results, based on his training and the policy manual that he was familiar with at the MCC. (Trial Tr. 783.)

39. When a blood specimen that was shipped to the Rochester Lab was unacceptable for testing, the Rochester Lab notified the MCC via a fax or telephone call. (Trial Tr. 774–75.) If the notice was received via fax, that fax was sent to the Physicians. (Trial Tr. 775.) Upon receiving a notice about an unacceptable specimen, Nurse Wagner had the authority to order that an inmate's blood be redrawn. (Trial Tr. 775.) Nurse Wagner could let the Physicians or a physician assistant know that the blood sample was bad. (Trial Tr. 775.) He did not need permission or an additional order from the Physicians to take another blood draw when a blood specimen that was shipped to the Rochester Lab was unacceptable. (Trial Tr. 775.) There was no system in place, however, to make sure that the nurse in fact called the inmate back down for a blood draw. (Trial Tr. 782.) When blood was redrawn, the nurse needed to have a new requisition sheet that would be sent to the Rochester Lab. (Trial Tr. 782–83.) The phlebotomist did not make the decision to redraw blood. (S. Wilson Dep. 44.) Based on the phlebotomist's experience, when a sample was unacceptable or rejected, a Physician would reorder the lab. (S. Wilson Dep. 79.)

***10** 40. If the notice that the specimen was unacceptable was received through a telephone call, someone, such as the phlebotomist, informed the nurse about the telephone call. (Trial Tr. 781–82.) This was the only system in place at the MCC to account for such telephone calls. (Trial Tr. 782.) The phlebotomist testified that she sometimes followed up by calling the Rochester Lab to determine what happened with the unacceptable specimen. (S. Wilson Dep. 40.) She also testified that the Physicians were responsible for ensuring that laboratory test results were returned to the MCC Laboratory or to the Medical Records department. (S. Wilson Dep. 72 .)

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41. The Physicians relied on Nurse Wagner to inform them that laboratory results were not returned. (Trial Tr. 512.) Although the Physicians could call the Rochester Lab themselves and ask for the laboratory results that day, this was not routinely done. (Trial Tr. 512.) Dr. Hoffman testified that at the clinical level, he, as the Clinical Director, was ultimately responsible for ensuring that results for laboratory tests that were ordered for inmates were actually performed. (Trial Tr. 436.) At an operational level, however, HSA Sample possessed that responsibility. (Trial Tr. 436–37.) Dr. Hoffman testified that he was responsible for attending to what was and was not being done, and for giving recommendations and suggestions to Sample, the associate warden, and Warden Wilson as to how he thought things could be best done to serve the interests of the patients. (Trial Tr. 437.)

42. The customary turn-around time for a blood test for a Dilantin level, from the time that a Physician ordered the test until the laboratory results were returned, was anywhere from a few days to between two and three weeks. (Trial Tr. 508, 786.) The delay was caused in part by the volume of the requests and by the procedures involved in delivering the results to the Physicians, including logging the results, making copies, and sending the results to the Physicians. (Trial Tr. 509, 786.)

43. Nevertheless, a STAT lab could be ordered to expedite the process; STAT labs were drawn on the day of the request and usually returned in 24 hours. (Trial Tr. 787; Trial Tr. 507.) The Physicians had the ability to order a blood test for a Dilantin level STAT, and if they did so, they would receive the results in approximately 24 hours. (Trial Tr. 507.)

44. The Lab Services Statement in effect during the relevant time period outlined the following objectives: (a) "Testing will be performed by qualified health care personnel;" (b) "Medical laboratory test reports will be accurate and timely;" (c) "Laboratory test results will be reported to inmates as necessary and incorporated into the inmate's health record;" (d) "Accurate records will be maintained;" and (e) "Safety and quality control procedures will be enforced." (Pl.'s Ex. E at 1; Trial Tr. 701, 783 .) Warden Wilson was responsible for ensuring that the Lab Services Statement was actually implemented. (Trial Tr. 703.) Dr. Hoffman testified that the objectives in the Lab Services Statement should be followed. (Trial Tr. 448–50.) According to Nurse Wagner, objectives 2(b)-(e) were objectives of the MCC Laboratory in 2007. (Trial Tr. 783–84.) Warden Wilson also testified that objectives 2(c)-(d) were being followed at the MCC. (Trial Tr. 704.) HSA Sample agreed that medical objectives 2(b)-(d) were being followed at the MCC. (Sample Dep. 85.)

***11** 45. The Lab Services Statement also contains a section on Laboratory Manuals. (Pl.'s Ex. E at 3.) That section provides, in part: "The director of the laboratory must approve, sign, and date any policies and procedures manuals." (Pl.'s Ex. E at 3.) Sample agreed that this statement was in effect. (Sample Dep. 85–86.)

5. MCC correctional officers

46. Beginning February 9, 2007, Solebo was housed in housing Unit 17E. (Pl.'s Ex. B at 1–2; Trial Tr. 186.) In 2007, Andrew Blanco was one of the officers assigned to Unit 17E. (Blanco Dep. 5–6, July 21, 2010.) Although Blanco did not testify at trial, his deposition was admitted into evidence. (*See* Trial Tr. 721, 788.) Vincent Cannon, a correctional officer, was occasionally assigned to Unit 17E during the evening watch in 2007. (Trial Tr. 176, 186.) Cannon was called to testify at trial. (Trial Tr. 175–90.)

47. Correctional officers assigned to Unit 17E maintained a logbook ("Unit 17E Logbook") that they updated when they were on duty. (Pl.'s Ex. B at 1–148; Trial Tr. 176–77, 180.) Post orders instructed correctional officers on what to write down in the Unit 17E Logbook. (Trial Tr. 177.)

48. Correctional Officers did not receive any instructions on how to handle the pill line, nor were

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there any post orders to instruct them on how to handle the pill line. (Trial Tr. 177–78; Blanco Dep. 16.) Although correctional officers sometimes noted that the pill line was administered on Unit 17E, they were not required to make entries about the pill line or whether an inmate received or did not receive medication on the pill line. (Blanco Dep. 13–14, 44, 47; *see also* Pl.'s Ex, B at 1–148.) If an inmate missed the pill line for any reason, Officer Cannon's practice was to note it in the Unit 17E Logbook and notify a physician assistant that the inmate had missed the pill line. (Trial Tr. 178–79.) If an inmate missed the pill line, Cannon did not call the Physicians to inform them of this, nor did he ask the inmate why he missed the pill line. (Trial Tr. 178–79.) Cannon did not discuss the importance of taking medication with the inmates when they missed me pill line. (Trial Tr. 179.)

49. Cannon knew that Solebo was taking medication on the pill line because the physician assistants called Cannon and requested that Solebo be brought down to the 7th Floor Health Services Unit ("7th Floor") for medication. (Trial Tr. 179.) Cannon did not, however, know that Solebo was taking medication for seizure disorder. (Trial Tr. 179.) Cannon testified that when he was on duty, inmates always received their medications. (Trial Tr. 179–80.)

B. MCC policies and procedures regarding medication

1. Pill line at the MCC

50. During the relevant time period, some medication, including Dilantin, was administered to MCC inmates through the pill line and under the direct supervision of the physician assistants. (Pl.'s Ex. A at 493; Trial Tr. 81, 126–27, 427–28.) The physician assistant administering the doses verified the patient's identity and the medication, and ensured that the inmate actually consumed his medication. (Trial Tr. 526.) The Physicians did not administer medication on the pill line. (Trial Tr. 428.) The pill line occurred twice a day, once in the morning and once in the evening. (Pl.'s Ex. A at 493; Trial Tr. 34.) The pill line took place either on the inmates' housing unit or on the 7th Floor. (Pl.'s Ex. A at 493; Trial Tr. 29–30, 81–82, 186–87.)

***12** 51. When the pill line took place on the inmates' housing unit, the physician assistant administering the medication placed it on a cart ("medication cart") and yelled, announcing, "pill line," or some variation thereof on the unit. (Trial Tr. 29, 84, 127; Blanco Dep. 23). The physician assistant then called out the names of each inmate receiving medication on that housing unit. (Trial Tr. 84; Blanco Dep. 25.) Those inmates then brought their identification and a glass of water and stood in a single-file line to receive their medication. (Trial Tr. 84–85, 127.) Officer Blanco's practice was to stand next to the physician assistant while medication was being administered. (Blanco Dep. 17, 23).

52. When the pill line took place on the 7th Floor, a physician assistant called the correctional officers and provided them with the names of the inmates who were supposed to receive medication on the pill line. (Trial Tr. 178.) The correctional officer on the floor then yelled, announcing, "pill line" on the housing unit. (Aruiza Dep. 33–34.) An internal security officer accompanied the inmates on an elevator to the 7th Floor. (Trial Tr. 30; Aruiza Dep. 29, 31–32.) When the physician assistants administered medication on the 7th Floor, they knew that an inmate had refused his medication because the officers told them. (Trial Tr. 187.) In 2007, if an inmate did not come down for his medication, Physician Assistant Iskandar did not request that someone bring the inmate to the 7th Floor so that he could receive his medication. (Trial Tr. 35.)

2. Medication Administration Records

53. During the relevant time period, the MCC personnel were required to follow a BOP Program Statement on Pharmacy Services ("Pharmacy Services Statement"). (Pl.'s Ex. J at 16–23; Trial Tr. 528.) Pursuant to the Pharmacy Services Statement, the administration of medication to an inmate was to be documented in an inmate's Medication Ad-

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ministration Record ("MAR"). (Pl's Ex. J at 19; Trial Tr. 81, 527.) The MARs were created for the benefit of the Physicians because the Physicians did not administer medication on the pill line and did not have direct knowledge of whether an individual inmate was receiving his medication. (Trial Tr. 529.) The purpose of the MAR was to have a record that the Physicians could review to see whether an inmate was refusing or missing his medication, and which a Physician could then use when making clinical judgments. (Trial Tr. 36, 529.) The Physicians were supposed review the MARs when they were treating the inmates. (Trial Tr. 36.)

54. Every inmate receiving medication on the pill line, including Solebo, had a MAR that was generated by the Pharmacy department on a monthly basis. (Trial Tr. 37–38, 528–29.) The MAR contained information such as the inmate's name, the name of the medication, and the dosage the inmate was to receive. (Trial Tr. 528.) Solebo's MAR indicated that he was taking Dilantin. (Trial Tr. 528; Jt. Ex. 1 at 786–803.)

***13** 55. When administering medication on the pill line, the physician assistants had the inmates' MARs in front of them and the information in the MARs was readily available to them. (Trial Tr. 61.) The MAR contained a designated box for each and every dose, which corresponded to the days of the month, for an appropriate code to be noted in the box by the person who was administering the medication. (Trial Tr. 528.) When an inmate received his medication on the pill line, the physician assistant administering his medication placed his or her initials in a designated box on the MAR. (Trial Tr. 35, 428.) When an inmate refused his medication on the pill line by telling the physician assistant or correctional officer that he did not want to take his medication, the physician assistant wrote "R" in the designated box on the MAR, per the Pharmacy Services Statement. (Pl.'s Ex. J at 19; Trial Tr. 35, 57, 528–29.) When an inmate did not present himself to the physician assistant or correctional officer on the pill line, the physician assistant wrote "NS" for no-show, per the Pharmacy Services Statement. (Pl.'s Ex. J at 19; Trial Tr. 35–37, 59, 62, 528–29.) Thus, there were times when the physician assistants relied only on what the correctional officer told them when they noted "R" or "NS" on an inmate's MAR. (Trial Tr. 58.)

56. MARs were kept on the medication cart and were available for the Physicians to review during the month that they were in use. (Trial Tr. 37–38, 89.) In addition to reviewing the MAR on the medication cart, the Physicians could also find out whether an inmate was taking his medication during the month by consulting with the physician assistants. (Trial Tr. 89.) At the end of each month, the MARs were given to the Physicians to review, and the MARs then became part of an inmate's medical chart. (Trial Tr. 90; Aruiza Dep. 75.)

3. Missing medication and Medical Treatment Refusal Forms

57. Inmates commonly failed to line up for the pill line. (Trial Tr. 127, 137). Although there were no written rules at the MCC requiring the physician assistants to notify the Physicians if a patient missed three consecutive doses of medication, Dr. Nowakowski requested the pill line staff to notify her when an inmate missed three or four consecutive doses of medication because it was possible for her to do something about it in that situation. (Trial Tr. 530–531, 555.) Similarly, Dr. Hoffman testified at trial that if he personally knew, in his capacity as a physician, that Solebo had missed three doses of his medication in a row, he would have "definitely" wanted someone to speak to Solebo. (Trial Tr. 474.) Dr. Hoffman also testified that if Solebo had missed two days of medication, he would have wanted to find out why and he may have wanted to speak to Solebo and ask him what was going on. (Trial Tr. 458.)

58. An admissions and orientation handbook ("A & O Handbook") for inmates instructed them to report to the pill line when scheduled and warned that a failure to show up at the pill line when scheduled *"will* result in an incident report." (Pl.'s Ex. A

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at 493) (emphasis added). Although incident report forms were available, Dr. Nowakowski testified that it was not the custom or practice at the MCC to complete an incident report form if an inmate missed the pill line. (Trial Tr. 546–47.)

***14** 59. Additionally, a BOP Program Statement on Patient Care ("Patient Care Statement"), that was in effect at the MCC during the relevant time period, instructed that "[a]ny refusal of recommended or offered treatment or a diagnostic procedure will be documented in the inmate health record. The inmate will be asked to sign a Refusal of Medical Treatment form." (Pl.'s Ex. S at 51; Trial Tr. 94–95, 522.) The Patient Care Statement further instructed that if the inmate refused to sign the Medical Treatment Refusal Form ("Refusal Form"), (*see* Pl.'s Ex. H; Trial Tr. 78, 522), "two staff witnesses will attest and sign to the fact that the consequences of refusing the proposed treatment or procedure were explained to the inmate in a language he/she understood," (Pl.'s Ex. S at 51; Trial Tr. 95, 522–23). In addition, the Patient Care Statement provided that "[a]s a general rule, medical and dental treatment, *including medication,* are given only when the inmate consents." (Pl.'s Ex. S at 51) (emphasis added). The Patient Care Statement also identified exceptions to the general rule, i.e., situations when medical treatment was to be provided without the patient's consent or on an involuntary basis. (Pl.'s Ex. S at 51). Thus, per the Patient Care Statement, an inmate who refused his medication was required to sign a Refusal Form. (Pl.'s Ex. S at 51.) Contrary to a plain reading of the Patient Care Statement, Dr. Nowakowski testified, quite incredibly, that the Refusal Form did not apply to the administration of voluntary medication. (Trial Tr. 523–24.)

60. Signed Refusal Forms were supposed to be placed in an inmate's medical chart, (Trial Tr. 33, 429–30, 547), so that the Physicians could see that an inmate refused medication on a certain date, (Trial Tr. 56–57, 78). Despite this purpose, Dr. Nowakowski testified that Refusal Forms were not commonly used at the MCC for medication refusal. (Trial Tr. 521.) Physician Assistants Iskandar and Velasquez testified that there was no written policy at the MCC as to when a physician assistant should provide an inmate with a Refusal Form, and instead each physician assistant could decide whether to provide an inmate who was refusing his medication with a Refusal Form. (Trial Tr. 61, 79–80.) Because Refusal Forms were not signed every single time an inmate missed his medication, there might not be a Refusal Form in an inmate's medical chart for each instance that an inmate missed his medication. (Trial Tr. 79–81.) In those circumstances, the only documentation the physician assistants made that an inmate refused medication on the pill line was the notation of an "R" in the MAR. (Trial Tr. 58.)

61. If a Refusal Form was completed, there could be a record in an inmate's medical chart of when he missed his medication on a day-to-day basis. (Trial Tr. 547.) And, if the incident reports or medical Refusal Forms were in the chart, such as the MARs were, Dr. Nowakowski testified that it could be easy to track when a patient was missing his medication. (Trial Tr. 547–48.)

***15** 62. There were occasions when an inmate talked to Officer Cannon and asked if he could receive his medication. (Trial Tr. 188.) When an inmate on Unit 17E who failed to line up for the pill line subsequently changed his mind and decided he wanted his medication or showed up to receive his medication, the inmate needed to speak with the correctional officer on duty. (Trial Tr. 188.) During those occasions, Cannon's practice was to call the physician assistant and send the inmate down to the 7th Floor to receive his medication. (Trial Tr. 188.) Cannon testified that he never refused an inmate's request to be sent down for his medication or to receive his medication. (Trial Tr. 188.) On the occasions that Cannon contacted a physician assistant and asked them to either return to the housing unit to administer medication to an inmate or to allow an inmate go down to the 7th Floor to receive his medication, a physician assistant never refused.

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(Trial Tr. 188.)

63. Physician Assistant Iskandar testified that the physician assistants gave the inmates second chances and accommodated any inmate who came to an officer after missing the pill line and asked for his medication. (Trial Tr. 63.) Physician Assistant Iskandar also testified that he was not aware of any instance in which an inmate requested his medications and was denied them. (Trial Tr. 63.)

4. Daily Meetings

64. In 2006 and 2007, the Physicians held morning endorsement meetings and close-out meetings to discuss patients. (Trial Tr. 68, 73, 131, 541, 778.) The endorsement and close-out meetings were not held on the weekends because the Physicians were not present. (Trial Tr. 92–93.) If both Physicians were present, they would both attend the endorsement and close-out meetings. (Trial Tr. 541.) Although the meetings were supposed to be held on a daily basis, Dr. Nowakowski testified that when she was present at the MCC the Physicians did not always hold a daily meeting. (Trial Tr. 541–42.) In April 2007, when Dr. Hoffman was on leave, Dr. Nowakowski ran the daily meetings. (Trial Tr. 542.) On the days in April that Dr. Nowakowski was not present, such as the week prior to Solebo's death, a daily meeting did not take place. (Trial Tr. 542.)

65. Daily meeting participants typically included both Dr. Hoffman and Dr. Nowakowski when they were present, the physician assistants, Nurse Wagner, and HSA Sample. (Trial Tr. 541, 778.) Pharmacists did not normally attend the daily meetings. (Trial Tr. 92.) The purpose of the daily meetings was to ensure that the Physicians and physician assistants discussed and were made aware of important or significant medical issues concerning the inmates. (Trial Tr. 68, 73, 131.) One such important or significant medical issue was inmates who were not taking their medication as prescribed. (Trial Tr. 69, 70, 74; *see also* Trial Tr. 459, 541.) Thus, during the daily meetings, the Physicians and physician assistants discussed what to do when an inmate was not taking his medication as prescribed. (Trial Tr. 71.) Additionally, if the physician assistants had any concerns about an inmate, like Solebo, missing his medication, they could raise and discuss these concerns with the Physicians. (Trial Tr. 131.)

IV. Solebo's time at the Metropolitan Correctional Center: August 2006 to May 2007

A. August 2006

***16** 66. Solebo was incarcerated at the MCC from August 28, 2006 until May 1, 2007, while awaiting trial. (Def.'s Ex. 22 at 1; R. 93, Proposed Pretrial Order, Ex. A: Stip. of Uncontested Facts ¶ 1.) Prior to Solebo's death, none of his medical records from Kankakee were ever at the MCC. (Trial Tr. 540–41.) Although an MCC Physician could have requested those records by signing a standard consent form, having Solebo sign the form, and noting what was requested from where and during what time period, no one did so. (Trial Tr. 493–94.)

67. On August 28, 2006, Physician Assistant Aruiza conducted an initial medical evaluation of Solebo and prepared the first note in Solebo's medical chart at the MCC. (Jt. Ex. 1 at 804; Aruiza Dep. 79–80.) Aruiza recorded that Solebo stated, "I need my medications ." (Jt. Ex. 1 at 804; Aruiza Dep. 81.) Solebo also informed Aruiza that his last seizure occurred one month prior and that he had been taking Dilantin for four months. (Jt. Ex. 1 at 804; Trial Tr. 497; Aruiza Dep. 81.) The assessment at this time was that Solebo had a history of seizure disorder. (Jt. Ex. 1 at 804; Aruiza Dep. 81.)

68. Solebo's treatment plan included an order by Aruiza to check Solebo's Dilantin levels. (Jt. Ex. 1 at 804.) Significantly, Aruiza entered an order to continue Solebo's Dilantin. (Jt. Ex. 1 at 805; Trial Tr. 494; Aruiza Dep. 84.) Solebo's dosage of Dilantin was increased to three 100–milligram capsules, equaling 300 milligrams, to be taken each evening. (Jt. Ex. 1 at 805.) Aruiza also ordered that Solebo be placed in a lower bunk until December

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28, 2006, because of his history of seizure disorder. (Jt. Ex. 1 at 804; Aruiza Dep. 81, 88.) Aruiza considered this a safety issue, meaning that if Solebo had a seizure, he would be safer if he did not fall from a higher bunk. (Aruiza Dep. 88.)

69. Finally, Aruiza ordered that Solebo visit the Chronic Care Clinic ("CCC") for Neurology ("Neurology CCC") for his seizures by September 18, 2006. (Jt. Ex. 1 at 804; Aruiza Dep. 81.) The first time that Solebo was seen by an MCC Physician in the Neurology CCC, however, was on November 30, 2006—over three months after his arrival at the MCC, and over two months after the date specified in Aruiza's order. (Jt. Ex. 1 at 806.) The Neurology CCC was for patients who exhibited neurological-related problems, such as seizure disorder. (Trial Tr. 464.) According to the BOP Patient Care Statement, CCCs were intended to be "a means for inmates with ongoing medical needs to be tracked on [an internal database known as] SENTRY and seen by a health care provider at clinically appropriate intervals." (Pl.'s Ex. S at 18; *see also* Trial Tr. 155). The Patient Care Statement provided that "a physician will see all inmates assigned to a CCC every six months, or more often if clinically indicated." (Pl.'s Ex. S at 18.) The Patient Care Statement further provided that "[h]igh risk or medically complex chronic care inmates will be seen more frequently in accordance with good clinical judgment, in addition to or in conjunction with regular visits with their primary provider." (Pl.'s Ex. S at 18.) Warden Wilson expected that the Patient Care Statement would be enforced and followed at the MCC. (Trial Tr. 711.)

***17** 70. Aruiza also prepared an Intake Screening form ("Intake Form") for Solebo. (Jt. Ex. 1 at 828–29; Trial Tr. 159.) Aruiza noted that Solebo had a history of seizure disorder and designated Solebo a Care Level 1. (Jt. Ex. 1 at 828–829; Trial Tr. 159.) That same day, Dr. Nowakowski reviewed the Intake Form and signed-off on the Care Level 1 for Solebo. (Jt. Ex. 1 at 828; Trial Tr. 169.) During the relevant time period, there were four levels of care for MCC inmates on a continuum from 1 to 4. (Pl.'s Ex. Q; Trial Tr. 156 .) Care Level 1 was considered the least serious medical level, whereas Care Level 4 was considered the most serious medical and psychiatric level. (Trial Tr. 156.) The MCC Physicians determined an inmate's care level. (Trial Tr. 159.)

71. On August 29, 2006, Dr. Nowakowski conducted an administrative chart review. (Jt. Ex. 1 at 804.) Dr. Nowakowski reviewed, signed and approved Aruiza's orders in Solebo's medical chart, including the prescription for Dilantin. (Jt. Ex. 1 at 804–805, 821; Trial Tr. 494.) When Dr. Nowakowski conducted administrative chart reviews, she would not typically communicate contemporaneously with the physician assistant who had made the notes, unless there was a specific problem that needed to be addressed. (Trial Tr. 492–93.) During the administrative chart review, Dr. Nowakowski questioned the etiology of the seizures and commented in Solebo's medical chart that she needed clarification of the history, prescription, and seizure type. (Jt. Ex. 1 at 804; Aruiza Dep. 83.) Dr. Nowakowski did not meet with Solebo during the administrative chart review. (*See* Trial Tr. 484.)

72. At trial, Dr. Hoffman testified that he did not disagree with the initial prescription of Dilantin that Solebo received during the MCC's intake process. (Trial Tr. 409–10.) Solebo's prescription, prescription number 96516, did not include any refills and was to expire on September 27, 2006. (Jt. Ex. 1 at 821.)

73. On August 29, 2006, a "Patient Problem List" that was likely prepared by a Physician provided that the "Significant Diagnosis" for Solebo was status post-seizure and designated Solebo a Care Level 2, (Jt. Ex. 1 at 823; Trial Tr. 159, 170.) According to Dr. Hoffman, Solebo was in the Neurology CCC because he was classified as a Care Level 2 inmate. (Trial Tr. 461–62.)

74. On August 30, 2006, Physician Assistant

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Carrera performed an initial physical examination of Solebo and completed a Report of Medical Examination ("Initial Report"). (Jt. Ex. 1 at 824–25; Trial Tr. 105–06.) In the Initial Report, Carrera noted that Solebo had seizure disorder and that he was currently on medication. (Jt. Ex. 1 at 824; Trial Tr. 106.) Carrera also summarized Solebo's prescription for Dilantin and noted that he was to take 300 milligrams of Dilantin every evening. (Jt. Ex. 1 at 825; Trial Tr. 107–08; 495–96.) In the "Summary of Defects and Diagnoses" section of the Initial Report, the only medical condition noted was that Solebo had a history of seizures that were controlled with medication. (Jt. Ex. 1 at 825; Trial Tr. 107, 496.) Carrera testified that this information was entered into Solebo's medical chart so that all medical personnel who came into contact with Solebo would be aware of his medical history. (Trial Tr. 108.) Carrera also recommended that Solebo be placed in a lower bunk so that he could not fall from an upper bunk if he had a seizure. (Trial Tr. 109.)

***18** 75. On August 30, 2006, Dr. Nowakowski reviewed the Initial Report. (Trial Tr. 109, 496.) In reviewing and signing off on the Initial Report, Dr. Nowakowski was aware that Solebo was presenting with seizure disorder controlled with medication. (Trial Tr. 497.) According to Dr. Nowakowski, the Initial Report did not outline a treatment plan for Solebo at that time because that plan was going to be created when he saw an MCC Physician, which was generally done at the CCC. (Trial Tr. 496–97.) Dr. Nowakowski again did not meet with Solebo during this review. (*See* Trial Tr. 484.)

76. When Solebo initially presented to the MCC, his prescription for Dilantin needed to be renewed. (Trial Tr. 524–25.) Dr. Nowakowski testified that it was common practice at the MCC to write a prescription for medication that an inmate was already taking when a Physician did not have time to see the patient. (Trial Tr. 525.) She further testified that even after a Physician saw the patient during a clinical visit, it was also common practice to write a prescription for medication that a patient did not medically require. (Trial Tr. 525.) According to Dr. Nowakowski, because Solebo came in to the MCC on Dilantin, his Dilantin was continued because it was better to be safe than sorry. (Trial Tr. 525.) But, in accordance with the MCC's custom and practice, Solebo was to be evaluated in a CCC. (Trial Tr. 525.) At the CCC, a Physician would then determine whether medication was medically necessary. (Trial Tr. 525.) Dr. Nowakowski testified unequivocally that Solebo would not have been prescribed anti-seizure medication if it was of no medical benefit to him. (Trial Tr. 525–26.) Dr. Nowakowski also testified that although she had prescribed medication that was medically unnecessary, such as Tylenol, for a patient at the MCC, she had never written a prescription for a controlled substance, such as Dilantin, when it was not necessary for a patient. (Trial Tr. 526.)

77. After arriving at the MCC, Solebo took his Dilantin on August 29, 30, and 31. (Jt. Ex. 1 at 802; Trial Tr. 531.)

B. September 2006

78. In early September 2006, Dr. Nowakowski reviewed Solebo's August 2006 MAR. (Jt. Ex. 1 at 802; Trial Tr. 531–532.)

79. On September 16, 2006, Solebo missed his Dilantin; it was the only dose of medication he missed that month. (Jt. Ex. 1 at 800; Trial Tr. 532.)

80. On September 18, 2006, Solebo's blood was drawn pursuant to an order by Dr. Nowakowski to test, among other things, his Dilantin level. (Jt. Ex. 1 at 817; Trial Tr. 117–18). The purpose of obtaining a blood draw and corresponding laboratory results for a Dilantin level was to determine the concentration of Dilantin in Solebo's blood; that is, to determine whether the Dilantin was at a therapeutic level. (*See* Trial Tr. 498.) Dr. Nowakowski testified that the purpose of administering Dilantin to Solebo was to keep him in a therapeutic range because maintaining his Dilantin level in a thera-

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peutic range lessened his chances of having a seizure. (Trial Tr. 549.) If Solebo missed multiple doses of Dilantin, this could increase his risk of having a seizure. (Trial Tr. 549.) Dr. Nowakowski explained that there are reference ranges for laboratory tests, which are basically a generic range, i.e., a bell-shaped curve, of the expected test results for a patient. (Trial Tr. 499.) Dr. Nowakowski further testified that the therapeutic range for Dilantin, according to the Rochester Lab, is between 10 <<mu>>/ml and 20 <<mu>>/ml, and that the therapeutic range and reference range are fairly similar. (Trial Tr. 499–500.)

*19 81. On September 20, 2006, the Rochester Lab faxed the results of Solebo's September 18 blood draw to the MCC. (Jt. Ex. 1 at 817.) The September 20 laboratory results revealed that the Dilantin level in Solebo's blood was 8 <<mu>>/ml, which was subtherapeutic. (Jt. Ex. 1 at 817; Trial Tr. 117–18.)

82. On September 21, 2006, Dr. Nowakowski reviewed the results of the September 18 blood draw and became aware that Solebo's Dilantin level was sub-therapeutic. (Jt. Ex. 1 at 817; Trial Tr. 119.)

C October 2006

83. On October 2, 2006, Dr. Nowakowski reviewed Solebo's September 2006 MAR. (Jt. Ex. 1 at 800; Trial Tr. 532.) Because the MAR indicated that Solebo had only missed one dose of his Dilantin, Dr. Nowakowski was not concerned about Solebo. (Trial Tr. 533.)

84. On October 3, 2006, Solebo made a visit to "sick call" and was seen by Physician Assistant Carrera. (Jt. Ex. 1 at 806; Trial Tr. 109–10.) During this visit, Carrera made a note in Solebo's medical chart ("October 3rd Note"). (Jt. Ex. 1 at 806; Trial Tr. 109–10.) The subjective portion of the October 3rd Note provided, in part: "[i]ncarceration started with seizure eight months ago. Wants medication refill. Is study case." (Jt. Ex. 1 at 806; *see also* Trial Tr. 110.) Carrera also noted that Solebo's Dilantin level from September 18, 2006, was 8 <<mu>>/ml. (Jt. Ex. 1 at 806.) The only assessment Carrera made, meaning the finding she made as a result of the information she had regarding Solebo, was subjective seizure disorder. (Jt. Ex. 1 at 806; Trial Tr. 110–11, 138–39.) If Carrera had any questions regarding whether Solebo had seizure disorder, she could have verified this with the Physicians. (Trial Tr. 139.)

85. At trial, Physician Assistant Carrera testified that in light of Solebo's history of seizure disorder, the treatment plan for him at this time was to continue his Dilantin. (Trial Tr. 139.) Specifically, Solebo was to continue taking three 100–milligram capsules of Dilantin by mouth every evening for 180 days. (Jt. Ex. 1 at 806; Trial Tr. 110–11.) The only medical condition for which Solebo was taking Dilantin was seizure disorder. (Trial Tr. 111.) The treatment plan also provided that Solebo was to be added to the Neurology CCC for seizures, so that he could be followed up for his seizure disorder. (Jt. Ex. 1 at 806; Trial Tr. 110–11.) There was no other reason that Solebo was being sent to the Neurology CCC, and Solebo did not have any other medical condition that was being considered. (Trial Tr. 111–112.) Although Carrera ordered "lab results in chart for Dilantin," (Jt. Ex. 1 at 806), she did not order any medical tests, (Trial Tr. 111).

86. The October 3 Note contains a stamp on the lower left-hand corner that states: "Written: Patient medication information was provided regarding use, precautions and possible side effects." (Jt. Ex. 1 at 806; Trial Tr. 167.) According to Assistant HSA Lamping, the stamp indicates that a written patient information sheet ("hiformation Sheet") for Dilantin was provided to Solebo on or about October 3. (Trial Tr. 167; *see also* Def.'s Ex. 1B–C.) The Information Sheet cautioned, "DO NOT STOP TAKING THIS MEDICINE without first checking with your doctor. TO PREVENT SEIZURES, continue taking this medicine on a regular schedule." (Def.'s Ex. 1B–C; Trial Tr. 166.) Although Assistant HSA Lamping testified that Information Sheets

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were given to inmates by staff members conducting the pill line, (Trial Tr. 164; *see also* Aruiza Dep. 49–50), she personally did not give Solebo an Information Sheet, nor did she have any personal knowledge that Solebo ever received an Information Sheet. (Trial Tr. 173.) Furthermore, none of the physician assistants testified that they had given Solebo the Information Sheet. Thus, the inference that Solebo actually received the Information Sheet is incredibly weak.

***20** 87. Effective October 4, 2006, the day after Solebo's sick call visit, a Physician changed elevated his care level to Care Level 3. (Pl.'s Ex. A at 299; Trial Tr. 155, 171; *see also* Trial Tr. 159 .) At the MCC, inmates classified at a Care Level 3 were considered to be "fragile outpatients with conditions that require frequent clinical contacts (daily to monthly)." (Pl.'s Ex. Q; Trial Tr. 157 .) According to Assistant HSA Lamping, Solebo was designated a Care Level 3 because he was a forensic study case, as reflected in the October 3 Note, meaning that a judge had ordered Solebo to undergo a forensic or psychiatric evaluation to determine his competency to stand trial. (Trial Tr. 158, 160.) However, according to an internal SENTRY document that contained an inmate profile for Solebo, (Trial Tr. 154), the "current assignment" for Solebo under Care Level 3 was "Unstable, complex chronic care." (Pl.'s Ex. at 299; Trial Tr. 156.) The SENTRY document did not reflect that Solebo was a forensic study case as of October 4. (Pl.'s Ex. A at 299; Trial Tr. 171.) Between October 4, 2006 and May 1, 2007, Solebo's care level was never changed. (Pl.'s Ex. A at 299; Trial Tr. 174.)

88. On October 10, 2006, Dr. Hoffman reviewed the October 3 Note. (Jt. Ex. 1 at 806; Trial Tr. 112.) If Dr. Hoffman had wanted to add anything regarding Solebo's medical care or treatment, he could have done so at this time, but he did not make any such notation on the October 3 Note. (Jt. Ex. 1 at 806; Trial Tr. 112.) That same day, Dr. Hoffman renewed Solebo's Dilantin prescription with five refills. (Jt. Ex. 1 at 821; Trial Tr. 410.) Solebo was to take three 100–milligram capsules of Dilantin by mouth each evening. (Jt. Ex. 1 at 821.) Solebo's prescription, prescription number 97535, was effective October 10, 2006, and was set to expire on April 7, 2007. (Jt. Ex. 1 at 821.)

89. Between October 1 and October 9, it is unclear whether Solebo received his Dilantin. (Jt. Ex. 1 at 798.) On October 14 and 25, Solebo's MAR reflects that he was a "no-show" on the pill line and missed his doses of Dilantin. (Jt. Ex. 1 at 798.)

D. November 2006

90. On November 1, 2, and 3, Solebo's MAR reflects that he was a "no-show" on the pill line and missed three consecutive doses of Dilantin. (Jt. Ex. 1 at 796; Trial Tr. 533.) Although missing three consecutive doses was the kind of activity that Dr. Nowakowski wanted to be made aware of, she did not become aware of the missed doses until she reviewed Solebo's MAR in December 2006. (Trial Tr. 533–34; Jt. Ex. 1 at 796.)

91. On November 15, 2006, a report on a forensic evaluation ("Forensic Report") of Solebo was completed. (Def.'s Ex. 22 at 1–6; Trial Tr. 160–61.) The Forensic Report noted that according to Solebo, "he began experiencing seizures for the first time, beginning in January 2006." (Def.'s Ex. 22 at 2.) Solebo also told the examiner that he had "suffered multiple seizures while detained in a county jail, prior to his transfer to MCC Chicago." (Def.'s Ex. 22 at 2.) Solebo's mental health prognosis at this time was "determined to be good," and it was determined that he was competent to stand trial. (Def.'s Ex. 22 at 6; Trial Tr. 161.) After the Forensic Report was completed, Solebo's care level did not change. (Trial Tr. 161.) According to Assistant HSA Lamping, Solebo's care level did not change because the information was not communicated to the Health Services department for them to change it. (Trial Tr. 161.) According to Lamping, an inmate's care level is typically changed once an inmate is sentenced, and the care level is a factor the BOP uses to determine to which institution to send an inmate. (Trial Tr. 161–62.) Lamping testi-

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fied that therefore, the fact that Solebo had a Care Level 3 after November 15, 2006, was just an artifact of the fact that he originally came to the MCC as a study case. (Trial Tr. 162.) Lamping also testified that Solebo's care level did not make a difference in the care that Solebo received while he was at the MCC because the Physicians did not look at an inmate's care level when deciding what care to provide to an inmate. (Trial Tr. 162.)

***21** 92. On November 21, 2006, Dr. Nowakowski reviewed Solebo's October 2006 MAR. (Jt. Ex. 1 at 798.)

93. On November 30, 2006, Dr. Hoffman examined Solebo in the Neurology CCC for his seizures. (Jt. Ex. 1 at 806–07; Trial Tr. 112–13.) Dr. Hoffman noted that Solebo's seizures began in February 2006, during Solebo's incarceration, and that his last seizure occurred in August 2006. (Jt. Ex. 1 at 806; Trial Tr. 433.) Dr. Hoffman also noted that Solebo began taking 100 milligrams of Dilantin in March 2006 and that the prescription was increased to 300 milligrams in July,[FN3] at which point his seizures stopped. (Jt. Ex. 1 at 806–07; Trial Tr. 433.) Dr. Hoffman also noted that Solebo experienced loss of consciousness when he seized, that he fell off the top bunk, experienced incontinence, and that the seizures only happened in his sleep. (Jt. Ex. 1 at 807; Trial Tr. 433.)

> FN3. Dr. Hoffman's note was incorrect. Solebo's Dilantin was increased to 300 milligrams upon his arrival at the MCC. (*See* Jt. Ex. 1 at 804–05.)

94. Dr. Hoffman's assessment was "grand mal seizure-strong history except only occurs in sleep suggesting [possible] sleep movement [disorder] or [secondary] gain." (Jt. Ex. 1 at 807; Trial Tr. 433–34.) At trial, Dr. Hoffman testified that his assessment was a differential diagnosis of three possibilities: seizure disorder; sleep movement disorder; or that Solebo was seeking a secondary gain. (Jt. Ex. 1 at 807; Trial Tr. 444.) Out of these three possibilities, Dr. Hoffman medicated Solebo for seizure disorder. (Trial Tr. 445.)

95. Solebo's treatment plan at this time was to continue his Dilantin. (Jt. Ex. 1 at 807.) Accordingly, Dr. Hoffman ordered that Solebo continue taking three 100–milligram capsules of Dilantin every evening on the pill line for 180 days. (Jt. Ex. 1 at 807; Trial Tr. 434.) The treatment plan also required that Solebo's Dilantin levels be monitored, that Solebo visit the Neurology CCC in two months, and that he undergo CT scan of his head. (Jt. Ex. 1 at 807; Trial Tr. 434.) The only tests ordered at this time were a blood draw to determine Solebo's Dilantin levels and the CT scan. (Trial Tr. 114.) Dr. Hoffman ordered that Solebo's Dilantin levels be monitored because in Dr. Hoffman's clinical judgment, it was indicated in Solebo's case. (Trial Tr. 434–35.)

96. According to Dr. Hoffman, when diagnosing seizure disorder in someone, a primary care doctor takes a history from the patient or an observer, or both. (Trial Tr. 442–43.) In making this diagnosis, Dr. Hoffman testified that it does not have to be a physician who witnesses the seizure. (Trial Tr. 442–43.) According to Dr. Hoffman, no one ever witnessed tonic-clonic movement, loss of consciousness, or any kind of incontinence in Solebo. (Trial Tr. 443.) At trial, Dr. Hoffman testified that he did not diagnose Solebo with seizure disorder at this time because Solebo's seizures had not been witnessed and because it would have been medically incorrect to diagnose Solebo based on history alone. (Trial Tr. 440–42.) Therefore, Dr. Hoffman believed that the safest thing to do was to treat Solebo as if he had seizure disorder. (Trial Tr. 442.)

E. December 2006

***22** 97. Sometime during the first few days of December 2006, Dr. Nowakowski reviewed Solebo's November 2006 MAR and at that point became aware that Solebo had missed three consecutive doses of Dilantin that month. (Jt. Ex. 1 at 796; Trial Tr. 533.) Although Dr. Nowakowski would have wanted to be made aware of the fact that Solebo missed three consecutive doses of Dilantin,

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by the time she reviewed his November 2006 MAR, Solebo had received the next 28 doses. (Trial Tr. 533.) Thus, Dr. Nowakowski was not concerned that his Dilantin level was subtherapeutic, and she did not counsel Solebo about these missed doses of Dilantin. (Trial Tr. 533–34, 556 .)

98. On December 7, 2006, pursuant to an order by Dr. Hoffman, Solebo's blood was drawn to test his Dilantin level. (Jt. Ex. 1 at 816; Trial Tr. 498.) On December 9, 2006, the Rochester Lab faxed to the MCC the results of Solebo's December 7 blood draw, which revealed that his Dilantin level was 11 <<mu>>/ml. (Jt. Ex. 1 at 816; Trial Tr. 119, 497–98.) Solebo's Dilantin level at the time was low normal, but it was still within the therapeutic range for Dilantin, which is between 10 <<mu>>/ml and 20 <<mu>>/ml. (Trial Tr. 119, 499.)

99. On December 11, 2006, Dr. Nowakowski reviewed the laboratory results from Solebo's December 7 blood draw and thus became aware of the Dilantin level in his blood. (Jt. Ex. 1 at 816; Trial Tr. 119–20, 499.) After reviewing the laboratory results, Dr. Nowakowski testified that she more than likely placed the December 9 laboratory results in a stack of many different patients* laboratory reports. (Trial Tr. 500.) Dr. Nowakowski testified that she may not have had Solebo's medical chart at the time she reviewed the December 9 laboratory results. (Trial Tr. 501.)

100. On December 18, 2006, a week after reviewing Solebo's laboratory results from his December 7 blood draw, Dr. Nowakowski conducted an administrative review of Solebo's medical chart and reordered a blood draw to check Solebo's Dilantin levels. (Jt. Ex. 1 at 808; Trial Tr. 500–01.) Dr. Nowakowski also added orders for RPR and HIV tests. (Jt. Ex. 1 at 808.) At some point in December 2006 and following, HSA Sample delegated to Nurse Wagner the duty of ensuring that laboratory tests that were ordered were carried out and that the corresponding results were returned to the MCC. (Trial Tr. 501.) Nurse Wagner was the only nurse at the MCC at this time. (Trial Tr. 501.)

101. On December 19, 2006, this Court entered an order as the presiding trial judge in Solebo's pending criminal case instructing the BOP and the United States Marshals to transport Solebo "to a suitable medical facility outside of the [BOP]" to undergo an MRI. (Pl.'s Ex. A at 631–33.) The order stated that, "[t]he examination shall include an MRI and any other test that the examiner deems appropriate in determining the cause of Mr. Solebo's seizures and blackouts." (Pl.'s Ex. A at 631.) The order also requested that a written report be prepared that included: "a) [Solebo's] history and present symptoms; b) a description of the medical tests that were employed, and their results; c) a statement regarding whether the condition may impact Mr. Solebo's cognitive functioning; [and] d) the examiner's opinions as to diagnosis and prognosis." (Pl.'s Ex. A at 631.) The MRI ordered by this Court was never performed. (*See* Trial Tr. 452–53.)

***23** 102. On December 26, 2006, Dr. Hoffman examined and assessed Solebo at the Neurology CCC. (Jt. Ex. 1 at 809; Trial Tr. 114, 503.) Dr. Hoffman's assessment at this time was "possible seizure disorder"; no other medical condition was indicated for Soiebo at this time. (Jt. Ex. 1 at 809; Trial Tr. 114–15, 134). At this visit, Dr. Hoffman increased Solebo's Dilantin dosage from 300 milligrams to 400 milligrams to be taken each evening for 180 days. (Jt. Ex. 1 at 809; Trial Tr. 114–15, 411, 504.) Dr. Hoffman again ordered that Solebo's Dilantin levels be monitored via a blood draw and scheduled a Neurology CCC follow-up visit for the second week of February. (Jt. Ex. 1 at 809; Trial Tr. 114–15,503.) Dr. Hoffman did not reference Dr. Nowakowski's December 18 order for a Dilantin level in his December 26 note. (Trial Tr. 503–04.) Dr. Hoffman also approved a CT scan for Soiebo. (Jt. Ex. 1 at 809; Trial Tr. 504.)

103. Although both Dr. Nowakowski and Dr. Hoffman requested that Solebo's blood be drawn in December 2006, Solebo's blood was not drawn until

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February 1, 2007. (*See* Trial Tr. 777–78; Pl.'s Ex. A at 636, 845.)

104. Solebo's revised prescription, prescription number 99214, became effective December 27, 2006, with an expiration date of June 24, 2007. (Jt. Ex. 1 at 794, 821; Trial Tr. 163–64.) The December 26 note is stamped with the following: "Written: Patient medication information was provided regarding use, precautions and possible side effects." (Jt. Ex. 1 at 809; Trial Tr. 166–67.) According to Assistant HSA Lamping, the stamp indicates that an Information Sheet for Dilantin was provided to Solebo on or about December 26. (*See* Trial Tr. 167; *see also* Def.'s Ex. 1B–C.) Assistant HSA Lamping, however, did not personally give Solebo an Information Sheet, nor did she ever see anyone give Solebo an Information Sheet, and did not have any personal knowledge that Solebo ever received an Information Sheet. (Trial Tr. 172–73.) Furthermore, none of the physician assistants testified that they had given Solebo the Information Sheet. Again, the inference that Solebo actually received the Information Sheet is incredibly weak.

105. Although Solebo did not miss any doses of Dilantin in December 2006, a Physician never reviewed Solebo's December 2006 MAR. (Jt. Ex. 1 at 794; Trial Tr. 534.)

F. January 2007

106. In January 2007, Solebo was to take four 100–milligram capsules of Dilantin by mouth each evening on the pill line pursuant to the prescription entered by Dr. Hoffman. (Jt. Ex. 1 at 792, 809.) On January 10, 2007, Solebo's MAR reflects that he was a "no-show" on the pill line and missed his dose of Dilantin. (Jt. Ex. 1 at 792.) As with the prior month, a Physician never reviewed Solebo's January 2007 MAR. (Jt. Ex. 1 at 792; Trial Tr. 534.)

107. On January 9, 2007, pursuant to Dr. Hoffman's prior order, a CT scan of the head performed on Solebo. (Jt. Ex. 2 at 13.) The CT scan findings provided, in part, "There is no evidence of an acute intracranial hemorrhage, mass effect, midline shift or extra-axial fluid collection. The ventricular system and basilar cisterns appear normal.... There are no depressed skull fractures." (Jt. Ex. 2 at 13.) The CT Scan impression provided, in part, "No CT evidence of an intracranial hemorrhage, mass effect or midline shift ." (Jt. Ex. 2 at 13.)

***24** 108. In January 2007, no one at the MCC drew Solebo's blood to test his Dilantin level. (*See* Trial Tr. 777–78.)

G. February 2007

1. February 1, 2007 blood draw

109. On February 1, 2007, the phlebotomist drew Solebo's blood to test his Dilantin level, as well as for chemistry metabolic panel, thyroid stimulating hormone ("sTSH"), RPR and HIV testing, pursuant to an order by Dr. Nowakowski. (Pl.'s Ex. A at 636, 845; Trial Tr. 120–21, 132–33, 772; S. Wilson Dep. 49.) The blood specimen from Solebo's February 1 blood draw was sent to the Rochester Lab for processing. (*See* Jt. Ex. 1 at 813; Trial Tr. 509.)

110. On February 6, 2007, the Rochester Lab faxed to the MCC a final report dated February 3, 2007, that contained the results of Solebo's sTSH and RPR tests. (Pl.'s Ex. A at 813, 851; Trial Tr. 779–80.) The next day, the phlebotomist noted in the MCC Laboratory Logbook that the MCC had received the results of Solebo's February 1 blood draw on February 7, 2007. (Pl.'s Ex. A at 636, 845; S. Wilson Dep. 54; Trial Tr. 121–23, 132, 772.) The phlebotomist did not indicate anywhere in the MCC Laboratory Logbook, however, that some laboratory results were still outstanding. (Pl.'s Ex. A at 636, 845 .) On February 7, 2007, Dr. Nowakowski reviewed the results of Solebo's sTSH and RPR tests. (Jt. Ex. 1 at 813; Trial Tr. 124.)

111. On February 22, 2007, the Rochester Lab faxed a report containing the results of Solebo's HIV test from the February 1 blood draw to the

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MCC. (Jt. Ex 1 at 815; Trial Tr. 136.) Dr. Hoffman reviewed the results of Solebo's HIV test the following month, on March 12, 2007, (Jt. Ex. 1 at 815, Trial Tr. 137), and reviewed them a second time on March 18, 2007, (Jt. Ex. 1 at 814; Trial Tr. 137.) Neither the February 3 or February 22 laboratory results contained a result for Solebo's Dilantin level. (Jt. Ex. 1 at 813–815; Trial Tr. 123, 125.)

112. Nevertheless, on a copy of the February 3 report ("February 3 Report"), which was faxed to the MCC on February 6, the phlebotomist handwrote a note that read, "Was not in plastic tube or not enough serum[;] reget Dilantin." (Pl.'s Ex. A at 851; *see also* Trial Tr. 779–81.) The February 3 Report was never placed in Solebo's medical chart, but was instead placed in a file cabinet. (Trial Tr. 513). Neither Physician saw the February 3 Report prior to Solebo's death. (Pl.'s Ex. A at 851; Trial Tr. 446–47, 513, 516.)

113. Dr. Hoffman testified that any MCC personnel who saw the February 3 Report knew or should have known, as a result of the handwritten note, that a Dilantin level for Solebo in 2007 was not forthcoming. (Trial Tr. 447.) In light of the handwritten note on the February 3 Report, Dr. Hoffman would have expected the MCC personnel to redraw Solebo's blood so as to obtain his Dilantin level. (Trial Tr. 447–48.) Had Dr. Hoffman seen the February 3 Report, he would have called Solebo down to get another blood draw because it was part of the MCC's clinical evaluation, and if anyone had shown Dr. Hoffman the February 3 Report, he would have signed off on a request for another blood draw. (Trial Tr. 446, 448.) Dr. Nowakowski testified that had Nurse Wagner seen the February 3 Report, he could have redrawn Solebo's blood without obtaining a new order from a Physician because a Physician had already ordered the blood draw. (Trial Tr. 515.) HSA Sample testified that the MCC personnel who saw the handwritten note on the February 3 Report should have acted on it and should have redrawn Solebo's blood. (Sample Dep. 80–81.)

***25** 114. At trial, Nurse Wagner testified that he did not recall the phlebotomist telling him that Solebo's blood draw for a Dilantin level was bad and needed to be redrawn. (Trial Tr. 783.) Nor did he recall informing Dr. Hoffman or Dr. Nowakowski that Solebo's blood draw for a Dilantin level was bad and needed to be redrawn. (Trial Tr. 783.) Nurse Wagner further testified that after Solebo's blood was drawn on February 1, he did not recall doing anything to follow up to see if a result for Solebo's Dilantin level was returned to the MCC. (Trial Tr. 778.)

115. A Dilantin level from the February 1 blood draw was never obtained by the MCC prior to Solebo's death, (Trial Tr. 126), and Solebo's blood was not redrawn at any time prior to his death, (Trial Tr. 515–16). Thus, the final laboratory results that the MCC obtained of Solebo's Dilantin level prior to his death were those from the December 7, 2006 blood draw. (Trial Tr. 126.)

116. Between February 7, 2007 and the date of Solebo's death, Dr. Nowakowski did not have any personal knowledge that a Dilantin level was not going to be obtained. (Trial Tr. 516.) Had Dr. Nowakowski known that a valid Dilantin level was not forthcoming, she would have done something about it. (Trial Tr. 516–17.) At trial, Dr. Nowakowski agreed that the MCC personnel knew or should have known that between February 7, 2007 and the date of Solebo's death, no value for his Dilantin level was forthcoming and that something needed to have been done. (Trial Tr. 517–18.)

2. February 12, 2007 Neurology CCC visit

117. On February 12, 2007, Solebo had a follow-up visit ("February 12 CCC Visit") with Dr. Hoffman in the Neurology CCC. (Jt. Ex. 1 at 810; Trial Tr. 115, 422, 506.) Dr. Hoffman's assessment of Solebo was that Solebo had a history that was suggestive of seizure disorder. (Jt. Ex. 1 at 810; Trial Tr. 115.) The treatment plan for Solebo included an order for an EEG, a CT scan of his head, and a follow-up visit to the CCC during the first

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week of May. (Jt. Ex. 1 at 810; Trial Tr. 115–16.) Aside from the seizure disorder, no other medical condition was listed in Solebo's medical records as of the date he was receiving the CCC treatment. (Jt. Ex. 1 at 810; Trial Tr. 115–16.) During this visit, no diagnoses of high blood pressure, arrhythmia, or heart problems were made. (Jt. Ex. 1 at 810; Trial Tr. 439.)

118. During the February 12 CCC Visit, Dr. Hoffman asked Solebo about side effects and noted that the only possible medication side effect from an increase in Dilantin was a mild headache. (Jt. Ex. 1 at 810; Trial Tr. 423.) Dr. Hoffman also noted that Solebo's Dilantin level on December 9, 2006, was 11 <<mu>>/ml, (Jt. Ex. 1 at 810; Trial Tr. 423, 506), which was within the therapeutic range, (Trial Tr. 435). Dr. Hoffman further noted that Solebo's blood was drawn two weeks prior. (Jt. Ex. 1 at 810; Trial Tr. 423). Thus, at the time of this visit Dr. Hoffman knew that the MCC had not yet received a laboratory value for Solebo's Dilantin level from the February 1 blood draw. (Trial Tr. 421.) Nowhere on Solebo's medical chart did Dr. Hoffman reorder or document a follow-up of the February 1 blood draw or the results of the February 1 blood draw, (Jt. Ex. 1 at 810), even though he could have ordered a new blood draw, (Trial Tr. 423).

***26** 119. Dr. Hoffman testified that it was his practice to perform blood draws every three months to check Dilantin levels in a patient's blood. (Trial Tr. 417, 424.) Despite Dr. Hoffman's practice, and the fact that a Dilantin level from the February 1 blood draw had not yet been received, Dr. Hoffman asked Solebo to return in three months. (Jt. Ex. 1 at 810.) Nowhere in the notes of the February 12 CCC Visit did Dr. Hoffman indicate that he intended to obtain Solebo's Dilantin level prior to his next visit. (Jt. Ex. 1 at 810.) Dr. Hoffman's testimony at trial was unreliable, as he testified that it would not have been appropriate to write an order for a new blood draw because it would have been "ridiculously expensive." (Trial Tr. 426–27.) Dr. Hoffman testified that had he seen the February 3 Report during the February 12 CCC Visit, he would have had Solebo's blood drawn before he left the CCC. (Trial Tr. 450.)

120. In February and March 2007, the MCC Physicians had the ability to order a STAT lab. (*See* Trial Tr. 507.) Although Dr. Hoffman did not have the lab results of the February 1 blood draw in Solebo's medical chart during the February 12 CCC Visit, (Jt. Ex. 1 at 810; Trial Tr. 465), he could have ordered the laboratory test that day STAT. (Trial Tr. 465.) According to Dr. Hoffman, however, he did not order the STAT lab because he was not worried. (Trial Tr. 466.) Dr. Hoffman testified that Solebo's Dilantin dosage was increased a month-and-a-half prior and since that time Solebo had not reported any seizure episodes. (Trial Tr. 466.) In addition, Dr, Hoffman noted in Solebo's medical chart that Solebo did not have any nystagmus,[FN4] (Trial Tr. 466; Jt. Ex. 1 at 810), which would have been indicative of Dilantin toxicity, (*see* also Tr. Tr. 643). Dr. Hoffman reasoned that Solebo was "probably either down 10 or 11 or a little bit less." (Trial Tr. 466.) Thus, Dr. Hoffman felt comfortable waiting until the Dilantin level "crossed [his] path through the regular procedures for laboratory return." (Trial Tr. 466.)

> FN4. Nystagmus is defined as "an involuntary, rapid, rhythmic movement of the eyeball, which may be horizontal, vertical, rotatory, or mixed, i.e., of two varieties." Dorland's Illustrated Medical Dictionary at 1307 (32d ed.2012).

3. February 2007 pill line

121. In February 2007, Solebo was to take four 100–milligram capsules of Dilantin by mouth each evening on the pill line, pursuant to prescription number 99214 entered by Dr. Hoffman. (Jt. Ex. 1 at 790, 809; Trial Tr. 50, 83–84.) The only medication Solebo was receiving on the pill line during this month was Dilantin. (Trial Tr. 54.) On February 10, 11, and 12, Solebo's MAR reflects that he was a "no-show" on the pill line and missed three consecutive doses of Dilantin. (Jt. Ex. 1 at 790; Trial Tr.

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534; Aruiza Dep. 12.)

122. On February 13, 2007 Physician Assistant Velasquez administered Dilantin to Solebo. (Jt. Ex. 1 at 790; Trial Tr. 85.) Velasquez knew that Dilantin was being given to Solebo to control his seizures. (Trial Tr. 89.) In administering medication to Solebo, she had his February 2007 MAR before her and could see that Solebo missed his medication on February 10, 11, and 12. (Trial Tr. 85–86.) At trial, Velasquez could not recall specifically informing the Physicians that Solebo missed three days in a row of his medication. (Trial Tr. 87–88.)

***27** 123. On February 15, 2007, Physician Assistant Iskandar administered Dilantin to Solebo. (Trial Tr. 51.) In administering Dilantin to Solebo on this day, Iskandar knew that Solebo had missed three consecutive doses of Dilantin between February 10 and February 12. (Trial Tr. 51.) At trial, Iskandar could not recall if he communicated this fact to a Physician. (Trial Tr. 51.)

124. On February 19, 2007, Physician Assistant Aruiza administered Dilantin to Solebo on the pill line. (Aruiza Dep. 73.)

125. Solebo's February 2007 MAR reflects that he was a "no-show" on the pill line and missed additional doses of medication on February 17, 20, 24 and 25, for a total of seven missed doses during the month of February 2007. (Jt. Ex. 1 at 790; Trial Tr. 534–535.)

126. On February 26, 2007, Physician Assistant Velasquez again administered Dilantin to Solebo on the pill line. (Trial Tr. 88–89.) In administering his medication, Velasquez knew that Solebo had missed his Dilantin on February 10, 11, 12, 24, and 25, and that Dilantin was being given to Solebo to control his seizures. (Trial Tr. 88–89.) Physician Assistant Velasquez testified that an inmate missing multiple days of medication would have been the type of thing about which she would inform a Physician. (Trial Tr. 89.)

127. On February 27, 2007, Physician Assistant Aruiza again administered Dilantin to Solebo on the pill line. (Aruiza Dep. 73.) In February 2007, Aruiza did not make any recommendations regarding the care, treatment or testing of Solebo as a result of his interactions with Solebo on the pill line. (Aruiza Dep. 99.)

128. On February 28, 2007, Physician Assistant Iskandar again administered Dilantin to Solebo. (Trial Tr. 51.) In administering Dilantin to Solebo on this day, Iskandar knew that Solebo had previously missed seven doses of Dilantin. (Trial Tr. 52–53.) Iskandar also knew that it was important for Solebo to receive his medication, and that it was important to tell a Physician that Solebo had missed seven days of medication. (Trial Tr. 54.) Iskandar also knew that seizures could cause death or serious permanent injuries. (Trial Tr. 54.) Despite this knowledge, Iskandar did not remember informing the Physicians about the missed doses, (Trial Tr. 53), or having any discussions with Solebo about him missing his medication, (Trial Tr. 54–55). Furthermore, nothing in Solebo's medical chart would have indicated that Iskandar discussed this with either Dr. Hoffman or Dr. Nowakowski because it was not the practice of the physician assistants to note such discussions in the medical charts. (Trial Tr. 53–54.)

129. Despite the fact that Solebo missed seven doses of Dilantin in February 2007, a Physician never reviewed his February 2007 MAR. (Jt. Ex. 1 at 790; Trial Tr. 534.)

130. Although Dr. Hoffman met with Solebo on February 12 and Solebo was a "no-show" on the pill line on the two prior days, (Jt. Ex. 1 at 790), Dr. Hoffman testified that he did not recall speaking to Solebo in February 2007 about missing his doses of Dilantin, (Trial Tr. 457). Nor did Dr. Nowakowski recall having any discussions with Solebo in February 2007 regarding the importance of taking his medication. (Trial Tr. 519.) Nothing in Solebo's medical chart indicates that any discussions were had with him in February 2007 about the import-

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ance of taking his Dilantin every day. (Jt. Ex. 1 at 810–11; Trial Tr. 519.) Furthermore, Dr. Nowakowski did not recall any discussions in February 2007 with any of the physician assistants or anyone else that worked on the pill line regarding Solebo's missed doses of medication. (Trial Tr. 519–20.) Although Dr. Hoffman testified that the MCC personnel attending the morning meetings discussed inmates who missed their medication, he did not recall any discussions about Solebo missing his medication in February 2007. (Trial Tr. 459.)

H. March 2007

***28** 131. In March 2007, Solebo was to take four 100–milligram capsules of Dilantin by mouth each evening on the pill line, pursuant to the prescription entered by Dr. Hoffman. (Jt. Ex. 1 at 788; Trial Tr. 46–47.) The only medication Solebo was receiving on the pill line during this month was Dilantin. (Trial Tr. 54.) That month, Solebo missed a total of eight doses of medication. (Jt. Ex. 1 at 788; Trial Tr. 535.) Specifically, Solebo's March 2007 MAR reflects that he was a "no-show" on the pill line and missed three consecutive doses on March 23, 24, and 25, (Trial Tr. 535, 537, Aruiza Dep. 70), and additional doses on March 4, 10, 11, 18, and 31, (Jt. Ex. 1 at 788; Aruiza Dep. 67–69).

132. On March 12 and 13, 2007, Physician Assistant Aruiza administered Dilantin to Solebo and in doing so, was aware that Solebo had not received his Dilantin on March 4, 10, and 11. (Aruiza Dep. 68–69.)

133. On March 14, 2007, Physician Assistant Iskandar administered Dilantin to Solebo and in doing so, knew that Solebo had missed his Dilantin on March 4, 10, and 11. (Trial Tr. 47–48.) Iskandar testified that it was his practice to inform the Physicians of this type of information at the next daily meeting. (Trial Tr. 48.)

134. On March 19 and 20, 2007, Physician Assistant Aruiza administered Dilantin to Solebo and in doing so, was aware that Solebo had not received his Dilantin on March 4, 10, 11, and 18. (Aruiza Dep. 69–70.)

135. On Friday, March 23, 2007, Dr. Nowakowski was out. (Pl.'s Ex. Y at 3.) Solebo missed three consecutive doses of medication on March 23, 24, and 25. (Jt. Ex. 1 at 788; Trial Tr. 535, 537.) Dr. Nowakowski testified that missing those three consecutive doses may have drawn her attention, but it was not enough for her to make an administrative note in Solebo's medical chart; otherwise, she would have done so. (Trial Tr. 535–36.)

136. The following week, from Monday, March 26 through Friday, March 30, 2007, Dr. Hoffman was on leave and was not present at the MCC. (Pl.'s Ex. Y at 2.) Dr. Hoffman did not return to the MCC at any point in time prior to Solebo's death. (Pl.'s Ex. Y at 2.) On March 26 and 27, 2007, Physician Assistant Aruiza again administered Dilantin to Solebo and in doing so, he had the MAR in front of him and could see that Solebo had not received his Dilantin on March 4, 10, 11, 18, 23, 24, and 25. (Aruiza Dep. 70–72.)

137. On March 28, 2007, Physician Assistant Iskandar administered Dilantin to Solebo. (Trial Tr. 48.) In administering Dilantin to Solebo on that day, Iskandar had the MAR in front of him and therefore, he knew that Solebo had missed his Dilantin on March 4, 10, 11, 18, 23, 24, and 25. (Trial Tr. 48–49; Jt. Ex. 1 at 788.) At trial, Iskandar testified that it was his practice to inform the Physicians of this type of information at the next daily meeting. (Trial Tr. 49.) Iskandar testified that he did this because he knew it was important for Solebo to take his medication and he knew that the Physicians needed to be informed that Solebo had missed his medication. (Trial Tr. 49.)

***29** 138. On March 31, 2007, Solebo was again a "no-show" on the pill line and missed his medication. (Jt. Ex. 1 at 788.)

139. Physician Assistant Velasquez testified at trial that Solebo missing his medication on specific days in March 2007 was the type of matter dis-

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cussed during the endorsement meetings in March 2007 because it was important to share this type of information with the Physicians. (Trial Tr. 76–77.) Nevertheless, she could not recall whether she brought up the fact that Solebo missed his medication during the daily endorsement or close-out meetings in March 2007. (Trial Tr. 76.) Physician Assistant Velasquez also could not recall any meetings with medical personnel at the MCC in March 2007 in which the issue of Solebo missing his medication was discussed. (Trial Tr. 92.) Nor did Physician Assistant Aruiza make any recommendations to the Physicians regarding the care, treatment or testing of Solebo as a result of his interactions with him on the pill line. (Aruiza Dep. 98–99.) Dr. Nowakowski could not recall any discussions in March 2007 with any of the physician assistants or anyone else that worked on the pill line regarding Solebo's missed doses of medication in March 2007. (Trial Tr. 519–20.)

140. Nothing in Solebo's medical chart indicates that a Physician or physician assistant had discussions with Solebo or counseled him in March 2007 about him taking his medication. (Jt. Ex. 1 at 810–11; Trial Tr. 55, 519.) Dr. Nowakowski did not personally recall any discussions she had with Solebo in March 2007 regarding the importance of taking his medication. (Trial Tr. 519.) In addition, Physician Assistants Velasquez and Iskandar could not recall speaking to Solebo in March 2007 about missing his medication. (Trial Tr. 45, 55, 92.) Nurse Wagner also did not recall ever having a conversation with Solebo about missing multiple days of Dilantin in 2007, nor did he recall talking to Dr. Hoffman or Dr. Nowakowski about Solebo missing his Dilantin. (Trial Tr. 779.)

141. At no point in time in March 2007 did any MCC personnel draw Solebo's blood to obtain or test his Dilantin level. (*See* Trial Tr. 126; 515–16.)

I. April 2007

142. On April 1, 2007, Eric Wilson became the MCC warden. (Trial Tr. 694.) Dr. Hoffman was on a leave of absence and not present at the MCC the entire month of April 2007. (Pl.'s Ex. Y at 2; Trial Tr. 698–99.) In Dr. Hoffman's absence, Dr. Nowakowski was the MCC's acting Clinical Director that month. (Trial Tr. 144, 482–83.) After assuming his position as warden, Wilson did not have any meetings with Dr. Hoffman or Dr. Nowakowski in April 2007. (Trial Tr. 700–01.) In addition, Warden Wilson did not review or have discussions with any medical personnel regarding the system that the MCC Laboratory had in place for following up with the Rochester Lab on laboratory tests and results. (Trial Tr. 707–09.) According to him, MCC medical personnel had the responsibility of following up on laboratory tests and results. (Trial Tr. 708.) Warden Wilson also knew that there was only one physician, Dr. Nowakowski, at the MCC during that month and that when she was absent, a physician was not present at the MCC. (Trial Tr. 700.)

***30** 143. On April 2, 2007, Dr. Nowakowski reviewed Solebo's MAR for March 2007. (Jt. Ex. 1 at 788; Trial Tr. 535–36.) Dr. Nowakowski did not view the fact that Solebo had missed three consecutive doses of Dilantin in late March, and a total of eight doses of Dilantin in March 2007, as an emergency, and she did not take any action in response to that information. (Trial Tr. 558.)

144. In April 2007, Solebo was to take four 100–milligram capsules of Dilantin by mouth each evening on the pill line, pursuant to a prescription entered by Dr. Hoffman. (Jt. Ex. 1 at 786; Trial Tr. 47, 128–29; Aruiza Dep. 59.) The only medication Solebo was receiving on the pill line during this month was Dilantin. (Trial Tr. 54, 129.) In April 2007, Solebo's MAR reflects that he missed 13 of his 30 doses of Dilantin on the pill line. (Jt. Ex. 1 at 786; Trial Tr. 538.) Specifically, Solebo's MAR reflects that he was a "no-show" on the pill line on April 1, 2, 5, 7, 8, 14, 15, 21, 22, 28, 29, and 30. (Jt. Ex. 1 at 786; Aruiza Dep. 62–63, 66–67; *see also* Trial Tr. 558–59), and that Solebo refused his medication on April 27, (Jt. Ex. 1 at 786). During the month, a copy of Solebo's MAR was kept on the medication cart. (Trial Tr. 37 .) If Dr. Nowakowski

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had wanted to review his MAR that month, she could have gone to the medication cart to do so. (Trial Tr. 46.)

145. On Monday, April 9 and Tuesday, April 10, 2007, Physician Assistant Aruiza administered Dilantin to Solebo on the pill line. (Aruiza Dep. 60, 62; Jt. Ex. 1 at 786.) In administering Dilantin to Solebo on these days, Aruiza was aware that Solebo had not received his medication on April 1, 2, 5, 7, and 8. (Aruiza Dep. 62–63.)

146. On Monday, April 16 and Tuesday, April 17, 2007, Physician Assistant Aruiza again administered Dilantin to Solebo on the pill line. (Aruiza Dep. 63.) In administering Dilantin to Solebo on this day, Aruiza was aware that Solebo had not received his medication on April 1, 2, 5, 7, 8, 14, and 15. (Aruiza Dep. 63.)

147. On April 18, 2007, Dr. Nowakowski was out and was not physically present at the MCC. (Pl.'s Ex. Y at 3; Trial Tr. 489–90.) That evening, Physician Assistant Iskandar administered Dilantin to Solebo. (Jt. Ex. 1 at 786; Trial Tr. 44.) In administering Dilantin to Solebo, he could see that Solebo had missed his doses of Dilantin on April 7, 8, 14, and 15. (Trial Tr. 43.) Iskandar testified that it was his practice to inform the Physicians about this type of issue at the next daily meeting because he knew it was important for Solebo to take his anti-seizure medication. (Trial Tr. 43.) Iskandar testified that he knew it was important so that Solebo would not have any serious permanent injury. (Trial Tr. 43.) Iskandar also knew it was important to inform the Physicians about these missed doses. (Trial Tr. 44.)

148. On Monday, April 23, 2007, Physician Assistant Aruiza again administered Dilantin to Solebo on the pill line. (Aruiza Dep, 64.) In administering Dilantin to Solebo on this day, Aruiza was aware that Solebo had not received his medication on April 1, 2, 5, 7, 8, 14, 15, 21, and 22. (Aruiza Dep. 64.)

***31** 149, On Tuesday, April 24, 2007, Solebo underwent an EEG that Dr. Hoffman had ordered on February 12, 2007. (Jt. Ex. 1 at 820; Jt. Ex. 2 at 12.) The EEG summary provides, in part, "no seizure activity," and the conclusion is "normal wake and drowsy record." (Jt. Ex. 1 at 820; Jt. Ex. 2 at 12.) This EEG scan was normal. (Trial Tr. 286–87.)

150. On the evening of April 24, 2007, Physician Assistant Carrera administered Dilantin to Solebo on the pill line. (Jt. Ex. 1 at 786; Trial Tr. 129.) Carrera testified that she did not talk to Solebo in April 2007 about why he missed his medication on the pill line, nor did she learn from anyone why Solebo missed his medication. (Trial Tr. 128.) Thus, Carrera did not know why Solebo missed his medication on the pill line in April 2007. (Trial Tr. 128 .) If an inmate did not appear on the pill line for a number of days to receive his prescribed medication, Physician Assistant Carrera testified that it was her practice to make a note on the inmate's medical chart so that a Physician reviewing the inmate's medical chart was aware of what was going on with the patient. (Trial Tr. 129–30.) Carrera testified that if she had a concern about Solebo missing his medication, she also could have easily contacted a Physician in April 2007 to discuss the issue with them. (Trial Tr. 130.) Nevertheless, Carrera did not recall having any discussions with any Physician about Solebo missing his medication, nor did she recall any meetings she had with any Physician about Solebo missing medication in April 2007. (Trial Tr. 131–132.)

151. On Wednesday, April 25, 2007, Dr. Nowakowski was at the MCC for a half-day and did not return to the MCC until Wednesday, May 2, 2007. (Pl.'s Ex. Y at 3; Trial Tr. 489–91.) On the days that Dr. Nowakowski was out, a Physician was not present at the MCC. (Trial Tr. 719–720.) At trial, Dr. Nowakowski did not recall having any contact with the MCC during these particular days. (Trial Tr. 491.) Warden Wilson also testified at trial that he was not aware of the dates that Dr. Nowakowski was out in April 2007. (Trial Tr.

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718–719.) On the days that Dr. Nowakowski was absent in April 2007, Warden Wilson did not take any additional action to bring in additional physicians. (Trial Tr. 719.) Warden Wilson testified, however, that he was not required to bring a doctor in to the MCC from a different BOP institution. (Trial Tr. 720.)

152. On Thursday, April 26, 2007, Physician Assistant Iskandar administered Dilantin to Solebo; in doing so, he could see that Solebo had missed his doses of medication on April 7, 8, 14, 15, 21, and 22. (Trial Tr. 44.) Iskandar testified that he knew at this time that it was important for Solebo's health to take his anti-seizure medication. (Trial Tr. 44–45.) Iskandar also testified that it was his practice to tell the Physician at the next daily meeting, assuming a Physician was present, that Solebo had missed his doses of anti-seizure medication on those dates in April. (Trial Tr. 45.) Notably, Dr. Nowakowski testified at trial that on days when she was not at the MCC, such as the week prior to Solebo's death, a daily meeting did not take place. (Trial Tr. 542.) Additionally, Iskandar did not recall speaking to Solebo in April 2007 about his missed doses of medication. (Trial Tr. 45.)

***32** 153. On Friday, April 27, 2007, the pill line was administered in housing Unit 17E at 9:28 p.m. (Pl.'s Ex. B at 143.) Solebo's MAR reflects that he refused his medication that evening. (Jt. Ex. 1 at 786.) Although Solebo's refusal was not documented in the Unit 17E Logbook, Officer Blanco specifically recalled Solebo refusing his medication this time. (Pl.'s Ex. B at 143; Blanco Dep. 28, 30.) Officer Blanco walked up to a section of Unit 17E where a group of inmates, including Solebo, was gathered around a television and told them that the pill line was here. (Blanco Dep. 29.) According to Officer Blanco, Solebo did not want to get up from his seat and he told Blanco that he did not want his medication, at which point Blanco told Solebo that the pill line was "down there." (Blanco Dep. 29.) Solebo got upset, stood up, and walked over to the railing and yelled to the person distributing medication on the pill line, "I'm refusing." (Blanco Dep. 29–31.) Solebo then walked past Blanco and sat back down. (Blanco Dep. 30.) Blanco testified that he was not aware of a physician assistant speaking with Solebo on this day. (Blanco Dep. 32.) Other than this single occurrence, Blanco was not aware of any other days that Solebo missed the pill line or refused to take his medication. (Blanco Dep. 37.) Additionally, Blanco did not have any discussions with Solebo at any time before he died about the importance of taking his medication. (Blanco Dep. 37–38.)

154. On Saturday, April 28, 2007, the pill line was administered in housing Unit 17E at 8:40 p.m. (Pl.'s Ex. B at 144–45; Blanco Dep. 48.) Solebo's MAR reflects that he was a "no-show" on the pill line this evening and did not receive his Dilantin. (Jt. Ex. 1 at 786.)

155. On Sunday, April 29, 2007, Solebo's MAR reflects that he was a "no-show" on the pill line and did not receive his Dilantin. (Jt. Ex. 1 at 786.)

156. On Monday, April 30, 2007, both Dr. Hoffman and Dr. Nowakowski were on leave and were not physically present at the MCC. (Pl.'s Ex. Y at 2–3; Trial Tr. 489–90.) From April 30 until May 4, 2007, Warden Wilson was at a warden training conference and was not physically present at the MCC. (Trial Tr. 699.) On the evening of April 30, 2007, the pill line took place on the 7th Floor and was administered by Physician Assistant Aruiza. (Trial Tr. 181–83 185; Pl.'s Ex. B at 148.) Solebo's MAR reflects that Solebo was a "no-show" on the pill line this evening and did not receive his medication. (Jt. Ex. 1 at 786; Aruiza Dep. 66–67.) According to Officer Cannon, however, Solebo was one of three inmates who refused to go to the pill line. (Trial Tr. 181, 185; Pl.'s Ex. B at 148.) Although Solebo told Officer Cannon that he was not going to go to the pill line that evening, he did not tell Cannon why he was refusing nor did Cannon ask why. (Trial Tr. 182.) Officer Cannon testified that it was not part of his job

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to talk to Solebo about the importance of taking his medication; therefore, he did not discuss this issue Solebo. (Trial Tr. 182.) After speaking to Solebo, Officer Cannon contacted Aruiza to let him know that Solebo refused his medication. (Trial Tr. 183, 185, 187.) Cannon also contacted his supervisor, Lieutenant Finley, and informed him that Solebo and other inmates were refusing their medication that evening. (Trial Tr. 183.) Lieutenant Finley did not instruct Cannon to do anything to encourage Solebo to take his medication. (Trial Tr. 183 .) Cannon did not contact a Physician that evening to let them know that Solebo was refusing to take his medication. (Trial Tr. 184.)

***33** 157. Officer Cannon testified that there were occasions when an inmate on housing Unit 17E changed his mind about receiving his medication. (Trial Tr. 188.) Neither Cannon or a physician assistant refused to accommodate the inmate on such occasions. (Trial Tr. 188.) Additionally, although there were occasions in 2007 when a physician assistant came up to the housing unit and spoke to an inmate after being notified by Cannon via a telephone call that the inmate was refusing his medication, Physician Assistant Aruiza did not do this on April 30, 2007. (Trial Tr. 189.) Neither a Physician or physician assistant came up to Solebo's housing unit to speak to Solebo about him not taking his medication. (Trial Tr. 183–84, 89.)

158. Other than putting his initials on the MAR, Physician Assistant Aruiza did not have contact with any Physician or physician assistants regarding the dates in April 2007 that Solebo had missed his medication. (Aruiza Dep. 65–66.) Indeed, he did not with anybody about Solebo missing his medication on those dates. (Aruiza Dep. 66.) During the month of April 2007, Aruiza testified that he did not have any daily meetings with the Physicians regarding the inmates he gave medication to on the pill line. (Aruiza Dep. 66.) In April 2007, Aruiza did not make any recommendations regarding the care, treatment or testing of Solebo as a result of his interactions with him on the pill line. (Aruiza Dep. 99.)

159. Physician Assistant Velasquez testified that Solebo missing his medication during the month of April 2007 probably would have been discussed during the daily endorsement or close-out meetings. (Trial Tr. 76.) According to her, it would have been brought up during those meetings because it was important for the Physicians to know that an inmate had missed his medication. (Trial Tr. 76.) Nevertheless, Velasquez could not recall any meetings with MCC medical personnel in April 2007 about Solebo missing his medication. (Trial Tr. 92.) Velasquez also could not recall any discussions or meetings that she had in April 2007 with Solebo about him missing his medication. (Trial Tr. 91–92.) Again, Dr. Nowakowski testified at trial that when she was not present at the MCC the week prior to Solebo's death, a daily meeting did not take place. (Trial Tr. 542.)

160. Prior to Solebo's death, Dr. Nowakowski was never made aware of the fact that Solebo missed 13 of his 30 doses of Dilantin in April and nothing in Solebo's medical chart reflects that any physician assistant brought this to her attention. (Trial Tr. 538.) Based on her clinical experience as a physician, Dr. Nowakowski testified that given the quantity of missed doses, it was quite possible that Solebo's Dilantin was not at a therapeutic level. (Trial Tr. 538–39.) But, this possibility could not be confirmed until she saw the laboratory results of a blood draw. (Trial Tr. 538–39.) Blood draws had been ordered but had not been received since December 2006. (Trial Tr. 539.)

***34** 161. Had Dr. Nowakowski been made aware of the facts in the April 2007 MAR, she testified that she would have certainly had Solebo evaluated within the week. (Trial Tr. 539, 559.) She would have checked his Dilantin level, reviewed everything in his medical chart, and performed a physical exam. (Trial Tr. 539.) Obtaining a history from Solebo and finding out "what was going on in terms of him missing his medication" would have been equally as important as a physical exam be-

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cause the April 2007 MAR suggested that Solebo's Dilantin level might be low. (Trial Tr. 539–40.) But, Dr. Nowakowski needed a laboratory test to confirm this suspicion. (Trial Tr. 540.) At no time in April 2007 did any MCC personnel draw Solebo's blood to obtain or test Solebo's Dilantin level. (*See* Trial Tr. 126. 515–16.)

162. Neither Dr. Hoffman nor Dr. Nowakowski reviewed Solebo's April 2007 MAR prior to his death. (Jt. Ex. 1 at 786; Trial Tr. 537 .) Dr. Nowakowski did not recall having any contact with the MCC during the last week of Solebo's life. (Trial Tr. 491.)

163. Nothing in Solebo's medical chart indicates that anyone had any discussions with Solebo in April 2007 about him taking his medication. (Jt. Ex. 1 at 810–11; Trial Tr. 519.) Dr. Nowakowski did not personally recall any discussions she had with Solebo in April 2007 regarding the importance of taking his medication. (Trial Tr. 519.) Nor did she recall any discussions in April 2007 with any of the physician assistants or anyone else that worked on the pill line regarding Solebo's missed doses of medication. (Trial Tr. 519–20.)

J. May 2007

164. In the early morning of May 1, 2007, Solebo was found dead in his cell. (R. 93, Proposed Pretrial Order, Ex. A: Stip. of Uncontested Facts ¶ 2.) Both Dr. Hoffman and Dr. Nowakowski were on leave on this day. (Pl.'s Ex. Y at 2–3.) Warden Wilson was also out. (Trial Tr. 699.) Assistant HSA Lamping responded to a call for assistance on the MCC's 17th floor. (Trial Tr. 151; Jt. Ex. 1 at 811.) She found Solebo face down in his cell; he was unresponsive with rigor mortis. (Jt. Ex. 1 at 811; Trial Tr. 151, 153–54.)

165. The Cook County coroner, Dr. Nancy Jones, personally went to the MCC and viewed Solebo's body. (Trial Tr. 344; Pl.'s Ex. M at 1.) She pronounced Solebo dead, and his body was transported to the Cook County coroner's office. (Pl.'s Ex. A at 58; Trial Tr. 151–52.) At the MCC, non-medical MCC personnel told Dr. Jones that Solebo had been diagnosed with and was being treated for seizure disorder. (Trial Tr. 344; 361). At trial, Dr. Jones clarified that although this information was useful, pathologists such as herself can conclude that a person died from seizure disorder if they find intramuscular hemorrhages of the tongue and cerebral edema and anoxia during an autopsy. (Trial Tr. 344–45.) The MCC personnel also provided her with copies of Solebo's medical records, which she testified indicated that he was diagnosed with seizure disorder. (Trial Tr. 361.) Dr. Jones did not speak with Dr. Hoffman or Dr. Nowakowski. (Trial Tr. 361–62.)

***35** 166. On May 1, 2007, Assistant HSA Lamping prepared a report ("Lamping Report") on Solebo's death. (Pl.'s Ex. A at 58; Trial Tr. 150.) The Lamping Report provided, in part, "The 23 year old inmate arrived at MCC Chicago on 2–26–2007 with a history of Grand Mal seizures and was seen 2–12–2007 for his chronic care clinic." (Pl.'s Ex. A at 58; Trial Tr. 152.) Lamping based the information in the Lamping Report on her personal knowledge, a review of Solebo's medical chart, and clinical information provided to her by a Physician or one of the other clinicians at the MCC. (Trial Tr. 150–52.)

167. On May 2, 2007, a letter under Warden Wilson's name was sent to Plaintiff. (Pl.'s Ex. A at 193; Trial Tr. 713.) Warden Wilson informed Plaintiff that her husband was pronounced dead by the Cook County Medical Examiner in Chicago on May 1, 2007. (Pl.'s Ex. A at 193; Trial Tr. 713.) The letter further stated: "The Cook County Medical Examiner's preliminary findings reveal the death was caused by a seizure disorder." (Pl.'s Ex. A at 193; Trial Tr. 713–14.) The letter was signed by James Henry, the associate warden, on Warden Wilson's behalf because Wilson was out of town that day. (Pl .'s Ex. A at 193; Trial Tr. 714.) Warden Wilson knew the letter was to be mailed out to Plaintiff, and he gave his approval to do so. (Trial Tr. 714.) That same day, a second letter was

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sent under Warden Wilson's name and at his request to Judge Ruben Castillo. (Pl.'s Ex. A at 194; Trial Tr. 714–15.) The first paragraph of that letter provides: "This is to advise you of the death of Habib Solebo. Mr. Solebo was pronounced dead on May 1, 2007, by the Cook County medical examiner. Preliminary findings indicate Mr. Solebo died of a seizure disorder." (Pl.'s Ex. A at 194; Trial Tr. 715.) At trial, Warden Wilson testified that the letters were standard notices that were sent from the MCC and that he was following the rules in effect regarding inmate death notices. (Trial Tr. 715.) In both letters, Warden Wilson indicated that the cause of death was seizure disorder. (Trial Tr. 716; Pl.'s Ex. A at 193–94.)

168. On May 8, 2007, the Rochester Lab faxed to the MCC an "On Demand Report" informing the MCC that the blood specimen for Solebo was unacceptable because it was placed in the wrong type of tube. (Pl.'s Ex. A at 639; Trial Tr. 776.) Specifically, the On Demand Report indicated that the "Test requires specimen in aliquot tube." (Pl.'s Ex. A at 639.) The On Demand Report made it clear that a Dilantin level for Solebo would not be forthcoming. (Trial Tr. 516.)

K. June 2007

169. On June 21, 2007, the MCC prepared a Multi–Level Mortality Review ("Mortality Review") of Solebo's death, (Pl.'s Ex. A at 84–92; Trial Tr. 148), wherein the cause of death was listed as "seizures." (Pl.'s Ex. A at 84; Trial Tr. 148.) The Mortality Review also noted that the only admitting and past diagnoses for Solebo were "seizures." (Pl.'s Ex. A at 84; Trial Tr. 147–48.) Dr. Paul Harvey, the MCC Clinical Director on July 6, 2007, signed the Mortality Review on July 6, 2007. (Trial Tr. 149.)

V. The autopsy and toxicology report

***36** 170. Dr. Jones performed an autopsy on Solebo's body on May 1, 2007, the same day that he passed away. (Trial Tr. 341.) In May 2007, Dr. Jones was one of three final candidates in contention for Chief Medical Examiner. (Trial Tr. 335.) She became the Chief Medical Examiner for Cook County on August 5, 2007, and held this position at the time of trial. (Trial Tr. 330, 335.)

171. Dr. Jones graduated in 1982 from the Chicago Medical School, which is part of Rosalind Franklin University of Medicine and Science. (Trial Tr. 331.) She completed a two-year residency in anatomic pathology and a second two-year residency in clinical pathology, both at the University of Chicago. (Trial Tr. 331.) Dr. Jones then did a one-year fellowship in forensic pathology at the Robert J. Stein Institute of Forensic Medicine at the Cook County Medical Examiner's Office. (Trial Tr. 331.) Dr. Jones has held a permanent license to practice medicine in the State of Illinois since 1983 and is board certified in anatomic, clinical and forensic pathology. (Trial Tr. 333.) After leaving the University of Chicago, she started her fellowship at the Medical Examiner's Office, completed one year of training and was hired full-time as a staff forensic pathologist in July 1987; she has been with the Medical Examiner's Office ever since. (Trial Tr. 333.) Dr. Jones is also a professor of pathology at the Chicago Medical School, where she teaches both general and forensic pathology. (Trial Tr. 334.) Over the course of her career, she has performed over 10,000 autopsies. (Trial Tr. 336.) She testified at trial pursuant to a subpoena, (Trial Tr. 331), and was the only pathologist to testify at trial.

172. Dr. Jones explained that an autopsy is a detailed, complete external examination coupled with an internal examination of a person's organs and a review of their medical history. (Trial Tr. 336.) One main purpose of an autopsy is to determine cause of death. (Trial Tr. 338.) Dr. Jones explained that a *cause of death* can result from any number of things, such as, in Solebo's case, seizure disorder, or in other cases, gunshot or stab wounds. (Trial Tr. 349–50.) A *mechanism of death*, on the other hand, is the actual physiologic change that takes place in an individual, such as respiratory arrest, cardiac arrest, or exsanguination. (Trial Tr. 349.) Finally, *manner of death* is defined by the cir-

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cumstances surrounding an individual's death, such as natural, accident, homicide, suicide, or undetermined. (Trial Tr. 350.)

A. Solebo's autopsy

173. As a result of the autopsy, Dr. Jones opined, to a reasonable degree of medical certainty, that Solebo's cause of death was seizure disorder, (Trial Tr. 341–42; 351–53, 386; Pl's Ex. M at 1–5), and that his manner of death was natural, (Trial Tr. 351). Dr. Jones based her opinion on the physical evidence she found at his autopsy and Solebo's clinical history of seizure disorder. (Trial Tr. 345, 359–60.) Dr. Jones also noted that according to his medical records, Solebo's seizures occurred while he was sleeping and that Solebo went to bed one night and was found dead the next morning in his bed. (Trial Tr. 345.) Dr. Jones testified that even if she had been told that Solebo's clinical history was one of only "possible or questionable seizures," she probably would not have reached a different conclusion regarding his cause of death because the physical findings at autopsy supported the cause of death as being a seizure. (Trial Tr. 366–68.)

***37** 174. Dr. Jones listed the following diagnoses on the autopsy report: (1) Clinical history of seizure disorder; (2) Pulmonary congestion and edema; (3) Hepatosplenomegaly, meaning an enlarged liver and spleen, (Trial Tr. 374); (4) Acute congestion of the visceral organs; (5) Marked cardiomegaly (610 grams) with concentric left ventricular hypertorphy; (6) Chronic passive congestion of the liver; (7) Mild cerebral edema; (8) Focal hemorrhage of the soft tissues over the isthmus of the left side of the thyroid gland consistent with body position when found; (9) Rare petechial hemorrhages of the sclerae with scleral injection consistent with the position of the body when found; (10) Small intramuscular hemorrhage of the tongue. (Pl.'s Ex. M at 4–5.) Of the ten diagnoses, the most important for her conclusion that Solebo died as a result of seizure disorder were: (a) his clinical history of seizure disorder; (b) the intramuscular hemorrhage, i.e., the bite mark, of his tongue; and (c) the cerebral edema, i.e., swelling of the brain. (Trial Tr. 360–61; *see also* Trial Tr. 348, 353; *see also* Pl.'s Ex. M at 4–5.)

175. The bite mark was significant to Dr. Jones because it is more probably true than not true that a bite mark is associated with a seizure. (Trial Tr. 348–49.) Dr. Jones testified that individuals who experience a seizure frequently bite their tongues, (Trial Tr. 345), and therefore, intramuscular hemorrhages of the tongue are very common in people who die from seizure disorders. (Trial Tr. 348–349.)

176. The finding of cerebral edema was also significant to Dr. Jones because it indicated that Solebo survived for a period of time long enough for his brain to swell and that there was blood flow to his brain for a period of time. (Trial Tr. 354.) Dr. Jones explained that the brain does not have time to swell when a person suffers an immediate cardiac event, and therefore cerebral edema is usually not seen in a person who dies from an acute cardiac arrest. (Trial Tr. 354.) In addition, Dr. Jones testified that an anoxic brain, meaning a brain that has been starved of oxygen, (Trial Tr. 349), has a dusky appearance, (Trial Tr. 354). In her experience, the dusky appearance of a brain is usually found in somebody who has had a fatal seizure. (Trial Tr. 354.)

177. Of the ten diagnoses from the autopsy, the most abnormal was the finding of cardiomegaly, i.e., an enlarged heart weighing 610 grams. (Trial Tr. 369; *see also* Trial Tr. 353.) Owing to the size of Solebo's heart, a cardiac event would have been in Dr. Jones' differential diagnoses for cause of death. (Trial Tr. 356, 369–370.) In that instance, a typical mechanism of death is a fatal arrhythmia. (Trial Tr. 369–71.) Had Solebo suffered an immediate cardiac event, such as a cardiac arrhythmia, however, he would have died quickly and his brain would not have had time to swell. (Trial Tr. 354, 356.) Thus, the finding of cerebral edema was the linchpin to her opinion that Solebo died of a fatal seizure and not of a heart-related illness, such as a

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fatal cardiac arrhythmia. (Trial Tr. 356, 386.)

***38** 178. Dr. Jones also opined, to a reasonable degree of medical certainty, that Solebo's mechanism of death was more consistent with asphyxia than with cardiac arrest, especially because Solebo had cerebral edema and anoxia. (Trial Tr. 349.) Dr. Jones explained that the breathing pattern of a person who is actively seizing is frequently strenuous. (Trial Tr. 351.) After a seizure has ended, a person's respiratory rate will frequently drop precipitously such that the person is not breathing adequately and can asphyxiate. (Trial Tr. 352.) According to Dr. Jones, at some point Solebo's breathing got slower and more laborious and then eventually stopped. (Trial Tr. 352.) Thus, Dr. Jones opined, to a reasonable degree of medical certainty, that a seizure ultimately caused Solebo's death. (Trial Tr. 352.)

179. Dr. Jones also testified that Solebo's enlarged heart could have made him more susceptible to having a fatal seizure. (Trial Tr. 354–55.) For instance, Dr. Jones explained that if Solebo's seizures were triggered by a reduction in me flow of oxygen to his brain, then Solebo could have had a cardiac event, such as an arrhythmia, that lowered the oxygen flow to his brain and then triggered a seizure, thereby resulting in his death. (Trial Tr. 354–55.) Dr. Jones made clear, however, that while she could speculate as to what role Solebo's enlarged heart played in his seizure, as a result of the physical findings at his autopsy she was certain that Solebo did in fact suffer a fatal seizure. (Trial Tr. 353.)

180. On cross-examination, Dr. Jones testified that in cases where the only finding is an enlarged heart and it is not enlarged for a specific reason, such as hypertension, pathologists describe that as hypertrophic cardiomyopathy ("HCM"). (Trial Tr. 370–71.) Thus, the finding of an enlarged heart would suggest that HCM could be a possible cause of death. (Trial Tr. 375–76.) On cross-examination, Defendant posited a theory that Solebo's cause of death was due to HCM. (Trial Tr. 371.) Under Defendant's theory, the mechanism of death could have been a heart arrhythmia precipitating a seizure-like episode or some kind of syncope or loss of consciousness with monoclonic activity leading to death. (*See* Trial Tr. 372.) Dr. Jones made it clear that a death by either of these mechanisms would only be consistent if there were a period of time that would allow the anoxic changes in the brain and the cerebral edema to occur, which is more likely to happen in a true seizure than in seizure-like activity precipitated by an arrhythmia. (Trial Tr. 373.) Dr. Jones also reiterated that cerebral edema is not usually seen in an acute cardiac arrest. (Trial Tr. 373–74.)

181. On redirect examination, Dr. Jones opined, to a reasonable degree of medical certainty, that Solebo did not die of HCM and that none of the possibilities posited by Defendant were the actual cause of death. (Trial Tr. 385.) Dr. Jones also explained that HCM is not listed as a secondary cause of death in this particular instance because when performing the autopsy with all the information she had, and based on all of the findings at autopsy, her opinion was and is that he died as a result of seizure disorder. (Trial Tr. 386 .)

B. Solebo's toxicology report

***39** 182. Dr. Jones also ordered a toxicology report for Solebo to detect whether there were any drugs, medications, recreational materials or poisons in his body. (*See* Trial Tr. 343, 379.) Solebo's toxicology report raised a red flag because it showed that the level of Dilantin in his blood at the time of his death was negative. (Pl.'s Ex. M at 6; Trial Tr. 344.) A negative Dilantin level indicates either that there was no Dilantin in Solebo's blood or that the level was below the laboratory's level of detection,[FN5] and that Solebo was definitely sub-therapeutic. (Trial Tr. 347.) If Solebo had a therapeutic level of Dilantin in his blood at the time of death, or if he had a sub-therapeutic level of 7 <<mu>>/ml or 8 <<mu>>/ml, it would have been detected on the toxicology report. (Trial Tr. 347–48.) Dr. Jones opined that the negative result was significant because if a person is supposed to

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be taking medication that is known to prevent seizures, then a negative result on the toxicology report indicates that the person was not taking the medication, or was not taking the medication as prescribed, and that the medication was not present in a therapeutic level therefore, making the person more susceptible to having a seizure. (Trial Tr. 346, 385.)

> FN5. Although Dr. Jones did not know what the laboratory's level of detection for Dilantin was, she testified that it could be .5 <<mu>>/ml or .25 <<mu>>/ml. (*See* Trial Tr. 385.)

183. On cross-examination, Dr. Jones testified that although she was able to conclude that Solebo's cause of death was seizure disorder from the autopsy itself, the toxicology report supported the cause of death in that Solebo's Dilantin level was definitely sub-therapeutic. (Trial Tr. 380.) Dr. Jones also testified that in reviewing Solebo's medical records, it seemed to her that his seizure-like activity was not occurring when he was taking his Dilantin and was in the therapeutic range. (Trial Tr. 380.)

VI. The Experts

A. Dr. Holtzman

184. Dr. Steven Holtzman testified for the Plaintiff. Dr. Holtzman is a physician currently licensed to practice medicine in the State of Texas. (Trial Tr. 203.) He graduated from the University of Illinois in 1967, and from the Chicago Medical School in 1971, and has since practiced as a physician. (Trial Tr. 203–04.) Dr. Holtzman completed a residency program in general surgery at the University of Illinois in Chicago and became board certified in general surgery; his certification expires in 2020. (Trial Tr. 204.) As part of his residency program, he entered graduate school at the University of Illinois and obtained a Ph.D. in biochemistry in about 1977. (Trial Tr. 204.) At the time of trial, Dr. Holtzman was the medical director of the emergency room in Harlingen, Texas. (Trial Tr. 203, 205.) As an emergency room physician, Dr. Holtzman sees patients who present to the emergency room with a number of emergency problems, including neurological problems such as seizures. (Trial 205–06.) His specific training relates to emergency room care only. (Trial Tr. 261–62.) Dr. Holtzman also works as a medical expert consultant and has testified over one hundred times as a retained expert at various trials. (Trial Tr. 209, 263–64.)

***40** 185. Dr. Holtzman has cared for, diagnosed, and treated between 500 and 1,000 patients who have had seizures. (Trial Tr. 223.) Although Dr. Holtzman does not typically encounter recurring patients as an emergency room physician, he has seen the continuum of problems that patients have over the course of seizure disorder. (Trial Tr. 223–24, 259–60.) Dr. Holt/man summarized his opinions as follows: Solebo suffered from seizure disorder; he had a seizure on May 1, 2007, that proximately caused his death; and he suffered a fatal seizure because the MCC and its staff failed to provide adequate and timely medical care. (Trial Tr. 213.)

1. Testimony on seizure disorder

186. Dr. Holtzman testified that seizure disorder is defined by the International Anti–Epileptic Society, in part, as "a brain disorder that causes an enduring predisposition to degenerate seizures." (Trial Tr. 213.) Dr. Holtzman also explained that seizures are caused by abnormal electrical activity in the brain and manifest in different ways. (Trial Tr. 214.) For instance, seizure-like activity (which must be present when diagnosing a person with seizure disorder) may include violent convulsions of a person's extremities, loss of consciousness, incontinence, salivation, and lip smacking. (Trial Tr. 215–16.)

187. According to Dr. Holtzman, a diagnosis of seizure disorder may be made after a person experiences two or more seizures that are unprovoked and separated by more than 24 hours. (Trial Tr. 214, 216 .) Physicians base a diagnosis of seizure dis-

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order on a patient examination, the patient's history, any observer input, and the results of neurological examinations. (Trial Tr. 216, 219.) In addition, a diagnosis of seizure disorder is bolstered when a patient who is thought to have seizures is treated with anti-seizure medication and the treatment is effective in that the patient ceases to have seizures for a long period of time. (Trial Tr. 219.) On cross-examination, Dr. Holtzman conceded that a physician might prescribe anti-seizure medication even in the absence of definitive tests that confirm seizure disorder. (Trial Tr. 267.)

188. Although a patient's history as provided by a patient to a physician is very important in diagnosing seizure disorder, (Trial Tr. 219–20), Dr. Holtzman testified that the most important factor in diagnosing seizure disorder is talking to an observer who witnessed the seizure, (Trial Tr. 216–17). Dr. Holtzman explained that anyone can be an observer because the physician is interested in the description of the seizure-like activity. (Trial Tr. 217.) Dr. Holtzman agreed that while a layperson is not qualified to diagnose a seizure, (Trial Tr. 264, 316), a layperson who witnesses a seizure is competent to report that information to a health care professional. (Trial Tr. 316.) Dr. Holtzman clarified that one does not have to be a physician, nurse, or physician assistant to relay seizure activity that he or she personally observed to a health care professional. (Trial Tr. 317.)

***41** 189. With respect to test results, Dr. Holtzman testified that CT scans of the head, MRIs, and EEGs are useful in diagnosing seizure disorder. (Trial Tr. 217–18.) Dr. Holtzman noted, however, that EEGs in patients with seizure disorder are frequently normal and that it may be important for a physician to provoke a seizure to obtain a reliable result. (Trial Tr. 218–219.) According to Dr. Holtzman, most patients who are diagnosed with seizures lack an abnormal CT scan, MRI, and EEG. (Trial Tr. 218–19.)

190. Dr. Holtzman testified that both of Solebo's CT scans and EEGs were normal. (Trial Tr. 286–87.) Dr. Holtzman also testified that an **MRI** being performed on Solebo was reasonable and necessary medical treatment, (Trial Tr. 228), and that an MRI might have shown some abnormality in Solebo's brain that would have confirmed that he had epilepsy, (Trial Tr. 229).

191. Dr. Holtzman offered his opinion to a reasonable degree of medical certainty, that Solebo suffered from seizure disorder while he was at the MCC. (Trial Tr. 225–27.) The primary basis for his opinion was that the doctors who treated and examined Solebo believed that he suffered from seizure disorder and they documented this belief in his medical records. (Trial Tr. 225–26, 268.) Specifically, Dr. Holtzman pointed out that the Kankakee health care personnel who examined Solebo thought he had experienced a seizure and that the MCC Physicians and physician assistants also thought he had seizure disorder. (Trial Tr. 226.) Although there was no firsthand account from anybody who observed Solebo having a seizure, (Trial Tr. 285), Dr. Holtzman noted that Solebo was seen by two cellmates in Kankakee who documented a similar story about Solebo having a seizure. (Trial Tr. 226; *see also* Jt. Ex. 3 at 18, 24). Dr. Holtzman testified that, based on his review of Solebo's medical records, he did not have any doubt in his opinion that the medical providers at the MCC believed Solebo had seizure disorder based upon what they wrote in their charts, their deposition testimony, and the fact that they treated the seizure disorder. (Trial Tr. 232–33.) Lastly, Dr. Holtzman noted that Dr. Jones concluded that he died from seizure disorder. (Trial Tr. 226.)

192. Dr. Holtzman's second basis for his opinion that Solebo had seizure disorder lies in the fact that while Solebo was taking anti-seizure medication he did not have any seizures. (Trial Tr. 226, 278–79.) Dr. Holtzman testified that when Solebo stopped taking his anti-seizure medication, his risk of having a seizure quadrupled, and after not taking his anti-seizure medication for four days, he had a fatal seizure. (Trial Tr. 227.) All of these different

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aspects led Dr. Holtzman to believe, to a reasonable degree of medical certainty, that Solebo had seizure disorder. (Trial Tr. 227.)

193. On cross-examination, Dr. Holtzman did not dispute that the assessment on Solebo's Kankakee medical records did not reveal anything other than questionable seizures, (*See* Trial Tr. 278), or that the MCC Physicians assessed Solebo as having "possible seizure disorder," (*See* Trial Tr. 283). Nevertheless, Dr. Holtzman opined, to a reasonable degree of medical certainty, that the two events at Kankakee that were described as seizure activity, specifically the February 17 and May 24 episodes, were reliable evidence by which a physician could diagnose seizure disorder in Solebo. (Trial Tr. 271–72, 276, 318.)

2. Testimony on cause of death

***42** 194. Dr. Holtzman also opined mat Solebo died of seizure disorder and, more specifically, that Solebo died from Sudden Unexpected Death From Epilepsy ("SUDEP"), (Trial Tr. 234, 236.) Dr. Holtzman based his opinion on the fact that Solebo suffered from seizure disorder and Dr. Jones' conclusion that Solebo's cause of death was seizure disorder. (Trial Tr. 234–35.) According to Dr. Holtzman, the physical findings at autopsy of the bite mark and cerebral edema, and the finding of a nontherapeutic level of Dilantin in Solebo's body were consistent with SUDEP. (Trial Tr. 236–37, 238.)

195. Dr. Holtzman testified that about ten percent of patients who have seizures will eventually die from SUDEP. (Trial Tr. 236, 290.) Dr. Holtzman also testified that the majority of patients that experience SUDEP have subtherapeutic levels of anti-seizure medication. (Trial Tr. 322.) In offering this testimony, Dr. Holtzman relied on a study that demonstrated certain characteristics of patients with SUDEP. (*See* Trial Tr. 323.) Characteristics of patients with SUDEP include dying in the prone position and on a bed, being young, having a subtherapeutic level of Dilantin, as well as having cerebral edema. (Trial Tr. 236–38.) Dr. Holtzman opined that, more likely than not, taking anti-seizure medication substantially and significantly reduces a person's risk of having a seizure and of dying from a seizure or SUDEP. (Trial Tr. 237.) He testified that while it is possible for a person to have a fatal seizure even when the person is taking anti-seizure medication, anti-epileptic drugs, such as Dilantin, reduce a person's risk of having a seizure. (Trial Tr. 237, 322). Therefore, the fact that Solebo had an undetectable level of Dilantin at the time of his death greatly increased his chances of having a seizure and contributed to his death from a seizure. (Trial Tr. 235–36, 322.)

196. On cross-examination, Dr. Holtzman explained that subtherapeutic Dilantin levels are part of the syndrome of SUDEP. (Trial Tr. 291.) Dr. Holtzman agreed that a therapeutic range is defined as the range of drug concentration that is associated with the best achievable response in a given person. (Trial Tr. 297.) Generally, the therapeutic range for Dilantin is between 10 <<mu>>/ml and 20 <<mu>>/ml. (Trial Tr. 235, 292–93.) For some patients, an optimal therapeutic level might lie outside of the range between 10 <<mu>>/ml and 20 <<mu>>/ml, but treating physicians always want to keep a patient's Dilantin level at 10 <<mu>>/ml or higher. (Trial Tr. 295.)

197. Because Solebo had not been taking Dilantin for four days, Dr. Holtzman knew that his Dilantin level was subtherapeutic. (Trial Tr. 322.) This was confirmed by the autopsy findings. (Trial Tr. 322.)

198. Dr. Holtzman testified that patients with HCM experience shortness of breath, chest pain, heart palpitations, fainting, dizziness, and also have heart murmurs. (Trial Tr. 241.) Dr. Holtzman pointed out that none of these symptoms were documented in Solebo's Kankakee or MCC medical records. (Trial Tr. 241, 243.) In addition, Dr. Holtzman pointed out that while Solebo had an enlarged heart, other organs, such as his spleen and liver, were also enlarged. (Trial Tr. 241.) Dr. Holtzman also testified that most people would not mistake fainting and shortness of breath with a seizure.

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(Trial Tr. 242.)

3. Testimony on standard of care

***43** 199. Dr. Holtzman first testified that the standard of care in a prison institution is the same as the standard of care outside of a prison institution. (Trial Tr. 212; 263.) Dr. Holtzman also testified that the standard of care dictates that the MCC Physicians were responsible for the care and treatment provided by the MCC physician assistants because they worked under the auspices of the Physicians. (Trial Tr. 233–34.) Therefore, Dr. Holtzman testified that Solebo was under the care of the MCC Physicians upon his arrival at the MCC, and it is not relevant that Solebo was seen by a physician assistant rather than a Physician because the Physicians had the final say in Solebo's care. (Trial Tr. 233.)

200. Dr. Holtzman testified that the standard of care for treating a patient with seizure disorder requires physicians to conduct examinations, (Trial Tr. 245), to review the patient's medical records and inquire into why a patient might not be taking his medication, (Trial Tr. 245–46), to obtain laboratory results and draw blood in order to monitor levels of anti-seizure medication in a patient's blood, (Trial Tr. 247–48), and to counsel a patient about the risks and benefits of taking or not taking his medication, (Trial Tr. 249–50).

201. With respect to the frequency of the examinations, Dr. Holtzman testified that in this case, monthly evaluations should have been conducted for Solebo because he was classified as a Care Level 3 patient. (Trial Tr. 245.) MCC policy explicitly provides that a Care Level 3 patient should be seen on a daily to monthly basis. (Pl.'s Ex. Q.) On cross-examination, Dr. Holtzman testified that a patient who is on anti-seizure medication and has not had a seizure for an extended period of time does not need to be seen on a frequent basis and would not need drug monitoring, assuming there are no seizures, there is no change in medication, he is not experiencing any effects, he is completely asymptomatic, and he is compliant with his medications. (Trial Tr. 288.)

202. Dr. Holtzman also testified that the standard of care required the MCC Physicians to review Solebo's medical records, specifically the MARs. (Trial Tr. 245–46.) The standard of care also required the MCC Physicians to counsel Solebo about his medication and inquire into why he was not taking his medication. (Trial Tr. 245–46.) Dr. Holtzman also testified that he would expect a reasonably well-qualified physician, according to the standard of care, to inquire into the reasons a patient stopped taking his medication, such as whether the patient was experiencing any side effects from the medication, during a physical examination. (Trial Tr. 246.)

203. Dr. Holtzman testified that the standard of care required the MCC Physicians to obtain blood draws and to follow up on the corresponding laboratory results in order to monitor Solebo's Dilantin level. (Trial Tr. 247–48, 325.) If a blood draw revealed a sub-therapeutic level of Dilantin, Dr. Holtzman testified that the standard of care required the MCC Physicians to counsel Solebo about why he had a sub-therapeutic level. (Trial Tr. 254–55.)

***44** 204. Dr. Holtzman testified that physicians have a duty to explain the risks and benefits of medication to a patient. (Trial Tr. 250.) According to Dr. Holtzman, a physician should consult a patient about the risk of not taking his anti-seizure medication because the risk of not taking the medication could be fatal and could cause a seizure. (Trial Tr. 248–49.) Thus, the MCC Physicians had a duty to tell Solebo that if he did not take his medication, he was at risk of having a seizure. (Trial Tr. 249.) Because seizure disorder carries with it a risk of great bodily injury and a risk of death, (Trial Tr. 255), Dr. Holtzman testified that the MCC Physicians and personnel also had a duty and obligation under the standard of care to inform Solebo that if he did not take his Dilantin, he could die, (Trial Tr. 249). Dr. Holtzman did not agree that it would cause Solebo great anxiety if he were told that a

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failure to take his anti-seizure medication could result in death. (Trial Tr. 249.)

205. Finally, Dr. Holtzman also testified that if Solebo refused to take his medication, the standard of care required the MCC Physicians to administer Solebo's medication involuntarily. (Trial Tr. 251.) For example, Dr. Holtzman suggested that the MCC Physicians could have sprinkled anti-seizure medication on Solebo's vanilla ice cream. (Trial Tr. 251, 326). Such testimony is not credible, however, especially when considered alongside Dr. Curlin's testimony on the most fundamental medical ethics principle of respect for persons. This Court therefore discounts this portion of Dr. Holtzman's testimony.

4. Testimony on breach of the standard of care and proximate cause

206. Dr. Holtzman also offered his opinion, to a reasonable degree of medical certainty, that Solebo had a fatal seizure because the MCC, through its employees, failed to provide Solebo with timely and adequate medical care. (Trial Tr. 243.) The primary basis for Dr. Holtzman's opinion was that Solebo should have been counseled as to his noncompliance with his medication, but the MCC Physicians failed to do so. (Trial Tr. 243–44.) Specifically, Dr. Holtzman pointed out that one of the reasons the MCC Physicians were unable to consult Solebo was because they did not know he was noncompliant. (Trial Tr. 243–44.) As Dr. Holtzman pointed out, neither Dr. Hoffman nor Dr. Nowakowski was present at the MCC during critical time periods in March, April, and May. (Trial Tr. 244.) In addition, Solebo did not receive monthly examinations as required by the standard of care and the MCC's internal policies. (Trial Tr. 245.) Had Solebo been examined on a monthly basis, Dr. Hoffman and Dr. Nowakowski would have also been required to review Solebo's MARs and to talk to Solebo about how he was doing with his medication. (Trial Tr. 245–46.) Neither Dr. Hoffman nor Dr. Nowakowski reviewed Solebo's MARs, as they were obligated to do, during critical time periods to determine whether Solebo was compliant with his medication. (Trial Tr. 244, 246.) Dr. Holtzman also pointed out that none of the physician assistants informed the Physicians that Solebo was not taking his medication. (Trial Tr. 244.) Had the MCC Physicians been aware that Solebo was noncompliant, they should have consulted with him, asked him why he was not taking his Dilantin, and informed him that by not taking his medicine he increased the risk of having a seizure. (Trial Tr. 244–45.) According to Dr. Holtzman, Solebo should have been consulted about the risk of not taking his anti-seizure medicine because the risk of not taking it could be fatal. (Trial Tr. 248–49.) Finally, Dr. Holtzman testified, on the basis of his review of the records, that Solebo would have taken his medicine had he received proper counseling. (Trial Tr. 251–52.)

***45** 207. Dr. Holtzman also pointed out that although Dr. Hoffman ordered a blood draw on December 26, 2006, and Solebo's blood was drawn on February 1, 2007, laboratory results for that blood draw were never returned to the MCC. (Trial Tr. 247–28.) Thus, the very last Dilantin level that the MCC personnel obtained for Solebo was from December 2006, when Solebo's Dilantin level was at 11 <<mu>>/ml. (Trial Tr. 247.) Dr. Holtzman testified that a Dilantin level obtained by a blood draw would have revealed whether or not Solebo's blood was in the therapeutic range for Dilantin and, most importantly, whether or not he was compliant with his medication in case the doctors were not performing their duty of reading the monthly MARs. (Trial Tr. 248.) Dr. Holtzman opined, to a reasonable degree of medical certainty, that Solebo was definitively subtherapeutic at the end of April. (Trial Tr. 253–54.) A blood draw taken around this time would have definitively told the MCC Physicians what Solebo's Dilantin level was. (Trial Tr. 254.) Had an MCC Physician been made aware on April 30, while Solebo was alive, that Solebo had not taken his medication the last four days of April, they should have counseled him about why his Dilantin level was zero <<mu>>/ml. (Trial Tr.

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253–54.) But, Dr. Hoitzman agreed that it was impossible for the Physicians to make that determination if they did not know that Solebo had missed his medication. (Trial Tr. 254.)

208. Dr. Hoitzman believed, to a reasonable degree of medical certainty, that Solebo not taking his medication from April 27 through April 30 increased his risk of death from a seizure. (Trial Tr. 255.) Dr. Hoitzman also believed, to a reasonable degree of medical certainty, that if Solebo had received his medication on those dates, he would not have died on May 1, 2007. (Trial Tr. 255.)

209. In sum, Dr. Holtzman testified that through examinations, a review of Solebo's medical records, and blood draws, the MCC personnel knew or should have known that Solebo's Dilantin level was reaching nontherapeutic levels. (Trial Tr. 248.)

B. Dr. Curlin

210. Dr. Farr Curlin was the Defendant's first expert witness to testify at trial. Dr. Curlin is board certified by the American Board of Internal Medicine with a subspecialty certification in hospice and palliative medicine. (Trial Tr. 565.) He obtained an undergraduate degree at the University of North Carolina and a medical degree in 1998 at the University of North Carolina Medical School. (Trial Tr. 561.) He completed his internal medicine residency in 2001 at the University of Chicago Hospital. (Trial Tr. 561.) From 2001 to 2003, he participated in the Robert Wood Johnson Clinical Scholars Program, which is a research training program. (Trial Tr. 561–562, 564.) From 2003 to 2004, he was a fellow at the MacLean Center for Clinical Medical Ethics at the University of Chicago, which is a program focused on the moral and ethical dimensions of the practice of medicine. (Trial Tr. 562, 565.) During and after his fellowship, he practiced outpatient primary care internal medicine at the University of Chicago Clinics on a part-time basis. (Trial Tr. 562.) Since his fellowship, he has been a part of the faculty in ethics and he lectures on medical ethics. (Trial Tr. 563, 566.) At the time of trial, Dr. Curlin was employed at the University of Chicago as an associate professor of medicine and was also the associate medical director for Horizon Hospice. (Trial Tr. 561–62.) Through his role with Horizon Hospice, he saw hospice patients in their home. (Trial Tr. 562.) In sum, Dr. Curlin's area of expertise is on hospice care, ethical issues, and general internal medicine. (Trial Tr. 658.) Prior to this case, Dr. Curlin had never been retained as an expert witness. (Trial Tr. 571.)

1. Testimony on seizure disorder

***46** 211. Dr. Curlin opined that Solebo did not have seizure disorder because his autopsy showed that he had HCM, and in his opinion, there was no definitive evidence that Solebo had seizure disorder. (Trial Tr. 572.) According to Dr. Curlin, a definitive diagnosis of seizure disorder can only be made on one of two bases. (Trial Tr. 572.) First, a diagnosis of seizure disorder may be made on the basis of an expert who witnesses a person having a seizure on more than one occasion. (Trial Tr. 572–73.) Second, a diagnosis of seizure disorder may be made where the person has an EEG showing that the person has epileptiform activity. (Trial Tr. 572–73.) Nevertheless, Dr. Curlin testified that an EEG of a person with seizure disorder could be normal and that EEGs are almost never performed when a person is actively seizing. (Trial Tr. 677.) According to Dr. Curlin, Solebo's Kankakee medical records only demonstrated that Solebo had a "questionable seizure disorder." (Trial Tr. 577, 582.) With regards to the February 23, 2006 episode, Dr. Curlin testified that while the roommate's account that he saw Solebo shaking during the episode could not be a basis on which a physician could reasonably diagnose seizure disorder, it could add to the physician's certainty that the person had a seizure. (Trial Tr. 579–80; Jt. Ex. 3 at 24.)

212. On direct examination, Dr. Curlin also testified that when a person has had "episodes that may be seizures" and has been injured as a result, and a physician believes that there is "a high enough threshold," then the physician may treat the person empirically, meaning that the patient is

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treated for a possible or likely diagnosis. (Trial Tr. 577–78.) On cross-examination, however, Dr. Curlin testified that once a person has two episodes that a physician "ha[s] a reasonable degree of certainty were seizures, then it is appropriate to start treating for a seizure disorder." (Trial Tr. 664.) Dr. Curlin also testified that it was reasonable for the Kankakee physicians to treat Solebo for a possible seizure disorder. (Trial Tr. 583, 663–64.) Although Dr. Curlin opined that it was reasonable for the Kankakee physicians to treat Solebo for seizure disorder, (Trial Tr. 663), he was not willing to concede that Solebo had two documented seizures at Kankakee, (Trial Tr. 664).

213. On cross-examination, Dr. Curlin also testified that he could not rule out with certainty the possibility that Solebo had seizure disorder, and that it was controlled at the MCC because he was compliant with his medication. (Trial Tr. 656.) Dr. Curlin opined that if Solebo had seizure disorder, he was therapeutic as a result of the medication he was given until March or April 2007. (Trial Tr. 670–71.) Dr. Curlin agreed that in March or April 2007, when Solebo began missing more doses of his medication, he would have started to become subtherapeutic. (Trial Tr. 671.) Dr. Curlin then conceded that if Solebo had seizure disorder, in March and April 2007, not taking his medication could have contributed to him having another seizure. (Trial Tr. 671.) Dr. Curlin also agreed that seizures could result in death and that a person could die of a fatal arrhythmia following a seizure. (Trial Tr. 671–72.) Finally, Dr. Curlin also agreed that everyone is qualified to report what they see to a physician who is diagnosing seizure disorder. (Trial Tr. 663.)

2. Testimony on cause of death

***47** 214. Dr. Curlin also gave unconvincing testimony as to Solebo's cause of death at trial. Dr. Curlin, who is neither a cardiologist nor pathologist, opined, to a reasonable degree of medical certainty, that Solebo did not die of seizure disorder, (Trial Tr. 598, 686), and that his cause of death was HCM, with the mechanism of death being a cardiac arrhythmia, (Trial Tr. 588). Dr. Curlin testified that Solebo died of HCM because there are objective findings to support that Solebo had HCM. (Trial Tr. 598.) Dr. Curlin testified that the only type of death that Solebo could have suffered from seizure disorder was SUDEP, but that SUDEP is uncommon. (Trial Tr. 598.) Dr. Curlin testified that the reason he believed that Solebo died of HCM as opposed to seizure disorder was because the likelihood of Solebo dying from HCM was much higher than the likelihood of Solebo dying from seizure disorder. (Trial Tr. 598–99.) Dr. Curlin based his opinion on a number of general statistical studies. (*See* Trial Tr. 598, 608–611.)

215. Dr. Curlin's testimony on cross-examination did not fare well. Dr. Curlin first conceded that the only training he had in diagnosing and treating HCM was the training he received as an internist and his reading of the literature. (Trial Tr. 673.) Dr. Curlin next testified that if an autopsy had not been performed, he would not have been able to render his opinions regarding HCM. (Trial Tr. 681–82.) He also conceded that Solebo's medical charts prior to his death did not contain a single reference to HCM, that there were no factors while Solebo was alive to diagnose him with HCM other than an enlarged heart, which was not detected while he was alive, and that there were no documented arrhythmias. (Trial Tr. 657, 674.) Although Dr. Curlin testified that Solebo's episodes of losing consciousness were consistent with arrhythmias, he conceded that they were also consistent with seizures. (Trial Tr. 657, 674–75.)

216. Dr. Curlin also testified that the basis for his opinions that Solebo died of HCM as opposed to SUDEP was simply "it's the math." (Trial Tr. 684.) According to Dr. Curlin, HCM posed a higher risk of death than SUDEP. (Trial Tr. 683.) Nonetheless, Dr. Curlin conceded that simply because statistics say a person is more likely to die of cause A over B, it is not necessarily the case that the person will die of cause A. (Trial Tr. 684.) When

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asked whether it was possible that Solebo died due to a seizure or seizure disorder, Dr. Curlin testified, "I can't with a hundred percent certainty rule that out." (Trial Tr. 598.) Furthermore, on cross-examination, Dr. Curlin was impeached, as he had previously testified at his deposition that it was his opinion that there was no way to know to a reasonable degree of medical certainty whether Solebo died of seizure disorder or a heart ailment.[FN6] (Trial Tr. 690–93.)

> FN6. Dr. Curlin's deposition testimony, as read into the trial transcript reads as follows:
>
> > Question: So it's your opinion here today that Mr. Solebo died of a heart-related ailment and not of a seizure disorder?
> >
> > Answer: It is my opinion that's more likely. The truth is, we don't know and there's no way to know. It's my opinion that there's no way to know to a reasonable degree of medical certainty whether he died of—which one he died of.
> >
> > (Trial Tr. 692–93.)

217. Given the overall inconsistencies in Dr. Curlin's testimony regarding Solebo's cause of death, this Court cannot credit his medical conclusions, as they are primarily based on general statistical studies that have been used to reach broad, unfounded and speculative conclusions about Solebo's cause of death.

3. Testimony on standard of care

***48** 218. Dr. Curlin testified that the most fundamental medical ethics principle is the principle of respect for persons. (Trial Tr. 612.) According to Dr. Curlin, this principle divides into two separate moral requirements: First, the requirement to acknowledge autonomy, meaning the ability to make one's own choices, and second, the requirement to protect those with diminished autonomy. (Trial Tr. 613.) With respect to the first moral requirement, respect for persons requires that people be given the opportunity to choose what should or should not happen to them. (Trial Tr. 613.) With respect to the second moral requirement, Dr. Curlin testified that whenever patients have diminished autonomy, such as prisoners, their freedoms are limited and this principle becomes even more sensitive. (Trial Tr. 613.) In those circumstances, physicians have to be particularly careful not to violate a patient's freedom to refuse medical treatment. (Trial Tr. 613, 629–30.) Thus, Dr. Curlin testified that it is absolutely unacceptable to force a mentally competent patient to take medication that he refuses and that the MCC Physicians did not have the option of forcing Solebo to take his anti-seizure medication. (Trial Tr. 613, 627–28.)

219. On direct examination, Dr. Curlin testified that when prescribing medication, a physician's responsibility is to give a reasonable amount of information so that the patient can come to what is called "informed consent." (Trial Tr. 613–14.) Patients should be given the information they need to understand the benefits of the medication, the purpose for which the medication is being prescribed, the risks of taking the medication, and that the patient is free to say yes or no. (Trial Tr. 613–14, 620.) Dr. Curlin also testified that, based on Solebo's visit to the Neurology CCC on November 30, 2006, he was certain that Solebo knew that Dilantin was for seizure disorder. (Trial Tr. 625.)

220. Dr. Curlin also testified that when a physician initially prescribes Dilantin to a patient, the standard of care requires the physician to inform the patient about the risks of Dilantin's side effects, which include tremors, nausea, slurred speech, and gingival hyperplasia. (Trial Tr. 664–65.) Dr. Curlin testified that he would also tell seizure patients that they are at risk of injury. (Trial Tr. 665.) Although Dr. Curlin acknowledged that seizure disorder carries with it a risk of death, (Trial Tr. 665–66), he testified that the standard of care did not impose a duty on the MCC Physicians to warn Solebo that he could die if he did not take his medication, (Trial

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Tr. 630). Dr. Curlin reasoned that the MCC Physicians did not have such a duty because, in his words, "medications do not prevent ... [SUDEP]." (Trial Tr. 630.) Dr. Curlin testified that the risk of death is so low that it is not recommended that a physician inform the patient of that risk because it potentially adds unwarranted anxiety. (Trial Tr. 630.) Dr. Curlin testified that he customarily does not advise his patients that they have a risk of death from SUDEP because the risk is extraordinarily small and nothing can be done to reliably prevent SUDEP. (Trial Tr. 630–31.)

***49** 221. On cross-examination, Dr. Curlin's direct testimony was again directly undermined. Dr. Curlin agreed that seizure disorder carries with it a risk of death. (Trial Tr. 666.) And, at his deposition, Dr. Curlin had testified that the only thing a patient could do to prevent his risk of death from seizure disorder was to take his medication.[FN7] (Trial Tr. 666.) At trial, however, Dr. Curlin was only willing to concede that while it was a reasonable hypothesis that medication reduces someone's risk of death from seizure disorder, he did not know that it had "been shown to be the case." (Trial Tr. 667.) According to Dr. Curlin, while it is true that the purpose of anti-seizure medication is to reduce the likelihood that a patient will have further seizures, "that's not death." (Trial Tr. 667.) Additionally, although Dr. Curlin agreed that anti-seizure medication lessens the chance of having seizures and the potential for complications from those seizures, he did not agree that it was "as simple as taking the medication reduces the chances of dying from a seizure." (Trial Tr. 667.) At his deposition, however, Dr. Curlin had testified that it was that simple; that taking anti-seizure medication lessened a person's chances of dying from a seizure. (Trial Tr. 668.) Dr. Curlin testified that the basis for his opinion was that while medication did not reduce the risk of SUDEP, it did reduce the risk of dying from seizure disorder. (Trial Tr. 668.) Dr. Curlin also conceded that if the medication did not have a function, no one would prescribe it. (Trial Tr. 669.) Dr. Curlin further conceded that people who adhere to their medication reduce their risk of future seizures by percentages. (Trial Tr. 669.)

> FN7. The trial transcript reflects that at his deposition, Dr. Curlin testified that "[t]here is nothing we can do to prevent risk of death from a seizure disorder except to take your medicines, and that's it." (Trial Tr. 666.)

222. Dr. Curlin also testified on direct examination that if a patient like Solebo did not want to take his medication, it would be reasonable to tell him, "why don't you not take them and we'll follow it, and I want you to let me know first thing if you have a seizure." (Trial Tr. 637.) Dr. Curlin testified that if Solebo had told him that he did not want to take his medication, Dr. Curlin would have advised Solebo that if he had seizure disorder, he may suffer a seizure that he could avoid by taking the medication, but that it was reasonable to try a period off the medications. (Trial Tr. 637.)

223. Dr. Curlin next testified that the usual practice of competent internists following patients for seizure disorder in terms of frequency of clinic visits is highly variable, depending on whether the patient continues to have seizures and whether they tolerate their medication. (Trial Tr. 640.) According to him, for a patient who is not having seizures and who is not reporting problems with their medications, the frequency of clinic visits could range from once a month to once at every six months, or less frequently. (Trial Tr. 640.) Dr. Curlin testified that Solebo fell into this category and that the usual practice of competent internists taking blood levels of patients with seizure disorder is to order tests only when the physician can use the information to change what the physician is doing in some way. (Trial Tr. 640.)

***50** 224. Dr. Curlin next testified that drug levels are typically obtained after a person is initially given his medication to obtain a reference point. (Trial Tr. 640.) Thereafter, drugs levels are obtained to gauge patient's levels if the patient has

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recurrent seizures, if there has been an increase or decrease in the medication, or if the physician anticipates changing the medications. (Trial Tr. 640.) Nonetheless, Dr. Curlin testified that the fact that Dr. Hoffman raised Solebo's does of Dilantin in December 2006 did not obligate him to conduct another Dilantin level test. (Trial Tr. 641.) Dr. Curlin disagreed that Dr. Hoffman should have done something immediately after Solebo's February 12, 2007 visit to the Neurology CCC to obtain a laboratory result for his Dilantin level because there was "no pressing reason to get a lab result," (Trial Tr. 643), and it would not have changed what the MCC Physicians could have done, (Trial Tr. 644). Dr. Curlin did agree, however, that a laboratory result for Solebo's Dilantin level could have been useful for Solebo's future care. (Trial Tr. 644–45.)

225. Dr. Curlin also opined that engaging in discussions with a patient who is not adherent to his medications does not increase the likelihood that the patient will take his medications. (Trial Tr. 646.) Dr. Curlin based his opinion on various statistical studies. (Trial Tr. 646–47.) Dr. Curlin also believed that Solebo would not have been susceptible to motivational counseling. (Trial Tr. 652.)

226. In light of Dr. Curlin's inconsistent testimony on whether medication may reduce a person's risk of death from seizure disorder, this Court discredits his testimony that the standard of care did not require the MCC Physicians to inform Solebo that he could die from seizure disorder. For the same reasons, this Court discredits his testimony that although taking medication reduces a patient's risk of dying from seizure disorder, it does not reduce the risk of dying from SUDEP.

C. Dr. Ebersole

227. Dr. John Ebersole was the Defendant's second expert witness. Dr. Ebersole is a professor of neurology at the University of Chicago. (Trial Tr. 728.) Dr. Ebersole completed his medical school training at Yale University School of Medicine. (Trial Tr. 728.) He later did a three-year residency in neurology at Yale University ("Yale"), and between 1978 and 2000, he was on the faculty at Yale. (Trial Tr. 728.) Since 2000, he has been a professor at the University of Chicago, director of the Adult Epilepsy Center, and director of the Clinical Neurophysiology Laboratories there. (Trial Tr. 728–729; *see also* Def.'s Ex. 19.) Dr. Ebersole's clinical specialty in neurology is epilepsy diagnosis and treatment. (Trial Tr. 729.) In his capacity as a professor, he cares for patients, teaches, and conducts research. (Trial Tr. 730.) With respect to patient care, he is responsible for the evaluation and treatment of inpatients in the Adult Epilepsy Monitoring Unit. (Trial Tr. 730.) Dr. Ebersole has an epilepsy clinic where he sees outpatients weekly and reads EEGs two days a week. (Trial Tr. 730.) With respect to his teaching duties, he is responsible for teaching fellows, that is to say, physicians who have finished their residency and are receiving extra education in clinical neurophysiology and epilepsy. (Trial Tr. 730.) He also conducts clinical neurophysiology research and tries to determine ways to better analyze electroencephalography in order to help patients with epilepsy. (Trial Tr. 730.) In his clinical practice, Dr. Ebersole is responsible for the diagnosis, care, and evaluation of patients in the Epilepsy Monitoring Unit four months a year. (Trial Tr. 730.) He typically has four patients a week in the monitoring unit. (Trial Tr. 730–31.) He has epilepsy clinic two days a week and sees approximately 25 patients with epilepsy weekly. (Trial Tr. 731.) Over the course of his career, Dr. Ebersole has treated or diagnosed thousands of patients with seizure disorder or possible diagnoses of seizure disorder. (Trial Tr. 731–32.)

1. Testimony on seizure disorder

***51** 228. Dr. Ebersole defined seizure disorder as a disorder of chronic recurrent seizures. (Trial Tr. 729.) Dr. Ebersole defined a seizure as a brief period of time, lasting a minute or two, sometimes longer, when the normal control functions in the brain go awry resulting in excessive, uncontrolled, excitatory activity in the brain. (Trial Tr. 732.) Dr. Ebersole testified that two events is considered the standard threshold for a clinical diagnosis of pos-

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sible seizure disorder. (Trial Tr. 751.) Dr. Ebersole testified that a patient's history, i.e., his subjective complaint, is very important in diagnosing seizure disorder because it is an intermittent disorder, meaning that a person is completely normal between seizures. (Trial Tr. 732, 750.) According to Dr. Ebersole, history encompasses past medical history, family history, and the patient's past history in terms of the characteristics of the seizures. (Trial Tr. 732–33.)

229. Dr. Ebersole opined, to a reasonable degree of medical certainty, that Solebo did not have seizure disorder. (Trial Tr. 735.) Dr. Ebersole first based his opinion on the fact that Solebo had normal EEGs and CT scans. (Trial Tr. 735.) Dr. Ebersole also based his opinion on the fact that Solebo did not have a history of seizure disorder prior to his stay at Kankakee, and in Dr. Ebersole's words, "why would he all of a sudden develop seizures de novo in Kankakee without any past history?" (Trial Tr. 736.) On cross-examination, however, Dr. Ebersole conceded that a patient can have a normal EEGs and CT scans and still suffer from seizure disorder, (Trial Tr. 748, 752), and that at some point a patient with seizure disorder has to have their first episode, and that can be at age 7, 23, and even age 50 or 60. (Trial Tr. 752–53.) Dr. Ebersole also testified that there were no clear descriptions of the episodes in Solebo's medical records and some "sketchy statements by cellmates that there was some shaking." (Trial Tr. 736.) According to Dr. Ebersole, it was therefore difficult to say that this was a seizure and not a different type of episode resulting in loss of consciousness. (Trial Tr. 736.)

230. On cross-examination, Dr. Ebersole also testified that there were only two ways to diagnose a person with seizure disorder: (1) through an actual recording of seizure activity taken during a long-term EEG; and (2) by a physician witnessing a seizure. (Trial Tr. 750.) With respect to the first basis, Dr. Ebersole testified that a long-term EEG involves monitoring a patient from several days to over a week, usually off medications, to see if there are any brainwave abnormalities and to see if a seizure can be induced and recorded. (Trial Tr. 749.) Nonetheless, only if a seizure is recorded will a long-term EEG definitively show whether someone has seizure disorder. (Trial Tr. 749.) In addition, Dr. Ebersole did not have any knowledge of a long-term EEG ever being performed in a prison. (Trial Tr. 750.)

***52** 231. With respect to the second basis, Dr. Ebersole was adamant that only the eyewitness account of a physician was a sufficient basis on which to base a diagnosis of seizure disorder. (Trial Tr. 750–51.) When pressed about whether a diagnosis of seizure disorder could be made on the basis of a nurse witnessing a person undergo a seizure five times, Dr. Ebersole testified that "[i]t would depend on the training of the nurse." [FN8] In other words, where a licensed nurse observes a person having multiple seizures, such history is not enough for Dr. Ebersole to conclude that the person has seizure disorder. According to Dr. Ebersole, the word of a cellmate or layperson was also not good enough. (Trial Tr. 751.)

FN8. The trial transcript reads:

> Q: You believe that recording seizure activity in that long-term EEG or a doctor actually witnessing a seizure is the only way to definitively make a diagnosis of epilepsy. Is that true?
>
> Answer: Correct.
>
> Question: So if the nurse sees someone having a seizure five times, you would still consider that possible seizure disorder and not an actual seizure disorder or epilepsy, is that correct?
>
> Answer: It would depend on the training of the nurse.
>
> Question: But I think you indicated in your previous testimony that the word of a cellmate or a layperson is not good

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> enough. Is that correct?
>
> Answer: It's not good enough. These people aren't trained to differentiate seizures from other episodes of loss of consciousness.
>
> (Trial Tr. 750–51.)

232. Because Dr. Ebersole concluded that Solebo did not have seizure disorder, he also opined, to a reasonable degree of medical certainty, that the MCC Physicians unnecessarily prescribed Solebo anti-seizure medication. (Trial Tr. 753.) In addition, Dr. Ebersole opined that because Solebo did not need anti-seizure medication, it did not make a difference if Solebo missed taking his prescribed doses of Dilantin. (Trial Tr. 753.) Finally, Dr. Ebersole gave his opinion as to whether it was necessary to obtain a blood draw in February 2007 to test Solebo's Dilantin level. (Trial Tr. 737.) According to Dr. Ebersole, because Solebo did not have any episodes of loss of consciousness while he was at the MCC, there was no clinical reason that the Dilantin level had to be redone when he had a level of 11 <<mu>>/ml in December 2006. (737–38.)

2. Testimony on cause of death

233. At trial, Dr. Ebersole also testified as to cause of death. Dr. Ebersole first testified that the risk of death from a seizure is infinitesimal. (Trial Tr. 739.) Dr. Ebersole next opined, to a reasonable degree of medical certainty, that Solebo did not die from SUDEP. (Trial Tr. 741.) The basis for his opinion was that Solebo did not fit the picture of a person who is at risk of dying from SUDEP, insofar that he was not an intractable epileptic. (Trial Tr. 741.) Dr. Ebersole also found it significant that Solebo was not alone when he died and, according to Dr. Ebersole, most cases of SUDEP occur when a person is sleeping alone. (Trial Tr. 741–42.) Dr. Ebersole explained that SUDEP is associated with a grand mal convulsive seizure which involves lots of shaking and noise and therefore, in his view, it would be difficult for somebody on the bunk above a person who is convulsing not to wake up and notice this. (Trial Tr. 742.) Dr. Ebersole also testified that there was no evidence from the autopsy that supported a diagnosis of seizure disorder or SUDEP. (Trial Tr. 742.) According to Dr. Ebersole, such evidence would include a finding of a structural abnormality in Solebo's brain. (Trial Tr. 743.) In addition, Dr. Ebersole testified that he personally felt that Solebo did not have seizure disorder, "so he couldn't have died of SUDEP." (Trial Tr. 745.) Therefore, Dr. Ebersole opined that the only other probable cause of death for Solebo was cardiopulmonary compromise of some sort. (Trial Tr. 745.) The basis for his opinion that Solebo had a cardiac event was that Solebo's autopsy had the abnormal finding of an enlarged heart, i.e., cardiomegaly. (Trial Tr. 746.) Dr. Ebersole is neither a cardiologist or pathologist, and this Court accordingly does not credit his opinion on Habib's cause of death.

3. Dr. Ebersole's testimony on standard of care

***53** 234. Dr. Ebersole testified that it is the standard practice to obtain blood levels periodically if a patient is doing well and to obtain blood levels more often if a patient is doing poorly. (Trial Tr. 737.) Specifically, he testified that it is standard practice to obtain a blood level once a year or, at most, twice a year, in those patients who are not having seizures. (Trial Tr. 737.) Dr. Ebersole also testified that if a person is having seizures while they are receiving a reasonable dose of medication, then it is standard practice to obtain a blood level right away. (Trial Tr. 737 .)

235. Dr. Ebersole testified that standard practice does not require physicians to warn a patient that he will die if he does not take his anti-convulsant medications. (Trial Tr. 744.) Dr. Ebersole testified that the main reason for this is that the likelihood of dying is so rare that a warning is not indicated and that such a warning would tend to scare patients more man anything else. (Trial Tr. 744.)

VII. Damages Testimony

236. Solebo was born in Nigeria to Nigerian

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parents and was a Nigerian citizen. (Damages Hr'g Stip. ¶ 5.) He immigrated to the United States with his mother when he was five years old. (Def.'s Ex. 22 at 2; *see also* Damages Hr'g Stip. ¶ 5.) Solebo was not a citizen of the United States and did not have a green card. (Damages Hr'g Stip. ¶ 5.) Although Plaintiff did not know that Solebo was in the United States illegally until after she married him, (June 4, 2012 Tr. 33), she testified that they had long-term plans to move to Nigeria. (June 4, 2012 Tr. 36.)

237. Solebo attended school through the 12th grade and received a diploma. (Def.'s Ex. 22 at 2.) Up until the day of his arrest, he was enrolled in courses at Harold Washington College. (Def.'s Ex. 22 at 2; *see also* June 4, 2012 Tr. 9, 26.) Plaintiff testified that he was studying nursing. (June 4, 2012 Tr. 9–10.)

238. Plaintiff met Solebo in the Fall of 2003, and the two became friends. (June 4, 2012 Tr. 9, 25.) Plaintiff and Solebo were friends for about one year before they began to date; they dated for approximately one year before they married in a civil ceremony on October 4, 2005. (June 4, 2012 Tr. 2, 9, 25.) At the time of their marriage, Plaintiff was 20 years old and Solebo was 22 years old. (June 4, 2012 Tr. 9.) Plaintiff described the day as a very happy day for her because she was marrying her best friend. (June 4, 2012 Tr. 2.) Plaintiff explained that Solebo was her best friend because he genuinely wanted the best for her. (June 4, 2012 Tr. 11.) Solebo listened to her and gave her unbiased opinions and she "just genuinely trusted any and everything that he said." (June 4, 2012 Tr. 11.)

239. Prior to their marriage, they lived separate and apart from one another. (June 4, 2012 Tr. 10.) After they married, they shared an apartment with Solebo's mother. (June 4, 2012 Tr. 10, 25–26.) Prior to their marriage, Solebo worked with his mother in home health care for two months. (June 4, 2012 Tr. 26.) Other than this job, Plaintiff testified that she was not aware of any other paid employment positions that Solebo had held. (June 4, 2012 Tr. 26.) Plaintiff also testified that Solebo's mother paid the rent on the apartment that all three shared and that Solebo's mother supported him financially. (June 4, 2012 Tr. 26.)

***54** 240. While they were newlywed, between October 2005 and January 2006, Plaintiff testified that she and Solebo were "happy, living together, still getting to know one another in a married sense, living with one another." (June 4, 2012 Tr. 10–11.) She described their relationship as follows: "Excellent. I loved him. We loved each other. I think it was a pretty good relationship." (June 4, 2012 Tr. 11.) During this time period, she and Solebo spent time together by going out to eat, going to the movies or the park, or taking walks. (June 4, 2012 Tr. 11.) Plaintiff and Solebo discussed having children, which they both wanted to do. (June 4, 2012 Tr. 11.) Solebo wanted to have at least five children. (June 4, 2012 Tr. 11.)

241. On cross-examination, Plaintiff testified that less than a month into her marriage, on November 2, 2005, when she was 20 years old, she called the Chicago Police Department to the apartment she shared with Solebo after they had a fight. (June 4, 2012 Tr. 29, 35 .) Plaintiff told the responding police officer that Solebo had punched her in me face, and Solebo was arrested that day. (June 4, 2012 Tr. 29.) As a result of this incident, Plaintiff signed a criminal complaint [FN9] charging Solebo with domestic battery. (June 4, 2012 Tr. 29–31; Def.'s Ex. 6, Misdemeanor Compl. at 668.) Plaintiff's signature appears under a sentence that reads, "The complainant, being first duly sworn on oath, deposes and says that he/she read the foregoing complaint by him/her subscribed and that the same is true." (Def.'s Ex. 6, Misdemeanor Compl. at 668.) At trial, however, Plaintiff testified that Solebo did not in fact punch her in the face and that she had lied to the responding police officer on the day of the incident. (June 4, 2012 Tr. 31.) On redirect examination, Plaintiff testified that she and Solebo were watching television when they got into an argument and he broke her phone. (June 4, 2012

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Tr. 34.) Plaintiff called the police to retaliate against him. (June 4, 2012 Tr. 34.) Plaintiff acknowledged that she had made a mistake, but testified that it was the only way she knew to get back at Solebo at the time because she was "young" and "stupid." (June 4, 2012 Tr. 34.) Plaintiff also testified that Solebo never struck her. (June 4, 2012 Tr. 34.) After the incident, they got Plaintiff a new phone and made up, and the incident was forgotten. (June 4, 2012 Tr. 35.)

> FN9. Although the Court admitted the criminal complaint that was signed by Plaintiff into evidence, it excluded the arrest report. (June 4, 2012 Tr. 39.)

242. At the end of November 2005, Plaintiff began to live with her father on a part-time basis. (June 4, 2012 Tr. 32.) According to Plaintiff, she stayed with her father or other family members after she was married for convenience or safety's sake, but it did not have anything to do with her relationship with Solebo. (June 4, 2012 Tr. 35.) Plaintiff testified that there was nothing unusual with her staying at her father's once in a while. (June 4, 2012 Tr. 36.)

243. Plaintiff and Solebo were living together at the time of Solebo's arrest. (June 4, 2012 Tr. 12.) Plaintiff testified that Solebo did not take any prescription medications at any point in time during which she knew him. (June 4, 2012 Tr. 12.) Plaintiff also testified that during their marriage and before Solebo's arrest. Solebo did not have any health issues or problems, nor was he under the care of any doctor, to her knowledge. (June 4, 2012 Tr. 12.)

***55** 244. Solebo was arrested on January 25, 2006, during an undercover investigation in which he delivered heroin to an undercover officer. (Stip. Ex., Arrest and Interview of Habib Solebo 01/25/06 at 7; Damages Hr'g Stip. ¶¶ 3–4; Def.'s Ex. 18, Photos 6, 9.) At the time of his death, Solebo was awaiting trial on charges of conspiracy to distribute and to possess heroin, distribution of heroin, and possession with intent to distribute and distribution of heroin. (Def.'s Ex. 8, Indictment at 1–3, *United States v. Solebo and Mustapher,* No. 06 CR 61 (N.D.Ill. Feb. 23, 2006).) Plaintiff testified that she did not realize Solebo was dealing in heroin before he was arrested and that she was surprised about the basis for his arrest. (June 4, 2012 Tr. 33.)

245. On March 1, 2006, Special Agent Robert Nicodemus lodged an Immigration Detainer–Notice of Action ("Detainer") with the MCC. (Def.'s Ex. 2 at 469.) The Detainer notified the MCC that the Immigration and Naturalization Service ("INS") had initiated an investigation to determine whether Solebo was subject to removal from the United States. (*Id.*) The Detainer required that the MCC detain Solebo for 48 hours to allow adequate time for the INS to assume custody over him. (*Id.*) The INS requested that the MCC notify the Department of Homeland Security of Solebo's release in advance or in the event of his death or transfer to another institution. (*Id.*)

246. Shortly after Solebo was arrested, Plaintiff learned that she was pregnant. (June 4, 2012 Tr. 12.) Plaintiff told Solebo that she was pregnant, and they were both happy with this news. (June 4, 2012 Tr. 13.) Plaintiff testified that there was never any doubt that she would have the baby and continue her marriage with Solebo. (June 4, 2012 Tr. 12.)

247. Plaintiff testified that she visited Solebo in prison every available visiting day that she could make during the length of his incarceration. (June 4, 2012 Tr. 13–14.) At Kankakee, visits were every other week, so Plaintiff saw Solebo every two weeks. (June 4, 2012 Tr. 14.) The main topic of conversation during their visits was her pregnancy. (June 4, 2012 Tr. 14.) While Solebo was incarcerated at Kankakee, Plaintiff spoke to Solebo on the telephone if not every day, then every other day. (June 4, 2012 Tr. 14.)

248. After Solebo was transferred to the MCC, Plaintiff visited him every visiting day she could and spoke to Solebo on the telephone if not every

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day, then every other day. (June 4, 2012 Tr. 15.) At the MCC, visits occurred every week, but every other week there were two visiting days. (June 4, 2012 Tr. 15.) Plaintiff did not visit if she was sick due to her pregnancy and she did not visit immediately after Jadesola's birth. (June 4, 2012 Tr. 15.) Solebo met Jadesola within a week of her birth and was very happy to see her. (June 4, 2012 Tr. 16.) Over the following months, Plaintiff and Jadesola continued to visit Solebo. (June 4, 2012 Tr. 16.)

***56** 249. Solebo selected their daughter's name, Jadesola, which means with blessings. (June 4, 2012 Tr. 16–17.) Plaintiff testified that Solebo selected that name because he felt he was very blessed to have his first daughter. (June 4, 2012 Tr. 17.) Plaintiff spoke to Solebo right after giving birth and before completing their daughter's birth certificate. (June 4, 2012 Tr. 16.) Their daughter's middle name, Yurianna, is derived from Solebo's middle name, which is Olayuri. (June 4, 2012 Tr. 16.) Solebo did not have any other children, to Plaintiff's knowledge. (June 4, 2012 Tr. 17.) During the first few months of Jadesola's life, Plaintiff took her daughter to visit Solebo every visiting day that Plaintiff herself could make. (June 4, 2012 Tr. 17.) When Plaintiff could not make a visit, Solebo's mother took Jadesola to visit Solebo. (June 4, 2012 Tr. 17.)

250. On May 1, 2007, the MCC Warden told Plaintiff over the phone that Solebo had died. (June 4, 2012 Tr. 17.) Jadesola was six months old at the time of Solebo's death. (June 4, 2012 Tr. 18.) At the time of Solebo's death, Plaintiff was not employed and was living with Solebo's mother. (June 4, 2012 Tr. 18.)

251. When asked to describe how Solebo's death has affected her, Plaintiff testified that she sometimes feels like a failure and like she has been cheated. (June 4, 2012 Tr. 18.) On some days, Plaintiff feels as if she can make it through and that everything is going to be okay, but on other days, she cannot get out of bed and function. (June 4, 2012 Tr. 18.) Plaintiff also testified that she has a hard time dealing with people because she feels like anybody can be taken away from her. (June 4, 2012 Tr. 18.) Plaintiff always thought that she would have a long marriage with children, and in her words, "to have that taken away is just-it's hard to face every day." (June 4, 2012 Tr. 18.) Plaintiff did not intend to be a single parent when she married Solebo. (June 4, 2012 Tr. 18.)

252. After Solebo passed away, Plaintiff could not look at her daughter for a period of time "[b]ecause she looked so much like him that it was almost like looking at a ghost every day." (June 4, 2012 Tr. 21.) Plaintiff testified that it was hard for her to deal with emotionally. (June 4, 2012 Tr. 21–22.) At times, she could not look at her daughter, could not hold her, and could not do anything for her because she looked like him. (June 4, 2012 Tr. 21–22.) Plaintiff relied heavily on the help of her mother as well as Solebo's mother during this time. (June 4, 2012 Tr. 22.)

253. According to Plaintiff, it took about two years for her to feel like her life was getting back to normal. (June 4, 2012 Tr. 22 .) On cross-examination, Plaintiff testified that she saw a psychiatrist to treat her emotional distress at the Erie Family Health Facility. (June 4, 2012 Tr. 27.) Although she was prescribed medication, she refused it. (June 4, 2012 Tr. 27.) At her deposition, however, Plaintiff testified that she had not sought medical treatment for depression, that she had not seen a psychiatrist because of the lengthy waiting period, and that she had not been prescribed any medications. (June 4, 2012 Tr. 27–28.)

***57** 254. Plaintiff testified that she has explained to her daughter that her father is in heaven. (June 4, 2012 Tr. 22.) Her daughter talks to her father every night when she says her prayers. (June 4, 2012 Tr. 22.) Plaintiff testified that her daughter does not remember visiting her father, but that she talks about it with her so much that her daughter minks she remembers. (June 4, 2012 Tr. 23.) Her daughter is inquisitive and asks Plaintiff questions about her father such as whether he is going to

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come back from heaven, how they met, how long they lived together, and how long she was in Plaintiff's stomach before Solebo passed away. (June 4, 2012 Tr. 23 .) Her daughter wants to know everything about her father. (June 4, 2012 Tr. 23.) Plaintiff testified that her daughter is barely beginning to grasp her father's death, as evidenced by the questions she asks, such as why her dad cannot pick her up from school or why he cannot come down from heaven to join the family for holidays. (June 4, 2012 Tr. 23.)

255. Plaintiff maintains a close relationship with Solebo's mother and intends to continue doing so. (June 4, 2012 Tr. 24–25.) Plaintiff's daughter has a close relationship with Plaintiff's parents and Solebo's mother. (June 4, 2012 Tr. 24.) For example, Plaintiff's parents and Solebo's mother attended Jadesola's recent graduation. (June 4, 2012 Tr. 24.)

256. At the time of trial, Plaintiff was employed full-time as a Customer Account Executive at a call center for Comcast. (June 4, 2012 Tr. 6–7.) Plaintiff did not have any plans to remarry at the time of trial and she plans to continue working. (June 4, 2012 Tr. 25.) Plaintiff also testified that no one currently lives with her and her daughter. (June 4, 2012 Tr. 25.) Plaintiff testified that her daughter, Jadesola, lives with her, that she takes care of her, and that Jadesola is about to begin Kindergarten. (June 4, 2012 Tr. 6.)

257. Dr. Holtzman testified that the survival rate of patients newly diagnosed with seizure disorder, such as Solebo, is lower as compared to people who do not have seizures. (Trial Tr. 256.) As those patients live longer, however, their mortality rate is approximately the same as people who do not have seizures. (Trial Tr. 256.) Dr. Holtzman testified, to a reasonable degree of medical certainty, that Solebo's life expectancy was approximately 48 years. (Trial Tr. 256.) In Dr. Holtzman's opinion, Solebo was in good health and he did not suffer from sustained hypertension. (Trial Tr. 287.)

258. Dr. Curlin also testified as to life expectancy. Dr. Curlin testified that Solebo's life expectancy would be significantly lower than the average person his age. (Trial Tr. 653.) The first basis for Dr. Curlin's opinion was the fact that Solebo had HCM, which carries with it an increased risk of death, (Trial Tr. 653), and which over time progresses to congestive heart failure and eventually to end-stage heart failure, (Trial Tr. 653). The second basis for Dr. Curlin's opinion was that Solebo was morbidly obese, which is associated with an increased risk of death between two and twelve times that of the normal population. (Trial Tr. 653.) Dr. Curlin also opined that Solebo had a history of smoking. (Trial Tr. 653.) Assuming that Solebo had seizure disorder, Dr. Curlin testified that Solebo would not be able to reduce his susceptibility to SUDEP by taking epileptic drugs. (Trial Tr. 654.)

***58** 259. Finally, photographs were admitted and received into evidence including a photograph of Solebo and Plaintiff eating out at a dinner, and a photograph of them with their family members on their wedding day. (Pl.'s Ex. P.) Photographs of their daughter at about six months of age, age three, and age five were also admitted and received into evidence. (June 4, 2012 Tr. 19–21; Pl.'s Ex. Z.)

CONCLUSIONS OF LAW

I. Legal Standards

1. Plaintiff brings this action against the United States pursuant to the FTCA, 28 U.S.C. §§ 1346(b), 2671 *et seq.* The FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Richards v. United States,* 369 U.S. 1, 6, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962); *accord Midwest Knitting Mills, Inc. v. United States,* 950 F.2d 1295, 1296–97 (7th Cir.1991) (The FTCA "effects a limited waiver of sovereign immunity for the United States."). The FTCA provides a remedy for "personal injury or death caused by the negligent or wrongful act or omission" of Government employ-

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ees while acting within the scope of their employment. 28 U.S.C. § 1346(b)(1). The Act imposes liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Morisch v. United States*, 653 F.3d 522, 530 (7th Cir.2011) (quoting 28 U.S.C. § 1346(b)(1) (internal quotation marks omitted)); *accord Massey v. United States*, 312 F.3d 272, 280 (7th Cir.2002). In other words, "the FTCA incorporates the substantive law of the state where the tortious act or omission occurred." *Midwest Knitting Mills, Inc.*, 950 F.2d at 1297. In this instance, Solebo died while in custody at the MCC, which is located in Chicago, Illinois. Thus, the cause of action arose in Illinois, and Illinois State law governs.

2. As an initial matter, this Court notes that prior to bringing an action pursuant to the FTCA, a plaintiff must have exhausted her administrative remedies. Specifically, a plaintiff "shall have first presented the claim to the appropriate Federal agency and [the plaintiff's] claim shall have been finally denied by the agency in writing ...." 28 U.S.C. § 2675(a). The Federal agency's failure "to make final disposition of a claim within six months after it is filed" is considered a final denial of the claim. *Id* . Prior to filing her suit, Plaintiff filed a Claim for Damage, Injury, or Death with the MCC. (R. 101, Fifth Am. Compl. ¶ 22.) It is undisputed that the MCC failed to make a final disposition of Plaintiff's claim within six months, and therefore its failure is deemed a final denial of her claim. *See* 28 U.S.C. § 2675. Accordingly, Plaintiff exhausted her administrative remedies as required by the FTCA.

3. Plaintiff contends that Solebo's death was caused by the negligent and wrongful acts and omissions of the MCC's physicians, staff, supervisors, employees, agents and apparent agents, including but not limited to Dr. Hoffman. (R. 1, Fifth Am. Compl. at 2–8.) Plaintiff further contends that if the United States were a private person it would be liable under the Illinois Wrongful Death Act for Solebo's death because of the negligent acts of the MCC's employees, and it is therefore liable under the FTCA. (*Id.* at 1–2, 10–11.)

***59** 4. The Illinois Wrongful Death Act provides a cause of action, "[w]henever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." 740 Ill. Comp. Stat. 180/1; *Williams v. Manchester*, 228 Ill.2d 404, 320 Ill.Dec. 784, 888 N.E.2d 1, 10 (Ill.2008) ("An injury resulting from the wrongful act, neglect, or default of another gives the victim, if she survives the injury, a right of action; if the victim dies, the [Wrongful Death] Act transfers the right of action to the victim's personal representative."). "A wrongful death action covers the time after death and addresses the injury suffered by the next of kin due to the loss of the deceased rather than the injuries personally suffered by the deceased prior to death." *Wyness v. Armstrong World Indus., Inc.*, 131 Ill.2d 403, 137 Ill.Dec. 623, 546 N.E.2d 568, 571 (Ill.1989). The action allows a surviving spouse and the next of kin "to recover damages for their own loss based on the wrongful actions of another," and "is premised on the deceased's potential, at the time of death, to initiate an action for injury." *Id.* at 571 –72, 137 Ill.Dec. 623, 546 N.E.2d 568 (citing *Biddy v. Blue Bird Air Serv.*, 374 Ill. 506, 30 N.E.2d 14, 18 (Ill.1940); *Mooney v. City of Chi.*, 239 Ill. 414, 88 N.E. 194, 196 (Ill.1909)); *see also Carter v. SSC Odin Operating Co.*, 364 Ill.Dec. 66, 976 N.E.2d 344, 354 (Ill.2012) (noting that a wrongful death action is brought for the benefit of the surviving spouse and next of kin who are the true parties in interest). Because the "action is derived from the decedent's cause of action, and is limited to what the decedent's cause of action against the defendant would have been had the decedent lived," the Illinois Supreme Court has said that the Illinois Wrongful Death Act "incorporates into the statutory right of action the familiar concepts of tort liability,—negligence, contributory

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negligence, and the like." *Williams*, 320 Ill.Dec. 784, 888 N.E.2d at 12 (quoting *Welch v. Davis*, 410 Ill. 130, 101 N.E.2d 547, 548 (Ill.1951)) (internal quotation marks omitted). Here, Plaintiff bases her wrongful death action on the alleged medical negligence of the MCC personnel in caring for Solebo. (R. 101, Fifth Am. Compl. at 2–8.) In addition, Plaintiff's complaint contains allegations of negligence based on the failure to counsel Solebo about the risks of not taking medication that he was prescribed. (R. 101, Fifth Am. Compl. at 5.)

5. Under Illinois law, to prevail in a medical negligence case,[FN10] a plaintiff must establish (1) the proper standard of care against which a physician's conduct is measured, (2) a negligent failure to comply with the applicable standard of care, and (3) a resulting injury proximately caused by the physician's lack of skill or care. *Sullivan v. Edward Hosp.*, 209 Ill.2d 100, 282 Ill.Dec. 348, 806 N.E.2d 645, 653 (Ill.2004) (identifying elements of "a negligence medical malpractice case"); *Neade v. Portes*, 193 Ill.2d 433, 250 Ill.Dec. 733, 739 N.E.2d 496, 502 (Ill.2000) (listing elements of an "action for medical negligence"); *Purtill v. Hess*, 111 Ill.2d 229, 95 Ill.Dec. 305, 489 N.E.2d 867, 872 (Ill.1986) (same). Generally, the plaintiff bears the burden of proving all three elements through the testimony of medical experts. *Wilbourn v. Cavalenes*, 398 Ill.App.3d 837, 338 Ill.Dec. 77, 923 N.E.2d 937, 949 (Ill.App.Ct. 1st Dist.2010); *Bergman v. Kelsey*, 375 Ill.App.3d 612, 313 Ill.Dec. 862, 873 N.E.2d 486, 500 (Ill.App.Ct. 1st Dist.2007) ("A plaintiff must generally prove the elements of a medical negligence cause of action through medical expert testimony.") (citing *Knauerhaze v. Nelson*, 361 Ill.App.3d 538, 296 Ill.Dec. 889, 836 N.E.2d 640, 652 (Ill.App.Ct. 1st Dist.2005)); *cf. Purtill*, 95 Ill.Dec. 305, 489 N.E.2d at 872 ("Unless the physician's negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert medical testimony is required to establish the standard of care and the defendant physician's deviation from that standard."); *see also Wipf v. Kowalski*, 519 F.3d 380, 384 (7th Cir.2008) ("Generally, these elements must be established through expert testimony."). The Seventh Circuit has held that Illinois' rule that a plaintiff must present expert testimony to establish medical negligence is not a procedural rule governed by the federal law of procedure and evidence, but rather is substantive and is therefore "part of the Illinois law of medical malpractice incorporated into the federal law of [FTCA actions] by 28 U.S.C. §§ 1346(b) and 2674." *Murrey v. United States*, 73 F.3d 1448, 1456 (7th Cir.1996); *accord Gipson v. United States*, 631 F.3d 448, 452 (7th Cir.2011) (discussing the holding in *Murrey*, 73 F.3d at 1456). Thus, Illinois' rule requiring a plaintiff to present expert testimony is binding on this Court,

> FN10. Under Illinois law, medical negligence is the same cause of action as medical malpractice, *Wipf v. Kowalski*, 519 F.3d 380, 384 (7th Cir.2008) (citing *Jinkins v. Evangelical Hosps. Corp.*, 336 Ill.App.3d 377, 270 Ill.Dec. 548, 783 N.E.2d 123, 126–27 (Ill.App.Ct. 1st Dist.2002)).

***60** 6. In a medical negligence action that raises a lack of informed consent, "[t]he elements of the informed consent action parallel those of an ordinary malpractice claim." *Roberts v. Patel*, 620 F.Supp. 323, 325 (N.D.Ill.1985). A plaintiff must establish that the physician had a duty to disclose material risks, that the physician failed to disclose such risks, that as a direct and proximate result of the physician's failure to disclose, the patient consented to treatment she otherwise would not have consented to, and that the plaintiff was injured by the treatment. *Coryell v. Smith*, 274 Ill.App.3d 543, 210 Ill.Dec. 855, 653 N.E.2d 1317, 1319 (Ill.App.Ct.3d Dist.1995) (citing *Roberts*, 620 F.Supp. at 325.) The purpose behind the doctrine of informed consent "is to afford the patient the ability to make an informed, intelligent decision regarding medical treatment he is to receive." *Roberts*, 620 F.Supp. at 325.

7. Plaintiff contends that the MCC committed

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no fewer than seventeen wrongful acts or omissions, including: failing to provide Solebo with proper and adequate medical attention; failing to properly and adequately counsel Solebo about the risks caused by a failure to take his prescribed Dilantin; failing to recognize Solebo's non-therapeutic levels of Dilantin; failing to monitor Solebo's condition; failing to follow MCC policies, procedures, rules, and regulations for administering medication to Solebo; and failing to involuntarily administer Dilantin to Solebo. (R. 101, Fifth Am. Compl. at 5–7.)

8. During closing arguments, the Government argued that there were five reasons why Plaintiff had not met her burden of proof. (Trial Tr. 823–24.) According to the Government, the first issue that negates Plaintiffs claims is whether Solebo had seizure disorder. (*Id.*) The second issue is whether Solebo's death was caused by his seizure disorder; the third issue is whether his failure to take his medications was the reason he died of seizure disorder. (*Id.*) The fourth issue is whether the BOP was responsible for Solebo's failure to take his medication. (*Id.*) And, the fifth issue is whether Solebo is more than 50% at fault and therefore barred from recovery under Illinois' comparative negligence laws. (*Id.*) This Court addresses each issue in turn.

II. Whether Solebo had seizure disorder

9. The parties have presented this Court with a "battle of the experts" on the issue of whether Solebo had seizure disorder. Plaintiff offered the testimony of one expert witness, Dr. Holtzman, who opined that Solebo did suffer from a seizure disorder. (Trial Tr. 225–27.) On the other hand, the Government offered the testimony of two expert witnesses, Dr. Curlin and Dr. Ebersole, who opined that Solebo did not suffer from seizure disorder. (Trial Tr. 572, 735.) In the case of dueling experts, the fact finder must "determine what weight and credibility to give the testimony of each expert and physician." *Gicla v. United States*, 572 F.3d 407, 414 (7th Cir.2009) (affirming district court's factual findings and its credibility assessments where they were well-supported by the record and concluding that the court had not committed an error); *accord Morisch*, 653 F.3d at 529 ("In a case of dueling experts, such as this one, 'it is left to the trier of fact, not the reviewing court, to decide how to weigh the competing expert testimony.' ") (quoting *Wipf*, 519 F.3d at 385; citing *Gicla*, 572 F.3d at 414); *Livermore v. Amax Coal Co.*, 297 F.3d 668, 672 (7th Cir.2002) (where an ALJ gave more weight to the opinions of experts who were more qualified and whose opinions were more specific and well-supported, the ALJ's finding was held to be supported by substantial evidence upon review); *see also Campbell v. United States*, 904 F.2d 1188, 1193 (7th Cir.1990) ("[T]he trier of fact is to determine the weight to be given to the testimony of expert medical witnesses, and [the Seventh circuit] will defer to the credibility assessments made by the trier of fact.") (internal quotation marks omitted) (quoting *Payne v. United States*, 711 F.2d 73, 76 (7th Cir.1983)). This is because the "trial judge is in the best position to judge the credibility of witnesses who offer conflicting testimony." *Morisch*, 653 F.3d at 529 (quoting *Spurgin–Dienst v. United States*, 359 F.3d 451, 453 (7th Cir.2004) (internal quotation marks omitted)).

***61** 10. This Court concludes that all of the evidence and testimony presented at trial establishes that it was more probable than not that Solebo had seizure disorder. In reaching this result this Court finds Dr. Holtzman's testimony to be overwhelmingly credible and credits his expert opinion that Solebo had seizure disorder. Although Dr. Holtzman has not followed a patient throughout the course of his treatment for seizure disorder, he testified that he has treated the continuum of problems presented by seizure disorder patients. Dr. Holtzman's testimony was clear, and he supported his opinions with detailed explanations that were reasonable. This Court also considers Dr. Jones' testimony that Solebo died from seizure disorder. This Court finds her testimony to be fully credible. Although Dr. Jones was not called as an expert wit-

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ness, she was subpoenaed to testify at trial and was therefore the only objective medical witness who testified. In addition, despite this Court's rulings that would have allowed the Government's designated pathologist to testify, (Trial Tr. 614–15), the Government elected not to call its designated pathologist at trial. Thus, Dr. Jones was the only pathologist to testify at trial. On the whole, this Court finds that Dr. Jones was the most credible medical witness, and that Dr. Holtzman was the second most credible medical witness.

11. As a preliminary matter, all three experts agreed that a patient's history, as provided by a patient to a physician, is very important in diagnosing seizure disorder. (Trial Tr. 219–20, 663, 750.) Solebo's medical history indicates that his first seizure occurred on February 17, 2006, and that he was treated in an emergency room for this episode. Following Solebo's visit to the emergency room, Dr. Long examined Solebo and described his assessment at that time as loss of consciousness accompanied with shaking activity. Dr. Long's medical judgment was that Solebo had experienced a seizure as his notes clearly instruct that if Solebo had further seizures, empiric Dilantin should be commenced. Solebo's second seizure occurred on May 24, 2006. Solebo reported to a Kankakee physician assistant that he woke up on the floor and that his cellmate told him that he was shaking. Solebo immediately requested that he be put back on Dilantin. Dr. Holtzman opined, to a reasonable degree of medical certainty, that the February 17 and May 24 episodes at Kankakee were reliable evidence by which a physician could diagnose seizure disorder in Solebo. (Trial Tr. 271–72, 276, 318.)

12. Significantly, the Kankakee medical records document that both episodes were witnessed by Solebo's cellmates. Dr. Holtzman testified that anyone can be an observer, and that for a diagnosis of seizure disorder to be valid, a physician does not need to witness a seizure. Dr. Curlin agreed that everyone is qualified to report what they see. Notably, Dr. Hoffman testified that a primary care doctor generally diagnoses seizure disorder by taking the history from the patient and an observer, or both. (Trial Tr. 443.) Dr. Hoffman also testified that it absolutely does not have to be a physician who witnesses a seizure, (Trial Tr. 442–43), which is entirely consistent with Dr. Holtzman's testimony. Again, this Court finds Dr. Holtzman's testimony overwhelmingly credible.

***62** 13. By contrast, Dr. Ebersole testified that a physician can only diagnose seizure disorder if the physician witnesses the episode. When pressed on this testimony, Dr. Ebersole was adamant that even where a licensed nurse observes a person having multiple seizures, such observations are not enough for a physician to conclude that the person has seizure disorder. This testimony is incredible and contrary to Dr. Holtzman's testimony, which this Court fully credits, and also contrary to Dr. Hoffman's testimony who attested to the fact that it absolutely does not have to be a physician who witnesses a patient having a seizure in order to diagnose a patient with seizure disorder. (Trial Tr. 442–43.) In Dr. Ebersole's view, unless there is a long-term EEG that records a seizure or a physician or appropriately trained nurse is able to witness seizures in a person, there can be no valid diagnosis of seizure disorder. This testimony is simply not worthy of credence. Accordingly, this Court discredits Dr. Ebersole's testimony as to how to diagnose seizure disorder.

14. Between May 2006 and April 2007, Solebo took Dilantin and during that time, he did not have another seizure. As Dr. Jones noted, Solebo's seizure-like activity was not occurring when he was taking Dilantin and was in the therapeutic range. In late April 2007, Solebo missed successive doses of Dilantin. Dr. Jones' testimony was unequivocal that, in light of her findings at autopsy, Solebo had a third and fatal seizure on May 1, 2007. (Trial Tr. 383.) Solebo's autopsy showed that he had a bite mark on the left tip of his tongue, cerebral anoxia, and cerebral edema, all of which are consistent with having a fatal seizure. On cross-examination, Dr.

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Jones's testimony was unshaken; she testified that the anoxic changes and cerebral edema she found in Solebo's brain are more likely to occur in a true seizure than in a seizure-like episode that is precipitated by a cardiac arrhythmia. Because Solebo experienced two or more unprovoked seizures 24 hours apart, this Court concludes that Solebo had seizure disorder.

15. This Court finds the testimony of Dr. Curlin and Dr. Ebersole incredible and unreliable as both of them were significantly impeached during trial. Dr. Curlin's testimony is unreliable for a number of reasons. On cross-examination, Dr. Curlin testified that once a person has two episodes that a physician "ha [s] a *reasonable degree of certainty were seizures*, then it is appropriate to start treating for a seizure disorder." (Trial Tr. 664) (emphasis added). Dr. Curlin also testified that it was reasonable for the Kankakee physicians to treat Solebo for a possible seizure disorder. Nevertheless, Dr. Curlin was not willing to concede that Solebo had two documented seizures at Kankakee. Dr. Curlin's testimony is contradictory. If it was reasonable for the Kankakee physicians to treat Solebo for seizure disorder, they must had a reasonable degree of certainty that Solebo's two episodes were indeed seizures and not merely "possible seizures."

***63** 16. Dr. Curlin also testified that after Solebo was transferred to the MCC, the MCC Physicians did not have a basis on which to diagnose Solebo with seizure disorder because "all they had was his report that ... he had a seizure disorder, and they knew he was taking Dilantin." (Trial Tr. 583.) Although Dr. Curlin's testimony that the MCC Physicians did not have Solebo's Kankakee medical records is technically accurate, it overlooks the fact that not a single MCC employee made any attempt to obtain Solebo's Kankakee medical records, which could have been useful in definitively diagnosing Solebo with seizure disorder while he was at the MCC. Dr. Curlin's testimony on this point also discounts the fact that when Solebo presented to the MCC, he was taking Dilantin, an anti-seizure medication requiring a prescription and not merely an over-the-counter drug like Tylenol. As Dr. Nowakowski testified, she had never written a prescription for a controlled substance, such as Dilantin, when it was not medically necessary for a patient. (Trial Tr. 526.) Dr. Curlin's statement is also at odds with his testimony that a patient's history, as provided by the patient, is very important to the patient's diagnosis. (Trial Tr. 663.)

17. In addition, there is a significant fit problem that exists with regard to both of the Government's experts, but more so with Dr. Curlin. Dr. Curlin is a general internal medicine practitioner whose area of expertise is in medical ethics and hospice issues and not in the treatment of seizure disorders. Despite the fact that he is neither a cardiologist or pathologist, and despite his limited training in treating and diagnosing HCM, Dr. Curlin offered his speculative and unreliable opinion that Solebo died of HCM. He offered this opinion despite the fact that nothing in Solebo's medical records mentioned anything about a heart-related illness. In Dr. Curlin's own words, the basis for his opinion as to cause of death was simply, "it's the math," (Trial Tr. 684), because the statistical studies he relied upon reflect that HCM poses a higher risk of death than SUDEP. While this Court understands Dr. Curlin's testimony about the statistical studies, this Court ultimately looks at what happened to Solebo on the basis of the evidence in the record and the expert testimony. This Court concludes that Solebo was on the outer edges of a bell curve because he was a person who suffered from seizure disorder who also happened to have cardiomegaly, and his death was ultimately caused by the rare combination of seizure disorder and his cardiomegaly.

18. Dr. Ebersole's testimony is not credible because of his failure to appropriately consider Solebo's medical history and because, as discussed above, his standards for making a valid diagnosis of epilepsy or seizure disorder are incredible. Ultimately, his testimony begins from the premise that

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Solebo did not have seizure disorder. In addition, Dr. Ebersole's testimony as to cause of death was contrary to what he said at his deposition, and he was therefore the victim of a critical impeachment on cross-examination. When asked at his deposition whether he was able to provide an opinion on Solebo's cause of death, to a reasonable degree of medical certainty, Dr. Ebersole answered unequivocally, "no." FN11 (Trial Tr. 754–55.) Although the Government tried to rehabilitate Dr. Ebersole on redirect examination, this Court finds that this is a classic impeachment, which leaves Dr. Ebersole's trial testimony with fundamental problems.

> FN11. Dr. Ebersole's deposition testimony, as read into the trial transcript, reads as follows:
>
> > Question: So you are—so are you able to tell me to a reasonable degree of medical certainty more probably true than not true what Mr. Solebo's cause of death actually was?
> >
> > Answer: No.
> >
> > (Trial Tr. 754–55.)

***64** 19. Finally, this Court asked Dr. Ebersole whether it was appropriate to interpret Solebo's medical records as demonstrating that Solebo's seizures were controlled when he was on Dilantin, but when he stopped taking Dilantin he experienced seizures; and ultimately in April 2007, when Solebo failed to take Dilantin for four continuous days, he subsequently died on May 1. (Trial Tr. 762 .) Dr. Ebersole testified that if he thought Solebo had seizure disorder, then such a reading of the medical records was "right on." (Trial Tr. 762.) Nonetheless, Dr. Ebersole testified that he did not believe that Solebo had seizure disorder and that it was simply coincidental that after four days of not taking his medication, Solebo's heart condition suddenly presented itself on May 1, and that just happened to be the day that Solebo died. (Trial Tr. 763.) This testimony is incredible because once this Court credits Dr. Holtzman's and Dr. Jones' testimonies, all the evidence in the record establishes by a preponderance of the evidence that Solebo had seizure disorder.

III. Whether the MCC was negligent in treating Solebo's seizure disorder

A. Standard of Care

20. Having concluded that Solebo suffered from seizure disorder, this Court turns to the standard of care for treating seizure disorder.[FN12] In medical negligence cases, "the standard of care is the relevant inquiry by which we judge a physician's actions." *Neade,* 250 Ill.Dec. 733, 739 N.E.2d at 502. To establish the standard of care required in a particular set of circumstances, a plaintiff must present expert medical testimony unless the physician's negligence is grossly apparent or the treatment lies within the common knowledge of a layperson. *Purtill,* 95 Ill.Dec. 305, 489 N.E.2d at 872; *accord Hardnick v. United States,* No. 07 C 1330, 2009 WL 1810106, at *7 (N.D.Ill. July 1, 2009) (Dow, J.). Under a standard of care analysis, a defendant physician "will be held to 'the reasonable skill which a physician in good standing in the community would use in a similar case.' " *Neade,* 250 Ill.Dec. 733, 739 N.E.2d at 502 (quoting *Newell v. Corres,* 125 Ill.App.3d 1087, 81 Ill.Dec. 283, 466 N.E.2d 1085, 1094 (Ill.1984)); *accord Purtill,* 95 Ill.Dec. 305, 489 N.E.2d at 872 (stating that the standard of care against which a defendant's conduct is measured is "that degree of knowledge, skill, and care which a reasonably well-qualified physician in the same or similar community would bring to a similar case under similar circumstances"). "If a physician deviates from the standard of care and that deviation proximately causes injury to a patient, the physician is liable for damages caused by his medical negligence." *Neade,* 250 Ill.Dec. 733, 739 N.E.2d at 502; *accord Hardnick,* 2009 WL 1810106, at *7 ("To prevail, a medical malpractice plaintiff must show that the doctor failed to do something that a reasonably careful physician would do, or did something that a reason-

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ably careful physician would not have done, under circumstances similar to those shown by the evidence in the case.").

> FN12. Were this an ordinary negligence case, as opposed to a medical negligence case, 18 U.S.C. § 4042 would establish a statutory duty of care owed by the MCC to Solebo. *United States v. Muniz*, 347 U.S. 150, 165 (1963) ("[T]he duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule."); *Parrott v. United States*, 536 F.3d 629, 637 (7th Cir.2008) ("[Section] 4042 describes a duty of care for persons in federal custody.") Under § 4402, the BOP has the duty, *inter alia*, to "provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise; [and] ... the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2)-(3).

***65** 21. When testifying physicians present only conflicting opinions as to what the correct technique should have been, "the Illinois Supreme Court has held that 'the plaintiff has failed to present sufficient evidence of a standard of care in the medical community to submit the case to the [trier of fact].' " *Donais v. United States*, 232 F.3d 595, 599–600 (7th Cir.2000) (citing *Walski v. Tiesenga*, 72 Ill.2d 249, 21 Ill.Dec. 201, 381 N.E.2d 279, 285 (Ill.1978)) (affirming judgment for defendant and concluding that "[b]ecause of the uncertainty of both expert witnesses in determining the applicable standard of care, [plaintiff] failed to establish a prima facie case"). "It is insufficient for plaintiff to establish a *prima facie* case merely to present testimony of another physician that he would have acted differently from the defendant, since medicine is not an exact science." *Walski*, 21 Ill.Dec. 201, 381 N.E.2d at 285 (affirming directed verdict for defendants where plaintiff's medical expert only testified that he would have acted differently and failed to testify that there was a generally accepted medical standard of care that defendant failed to follow).

22. Furthermore, to establish the standard of care in a medical negligence action that raises the issue of lack of informed consent, a plaintiff must establish that prior to administering medical treatment, the physician should have informed the patient of the "diagnosis, the general nature of the contemplated procedure, the risks involved, the prospects of success, the prognosis if the procedure is not performed and alternative medical treatment." *Coryell*, 210 Ill.Dec. 855, 653 N.E.2d at 1321 (quoting *Roberts*, 620 F.Supp. at 325) (internal quotation marks omitted).

23. Here, again, the parties have presented this Court with a "battle of the experts." In the case of dueling experts, the fact finder must "determine what weight and credibility to give the testimony of each expert and physician." *Gicla*, 572 F.3d at 414; *see also Campbell*, 904 F.2d at 1192 ("[T]he trier of fact is to determine the weight to be given to the testimony of expert medical witnesses, and [the Seventh Circuit] will defer to the credibility assessments made by the trier of fact." (quoting *Payne*, 711 F.2d at 76) (internal quotation marks omitted)). On the whole, this Court finds Dr. Holtzman's testimony to be the most reliable, except for his testimony that the MCC Physicians should have forcibly or involuntarily administered Dilantin to Solebo. On the latter point, this Court finds that Dr. Curlin's testimony on whether a physician should force medication is credible.

24. Based on a review of the expert testimony and the evidence in this case, this Court concludes that the standard of care for treating Solebo's seizure disorder required MCC medical personnel, including the Physicians and physician assistants, to examine Solebo on a monthly basis. As Dr. Holtzman explained, shortly after arriving at the

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MCC in October 2006, Solebo's care level at the MCC was elevated from a Care Level 1 to a Care Level 3, signifying that Solebo required care for an unstable, complex, and chronic condition and required examinations on a daily to monthly basis. Dr. Holtzman's testimony is not simply testimony that he would have acted differently than MCC medical personnel, nor is it inconsistent with the testimony of Dr. Curlin, who testified that the frequency of visits could range from once a month to once every six months, and conceded that the appropriate frequency of visits is highly variable.

***66** 25. The standard of care also required MCC medical personnel, including the Physicians and physician assistants, to review Solebo's medical records, including his MARs. The standard of care further required MCC medical personnel, including the Physicians and physician assistants, to draw Solebo's blood for the purpose of monitoring the level of anti-seizure medication in his blood and to obtain the corresponding laboratory results. Dr. Holtzman's testimony on these points was not disputed.

26. Most importantly, the standard of care required MCC medical personnel, including the Physicians and physician assistants, to inform Solebo about the risks and benefits of taking and not taking Dilantin and to counsel Solebo about his medication. It is axiomatic that "[b]efore one can make a reasoned decision regarding medication, it is first necessary to be informed about the risks and benefits of the proposed course of medication." *In re Christopher P.*, 342 Ill.App.3d 336, 276 Ill.Dec. 970, 795 N.E.2d 323, (Ill.App.Ct. 5th Dist.2003) (quoting *In re Edward*, 298 Ill.App.3d 162, 232 Ill.Dec. 348, 698 N.E.2d 186, 188 (Ill.App.Ct.2d Dist.1998) (internal quotation marks omitted)). Both Dr. Holtzman and Dr. Curlin testified about the concept of informed consent and the need to counsel a patient when he stops taking his prescribed medication. Informed consent requires a physician to meet with a patient and inform him about the realistic risks associated with not taking his medication. Indeed, even Dr. Curlin testified that a physician should provide patients with the information they need to understand the benefits of the medication they are prescribed, the purpose for which the medication is being prescribed, the risks involved in taking the medication, and that the patient is free to say yes or no. Because seizure disorder carries with it a risk of injury and death, a physician should also inform a patient who is taking anti-epileptic medication about these risks. Here, the standard of care required MCC medical personnel, including the Physicians and physician assistants, to meet with Solebo, ask him why he was not taking his medication and inform him of the realistic risks associated with not taking his prescribed Dilantin. Those risks included the risk of future seizures, which in turn carry with them a risk of great bodily injury and death. Thus, the standard of care required MCC medical personnel to inform Solebo that if he did not take his anti-seizure medication, he could be injured or he could die. Finally, the standard of care also required MCC medical personnel to inquire into the reasons that Solebo stopped taking his medication.

B. Breach of the standard of care

27. Once the standard of care has been established, a plaintiff must then show that, "judged in the light of these standards, the doctor was unskillful or negligent and that his want of skill or care caused the injury to the plaintiff." *Walski*, 21 Ill.Dec. 201, 381 N.E.2d at 282 (citing *Borowski v. Von Solbrig*, 60 Ill.2d 418, 328 N.E.2d 301, 305 (1975)). To establish that a physician breached the standard of care, the plaintiff must show, through expert testimony, that an injury occurred and that such an injury "does not ordinarily occur in the normal course of events without negligence." *Lawrence v. Rubio*, 85 Ill.App.3d 472, 40 Ill.Dec. 743, 406 N.E.2d 946, 951 (Ill.App.Ct. 5th Dist.1980) (citing *Sanders v. Frost*, 112 Ill.App.2d 234, 251 N.E.2d 105, 107 (Ill.App.Ct. 5th Dist.1969)). "Mere proof that the defendant doctor made a mistake or that his treatment harmed plaintiff is no evidence of lack of skill or negli-

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gence." *Id.* (citing *Sanders*, 251 N.E.2d at 107); *Gray v. United States*, No. 08–cv–116–JPG, 2010 WL 1540117, at * 3 (N.D.Ill. Apr.11, 2010) ("[I]t is not enough to show that the physician made a mistake or that the plaintiff suffered harm because of the physician's mistake.") (citing *Lawrence*, 40 Ill.Dec. 743, 406 N.E.2d at 951). The question of whether a physician deviated from the standard of care is a fact-specific inquiry in which case law provides little guidance. *Liebig–Grigsby v. United States*, No. 00 C 4922, 2003 WL 1090272, at * 11 (N.D.Ill. Mar.11, 2003); *Borowski*, 328 N.E.2d at 305.

***67** 28. Based on a review of the expert testimony and the evidence in this case, this Court concludes that the MCC breached the appropriate standard of care for treating Solebo's seizure disorder. Again, the standard of care required MCC medical personnel, including the MCC Physicians and physician assistants, to examine Solebo on a monthly basis. As Dr. Hoitzman testified, however, such evaluations were not conducted, and the MCC therefore breached the standard of care. (Trial Tr. 245–46.) When Solebo first presented to the MCC, Physician Assistant Aruiza ordered that Solebo be seen in the Neurology CCC for his seizure disorder by September 18, 2006. Nevertheless, the first time Solebo was seen in the Neurology CCC was over three months after he initially arrived at the MCC, on November 30, 2006. Solebo's last visit to the Neurology CCC was in February 2007. The record is clear that although Dr. Nowakowski was the Acting Clinical Director and the only physician on the MCC's premises after mid-March 2007, she never saw or examined Solebo and she never rendered any medical treatment to Solebo. (Trial Tr. 484). Had Solebo been examined, Dr. Hoitzman testified that the MCC Physicians could have spoken to him to find out whether he was taking his medication and why he was not taking his medication on a consistent basis. (Trial Tr. 244–46.) The MCC Physicians failed to do so, however, and they were therefore not aware that Solebo was not compliant with his medication.

29. The standard of care also required MCC medical personnel to review Solebo's medical records. The evidence is clear that the MCC personnel failed to make any efforts to retrieve Solebo's Kankakee medical records while they were treating Solebo. These records are absolutely vital. Solebo presented to the MCC with a history of seizure disorder and a prescription for Dilantin, an anti-seizure medication. Yet the MCC Physicians and physician assistants who treated Solebo failed to submit a request for these records. *See Hardnick*, 2009 WL 1810106, at * 10 (concluding that where the standard of care required a reasonably careful physician to undertake a more careful assessment than typical during the decedent's examination, the physician deviated from the standard of care in failing to attempt to access decedent's readily available medical records from prior emergency room visit). Instead, the MCC medical personnel simply continued Solebo's prescription for Dilantin, and in fact, Dr. Hoffman later increased the dosage that Solebo was prescribed. If Dr. Hoffman had any suspicions about Solebo's medical history, he could have easily requested the Kankakee medical records from Kankakee; yet he did not attempt to do so.

30. The evidence is also undisputed that the MCC Physicians were derelict in their duty to review the medical records they actually possessed, specifically the MARs, and to then meet with Solebo in light of the information they derived from those MARs. Although the MARs were kept on the medication cart during the month and were available for the MCC Physicians to review, they consistently failed to do so. An MCC Physician never reviewed Solebo's MARs for December 2006, January 2007, and February 2007. While Dr. Nowakowski eventually reviewed the MAR from March 2007, she did so several weeks after Solebo had a period in which he missed multiple doses of his medication. Most importantly, an MCC Physician never reviewed the critical MAR for April 2007. Because Dr. Nowakowski failed to review Solebo's April 2007 MAR, she was never aware, prior to Solebo's death, that Solebo had missed

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nearly half of his doses of Dilantin in April 2007. Furthermore, no one informed Dr. Nowakowski that Solebo had missed multiple doses of his medication despite the fact that the Physicians were supposed to conduct daily meetings twice a day to discuss matters such as an inmate missing his medication. Dr. Nowakowski did not recall having any discussions with the physician assistants or any other MCC personnel about Solebo missing his medication in February 2007, March 2007, or April 2007. Similarly, Dr. Hoffman did not recall having such discussions in February 2007. Had Dr. Nowakowski known that Solebo was not taking his medication, she then should have consulted Solebo about the risks and benefits of taking and not taking his medication. Dr. Holtzman testified that a reasonable physician would consult a patient about the risks of not taking his anti-seizure medication because the risk of not taking the medication could be fatal. (Trial Tr. 248–49.) Dr. Holtzman opined that not only did Solebo not receive a proper consultation by the MCC Physicians or staff, including the MCC physician assistants, about the risks and benefits of taking Dilantin, he simply never had such a consultation. (Trial Tr. 327.)

***68** 31. Furthermore, there was a complete disregard of the MCC's written policies. Despite internal policies dictating that inmates were supposed to sign Refusal Forms when refusing medication, which in turn were supposed to be placed in their medical charts, Dr. Nowakowski admitted at trial that the Refusal Forms were not used for medication refusal. Nor were the incident report forms used when an inmate refused to report to the pill line, as the A & O Handbook warned new inmates. Had the Refusal Forms been completed, there would have been a record in Solebo's medical chart documenting his missed medication on a day-to-day basis. And, as Dr. Nowakowski admitted at trial, had the Refusal Forms or incident reports been included in the inmates' medical charts, it would have been easy to track whether a patient missed his medications.

32. The standard of care also required the MCC personnel to monitor the Dilantin level in Solebo's blood by obtaining blood draws and following up on the corresponding laboratory results. The MCC breached the standard of care when it failed to obtain the laboratory results of Solebo's blood draw from February 1, 2007. (Trial Tr. 247.) On December 26, 2006, Dr. Hoffman ordered that Solebo's Dilantin levels be monitored via blood draws. Although Dr. Hoffman ordered this laboratory test, a blood draw pursuant to Dr. Hoffman's order was never performed. In December 2006, Dr. Nowakowski also ordered a laboratory test, and a blood draw to fulfill this order was obtained on February 1, 2007. Unfortunately, the blood sample was placed in the wrong type of tube prior to being shipped to the Rochester Lab. The Rochester Lab informed the MCC of the problem with the blood specimen via the February 3 Report; however, an MCC Physician never saw the February 3 Report prior to Solebo's death because it had been placed in a file cabinet, rather than in Solebo's medical chart. Although Dr. Hoffman met with Solebo in the Neurology CCC on February 12, 2007, and was **aware that** the MCC had not yet received the laboratory results for Solebo's February 1, 2007 blood draw, he did not follow up to try to obtain the laboratory results nor attempt to order a STAT lab. Indeed, no one at the MCC made any effort to ascertain the status of the results of that blood draw. Thus, as Dr. Holtzman pointed out, the last Dilantin level that the MCC medical personnel obtained for Solebo was from December 2006, when his level was 11 <<mu>>/ml. (Trial Tr. 247.) Dr. Holtzman testified that a Dilantin level obtained by a blood draw between December 2006 and May 1, 2007, would have revealed whether or not Solebo's Dilantin level was therapeutic and, most importantly, whether he was compliant with his medication in case the doctors were not reviewing the MARs. (Trial Tr. 248.)

33. Dr. Holtzman testified, to a reasonable degree of medical certainty, that Solebo's Dilantin level became subtherapeutic in April 2007 because

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of Solebo's failure to take his Dilantin. (Trial Tr. 253–54.) According to Dr. Holtzman, had a blood draw been taken in April that revealed a subtherapeutic or zero <<mu>>/ml level of Dilantin, the standard of care required the MCC Physicians to counsel Solebo about why his levels were zero <<mu>>/ml and to institute treatment urgently. (Trial Tr. 254.) Thus, MCC medical personnel, including the Physicians and physician assistants, breached the standard of care in obtaining blood draws from Solebo and following up on the corresponding laboratory results in order to monitor his Dilantin level.

***69** 34. Finally, the standard of care also required the MCC Physicians to talk to Solebo about his medication, to ask him why he was not taking his medication, and to counsel him about his noncompliance. (Trial Tr. 243–46.) This Court concludes that the MCC breached the standard of care in treating Solebo's seizure disorder by failing to inform Solebo of the risks associated with his failure to take his anti-seizure medication. There is absolutely no evidence that anyone at the MCC had any discussions with Solebo during critical time periods to inform him of the importance of taking his medication and the risks he was taking by not doing so. In short, the MCC personnel simply failed to disclose to Solebo any risks associated with failing to take his Dilantin. Dr. Holtzman pointed out that no one ever counseled Solebo to ask him why he was starting to miss more doses of his medication, (Trial Tr. 248), and that there are no records of any sort of discussion that the MCC personnel had with Solebo regarding the risks or benefits of taking his medication, (Trial Tr. 325). After Solebo's visit with Dr. Hoffman on February 12, 2007, Solebo was never counseled and there were no other scheduled visits with Solebo. It is undisputed that Dr. Hoffman and Dr. Nowakowski were not physically present at the MCC during critical time periods in April 2007, and thus a physician was not available to speak with Solebo. Dr. Hoffman did not make himself available over the telephone while he was out; while Dr. Nowakowski testified that she made herself available by telephone, there is no testimony in the record that anyone at the MCC ever called her to inform her that Solebo was not taking his Dilantin. And, as Dr. Nowakowski conceded, nothing in Solebo's medical charts in March 2007, April 2007, or on May 1, 2007 documented any discussions with Solebo regarding taking his medication. (Trial Tr. 519–20.) Indeed, Dr. Nowakowski did not recall having any discussions with Solebo in February, March, or April 2007 regarding the importance of taking his medication. (Trial Tr. 519.) Nor did she recall any discussions with the physician assistants, or with anyone who worked on the pill line, regarding Solebo missing doses of medication in February, March, or April 2007. (Trial Tr. 519–20.)

35. As Dr. Holtzman testified, through monthly examinations, a review of Solebo's medical records, and through the blood draws, the MCC personnel knew or should have known that Solebo was becoming nontherapeutic in terms of his Dilantin intake. (Trial Tr. 248.) All of these failures were negligent—not mere mistakes—and they ultimately led to Solebo's fatal seizure on May 1, 2007.

C. Proximate cause

36. This Court must next inquire into whether the Government's breaches of the standard of care proximately caused the injury for which Plaintiff seeks damages. In Illinois, proximate cause is defined as "a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury." Ill. Pattern Jury Instr. Civ. 15.01. Under Illinois law, the question of whether a physician's conduct was a proximate cause of the plaintiff's injuries is a question of fact for the trier of fact to decide. *Campbell*, 904 F.2d at 1193 (citing *Borowski*, 328 N.E.2d at 305; *Kaplan v. Berger*, 184 Ill.App.3d 224, 132 Ill.Dec. 461, 539 N.E.2d 1267, 1273 (Ill.App.Ct.2d Dist.1989)). "[O]nly rarely are the facts so clear that the court can resolve the issue as a matter of law." *Palay v.*

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United States, 349 F.3d 418, 432–33 (7th Cir.2003) (citing *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 615 (7th Cir.2002); *First Springfield Bank & Trust v. Galman,* 188 Ill.2d 252, 242 Ill.Dec. 113, 720 N.E.2d 1068, 1071 (Ill.1999); *Felty v. New Berlin Transit, Inc.*, 71 Ill.2d 126, 15 Ill.Dec. 768, 374 N.E.2d 203, 205 (Ill.1978)). Proximate cause "must be established by expert testimony to a reasonable degree of medical certainty, and the causal connection must not be contingent, speculative, or merely possible." *Morisch,* 653 F.3d at 531 (quoting *Johnson v. Loyola Univ. Med. Ctr.*, 384 Ill.App.3d 115, 323 Ill.Dec. 253, 893 N.E.2d 267, 272 (Ill.App.Ct. 1st Dist.2008) (internal quotation marks omitted)); *see also Walton v. Dirkes,* 388 Ill.App.3d 58, 327 Ill.Dec. 921, 903 N.E.2d 18, 20 (Ill.App.Ct. 1st Dist.2009). Proximate cause is not established where the "the injury would have occurred even in the absence of that act [or] omission." *Hardnick,* 2009 WL 1810106, at * 11 (citing *Campbell,* 904 F.2d at 1193–94). Rather, "[a] plaintiff must establish that it is more probably true than not true that the defendant's negligence was a proximate cause of the injury." *Johnson,* 323 Ill.Dec. 253, 893 N.E.2d at 272 (citing *Borowski,* 328 N.E.2d at 305); *see also Hardnick,* 2009 WL 1810106, at * 11 ("Plaintiff must show by a preponderance of the evidence that Defendant's failure to comply with the applicable standard of care caused or contributed to the injury giving rise to Plaintiff's cause of action.") (citing *Wise v. St. Mary's Hosp.*, 64 Ill.App.3d 587, 21 Ill.Dec. 482, 381 N.E.2d 809, 811–12 (Ill.App.Ct. 5th Dist. Dist.1978); *Kasongo v. United States,* 523 F.Supp.2d 759, 802 (N.D.Ill.2007) (defining causation inquiry as whether "the defendant's breach of the applicable standard of care more probably than not caused [the plaintiff's] injury")).

***70** 37. To establish proximate cause, the plaintiff must show cause in fact and legal cause. *Bergman,* 313 Ill.Dec. 862, 873 N.E.2d at 500 (citing *Hooper v. Cnty. of Cook,* 366 Ill.App.3d 1, 303 Ill.Dec. 476, 851 N.E.2d 663 (Ill.2006)); *see also Palay,* 349 F.3d at 432 ("Under Illinois law, proximate cause consists of two elements: cause in fact and legal cause.") (citing *Evans v. Shannon,* 201 Ill.2d 424, 267 Ill.Dec. 533, 776 N.E.2d 1184, 1190 (Ill.2002)). The Illinois Supreme Court has stated that "[c]lause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage." *Evans,* 267 Ill.Dec. 533, 776 N.E.2d at 1190 (quoting *Galman,* 242 Ill.Dec. 113, 720 N.E.2d at 1072) (internal quotation marks omitted). If a defendant's negligent conduct "is a material element and a substantial factor in bringing about the injury," then cause in fact is established. *Id.* Further, "a defendant's conduct is a material element and a substantial factor in bringing about an injury if, absent that conduct, the injury would not have occurred." *Id.* Thus, in deciding whether cause in fact exists, this Court must first ask "whether the injury would have occurred absent the defendant's conduct.' " *City of Chi. v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099, 1127 (Ill.2004) (citing *Lee v. Chi. Transit Authority,* 152 Ill.2d 432, 178 Ill.Dec. 699, 605 N.E.2d 493, 502–03 (Ill.1992)). When multiple factors may have combined to cause the injury, the inquiry remains the same, and this Court asks "whether the defendant's conduct was a material element and a substantial factor in bringing about the injury." *Id.* (citing *Lee,* 178 Ill.Dec. 699, 605 N.E.2d at 503). Furthermore, cause in fact may be established through a "lost chance" or "loss of chance" theory whereby the defendant's negligent conduct "deprived the plaintiff of a chance to survive or recover from a health problem, or where the malpractice has lessened the effectiveness of the treatment or increased the risk of an unfavorable outcome to the plaintiff." *Holston v. Mem'l Hosp.*, 176 Ill.2d 95, 223 Ill.Dec. 429, 679 N.E.2d 1202, 1209 (Ill.1997); *Scardina v. Nam,* 333 Ill.App.3d 260, 266 Ill.Dec. 454, 775 N.E.2d 16, 24 (Ill.App.Ct. 1st Dist.2002) (noting that the loss of chance "doctrine is not a separate theory of recovery but, rather, a concept that factors into the proximate cause analysis"); *Lambie v. Schneider,* 305 Ill.App.3d 421, 239 Ill.Dec. 72, 713 N.E.2d 603, 609 (Ill.App.Ct. 4th Dist.1999) ("While the 'lost

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chance' doctrine eliminates a problem of demonstrating 'cause in fact,' it does not eliminate the requirement that the plaintiff prove defendant's conduct was the legal cause of his injury.") (citing *Holston*, 223 Ill.Dec. 429, 679 N.E.2d at 1213).

38. Legal cause, by contrast, "presents a question of foreseeability." *Bergman*, 313 Ill.Dec. 862, 873 N.E.2d at 500; *Palay*, 349 F.3d at 432. To establish legal cause, a plaintiff must demonstrate that "an injury was foreseeable as the type of harm that a reasonable person would expect to see as a likely result of his or her conduct." *Bergman*, 313 Ill.Dec. 862, 873 N.E.2d at 500 (citing *Knauerhaze*, 296 Ill.Dec. 889, 836 N.E.2d at 651–52); *Morisch*, 653 F.3d at 531. "Under Illinois law, so long as the defendant could have foreseen that his negligence would result in some type of injury, the precise nature or method of injury need not have been foreseeable." *Palay*, 349 F.3d at 434 (citing *Enis v. Ba–Call Bldg. Corp.*, 639 F.2d 359, 362 (7th Cir.1980); *Neering v. Ill. Central R.R. Co.*, 383 Ill. 366, 50 N.E.2d 497, 503 (Ill.1943); *Colonial Inn Motor Lodge, Inc. v. Gay*, 288 Ill.App.3d 32, 223 Ill.Dec. 674, 680 N.E.2d 407, 413 (Ill.App.Ct.2d Dist.1997)).

***71** 39. Furthermore, to establish proximate cause in a medical negligence action that raises the issue of lack of informed consent, expert testimony is not required. *See Coryell*, 210 Ill.Dec. 855, 653 N.E.2d at 1321 ("[W]hat is required to prove the element of proximate causation in an action based upon a physician's failure to disclose differs significantly from what is required to prove that same element in an 'ordinary' malpractice action."); *but see Mansmith v. Hameeduddin*, 369 Ill.App.3d 417, 307 Ill.Dec. 741, 860 N.E.2d 395, 411 (Ill.App.Ct. 1st Dist.2006) (disagreeing with statement in *Coryell* that a plaintiff in an informed consent case is not required to present expert testimony to establish proximate cause). Instead, in assessing whether proximate cause exists, Illinois courts employ an objective standard, i.e., what a prudent person in the plaintiff's position would have decided if the plaintiff had been adequately informed. *Taylor v. Cnty. of Cook*, 354 Ill.Dec. 97, 957 N.E.2d 413, 433 (Ill.App.Ct. 1st Dist.2011); *Smith v. Marvin*, 377 Ill.App.3d 562, 317 Ill.Dec. 31, 880 N.E.2d 1023, 1031 (Ill.App.Ct.3d Dist.2008); *Guebard v. Jabaay*, 117 Ill.App.3d 1, 72 Ill.Dec. 498, 452 N.E.2d 751, 757 (Ill.App.Ct.2d Dist.1983); *see also Coryell*, 210 Ill.Dec. 855, 653 N.E.2d at 1320 (noting that the appropriate question is: "Would a reasonably prudent person in the plaintiff's position, after being properly informed, have nonetheless proceeded with the proposed treatment?"). Whether "any alleged undisclosed information would have altered the plaintiff's decision to undergo the proposed treatment had it been disclosed" is a question of fact for the trier of fact to determine. *Coryell*, 210 Ill.Dec. 855, 653 N.E.2d at 1321; *Smith*, 317 Ill.Dec. 31, 880 N.E.2d at 1031; *see also Guebard*, 72 Ill.Dec. 498, 452 N.E.2d at 758 (If disclosure would have caused a reasonable person in the position of the patient to refuse the medical treatment, then a causal connection is shown.).

40. This Court concludes that as a result of the MCC personnel's failures and breaches of the standard of care in treating Solebo's seizure disorder, the MCC personnel proximately caused Solebo's injury and death on May 1, 2007. Dr. Holtzman opined, to a reasonable degree of medical certainty, that Solebo had a fatal seizure because the MCC, through its employees, failed to provide him with timely and adequate medical care for his seizure disorder.

41. Dr. Holtzman's testimony establishes that the MCC's failures were substantial factors in bringing about Solebo's fatal seizure on May 1, 2007. As Dr. Holtzman explained, the MCC personnel should have known that Solebo's Dilantin level was becoming nontherapeutic through monthly examinations, a review of his medical records, and regular blood draws. As a result of the MCC personnel's failure to adhere to the standard of care, however, they were simply unaware that Solebo was not compliant with taking his anti-

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seizure medication and that his Dilantin level was therefore approaching a nontherapeutic level. Dr. Holtzman also testified that Solebo was definitely subtherapeutic at the end of April, and a blood draw conducted around that time would have revealed this. Because the MCC Physicians did not know that Solebo was noncompliant, however, it was impossible for them to counsel Solebo about the importance of taking his medication or about the risks of failing to do so—they therefore failed to counsel him. Dr. Holtzman further opined, on the basis of his review of the records in this case, that Solebo would have taken his anti-seizure medication had he received appropriate counseling. Furthermore, Dr. Holtzman opined that Solebo's failure to take his medication increased his risk of death from a seizure, and had Solebo received his medication during the last few days of April, he would not have died from a fatal seizure on May 1, 2007. Dr. Holtzman's testimony establishes that the MCC's failures were substantial factors in bringing about Solebo's fatal seizure. Dr. Holtzman's testimony also establishes that it was foreseeable to the MCC personnel that a patient who was not taking his medication was more likely to have a seizure than a patient who was taking his anti-seizure medication. As Dr. Holtzman explained, anti-seizure medication like Dilantin substantially reduces a person's risk of having a seizure and of dying from a seizure.

***72** 42. In sum, Dr. Holtzman's testimony that the MCC personnel's negligent failures lessened the effectiveness of Solebo's treatment for seizure disorder and increased his risk of harm sufficiently establishes a causal connection to establish proximate cause. Illinois courts have held similar expert testimony sufficient to establish proximate cause in past medical negligence cases. For example, in *Walton*, 327 Ill.Dec. 921, 903 N.E.2d at 26–27, the plaintiff's expert testified that the defendant's failure to order a blood count test resulted in a delayed diagnosis of leukemia and lessened the effectiveness of the treatment the decedent received. The plaintiff's expert further testified that had a complete blood count been performed, the blood count would have been abnormal, and that upon the finding of an abnormal blood count, he would have received specific treatments that would have prolonged the decedent's life. *Id.* at 23–24. The *Walton* court found that the expert testimony regarding how a diagnosis and treatment would have resulted from a complete blood count provided a sufficient causal connection to establish proximate cause. *Id.* at 27. Similarly, in *Johnson v. Loyola University Medical Center*, 323 Ill.Dec. 253, 893 N.E.2d at 268–69, the decedent was transported to a hospital where he was initially monitored after he suffered a cardiac arrest. A few days later, the decedent was moved to a floor where he was not subject to continuous monitoring, and he subsequently suffered a second cardiac arrest that caused irreversible brain damage; he subsequently died. *Id.* An Illinois appellate court reversed the trial court's grant of judgment notwithstanding the verdict to the defendants where the plaintiff's expert presented testimony that the defendants' failure to monitor the decedent was the proximate cause of his injuries. *Id.* at 272. Specifically, the plaintiff's expert had testified that with adequate monitoring, hospital staff would have intervened earlier than they did, and had they done so the decedent would not have suffered the irreversible brain damage that ultimately led to his death. *Id.* at 272–73. In addition, in *Liebig–Grigsby v. United States*, No. 00 C 4922, 2003 WL 1090272, at *13 (N.D.Ill. Mar.11, 2003), a medical negligence case brought under the FTCA, the court applied the lost chance doctrine and found that the plaintiff had established proximate cause where the plaintiff's physicians "failed to comprehensively treat and assess [the plaintiff's] condition" and as a result failed to consider the appropriate treatment. In *Liebig–Grigsby*, 2003 WL 1090272, at *13, had the physicians met the standard of care they would have advised the plaintiff to have a surgery that would have given plaintiff a good chance of avoiding her paralysis. Similarly, here, had the MCC personnel complied with the standard of care, they

would have been able to counsel Solebo about taking his medication; because they were not even

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aware that Solebo was not taking his medication as prescribed, however, it was impossible for them to counsel Solebo. Therefore, this Court finds that Dr. Holtzman's testimony establishes that it was more probably true than not true that the MCC personnel's negligent failure to consult Solebo after February 2007, to obtain the results of a blood draw, and to appropriately monitor whether Solebo was taking the prescribed medication to treat his seizure disorder lessened the effectiveness of the medical treatment Solebo received and increased his risk of harm.

***73** 43. During closing arguments, the Government argued that it is a fallacy to say that because two things are temporally related, there is a cause-and-effect relationship between them. (Trial Tr. 837.) The Government argued that Solebo's death on May 1, 2007, was simply coincidental with his failure to take his Dilantin as prescribed. (Trial Tr. 838–39.) Contrary to the Government's argument, this Court has not merely relied on the temporal sequence of events to reach its proximate cause finding. As both Dr. Holtzman and Dr. Jones testified, the evidence demonstrates that when Solebo was actually taking his medication, he stopped seizing. In fact, Dr. Curlin conceded on cross-examination that if Solebo had seizure disorder, then not taking his medication in March and April of 2007 could have contributed to him having another seizure. (Trial Tr. 671.) Furthermore, Illinois courts have found that where an expert testifies that mere is a causal connection between two events because of their temporal proximity, such testimony is sufficient to establish proximate cause. In *Wartalski v. JSB Construction*, 384 Ill.App.3d 139, 322 Ill.Dec. 875, 892 N.E.2d 122, 129 (Ill.App.Ct. 1st Dist.2008), an Illinois appellate court specifically recognized that contrary to the defendant's assertions in that case, "a temporal relationship is, in fact, an acceptable basis for an expert's opinion." *See also Valiulis v. Scheffels*, 191 Ill.App.3d 775, 138 Ill.Dec. 668, 547 N.E.2d 1289, 1294, 1298 (Ill.App.Ct.2d Dist.1989) (where the plaintiff's expert testified that there was causal relationship between the trauma the plaintiff endured and the onset of his multiple sclerosis ("MS") symptoms "because of the close proximity in time" between the events, such "testimony was sufficient evidence that the negligence of [the defendant] was the proximate cause of [the plaintiff's] MS."); *but see Hussung v. Patel*, 369 Ill.App.3d 924, 308 Ill.Dec. 347, 861 N.E.2d 678, 685–86 (Ill.App.Ct.2d Dist.2007) (finding that there was no factual basis to support an expert physician's conclusions where the plaintiff's treating physicians testified that the relationship between an injection and the plaintiff's subsequent onset of symptoms was speculative). Here, Dr. Holtzman testified, to a reasonable degree of medical certainty, that Solebo's failure to take his medication between April 27 and April 30 increased his risk of death and that if Solebo had received his medication on those dates, he would not have died on May 1. As *Wartalski* and *Valiulis* instruct, such evidence is sufficient to support a finding of proximate cause.

44. Furthermore, while the evidence establishes that Solebo's seizure disorder combined with his cardiomegaly to cause his death, Illinois courts recognize that an injury may have multiple causes. For instance, in *Chambers v. Rush–Presbyterian St. Luke's*, 155 Ill.App.3d 458, 108 Ill.Dec. 265, 508 N.E.2d 426, 430 (Ill.App.Ct. 1st Dist.1987), the appellate court there recognized that "[i]t is fundamental law that in negligence cases, there may be more man one proximate cause of injury and that one is liable for its negligent conduct whether it contributed in whole or in part to the injury as long as proximate cause exists." In *Chambers*, 108 Ill.Dec. 265, 508 N.E.2d at 431, the medical experts disagreed as to whether the decedent's coma or his cancer caused his death. The plaintiff's expert testified that the defendants' negligence was a proximate cause of the decedent's death and that if the decedent's cancer has been treated earlier, he would have had a good chance of recovering. *Id.* at 431. Under these circumstances, the court held that the trial court properly denied the defendant's motion for a judgment notwithstanding the verdict. *Id.*

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Thus, although Solebo died as a result of both his seizure disorder and his cardiomegaly, Dr. Holtzman's testimony that the MCC personnel's negligence was a proximate cause of Solebo's fatal seizure is sufficient to sustain the Plaintiff's burden of proof on proximate cause.

***74** 45. Where a case involves a lack of informed consent, this Court reiterates that expert testimony is not required to establish proximate cause. *See Coryell,* 210 Ill.Dec. 855, 653 N.E.2d at 1321. Rather, the inquiry is whether a reasonably prudent person in the same position would have altered his decision about the proposed treatment. *Taylor,* 354 Ill.Dec. 97, 957 N.E.2d at 433. Here, this Court finds that a prudent person in Solebo's position would have resumed taking his anti-seizure medication after being fully informed of the risks of not taking that medication. Again, as Dr. Holtzman testified, the risk of not taking one's anti-seizure medication increased the risk of having a seizure, which carries with it a risk of great bodily injury or death. The evidence that Solebo would have complied with taking his medication as prescribed after receiving counseling is conclusively found in the Kankakee records. These records demonstrate that Solebo suffered a second seizure after he stopped taking his medication, and on his own accord he then requested that his Dilantin be resumed. Specifically, Solebo wrote, "I was previously on Dilantin medication and was taken off prescription and believe I may have suffered a seizure because of discontinuation of Dilantin. I want to be put back on the medication Dilantin." (Jt. Ex. 3 at 58.) The evidence establishes that Solebo mistakenly and naively believed that because he was not suffering any seizures, he would remain seizure-free. Unfortunately for Solebo and his family, that is not what occurred.

46. In sum, Plaintiff has presented expert testimony that establishes, to a reasonable degree of medical certainty, that it is more probably true than not true that the MCC's negligence was a proximate cause of Solebo's fatal seizure on May 1, 2007.

IV. Comparative negligence

47. Traditionally, under the doctrine of contributory negligence, a plaintiff was barred from recovering for his injuries in a negligence action if any degree of his negligence contributed to the accident. *Alvis v. Ribar,* 85 Ill.2d 1, 52 Ill.Dec. 23, 421 N.E.2d 886, 887–88 (Ill.1981), abrogated by Ill.Rev.Stat.1991, ch. 110, par. 2–116 (now 735 Ill. Comp. Stat. 5/2–1116), as recognized in *Burke v. 12 Rothschild's Liquor Mart, Inc.,* 148 Ill.2d 429, 170 Ill.Dec. 633, 593 N.E.2d 522, 527 (Ill.1992); *Coney v. J.L . G. Indus., Inc.,* 97 Ill.2d 104, 73 Ill.Dec. 337, 454 N.E.2d 197, 200 (Ill.1983). In response to the unfairness of that doctrine, the Illinois Supreme Court adopted the doctrine of pure comparative negligence in *Alvis,* 52 Ill.Dec. 23, 421 N.E.2d at 896–98, and explained that the adoption was demanded by contemporary society because it produced "a more just and socially desirable distribution of loss," *id.* at 893. "The system of pure comparative negligence which [the Illinois Supreme Court] adopted in *Alvis* was intended to apportion damages according to the relative fault of the parties." *Burke,* 170 Ill.Dec. 633, 593 N.E.2d at 527. In 1986, however, the Illinois legislature adopted a modified version of comparative negligence. *Id.* Section 2–1116 of the Illinois Code of Civil Procedure, 735 Ill. Comp. Stat. 5/2–1116(c), bars a plaintiff whose comparative negligence "is more than 50% of the proximate cause of the injury or damage for which recovery is sought" from recovering damages. *Merca v. Rhodes,* 355 Ill.Dec. 642, 960 N.E.2d 85, 95 (Ill.App.Ct. 1st Dist.2011) (citing *Hobart v. Shin,* 185 Ill.2d 283, 235 Ill.Dec. 724, 705 N.E.2d 907, 910 (Ill.1998)). Where a plaintiff's comparative negligence "is not more than 50% of the proximate cause of the injury or damage for which recovery is sought," 735 Ill. Comp. Stat. 5/2–1116(c), a plaintiff is allowed to recover the proportion of damages that are not attributable to her own fault. *Torres v. United States,* 953 F.Supp. 1019, 1025 (N.D.Ill.1997) (applying Illinois law in an FTCA action). "When there is a showing of contributory negligence on behalf of a plaintiff, the trier of fact makes the determination as to the percent-

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age of contributory negligence." *Merca*, 930 N.E.2d at 96 (citing *Johnson v. Colley*, 111 Ill.2d 468, 95 Ill.Dec. 832, 490 N.E.2d 685, 688 (Ill.1986)).

***75** 48. "A plaintiff is contributorily negligent when he or she acts without the degree of care that a reasonably prudent person would have used for his or her own safety under like circumstances and that action is a proximate cause of his or her injuries or death." *Id.* at 96 (citing *Basham v. Hunt*, 332 Ill.App.3d 980, 266 Ill.Dec. 143, 773 N.E.2d 1213, 1225 (Ill.App.Ct. 1st Dist.2002)); *Gill v. Foster*, 157 Ill.2d 304, 193 Ill.Dec. 157, 626 N.E.2d 190, 198 (Ill.1993) ("In order to prove contributory negligence, a defendant must show that the plaintiff failed to exercise that degree of care which a reasonably prudent person would have used for his or her own safety under like circumstances.") (citing *Johnson v. Abbott Labs., Inc.*, 238 Ill.App.3d 898, 179 Ill.Dec. 84, 605 N.E.2d 1098, 1104 (Ill.App.Ct.2d Dist.1992)); *see also Arroyo v. United States*, 656 F.3d 663, 673 (7th Cir.2011) (Posner, J. concurring) ("[C]ontributory or comparative negligence is failure to take the care that the average person in the plaintiff's position would have taken.").

49. Comparative negligence is a proper affirmative defense in a medical malpractice case. *Krklus v. Stanley*, 359 Ill.App.3d 471, 295 Ill.Dec. 746, 833 N.E.2d 952, 961 (Ill.App.Ct. 1st Dist.2005). "Illinois courts have held that comparative negligence applies when the plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm and there is no rule restricting his responsibility for it." *Id.* at 960 (quoting *Malanowski v. Jabamoni*, 332 Ill.App.3d 8, 265 Ill.Dec. 596, 772 N.E.2d 967, 973 (Ill.App.Ct. 1st Dist.2002) (internal quotation marks omitted)). In *Krklus*, defendants introduced evidence that the decedent was negligent in failing to follow his physician's advice to regularly take his blood pressure medication. 295 Ill.Dec. 746, 833 N.E.2d at 961. The decedent's autopsy revealed that the decedent's cause of death was a hemothorax caused by an aortic dissection. *Id.* at 957. Expert testimony established that had the decedent taken his medication, he would not have developed the aortic dissection. *Id.* at 961–62. Under those circumstances, an Illinois appellate court concluded that the decedent's failure to follow his physician's advice to take his medication, coupled with the decedent's act of subsequently misinforming his physician about his compliance, were the types of substantial factors that brought about his harm. *Id.* at 962 (concluding that the trial court did not err in allowing the defendants to introduce evidence in support of their comparative negligence defense or in instructing the jury that it could consider comparative negligence and affirming the jury verdict in favor of the defendants).

50. Here, this Court concludes that Solebo failed to take his medication as prescribed. As in *Krklus*, this inaction was a substantial factor in bringing about his fatal seizure. Thus, because of Solebo's repeated decisions to not take the medication made available to him by the MCC personnel on a daily basis, Solebo's contributory fault under applicable Illinois law is 33%. (*See* R. 117, Order on Comparative Fault at 1.) Because his decisions were not made on an informed basis, however, the Government bears 67% of the responsibility because the actions and inactions of the MCC personnel were a proximate cause of Solebo's tort damages. (*Id.*)

V. Damages

***76** 51. Lastly, this Court turns to the question of damages. Plaintiff seeks a total of $1,650,000.00 in damages. (R. 93, Proposed Pretrial Order, Ex. M, Pretrial Mem. at 3.) In her pretrial order, Plaintiff stated that she "is making a claim for damages for a loss of consortium, money, loss of society, benefits, money, [sic] goods, services and companionship of [Solebo]," in the amount of $550,000.00. (R. 93, Proposed Pretrial Order, Ex. G, Statement of Damages at 1.) Plaintiff stated that she is also making a Wrongful Death claim on behalf of herself and her daughter "for being deprived of large sums of

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money and valuable services which [Solebo] would have performed but for his untimely death, as well as suffering loss of society and companionship, loss of money, services, instruction, superintendence of education, benefits and goods, and grief, sorrow and mental suffering as a result as the death of [Solebo]," in the amount of $1,100,000.00. (*Id.*) Thus, Plaintiff seeks a total award of $1,650,000.00. (*Id.*)

52. During closing arguments in the damages phase of the trial, Plaintiff's counsel clarified that Plaintiff seeks $550,000.00 for herself "for wrongful death, loss of consortium, society and companionship and an award in favor of her daughter of $1.1 million," for a total award of $1,650,000.00 after any reduction by this Court. (June 4, 2012 Tr. 46–48.) In other words, Plaintiff's request of $550,000.00 for loss of consortium is not a request that is separate and independent from her request for damages for wrongful death. This Court treats Plaintiff's clarification as a request to modify the pretrial order. *See Gorlikowski v. Tolbert,* 52 F.3d 1439, 1445 (7th Cir.1995) ("[W]here a party requests that jury instructions be modified to remedy a variance between a pretrial order and their trial presentation, that request is properly treated as a motion to modify the pretrial order ... and the trial court's decision is properly reviewed for an abuse of discretion.") (citing *Santiago v. Lykes Bros. S.S. Co., Inc.,* 986 F.2d 423, 427 (11th Cir.1993) (affirming district court's decision to instruct the jury on a theory that was not mentioned in the pretrial order); *Mankey v. Bennett,* 38 F.3d 353, 359 (7th Cir.1994)).

53. Because the purpose of a pretrial order is to clarify the nature of the dispute at issue and inform the parties of precisely what is in controversy, a pretrial order may be modified "only to prevent manifest injustice." *Gorlikowski,* 52 F.3d at 1444 (quoting Fed.R.Civ.P. 16(e)); *see also Harper v. Albert,* 400 F.3d 1052, 1063 (7th Cir.2005) ("In order for a pretrial order to have any value as a procedural mechanism and to protect against the possibility of either of the parties being taken by surprise at trial, the parties must be held to the issues set forth in that order."). When confronted with such a request, a district court must weigh the possible hardships imposed on the parties and "balance the need for doing justice on the merits between the parties (in spite of errors and oversights of their attorneys) against the need for maintaining orderly and efficient procedural arrangements." *Gorlikowski,* 52 F.3d at 1444 (quoting *Matter of Delagrange,* 820 F.2d 229, 232 (7th Cir.1987)); *see also Ryan v. Ill. Dep't of Children & Family Servs.,* 185 F.3d 751, 763 (7th Cir.1999) (instructing district courts to consider factors such as the (1) prejudice or surprise to the nonmoving party; (2) ability of the party to cure the prejudice; (3) extent of the disruption to the orderly and efficient trial of the case or other cases in the court; and (4) bad faith and willfulness in failing to comply with the pretrial order) (citations omitted).

***77** 54. While "[a] cause of action for loss of consortium is a tort action based on an injury to the personal relationship established by the marriage contract," *Brown v. Metzger,* 118 Ill.App.3d 855, 74 Ill.Dec. 405, 455 N.E.2d 834, 837 (Ill.App.Ct.2d Dist.1983), Illinois law also recognizes toss of consortium as an element of damages under the Wrongful Death Act. *Elliott v. Willis,* 92 Ill.2d 530, 65 Ill.Dec. 852, 442 N.E.2d 163, 168 (1982). Thus, in Illinois, "any loss of consortium action by [a] surviving spouse [does] not exist separate and apart from an action under the Wrongful Death Act, but rather [is an] element[ ] for which damages may be recovered in such an action." *Johnson v. Vill. of Libertyville,* 150 Ill.App.3d 971, 104 Ill.Dec. 211, 502 N.E.2d 474, 477 (Ill.App.Ct.2d Dist.1986), *overruled on other grounds by Mio v. Alberto–Culver Co.,* 306 Ill.App.3d 822, 239 Ill.Dec. 864, 715 N.E.2d 309, 313 (Ill.App.Ct.2d Dist.1999) ; *see also Nielsen v. United States,* No. 94 C 383, 1995 WL 88796, at *2 (N.D.Ill. Mar.1, 1995) ("Illinois law recognizes loss of consortium as an element of damages under the Wrongful Death Act, but not as a separate cause of action in a wrongful

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death case.") (internal citations omitted). Because loss of consortium may be recovered in a wrongful death action, it cannot be said that Defendant has been prejudiced or surprised by Plaintiff's request. Therefore, to prevent manifest injustice, this Court allows Plaintiff to modify the pretrial order and construes her request to mean that she seeks $550,000.00 on behalf of herself and $1,100,000.00 on behalf of her daughter on the basis of her wrongful death action.

55. The purpose of the Illinois Wrongful Death Act is to compensate the surviving spouse and next of kin for the pecuniary losses they may have sustained as a result of the death of the decedent. 740 Ill. Comp. Stat. 180/2 (allowing recovery of damages "for the exclusive benefit of the surviving spouse and next of kin of such deceased person"); *Glenn v. Johnson,* 198 Ill.2d 575, 261 Ill.Dec. 756, 764 N.E.2d 47, 52 (Ill.2002); *Elliott,* 65 Ill.Dec. 852, 442 N.E.2d at 168; *Knierim v. Izzo,* 174 N.E.2d 158, 160 (Ill.1961) (citations omitted). It is intended to provide the surviving spouse and next of kin "the benefits that would have been received from the continued life of the decedent." *Elliott,* 65 Ill.Dec. 852, 442 N.E.2d at 168. The "phrase 'next of kin,' for purposes of the Wrongful Death Act, are those blood relatives of decedent in existence at decedent's death who would take decedent's property if decedent had died intestate." *In re Estate of Finley,* 601 N.E.2d 95, 101 (Ill.1992). Thus, a decedent's child is appropriately considered to be the next of kin in Illinois. *Cf. Step hens v. Trinity Med. Ctr.,* 292 Ill.App.3d 165, 226 Ill.Dec. 300, 685 N.E.2d 403, 404 (Ill.App.Ct.3d Dist.1997) ("The law of this state is well settled that parents are not found to be the next-of-kin under the [Wrongful Death] Act when the decedent is survived by a spouse and children.") In this case, Solebo's next of kin is his daughter. Thus, the persons eligible to recover for Solebo's death under the Wrongful Death Act are Plaintiff as his surviving spouse and their daughter as his next of kin.

***78** 56. Furthermore, the Illinois Supreme Court has stated that where a widow and minor child seek to recover damages under the Wrongful Death Act, "a presumption of pecuniary loss obtains from that relationship, alone." *Hall v. Gillins,* 13 Ill.2d 26, 147 N.E.2d 352, 355 (Ill.1958). While the rebuttable presumption does not necessarily guarantee recovery, it shifts "the burden of coming forward with proof that the damages are minimal or nonexistent onto the party who created the uncertainty surrounding the damages by causing the wrongful death." *Seef v. Sutkus,* 205 Ill.App.3d 312, 150 Ill.Dec. 76, 562 N.E.2d 606, 611 (Ill.App.Ct. 1st Dist.1990). Thus, there is a presumption that Plaintiff and her daughter, as the widow and minor child of Solebo, respectively, have suffered pecuniary losses as a result of his death.

57. In its current form, the Illinois Wrongful Death Act allows the trier of fact to "give such damages as [the trier of fact] shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such [wrongful] death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person." 740 Ill. Comp. Stat. 180/2. Prior to 2007, Illinois courts prohibited wrongful death claimants from recovering damages for grief, sorrow, or mental suffering. *See Watson v. S. Shore Nursing & Rehabilitation Ctr.,* 358 Ill.Dec. 721, 965 N.E.2d 1200, 1208 (Ill.App.Ct. 1st Dist.2012) (in a wrongful death suit where decedent died in 2006, damages for grief and mental anguish resulting from the death were not recoverable); *Turner v. Williams,* 326 Ill.App.3d 541, 260 Ill.Dec. 804, 762 N.E.2d 70, 77 (Ill.App.Ct.2d Dist.2001) (noting that while decedent's sons were "entitled to recover for the pecuniary losses incurred as a result of the death, including money, benefits, goods, services, and society ... those damages do not include grief or mental anguish resulting from the death."); *Seef,* 150 Ill.Dec. 76, 562 N.E.2d at 610 (noting that the term "pecuniary" does not "extend to the grief or mental anguish that family members suffer after a wrongful death"); *Elliott,* 65 Ill.Dec. 852, 442 N.E.2d at 167–68 (distinguishing between damages

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for emotional distress brought on by the decedent's death and damages for the benefits of companionship that a widow would have enjoyed). In 2007, however, the Illinois Legislature amended the Wrongful Death Act to allow recovery for grief, sorrow, and mental suffering of the decedent's lineal next of kin. *See* 2007 Ill. Legis. Serv. P.A. 95–3 (H.B.1798) (West). This amendment only applies to causes of action accruing on or after May 31, 2007. *Id.;* 740, 65 Ill.Dec. 852, 442 N.E.2d 163 Ill. Comp. Stat. 180/2 ("This Amendatory Act of the 95th General Assembly applies to causes of actions accruing on or after its effective date ."). "[I]n an ordinary wrongful death action under the FTCA, the federal rule is that the cause of action accrues upon the date of death." *Warrum v. United States,* 427 F.3d 1048, 1051 (7th Cir.2005) (alterations omitted) (quoting *Fisk v. United States,* 657 F.2d 167, 170 (7th Cir.1981) (internal quotation marks omitted)). Here, Plaintiffs cause of action accrued on May 1, 2007–the date of Solebo's death. Therefore, because her wrongful death action accrued prior to May 31, 2007, neither she nor her daughter may recover damages for their grief, sorrow and mental suffering.

***79** 58. In addition, although Plaintiff seeks to recover for loss of money, benefits, goods, and services as a result of Solebo's death, the evidence presented at trial does not support an award for any economic losses. Plaintiff testified at trial that prior to getting married, Solebo worked with his mother for two months, and she was not aware of any paid employment positions that Solebo had other than that job. Plaintiff also testified that Solebo's mother paid the rent on the apartment the three of them shared. Although Solebo was in school at the time of his arrest, Plaintiff did not present any evidence about the number of credits or courses Solebo had completed towards his nursing degree or about any expected earnings Solebo anticipated upon obtaining his degree. Therefore, this Court focuses its analysis only on whether the evidence supports awards for loss of consortium and society to Plaintiff and her daughter.

59. Plaintiff's request for damages for loss of consortium for herself and damages for loss of society for her daughter are recoverable as "pecuniary losses" in an Illinois Wrongful Death Action. Illinois courts construe the phrase "pecuniary losses" broadly to include loss of companionship, society, and consortium. In *Hall,* the Dlinois Supreme Court recognized the broad scope of the phrase "pecuniary injuries," and stated that "deprivation of support as well as deprivation of the companionship, guidance, advice, love and affection" were included in the definition. 147 N.E.2d at 355. The Illinois Supreme Court found additional support for the broad scope of the phrase "pecuniary injures" in earlier cases holding "that in the case of a child the jury may take into account the loss of instruction and moral, physical and intellectual training brought about by the death of the father." *id.* (citing *Goddard v. Enzler,* 222 Ill. 462, 78 N.E. 805, 809 (Ill.1906); *Ittner Brick Co. v. Ashby,* 198 Ill. 562, 64 N.E. 1109, 1110 (Ill.1902); *Ill. Central R. Co. v. Weldon,* 52 Ill. 290, 294 (Ill.1869)). More recently, in *Elliott,* the Illinois Supreme Court unequivocally stated that pecuniary injuries include loss of consortium for a widowed spouse. 65 Ill.Dec. 852, 442 N.E.2d at 168 (citations omitted).

60. Recognizing that the term "society" eludes precise definition, Illinois courts have looked to the United States Supreme Court's definition of the term for guidance. The Supreme Court defines the term as encompassing " 'a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.' " *Watson,* 358 Ill.Dec. 721, 965 N.E.2d at 1208 (quoting *Sea–Land Servs., Inc. v. Gaudet,* 414 U.S. 573, 584–87, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974)); *see also Hunt v. Chettri,* 158 Ill.App.3d 76, 110 Ill.Dec. 293, 510 N.E.2d 1324, 1326 (Ill.App.Ct. 5th Dist.1990). Illinois courts have used similar terms to define "society," and have stated that it includes loss of the decedent's "companionship, guidance, advice, love, and affec-

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tion." *Williams v. Rush–Presbyterian St. Luke's Med. Ctr.*, 387 Ill.App.3d 77, 326 Ill.Dec. 590, 899 N.E.2d 1241, 1246 (Ill.App.Ct. 1st Dist.2008) (internal quotation marks omitted) (quoting *Bullard v. Barnes*, 102 Ill.2d 505, 82 Ill.Dec. 448, 468 N.E.2d 1228, 1232 (Ill.1984)); *see also Singh v. Air Ill., Inc.*, 165 Ill.App.3d 923, 117 Ill.Dec. 501, 520 N.E.2d 852, 858 (Ill.App.Ct. 1st Dist.1988) (concluding that an instruction defining the term "society" to mean the "mutual benefits that each family member receives from others [ ] continued existence, including love, affection, care, attention, companionship, comfort, guidance and protection" reflected a generally accepted definition of the term for purposes of a wrongful death action) (citing *Bullard*, 82 Ill.Dec. 448, 468 N.E.2d at 1232; *Drake v. Harrison*, 151 Ill.App.3d 1082, 105 Ill.Dec. 66, 503 N.E.2d 1072, 1076 (Ill.App.Ct. 5th Dist.1987)).

***80** 61. Loss of consortium is unique to the marital relationship and encompasses two basic elements of that relationship: "loss of support and loss of society, which includes companionship and sexual intercourse." *Brown v. Metzger*, 104 Ill.2d 30, 83 Ill.Dec. 344, 470 N.E.2d 302, 304 (Ill.1984); *see also Malfeo v. Larson*, 208 Ill.App.3d 418, 153 Ill.Dec. 406, 567 N.E.2d 364, 426 (Ill.App.Ct.1990) ("[C]onsortium includes loss of a spouse's companionship, happiness, and society."); *Brown v. Metzger*, 118 Ill.App.3d 855, 74 Ill.Dec. 405, 455 N.E.2d 834, 836 (Ill.App.Ct.2d Dist.1983) (This loss includes " 'material services, elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity.' ") (quoting *Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881, 891 (Ill.1960)), *aff'd*, 104 Ill.2d 30, 83 Ill.Dec. 344, 470 N.E.2d 302, 306 (Ill.1984); *Blagg v. Ill. F.W.D. Truck & Equip. Co.*, 143 Ill.2d 188, 157 Ill.Dec. 456, 572 N.E.2d 920, 924 (Ill.1991).

62. Although both loss of consortium and loss of society are incapable of being measured with precision and particularity, a trier of fact must nevertheless place a monetary value on these items. *See Elliott*, 65 Ill.Dec. 852, 442 N.E.2d at 168. To ascertain that value, the Seventh Circuit has instructed that a judge should consider damages awards in similar cases. *Arpin v. United States*, 521 F.3d 769, 776 (7th Cir.2008). In *Arpin*, the Seventh Circuit reversed a $7,000,000.00 award for loss of consortium to the decedent's widow and his children in an FTCA action seeking damages pursuant to the Illinois Wrongful Death Act. *Id.* at 777. In reversing the award, the Seventh Circuit stated that the district court should have considered awards in similar cases, both in Illinois and elsewhere. *Id.* at 776. The Seventh Circuit recognized that "the Supreme Court of Illinois does not require or even encourage such comparisons," and that in an FTCA action, "the damages rules of the state whose law governs the substantive issues in the case bind the federal court [because] damages law is substantive law." *Id.* at 776. The *Arpin* court pointed out, however, that "whether or not to permit comparison evidence in determining the amount of damages to award in a particular case is a matter of procedure rather than substance." *Id.* The Seventh Circuit also noted that "[t]he policy of permitting such comparison evidence is based ... on the requirement in [Federal Rule of Civil Procedure] 52(a) that judges explain their reasoning." *Id.* at 776–77. Therefore, Illinois* rule that comparable damages awards should not be considered is not binding on "federal courts even in cases such as this where the rule of decision is given by Illinois law." *Id.* at 777 (citing *Jutzi–Johnson v. United States*, 263 F.3d 753, 759–60 (7th Cir.2001)). Accordingly, this Court reviews damages awards for wrongful death in cases similar to the one at hand. Before discussing the comparable awards, however, this Court addresses the Government's arguments concerning Solebo's alleged crimes and his life expectancy.

A. Solebo's alleged crimes

***81** 63. During closing arguments in the damages phase of the trial, the Government argued that the evidence against Solebo in his criminal case included post-arrest statements made by him in which he acknowledged that he had delivered heroin to a

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confidential informant and testimony from a confidential informant. (June 4, 2012 Tr. 49.) In light of this evidence, the Government believed that Solebo faced a sentencing range from five to ten years, which he would have served in a federal prison that was substantially farther away from Chicago than the MCC. (June 4, 2012 Tr. 49–50.) The Government also believed that after completing his prison term, Solebo would have been removed to Nigeria. (June 4, 2012 Tr. 50.) Finally, the Government asserted that because Solebo was incarcerated at the time of his daughter's birth, he did not have a preexisting relationship with his daughter. (June 4, 2012 Tr. 52.) Therefore, the Government argued that any loss of society is limited by these circumstances. (June 4, 2012 Tr. 52.)

64. While it is undisputed that Solebo was incarcerated at the time of his death, this Court finds it compelling that Solebo was in custody as a pretrial detainee awaiting trial—he was not in custody as a result of being convicted of any crime—and he was therefore presumed innocent. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 403 (1895). "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 452 U.S. 501, 503 (1976). This presumption is not to be taken lightly, and the Supreme Court has long held that "the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf." *Coffin*, 156 U.S. at 460. While the Government would like this Court to believe that Solebo would have been convicted with one hundred percent certainty, this Court declines the Government's invitation to ignore the uncontroverted fact that at the time of his death, Solebo had never been convicted of any crimes and that he was presumed innocent as a matter of law at the time of his death.

65. By mere coincidence, this Court also presided over the trial and heard the Government's evidence in its less than successful criminal prosecution of Solebo's co-defendant, Wasiu Mustapher, who was indicted on the same exact counts as Solebo. Specifically, the Government charged Mustapher with conspiracy to distribute and to possess heroin with intent to distribute (Count I), distribution of heroin (Count II), and possession with intent to distribute and distribution of heroin (Count III). (Def.'s Ex. 8, Indictment at 1–3, *United States v. Solebo and Mustapher*, No. 06 CR 61 (N.D.Ill. Feb. 23, 2006).) Mustapher entered a plea of not guilty to all counts, *United States v. Mustapher*, No. 06 CR 61–2, ECF No. 87 Min. Entry (Jan. 22, 2007) and proceeded to trial. The Government's case against him was heard by a jury in January 2007. *Mustapher*, No. 06 CR 61–2, ECF No. 87 Min. Entry (Jan. 22, 2007); *Mustapher*, No. 06 CR 61–2, ECF No. 92 Min. Entry (Jan. 24, 2007); *Mustapher*, No. 06 CR 61–2, ECF No. 97 Min. Entry (Jan. 26, 2007). At Mustapher's trial, a confidential informant recognized and identified Mustapher as the individual who supplied Solebo with heroin. (Stip. Ex., *United States v. Mustapher*, No. 06 CR 61–2, Excerpt of Trial Tr. 6–7, 19 (Jan. 22, 2007, J. Castillo); Stip. Ex., *United States v. Mustapher*, No. 06 CR 61–2, Excerpt of Trial Tr. 50 (Jan. 24, 2007, J. Castillo)). Nevertheless, the jury returned a split verdict of guilty on Count I, but not guilty on Counts II and III. *Mustapher*, No. 06 CR 61–2, ECF No. 97 Min. Entry (Jan. 26, 2007).

***82** 66. At the close of trial, Mustapher made an oral motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. *Id.* This Court entered the jury verdict and took Mustapher's oral motion for a judgment of acquittal under advisement. *Id.* On February 5, 2007, Mustapher renewed his motion for a judgment of acquittal in writing. *Mustapher*, No. 06 CR 61–2, ECF No. 100 Min. Entry (Feb. 5, 2007). Two days later, Mustapher also moved for a mistrial on Count I. *Mustapher*, No. 06 CR 61–2, ECF No. 101 Min.

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Entry (Feb. 7, 2007). The Government filed its response to each of Mustapher's motions on February 28, 2007, *Mustapher,* No. 06 CR 61–2, ECF No. 104 Government's Resp. (Feb. 28, 2007); *Mustapher,* No. 06 CR 61–2, ECF No. 105 Government's Resp. (Feb. 28, 2007), and this Court then held a hearing on March 29, 2007, on Mustapher's motions, *Mustapher,* No. 06 CR 61–2, ECF No. 111 Min. Entry (Mar. 29, 2007). At the conclusion of the hearing, this Court granted Mustapher's motion for a judgment of acquittal, but stayed the effective date of its ruling until April 3, 2007, to allow the Government an opportunity to appeal. *Id.*

67. The Government elected not to pursue an appeal and on April 3, 2007, this Court entered a judgment of acquittal on Count I and dismissed Count I against Mustapher. *Mustapher,* No. 06 CR 61–2, ECF No. 114 Min. Entry (Apr. 3, 2007). In granting Mustapher's motion for a judgment of acquittal on Count I, this Court determined that the evidence the Government presented at his criminal trial was insufficient to sustain the jury's verdict finding Mustapher guilty of conspiring to distribute and to possess heroin with intent to distribute. *See* Fed.R.Crim.P. 29. In light of the acquittal on all counts of Solebo's co-defendant, there is no certainty that a jury would have found that Solebo was guilty beyond a reasonable doubt on the charges against him had he proceeded to trial.

68. Certainly, the evidence against Solebo was likely stronger than the evidence against Mustapher. Specifically, a confidential informant would have testified that he purchased heroin from Solebo on January 19, 2006, (Stip. Ex., *United States v. Mustapher,* No. 06 CR 61–2, Excerpt of Trial Tr. 74–75 (Jan. 22, 2007, J. Castillo); Damages Hr'g Stip. ¶ 3; Def.'s Ex. 18, Photo 6), and that he also orchestrated an undercover agent's sale of heroin from Solebo on January 25, 2006, (Stip. Ex., *United States v. Mustapher,* No. 06 CR 61–2, Excerpt of Trial Tr. 59–62 (Jan. 24, 2007, J. Castillo); Damages Hr'g Stip. ¶ 4; Def.'s Ex. 18, Photo 9). The confidential informant's testimony at Mustapher's trial was not without holes, however, as he testified under cross-examination that he began to cooperate with the Government in order to obtain a reduced sentence for a crime he had previously committed. (Stip. Ex., *United States v. Mustapher,* No. 06 CR 61–2, Excerpt of Trial Tr. 112–15 (Jan. 24, 2007, J. Castillo).) In fact, at Mustapher's trial, the confidential information agreed that he "had to provide somebody else [i.e., Solebo] to [the Government] or help [the Government] get somebody else who was involved in drug trafficking." (Stip. Ex., *United States v. Mustapher,* No. 06 CR 61–2, Excerpt of Trial Tr. 115–16 (Jan. 24, 2007, J. Castillo).) While this Court hesitates to speculate on what defenses Solebo would or could have brought and whether such defenses would have been successful, the jury's verdict in the case of Solebo's co-defendant suggests that something about the Government's investigation was less than conclusive and caused the jury to question the Government's prosecution against Solebo's co-defendant. Therefore, this Court cannot find that it was more probably true than not true that Solebo would have been convicted of the charges against him.

***83 69. Even if Solebo had been convicted, incarcerated for seven years, and subsequently** deported to Nigeria, as the Government argued during closing arguments, (June 4, 2012 Tr. 50, 52), this Court notes that he would have been about thirty years old when he was released from prison and his daughter would have been about seven years old, which would have very likely left time for Solebo to lead a meaningful life with his wife and daughter. Whether that life was in the United States or in Nigeria—which Plaintiff testified that they had plans to move to (June 4, 2012 Tr. 36)—is not relevant to the loss of consortium and loss of society analyses, as damages for such losses are intended to compensate a widowed spouse and the next of kin for the loss of the decedent's companionship, advice, love, and affection, among other qualities; the relationships between Solebo and his wife and Solebo and his daughter would have continued to exist regardless of whether the family was

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in the United States or Nigeria.

B. Solebo's life expectancy

70. This leads this Court to the question of precisely how long Solebo should have been expected to live despite the fact that he had, as this Court found, both an enlarged heart and seizure disorder. Both Dr. Holtzman and Dr. Curlin testified as to Solebo's life expectancy. Dr. Holtzman testified that Solebo's life expectancy as a result of his seizure disorder was approximately 48 years, meaning that Solebo would have lived for an additional 25 years. In making this estimate, however, Dr. Holtzman did not consider Solebo's enlarged heart and the effects his enlarged heart would have on his life expectancy. Dr. Curlin, on the other hand, testified that Solebo's life expectancy would be "significantly lower" than the average person his age because Solebo had an enlarged heart, was morbidly obese, and had a history of smoking. Despite his testimony, Dr. Curlin did not quantify Solebo's life expectancy. During closing arguments, the Government conceded that it had not presented evidence of an actual figure but nonetheless argued that "five to ten years would be generous." (June 4, 2012 Tr. 59–60.)

71. In light of the fact that the Government did not offer any evidence of its own regarding Solebo's life expectancy, this Court is not willing to accept its assertion that Solebo had only a five to ten year life expectancy. This Court is also unwilling to accept Dr. Holtzman's testimony that Solebo had a 25 year life expectancy because Dr. Holtzman did not consider that Solebo had both seizure disorder and an enlarged heart when making this estimate. Instead, this Court finds that a reasonable life expectancy for Solebo is 17.5 years, meaning that Solebo should have expected to live until he was 40.5 years old. *See Kwasny v. United States*, No. 80 C 2198, 1986 WL 9184, at *13–*16 (N.D.Ill. Aug.15, 1986) (Parson, J.) (finding that the decedent's life expectancy would have been 7.6 years after considering the evidence concerning the decedent's health and despite the fact that the mortality table evidence showed the decedent's life expectancy to be 15.2 years in an FTCA action where the plaintiff sought wrongful death and survivorship damages).

C. Comparable cases involving minor children

***84** 72. The Government presented this Court with one comparable case, *Trunk v. United States*, No. 04 C 1545. There, Judge James Zagel awarded the decedent's five children varying amounts for the 29 years of the decedent's life expectancy because the decedent had unequal relationships with each of his children, four of whom were adults at the time of their father's death. (R. 124, Def.'s Resp. to Court's Order of July 3, 2012, *Trunk v. United States*, No. 04 C 1545, Excerpt of Trial Tr. 7 (Oct. 3, 2006 Zagel, J.)) In addition, Judge Zagel described the decedent as a less than ideal father who when judged "even on the standard of the traditional flawed father ... had special flaws." (*Id.* at 7.) Judge Zagel awarded one of the decedent's daughters, who had "no functional relationship with her father for a very long period of time," $500 per year for a total award of $14,500.00. (*Id.* at 7.) Judge Zagel awarded $1,500.00 per year for a total award of $43,500.00 to another daughter who had a closer relationship with her father, but who "candidly admitted her relationship with her father was based on some instances of real contact and the rest of it was hope for the future." (*Id.* at 8.) Judge Zagel reasoned that in the case of the second daughter, "because she had started a relationship, because of the [decedent's grandchild], there was a significant possibility that it might continue or at least grow to some extent." (*Id.*) Judge Zagel next awarded one of the decedent's sons, who had a "decent but not extraordinary" relationship with the decedent $2,000.00 per year for a total award of $58,000.00. (*Id.*) Judge Zagel awarded another son, who "quite clearly [had] a relationship with his father" and whose relationship was of the type "that lasts over a period of time," $5,000.00 per year for a total award of $145,000.00. (*Id.* at 9.) Judge Zagel noted that this son "admired his father," "did many of the things that his father did," and Judge Zagel

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believed that "he would have sought advice from his father, ... [and] would have helped his father." (*Id.*) Finally, Judge Zagel awarded the child who was a minor at the time of the decedent's death and who "had not yet reached that point of adolescent rebellion," $3,000 for 22 years for a total award of $66,000.00. (*Id.*) Judge Zagel then noted that "[t]he more difficult question is, and obviously a more substantial question, is what the loss of the father, what significance it had for [the minor child] while he was growing up." (*Id.*) Judge Zagel believed that this loss was "quite substantial" and awarded the youngest child $40,000.00 for seven years for an award of $280,000.00. (*Id.* at 10.) Thus, the total award for the "minor child" was $346,000.00. (*Id.* at 10 .) On the basis of *Trunk*, the Government argued that the amounts of $500.00, $1,000.00, or $2,000.00 that Judge Zagel "provided for the children who had little relationship with their father [are] the right touchstone," (June 4, 2012 Tr. 60), and advocated for an award of $100,000.00 or less. (June 4, 2012 Tr. 62.) This Court rejects the Government's approach.

***85** 73. The cases demonstrate a distinction—which is evident in *Trunk* —between the awards that minor children and adult children receive. *See, e.g., Barry v. Owens Corning,* 282 Ill.App.3d 199, 217 Ill.Dec. 823, 668 N.E.2d 8, 10 (Ill.App.Ct. 1st Dist.1996) (affirming jury awards of $500,000.00 to each adult child, $600,000.00 to the college-age child, and $750,000.00 to the minor child). Importantly in *Trunk*, the child who was eleven years old at the time of his father's death was awarded $40,000.00 per year for each remaining year of his father's life expectancy that the child would have remained a minor, and thereafter, the child was awarded $3,000.00 per year for each remaining year of his father's life expectancy that the child would have been an adult. Judge Zagel did not look at whether there was a preexisting relationship with the minor child, but instead inquired into the significance of the loss of the father on the minor child, which he determined was quite substantial despite the fact that the decedent was significantly flawed. Applying the same methodology here, Solebo's daughter—who was only six months old at the time of her father's death—would receive $40,000.00 for the remaining 17.5 years of Solebo's life expectancy for a total of $700,000.00.

74. A review of jury awards in comparable wrongful death cases reveals that juries have awarded minor children between approximately $40,000.00 and $90,000.00 per year when the life expectancy of the parent is known. For instance, in *Hart v. Almeida,* No.2007–L–006654, 2011 Jury Verdicts LEXIS 15999, at *1 (Ill. Cir. Ct. Cook Cnty. May 12, 2011), a Cook County jury awarded the decedent's daughter who was two years old at the time of her father's death and who did not live with her father, but who nonetheless had a close relationship with her father, $2,504,528.00 in wrongful death damages for loss of society. Family members testified that the daughter's life would never be the same after the loss of her father. The father died at the age of 35, but was expected to live until he was 63 years old, and therefore had a life expectancy of 28 years. Thus, the amount awarded per year for the father's remaining life expectancy was $89,447.43.

75. In *Holston v. Sisters of the Third Order of St. Francis,* 247 Ill.App.3d 985, 187 Ill.Dec. 743, 618 N.E.2d 334, 348 (Ill.App.Ct. 1st 1993), *aff'd by* 165 Ill.2d 150, 209 Ill.Dec. 12, 650 N.E.2d 985 (Ill.1995), an Illinois appellate court affirmed a Cook County jury award of $2,500,000.00 for loss of society to each minor son, ages eight and twelve, of the decedent mother. There, the mother died at the age of 29, but had a life expectancy of 50.6 years. *Id.* at 341. Thus, the amount awarded to the minor children for each year of the mother's remaining life expectancy was $49,407.11.

76. In *Barry*, 217 Ill.Dec. 823, 668 N.E.2d at 10, an Illinois appellate court affirmed a Cook County jury award of $750,000.00 to a minor child who was fifteen or sixteen years old at the time of her father's death, *see* Pl.'s Br. at *8, *Barry v. Owens–Coring Fiberglass Corp.*, 282 Ill.App.3d

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199, 217 Ill.Dec. 823, 668 N.E.2d 8, 10 (Ill.App.Ct. 1st 1996) (No. 1–94–2193), 1995 WL 17168001. There, the father died at the age of 59 but had a life expectancy of 19.1 years. *Barry*, 217 Ill.Dec. 823, 668 N.E.2d at 13. Thus, the amount awarded to the minor child for each year of the father's remaining life expectancy was $39,267.02.

***86** 77. The cases demonstrate a trend towards awarding minor children who are younger at the time of a parent's death higher awards than minor children who are older or are teenagers at the time of a parent's death. As in *Hart*, Jadesola did not live with her father. Despite this, Solebo played a significant role in his daughter's life as he selected her name and met her within a week of her birth. In addition, Jadesola visited Solebo at the MCC at least once a week and sometimes twice a week; essentially, Jadesola visited Solebo on every available visiting day. As in *Trunk*, this Court asks about the significance that Solebo's death has had on Jadesola. It is evident that the loss is substantial. Plaintiff testified that Jadesola talks to her father in heaven each night when she says her prayers and that Jadesola asks questions about her father. As Jadesola ages, the enormity of her father's loss has become more palpable and presents itself when she asks her mother why her father cannot pick her up from school or join the family on holidays. Therefore, this Court finds that $90,000.00 for each year of Solebo's remaining life expectancy is an appropriate amount to award to Jadesola, for a total award of $1,575,000.00 in wrongful death damages for loss of society.

78. This amount falls within the range awarded to minor children in comparable wrongful death cases where the life expectancy of the parent is not known. For instance, in *Arellano v. Cnty. of Cook*, No. 99–L–7279, 2002 Jury Verdicts LEXIS 58369, at *1 (Ill. Cir. Ct. Cook Cnty. June 13, 2002), a Cook County jury awarded $1,300,000.00 in wrongful death damages for loss of society to each of the decedent mother's three minor children, the youngest of whom was a newborn baby. Like Solebo, the mother was 23 years old at the time of her death. Similarly, in *Gleeson v. Stephani*, No. 02–L–14444, 2007 WL 3326695, at *1 (Ill. Cir. Ct. Cook Cnty. Aug. 28, 2007), a Cook County jury awarded $2,000,000.00 in wrongful death damages for loss of the decedent mother's society to each of her minor sons, the youngest of whom was four months old. In *Gleeson*, the mother was 26 years old at the time of her death. In *Hollister v. NW Assoc. for Women's Healthcare*, No. 05–L–8872, 2010 WL 4358538, at *1 (Ill. Cir. Ct. Cook Cnty. Sept. 22, 2010), a Cook County jury awarded $400,000.00 in wrongful death damages for loss of society to each minor son, the youngest of whom was less than two years old at the time of his mother's death. Notably, *Hollister* appears to be an outlier as compared to other jury awards. In *Williams v. City of Chi.*, No. 04–L–11193, 2010 WL 6466042 at *1 (Ill. Cir. Ct. Cook Cnty. Feb. 1, 2010), a Cook County jury awarded $1,000,000.00 in wrongful death damages for loss of society to each of the decedent's minor daughters. The mother in *Williams* was 24 years old when she died. And, in *Kasongo*, 523 F.Supp.2d at 809, an FTCA action seeking damages pursuant to the Illinois Wrongful Death Act, the Judge Rebecca Pallmeyer awarded each of the decedent's minor daughters, the youngest of whom was five years old at the time of the decedent mother's death, $1,000,000.00 for loss of society. Thus, damages awards to minor children in comparable wrongful death cases where the decedent parent's life expectancy is not ascertainable range from $400,000.00 to $2,000,000.00. When the outlier case of *Hollister* is excluded, the range of such awards is from $1,000,000.00 to $2,000,000.00. The award to Jadesola of $1,575,000 .00 falls squarely within these ranges.

D. Comparable cases for loss of consortium

***87** 79. Neither the Government nor Plaintiff presented this Court with comparable cases involving loss of consortium awards to a surviving spouse. Nonetheless, some of the cases involving minor children also involved a surviving spouse and are therefore instructive.

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80. In *Arellano,* 2002 Jury Verdicts LEXIS 58369 at *1, a Cook County jury awarded the surviving husband $40,000.00 in wrongful death damages for loss of society. The jury verdict form does not contain any information about the relationship between the decedent and her surviving husband. In *Gleeson,* 2007 WL 3326695, at *1, a Cook County jury awarded $75,000.00 in wrongful death damages to the surviving husband for loss of society. Again, the jury verdict form does not contain any information about the relationship between the decedent and her surviving husband. In *Hollister,* 2010 WL 4358538, at *1, a Cook County jury awarded $500,000.00 in wrongful death damages for loss of society to the surviving husband. Again, the jury verdict form does not contain any information about the relationship between the decedent and her surviving husband.

81. In *Kasongo,* 523 F.Supp.2d at 809, Judge Pallmeyer awarded the surviving husband $500,000.00 for loss of society and consortium. There, the decedent and surviving spouse had been married for fourteen years at the time of the decedent's death, and they had three children aged five, seven, and ten. *Id.* The surviving husband and the decedent had immigrated to the United States in July 2000, after fleeing the Democratic Republic of Congo due to civil wars in that region. *Id.* at 763–64. At trial, the surviving husband testified about his relationship with the decedent, explained that she was the foundation of the family's household, and described his loss as very great. *Id.* at 791.

82. More recently, in *Arpin v. United States,* No. 04–cv–128–DRH, 2009 WL 3816844, at *6 (S.D.Ill. Nov.13, 2009), an FTCA case grounded on the Illinois Wrongful Death Act, Chief Judge David Herndon awarded the surviving spouse $4,000,000.00 in wrongful death damages for loss of consortium. There, the decedent's widow was described as the "traditional American housewife," and she did not drive or work outside of the home. *Id.* at *3. The decedent, on the other hand, was the family breadwinner. *Id.* As in *Kasongo,* the decedent in *Arpin* was said to have held the family together. *Id.* The decedent and his widow had been married 35 years. *Arpin v. United States,* No. 04–cv–128–DRH, 2006 WL 3314454, at *1 (S.D.Ill. Nov.15, 2006). Overall, damages awards for a surviving spouse in comparable cases range from $40,000 .00 to $4,000,000.00.

83. Undoubtedly, Plaintiff's loss of her husband is significant, but it cannot be said that her loss reaches the same level as the surviving husband's loss in *Kasongo* or the surviving wife's loss in *Arpin.* At the time of Solebo's death, Plaintiff and Solebo had known each other for about three-and-a-half years and had only been married for about a year-and-a-half. Indeed, they were married for only three-and-a-half months prior to Solebo's arrest. Thus, they celebrated their first year wedding anniversary while Solebo was incarcerated at the MCC. Furthermore, although Plaintiff testified that her relationship with Solebo between October 2005 and January 2006 was excellent and that they were both happy, the evidence in the record suggests that their relationship was a nascent one and that they were still in the process of getting to know each other. For instance, in November 2005, the couple had a quarrel that they were unable to resolve without involving the police. As a result of this incident, Plaintiff signed a criminal complaint stating that Solebo had physically hurt her. Although Plaintiff testified at trial that Solebo never struck her, this Court finds her testimony on this point less than credible. Nevertheless, it appears that the young couple remained a steady unit throughout Solebo's incarceration as Plaintiff visited him both at Kankakee and at the MCC on every visiting day she could. Thus, this Court finds that while Plaintiff should be compensated for her loss of consortium, a reasonable award is one that falls in the lower range of comparable cases. Accordingly, this Court awards Plaintiff $40,000.00 in wrongful death damages for her loss of consortium.

E. Reductions for Solebo's contributory fault

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and the risk of a conviction

***88** 84. The Wrongful Death Act limits the amount of recovery by the decedent's negligence. 740 Ill. Comp. Stat. 180/2. Under the Wrongful Death Act, "the plaintiff's recovery in actions for bodily injury or death is barred if the trier of fact finds that plaintiff's fault is more than 50% of the proximate cause of the injury. If the plaintiff's fault is not more than 50% of the proximate cause of the injury, recovery will not be barred but will be reduced in the proportion of the amount of fault attributable to the plaintiff." *Glasser v. United States*, 786 F.Supp. 1334, 1335–36 (1992) (citing *Fetzer v. Wood*, 211 Ill.App.3d 70, 155 Ill.Dec. 626, 569 N.E.2d 1237, 1240 (Ill.App.2d Dist.1991)); 740 Ill. Comp. Stat. 180/2. Here, this Court has determined that Solebo bore 33% of the fault for not taking his Dilantin as prescribed. Because Solebo did not bear more than 50% of the fault, recovery of damages under the Illinois Wrongful Death Act is not barred, but must be reduced. *See Gleeson*, 786 F.Supp. at 1335–36. Accordingly, this Court reduces the awards to Plaintiff and Jadesola by 33% to account for Solebo's contributory fault.

85. Finally, this Court takes into account the fact that Solebo was a pre-trial detainee who was at risk of being convicted. To account for that risk, this Court reduces the total awards for loss of society and loss of consortium by an additional 10%, for a total reduction of 43%.

86. Therefore, this Court reduces the loss of society award to Jadesola by $677,250.00 and accordingly awards her a total of $897,750.00. Similarly, this Court reduces the loss of consortium award to Plaintiff by $17,200.00 and accordingly awards her a total of $22,800.00. Therefore, the total amount of wrongful death damages awarded is $920,550.00.

CONCLUSION

As Judges Robert Dow and Rebecca Pallmeyer have both previously recognized, FTCA claims involving alleged medical negligence can be "exceedingly challenging," *Hardnick*, 2009 WL 1810106, at *15 (citing *Kasongo*, 523 E Supp.2d at 812), especially because medicine "is not an exact science." *Id.* For that reason, and many others, this highly contested case presented a number of challenges. This Court is optimistic that some of the breakdowns in administering vital medication and providing adequate medical care to inmates that occurred at the MCC during Solebo's incarceration have now been remedied by improved medical procedures and oversight as a result of recent changes in the MCC leadership. Certainly, it is this Court's hope that the appropriate MCC officials will carefully study this opinion to ensure that these breakdowns do not reoccur in the future.

In this case, this Court finds on the basis of the evidence and expert testimony presented at trial that Plaintiff established by a preponderance of that evidence that the MCC personnel's negligence proximately caused Solebo's unfortunate and untimely death on May 1, 2007, and that the evidence supports this Court's reasonable damages award. Accordingly, this Court enters judgment in favor of Plaintiff and against Defendant on Plaintiff's FTCA action. This Court awards Plaintiff wrongful death damages in the amount of $920,550.00; $897,750.00 to Plaintiff's daughter for loss of society and $22,800.00 to Plaintiff for loss of consortium.

N.D.Ill.,2013.
Ford-Sholebo v. U.S.
Slip Copy, 2013 WL 4733998 (N.D.Ill.)

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AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court
Northern District of Illinois
Eastern Division

Dominique Ford-Sholebo

v.

The United States of America

JUDGMENT IN A CIVIL CASE

Case Number: 09 C 2287

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of the Plaintiff Dominique Ford-Sholebo, individually and as administrator of the estate of Habib Solebo and against the Defendant, The United States of America in the amount of $920,550.00. $897,750.00 to Plaintiff's daughter for loss of society and $22,800.00 to Plaintiff for loss of consortium.

Thomas G. Bruton, Clerk of Court

Date: 9/3/2013

Ruth O'Shea

Ruth O'Shea, Deputy Clerk

a22

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased	)	
Plaintiff,	)	
	)	**No. 09 C 2287**
v.	)	
	)	**Judge Ruben Castillo**
THE UNITED STATES OF AMERICA, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO,	)	
Defendants.	)	

ORDER

This Court expressly on the record enters factual and legal findings in favor of Plaintiff on liability and against the Defendants. Judgment on liability only is entered in favor of the Estate of Habib Solebo against the United States for all the reasons stated in open court. The Court expressly finds that Plaintiff established by a preponderance of the evidence that Defendants violated the appropriate standard of care to Mr. Solebo and that Defendants' negligent failure to comply with that standard proximately caused Mr. Solebo's death in a reasonably foreseeable manner during his ongoing treatment for a seizure disorder. Specifically, Plaintiffs offered evidence to a reasonable degree of medical certainty that Defendants' negligent failure to consult with Mr. Solebo after February 2007, obtain the results of a blood draw, and appropriately monitor whether Mr. Solebo was taking the prescribed medication to treat his seizure disorder lessened the effectiveness of the medical treatment Mr. Solebo received. The

temporal proximity of these events, coupled with a lack of informed consent, Dr. Jones' testimony, and her autopsy report all support the Court's proximate cause finding.

The Court expressly credits the testimony of Dr. Jones and Dr. Holtzman and discredits the testimony of Dr. Ebersole and Dr. Curlin to the extent stated in open court.

The Court further finds that Mr. Solebo bears some contributory negligence on his part for failure to take his prescribed medication. Said negligence, however, is less than 50% and a precise amount will be determined following the damages trial.

The Court will retain jurisdiction to enter a final and appealable judgment. Damages trial is set for June 4, 2012, at 9:45 A.M. A hearing on plaintiff's remaining motion in limine is set for April 3, 2012 at 10:00 A.M. A full, written and appealable decision will follow at the conclusion of the damages trial.

Entered: 

Judge Ruben Castillo
United States District Court

Date: March 15, 2012

Order Form (01/2005)

United States District Court, Northern District of Illinois

MHN

Name of Assigned Judge or Magistrate Judge	William J. Hibbler	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	09 C 2287	DATE	May 11, 2010
CASE TITLE	Ford-Sholebo v. United States		

DOCKET ENTRY TEXT:

The Court DENIES Plaintiff's Motion for an in camera inspection (doc. #43).

■[For further details see below.] Docketing to mail notice.

STATEMENT

After Habib Solebo died in the custody of the United States, the Plaintiff, individually and on behalf of Solebo's estate, sued the United States and unnamed Correctional Officers. In the course of discovery, Plaintiff learned that the Bureau of Prisons had conducted an after-investigation concerning Solebo's death, which resulted in an After-Action Report. The United States has asserted that the After-Action Report is protected from disclosure by the deliberative process privilege. Plaintiff requests that the Court conduct an *in camera* inspection of the Report to determine if it falls within the scope of the privilege.

The deliberative process privilege protects the decisionmaking process of governmental agencies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-153 (1975). The purpose behind the privilege is to encourage candid communication and frank discussion among policy makers by shielding their deliberations regarding policy. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). The process protects neither purely factual discussions nor documents reflecting the agency's final policy decision. *Enviro Tech. Int'l, Inc. v. EPA*, 371 F.3d 370, 374 (7th Cir. 2004). It does protect predecisional policy discussions and factual matters intertwined with those discussions. *Id.* at 374-75.

The United States submits the affidavit of the relevant Regional Director for the Bureau of Prisons, who explains the process that the BOP uses to compile the After-Action Reports and the affidavit of counsel for the prison where Solebo was housed, who avers that the factual information contained in the After-Action Report has already been provided to the Plaintiff. The Supreme Court has stated that an *in camera* inspection frustrates the purpose of the privilege and suggests that the government should have the opportunity to establish the applicability of the privilege with affidavits or testimony. *EPA v. Mink*, 410 U.S. 73, 93 (1973).

STATEMENT

Plaintiff suggests the privilege does not apply because the United States has admitted that no governmental policies were changed as a result of the After-Action Report. Plaintiff's argument is based upon a misreading of *Enviro Tech Int'l*, 371 F.3d at 375. Plaintiff seizes upon *Enviro Tech Int'l*'s instruction that in order to invoke the privilege "a document must be predecisional in the sense that it is actually antecedent to the adoption of an agency policy." *Id.* Plaintiff reads this instruction to mean that a specific policy must be adopted to invoke the privilege. But the word "actually" modifies *antecedent*, not *policy*, contrary to Plaintiff's suggestion. In other words, *Enviro Tech Int'l* does not instruct that an actual policy must be adopted for the privilege to apply, but rather that the discussions must actually take place before the policy is adopted. Indeed, the Supreme Court has stated as much. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 153 n.18. And Plaintiff's argument makes little sense in light of the purposes of the privilege — to encourage frank policy discussions among agency personnel. Under Plaintiff's view of the privilege, agency personnel could openly and frankly debate policy only if they were confident that the policy that they debated would be adopted (which would rarely be the case — logically there would be no debate if the discussion had reached that point of certainty).

Plaintiff also suggests that the privilege does not protect purely factual material. As noted earlier, it does protect factual material that is intertwined with a policy discussion. The affidavits submitted by the government, one of which is made by an officer of the Court, are sufficient to convince the Court that the privilege applies and that an *in camera* inspection is not necessary.

The Court DENIES Plaintiff's Motion for an *in camera* inspection.

Wm. J. Hibbler

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Emt

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, Plaintiff,	)	
-vs-	)	No.09CV2287
THE UNITED STATES OF AMERICA,	)	Chief Judge Castillo
	)	Magistrate Judge Denlow
Defendants.	)	

ORDER OF DISMISSAL PURSUANT TO SETTLEMENT

This cause coming to be heard before the Court on the Plaintiff's, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, Motion to Approve Distribution of the Settlement Proceeds in the above-captioned matter, due notice being given, and the Court being fully advised:

IT IS HEREBY ORDERED:

1. Findings of Fact and conclusions of law were entered on September 3, 2013, and the Defendant, THE UNITED STATES OF AMERICA, subsequently appealed the decision of the District Court to the Seventh Circuit Court of Appeals, No. 13-3450.

2. During the pendency of the appeal, the parties reached a settlement agreement in the amount of $700,000.00, and the Court of Appeals has remanded the case to the District Court for further findings and dismissal.

3. The District Court makes the following findings:

   a. The amount of the settlement is fair and reasonable;

   b. Litigation expenses of $46,494.91 are fair and reasonable;

   c. Attorneys' fees in the amount of $175,000.00 (25% of the settlement amount) are approved pursuant to 28 U.S.C. 2678;

   d. That the total amount of $13,058.04 to be paid in full and final satisfaction of the Mordy's Kosher Express, LLC (lender) liens is fair and reasonable;

   e. That the net settlement proceeds available to the Plaintiff and Plaintiff's daughter, $465,447.05, are to be distributed pursuant to the prior apportionment

found by this Court's September 3, 2013 judgment order;

f. The distribution of 2.5% of the net proceeds in the amount of $11,636.18 to the Plaintiff, Dominique Ford-Sholebo, is fair and reasonable;

g. The distribution of 97.5% of the net proceeds in the amount of $453,810.87 to Dominique Ford-Sholebo for the benefit Plaintiff's and Plaintiff's Decedent's daughter, REDACTED, a minor, is fair and reasonable.

h. This Cause is dismissed in its entirety, with prejudice, pursuant to the settlement agreement, each party bearing its own costs.

i. The Court shall retain jurisdiction for the purposes of enforcing the settlement agreement.

j. The net proceeds distributable to Dominique Ford-Sholebo for the benefit Plaintiff's and Plaintiff's Decedent's daughter, REDACTED, a minor, shall be placed into a minor's estate opened in the Probate Court of Cook County and deposited into an account in the name of the minor to be held subject to further order of the Probate Court of the Circuit Court of Cook County.

ENTER: _____

Chief Judge Ruben Castillo

DATED: 2/28/14

Atty. Name: Cindy G. Fluxgold

Firm Name: Goldstein, Fluxgold & Baron, P.C.
Atty. for Petitioner: Dominique Ford-Sholebo
Address: 33 N. Dearborn St., Suite 950
City/Zip: Chicago, IL 60602
Telephone: 312/726-7772

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	William J. Hibbler	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	09 C 2287	DATE	5/11/2010
CASE TITLE	FORD-SHOLEBO, etc. vs. U.S.A., et al.		

DOCKET ENTRY TEXT

Status hearing held and continued to 6/29/10 at 9:30 a.m. Plaintiff's motion to order release of records is granted without objection. Plaintiff's motion to limit discovery and/or bar is denied without prejudice. Plaintiff's motion for in camera inspection of After-Action Report. Plaintiff's motion to compel and for leave to propound additional interrogatories is granted as to 1,2,3 and 4 of 1st supplement and 2,3,4 and 8 of 2nd supplement. Plaintiff's motion to compel is denied and the motion to extend discovery is granted. Fact discovery cut-off extended to 7/21/10. Plaintiff's FRCP 26(a)(2) by 8/16/10. Defendant's FRCP 26(a)(2) by 9/15/10. All discovery to close by 10/15/10. Filing of dispositive motions with supporting memoranda by 11/15/10.

Docketing to mail notices.

00:43

	Courtroom Deputy Initials:	JHC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, Plaintiff,	)	
-vs-	)	No.09CV2287
THE UNITED STATES OF AMERICA,	)	Chief Judge Castillo
	)	Magistrate Judge Denlow
Defendants.	)	

MOTION TO APPROVE DISTRIBUTION OF THE SETTLEMENT PROCEEDS

NOW COMES the Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, by her attorney's GOLDSTEIN, FLUXGOLD & BARON, P.C., and requests this Honorable Court for entry of an Order approving distribution of the settlement proceeds in the above-captioned matter. In support of this motion, Plaintiff states as follows:

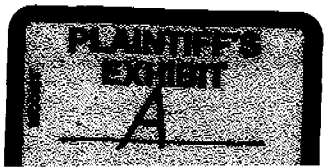
INTRODUCTION and SETTLEMENT

1. That on September 3, 2013, the final judgment and memorandum in this case was entered in favor of the Plaintiff and awarding Plaintiff and decedent's minor child $1,615,000.00 in damages. Said amount was reduced by the Plaintiff's decedent's contributory negligence by 33% and an additional 10% reduction for risk of conviction. After the reduction, the net total Wrongful Death damages awarded to the Plaintiff and decedent's minor child was $920,500.00.

2. That pursuant to said final judgment, the total net judgment was apportioned as follows: $897,750.00 to the Plaintiff's daughter for loss of society and $22,800.00 to Plaintiff for loss of consortium.

3. That the judgment was rendered by this Honorable Court in the Northern District of Illinois pursuant to Section 1346(b) of the Federal Tort Claims Act. 28 USCS §1346(b).

4. That on November 1, 2013, the Defendant, THE UNITED STATES OF AMERICA, filed its Notice of Appeal appealing the September 3, 2013 final judgment with United States Court of Appeals for the Seventh Circuit.



5. That after settlement discussions in accordance with the Federal Rules of Appellate Procedure, this matter has been settled by the parties for a sum in the amount of seven hundred thousand dollars ($700,000.00).

6. That the settlement of this matter was made in accordance with 28 USCS §2677 of the Federal Tort Claims Act.

DISTRIBUTION OF PROCEEDS

(a) ATTORNEY'S FEES and COSTS

1. The Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, contracted to pay Plaintiff's attorneys, GOLDSTEIN, FLUXGOLD & BARON, P.C., an attorney's fee of ONE-THIRD (1/3) of the gross settlement and/or judgment plus costs. Pursuant to 28 USCS §2678 of the Federal Tort Claims Act, the attorney's fees shall not exceed "25 per centum" of any judgment or settlement made in accordance with 28 USCS §1346(b) or 28 USCS §2677.

2. Plaintiff's attorneys are entitled to attorney's fees equal to 25% of the gross settlement amount $700,000.00, for a sum in the amount of One Hundred Seventy-Five Thousand Dollars ($175,000.00 (reduced from $233,333.33)).

3. In addition to the aforementioned fee, the Plaintiff's attorneys incurred costs in the sum of Forty Six Thousand Four Hundred Ninety-Four Dollars and Ninety-One Cents ($46,494.91). Said expenses are itemized as follows:

• Alexandra Roth, CSR, Ltd., Transcript 7/15/10 hearing	$ 58.20
• Atkinson Baker, Dep. Trans. Dr. Spencer	$ 515.00
• Beth Astrowski, Reimbursement Trial Costs	$ 145.01
• Carlisle M. Strening & Son, Renewal Bond Probate Solebo	$ 50.00
• Chuhak & Tecson, Probate Estate Fees	$ 2,660.80
• Cindy Fluxgold, Reimbursement Trial Costs	$ 221.22
• Cook County Coroner, Habib Solebo autopsy report	$ 20.00
• Dr. Arthur Hoffman, Subpoena Witness travel fee	$ 40.00
• Dr. Arthur Hoffman, Trial Subpoena Fee	$ 53.00
• Dr. Nancy Jones, Trial Subpoena Fee	$ 45.00
• Federal District Complaint Filing Fee	$ 350.00
• Gunther Polak, Service Fees	$ 1,437.00
• Harold Washington College, school transcripts	$ 5.00
• Kathleen M. Fennell, RMR, FCRR, Trial Transcripts	$ 884.00
• Law Bulletin Publishing Company, Jury Verdict Reporter Search	$ 170.00
• Lisit Court Reporting Service, Deposition Transcripts	$ 252.50
• Lorenzo Valladolid, Reimbursement Trial Costs	$ 142.82

• Medical Consult	$ 500.00
• Michael Baron, Deposition Travel Expenses	$ 2,149.57
• Michael Baron, Reimbursement Trial Costs	$ 86.64
• Michael Rathsack, Trial Research and Appeal Costs	$ 7,417.95
• National Court Reporters, Deposition Transcript	$ 493.80
• Patti Blair Court Reporters, Deposition Transcripts and Appearance	$ 13,755.90
• Romanucci & Blandin, LLC, Prior File Reproduction	$ 1,393.89
• Sandra Wilson, subpoena travel fees	$ 150.00
• Scott Goldstein, Reimbursement Costs	$ 47.00
• Steven Holtzman, M.D., Trial Expert Fee and Costs	$ 13,389.40
• Thorek Hospital and Medical Center, Medical Records	$ 20.00
• Truman College, school transcripts	$ 5.00
• UPS, Costs	$ 36.21
TOTAL	**$ 46,494.91**

4. Petitioner's Attorney's Fees and Costs total in the amount of Two Hundred Twenty-One Thousand Four Hundred Ninety-Four Dollars and Ninety-One Cents ($221,494.91).

(b) LIENS

5. That during the pendency of this matter, Plaintiff, Dominique Ford-Sholebo, required and obtained loans with liens from Mordy's Kosher Express, LLC (lender) for a total repayment in the amount of Thirteen Thousand Fifty-Eight Dollars and Four Cents ($13,058.04). Said loans were needed to cover family and living expenses, including but not limited to money to pay rent to avoid eviction of Plaintiff and Plaintiff's daughter from their residence.

6. That Mordy's Kosher Express, LLC (lender) has an August 7, 2012 lien from a loan in this matter in the amount of seven thousand two hundred eight dollars and four cents ($7,208.04).

7. That Mordy's Kosher Express, LLC (lender) has an additional October 10, 2012 lien from a loan in this matter in the amount of Five Thousand Eight Hundred Fifty Dollars ($5,850.00).

8. That the total amount to be paid in satisfaction of Mordy's Kosher Express, LLC (lender) liens is Thirteen Thousand Fifty-Eight Dollars and Four Cents ($13,058.04).

SUMMARY and FINAL ACCOUNTING

9. Petitioner requests that this Court approve the following itemized distribution of proceeds from the settlement for Attorney's fees and expenses, and outstanding liens:

Goldstein, Fluxgold & Baron, P.C.- Attorneys' Fees reduced from $233,333.33.....	$ 175,000.00
Goldstein, Fluxgold & Baron, P.C.- Expenses and Costs	$ 46,494.91
Mordy's Kosher Express, LLC (lender)- Lien	$ 7,208.04
Mordy's Kosher Express, LLC (lender)- Lien	$ 5,850.00
TOTAL	**$ 234,552.95**

10. That after the aforementioned distribution of proceeds from the $700,000.00 settlement amount, the net proceeds available to the Plaintiff and Plaintiff's daughter, total in the amount of Four Hundred Sixty Five Thousand Four Hundred Forty-Seven Dollars and Five Cents ($465,447.05).

11. That per the prior apportionment by this Court's September 3, 2013 judgment order, Plaintiff's daughter's loss of society claim was awarded 97.5% of the total judgment ($897,750/$920,500). Plaintiff's loss of consortium claim was awarded 2.5% of the total judgment ($22,800.00//$920,500).

12. Accordingly, Plaintiff requests this Court to approve the distribution of 2.5% of the net proceeds in the amount of Eleven Thousand Six Hundred Thirty-Six Dollars and Seventy-Three Cents ($11,636.18) to the Plaintiff, Dominique Ford-Sholebo.

13. That the Plaintiff request that the Court approve payment of 97.5% of the net proceeds in the amount of Four Hundred Fifty-Three Thousand Eight Hundred Ten Dollars and Eighty-Seven Cents ($453,810.87) to Dominique Ford-Sholebo for the benefit Plaintiff's daughter, _____, a minor. Said funds to be placed into a minor's estate opened in the Probate Court of Cook County and deposited into an account in the name of the minor to be held subject to further order of the Probate Court of the Circuit Court of Cook County.

Wherefore, Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, prays that this Honorable Court enter an Order to:

a. Approve the distribution of the aforementioned settlement proceeds as itemized below:

Goldstein, Fluxgold & Baron, P.C.- Attorneys' Fees reduced from $233,333.33.....	$ 175,000.00
Goldstein, Fluxgold & Baron, P.C.- Expenses and Costs	$ 46,494.91
Mordy's Kosher Express, LLC (lender)	$ 7,208.04

Mordy's Kosher Express, LLC (lender)	$ 5,850.00
Plaintiff, Dominique Ford-Sholebo	$ 11,636.18
Dominique Ford-Sholebo, for the benefit of Plaintiff's daughter, _____, a minor, subject to further order of the Probate Court in the Circuit Court of Cook County	$ 453,810.87
TOTAL	**$700,000.00**

b. For any additional relief deemed just by this Court.

By:_____
Dominique Ford-Sholebo

By:_____
One of Plaintiff's Attorneys

Atty. Name: Cindy G. Fluxgold
Firm Name: Goldstein, Fluxgold & Baron, P.C.
Atty. for Petitioner: Dominique Ford-Sholebo
Address: 33 N. Dearborn St., Suite 950
City/Zip: Chicago, IL 60602
Telephone: 312/726-7772

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERIC R. McCLINTON,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	Case No. 09 C 7607
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

AFFIDAVIT OF PLAINTIFF'S ATTORNEY PURSUANT TO 735 ILCS 5/2-622

I, Craig M. Sandberg, being first duly sworn on oath, depose and state:

1. I have personal knowledge of the facts stated in this affidavit, and if sworn as a witness, would testify competently thereto.

2. That the Affiant is an attorney for the plaintiff.

3. That the Affiant has consulted and reviewed the facts of this case with a health professional who the affiant reasonably believes:

i. is knowledgeable in the relevant issues involved in this particular action;

ii. practices or has practiced within the last 5 years or teaches or has taught within the last 5 years in the same area of health care or medicine that is at issue in this particular action; and

iii. meets the expert witness standards set forth in paragraphs (a) through (d) of Section 8-2501 of the Illinois Code of Civil Procedure.

4. That the reviewing health professional has determined in a written report, after a review of the medical records and other relevant material involved in this particular action, that there is a reasonable and meritorious cause for filing of such action.

5. That the Affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action.

6. That the reviewing health professional is a physician licensed to practice medicine in all its branches who is qualified by experience with the standard of care, methods, procedures and treatments relevant to the allegations at issue in the case.

7. That a copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists is attached to this affidavit.

FURTHER AFFIANT SAYETH NAUGHT.

By:

s/CRAIG M. SANDBERG
ARDC No. 6257836
Muslin & Sandberg
19 S. LaSalle Street, Suite 700
Chicago, Illinois 60603
(312) 263-7249

CERTIFICATION OF AN ACTION IN MEDICAL MALPRACTICE PURSUANT TO 735 ILCS 5/2-622

Re: Eric R. McClinton v. United States of America

I am licensed to practice by the State of Illinois and qualified by experience with the standard of care, methods, procedures and treatments relevant to the allegations at issue in the case. I have reviewed the records, facts and other relevant material pertaining to the above-referenced matter. I am knowledgeable in the relevant issues involved in this matter and I have practiced in the same area of health care or medicine that is at issue in this particular action within the last 5 years. The act(s) to follow reasonably caused or contributed to the chain of events, which in my opinion, ultimately is a reasonable and meritorious basis for an action in medical malpractice against the below-named defendant.

That following the aforementioned review, I am of the opinion that there is a reasonable and meritorious cause for the filing of the action against the United States of America, by and through its agents, servants and employees, both actual and apparent for all the following reasons:

1) On or about November 8, 2006, the United States of America breached the standard of care by providing a water-based solution for Eric McClinton to soak his foot that burned his left foot.
2) The employees and agents of the United States of America breached the standard of care in that they failed to timely refer Eric McClinton to a vascular surgeon or specialist.
3) The employees and agents of the United States of America breached the standard of care in that they failed to timely obtain a work up of Eric McClinton with a vascular surgeon or specialist.
4) The employees and agents of the United States of America breached the standard of care in that no wound debridements were ever performed the entire time the patient was in jail until he was seen at Thorak Memorial Hospital.
5) The employees and agents of the United States of America breached the standard of care in that there was a recommendation for further vascular testing by the doctor doing the initial doppler testing to run an angiogram since the ABI was not registering on his left leg, however, this was never performed.
6) The employees and agents of the United States of America breached the standard of care in that the patient never was made to stay off his foot which would have consisted of a wheelchair or cast walker. Because he was not sufficiently off-loaded the ulcer never had a chance to heal.

As a direct and proximate result of one of the foregoing deviations in the standard of care of the defendant, Eric R. McClinton suffered injuries casually related to the breaches of the standard of care by the United States of America, by and through its agents, servants and employees, both actual and apparent.

By:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERIC R. McCLINTON,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	Case No. 09 C 7607
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

AMENDED COMPLAINT AT LAW

NOW COMES the plaintiff, ERIC R. McCLINTON, by his attorneys, Muslin & Sandberg, through Craig M. Sandberg, and complaining of the defendant states as follows:

NATURE OF ACTION

1. ERIC R. McCLINTON was initially injured by an employee and/or agent of the UNITED STATES OF AMERICA on November 8, 2006. Thereafter, the defendant failed to timely and appropriately care for the plaintiff and his injuries and/or conditions of ill-being related to his lower-left extremity, which worsened over time and resulted in amputation of his left first ("Great") toe, amputation of his second and third toes, and a below-the-knee amputation. This is a medical malpractice suit against the UNITED STATES OF AMERICA under the Federal Tort Claims Act seeking monetary damages on behalf of ERIC R. McCLINTON.

PARTIES

2. Plaintiff ERIC R. McCLINTON is a citizen of the State of Indiana residing in Lake County. At all times relevant herein, ERIC R. McCLINTON was in the custody and care of the UNITED STATES OF AMERICA while he was an inmate resident.

3. Defendant UNITED STATES OF AMERICA, through the Federal Bureau of Prisons, an agency of the U.S. Department of Justice, provides custody and care to its inmate resident population, including medical care.

JURISDICTION AND VENUE

4. The court has jurisdiction over the lawsuit under 28 U.S.C. § 1346(b) because the suit involves a claim against the United States for personal injury caused by the negligent act of a government employee while acting within the scope of his/her employment. This cause of action arises under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*

5. Venue is appropriate in the Northern District of Illinois pursuant to 28 USC § 1402(b) because the act or omission in the complaint occurred in this district.

CONDITIONS PRECEDENT

6. On October 31, 2008, ERIC R. McCLINTON filed an administrative claim with the U.S. Department of Justice, Federal Bureau of Prisons (received on November 7, 2008) in the sum total of $2,000,000. On June 9, 2009, the U.S. Department of Justice, Federal Bureau of Prisons, North Central Regional Office, sent ERIC R. McCLINTON a "Final Denial of Claim."

BACKGROUND

7. Plaintiff alleges that the UNITED STATES OF AMERICA, by its agents and/or employees, initially injured ERIC R. McCLINTON at the Metropolitan Correctional Center in Chicago, Illinois on November 8, 2006. As a result of those injuries, ERIC R. McCLINTON suffered severe and permanent injuries. Thereafter, the UNITED STATES OF AMERICA failed to timely and appropriately care for the plaintiff and his injuries and/or conditions of ill-being related to his lower-left extremity, which worsened over time and resulted in amputation of his left first ("Great") toe, amputation of his second and third toes, and a below-the-knee amputation.

8. On, before, and after November 8, 2006, and at all times relevant, the FEDERAL BUREAU OF PRISONS had been deemed by the UNITED STATES DEPARTMENT OF JUSTICE to be an employee of the UNITED STATES OF AMERICA pursuant to 42 U.S.C. § 233, for Federal Tort Claims Act purposes only.

9. On, before, and after November 8, 2006, and at all times relevant, the FEDERAL BUREAU OF PRISONS was an agency of the UNITED STATES DEPARTMENT OF JUSTICE, which is a Cabinet department of the UNITED STATES OF AMERICA.

10. On, before, and after November 8, 2006, and at all times relevant, the defendant, UNITED STATES OF AMERICA, employed various physicians, nurses, technicians and other healthcare professionals that acted as its actual agents and/or employees relative to the care rendered to ERIC R. McCLINTON.

11. On, before, and after November 8, 2006, and at all times relevant, the defendant, UNITED STATES OF AMERICA, employed various physicians, nurses, technicians and other healthcare professionals that acted as its apparent agents and/or employees relative to the care rendered to ERIC R. McCLINTON.

12. That at all times complained of herein, defendant UNITED STATES OF AMERICA operated licensed health care facilities located at, *inter alia*, the Metropolitan Correctional Center (MCC) in Chicago, Illinois, the Forrest City Federal Correctional Complex (FCC) in Forrest City, Arkansas, and U.S. Medical Center for Federal Prisoners (MCFP) in Springfield, Missouri.

13. On, before, and after November 8, 2006, and at all times relevant, the physicians, nurses, technicians and other healthcare professionals involved in the care and treatment of ERIC R. McCLINTON at the BUREAU OF PRISON'S health care facilities including, but not limited to, MCC, FCC, and MCFP, were acting within the course and

scope of their agency and/or employment with UNITED STATES OF AMERICA while rendering treatment to ERIC R. McCLINTON.

14. That at all times complained of herein, defendant UNITED STATES OF AMERICA held itself out and informed the resident inmate population and public, including ERIC R. McCLINTON, that it possessed the requisite skill, competence, know-how, facilities, equipment, information and personnel to properly care for and treat the resident inmate population and public including ERIC R. McCLINTON.

15. On October 26, 2006, ERIC R. McCLINTON, following his arrest, presented to UNITED STATES OF AMERICA with various medical complaints.

16. That at said time and place, defendant UNITED STATES OF AMERICA, by and through its agents, servants and/or employees, undertook to provide medical care and treatment to ERIC R. McCLINTON.

17. Between October 26, 2006 and November 8, 2006, upon information and belief, ERIC R. McCLINTON soaked his foot at the nurses' office at the MCC as part of a course of care for one or more of his various medical complaints including, but not limited to, a wound or ulcer on his left foot/toe.

18. On November 8, 2006, Nurse Wagner instructed ERIC R. McCLINTON to soak his foot in a Betadine® and water solution that was provided by the nurse and/or the UNITED STATES OF AMERICA.

19. The solution used to care for the plaintiff's left foot on November 8, 2006 burned or caused injury to ERIC R. McCLINTON's left foot.

20. Following the November 8th soaking, ERIC R. McCLINTON sustained serious injuries to his person including, but not limited to, burns (which were not part of the procedure) to the dorsal and planter aspect of his left foot and with "blistering across the entire forefoot with oozing." Additionally, and thereafter, the defendant failed to timely and

appropriately care for the plaintiff and his injuries and/or conditions of ill-being related to his lower-left extremity, which worsened over time and resulted in amputation of his left first ("Great") toe, amputation of his second and third toes, and a below-the-knee amputation.

21. That at all times relevant herein, ERIC R. McCLINTON was in the exercise of due care and caution for his own safety and well being and following the laws of the State of Illinois.

Count I
(Medical Malpractice Negligence – United States of America)

22. Plaintiffs restate and incorporate by reference as if fully set forth herein paragraphs 1 through 21.

23. That at all times complained of herein, defendant UNITED STATES OF AMERICA, by and through its agents, servants, and/or employees had a duty to exercise that degree of care, skill, and caution in administering medical treatment and services to its patients, including ERIC R. McCLINTON, that a reasonably licensed health care facility operating in the same or similar community would exercise under the same or similar circumstances.

24. That at all times complained of herein, defendant UNITED STATES OF AMERICA had a duty to exercise that degree of care, skill, and caution in administering medical care and treatment to ERIC R. McCLINTON that a reasonably trained health care professional in the same or similar community at that time would exercise in the same or similar case under like circumstances.

25. Defendant UNITED STATES OF AMERICA, by and through the actions and/or omissions of its employees, agents and/or apparent agents, breached its duties and was negligent in one or more of the following respects:

a) On or about November 8, 2006, the United States of America breached the standard of care by providing a water-based solution for ERIC R. McCLINTON to soak his foot that resulted in burns his left foot;
b) The employees and agents of the United States of America breached the standard of care in that they failed to timely refer ERIC R. McCLINTON to a

vascular surgeon or specialist;

c) The employees and agents of the United States of America breached the standard of care in that they failed to timely obtain a work up of ERIC R. McCLINTON with a vascular surgeon or specialist;
d) The employees and agents of the United States of America breached the standard of care in that no wound debridements were ever performed the entire time ERIC R. McCLINTON was in jail until he was seen at Thorak Memorial Hospital;
e) The employees and agents of the United States of America breached the standard of care in that there was a recommendation for further vascular testing by the doctor doing the initial doppler testing to run an angiogram since the ABI was not registering on his left leg, however, this was never performed;
f) The employees and agents of the United States of America breached the standard of care in that ERIC R. McCLINTON never was made to stay off his foot which would have consisted of a wheelchair or cast walker. Because he was not sufficiently off-loaded the ulcer never had a chance to heal.

26. As a direct and proximate result of one or more of the foregoing negligent acts and/or omissions of the UNITED STATES OF AMERICA, by and through the actions and/or omissions of its employees, agents and/or apparent agents, ERIC R. McCLINTON sustained severe, permanent and irreversible injuries; is permanently disabled; has experienced and will permanently experience untold suffering; has incurred and/or in the future will incur obligations for substantial sums of money for hospital, medical, nursing, caretaking, custodial and other expenses; and has been permanently deprived of the ability and capacity to earn a living.

27. Attached hereto as Exhibit "A" and made a part hereof is an affidavit submitted in compliance with Section 2-622(a)(1) of the Illinois Code of Civil Procedure.

WHEREFORE the plaintiff, ERIC R. McCLINTON, requests that the Court enter judgment in favor of Plaintiff ERIC R. McCLINTON and against Defendant UNITED STATES OF AMERICA, award compensatory damages against Defendant, in the amount to be determined upon trial of this case, and award Plaintiff attorney's fees and costs.

Respectfully submitted,

MUSLIN & SANDBERG

By: /s/Craig M. Sandberg
CRAIG M. SANDBERG
19 S. LaSalle Street, Suite 700
Chicago, Illinois 60603
(312) 263-7249

CERTIFICATE OF SERVICE

The undersigned hereby certifies that in accordance with FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF), the following documents:

1. **Amended Complaint at Law.**

were served pursuant to the district court's ECF system as to ECF filers.

By:

s/CRAIG M. SANDBERG
ARDC No. 6257836
19 S. LaSalle Street, Suite 700
Chicago, Illinois 60603
(312) 263-7249

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERIC R. McCLINTON,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	Case No. 09 C 7607
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

AFFIDAVIT OF PLAINTIFF'S ATTORNEY PURSUANT TO 735 ILCS 5/2-622

I, Craig M. Sandberg, being first duly sworn on oath, depose and state:

1. I have personal knowledge of the facts stated in this affidavit, and if sworn as a witness, would testify competently thereto.

2. That the Affiant is an attorney for the plaintiff.

3. That the Affiant has consulted and reviewed the facts of this case with a health professional who the affiant reasonably believes:

i. is knowledgeable in the relevant issues involved in this particular action;

ii. practices or has practiced within the last 5 years or teaches or has taught within the last 5 years in the same area of health care or medicine that is at issue in this particular action; and

iii. meets the expert witness standards set forth in paragraphs (a) through (d) of Section 8-2501 of the Illinois Code of Civil Procedure.

4. That the reviewing health professional has determined in a written report, after a review of the medical records and other relevant material involved in this particular action, that there is a reasonable and meritorious cause for filing of such action.

5. That the Affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action.

6. That the reviewing health professional is a physician licensed to practice medicine in all its branches who is qualified by experience with the standard of care, methods, procedures and treatments relevant to the allegations at issue in the case.

7. That a copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists is attached to this affidavit.

FURTHER AFFIANT SAYETH NAUGHT.

By:

s/CRAIG M. SANDBERG
ARDC No. 6257836
Muslin & Sandberg
19 S. LaSalle Street, Suite 700
Chicago, Illinois 60603
(312) 263-7249

CERTIFICATION OF AN ACTION IN MEDICAL MALPRACTICE PURSUANT TO 735 ILCS 5/2-622

Re: Eric R. McClinton v. United States of America

I am licensed to practice by the State of Illinois and qualified by experience with the standard of care, methods, procedures and treatments relevant to the allegations at issue in the case. I have reviewed the records, facts and other relevant material pertaining to the above-referenced matter. I am knowledgeable in the relevant issues involved in this matter and I have practiced in the same area of health care or medicine that is at issue in this particular action within the last 5 years. The act(s) to follow reasonably caused or contributed to the chain of events, which in my opinion, ultimately is a reasonable and meritorious basis for an action in medical malpractice against the below-named defendant.

That following the aforementioned review, I am of the opinion that there is a reasonable and meritorious cause for the filing of the action against the United States of America, by and through its agents, servants and employees, both actual and apparent for all the following reasons:

1) On or about November 8, 2006, the United States of America breached the standard of care by providing a water-based solution for Eric McClinton to soak his foot that burned his left foot.
2) The employees and agents of the United States of America breached the standard of care in that they failed to timely refer Eric McClinton to a vascular surgeon or specialist.
3) The employees and agents of the United States of America breached the standard of care in that they failed to timely obtain a work up of Eric McClinton with a vascular surgeon or specialist.
4) The employees and agents of the United States of America breached the standard of care in that no wound debridements were ever performed the entire time the patient was in jail until he was seen at Thorak Memorial Hospital.
5) The employees and agents of the United States of America breached the standard of care in that there was a recommendation for further vascular testing by the doctor doing the initial doppler testing to run an angiogram since the ABI was not registering on his left leg, however, this was never performed.
6) The employees and agents of the United States of America breached the standard of care in that the patient never was made to stay off his foot which would have consisted of a wheelchair or cast walker. Because he was not sufficiently off-loaded the ulcer never had a chance to heal.

As a direct and proximate result of one of the foregoing deviations in the standard of care of the defendant, Eric R. McClinton suffered injuries casually related to the breaches of the standard of care by the United States of America, by and through its agents, servants and employees, both actual and apparent.

By:

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 4.2
Eastern Division

Eric R. McClinton

Plaintiff,

v.

Case No.: 1:09–cv–07607
Honorable Susan E. Cox

United States of America

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, December 16, 2011:

MINUTE entry before Honorable Susan E. Cox: The parties having filed a stipulation for dismissal, the above–entitled cause of action is dismissed. Civil case terminated. Mailed notice(vkd,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 4.2
Eastern Division

Eric R. McClinton

Plaintiff,

v.

Case No.: 1:09–cv–07607
Honorable Susan E. Cox

United States of America

Defendant.

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 4.2
Eastern Division

Eric R. McClinton

Plaintiff,

v.

Case No.: 1:09–cv–07607
Honorable Susan E. Cox

United States of America

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, December 16, 2011:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERIC MCCLINTON,	)	
	)	
Plaintiff,	)	
	)	No. 09 C 7607
v.	)	
	)	Magistrate Judge Susan E. Cox
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff and the United States of America, by and through their respective attorneys (collectively, the "parties"), as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677 (hereinafter "Stipulation").

2. The United States of America agrees to pay the cash sum of $450,000 (four hundred fifty thousand and 00/100) (hereinafter "Settlement Amount"), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which

plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the settlement amount set forth in this Stipulation in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Stipulation is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney fees for services rendered in connection with this action shall not exceed 25 percent of the settlement amount.

6. The persons signing this Stipulation warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event the plaintiff is a minor, a legally incompetent adult, or a representative of an Estate or of a wrongful death beneficiary, the plaintiff must obtain court approval of the settlement at her expense from a court of competent jurisdiction. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such court approval, the entire Stipulation and the compromise settlement are null and void.

7. Payment will be paid to Craig M. Sandberg, Muslin & Sandberg, 19 South LaSalle Street, Suite 700, Chicago, Illinois 60603, as counsel for plaintiff, who will assume responsibility for disbursement to Plaintiff. Plaintiff's attorney is responsible for distributing the settlement amount to the plaintiff, after paying or resolving any known lien or claim for payment or reimbursement arising out of the subject matter of this action. Plaintiff agrees to dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

8. The undersigned each acknowledge and represent that this Stipulation contains all the terms and conditions of this compromise settlement, that no promise or representation not contained in this Stipulation has been made to them, and that this Stipulation contains the entire

understanding between the parties and contains all terms and conditions pertaining to the within compromise and settlement of the disputes referenced herein.

9. The parties agree that this Stipulation and any additional documents relating to this settlement, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: _____

LASHONDA A. HUNT
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-4190
lashonda.hunt@usdoj.gov
Defendant United States of America

_____

Craig M. Sandberg
Muslin & Sandberg
19 South LaSalle Street, Suite 700
Chicago, Illinois 60603
Attorney for Plaintiff

Dated: December 9, 2011

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLY FITTS,

Plaintiff,

-v-

Case No.
Hon.

W. MALATINSKY, M.D.,
Federal Prison at Milan, sued
in his individual capacity; and
UNITED STATES OF AMERICA,
sued pursuant to the Federal Tort
Claims Act,

Defendants.
_____/

JURY TRIAL DEMANDED - Bivens CLAIM

FIRST COMPLAINT

INTRODUCTION

In late 2006, while confined at the Federal Prison located at Milan, Michigan, Plaintiff was given a biopsy in regards to a lump on his neck. The biopsy report was provided to the treating prison doctor of Plaintiff approximately in December of 2006. Plaintiff's prison doctor was Defendant Dr. W. Malatinsky. Even though the biopsy report listed that Plaintiff had Thyroid cancer, Dr. Malatinsky never informed Plaintiff of the biopsy results nor did he take steps to provide treatment to Plaintiff for the Thyroid cancer. It was not until November of 2007 that medical staff at Terre Haute informed Plaintiff that he had cancer which had been diagnosed in 2006. Further, Defendant Malatinsky never placed the biopsy report in the medical record of Plaintiff. As a result of these failures by the Defendants, the Thyroid Cancer has spread, which has required Plaintiff to have extensive surgery and is presently still receiving treatment for this

cancer.

PARTIES

1. Plaintiff BILLY FITTS was at all times relevant to this action a prisoner confined with the Federal Bureau of Prisons. At the filing of this complaint, Plaintiff has been released from prison.

2. Defendant Dr. W. MALATINSKY was at all times relevant to this action a medical staff employed at the Federal Prison located at Milan, Michigan. He is being sued in his individual capacity and was acting under federal law. Defendant was responsible for providing medical care to Plaintiff.

3. Defendant UNITED STATES OF AMERICA is being sued pursuant to the Federal Tort Claims Act for the conduct of its employee Dr. W. Malatinsky.

JURISDICTION

4. This Court has jurisdiction under 28 U.S.C. §§1331, 1343 and 1346(b)(1). This lawsuit is filed pursuant to the Eighth Amendment and the Federal Tort Claims Act (FTCA).

VENUE

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), as all events giving rise to Plaintiff's Complaint occurred in the Eastern District of Michigan.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

5. At the time of filing this complaint, Plaintiff has been released from prison and is not required to exhaust the prison grievance system.

6. Plaintiff filed timely an administrative tort claim, see Administrative Tort Claim Number TRT-MXR-2009-02085. The final denial of his claim was mailed on October 21, 2009.

FACTS COMMON TO ALL ALLEGATIONS

7. Prior to December of 2006, Plaintiff complained to the medical staff at the Federal Prison located at Milan, Michigan, about a lump on his neck.

8. On December 18, 2006, Plaintiff was sent to St. Joseph Hospital, Ann Arbor, Michigan, so that a biopsy could be taken of this lump.

9. From December 18, 2006, until May of 2007 when Plaintiff was transferred from Milan to Terre Haute Prison Defendant Malatinksy never informed Plaintiff that the biopsy had determined that he had Thyroid Cancer.

10. It was within the scope of the employment of Dr. Malatinsky to inform Plaintiff that he had Thyroid Cancer and to take steps to treat that cancer.

11. In fact, Defendant Malatinsky never placed the biopsy report in the prison medical recordof Plaintiff stating that he had Thyroid Cancer.

12. It was within the scope of the employment of Dr. Malatinsky to place the biopsy report in the prison medical file of Plaintiff so that others would be aware of the serious medical needs of Plaintiff so that proper care would not be delayed or denied.

13. Because he had not heard any negative news from Defendant Malatinsky, Plaintiff believed that the biopsy was negative as to any medical problems.

14. In May of 2007, Plaintiff saw Defendant Malatinsky and inquired about the lump on his neck and informed Malatinsky Plaintiff was being transferred to Terre Haute.

15. In response to this inquiry, Defendant Malatinsky informed Plaintiff that his Thyroid was swollen and that when he arrived at Terre Haute he should have them do surgery on the lump.

16. At no time during that conversation between Plaintiff and Defendant Malatinsky did the Defendant informed Plaintiff that the biopsy had shown Plaintiff had Thyroid cancer.

17. It was within the scope of the employment of Dr. Malatinsky to inform Plaintiff that his biopsy report had stated he had Thyroid cancer.

18. After Plaintiff was transferred to Terre Haute, Plaintiff inquired from the doctor there whether Milan had let them know about his receiving Thyroid surgery.

19. The doctor at Terre Haute informed Plaintiff that there was nothing in his prison medical file about Thyroid problems or a recommendation for surgery.

20. The doctor at Terre Haute arranged for Plaintiff to be sent to an outside medical staff for a CT scan from Union Hospital.

21. Plaintiff informed the doctor at Terre Haute as to the biopsy that had been done in December of 2006 but that doctor could not find it in his prison medical file.

22. It is not until after the result from the CT scan had been reported back to the prison that the biopsy report was obtained from Milan.

23. The biopsy report from Milan showed that Plaintiff had Thyroid cancer.

24. Once it was confirmed that Plaintiff had Thyroid cancer by Terre Haute medical staff it was arranged for an immediate transfer of Plaintiff to the cancer center at Butner, N.C.

25. It took nine days for Plaintiff to be transferred to the cancer center at Butner, N.C., which transfer occurred on November 20, 2007.

26. By the time of this transfer, the lump in the neck of Plaintiff had become swollen and was very painful. This lump also caused discomfort when Plaintiff laid down in bed to sleep.

27. After his arrival at Butner, the medical staff did additional test and not only confirmed

that Plaintiff had Thyroid cancer but that it had spread to his left lung.

28. Plaintiff was given surgery for this Thyroid cancer while at Butner.

29. Since his release from prison, Plaintiff is still receiving medical care for his Thyroid cancer.

30. Plaintiff has been subjected to pain and has also suffered emotional and mental anguish.

31. The action of Defendant Malatinsky was done willfully, wantonly and maliciously.

32. It was within the scope of the employment of Dr. Malatinsky to inform Plaintiff of the results of the biopsy and to provide earlier treatment for Thyroid cancer.

COUNT I: DELIBERATE INDIFFERENCE

33. Plaintiff incorporates paragraphs 1 through 32 as though they were stated fully herein.

34. Plaintiff has an Eighth Amendment right to receive medical care for a serious illness.

35. Defemdant Malitinsky and Defendant USA knew that Plaintiff had Thyroid cancer but failed and/or refused to inform Plaintiff of this serious medical condition and failed and/or refused to provide any medical care to treat this cancer.

36. Defendants also failed to place the biopsy report in the medical file of Plaintiff so that he would be provided adequate medical care by prison staff.

37. Defendants' actions were done to violate the Eighth Amendment rights of Plaintiff.

COUNT II – MEDICAL MALPRACTICE

38. Plaintiff incorporates paragraphs 1 through 37 as though they were stated fully herein.

39. The actions of defendants in failing to inform and to treat Plaintiff for Thyroid cancer was gross negligent

40. Defendants owed Plaintiff a duty to inform him that he had Thyroid cancer and to

provide treatment adequate to address that cancer.

41. Defendants filed to inform or to treat Plaintiff for medical malpractice.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant the following relief against Defendants:

A. Declare that Defendant Malatinsky violated Plaintiff's Eighth Amendment rights by not informing him of the biopsy report stating that he had Thyroid cancer and for failure to provide adequate treatment;

B. Declare that Defendant USA, through the non-actions of Dr. Malatinksy, committed medical malpractice;

C. Award compensatory and punitive damages;

D. Award reasonable attorney fees and costs; and

E. Grant other just and equitable relief this Honorable Court deems necessary.

DEMAND FOR JURY TRIAL

Plaintiff demands his right to trial by jury as to any question of damages pertaining to the *Bivens* action.

Respectfully submitted,

s/ Daniel E. Manville
Daniel E. Manville (P39731)
DANIEL E. MANVILLE, P.C.
P.O. Box 20321
Ferndale, MI 48220
(248) 890-4720 (office)
daniel.manville@gmail.com

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CI-NCR-2010-00500 **Short Description:** FITTS V. MALATINSKY, ET AL.

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	10-cv-11100-VAR-PJK	Date	07/24/2012
Short Description	FITTS V. MALATINSKY, ET AL.	Type	Settled
Classification	Civil	Reason	
Case Type	FTCA & Bivens	Sought	Compensatory Damages
Case Sub-Type		Amount offered	$10,000.00
Current Region	NORTH CENTRAL REGIONAL OFFICE	Total Amount Paid	$10,000.00
Current Institution	Milan (FCI)	Description	
Incident Region	NORTH CENTRAL REGIONAL OFFICE	Description	
Incident Institution	Milan (FCI)	Court Fee Paid ?	No
Monetary Relief Sought	$	Pro Se ?	No
Estimated Amount	$		
Office	Detroit	Date Received	03/24/2010
Jurisdiction	EASTERN DISTRICT OF MICHIGAN		
Responsible Legal Office	St. Louis, MO	Date Filed	03/18/2010

Estimated Amount	$ -	Current Owner	HEATHER MACCONNELL
Estimated Outcome	No evaluation can be made at this time	Case Status	Closed
		Timeline Status	Closed
		Monthly Report Status	NEW CASES
		Private Case	No

Long Description	28:1346 TORT CLAIM
Further Case Classification	
Comments	

E-FILED
Tuesday, 13 April, 2010 10:35:37 AM
Clerk, U.S. District Court, ILCD

FILED
APR 12 2010
PAMELA E. ROBINSON, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

GUADALUPA DE ANDA,
PLAINTIFF,

VERSUS

MR. D. SMITH, DEFENDANT,
WARDEN, F.C.I. PEKIN,

OFFICER BLACK, DEFENDANT,
CORRECTIONAL OFFICER,

MR. VERFURTH, DEFENDANT,
CAPTAIN, F.C.I. PEKIN,

MR. FARDEL, DEFENDANT,
LIEUTENANT, F.C.I. PEKIN,

SCOTT MOATS, DEFENDANT,
DOCTOR, F.C.I. PEKIN.

CIVIL ACTION NO. 10-1094
(Number to be assigned by Court)

COMPLAINT

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes _____ No XXXXX

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline).

1. Parties to this previous lawsuit: N/A

Plaintiffs: N/A

N/A

N/A

Defendants: N/A

N/A

N/A

2. Court (if federal court, name the district; if state court, name the county); N/A

N/A

3. Docket Number: N/A

4. Name of judge to whom case was assigned: N/A

N/A

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending? N/A

N/A

6. Approximate date of filing lawsuit: N/A

7. Approximate date of disposition: N/A

II. Place of Present Confinement: F.C.I. Beckley, Beaver West Virginia

A. Is there a prisoner grievance procedure in this institution?

Yes XXXXX No _____

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

Yes XXXXX No _____

C. If you answer is YES:

1. What steps did you take? I Fully Exhausted Any And All Administrative Remedies.

2. What was the result? Relief Denied At Each Level Of The Administrative Departments.

D. If your answer is NO, explain why not: N/A

N/A

III. Parties

(In item A below, place your name and inmate registration number in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff: Guadalupe De Anda, 02215-029

Address: F.C.I. Beckley
P.O. Box 350, Beaver, W.V. 25813

B. Additional Plaintiff(s) and Address(es): N/A

No Additional Plaintiffs

(In item C below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item D for the names, positions, and places of employment of any additional defendants.)

C. Defendant: **Mr. D. Smith,**

is employed as: **Warden, Federal Correctional Institution,**
at **P.O. Box 5000**
Pekin, Il. 61555

D. Additional defendants: **Officer Black, Correctional Officer, Mr, Verfurth, Captain, Mr. Ferdel, Lieutenant, Scott Moats, Doctor, (All Defendants Employed At The Federal Correctional Institution, P.O. Box 5000, Pekin, Il. 61555.)**

IV. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

The Defendant, known only to the Plaintiff as being, "Officer Black" did intentionally and purposely tell the other "inamtes" that I was a "snich and an informant." The actual intentions of Officer Black was for the Inmates to take offense of me being labeled as a snich so that the inmates would jump on me and beat me up. As a direct result of Officer Black telling the other inmates that I was a snich, I was in fact jumped on by a group of inmates and was injured in several ways. Because of the inmates kicking me in the head and face, I have lost part of the vision in my left eye that cannon be repaired and have neck injuries that may never heal. Office Black did intentionally cause the inmates to jump on me and beat me up, such is documented at the Federal Correctional Institution, Pekin, Il. (See, **PLAINTIFF'S MEMORANDUM OF LAW AND FACTS IN SUPPORT OF CIVIL COMPLAINT PURSUANT TO TITLE 42 U.S.C. SECTION 1983 AND, BIVINS V. SIX UNKNOWN FEDERAL NARCOTICS AGENTS, 403 U.S. 388, FILED SEPERATELY).**

IV. **Statement of Claim (continued):** The Defendants, Mr. D. Smith, Mr. Verfurth, Mr. Fardel and Dr. Moats, are all named as Defendants for their parts in causing additional pain and suffering and or for their failure to take action to have prevented the additional injuries, pain and suffering. Mr. Smith, Mr. Verfurth, and Mr. Fardel, all had the official authority to have ended the harassment of the SHU Guards and failed to do so. Dr. Moats was fully aware of the extent of the injuries and purposely reduced the pain medication so that the pain would be suffered more than necessary. **(See, PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF CIVIL COMPLAINT PURSUANT TO TITLE 42 U.S.C SECTION 1983 AND, BIVINS V. SIX UNKNOWN FEDERAL NARCOTICS AGENTS, 403 U.S. 388, FILED SEPERATELY).**

V. **Relief**

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

The Plaintiff in this case did suffer life long injuries as a direct result of the Defendants actions stated in the complaint and extended through the process of the Memorandum Of Law And Facts In Support. The Plaintiff is asking that the Court allow the complaint to proceed as a BIVINS ACTION due to the fact that the Plaintiff does not have the full names and information of each of the Defendants and request that each of the Defendants be identified through discovery proceedings. The Plaintiff is seeking both Monetary and Punitive Damages from each of the named Defendants, the amount of $500.000.00 from each as Monetary Damages, and $500.000.00 from each as Punitive Damages. The Plaintiff also request that this case be fully determined by a Jury. The Plaintiff also request any other relief that the Court deem to be proper.

V. **Relief (continued)):** The Plaintiff has presented to the Court at the time of submitting this Civil Complaint, Plaintiff's Memorandum Of Law And Facts In Support Of Civil Complaint, the Plaintiff is asking that the Court review the Relief Requested at the end of the Memorandum In Support.

VII. Counsel

A. If someone other than a lawyer is assisting you in preparing this case, state the person's name:

All Documents Are Presented In Pro se.

B. Have you made any effort to contact a private lawyer to determine if he or she would represent you in this civil action?

Yes _____ No XXXXX

If so, state the name(s) and address(es) of each lawyer contacted:

_____

_____

If not, state your reasons: I cannot afford to retain an Attorney to represent me in this matter.

C. Have you previously had a lawyer representing you in a civil action in this court?

Yes _____ No XXXXX

If so, state the lawyer's name and address:

Signed this 31st day of March, 2010.

Guadalupe De Anda
Signature of Plaintiff or Plaintiffs

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 31st day of March 2010.
(Date)

Guadalupe De Anda
Signature of Movant/Plaintiff

Guadalupe De Anda
02215-029, F.C.I. Beckley
P.O. Box 350
Beaver, W.V. 25813

N/A NO ATTORNEY
Signature of Attorney
(if any)

Office Of The Court Clerk
United States District Court
100 N.E. Monroe, Room 309
Peoria, Il. 61602

Guadalupe De Anda
02215-029, Pine Unit
F.C.I. Beckley
P.O. Box 350
Beaver, W.V. 25813

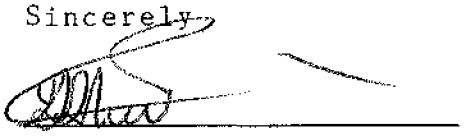
Re: Guadalupe De Anda VS. D. Smith, Warden, et al.
Request To File Civil Action Complaint.

Dear Clerk Of The Court, April 6, 2010

I have enclosed the ORIGINAL CIVIL COMPLAINT FORM with a total of six copies to be filed with the Court. The copies are, one for the Court Clerk File and a copy for each of the Defendants named within the complaint.

Also, I have enclosed the ORIGINAL MEMORANDUM OF LAW AND FACTS IN SUPPORT OF CIVIL COMPLAINT, with six copies of it as well. I will greatly appreciate it if the documents can be filed with out delay, and request that I be informed of the Civil Case Number after the Civil Complaint is filed. The address stated above is my correct address. I do thank you for your time in this matter.

Sincerely,



Guadalupe De Anda

E-FILED
Tuesday, 13 April, 2010 10:35:37 AM
Clerk, U.S. District Court, ILCD

FILED
APR 12 2010
PAMELA E. ROBINSON, CLERK
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

GUADALUPE DE ANDA,
PLAINTIFF,

VS.

CIVIL ACTION NO. 10-1094
(JURY TRIAL DEMANDED)

MR. D. SMITH, DEFENDANT,
WARDEN, F.C.I. PEKIN,

OFFICER BLACK, DEFENDANT,
CORRECTIONAL OFFICER,

MR. VERFURTH, DEFENDANT,
CAPTAIN, F.C.I. PEKIN,

MR. FARDEL, DEFENDANT,
LIEUTENANT, F.C.I. PEKIN,

SCOTT MOATS, DEFENDANT,
DOCTOR, F.C.I. PEKIN.

PLAINTIFF'S MEMORANDUM OF LAW AND FACTS IN SUPPORT OF CIVIL COMPLAINT PURSUANT TO TITLE 42 U.S.C. SECTION 1983 AND, BIVINS V. SIX UNKNOWN FEDERAL NARCOTICS AGENTS, 403 U.S. 388

The Plaintiff, Guadalupe De Anda, being in a pro se manner, is respectfully submitting to this Honorable Court to fully consider, Plaintiff's Memorandum Of Law And Facts In Support Of Civil Complaint Pursuant To Title 42 U.S.C. Section 1983 And, Bivins V. Six Unknown Narcotics Agents, 403 U.S. 388. The Plaintiff can show good cause as to why the Civil Complaint is in compliance of being a "Bivins Action" in this case, and that the Title 42 U.S.C. Section 1983 Civil Action Complaint is also in compliance with the Plaintiff's due process rights in presenting all of the facts supporting his claims in this matter and why the Plaintiff is entitled for relief and compensation for the over all damages claimed herein.

JURISDICTION OF THE COURT

1. The Federal Correctional Institution is located at P.O. Box 5000, Pekin, Illinois, 61555, with such being within the geographic jurisdiction of the United States District Court For The Central District Of Illinois, Peoria Division. The Plaintiff has "fully exhausted all administrative remedies" related to his claims which provides this Court with full jurisdiction to hear this complaint pursuant to Title 42 U.S.C. Section 1983. The Prisoners Litigation Reform Act (PLRA) did make clear that a prisoner [m]ust first exhaust [all] administrative remedies, therefore in this case, subject matter jurisdiction is fully satisfied pursuant to 42 U.S.C. Section 1997 (e) (2), and the Plaintiff has brought his Bivins claim within the applicable three-year statute of limitations to do so.

INTRODUCTION OF CIVIL COMPLAINT

2. The Plaintiff, Guadalupe De Anda, pro se, under the penalty of perjury, hereby solemnly states unto this Honorable Court that, the Plaintiff was a Federal Inmate that had previously been housed at the Federal Correctional Institution located at Pekin, Illinois, and is now housed at the Federal Correctional Institution-Beckley, located at P.O. Box 350, Beaver, West Virginia 25813. The Plaintiff filed this Civil Action, pro se, pursuant to Title 42 U.S.C. Section 1983 and Bivins V. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), seeking damages with respect to (1) negligence, (2) injury, (3) life endangerment and, (4) lack of and refusal of medical treatment while incarcerated at the Federal Correctional Institution, Pekin, Illinois.

3. It is clearly established by the statutory provisions of Title 42 U.S.C. Section 1983 that the Plaintiff's Civil Action is proper pursuant to Section 1983. However, the Bivins claim is due to the fact that the Plaintiff is unable to provide the full identity of [all persons directly and indirectly liable] for the cause and the injuries substained while incarcerated at F.C.I. Pekin. The Plaintiff is requesting that at the proper time, an identity hearing will be ordered by the Court so that a proper amendment can be put into place to name any Defendants being newly identified through the process of the identity hearing. The factual basis of the Plaintiff's Civil Action Complaint is as follows.

PLAINTIFF'S GROUNDS AND FACTS IN SUPPORT OF CIVIL COMPLAINT

4. PLAINTIFF'S GROUND ONE: The Plaintiff's Eighth Amendment Constitutional Right to be free of the unnecessary and waton infliction of pain and suffering was deliberately bestowed upon the Plaintiff by the Defendant that can only be identified as "Officer Black." The deliberate actions of Officer Black did cause actual injury that is permanent and has placed the Plaintiff's life, safety and well being at a huge risk throughout the duration of the Plaintiff's incarceration.

5. PLAINTIFF'S FACTS AND LAW IN SUPPORT OF GROUND ONE: Officer Black, full name unknown, was a female officer employed by the Federal Bureau Of Prisons and worked as a Correctional Officer at F.C.I. Pekin. Officer Black purposely and intentionally, labeled the Plaintiff as being a "Snich or Informant" with the intent of such to cause the Plaintiff harm and injury. As a [d]irect result of Officer Black's false claim to the

"other inmates" that the Plaintiff was a "Snich," three or four of the inmates vigorously attacked the Plaintiff in an attempt to kill him. The fact of the Plaintiff being attacked by the inmates is fully documented by the prison records and by the prison medical records in as much that the Plaintiff's claims can be confirmed.

6. With respect to the "deliberate indifference" test that the Courts use to determine whether officials acted with a sufficiently culpable state of mind, it can be determined in this case that Officer Black [knew full well] that the Plaintiff faced a substantial risk of serious harm....for Officer Black purposely [c]reated the "substantial risk" by specifically telling other inmates that he....(the Plaintiff)....was a Snich and Informant. See, Farmer V. Brennan, 511 U.S. 825, 838-42 (1994) (Eighth Amendment claim remanded to determine if prison officials acted with deliberate indifference); see also, Giroux V. Somerset County, 178 F.3d 28, 34 (1st Cir. 1999)(Eighth Amendment claim stated because inmate alleged officials awareness of impending attack by fellow prisoner and failed to take action); Hamilton V. Leavy, 117 F.3d 742, 747 (3rd Cir. 1997)(Eighth Amendment claim stated under Farmer because prisoner had history of violent acts against him, was subsequently labeled "snich," and prison officials failed to take additional protective steps beyond recommendations of protective custody).

7. The Plaintiff's case is [totally oppsite] of that of the Second Circuit Court of Appeals in Dawes v. Walker, 239 F.3d 489, 492-93 (2nd Cir. 2001)(Eighth Amendment [n]ot violated though correctional officer referred to prisoner as "informant" and "rat" because prisoner did not present factual allegations to support claim that he actually faced

serious threat of harm from other inmates)(emphasis added). The Plaintiff in this case, the attack upon him was intentionally caused by the direct actions of Officer Black, the Plaintiff was not aware of his life being in danger until he was attacked by the group of inmates, therefore, the Plaintiff did not know that he should seek protection.

8. In analyzing the Eighth Amendment claims by the Plaintiff, the "injury" caused by Officer Black's actions does meet both the subjective and objective elements of the Constitutional violations. See, Hudson V. McMillian, 503 U.S. 1, 8 (1992)("Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.") Id. Hudson at 9-10. In this case, the Plaintiff's pain from the injuries continue and has caused permanent damage of the Plaintiff's vision, although a year has come to pass, the Plaintiff still suffers from the ringing of the ears from being stomped in the head several times and has neck, shoulder and rib cage pains existing from the three or four inmates who attacked him as a direct result of Officer Black telling these inmates that the Plaintiff was a "snich or informant."

9. The Defendant, Officer Black did, while acting in her official capacity, "intentionally" caused other inmates to believe that the Plaintiff was a snich or informant which was specifically for the purpose of causing the harm and injury upon the Plaintiff which could have very well had cause his death. The Plaintiff is clearly entitled to compensation from the Defendant in the form of both, monetary and punitive damages. (See, Relief Sought By Plaintiff).

10. PLAINTIFF'S GROUND TWO: The Plaintiff's Eighth Amendment right to protection against cruel and unusual punishment was intentionally violated by the Defendants known only as....Lieutenant Fardel and Captain Verfurth, full and correct names unknown. The Defendants, Fardel and Verfurth were both "fully aware" of the actions that were created and caused by Officer Black and protected her actions by their intentional failure to investigate her actions. The following facts do establish the "additional" pain and suffering that was brought upon the Plaintiff as a direct result of Fardel's and Verfurth's actions.

11. PLAINTIFF'S FACTS AND LAW IN SUPPORT OF GROUND TWO: The Defendants, Fardel and Verfurth were fully aware of the false claims made by Officer Black in telling "other inmates" that the Plaintiff was a "Snich or an Informant" and knew "full well" what the consequences would be of that type of snich jacket being placed upon [a]ny inmate in a high security level institution. Both of the Defendants, Fardel and Verfurth, did.... intentionally choose to ignor the complaints made by the Plaintiff and purposely retaliated by telling the Officers working in the Special Housing Unit (SHU) that the Plaintiff is "filing complaints" on their "fellow Officers." This did cause the SHU Officers to constantly harass the Plaintiff throughout the duration of his stay in SHU.

12. The actions by these two Defendants did amount to cruel and unusual punishment. In Wilson V. Seiter, 501 U.S. 294, 297-303 (1991), the United States Supreme Court determined that, "Eighth Amendment prohibits only 'cruel and unusual punishment,' and '[t]he inflection of punishment is a deliberate act intended to chastise or deter.'" The Wilson Court reasoned

that "[i]f the pain inflected is not formally meted out as punishment" by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify as cruel and unusual punishment. Id. Wilson, at 300.

13. In the Plaintiff's case, the two Defendants, (Fardel and Verfurth), contributed largely to cause pain and suffering upon the Plaintiff, such was done knowingly and intentionally for the purpose of "punishing" the Plaintiff for filing complaints on Officer Black and for bringing the facts to the attention of the Warden, Mr. Smith. Their actions were unnecessary and was "totally" without penological justification and grossly out of proportion to the severity of the crime and was [n]ot within the statutory provisions or imposed by the sentencing judge for the Plaintiff to be [punished] in ways that would cause actual physical and psychological pain and suffering.

14. The Defendants, Fardel and Verfurth, both had the "authority" by their official rank as "Lieutenant and Captain, to have ended the lies that were purposely stated by Officer Black that caused the actual injuries from the group of inmates that beat him and could have prevented the further harassment of the SHU Officers while being housed in the Special Housing Unit. The Defendants, Fardel and Verfurth are to be held fully responsible for their actions and the Plaintiff is entitled to both, monetary and punitive damages from both of the Defendants, Fardel and Verfurth. (See, Relief Sought By Plaintiff).

15. PLAINTIFF'S GROUND THREE: The Plaintiff was denied proper medical treatment and care while being incarcerated at the Federal Correctional

Institution, Pekin. It is of a Constitutional right for incarcerated persons be treated properly by Medical Staff of the Prisons, which includes providing the "proper amount and proper type of medication" for the inmate that is being treated for pain.

16. PLAINTIFF'S FACTS AND LAW IN SUPPORT OF GROUND THREE: In this case, the Defendant, Scott moats, MD. was "fully responsible" for the treatment and care of the Plaintiff's injuries after he was beaten by the group of inmates, and purposely and intentionally failed and refused to provide proper care and treatment.. The Plaintiff was beaten by a group of other inmates as a direct result of Officer Black's false information that was provided to the inmates that the Plaintiff was a "snich or an informant." The MPL, Sattinder Rattan documented the full extent of the injuries and knew that the Plaintiff took a hard beating and that such would require at a minimum, pain medication three times a day and prescribed the medication properly.

17. The Defendant, Doctor Moats claimed that the Plaintiff was "over-acting" the extent of his injuries and reduced the pain medication from three time a day to [only once] per-day. This placed the Plaintiff at having to suffer with the pain for at least six-teen hours out of every twenty- four hour period. The reduction of the pain medication was done by Doctor Moats from his review of the "medical charts" and [n]ot from an actual physcial, or in person evaluation of the Plaintiff. When the nurse brought the medication to the SHU, the Plaintiff did ask the Nurse...."where is my medication, the Nurse said, Dr. Moats reduced it to [once a day] because he said that you are faking the pain."

18. This type of refusal of treatment has been determined to be an Eighth Amendment violation for the identical type of situations as the Plaintiff's in this case. See, Greeno V. Daley, 414 F.3d 645, 654-55 (7th Cir. 2005)(Eighth Amendment claim stated because prison nurse allegedly deprived prisoner of medication and persisted with ineffective treatment despite deteriorating condition); Johnson V. Wright, 412 F.3d 398, 403-06 (2nd Cir. 2005)(Eighth Amendment claim stated because prison officials disregarded excessive risk to prisoner's health by denying treatment with particular drugs despite repeated recommendations by prison doctors) and see also, Easter V. Powell, 467 F.3d 459, 464 (5th Cir 2006)(Eighth Amendment claim stated because prison nurse refused to follow inmate's prescribed course of treatment).

19. The Defendant, Dr. Moats was aware of the Plaintiff's complaint against Officer Black and in retaliation of such, chose to disregard the medical needs of the Plaintiff and such caused the Plaintiff a great amount of unnecessary pain and suffering. The Defendant knew that the Plaintiff was in the SHU and had very little to almost no access to present his complaints to anyone and that "no one will even listen to inmates that are in the SHU and complain." It is further known by most all prison staff that "complaints" made by inmates housed in the SHU go unheard and are ignorred by "whoever" the inmate complains to. The Defendant, Dr. Moats did take advantage of knowing that the Plaintiff's complaints would go un-noticed and continued to deny the treatment , care and medication for pain for the Plaintiff. The Defendant, Dr. Moats must be held liable for his actions and the Plaintiff is fully entitled to both, monetary and punitive damages from the De-

fendant, Dr Moats. (See, Relief Sought By Plaintiff).

20. PLAINTIFF'S GROUND FOUR: The Warden, Mr. D. Smith, was made aware of all of the facts presented throughout this complaint and stood by and allowed the harassment by other Officers that worked in the SHU to continue, allowed the Medical Department to refuse proper care and treatment and placed the Plaintiff's life in danger of future injuries by not investigating Officer Black's intentional claims that the Plaintiff was a snich or an informant. The Plaintiff has a continuing existance of both physical and psychological injuries as a result of the Warden's failure to take action.

21. PLAINTIFF'S FACTS IN SUPPORT OF GROUND FOUR: The "Warden" at [every] Federal Correctional Institution has an [obligated duty] to both the inmates and the public interest to ensure the safety of the inmates, to assure that inmates are not abused by Staff or other Officers and the care and well being of [all inmates] within the Institution....[regardless] of race or religion. The Warden, Mr. Smith was fully aware of all of the actions of the SHU Officers, the Lieutenant, the Captain and the Doctor of Health Services. Knowing such, the Warden, Mr. Smith chose to do "nothing" to correct the problems presented to him or to entervene by stopping the problems.

22. The Defendant, Warden Smith, did act with deliberate indefference, his failure to take action upon becoming aware of the need to intervene was intentional and deliberate knowing full well that the "lack of action" would subject the Plaintiff to additional harassment from the SHU Officers in the form of retaliation. The additional harassment did bring-

forth a large amount of stress and mental anguish. The Plaintiff did suffer from migrain type headaches brought on from the worry and stress and not knowing when Officers would create yet another attack upon at the hands of other inmates.

23. The Warden, Mr. Smith was obligated to have prevented the other guards from the harassment, insults and attempting to turn other inmates against another inmate....which in this case, was the Plaintiff that these acts were committed against. The Warden, Mr. Smith was fully aware of all of all of these acts and chose to stand silently by and made no attempts to stop it. The United States Supreme Court has in the past ruled in favor of Plaintiffs in similar situations. See, Whitley V. Albers, 475 U.S. 312, 319 (1986), see also, Meriwether V. Coughlin, 879 F.2d 1037, 1047-48 (2nd Cir. 1989)(Eighth Amendment claim stated because corrections officers knew inmates' past involvement in plot of violent insurrection against guards would expose inmate to extreme hostility from guards and yet did nothing to prevent beating from guards).

24. In the Plaintiff's case, the actions of Officer Black did cause actual physical injuries to the Plaintiff by the group of inmates that "attacked him and beat him" as a direct result of Officer Black telling the other inmates that the Plaintiff was a "snich or informant." Officer Black did encourage the other inmates to believe that the Plaintiff was a snich so that they would attack him. The Warden, Mr. Smith was made fully aware of Officer Black's actions and condoned her actions by his failure to have the incident investigated. See, Benefield V. McDowall, 241 F.3d 1272 (10th Cir. 2001)(Eighth Amendment claim stated

for psychological injury for fear of harm, absent physical injury, when prisoner alleged that "prison official" [deliberately] exposed prisoner to harm by labeling prisoner a "snich")(emphasis added).

25. After the Plaintiff was placed in the SHU and the SHU Officers were made aware of the Plaintiff's complaint against Officer Black, the psychological injury increased tremendously due to the SHU Officers' insults and harassment. The Warden, Mr. Smith was made aware of the guards actions and again....failed to intervene or make [any attempts] to stop....or prevent the guards' harassment. The Warden, Mr. Smith did deliberately violate the Plaintiff's Constitutional right to be free from physical and psychological harm and [is] entitled to both, monetary and punitive damages from the Defendant, Mr. Smith.

PLAINTIFF'S CLOSING STATEMENT

26. The Plaintiff has clearly presented facts that amount to Constitutional violations in that the Plaintiff was....subjected to cruel and unusual punishment....for several months....in a variety of forms and methods from [each] of the Defendants named herein. There is no justifiable explanation that Officer Black could possibly provide in purposely and intentionally telling "other inmates" that the Plaintiff was a "snich or an informant." It was the [specific intent] of Officer Black to have the Plaintiff killed, or at a minimum, beaten up by the group of inmates when she purposely labeled the Plaintiff as a snich.

27. As a direct result of Officer Black's actions, the Plaintiff was in fact beaten up by a group of inmates, this fact is fully documented as being the "cause" of the inmates to beat the Plaintiff up. The Plaintiff

did obtain several injuries, some in which still have not healed up to this present date....and very well may [n]ever heal, both physically and psychologically. The "injuries" stated by the Plaintiff were created by Officer Black, a Correctional Officer at the Federal Correctional Institution, located at Pekin, Illinois. This Court does have the proper jurisdiction to grant the Plaintiff the full amount of relief due to the Plaintiff in regards to the specific complaint against Officer Black.

28. The Defendants, Fardel and Verfurth and Smith, [all] had the full "Aministrative Authority" to have intervened and could have stopped the harassment by the SHU guards and [could have] brought the whole situation fully under control and chose intentionally to look the other way and allow the physical and psychological injuries to continue. These Defendants were Staff Members at the Federal Correctional Institution, located at Pekin, Illinois. This Court does have the proper jurisdiction to grant the Plaintiff in regards to the specific complaints made against each of the Defendants named herein.

29. The Defendant, Doctor Moats, was "fully aware" of the extent of the injuries caused by the beating by the group of inmates and [had to have known] the extent of pain that is the result of a serious beating. The Defendant, Doctor Moats "knowing" that a reduction of the pain medication would increase the amount of pain and suffering upon the Plaintiff and deliberately "reduced the pain medication" which caused additional pain and suffering. Doctor Moats was employed at the Federal Correctional Institution, located at Pekin, Illinois. This Court does have the full

authority and jurisdiction to grant the Plaintiff the relief that is due to the Plaintiff in regards to the specific complaint made against the Defendant, Doctor Moats.

PLAINTIFF'S RELIEF REQUESTED

30. The Plaintiff is requesting that his Civil Complaint presented be determined by a Jury and that he be appointed Counsel to represent the case presented to the Jury. Upon a finding of the Jury that each of the Defendants are in fact guilty of the claims stated against each of the Defendants, their actions must be held accountable for such, the Plaintiff is seeking to be paid a minimum of $500.000.00 in Monetary Damages from "each" of the Defendants and the amount of $500.000.00 in Punitive Damages from "each" of the Defendants.

31. Wherefore the Plaintiff prays that this Honorable Court will grant any and all relief that the Court deems to be proper at this time.

Respectfully Submitted

Dated this 31st day of March, 2010.

Guadalupe De Anda
Plaintiff In Pro se

PLAINTIFF'S DECLARATION

I, Guadalupe De Anda, do hereby declare under the penalty of perjury that all facts and statements that are presented herein, are true and correct to the very best of my belief and knowledge.

Dated this 31st day of March, 2010.

Guadalupe De Anda
02215-029, F.C.I. Beckly
P.O. Box 350
Beaver, W.V. 25813

CLOSED,PRISONER,PROBONO,PROSE,REFER

U.S. District Court
CENTRAL DISTRICT OF ILLINOIS (Peoria)
CIVIL DOCKET FOR CASE #: 1:10-cv-01094-JES-JAG

De Anda v. Smith et al
Assigned to: Chief Judge James E. Shadid
Referred to: Magistrate Judge John A. Gorman
Cause: 28:1331 Federal Question: Bivens Act

Date Filed: 04/12/2010
Date Terminated: 09/12/2013
Jury Demand: Both
Nature of Suit: 555 Prisoner Petitions - Prison Conditions
Jurisdiction: Federal Question

Plaintiff

Guadalupe De Anda
02215-029
EDGEFIELD
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 725
EDGEFIELD, SC 29824
803-637-1500

represented by **Aaron S Galloway**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

United States

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Email: gerard.brost@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/13/2010	1	COMPLAINT against. Fardel, Scott Moats, Officer Black, D Smith,. Verfurth, filed by Guadalupe De Anda. (Attachments: # 1 Memorandum)(RP, ilcd) (Entered: 04/13/2010)

04/13/2010	2	PETITION TO PROCEED IN FORMA PAUPERIS, filed by Guadalupe De Anda.(RP, ilcd) (Entered: 04/13/2010)
04/13/2010	3	Letter requesting trust fund ledger sent to FCI Beckley for Guadalupe De Anda. (cc:pla)(cc:trust fund department) (RP, ilcd) (Entered: 04/13/2010)
04/14/2010		MERIT REVIEW ORDER: This case is set for merit review. The court is required by 28 U.S.C. Section 1915A to "screen" the plaintiff's complaint, and through such process to identify and dismiss any legally insufficient claim, or the entire action if warranted. A claim is legally insufficient if it "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." The plaintiff must be prepared to identify each of his claims and defendants during the hearing. The clerk is to notify the plaintiff's place of incarceration and to issue a writ for the plaintiff's participation in the telephone conference call. Merit Review Hearing set for 4/26/2010 10:00 AM OR AS SOON THEREAFTER THE COURT REACHES THE CASE by telephone from Urbana (court will place call) before Judge Harold A. Baker. Entered by Judge Harold A. Baker on 4/14/2010. (CC:PLA)(RP, ilcd) (Entered: 04/14/2010)
04/14/2010	4	TELEPHONE WRIT issued for Guadalupe De Anda. (cc:pla)(cc:Warden FCI Beckley) (RP, ilcd) (Entered: 04/14/2010)
04/19/2010		TEXT ORDER- The merit review hearing scheduled for April 26, 2010 at 10:00 a.m. is canceled as unnecessary and the writ is recalled. The clerk is to notify the plaintiff and his place of residence. A merit review order will be entered. Entered by Judge Harold A. Baker on 4/19/10. (TD, ilcd) (Entered: 04/19/2010)
04/27/2010	5	MERIT REVIEW ORDER Entered by Judge Harold A. Baker on 4/27/10. IT IS THEREFORE ORDERED: Pursuant to its merit review of the complaint under 28 U.S.C. Section 1915A, the court finds that the plaintiff states the following federal claims:a) Defendants Black, Fardel, Verfurth, and Smith violated the plaintiffs EighthAmendment rights when the plaintiff was intentionally labeled a snitch withdeliberate indifference to a substantial risk of serious harm to the inmate;b) Defendants Fardel and Verfurth violated the plaintiffs First Amendment rights when the retaliated against the plaintiff for filing complaints against officers; and, c) Defendants Moats and Smith violated the Eighth Amendment when they were deliberately indifferent to the plaintiffs serious medical condition. All other claims based on federal law, other than those set forth in paragraph one above, are dismissed for failure to state a claim pursuant to 28 U.S.C. Section 1915A. This case shall proceed solely on those federal claims identified in paragraph one above. Any claims not set forth in paragraph one above shall not be included in the case, except in the courts discretion on motion by a party for good cause shown, or by leave of courtpursuant to Federal Rule of Civil Procedure 15. A Prisoner Scheduling Order shall be entered directing service and setting a Rule 16 conference date. A copy of this Case Management Order shall be served with the Complaint and Scheduling Order. The defendants shall file an answer within the time prescribed by Local Rule. A motion to dismiss is not an answer. The answer must be considered a responsive pleading under Federal Rule of Civil Procedure 15(a) and should include all defenses appropriate under the Federal Rules. The answer and subsequent

		pleadings shall be to the issues and claims stated in this Case Management Order. (cc:plaintiff)(SM, ilcd) (Entered: 04/27/2010)
04/28/2010	6	PRISONER SCHEDULING ORDER Entered by Magistrate Judge John A. Gorman on 4/28/10. Cause set for further scheduling procedures under Fed. R. Civ. P. 16 by telephone conference call. Rule 16 Scheduling Conference set for 7/20/2010 at 10:00 AM by telephone from Urbana (court will place call) before Judge Harold A. Baker. (cc:pla)(SM, ilcd) (Entered: 04/28/2010)
04/28/2010	7	REQUEST FOR WAIVER OF SERVICE and Notice of Lawsuit sent to all Defendants on 4/28/10. (Attachments: # 1 Smith Notice & Waiver, # 2 Fardel Notice & Waiver, # 3 Moats Notice & Waiver, # 4 Verfurth Notice & Waiver) (SM, ilcd) (Entered: 04/28/2010)
04/28/2010		Set/Reset Deadlines: Waivers for all Dfts due back on Miscellaneous Deadline of 5/28/2010 (SM, ilcd) (Entered: 05/24/2010)
05/05/2010	8	Prisoner Trust Fund Ledger from FCI Beckley for the time period of 11/24/09-4/12/10 for Guadalupe De Anda (SM, ilcd) (Entered: 05/06/2010)
05/06/2010		TEXT ORDER granting 2 Petition to Proceed In Forma Pauperis. Pursuant to 28 U.S.C. Section 1915(b)(1), Plaintiff is assessed an initial partial filing fee of $18.68. The agency having custody of Plaintiff is directed to forward the initial partial filing fee from Plaintiff`s account to the Clerk of Court. After payment of the initial partial filing fee (or immediately if no funds are available for that payment) the agency having custody of Plaintiff is directed to make monthly payments of 20 percent of the preceding month`s income credited to Plaintiff`s account to the Clerk of Court. The agency having custody of the plaintiff shall forward these payments each time Plaintiff`s account exceeds $10, until the filing fee of $350 is paid in full. The Clerk is directed to mail a copy of this order to Plaintiff`s place of confinement, to the attention of the Trust Fund Office. Entered by Magistrate Judge John A. Gorman on 5/6/10. (cc:Pla, Institution, Finance) (SM, ilcd) (Entered: 05/06/2010)
06/02/2010	9	Letter from Plaintiff De Anda re Mail. (SM, ilcd) (Entered: 06/02/2010)
06/03/2010		TEXT ORDER entered by Judge Harold A. Baker on 6/3/2010. Due to a conflict in the Court's calendar, the Rule 16 hearing on 7/20/10 time has been changed from 10:00 a.m. to 8:45 a.m. (CENTRAL TIME) by telephone conference call or as soon thereafter as the court reaches the case. Writ to issue for the plaintiff. (cc: Plaintiff/Records Dept) (KB, ilcd) (Entered: 06/03/2010)
06/11/2010	10	Letter re service Plaintiff Guadalupe Anda (SM, ilcd) (Entered: 06/11/2010)
06/23/2010	11	Letter to the Court from Guadalupe De Anda (SM, ilcd) (Entered: 06/23/2010)
06/28/2010	12	AMENDED WRIT of Habeas Corpus Ad Testificandum issued for Rule 16 Conference reset to Tuesday, July 20, 1020, at 8:45 a.m. (cc: plaintiff/Correctional Center Records Office) (MSB, ilcd) (Entered: 06/28/2010)
07/12/2010	13	MOTION to Appoint Counsel by Plaintiff Guadalupe De Anda. Responses due by 7/29/2010 (KB, ilcd) (Entered: 07/12/2010)
07/15/2010	14	

		SECOND REQUEST FOR WAIVER OF SERVICE and Notice of Lawsuit sent to All Defendants at FCI PEKIN on 7/15/10. (Attachments: # 1 Brost Notice & Waiver, # 2 Fardel Notice & Waiver, # 3 Moats Notice & Waiver, # 4 Smith Notice & Waiver, # 5 Verfurth Notice & Waiver, # 6 Atty General Notice & Waiver)(SM, ilcd) (Entered: 07/15/2010)
07/16/2010		TEXT ORDER Entered by Judge Harold A. Baker on 7/16/10. This cause is before the court for case management. The clerk of the court did send Notice of Lawsuit and Waiver of Service Forms to the defendants, but they were not received by the institution. Therefore, the clerk has resent the documents and additional time is needed for their return. The hearing pursuant to Rule 16 of the Federal Rules of Civil Procedure on July 20, 2010 is canceled and the writ is recalled. The hearing is now rescheduled for August 18, 2010 at 8:30 a.m. (CENTRAL TIME) by telephone conference call. The clerk is to notify the plaintiff and his place of residence of the changes and issue a writ for the plaintiffs participation in the revised hearing. The plaintiff has also filed a motion for appointment of counsel. 13 In considering the plaintiffs motion, the court asks: (1) has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself? Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007), citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir.1993). The plaintiff has provided no information or documentation concerning his attempts to contact counsel. The plaintiff has NOT demonstrated that he has made a reasonable attempt to find counsel on his own. The motion is denied. 13 Finally, the court notes that the plaintiff has sent random letters to the court. [d/e 9, 10, 11] These are not proper filings. The plaintiff may file clearly labeled motions with the court, or may respond to pending motions or court orders. In addition, the plaintiff wrote part of one letter to the court in Spanish. 11 The plaintiff must file all documents in English. The plaintiff appears capable of filing his documents in English based on the remainder of this letter and his other filings with the court. (cc:pla, institution) (SM, ilcd) (Entered: 07/16/2010)
07/16/2010	15	TELEPHONE WRIT issued for Rule 16 scheduling conference set for 8/18/10 at 8:30 AM CENTRAL TIME re Guadalupe De Anda. (SM, ilcd) (Entered: 07/16/2010)
07/22/2010		Waiver of Service Returned Unexecuted as to D Smith. Dft now Warden at FCI Phoenix. (SM, ilcd) (Entered: 07/23/2010)
07/23/2010	16	THIRD REQUEST FOR WAIVER OF SERVICE and Notice of Lawsuit sent to D. Smith at FCI Phoenix on 7/23/10. (SM, ilcd) (Entered: 07/23/2010)
07/28/2010		Waiver of Service Returned Unexecuted as to Officer Black, filed by Guadalupe De Anda. BOP indicates no Officer Black currently located at FCI Pekin. (SM, ilcd) (Entered: 07/28/2010)
07/28/2010		TEXT ORDER Entered by Judge Harold A. Baker on 7/28/10. As the attached copy of the docket sheet indicates, the Notice of Lawsuit and Request for Waiver of Service of Summons has been returned as to one or more of the named defendants. Ultimately, it is the plaintiffs responsibility to locate and effect service on the defendants pursuant to Fed. R. Civ. P. 4. Each defendant

		must be served within 120 days of the date the complaint was filed. The court may dismiss the complaint as to any defendant not served within that time period. See Fed. R. Civ. P. 4 (m).(cc:pla) (SM, ilcd) (Entered: 07/28/2010)
08/04/2010		Set/Reset Deadlines: Waiver from D. Smith due back by Other Deadline of 8/23/2010. (SM, ilcd) (Entered: 08/04/2010)
08/09/2010	17	MOTION for 90 day Extension of Time re Writ by Plaintiff Guadalupe De Anda. Responses due by 8/26/2010 (SM, ilcd) (Entered: 08/09/2010)
08/09/2010	18	WAIVER OF SERVICE Returned Executed by. Fardel. Fardel waiver sent on 7/15/2010, answer due 9/13/2010. (SM, ilcd) (Entered: 08/09/2010)
08/09/2010	19	WAIVER OF SERVICE Returned Executed by Scott Moats. Scott Moats waiver sent on 7/15/2010, answer due 9/13/2010. (SM, ilcd) (Entered: 08/09/2010)
08/09/2010	20	WAIVER OF SERVICE Returned Executed by D Smith. D Smith waiver sent on 7/15/2010, answer due 9/13/2010. (SM, ilcd) (Entered: 08/09/2010)
08/09/2010	21	WAIVER OF SERVICE Returned Executed by. Verfurth.. Verfurth waiver sent on 7/23/2010, answer due 9/21/2010. (SM, ilcd) (Entered: 08/09/2010)
08/12/2010		TEXT ORDER Entered by Judge Harold A. Baker on 8/12/10. This cause is set for hearing pursuant to Rule 16 of the Federal Rules of Civil procedure on August 18, 2010. The plaintiff has filed a motion for an extension of time saying he does not have access to the law library. 17 The plaintiff does not specifically state why he needs extra time and there is nothing currently pending that requires research. The motion is denied. 17 However, if the plaintiff does have specific motions or responses to motions that he needs to file and he makes a request for library time or legal research that is denied, he may always file a motion with the court that outlines these details. The court notes that most defendants have now been served. Defendants Fardel, Moats, Smith and Verfurth must all file answer to the complaint within the time specified. The waiver of service form for Officer Black was returned to the clerk of the court indicating that no Officer Black currently works at FCI Pekin. This is not a sufficient response. The correctional center needs to clarify whether there ever was an Officer Black working at FCI Pekin during the relevant time period and if so, must provide the clerk of the court with his last known address. Defense counsel for the FCI Pekin Defendants has not yet entered an appearance. Therefore, the Rule 16 hearing scheduled for August 18, 2010 is canceled. The hearing is now re-rescheduled for September 22, 2010 at 9:45 AM by telephone conference call from Urbana (court will place the call) before Judge Harold A. Baker to address service of process of Defendant Black. The clerk is to issue a writ for the plaintiffs participation in the call. (cc:pla/institution) (SM, ilcd) (Entered: 08/12/2010)
09/07/2010	22	NOTICE of Change of Address by Guadalupe De Anda. No Address at this time. (SM, ilcd) (Entered: 09/07/2010)
09/10/2010	23	MOTION for Extension of Time to File Answer re 1 Complaint by Defendants. Fardel, Scott Moats, Officer Black, D Smith,. Verfurth. Responses due by 9/27/2010 (Brost, Gerard) (Entered: 09/10/2010)

09/16/2010		TEXT ORDER Entered by Judge Harold A. Baker on 9/16/10. The plaintiff has filed a notice of change of address, but has not provided his new address. This case cannot proceed without an address and telephone number from the plaintiff. As the plaintiff was advised on April 28, 2010, he must immediately notify the court of any change in his mailing address and telephone number. See April 28, 2010 Scheduling Order. p. 2. Failure to notify the court could result in the dismissal of this lawsuit. The court cannot proceed with the September 22, 2010 hearing pursuant to Rule 16 without this information. Therefore, the hearing is canceled and the writ is recalled since the plaintiff no longer resides at the initial residence provided to the court. The hearing is rescheduled for October 20, 2010 at 9:15 a.m by telephone conference call. The plaintiff must provide his new contact information on or before October 8, 2010. If he fails to do so, his case will be dismissed. The defendants motion for an extension of time to file an answer is granted in part. 23 The court will allow an extension, but not the 60 days requested. The defendants must file an answer to the complaint on or before October 19, 2010. (SM, ilcd) (Entered: 09/16/2010)
10/15/2010		TEXT ORDER Entered by Judge Harold A. Baker on 10/15/10. This cause is before the court for case management. On September 7, 2010, the plaintiff informed the court that he would be moved to a new facility, but he was unsure which facility. On September 16, 2010, the court told the plaintiff that he must provide his new address by October 8, 2010, or his case could be dismissed. See September 16, 2010 Text Order; see also April 28, 1010 Scheduling Order. The plaintiff has not responded, but it appears he has been moved from different facilities during this time period. The Bureau of Prisons currently lists the plaintiff at the Federal Correctional Institution in Edgefield, South Carolina. The clerk of the court is directed to send a copy of this order to the plaintiff at this location. The plaintiff must inform the court on or before November 10, 2010 whether this is his current location. If the plaintiff fails to respond to this order, his case will be dismissed. In addition, it is the plaintiffs responsibility, not the courts, to keep the court informed of his current location. If the plaintiff does not immediately inform the court of any address change in the future, his case could be dismissed. In the meantime, the hearing pursuant to Rule 16 scheduled on October 20, 2010 is again canceled because the plaintiff has not provided his most recent address. To prevent further delay, the court will set scheduling deadlines. The court will abide by the following scheduling deadlines: 1) all discovery must be completed on or before May 28, 2011; and 2) any dispositive motion must be filed on or before June 25, 2011. (cc:pla)(SM, ilcd) (Entered: 10/15/2010)
10/19/2010	24	ANSWER to 1 Complaint AND AFFIRMATIVE DEFENSES by. Fardel, Scott Moats, D Smith,. Verfurth.(Brost, Gerard) (Entered: 10/19/2010)
10/22/2010	25	NOTICE of Change of Address by Guadalupe De Anda. Plaintiff now located at FCI Edgefield, PO Box 725, Edgefield, SC 29824. (SM, ilcd) (Entered: 10/22/2010)
10/25/2010		TEXT ORDER: Pursuant to instructions from Chief U.S. District Judge Michael P. McCuskey, this case is transferred to U.S. District Judge Joe Billy McDade for further proceedings due to Senior Judge Baker no longer handling Peoria and Rock Island Division cases. The referral Magistrate Judge shall remain the same

		for all further proceedings. Entered by Chief Judge Michael P. McCuskey on 10/25/2010. (MC, ilcd) (Entered: 10/25/2010)
12/17/2010	26	MOTION for Early Discovery by Plaintiff Guadalupe De Anda. Responses due by 1/6/2011 (SM, ilcd) (Entered: 12/17/2010)
01/05/2011		TEXT ORDER- The Plaintiffs motion for discovery is denied. [d/e 26]. The Plaintiff must not file his discovery requests with the court. The Plaintiff must send those requests directly to defense counsel. The Plaintiff may utilize any of the discovery methods prescribed in the Federal Rules of Civil Procedure, subject to the same terms and conditions as any other civil litigant. The Plaintiff may submit his written interrogatories for the Defendants to defense counsel. See Fed.R.Civ.P. 33. The Plaintiff may also submit requests for production of documents to defense counsel. See Fed.R.Civ.P. 34. If the Defendants do not properly respond to the Plaintiffs requests for relevant information, he may then file a motion with the court to compel discovery. See Fed.R.Civ.P. 37. Entered by Judge Joe Billy McDade on 1/6/11. (TD, ilcd) (Entered: 01/05/2011)
02/03/2011	27	CERTIFICATE OF SERVICE re Discovery by Guadalupe De Anda (Attachments: # 1 Fardel Certificate, # 2 Moats Certificate, # 3 Smith Certificate, # 4 Verfurth Certificate)(SM, ilcd) (Entered: 02/03/2011)
03/18/2011	28	TEXT ORDER: Pursuant to instructions from Chief U.S. District Judge Michael P. McCuskey, this case is transferred to U.S. District Judge James E. Shadid for further proceedings due to his recent appointment as U.S. District Judge for the Central District of Illinois, Peoria and Rock Island Divisions. Entered by Chief Judge Michael P. McCuskey on 3/18/2011. (MC, ilcd) (Entered: 03/18/2011)
04/20/2011	29	MOTION for Hearing, pursuant to Fed.R.Civ.P.6(C) 12(I) 43(C) 55(B)(2) 57 78 (A) by Plaintiff Guadalupe De Anda. Responses due by 5/9/2011 (SM, ilcd) (Entered: 04/20/2011)
04/20/2011	30	MOTION for Summary Judgment by Plaintiff Guadalupe De Anda. Responses due by 5/16/2011 (SM, ilcd) (Entered: 04/20/2011)
05/10/2011	31	Response by. Fardel, Scott Moats, D Smith,. Verfurth *DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR HEARING.* (Brost, Gerard) (Entered: 05/10/2011)
05/16/2011	32	Response by. Fardel, Scott Moats, D Smith,. Verfurth *DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR SUMMARY JUDGMENT.* (Brost, Gerard) (Entered: 05/16/2011)
05/23/2011		TEXT ORDER entered by Judge James E. Shadid on 5/23/11 denying 29 Motion for Hearing: The Plaintiff has filed a motion asking the court to set this case for hearing. [d/e 29]. The motion is denied. The Plaintiff has not stated an adequate basis for a hearing. If the Plaintiff has had difficulty with discovery, he should file a motion to compel discovery providing copies of any discovery requests he has sent to the Defendants and any responses he has received. (cc: plaintiff) (MSB, ilcd) (Entered: 05/23/2011)
05/26/2011	33	

		MOTION To Extend Discovery Deadline by Defendants. Fardel, Scott Moats, D Smith,. Verfurth. Responses due by 6/13/2011 (Brost, Gerard) (Entered: 05/26/2011)
06/02/2011	34	Letter from plaintiff requesting assistance from the clerk's office with filing a document. (DK, ilcd) (Entered: 06/03/2011)
06/02/2011	35	MOTION for Evidentiary Hearing by Plaintiff Guadalupe De Anda. Responses due by 6/20/2011 (DK, ilcd) (Entered: 06/03/2011)
06/20/2011	36	MOTION to Compel by Plaintiff Guadalupe De Anda. Responses due by 7/8/2011 (SW, ilcd) (Additional attachment(s) added on 6/20/2011: # 1 Exhibit Verfurth Request, # 2 Exhibit Black Request, # 3 Exhibit Moats Request, # 4 Exhibit Smith Request, # 5 Exhibit Fardel Request, # 6 Verfurth Responses, # 7 Moats Responses, # 8 Fardel Responses, # 9 Smith Responses) (SW, ilcd). (Entered: 06/20/2011)
07/07/2011	37	MOTION for Extension of Time to File Response/Reply by Defendants. Fardel, Scott Moats, D Smith,. Verfurth. Responses due by 7/25/2011 (Brost, Gerard) (Entered: 07/07/2011)
07/12/2011	38	RESPONSE to Motion re 36 MOTION to Compel filed by Defendants. Fardel, Scott Moats, D Smith,. Verfurth. (Brost, Gerard) (Entered: 07/12/2011)
08/19/2011	39	MOTION for Order (filed as Motion and Order Overruling Objections and Comelling Production of Documents, Pursuant to Federal Rule Civil Procedure 37(A)) filed by Plaintiff Guadalupe De Anda. Responses due by 9/6/2011 (FDT, ilcd) (Entered: 08/19/2011)
08/19/2011	40	Letter from Guadalupe De Anda dated 8/14/11 re filing a motion. (FDT, ilcd) (Entered: 08/19/2011)
08/29/2011		TEXT ORDER Entered by Judge James E. Shadid on 8/29/11. The Plaintiff has filed a motion for summary judgement. 30 . The court agrees with the Defendants that the Plaintiff's motion is premature. The Plaintiff filed hismotion before discovery had been conducted in this case. In addition, the exhibits attached to the Plaintiff's motion do not address his claims against most of the Defendants and fail to demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) Therefore, the motion is denied. 30 .However, the Plaintiff may refile his motion with additional support at the close of discovery. (cc:pla)(SW, ilcd) (Entered: 08/29/2011)
08/29/2011		TEXT ORDER Entered by Judge James E. Shadid on 8/29/11. This cause is before the court for case management. The Defendants motion to extend the discovery deadlines is granted. 33 . The court will now abide by the followingdeadlines: 1) all discovery must be completed on or before October 3, 2011; and 2) any dispositive motions must be filed on or before November 1, 2011. The Plaintiff's motion for an evidentary hearing is denied. 35 . The Plaintiff is requesting a hearing on discovery issues. However, the Plaintiff has filed an in depth motion to compel discovery which the court will first consider. The Defendants motion for additional time to file a response is granted. 37 The court notes the Defendants have now filed a response. The Plaintiff has also

		filed a motion asking the court to overule the Defendants objections to his discovery requests. 39 The motion is denied. 39 The court will consider each parties argument before ruling on the motion to compel discovery. (cc:pla)(SW, ilcd) (Entered: 08/29/2011)
09/09/2011	41	NOTICE to Take Deposition of Guadalupe De Anda on September 21, 2011 (Brost, Gerard) (Entered: 09/09/2011)
11/01/2011	42	MOTION for Summary Judgment by Defendants. Fardel, Scott Moats, D Smith,. Verfurth. Responses due by 11/28/2011 (Attachments: # 1 Copy of Local Rule 7.1)(Brost, Gerard) (Entered: 11/01/2011)
11/01/2011	43	MEMORANDUM *in Support of Motion for Summary Judgment* re 42 MOTION for Summary Judgment by. Fardel, Scott Moats, D Smith,. Verfurth. (Brost, Gerard) (Entered: 11/01/2011)
11/01/2011	44	STATEMENT OF FACTS Undisputed re 43 Memorandum *in Support of Motion for Summary Judgment* by. Fardel, Scott Moats, D Smith,. Verfurth. (Attachments: # 1 Appendix)(Brost, Gerard) (Entered: 11/01/2011)
11/01/2011	45	Letter from Clerk informing Plaintiff of 21 days to respond to Motion for Summary Judgment. (SW, ilcd) (Entered: 11/01/2011)
11/28/2011	46	RESPONSE to 42 MOTION for Summary Judgment filed by Plaintiff Guadalupe De Anda. (SW, ilcd) (Entered: 11/28/2011)
02/17/2012	47	Letter from Guadalupe De Anda requesting copy of docket sheet. (SW, ilcd) (Entered: 02/17/2012)
02/27/2012		TEXT ORDER Entered by Judge James E. Shadid on 2/27/12. The Plaintiffs motion to compel discovery is denied with leave to renew 36 . On its own motion, the court will attempt to appoint counsel to represent the Plaintiff. In addition, the court notes that on September 16, 2010, Defense counsel filed a motion for an extension of time on behalf of all Defendants in this case including Officer Black. [d/e 23]. Therefore, the docket reflects that counsel is representing all Defendants. However, it appears that Officer Black may not have been served. Therefore, Defense counsel must clarify in writing on or before March 7, 2012 if he is representing this individual (Miscellaneous Deadline for 3/7/2012). If he is not, he must provide Officer Blacks full name and state whether he is still employed by the Bureau of Prisons. In addition, Defense counsel must provide Officer Blacks last known address. (cc: plaintiff at FCI Edgefield) (DK, ilcd) (Entered: 02/27/2012)
03/02/2012	48	NOTICE *of Representation* (Brost, Gerard) (Entered: 03/02/2012)
03/08/2012	49	ORDER APPOINTING ATTORNEY Aaron S Galloway for Guadalupe De Anda entered by Judge James E. Shadid on 3/8/12. (DK, ilcd) (Entered: 03/08/2012)
03/15/2012	50	Letter requesting status from Guadalupe De Anda (SW, ilcd) (Entered: 03/15/2012)
03/23/2012	51	First MOTION for Leave to Appear General *Counsel* by Plaintiff Guadalupe De Anda. Responses due by 4/9/2012 (Galloway, Aaron) (Entered: 03/23/2012)

03/23/2012	52	MOTION to Waive *PACER Fees* by Plaintiff Guadalupe De Anda. Responses due by 4/9/2012 (Galloway, Aaron) (Entered: 03/23/2012)
03/28/2012		TEXT ORDER Entered by Chief Judge James E. Shadid on 3/28/12. Counsel's motion for leave to appear on behalf of the Plaintiff is granted. 51 . The record already reflects that counsel was appointed to represent the Plaintiff. Plaintiff's counsel's motion to waive pacer fees for the purposes of this litigation only is also granted. 52 (SW, ilcd) (Entered: 03/28/2012)
03/29/2012		TEXT ORDER Entered by Chief Judge James E. Shadid on 3/29/12. This cause is before the court for case management. The clerk of the court is to send notice of lawsuit and waiver of service forms to Defendant Correctional Officer Linda Black at the Estill Federal Correctional Institution at the address provided by Defense counsel. 48 This cause is set for hearing to discuss the status of Defendant Black on May 3, 2012 at 9:00 am by telephone conference call. (SW, ilcd) (Entered: 03/29/2012)
03/29/2012	53	THIRD REQUEST FOR WAIVER OF SERVICE and Notice of Lawsuit sent to Linda Black at FCI ESTILL on 3/29/12. (SW, ilcd) Modified on 3/29/2012 (SW, ilcd). (Entered: 03/29/2012)
04/04/2012	54	Letter from Pro Bono Coordinator to plaintiff re: Agreement to Attorneys Fees. Deadline of 14 days (4/18/12) for plaintiff to return the signed Agreement to Attorneys Fees. (DK, ilcd) (Entered: 04/04/2012)
04/04/2012		Set Deadlines: Miscellaneous Deadline 4/18/2012 for plaintiff to return the signed Agreement to Attorneys Fees. (DK, ilcd) (Entered: 04/04/2012)
04/13/2012	55	NOTICE: Agreement to Attorneys Fees/Costs by Guadalupe DeAnda (SW, ilcd) (Entered: 04/13/2012)
04/26/2012	56	MOTION to Amend/Correct 44 Statement of Facts *Appendix by Supplement* by Defendants. Fardel, Scott Moats, D Smith,. Verfurth. Responses due by 5/14/2012 (Attachments: # 1 Exhibit Deposition)(Brost, Gerard) (Entered: 04/26/2012)
05/02/2012		TEXT ONLY ORDER noting that Attorney Aaron S. Galloway was appointed as pro bono counsel for Plaintiff. Pursuant to CDIL Policy, Plan for the Establishment and Administration of the District Court Fund and Regulations Governing Reimbursement from the District Court Fund, Section B(2)(a), appointed counsel can petition for fees and costs, however said fees and costs are not to exceed $1,000 without further authorization from the Court. Appointed counsel should tailor his/her discovery to stay within the above dollar limit for fees and costs. Entered by Chief Judge James E. Shadid on 05/02/12. (KK, ilcd) (Entered: 05/02/2012)
05/03/2012		Minute Entry for proceedings held before Chief Judge James E. Shadid: This cause is before the court for status conference. The Plaintiff was represented by Attorney Aaron Galloway. Defendants Smith, Verfurth, Fardel and Moats were represented by Assistant U.S. Attorney Gerald Brost. Defendant Black has not returned the waiver of service form which was sent to her. Therefore, the court will order the U.S. Marshal's to serve Defendant Correctional Officer Linda Black at her new institution, the Federal Correctional Institution in Estill, South

		Carolina. The clerk of the court is to prepare service of process documents and provide the documents to the U.S. Marshals. This case is set for hearing on the status of service of process on July 9, 2012 at 11:00 a.m. In addition, the court will allow Plaintiff's counsel an additional twenty-one days to file any further response to the pending motion for summary judgment. (See doc. 46, Plain. Resp). The court will only consider the dispositive motion as it pertains to Counts two and three as identified in the court's April 27, 2010 merit review order. The Defendants' motion to supplement the appendix to their motion for summary judgment is granted. 56 (Court Reporter NM.) (RP, ilcd) (Entered: 05/03/2012)
05/03/2012	57	Summons Issued as to Officer Black and sent to the US Marshals for service on the Dft. (RP, ilcd) (Entered: 05/03/2012)
05/11/2012	58	WAIVER OF SERVICE Returned Executed by Officer Black. Officer Black waiver sent on 3/29/2012, answer due 5/29/2012. (FDT, ilcd) (Entered: 05/11/2012)
05/24/2012	59	RESPONSE to Motion re 42 MOTION for Summary Judgment filed by Plaintiff Guadalupe De Anda. (Galloway, Aaron) (Entered: 05/24/2012)
05/24/2012	60	MOTION for Extension of Time to File Answer re 1 Complaint by Defendant Officer Black. Responses due by 6/11/2012 (Brost, Gerard) (Entered: 05/24/2012)
05/25/2012	61	CERTIFICATE OF SERVICE by Guadalupe De Anda (Galloway, Aaron) (Entered: 05/25/2012)
05/30/2012		TEXT ORDER Entered by Chief Judge James E. Shadid on 5/30/12. The Defendants motion for additional time to file an answer to the complaint is granted. 60 . Although, due to the extended delay in this case, the court will not allow anadditional 60 days. The Defendant must file an answer to the complaint on or before June 22, 2012. (SW, ilcd) (Entered: 05/30/2012)
06/07/2012	62	REPLY to Response to Motion re 42 MOTION for Summary Judgment filed by Defendants. Fardel, Scott Moats, D Smith,. Verfurth. (Brost, Gerard) (Entered: 06/07/2012)
06/10/2012	63	Amended Appearance of Counsel as to Guadalupe Deanda. (Galloway, Aaron) Modified on 6/11/2012 to correct title of document (SW, ilcd). (Entered: 06/10/2012)
06/20/2012	64	Motion for Extention of Time - Filed as NOTICE *of Need for Additional Time to File Answer* (Brost, Gerard) Modified on 6/21/2012 to correct the filing event from a Notice to a Motion (FDT, ilcd). (Entered: 06/20/2012)
06/21/2012		Set/Reset Deadlines: Responses to Motion for Extension of Time due by 7/9/2012 (FDT, ilcd) (Entered: 06/21/2012)
06/29/2012		TEXT ONLY ORDER granting 64 Motion for Extension of Time to File Answer. Due to the conflict of interest requiring separate representation, Defendant will be allowed an additional 21 days in which to file her answer. Entered by Chief Judge James E. Shadid on 06/29/12. (KK, ilcd) (Entered: 06/29/2012)

07/05/2012		TEXT ORDER Entered by Chief Judge James E. Shadid on 7/5/12. The hearing on July 9, 2012 to check on service of process is canceled as unnecessary. Defendant Black has returned her waiver of service form. Since Defendant Black will need to acquire separate representation from the other Defendants, the court has allowed additional time for Defendant Black to file an answer to the complaint. See June 29, 2012 Text Order. This case is set for further status hearing on August 23, 2012 at 9:00 a.m. by telephone conference call before Chief Judge James E. Shadid. The clerk will initiate the call. (SW, ilcd) (Entered: 07/05/2012)
07/17/2012	65	NOTICE of Change of Address by Aaron S Galloway (Attachments: # 1 Certificate of Service)(Galloway, Aaron) (Entered: 07/17/2012)
07/23/2012	66	NOTICE of Appearance of Attorney by Masoud None Mirsafian on behalf of Officer Black (Mirsafian, Masoud) (Entered: 07/23/2012)
07/23/2012	67	ANSWER to 1 Complaint AND AFFIRMATIVE DEFENSES by Officer Black. (Mirsafian, Masoud) (Entered: 07/23/2012)
08/21/2012		TEXT ORDER Entered by Chief Judge James E. Shadid on 8/21/12. The status hearing scheduled for August 23, 2012 at 9:00 a.m. is canceled. A case management order will be entered.(SW, ilcd) (Entered: 08/21/2012)
08/28/2012	68	SUMMARY JUDGMENT ORDER granting in part and denying in part Defendants Verfurth, Fardel, Smith and Moat's 42 Motion for Summary Judgment. The Clerk is to dismiss Dfts Smith and Moats. This cause is set for a hearing on discovery on September 12, 2012 at 9:30 AM by telephone conference call. The Court sets the following dates: Discovery due by 12/21/2012; Dispositive Motions due by 1/4/2013. Final Pretrial Conference set for 2/22/2013 at 11:00 AM in Courtroom A in Peoria before Chief Judge James E. Shadid. Jury Trial set for 3/25/2013 at 09:00 AM in Courtroom A in Peoria before Chief Judge James E. Shadid. See Order attached. Entered by Chief Judge James E. Shadid on 8/28/2012. (RK, ilcd) Modified on 8/28/2012 to delete (cc:) language as plaintiff as counsel (RK, ilcd). (Entered: 08/28/2012)
09/04/2012	69	Letter from Plaintiff De Anda requesting copy of docket sheet. (SW, ilcd) Modified on 9/4/2012 to delete "Pro Se" as Plaintiff is represented (SW, ilcd). (Entered: 09/04/2012)
09/12/2012		Minute Entry for proceedings held before Chief Judge James E. Shadid: This cause is before the court for status hearing by telephone conference call. The Plaintiff was represented by Attorney Aaron Galloway present. The Defendants were represented by Attorneys Gerard Brost and Masoud None Mirasafin. The parties discussed obtaining the relevant investigatory documents from the Office of Internal Affairs and Special Investigatory Services. Attorney Galloway will issue a subpoena this week for the documents. The parties agree that the documents will only be provided to counsel. This case is set for further status hearing on October 24, 2012 at 11:00 a.m. by telephone conference call. The clerk will initiate the call. All scheduling deadlines remain as set. (Court Reporter JJ.) (RP, ilcd) (Entered: 09/12/2012)
10/01/2012	70	

		Summons Returned Unexecuted as to Officer Black. This defendant accepted Waiver of Service and has since answered the complaint. (DK, ilcd) (Entered: 10/01/2012)
10/10/2012	71	MOTION for Protective Order by Defendants. Fardel,. Verfurth. Responses due by 10/29/2012 (Attachments: # 1 Subpoena, # 2 Text of Proposed Order)(Brost, Gerard) (Entered: 10/10/2012)
10/15/2012		TEXT ONLY ORDER entered by Chief Judge James E. Shadid on 10/15/12. Defendants Fardel and Verfurth's motion for a protective order is granted. 71 The clerk is to entered the attached protective order.(FDT, ilcd) (Entered: 10/15/2012)
10/15/2012	72	PROTECTIVE ORDER entered by Chief Judge James E. Shadid on 10/15/12. (FDT, ilcd) (Entered: 10/15/2012)
10/23/2012		TEXT ORDER Entered by Chief Judge James E. Shadid on 10/23/12. The status hearing scheduled for October 24, 2012 at 11:00 a.m. by telephone conference call is canceled as unnecessary. The court has entered a protective order concerning the relevant investigatory documents. See October 15, 2012. The parties are reminded that discovery ends on December 21, 2012. See August 28, 2012 Summary Judgment Order. Motions to compel discovery must be accompanied by the relevant portions of the discovery request and the response. Additionally, except for good cause shown, motions to compel must be filed within 14 days of receiving an unsatisfactory response to a timely discovery request. (SW, ilcd) (Entered: 10/23/2012)
12/14/2012	73	First MOTION for Extension of Time to Complete Discovery by Plaintiff Guadalupe De Anda. Responses due by 1/2/2013 (Galloway, Aaron) (Entered: 12/14/2012)
01/31/2013	74	Second MOTION for Extension of Time to Complete Discovery by Plaintiff Guadalupe De Anda. Responses due by 2/19/2013 (Galloway, Aaron) (Entered: 01/31/2013)
01/31/2013	75	First PETITION Authorize additional fees and costs by Plaintiff Guadalupe De Anda. Responses due by 2/19/2013 (Galloway, Aaron) (Entered: 01/31/2013)
01/31/2013	76	First MOTION Personal Service of Subpoena by Plaintiff Guadalupe De Anda. Responses due by 2/19/2013 (Attachments: # 1 Exhibit Subpoena)(Galloway, Aaron) (Entered: 01/31/2013)
02/14/2013		TEXT ORDER Entered by Chief Judge James E. Shadid on 2/14/13. The pretrial conference scheduled for February 22,2013 is canceled. A case management order will be entered.(SW, ilcd) (Entered: 02/14/2013)
03/15/2013		TEXT ORDER Entered by Chief Judge James E. Shadid on 3/15/13. For clarification of the docket, the jury trial setting on March 25, 2013 is canceled. A case management order will be entered. (SW, ilcd) (Entered: 03/15/2013)
05/13/2013		TEXT ORDER entered by Chief Judge James E. Shadid on 05/13/13. This cause is set for status hearing and consideration of the pending motions on May 29, 2013 at 10:30 a.m. by telephone conference call. The clerk of court will initiate the call. (JS, ilcd) (Entered: 05/13/2013)

05/29/2013		Minute Entry for proceedings held before Chief Judge James E. Shadid: Parties present via phone by Attys Galloway/Brost/Mirsafian for Status Conference on Wednesday, 5/29/13. The parties discussed the status of discovery and the matter was set for further status hearing on June 13, 2013 at 1:00 p.m. by telephone conference call. The clerk will initiate the call. The initial motion to extend discovery deadlines is denied as moot. 73 . The court will reserve ruling on the remaining motions until the June 13, 2013 telephone conference. If the parties have not resolved the discovery issues with the investigatory documents, Attorney Gerard Brost is to provide the court with the name and phone number for the appropriate Bureau of Prisons Attorney for the June 13, 2013 telephone conference. (SW, ilcd) (Entered: 05/29/2013)
06/13/2013		Minute Entry for proceedings held before Chief Judge James E. Shadid: Parties present via phone by Attys Galloway/Brost/Mirsafian for Status Conference on 6/13/13. This cause is set for further status hearing on July 25, 2013 at 9:30 a.m. by telephone conference call (Attorneys Only). The clerk is to initiate the call. The motion to extend discovery deadlines is granted. 74 The court will set any needed dates at the next hearing. The court will take the motion for additional fees and costs as well as the motion for personal service under advisement. 75 , 76 (Court Reporter J.J.) (SW, ilcd) (Entered: 06/13/2013)
07/25/2013		Minute Entry for proceedings held before Chief Judge James E. Shadid: This cause is before the court for telephone status hearing. The Plaintiff was represented by Attorney Aaron Galloway; Defendant Black was represented by Attorney Masoud Mirsafan and Defendants Verfurth and Fardel were represented by Attorney Gerard Brost. The parties updated the court on settlement discussions. This cause is set for further status hearing on September 19, 2013 at 9:30 a.m. by telephone conference call. This hearing will be canceled if a motion to substitute and stipulation of dismissal are filed prior to the hearing date. The pending motions are denied with leave to refile. 75 , 76 (Court Reporter NM.) (SW, ilcd) (Entered: 07/25/2013)
08/19/2013		Prisoner Partial Filing Fee received 8/19/13, in the amount of $ 36.34; receipt number 14626018367 (SW, ilcd) (Entered: 08/19/2013)
09/03/2013	77	Joint MOTION to Dismiss *Individual Defendants and Substitute the United States of America* by Defendants. Fardel,. Verfurth. Responses due by 9/20/2013 (Brost, Gerard) (Entered: 09/03/2013)
09/03/2013		TEXT ORDER entered by Chief Judge James E. Shadid on 9/3/2013: Pursuant to the agreed motion filed by the parties, the court will dismiss the remaining individual Defendants and add the United States as a Defendant. The motion is therefore granted. 77 The clerk of the court is directed to dismiss Defendants Black, Verfurth and Fardel from this lawsuit. The clerk is also directed to add one remaining Defendant: the United States. The case remains as set for hearing on September 19, 2013, but the hearing will be canceled if a stipulation of dismissal is filed prior to the hearing date.(JRK, ilcd) (Entered: 09/03/2013)
09/09/2013	78	Joint MOTION to Dismiss by Defendant United States. Responses due by 9/26/2013 (Brost, Gerard) (Entered: 09/09/2013)
09/12/2013		

		TEXT ORDER entered by Chief Judge James E. Shadid on 09/12/2013. The parties joint motion to dismiss this action with prejudice pursuant to their Stipulation for Compromise Settlement and Release of Federal Tort Claims Act agreement is granted. 78 The parties have agreed to the dismissal of all claims against the United States, the Federal Bureau of Prisons, its agents, servants and employees. 78 The hearing scheduled for September 19, 2013 is therefore canceled as unnecessary.(JS, ilcd) (Entered: 09/12/2013)
09/23/2013		Prisoner Partial Filing Fee received 09/23/2013, in the amount of $ 35.36; receipt number 14626018628 (JS, ilcd) (Entered: 09/24/2013)

PACER Service Center			
Transaction Receipt			
10/29/2015 10:00:52			
PACER Login:	bp0189:2516419:4299065	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	1:10-cv-01094-JES-JAG
Billable Pages:	12	**Cost:**	1.20

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2010-01177 **Short Description:** DE ANDA V. SMITH ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	10-cv-01094-HAB-JAG	Date	09/12/2013
Short Description	DE ANDA V. SMITH ET AL	Type	Settled
Classification	Civil	Reason	
Case Type	Bivens 8th Amend	Sought	Compensatory Damages
Case Sub-Type	Assault-Failure to Protect	Amount offered	$3,000.00
Current Region	NORTH CENTRAL REGIONAL OFFICE	Total Amount Paid	$3,000.00
Current Institution	Pekin (FCI)	Description	
Incident Region	NORTH CENTRAL REGIONAL OFFICE	Description	
Incident Institution	Pekin (FCI)	Court Fee Paid ?	No
Monetary Relief Sought	$1,000,000.00	Pro Se ?	No
Estimated Amount	$		
Office	Peoria	Date Received	07/23/2010
Jurisdiction	CENTRAL DISTRICT OF ILLINOIS		
Responsible Legal Office	St. Louis, MO	Date Filed	04/12/2010

Estimated Amount	$ -	Current Owner	HEATHER MACCONNELL
Estimated Outcome	No evaluation can be made at this time	Case Status	Closed
		Timeline Status	Closed
		Monthly Report Status	NEW CASES
		Private Case	No

Long Description	28:1331 FEDERAL QUESTION: BIVENS ACT
Further Case Classification	
Comments	

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

2010 MAY 24 AM 10:15
LAURA A. BRIGGS

JOSEPH ANDERSEN
12264-040
F.C.I. 2
P.O. Box 1500
Butner, N.C. 27509,
Plaintiff,

2:10-cv-0140LJM-DML
CASE NUMBER:

vs.

Jury Trial Demanded

UNITED STATES OF AMERICA,
through its Federal Bureau of Prisons,
P.A. Joe Williams (FCI S.H.U. P.A.),
M.D. Dr. Wilson (FCI Medical Doctor),
P.A. McDonald (FCI S.H.U. P.A.),
F.C.I. Terre Haute, Indiana.

/

C O M P L A I N T

COMES HERETO Joseph Andersen, plaintiff pro se and presents this complaint against the Defendents, the United States of America, through its Federal Bureau of Prisons (F.B.O.P.), P.A. Joe Williams (FCI S.H.U. P.A.), and Dr. Wilson (FCI Medical Doctor), and P.A. McDonald (FCI S.H.U. P.A.), FCI Terre Huate, Indiana.

JURISDICTION OF COMPLAINT

This complaint is filed under the Federal Tort Claims Act, 28 USC 2675. This complaint is filed for Medical Negligence on the part of the defendant, in regards to the health care needs of plaintiff Andersen which caused him considerable pain and suffering - both physical and emotional - and caused him further deterioration of his condition than would have been suffered if he had received proper and timely medical care. Due to the inadequacy of the medical treatment he received while in the custody of FCI Terre Haute, Indiana, plaintiff Andersen has suffered permanent physical damage.

SUMMARY OF THE ARGUMENT

Plaintiff Andersen went to the S.H.U. (Specialized Housing Unit) in March of 2007 while incarcerated at F.C.I. Terre Haute, Indiana. On or about the beginning of May he began to see traces of blood in his stool, accompanied by an extreme amount of flatulence and stomach pain. He went to sick call and was prescribed some medication that only worsened his symptoms. He went back to sick call and was met with indifference. At this point the bowel movements had become ALL BLOOD, and plaintiff Andersen was unable to eat. He continued to go to sick call as he was losing blood and weight at a rapid pace. On several occasions did he request that samples be taken and tests be run. He requested to be taken to the hospital at every trip to see the P.A. while in the SHU. Upon his release from S.H.U. back into the General Population, plaintiff Andersen had lost 35 lbs. and was unable to carry his own property bag. Almost immediately after being released from SHU, plaintiff Andersen fainted in the shower and was rushed to medical. Blood tests determined that the plaintiff was severely anemic due to blood loss, and he was rushed to the local hospital for emergency blood transfusions and further testing. A colonoscopy revealed that the plaintiff had severe onset ulcerative colitis, and further testing revealed severe anemia status post blood infusions, hypokalemia, and hypomagnasemia post replacement, with weight loss secondary to the above. Dr. Chen - the gastro-specialist - explained that all but the ulcerative colitis could have been prevented, and that if plaintiff Andersen had been brought into the hospital sooner, the ulcerative colitis could have been prevented from spreading throughout the entire colon (pancolitis). However, since timely treatment was not provided, the plaintiffs entire colon is covered with scar tissue, and the mucosa lining has been permanently damaged.

ADMINISTRATIVE REMEDIES

Plaintiff has exhausted all of his prison administrative remedies. He has filed a BP-8, BP-9, BP-10, and BP-11, and has not received any remedy or compensation. Furthermore, he has filed Tort Claim against the F.B.O.P. (Federal Bureau of Prisons) using Standard Form 95 (Dept. of Justice). See: Attachment 1.

PARTIES

1. The Department of Justice and the FBOP are part of the executive branch of the government of the United States of America.

Some of the FBOP employees involved in the Plaintiff's claim are:

2. P.A. Joe Williams, FCI Terre Haute, Indiana, S.H.U. Physician's Assistant

3. M.D. Dr Wilson, FCI Terre Haute, Indiana, Medical Doctor.

4. P.A. McDonald, FCI Terre Haute, Indiana, S.H.U. Physician's Assistant.

Plaintiff:

5. Joseph Andersen has been incarcerated with the F.B.O.P. during the entire length of time of the events described herin.

STATEMENT OF FACTS

6. Plaintiff was placed in S.H.U. (Specialized Housing Unit) on March 7, 2007. Plaintiff began to see traces of blood in his stool on or about the beginning of May, 2007 - followed by extreme flatulence and stomach pain.

7. Plaintiff filled out a sick call slip and was expecting to see a P.A. or Doctor A.S.A.P. After a few weeks of suffering, Plaintiff still had not seen anyone for Medical Treatment, and his symptoms were getting worse: more blood in stool, extreme stomach pain, and cold sweats from blood loss, presumably.

8. Eventually, Plaintiff was called out to see P.A. Joe Williams. He told the Physicians Asst. of his loss of blood through his rectum, as well as the gas, abdominal pain, and cold sweats. Plaintiff requested to go to the hospital and was refused. P.A. Williams seemed unconcerned with Plaintiff Andersen's urgency, and almost seemed too incompetent to properly diagnose and treat the Plaintiff. He prescribed the Plaintiff: Simethicone 80mg UD (for gas pain), and Ducosate

Sodium 100mg CAP (a stool softener), after being informed that the Plaintiff was taking psyllium fiber to add bulk to his stool.

9. On the "Patient Medication Information" sheet that came with the Medication bottle - see: Attachment 2 - it clearly states: "Do not take this medicine with other Laxatives or Stool Softeners, UNLESS DIRECTED BY YOUR DOCTOR." It goes on to say: "DO NOT USE THIS MEDICINE IF YOU ARE EXPERIENCING ABDOMINAL PAIN, OR RECTAL BLEEDING, EXCEPT UNDER THE DIRECTION OF YOUR DOCTOR."

10. When Plaintiff Andersen asked to see and consult the Doctor, P.A. Williams told him not to worry about it; "Just take the medicine and you'll feel better." (or something to that effect.)

11. Reluctantly, the Plaintiff took the medication and within 12 hours of taking the first dose, his bowel movements became much worse and were approx. 70% dark-red blood, and all diarrhea. The plaintiff discontinued use immediately, however, the damage had already been done.

12. For the next two and-a-half (2 1/2) months the Plaintiff experienced blood loss through the rectum, diarrhea, fever, abdominal pain, cold sweats, extreme gas, difficulty breathing, and at least 8 - 30 runny bowel movements per day. Plaintiff was also experiencing light headedness, dizzyness, and occasionally fainting in the shower. After discontinuing use of the Ducosate Sodium, the Plaintiff immediately filled out another sick-call slip and submitted it to the nurse the next morning. Shortly thereafter, Plaintiff Andersen was called out to see P.A. McDonald.

13. P.A. McDonald seemed unconcerned with the Plaintiff's desperate requests to go to the hospital since the symptoms of the recent crisis with his previous medication had worsened his condition. Plaintiff Andersen told her that he needed to go to the hospital ASAP and that he was losing approximately 1/4 cup of blood per bowel movement. He told her that he was light headed and that he had fainted in the shower. She said that she would send one of the nurses to get a sample of the Plaintiff's stool and blood within the next week. Plaintiff told P.A. McDonald that it was a medical emergency, but she said that he would need to fill out a "cop-out" to see the Doctor, and that it would take about 2 weeks to see him.

The Plaintiff told her: "AT THE RATE I'M LOSING BLOOD, I MIGHT NOT MAKE IT THE TWO WEEKS THAT ITS GOING TO TAKE THE DOCTOR TO RESPOND TO MY COP-OUT." Plaintiff Andersen was then brought back to his cell in the S.H.U. with no medical treatment.

14. From that point forward Plaintiff Andersen told EVERY SINGLE C.O. (Correctional Officer) on EVERY SINGLE shift, EVERY DAY, that he needed to go to the hospital. The Plaintiff also told EVERY single Nurse that passed out Medication (4 times a day), every day until his release from the S.H.U... (and the Plaintiff's S.H.U. cell-mate, Marvin Landfair, has agreed to attest to this as a witness.)
The Plaintiff was told on several occasions that it was not an emergency and that he was just panicking.

15. On 5-24-07 Plaintiff Andersen wrote a Cop-Out to Dr. Wilson (see: Attachment 2) because he was in the S.H.U. seeing patients.He had the C.O. that was working B WING (plaintiff was being housed in) give the cop-out DIRECTLY to Dr. Wilson, in his hand, and tell him that He was having a Medical Emergency; in hopes of seeing the Doctor and being sent to the hospital immediately. No one came to see or examine the Plaintiff.

16. Plaintiff again filled out another sick-call slip, and was yet again sent to see P.A. Williams. The Plaintiff was again met with an attitude of indifference, as Mr. Williams did not seem at all concerned with Plaintiff Andersen's condition. P.A. Williams said that the Plaintiff probably had a "gastral infection," or even Gonorrhea(???); and subsequently prescribed the Plaintiff an Antibiotic. This diagnosis led the plaintiff to question the medical competence of P.A. Williams as he was being escorted back to his cell, again without adequate medical treatment.

17. At this point the Plaintiff had already fainted in the shower twice and was almost incapable of functioning or eating. He had lost 35 lbs. since last being weighed and was losing what seemed to be about a cup of blood per day.

18. The Plaintiff finally got the attention of Officer McIntyre (who was the acting S.H.U. Number 1 at the time). Officer McIntyre brought the Plaintiff to see the nurse on an Emergency trip, and was very helpful. The nurse seemed very concerned with Mr. Andersen's condition and was befuddled as to why the Plaintiff had not yet

been seen by a Doctor or sent to the hospital for diagnostic testing. Plaintiff Andersen told the nurse that he was experiencing dizziness, light headedness, extreme abdominal pain, gas, fever, nausea, cramping, cold sweats, and diarrhea. Plaintiff also informed her that he was losing what he thought to be approx. 2 1/2 - 3 CUPS of blood per day through the rectum, and that he was having anywhere between 8 - 15 bowel movements per day. He explained that his symptoms were getting worse, and had increased considerably since his last trip to see the P.A.; that he was unable to eat, and that all of his bowel movements at this point were all blood and mucus, and that the number of these movements were increasing every day. She seemed very concerned and wanted to help. Thus, she had an emergency prescription filled for: Lopermide 2mg CAP to stop the diarrhea. She took the Plaintiff's temperature and it was 101 degrees.

19. The plaintiff received the Loperamide in a plastic bag with a label on it that said: "Immodium" and it had dosing instructions. The Plaintiff followed the dosing instructions, and had taken about 5 doses before the Medication Bottle and its accompanying "Patient Medication Information" sheet arrived. The Loperamide made the bowel movements stop after the first few doses, however, it gave the Plaintiff abdominal pains. Once the Plaintiff read the "Patient Medication Information" sheet he discontinued use because of the cautions indicated therein. Under the cautions section it stated: "If you are treating yourself, do not use this medicine if you have rectal bleeding, or a fever greater than 101 degrees..." Unfortunately, the Plaintiff had both of these symptoms and should not have been prescribed these medications. After Plaintiff Andersen discontinued their use, his diarrhea seemed "three times worse."

20. At this point Mr. Andersen was unable to eat, and was in bed approx. 18 hours per day; spending the other 6 hours contending with fever, cold sweats, severe abdominal pain, and seemingly endless bowel movements. The Plaintiff compaires his condition with "a living hell,.." and stated that he "seriously felt like I was going to die, and nobody on the medical staff....seemed to care..." The Plaintiff believes that the Law affords him the right to adequate

medical treatment, and that he was denied this Right because of being in the custody of the F.B.O.P.

21. On June 4, 2007, the Plaintiff was released from the S.H.U. in the "worse physical condition (he has) ever been in in (his) life." He states: "I was too weak to carry my property bags to my unit with me." He goes on to say that upon his return to his Unit - where he had been staying for over a year - that: "(he) was almost unrecognizable. People who knew me very well didn't even recognize me. They actually thought I was a "hold-over" (an inmate in transfer from another institution)...I had lost over 35 lbs. and was "as pale as a ghost from loss of blood."

22. Upon his release from S.H.U. the Plaintiff tried to take a shower and fainted in the shower, again. The Correctional Officer that was working his Unit was alerted, and he was rushed to the Medical Facilities to see P.A. Armstrong. The P.A. was very helpful and told the Plaintiff that he looked "horrible." The P.A. said he looked very pale, and, upon squeezing the Plaintiffs fingertips to check circulation, said that the Plaintiff looked anemic and immediately requested that some "blood-work" (testing) be preformed. The blood-tests revealed that the Plaintiff's potassium levels were dangerously low, as well as his iron and overall blood levels. The Plaintiff needed an EMERGENCY Blood Transfusion, and a colonoscopy to determine the source of the bleeding.

23. The Plaintiff was transported to a nearby, outside hospital on the very same day, (June 4, 2007), and was put on a liquid diet. The next day the colonoscopy revealed that the Plaintiff had Ulcerative Colitis, and that his whole entire colon was inflamed, (a.k.a. Pan-colitis: Bloody ulcers cover the entire lining of the colon). Plaintiff Andersen was informed by the Doctor that it was in its "late stages", and could possibly require <u>emergency surgery</u> to remove his entire colon. Dr. Chen said (paraphrasing): If the Plaintiff would have brought into the hospital sooner, when he first started having symptoms of bloody bowel movements, they could have stopped the inflammatory ulcers from spreading throughout his entire colon. But, now that it has spread throughout,

it would be something that he would have to deal with - pancolotis - for the rest of his life; the scar tissue covering the entire mucosa lining of his colon. The Doctor said that the only cure was surgery - surgical removal of the entire colon - and that if the inflammation did not improve soon, they'd be forced to preform the emergency surgery in order to save the Plaintiff's Life.

24. Plaintiff Andersen was treated for "Severe onset Ulcerative Colitis, severe Anemia status post blood infusions, Hypokalemia, and Hypomagnasemia post replacement, with weight loss secondary to the above."

25. The Doctors also said that all of the above ailments, except for the Ulcerative Colitis, could have been avoided if the Patient had been given timely medical care; all of which the Plaintiff requested for approximately a whole month prior to hospitalization.

26. Dr Chen gave the Plaintiff an arsonal of different medications to combat his sicknesses, as well as two sererate blood transfusions, potassium IVs every day for almost two weeks, and a host of other suppliments to combat the Anemia. Plaintiff Andersen said that Dr. Chen was very pleasant and helpful throughout the entire period of hospitalization.

27. After approx. 3 1/2 weeks in Terre Haute, Indiana's Union Hospital, the Plaintiff was released, as Dr. Chen felt as though he was fit to return back to the prison, eventhough the disease was not in remission, the Doctor believed that it would be manageable enough to combat with the prescribed medications. Dr. Chen also scheduled Plaintiff Andersen to come back to the hospital in "two days" - July 29, 2007 - to continue his treatment with "Remicade", which is a form of chemo-therapy that is usually only used in extreme cases, as it may have severe side-effects. Upon his return to F.C.I. Terre Haute, In, the Plaintiff was still experiencing bloody stools 8 - 10 times per day. He did not receive his medication for almost 24 hours upon his arrival at the prison, and his conditions began to worsen. Plaintiff Andersen also never received his 2nd, 3rd, or 4th treatments of Remicade, which were prescribed by Dr. Chen.

28. For the above mentioned causes, the Plaintiff now comes before the court seeking some form of Justice. He believes that his disease could have been stopped from spreading throughtout the entirety of his colon, thus causing him permanent physical damage and scar tissue to the entire lining of his colon. Also, by not receiving adequate medical treatment - as he would have had he not been in the custody of the F.B.O.P. - the Plaintiff is holding the Medical Staff of F.C.I. Terre Haute, Indiana responsible for medical negligence To this very day, Plaintiff Andersen is still suffering the effects of his disease, and the decisions of the F.C.I. THA Medical Staff.

DEMAND FOR A JURY TRIAL

29. Plaintiff Andersen demands a trial by jury.

RELIEF REQUESTED

30. WHEREFORE, Plaintiff Andersen respectfully requests the following:

A. That award for Actual Damages be made as to be determined by a jury;

B. That award for Compensatory damages be made as to be determined by a jury;

C. That allowance be made to the Plaintiff for all reasonable filing fees, Attorney fees, and such other costs for the prosecution of this action; and

D. That such other awards and relief be made as the Honorable Court may deem just and proper.

RESPECTFULLY SUBMITTED this 18th day of May, 2010.

Joseph C. Andersen
12264-040
F.C.I. 2
P.O. Box 1500
Butner, N.C. 27509

ATTACHMENT 1: Administrative Remedy & Tort Claim(s)

Note: Exact dates aRE not given because of my inability to obtain my medical records in a timely fashion.

IN THE SHU:
-On or about the beginning of May I began to see traces of blood in my stool. I had an extreme amount of gas and stomach pain.
-I filled out a sick call slip and was expecting to see the PA or Doctor within the next two weeks. However, after two weeks passed and I had not recieved any medical attention, I was extremely disturbed. My symptoms where getting worse and my stool contained much more blood than before. I was also experiencing extreme abdominal pain and cold sweats.
-I was called out to see PA Joe Williams. I told him that I was losing alot of bloodthrough my rectum and having abdominal pain and cold sweats.
-He seemed rather unconcerned and detached with my urgency, and wrote a presr-iption. He prescribed me: SIMETHICONE 80 MG UD (used to treat gas pain)
He also presrcibed: DUCOSATE SODIUM 100 MG Cap (a stool softener)
-I informed him of my rectal bleeding and I informed him that I was taking the psyllium fiber to add bulk to my stool.
-On the "patient Medication Information" (see attached) sheet that came with the Ducosate bottle, it clearly states: "Do not take this medicine with other Laxatives or Stool softeners, UNLESS DIRECTED BY YOUR DOCTOR." It goes on to say: "DO NOT USE THIS MEDICINE IF YOU ARE EXPERIENCING ABDOMINAL PAIN, OR RECTAL BLEEDING, EXCEPT UNDER THE DIRECTION OF YOUR DOCTOR."
-I asked to see a doctor and was told not to worry about it. "Just take the medicine and you'll feel better." (or something to that effect)
Reluctantly I took the medicine... And within 12 hours of my first dose,...my bowel movements became much worse and where approx. 70% dark red blood, and all diarrhea. I discontinued use immediately, but the damage was already done.
-For the next two ond a half (2 1/2) months, I had bloody diarrhea, fever, ab-dominal pain, cold sweats, extreme gas, difficulty breathing, and at least 8 - 30 bowel movements per day. I was losing large amounts of blood and experiencing light headedness, dizzyness, and occasionaly fainting in the shower, (as well as all of the aforementioned symptoms).
-After discontinuing use of the ducosate sodium, I immediately filled out another sick-call slip and was called out to see PA McDonald.
-She seemed unconcerned with my symptoms and recent crisis with my previous prescription. I TOLD HER I NEEDED TO GO TO THE HOSPITAL ASAP, and that I was losing approx. 1/4 cup of blood per bowel movement. I told her that I was light headed and that I had fainted in the shower.
-She said thaT SHE WOULD SEND one of the nurses to get a sample of my stool and my blood within the next week.
-I TOLD HER THAT IT WAS AN EMERGENCY AND THAT I NEEDED MEDICAL ATTENTION ASAP, BUT SHE SAID THAT I NEEDED TO FILL OUT A COP OUT TO SEE THE DOCTOR.
-I TOLD HER THAT " AT THE RATE I'M LOSING BLOOD, I MIGHT NOT MAKE IT THE TWO WEEKS THAT IT'S GOING TO TAKE THE DOCTOR TO RESPOND TO MY COP_OUT"
-I was brought back to my cell in the S.H.U. with no medical treatment.
-From that point forward I told every C.O. on every shift, every day. I told every nurse that passed out meds. (4 times a day), every day... (and I have witnesses that will attest to this).
-I was told on several different occasions that it wasn't an emergency and that it would be fine.
-On 5/24/07, I wrote Dr. Wilson a cop-out because he was in the S.H.U. seeing patients. I had the cop-out given directly to Dr. Wilson in hopes of seeing him immediately and getting to the hospital, and addressing my MEDICAL EMERGENCY.

-No body came to see me or examine me.
-I filled out another sick-call slip and was again sent to see PA J. Williams. Not only did he seem unconcerned with my health, but he almost seemed too incompitent to even examine or diagnose me.
-He said I probably had a gastral infection, or even Ghonneria(???)... and he prescribed me an antibiotic.
-At this piont I had already fainted twice and was almost incapable of functioning. I could not eat and had lost 35lbs. since last being weighed. I spoke with officer Mack (who was the acting S.H.U. #1 at the time).
-He brought me to see the nurse on an emergency trip, and was very helpful.
-I saw the nurse and she seemed very concerned. I told her I was dizzy, lightheaded, experiencing extreme abdominal pain, gas, fever, nausea, and cramping. I explained that I was losing what I thought to be approx. 2 1/2 - 3 cups of blood per day, and that I was having approx. 8 - 15 bowel movements per daY. I explained that my symptoms where getting worse and had increased considerably since my last trip to see the PA,...that I was unable to eat, and that my bowel movements at this point where all blood and mucus, and the number of those movements where increasing every day.
-She seemed very concerned and wanted to help. She had an emergency prescription filled for: LOPERAMIDE 2 MG Cap to stop the diarrhea.
She took my temperature and it was over 101 degrees.
-The Loperamide came in a plastic bag with a label onit that said: "Immodium" and it had dosing instructions.
-I followed the instructions and had taken about 5 doses berore I was brought a prescription bottle and a "Patient Medication Information" sheet.
-The Loperamide made my diarrhea stop, and gave me abdominal pains, but I did not have any bowel movements after a few hours from my first dose, until I discontinued use. Once I discontinued use, my diarrhea seemed 3 times worse, with more blood and mucus than before. And extreme abdominal pain,...especially durring bowel movements.
-UNDER CAUTIONS ON THE :patient Medication Information sheet, it said: "If you are treating yourself, do not use this medicine if you have rectal bleeding, or a fever greater than 101 degrees, instead check with your doctor.
-Can you imagine my utter shock and amaizment when I read the caution section and realized that I had both of the symptoms mentioned in the DO NOT USE section. I discontinued use immediately and my symptoms grew 3 times worse than before.
-At this point I was unable to eat, sleeping approx. 18 hours a day, and spending the other 6 hours contending with fever, cold chills /sweats, abdominal pain, and seemingly endless bowel movements. My life had become a living hell. I seriously felt like I was going to die, and nobody on the medical staff here in Terre Haute, IN seemed to care enough to get me to a hospital to get the emergency medical treatment that I needed, and have the right to recieve by law.
-On June 4th, 2007 I was released from the S.H.U. in the poorest physical condition I have ever been in in my life. I was too weak to even carry my property bags to my unit with me.
-Upon my return to my unit, I was almost unrecognizable. People who knew me very well didn't even recognize me. They actually thought I was a "hold-over"... I had lost 35 ibs. and was "as pale as a ghost" from loss of blood.
-I tried to take a shower and fainted in the shower.
-I told the C.O. that was working my unit that I had fainted in the shower, and was taken to see PA Armstrong.
-He said I looked horrible and had a blood test performed.
-The blood test revealed that my potassium levels where dangerously low, as well as my iron & blood levels.

-I needed an emergency blood transfusion & a colonscopy to determine the source of the bleeding.
-I was transported to a near by hospital on the same day (7/04/07) and was put on a liquid diet. The next day, my colonoscopy revealed that I had Ulcerative Colitis, and that my whole colon was inflamed, (aka Pan-colitis---bloody ulcers cover the inner lining of my entire colon).
-I was informed by the doctor that it was in its late stages, and could possibly require emergency surgery to remove my entire colon.
-He said that if I would have been brought to the hospital sooner, they could have cought it before it spread throughout my entire colon, but now that it has spread throughout , it would be something that I would have to deal with for the rest of my life. The doctor said that the only cure was surgery (sergical removal of the whole colon), and that if the inflammation did not improve soon, they would have to perform emergency surgery.

I WAS TREATED FOR "SEVERE ONSET ULCERATIVE COLITIS, SEVERE ANEMIA STATUS POST BLOOD INFUSIONS, HYPOKALEMIA, AND HYPOMAGNASEMIA POST REPLACEMENT, WITH WEIGHT LOSS SECONDARY TO THE ABOVE"

-Dr. Chin gave me an arsonal of different medications to combat my disease, as well as two seperate blood transfusions, potassium IVs every day for almost two weeks, and a host of other supplements to combat my anemia (all of which could have been avoided if I had recieved the medical attention that I requested for almost a whole month prior to my hospitalization.)
-After approx. 3 1/2 weeks in the hospital , Dr. Chin believed I was fit to return back to the prison, even though the disease was not in remission,...he believed it would be manageable enough for me to combat it with my medications.
-Dr Chin scheduled me to come back to the hospital in two days (on 6/29/07) to continue my treatment with "Remicade", which is a form of chemo-thearapy.
-When I returned back to the prison on 6/27/07, they did not have my medication for almost 24 hours.
-I was still experiencing bloody stools and using the bathroom at least 8-10 times a day, upon my release from the hospital, and for at least a month or so after my release from the hospital.
-Not recieving my medication for almost 24 hrs. upon my arrival caused my symptoms to begin to worsen again. I also never recieved my 2nd, 3rd, or 4th treatments of REMICADE,(which was in the Doctors orders), & I am still experiencing bloody bowel movements to this day (9/22/07). My disease has never been brought into remission (allowing my scar tissue to heal), and I believe it is because the medical staff here at FCI Terre Haute, Indiana did not comply with Dr. Chin's orders to continue my REMICADE treatments. And even to this day I am going through "hell" just to continue to get my medicine, and being delayed by 2 week waiting periods, just to get my prescriptions re-filled.

I believe that the spread of my disease could have been avoided by simply recieving the medical attention that I continuously asked for, and expressed my symptoms and concerns about to the medical staff.
-Durring the course of a month I experienced pain, frustration, and medical niglect, equivalent of a living hell. I lost 50ibs. within the course of the same month, and I hold the medical staff here in TerreHaute, Indiana (FCI) responsible for MEDICAL NIGLECT,

Remedy No.: 470625-F1 FCC Terre Haute, IN

PART B - RESPONSE

This is in response to your Administrative Remedy receipted on October 23, 2007, in which you claim the Health Service Department medically neglected you and has mis-diagnosed your condition.

An investigation into your request and a review of your medical record reveals that you first requested to be evaluated by an MLP on April 23, 2007. Your complaint was abdominal pain from gas and indigestion. You again requested to be seen for abdominal pain on May 4, 2007. You were examined May 15, 2007, for abdominal pain, hard stools, rectal bleeding following a bowel movement (a tsp. amount), and burning with urination. The MLP ordered a urinalysis, a medication for gas, a stool softener, and instructed you to increase your fluids and fiber. You were again examined by the MLP on May 22, 2007, after you stated the medication made your symptoms worse. The MLP ordered other tests to try and find out the source of your discomfort and now complaint of bloody diarrhea. On May 27, 2007, the MLP examined you again for the same symptoms. Medication for diarrhea was prescribed. On May 31, 2007, the MLP examined you again and found you to have a low grade temperature. An antibiotic was ordered and the MLP asked for you to be followed up by a staff physician. On June 4, 2007, you were examined by a staff physician and found to have not responded to the previous medications prescribed. Therefore, the staff physician felt you needed to be hospitalized and examined by a Gastroenterologist to find out the cause of your rectal bleeding, temperature and abdominal pain. You were admitted to the local hospital on June 4, 2007, you returned back to the institution on June 26, 2007. You were diagnosed with Ulcerative Colitis. You continue to receive proper treatment. Therefore, you received the proper treatment based upon the symptoms you presented.

Therefore, this response to your Request for Administrative Remedy is for informational purposes only.

If you are dissatisfied with this response, you may appeal to the Regional Director, Federal Bureau of Prisons, Gateway Complex, Tower II, 8th Floor, 4th & State Ave., Kansas City, Kansas 66101. Your appeal must be received within 20 calendar days of the date of this response.

11.01.07
Date

B.R. Jett, Warden

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

Regional Administrative Remedy Appeal
Part B - Response

Admin Remedy Number: 470625-R2

This is in response to your Regional Administrative Remedy Appeal received on December 12, 2007. You allege Health Services Department (HSD) staff failed to provide you proper and timely medical care for your multiple symptoms. You contend, as a result, your health deteriorated prior to being hospitalized from June 4-26, 2007. Your appeal makes no specific request for relief.

We have reviewed the documentation related to your appeal. Based on this review, we have determined Health Services staff have consistently provided you appropriate medical care and have been responsive to your medical needs. Decisions have been guided by your clinical presentation and the BOP's Patient Care policy, Program Statement 6031.01. We encourage you to sign up for sick call if you wish to discuss your previous provision of health care and/or to request an assessment of any current symptoms. Your cooperation with staff will enhance their ability to continue providing you essential medical care.

Based on these findings, this response is for informational purposes only.

If you are dissatisfied with this response, you may appeal to the Office of General Counsel, Federal Bureau of Prisons, 320 First Street, NW, Washington, DC 20534. Your appeal must be received in the Office of General Counsel within 30 days from the date of this response.

1-7-08
Date

for Charles L. Lockett
Michael K. Nalley, Regional Director

Administrative Remedy No. 470625-A1
Part B - Response

You allege FCC Terre Haute medical staff have failed to provide proper and timely medical care for your medical condition. You contend your health has deteriorated prior to your being hospitalized from June 4-26, 2007.

Relevant portions of your medical record have been reviewed which reveal you have been diagnosed with ulcerative colitis, a disease that causes inflammation and sores, called ulcers, in the lining of the rectum and colon. Ulcers form where inflammation has killed the cells that usually line the colon, then bleed and produce pus. Information in the colon also causes the colon to empty frequently, causing diarrhea. You have been prescribed appropriate medication, and you have been educated on your condition. There is no indication FCC Terre Haute medical staff have failed to provide proper and timely medical care. The record reflects you are receiving medical care and treatment in accordance with Bureau policy.

Your appeal is denied.

April 2, 2008
Date

Harrell Watts, Administrator
National Inmate Appeals

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
North Central Regional Office
400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.)* *(Number, street, city, State and Zip Code)*
Joseph C. Andersen 12264-040
F.C.I. 2, Butner, NC
P.O.Box 1500
Butner, N.C. 27509

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. OR P.M.)*
☐ MILITARY ☒ CIVILIAN	11-23-1982	Single	Beginning of May-June 5, 2007	N/A

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.)*
See: Attached

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*
N/A.

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.
See: Attached

11. **WITNESSES**

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
Marvin Landfair Officer McIntyre Dr. Chen	

12. *(See instructions on reverse)* **AMOUNT OF CLAIM** *(in dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	$250,000.00	N/A	$250,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
	N/A	June 29, 2009

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of $2,000. plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

NOT A COPY OF ORIGINAL

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☒ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☒ No

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of the Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

July 15, 2009

Joseph Andersen, 12264-040
FCI Butner
PO Box 1500
Butner NC 27509

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2009-04859 $ 250,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on June 29, 2009. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until December 26, 2009.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et.seq., and §543.30.

Sincerely,
Richard W. Schott
Regional Counsel

U.S. Department of Justice

Federal Bureau of Prisons

North Central Regional Office

Tower II, 8th Floor
4th and State Avenue
Kansas City, KS 66101

November 24, 2009

Joseph Anderson
Register No. 12264-040
FCI Butner Med. II
P.O. Box 1500
Butner, NC 27509

Re: Claim Number TRT-NCR-2009-04859
Alleged Personal Injury Loss: $250,000.00
Certified Receipt No. 7007 0220 001 6105 6285

The above referenced tort claim has been considered for administrative review pursuant to 28 CFR § 0.172, Authority; Federal Tort Claim and 28 CFR Part 14, Administrative Claims Under Federal Tort Claims Act. Review of the investigation of your claim did not reveal that you suffered any personal injury loss as the result of the negligent acts or omissions of Federal Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 CFR § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six (6) months after the date of the mailing of this notification.

Sincerely,

Michael Romano
for

Richard W. Schott
Regional Counsel

cc: File

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
North Central Regional Office
Air World Center, STE 200
10920 Ambassador Drive
Kansas City, MO 64153

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*
Joseph C. Andersen 12264-040
F.C.I. 2 Butner NC
P.O. Box 1500
Butner, N.C. 27509

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. OR P.M.)*
☐ MILITARY ☒ CIVILIAN	11-23-1982	Single	Beginning of May-June 5, 2007	N/A

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.)*

See: Attached

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*
N/A

10. **PERSONAL INJURY/WRONGFUL DEATH**

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See: Attached

11. **WITNESSES**

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
Marvin Landfair Officer McIntyre Dr. Chen	

12. *(See instructions on reverse)* **AMOUNT OF CLAIM** *(in dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	$250,000.00	N/A	$250,000.00

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13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
	N/A	July 14, 2009

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

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(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☒ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

N/A

9. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☒ No

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of the Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

July 22, 2009

Joseph Andersen, 12264-040
FCI Butner
PO Box 1500
Butner NC 27509

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2009-05078 $ 250,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on July 14, 2009. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until January 10, 2010.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et.seq., and §543.30.

Sincerely,
Richard W. Schott
Regional Counsel

U.S. Department of Justice

Federal Bureau of Prisons

North Central Regional Office

Tower II, 8th Floor
4th and State Avenue
Kansas City, KS 66101

November 24, 2009

Joseph Anderson
Register No. 12264-040
FCI Butner Med. II
P.O. Box 1500
Butner, NC 27509

Re: Claim Number TRT-NCR-2009-05078
Alleged Personal Injury Loss: $250,000.00
Certified Receipt No. 7007 2560 0003 1588 8471

The above referenced tort claim has been considered for administrative review pursuant to 28 CFR § 0.172, Authority; Federal Tort Claim and 28 CFR Part 14, Administrative Claims Under Federal Tort Claims Act. Review of the investigation of your claim did not reveal that you suffered any personal injury loss as the result of the negligent acts or omissions of Federal Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 CFR § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six (6) months after the date of the mailing of this notification.

Sincerely,

Richard W. Schott
Regional Counsel

cc: File

ATTACHMENT 2: Medical Records

NSN 7540-00-634-4176

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE | SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*

04/23/2007 08:50

SUBJECTIVE:

SICK CALL/TRIAGE NOTE: I've been receiving abdominal pains from gas and indigestion.

OBJECTIVE:

Lock down inmate.

ASSESSMENT:

Sick call triage.

PLAN:

~~Refer to duty PA for sick call appointment. 05/01/2007.~~

MEDICATION:

None at this time.

FOLLOW UP:

with sick call appointment date and time.

~~D. Decker RN~~

D Decker

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)*

ANDERSON, JOSEPH-I
12264-040
FCI THA DOB:11/23/1982 AGE:24
CARE LEVEL:

REGISTER NO. | WARD NO.

NSN 7540-00-634-4178 AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD	CHRONOLOGICAL RECORD OF MEDICAL CARE
DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*

05/04/2007 08:59

SUBJECTIVE:

SICK CALL/TRIAGE NOTE: "I am having tremendous pains in my stomach, about a month now.

OBJECTIVE:

Lock down inmate.

ASSESSMENT:

Sick call triage.

PLAN:

Refer to duty PA for sick call appointment, 05/15/2007.

MEDICATION:

None at this time.

FOLLOW UP:

With sick call appointment date and time.

D. Decker RN

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Rate/Rank/Grade.)*	REGISTER NO.	WARD NO.
ANDERSON, JOSEPH I 12264-040 FCI THA DOB:11/23/1982 AGE:24 CARE LEVEL:		

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record
STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR (41 CFR) 201-9.202-1 USP LVN

NSN 7540-00-634-4178 AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD — **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*
05/15/2007 13:47	**SUBJECTIVE:** Inmate complains of rectal bleeding after BM-only a tsp.- He states his bowel movements are often hard. He also complains of burning when he urinates. He denies any discharge.. **OBJECTIVE:** There is marked resonance to percuss his abdomen. I was unable to collect a urine specimen at this time. **ASSESSMENT:** THA SENS MED NOT TESTED NOT HIV TESTED 02-01-2006 THA SENS MED V74.1 NEG PPD-NEXT DUE DATE 03-04-2007 THA SENS MED 0MM PPD RESULT - 0MM 03-04-2006 Internal Hemorrhoids. Abdominal gas. **PLAN:** Increase fluids and fiber. Order a UA. **MEDICATION:** None current. Colace 100mg. Take 1 tab twice daily by mouth for 30 days. Simethicone 80mg. #40. Take and chew 1 tab four times daily by mouth. **FOLLOW UP:** Verbal understanding returned by inmate with above instruction and medication. Joe Williams PA-C V.M.E.W. FCC Terre Haute

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)* REGISTER NO. WARD NO.

ANDERSON, JOSEPH-1
12264-040
DOB: 11/23/1982, AGE: 24
FCI THA
Care Level: 1

LOPERAMIDE 2 MG CAP ANDERSEN, JOSEPH CHRISTOP Rx # 157352

COMMON USES: This medicine is an antiperistaltic agent used to treat diarrhea.

BEFORE USING THIS MEDICINE: INFORM YOUR DOCTOR OR PHARMACIST of all prescription and over-the-counter medicine that you are taking. Inform your doctor of any other medical conditions including other bowel conditions, allergies, pregnancy, or breast-feeding.

HOW TO USE THIS MEDICINE: Follow the directions for using this medicine provided by your doctor. DRINK EXTRA FLUID while you are taking this medicine and while you have diarrhea. STORE THIS MEDICINE at room temperature in a tightly-closed container, away from heat and light. IF YOU MISS A DOSE OF THIS MEDICINE and you are using it regularly, take it as soon as possible. If it is almost time for your next dose, skip the missed dose and go back to your regular dosing schedule. Do not take 2 doses at once.

CAUTIONS: If your diarrhea does not improve within 48 hours or if you develop a fever, stop using this medicine and contact your doctor. IF YOU ARE TREATING YOURSELF, do not use this medicine if you have bloody diarrhea or a fever greater than 101 degrees F. Instead, check with your doctor. FOR WOMEN: IT IS UNKNOWN IF THIS MEDICINE IS EXCRETED in breast milk. IF YOU ARE OR WILL BE BREAST-FEEDING while you are using this medicine, check with your doctor or pharmacist to discuss the risks to your baby.

POSSIBLE SIDE EFFECTS: CHECK WITH YOUR DOCTOR AS SOON AS POSSIBLE if you experience sudden abdominal pain, discomfort, or bloating; constipation; nausea; or vomiting. If you notice other effects not listed above, contact your doctor, nurse, or pharmacist.

OVERDOSE: If overdose is suspected, contact your local poison control center or emergency room immediately. Symptoms of overdose may include nausea, vomiting, slowed breathing, drowsiness or deep sleep, and slow pulse.

ADDITIONAL INFORMATION: DO NOT SHARE THIS MEDICINE with others for whom it was not prescribed. DO NOT USE THIS MEDICINE for other health conditions. KEEP THIS MEDICINE out of the reach of children.

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PATIENT MEDICATION INFORMATION

DOCUSATE SODIUM 100 MG CAP ANDERSEN, JOSEPH CHRISTOP Rx # 1566

COMMON USES: This medicine is a stool softener used to treat constipation due to hard stools.

BEFORE USING THIS MEDICINE: Some medicines or medical conditions may interact with this medicine. INFORM YOUR DOCTOR OR PHARMACIST of all prescription and over-the-counter medicine that you are taking. Inform your doctor of any other medical conditions, allergies, pregnancy, or breast-feeding. USE OF THIS MEDICINE IS NOT RECOMMENDED if you have appendicitis or a history of bowel obstruction. Contact your doctor or pharmacist if you have any questions or concerns about using this medicine.

HOW TO USE THIS MEDICINE: Use this medicine exactly as directed on the package, unless instructed differently by your doctor. DRINK SEVERAL GLASSES of water or other liquid each day while you are taking this medicine. STORE THIS MEDICINE at room temperature in a tightly-closed container, away from heat and light. IF YOU MISS A DOSE OF THIS MEDICINE and you are using it regularly, take it as soon as possible. If it is almost time for your next dose, skip the missed dose and go back to your regular dosing schedule. Do not take 2 doses at once.

CAUTIONS: IF YOUR SYMPTOMS DO NOT IMPROVE WITHIN 1 WEEK, or if they become worse, check with your doctor. Do not use this medicine for more than 1 week unless prescribed by your doctor. USING THIS MEDICINE for a long time may result in loss of normal bowel function. DO NOT TAKE this medicine with other laxatives or stool softeners, unless directed by your doctor. DO NOT USE this medicine if you experience abdominal pain, nausea, vomiting, or rectal bleeding, except under the direction of your doctor. IF YOU NOTICE A SUDDEN CHANGE IN BOWEL HABITS which lasts for 2 weeks or more, check with your doctor. Do not continue using this medicine. FOR WOMEN: IF YOU PLAN ON BECOMING PREGNANT, discuss with your doctor the benefits and risks of using this medicine during pregnancy.

POSSIBLE SIDE EFFECTS: SIDE EFFECTS, that may go away during treatment, include bitter taste, throat irritation or nausea. If they continue or are bothersome, check with your doctor. If you notice other effects not listed above, contact your doctor, nurse, or pharmacist.

OVERDOSE: If overdose is suspected, contact your local poison control center or emergency room immediately.

ADDITIONAL INFORMATION: DO NOT SHARE THIS MEDICINE with others for whom it was not prescribed. DO NOT USE THIS MEDICINE for other health conditions. KEEP THIS MEDICINE out of the reach of children.

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NSN 7540-00-634-4178 AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD	CHRONOLOGICAL RECORD OF MEDICAL CARE
DATE 05/21/2007 09:13	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*

FCC TERRE HAUTE

SICK CALL SIGN UP TRIAGE RECORD

1. **Subjective: BLD IN STOOL. SEEN FOR THIS C/O RECENTLY.**

2. **Objective:**
   Temp: SHU
   Pulse: SHU
   Resp: SHU
   B/P: SHU

3. **Appointment Date and time: 05-29-2007**

4. **Triage personnel's signature: C MCCOY RN**

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)*	REGISTER NO.	WARD NO.
ANDERSON, JOSEPH-I **12264-040** **Institution: FCI-THA Date of Birth: 11/23/1982**		

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record
STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR 141 CFR 201-9.202-1 USP LVN

NSN 7540-00-634-4178 AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD — **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE | SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*

05/22/2007 11:26

SUBJECTIVE:

"THE MEDICINE MADE ME WORSE".

OBJECTIVE:

PT. WAS SEEN FOR SAME COMPLAINT ON 5/15/07. COLACE AND SIMETHICONE WERE PRESCRIBED. patient STATES HE STOPPED TAKING THEM AFTER TWO DOSES BECAUSE THEY SEEMED TO MAKE HIS DIARRHEA WORSE. THE ABDOMEN IS SOFT WITH HYPERACTIVE BOWEL SOUNDS. THERE IS NO ORGANOMEGALY.

ASSESSMENT:

complains of BLOODY DIARRHEA.

~~THA SENS MED NOT TESTED NOT HIV TESTED 02-01-2006~~

THA SENS MED V74.1 NEG PPD-NEXT DUE DATE 03-04-2007

THA SENS MED 0MM PPD RESULT - 0MM 03-04-2006

PLAN:

WILL OBTAIN STOOL SPECIMEN FOR CULTURE, OVA AND PARASITE

~~WATCH FOR DEHYDRATION.~~

MEDICATION:

DATE PRINTED: 05/22/2007 PERSON: ANDERSEN, JOSEPH CHRISTOP PERSON ID#: 12264-040

~~USP TERRE HAUTE PHARMACY Z01-007LAD~~

4200 BUREAU RD NORTH FCC TERRE HAUTE HOUSING

TERRE HAUTE, IN 47808

(812) 238-3398

~~RX NUM LAST FILL DRUG NAME START DATE EXP DATE~~

FACILITY QUANTITY DOCTOR NAME DC DATE REFILL DUE

SIG

156643 05/15/2007 DOCUSATE SODIUM 100 MG CAP 05/15/2007 06/14/2007

THA 60.0000EA

TAKE ONE CAPSULE BY MOUTH IN THE MORNING AND IN THE EVENING

156644 05/15/2007 SIMETHICONE 80 MG UD 05/15/2007 05/25/2007

THA 40.0000EA

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)* REGISTER NO. WARD NO.

ANDERSON, JOSEPH-1
12264-040
FCI THA DOB:11/23/1982 AGE:24
CARE LEVEL:

rescheduled to see me

WM E. Wilson, MD
FCC Terre Haute
5-28-7

TO: DR. WILSON 05/24/07

FROM: JOSEPH ANDERSEN #12264-040

B-07 (STU)

DR. WILSON...

IVÉ SEEN THE PA TWICE ABOUT MY SITUATION. IVÉ BEEN HAVING DARK/THICK RED BLOOD IN MY STOOL. ITS ALMOST ALL LIQUID.

THE PA SAID I HAVE, A GASTRAL INFECTION & THAT'S WHAT EXPLAINS THE DARK RED MUDDISH BOWEL MOVEMENTS & THE SEVERE CRAMPING IVÉ BEEN HAVING.

THE PA WAS SUPPOSED TO SEND A CUP DOWN HERE FOR A SAMPLE, BUT STILL, IVÉ HAD NO HELP. ITS BEEN GOING ON FOR APPROX. 2 WEEKS NOW, W/@ LEAST 6-8 BOWEL MOVEMENTS A DAY. I NEED HELP DOCTOR. PLEASE - MAYBE MY ANTIBIOTIC, OR SOMETHING. PLEASE!

NSN 7540-00-634-4176

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD	CHRONOLOGICAL RECORD OF MEDICAL CARE
DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*

05/27/2007 17:26

SUBJECTIVE:
"I'M STILL HAVING BLOOD IN MY BOWEL MOVEMENTS"

OBJECTIVE:
COMPLAINS THAT THIS HAS BEEN GOING ON FOR 2 WEEKS, THAT HE HAS CRAMPING TO THE LOWER LEFT ABDOMINAL AREA AND THAT HE HAS 7-8 BLOODY/DIARRHEA STOOLS A DAY. ABDOMEN SOFT, POSITIVE BOWEL SOUNDS X 4 QUADS. SAW THE PA ON 5/15/07 AND 5/22/07 AND NO CHANGE OR IMPROVEMENT AS OF YET. COMPLAINS OF INTERMITTENT NAUSEA. STATES BOWEL MOVEMENTS ARE DARK/MUCOUS LIKE BLOOD, MAROON. VS: BP: 128/079. P: 089. RR: 18. T: 098.00 Deg..

ASSESSMENT:
COMPLAINS OF CONTINUED BLOODY DIARRHEA.

THA SENS MED NOT TESTED NOT HIV TESTED 02-01-2006
THA SENS MED V74.1 NEG PPD-NEXT DUE DATE 03-04-2007
THA SENS MED 0MM PPD RESULT - 0MM 03-04-2006

PLAN:
DISCUSSED WITH JASTILLANO, PA ON CALL - ORDERS OBTAINED FOR Complete Blood Count THIS WEEK, FLAT PLATE OF ABDOMEN, STOOL SPECIMENS AND

MEDICATION:
IMODIUM 2 CAPSULES PO INITIALLY THEN 1 CAPSULE PO AFTER EACH LOOSE bowel movement UP TO 3 TIMES A DAYS #21

FOLLOW UP:
FOLLOW UP ON SICK CALL OR HEALTH SERVICES AS NEEDED FOR WORSENING CONDITION. Verbal understanding returned by inmate with above instruction and medication. Verbal orders read back with verbal orders approved and verified by physician or MLP.
H.KEILMAN, RN
Alex Jastillano PA
USP Terre Haute

WM E. W
FCC Terre Hau
5-29-7

(over)

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)*

REGISTER NO.	WARD NO.

ANDERSON, JOSEPH-1
12264-040
DOB: 11/23/1982, AGE: 24
FCI THA
Care Level: 1

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record
STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR (41 CFR) 201-9.202-1

USP LVN

NSN 7540-00-634-4178 AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD — **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*
05/31/2007 12:29	**SUBJECTIVE:** Inmate complains of hot and cold feeling. He has burning on urination and some diarrhea. **OBJECTIVE:** VS: BP: 114/073, P: 102, RR: 15, T: 100.30 Deg., Some pain to percuss right flank and Lf CVA. Obtained witnessed urine. U/A--SG-1.030. white blood cells 2-4. Trace ketones. **ASSESSMENT:** THA SENS MED NOT TESTED NOT HIV TESTED 02-01-2006 THA SENS MED V74.1 NEG PPD-NEXT DUE DATE 03-04-2007 THA SENS MED 0MM PPD RESULT - 0MM 03-04-2006 Rule out UTI. **PLAN:** Increase fluids. **MEDICATION:** Recent meds--Colace,Simethicone, and Imodium. Septra DS. #20. Take 1 tab twice daily by mouth x 10 days. **FOLLOW UP:** Verbal understanding returned by inmate with above instruction and medication. Joe Williams PA-C

(over)

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)*

ANDERSON, JOSEPH-1
12264-040
DOB: 11/23/1982, AGE: 24
FCI THA
Care Level: 1

REGISTER NO.	WARD NO.

NSN 7540-00-634-4178

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*
06/04/2007 14:55	**SUBJECTIVE:** Has been complains of burning lower abdominal pain, excessive flatulence, bowel movements seven times a day, diarrhea with dark blood formed "like snot" for over three weeks. Previous complaints of blood in stool, abdominal pain for a few months. Released from SHU today. Near-syncopal in the shower today. Dizzy whenever he gets up. **OBJECTIVE:** Patient is in no acute distress. Breathing is at a normal rate and unlabored. Speech is clear and unlabored. Gait is steady and even without ataxia. Skin appears healthy without cyanosis, flushing or diaphoresis and there is no generalized rash or lesions. Lips and nails still pink. Upright 125/075 P: 100 VS: Sitting BP: 128/068 P: 107 RR: 16 Supine 116/070 P: 87 STAT CBC WBC 13.1 RBC 3.16 HGB 9.0 HCT 27.2 PLT 489 H. pylori negative **ASSESSMENT:** GI bleed **PLAN:** STAT CBC and glucose, H. pylori Discussed with MD. Inmate will be direct admit to hospital and will be scoped ASAP. **MEDICATION:** PERSON PROFILE PAGE: 1 DATE PRINTED: 06/04/2007 PERSON: ANDERSEN, JOSEPH CHRISTOP PERSON ID#: 12264-040 USP TERRE HAUTE PHARMACY Z01-007LAD 4200 BUREAU RD NORTH FCC TERRE HAUTE HOUSING TERRE HAUTE, IN 47808 (812) 238-3398 RX NUM LAST FILL DRUG NAME START DATE EXP DATE FACILITY QUANTITY DOCTOR NAME DC DATE REFILL DUE (over)

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)*

ANDERSON, JOSEPH-1
12264-040
DOB: 11/23/1982, AGE: 24
FCI THA
Care Level: 1

REGISTER NO.	WARD NO.

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*
06/04/2007 14:55	(continued from previous page)
	SIG
	156643 05/15/2007 DOCUSATE SODIUM 100 MG CAP 05/15/2007 06/14/2007 THA 60.0000EA TAKE ONE CAPSULE BY MOUTH IN THE MORNING AND IN THE EVENING
	~~157352 05/29/2007 LOPERAMIDE 2 MG CAP 05/29/2007 06/08/2007~~ THA 20.0000EA TAKE 2 CAPSULES NOW THEN TAKE 1 CAPSULE AFTER EACH LOOSE BOWEL MOVEMENT MAX
	~~157708 05/31/2007 SULFAMETHOXAZOLE/TRIMETH 800MG/160 05/31/2007~~ 06/10/2007 THA 20.0000EA TAKE ONE TABLET BY MOUTH IN THE MORNING AND IN THE EVENING TILL ALL TAKEN
	FOLLOW UP: Verbal understanding returned by inmate with above instruction and medication. Michael E. Armstrong PA-C USP/FPC Terre Haute

NSN 7540-00-634-4175

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*
~~06/04/2007 14:40~~	**SUBJECTIVE:** follow-up INFO FROM MLP TODAY THAT HE HAD 3-4 WEEK history of LOWER ABD. DISCOMFORT, HEMATOCHEZIA, PRESYNCOPAL THIS AM, AND HGB= 9.0 WITH white blood cells 13. Review of systems otherwise negative. PMHx, ~~meds reviewed.~~
	OBJECTIVE: GENERAL:APPEARS PALE Lymphatics: Negative HEENT:Negative Pulm:Nl appearance, clear to ascultation bilaterally, nontender, no retractions COR:Regular rate and rhythm,no m/g/r, normalS1 and S2,normal PMI. ~~Vasc-radial +2 right~~ ABD- MILD DIFFUSE TENDERNESS, positive BOWEL SOUNDS EXTREMITIES: no c/c/e ~~INTEGUMENT- grossly normal~~ NEURO- No focal deficits VS: BP: 125/075. P: 100. RR: 20. T: 100.60 Deg.. W: 180 lbs. 00.0 oz.. 0— 116/70, 87
	ASSESSMENT: THA SENS MED NOT TESTED NOT HIV TESTED 02-01-2006 ~~THA SENS MED V74.1 NEG PPD-NEXT DUE DATE 03-04-2007~~ THA SENS MED 0MM PPD RESULT - 0MM 03-04-2006 PAIN 0 1 2 3 4 5 6 7 8 9 10
	PLAN: ~~-HEMATOCHEZIA,~~ -LEUKOCYTOSIS - ANEMIA HOSPITALIZATION , DIRECT ADMIT, FOR ANEMIA, gastrointestinal CONSULT FOR ~~ENDOSCOPY, SERIAL HGB, FURTHER WORK UP. SPOKE WITH DR KOJ.~~ **MEDICATION:**

(over)

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)* | REGISTER NO. | WARD NO.

ANDERSON, JOSEPH-1
12264-040
DOB: 11/23/1982, AGE: 24
FCI THA
Care Level: 1

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*
06/04/2007 14:40	(continued from previous page)
	SEPTRA
	~~FOLLOW UP:~~
	Callback instructions given. Informed may follow up on sick call as needed. Pertinent education given. Verbal understanding returned by inmate with above instruction and medication. Follow up per CHRONIC CARE CLINIC guidelines.
	Wm. Eric Wilson M.D.
	~~Staff Physician~~
	FCC Terre Haute

FEDERAL CORRECTIONAL COMPLEX
4400 BUREAU ROAD SOUTH
TERRE HAUTE, IN 47802
(812)244-4589

FINAL SAMPLE REPORT

Page: 1

Patient ID: 12264-040
Patient Name: **ANDERSON, JOSEPH-1**
DOB: 11/23/1982 Sex: M
Comments: CHRONIC CARE

Reported: 06/05/07 13:52
Doctor: **WM ERIC WILSON M.D.**
Location: **FCI TERRE HAUTE**

Lab No: 07156046 Drawn: 06/04/07 13:00 Tech: AMT Rec'd: 06/04/07 13:00 Tech: AMT
Comments:

PROCEDURE	NORMAL	ABNORMAL		UNITS	REF RANGE	TECH
*** HEMATOLOGY ***						
WBC		**13.1**	H	x10^3/uL	4.0 - 10.5	AMT
RBC		**3.16**	L	x10^6/uL	4.10 - 5.60	AMT
HGB		**9.0**	L	g/dL	12.5 - 17.0	AMT
RESULTS GIVEN TO PA ARMSTRONG 1320 6-4-07. AMT						
HCT		**27.2**	L	%	36.0 - 50.0	AMT
MCV	86			fL	80 - 98	AMT
MCH	28.5			pg	27.0 - 34.0	AMT
MCHC	33.1			g/dL	32.0 - 36.0	AMT
RDW	12.0			%	11.7 - 15.0	AMT
PLT		**489**	H	x10^3/uL	140 - 415	AMT
MPV	9.1			fL	8.1 - 12.4	AMT
** AUTO DIFF ***						
GRAN%		**71.8**	H	%	38.3 - 69.0	AMT
LYMPH%		**11.0**	L	%	17.5 - 47.9	AMT
MIXED%	17.2			%	1.9 - 24.6	AMT
*** LIPID PROFILE ***						
CHOLESTEROL	146			mg/dL	140 - 200	AMT
TRIGLYCERIDES	104			mg/dL	56 - 169	AMT
HDL		**22**	L	mg/dL	35 - 80	AMT
LDL (CALCULATED)	103			CALC	< 130	AMT
HDL RISK FACTOR	6.7			CALC		AMT
*** GENERAL CHEMISTRIES ***						
GLUCOSE		**126**	H	mg/dL	70 - 110	AMT
*** SEROLOGY/IMMUNOLOGY ***						
H. PYLORI	NEGATIVE				NEGATIVE	AMT
*** SEND OUT TESTS ***						
SEND OUT TESTS	SENT TO REFERENCE LAB					AMT
STOOL CULTURE,STOOL O&P						

ENTERED

==========SENSITIVE==========

REVIEWED BY

FCI

12264-040

UNION HOSPITAL

1606 N. 7th Street
Terre Haute, Indiana 47804

Patient Name:
ANDERSON, JOSEPH

Hospital: 15950884 - I
Med Rec#: 351532
Room #: 202103

DOB: 11/23/1982
Sex: M

Age: 24Y
Race: W

Adm Dr: KOJ, I GEORGE
~~**Atn Dr:** KOJ, I GEORGE~~
Ref Dr:
DICTATING DOCTOR: BILOTTA, JEFFREY
CC: KOJ, I GEORGE

Adm Date: Jun 4 2007 5:15PM
~~**Dis Date:**~~

CONSULTING DOCTOR: BILOTTA, JEFFREY

UH CONSULTATION REPORT

Temperature	Afebrile
Pulse	80
Respirations	16
Blood Pressure	140/80
Height	
Weight	

WM E. Wilson, MD
FCC Terre Haute

Thank you for permitting me to assist you in the care and management of your nice patient, a 24 year old man with rectal bleeding.

The past medical history is unremarkable as is the past surgical history.

OUTPATIENT MEDICATION:
Stool softeners.
Imodium.
Bactrim.

He has no known drug allergies.

This very pleasant 24 year old man was admitted to the hospital with a three week history of passing liquid, bloody, mucoid stools. He was having 7 loose stools per day that represented a marked change in his bowel activity. For the first week he experienced urgency with this condition but no incontinence. Nevertheless, over the last two weeks, he has had no urgency. He reports fever and chills. He has had nausea but no vomiting. He has diffuse abdominal pain. Although is appetite has been good he has lost 20 pounds with this illness. He has had no indigestion or heartburn, vomiting, dysphasia, odynophagia or frequent eructations.

In the outpatient setting a therapeutic trial of stool softeners appeared to worsen his symptoms and Imodium was discontinued after the fever developed. A course of Bactrim was initiated when he was admitted.

ENTERED
JUN 27 2007
BY: DW

User: Lindsay Ogle Date: 6/19/2007 3:36:02 PM Union

CONFIDENTIAL

Location	Patient Name	Admit Date	Acct#	MRN	Sex	DOB	Height	Weight
2WB 2021-01	ANDERSON, JOSEPH	06/04/2007	15950884	351532	M	11/23/1982		

SYSTEM COPY
NOT A LEGAL DOCUMENT
RE-DISCLOSURE PROHIBITED

Back to Index

Report Name: OPERATIVE REPORT
Work Type: OPERATIVE REPORT
Report Date/Time: 06/10/2007 13:55

PATIENT: ANDERSON, JOSEPH
HOSPITAL: 15950884-I
MR #: 351532
ROOM#: 202103
DOB: 11/23/1982
AGE: 24Y
SEX: M
RACE: W
ADM DR: KOJ, I GEORGE
ADM DATE: Jun 4 2007 5:15PM
DIS DATE:
HOSP SERV: MED
DICTATING DOCTOR: BILOTTA, JEFFREY
ORDERING DOCTOR:
REFERRING DOCTOR:
CC: KOJ, I GEORGE
OH OPERATION REPORT

WM E. Wilson, MD
FCC Terre Haute

Surgeon: BILOTTA Assistant:
Anesthesiologist: Anesthetic:

DATE OF OPERATION: 6-5-07

PROCEDURE:
1. Colonoscopy.

ENTERED
JUN 20 2007
BY:

PREMEDICATION: Demerol 100 mg IV, Versed 4 mg IV.

ENDOSCOPIC FINDINGS:
1. Diffuse left sided ulcerative colitis, status post biopsy.

Colonoscopy was performed and the tip of the instrument advanced to the cecum as identified by the appendiceal orifice and ileocecal valve. Retrograde ileoscopy revealed the terminal ileum to appear normal. The ascending colon was unremarkable. Beginning at the hepatic flexure and extending in a contiguous fashion to the rectum, diffuse moderately severe ulcerative colitis was identified with no skip areas. There was marked tissue friability and tissue edema. Multiple biopsies were obtained from the ascending colon, transverse colon, sigmoid colon and rectum for histopathology. Your patient tolerated the procedure well.

PLAN:
1. Initiate corticosteroid therapy with Hydrocortisone 100 mg IV now and then 100 mg IV q8h.
2. Advance to regular diet.
3. Follow the patient clinically.

DD: (6-5-07 2017)
TRANSCRIBED BY: (jls) on Jun 10 2007 1:55P
EXTRAPRINTSMRD123: ()

[redacted]

User: Lindsay Ogle Date: 6/19/2007 3:36:38 PM Union

CONFIDENTIAL

Location	Patient Name	Admit Date	Acct #	MRN	Sex	DOB	Height	Weight
2WB 2021-01	ANDERSON, JOSEPH	06/04/2007	15950884	351532	M	11/23/1982		

SYSTEM COPY
NOT A LEGAL DOCUMENT
RE-DISCLOSURE PROHIBITED

Test Name: Pathology SURG/NucMED
Accession#: SP07-9141

Final Report

Pathology SURG/NucMED #
P.O. Box 1054 Phone: (812) 238-7543
Terre Haute, IN 47808 Fax: (812) 238-7230
Kashlan, M.D.
M.D.
Associates
M.B.
G.J. Longa,
and

Accession Number: SP07-9141
Attending: I GEORGE KOJ
Surgeon: JEFFREY BILOTTA
Location: UH 2WB 2021 03
Patient Name: ANDERSON, JOSEPH
Age: 24 Y, M DOB: 11/23/1982
MR#: U351532 Procedure Date:
Admission #: 06/05/2007
U15950884 Received Date:
Chart #: 348473 06/06/2007
Reported Date:
06/07/2007

FINAL SURGICAL PATHOLOGY REPORT

WM E. Wilson, MD
FCC Terre Haute

CLINICAL HISTORY: BLOOD WITH BOWEL MOVEMENT

PROCEDURE: COLONOSCOPY WITH BIOPSY

FINAL MICROSCOPIC DIAGNOSIS:

A. COLON, ASCENDING, BIOPSY:
CHRONIC ACTIVE COLITIS.

B. COLON, TRANSVERSE, BIOPSY:
MARKED CHRONIC ACTIVE COLITIS.

C. COLON, SIGMOID, BIOPSY:
MARKED CHRONIC ACTIVE COLITIS.

ENTERED
JUN 20 2007
BY:

NSN 7540-00-634-4178

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD — **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION *(Sign each entry)*

06/26/2007 18:50

FCC TERRE HAUTE HOSPITALIZATION SUMMARY

ANDERSON, JOSEPH-1

12264-040

HOSPITALIZED FROM: 06-04-2007

TO: 06-26-2007

HOSPITAL DISCHARGE DIAGNOSIS: SEE DISCHARGE SUMMARY

CHRONOLOGICAL SUMMARY:

6/4/2007 12264-040 JOSEPH ANDERSON UNION HOSPITAL 1528 N. 7TH STREET TERRE HAUTE IN 47807 8122387352 PRE-OP: Time: Details: WAS A DIRECT ADMIT VIA GOV VECH TO R/O GI BLEED

*******HOSPITALIZED 06-04-2007----06-26-2007:

1. SEVERE NEW ONSET ULCERATIVE COLITIS

2. SEVERE Anemia (weak blood) #285.9 STATUS POST BLOOD TRANSFUSIONS

3. Hypokalemia (low blood potassium) #276.8, AND HYPOMAGNASEMIA STATUS POST REPLACEMENT

4. WEIGHT LOSS SECONDARY TO ALL OF THE ABOVE.

Thomas Webster M.D.
Clinical Director
FCC Terre Haute

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: *(For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)*	REGISTER NO.	WARD NO.
ANDERSON, JOSEPH-1 **12264-040 11/23/1982** **Age: 24 FCI THA**		

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record

STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR (41 CFR) 201-8.202-1

USP LVN

DISCHARGE TEACHING DOCUMENT

FOR: ANDERSON ,JOSEPH ROOM: 2021 - 01 DATE: 06/26/07
PT NO/MED REC NO: 15950884 / 351532 TIME: 16:50
DIAGNOSIS: RECTAL BLEED ADM DATE/TIME: 06/04/07 17:15

MEDICATIONS

MEDICATIONS
HERE ARE THE MEDICATIONS THAT YOU ARE TO TAKE AT HOME:

protonix 40mg by mouth daily.
YOUR NEXT DOSE IS DUE 6/27/07 0900

potassium 40meq by mouth daily for 1 week than stop.
YOUR NEXT DOSE IS DUE 6/27/07 0900

ferrous sulfate 325mg by mouth daily.
YOUR NEXT DOSE IS DUE 6/27/07 0900

imuran 50mg by mouth daily.
YOUR NEXT DOSE IS DUE 6/27/07 0900

colozal 2250mg by mouth three times daily.
YOUR NEXT DOSE IS DUE tonight at 9p.m..

folic acid 1mg by mouth daily.
YOUR NEXT DOSE IS DUE 6/27/07 0900

prednisone 50mg by mouth daily x1 week,then 40mg by mouth daily x 2 week,then 30mg by mouth daily x2 week,then 20mg by mouth daily
YOUR NEXT DOSE IS DUE 6/27/07 0900

for 2 week,then 10mg by mouth daily x2 week,then 5mg by mouth dai ly for 2 weeks then stop.
YOUR NEXT DOSE IS DUE see above

remicade 5mg/kg i.v. this friday,then every 8 weeks x3 doses then stop.
YOUR NEXT DOSE IS DUE 6/29/07

WM E. Wilson, MD
FCC Terre Haute

ACTIVITY

LIMITATIONS
as tolerated
POSITIONING
as tolerated
WALKING
as tolerated
DRIVING
as tolerated
BATHING
as tolerated
SITTING
as tolerated
LIFTING
as tolerated

DIET

HOME DIET
regular

INSTRUCTIONS

EXPL TO PATIENT
Explained condition/possible complications to patient

COMMENTS

ADDL COMMENT
please obtain cbc and liver function panel in 2 months.

ENT[illegible]
JUN 27 2007
BY: DW

UNION HOSPITAL 1606 N. 7th St, Terre Haute, IN
System date/time: 06/26/07 16:50

PATIENT COPY

UNION HOSPITAL

1606 N. 7th Street
Terre Haute, Indiana 47804

Patient Name:
ANDERSON, JOSEPH

Hospital: 15950884 - I
Med Rec#: 351532
Room #: 202101

DOB: 11/23/1982
Sex: M

Age: 24Y
Race: W

Adm Dr: KOJ, I GEORGE
Atn Dr: KOJ, I GEORGE
Ref Dr:
DICTATING DOCTOR: KOJ, I GEORGE
CC: KOJ, I GEORGE

Adm Date: Jun 4 2007 5:15PM
Dis Date:

UH DISCHARGE SUMMARY

DISCHARGE DIAGNOSIS:
1. Severe new onset ulcerative colitis.
2. Severe anemia status post-blood transfusion.
3. Hypokalemia and hypomagnesemia status post-replacement.
4. Weight loss secondary to all of the above.

WM E. Wilson, MD
FCC Terre Haute

For more details refer to my history and physical.

HOSPITAL COURSE: The patient was admitted to the hospital with rectal bleeding and he had immediately GI evaluation with colonoscopy, which revealed the presence of diffuse ulcerative colitis. The patient was started with IV steroids and he was also treated with Imuran and Colazal. The patient slowly improved dramatically. He received blood transfusion also through this hospitalization. The texture of his stool and the amount of rectal bleeding went down dramatically after the Remicade was given as well. So, the patient is currently under the care of Dr. Chen. He received Remicade last week and he is going to receive another Remicade next week. He is also on Colazal and Imuran (azathioprine) and also is on prednisone. Dr. Chen, I believe, is planning to taper off the steroids slowly and keep the patient on Imuran and Colazal for awhile. The patient was also given Protonix to protect his stomach while he is on steroids.

DISCHARGE MEDICATIONS:
The patient will be discharged on Protonix 40 once a day.
K-Dur 40 mEq two times a day because of the persistent hypokalemia.
He will be discharged on ferrous sulfate 325 mg orally once a day.
Imuran 50 mg orally daily.
Colazal 2,250 mg three times a day.
Prednisone 15 mg orally every day for right now and the tapering dose schedule issued by Dr. Chen.

ENTERED
JUN 27 2007
BY: [illegible]

Again, the patient needs close follow-up with Dr. Chen. The patient most likely would need baseline bone density testing while he is on high dose steroids, and I am sure he is going to be on more steroids in the future. The patient was told about the serious side effects of all the medicine he takes including Imuran and prednisone and even in the future the possibility of colectomy was mentioned to him. The patient did have a colonoscopy in this hospitalization and again the colonoscopy did not show any evidence of dysplasia, so there is no need to repeat a colonoscopy more frequently at this point, other than screening for colon cancer, which is very common in patients with ulcerative colitis. Again, I will

UNION HOSPITAL

1606 N. 7th Street
Terre Haute, Indiana 47804

Patient Name:
ANDERSON, JOSEPH

Hospital: 15950884 - I
Med Rec#: 351532
Room #: 202101

leave the long-term plan to Dr. Chen, his gastroenterologist, to deal with his ulcerative colitis. He needs close check on his potassium, HgB, magnesium once a month, at least for now until he goes into remission. Then he needs them probably every three to four months.

Thank you Dr. Breitweiser, Dr. Wilson, and Dr. Williams for this interesting case.

DD: (6/26/07 0819)
TRANSCRIBED BY: (VEC) on Jun 26 2007 9:40A

Federal Bureau of Prisons

Federal Correctional Institution
Terre Haute, Indiana

August 22, 2007

This is a letter sent to the Plaintiff's father, David C. Andersen, from the Warden of Terre Haute, In, B.R. Jett, regarding the medical condition of his son: Plaintiff Andersen.

David C. Andersen
Attorney at Law
PO Box 141547
866 3 Mile Road NW
Grand Rapids, MI 49514-1547

Re: Joseph Andersen
Register No. 12264-040

Dear Mr. Andersen,

This is in response to your letter dated June 19, 2007, wherein you question the medical condition of your son, Joseph Andersen. You are also inquiring about visitation.

A review of Mr. Andersen's medical record reveals on June 4, 2007, Mr. Andersen presented to Health Services with complaints of burning lower abdominal pain, excessive flatulence, bowel movements seven times a day, diarrhea with dark blood formed "like snot" for over three weeks. Mr. Andersen was sent to the hospital for further tests. On June 5, 2007, a colonoscopy revealed ulcerative colitis. While hospitalized from June 4, until June 26, 2007, Mr. Andersen received treatment for severe new onset ulcerative colitis, severe anemia status post blood infusions, hypokalemia, and hypomagnasemia post replacement, with weight loss secondary to the above. On June 18, 2007, Mr. Andersen received Remicade treatment. Remicade therapy will be the prescribed ongoing treatment for Mr. Andersen's condition of ulcerative colitis. On July 5, 2007, Mr. Andersen was evaluated by the Physician Assistant, requesting a second pair of TED hose. No complaints regarding ulcerative colitis were voiced at the time of this visit.

Visitation was previously suspended due to Mr. Andersen's hospitalization. Regular visiting hours are 8:00 A.M. to 3:00 P.M. on Friday through Sunday. Visitors will not be admitted after 2:00 P. M. Mondays, Tuesdays, Wednesdays and Thursdays are not visiting days unless a legal holiday falls on either of those days. There is a limit of five visitors during each visit.
I trust this response addresses your concerns. Please advise your son to sign up for sick call if other medical issues arise which require an evaluation or treatment.

Sincerely,

B. R. Jett,
Warden

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

United States District Court
921 Ohio Street
Terre Haute, In 47807
(812) 231-1840

Joseph C.Andersen
12264-040
FCI 2
P.O. Box 1500
Butner, NC 27509

To Whom It May Concern;

I have just recently filed a Complaint against F.C.I. Terre Haute, In and sent my complaint Certified Mail to your location.

Enclosed is the $350.00 filing fee which I have had withdrawn from my inmate account. Please forgive any lack of syncronicity between the filing of the COMPLAINT and the FEE.

Your consideration in this matter is greatly appreciated. Thank You.

Sincerely,

Joseph C. Andersen
12264-040
FCI 2
PO Box 1500
Butner, NC 27509

05/18/10

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
	)	Cause No. 2:10-CV-140-JMS-WGH
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL

Plaintiff, by counsel, and defendant, by counsel, stipulate that the above entitled cause of action should be dismissed, with prejudice, costs paid.

Respectfully submitted,

GARAU GERMANO HANLEY & PENNINGTON, P.C.

/s/Jerry Garau
Jerry A. Garau
Attorney No. 10822-49
151 North Delaware Street, Suite 1515
Indianapolis, IN 46204
Telephone No.: (317) 822-9530
Attorneys for Plaintiff

OFFICE OF THE UNITED STATES ATTORNEY

/s/Jonathan A. Bont
Jonathan A. Bont,
Assistant U.S. Attorney
10 West Market Street
Suite 2100
Indianapolis, IN 46204
Telephone: (317) 226-6333
Attorney for the Defendant United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
	)	Cause No. 2:10-CV-140-JMS-WGH
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

IT IS NOW ORDERED by the Court that the above-entitled cause of action is dismissed, with prejudice, costs paid.

05/19/2014
Date

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution to:

Jerry Garau
GARAU GERMANO HANLEY & PENNINGTON, P.C.
151 N. Delaware Street, Suite 1515
Indianapolis, IN 46204

Jonathan A. Bont
Office of the United States Attorney
Assistant U.S. Attorney
10 West Market Street
Suite 2100
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
vs.	)	No. 2:10-cv-140-JMS-DML
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendant.	)	

E N T R Y

The plaintiff's motion for extension of time [27] is **granted in part and denied in part,** such that the parties shall have **through July 18, 2011**, in which to complete written discovery and discovery depositions. The parties shall also have **through August 18, 2011**, in which to file any dispositive motion, including any motion for summary judgment.

IT IS SO ORDERED.

Date: 05/18/2011

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution:

Gerald A. Coraz
UNITED STATES ATTORNEY'S OFFICE
gerald.coraz@usdoj.gov

JOSEPH ANDERSEN
No. 12264-040
PEKIN
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 5000
PEKIN, IL 61555

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO. 2:10-cv-140-JMS-DML
	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendant.	)	

ORDER

This matter having come before the Court on the United States' motion for enlargement of time, said motion being in the following words and figures, to-wit:

[H.I.]

And the Court, being duly advised in the premises, now GRANTS the motion for enlargement of time in part.

The United States shall have up to and including January 25, 2011, to respond to the plaintiff's Complaint.

So ORDERED.

DATED: 11/29/2010

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

DISTRIBUTION:

Joseph Andersen
Reg. No. 12264-040
Butner Federal Correctional Institution
Post Office Box 1500
Butner, NC 27509

Gerald A. Coraz, AUSA
United States Attorneys Office
Southern District of Indiana
10 West Market Street, Suite 2100
Indianapolis, IN 46204-3048

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
vs.	)	No. 2:10-cv-140-JMS-DML
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendant.	)	

E N T R Y

The plaintiff's motion for extension of time [18] is **granted.** The parties shall have **through May 16, 2011**, in which to complete written discovery and discovery depositions. The parties shall also have **through June 16, 2011**, in which to file any dispositive motion, including any motion for summary judgment.

IT IS SO ORDERED.

Date: 03/01/2011

Distribution:

Joseph Anderson
#12264-040
Pekin Federal Correctional Institution
P.O. Box 5000
Pekin, IL 61555

Gerald A. Coraz
gerald.coraz@usdoj.gov

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO. 2:10-cv-140-JMS-DML
	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendant.	)	

ORDER

This matter having come before the Court on the United States' motion for enlargement of time, said motion being in the following words and figures, to-wit:

[H.I.]

And the Court, being duly advised in the premises, now GRANTS the motion for enlargement of time.

The United States shall have up to and including May 4, 2011, to respond to the plaintiff's interrogatories and his request for production.

So ORDERED.

DATED: 04/11/2011

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

DISTRIBUTION:

Joseph Andersen
Reg. No. 12264-040
Butner Federal Correctional Institution
Post Office Box 1500
Butner, NC 27509

Gerald A. Coraz, AUSA
United States Attorneys Office
Southern District of Indiana
10 West Market Street, Suite 2100
Indianapolis, IN 46204-3048

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
vs.	)	No. 2:10-cv-140-JMS-DML
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendant.	)	

ENTRY

Plaintiff Andersen's motion to compel discovery [23] is **denied.** The reason for this ruling is because this motion does not show that Andersen has complied with the requirement of Rule 37(a)(2)(A) of *Federal Rules of Civil Procedure*. In this subject area, the court expects the parties to work through their concerns relating to discovery and arrive at a resolution without resorting to intervention by the court except in extreme circumstances. At least at this point, and based on the motion to compel, extreme circumstances are not present.

IT IS SO ORDERED.

Date: 04/22/2011

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution:

Joseph Anderson
#12264-040
Pekin Federal Correctional Institution
P.O. Box 5000
Pekin, IL 61555

Gerald A. Coraz
gerald.coraz@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
vs.	)	No. 2:10-cv-140-JMS-WGH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ENTRY

The defendant's motion to stay discovery and objection to second set of request for admissions [33] is **granted**, consistent with the following:

The defendant is not obligated to respond to the plaintiff's second request for admissions because the plaintiff did not seek leave of court to serve additional requests in a motion setting forth the proposed additional requests and the reasons for their use in accordance with Local Rule 36.1.

Although the plaintiff's second set of interrogatories were served before the close of discovery, the interrogatories exceed the number allowed under Rule 33 of the *Federal Rules of Civil Procedure*. The defendant is relieved of its obligation to respond to the second set of interrogatories.

The defendant's motion for summary judgment is fully briefed and therefore any otherwise timely-filed outstanding discovery in this matter is **stayed** until after the resolution of the motion for summary judgment. The subject of further discovery will be addressed, if necessary, at that time.

IT IS SO ORDERED.

Date: 11/17/2011

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution:

Gerald A. Coraz
UNITED STATES ATTORNEY'S OFFICE
gerald.coraz@usdoj.gov

Joseph Andersen
No. 12264-040
Pekin – Federal Correctional Institution
Inmate Mail/Parcels
P.O. Box 5000
Pekin, IL 61555

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
vs.	)	No. 2:10-cv-140-JMS-WGH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Entry Discussing Motion to Appoint Counsel

The plaintiff's motion for appointment of counsel [37] has been considered. The plaintiff asserts that he has been unsuccessful in recruiting representation on his own. Although the court concludes, based on the above filing, that the plaintiff has made a reasonable effort to secure representation, he should continue his own effort.

The court proceeds to the second inquiry required in these circumstances. The court's task in this second inquiry is to analyze the plaintiff's abilities as related to "the tasks that normally attend litigation: evidence gathering, preparing and responding to motions and other court filings, and trial." *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). Accordingly, the question is not whether an attorney would help the plaintiff's case, but whether, given the difficulty of the case, the plaintiff seems competent to litigate it himself. *Id.* at 653-655. The plaintiff has participated in discovery and responded to the defendant's motion for summary judgment. At this point, and based on the plaintiff's comprehensible filings, his use of the court's processes, his familiarity with both the factual circumstances surrounding his claims and with the legal issues associated with those claims, the plaintiff is competent to litigate on his own. His motion to appoint counsel [37] is therefore **denied**.

IT IS SO ORDERED.

Date: 11/17/2011

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
vs.	)	No. 2:10-cv-140-JMS-WGH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Entry Denying Motion for Summary Judgment and Directing Further Proceedings

Plaintiff Joseph Andersen ("Andersen") is a federal prisoner who was incarcerated, at all times relevant to this action, at the Federal Correctional Complex at Terre Haute, Indiana ("FCC-TH"). The defendant in this action is the United States of America. Andersen's action against the United States is premised upon the government's waiver of sovereign immunity as set forth in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671, et seq.

Andersen alleges that the medical staff at FCC-TH negligently failed to diagnose and properly treat his gastrointestinal condition which caused it to deteriorate into severe ulcerative colitis, anemia, hypoklemia, hypomagnesemia, and extreme weight loss. Andersen alleges that he has incurred ongoing and permanent damages and seeks compensatory damages and costs. The defendant seeks resolution of Andersen's claims through the entry of summary judgment.

For the reasons explained in this Entry, the defendant=s motion for summary judgment [29] is **denied.**

I. Motion for Summary Judgment

A. Summary Judgment Standard

A motion for summary judgment must be granted Aif the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a) of the *Federal Rules of Civil Procedure*. A "material fact" is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine only if a reasonable jury could find for the non-moving party. *Id.* The applicable substantive law will dictate which facts are material.@ *National Soffit & Escutcheons, Inc., v. Superior Systems,*

Inc., 98 F.3d 262, 265 (7th Cir. 1996) (citing *Anderson,* 477 U.S. at 248). The court views the facts in the light most favorable to the non-moving party and all reasonable inferences are drawn in the non-movant=s favor. *Ault v. Speicher*, 634 F.3d 942, 945 (7th Cir. 2011).

B. Discussion

1. Undisputed Facts

On the basis of the pleadings and the expanded record, and specifically on the portions of that record which comply with the requirements of Rule 56(c), the following facts, construed in the manner most favorable to Andersen as the non-movant, are undisputed for purposes of the motion for summary judgment:

Andersen arrived at FCC-TH on March 9, 2006. On April 23, 2007, while in the Special Housing Unit ("SHU"), Andersen was seen in the triage/sick call by D. Decker, R.N. for complaints of abdominal pain, gas and indigestion. Andersen was referred to a Physician's Assistant ("PA") for a sick call appointment on May 1, 2007. The sick call appointment did not transpire. On May 4, 2007, Andersen complained of having tremendous pains in his stomach for the past month. He was triaged by Nurse Decker during sick call.

Andersen was seen by a PA on May 15, 2007. At that time Andersen complained of rectal bleeding following bowel movements and burning urination. The PA ordered a urine analysis, placed Andersen on prescriptions of Colace (stool softener) and Simethicone (for gas pain), and instructed him to increase his fluid consumption. Andersen questioned the stool softener because his stool was already loose. He also read the "cautions" on the label which stated, in part, "DO NOT USE this medicine if you experience abdominal pain, nausea, vomiting, or rectal bleeding, except under the direction of your doctor." Within twelve hours of taking the medicine prescribed by the PA, Andersen had even more frequent bowel movements, all diarrhea, with dark red blood.

On May 21, 2007, Andersen reported to sick call complaining of blood in his stool and was triaged by a registered nurse. Andersen reported not eating much and having 6 – 8 bloody diarrhea bowel movements each day for the past two weeks. He reported feeling dizzy when he stood up and experiencing severe abdominal pain, cold sweats, hot flashes, fever, gas, and tremendous abdominal cramping. He asked to see a doctor or go to the hospital as soon as possible.

The next day, May 22, 2007, Andersen was evaluated by a PA. At that time, Andersen advised that the medication previously prescribed made his symptoms much worse and that, after two doses, he discontinued the medication. The PA ordered a stool specimen be taken from Andersen and instructed him to watch for

symptoms of dehydration. Andersen reported having fainted in the shower the night before, and asked to go to the hospital and to have a colonoscopy. Andersen was told he would need to fill out another form to see a physician and it would take a couple weeks. Andersen felt frantic and voiced his concerns that because he was losing so much blood, he might not make it another two weeks. He was taken back to his cell and no stool specimen was taken.

On May 24, 2007, Andersen was told that Dr. Wilson was in the SHU seeing patients, so Andersen wrote a request that a correctional officer gave to Dr. Wilson. The request stated that Andersen was having a medical emergency, he had seen a PA twice but that he continued to have dark thick red blood in his stool and he needed help. Andersen was not seen that day.

On May 27, 2007, Andersen told a correctional officer that he had again fainted in the shower and felt like he was going to die. The officer took him to see the off-shift nurse on an emergency basis. Andersen stated that he had been cramping with bloody diarrhea for two weeks. He reported 7-8 bloody diarrhea stools a day. He also complained of nausea, fever, dizziness, cold sweats, excessive gas and indigestion, and severe abdominal cramping. The nurse contacted the on-call PA who prescribed imodium and instructed Andersen to follow-up on sick call as needed or if his symptoms worsened. The patient medication information sheet for the imodium stated, "CAUTIONS: ... do not use this medicine if you have bloody diarrhea or a fever greater than 101 degrees F."

On May 31, 2007, Andersen was evaluated by the PA at sick call. Andersen had not eaten anything for over five days. Andersen reported having fainted twice in the shower, hot flashes, cold sweats, excessive bleeding, fever, nausea, abdominal cramps, dizziness when he tried to stand up, burning on urination, and diarrhea. That examination noted Andersen's blood pressure as 114 over 73, his pulse as 102, and his temperature as 100.3. A ten day course of antibiotics was prescribed for his symptoms.

Andersen was released from the SHU on June 4, 2007, into general population. Andersen was so weak he could not carry his own property bags back to the housing unit. He was unrecognizable to inmates he had known before being placed in the SHU. He tried to take a shower that day but fainted. He was then taken to sick call. PA Armstrong told Andersen that he looked "horrible." The PA squeezed Andersen's finger tips and told Anderson that he looked anemic. Andersen reported burning lower abdominal pain, excessive flatulence, bowel movements seven times a day, diarrhea with dark blood for over three weeks, and dizziness whenever he stood up. The PA ordered a STAT complete blood count ("CBC"). The CBC revealed Andersen's hemoglobin level to be 9 and white blood cell count at 13. The PA conferred with a physician and they decided that Andersen should be transported to a local hospital as a direct admit for anemia and to be scoped for

gastrointestinal bleeding, serial hemoglobin, and further work up. While Andersen was waiting to be transported to the hospital, Dr. Webster, the Clinical Director, told Anderson, "[w]e really messed up, Mr. Andersen. We're sorry."

At the hospital, Andersen had an immediate gastrointestinal evaluation and a colonoscopy. Andersen reported having lost 20 pounds with this illness. Andersen remained hospitalized for treatment of this condition for twenty-two days.

On June 26, 2007, Andersen was discharged from the local hospital and was returned to FCC-TH. Andersen's discharge diagnoses were (1) severe new onset ulcerative colitis; (2) severe anemia status post blood transfusion; (3) hypoklemia; (4) hypomagnesemia; and (5) weight loss secondary to the above conditions. Andersen was prescribed several medications to treat the above conditions. He received an IV Remicade treatment while in the hospital and was scheduled to return to the hospital for another Remicade treatment June 29, 2007, and then every 8 weeks for three doses. Andersen was never given a second treatment of Remicade because the BOP considered it too expensive.

2. Analysis

Andersen alleges that the denial of his repeated requests to be seen by a physician or specialist, taken to a hospital, and be given a colonoscopy amounted to medical malpractice. He asserts that earlier intervention would have prevented pain and suffering and the severity and spread of his ulcerative colitis.

The defendant argues that summary judgment should be granted in its favor because Andersen has failed to present expert evidence on the issues of causation and damages. Andersen responds that he does not need to submit expert evidence because the negligence is so obvious that a lay person would know that the prison medical staff did not provide adequate or appropriate treatment in response to his complaints.

The FTCA incorporates the substantive law of the state where the alleged acts occurred. *Morisch v. United* States, 653 F.3d 522, 530 (7th Cir. 2011). All of the acts in this case occurred in Indiana. Therefore, the court will apply Indiana law. *Id.*

"In addressing the sufficiency of a medical malpractice action based upon negligence, the plaintiff must establish: 1) a duty on the part of the defendant in relation to the plaintiff; 2) failure on the part of the defendant to conform to the requisite standard of care required by the relationship; and 3) an injury to the plaintiff resulting from that failure." *Syfu v. Quinn*, 826 N.E.2d 699, 703 (Ind. Ct. App. 2005). The Indiana Supreme Court explained in *Bader v. Johnson*, 732 N.E.2d 1212, 1217-18 (Ind. 2000), that expert medical testimony is usually required to determine whether a physician's conduct fell below the applicable standard of care "because the technical and complicated nature of medical treatment makes it

impossible for a trier of fact to apply the standard of care without the benefit of expert opinion on the ultimate question of breach of duty." *Id.* (finding that expert testimony was not required when healthcare providers failed to provide parents with the result of an ultrasound showing a fetus with a large cavity within the brain and an unusual head shape).

A plaintiff is not required to present expert testimony in medical malpractice cases "where deviation from the standard of care is a matter commonly known by lay persons." *Culbertson v. Mernitz*, 602 N.E.2d 98, 104 (Ind. 1992); *see also Singh v. Lyday,* 889 N.E.2d 342, 357-58 (Ind. Ct. App. 2008) (the "common knowledge" exception does not apply when, for example, the injuries are subjective, i.e., not directly observable by any of the physicians, when there are pre-existing injuries, and when the question involves the inter-relationship between a particular medical procedure and the effect of that procedure upon a given patient's biological makeup, pathology, and structure). Application of the "common knowledge" exception is "limited to situations in which the physician's conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach of the applicable standard of care." *Syfu*, 826 N.E.2d at 703 (citing cases in which juries could understand without technical input that a physician's care fell below standard of care). "'Cases which do not require expert testimony generally involve the physician's failure to remove surgical implements or foreign objects from the patient's body.'" *Lusk v. Swanson*, 753 N.E.2d 748, 753 (Ind. Ct. App. 2001) (quoting *Simms v. Schweikher*, 651 N.E.2d 348, 350 (Ind. Ct. App. 1995)).

The defendant argues that there is no evidence to suggest that the United States breached any duty of care. The defendant suggests that the record reflects that Andersen received continuous care. "Continuous care" is not a fair description of the treatment provided, nor is it a meaningful one. In making this assertion, the defendant wholly overlooks the relevant summary judgment standard: all facts are to be construed in the light most favorable to Mr. Andersen.

Apply the proper standard, the Court finds that for purposes of summary judgment, there are several examples of evidence in the record from which a jury could infer that the treatment provided by the prison medical staff fell below the appropriate standard of care. Significantly, Dr. Webster apologized, saying that "[w]e really messed up, Mr. Andersen. We're sorry." This statement could be construed by a jury as an admission by Dr. Webster that Andersen received substandard care. Moreover, on two occasions medications were prescribed that were contraindicated given Andersen's symptoms. The failure to respond to requests to see a physician and to provide diagnostic tests in response to the reports of extreme loss of blood and weight and of fainting could also give rise to such an inference. In addition, a series of Remicade treatments, prescribed by the hospital specialist, were never provided. The prescription itself establishes a standard of

care, and the prison's refusal to provide the medication could be construed as a failure to meet it.

Thus, summary judgment must be denied on either of two bases: First, the standard of care has been established by Dr. Webster, the medication information sheets, and/or the treating specialist. Or, a lay person could understand with no additional medical or technical input that the care provided under these circumstances was substandard, bringing the case within the "common knowledge" exception to the requirement of expert testimony.

The defendant also contends that Andersen has failed to show any injury or damages. To the contrary, Andersen seeks damages for several weeks of pain and suffering, weight and blood loss rendering him unrecognizable, and a belief he was going to die because of defendant's failure to treat him. In his sworn declaration, Andersen recorded in descriptive detail his physical discomfort and his mental and emotional distress throughout his ordeal. This evidence is more than sufficient for purposes of summary judgment.

C. Conclusion

The defendant has not shown that it is entitled to judgment as a matter of law. For the foregoing reasons, the defendant's motion for summary judgment [29] is **denied.**

II. Further Proceedings

The plaintiff's requests for the appointment of counsel have been previously denied. Given the posture of the case at this time, the court will now attempt to recruit counsel pursuant to Local Rule 4.6. The parties will be notified whether this effort is successful.

Once the recruitment conference is complete, the Court requests that the Magistrate Judge to thereafter schedule a status/settlement conference with the parties. Consistent with the development of a case management plan associated with that conference, discovery, including expert witness discovery, will be reopened. The parties will be notified of the conference in a separate Entry.

IT IS SO ORDERED.

Date: 02/24/2012

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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Magistrate Judge William Hussmann

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO. 2:10-cv-140-JMS-DML
	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendant.	)	

ORDER

This matter having come before the Court on the United States' motion for leave to amend answer, said motion being in the following words and figures, to-wit:

[H.I.]

And the Court, being duly advised in the premises, now GRANTS the motion for leave to amend answer. The Clerk of the Court is hereby directed to file the Amended Answer of the United States that was submitted with the United States' motion for leave to amend answer.

So ORDERED.

DATED: 06/12/2012

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JOSEPH ANDERSEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	No. 2:10-cv-00140-JMS-WGH
UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	
	)	

ORDER DIRECTING FILING OF A PLEADING AUTHORIZING DISMISSAL

This case has been reported settled. All that remains to be done is the execution of documents and/or delivery of funds, if so required, in accordance with their agreement. All pending motions, if any, are now DENIED AS MOOT and all previously ordered dates relating to discovery, filings, schedules, conferences, and trial, if any, are VACATED.

IT IS ORDERED that within sixty (60) days of this date, counsel for the plaintiff shall file a motion to dismiss this cause or a stipulation of dismissal and submit an order for the Court's signature ordering the dismissal (in conformance with the agreement of the parties). Failure to comply with this order will result in DISMISSAL WITH PREJUDICE pursuant to Rule 41(b), Fed. R. Civ. P. for failure to prosecute this action in a timely manner. Additional time to complete the execution of the settlement document may be granted if requested in writing prior to the expiration of this period of time.

Date: 02/14/2014

Jane Magnus-Stinson

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

AEE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Daniel Rappe
Plaintiff, pro se

v.

Paul Harvey, M.D.,
Correctional Officer Frazier,
Correctional Officer Jackson,
United States of America
Defendants

Case No: 10C4636

Judge Kennelly

RECEIVED
AUG 04 2011
AUG 04 2011
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

(AMENDED COMPLAINT)
COMPLAINT FOR DAMAGES AND COMPLAINT OF DENIAL OF CONSTITUTIONAL RIGHTS

1. This Court has jurisdiction over civil matters arising within this District involving parties within this District.

2. At all times described herein, unless otherwise noted, plaintiff resided in Northern District of Illinois, defendant United States of America (USA) operated various involved departments in same, and individual defendants resided in and/or engaged in employment with defendant USA in same.

3. Plaintiff has submitted Administrative claims to both the U.S. Marshal's Service and the Public Health Service, as well as the Bureau of Prisons. These claims were denied.

PLAINTIFF

4. Plaintiff pro se Daniel Rappe is currently housed at Federal Medical Center Devens in Ayer, Massachusetts. (cont.)

4. continued. At all times described herein, he was housed at MCC Chicago. MCC Chicago (MCC) is Metropolitan Correctional Center, a U.S. Bureau of Prisons (BOP) facility. While at MCC, plaintiff was in the custody of U.S. Marshal's and under the medical care of U.S. Public Health Service personnel.

DEFENDANTS

5. Defendant United States of America maintained U.S. Bureau of Prisons (BOP), U.S. Public Health Service (PHS), and U.S. Marshal's Service operations in the Northern District of Illinois, and these departments and their employees are responsible for the negligent acts, ommissions, and misdeeds described herein. While employees acts and interactions with plaintiff took place owing to their condition of being U.S. employees, they were not necessarily acting within the scope of their employment. Defendant United States of America is sued under the Federal Tort Claims Act, 28 U.S.C. § 1346.

6. Defendant Paul Harvey, M.D. was, at all times relevant to this complaint, an employee of PHS, stationed at MCC as first Clinical Director, then Regional Clinical Director. He was plaintiff's primary care provider and had ultimate authority to approve or deny any medical care provided plaintiff by other MCC Medical Department personnel. Although Harvey interacted with plaintiff by reason of Harvey's employment with defendant USA, a strong argument is to be made that Harvey's acts and ommissions took him outside the scope of his employment. Harvey is sued for Constitutional rights violations ("Bivens" action) under 28 Section 1331 U.S. Code.

7. Defendant Correctional Officer Frazier was, at all times relevant to this complaint, employed by defendant USA as a corrections officer at the BOP, stationed at the Metropolitan Correctional Center in Chicago. Defendant Frazier interacted with plaintiff as a result of Frazier's employment with defendant USA, but it can be argued that Frazier none the less violated plaintiff's First Amendment right and possibly acted outside the scope of his employment. Defendant Frazier is sued in his individual capacity for violation of Constitutional rights under 28 Section 1331 U.S. Code ("Bivens" action).

Plaintiff does not know Fraziers first name, but MCC officials will be able to identify him by checking their records, which should indicate the proper Frazier as having accompanied plaintiff at Northwestern Memorial Hospital on March 1, 2009.

8. Defendant Correctional Officer Jackson, at all times relevant to this complaint, was employed by defendant USA as a corrections officer with the BOP, stationed at the Metropolitan Correctional Center in Chicago. Defendant Jackson interacted with plaintiff as a result Jackson's employment with defendant USA, but it can be argued that Jackson none the less violated plaintiff's First Amendment right and possibly acted outside the scope of his employment. Defendant Jackson is sued in his individual capacity for violation of Constitutional rights under 28 Section 1331 U.S Code.

Plaintiff does not know Jackson's first name, but MCC officials will be able to identify him by checking their records, which should indicate the proper Jackson as having accompanied plaintiff at Northwestern Memorial Hospital on March 1, 2009.

STATEMENT OF CLAIM

9. Plaintiff was placed in MCC, a facility of the BOP, as a pretrial detainee, in August, 2007. Defendant Harvey was at all times from mid-August, 2007 to mid-August, 2009, clinical director of the Health Services Department at MCC.

10. On July 12, 2008, plaintiff was first seen by MCC medical personnel for abdominal pain and bloody stool, possibly precipitated by medication dispensed by BOP/PHS personnel.

11. On July 18, 2008, plaintiff was admitted to Thorek Hospital in Chicago for transfusions and endoscopy, as well as additional tests and treatments. Plaintiff was subsequently diagnosed as having a bleeding duodenal ulcer, which was treated by hospital specialists.

12. On July 22, 2008, plaintiff was returned to MCC. From this time until plaintiffs departure from MCC on or about August 15, 2009, plaintiff suffered continuing and ongoing gastrointestinal (GI) injury, distress, pain and suffering.

13. From on or about July 25, 2008 to on or about August 15, 2009, plaintiff repeatedly attempted to bring his injury, discomfort, pain and suffering to the attention of Harvey.

14. Harvey demonstrated a failure to respond reasonably to the plaintiff's serious medical needs, resulting in continual injury, pain, distress and suffering, nearly leading to plaintiff's death.

15. Agents of defendant USA, in the BOP, PHS and U.S. Marshal's Service, were made of this situation, but plaintiff received no relief.

16. Harvey denied plaintiff proper medical care and provided plaintiff with grossly inadequate treatment contrary to the requests of other MCC medical personnel and hospital medical specialists, and continued to do so in the face of resultant pain and suffering, and risk of plaintiff's permanent injury and/or death, as described in the following paragraphs:

17. On August 4, 2008, plaintiff was seen by defendant Harvey. According to Harvey's notes (Exhibit 1), Harvey had requested approval for a dosage of Omeprazole (GI antacid) at 20 mg twice a day, in keeping with plaintiff's hospital discharge papers. Harvey also advised plaintiff to "increase the intake of protein" to rebuild lowered levels of important blood components following plaintiff's blood loss, but Harvey was, upon request of plaintiff, unwilling to provide any options for doing so, and instead deliberately and unnecessarily withheld additional protein and/or protein supplements, an indifference to plaintiff's medical needs.

18. On August 6, 2008, plaintiff was seen by Bonnie Nowakowski, D.O. (Dr. N.), staff physician at MCC, acting as Clinical Director for the absent Harvey. Dr. N. notes (Exhibit 2) that she submitted a request for plaintiff's Omeprazole at the hospital GI specialist-recommended dosage, but Harvey had ordered that the request be cancelled and stated he would evaluate the request upon his return to MCC. Dr. N. indicates that the MCC pharmacist was instructed, on July 25, 2008, to give plaintiff a 15 day supply of Omeprazole at a dosage of 20 mg once a day, half that prescribed by the hospital GI specialists. This left plaintiff, from the date of hospital discharge to the date medication is ordered, by Harvey, to spend at least 3 days without medication to treat his ulcer.

(cont.)

18.(cont.) allowing it to worsen and cause pain and suffering in the days following plaintiff's release from the hospital.

19. After several weeks of plaintiff requesting medication by sending sick call and request forms to Harvey, as well as speaking repeatedly to the physicians assistants (MLPs) when they visited plaintiffs MCC housing unit to dispense medication, Harvey prescribed plaintiff Omeprazole, at only half the hospital GI specialist-prescribed dosage, on September 2, 2008 (Exhibit 3). From being prescribed a 15 day supply of lowered-dose Omeprazole on July 25, 2008 and having it again prescribed on September 2, 2008, plaintiff was at least an additional 24 days without medication to treat his ulcer, allowing it to worsen still and causing plaintiff continued injury to his GI system, distress, pain and suffering. Despite assurance from Dr. N that she would do whatever she could to help plaintiff heal and become well again, plaintiff began having serious doubts about his future health and well being, given the apparent disregard and indifference exhibited by her supervisor, defendant Harvey.

20. On October 14, 2008, Dr. N. made an administrative note (Exhibit 4) stating that on August 12, 2008 Harvey did make a medication request as described in paragraph 18 above. The timing of this request means Harvey made it knowing that his previous order of 15 pills had been exhausted 4 days earlier. Harvey did not give plaintiff any additional medication at this time, instead choosing to allow plaintiff to go at least 24 days without medication, as described in paragraph 19 above. Dr. N. noted that the medication request from Harvey had since been approved by "central office," but the order, initiated by Harvey and now allowing for the (cont.)

20. (cont.) hospital GI specialist-prescribed dosage of Omeprazole 20 mg twice a day "was never written, nor processed," and plaintiff did not receive this dosage. Harvey denied plaintiff this dosage without seeing plaintiff to assess plaintiff's need. Dr. N. also noted plaintiff was due for Chronic Care Clinic (CCC), a function provided by Harvey and necessitating being examined by Harvey to assess chronic care issues, including progress/lack of progress, pain and other quality-of-life issues, and new and/or continuing concerns regarding illness and treatment. Dr. N. placed me in the MCC callout (inmate notification) system for an October 31, 2008 CCC appointment with Harvey. According to plaintiff's medical records, he was not seen on October 31, 2008 for CCC and did not receive an appointment from Harvey for over 6 months after this date despite repeated requests from plaintiff, who again sent request forms and frequently spoke to MLPs concerning his ongoing illness, pain and suffering. Plaintiff's next CCC appointment, scheduled by Dr. N. herself after she recognized she must take the initiative abandoned by Harvey, took place on May 5, 2009. The result of the information contained in Exhibit 4 is that Harvey acted indifferently to plaintiff's health by failing to prescribe vital medication in a timely fashion or in a sufficient, authorized amount. The circumstances described in Exhibit 4 left plaintiff with continued, worsening injury to his GI system, distress, discomfort, pain and suffering which, despite medical requests and discussions with MLPs, continued for months. This caused plaintiff's previous serious doubts about Harvey's intentions to increase to the point plaintiff began to see that no healing help or health gains were going to be offered or allowed by Harvey; rather, the best plaintiff felt and believed he could hope for, given Harvey's grossly inadequate care, was being maintained in an ongoing state of injury, distress, discomfort, pain and suffering.

21. Plaintiff was seen by Dr. N. on February 10, 2009 for an "emergency encounter" (Exhibit 5) after numerous requests to Harvey went unanswered. The last paragraph of the Subjective Section of the exhibit indicates plaintiff was becoming very ill again. Paragraph 4 of the same section indicates Dr. N. had submitted a request to have plaintiff be seen for follow up testing and examination by hospital GI specialists, as these same specialists had recommended, but this request was denied by Harvey, who commented that such testing was "... not clinically indicated," even though Harvey had not examined plaintiff for over 2 months prior to the date of this denial.

22. Plaintiff was seen by MLP Arvizo on Febcuery 20, 2009. He reported plaintiffs stool samples were all found to contain blood (Exhibit 6). MLP Arvizo discussed this with Dr. N., whose comments again state her request for a follow up visit by plaintiff to the hospital GI physicians. The final paragraph of Dr. N.'s comments indicate she was becoming both concerned with the plaintiff's health and exasperated by Harvey's lack of action and cooperation.

23. Results of lab tests (Exhibit 7) done on plaintiffs' blood, dated 02/6/09 and stamped by defendant, indicate plaintiff's Red Blood Cell count and Hematocrit levels were "Out of Range," lower than normal, and the Hemeglobin level is at the absolute low end of the Reference Range. These are indications of possible blood loss by plaintiff, and considered along with the information contained in Exhibit 6, indicate a probable blood loss.

24. On February 23, 2009, plaintiff was seen by Harvey (Exhibit 8). Harvey told plaintiff to stop taking Tylenol (cont.)

24.(cont.) (which Harvey had prescribed) for plaintiff's severe pain, but Harvey gave plaintiff no other options for the sometimes unbearable pain. Tylenol is not known for causing or aggravating GI problems, and the dosage was well below the maximum over-the-counter dosage. Harvey stated he didn't think plaintiff was intolerant of meds, but he didn't offer any reasoning. Harvey told plaintiff his recent lab tests were normal (Exhibit 7) when clearly they were not, and they were 3 weeks old at this time - a long time when dealing with a case involving evidence of internal blood loss. Harvey mentioned plaintiff's inquiry about previous stool blood tests (Exhibit 6), but Harvey claimed to know nothing about such tests or their results. Plaintiff was at this time becoming very ill and very weary of being ill and experiencing near-constant pain and suffering, so he asked Harvey questions in the hope of having the possibility of treatment to look forward to in the future. Harvey's attitude and demeanor toward plaintiff during this exchange indicated Harvey enjoyed denying plaintiff hope of treatment. The final line in Administrative Note 1 of Exhibit 8 makes no apparent logical sense, but does indicate a possible prejudice against plaintiff. Harvey denied plaintiff hospital GI specialist-prescribed dosage of Omeprazole, as well as alternate pain medication. This, combined with the fact that plaintiff had recently had two rectal exams that were positive for blood, caused plaintiff, in later discussing these events with his cellmate, a former nurse, to realize that plaintiff's death at MCC due to grossly inadequate medical care by defendant Harvey was a very real possibility.

25. On March 1, 2009 plaintiff nearly bled to death at MCC, owing to his duodenal ulcer. He was given emergency treatment by MLP Velazquez and MCC officers (Exhibit 9) and taken via

(cont.)

25. (cont.) ambulance to Northwestern Memorial Hospital in Chicago, where plaintiff remained for 10 days, spending hours in the emergency room (ER) and the first days in the Intensive Care Unit. Plaintiff was given emergency treatment at the ER and gradually became lucid, at which point he refused further treatment, specifically blood transfusions, even though ER physicians informed plaintiff such a refusal could result in plaintiff's death. Plaintiff expressed to hospital personnel that he was very tired of his prolonged physical and mental pain and suffering, and he anticipated being healed to the point where he would be returned to the care of Harvey, who would again allow plaintiff to become very ill, as he had after plaintiff's first hospitalization. Plaintiff explained that Harvey had ample opportunity to heal plaintiff and Harvey chose not to, so plaintiff was instead placing his faith and fate in the care of a higher power by letting his God decide whether or not to heal him. Personnel at the ER told plaintiff it was his right to refuse treatment, but they were then told by Harvey, as well as BOP employees and defendants, Jackson and Frazier, that plaintiff was prohibited by law/policy from making such decisions (Exhibit 13). In fact, both law and BOP policy do allow plaintiff to make such decisions, a point Harvey eventually conceded, but only after hospital personnel had started a blood transfusion on plaintiff, undoubtedly moved to do so, at least in part, by the statements of defendants Harvey, Jackson and Frazier. Harvey then informed the hospital personnel, after they ultimately determined plaintiff indeed had the right to refuse treatment, that Harvey would have plaintiff removed from the hospital back to MCC, and Harvey would obtain an emergency court order forcing plaintiff to receive treatment at MCC. In light of this information, plaintiff reluctantly agreed to allow hospital personnel to continue

(cont.)

25.(cont.) treatment. Harvey states in plaintiff's medical records that plaintiff was compelled to agree to treatment after being allowed to speak to plaintiff's mother by telephone. this is simply not true, as will be testified to in court by BOP and U.S. Marshal personnel, and hospital personnel. Plaintiff was forbidden from contacting anyone, including his attorney, and specifically his family, during his hospitalization. Plaintiffs requests to have his attorney and family informed of his situation were repeatedly refused, and hospital staff were warned by U.S. Marshal staff against making any such contact themselves. this is confusing, as the BOP collects contact information from all inmates, stating the information will be used in a medical emergency. Plaintiff was compelled to agree to treatment, against his religious convictions, by threats from Harvey, whose 'treatment' had just nearly killed plaintiff. Because MCC lacks an infirmary, plaintiff feared the experience of undergoing treatment while physically restrained, handcuffed, shackled and strapped to a bunk in the Segregation (punishment) unit of MCC being physically forced by BOP officers and Harvey. Plaintiff, an unconvicted, presumed innocent citizen, lost his right to religious choice because he feared dying in prison at the hands of Harvey, who had maltreated plaintiff for over 6 months.

26. On March 10, 2009, plaintiff was released from the hospital with an order (Exhibit 10) that included 40mg of Omeprazole twice daily, Tylenol #3 for pain, and a soft diet (second page of order, not included in exhibit). The dosage of Omeprazole was described as "... ABSOLUTELY MANDATORY FOR ULCER HEALING," but Harvey again allowed plaintiff only 20mg once daily until May 4, 2009. In other words, plaintiff was initially given 1/4 of the dosage hospital specialists described as

(cont.)

26.(cont.) "ABSOLUTELY MANDATORY" for 8 weeks, then given 20 mg twice daily - half the dosage - until plaintiff left MCC in mid-August, 2009. Harvey completely denied plaintiff access to Tylenol #3 despite plaintiff's ongoing pain. Plaintiff found himself in precisely the position he told hospital personnel he feared.

27. On March 12, 2009, the BOP Central Office Pharmacist recommended Harvey give plaintiff adequate amount of medication necessary to manage symptoms (Exhibit 11), but Harvey did not do this, instead giving inadequate amounts in indifference to plaintiff's condition and history. Plaintiff was left directing his own recovery by taking the 40mg twice daily dosage of Omeprazole, as prescribed by the hospital specialist discharge orders, on his own. This was done by plaintiff's using prescribed, insufficient ¼ or ½ dosage of the drug much faster than he should and hoping it would be refilled early when plaintiff ran out much earlier than prescribed. Sympathetic MCC medical personnel caused several such renewals. Plaintiff also secured additional supply of Omeprazole through alternate means. Through this self-medication and the use of over-the-counter medications, plaintiff was gradually able to improve his health.

28. The soft diet prescribed by hospital specialists was ordered by Dr. N., but the order was cancelled by Harvey several days later, without consulting plaintiff or Dr. N., and in spite of the fact the diet was allowing plaintiff to finally, safely, comfortably receive nourishment after weeks of barely eating at all. Dr. N., expressing exasperation at having an order she specifically designated as cancellable only by her instead cancelled by Harvey, again ordered plaintiff a soft diet. The diet was, after one more day, again cancelled, permanently, by Harvey (Exhibit 12), calling it a "bland" diet rather than a soft

(cont.)

28.(cont.) diet. Harvey stated a "bland" diet was not "clinically indicated for peptic ulcer." This may be, but plaintiff was prescribed a soft diet, and BOP document TRM 4700.02, Section 8, part K, Food Services Technical and Reference Manual: Guidelines for Medical Diets: Soft Diets, states: "It may also be used for patients who do not tolerate a regular diet or for patients with mild gastrointestinal problems who may not tolerate highly seasoned or fried foods," and "Individual tolerances may vary. Any food tolerated by the patients is allowed." The regular diet was not tolerated by plaintiff, who badly needed nourishment, so Dr. N., with the help of MCC Food Service Administrator Mr. Luter, placed plaintiff on a BOP-approved, hospital specialist prescribed, nourishing soft diet, which plaintiff did tolerate and which required no additional or special preparation by MCC Food Service. When plaintiff informed Harvey the diet was not "bland," but rather soft, and helpful, Harvey stated, "I don't care what it is, you're not getting it." Harvey twice removed plaintiff from the diet, again creating a barrier to the return to health plaintiff sought, not only showing indifference to plaintiff's recovery but actively working against such recovery.

29. As shown in this document, defendant Harvey knew plaintiff had a history of serious GI disease and risk of serious harm and/or death, but Harvey deliberately disregarded that risk. Treatment provided by Harvey was grossly inadequate to the point such a state was recognized and aknowledged by his fellow healthcare professionals, possibly constituting a situation where he could be found to be acting outside the scope of his employment.

30. Numerous times, after two hospitalizations, Harvey deliberately disregarded plaintiff's health and safety by refusing to comply with prescriptions and orders of hospital-based GI specialists and fellow BOP medical professionals, instead choosing to supply inadequate, substandard care to plaintiff, a pre-trial, unconvicted, presumed innocent citizen of the United States of America, much to the detriment of plaintiff's health and nearly causing plaintiff's death.

31. Defendant Harvey's failure to reasonably respond to plaintiff's serious medical needs amounts to deliberate indifference and violates plaintiff's Fifth Amendment rights under the United States Constitution.

32. Defendant Harvey's use of coersion and threats to force plaintiff to receive medical treatment against plaintiff's expressed will, owing to plaintiff's religious beliefs, violates plaintiffs First Amendment rights under the United States Constitution.

33. Defendant Frazier's instructions to hospital personnel, telling them plaintiff was not allowed to refuse a blood transfusion, although such refusal was plaintiffs expressed will, owing to plaintiffs religious beliefs, violates plaintiffs First Amendment rights under the U.S. Constitution.

34. Defendant Jackson's instructions to hospital personnel, telling them plaintiff was not allowed to refuse a blood transfusion, although such refusal was plaintiff's expressed will owing to plaintiff's religious beliefs, violates plaintiffs First Amendment rights under the U.S. Constitution.

35. Plaintiff sustained injury to his GI tract. Owing to inaction and wrongcation by defendant United States of America, through it's departments, agents, officers and employees, caused and/or allowed indifference toward this injury. Due to mistreatment by USA employee Harvey, the injury worsened, causing chronic side effects and nearly becoming fatal. Plaintiff experienced great physical, mental, and emotional distress, pain and suffering. Discomfort, pain and suffering from this injury continue and will likely be permanent, altering plaintiffs lifestyle and resulting in increased medical payments and lower quality of life in the future, as well as the possibility of further damage and/or complications in the future, as plaintiff now has chronic gastric reflux disease (GERD), a condition not previously present. Having GERD puts plaintiff at greater risk of contracting esophageal cancer than the risk a heavy smoker has of contracting lung cancer. Plaintiff has pain and discomfort from another, potentially life-threatening chronic condition, but does not have it addressed as aggressively as he should, as he now has a great deal of distrust of the motives of most BOP medical personnel, to the detriment of plaintiff's continued health and well being. Plaintiff has also experienced a life-altering crisis of religious and spiritual beliefs, again owing to defendant USA's departments, agents, officers and employees.

36. Defendant USA's failure to respond, through it's departments, agents, officers, and employees, in a reasonable manner to plaintiff's serious medical needs amounts to deliberate indifference, which violates plaintiffs Fifth Amendment rights under the U.S. Constitution and the Federal Tort Claim Act.

37. Defendant USA's use, through it's departments, agents, officers, and employees, of coersion, threats and false information to force plaintiff to receive medical treatment against plaintiffs expressed will, owing to plaintiff's religious beliefs, violates plaintiff's First Amendment rights under the U.S. Constitution and the Federal Tort Claims Act.

38. Plaintiff asserts both that defendant United States of America was responsible for the acts and ommissions described herein, acting as master, plaintiff also asserts that one or more of the remaining defendants, Harvey, Frazier and Jackson, may have acted outside the scope of their employment - a question which will be raised at trial. Plaintiff bases these assertions on rights afforded him by Fed. R. Civ. P. 8(d)(2),(3).

RELIEF SOUGHT

Plaintiff respectfully prays that this court:

A.) Declare that the acts and ommissions described herein violated plaintiffs rights under the Constitution and other laws of the United States.

B.) Enter judgement against defendant United States of America and hold the defendant liable to the plaintiff for compensatory damages.

C.) Enter judgement against defendants Harvey, Frazier and Jackson and hold those defendants liable to the plaintiff for compensatory damages.

D.) Order such additional relief as this Court may deem just and proper

TRIAL BY JURY

Plaintiff demands that this case be tried by a jury.

CERTIFICATION

By signing this Complaint, I certify that the facts stated in this Complaint are true to the best of my knowledge, information and belief. I understand that if this certification is not correct, I may be subject to sanctions by the Court.

Signed this Twenty-eighth day of July, 2011

by: Dail Rappe

Daniel Rappe, pro se
2247424
FMC Devens
P.O. Box 879
Ayer, MA 01432

Exhibit 1

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: RAPPE, DANIEL Reg #: 22472-424
Date of Birth: 09/01/1960 Sex: M Race: WHITE
Encounter Date: 08/04/2008 12:53 Provider: Harvey, Paul MD CD Facility: CCC

Chronic Care Visit encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Harvey, Paul MD CD

Chief Complaint: GASTROINTESTINAL CLINIC

Subjective: Pt. sent out to local hospital after labs drawn because the patient appeared pale to medical staff while being seen for left lower abdomenal pain. The H/H returned as 7.8/23.2 with abnormal WBC. Subsequent EGD revealed a duodenal ulcer and the patient received 3 units of blood with a post-transfusion H/H of 9.5/29.4. Pt. was discharged with Omeprazole 20mg po BID but we have requested a non-formulary approval for this dose. Pt. looks good at this point and he is doing well since both his discharge and return to us. Labs also indicate his serum albumin was low and so he was advised to increase the intake of protein to improve this level.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma: No

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
08/04/2008	13:04 CCC	99.1	37.3		Harvey, Paul MD CD

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
08/04/2008	13:04 CCC	84			Harvey, Paul MD CD

Respirations:

Date	Time	Rate Per Minute	Provider
08/04/2008	13:04 CCC	20	Harvey, Paul MD CD

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
08/04/2008	13:04 CCC	122/76				Harvey, Paul MD CD

Weight:

Date	Time	Lbs	Kg	Waist Circum.	Provider
08/04/2008	13:04 CCC	Unavail	0.0		Harvey, Paul MD CD

Exam:

General

Exhibit 2

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: RAPPE, DANIEL Reg #: 22472-424
Date of Birth: 09/01/1960 Sex: M Race: WHITE
Encounter Date: 08/06/2008 14:29 Provider: Nowakowski, Bonnie M Facility: CCC

Follow-up encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Nowakowski, Bonnie M DO

Chief Complaint: GASTROINTESTINAL CLINIC

Subjective: 47 yo WM for F/U after hosp. (for GI Bleed); and review of Path report fromEGD done 7/21;

Has Hx of HBV/HCV, (self report, unconfirmed here) , inguinal hernia & diverticulitis;
? hx of "enlarged heart" ? etio

1st c/o abd pain/blood (stools), and seen (by MLPs) 7/12 , found guiac + ; Case presented to Physician on call w/ plan to order baseline labs & F/U;

7/15 pt seen for c/o increasing abd pain, dizziness; found tachycardic;

7/17 pt seen (sick call triage) c/o abd pain (10/10) , "heart beating fast" w/ standing, & "I am passing unbelievable amounts of blood" ; Baseline Labs drawn

7/18 Lab reported Hgb = 7.8 to CD; Pt directly admitted to Thorek Hospital for transfusion & endoscopy. Pt rec'd 3 U PRBCs, endoscopy (7/21) , and when stable, returned to MCC (7/22/08).

Med reconciliation orders (completed by this physician, "acting CD") included Rx for PPI BID (as Per Rec's of GI & GI guidelines) X 6 - 8 wks; Electronic Non formulary request submitted for BID dosing ;
7/25, TDY PharmD Spoke w/ Regional PharmD & CD, (documented in medical chart), who indicated not to submit Non Formulary Request, but to fill a 15 day supply of daily PPI, and CD would evaluate upon his return.
Today, pt c/o stomach pains, worse since d/c from hosp (when was on IV PPI)

Path report obtained by me from Thorek Hospital Path Dept: Post op dx: "DUODENAL/VERENEAL ULCER"; also , H. pylori NEG (7/19/08) ;
Pt made aware of recommended medication regimen, but that , @ this current time, awaiting Central Office Non Formulary Approval; Per BOP Pharmacy Policy, only QD PPI was allowable until the Clinical Director could return to compete the Electronic Non formulary Process.

Pain Location: Other
Pain Scale: 3
Pain Qualities: Intermittent | Burning | Radiating | Sharp | Tender
History of Trauma: No
Onset:
Duration:
Exacerbating Factors: lying prone
Relieving Factors:
Comments: definately noticed improvement in pain when had IV dosed PPI and BID PPI

ROS:

General

Constitutional Symptoms

Weakness (no)

GI

Exhibit 3

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg.#:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	09/02/2008 11:12	Provider:	Harvey, Paul MD CD	Facility:	CCC

Admin Note encounter performed at Other.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Harvey, Paul MD CD

Medication renewal request from a Cop-Out from the patient.

ASSESSMENTS:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Acetaminophen Oral Tablet	09/02/2008 11:12	500mg T1T TID, PRN Orally every 8 hours PRN x 180 day(s)
	Indication: Other unspecified back disorders		
	Omeprazole Capsule	09/02/2008 11:12	20mg T1T q AM Orally each morning x 180 day(s) -- #30/month
	Indication: Hemorrhage of gastrointestinal tract, unspecified		

Cosign Required: No

Telephone/Verbal Order: No

Administrative Note completed on RAPPE, DANIEL by Harvey, Paul MD CD on 09/02/2008 11:12

Exhibit 4

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg #:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	10/14/2008 17:16	Provider:	Nowakowski, Bonnie M	Facility:	CCC

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Nowakowski, Bonnie M DO

Pt due this month for CCC -
No labs done for f/u CBC (yet were ordered)

CLARIFICATION OF ENTRY MADE ON NONFORMULARY REQUEST FORM DATED 8/12/2008:
It is noted that my original request (for BID PPI) to Central office (done by hospital discharge papers from GI consultant recommendations) was cancelled at request of Clincal Director.

ON 8/12, a second Non Formulary Electronic request for same (BID PPI) was initiated by the clinical director, which was approved by central office, but this order was never written, nor processed. Thus, this patient never received BID PPI at any time since his return from the hospital; (unless he has been purchasing additional pills from commissary);

ON 9/02 a med order was written for 180 days of once daily PPI by CD.

Lab orders for Repeat CBC, Fe, Ferritin, Chem LFTs being placed

Also ordering GI Consult for 2 - 3 month F/U re: possible need to re- EGD;
Will Schedule for CCC on 10/31, presuming labs will be available.

ASSESSMENTS:

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Profile tests-General-Lipid Profile	One-Time		10/31/2008 10:00	Routine
Profile tests-General-Comprehensive Metabolic Profile (CMP)				
Profile tests-General-Hepatic Profile				
Blood tests-d-e-f-Ferritin				
Blood tests-i-j-Iron				
Profile tests-General-Complete blood count (CBC)				

Schedule:

Activity	Date Scheduled	Scheduled Provider
Chronic Care Visit	10/31/2008 09:00	Physician 02

GI CCC
ENtereed into SENTRY for Callout on 10/31

Other:

- labs ordered for F/U of transfusion, and CCC
- Consult submitted for post op f/u w/ GI
- CCC due this Mo - Entered into Callout for 10/31 for GI CCC

Disposition:

Exhibit 5

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: RAPPE, DANIEL Reg #: 22472-424
Date of Birth: 09/01/1960 Sex: M Race: WHITE
Encounter Date: 02/10/2009 10:13 Provider: Nowakowski, Bonnie M Facility: CCC

Emergency encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Nowakowski, Bonnie M DO

Chief Complaint: Abdominal Pain

Subjective: 48 yo WM admitted to MCC Chicago 8/07, w/ hx of GI bleed last summer d/t duodenal ulcer, now here to be seen @ request of CD; Pt is overdue for CCC (GI).

Pt was admitted to Thorek Hospital 7/08 for GI bleed d/t duodenal ulcer, requiring 3 U PRBCs transfusion, serum neg & Endoscopy neg (path) for H pylori; (but Rx'd for it empiricaly per GI rec's);
Path report (7/21/08) = NEG for malig/NEG for H. pylori;
CT Abd/pelvis (7/19/08) done - showed "minimal nonspecific ventral mesenteric edema with a few tiny mesenteric lymph nodes, but no ascites or obstruction; incidental R inguinal hernia present; * Follow up CT suggested"

Per GI recs @ hospital D/C ; cont PPI Rx BID X 6 - 8 wks; then GI F/U; Recommended med regimen was ordered @ reconciliation upon pts return to MCC, but Rx was subsequently changes by CD;

10/14/2008, consultation request was submitted by this physician to Utilization Review Committee for GI follow up re: post op eval & rec's ; Consult was not approved by CD w/ comment: "f/u not clinically indicated" , dated 10/20/08; (patient claims he was unaware of the denied request for follow up appt);
Pt was called 11/12/08 for post transfusion labs, but signed refusal; These orders were resubmitted after attempts (unsuccessfully) by this physician to verbally persuade pt to comply);

Pt seen by MLP 1/21/09 & 2/03/09 for abd pain, (noted: refused rectal exam, but allowed labs); (chem, cbc - normal) ;

Today: pt states was in R&D (awaiting court) , became dizzy & almost passed out; claims , recently, w/ this abd pain, (similar to pain as w/ last smr), : epigastric, crampy w/ sharp pains radiating to B/L "kidneys" (R>L) , & sometimes pulling toward his testicle; persistent (tho mild), since last smr, and progressive to now,(last nite 's pain he claims was unbearable);
where he has been taking "extra pills" ; He has decreased his PO intake, claims, lost wt& has been having "dark tarry stools"

Pain Location: Abdomen - Epigastric
Pain Scale: 10
Pain Qualities: Unbearable | Radiating | Sharp | Cramping | Burning
History of Trauma: No
Onset: 2-6 Months
Duration:
Exacerbating Factors: supine position
Relieving Factors: lying on Left side , milk, tylenol
Comments:

ROS:

General

Constitutional Symptoms

Anorexia (yes), Fatigue (yes), Fever (no), Unexplained Weight Loss (yes), Weakness (yes)

Exhibit 6

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg #:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	02/20/2009 10:55	Provider:	Aruiza, Roberto MLP	Facility:	CCC

Evaluation encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Aruiza, Roberto MLP

Examined 3 samples of his stool taken at 3 bowel movements. Hemocult test is positive of blood on all samples. Showed results to Dr. Nowakowski.

ASSESSMENTS:

Cosign Required: Yes

Telephone/Verbal Order: No

Administrative Note completed on RAPPE, DANIEL by Aruiza, Roberto MLP on 02/20/2009 10:55

Requested to be cosigned by Nowakowski, Bonnie M DO.

Cosigned by Nowakowski, Bonnie M DO on 02/20/2009 21:33.

Cosigner Comments:

48 yo WM seen 2/10 for abd pain -
has been on GI meds after hospitalization last summer for GI bleed d/t duod ulcer, and has not had f/u until now (tho labs, GI f/u request were ordered by this physician);
2/10, re-reviewed all records, test/ path reports from GI workup last summer & reviewed w/ pt what my recommendations were, based on my clinical impressions, given my clinical interview and physical examination; Lab tests were ordered (for chem, amylase, lipase, mag, lipids, CBC, CA19-9, gastrin & retic); FOBT was given and consults for Repeat CT and request (again) for GI follow up after last summer's workup;

Above noted, and this pt has a follow-up appt entered in SENTRY for CALLOUT for me on 3/13/09;
I anticipate, that if the above blood tests are allowed to be drawn by the Clinical Director, that the results of the blood tests would be kindly be allowed for my review with this patient by that date; he is , as well as I , am becoming conserned;

Exhibit 7

Quest Diagnostics

QUEST DIAGNOSTICS INCORPORATED
CLIENT SERVICE 800.323.5917

SPECIMEN INFORMATION
SPECIMEN: WX094410L
REQUISITION: 3801899

PATIENT INFORMATION
RAPPE,DANIEL

DOB: 09/01/1960 AGE: 48
GENDER: M FASTING: U

ID:
PHONE:

REPORT STATUS FINAL

ORDERING PHYSICIAN

CLIENT INFORMATION
C22166736 4000000
METRO CORP CTR PO-0057
DENISE FEDERIGHI
71 W VAN BUREN ST
CHICAGO, IL 60605-1004

COLLECTED: 02/03/2009 10:15 CT
RECEIVED: 02/03/2009 20:53 CT
REPORTED: 02/04/2009 00:48 CT

COMMENTS: REG #22472-424

Test Name	In Range	Out of Range		Reference Range	Lab
COMPREHENSIVE METABOLIC PANEL W/EGFR					CB
GLUCOSE	97			65-99 mg/dL FASTING REFERENCE INTERVAL	
UREA NITROGEN (BUN)	16			7-25 mg/dL	
CREATININE	0.88			0.50-1.30 mg/dL	
eGFR NON-AFR. AMERICAN	>60			> OR = 60 mL/min/1.73m2	
eGFR AFRICAN AMERICAN	>60			> OR = 60 mL/min/1.73m2	
BUN/CREATININE RATIO	NOT APPLICABLE BUN/CREATININE RATIO IS NOT REPORTED WHEN THE BUN AND CREATININE VALUES ARE WITHIN NORMAL LIMITS.			6-22 (calc)	
SODIUM	139			135-146 mmol/L	
POTASSIUM	4.5			3.5-5.3 mmol/L	
CHLORIDE	104			98-110 mmol/L	
CARBON DIOXIDE	23			21-33 mmol/L	
CALCIUM	9.9			8.6-10.2 mg/dL	
PROTEIN, TOTAL	7.3			6.2-8.3 g/dL	
ALBUMIN	4.5			3.6-5.1 g/dL	
GLOBULIN	2.8			2.1-3.7 g/dL (calc)	
ALBUMIN/GLOBULIN RATIO	1.6			1.0-2.1 (calc)	
BILIRUBIN, TOTAL	0.4			0.2-1.2 mg/dL	
ALKALINE PHOSPHATASE	72			40-115 U/L	
AST	12			10-40 U/L	
ALT	14			9-60 U/L	
CBC (H/H, RBC, INDICES, WBC, PLT)					CB
WHITE BLOOD CELL COUNT	6.9			3.8-10.8 Thousand/uL	
RED BLOOD CELL COUNT		4.10	L	4.20-5.80 Million/uL	
HEMOGLOBIN	13.2			13.2-17.1 g/dL	
HEMATOCRIT		37.5	L	38.5-50.0 %	
MCV	91.5			80.0-100.0 fL	
MCH	32.2			27.0-33.0 pg	
MCHC	35.1			32.0-36.0 g/dL	
RDW	14.5			11.0-15.0 %	

2/6/09

P. Harvey, M.D.
Clinical Director

RAPPE,DANIEL - WX094410L

Page 1 - Continued on Page 2

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Exhibit 9

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: RAPPE, DANIEL Reg #: 22472-424
Date of Birth: 09/01/1960 Sex: M Race: WHITE
Encounter Date: 03/01/2009 19:02 Provider: Velazquez, Maria MLP Facility: CCC

Emergency encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Velazquez, Maria MLP

Chief Complaint: Bleeding from Mouth

Subjective: I/M was brought down by Op. Lt. and Internal Of. via wheelchair. I was informed by the Op. Lt. that the inmate was throwing-up and defecating coffee ground material in his floor minutes prior to bringing the I/M to the 7th floor Medical.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma: No

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

ROS:

General

Constitutional Symptoms

Weakness (yes)

Integumentary

Patient's facial skin lips were very pale. Skin was moist and cold. Clotted brownish lack material coming out of his nose and lips. His front sweat shirt was stained with the brownish black material, also the crotch area of his sweat pants was stainged with brownish black material. He was conscious but confused. He was very weak. He needed the help of two officers to transfer him to the table. He verbally requested that his feet be elevate; of which the internal officer did.

I immediately told the Op. Lt. to call an ambulance via 911.

I had difficulty getting his blood pressure reading.

GI

General

Abdominal Pain or Colic (yes), Blood in Stools (yes), Hematemesis (yes), Rectal Bleeding (yes), Stools Black (yes)

Neurological

Motor System

Limp (yes), Weakness (yes)

OBJECTIVE:

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
03/01/2009	19:07 CCC	108	Via Machine		Velazquez, Maria MLP

SaO2:

Exhibit 10

Discharge Instructions

RAPPE, DANIEL - 000666007065

* Final Report *

Result type:	Discharge Instructions
Result date:	10 March 2009 12:57
Result status:	Authenticated
Performed by:	VAID, AMIT R. on 10 March 2009 13:07
Verified by:	VAID, AMIT R. on 10 March 2009 13:07
Encounter info:	006000025534, NMH, Inpatient, 3/2/2009 -

Allergies:
No Known Allergies

Your complete list of medications to take:

esomeprazole (Nexium) 40 mg twice daily for 7 more weeks (THIS IS ABSOLUTELY MANDATORY FOR ULCER HEALING)
-after this is given for 7 weeks, switch to once daily for lifetime
-note: a proton pump inhibitor substituation is okay, but must be twice daily
acetaminophen (Tylenol) 650 mg every 6 Hours as needed for pain
Pepcid or equivalent H2 blocker PRN pain
Tylenol # 3 as needed for pain
prochlorperazine (Compazine) 5 mg every 6 Hours as needed for nausea
sodium chloride nasal (Saline Nasal Mist 0.65% solution) 1 Spray Each Nostril As Needed

Changes from your prior medications:
Started Nexium twice daily

DR. B. NOWAKOWSKI
Staff Physician
MSC Chicago, IL
3/13/09

When to call your doctor:
If symptoms of GI bleed recur

Additional instructions (daily weights, wound care):

Do not take any NSAIDs (for example, Motrin, ibuprofen, alleve) or Aspirin

Exhibit 11

BP-S802.060
FEB 05

NON-FORMULARY DRUG AUTHORIZATION

CDFRM

U.S. DEPARTMENT OF JUSTICE — **FEDERAL BUREAU OF PRISONS**

Patient name: RAPPE, DANIEL
Register number: 22472-424
Requestor: Iskandar, Albert MLP
Institution: CHICAGO MCC
Drug requested: Esomeprazole magnesium 40 MG Cap [Nexium]
Drug approved:
Dose and Regimen: 40 mg twice daily
Date requested: 03/10/2009
Expiration of order: 03/10/2010
Diagnosis: Bleeding doudenal ulcer
Reason(s) why formulary agent(s) cannot be used: formulary agents used maximum dose for a long time, non-formulary Omperazole used too but no help.
Formulary agent(s) tried:
Cost of therapy: $0.00
Cost of formulary agent: $0.00

Institutional Chief Pharmacist:	Action taken:	Date:
Lyubashevsky, Irina PharmD	Refer up	03/12/2009

Comments:
Please, evaluate. Omeprazole is given 20mg qam.

Institution Clinical Director:	Action taken:	Date:
Harvey, Paul MD CD	Refer up	03/12/2009

Comments:
Two episodes of acute UGI Bleeding requiring endoscopy and blood transfusions. Most recent episode last week documented a HgB 5.0 (NL >14.0) at local hospital with inmate refusing treatment.

Pt. is awaiting sentencing and designation.

Central Office Pharmacist:	Action taken:	Date:
Shiber, Mike RPh	Refer up	03/12/2009

Comments:
There is no therapeutic difference between PPI's unless utilizing IV route. Recommend titrating formulary omeprazole to symptom management.
Refer Up

Central Office Physician:	Action taken:	Date:
Manenti, John MD, BMD	Disapproved	03/13/2009

Comments:

Use Criteria:

Y	N	N/A	
X			1. Patient does NOT have Non-Ulcer Dyspepsia: NO APPROVALS. REFER TO COMMISSARY FOR OTC AGENTS
X			2. GERD: supported by current EGD documentation

Exhibit 12

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg #:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	04/14/2009 22:52	Provider:	Iskandar, Albert MLP	Facility:	CCC

Admin-Note encounter performed at Housing Unit.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Iskandar, Albert MLP

Inmate was informed that the bland diet will not be supplied anymore, as per Dr.Harvey's order since it is not clinically indicated for peptic ulcer, Inmate verbalized understanding

ASSESSMENTS:

Cosign Required: Yes

Telephone/Verbal Order: No

Administrative Note completed on RAPPE, DANIEL by Iskandar, Albert MLP on 04/14/2009 22:52

Requested to be cosigned by Harvey, Paul MD CD.

Cosigned by Harvey, Paul MD CD on 04/15/2009 08:17.

Cosigner Comments:

Noted.

saving intervention his HR was 106, BP 119/70 and O2 sat ranging from 88-95% (poor wave form). he is competent to make his own decisions and even points out that he is former army medic and that he want s to be a DNR/DNI. We then called the federal lock-up and spoke with Dr. Paul Harvey, his physician. According o Dr. Harvey, there is no pmhx of schizophrenia, bipolar d/o or extreme depression taht would preclude his competency. additionally he has no hx of suicidality.

GEN: mod distress;
HEENT: PERRL; EOMI
NECK: supple
CV: RRR; nl S1, S2; no m/r/g
PULM: CTAB
ABD: (+)BS; s/nt/nd
EXT: no c/c/e
NEURO: no focal deficits
LAD: no LAD
SKIN: no rash; extreme pallor

A/P: 48 yo male with upper GIB
- will send CBC< CMP, LIPASE, INR,
- Dr. williamson placed Rt Femoral Cordis for rapid transfusion should need arise
- if pt insists on being DNRDNI and refuses EGD then will place pt on the floor; if he is amenable to EGD then will place in MICU

PROCEDURE -
1) Rt Femoral Cordis - placed w/o written consent out of medicily necessity. pt gave verbal consent; I was present throughout; pt tolerated well; no complications

Danielle McGee, MD

Addendum by DONLAN, SARAH on 01 March 2009 19:19 (Verified)
discussed pt w/ Dr. harvey at correctional center, states pt has no Pysch history, competent to make decisions.

Addendum by MCGEE, DANIELLE M. on 01 March 2009 19:24 (Verified)
1922 - I again asked pt if he would allow NG lavage and he continues to say no; However he is willing to do an EGD so we will call GI fellow and admit to the MICU.

Danielle McGee, MD

Addendum by MCGEE, DANIELLE M. on 01 March 2009 21:12 (Verified)
2100 - After 2.5hrs, the federal officers accompanying this pt say that by law/policy this pt doesn't have the right to make himself DNR/DNI. They call Dr. Harvey who confirms this. We spoke with Dr. Harvey within 30minutes of pt's arrival (as outline in my previous note) to ascertain if there was any reason why this pt could not make this decision. He failed to mention the fact that by law he doesn't have the right to make this decision at that time but during this second phone call says that this is indeed the case. The situation is further compounded by the fact that GI is refusing to do the EGD unless the pt rescinds his DNR/DNI. MICU refuses to take the pt if he can't or won't get an EGD. I then called Laura Lingl of Risk Mgmt to help me further wade through this issue. She spoke with the atty on call who said that unless the pt is deemed incompetent, we can not bypass his wishes. the pt is awake, alert and fully competent to refuse care in my estimation.

CERTIFICATE OF SERVICE

The undersigned Daniel Rappe, pro se, caused copies of the document "(AMENDED COMPLAINT) COMPLAINT FOR DAMAGES AND COMPLAINT OF DENIAL OF CONSTITUTIONAL RIGHTS" to be served to the following:

Clerk of the U.S. District Court
United States Court House
219 South Dearborn Street
Chicago, IL 60604
(7 copies)

Jonathan Haile, Atty
United States Court House
219 South Dearborn Street
Chicago, IL 60604
(1 copy)

by placing it in the legal mail system at Federal Medical Center Devens, giving it to an authorized legal mail collection staff member on July 29, 2011.

Signed: Dal Rapp

Daniel Rappe
22472424
FMC Devens
P.O. Box 879
Ayer, MA 01432

FILED
AUGUST 19, 2010
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

RECEIVED
JUL 26 2010
7-26-10
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VMJ

Daniel Rappe
(Enter above the full name of the plaintiff or plaintiffs in this action)

vs.

Paul Harvey, MD

(Enter above the full name of ALL defendants in this action. Do not use "et al.")

10 C 4636
Judge Matthew F. Kennelly
Magistrate Judge Sidney I. Schenkier

CHECK ONE ONLY:

_____ **COMPLAINT UNDER THE CIVIL RIGHTS ACT, TITLE 42 SECTION 1983 U.S. Code** (state, county, or municipal defendants)

X **COMPLAINT UNDER THE CONSTITUTION ("BIVENS" ACTION), TITLE 28 SECTION 1331 U.S. Code** (federal defendants)

_____ **OTHER** (cite statute, if known)

BEFORE FILLING OUT THIS COMPLAINT, PLEASE REFER TO "INSTRUCTIONS FOR FILING." FOLLOW THESE INSTRUCTIONS CAREFULLY.

I. **Plaintiff(s):**

A. Name: Daniel Rappe

B. List all aliases: N/A

C. Prisoner identification number: 22472 424

D. Place of present confinement: Federal Medical Center Devens

E. Address: P.O. Box 879, Ayer, MA 01432

(If there is more than one plaintiff, then each plaintiff must list his or her name, aliases, I.D. number, place of confinement, and current address according to the above format on a separate sheet of paper.)

II. **Defendant(s):**

(In **A** below, place the full name of the first defendant in the first blank, his or her official position in the second blank, and his or her place of employment in the third blank. Space for two additional defendants is provided in **B** and **C**.)

A. Defendant: Paul Harvey, MD

Title: Clinical Director

Place of Employment: Metropolitan Correctional Center Chicago

B. Defendant: N/A

Title: N/A

Place of Employment: N/A

C. Defendant: N/A

Title: N/A

Place of Employment: N/A

(If you have more than three defendants, then all additional defendants must be listed according to the above format on a separate sheet of paper.)

III. List ALL lawsuits you (and your co-plaintiffs, if any) have filed in any state or federal court in the United States:

A. Name of case and docket number: N/A

B. Approximate date of filing lawsuit: N/A

C. List all plaintiffs (if you had co-plaintiffs), including any aliases: N/A

D. List all defendants: N/A

E. Court in which the lawsuit was filed (if federal court, name the district; if state court, name the county): N/A

F. Name of judge to whom case was assigned: N/A

G. Basic claim made: N/A

H. Disposition of this case (for example: Was the case dismissed? Was it appealed? Is it still pending?): N/A

I. Approximate date of disposition: N/A

IF YOU HAVE FILED MORE THAN ONE LAWSUIT, THEN YOU MUST DESCRIBE THE ADDITIONAL LAWSUITS ON ANOTHER PIECE OF PAPER, USING THIS SAME FORMAT. REGARDLESS OF HOW MANY CASES YOU HAVE PREVIOUSLY FILED, YOU WILL NOT BE EXCUSED FROM FILLING OUT THIS SECTION COMPLETELY, AND FAILURE TO DO SO MAY RESULT IN DISMISSAL OF YOUR CASE. CO-PLAINTIFFS MUST ALSO LIST ALL CASES THEY HAVE FILED.

IV. Statement of Claim:

State here as briefly as possible the facts of your case. Describe how each defendant is involved, including names, dates, and places. **Do not give any legal arguments or cite any cases or statutes.** If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheets if necessary.)

1. Plaintiff was placed in Metropolitan Correctional Center Chicago (MCC), a facility of the Federal Bureau of Prisons (BOP), as a pretrial detainee, in August, 2007. Defendant Harrey was at all times from mid-August, 2007 to mid-August, 2009, Clinical Director of the Health Services Department at MCC.
2. On July 12, 2008, Plaintiff was first seen by MCC medical personnel for abdominal pain and bloody stool.
3. On July 18, 2008, plaintiff was admitted to Thorek Hospital in Chicago for transfusions and endoscopy, as well as additional tests and treatments. Plaintiff was subsequently diagnosed as having a bleeding duodenal ulcer, which was treated by hospital specialists.
4. On July 22, 2008, plaintiff was returned to MCC. From this time until plaintiffs departure from MCC on or about August 15, 2009, plaintiff suffered continuing and ongoing gastrointestinal (GI) injury, distress, pain and suffering.

5. From on or about July 25, 2008 to on or about August 15, 2009, plaintiff repeatedly attempted to bring his injury, discomfort, distress, pain and suffering to the attention of defendant Harvey.
6. Defendant Harvey demonstrated a failure to respond reasonably to the plaintiff's serious medical needs, resulting in continued injury, pain, distress and suffering, nearly leading to plaintiff's death.
7. Defendant Harvey denied plaintiff proper medical care and provided plaintiff with grossly inadequate treatment contrary to the requests of other MCC medical personnel and hospital medical specialists, and continued to do so in the face of resultant pain and suffering, and risk of plaintiff's permanent injury and/or death, as described in the following paragraphs:
8. On August 4, 2008, plaintiff was seen by defendant Harvey. According to defendant's notes (Exhibit 1), defendant had requested approval for a dosage of Omeprazole (GI antacid) at 20mg twice a day, in keeping with plaintiffs hospital discharge papers.

(Continued on page 5-A)

8. continued: Defendant also advised plaintiff to "increase the intake of protein" to rebuild lowered levels of important blood components following plaintiffs blood loss, but defendant was, upon request of plaintiff, unwilling to provide any viable options for doing so, and instead deliberately and unnecessarily withheld additional protein and/or protein supplements, an indifference to plaintiffs medical needs.

9. On August 6, 2008, plaintiff was seen by Bonnie Nowakowski, D.O. (Dr. N.), staff physician at MCC, acting as Clinical Director for the absent defendant Harvey. Dr. N. notes (Exhibit 2) that she submitted a request for plaintiffs Omeprazole at the hospital GI specialist-recommended dosage, but defendant ordered that request be cancelled and stated he would evaluate the request upon his return to MCC. Dr. N. indicates that the MCC pharmacist was instructed, on July 25, 2008, to give plaintiff a 15 day supply of Omeprazole at a dosage of 20mg once a day, half that prescribed by the hospital GI specialists. This left plaintiff, from date of hospital discharge to date medication is ordered, to spend at least 3 days without medication to treat his ulcer, allowing it to worsen and cause pain and suffering in the days following plaintiffs release from the hospital.

10. After several weeks of plaintiff requesting medication by sending sick call and request forms to defendant Harvey, as well as speaking repeatedly to the physicians assistants (NLPs) when they visited plaintiffs MCC housing unit to dispense medication, defendant prescribed plaintiff Omeprazole, at only half the hospital GI specialist-prescribed dosage, on September 2, 2008 (Exhibit 3).

(Continued on page 5-B)

10. continued: From being prescribed a 15 day supply of lowered-dose Omyprazole on July 25, 2008 and having it again prescribed on September 2, 2008, plaintiff was at least an additional 24 days without medication to treat the ulcer, allowing it to worsen still and causing plaintiff continued injury to his GI system, distress, pain and suffering. Despite assurance from Dr. N. that she would do whatever she could to help plaintiff heal and become well again, plaintiff began having serious doubts about his future health and wellbeing, given the apparent disregard and indifference exhibited by her supervisor, defendant Harvey.

11. On October 14, 2008, Dr. N. made an administrative note (Exhibit 4) stating that on August 12, 2008 defendant Harvey did make a medication request as described above in paragraph 9. Plaintiff had this administrative note information related to him through an MLP during the MLPs visit to plaintiffs housing unit for medication distribution. The timing of this request means defendant made the request knowing that his previous order of 15 pills had been exhausted 4 days earlier. Defendant did not give plaintiff any additional medication at this time, instead choosing to allow plaintiff to go at least 24 days without medication, as described in paragraph 10 above. Dr. N. noted that the medication request from defendant had since been approved by "central office," but the order, initiated by defendant and now allowing for the hospital GI specialist-prescribed dosage of Omeprazole 20mg twice a day, "was never written, nor processed," and plaintiff did not receive this dosage. Defendant denied plaintiff this dosage without seeing plaintiff to assess plaintiffs need.

(Continued on page 5-C)

11. continued: Dr. N. also noted plaintiff was due for Chronic Care Clinic (CCC), a function provided by defendant and necessitating being examined by defendant to assess chronic care issues, including progress/lack of progress, pain and other quality of life issues, and new and/or continuing concerns regarding illness and treatment. Dr. N. placed me in the MCC callout (inmate notification) system for an October 31, 2008 CCC appointment with defendant. According to plaintiffs medical records, he was not seen on October 31, 2008 for CCC and did not receive an appointment from defendant for over 6 months after this date despite repeated requests from plaintiff, who again sent request forms and frequently spoke to MLPs concerning ongoing illness, pain and suffering. Plaintiffs next CCC appointment, scheduled by Dr. N. herself after she recognized she must take the initiative abandoned by defendant, took place on May 5, 2009. The result of the information contained in Exhibit 4 is that defendant Harvey acted indifferently to plaintiffs health by failing to prescribe vital medication in a timely fashion or in a sufficient, authorized amount. the circumstances described in Exhibit 4 left plaintiff with continued, worsening injury to his GI system, distress, discomfort, pain and suffering which, despite medical requests and discussions with MLPs, continued for months. This caused plaintiffs previous serious doubts about defendants intentions to increase to the point plaintiff began to see that no healing help or health gains were going to be offered or allowed by defendant; rather, the best plaintiff felt and believed he could hope for, given defendants grossly inadequate care, was being maintained in an ongoing state of injury, distress, discomfort, pain and suffering.

12. Plaintiff was seen by Dr. N. on February 10, 2009 for an "emergency encounter" (Exhibit 5) after numerous requests to defendant went unanswered. The last paragraph of the Subjective Section of the exhibit indicates plaintiff was becoming very ill again. Paragraph 4 of the same section indicates Dr. N. had submitted a request to have plaintiff be seen for followup testing and examination by hospital GI specialists, but this request was denied by defendant Harvey, who commented that such testing was "... not clinically indicated," even though defendant had not examined plaintiff for over 2 months prior to the date of this denial.

13. Plaintiff was seen by MLP Aruiza on February 20, 2009. He reported plaintiffs stool samples were all found to contain blood (Exhibit 6). MLP Aruiza discussed this with Dr. N., whose comments again state her request for a followup visit by plaintiff to the hospital GI physicians. The final paragraph of the doctor's comments indicate she is becoming both concerned with the plaintiffs health and exasperated by defendants lack of action.

14. Results of lab tests done on plaintiffs blood, dated 02/6/09 and stamped by defendant, indicate plaintiffs Red Blood Cell count and Hematocrit levels were "Out of Range," lower than normal, and the Hemeglobin level is at the absolute low end of the Reference Range. these are indications of possible blood loss by plaintiff, and considered along with the information contained in Exhibit 6, indicate a probable blood loss. Lab test is Exhibit 7.

15. On February 23, 2009, Plaintiff was seen by defendant Harvey (Exhibit 8). Defendant told plaintiff to stop taking Tylenol for plaintiffs severe pain, but defendant gave plaintiff no other options for the sometimes unbearable pain.

(Continued on page 5-E)

15. continued: Tylenol is not known for causing or aggravating GI problems, and the dosage defendant took was prescribed by MCC Health Services personnel and was well below the over-the-counter dosage. Defendant stated he didn't think plaintiff was intolerant of meals, but he didn't offer any reasoning. Defendant told plaintiff his recent lab tests were normal (Exhibit 7) when clearly they were not, and they were 3 weeks old at this time - a long time when dealing with a case involving evidence of internal blood loss. Defendant mentioned plaintiffs inquiry about previous stool blood tests (Exhibit 6), but defendant claimed to know nothing about such tests or their results. Plaintiff was at this time becoming very ill and very weary of being ill and experiencing near-constant pain and suffering, so he asked defendant questions in the hope of having the possibility of treatment to look forward to in the future. Defendants attitude and demeanor toward plaintiff during this exchange indicated defendant enjoyed denying plaintiff hope of treatment. The final line in Administrative Note 1 of Exhibit 8 makes no apparent logical sense but does indicate a possible prejudice against plaintiff. Defendant denied plaintiff hospital GI specialist-prescribed dosage of Omeprazole, as well as alternate pain medication. this, combined with the fact that plaintiff had recently had 2 rectal exams that were positive for blood, caused plaintiff, in later discussing these events with his cellmate, a former nurse, to realize that plaintiffs death in MCC due to grossly inadequate medical care by defendant was a very real possibility.

16. On March 1, 2009, plaintiff nearly bled to death at MCC, owing to his duodenal ulcer. He was given emergency treatment by MLP Velazquez and MCC officers (Exhibit 9) and taken via ambulance to Northwestern Memorial Hospital in Chicago, where plaintiff remained for 10 days, spending hours in the emergency room (ER) and the first days in the Intensive Care Unit.

(Continued on page 5-F)

16. continued: Plaintiff was given emergency treatment at the ER and gradually became lucid, at which point he refused further treatment, even though ER physicians informed plaintiff such refusal could result in plaintiffs death. Plaintiff expressed to hospital personnel that he was very tired of his prolonged physical and mental pain and suffering, and anticipated being healed to the point where he would be returned to the care of defendant Harvey, who would again allow plaintiff to become very ill as he had after plaintiffs first hospitalization. Plaintiff expressed that defendant had ample opportunity to heal plaintiff and defendant chose not to, so plaintiff was instead placing his faith and fate in the care of a higher power by letting his God decide whether or not to heal him. Personnel at the ER told plaintiff it was his right to refuse treatment, but defendant informed the same personnel that defendant would have plaintiff removed from the hospital back to MCC and defendant would obtain an emergency court order forcing defendants treatment at the MCC. In light of this information, plaintiff reluctantly agreed to allow ER personnel to continue treatment. Defendant states elsewhere in plaintiffs medical records that plaintiff was compelled to agree to treatment after being allowed to speak to plaintiffs mother by telephone. this is a factual error which will be refuted in court by hospital personnel, and BOP and U.S. Marshal personnel. Plaintiff was specifically forbidden from contacting his family during his hospitalization, as was hospital staff. Plaintiff was compelled to agree to treatment, against his religious convictions, by threats from defendant, whose "treatment" had just nearly killed plaintiff. Because MCC lacks an infirmary, plaintiff feared the experience of undergoing treatment while physically

(Continued on page 5-G)

16. continued: restrained, handcuffed, shackled and strapped to a bunk in the segregation (punishment) unit of MCC, being physically forced by BOP officers and defendant. Plaintiff, an unconvicted, presumed innocent citizen, lost his right to religious choice because he feared dying in prison at the hands of the defendant, who had maltreated plaintiff for over 6 months.

17. On March 10, 2009, plaintiff was released from the hospital with an order (Exhibit 10) that included 40mg of Omeprazole twice daily, Tylenol #3 for pain, and a soft diet (second page of order - not in exhibit). The dosage of Omeprazole was described as "... ABSOLUTELY MANDATORY FOR ULCER HEALING," but defendant again allowed plaintiff only 20mg once daily until May 4, 2009. In other words, plaintiff was initially given 1/4 of the dosage hospital specialists described as "... ABSOLUTELY MANDATORY..." for 8 weeks, then given 20mg twice daily - half the dosage - until plaintiff left MCC in mid-August, 2009. Defendant completely denied plaintiff access to Tylenol #3 despite plaintiffs ongoing pain. Plaintiff found himself in precisely the position he told hospital personnel he feared.

18. On March 12, 2009, the BOP Central Office Pharmacist recommended defendant give plaintiff adequate amount of medication necessary to manage symptoms (Exhibit 11), but defendant did not do this, instead giving inadequate amounts in indifference to defendants condition and history. Plaintiff was left directing his own recovery by taking the 40mg twice daily dosage, as prescribed by the hospital specialist discharge orders, on his own. This was done by plaintiff using prescribed, insufficient 1/4 or 1/2 dosage of drug much faster than he should and hoping it would be refilled early when plaintiff ran out much earlier than prescribed.

(Continued on page 5-H)

18. continued: Plaintiff also secured additional supply of Omeprazole through alternate means. Through this self-medication and the use of over-the-counter medications, plaintiff was gradually able to improve his health.

19. The soft diet prescribed by hospital specialists was ordered by Dr. N., but the order was cancelled by defendant several days later, without consulting plaintiff or Dr. N., and in spite of the fact the diet was allowing plaintiff to finally, safely, comfortably receive nourishment, Dr. N., expressing exasperation at having an order she specifically designated as cancellable only by her instead cancelled by defendant Harvey, again ordered plaintiff a soft diet. the diet, provided most professionally by MCC Food Service Supervisor Mr. Luter, was after a couple more days again cancelled, permanently, by defendant Exhibit 12), calling it a "bland" diet rather than a soft diet. Defendant stated a "bland" diet was not "clinically indicated for peptic ulcer." This may be, but plaintiff was prescribed a soft diet, and BOP document TRM 4701.02, Section 8, part K, Food Services Technical and Reference Manual: Guidelines for Medical Diets: Soft Diet, states: "It may also be used for patients who do not tolerate a regular diet or for patients with mild gastrointestinal problems who may not tolerate highly seasoned or fried foods," and "Individual tolerances may vary. Any food tolerated by the patients is allowed." The regular diet was not tolerated by plaintiff, so Dr. N., with Mr. Luter's help, placed plaintiff on a BOP-approved, hospital-specialist prescribed soft diet, which plaintiff did tolerate. When plaintiff informed defendant the diet was not "bland," but rather soft, and helpful, defendant stated, "I don't care what it is, you're not getting it." Defendant twice removed plaintiff from the diet, again creating a barrier to the return to

(Continued on page 5-I)

19. continued: health plaintiff sought, not only showing indifference to plaintiffs recovery but actively working against such recovery.
20. Plaintiff is able to produce numerous witnesses to attest to the facts contained in this document, as well as additional facts surrounding this case, by affidavit and/or in court.
21. Plaintiff sustained injury to his GI tract. Owing to defendant Harveys indifference toward this injury, the injury worsened, causing chronic side effects and nearly becoming fatal. Plaintiff experienced great physical, mental, and emotional distress, pain and suffering. Discomfort, pain and suffering from this injury continue and will likely be permanent, altering plaintiffs lifestyle and resulting in increased medical payments by plaintiff in the future, as well as the possibility of further damage and/or complications in the future, as plaintiff now has chronic gastric reflux disease, a condition not previously present. Plaintiff has pain and discomfort from another potentially life-threatening chronic condition, but rarely has it addressed, as he now has a complete distrust of the motives of BOP medical personnel, to the detriment of plaintiffs continued health and well being.
22. As shown in this document, defendant Harvey knew plaintiff had a history of serious GI disease and a risk of serious harm and/or death, but defendant deliberately disregarded that risk. Treatment provided by defendant was grossly inadequate to the point such a state was recognized and acknowledged by his fellow health care professionals.

(Continued on page 5-J)

22. continued: Numerous times after two hospitalizations, defendant deliberately disregarded plaintiffs health and safety by refusing to comply with prescriptions and orders of hospital-based GI specialists and fellow BOP medical professionals, instead choosing to supply inadequate, substandard care to plaintiff, a pre-trial, un-convicted, presumed innocent citizen of the United States of America, much to the detriment of plaintiffs health and nearly causing plaintiffs death.

23. Defendant Harvey's failure to reasonably respond to plaintiffs serious medical needs amounts to deliberate indifference and violates plaintiffs Fifth Amendment rights under the United States Constitution.

24. Defendant Harvey's use of coersion and threats to force plaintiff to receive medical treatment against plaintiffs expressed will, owing to plaintiffs religious beliefs, violates plaintiffs First Amendment rights under the United States Constitution.

End of Statement of Claim

V. Relief:

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

Plaintiff respectfully prays that this court:
1. Declare that the acts and ommissions described herein violated plaintiff's rights under the Constitution and laws of the United States.
2. Enter judgement in favor of plaintiff for compensatory and punitive damages as allowed by law, against the defendant.
3. Order such additional relief as this court may deem just and proper.

VI. The plaintiff demands that the case be tried by a jury. ☒ YES ☐ NO

CERTIFICATION

By signing this Complaint, I certify that the facts stated in this Complaint are true to the best of my knowledge, information and belief. I understand that if this certification is not correct, I may be subject to sanctions by the Court.

Signed this 18th day of July, 2010

(Signature of plaintiff or plaintiffs)

Daniel Rappe
(Print name)

22472 424
(I.D. Number)

Federal Medical Center Devens
P.O. Box 879
Ayer, MA 01432
(Address)

Exhibit 1

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: RAPPE, DANIEL Reg #: 22472-424
Date of Birth: 09/01/1960 Sex: M Race: WHITE
Encounter Date: 08/04/2008 12:53 Provider: Harvey, Paul MD CD Facility: CCC

Chronic Care Visit encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Harvey, Paul MD CD

Chief Complaint: GASTROINTESTINAL CLINIC

Subjective: Pt. sent out to local hospital after labs drawn because the patient appeared pale to medical staff while being seen for left lower abdomenal pain. The H/H returned as 7.8/23.2 with abnormal WBC. Subsequent EGD revealed a duodenal ulcer and the patient received 3 units of blood with a post-transfusion H/H of 9.5/29.4. Pt. was discharged with Omeprazole 20mg po BID but we have requested a non-formulary approval for this dose. Pt. looks good at this point and he is doing well since both his discharge and return to us. Labs also indicate his serum albumin was low and so he was advised to increase the intake of protein to improve this level.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma: No

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
08/04/2008	13:04 CCC	99.1	37.3		Harvey, Paul MD CD

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
08/04/2008	13:04 CCC	84			Harvey, Paul MD CD

Respirations:

Date	Time	Rate Per Minute	Provider
08/04/2008	13:04 CCC	20	Harvey, Paul MD CD

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
08/04/2008	13:04 CCC	122/76				Harvey, Paul MD CD

Weight:

Date	Time	Lbs	Kg	Waist Circum.	Provider
08/04/2008	13:04 CCC	Unavail	0.0		Harvey, Paul MD CD

Exam:

General

Exhibit 2

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: RAPPE, DANIEL Reg #: 22472-424
Date of Birth: 09/01/1960 Sex: M Race: WHITE
Encounter Date: 08/06/2008 14:29 Provider: Nowakowski, Bonnie M Facility: CCC

Follow-up encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Nowakowski, Bonnie M DO

Chief Complaint: GASTROINTESTINAL CLINIC

Subjective: 47 yo WM for F/U after hosp. (for GI Bleed); and review of Path report from EGD done 7/21;

Has Hx of HBV/HCV, (self report, unconfirmed here) ; inguinal hernia & diverticulitis;
? hx of "enlarged heart" ? etio

1st c/o abd pain/blood (stools), and seen (by MLPs) 7/12 , found guiac + ; Case presented to Physician on call w/ plan to order baseline labs & F/U;

7/15 pt seen for c/o increasing abd pain, dizziness; found tachycardic;

7/17 pt seen (sick call triage) c/o abd pain (10/10) , "heart beating fast" w/ standing, & "I am passing unbelievable amounts of blood" ; Baseline Labs drawn

7/18 Lab reported Hgb = 7.8 to CD; Pt directly admitted to Thorek Hospital for transfusion & endoscopy. Pt rec'd 3 U PRBCs, endoscopy (7/21) , and when stable, returned to MCC (7/22/08).

Med reconciliation orders (completed by this physician, "acting CD") included Rx for PPI BID (as Per Rec's of GI & GI guidelines) X 6 - 8 wks; Electronic Non formulary request submitted for BID dosing ;
7/25, TDY PharmD Spoke w/ Regional PharmD & CD, (documented in medical chart), who indicated not to submit Non Formulary Request, but to fill a 15 day supply of daily PPI, and CD would evaluate upon his return.
Today, pt c/o stomach pains, worse since d/c from hosp (when was on IV PPI)

Path report obtained by me from Thorek Hospital Path Dept: Post op dx: "DUODENAL/VERENEAL ULCER"; also , H. pylori NEG (7/19/08) ;
Pt made aware of recommended medication regimen, but that , @ this current time, awaiting Central Office Non Formulary Approval; Per BOP Pharmacy Policy, only QD PPI was allowable until the Clinical Director could return to compete the Electronic Non formulary Process.

Pain Location: Other
Pain Scale: 3
Pain Qualities: Intermittent | Burning | Radiating | Sharp | Tender
History of Trauma: No
Onset:
Duration:
Exacerbating Factors: lying prone
Relieving Factors:
Comments: definately noticed improvement in pain when had IV dosed PPI and BID PPI

ROS:

General

Constitutional Symptoms

Weakness (no)

GI

Exhibit 3

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg #:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	09/02/2008 11:12	Provider:	Harvey, Paul MD CD	Facility:	CCC

Admin Note encounter performed at Other.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Harvey, Paul MD CD

Medication renewal request from a Cop-Out from the patient.

ASSESSMENTS:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Acetaminophen Oral Tablet	09/02/2008 11:12	500mg T1T TID, PRN Orally every 8 hours PRN x 180 day(s)
	Indication: Other unspecified back disorders		
	Omeprazole Capsule	09/02/2008 11:12	20mg T1T q AM Orally each morning x 180 day(s) -- #30/month
	Indication: Hemorrhage of gastrointestinal tract, unspecified		

Cosign Required: No

Telephone/Verbal Order: No

Administrative Note completed on RAPPE, DANIEL by Harvey, Paul MD CD on 09/02/2008 11:12

Exhibit 4

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg #:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	10/14/2008 17:16	Provider:	Nowakowski, Bonnie M	Facility:	CCC

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Nowakowski, Bonnie M DO

Pt due this month for CCC -
No labs done for f/u CBC (yet were ordered)

CLARIFICATION OF ENTRY MADE ON NONFORMULARY REQUEST FORM DATED 8/12/2008:
It is noted that my original request (for BID PPI) to Central office (done by hospital discharge papers from GI consultant recommendations) was cancelled at request of Clincal Director.

ON 8/12, a second Non Formulary Electronic request for same (BID PPI) was initiated by the clinical director, which was approved by central office, but this order was never written, nor processed. Thus, this patient never received BID PPI at any time since his return from the hospital; (unless he has been purchasing additional pills from commissary);

ON 9/02 a med order was written for 180 days of once daily PPI by CD.

Lab orders for Repeat CBC, Fe, Ferritin, Chem LFTs being placed

Also ordering GI Consult for 2 - 3 month F/U re: possible need to re- EGD;
Will Schedule for CCC on 10/31, presuming labs will be available.

ASSESSMENTS:

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Profile tests-General-Lipid Profile	One Time		10/31/2008 10:00	Routine
Profile tests-General-Comprehensive Metabolic Profile (CMP)				
Profile tests-General-Hepatic Profile				
Blood tests-d-e-f-Ferritin				
Blood tests-i-j-Iron				
Profile tests-General-Complete blood count (CBC)				

Schedule:

Activity	Date Scheduled	Scheduled Provider
Chronic Care Visit	10/31/2008 09:00	Physician 02

GI CCC
ENtereed into SENTRY for Callout on 10/31

Other:

- labs ordered for F/U of transfusion, and CCC
- Consult submitted for post op f/u w/ GI
- CCC due this Mo - Entered into Callout for 10/31 for GI CCC

Disposition:

Exh; b; t 5

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: RAPPE, DANIEL — Reg #: 22472-424
Date of Birth: 09/01/1960 — Sex: M — Race: WHITE
Encounter Date: 02/10/2009 10:13 — Provider: Nowakowski, Bonnie M — Facility: CCC

Emergency encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Nowakowski, Bonnie M DO

Chief Complaint: Abdominal Pain

Subjective: 48 yo WM admitted to MCC Chicago 8/07, w/ hx of GI bleed last summer d/t duodenal ulcer, now here to be seen @ request of CD; Pt is overdue for CCC (GI)

Pt was admitted to Thorek Hospital 7/08 for GI bleed d/t duodenal ulcer, requiring 3 U PRBCs transfusion, serum neg & Endoscopy neg (path) for H pylori, (but Rx'd for it empiricaly per GI rec's);
Path report (7/21/08) = NEG for malig/NEG for H. pylori;
CT Abd/pelvis (7/19/08) done - showed "minimal nonspecific ventral mesenteric edema with a few tiny mesenteric lymph nodes, but no ascites or obstruction; incidental R inguinal hernia present; * Follow up CT suggested"

Per GI recs @ hospital D/C : cont PPI Rx BID X 6 - 8 wks; then GI F/U; Recommended med regimen was ordered @ reconciliation upon pts return to MCC, but Rx was subsequently changes by CD;

10/14/2008, consultation request was submitted by this physician to Utilization Review Committee for GI follow up re: post op eval & rec's ; Consult was not approved by CD w/ comment: "f/u not clinically indicated" , dated 10/20/08; (patient claims he was unaware of the denied request for follow up appt);
Pt was called 11/12/08 for post transfusion labs, but signed refusal; These orders were resubmitted after attempts (unsuccessfully) by this physician to verbally persuade pt to comply);

Pt seen by MLP 1/21/09 & 2/03/09 for abd pain, (noted: refused rectal exam, but allowed labs); (chem, cbc - normal) ;

Today: pt states was in R& D (awaiting court) , became dizzy & almost passed out; claims , recently, w/ this abd pain, (similar to pain as w/ last smr), : epigastric, crampy w/ sharp pains radiating to B/L "kidneys" (R>L) , & sometimes pulling toward his testicle; persistent (tho mild), since last smr, and progressive to now,(last nite 's pain he claims was unbearable);
where he has been taking "extra pills" ; He has decreased his PO intake, claims, lost wt& has been having "dark tarry stools"

Pain Location: Abdomen - Epigastric
Pain Scale: 10
Pain Qualities: Unbearable | Radiating | Sharp | Cramping | Burning
History of Trauma: No
Onset: 2-6 Months
Duration:
Exacerbating Factors: supine position
Relieving Factors: lying on Left side , milk, tylenol
Comments:

ROS:

General

Constitutional Symptoms

Anorexia (yes), Fatigue (yes), Fever (no), Unexplained Weight Loss (yes), Weakness (yes)

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg #:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	02/20/2009 10:55	Provider:	Aruiza, Roberto MLP	Facility:	CCC

Evaluation encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Aruiza, Roberto MLP

Examined 3 samples of his stool taken at 3 bowel movements. Hemocult test is positive of blood on all samples. Showed results to Dr. Nowakowski.

ASSESSMENTS:

Cosign Required: Yes

Telephone/Verbal Order: No

Administrative Note completed on RAPPE, DANIEL by Aruiza, Roberto MLP on 02/20/2009 10:55

Requested to be cosigned by Nowakowski, Bonnie M DO.

Cosigned by Nowakowski, Bonnie M DO on 02/20/2009 21:33.

Cosigner Comments:

48 yo WM seen 2/10 for abd pain -
has been on GI meds after hospitalization last summer for GI bleed d/t duod ulcer, and has not had f/u until now (tho labs, GI f/u request were ordered by this physician);
2/10, re-reviewed all records, test/ path reports from GI workup last summer & reviewed w/ pt what my recommendations were, based on my clinical impressions, given my clinical interview and physical examination; Lab tests were ordered (for chem, amylase, lipase, mag, lipids, CBC, CA19-9, gastrin & retic); FOBT was given and consults for Repeat CT and request (again) for GI follow up after last summer's workup;

Above noted, and this pt has a follow up appt entered in SENTRY for CALLOUT for me on 3/13/09;
I anticipate, that if the above blood tests are allowed to be drawn by the Clinical Director, that the results of the blood tests would be kindly be allowed for my review with this patient by that date; he is , as well as I , am becoming conserned;

Exhibit 7

Quest Diagnostics

QUEST DIAGNOSTICS INCORPORATED
CLIENT SERVICE 800.323.5917

SPECIMEN INFORMATION
SPECIMEN: WX094410L
REQUISITION: 3801899

COLLECTED: 02/03/2009 10:15 CT
RECEIVED: 02/03/2009 20:53 CT
REPORTED: 02/04/2009 00:48 CT

PATIENT INFORMATION
RAPPE,DANIEL

DOB: 09/01/1960 AGE: 48
GENDER: M FASTING: U

ID:
PHONE:

REPORT STATUS FINAL

ORDERING PHYSICIAN

CLIENT INFORMATION
C22166736
METRO CORP CTR PO-0057
DENISE FEDERIGHI
71 W VAN BUREN ST
CHICAGO, IL 60605-1004

COMMENTS: REQ #22472-424

Test Name	In Range	Out of Range		Reference Range	Lab
COMPREHENSIVE METABOLIC PANEL W/EGFR					CB
GLUCOSE	97			65-99 mg/dL FASTING REFERENCE INTERVAL	
UREA NITROGEN (BUN)	16			7-25 mg/dL	
CREATININE	0.88			0.50-1.30 mg/dL	
eGFR NON-AFR. AMERICAN	>60			> OR = 60 mL/min/1.73m2	
eGFR AFRICAN AMERICAN	>60			> OR = 60 mL/min/1.73m2	
BUN/CREATININE RATIO	NOT APPLICABLE			6-22 (calc)	
BUN/CREATININE RATIO IS NOT REPORTED WHEN THE BUN AND CREATININE VALUES ARE WITHIN NORMAL LIMITS.					
SODIUM	139			135-146 mmol/L	
POTASSIUM	4.5			3.5-5.3 mmol/L	
CHLORIDE	104			98-110 mmol/L	
CARBON DIOXIDE	23			21-33 mmol/L	
CALCIUM	9.9			8.6-10.2 mg/dL	
PROTEIN, TOTAL	7.3			6.2-8.3 g/dL	
ALBUMIN	4.5			3.6-5.1 g/dL	
GLOBULIN	2.8			2.1-3.7 g/dL (calc)	
ALBUMIN/GLOBULIN RATIO	1.6			1.0-2.1 (calc)	
BILIRUBIN, TOTAL	0.4			0.2-1.2 mg/dL	
ALKALINE PHOSPHATASE	72			40-115 U/L	
AST	12			10-40 U/L	
ALT	14			9-60 U/L	
CBC (H/H, RBC, INDICES, WBC, PLT)					CB
WHITE BLOOD CELL COUNT	6.9			3.8-10.8 Thousand/uL	
RED BLOOD CELL COUNT		4.10	L	4.20-5.80 Million/uL	
HEMOGLOBIN	13.2			13.2-17.1 g/dL	
HEMATOCRIT		37.5	L	38.5-50.0 %	
MCV	91.5			80.0-100.0 fL	
MCH	32.2			27.0-33.0 pg	
MCHC	35.1			32.0-36.0 g/dL	
RDW	14.5			11.0-15.0 %	

P. Harvey, M.D.
Clinical Director

2/6/09

RAPPE,DANIEL - WX094410L

Page 1 - Continued on Page 2

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Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg #:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	02/23/2009 12:20	Provider:	Harvey, Paul MD CD	Facility:	CCC

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Harvey, Paul MD CD

Pt. is here for abdominal pain on Omeprazole 20mg once daily and Zantac 150mg po BID. He says he is taking Tylenol 500mg orally for his pain but I have cautioned him against this course of action. He says he needs to take it for the pain though I have told him he is making the problem worse and so much so that neither the Omeprazole or Zantac will relieve his symptoms. I will increase the Zantac to 300mg po BID. He tells me his waiting for a Court appearance this Thursday 2/26 for a 'continuance' but he says he does not know when he will be sentenced. He also tells me he has not eaten since last Thursday though I do not think he is so intolerant of his meals that he cannot eat. His weight today is 214 pounds. I have also informed him that his last CBC done a few weeks ago were reviewed with him during his last visit with the staff physician and he acknowledges this and that they were normal. He inquired about the status and results of the Gualac stool cards he turned in several days. He also inquired about his eligibility to be designated to a BOP MRC and I informed him that I did not think he was sick enough to be designated to a medical center given his illness and medical acuity, the paucity of MRC beds, and the total number of inmates in the system.

The Zantac order has expired and so the medication will be renewed at the higher dose for 180 days i.e. 150 mg T2T po BID.

I am not so sure that he is not trying to delay his Court appointments as an Ex-LEO.

ASSESSMENTS:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Ranitidine Tablet	02/23/2009 12:20	150mg T2T Orally every 12 hours x 180 day(s)

Indication: Hemorrhage of gastrointestinal tract, unspecified

Cosign Required: No

Telephone/Verbal Order: No

Administrative Note completed on RAPPE, DANIEL by Harvey, Paul MD CD on 02/23/2009 12:20

Exhibit 9

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: RAPPE, DANIEL | Reg #: 22472-424
Date of Birth: 09/01/1960 | Sex: M | Race: WHITE
Encounter Date: 03/01/2009 19:02 | Provider: Velazquez, Maria MLP | Facility: CCC

Emergency encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Velazquez, Maria MLP

Chief Complaint: Bleeding from Mouth

Subjective: I/M was brought down by Op. Lt. and Internal Of. via wheelchair. I was informed by the Op. Lt. that the inmate was throwing-up and defecating coffee ground material in his floor minutes prior to bringing the I/M to the 7th floor Medical.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma: No

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

ROS:

General

Constitutional Symptoms

Weakness (yes)

Integumentary

Patient's facial skin lips were very pale. Skin was moist and cold. Clotted brownish lack material coming out of his nose and lips. His front sweat shirt was stained with the brownish black material, also the crotch area of his sweat pants was stainged with brownish black material. He was conscious but confused. He was very weak. He needed the help of two officers to transfer him to the table. He verbally requested that his feet be elevate; of which the internal officer did.

I immediately told the Op. Lt. to call an ambulance via 911.

I had difficulty getting his blood pressure reading.

GI

General

Abdominal Pain or Colic (yes), Blood in Stools (yes), Hematemesis (yes), Rectal Bleeding (yes), Stools Black (yes)

Neurological

Motor System

Limp (yes), Weakness (yes)

OBJECTIVE:

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
03/01/2009	19:07 CCC	108	Via Machine		Velazquez, Maria MLP

SaO2:

Discharge Instructions

RAPPE, DANIEL - 000666007065

* Final Report *

Result type:	Discharge Instructions
Result date:	10 March 2009 12:57
Result status:	Authenticated
Performed by:	VAID, AMIT R. on 10 March 2009 13:07
Verified by:	VAID, AMIT R. on 10 March 2009 13:07
Encounter info:	006000025534, NMH, Inpatient, 3/2/2009 -

Allergies:
No Known Allergies

Your complete list of medications to take:

esomeprazole (Nexium) 40 mg twice daily for 7 more weeks (THIS IS ABSOLUTELY MANDATORY FOR ULCER HEALING)
-after this is given for 7 weeks, switch to once daily for lifetime
-note: a proton pump inhibitor substituation is okay, but must be twice daily
acetaminophen (Tylenol) 650 mg every 6 Hours as needed for pain
Pepcid or equivalent H2 blocker PRN pain
Tylenol # 3 as needed for pain
prochlorperazine (Compazine) 5 mg every 6 Hours as needed for nausea
sodium chloride nasal (Saline Nasal Mist 0.65% solution) 1 Spray Each Nostril As Needed

Changes from your prior medications:
Started Nexium twice daily

DR. S. NOWAKOWSKI
Staff Physician
MCC Chicago, IL
3/13/09

When to call your doctor:
If symptoms of GI bleed recur

Additional instructions (daily weights, wound care):

Do not take any NSAIDs (for example, Motrin, ibuprofen, alleve) or Aspirin

Exhibit 11

BP-S802.060
FEB 05

NON-FORMULARY DRUG AUTHORIZATION

CDFRM

U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

Patient name: RAPPE, DANIEL
Register number: 22472-424

Requestor: Iskandar, Albert MLP
Institution: CHICAGO MCC

Drug requested: Esomeprazole magnesium 40 MG Cap [Nexium]
Drug approved:

Dose and Regimen: 40 mg twice daily

Date requested: 03/10/2009
Expiration of order: 03/10/2010

Diagnosis: Bleeding doudenal ulcer

Reason(s) why formulary agent(s) cannot be used: formulary agents used maximum dose for a long time, non-formulary Omperazole used too but no help.

Formulary agent(s) tried:

Cost of therapy: $0.00
Cost of formulary agent: $0.00

Institutional Chief Pharmacist:	Action taken:	Date:
Lyubashevsky, Irina PharmD	Refer up	03/12/2009

Comments: Please, evaluate. Omeprazole is given 20mg qam.

Institution Clinical Director:	Action taken:	Date:
Harvey, Paul MD CD	Refer up	03/12/2009

Comments: Two episodes of acute UGI Bleeding requiring endoscopy and blood transfusions. Most recent episode last week documented a HgB 5.0 (NL>14.0) at local hospital with inmate refusing treatment.

Pt. is awaiting sentencing and designation.

Central Office Pharmacist:	Action taken:	Date:
Shiber, Mike RPh	Refer up	03/12/2009

Comments: There is no therapeutic difference between PPI's unless utilizing IV route. Recommend titrating formulary omeprazole to symptom management.
Refer Up

Central Office Physician:	Action taken:	Date:
Manenti, John MD, RMD	Disapproved	03/13/2009

Comments:

Use Criteria:

Y	N	N/A	
X			1. Patient does NOT have Non-Ulcer Dyspepsia: NO APPROVALS. REFER TO COMMISSARY FOR OTC AGENTS
X			2. GERD: supported by current EGD documentation

Exh. 6, 1 of 2

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	RAPPE, DANIEL			Reg #:	22472-424
Date of Birth:	09/01/1960	Sex:	M	Race:	WHITE
Note Date:	04/14/2009 22:52	Provider:	Iskandar, Albert MLP	Facility:	CCC

~~Admin Note encounter performed at Housing Unit.~~

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Iskandar, Albert MLP

Inmate was informed that the bland diet will not be supplied anymore, as per Dr.Harvey's order since it is not clinically indicated for peptic ulcer, Inmate verbalized understanding

ASSESSMENTS:

~~**Cosign Required:** Yes~~

Telephone/Verbal Order: No

Administrative Note completed on RAPPE, DANIEL by Iskandar, Albert MLP on 04/14/2009 22:52

Requested to be cosigned by Harvey, Paul MD CD.

Cosigned by Harvey, Paul MD CD on 04/15/2009 08:17.

Cosigner Comments:

Noted.

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Matthew F. Kennelly	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 4636	**DATE**	December 23, 2011
CASE TITLE	Daniel Rappe (22472-424) v. Paul Harvey, M.D.		

DOCKET ENTRY TEXT:

The case is dismissed with prejudice pursuant to the parties' settlement agreement. As set forth in the parties' agreement, each side shall bear its own costs. Civil Case Terminated.

Docketing to mail notices.

	Courtroom Deputy Initials:	CR

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Matthew F. Kennelly	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 4636	**DATE**	December 23, 2011
CASE TITLE	Daniel Rappe (22472-424) v. Paul Harvey, M.D.		

DOCKET ENTRY TEXT:

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Docketing to mail notices.

	Courtroom Deputy Initials:	CR

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Matthew F. Kennelly	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 4636	**DATE**	November 17, 2011
CASE TITLE	Daniel Rappe (22472-424) v. Paul Harvey, M.D., et al.		

DOCKET ENTRY TEXT:

The parties have filed a Stipulation for Compromise Settlement and Release signed by both parties. (Dkt. No. 47). The settlement releases Plaintiff's claims against all parties in this suit and his claims in his administrative actions in exchange for a monetary payment. The settlement also calls for a dismissal of this action with prejudice. The Court intends to dismiss this case with prejudice pursuant to the settlement agreement. If either party objects to the dismissal of the case with prejudice, he should file a motion with the Court by no later than December 8, 2011.

Docketing to mail notices.

	Courtroom Deputy Initials:	CR

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Matthew F. Kennelly	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 4636	**DATE**	December 23, 2011
CASE TITLE	Daniel Rappe (22472-424) v. Paul Harvey, M.D.		

DOCKET ENTRY TEXT:

The case is dismissed with prejudice pursuant to the parties' settlement agreement. As set forth in the parties' agreement, each side shall bear its own costs. Civil Case Terminated.

Docketing to mail notices.

	Courtroom Deputy Initials:	CR

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Matthew F. Kennelly	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 4636	DATE	10/24/2011
CASE TITLE	Daniel Rappe (#22472-424) vs. Paul Harvey, et al.		

DOCKET ENTRY TEXT

For the reasons stated below, the Court denies defendant Harvey's motion to dismiss [dkt. no. 19]. The Court grants plaintiff's motion to extend time to file his amended complaint [dkt. no. 38] and, based on its order of 9/12/11, terminates plaintiff's motion for a judicial letter [dkt. no. 42]. The Court directs the Clerk to issue summonses to newly named defendants Officer Frazier, Officer Jackson, and the United States, and directs the Marshal to serve those defendants. Plaintiff is directed to cooperate with the Marshal in completing any forms necessary for service of summons. Dr. Harvey is directed to answer the amended complaint by no later than 11/14/11.

■[For further details see text below.] Docketing to mail notices.

STATEMENT

Daniel Rappe, a federal prisoner formerly housed at the Chicago Metropolitan Correctional Center (MCC), brought a pro se *Bivens* action against Dr. Paul Harvey, a physician at the MCC. Rappe alleged in his original complaint that Dr. Harvey violated his constitutional rights by acting with deliberate indifference to his medical needs and coercing him to accept medical treatment against his will and religious beliefs. With leave of court, Rappe later filed an amended complaint in which he named additional defendants and also sued the United States under the Federal Tort Claims Act (FTCA).

Dr. Harvey has moved to dismiss the *Bivens* claim against him on the ground that 42 U.S.C. § 233(a) grants him absolute immunity. He supported the motion with an affidavit by Captain Ben Brown, the Commissioned Corps Liaison for the Health Services Division of the Federal Bureau of Prisons. Captain Brown states that Dr. Harvey was a Public Health Services official during the time alleged in Rappe's suit. Rappe argues in response that Dr. Harvey's alleged actions were not within the scope of his employment and that the Court allow discovery before deciding the issue. In reply, Dr. Harvey argues that the Court should not grant discovery or a hearing because Rappe has failed to plead facts sufficient to support a claim that Dr. Harvey acted outside the scope of his employment.

Rappe was housed at the MCC as a pretrial detainee. In July 2008, he complained of abdominal pain and bloody stool, MCC medical personnel sent him to Thorek Hospital. Physicians there diagnosed Rappe as suffering from a bleeding duodenal ulcer and provided treatment. They also prescribed Omeprazole, a medicine used to treat peptic ulcers. Upon his return to the MCC, however, the MCC pharmacist was told to provide Rappe with half the dosage the Thorek physicians had prescribed.

On August 6, 2008, Rappe was examined at the MCC by Dr. Bonnie Nowakowski, a staff physician who was acting as clinical director while Dr. Harvey, the clinical director, was away. Dr. Nowakowski submitted a

STATEMENT

request for the full dosage of Omeprazole prescribed by the Thorek physicians, but Dr. Harvey cancelled this request, saying he wanted to evaluate Rappe first. Dr. Nowakowski's notes reflect that Dr. Harvey requested medication for Rappe on August 12, 2008. Rappe did not receive the medication, however, because (as he later learned) the request was never written up.

Rappe continued to request medication and make complaints regarding his condition. On September 12, 2008, Dr. Harvey approved the Omeprazole, but at half the dosage prescribed by the Thorek physicians. Rappe alleges that as a result, his condition continued to worsen. Dr. Nowakowski placed Rappe in the chronic care clinic so that Dr. Harvey could assess his long term treatment. An evaluation was scheduled for October 31, 2008, but Rappe says it never took place. He continued to make requests for examination and treatment over a period of several months, to no avail.

Dr. Nowakowski examined Rappe on February 10, 2009 for an "emergency encounter" and noted in her report that Rappe's condition had worsened. A lab report dated February 6, 2009 indicated that Rappe had low red blood cell, hemoglobin, and hematocrit counts, indicating internal bleeding. Dr. Nowakowski noted on February 20, 2009 that she was becoming concerned and that she had already made multiple requests for further testing and treatment.

Dr. Harvey examined Rappe on February 23, 2009, and instructed him to stop taking Tylenol, which he had been taking to alleviate his pain. Dr. Harvey also stated that Rappe's recent lab tests were "normal." Rappe alleges that Dr. Harvey's demeanor during this examination suggested that he "enjoyed denying plaintiff hope of treatment."

On March 1, 2009, Rappe was taken to Northwestern Memorial Hospital in by ambulance due to blood loss. He remained there for ten days, and his condition began to improve during that stay. During this time Rappe was treated and his condition began to improve. Once he became lucid, however, Rappe refused further blood transfusions. The Northwestern physicians told Rappe that he might die without additional blood transfusions, but he continued to refuse. Rappe says that he had grown tired of the pain and suffering and did not want to be healed to the point where he would be returned to the care of Dr. Harvey. Instead, he says, he wished to place "his faith and fate in the care of a higher power by letting God decide whether or not to heal him." Dr. Harvey informed the hospital and Rappe that he intended to remove Rappe back to the MCC and obtain an emergency court order for treatment. Rappe says that as a result of this threat, he agreed to allow hospital personnel to continue treating him.

Rappe was released from the hospital on March 10, 2009. His treating physician gave express instructions to take 40 mg of Omeprazole twice daily for eight weeks. Dr. Harvey, however, prescribed only one 20 mg dose per day through May 4. Rappe says that his requests for additional medication were officially denied but that he was able to obtain additional medicine from "sympathetic MCC medical personnel" and through "alternate means." Over time, he says, his condition improved.

The physicians at Northwestern Hospital also prescribed a "soft diet" to avoid aggravating his condition. He alleges that Dr. Nowakowski ordered this but that Dr. Harvey cancelled the order and a later reinstatement of the order by Dr. Nowakowski. Dr. Rappe stated that a "bland diet" was not "clinically indicated for peptic ulcer."

Rappe filed this suit on July 26, 2010. He filed an amended complaint on August 4, 2011 to add a claim against the United States under the FTCA and to name additional individual defendants.

STATEMENT

Pursuant to 42 U.S.C. § 233(a), a suit against the government under the FTCA is the exclusive remedy for a claim against a member of the Public Health Service (PHS) involving the performance of medical or related functions within the scope of the PHS member's employment, including treatment of or failure to treat an inmate. *Hui v. Castaneda*, 130 S. Ct. 1845, 1851 (2010). Federal law governs whether a federal employee was acting within the scope of his employment, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 435 (1995), but Dr. Harvey expressly concedes that to determine this issue, a federal court looks to the law of the state where the alleged acts took place, in this case Illinois. Def.'s Reply at 2.

Several Illinois cases indicate that when a government employee acts out of personal animosity toward an injured party, the employee's acts may be outside the scope of his government employment. *See, e.g., Sellers v. Rudert*, 395 Ill. App. 3d 1041, 1047, 918 N.E.2d 586, 592 (2009); *Nikelly v. Stubing*, 204 Ill. App. 3d 870, 876, 562 N.E.2d 360, 364 (1990). Rappe has alleged sufficient facts to invoke this apparent rule. His allegations that Dr. Harvey repeatedly overruled, cancelled, or ignored treatment prescribed by other physicians might not be enough by themselves, but Rappe also alleges that during at least one visit, Dr. Harvey displayed a demeanor indicating that he took pleasure from denying Rappe treatment and seeing him suffer. That allegation gives rise to a viable claim of personal animus. The Court makes no finding, of course, that what Rappe alleges is true. At the motion to dismiss stage, however, the Court is required to take Rappe's factual allegations as true. And even though the hurdle established by *Sellers* and other Illinois cases may be quite difficult for Rappe to clear, his allegations entitle him to an opportunity to try.

The Court also notes that it has not yet ordered service of summons on the defendants newly named in the amended complaint. The Court will do so by way of this order.

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Matthew F. Kennelly	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 4636	DATE	May 23, 2011
CASE TITLE	Daniel Rappe (22472-424) vs. Paul Harvey, M.D.		

DOCKET ENTRY TEXT

Plaintiff's motion to add Defendants (dkt. no. 28), is denied without prejudice. Plaintiff is given leave to submit a proposed amended complaint, if he wishes to do so, by June 23, 2011. The clerk shall provide plaintiff with an amended civil rights complaint form and instructions along with a copy of this order.

■[For further details see text below.] Docketing to mail notices.

STATEMENT

Pro se plainitff Daniel Rappe has filed suit under *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against defendant Dr. Paul Harvey, M.D. Plaintiff now requests leave to add the United States, among others, as defendants.

A lawsuit for damages against an agent of the United States Government for alleged unconstitutional conduct is governed by *Bivens*. A lawsuit for damages against the United States is governed by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 & 2671-80. *Okoro v. Callaghan*, 324 F.3d 488, 490 (7th Cir. 2003). "Plaintiffs contemplating both a *Bivens* claim and an FTCA claim are encouraged to pursue their claims concurrently in the same action, instead of in separate actions." *Manning v. United States*, 546 F.3d 430, 433 (7th Cir. 2008) (citing *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996)).

Before a plaintiff can file a claim under the FTCA, however, he must first exhaust administrative remedies by filing an administrative claim with the federal agency or agencies involved. *See* 28 U.S.C. § 2675(a). A plaintiff satisfies the exhaustion requirement only when such a claim has been denied by the agency or the agency has failed to decide the claim within six months of the claim being filed. *Id.* There is a two-year time limit for presenting an administrative claim to the federal agency. *See* 28 U.S.C. § 2401. If plaintiff has not yet filed an administrative claim with the agency or agencies involved, he would be well-advised to do so promptly.

Plaintiff simply seeks to add the United States as a defendant without asserting a claim under the FTCA. The Court therefore denies his motion without prejudice. If plaintiff wishes to add a claim under the FTCA naming the United States as a defendant, he may file a proposed amended complaint.

Should he plaintiff chooses to file a proposed amended complaint, plaintiff must write both the case number and the Judge's name on the proposed amended complaint, sign it, and return it to the Prisoner Correspondent. As with every document filed with the Court, plaintiff must provide an extra copy for the Judge; he must also submit a service copy for each defendant named in the proposed amended complaint. Plaintiff is cautioned that an amended pleading supersedes the original complaint and must stand complete on its own. Therefore, *all* allegations against *all* defendants must be included in the amended complaint, without reference to the original complaint. Any exhibits plaintiff wants the Court to consider in its threshold review of the proposed amended complaint must be attached, and each copy of the proposed amended complaint must include complete copies of any and all exhibits. Plaintiff is advised to keep a copy for his files. The clerk will provide plaintiff with an amended civil rights complaint form and instructions along with a copy of this order.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANIEL RAPPE,	)	
	)	
Plaintiff,	)	No. 10 C 4636
	)	
v.	)	Judge Kennelly
	)	
UNITED STATES *et al.*,	)	
	)	
Defendants.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between the undersigned plaintiff and the United States of America (collectively, the "parties") as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action, and that gave rise to plaintiff's administrative claims nos. TRT-NCR-2011-03898 and TRT-NCR-2010-00365 , under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release.

2. The United States of America agrees to pay the sum of $25,000 (twenty-five thousand dollars) (hereinafter "Settlement Amount"), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators, or assigns hereby agree to accept the settlement amount set forth in this Stipulation in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, and that gave rise to plaintiff's administrative claims nos. TRT-NCR-2011-03898 and TRT-NCR-2010-00365, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators, or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Stipulation is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. Plaintiff agrees to the dismissal of this action with prejudice.

7. The persons signing this Stipulation warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. The undersigned each acknowledge and represent that this Stipulation contains all the terms and conditions of this compromise settlement, that no promise or representation not contained in this Stipulation has been made to them, and that this Stipulation contains the entire understanding between the parties and contains all terms and conditions pertaining to the compromise and settlement of the disputes referenced herein.

9. The parties agree that this Stipulation and any additional documents relating to this settlement, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 9th day of November 2011.

JONATHAN C. HAILE
Assistant United States Attorney

Executed this 4th day of November 2011.

DANIEL RAPPE, Plaintiff

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0810 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0811 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0812 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0813 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0814 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANIEL RAPPE,	)	
	)	
Plaintiff,	)	No. 10 C 4636
	)	
v.	)	Judge Kennelly
	)	
UNITED STATES *et al.*,	)	
	)	
Defendants.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between the undersigned plaintiff and the United States of America (collectively, the "parties") as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action, and that gave rise to plaintiff's administrative claims nos. TRT-NCR-2011-03898 and TRT-NCR-2010-00365 , under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release.

2. The United States of America agrees to pay the sum of $25,000 (twenty-five thousand dollars) (hereinafter "Settlement Amount"), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators, or assigns hereby agree to accept the settlement amount set forth in this Stipulation in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, and that gave rise to plaintiff's administrative claims nos. TRT-NCR-2011-03898 and TRT-NCR-2010-00365, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators, or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Stipulation is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. Plaintiff agrees to the dismissal of this action with prejudice.

7. The persons signing this Stipulation warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. The undersigned each acknowledge and represent that this Stipulation contains all the terms and conditions of this compromise settlement, that no promise or representation not contained in this Stipulation has been made to them, and that this Stipulation contains the entire understanding between the parties and contains all terms and conditions pertaining to the compromise and settlement of the disputes referenced herein.

9. The parties agree that this Stipulation and any additional documents relating to this settlement, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 9th day of November 2011.

JONATHAN C. HAILE
Assistant United States Attorney

Executed this 4th day of November 2011.

DANIEL RAPPE, Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JAN 14 2011

GREGORY C. LANGHAM
CLERK

Civil Action No. '11 -CV - 00109
(To be supplied by the court)

Mikeal Glenn Stine #55436-098, Plaintiff,

Verified Complaint
28 USC 1331 ACTION
Under Penalty of
"PERJURY"
28 USC 1746 AS being
True And Correct
Mikeal D. Stine
DATE 1-7-2011

v.

Federal Bureau of Prisons,
Harley Lappin, Director BOP,
Michael K. Nalley, Regional Dir. BOP N.C. Region,
Blake Davis, Warden ADX Florence,
Mr. D. Allred, Clinical Director ADX,
A. Osagie, Physicians Assistant ADX,
Ms. Patricia Rangel, D-unit Manager,
Ms. Tina Sudlow, D-unit Case Manager ADX,
Mr. D. Foster, D-unit Counselor ADX,

, Defendant(s).

(List each named defendant on a separate line.)

PRISONER COMPLAINT

A. PARTIES:

"Plaintiff"

(1). MIKEAL Glenn Stine # 55436-098

United States Penitentiary ADX, P.O. Box 8500, Florence, Co. 81226

Defendants

(2). Harley LAPPIN Director, U.S. Federal Bureau of Prisons
320 First Street NW.
WASHINGTON D.C. 20534

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes __ No (CHECK ONE). Briefly explain your answer:

AS (Director BOP) At Central office Wash. D.C.; ACTION IS BROUGHT against (HARLEY LAPPIN) in His official And Individual Capacity:

(3). Michael K. NALLEY, Regional Director North Central Region BOP
(Name, title, and address of second defendant)
Gateway Complex, Tower II / 8th Floor
500 State Avenue, KANSAS City, KS. 66101

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes __ No (CHECK ONE). Briefly explain your answer:

AS (Regional Director) At BOP N.C. REGION; Action is BROUGHT against (Michael K. NALLEY) in His official And INDIVIDUAL Capacity:

(4). D. Allred, MD. / Clinical Director ADX Florence
(Name, title, and address of third defendant)

United States Penitentiary ADX, P.O. Box 8500, Florence, Co. 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes __ No (CHECK ONE). Briefly explain your answer:

AS (DR. Clinical Dir. ADX) At USP-Florence ADX; Action is BROUGHT Against (D. Allred) in His official And Individual Capacity:

(If you are suing more than three defendants, use extra paper to provide the information requested above for each additional defendant. The information about additional defendants should be labeled "A. PARTIES.")

* CONTINUED AT PG. (2-A) *

(Rev. 1/30/07)

A. PARTIES Continued

(5). A. OSAGIE, Physicians Assistant ADX

United States Penitentiary ADX, P.O. Box 8500, Florence, Co. 81226
Acting Under Color of Law As (Physicians Asst)/Action is Brought
Against (A. OSAGIE)/in His official And Individual Capacity:

(6). Patricia Range), D-unit Manager ADX Florence

United States Penitentiary ADX, P.O. Box 8500, Florence, Co. 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes ___ No (CHECK ONE). Briefly explain your answer:

As (Unit Manager) At USP-Florence ADX; Action is Brought
against (Patricia Range) in Her official And Individual Capacity:

(7). Tina Sudlow, D-unit CASE MANAGER
(Name, title, and address of second defendant)

United States Penitentiary ADX P.O. Box 8500 Florence, Co. 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes ___ No (CHECK ONE). Briefly explain your answer:

As (D-unit Case Manager) At USP-Florence ADX; Action is Brought
against (Tina Sudlow) in Her official And Individual Capacity:

(8). Blake Davis, Warden ADX Florence
(Name, title, and address of third defendant)

United States Penitentiary ADX, P.O. Box 8500, Florence, Co. 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes ___ No (CHECK ONE). Briefly explain your answer:

As (Warden) At USP-Florence ADX; Action is Brought
Against (Blake Davis) in His official And Individual Capacity:

(If you are suing more than three defendants, use extra paper to provide the information requested above for each additional defendant. The information about additional defendants should be labeled "A. PARTIES.")

* CONTINUED AT PG. (2-B) *

A. PARTIES Continued

(9). D. Foster, Counselor D-unit ADX Florence

United STATES Penitentiary ADX, P.O. Box 8500, Florence Co. 81226
Acting under Color of Law AS (Counselor)/Action is Brought
Against (D. Foster)/in His official And Individual Capacity:

(10). Federal Bureau of Prisons (Agency)

320 First Street N.W. Washington D.C. 20534

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes __ No (CHECK ONE). Briefly explain your answer:

AS (Agency) Federal Bureau of Prisons; Action is Brought
Against (Agency BOP) under official And Individual Capacity:

( )

(Name, title, and address of second defendant)

United STATES Penitentiary ADX P.O. Box 8500 Florence, Co. 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes __ No (CHECK ONE). Briefly explain your answer:

AS ( ) At USP-Florence ADX; Action is Brought
Against ( ) in their official And INDIVIDUAL Capacity:

( )

(Name, title, and address of third defendant)

United STATES Penitentiary ADX, P.O. Box 8500, Florence Co. 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes __ No (CHECK ONE). Briefly explain your answer:

AS ( ) At USP-Florence ADX; Action is Brought
Against ( ) in their official And Individual Capacity:

(If you are suing more than three defendants, use extra paper to provide the information requested above for each additional defendant. The information about additional defendants should be labeled "A. PARTIES.")

[redacted]

B. JURISDICTION

1. I assert jurisdiction over my civil rights claim(s) pursuant to: (check one if applicable)

___ 28 U.S.C. § 1343 and 42 U.S.C. § 1983 (state prisoners)

X 28 U.S.C. § 1331 and ***Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics***, 403 U.S. 388 (1971) (federal prisoners)

2. I assert jurisdiction pursuant to the following additional or alternative statutes (if any):

28 USC 2241 HAbeas Corpus of Which The Plra does NOT ATTACH.

C. NATURE OF THE CASE

BRIEFLY state the background of your case. If more space is needed to describe the nature of the case, use extra paper to complete this section. The additional allegations regarding the nature of the case should be labeled "C. NATURE OF THE CASE."

DeNial of RiGHT To, SPeedY; And AdeQUATE MedicAl And DentaL CAre for SERious Medical And Dental Conditions. That HAS Allow the Conditions To ProGress And Worsen and me to suffer Pain because of NOT being Afforded Medical Care as means of Retaliation For Adminstrative + LeGAl filings Against BOP And its Staff, And Based Upon Stated Violate The 8th Amendment against CRUEL AND UNUSABLE PUNISHMENT", CLAIMS ONE AND TWO:

Plaintiff STATES, "MR Harley LAPPin; MICHaeL K. NAlley And The United STATES Federal Bureau of Prisons" HAVE SINCE Oct. 2nd 2006 And Continue To FALSELY IMPRISON Plaintiff in A Control Unit. Claims Three:

"Harley LAPPin; Michael NAlley; Blake Davis; P. Rangel; Tina Sudlow; D. Foster; And BOP" HAVE SINCE 10-2-2006 INCArcerated Plaintiff under unsafe Conditions Allowing Plaintiff to be assaulted With Weapons by Members of The "ARYAN Brotherhood" Whom Have Murder Contract on Plaintiff, IN order To operate ADX on less Money Than to Provide AdeQuate SAfety + safe INCArceration Claim(4)

D. CAUSE OF ACTION

State concisely every claim that you wish to assert in this action. For each claim, specify the right that allegedly has been violated and state all supporting facts that you consider important, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific cases to support your claim(s). If additional space is needed to describe any claim or to assert more than three claims, use extra paper to continue that claim or to assert the additional claim(s). The additional pages regarding the cause of action should be labeled "D. CAUSE OF ACTION."

1. Claim One: 8TH Amendment Violation /Re: Medical + Dental Care: CRUEL + UNUSUAL PUNISHMENT.

Supporting Facts: During the last Week of Nov. 2010 Approximately (35-40) DAYS AGO I Wrote ADX Health Services (Dental) And Advised I HAD 1-2 Teeth abscessed Very Painful. Swelled and DISAllowing me to EAT The MAJority of my meals. This is further adversely effecting MY Health OVER-All because I'm NOT Getting the Adequate Nutrition, And is Causing me WEIGHT loss; Weakness; Head-aches; Hunger Pains; And Whirling DIZZYness that CAUSED Knee injury on 1-3-2010 At approximately 2230 Hours (Addressed INFRA) The lack of Treatment HAS Allowed The infection to Spread To All(R) Upper teeth that Will Now CAUSE them the Need of Extraction, Additionally Teeth ABSCESSES HAS Allowed The infection to travel to brain And Cause Death. AS of this Writing I Have received No Treatment or Pain medication... However I received Response To The request That MY NAME HAS been added To The Dental WAiting list. I Would Add Prisoners Generally HAVE More Extensive dental Problems than the AVERAGE citizen And Consequently dental CARE is ONE of The most important medical Needs of INMATES; SEE; RAMOS V. LAMM, 639 F.2d. 559, 576 (10TH CIR. 1980); PATTERSON V. Pearson, 19 F.3d. 439 at 440 (8TH CIR. 1994); Fields V. Gander, 734 F.2d. 1313, 1314-1315 (8TH CIR. 1984).

(b). Dr. D. Allred is employed AS Health SERVICES Clinical Director OVER All Medical To include Dental for INMATES of The ADX And is Responsible for Seeing All INMATES Receive Prompt And ADEQUATE Medical And DENTAL CARE. Additionally MR. Allred is responsible for INSURING Adequate Dental STAFF ARE Available To Treat The Number of Dental Problems of ADX inmates insuring That inmates receive Speedy Treatment and Not left days Weeks And Months Suffering Dental Problems.

(c). Plaintiff STATES No full time Dentist for over 500 inmates is Constitionally inadequate AS MANY INMATES of ADX HAVE Been on Treatment list

* Continued At (4A) *

(1). CLAIM ONE CONTINUED :

- for years without being treated, To be on waiting list is NOT Adequate Dental CARE, RAMOS V. LAMM 639 F.2d. 559 at 576 (10TH Cir. 1980); CHANCE V. ARMSTRONG, 143 F.3d. 698 at 703 (2nd Cir. 1998) Holding failure to treat Dental Problems of inmates CAUSES the INMATE to Suffer Extreme Pain And HAVE His teeth deteriorate and disAllowing INMATE to EAT; Boyd V. Knox, 47 F.3d. 966, 969 (8TH Cir. 1995) Holding 3-week delay in recieving Dental CARE Coupled With Written Statement from INMATE of Pain Supports Eighth Amend. Violation, The Courts HAVE Held Dental PAin by INMATE IS Serious Medical Condition. RAMOS V. LAMM, 639 F.2d. 559 (10TH Cir. 1980) And WYNN V. Southward, 251 F.3d. 588 at 593 (7TH Cir. 2001). "This Claim Constitutes Imminent Danger Exception.

= End of Claim one"

2. Claim Two: 8TH Amendment Violation/Medical Care Not Provided For Serious injury Cruel + Unusual Punishment

Supporting Facts:

ON 1-3-2011 because of Dental Problems And refused Treatment AT This Writing I WAS WALKING to MY Cell Tolet D-C-606 of the Admistrative MAXimum Control unit and become Dizzy And falling, MY left Knee entangled between Tolet + Stool Approximately 1-Foot from each other Causing Knee to Pop With Extreme Pain and unable to Straishten or Put weight on. "feels like Grinding Popping And Catching Causing Shap Shooting Pains on Scale of (1-10) The Pain is at unbearable 9½ at least. I Pushed Emergency medical assist button And STAff STATed I must wait until Morning (1-4-2011). at Approximately 0630 hours While Attempting To WALK To Cell Door to receive Breakfast Knee Popped Worse Again and Unit STAff Whiting the Unit officer Notified Medical of MY injury And Problem at Approximately 0800 Hours 1-4-2011, I further wrote Cop-out Requesting To SEE Doctor And for Treatment. AT Approximately 1100 hours The officer (unknown in Control Bubble) CAME on intercom STATED STINE Medical Will NOT Answer We left Message, At 1300 hours C/O Whiting CAME to door And Told me STINE We Called Again... But No one's AT Medical.. about 1325 hours The unknown Control bubble officer CAME on intercom STATED Medical Called And if No one Comes before meds Are Passed out For me To Address With Medical STAff PASSING OUT The medication. No ONE Ever Came And Ms. Vanderman (Passes out Medication Wears White like Nurse) Come To MY Cell Door On 1-4-2011 AT Approximately 1822 Hours With Correctional officer T. Goff, Ms. Vanderman looked Throush Cell door Window AT left Knee Swelled Purple + Blue Noting INJURY STATED STAP off So Not To Worsen The injury, But STATED STINE its Clear Your injuried But I'm No Nurse or P/A Write a Cop-out To medical. And left. The SAME HAS occurred With all STAff PASSING OUT Medications being: 1-5-2011 at 0430 Hours; 1-5-2011 at 1800 hours; 1-6-2011 at 0430 Hours. And Continues With No Treatment

 Continued at (PAGE 5-A)

(2). Claim Two Continued:

- I CANT WALK And Medical HAVE Advised in ADX Florence Wheel Chairs or Crutchs ARE NOT Allowed For inmates that if I WAnt to USE rest room or Receive my meals I Must Crawl to toilet or door for Meals And To The Shower of Sink.

"NOTE" This EXACT SAMEthing WAS done IN Fuller V. Wilcox, 288 Fed. Appx. 509; 2008 U.S. App. Lexis 16581 No. 08-3077 AUG. 4TL 2008 in Which The United STATES Court of APPeal found Souly on The FACT THAT The WAS denied Wheelchair or Crutches And forced to Crawl on floor to Shower etc. Could result in a Number of Serious injuries And Therefore SATISfied IMMINENT DANGER EXCEPTION. The Court EXPressed NO OPINION ConCerning the Merits OF the CASE. SEE Exhibit (2) ATTACHED Hereto;

The Plaintiff Herein is Subject To The 3-Strike restriction And STATES Fuller SUPRA Shows He SAtisfies The imminent DANGER EXCEPtion The Tenth Circuit Concluded in Fuller And That This ACTION MUST be Allow based on 10TL Cir. Conclusion of Fuller

(b). Here Security STAFF refused to Allow Plaintiff His Prescribed left Knee BRACE. (TAKEN MONTHS ASO in Shake Down) And HAd written Medical STAFF And Addressed With MR. A. OSAGIE PHYSICIAN'S ASSISTant Whom Will NOT Address, NOTE MR A. OSAGIE IS ASSigned to D-unit And Provides All Medical To INMATES of D-unit And Resularly Denys — —

* CONTINUED AT (5B) *

(2). CLAIM TWO Continued:

- Medical Attention to Plaintiff as Retribution for CASE No. 07-CV 00799-WYD-KLM Defendants; Ron Wiley; Steven Natziger; George Knox; A. OSAgie; officer, Jenkins And Lt. SWANSON of Which I WAS The Plaintiff, And DURING the Month of OCT 2008 MR. A. OSAgie STATED, "STINE me And Doctors Here Will No longer Treat You", "You file on me at Courts, You learn that - a BAD thing for Prisoner", NOTE MR. OSAgie CAN HARDLY TALK And From UKraine And thereby Demonstrating A Meeting of the Minds With (UnKnown Medical STAFF) to Give me medical treatment. NOTE, the Conditions Stated Allege And SATISFY IMMINENT DANGER EXCEPTION REQUIREMENT, STAFF And BOP/ Agency in Providing Undelayed Medical Treatment results in My Suffering Un-Needed Extreme Pain, and Amounts to Deliberate indifference, Hoe V. Armistead, 582 F.2d. 1291, 1296 (4TH Cir. 1978) Holding that 11-hour Delay in Examining INMATE Painfully Swollen Arm amounted to Deliberate indifference Here its been days. Here after Medical STAFF HAVE been NOTIFIED of inJury By Unit Staff And HAVE Done NOTHING, Sealock V. Colorado 218 F.3d. 1205, 1208 (10TH Cir. 2000). And Estelle V. Gamble, 429 U.S. at 105-06; Hunt V. Uphoff, 199 F.3d. 1220, 1224, (10TH Cir. 1999).

3. Claim Three: "FALSE IMPRISONMENT IN CONTROL UNIT" of Plaintiff MIKEAL Glenn Stine:

Supporting Facts:

Plaintiff MIKEAL Glenn Stine No. 55436-098 States Harley LAPPIN Director BOP: Michael K. NALLEY, Regional Dir. BOP: Blake Davis, Warden ADX: P. Rangel, Unit Manager D-unit ADX: Tina Sudlow, CASE MANAGER D-unit: And D. Foster, Counselor, HAVE Since 10-2-2006 Held Plaintiff FALSELY Imprisoned Within the Control Unit, Without SENTENCE to Control Unit or Requirements of 28 CFR 541.40 Through 541.49 And Knowingly Continued Plaintiff FALSE imprisonment of Which He is entitled to immediate Release.

End of Claim Three

4. Claim Four: UNSAFE INCARCERATION in Violation of 8th Amendment:

Supporting Facts:

Director LAPPIN + Regional Director While Meeting With officials At ADX Florence FACILITY Choose to DISCONTINUE Protective Custody in order To Run ADX on less funds. MR. LAPPIN And MR. NALLEY Knew That discontinuing Protective Custody Would Result in inmate Assaults And Murder. because it Forces INMATES Such as "Informants", To live Amouns Those They HAVE Cooperated Against; Gang Drop-outs To live Amouns Active Gang Members Seeking To Murder Them, And SEX offenders To be around General INMATES When its Common Knowledge All NON-sex offenders Will And WANT TO Assault them. It Does NOT MATTER That inmates Are Single Celled at ADX AS INMATE Works HAVE Access To Tools And Access To All inmates And HAVE

Continued At (6A) *

(4). CLAIM FOUR CONTINUED:

-used their Work tools to breakintothe tarset INMATES Cell and ASSault them in (D) (E) (F) (G) (H) (B) And (Z) units AS Well Plaintiff HAS been assaulted by A/B And the ORGANIZATIONS ASSOCIATES BY Means that The BOP Staff testified Could NOT HAPPEN in JAN. 2007 EVIDENTIARY HEARING CASE No. 06-CV-02105-WYD-KLM because Members of A/B ARE Housed With DROP-OUTS Such AS Plaintiff And Recreated With in Connecting CASES And HAVE ASSaulted Plaintiff And OTHERS With Blow DARTS DIPPED in HUMAN feces And Blood of Infected Persons, And ASSaulted BY HAVING feces URINE And unKnown Substances, AS Well on DEC. 25TH 2010 officer J. Gabby Will Confirm Tower Bubble OPened Plaintiff And INMATE Nichols Doors AT SAME TIME However Were friends And NOTHING HAPPEN, But SUPPOSE it WAS ENEMY WISHING TO ASSault me. The 8TH CIR. Address this EXACT Point in Ashley V. Dilworth, 147 F.3d. 715 AT 717 (8TH CIR. 1998) Holding HOUSING KNOWN ENEMIES AROUND EACH EACH OTHER IS Powder KEG WAITING to EXPLODE And Constitues IMMINENT DANGER ALSO SEE; Rowe V. Howard 2010 U.S. Dist. Lexis 68164 Where INMATE WAS SCALded With HOT SUBSTANCE BY LATIN KING member of Which Plaintiff in Rowe V. Howard WAS drop-out, And WAS HOUSED Alone. Plaintiff Will REQUEST EVIDENTIARY HEARING CALLING STAFF And inmates for DIRECT EXAMINATION And Cross And AT Conclusion there Will be NO Doubt, Current Conditions of ADX Constitute Unsafe INCARCERATION, NOTE This HAS Already resulted in Chris Anderson Murder: And MANUEL Torrez's Murder AS Well Several OTHER ASSAULTS (A few being) —

 * CONTINUED AT (6B) *

(4) Claim Four Continued:

- Emilio Bravo Assault By A/B Whom is to be Kept Seperated From And Not Done. Then inmate K. Lewis been assulted by His official Seperation William Temple No. 38462-066 As Well the Most resent Assault of Eric Rudolph With Spear and feces While in recreation Pens. The list goes on And on And New Evidence That was Not Prior-ly Available is Now Available through oral Testimony of Staff And Inmates to Prove this Point before this Court, This Claim Also Satisfys Immiment Danger Exception.

"End of Claim Four"

E. PREVIOUS LAWSUITS

Have you ever filed a lawsuit, other than this lawsuit, in any federal or state court while you were incarcerated? X Yes ___ No (CHECK ONE). If your answer is "Yes," complete this section of the form. If you have filed more than one lawsuit in the past, use extra paper to provide the necessary information for each additional lawsuit. The information about additional lawsuits should be labeled "E. PREVIOUS LAWSUITS."

1. Name(s) of defendant(s) in prior lawsuit: RON WILEY, ET. AL.

2. Docket number and court name: 09-CV-00278-CMA-MEH

3. Claims raised in prior lawsuit: 8th Amendment + Due Process

4. Disposition of prior lawsuit (for example, is the prior lawsuit still pending? Was it dismissed?): Voluntary Dismissed Prior to Answer

5. If the prior lawsuit was dismissed, when was it dismissed and why? Voluntary Dismissed End of Au...

6. Result(s) of any appeal in the prior lawsuit: N/A

*CONTINUED AT (7-A) *

F. ADMINISTRATIVE RELIEF

1. Is there a formal grievance procedure at the institution in which you are confined?

   X Yes ___ No (CHECK ONE).

2. Did you exhaust available administrative remedies? X Yes ___ No (CHECK ONE).

   SEE: Exhibit (ONE Affidavit of MIKEAL Glenn STINE)

(D). [redacted] Previous Lawsuits Continued:

SHOWS All Federal CASES OF STINE MIKEAL #55436-098

	Name	Court	Case No.	Filed	NOS	Closed
1	STINE, MIKEAL	codce	1:2006cv02105	10/23/2006	555	05/09/2007
2	STINE, MIKEAL GLENN	txsdce	6:2006cv00021	02/28/2006	510	
3	STINE, MIKEAL GLENN	azdce	2:1994mc00044	05/12/1994	999	08/12/1998
4	STINE, MIKEAL GLENN	azdce	4:1995cv00098	02/15/1995	550	06/22/1995
5	STINE, MIKEAL GLENN	codce	1:2007cv00102	01/16/2007	555	02/08/2007
6	STINE, MIKEAL GLENN	kywdce	3:1994cv00106	02/18/1994	550	05/03/1995
7	STINE, MIKEAL GLENN	codce	1:2007cv00121	01/17/2007	360	
8	STINE, MIKEAL GLENN	txsdce	6:2003cv00125	10/14/2003	555	12/07/2005
9	STINE, MIKEAL GLENN	flmdce	5:2004cv00345	07/29/2004	555	08/08/2005
10	STINE, MIKEAL GLENN	azdce	2:1993cv00372	02/24/1993	550	09/22/1993
11	STINE, MIKEAL GLENN	ilsdce	3:2005cv00468	07/01/2005	540	08/12/2005
12	STINE, MIKEAL GLENN	flmdce	5:2004cv00536	12/02/2004	555	05/25/2005
13	STINE, MIKEAL GLENN	azdce	2:2007cv00581	03/19/2007	555	04/02/2007
14	STINE, MIKEAL GLENN	codce	1:2007cv00799	04/19/2007	550	
15	STINE, MIKEAL GLENN	codce	1:2007cv01248	06/14/2007	555	08/02/2007
16	STINE, MIKEAL GLENN	codce	1:2007cv01250	06/14/2007	555	
17	STINE, MIKEAL GLENN	flmdce	6:2006cv01278	08/28/2006	550	11/08/2006
18	STINE, MIKEAL GLENN	flmdce	6:2006cv01361	09/11/2006	555	12/18/2006
19	STINE, MIKEAL GLENN	azdce	2:1989cv01667	10/06/1989	550	04/02/1996
20	STINE, MIKEAL GLENN	azdce	2:2001cv01671	09/06/2001	555	10/03/2001
21	STINE, MIKEAL GLENN	codce	1:2007cv01839	08/31/2007	550	
22	STINE, MIKEAL GLENN	azdce	2:2001cv01864	10/03/2001	550	11/28/2001
23	STINE, MIKEAL GLENN	codce	1:2007cv02203	10/19/2007	555	
24	STINE, MIKEAL GLENN	azdce	2:1993cv02284	12/06/1993	550	05/05/1994
25	STINE, MIKEAL GLENN	azdce	2:1993cv02338	12/15/1993	550	03/08/1994
26	STINE, MIKEAL GLENN	mowdce	6:2005cv03094	03/07/2005	530	08/03/2005
27	STINE, MIKEAL GLENN	scdce	3:2001cv04788	12/19/2001	555	01/28/2002

	Name	Court	Case No.	Filed	Closed
28	STINE, MIKEAL GLEN	txsdce	6:2003cr00044	07/17/2003	04/29/2004
29	STINE, MIKEAL GLEN	txsdce	2:2003mj00238	07/10/2003	
30	STINE, MIKEAL GLEN	azdce	2:2003mj05182	07/31/2003	
31	STINE, MIKEAL GLENN	txedce	6:2004cr00020	02/20/2004	
32	STINE, MIKEAL GLENN	azdce	3:1999cr00155	03/04/1999	07/13/1999
33	STINE, MIKEAL GLENN	txsdce	4:2004mj00169	03/03/2004	
34	STINE, MIKEAL GLENN	azdce	2:1997cr00512	11/05/1997	04/13/1998

[redacted]

CONTINUED AT (7B)

(D): [redacted]. Previous Lawsuits Continued:

35	STINE, MIKEAL GLENN	azdce	2:1997mj03321	09/15/1997
36	STINE, MIKEAL GLENN	azdce	2:2003mj05182	07/31/2003

	Name	Court	Case No.	Filed	NOS	Closed
37	STINE, MIKEAL GLENN	10ca	07-1043	02/01/2007	2550	05/18/2007
38	STINE, MIKEAL GLENN	10ca	07-1117	03/26/2007	2550	05/18/2007
39	STINE, MIKEAL GLENN	09ca	94-17129	12/07/1994	1890	11/08/1995
40	STINE, MIKEAL GLENN	09ca	99-10337	07/27/1999	0	12/22/2000
41	STINE, MIKEAL GLENN	10cae	07-1043	02/01/2007	2550	05/18/2007
42	STINE, MIKEAL GLENN	10cae	07-1117	03/26/2007	2550	05/18/2007

43. Stine Vs. Lappin et. al. No. 08-CV-00164-WYD-KLM / Pending
44. Stine Vs. Lt. Trotter et. al. No. EDCV-08-00251 RGK (MLG) / Pending
45. Stine Vs. USA (Criminal Appeal No 03-44-2 / Pending

46. Preacher et. al. Vs. Wiley et. al. 09-CV-00278 CMA-MEH / Voluntary Dismissed.
47. Stine Vs. Blanke 09-CV-1522 BNB / Pending.
48. Stine Vs. Wiley 09-CV-0933 ZLW / Appeal U.S. Tenth Circuit No. 10-1189
49. Stine Vs. Blake Davis / USDC No. 10-CV-00977-ZLW / Appeal U.S. Tenth Circuit No. 10-1217;
50. Stine Vs. U.S. Federal Bureau of Prisons / United States Dist. Court / Dist. of Columbia No. 10-CV-228-ELP / Transferred To U.S. Dist. Court Colorado No. 10-CV-3152-BNB

51. Stine Vs Wiley No. 10-1189 US Court Appeals 10th Cir. Pending.
52. Stine Vs. Davis No. 10-1217 US Court Appeals 10th Cir. Pending

G. REQUEST FOR RELIEF

State the relief you are requesting. If you need more space to complete this section, use extra paper. The additional requests for relief should be labeled "G. REQUEST FOR RELIEF."

(1). Jury Trial on All issues Raised in Complaint: (2), Find Plaintiff HAS And Continues To be denied Dental CARE by BOP And Supervisor of ADX Health Services, That Dental CARE relating To obtaining Dental CARE in The ADX is below Constitutional Requirements And Allowed Plaintiff To Suffer Unnecessary "Extreme Pain" And Actual Injury Infection Spreading To other Teeth Causing There need for Extraction, order Plaintiff Paid $100.00 Per day dating from Nov. 29th 2010 until Treatment DATE, And Paid $1500.00 for each Teeth Required Extracted Because of Spread of infection Complained of in late Nov. 2010; Further Find Current Access to Dental CARE At ADX is All But None Allowing ADX inmates To Suffer unnecessary Pain And Injury Due lack of Adequate Dental Staff To Treat ADX INMATES; order Immediate Correction And Appoint Special Master At Cost of Defendants To Help Establish Adequate Dental CARE FOR ADX INMATES.

CONTINUED AT PG. (8-A)

DECLARATION UNDER PENALTY OF PERJURY

"VERIFIED COMPLAINT"

I declare under penalty of perjury that I am the plaintiff in this action, that I have read this complaint, and that the information in this complaint is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621. Plaintiffs Declare all Allegations Against Named Defendants Are True To the best of Plaintiffs knowledge and beliefs under Penalty of Perjury by our Signatues below 28 USC 1746 & 1621.

Executed on 1-7-2011
(Date)

Mikeal Glenn Stine

MIKEAL Glenn STINE # 55436-098
U.S. Penitentiary ADX Florence
P.O. Box 8500
Florence, Colorado.
81226-8500

[redacted]

G. Request For Relief Continued

(3). find BoP (Agency) And Staff Such As Blake Daws, Warden ADx; Dr. D. Allred, Clinical Director; And A. OSAGIE, Physician's Assistant failed to Provide Adequate Medical Care To Plaintiff relating To Left Knee Injury Occurring At About 2230 Hours Jan 3rd 2011 And As of this Writing Have fail to Even Examine Plaintiffs left Knee, Allowing Plaintiff to Suffer Extreme Pain And Possible enhance injury To Life Long Unreparable, The Complete denial of Medical Care for Plaintiffs Right Knee Constitutes Deliberate indifference to A Serious Medical Need, Awarding Plaintiff $1000.00 Per-day for left Knee injury from 1-3-2011 thrush date Medical Treatment is Started, The Award is for Pain Unnecessary inflicted because of No Medical Attention And lack of Medical Staff To Provide Treatment, Further Plaintiff Shall be Awarded $5,000.00 for Deliberate indifference to Serious Medical Needs. Additionally The Defendants Shall Establish New Medical Procedures And Policy That Will Assure Medical Staff of At Least a (P/A Physician's Assistant) is on duty At ADx 24-hours daily, And That A Person of P/A or Higher Shall MAKe Rounds of All Ranges Daily in ADx Addressing Inmate Medical Needs Because ADx inmates Are locked down And Can not Travel to Medical Sick Call Afforded Daily At All BoP facilities Monday-through-Fridays. That Stated Physicians Assistant Must be Qualified to Examine inmates, Address Injuries And Medical Needs And To Treat injuries; Further Special Master Appointed to Help Design And Incorporate New Medical Procedures And Policy relating only To This Court —

Continued At (8B)

G. Request For Relief Continued:

-- And That Stated Master Shall be Allowed Unannounced Visits And be allowed Unobstructed Confidential Visits With All ADX Inmates And that Stated Master Shall Have Unrestricted to All Medical files; Policys; Memo's; E-Mails And Inmate Administrative remedies relating To Medical Treatment of Inmates. (4) Order Mikeal Glenn Stine No. 55436-098 Within 20-days be transported to St. Thomas More or Pebla Medical Center And be Examined by A Orthopedic Surgeon And that Any treatment Stated feels Needed Shall be immediately Provided To Mikeal Glenn Stine No. 55436-098 Without delay. Forthwith. And upon treatment A Report from Orthopedic Surgeon Shall be Provided to This Court And Allow Amendments To Injury for Damages.

(4) find BOP (Agency) And defendants Lappin; Nalley; Davis; Rangel; Sudbow And Foster Have Willingly And intentionally False imprisoned Mikeal Glenn Stine No. 55436-098 in Control Unit Without Sentence To Control Unit or Due Process Required By BOP Policy 5100.08; 28 CFR 541.40-Through-541.49 And The Supreme Courts Mandate in Wilkinson V. Austin 545 U.S. 209; Awarding Plaintiff $100.00 Per-day that He has been Falsely imprisoned in Control Units And Award Plaintiff $10,000.00 Punitive Damages from All defendants Grouped as One for Damages. ORDER Plaintiff immediately released from Control Unit.

(5) Find That Current Conditions of incarceration Subject Plaintiffs to Assault; And Murder And That ADX Must Provide Protective Custody Unit for inmates Whom are Informants; Gang Dropouts;

 Continued at (8C)

- Sex offenders or INMATES Whom Continues to be assaulted while NOT Housed in Protective Custody. order BoP & Defendants immediately Establish A Protective Custody Cell Block with ONE Range for P/C INMATES To serve Disciplinary Sanctions Without Need to Place in Stile With NON-Protective Custody INMATES, Further that At No TIME Will BoP or defendants House P/C inmates in Same Cell Block AS NON-PC INMATES Nor Transport P/C And NON-PC inmates in SAME Vechile together, (6), What Ever Else this Court Deems Necessary And Will SERVE Justice for All Parties. (6). Award Plaintiff Costs of Action, fee's; Copies; Postage; Expert Witness fees And reasonable attorney fee's.

* END of Requested Relief *

Exhibit (1) 1-PAGE

Declaration/Affidavit of
MIKEAL Glenn STINE #55436-098

(1). I MIKEAL Glenn STINE ARE the Writer of below STATEMENTS.

(2) On Tuesday 1-4-2011 MS. Tina Sudlow refused me Administrative Remedy On Medical Reference NO Treatment for Knee INJURY, And Dental.

(3) ON Wen. 1-5-2011 Counselor Madison filling in for Counselor MADISON STATED He Could NOT Give me Administrative Remedy on No Medical Treatment for Knee INJURY And No Dental Treatment.

(4). ON Thursday 1-6-2010 MS. Tina Sudlow CASE MANAGER Refused me administrative Remedys on No Medical Treatment on Knee injury And No Dental Treatment

(5) BASED UPON STATEMENTS 1-5 above the refusal To Provide me with Necessary Administrative Remedy forms MAKE The process unavailable And Exhausted 42 USC 1997(e) Wherefore I NOW bring Federal action this 7TH day of JAN 2011 before USDC/Colorado

I MIKEAL Glenn STINE No:55436-098 Declare The above STATEMENTS ARE TRUE And Correct under PENALTY of PERJURY 28 USC 1746 This 7TH DAY of JAN. 2011 AT ADX Florence Colorado

MIKEAL Glenn STINE/Mikeal Glenn Stine
MIKEAL Glenn STINE #55436-098
USP-F-ADX
P.O. BOX 8500
Florence, Colorado, 81226

Exhibit (1) 1-PAGE

In Support of Imminent DANGER

EXHIBIT (2) 4-PAGES

JOE FLOYD FULLER, SR., Plaintiff-Appellant, v. BILLY WILCOX, Sergeant Deputy, Johnson County Detention Center; VALERIE (LNU), Nurse, Johnson County Detention Center; CORRECT CARE SOLUTIONS, Defendants-Appellees.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
288 Fed. Appx. 509;2008 U.S. App. LEXIS 16581
No. 08-3077
August 4, 2008, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

Editorial Information: Prior History

(D. Ct. No. 08-CV-03065-SAC). (D. Kan.)Fuller v. Wilcox, 2008 U.S. App. LEXIS 18549 (10th Cir., Mar. 24, 2008)

Counsel JOE FLOYD FULLER, Sr., Plaintiff - Appellant, Pro se, Olathe, KS.
For VALERIE (LNU), Nurse, Johnson County Detention Center, Defendant - Appellee: Paul Morrison, Attorney General, Topeka, KS.

Judges: Before TACHA, KELLY, and McCONNELL, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff prisoner, appearing pro se, appealed from an order of the United States District Court for the District of Kansas, which denied his motion for leave to proceed in forma pauperis (IFP) in his civil rights action in the district court. The district court also denied the prisoner leave to proceed IFP on appeal because it determined that the prisoner failed to allege a serious physical injury occurring at the time he filed the complaint.Denial of prisoner's motion for leave to proceed IFP was vacated and remanded because, although under 28 U.S.C.S. § 1915(g) the prisoner could not proceed IFP unless he was under imminent danger of serious physical injury, the prisoner's complaint stating he could not walk and had no wheelchair facially satisfied the imminent danger requirement.

OVERVIEW: Under 28 U.S.C.S. § 1915(g), as a prisoner who had filed in federal court at least three prisoner actions or appeals that were determined to be frivolous or malicious or failed to state a claim upon which relief may be granted, the prisoner could not proceed IFP on appeal--or in the district court--unless he was under imminent danger of serious physical injury. Remanding, the court noted that the prisoner's complaint alleged that he was unable to walk without a wheelchair and prison officials had refused to provide him with one. He claimed that, without a wheelchair, he was forced to crawl and was unable to walk to the shower or lift himself from the cell floor to his bed. The court determined that, if the

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EXHIBIT (2) 4-PAGES

prisoner did indeed require a wheelchair, the failure to provide him with one could result in a number of serious physical injuries. The court therefore concluded that the prisoner's allegations, assuming they were true, satisfied the imminent danger exception. In concluding that the exception applied, the court expressed no opinion concerning the merits of the claim.

OUTCOME: The court granted the prisoner leave to proceed IFP on appeal, vacated the district court's order denying him leave to proceed IFP in that court, and remanded the case for further proceedings, including the screening process. The court denied the prisoner's motion to supplement his opening brief.

LexisNexis Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

An order denying a motion for leave to proceed in forma pauperis is a final, appealable order.

Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners > Three Strikes Provision

Under 28 U.S.C.S. § 1915(g), a prisoner who has filed in federal court at least three prisoner actions or appeals that were determined to be frivolous or malicious or failed to state a claim upon which relief may be granted may not proceed in forma pauperis on appeal--or in the district court--unless he is under imminent danger of serious physical injury.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners > Three Strikes Provision

To determine whether a prisoner, who has filed in federal court at least three prisoner actions or appeals that were determined to be frivolous or malicious or failed to state a claim upon which relief may be granted, is under imminent danger of serious physical injury, the United States Court of Appeals for the Tenth Circuit looks to the allegations in his complaint. In addition, the court liberally construes his complaint, accepting the allegations as true. In order to meet the "imminent danger" requirement, the harm must be imminent or occurring at the time the complaint is filed. In other words, allegations of past injury or harm are insufficient, as are vague and conclusory assertions of harm. To fall within the exception to the filing fee requirement, the prisoner's complaint must therefore contain specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury.

Civil Procedure > Pleading & Practice > Pleadings > Proceedings in Forma Pauperis > Prisoners > General Overview
Civil Procedure > Parties > Prisoners > Screening of Petitions
Civil Rights Law > Prisoner Rights > Prison Litigation Reform Act > Judicial Screening

A district court should dismiss a prisoner's complaint as part of the screening process if it determines that the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks

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monetary relief from an immune defendant. 28 U.S.C.S. §§ 1915(e)(2)(B), 1915A.

Opinion

Opinion by: Deanell Reece Tacha

Opinion

{288 Fed. Appx. 510} ORDER AND JUDGMENT *

Joe Floyd Fuller, a prisoner appearing pro se, appeals the district court's order denying his motion for leave to proceed in forma pauperis (IFP) in his civil rights action in the district court. The district court also denied Mr. Fuller leave to proceed IFP on appeal. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, 1 we grant Mr. Fuller leave to proceed IFP on appeal, vacate the district court's order denying him leave to proceed IFP in that court, and remand for further proceedings.

I. Background

In a previous order, this Court found that Mr. Fuller had filed in federal court at least three prisoner actions or appeals that were determined to be frivolous or malicious or failed to state a claim upon which relief may be granted. *Fuller v. Wilcox*, No. 08-3077, 2008 U.S. App. LEXIS 18549, Mar. 24, 2008. Mr. Fuller does not challenge his status as a prisoner who has filed at least three such actions or appeals. Consequently, under 28 U.S.C. § 1915(g), Mr. Fuller may not proceed IFP on appeal or in the district court unless he is "under imminent danger of serious physical injury." We therefore ordered Mr. Fuller to show cause why this appeal should not be dismissed for failure to prepay the entire appellate filing fee as required by § 1915(g).

To determine whether Mr. Fuller is "under imminent danger of serious physical injury," we look to the allegations in his complaint. *See Ibrahim v. Dist. of Columbia*, 373 U.S. App. D.C. 217, 463 F.3d 3, 6 (D.C. Cir. 2006). In addition, we liberally construe his complaint, accepting the allegations as true. *See Martinez v. Garden*, 430 F.3d 1302, 1304 (10th Cir. 2005) (noting that we construe "a pro se complaint liberally" and "must accept the allegations of the complaint as true" (quotation omitted)). In order to meet the "imminent danger" requirement, "the harm must be imminent or occurring at the time the complaint is filed." *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003). In other words, allegations of past injury or harm are insufficient, *see id.*, as are vague and conclusory assertions of harm, *see White v. Colorado*, 157 F.3d 1226, 1231 (10th Cir. 1998). To fall within the exception, Mr. Fuller's complaint must therefore contain " *specific* fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury." *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003) (emphasis added).

The district court denied Mr. Fuller leave to proceed IFP because it determined that Mr. Fuller failed to allege a serious physical injury occurring at the time he filed the complaint. But although most of Mr. Fuller's allegations concern past injuries, he also alleges that he is unable to walk without a wheelchair and prison officials have refused to provide him with one. He claims that, without a wheelchair, he is forced to crawl and is unable to walk to the shower or lift himself from the cell floor to his bed. If Mr. Fuller does indeed require a wheelchair, the failure to provide him with one could result in a number of serious physical injuries. We therefore conclude that Mr. Fuller's allegations, assuming they are true, satisfy the imminent danger exception.

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In concluding that the exception applies, we express no opinion concerning the merits of Mr. Fuller's claim. *See Ciarpaglini*, 352 F.3d at 331 (noting that "§ 1915(g) is not a vehicle for determining the merits of a claim"). On remand, the district court should dismiss the complaint as part of the screening process if it determines that the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from an immune defendant. *See* 28 U.S.C. §§ 1915(e)(2)(B), 1915A. Provided the complaint satisfies the threshold requirements, the court should provisionally grant IFP status and proceed with service of process. If the defendants challenge the factual allegations supporting the imminent danger exception, the district court must then determine whether these allegations are credible. *See Fuller v. Myers*, 123 Fed. Appx. 365, 2005 U.S. App. LEXIS 3111, *7 (10th Cir. 2005) (unpublished opinion) (citing *Gibbs v. Roman*, 116 F.3d 83, 86-87 (3d Cir. 1997), *overruled on other grounds by Abdul-Akbar v. McKelvie*, 239 F.3d 307 (3d Cir. 2001) (en banc)).

Because Mr. Fuller's complaint facially satisfies the imminent danger requirement, we VACATE the district court's denial of his motion for leave to proceed IFP and REMAND for further proceedings. We also GRANT Mr. Fuller leave to proceed IFP in this appeal and remind him of his obligation under § 1915(b) to make payments until the appellate filing fee is paid in full. In addition, we DENY Mr. Fuller's motion to supplement his opening brief.

ENTERED FOR THE COURT,

Deanell Reece Tacha

Circuit Judge

Footnotes

*

This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1

An order denying a motion for leave to proceed IFP is a final, appealable order. *Roberts v. United States Dist. Ct.*, 339 U.S. 844, 845, 70 S. Ct. 954, 94 L. Ed. 1326 (1950) (per curiam).

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Exhibit (L) / 19-PAGES

SHOWS STEPS I MUST COMPLY WITH PAGES 13-14

MIKEAL GLENN STINE, Plaintiff, v. HARLEY LAPPIN, Director B.O.P., MICHAEL NALLEY, Regional Director B.O.P., and RON WILEY, Warden ADX Supermax, Defendants.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
2009 U.S. Dist. LEXIS 78373
Civil Action No. 07-cv-01839-WYD-KLM
June 25, 2009, Decided
June 25, 2009, Filed

Counsel Mikeal Glenn Stine, Plaintiff, Pro se, FLORENCE, CO.
For Harry Lappin, Director BOP, Michael Nalley, Regional Director BOP, Ron Wiley, Warden ADX Supermax, Defendants: Amy L. Padden, U.S. Attorney's Office-Denver, Denver, CO.

Judges: Kristen L. Mix, United States Magistrate Judge.

Opinion

Opinion by: Kristen L. Mix

Opinion

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on **Defendants' Motion to for [sic] Dismissal Pursuant to Rule 41 and 28 U.S.C. § 1915** [Docket No. 258; Filed February 11, 2009] ("Motion to Dismiss") and **Plaintiff's Motion for Injunction/with Evidentiary Hearing/and Request for Expedited Consideration** [Docket No. 304; March 13, 2009] ("Motion for Injunction"). As will be discussed at length below, Plaintiff failed to respond to Defendants' Motion to Dismiss despite multiple opportunities to do so. Defendants filed a Response to Plaintiff's Motion for Injunction on April 2, 2009 [Docket No. 313], but Plaintiff did not file a reply. Because the Court became concerned during the briefing of these Motions that the Court was not receiving mail from Plaintiff, the Court set the matter for evidentiary hearing on May 22, 2009 [Docket Nos. 326 & 332]. The Motions are now ripe for a determination.

Pursuant to 28 U.S.C. § 636(b)(1)(A) and D.C. Colo. L. Civ. R. 72.1C, the Motions have been referred to this Court for recommendation. The Court has reviewed the relevant pleadings, the case record and testimony and exhibits presented at the evidentiary hearing. For the reasons set forth below, the Court recommends that the Motion to Dismiss [# 258] be **GRANTED** and that Plaintiff's case be **DISMISSED** pursuant to Fed. R. Civ. P. 41(b) and 28 U.S.C. § 1915(e)(2)(B)(i). I further recommend that Plaintiff's Motion [# 304] be **DENIED** and that Plaintiff be **enjoined from filing future *pro se* lawsuits in this District** pursuant to similar procedures set forth in *Ketchum v. Cruz*, 775 F. Supp. 1399, 1406-08 (D. Colo. 1991), *aff'd*, 961 F.2d 916 (10th Cir. 1992) and *Penk v. Huber*, No. 07-cv-00607-WYD-MEH, 2007 U.S. Dist. LEXIS 74018, 2007 WL 2908425 (D. Colo. Oct. 3, 2007) (unpublished decision).

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Exhibit (L) / 19-PAGES

By way of providing context to the Court's Recommendation, the following explains the factual and procedural background regarding Plaintiff's case. Plaintiff, who is proceeding *pro se,* is a prisoner at the federal government's maximum-security prison, ADX Florence ("ADX"). Plaintiff filed the present action in August 2007 and was given leave to proceed *in forma pauperis* [Docket Nos. 3 & 22]. Plaintiff alleges that his transfer to and confinement at ADX constitute atypical punishment in violation of his right to due process pursuant to the Fifth Amendment. 1

Since the filing of Plaintiff's Complaint, Plaintiff has filed thirteen motions for preliminary injunctive relief [Docket Nos. 6, 12, 19, 21, 49, 66, 71, 78, 93, 184, 247, 249 & 304]. All but Plaintiff's pending Motion for Injunction have been denied. 2 At the time Defendants filed their pending Motion to Dismiss, Plaintiff had also filed approximately ninety pleadings requesting relief, nearly all of which have been denied. *See Motion to Dismiss* [# 258] at 2. Since that time, Plaintiff has filed approximately twenty-five motions or requests, the majority of which have been denied. In addition to Plaintiff's Motion for Injunction, two appeals of my decisions to the District Court [Docket Nos. 267 & 302] and a Motion to Compel [Docket No. 314] remain pending.

Plaintiff has also sent several letters to the Court and/or defense counsel Amy Padden which, because of their offensive and threatening nature, have not been docketed and are on file with Chambers. *Letter to Kristen L. Mix* dated 12/29/2008; *Letter to Deborah Locke* dated 12/31/2008; *Letter to Kristen L. Mix* received on 2/23/2009 (on file with Chambers). Finally, Plaintiff has sent at least one letter to then President-elect Barack Obama accusing the Court and defense counsel of conspiring against him and threatening harm. *Letter to Barack Obama* dated 11/17/2008 (on file with Chambers).

The majority of the filings referenced above provide the basis for Defendants' Motion to Dismiss at issue here. *See Motion to Dismiss* [# 258] at 2-12. Plaintiff failed to respond to the Motion to Dismiss within the deadline set by the Local Rules. The Court has since learned that from January 7, 2009 to February 19, 2009, Defendants were withholding Plaintiff's legal mail while awaiting approval from Bureau of Prison's regional counsel to put Plaintiff on special legal mail status, 28 C.F.R. § 540.18, as a result of his threatening letters sent at the end of 2008 [Docket No. 278]. *Hearing Tr.* [# 339] at 120:22-:25. While the Court does not condone Defendants' unilateral decision to delay sending Plaintiff's legal mail for this month-and-a-half time period, particularly because such conduct does not appear to be authorized by any regulation or statute, 3 Defendants' conduct does not excuse Plaintiff's behavior throughout this case. Moreover, to the extent that Defendants' conduct is not ongoing, even if improper, it cannot form the basis for any injunctive relief sought by Plaintiff. *See Schrier v. Univ. of Colo.,* 427 F.3d 1253, 1267 (10th Cir. 2005); *see also Nova Health Sys. v. Gandy,* 416 F.3d 1149, 1155 n.6 (10th Cir. 2005) (quoting *San Diego County Gun Rights Comm'n v. Reno,* 98 F.3d 1121, 1126 (9th Cir. 1996) ("Because plaintiffs seek declaratory and injunctive relief only . . . it is insufficient for them to demonstrate only a past injury.")).

However, soon after Defendants assert that they resumed normal transmission of Plaintiff's mail, Plaintiff and other inmates began filing pleadings and letters accusing Defendants of withholding, and even destroying, Plaintiff's mail. A timeline of events relevant to this matter is set forth below:

Early Jan. 2009 -- The Court received two pleadings from Plaintiff about his erratic mental state and desire to kill people [Docket Nos. 246 & 248].

Early Jan. 2009 -- The Court received a letter from Plaintiff threatening and making scandalous allegations about the Court and defense counsel (on file with Chambers). Pursuant to this letter, and those sent by Plaintiff which contained threatening and offensive statements directed toward defense counsel and ADX attorney Deborah Locke, the United States Marshal Service undertook an

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investigation into whether Plaintiff had the means or connections to carry out his threats.

Jan. 7, 2009 -- Defendants began withholding all of Plaintiff's outgoing mail, including legal mail [Docket No. 278]. *Hearing Tr.* [# 339] at 120:22-:25.

Jan. 7, 2009 -- The date of filing of the last pleading filed by Plaintiff until February 23, 2009 [Docket No. 249].

February 11, 2009 -- Defendants filed a Motion to Dismiss as a sanction [Docket No. 258].

February 19, 2009 -- The Court received a letter from ADX inmate Luke Preacher indicating that Plaintiff's mail was being withheld [Docket No. 261]. Mr. Preacher is a co-plaintiff with Plaintiff in another case pending in this District, 09-cv-00278-CMA-MEH. Although prior to filing of that case Plaintiff had already accumulated at least three strikes to prevent him from proceeding *in forma pauperis* pursuant to 28 U.S.C. § 1915(g), Mr. Preacher paid the filing fee.

February 19, 2009 -- Defendants received permission to place Plaintiff on special legal mail status and stopped withholding Plaintiff's outgoing mail [Docket No. 278]. *Hearing Tr.* [# 339] at 120:22-:25.

February 23-27, 2009 -- The Court received and docketed all of Plaintiff's withheld mail, some of it dating back to January 8, 2009. Nearly twenty withheld pleadings were docketed in this case, and a similar number were docketed in several of his other pending cases, 08-cv-02203-WYD-KLM and 09-cv-00164-WYD-KLM.

February 23, 2009 -- The Court received a letter in an envelope addressed by Plaintiff. Because the letter contained threatening language directed at the Court, it was not docketed (on file with Chambers).

March 3, 2009 -- The deadline for Plaintiff to respond to Defendants' Motion to Dismiss. Plaintiff did not respond. Instead, he filed a motion for an extension of time [Docket No. 290].

March 4, 2009 -- The Court extended the time for Plaintiff to respond to Defendants' Motion to Dismiss [Docket No. 292]. The new deadline was April 3, 2009. Again, Plaintiff did not respond.

March 13, 2009 -- The Court received Plaintiff's Motion for Injunction regarding the previous withholding of his mail which alleged that "if relief is not granted, the Defendants will continue to withhold Plaintiff's outgoing legal mail for days, weeks and even months . . . ." *Motion for Injunction* [# 304] at 6. The Court notes that since the filing of Plaintiff's Motion and through June 25, 2009, Plaintiff has filed nine pleadings in this case (including a motion to compel); six pleadings in 08-cv-02203-WYD-KLM; seventeen pleadings in 09-cv-00278-CMA-MEH (including three motions seeking injunctive relief); two pleadings in a case that has been closed since May 9, 2007, 06-cv-02105-WYD-PAC; and a new habeas petition pursuant to 28 U.S.C. § 2241, 09-cv-00933-BNB.

March 30, 2009 -- The Court received a letter from Plaintiff indicating that Defendants continue to withhold his mail and that some of his mail is being destroyed [Docket No. 312].

April 15, 2009 -- After Plaintiff did not respond to Defendants' Motion to Dismiss within the extended deadline to do so, the Court directed each party to file a status report regarding the current status of Plaintiff's incoming and outgoing mail [Docket No. 316]. Plaintiff did not respond. Defendants responded that since mid-February, none of Plaintiff's mail was being unnecessarily delayed and none had been withheld or destroyed [Docket No. 321]. *Affidavit of Kelly Dell* [# 321-2] at 3.

April 28, 2009 -- The Court ordered Plaintiff to show cause why his case should not be dismissed pursuant to Defendants' Motion to Dismiss and for failure to comply with Court Orders [Docket No.

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319]. The Court also extended the time for Plaintiff to respond to Defendants' Motion to Dismiss. Again, Plaintiff did not respond.

May 5, 2009 -- The Court received letters from ADX inmate Damani Nantambu indicating that Plaintiff's mail was being withheld [Docket Nos. 324 & 325]. Mr. Nantambu is also Plaintiff's co-plaintiff in 09-cv-00278-CMA-MEH.

May 8, 2009 -- The Court set a hearing for May 22, 2009 to address the status of Plaintiff's mail [Docket No. 326]. The Court directed Plaintiff to bring a copy of his response to Defendants' Motion to Dismiss to the hearing.

May 14, 2009 -- The Court received a letter from ADX inmate Ronnie Beverly indicating that Plaintiff's outgoing mail was being withheld [Docket No. 328].

May 21, 2009 -- The Court received a motion from Defendants requesting that the Court strike the inmate letters filed on behalf of Plaintiff [Docket No. 330]. Attached to Defendants' motion is a letter from ADX inmate Shawn Williams to Ms. Locke, claiming that Plaintiff asked him to be a witness at the hearing on May 22, 2009 and to lie on his behalf [Docket No. 330-4]. Mr. Williams also claimed that Plaintiff intended to have other ADX inmates lie for him at the hearing and "set up a slew/bunch of ADX officials/staff." Defendants also attached a letter from ADX inmate **Raymond Oechsle** that they received close in time to when Mr. Oechsle voluntarily dismissed his claims from this case [Docket No. 330-3]. In the letter, Mr. Oechsle addressed Plaintiff's willingness to lie to the Court, forge documents, and have others lie on his behalf. Finally, Defendants attached two witness lists for the May 22, 2009 hearing prepared by Plaintiff; the first listed Mr. Williams as a witness for Plaintiff and the second replaced Mr. Williams with Mr. Preacher [Docket Nos. 330-2 & 330-5].

May 22, 2009 -- At the May 22, 2009 hearing, Plaintiff called three inmate witnesses to testify on his behalf: (1) Mr. Preacher; (2) Mr. Gambina; and (3) Mr. Nantambu. Plaintiff was also questioned by the Court and cross examined by defense counsel. Defendants called two witnesses: (1) Richard Madison (Plaintiff's case manager from March 18, 2009 to May 15, 2009); and (2) Kelly Dell (the ADX staff member who handles all of Plaintiff's outgoing mail once it reaches the ADX mail room). The Court summarizes the parties' arguments and testimony as follows:

Of Plaintiff's three inmate witnesses, only the testimony of Mr. Nantambu was relevant to the issue of whether Defendants are presently withholding or destroying portions of Plaintiff's legal mail. Briefly, Mr. Preacher and Mr. Gambina testified only about their knowledge of the withholding of Plaintiff's mail during or immediately prior to the time period when Defendants admit to withholding Plaintiff's mail, e.g., January to mid-February 2009. *See, e.g., Hearing Tr.* [# 339] at 8, 13 (Mr. Preacher); 22, 26 (Mr. Gambina). Because the Court is already aware that ADX officials were withholding Plaintiff's mail during this time period while they were awaiting approval of special legal mail status, this testimony is not relevant to the issue of whether Plaintiff's legal mail is *currently* being withheld or destroyed.

Further, much of Plaintiff's testimony regarding the withholding and alleged destruction of his mail related to the January to mid-February time period and is equally irrelevant to the issue of how ADX officials are *currently* handling Plaintiff's legal mail. *See, e.g., id.* at 65-68; 138-42; *see also id.* at 143:12-144:6. The relevant portions of Mr. Nantambu's and Plaintiff's testimony are described below.

(1) He testified that prior to his appearance at the hearing, he received a threat from an ADX staff member, Officer Manspeaker (who is not a named party), about testifying on Plaintiff's behalf. *Id.* at 36:8-:19. He believes that due to his support of Plaintiff, ADX officials have been preventing him from having paper, recreation, library access, food, etc. *Id.* He also testified that ADX officials have recently dubbed him as Plaintiff's "puppy dog." *Id.* at 36:18-:19, 36:24-37:2.

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(2) He initially testified that Plaintiff told him about a conversation he had with Defendant Ron Wiley (ADX warden) regarding Plaintiff's mail. *Id.* at 43:19-44:9. He later claimed that he heard this conversation personally. *See id.* at 61:18-:22. The gist of the conversation is that Defendant Wiley allegedly told Plaintiff that even if ADX staff was throwing Plaintiff's mail in the trash, they have good reason to do so given Plaintiff's lawsuits against him and his staff. *Id.* at 46:19-47:2; 62:24-63:25.

(3) He testified that during the week of May 18, 2009, he heard Defendant Wiley tell Plaintiff that he gives the orders at ADX, and that he won't take orders from the Court. *Id.* at 46:22-47:2.

(4) He testified that ADX officials impose paper, hygiene, and library restrictions on him and Plaintiff at will. *Id.* at 53.

(5) He testified that sometime in April 2009, he heard ADX officers tell Plaintiff that he was on mail restriction and that any mail could be thrown in trash. *Id.* at 56:20-57:3. He testified that in response to the conversations he overheard, he sent a letter to the Court indicating that Defendants were withholding Plaintiff's mail. *Id.* at 61:12-62:23. While Plaintiff asked him to write on Plaintiff's behalf, the letter was based on conversations Mr. Nantambu allegedly heard between Plaintiff and Defendant Wiley, Officer Manspeaker or ADX officials. *Id.*

(1) He testified that he tried to send his response to Defendants' Motion to Dismiss to the Court six times, but ADX officials destroyed each response. *Id.* at 73:13-74:7. He claimed that he kept detailed mail logs that show when he mailed his response to Defendants' Motion to Dismiss, which is also allegedly supported by USPS track and confirm slips he retained. *Id.* at 69-71; *Plaintiff's Exs.* 11 & 12. 4 Although the Court instructed him in writing to bring a copy of his response to the Motion to Dismiss to the hearing [Docket No. 326], he testified that he gave his only copy to an ADX official for mailing before the hearing and neglected to keep a copy for himself. Plaintiff could not remember the name of the official he allegedly provided the response to for mailing. He admitted that he was on notice to bring a copy to the hearing and that he had retained a copy the five previous times when he allegedly mailed the response to the Court. *Hearing Tr.* [# 339] at 73:16-:20; 74:2-:22; 96:20-98:8.

(2) He testified that he sent multiple pleadings that the Court allegedly did not receive. *Id.* at 71-74; 81-93. The Court notes that the majority of the pleadings identified by Plaintiff were received: (1) Motion for Protective Order (received) [Docket No. 287 in this case and Docket No. 194 in 07-cv-02203-WYD-KLM]; (2) Motion to Compel (received) [Docket No. 314]; (3) response to Defendants' Motion to Dismiss (not received); (4) letters about his mail (received) [Docket Nos. 261, 312, 324, 325 & 328]; (5) Motion for Preliminary Injunction (received) [Docket No. 304]; (6) Motion for Summary Judgment (not received in this case, but received in 07-cv-02203-WYD-KLM) [Docket No. 173]. Plaintiff claimed that he failed to keep copies of any of the "missing" pleadings.

(3) He testified that he mailed objections to my Recommendation to dismiss his case in 08-cv-00164-WYD-KLM. *Hearing Tr.* [# 339] at 78-79, 92. The Court did not receive any objections by Plaintiff to that Recommendation. Despite his alleged making of objections, Plaintiff stated that he is willing to voluntarily dismiss that case because he does not have "the time . . . to comply" and is no longer interested in litigating the issues raised therein. *Id.* at 78:20-79:1; 92:12-:20. The Court notes that since the hearing, the parties have filed a stipulation to dismiss Plaintiff's case with prejudice and 08-cv-00164-WYD-KLM is now terminated [Docket No. 173].

(4) Plaintiff testified that he was not able to explain why the Court receives the pleadings he mails regarding his other pending case against ADX officials, 09-cv-00278-CMA-MEH. *Hearing Tr.* [# 339] at 79:5-:20.

(5) On cross examination, Plaintiff testified that he did not remember when he first sent his response

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to Defendants' Motion to Dismiss to the Court. *Id.* at 85:20-86:20. He also claimed that he did not remember what the response said or any arguments he raised. *Id.* at 87:8-88:23. He claimed that he thought it was between 90-100 pages long with exhibits. *Id.* at 86-87. He also claimed that he did not remember the arguments he made in a Motion for Summary Judgment he purportedly mailed, but he thought he raised arguments pursuant to *Wilkinson v. Austin,* 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005). *Hearing Tr.* [# 339] at 88-92. The Court notes that this case was cited extensively in my Recommendation on Defendants' first motion to dismiss Plaintiff's case [Docket No. 222].

As noted above, Defendants called two witnesses at the May 22, 2009 hearing: (1) Richard Madison (Plaintiff's case manager); and (2) Kelly Dell (ADX mail room staff). The relevant portions of Mr. Madison's and Ms. Dell's testimony are described below.

(1) He testified that one of his responsibilities while serving as Plaintiff's case manager was to pick up Plaintiff's legal mail and deliver it to the mail room. *Hearing Tr.* [# 339] at 99-101. In relation to legal mail, he examined the mail for contraband, then gave it to Plaintiff to seal. He then took the mail to the ADX mail room. He testified that Defendant Wiley is not involved in this process. *Id.* at 101:11-:13.

(2) He testified that he has never thrown away any of Plaintiff's mail. *Id.* at 101:14-102-:2. On cross examination, he admitted that he is not the only ADX official who is authorized to pick up Plaintiff's legal mail. *Id.* at 110:14-11:24. He testified that any unit team member on Plaintiff's cell range may pick up Plaintiff's mail, but he claimed not to have any knowledge about whether others did in fact pick up Plaintiff's mail. *Id.*

(3) He testified that it is difficult for inmates to hear from cell to cell on the A range (where Plaintiff and Mr. Namtambu are housed in ADX) because the inmates are almost never quiet. *Id.* at 107:14-108:1.

(4) He testified that in all of Plaintiff's legal mail he reviewed from March 18, 2009 until May 15, 2009, he did not recall ever seeing a response to Defendants' Motion to Dismiss. *Id.* at 99:17-:20; 111:7-:8; 109:19-110:8. By contrast, during the time period when Mr. Madison was Plaintiff's case manager, Plaintiff testified that he tried to mail copies of his response to the Motion to Dismiss to the Court on three occasions. *Id.* at 70:1-:4; 71:24-74:7.

(1) She testified that she has handled Plaintiff's mail, including all of his legal mail, since his transfer to ADX. *Id.* at 114:14-:17; 120:4-:9.

(2) She testified that when she receives Plaintiff's legal mail from his case manager, it is sealed. *Id.* at 115:22-116:21; 129:1-:18. Given Plaintiff's special legal mail status, she contacts the addressee for permission to open the mail for the purpose of screening it for threats. *Id.* at 116:22-117:8. After she reads the mail, she reseals and mails it that day. *Id.* If the addressee does not give permission for the mail to be opened, the legal mail is not read and is then mailed. *Id.* at 117:9-:13. She testified that Defendant Wiley is not involved in this process. *Id.* at 118:1-:5.

(3) She testified that she has never destroyed Plaintiff's legal mail. *Id.* at 117-118. She also claimed that she has never rejected or confiscated any mail sent to the Court, either before or after Plaintiff was placed on special legal mail status. *Id.* at 118:16-120:1; 129:18-:20; 131:21-:25.

(4) She testified that she withheld Plaintiff's legal mail from Jan. 7, 2009 to Feb 19, 2009. *Id.* at 120:22-:25.

Plaintiff argued that the validity of his special legal mail status is questionable, and that ADX officials had no authority to withhold his legal mail while such status was being sought. *Id.* at 137:8-139:20; 140:5-:10; 141:23-142:25. He argued that unnamed ADX officials continue to pick up his mail, but

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the Court does not receive it. *Id.* at 139:20-140:4 In a case pending in the Central District of California, Plaintiff claimed that discovery sanctions were imposed against him by the Court due to Defendants' withholding of his mail. 5 *Id.* at 68:22-69:11; 140:2-:4.

Ms. Padden argued that there is no credible evidence that Plaintiff's legal mail has been confiscated or destroyed. *Id.* at 143:8-:11; 146:25-147:3. She did not dispute that Plaintiff's legal mail was withheld from January to mid-February 2009, but argued that there is no direct evidence that any of the delayed mail, or Plaintiff's legal mail thereafter, was not received by the Court. *Id.* at 143:12-:18. She argued that none of Plaintiff's witnesses are credible and that the testimony of Mr. Preacher and Mr. Nantambu should be viewed critically because they are co-plaintiffs of Mr. Stine in another pending case. In any event, she noted that most of the testimony derived from the witnesses related to the withholding of Plaintiff's legal mail during the time period when ADX officials admit to withholding his mail. *Id.* at 143:19-144:24.

Ms. Padden also argued that Plaintiff's professed inability to remember the contents of his response to Defendants' Motion to Dismiss or the date when he first mailed it to the Court undermines his credibility. *Id.* at 144:25-145:13. She noted that if such a response existed, Plaintiff could have brought it to the hearing. *Id.* at 145:14-:23. She argued that the only logical conclusion is that Plaintiff never responded to the Motion to Dismiss and is now attempting to use his special legal mail status and ADX officials' previous withholding of his mail as an excuse to mislead the Court. *Id.* at 145:23-146:2; 147:8-:13. 6

Ms. Padden reminded the Court of Plaintiff's history of not responding to dispositive motions when there was a likelihood that they would be granted. *Id.* at 146:3-:24. In 07-cv-00121-WYD-KLM, Plaintiff failed to respond to the pending Motion to Dismiss. *Id.* In a hearing held in that case, he was also found not to be a credible witness, to have lied under oath, and to have submitted a forged document to the Court. *Id.* She contended that Plaintiff's current conduct should be viewed similarly. Finally, she noted that the dockets in all of Plaintiff's cases belie Plaintiff's testimony that the Court is not receiving his legal mail. *Id.* at 147:4-:7.

As noted above, the matter is before the Court on both Defendants' Motion to Dismiss and Plaintiff's Motion for Injunction. The Motions are related in that Plaintiff failed to file a response to Defendants' Motion to Dismiss (despite several Court Orders to do so) because he contends that Defendants are unlawfully withholding his mail, including his response. The alleged withholding of Plaintiff's mail is the subject of Plaintiff's Motion for Injunction.

In support of their Motion to Dismiss, Defendants trace the history of the pleadings filed by Plaintiff in this case and the Court's repetitive warnings that sanctions would result if Plaintiff continued to inundate the Court with frivolous and malicious filings. The Court organizes the relevant information as follows: (1) the Court's warnings; (2) Plaintiff's abusive pleadings and letters; (3) Plaintiff's threatening pleadings and letters; (4) Plaintiff's documents of questionable veracity; and (5) Plaintiff's litigious history.

(1) Plaintiff has been warned at least twelve times by four different judges in this case that his continued filing of pleadings which are frivolous, redundant, malicious or threatening will lead to sanctions, including the dismissal of his case or the imposition of an injunction. For example, Magistrate Judge Boyd N. Boland found that "[t]he exhibits and letters [filed by Plaintiff] border on being malicious and frivolous and may subject Plaintiff[] to possible sanctions." *Order* [# 16] at 2. Senior District Judge Zita L. Weinshienk found that Plaintiff's "continual filing of motions . . . are no more than [his] attempt to inundate the Court . . . ." *Order* [# 36] at 5. This Court struck several of Plaintiff's pleadings from the docket because they contained false accusations and were abusive [Docket No. 76]. Chief Judge Wiley Y. Daniel warned Plaintiff that "abusive pleadings will result in

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the imposition of sanctions, including entry of an injunction prohibiting him from filing future pleadings and/or [dismissal]." *Order* [# 240] at 2;

(2) Plaintiff has sent or filed pleadings and letters which contain malicious, abusive, and offensive language directed at the Court, Defendants, ADX offcials and defense counsel. Plaintiff accused Judge Boland of "los[ing] his mind" and engaging in the "illegal use of his office" [Docket Nos. 27 & 28]. Plaintiff accused this Court of being "prejudicial and hostile," having a "deep seated favoritism of [Defendants]," "allow[ing] [an] attempted murder to happen,"and being "full of shit" [Docket Nos. 91, 97, 123, 139 & 210]. Plaintiff accused Defendants of being "out of control," committing "malicious acts," and subjecting him to "barbaric and demoralizing treatment" [Docket Nos. 93, 184 & 246]. Plaintiff accused Ms. Padden of "stat[ing] a bald face lie," committing "forgery," being corrupt, and lying to the Court even though her "shit stinks too" [Docket Nos. 120, 190 & 239]. In particularly offensive letters on file with the Court, Plaintiff accused the Court and defense counsel of having an inappropriate relationship. *Letter to Barack Obama* dated 11/17/2008. 7 Plaintiff's accusations became even more defamatory in a letter sent to the Court. *Letter to Kristen L. Mix* dated 12/29/2008. Plaintiff also sent a letter to an ADX attorney about this case containing inappropriate and maligning language. *Letter to Deborah Locke* dated 12/31/2008;

(3) Plaintiff has sent or filed several pleadings and letters which contain threats of harm against the Court, Defendants, ADX officials and defense counsel. For example, Plaintiff informed then President-elect Obama: "People wonder why prisoners leave prison with only hate and murderful [sic] thoughts. . . . Straight out Mr. Obama, I should never be allowed out of prison because my hate for Amy Padden has reach [sic] the point of . . . seeing her die most painful ways." *Letter to Barack Obama* dated 11/17/2008; Docket Nos. 234 & 236. In an objection filed with Chief Judge Daniel, "Plaintiff states its [sic] very true that he hates not only Amy L. Padden but Magistrate Mix as well" [Docket No. 239]. In a letter sent to the Court, Plaintiff threatened the Court, Defendant Wiley and defense counsel with harm to them and their families. *Letter to Kristen L. Mix* dated 12/29/2008. In an unsigned letter sent in an envelope written by and addressed from Plaintiff to the Court, the author of the letter conveyed the desire for terrible harm to befall the Court. *Letter to Kristen L. Mix* received on 2/23/2009. In a letter sent to an ADX attorney, Plaintiff warned her that he would use any means to take action against her and defense counsel. *Letter to Deborah Locke* dated 12/31/009. In a pleading filed on the docket, Plaintiff stated that he goes "to sleep thinking of ways to murder the ones inflicting [pain] . . . . I fully believe within the next few days I will have committed murder. Well Judge Wiley Daniel, its [sic] now reached a point of no return and I've made sure that my family will not let it go . . ." [Docket No. 246];

(4) Plaintiff has filed multiple pleadings of questionable veracity. In the earlier stages of his case when he was proceeding with a co-Plaintiff, Plaintiff filed several pleadings which Judges Boland and Weinshienk noted were of questionable authenticity [Docket Nos. 3, 4, 6, 10, 11 & 12]. *See Order* [# 16] at 2; *Order* [# 22] at 2; *Order* [# 26] at 1-2; *Order* [# 33] at 1. Plaintiff filed an alleged declaration from inmate Ronnie Beverly written in Plaintiff's handwriting and signed, in all likelihood, by Plaintiff [Docket No. 142]. The Court has examined the signature of Mr. Beverly contained in a letter purported to be filed by Mr. Beverly [Docket No. 328] and notes that the signature in Plaintiff's pleading is not similar to Mr. Beverly's signature in the letter. Plaintiff filed a motion in his handwriting asking for an extension of time, which was granted [Docket Nos. 194 & 196]. Inexplicably, Plaintiff then filed a motion to strike Docket Nos. 194 and 196, claiming that the earlier motion had not been written by him and was a forgery [Docket No. 199]. Given this Court's overwhelming familiarity with Plaintiff's handwriting, spelling, syntax, and grammar, I rejected Plaintiff's contention that the motion was forged and noted that contrary to Plaintiff's argument, "it [was] highly unlikely that these pleadings were drafted and signed by anyone other than Plaintiff."

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Order [# 202] at 1. Finally, I note that in Plaintiff's Motion for Injunction, Plaintiff claims that he has never made any threats against the Court and that he "denys [sic] writing alleged letters" [Docket No. 304]. However, there is no doubt that the Court has received letters written in Plaintiff's handwriting, signed by Plaintiff, and sent in envelopes written and addressed by Plaintiff, that contain threats; and

(5) Plaintiff has a longstanding history of litigious behavior in this District and in other districts across the country. Plaintiff has filed thirteen cases since October 2006 in this District alone (four of which remain pending), as well as a large number of cases in other federal courts across the country. 8 Moreover, the Court notes the many Orders that judges of this District have entered addressing Plaintiff's malicious and frivolous filings. 9 As noted above, in this case alone, Plaintiff has been repeatedly warned by this Court, the preliminary review Court and the District Court. For example, at the inception of his case, Judge Boland twice warned Plaintiff that if he continued to inundate the Court with borderline malicious filings, his case would be dismissed [Docket Nos. 26 & 33]. Further, the Court notes that out of the thirteen cases Plaintiff has filed in this District, he has filed approximately seventy motions for injunctive relief, all of which have been denied as having no merit. While the quantity of Plaintiff's motions is not necessarily the prevailing concern here, the Court notes that the quality of the motions in almost every instance is lacking, evidencing repeated violations of Fed. R. Civ. P. 11 and the Court's prior Orders.

The Court also notes Plaintiff's history of making false statements, not only on this record, but in previous cases. Plaintiff submitted a forged document into evidence in 07-cv-00121-WYD-KLM. *Recommendation* [# 192] at 17. Plaintiff also lied under oath at a hearing and in his deposition testimony. *Id.* Plaintiff submitted false pleadings in that case [Docket Nos. 44, 113, 122 & 145], in the present case [Docket No. 14], and in 07-cv-00799-WYD-KLM [Docket No. 55]. Further, I note Plaintiff's testimony at the May 22, 2009 hearing where he informed the Court that he had been sanctioned by the District Court for the Central District of California, *Hearing Tr.* [# 339] at 68:22-69:5, but no such court order exists.

The Court is also mindful of unsolicited letters received by counsel regarding Plaintiff's willingness to lie to the Court and enlist others to lie on his behalf. In the Court's estimation, these inmates likely gain very little by playing the role of whistle blower and, in fact, likely subject themselves to ridicule or worse by other inmates. The Court notes the statements made by Plaintiff's previous co-Plaintiff, Mr. Oecshle, that Plaintiff forged his signature on countless pleadings, filed "bogus declarations," and "is knowingly & intentionally committing a multitude of Federal Crimes [by filing false documents]" [Docket No. 330-3]. The Court also notes the statements made by an inmate Plaintiff intended to call as a witness at the May 22, 2009 hearing, Mr. Williams. Shortly before the hearing, Mr. Williams informed ADX attorney, Ms. Locke, that "[i]nmate Mikeal Glenn Stine . . . is a liar & fraud . . . and he/Stine wanted me to LIE for him at the upcoming 05/22/09 hearing" [Docket No. 330-4]. He further stated that he "played this inmate Stine to find out the real deal . . . now I know . . . [that he] is planning to get other inmates to lie/testify, etc., for him [including] . . . Luke Preacher, . . . Ralph Gambina, [and] Damonde Nantambul [sic] . . . ." The credibility of Mr. Oecshle's and Mr. Williams' letters have not been tested. However, in relation to Mr. William's letter, the Court notes that the three inmates identified in the letter did testify for Plaintiff at the May 22, 2009 hearing and that Mr. Williams was originally listed by Plaintiff as a witness on his behalf but was removed by Plaintiff from his witness list just prior to the hearing.

The Court treats Plaintiff's false filings and allegations that he solicited others to lie on his behalf very seriously. In addition, I note that submission of a false document to the Court and suborning perjury are criminal acts. *See* 18 U.S.C. §§ 401, 1622. Further, this is not the first time a federal court has addressed Plaintiff's false filings. The Court takes judicial notice that Plaintiff was previously convicted of criminal contempt for submitting a document found not to be genuine in an attempt to

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avoid dismissal of one of his cases. *United States v. Stine,* 70 F.3d 121 (table) (9th Cir. 1995) (unpublished decision), *aff'g* No. 94-mc-00044-PGR (D. Ariz. Nov. 28, 1994). The Ninth Circuit found that "Stine did not have a good faith belief that the exhaustion letter was genuine" and affirmed his conviction for criminal contempt. *Id.*

Considering the information, evidence, testimony, documents, exhibits and pleadings set forth above, the Court finds as follows:

> (1) The testimony presented by Plaintiff at the May 22, 2009 hearing that Defendants are destroying his legal mail was not credible;(2) There is no credible evidence that Plaintiff prepared or sent a response to the Motion to Dismiss to the Court;(3) Defendants had no authority to withhold Plaintiff's mail from January to mid-February 2009;(4) There is no credible evidence that Defendants are currently withholding or destroying Plaintiff's legal mail;(5) There is credible evidence that Plaintiff has filed false pleadings on the record;(6) Plaintiff has maliciously and falsely accused the Court and defense counsel of improper conduct;(7) Plaintiff has threatened and harassed the Court and defense counsel;(8) Plaintiff has inundated the Court with meritless and frivolous filings;(9) Plaintiff has failed to comply with three Court Orders regarding the filing of his response to the Motion to Dismiss [Docket Nos. 292, 319 & 326]; and(10) Plaintiff has failed to comply with at least twelve Court Orders regarding the filing of frivolous, malicious, and abusive pleadings.

In light of the above findings, the Court recommends that several actions be taken to address this matter.

First, the Court recommends that Plaintiff's case be dismissed as a sanction pursuant to Fed. R. Civ. P. 41(b) and 28 U.S.C. § 1915(e)(2)(B)(i).

Second, the Court recommends that Plaintiff be enjoined from filing future cases in this District. My recommendations are addressed below.

The Court's "discretion to choose a sanction is limited in that the chosen sanction must be both 'just' and 'related to the particular "claim" . . . at issue . . . .'" *Ehrenhaus v. Reynolds,* 965 F.2d 916, 920-21 (10th Cir. 1992) (citation omitted). In *Ehrenhaus,* the Tenth Circuit enumerated the factors to be considered when evaluating grounds for dismissal of an action. The factors are: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *Id.* at 921 (internal quotations and citations omitted); *see also Gates Rubber Co. v. Bando Chem. Indus.,* 167 F.R.D. 90, 101 (D. Colo. 1996). "[D]ismissal is warranted when 'the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits.'" *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.,* 497 F.3d 1135, 1144 (10th Cir. 2007) (quoting *Ehrenhaus,* 965 F.2d at 921). Given that Plaintiff is proceeding *pro se,* the Court must carefully conduct its analysis and consider whether "some sanction other than dismissal [with prejudice is appropriate], so that the party does not unknowingly lose [his] right of access to the courts . . . ." *Nasious v. Two Unknown BICE Agents,* 492 F.3d 1158, 1163 (10th Cir. 2007) (quoting *Ehrenhaus,* 965 F.2d at 920 n.3).

The Court notes that the standards for dismissal pursuant to Rule 41(b) are essentially the same as those utilized for discovery violations. *See Mobley v. McCormick,* 40 F.3d 337, 340-41 (10th Cir. 1994) ("[W]e see no principled distinction between sanctions imposed for discovery violations and sanctions imposed for noncompliance with other orders [and] . . . involuntary dismissals should be determined by reference to the *Ehrenhaus* criteria."). Rule 41(b) authorizes the Court to dismiss Plaintiff's case due to his failure to prosecute his case and failure to comply with Court rules or

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Orders. Fed. R. Civ. P. 41(b). Finally, although Plaintiff is proceeding *pro se,* he is not immune from Rule 41(b) sanctions. *See, e.g., Steiner v. Concentra Inc.,* 195 Fed. Appx. 723, 727-28 (10th Cir. 2006) (unpublished decision); *Clements v. Chapman,* 189 Fed. Appx. 688, 692-93 (10th Cir. 2006) (unpublished decision).

I find that Plaintiff's conduct prejudiced Defendants' ability to defend against the accusations lodged by Plaintiff in his Complaint. In this regard, the Court notes that Plaintiff's abuses have caused Defendants to expend unnecessary resources and time to refute the wholly unsupported accusations lodged against defense counsel. Defense counsel has also been subjected to unwarranted name calling and threats. In addition, the large number of meritless or frivolous pleadings filed in this case, to which Defendants were compelled to respond, either via written pleadings or hearing testimony, further justifies the Court's finding of prejudice. As a result of Plaintiff's actions, including sending threatening letters to the Court and defense counsel, the case has been brought to a virtual standstill and has not progressed with any substance toward trial despite the significant amount of time and effort expended on it by Defendants. While Defendants' conduct in withholding Plaintiff's mail from January to mid-February 2009 contributed to their burden, and unnecessarily complicated these proceedings, this conduct is outweighed by Plaintiff's overall litigation abuses.

I find that Plaintiff's conduct in this case has interfered with the judicial process. Just as Defendants are burdened by Plaintiff's abuses so, too, is the Court. The issue here "is respect for the judicial process and the law." *See Cosby v. Meadors,* 351 F.3d 1324, 1326-27 (10th Cir. 2003). Plaintiff's unconscionable and slanderous accusations and his continued filing of meritless pleadings, despite being warned about such in this case and others, evidences a lack of respect for the Court, Defendants, and the judicial process. In addition, Plaintiff's incredible testimony at the evidentiary hearing, the unsupported allegations about the status of his legal mail, and the submission of false pleadings also justify the Court's finding of judicial interference. Moreover, the Court's continual review of Plaintiff's file, the issuance of Orders prompted by Plaintiff's unnecessary and noncompliant filings, and the holding of a hearing to address Plaintiff's unsupported allegations increases the workload of the Court and interferes with the administration of justice. "This order is a perfect example, demonstrating the substantial time and expense required to perform the legal research, analysis, and writing to craft this document." *See Lynn v. Roberts,* No. 01-cv-3422-MLB, 2006 U.S. Dist. LEXIS 72562, 2006 WL 2850273, at *7 (D. Kan. Oct. 4, 2006) (unpublished decision).

Plaintiff has, without any reasonable excuse, invented slanderous allegations regarding the Court, defense counsel, and Defendants and further subjected the same to unwarranted threats, abuse, and accusations. "The vileness of [P]laintiff's comments speak for themselves." *Id.* He also has needlessly inundated the Court with filings and letters, even after being warned by this Court and others that sanctions would result. In regard to Plaintiff's unsupported allegations about the status of his legal mail, the Court provided Plaintiff with an opportunity to support his allegations and to submit his response to the Motion to Dismiss at the evidentiary hearing. Instead, he presented irrelevant or incredible testimony and documents and failed to file his response despite several Court Orders requiring him to do so and despite being provided with a unique opportunity to avoid any contact with ADX officials whatsoever prior to filing it, by bringing it to the hearing and transmitting it under the watchful eye of the Court.

Considering the record before the Court, including the docket, the hearing testimony and exhibits, and Defendants' arguments, the Court believes that Plaintiff fabricated the allegation about the current state of his legal mail in an attempt to avoid prosecuting his case after receiving a Motion to Dismiss which he could not overcome. As a result, I must conclude that Plaintiff's conduct, which was perpetrated throughout the course of this litigation, was willful, and that he is therefore

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responsible for his litigation abuses. *See id.* (noting that plaintiff's continued filing of abusive pleadings, despite warnings about the same, evidenced wilfulness). "This factor virtually compels dismissal." *Id.*

The fact that Plaintiff was warned repeatedly that he risked dismissal for his litigation abuses in this case and several of his other pending cases makes it clear that Plaintiff knew, or reasonably should have known, that his litigation abuses would ultimately result in dismissal. *See id.* (justifying its decision to dismiss on the various warnings plaintiff received in his present and other cases). The Court also notes that despite warnings given to Plaintiff, he has continued to flood the Court with unnecessary, malicious and false filings, indicating to this Court that warnings (and even dismissals of other cases on similar grounds) do little to deter Plaintiff's abusive conduct.

Finally, I conclude that no sanction less than dismissal with prejudice would be effective. Although Plaintiff is proceeding *pro se,* his lack of legal representation does not excuse his abuses here. *See Garrett v. Selby Connor Maddux & Janer,* 425 F.3d 836, 841 (10th Cir. 2005) (citing *Theriault v. Silber,* 579 F.2d 302, 303 (5th Cir. 1978)). *See generally Green v. Dorrell,* 969 F.2d 915, 917 (10th Cir. 1992). Warnings to Plaintiff have been resoundingly unsuccessful. In addition, the Court doubts that a monetary sanction would be effective or meaningful to Plaintiff. In summary, Plaintiff's conduct has been malicious. He has proceeded without conscience regarding his unsupported accusations. 10 Moreover, it is clear to the Court that Plaintiff is wholly unconcerned about telling the truth in pleadings and while under oath. Under these circumstances, no lesser sanction would be effective. Dismissal of this case with prejudice is the appropriate result.

In addition to the sanction of dismissal, the Court is compelled to address the status of Plaintiff's ability to file future *pro se* cases and lodge future baseless accusations in this District. Plaintiff already has at least four strikes against him pursuant to 28 U.S.C. § 1915(g). 11 Despite his inability to proceed *in forma pauperis,* Plaintiff has now enlisted the financial aid of other inmates to allow him to proceed undaunted. *See, e.g.,* 09-cv-00298-CMA-MEH. Since 2006, Plaintiff has filed thirteen cases in this District, dismissing several of them voluntarily when facing a dispositive motion (but only after much effort was expended by the Court and Defendants). Excluding those cases that were dismissed on preliminary review, Plaintiff's cases have two things in common: (1) none has been found to have merit and (2) all have involved vexatious, frivolous and malicious filing of pleadings without legal justification. Although it is clear that Plaintiff believes that he has been treated unfairly by various individuals in the federal prison system, executive branch, and the judiciary, "he has inappropriately used the federal court system as a means to express his displeasure" in an abusive, malicious, and unconscionable manner. *See Penk v. Huber,* 07-cv-00607-WYD-MEH, 2007 U.S. Dist. LEXIS 74018, 2007 WL 2908425, at *2 (D. Colo. Oct. 3, 2007) (unpublished decision). Plaintiff has been frequently warned that his misconduct could lead to an injunction against making future filings [Docket Nos. 76, 236 & 240]. Because it is clear that Plaintiff finds unfairness with every action taken against him, whether real or imaginary, and does not show any signs of deviating from his campaign of harassment, "justice requires this District to follow through with the warning to impose restrictions on his ability to file" future federal lawsuits. *See id.*

The Court has authority to "enjoin litigants who abuse the court system by harassing their opponents" pursuant to 28 U.S.C. § 1651(a). *Tripati v. Beaman,* 878 F.2d 351, 352 (10th Cir. 1989). Indeed, "[t]here is a strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions . . . ." *Cotner v. Hopkins,* 795 F.2d 900, 902 (10th Cir. 1986). To this end, "'[e]ven onerous conditions' may be imposed upon a litigant as long as they are designed to assist the district court in curbing the particular abusive behavior involved." *Id.* (quoting *Carter v. United States,* 733 F.2d 735, 737 (10th Cir. 1984)). Because "[n]o one, rich or poor, is entitled to abuse the judicial process," the Court finds that an

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injunction restricting Plaintiff's filings is appropriate. *See Tripati,* 878 F.2d at 353 (noting that "the right of access to the courts is neither absolute nor unconditional . . . [and] there is no constitutional right . . . to prosecute an action that is frivolous or malicious" (citation omitted)).

"[I]njunctions are proper where the litigant's abusive and lengthy history properly is set forth." *Id.* Here, the Court has detailed Plaintiff's history of abusive filings throughout the Recommendation. In addition, the Court attaches an appendix summarizing Plaintiff's cases filed in this District and the Tenth Circuit Court of Appeals. "Where a litigant's court access is restricted, guidelines must be set forth so that the litigant is aware of what must be done in order to obtain the court's permission to file an action." *Cromar v. Railey,* 43 F.3d 1482 (table) (10th Cir. 1994) (unpublished decision). The restrictions proposed by this Court are set forth below:

> Any documents Plaintiff wishes to submit for filing in this District shall be delivered to the Office of the Clerk, United States District Court, Alfred A. Arraj United States Courthouse, 901 19th Street, Denver, Colorado 80294. As a prerequisite to filing a *pro se* complaint, **including complaints where Plaintiff is proceeding as a co-plaintiff,** Plaintiff must file **THREE** documents:**(1) A petition titled, "Petition Pursuant to Court Order Seeking Leave to File a *Pro Se* Action," as directed below. Plaintiff shall affix a copy of the injunction to the petition.**The petition must contain the following information:(a) a statement advising the Court whether any defendant to the lawsuit was a party to, or was any way involved in, any prior lawsuit involving Plaintiff and, if so, in what capacity;(b) a list of all lawsuits in the United States District Court for the District of Colorado, the United States Court of Appeal for the Tenth Circuit, the United States Supreme Court, as well as any other federal or state court in which Plaintiff was or is a party; the name and citation of each case, if applicable, including jurisdiction; his involvement in each lawsuit; the status of each lawsuit; and the disposition;(c) a list of all federal or state cases in which a judgment was rendered against Plaintiff, if any; the name and citation of each case; the amount of judgment rendered against him, if any; the amount of the judgment that remains outstanding; and the reasons why the judgment remains outstanding; and(d) a list of all federal or state cases in which a judgment was rendered in favor of Plaintiff, if any; the name and citation of each case; the amount of judgment rendered in favor of him, if any; the amount of the judgment that remains outstanding; and the reasons why the judgment remains outstanding.**(2) An affidavit as directed below:**The affidavit shall be signed under the penalty of perjury, and shall contain the following recitals:(a) that the complaint or claims Plaintiff wishes to present never before have been raised by him and disposed of by any federal or state court;(b) that to the best of his knowledge the claim or claims are not frivolous or taken in bad faith; that the claim or claims are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; that the lawsuit is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *See* Fed. R. Civ. P. 11; and(c) that the claim or claims are not meant to harass any individual or entity.**(3) A copy of the complaint or claims sought to be filed in this District on the Court's prisoner complaint form.**The complaint or claims sought to be filed in this district must comply with the injunction, Fed. R. Civ. P. 8, all other provisions contained in the Federal Rules of Civil Procedure, and the United States District Court for the District of Colorado Local Rules of Practice (the "Local Rules of Practice").***WHILE PLAINTIFF AWAITS APPROVAL OF HIS PETITION, HE SHALL NOT FILE ANY MOTIONS OR OTHER PLEADINGS PERTAINING TO THE PETITION UNLESS DIRECTED TO DO SO.******PLAINTIFF IS NOT PERMITTED TO HAVE MORE THAN ONE PETITION PENDING AT A TIME. IN NO EVENT SHALL PLAINTIFF SUBMIT MORE THAN ONE PETITION PER MONTH.****The procedure for review of Plaintiff's intended filings should be as follows:**Whenever Plaintiff submits a petition for leave to file a *pro se* action, the Clerk of the

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Court, or designated deputies, will accept the documents, mark them received, and immediately forward them to the preliminary review unit.The preliminary review unit (*pro se* division), which is currently under the supervision of the Chief District Judge Wiley Y. Daniel, Senior District Judge Zita L. Weinshienk, and Magistrate Judge Boyd N. Boland, shall decide whether to approve or disprove the petition by considering the following:(1) whether Plaintiff has complied with the injunction in all particulars;(2) whether Plaintiff's complaint complies with the Federal Rules of Civil Procedure and Local Rules of Practice;(3) whether the complaint is frivolous, abusive, harassing, or malicious;(4) whether the claims raised in Plaintiff's complaint have been raised by him and disposed of by any federal or state court;(5) whether there has been full compliance with Fed. R. Civ. P. 11, and all pleadings and filings do not violate 28 U.S.C. § 1927;(6) whether the complaint alleges claims against individuals or entities that may have immunity from suit;(7) such other reasonable requirements established by the reviewing judge; and(8) the reviewing judge shall not otherwise address the merits of the complaint.Plaintiff's failure to comply with the procedures and principles mandated by the injunction shall be sufficient grounds for denying the petition.As noted in item (5), disapproval of the petition may be founded upon false recitals in any of Plaintiff's filings. If any false statement is made, Plaintiff may be considered in violation of the injunction and subject to other orders of the reviewing judge, including appropriate sanctions. The provisions contained in Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 are incorporated into this injunction.If the reviewing judge enters an order granting the petition, the Clerk of the Court shall cause the complaint and materials to be filed as of the date of the order. The assignment of the case shall be pursuant to the Local Rules of Practice.The injunction shall not interfere in any way with actions, orders, or judgments of any federal court involving Plaintiff which predate the injunction.(Taken, in part, from *Ketchum v. Cruz,* 775 F. Supp. 1399, 1406-08 (D. Colo. 1991), *aff'd,* 961 F.2d 916 (10th Cir. 1992)).

I respectfully **RECOMMEND** that Defendants' Motion to Dismiss [# 258] be **GRANTED,** and that Plaintiff's action be **DISMISSED WITH PREJUDICE** pursuant to Fed. R. Civ. P. 41(b) and 28 U.S.C. § 1915(e)(2)(B)(i). 12

I FURTHER **RECOMMEND** that the Order to Show Cause [# 319] be made **ABSOLUTE.**

I FURTHER **RECOMMEND** that Plaintiff be **enjoined from filing future *pro se* cases** as set forth above.

I FURTHER **RECOMMEND** that Plaintiff's Motion for Injunction [# 304] be **DENIED.** Plaintiff failed to carry his burden of proving the probability of irreparable harm. *See Schrier,* 427 F.3d at 1258. It is well established that "[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.,* 356 F.3d 1256, 1260 (10th Cir. 2004) (citations omitted). Moreover, I have found that the accusations forming the basis for the Motion, namely that Defendants are currently destroying or withholding Plaintiff's mail, are incredible and unsupported by the record.

With that being said, the Court does not ignore Defendants' role in prompting the filing of the Motion for Injunction. The Court warns Defendants that, without statutory or regulatory support, there is no legal basis for them to take similar action against this Plaintiff or any other inmate. Nevertheless, Defendants' past conduct does not entitle Plaintiff to prospective relief. *See Schrier,* 427 F.3d at 1267 ("The purpose of a preliminary injunction is not to remedy past harm but to protect plaintiff[] from irreparable injury that will surely result . . . ."); *Connecticut v. Massachusetts,* 282 U.S. 660, 674, 51 S. Ct. 286, 75 L. Ed. 602 (1931) (holding that an injunction is only appropriate "to prevent

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existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future").

I FURTHER **ORDER** that Plaintiff's Motion to Compel and Motion for Sanctions [# 314] be **DENIED as moot.**

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the parties have 10 days after service of this Recommendation to serve and file specific, written objections. A party's failure to serve and file specific, written objections waives *de novo* review of the Recommendation by the district judge, Fed. R. Civ. P. 72(b); *Thomas v. Arn,* 474 U.S. 140, 147-48, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985), and also waives appellate review of both factual and legal questions. *In re Key Energy Resources Inc.,* 230 F.3d 1197, 1199-1200 (10th Cir. 2000). A party's objections to this Recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review. *United States v. One Parcel of Real Property,* 73 F.3d 1057, 1060 (10th Cir. 1996).

DATED: June 25, 2009

BY THE COURT:

/s/ Kristen L. Mix

Kristen L. Mix

United States Magistrate Judge

(1) 06-cv-02105-WYD-PAC. *Pro se* civil rights action against ADX Warden Ron Wiley, Agent Diana Krist and Associate Warden J.T. Shartle seeking injunctive relief and damages related to Plaintiff's alleged unsafe housing conditions at ADX. Plaintiff voluntarily dismissed his case after the denial of his motion for preliminary injunction and while a motion to dismiss his case on the merits was pending. The case was pending from October 23, 2006 to May 9, 2007. During that time, Plaintiff filed approximately seventy-one motions and letters, the majority of which were denied or rejected, including approximately eight motions for injunctive relief. He also filed at least two notices of appeal to the Tenth Circuit which did not proceed.

(2) 07-cv-00102-ZLW. *Pro se* civil rights action against ADX Warden Ron Wiley, Unit Manager Mark Collins, Case Manager Tina Sudlow and Agent Diana Krist seeking an emergency writ of mandamus related to Plaintiff's alleged unsafe housing conditions at ADX. The action was dismissed in preliminary review as frivolous and malicious pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

(3) 07-cv-00121-WYD-KLM. *Pro se* civil rights action against the United States, ADX Warden Ron Wiley and medical official Steven Nafziger seeking injunctive relief and damages related to Plaintiff's medical care. Plaintiff voluntarily dismissed his case while a motion to dismiss, a motion for sanctions, and a recommendation to dismiss for failure to pay the filing fee were pending. The dismissal was converted to a dismissal with prejudice pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1915(e)(2)(B)(i). The case was pending from January 8, 2007 to June 24, 2008. During that time, Plaintiff filed approximately forty-seven motions and letters, the majority of which were denied or rejected, including approximately five motions for injunctive relief. He also filed at least one notice of appeal to the Tenth Circuit which did not proceed.

(4) 07-cv-00799-WYD-KLM. *Pro se* civil rights and Federal Tort Claims action against ADX Warden Ron Wiley, medical official Steven Nafziger, Case Manager George Knox, Nurse Osagie, Officer Jenkins and Lt. Swanson seeking injunctive relief and damages related to Plaintiff's medical care and an alleged assault against him. The tort claim was dismissed for failure to exhaust and the civil

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rights claims were dismissed on summary judgment following a review of the merits. The case was pending from April 11, 2007 to September 22, 2008. During that time, Plaintiff filed approximately forty-nine motions and letters, the majority of which were denied or rejected, including approximately nine motions for injunctive relief. Due to Plaintiff's frivolous filings, Plaintiff was prohibited from filing motions without leave of Court.

(5) 07-cv-01248-ZLW. *Pro se* civil rights action against ADX Warden Ron Wiley, medical official Steven Nafziger and Nurse Osagie seeking injunctive relief and damages related to Plaintiff's medical care. Plaintiff voluntarily dismissed the case during the preliminary review phase because of its overlap with 07-cv-00799-WYD-KLM. The case was pending from June 4, 2007 to August 2, 2007. During that time, Plaintiff filed nine motions and letters, all of which were denied or rejected, including three motions for injunctive relief.

(6) 07-cv-01250-WYD-KMT. *Pro se* civil rights action against ADX Warden Ron Wiley seeking injunctive relief and damages related to regulatory and constitutional violations with respect to Plaintiff's housing at ADX. The action was dismissed on a motion to dismiss, to which Plaintiff did not respond. The case was pending from June 6, 2007 to September 18, 2008. During that time, Plaintiff filed eighteen motions and letters, the majority of which were denied or rejected, including one motion for injunctive relief.

(7) 07-cv-01839-WYD-KLM. *Pro se* civil rights action against ADX Warden Ron Wiley, BOP Director Harley Lappin and Regional Director Michael Nalley seeking injunctive relief related to the conditions of Plaintiff's confinement at ADX. This action has been pending since August 27, 2007. This case is discussed extensively in the text of the Recommendation.

(8) 07-cv-02203-WYD-KLM. *Pro se* civil rights action against ADX Warden Ron Wiley and medical official Steven Nafziger seeking injunctive relief and damages related to Plaintiff's medical care. This action has been pending since October 9, 2007. A portion of a single claim for injunctive relief remains following adjudication of a motion to dismiss. Since the case's filing, Plaintiff has filed approximately fifty-three motions and letters, the majority of which were denied or rejected, including approximately eleven motions for injunctive relief. A motion to dismiss as a sanction similar to the one at issue here and involving similar conduct and pleadings is pending to which Plaintiff did not respond.

(9) 08-cv-00164-WYD-KLM. *Pro se* civil rights action against ADX Warden Ron Wiley, BOP Director Harley Lappin and Regional Director Michael Nalley seeking injunctive relief and damages related to the conditions of Plaintiff's confinement at ADX. This was dismissed with prejudice pursuant to the parties' stipulation of dismissal while a Recommendation to dismiss the case on its merits was pending. The action was pending from January 16, 2008 to June 9, 2009. During that time, Plaintiff filed approximately thirty-eight motions and letters, the majority of which were denied or rejected, including approximately ten motions for injunctive relief. He also filed at least one notice of appeal to the Tenth Circuit which was voluntarily dismissed.

(10) 08-cv-00298-ZLW. *Pro se* civil rights action against ADX Unit Manage Mark Collins, Case Manager Tina Sudlow and Case Manager George Knox seeking a petition for writ of mandamus related to Plaintiff's desire to converse freely with other inmates. The action was dismissed as frivolous and malicious pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). Plaintiff filed a notice of appeal to the Tenth Circuit, which was resolved on its merits against Plaintiff.

(11) 09-cv-00278-CMA-MEH. *Pro se* civil rights action against ADX Warden Ron Wiley, Associate Warden J. Fox, Lt. Manley, Lt. J.D. Walters, Unit Manager Mark Collins, Case Manager George Knox, Officer Bream, Case Manager Tina Sudlow, Officer Manspeaker, Officer Batulis, Lt. Rivers,

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Agent Diana Krist and USP-Marion Warden B.A. Bledsoe seeking injunctive relief and damages regarding the conditions of multiple inmates' confinement at ADX. The action has been pending since February 10, 2009. Since the case's filing, Plaintiff has filed approximately fifteen motions and letters, including three motions for injunctive relief which remain pending.

(12) 09-cv-00665-ZLW. *Pro se* civil rights action against San Bernadino County Jail officials Lt. Trotter, Sgt. Florence and Sgt. Mahoney seeking injunctive relief regarding the status of Plaintiff's mail. The action was dismissed in preliminary review because Plaintiff failed to pay his filing fee and can no longer proceed *in forma pauperis*.

(13) 09-cv-00933-BNB. *Pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 against ADX Warden Ron Wiley seeking expungement of disciplinary conviction, damages, and attorney's fees. The case remains in preliminary review. In Respondents' preliminary response they argue that the petition should be dismissed for failure to exhaust.

Footnotes

1

Plaintiff was initially proceeding with a co-Plaintiff, Raymond Oecshle. Mr. Oecshle has voluntarily dismissed his claims [Docket No. 221] and, as will be discussed later, has accused Plaintiff of filing false pleadings on the record [Docket No. 330-3]. Plaintiff's case also initially contained an Eighth Amendment claim which has been dismissed [Docket No. 254].

2

The Court notes that Plaintiff has actually filed twenty motions for injunctive relief. Seven were denied without prejudice, and Plaintiff was permitted to consolidate the allegations contained therein in a single pleading [Docket No. 299]. Those allegations are now contained in Plaintiff's Motion for Injunction at issue here.

3

The Court knows of no authority authorizing Defendants to take this action while awaiting approval from regional counsel to place Plaintiff on special legal mail status, nor have Defendants cited any authority.

4

The Court has reviewed Plaintiff's mail log exhibits and notes that although they purport to convey a contemporaneous list of the mailings sent by Plaintiff over a period of time, the exhibits do not have the earmarks of documents containing entries made on an event-by-event basis. Rather, the documents appear to have been created in one sitting, meaning there are no deviations in penmanship, changes in the thickness of the handwriting, or similar detail suggesting that the documents were truly created contemporaneously with Plaintiff's mailings. Moreover, even if the mail logs reflect an accurate depiction of Plaintiff's mailings, they are incomplete and cover only the time period from March 9, 2009 to May 15, 2009.

5

Plaintiff filed a civil rights action in the Central District of California which involves alleged First, Fifth and Eighth Amendment violations, 5:08-cv-00251-RGK-MLG. The Court has reviewed the docket in that case and has been unable to locate an order imposing sanctions upon Plaintiff. Moreover, I note the lenience of the Magistrate Judge presiding over that case, Hon. Marc L. Goldman, in that Judge Goldman credited Plaintiff's contention that Defendants were delaying Plaintiff's mail from January to

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mid-February 2009 and extended Plaintiff's deadline to respond to outstanding discovery requests [Docket Nos. 89 & 91]. In short, I ascertain no prejudice or injury to Plaintiff regarding the status of his mail from the face of the docket and note that Plaintiff's testimony that sanctions have been imposed lacks factual support. *See Hearing Tr.* [# 339] at 68:22-69:5.
6

The Court notes that since the date of the hearing, Plaintiff has sent three pleadings to the Court [Docket Nos. 336, 340 & 343], two of which were motions which contained inflammatory information and were stricken for lack of relevance and support [Docket No. 342], but the Court has not received Plaintiff's response to the Motion to Dismiss.
7

Interestingly, Plaintiff also accused another Magistrate Judge of having an inappropriate relationship with Ms. Padden. That accusation was found to be entirely without merit and malicious. *See, e.g.*, 07-cv-00121-WYD-KLM [Docket Nos. 213 at 3-5 & 192 at 17-18].
8

The Court takes judicial notice of the complaint filed by Plaintiff in 08-cv-00298-ZLW, wherein Plaintiff provides his past and current federal lawsuits in what purports to be an exhaustive list [Docket No. 3]. At the time of its filing, Plaintiff had twenty-seven past and present federal actions. Since that time Plaintiff has filed three additional cases in this District. These numbers do not also include the number of appeals Plaintiff has filed to date. In addition to this Court, the Court notes that Plaintiff has filed cases in the Southern District of Texas, District of Arizona, the Western District of Kentucky, the Middle District of Florida, the Eastern District of Florida, the Southern District of Illinois, the Western District of Missouri, the District of South Carolina, the Southern District of California, and the Central District of California. As noted earlier, the Court takes judicial notice that Plaintiff has at least one pending case in the Central District of California which was filed on February 29, 2008, 5:08-cv-00251-RGK-MLG. As a result of the Court's review of Plaintiff's filings across districts, the Court notes that Plaintiff appears to have at least six pending cases: four in this District, one in the Southern District of Texas, and one in the Central District of California.
9

The following represent only a sample of Orders that have been issued against Plaintiff that speak to this issue. In 07-cv-00121-WYD-KLM, the Court denied Plaintiff's motion because it contained "at least one untruthful statement" [Docket No. 212]. The Court also sanctioned Plaintiff for filing unnecessary pleadings [Docket No. 190]. The Court found that Plaintiff had committed "contumacious behavior," had lied under oath, had filed false pleadings, and had submitted a forged document into evidence. In 07-cv-00799-WYD-KLM, Plaintiff was warned about the "malicious attempts by Plaintiff to inundate the Court with unnecessary filings" [Docket No. 22]. Plaintiff was also sanctioned by this Court for his continued filing of the same motion by striking the redundant documents and requiring that Plaintiff seek leave of the Court before filing any new motion [Docket No. 106]. In 07-cv-01248-ZLW, Plaintiff was cautioned about "his filings [which were] for the most part unnecessary and [were] a malicious attempt to inundate the Court" [Docket No. 12]. In 07-cv-02203-WYD-KLM, the Court twice struck noncompliant pleadings filed by Plaintiff [Docket Nos. 142 & 188]. The District Judge also determined that "Plaintiff cannot ignore warnings of the Court and file [inappropriate pleadings]. . . [which] make[] unfounded and conclusory statements . . ." [Docket No. 102]. Further, the District Judge found objections filed by Plaintiff to be "frivolous" [Docket No. 64]. In 09-cv-00278-CMA-MEH, Plaintiff was warned about his "obligation to file specific, non-frivolous pleadings that comply with both local and federal court rules" [Docket No. 77].
10

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Plaintiff has also sent letters to Senator John McCain containing unsupported and malicious accusations directed at the Court and defense counsel [Docket Nos. 123 & 139].
11

The four known strikes were issued in 07-cv-581-PHX-PGR (MHB) (D. Ariz.) where the Court held that Plaintiff's Complaint failed to state a claim, in Civil Action No. 07-cv-00102-ZLW [Docket No. 6] and Civil Action No. 08-cv-00298-ZLW [Docket No. 7] where the Court dismissed Plaintiff's cases as frivolous and malicious, and in 07-cv-00121-WYD-KLM [Docket No. 213] where the Court dismissed his case as malicious.
12

The Court need only provide a brief basis for its recommendation to dismiss Plaintiff's action as malicious. *See Boag v. MacDougall,* 454 U.S. 364, 365 n.1, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982). The Court notes that the egregious conduct which justifies the Court's recommendation for dismissal with prejudice as a Rule 41(b) sanction also fully supports the Court's recommendation to categorize Plaintiff's case as malicious. *See generally Hawkinson v. Montoya,* 283 Fed. Appx. 659, 662-67 (10th Cir. July 7, 2008) (unpublished decision) (upholding dismissal of case pursuant to both § 1915 and Rule 41(b) based on the same conduct); *Kettering v. Chaves,* No. 07-cv-01575-CMA-KLM, 2008 U.S. Dist. LEXIS 91526, 2008 WL 4877005, at **1, 21 n.4 (D. Colo. Nov. 12, 2008) (unpublished decision) (dismissing plaintiff's case pursuant to § 1915 and Rule 41(b) due to "Plaintiff's pattern of unacceptable and abusive behavior"); *Taylor v. Chicago Police Dep't,* No. 07-cv-5097, 2008 U.S. Dist. LEXIS 47204, 2008 WL 2477694, at *4 (N.D. Ill. June 18, 2008) (unpublished decision) (dismissing plaintiff's case pursuant to § 1915 and Rule 41(b) regarding the same malicious conduct).

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Exhibit (a) 3-pages

PAGE 1-of-2

	Name	Court	Case No.	Filed	NOS	Closed
1	STINE, MIKEAL	codce	1:2006cv02105	10/23/2006	555	05/09/2007
2	STINE, MIKEAL GLENN	txsdce	6:2006cv00021	02/28/2006	510	
3	STINE, MIKEAL GLENN	azdce	2:1994mc00044	05/12/1994	999	08/12/1998
4	STINE, MIKEAL GLENN	azdce	4:1995cv00098	02/15/1995	550	06/22/1995
5	STINE, MIKEAL GLENN	codce	1:2007cv00102	01/16/2007	555	02/08/2007
6	STINE, MIKEAL GLENN	kywdce	3:1994cv00106	02/18/1994	550	05/03/1995
7	STINE, MIKEAL GLENN	codce	1:2007cv00121	01/17/2007	360	
8	STINE, MIKEAL GLENN	txsdce	6:2003cv00125	10/14/2003	555	12/07/2005
9	STINE, MIKEAL GLENN	flmdce	5:2004cv00345	07/29/2004	555	08/08/2005
10	STINE, MIKEAL GLENN	azdce	2:1993cv00372	02/24/1993	550	09/22/1993
11	STINE, MIKEAL GLENN	ilsdce	3:2005cv00468	07/01/2005	540	08/12/2005
12	STINE, MIKEAL GLENN	flmdce	5:2004cv00536	12/02/2004	555	05/25/2005
13	STINE, MIKEAL GLENN	azdce	2:2007cv00581	03/19/2007	555	04/02/2007
14	STINE, MIKEAL GLENN	codce	1:2007cv00799	04/19/2007	550	
15	STINE, MIKEAL GLENN	codce	1:2007cv01248	06/14/2007	555	08/02/2007
16	STINE, MIKEAL GLENN	codce	1:2007cv01250	06/14/2007	555	
17	STINE, MIKEAL GLENN	flmdce	6:2006cv01278	08/28/2006	550	11/08/2006
18	STINE, MIKEAL GLENN	flmdce	6:2006cv01361	09/11/2006	555	12/18/2006
19	STINE, MIKEAL GLENN	azdce	2:1989cv01667	10/06/1989	550	04/02/1996
20	STINE, MIKEAL GLENN	azdce	2:2001cv01671	09/06/2001	555	10/03/2001
21	STINE, MIKEAL GLENN	codce	1:2007cv01839	08/31/2007	550	
22	STINE, MIKEAL GLENN	azdce	2:2001cv01864	10/03/2001	550	11/28/2001
23	STINE, MIKEAL GLENN	codce	1:2007cv02203	10/19/2007	555	
24	STINE, MIKEAL GLENN	azdce	2:1993cv02284	12/06/1993	550	05/05/1994
25	STINE, MIKEAL GLENN	azdce	2:1993cv02338	12/15/1993	550	03/08/1994
26	STINE, MIKEAL GLENN	mowdce	6:2005cv03094	03/07/2005	530	08/03/2005
27	STINE, MIKEAL GLENN	scdce	3:2001cv04788	12/19/2001	555	01/28/2002

Criminal Cases

	Name	Court	Case No.	Filed	Closed
28	STINE, MIKEAL GLEN	txsdce	6:2003cr00044	07/17/2003	04/29/2004
29	STINE, MIKEAL GLEN	txsdce	2:2003mj00238	07/10/2003	
30	STINE, MIKEAL GLEN	azdce	2:2003mj05182	07/31/2003	
31	STINE, MIKEAL GLENN	txsdce	6:2004cr00020	02/20/2004	
32	STINE, MIKEAL GLENN	azdce	3:1999cr00155	03/04/1999	07/13/1999
33	STINE, MIKEAL GLENN	txsdce	4:2004mj00169	03/03/2004	
34	STINE, MIKEAL GLENN	azdce	2:1997cr00512	11/05/1997	04/13/1998
35	STINE, MIKEAL GLENN	azdce	2:1997mj03321	09/15/1997	
36	STINE, MIKEAL GLENN	azdce	2:2003mj05182	07/31/2003	

Appellate Cases

	Name	Court	Case No.	Filed	NOS	Closed
37	STINE, MIKEAL GLENN	10ca	07-1043	02/01/2007	2550	05/18/2007
38	STINE, MIKEAL GLENN	10ca	07-1117	03/26/2007	2550	05/18/2007
39	STINE, MIKEAL GLENN	09ca	94-17129	12/07/1994	1890	11/08/1995
40	STINE, MIKEAL GLENN	09ca	99-10337	07/27/1999	0	12/22/2000

Appellate Cases

41	STINE, MIKEAL GLENN	10cae	07-1043	02/01/2007	2550	05/18/2007
42	STINE, MIKEAL GLENN	10cae	07-1117	03/26/2007	2550	05/18/2007

Exhibit (a) 2-pages

PAGE (2) OF EXHIBIT

Previous Law Suites Continued

43. Stine V. Lappin et. al. #08-CV-00164-WYD-KLM /Dismissed;
44. Stine V. Trotter et. al. # EDCV-08-00251-RGK(MLG) Dismissed;
45. Stine V. USA No. 03-44-Z Pending/Criminal Appeal
46. Preacher V. Wiley et. al. No. 09-CV-00278-CMA-MJEH /Voluntary Dismissed.
47. Stine V. Blanke. 09-CV-1527-BNB Dismissed
48. Stine V. Wiley 09-CV-0933-ZLW Appealed No. 10-1189 Pending:
49. Stine V. Davis 10-CV-00977-ZLW Appealed No. 10-1217 Pending
50. Stine V. Fed. Bureau of Prisons 10-CV-228 FLP/Reassigned 10-CV-3152-BNB
51. Stine V. Wiley No. 10-1189 Tenth Cir. Pending
52. Stine V. Davis No. 10-1217 Tenth Cir. Pending

PAGE (2) of EXHIBIT

Exhibit (3)

Affidavit/Declaration
of
MIKEAL Glenn STINE No. 55436-098
DATED 1-7-2011

1). The Complaint I MIKEAL G. STINE Wish To file Herein has Never been raised before Nor Adjudicated in STATE or Federal Court To My Knowledge.

2). The Claims ARE NOT frivolous or TAKEN in Bad faith TO HARASS Defenderts or iendate the Courts. The Claims ARE Well Grounded in CASE LAW And Constitute A TRUE IMMINENT DANGER To Plaintiff relating TO SERIOUS Medical Needs That TIME/Delay Will ENHANCE The INJURY And PAIN to Plaintiff. Wherefore With Good CAUSE EXPEDITED Consideration is Requested Herein.

I MIKEAL Glenn STINE STATE The above facts & STATEMENTS ARE TRUE And Correct To The best of My Knowledge And beliefs under PENALTY of PERJURY PURSUANT TO 28 USC 1746 This 7TH DAY of JAN 2011

Mikeal Glenn Stine
MIKEAL Glenn STINE #55436-098

1-of-1

Exhibit (3)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Craig B. Shaffer

Civil Action: 11-cv-00109-WJM-CBS
Date: April 12, 2013

FTR - Reporter Deck - Courtroom A402
Courtroom Deputy: Ellen E. Miller

Parties:	*Counsel:*
MIKEAL GLENN STINE, Plaintiff, v. FEDERAL BUREAU OF PRISONS, MR. DAVID ALLRED, Clinical Dir. ADX, MR. BLAKE DAVIS, Warden ADX, MR. MUNSON, Associate Warden ADX, MR. A. OSAGIE, Physician Assist. ADX, MR. R. HUDDLESTON, EMT/ADX, MR. SMITH, Assist. Health Services Administrator, MR. MANSPEAKER, Corr. Officer ADX, Defendants.	Pro Se (by Telephone) J. Benedict Garcia

COURTROOM MINUTES/MINUTE ORDER

HEARING: RULE 16(b) SCHEDULING CONFERENCE
Court in session: 10:04 a.m.
Court calls case. Appearances of *Pro Se* plaintiff and defense counsel. Also present for defendants is Bureau of Prisons representative, Clay Cook.

As the case is called, Plaintiff advises the Court he wishes to discuss settlement of the case in its entirety. Therefore, the Scheduling Conference is vacated and the time is utilized for settlement discussions.

10:06 a.m. The Court goes off the record to discuss settlement with the parties.

11:12 a.m. The Court is back on the record.

A full settlement has been reached. The Settlement Agreement is accepted by the Court and both sides.

It is ORDERED: The unopposed THIRD AMENDED VERIFIED PRISONER COMPLAINT tendered to the Court is accepted for filing and shall be filed by the Clerk of the Court as of this date.

It is ORDERED: Plaintiff's ORAL MOTION to withdraw all pending motions is, with no objects, **GRANTED**. Therefore,

It is ORDERED: Plaintiff's MOTION FOR CHANGE OF VENUE AND APPOINTMENT OF COUNSEL [Docket No. **339**, filed March 04, 2013] is **WITHDRAWN.**

It is ORDERED: Plaintiff's VERIFIED MOTION TO EXPEDITE MOTION FOR PRELIMINARY INJUNCTION No. 340 [Docket No. **345.** filed March 20, 2013] is **WITHDRAWN.**

It is ORDERED: Plaintiff's VERIFIED MOTION FOR AFFIRMATIVE AND OR MANDATORY INJUNCTION [Docket No. **347,** filed April 01, 2013] is **WITHDRAWN.**

It is ORDERED: Plaintiff's MOTION REQUESTING EVIDENTIARY HEARING ON VERIFIED MOTION FOR PRELIMINARY INJUNCTION DOC. 340 DATED MARCH 4TH 2013 AND REQUEST THE COURT ACCEPT ADDITIONAL EXHIBIT (A) ATTACHED HERETO IN SUPPORT OF 340 [Docket No. **349,** filed April 03, 2013] is **WITHDRAWN.**

It is ORDERED: Plaintiff's VERIFIED MOTION FOR PROHIBITORY INJUNCTION / AND REQUEST FOR EVIDENTIARY HEARING WITH EXPEDITED CONSIDERATION DUE IRREPARABLE INJURY AND IMMINENT DANGER [Docket No. **351**, filed April 05, 2013] is **WITHDRAWN.**

It is ORDERED: Plaintiff's MOTION REQUESTING THE COURT ACCEPT SUPPLEMENT EVIDENCE/EXHIBIT (A) IN SUPPORT OF PENDING MOTION FOR PROHIBITORY INJUNCTION [Docket No. **353**, filed April 10, 2013] is **WITHDRAWN.**

In his Order [Docket No. 342] entered March 07, 2013, Judge Martinez ordered that Plaintiff's Verified Motion for Emergency Temporary Restraining Order and/or Preliminary Injunction is denied to the extent it seeks a temporary restraining order. The portion of the Motion seeking a preliminary injunction is referred to United States Magistrate Judge Craig B. Shaffer for any appropriate proceedings.

It is ORDERED: That portion of Plaintiff's MOTION ... FOR PRELIMINARY INJUNCTION [Docket No. **340,** filed March 04, 2013] is **DENIED AS MOOT.**

Parties anticipate forthwith filing a Stipulated Motion to Dismiss.

Hearing concluded.

Court in recess: 11:17 a.m.
Total In-Court Time: 01:13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Case No. 11-cv-0109-WJM-CBS

MIKEAL GLENN STINE,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

ORDER GRANTING STIPULATED MOTION TO DISMISS

This matter comes before the Court on the Parties' Stipulated Motion to Dismiss filed April 12, 2013 (ECF No. 359). The Court having reviewed the Motion and being fully advised hereby ORDERS as follows:

The Parties' Stipulated Motion to Dismiss is GRANTED. The above-captioned matter is DISMISSED WITH PREJUDICE. Each party shall pay his or its own attorney's fees and costs.

Dated this 12th day of April, 2013.

BY THE COURT:

William J. Martínez
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 11-cv-00109-WJM-CBS

MIKEAL GLENN STINE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS (Agency),
MR. DAVID ALLRED, Clinical Dir. ADX,
MR. BLAKE DAVIS, Warden ADX,
MR. MUNSON, Associate Warden ADX,
MR. A. OSAGIE, Physician Assist. ADX,
MR. R. HUDDLESTON, EMT/ADX,
MR. SMITH, Assist. Health Services Administrator,
MR. MANSPEAKER, Corr. Officer ADX,

Defendants.

FINAL JUDGMENT

Pursuant to and in accordance with Fed. R. Civ. P. 58(a), the orders entered during the course of proceedings in this case, and the Order Adopting Magistrate Judge's Recommendation And Granting Defendants' Motion for Summary Judgment, entered by the Honorable William J. Martínez, United States District Judge, on March 15, 2012,

IT IS ORDERED that

1. Magistrate Judge Craig B. Shaffer's Recommendation [ECF No. 281] is ACCEPTED;

2. Defendants' Motion for Summary Judgment (ECF No. 213) is GRANTED;

3. Plaintiff's Second Amended Complaint [ECF No. 153] is DISMISSED

WITHOUT PREJUDICE for failure to exhaust.

IT IS FURTHER ORDERED THAT Final Judgment is entered for Defendants and against the Plaintiff. Each party shall bear their own costs.

Dated at Denver, Colorado this 19th day of March 2012.

FOR THE COURT:

GREGORY C. LANGHAM, CLERK

By: s/ Edward P. Butler
Edward P. Butler, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martinez

Civil Action No. 11-cv-00109-WJM-CBS

MIKEAL GLENN STINE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS (Agency),
MR. DAVID ALLRED, Clinical Dir. ADX,
MR. BLAKE DAVIS, Warden ADX,
MR. MUNSON, Associate Warden ADX,
MR. A. OSAGIE, Physician Assist. ADX,
MR. R. HUDDLESTON, EMT/ADX,
MR. SMITH, Assist. Health Services Administrator,
MR. MANSPEAKER, Corr. Officer ADX,

Defendants.

ORDER ADOPTING MAGISTRATE JUDGE'S RECOMMENDATION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Mikeal Glenn Stine brings claims against the above-listed Defendants, all of whom are employees of the United States Bureau of Prisons, alleging that they violated his Eighth Amendment right to be free from cruel and unusual punishment by failing to provide adequate dental care. (ECF No. 153.) On September 14, 2011, Defendants filed a Motion for Summary Judgment ("Motion") arguing that Plaintiff had failed to exhaust his administrative remedies. (ECF No. 213.) The Court referred the Motion to Magistrate Judge Craig B. Shaffer for a recommended decision. (ECF No. 214.) On February 10, 2012, Magistrate Judge Shaffer issued his Recommendation that the Motion be granted ("Recommendation"). (ECF No. 281.) Plaintiff filed timely objections. (ECF No. 287.)

The Motion, the Recommendation, and Plaintiff's Objections are currently before the Court. For the reasons set forth below, Plaintiff's Objections are overruled, Magistrate Judge Shaffer's Recommendation is adopted, and the Motion is granted. Additionally, the Court adopts the Recommendation with respect to various other motions that Plaintiff has filed.

I. LEGAL STANDARD

When a magistrate judge issues a recommendation on a dispositive matter such as a motion for summary judgment, Federal Rule of Civil Procedure 72(b)(3) requires that the district court judge "determine de novo any part of the magistrate judge's [recommendation] that has been properly objected to." Fed. R. Civ. P. 72(b)(3). In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567, 569 (10th Cir. 1994). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or conversely, is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132 (10th Cir. 2000); *Carey v. U.S. Postal Service*, 812 F.2d 621, 623 (10th Cir. 1987).

A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable party could return a verdict for either party. *Anderson*, 477 U.S. at 248. The Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *Quaker State Mini-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1527 (10th Cir. 1995); *Houston v. Nat'l General Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

II. FACTUAL BACKGROUND

Neither party objects to the recitation of facts set forth by the Magistrate Judge in the "Background" section of the Recommendation. (Rec. at 2-4.) Accordingly, the Court adopts and incorporates the Background section of the Recommendation as if set forth herein. To the extent any additional facts are necessary for the Court's resolution of the summary judgment motion, such facts will be set forth in the analysis section below.

III. ANALYSIS

The Magistrate Judge found that Plaintiff had failed to exhaust his administrative remedies and, therefore, Defendants were entitled to summary judgment. (Rec. at 17.) The Prison Litigation Reform Act (PLRA) requires exhaustion of all "available" remedies. *See* 42 U.S.C. § 1997e(a). To be "available" under the PLRA, a remedy must afford "the possibility of some relief for the action complained of." *Booth v. Churner*, 532 U.S. 731, 738 (2001). The Tenth Circuit has previously recognized that an administrative remedy is not "available" under the PLRA if "prison officials prevent,

thwart, or hinder a prisoner's efforts to avail himself of [the] administrative remedy." *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010); *see also Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002) (holding that a prison official's failure to respond to a grievance within prescribed time limit renders an administrative remedy unavailable). Based on this principle, the Court must "ensure that any defects in exhaustion [are] not procured from the action or inaction of prison officials." *Aquilar–Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007).

The PLRA's requirement that an inmate exhaust all available administrative remedies before initiating suit is "mandatory," whether or not such remedies "meet federal standards." *Woodford v. Ngo*, 548 U.S. 81 (2006). This "exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002).

Plaintiff objects to the Magistrate Judge's finding that he failed to exhaust his administrative remedies. Though somewhat rambling, his arguments boil down to the following: (1) the Bureau of Prison's ("BOP") policy of only allowing one informal resolution to be pursued at a time excuses his failure to exhaust; and (2) Defendants' verbal statements and actions excused his failure to exhaust. The Court will discuss each of Plaintiff's arguments in turn below.

A. BOP Policy

The first step in the BOP's administrative remedy process requires that a prisoner informally present the issue to staff. 28 C.F.R. § 542.13(a). In Plaintiff's unit,

that typically occurs when the prisoner completes an Informal Resolution form. Plaintiff has submitted evidence showing that BOP has a policy of only issuing one Informal Resolution form at a time. (ECF No. 242-2.) The purpose of this policy is "to ensure issues are thoroughly investigated and adequate time is allowed for informal resolution." (*Id.*)

Plaintiff argues that this policy prevented him from being able to adequately exhaust his administrative remedies. (Obj. at 5.) The Magistrate Judge did not address this argument in the Recommendation. Therefore, the Court looks at this issue anew.

In support of this claim, Plaintiff cites *Rhodan v. Schofield*, 2007 WL 1810147 (N.D. Ga. June 19, 2007), and argues that it holds that the BOP policy of only allowing one informal grievance at a time excuses a prisoner from exhausting his administrative remedies. However, *Rhodan* does not address the one grievance policy; rather, the court found that administrative remedies were unavailable to a prisoner because prison officials affirmatively misled him as to the grievance policy. *Id.* at *6-7. The Court finds that *Rhodan* is not instructive here.

Plaintiff fails to cite any additional authority for his claim and the Court finds not merit in his argument. If a prisoner is pursuing a case that involves multiple claims, the Court could see how the BOP policy of only issuing on Informal Resolution form at a time could hinder the prisoner's ability to exhaust his administrative remedies. This is especially true given the short time constraints typically associated with the prison grievance system. However, the instant action involves only one claim—that Plaintiff was denied constitutionally adequate dental care. (ECF No. 153.) Therefore, the Court fails to see how the BOP policy of only issuing one Informal Resolution at a time could

have interfered with Plaintiff's ability to exhaust his administrative remedies on his dental care claim. Accordingly, the Court finds that Plaintiff has failed to show a genuine dispute of fact as to whether the BOP's one Informal Resolution policy made his administrative remedies unavailable such that his non-exhaustion is excused.

B. Defendants' Representations and Actions

The Magistrate Judge found that Plaintiff had failed to show that Defendants interfered with Plaintiff's ability to exhaust his administrative remedies. (Rec. at 16-17.) Plaintiff objects and argues: (1) he was denied grievance forms by Defendants; and (2) Defendants made affirmative representations to him that excuse his non-compliance with the exhaustion requirements. The Court will address each of these arguments below.

1. Denial of Grievance Forms

Plaintiff alleges that he submitted evidence showing that he was denied grievance forms by prison officials. (Obj. at 2-3.) In support of his opposition to the Motion, Plaintiff submitted declarations from Mark Allen, Terry Nichols, Tim Hume, Richard Nunes, and Willie Clark. (ECF Nos. 242-1; 242-3; 147 at 3-5.) Allen, Nichols, Hume, and Clark state that they heard Plaintiff request administrative remedy forms from individuals named Foster, Sudlow, and Rangel. (*Id.*) The declarations state that, instead of providing Plaintiff with the requested forms, these individuals walked away and ignored him. (*Id.*)

The Magistrate Judge found that these declarations constituted inadmissible hearsay and refused to consider them. (Rec. at 14.) Plaintiff objects to this finding and contends that the declarations were based on each declarant's personal knowledge

and that the declarants were eye-witnesses to the events described. (Obj. at 2; 7-8.)

The Tenth Circuit has held: "hearsay testimony that would be inadmissible at trial cannot be used to defeat a motion for summary judgment." *Adams v. Amer. Guar. And Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000). The Federal Rules of Evidence define "hearsay" as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Allen, Nichols, Hume, and Clark's statements that they heard Plaintiff ask for administrative remedy forms are hearsay. They are recounting Plaintiff's statements made outside of the courtroom and they are offered for the truth of the matter asserted, *i.e.* that Plaintiff requested administrative grievance forms. Accordingly, the Magistrate Judge correctly refused to consider these statements in making his Recommendation on the Motion. Therefore, the declarations do not show a dispute of fact as to whether Plaintiff was denied access to the administrative process.

Plaintiff contends that, because his Second Amended Complaint was verified, he has submitted evidence sufficient to meet his burden of showing the Defendants' refused to provide him the forms required to exhaust his administrative remedies. However, the Court has reviewed the Second Amended Complaint and finds no allegation therein regarding Plaintiff being denied administrative grievance forms. (ECF No. 153.) Plaintiff points to no other evidence in the record supporting his contention that he was denied access to the required forms. Rather, the record contains evidence showing that, since June 1, 2010, Plaintiff filed at least twenty-two administrative grievances on the forms that he alleges he was denied. (ECF No. 242-11.) This

evidence hardly supports Plaintiff's contention that he was denied access to these forms on any type of sustained basis. Accordingly, the Court finds that Plaintiff has failed to meet his burden of showing that Defendants interfered with his administrative remedies by failing to provide the necessary forms. *Morgan v. Franklin*, 2008 WL 1925080, *5 (W.D. Okla. April 29, 2008) (prisoner has burden to show that defendants thwarted his efforts to exhaust his administrative remedies).

2. Defendants' Representations to Plaintiff

Plaintiff also alleges that he presented evidence showing that two Defendants—Munson and Davis—told him that he did not need to file an administrative grievance on his dental issues and that these representations excuse his failure to exhaust. (Obj. at 6-7.) The Magistrate Judge found that the evidence in the record was not specific enough to meet Plaintiff's burden of showing that his failure to exhaust should be excused. (Rec. at 15-16.)

"An administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials erroneously inform an inmate that the remedy does not exist or inaccurately describe the steps he needs to take to pursue it." *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011); *see also Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010); *Curtis v. Timberlake*, 436 F.3d 709, 712 (7th Cir. 2005); *Brown v. Croak*, 312 F.3d 109, 112-13 (3d Cir. 2002). The Tenth Circuit has made clear that a prisoner must exhaust his administrative remedies before filing suit. *Ruppert v. Aragon*, 448 F. App'x 862, 863 (2012) ("Since the PLRA makes exhaustion a precondition to *filing* a suit, an action brought before administrative remedies are exhausted must be

dismissed[.]"). It follows that a prisoner claiming that he was excused from exhausting his administrative remedies must show that such occurred before he commenced the litigation.

The evidence in the record on this point comes from Plaintiff's verified Second Amended Complaint and is as follows:

> During the month of Jan. 2011 Mr. Blake Davis and Mr. Munson/Associate Warden making weekly security rounds stopped at my cell and stated we will take care of it (no need to tell the Court or file anything) I advised that Mr. Foster: Mr. Madison filing in for Mr. Foster and Ms. Tena Sudlow had all refused me administrative remedies on being refused Dental since 11-28-2010 and medical on my knee since Jan 3rd 2011, Mr. Munson and Davis stated well there's no need we will take care of it, I told them I can take this to the Court because them refusing me the administrative remedies makes the administrative remedy process unavailable, they stated were [sic] going to get you some help that never came.

(ECF No. 153 at 7-8.)

The Court finds that this evidence fails to show a dispute of fact as to whether Plaintiff was excused from exhausting his administrative remedies before he filed suit. Plaintiff alleges that he complained of not getting care for his knee since January 3, 2011. (*Id.*) Thus, the exchange between Munson and Davis must have occurred sometime after this date. However, Plaintiff has not specified that Munson and Davis made these statements before he signed and submitted his initial Complaint on January 7, 2011. (ECF No. 153 at 7-8; *see also* ECF No. 1.) Plaintiff's initial Complaint mentions other issues with respect to exhaustion, but there is no mention of Plaintiff's exchange with Munson and Davis. (ECF No. 1.) The allegation that this exchange occurred first appeared in Plaintiff's First Amended Complaint, which was signed by

Plaintiff on March 13, 2011. (ECF No. 42 at 7-8.) In the operative pleading, Plaintiff's Second Amended Complaint, Plaintiff alleges only that Davis and Munson made these verbal representations to him sometime "[d]uring the month of Jan[uary] 2011." (ECF No. 153 at 7-8.) Accordingly, the Court finds that Plaintiff has failed to create a genuine dispute of fact as to whether he was excused from exhausting his administrative remedies before he brought this action on January 7, 2011.

C. Conclusion of Motion for Summary Judgment

In sum, Defendants bear the initial burden of showing that Plaintiff failed to exhaust his administrative remedies. *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011). Once Defendants meet this burden, as they have done in this case (*see* ECF No. 213-1), "the onus falls on the plaintiff to show that remedies were unavailable to him." *Tuckel*, 660 F.3d at 1254. Plaintiff has failed to meet that burden. Accordingly, Defendants' Motion for Summary Judgment is granted and Plaintiff's claims are dismissed without prejudice for failure to exhaust his administrative remedies. *See Garcia v. Taylor*, 113 F. App'x 857, 859 (10th Cir. 2004) (affirming district court's dismissal of claims without prejudice where prisoner had failed to exhaust available administrative remedies).

D. Other Pending Motions

In the Recommendation, the Magistrate Judge also recommended that the Court deny the following motions: (1) Plaintiff's "Petition Pursuant to Court Order Seeking Leave of the Court to File Third Verified Amended Complaint Pursuant to Fed. R. Civ. P. 15" (ECF No. 197); (2) Plaintiff's "Verified Emergency Motion for TRO/Preliminary

Injunction/with Expedited Consideration, pursuant to Fed. R. Civ. P. 65" (ECF No. 222); and (3) Plaintiff's "Verified Motion for Partial Summary Judgment on Liability Pursuant to Rule 56(c) + (d)" (ECF No. 236). (Rec. at 22.) The Magistrate Judge recommended that Plaintiff's "Motion Requesting Hon. William J. Martinez Certify that Magistrate Craig B. Shaffer's Order of Sept. 9, 2011 Denying Plaintiff's Verified Motion for TRO/Preliminary Injunction Doc. 136 Filed 6-6-2011" (ECF No. 259) be granted. (Rec. at 22.)

Plaintiff does not object to any of these recommendations. "In the absence of timely objection, the district court may review a magistrate . . . [judge's] report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (citing *Thomas v. Arn*, 474 U.S. 140, 150 (1985) (stating that "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings"). Having reviewed the Recommendation, the Court finds no clear error associated with any of the recommended rulings on Plaintiff's remaining motions. Accordingly, the Court adopts the Recommendation with respect to the rulings on the above-listed motions.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Magistrate Judge Craig B. Shaffer's Recommendation (ECF No. 281) is ACCEPTED;
2. Plaintiff's Objections to the Recommendation are OVERRULED (ECF No. 287);

3. Plaintiff's "Petition Pursuant to Court Order Seeking Leave of the Court to File Third Verified Amended Complaint Pursuant to Fed. R. Civ. P. 15" (ECF No. 197) is DENIED;

4. Plaintiff's "Verified Emergency Motion for TRO/Preliminary Injunction/with Expedited Consideration, pursuant to Fed. R. Civ. P. 65" (ECF No. 222) is DENIED;

5. Plaintiff's "Verified Motion for Partial Summary Judgment on Liability Pursuant to Rule 56(c) + (d)" (ECF No. 236) is DENIED;

6. Plaintiff's "Motion Requesting Hon. William J. Martinez Certify that Magistrate Craig B. Shaffer's Order of Sept. 9, 2011 Denying Plaintiff's Verified Motion for TRO/Preliminary Injunction Doc. 136 Filed 6-6-2011" (ECF No. 259) is GRANTED;

7. The Court CERTIFIES that Magistrate Judge Shaffer's September 9, 2011 order denying Plaintiff's "Verified Emergency for TRO/Preliminary Injunction Pursuant to Fed. R. Civ. P. 65(a)" is a final order based on the parties' consent (ECF Nos. 160 & 195) to allow the Magistrate Judge to fully and finally resolve the issue pursuant to 28 U.S.C. § 636(c)(1);

8. Defendants' Motion for Summary Judgment (ECF No. 213) is GRANTED;

9. Plaintiff's Second Amended Complaint (ECF No. 153) is DISMISSED WITHOUT PREJUDICE for failure to exhaust; and

10. The Clerk shall enter judgment for Defendants. Each party shall bear its own costs. *See Cantrell v. Int'l Brotherhood of Elec. Workers,* 69 F.3d 456, 459 (10th Cir. 1995) (district court may deny costs if the non-prevailing party is indigent).

Dated this 15th day of March, 2012.

BY THE COURT:



William J. Martínez
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

January 23, 2013

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MIKEAL GLENN STINE,

Plaintiff–Appellant,

v.

U.S. FEDERAL BUREAU OF PRISONS; DAVID ALLRED, Clinical Director; BLAKE DAVIS, Warden, ADX; MR. MUNSON, Associate Warden, ADX; A. OSAGIE, Physician Assistant, ADX; MR. SMITH, Assistant, Administrative Health Services; R. HUDDLESTON, EMT/ADX; MR. MANSPEAKER, Correctional Officer, ADX,

Defendants–Appellees.

No. 12-1098
(D.C. No. 1:11-CV-00109-WJM-CBS)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BRISCOE**, Chief Judge, **McKAY** and **HOLMES**, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore ordered

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

submitted without oral argument.

Plaintiff Mikeal Stine, a federal prisoner proceeding pro se, appeals the district court's dismissal of his civil rights complaint on summary judgment. Plaintiff has an extensive history of filing frivolous and malicious actions in federal courts. For this reason, the district court in a previous case imposed prospective filing restrictions on any of his future pro se complaints. *Stine v. Lappin*, No. 07-CV-01839, 2009 WL 2848849, at *5, 20-22 (D. Colo. Sept. 1, 2009). In the present case, Plaintiff filed a *Bivens* complaint asserting claims of inadequate dental care, inadequate medical care for a knee injury, false imprisonment, and unsafe conditions at the prison. The magistrate judge noted that Plaintiff had failed to comply with the district court's filing restrictions but, due to "a continuing concern for the safety of prisoners housed within [the] jurisdiction" (R. Vol. I at 93), directed the warden to provide a statement addressing Plaintiff's allegations of inadequate dental and medical care. After considering the materials submitted by the warden, the district court ordered Plaintiff's dental claims be assigned to a district judge and a magistrate judge despite his failure to comply with the filing restrictions. All other claims were dismissed. The district court ultimately granted summary judgment to Defendants, concluding that Plaintiff had failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). It then denied Plaintiff leave to file a third amended complaint. Plaintiff appeals these decisions.

Plaintiff raises three issues on appeal. First, he argues the district court erred in refusing to consider the affidavits of four other inmates Plaintiff submitted as evidence of

the prison's refusal to provide administrative remedy forms.[1] Second, he argues summary judgment was otherwise inappropriate. Finally, Plaintiff argues the district court erred in denying him leave to file a third amended complaint. We address each of these arguments in turn.

"Like other evidentiary rulings, we review a district court's decision to exclude evidence at the summary judgment stage for abuse of discretion." *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 894 (10th Cir. 1997). Plaintiff argues the district court erred when it refused to consider the affidavits of four of his fellow inmates because they contained inadmissible hearsay. The district court agreed with the magistrate judge's report and recommendation and concluded the affiants' statements that they heard Plaintiff ask for administrative remedy forms were hearsay because they were "recounting Plaintiff's statements made outside of the courtroom and [were] offered for the truth of the matter asserted, *i.e.* that Plaintiff requested administrative grievance forms." (R. Vol. IV at 170.) However, as Plaintiff correctly points out, the affiants' accounts of hearing Plaintiff request administrative remedy forms are not hearsay. Nor

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[1] Plaintiff relies on the affidavits of Terry Nichols, Mark Allen, Tim Hume, Michael Birman, Willie Clark, and Greg Storey. (Appellant's Opening Br. at 24.) After reviewing the record, we are unable to identify any affidavit submitted by Michael Birman or Greg Storey. Plaintiff additionally refers to the affidavit of Richard Nunes, which was attached to his response and considered by the district court, and concedes it was not offered as direct evidence he had been denied administrative remedy forms. (*Id.* at 6.) Rather, it was offered only as evidence that the denial of administrative remedy forms for dental issues "is not an isolated incident" and is "common practice within the ADX facility." (*Id.*) We therefore consider only the affidavits of Terry Nichols, Mark Allen, Tim Hume, and Willie Clark.

are their accounts of the prison officials' responses and refusal to provide the forms. Neither are offered to prove the truth of what Plaintiff or the prison officials said—such as, "May I have a form?" and "No, you may not"—but rather, they are offered to prove that such exchanges took place.[2] Furthermore, the affiants' affidavits make clear their accounts are each based on what they personally overheard and saw, not what Plaintiff told them. Accordingly, the district court abused its discretion when it failed to consider these affidavits.

Having concluded the district court erred in excluding the affidavits of four of Plaintiff's fellow inmates, we now turn to whether, considering these affidavits, summary judgment was appropriate. In doing so, "[w]e review [the] district court's decision to grant summary judgement de novo, applying the same standard as the district court." *Lundstrom v. Romero*, 616 F.3d 1108, 1118 (10th Cir. 2010) (internal quotation marks omitted). Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

Defendants' motion for summary judgment was based on Plaintiff's alleged failure to exhaust administrative remedies. In response to Defendants' motion, Plaintiff did not

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[2] Each of the four affiants recounted only generally what they had seen and heard. For example, one stated that he "heard Stine request administrative remedies on dental and medical and when he stated medical and dental they would just walk away not providing the grievance." (R. Vol. III at 55 (capitalization omitted).) As a result, we do not have any specific statements made by Plaintiff or the prison officials to evaluate.

dispute he failed to exhaust the claims in his second amended complaint. Rather, he argued that prison officials refused to issue the required administrative remedy forms necessary to exhaust, thereby rendering the grievance procedure unavailable. *See Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010) ("Where prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy 'unavailable' and a court will excuse the prisoner's failure to exhaust.") In support of this argument, Plaintiff offered affidavits from four fellow inmates demonstrating he had, on several occasions, been denied the necessary administrative remedy forms. In addition to concluding these inmates' affidavits contained inadmissible hearsay, which, as previously discussed, was error, the magistrate judge further concluded that they did not create a genuine issue of fact because they did not sufficiently identify specific dates or individuals and did "not establish that Mr. Stine was prevented from exhausting all required steps of administrative remedies as to his claim of denied treatment."[3] (R. Vol. IV at 81-82.) We see no such deficiencies in the affidavits.

Although perhaps not models of clarity, the affidavits Plaintiff submitted identified late November 2010 through January 2011 as the relevant time during which the affiants observed Plaintiff's inability to obtain administrative remedy forms. This time period was variously described as "around Thanks Giving [sic] of 2010" and "Xmas 2010

[3] The district court, in adopting the magistrate judge's report and recommendation, did not address these alternative perceived deficiencies. Rather, it refused to consider the affidavits, concluding they contained inadmissible hearsay.

through early 2011" (R. Vol. III at 55), "around Xmas and first part of 2011" (*id.* at 54), and "the months of Dec. 2010 and Jan. 2011" (*id.* at 695 (capitalization omitted)). One of the affiants further identified four specific days on which he observed prison officials refuse to provide administrative remedy forms to Plaintiff. (R. Vol. II at 88 ("January 04, 05 and/or 06, 2011" and "January 13, 2011").) Similarly, the affiants identified specific prison officials whom they had observed refuse to provide the forms: Mr. Foster (R. Vol. II at 88; R. Vol. III at 54, 695), Ms. Sudlow (R. Vol. II at 88; R. Vol. III at 54), Ms. P. Rangel (R. Vol. III at 54), as well as other unspecified "unit team member[s]" (R. Vol. II at 88; *see also* R. Vol. III at 695). Viewing these facts in the light most favorable to Plaintiff and drawing all reasonable inferences in his favor, as we must, we conclude the affidavits are sufficiently specific to create a genuine dispute as to whether Plaintiff was denied access to administrative remedy forms during the period from late November 2010 through January 2011. We see no reason that, in order to meet his burden at summary judgment, Plaintiff was required to present evidence he had specifically requested and been denied every level of administrative remedy form when the previous level form had been withheld.

We conclude Plaintiff has created a triable issue of whether during late November 2010 through January 2011 he was prevented, and thereby excused, from exhausting administrative remedies. This time period, however, does not encompass all claims raised in Plaintiff's second amended complaint. Plaintiff has provided no evidence that prior to November 2010 or after January 2011, he was similarly denied access to

administrative remedy forms for his dental issues. Accordingly, summary judgment was inappropriate only on the claims that Plaintiff would have been required to exhaust during that period. These include Plaintiff's claim that there was a delay in his dental treatment from November 28, 2010, until February 3, 2011 (R. Vol. III at 77), that on January 7, 2011, Defendant Osagie did not address Plaintiff's complaint of "teeth infection" (*id.* at 71), and that during "the rest of Jan. 2011 . . . Mr. Rogers, Vanderman, and Huddleston all stated we can't do anything for you" (*id.* at 72 (capitalization omitted)). As for the remaining claims, the four affidavits do not satisfy Plaintiff's burden on summary judgment of establishing that he exhausted, or was prevented from exhausting, administrative remedies.

Plaintiff argues that summary judgment was inappropriate for three additional reasons. First, Plaintiff argues summary judgment was inappropriate because he presented evidence that prison officials told him they would take care of his complaints, thereby excusing him from complying with the administrative remedy procedure. As the district court noted, other circuits have held that "[a]n administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials erroneously inform an inmate that the remedy does not exist or inaccurately describe the steps he needs to take to pursue it." *Pavey v. Conley*, 663 F.3d 899, 906 (7th Cir. 2011); *see also Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) ("When a prisoner has no means of verifying prison officials' claims about the administrative grievance process, incorrect statements by officials may indeed make remedies unavailable."). Plaintiff argued that

administrative remedies were unavailable to him because "there is no reason to file remedy or litigation because they Mr. Davis, warden and Mr. Munson, associate warden would take care of my dental needs." (R. Vol. III at 689 (capitalization omitted).) In doing so, Plaintiff referred to the following statement contained in his verified second amended complaint:

> During the month of Jan. 2011 Mr. Blake Davis, and Mr. Munson/associate warden making weekly security rounds stopped at my cell and stated we will take care of it (no need to tell the court or file anything)[.] I advised that Mr. Foster: Mr. Madisen filing [sic] in for Mr. Foster and Ms. Tena Sudlow had all refused me administrative remedies on being refused dental since 11-28-2010 and medical on my knee since Jan 3rd 2011, Mr. Munson and Davis stated well theres [sic] no need we will take care of it, I told them I can take this to the court because them refusing me the administrative remedies makes the administrative remedy process unavailable and exhausted, they stated were [sic] going to get you some help that never came . . . .[4]

(R. Vol. III at 71-72 (capitalization omitted).)

We agree with the magistrate judge that this statement falls short of a representation that Plaintiff need not comply with the administrative remedy process. "Although [o]ur summary judgment standard requires us to view the facts in the light most favorable to the non-moving party[,] it does not require us to make unreasonable inferences in favor of the non-moving party." *Carney v. City & Cnty. of Denver*, 534 F.3d 1269, 1276 (10th Cir. 2008) (internal quotation marks omitted) (alterations in

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[4] Plaintiff now describes the prison officials' statements as "no need to file grievance or to court we get you treated" (Appellant's Opening Br. at 6 (capitalization omitted)) and "that they would take care of it, and ensure I was given dental treatment" (*id.* at 17 (capitalization omitted)).

original). It would be unreasonable to infer from the prison officials' statement that they "will take care of it" that Plaintiff was entirely excused from following the administrative remedy process either with regard to that particular claim or, more broadly, for all dental-related claims that might arise in the future. At most, the prison officials were informing Plaintiff they would see to it that his dental concerns, primarily his claim that he had been denied treatment since November 2010, were addressed. Furthermore, Plaintiff has repeatedly stated that the alleged conversation took place in January 2011, after Plaintiff informed the prison officials he had been denied administrative remedy forms for his complaint about the lack of dental treatment since November 2010. Even accepting that the prison officials' statements excused Plaintiff from exhausting administrative remedies, it would be with respect to this claim only, and not the claims that arose after the representation was made. Accordingly, the prison officials' alleged representation does not create a genuine dispute as to whether Plaintiff was excused from exhausting administrative remedies for the remaining claims.

Plaintiff next argues that summary judgment on his claim against Defendant Manspeaker was inappropriate because he had not learned of the facts giving rise to that claim until sometime later and therefore had no opportunity to exhaust his administrative remedies. However, Plaintiff did not raise this argument until his objection to the magistrate judge's report and recommendation. It is well settled that, "[i]n this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived." *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001). We therefore

decline to address Plaintiff's argument that summary judgment against Defendant Manspeaker was improper.

In his last challenge to the district court's grant of summary judgment, Plaintiff argues generally that the district court erred in refusing to "consider[] the complete file and [listed documents]" that were part of the docket, but had not been submitted in connection with his response to Defendants' motion for summary judgment. (Appellant's Opening Br. at 7 (capitalization omitted).) Plaintiff does not point to any specific piece of evidence in the record that, had it been considered, would have supported his opposition to summary judgment. While we and the district court liberally construe Plaintiff's pro se pleadings, "we do not act as his advocate." *Cardoso v. Calbone*, 490 F.3d 1194, 1197 (10th Cir. 2007). "Thus, although we make some allowances for the [pro se] plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements[,] the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and *searching the record*." *Garett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks and citation omitted) (alterations in original) (emphasis added). We see no error in the magistrate judge's or district court's treatment of Plaintiff's pleadings, which included careful consideration of his various arguments.

For the foregoing reasons, we conclude the district court erred in granting summary judgment on Plaintiff's claims that arose during November 2010 through

January 2012. However, summary judgment was appropriate on the remaining claims because Plaintiff offered no evidence he was excused from exhausting those claims.

We turn now to Plaintiff's challenge to the district court's order denying him leave to file a third amended complaint. The magistrate judge's report and recommendation, which the district court adopted, set forth two reasons for the denial of Plaintiff's motion to amend: first, Plaintiff's proposed amendments were futile because of his failure to exhaust administrative remedies, and second, "[a]llowing Mr. Stine to allege additional claims against new defendants based on actions taken after the filing of his original Complaint would defeat the purposes of Mr. Stine's filing restrictions, filing fees, the three strikes provision of § 1915(g), and the imminent danger exception." (R. Vol. IV at 86.) The district court adopted the magistrate judge's recommendation after determining Plaintiff had not objected to this portion of the report and recommendation. After reviewing Plaintiff's objection and construing it liberally, we conclude Plaintiff did object to the magistrate judge's determination that he had failed to exhaust his proposed claims against Mr. Rogers. (*See* R. Vol. IV at 156 ("The courts accross [sic] the board have held that new issues can be added that happen after complaint was filed that are now exhausted . . . see Exhibit (3) attached hereto that the new + related issue in relation to Third Amended Complaint against EMT Roger's [sic] should be allowed." (capitalization omitted)), 162 (labeling Exhibit 3 as "Total Exhaustion for EMT/Rogers Refusing to Respond to Emergency" (capitalization omitted)).) However, Plaintiff did not object to the magistrate judge's determination that permitting Plaintiff to file the proposed third

amended complaint would allow him to circumvent the PLRA. Plaintiff therefore waived this issue, *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010), and is unable to challenge the magistrate judge's second basis for recommending that his motion to amend be denied. We therefore need not address Plaintiff's argument that he sufficiently exhausted his claims against Mr. Rogers.

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment on Plaintiff's three claims that arose during November 2010 through January 2011 and **REMAND** for further proceedings consistent with this order. We **AFFIRM** the district court's grant of summary judgment on Plaintiff's remaining claims and its denial of Plaintiff's motion to amend. Plaintiff's motion to proceed *in forma pauperis* is **GRANTED**. Plaintiff is reminded of his continuing obligation to make partial payments until the filing fee has been paid in full. All other pending motions are **DENIED.**

Entered for the Court

Monroe G. McKay
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

January 23, 2013

Mikeal Glenn Stine
USP - Florence ADMAX
P.O. Box 8500
Florence, CO 81226
#55436-098

RE: 12-1098, Stine v. U.S. Federal Bureau of Prisons, et al
Dist/Ag docket: 1:11-CV-00109-WJM-CBS

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Paul Farley
J. Benedict Garcia

EAS/kf

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00109-WJM-CBS

MIKEAL GLENN STINE,

Plaintiff,

v.

USA,

Defendant.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2672

It is hereby stipulated by and between the undersigned Plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of $2,000, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which

Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to Plaintiff. This settlement is entered into by all parties for the purpose of

compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

7. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for Two Thousand dollars ($2,000.00) and made payable to Mikeal Stine.

8. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

9. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

10. Faxed or scanned signatures may serve as originals.

Executed this 12th day of April, 2013.

J. Benedict Garcia
Attorney for United States of America
Assistant United States Attorney
1225 Seventeenth Street, Suite 700
Denver, Colorado 80202
Phone: (303) 454-0100
Fax: (303) 454-0404

Attorney for Defendant

Executed this 12th day of April, 2013.

Clay Cook
Senior Attorney Advisor, Federal Bureau of Prisons
P.O. Box 8500
Florence, CO 81226

Attorney for the Federal Bureau of Prisons

Executed this 12 day of April, 2013.

Mikeal Glenn Stine #55436-098
Florence Admax - U.S. Penitentiary
P.O. Box 8500
Florence, CO 81226

Plaintiff, *pro se*

Cause of Action I

4.) The DOJ failed to ensure that each of the components named herein complied with its obligations under the FOI/PA;

DEFENDANT OFFICE OF INFORMATION POLICY

5.) The Office of Information Policy (OIP) is a component of the DOJ and is responsible for encouraging compliance with the FOI/PA through the adjudication of administrative appeals from component responses to FOI/PA requests;

6.) The OIP maintains offices at:

Office of Information Policy
1425 New York Avenue
Suite 11050
Washington, D.C. 20530-0001;

Cause of Action II

7.) On or about April 1, 2011 Plaintiff submitted an FOI/PA request to the OIP asking for all records related to each of Plaintiff's administrative appeals;

8.) The OIP failed to disclose any records responsive to Plaintiff's request or even acknowledge receipt of Plaintiff's request in writing;

9.) The OIP improperly denied each of Plaintiff's appeals from Defendants Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Executive Office for United States Attorneys' (EOUSA) responses to Plaintiff's FOI/PA requets, affirming the action of the Defendant in nearly every appeal;

DEFENDANT NATIONAL SECURITY DIVISION

10.) The National Security Division (NSD), created in 2006 by

the reauthorization of the USA PATRIOT Act, is a consolidation of the Office of Intelligence and the Counterterrorism and Counterespionage Sections of the DOJ's Criminal Division and is responsible for overseeing terrorism investigations and prosecutions;

11.) The NSD maintains offices at:

National Security Division
950 Pennsylvania Ave., N.W.
Room 6150
Washington, D.C. 20530-0001

Cause of Action III

12.) On or about March 21, 2011 Plaintiff submitted an FOI/PA request to the NSD asking for all documents and records pertaining to Plaintiff;

13.) The NSD failed to disclose any records responsive to Plaintiff's request or even acknowledge receipt of Plaintiff's request in writing;

14.) During the course of FBI investigation No. 2260-SI-55106 several reports were sent to the NSD's Counterterrorism office in Washington D.C., one of which is made part of this Amended Complaint (see Plaintiff's Exibit (P.Ex.) 44), and the NSD improperly withheld these records;

DEFENDANT EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

15.) The Executive Office for United States Attorneys (EOUSA) is responsible for, among other things, processing FOI/PA requests directed to any of the ninety-three U.S. Attorneys Office districts;

16.) The EOUSA maintains offices at:

Executive Office for United States Attorneys
600 East Street, N.W.
Room 7300
Washington, D.C. 20530-0001;

Cause of Action IV

17.) On or about July 21, 2010 Plaintiff submitted an FOI/PA request to the EOUSA asking for all documents and records pertaining to the Plaintiff that are in the posession of the Central District of Illinois office;

18.) On November 12, 2010 the EOUSA mailed Plaintiff a response to his July 21st request which included a cover letter containing an index of exemptions cited and pages released in full, in part, or withheld in full (see P.Ex. 45);

19.) The EOUSA states in its cover letter that one page was withheld in full (see P.Ex. 45);

20.) By comparing the exemptions cited in the cover letter to the exemptions listed next to the redactions made to the pages that were released in part, Plaintiff was able to determine that the only page withheld in full related to grand jury proceeding, exemption 6(e) (see P.Ex. 45);

21.) The FBI provided Plaintiff with a copy of a letter sent to the FBI from assistant U.S. Attorney Patrick Chesley on July 23, 2007, referencing the Plaintiff, which is one of at least two letters the FBI received from AUSA Chesley that were improperly withheld in full, without being acknowledged in a deleted page index, from the EOUSA's response to Plaintiff's FOI/PA request (see P.Ex. 44 p.2 @ paragraph 5 and 46);

22.) The Christian County Sheriff's Office (CCSO) provided Plaintiff with a copy of a report it sent to the U.S. attorney's office on July 6, 2009 that the EOUSA improperly withheld in full, without listing in a deleted page index, from the EOUSA's response to Plaintiff's FOI/PA request (P.Ex. 48);

Cause of Action V

23.) In early 2011 Plaintiff submitted another FOI/PA request to the EOUSA asking for all records petaining to Plaintiff that are in the possession of the U.S. Attorneys Offices for the districts of Southern Illinois, Northern Illinois, Eastern Missouri, Eastern Wisconsin, and Southern Indiana;

24.) The EOUSA acknowledged receipt of Plaintiffs request but as of the date this Amended Complaint was drafted, Plaintiff has not received a response;

25.) The EOUSA is in possession of at least one document responsive to Plaintiffs 2011 request (see P.Ex. 56);

26.) Given the fact that the EOUSA failed to recognize letters created by one of its offices as responsive to Plaintiffs FOI/PA request, delaying these proceedings pending a response from the EOUSA would be futile;

DEFENDANT UNITED STATES MARSHALS SERVICE

27.) The United States Marshals Service (USMS) serves as a law enforcement agency of the federal government and also as officer of the federal courts. The USMS maintains files on individuals for whom federal warrants have been issued, records on prisoners in the custody of the USMS, background information and records related to threats to and the protection of government witnesses, U.S. Attorneys and their assistants, federal jurists, and other court officials, records on process served and executed in federal court proceedings, and records of seized and forfeited property and evidence;

28.) The USMS maintains offices at:

United States Marshals Service
2604 Jefferson Davis Highway
Alexandria, VA 22301-1025;

Cause of Action VI

29.) In early 2011 Plaintiff submitted an FOI/PA request to the USMS asking for all records pertaining to Plaintiff;

30.) On March 23, 2011 the USMS sent Plaintiff a response to Plaintiff's request which included a cover letter wherein the USMS states that it withheld agency records that "...originated with or contain information furnished by the Bureau of Prisons (BOP)." (see P.Ex. 55);

31.) On November 7, 2006 while in the custody of the BOP at the United States Penitentiary in Terre Haute, Indiana Plaintiff filed a Habeas Corpus petition challenging the calculation of his jail credits. The governments return to the order to show cause included USMS records that were not included with the USMS's response to Plaintiff's FOI/PA request (see Shehadeh v. Veach, Southern District of Indiana case No.: 2:06-CV-00238-LTM-WTL d/e 7);

32.) The USMS improperly withheld agency records including the nine documents cited in the cover letter to the March 23rd response and those that were included with the governemnt's return on the order to show cause in Shehadeh v. Veach;

DEFENDANT FEDERAL BUREAU OF PRISONS

33.) The Federal Bureau of Prisons (BOP) maintains records on current and former inmates of federal penal and correctional institutions concerning: sentence computation, institution of confinement, criminal, social, educational, and occupational background, identification data, institutional work and housing assignments,

educational, disciplinary, health, and work data during incarceration, and report relating to release planning, furlough, institutional adjustment, and violations of release;

34.) The BOP maintains offices at:

Federal Bureau of Prisons
Room 841, HOLC Building
Washington, D.C. 20534

Cause of Action VII

35.) In January 2011 Plaintiff submitted an FOI/PA request to the BOP asking for all records pertaining to Plaintiff and as of the date this Amended Complaint was drafted the BOP has failed to provide Plaintiff with a response or an acknowledgement letter;

36.) The BOP improperly withheld those agency records that were furnished to the USMS (see P.Ex. 55);

DEFENDANT DRUG ENFORCEMENT ADMINISTRATION

37.) The Drug Enforcement Administration (DEA) maintains investigative and intelligence files of criminal activities related to illicit drug traffic and drug abuse, rosters and investigations of legitimate drug handlers, distributors and manufacturers, and records of controlled substance security investigations;

38.) The DEA maintains offices at:

Drug Enforcement Administration
700 Army Navy Drive
Arlington, VA 22202

Cause of Action VIII

39.) In late 2009 Plaintiff submitted an FOI/PA request to the DEA asking for all records pertaining to Plaintiff;

40.) On or about August 27, 2010 the DEA provided Plaintiff with a response that included a cover letter with an index of

exemptions cited;

41.) After comparing the exemptions cited in the cover letter with the exemptions listed by the redacted portions of the pages released in part Plaintiff was able to determine that two of the exemptions cited, 5 U.S.C. 552(b)(7)(A) and 5 U.S.C. 552a(j)(2), did not correspond to any of the four pages of released documents leading Plaintiff to believe that the DEA improperly withheld agency records (see P.Ex. 53 and 54);

42.) Of the four pages released three are from a report of at lease four pages however only pages two, three and four were released proving that the DEA improperly withheld agency records (see P.Ex. 54 p. 1-3);

43.) Sometime in September or October of 2010 Plaintiff wrote a letter to DEA FOI Specialist John Kewley and informed him of the inconsistency with the cover letter and the documents released and requested an explanation but Plaintiff received no reply;

44.) The DEA improperly withheld agency records by not providing Plaintiff with page one of the report dated June 2, 2009 and the other documents responsive to Plaintiff's request that are referenced in the exemptions cited section of the cover letter (see P.Ex. 53, 54);

45.) During the course of a 2009 investigation conducted by the Central Illinois Enforcement Group (CIEG) several telephone calls made to Plaintiff by CIEG agent James Stewart were recorded. After Plaintiff was formally charged with delivert of a controlled substance Plaintiff's defense counsel attorney Dennis Atteberry, through several pre-trial motions, sought documentation of the authority obtained by CIEG agents to record said phone calls. According to reports from the Illinois State Police that were provided to Plaintiff and his

defense counsel a federal overhear authorization was obtained by DEA agent Tim Hanson and given to the CIEG agents (see record in People v. Shehadeh Christian County Case No. 2009-CF-66, ISP FOI file No. 9873, and ISP investigative file 08-16034CI);

46.) The DEA improperly withheld agency records related to the federal overhear authorization;

DEFENDANT FEDERAL BUREAU OF INVESTIGATION

47.) The Federal Bureau of Investigation (FBI) maintains files of its criminal, legal, and security investigations, a nationwide index of wanted persons, stolen property, criminal histories, and missing persons, and fingerprint identification records;

48.) The FBI maintains offices at:

Federal Bureau of Investigation
170 Marcel Drive
Winchester, VA 22602;

Cause of Action IX

49.) Sometime in February or March of 2011 Plaintiff submitted an FOI/PA request to the FBI asking for all records that have been made part of any of the FBI files from which the records released in response to Plaintiff's late 2009 FOI/PA request came, since said response was provided to Plaintiff in mid-2010, that were not disclosed in the first or second release of responsive records and the FBI failed to provide a response or even acknowledge Plaintiff's request in writing;

Cause of Action X

50.) Sometime in late 2010 or early 2011 Plaintiff submitted an FOI/PA request to the FBI asking for all records related to an investigation involving Christian County State's Attorney Thomas O.

Finks that was conducted during Finks' term in office;

51.) On January 13, 2011 the FBI sent Plaintiff a letter in response to Plaintiff's FOI/PA request (FBI FOIPA Request No.: 1160100-000) which stated that records concerning a third party cannot be released absent "...a clear demonstration that the public interest in disclosure outweighs the personal privacy interest and that significant public benefit would result from the disclosure of the requested records." (see P.Ex. 51);

52.) Thomas O. Finks is currently and was at the time that the investigation for which the records Plaintiff seeks were produced, State's Attorney for Christian County, Illinois and the FBI's own records in FBI file No.: 2660-SI-55106-68 document its awarness of Finks' position as State's Attorney (see P.Ex. 52 and 58);

53.) The disclosure of information surrounding the suspected illegal activities of a public official outweighs any personal privacy interest;

Cause of Action XI

54.) In October or November of 2010 Plaintiff submitted an FOI/PA request to the FBI (FBI FOIPA Request No.: 1157327-000) asking for all records that have been made part of any of the FBI files from which the records released in response to Plaintiff's late 2009 FOI/PA request came, since said response to Plaintiff's request was furnished to Plaintiff in mid-2010, that were not disclosed in the first or second release of responsive records;

55.) The FBI provided Plaintiff with a letter on or about November 18, 2010 which stated that a new search was conducted and no additional records were located;

56.) The FBI improperly withheld agency records that were responsive

to Plaintiff's FOI/PA request by not providing Plaintiff with records that were created since the FBI's response to Plaintiff's late 2009 request;

Cause of Action XII

57.) In August of 2010 Plaintiff submitted an FOI/PA request to the FBI (FBI FOIPA Request No.: 1140560-001) asking for all records that have been made part of any of the FBI files from which the records released in response to Plaintiff's late 2009 FOI/PA request came, since said response was furnished to Plaintiff in mid-2010, that were not disclosed in the first or second release of responsive records;

58.) The FBI provided Plaintiff with a letter on or about September 2, 2010 which stated that a new search was conducted and no additional records were located;

59.) Plaintiff realledges statements made in paragraph 56.);

Cause of Action XIII and XIV

60.) Once in late 2010 and again in early 2011 Plaintiff submitted an FOI/PA request to the FBI asking that Plaintiff be furnished with copies of records newly added to the FBI files from which the records responsive to Plaintiff's late 2009 FOI/PA request came and that said newly added records be furnished to Plaintiff immediately after being added to the FBI files without Plaintiff having to submit a new request;

61.) The FBI failed to acknowledge Plaintiff's request in writing or provide Plaintiff with the requested newly added records;

62.) The FBI improperly withheld agency records by failing to provide Plaintiff with copies of the newly added records responsive to Plaintiff's requests and despite Plaintiff describing the event that is documented in the newly added records;

Cause of Action XV

63.) In mid to late-2010 Plainitff submitted a follow-up FOI/PA request to his late-2009 request to the FBI asking for all records pertaining to four FBI files referenced in the records released in response to Plaintiff's late-2009 FOI/PA request but not released in the FBI's response (FBI file Nos.: 321A-SI-A-48685-E, P.Ex. 5 and 39; 801E-SI-A55730, P.Ex. 32; 66F-SI-A54333-A-17 and 66F-SI-A54333-B-33, P.Ex. 21);

64.) The four files listed in paragraph 63.) are responsive to Plaintiff's late-2009 FOI/PA request since at least some of the records contained therein overlap with the three FBI files from which the records responsive to Plaintiff's late-2009 request came (FBI file Nos.: 174-C-SI-53671, 89B-SI-53766, and 2660-SI-55106)(P.Ex. 5, 21, 32, and 39);

65.) The FBI improperly withheld the agency records contained in the four FBI files listed in paragraph 63.) by failing to release all documents contained in said files and by failing to respond to Plaintiff's mid to late-2010 follow-up FOI/PA request;

Cause of Action XVI

66.) On or about November 17, 2009 Plaintiff submitted an FOI/PA request to the FBI asking for all records pertaining to Plaintiff;

67.) According to the cover letters included with the FBI's releases of documents responsive to Plaintiff's FOI/PA request, there are three FBI files in which records pertaining to Plaintiff were found (see paragraph 64.));

68.) Upon information and belief it is the practice of the FBI to assign individual reports contained in a particular file a series or document number based on the FBI file number followed by

a hyphen and then a number representative of the chronological order in which said report was made part of the FBI file (compare P.Ex. 12-15);

69.) Upon information and belief it is the practice of the FBI incorporate sub-files for grand jury, financial loss, etc. documents into a file and assign the reports contained therein a series or document number based on the FBI file number followed by a hyphen and the abbreviation for the type of sub-file followed by a number representative of the chronological order in which the report was made part of the sub-file (compare P.Ex. 1-3, 18, and 19);

70.) Upon information and belief it is the practice of the FBI to document the file to which a report belongs by listing the file number on the report;

71.) By comparing the records released and their series or document number Plaintiff has been able to determine that the FBI did not release the following reports or pages in a report that belong to the corresponding FBI files:

FBI File No.	Series or Document No.	Pages Missing
174C-SI-53671-GJ	2	all
	5-end	all
321A-SI-A-48685-E	1-678	all
	680-768	all
	770-end	all
89B-SI-53766	1	3,4,7, and 8
	3	3,4,8, and 9
	5	3,4,8-end
	6	3,4,5,9-end
	9	4-end

FBI File No.	Series or Document No.	Pages Missing
	19-end	all
89B-SI-53766-ELA	1	all
	2	3,7,8, and 9
	3	3 and 4
	4	3 and 4
	5	3,4,7-end
	6-end	all
66F-SI-A54333-A	1-16	all
	18-end	all
66F-SI-A54333-B	1-32	all
	34-end	all
2660-SI-55106	4	all
	11	all
	24	all
	29-37	all
	46	all
	47	all
	87-88	all
	91-92	all
	94-end	all
2660-SI-55106-GJ	3-end	all
2660-SI-55106-FIN	2-end	all
801E-SI-A55730	1-7	all
	9-end	all
174C-SI-53671	3-4	all
	6-7	all
	10-11	all

FBI File No.	Series or Document No.	Pages Missing
	13	all
	20-23	all
	26	all
	30-31	all
	35-36	all
	39-40	all
	42-end	all

72.) Upon information and belief of the Plaintiff it is common practice for FBI agents to take handwritten notes during interviews (see P.Ex. 26,27, and 57). In P.Ex 27 on page 1 at paragraph 3 the reporting agent references an interview with Plaintiff that is memorialized, in part, in the handwritten notes taken by agent Don Berecz during said interview (P.Ex. 27 p.4);

73.) The FBI did not include the handwritten notes from the agents present during the interview referenced in most of the records released (see P.Ex. 12-15, 22, 26-28, 35-38, 40-43, 57, and 58);

74.) Many of the reports contained in the records released document the FBI's receipt of files from outside the FBI or reference attatchments that were not included with the records released (see P.Ex. 4, 23-25, 30, 31, 33, and 34);

75.) The FBI improperly redacted information not exempt from disclosure in the records released in part and in many cases deleted entire paragraphs and pages of information failing to leave even connecting words (see P.Ex. 2,3, 5-17, 22, 26-28, 33, 35-38, 40, 41, and 43);

76.) The FBI failed to account for the origin of certain facts, allegations, and information that the FBI did not and could not have

obtained without the assistance of outside agencies (see P.Ex. 20, 21, and 50); In P.Ex. 20 the reporting agent simply states that the "Captioned subject [Plaintiff] has been identified as possibly being the responsible party for outages of several area power stations. He is also believed to be [a] member of White Supremacy Movement" without documenting why the FBI believes this or where the information that suggests this came from. The reporting agent in P.Ex. 21 makes the same statement on pages 1 and 3 and additionally states that Plaitiff has "made several threats in the past to blow-up buildings and has some previous explosives/fireworks training" and that "Shehadeh has also previously been oberved with firearms at his residence in 2003" without stating where this information, represented as fact in P.Ex. 21, originated from. P.Ex. 50, a summary of a Christian County Crime Stoppers tip, is also made part of the FBI file without documentation of its origin;

77.) The FBI failed to release records documenting several telephone calls agents made to the Sangamon County State's Attorney's Office (SCSA) and the Jackson County State's Attorney's Office (JCSA) in 2007 and 2008 and the Christian County States's Attorney's Office in 2009 and 2010. According to Plaintiff's defense counsel for a 2007 DUI in Sangamon County, John Sharp, the assistant state's attorney assigned to prosecute Plaintiff's case was contacted by the FBI in late-2007 and early-2008 and asked to ensure that a conviction was secured for Plaintiff's DUI charge prior to the termination of Plaintiff's Jackson County probation in August of 2008 so that Jackson County will have grounds to seek the revocation of Plaintiff's probation. According to Plaintiff's defense counsel for a 2007 Christian County charge, Aaron Calvert, an attorney he knows in the JCSA was contacted

by the FBI in 2007 and asked to seek revocation of Plaintiff's proabtion. According to Christian County State's Attorney Thomas Finks, the FBI contacted his office several times in 2009 and 2010 regarding the status of Plaintiff's pending drug charges. In P.Ex. 59 the FBI documents a 2008 phone conversation with Thomas Finks and in P.Ex. 60 the FBI documents a phone conversation with the SCSA. The FBI discloses the identity of the person they are speaking with in P.Ex. 58 and 59 but not in 60. The FBI also failed to disclose the report documenting the telephone call it originally made to the SCSA, the telephone call it made to JCSA, and the several telephone calls it made to Thomas Finks in 2009 and 2010 (see P.Ex. 58-60);

78.) In late-2009 or early-2010 a male and female FBI agent attempted to question Plaintiff at his home in Taylorville in reference to Plaintiff's attempt to get in contact with an FBI agent who Plaintiff had learned from Thomas Finks was inquiring about the status of Plaintiff's pending drug charges. None of the records released contain a report of this meeting.

79.) The FBI failed to release the video tapes that it made and that are referenced in several of the records released (see P. Ex. 29 and 30);

80.) The FBI failed to release the exact dollar amount of the damage and the list of critical needs customers that are referenced in one of the documents (see P.Ex. 29 p.2 at paragraph 4);

81.) P.Ex. 42 references the receipt of evidence by a St. Louis, Missouri FBI agent. The FBI failed to release the report of this St. Louis FBI agent or the evidence receipt for the item collected by said FBI agent (see P.Ex 42);

82.) The FBI failed to release or identify the reports referenced

P.Ex. 58 that were shown to Christian County State's Attorney Thomas Finks (see P.Ex. 58);

83.) The FBI failed to release the documents referenced in paragraph four of P.Ex. 61 (see P.Ex. 61);

WHEREFORE Plaintiff prays that this Honorable Court grant the following relief;

1.) A jury trial on matters triable by jury;

2.) All of the relief requested in the original complaint filed on November 22, 2010;

3.) Damages in excess of $1.00.

Respectfully Submitted,

DATED: April 25th 2011

Jamal Shehadeh, Plaintiff

VERIFICATION

I Jamal Shehadeh, first being duly sworn, hereby swear and affirm under penalties of perjury that the contents of the foregoing document except for that stated upon information and belief is true and accurate to the best of my knowledge.

STATE OF ILLINOIS)
) ss
COUNTY OF LOGAN)

Subscribed and sworn before me on this the 26 day of April, 2011.

Notary Public

SEAL

NOTARY PUBLIC OFFICIAL SEAL STATE OF ILLINOIS
K BRINTON
MY COMMISSION EXPIRES
FEBRUARY 19, 2013

PROOF OF SERVICE

I Jamal Shehadeh do hereby swear and affirm under penalties of perjury that a copy of the foregoing Amended Complaint consisting of ninteen typewritten pages including this Proof of Service was served on the Government via electronic means by placing the original of the same in U.S. mail adressed to:

United States District Court
Office of CLerk of the Court
600 East Monroe Street
Springfield, IL 62701

On this the 26 th day of April, 2011.



Mr. Jamal Shehadeh #s10300
Plaintiff, pro-se
Logan Correctional Center
P.O. Box 1000
Lincoln, IL 62656

CLOSED,CONMAG

U.S. District Court
CENTRAL DISTRICT OF ILLINOIS (Springfield)
CIVIL DOCKET FOR CASE #: 3:10-cv-03306-BGC

Shehadeh v. Federal Bureau of Investigation
Assigned to: Magistrate Judge Byron G. Cudmore
Cause: 05:552 Freedom of Information Act

Date Filed: 11/22/2010
Date Terminated: 03/26/2012
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: Federal Question

Plaintiff

Jamal Shehadeh

represented by **Jamal Shehadeh**
S10300
LOGAN
Logan Correctional Center
Inmate Mail/Parcels
1096-1350th St., Box 1000
Lincoln, IL 62656
217-735-5581
PRO SE

V.

Defendant

Federal Bureau of Investigation
TERMINATED: 08/30/2011

represented by **David H Hoff**
US ATTY
201 South Vine
Urbana, IL 61801
217-373-5875
Fax: 217-373-5891
Email: david.hoff@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Drug Enforcement Administration
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

United States Marshal Service
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Office of Information Policy
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

National Security Division
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Federal Bureau of Prisons
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Executive Office for United States Attorneys
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

United States Department of Justice

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/26/2012		TEXT ORDER by Magistrate Judge Byron Cudmore: Parties' Stipulated Motion to Dismiss the Plaintiff's Amended Complaint and this Case With Prejudice 122 reviewed and ALLOWED. Case is dismissed with prejudice. CASE CLOSED. Entered by Magistrate Judge Byron G. Cudmore on 3/26/2012. (MAS, ilcd) (Entered: 03/27/2012)
03/20/2012	122	Joint MOTION to Dismiss by Plaintiff Jamal Shehadeh, Defendant United States Department of Justice. Responses due by 4/6/2012 (Hoff, David) (Entered: 03/20/2012)
03/20/2012		TEXT ORDER by Magistrate Judge Byron Cudmore: Defendant's Motion with Telephonic Consent of Plaintiff to Suspend the March 20, 2012 Summary Judgment Deadline Pending Agreed Resolution of Case 121 reviewed. The Court suspends the 3/20/2012 deadline for filing a summary judgment in this case. Status report or motion to dismiss based on settlement due by 4/13/2012. (LB, ilcd) (Entered: 03/20/2012)

CLOSED,CONMAG

U.S. District Court
CENTRAL DISTRICT OF ILLINOIS (Springfield)
CIVIL DOCKET FOR CASE #: 3:10-cv-03306-BGC

Shehadeh v. Federal Bureau of Investigation
Assigned to: Magistrate Judge Byron G. Cudmore
Cause: 05:552 Freedom of Information Act

Date Filed: 11/22/2010
Date Terminated: 03/26/2012
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: Federal Question

Plaintiff

Jamal Shehadeh

represented by **Jamal Shehadeh**
S10300
LOGAN
Logan Correctional Center
Inmate Mail/Parcels
1096-1350th St., Box 1000
Lincoln, IL 62656
217-735-5581
PRO SE

V.

Defendant

Federal Bureau of Investigation
TERMINATED: 08/30/2011

represented by **David H Hoff**
US ATTY
201 South Vine
Urbana, IL 61801
217-373-5875
Fax: 217-373-5891
Email: david.hoff@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Drug Enforcement Administration
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

United States Marshal Service
TERMINATED: 08/30/2011

represented by **David H Hoff**
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Defendant

Office of Information Policy
TERMINATED: 08/30/2011

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Defendant

National Security Division
TERMINATED: 08/30/2011

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Defendant

Federal Bureau of Prisons
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Executive Office for United States Attorneys
TERMINATED: 08/30/2011

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

United States Department of Justice

represented by **David H Hoff**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/26/2012		TEXT ORDER by Magistrate Judge Byron Cudmore: Parties' Stipulated Motion to Dismiss the Plaintiff's Amended Complaint and this Case With Prejudice 122 reviewed and ALLOWED. Case is dismissed with prejudice. CASE CLOSED. Entered by Magistrate Judge Byron G. Cudmore on 3/26/2012. (MAS, ilcd) (Entered: 03/27/2012)
03/20/2012	122	Joint MOTION to Dismiss by Plaintiff Jamal Shehadeh, Defendant United States Department of Justice. Responses due by 4/6/2012 (Hoff, David) (Entered: 03/20/2012)
03/20/2012		TEXT ORDER by Magistrate Judge Byron Cudmore: Defendant's Motion with Telephonic Consent of Plaintiff to Suspend the March 20, 2012 Summary Judgment Deadline Pending Agreed Resolution of Case 121 reviewed. The Court suspends the 3/20/2012 deadline for filing a summary judgment in this case. Status report or motion to dismiss based on settlement due by 4/13/2012. (LB, ilcd) (Entered: 03/20/2012)

U.S. Department of Justice

United States Attorney
Central District of Illinois
Headquarters Office
Springfield, IL

Reply to:
Urbana Division Office
Urbana Federal Building and U.S. Courthouse
201 South Vine Street, Suite 226
Urbana, Illinois 61802
(217) 373-5875
FAX: (217) 373-5891

MEMORANDUM

DATE: March 27, 2012

FROM: PETER G. PAOLI, ACP

TO: NOTE TO FILE

RE: *Shehadeh v. DOJ*, CDIL 10-cv-3066
Note pertaining to final consent to file MTD

PLEASE NOTE THAT USAO OFFICE NEVER RECEIVED SIGNED CONSENT TO FILE MTD. INSTEAD, AUSA DAVID HOFF CONTACTED JAMAL SHEHADEH BY TELEPHONE CONFERENCE ON MARCH 20, 2012. SHEHADEH AT THAT TIME STATED HE AGREED AND HAD NO OBJECTIONS TO THE USAO FILING THE JOINT MOTION TO DISMISS WITH THE COURT ON THAT DAY. I WAS PRESENT IN DAVID HOFF'S OFFICE DURING THE ENTIRE TELEPHONE CALL AND WITNESSED MR. SHEHADEH'S REPRESENTATIONS. SEE DAVID HOFF'S HANDWRITTEN NOTE INCLUDED WITH THESE ATTACHED DOCUMENTS.

PETER

Mr. Jamal Shehadeh #s10300
Logan Correctional Center
Post Office Box 1000
Lincoln, IL 62656

March 20, 2012

Attorney David Hoff, AUSA
U.S. Attorney's Office
201 South Vine Street
Suite 226
Urbana, IL 61802-3369

Re: Shehadeh v. DOJ, 10-cv-3306

Dear Mr. Hoff,

This letter is to memorialize our conversation this afternoon. Tuesday is the last day of the week that I can send mail and expect it to reach its destination by Friday so I wanted to send you this written consent since the document you stated you will be mailing me today cannot be returned to you by me until next week.

Since we have reached an agreement and entered into a stipulated dismissal order you may now file those documents with the Court and ask that the case be dismissed with prejudice. I need not be present nor do I wish that we go on the record to present our agreement to the Court.

Feel free to contact me if you need anything further.

Respectfully yours,

Jamal Shehadeh

JSS/js

RECEIVED
MAR 23 2012
U.S. ATTORNEY
URBANA, ILLINOIS

U.S. Department of Justice

United States Attorney
Central District of Illinois
Headquarters Office
Springfield, IL

Reply to:
Urbana Division Office
Urbana Federal Building and U.S. Courthouse
201 South Vine Street, Suite 226
Urbana, Illinois 61802
(217) 373-5875
FAX: (217) 373-5891

2 PM 3-20-2012 Shehadeh gave telephonic consent to file dismissal notice today. Peter Prelen

MEMORANDUM

DATE: March 19, 2012

FROM: DAVID H. HOFF, AUSA

TO: Logan County Correctional Center **Via Facsimile (217) 735-4807**
Attn: Nancy and/or Individual handling Inmate Phone Conferences
1096 1350th Street, P.O. Box 1000
Lincoln, Illinois 62656

RE: **Request Telephone Conference w/ Jamal Shehadeh (Inmate S10300)**
TIME: Tuesday, March 20, 2012, at 2:00 p.m. (5 to 10 minutes)

Dear Nancy:

Inmate Shehadeh is the plaintiff in FOIA litigation I am defending on behalf of the Department of Justice.

I would like to have a conference call with him Tuesday, March 20, at 2:00 p.m. to discuss the status of this litigation with him in a telephone call lasting approximately five to ten minutes.

Would you please provide Mr. Shehadeh with notice of this call and make him available? I will initiate the call to your office at (217) 735-5581, Extension 261 at 2:00 p.m. tomorrow unless I hear otherwise.

Thank you.

DAVID H. HOFF, AUSA
Attorney for the United States Department of Justice
217/373-5875

E-FILED
Tuesday, 20 March, 2012 02:39:59 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JAMAL SHEHADEH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10-CV-03306
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
	)	
Defendant.	)	

PARTIES' STIPULATED MOTION TO DISMISS THE PLAINTIFF'S AMENDED COMPLAINT AND THIS CASE WITH PREJUDICE

The pro se plaintiff, Jamal Shehadeh, and the defendant, United States Department of Justice, in compliance with the parties' written stipulation for compromise, hereby jointly move this Court to dismiss with prejudice the plaintiff's amended complaint and this cause of action, with each party paying his and its own costs and expenses.

The parties further stipulate and agree that this Court shall retain jurisdiction to enforce the terms of the parties' written stipulation for compromise and dismissal of this case with prejudice.

s/ Jamal Shehadeh
JAMAL SHEHADEH
PRO SE PLAINTIFF

March 14, 2012
DATE SIGNED

s/David H. Hoff
THE DEPARTMENT OF JUSTICE
DEFENDANT, by DAVID H. HOFF,
ASSISTANT UNITED STATES ATTORNEY

March 19, 2012
DATE SIGNED

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and I hereby certify that I have caused to be mailed by United States Postal Service the document to the following non CM/ECF participant:

Jamal Shehadeh
Reg. No. S10300
Logan Correctional Center
P.O. Box 1000
Lincoln, IL 62656

s/David H. Hoff
DAVID H. HOFF, Bar No. IL 1234072
Assistant United States Attorney
201 S. Vine Street, Suite 226
Urbana, Illinois 61802
Phone: 217/373-5875
Fax: 217/373-5891
david.hoff@usdoj.gov

U.S. Department of Justice

United States Attorney
Central District of Illinois

James A. Lewis
United States Attorney

Urbana Division Office
Urbana Federal Building and U.S. Courthouse
201 South Vine Street, Suite 226
Urbana, Illinois 61802-3369
TEL: (217) 373-5875
FAX: (217) 373-5891

March 19, 2012

Mr. Jamal Shehadeh #S10300
Logan Correctional Center
P. O. Box 1000
Lincoln, IL 62526

Re: Final Settlement of FOIA/Privacy Act Pending Litigaton and Requests

Dear Mr. Shehadeh:

Enclosed are your copy of the Compromise Stipulation and Stipulation To File With The Court For Dismissal With Prejudice that I signed after receiving the signed documents from you on March 19, 2012.

I need you to agree that I now can file our signed Stipulation for Dismissal with the Court. Please sign and return in the enclosed envelope one of the two enclosed Consents, keeping the other copy for your records.

Hopefully, we will have discussed this by telephone prior to you receiving this letter.

As I stated in my letter to you of March 13, "Upon receipt, I will file stipulation #2 with the Court which will include our electronic signatures. Once the Court dismisses the case with prejudice, I will mail to you from our office in Urbana the copy of the referenced FOIA book. I will also process your $1,150 check for payment."

Thank you for your assistance in resolving this matter.

Very truly yours,

JAMES A. LEWIS
United States Attorney

DAVID H. HOFF
Assistant United States Attorney
Enclosures

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JAMAL SHEHADEH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10-CV-03306
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
	)	
Defendant.	)	

PLAINTIFF'S CONSENT TO FILING WITH THE DISTRICT COURT THE PARTIES' STIPULATED MOTION TO DISMISS THE PLAINTIFF'S AMENDED COMPLAINT AND THIS CASE WITH PREJUDICE

The pro se plaintiff, Jamal Shehadeh, hereby consents to the immediate filing with this Court of the parties' Stipulated Motion to Dismiss The Plaintiff's Amended Complaint And This Case With Prejudice, that is attached hereto and incorporated herein.

_____ _____

JAMAL SHEHADEH
PRO SE PLAINTIFF

DATE SIGNED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JAMAL SHEHADEH,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	No. 10-CV-03306
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF CLAIMS AND DISMISSAL WITH PREJUDICE OF THIS PENDING CASE

It is hereby stipulated by and between Jamal Shehadeh, the undersigned pro se plaintiff, and the United States of America on behalf of the defendant, United States Department of Justice and its employees and agencies, by Assistant United States Attorney David H. Hoff, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, including but not limited to those arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement including, but not limited to, all causes of action related in any way to the Freedom of Information Act and the Privacy Act and all other causes of action, demands, rights,

damages, costs, expenses compensation and all known and unknown, foreseen and unforseen that the plaintiff may have or claim to have or may have had against the United States of America, its employees, agencies and departments including the United States Department of Justice and its agencies and departments at any time up to and including through the date of approval of this Stipulation and dismissal of the above-entitled cause of action with prejudice, with each party paying its own costs and expenses.

2. By executing this Release, the plaintiff, Jamal Shehadeh hereby withdraws and voluntarily terminates all outstanding requests to any and all agencies and departments of the United States of America for records and or any other type of relief including but not limited to requests or complaints arising from both the Freedom of Information Act and the Privacy Act.

3. As additional consideration for the United States agreeing to this Compromise, the plaintiff, Jamal Shehadeh, stipulates and agrees to submit no additional requests to the United States of America, its agencies and departments, including but not limited to requests under the Freedom of Information Act and the Privacy Act for information pertaining in any way to the subject matters of the requests at issue in this litigation that are hereby withdrawn and terminated by this Compromise or that otherwise pertain to any matters occurring at any time prior to execution of this Stipulation.

4. The United States of America agrees to pay the sum of **ONE THOUSAND ONE HUNDRED FIFTY DOLLARS ($1,150.00)** which sum and waiver shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, including but not limited to those resulting, and to result, from the subject matter of this settlement, including any future claims for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees at any time up to and including the date of approval of this Stipulation and dismissal of the above-entitled cause of action with prejudice, with each party paying its own costs and expenses.

5. The Office of the United States Attorne for the Central District of Illinois, in further consideration of this settlement, hereby agrees to and shall mail by first class mail to the plaintiff within 10 days after this stipulation is approved by this Court a 900 plus page Guide to the Freedom of Information Act 2009 Edition by the United States Department of Justice Office of Information Policy.

6. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known

and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agencies, departments, agents, servants and employees including but not limited to those on account of the same subject matter that gave rise to the above-captioned action, or otherwise, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages.

7. This stipulation for compromise settlement is not, is no way intended to be, and should not be construed as an admission of liability or fault on the part of the United States, its departments, agencies, agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement includes compromising, dismissing with prejudice and releasing disputed claims under the Freedom of Information Act and Privacy Act, and avoiding the expenses and risks of further litigation.

8. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses.

9. Payment of the settlement amount will be made by check issued by the United States Department of Treasury, made payable to the plaintiff and mailed to him at his current address including notation of his prisoner identification number.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any

additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to Title 5, United States Code, Section 552a(b).

11. The parties further agree that the plaintiff will dismiss this cause of action with prejudice by submitting a stipulated motion to the Court in the above-entitled action within 21 days after executing this Stipulation.

12. This Court shall retain jurisdiction in this above-entitled cause to enforce the terms of this Settlement Agreement that has been knowingly and voluntarily executed on the date set next to each of the parties' undersigned signatures.

/s/JAMAL SHEHADEH
JAMAL SHEHADEH
PRO SE PLAINTIFF

March 14, 2012
DATE SIGNED

/s/DAVID H. HOFF
THE DEPARTMENT OF JUSTICE
DEFENDANT, by DAVID H. HOFF
ASSISTANT UNITED STATES ATTORNEY

March 19, 2012
DATE SIGNED

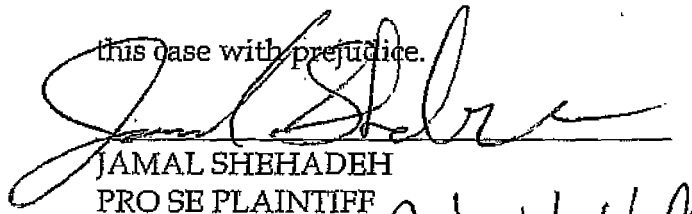
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JAMAL SHEHADEH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10-CV-03306
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
	)	
Defendant.	)	

PARTIES' STIPULATED MOTION TO DISMISS THE PLAINTIFF'S AMENDED COMPLAINT AND THIS CASE WITH PREJUDICE

The pro se plaintiff, Jamal Shehadeh, and the defendant, United States Department of Justice, in compliance with the parties' written stipulation for compromise, hereby jointly move this Court to dismiss with prejudice the plaintiff's amended complaint and this cause of action, with each party paying his and its own costs and expenses.

The parties further stipulate and agree that this Court shall retain jurisdiction to enforce the terms of the parties' written stipulation for compromise and dismissal of this case with prejudice.



March 14th 2012

JAMAL SHEHADEH
PRO SE PLAINTIFF
DATE SIGNED

/s/David H. Hoff

March 19, 2012

THE DEPARTMENT OF JUSTICE
DEFENDANT, by DAVID H. HOFF, ASSISTANT UNITED STATES ATTORNEY
DATE SIGNED

David H. Hoff March 19, 2012

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JAMAL SHEHADEH,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	No. 10-CV-03306
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF CLAIMS AND DISMISSAL WITH PREJUDICE OF THIS PENDING CASE

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1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, including but not limited to those arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement including, but not limited to, all causes of action related in any way to the Freedom of Information Act and the Privacy Act and all other causes of action, demands, rights,

damages, costs, expenses compensation and all known and unknown, foreseen and unforseen that the plaintiff may have or claim to have or may have had against the United States of America, its employees, agencies and departments including the United States Department of Justice and its agencies and departments at any time up to and including through the date of approval of this Stipulation and dismissal of the above-entitled cause of action with prejudice, with each party paying its own costs and expenses.

2. By executing this Release, the plaintiff, Jamal Shehadeh hereby withdraws and voluntarily terminates all outstanding requests to any and all agencies and departments of the United States of America for records and or any other type of relief including but not limited to requests or complaints arising from both the Freedom of Information Act and the Privacy Act.

3. As additional consideration for the United States agreeing to this Compromise, the plaintiff, Jamal Shehadeh, stipulates and agrees to submit no additional requests to the United States of America, its agencies and departments, including but not limited to requests under the Freedom of Information Act and the Privacy Act for information pertaining in any way to the subject matters of the requests at issue in this litigation that are hereby withdrawn and terminated by this Compromise or that otherwise pertain to any matters occurring at any time prior to execution of this Stipulation.

4. The United States of America agrees to pay the sum of **ONE THOUSAND ONE HUNDRED FIFTY DOLLARS ($1,150.00)** which sum and waiver shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, including but not limited to those resulting, and to result, from the subject matter of this settlement, including any future claims for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees at any time up to and including the date of approval of this Stipulation and dismissal of the above-entitled cause of action with prejudice, with each party paying its own costs and expenses.

5. The Office of the United States Attorne for the Central District of Illinois, in further consideration of this settlement, hereby agrees to and shall mail by first class mail to the plaintiff within 10 days after this stipulation is approved by this Court a 900 plus page Guide to the Freedom of Information Act 2009 Edition by the United States Department of Justice Office of Information Policy.

6. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known

and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agencies, departments, agents, servants and employees including but not limited to those on account of the same subject matter that gave rise to the above-captioned action, or otherwise, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages.

7. This stipulation for compromise settlement is not, is no way intended to be, and should not be construed as an admission of liability or fault on the part of the United States, its departments, agencies, agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement includes compromising, dismissing with prejudice and releasing disputed claims under the Freedom of Information Act and Privacy Act, and avoiding the expenses and risks of further litigation.

8. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses.

9. Payment of the settlement amount will be made by check issued by the United States Department of Treasury, made payable to the plaintiff and mailed to him at his current address including notation of his prisoner identification number.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any

additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to Title 5, United States Code, Section 552a(b).

11. The parties further agree that the plaintiff will dismiss this cause of action with prejudice by submitting a stipulated motion to the Court in the above-entitled action within 21 days after executing this Stipulation.

12. This Court shall retain jurisdiction in this above-entitled cause to enforce the terms of this Settlement Agreement that has been knowingly and voluntarily executed on the date set next to each of the parties' undersigned signatures.

March 14th 2012

JAMAL SHEHADEH
PRO SE PLAINTIFF

DATE SIGNED

March 19, 2012

THE DEPARTMENT OF JUSTICE
DEFENDANT, by DAVID H. HOFF
ASSISTANT UNITED STATES ATTORNEY

DATE SIGNED

March 19, 2012

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

Matthew D. Renner,

Plaintiff,

v.

Jan Cole, individually; Judy Spahn, individually; Brad Malcolm, individually; Christopher Hanson, individually; and The United States of America.

Defendants.

AMENDED COMPLAINT

Case No. 11-CV-419 (BBC)

JURY TRIAL REQUESTED

I. PRELIMINARY STATEMENT

1. This case involves nursing staff at a federal correctional institution (FCI) who were deliberately indifferent to the obvious medical needs of an inmate. Matthew D. Renner was confined at FCI-Oxford in February and March 2009 when he became seriously ill with appendicitis. From February 27 through March 3, 2009, Mr. Renner complained to prison nursing staff of increasingly worsening symptoms including right lower quadrant pain, nausea, vomiting, diarrhea, fever and chills on at least seven different occasions. Though his condition progressively worsened and though his symptoms clearly suggested that he was in fact suffering from appendicitis, prison nursing staff deliberately failed to do what a reasonably trained registered nurse or health care professional would have done in terms of physically examining Mr. Renner and having him seen by a medical doctor. On March 3, 2009, at approximately 9:38 a.m., Mr. Renner was finally seen by a doctor who ordered that he immediately be transferred to a nearby hospital. An

emergency appendectomy was performed later that day. Tragically, the delay in treatment resulted in the infectious process spreading to such an extent that Mr. Renner was air-lifted the next morning to the University of Wisconsin Hospital in Madison, Wisconsin where he underwent further extensive surgeries. The delay in receiving medical care allowed the infectious process to spread resulting in a longer period of hospitalization and requiring significantly more extensive surgical procedures, including removal of large portions of his intestines, than would have been necessary if Mr. Renner had received prompt medical treatment.

2. Plaintiff Matthew D. Renner now commences this action against the individual Defendants under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); for violations of his right to adequate medical care under the Eighth Amendment to the United States Constitution. Plaintiff also brings claims under the Federal Tort Claims Act for medical negligence under Wisconsin law pursuant to 28 U.S.C. §§1346 (b) and §2671 et seq.

3. Plaintiff demands that this action be tried to a jury.

II. PARTIES

4. Plaintiff Matthew D. Renner is a resident of the City of Schuyler, State of Nebraska. At all times relevant hereto he was in the custody of the United States Bureau of Prisons (hereafter "BOP") at FCI-Oxford, in Oxford, Wisconsin with inmate registration number 21170-047.

5. Defendant Jan Cole, upon information and belief, at all times relevant hereto was a Registered Nurse employed by the BOP, Health Services and assigned to FCI-Oxford.

At all times relevant hereto Ms. Cole was acting within the course and scope of her office or employment and under color of law.

6. Defendant Judy Spahn, upon information and belief, at all times relevant hereto was an Advanced Registered Nurse Practitioner employed by the BOP, Health Services and assigned to FCI-Oxford. At all times relevant hereto Ms. Spahn was acting within the course and scope of her office or employment and under color of law.

7. Defendant Brad Malcolm at all times relevant hereto was an employee of the BOP and member of the nursing or health services staff at FCI-Oxford and acting within the course and scope of his office or employment and under color of law.

8. Defendant Christopher Hanson at all times relevant hereto was an employee of the BOP and member of the nursing or health services staff at FCI-Oxford and acting within the course and scope of his office or employment and under color of law.

9. The United States of America is a body politic and corporate which is liable for tort claims against it for personal injury caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of her office or employment to the same extent as a private individual under like circumstances under 28 U.S.C. §1346(b)(1)and 28 U.S.C. §2674. Said Defendant was the employer of the individually named Defendants at all times relevant hereto.

III. JURISDICTION

10. This action is brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents,* supra, the Eighth Amendment to the United States Constitution, and the Federal Tort Claims Act, 28 U.S.C. §2674. Jurisdiction is founded upon 28 U.S.C. §1346(b)(1) and (2) and the aforementioned statutory and constitutional provisions.

IV. FACTS

11. On February 24, 2009, Matthew Renner was an inmate at FCI-Oxford, Oxford, Wisconsin, within the Western District of Wisconsin.

12. His inmate registration number was and is 21170-047.

13. As of February 26, 2009, Mr. Renner was housed in the Dane Unit, Range C, Room 12.

14. On February 26, 2009, Mr. Renner began experiencing symptoms of illness including loss of appetite, lethargy, and sharp pain in his lower abdomen.

15. The symptoms continued and got progressively worse over the course of the following day, February 27, 2009. Therefore, in the late afternoon Mr. Renner went to what is called the "pill line."

16. He spoke to a member of the prison's medical staff, Defendant Brad Malcolm. The individual was handing out medications to inmates. He told Defendant Malcolm of his symptoms including pain in his right lower quadrant. He told Mr. Malcolm he had been having these symptoms for a few days.

17. Defendant Malcolm did not take any vital signs from Mr. Renner or otherwise conduct any examination. Rather, he told Mr. Renner to go to sick call. Mr. Renner then stepped out of the pill line.

18. When he realized that the next sick call was not until the following Monday, some three days later, Mr. Renner got back in line and again spoke with Defendant Malcolm. He emphasized the severity of his pain in his right lower quadrant of his abdomen and told him that he could not wait until Monday to receive medical attention. Defendant Malcolm responded that there was nothing he could do for Mr. Renner.

19. Defendant Malcolm failed to use the degree of care, skill and judgment which would be exercised by an average medical professional of his respective profession in the same or similar circumstances by, among other things, failing to obtain any patient history for a patient presenting with abdominal pain including any of the following:

a. Ask location of pain;

b. Determine character of pain;

c. Ask if pain developed gradually or suddenly;

d. Determine if pain is referred to other sites;

e. Ask if there are any aggravating or relieving factors; and

f. Ask about associated symptoms of vomiting, diarrhea, constipation, urogenital symptoms, and fever or chills.

20. Defendant Malcolm also failed to conduct any physical examination including any of the following steps required for a patient presenting with abdominal pain:

a. Taking vital signs;

b. Position patient with hips flexed and ausculate for bowel sounds;

c. Palpate abdomen;

d. Determine areas of localized tenderness;

e. Assess for rigid abdomen, guarding and rebound tenderness; and

f. Obtain a clean catch urine and dipstick.

21. Mr. Renner then returned to his cell. He was sick the entire night. In addition to the symptoms he was already suffering from, he experienced vomiting and diarrhea. He was not sleeping. The pain in his lower abdomen continued throughout the night.

22. On the morning of February 28, 2009, Mr. Renner went to breakfast. He was unable to eat. He then returned to the pill line and spoke with Defendant Jan Cole. He complained of lower abdominal pain for at least 6-12 hours. He explained he had been to the pill line the day before and had told the other nurse of his problems but not had received any attention.

23. Defendant Cole failed to conduct any physical examination of Mr. Renner including omitting to do any of the following which would have been done by an average registered nurse in the same or similar circumstances for a patient presenting with abdominal pain:

a. Taking vital signs;

b. Position patient with hips flexed and ausculate for bowel sounds;

c. Palpate abdomen;

d. Determine areas of localized tenderness;

e. Assess for rigid abdomen, guarding and rebound tenderness; and

f. Obtain a clean catch urine and dipstick.

The only thing she did for him was to give him Maalox and tell him to come back if that did not make him feel better.

24. On February 28, 2009, at approximately 12:00 p.m., Matthew Renner again returned to the pill line. He again spoke with Defendant Cole. He told her that his pain in his lower abdomen had gotten worse. He told Nurse Cole that the Maalox did not help.

Again, Defendant Cole failed to use the degree of care, skill and judgment which would be exercised by an average registered nurse in same or similar circumstances as alleged in paragraph 23. All she did was give him more Maalox and tell him to go to sick call on Monday morning.

25. On the evening of February 28, 2009, Mr. Renner returned to the pill line. He spoke with a different member of the prison medical staff, Defendant Christopher Hanson. He told Defendant Hanson of his symptoms including an inability to eat, stabbing pain in the right lower quadrant, nausea, vomiting and diarrhea. Defendant Hanson failed to use the degree of care, skill and judgment which would be exercised by an average medical professional of his respective profession in the same or similar circumstances by, among other things, failing to obtain any patient history, including asking the questions specified in paragraph 19 above, and failing to conduct any physical examination, including conducting the requisite steps of a physical examination of a patient presenting with abdominal pain as specified in paragraph 20 above. Rather, all said defendant did was to tell Mr. Renner to go to sick call on Monday.

26. On Sunday, March 1, 2009, Mr. Renner again returned to the morning pill line. He told Defendant Hanson of his symptoms. He gave the same symptom description as he had previously done when he went to the pill lines going back to February 27, 2009. Again, his complaints of pain and severe symptoms were ignored.

27. Defendant Hanson failed to use the degree of care, skill and judgment which would be exercised by an average medical professional of his respective profession in the same or similar circumstances by, among other things, failing to obtain any patient history, including asking the questions specified in paragraph 19 above, and failing to conduct any physical examination, including conducting the requisite steps of a physical examination of a patient presenting with abdominal pain as specified in paragraph 20 above. Rather, all said defendant did was to tell Mr. Renner to go to sick call on Monday.

28. Later on March 1, 2009, Mr. Renner again returned to the prison pill line. He told Defendant Hanson of his symptoms including stabbing right lower quadrant pain, nausea, vomiting, and diarrhea. His complaints of a serious medical need were again ignored.

29. Defendant Hanson failed to use the degree of care, skill and judgment which would be exercised by an average medical professional of his respective profession in the same or similar circumstances by, among other things, failing to obtain any patient history, including asking the questions specified in paragraph 19 above, and failing to conduct any physical examination, including conducting the requisite steps of a physical examination of a patient presenting with abdominal pain as specified in paragraph 20 above. Rather, all said defendant did was to tell Mr. Renner to go to sick call on Monday.

30. On the evening of March 1, 2009, Mr. Renner returned to the evening pill line. Again, he spoke with Defendant Cole. He relayed his continuing symptoms including stabbing pain in the right lower quadrant, loss of appetite, nausea, vomiting, diarrhea, and the rest. Again, the complaints of a serious medical condition were met with deliberate indifference.

31. Defendant Cole again failed to use the degree of care, skill and judgment which would be exercised by an average medical professional of her respective profession in the same or similar circumstances by, among other things, failing to obtain any patient history, including asking the questions specified in paragraph 19 above, and failing to conduct any physical examination, including conducting the requisite steps of a physical examination of a patient presenting with abdominal pain as specified in paragraph 20

above. Rather, all said defendant did was to tell Mr. Renner to go to sick call on Monday.

32. On Monday, March 2, 2009 at approximately 7:53 a.m., Matthew Renner returned to Health Services at the prison and went to sick call. He was seen by Defendant Judy Spahn. He complained of pain in the right side of his abdomen, nausea, vomiting, and diarrhea, fever and chills. He related that the pain in his abdomen was present for six days. He described the pain as constant and aching. Vital signs were taken indicating a temperature of 101.9. Findings on physical examination included tenderness on palpation of the right lower quadrant. Rather than immediately referring Mr. Renner for a physician consultation, as would an average member of defendant Spahn's profession in the same or similar circumstances, or sending him for medical care outside the prison, the only care he received was receiving acetaminophen.

33. On Monday, March 2, 2009, at 9:23 a.m., Mr. Renner returned to health services because his symptoms had continued unabated. He described to defendant Spahn the same symptoms at 9:23 a.m. as he had earlier the same day. An abdominal X-ray was then taken. Labs were drawn which showed large amounts of nitrates and traces of blood in his urine. Medications were prescribed, specifically Sulfamethoxazole/trimethoprim, an antibiotic. However, Defendant Spahn did not immediately refer Mr. Renner for a physician consultation nor send him to a hospital outside the prison for medical care.

34. On Tuesday, March 3, 2009, at 9:08 a.m., Matthew Renner returned to Health Services at FCI – Oxford. He described the same symptoms including right lower quadrant pain, nausea, and vomiting. His vitals were taken which indicated a temperature of 96.9. He was then finally referred to a physician, James Reed, M.D.

35. On March 3, 2009, at 9:38 a.m., Dr. Reed saw Mr. Renner. He described the same symptoms to Dr. Reed and related that he had been having the symptoms for days. Dr. Reed quickly made a provisional diagnosis of acute abdominal pain. He ordered that Mr. Renner be immediately transferred to the emergency room at Divine Savior Hospital in Portage, Wisconsin.

36. On March 3, 2009, at 12:05 p.m., Matthew Renner arrived at the Divine Savior Hospital Emergency Room. He reported he had been having abdominal pain and other symptoms for 5 days. He related the symptoms were bad on February 27 and had increased in severity thereafter. The emergency room doctor's impression was appendicitis. It was also determined that Mr. Renner's appendix had ruptured. Mr. Renner was then taken to surgery.

37. On March 3, 2009, at 4:00 p.m., Mr. Renner underwent surgery at Divine Savior Hospital. The procedure began as a laparoscopy but was converted to an open appendectomy for a perforated appendix. Findings on examination included the appendix being perforated in the mid segment. Necrosis was found on the serosal surface of the mesentery of the small bowel near the terminal ileum. It was removed.

38. Mr. Renner's condition deteriorated overnight while in the hospital. He became hemodynamically unstable. On March 4, 2009, at 9:05 a.m., he appeared to the medical staff at the hospital to be septic. His temperature spiked to 103.6 degrees. The decision was therefore made to transport him by helicopter to the University of Wisconsin Hospital in Madison, Wisconsin.

39. Mr. Renner arrived at the University of Wisconsin Hospital, Madison, Emergency Room on March 4, 2009, at approximately 11:20 a.m. He was in critical and unstable condition.

He was intubated. He presented with septic shock. Findings included scrotal swelling and necrosis. Surgery was consulted and Mr. Renner was taken on an emergency basis to the operating room.

40. Mr. Renner underwent an exploratory lapartotomy on March 4, 2009, beginning at 2:00 p.m. Other procedures then performed included a right hemicolectomy, in which approximately half of his colon was removed; an end ileostomy, in which the last section of Mr. Renner's small intestine was connected to an opening created in his abdominal wall; and debridement of the retroperitonum. Findings included intraabdominal sepsis with necrotic right colon and retroperitoneal necrotizing fascitis leading to Fournier gangrene.

41. Mr. Renner underwent additional surgery at University of Wisconsin Hospital – Madison, on March 12, 2009.

42. Mr. Renner remained hospitalized at University of Wisconsin – Madison until April 14, 2009. He was thereafter transferred to Federal Medical Center-Rochester, Minnesota.

43. Though Mr. Renner had an objectivity serious need for medical care as of February 27, 2009, defendants Jan Cole, Brad Malcolm, and Christopher Hanson deliberately and intentionally disregarded this need by failing to do what they, as trained registered nurses or trained members of the Health services staff knew they should have done to address the need including, but not limited to:

a. Failing to conduct a proper examination including obtaining a complete history and conducting a thorough physical examination;

b. Failing to obtain a blood specimen from Mr. Renner and direct that such specimen be submitted for analysis to determine, among other things, his white blood cell count; and

c. Failing to immediately consult with a physician.

44. Though Mr. Renner's objectively serious need for medical care continued unabated in to the morning of March 2, 2009, Defendant Spahn was also deliberately indifferent to this need when, during the clinical encounters on that morning, her response to his condition, clearly suggesting possible appenditis, in failing to immediately consult with a physician or have Mr. Renner transported to a local hospital, so departed from accepted professional standards that no minimally competent advanced registered nurse practitioner would not have done what Ms. Spahn failed to do.

45. As a result of the Defendants' actions and omissions, including specifically the delay in receiving proper medical care until March 3, 2009, Plaintiff sustained severe injury including a prolonged hospitalization and having to undergo more extensive medical procedures than would have been necessary had Mr. Renner received prompt and appropriate medical care. This includes his having to undergo the procedures described in paragraphs 37, 40 and 41 rather than simply an appendectomy.

46. As a result, Mr. Renner has in the past and will in the future incur medical and hospital expenses necessary for the care and treatment of his injuries; and, as a result, he has in the past and will in the future suffer great pain and disability, embarrassment, emotional distress, loss of enjoyment of life and loss of earning capacity. Therefore, Plaintiff Matthew D. Renner has been damaged in an amount greater than Seventy-Five Thousand and No/One Hundredths ($75,000.00) Dollars.

47. As of February 27, 2009, prisoners such as Matthew Renner had a clearly established right that prison medical personnel would not be deliberately indifferent to their objectively serious medical needs such as Mr. Renner had as described above and Defendants Cole, Spahn, Malcolm and Hanson as reasonably trained nurses and health care professionals, would have known that their conduct as described above violated such right.

48. On October 18, 2010, the United States Department of Justice, Federal Bureau of Prisons received plaintiff's notice of administrative claim for damages as required by 28 U.S.C. §2671 et seq.

49. On May 13, 2011, the BOP responded to plaintiff's claim and finally denied said claim in writing and sent such denial by certified mail number 7011 0470 0002 4814 2609.

V. FEDERAL CLAIM AGAINST INDIVIDUAL DEFENDANTS

COUNT I: DENIAL OF MEDICAL CARE

Plaintiff realleges the above allegations as if hereinafter set forth in full and further states and alleges as follows:

50. Plaintiff had a serious need for medical care on or before February 27, 2009, continuing and increasing thereafter while he remained at FCI-Oxford up until the time he was removed from the prison on March 3, 2009, for emergency medical care.

51. Defendants Jan Cole, Judy Spahn, Brad Malcolm and Christopher Hanson were aware of Plaintiff's serious need for medical care.

52. Said Defendants, with deliberate indifference, provided care that was so inadequate and inappropriate as to evidence intentional maltreatment or refusal to provide essential care, thereby depriving Plaintiff of his right to be free from cruel and unusual punishment

under the Eighth Amendment to the United States Constitution in violation of *Bivens v. Six Unknown Federal Narcotics Agents.*

53. As a direct result of such actions and omissions, Plaintiff sustained injuries and incurred damages as set forth in paragraph 46 above.

COUNT II: PUNITIVE DAMAGES UNDER FEDERAL LAW

Plaintiff realleges the above allegations as if hereinafter set forth in full and further states and alleges as follows:

54. All of the aforementioned acts, errors and omissions of Defendants Cole, Spahn, Malcolm and Hanson were committed in bad faith and with reckless disregard for the rights and safety of Plaintiff as well as other citizens so as to subject said Defendants to punitive damages pursuant to the statutes and common law of the United States of America.

VI. CLAIMS AGAINST THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT

COUNT III: MEDICAL NEGLIGENCE

Plaintiff realleges the above allegations as if hereinafter set forth in full and further states and alleges as follows:

55. The United States; by and through its employees Jan Cole, Judy Spahn, Brad Malcolm and Christopher Hanson; had a duty to use the same degree of skill and learning in the provision of medical care to inmates and detainees at FCI-Oxford as would any other registered nurse, advanced registered nurse practitioner, or other health care professional in good standing with similar qualifications in similar circumstances.

56. Such standard of care included, among other things, on or before the time when Mr. Renner first saw Brad Malcolm on February 27, 2009, continuing when he saw Jan Cole twice on February 28, 2009, continuing when he saw Christopher Hanson, and continuing thereafter until the morning of March 3, 2009 when Mr. Renner was seen by Dr. James Reed, the following:

a. Conduct prompt, proper and thorough examinations of inmates or detainees presenting with the symptoms Mr. Renner exhibited on February 27 through March 2, 2009, including taking a complete history as described in paragraph 19, and performing a complete physical examination as described in paragraph 20;

b. Consult with a physician; and/or

c. Have Mr. Renner transported to a local hospital.

57. The United States breached this standard of care when Jan Cole, Brad Malcolm, and Christopher Hanson, among other things, negligently failed to meet this standard of care by failing to provide some or all of the requisite care described in paragraph 56.

58. The United States also breached this standard of care when Judy Spahn negligently failed to have Mr. Renner promptly seen by a doctor or otherwise failed to promptly consult with a physician or have Mr. Renner transported to a local hospital on the morning of March 2, 2009.

59. As a direct and proximate result such acts and omissions, Mr. Renner sustained the injuries and incurred the damages as set forth in paragraph 46 above.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Matthew D. Renner respectfully prays that this Court grant him relief as follows:

1. Awarding judgment in favor of Plaintiff Matthew D. Renner against Defendants and each of them, jointly and severally, in an amount greater than $75,000.00 in compensatory damages.

2. Awarding judgment in favor of Plaintiff Matthew D. Renner and against each individual Defendant in a just and proper amount as and for punitive damages.

3. Awarding Plaintiff reasonable attorney's fees.

4. Awarding Plaintiff his costs and disbursements incurred herein.

5. For such other and further relief as to the Court is just and equitable.

GOETZ & ECKLAND P.A.

By: _____
FREDERICK J. GOETZ (#185425)
Exposition Hall at Riverplace
43 Main Street S.E., Suite 505
Minneapolis, MN 55414
(612) 874-1552

ATTORNEY FOR PLAINTIFF

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded to the Defendants.

GOETZ & ECKLAND P.A.

By: _____

FREDERICK J. GOETZ (#185425)
Exposition Hall at Riverplace
43 Main Street S.E., Suite 505
Minneapolis, MN 55414
(612) 874-1552

ATTORNEY FOR PLAINTIFF

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

MATTHEW D. RENNER,

Plaintiff(s),

v.

JAN COLE, JUDY SPAHN, BRAD MALCOLM, CHRISTOPHER HANSON and THE UNITED STATES OF AMERICA,

Defendant(s).

ORDER

Case No. 11-cv-419-bbc

The court having been advised by counsel for the parties that the above-entitled action has been settled, this case is hereby dismissed. Any party may move to reopen for good cause shown.

Entered this 31st day of May, 2012.

Barbara B. Crabb

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MATTHEW D. RENNER,

ORDER

Plaintiff,

11-cv-419-slc[1]

v.

JAN COLE, JUDY SPAHN,
JOHN DOES I – IV and
THE UNITED STATES OF AMERICA,

Defendants.

- -

In this proposed civil action for monetary relief brought under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, plaintiff Matthew Renner contends that defendants Jan Cole, Judy Spahn and several members of the nursing staff at the Federal Correctional Institution in Oxford, Wisconsin, violated his rights under the Eighth Amendment and FTCA by failing to provide him adequate medical treatment. Plaintiff has paid the $350 filing fee and is represented by counsel.

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[1] For the purpose of issuing this order, I am assuming jurisdiction over this case.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A.

After reviewing the complaint, I conclude that plaintiff may proceed on his claims against defendants under the Eighth Amendment and FTCA.

In his complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

In February and March 2009, plaintiff Matthew Renner was confined at the Federal Correctional Institution in Oxford, Wisconsin. On February 26, 2009, he started experiencing symptoms of illness, including loss of appetite, lethargy and sharp pain in his lower abdomen. The symptoms continued and worsened over the course of the following day, and on the afternoon of February 27, plaintiff went to the "pill line." He spoke to a member of the prison's medical staff, defendant John Doe I, who was handing out medications to inmates. Plaintiff told John Doe I of his symptoms and John Doe I told plaintiff to attend "sick call." Plaintiff responded that he could not wait three days until the next sick call was scheduled, but John Doe I told plaintiff there was nothing he could do. He did not take any vital signs from plaintiff or conduct any examination.

Plaintiff returned to his cell. He suffered the entire night from abdominal pain, vomiting and diarrhea and could not sleep. On the morning of Saturday, February 28, plaintiff could not eat. He went to the pill line and spoke to defendant Jan Cole, a registered nurse in the health services unit, about his symptoms. Cole did not conduct any examination of plaintiff and did not take his vital signs. She gave plaintiff Maalox and told him to come back if he did not feel better. The Maalox did not help, and plaintiff returned to the pill line later that day. He told defendant Cole that the pain in his lower abdomen was worse. Cole gave plaintiff more Maalox and told him to go to sick call on Monday morning.

On the evening of February 28, plaintiff returned to the pill line. He told a different member of the prison medical staff, defendant John Doe II, about his symptoms, including his inability to eat, stabbing pain in his right lower abdomen, nausea, vomiting and diarrhea. John Doe II did not take plaintiff's vital signs or conduct any examination of plaintiff. He told plaintiff to attend sick call on Monday.

On Sunday, March 1, 2009, plaintiff went to the morning, afternoon and evening pill lines. He told members of the prison medical staff, defendants John Doe III and John Doe IV, of his symptoms and severe pain. They did not take plaintiff's vital signs, conduct any examination of plaintiff or provide him any treatment. They told plaintiff to attend sick call on Monday.

On Monday, March 2, 2009 at approximately 7:53 a.m., plaintiff went to sick call in the health services unit. He was seen by defendant Judy Spahn, an advanced nurse practitioner. He complained of pain on the right side of his abdomen, nausea, vomiting, diarrhea, fever and chills. He told Spahn that he had been experiencing abdominal pain for six days. Spahn took plaintiff's temperature and conducted a physical examination, noting that he had a temperature of 101.9 degrees and tenderness in the right lower quadrant. Spahn gave plaintiff acetaminophen.

A couple of hours later, plaintiff returned to the health services unit because his symptoms continued. Defendant Spahn took an abdominal x-ray and conducted lab tests. The lab results showed large amounts of nitrates and traces of blood in plaintiff's urine. Spahn prescribed an antibiotic to plaintiff.

On March 3, 2009, at 9:08 a.m., plaintiff returned to the health services unit and told the staff that he was experiencing pain, nausea and vomiting. His vitals were taken and he had a temperature of 96.9 degrees. He was referred to a physician, Dr. James Reed. When Reed saw plaintiff, he transferred plaintiff immediately to the emergency room at Divine Savior Hospital in Portage, Wisconsin. The emergency room doctor determined that plaintiff had appendicitis, that his appendix had ruptured and that he needed surgery. Plaintiff underwent surgery later that day. The procedure began as a laparoscopy but was converted to an open appendectomy for a perforated appendix.

Plaintiff's condition deteriorated overnight while he was in the hospital. He was "hemodynamically unstable," in septic shock and had a temperature of 103.6 degrees. On March 4, he was transported by helicopter to the University of Wisconsin Hospital in Madison, Wisconsin. Plaintiff was taken into surgery, where approximately half of his colon and part of his small intestine were removed. He underwent additional surgery on March 12, 2009. He was released from the hospital on March 14, 2009 and was transferred to the Federal Medical Center in Rochester, Minnesota.

DISCUSSION

Plaintiff contends that defendants' failure to properly diagnose and treat plaintiff's serious medical needs violated his rights under the Federal Tort Claims Act and the constitution.

A. Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) provides a remedy for an individual seeking recovery for damages caused by the negligent or wrongful act of an employee of the federal government. 28 U.S.C. §§ 2671-2680. The coverage of the Act extends to federal prisoners, who may sue for injuries caused by the negligence of prison employees. United States v. Muniz, 374 U.S. 150, 150 (1963). The United States is the proper defendant in a claim

brought under the FTCA, 28 U.S.C. § 2679(b)(1); Jackson v. Kotter, 541 F.3d 688, 693 (7th Cir. 2008).

Because a claim brought under the FTCA is governed by "the law of the place where the act or omission occurred," the substantive law of Wisconsin governs plaintiff's claim for medical negligence. 28 U.S.C. § 1346(b); Gil v. Reed, 381 F.3d 649, 658 (7th Cir. 2004); Campbell v. United States, 904 F.2d 1188, 1191 (7th Cir. 1990). To prevail on a claim for medical negligence in Wisconsin, plaintiff must prove that defendants breached their duty of care and plaintiff suffered injury as a result. Paul v. Skemp, 2001 WI 42, ¶ 17, 242 Wis. 2d 507, 520, 625 N.W.2d 860, 865.

Plaintiff's allegations are sufficient to state a claim for medical negligence against all defendants. He alleges that defendants, members of the medical staff at the Federal Correctional Institution in Oxford, Wisconsin, failed to recognize his serious medical needs and provide proper treatment for those needs. He alleges that defendants were aware that he was suffering severe abdominal pain, nausea, diarrhea and other symptoms, yet failed to conduct any examination or test, consult any doctor or provide him any effective treatment for his condition. Plaintiff alleges that defendants' negligence caused his appendicitis to go undiagnosed and untreated, resulting in serious pain, permanent injury and disability. From these allegations, it can be inferred that defendants breached the applicable standard of care and caused plaintiff to suffer injuries. Therefore, he may proceed on his claims under the

Federal Tort Claims Act against all defendants.

B. Eighth Amendment Claim

Plaintiff also contends that defendants violated his rights under the Eighth Amendment by exhibiting deliberate indifference to his serious medical needs. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996); Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a "serious medical need" and that prison officials were "deliberately indifferent" to this need. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Plaintiff alleges that he had severe pain, nausea and diarrhea, among other symptoms, and ultimately was diagnosed with appendicitis and a ruptured appendix. This is sufficient to allege a serious medical need. In addition, plaintiff alleges that he told all defendants about his severe pain and other symptoms but that they failed to take reasonable measures to help him. Thus, plaintiff has stated claims under the Eighth Amendment against all defendants and may proceed on those claims.

However, I caution plaintiff to think carefully about the possible consequences of pursuing both his FTCA and his Eighth Amendment claims. In particular, plaintiff should be aware that a judgment in the FTCA action would act as a complete bar to any action by plaintiff concerning the same subject matter against the employee of the government whose

actions gave rise to the FTCA claim. 28 U.S.C. § 2676. In other words, if judgment is entered on plaintiff's FTCA claim concerning defendants' failure to diagnose and treat plaintiff's medical needs, he may not pursue a constitutional tort claim under the Eighth Amendment against defendants arising from the same set of facts. Manning v. United States, 546 F.3d 430, 431 (7th Cir. 2008). Moreover, even if plaintiff wins his Eighth Amendment claim against defendants and judgment is entered in plaintiff's favor, the judgment would be vacated if plaintiff lost his FTCA claim later. For example, in Manning, 546 F.3d 430, the plaintiff pursued a Bivens claim against federal agents and an FTCA claim against the United States for malicious prosecution and intentional infliction of emotional distress. Id. at 431-32. After a jury entered a verdict for $6.5 million in the plaintiff's favor on his Eighth Amendment claims, the court entered judgment for the United States on the FTCA claim. Id. at 432. The Court of Appeals for the Seventh Circuit held that the court's judgment in the FTCA claim triggered the FTCA bar under § 2676 and required that the Eighth Amendment judgment be vacated. Id. at 438. Thus, plaintiff should keep these rules in mind when deciding whether he wishes to pursue both an FTCA claim against the United States and an Eighth Amendment claim against one or all defendants. He should also know that it is usually easier to prove an FTCA claims against defendants because he need show only negligence, that is, the medical personnel who saw him and prescribed medication for him failed to meet the standard of care required of persons in their profession. To state an

Eighth Amendment claim, plaintiff will have to prove that each defendant was deliberately indifferent to his serious medical needs.

ORDER

IT IS ORDERED that plaintiff Matthew Renner is GRANTED leave to proceed on his claims that defendants Jan Cole, Judy Spahn and John Does I – IV failed to provide him adequate medical treatment in violation of the Federal Tort Claims Act and the Eighth Amendment.

Entered this 5th day of July, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

UNITED STATES DISTRICT COURT
District of Minnesota

Matthew Phillip Sheridan

V.

Warden R. Rios; Kirk Alford, RN; Correctional Officer Dunn; Correctional Officer Burns; Correctional Officer Pena; Correctional Officers John Does 1-4, officers of the BOP, FCI Waseca, the identities of whom are presently unknown to Plaintiff; and the United States

JUDGMENT IN A CIVIL CASE

Case Number: 11-cv-02487-DWF-FLN

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

the above entitled action is and shall be DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED AND ADJUDGED THAT:

either party may move to reopen the case within 60 days of the date of this Order.

April 11, 2014
Date

RICHARD D. SLETTEN, CLERK

s/L. Brennan
(By) L. Brennan, Deputy Clerk

UNITED STATES DISTRICT COURT
District of Minnesota

Richard D. Sletten, Clerk
Tricia Pepin, Chief Deputy Clerk

Warren E. Burger Federal Building and U.S. Courthouse
316 North Robert Street
Suite 100
St. Paul, MN 55101
(651) 848-1100

U.S. Courthouse
300 South Fourth Street
Suite 202
Minneapolis, MN 55415
(612) 664-5000

Gerald W. Heaney Federal Building and U.S. Courthouse and Customhouse
515 West First Street
Suite 417
Duluth, MN 55802
(218) 529-3500

U.S. Courthouse
118 South Mill Street
Suite 212
Fergus Falls, MN 56537
(218) 739-5758

CIVIL NOTICE

The appeal filing fee is $505.00. If you are indigent, you can apply for leave to proceed in forma pauperis, ("IFP").

The purpose of this notice is to summarize the time limits for filing with the District Court Clerk's Office a Notice of Appeal to the Eighth Circuit Court of Appeals from a final decision of the District Court in a civil case.

This is a summary only. For specific information on the time limits for filing a Notice of Appeal, review the applicable federal civil and appellate procedure rules and statutes.

Rule 4(a) of the Federal Rules of Appellate Procedure (Fed. R. App. P.) requires that a Notice of Appeal be filed within:

1. Thirty days (60 days if the United States is a party) after the date of "entry of the judgment or order appealed from;" or

2. Thirty days (60 days if the United States is a party) after the date of entry of an order denying a timely motion for a new trial under Fed. R. Civ. P. 59; or

3. Thirty days (60 days if the United States is a party) after the date of entry of an order granting or denying a timely motion for judgment under Fed. R. Civ. P. 50(b), to amend or make additional findings of fact under Fed. R. Civ. P. 52(b), and/or to alter or amend the judgment under Fed. R. Civ. P. 59; or

4. Fourteen days after the date on which a previously timely Notice of Appeal was filed.

If a Notice of Appeal is not timely filed, a party in a civil case can move the District Court pursuant to Fed. R. App. P. 4(a)(5) to extend the time for filing a Notice of Appeal. This motion must be filed no later than 30 days after the period for filing a Notice of Appeal expires. If the motion is filed after the period for filing a Notice of Appeal expires, the party bringing the motion must give the opposing parties notice of it. The District Court may grant the motion, but only if excusable neglect or good cause is shown for failing to file a timely Notice of Appeal.

UNITED STATES DISTRICT COURT
District of Minnesota

Matthew Phillip Sheridan

V.

Warden R. Rios; Kirk Alford, RN; Correctional Officer Dunn; Correctional Officer Burns; Correctional Officer Pena; Correctional Officers John Does 1-4, officers of the BOP, FCI Waseca, the identities of whom are presently unknown to Plaintiff; and the United States

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IT IS ORDERED AND ADJUDGED THAT:

the above entitled action is and shall be DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED AND ADJUDGED THAT:

either party may move to reopen the case within 60 days of the date of this Order.

April 11, 2014
Date

RICHARD D. SLETTEN, CLERK

s/L. Brennan
(By) L. Brennan, Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 11-CV-2487 DWF/FLN

MATTHEW PHILLIP SHERIDAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM IN**
	)	**SUPPORT OF MOTION**
	)	**TO DISMISS AND**
WARDEN R. RIOS, et al,	)	**FOR SUMMARY JUDGMENT**
	)	
Defendants.	)	

I. INTRODUCTION

This Bivens and tort action arises from Plaintiff falling out of bed on June 2, 2008, while in the custody of the U.S. Bureau of Prisons (BOP) at FCI Waseca. He sues a nurse and two correctional officers under Bivens for violating the Eighth Amendment by failing to immediately get him to a doctor and hospital and using restraints to transport him to the hospital. He sues the United States in tort for negligently failing to prevent him from falling out of bed and not getting him immediately to a doctor and hospital. The nurse is a Public Health Service (PHS) employee and statutorily immune. The correctional officers are qualifiedly immune. The officers modified the restraints to accommodate Plaintiff's injury and he lacks evidence the constraints injured him. The negligence actions are barred by the state of limitations, the discretionary function exception and the lack of expert evidence. Therefore, the defendants are entitled to judgment.

II. BACKGROUND

A. Parties

1. Plaintiff

Matthew Phillip Sheridan (Plaintiff) brings this action for allegedly wrongful conduct while he was imprisoned at FCI Waseca on June 2, 2008. Plaintiff was serving a 5 year term of imprisonment for manufacturing methamphetamine. Declaration of Buege at ¶5. While in prison, Plaintiff got better ... lost weight, [and doesn't] have to take asthma medicine anymore...." Deposition of Plaintiff at 62:22-63:1.

Before filing the instant case, Plaintiff filed an action for negligence, malpractice and violations of the Eighth Amendment against the United States, Defendant Kurt Alford R.N. (Nurse Alford) and Defendant Officer Burns. Sheridan v. Rios, 09-cv-844 (JMR/FLN) (D.Minn.). Not only did Plaintiff sue the instant defendants in the prior case, the claims arose from the same facts as the instant case. There, Plaintiff withdrew the negligence claim. Later, the complaint was dismissed for failure to exhaust the inmate administrative remedy procedure.[1] Plaintiff commenced the instant case 8 days after he was released and no longer required to exhaust the inmate remedy procedure. 42 U.S.C. § 1997e(a).

2. There are Four Defendants.

Three defendants are named in their individual capacity in a Bivens action under the Eight Amendment alleging deliberate indifference to Plaintiff's serious medical

[1] Defendants ask this Court to take judicial notice of the filings and proceedings in Sheridan v. Rios, 09-cv-844 (JMR/FLN) (D.Minn.). Exhibit 045 is the docket sheet.

needs. ECF No. 27 at ¶¶47-49, Count I. Defendant, Kurt Alford R.N. (Nurse Alford) was an employee of the Public Health Service (PHS). He provided medical care to Plaintiff and arranged for additional medical care. The other two defendants, Correctional Officers Cory Burns and Jose Pena, transported Plaintiff to the Hospital in restraints modified to accommodate Plaintiff's injury. Deposition of Plaintiff at 16:12-14; Declaration or Burns at ¶3; Declaration of Pena at ¶4.

The United States is the defendant to Sheridan's common law tort claims for which he asserts that the Federal Tort Claims Act (FTCA) waives the sovereign immunity. ECF No. 27 at ¶¶1, 53-70, Counts II, III, IV and V.

B. Plaintiff was not Restricted to a Lower Bunk Before he Fell on June 2, 2008.

Before arriving at FCI Waseca, the BOP obtained a history from Plaintiff and examined him twice. Exhibit 001. They noted Plaintiff had asthma. They did not restrict him to a lower bunk. Moreover, he was even assigned to an upper bunk before he came to FCI Waseca. Plaintiff did not fall out of bed from a lower or upper bunk on those occasions. Deposition of Plaintiff 47:19.

On or about May 8, 2008, Plaintiff arrived at FCI Waseca where he was assigned to the Special Housing Unit (SHU) until a different cell became available. Declaration of Alford at ¶3. SHU has a bunk bed in each cell. Exhibit 024. The bunk bed has two levels, a lower and upper bunk. A ladder is used to access the upper bunk. The upper bunk does not have a railing or other device to secure a prisoner from falling out of bed.

That same day, Nurse Tracie Peterson R.N. prepared a health screening. Exhibit 002. The health screening report indicated Plaintiff had Asthma. Id. She did not restrict him to a lower bunk or report a condition that merited a low bunk restriction. Exhibit 025.

On May 12, 2008, Linda Brandt, a Physician's Assistant, (PA) took a medical history from and examined Plaintiff. Declaration of Brandt ¶¶2-3. Deposition of Plaintiff at 20:1-22. PA Brandt noted Plaintiff had asthma but otherwise normal. She did not report symptoms, conditions or other reasons to restrict Plaintiff to a lower bunk. See Exhibit 003 and 025.

PA Brandt prepared the physical examination report, Exhibit 003, on the BOP's electronic medical records system (BEMR). In this system, the physical examination report is linked to a medical duty status report. When a restriction is entered in the report of a physical examination, the link is automatically activated, a new screen pops-up and a medical duty status report is populated and ready for review. Once the duty status report is completed, it is necessary to print and distribute a copy of the report to the Medical Records Department for keying into SENTRY. Additional copies of the report are generally distributed to the unit officer, the inmate, the work supervisor, and the nursing staff.[2] Other correctional officers can access the duty status on SENTRY.

[2] Here, there is a copy of the original, a copy of the original with a checkmark in the lower right corner and a copy of the original with a circled "B" and checkmark in the lower right corner. Exhibits 004 and 004A. These marginalia were either placed by one person who saw a copy twice or two people each of whom saw it once. It is not known who made these marks. Plaintiff, however, first learned of the May 12, 2008 report when

PA Brandt did not prepare the duty status report on BEMR. Instead, she used a hardcopy of the report.[3] Exhibit 004. Once completed, the hardcopy is delivered to medical records. There, the duty report is manually entered into SENTRY. SENTRY automatically records the date, time and location of the entry. The entry cannot be altered. Exhibit 41, Response to Interrogatory 11, Kate Gulbrandson.

Here, there is evidence that on May 12, 2008, the medical duty status report did not restrict Plaintiff to a low bunk. PA Brandt did not tell Plaintiff that he was restricted to a lower bunk. Deposition of Plaintiff at 28:15-19. Instead, Plaintiff found out as a result of a request for records after he fell. Id., at 21:17-19. Moreover, Kate Gulbrandson, in medical records, entered the duty status report into SENTRY on May 12, 2008. Exhibit 005. She entered all of the duty restrictions. Exhibit 41, Response to Interrogatory 11, Kate Gulbrandson. The restrictions were associated with asthma, the only restricting condition that PA Brandt noted during her examination of Plaintiff. Exhibit 004. Consequently, according to SENTRY, Plaintiff was not restricted to a lower bunk and was assigned to the upper bunk without incident. Declaration of Gulbrandson at ¶3; Exhibit 026. Finally, the physical examination did not identify one or more of the conditions that merited a low bunk assignment at FCI Waseca. Exhibit 025.

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he received a copy of his records after he had fallen. Deposition of Plaintiff at 22:6-10; 28:11-19.

[3]Exhibit 004 is a color scan of the original. It contains one signature and one date – May 12, 2008. Even if the Court infers that the duty status report was completed on one day and restricted Plaintiff to a lower bunk before he fell, the failure to maintain accurate records at best negligence may raise an inference of negligence. See Valedon Martinez v. Hospital Presbiteriano, 806 F.2d 1128, 1134, (1st Cir. 1986).

C. Plaintiff Fell from an Upper Bunk on June 2, 2008.

On Monday, June 2, 2008, at 6:15 a.m., Plaintiff pushed the duress alarm in his cell to request help. Exhibit 007. A Correctional Officer promptly responded. Deposition of Plaintiff at 67:12-14. Plaintiff said he fell out of the upper bunk. His left forearm and forehead were injured. He asked to see a doctor. Id.; Exhibit 007.[4] The officer contacted medical staff. Nurse Alford came to SHU to examine, evaluate and treat Plaintiff's injuries.[5] Exhibit 008. After examining the injury and diagnosing it as a fractured left wrist, Nurse Alford classified treatment as "urgent." Id.; Declaration of Alford at ¶¶4-5. He did not immediately arrange for Plaintiff to see a doctor or be transported to the Hospital.

Instead, Nurse Alford injected Plaintiff with 60 mg of ketorolac, ordered x rays and splinted Plaintiff's wrist.[6] Plaintiff told Nurse Alford his pain was dull and throbbing and an 8 on a scale of 1-10, with 10 the worst pain. Id. Use of a wrist splint eased the pain some. Id. Plaintiff's wrist was tender and deformed without breaking the skin or affecting the range of motion or the flow of blood to his fingers. Id. Nurse Alford

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[4]The officer is not sued. Instead, Plaintiff's claims that the officer failed to get him to Nurse Alford in a timely manner sounds in negligence. See Deposition of Plaintiff at 36:12-18.

[5] Plaintiff claims he was taken to see Defendant Nurse Alford. Deposition at 15:14-19. The contemporaneous medical record, however, states, "Emergency Encounter performed at [SHU]." Exhibit 008.

[6] Ketorolac is a non-steroidal anti-inflammatory drug for "management of moderately severe acute pain that requires analgesia at the opioid level." Exhibit 009.

diagnosed Plaintiff's wrist as fractured. Id. He told Plaintiff that he would have to wait for x-rays until the day shift arrived. Deposition of Plaintiff at 9:23-25; 12:21-13:11.

After eating breakfast at 7:30 a.m., Plaintiff became nauseated and pushed the duress alarm. Id.; Deposition of Plaintiff at 36:21-37:1. A correctional officer responded. She ordered Plaintiff to use the lower bunk, suggested he may have a mild concussion, told him to lie down and the medical staff would get to him when they could. Deposition of Plaintiff at 37:1-20. Until 9:50 a.m., there are no additional reports concerning Plaintiff in the SHU log. Exhibit 007.

At 9:50 a.m., Plaintiff was escorted to the medical center at FCI Waseca. Id. At 10:00 a.m., his wrist was x-rayed. Exhibit 010. He claims to have been told he did not break his wrist and a correctional officer commented, "fall harder next time." ECF No. 27 at ¶¶30-31. After the x-ray, PA Brandt followed up with Plaintiff. Exhibit 010. She approved the note by Nurse Alford, and examined the x-ray to confirm Nurse Alford's diagnosis of a fractured wrist. Id. PA Brandt requested a consultation with an orthopedic surgeon "today." Id. Plaintiff's wrist was splinted and he was escorted back to SHU. Id.

At 10:10 a.m., Plaintiff was escorted back to SHU. At 11:20 a.m., correctional officers began serving lunch. Exhibit 007. While Plaintiff ate his lunch, Dr. Salwa Khouri examined and cosigned the BEMR report by PA Brandt. Exhibit 010. At this point the administrative process to transport Plaintiff to the Hospital was commenced. See Exhibit 027.

D. Transportation for Consultation to Immanuel St. Joseph Hospital on June 2, 2008.

During the morning of June 2, 2008, Officers Burns and Pena were assigned to medical transport duties. Exhibit 011. They made one trip to and from the Hospital. Id.[7] At about 12:15 p.m., they had their first contact with Plaintiff when they entered SHU to transport Plaintiff to the Hospital. Exhibit 007. Officer Burns was the senior officer. He received and reviewed the authorization to transport Plaintiff. The authorization provided, Plaintiff should be transported in the restraints commonly used to transport inmates – handcuffs, shackles and a martin chain.[8] Declaration of Burns at ¶¶9-10.

When Officer Burns applied the restraints, he handcuffed Plaintiff's right wrist. He did not, however handcuff Plaintiff's left wrist the same way. Instead, he accommodated the splint on the left wrist. He looped a plastic tie around the splint and through a closed hand cuff.[9] Deposition of Plaintiff at 48:1-12.

At 12:40 p.m., Officers Burns and Pena logged out of SHU. Exhibit 007. About 20 minutes later, they arrived with Plaintiff at the Hospital. ECF No. 27 at ¶37. At the

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[7] Staffs at FCI Waseca were also taking precautions to avert a potential food strike, precautions that required additional manpower. Declaration of Rios at ¶4. Plaintiff became aware of the need for additional Officers when Officer Burns received a radio call while on the way to the hospital. Deposition of Plaintiff at 50:4-18. The call asked Officer Burns to work overtime that day. Id.

[8] The authorization is not in the record.

[9] While Plaintiff was escorted inside FCI Waseca to the medical center he wore restraint. Deposition of Plaintiff 15:17-16:22. Later, about two weeks after surgery, Plaintiff was transported to the hospital in the same restraints. Deposition of Plaintiff at 48:16-59:1; Exhibit 012.

hospital, the nurse and orthopedic surgeon did not ask for the restraints to be removed. Deposition of Plaintiff at 52-54.

E. Medical Care at the Hospital on June 2, 2008.

When Plaintiff arrived at the Hospital, the triage nurse classified his condition as "urgent." Exhibit 013. She noted Plaintiff had limited motion in his left wrist; blood was circulating to his fingers; neurological signs were within normal limits and; Plaintiff's blood pressure was not significantly elevated. Id.

At 2:00 p.m., Dr. Kyle Swanson, an orthopedic surgeon, examined Plaintiff. Exhibit 014. ATCH_5/D_3. Dr. Swanson saw his role as "further evaluation secondary to a left distal radius fracture."[10] Id. Dr. Swanson's physical evaluation noted, "[Plaintiff] is in no apparent distress." Id. After his evaluation, Dr. Swanson described "treatment options" to Plaintiff. Id. Plaintiff chose surgery. Id. Dr. Swanson ordered morphine. At 2:50 p.m., Morphine was administered. Exhibits 015, 016 and 017.

At 8:00 p.m., Dr. Swanson and an assistant began surgically repairing Plaintiff's wrist. Exhibit 019. They were able to achieve anatomical alignment and fashioned and secured a wrist plate to maintain this alignment. When completed, imaging confirmed that all of the hardware was in "excellent alignment." Exhibit 019. Plaintiff was placed in a plaster splint, awakened and transferred to the recovery room, where he stated his pain was 8 out of 10. Exhibit 020.

[10] Plaintiff had a "Colles" fracture. Exhibit 035 is a diagram of such a fracture.

After Plaintiff returned from the hospital, on June 3, 2008, PA Brandt updated Plaintiff's medical duty status. Exhibit 021. She restricted Plaintiff to a lower bunk. Id. Again, she noted the restrictions on a hardcopy of the report and the report was provided to medical records, where Kate Gulbrandson changed the restriction indicated in SENTRY. Exhibit 41, Response to Interrogatory 11, Kate Gulbrandson. On June 9, 2008, Kate Gulbrandson entered the restrictions associated with Plaintiff falling out of the bed and breaking his wrist, including a restriction to a lower bunk. Exhibit 006.

In an extra precautionary measure, PA Brandt was prone to update restrictions on a duty status report she had previously prepared.[11] Id. Consequently, Kate Gulbrandson will testify that the May 12, 2008 medical duty status for Plaintiff was also updated when Plaintiff returned from the Hospital the day after he fell.

III. DEFENDANTS ARE ENTITLED TO STAUTORY AND QUALIFIED IMMUNITY FROM PLAINTIFF'S DELIBERATE INDIFFERENCE CLAIMS.

Plaintiff claims Nurse Alford and Correctional Officers Burns and Pena violated the Eighth Amendment in 3 different ways: "(1) when they ignored his requests for medical attention, (2) when they ignored his requests to be immediately taken to the hospital, and (3) when they ignored his requests to be transported without handcuffs or shackles."[12] ECF No. 27 at ¶48. Essentially, Plaintiff claims he has an Eighth

[11] Regardless of whether the May 12, 2008 duty status report restricted Plaintiff to a lower bunk. There is no evidence that the restriction was placed in SENTRY and available to correctional officers in SHU.

[12] Although Plaintiff claims his "requests" were "ignored," he admits receiving medical care from Nurse Alford. Id., at 29-30, 32 and 33.

Amendment right to be seen by a doctor or hospitalized for a broken wrist and to be free of restraints. Nurse Alford, however, is entitled to statutory immunity. Officers Burns and Pena are entitled to qualified immunity.

A. **Nurse Alford is entitled to Statutory Immunity.**

Nurse Alford is a member of the Public Health Service (PHS). He is entitled to absolute immunity from a Bivens action unless his conduct was unrelated to providing medical services. 42 U.S.C. § 233(a); Hui v. Castenada, 559 U.S. 799, 130 S.Ct. 1845 1850-51 (2010) Novak v. Mundt, 2005 WL1277834 *6 (D.Minn. May 10, 2005). Section 23(a) immunizes members of the PHS from personal liability under Bivens so long as the allegedly wrongful conduct was related to providing health services.[13] Hui, 599 U.S. at 1851.

Here, Nurse Alford only interacted with Plaintiff when Nurse Alford examined and treated Plaintiff at 6:30 a.m., about an hour after Plaintiff fell. ECF No. 27 at ¶¶19-22; Declaration of Nurse Alford at ¶7, Exhibit 008. Nurse Alford performed the examination and treatment at FCI-Waseca where he worked as a nurse.

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[13] Section 233(a) provides as follows:

> The remedy against the United States provided by [the FTCA] ... for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

42 U.S.C. § 233(a)

Nurse Alford, like the nurse at Mankato Hospital, made a medical judgment classifying Plaintiff's need for care as "urgent" not immediate. Exhibit 008. Consequently, the claim arises out of Nurse Alford providing or not providing medical services, services that were within the scope of his employment. He is entitled to statutory immunity from the Bivens action.

B. Officers Burns and Pena are entitled to Qualified Immunity.

The purpose of qualified immunity is to allow public officers to carry out their duties consistent with good public policy, rather than acting out of fear for their own personal financial well-being. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). Toward this end, an official is immune from liability unless a reasonable person in his position would have known his actions violated clearly established law. Anderson v. Creighton, 483 U.S. 635, 640 (1987). An official loses this immunity if the law he violated was clearly established at the time of the violation and the applicability of the law to his particular conduct was evident. Id. When qualified immunity is raised as a defense, the Court may address either or both of two general issues:

(1) Do the facts alleged show the official's conduct violated a constitutional right?

(2) If so, was the constitutional right "clearly established" at the time of the official's conduct?

See Scott v. Harris, 500 U.S. 372, 377 (2007); Saucier, 533 U.S. at 201; Brown v. Frey, 889 F.2d 159, 170 (8th Cir. 1989). Qualified immunity is appropriate if no reasonable fact-finder could answer yes to both of these questions. Nelson v. Corr. Med. Servs., 583 F. 3d 522, 528 (8th Cir. 2009).

To show that the defendant's conduct violated a constitutional right, a plaintiff must prove an affirmative link between the defendant's personal conduct and the alleged violation. Andrews v. Fowler, 98 F.3d 1069 (8th Cir. 1996). "Without a showing of direct responsibility for the improper action, liability will not lie against [an] ... official." Rubek v. Barnhart, 814 F.2d 1283, 1284 (8th Cir. 1987). A defendant cannot be held liable for another's conduct. Smith v. Clarke, 458 F.3d 720, 723 (8th Cir. 2006). Here, Plaintiff lacks evidence to survive a summary judgment motion based on qualified immunity.

1. Correctional Officers Burns and Pena are entitled to qualified immunity on the claim that the failure to immediately send Plaintiff to a doctor or hospital violated the Eighth Amendment because they were uninvolved in providing medical care to Plaintiff.

Plaintiff alleges that Officers Burns and Pena transported Plaintiff to the emergency room and did not remove his restraints when he asked. ECF No. 27 at ¶32, 35-36. In addition, he claims Officer Burns was rude and unprofessional during the ride to the hospital.[14] ECF No. 27 at ¶35. Plaintiff does not allege that Officers Burns and Pena were involved in providing or not providing medical treatment for his injured wrist. They simply restrained Plaintiff during the trip from SHU inside FCI Waseca to the Hospital outside FCI Waseca. Therefore, the Officers are entitled to qualified immunity

[14] Caustic comments do not infringe on plaintiff's rights. "[H]arassment and verbal abuse ... do not constitute the type of infliction of pain that the Eighth Amendment prohibits." Johnson v. Unknown Dellatifa 357 F.3d 539, 546 (6th Cir.2004).

on the claim that the medical care provided or delayed violated the Eight Amendment because they were uninvolved.

2. Correctional Officers Burns and Pena are entitled to qualified immunity on the claim that they violated the Eighth Amendment by transporting Plaintiff out of FCI Waseca to the hospital in restraints.

Under the Eighth Amendment, prison officials must provide humane conditions of confinement, including adequate food, clothing, shelter, and medical care. Farmer v. Brennan, 511 U.S. 825, 832 (1994). For the action against Officers Burns and Pena, the Eighth Amendment test is akin to the one described in Nelson v. Corr. Med. Servs., 583 F.3d 522, 528 (8th Cir.2009) (en banc) where the plaintiff complained of the use of restraints while she was in labor. There, the court identified the test as, "A prison official is deliberately indifferent if she knows of and disregards a serious medical need or a substantial risk to an inmate's health or safety." Id., at 528(internal quotation marks and citation omitted.) The claim has both an objective and a subjective component. Id., at 529. The second issue is the subjective component. It requires proof of a culpable state of mind – the official was both aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and he must also draw the inference." Id., at 548–49. "[D]eliberate indifference includes something more than negligence but less than actual intent to harm; it requires proof of a reckless disregard of the known risk." Crow v. Montgomery, 403 F.3d 598, 602 (8th Cir.2005). (Internal quotation marks and citation omitted).

Here, the relevant questions are: (1) whether the use of restraints posed a substantial risk to Plaintiff's health or safety, and (2) whether Officers Burns and Pena had knowledge of the substantial risk but nevertheless disregarded it. See Nelson, 583 F.3d at 532; Farmer v. Brennan, 511 U .S. at 832; Johnson v. Hamilton, 452 F.3d 967, 972–73 (8th Cir.2006). With regard to the first issue, the Officers knew the use of restraints posed a risk to Plaintiff's injury. He wore a splint and they were taking him to the hospital and as a result they accommodated the injury. Consequently, Officers Burns and Pena do not argue that there was a substantial risk to Plaintiff's health.

Instead, Officers Burns and Pena argue that Plaintiff lacks evidence that they nevertheless disregarded the risk. They accommodated Plaintiff's injury by modifying the restraints. Deposition of Plaintiff at 38:6-9. Moreover, they removed the restraints whenever a nurse or doctor requested the removal. Deposition of Plaintiff at 53:23-54:11. Although Plaintiff claims that he had a right to be transported without restraints because he was classified as out-custody, Deposition of Plaintiff at 48:13-25, the violation of a prison regulation is not actionable under Bivens. Acoren v. Peters, 829 F.2d 671, 676-77 (8th Cir. 1987). Furthermore, Plaintiff lacks evidence that the use of restraints injured him.

It is not enough to show that Plaintiff had a broken wrist before he had contact with Officers Burns and Pena. He must demonstrate that their personal conduct caused an injury. Gibson v. Weber, 433 F.3d 642, 646 (8th Cir.2006). Pain alone is insufficient, particularly, where, as here, Plaintiff was in pain before he was restrained and after restraints were removed. See Sheldon v. Pezley, 49 F.3d 1312, 1316 (8th Cir. 1996).

Before Officers Burns and Pena restrained Plaintiff, he was treated by medical personnel, who administered pain medication and treatment – treatment non-medical prison personnel can rely on as satisfactory. Meloy v. Bachmeier, 302 F.3d 845, 849 (8th Cir. 2002). Expert evidence is required to prove the injury because how the restraints, as modified, caused an injury to Plaintiff's already painful and broken wrist is complicated. See Robinson v. Hauer, 292 F.3d. 560, 564 (8th Cir. 2002); Gibson v. Weber, 4233 F.3d 642, 646 (8th Cir. 2006). Plaintiff lacks evidence that the restraints injured him.

Officers Burns and Pena are entitled to qualified immunity on Plaintiff's claim that they illegally used restraints.

IV. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE TORTS.

In Counts II through V, Plaintiff claims the BOP negligently failed to (a) provide suitable and safe sleeping quarters because the upper bunk did not have a railing or device to prevent Plaintiff from rolling out of bed, (b) follow a medical restriction requiring an assignment to a lower bunk, (c) provide prompt and adequate medical care to diagnose Plaintiff's condition and alleviate his pain, and (d) abide by 18 U.S.C. § 4042. ECF No. 27 at 10-13. The Court, however, lacks subject matter jurisdiction to proceed with the claims. All claims (a) through and including (d) are barred by the statute of limitations. Claim (a) is barred by the discretionary function exception. Claim (c) requires expert evidence that Plaintiff does not have. And Claim (d) is not cognizable as a claim against a private person subject to the laws of Minnesota. Therefore, the tort actions should proceed no further.

A. The FTCA is a Limited Waiver of Sovereign Immunity.

The jurisdiction of a federal court to entertain a suit against the United States requires a waiver of sovereign immunity. United States v. Mitchell, 463 U.S. 206, 216-17 (1983). As sovereign, the United States is immune from suit unless Congress consented to the suit. Brown v. United States, 151 F.3d 800 (8th Cir. 1998). The consent must be found in a clear, unequivocal, and specific act of Congress. Miller v. Tony and Susan Alamo Foundation, 134 F.3d 910, 915 (8th Cir. 1998). Concomitantly, Congress may limit the consent. These limits are strictly observed. Miller, 134 F.3d at 915-916. A plaintiff bears the burden of showing that Congress has consented to his particular cause of action. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000).

Through the FTCA, Congress waived the United States' immunity for certain tort actions. See 28 U.S.C. §§ 1346(b)(1); 2401, 2671-2680; Berkowitz v. United States, 486 U.S. 531, 535-36 (1988). It also limited the consent. Congress enacted a statute of limitations at 28 U.S.C. § 2401(b). Congress also enacted exceptions to the consent, including the discretionary function exception at 28 U.S.C. § 2680(a). In addition, Congress limited the consent in the language of the consent itself to tort actions under state law that subject a private person to tort liability. 28 U.S.C. § 1346(b) and 2674. Here, these limitations divest this Court of jurisdiction to entertain Plaintiff's tort actions.

B. Plaintiff's Action is Untimely.

The common law torts in Counts II through V are barred by the statute of limitations. 28 U.S.C. § 2401(b). Compliance with the FTCA's limitations period "is prerequisite to the district court's jurisdiction over a suit against the United States." T.L.

ex rel. Ingram v. United States, 443 F.3d 956, 961 (8th Cir. 2006). Consequently, the Court lacks subject matter jurisdiction to proceed with the tort actions brought by Plaintiff.

Section 2401(b) has two periods of limitation that retain sovereign immunity if either period is missed. Mader v. United States, 654 F.3d 794, 800-801 (8th Cir. 2011)(en banc). One period requires that Plaintiff present the administrative claim within 2 years of the action accruing. Id. The other period requires commencement of an action in District Court within 6 months after the BOP mailed Plaintiff a denial of his administrative claim. Id. The time is extended while a request for reconsideration is pending. 28 C.F.R. § 14.9(b). An action is commenced by filing a complaint. Fed. R. Civ. P. 3. Although Plaintiff presented a timely administrative claim, he did not commence the instant action within 6 months of the denial of that claim.

On February 18, 2009, the BOP denied Plaintiff's initial administrative claim. Declaration of Buege at ¶6 Attachment A. Although Plaintiff requested reconsideration, to toll the statute of limitations the request must comply with the applicable regulations. See Mader, 654 U.S. at 800-01. Here, Plaintiff's request was improper, submitted while Plaintiff was litigating the tort in federal court.

Most importantly, regardless of whether the prior request for reconsideration or prior action tolled the statute of limitations, which the United States denies, the period of limitations was only tolled until the prior litigation concluded on September 29, 2010. See Sells v. United States Dep't of Justice, 585 F.3d 407, 410 (8th Cir. 2009). On August

30, 2011, Plaintiff commenced the instant action. Because more than six months intervened, Plaintiff's present action is barred by the statute of limitations.

C. The Design of the Bunk Beds at FCI Waseca was a Discretionary Function for which Congress Retained Sovereign Immunity.

Even if Plaintiffs timely commenced claim that the bunk beds at FCI Waseca were unsafe, it is barred by the discretionary function exception at 28 U.S.C. § 2680(a). In that exception, Congress retained immunity for:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit . . . ." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984). The Court of Appeals has explained:

> The point of the discretionary-function exception is to make sure that government agencies and employees are free to make the policy related decisions that their jobs require, without fear that they or the government may be sued whenever someone thinks they have decided badly, and without the added cost to taxpayers that frequent lawsuits would bring.

Claude v. Smola, 263 F.3d 858, 860 (8th Cir. 2001). To the extent conduct falls within the discretionary function exception, a court lacks subject matter jurisdiction. Dykstra v. U.S. Bureau of Prisons, 140 F.3d 791, 795 (8th Cir. 1998)

The Supreme Court has established a two-prong test to determine whether the discretionary function exception applies to the case at hand. Berkovitz, 486 U.S. at 536-37. First, to be discretionary, the challenged action or omission must involve an element of judgment or choice; it cannot violate a mandatory and specific directive. Id. at 536, 544. Second, to be protected, the challenged conduct must be "susceptible to policy analysis." United States v. Gaubert, 499 U.S. 315, 322-25 (1991). Negligence is not part of the inquiry, because the government has "the right to act without liability for misjudgment and carelessness in the formulation of policy." Walters v. United States, 474 F.3d 1137, 1140 (8th Cir. 2007)(internal quotation marks omitted).

1. The Conduct at Issue

To analyze the assertion of the discretionary function exception, courts first determine the conduct at issue. Bultema v. United States, 359 F.3d 379, 383-84 (6th Cir. 2004). Here, Plaintiff claims the BOP negligently failed to provide suitable and safe sleeping quarters because the upper bunk did not have a railing or device to prevent Plaintiff from falling out of bed. ECF No. 27 at ¶52

2. A railing or other device is not mandated.

If "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," the discretionary function exception does not apply. Gaubert, 499 U.S. at 322; Calderon v. United States, 123 F.3d 947, 949 (7th Cir. 1997). Here, Plaintiff alleges 18 U.S.C. § 4042(a) creates a mandatory duty to provide safety devices to prevent him from falling out of bed. Plaintiff, however, is mistaken.

Section 4042(a) grants the BOP broad discretion over how to provide for the safe treatment of inmates and safe conditions of confinement. Muick v. Reno, 83 Fed.Appx. 851, 853 (8th Cir.2003); Parrott v. United States, 536 F.3d 629, 638 (7th Cir.2008). "The general duty set forth by § 4042(a) does not mean that the BOP cannot exercise judgment on how to fulfill that duty." Fargas v. United States, 2008 WL 698487 *9 (D.Minn. March 13, 2008). Indeed, Section 4042 does not mandate the placement of safety devices on bunk beds. Cohen v. United States, 151 F.3d 1338, 1342 (11th Cir. 1998).

Section 4042 sets forth no particular conduct that BOP personnel should, let alone must, do or not do to fulfill the duty of providing for the safety of its inmates. Instead, it satisfies the first prong of the discretionary function exception – providing such equipment is susceptible to policy analysis. Muick, 83 Fed.Appx. at 853.

Even if the Court looks beyond Section 4042(a), there are not rules or regulations that mandate the BOP place a guard rail or other device on the upper bunk at FCI Waseca. Declaration of Trevor Kroger at ¶¶3-4. Placement of such devices was a matter of judgment and choice. The first element for application of the discretionary function exception is satisfied.

3. Placement of railings and safety devices on the upper bunk is susceptible to policy analysis.

The determination to install guardrails or other safety devices on prison beds is susceptible to policy analysis because it balances the safety of inmates and correctional workers, the good order of the correctional facilities, and institutional resources. Paulino-Duarte v. U.S., 2003 WL 22533401 *2 (S.D.N.Y. November 7, 2003). When, as here,

the relevant policy allows government employees to exercise discretion, the government enjoys a presumption that the agent's acts are grounded in policy when exercising that discretion." Gaubert, 499 U.S. at 324.

Courts have found that the determination of whether to equip prison bunk beds with railings and other safety devices is susceptible to policy analysis. Bultema v. U.S., 359 F.3d 379, 384 (6th Cir. 2004); Francis v. U.S., 2011 WL 3563146 (D.Conn. August 12, 2011); Paulino-Duarte, 2003 WL 22533401 *2; Harper v. U.S., 2009 WL 3190377 *3 (E.D.Ky. September 30, 2009). As these courts hold the placement of safety devices in a prison involves a balancing of the safety of inmates and BOP personnel and the need for security and control where convicted criminals are closely confined. See Declaration of Kroger ¶4. Hence, the placement of a railing or other safety device on the upper bunk of the bunk beds at FCI Waseca was susceptible to policy analysis.

Plaintiff's action for unsafe beds at FCI Waseca is barred by the discretionary function exception, which retains sovereign immunity.

D. Congress did not Waive Sovereign Immunity for Negligence *Per Se*.

Plaintiff alleges Section 4042(a)(2), would subject a private person to liability for Negligence per se. ECF No.27 at Count V. The Court applies Minnesota tort law to determine whether Section 4042 supports an action for negligence per se. Gelley v. Astra Pharmaceutical Prod., Inc., 610 F.2d 558, 562 (8th Cir.1979). Section 4042, however, is insufficient to give rise to negligence per se, on its own or under Minnesota law.

Under the FTCA a private person must be subject to the tort action. Section 4042, however, places a duty on the government, not on the conduct of a private individual.

> [T]o allow FTCA recovery merely on the basis of a general doctrine of negligence per se, without requiring that there be some specific basis for concluding that similar conduct by private persons or entities would be actionable under state law, is to in essence discriminate against the United States: recovery against it is allowed, although for similar conduct the private person or entity would not be subject to liability under state law. Plainly, the FTCA waiver of sovereign immunity does not go so far.

Johnson v. Sawyer, 47 F.3d 716, 728 (5th Cir.1995) (en banc).[1] It is well-established that "the violation of a federal statute or regulation by government officials does not of itself create a cause of action under the FTCA." Art Metal USA, Inc. v. United States, 753 F.2d 1151, 1157 (D.C.Cir. 1985); Gelley, 610 F.2d at 562-63. Consequently, an action premised on violation Section 4042 is not cognizable under the FTCA because it does not impose a duty on a private person.

In Minnesota "negligence per se is a form of ordinary negligence that results from violation of a statute." Anderson v. State, 693 N .W.2d. 181, 189–90 (Minn.2005)(internal quotation marks omitted.). It is a cause of action separately pleaded and inseparably intertwined with negligence. Anderson v. Stat, Dept. of Natural Resources, 693 N.W.2d 181, 189 (Minn. 2005)." A violation of federal statutes or regulations does not automatically invoke a state's doctrine of negligence per se. Appley Bros. v. United States, 924 F.Supp. 944, 961 (D.S.D. 1996) aff'd 164 F.3d 1164 (8th Cir. 1999); Davis v. United States, 536 F.2d 758 (8th Cir. 1976). Minnesota law agrees, "Not every statutory violation is negligence." Johnson v. Farmers & Merchant's State Bank, 320 N.W.2d 892, 897 (Minn. 1982). The undersigned could not find a Minnesota case,

statute or regulation adopting 18 U.S.C. § 4042 or applying it as the basis for a negligence action. See Legrande v. U.S., 687 F.3d 800, 809 (7th Cir. 2012)(FAA standards.); Anderson v. Anoka Hennepin Independent School Dist. 11, 678 N.W.2d 651, 663 n. 12 (Minn. 2004)(OSHA).

Not only is there no Minnesota case law, statute or regulation adopting 18 U.S.C. § 4042, this statute does not satisfy the elements of negligence per se. The Minnesota Supreme Court has held that a violation of a legislative enactment can be evidence of negligence if

> (1) The intent of the statute is to protect a class of which plaintiff is a member, but only if
>
> (2) The plaintiff's injury involves an invasion of the particular interest protected by the statute,
>
> (3) Was caused by the particular hazard or form of harm against which the enactment was designed to give protection and
>
> (4) It was proximately caused by its violation.

Johnson, 320 N.W.2d at 897; Lorschbough v. Township of Buzzle, 258 N.W.2d 96, 98 (Minn. 1977). While arguably, Plaintiff may satisfy elements 1, 2 and 4. Section 4042 does not satisfy the third element.

To satisfy the third element, Section 4042 must provide protection from "a particular hazard or form of harm ...." and establish a standard of care to protect against that hazard or harm. Hutchinson v. Cotton, 53 N.W.2d 27, 29 (Minn. 1952). Section 4042, however, does not contain standards that dictate the conduct of a federal employee. Smith v. U.S., 19 F.3d 22, 23 n.1 (7th Cir. 1994); Chinchello v. Fenton, 805 F.2d 126,

134 (3d Cir. 1986); Dulany v. Carnahan, 132 F.3d 1234, 1240 (8th Cir. 1997). Therefore, under Minnesota law an action for negligence per se cannot arise from 18 U.S.C. § 4042(a).

Plaintiff cannot use 18 U.S.C. § 4042 by itself or under Minnesota law to sustain an action for negligence per se action. Therefore, it should be dismissed.

V. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT.

A. Plaintiff Lacks Expert Evidence Needed to Proceed with a Negligent Failure to Provide Prompt and Adequate Medical Care.

Plaintiff claims FCI-Waseca negligently failed to provide prompt and adequate medical care to diagnose Plaintiff's condition and alleviate his pain. ECF No. 27. In particular he claims PHS Nurse Alford examined him about an hour after he fell on June 2, 2008. Id., at ¶19. During the examination, Plaintiff alleges he told Nurse Alford that he was in severe pain and discomfort, required a doctor and needed "to be immediately taken to a hospital to be examined and receive proper treatment." Id., at 20. Nurse Alford injected plaintiff with ketorolac, a pain medication and placed a splint on his wrist but did not immediately transfer him to a hospital. Id., at ¶21. Plaintiff returned to his cell. Id., at ¶22. These claims require expert evidence because the promptness and adequacy of the medical care received by Plaintiff at FCI Waseca and the hospital is not within a layman's knowledge. Instead, it raises a complex question about the standard of care for treating a wrist fracture, the use of ketorolac to provide pain relief and when the timing of surgical repair of the fracture causes an injury.

Title 18 United States Code 4042 imposes a duty on the BOP to provide adequate medical care to its inmates. United States v. Muniz, 374 U.S. 150, 165-6 (1963). But Section 4042 does not provide a private right of action for its enforcement. Harper v. Williford, 96 F.3d 1526, 1528 (D.C. Cir. 1996); Chinchello v. Fenton, 805 F.2d 126, 134 (3d Cir. 1986). An action for breach of this duty must be brought under the FTCA. Id.

To determine if the United States has breached its duty to provide medical care, the Court looks to the law of the state where the alleged tortuous conduct occurred. Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969). Here, the allegedly tortuous conduct occurred in Minnesota where medical negligence requires proof that

> 1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct;
>
> 2) the defendant departed from that standard;
>
> 3) the defendant's departure from that standard was a direct cause of the patient's injuries; and
>
> 4) the plaintiff sustained damages.

Tousignant v. St. Louis County, 615 N.W.2D 53, 59 (Minn. 2000). In such cases, the plaintiff must serve two different affidavits of expert review on the defendant at designated times unless it is one of the rare cases that does not require expert evidence. Minn. Stat. § 145.682subd 2 (2008); Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188, 191 (Minn. 1990). A plaintiff's failure to characterize the action as medical malpractice is irrelevant under the statute. Tousignant v. St. Louis County, 615 N.W.2d 53, 56 n. 56 (Minn. 2000). Plaintiff did not comply with Minn. Stat. § 145.682.

Moreover, to proceed to trial he needs expert evidence to prove his case or rebut the report by Dr. Donavon.

Instead of expert evidence Plaintiff claims the negligence is within the knowledge of a lawman. The history of Plaintiff's treatment, however, demonstrates that Plaintiff's claims are too complex for laymen. Plaintiff himself did not know that his wrist would require surgery. Deposition of Plaintiff at 44:20-23. And when he chose surgery, the orthopedic surgeon provided him with different treatment options. Exhibit 014 and 017. Hence, Plaintiff's own choice of treatment required expert advice.

Expert testimony is generally required to establish the standard of care and the departure from that standard. "The purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes [medical] malpractice and causation." Tousignant, 615 N.W.2d at 58 (citation and internal quotation marks omitted.) The testimony normally assists the trier of fact with determining liability. Id. There is, however, an exception when "the acts or omissions complained of are within the general knowledge and experience of lay persons..." Id. (Citations and internal quotation marks omitted). All elements of Plaintiff's action, the standard of care applicable to the defendant's acts or omissions, the breach of that standard of care, and the chain of causation, must be within the general knowledge and experience of lay persons before he can dispense with expert evidence. Id., at 61. The exception is applied only "in the simplest of fact situations, such as when metal clips or a sponge have been left in the body after surgery or a dentist's grinding disc has slipped and cut membranes and tissues

at the base of the tongue." Chizmadia v. Smiley's Point Clinic, 768 F.Supp. 266, 271 (D.Minn.1991).

Here, Plaintiff claims are not simple. He claims Nurse Alford should have immediately referred him to a doctor or a hospital. But when PA Brandt examined Nurse Alford's note she approved it and implicitly the timeline for treating Plaintiff. Although a lay person with the injury suffered by Plaintiff may immediately go to the emergency room, Nurse Alford, PA Brandt and the triage nurse at the Hospital did not consider Plaintiff's condition an emergency. Instead, it was urgent and an orthopedic consultation obtained that day. Exhibits 008, 010 and 018. Consequently, the standard of care is not within the ken of Lay people.

Likewise, causation requires expert evidence. No one has told Plaintiff the delay caused an injury. Deposition of Plaintiff at 55:2-7. An expert must explain when an injury requires urgent or emergency care, what is the difference between the two levels of care, and the effect on a broken wrist when surgery is performed about 14 hours later. These are not matters within the common knowledge of laymen.

But even if there was some doubt about Plaintiff's need for expert evidence, Dr. Donovan, a hand surgeon, has stated,

> It is my medical opinion that the treatment that was rendered to Mr. Sheridan was appropriate. It is not uncommon to have to delay surgery, such as the type that Mr. Sheridan underwent, for several days. There was no documented neurologic compromise of the hand and therefore, no urgency existed to proceed with surgery.

Exhibit 028 at 8. Consequently, to survive summary judgment, Plaintiff must produce evidence to rebut the report. But Plaintiff lacks such evidence and the United States is entitled to summary judgment.

Dated: July 8, 2013

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 11-CV-2487 DWF/FLN

MATTHEW PHILLIP SHERIDAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CERTIFICATE OF COMPLIANCE**
	)	
WARDEN R. RIOS, et al,	)	
	)	
Defendants.	)	

The undersigned attorney for the United States certifies this memorandum complies with the type-volume limitation of D. Minn. LR 7.1(f) and the type size limitation of D. Minn. LR 7.1(h). The memorandum has 7,665 words of type, font size 13. The memorandum was prepared using Microsoft Word, which includes all text, including headings, footnotes and quotations in the word count.

Dated: July 8, 2013

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 11-cv-2487 DWF/FLN

MATTHEW PHILLIP SHERIDAN, Plaintiff, v. WARDEN R. RIOS, et al, Defendants.	)	**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE RESPOND**

On November 3, 2011, service on defendants was completed. As a result, a response to the complaint is due on or before January 3, 2012. The Defendants expect to bring a dispositive motion but an essential witness is unexpectedly unavailable during the holidays. In addition, Plaintiff 's attorney has consented to a 21 day extension, until January 24, 2012. Therefore, this Court should grant an extension of time until January 24, 2012.

Rule 6(b) of the Federal Rules of Civil Procedure provides, in part as it pertains to this case,

> When by these rules . . . an act is required . . . to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed . . . .

This request is made before time has expired to respond to the Complaint. The cause shown is an essential witness is currently unavailable. Moreover, Plaintiff's counsel has consented to the 21 day extension until January 24, 2012.

Dated: 12-19-11

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 11-cv-2487 DWF/FLN

MATTHEW PHILLIP SHERIDAN,	)	
	)	
Plaintiff,	)	**CERTIFICATE OF**
	)	**COMPLIANCE**
v.	)	
	)	
WARDEN R. RIOS, et al,	)	
	)	
Defendants.	)	

The undersigned attorney for the United States certifies this memorandum complies with the type-volume limitation of D. Minn. LR 7.1(c) and the type size limitation of D. Minn. LR 7.1(e). The memorandum has 181 words of type, font size 13. The memorandum was prepared using WordPerfect X4, which includes all text, including headings, footnotes and quotations in the word count.

Dated: 12-19-11

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Matthew Phillip Sheridan,

Plaintiff,

vs.

Kirk Alford, RN, Correctional Officer Burns, Correctional Officer Pena, and the **United States**,

Defendants.

Court File No. 11-cv-02487 (DWF/FLN)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

On May 8, 2008, Plaintiff Matthew Sheridan was admitted as a federal inmate to Bureau of Prisons (BOP), Federal Correctional Institution (FCI) Waseca. (Sheridan Decl. 4.) Due to overcrowding and inadequate bed space in the general population, Mr. Sheridan was placed in the Special Housing Unit (SHU) pending available bed space. (Sheridan Decl. 4-5.) Mr. Sheridan was initially assigned to a two-person cell with a bunk-bed, and Mr. Sheridan was assigned to sleep in the upper bunk. (Sheridan Decl. 5.)

On May 12, 2008, Mr. Sheridan was seen by Linda Brandt, PA, for a physical examination and medical screening. (Sheridan Decl. 5; Leyderman Decl., Ex. 1, hereinafter Sheridan Dep." 20-21.) During his visit with Ms. Brandt, Mr. Sheridan requested to be assigned a lower bunk due to his asthma, significant obesity, frequent urination at night, emphysema, difficulty breathing, and his fear and concerns of rolling out of bed in his sleep. (Sheridan Decl. 5; Sheridan Dep. 21.) On May 12, 2008, Ms.

Brandt granted Mr. Sheridan's request and placed Mr. Sheridan on several medical restrictions. (Sheridan Decl. 5.) This was done by placing a "Medical Duty Status" form into Mr. Sheridan's file. (Sheridan Decl. 5; Leyderman Decl., Ex. 2, hereinafter "Ex. 2.") This form included the following restrictions: (1) "No Access to Cold/Wind;" (2) "Height Restrictions/No Ladders;" (3) Assignment to "Pollution Free Area;" and (4) "Lower Bunk Required." (Sheridan Decl. 5; Ex. 2.)

On May 22, 2008, Mr. Sheridan was transferred to a different cell within the SHU, which was also a two-person cell with a bunk-bed. (Sheridan Decl. 5.) Per Ms. Brandt's instructions and Mr. Sheridan's Medical Duty Status, Mr. Sheridan was assigned a lower bunk inside the new cell. (Sheridan Decl. 5.) On May 29, 2008, Mr. Sheridan was transferred to a third cell within the SHU by FCI Waseca employee Correctional Lieutenant Lyngaas, which was also a two-person cell with a bunk-bed. (Sheridan Decl. 5.) Lieutenant Lyngaas disregarded Ms. Brandt's May 12, 2008, directives and Mr. Sheridan's Medical Duty Status and assigned Mr. Sheridan to the top bunk within the new cell. (Sheridan Decl. 5; Sheridan Dep. 24.) The top bunk inside the third cell was approximately 5 feet off the ground and required the use of a ladder to get in and out of bed. (Sheridan Decl. 5.) Mr. Sheridan immediately complained to Lieutenant Lyngaas regarding his assignment to the top bunk within the new cell. (Sheridan Decl. 6; Sheridan Dep. 24.) Lieutenant Lyngaas responded that the bottom bunk had already been taken by another inmate and refused to transfer Mr. Sheridan to a lower bunk. (Sheridan Decl. 6; Sheridan Dep. 24-25, 42.) This upper bunk-bed was not equipped with a railing or any

other device or mechanism designed to prevent Mr. Sheridan from rolling out of bed while asleep. (Sheridan Decl. 6.)

On June 2, 2008, at approximately 5:30 a.m., Mr. Sheridan rolled out of his bed while asleep and fell to the concrete floor from the upper level of the bunk-bed. (Sheridan Decl. 6.) Mr. Sheridan woke up as soon as he landed on the ground. (Sheridan Decl. 6.) Mr. Sheridan immediately felt severe pain in his left lower arm and wrist as well as his head and knew that he was seriously injured. (Sheridan Decl. 6.) Specifically, due to the severe pain in his wrist, Mr. Sheridan believed that he had suffered a bone fracture in his wrist or lower arm. (Sheridan Decl. 6.) At this point, Mr. Sheridan also knew that he required immediate emergency medical attention. (Sheridan Decl. 6.) Mr. Sheridan then got up and pressed the distress button inside his cell to ask for medical attention and assistance. (Sheridan Decl. 6.) Correctional Officer Laird responded shortly thereafter, and Mr. Sheridan explained that he had fallen from the top bunk and suffered a serious injury to his left arm. (Sheridan Decl. 6.) Mr. Sheridan also explained that he was in severe and excruciating pain and that he required immediate medical assistance. (Sheridan Decl. 6.) Officer Laird left without providing any assistance or medical attention to Mr. Sheridan. (Sheridan Decl. 6.)

Approximately one hour later, at 6:30 a.m., Mr. Sheridan was taken to see Defendant Nurse Alford. (Sheridan Decl. 6.) Prior to this time, Mr. Sheridan had received no medical attention or care whatsoever, even though he continued to complain that he was in severe pain and discomfort. (Sheridan Decl. 6.) During his visit with Nurse Alford, Mr. Sheridan explained that he was experiencing excruciating pain in his wrist

and lower arm and that he believed that he had fractured a bone in his wrist or lower arm. (Sheridan Decl. 7.) Mr. Sheridan also asked to be seen by a doctor and to be immediately taken to a hospital to be examined and to receive proper medical treatment. (Sheridan Decl. 7.) Nurse Alford refused to allow Mr. Sheridan to be seen by a doctor and refused to transport Mr. Sheridan to a hospital for examination and treatment. (Sheridan Decl. 7.) Instead, Nurse Alford injected an Ibuprofen shot into Mr. Sheridan's left arm and then put Mr. Sheridan's left arm into an arm-brace. (Sheridan Decl. 7; Sheridan Dep. 12-13, 46.) Mr. Sheridan made numerous complaints about his severe pain and discomfort during his visit with Nurse Alford and requested to be seen by a doctor and to be taken to a hospital numerous times. (Sheridan Decl. 7.) Nurse Alford refused to provide any additional care or medical attention for Mr. Sheridan and instead ordered Mr. Sheridan to go back to his cell. (Sheridan Decl. 7.)

Two FCI Waseca correctional officers then escorted Mr. Sheridan back to his cell. (Sheridan Decl. 7.) While walking back to his cell, Mr. Sheridan complained to these Officers about his severe pain and discomfort and asked them to take him to a hospital and to be seen by a doctor. (Sheridan Decl. 7.) These officers ignored Mr. Sheridan's complaints and requests and instead placed him back into his cell. (Sheridan Decl. 7.)

When Mr. Sheridan returned to his cell, the pain and discomfort in his left arm became even more intense and he started to experience additional symptoms, including a severe headache, dizziness, and upset stomach. (Sheridan Decl. 7.) Mr. Sheridan could not sleep due to the severe pain and discomfort and he was convinced that he needed to be seen by a doctor and that he needed to go to the hospital to treat the fracture and to

receive proper medical attention. (Sheridan Decl. 7.) At approximately 7:30 a.m., Mr. Sheridan once again pressed the distress button in his cell. FCI Correctional Officer Denn responded to Mr. Sheridan's call. (Sheridan Decl. 8; Sheridan Dep. 36-37.) Mr. Sheridan explained that he had fallen from his bunk and most likely suffered a fracture to his left arm, that he was experiencing severe pain and discomfort in his left arm, that the medication was not helping, and that he was dizzy and had an upset stomach and a severe headache. (Sheridan Decl. 8.) Mr. Sheridan also requested that Officer Denn take Mr. Sheridan to see a doctor and to be transported to a hospital where he could receive proper treatment and medical attention. (Sheridan Decl. 8.) Officer Denn ignored Mr. Sheridan's complaints and instead informed Mr. Sheridan that he had a concussion and ordered Mr. Sheridan to switch bunks with his cellmate and to lie down and try to sleep. (Sheridan Decl. 8; Sheridan Dep. 37.) Officer Denn then left, leaving Mr. Sheridan suffering in his cell. (Sheridan Decl. 8.) For the next two and half hours, Mr. Sheridan continued to suffer in his cell. (Sheridan Decl. 8.) The pain in Mr. Sheridan's left arm remained severe and did not alleviate. (Sheridan Decl. 8.) Mr. Sheridan also continued to suffer from a severe headache, dizziness, and an upset stomach. (Sheridan Decl. 8.)

At approximately 9:30 a.m., Mr. Sheridan once again pressed the distress button to ask for assistance. (Sheridan Decl. 8.) An FCI Waseca Correctional Officer responded, and Mr. Sheridan explained that he was suffering from severe pain and requested to see a doctor and be taken to a hospital. (Sheridan Decl. 8; Sheridan Dep. 40-41.) This officer listened to Mr. Sheridan's complaints but ignored Mr. Sheridan's complaints and left. (Sheridan Decl. 8.) At approximately 10:00 a.m., Mr. Sheridan was finally taken to the

medical unit to be seen by medical staff. (Sheridan Decl. 8.) Once there, Mr. Sheridan once again explained that he had fallen from the top bunk, that he most likely broke a bone in his wrist or lower arm, and that he was suffering from severe and excruciating pain in his lower left arm as well as his head. (Sheridan Decl. 8.) Mr. Sheridan also requested to be immediately seen by a doctor and to be immediately taken to the hospital for proper treatment and medical care. (Sheridan Decl. 8-9.) Mr. Sheridan complained to Nurse Alford once again, stating that he was in severe pain, and asked for stronger medication to control the pain. (Sheridan Dep. 46.) Nurse Alford refused to treat Mr. Sheridan's pain, stating, "Oh, I gave you Ibuprofen, you ain't getting no more than that." (Sheridan Dep. 46.) Mr. Sheridan knew that he had suffered a serious injury to his left arm and repeated numerous times that he needed immediate medical attention and that he needed to go to the hospital right away. (Sheridan Decl. 9.)

The medical staff performed an x-ray on Mr. Sheridan's left wrist and arm and, after inspecting the image, stated that Mr. Sheridan had no fractures. (Sheridan Decl. 9.) One of the FCI, Waseca staff present stated to Mr. Sheridan, "You should fall harder next time." (Sheridan Decl. 9; Sheridan Dep. 17-18.) Mr. Sheridan continued to complain about his pain, but he was once again ignored and ordered to go back to his cell. (Sheridan Decl. 9.) Once back at his cell, Mr. Sheridan continued to suffer from severe and excruciating pain and continued to complain to prison staff. (Sheridan Decl. 9.) Mr. Sheridan also continued his requests to be seen by a doctor and to be taken to a hospital for treatment. (Sheridan Decl. 9.) Mr. Sheridan's complaints and requests were once again ignored by FCI Waseca staff. (Sheridan Decl. 9.)

At 11:30 a.m., six hours after Mr. Sheridan's injury, a doctor finally examined Mr. Sheridan's arm and the x-ray image. (Sheridan Decl. 9.) The doctor immediately determined that Mr. Sheridan had a fracture in his left radius bone and that he needed an emergency surgical procedure to treat the fracture. (Sheridan Decl. 9.) Although Mr. Sheridan had asked to see a doctor numerous times, this was the first time that morning that Mr. Sheridan was seen by a doctor. (Sheridan Decl. 9.)

Approximately 45 minutes later, Mr. Sheridan was transported to the Immanuel St. Joseph's Hospital Emergency Room in Mankato, MN, by Defendant Officers Burns and Pena. (Sheridan Decl. 9.) While transporting Mr. Sheridan, Defendant Officers Burns and Pena restrained Mr. Sheridan in handcuffs and shackles. (Sheridan Decl. 9.) Mr. Sheridan was in severe pain due to the fracture in his left arm. (Sheridan Decl. 10.) The handcuffs and shackles that were used to restrain Mr. Sheridan during transport significantly intensified the pain and did not allow Mr. Sheridan to position his fractured arm into a comfortable position. (Sheridan Decl. 10.) During the ride to the hospital, Mr. Sheridan made numerous complaints to Defendant Officers Burns and Pena about his pain and requested numerous times that his handcuffs and shackles be removed. (Sheridan Decl. 10.) At the time of this incident, Mr. Sheridan had out custody clearance, meaning that Mr. Sheridan could have been transported unshackled outside the prison and with minimum security. (Sheridan Decl. 10; Sheridan Dep. 48-49; Leyderman Decl., Ex. 11 (stating that Mr. Sheridan had "Minimum/Out" Custody Classification on June 20, 2008); see also Defs.' Ex. 30, p. 31 [ECF Doc. 31-31] defining "out custody").) Mr. Sheridan explained, "I came into . . . [FCI, Waseca] with no handcuffs on. There was no reason

they had to have me [shackled]. . . . They didn't need two guards, I didn't need shackles . . . ." (Sheridan Dep. 48-49.) Mr. Sheridan further explained that when he was initially transported to FCI, Waseca, he overheard a BOP official instructing the correctional officers transporting Mr. Sheridan to leave Mr. Sheridan unshackled and unhandcuffed for the trip. (Sheridan Dep. 48-50.) Nonetheless, Defendant Officers Burns and Pena ignored Mr. Sheridan's requests and refused to remove his handcuffs or shackles until after Mr. Sheridan arrived at the hospital. (Sheridan Decl. 10.) Officer Burns was also extremely rude and unprofessional during the ride to the hospital and then joked about the accident and laughed at Mr. Sheridan once at the hospital. (Sheridan Decl. 10; Sheridan Dep. 52.) Officers Burns and Pena held Mr. Sheridan shackled the entire day and removed the shackles only when Mr. Sheridan was about to go into surgery. (Sheridan Dep. 53-54.) The Defendant Officers' refusal to remove Mr. Sheridan's handcuffs and shackles caused Mr. Sheridan to suffer intensified and unnecessary pain and discomfort in his left arm. (Sheridan Decl. 10.)

Mr. Sheridan arrived at the hospital at approximately 1:00 p.m. (Sheridan Decl. 10.) Shortly after his arrival, Mr. Sheridan was placed on a morphine drip to help alleviate the severe pain and an emergency surgery was performed later that day. (Sheridan Decl. 10, Sheridan Dep. 52; Leyderman Decl., Ex. 10.) Mr. Sheridan received 2 steel plates and 9 screws in his left forearm to treat the fracture. (Sheridan Decl. 10.) The doctor who examined Mr. Sheridan at Immanuel St. Joseph's Hospital expressed concern as to why it took prison officials such a long time to bring Mr. Sheridan to the hospital. (Sheridan Decl. 10; Sheridan Dep. 9, 52.) Because Mr. Sheridan had eaten

earlier that morning, the surgeon had to postpone the surgery until 8:00 p.m. (Sheridan Decl. 10; Sheridan Dep. 45, 52.) Had Defendants transported Mr. Sheridan to the hospital right away, his surgery could have been completed approximately 12 hours earlier. (Sheridan Decl. 10.)

Mr. Sheridan rated his pain at 10, on a 1-10 scale, prior to receiving the injection from Nurse Alford. (Sheridan Dep. 69.) Within 30 minutes after receiving the injection, Mr. Sheridan rated his pain at 9.5 on a 1-10 scale. (Sheridan Dep. 69.) However, within 30 minutes of receiving the morphine drip, Mr. Sheridan rated his pain at 4 on a 1-10 scale. (Sheridan Dep. 69.)

As a result of the Defendant United States' negligence in installing unsafe bunk-beds, forcing Mr. Sheridan to sleep in these bunk-beds, and failing to follow Ms. Brandt's instructions and Mr. Sheridan's Medical Duty Status, Mr. Sheridan was forced to sleep in the upper bunk, rolled out of his bunk-bed at night, and fractured the radius bone in his left forearm, which resulted in severe pain and suffering as well as emotional anguish and distress. (Sheridan Decl. 10-11.) As a result of the Defendants' ignorance, neglect, negligence, and deliberate indifference, Mr. Sheridan needlessly suffered severe and excruciating pain in his left forearm for approximately 6 hours. (Sheridan Decl. 11.) Had Defendants transported Mr. Sheridan to the hospital upon Mr. Sheridan's request, Mr. Sheridan's pain could have been easily alleviated and contained through the use of the morphine drip approximately 6 hours earlier. (Sheridan Decl. 11.) As a result of the Defendants' ignorance, neglect, negligence, and deliberate indifference, Mr. Sheridan's

suffered approximately 6 hours of excruciating and unnecessary pain and emotional anguish and distress. (Sheridan Decl. 11.)

As a direct result of the fall, Mr. Sheridan continues to experience pain in his left wrist on the daily basis: "I have pain every day, I mean it's sharp pains. I can't do . . . a normal pushup . . . without having excruciating pain." (Sheridan Dep. 55.) Mr. Sheridan explained that, as a result of the fall, he now has to do pushups on his knuckles and experiences pain when doing basic tasks with his hands at work, such as shoveling or scooping. (Sheridan Dep. 55, 59, 61-62.) Mr. Sheridan also experiences difficulty lifting heavy objects with his left hand, especially at work. (Sheridan Dep. 59-60, 61-62.) Mr. Sheridan also has trouble exercising as a result of the fall: "I used to enjoy lifting weights . . . and . . . some things, the curls I can't do." (Sheridan Dep. 62.) Mr. Sheridan testified that, as a result of the fall, he cannot exercise as often as he would like and that he exercises less than he did prior to the fall. (Sheridan Dep. 62.) Mr. Sheridan takes Ibuprofen daily to control the pain in his left wrist. (Sheridan Dep. 60.) Mr. Sheridan also now has a permanent scar, approximately four inches in length, below his left wrist, as a direct result of the fall. (Sheridan Dep. 61.) In addition, as a result of the incident described above, Mr. Sheridan has suffered future lost wages and diminished earning capacity. (Sheridan Decl. 11.)

On October 14, 2008, Mr. Sheridan filed an FTCA Administrative Claim with the United States pursuant to 28 U.S.C. 2671, et seq. (Leyderman Decl., Ex. 3, hereinafter "Ex. 3;" Leyderman Decl., Ex. 4, hereinafter "Ex. 4.") On February 18, 2009, the United States denied Mr. Sheridan's tort claim. (Leyderman Decl., Ex. 5, hereinafter "Ex. 5.")

On April 13, 2009, Mr. Sheridan filed a lawsuit arising from the facts described above in U.S. District Court, District of Minnesota. (Court File No. 09-cv-00844-DWF-FLN, hereinafter "*Sheridan I*," ECF Doc. 1.) In his Complaint, Mr. Sheridan alleged three different violations as three separate counts: Count I: "Negligence;" Count II: "Deliberate Indifference;" and Count III: "Medical Malpractice." (*Sheridan I*, ECF Doc. 1, p. 4-5.) On June 29, 2009, Mr. Sheridan filed an amended complaint, once again alleging the same violations as in his original complaint. (*Sheridan I*, ECF Doc. 11, p. 3-4.)

On February 28, 2010, the defendants in *Sheridan I* filed a Motion for Summary Judgment. (*Sheridan I*, ECF Doc. 26.) On August 18, 2010, this Court issued a Report and Recommendation on the Motion for Summary Judgment, recommending that *Sheridan I* be dismissed without prejudice for failure to exhaust administrative remedies. (*Sheridan I*, ECF Doc. 45.) On September 28, 2010, this Court issued an Order Adopting Report and Recommendation and Memorandum, wherein this Court adopted the Report and Recommendation and dismissed *Sheridan I* without prejudice to allow Mr. Sheridan to exhaust administrative remedies. (*Sheridan I*, ECF Doc. 50.)

Mr. Sheridan attempted to exhaust his administrative remedies early on, in the summer of 2009, but was unsuccessful because BOP employees refused to reply to his written submissions. (See *Sheridan I*, ECF Doc. 19, p. 2.) After *Sheridan I* was dismissed, and as suggested by this Court in the Report and Recommendation and subsequent Order dismissing *Sheridan I*, Mr. Sheridan once again attempted to exhaust his administrative remedies. On October 19, 2010, Mr. Sheridan filed an Informal Resolution Form with FCI, Sandstone, where he was being detained at the time.

(Leyderman Decl., Ex. 8, hereinafter "Ex. 8.") After receiving an unsatisfactory response, Mr. Sheridan exhausted the BOP administrative remedy process by filing a BP-9, BP-10, and BP-11 (Central Officer Appeal). (Leyderman Dec., Ex. 9, hereinafter "Ex. 9.") Mr. Sheridan never received a response to the BP-11. (See Ex. 9.) After having been released from custody, Mr. Sheridan filed the present lawsuit, "*Sheridan II*." (See Compl., ECF Doc. 1, p. 2; Sheridan Decl. 4.) Mr. Sheridan's operative complaint names four Defendants (Kirk Alford, RN, Correctional Officer Burns, Correctional Officer Pena, and the United States) and states five claims for relief (one count for Eighth Amendment violation and four counts of negligence and negligence per se under the FTCA).

On July 8, 2013, the Defendants filed a Motion to Dismiss and for Summary Judgment. In their supporting memorandum, Defendants raise numerous arguments and defenses as to why this lawsuit should be dismissed. As explained in detail below, Defendants' arguments are without merit and their motion should be denied in its entirety.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party can demonstrate that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A court considering a motion for summary judgment must view the facts in the light most

favorable to the non-moving party and give that party the benefit of all reasonable inferences that can be drawn from those facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

ARGUMENT

I. THE INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON MR. SHERIDAN'S EIGHTH AMENDMENT CLAIM BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THEY WERE DELIBERATELY INDIFFERENT TO MR. SHERIDAN'S SERIOUS MEDICAL NEEDS.

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. "[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney,* 509 U.S. 25, 31 (1993). To prevail on an Eighth Amendment claim for deprivation of medical care, an inmate must show that the prison official was deliberately indifferent to the inmate's serious medical needs. *Coleman v. Rahija,* 114 F.3d 778, 784 (8th Cir. 1997). This requires a two-part showing that (1) the inmate suffered from an objectively serious medical need, and (2) the prison official knew of the need yet deliberately disregarded it. *Id.; see also Farmer v. Brennan,* 511 U.S. 825, 837 (1994); *Estelle v. Gamble,* 429 U.S. 97, 105 (1976).

A serious medical need is "one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Camberos v. Branstad,* 73 F.3d 174, 176 (8th Cir.

1995). A medical need that would be obvious to a layperson makes verifying medical evidence unnecessary. *Hartsfield v. Colburn,* 371 F.3d 454, 457 (8th Cir. 2004).

Deliberate indifference is equivalent to criminal-law recklessness, which is "more blameworthy than negligence," yet less blameworthy than purposefully causing or knowingly bringing about a substantial risk of serious harm to the inmate. *See Farmer,* 511 U.S. at 835, 839-40. An obvious risk of harm justifies an inference that a prison official subjectively disregarded a substantial risk of serious harm to the inmate. *Lenz v. Wade,* 490 F.3d 991, 995 (8th Cir. 2007). Deliberate indifference must be measured by the official's knowledge at the time in question, not by "hindsight's perfect vision." *Id.* at 993 n.1 (quoting *Jackson v. Everett,* 140 F.3d 1149, 1152 (8th Cir. 1998)). Whether an inmate's condition is a serious medical need and whether an official was deliberately indifferent to the inmate's serious medical need are questions of fact. *Coleman,* 114 F.3d at 785.

A. Nurse Alford is Not Entitled to Statutory Immunity.

Defendant Nurse Alford presents only one argument on the immunity issue, namely that he is immune from liability for constitutional violations in this lawsuit under 42 U.S.C. § 233(a), and *Hui v. Castenada*, 559 U.S. 799 (2010). As explained below, Nurse Alford is not entitled to statutory immunity because Mr. Sheridan's claims against Nurse Alford arise, partially, from Nurse Alford's acts and omissions unrelated to his medical functions.

Section 233(a), states, in relevant part:

> The remedy against the United States provided by [the FTCA] . . . for damage to personal injury . . . resulting from the performance of medical . . . or related functions, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding . . . against the officer or employee . . . whose act or omission gave rise to the claim.

In *Hui*, the U.S. Supreme Court recently held that section 233(a) provides immunity to federal Public Health Services employees sued for constitutional violations under *Bivens* for injuries caused by the employees' performance of medical or related functions. 559 U.S. at 1848. As such, section 233(a) immunity does not attach when the PHS employee is sued under *Bivens* for acts or omissions unrelated to the employee's medical or related functions, *see id.*, which is precisely the issue in this case.

Mr. Sheridan does not dispute that Nurse Alford is immune under section 233(a) for at least some of his actions related to the subject incident. However, not all of Nurse Alford's actions and omissions are immune. Specifically, Mr. Sheridan alleges in this lawsuit that he spoke with Nurse Alford twice, once during the initial visit at approximately 6: 30 a.m. and once again during their second encounter at approximately 10:00 a.m. One of Mr. Sheridan's main complaints aimed specifically at Nurse Alford is that Nurse Alford failed and refused to find a doctor to diagnose and treat Mr. Sheridan's broken wrist in a timely manner, between 6:30 a.m. and 10:00 a.m. Nurse Alford was, in part, providing services related to his medical or related functions as a PHS employee during his encounters with Mr. Sheridan. At the same time, however, Nurse Alford was also acting in his capacity as a government employee who had a constitutional duty, under the Eighth Amendment, to ensure that Mr. Sheridan's serious medical needs were

being promptly addressed by proper medical staff. In other words, Nurse Alford was obligated, just like any other nonmedical BOP employee, to ensure that Mr. Sheridan's constitutional right to medical care under the Eighth Amendment was not being ignored, and these constitutional duties and obligations arise separately and independently from Nurse Alford's employment with the PHS or his administration of medical or related services to prison inmates.

Here, Mr. Sheridan alleges that Nurse Alford failed to act after Mr. Sheridan's numerous requests to be seen by a doctor and to be taken to a hospital. As explained above, Nurse Alford had a constitutional duty to respond to these requests notwithstanding Nurse Alford's employment with the PHS and independently from any medical services Nurse Alford was providing to Mr. Sheridan as a BOP nurse. As such, Mr. Sheridan's *Bivens* claims against Nurse Alford for his failure to promptly get a doctor for Mr. Sheridan or promptly get Mr. Sheridan to a doctor do not result from Nurse Alford's performance of medical or related functions, and Nurse Alford is thus not entitled to statutory immunity on these *Bivens* claims. Since Nurse Alford does not seek immunity on any other grounds, (see Defs.' Mem. 10-11), Nurse Alford is not entitled to immunity on these specific *Bivens* claims. As such, Nurse Alford's motion for summary judgment on the immunity issue should be denied.

B. Officers Burns and Pena are Not Entitled to Qualified Immunity.

Public officers are entitled to qualified immunity unless their conduct violates a clearly established statutory or constitutional right of which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815 (2009). To

overcome the defendants' qualified immunity claims, the plaintiff must show that: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional right; and, (2) the right was clearly established at the time of the deprivation. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 474 (8th Cir. 2010). This Court can exercise its sound discretion to determine which qualified immunity prong to address first. *Pearson*, 129 S. Ct. at 818. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotations omitted); *see also Bernini v. City of St. Paul*, 665 F.3d 997, 1005 (8th Cir. 2012). As explained below, Defendant Officers Burns and Pena are not entitled to qualified immunity on Mr. Sheridan's Eighth Amendment *Bivens* claims.

Mr. Sheridan's Eighth Amendment claims against Officers Burns and Pena relate to the Defendant Officers' shackling and handcuffing of Mr. Sheridan on the way to the hospital as well as the Defendant Officers' refusal to unhandcuff and unshackle Mr. Sheridan once he arrived at the hospital. Specifically, Mr. Sheridan alleges that the handcuffing and shackling was unnecessary because Mr. Sheridan had out custody clearance, meaning that Mr. Sheridan could have been transported unshackled outside the prison and with minimum security. As explained in the facts, Mr. Sheridan made numerous requests during his ride to the hospital to have his handcuffs and shackles removed due to the severe pain they were causing and further complained to Officers Burns and Pena multiple times. The facts show that the Defendant Officers knew that they were transporting Mr. Sheridan to the hospital to receive treatment for a fractured

wrist, a serious medical condition, and the facts further show that the Defendant Officers knew that Mr. Sheridan was suffering severe pain as a result.

Mr. Sheridan's numerous complaints on the way to the hospital clearly put Officers Burns and Pena on notice that the handcuffs and shackles were causing Mr. Sheridan significant and unnecessary pain and discomfort. Officer Burns and Pena, nonetheless, refused to accommodate Mr. Sheridan's reasonable requests and kept Mr. Sheridan shackled and handcuffed the entire day. In addition to the Officers' failure to manage Mr. Sheridan's pain, which they easily could have done without compromising safety or security, Officer Burns maintained a rude and unprofessional attitude towards Mr. Sheridan, laughed at Mr. Sheridan, and joked about Mr. Sheridan's injuries. The Defendant Officers removed Mr. Sheridan's shackles and handcuffs in the evening, when Mr. Sheridan was about to go into surgery, thus keeping Mr. Sheridan handcuffed, shackled, and suffering unnecessary pain the entire day.

The facts set forth above demonstrate that Defendant Officers Burns and Pena knew that Mr. Sheridan had a serious physical injury, that Mr. Sheridan was suffering severe pain as a result, and that their unnecessary handcuffing and shackling was causing Mr. Sheridan to suffer significant and unnecessary pain and discomfort. *See Johnson v. Hamilton*, 452 F.3d 967, 973 (8th Cir. 2006) (stating that a fractured bone constitutes an objectively serious medical need under the Eighth Amendment). Officers Burns and Pena were deliberately indifferent to Mr. Sheridan's serious medical needs when they refused to unshackle and unhandcuff Mr. Sheridan during the ride to the hospital and while at the hospital, even though Mr. Sheridan had out custody clearance and was not a safety threat

to anyone, especially on the way to the hospital. *See Johnson v. Cook*, 481 Fed.Appx. 283, 285 (8th Cir. 2012) (unpublished) (stating that suffering unnecessary pain as a result of a delayed treatment of a bone fracture is sufficient to state an Eighth Amendment deliberate indifference claim); *Nelson v. Correctional Medical Services*, 583 F.3d 522, 529-30 (8th Cir. 2009) (stating that unnecessary shackling of an inmate who is in pain and in need of medical attention violates the Eight Amendment, in part, because the inmate did not pose a safety threat and the shackling was not justified by any objective safety concerns).

The Defendant Officers' ignorance and deliberate indifference towards Mr. Sheridan's pain and fractured wrist caused Mr. Sheridan to suffer severe and unnecessary pain and discomfort without any reasonable justification. Based on these facts, Officers Burns and Pena were deliberately indifferent towards Mr. Sheridan's serious medical needs and violated Mr. Sheridan's Eighth Amendment right to remain free from cruel and unusual punishment. *See Nelson*, 583 F.3d at 529 (stating that unnecessary shackling of an inmate in need of medical attention which "aggravate[s] . . . already considerable pain and suffering" and "causes unnecessary suffering" violates the Eighth Amendment); *Croft v. Hampton*, 286 Fed.Appx. 955, 956 (8th Cir. 2008) (unpublished) (finding that a fractured bone is a serious medical need and denying summary judgment to prison personnel who improperly handled the inmate's fracture). Furthermore, Mr. Sheridan's Eighth Amendment right to remain free from cruel and unusual punishment through deliberate indifference of serious medical needs was clearly established in 2008. *Langford v. Norris*, 614 F.3d 445, 461 (8th Cir. 2010) (stating that the Eighth

Amendment right to remain free from cruel and unusual punishment through deliberate indifference of serious medical needs was clearly established in 2003); *Nelson*, 583 F.3d at 534 (stating that the Eighth Amendment right be remain free from cruel and unusual punishment through unnecessary and painful shackling of injured inmates was clearly established in 2003). For these reasons, Officers Burns and Pena are not entitled to qualified immunity on Mr. Sheridan's Eighth Amendment *Bivens* claims.

II. MR. SHERIDAN'S FTCA TORT CLAIMS SHOULD BE ALLOWED TO PROCEED TO TRIAL.

A. The Applicable Statutes of Limitations Should be Equitably Tolled in this Case Such that Mr. Sheridan's Present FTCA Tort Claims Are Considered Timely.

28 U.S.C. § 2401(b) states:

> A tort claim against the United States should be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented.

Mr. Sheridan filed a timely administrative tort claim with the United States on October 14, 2008. (See Ex. 4 (acknowledging the filing of Mr. Sheridan's claim on October 14, 2008).) On February 18, 2009, the United States denied Mr. Sheridan's claim. (Ex. 5.) On April 13, 2009, within six months of the mailing of the denial letter, Mr. Sheridan filed a lawsuit against the United States in this Court, alleging negligence. (*Sheridan I*, Doc. 1.) On September 28, 2010, this Court dismissed Mr. Sheridan's negligence claim for failure to exhaust administrative remedies even though Mr. Sheridan's negligence claim had

been properly exhausted and denied through the FTCA administrative claim process. (*Sheridan I*, ECF Doc. 50.) Defendant United States now argues that Mr. Sheridan's present FTCA claims should also be dismissed because they have now expired and are thus untimely under section 2401(b). As explained in detail below, the statute of limitations should be equitably tolled in this case such that Mr. Sheridan's FTCA claims are considered timely.

In *Irwin v. Department of Veteran Affairs*, the Supreme Court held that statutes of limitations pertaining to claims against the United States are subject to equitable tolling. 498 U.S. 89, 95 (1990); *see also T.L. v. United States*, 443 F.3d 956, 959-60 (8th Cir. 2006). "The doctrine of equitable tolling applies to FTCA claims against the government, but does not apply to 'garden variety' claims of excusable neglect, . . . and should be invoked only in exceptional circumstances." *Id.* at 963 (citations omitted). "To equitably toll a statute of limitations, the plaintiff must demonstrate (1) timely notice, (2) lack of prejudice to the defendant, and (3) reasonable, good-faith conduct by the plaintiff." *Pecoraro v. Diocese of Rapid City,* 435 F.3d 870, 875 (8th Cir. 2006) (citation omitted). "[T]he remedy of equitable tolling traditionally is reserved for circumstances truly beyond the control of the plaintiff, and should be applied where a party acts diligently, only to find himself caught up in an arcane procedural snare." *Id.* (citations omitted).

As a general rule, equitable tolling is a remedy reserved for circumstances that are "truly beyond the control of the plaintiff." *Hill v. John Chezik Imports,* 869 F.2d 1122, 1124 (8th Cir. 1989); *see also Lown v. Brimeyer,* 956 F.2d 780, 782 (8th Cir. 1992) ("Equitable tolling is appropriate only when the circumstances that cause a plaintiff to

miss a filing deadline are out of his [or her] hands.") *Baldwin County Welcome Ctr. v. Brown* suggests instances in which equitable tolling would be appropriate: (1) a claimant has received inadequate notice; (2) a motion for appointment of counsel is pending; (3) the court has led the plaintiff to believe that he or she has done everything required of him or her; or (4) affirmative misconduct on the part of a defendant lulled the plaintiff into inaction. 466 U.S. 147, 151 (1984). Plaintiff's "diligence in preserving . . . [his] legal rights" is another factor considered by the courts in determining whether the applicable statute of limitations can be equitably tolled. *See Flores v. United States*, 689 F.3d 894, 901 (8th Cir. 2012).

Based on the legal principles set forth above, section 2401(b) should be equitably tolled in this case such that Mr. Sheridan's present lawsuit is considered timely. As explained above, Mr. Sheridan's tort claims were dismissed by this Court for failure to exhaust administrative remedies even though Mr. Sheridan had properly exhausted his FTCA tort claims by filing an administrative claim and obtaining a denial. This Court's order further stated that Mr. Sheridan's lawsuit was being dismissed specifically to allow Mr. Sheridan to exhaust his administrative remedies. (*Sheridan I*, Doc. 50, p. 6.) Mr. Sheridan, reasonably relying on this Court's instructions, immediately started to exhaust his administrative remedies through the BOP by filing forms BP-8, BP-9, BP-10, and BP-11. (Ex. 9.) Mr. Sheridan filed his BP-11 on February 10, 2011. (Ex. 9.) Approximately six months after filing the BP-11, having received no response and having now fully exhausted his administrative remedies, Mr. Sheridan filed the present lawsuit, once again claiming violations under the FTCA.

As these facts demonstrate, Mr. Sheridan acted diligently in preserving his FTCA tort claims by first filing a timely administrative claim, obtaining a denial letter, and then filing a timely lawsuit in this court (*Sheridan I*). In *Sheridan I*, Mr. Sheridan's FTCA claims had been properly exhausted prior to filing and should have been allowed to proceed to discovery and trial. After the tort claims in *Sheridan I* were dismissed, Mr. Sheridan reasonably relied on this Court's instructions to exhaust his administrative remedies prior to re-filing his lawsuit. Mr. Sheridan acted promptly and diligently in exhausting his administrative remedies within the BOP, fully exhausted the administrative remedies, and filed the present lawsuit less than one year after the dismissal of *Sheridan I*.

The circumstances which resulted in the dismissal of Mr. Sheridan's FTCA claims in *Sheridan I* were beyond his control, and Mr. Sheridan has always acted in good faith. Furthermore, there has been no prejudice to the United States since Mr. Sheridan continued pursuing his claims against the United States at all times, starting with the FTCA tort claim, then through *Sheridan I*, then through the BOP administrative remedies process, and now through this present lawsuit. As such, the United States has always been on notice that Mr. Sheridan was actively pursuing his claims against the United States. Finally, Mr. Sheridan has acted reasonably throughout this process and should not be penalized for relying on this Court's orders and instructions as well as this Court's unnecessary dismissal of the tort claims in *Sheridan I*. For all of these reasons, section 2401(b) should be equitably tolled in this case such that Mr. Sheridan's present FTCA tort claims are considered timely.

B. The United States is Not Entitled to Summary Judgment on Mr. Sheridan's FTCA Negligence Claims.

Mr. Sheridan presents four separate FTCA negligence claims against the United States:

- Count II of the Amended Complaint alleges negligence associated with the United States' failure to provide a safe bunk bed equipped with proper safety mechanisms to prevent falls, such as Mr. Sheridan's fall in this case.
- Count III of the Amended Complaint alleges negligence associated with the United States' failure to assign Mr. Sheridan to a lower bunk, in violation of Mr. Sheridan's Medical Duty Status. These acts specifically include the negligence of Lt. Lyngaas. (Am. Compl. ¶13.)
- Count IV of the Amended Complaint alleges negligence associated with the United States' failure to provide prompt medical care, diagnosis, and treatment of Mr. Sheridan's severe and excruciating pain after the fall. These acts specifically include the negligence of Officer Denn, (Am. Compl. ¶25-26) and Nurse Alford (Am. Compl. ¶19-22, 29; Sheridan Dep. 46).
- Count V of the Amended Complaint alleges negligence per se associated with the Defendant United States' violation of 18 U.S.C. § 4042(a).

To prove negligence in Minnesota, a plaintiff must prove a duty of care, breach, causation, and damages. *Schweigh v. Ziegler, Inc.* 463 N.W.2d 722, 729 (Minn. 1990).

To prove medical malpractice in Minnesota, the Plaintiff must prove (1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of the plaintiff's injuries. *Plutshack v. Univ. of Minn. Hosps.*, 316 N.W.2d 1, 5 (Minn. 1982). As to negligence per se, "It is well settled under Minnesota law that breach of a statute gives rise to negligence per se if the persons harmed by that violation are within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent." *Alderman's Inc. v. Shanks*, 536 N.W.2d 4, 8 (Minn. 1995). "[T]he general rule is that violation of a statute which imposes a standard of conduct designed to protect the party injured is negligence per se unless the statute or ordinance designates that a breach is only prima facie evidence of negligence." *Id.* As explained below, Defendant United States is not entitled to summary judgment on Mr. Sheridan's FTCA negligence claims.

1. Summary Judgment Should be Denied on Count II.

Count II of Mr. Sheridan's Amended Complaint relates to the United States' unsafe bunk-beds, which Mr. Sheridan alleges caused his injury. The only defense presented by the United States on this claim is that it is entitled to summary judgment under the discretionary function exception pursuant to 28 U.S.C. § 2680(a). As explained below, United States' arguments are without merit and Count II should be allowed to proceed to trial.

18 U.S.C. § 4042(a)(2), states in relevant part, "The Bureau of Prisons . . . **shall** . . . provide suitable quarters and provide for safekeeping, care, and subsistence of all person

charged with or convicted of offenses against the United States, or held as witnesses or otherwise." (emphasis added). Mr. Sheridan does not dispute that section 4042(a)(2) provides the BOP generous discretion as to how to provide for the safekeeping of its inmates as well as the suitable quarters. However, section 4042(a)(2) leaves no discretion as to whether inmates should be provided suitable quarters and kept safe. In other words, the BOP has discretion as to what type of safety devices should be installed, but the BOP does not have discretion as to whether safety devices should be installed altogether.

In the present case, the issue is not whether the BOP selected an appropriate safety device for its bunk-beds. Rather, the issue is that the bunk-beds where Mr. Sheridan was required to sleep had no safety devices at all, meaning that the quarters were not suitable and Mr. Sheridan was not kept safe. Mr. Sheridan is not challenging a particular safety mechanism or safety device in this case or a particular method selected by the BOP to keep him safe. Instead, Mr. Sheridan is alleging negligence for the United States' complete failure to provide a safety device for its bunk-beds, which directly resulted in Mr. Sheridan falling and suffering an injury. Thus, while the BOP certainly has discretion as to what type of safety device to employ, the BOP is mandated under section 4042(a)(2) to provide at least some safety device, which was completely lacking in this case.

Under section 4042(a)(2), the BOP was mandated to employ at least some sort of safety mechanism to prevent inmates from rolling out of bed and falling to the floor. In the present case, it is undisputed that Mr. Sheridan was required to sleep in bunk beds with no safety mechanism at all to prevent falls, in violation of the specific directive under section 4042(a)(2). Since the issue in dispute is the BOP's complete failure to

provide safety equipment, the BOP is not entitled to the discretionary function exception. For these reasons, the United States is not entitled to summary judgment on Count II of Mr. Sheridan's Amended Complaint.

2. Summary Judgment Should be Denied on Count III.

As noted above, Count III of Mr. Sheridan's Amended Complaint alleges negligence associated with Lt. Lyngaas' assignment of Mr. Sheridan to the upper bunk in violation of Mr. Sheridan's Medical Duty Status. Specifically, the facts show that on May 12, 2008, Ms. Brandt placed a "Medical Duty Status" form into Mr. Sheridan's file. (Sheridan Decl. 5; Ex. 2.) This form included the following restrictions: (1) "No Access to Cold/Wind;" (2) "Height Restrictions/No Ladders;" (3) Assignment to "Pollution Free Area;" and (4) "Lower Bunk Required." (Sheridan Decl. 5; Ex. 2.) On May 29, 2008, Lt. Lyngaas transferred Mr. Sheridan into a SHU cell equipped with a bunk-bed. (Sheridan Decl. 5.) Lieutenant Lyngaas disregarded Ms. Brandt's May 12, 2008, directives and Mr. Sheridan's Medical Duty Status and assigned Mr. Sheridan to the top bunk within the new cell. (Sheridan Decl. 5; Sheridan Dep. 24.) The top bunk inside this cell was approximately 5 feet off the ground and required the use of a ladder to get in and out of bed, also in violation of the Medical Duty Status. (Sheridan Decl. 5.) Mr. Sheridan immediately complained to Lieutenant Lyngaas regarding his assignment to the top bunk within the new cell. (Sheridan Decl. 6; Sheridan Dep. 24.) Lieutenant Lyngaas responded that the bottom bunk had already been taken by another inmate and refused to transfer Mr. Sheridan to a lower bunk. (Sheridan Decl. 6; Sheridan Dep. 24-25, 42.) Several days

later, while sleeping in the upper bunk, Mr. Sheridan rolled out of bed while asleep, fell to the floor, and injured his wrist, leading to the present lawsuit.

The facts set forth above create a genuine issue of material fact on the issue of negligence and United States' liability for the negligence of Lt. Lyngaas. Specifically, based on these facts, a reasonable jury can conclude that Defendant United States and Lt. Lyngass owed Mr. Sheridan a duty to assign him to the lower bunk after May 12, 2008, that Defendant United States and Lt. Lyngass breached this duty when Lt. Lyngass assigned Mr. Sheridan to the upper bunk in violation of the Medical Duty Status, and that, as a direct and proximate result of the assignment to the upper bunk, Mr. Sheridan fell to the floor while asleep on June 2, 2008, and suffered physical injuries. Because these facts will easily allow the jury to find in Mr. Sheridan's favor, summary judgment on Count III is inappropriate and should denied. *See Jones v. Minnesota Department of Corrections*, 512 F.3d 478, 482 (8th Cir. 2008) ("[I]f there is a [factual] dispute and a reasonable jury could return a verdict for either party, then summary judgment is not appropriate.")

In addition to the factual dispute precluding summary judgment, it is also important to emphasize that Defendant United States does not present legal arguments anywhere in its memorandum submitted to this Court that Count III of Mr. Sheridan's Amended Complaint should be dismissed on the merits. (See Defs.' Mem. 16-29.) Defendants' Motion to Dismiss and For Summary Judgment, (ECF Doc. 29), similarly does not address this particular claim related to Lt. Lyngaas' negligent assignment of Mr. Sheridan to the upper bunk just days prior to the fall. Instead, United States only presents

the jurisdictional argument pertaining to the timing of Mr. Sheridan's tort claims under the statute of limitations, which has already been addressed above. As a result, Count III of Mr. Sheridan's complaint remains unchallenged and should therefore be permitted to proceed to trial. For these reasons, United States is not entitled to summary judgment on Count III of Mr. Sheridan's Amended Complaint.

3. Summary Judgment Should be Denied on Count IV.

Count IV of Mr. Sheridan's Amended Complaint presents two issues: (1) whether Defendant United States is liable for the negligence of Nurse Alford and (2) whether Defendant United States is liable for the negligence of Officer Denn. As explained below, summary judgment should be denied as to both of these United States employees.

As to Nurse Alford, Mr. Sheridan's claims are rather simple and do not require any scientific or medical proof, as Defendant United States asserts in its memorandum. As explained in the statement of facts above, Mr. Sheridan had two encounters with Nurse Alford after his fall on June 2, 2008. The first encounter occurred at approximately 6:30 a.m. At this time, Mr. Sheridan complained of severe pain, asked to be seen by a doctor and asked to be taken to a hospital. Mr. Sheridan alleges that Nurse Alford injected him with Ibuprofen, put his left wrist in a brace, and sent him back to the cell without any additional treatment. Mr. Sheridan testified that the Ibuprofen barely helped with the pain. At approximately 10:00 a.m., Mr. Sheridan spoke with Nurse Alford again and continued to complain about the severe pain he was experiencing. During the second encounter, Nurse Alford refused to treat Mr. Sheridan's pain and once again did not transport Mr. Sheridan to the hospital to be treated by a doctor. Instead, Mr. Sheridan had

to wait until approximately 12:15 to be transported to the hospital, still with no treatment for his pain. Based on these facts, Mr. Sheridan alleges that Nurse Alford caused him to suffer severe and unnecessary pain for approximately 6 hours, between 6:30 a.m. and 12:15 p.m., which could have been avoided had Nurse Alford provided adequate pain medication or had Mr. Sheridan transported to the hospital, as Mr. Sheridan had been asking all day.

Based on these facts, a reasonable jury could conclude that Nurse Alford owed Mr. Sheridan a duty of care to either provide adequate pain medication to control Mr. Sheridan's pain (by providing a morphine drip, for example, as Mr. Sheridan was provided at the hospital) or to have Mr. Sheridan transported to the hospital where his injuries could be immediately diagnosed and where the pain could be immediately treated (as it was, using the morphine drip, as soon as Mr. Sheridan arrived at the hospital). A reasonable jury could further conclude that Nurse Alford breached this duty of care when he provided only one shot of Ibuprofen to treat a fractured wrist over a period of 6 hours, when he ignored Mr. Sheridan's numerous requests for treatment of his pain, and when he refused to have Mr. Sheridan transported to a hospital where Mr. Sheridan could be properly treated. Finally, a reasonable jury could easily conclude that, as a direct result of Nurse Alford's conduct, Mr. Sheridan suffered severe and unnecessary pain for approximately 6 hours. *See Higgins v. J.C. Penney Cas. Ins. Co.*, 388 N.W.2d 429, 430 (Minn. Ct. App. 1986) (stating that plaintiffs in medical malpractice cases can recover damages for pain and suffering). It should also be emphasized that there is a factual dispute as to whether Nurse Alford administered a shot of Ibuprofen (as alleged by Mr.

Sheridan) or a shot of Ketorolac (as alleged by Nurse Alford). Because there are genuine issues of material fact in dispute and because a reasonable jury could find in favor of Mr. Sheridan as to Nurse Alford's negligence, summary judgment should be denied as to Count IV of Mr. Sheridan's Amended Complaint. *See Jones*, 512 F.3d at 482 ("[I]f there is a [factual] dispute and a reasonable jury could return a verdict for either party, then summary judgment is not appropriate.")

Defendant United States argues that Count IV as it relates to Nurse Alford should be dismissed because Mr. Sheridan failed to provide expert witness affidavits as required under Minnesota law. As explained below, this argument is without merit.

Minnesota law generally requires expert testimony in medical-malpractice cases because they often "involve complex issues of science or technology, requiring expert testimony to assist the jury in determining liability." *Tousignant v. St. Louis County, Minn.*, 615 N.W. 2d 53, 58 (Minn. 2000). There is a limited exception to the expert requirement, which applies when the "acts or omissions complained of are within the general knowledge and experience of lay persons." *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985). "If the jury, as lay people, can understand all elements of the claim, including the standard of care, breach of that standard, and causation, without expert testimony, the exception applies and expert testimony is not required." *Cyrette v. Velcommen Village, Inc.*, No. A07-849, 2008 WL 853570, at *4 (Minn. Ct. App. Apr. 1, 2008). Whether expert testimony is required is a legal question to be determined by the court. *Tousignant,* 615 N.W. 2d at 58.

In the present case, Mr. Sheridan's claims against Nurse Alford are within the general understanding of lay people and are therefore exempt from the expert affidavit requirements under Minnesota state law. Essentially, Mr. Sheridan claims that Nurse Alford failed to treat his pain and refused to have him transported to a hospital where such treatment could be provided. Mr. Sheridan claims that Nurse Alford gave him a shot of Ibuprofen which did not help with the pain and then left Mr. Sheridan suffering in his cell for 6 hours without any additional pain treatment. Expert testimony is unnecessary for a jury to understand that Mr. Sheridan was in severe pain after suffering a fractured wrist, that he complained to Nurse Alford numerous times, that Nurse Alford administered one shot of Ibuprofen at 6:30 a.m. which did not help, and that Nurse Alford then essentially ignored Mr. Sheridan's numerous requests for pain management for 6 hours, which caused Mr. Sheridan to suffer severe and unnecessary pain until he finally got to the hospital.

The issues at hand are not related to scientific or medical knowledge requiring the opinions and testimony of expert doctors or nurses. Rather, Mr. Sheridan's claims against Nurse Alford are based on basic common sense and the general understanding of lay people that nurses should provide care and sympathy for people experiencing severe pain instead of ignoring them and leaving them to suffer in a prison cell. Because Mr. Sheridan's claims against Nurse Alford are based on common sense and are within the general understanding of lay persons, Mr. Sheridan is exempt from the expert affidavit requirements which are typically required for medical malpractice claims. *See Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 728 (Minn. 2005) (providing that the

Tousignant exception may apply to claims involving administrative or custodial judgment).

Finally, Defendant United States does not present legal arguments anywhere in its memorandum submitted to this Court that Count IV of Mr. Sheridan's Amended Complaint should be dismissed on the merits as it relates to the negligence of Officer Denn. (See Defs.' Mem. 16-29.) Defendants' Motion to Dismiss and For Summary Judgment, (ECF Doc. 29), similarly does not address this particular claim related to Officer Denn's alleged neglect of Mr. Sheridan's requests for help at approximately 7:30 a.m. on the day of the fall. Instead, United States only presents the jurisdictional argument pertaining to the timing of Mr. Sheridan's tort claims under the statute of limitations, which has already been addressed above. As a result, Count IV of Mr. Sheridan's Amended Complaint, as it relates to the actions of Officer Denn, remains unchallenged and should therefore be permitted to proceed to trial. For the reasons set forth above, United States is not entitled to summary judgment on Count IV of Mr. Sheridan's Amended Complaint.

4. Summary Judgment Should be Denied on Count V.

As noted above, Count V of Mr. Sheridan's Amended Complaint alleges negligence per se for United States' violation of 18 U.S.C. § 4042(a). "It is well settled under Minnesota law that breach of a statute gives rise to negligence per se if the persons harmed by that violation are within the intended protection of the statute and the harm suffered is of the type the legislation was intended to prevent." *Shanks*, 536 N.W.2d at 8. Minnesota law also recognizes a common law action for negligence per se stemming

from a defendant's violation of federal regulations. *See Femrite*, 568 N.W.2d at 539 & n.4; *see also Brooks v. Howmedia, Inc.*, 236 F.3d 956, 966 (8th Cir. 2000). *Femrite* requires a plaintiff to prove both that he "belongs to the class of persons that the regulation is intended to protect," 568 N.W.2d at 539, and that the defendant in fact violated the applicable federal regulations, *see id.* at 542. In *Femrite*, the Minnesota Court of Appeals rejected the argument that a violation of federal law which does not allow for a private cause of action cannot be used to establish negligence per se. *Id.* at 539 n.4.

In the present case, a reasonable jury could conclude that United States violated section 4042(a) when it failed to provide a safety mechanism to prevent falls from its bunk-beds. A reasonable jury could further conclude that Mr. Sheridan belongs to the class of persons that section 4042 is intended to protect. In fact, it appears that the main purpose of section 4042(a)(2) is to provide protection for persons, such as Mr. Sheridan, who are in the custody of the United States as an inmate or a witness. Finally, as noted above, *Femrite* permits a finding of negligence per se under Minnesota state law in this case. *See* 568 N.W.2d at 539 & n.4. For these reasons, United States is not entitled to summary judgment on Count V of Mr. Sheridan's Amended Complaint.

CONCLUSION

As explained in detail above, the individual Defendants are not entitled to qualified or statutory immunity on Mr. Sheridan's Eighth Amendment *Bivens* claims. Furthermore, the FTCA statute of limitations should be equitably tolled under the circumstances of this case to allow Mr. Sheridan's present claims to move forward. Finally, Defendant United States is not entitled to summary judgment on Mr. Sheridan's FTCA tort claims. For the foregoing reasons, Mr. Sheridan respectfully requests that Defendants' Motion to Dismiss and for Summary Judgment be denied in its entirety.

THE LAW OFFICE OF ZORISLAV R. LEYDERMAN

Dated: July 29, 2013

By: s/ Zorislav R. Leyderman

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Matthew Phillip Sheridan,

Plaintiff,

vs.

Kirk Alford, RN, Correctional Officer Burns, Correctional Officer Pena, and the **United States,**

Defendants.

Court File No. 11-cv-02487 (DWF/FLN)

LR 7.1(f) WORD COUNT COMPLIANCE CERTIFICATE REGARDING PLAINTIFF'S MEMORANDUM

I, Zorislav R. Leyderman, certify that Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment complies with Local Rule 7.1(f) and (h). I further certify that in preparation of this memorandum, I used Microsoft Word 2007 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify that the above-referenced memorandum contains 9,806 words and is prepared in a proportionally spaced typeface using 13-point Times New Roman Font.

THE LAW OFFICE OF ZORISLAV R. LEYDERMAN

Dated: July 29, 2013

By: s/ Zorislav R. Leyderman
ZORISLAV R. LEYDERMAN
Attorney License No. 0391286
Attorney for Plaintiff
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 11-CV-2487 DWF/FLN

MATTHEW PHILLIP SHERIDAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
WARDEN R. RIOS, et al,	)	
	)	
Defendants.	)	

Upon Stipulation of the parties, no hearing hereon being deemed necessary, and for good cause shown, it is hereby

ORDERED that the pretrial order ECF No. 15 is and shall be amended to provide that the discovery and nondispositive motions shall be concluded on or before October 1, 2012, and dispositive motions shall be filed and served on or before November 1, 2012. It is further

ORDERED that in all other respects ECF No. 15 is and shall remain in full force and effect.

Dated: August 27, 2012

s/ *Franklin L. Noel*
FRANKLIN L. NOEL
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 11-CV-2487 DWF/FLN

MATTHEW PHILLIP SHERIDAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
WARDEN R. RIOS, et al,	)	
	)	
Defendants.	)	

Upon Stipulation of the parties, no hearing hereon being deemed necessary, and for good cause shown, it is hereby

ORDERED that the pretrial order ECF No. 15 is and shall be amended to provide that the discovery and nondispositive motions shall be concluded on or before February 4, 2013, and dispositive motions shall be filed and served on or before March 4, 2013.

It is further

ORDERED that in all other respects ECF No. 15 is and shall remain in full force and effect.

Dated: September 27, 2012

s/ Franklin L. Noel
FRANKLIN L. NOEL
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Matthew Phillip Sheridan,

Plaintiff,

v.

Warden R. Rios; Kirk Alford, RN; Correctional Officer Dunn; Correctional Officer Burns; Correctional Officer Pena; Correctional Officers John Does 1-4, officers of the BOP, FCI Waseca, the identities of whom are presently unknown to Plaintiff; and the United States,

Defendants.

Civil No. 11-2487 (DWF/FLN)

ORDER

Upon the parties' Stipulation for Compromise Settlement (Doc. No. [55]), no hearing hereon being deemed necessary, and for good cause shown,

IT IS HEREBY ORDERED that the above entitled action is and shall be **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that either party may move to reopen the case within 60 days of the date of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 10, 2014

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 11-CV-2487 DWF/FLN

MATTHEW PHILLIP SHERIDAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**STIPULATION FOR COMPROMISE SETTLEMENT**
	)	
	)	
WARDEN R. RIOS, et al,	)	
	)	
Defendants.	)	

It is hereby stipulated by and between Matthew Sheridan, Plaintiff, and the United States of America, and its agents and officials, Defendants, by and through their respective attorneys as follows:

1. The parties do hereby agree to settle and compromise the above-entitled action under the terms and conditions set forth herein.

2. The United States of America, Defendant, agrees to pay to the Plaintiff the sum of Fifteen Thousand dollars ($15,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the same subject matter that gave rise to the above-captioned lawsuit, including any claims for wrongful death, for which Plaintiff or his

heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his heirs, executors, administrators or assigns hereby agree to accept the sum of Fifteen Thousand dollars ($15,000.00), in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which he may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, including any future claim for wrongful death. Plaintiff and his heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of the United States, its agents, servants, or employees, and is entered into by both parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

5. It is also agreed, by and among the parties, that the settlement amount of Fifteen Thousand dollars ($15,000.00) represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys' fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. Payment of the settlement amount will be made by a check drawn on the Treasury of the United States for Fifteen Thousand dollars ($15,000.00) and made payable to Matthew Sheridan, Plaintiff, and Zorislav Leyderman, Plaintiff's attorney. The settlement will be paid by electronic transfer to

TCF Bank
The Law Office of Zorislav R. Leyderman IOLTA Trust
Routing No: (b)(6)
Acct. No: (b)(6)
TIN 46-1018392

Plaintiff's attorney agrees to distribute the settlement proceeds to the Plaintiff.

8. In consideration of the payment of Fifteen Thousand dollars ($15,000.00) as set forth above, Plaintiff agrees that he will cause he attorney to execute and file with the court such documents as shall be necessary to cause the above-styled action to be dismissed with prejudice from the docket of the court.

Dated: 4-1-14

ANDREW M. LUGER
United States Attorney

BY: LONNIE F. BRYAN
Assistant U.S. Attorney
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Dated: 03/27/14

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Attorney for Plaintiff

Dated: 3/18/14

MATTHEW PHILLIP SHERIDAN
Plaintiff

Steven L. Barker # 15893-076
Name and Prisoner/Booking Number
U.S.P. Canaan
Place of Confinement
3057 Eastern Turnpike, P.O. Box 300
Mailing Address
Waymart, PA 18472-0300
City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

STEVEN L. BARKER
(Full Name of Plaintiff) Plaintiff,

vs.

(1) BUREAU OF PRISONS, LT. McPHERSON
(Full Name of Defendant)
(2) LT. EMMERICH, SENIOR OFFICER
(3) BOBO, SIA JEAGER, and Correcti-
(4) onal Officers John/Jane Doe 1-100
Defendant(s).
☐ Check if there are additional Defendants and attach page 1-A listing them.

2:10-cv-0314 WTL-TAB

CASE NO. _____
(To be supplied by the Clerk)

CIVIL RIGHTS COMPLAINT BY A PRISONER

☒ Original Complaint
☐ First Amended Complaint
☐ Second Amended Complaint

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:
   - ☐ 28 U.S.C. § 1343(a); 42 U.S.C. § 1983
   - ☒ 28 U.S.C. § 1331; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).
   - ☒ Other: 28 U.S.C. Section 2671, et.al.

2. Institution/city where violation occurred: Terre Haute, Indiana

B. DEFENDANTS

1. Name of first Defendant: See Attached. The first Defendant is employed as: _____ at _____.
(Position and Title) (Institution)

2. Name of second Defendant: _____. The second Defendant is employed as: _____ at _____.
(Position and Title) (Institution)

3. Name of third Defendant: _____. The third Defendant is employed as: _____ at _____.
(Position and Title) (Institution)

4. Name of fourth Defendant: _____. The fourth Defendant is employed as: _____ at _____.
(Position and Title) (Institution)

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

1. Have you filed any other lawsuits while you were a prisoner? ☐ Yes ☒ No

2. If yes, how many lawsuits have you filed? _____. Describe the previous lawsuits:

a. First prior lawsuit:
   1. Parties: _____ v. _____
   2. Court and case number: _____.
   3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____.

b. Second prior lawsuit:
   1. Parties: _____ v. _____
   2. Court and case number: _____.
   3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____.

c. Third prior lawsuit:
   1. Parties: _____ v. _____
   2. Court and case number: _____.
   3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____.

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

D. CAUSE OF ACTION

COUNT I

1. State the constitutional or other federal civil right that was violated: See Attached

2. **Count I.** Identify the issue involved. Check **only one**. State additional issues in separate counts.

☐ Basic necessities ☐ Mail ☐ Access to the court ☐ Medical care
☐ Disciplinary proceedings ☐ Property ☐ Exercise of religion ☐ Retaliation
☐ Excessive force by an officer ☐ Threat to safety ☐ Other: See Attached

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count I. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

See Attached

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

See Exhibits thru and attached.

5. **Administrative Remedies:**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☒ Yes ☐ No

b. Did you submit a request for administrative relief on Count I? ☒ Yes ☐ No

c. Did you appeal your request for relief on Count I to the highest level? ☒ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not.

COUNT II

1. State the constitutional or other federal civil right that was violated: See Attached

2. **Count II.** Identify the issue involved. Check **only one.** State additional issues in separate counts.

☐ Basic necessities ☐ Mail ☐ Access to the court ☐ Medical care
☐ Disciplinary proceedings ☐ Property ☐ Exercise of religion ☐ Retaliation
☐ Excessive force by an officer ☐ Threat to safety ☐ Other: See Attached

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count II. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

See Attached

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

See Exhibits thru and Attached.

5. **Administrative Remedies.**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☒ Yes ☐ No

b. Did you submit a request for administrative relief on Count II? ☒ Yes ☐ No

c. Did you appeal your request for relief on Count II to the highest level? ☒ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not.

COUNT III

1. State the constitutional or other federal civil right that was violated: See Attached

2. **Count III.** Identify the issue involved. Check **only one**. State additional issues in separate counts.

☐ Basic necessities ☐ Mail ☐ Access to the court ☐ Medical care
☐ Disciplinary proceedings ☐ Property ☐ Exercise of religion ☐ Retaliation
☐ Excessive force by an officer ☐ Threat to safety ☐ Other: See Attached

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count III. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

See Attached

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

See Exhibits thru and Attached.

5. **Administrative Remedies.**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☒ Yes ☐ No

b. Did you submit a request for administrative relief on Count III? ☒ Yes ☐ No

c. Did you appeal your request for relief on Count III to the highest level? ☒ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not.

If you assert more than three Counts, answer the questions listed above for each additional Count on a separate page.

E. REQUEST FOR RELIEF

State the relief you are seeking: See Attached.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11-17-10
DATE

x Steven J. Barber
SIGNATURE OF PLAINTIFF

ERNEST J. HILL, III #37509-012
(Name and title of paralegal, legal assistant, or other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

STEVEN L. BARKER,
Fed. Reg. No. 15893-076
U.S.P. Canaan
3057 Eastern Turnpike
P.O. Box 300
Waymart, PA 18472-0300,
Plaintiff,

v.

BUREAU OF PRISONS,
LT. McPHERSON,
LT. EMMERICH,
SENIOR OFFICER BOBO,
S.I.A. JEAGER, and
Correctional Officers
John/Jane Does, 1-100,
Defendants.

TRIAL BY JURY DEMANDED

Civil Action No.

COMPLAINT

NOW COMES the Plaintiff, **Steven L. Barker**, in pro se [1/] and pursuant to 28 U.S.C. § 2671 et.seq. and Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)(28 U.S.C. § 1331), and hereby files the instant complaint against the named Defendants, for damages, and states as follows:

JURISDICTION

Jurisdiction is invoked pursuant to the Federal Tort Claims

1/ Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006)(pro se plaintiff's complaint is to be liberally construed).

Act ("FTCA"), 28 U.S.C. § 2671 et.seq. [2/] and Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)(28 U.S.C. § 1331).

PARTIES

Plaintiff is Steven L. Barker, who at all times relevant, was a prisoner in custody of the Federal Bureau of Prisons at Terre Haute, Indiana. Plaintiff's current legal mailing address is:

Steven L. Barker
Fed. Reg. No. 15893-076
U.S.P. Canaan
3057 Eastern Turnpike
P.O. Box 300
Waymart, PA 18472-0300

Defendant Federal Bureau of Prisons is an agency of the United

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[2/] Liability under the Federal Tort Claims Act. The Federal Tort Claims Act ("FTCA") grants the federal district courts jurisdiction over a category of claims for which the United States has waived its sovereign immunity and rendered itself liable. See 28 U.S.C. § 1346(b); Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 477, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). Under the FTCA, the government is liable for the negligent conduct of an employee "while acting within the scope of his office or employment" under circumstances where "a private person [] would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The Supreme Court has "consistenly held that § 1346(b)'s reference to the law of the place means law of the State--the source of substantive liability under the FTCA." Meyer, 510 U.S. at 478. AS such, "for liability to arise under the FTCA, the plaintiff's cause of action must be 'comparabler' to a 'cause of action against a private citizen' recognized in the jurisdiction where the tort occurred, and the allegations, taken as true, must satisfy the necessary elements of that comparable state cause of action." Bergquist v. United States, 849 F.Supp. 1221, 1232 (N.D. Ill. 1994)(quoting Chen v. United States, 854 F.2d 622, 626 (2nd Cir. 1988)). Under Indiana law, the tort of battery is defined as "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent...." West v. LTV Steel Co., 839 F.Supp. 559, 562 (N.D. Ind. 1993)(quoting Fields v. Cummins Employees Fed. Credit Union, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989)). "It has long been established in Indiana that 'any touching, however slight, may constitute assault and battery.'" Oliver v. McClung, 919 F.Supp. 1206, 1220 (quoting Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (Ind. Ct. App. 1966)).

States Department of Justice under the direction of the United States Attorney General, Eric Holder, and the Director of the Federal Bureau of Prisons, Harley G. Lappin. The Federal Bureau of Prisons business mailing address is:

Federal Bureau of Prisons
Central Office
320 First St. N.W.
Washington, DC 20534

Defendants Lt. McPherson, Lt. Emmerich, Senior Officer Bobo, S.I.A. Jeager, and Correctional Officers John/Jane Does, 1-100, are all correctional officers employed by the Federal Bureau of Prisons, United States Department of Justice, at the Federal Correctional Complex in Terre Haute, Indiana. The Defendants business mailing address is:

Federal Correctional Complex
4200 Bureau Rd. North
P.O. Box 33
Terre Haute, Indiana 47808

All named Defendants are sued in both their official and individual capacities.

PREVIOUS LAWSUITS

No previous lawsuits have been filed by this Plaintiff.

EXHAUSTION OF AVAILABLE ADMINISTRATIVE REMEDIES

All available administrative remedies have been exhausted under the Federal Bureau of Prisons Administrative Remedy Procedure, P.S. 1330.16, as is required under 42 U.S.C. § 1997e. See Exhibits A- . (All the attached Exhibits are incorporated by reference as though fully set forth herein. See Fed.R.Civ.P. 10(c); Ortiz v. Downey, 561 F.3d 664 (7th Cir. 2009)).

STATEMENT OF THE CASE

On March 11, 2009, the undersigned Plaintiff was seriously assaulted by federal correctional officers at the United States Federal Correctional Complex (FCI) in Terre Haute, Indiana.

Specifically, on March 11, 2009, at the Federal Correctional Institution in Terre Haute, Indiana, there was an incident in (F-Unit), Cell 74, an inmate by the name of Steven Marsh #41872-039 was thought to have been assaulted in his cell. While conducting an investigation of the incident a Lt. Emmerich asked me to put my hands on bunk. He started running his hands down in my pockets which pulled my shorts down from my waist. He then took my glasses off my face and threw then somewhere behind me. He then proceeded to run his hands all around my body which amounted to me more than sexual harassment. I asked Lt. Emmerich nicely if he could step outside the cell because the cells here are extremely small and he stated, "I will do whatever the fuck I want to do!" It was at this time that I realized that there was no reasoning with this man.

After the shakedown of my cell, he asked me at that time to step down to the (F-Unit T.V. Room). Lt. Emmerich asked me at that time if I assaulted inmate Steven Marsh. I stated to him I had nothing to say and to go ahead and take me to the Special Housing Unit. He tells me to have a seat in the tv room. Approximately ten minutes later, Lt. Emmerich comes back to the tv room and asked me to follow him to the Lt.'s Office.

When we reached the Lt.'s Office he tells me to have a seat. (At this time I was not handcuffed).

Another ten minutes passes and he asked me my name and number.

It was at this time that Lt. Emmerich started talking in a manner which made it obvious that he wanted a confrontation (also in the office was Lt. McPherson, who was sitting at a desk in the back center of the room). Lt. Emmerich called for Officer Bobo on the radio to escort me to the Special Housing Unit (at this time I was handcuffed behind my back). I asked him to please let me have my glasses because I cannot see without them. He said "fuck you, you have nothing coming." I said that I didn't understand why he was so upset over a child molester getting assaulted, I guess they need to check on his past. He jumped up and grabbed me by the handcuffs and beat me until I deficated on myself. I was beaten between one and two minutes. There was blood everwhere. He then picked me up by the handcuffs and throws me to Officer Bobo and tells me that is what I get for calling him a bitch. I never called him a bitch. On the way to the Special Housing Unit, he tried to have Officer Bobo take me back in the Lt.'s Office. I refused to go and told him that if he was going to kill me that he was going to do it in front of the cameras in the corridor. At that time he brought a broken camera and took a picture of me. After taking pictures, I was on my way escorted to the Special Housing Unit withou any medical attention.

On our way to the Special Housing Unit we were approached by Officer Waylon from (K-Unit). He asked me if I was alright and I told him that I was alright. He asked me who did this to me and I told him that Lt. Emmerich did it. Officer Waylon looks Officer Bobo in the eyes and Officer Bobo confirmed with a(it must be noted that by saying I was alright, I meant that I would survive)

("yes" head shake). Officer Waylon is so worried at this point of my welfare that he asked Officer Bobo to let him take me to the Special Housing Unit. Officer Bobo refused.

As I entered the Special Housing Unit, I was met by Officer Bryan and Officer Buck. They asked what happened and I told them what Lt. Emmerich had done. They both were shaking their heads in disbelief. I asked them if they would both (Bryan and Buck) testify to my condition. They said that if anyone came to talk with them that they would be more than glad to.

On March 12, 2009, I had Lt. Winterberger (S.I.S.) come to my cell (B-28) and hand me two disciplinary reports: (1) one for assaulting inmate Marsh; and (2) the second one was for spitting on Lt. Emmerich. This incident had went from me calling him a bitch to spitting on him. I asked Lt. Winterberger about this and he told me that he never heard anything about me calling him a bitch. I told him that I didn't call Lt. Emmerich a bitch and I didn't spit on him either. I told Lt. Winterberger that this was a lie and that it was not going to go away. I asked him if there was going to be an investigation of this and he told me probably not. It was at this time that Lt. Winterberger asked me if I would accept an apology from Lt. Emmerich and I said "Hell no!" I told him that I wanted him charged by the F.B.I. and that I will not let this go until Lt. Emmerich is prosecuted for assault and falsifying government documents. I told him that I had contacted my family about this matter.

On March 17, 2009, Captain Kalman came to my cell, I told him what happened and he cut me off and said that he was sending

me across the street (the U.S.P. is across the street). Because my points were too high. I showed him a newspaper where a man had received 41 months in Federal Prison for falsifying documents. I told him that I wanted an investigation done on this incident. He turned around and told Lt. Winterberger to open an investigation. Captain Kalman told me to trust him and that there would be an investigation. On March 18, 2009, Captain Kalman came back to my cell and told me that he sent the paperwork across the street to the S.I.A. at the U.S.P.

On March 23, 2009, Counselor Edwards which is my counselor in (F-Unit), came to my cell and told me that he tried his best to get the incident with me and Lt. Emmerich kicked up to his old boss the S.I.A. Counselor Edwards worked for S.I.S. before becoming a counselor in (F-Unit). He told me he didn't think he would have much luck since S.I.S. Winterberger was the one who helped get Lt. Emmerich brought to F.C.I. Terre Haute. Counselor Edwards said that he thought it should be investigated by a higher authority for this reason.

On March 23, 2009, Case Manager Perdue from (L & M Units) came to my cell. I asked Case Manager Perdue to be my staff representative on my disciplinary reports. He told me to tell that to my unit team at my U.D.C. Hearing. I asked Case Manager Perdue if he thought that I did what the reports said I did. He told me "Hell No!" He told me that Lt. Emmerich doesn't know that the staff gets along with me because of all the work I do around the institution. Mr. Perdue goes on to state that no one believes any of that shit that Lt. Emmerich was saying. I said

what about my unit team members, and he shook his head no and told me that they didn't believe it either.

On March 12, 2009, Counselor Edwards from (K & J Units)(this is not the same Counselor Edwards that is my counselor in (F Unit), came to my cell to see if I was alright. I showed him my body where Lt. Emmerich had beaten me. I also showed him the stitches that I received above my left eye. I asked him if he thought that I did the things that Lt. Emmerich accused me of. He told me that he did not believe that I did what Lt. Emmerich said I did. He went on to tell me that he had talked with Officer Waylon and that Officer Waylon had told him that he could not recognize me when I was being escorted to the Special Housing Unit by Officer Bobo. Officer Waylon told him that I was really messed up and covered head to toe in blood.

On April 1, 2009, I had my D.H.O. Hearing on the two Disciplinary Reports that Lt. Emmerich had written me. After hearing all the evidence on the assault charge that I supposedly committed against Steven Marsh, the D.H.O. found me NOT GUILTY, and after having the evidence that was gathered for the assault charge on Lt. Emmerich, he ordered an investigation by the S.I.A. to be conducted on this matter. The reason for this is that the D.H.O. Officer told me that Lt. McPherson stated in his report that he seen me spit on Lt. Emmerich. At that time my staff representative Mr. Perdue intervened and said that this was simply a lie, that Lt. McPherson had told Mr. Perdue that he didn't see inmate Barker spit on Lt. Emmerich. This is why an investigation was ordered by the D.H.O. I also stated to the D.H.O. that if I am found guilty

of assaulting Lt. Emmerich, that I wanted to be charged by the F.B.I. 3/

The Disciplinary Reports that were written under fraudulent pretenses were ultimately expunged based on a finding that the charges were baseless and contained inconsistent statements as well as false statements.

On May 21, 2010, the undersigned filed a claim for damages pursuant to the FTCA with the Federal Bureau of Prisons. To date, no final action has been taken.

Since there has been no proper final agency denial within 6 months of the claim as required by 28 U.S.C. § 2675, the Plaintiff has the right at any time of his own option to deem such a failure to be a final agency denial. This is precisely the result allowed in Mack v. United States Postal Service, 414 F.Supp. 504 (D.C. Mich. 1976). In that case, an agency had not acted on the plaintiff's claim. The court found that the denial could not be deemed to have occurred sixh months after the date of the claim. Such a result would be too harsh. The court said that 28 U.S.C. § 2675 (a) and the statute of limitations of 28 U.S.C. § 2401 are to be read together. 28 U.S.C. § 2675(a) provides:

3/ To state a claim under the federal notice pleading standards, all that a complaint must do is set forth "a short and plain statement of the grounds for the court's jurisdiction." "a short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for relief sought." Fed.R.Civ.P. 8(a). Factual allegations are accepted as true and need only give "fair notice of what the ... claim is and the grounds upon which it rests." EEOC v. Concentra Health Servs., Inc., 496 F.3d 773, 776 (7th Cir. 2007)(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))(other citation omitted).

> The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

The Court in Mack found that this gave the claimant the option to pick the time on which the agency action was deemed to be finally denied. See Appendix A, hereto.

As stated supra, on May 21, 2010, Plaintiff filed an FTCA claim utilizing the standard form 95. Therein said form, Plaintiff made the following claim:

> On March 11, 2009, Lt. Emmerich of the United States Federal Correctional Complex, in Terre Haute, Indiana, assaulted me in the Lieutenant's Office of the Federal Correctional Institution located on the Complex.
>
> Lt. Emmerich viciously assaulted me by slamming my right shoulder into institutional Postal lock boxes located in the Lieutenant's Office, in an attempt to ram my face into those lock boxes. The impact of the assault was so forceful that it left impression marks from the lock boxes in my right shoulder. (See attached affidavits.) The injuries I sustained included but were not limited to a cut and contusion above my left eyebrow, cuts and bruises, laceratins and loss of blood from my face, knees and shins.
>
> In support of the foregoing claims, the attached affidavits and exhausted Administrative Remedies are hereby incorporated by references as though fully set forth herein. Further, the medical reports attached hereto also incorporated by reference.
>
> A claim for damages made pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. Section 2671, et.seq., shall be deemed presented when a federal agency receives from a claimant an executed Standard Form 95 or other written notification of an indident, accompanied by a claim for money damages in a sum certain for injury of the claimant by an employee of the federal government or agency of the government.
>
> This particular claim being submitted here is limited to the liability of the government based on the acts and ommissions of Lt. Emmerich while employed by the Federal Bureau of Prisons when this Officer assaulted the undersigned on March 11, 2009. (Case law and final paragraph omitted).

CAUSES OF ACTION

Count One:

As to Defendant Bureau of Prisons negligence for failure to properly train its employees Defendants Lt. McPherson, Lt. Emmerich, Senior Officer Bobo, S.I.A. Jeager, and Correctional Officers John/Jane Does, 1-100. Plaintiff requests $250,000.00 compensatory damages and $500,000.00 punitive damages;

Count Two:

As to Defendants Lt. McPherson, Lt. Emmerich, Senior Officer Bobo, S.I.A. Jeager, and Correctional Officers John/Jane Does, 1-100, falsification of official documents; deliberate indifference; assault and battery. Plaintiff requests $250,000.00 compensatory damages and $500,000.00 punitive damages;

Count Three:

As to Defendant Lt. Emmerich, assault and battery and falsification of official documents, intentional infliction of emotional distriss.[4/] Plaintiff requests $1,500,000.00 compensatory damages and $5,000,000.00 punitive damages.

4/ The Indiana Supreme Court defined the tort of intentional infliction of emotional distress as follows: "'one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress....' RESTATEMENT (SECOND) OF TORTS § 46 (1965). It is the intent to harm one emotionally that constitutes the basis for the tort of an intentional infliction of emotional distress." Id. (quoting Cullison, 570 N.E.2d 27 at 31).

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grants the relief requested herein above and any other relief the Court may find due and owing Plaintiff under the circumstances.

Respectfully submitted,

Dated: 11-17-10

x Steven J. Barker

Steven L. Barker
Fed. Reg. No. 15893-076
U.S.P. Canaan
3057 Eastern Turnpike
P.O. Box 300
Waymart, PA 18472-0300
Plaintiff, Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

STEVEN L. BARKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Cause No. 2:10-cv-314-WTL-WGH**
	)	
LT McPHERSON, et al.,	)	
	)	
Defendants.	)	

ENTRY FOLLOWING BENCH TRIAL

A bench trial in the above-captioned cause was held on January 13, 2015. In lieu of final arguments, the parties submitted post-trial submissions on January 23, 2015. Dkt. Nos. 98-99. Pursuant to Federal Rule of Civil Procedure 52(a)(1), the Court now issues its findings of fact and conclusions of law.

I. BACKGROUND

A. Procedural History

On November 22, 2010, *pro se* Plaintiff Steven L. Barker filed suit alleging excessive force and related claims against the Bureau of Prisons ("BOP"), Lt. Lloyd McPherson, Lt. Eric Emmerich, Senior Officer Larry ("Fred") Bobo, SIA Jaeger, and 100 anonymous correctional officers pursuant to *Bivens v. Six Unkonw Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In his complaint, Barker alleged, in part, that Lt. Emmerich used excessive force against him in violation of his Eight Amendment rights. Compl. at 11. He further alleged that Lt. McPherson, Officer Bobo, and SIA Jaeger falsified documents, committed assault and battery, conspired to cover up the incident with Lt. Emmerich, and/or were deliberately indifferent to Lt. Emmerich's use of excessive force and Barker's medical needs.

On November 16, 2011, the claims against the BOP and the 100 anonymous correctional officers were deemed "legally insufficient" and dismissed from the suit. Dkt. No. 13 at 1. Thereafter, the remaining Defendants filed a motion for summary judgment. On July 25, 2013, the Court granted in part and denied in part the Defendants' motion, ruling as follows:

> [T]he motion for summary judgment [Dkt. 31] is **granted** as to all claims asserted against Jaeger. The motion for summary judgment [Dkt. 31] is also **granted** as to the claims of falsifying documents, assault and battery, conspiracy, and deliberate indifference in delaying medical care asserted against Lt. McPherson and Officer Bobo.
>
> The motion for summary judgment [Dkt. 31] is **denied** as to the claim of excessive force asserted against Lt. Emmerich and as to the claims of deliberate indifference for failure to intervene against Lt. McPherson and Officer Bobo.

Dkt. No. 50 at 10-11 (emphasis in original).

On September 18, 2013, the Court granted Barker's motion to appoint counsel, and on October 4, 2013, the Court appointed volunteer counsel, John Andrew Goodridge. Thereafter, Barker was permitted to file an amended complaint and did so on July 1, 2014. The amended complaint contained the following claims against the following parties:

Count I	Violation of constitutional rights for the use of excessive force and/or failing to intervene against the United States, Lt. Emmerich, Lt. McPherson, and Officer Bobo
Count II	Assault and battery against the United States and Lt. Emmerich
Count III	Violation of constitutional rights for deliberate indifference to Barker's medical needs against the United States, Lt. Emmerich, Lt. McPherson, and Officer Bobo
Count IV	Gross negligence against the United States, Lt. Emmerich, Lt. McPherson, and Officer Bobo
Count V	Intentional infliction of emotional distress against the United States, Lt. Emmerich, Lt. McPherson, and Officer Bobo

Thereafter, the Defendants moved to dismiss several of Barker's claims, and on October 9, 2014, the Court granted the motion. The following claims remained for trial.

Count I	Violation of constitutional rights for the use of excessive force and/or failing to intervene against Lt. Emmerich, Lt. McPherson, and Officer Bobo
Count II	Assault and battery against the United States
Count IV	Gross negligence against the United States (in relation to the excessive force and deliberate indifference of Lt. Emmerich, Lt. McPherson, and Officer Bobo)
Count V	Intentional infliction of emotional distress against the United States

On the morning of trial,[1] Barker orally moved to dismiss his failure to intervene claims against Lt. McPherson and Officer Bobo, and the related gross negligence claims against the United States. The Court **GRANTED** Barker's motion, and the trial proceeded as to Barker's excessive force claim against Lt. Emmerich and the related assault and battery, gross negligence, and intentional infliction of emotional distress claims against the United States.

B. Trial Testimony

The following is a summary of the testimony given at trial.

1. Barker

On the evening of March 11, 2009, Barker was removed from his cell in the Federal Correctional Complex in Terre Haute, Indiana ("FCC Terre Haute") and questioned regarding an assault on another inmate, Steven Marsh. Apparently, Marsh is a convicted child molester. After Barker refused to speak with Lt. Emmerich about the assault on Marsh in the TV room outside his cell, he was summoned to the Lieutenant's office for further questioning. At that point,

[1] Although Barker originally demanded a trial by jury, Barker subsequently requested a bench trial and the Government did not object. Therefore, a bench trial was held.

Barker knew that he was being sent to the Segregated Housing Unit (the "SHU") in the prison while the staff investigated whether he assaulted Marsh. After Lt. Emmerich finished the transfer paperwork, Officer Bobo was called to escort Barker to the SHU.

Once Officer Bobo arrived, he handcuffed Barker behind his back. Barker then asked Officer Bobo if he could have his glasses from his cell. Before Officer Bobo could answer, Lt. Emmerich said "fuck you, you ain't got nothing coming." Barker responded by saying, among other things, "fuck you, too. . . . I don't know why you so screwed up about a child molester." Apparently angered by Barker's words, Lt. Emmerich assaulted Barker. He slammed Barker's head into a wall of metal mailboxes a number of times, slammed his head into a steel cage on the opposite side of the office, slammed his head into a nearby refrigerator, slammed him onto the floor, picked him back up, rammed him into the mailboxes again, and then slammed him to the floor one last time. With the final slam to the floor, Lt. Emmerich pushed his knee against Barker's ribs with so much force that Barker defecated on himself. After seeing what Barker described as a pool of blood on the floor, Lt. Emmerich eased off of Barker and brought him to his feet. Barker never resisted Lt. Emmerich's force, although he believes that Lt. Emmerich yelled "quit resisting, quit resisting" during the assault to give others the impression that Barker was in fact resisting.

Thereafter, Officer Bobo escorted Barker out of the Lieutenant's office. Several moments later, Lt. Emmerich radioed Officer Bobo and asked him to bring Barker back to the Lieutenant's office so that they could photograph his injuries. Barker refused to return to the Lieutenant's office and advised Officer Bobo that, if Lt. Emmerich wanted to kill him, he would have to do it in the hallway in front of the cameras.[2] Lt. Emmerich brought a camera into the hallway and

[2] There were no cameras in the Lieutenant's office.

took a photograph of Barker from the chest up. Barker asked Lt. Emmerich to take additional pictures because he also had injuries below his chest, but Lt. Emmerich did not. Officer Bobo then escorted Barker to the SHU.

Barker suffered a 4-centimeter laceration above his left eye that required stiches, two other lacerations on his head, a shoulder injury, a knee injury, bruised ribs, and various other cuts, scrapes, and bruises during the incident. He was in serious pain and unable to move for almost a week after the incident, and it was several months before the pain in his knee and shoulder subsided.

2. Lt. Emmerich

Lt. Emmerich, now a Captain at a prison in Oxford, Wisconsin,[3] remembers the incident differently.

On March 11, 2009, Lt. Emmerich was told that Barker had assaulted Marsh. As a result, a "lockdown" was called, and Lt. Emmerich began investigating the allegation. Barker was summoned to the Lieutenant's office, and Lt. Emmerich questioned him regarding the assault. Once Barker was in the Lieutenant's office, he became increasingly agitated after hearing that he was being sent to the SHU. While Lt. Emmerich questioned Barker, the volume of Barker's voice continued to rise and his physical posturing indicated that he was angry and upset. After Officer Bobo arrived at the Lieutenant's office and handcuffed Barker, Barker spat on Lt. Emmerich while he was yelling.[4] At that point, Lt. Emmerich believed force was required to take control of the situation. With Barker handcuffed, Lt. Emmerich grabbed Barker and pushed him

[3] For the sake of clarity, the Court will continue to refer to Emmerich as Lt. Emmerich.

[4] Whether the spit was intentional or not, is not entirely clear from Lt. Emmerich's testimony.

against the wall with the metal mailboxes. Because Barker resisted Lt. Emmerich's force, he took him down to the floor and held him on the ground for a brief moment. After Barker indicated that he was done resisting, Lt. Emmerich picked him up, and Officer Bobo escorted him out of the Lieutenant's office.

3. Lt. McPherson

Senior Officer Specialist Lloyd McPherson, now a Lieutenant,[5] testified that he was sitting at a desk in the Lieutenant's office while Lt. Emmerich questioned Barker. During their discussion, Lt. McPherson observed Barker become very angry and argumentative. After Officer Bobo arrived, Lt. McPherson saw Barker make "a spitting motion" towards Lt. Emmerich, but he did not see any spit. This testimony, however, is in contrast to the statement Lt. McPherson gave to an investigator after the incident, his memorandum documenting the incident, and the affidavit he submitted previously in this case.

In the memorandum, Lt. McPherson reported that "Inmate Barker started to yell and [became] visibly upset. Barker then spit on Lt. Emmerich at which time he was placed on the ground to regain control." Trial Ex. 9.

The investigator's notes, however, state that "Lt. McPherson . . . told [him] that he did not actually see the inmate spit." Trial Ex. 11.

Lt. McPherson's affidavit further stated as follows:

> I heard a commotion and looked up and saw the Plaintiff *attempt to spit* on Defendant Emmerich. I recall Defendant Emmerich had a wet spot on his clothing, but I do not remember the exact spot. I then saw Defendant Emmerich place the Plaintiff on the ground to gain control by grabbing him and putting him on the ground. This all happened in a matter of seconds. At this time, the Plaintiff was restrained behind his back. I believe his head hit the floor, but I do not know for sure. I observed Defendant Emmerich fall on top of the Plaintiff when he went to the ground. I assisted with helping the Plaintiff to his feet.

[5] For the sake of clarity, the Court will continue to refer to McPherson as Lt. McPherson.

Dkt. No. 32-3 at ¶ 4.

4. Officer Bobo

According to Officer Bobo, after he arrived at the Lieutenant's office, he handcuffed Barker. At that time, Barker was in a heated discussion with Lt. Emmerich. Barker expressed disbelief that they were going to "lock him up for taking care of a child molester." Once handcuffed, Barker "jerked" aggressively towards Lt. Emmerich. He then observed Lt. Emmerich place Barker against the wall with the metal mailboxes. Barker resisted the force, and Lt. Emmerich took him down to the floor. Officer Bobo assisted in restraining Barker by grabbing one of his legs. After Barker calmed down, Officer Bobo escorted him out of the Lieutenant's office. When Lt. Emmerich asked Officer Bobo to bring Barker back to the Lieutenant's office to take photographs, Barker refused to go. As a result, Officer Bobo asked Lt. Emmerich to come out into the hallway to take the photographs, and he did.

5. Chris Perdue

Chris Perdue, a Case Manager at FCC Terre Haute, testified that Barker was investigated by the prison for spitting on Lt. Emmerich, and thus assaulting him. Barker chose Perdue to assist him during those proceedings. The prison did not find the allegation credible, and Barker was not disciplined or charged in relation to the incident with Lt. Emmerich.

Perdue also testified that Barker was well-respected by other inmates in the prison, and because of this, he occasionally asked Barker to facilitate discussions between the prison staff and the inmates. Barker, however, denied doing any "favors" for Perdue.

II. FINDINGS OF FACT

1. On March 11, 2009, Barker was an inmate at FCC Terre Haute.

2. On March 11, 2009, Marsh was an inmate at FCC Terre Haute.

3. On that day, Lt. Emmerich, Lt. McPherson, and Officer Bobo were working the evening shift at FCC Terre Haute.

4. During his shift, Lt. Emmerich received information that Barker had assaulted Marsh.

5. Because of the assault, an emergency "lockdown" was called.

6. During the lockdown, Barker was removed from his cell and taken to the TV room.

7. Lt. Emmerich questioned Barker in the TV room regarding the assault on Marsh.

8. Barker refused to discuss the assault on Marsh with Lt. Emmerich.

9. Barker was summoned to the Lieutenant's office for additional questioning.

10. Lt. McPherson and Lt. Emmerich were in the Lieutenant's office when Barker arrived.

11. While in the Lieutenant's office, Lt. Emmerich advised Barker that he was being transferred to the SHU while the staff investigated the assault.

12. Barker became angry and argumentative when Lt. Emmerich told him that he was being transferred to the SHU.

13. After Lt. Emmerich finished preparing the transfer paperwork, he radioed for Officer Bobo to escort Barker from the Lieutenant's office to the SHU.

14. When Officer Bobo arrived at the Lieutenant's office, he handcuffed Barker's wrists behind his back.

15. As Officer Bobo began to escort Barker from left the Lieutenant's office, Barker and Lt. Emmerich became involved in a verbal altercation.

16. Barker and Lt. Emmerich cursed at one another.

17. During the altercation, Barker unintentionally spat on Lt. Emmerich while he was yelling.

18. Lt. Emmerich subsequently used force on Barker.

19. Lt. Emmerich grabbed Barker and forcefully threw him against a wall containing metal mailboxes.

20. Lt. Emmerich shoved Barker's head into the metal mailboxes.

21. Lt. Emmerich then threw Barker to the floor.

22. Lt. Emmerich landed forcefully on Barker's back and rib area with his knee.

23. Lt. Emmerich held Barker to the ground with his knee for several moments.

24. After Barker indicated that he would not resist or fight, Lt. Emmerich pulled Barker to his feet.

25. Officer Bobo then escorted Barker from the Lieutenant's office.

26. Barker suffered a 4-inch laceration above his left eye, two other lacerations on his forehead, a shoulder injury, a knee injury, bruised ribs, and various other cuts, scrapes and bruises as a result of the incident with Lt. Emmerich.

III. CONCLUSIONS OF LAW

A. Counts I and II – Excessive Use of Force against Lt. Emmerich and Assault and Battery against the United States

To succeed on his claim of excessive use of force against Lt. Emmerich, Barker must prove by a preponderance of the evidence that (1) Lt. Emmerich used force on him, (2) Lt. Emmerich intentionally used extreme or excessive cruelty toward him for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline, and (3) Lt. Emmerich's conduct caused him harm. *See Whitley v. Albers*, 475 U.S. 312, 320-21 (1986); *Williams v. Boles*, 842 F.2d 181 (7th Cir. 1988). It is undisputed that Lt. Emmerich used force on

Barker. It is also undisputed that Lt. Emmerich's conduct harmed Barker. With regard to the only element in question, the Court finds that Lt. Emmerich used excessive force against Barker for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline.

Despite the fact that Barker's wrists were cuffed behind his back, Lt. Emmerich threw Barker into a wall with metal mailboxes, shoved his head into the mailboxes, threw Barker onto the floor, and held Barker to the ground with this knee. Barker's injuries support this set of events. While *some* amount of force *may* have been warranted, Lt. Emmerich's use of force was excessive under the circumstances.

With regard to Barker's corresponding assault and battery claim against the United States under the Federal Tort Claims Act ("FTCA"), the FTCA waives the Government's sovereign immunity only "under circumstances where . . . a private person . . . would be liable" under applicable state tort law. 28 U.S.C. § 1346(b)(1). A person commits the civil tort of assault and battery in Indiana if "(a) he acts intending to cause a harmful or offensive contact with the person of the other or third person, or an imminent apprehension of such contact, and (b) a harmful contact with the person of the other directly or indirectly results." *Singh v. Lyday*, 889 N.E.2d 342, 360 (Ind. Ct. App. 2008) (quoting *Mullins v. Parkview Hospital, Inc.*, 865 N.E.2d 608, 610 (Ind. 2007)). "A touching, however slight, may constitute an assault and battery." *Id.* (quoting *Knight v. Ind. Ins. Co.*, 871 N.E.2d 357, 362 (Ind. Ct. App. 2007)).

As noted above, despite the fact that Barker's wrists were cuffed behind his back, Lt. Emmerich threw Barker into a wall with metal mailboxes, shoved his head into the mailboxes, threw Barker onto the floor, and held Barker to the ground with this knee. Lt. Emmerich's use of force was excessive under the circumstances. These facts satisfy the elements of assault and

battery in Indiana: Lt. Emmerich acted intending to cause harmful or offensive contact with Barker, and harmful contact resulted.

Pursuant to the FTCA's judgment bar rule, codified at 28 U.S.C. § 2676, however, a judgment against both Lt. Emmerich and the United States cannot stand. *See, e.g.*, *Manning v. United States*, 546 F.3d 430, 434 (7th Cir. 2008) ("an FTCA judgment [whether successful or unsuccessful] bars a *Bivens* claim raised in the same suit." *Manning*, 546 F.3d at 434. As such, the Court will enter judgment in favor of Lt. Emmerich and against the Plaintiff on Count I and in favor of the Plaintiff and against the United States on Count II.

With regard to damages, the Court finds that Barker's compensatory damages total $1,500.00.

B. Count IV – Gross Negligence against the United States

With regard to Barker's gross negligence claim, Indiana courts recognize the same four elements (duty, breach, cause, and injury) for negligence and gross negligence. *See N. Ind. Public Serv. Co. v. Sharp*, 790 N.E.2d 462, 465-66 (Ind. 2003). The two claims, however, have different definitions of what constitutes a "breach." For ordinary negligence, a plaintiff must show that the defendant "merely failed to exercise its duty of care." *Id.* at 465. For gross negligence, a plaintiff must show that the defendant "breached its duty . . . by engaging in a conscious, voluntary act or omission in reckless disregard of the consequences to" the plaintiff. *Id.* at 466.

Barker has not argued or established how each element is satisfied in this case. Thus, the Court finds in favor of the United States and against Barker on Count IV.

C. Count V – Intentional Infliction of Emotional Distress against the United States

Lastly, "intentional infliction of emotional distress is committed by 'one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 522-23 (Ind. Ct. App. 2001) (quoting *Ledbetter v. Ross*, 725 N.E.2d 120, 123-24 (Ind. Ct. App. 2000)). "The intent to harm emotionally constitutes the basis of the tort." *Id.* at 523 (citing *Ledbetter*, 725 N.E.2d at 124). "Thus, the elements of the tort are: a defendant (1) engages in extreme and outrageous conduct that (2) intentionally or recklessly (3) causes (4) severe emotional distress to another." *Id.* (citing *Bradley v. Hall*, 720 N.E.2d 747, 752 (Ind. Ct. App. 1999)).

Again, Barker has not argued or established how each element is satisfied in this case. Therefore, the Court finds in favor of the United States and against Barker on Count V.

IV. CONCLUSION

The Court finds in favor of Barker and against the United States on his claim for assault and battery (Count II). Barker's compensatory damages total $1,500.00.

The Court finds in favor of the United States and against the Plaintiff on his remaining claims for gross negligence (Count IV) and intentional infliction of emotional distress (Count V).

Pursuant to the FTCA's judgment bar rule, judgment will be entered in favor of Lt. Emmerich and against Barker on his claim for excessive force (Count I).

A separate judgment shall now issue.

SO ORDERED: 5/4/15

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Copies to all counsel of record via electronic communication.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

STEVEN L. BARKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Cause No. 2:10-cv-314-WTL-WGH**
	)	
LT McPHERSON, et al.,	)	
	)	
Defendants.	)	

FINAL JUDGMENT

The Court, having dismissed various claims and parties before and during the trial, having resolved various claims through the summary judgment process, and having this day ruled on the Defendants' motion to alter or amend final judgment and made its findings of fact and conclusions of law, **JUDGMENT IS HEREBY ENTERED AS FOLLOWS:**

As to Count I, pursuant to Federal Tort Claims Act's judgment bar rule, judgment is entered in favor of Defendant, Lt. Emmerich, and against the Plaintiff. The Plaintiff shall recover nothing against Lt. Emmerich.

As to Count II, judgment is entered in favor of the Plaintiff and against the Defendant, United States of America. The Plaintiff is awarded compensatory damages in the amount of $1,500.00.

As to Counts IV, and V, judgment is entered in favor of the Defendant, United States of America, and against the Plaintiff. The Plaintiff shall recover nothing against the United States of America as to those claims.

SO ORDERED: 5/4/15

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Copies to all counsel of record via electronic communication.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

STEVEN L. BARKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Cause No. 2:10-cv-314-WTL-WGH**
	)	
LT EMMERICH, et al.,	)	
	)	
Defendants.	)	

ENTRY ON DEFENDANTS' MOTION TO ALTER OR AMEND FINAL JUDGMENT

This cause is before the Court on the Defendants' motion to alter or amend the final judgment in this case. Dkt. No. 103. The motion is ripe for ruling,[1] and the Court, being duly advised, **GRANTS** the Defendants' motion for the reasons set forth below. The Court further finds that the Court's prior ruling in favor of the United States of America and against the Plaintiff on his assault and battery claim under the Federal Tort Claims Act ("FTCA") was based on a manifest error of law, and the Court must now correct that error. *See Mendez v. Republic Bank*, 725 F.3d 651 (7th Cir. 2013). As a result of the foregoing rulings, the Court **VACATES** the findings of fact and conclusions of law (Dkt. No. 100) and the final judgment (Dkt. No. 101) previously entered in this case. New findings of fact and conclusions of law and a new judgment will be issued under separate order.

I. BACKGROUND

The bench trial in this matter was held on January 13, 2015. On January 29, 2015, the Court issued its findings of fact and conclusions of law (Dkt. No. 100), and entered final judgment in this case (Dkt. No. 101). As to Count I, the Plaintiff's excessive force claim against

[1] The Plaintiff did not file a response; however, the time for doing so has passed.

Lt. Emmerich in his individual capacity under *Bivens*, the Court entered judgment in favor of the Plaintiff and against Lt. Emmerich. *Id.* The Court concluded that Lt. Emmerich used excessive force against the Plaintiff. As to Counts II (assault and battery), IV (gross negligence), and V (intentional infliction of emotional distress) against the United States under the FTCA, the Court entered judgment in favor of the United States and against the Plaintiff.

II. DEFENDANTS' MOTION TO ALTER OR AMEND FINAL JUDGMENT

A. Standard

The Defendants timely filed their motion pursuant to Federal Rule of Civil Procedure 59(e). "A Rule 59(e) motion will be successful only where the movant clearly establishes: '(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment.'" *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013) (quoting *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012)).

B. Discussion

The Defendants argue that "[b]ecause Plaintiff pursued his parallel FTCA and *Bivens* claims to judgment, and the Court entered Judgment on the Plaintiff's FTCA claim, the Court must vacate its judgment against the individual Defendant Emmerich pursuant to 28 U.S.C. § 2676, the 'Judgment Bar.'" Dkt. No. 103 at 2.[2] The Court agrees.

> If a federal law enforcement officer commits a tort, the victim has two distinct avenues of relief: he may pursue a constitutional tort claim against the individual officer under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), or he may pursue a common law tort claim against the United States pursuant to the [FTCA].

Manning v. United States, 546 F.3d 430, 431 (7th Cir. 2008). Section 2676 of the FTCA, however, provides that a judgment in an FTCA action "shall constitute a complete bar to any

[2] This argument was not previously bought to the Court's attention.

action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

In *Manning*, the jury found in favor of the plaintiff on his *Bivens* claim, but the Court ruled in favor of the United States on the plaintiff's FTCA claims. Thereafter, the Defendants moved to vacate the jury's verdict, claiming that the FTCA's judgment bar also precluded the *Bivens* claims. The district court and the Seventh Circuit agreed with the Defendants, finding that "an FTCA judgment [whether successful or unsuccessful] bars a *Bivens* claim raised in the same suit." *Manning*, 546 F.3d at 434. The court further explained that

> [a] plaintiff may still bring both parallel claims as remedies to torts committed by law enforcement officers against the government and the individual officers, and the remedies complement each other. But the idea that a plaintiff may bring claims against both the government and the federal officer does not directly implicate whether one may pursue those claims to judgment. Both remedies remain as viable causes of action, but because of the broad language of the judgment bar, plaintiffs must make strategic choices in pursuing the remedies.

Id. at 434-35; *see also Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996) ("[A]ny FTCA judgment, regardless of outcome, bars a subsequent *Bivens* action on the same conduct that was at issue in the prior judgment.").

Based on the foregoing case law, the Court **GRANTS** the Defendants' motion to alter or amend the final judgment. The Court will enter judgment in favor of Lt. Emmerich on the *Bivens* claim.

III. FTCA CLAIM – ASSAULT AND BATTERY

With regard to the Plaintiff's assault and battery claim against the United States, the Court now finds that it also committed a manifest error of law when it found that the Plaintiff's claim for assault and battery was not recoverable under the FTCA. *See Mendez*, 725 F.3d at 660 (court's decision to grant relief from judgment was within its discretion to remedy its own

mistake). The Court now finds that the state-law elements of battery are indeed met and judgment should be entered in favor of the Plaintiff and against the United States as to this claim.

A person commits the civil tort of assault and battery in Indiana if "(a) he acts intending to cause a harmful or offensive contact with the person of the other or third person, or an imminent apprehension of such contact, and (b) a harmful contact with the person of the other directly or indirectly results." *Singh v. Lyday*, 889 N.E.2d 342, 360 (Ind. Ct. App. 2008) (quoting *Mullins v. Parkview Hospital, Inc.*, 865 N.E.2d 608, 610 (Ind. 2007)). "A touching, however slight, may constitute an assault and battery." *Id.* (quoting *Knight v. Ind. Ins. Co.*, 871 N.E.2d 357, 362 (Ind. Ct. App. 2007)). As will be detailed in the findings of fact and conclusions of law: Despite the fact that Barker's wrists were cuffed behind his back, Lt. Emmerich threw Barker into a wall with metal mailboxes, shoved his head into the mailboxes, threw Barker onto the floor, and held Barker to the ground with this knee. While *some* amount of force *may* have been warranted, Lt. Emmerich's use of force was excessive under the circumstances. These facts satisfy the foregoing assault and battery elements: Lt. Emmerich acted intending to cause harmful or offensive contact, and harmful contact resulted.

IV. CONCLUSION

For the reasons set forth above, the Defendants' motion to alter or amend final judgment (Dkt. No. 103) is **GRANTED**. The Court also **VACATES** the findings of fact and conclusions of law (Dkt. No. 100) and the final judgment (Dkt. No. 101) previously entered in this case. New findings of fact and conclusions of law and a new judgment will be issued under separate order.

SO ORDERED: 5/4/15

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Copies to all counsel of record via electronic communication.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

STEVEN L. BARKER,	)	
	)	
Plaintiff,	)	
vs.	)	No. 2:10-cv-314-WTL-TAB
	)	
LT. MCPHERSON, et al.,	)	
	)	
Defendants.	)	

E N T R Y

The plaintiff's motion to proceed *in forma pauperis* (dkt 2) is **granted.** The plaintiff is assessed an initial partial filing fee of Fourteen Dollars and Sixteen Cents ($14.16). He shall have **through December 29, 2010,** in which to pay this sum to the clerk of the district court.

IT IS SO ORDERED.

Date: 11/30/2010

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Distribution:

Financial Deputy Clerk

STEVEN L. BARKER
15893-076
CANAAN
U.S. PENITENTIARY
Inmate Mail/Parcels
P.O. BOX 300
WAYMART, PA 18472

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

STEVEN L. BARKER,	)	
	)	
Plaintiff,	)	
vs.	)	No. 2:10-cv-314-WTL-TAB
	)	
LT. MCPHERSON, et al.,	)	
	)	
Defendants.	)	

ENTRY

The plaintiff's motion for appointment of counsel (dkt 3) filed on November 22, 2010, is **denied as premature**. The plaintiff's request may be renewed after he has paid the initial partial filing fee, after the court has determined whether the complaint states any viable claim for relief, and after he has made a reasonable effort to recruit counsel on his own.

IT IS SO ORDERED.

Date: 12/02/2010

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Distribution:

Steven L. Barker
15893-076
Canaan - U.S. Penitentiary
Inmate Mail/Parcels
P.O. Box 300
Waymart, PA 18472

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 2:11-cv-337-JMS-MJD
	)	
UNITED STATES OF AMERICA, and UNITED STATES BUREAU OF PRISONS,	)	
	)	
	)	
Defendant.	)	

AMENDED COMPLAINT FOR DAMAGES

Comes now, Plaintiff Estate of Osuyuwamen Ojo, by counsel, and in support of its claim for damages under the Federal Tort Claims Act against the defendant United States of America and United States Bureau of Prisons would state as follows:

I. JURISDICTION

1. This court has jurisdiction over this action pursuant to 28 U.S.C. §1331 and 28 U.S.C. §2671 et. seq.

II. VENUE

2. At all relevant times, the Osuyuwamen Ojo resided at the United States Penitentiary in Terre Haute, Indiana.

3. All of the events forming the basis of Plaintiff's claims occurred in the City of Terre Haute, County of Vigo, Indiana, which is located within the Southern District of Indiana.

III. NOTICE OF TORT CLAIM

4. On June 27, 2011 the Estate of Osuyuwamen Ojo submitted its notice of tort claim to the United States. A copy of this notice of tort claim is attached herewith as "Exhibit A." Subsequently, the United States, through the Federal Bureau of Prisons, responded to the notice of tort claim by letter of October 4, 2011. See "Exhibit B." This lawsuit is filed within six (6) months thereof.

IV. FACTS

5. At all relevant times, the United States was a health provider providing medical services within the state of Indiana at the United States Penitentiary in Terre Haute, Indiana.

6. At all relevant times mentioned herein, Osuyuwamen Ojo was under the medical care treatment and supervision of agents and employees of Defendant United States at the United States Federal Bureau of Prisons.

7. During the course of evaluating, assessing, treating, and performing medical services for Osuyuwamen Ojo, the Defendants, through their employees, committed negligent and careless acts or omissions, constituting medical malpractice causing the death of Osuyuwamen Ojo.

8. As a direct and proximate result of the negligent and careless acts or omissions of the employees of the Defendant, Plaintiff Osuyuwamen Ojo lost the opportunity for successful treatment of his medical condition, causing him to lose his life.

WHEREFOR, Plaintiff Estate of Osuyuwamen Ojo, by counsel, respectfully requests that this Court award damages in an amount which will fairly and adequately compensate it for all

damages recoverable under law, for costs of this actions, and for all other just and proper relief on the premises.

Respectfully submitted,

/s/ Andrew P. Wirick
Andrew P. Wirick, Atty. No.: 11362-49
Hume Smith Geddes Green & Simmons, LLP
54 Monument Circle, 4th Floor
Indianapolis, Indiana 46204
PH: 317/632-4402 FAX: 317/632-5595
awirick@humesmith.com

Attorney for Plaintiff Estate of Osuyuwamen Ojo

"EXHIBIT A"

ATTORNEYS AT LAW
HUME SMITH GEDDES GREEN & SIMMONS, LLP

John T. Hume Jr. • Robert W. Geddes* • John C. Green* • Michael E. Simmons* • Andrew P. Wirick • Edward F. Harney Jr.† • Theodore J. Branford
Michael R. Bain • Christopher D. Cody • Christopher A. Pearcy • Seth R. Wilson • Mark M. Holdridge • Beth A. Bomsc • William D. Beyers

Gordon Smith (1933 - 2010) Established 1951 * Certified Mediators † Also admitted in Illinois

June 27, 2011

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Attorney General Eric H. Holder, Jr.
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Thomas R. Kane, Acting Director
Federal Bureau of Prisons
320 First St., NW,
Washington, DC 20534

Re: Notice of Tort Claim by Estate of Osuyuwamen Ojo

Greetings,

Please find enclosed the notice of tort claim pursuant to the Federal Tort Claims Act that I have prepared on behalf of my client, the Estate of Osuyuwamen Ojo, as well as the accompanying CD which contains Mr. Ojo's death certificate and medical records previously obtained from the United States Bureau of Prisons which describes the events preceding his death. If there is any other person or entity whom this tort claim needs to be forwarded to, please contact me at your earliest convenience so that I may forward same to such person or entities. Thank you in advance for your assistance in this regard.

Very truly yours,

HUME SMITH GEDDES GREEN & SIMMONS, LLP

Andrew P. Wirick

APW/fb
cc: Audu Hamed w/o enclosure

54 Monument Circle, Fourth Floor | Indianapolis, Indiana 46204-2996 Telephone 317-632-4402 | FAX 317-632-5595 | humesmith.com

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO.
1105-0008

1. Submit To Appropriate Federal Agency:

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Federal Bureau of Prisons
320 First St., NW
Washington, DC 20534

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code)

Mr. Addy Hamad
[redacted]
01012

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	[redacted]	single	2/26/2011, Monday	unknown

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.)

Addy Hamad is the personal representative of the estate of his son, Okuyuwaman Ojo, deceased, pursuant to the estate opened in the Vigo County Circuit Court on June 21, 2011. Mr. Ojo was arrested on February 22, 2007 in Manchester, New Hampshire on drug charges, and sentenced to eight (8) years in March of 2008, with a release date of 2014 and a parole date of November 2011. Since February of 2009, when Mr. Ojo was imprisoned at the federal prison in Terre Haute, Indiana, he consistently complained about various pains that were all symptoms of chronic myeloid leukemia. It is believed that Mr. Ojo also made prior complaints while housed in the federal prison system in Pennsylvania, and subsequently in Kentucky where he was housed until his death. He made a series of documented sick calls and also requested treatments that were either denied by the prison authority (to be unwarranted, or denied outright by the prison authority. See additional pages attached herewith.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

We also have enclosed a copy of the death certificate as well as the CD of the medical records for Mr. Ojo at the Bureau of Prisons.

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
The witnesses were the fellow inmates at the various federal prisons where Mr. Ojo was incarcerated as well as his medical care providers, the names of which are contained in the enclosed medical records.	We do not currently have the address of the fellow inmates of Mr. Ojo or his medical care providers, although this information is likely maintained by the Federal Bureau of Prisons.

12. (See instructions on reverse.) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
N/A	$2,000,000.00	$8,000,000.00	$10,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
[signature]	[redacted]	6/24/11

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant is liable to the United States Government for the civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046 STANDARD FORM 95
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☐ No

16. Have you filed a claim on your insurance carrier in this instance, and if so, is it full coverage or deductible? ☐Yes ☐No

17. If deductible, state amount.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts.)

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☐ No

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item #12 of this form.

DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute this form may render your claim "invalid".

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

Basis of Claim Cont.:

Whenever the prison authority approved a test for Mr. Ojo, the test result was "negative" which was an obvious indication that he was either being given the wrong test or the test was being performed in a negligent manner. It was not until August of 2009 that Mr. Ojo was diagnosed with chronic myeloid leukemia in the last stage, despite the fact that he had consistently complained of symptoms of the disease since February of 2009. If Mr. Ojo had been tested sooner or correctly, his illness would have be diagnosed sooner, and he would have had a far greater chance of survival as the Leukemia was very likely in one of the earlier stages which hold a much higher survival rate. If the prison officials had approved his request for treatment and run the correct tests, the Leukemia would have been diagnosed in the chronic phase or accelerated phase, and he would have had a much greater chance of survival.

"EXHIBIT B"

UNITED STATES GOVERNMENT
Federal Bureau of Prisons
Federal Medical Center
Consolidated Legal Center
3301 Leestown Road
Lexington, Kentucky 40511-8799

October 4, 2011

Hume, Smith, Geddes, Green, & Simmons, LLP
54 Monument Circle
Fourth Floor
Indianapolis, IN 46204-2996

Re: Administrative Tort Claim No. 2011-05744
Estate of Osuyuwamen Ojo, 09818-049

Mr. Wirick:

Your administrative tort claim has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), Title 28 U.S.C. § 2672, et seq., and the authority granted under 28 C.F.R. § 0.172. You allege inmates requests for sick call and treatments were denied by staff at FMC Lexington. You seek $10,000,000.00 as compensation.

The Federal Tort Claims Act, which is presented to the agency via an administrative tort claim is based upon the legal theory of negligence. The FTCA waives sovereign immunity and allows suits against the United States for personal injuries caused by governmental employees acting within the scope of their employment. See 28 U.S.C. § 1346(b). Under the FTCA, a plaintiff may recover monetary awards from the United States for injury, property loss, or death "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope . . . of employment." 28 U.S.C. § 1346(b). The United States may be held liable only if the conduct complained of amounts to negligence "in accordance with the law of the place where the act or omission occurred." Id.

An investigation was conducted in reference to your allegations and the investigation revealed the following: Inmate Ojo was a Care Level 4 medical designation when he was designated to FMC Lexington. This was for treatment of Philadelphia chromosome – positive Chronic Myelogenous Leukemia (CML). He was diagnosed

approximately one and one-half years earlier, now in last crisis. Inmate Ojo was transferred as a direct admission inpatient from Union Hospital in Terre Haute, Indiana, to the University of Kentucky Markey Cancer Center on October 26, 2010. On his date of arrival, he underwent a bone marrow biopsy to reestablish a baseline, at which time showed 38% blasts, consistent with a blast crisis. Cerebral spinal fluid (CSF) was also positive for involvement. Inmate Ojo started a Dasatinib October 28, 2010, and also received intrathecal Cytarabine and Methotrexate as prescribed until CSF cleared. Desatinib was discontinued on November 30, 2010, after 32 days of treatment, due to concerns that his acute heart failure was secondary to treatment.

Inmate Ojo was started on Nilotinib December 1, 2010, and daily EKGs were performed to assess QTC interval and, if greater than 490, treatment was held. Over the following 21 days of therapy, inmate Ojo missed 8 doses of chemotherapy, secondary to the prolonged QTC interval. An echocardiogram performed December 6, 2010, showed a retainment of overall cardiac function with an ejection fraction of 40% to 50%. Inmate Ojo remained an inpatient at University of Kentucky Markey Cancer Center until December 20, 2010. He was transferred to the Long Term Care Unit at the Federal Medical Center, Lexington, Kentucky on the same date. On December 24, 2010, inmate Ojo returned to Markey Cancer Center due to fever of unknown origin, abdominal, chest, and knee pain. A repeat bone marrow biopsy was performed during this stay on December 30, 2010, and shoed an acellular marrow with necrosis and fibrosis and 10% blasts. Cytology from CSF January 20, 2011 was negative. Gastorintestinal bleeding was noted but was believed to be secondary to his use of Naproxin for pain. MRI of the knee performed during this stay showed abnormal marrow replacement consistent with his disease process. Inmate Ojo was later discharged back to inpatient status at FMC Lexington on January 3, 2011.

Inmate Ojo was admitted again to the University of Kentucky Markey Cancer Center on January 10, 2011, due to gastrointestinal bleeding secondary to diffuse chloromas throughout the intestinal tract directly related to his CML. He remained an inpatient until his death February 28, 2011. During this stay, he underwent numberous diagnostic testing to include endoscopy, sigmoidoscopy and colonoscopy. Multiple bleeding ulcerations were noted throughout the descending colon, heptic flexure, all the way to the cecum, as well as 3 areas of ischemic bowel, all within the small intestine. Numerous bleeding lesions were identified in his colon. During this hospital stay, he required up to 4 units of packed red blood cells daily and 2 six packs of platlets each day, in efforts to keep his hemoglobin in a range of 3 – 4 g/dL. Inmate Ojo was not a good surgical candidate and because of this condition he was too unstable to begin systemic therapy. His chemotherapy treatments were put on hold until the bleeding could be controlled. Multiple radiation treatments were administered to inmate Ojo's abdomen during the dates of January 25- 27, 2011, in attempts to stop the intestinal bleeding. He received salvage chemotherapy but a repeat bone marrow biopsy showed a fibrotic marrow. As inmate Ojo's white blood cell counts stated to recover post treatment, a large number of blasts were still present. Inmate Ojo's condition continued to decline and the intestinal bleeding persisted despite radiation therapy.

Options for further chemotherapy treatment were limited due to inmate Ojo's poor and rapidly declining health. Inmate Ojo was made a DNR and in Hospice to Palliative care. Inmate Ojo died February 28, 2011. Death was expected and no autopsy was requested.

By preemptively placing inmate Ojo at the UK Markey Cancer Center, our institution provided immediate access and expert care. Inmate Ojo was provided prompt and appropriate urgent medical attention starting at the time of his arrival, and continuing through out his CML treatment regimen and follow-up while under care both at our facility and at the University of Kentucky Markey Cancer Center.

We show no evidence of discrimination or retaliation. There is no indication that any negligent act or omission on the part of a Bureau of Prisons' employee was a factor in any loss you may have incurred. Accordingly, your claim is denied.

This letter constitutes a formal denial of your claim. If you are not satisfied with our determination in this matter, you may file suit in the appropriate U.S. District Court no later than six months from the date of this letter.

Sincerely,

Michelle Fuseyamore
Regional Counsel

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Estate of Osuyuwamen Ojo

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number) 317.632.4402
Andrew P. Wirick, Hume Smith Geddes Green & Simmons, LLP
54 Monument Circle, 4th Floor, Indianapolis, IN 46204

DEFENDANTS

United States of America, and United States Bureau of Prisons

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☒ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	SOCIAL SECURITY	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other	☐ 861 HIA (1395ff)	☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	☐ 862 Black Lung (923)	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 863 DIWC/DIWW (405(g))	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 864 SSID Title XVI	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt. Reporting & Disclosure Act	☐ 865 RSI (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	FEDERAL TAX SUITS	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	☐ 871 IRS—Third Party 26 USC 7609	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General	IMMIGRATION		☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty	☐ 462 Naturalization Application		☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other	☐ 463 Habeas Corpus - Alien Detainee		☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights	☐ 465 Other Immigration Actions		☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. §2671, et seq.

Brief description of cause:
Plaintiff brings a Fed. Tort Claims Act claim for med. mal.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 12/17/11

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO, Plaintiff, v. UNITED STATES OF AMERICA, and UNITED STATES BUREAU OF PRISONS, Defendant.	)	CAUSE NO.

APPEARANCE

Comes now Andrew P. Wirick of the law firm of Hume, Smith, Geddes, Green & Simmons, LLP, and hereby enters his Appearance for Plaintiff, Estate of Osuyuwamen Ojo, in the above-captioned cause of action.

Respectfully submitted,

Andrew P. Wirick, Atty. No.: 11362-49
Hume Smith Geddes Green & Simmons, LLP
54 Monument Circle, 4th Floor
Indianapolis, Indiana 46204
PH: 317/632-4402 FAX: 317/632-5595
awirick@humesmith.com

Attorney for Plaintiff Estate of Osuyuwamen Ojo

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Indiana

Estate of Osuyuwamen Ojo

Plaintiff

v.

United States of America, and United States Bureau of Prisons

Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Mr. Joe Hogsett
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Andrew P. Wirick
Hume Smith Geddes Green & Simmons, LLP
54 Monument Circle, 4th Floor
Indianapolis, IN 46204

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Indiana

Estate of Osuyuwamen Ojo

Plaintiff

v.

United States of America, and United States Bureau of Prisons

Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Mr. Eric H. Holder, Jr.
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Andrew P. Wirick
Hume Smith Geddes Green & Simmons, LLP
54 Monument Circle, 4th Floor
Indianapolis, IN 46204

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

HUME SMITH GEDDES GREEN & SIMMONS, LLP
54 Monument Circle, 4th Fl.
Indianapolis, IN 46204

REGIONS BANK
INDIANAPOLIS, IN 46220
20-1421/740

29499

12/27/2011

PAY TO THE ORDER OF Clerk Of U. S. District Court $ **350.00

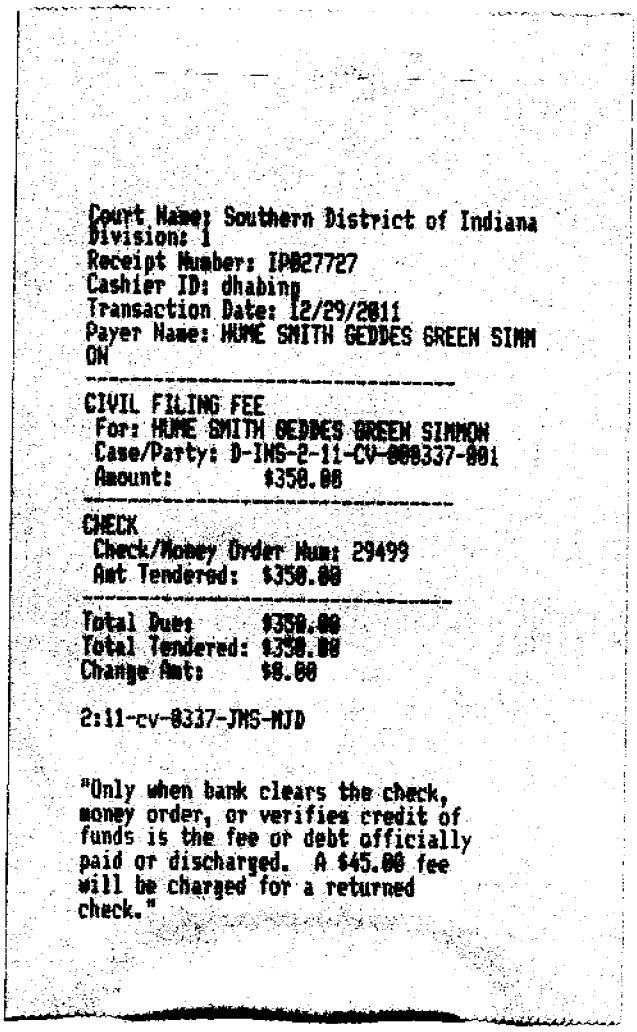
Three Hundred Fifty Only***** DOLLARS

Details on Back

Invisible Checkmark™ Secure Check

Est. of Ojo v US Dept. of Justice/Filing fee

⑈029499⑈ ⑆074014213⑆ 4200557994⑈



Court Name: Southern District of Indiana
Division: 1
Receipt Number: IP027727
Cashier ID: dhabing
Transaction Date: 12/29/2011
Payer Name: HUME SMITH GEDDES GREEN SIMM
ON

CIVIL FILING FEE
For: HUME SMITH GEDDES GREEN SIMMON
Case/Party: D-INS-2-11-CV-000337-001
Amount: $350.00

CHECK
Check/Money Order Num: 29499
Amt Tendered: $350.00

Total Due: $350.00
Total Tendered: $350.00
Change Amt: $0.00

2:11-cv-0337-JMS-MJD

"Only when bank clears the check, money order, or verifies credit of funds is the fee or debt officially paid or discharged. A $45.00 fee will be charged for a returned check."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 2:11-CV-337-JMS-MJD
	)	
UNITED STATES OF AMERICA, and UNITED STATES BUREAU OF PRISONS,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL

Come now Plaintiff, Estate of Osuyuwamen Ojo, and Defendants, United States of America, and United States Bureau of Prisons, by counsel, and files an Amended Stipulation of Dismissal, by way of settlement, of this cause of action.

And the Court having considered said stipulation and being duly advised in the premises, now finds the Stipulation of Dismissal should be, and hereby is, APPROVED.

IT IS, THEREFORE, ORDERED, JUDGED AND DECREED that the above-captioned cause of action is now DISMISSED, with Prejudice. The parties are to pay and bear their respective costs without reimbursement.

IT IS SO ORDERED.

Date: 02/11/2014

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution to all registered counsel of record via CM/ECF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO, Plaintiff, v. UNITED STATES OF AMERICA, and UNITED STATES BUREAU OF PRISONS, Defendant.	)	CAUSE NO. 2:11-CV-337-JMS-MJD

AMENDED STIPULATION OF DISMISSAL

Comes now Plaintiff, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), and Defendant, by each parties' respective counsel of record, and hereby stipulate and agree that the above-captioned cause of action be DISMISSED, with prejudice, and each party to pay their own costs.

Respectfully submitted,

/s/ Andrew P. Wirick
Andrew P. Wirick
Attorney for Plaintiff

JOSEPH H. HOGSETT
United States Attorney

By: /s/ Jeffrey L. Hunter
Jeffrey L. Hunter
Assistant United States Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, a copy of the foregoing **STIPULATION OF DISMISSAL** was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Andrew P. Wirick
awirick@humesmith.com

Jeffrey L. Hunter
jeff.hunter@usdoj.gov

/s/ Andrew P. Wirick
Andrew P. Wirick
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO, Plaintiff, v. UNITED STATES OF AMERICA, and UNITED STATES BUREAU OF PRISONS, Defendant.	)	CAUSE NO. 2:11-CV-337-JMS-MJD

STIPULATION OF DISMISSAL

Comes now Plaintiff, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), and Defendant, by each parties' respective counsel of record, and hereby stipulate and agree that the above-captioned cause of action be DISMISSED, with prejudice, and each party to pay their own costs.

Respectfully submitted,

/s/ Andrew P. Wirick
Andrew P. Wirick
Attorney for Plaintiff

JOSEPH H. HOGSETT
United States Attorney

By: /s/ Jeffrey L. Hunter
Jeffrey L. Hunter
Assistant United States Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, a copy of the foregoing **STIPULATION OF DISMISSAL** was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Andrew P. Wirick
awirick@humesmith.com

Jeffrey L. Hunter
jeff.hunter@usdoj.gov

/s/ Andrew P. Wirick
Andrew P. Wirick
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 2:11-cv-00337-JMS-MJD
	)	
UNITED STATES OF AMERICA,	)	
UNITED STATES BUREAU OF PRISONS,	)	
	)	
Defendants.	)	

ORDER REGARDING DEFENDANT'S MOTION FOR MODIFICATION OF MINUTE ENTRY FOR DECEMBER 13, 2012

This matter comes before the Court on Defendant's motion to modify the Court's December 13, 2012 minute entry setting forth the appropriate representatives to attend the settlement conference scheduled on August 28, 2013. [Dkt. 74.] That motion will be GRANTED IN PART and DENIED IN PART. Defendant may be represented in person by the Assistant United States Attorney assigned to the case; however, that attorney must be accompanied to the settlement conference in person by either a representative of the Defendants or a representative of the office of the United States Attorney for the Southern District of Indiana with settlement authority and who is not counsel of record in this case. In addition, the Chief of the Civil Division of the office of the United States Attorney for the Southern District of Indiana must, at a minimum, be available to participate telephonically in the settlement conference.

All other requirements of the Court's December 13, 2012

minute entry remain in full force and effect.

Dated; 07/17/2013

Distribution:
All Electronically Registered Counsel

Mark J. Dinsmore
United States Magistrate Judge
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO, *Plaintiff*,	)	
vs.	)	2:11-cv-337-JMS-MJD
UNITED STATES OF AMERICA, *et al.*, *Defendants.*	)	

ORDER

Presently pending before the Court is Defendant United States of America's Motion for Partial Dismissal. [Dkt. 59.] Plaintiff Estate of Osuyuwamen Ojo ("the Estate") asserts claims against the United States under the Federal Tort Claims Act ("FTCA"). The United States contends that it has not waived sovereign immunity for two issues that the Estate's claims raise—liability for the acts of independent contractors and the recoverability of attorney's fees. Thus, the United States contends that this Court lacks jurisdiction over those issues. For the following reasons, the Court denies the United States' motion in part and grants it in part.

I.
NATURE OF MOTION

The United States characterizes its motion as a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). [Dkt. 60 at 3-5.] The Estate contends that this characterization is improper because subject matter jurisdiction "appears to be an all or nothing issue" and the United States does not seek to dismiss the Estate's entire action. [Dkt. 70 at 2.]

The FTCA is a limited waiver of sovereign immunity, authorizing tort suits against the United States by those who are injured by the negligent acts or omissions of any employee of the government acting within the scope of official duties. 28 U.S.C. § 1346(b); *LM ex rel. KM v.*

United States, 344 F.3d 695, 698 (7th Cir. 2003). The Court "lacks jurisdiction to consider any claims against the United States" based on negligence for which it has not waived sovereign immunity. *Alinsky*, 415 F.3d at 644; *see also Halker v. United States*, 2010 U.S. Dist. LEXIS 72339, *11-*13 (S.D. Ind. 2010) (collecting cases in support of conclusion "that the requirement that the alleged tortfeasor in an FTCA claim be an employee of the United States acting within the scope of his office or employment is a jurisdictional requirement of an FTCA action and that a challenge to a tortfeasor's employment status is properly asserted by way of a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction"). Accordingly, the Court agrees with the United States that its motion raises jurisdictional issues. The Court may consider evidence outside the pleadings to make the necessary factual determinations to resolve its own jurisdiction. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009).[1]

II.
BACKGROUND

The facts relevant to addressing the issues raised by the United States' motion are as follows, and are not in dispute.[2] Mr. Ojo was an inmate at the United States Penitentiary in Terre Haute, Indiana. [Dkt. 5 at 1.] In August 2009, he was transported to Union Hospital for medical evaluation. [Dkt. 59-3 at 3.] A hematologist at Union Hospital diagnosed Mr. Ojo with chronic myeloid leukemia ("CML"). [Dkt. 59-1 at 17.] Dr. Chandra Reddy was the primary medical

[1] The Court disagrees with the Estate that subject matter jurisdiction always requires the Court to retain or dismiss an entire case. For example, although the Court has jurisdiction over claims that raise a federal question under 28 U.S.C. § 1331, it does not have jurisdiction over state-law claims in that action unless there is another basis for jurisdiction over those claims—typically, diversity or supplemental jurisdiction, 28 U.S.C. §§ 1367, 1332; *see also College Network v. Cincinnati Ins. Co.*, 2011 U.S. Dist. LEXIS 19073 (S.D. Ind. 2011) (dismissing third-party state law claims for which the Court did not have independent jurisdiction but retaining underlying claims).

[2] The Estate does not dispute any of the facts set forth by the Government in its brief.

provider for Mr. Ojo when he returned to the Terre Haute penitentiary. [Dkts. 59-1 at 30-31; 59-3 at 3.]

The Union Hospital physicians and Dr. Reddy are not employees of the United States; instead, they are independent contractors with a company called NaphCare. [Dkt. 59-3 at 3.] The United States did not exercise control over their clinical decisions. [*Id.*] Mr. Ojo died on February 28, 2011, allegedly from complications of CML. [Dkt. 5-2 at 3-4.]

On October 4, 2011, the Federal Bureau of Prisons denied an administrative tort claim regarding Mr. Ojo's death. [Dkt. 5-2 at 2.] The Estate filed this lawsuit in January 2012, alleging that the United States, through its employees, committed medical malpractice and caused Mr. Ojo's death. [Dkts. 1; 5.]

III.
DISCUSSION

The Government presents two issues in its motion. First, it argues that the Court lacks subject matter jurisdiction over the Estate's claims based on the conduct of independent contractors. [Dkt. 60 at 5-10.] Second, the Government argues that there has been no waiver of sovereign immunity to allow the Court to award attorney's fees against the United States under the FTCA, should the Estate prevail. [*Id.* at 10-15.]

A. The FTCA Claim

The United States argues that the FTCA expressly disclaims the waiver of sovereign immunity for the acts of independent contractors. Therefore, the United States contends that this Court must dismiss the Estate's claims based on the actions of Dr. Reddy and independent contractors at Union Hospital, who were undisputedly independent contractors.

The Estate does not dispute that the FTCA does not waive sovereign immunity for the acts of independent contractors or that Dr. Reddy or the medical professionals from Union Hospital were independent contractors. It emphasizes, instead, that the United States can be liable

> [t]o the extent the medical officials of the United States (were continuing to provide medical care to [Mr. Ojo] during the relevant time periods), failed to properly oversee the services of the independent contractors, failed to properly obtain information with regard to the further deterioration of the physical condition of [Mr. Ojo], and otherwise failed to properly participate in appropriate medical care for [Mr. Ojo] *on their own behalf.*

[Dkt. 70 at 3 (original emphasis).]

The Court notes that the Estate's Complaint expressly alleges that the United States is liable based on the acts or omissions of its "employees," not independent contractors. [Dkt. 5 at 2 ¶¶ 6-8.] In fact, the Complaint does not mention Dr. Reddy or the independent contractors at Union Hospital. [Dkt. 5.] Likewise, in response to the United States' motion, the Estate does not dispute that the FTCA does not waive sovereign immunity for the acts of independent contractors. Instead, the Estate argues that the United States can be liable to the extent that United States employees failed to properly oversee or participate in the care provided by the independent contractors. [Dkt. 70 at 3.] While the United States disputes this contention, [dkt. 71 at 2], it provides no legal support for its position.

It is clear that the Court would lack subject matter jurisdiction over any claims the Estate brings against the United States based on the acts or omissions of independent contractors. 28 U.S.C. § 2671; *Alinsky*, 415 F.3d at 644 (7th Cir. 2005) (holding that acts of independent contractors hired by the United States to provide services are excluded from the limited waiver of sovereign immunity in the FTCA and the Court lacks jurisdiction over those claims). But the Estate's Complaint and response to the United States' motion confirm that it is not making claims based on the actions of independent contractors. Instead, it is asserting that the United

States and its employees acted or failed to act in the oversight of those independent contractors. While that may be a fine line to walk, the United States cites no authority for it being impermissible.

The Court concludes that the Estate has alleged a cognizable FTCA claim against the United States and, therefore, denies that part of the United States' motion to dismiss. The Estate must make sure, however, that it and its experts consistently frame the claim against the United States based on the acts or omissions of the United States' employees, not on the acts or omissions of any independent contractors. The United States will not be vicariously liable for the acts of independent contractors, so the Estate must prove the elements of its claims with regard to the actions, or lack thereof, of the United States and its employees.

B. Recoverability of Attorney's Fees

The parties dispute whether the Estate can recover attorney's fees against the United States if it is successful on the FTCA claim. The United States emphasizes that waivers of sovereign immunity must be narrowly construed and contends that the FTCA does not waive such immunity with respect to attorney's fees. [Dkt. 60 at 13-15.] The Estate argues that Indiana law allows a plaintiff to recover attorney's fees under Indiana's Adult Wrongful Death Statute. *See McCabe v. Comm'r of Ind. Dept. of Ins.*, 949 N.E.2d 816, 821 (2011) ("In conclusion, we hold that reasonable attorney fees incurred in the prosecution of an action under the Adult Wrongful Death Statute are within the damages permitted by the statute.") (referring to Ind. Code § 34-23-1-2). Thus, the Estate contends that it can recover attorney's fees if it prevails in this action.

"Except to the extent it has waived immunity, the Government is immune from claims for attorney's fees." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). Specifically, waivers of

immunity "must be construed strictly in favor of the sovereign" and "not enlarged beyond what the language requires." *Id.*

The FTCA provides that the United States "shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674 (emphasis added). The parties focus their arguments exclusively on this provision of the FTCA, even though it does not mention attorney's fees.[3] Given the requirement that waivers of sovereign immunity must be strictly construed, the Court cannot conclude that § 2674 of the FTCA waives sovereign immunity for attorney's fees, particularly considering that it does not mention them. As the Seventh Circuit Court of Appeals observed while discussing various federal statutes in an *en banc* opinion addressing attorney's fees under the Prison Litigation Reform Act ("PLRA"), under the FTCA "legal fees are deducted from the plaintiff's recovery; the United States does not cover any part of a prevailing plaintiff's legal expenses."[4] *See Johnson v. Daley*, 339 F.3d 582, 588 (7th Cir. 2003) (*en banc*) (citing 28 U.S.C. §§ 2674; 2678). Other circuits that have addressed attorney's fees under the FTCA have reached the same conclusion. *See, e.g., Anderson v. United States*, 127 F.3d 1190, 1191-92 (9th Cir. 1997) ("Congress has not waived the government's sovereign immunity for attorneys' fees and expenses under the FTCA."); *Jackson v. United States*, 881 F.2d 707, 712 (9th Cir. 1989) (hold-

[3] The only provision of the FTCA that mentions attorney's fees provides that "[n]o attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered . . . ." 28 U.S.C. § 2678. The Seventh Circuit has held that "[i]t is unlikely that the statute [28 U.S.C. § 2678] has anything to do with attorneys' fee shifting[; instead it is likely] for the protection of plaintiffs from being gouged by their lawyers." *Stive v. United States*, 366 F.3d 520, 523 (7th Cir. 2004). Thus, the Estate cannot recover fees from the United States based on that provision.

[4] This language was not the holding of *Johnson*, which addressed the constitutionality of an attorney's fee provision of the PLRA, 339 F.3d at 583, but the Seventh Circuit's *en banc* observation regarding the FTCA is relevant to the Court's conclusion.

ing that the language in the FTCA providing that the Government shall be liable "to the same extent as a private individual under like circumstances" applies to issues of substantive liability and that a state law concerning attorney's fees does not apply); *Bergman v. United States*, 844 F.2d 353, 355 (6th Cir. 1988) ("It is clear that the FTCA does not waive the United States' immunity from attorneys' fees."); *Joe v. United States*, 772 F.2d 1535, 1536 (11th Cir. 1985) (holding that "[t]he FTCA does not contain the express waiver of sovereign immunity necessary to permit a court to award attorneys' fees against the United States directly under that act"). Therefore, the Court concludes that because the FTCA does not waive the United States' sovereign immunity with regard to attorney's fees, the Estate cannot recover them under the FTCA, regardless Indiana law that would permit such recovery.

Additionally, while not directly addressed by the parties, the Equal Access to Justice Act ("EAJA") determines when it is appropriate for the Court to award attorney's fees when the United States is a party to litigation.[5] It provides that

> [u]nless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b). But that statute expressly prohibits a Court from awarding attorney's fees in "cases sounding in tort." 28 U.S.C. § 2412(d)(1)(A); *see also Andrews v. United States*, 122 F.3d 1367, 1374 (11th Cir. 1997) ("The EAJA specifically excludes recovery for fees and costs expended on tort claims."); *Campbell v. United States*, 835 F.2d 193, 196 (9th Cir. 1987) ("Tort actions were specifically excluded from the EAJA because Congress believed the legal remedies

[5] The United States cites the costs provision of the EAJA in its reply, [dkt. 71 at 5 (citing 28 U.S.C. § 2412(a)(1))], but ignores the subsection discussing attorney's fees.

available in tort cases were adequate in diminishing this deterrent effect.") (citations omitted). Congress' express prohibition on a Court awarding attorney's fees in tort cases involving the United States further bolsters the Court's conclusion that the Estate cannot recover attorney's fees against the United States in this tort case. Accordingly, the Court grants the United States' motion to the extent that should the Estate prevail, it will not be able to recover attorney's fees against the United States.

IV.
CONCLUSION

For the reasons detailed herein, the Court **DENIES IN PART AND GRANTS IN PART** the United States' Motion for Partial Dismissal. [Dkt. 59.]

06/07/2013

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Distribution via ECF only:

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Andrew P. Wirick
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO, Plaintiff, v. UNITED STATES OF AMERICA, and UNITED STATES BUREAU OF PRISONS, Defendant.	)	CAUSE NO. 2:11-cv-337-JMS-MJD

ORDER ON MOTION TO SEAL DOCUMENT NO. 1

Comes now Court upon the motion of the Plaintiff to seal Document No. 1. The Court being duly advised, hereby GRANTS IN PART and DENIES IN PART said motion.

IT IS ORDERED that the Clerk shall place Exhibit A to the Complaint [Dkt.1-1] under seal

Dated: 01/12/2012

Mark J. Dinsmore
United States Magistrate Judge
Southern District of Indiana

Copies to:

Andrew P. Wirick, Atty. No.: 11362-49
awirick@humesmith.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 2:11-cv-00337-JMS-MJD
	)	
UNITED STATES OF AMERICA,	)	
UNITED STATES BUREAU OF PRISONS,	)	
	)	
Defendants.	)	

SCHEDULING ORDER
HON. MAGISTRATE JUDGE MARK J. DINSMORE

This matter is scheduled for an initial pretrial conference on **Wednesday, May 9, 2012 at 3:20 p.m., in Room 257,** United States Courthouse, 46 East Ohio Street, Indianapolis, Indiana, before Magistrate Judge Mark J. Dinsmore. The parties shall file a proposed Case Management Plan ("CMP") no fewer than **seven days** before the pretrial conference. Unless the parties agree there are compelling reasons for a departure, the CMP shall be in the format set forth in the model CMP[1] found on the Court's website (www.insd.uscourts.gov). At a minimum, the Plan should include:

1. The format in which electronically stored information will be produced by each party (this may be different as to each party to accommodate the particular resources of that party); and

2. An appropriate claw back provision to deal with the production of potentially privileged material.

---

[1] Please note that the magistrate's CMP summary is no longer required.

In advance of the initial pretrial conference, counsel shall plan for discovery and conduct the conference required by Fed. R. Civ. P. 26(f). Represented parties shall attend the initial pretrial conference by counsel. Clients are not required (but are permitted) to attend this conference. Counsel shall appear in person unless they obtain leave to appear at the pretrial conference by telephone. Leave to appear by telephone will be freely granted to counsel outside the Indianapolis Division; such counsel may request to participate by telephone by calling chambers at 317-229-3901. Counsel within the Indianapolis Division are expected to appear in person.

Counsel who attend the conference must have their appearance on file. At the conference, counsel should be prepared to discuss:

1. The volume of electronically stored information identified by each party as potentially relevant in this matter;

2. Each party's plan for collection of electronically stored information;

3. The software tools each party intends to use to manage electronically stored information;

4. The format in which electronically stored information will be produced by each party (this may be different as to each party to accommodate the particular resources of that party);

5. Any electronically stored information that has been identified as not reasonably accessible;

6. How issues relating to the production of potentially privileged information will be handled, including inclusion of an appropriate claw back provision to deal with the production of potentially privileged material;

7. How exhibits will be identified during the discovery

process consistent with the Court's trial procedures;

8. The types and number of witnesses the parties anticipate may provide evidence under Federal Rule of Evidence 702, 703 or 705;

9. Any issues anticipated at the outset regarding the scope or nature of discovery anticipated in the case;

10. Any anticipated deviations from the established limitations on discovery;

11. Any anticipated need for the entry of a protective order in the matter; and

12. How soon the parties anticipate being in a position to discuss settlement of the matter and what specific items of discovery need to be completed prior thereto, and how that necessary discovery can be accomplished as quickly and efficiently as possible.

So ORDERED.

Dated: 04/12/2012

Mark J. Dinsmore
United States Magistrate Judge
Southern District of Indiana

Distribution:

All Electronically Registered Counsel

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO, Plaintiff, v. UNITED STATES OF AMERICA, and UNITED STATES BUREAU OF PRISONS, Defendant.	)	CAUSE NO. 2:11-cv-337-JMS-MJD

CASE MANAGEMENT PLAN

I. **Parties and Representatives**

A. Estate of Osuyuwamen Ojo, Plaintiff

United States of America, Defendant

B. Andrew P. Wirick
Hume Smith Geddes Green & Simmons, LLP
54 Monument Circle, 4th Floor
Indianapolis, IN 46204
awirick@humesmith.com
317-632-4402 ph
317-632-5595 fax
Attorney for Plaintiff Estate of Osuyuwamen Ojo

Joseph H. Hogsett
United States Attorney
By: Jeffrey Hunter

Assistant United States Attorney
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204
Attorney for Defendant United States of America

Counsel shall promptly file a notice with the Clerk if there is any change in this information.

I. Synopsis of Case

A. Plaintiff's Claims: This court has jurisdiction over this action pursuant to 28 U.S.C. §1331 and 28 U.S.C. §2671 et. seq. At all relevant times, the Osuyuwamen Ojo resided at the United States Penitentiary in Terre Haute, Indiana. All of the events forming the basis of Plaintiff's claims occurred in the City of Terre Haute, County of Vigo, Indiana, which is located within the Southern District of Indiana.

On June 27, 2011 the Estate of Osuyuwamen Ojo submitted its notice of tort claim to the United States. Subsequently, the United States, through the Federal Bureau of Prisons, responded to the notice of tort claim by letter of October 4, 2011. This lawsuit is filed within six (6) months thereof. At all relevant times, the United States was a health provider providing medical services within the state of Indiana at the United States Penitentiary in Terre Haute, Indiana. At all relevant times mentioned herein, Osuyuwamen Ojo was under the medical care treatment and supervision of agents and employees of Defendant United States at the United States Federal Bureau of Prisons.

During the course of evaluating, assessing, treating, and performing medical services for Osuyuwamen Ojo, the Defendants, through their employees, committed negligent and careless acts or omissions, constituting medical malpractice causing the death of Osuyuwamen Ojo. As a direct and proximate result of the negligent and careless acts or omissions of the employees of the Defendant, Plaintiff Osuyuwamen Ojo lost the opportunity for successful treatment of his medical condition, causing him to lose his life.

Plaintiff Estate of Osuyuwamen Ojo seeks an award damages in an amount which will fairly and adequately compensate it for all damages recoverable under law, for costs of this actions, and for all other just and proper relief on the premises.

B. Defendant's Claims: The Defendants exercised due care and diligence with respect to the matters alleged in the Plaintiff's Complaint. If applicable, Plaintiff's alleged damages and losses, if any, are the result of Plaintiff's own negligence. To the extent that the substantive state law governing this action limits damages recoverable in medical malpractice actions, such law limits plaintiff's damages in this action. The Defendant specifically reserves the right to raise any additional affirmative defenses which may be identified as the case develops.

III. Pretrial Pleadings and Disclosures

A. The parties shall serve their Fed. R. Civ. P. 26 initial disclosures on or before **June 15, 2012**.

The parties are instructed to email Judge Dinsmore a copy of the settlement demand and response thereto to MJDinsmore@insd.uscourts.gov

C. Plaintiff(s) shall file preliminary witness and exhibit lists on or before **June 15, 2012**.

C. Defendant(s) shall file preliminary witness and exhibit lists on or before **June 29, 2012.**

D. All motions for leave to amend the pleadings and/or to join additional parties shall be filed on or before **July 27, 2012**.

E. Plaintiff(s) shall serve Defendant(s) (but not file with the Court) a statement of special damages, if any, and make a settlement demand, on or before **July 27, 2012**. Defendant(s) shall serve on the Plaintiff(s) (but not file with the Court) a response thereto within 30 days after receipt of the demand.

F. Plaintiff(s) shall disclose the name, address, and vita of all expert witnesses, and shall serve the report required by Fed. R. Civ. P. 26(a)(2) on or before **November 2, 2012**.

G. Defendant(s) shall disclose the name, address, and vita of all expert witnesses, and shall serve the report required by Fed. R. Civ. P. 26(a)(2)(B) on or before **December 7, 2012**.

H. Any party who wishes to limit or preclude expert testimony at trial shall file any such objections no later than **February 28, 2013**. Any party who wishes to preclude expert witness testimony at the summary judgment stage shall file any such objections with their responsive brief within the briefing schedule established by Local Rule 56.1.

The list of final witnesses shall include a brief synopsis of the expected testimony and counsel's certification that the witness has been interviewed and/or deposed.

I. All parties shall file and serve their final witness and exhibit lists on or before **December 7, 2012**.

J. Any party who believes that bifurcation of discovery and/or trial is appropriate with respect to any issue or claim shall notify the Court as soon as practicable.

K. The parties have discussed preservation and disclosure of electronically stored discovery information, including a timetable for making the materials available to the opposing party. The parties have discussed preservation and disclosure of electronically stored discovery information, including a timetable for making the materials available to the opposing party. The parties have agreed that disclosures and searches of metadata, embedded data, disaster recovery processes, back-up processes, auto-delete and archiving processes, and other electronically stored processes is not necessary for this case. However, this waiver does not affect disclosure of current, relevant computer documents, including electronic messages, which are not privileged.

IV. Discovery[1] and Dispositive Motions

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[1] The term "completed," as used in Section IV.B, means that counsel must serve their discovery requests in sufficient time to receive responses before this deadline. Counsel may not serve discovery requests within the 30-day period before this deadline unless they seek leave of Court to serve a belated request and show good cause for the same. In such event, the proposed belated discovery request shall be filed with the motion, and the opposing party will receive it with service of the motion but need not respond to the same until such time as the Court grants the motion.

Due to the time and expense involved in conducting expert witness depositions and other discovery, as well as preparing and resolving dispositive motions, the Court requires counsel to use the CMP as an opportunity to seriously explore whether this case is appropriate for such motions (including specifically motions for summary judgment), whether expert witnesses will be needed, and how long discovery should continue. To this end, counsel must select the track set forth below that they believe best suits this case. If the parties are unable to agree on a track, the parties must: (1) state this fact in the CMP where indicated below; (2) indicate which track each counsel believes is most appropriate; and (3) provide a brief statement supporting the reasons for the track each counsel believes is most appropriate. If the parties are unable to agree on a track, the Court will pick the track it finds most appropriate, based upon the contents of the CMP or, if necessary, after receiving additional input at an initial pretrial conference.

If the required conference under Local Rule 37-1 does not resolve discovery issues that may arise, the parties will request a telephonic status conference prior to filing any disputed motion to compel or for protective order.

A. Does any party believe that this case may be appropriate for summary judgment or other dispositive motion? Yes. The Defendant anticipates filing a motion for summary judgment regarding whether there was a violation of the standard of care, and whether any damages resulted therefrom. Additionally, the Defendant reserves the right to challenge the timeliness of either the administrative tort claim notice or the filing of the instant law suit.

B. Select the track that best suits this case:

__X__ Track 2: Dispositive motions are expected and shall be filed by **February 28, 2013;**

all discovery shall be completed by **January 31, 2103.**

Absent leave of court, and for good cause shown, all issues raised on summary judgment under Fed. R. Civ. P. 56 must be raised by a party in a single motion.

V. Pre-Trial/Settlement Conferences

This case is currently set for an initial pretrial conference on May 9, 2012. The parties have no position as to additional conferences with the Magistrate Judge.

VI. Trial Date

The presumptive trial date is 18 months from the Anchor Date. The parties request a trial date in September, 2013. The trial is by Court and is anticipated to take no more than 3 days. Counsel should indicate here the reasons that a shorter or longer track is appropriate. While all dates herein must be initially scheduled to match the presumptive trial date, if the Court agrees that a different track is appropriate, the case management order approving the CMP plan will indicate the number of months by which all or certain deadlines will be extended to match the track approved by the Court.

VII. Referral to Magistrate Judge

At this time, all parties do not consent to refer this matter to the Magistrate Judge pursuant to 28 U.S.C. 636(b) and Federal Rules of Civil Procedure 73 for all further proceedings including trial.

VIII. Required Pre-Trial Preparation

A. TWO WEEKS BEFORE THE FINAL PRETRIAL CONFERENCE, the parties shall:

1. File a list of witnesses who are expected to be called to testify at trial.

2. Number in sequential order all exhibits, including graphs, charts and the like, that will be used during the trial. Provide the Court with a list of these exhibits, including a description of each exhibit and the identifying designation. Make the original exhibits available for inspection by opposing counsel. Stipulations as to the authenticity and admissibility of exhibits are encouraged to the greatest extent possible.

3. Submit all stipulations of facts in writing to the Court. Stipulations are always encouraged so that at trial, counsel can concentrate on relevant contested facts.

4. A party who intends to offer any depositions into evidence during the party's case in chief shall prepare and file with the Court and copy to all opposing parties either:

    a. brief written summaries of the relevant facts in the depositions that will be offered. (Because such a summary will be used in lieu of the actual deposition testimony to eliminate time reading

depositions in a question and answer format, this is strongly encouraged.); or

b. if a summary is inappropriate, a document which lists the portions of the deposition(s), including the specific page and line numbers, that will be read, or, in the event of a video-taped deposition, the portions of the deposition that will be played, designated specifically by counter-numbers.

5. Provide all other parties and the Court with any trial briefs and motions in limine, along with all proposed jury instructions, voir dire questions, and areas of inquiry for voir dire (or, if the trial is to the Court, with proposed findings of fact and conclusions of law).

6. Notify the Court and opposing counsel of the anticipated use of any evidence presentation equipment.

B. ONE WEEK BEFORE THE FINAL PRETRIAL CONFERENCE, the parties shall:

1. Notify opposing counsel in writing of any objections to the proposed exhibits. If the parties desire a ruling on the objection prior to trial, a motion should be filed noting the objection and a description and designation of the exhibit, the basis of the objection, and the legal authorities supporting the objection.

2. If a party has an objection to the deposition summary or to a designated portion of a deposition that will be offered at trial, or if a party intends to offer additional portions at trial in response to the opponent's designation, and the parties desire a ruling on the objection prior to trial, the party shall submit the objections and counter summaries or designations to the Court in writing. Any objections shall be made in the same manner as for proposed exhibits. However, in the case of objections to video-taped depositions, the objections shall be brought to the Court's immediate attention to allow adequate time for editing of the deposition prior to trial.

3. File objections to any motions in limine, proposed instructions, and voir dire questions submitted by the opposing parties.

4. Notify the Court and opposing counsel of requests for separation of witnesses at trial.

IX. Other Matters

The parties do not believe there are any other matters that require the Court's immediate attention.

Respectfully submitted,

/s/ Andrew P. Wirick
Andrew P. Wirick, Atty. No.: 11362-49
Hume Smith Geddes Green & Simmons, LLP
54 Monument Circle, 4th Floor
Indianapolis, Indiana 46204
PH: 317/632-4402 FAX: 317/632-5595
awirick@humesmith.com
Attorney for Plaintiff Estate of Osuyuwamen Ojo

/s/ Jeffrey L. Hunter
Jeffrey L. Hunter, Assistant U.S. Attorney
United States Attorney's Office
10 West Market Street, Suite 2100
Indianapolis, IN 46204
Attorney for Defendant United States of America

****

_____ PARTIES APPEARED IN PERSON/BY COUNSEL ON FOR A PRETRIAL/STATUS CONFERENCE.

_____ APPROVED AS SUBMITTED.

x APPROVED AS AMENDED.

_____ APPROVED AS AMENDED PER SEPARATE ORDER.

_____ APPROVED, BUT ALL OF THE FOREGOING DEADLINES ARE SHORTENED/LENGTHENED BY _____ MONTHS.

_____ APPROVED, BUT THE DEADLINES SET IN SECTION(S) _____ OF THE PLAN IS/ARE SHORTENED/LENGTHENED BY _____ MONTHS.

_____ THIS MATTER IS SET FOR TRIAL BY_____ ON _____. FINAL PRETRIAL CONFERENCE IS SCHEDULED FOR _____ AT _____.M., ROOM _____.

_____ A SETTLEMENT/STATUS CONFERENCE IS SET IN THIS CASE FOR _____ AT _____.M. COUNSEL SHALL APPEAR:

_____ IN PERSON IN ROOM _____; OR

_____ BY TELEPHONE, WITH COUNSEL FOR INITIATING THE CALL TO ALL OTHER PARTIES AND ADDING THE COURT JUDGE AT (____) _____; OR

_____ BY TELEPHONE, WITH COUNSEL CALLING THE JUDGE'S STAFF AT (____) _____; OR

x _____ DISPOSITIVE MOTIONS SHALL BE FILED NO LATER THAN

February 28, 2013

Upon approval, this Plan constitutes an Order of the Court. Failure to comply with an Order of the Court may result in sanctions for contempt, or as provided under Rule 16(f), to and including dismissal or default.

Approved and So Ordered.

Dated: 05/14/2012

Mark J. Dinsmore
United States Magistrate Judge
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO, *Plaintiff*,	)	
v.	)	2:11-cv-337-JMS-MJD
UNITED STATES OF AMERICA AND UNITED STATES BUREAU OF PRISONS, *Defendants.*	)	

TRIAL SETTING AND NOTICE OF FINAL PRETRIAL CONFERENCE

This cause is hereby set for a Court Trial before Judge Jane Magnus-Stinson on **September 25, 2013 at 9:00 a.m.** in Room 307 of the Birch Bayh Federal Building and U.S. Courthouse, 46 East Ohio Street, Indianapolis, Indiana.

A Final Pretrial Conference is also set for **August 29, 2013 at 1:00 p.m.** in Room 307 of the Birch Bayh Federal Building and U.S. Courthouse, 46 East Ohio Street, Indianapolis, Indiana.

Counsel are reminded of the required pretrial preparation deadlines set forth in paragraph VIII of the case management plan [dkt. 15].

Counsel are further reminded to review the undersigned's Practices and Procedures, available on the internet at http://www.insd.uscourts.gov/Publications/CourtroomProceduresJMS.pdf .

07/03/2012

Jane Magnus-Stinson

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Copies via ECF only:

Jeffrey L. Hunter
UNITED STATES ATTORNEY'S OFFICE
jeff.hunter@usdoj.gov

Andrew P. Wirick
HUME SMITH GEDDES GREEN & SIMMONS
awirick@humesmith.com

Court Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 2:11-cv-00337-JMS-MJD
	)	
UNITED STATES OF AMERICA,	)	
UNITED STATES BUREAU OF PRISONS,	)	
	)	
Defendants.	)	

SCHEDULING ORDER
HON. MAGISTRATE JUDGE MARK J. DINSMORE

This matter is currently set for a settlement conference on **Friday, December 14, 2012 at 9:00 a.m.** The court *sua sponte* changes the date and time to **Thursday, December 13, 2012 at 9:00 a.m.**

All other requirements of the Court's Order dated 5/14/2012 (Dkt. 16) are still in order and effect.

Dated: 07/10/2012

Mark J. Dinsmore
United States Magistrate Judge
Southern District of Indiana

Distribution:

All Electronically Registered Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 2:11-cv-00337-JMS-MJD
	)	
UNITED STATES OF AMERICA,	)	
UNITED STATES BUREAU OF PRISONS,	)	
	)	
Defendants.	)	

SCHEDULING ORDER
HON. MAGISTRATE JUDGE MARK J. DINSMORE

This matter is currently set for a telephone status conference on **Friday, August 3, 2012 at 10:30 a.m.** The court now changes the date and time to **Thursday, August 2, 2012 at 2:40 p.m.** All other requirements of the Court's Order dated 6/21/12 (Dkt. 21) are still in order and effect.

Dated: 07/30/2012

Mark J. Dinsmore
United States Magistrate Judge
Southern District of Indiana

Distribution:

All Electronically Registered Counsel

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO, Plaintiff, v. UNITED STATES OF AMERICA, and UNITED STATES BUREAU OF PRISONS, Defendant.	)	CAUSE NO. 2:11-cv-337-JMS-MJD

ORDER GRANTING ENLARGEMENT OF TIME

Comes now the Court upon the motion of the Plaintiff Estate of Osuyuwamen Ojo for an enlargement of time to file its motion for summary judgment with regard to choice of law issues. The Court, being duly advised, hereby GRANTS said motion. Plaintiff shall have to and including October 10, 2012, in which to file its motion for summary judgment with regard to choice of law issues. There will be no further extensions.

IT IS SO ORDERED.

08/20/2012
Date

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

Copies to:

Andrew P. Wirick
Hume Smith Geddes Green & Simmons, LLP
54 Monument Circle, 4th Floor
Indianapolis, Indiana 46204

Joseph H. Hogsett
Jeffrey L. Hunter
Office of the United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ESTATE OF OSUYUWAMEN OJO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO. 2:11-CV-337-JMS-MJD
	)	
UNITED STATES OF AMERICA and UNITED STATES BUREAU OF PRISONS,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT AND RELEASE

1. Plaintiff, Estate of Osuyuwamen Ojo, (hereinafter "Estate"), and the Defendant, United States of America (hereinafter "United States"), do hereby agree to settle and compromise the above-titled cause of action under the terms and conditions set forth herein.

2. This Settlement Agreement And Release (hereinafter "Settlement Agreement") shall not constitute an admission of liability or fault on the part of the United States, its agents, servants, or employees, and is entered into by both parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

3. The United States agrees to pay to the Estate, the cash sum of One Hundred Twelve Thousand Five Hundred Dollars and No Cents ($112,500.00.00) (hereinafter the "Settlement amount"), which shall be in full settlement, satisfaction, and release of any and all claims the Estate, and its executors, administrators, or assigns now has or may hereafter acquire against the United States, its agents, servants and employees on account of the facts or circumstances which gave rise to the above-captioned lawsuit. In consideration for the

payment of the Settlement Amount, the Estate stipulates and agrees that the United States will not sign an annuity application form, uniform qualified settlement form, or any equivalent forms, and will not pay the Settlement Amount into a qualified settlement fund or its equivalent. The Estate further stipulates and agrees that it, its attorney, and its representatives (including any structured settlement annuity broker, regardless of whether said broker was retained by them or by someone else, either before, during or after the settlement) will not attempt to structure the Settlement Amount in any way, form, or manner, including by placing any of the settlement amount into any qualified settlement fund or its equivalent.

4. The Estate hereby agrees to accept the Settlement Amount and the terms and conditions of this Settlement Agreement in full settlement, satisfaction, and release of any and all claims and demands, including any claim for expenses and court costs, which the Estate, its executors, administrators or assigns may have or hereafter acquire against the United States, its agents, servants and employees on account of the facts or circumstances which gave rise to the above-captioned lawsuit.

5. It is expressly understood and agreed by Estate that the United States, including its employees, is released from any and all claims and liability arising directly or indirectly from the subject matter of this action upon payment of the Settlement Amount. It is also expressly understood and agreed by the Estate that the Estate will pay all fees and costs incurred by the United States in enforcing the terms of this Settlement Agreement, made necessary by the conduct of Plaintiff in refusing or failing to abide by the terms of this Settlement Agreement.

6. The parties agree that the Settlement Amount represents the entire amount of

the settlement and compromise and that the respective parties will each bear their own costs, fees, and expenses and that any attorney fees owed by the Estate will be paid out of the Settlement Amount and not in addition thereto.

7. The parties agree that pursuant to Title 28, United States Code, § 2678, attorney fees for services rendered in connection with this action against the United States shall not exceed 25 per centum of the Settlement Amount.

8. The parties agree that payment of the Settlement Amount will be made by a check from the United States payable to Estate and the law firm Hume Smith Geddes Green & Simmons, LLP by Andrew P. Wirick, its attorney.

9. In consideration of the payment of the settlement amounts, the Estate agrees that Estates will cause its attorney to execute and file with the Court such documents as shall be necessary to cause the above-captioned claim against the United States to be dismissed with prejudice, with each party bearing its own costs, fees, and expenses.

10. The Estate agrees to reimburse, indemnify and hold harmless the United States, its agents, servants and employees from any and all such causes of action, claims, liens, rights or subrogated interests against the United States, its agents, servants, and employees arising directly or indirectly from the subject matter of this action, and further, the Estate agrees to reimburse or advance, at the option of counsel for the United States, any expense or cost which may be incurred incident to or resulting from such further litigation against the United States, its agents, servants and employees or the prosecution of claims by the Estate against any third party.

11. The Estate stipulates and agrees to obtain, at its expense, final court approval of

the settlement on behalf of the Estate from a court of competent jurisdiction. In the event that the requisite court approval of the settlement is not obtained, then this compromise settlement and the Settlement Agreement shall be null and void.

12. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the parties on whose behalf they are signing to the terms of the settlement.

13. The parties agree that this Settlement Agreement constitutes the entire understanding of the parties and that no representations which are not contained herein shall be binding upon either party. The parties further stipulate and agree that this compromise settlement is specifically subject to each of the following conditions:

a. An agreement by the parties on the terms, conditions, and requirements of this Settlement Agreement.

b. Approval of the settlement, including the Settlement Agreement, by the Attorney General or his designee of the terms, conditions, and requirements of this Settlement Agreement.

14. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

15. This Settlement Agreement consists of five (5) pages, including signatures, and fifteen (15) paragraphs of text.

ON BEHALF OF THE PLAINTIFF:

DATE: 8/28/13

Audu Hamed, Personal Representative
Estate of Osuyuwamen Ojo
PLAINTIFF

DATE: 8/28/13

HUME SMITH GEDDES GREEN & SIMMONS, LLP

By: _____
Andrew P. Wirick

ATTORNEY FOR PLAINTIFF

ON BEHALF OF THE UNITED STATES:

JOSEPH H. HOGSETT
UNITED STATES ATTORNEY

8/29/13

By: Jill Z. Julian, Chief, Civil Division

8/28/13

By: Jeffrey J. Hunter, Assistant U.S Attorney

E-FILED
Thursday, 30 October, 2014 03:21:58 PM
Clerk, U.S. District Court, ILCD

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT PEORIA**

JUAN MONTOYA, Personal Representative of the Estate of Adam Montoya,	)	
Plaintiff,	)	
vs.	)	**Civil Case No. 11-1414**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

AMENDED COMPLAINT

NOW COMES Juan Montoya as Personal Representative of the Estate of Adam Montoya, Plaintiff, by and through his Counsel Blake Horwitz, Esq of the Blake Horwitz Law Firm, Ltd. and for his Amended Complaint at Law, states the following: s;

JURISDICTION AND VENUE

1. This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code. This court is vested with jurisdiction pursuant to Section 1346(b) of Title 28 of the Unites Code.

2. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b), in that the events giving rise to complaint occurred within this district.

PARTIES

3. Juan Montoya is the father of Adam Montoya and a resident of the State of New Mexico who has been appointed by the Probate Court in Bernalillo County, New Mexico to be the representative of Adam Montoya's estate. Juan Montoya is acting

in his capacity as the duly authorized Representative of the Estate of Adam Montoya.

4. During all times relevant herein, Adam Montoya was in the custody of the United States Bureau of Prisons having been incarcerated in the Federal Correctional Institution located in Pekin, Illinois ("FCI Pekin") until his death on November 13, 2009.

5. The United States of America is named as defendant in this case in that it is legally responsible for its employees acting within the scope of their employment at the Medical Unit of FCI Pekin whose negligence was the proximate cause of Adam Montoya's death on November 13, 2009.

FACTS

6. On or about October 26, 2009, Adam Montoya, inmate register #37786-177, was transferred to Pekin Federal Correctional Institution ("Pekin FCI").

7. Pekin FCI is located at 2600 S Second St, Pekin, Illinois 61554. Adam Montoya was serving a 27 month sentence for conspiracy to manufacture and traffic in counterfeit obligations and access devices in violation of 18 USC §371.

8. Prior to being transferred to Pekin FCI, Adam Montoya was diagnosed with HIV/AIDS and Hepatitis C in approximately August of 2009.

9. On or about October 27, 2009, Adam Montoya submitted to a health screen at Pekin FCI, where it was noted that he was positive for HIV/AIDS as well as Hepatitis C.

10. The Medical Staff were aware of and had personal knowledge of Adam Montoya's medical conditions, specifically that he tested positive for HIV/AIDS and Hepatitis C.

11. On or about November 9, 2009, Adam Montoya complained to the Medical Staff of severe abdominal pain.

12. The plaintiff continued to complain to the Medical Staff at FCI Pekin of severe abdominal pain from November 9, 2009 until his death on November 13, 2009.

13. In addition to complaining of severe abdominal pain, during this time period, plaintiff presented with symptoms that included vomiting, sweating, rapid pulse, constipation, yellowish skin color, and an inability to eat solid foods which symptoms should have alerted Medical Staff that plaintiff had a serious medical condition that needed immediate attention.

14, Despite plaintiff's complaints and his symptoms, the Medical Staff at FCI Pekin failed to take proper medical action which a reasonable medical professional would have done under similar circumstances.

15. As a proximate cause of Medical Staff's failure to take reasonable and proper actions in response to plaintiff's complaints and symptoms, Adam Montoya died in his cell on the morning of November 13, 2009.

16. At all times relevant to this action, Medical Staff were employees of the United States Bureau of Prisons at FCI Pekin and, therefore, employees of the United States of America, acting within the scope of their employment.

Count One

17. Under the Federal Tort Claims Act, the United States of America is liable for the negligence of its employees acting within the scope of their employment.

18. For the reasons set forth above, the United States is liable to plaintiff for the acts of the FCI Pekin's Medical Staff for their negligent treatment of Adam Montoya's medical condition from November 9, 2009, until his death on November 13, 2009.

19. The Medical Staff acted with negligence towards Adam Montoya's medical needs, but not limited to the following:

a. The Medical Staff did not properly examine, diagnose and treat Adam Montoya's pain and serious symptoms;

b. The Medical Staff failed to transport Adam Montoya to an outside medical facility despite his complaints and symptoms which clearly indicated Adam Montoya was in need of immediate and intensive medical treatment;

c. The Medical Staff failed to provide Adam Montoya with reasonable and proper medical attention even though he continued to complain of severe pain and symptoms;

20. The Medical Staff actions in light of Adam Montoya's complaints and symptoms was below the standard of ordinary care that reasonable medical staff should have provided to Adam Montoya, and the negligent actions of the Medical Staff, and their negligent failures to act, were the direct and proximate cause of

Adam Montoya's death and injuries.

WHEREFORE, PLAINTIFF demands compensatory damages from the DEFENDANT United States of America and other such relief as this Court deems equitable and just.

Respectfully submitted,

s/ Blake Horwitz One of the Attorneys for the Plaintiff

Blake W Horwitz, Esq.
Mustafa Kamal, Esq.
The Blake Horwitz Law Firm, Ltd.
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E-FILED
Thursday, 10 November, 2011 06:08:37 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

JUAN MONTOYA, Personal Representative of the Estate of Adam Montoya, Plaintiff, v. Bureau of Prisons RN Ted Wall, Bureau of Prisons MLP Sattinder Rattan, Bureau of Prisons Lieutenant Gregory, Bureau of Prisons R. Kabatry, M.D., Bureau of Prisons Scott Moats, M.D., and Bureau of Prisons Lieutenant Wallace, Defendants.	No: 11 CV 1414 JUDGE:

COMPLAINT AT LAW

NOW COMES the PLANTIFF, by and through Blake Horwitz, Esq of the Blake Horwitz Law Firm, Ltd. and pursuant to this Complaint at Law, states the following against the above named Defendants in their individual capacities, to wit Bureau of Prisons RN Ted Wall, Bureau of Prisons MLP[1] Sattinder Rattan, Bureau of Prisons Lieutenant Gregory, (hereinafter the "MEDICAL STAFF DEFENDANTS"), Bureau of Prisons R. Kabatry, M.D., Bureau of Prisons Scott Moats, M.D., (hereinafter the "DEFENDANT DOCTORS"), and Bureau of Prison Lieutenant Wallace, (hereinafter the "DEFENDANT OFFICER").

JURISDICTION AND VENUE

1. The jurisdiction of the court is invoked pursuant to the 28 U.S.C. §1331 and §1343(a); 42 U.S.C. § 1983; the Constitution of the United States; and this Court's supplemental jurisdiction powers.

[1] On information and belief "MLP" is an acronym that stands for "Mid Level Practioner."

2. The jurisdiction of the court is also invoked pursuant to a federal question derived from common law: *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

3. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b), in that the events giving rise to complaint occurred in this district.

PARTIES

4. PLAINTIFF is the father of Adam Montoya, a resident of the State of New Mexico and the representative of Adam Montoya's estate as authorized by the Probate Court in Bernalillo County, New Mexico.

5. Adam Montoya was a resident of the State of Illinois and of the United States, as he was incarcerated in a federal prison in Pekin, Illinois.

6. DEFENDANT BUREAU OF PRISONS LIEUTENANT WALLACE was at all times relevant hereto employed by, acting under the color of law and in the scope of employment for the UNITED STATES OF AMERICA and is sued in his/her individual capacity.

7. DEFENDANT BUREAU OF PRISONS RN TED WALL was at all times relevant hereto employed by, acting under the color of law and in the scope of employment of the UNITED STATES OF AMERICA and is sued in his individual capacity.

8. DEFENDANT BUREAU OF PRISONS MLP SATTINDER RATTAN was at all times relevant hereto employed by, acting under the color of law and in the scope of employment for the UNITED STATES OF AMERICA and is sued in his/her individual capacity.

9. DEFENDANT BUREAU OF PRISONS LIEUTENANT GREGORY was at all times relevant hereto employed by, acting under the color of law and in the scope of employment for of the UNITED STATES OF AMERICA and is sued in his/her individual capacity.

10. DEFENDANT BUREAU OF PRISONS R. KABATAY, M.D., was at all times relevant hereto employed by, acting under the color of law and in the scope of employment for the UNITED STATES OF AMERICA and is sued in his/her individual capacity.

11. DEFENDANT BUREAU OF PRISONS SCOTT MOATS, M.D., was at all times relevant hereto employed by, acting under the color of law and in the scope of employment for the UNITED STATES OF AMERICA and is sued in his individual capacity.

FACTS

12. On or about October 26, 2009, Adam Montoya, inmate register #37786-177, was transferred to Pekin Federal Correctional Institution ("Pekin FCI").

13. Pekin FCI is located at 2600 S Second St, Pekin, Illinois 61554.

14. Adam Montoya was serving a 27 month sentence for conspiracy to manufacture and traffic in counterfeit obligations and access devices in violation of 18 USC §371.

15. Prior to being transferred to Pekin FCI, Adam Montoya was diagnosed with HIV/AIDS and Hepatitis C in approximately August of 2009.

16. The Medical Staff Defendants and the Defendant Doctors were aware and had full knowledge of Adam Montoya's medical conditions when Adam Montoya arrived at Pekin FCI.

17. On or about October 27, 2009, Adam Montoya submitted to a health screen at Pekin FCI, where it was noted that he was positive for HIV/AIDS as well as Hepatitis C.

18. All of the Defendants were aware of and had personal knowledge of Adam Montoya's medical conditions, specifically that he tested positive for HIV/AIDS and Hepatitis C.

19. On or about November 9, 2011, Adam Montoya complained to the Medical Staff Defendants and the Defendant Officer of severe abdominal pain.

20. The Medical Staff Defendants only prescribed Acetaminophen, Tylenol, and just noted "flu-like symptoms" without conducting any physical examination on Adam Montoya.

21. Upon information and belief, Defendant Rattan prescribed the Acetaminophen, Tylenol, to Adam Montoya for his severe abdominal pain.

22. Adam Montoya continued to suffer and experienced other severe symptoms in addition to severe abdominal pain including but not limited to, inability to eat, vomiting, nose bleeds, yellowish skin color/tone, rapid breathing, lack of bowel movements for several days and visible bruises on his hand, wrists, abdomen, legs and feet.

23. Adam Montoya complained to the Medical Staff Defendants and the Defendant Officer of these serious symptoms.

24. The Medical Staff Defendants and the Defendant Officer observed Adam Montoya having said symptoms.

25. Adam Montoya's symptoms were so severe that it was obvious and should have been obvious to the Defendant Officer that Adam Montoya was severely ill and needed immediate medical care and attention.

26. The Medical Staff Defendants generated medical records that documented Adam Montoya's symptoms.

27. Defendant Doctors read the medical reports documenting Adam Montoya's symptoms.

28. The Medical Staff Defendants told the Defendant Doctors of Adam Montoya's symptoms.

29. Adam Montoya repeatedly asked the Medical Staff Defendants and the Defendant Officer, verbally and in writing, to see a doctor as he continued to suffer severe pain and experience the symptoms alleged above.

30. Upon information and belief, Defendant Wall prescribed Adam Montoya only a simple laxative even though he was experiencing severe pain and symptoms.

31. The laxative did nothing to help Adam Montoya of his pain and symptoms.

32. Adam Montoya was still severely ill and continued to make numerous requests to see a doctor to the Medical Staff Defendants and the Defendant Officer.

33. Defendant Officer told Adam Montoya that there is nothing that he or she could do.

34. Defendant Officer told Adam Montoya to "man up," stop complaining and bothering him or her.

35. Defendant Gregory told Adam Montoya that he just had the flu and there was nothing that they could do.

36. On or about November 12, 2009, Adam Montoya pressed the panic button located in his cell and begged for medical attention.

37. Adam Montoya stated to the Medical Staff Defendants and the Defendant Officer that he felt like he was dying.

38. Despite the serious symptoms and pain that Adam Montoya was experiencing and without conducting any examination on Adam Montoya, Defendant RN Ted Wall told Mr. Montoya that he was simply hyperventilating and instructed him to drink water and relax.

39. On or about the evening of November 12, 2009, Adam Montoya sat on his bunk, grabbing his abdominal area and continuously groaned and moaned due to the severe pain in his abdominal region.

40. Adam Montoya told his cell mates that he felt like he was dying and could not take the pain anymore.

41. On November 13, 2009, at approximately 6:15 a.m. the Medical Staff Defendants and the Defendant Officer observed Adam Montoya in his cell.

42. The Medical Staff Defendants and the Defendant Officer specifically observed that Adam Montoya appeared to be unresponsive while sitting upright on the lower bunk, his skin pale with a yellow cast and his abdomen distended.

43. Even though Adam Montoya appeared extremely ill, as alleged above, the Medical Staff Defendants and the Defendant Officer took no actions to provide Adam Montoya with medical attention or treatment.

44. It was obvious to the Medical Staff Defendants and even to the Defendant Officer as a medical layperson that Adam Montoya needed immediate medical care and treatment.

45. Approximately an hour later, 7:15 a.m., Adam Montoya was found unresponsive in his cell and attempts to resuscitate him were unsuccessful.

46. The time of death according to the autopsy report was 7:49 a.m. on November 13, 2009.

47. The official cause of death was "hemoperitoneum due to rupture of the spleen due to non-Hodgkin's lymphoma."

48. Adam Montoya's spleen was nearly ten (10) times the normal weight.

49. A postmortem urine drug screen revealed that Acetaminophen, Tylenol, was the only detectable medication in Adam Montoya's urine.

50. A simple examination of Adam Montoya would have revealed that his spleen was severely inflamed and that he was not suffering from a simple flu or just hyperventilating.

51. An inflamed spleen presents a serious risk of injury as it can cause death if it ruptures.

52. Given Adam Montoya's prolonged serious symptoms and his medical history, particularly Hepatitis C, the Medical Staff Defendants and the Defendant Doctors should have conducted a physical examination of Adam Montoya.

53. Defendant Officer knew of and observed Adam Montoya's pain and serious symptoms, but ignored Adam Montoya's request for medical help.

54. For several days leading up to his death Adam Montoya complained of and was in excruciating pain.

55. Adam Montoya was given only Tylenol by the Medical Staff Defendants to help Adam Montoya cope with his pain.

56. The Tylenol did not relive Adam Montoya's pain and Adam Montoya continued to complain of excruciating pain.

57. The Medical Staff Defendants and the Defendant Doctors failed to prescribe or administer any other pain medication to Adam Montoya after the Tylenol failed to relive the pain.

58. Adam Montoya continued to be in excruciating pain up and until the time of his death.

59. From the time Adam Montoya started experiencing the symptoms alleged above, he continuously asked the Medical Staff Defendants and the Defendant Officer to see a doctor.

60. Despite Adam Montoya's repeated requests and the seriousness of his symptoms, Adam Montoya was never treated or even seen by a doctor.

61. Defendant Doctors did not see Adam Montoya, even though the Defendant Doctors knew of Adam Montoya's medical conditions, symptoms and his repeated requests for a doctor.

62. Adam Montoya received medication for his HIV/AIDS and Hepatitis C conditions at Randall County Jail in Amarillo, Texas, the correctional institution before Adam Montoya was transferred to Pekin FCI.

63. After arriving at Pekin FCI, Adam Montoya made repeated requests to the Medical Staff Defendants, Defendant Officers and Doctors for his medication.

64. Adam Montoya's parents wrote letters to and called Pekin FCI Officers, officials and employees requesting Adam Montoya be allowed to take his medication.

65. Despite such requests, Adam Montoya was never given any medication for the treatment of his medical conditions, even though the medication was available to the Medical Staff Defendants and the Defendant Doctors.

66. The conduct alleged above violated the Eighth Amendment to the United States Constitution.

67. Plaintiff filed an Administrative claim pursuant to the Federal Tort Claims Act on December 10, 2010.

68. The claim was denied by the U.S. Department of Justice in a letter dated May 19, 2011, and allowed the Plaintiff to file a lawsuit no later than six months after said date.

COUNT I
Deliberate Indifference Pursuant to the Eighth Amendment to the U.S. Constitution

69. Plaintiff re-alleges paragraphs 1 – 68 as though fully set forth herein.

70. The Defendants knew that Adam Montoya was diagnosed with and suffered from AIDS/HIV and Hepatitis C.

71. The Defendants knew that Adam Montoya was suffering from serious symptoms.

72. The symptoms presented an obvious substantial risk to the health of Adam Montoya that required immediate medical care and treatment.

73. It was obvious to the Defendants, including the layperson Defendant Officer that Adam Montoya was suffering from serious symptoms that required immediate medical care and treatment.

74. It was obvious to the Defendants, including the layperson Defendant Officer that Adam Montoya needed to see a doctor immediately given his severe symptoms.

75. The Defendants acted with deliberate indifference towards Adam Montoya's medical needs, but not limited to the following:

a. The Medical Staff Defendants and the Defendant Doctors withheld medication from Adam Montoya for his AIDS/HIV and Hepatitis C, even though they had access and authority to dispense the medication to Adam Montoya;

b. The Medical Staff Defendants and the Defendant Doctors did not properly examine, diagnose and treat Adam Montoya's pain and serious symptoms;

c. The Medical Staff Defendants only prescribed Tylenol and a laxative to treat Adam Montoya's severe abdominal pain and related symptoms;

d. The Defendants refused to allow Adam Montoya see a doctor even though Adam Montoya was experiencing severe pain and symptoms;

e. The Medical Staff Defendants and the Defendant Officer refused to render medical attention to Adam Montoya even though he continued to suffer from severe pain and symptoms and kept requesting such attention and to see a doctor;

f. The Medical Staff Defendants and the Defendant Officer kept telling Adam Montoya to stop bothering them, and that he just had the flu and was only hyperventilating;

g. The Defendant Doctors failed to see and/or treat Adam Montoya, even though they knew of Adam Montoya's medical history, pain, symptoms, and repeated request to see a doctor;

h. The Medical Staff Defendants and the Defendant Officer failed to render medical attention to Adam Montoya on November 13, 2009, when these Defendants observed Adam Montoya unresponsive in his cell with yellowish skin and his abdomen distended;

i. The Defendants allowed Adam Montoya to suffer excruciating pain up until his death;

j. The Defendants failed to provide Adam Montoya with minimal medical care;

k. The treatment given by the Defendants to Adam Montoya was so poor that no minimally competent medical professional would have so responded under those circumstances.

76. This conduct violated the Eighth Amendment of the United States Constitution.

77. The aforementioned actions of the DEFENDANTS were the direct and proximate cause of the constitutional violations set forth above.

WHEREFORE, PLAINTIFF demands compensatory damages from the DEFENDANTS. PLAINTIFF also demands punitive damages, costs and attorneys' fees against the DEFENDANT DEPUTIES and whatever additional relief this Court deems equitable and just.

JURY DEMAND

78. PLANTIFF demands trial by jury.

Respectfully submitted,

s/ Blake Horwitz
One of the Attorneys for the Plaintiff

Blake W Horwitz, Esq.
Mustafa Kamal, Esq.
The Blake Horwitz Law Firm, Ltd.
39 S. LaSalle St., Suite 1515
Chicago, Illinois 60603
Ph (312) 676-2100
Fax (312) 445-8741

JS 44 (Rev. 09/11) 1:11-cv-01414-JBM-JAG # 1 Page 1 of 2

CIVIL COVER SHEET

E-FILED
Friday, 18 November, 2011 03:27:06 PM
Clerk, U.S. District Court, ILCD

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Juan Montoya, Personal Representative of the Estate of Adam Montoya

(b) County of Residence of First Listed Plaintiff Tazewell
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Blake Horwitz
The Blake Horwitz Law Firm, Ltd.
39 South LaSalle St, Suite 1515, Chicago, IL 60603

DEFENDANTS
Bureau of Prisons RN Ted Wall, Bureau of Prisons MLP Sattinder Rattan, Bureau of Prisons Lieutenant Gregory, Bureau of Prisons R. Kabatay M.D., Bureau of Prisons Scott Moats M.D., Bureau of Prisons

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff) (For Diversity Cases Only) and One Box for Defendant)*

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
Bivens Action, Violation of Prisoner's Eighth Amendment
Brief description of cause:
Violation of Prioner's Contitutional Rights pusuant to the Eighth Amendment of the U.S. Constitution for

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND $ CHECK YES only if demanded in complaint: JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE DOCKET NUMBER

DATE 11/11/2011 SIGNATURE OF ATTORNEY OF RECORD s/Blake Horwitz

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Tracy Knutson - Estate of Adam Montoya v. Wall, et al., No. 11-1414 (C.D. of Illinois)

From: Kenneth Hyle
To: Bitner, Grzegorz; Brinker Fornshill, Renee; Kerrigan, Marli; Knutson,...
Date: 10/9/14 7:46 AM
Subject: Estate of Adam Montoya v. Wall, et al., No. 11-1414 (C.D. of Illinois)

Good Morning - settlement of the above-referenced case for $475,000 is authorized. If anyone has any further questions, please let me know-

Page 1163 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1164 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1165 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1166 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Welcome WILSON J MOORER | Log-out

HOME | ALERTS | MY WORK | NEW CASE | SEARCH MAIN | EMAIL

CASE DETAILS

Back to Case Results **Case Actions:**

Case ID: CIV-NCR-2012-00142 **Short Description:** MONTOYA V. WALL ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	11-cv-01414-JBM-JAG	Date	11/01/2014
Short Description	MONTOYA V. WALL ET AL	Type	Settled
Classification	Civil	Reason	
Case Type	FTCA & Bivens	Sought	
Case Sub-Type		Amount offered	$475,000.00
Current Region	NORTH CENTRAL REGIONAL OFFICE	Total Amount Paid	$475,000.00
Current Institution	Pekin (FCI)	Description	SETTLED FTCA CLAIM
Incident Region	NORTH CENTRAL REGIONAL OFFICE	Description	SETTLED FTCA CLAIM
Incident Institution	Pekin (FCI)	Court Fee Paid ?	No
Monetary Relief Sought	$	Pro Se ?	No
Estimated Amount	$		
Office	Peoria	Date Received	02/02/2012
Jurisdiction	CENTRAL DISTRICT OF ILLINOIS		
Responsible Legal Office	St. Louis, MO	Date Filed	11/10/2011

Estimated Amount	$ -	Current Owner	HEATHER MACCONNELL
Estimated Outcome	No evaluation can be made at this time	Case Status	Closed
		Timeline Status	Closed
		Monthly Report Status	SETTLEMENTS/AWARDS
		Private Case	No

Long Description	28:1331 FEDERAL QUESTION: BIVENS ACT & FTCA CLAIM ADDED
Further Case Classification	
Comments	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICE OF ILLINOIS
EASTERN DIVISION

FILED
FEB 16 2012
THOMAS G. BRUTON
CLERK, U.S. DISTRICT COURT

THOMAS CUNNINGHAM,

Plaintiff,

v.

THE UNITED STATES OF AMERICA, THE UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, AND METROPOLITAN CORRECTIONAL CENTER,

Defendants.

No.

12-cv-01115
Judge Ruben Castillo
Magistrate Judge Morton Denlow

COMPLAINT

Plaintiff, Thomas Cunningham, by his attorneys, Cheely, O'Flaherty & Ayres, complaining of Defendants herein, states as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and the laws of the United States and is premised on the acts and omissions of defendants acting under the color of federal law as well as pursuant to 28 U.S.C. §1346(b)(1) in that this is a claim against The United States of America, for money damages, accruing on or after Jan. 1, 1945, for injury and personal injury caused by the negligent and wrongful acts and omissions of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States America, if a private person, would be liable to the Plaintiff in accordance with the law of the place where the act or omission occurred.

2. Jurisdiction founded upon the federal law is proper in that this action is premised upon causes of action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, et. Seq., as well as pursuant to the Eighth and Fourteenth Amendments to the Constitution of the United States of America.

3. This is an action to redress under the color of statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured to Plaintiff by the Eighth and Fourteenth Amendments to the Constitution of the United States, the Federal Tort Claims Act, and arising under the laws and statutes of the State of Illinois.

4. Venue is appropriate in this Court pursuant to 28 U.S.C. 1391(e)(3) in that this action is against the United States of America and an agent thereof, the acts and omissions of Defendants took place in the County of Cook in the State of Illinois and the plaintiff currently resides in the County of Cook in the State of Illinois.

5. Pursuant to the Federal Tort Claims Act, Plaintiff attempted to exhaust his claim administrative channels, but was initially thwarted in said attempts by MCC authorities, who by their actions prevented and made such exhaustion impossible. MCC was well aware of the incident, which is on information and belief was investigated by the institutional defendants as referenced by the declaration of Vincent E. Shaw. Thereafter, Plaintiff filed a timely administrative grievance, which was formally denied on or about August 23, 2011 (Exhibit A).

6. Plaintiff has been deprived of a right secured by the Constitution and the laws of the United States and State of Illinois.

7. Plaintiff has been deprived of his rights by defendants acting under color of federal law.

PARTIES

8. At all times relevant, plaintiff Thomas Cunningham was an inmate at the Metropolitan Correctional Center ("MCC") in the County of Cook in the State of Illinois.

9. On information and belief, at all times relevant, The United States of America was and is a sovereign entity named herein pursuant to the FTCA.

10. On information and belief, at all times relevant, The United States Department of Justice was an agency of the United States of America and as such, was and still is a sovereign entity named pursuant to the FTCA.

11. On information and belief, at all times relevant, the Federal Bureau of Prisons ("BOP") was a division or agency of the United States Department of Justice and as such, was and is a sovereign entity named herein pursuant to the FTCA.

12. Upon Information and belief, the Metropolitan Correctional Center was and is a division or agency of the BOP and as such, was and still is a sovereign entity named herein pursuant to the FTCA.

13. Upon information and belief, D. DePaul was a correctional officer/security guard employed by and acting as agent of the above named defendants at the MCC, and as such, was charged with the custody and care of Plaintiff while he was an inmate at the MCC, and is sued herein in his capacity as an individual and agent of the above defendants.

STATEMENT OF FACTS

14. On or about April 9, 2008, Plaintiff was incarcerated at the MCC with a prisoner identification number of 0123-424.

15. On or about April 9, 2008, D. DePaul was on duty at the MCC and charged with Plaintiff's custody and care.

16. On or about April 9, 2008, while in solitary confinement at the MCC, Plaintiff peacefully requested a law book by putting his arm out of the cuff point/food slot of his cell, at which point D. DePaul grabbed and twisted Plaintiff's arm and beat Plaintiff through the cuff point/food slot of his cell.

17. Defendant DePaul's actions were undertaken intentionally and with malice, and with a reckless and total disregard for the constitutional and common law rights of Plaintiff.

18. Defendant DePaul's actions were totally without justification or cause.

19. Defendant DePaul's actions constituted an assault and battery under the laws of the State of Illinois.

20. Defendant DePaul's actions constituted cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution.

21. As a direct result of Defendant DePaul's actions, Plaintiff sustained physical injury, pain and suffering, and emotional suffering and anguish, for which he was treated medically at the MCC.

COUNT I AGAINST THE UNITED STATES OF AMERICA, THE UNITED STATES DEPARTMENT OF JUSTICE, THE FEDERAL BUREAU OF PRISONS AND THE METROPOLITAN CORRECTIONAL CENTER PURSUANT TO THE FTCA

22. Plaintiff realleges paragraphs 1-22 as though fully set forth herein.

23. At all times relevant, Plaintiff was under the custody and care of MCC through its agent, D. DePaul.

24. On or about April 9, 2008, through the actions of their agent, servant or employee DePaul, the above defendants were guilty of negligence, as well as assault and battery under Illinois law.

25. By reason of foregoing, Plaintiff has been damaged physically and emotionally for which he seeks money damages in a sum to be determined by the trier of fact.

WHEREFORE, Plaintiff prays for judgment in his favor and against Defendants for compensatory damages and for such other relief as this Court deems just.

Respectfully Submitted,



One of the Attorneys for the Plaintiff

Stephen R. Ayres
CHEELY, O'FLAHERTY & AYRES
19 South LaSalle Street
Suite 1203
Chicago, IL 60603
(312) 853-8719

P:\7777-003.001\34310_2

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

AUG 23 2011

Thomas Cunningham
Register No. 01293-424
Chicago MCC
71 West Van Buren Street
Chicago, IL 60605

Re: Administrative Claim Number TRT-NCR-2010-02828
Personal Injury: $250,000.00

CERTIFIED NUMBER 7011 0470 0002 4814 3354

Dear Mr. Cunningham:

Your above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six months after the date of mailing of this notification.

Sincerely,

Richard W. Schott
Regional Counsel

EXHIBIT
tabbies
A

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 5.1.1
Eastern Division

Thomas Cunningham

Plaintiff,

v.

Case No.: 1:12–cv–01115
Honorable Joan B. Gottschall

The United States of America, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Saturday, January 19, 2013:

MINUTE entry before Honorable Joan B. Gottschall: Pursuant to Stipulation for Compromise Settlement and Release [24], this action is dismissed with prejudice. Civil case terminated. Mailed notice(rj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMAS CUNNINGHAM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 12 C 1115
	)	
THE UNITED STATES OF AMERICA,	)	Judge Gottschall
	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between the undersigned plaintiff and the United States of America (collectively, the "parties") as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action, and that gave rise to plaintiff's administrative claim no. TRT-NCR-2010-02828, under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release ("Stipulation").

2. The United States of America agrees to pay the sum of $50,000 (fifty thousand dollars) (hereinafter "Settlement Amount"), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators, or assigns hereby agree to accept the Settlement Amount in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, and that gave rise to plaintiff's administrative claims no. TRT-NCR-2010-02828, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators, or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Stipulation is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. Plaintiff hereby dismisses, with prejudice, the following actions filed in the United States District Court for the Northern District of Illinois: Case No. 12 C 1115 (N.D. Ill.) and Case No. 08 C 4259 (N.D. Ill.).

7. The persons signing this Stipulation warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. The undersigned each acknowledge and represent that this Stipulation contains all the terms and conditions of this compromise settlement, that no promise or representation not contained in this Stipulation has been made to them, and that this Stipulation contains the entire understanding between the parties and contains all terms and conditions pertaining to the compromise and settlement of the disputes referenced herein.

9. The parties agree that this Stipulation and any additional documents relating to this settlement, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 3 day of ~~December 2012.~~ January 2013

DAVID R. LIDOW
Assistant United States Attorney

Executed this 18th day of December 2012.

THOMAS CUNNINGHAM
Plaintiff

Executed this 31st day of December 2012.

STEPHEN R. AYRES
HEYL, ROYSTER, VOELKER, & ALLEN
19 South LaSalle Street
Suite 1203
Chicago, Illinois 60603
Counsel for plaintiff

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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Page 1188 of 2033

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of the Freedom of Information and Privacy Act

E-FILED
Friday, 25 May, 2012 04:46:18 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

DANIEL HUDSON,	)	
	)	
Plaintiff,	)	Case No.:
	)	
v.	)	Judge:
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

COMPLAINT

1. Plaintiff DANIEL HUDSON (hereinafter "PLAINTIFF") brings this suit under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671-80.

2. Exclusive jurisdiction in this Court is pursuant to 28 U.S.C. §1346(b) because the Defendant is the United States of America.

3. Venue is proper in this Court because PLAINTIFF is a resident of Decatur, Macon County, Illinois in the Central District of Illinois – Urbana Division.

4. Defendant United States of America (hereinafter "DEFENDANT") is a named Defendant pursuant to 38 U.S.C. §7316 because the medical malpractice alleged herein was a result of medical treatment the PLAINTIFF received from employees and/or agents of Federal Prison Camp Leavenworth in Leavenworth, Kansas (hereinafter "LEAVENWORTH") including Dr. Kristine Aulepp, DO (hereinafter "AULEPP") and Donald Satterfield, PA (hereinafter "SATTERFIELD").

5. DEFENDANT is sued as principal and, as alleged herein, all of the acts performed by DEFENDANT'S agents and employees, including SATTERFIELD and AULEPP, were performed within the course and scope of their authority and employment and/or agency and

with the consent of DEFENDANT, making DEFENDANT, United States of America, liable for all of their actions and inactions detailed below pursuant to the Federal Tort Claims Act, 26 U.S.C. §§ 1346(b) and 2671-80.

6. In accordance with 28 U.S.C. §2401(b) and §2675(a), on or about May 4, 2011, PLAINTIFF did timely serve an administrative claim for damages under the provisions of the Federal Tort Claims Act upon the U.S. Department of Justice, Federal Bureau of Prisons. On or about November 30, 2011, PLAINTIFF received a correspondence from the U.S. Department of Justice, Federal Bureau of Prisons in the form of a Final Denial of Claim denying PLAINTIFF'S claim.

7. At all times material to this Complaint, the physicians, physicians assistants, nurses, and staff of LEAVENWORTH who provided medical care to PLAINTIFF, including, but not limited to SATTERFIELD and AULEPP, were employees and/or agents of LEAVENWORTH and acted under color of the statutes, customs, ordinances, policies, and usage of the U.S. Department of Justice and of the United States of America.

8. All acts or omissions alleged here in occurred in Leavenworth, Kansas. Therefore, the law of the State of Kansas determines liability.

9. At all times mentioned herein the physicians, physicians assistants, nurses, and staff of LEAVENWORTH were practicing physicians and/or medical doctors, and/or physicians assistants and/or medical specialists, and/or nurses, and/or certified technicians, without being limited thereto, in Leavenworth County, Kansas, duly licensed to practice medicine and/or to provide medical care and treatment under the laws of the State of Kansas. Each of said physicians, physicians assistants, nurses, and staff of LEAVENWORTH at all times mentioned herein held themselves out to the general public and to PLAINTIFF as possessing that degree of

learning and skill ordinarily possessed and used by members of the same profession and school of medicine in which they practice and under like circumstances.

STATEMENT OF FACTS

10. At all times relevant to this Complaint, PLAINTIFF was an inmate in the Federal Prison System housed at Federal Prison Camp Leavenworth, in Leavenworth, Kansas.

11. On July 18, 2008, PLAINTIFF presented to Health Services at Federal Prison Camp Leavenworth (hereinafter "Health Services") and complained to SATTERFIELD of swelling in his left calf for the prior four weeks. SATTERFIELD counseled PLAINTIFF to reduce his weightlifting and running and to elevate his legs as needed.

12. On February 2, 2009, PLAINTIFF presented to Health Services and complained to SATTERFIELD of shortness of breath with onset six to twelve months prior. SATTERFIELD orders a chest x-ray to be taken.

13. On February 13, 2009, PLAINTIFF presented to Health Services and complained to SATTERFIELD of shortness of breath, swelling in his legs, and generally not feeling well. SATTERFIELD prescribed Hydrochlorothiazide tables.

14. On February 22, 2009, PLAINTIFF presented to Health Services and complained to Randal Gilliam, EMT that he felt like he was going to faint. Gilliam told PLAINTIFF to return to sick call the following morning. Randal Gilliam was acting under the general supervision of AULEPP, and AULEPP cosigned the record of this encounter.

15. On February 23, 2009, as instructed, PLAINTIFF returned to sick call at Health Service and there complained to SATTERFIELD of near fainting the night before, shortness of breath, sweats, and weakness. PLAINTIFF also complained of a sharp pain in his inner right thigh. SATTERFIELD ordered blood tests.

16. On February 26, 2009, PLAINTIFF presented to Health Services and complained to Donna Strong, RN of sharp pain in his right knee and calf for the preceding three days. PLAINTIFF was prescribed Ibuprofen, given an ace bandage and told to return to Health Services the following day. Donna Strong was acting under the general supervision of AULEPP, and AULEPP cosigned the record of this encounter.

17. As requested, on February 27, 2009, PLAINTIFF returned to Health Services and complained to SATTERFIELD of right leg and thigh pain for the past five days. SATTERFIELD told PLAINTIFF to ice, rest and wrap with an ace bandage his right leg.

18. On March 18, 2009, PLAINTIFF presented to Health Services and complained to SATTERFIELD of continued breathing problems and hemoptysis, coughing up blood. SATTERFIELD prescribed antibiotics.

19. On March 31, 2009, PLAINTIFF returned to Health Services and complained to SATTERFIELD of a cough, shortness of breath and cold or flu symptoms. PLAINTIFF stated that his respiratory problems seemed initially to improve then worsen with the antibiotics prescribed at the last encounter. SATTERFIELD ordered lab work.

20. On April 24, 2009, PLAINTIFF was once again at Health Services complaining to SATTERFIELD of continued shortness of breath, a chronic cough and leg swelling. PLAINTIFF also stated that he could no longer do exercise. SATTERFIELD observed that PLAINTIFF had developed a systolic murmur. SATTERFIELD refilled PLAINTIFF'S prescription for Hydrochlorothiazide.

21. On April 30, 2009, PLAINTIFF presented to Health Services and complained to SATTERFIELD of a constant, sharp, mid-sternal chest pain that had started several days prior. PLAINTIFF also indicated that his appetite was decreased, he was suffering from insomnia, he

had increased leg swelling and worsened shortness of breath. SATTERFIELD took no new action.

22. On May 4, 2009, PLAINTIFF presented at Health Services and complained to SATTERFIELD of right groin pain with onset on May 1. PLAINTIFF indicated that the deep, crushing, stabbing and unbearable pain was not the result of an injury and that his right leg was still swollen. SATTERFIELD determined that PLAINTIFF'S pain was the late effect of a sprain or strain and prescribed Naproxen, an over-the-counter pain reliever.

23. On May 8, 2009, PLAINTIFF presented at Health Services and indicated to SATTERFIELD that he wanted the results of a May 6 EKG. SATTERFIELD arranged a cardiology consult for PLAINTIFF that same day.

24. Dr. William McCollum, MD provided that consultation and ordered a V-Q Scan which demonstrated significant bilateral pulmonary emboli. PLAINTIFF was diagnosed as having venous thombrosis and pulmonary embolism and sent to Cushing Hospital for evaluation and therapy.

25. The total damages at issue exceed the sum of $75,000.00 and, more specifically, PLAINTIFF makes claim for a total of $20,000,000.00 as set forth in the Form 95 administrative filing, and for such other and further relief as the Court deems just and equitable in the premises.

FIRST CAUSE OF ACTION
Medical Malpractice/Negligence: SATTERFIELD

26. PLAINTIFF refers to paragraphs 1 through 25 of this Complaint and incorporates them into this cause of action as though fully set fourth herein.

27. SATTERFIELD owed PLAINTIFF a duty of care and was required to meet or exceed a certain standard of care to protect PLAINTIFF from injury.

28. In providing medical care and treatment to PLAINTIFF, SATTERFIELD had a duty to possess and use that degree of learning and skill ordinarily possessed and used by physician assistants under like circumstances, and in applying this skill and learning, SATTERFIELD was required to use ordinary care and diligence.

29. Between July 18, 2008 and May 8, 2009, defendant SATTERFIELD failed to use that degree of learning and skill ordinarily possessed and used by physician assistants under like circumstances in the treatment of PLAINTIFF thereby breaching the duty owed to PLAINTIFF and/or deviating from the applicable standard of care in one or more of the following respects:

a. Failed to timely and appropriately appreciate and react to signs and symptoms of PLAINTIFF'S venous thombrosis;

b. Failed to timely and appropriately treat PLAINTIFF'S venous thombrosis;

c. Failed to possess and use knowledge of the signs and symptoms of venous thombrosis for PLAINTIFF'S benefit;

d. Failed to timely and appropriately obtain appropriate consultation with a qualified physician to treat PLAINTIFF'S venous thombrosis;

e. Failed to timely and appropriately appreciate and react to signs and symptoms of PLAINTIFF'S pulmonary embolism;

f. Failed to timely and appropriately treat PLAINTIFF'S pulmonary embolism;

g. Failed to possess and use knowledge of the signs and symptoms of pulmonary embolism for PLAINTIFF'S benefit; and

h. Failed to timely and appropriately obtain appropriate consultation with a qualified physician to treat PLAINTIFF'S pulmonary embolism.

30. As a proximate result of one or more of the negligent acts and/or omissions, each of which constitutes a breaches of the applicable standard of care by SATTERFIELD, PLAINTIFF was injured and sustained pecuniary damages including, but not limited to, conscious pain and suffering, medical bills, lost earning capacity and loss of normal life.

SECOND CAUSE OF ACTION
Medical Malpractice/Negligence: AULEPP

31. PLAINTIFF refers to paragraphs 1 through 25 of this Complaint and incorporates them into this cause of action as though fully set fourth herein.

32. AULEPP owed PLAINTIFF a duty of care and was required to meet or exceed a certain standard of care to protect PLAINTIFF from injury.

33. In providing medical care and treatment to PLAINTIFF, AULEPP had a duty to possess and use that degree of learning and skill ordinarily possessed and used by osteopathic physicians practicing family medicine under like circumstances, and in applying this skill and learning, AULEPP was required to use ordinary care and diligence.

34. Between July 18, 2008 and May 8, 2009, AULEPP failed to use that degree of learning and skill ordinarily possessed and used by osteopathic physicians practicing family medicine under like circumstances in the treatment of PLAINTIFF thereby breaching the duty owed to PLAINTIFF and/or deviating from the applicable standard of care in one or more of the following respects:

a. Failed to timely and appropriately appreciate and react to signs and symptoms of PLAINTIFF'S venous thombrosis;

b. Failed to timely and appropriately treat PLAINTIFF'S venous thombrosis;

c. Failed to possess and use knowledge of the signs and symptoms of venous thombrosis for PLAINTIFF'S benefit;

d. Failed to timely and appropriately obtain appropriate consultation with a qualified physician to treat PLAINTIFF'S venous thombrosis;

e. Failed to timely and appropriately appreciate and react to signs and symptoms of PLAINTIFF'S pulmonary embolism;

f. Failed to timely and appropriately treat PLAINTIFF'S pulmonary embolism;

g. Failed to possess and use knowledge of the signs and symptoms of pulmonary embolism for PLAINTIFF'S benefit; and

h. Failed to timely and appropriately obtain appropriate consultation with a qualified physician to treat PLAINTIFF'S pulmonary embolism.

35. As a proximate result of one or more of the aforesaid negligent acts and/or omissions, each of which constitutes a breach of the applicable standard of care by AULEPP, PLAINTIFF was injured and sustained pecuniary damages including, but not limited to, conscious pain and suffering, medical bills, lost earning capacity and loss of normal life.

WHEREFORE, PLAINTIFF prays for judgment against DEFENDANT as follows:

1. For $20,000,000.00 in damages for:

    a. Medical, incidental, hospital and service expenses,

    b. Future care and treatment expenses,

    c. Loss of earnings and diminution of earning capacity,

    d. Loss of normal life, and

    e. Diminished life expectancy;

2. For costs of suit incurred herein and prejudgment interest; and

3. For such other and further relief as the Court deems just and proper.

Dated: May 25, 2012

DANIEL HUDSON

By: s/ Thomas G. Gardiner
One of his Attorneys

Thomas G. Gardiner
Gardiner Koch Weisberg & Wrona
53 West Jackson Boulevard, Suite 950
Chicago, Illinois 60604
(312) 362-0000
Atty. No. 29637

*JS 44 (Rev. 11/04)

CIVIL COVER SHEET

E-FILED
Tuesday, 29 May, 2012 11:15:11 AM
Clerk, U.S. District Court, ILCD

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

DANIEL HUDSON

(b) County of Residence of First Listed Plaintiff Macon County, IL
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Thomas G. Gardiner, 53 W. Jackson Blvd., Chicago, IL 60604, 312.362.0000

DEFENDANTS

UNITED STATES OF AMERICA

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☒ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881		☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	PROPERTY RIGHTS	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 820 Copyrights	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 830 Patent	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	☐ 840 Trademark	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other		☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General		☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty		☐ 871 IRS Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other			☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights			☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity)**:
Federal Tort Claims Act, 28 U.S.C. §1346(b)

Brief description of cause:
Medical malpractice by employees of the United States of America acting in the scope of their employment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 05/25/2012

SIGNATURE OF ATTORNEY OF RECORD s/ Thomas G. Gardiner

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DANIEL HUDSON,

Plaintiff,

vs. Case No. 12-3258-JAR-KGS

UNITED STATES OF AMERICA,

Defendant.

STIPULATION OF DISMISSAL PURSUANT TO FED. R. CIV. P. 41(a)(1)(A)(ii)

Plaintiff Daniel Hudson, by and through his attorney John R. Wrona of Gardiner, Koch, Weisberg & Wrona, and Defendant United States of America by and through Barry R. Grissom, United States Attorney for the District of Kansas, and Thomas E. Beall, Assistant United States Attorney, hereby stipulate the above-captioned case has been settled, and therefore should be dismissed with prejudice. It is further stipulated that each party shall be responsible for its own costs and attorney's fees incurred in the above-captioned case.

IT IS SO STIPULATED.

s/ John R. Wrona
JOHN R. WRONA
Gardiner, Koch, Weisberg & Wrona
53 West Jackson Blvd., Suite 950
Chicago, IL 60604
Telephone: (312) 362-0000
Facsimile: (312) 362-0440
E-mail: jwrona@gkwwlaw.com
Attorney for Plaintiff

Executed this 14th day of January, 2015.

BARRY R. GRISSOM
United States Attorney
District of Kansas

s/ Thomas E Beall
THOMAS E. BEALL
Assistant United States Attorney
Ks. S.Ct. No. 19929
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Topeka, Kansas 66683
Telephone: (785) 295-2850
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E-mail: thomas.beall@usdoj.gov
Attorneys for Defendant

Executed this 14th day of January, 2015.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 14, 2015, the foregoing document was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Micah Jon Hughes, mhughes@gkwwlaw.com, Attorney for Plaintiff
Ronald P. Pope, ron@ralstonpope.com, Attorney for Plaintiff
Thomas B. Diehl, tom@ralstonpope.com, Attorney for Plaintiff
Thomas Gardiner, tgardiner@gkwwlaw.com, Attorney for Plaintiff
John R. Wrona, jwrona@gkwwlaw.com, Attorney for Plaintiff

s/ Thomas E. Beall
THOMAS E. BEALL
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DANIEL HUDSON,

Plaintiff,

v. Civil Action No. 12-3258-DDC-KGS

UNITED STATES OF AMERICA,

Defendant.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF
FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned Plaintiff Daniel Hudson (meaning any person, other than Defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of $500,000.00, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff or his guardians, heirs, executors,

administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which he may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event Plaintiff is a minor or a legally incompetent adult, Plaintiff must obtain Court approval of the settlement at his expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event Plaintiff fails to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for five hundred thousand dollars ($500,000.00) and made payable to Daniel Hudson (Plaintiff) and Gardiner, Koch, Weisberg, and Wrona (Plaintiff's Attorney). The check will be mailed to Plaintiff's attorney at the following address: Gardiner, Koch, Weisberg, and Wrona, 53 W. Jackson Blvd., Suite 950, Chicago, IL 60604. Plaintiff's attorney agrees to distribute the settlement proceeds among Plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 7th day of October, 2014.

THOMAS E. BEALL
Assistant United States Attorney
District of Kansas
Attorney for Defendant United States of America

Executed this 25th day of September, 2014.

JOHN R. WRONA
Gardiner, Koch, Weisberg, and Wrona
Attorney for Plaintiff Daniel Hudson

Executed this 18 day of September, 2014.

DANIEL HUDSON
DOB: 07-18-1972
SSN: 354-80-7805
Plaintiff

Page 1206 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Page 1214 of 2033

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello

Civil Action No. 11-cv-02484-CMA-BNB

BENJAMIN GODFREY CHIPPS, SR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to and in accordance with Fed. R. Civ. P. 41(a)(i)(A)(ii) and the Stipulation for Dismissal (Doc. # 54), signed by the attorneys for the parties hereto, it is

ORDERED that this case is DISMISSED WITH PREJUDICE, each party to pay his or its own costs and attorney fees. It is

FURTHER ORDERED that the Final Trial Preparation Conference, set for January 24, 2014, at 10:00 AM, and the five-day trial to the Court, set to commence January 27, 2014, are VACATED.

DATED: January 15, 2014

BY THE COURT:

Christine M. Arguello

CHRISTINE M. ARGUELLO
United States District Court Judge

E-FILED
Monday, 20 May, 2013 05:23:45 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TONY HILDEBRAND,

Plaintiff,

v.

UNITED STATES OF AMERICA, ASSISTANT WARDEN JONES, WARDEN RICARDO RIOS, DR. SCOTT MOATS, ASSISTANT HEALTH SERVICES ADMINISTRATOR DILTELMAN, HEALTH SERVICES ADMINISTRATOR FREDDY GARRIDO, and AS-YET UNIDENTIFIED FEDERAL BUREAU OF PRISON EMPLOYEES,

Defendants.

JURY TRIAL DEMANDED

COMPLAINT

NOW COMES Plaintiff, TONY HILDEBRAND, by and through his attorneys, Smith, Johnson & Antholt, LLC, and complaining of Defendants, UNITED STATED OF AMERICA, WARDEN RICARDO RIOS, ASSISTANT WARDEN JONES, DR. SCOTT MOATS, ASSISTANT HEALTH SERVICES ADMINISTRATOR DILTELMAN, HEALTH SERVICES ADMINISTRATOR FREDDY GARRIDO and AS-YET UNIDENTIFIED FEDERAL BUREAU OF PRISON EMPLOYEES as follows:

Introduction

1. This civil action is brought pursuant to the Federal Tort Claims Act ("FTCA"); in addition, this action is brought pursuant to *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) ("Bivens"), to redress the deprivation under color of law of Plaintiff's rights as secured by the United States Constitution.

Jurisdiction & Venue

2. This Court has jurisdiction of the action pursuant to FTCA, 28 U.S.C. § 2671 *et seq.*; 28 U.S.C. Sections 1331 and 1332; and *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971), because the case arises under the Constitution and law of the United States.

3. A Claim Form 95 was timely filed on the Bureau of Prisons and was denied on March 29, 2013. A copy is attached as Exhibit A.

4. Venue is proper under 28 U.S.C. § 1391(b). The events giving rise to Plaintiff's claims occurred within this judicial district; in addition, all of the Defendants are employed within this judicial district.

Parties

5. Plaintiff Tony Hildebrand was at all times mentioned in this complaint a federal prisoner in the custody of the United States Attorney General. Plaintiff presently resides in Lake in the Hills, Illinois.

6. Defendant Dr. Scott Moats is and was at all times mentioned in this complaint a citizen of Illinois and an employee of the United States Department of Justice, Federal Bureau of Prisons and assigned to the Federal Correctional

Institution at Pekin, Illinois. Dr. Moats is the Medical Director and was responsible for Plaintiff's medical care. Dr. Moats engaged in the conduct complained of in the scope of his employment and under color of law. He is sued in his individual capacity.

7. Defendant Mr. Diltelman is and was at all times mentioned in this complaint a citizen of Illinois and an employee of the United States Department of Justice, Federal Bureau of Prisons and assigned to the Federal Correctional Institution at Pekin, Illinois. Defendant Diltelman is the Assistant Health Services Administrator and was responsible for Plaintiff's medical care. Defendant Diltelman engaged in the conduct complained of in the scope of his employment and under color of law. He is sued in his individual capacity

8. Defendant Ricardo Rios is and was at all times mentioned in this complaint a citizen of Illinois and an employee of the United States Department of Justice, Federal Bureau of Prisons and assigned to the Federal Correctional Institution at Pekin, Illinois. Defendant Rios is the Warden of FCI-Pekin, he engaged in the conduct complained of in the scope of his employment and under color of law. He is sued in his individual capacity and is sued in his individual capacity.

9. Assistant Warden Jones is and was at all times mentioned in this complaint a citizen of Illinois and an employee of the United States Department of Justice, Federal Bureau of Prisons and assigned to the Federal Correctional Institution at Pekin, Illinois. Defendant Jones is the Assistant Warden of FCI-

Pekin, she engaged in the conduct complained of in the scope of his employment and under color of law. She is sued in her individual capacity.

10. Defendant Freddy Garrido is and was at all times mentioned in this complaint a citizen of Illinois and an employee of the United States Department of Justice, Federal Bureau of Prisons and assigned to the Federal Medical Center at Lexington, Kentucky. Defendant Freddy Garrido is the Health Services Administrator and was responsible for Plaintiff's medical care, he engaged in the conduct complained of in the scope of his employment and under color of law. He is sued in his individual capacity.

11. Defendant United States of America, through the United States Department of Justice, Federal Bureau of Prisons, is responsible for the overall operations of FCI-Pekin and for the medical care provided to Plaintiff.

Background

12. On or about April 22, 2011, Plaintiff injured his left knee while in federal custody awaiting his sentencing and designation to a federal correctional facility.

13. Following the injury, Plaintiff's knee swelled and he suffered from severe pain, inhibiting his ability to walk or bear weight on his left leg.

14. At the time, Plaintiff was provided with a cloth brace for his knee. This brace did not provide sufficient support to prevent his knee from buckling.

15. The initial orthopedic evaluation of the injury found, "significant internal derangement of the left knee that is questionably a locked bucket-handle tear of the meniscus."

16. An MRI confirmed the injury, finding (1) an anterior cruciate ligament tear; (2) bucket-handle tear of the posterior horn and body of the lateral meniscus with a flipped fragment within the intercondylar notch and adjacent to the anterior horn of the lateral meniscus; (3) horizontal undersurface tear of the posterior horn of the medial meniscus; and (4) knee joint effusion.

17. On June 23, 2011, Dr. Puccinelli, the physician who conducted the orthopedic evaluation, gave the following plan of care, "knee arthroscopy with ACL reconstruction with menisectomy, possible Chondroplasty of the left knee."

18. Two weeks later, on or about July 6, 2011, Plaintiff was transferred to the Federal Correctional Institution in Pekin, Illinois.

19. On July 11, 2011, Plaintiff was evaluated by Defendant Dr. Scott Moats, who also had access to the prior medical reports that were transferred with Plaintiff.

20. Dr. Moats placed Plaintiff on restricted medical status due to the "ongoing evaluation of acute left kneed injury."

21. Upon arrival, and continuing thereafter, Plaintiff began requesting medical treatment. When his requests for treatment were ignored or denied, Plaintiff submitted grievances. Each of those grievances was denied.

22. Plaintiff also began to experience significant pain in his right knee due to the increased pressure on that knee and multiple falls. His complaints and requests for treatment for that knee were all denied and/or ignored.

23. Plaintiff requested that the cloth brace originally issued to him be replaced with a proper orthopedic brace to stabilize his left knee and ease the pressure on his right knee. Those requests were all denied and/or ignored for more than three months.

24. Plaintiff was forced to walk each step in fear that his knee would buckle, causing him to lose balance, fall, and sustain further injuries. This fear had been realized on multiple occasions.

25. Despite his numerous requests, Plaintiff was not seen by the facility's orthopedic specialist, Dr. Clark, for two months.

26. On September 7, 2011, Dr. Clark evaluated Plaintiff and agreed with Dr. Puccinelli's finding that Plaintiff's condition required surgical intervention.

27. Defendant Dr. Moats, however, denied Plaintiff the necessary surgery. Plaintiff's attempts to appeal that decision were denied.

28. Defendant Mr. Diltelman, the Assistant Health Services Administrator, was also aware of Plaintiff's condition, ongoing complaints, and the failure to provide the necessary medical treatment including that Plaintiff regularly spoke directly to Mr. Diltelman regarding his ongoing condition, pain and the need for medical treatment.

29. When Plaintiff reached out to Assistant Warden Jones about the ongoing denials of medical treatment and his worsening condition, her response was that BOP would not provide the necessary surgery because Plaintiff's condition was not life threatening.

30. Not until approximately late October, 2011 was Plaintiff finally provided with an orthopedic brace for his knee. While the new brace helped to prevent future falls, it did not lessen the pain or treat the injuries now incurred to both knees.

31. Defendants were on notice that the passing time without the necessary surgery directly decreased the chances that any eventual surgery could successfully treat the injury.

32. Additionally, on November 14, 2011, correspondence to Warden Rios and Dr. Moats on Plaintiff's behalf put the warden directly on notice of the failure to provide necessary medical treatment. The notice to Warden Rios also included a description of Plaintiff's pain and suffering and that further delay would likely lead to further injury and potentially permanent physical disability.

33. Throughout his six months at Pekin, Plaintiff suffered from severe pain. Despite his complaints and requests, Plaintiff was not treated with anything stronger than ibuprofen.

34. Throughout his six months at Pekin, Plaintiff's left knee injury did not improve and the condition of his right knee deteriorated. Plaintiff continued to

make requests for the necessary medical treatment for both knees. All of those requests were denied.

35. BOP health services records document that medical staff were on notice that the ibuprofen was not addressing Plaintiff's pain as early as September 2011.

36. In Plaintiff continued to complain about the pain and his inability to function, as well his fear that further injury was being caused to his knee, directly to Dr. Moats and Mr. Diltelman, as well as other correctional and medical staff.

37. On January 12, 2012, over eight months since the injury occurred, Plaintiff was transferred to the Federal Medical Center in Lexington, Kentucky.

38. At the Federal Medical Center, Defendant Health Services Administrator Freddy Garrido was responsible for obtaining the necessary medical treatment for Plaintiff.

39. Defendant Health Services Administrator Freddy Garrido was aware that Plaintiff was transferred to their facility due to his knee injury and the need for surgery.

40. Despite this knowledge, Mr. Hildebrand was not given the orthopedic evaluation required for the surgery for another three months.

41. With appropriate and timely surgical intervention, an injury such as Plaintiff's can be repaired and use of the knee regained.

42. Because Plaintiff did not receive timely necessary treatment at either Pekin or the Federal Medical Center, the injury to his knee became irreparable.

43. On April 16, 2012, Mr. Hildebrand was evaluated by Dr. Darren Johnson at the University of Kentucky who stated, among other things:

> The main thing with his knee is he has had his lateral meniscus sitting in the middle of the knee since May of last year. I am not sure of my ability to fix it, based on the fact that is has been in the middle of his knee at least from this MRI scan it was at that time. Obviously we will do everything we can to save it but his entire lateral meniscus is sitting there for the last 11 months.

44. The surgery was finally performed on June 12, 2012, over a year after the first MRI was taken and Dr. Puccinelli recommended surgery.

45. As Dr. Johnson had feared, due to the "chronicity of approximately 12 months of being bucketed, [he] could not do a meniscus repair" and instead was forced to "perform[] a near-total lateral meniscectomy of approximately 90% of the meniscus."

46. It is well established and known that there is a direct relationship between the amount of meniscus tissue that is surgically removed and the load distribution across the knee. Therefore, since the majority of tissue was removed (90%), Plaintiff's knee is now considerably less able to sustain the load of walking, running, and other activities of everyday life. This is especially problematic since Mr. Hildebrand's previously work experience has been in the labor field—specifically, the heating and cooling industry.

47. In addition, with uneven load distribution, degeneration of his knee joint will happen at a faster pace than it would with an intact meniscus. Thus,

whereas Mr. Hildebrand is already suffering from arthritis, he will likely also have to have a knee replacement at a much younger age than normal.

48. As a result of the unnecessary delay in appropriate and necessary medical treatment, at the age of thirty-six, Mr. Hildebrand will have to live the remainder of his natural life with a permanent disability.

Count I: Failure to Provide Medical Attention
Eighth Amendment – *Bivens* Action

49. Each of the foregoing paragraphs is incorporated as if fully restated herein

50. As described more fully above, the injury to Plaintiff's his knee and the resulting pain constituted objectively serious and obvious medical needs.

51. Defendants, acting under color of law, were deliberately indifferent to Plaintiff's condition; they knew of the substantial risk of serious harm under which he was placed, and they consciously disregarded that risk by failing to take timely measures to respond to it.

52. Defendants' deliberate indifference to Plaintiff's serious medical need constituted the unnecessary and wanton infliction of pain and injury forbidden by the Eighth Amendment of the United States Constitution.

53. Defendants' conduct caused Plaintiff injuries, including physical injury and emotional distress.

Count II: Medical Malpractice
Federal Tort Claims Act

54. Each of the foregoing paragraphs is incorporated as if fully restated herein.

55. At all relevant times hereto, Defendants were under a duty to exercise the skill and care that was expected by physicians and healthcare providers in treatment the condition of Plaintiff.

56. Notwithstanding its duty to provide necessary medical treatment and to exercise the skill and care that was expected by physicians and healthcare providers, Defendant United States of America, by and through its agents and employees, were negligent in the treatment of Plaintiff's condition in one or more of the of the following ways: (1) failed to provide the necessary surgical intervention for Plaintiff's left knee; (2) failed to diagnose or treat the injury to Plaintiff's right knee; and (3) failed to provide necessary pain management.

57. That as a direct and proximate cause of each of the aforesaid acts of negligence and/or omissions of the Defendant United States of America, by and through its agents and employees, Plaintiff suffered permanent disability to his left knee, pain and injury to his right knee, physical pain and suffering, and emotional distress.

58. Attached as Exhibit B is the 2-6222 report of the reviewing health professional and supporting affidavit.

Count III: Negligence
Federal Tort Claims Act

59. Each of the foregoing paragraphs is incorporated as if fully restated herein.

60. At all relevant times hereto, each of the Defendants were under a duty to exercise reasonable care and caution to prevent injury and wanton pain to Plaintiff including an obligation to obtain necessary medical treatment for Plaintiff.

61. Notwithstanding its duty, Defendant United States of America, by and through its agents and employees, was negligent in the treatment of Plaintiff's condition in one or more of the of the following ways: (1) failed to provide the necessary surgical intervention for Plaintiff's left knee; (2) failed to diagnose or treat the injury to Plaintiff's right knee; and (3) failed to provide necessary pain management.

62. That as a direct and proximate cause of each of the aforesaid acts of negligence and/or omissions of the Defendant United States of America, by and through its agents and employees, Plaintiff suffered permanent disability to his left knee, pain and injury to his right knee, physical pain and suffering, and emotional distress.

63. Attached as Exhibit B is the 2-6222 report of the reviewing health professional and the supporting affidavit.

PLAINTIFF DEMANDS TRIAL BY JURY.

RESPECTFULLY SUBMITTED,

/s/ Amanda Antholt
By: An Attorney for Plaintiff

Amanda Antholt
Christopher Smith
James Baranyk
Emily J. Stine
Smith, Johnson & Antholt, LLC
112 S. Sangamon Street, 3rd Floor
Chicago, IL 60607
312.432.0400

E-FILED
Monday, 20 May, 2013 05:23:46 PM
Clerk, U.S. District Court, ILCD

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

MAR 29 2013

Emily J. Stine
Smith, Johnson & Antholt, LLC
112 S. Sangamon St., 3rd Floor
Chicago, IL 60607

Re: Administrative Claim Number TRT-NCR-2013-00335 (Tony Hildebrand)
Personal Injury: $475,000.00

CERTIFIED NUMBER 7012 3050 0001 1646 2907

Dear Ms. Stine:

Your above referenced tort claim filed on behalf of Tony Hildebrand has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal Mr. Hildebrand suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six months after the date of mailing of this notification.

Sincerely,

Richard W. Schott
Regional Counsel

E-FILED
Monday, 20 May, 2013 05:23:46 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TONY HILDEBRAND,

Plaintiff,

v.

UNITED STATES OF AMERICA, ASSISTANT WARDEN JONES, WARDEN RICARDO RIOS, DR. SCOTT MOATS, ASSISTANT HEALTH SERVICES ADMINISTRATOR DILTELMAN, HEALTH SERVICES ADMINISTRATOR FREDDY GARRIDO, and AS-YET UNIDENTIFIED FEDERAL BUREAU OF PRISON EMPLOYEES,

Defendants. JURY TRIAL DEMANDED

AFFIDAVIT OF AMANDA C. ANTHOLT
IN COMPLIANCE WITH 735 ILCS 5/2-622

Amanda Antholt, an attorney admitted in the State of Illinois and Central District of Illinois, hereby states and affirms the following:

1. I, Amanda Antholt, am an attorney licensed in the state of Illinois and partner at Smith, Johnson & Antholt, LLC. My firm represents Tony Hildebrand in this action.

2. I have consulted and reviewed the facts of the case with Dr. Michael Treister, M.D., a licensed and practicing orthopedic surgeon based in Chicago, IL. Dr. Treister is knowledgeable about the relevant issues involved in this action, practices in the same area of health care that is at issue in this action, and is qualified by 40 years of experience and demonstrated competence treating knee and other orthopedic injuries.

3. Dr. Treister has determined in his written report, after a review of the medical record and other relevant material involved in this action that there is a reasonable and meritorious cause for the filing of such action. His report is attached hereto.

4. I have concluded on the basis of Dr. Treister's review and consultation that there is a reasonable and meritorious cause for filing of this action.

Further affiant sayeth naught,

Amanda Antholt
Smith, Johnson & Antholt, LLC
112 S. Sangamon St.
Chicago, IL 60607
Tel: 312.432.044
Email: amanda@lawsja.com

Subscribed and sworn to before me on this

20th day of May, 2013

Notary Public

OFFICIAL SEAL
CHRISTOPHER SMITH
Notary Public - State of Illinois
My Commission Expires Apr 28, 2015

TREISTER ORTHOPAEDIC SERVICES LTD.

May 5, 2013

MICHAEL ROY TREISTER, M.D.
F.A.A.O.S., F.A.C.S., F.I.C.S.
Diplomate American Board of
Orthopaedic Surgery
Medical Director
Orthopaedic and Hand Surgery

Ms. Amanda Antholt
Smith, Johnson & Antholt, LLC
112 S. Sangamon St., 3rd Floor
Chicago, IL 60607

RE: Tony Hildebrand
Our file #72736

DIANE RAMOS
Office Manager

ALBERTO GONZALEZ
Certified Orthopaedic Technician

CARMEN GARCIA
Patient Care Coordinator

PETRA PORRATA
Medical Records Coordinator

To whom it may concern:

I am an actively practicing board certified Chicago based orthopaedic surgeon with 40 years of clinical experience treating knee injuries the same as and very similar to those sustained by Tony Hildebrand while he was incarcerated in April of 2011. I have personally performed thousands of arthroscopic surgeries during my professional career. I am very familiar with the pathophysiology of those injuries, as well as their short and long term sequella.

To a high degree of medical and orthopaedic certainty, the left knee injuries sustained by Tony Hildebrand in April of 2011 required urgent orthopaedic surgical treatment in order to avoid ongoing knee instability and knee pain as well as potential additional injuries (such as occurred to the opposite right knee) and in order to avoid future osteoarthritic deterioration of the left knee.

The acceptable standards of medical care demand that a displaced bucket handle tear of the lateral meniscus be urgently appropriately surgically treated. The acceptable standards of medical care demand that an anterior cruciate ligament tear and that a sprain of the medial collateral ligament be urgently appropriately treated.

Mr. Tony Hildebrand, while incarcerated, for over one year, received neither appropriate conservative nor appropriate surgical treatment for his injured left knee. As such, there was a clear and obvious violation of the acceptable standards of medical care.

The negligence extends to the medical personnel who evaluated and communicated with Mr. Hildebrand including nurses, doctors, other medical staff, and their administrators. Any nurse, physician, physician assistant, or other medical personnel should have known that a displaced bucket handle tear of a meniscus is a surgically urgent condition, and that the failure to deal urgently with that component of Mr. Hildebrand's knee injury would, much more likely than not, lead to premature arthritic knee deterioration with time passage. Likewise, the failure to properly immobilize and splint a complete tear of the anterior cruciate ligament and/or a sprain of the medial collateral ligament is likely to have similar consequences.

ST. ELIZABETH PROFESSIONAL PLAZA
1431 NORTH WESTERN AVENUE
SUITE 510
CHICAGO, ILLINOIS 60622
PHONE: 312/633-5866
FAX: 312/633-5867
E-MAIL: drtreister@ameritech.net

Sincerely,

Michael Roy Treister, M.D., F.A.A.O.S., F.A.C.S., F.I.C.S.
Orthopaedic and Hand Surgeon

MT/ds

E-FILED
Monday, 23 September, 2013 09:04:51 AM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS, PEORIA DIVISION

TONY HILDEBRAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 13-cv-1233
	)	
UNITED STATES OF AMERICA, WARDEN RICARDO RIOS, ASSISTANT WARDEN TAMMY JONES, DR. SCOTT MOATS, ASSISTANT HEALTH SERVICES ADMINISTRATOR DAVID DILTELMAN, and HEALTH SERVICES ADMINISTRATOR FREDDY GARRIDO,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

BYRON G. CUDMORE, U.S. MAGISTRATE JUDGE:

This matter comes before the Court for a Report and Recommendation on Defendant Freddy Garrido's Motion to Dismiss (d/e 23) (Motion). For the reasons set forth below, this Court recommends that Motion should be ALLOWED in part. The claims against Garrido should be dismissed for lack of personal jurisdiction, and the request to dismiss for improper venue should be denied as moot.

STATEMENT OF FACTS

Plaintiff Tony Hildebrand alleges that on April 22, 2011, he injured his left knee while in federal custody awaiting sentencing and designation to a correctional facility. On June 23, 2011, an orthopedic surgeon evaluated his knee and recommended surgery. On July 6, 2011, Hildebrand was transferred to the Federal Correctional Institution in Pekin, Illinois (FCI Pekin) operated by the Federal Bureau of Prisons (BOP). Hildebrand stayed at FCI Pekin until January 12, 2012. Hildebrand alleges that the individual defendants who worked at FCI Pekin were deliberately indifferent toward his knee injury and refused to provide him with the recommended surgery.

On January 12, 2012, Hildebrand was transferred to Federal Medical Center in Lexington, Kentucky (FMC Lexington), also operated by the BOP. Defendant Garrido was the Health Services Administrator at FMC Lexington. Upon Hildebrand's arrival at FMC Lexington, Garrido "was responsible for obtaining the necessary medical treatment for Plaintiff." Complaint (d/e 1), ¶ 38. Hildebrand alleges, "Defendant Health Services Administrator Freddy Garrido was aware that Plaintiff was transferred to their facility due to his knee injury and the need for surgery." Id., ¶ 39.

On June 12, 2012, the surgeons at FMC Lexington operated on Hildebrand's knee. Hildebrand alleges that the defendants waited too long to perform the necessary surgery, and as a result, the surgery was not successful and the damage to his knee is now irreparable. Id., ¶¶42-48.

Hildebrand brings a claim against Garrido and the other individual defendants for deliberate indifference to his serious medical condition in violation of his Eighth Amendment right to be free from cruel and unusual punishment. Hildebrand brings these claims pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Complaint, Count I. Hildebrand also brings claims against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Id., Counts II and III.

Hildebrand alleges that Garrido "is and was at all times mentioned in this complaint a citizen of Illinois and an employee [at FMC Lexington]." Id., ¶ 10. Hildebrand alleges that the other individual defendants are citizens of Illinois and are employed at FCI Pekin. Id., ¶¶ 6-9.

Garrido moves to dismiss for lack of personal jurisdiction and for improper venue. Fed. R. Civ. P. 12(b)(2) and 12(b)(3). Garrido submits a declaration in which he declares that he is a citizen of Kentucky, works at FMC Lexington, and has no connection to Illinois, "I have no connection

with the state of Illinois. I do not own any real or personal property within Illinois. I do not, nor have I ever, worked or resided in the State of Illinois." Memorandum in Support of Defendant Garrido's Motion to Dismiss (d/e 24), attached Declaration of Freddy Garrido, ¶ 4.

ANALYSIS

Garrido moves to dismiss for lack of personal jurisdiction. Once Garrido makes this motion, Hildebrand bears the burden to establish that personal jurisdiction exists. Purdue Research Foundation v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 782 (7th Cir. 2003). The Court may consider matters outside the pleadings to determine whether personal jurisdiction exists. Nelson by Carson v. Park Industries, Inc., 717 F.2d 1120, 1123 (7th Cir. 1983).

This Court's personal jurisdiction in this case is limited to the personal jurisdiction of the courts of the state in which this Court sits, Illinois. Fed. R. Civ. P. 4(k)(1)(A); see Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 107 (1987). Under Illinois law, Illinois courts "may . . . exercise jurisdiction on any . . . basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." 735 ILCS 5/2-209(c). No operative difference exists between the Illinois and United States Constitution with respect to the limits of personal jurisdiction. Thus,

the limits on this Court's personal jurisdiction are governed by federal due process principles. See Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A., 623 F.3d 440, 443 (7th Cir. 2010).

Due process limits this Court's jurisdiction to parties who can reasonably foresee, as a result of their own actions, that they could be haled into this Court. A defendant must purposefully establish some minimum contacts with the forum state to make personal jurisdiction reasonably foreseeable, "[T]here must be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). The Supreme Court later explained, "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' fortuitous,' or attenuated contacts, or of the 'unilateral activities of another party or third person.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (internal citations and footnote omitted).

Personal jurisdiction can be general or specific. General personal jurisdiction means that a person can be sued in the forum based on any transaction that occurred anywhere. General personal jurisdiction exists

over a defendant who has such "continuous and systematic contacts" with a forum state that he is "constructively present . . . to such a degree that it would be fundamentally fair" to subject the person to the forum's jurisdiction for resolution of any claim. Purdue Research Fund, 338 F.3d at 787. Specific personal jurisdiction exists when the plaintiff's claim arises out of or is related to the defendant's purposeful contacts with the forum state. In such situation, the defendant's contacts with the forum make it reasonably foreseeable that the defendant could be haled into the forum's courts to answer for his actions. See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1277 (7th Cir. 1997).

Under these principles, Hildebrand has failed to establish that this Court has either general or specific personal jurisdiction over Garrido. Hildebrand alleges that Garrido is a citizen of Illinois, but Garrido states in his declaration that he is a citizen of Kentucky, has no connection to Illinois. Garrido states that he has never lived in Illinois, never worked in Illinois, and does not own any property in Illinois. Hildebrand does not dispute this evidence and does not present any other evidence that Garrido has engaged in any other type of continuous and systematic contacts with Illinois. Therefore, Hildebrand does not attempt to establish that Garrido is subject to this Court's general personal jurisdiction.

Hildebrand also fails to establish specific jurisdiction. Hildebrand does not allege that Garrido performed any wrongful act in Illinois or connected to the State of Illinois. Hildebrand alleges that the BOP transferred Hildebrand to FMC Lexington in Kentucky, and only then did Garrido become responsible for securing medical treatment for Hildebrand. Hildebrand concedes this point in his memorandum, "Plaintiff's claims against Defendant Garrido arise out of his handling of Plaintiff's medical condition once he was transferred to the Federal Medical Center at Lexington for the purpose of obtaining the previously diagnosed knee surgery." Plaintiff's Response in Opposition to Defendant Garrido's Motion to Dismiss (d/e 29) (Hildebrand Memorandum), at 6. Garrido had no involvement in any of the alleged activity in Illinois. Hildebrand fails to establish that Garrido purposely availed himself of the privilege of conducting activities in Illinois or connected to Illinois. He fails to allege a basis for personal jurisdiction.

The case is remarkably similar to the facts in Kinslow v. Pullara, 538 F.3d 687 (7th Cir. 2008). In that case, the plaintiff was incarcerated in the custody of the New Mexico Department of Corrections (NMDC) and then transferred to the custody of the Illinois Department of Corrections (IDOC). The plaintiff alleged that he was denied adequate medical treatment by

defendants who worked for NMDC and by other defendants who worked for IDOC. The plaintiff brought suit in Illinois. The defendants who worked for NMDC were properly dismissed from the action because the plaintiff failed to present evidence that any of these defendants purposely availed himself of the privilege of conducting activities in Illinois. Id., at 692-93. Hildebrand has similarly failed to present any evidence that Garrido engaged in any activity that would subject him to the personal jurisdiction of Illinois courts.

Hildebrand argues that it was foreseeable to Garrido that he would be sued in Illinois because Garrido's alleged conduct was a continuation of the alleged tortious conduct that occurred in Illinois. See Hildebrand Memorandum, at 5. Foreseeability alone is not sufficient, "Instead, 'the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" Burger King Corp., 471 U.S. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 286, 295 (1980). Garrido's alleged conduct only occurred in Kentucky and only related to Hildebrand's medical treatment in Kentucky. Hildebrand does not allege that Garrido did anything in Illinois or connected to Illinois.

Hildebrand cites three cases in which the forum state had personal jurisdiction over a defendant who did not physically enter the forum state. In each case, however, the defendant purposely engaged in activity that was connected with the forum state and directed at individuals in the forum state. In Harley v. Harley G. Lappin, 2008 WL 4889965, at *4 (S.D. Ill., December 16, 2009), Illinois courts had personal jurisdiction over BOP administrators located in Kansas City and Washington D.C., who allegedly violated the rights of the plaintiff, a federal prisoner located in Illinois. The Kansas City and D.C. administrators allegedly mishandled the prisoner's grievance regarding his medical treatment at the facility in Illinois where he was incarcerated. In Calder v. Jones, 465 U.S. 783, 788-89 (1983), California courts had personal jurisdiction over a Florida journalist and editor who wrote and edited for publication and distribution in California an alleged defamatory article about a California citizen, which article was based on information secured from sources in California. In Kennedy v. Freeman, 919 F.2d 126, 129-30 (10th Cir. 1990), Oklahoma courts had personal jurisdiction over a Texas physician who received a tissue sample from an Oklahoma physician taken from an Oklahoma patient. The Texas physician examined the sample, and communicated his alleged negligently

erroneous diagnosis regarding the sample to the requesting Oklahoma physician.

In each of these three cases, the defendant purposely engaged in wrongful activity connected to the forum state. In Harley, the defendants handled a grievance filed by an Illinois resident about his treatment in Illinois. In Calder, the defendants collected information from California sources, wrote an article about a California resident for publication and distribution in California. In Kennedy, the defendant received a sample taken from an Oklahoma resident, made a diagnosis about the sample, and transmitted the diagnosis to a physician in Oklahoma. Hildebrand does not allege that Garrido engaged in any such activity. All of Garrido's actions occurred in Kentucky after the BOP transferred Hildebrand to Kentucky. Hildebrand makes no allegation that Garrido had any involvement in Hildebrand's treatment while Hildebrand was in Illinois. Therefore, these cases do not apply. Hildebrand fails to establish that this Court has personal jurisdiction over Garrido.

Hildebrand finally argues that the interests of justice require trying this case in one forum, here in the Central District of Illinois. The interests of justice require honoring Defendant Garrido's constitutional right to due

process. Due process does not allow this Court to exercise personal jurisdiction over Defendant Garrido under these circumstances. If Hildebrand wishes to try these claims in a single trial, he must first bring an action against Garrido in a court that can properly exercise personal jurisdiction over Garrido, and then present his argument for consolidation of the cases in the interests of justice. The current claims against Garrido set forth in the Complaint should be dismissed for lack of personal jurisdiction. Dismissing the action for lack of personal jurisdiction renders Garrido's challenge to venue moot.

WHEREFORE the Court recommends that Defendant Freddy Garrido's Motion to Dismiss (d/e 23) should be ALLOWED in part. The claims against Defendant Garrido should be dismissed without prejudice for lack of personal jurisdiction. The request to dismiss for improper venue should be denied as moot.

The parties are advised that any objection to this Report and Recommendation must be filed in writing with the Clerk of the Court within fourteen days after service of an ECF copy of this Report and Recommendation. 28 U.S.C. § 636(b)(1). Failure to file a timely objection

will constitute a waiver of objections on appeal. See Video Views, Inc. v. Studio 21, Ltd., 797 F.2d 538, 539 (7th Cir. 1986). See Local Rule 72.2.

ENTER: September 23, 2013

s/ Byron G. Cudmore
UNITED STATES MAGISTRATE JUDGE

E-FILED
Monday, 12 January, 2015 02:48:08 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

TONY HILDEBRAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 13-cv-1233
	)	
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

O R D E R

This matter is before the Court on the parties' Agreed Motion to Nonsuit *Bivens* Claim (Doc. 60). For the reasons stated below, this motion is granted.[1]

On May 20, 2013, Plaintiff Tony Hildebrand filed a three-count complaint against the United States and five of its employees in their individual capacities. (Doc. 1). In the Complaint, Plaintiff alleges that federal employees working at the Federal Correctional Institution in Pekin, Illinois and the Federal Medical Center in Lexington, Kentucky failed to provide him with required medical treatment for his injured knee. (*Id.* at 2-4, 10). Plaintiff has brought his claim against the individual defendants pursuant to *Bivens v. Six Unknown Agents*, 408 U.S. 388 (1971). He alleges that they acted under color of state law to violate his Eighth Amendment rights. (*Id.* at 10). He has also brought state law tort claims for medical malpractice and negligence against the United States pursuant to the Federal Tort Claims Act. (*Id.* at 11-12).

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[1] Plaintiff filed a first Motion to Nonsuit *Bivens* Claim (Doc. 59). This first motion requests the same relief as the second, agreed, motion, but does not indicate Defendants' consent or lack of objection to the requested relief.

Individual Defendant David Diltelman was dismissed on November 6, 2013. (Nov. 6, 2013 Text Order). Plaintiff now voluntarily seeks to dismiss with prejudice the *Bivens* claim against the remaining individual defendants.

Pursuant to Rule 41, a Plaintiff may voluntarily dismiss an action without a court order either by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment, or by filing a stipulation of dismissal signed by all parties who have appeared. Fed. R. Civ. P. 41(a)(1)(A). In the absence of those circumstances, a dismissal pursuant to Rule 41(a) requires Court approval. *See* Fed. R. Civ. P. 41(a)(2). Although Rule 41 speaks in terms of dismissing entire actions rather than individual claims, "the sounder view" is that plaintiffs may dismiss individual claims. 9 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2362 (3d ed.); *see also Ward v. Gaetz*, No. 10-cv-640, 2011 WL 977921 (S.D. Ill. Mar. 18, 2011)(dismissing individual claims pursuant to Rule 41).

In this case, the individual defendants have answered Plaintiff's Complaint and Plaintiff has not submitted a stipulation. Therefore, the Court must approve Plaintiff's motion to dismiss the *Bivens* claims. *See* Fed. R. Civ. P. 41(a)(2). Because all parties consent to the dismissal of Plaintiff's *Bivens* claims with prejudice, Plaintiff's motion is granted.

IT IS THEREFORE ORDERED THAT Plaintiff's Agreed Motion to Nonsuit *Bivens* Claim (Doc. 60) is GRANTED. Plaintiff's Motion to Nonsuit *Bivens* Claim (Doc. 59) is DENIED as MOOT. Count I of the Complaint is DISMISSED WITH

PREJUDICE. Assistant Warden Jones, Warden Ricardo Rios, Dr. Scott Moats, and Health Services Administrator Freddy Garrido are TERMINATED from this action.

Entered this 12th day of January, 2015.

s/Joe B. McDade
JOE BILLY McDADE
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT PEORIA

TONY HILDEBRAND,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1:13-CV-1233-JBM-TSH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

Whereas, the parties have agreed to a compromise settlement to fully resolve all issues presented in the Complaint filed in this case, it is hereby stipulated by and between the undersigned Plaintiff and the UNITED STATES OF AMERICA, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the administrative claim, *i.e.*, the medical care of Tony Hildebrand while he was an inmate at the Federal Correctional Institution in Pekin, Illinois and, the Federal Medical Center in Lexington, Kentucky, under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of Fifty-Seven Thousand Dollars and No Cents ($57,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever

the prosecution of claims by Plaintiff and his guardians, heirs, executors, administrators or assigns against any third party or against the United States and/or United States Bureau of Prisons, its agents, servants and employees, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, United States Bureau of Prisons, or their agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this matter shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally

12. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Respectfully submitted:

For Plaintiff Tony Hildebrand:

Dated:

By: _____
Blake Horwitz
Blake Horwitz Law Firm Ltd.
111 W Washington Street
Suite 1611
Chicago, Illinois 60602
Phone: (312) 676-2100

For Defendant United States of America:

Dated:

By: _____
Gerard A. Brost
Assistant United States Attorney
United States Attorneyâ€™s Office
One Technology Plaza
211 Fulton Street, Ste. 400
Peoria, Illinois 61602
Phone: (309) 671-7050
Email: gerard.brost@usdoj.gov

Dated: 6-24-15

_____
Plaintiff: Tony Hildebrand

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT PEORIA

TONY HILDEBRAND,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1:13-CV-1233-JBM-TSH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

STIPULATION FOR DISMISSAL

Pursuant to Rule 41 of the Federal Rules of Civil Procedure, the Plaintiff, Tony Hildebrand, and the Defendant, United States of America, through their undersigned counsel, hereby stipulate and agree to dismiss this case, including all claims set forth in the Complaint filed in this case.

This Stipulation for Dismissal is based upon a settlement agreement made between the parties. The agreement between the Plaintiff and the United States of America is embodied in the Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677, which is attached hereto and incorporated herein. The Stipulation for Compromise Settlement contains the complete agreement between the Plaintiff and the United States to resolve all issues involved in this case.

The Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677 which is made between the Plaintiff and the

United States of America, provides that a payment is to be made to the Plaintiff in the future. The parties agree, and the Court consents, to this Court retaining continuing jurisdiction over this matter solely for the purpose of enforcing compliance with the terms of the Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677.

The Plaintiff further agrees that upon completion of the payment to be made by the Defendant under the terms of the settlement agreement, the Plaintiff shall file a Notice of Satisfaction of Settlement.

IT IS SO AGREED AND STIPULATED:

For the Plaintiff: Dated: 6/23/15

Blake W. Horwitz
Blake Horwitz Law Firm
111 W. Washington St., Ste. 1611
Chicago, IL 60602
Phone: (312) 676-2100
Email: bhorwitz@bhlfattorneys.com

For the United States of America: Dated:

Gerard A. Brost
Assistant United States Attorney
211 Fulton Street, Ste. 400
Peoria, IL 61602
Phone: (309) 671-7050
Email: gerard.brost@usdoj.gov

Page 1254 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1255 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1256 of 2033

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of the Freedom of Information and Privacy Act

Page 1257 of 2033

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of the Freedom of Information and Privacy Act

Page 1258 of 2033

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 1259 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JAMES EDWARD PENICK,
Plaintiff,
vs.
PRISON MEDICAL REVIEW COMMITTEE AND PRISON OPTOMETRIST WHOSE NAMES ARE UNKNOWN AT THIS TIME.
Defendants.

Cause No. 2:12-cv-341-WTL-WGH

FILED
APR 17 2013
U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

AMENDED COMPLAINT

I'm presently confined to the disciplinary unit. My movement and access to anything is highly restricture to say the least. Vision in right eye virtually non-existent, left eye strains easily and is saturated with numerous floaters which restricts vision. Guidence in this matter is unavailable.

1) A cataract extraction procedure was continuously denied until it reached the unacceptable level of blindness in my right eye. Verifying documents in my initial complaint. Witnesses include but not limited to the local Ophthalmologist who was outraged by the delays.

Culpability lies with the prison medical review committee and perhapse to a lesser degree the prison hospital administrator, names of which are unknown at this time.

About 50% of my vision was losted as a results of the above itemized events. Oh, one of my witnesses will attest to the fact that in my case I somehow fell below an acceptible minimal level before said procedure was authorized. This according to the Optometrist. (1)

2) Prison Optometrist negligently misdiagnosed a small blind spot in the extreme upper left corner of my right eye stating that it would be like that 10 years from now - not to worry. Two weeks later I was blind in said eye (retinal tearing).

The medical department stated it was macular degeneration in an attempt to hide their negligence. Macular degeneration occurs in the center of the retina the area of most acute visual perception. Even the Ophthalmologist who performed two micro surgeries on said eye emphatically stated it had nothing whatsoever to do with macular degeneration. My visual loss occurred as a direct lack of prompt medical attention/care.

The culpable party is clearly the Optometrist. The name of which is not known at this time.

RELIEF SOUGHT

I would be content with just the restoration of my vision but according to the Ophthalmologist that is not possible. I would like to insure that my situation is not permitted to happen to others; therefore, I request a substantial financial award (#1,000,000.00 Two Million Dollars). What is the price of an eye?

I certify that the above account is true and correct according to my recollection.

Without Prejudice
James Penick
01552-061

I further certify that this was placed in the outgoing mail on 4-14-13. Without Prejudice
Jim Penick

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JAMES EDWARD PENICK,
Plaintiff,
vs.
PRISON MEDICAL REVIEW COMMITTEE AND PRISON OPTOMETRIST WHOSE NAMES ARE UNKNOWN AT THIS TIME.
Defendants.

Cause No. 2:12-cv-341-WTL-WGH

FILED
APR 17 2013
U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

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Without Prejudice
James Penick
01552-061

I further certify that this was placed in the outgoing mail on 4-14-13. Without Prejudice
Jim Penick

0341-WTL-WGH Document 8-1 Filed 04/17/13 Page

James Pencek
#01552-061
P.O. Box 33
Terre Haute, IN 47808

LEGAL
MAIL

RECEIVED
APR 16 2013
U.S. CLERK'S OFFICE
TERRE HAUTE, INDIANA

William T. Lawrence, Judge
United States District Court
Southern District of Indiana
Care of: The Office of the Clerk
of the U.S. District Court
921 Ohio Street, Room 104
Terre Haute, IN 47807

47807373829

UNITED STATES
PACKAGE
X-RAY/MAGNETOMETER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JAMES EDWARD PENICK,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 2:12-cv-0341-WTL-WGH

ORDER ACKNOWLEDGING STIPULATION OF DISMISSAL

The Stipulation of Dismissal is acknowledged. This action is now closed.

DATE: 6/9/15

William T Lawrence

JUDGE, United States District Court
Southern District of Indiana, Terre Haute Division

COPIES TO:

All Electronically Registered Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JAMES EDWARD PENICK, Plaintiff, vs. PRISON CONTRACT OPTOMETRIST (Name Unknow), H. LAPPIN Bureau of Prison Director, JULIE ANN BEIGHLEY Health Services Administrator, H. M. MARBERRY Warden at the time, T. (THOMAS) A. WEBSTER Clinical Director, DAVID L. YOUNG Associate Warden, E. WILSON Staff Physician, U.S. ATTORNEY GENERAL et al, UNITED STATES OF AMERICA, J. F. CARAWAY, PRISON MEDICAL REVIEW COMMITTEE whose names are unknown at this time, PRISON OPTOMETRIST whose names are unknown at this time, RADANEATA Dr., DRUMMY, Defendants.	)	No. 2:12-cv-00341-WTL-WGH

ORDER DIRECTING FILING OF A PLEADING AUTHORIZING DISMISSAL

The Court has been advised by counsel that a settlement has been reached in this action. All that remains to be done is the execution of documents and/or delivery of funds, if so required, in accordance with their agreement. Therefore, all pending motions, if any, are now **DENIED AS MOOT** and all previously ordered dates relating to discovery, filings, schedules, conferences and trial, if any, are **VACATED**.

IT IS ORDERED that within forty five (45) days of this date, counsel for the plaintiff shall file a motion to dismiss this cause or a stipulation of dismissal and submit an order for the Court's signature ordering the dismissal of this action (in conformance with the agreement of the parties). Failure to comply with this order will result in DISMISSAL WITH PREJUDICE pursuant to Rule 41(b), Fed. R. Civ. P. for failure to prosecute this action in a timely manner. Additional time to complete the execution of the settlement document may be granted if requested in writing prior to the expiration of this period of time.

ALL OF WHICH IS ORDERED THIS 26th DAY OF FEBRUARY, 2015.

Wm G. Hussmann Jr.

WILLIAM G. HUSSMANN, JR.
Magistrate Judge

Distribution:

JAMES EDWARD PENICK
c/o Volunteers of America
9738 Hamilton Avenue
Cincinnati, OH 45231

Michael J. Blinn
HOOVER HULL TURNER LLP
mblinn@hooverhullturner.com

Jeffrey L. Hunter
UNITED STATES ATTORNEY'S OFFICE
jeff.hunter@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JAMES EDWARD PENICK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2:12-cv-00341-WTL-WGH
	)	
UNITED STATES OF AMERICA, DR. RADANEATA AND DRUMMY,	)	
	)	
	)	
Defendants.	)	

ENTRY VACATING FINAL JUDGMENT

The final judgment entered on October 24, 2014, is **VACATED.** The Entry of October 24, 2014, did not resolve all claims against all parties. The Entry of February 5, 2014, found that construed liberally, the second amended complaint can be understood to assert a claim under the Federal Tort Claims Act, 28 U.S.C. ' 2671, *et seq.* ("FTCA"), against the United States of America. This claim (and this claim only) remains for resolution.

The clerk is directed to **reopen this action and to add the United States of America as a defendant on the docket.**

IT IS SO ORDERED.

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Date: 10/27/14

Distribution:

JAMES EDWARD PENICK
2216 Vine Street
Cincinnati, OH 45219

All Electronically Registered Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

JAMES EDWARD PENICK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2:12-cv-00341-WTL-WGH
	)	
UNITED STATES OF AMERICA, DR. RADANEATA AND DRUMMY,	)	
	)	
	)	
Defendants.	)	

ENTRY SETTING PRETRIAL SCHEDULE

The action shall proceed in accordance with the following schedule:

A. No later than December 11, 2014 – Each party must give the other parties a list (with addresses and telephone numbers) of every witness who has knowledge that could help prove that party's claims or defenses. For each witness the party lists, there should be a brief description of what that witness knows. This list shall NOT be filed with the Court.

B. No later than December 11, 2014 – Each party must give the other parties copies of all documents or electronic data that the party has that it may use to prove its case. The copies of documents shall NOT be filed with the Court.

C. No later than December 11, 2014 – The Plaintiff must give the Defendant(s) a written estimate of how much money the Plaintiff claims he is entitled to for any injuries or damages the Plaintiff claims to have suffered. At that time, the Plaintiff must also give the Defendant(s) all non-privileged documents that support that estimate, including those that might prove the nature and the extent of the Plaintiff's injury. This estimate and the documents are NOT filed with the Court.

D. The parties must update the information and documents that they provided to each other under Paragraphs B-D above as additional information becomes available to them. The Court may prevent a party from using evidence that it has not shared with the other side.

E. No later than February 27, 2015 - The parties shall complete written discovery and discovery depositions pursuant to Rules 26 through 37 and 45 of the *Federal Rules of Civil Procedure*. This means discovery must be served 30 days before the deadline to allow time for a response.

F. No later than January 27, 2015 – Each party must tell the other parties if it intends to use any testimony by expert witnesses. At that time, if a party intends to use an expert, it must give the other party a signed report from the expert that presents all the witness' opinions and all the other information required by Federal Rule of Civil Procedure 26(a)(2). Thirty days later, the other side must file a report by any rebuttal expert.

G. No later than March 27, 2015 – Any party who believes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, and therefore the case does not need to go to trial, must file its motion under Federal Rule of Civil Procedure 56 and Local Rule 56-1.

H. If the case is not resolved by settlement, motion, or other ruling, the Court will set a trial date.

IT IS SO ORDERED.

Date: 10/27/14

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Distribution:

JAMES EDWARD PENICK
2216 Vine Street
Cincinnati, OH 45219

All Electronically Registered Counsel

Page 1272 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

6-21-09

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code)
North Central Regional Office Attn. of: Regional Counsel's Office Gateway Complex, Tower II, 8th Floor 4th and State Avenue Kansas City, Kansas 66101	JAMES PENICK # 01552-061 USP-TERRE HAUTE P.O. Box 33 Terre Haute, IN 47808

3. TYPE OF EMPLOYMENT ☐ MILITARY ☒ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
	06-13-1939	Divorced	? 12-07	?

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.)

On 05-13-05 a cataract extraction procedure was performed on Claimant's left eye by Dr. Thomas Norton of the Alexandria Eye & Laser Center in Alexandria, LA 71301 while Claimant was confined to USP-Pollock. Since the left eye had deteriorated more rapidly it was naturally done first. The right eye was scheduled for the following month (06-05). However, Claimant was transferred in spite of last minute protests wanting first to have the procedure performed. In the interim Claimant has been examined by about four (4)

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

Please refer to item #8

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

Please refer to item # 8

RECEIVED
DEC 23 2008
LEGAL
NORTH CENTRAL REGIONAL OFFICE

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
To be named at a later date. Various inmates, family members, Optometrists & Ophthalmologists, etc.	

12. (See instructions on reverse.) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
N/A	$10,000,000.00	N/A	$10,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
Without Prejudice James Penick	None	12-15-08

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for the civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046 STANDARD FORM 95
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

TRT-NCR-2009-01448

(Continued from Standard Form 95, Item #8)

Optometrists and two (2) Ophthalmologists all concluding that the right eye was in an advanced state of deterioration and that a cataract extraction procedure was necessary. About a year prior to the extraction procedure finally having been performed the right eye had lost about 95-98% of its vision. The Ophthalmologist informed Claimant that the opacity of the crystalline lens was such that she could not even see the retina, therefore, could not make any predictions as to the outcome of the operation. It has since been realized and stated by the ophthalmologist that as a direct result of the numerous unjustified referrals, postponements and refusals of the BOP and medical administrators for the operation an accumulation of encrusted matter had deposited at the bottom of the cavity housing the crystalline lens. Not all, according to the ophthalmologist, of the encrusted matter could be safely removed, hence, the reason that only about 40% of my vision could be restored to date.

During the time of my fervent and what proved to be fruitless attempts at having the procedure preformed my family even interceded by writing letters to the Regional Office and the Warden demanding the reason for not approving the operation and why I had lost 95% of my vision and why I was wearing an eye patch. The replies received by my family were that I was being treated appropriately.

Each and every claim made herein can readily be proven via the medical record unless those pertinent documents have been removed or destroyed. If so, one thing for certain, the testimony of the optometrists, ophthalmolgists, my family, various inmates, etc. will prevail. The exhausting of administrative remedies, filing of Commercial Liens and tort claims will also attest to my efforts at having said operation performed. Furthermore, as a certified health practitioner/nutritional consultant I also was aware of the potential dangers of having the operation constantly postponed or denied. Be advised that the salve prescribed by the ophthalmologist as of this date has not been given to Claimant. The various eye drops have been given but not the ointment.

What with advisory fees to be deducted the stated amount for damages resulting from the injuries you have caused is more than fair considering the extent and degree of the malpractice and remiss concerning everyone involved in these criminal activities. The Commercial Liens presently being persued against some of those responsible will be terminated if there is a satisfactory conclusion to this claim as the liens will mature in 90 days after the filing of the Notice of Default. I would advise you to expedite this claim as said liens are demanding $1,045,000.00 for each Respondent. If I am forced to persue civil action a substantial award is inevitable all things considered.

Commercial liens have been filed in an attempt to have the cataract extraction procedure performed for which Claimant was given hole time, loss of goodtime, six months loss of commissary, telephone and visiting privileges plus a recommended disciplinary transfer.

Names of my witnesses will not be divulged until Claimant has determined whether a civil suit will follow.

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region
Kansas City KS 66101

Office of the Regional Counsel

December 31, 2008

MEMORANDUM FOR PAUL PEPPER, ATTORNEY ADVISOR
ST. LOUIS CLC

FROM: Richard W. Schott
Regional Counsel

SUBJECT: INMATE James Perlick REG. # 01552-061
INSTITUTION THP
PROPERTY CLAIM NUMBER 2009-01448

Find attached a copy of the above referenced administrative claim. This is a request that an investigation be conducted by the appropriate designated staff and in accordance with the Tort Claim Protocols of the North Central Region.

Sixth Month Date: 06/21/09

If you consider settlement, you should review all available records to ascertain if the inmate has any unpaid fines, costs, or other sums due or owing to the United States.

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of the Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

December 31, 2008

James Penick
01552-061
USP Terre Haute

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2009-01448 $ 10,000,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on December 23, 2008. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such proper claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until June 21, 2009.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et.seq., and §543.30.

Sincerely,
Richard W. Schott
Regional Counsel

Welcome NINA FIELDS

CASE DETAILS

Back to Case Results | Case Actions:

Case ID: TRT-NCR-2012-04072 **Short Description:** PENICK, JAMES

Case Login Information

Inmate Reg No.	01552-061
*Short Description	PENICK, JAMES
*Classification	Administrative Tort
*Case Type	FTCA-Personal Injury
Case Sub-Type	Medical Malpractice
*Current Region	North Central Region
Current Institution	Terre Haute (USP)
Incident Region	
Incident Institution	
Incident Date	05/01/2005
Monetary Relief Sought $	250,000.00
*Responsible Legal Office	St. Louis, MO

Legal Liability Evaluation

Estimated Amount $	-
Estimated Outcome	N/A

Additional Case Information

Long Description	
Further Case Classification	
Comments	

Case Resolution

Date	
Type	
Reason	
Sought	
Amount offered $	
Amount Paid $	
Description	

Close Case

Case Initiation Dates

*Date Received 05/04/2012

Note: The Six Month Date is set by **Inmate Response (Six Month Date)** under CASE DATES tab.

Six Month Date 11/03/2012

Case Progress

Current Owner	NINA FIELDS
Timeline Status	
Monthly Report Status	
Private Case	No

Update | Mark Private | Mark Public

Home | Alert | My Work | New Case | Search Main | Email

United States Department of Justice - Office of General Counsel & Review

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
North Central Regional Office Attn. Of: Regional Counsel's Office Gateway Complex, Tower II, 8th Floor 4th and State Avenue Kansas City, Kansas 66101	James Penick #01552-061 USP-Terre Haute P.O. Box 33 Terre Haute, Indiana 47808

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. or P.M.)
☐ MILITARY ☒ CIVILIAN	06-13-39	Divorced	05-2005 to Current	

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

On 05-13-2005 a Cataract extraction procedure was performed on Claimant's left e by Dr Norton of the Alexandria Eye & Laser Center in Alexandria, LA &1301 while Claimant was confined to USP-Pollock. Since the left eye had deteriorated more rapidly it was naturally done first. The right eye was scheduled for the following month (06-2005). However, Claimant was transferred in spite of last minute protests wanting first to have the procedure performed. In the interim Claimant has been examined by about 4 Optometrists and 2 Ophthalmologists all concluding that the right eye was in an advanced state of deterioration and that a cataract extraction (continued)

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

NA

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

Please refer to item #8

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

Please refer to item #8

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
Dr Minturn, Ophthalmologist	Indianapolis, IN (812-224-4592)
Dr Ponugot, Ophthalmologist	Terre Haute, IN
Various Convicts	
Family Members	4161 Clough Lane, Cincinnati, Ohio

12. (See instructions on reverse) AMOUNT OF CLAIM (In dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
None	$250,000.00	NA	$250,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
James Penick Without Prejudice Jim Penick, Credit	NA	4-20-2012

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

RECEIVED
MAY - 4 2012
LEGAL
NORTH CENTRAL REGIONAL OFFICE

95-109
Previous editions not usable.

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85) (EG)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☒ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

No

17. If deductible, state amount

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* ☒ No

(Continued from SF 95, Item #8)

procedure was necessary. About a year prior to the extraction procedure finally having been performed the right eye had lost about 98% of its vision. The Ophthalmologist informed Claimant that the opacity of the crystalline lens was such that she could not even see the retina, therefore, could not make any predictions as to the outcome of the operation. It has since been realized and stated by the Ophthalmologist that as a direct result of the numerous unjustified referrals, postponements and refusals of the BOP and medsical administrators for the operation, an accumulation of encrusted matter had deposited at the bottom of the cavity housing the crystalline lens. Not all, according to the Ophthalmologist, of the encrusted matter could be safely removed, hence, the reason that only about 40% of my vision could be restored to date (12-15-2008)

During the time of my fervent and what proved to be fruitless attempts at having the procedure performed my family even interceded by writing letters to the Regional Office and the Warden demanding the reason for not having approved the procedure long ago and why I had lost about 95% of my vision. Commercial liens were also filed in an attempt to have the procedure performed for which Claimant was given numerous incident reports, hole time, loss of goodtime, commissary/visiting/telephone privileges, recommended disciplinary transfer and certain staff members even resorted to confiscating my incoming/outgoing mail in order to seize said liens.

So, there I set with a 60% loss of my vision. I quote from a Convict Request to Staff dated 08-17-'09 and addressed to Medical Records: "I have mentioned on numerous occasions to my chronic care physician that even with a corrective lens for my right eye I am still unable to read or focus long distance. My right eye is the one damaged as a result of the constant postponements of the cataract extraction procedure. Why is it I am refused another appointment with the Optometrist in order to resolve this untenable situation?" It was witnessed by convict Kelly and a copy is included.

Several days before the aforementioned appointment with the optometrist I noticed a blind spot the size of a small pea in the extreme upper left peripheral area of my right eye. On the day of my appointment I expressed my concern about the blind spot to which he stated it was nothing in which to be concerned, that it would be like that 10 years from now.

I quote from the Informal Resolution Form (Mr Drummy's EMT-P, 08-14-2010) reply:"I have reviewed your Informal Resolution Form and recent medical record. I have also inquired with Mrs Bowman who does the clinics. In doing so I have learned that at the time of your appointment with the optometrist (prior to being diagnosed with a retinal detachment) January 12, 2010, your pressures were within normal limits and you showed signs of Macular Degeneration, there were no indications of retinal detachment at that time. Just because you were diagnosed with a retinal detachment does not mean that it had occurred prior to this appointment in January. This easily could have occurred after this visit and developed gradually until you saw the eye specialist. I see you were evaluated by PA Jastillano on 2-22-2010 for vision complaints, but I see no other documentation that would indicate you were having problems after your visit with the optometrist in January".

Mr Drummy states that my problems were as a result of Macular Degeneration. On 01-16-2012, Doctor Minturn the Ophthalmological specialist/surgeon unequivocally stated that I showed absolutely no signs of Macular Degeneration. Since Dr Minturn is the specialist and performed two micro-surgeries on my right eye I readily accept his words as fact.

Further Mr Drummy states that in his opinion: "Just because you were diagnosed with a retinal detachment does not mean that it had occurred prior to this appointment in January. This easily could have occurred after this visit and developed gradually until you saw the eye specialist". The pea size blind spot "developed gradually" (that is a laugh) over a 5 week span as I obsered almost on a daily basis the blind spot tear away becomming larger.

Refer to Mr Drummy's last sentence in the quote from the Informal Resolution Form. The reason I saw PA Jastillano was because I had no vision in my right eye at the time - I was blind!!! What more documentation would he need to verify I was having vision problems?!

So, now, here I set again, but this time I have ~~but~~ only about 2% of my vision remaining. Each and every claim made herein can readily be proven via the medical record unless those pertinent documents have been removed or destroyed. If so, one thing for certain, the testimony of the optometrists, ophthalmolgists, my family, various convicts, etc. will prevail. The exhausting of administrative remedies, filing of commercial liens and tort claims will also attest to my efforts at having said operation performed and the malpractice involved with the retinal detachment.

Attachment 1
THX-1330.13J

10-129

FEDERAL CORRECTIONAL COMPLEX
TERRE HAUTE, INDIANA
INFORMAL RESOLUTION FORM

Inmate Name: PENICK, JAMES Reg. No. 21552-061
Unit: A-1 104

NOTICE TO INMATE: You are advised normally prior to filing a Request for Administrative Remedy, BP-2999(13), you **must** attempt to informally resolve your complaint through your Correctional Counselor. Please follow the steps listed below:

1. **State your complaint:** THE OPTOMETRIST ON OR ABOUT 02-10 STATED THAT THE PARTIAL BLIND SPOT IN MY EYE WAS NOTHING WITH WHICH I SHOULD BE CONCERNED. AFTER ABOUT A MONTH I LOST MY VISION BECAUSE OF RETINAL DETACHMENT. THE OPHTHALMOLOGIST STATED THAT THE MISDIAGNOSIS AND DELAY RESULTED IN MASSIVE SCAR TISSUE WHICH EFFECTIVELY LEAD TO THE DESTRUCTION OF MY VISION.

(If more space is needed, you may use up to one letter size (8 ½ x 11) continuation page. You must also submit one copy of supporting exhibits. (Exhibits will not be returned with the response to the BP-229(13) responses.))

2. **State what actions you have made to informally resolve your complaint:** MEDICAL RECORD WILL VERIFY MY CONSTANT COMPLAINTS, BUT TO NO AVAIL.

3. **State what resolution you expect:** THOSE RESPONSIBLE MADE TO RESTORE MY VISION OR RESTITUTION OF $1,000,000.00

FDC

Inmate's Signature: [signature] Date: 08-02-10

Correctional Counselor's Comments (Steps to Resolve): RESPONSE ON BACK [redacted]

Counselor' Signature: _____ **Date:**
Unit Manager's Review: _____ **Date:**
Informally Resolved: _____ **Date:**

	BP-8 ISSUED	BP-8 RETURNED	BP-9 ISSUED	BP-9 RETURNED
DATE	08-02-10	08-12-10	08-17-10	
TIME	0900	1000	1500	
COUNSELOR	TC	TC	TC	

IM Penick, James 01552-061,

I have reviewed your Informal Resolution Form and recent medical record. I have also inquired with Mrs. Bowman who does the clinics. In doing so I have learned that at the time of your appointment with the optometrist (prior to be diagnosed with a retinal detachment) January 12, 2010 your pressures were within normal limits and you showed signs of Macular Degeneration, there were no indications of a retinal detachment at that time. Just because you were diagnosed with a retinal detachment does not mean that it had occurred prior to this appointment in January. This easily could have occurred after this visit and developed gradually until you saw the eye specialist. I see that you were evaluated by PA Jastillano on 02/22/2010 for vision complaints, but I see no other documentation that would indicate you were having problems after your visit with the optometrist in January.

Mr. Drummy EMT-P 08/14/2010

10-108

Attachment 1
THX-1330.13J

FEDERAL CORRECTIONAL COMPLEX
TERRE HAUTE, INDIANA
INFORMAL RESOLUTION FORM

Inmate Name: PENICK, JAMES Reg. No. 01552-061
Unit: A-1

NOTICE TO INMATE: You are advised normally prior to filing a Request for Administrative Remedy, BP-2999(13), you **must** attempt to informally resolve your complaint through your Correctional Counselor. Please follow the steps listed below:

1. **State your complaint:** For the past several years my many attempts at obtaining an eye patch have been to no avail. The Ophthalmologists both in Indianapolis and locally agree that I should have one. I feel nauseated and disoriented without a patch. The one I presently have was given to me by a convict, but it has since lasted its elasticity, therefore, fits poorly. Please, cease the madness!

(If more space is needed, you may use up to one letter size (8 ½ x 11) continuation page. You must also submit one copy of supporting exhibits. (Exhibits will not be returned with the response to the BP-229(13) responses.))

2. **State what actions you have made to informally resolve your complaint:** I have spoken with the PA and retina specialist but still no patch.

3. **State what resolution you expect:** I expect an eye patch.

Inmate's Signature: FDC [signature] Date: 7-14-10

Correctional Counselor's Comments (Steps to Resolve): Response on back

Counselor' Signature: _____ **Date:**
Unit Manager's Review: _____ **Date:**
Informally Resolved: _____ **Date:**

	BP-8 ISSUED	BP-8 RETURNED	BP-9 ISSUED	BP-9 RETURNED
DATE	07-13-10	07-14-10	08-02-10	
TIME	1253	1327	1500	
COUNSELOR	[initials]	[initials]	[initials]	

IM Penick, James #01552-061,

I have reviewed your Informal Resolution Form and recent medical record. You will need to discuss obtaining an eye patch with your PA, so you will need to sign up for sick call to discuss this issue. Just because an outside specialist has recommended an item does not mean it will be ordered here at the USP, but discuss the matter with your PA.

Mr. Drummy EMT-P 08/02/2010

RE: JAMES PENICK
#01552-061
USP-Terre Haute

Bob Hatley
4161 Clough Lane
Cincinnati, Ohio 45245

Dear Mr Lapin:

I am the very concerned brother of James Penick. On 05-13-'05 a cataract extraction procedure was performed on Jim's left eye by Dr. Thomas Norton of the Alexandria Eye and Laser Center in Alexandria LA. while he was confined to USP-Pollock. The same procedure was scheduled for his right eye the following month, 06-'05. However, he was transferred in spite of last minute protests wanting first to have the procedure performed. In the interim Jim has been examined by about four (4) Optometrists and two if not more Ophthalmologists all concluding that his right eye was in an advanced stage of deterioration and that a cataract extraction procedure was necessary.

About a year before the procedure had finally been performed (12-'07) his right eye had lost about 95% of its vision. The Ophthalmologist informed Jim that the opacity of the crystalline lens was such that she could not even see the retina. It has since been realized and stated by the Ophthalmologist that as a direct result of the numerous and unjustified refusals and postponements by the BOP and medical administrators for the operation an accumulation of encrusted matter had deposited at the bottom of the cavity housing the crystalline lens. Not all, according to the Ophthalmologist, of the encrusted matter

and why he was wearing an eye patch. We were informed that he was being "treated appropriately!" In fruitless attempts at having the operation performed he filed Administrative Remedies and finally Commercial Liens. For filing said liens Jim was written up on numerous occasions and given time in the hole, good time taken and loss of visiting, telephone and commissary privileges for, as of now, one and a half years each plus a recommended disciplinary transfer. His property has been misplaced / stolen and his mail including his legal mail is being confiscated. Every serious charge that, nevertheless, can be proved by numerous witnesses including a County Recorded. Jim stated that his medical record will support what he says. He has also just recently filed a $10,000,000.00 tort claim.

My questions are not rhetorical, we indeed expect, even, demand answers. How can you possibly punish him for filing liens? We expect that his record be immediately expunged of all related incident reports and his good time be restored, plus remove the restrictions barring him from visiting, commissary and telephone. ~~Further~~ Further, please stop confiscating his mail.

Your attention in this matter would certainly be appreciated.

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
FROM:	REGISTER NO.:
WORK ASSIGNMENT:	UNIT:

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86
and BP-S148.070 APR 94

Printed on Recycled Paper

U.S. Department of Justice

Memorandum

Federal Bureau of Prisons
FCC Terre Haute
HEALTH SERVICES

Date: 04/03/2008
Reply To
Attn Of: CLINICAL DIRECTOR, HEALTH SERVICES DEPARTMENT

To: PENICK, JAMES-3, 01552-061

Subject: DECISION REGARDING SURGICAL EXTRACTION OF RIGHT EYE CATARACT:

ON 04/03/2008
YOUR MEDICAL FILE WAS PRESENTED TO THE UTILIZATION REVIEW COMMITTEE FOR REVIEW OF A RECOMMENDATION FOR TREATMENT WITH A LOCAL PHYSICIAN. THE COMMITTEE, COMPOSED PRIMARILY OF MEMBERS OF THE HEALTH SERVICES DEPARTMENT, IS DESIGNED TO ASSIST HEALTH SERVICES STAFF IN DETERMINING THE LEVEL AND EXTENT OF TREATMENT NEEDED IN A PARTICULAR SITUATION. IN YOUR CASE, A RECOMMENDATION WAS MADE:

AFTER REVIEWING YOUR FILE, THE COMMITTEE DETERMINED THE FOLLOWING:

✓ DEFERRED

_____REVIEW OF YOUR CONDITION BY AN OUTSIDE CONSULTANT/TEST IS WARRANTED. YOU WILL BE SCHEDULED FOR AN APPOINTMENT.

_____REVIEW OF YOUR CONDITION BY AN OUTSIDE CONSULTANT/OR TESTING IS NOT WARRANTED AT THIS TIME. MEDICAL STAFF WILL CONTINUE TO MONITOR YOUR SITUATION AND RECOMMEND APPROPRIATE TREATMENT. YOU WILL BE SCHEDULED FOR A FOLLOW UP VISIT WITH YOUR ASSIGNED PHYSICIAN. PLEASE WATCH THE CALL OUT SHEET FOR THIS APPOINTMENT

IF YOU HAVE PARTICULAR QUESTIONS WITH REGARD TO THIS ISSUE, PLEASE CONTACT THE HEALTH SERVICES DEPARTMENT. IF YOUR CONDITION CHANGES PRIOR TO YOUR SCHEDULED APPOINTMENT, PLEASE SIGN UP FOR SICK CALL.

07-17-10

On 07-16-10 and again on 07-17-10 I requested, at ~~pilline~~ the pharmacy window, tape for my eye guard and cotton eye patches. Retinal surgery was performed on 07-16-10. The ophthalmologist and his nurse were most emphatic instructing me to ~~wear~~ wear the eye guard for two weeks and the patches for about 4 days. Some eye drops I take 4 times a day others twice per day so I need a substantial amount of tape. The second time on 07-17-10 I asked for tape and was denied again. I ~~to~~ gave the pharmacist the guard and patches as I could not use them without tape.

WITNESSES [signature] 18982-058

[signature] 07181-014

(IDC) [signature] Penick #01552-061

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) MEDICAL RECORDS (HOSP)	DATE: 09-30-10
FROM: PENICK JAMES	REGISTER NO.: 01552-061
WORK ASSIGNMENT: MED. UNASSG.	UNIT: A-1

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Why is the directive of Dr. Minture being obviated? He is an Ophthalmologist who specifically stated he would schedule a follow-up appointment with me within 4-6 week. That time frame has elapsed. Please explain?

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
MEDICAL RECORDS	06-28-10
FROM: PENICK, JAMES	REGISTER NO.: 05532-061
WORK ASSIGNMENT: MED. UNASS.	UNIT: A-1

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

I SIT AND STARE AT THE FLOOR IN DEFINED PERPLEXITY DESPERATELY ATTEMPTING TO RESOLVE THE DILEMMA AS TO WHY ONCE AGAIN MY SCHEDULED APPOINTMENT WITH THE OPHTHALMOLOGIST HAS BEEN SHUNNED. HE WAS VERY EMPHATIC WHEN HE TOLD ME HE WOULD SEE ME IN 2-3 WEEKS. I WOULD BE MOST APPRECIATIVE IF YOU WOULD KINDLY ELUCIDATE THIS MATTER.

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
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BP-10 Randy #53354-FI mailed 4-28-09 8:30 PM
on lockdown contact copy

Why the BP-8 wasn't included with the return of the Warden's BP-9 response completely escapes me. It completely distorts the understanding a third parties understanding of my complaint. According to the Warden no authorization for an eye patch by the Ophthalmologist is available in the medical record. Where, then, did I get the plastic patch? It was given to me by the attending nurse who obtained it from the Optometrist who just happened to be here. Earlier that day I had one of several stitches removed by the Ophthalmologist. The eye was still sensitive and to have a plastic eye patch ride directly on my eyeball wasn't very conducive to healing or my comfort. My question or to why this facility never approved a cataract extraction procedure for almost two (2) years in spite of numerous recommendation by several Optometrists and Ophthalmologists was not addressed.

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
MEDICAL RECORDS	05-17-09
FROM: PENICK, J	REGISTER NO.: 01552-061
WORK ASSIGNMENT: MEDICALLY UNASSIGNED	UNIT: A-1

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

The Opthalmologist informed me that since the cataract extraction procedure was not completely successful she would reschedule laser in about six months following surgery which was performed the first of the year. Time to be taken for the laser procedure the day the officers were stalled but it was cancelled and not according to my chronic care physician ~~not~~ rescheduled. Please inform me as to why it was not rescheduled and who took it upon themselves to deny it after the Opthalmologist ordered it?

WITNESSED FOR MAILING: Kelly Jr 9-35/05 CC: FILE

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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Claimant: JAMES PENICK

NOTICE

Respondents: H.J. Marberry, Complex Warden
Thomas A. Webster, M.D.
David L. Young, Associate Warden
Julie Ann Beighley, Health Services Administrator, et al

You are hereby NOTICED of a possible civil action against the above named respondents, et al. If the $10,000,000.00 tort claim, already submitted, resulting from blatant malpractice and remiss is not settled to Claimants complete satisfaction, then additional commercial liens and civil actions are inevitable.

Your continuous unjustified and arbitrary denials and refusals since Claimant was transferred here to approve a cataract extraction procedure of Claimant's right eye which was initially scheduled for June, 2005, is indefensible and resulted in the permanent loss of about 65% of the vision in Claimant's right eye. Refer to the enclosed Tort Claim.

Your confiscation of Claimant's mail pertaining to liens is readily verifiable. Said liens were resorted to in an effort at forcing Respondents to approve said eye operation. You had, instead of approving the operation, sanctioned Claimant with hole time, loss of good time, 18 months loss of visiting, telephone and commissary privileges in your fruitless efforts at silencing Claimant. With a clarion call I promise Respondents, et al, catastrophic economic destruction either via tort claim, commercial liens or civil action for your criminal neglect and actions in this untenable matter.

Now, again, submit your incident reports and again issue your unlawful, illegal and arbitrary sanctions.

Without Prejudice

James Penick, Secured Party/Creditor
By Authorized Representative, Attorney-In-Fact. In behalf of JAMES PENICK, Ens Legis

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: PENICK JAMES E | 01552-061 | A-1 | USP-Terre Haute
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A– INMATE REQUEST

After having submitted the attached BP-8 I continued for four more ~~days~~ consecutive sick calls which totalled six days in fruitless efforts at acquiring pain medication. When will this insanity cease? The pain goes on and on and on and, indeed, it goes on and on... Fortunately the pain has subsided to the extent I can now get some sleep after about a week of sleepless nights due to excruciating pain. My two mattress authorization from USP-Pollock was not recognized here at USP-Terre Haute. Were the PA's and doctors at Pollock incompetent? An altercation with the guard (Smith) who had taken my second mattress resulted in me being placed in SHU for insolence. The pain began at about that time and progressed in intensity then subsided somewhat. TJC

03-04-04 | Jim Penick
DATE | SIGNATURE OF REQUESTER

Part B– RESPONSE

RECEIVED
19
FCI TERRE HAUTE

DATE | WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE | CASE NUMBER: 530676-F1

CASE NUMBER: _____

Part C– RECEIPT

Return to: _____ | _____ | _____ | _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

DATE | RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP / WN

BP-229(13)
APRIL 1982

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
MEDICAL RECORDS	08-17-09
FROM: PENICK J	REGISTER NO.: 01552-061
WORK ASSIGNMENT: MEDICALLY UNASSIGNED	UNIT: A-1

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

I have mentioned on numerous occasions to my chronic care physician that even with a corrective lens for my right eye I am still unable to read or focus long distance. My right eye is the one damaged as a result of the constant postponement of the cataract extraction procedure. Why is it I am refused another appointment with the optometrist in order to resolve this untenable situation?

WITNESSED: [illegible]

FOR MAILING (Do not write below this line) CC: FILE

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
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This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of the Regional Counsel *Kansas City, KS 66101*

05-23-2012

MEMORANDUM FOR PAUL PEPPER, ATTORNEY ADVISOR
ST LOUIS CLC

FROM: Richard W. Schott
Regional Counsel

SUBJECT: **Inmate JAMES PENICK**
Institution USP TERRE HAUTE
Property Claim Number 2012-04072

Find attached a copy of the above referenced administrative claim. This is a request that an investigation be conducted by the appropriate designated staff and in accordance with the Tort Claim Protocols of the North Central Region.

Sixth Month Date: 11-03-2012

If you consider settlement, you should review all available records to ascertain if the inmate has any unpaid fines, costs, or other sums due or owing to the United States.

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of the Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

05-23-2012

JAMES PENICK, #01552-061
USP TERRE HAUTE

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2012-04072 $ 250,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on 05-04-2012. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until 11-03-2012.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et.seq., and §543.30.

Sincerely,
Richard W. Schott
Regional Counsel

Page 1318 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1319 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1320 of 2033

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of the Freedom of Information and Privacy Act

Page 1321 of 2033

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Page 1322 of 2033

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Page 1323 of 2033

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Page 1324 of 2033

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Page 1325 of 2033

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of the Freedom of Information and Privacy Act

Page 1326 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

OCT 29 2012

James Penick
Register No. 01552-061
Terre Haute USP
P.O. Box 33
Terre Haute, IN 47808

Re: Administrative Claim Number TRT-NCR-2012-04072
Personal Injury: $ 250,000.00

CERTIFIED NUMBER 7011 3500 0003 0976 5267

Dear Mr. Penick:

Your above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six months after the date of mailing of this notification.

Sincerely,

for Richard W. Schott
Regional Counsel

(b)(6)

The following opinions are based on the medical and prison records of James Edward Pennick. Documents that support my opinions include: Bureau of Prisons Health Services Records from 2007 t0 2013 as well as medical records from Dr. Webster, and Dr Minturn (2007-2013). I am a board certified ophthalmologist, Associate Professor of Ophthalmology at the Northwestern Feinberg School of Medicine who practices at University Eye Specialists in Chicago, Illinois. My curriculum vita is attached.

(b)(6)

(b)(6)

Sincerely,

Jon M. Ruderman, MD
Associate Professor of Ophthalmology
Northwestern Feinberg School of Medicine

January 16, 2015

(b)(6)

I had the pleasure of reviewing this case and speaking to you about this Penick Case. We actually spoke on the phone regarding this case on January 14, 2015. I am expressing a summary of the case I reviewed along with our discussion.

(b)(6)

Page 1331 of 2033

Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

Page 1332 of 2033

Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

(b)(6)

Sincerely yours,

Jack A. Cohen, MD
jac:nrp/61680708

Welcome WILSON J MOORER | Logout

HOME | ALERTS | MY WORK | NEW CASE | SEARCH MAIN | EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2013-01158 **Short Description:** PENICK V. PRISON CONTRACT OPTOMETRIST ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	2:12-cv-00341-WTL-WGH	Date	06/09/2015
Short Description	PENICK V. PRISON CONTRACT OPTOMETRIST ET AL	Type	Settled
		Reason	
Classification	Civil	Sought	Punitive Damages
Case Type	Bivens 8th Amend	Amount offered	$
Case Sub-Type	COC-Medical Condition	Total Amount Paid	$2,000.00
Current Region	NORTH CENTRAL REGIONAL OFFICE	Description	SETTLED FOR $2,000
Current Institution	Terre Haute (FCI)	Description	SETTLED FOR $2,000
Incident Region		Court Fee Paid ?	Yes
Incident Institution		Pro Se ?	No
Monetary Relief Sought	$250,000.00		
Estimated Amount	$	Date Received	06/28/2013
Office	Terre Haute		
Jurisdiction	SOUTHERN DISTRICT OF INDIANA	Date Filed	11/19/2012
Responsible Legal Office	St. Louis, MO		
		Current Owner	SARAH ALLISON ARMSTRONG
Estimated Amount	$ -	Case Status	Closed
Estimated Outcome	No evaluation can be made at this time	Timeline Status	Closed
		Monthly Report Status	NEW CASES
		Private Case	No

Long Description	28:1331 FEDERAL QUESTION: BIVENS ACT
Further Case Classification	
Comments	

Joseph Franklin Fejeran Drake
Fed. Reg. NO.: 00886-093
U.S. Penitentiary Canaan
P.O. Box 300
Waymart, PA. 18472

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

Joseph Franklin Fejeran Drake, Plaintiff,	CASE NO.: 1:13-CV-00961-TWP-DML
VS.	AMENDED CIVIL COMPLAINT PURSUANT TO FRCP RULE 15
United States Of America, Defendant,	

FEDERAL TORT CLAIM ACT 28 U.S.C. § 2676

CIVIL RIGHTS COMPLAINT BY A FEDERAL PRISONER

Plaintiff, Joseph Franklin Fejeran Drake, currently Resides at U.S.P. Canaan, P.O. Box 300, Waymart, PA. 18472... The Plaintiff is acting in pro-se capacity and Request that this Honorable Court Grant this amended complaint pursuant to Federal Rules Civil Procedure Rule 15, and that this claim be construed liberally under Haines V. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972)...

Introduction

This is a civil action being filed in compliance with the Federal Tort claim Act (F.T.C.A.) 28 U.S.C. 2676-79... Before this act was federally Granted agency's could be sued for it's torts if congress had given the agency power to "sue and be sued" under (F.T.C.A.) however;

(authority of any federal agency to sue or be sued in it's own name shall not be construed to authorize suits against such federal agency on claim which a cognizable under 28 U.S.C. 1346(b))

Instead, the remedies provided by the (F.T.C.A.) are the exclusive Remedy for claims that are cognizable under 28 U.S.C.A 1346(b), which grants the federal district court jurisdiction over tort claims against the United states...

This action is being brought pursuant to the (F.T.C.A.) under title 28 U.S.C. 2671 thru 2679...

FACTS

The plaintiff listed above is currently residing at USP canaan; P.O. Box 300, waymart, PA. 18472... The plaintiff has individually filed (i.e. Exhausted Administrative Remedy) standard 95 as (incarcerated Person) Required (F.B.O.P. Program statement 1320.06) under (F.T.C.A.)...

The defendant, United states is being sued directly for negligence, negligence per se, wrongful acts or omission of any employee of the government while acting within the scope of his office or employment... can be served at office of General Counsel, Federal Bureau of Prisons, 320 First street, N.W. washington, DC. 20530...

On or about may 02, 2012 at 1:00 pm, plaintiff was placed in special Housing Unit (SHU) B-Range-Lower-cell #118 (U.S.P. TERRE Haute) under going institution (S.I.S.) investigation.

On or about may 12 or 14, at 5:00 pm. (FBOP) correctional staffs (Yo-MR. PITMAN, Yo-MR. ROGERS, Yo-MR. SOVOUT, Yo-MR. SEARS, Yo-MR. TURNER, Yo-LT. MR. MEANS) in (SHU) conducted inmates cells Rotation every 21 days (SHU) Rule, and cells are inspected and searched before inmates being moved/transfered into new assigned cells...

On or about may 12 or 14 at 5:00 pm, plaintiff was moved/transferred by (SHU) staffs from cell #118 to cell #119, into a cell with unsuitable bunkbed hazardous, unsafe living condition that poses substantial Risk of serious harm... see attached Exhibit- ...

on or about may 16, 2012 at 8:00 am, while plaintiff being housed in (SHU) B-Range-lower-cell #119, while in the process of cleaning assigned cell wiping walls with cloth rag and floor; for the weekly (SHU) cells inspection and institutional Executive staffs (SHU) Rounds walk through...

on or about may 16, 2012 at 8:00 am, plaintiff while in the Process of washing cell floor on hands on knees while getting up plaintiff slipped lost of balance and plaintiff right forearm struck the right side of the bunkbed post frame, this Part of the frame was "cut out" in the shape of a weapon a home made "knife"...

F.B.O.P. correctional staffs acknowledge this bunkbed post frame "cut out" area by "spraying" the "cut out" area with (orange paint) and ignored the razor sharp edges, burrs, cut out areas, unsuitable, unsafe, hazardous bunk bed living conditions which over Period of time cut out area has turned "rusty"... This cutout area (Piece of metal) on bed frame post is approximately 14 inches long... see attached Exhibit- A ...

On or about may 16, 2012 at 8:05 am, while (SHU) staffs (Yo-Mr. Booker) making his (SHU) rounds making sure that (SHU) cells are in accordance for cell inspection and Executive walk through, I got Yo-Mr. Booker attention of my injury caused by the bunkbed cut out area (4 inch cut to right forearm) and stated he would call and inform P.A. or nurse...

On or about may 16, 2012 at 8:15 am while institution Executive staffs were making their (SHU) Rounds, I stopped (A.W./Mr. church) and brought to his attention by showing him my injury (4 inch cut right forearm), and explained what had happened and cause of injury, and (Mr. church / A.W.) noticed the

cut out area piece of metal missing from bunkbed frame post that's been "spread" with (orange paint) identifying cut out area and cut out exposed within all common areas immediately (sm. church / A.U.) called medical staff and ordered medical injury assessment be performed on plaintiff injury, and called institutional facility maintainance manager, and ordered to have the bunkbed post frame cut out area be immediately fixed... bunk bed cut out area was not fix until "June 07, 2012" by institution facility utility maintenance operation (MR. Linton) and before bunkbed cut out area repair (SHU) staff c/o-MR. Gibbons took Picture Photos of bunkbed frame cut out area (June 07, 2012)... see attached (BOP) Health Services dept. clinical Encounter medical injury assessment report Exhibit- B ....

On or about May 25, 2012, Plaintiff filed (SF-95) form admin. claim for money sums ($10,000.00) for damages, suffered Personal injury before U.S. (D.O.J.) (F.B.O.P.) North Central Regional office under Provision of (F.T.C.A.) 28 USC 1346(b), 2671 Et. Seq. See attached Exhibit- C ...

On or about June 04, 2012, Plaintiff received a Response that Plaintiff filed (SF-95) form Admin. claim for damages, Personal injury under (F.T.C.A.) before (NCR) office Received (05.25.12) and accepted for Admin. determination. See attached (NCR) Memorandum (Admin. claim) TRT-NRC-2012-04163. Exhibit- C ...

On or about January 23, 2013, Plaintiff received a denial Response from (NCR) office denying plaintiff filed (SF-95) form admin. claim for damages, Personal injury under (F.T.C.A.) See attached (NCR) Memorandum (Admin. claim) disposition final denial of claim, Exhibit- D ...

Plaintiff seek that said (SF-95) form denial on admin. claim for damages, Personal injury under (F.T.C.A.) Plaintiff wishes to Proceed further on filing a civil suite in appropriate U.S. District Court for the Southern District of Indiana...

B.O.P. STAFF NEGLIGENCE FAILURE TO PROVIDE PLAINTIFF PROTECTION, SAFE AND SUITABLE LIVING QUARTERS

1.) Under 18 USC 4041 & 4042 (a)(1)(2) the (B.O.P.) has mandated duty to provide Plaintiff, suitable Quarters, safekeeping care, protection to all inmates here at U.S.P. Terre Haute...

2.) On May 16, 2012, the (BOP) was in breach of it's mandated duty under the policies and regulation implemented by congress when they conducted cells Rotation and transferred Plaintiff from Cell #118 to cell #119 in new assigned cell, with a bunkbed hazardous, unsafe living condition, and before placing Plaintiff in cell failing to recognize through cell search/ and inspection bunkbed from a post cut out area that's been sprayed with Orange Paint, identifying bunkbed cut out area...

3.) As a Proximate Result from (B.O.P.) staffs "deliberate indifference" and deliberate Neglect", wrongful acts or omission, inattention to duty, consciously or Recklessly contributed and has knowledge of a harmful prison condition that pose a substantial risk of serious harm to plaintiff safety, and does nothing to correct it which Resulted in causing actual harm/and personal injury causing Plaintiff to suffer Pain and bleeding (4 inch cut to right forearm)..

4.) As a proximate Result from this breach in mandated duties the plaintiff inmate's rights were violated..

A. Plaintiff has the Right to expect that staff and/or other personal will treat the plaintiff as a human being in a Respectful, important and fair manner...

B. Plaintiff has the right to be informed and know the Rules and Procedures and/or schedules concerning the operation of this institution...

c. Plaintiff has the right to be provided suitable Quarters and proper bedding, etc. etc...

5.) Paragraph 4(a) was breached when plaintiff been placed in a cell with bunkbed hazardous, unsafe living condition, and failure to recognize harmful Prison condition that pose a substatial risk of serious harm to plaintiff safety...

6.) Paragraph 4(b) was breached when staffs failure to show the minimal concern for inmate plaintiff safety during cell Rotations of cell search and inspection before Placing plaintiff in cell with bunkbed unsafe living condition...

7.) Paragraph 4(a) was breached when plaintiff was placed in unsuitable Quarters unsafe living condition that pose a substantial risk of harm to plaintiff safety, and does nothing to combat it which resulted in causing actual harm/and personal injury. causing plaintiff to suffer pain and bleed (4inch cut to right forearm) this incident would have not occurred if staff would exercise minimal concerns upon plaintiff safety by Recognition of observation of Orange Paint Applyed on bunkbed cut out area of it hazardous, unsafe condition and not Placing plaintiff in said cell danger...

8.) As a direct and Proximate Result of plaintiff Personal injury (4inch cut Right forearm) from with cell bunkbed unsafe living condition, due to USP TERRE Haute staff negligence, the plaintiff suffered a painful system that included (bleeding)... Further the above Mentioned system in which plaintiff suffered from being Placed in unsuitable Quarter with a bunkbed unsafe living condition that cause plaintiff injury...

9.) The action and omission of U.S.P. Terre Haute staffs on may 16, 2012 in conducting (SHU) cell Rotation and transferring plaintiff from cell #118 to cell #113 in a cell with bunkbed unsafe living condition even after routine cell search and inspection on discovering orange paint sprayed on bunkbed without area exposing razor sharp edges and burrs, that over a period of time turned rusty, staffs behavior amounts to gross Negligence, a failure to adequately train staffs and denial of plaintiff mandatory rights to be provided a safe, suitable Quantan constitute negligence...

10.) The united states is responsible under F.T.C.A. for the acts described herein based on the wrongful act or omissions of the federal employees acting within the scopes of duty he/she owes to his/her employer and the conduct is the type that he/she was hired to do...

11.) Pursuant to 28 U.S.C. 2675 (b) and 28 C.F.R. 14.2, the undersigned plaintiff is required to request a specific sum ($10,000.00) certain for the damages (he) sustained, and therefore the above mentioned plaintiff have requested specific damages and/or settlement with the agency responsible (B.O.P.) personal injury staffs negligence for not providing Plaintiff a safe suitable living Quarters...

Damage Sought

Affidavit in support of claims made

For the facts stated in this civil complaint is within their personal knowledge and are true and correct...

The above plaintiff declares under the Penalty of perjury under the laws of the United States of America (28 USC 1746) that the above mentioned is true and correct..

Executed on this day _____ of 2013

signature _____

Joseph Franklin Felarson Drake
Fed. Reg. No.: 00816-093

CERTIFICATE OF SERVICE

I Joseph F.F. Drake, do hereby certify under penalty of perjury (28 USC 1746) that I have served a true and correct copy of the following documents: Amended COMPLAINT (F.T.C.A. 28 USC § 2676) PURSUANT to F.R.C.P. Rule 15.

which, Pursuant to Houston v. Lack, 487 US 266 (1988), is deemed filed at the time it was delivered to prison authorities for forwarding to the court and service upon Parte to this litigation and/or their attorney(s) of record..

I have placed the material reference above in a properly sealed envelope with first class postage affixed and I addressed it to: The office of the
Clerk of the U.S. District Court
105 US. Court House
46 East Ohio Street
Indianapolis, Indiana 46204

And deposited said envelope via hand delivery to the mail room staff at the U.S.P. Canon on this 02 day of Dec 2013..

respectfully submitted,

Joseph F. F. Drake #00816-093

United States Penitentiary TERRE Haute
(SHU) Special Housing Unit - B - Range - Lower - Cell # 119.
Date Injury occurred : May 16, 2012

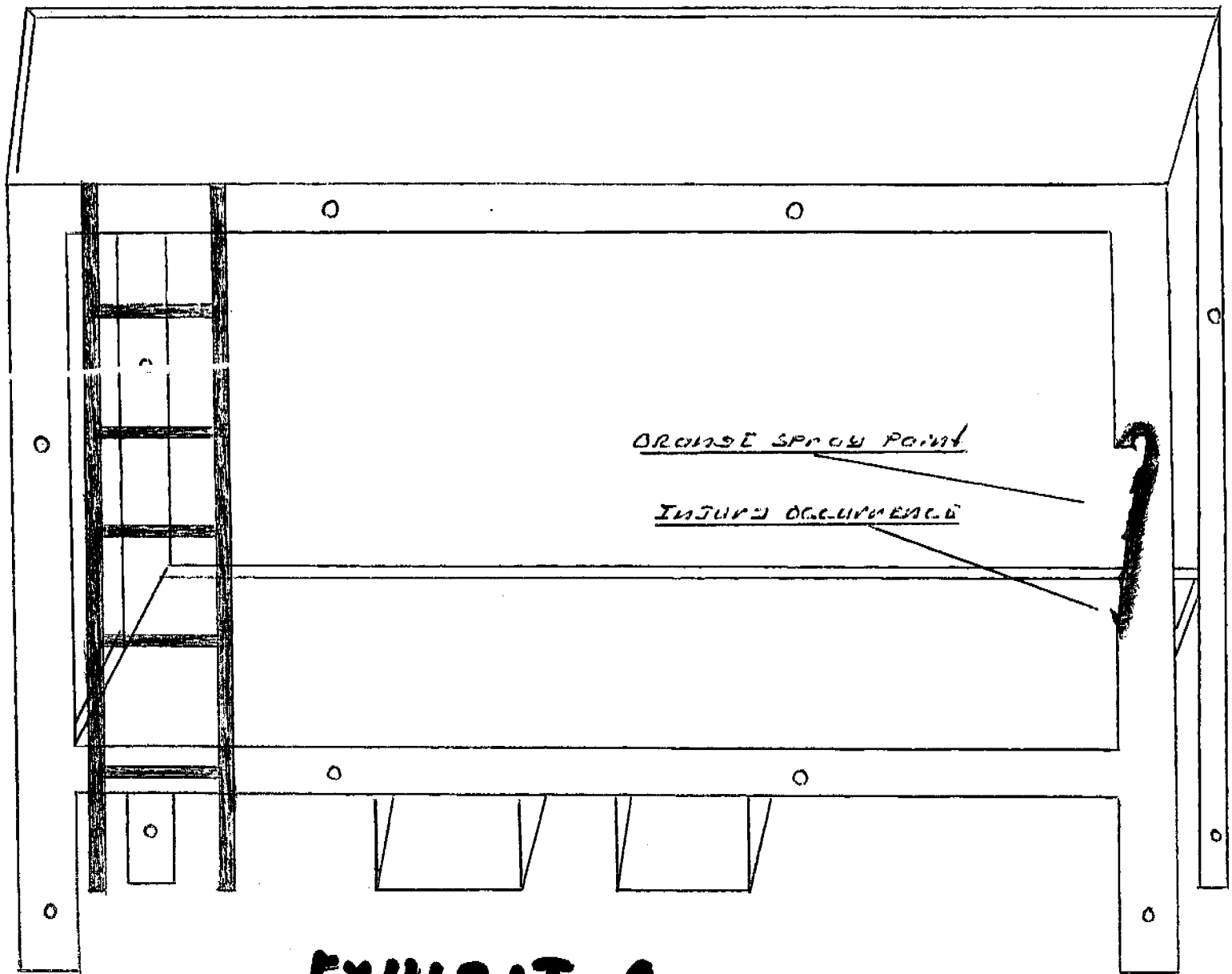


EXHIBIT-A

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: DRAKE, JOSEPH F			Reg #: 00886-093
Date of Birth: 08/15/1971	Sex: M	Race: ASIAN/PAC.	Facility: THP
Encounter Date: 05/16/2012 07:00	Provider: Clingerman, Nicole LPN		Unit: Z02

Injury Assessment-Not Work Related encounter performed at Special Housing Unit.

SUBJECTIVE:

INJURY 1 **Provider:** Clingerman, Nicole LPN

Date of Injury: 05/16/2012 07:00 **Date Reported for Treatment:** 05/16/2012 12:56

Work Related: No **Work Assignment:** INST A/O, SHU UNASSG

Pain Location:

Pain Scale: 0

Pain Qualities:

Where Did Injury Happen (Be specific as to location):

In my cell

Cause of Injury (Inmate's Statement of how injury occurred):

I cut my arm on my bunk.

Symptoms (as reported by inmate):

My arm was bleeding.

OBJECTIVE:

Exam:

ASSESSMENT:

Cut(s) and/or Abrasion(s)

Inmate brought to health services room in SHU. A&O x3. Skin warm, pink and dry. Respirations easy and unlabored. Right forearm has approximately 4 inch cut. Wound was not actively bleeding during the exam. Area was cleansed with normal saline. Inmate states that the bunk was rusty. Per Dr Harvey give tetanus immunization.

PLAN:

Disposition:

Follow-up at Sick Call as Needed

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
05/16/2012	Counseling	Access to Care	Clingerman, Nicole	Verbalizes Understanding

EXHIBIT-B

Inmate Name: DRAKE, JOSEPH F			Reg #: 00886-093
Date of Birth: 08/15/1971	Sex: M	Race: ASIAN/PAC.	Facility: THP
Encounter Date: 05/16/2012 07:00	Provider: Clingerman, Nicole LPN		Unit: Z02

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: No

Completed by Clingerman, Nicole LPN on 05/16/2012 13:00
Requested to be cosigned by Harvey, Paul MD, RMD.
Cosign documentation will be displayed on the following page.

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of the Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

06-04-2012

JOSEPH DRAKE, #00886-093
USP TERRE HAUTE

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2012-04163 $ 10,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on 05-25-2012. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until 11-24-2012.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et.seq., and §543.30.

Sincerely,
Richard W. Schott
Regional Counsel

EXHIBIT-C

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

JAN 23 2013

Joseph Drake
Register No. 00886-093
USP Canaan
P.O. Box 300
Waymart, PA 18472

Re: Administrative Claim Number TRT-NCR-2012-04163
Personal Injury: $10,000.00

CERTIFIED NUMBER 7011 3500 0003 0976 5663

Dear Mr. Drake:

Your above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six months after the date of mailing of this notification.

Sincerely,

Richard W. Schott
Regional Counsel

EXHIBIT-D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOSEPH FRANKLIN FEJERAN DRAKE,	)	
	)	
Plaintiff,	)	
v.	)	CASE NO. 1:13-cv-00961-TWP-DML
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

DEFENDANT'S ANSWER

Defendant United States of America, by counsel, Joseph H. Hogsett, United States Attorney for the Southern District of Indiana, and Lindsay Dunn, Assistant United States Attorney, answers Plaintiff's Amended Civil Complaint ("Complaint") pursuant to the Court's order of December 10, 2013 (Docket# 27) as follows:[1]

I. PARTIES AND VENUE

The Defendant does not deny that it has been named as a proper defendant, nor does it deny that venue is proper.

II. DEFENSES

1. Plaintiff has failed to state a claim upon which relief can be granted.

2. Plaintiff's alleged injuries and damages were not proximately caused by the negligent or wrongful act or omission of an employee of the United States acting within the scope of his or her employment.

3. Plaintiff is not entitled to a jury trial on his money damage claims alleged against the United States of America for negligent acts or omissions of its employees.

[1] Due to the format of Plaintiff's Complaint (and for purposes of clarity), Defendant has not answered in a traditional format following paragraph by paragraph. To the extent an allegation against Defendant is not fully addressed herein, Defendant expressly denies such allegation.

4. For its Answer to the factual allegations set forth in Plaintiff's Complaint, Defendant alleges as follows: The Defendant denies each and every allegation of wrongful, unconstitutional, illegal, improper, tortious, or in any manner negligent or reckless conduct on the part of the Defendant, its agents, servants, or employees as alleged by the Plaintiff in his Complaint. Specifically, with respect to Plaintiff's alleged injury to his forearm, Defendant denies each and every allegation of wrongful, unconstitutional, illegal, improper, tortious, or in any manner negligent or reckless conduct on the part of the Defendant, its agents, servants, or employees as alleged by the Plaintiff in his Complaint. Defendant further denies that it breached any legal duty to Plaintiff.

Wherefore, the Defendant respectfully prays that the Plaintiff take nothing by way of his Complaint, that the Complaint be dismissed with prejudice, that judgment be entered in favor of the Defendant and against the Plaintiff, and for all further relief just and proper in the premises.

Respectfully Submitted,

JOSEPH H. HOGSETT
United States Attorney

By: */s/Lindsay Dunn*
Lindsay Dunn
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing upon the Plaintiff herein by electronically filing and mailing a copy thereof to the following on the 7th day of January, 2014:

Joseph Franklin Fejeran Drake
00886-093
CANAAN - USP
CANAAN U.S. PENITENTIARY
Inmate Mail/Parcels
P.O. Box 300
Waymart, PA 18472

/s/Lindsay Dunn
Lindsay Dunn
Assistant United States Attorney

Office of the United States Attorney
10 West Market Street
Suite 2100
Indianapolis, Indiana 46204

file for clerk of u.s. court

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION
2013 JUN 14 PM 4:03
SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

JOSEPH Franklin FEJERan Drake
Plaintiff's full name(s)

00886-093
Prisoner or registration number

U.S. Penitentiary Canaan
P.O. Box 300
Street address or postal box number

Waymart, PA. 18472
City, state and zip code

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

1:13-cv-0961 TWP-DML

Civil Action No. _____
(To be supplied by the Court)

JOSEPH Franklin FEJERan Drake
_____ Plaintiff(s)
Full name(s) (Do not use *et al.*)

v.

UNITE STATES OF AMERICA

_____

_____

_____

_____

_____ Defendant(s).
(Enter above the full name of ALL defendants in this action.
Do not use "et al.")

CIVIL RIGHTS COMPLAINT

I. Parties

A. Plaintiff's Information:

Name and Prisoner Number of Plaintiff: JOSEPH F.F. Drake #00886-093

Present Place of Confinement or Mailing Address: U.S. Penitentiary canaan,

P.O. Box 300, waymart, PA. 18472

B. Defendant's Information: *(NOTE: To provide information about more defendants than there is room for here, use this format on another sheet of paper.)*

Name of Defendant 1: "united states of America"

Title (If applicable): _____

Address of Defendant: _____

_____

Name of Defendant 2: "united states of America"

Title (If applicable): _____

Address of Defendant: _____

_____

Name of Defendant 3: "united states of America"

Title (If applicable): _____

Address of Defendant: _____

_____

Name of Defendant 4: "united states of America"

Title (If applicable): _____

Address of Defendant: _____

II. Jurisdiction

Jurisdiction is invoked pursuant to 28 U.S.C. § 1331. *(If you wish to assert jurisdiction under additional statutes, you may fill in the title and section below.)*

28 U.S.C. § 1346(b)

28 U.S.C. § 2671 Et. Seq.

III. Basis for Claims

Check any Applicable Item(s):

_____ Complaint Under the Civil Rights Act, **42 U.S.C. § 1983** (state, county, or municipal defendants)

_____ Complaint under ***Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)** (federal defendants)

✓ **Other** (cite statute, if known) 28 USC §§ 1346(b), 2671 Et. Seq.

IV. Claims

BRIEFLY state the background of your case:

"SEE Attached Page"

Claim I: (Include all facts you consider important, including names of persons involved, places and dates. Describe exactly how each defendant is involved. State the facts clearly in your own words without citing legal authority or argument.)

"SEE Attached Page"

Claim II: N/A

Claim III: N/A

V. Previous Lawsuits and Administrative Relief

1. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to the conditions of your imprisonment?

____ Yes ✓ No

If your answer is "Yes," describe each lawsuit. (If there is more than one lawsuit, describe the additional lawsuits using this same format on a blank sheet which you should label "IV. Previous Lawsuits and Administrative Relief".)

a. Parties to previous lawsuit:

Plaintiff(s): N/A

Defendant(s): N/A

b. Name and location of court and docket number: N/A

c. Disposition of lawsuit. (For example, was the case dismissed? Was it appealed? Is it still pending?) N/A

d. Issues raised: N/A

e. Approximate date of filing lawsuit: N/A

f. Approximate date of disposition: N/A

2. I have previously exhausted available administrative remedies regarding the or events acts complained of in Part III of this complaint. ✓ Yes _____ No

If your answer is "Yes," briefly describe how relief was sought and the result:

Administrative claim under (F.T.C.A.) Disposition "DENIED" Memorandum state claim did not reveal plaintiff suffered any personal injury as result of NEGligent acts or omissions of "B.O.P." Employees acting within the scope of their employment... SEE attached Administrative Memorandum under (F.T.C.A.)...

VI. Previously Dismissed Actions or Appeals

1. If you are proceeding under 28 U.S.C. §1915, please list each civil action or appeal you have brought in any court of the United States while you were incarcerated or detained in any facility, that was dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. Please describe each civil action or appeal. If there is more than one civil action or appeal, describe the additional civil actions or appeals using this same format on a blank sheet which you should label "V. Previously Dismissed Actions or Appeals."

a. Parties to previous lawsuit:

Plaintiff(s): N/A

Defendant(s): N/A

b. Name and location of court and docket number: N/A

c. Grounds for dismissal:

( ) frivolous ( ) malicious ( ) failure to state a claim upon which relief may be granted.

d. Approximate date of filing lawsuit: N/A

e. Approximate date of disposition: N/A

VII. Request for Relief

I request the following relief:

"SEE attached page"

Signature of attorney (if any)

Plaintiff's Signature

Date: 06-09-13

CERTIFICATE OF SERVICE

I Joseph Franklin Federon Drake, do hereby certify under penalty of perjury (28 U.S.C. § 1746) that I have served a true and correct copy of the following documents: CIVIL RIGHTS COMPLAINT PURSUANT UNDER 28 USC § 2671 ET. SEQ.
MOTION AND AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS

which, pursuant to Houston v. Lack, 487 U.S. 266 (1988), is deemed filed at the time it was delivered to prison authorities for forwarding to the court and service upon parties to this litigation and/or their attorney(s) of record.

I have placed the material referenced above in a properly sealed envelope with first class postage affixed and I addressed it to:

THE OFFICE OF THE
CLERK OF THE U.S. DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
105 U.S. COURTHOUSE
46 EAST OHIO STREET
INDIANAPOLIS, INDIANA 46204

And deposited said envelope via hand delivery to the Mail Room staff at the United States Penitentiary CANAAN on this 09 day of JUNE, 2013.

Respectfully submitted,

Joseph Franklin Federon Drake

Name: JOSEPH F.F. DRAKE
Reg. No. 00886-093
U.S. PENITENTIARY CANAAN
P.O. BOX 300
WAYMART, PA. 18472

CIVIL RIGHTS COMPLAINT ATTATCHMENT PAGE TO

IV. CLAIMS

Briefly state The Background of your case:

On may 02, 2012 at about 1:00 pm. Plaintiff was placed in Special Housing Unit (SHU) B-range-Lower- cell #118 (U.S.P. Terre Haute) undergoing institution (S.I.S.) investigation...

On may 12 or 14, at about 5:00 pm. Federal Bureau of Prisons (F.B.O.P.) correctional staff's in (SHU) conducted inmate cells rotation every 21 days (SHU) Rule on (B-Range-Lower) and cells are inspected and searched before inmates moved / transfered into new assigned cells...

Plaintiff was moved / transfered from cell #118 to cell #119 into a cell with a bunkbed hazardous, unsafe living condition, that pose substantial risk of serious harm...

On 05-16-12 at about 8:00 am, while Plaintiff being housed in (SHU) B-range-Lower-cell #119, while in the process of cleaning assigned cell wipping walls with cloth rose and floor, for the weekly (SHU) cells inspection and institutional Executive staff (SHU) rounds walk through...

Plaintiff while in the process of washing cell floor plaintiff slipped lost of balance and plaintiff right forearm struck the right side of the bunkbed post frame this part of the frame was "cut out" in the shape of a weapon a home made "knife"...

(BOP) correctional staffs acknowledge this bunkbed post frame "cut out" area by "spraying" the "cut out" area with (orange paint) and ignored the razor sharp edges, burr's unsafe living condition, which over period of time has turned "rusts"... This cut out area (piece of metal) on bed post frame is approximately 14 inches long... See attached Picture drawn sceph of bunkbed...

while Executive staff's were making their (SHU) rounds I stopped "A.W." (Mr. church) and showed him my injury (4 inch cut right forearm), and explained what had happened, and Mr. church (A.W.) noticed the cut out area piece of metal missing from bunkbed post from thats been "sprayed" with (orange Paint) and cut out area within cell common area, and immediately called medical staff and ordered medical injury assessment be performed on Plaintiff injury, and called institutional facility maintenance manager, and ordered to have the bunkbed post frame cut out area be immediately fixed... See attached (BOP) Health services Department clinical Encounter medical injury assessment Report...

On may, 2012, Plaintiff filed (SF-95) form Admin. claim for money sums ($ 10,000.00) for damages, suffered Personal injury before u.s. (D.O.J.) Federal Bureau of Prisons (F.B.O.P.) North central Regional (NCR) office under Provision of Federal Tort claim Act (FTCA) title 28 usc §1346(b), 2671 Et. seq.

On 06-04-12, Plaintiff received a response that plaintiff filed (SF-95) Admin. claim for damages, personal injury under (F.T.C.A.) before (NCR) received (05-25-12) and accepted for Admin. determination .. see attached (NCR) Memorandum (Admin. claim) TRT-NCR-2012-04163...

01-23-13, Plaintiff received a denial response from (NCR) denying Plaintiff filed (SF-95) Admin. claim for damages, Personal injury under (FTCA)... see attached (NCR) Memorandum (Admin. claim) disposition final denial of claim (TRT-NCR-2012-04163)..

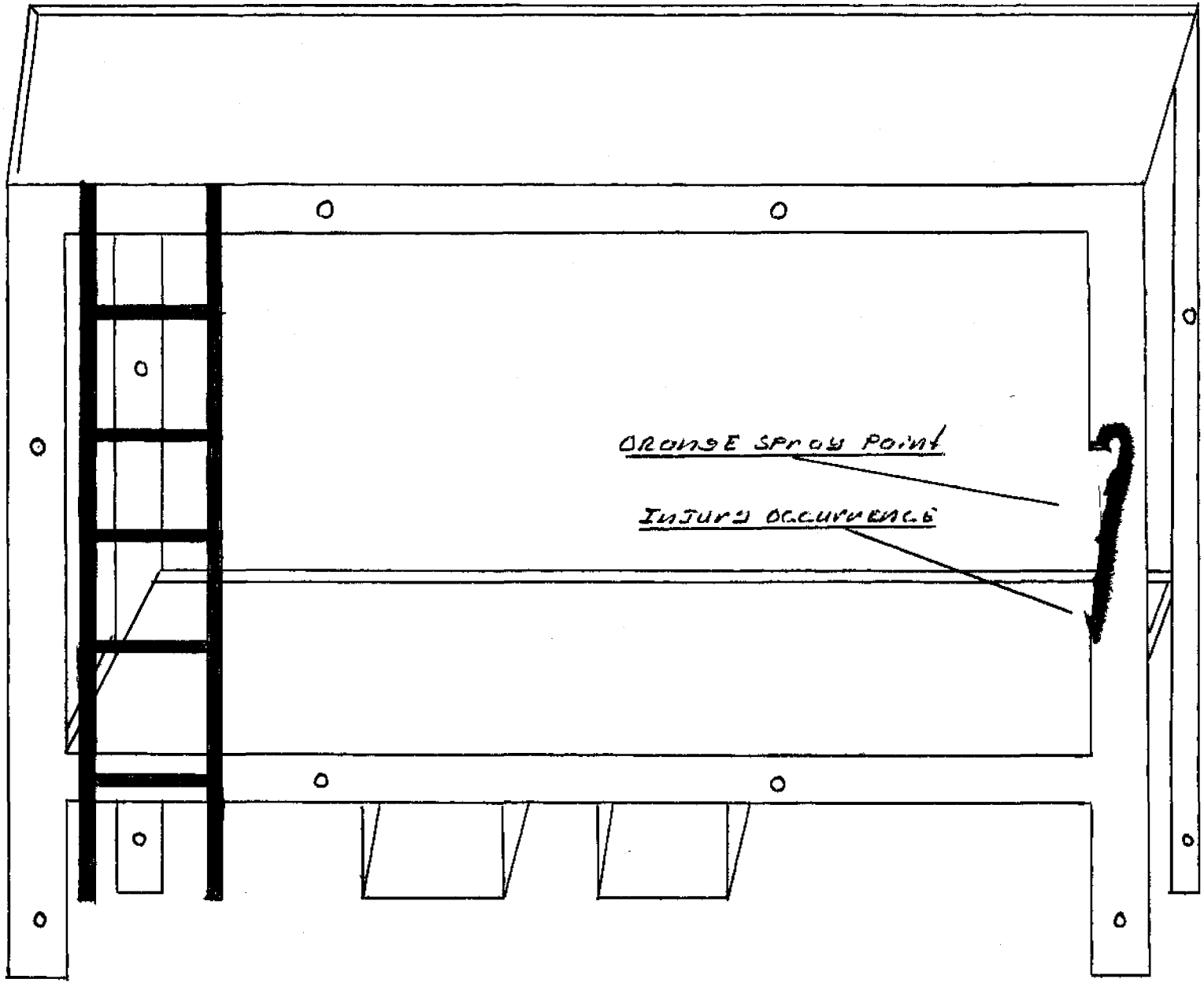
Plaintiff seek that said denial on admin. claim for damages, Personal injury under (F.T.C.A.) wishes to proceeds further on filing a suite in appropriate U.S. District Court for the southern District of Indiana..

I declare under Penalty of Perjury that the foregoing is true and correct... Executed at U.S. Penitentiary, Waymart, PA. 18472 on 06-09-13..

Joseph F.F. Drake
Fed. Reg No.: 00286-093
U.S.P. Canaan
P.O. Box 300
Waymart, PA. 18472

Joseph F.F. Drake
#00686-093

United States Penitentiary TERRE Haute
(SHU) Special Housing Unit - B - Range - Lower - Cell # 119
Date Injury occurred : May 16, 2012



Case 1:13-cv-00961-TWP-DML Document 1-1 Filed 06/14/13 Page 3 of 7 PageID #: 10

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: DRAKE, JOSEPH F			Reg #: 00886-093
Date of Birth: 08/15/1971	Sex: M	Race: ASIAN/PAC.	Facility: THP
Encounter Date: 05/16/2012 07:00	Provider: Clingerman, Nicole LPN		Unit: Z02

Injury Assessment-Not Work Related encounter performed at Special Housing Unit.

SUBJECTIVE:

INJURY 1 **Provider:** Clingerman, Nicole LPN

Date of Injury: 05/16/2012 07:00 **Date Reported for Treatment:** 05/16/2012 12:56

Work Related: No **Work Assignment:** INST A/O, SHU UNASSG

Pain Location:

Pain Scale: 0

Pain Qualities:

Where Did Injury Happen (Be specific as to location):

In my cell

Cause of Injury (Inmate's Statement of how injury occurred):

I cut my arm on my bunk.

Symptoms (as reported by inmate):

My arm was bleeding.

OBJECTIVE:

Exam:

ASSESSMENT:

Cut(s) and/or Abrasion(s)

Inmate brought to health services room in SHU. A&O x3. Skin warm, pink and dry. Respirations easy and unlabored. Right forearm has approximately 4 inch cut. Wound was not actively bleeding during the exam. Area was cleansed with normal saline. Inmate states that the bunk was rusty. Per Dr Harvey give tetanus immunization.

PLAN:

Disposition:

Follow-up at Sick Call as Needed

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
05/16/2012	Counseling	Access to Care	Clingerman, Nicole	Verbalizes Understanding

Inmate Name: DRAKE, JOSEPH F			Reg #: 00886-093
Date of Birth: 08/15/1971	Sex: M	Race: ASIAN/PAC.	Facility: THP
Encounter Date: 05/16/2012 07:00	Provider: Clingerman, Nicole LPN		Unit: Z02

Copay Required: No **Cosign Required:** Yes

Telephone/Verbal Order: No

Completed by Clingerman, Nicole LPN on 05/16/2012 13:00
Requested to be cosigned by Harvey, Paul MD, RMD.
Cosign documentation will be displayed on the following page.

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of the Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

06-04-2012

JOSEPH DRAKE, #00886-093
USP TERRE HAUTE

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2012-04163 $ 10,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on 05-25-2012. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until 11-24-2012.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et.seq., and §543.30.

Sincerely,
Richard W. Schott
Regional Counsel

U.S. Department of Justice
Federal Bureau of Prisons

North Central Regional Office

Office of Regional Counsel

400 State Avenue
Tower II, Suite 800
Kansas City, KS 66101

JAN 23 2013

Joseph Drake
Register No. 00886-093
USP Canaan
P.O. Box 300
Waymart, PA 18472

Re: Administrative Claim Number TRT-NCR-2012-04163
Personal Injury: $10,000.00

CERTIFIED NUMBER 7011 3500 0003 0976 5663

Dear Mr. Drake:

Your above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than six months after the date of mailing of this notification.

Sincerely,

Richard W. Schott
Regional Counsel

CIVIL RIGHTS COMPLAINT ATTACHMENT PAGE TO

IV. CLAIM

Claim I.: Personal Injure (4inch cut right forearm) suffered bleeding, caused by (F.B.O.P.) employee's (U.S.P. Terre Houte) negligent or wrongful act or omission, while the employee's is acting within the scope of their employment... The united states is responsible/and liable under the (F.T.C.A.) for the behavior of a federal employee's while acting within the scope of their employment. [28 USC § 1346(b), 2671 et. seq.]

(F.B.O.P.) correctional staffs "Deliberate Indifference" on "Deliberate Negligent", wrongful acts or omission, inattention to duty, consiously or recklessly contributed and has knowledge of a harmful prison condition that pose a substantial risk of serious harm to plaintiff safety as to this instant case, and does nothing to correct it which resulted in actual or potential harm/personal injure, causing plaintiff to suffer bleeding (4inch cut to right fore arm)... (28 USC § 2679(b)(1))

On May 12 or 14, 2012, at about 5:00 pm. (F.B.O.P.) correctional staffs in (SHU) conducted inmate cells rotation (SHU) rule every 21 days on (B-Range-Lower) and cells are inspected and searched before inmates are moved/transfered placed into new assigned cells...

(F.B.O.P.) correctional staffs moved/transfered plaintiff from cell #118 to cell #119, placed plaintiff into a cell with a bunkbed post frame metal piece (14 inch long) was cut out in a shape of a weapon a homemade "knife" leaving razor sharp edges, burr's, bunkbed unsafe living condition....

(F.B.O.P.) Correctional staffs "spraying" bed post frame "cutout" area with (orang paint) acknowledging they are aware of bunkbed condition...

(F.B.O.P.) correctional staffs spraying bed post frame cutout area with (orange paint) acknowledging bed frame cut out area condition, and ignoring razor sharp edges, burr's, and not properly inspecting an searching cell safety before placing plaintiff in said cell (SHU-B-Range-Lower-Cell #119) with a bunkbed hazardous, unsafe living condition, and exercised minimal concern plaintiff safety...

(F.B.O.P.) correctional staffs deliberate negligents, wrongful acts, omission, inattention to duty (plaintiff safety) in said instant case (F.B.O.P.) Correctional staffs acts, acting within the scope of their Employment which resulted of causing plaintiff personal injury and suffering bleeding damage (4 inch cut to plaintiff right forearm..)

I declare under penalty of perjury that the foregoing is true and correct... Executed at U.S. Penitentiary Canaan, Waymart, PA. 18472, on 06-09-13 ...

JOSEPH F.F. Drake
Fed. Reg. No.: 00886-093
U.S.P. Canaan
P.O. Box 300
Waymart, PA. 18472

CIVIL RIGHTS COMPLAINT ATTATCHMENT PAGE TO

VII. REQUEST For RELIEF

I REQUEST the Following RELIEF:

The U.S. IS RESPONSIBLE under the (F.T.C.A.) for the behavior of a federal EMPLOYEE while acting within the SCOPE of his or her EMPLOYMENT... 28 U.S.C. 2679(B)(1)... In general, an EMPLOYEE acts within the SCOPE of his EMPLOYMENT when he is doing something to further the duties he owes to his EMPLOYER and the conduct is the type that he was hired to do...

Plaintiff claim for relief PURSUANT to 28 U.S.C 2671 ET. SEQ.. Plaintiff ask for a SPECIFIC amount of SUMS ($10,000.00) for PERSONAL INJ. DAMAGES (4inch cut right forearm) Plaintiff SUFFERED RESULTED by (BOP) correctional staffs (USP TERRE HAUTE) NEGLIGENT, wrongful act or OMISSION as CONSCIOUSLY or RECKLESSLY contraLated and has knowledge of a harmful / unsafe living PRISON condition Placing Plaintiff in a CELL (SHU) with a bunkbed that POSE substantial risk of SERIOUS harm to plaintiff in instant CASE and does nothing to safe guard inmate safety, which RESULTED in actual or POTENTIAL harm, PERSONAL INJURY...

(BOP) correctional staffs (USP TERRE HAUTE deliberate NEGLIGENT, wrongful act or omission, acting within the SCOPE of their EMPLOYMENT resulting Plaintiff to suffer PERSONAL INJURY, DAMAGES (4inch cut on Plaintiff right forearm)...

Plaintiff SEEKS that the court award the SUMS ($10,000.00) to Plaintiff in PERSONAL INJURY and DAMAGES... Pursuant under (28 U.S.C. § 1346(b), 2671 ET. SEQ.)

I declare under PENALTY of PERJURY that the foregoing is true and correct... EXECUTED at USP CANAAN, WAYMART, PA. 18472, on 06-09-13.

JOSEPH F.F. DRAKE
FED. REG. NO.: 00886-093
U.S.P. CANAAN
P.O. BOX 300
WAYMART, PA. 18472



Case 1:13-cv-00961-TWP-DMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOSEPH FRANKLIN FEJERAN DRAKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:13-cv-0961-TWP-DML
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

The Court conducted a bench trial in this action on December 7, 2015. The Plaintiff, Joseph Franklin Fejeran Drake ("Mr. Drake"), appeared in person and by counsel Andrew Campbell and Haroon Anwar.[1] Defendant, the United States of America (the "United States") was represented by counsel Jonathan A. Bont and Kathryn E. Olivier.

Mr. Drake is currently confined at the United States Penitentiary Cannan, but at all relevant times was in custody at the Federal Correctional Complex in Terre Haute, Indiana ("FCC-TH"). Mr. Drake brought this claim against the United States pursuant to the Federal Tort Claims Act (the "FTCA") for an injury to his right arm that occurred at FCC-TH. *See* 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671, *et seq.* Specifically, Mr. Drake cut his arm on his bunkbed frame after slipping on his cell floor in the Special Housing Unit (the "SHU") on May 16, 2012. He claims that staff at FCC-TH caused this injury by negligently placing and leaving him in an unsafe cell. The United States' motion for summary judgment was denied, (Filing No. 85), and efforts to settle the case were unsuccessful. After considering the evidence presented during the bench trial, the Court now issues its findings of fact and conclusions of law pursuant to Federal Rule of Civil

[1] The Court greatly appreciates the capable representation that volunteer counsel provided to the plaintiff.

Procedure 52(a)(1). Any finding of fact that is more properly considered a conclusion of law is adopted as such. Similarly, any conclusion of law that is more properly considered a finding of fact is adopted as such.

I. FINDINGS OF FACT

On May 16, 2012, Mr. Drake was an inmate incarcerated in Cell Number 119, B-Range, which is located within in the SHU ("Cell No. 119"). The SHU is a segregation unit in which inmates are separated from the general prison population. For security reasons, inmates in the SHU are rotated every 21 days to different prison cells. Two inmates are usually assigned to each prison cell within the SHU, and the inmates are required to share a bunkbed, sink, and toilet.

Prison cells in the SHU are subject to regular inspections by prison officials. Inmates housed in the SHU are required to clean their prison cells, including the floor of their cell, on a daily basis with cleaning supplies provided by the prison. Prisoners who fail to properly clean or maintain their cells may face discipline or loss of privileges. Several years ago, at a different prison, Mr. Drake was disciplined for not having a clean cell. He learned his lesson with that experience and since that occasion, he has not been disciplined for failure to maintain a clean cell.

Inmates are provided a pink disinfectant solution for cleaning purposes, but the allotted amount is often insufficient for Mr. Drake's cleaning needs. Mr. Drake typically used soap or shampoo that either he or his cellmate purchased from the commissary to clean the walls, floor, urinal, and sink, thereafter, they would use the pink solution to disinfect.

Several bunkbeds in the SHU have metal cutouts where prisoners have attempted to craft weapons by cutting out pieces of metal from the bunkbed frames. Sometime prior to May 16, 2012, an unidentified inmate at FCC-TH cut out a section of the metal bunk bed in Cell No. 119. The prison paints the metal cutouts with orange spray paint so that it can track when the cutout

occurred. That way, a new inmate moving into a cell will not be disciplined for making the cutout. The purpose of the orange paint is for tracking purposes only, and is not intended for the safety of the prisoners. The prison does not repair bunkbed frames, including metal cutouts, unless the actual structural integrity of the bedframe is in question.

On or about May 14, 2012, Mr. Drake was placed in Cell No. 119. When he was placed in the cell, he noticed that the bunkbed had a 14-inch exposed metal cutout that was in the shape of a homemade knife. The exposed metal cutout was located on the bunkbed post frame approximately three to four feet off the ground, and was painted orange.

On or about May 16, 2012, Mr. Drake was cleaning Cell No. 119 in preparation for a weekly inspection by the prison's executive staff. He did not have enough of the pink cleaning solution at that time so he used shampoo to wash the floor of Cell No. 119. As he stood up from washing the floor, Mr. Drake slipped and lost his balance. As he fell, he struck his right forearm on the exposed metal cutout of the bunkbed frame.

Mr. Drake suffered a 4-inch cut on his right forearm. His arm bled for approximately 20 minutes. He was seen by medical staff about three hours later. A nurse cleaned the cut with saline, bandaged the cut, and gave Mr. Drake a tetanus immunization shot. He was given bandages and ointment to cover the cut. Mr. Drake still has a visible 4-inch scar on his forearm.

Mr. Drake is a diabetic who receives regular insulin treatments. As a diabetic, he is concerned about germs and infection because it takes extra time for any wound to heal. If the wound to his arm were not properly treated it could have become infected and he feared he could lose his arm. He washed the wound every day with soap and it did not get infected.

Following Mr. Drake's injury, on June 7, 2012, Bradley Linton, the SHU facilities maintenance person at the time, repaired the bunkbed by grinding down the sharp edges of the

exposed metal cutout with an electric grinding wheel. The repair took approximately three hours to complete and the cost of materials used was $6.00.

Mr. Drake exhausted his administrative remedies before timely filing this lawsuit.

II. CONCLUSIONS OF LAW

Under the FTCA, "federal inmates may bring suit for injuries they sustain in custody as a consequence of the negligence of prison officials." *Buechel v. United States*, 746 F.3d 753, 758 (7th Cir. 2014). State tort law of the state where the tort occurred, in this case Indiana, applies when determining "whether the duty was breached and whether the breach was the proximate cause of the plaintiff's injuries." *Parrott v. United States,* 536 F.3d 629, 637 (7th Cir. 2008).

Under Indiana law, a "plaintiff seeking damages for negligence must establish (1) a duty owed to the plaintiff by the defendant, (2) a breach of the duty, and (3) an injury proximately caused by the breach of duty." *Kader v. State Dept. of Correction,* 1 N.E.3d 717, 727 (Ind. Ct. App. 2013). Under Indiana law, when a party is in custody, "the custodian has the duty to exercise reasonable care to preserve the life, health, and safety of the person in custody." *Sauders v. County of Steuben,* 693 N.E.2d 16, 18 (Ind. 1998). "The appropriate precautions will vary according to the facts and circumstances presented in each case." *Id.* The duty is to "take reasonable steps under the circumstances" to protect an inmate from harm. *Id.*

The duty owed by the United States is also created by 18 U.S.C. § 4042, which provides, in relevant part, that the Bureau of Prisons ("BOP") shall "(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, . . . ; [and] (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States...." 18 U.S.C. § 4042(a)(2), (3). Although written in general terms, the statute "sets forth a mandatory duty of

care." *Parrott,* 536 F.3d at 637 (internal quotation omitted). Thus, the determinative issue is whether the BOP took reasonable steps under the circumstances to provide Mr. Drake with suitable quarters to preserve his health and safety.

The Court finds that the United States failed to act with reasonable care when it placed Mr. Drake in Cell No. 119 with the knowledge that the metal bed frame contained a sharp cutout area. Mr. Drake had no control over the assignment to Cell No. 119, nor did he create the metal cutout on the bed frame. The cutout area was painted orange for purposes of tracking. Simply painting a dangerous object orange does not remove the danger. Prison officials acknowledged that they were aware of the cutout area, but they did not deem it necessary to repair the sharp edges because the structural integrity of the bed was not threatened. The fact that the bed was not about to fall apart, however, does not negate the existence of the jagged metal edge.

The United States has failed to acknowledge throughout this case that it breached its own duty to provide reasonably safe quarters for Mr. Drake. The United States instead argues contributory negligence and asserts that Mr. Drake's injury was caused by his own act of washing the floor with shampoo and slipping on the wet floor. The United States' position is not persuasive. In part because he is diabetic, Mr. Drake understands the importance of keeping his cell clean. Further, he wants and is obligated to keep his cell floor clean. When he is not provided sufficient cleaning supplies he must use other cleaning products of his own. Regardless of what product was used, the wet slippery floor caused the fall, but the wet floor did not cause Mr. Drake to be injured. It is reasonable to believe that if Mr. Drake's forearm had not struck the jagged piece of metal, he would not have sustained an injury when he lost his balance. He certainly would not have suffered a 4-inch cut that left a scar. The injury was caused by the sharp metal bed frame. Accordingly, the Court finds no contributory negligence on the part of Mr. Drake.

The United States urges the Court to infer a sinister motive on the part of Mr. Drake for having filed this claim (and a subsequent tort claim for another cut to his hand which occurred on October 4, 2012). However, there is no evidence to support any motivation on the part of Mr. Drake other than wanting to bring more attention to the fact that many cells in the prison have bed frames that have dangerous cutouts that are marked with orange paint but not repaired, and his desire to be compensated for his injury.

Mr. Drake's position has been reasonable throughout. He did not "manufacture" this lawsuit. Mr. Drake was making reasonably foreseeable attempts to keep his cell clean. His health concerns as a result of being diabetic are genuine and reasonable. Mr. Drake has not exaggerated his injury nor has he demanded an excessive amount of compensation for his injury.

The United States breached its duty of care and Mr. Drake was injured as a result. Therefore, he is entitled to damages. Although the cut did not require substantial treatment, it needed to be cleaned properly and bandaged and kept clean to avoid infection. Mr. Drake is diabetic and his concern regarding proper cleaning and healing of the injury was reasonable. A tetanus shot was also deemed to be warranted. Of greatest significance is the fact that Mr. Drake still has a 4-inch scar on his arm.

Mr. Drake's injury was not *de minimus.* Slip and fall negligence awards in Indiana fall within a wide range depending on the seriousness of the injuries and the degree to which the plaintiff is found to be negligent. Here, the plaintiff was not contributorily negligent. The "slip and fall" claim damages awarded in *Reeves v. Finley,* 45D11-0301-CT-6, 2006 WL 6861633 (Ind. Super. Ct. 2003) ($44,000.00 for bulging disc and buttock contusions) and *Williams v. Smokes, Inc.,* 45D05-9908-CT-1415, 2003 WL 25974438 (Ind. Super. Ct. 2003) ($38,000.00 for arm fracture and minor injuries, reduced to $19,380.00 for plaintiff's 49% negligence) support an

award of Ten Thousand Dollars ($10,000.00) in this case. Although Mr. Drake did not suffer any fracture, a 4-inch scar remains clearly visible on his forearm, three and one half years after the incident.

III. CONCLUSION

For the reasons stated above, the Court finds in favor of Mr. Drake and against the United States. Mr. Drake is hereby awarded Ten Thousand Dollars ($10,000.00) in damages.

Judgment consistent with this Entry shall now issue in a separate order.

SO ORDERED.

Date: 12/29/2015

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOSEPH FRANKLIN FEJERAN DRAKE,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 1:13-cv-0961-TWP-DML
	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

Entry Denying Defendant's Motion for Summary Judgment and Directing Further Proceedings

For the reasons explained in this Entry, Defendant United States of America's ("United States") Motion for Summary Judgment (Dkt. 65) must be **DENIED**.

I. Background

The plaintiff in this action is Joseph Franklin Fejeran Drake ("Mr. Drake"), an inmate who is currently confined at the United States Penitentiary-Canaan, in Pennsylvania, but who at all relevant times was in custody at the Federal Correctional Complex in Terre Haute, Indiana ("FCC-TH"). Mr. Drake brings this claim against the United States pursuant to the Federal Tort Claims Act (the "FTCA") for an injury to his right arm that occurred at the FCC-TH. *See* 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671, *et seq*. Mr. Drake alleges that he cut his arm on his bunk bed frame after slipping on his cell floor in the Special Housing Unit (the "SHU") on May 16, 2012, and that this injury was caused by staff at FCC-TH negligently placing and leaving him in an unsafe cell.

The United States seeks resolution of Mr. Drake's claim through the entry of summary judgment. Mr. Drake has opposed the motion for summary judgment.

II. Summary Judgment Standard

Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A "material fact" is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the non-moving party must set forth specific, admissible evidence showing that there is a material issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The Court views the record in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 907 (7th Cir. 2008). It cannot weigh evidence or make credibility determinations on summary judgment because those tasks are left to the fact-finder. *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 630 (7th Cir. 2011).

A dispute about a material fact is genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). If no reasonable jury could find for the non-moving party, then there is no "genuine" dispute. *Scott v. Harris,* 550 U.S. 372, 380 (2007).

III. Discussion

A. Undisputed Facts

On the basis of the pleadings and the portions of the expanded record that comply with the requirements of Rule 56(c)(1), construed in a manner most favorable to Mr. Drake as the non-moving party, the following facts are undisputed for purposes of the motion for summary judgment:

As noted above, during all times relevant to this action, Mr. Drake was incarcerated at the FCC-TH. On May 16, 2012, Mr. Drake was on his hands and knees cleaning his cell floor using a

towel and shampoo. He stood up, slipped on the wet soapy floor, lost his balance, and his right forearm struck the bunk bed post frame. He cut himself on the cut-out area of the bed post frame which he describes as being "in the shape of a weapon, a homemade knife." The cut-out area was about 14 inches long, about 3 feet above the ground.

Mr. Drake had noticed the cut-out area of the frame immediately when he moved into his cell because it was spray painted a fluorescent orange color and because he had seen the orange paint used on other bed frames in prison cells. To him, the orange paint meant that there was a piece of metal missing from the bunk bed.

Mr. Drake was taken to FCC-TH Health Services, where he reported that he had fallen and cut himself on his bunk. A nurse cleaned a 4 inch cut on his right forearm with saline and put a bandage on the cut. The wound was not actively bleeding during the exam. Mr. Drake reported that the bunk was rusty and so he was given a tetanus immunization shot.

Mr. Drake submitted a notice of claim (No. TRT-NCR-2012-04163) which was received by the Federal Bureau of Prisons (the "BOP") Regional Office on May 25, 2012. His tort claim was denied on November 26, 2012. Mr. Drake filed a request for reconsideration on January 7, 2013, and that request was denied on January 23, 2013. This action was filed on June 14, 2013.

B. Legal Standards

Pursuant to the FTCA, "federal inmates may bring suit for injuries they sustain in custody as a consequence of the negligence of prison officials." *Buechel v. United States*, 746 F.3d 753, 758 (7th Cir. 2014). The duty owed by the government is created by 18 U.S.C. § 4042, which provides, in relevant part, that the BOP shall "(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise; [and] (3) provide for the protection, instruction,

and discipline of all persons charged with or convicted of offenses against the United States...." 18 U.S.C. § 4042(a)(2), (3). State tort law of the state where the tort occurred, in this case Indiana, applies when determining "whether the duty was breached and whether the breach was the proximate cause of the plaintiff's injuries." *Parrott v. United States,* 536 F.3d 629, 637 (7th Cir. 2008). Section 4042 is "written in very general terms" and although it establishes a mandatory duty of care, it does not direct any particular conduct BOP personnel should engage in or avoid while fulfilling their duty to provide suitable quarters for and the safekeeping of inmates. *Id.*

Under Indiana law, a "plaintiff seeking damages for negligence must establish (1) a duty owed to the plaintiff by the defendant, (2) a breach of the duty, and (3) an injury proximately caused by the breach of duty." *Kader v. State Dept. of Correction,* 1 N.E.3d 717, 727 (Ind.Ct.App. 2013). Under Indiana law, when a party is in custody, "the custodian has the duty to exercise reasonable care to preserve the life, health, and safety of the person in custody." *Sauders v. County of Steuben,* 693 N.E.2d 16, 18 (Ind. 1998). "The appropriate precautions will vary according to the facts and circumstances presented in each case." *Id.* The duty is to "take reasonable steps under the circumstances" to protect an inmate from harm. *Id.*

The undisputed facts in this case are that Mr. Drake was washing his cell floor with shampoo, stood up, lost his balance and fell, hitting and cutting his right forearm on a piece of metal on his bunk bed. Mr. Drake stated in his deposition that he had to use shampoo on the floor because the prison did not provide adequate cleaning supplies. (Dkt. 84-1, at p. 10). He also stated that he cleaned his cell floor because a weekly inspection was conducted by executive staff. (Dkt. 84-1, at p. 3).

Mr. Drake contends that prison staff were negligent by moving him to a cell that had a hazardous condition and by failing to repair the bunk bed, leaving a piece missing which resulted

in an exposed metal "cut-out area." He also argues that prison staff failed to provide sufficient cleaning supplies, which led to him using shampoo to clean the floor. Mr. Drake attached to his amended complaint a diagram of the bed frame. (*See* Dkt. 28-1).

The United States argues that it did not breach any duty of care. In addition, it contends that Mr. Drake's own negligence bars any recovery because he knew that the hole in the bed frame existed but used shampoo to clean his floor while in somewhat close proximity to the bed.

"[S]ummary judgment is generally inappropriate in negligence cases because issues of *contributory negligence*, causation, and reasonable care are more appropriately left for the trier of fact." *Lyons v. Richmond Community School Corp.*, 19 N.E.3d 254, 261 (Ind. 2014) (emphasis in original) (internal quotation omitted). To warrant summary judgment the defendant would have to show that Mr. Drake's alleged contributory negligence "was so clear and palpable that no verdict could make it otherwise." *Id.* at 262 (internal quotation omitted). "[N]egligence cases are particularly fact sensitive and are governed by a standard of the objective reasonable person, which is best applied by a jury after hearing all of the evidence." *Henderson v. Reid Hosp. and Healthcare Services,* 17 N.E.3d 311, 315 (Ind. Ct. App. 2014). Only if the material evidence negates one or more of the three elements of a negligence claim--duty, breach, causation--would summary judgment be appropriate. *Id.*

The threshold issue is whether the prison exercised reasonable care when it placed Mr. Drake in a cell with a broken metal bed frame and then did not repair the bed frame, leaving an exposed piece of sharp metal on one side of the bed. Mr. Drake did not have any choice as to where he lived in the prison and he could not avoid the bed entirely. Neither could Mr. Drake fix a broken metal frame. There is no evidence as to the purpose of the orange paint, how long it had been there, or what it signified within the prison system, all of which could have some bearing on the question

of whether the prison acted reasonably in relation to the broken bed frame. As to the issue of duty, a reasonable person could conclude that the existence of the sharp piece of metal on the bed, of which prison staff were aware, violated the prison's duty to provide a safe living environment. The Court cannot conclude as a matter of law based on this record that the United States did not breach its duty of care.

With respect to the contributory negligence defense, the United States appears to argue that because the bed frame was painted and Mr. Drake was thereby on notice, any injury that resulted from coming into contact with that piece of the bed frame was Mr. Drake's fault, no matter the circumstances. The United States specifically asserts that because he chose to clean his floor nearby with shampoo, no reasonable fact finder could find in Mr. Drake's favor. The Court disagrees. It is that type of determination that is best left to the fact-finder. The Court does not find that Mr. Drake's alleged contributory negligence "was so clear and palpable that no verdict could make it otherwise." *Lyons,* 19 N.E.3d at 262. For these reasons, the Court finds that this action cannot be decided as a matter of law and the defendant's motion for summary judgment (Dkt. 65) must be **DENIED.**

IV. Further Proceedings

The Magistrate Judge is requested to set this matter for a telephonic status conference to discuss the further development and resolution of this action, whether by settlement or trial.

IT IS SO ORDERED.

Date: 3/13/2015

Tanya Walton Pratt

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Joseph Franklin Fejeran Drake, No. 00886-093, USP Canaan, Inmate Mail/Parcels, P.O. BOX 300, Waymart, PA 18472

Magistrate Judge Debra McVicker Lynch

All electronically registered counsel

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of the Freedom of Information and Privacy Act

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2013-01281 **Short Description:** DRAKE V. UNITED STATES OF AMERICA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	1:13-cv-00961-TWP-DML
Short Description	DRAKE V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	SAF-Inmate
Current Region	NORTH CENTRAL REGIONAL OFFICE
Current Institution	Terre Haute (USP)
Incident Region	NORTH CENTRAL REGIONAL OFFICE
Incident Institution	Terre Haute (USP)
Monetary Relief Sought	$10,000.00
Estimated Amount	$
Office	Indianapolis
Jurisdiction	SOUTHERN DISTRICT OF INDIANA
Responsible Legal Office	St. Louis, MO

Date	12/29/2015
Type	Adverse Ruling
Reason	
Sought	Compensatory Damages
Amount offered	$500.00
Total Amount Paid	$10,000.00
Description	COURT FOUND FOR IM & AWARDED HIM 10K FOR HIS SCRATCH.
Description	COURT FOUND FOR IM & AWARDED HIM 10K FOR HIS SCRATCH.
Court Fee Paid ?	No
Pro Se ?	No

Date Received	07/30/2013
Date Filed	06/14/2013

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Current Owner	SARAH K ALLISON ARMSTRONG
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	NEW CASES
Private Case	No

Long Description	28:1331 FED. QUESTION
Further Case Classification	
Comments	FTCA Claim - alleges he fell in his SHU Cell and scratched arm on bunk

HALLBERG &McCLAIN
ATTORNEYS AT LAW

MARK A. HALLBERG*
TERESA FARISS McCLAIN
MARSHALL S. LICHTY

MAGGIE PALMISANO PARALEGAL

October 16, 2013

Certified Mail

U.S. Department of Justice
Federal Bureau of Prisons
400 State Avenue Tower II, Suite 800
Kansas City, KS 66101-2492

Re: Hilaire v. The United States of America

Dear Sir/Madam:

Enclosed and herewith served upon you, please find the following:

1. Summons.
2. Complaint.
3. Affidavit of Expert Review.

Very truly yours,

Mark Hallberg
Marshall S. Lichty

MH:MSL:ls
Enc.

Received in NCRO
10/21/13
THANKS Jen!
Rich

380 ST. PETER STREET 651.255.6810 • FAX 651.255.6820
*CIVIL TRIAL SPECIALIST CERTIFIED BY THE MINNESOTA STATE BAR ASSOCIATION AND THE NATIONAL BOARD OF TRIAL ADVOCACY

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Minnesota

Mika Hilaire,

Plaintiff,

v. Case No. 0:13-cv-02844-PAM-LIB

United States of America, The,

Defendant.

SUMMONS IN A CIVIL ACTION

To: The United States of America

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Mark A Hallberg
380 St Peter St Ste 715
St Paul, MN
55102

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

RICHARD D. SLETTEN, CLERK OF COURT

By:

U.S. DISTRICT COURT DISTRICT OF MINNESOTA

M. Price

Signature of Clerk or Deputy Clerk

Mandy M. Price

Date of Issuance: October 16, 2013

AO 440 (Rev. 02/09) Summons in a Civil Action

Summons and Complaint Return of Service

Case No. 0:13 cv-02844-PAM-LIB

A copy of the Summons and Complaint has been served in the manner indicated below:

Name of Defendant Served: The United States of America

Date of Service: _____

Method of Service

_____ Personally served at this address:

_____

_____

_____

_____ Left copies at defendant's usual place of abode with (name of person):

_____

_____

_____

_____ Other (specify):

_____

_____

_____

_____ Returned unexecuted (reason):

_____

_____

_____

Service Fees: Travel $_____ Service $_____ Total $_____

Declaration of Server

I declare under the penalty of perjury that the information contained in this Return of Service is true and correct.

Name of Server: _____

Signature of Server: _____

Date: _____

Server's Address: _____

_____

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Mika Hilaire, Trustee for the Next-of-Kin of Stafford Hilaire, deceased,

Plaintiff,

v.

The United States of America,

Defendant.

Case No.: _____
(Medical Malpractice)

Complaint

Plaintiff, Mika Hilaire, the Trustee for the Next-of-Kin of Stafford Hilaire, deceased, for her cause of action against defendant The United States of America, alleges and states that:

1. Mika Hilaire is the duly-appointed trustee for Stafford Hilaire's heirs and next of kin, having been appointed by an Order of the District Court for the Sixth Judicial District, County of Saint Louis (Minnesota), dated July 22, 2011.

2. This Court has exclusive jurisdiction under 28 U.S.C. § 1346(b) because this matter involves a claim for money damages against the United States for death caused by the negligent or wrongful acts and omissions of government employees acting within the scope of their office or employment.

3. Venue is proper because the care and treatment at issue was provided in Minnesota.

4. The plaintiff timely presented her Federal Tort Claim Act claim with the U.S. Bureau of Prisons on November 1, 2012 (Administrative Claim Number TRT-NCR-2013-00835) and the agency finally denied the claim and notified the plaintiff of that denial under 28 C.F.R. § 14.9 on April 25, 2013. The plaintiff has satisfied the administrative prerequisites to filing this action.

5. The Federal Prison Camp Duluth is a prison camp located in Minnesota that defendant The United States of America owns and/or operates.

6. At all relevant times, defendant The United States of America, through the Federal Bureau of Prisons, employed various physicians and physician extenders, including but not limited to Robin Floyd, PA-C and Benjamin Rice, MD, CD, to provide medical care and treatment to inmates at Federal Prison Camp Duluth.

7. From May 2010 and continuing through November 2010, plaintiff's decedent, Stafford Hilaire (DOB Reg. #:), was an inmate at Federal Prison Camp Duluth.

8. At all relevant times between May 2010 and continuing through November 2010, Mr. Hilaire was under the care and treatment of agents and employees of defendant The United States of America, including—but not limited to—Robin Floyd, PA-C and Benjamin Rice, MD, CD for care and treatment of his primary and general medical conditions.

9. In October 2010, in their capacity as agents and employees of defendant The United States of America, Robin Floyd, PA-C and Benjamin Rice, MD, CD, and other healthcare providers, saw Mr. Hilaire to diagnose and treat his primary and general medical conditions.

10. On or about October 18, 2010, Mr. Hilaire began feeling ill and complained of feeling "under the weather" and "cold symptoms."

11. By October 21, 2010, Mr. Hilaire was having flu-like symptoms and a fever.

12. By October 23, 2010, Mr. Hilaire had developed a rash on his arms and was feeling quite ill.

13. On October 24, 2010, Mr. Hilaire complained of fatigue, weakness, and dizziness and was perspiring heavily.

14. On October 25, 2010, Mr. Hilaire reported having a fever and very low blood pressure.

15. On October 26, 2010, Mr. Hilaire reported to sick call with complaints of having flu-like symptoms for about a week with corresponding complaints of having achiness, fevers, tremendous fatigue, a whole-body rash, and itching that began two days prior.

16. Robin Floyd, PA-C and Benjamin Rice, MD, CD evaluated Mr. Hilaire on October 26, 2010 and reported "small (<3cm) raised lesions covering most of his body (also involves scalp)" and low blood pressure. PA-C Floyd and Dr. Rice diagnosed Mr. Hilaire with "Hypotension, unspecified" and "rash and other nonspecific skin eruption," gave him a prescription for azithromycin and

instructed him to stop taking ibuprofen. They planned to recheck Mr. Hilaire's blood pressure that evening.

17. At his hypotension recheck later that evening, Mr. Hilaire had a fever, was acutely ill, appeared fatigued, and was hypotensive. PA-C Floyd noted Mr. Hilaire's rash was worse on his lower legs, instructed him to follow up in the morning for a recheck, and gave Mr. Hilaire a prescription for Tylenol because of the unresolved fever.

18. On October 27, 2010, Mr. Hilaire presented for a recheck that revealed ongoing weakness, hypotension, fatigue, dizziness, lack of energy, and lack of appetite. Mr. Hilaire reported that he fell in his cell as a result of his lightheadedness, and he demonstrated significant weight loss and persistent skin lesions reported to be "mildly improved."

19. On October 28, 2010, Mr. Hilaire presented to PA-C Floyd and Dr. Rice. They did not measure his blood pressure despite a "grossly unchanged" skin rash and significant problems with fatigue and lightheadedness. Mr. Hilaire was discharged to the housing unit and no plan for follow up was noted.

20. Mr. Hilaire presented to PA-C Floyd on October 29, 2010 and reported that his rash had become more itchy and he had become more congested with hoarseness and clear, thick mucus when he coughed. Mr. Hilaire was hypotensive, had depressed oxygen saturation levels, had lost more weight, and increased pruritis and mild rhonchi scattered throughout his chest on auscultation. A urinalysis revealed amber-colored, turbid urine with trace ketones, >1.030 specific gravity, 4+ protein, and "trace blood."

21. Mr. Hilaire coughed up blood and developed a bloody nose on October 30, 2010. He reported to an EMT, but there were no vital signs evaluated, including blood pressure or temperature.

22. Mr. Hilaire's vital signs were not taken on October 31, 2010, and he did not receive any other care or treatment to diagnose or treat his worsening condition that day.

23. Mr. Hilaire presented to Dr. Rice on November 1, 2010 with complaints of more bleeding, now when he urinated and defecated. He was reported to have extensive bruising, exertional dyspnea, fatigue, shortness of breath, hypotension, and "extensive ecchymosis all over his body." Dr. Rice's "Provisional Diagnosis" was "bleeding disorder" and Mr. Hilaire was transferred to Essentia Health—St. Mary's, the local civilian hospital in Duluth, Minnesota.

24. Between November 1, 2010 and November 4, 2010, healthcare providers at Essentia Health—St. Mary's cared for and treated Mr. Hilaire.

25. On November 3, 2010, Mr. Hilaire developed a left-sided intraparenchymal hemorrhage that resulted in brain death. He expired at 21:32 hours on November 4, 2010.

26. An autopsy performed on November 5, 2010 resulted in a final pathologic diagnosis of thrombocytopenia purpura with cerebral hemorrhage, with a summary of autopsy findings that read:

> This man was a resident of the federal prison in Duluth. He was admitted with bleeding from the nose, rectum, and hemorrhages from the skin. There is a history of flu-like episode treated with ibuprofen followed by a rash diagnosed as a drug reaction. The bleeding on admission was associated with a platelet count of 4,000, and platelet transfusions were ineffective. Two days after admission, he developed stroke-like symptoms. Left cerebral hemorrhage was demonstrated which progressed and caused death.
>
> Autopsy demonstrated extensive, widespread hemorrhages. The bone marrow demonstrated the presence of megakaryocytes indicating that this is peripheral destruction rather than lack of production of platelets. The immediate cause of death was the massive cerebral hemorrhage.

27. At all relevant times, it was the defendant's duty, by and through its agents, servants, and employees, to act as a reasonably well-qualified provider of medical care in the care and treatment of plaintiff's decedent, Stafford Hilaire.

28. In providing healthcare services to plaintiff's decedent, Stafford Hilaire, during his incarceration at the Federal Prison Camp Duluth, defendant The United States of America was negligent in that its agents and employees, including but not limited to Robin Floyd, PA-C and Benjamin Rice, MD, CD, failed to comply with accepted standards of medical practice. Illustrations of this negligence, cited by way of example but not by limitation, include:

    a. On and after October 26, the defendant failed to properly evaluate Stafford Hilaire's medical condition despite persistent hypotension, hypoxia, fever, profound fatigue, weakness, dizziness, increased mucus, and bleeding;

    b. Failed to refer Stafford Hilaire for care and treatment by a qualified specialist for diagnosis, care, and treatment of his hypotension, fever, profound fatigue, weakness, and dizziness;

    c. Failed to timely order additional testing, including urinalysis and blood work (CBC) that would have, to a reasonable degree of medical certainty, revealed thrombocytopenia and would have required immediate intervention;

d. Failed to have Mr. Hilaire admitted to the hospital on October 26, 2010 or October 27, 2010; and

e. Acted and failed to act in other ways that were inconsistent with applicable standards of medical practice under the circumstances.

29. If Stafford Hilaire's healthcare providers had complied with accepted standards of medical practice and ordered appropriate tests on or before October 27, 2010, it is more likely than not that, to a reasonable degree of medical certainty, they would have diagnosed Mr. Hilaire's medical emergency and either initiated appropriate care and treatment or transferred him to another facility for the initiation of appropriate care and treatment that would have, to a reasonable degree of medical certainty, resulted in improvement of his condition, prevented the massive cerebral hemorrhage, and prevented death.

30. As a direct and proximate result of one or more of the above negligent acts or omissions by the defendant, The United States of America, Mr. Hilaire's thrombocytopenia went undiscovered and untreated and resulted in a massive cerebral hemorrhage and death. As a direct and proximate result of Stafford Hilaire's wrongful death, his heirs and next of kin have been damaged as follows:

a. They have suffered the loss of Stafford Hilaire's aid, society, comfort, companionship, and advice;

b. They will, in the future, suffer the loss of Stafford Hilaire's aid, society, comfort, companionship, and advice;

c. They have suffered losses of financial support and services with pecuniary value;

d. They will, in the future, suffer losses of financial support and services with pecuniary value;

e. They have incurred funeral and burial expenses; and

f. They have been otherwise damaged.

WHEREFORE, the plaintiff asks for judgment against the defendant in an amount exceeding Seventy-Five Thousand Dollars ($75,000.00), together with her interest, costs, and disbursements and such other and further relief as this Court deems just, proper, and equitable.

Dated: October 16, 2013

By: _____

Mark A. Hallberg (No. 39639)
HALLBERG & MCCLAIN, P.A.
380 St. Peter Street, Suite 715
Saint Paul, Minnesota 55102
p: 651.255.6810
f: 651.255.6820
e: mhallberg@hallberglaw.com

Attorneys for plaintiff Mika Hilaire, Trustee for the Next-of-Kin of Stefford Hilaire, decedent.

ACKNOWLEDGMENT

The undersigned acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded under MINN.STAT. § 549.21, subd. 2, to the party against whom the allegations in this pleading are asserted.

Dated: October 16, 2013

By: _____

Mark A. Hallberg (No. 39639)
HALLBERG & MCCLAIN, P.A.
380 St. Peter Street, Suite 715
Saint Paul, Minnesota 55102
p: 651.255.6810
f: 651.255.6820
e: mhallberg@hallberglaw.com

Attorneys for plaintiff Mika Hilaire, Trustee for the Next-of-Kin of Stefford Hilaire, decedent.

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Marshall S. Lichty, being duly sworn on oath, states as follows:

1. I am an attorney with the law firm of Hallberg & McClain, P.A., and I am licensed to practice before the state and federal courts for the State of Minnesota.

2. Mika Hilaire, as the trustee for the next-of-kin of Stafford Hilaire, deceased, retained me to represent the next-of-kin in connection with the pursuit of claims for Stafford Hilare's death on November 4, 2010, which was caused by wrongful acts and omissions of agents and employees of the Federal Prison Camp in Duluth, Saint Louis County, Minnesota on and after October 18, 2010.

3. I have reviewed the facts of this case with experts whose qualifications provide a reasonable expectation that the experts' opinions could be admissible at trial. In the experts' opinions, one or more defendants deviated from the applicable standard of care, and by that action caused injury to the plaintiff and Stafford Hilaire's next-of-kin.

4. I submit this affidavit to conform and comply with the requirements of Minn.Stat. § 145.682, subd. 3.

This concludes my Affidavit.

Subscribed and sworn to before me
this 30th day of October, 2012

Laura R Carrero
Notary Public

Laura R. Carrero
Notary Public
Minnesota
My Commission Expires January 31, 2013

By: Marshall S. Lichty

Marshall S. Lichty (No. 0323767)
HALLBERG & MCCLAIN, P.A.
380 St. Peter Street, Suite 715
Saint Paul, Minnesota 55102
p: 651.255.6810
f: 651.255.6820

Attorneys for plaintiff Mika Hilaire, Trustee for the Next-of-Kin of Stafford Hilaire, decedent.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

Mika Hilaire, Trustee for the Next-of-Kin of Stafford Hilaire, deceased,

Plaintiff,

v.

The United States of America,

Defendant.

Civ. No.13-2844 (PAM/LIB)

Order for Distribution of Wrongful Death Settlement Proceeds

The above-entitled matter came before the Court on the Motion of Mika Hilaire, as trustee for the heirs and next-of-kin of Stafford Hilare, decedent, for approval of settlement and distribution of the proceeds. Pursuant to that Motion and the documents filed therewith, **IT IS ORDERED that:**

1. The Motion (Docket No. 25) is **GRANTED** and Mika Hilaire, Petitioner and trustee for the heirs and next-of-kin of Stafford Hilaire, decedent, is authorized and directed to accept the settlement described in the Petition herein as and for a settlement against The United States of America, for claims arising out of the death of Stafford Hilaire and to execute all documents necessary to the final termination of said action against said defendant.

2. That from the sum of Two Hundred Twenty-five Thousand and no/100 Dollars ($225,000.00), petitioner is authorized and directed to make the following disbursements:

a) To Hallberg & McClain, P.A. the sum of Sixty-Seven Thousand Two Hundred Forty-six and 62/100 Dollars ($67,246.62), representing attorneys' fees in the amount of Fifty-six Thousand Two Hundred Fifty and No/100 Dollars ($56,250.00) and out-of-pocket costs in the amount of Ten Thousand Nine Hundred Ninety-six and 62/100 Dollars ($10,996.62). An itemization of said costs is attached to the Petition.

b) To the heirs and next-of-kin, the following amounts:

Mika Hilaire (reimbursement for funeral expenses)	$ 10,000.00
Mika Hilaire	65,876.69
Evan Hilaire	65,876.69
Fitzroy Hilaire	5,000.00
Arleen Hilaire	5,000.00
Francine Hilaire-Miller (reimbursement for funeral expenses)	1,000.00
Francine Hilaire-Miller	5,000.00

3. The trustee has fulfilled her obligations and is hereby released.

DATED: August 21, 2014

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

Mika Hilaire, Trustee for the Next-of-Kin of Stafford Hilaire, deceased,

Plaintiff,

v.

The United States of America,

Defendant.

Civ. No.13-2844 (PAM/LIB)

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Francine Hilaire-Miller	5,000.00

3. The trustee has fulfilled her obligations and is hereby released.

DATED: August 21, 2014

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CIVIL NO. 0:13-CV-02844 (PAM/LIB)

Mika Hilaire, Trustee for the Next-of-Kin of Stafford Hilaire, deceased, Plaintiff, v. The United States of America, Defendant.	)	**COMPROMISE AND SETTLEMENT AGREEMENT**

It is hereby stipulated by and between Plaintiff, Mika Hilaire, Trustee for the Next-of-Kin, of Stafford Hilaire, deceased, and the United States of America, and its agents and officials, Defendants, by and through their respective attorneys as follows:

1. The parties do hereby agree to settle and compromise the above-entitled action under the terms and conditions set forth herein.

2. The United States of America, Defendant, agrees to pay to the Plaintiff the sum of two hundred twenty five thousand dollars ($225,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the same subject matter that gave rise to the above-captioned lawsuit, including any claims for wrongful death, for which Plaintiff or his heirs, executors, administrators, or assigns, and each of

them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his heirs, executors, administrators or assigns hereby agree to accept the sum of two hundred twenty five thousand dollars ($225,000.00), in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which he may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, including any future claim for wrongful death. Plaintiff and his heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of the United States, its agents, servants, or employees, and is entered into by both parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

5. It is also agreed, by and among the parties, that the settlement amount of two hundred twenty five thousand dollars ($225,000.00) represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. Payment of the settlement amount will be made by a check drawn on the Treasury of the United States for two hundred twenty five thousand dollars ($225,000.00), and made payable to Mika Hilaire, Trustee for the Next of Kin of Stafford Hilaire, and Mark Hallberg, Plaintiff's attorney. The settlement will be paid by electronic transfer to

Bremer Bank, National Association
Bremer Service Center
P.O. Box 1000
Lake Elmo, MN 55042-1000

Treasury Financial Communication System (TFCS) Routing Symbol
(9-digit American Banking Assoc. Ident. Code): 096010415

Hallberg & McClain, P.A.
IOLTA Account
Bank Account No.: 666 3024

Plaintiff's attorney agrees to distribute the settlement proceeds to the Plaintiff.

8. In consideration of the payment of two hundred twenty five thousand dollars ($225,000.00), as set forth above, Plaintiff agrees that she will cause he attorney

to execute and file with the court such documents as shall be necessary to cause the above-styled action to be dismissed with prejudice from the docket of the court.

ANDREW M. LUGER
United States Attorney

Dated: 8-14-14, 2014

BY: LONNIE F. BRYAN
Assistant U.S. Attorney
Attorney ID Number 206635
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
Phone: 612-664-5600
Email: Lonnie.Bryan@usdoj.gov

Attorneys for United States of America

Dated: July 28, 2014

MIKA HILAIRE,
Trustee for the Next-of-Kin of
Stafford Hilaire, Deceased

HALLBERG & McCLAIN, P.A.

Dated: August 1, 2014

BY: MARK HALLBERG
380 St. Peter Street, Suite 715
St. Paul, MN 55102
Phone: 651-255-6810
Email: mhallberg@hallberglaw.com

Attorneys for Plaintiff

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of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

HEATHER M. PAPPAS,

Plaintiff

v. Case No.: 14-CV-1212

UNITED STATES OF AMERICA,

Defendant

Plaintiff, Heather M. Pappas, by and through counsel, and for his complaint against the United States of America, hereby states as follows:

JURISDICTION AND VENUE

1. Plaintiff, Heather M. Pappas, resides in St. Louis County, Duluth, Minnesota, with a mailing address of 4496 Carey Road, Duluth, Minnesota 55803.

2. This action arises under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 28 U.S.C. §§ 2671-2680. Pursuant to 28 U.S.C. § 1346(b), United States Federal District Courts have jurisdiction over Plaintiff's civil action for damages against Defendant, United States of America.

3. Prior to the filing of this complaint, Plaintiff filed written administrative claims pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2675, a written denial was provided to Plaintiff in a letter dated November 20, 2013.

4. The District of Minnesota is the appropriate venue, as Plaintiff resides within the state of Minnesota and the negligent act(s) occurred within the state of Minnesota.

Bye, Goff & Rohde, Ltd.
P.O. Box 167
River Falls, WI 54022

NEGLIGENCE

5. On January 12, 2013 Heather M. Pappas stopped at her brother, Gene Pappas's residence. Gene is a corrections officer and his residence is located on and maintained by the Federal Prison Camp. Heather walked up the driveway and was passing the garage on the cement walkway when she slipped and fell on a patch of ice. Said injuries were proximately caused by the negligence of the Federal Prison Camp and/or its agents and employees.

6. As a proximate result of said negligence, Plaintiff Heather M. Pappas suffered permanent personal injuries causing her to incur pain suffering and disability in the past; pain, suffering and disability in the future; past medical expense; future medical expense; past loss of earning capacity; and future loss of earning capacity.

WHEREFORE, judgment is demanded as follows:

(1) against the defendant for monetary damages in the amount of Three Hundred Thousand and no/100 Dollars ($300,000.00);

(2) for costs, and all other further relief to which plaintiff may be entitled.

Dated this 21st day of April, 2014.

BYE, GOFF & ROHDE, Ltd.

By: Robert A. Parsons, #287544
Attorneys for Plaintiff

258 Riverside Drive, BOX 167
River Falls, Wisconsin 54022
Telephone: (715) 425-8161
Email: Robert@byegoff.com

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Heather M. Pappas

(b) County of Residence of First Listed Plaintiff St. Louis
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Robert A. Parsons, Bye, Goff & Rohde, Ltd., 258 Riverside Drive, PO Box 167, River Falls, Wisconsin 54022
715-425-8161

DEFENDANTS
United States of America

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☒ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28:2671
Brief description of cause:
Personal injury at Federal Prison Camp in Duluth, Minnesota

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND $ 300,000.00
CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:
JUDGE _____ DOCKET NUMBER _____

DATE 4/21/2014
SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Heather M. Pappas,	))	COURT MINUTES - CIVIL	
	))	BEFORE: Leo I. Brisbois	
Plaintiff,	))	U.S. Magistrate Judge	
	))		
v.	))	Case No:	14-cv-1212 (PAM/LIB)
		Date:	July 30, 2014
United States of America,		Court Reporter:	
		Courtroom:	Duluth 3 (in chambers)
Defendant.		Time Commenced:	10:57 a.m.
		Time Concluded:	11:17 a.m.
		Time in Court:	0 Hours & 20 Minutes

Hearing on: **Initial Pretrial Conference**

APPEARANCES:

Plaintiff: Robert A. Parsons
Defendant: Lonnie F. Bryan

PROCEEDINGS:

- ☒ Initial pretrial conference held.
- ☒ Dates discussed for the progression of the case.
- ☒ Written Pretrial Order to be issued.

s/ EJT
Law Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

* *

Heather M. Pappas,

Plaintiff,

vs. PRETRIAL SCHEDULING ORDER

United States of America,

Defendant. Court File No. 14-cv-1212 (PAM/LIB)

* *

Pursuant to Pretrial Conference convened on July 30, 2014, and in accordance with provisions of Rule 16, Federal Rules of Civil Procedure, and the Local Rules of this Court, to administer the course of this litigation in a manner which promotes the interests of justice, economy and judicial efficiency, the following Schedule will govern these proceedings. **The Schedule may be modified only upon formal Motion and a showing of good cause as required by Local Rules 7.1 and 16.3**.

Counsel shall also comply with the Electronic Case Filing Procedures For The District of Minnesota, pursuant to Order Adopting Electronic Case Filing, dated May 13, 2004.

THEREFORE, It is --

ORDERED:

I.

That all pre-discovery disclosures required by Rule 26(a)(1) shall be completed on or before **September 1, 2014**. The period during which the parties must conduct all discovery (whether fact

or expert) shall terminate on **April 1, 2015**.[1] Disputes with regard to pre-discovery disclosures or discovery shall be called immediately to the Court's attention by the making of an appropriate Motion, and shall not be relied upon by any party as a justification for not adhering to this Pretrial Scheduling Order. No further or additional discovery shall be permitted after the above date except upon motion and by leave of the Court for good cause shown, and any independent Stipulations or agreements between counsel which contravene the provisions of this Order will not be recognized. However, upon agreement of counsel, or with leave of the Court, depositions in lieu of in-Court testimony may be taken after the close of discovery.

II.

That all Motions which seek to amend the pleadings or add parties must be filed and the Hearing thereon completed on or before **October 1, 2014**.[2]

III.

That all other nondispositive Motions shall be filed and the Hearing thereon completed prior to **May 1, 2015**, by calling Victoria L. Miller at 218-529-3520, Courtroom Deputy for Magistrate Judge Leo I. Brisbois. All nondispositive Motions shall be scheduled, filed and served in compliance with Local Rule 7.1(a) and (b) and the Electronic Case Filing Procedures For The

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[1] See, Local Rule 16.2(d)(3) of the United States District Court For the District of Minnesota Local Rules.

[2] This deadline does not apply to motions to amend pleadings to assert a claim for punitive damages. Motions which seek to assert claims for punitive damages must be filed and the Hearing thereon completed prior to the discovery deadline in Paragraph I.

District of Minnesota. No discovery Motion shall be heard unless the moving party complies with the requirements of Local Rule 37.1.

IV.

A Settlement Conference pursuant to Local Rule 16.5(b) in the above-entitled matter is set before Magistrate Judge Leo I. Brisbois, on **April 28, 2015, at 9:30 a.m., in Courtroom No. 3, Gerald W. Heaney Federal Building and U.S. Courthouse, 515 W. First St., Duluth, Minnesota**. A separate Notice of this Settlement Conference shall be issued outlining the parties' obligations for preparation and for appearance of the Conference.

V.

That no more than **25** Interrogatories (counted in accordance with Rule 33(a), Federal Rules of Civil Procedure), **25** Document Requests and **25** Requests for Admissions shall be served by any party.

VI.

That no more than **five (5)** depositions (excluding expert depositions) shall be taken by any party without prior Order of the Court.

VII.

That within the foregoing period allotted for discovery, but no later than the dates set forth below, the parties shall retain and disclose to opposing counsel all persons they intend to call as expert witnesses at trial.[3] Each party's disclosure shall identify each expert and state the subject

[3]Any experts retained for purposes of conducting any examinations in accordance with Fed. R. Civ.
(continued...)

matter on which the expert is expected to testify. The disclosure shall be accompanied by a written report prepared and signed by the expert witness.[4] As required by Rule 26(a)(2)(B), Federal Rules of Civil Procedure, the report shall contain:

> a. The qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years;
>
> b. The compensation to be paid for the study and testimony;
>
> c. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years;
>
> d. A complete statement of all opinions to be expressed and the basis and reasons therefor;
>
> e. The data or other information considered by the witness in forming the opinions; and
>
> f. Any exhibits to be used as a summary of or support for the opinions.

The Plaintiff's disclosures shall be made on or before **November 1, 2014**. The Defendant's disclosures shall be made on or before **February 1, 2015**.

VIII.

That the parties **do** contemplate taking expert depositions. No more than **three (3)** experts may be deposed by any party without prior Order of the Court.

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[3] (...continued)
P. 35 are included in these disclosures.

[4] If no written report is required by Rule 26(a)(2)(B), the disclosures shall still comply with Rule 26(a)(2)(C).

IX.

That each party shall fully supplement all discovery responses according to Rule 26(e), Federal Rules of Civil Procedure. Any evidence responsive to a discovery request which has not been disclosed on or before the discovery cutoff or other dates established herein, except for good cause shown, shall be excluded from evidence at trial.

X.

That all dispositive Motions shall be filed by the moving party by **June 1, 2015**.[5] All dispositive Motions shall be scheduled, filed and served in compliance with the Order regarding dispositive motion practices in cases assigned to Judge Magnuson by contacting his Courtroom Deputy, Suzanne Ruiz at 651-848-1156. Counsel are given notice that six to eight weeks advance notice is necessary to place a dispositive Motion on the calendar.

XI.

That this case shall be ready for Trial on **August 1, 2015**[6], or 30 days after the Court renders its Order on any dispositive Motion (whichever is later), at which time the case will be placed on the

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[5]The parties should attempt to schedule dispositive motions after all discovery has been completed and to schedule all dispositive motions for the same hearing and should strive to avoid duplication in their briefing. If the parties believe early or piecemeal dispositive motion practice is necessary, they should seek permission of the District Judge.

[6]**THIS DATE IS NOT A TRIAL SETTING DATE.** The parties will be notified by the Calendar Clerk of the assigned Judge to a case by way of a Notice of Trial as to when this case will be placed on the Trial Calendar. The above date is merely a notice to all parties to consider the case ready for trial as of this date. **DO NOT PREPARE FOR TRIAL UNTIL NOTIFIED.**

Court's **non-Jury** Trial calendar. That the anticipated length of Trial is **two (2) days**.

BY THE COURT:

DATED: August 13, 2014

s/Leo I. Brisbois
Leo I. Brisbois
U.S. MAGISTRATE JUDGE

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

> was going on, chose not to call deuces until a long while later, acting under color of law. I have now possibly contracted the deadly disease HIV/Aids and Hepatitus-C from the know (Hepatitus-C) carrier....His feces and blood actually got in my open stab wounds and mixed with my blood, which puts me at risk, during the very long physical altercation.... ....
>
> After the incident on 4-4-13, my civil attorney discovered that, in fact . . . .several ADX-staff already knew what was going to happen and they assumed I would likely be killed by [Attacking Inmate] so I can't be part of the [SuperMax Lawsuit].

See Part A and Continuation, Request for Administrative Remedy Case No. 760642 filed by Carlton Dunbar, dated December 3, 2013.

3. With this action, Plaintiff seeks an award of monetary damages to compensate him for injuries sustained and for the violation by Defendants of Plaintiff's constitutional rights.

II. JURISDICTION & VENUE

4. This Court has jurisdiction over Plaintiff's *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), claims pursuant to 28 U.S.C. §§ 1331 and 2201.

5. This Court has jurisdiction of Plaintiff's Federal Tort Claims Act, 28 U.S.C. 1346(b) *et seq.* ("FTCA") claims pursuant to 28 U.S.C. 2671 *et seq.* and 28 U.S.C. 1346(b).

6. Venue is proper before this Court under 28 U.S.C. §1391(b)(2), as the activities giving rise to Plaintiff's claims occurred within the confines of this federal judicial district.

III. PARTIES

7. Plaintiff is an inmate who resides at the ADX.

8. The Federal Bureau of Prisons (the "BOP") is Defendant United States of America's administrative agency charged with operating the ADX.

9. Defendant Foster was, at all relevant times, employed at the ADX by the BOP, and served as Plaintiff's counselor.

10. Defendant Does 1-20 are BOP employees who bear responsibility for Plaintiff's Injuries.

IV. FACTUAL BACKGROUND

A. The BOP and ADX – "America's Most Secure Prison"

11. According to the BOP's official website, the BOP is "an Agency Like No Other," as it "protect[s] public safety by ensuring that federal offenders serve their sentences of imprisonment in facilities that are safe, humane . . . and appropriately secure." *See* "About Our Agency", http://www.bop.gov/about/agency/ (attached as Exhibit 2).

12. The BOP proclaims that it "ensures the physical safety of all inmates through a controlled environment which meets each inmate's need for security through the elimination of violence, predatory behavior, gang activity . . . and inmate weapons." *See* "Pillars: A Foundation Built on Solid Ground", http://www.bop.gov/about/agency/agency_pillars.jsp (attached as Exhibit 3).

13. According to the BOP, its "[s]taff maintain high ethical standards in their day-to-day activities." *Id.*

14. In describing the purpose behind the creation of the ADX – "the most secure prison in the federal prison system" – the BOP notes that it was specifically "designed to house inmates who require an uncommon level of security." *See* Defendants/Appellees' Response Brief, *Silverstein v. Bureau of Prisons*, 7th Cir. No. 12-1450, at 13.

B. Plaintiff Carlton Dunbar and the *Supermax Lawsuit*

15. Plaintiff was transferred to ADX from the United States Penitentiary in Allenwood, Pennsylvania in 2009. After a period of incarceration at ADX, Plaintiff's behavior warranted his transfer from the ADX's general population housing to a "step-down" unit. In the "step-down" unit, while inmates are allowed limited interaction, they are constantly subject to human and video surveillance.

16. Plaintiff serves as a class representative in *Cunningham, et al. v. Federal Bureau of Prisons*, Case No. 1:12-cv-01570 (the "Supermax Lawsuit"), which is currently pending before this Court. The Supermax Lawsuit seeks mental healthcare access for ADX inmates, and transfer for those whose mental illness makes their incarceration at the ADX inappropriate under the BOP's own policies. Plaintiff's participation in the Supermax Lawsuit is public knowledge, and has been discussed by Defendants in the presence of ADX inmates.

C. The April 4, 2013 Attack on Plaintiff, and the BOP's Advance Notice

17. In or about March 2013, Plaintiff resided in J Unit ("Joker Unit"), a "Step Down" unit at ADX. Like all units within the ADX, Joker Unit is monitored at all times by BOP employees. An officer station, known as "the Bubble," is located within Joker Unit and allows correctional officers to view all activity in the common area of Joker Unit. The Bubble is equipped with telephones, computers, whistles, and alarms that allow correctional officers to alert BOP personnel to situation in which an inmate is placed in danger. The Bubble is also equipped with gas masks for correctional officers, and devices such as "pepper balls" which can be deployed by the correctional officers to impair the breathing of assaultive inmates and allow from such inmates to be restrained.

18. On or about March 28, 2013, a prisoner housed at ADX ("Witness A") obtained knowledge concerning an attack, or "hit," on Plaintiff that was being planned by other ADX prisoners. On that date, Witness A drafted a letter outlining the planned attack against Plaintiff and asked his ADX counselor to deliver the letter to the BOP's Special Investigative Service ("SIS").

19. Witness A has provided other reliable information to the SIS and the BOP generally. Defendants Does 1-20 knew that the information received from Witness A regarding the planned attack on Plaintiff was credible, and that an attack would likely result in serious injury or death to Plaintiff.

20. Despite Witness A's informing the BOP that an attack on Plaintiff was being planned by other inmates, the BOP did not take any steps to inform or warn Plaintiff of the imminent danger that existed. Nor did the BOP take appropriate steps to ensure that the inmates who were planning the attack on Plaintiff were removed from the Step Down units and placed in higher security units with the ADX.

21. As part of the Step Down protocol, prisoners on Joker Unit were permitted to comingle during daily recreation. On or about the morning of April 4, 2013, Plaintiff was released from his cell to the ADX's outer yard to participate in recreation with certain other prisoners from Joker Unit.

22. On or about 9:50 a.m. on April 4, 2013, during Joker Unit's scheduled recreation period, Plaintiff and the other upper-tier Joker Unit prisoners participating in recreation were given orders to return to Joker Unit for lock in while another Joker Unit resident was taken to a legal visit. After that inmate was taken to his legal visit, Joker Unit was re-secured, the upper-tier Joker Unit residents were again permitted outside of their cells to move about the common space

on the lower level of Joker Unit. This area of Joker Unit is constantly monitored and surveilled by correctional officers and cameras.

23. At or about 10:11 a.m., in full view of correctional officers and inmates housed in Joker Unit, one of the Joker Unit inmates (the "Attacker") initiated an unprovoked, sustained and prolonged attack on Plaintiff with a knife. Plaintiff, who was caught completely unaware by the Attacker's ambush, defended himself with his bare hands with the expectation that the correctional officers would quickly restrain the Attacker. However, the correctional officers did not initiate any efforts to stop the Attacker's assault on Plaintiff.

24. For a period of approximately thirteen minutes, Plaintiff and the Attacker were engaged in hand-to-knife, vicious combat on the lower level of Joker Unit. Despite their in-person view of the attack and ensuing battle, the multiple correctional officers who witnessed continued merely to observe the carnage as a form of entertainment, without taking any steps to intervene. Because none of the on-duty correctional officers would come to Plaintiff's aid, or make any attempt to terminate the attack, Plaintiff was forced to fight in order to protect his own life.

25. In fighting to survive, Plaintiff acted in self-defense, and sought to restrain the Perpetrator. During the attack, Plaintiff – who remained unarmed – suffered multiple stab wounds from the knife used by the Attacker including, but not limited to, a stab wound behind his left ear; a stab wound inside his left ear; and a stab would on his nose.

26. As a result of Plaintiff defending himself, the Attacker lost control of his bowels. Additionally, the Attacker suffered injuries and cuts, from which he bled. As the fight continued, Plaintiff came into contact with the Attacker's feces and blood, which mixed with Plaintiff's own blood via the open wounds inflicted upon Plaintiff by the Attacker.

27. After approximately thirteen minutes of hand-to-knife combat, correctional officers – including those who had been stationed in the Bubble throughout the fight – finally initiated an intervention to stop the fight. These correctional officers shot a pepper ball gun into the Joker Unit common area. While the Defendant Does knew that the Attacker, and not Dunbar, had been the instigator, some of them nonetheless shouted "Dunbar! Dunbar!" to imply that Plaintiff had been the aggressor.

28. Upon the pepper ball taking effect, and despite knowing that Plaintiff had not been the aggressor but was only defending his own life, the correctional officers and numerous other BOP employees entered the Joker Unit common area and forcefully restrained Plaintiff. In their application of leg irons and wrist restraints, these Defendant Does restrained Plaintiff – severely weakened by the prolonged life-or-death battle – in a punitive, unnecessarily painful manner, including applying weight to Plaintiff's calf area (a "knee shot") which caused a severe and painful cramp. Plaintiff lost feeling in his feet and hands at this time. Plaintiff did not resist the restraint process.

29. The entire fight between Plaintiff and the Perpetrator was captured by the multiple video cameras located throughout Joker Unit.

D. Post-Fight Treatment of Plaintiff

30. At approximately the time of the application of the leg irons and wrist restraints, Plaintiff noticed that a blonde female, thought by Plaintiff to be an SIS officer, was recording the incident with a hand-held camera.

31. Plaintiff was then taken to triage by BOP employees, where Defendant Does – including and in addition to medical staff – joked and laughed. At this time, Plaintiff complained to the attending Defendant Does that the leg irons and wrist restraints were hurting him, cutting

off his circulation and causing loss of feeling in his hands and feet. Plaintiff's complaints were ignored as BOP medical staffer Cardoza assessed Plaintiff's condition.

32. During the assessment, a BOP employee checked Plaintiff's jaw and looked at Plaintiff's wounds, but did not attend to those wounds. Plaintiff requested water. Plaintiff, bleeding and wounded, was placed in a wheelchair and escorted by numerous BOP employees to a medical room. At that time, a correctional officer was discussing the battle in a casual manner with his co-workers, describing the life-or-death attack on Plaintiff as "one of the best fights I have ever seen," discussing the battle in a casual manner as entertainment rather than as a preventable, life-threatening incident. The SIS officer continued to record this with the hand-held camera.

33. Plaintiff's clothes were removed in the medical room, but the unnecessarily tight restraints remained. Plaintiff was given khakis but no undergarments, and the clothes that Plaintiff had worn during the fight were bagged for evidence. Plaintiff begged for, and was finally given, water, which he was made to drink like a dog, without the use of his hands. Plaintiff's leg and wrist restraints were eventually released by medical personnel. The wrist restraints were so tight that they could not be unlocked without further tightening; both the leg irons and the wrist restraints left visible injuries to Plaintiff's skin. Plaintiff experienced a high-pitched ringing in his ear, as well as a headache.

34. Plaintiff, who lost feeling in parts of his body from the attack, asked to have his stab wounds assessed. Plaintiff expressed concern regarding the contact with the Perpetrator's feces and blood, and wanted to shower to get the blood and fecal matter off of his body. Fearing that his contact with the fecal matter subjected him to hepatitis, Plaintiff asked for the hepatitis vaccine to be administered. No vaccine was administered.

35. Medical personnel stitched a stab wound and/or cut that Plaintiff sustained on his nose, as well as stab wounds and/or cuts to the the interior and anterior of his left ear, and administered a pain injection. Plaintiff received a tetanus shot and a topical cream for certain injuries, and was placed in a holding cell in K Unit. Plaintiff again requested that the hepatitis vaccine be administered; despite Defendants' knowledge that the Attacker had hepatitis, the vaccine was not administered.

36. Despite Plaintiff's severe injuries, and although Defendants knew that Plaintiff was not the aggressor, and was forced to use his bare hands to defend himself against the larger, shank-wielding Attacker, Defendants placed Plaintiff in the brutal confinement of the Special Housing Unit (SHU). Rather than allowing Plaintiff to recover from the life-or-death trauma in the calm of a hospital setting, the SHU environment in which Plaintiff was held was constantly subject to loud noise, the smell of urine, and filth, causing Plaintiff more trauma and making him reluctant to sleep for fear of contracting illness from his surroundings.

37. During his confinement in the SHU, Plaintiff sent a letter to the Warden requesting the hepatitis vaccine. As he waited in the SHU, Plaintiff became increasingly fearful that he had contracted hepatitis or AIDS from his contact with the Perpetrator's feces. Plaintiff was eventually provided with the hepatitis vaccine.

38. Defendants issued a misconduct notice ("Shot") to Plaintiff. Defendant appealed the Shot via administrative channels.

39. Upon information and belief, the Federal Bureau of Investigation and Defendants have reviewed all evidence concerning the attack, including the visual recordings of the attack and its aftermath. The FBI did not prosecute either the Perpetrator or Plaintiff, and months after

it was issued, the Shot issued to Plaintiff was rescinded. Nonetheless, Defendants held Plaintiff in the SHU for a period of months.

E. Defendant Foster's Interference With Plaintiff's *Bivens* Claims

40. While in the SHU, Plaintiff repeatedly requested the Administrative Complaint form BP-228(13) (the "BP-8"). His confinement to the SHU meant that Plaintiff was entirely reliant upon his counselor, Defendant Foster, to provide him with the BP-8 and file it on his behalf. In response, Defendant Foster told Plaintiff that he did not want to help Plaintiff sue the BOP or its employees for the injuries Plaintiff sustained. Defendant Foster, knowing that Plaintiff was required by BOP policy to file such form in time to subsequently file his BP-9 within twenty (20) days of the incident and that a delay may harm his ability to bring a later *Bivens* claim, intentionally delayed the filing of the administrative remedies.

F. Plaintiff's Permanent Physical and Psychological Injuries

41. More than a year after being assaulted by the Attacker, Plaintiff continues to suffer nerve damage behind his ear; wrist "pops" at the location where the too-tight restraints were applied; pain behind his shoulder; internal pain; knew injuries and scars; chronic fatigue; and other physical and psychological injuries. Plaintiff suffers from an extreme fear of contracting hepatitis and/or HIV from the attacker.

42. Plaintiff has recurring dreams regarding the attack and the battle. Because of his fear of another attack that Defendants will wilfully fail to prevent, Plaintiff is reluctant to take the medicine that is necessary to treat his mental illness, as he fears that it will leave him susceptible to efforts by Defendants to have him further injured or possibly killed.

43. The attack and ensuing trauma suffered by Plaintiff exacerbated his known, severe mental illness, including paranoia. Despite the fact that Defendants are aware of

Plaintiff's psychological injuries, they have not made any effort to treat or assuage his mental illness or symptoms of trauma after the attack.

PLAINTIFF'S CLAIMS

CLAIM I – *BIVENS* ACTION – EIGHTH AMENDMENT

FAILURE TO PREVENT ATTACK ON PLAINTIFF

(DOE DEFENDANTS 1-20)

44. Plaintiff restates paragraphs 1 through 43 as if fully set forth herein.

45. On April 4, 2013, despite having knowledge that an attack would be carried out on Plaintiff and despite appreciating the probability of injury to Plaintiff in such an attack, Doe Defendants 1-20 failed to prevent the attack on Plaintiff that occurred on April 4, 2013.

46. Defendants' actions constituted cruel and unusual punishment, in violation of the Eighth Amendment of the United States Constitution.

47. As a result of Defendants' actions, Plaintiff has suffered and will continue to suffer physical and emotional injuries.

48. Defendants are liable to Plaintiff under *Bivens* for compensation for all his injuries in such amount as the Court determines, plus attorney fees and other fees and costs.

CLAIM II – BIVENS ACTION – EIGHTH AMENDMENT

FAILURE TO STOP ATTACK ON PLAINTIFF

(DOE DEFENDANTS 1-20)

49. Plaintiff restates paragraphs 1 through 43 as if fully set forth herein.

50. Despite having ample opportunity to do so, and despite being armed with tear gas, pepper spray, and other devices that would impair the Perpetrator and prevent further injury to

Plaintiff, and despite understanding the severe and continuing injuries being inflicted upon Plaintiff, Doe Defendants 1-20 did not make any effort to stop the April 4, 2013 attack on Plaintiff until approximately thirteen (13) minutes after it began. Instead, Doe Defendants 1-20 watched from behind locked bars as Plaintiff fought for his life.

51. Defendants' actions constituted cruel and unusual punishment, in violation of the Eighth Amendment of the United States Constitution.

52. As a result of Defendants' actions, Plaintiff has suffered and will continue to suffer physical and emotional injuries.

53. Defendants are liable to Plaintiff under *Bivens* for compensation for all his injuries in such amount as the Court determines, plus attorney fees and other fees and costs.

WHEREFORE, Plaintiff requests monetary damages in the amount such amount as the Court determines, plus attorney fees and other fees and costs.

CLAIM III - BIVENS ACTION -- FIRST AMENDMENT

(DEFENDANT FOSTER)

54. Plaintiff restates paragraphs 1 through 43 as if fully set forth herein.

55. Defendant Foster deliberately and intentionally prevented Plaintiff from being able to file a BP-9 within twenty days of the attack.

56. Defendant Foster's actions constitute of violation of Plaintiff's civil rights under the First Amendment of the United States Constitution.

57. Defendants are liable to Plaintiff under *Bivens* for compensation for all his injuries in such amount as the Court determines, plus attorney fees and other fees and costs.

WHEREFORE, Plaintiff requests monetary damages in such amount as the Court determines, plus attorney fees and other fees and costs.

CLAIM IV – FTCA CLAIM

(United States of America)

58. Plaintiff restates Paragraphs 1 through 43 as if fully set forth herein.

59. Defendant the United States of America failed to prevent, or to stop within a reasonable time, the April 4, 2013 attack on Plaintiff.

60. As a result of the gross negligence and deliberate indifference by Defendant the United States of America to Plaintiff's plight, Plaintiff suffered severe and permanent physical and emotional injuries.

60. Defendant the United States of America is liable to Plaintiff under the FTCA for injuries he sustained as a result of the April 4, 2013 attack.

WHEREFORE, Plaintiff requests monetary damages in the amount of $50,000, or in such greater amount as the Court determines, plus attorney fees and other fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

1. That Plaintiff's *Bivens* claims (asserted in Claims I – III) be adjudicated prior to Plaintiff's FTCA claim (asserted in Count IV).

2. That Plaintiff be awarded compensatory damages for each of his *Bivens* claims in an amount to be determined by the Court.

3. That Plaintiff be awarded punitive damages for each of his *Bivens* claims, in an amount to be determined by the Court.

4. That Plaintiff be awarded damages in the amount of $50,000 for his FTCA claim.

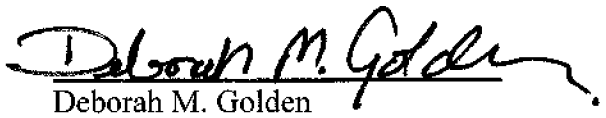
5. That Plaintiff be awarded all such further monetary and injunctive relief that is permitted by law, as determined by the Court.

6. That Plaintiff be transferred to a different prison within the BOP's system.

7. The Plaintiff be awarded attorney fees and costs as permitted by law.

Dated: July 2, 2014

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-01838-MJW

CARLTON DUNBAR,

Plaintiff,

v.

UNITED STATES OF AMERICA, and
DOES 1-20,

Defendants.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. §2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys, and the Settlement Broker, signing this agreement, whether or not a party to this civil action), and the United States of America (hereinafter "United States"), by and through their respective attorneys, as follows:

1. The parties to this Stipulation For Compromise Settlement And Release (hereinafter "Settlement Agreement") do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.
2. This Settlement Agreement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents,

servants, or employees, and it is specifically denied that they are liable to the plaintiff. This Settlement Agreement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

3. The United States agrees to pay the cash sums set forth below in paragraph 3(a) to purchase the annuity contract(s) described below in paragraph 3(b).

   a. As soon as it is practicable after the execution of this Settlement Agreement, the United States will pay by wire transfer to the settlement trust account of JMW Settlements, LLC (hereinafter "JMW") (BB&T Bank, Washington, DC, Account Number 0005162719272, ABA Routing Number 054001547), the sum of thirty-thousand Dollars ($30,000) (hereinafter "Settlement Amount"). Within 5 business days after JMW has received notice from its bank that the Settlement Amount has been received into said trust account, JMW will distribute the Settlement Amount to an annuity company rated A, A+ or A++ by A.M. Best Company to purchase the annuity contract described in Paragraph 3.b., below. The parties agree that any attorney's fees owed by the plaintiff shall not exceed 25% of the settlement amount (28 U.S.C. §2678) and must be paid out of the settlement amount and not in addition thereto.

   b. The United States will purchase an annuity contract on the following terms and conditions:

      (1) The annuity contract will pay (i) the sum of $125.00 per month, beginning one month from the date of purchase, continuing for a period

7 years, 2 months (86 months), and (ii) a single lump sum in the amount of $23,295.00, on February 1, 2023. In the event that the cost of the annuity contract has either increased or decreased by the date of purchase, the monthly annuity payments set forth above shall be adjusted upward or downward to ensure that the total premium cost is equal to and does not exceed the Settlement Amount. These payments are certain and shall be payable regardless of survivorship. In the event of the death of Carlton Dunbar during a period of certain payments specified above, all remaining certain payments from the annuity purchased shall be made payable to the Estate of the respective payee, or to any secondary beneficiary designated by the respective payee during his lifetime, provided that any such designation shall be in writing and in a form acceptable to the United States and the annuity issuer.

(2) The annuity contract to be purchased pursuant to this Paragraph 3.b will be owned solely and exclusively by the United States and will be purchased through JMW as specified above in Paragraph 3.a. The parties stipulate and agree that the United States' only obligation with respect to said annuity contract and any annuity payments therefrom is to purchase the annuity contract, and they further agree that the United States does not guarantee or insure any of the annuity payments. The parties further stipulate and agree that the United States is released from any and all

obligations with respect to the annuity contract and annuity payments upon the purchase of said annuity contract.

(3) The parties stipulate and agree that the annuity company that issues the annuity contract shall, at all times, have the sole obligation for making all annuity payments. The obligation of the annuity company to make each annuity payment shall be discharged upon the mailing of a valid check, or executing an electronic funds transfer in the amount of such payment to the address, or account, designated by the party to whom the payment is required to be made under this Settlement Agreement. Payments lost or delayed through no fault of the annuity company shall be promptly replaced by the annuity company, but the annuity company is not liable for interest during the interim.

(4) The parties stipulate and agree that the annuity payments cannot be assigned, accelerated, deferred, increased, or decreased by the parties, that no part of any annuity payments called for herein nor any assets of the United States or the annuity company, are subject to execution or any legal process for any obligation in any manner, and that the plaintiff shall not have the power, or right, to sell, assign, mortgage, encumber, or anticipate said annuity payments, or any part thereof, by assignment or otherwise.

Plaintiff, Plaintiff's guardians, heirs, executors, administrators and assigns do hereby agree to maintain with the annuity company and the

United States a current mailing address, and to notify the annuity company and the United States of the death of Carlton Dunbar within ten (10) days of death, and to provide the annuity company and the United States a certified death certificate within forty-five (45) days of death.

4. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the Settlement Amount and purchase of the annuity contract set forth in this Settlement Agreement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the Settlement Amount and not in addition thereto.
6. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Settlement Agreement and the compromise settlement are null and void.
7. The parties stipulate and agree that the Settlement Agreement and the compromise settlement are null and void in the event the parties cannot agree on the terms, conditions and requirements of this Settlement Agreement and the annuity contract. The terms, conditions and requirements of this Settlement Agreement are not severable and the failure to agree, fulfill or comply with any term, condition, or requirement renders the entire Settlement Agreement and the compromise settlement null and void. The authorization by the Attorney General or the Attorney General's designee to negotiate and consummate a settlement for the amount agreed upon by the parties does not make the settlement binding upon the United States unless and until the other terms, conditions

and requirements of this Stipulation For Compromise Settlement And Release have been completely agreed upon in writing.

8. Plaintiff's attorney agrees to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Settlement Agreement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. §552a(b).

10. It is contemplated that this Settlement Agreement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

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Executed this 26th day of August, 2015

Deborah M. Golden
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Counsel for Plaintiff

Executed this 25 day of August, 2015

Carlton Dunbar Reg#32660-007
Plaintiff

Executed this 26th day of August, 2015

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Executed this 26th day of August, 2015

JMW Settlements LLC

James Klapps

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Settlement Broker

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FILED
JAN 23 2002
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON OFFICE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ILLINOIS

WA'IL MANSUR MUHANNAD,
Plaintiff,

vs.

UNITED STATES OF AMERICA; ~~KATHLEEN HAWK-SAWYER~~; ~~C.L. HERSHBERGER~~; ~~Bill HEDRICK~~; E.A. STEPP; ~~HARRELL WATTS~~; BOBBY COMPTON; WILLIAM CHISM, JR.; BUDDY J. ADELSBERGER; GREGORY E. SHADOWENS; RICKY ELLET; EDWARD JAMES RIVETT; DAVE GLOBUN; ~~THOMAS B. SMITH~~; RANDY BAGGOTT; ~~TERRY FOSTER~~; ~~CHARLES (CHIP) YOUNG~~; JAMES E.TUBB, JR.; ~~JOHN BRYANT~~; ~~H. HOPKINS~~; ~~JOSEPH YONKMAN~~; NELSON BEISNER; MICHAEL BELTZ; DAVID BENSON; ~~LOUIS FORD~~, and; ~~D.L. CAMPBELL~~,

Defendant(s).

Case No. CV 00-864-~~GPM~~ JPG

SUPPLIMENTAL COMPLAINT

CIVIL RIGHTS COMPLAINT
28 U.S.C. 1331 and
42 U.S.C. 2000bb

FEDERAL TORT CLAIM
28 U.S.C. 2671, et seq., and;

ADMINISTRATIVE PROCEDURES ACT PETITION
5 U.S.C. 702, et seq.

DEMAND FOR JURY TRIAL

COMBINED

Docketed as Second Amended Complaint

INTRODUCTION

1. This is a civil action seeking Declaratory Judgment, Injunctive Relief and Monetary Damages, against the Defendants, and Each of Them, for committing acts and/or omissions, under color of the authority of the United States, which deprived Plaintiff of rights secured under the Constitution and laws of the United States of America; for Interfering with Plaintiff's rights under the First Amendment and Religious Freedom Restoration Act to the Free practice of religion; for violations of the Establishment Clause for Separation between church and state; for Racial biasness with regards to Defendants' Use of Force in connection with their use of riot batons against black prisoners confined at USP-Marion, Illinois; for Excessive and Unnecessary use of force and/or Assault and Battery against Plaintiff by Law Enforcement of the United States within the meaning of 28 U.S.C. 2680(h); for Racial Discrimination in co

nection with the Defendants' enforcement of the Bureau of Prisons' Disciplinary Policies at USP-Marion, Illinois; for an abuse of discretion and arbitrary and capricious enforcement of the Bureau of Prisons' Disciplinary Policies at USP-Marion, Illinois, and in violation of Plaintiff's substantive and statutory due process rights under the Administrative Procedures Act; for enforcement of invalid rules or Prohibited Acts against the Plaintiff which are set forth at 28 C.F.R. 541.13 which the Defendants failed to publish in compliance with the rule making provisions, 5 U.S.C. 553(b)(3), of the Administrative Procedures Act and failed to notify Plaintiff of what inmate behavior and conduct was Proscribed under the regulation; for failing to provide Plaintiff suitable quarters or for the safekeeping, care, subsistence, protection, discipline and instruction of Plaintiff in violation of 18 U.S.C. 4042(a)(2)&(3); for conspiring for the purpose of impeding and hindering the due course of justice in violation of Plaintiff's rights to due process, and; for refusing or neglecting to prevent such deprivation and details to Plaintiff. This action is brought pursuant to 5 U.S.C. 702, et seq., 18 U.S.C. 4042(a)(2)&(3), 28 U.S.C. 2671, et seq., and 42 U.S.C. 2000bb. Jurisdiction is based on 28 U.S.C. 1331.

2. At all times Material herein, each and every Defendant acted under color of the authority of the United States of America.

PARTIES

3. At all times relevant to this complaint, Plaintiff was confined at USP-Marion, Illinois; and is a citizen of the United States of America. Plaintiff is currently confined at USP-Marion, P.O. Box 1000, Marion, Illinois 62959.

4. At all times relevant to this complaint, the Federal Bureau of Prisons was an agency of the United States and U.S. Department of Justice. Its duty included, but was not limited to providing Plaintiff suitable quarters, safe-

keeping, care, subsistence, protection, discipline and instruction. Among such other duties as to train and supervise the acts and/or omissions of Defendants Hawk-Sawyer, Hershberger, Hedrick, Stepp, Watts, Compton, Chism, Adelsberger, Shadowens, Ellet, Rivett, Smith, Baggott, Foster, Young, Tubb, Bryant, Yonkman, Globun, Ford, Beisner, Beltz, Benson and Campbell.

5. At all times relevant to this complaint, Defendant Hawk-Sawyer was the Director of the Federal Bureau of Prisons. Her duty included, but was not limited to overseeing all aspects of the daily operations of the Bureau, providing Plaintiff suitable quarters, safekeeping, care, subsistence, protection, discipline and instruction. Among such other duties as to train and supervise the acts and/or omissions of defendants Hershberger, Hedrick, Stepp, Watts, Compton, Chism, Adelsberger, Shadowens, Ellet, Rivett, Smith, Baggott, Foster, Young, Tubb, Bryant, Yonkman, Beisner, Beltz, Globun, Ford, Benson and Campbell.

6. At all times relevant to this complaint, Defendant Hershberger was the North Central Regional Director of the Federal Bureau of Prisons. His duty included, but was not limited to overseeing all aspects of the daily operations of the North Central Regional Office and USP-Marion, Illinois and to provide Plaintiff suitable quarters, safekeeping, care, subsistence, protection, discipline and instruction. Among such other duties as to train and supervise the acts and/or omissions of defendants Hedrick, Stepp, Compton, Chism, Adelsberger, Shadowens, Ellet, Rivett, Ford, Globun, Smith, Baggott, Foster, Young, Tubb, Bryant, Yonkman, Beisner, Beltz, Benson and Campbell.

7. At all times relevant to this complaint, defendant Hedrick was a Warden for the Federal Bureau of Prisons and Chief Executive Officer at USP-Marion, Illinois. His duty included, but was not limited to overseeing the

daily operations of USP-Marion, Illinois, and to provide Plaintiff suitable quarters, safekeeping, care, subsistence, protection, discipline and instruction. Among such other duties as to train and supervise the acts and/or omissio of defendants Compton, Chism, Adelsberger, Shadowens, Ellet, Rivett, Ford, Globun, Smith, Baggott, Foster, Young, Tubb, Bryant, Yonkman, Beisner, Beltz, Benson and Camobell.

8. At all times relevant to this complaint, Defendant Stepp was a Warden for the Federal Bureau of Prisons and Chief Executive Officer at USP-Marion, Illinois. His duty included, but was not limited to overseeing the daily operations of the prison and to provide for the safekeeping, care, subsistence, discipline and instruction of Plaintiff. Among such other duties as to train and supervise the acts and/or omissions of defendants Compton, Chism, Globun, Adelsberger, Shadowens, Ellet, Rivett, Ford, Benson, Yonkman and Campbell.

9. At all times relevant to this complaint, Defendant Watts was the Administrator of Inmate Appeals for the Federal Bureau of Prisons at Central Office. His duty included, but was not limited to reviewing inmate appeals and disciplinary proceedings held against inmates on behalf of defendant Hawk-Sawyer.

10. At all times relevant to this complaint, Defendant Compton was an Associate Warden for the Federal Bureau of Prisons at USP-Marion, Illinois. His duty included, but was not limited to overseeing all aspects of Security at the prison, providing for the day to day security at the prison, to Provide Plaintiff with suitable quarters, safekeeping, care, subsistence, protection, discipline and instruction. Among such other duties as to train and supervise the acts and/or omissions of Defendants Adelsberger, Shadowens, Ellet, Rivett, Ford, Globun, Smith, Baggott, Foster, Young, Tubb, Bryant, Yonkman, Beisner, Beltz, Benson and Camobell.

11. At all times relevant to this complaint, Defendant Chism was an Associate Warden for the Federal Bureau of Prisons at USP-Marion, Illinois. Hi duty included, but was not limited to providing for the day to day security at the prison and to provide Plaintiff suitable quarters, safekeeping, care, subsistence, protection, discipline and instruction. Among such other duties as to train and supervise the acts and/or omissions of Defendants Adelsberger, Shadowens, Ellet, Rivett, Ford, Globun, Smith, Baggott, Foster, Young, Tubb, Bryant, Yonkman, Beisner, Beltz, Benson and Campbell.

12. At all times relevant to this complaint, Defendant Adelsberger was a Correctional Supervisor for the Federal Bureau of Prisons holding the rank o: Housing Unit Manager at USP-Marion, Illinois. His duty included, but was not limited to overseeing the daily operations of Housing Units, I and G; to provide Plaintiff suitable quarters, safekeeping, care, subsistence, protection, discipline and instruction, among such other duties as to train and supervise the acts and/or omissions of Defendants Shadowens and Ellet.

13. At all times relevant to this complaint, Defendant Shadowens was a correctional supervisor for the Federal Bureau of Prisons holding the rank of Case Manager at USP-Marion, Illinois. His duty included, but was not limited to making housing unit assignments on behalf of defendant Adelsberger; overseeing the daily operations of housing units, I and G; and, to provide Plaintiff suitable quarters, safekeeping, care, subsistence, protection and instruction.

14. At all times relevant to this complaint, Defendant Ellet was a correctional officer for the Federal Bureau of Prisons holding the rank of Correctional Counselor at USP-Marion, Illinois. His duty included, but was not limited to overseeing the day to day operations of housing units I and G, making cell assignments and changes on behalf of defendant Adelsberger and to provide

Plaintiff suitable quarters, safekeeping, Care, subsistence, protection, discipline and instruction.

15. At all times relevant to this complaint, Defendant Rivett was a correctional supervisor for the Federal Bureau of Prisons holding the rank of Supervisory Chaplain at USP-Marion, Illinois. His duty included, but was not limited to providing for the spiritual needs, care, and subsistence of inmates confined at USP-Marion, Illinois, in compliance with 18 U.S.C. 4042(a)(2).

16. At all times relevant to this complaint, Defendant Ford was a correctional supervisor for the Federal Bureau of Prisons holding the rank of Chaplain at USP-Marion, Illinois. His duty included, but was not limited to providing for the spiritual needs, care and subsistence of prisoners confined at USP-Marion, Illinois, in compliance with 18 U.S.C.4042(a)(2).

17. At all times relevant to this complaint, Defendant Globun was a correctional supervisor for the Federal Bureau of Prisons holding the rank of Food Service Administrator at USP-Marion, Illinois. His duty included, but was not limited to providing for the care and subsistence of Plaintiff in accordance with 18 U.S.C. 4042(a)(2) and overseeing the daily operations of Food Service at the prison. Among such other duties as to coordinate all religious meals and celebration with defendant Rivett for inmates at the institution.

18. At all times relevant to this complaint, Defendant Benson was a Correctional Supervisor for the Federal Bureau of Prisons holding the rank of Captain and Custody Supervisor at USP-Marion, Illinois. His duty included, but was not limited to overseeing all aspects of the daily operations of security at the prison and to provide Plaintiff safekeeping, care, protection, discipline and instruction in compliance with 18 U.S.C. 4042(a)(2)&(3), among such other duties

as to train and supervisor the acts and/or omissions of Defendants Yonkman, Camobell, Smith, Baggott, Foster, Young, Tubb, Bryant, Hopkins, Beisner and Beltz.

19. At all times relevant to this complaint, Defendant Campbell was a Correctional Supervisor for the Federal Bureau of Prisons holding the rank of Discipline Hearing Officer at USP-Marion, Illinois. His duty included, but was not limited to presiding over all disciplinary hearings or proceedings held against inmates at the prison pursuant to 28 C.F.R. 541, 5 U.S.C. 500, et seq., and 18 U.S.C. 4042(a)(3).

20. At all times relevant to this complaint, Defendant Yonkman was a Correctional Supervisor for the Federal Bureau of Prisons holding the rank of Lieutenant and Special Investigative Agent at USP-Marion, Illinois. His duty included, but was not limited to investigating all reported incidents of staff and inmate misconduct at the prison, to provide for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C.4042(a)(2)&(3). Among such other duties as to train and supervise the acts and/or omissions of defendants Baggott, Foster, Young, Tubb, Bryant, Hopkins, Beisner and Beltz.

21. At all times relevant to this complaint, Defendant Smith was a Correctional Supervisor for the Federal Bureau of Prisons holding the rank of Lieutenant at USP-Marion, Illinois. His duty included,but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3). Among such other duties as to train and supervise the acts

and/or omissions of defendants Baggott, Foster, Young, Tubb, Bryant, Hopkins, Beisner and Beltz.

22. At all times relevant to this complaint, Defendant Baggott was a Correctional officer for the Federal Bureau of Prisons holding the rank of Senior Officer Specialist at USP-Marion, Illinois. His duty included, but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3).

23. At all times relevant to this complaint, Defendant Foster was a Correctional Officer for the Federal Bureau of Prisons holding the rank of Senior Officer Specialist at USP-Marion, Illinois. His duty included, but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3).

24. At all times relevant to this complaint, Defendant Young was a Correctional Officer for the Federal Bureau of Prisons holding the rank of Senior Officer Specialist at USP-Marion, Illinois. His duty included, but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3).

25. At all times relevant to this complaint, Defendant Tubb was a Correctional Officer for the Federal Bureau of Prisons holding the rank of Senior Officer Specialist at USP-Marion, Illinois. His duty included, but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3).

26. At all times relevant to this complaint, Defendant Bryant was a Correctional Officer for the Federal Bureau of Prisons holding the rank of Senior Officer Specialist at USP-Marion, Illinois. His duty included, but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3).

27. At all times relevant to this complaint, Defendant Hopkins was a Correctional Officer for the Federal Bureau of Prisons holding the rank of Senior Officer Specialist at USP-Marion, Illinois. His duty included, but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3).

28. At all times relevant to this complaint, Defendant Beisner was a Correctional Officer for the Federal Bureau of Prisons holding the rank of Senior Officer Specialist at USP-Marion, Illinois. His duty included, but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3).

29. At all times relevant to this complaint, Defendant Beltz was a Correctional Officer for the Federal Bureau of Prisons holding the rank of Senior Officer Specialist at USP-Marion, Illinois. His duty included, but was not limited to providing for the day to day security at the prison and to provide for the safekeeping, care, protection and instruction of Plaintiff pursuant to 18 U.S.C. 4042(a)(2)&(3).

30. Plaintiff sues Each and Every Defendant in both their Individual and Official Capacities.

STATEMENT OF FACTS

COUNT I.

31. On August 4, 1999, two Sunni muslim prisoners, Dante Brown and Sekou Odinga, were attacked and physically assaulted, in Housing Unit (G) on A-range by two mexican prisoners assisted by two other white prisoners and all of whom defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, knew or should have known to be affiliates and/or gang members of the Mexican Mafia, Seranos, Skin Heads, Dirty White Boys and Aryan Brotherhood.

32. At no time did either Dante Brown or Sekou Odinga cause or initiate the physical confrontation between themselves and the mexican and white prisoners described in paragraph 31.

33. Dante Brown had just arrived in the Housing Unit approximately two hours earlier and was standing in line to receive his food tray when suddenly inmate Robert Payares approached and began striking his fists at Dante Brown. Inmate Payares belongs to the California mexican gang known to the defendants as the "Seranos" which is an affiliate offspring of the Mexican Mafia.

34. Sekou Odinga attempted to interpose and stop the assault when inmate Mike Salinas joined in to help Payares. Inmate Salinas attacked Odinga and then inmate Jimmy Davis joined in and helped Payares. Inmate Salinas was a member and leader of the Mexican Mafia and inmate Davis was a member of the Skin Heads and dirty white boys which are affiliates of both the Seranos and Mexican Mafia. while inmates Payares and Davis were teaming up on Dante Brown inmate Jeffreys joined in and teamed up with inmate Salinas on

Sekou Odinga. Inmate Jeffreys was an affiliate of the Mexican Mafia, Seranos, skin Heads, Dirty White Boys and Aryan Brotherhood at all times relevant herein

35. Dante Brown and Sekou Odinga, were merely protecting themselves in response to the attacks on them by inmates Payares, Davis, Salinas and Jeffreys but defendants Tubb and Beltz wrote false Incident Reports against Brown and Odinga, accusing them of engaging in mutual combat with those other prisoners in an attempt to conceal the security flaws in the housing unit arrangements and the fact that defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, provided no security or protection to prisoners at the time from physical assaults by other prisoners.

36. Subsequently all six prisoners were placed in the Special Housing Unit(S.H.U.) pending investigation of their alleged involvement in this group conflict and the housing unit was placed on immediate lockdown status under the orders of defendants Hedrick, Compton, Chism, Adelsberger, Sahdowens, Benson and Ellet.

37. The following day, Thursday August 5, 1999, defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, released inmates Salinas, Jeffreys and Troy Yerks from the S.H.U. and placed all of them on A-range in Housing Unit (G). Inmate Yerks was another muslim prisoner and upon information and belief inmate Yerks became fully aware of the previous physical altercation between Dante Brown, Sekou Odinga, and inmates Salinas, Davis, Payares and Jeffreys, prior to the defendants releasing Yerks, Jeffreys and Salinas to the general population that same day.

38. Upon information and belief inmate Yerks also requested on several occasions throughout that day to be moved away from inmates Jeffreys and Salinas out of fear he may be assaulted by them due to his association with Odinga and Brown and his religious status as a muslim.

39. Approximately one hour after defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, assigned inmates Yerks, Jeffreys and Salinas, to A-range in Housing Unit(G), the defendants lifted the temporary lockdown and a second physical confrontation occurred between a Sunni muslim prisoner, Hakim Abdul-Shaheed, and another mexican gang member, Inmate Yanez.

40. Inmate Yanez was a member of the gang called Seranos which are affiliated with the Mexican Mafia. Inmate Yanez was also associated with inmate Salinas and under his leadership.

41. Upon information and belief inmate Yerks observed this second altercation between inmates Yanez and Abdul-Shaheed which occurred right in front of his cell and on the range shared by both A-B ranges.

42. Immediately thereafter the defendants placed Housing Unit (G) back on lockdown status to avoid any further altercations between other muslim prisoners and members of the white and mexican gangs housed therein.

43. The defendants also placed inmates Yanez and Abdul-Shaheed in the S.H.U. pending an investigation for their particpation in the group conflict.

44. Inmate Yerks continued to make requests, upon information and belief, to the Operations Lieutenant and other staff for a housing unit change out of his fear of being assaulted by the mexican and white gang members, described-above, and in order to avoid participating in the physical altercations between the muslim prisoners and mexican and white gang members the defendants had confined to Housing Unit (G) and without providing inmates adequate protection from physical assaults by other prisoners.

45. Upon information and belief, the Operations Lieutenant informed inmate Yerks that the unit would remain on lockdown status until the following

monday and that inmate Yerks would be safe until then at which time inmate yerks could make his request to defendants Adelsberger, Shadowens and Ellet, for a housing unit change.

46. On Friday morning August 6, 1999, defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, lifted the lockdown in Housing Unit (G) without first notifying any of the inmates confined therein.

47. As soon as corrections staff opened the celldoors on A-range inmate Yerks exited his cell and ran towards the back of A-range out of fear that inmates Jeffreys and Salinas would trap him inside his cell and that he'd be murdered as a result.

48. On or about May 17, 1999, a black prisoner and associate of inmate Yerks was murdered and stabbed to death at USP-Marion, Illinois, in Housing Unit (E) by two white prisoners who were members and affiliates of the Skin Heads, Aryan Brotherhood, Dirty White Boys, Mexican Mafia and Seranos.

49. The white and mexican gang members have been allowed, by the defendants, to reign terror, murder and assault the black prison population at USP-Marion, Illinois, at all times relevant to this complaint.

50. Right after inmate Yerks ran towards the back of the range corrections staff announced immediately that the unit was returning to lockdown status. Inmate Yerks was then placed in the S.H.U. without further incident.

51. Later that evening, Friday August 6, 1999, and with deliberate indifference and reckless disregard to Plaintiff's health, safety and welfare, defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, moved Plaintiff from C-range in Housing Unit (G) to B-range in Housing Unit (G), to where the ongoing physical confrontations continued to occur between the muslim prisoners and the white and mexican gang members.

52. The defendants knew or should have known of the pervasive risk of harm to Plaintiff and that the confrontation in Housing Unit (G) between the muslim prisoners and the white and mexican gang members confined therein had escalated into a constant and emminent threat to Plaintiff and into a group conflict which was their reason for moving Plaintiff to B-range from C-range where Plaintiff had previously been housed with a member of the Mexican Mafia and close associate of inmates Salinas, Payares, Yanez, Rodriguez, Davis and Jeffreys.

53. At all times relevant herein, Plaintiff was an Orthodox Sunni muslim closeley affiliated to inmates Odinga, Abdul-Shaheed, Brown and Yerks through religious community ties.

54. Defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, were all well aware of Plaintiff's religious ties to inmates Odinga, Abdul-Shaheed, Brown and Yerks, and also of Plaintiff's religious beliefs and practices when they decided to move Plaintiff to B-range where Plaintiff was subsequently assaulted.

55. On Thursday August 12, 1999, inmate Noe rodriguez assaulted and attacked Plaintiff while Rodriguez wielded a 6½ inch knife Plaintiff believes came from defendants Tubb and Beltz during their shakedown of B-range on Monday August 9, 1999, while the housing unit remained on total lockdown status.

56. Inmate Noe Rodriguez was a member of the Mexican Mafia and closely associated to inmates Salinas, Payares, Yanez, Davis and Jeffreys when he committed the assault on Plaintiff.

57. At no time did Plaintiff cause or initiate any verbal or physical confrontation with inmate Rodriguez.

58. On Monday August 9, 1999, defendants Tubb and Beltz conducted cell searches on A and B ranges that were occupied by every prisoner housed therein and after the search inmate Rodriguez had no other way to obtain his knife to use on Plaintiff during the lockdown at this time besides obtaining it from defendants Tubb and Beltz.

59. Defendants Tubb and Beltz conducted a sham search on inmate Rodriguez's cell or provided inmate Rodriguez the 6½ inch knife thereafter.

60. Inmate Rodriguez's attack on Plaintiff was in furtherance of the ongoing and previous attacks on inmates Odinga, Brown, Abdul-Shaheed and Yerks by Rodriguez's fellow gang members and associates, inmates Salinas, Payares, Yanez, Davis and Jeffreys.

61. On or about June 8, 1999, inmate Rodriguez had also provided defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, with one of his annonymous letters, the defendants were quite familiar with, claiming that Rodriguez had heard Plaintiff make threats to harm himself and other prisoners in the housing unit on B-range.

62. Inmate Rodriguez provided defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, his letter during the total institutional lockdown in the aftermath of the Terry Walker murder which was carried out by two white supremacist inmates closely associated with the Aryan Brotherhood, Skin Heads, Dirty White Boys, Mexican Mafia, Seranos and with inmates Salinas, Payares, Yanez, Davis, Rodriguez and Jeffreys.

63. Inmate Rodriguez was also presribed psycho-tropic medications and being treated by the institution's clinical psychologist, Dr. Anderson, when he carried out his assault on Plaintiff.

64. As a proximate and direct result of inmate Rodriguez's assault on Plaintiff and the defendants' failure to provide adequate protection from the assault Plaintiff continues to suffer irreparable physical/psychological injury.

65. Defendants Hershberger, Hedrick, Compton, Chism, Benson, Adelsberger Shadowens, Ellet and Hawk-Sawyer, transfered Plaintiff to USP-Marion, Illinois December 8, 1999, due to Plaintiff's special security needs and pursuant to a Close Supervision transfer authorized by the Bureau of Prisons.

66. Pursuant to 18 U.S.C. 4042(a)(2),(3), defendants Hawk-Sawyer, Hershberger, Hedrick, Compton, Chism, Benson, Adelsberger, Yonkman, Shadowens, Elle and the United States of America, had a legal duty and responsibility to provide Plaintiff suitable quarters, and for the safekeeping and protection of Plaintiff from physical assaults by other prisoners.

67. On August 12, 1999, inmate Rodriguez attacked Plaintiff shortly afte defendant Tubb released inmates confined on B-range to participate in recreation on the range. At that time Plaintiff was being housed in cell #2 while inmate Rodriguez was housed in cell #15. While Plaintiff was bending over and placing some clothing items on the floor inmate Rodriguez walked from his cell to Plaintiff's and began striking Plaintiff about the head and facial area and used his knife .

68. Defendant Tubb then ordered the other inmates to return to their cel at which time he closed their celldoors and locked Plaintiff in on the range together with inmate Rodriguez who continued to wield his knife.

69. Plaintiff was locked in on the range together with inmate Rodriguez

and was provided no way of escape by the defendants nor any protection from the assault.

70. From the point of attack Plaintiff was locked in on the range with inmate Rodriguez and required to provide for Plaintiff's own protection and self defense.

71. Plaintiff was in extreme and constant fear of being killed by inmate Rodriguez or perhaps seriously injured while Rodriguez possessed the knife.

72. Previously on November 11, 1997, Plaintiff was physically assaulted and brutally stabbed by another inmate in a similar manner to how inmate Rodriguez attacked Plaintiff from behind. In that case Plaintiff was severely injured by the attacker and suffered temporary paralysis along the left side of Plaintiff's body, mild brain damage and permanent loss of hearing in Plaintiff's left ear.

73. Inmate Rodriguez's assault on Plaintiff was an instant reminder of the November 1997 assault on Plaintiff which caused Plaintiff to suffer overwhelming fear and mental anguish.

74. Inmate Terry Walker was also locked in on a range with the two white supremacist inmates that murdered him on or abour May 17, 1999, with their knives and due to the similarities in the attacks this caused Plaintiff to be more frightful when Plaintiff was attacked August 12, 1999, by inmate Rodriguez.

75. As a result of the numerous blows inmate Rodriguez delivered to Plaintiff's head Plaintiff was dazed, fuzzy eyed and confused, in addition to afraid, and then struck out, in self defense, at inmate Rodriguez.

76. Plaintiff did not stop there but continued to strike inmate Rodriguez about his head and body and then kicked Rodriguez once Rodriguez went to the floor until defendants Adelsberger, Smith, Tubb, Baggott, Beisner, Bryant, Young, Ellet, Foster, Hopkins and Shadowens, decided to enter upon the range and interpose.

77. Inmate Rodriguez continued to possess his knife and to struggle and position himself to return to use his knife on Plaintiff while Plaintiff had Rodriguez on the floor.

78. With deliberate indifference and negligence to Plaintiff's health, safety and welfare, the United States of America, and defendants Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, set Plaintiff up to be assaulted and seriously injured by inmate Rodriguez when they reassigned Plaintiff to B-range on Friday August 6, 1999.

79. The defendants knew of the escalating conflicts between the muslim prisoners housed in housing unit (G) at that time and the white and mexican gang member, but failed to prevent Plaintiff from being attacked.

80. On June 8, 1999, inmate Rodriguez informed the defendants that he heard Plaintiff threatening inmates on B-range, incllluding himself, which resulted in the defendants removing Plaintiff from B-range on June 9, 1999, and reassigning Plaintiff to C-range June 14, 1999, separated from inmate Rodriguez and the other inmates confined on that range who the defendants believed were an imminent threat to or of Plaintiff.

81. On several occasions after June 14, 1999, Plaintiff asked defendants Adelsberger and Ellet to either move inmates Odinga and Abdul-Shaheed up to C-range to be near Plaintiff or to move Plaintiff back to B-range so Plaintiff

could be near other muslim prisoners, but the defendants Adelsberger, Ellet and Shadowens refused those requests.

82. Defendants Hawk-Sawyer, Hershberger, Hedrick, Compton, Chism, Benson Adelsberger, Yonkman, Shadowens and Ellet, also deprived Plaintiff of any information pertaining to the source of the annonymous letter written by inmate Rodriguez on or about June 8, 1999, and continued to lead Plaintiff to believe in their responses to Plaintiff's grievances pertaining to the lock-up order, that staff were merely using the placement of Plaintiff in the S.H.U. to harass or intimidate Plaintiff for being litigious.

83. When defendants Hedrick Compton, Chism, Benson, Adelsberger, Shadowens, and Ellet reassigned Plaintiff to B-range, August 6, 1999, Plaintiff had no idea inmate Rodriguez had wrote that letter June 8, 1999, to the defendants or that inmate Rodriguez would attack the Plaintiff June 12, 1999, in support of the previous attacks his fellow inmates, Salinas, Payares, Yanez, Davis and Jeffreys, had carried out on the other muslim prisoners.

84. Defendants Hedrick,Compton, Chism, Benson, Adelsberger, Shadowens and Ellet, were well aware of the pervasive risk of harm to Plaintiff before reassigning Plaintiff to B-range in housing unit (G), because on Wednesday August 11, 1999, during the housing unit lockdown, defendant Benson conducted interviews with every inmate confined on A and B ranges and informed Plaintiff personally that the incidents that occurred on August 4, 5, and 6, were not the results of the white and mexican inmates, housed therein, attacking the muslim prisoners, but the result of a mistaken identity between inmates Salinas Payares, Yanez, davis and Jeffreys.

85. Defendants Hedrick, Compton, Chism, Benson, Adelsberger, shadowens

and Ellet knew or should have known of the pervasive risk of harm to Plaintiff before moving Plaintiff to B-range and they were well aware of the ongoing group conflicts between the, above-described, groups of prisoners which caused them to change the living locations of inmates Salinas and Jeffreys on Monday August 9, 1999 and Wednesday, after the interviews, August 11, 1999, to the protective custody units.

86. The defendants ignored and disregarded any threats or imminent dangers Rodriguez posed to Plaintiff thereafter and particularly in aftermath of those most recent assaults Rodriguez's fellow gang members and associates had committed against the other muslim prisoners confined to that unit and in aftermath of the letter Rodriguez provided to the defendants, June 8, 1999, expressing his concerns about being harmed by Plaintiff and claiming that he had heard Plaintiff threatening other inmates on B-range with bodily harm.

87. As a proximate and direct result of the defendants deliberate indifference, failure to provide Plaintiff suitable quarters, safekeeping and adequate protection from the assault by Rodriguez, which the defendants could hav easily prevented, Plaintiff continues to suffer irreparable physical/psycholog ical injury.

COUNT II.

88. Plaintiff fought inmate Noe Rodriguez in self defense and to keep Rodriguez from being able to cause Plaintiff additional injury with Rodriguez' 6½ inch knife and due to the defendants failure to provide Plaintiff with adequate protection from the assault.

89. The defendants had the range secured and locked at both ends so that

Plaintiff could neither exit the range or take flight away from inmate Rodriguez in order to avoid further confrontation without suffering additional injuries and Plaintiff had to continue striking inmate Rodriguez with Plaintiff' hands and feet to prevent Rodriguez from using his knife on Plaintiff again.

90. Plaintiff was extremely afraid of being killed or seriously injured by Rodriguez and continued to strike Rodriguez until the defendants Adelsberger, Smith, Shadowens, Ellet, Beisner, Baggott, Foster, Bryant, Young and Tubb, entered upon the range to interpose.

91. Prior to entering upon the range, defendants Adelsberger, Shadowens, Ellet, Smith, Beisner, Baggot, Foster, Bryant, Young and Tubb just stood on the outerside of the range, secure and for several minutes screaming simultaneously something incomprehensible and confusing to Plaintiff which added to the chaos and Plaintiff's fear of being seriously injured or killed similarly to how inmate Terry Walker had been killed a few months earlier.

92. The defendants all possessed their standard issued riot batons and as soon as Plaintiff recognized their presence upon the range Plaintiff stopped striking Rodriguez, as they approached, and then walked, facing the back o the range, to where Plaintiff's prescription glasses had fallen to the floor and then bent over to retrieve them.

93. While Plaintiff was still bending moments later defendant Baeisner walked up and struck Plaintiff maliciously and sadistically on the back of Plaintiff's head while Plaintiff's back was faced towards Beisner and for the purpose of causing Plaintiff additional pain and suffering.

94. Within a few moments thereafter and as Plaintiff began to fall prostrate to the floor, Plaintiff heard defendant Baggott state "Mothefucker the

next time I say get down, Get down!" at which time Baggott struck Plaintiff maliciously and sadistically on the back of Plaintiff's head with his riot baton and for the purpose of causing Plaintiff to suffer additional injury.

95. At no time did Plaintiff, resist, struggle, or cause or initiate any type of physical confrontation with any of the defendants.

96. The area on the back of Plaintiff's skull that was struck by the defendants' riot batons began to bleed thereafter profusely within seconds after Plaintiff fell to the floor and the blood pooled up surrounding Plaintiff's face.

97. Plaintiff looked up to tell the officer kneeling next to Plaintiff's face and notice defendant Beisner occupying that spot.

98. Defendant Baggott noticed Plaintiff's raised up and he starting shouting at the Plaintiff to replace Plaintiff's head back in the pool of blood and also threatening to strike Plaintiff again with his riot baton if Plaintiff did not comply with his order.

99. Plaintiff was unable to comprehend that the defendants were giving Plaintiff an order to get down on the floor while they stood on the outer side of the secured range when inmate Rodriguez assaulted Plaintiff with the knife and even after Rodriguez was on the floor still going after his knife.

100. Plaintiff also suffered permanent hearing loss in Plaintiff's left ear as a result of the previous attack on Plaintiff November 11, 1997, which prevented Plaintiff from comprehending that the defendants were giving Plaintiff an order and especially through all the screaming and confusing each of the defendants were making while they just stood on the outer side of the range and protected themselves.

101. Defendant Ellet secured Plaintiff in Leg irons thereafter and then defendants Beisner and Baggott lifed Plaintiff off the floor and began dragging Plaintiff to the front of the range.

102. As the defendants continued to drag the Plaintiff defendant Baggott stated " he doesn't want to walk we'll just drag his ass then!"

103. Defendants Beisner and Baggott were Law Enforcement officers for the United States and the defendants committed the assault and battery on Plaintiff, and/or excessive and unnecessary use of force, in their official capacity as Law Enforcement officers, for the purpose of causing Plaintiff additional pain and suffering for failing to follow their orders to "get Down!".

104. As a proximate and direct result of their concerted unlawful and negligent acts and/or omissions, defendants Beisner and Baggott violated Plaintiff's rights under the Federal Tort Claims Act, and 18 U.S.C. 4042(a)(2) & (3)

COUNT III.

105. The defendants continued to house Plaintiff in the Special Housing Unit until on or about December 22, 1999, after the altercation with inmate Rodriguez, when they reassigned Plaintiff to A-range in Housing Unit (G) where the defendants had also housed inmates Odinga, Brown and Abdul-Shaheed, prior to Plaintiff's release.

106. On or about December 21, 1999, Plaintiff submitted an Inmate Request Form or letter to defendants Compton, Adelsberger and Benson, personnally, that placed each of the defendants on notice of Plaintiff's fears about being assaulted again by friends or associate of inmate Rodrguez, Salinas, Payares, Davis, Jeffreys or Yanez, if the defendants placed Plaintiff in the same quarters with such inmates. Plaintiff also requested the defendants to place a

separation on Plaintiff pursuant to the Bureau of Prisons' Central Inmate Monitoring System (CIM) from other members or associate of the Aryan Brotherhood, Skin Heads, Dirty White Boys, Mexican Mafia and Seranos, that had affiliations with inmates Rodriguez, Salinas, Yanez, Payares, Davis and Jeffreys.

107. Plaintiff's Inmate Request Forms or Letters to defendants Compton, Adelsberger and Benson, also requested the defendants to house Plaintiff together with inmates Odinga, Brown and Abdul-Shaheed, whom the defendants had released from the Special Housing Unitsome months earlier after the altercations and seemed, to Plaintiff, to be then housed in suitable quarters under the circumstances.

108. Defendants Compton and Adelsberger informed Plaintiff that they would place Plaintiff on separation status with the inmates described in paragraph #106 above, with the exception of an older mexican and former member of the Mexican Mafia, b/k/a "Mongus" , whom the defendants were then housing on A-range together with inmates Odinga, Brown and Abdul-Shaheed.

109. The defendants also informed Plaintiff that inmate Mongus was then assigned as the A-range Orderly and that he too had a separation from his former gang members due to an incident involving a stabbing between he and other members or associates of his former gang at USP-Marion, Illinois.

110. Defendants Adelsberger, and Shadowens also informed Plaintiff that they did not believe inmate Mongus would be of any threat to Plaintiff under the circumstances and considering the number of other muslim prisoners being housed on A-range at that time.

111. Plaintiff accepted the conditions of being placed on A-range in Housing Unit (G), as described above, and informed defendants Adelsberger, Shadowens and Ellet, thereafter that Plaintiff still feared being housed together with any other gang members as described in paragraph #106 above.

112. Defendants Compton, Adelsberger, Shadowens and Ellet, assured Plaintiff thereafter that Plaintiff would remain safe and secure on A-range in Housing unit (G) and that they would not house any other inmates on that range either associated or belonging to the gangs described in paragraph #106 above.

113. Around late May or early June of 2000, defendant Adelsberger delegated authority to defendant Shadowens to make housing unit assignments in Housing (G). Plaintiff had several conversations with defendant Shadowens previously wherein Plaintiff continued to express fears about being housed together with inmates either members of or associated with the gangs described in paragraph #106, above.

114. Defendant Shadowens assured Plaintiff during those discussions that no other members of the Mexican Mafia, Seranos , Aryan Brotherhood, Dirty White Boys or Skin Heads would be assigned to A-range together with Plaintiff.

115. Defendant Shadowens had become so aware of Plaintif's fears in this regard that Shadowens informed Plaintiff that inmate John Jordan was a white inmate, but not associated with any of the white supremacist groups, as described in paragraph #106 above, prior to Shadowens assigning inmate Jordan to A-range in housing unit (G).

116. Not long after assigning inmate Jordan to A-range defendant Shadowens moved inmate Mongus from A-range up to C-range and then moved inmates Gallardo and Martinez on A-range together with Plaintiff.

117. Inmates Gallardo and Martinez both were members of the Mexican Mafia and close friends of inmates Rodriguez, Salinas, Payares and Yanez, in particular.

118. Defendant Shadowens ingored and disregarded the pervasive risk of

harm inmates Gallardo and Martinez posed on Plaintiff and with deliberate indifference to Plaintiff's health, safety and welfare, caused Plaintiff to be assaulted on August 20, 2000, by inmate Gallardo.

119. Inmate Gallardo was also a leader of the Mexican Mafia and convicted by the federal government in the United States District Court for the Central District of California on several violations of the RICO act involving illegal or criminal activities pertinent to his involvement with the Mexican Mafia within the Los Angeles district.

120. Inmate Gallardo confronted Plaintiff after being assigned to A-range about the altercation between Plaintiff and Rodriguez back in August of 1999, but committed no retaliatory action against Plaintiff because he and inmate Martinez remained out numbered by Plaintiff and inmates Odinga, Brown and Abdul-Shaheed.

121. Around the second week of August 2000, defendant Shadowens assigned two more mexican inmates to A-range and both leaders and members of the Mexican Mafia.

122. The inmates then conspired amongst themselves to assault Plaintiff in retaliation for the Rodriguez confrontation. The older of the two latest Mexican inmates defendant Shadowens had assigned to A-range encouraged inmate Gallardo to take decisive action against the Plaintiff and also provided inmate Gallardo with a knife which inmate Gallardo used to stab Plaintiff approximately seven times on August 20, 2000.

123. On August 17, 2000, prior to the Gallardo stabbing incident the Plaintiff wrote to defendant Compton complaining about defendants Adelsberger, Shadowens and Ellet, ignoring and disregarding Plaintiff's previous requests

for a separation with all members of the Mexican Mafia, Seranos, Aryan Brotherhood, Dirty White Boys and Skin Heads, and about defendants Adelsberger, Shadoens and Ellet, failing to reasonably respond to Plaintiff's security needs under the circumstances.

124. With deliberate indifference to Plaintiff's health, safety and welfare, defendant Compton refused to respond to Plaintiff complaint in this regard which resulted in Plaintiff suffering additional physical/psychological injuries after being assaulted subsequently by inmate Gallardo.

125. On August 20, 2000, at approximately 11:09 a.m., inmate Gallardo stabbed Plaintiff about seven times with a knife and in retaliation for the altercation between Plaintiff and inmate Rodriguez.

126. The assault occurred while Plaintiff was standing in line to receive the noon meal and when Plaintiff bent over the Ice chest to fill Plaintiff's ice container.

127. Upon information and belief inmate Brown observed inmate Gallardo obtain his food tray and then delivered them to cell #2, which was then occupied by Gallardo's fellow gang member.

128. Upon information and belief inmate Brown then observed inmate Gallardo place his food trays on the floor just inside cell #2, and obtained the knife and then attacked while Plaintiff was unobservant and bent over the Ice Chest.

129. Inmate Gallardo struck Plaintiff with the knife on the spinal cord at the base of Plaintiff's skull; on Plaintiff's left temple, face and on the upper part of Plaintiff's back.

130. Inmate Gallardo also struck Plaintiff numerous times, before Plaintiff could react, on the head and face with Gallardo's fists which caused Plaintiff to suffer serious pain. Inmate Gallardo also kicked Plaintiff in the midsection twice which cause Plaintiff pain.

131. Plaintiff tried to fight back in self-defense, but to no avail and Plaintiff was no match for Gallardo and the knife.

132. Officer Williams and several other staff members responded shortly thereafter and entered upon the range immediately.

133. No other muslim inmates, including inmates Odinga, Brown and Abdul-Shaheed, got involved or tried to help Plaintiff in this situation.

134. After entering upon the range officer Williams struck inmate Gallardo on the lower part of Gallardo's leg with Williams riot baton which caused Gallardo to fall to the floor.

135. The Physician's Assistant, Mr. Spicer, then removed the knife from Gallardo's hand and stood on it until another staff member took the knife into custody.

136. As soon as Plaintiff observed staff take inmate Gallardo to the floor and also possession of Gallardo's knife Plaintiff laid down prostrate on the floor at which time officer Williams stood over Plaintiff.

137. Physician's Assistant, Mr. Spicer, examined Plaintiff and ordered officer Williams to take Plaintiff to the prison's infirmary immediately thereafter.

138. After reaching the infirmary Mr. Spicer reexamined Plaintiff and then performed minor surgery and stitched up the wounds on Plaintiff's head, face and back areas.

139. Plaintiff was then escorted to the Special Housing Unit and placed thereafter pending an investigation into the matter.

140. The Officer in Charge of Housing Unit (G), R. Carter, then wrote false Incident Reports against every inmate that was present, including Plaintiff, in an attempt to cover-up for the defendants and to conceal the deficient security and housing unit policies then in place.

141. In the Incident Report written by officer, Carter, against the Plaintiff, officer Carter stated that " On the above mentioned date at approximately 11:09 am while feeding A-range I observed inmate Austin #12760-047 come up to inmate Gallardo #03336-112 who was crring his food tray. Inmate Austin started hitting Gallardo with closed fists. In response inmate Gallardo started to return the punches. The inmate were ordered to stop fighting which they refused. The inmates fighting as well as the other inmates on the range were ordered to the floor which they still refused. Dueces activated when staff arrived all the inmates on the were taken to the floor without further incident. It should be noted the inmates mentioed above were the only ones involved in the physical altercation. They were placed in Administrative detention after being seen by the on duty P.A."

142. When staff members who responded to the incident took custody of inmate Gallardo the staff documented that inmate Gallardo was wearing cotton gloves, two standard issued Khaki shirts and Khaki pants which are often worn by inmates as protection from knife injuries during physical altercations.

143. Plaintiff was only wearing a T-shirt and shorts when the incident took place.

144. Lieutenant P. Bludworth conducted his investigation and served

Plaintiff with a copy of the Incident Report written by Officer Carter on August 20, 2000. During the interview with Lieutenant Bludworth Plaintiff flatly denied the charges and the factual allegations underlying the report.

145. Plaintiff also requested Lieutenant Bludworth, to compare the Incident Report with the Inmate Injury Assessment form prepared by Mr. Spicer and the memoranda submitted by the staff that responded to the situation which all clearly demonstrated that Plaintiff had been attacked from behind and stabbed which contradicted officer Carter's report.

146. The cotton gloves, knife and clothing that staff had removed from inmate Gallardo immediate during and after the incident showed that officer Carter could not have just served inmate Gallardo his food trays and Plaintiff' knife wounds also showed that Plaintiff had been stabbed from the rear all of which was not mentioned by officer Carter.

147. Plaintiff was not informed of the results from Lieutenant Bludworth's investigation, however, on August 23, 2000, defendants Adelsberger and Shadowens convened a sham Unit Disciplinary Committee (UDC) hearing on the Incident Report and endorsed Carter's false report in an attempt to conceal how they had ignored and disregarded the pervasive risk of harm to Plaintiff by assigning inmates Gallardo and Martinez on the range with Plaintiff after receiving sufficient notice from Plaintiff about Plaintiff's fears of being asaulted again in aftermath of the Rodriguez incident and to conceal how they knew or should have known that those inmates would soon attack Plaintiff in retaliation for the injuries Plaintiff caused to Rodriguez when Rodriguez attacked Plaintiff August 12, 1999.

148. As Unit Manager of Housing Unit (G) at USP-Marion, Illinois, and as a prison official defendants Adelsberger and Shadowens were also aware of the retaliatory tactics used by inmates at the institution that are members of the Mexican Mafia.

149. Defendants Adelsberger and Shadowens, referred the Incident Report to the Discipline Hearing Office (DHO) over Plaintiff's objection and continued to accuse the Plaintiff of instigating the incident in order to cover-up for their own deliberate indifference and negligence towards Plaintiff's health, safety and welfare, in this regard.

150. During the UDC hearing defendant Shadowens also threatened to place Plaintiff in a housing unit together with other inmates that were members of the Mexican Mafia if Plaintiff persisted upon complaining.

151. Plaintiff then wrote several letters to defendant Stepp, Compton and Yonkman, requesting that they conduct further investigations into the matter and into defendants Adelsberger's and Shadowens' conduct in this regard.

152. Defendant Stepp spoke with Plaintiff subsequently while Stepp was making rounds in the Special Housing Unit and informed Plaintiff that he had defendant Yonkman looking into that matter.

155. Thereafter defendant Yonkman met with Plaintiff in the Special Housing Unit and informed Plaintiff that he conducted an investigation and found officer Carter's Incident Report to be inconsistent with Plaintiff's injuries and the with the evidence gathered by the staff member who responded to the incident on August 20, 2000.

156. Defendant Yonkman also informed Plaintiff that he was expunging the

Incident Report written by officer Carter and that he was refering the case to the Federal Bureau of Investigations upon defendant Yonkman's return from his vacation or annual leave.

157. At no time relevant herein was Plaintiff contributorally negligent in relations to the injuries Plaintiff suffered as a result or in relations to the assaults committed by inmates Rodriguez and Gallardo or in relations to the use of excessive and unnecessary and/or assault and battery committed by defendants Beisner and Baggot or as a result of the Defendants', and each of their, failure to provide Plaintiff suitable quarters, safekeeping and adequate protection from the assaults which violated Plaintiff's statutory and constitutional rights.

158. As a proximate and direct result of the defendants' failure to provide Plaintiff suitable quarters, safekeeping and adequate protection from the assaults and batterys and/or use of unnecessary and excessive force, Plaintiff continues to suffer irreparable physical/psychological injuries.

COUNT IV.

159. Defendants Hawk-Sawyer, Hershberger, Hedrick, Compton, Chism, and Benson, permit certain racist corrections officers like officers Tobias, Dennis Cozort, Randy Huckleberry, Schroeder, E. Frances, Robert Burns,Jr.,Charles Cates, Gene Beasley, Randy Schaubert, Lewis Hackleman, William Newbold, Clifton Gosnell, Joel Murray and defendants Baggot, Beisner, Bryant and Foster, to routinely abuse or strike the black prisoners with their riot batons about the head area resulting in serious and sometime severe injuries to the black inmates out the correctional officers own racial hatred towards black prisoners.

160. Plaintiff has also noticed and observed that the corrections officer

,as described-above, often treat the white and mexican prisoners differently in connections with the officers' use of force situations and that such do not strike the white and mexican prisoners above the neck with the riot batons.

161. Plaintiff and other black prisoners have filed grievances with the defendants, tort claims in connection with the injuries suffered by each black inmate, but to no avail.

162. With deliberate indifference to the health, safety and welfare of Plaintiff and the black inmates-who have continued to suffer at the hands of such racist correctional staff the defendants continue to fabricate false Use of Force reports, memoranda and Incident Reports in a systematic conspiracy to conceal such violations of Plaintiff's Fifth and Eighth Amendment rights.

163. On August 12, 1999, defendants Baggott and Beisner struck Plaintiff twice on the back of Plaintiff's head with their riot baton causing Plaintiff to suffer serious injuries and pain.

164. Thereafter Plaintiff had to undergo minor surgery to have the wound sutured which was caused by the defendants' malicious and sadistic use of their riot baton on the back of Plaintiff's head while they knew Plaintiff offer them no resistance at that time.

165. On or about September 4, 1999, the defendants had Plaintiff interviewed Special Agent, Jon Ford, of the Federal Bureau of Investigations, in connection with the Rodriguez assault on Plaintiff and in an effort to get Plaintiff to press criminal charges against Rodriguez.

166. During the interview Plaintiff informed Agent Jon Ford that Plaintiff was not interested in pressing charges against inmate Rodriguez, but interested in pressing criminal charges against defendants Adelsberger, Shadowens and Ellet, and accused them of arranging inmate Rodriguez's

attack on Plaintiff August 12, 1999, and Plaintiff also requested to press charges against defendants Beisner and Baggott, for committing their assault and battery on Plaintiff, August 12, 1999, with their riot baton and out of racial hatred.

167. Plaintiff also informed Agent Jon Ford, about the statement defendant Baggott made about the time he and defendant Beisner struck Plaintiff with their riot baton.

168. Special FBI Agent, Jon Ford, ignored and disregarded Plaintiff's complaints in this regard and tried to persuade Plaintiff to agree that Rodriguez's assault on Plaintiff was instigated by the Aryan Brotherhood.

169. Special FBI Agent, Jon Ford, was not interested in hearing about any complaints from Plaintiff with regards to the defendants' acts and/or omissions or about such committing violations of Plaintiff's civil rights.

170. On June 17, 1999, defendant Bryant sexually assaulted inmate Anthony W. Kingsberry #07551-045, with his riot baton. Although inmate Kingsberry filed an administrative tort claim and grievance and formal complaint with the F.B.I. against the defendant, no thorough investigation or official action was instituted against the defendant by any of the defendants in this regard.

171. On or about May 17, 1999, inmate Terry Walker, a black prisoner, was brutally stabbed and murder at USP-Marion, Illinois, by two white supremacist prisoners. The corrections officer who responded to the incident, including defendants Bryant, and Foster, contributed to inmate Walker's death by slamming him to the floor head first.

172. Inmate Terry Walker had a longstanding feud going on between himself and the white correctional staff at USP-Marion, Illinois, involving verbal and physical assaults frequently and the throwing of feces, urine and other objects.

173. Upon information and belief the Federal Bureau of Prisons placed defendant Benson on leave during the first quarter of 2001, after defendant Benson had been implicated in the Terry Walker murder and accused of arranging the housing unit reassignments of inmate Walker and the two white supremacists so that the murder would take place jsut two days later.

174. Upon information and belief defendant Benson's suspension came as a result of the ongoing investigation by the F.B.I. with respect to Benson's alleged involvement in Terry Walker's murder.

175. On September 5, 1999, officer Dennis Cozort threatened inmate Anthony Kingsberry with bodily harm for his reporting defendant Bryant and defendant Foster in connection with Kingsberry's accusations against Bryant stemming from the June 17, 1999, sexual assault and defendant Foster's subsequent labelling inmate Kingsberry a "snitch" before inmates housed in the Special Housing Unit after Kingsberry made out a formal complaint against Bryant with the F.B.I.

176. On November 2, 1999, at approximately 3:45 P.M., defendant Foster threatened inmate Kingsberry a second time with bodily harm due to Kingsberry filing his previous complaints and inmate Kingsberry reported each of those threats to the defendants, but to no avail.

177. On May 28, 1999, officers E. Frances, Robert Burns,Jr., Charles Cates, Gene Beasley, John Dooley, Randy Schaubert and several other unknown correctional staff members, all of whom were white, physically assaulted inmate Andrew Ratcliffe #17358-016, with their hands, feet and riot batons while inmate Ratcliffe was then confined in the Special Housing Unit.

178. On Monday October 4, 1999, defendant Bryant assaulted inmate David Rollins #07001-055 and struck Rollins in the face with Bryant's riot baton.

179. Each of these black inmates, Kingsberry, Ratcliffe and Rollins, filed complaints with the defendants Hawk-Sawyer, Hershberger, Hedrick, Compton

Chism, Benson and Yonkman, against the officers who committed the acts out of their own racial hatred towards black prisoners, but to no avail.

180. On March 3, 1997, officers Gosnell, Hackleman, Ralls, Newbold, Cates and Meador, brutally beat inmate Gerald Kelly #06987-021, with their riot batons. At no time did inmates Ratcliffe, Rollins, Kingsberry or Kelly cause or initiate any physical confrontations between themselves and the above-named white corrections officers.

181. The defendants continue to ignor and disregard, with deliberate indifference, Plaintiff's and other black prisoners' complaint about the white correctional staff selectively strike black prisoners about the head with their riot batons during use of force situations, but not treating the white and mexican prisoners the same.

182. On August 20, 1999, another black prisoner, Matthew Tomlin, was placed in a housing unit infested with white supremacist inmates.

183. Thereafter one white supremacist inmate attacked and stabbed inmate Tomlin with a knife.

184. The white officers that responded to the incident at the time used absolutely no force or their riot batons on the white inmate who was straddling inmate Tomlin on the Floor and with his knife in hand.

185. Around October 28, 1999, another white supremacist inmate attacked another black prisoner, Roosevelt Burgess-III. Inmate Burgess tried to hold the white inmate in such a position to prevent him from continuing with the assault, but to no avail. Eventually, inmate Burgess was force to slap the white inmate a couple of times in order to maintain control which also was observed by the white corrections officers standing on the outerside of the range.

186. The white supremacist inmate struck inmate Burgess on his face numerous times before Burgess struck back in self-defense. However, the white correctional officers that observed the incident retaliated against inmate Burgess with their riot batons subsequently and struck him several times on his upper body.

187. The white officers who struck inmate Burgess with their riot batons after Burgess struck back at the white inmate, were also present when the white initially assaulted inmate Burgess.

188. After the white officers entered upon the range the white inmate contiued to assault inmate Burgess and to be the aggressor, however, the officers ignored his actions and focused their attention upon inmate Burgess and attacked him with their riot batons out their own racial hatred towards black prisoners.

189. On August 12, 1999, after Plaintiff was assaulted by inmate Rodriguez and taken to the prison infirmary the Physician's Assistant, Chuck Welch, looked at Plaintiff's head injuries and stated " I see you didn't get down fast enogh!", as though he were familiar with how routinely the white officers injured black prisoners by striking such with their riot batons on such inmates' heads.

190. Defendant Chism was also present while Plaintiff was being examined after the Rodriguez incident and defendant Chism stated that Plaintiff's head injuries were simple "battle scars" and "a badge of honor".

COUNT V.

191. Defendants Tubb and Beltz filed false Incident Reports against inmates Odinga, Brown and Abdul-Shaheed, in relations to their altercations on

August 4, 1999 and August 5, 1999, with inmates Salinas, Payares, Yanez, Davis and Jeffreys, and in order to conceal the defendants' awareness of the ongoing confrontations between the muslims prisoners and the white and mexican prisoners confined in the housing unit and also in order to conceal the unsuitable, unsafe and inadequate security in the housing unit.

192. Defendants Adelsberger, Shadowens, Ellet, Tubb, Beltz, Yonkman, Smith, Baggott, Beisner, Foster, Hopkins and Young, conspired to impede and hinder the due course of justice by filing false memoranda and Incident Reports against Plaintiff in order to conceal the unsuitable quarters; the unsafe enronment; their failure to protect Plaintiff from the Rodriguez assault under the circumstances involving the previous altercations between the muslim prisoners and the gang members, and; the assault and battery and/or Use of excessive and unnecessary force on Plaintiff by defendants Beisner and Baggott.

193. Upon reviewing the videotape recording of the incident between Plaintiff and inmate Rodriguez, defendants Hedrick, Compton, Chism, Benson and Yonkman refused to process the Incident Report against Plaintiff written by defendant Tubb.

194. Defendant Tubb had falsely reported that he observed Plaintiff and inmate Rodriguez both exited the cells, turn towards each other and then began to strike each other with closed fists.

195. Defendant Tubb's Incident Report was false, because Plaintiff and inmate Rodriguez resided in cells which were approximately thirteen cells apart and inmate Rodriguez had travelled from his cell (cell #15) to where Plaintiff was preoccupied at Plaintiff's cell (cell#2) and then commenced attacking Plaintiff with Rodriguez's knife while Plaintiff was bent over placing clothing on the floor.

196. On or about September 4, 1999, the defendants had their Lieutenant Krammerer escort Special F.B.I. Agent, Jon Ford, to the recreation pen in the Special Housing Unit and to interview Plaintiff in connection with the Rodriguez incident and to inquire if Plaintiff wanted to press criminal charges against inmate Rodriguez.

197. During the interview Special Agent, Jon Ford, continued to suggest that members of the Aryan Brotherhood instigated inmate Rodriguez's assault on Plaintiff, August 12, 1999.

198. Plaintiff declined to verify the Agent's suspicions, in this regard, however, Plaintiff did accuse defendants Adelsberger, Shadowens and Ellet, of arranging inmate Rodriguez's assault on Plaintiff and requested Special Agent Jon Ford to press charges against the defendants in this regard.

199. The Plaintiff also informed Special Agent, Jon Ford, about the statement defendant Baggott made ("Motherfucker the next time I say get down, Get Down!") when he struck Plaintiff on the back of Plaintiff's skull causing those injuries and Plaintiff asked to press criminal charges against both defendants Beisner and Baggott in this regard.

200. Special Agent, Jon Ford, seemed disinterested in Plaintiff's charges in this regard against the defendants so Plaintiff ended the interview with the agent.

201. Lieutenant Krammerer was present during the entire interview and noted the Plaintiff's claims against the defendants.

202. Thereafter Lieutenant Krammerer reported Plaintiff's charges to defendants Hedrick, Compton, Chism, Benson and Yonkman, and in response to those charges the defendant Yonkman retaliated and filed an untimely Incident Report

against Plaintiff on September 14, 1999, in connection with the incident between inmate Rodriguez and Plaintiff, on August 12, 1999, which violated Plaintiff's substantive and statutory rights to due process under Title 5, United States Code, Section 702, et seq., and Title 28, Code of Federal Regulations, Part 541.

203. The Federal Bureau of Prisons' disciplinary rules and procedures for committed offenders were developed and promulgated pursuant to the Administrative Procedures Act, 5 U.S.C. §500, et seq.

204. Defendant Yonkman exceeded his statutory authority, jurisdiction and limitation by filing the Incident Report without observance of proper disciplinary procedures, set forth at 28 C.F.R. 541, required by law, in violation of Plaintiff's substantive rights and 5 U.S.C. 706(2)(C),(D), because: 1) Yonkman was prohibited from acting as both the reporting employee and Investigating officer pursuant to 28 C.F.R. 541.2(a); 2) Yonkman failed to file the Incident report and to provide Plaintiff with a copy within 24 hours from the time staff became aware of Plaintiff's involvement August 12, 1999, or at the begginning of his investigation in violation of 28 C.F.R. 541.14(a), 541.14(b), 541.14(b)(2) and 541.15(a); 3) Yonkman filed his Incident Report in retaliation against Plaintiff for complaining to the F.B.I. about the defendants' mistreatment of Plaintiff and in violation of 28 C.F.R. 541.10(b)(3),(4); and, 4) Yonkman failed to complete the internal investigation promptly or within twenty four hours from the time staff became aware of Plaintiff's involvement in the incident August 12, 1999, or to obtain defendant Hedrick's written approval to extend the time limits beyond 5 working days for his investigation or provide Plaintiff written notice of the extension of the time limits all in violation of 28 C.F.R. 541.14(b) and Program Statement 5270.7, entitled: Inmate Discipline and Special Housing Units, Chapter 4 (Investigations) and Chapter 5, section [k.

205. Defendant Yonkman's Incident Report against Plaintiff in connection with the August 12, 1999, incident between Plaintiff and Inmate Rodriguez was invalid due to the deficiencies in the notice of the charges.

206. In section #9 of the Incident Report defendant Yonkman described the rule violation as "Refusing to Obey an Order" and "Assault, whereas in section #10 of the same report defendant Yonkman charged Plaintiff with a violation of Codes 307 and 201, set forth at 28 C.F.R. 541.13.

207. Code 201 of 28 C.F.R. 541.13, proscribes inmate behavior and conduct involving "Fighting with another person" and does not government conduct involving inmate "Assault[s]".

208. Defendant Yonkman's Incident Report also stated in pertient part, that:

> "A review has indicated that on August 12, 1999, at approximately 2:20 P.M., you were standing in the area of cell #2 when inmate Noe Rodriguez #50711- passed by you and began to strike you in the area of your head. After Rodriguez was on the floor and after staff ordered you to cease your actions, you refused, and continued kicking Rodriguez in the face, head, and upper body."

208. On September 16, 1999, Unit Manager K. Murphy convened a sham UDC hearing on the Yonkman Incident Report which amounted to an empty formality as a result of Mr. Murphy's refusal to provide Plaintiff a fair and impartial UDC hearing.

209. At that hearing Plaintiff presented medical documents compiled by officials of the Bureau of Prisons' which showed that Plaintiff suffered in Plaintiff's left ear from permanent hearing loss which resulted from the head trauma inmate Jerome Williams inflicted November 11, 1997 and that such evidence showed that Plaintiff had been diagnosed by a Ear, Nose and Throat Specialist who had previously recommended that the defendants provide Plaintiff with a hearing aide. The medical records Plaintiff presented also supported Plain-

tiff's claims that under such extreme circumstances of being attacked with a knife by another inmate in less than two years from the previous incident which resulted in Plaintiff's hearing loss and other severe head injuries coupled with the noise and screaming the defendants made simultaneously on the outer side of range prevented Plaintiff from hearing any comprehensible order being given by any of the defendants at that time.

210. Plaintiff also presented other documentary evidence compiled by other prison officials of the Bureau of Prisons, including photocopies of the photographs, on Novembbr 11, 1997, in relations to the previous assault on Plaintiff by another inmate that showed that the defendants were aware that inmate Rodriguez's assault on Plaintiff was conducted similar to how Plaintiff had been previously assaulted on November 11, 1997, and that Plaintiff's response to the Rodriguez attack was reasonable under the circumstances and since the defendants failed to provide Plaintiff adequate protection.

211. The UDC hearing was a sham and amounted to nothing more than an empty formality in violation of Plaintiff's due process, because Unit Manager Murphy informed Plaintiff that the Unit Manager's "hands" had been tied from the beginning and that he had been given orders to refer the case to defendant Campbell.

212. 28 C.F.R. 541.15(b), provides in pertinent part, that : "Each inmate so charged is entitled to an initial hearing before the UDC, ordinarily held within three work days from the time staff became aware of the inmate's involvement in the incident."

213. Mr. Murphy exceeded his statutory jurisdiction, authority and limitations in violation of 5 U.S.C. §706(2)(C),(D), because the regulation (e.g.

28 C.F.R. 541.15(b) did not authorize him to take any disciplinary action against Plaintiff due his failure to observe the proper disciplinary procedures required by law and promulgated pursuant to this statute.

214. 28 C.F.R. 541.15(f) also required Mr. Murphy to make his determination based on the evidence presented at the hearing and not on any political decisions which had been previously made by any of the defendants in connection with the incident between Plaintiff and inmate Rodriguez, or in connection with the charges Plaintiff brought against the defendants with the F.B.I., on or about September 4, 1999, in connection with the incident.

215. Mr. Murphy ignored and disregarded the disciplinary procedures set forth at 28 C.F.R. 541.15, and refered the case to defendant Campbell without paying particular attention to any of the documentary evidence Plaintiff presented at the hearing.

216. On October 13, 1999, defendant Campbell attempted to convene a D.H.O. Hearing against Plaintiff on the Incident Report written by defendant Yonkman, however, Plaintiff objected to defendant Campbell's authority, jurisdiction and limitations to hear the Incident Report.

217. Plaintiff asserted that staff had not provided adequate notice of the charges in violation of Plaintiff's due process rights and that the Incident Report was invalid, because defendant Yonkman had no authority to file such and that such had not been filed in observance of proper procedures required by law pursuant to the Administrative Procedures Act.

218. Plaintiff pointed out for defendant Campbell the deficiencies of defendant Yonkman's Incident Report, as described in paragraphs #205-207 above, and in response to those complaints defendant Campbell changed the

Code 201 Charge, with his ink pen, to a Code 224 charge and then attempted to proceeed to hear the Incident Report.

219. Plaintiff complained about the improper way defendant Campbell was proceeding to hear the Incident Report and about not receiving proper 24 hour notice to muster a defense to the amended charge in compliance with Plaintiff's due process rights.

220. Plaintiff then requested defendant Campbell to recuse himself as the D.H.O. due to biasness and informed defendant Campbell that his further participation as the D.H.O. after having changed the alleged charges upon the face of defendant Yonkman's Incident Report himself rendered him partial and ineligible to preside over the hearing or to render a decision and impose sanctions and for him to do so would violate Plaintiff's due process rights and 28 C.F.R. 541. 16(b).

221. Defendant Campbell then ordered the Plaintiff to leave his office and threatened to include additional charges for his own consideration in relations to the Incident Report written by defendant Yonkman.

222. On October 14, 1999, defendant Campbell served Plaintiff with a memorandum entitled: Notice of Charges, Incident Report #713873, dated 09/14/99, which stated in pertinent part, that:

> "...The purpose of this memorandum is to notify you that the following charges will be considered by the Discipline Hearing Officer, in addition to Refusing an Order, Code #307...Assault (Less Serious Injury), Code #224...Assault(Serious Injury), Code #101."

223. The Incident Report #713873, defendant Campbell referred to in said memorandum, as described in paragraph #222 above, was the Incident Report written against Plaintiff by defendant Yonkman in connection with the August 12, 1999, incident between Plaintiff and inmate Rodriguez as described therein.

224. Pursuant to 28 C.F.R. 541.16(c), The Discipline Hearing Officer, defendant Campbell, shall conduct hearings, make findings, and impose appropiate sanctions for incidents of inmate misconduct referred for disposition following the hearing required by §541.15 before the UDC. The DHO, defendant Campbell, may not hear any case or impose any sanctions in a case not heard and referred by the UDC.

225. The charges, Codes 101 and 224, referred to in defendant Campbell's memorandum to Plaintiff, were neither charged in the Incident Report or heard or referred to defendant Campbell by the UDC, Mr. Murphy, and defendant Campbells' act of including those additional charges or referring the same to himself for consideration in this matter was arbitrary, capricious and made without observance of proper procedures required by 28 C.F.R. 541.16(c) and in violation of 5 U.S.C. 706(2)(D).

226. On October 24, 1999, defendant Campbell convened a hearing on the Incident Report written by defendant Yonkman which included the additional charges set forth in defendant Campbell's memorandum. Plaintiff appeared in person and without staff representation.

227. At the hearing Plaintiff requested defendant Campbell to recuse himself as the DHO in this matter and in the interests of impartiality pursuant to 28 C.F.R. 541.16(b). Title 28 C.F.R. 541.16(b), provides in pertinent part, that: " In order to insure impartiality, the DHO may not...play any significant part in having the charge(s) referred to the DHO."

228. Plaintiff argued that since defendant Campbell referred the additional Codes 101 and 224, to himself for consideration in this matter that the defendant's conduct fell within that described in §541.16(b) and that defendant Campbell was therefore required to recuse himself from the DHO proceedings.

229. Plaintiff also presented defendant Campbell with the same medical records Plaintiff provided to the UDC, in relations to Plaintiff's hearing loss and records compiled by the defendants' Special Investigative Services (S.I.S) in relations to the November 11, 1997, incident wherein Plaintiff was brutally attacked, stabbed and severely beaten by another prisoner similar to how inmate Rodriguez committed his assault on Plaintiff August 12, 1999, in relations to defendant Yonkman's Incident Report.

230. Plaintiff also presented such documentation to show that under such circumstances and the defendants Adelsberger, Shadowens and Ellet's failure, in particular, to provide Plaintiff suitable quarters, safekeeping and adequate protection from the assault by inmate Rodriguez, including with a knife, Plaintiff suffered from extreme fright due to the surprised attack and that Plaintiff used a reasonable amount or degree of force, in self-defense, to disable inmate Rodriguez temporarily and to prevent him from continuing his assault on Plaintiff with his knife.

231. Plaintiff also presented defendant Campbell with DHO Reports from other disciplinary hearings which showed in similar situations that the Bureau of Prisons and defendant Campbell recognized a white and hispanic prisoner's right to self-defense.

232. Defendant Campbell completely ingored and disregarded each of Plaintiff's procedural and factual claims presented in writing and found the Plaintiff guilty on the Code 101, charge defendant Campbell filed against the Plaintiff himself and guilty on the Code 307 charge included in defendant Yonkman's Incident Report.

233. Defendant Campbell also imposed sanctions of 30 days disciplinary

segregation and 30 days loss of Plaintiff's Statutory Good Conduct Time in relations to the Code 101 violation defendant Campbell filed against the Plaintiff in relation to defendant Yonkman's Incident Report.

234. Defendant Stepp became Warden and Chief Executive Officer of USP-Marion, Illinois, during September of 1999.

235. The Plaintiff appealed to defendants Stepp, Compton and Chism by letter or Inmate Request Forms, asking them to intercede with the DHO proceedings and to audit the matter in this case.

236. In those communications Plaintiff also informed defendants Stepp, Compton and Chism, that defendant Campbell was not following proper disciplinary procedures required by law or 28 C.F.R. 541.16(b),(c), and that the disciplinary action and sanctions defendant Campbell imposed in relations to defendant Yonkman's Incident Report and defendant Campbell's memorandum was arbitrary and capricious and exceeded defendant Campbell's statutory authority, jurisdiction and limitations, but to no avail.

237. The defendants ignored and disregarded Plaintiff's complaints and informed Plaintiff to file an appeal with defendant Hershberger for relief.

238. Plaintiff then appealed the DHO proceedings to both defendants Hawksawyer and Hershberger, but to no avail. Defendant Hershberger, denied that defendant Campbell violated the Bureau's disciplinary policies or Plaintiff's substantive and statutory rights by filing additional charges against the Plaintiff in relations to defendant Yonkman's Incident Report and by then presiding as the DHO, making findings of fact and by imposing sanctions. Defendant Hershberger, also ignored and disregarded Plaintiff' s other claims about defendant Yonkman acting as both the reporting employee and investigating offic-

er, filing his Incident Report in an untimely manner, failing to observe proper procedures required by law and in compliance with 5 U.S.C. 706(2)(D), and 28 C.F.R. 541.

239. Defendant Watts on behalf of defendant Hawk-Sawyer denied the appeal and affirmed the DHO proceedings without conducting any meaningful review of the particular facts and claims Plaintiff presented especially the DHO Reports from other disciplinary proceedings involving white and hispanic prisoners in similar situations to Plaintiff's wherein the Bureau of Prisons and defendant Campbell recognized those inmates' right to self-defense, but discrimi nated against Plaintiff based on Plaintiff's race.

COUNT VI.

240. The Plaintiff seeks to have this Court declare invalid and enjoin the defendants from further use of certain disciplinary rules or "Prohibited Acts" set forth at 28 C.F.R. 541.13, which the defendants failed to publish or define properly in compliance with the "rule making" provisions of the Administrative Procedures Act, 5 U.S.C. §553(b)(3), which continues to violate Plaintiff's substantive and statutory due process rights protected under the Fifth Amendment and 5 U.S.C. 702, et seq.

241. The defendants' continued enforcement of the Prohibited Acts set forth at 28 C.F.R. 541.13 and particularly Prohibited Acts: 101 - Assault, 224 - Assault and 307 - Refusing to Obey an Order, against Plaintiff in the case as described in Count V above, was arbitrary; capricious; an abuse of discretion; otherwise not in accordance with law; contrary to constitutional rights of Plaintiff's; in excess of their statutory authority, jurisdiction and limitations, and; without observance of publishing procedures required by law.

242. The Defendants failed in their legal duty and responsibility to publish the "terms or substance of" Prohibited Acts: 100, 101, 102, 103, 104, 105, 106, 107, 108, 198, 199, 200, 204, 205, 206, 207, 209, 211, 212, 213, 215, 216, 219, 220, 221, 223, 298, 299, 300, 302, 304, 305, 306, 308, 309, 310, 311, 313, 314, 315, 316, 317, 320, 321, 324, 325, 326, 331, 398, 399, 400, 402, 404, 405, 407, 498 and 499; and Prohibited Acts 101, 224 and 307, and the same are void for vagueness under the Due Process Clause of the Constitution.

243. The rules provide no "terms or substance of" what inmate behavior and conduct constitutes a Prohibited Act and the rules are written so unconstitutionally vague and imprecise that Plaintiff has to guess at the meaning of the terms and how the rules apply which continues to affect the Plaintiff adversely and subject Plaintiff to disciplinary action and the loss of Plaintiff's Statutory Good Conduct Credits for guessing wrong

244. The Defendants' continued refusal and failure to provide the "terms or substance of" the Prohibited Acts set forth at 28 C.F.R. 541.13, detailing what inmate behavior and conduct constitutes a Prohibited Act renderes the rules invalid pursuant to 5 U.S.C. 553(b)(3) and 5 U.S.C. 702, at seq.

COUNT VII.

245. The Plaintiff is an Orthodox Sunni Muslim prisoner of American born African descent currently confined at USP-Marion, Illinois.

246. The Plaintiff has been committed to the Bureau of Prisons since August 31, 1993, and the defendants continue to violate Plaintiff's rights under the Religious Freedom Restoration Act (RFRA), the First Amendment and the U.S. Constitution's Establishment Clause by forcing Plaintiff to consume certain food items or meals on Christian and Jewish holidays in commemoration of the

birth of the christian god Jesus Christ; Easter; Lint; Passover; and, Ash Wednesday, and; by constantly interfering and preventing Plaintiff from practicing Plaintiff's religion freely and particularly during the Holy month of Ramadan and the annual feasts which follows.

247. The Defendants also provide christmas packages to all prisoners and force the non-christian prisoners to feel guilty, embarassed, humiliated and degraded for rejecting the christian gifts and religion.

248. The Defendants also discriminate against the non-christian prisoners by refusing to provide such gifts for the non-christian prisoners to celebrate non-christian religious holidays or events.

249. By forcing the Plaintiff and all others similarly situated to partici pate in christian practices and beliefs the Defendants have endorsed the christian religion in violation of the Establishment Clause of the U.S. Constitution.

250. Plaintiff is and has always been a sincere practicing Orthodox Sunni muslim prisoners since Plaintiff's committed to the Bureau of Prisons and Plaintiff has also made it known to the defendants, and each of them, through letters and grievances or tort claims from the start of Plaintiff's incarceration.

251. Plaintiff also informed the defendants Hawk-Sawyer, Stepp, Hershberger and Rivett, in particular, of Plaintiff's religious preference and the defendants cannot show any compelling penological interests in forcing Plaintiff to: 1) consume certain food items or meals to commemorate certain christian beliefs and practices, which violates Plaintiff's own religious tenets; 2) practice Plaintiff's religion the way the defendants dictate the religion of Al-Islam should be practiced during the holy month of Ramadan and in the annual feast which follows; 3) to feel guilty, embarassed, humiliate or degraded for refusing to accept christian gifts at tax payers' expense; and, 4) sign an adhesionary contract agreeing not to purchase any non-certified food items from

the prison's commissary or else the defendants would refuse to provide Plaintiff with a diet condusive with Plaintiff's religious tenets while Plaintiff's religion merely prohibits muslims, including Plaintiff, from consuming "meats" that have not been properly slaugtered in accordance with either Islamic or Jewish religious laws.

252. The defendants Hawk-Sawyer, Hershberger, Stepp, Ford and Rivett, provide diets to the prison population most commonly referred to as "Common Fair meals."

253. The defendants were providing Plaintiff Common Fair meals until November 2000, when defendants Ford and Rivett, removed Plaintiff from the Common Fair program arbitrarily after Plaintiff refused to sign a new adhesionary contract which compelled prisoners to agree not to purchase any non-certified food items from the commissary in exchange for a common fair meal.

254. Plaintiff refused to sign the new contract because the same served no legitimate or compelling penological objectives.

255. Plaintiff's religion only forbids Plaintiff to eat any meats which are not properly slaughtered in accordance with either Islamic or Jewish religious laws and Plaintiff may eat any other food items other than pork.

256. Plaintiff also refused to sign the new contract, because inmates have no control over what food items the defendants sell at the prison commissary and the defendants Ford and Rivett have no legitimate penological objective regulating or restricting what other food items inmate may purchase at the prison commissary.

257. The contract defendants Ford and Rivett tried to compel Plaintiff to sign in exchange for Common Fair meals placed new conditions on Plaintiff's

right to the Free Practice of Religion in violation of the First Amendment and the Religious Freedom Restoration Act, because the defendants Rivett and Ford cannot show a compelling penological interest in forcing Plaintiff to sign the new adhesionary contracts or show how the new contracts further a compelling penological interest by conditioning an inmate's receipt of a Common Fair meal, for the purpose of accommodating an inmate's religious practices, on his forced agreement not to purchase any non-certified food items, with an inmate's own moneys, from the prison commissary.

258. Defendants Rivett and Ford also infringed upon Plaintiff's right to freely practice Plaintiff's religion by forcing the Plaintiff off of the Common Fair program and by denying Plaintiff the same after November 2000, for refusing to agree to the new conditions the defendants placed on Plaintiff's receipt of a Common Fair meal thereafter that also were not conditions required by Plaintiff's religion, but created by the defendants themselves.

259. Defendants Hawk-Sawyer, Hershberger, Stepp, Rivett and Ford cannot show a compelling penological interest in providing christian gifts such as christmas packages to the christian prisoners in commemoration of their religious holidays while the defendants discriminate against the non-christian prisoners by refusing to provide similar gifts to commemorate non-christian holidays or, show how their religious policies, in this regard, further a compelling penological interest without continuing to infringe upon Plaintiff's rights under the Religious Freedom Restoration Act, the First Amendment or the Establishment clause of the U.S. Constitution.

260. On December 25, 1998, December 25, 1999 and December 24, 2000, defendants Hawk-Sawyer, Hershberger, Hedrick, Stepp, Rivett, Ford and Globun,

compelled Plaintiff to consume certain christian food items in commemoration of the birth of the christian god, Jesus Christ, and in violation of Plaintiff's own religious beliefs and practices, the Establishment Clause, the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb.

261. During Easter, Lint, Passover, and Ash Wednesday in 1998, 1999, 2000 and 2001, defendants Hawk-Sawyer, Hershberger, Hedrick, Stepp, Rivett, Ford and Globun, compelled Plaintiff to consume certain christian food items in commemoration of the christian and Jewish religious holidays and in violation of Plaintiff's own religious beliefs and practices and rights under the Establishment Clause of the U.S. Constitution, the First Amendment and the Religious Freedom Restoration, 42 U.S.C. 2000bb.

262. In December of 1998, 1999 and 2000, defendants Hawk-sawyer, Hershberger, Hedrick, Stepp, Rivett, Ford and Globun, provided christmas packages, at tax payers' expense, to christian prisoners in commemoration of the birth of the christian god, Jesus Christ, and made the non-christian prisoners feel guilty, embarassed, humiliated and degraded for not being christian and in violation of Plaintiff's rights to equal protection under the law. The defendants refused to provide similar gifts to the non-christian prisoners to commemorate non-christian religious holidays and in violation of the Equal Protection Clause, the First Amendment, The Establishment Clause and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb.

263. By compelling Plaintifff to participate in the above-described christian beliefs, practices and holidays, the defendants have entangled the Bureau of Prisons in the christian faith and enbraced the Christian religion as the official religion of the United States, in violation of the Establishment Clause and Plaintiff's rights under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb.

264. The Plaintiff has filed several grievances and administrative tort claims against the defendants requesting the same to discontinue embracing the christian and Jewish faiths and thus forcing non-christian and non-Jewish prisoners, including Plaintiff, to participate in such religious beliefs or practices which violate Plaintiff's rights, but to no avail.

265. Defendant Watts on behalf of defendant Hawk-Sawyer, and defendants Hershberger, Hedrick, Stepp, Rivett and Globun, responded to Plaintiff's complaints and acknowledged the defendants' promotion of said religions, but denied violating Plaintiff's rights under the First Amendment and Religious Freedom Restoration Act or in violation of the Establishment Clause of the U.S. Constitution.

266. The Federal Bureau of Prisons has also recognized that muslim prisoners, including Plaintiff, must fast during the Holy month of Ramadan according to the muslim religion, and in response to Plaintiff's religious needs the defendants have also developed and promulgated national regulations and Institutional Suppliments to accommodate inmates' religious needs.

267. During the Holy month of Ramadan all muslims, who are physically able and adhere to the orthodoxy of Islam, are required to fast during the day time and until sunset each evening. Muslims must also abstain from eating, drinking fluids, or engaging in sexual incourses with spouses during such hours as well.

268. Muslims must also read the Holy Qur'an and other religious books written by Muslims scholars wach day during the fast as well.

269. Muslims who become sick or ill at any time during the fast are permitted to break the fast and discontinue until such ilness subsides, but a muslim must also make up for any days not completed any day subsequent to the feast which follows the Ramadan fast each year.

270. Each year muslims also celebrate two important feasts. One feast, id-ul-fitr, is celebrate at the end of Ramadan for the muslims who participate and commemorates an occassion of giving, and the other feast is, Id-ul-Adha, which comes at the end of the annual pilgrimage to the Holy city MECCA in Saudi Arabia and commemorates, according to muslim tradition, Allah's (God's) commandment to Prophet Ibrihim (Abraham) to sacrifice his first son, prophet Ismael(Peace and Blessings be unto him) Son of Hagar. After showing his willingness to sacrifice his first son prophet Irbihim was then commanded to sacrifice a Ram in place of his son Ismael.

271. Every muslim is required to participate in Id-ul-Adha, regardless of whether or not the muslim is physically and financially able to make the annual pilgrimage known as HAJJ. In commemoration of the sacrificial Ram it is traditional for muslims to sacrifice a lamb, cow or camel and to feed the poor in the feast which follows.

272. The Federal Bureau of Prisons' religious policies for committed offenders, including Plaintiff, provides for any prisoner belonging to a religious group, e.g. christian, Jewish, Muslim, etc., to have an annual feast to accommodate such religious traditions as Id-ul-Adha. Id-ul-Adha, is the most important feast for muslims throughout the world and muslim prisoners in the defendants' custody generally select to celebrate Id-ul-Adha for the annual feast to be provided for by the defendants.

273. In 1998, 1999 and 2001, defendants Hawk-Sawyer, Hershberger, Hedrick Stepp, Rivett, Ford and Globun, discriminated against the muslim prisoners and refused to provide the muslim prisoners, including Plaintiff,, a feast in accordance with the traditions or orthodxy of Al-Islam, while the defendants con-

tinued to provide the same to all of the non-muslim religious groups of prisoners confined at USP-Marion, Illinois.

274. In 1998, 1999, 2000 and 2001, defendants Hawk-Sawyer, Hershberger, Hedrick, Stepp, Rivett and Globun, provided the Christian, Jewish, Catholic and Indian prisoners, at USP-Marion, Illinois, with all of the essential food items to commemorate Christmas, Easter, Pass Over, Lint, Ash Wednesday and Pow Wow, but refused to provide Plaintiff or other muslim prisoners the liturgical or traditional food muslim needed to commemorate Id-ul-Adha.

275. In every federal institution throughout the Bureau of Prisons the defendant Hawk-Sawyer and her chaplains permit muslim prisoners to select which of the two feasts, e.g. Id-ul-Adha or Id-ul-Fitr, the muslims wish to celebrate and the defendant Hawk-Sawyer also informs muslim prisoners that the Bureau of Prisons will only provide lamb and make provisions for the muslim prisoners to celebrate one of the two muslim feasts.

276. Defendants Hedrick, Stepp and Rivett devised their Institutional Suppliment at USP-Marion, Illinois, that they could deny the muslim prisoners any lamb or liturgical foods to provide Plaintiff and the other muslim prisoners a meaningful feast in violation of Plaintiff's right to equal protection under the law while the defendants continue to spend thousands of dollars to provide the same religious services to the other religious groups and particularly the Christian and Jewish prisoners.

277. In 1998, Plaintiff requested that defendant Rivett provide the muslim prisoners lamb to celebrate the Id-ul-Adha feast and the defendant refused. Instead the defendant Rivett forced the muslim prisoners to celebrate Id-ul-Adha at the end of Ramadan.

278. The feast defendants Hawk-sawyer, Hershberger, Hedrick, Rivett and Globun, provided to Plaintiff and the other muslim prisoners in 1998, was meaningless, because the defendants refused to provide any of the traditional liturgical foods muslims customarily use to celebrate the feast with and the defendants reduced the feast to an empty formality by serving the same fried fish to every inmate in the general inmate population at the prison.

279. Defendant Rivett also informed Plaintiff that he did not provide the lamb because Plaintiff had not requested it 60 days in advance of Id-ul-Fitr, with Rivett knowing full well that he had participated in developing the Institutional Suppliment which dictated which feast muslim prisoners would be allowed to celebrate (e.g. Id-ul-Fitr) and that lamb is not required to celebrate that feast.

280. Plaintiff complained to defendants Hedrick, Hershberger and Hawk-Sawyer, about defendant Rivett's violations of Plaintiff's right to Equal Protection under the law, but to no avail.

281. In 1999, Plaintiff made a verbal and written request to defendant rivett to be provided lamb to celebrate the Id-ul-Adha feast, and defendant Rivett refused to provide the same. Defendant Rivett told Plaintiff personally while Rivett was making his round in the S.H.U. that "the muslims have nothing coming so long as he is in charge" of religious services at the prison.

282. In 1999, defendant Rivett refused to provide Plaintiff or the other muslim prisoners a meaningful feast and fed Plaintiff and every other inmate fried fish. Plaintiff complained to defendants Stepp, Hershberger and Hawk-Sawyer, about defendant Rivett denying the muslim prisoners similar treatment, in this regard, to what the defendants were providing the christian and Jewish prisoners at the institution.

283. Defendants Hawk-Sawyer, Hershberger and Stepp, ignored and disregarded Plaintiff's complaints about being denied equal treatment and a meaningful feast commensurate with Plaintiff's religious traditions.

284. In 2000, Plaintiff filed a BP-8, BP-9, BP-10 and BP-11, to defendants Stepp, Hershberger and Hawk-Sawyer, demanding that changes to their Institutional Suppliment be made immediately which permitted defendant Rivett to dictate which feast the muslim prisoners could celebrate; made it contingent upon a muslim prisoner to participate in the Ramadan fast in order to receive his annual feast provided by the Bureau of Prisons, and; permitted defendant Rivett to dictate to muslim prisoners the rules of the Ramadan fast as commanded in the Holy Qur'an by Allah, Most High.

285. Defendants Hawk-Sawyer, Hershberger and Stepp, responded to Plaintiff's grievance, in this regard, and stated that they would revise the policy and take into consideration Plaintiff's complaints, but that they would not revise the policy at that time.

286. In 2000, Plaintiff made another request to defendant Rivett asking to be provided with lamb for the Id-ul-Adha, feast, but defendant Rivett refused to respond to that request. The request was made for the celebration of Id-ul-Adha, in 2001.

287. It was defendant Rivett's legal duty and responsibility to coordinate the muslim feast with defendant Globun.

288. In 2000, the then contract Imam (Spiritual leader), Abdul-Haqq, gathered a consensus amongst the muslim prisoners at USP-Marion to celebrate the feast of Id-ul-Adha, and subsequently conveyed that information to defendant Rivett. Imam Abdul-Haqq, also informed defendant Rivett that Plaintiff and the

other Sunni muslim prisoners requested Lamb for the feast Id-ul-Adha.

289. On March 4, 2001, defendants Rivett and Globun, intentionally served Plaintiff and the other Sunni muslim prisoners carrion meats to celebrate Id-ul-Adha, and in violation of Plaintiff's rights to the free practice of religion.

290. The carrion meats that defendants Rivett and Globun served were chick ens which the defendants knew or should have known had not been slaughtered in accordance with either Islamic or Jewish religious laws and which defendant rivett himself knew Plaintiff was forbidden to eat.

291. Defendant Rivett also knew that it was unlawful in accordance with muslim religious laws and the Id-ul-Adha feast to serve carrion meats to the muslim population. Defendants Rivett and Globun also failed in their legal duty and responsibility to notify Plaintiff that the chicken was not lawful meats for the muslims to eat when the defendants served such to Plaintiff and the muslim population March 4, 2001, in commemoration of the Id-ul-Adha feast.

292. Since 1994, defendant Rivett has been using administrative means, harassment, oppression and intimidation to convert Plaintiff from the muslim faith, but to no avail.

293. Around October 1999, Plaintiff submitted an Inmate Request form to defendant Rivett advising him of Plaintiff's intentions to fast during the Holy month of Ramadan at the end of 1999 and requested the defendant to make arrangement for Plaintiff to receive Ramadan meals for the fast.

294. Towards the end of October 1999, defendant Rivett provided Plaintiff an application in the form of a contract which required Plaintiff to agree to fast during Ramadan under conditions unrelated to any compelling governmental interest and inaccordance with defendant Rivett's interpretation of Plaintiff's religion.

295. The contract also made references to dictates or statements in a letter defendant Rivett apparently received from Louis Farakhan, Leader of the organization, Nation of Islam, commanding his followers to participate in the Ramadan fast.

296. In response to the conditions defendant Rivett setforth in the contract and the references to Louis Farakhan's letter, Plaintiff wrote defendant rivett back and informed the defendant that Plaintiff could not sign the contract or agree to the term of the contract because the same would associate Plaintiff with statements by Louis Farakhan referred to therein and placed conditions upon Plaintiff's right to practice Al-Islam freely which were not reasonably related to a compelling penological objective.

297. Louis Farakhan and the Nation of Islam, is an organization of black Americas and minorities with no relations or associations with the Sunni muslim practices, faith or beliefs in Al'Islam.

298. Plaintiff informed defendant Rivett, as Plaintiff had many times before between 1994 and 1999, that it was religiously offensive to associate Plaintiff with Louis Farakhan or the Nation of Islam, because of fundamental relgious differences. Plaintiff also informed defendant Rivett that Plaintiff understood Bureau of Prisons' religious regulations which prohibited muslim prisoners who participate in the Ramadan fast from obtaining food from the main kitchen in exchange for Ramadan meals each evening during fast and that Plaintiff agreed to follow those rules.

299. After not receiving a response in a timely manner Plaintiff filed a BP-8, in order to ensure defendant Rivett received Plaintiff's correspondence.

300. Defendant Rivett responded to the BP-8, and informed Plaintiff that

Rivett had received Plaintiff's correspondence and would be placed on the list to receive Ramadan meals after sunset each evening during the fast.

301. Plaintiff first became Sunni muslim August 4, 1984, and has fasted each year since then, as Commanded by the religion, during the Holy month of Ramadan.

302. Plaintiff has also put defendants Hawk-Sawyer, Hershberger, Stepp, Rivett, Globun and other officials at various institutions, on notice of Plaintiff's intent to fast each year and requested provisions to sustain Plaintiff after sunset and during the fast each year, which was honored, in accordance with Bureau of Prisons' policies, up until Plaintiff came back into contact with defendant Rivett at USP-Marion, Illinois.

303. On December 6, 1999, defendant Rivett responded to Plaintiff's previous correspondence acknowledging that the defendant placed Plaintiff on the Ramadan list.

304. At the beginning of Ramadan 1999, which started on December 9, 1999, Plaintiff remained confined in the Special Housing Unit (S.H.U.) serving out the disciplinary segregation sentence which resulted from the August 12, 1999, between Plaintiff and inmate Rodriguez.

305. During the first five days of the Ramadan fast the correctional officers assigned the S.H.U. continued deliver Plaintiff's evening meals which were luke warm. Each time Plaintiff requested that the meals be heated up in the unit microwave oven the officer became verbally abusive and refused the same.

306. Plaintiff then asked either Lieutenant Hughes or Lieutenant Mash to heat the food trays while such made their rounds in the S.H.U.

307. On two of the five occasions the Lieutenants warmed the meals in the unit's microwave oven.

308. On December 13, 1999, when Lieutenant Mash warmed Plaintiff's food trays Plaintiff accused the correctional officers of racism towards muslim prisoners after they refused Plaintiff's requests and continued harassing Plaintiff thereafter.

309. The officers were also present when Plaintif made the accusation to Lieutenant Mash about the officers.

310. In response to Plaintiff's accusation about the officers being racist upon information and belief the officers contacted defendant Rivett and informed him that the Plaintiff had cursed the officers and Lieutenant Mash.

311. At no time did Plaintiff curse or use any form of profanity towards the officers or Lieutenant Mash.

312. That same night Plaintiff wrote to defendant Rivett and stated: "...Chaplain Rivett: The purpose of this communications is to complain about the Ramadan meals I'm receiving here in S.H.U. being mild to luke warm. Its nothing for these lazy guards to heat the trays before delivering in such condition, but thats too much like right for us. Chaplain, I'm fasting and I expect to receive a hot meal at the end of my fast each day and to allowed to be at peace rather than disappointed. Would you interpose with a memo to the Captain concerning this mater...Respectfully Submitted."

313. On December 14, 1999, defendant Rivett responded to Plaintiff's correspondence and punished Plaintiff for complaining about the mistreatment of the correctional officers in this regard.

314. In response to Plaintiff's letter defendant Rivet stated: "...This

"should no longer be a problem since you have been removed from the Ramadan list effective 12/15/99."

315. On December 14, 1999, also sent Plaintiff a memorandum and supplied copies of the memo to defendants Stepp, Benson and Globun, which stated: "... This note is to inform you that you have been removed from the Ramadan List effective this date, meaning that you will receive no/meat trays during the day beginning on 12/15/99. You have been removed for violating the intentions and behavior of Ramadan by cursing out correctional officers and the Lt. On evening shift. To quote the Muslim Information center of Philadelphia: 'During Ramadan...you are not to use the tongue for lying, backbiting, tale-bearing, obscentity, and abusive speech...The fasting of the believers is to keep the ears, the eyes, the tongue, and hands and the feet as well as the other senses free from sin.' ...If you have any questions, please let me know. I pray that your behavior will improve for the remainder of Ramadan. God's peace be with you as you diligently study the Qur-an and grow in your faith."

316. By issuing that memorandum and removing Plaintiff from the List of Ramadan participants and by expressing his (Rivett's) opinion how Plaintiff should have practiced the religion made an Open mockery of Plaintiff's religious beliefs and practices, because Rivett is a christian government employee and he knew or should have known that he was interfering with Plaintiff's rights to freely practice Plaintiff's religion.

317. Defendant Rivett's dictates to how Plaintiff should have practiced Plaintiff's own religion served no compelling or legitimate penological interest.

318. On December 15, 1999, defendant Stepp spoke with Plaintiff at the S.H.U. outside recreational area and asked Plaintiff to explain in Plaintiff's own words what occurred. After telling Plaintiff's own version defendant Stepp informed Plaintiff that the defendant would resolve the matter and get back in touch with Plaintiff later that day.

319. Defendant Stepp never got back in touch with Plaintiff December 15, 1999, and for the following five days the defendants deprived Plaintiff of food in violation of Plaintiiff's rights pursuant to Title 18, United States Code, Section 4042(a)(2), Title 42 U.S.C. §2000bb and the First Amendment.

320. On December 18, 1999, defendant Benson placed Plaintiff in the S.H.U. "Boxcar" so no other prisoners could provide Plaintiff any food after sunset and to punish Plaintiff for complaining about the mistreatment of the correctional officers assigned to the S.H.U.

321. Defendants Stepp, Rivett and Benson, were all aware of their own institutional policies governing Special Housing Unit operations which prohibited inmates from storing any food items served by the defendants with the morning, noon and evening meals, all of which were then being served before sunset, and that Plaintiff would have been subject to disciplinary action had Plaintiff ignored or disregarded those rules.

322. Defendants Stepp, Rivett and Benson, were also fully aware of Plaintiff's obligations to continue fasting each day and until sunset for the remainder of Ramadan, regardless of whether the defendants provided Plaintiff meals after sunset or not.

323. Defendants Stepp, Rivett and Benson knew or should have known that Plaintiff was and had been a pious Orthodox Sunni Muslim from the time Plaintiff arrived at USP-Marion, Illinois, and that Plaintiff would not break the fast without a legal reason according to the orthodoxy of Al-Islam.

324. For five consecutive days defendants Stepp, Rivett, Benson and Globun, forced Plaintiff to go without any food which caused Plaintiff to continue to suffer irreparable physical/psychological injury.

325. During those same said five days Plaintiff suffered hypoglycemia, headaches and a loss of 17½ pounds.

326. Each day after sunset the defendants forced Plaintiff to break the fast and to sustain on water alone because they refused to feed Plaintiff after sunset.

327. On or about december 21, 1999, defendants Stepp, Rivett, Benson and Globun, placed Plaintiff back on the Ramadan list and provided Plaintiff meals after sunset.

328. On or about November 4, 2000, defendant Rivett sent Plaintiff an application in the form of a contract requiring Plaintiff to agree to the terms setforth therein to participate in the Ramadan fast and to be provided with meals after sunset.

329. Plaintiff informed defendant Rivett by letter that Plaintiff could not sign the contract because the same contained references to Louis Farakhan and the Nation of Islam, which was religiously offensive,and also conditions or requirements for participants the defendant imposed which had no relations to either a legitimate or compelling penological interest, but were very delicate matters which can only be Judged by Plaintiff's Deity. Plaintiff also informed defendant Rivett of Plaintiff's intent to fast and requested provisions to sustain Plaintiff after sunset during the fast.

330. Defendant Rivett approved Plaintiff's request and the fast began around the end of November 2000.

331. On December 10, 2000, defendant Rivett arbitrarily removed Plaintiff from the list of Ramadan participants and deprived Plaintiff of meals for ten days thereafter to punish Plaintiff for obtaining ice, which Plaintiff stored and melted for drinking water after sunset, from another prisoner.

332. The defendants provide ice to inmates with the noon and supper meals during winter months and with the morning, noon, and supper meals during the summer months. Ice is also provided at night during the summer months.

333. Plaintiff has stored and melted ice for drinking water every day since Plaintiff's arrival at USP-Marion, Illinois, because Plaintiff cannot bear the taste of the tap water at the institution.

334. Plaintiff filed both an administrative tort claim and grievance against defendant Rivett in relations to the defendant depriving Plaintiff of food between December 15, 1999, and December 21, 1999, and in response to those complaints defendant Rivett retaliated and filed an Incident Report against Plaintiff which accused Plaintiff of making false statements in the tort claim.

335. Upon receipt of the administrative tort claim after Plaintiff filed it, defendant Stepp's staff attorney, Paul Pepper, sent such to defendant Rivett and ordered him to file a response. In turn defendant Rivett filed the Incident Report against Plaintiff which accused Plaintiff of committing fraud, counterfeiting and making a false statement for filing the claim, which defendant Hershberger had already acknowledged as filed properly, under Plaintiff's legally changed religious name.

336. Lieutenant Shank attempted to serve the Incident Report upon Plaintiff, but hesitated after Plaintiff showed the Lieutenant a court order, judgment and decree, for Plaintiff's legal name change, which defendant Rivett already knew about. Defendant Rivett, filed the Incident Report against Plaintiff

and brought his false allegations against Plaintiff to intimidate, harass and retaliate against Plaintiff for filing the tort claim on Rivett.

337. After consulting Paul Pepper, defendant Ellet, expunged the Incident Report and informed defendant Rivett that he could not use administrative reprisals as means for retaliating against Plaintiff.

338. On December 10, 2000, defendant Rivett instructed officer Helm to file an Incident Report against Plaintiff for obtaining ice from another prisoner thereby violating the Ramadan fast.

339. Plaintiff received the Incident Report written by officer Helms and also a memorandum from defendant Rivett which informed Plaintiff that he was removing Plaintiff from the list of Ramadan participant and that Plaintiff would be receiving the Incident Report consequently.

340. Defendant Rivett instructed officer Helms to file the Incident Report on Rivett's behalf in order to conceal Rivett's means of retaliation against Plaintiff for the number of complaints Plaintiff had file against the defendant between December 15, 1999 and December 10, 2000.

341. After Plaintiff was served with a copy of the Incident Report written by officer Helms, Plaintiff's Unit Manager, Mr. Murphy, convened a hearing

342. Plaintiff complained to Mr. Murphy about being persecuted by defendant Rivett through officer Helms and denied breaking any rule violations.

343. Plaintiff also argued that staff could not punish Plaintiff under Bureau of Prisons' disciplinary regulations in response to Plaintiff's failure to practice Plaintiff's religion according to how defendant Rivett or any other official believed Plaintiff should practice the religion and Mr. Murphy took Plaintiff's comments under advisement. Subsequently, Mr. Murphy consulted Paul Pepper and defendant Rivett about the constitutional implications involving Plaintiff's First Amendment rights and thereafter he expunged the Incident Report.

344. Plaintiff complained to defendants Benson and Stepp, after defendant Rivett, removed Plaintiff from the Ramadan list arbitrarily and without any form of consultation.

345. For the folowing ten days, beween December 10, 2000 and December 21, 2000, the defendants refused to provide Plaintiff any meals.

346. As a result of their concerted unlawful and deliberate acts and/or omissions, Plaintiff was forced to ask fellow inmates for their own personal food purchased from the prison commissary for several days.

347. Each day for the fist four days Plaintiff obtained a small pack of Quaker Oatmeal or a Ramen Soup. For the remaining six days Plaintiff was forced to sustain on water alone.

348. On December 11, 12 and 13, 2000, Plaintiff was examined by the nurse and informed her that Plaintiff had received those few items and thereafter no other health service provider contacted Plaintiff.

349. On December 21, 2000, defendant Stepp ordered defendant Rivett to place Plaintiff back on the Ramadan list and provide Plaintiff meals after sunset.

350. The defendants had removed Plaintiff from the Ramadan list and deprived Plaintiff of meals for ten days in order to punish Plaintiff for not practicing Plaintiff's religion to the defendants satisfaction and in violation of Plaintiff's rights under the Religious Freedom Restoration Act and the First Amendment.

351. Pursuant to Title 18, United States Code, Section 4042(a)(2), defendants Stepp, Rivett, Benson, Globun, and the United States had a legal duty and responsibility to provide for Plaintiff's safekeeping, care and subsistance,

between December 15, 1999 and December 21, 1999, and also between December 10, 2000 and December 21, 2000, and Plaintiff was not contributorially negligent in relations to the irreparable physical/psychological injuries Plaintiff suffered as a result of their negligence and/or concerted unlawfu and deliberate acts and/or omissions.

352. Defendant Rivett continues to use administrative reprisals against Plaintiff by filing false Incident Reports, and through his use of harassment and intimidation while defendants Hawk-sawyer, Hershberger, and Stepp acquiesce.

353. It has always been the custom, practice and tradition for officials at USP-Marion, Illinois, to provide muslim prisoners, who are indigent, one ounce of muslim prayer oil. Other muslim prisoners are required to purchase their prayer oil from the prison commissary.

354. Plaintiff brought it to the attention of defendants Stepp and Adelsberger, that defendant Rivett was only providing muslim prisoners, including Plaintiff, a half ounce of prayer oil each month, but reporting that such were receiving one ounce each month.

355. The defendants also display an Orientation video every Friday of each month and wherein Defendant Rivett informed muslim inmates that indigent inmates were entitled to receive one ounce each month.

356. After Plaintiff brought it to the attention of defendants Stepp and Adelsberger, that the indigent muslim prisoners were only receiving a half an ounce each month and demanded the other half ounce, defendant Rivett changed the policy on the spot and revised the Orientation video informing that inmates would only receive one bottle of prayer oil each month.

357. Plaintiff filed complaints about defendant Rivett's sudden change in policy , but to no avail. Defendants Hawk-sawyer, Hershberger and Stepp, ignored

and disregarded those complaints and accepted the false statements defendant Rivett provided thereafter claiming that he never admitted on video that the indigent muslim prisoners were entitled to receive one ounce of prayer oil each month.

358. On March 22, 2001, Plaintiff filed a BP-8, against defendant Rivett accusing him of continuing to invoke his deity on Plaintiff in the defendant's attempt to convert Plaintiff to the Christian faith. Plaintiff also requested that Rivett be required to stop using the terms "God's peace" at the closing of any correspondence between the defendant and Plaintiff which was religiously offensive to Plaintiff.

359. On March 27, 2001, defendant Rivett filed an Incident Report against Plaintiff in relation to the BP-8, Plaintiff filed against Rivett and to retaliate. In his Incident Report against Plaintiff defendant Rivett accused Plaintiff of making a false statement against him in Plaintiff's BP-8 grievance, and claimed that Plaintiff never told Rivett to stop saying "God's peace" or words of similar import.

360. On March 28, 2001, Lieutenant Mash delivered defendant Rivett's Incident Report to Plaintiff. After reading the charges to Plaintiff Lieutenant Mash provided Plaintiff a copy of the Incident Report and asked if Plaintiff had any comments to make. Plaintiff informed Lieutenant Mash that staff could not lawfully file Incident Reports against inmates in retaliation for exercising the right to file grievances against staff and that defendant Rivett had violated Plaintiff's constitutional rights by doing so. Lieutenant Mash then had second thoughts and informed Plaintiff that he, Lieutenant Mash, would consult Paul Pepper and get back in touch with Plaintiff, on March 29, 2001. Lieutenant Mash has yet to advise Plaintiff about the status of the Incident Report written on

March 27, 2001, by defendant Rivett, and as a result Plaintiff continues to live in constant fear of administrative reprisals by prison staff for exercising the right to seek redress on Plaintiff's grievances with the government.

361. Plaintiff filed a grievance with defendants Hawk-Sawyer, Hershberger and Stepp with regards to defendant Rivett's use of administrative reprisals against Plaintiff, in this regard, but to no avail. The defendants Hawk-Sawyer, Hershberger and Stepp, continue to ignor and disregard the complaints and acquiesce while defendant Rivett forces Plaintiff to live in constant fear of administraTive reprisals.

FIRST CAUSE OF ACTION

362. As a direct result of aforementioned Failure to Protect Plaintiff from the inmate assault by inmate Noe Rodriguez, as described in Counts One and Two, defendants Hawk-Sawyer, Hershberger, Watts, Hedrick, Compton, Chism, Adelsberger, Shadowens, Ellet, Benson, Smith, Young, Foster, Tubb, Beltz, Bryant, Hopkins, Beisner, and Baggott, as prison officials, knew or should have known of the pervasive risk of harm to Plaintiff.

363. Defendants Hawk-Sawyer, Hershberger, Watts, Hedrick, Compton, Chism, Adelsberger, Shadowens, Ellet, Benson, Smith, Young, Foster, Tubb, Beltz, Bryant, Hopkins, Beisner and Baggott, knowingly, deliberately and negligently, with reckless indifference, breached this duty due to their awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding the warnings inmate Noe Rodriguez provided in his annonymous letter June 8, 1999, which was similar to orevious annonymous letter the defendants knew or should known Rodriguez had previously provided; in ignoring and disregarding their reasons for removing Plaintiff from 8-range June 9, 1999, in response to Rodriguez's annonymous letter, and; in ignoring and disregarding the ongoing physical confrontat-

ions between the Plaintiff's muslim brothers confined in Lower G-unit and inmate Rodriguez's fellow gang members and associates.

364. Pursuant to Eighth Amendment of the Constitution of the United States of America , Plaintiff has a right to be free from physical assaults by other prisoners and additional injury; and, prison officials have a concomitant duty to develope policies which provide adequate protection to prisoners from stabbings and physical assaults by other prisoners.

365. As a proximate and direct result of Defendants' acts and/or omissions Plaintiff continues to suffer irreparable physical/psychological injury.

366. As a direct result of their concerted unlawful and deliberate acts and/or omissions, Defendants deprived Plaintiff of the right to be free from physical assaults by other prisoners and to be provided safekeeping and protection and impeded the due course of justice in violation of the Eighth Amendment of the Constitution and Title 18 U.S.C. §4042(a)(2) and 28 U.S.C. 1331.

SECOND CAUSE OF ACTION

367. As a direct result of aforementioned Failure to provide Plaintiff suitable quarters, safekeeping and protection, as described in Counts One and Two, the United States of America, as a prison official, knew or should have known of the pervasive risk of harm to Plaintiff.

368. The United States of America, negligently breached its duty due to its awareness of the pervasive risk of harm to plaintiff, in ignoring and disregarding inmate Noe Rodriguez's mental illness and warnings about his fear of being attacked by Plaintiff; in ignoring and disregarding its duty to provide Plaintiff suitable quarters, safekeeping and adequate protection from inmate stabbings and assaults and the United States failure to reasonably respond to Plaintiff's serious security needs.

369. Pursuant to Title 18 U.S.C. §4042(a)(2) and Title 28 U.S.C. §2671, et seq., Plaintiff had a right to be provided suitable quarters, safekeeping and protection by the United States from stabbings and physical assaults by other prisoners and the United States had a concomitant duty to respond to Plaintiff's needs.

370. As a proximate and direct result of the United States' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

371. As direct result of its concerted unlawful and negligent acts and/or omissions, the United States deprived Plaintiff of the right to be provided suitable quarters, safekeeping and protection and additional injury, and; impeded the due course of justice in violation of Titlte 18 U.S.C. §4042(a)(2) and Title 28 U.S.C. §2671, et seq.

THIRD CAUSE OF ACTION

372. As a direct result of aforementioned Excessive and Unnecessary use of force and denial of adequate instructions on how to get down before use of force could be applied, as described in Counts One and Two, defendants Hawk-Sawyer, Hershberger, Hedrick, compton, Chism, Benson, Adelsberger, Shadowens, Ellet, Beisner, and Baggot, as prison officials, knew or should have known of the pervasive risk of harm to Plaintiff.

373. Defendants Hawk-Sawyer, Hershberger, Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens, Ellet, Beisner and Baggot, knowingly, deliberately and negligently, with reckless indifference, breached this duty due to their awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff permanent hearing loss; their own failure to provide proper instruct-

ions at the scene and their failure to refrain from using their riot batons maciliously and sadistically on Plaintiff for the purpose of causing Plaintiff harm.

374. Pursuant to the Eighth Amendment of the Constitution of the United States of America, Plaintiff has a right to be free from the use of Excessive and Unnecessary Force by prison officials, and additional injury, and; prison officials have a concomitant duty to protect inmates from assaults by other orison officials.

375. As a proximate and direct result of Defendants' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

376. As a direct result of their concerted unlawful and deliberate acts and/or omissions, Defendants deprived Plaintiff of the right to be free from the use of Excessive and Unnecessary and impeded the due course of justice in violation of the Eighth Amendment of the Constitution and 28 U.S.C. §1331.

FOURTH CAUSE OF ACTION

377. As a direct result of aforementioned Assault and Battery by federal law enforcement officials, as described in Counts One and Two the United States of America, knew or should have known of the pervasive risk of harm to Plaintiff.

378. The United States of America, negligently breached its duty due to its awareness of the pervasive risk of harm to Plaintiff, in failing to properly train and supervise defendants Beisner and Baggot, and; its failure to reasonably protect Plaintiff from the assault and battery by defendants Beisner and Baggott.

379. Pursuant to Title 18 U.S.C. §4042(a)(2),(3) and Title 28 U.S.C. 2680(h), Plaintiff has a right to be provided safekeeping and protection from

Assaults and Batterys by federal law enforcement officials, and additional injury and; the United States has a concomitant duty to protect Plaintiff from assaults and batterys by its law enforcement officials.

380. As a proximate and direct result of the United States' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

381. As a direct result of its concerted unlawful and negligent acts and/or omissions, the United States deprived Plaintiff of the right to be provided safekeeping and protected from the assault and battery by defendants Beisner and Baggot and impeded the due course of justice in violation of Title 18 U.S.C. 4042(a)(2),(3), 28 U.S.C. 2680(h) and 28 U.S.C. 2671, et seq.

FIFTH CAUSE OF ACTION

382. As a direct result of aforementioned to protect Plaintiff from the physical assault and stabbing by inmate Gallardo, as described in Counts One, Two and Three, defendants Hawk-Sawyer, Hershberger, Stepp, Adelsberger, Benson, Compton, and Shadowens, as prison officials, knew or should have known of the pervasive risk of harm to Plaintiff.

383. Defendants Hawk-Sawyer, Hershberger, Stepp, Compton, Adelsberger, Benson and Shadowens, knowingly, deliberately and negligently, with reckless indifference, breached this duty due to their awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff's requests to be separated from the Mexican Mafia, and their failure to reasonably respond to that request.

384. Pursuant to the Eighth Amendment of the Constitution of the Unite States of America, Plaintiff has a right to be free from phsyicalassaults and stabbing by other inmates and additional injury; and, prison officials have a

concomitant duty to develope policies which provide adequate protection to inmates from physical assaults and stabbings by other prisoners.

385. As a proximate and direct result of defendants' acts and/or omissions plaintiff continues to suffer irreparable physical/psychological injury.

386. As a direct result of their concerted unlawful and deliberate acts and/or omissions, Defendants deprived Plaintiff of the right to be free from physical assaults by other prisoners and impeded the due course of justice in violation of the Eighth Amendment to the Constitution and 28 U.S.C. 1331.

SIXTH CAUSE OF ACTION

387. As a direct result of aforementioned Failure to provide Plaintiff suitable quarters, safekeeping and protection from the assault and stabbing by inmate Gallardo, as Described in Counts One, Two and Three, the United States, knew or should have known of the pervasive risk of harm to Plaintiff.

388. The United States negligently breached its duty due to its awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff's serious security needs and request to be separated under the Central Inmate Monitoring System from the Mexican Mafia, and its failure to reasonable respond to that request.

389. Pursuant to Title 18 U.S.C. §4042(a)(2),(3) and Title 28 U.S.C. §2671, et seq., Plaintiff has a right to be provided suitable quarters, safekeeping and protection from physical assaults by other prisoners and additional injury, and; the United States has a legal duty and responsibility to provide the same.

390. As a proximate and direct result of the United States' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

391. As a direct result of its concerted unlawful and negligent acts and/or omissins, the United States deprived Plaintiff of the right to be provided suitable quarters, safekeeping and protection from the assault and stabbing by inmate Gallardo and impeded the due course of justice in violation of Title 18 U.S.C. §4042(a)(2),(3) and 28 U.S.C. §1331.

SEVENTH CAUSE OF ACTION

392. As a direct result of aforementioned Failure to publish "the terms or substance" or definitions of the rules or Prohibited Acts set forth at Title 28 C.F.R. 541.13, and particularly with respect to Codes 101, 224 and 307, which do not comply with the rule making provisions of Title 5 U.S.C. §553(b)(3), of the Administrative Procedures Act, as described in Counts Five and Six, defendants Hawk-Sawyer, Hershberger, Watts, Stepp, Compton, Chism, Yonkman and Campbell, as prison officials, knew or should have known of the pervasive risk of harm to Plaintiff, and of the adverse affect and legal wrong Plaintiff suffered by the agency's failure to define the rules.

393. Defendants Hawk-Sawyer, Hershberger, Watts, Stepp, Compton, Chism, Yonkman and Campbell, knowingly, deliberately and negligently, with reckless indfifference, breached this duty due to their awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding the rules making provisions of the Administrative Procedures Act, 5 U.S.C. 553(b)(3), which required the defendants to define the Prohibited Acts set forth at Title 28 C.F.R. 541.13, which affected Plaintiff's substantive rights under the Due Process Clause of the constitution, because the rules are written so unconstitutionally vauge and imprecise that one has to guess at the meaning of the term and be subject to a loss of statutory good conduct time when the guess is wrong.

394. Pursuant to Title 5 U.S.C. §553(b)(3), and 5 U.S.C. 702, et seq., the Federal Bureau of Prisons had a legal duty and responsibility to publish "the terms or substance" or definitions of the rules or Prohibited Acts set forth at Title 28 C.F.R. 541.13, in accordance with the rules making provisions of the Administrative Procedures Act and Plaintif had a substantive right to know what inmate behavior and conduct the defendants prohibited under the rules and to petition the Court for Judicial review as a result of the adverse affect the rules have had on Plaintiff's substantive rights under the Due process Clause.

395. As a proximate and direct result of the Defendants' acts and/or omissions, Plaintiff continues to suffer a legal wrong and grievance from the agency's failure to publish and furnish "the terms or substance" of the Prohibited Acts set forth at Title 28 C.F.R. 541.13.

396. As a direct result of their concerted unlawful and deliberate acts and/or omissions, Defendants deprived Plaintiff of due process of law in violation of Plaintiff's substantive rights pursuant to Title 5 U.S.C. 553(b)(3) and 5 U.S.C. 702, et seq.

EIGHTH CAUSE OF ACTION

397. As a direct result of aforementioned Denial of Substantive and Statutory due process and racial discrimination in connection with the defendants' enforcement of the Bureau of Prisons' disciplinary policies at USP-Marion, Illinois, as described in Count Five, defendants Hawk-Sawyer, Watts, Hershberger, Stepp, Compton, Yonkman and Campbell, as prison officials, knew or should have known, of the pervasive risk of harm to Plaintiff.

398. Defendants Hawk-Sawyer, Watts, Hershberger, Stepp, Compton, Yonkman and Campbell, knowingly, deliberate and negligently, with reckless indifference,

breached this duty due to their awareness of the pervasive risk of harm to plaintiff, in ignoring and disregarding Plaintiff's complaints about their repeated violations of Plaintiff's due process and equal protection rights and their failure to reasonably respond to those concerns and follow their own disciplinary rules and regulations.

399. Pursuant to the Fifth Amendment to the Constitution of the United States of America, Title 28 C.F.R. 541.10(b)(1)-(4), 541.2(a), 541.14(a),(b), (b)(2), 541.15(a), 541.16(b),(c), 541.15(f); 5 U.S.C. 702, et seq., Plaintiff has a right to Equal protection and due process under the law and prison officials have a concomitant duty to treat all inmates similarly situated the same.

400. As a proximate and direct result of Defendants' acts and/or omissions Plaintiff continues to suffer irreparable physical/psychological injury.

401. As a direct result of their concerted unlawful and deliberate acts and/or omissions, Defendants deprived Plaintiff of Equal Protection and due process under the law, and impeded the due course of justice in violation of Title 5 U.S.C. §§702, et seq., and the Fifth Amendment of the Constitution and 28 U.S.C. 1331.

NINTH CAUSE OF ACTION

402. As a direct result of aforementioned Racial Biasness in connection with the defendants use of their riot baton in Use of force situations involving black prisoners at USP-Marion, Illinois, defendants Hawk-Sawyer, Hershberger, Hedrick, Comoton, Benson and Yonkman, as prison officials, knew or should have known of the pervasive risk of harm to Plaintiff.

403. Defendants Hawk-Sawyer, Hershberger, Hedrick, Compton, Benson and Yonkman, knowingly, deliberately and negligently, with reckless indifference,

breached this duty due to their awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding black prisoners' complaints, including Plaintiff's, about the white officers using their riot baton against black prisoners with racial biasness and their failure to reasonably respond to those complaints.

404. Pursuant to the Fifth and Eighth Amendments of the Constitution of the United States of America, Plaintiff has a right to Equal Protection under the law and to be free from Cruel and Unusual Punishment, and prison officials have a concomitant udty to protect black inmates from racial biasness and guard brutality.

405. As a proximate and direct result of Defendants' acts and/or omissions Plaintiff continues to suffer irreparable physical/psychological injury.

406. As a direct result of their concerted unlawful and deliberate acts and/or omissions, Defendants deprived Plaintiff of the right to Equal Protection under the law and impeded the due course of justice in violation of the Fifth and Eighth Amendments of the Constitution and 28 U.S.C. 1331.

TENTH CAUSE OF ACTION

407. As a direct result of aforementioned Interference with Plaintiff's right to the free practice of religion and deprivation of food between December 15, 1999 and December 21, 1999, as described in Count Seven, Defendants Stepp, Rivett, Globun and Benson, as prison officials, knew or should have known of the pervasive risk of harm to Plaintiff.

408. Defendants Stepp, Rivett, Globun and Benson, Knowingly, deliberately and negligently, with reckless indifference, breached this duty due to their awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff's need for food and subsistence at the time and their failure to

reasonably respond to those needs without interfering with Plaintiff's right to practice Plaintiff's religion freely.

409. Pursuant to the First Amendment of the Constitution of the United States of America, and the Religious Freedom Restoration Act, 42 U.S.C. §2000bb, Plaintiff had a right to practice Plaintiff's religion freely and without interferance from the government and prison officials had a concomitant duty to feed Plaintiff after sunset between December 15, 1999 and December 21, 1999, in accordance with Bureau of Prisons' policies and Plaintiff's rights.

410. As a proximate and direct result of Defendants' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

411. As a direct result of their concerted unlawful and deliberate acts and/or omissions, Defendants deprived Plaintiff of the right to practice Plaintiff's religion freely and without interference with the government and impeded the duecourse of justice in violation of the First Amendment of the Constitution and the Religious Freedom Restoration Act and 28 U.S.C. §1331.

ELEVENTH CAUSE OF ACTION

412. As a direct result of aforementioned Deprivation of food for five consecutive days between December 15, 1999 and December 21, 1999, as described in Count Seven, the United States of America, as a prison official, knew or should have known of the pervasive risk of harm to Plaintiff.

413. The United States of America, negligently breached its duty due to its awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff's need to be provided subsistence and its failure to reasonably respond to that need.

414. Pursuant to Title 18 U.S.C. §4042(a)(2), Plaintiff had a right to be provided food by the United States between December 15, 1999 and December 21, 1999, while Plaintiff was engaged in practicing Plaintiff's religion and prison

officials of the United States had a concomitant duty to provide plaintiff with food between December 15, 1999 and December 21, 1999.

415. As a proximate and direct result of the United States' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

416. As a direct result of its concerted unlawful and negligent acts and/or omissions, the United States deprived Plaintiff of the right to be provided with subsistence and to be free from additional injury and impeded the due course of justice in violation of Title 18 U.S.C. §4042(a)(2) and 28 U.S.C. §2671, et seq.

TWELVETH CAUSE OF ACTION

417. As a direct result of aforementioned Interference with Plaintiff's right to the free practice of religion and deprivation of food between December 10, 2000 and December 21, 2000, as described in Count Seven, defendants Stepp, Rivett and Globun, as prison officials, knew or should have known of the pervasive risk of harm to plaintiff.

418. Defendants Stepp, Rivett and Globun, knowingly, deliberately and negligently, with reckless indifference, breached this duty due to their awareness of the pervasive of harm to Plaintiff, in ignoring and disregarding Plaintiff's need for food and subsistence at the time and their failure to reasonably respond without interfering with Plaintiff's right to practice Plaintiff's religion freely.

419. Pursuant to the First Amendment of the Constitution of the United States of America and the Religious Freedom Restoration Act, 42 U.S.C. §2000bb, Plaintiff had a right to practice Plaintiff's religion freely and without interference from the government and prison officials had a concomitant duty to feed

Plaintiff after sunset between December 10, 2000 and December 21, 2000, in accordance with Bureau of Prisons' policies and Plaintiff's rights.

420. As a proximate and direct result of Defendants' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

421. As a direct result of their concerted unlawful and deliberate acts and/or omissions, Defendants Deprived Plaintiff of the right to Practice Plaintiff's religion freely and without interference from the government and impeded the due course of justice in violation of the First Amendment of the Constitution, the Religious Freedom Restoration Act and 28 U.S.C. §1331.

THIRTEENTH CAUSE OF ACTION

422. As direct result of aforementioned Deprivation of food for Ten consecutive days between December 10, 2000 and December 21, 2000, as described in Count Seven, the United States of America, as a prison official, knew or should have known of the pervasive risk of harm to Plaintiff.

423. The United States of America, negligently breached its duty due to its awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff's need to be provided subsistence and its failure to reasonably respond to that need.

424. Pursuant to Title 18 U.S.C. §4042(a)(2), Plaintiff had a right to be provided fod by the United States between Deceber 10, 2000 and December 21, 2000, while Plaintiff was engaged in practiciing Plaintif's religious beliefs and prison officials had a concomitant duty to provide Plaintiff with food after sunset between December 10, 2000 and December 21, 2000.

425. As a proximate and direct result of the United States' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

426. As a direct result of its concerted unlawful and negligent acts and/

or omissions, the United States deprived Plaintiff of the right to be provided with subsistence and to be free from additional injury and impeded the due course of justice in violation of Title 18 U.S.C. §4042(a)(2) and 28 U.S.C. §2671, et seq.

FOURTEENTH CAUSE OF ACTION

427. As a direct result of aforementioned violations of the Establishment Clause and the Government's Entanglement with the Christian religion, as described in Count Seven, defendants Hawk-Sawyer, Hershberger, Watts, Stepp, Rivett, Ford and Globun, as prison officials, knew or should have known of the pervasive risk of harm to Plaintiff.

428. Defendants Hawk-Sawyer, Hershberger, Watts, Stepp, Rivett, Ford and Globun, knowingly, deliberately and negligently, with reckless indifference, breached its duty due its awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff's complaints about being forced to participate in christian and Jewish religious beliefs and practices, which violates Plaintiff's own religious beliefs and practices, and their faiure to reasonable respond to those complaints.

429. Pursuant to the Establishment Clause of the Constitution of the United States of America, Plaintiff has a right to be free from forced participation in religious affairs and prison officials have a concomitant duty to refrain from endorcing any particular religion or entangling the government in the practice of any particular religion.

430. As a proximate and direct result of Defendants' acts and/or omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

431. As a direct result of their concerted unlawful and deliberate acts

and/or omissions, Defendants deprived Plaintiff of the right to be free from forced participation in the christian and jewish religious beliefs and practices and impeded the due course of law in violation of the Establishment Clause of the Constitution, the Religious Freedom Restoration Act and 28 U.S.C. §1331.

FIFTEENTH CAUSE OF ACTION

432. As a direct result of aforementioned Revocation of Plaintiff's Common Fair and new adhesionary contracts, as described in Count Seven, defendants Rivett and Ford, as prison officials, knew or should have known of the pervasive risk of harm to Plaintiff.

434. Defendants Rivett and ford, knowingly, deliberate and negligently, with reckless indifference, breached this duty due to their awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff's complaints about the new contracts' adhesionary terms which had no relations to either a legitimate or compelling penological interest and their failure to reasonably respond to those complaints.

435. Pursuant to the First Amendment of the Constitution of the United States of America and the Religious Freedom Restoration Act, 42 U.S.C. §2000bb, Plaintiff had a right to be provided meals conducive with Plaintiff's religious beliefs and practice without being required to sign a adhesionary contract as a condition to receive such, and prison officials had a concomitant duty to provide Plaintiff a Common Fair meal without requiring Plaintiff to sign the new adhesionary contracts which did not further a compelling penological interest.

436. As a proximate and direct result of Defendants' acts and/or omissions, Plaintiff continues to suffer irreparable phsycial/psychological injury.

437. As a direct result of their concerted unlawful and deliberate acts

and/or omissions, Defendants deprived Plaintiff of the right to practice Plaintiff's religion freely and impeded the due couse of justice in violation of the First Amendment to the Constitution, the Religious Freedom Restoration Act, 42 U.S.C. §2000bb, and 28 U.S.C. §1331.

SIXTEENTH CAUSE OF ACTION

438. As a direct result of aforementioned Retaliation against Plaintiff for exercising the right to seek redress on grievances with the government, as described in Count Seven, defendant Rivett, as a prison official, knew or should have known, of the pervasive risk of harm to Plaintiff.

439. Defendant Rivett, knowingly, deliberately and negligently, with reckless indifference, breached this duty due to his awareness of the pervasive risk of harm to Plaintiff, in ignoring and disregarding Plaintiff's right to be free from fear of administrative reprisals from the defendant for exercising the right to file grievances or complaints against the defendant and his failure to reasonably refrain from using administrative reprisals to harass, intimidate or oppress Plaintiff in resonse to Plaintiff's complaints against the defendant.

440. Pursuant to the Fifth Amendment of the Constitution of the United States of America, Plaintiff has a right to seek redress on grievances with the government without fear of retaliation from government employees and prison officials have a concomitant duty to protect inmates from administrative reprisal, in this regard, and to refrain from filing fabricated misconduct reports or depriving inmates of certain prison benefits and services as a means for harassing, intimidating or oppressing inmates that exercise the right to seek redress with the government on grivenaces against prison officials.

441. As a proximate and direct result of Defendant Rivett's acts and/or

omissions, Plaintiff continues to suffer irreparable physical/psychological injury.

442. As direct result of his concerted unlawful and deliberate acts and/or omissions, defendant Rivett deprived Plaintiff of the right to be free from administrative reprisals for exercising a constitutional right and impeded the due course of justice in violation of the Fifth Amendment of the Constitution and 28 U.S.C. §1331.

WHEREFORE Plaintiff demands judgment on the First Cause of Action against Defendants Hawk-Sawyer, Hershberger, Watts, Hedrick, Compton, Chism, Adelsberger, Shadowens, Ellet, Benson, Smith, Young, Foster, Tubb, Baltz, Bryant, Hopkins, Beisner, and Baggett, jointly and severally, for compensatory damages in the amount of $100,000.00; and further demands judgment against each of said defendants, jointly and severally, for punitive damages in the amount of $300,000.00, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER demands judgment on the Second Cause of Action against Defendant United States of America, for compensatory damages in the amount of $25,000.00, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER demands judgment on the Third Cause of Action against Defendants Hawk-Sawyer, Hershberger, Hedrick, Compton, Chism, Benson, Adelsberger, Shadowens, Ellet, Beisner and Baggot, jointly and severally, for compensatory damages in the amount of $100,000.00; and further demands judgment against each of said defendants, jointly and severally, for punitive damages in the amount of $300,000.00, cost of this action and for such other relief this

Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Fourth Cause of Action against the United States of America, for compensatory damages in the amount of $25,000.00, and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Fifth Cause of Action against Defendants Hawk-sawyer, Hershberger, Stepp, Adelsberger, Benson, Compton and Shadowens, jointly and severally, for compensatory damages in the amount of $1,000,000.00; and further demands judgment against each of said defendants, jointly and severally, for punitive damages in the amount of $5,000,000.00, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Sixth Cause of Action against the United States of America, for compensatory damages in the amount of $1,000,000.00, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Seventh Cause of Action against Defendants Hawk-Sawyer, Hershberger, Watts, Stepp, Compton, Chism, Yonkman and Campbell, jointly and severally, for declaratory and injunctive relief, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Eighth Cause of Action against Defendants Hawk-Sawyer, Watts, Hershberger, Stepp, Compton, Yonkman and Campbell, jointly and severally, for declaratory judgment and injunctive relief, and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Deands judgment on the Ninth Cause of Action against Defendants Hawk-Sawyer, Hershberger, Hedrick, Compton, Benson and Yonkman,

jointly and severally, for declaratory judgment and injunctive relief, and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Tenth Cause of Action against Defendants Stepp, Rivett, Globun, and Benson, jointly and severally, for compensatory damages in the amount of $100,000.00; and further demands judgment against each of said defendants, jointly and severally, for punitive damages in the amount of $300,000.00, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Eleventh Cause of Action against Defendant United States of America, for compensatory damages in the amount of $500.00, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Twelveth Cause of Action against defendants Stepp, Rivett and Globun, jointly and severally, for compensatory damages in the amount of $100,000.00; and further demands judgment against each of said defendants, jointly and severally, for penitive damages in the amount of $300,000.00, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Thirteenth Cause of Action against the United States of America, for compensatory damages in the amount of $500.00, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Fourteenth Cause of Action against Defendants Hawk-Sawyer, Hershberger, Watts, Stepp, Rivett, Ford and Globun, jointly and severally, for compensatory damages in the amount of $10,000.00; and further demands judgment against each of said defendants jointly and

severally, for punitive damages in the amount of $30,000.00, declaratory judgment, Injunctive relief, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Fifteenth Cause of Action against defendants Rivett and Ford, jointly and severally, for compensatory damages in the amount of $10,000.00; and further demands judgment against each of said defendants, jointly and severally, for punitive damages in the amount of $30,000.00, declaratory judgment and injunctive relief, cost of this action and for such other relief this Court deems just and equitable.

PLAINTIFF FURTHER Demands judgment on the Sixteenth Cause of Action against Defendant Rivett, for compensatory damages in the amount of $1,000,000.00; and further demands judgment against the defendant for puntive damages in the amount of $3,000,000.00, declaratory judgment, injunctive relief and for cost of this action and such other relief this Court deems just and equitable.

FURTHERMORE PLAINTIFF requests this Court to appoint counsel to represent him in this case.

I, WA'IL MANSUR MUHANNAD, hereby declare under penalty of perjury and the laws of the United States that the foregoing is true and correct to my knowledge.

وائل منصور محمد

June 8, 2001

WA'IL MANSUR MUHANNAD, Plaintiff
#12780-047
P.O. Box 1000
Marion, Illinois 62959

DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

WA'IL MANSUR MUHANNAD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 00-864-JPG**
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

This matter having come before the Court, the issues having been heard, and the Court having rendered a decision,

IT IS HEREBY ORDERED AN ADJUDGED that plaintiff Wa'il Mansur Muhannad's claims in Counts 1, 2, 3, 4, 5, 9, 10, 11 and 12 against defendant United States of America are dismissed with prejudice and without costs;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Wa'il Mansur Muhannad's claims in Count 2 against defendants Kathleen Hawk-Sawyer, G.L. Hershberger, Joseph Yonkman, Bill Hedrick, Bobby Compton, Willliam Chism, David Benson, Buddy J. Adelsberger, Gregory E. Shadowens, Ricky Ellet, James E. Tubb, Jr., and Micheal Beltz are dismissed with prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Wa'il Mansur Muhannad's claims in Count 4 against defendants Kathleen Hawk-Sawyer, G.L. Hershberger, David Benson, Buddy J. Adelsberger, Gregory E. Shadowens, Ricky Ellet, and E.A. Stepp are dismissed without prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Wa'il Mansur Muhannad's claims in Count 6 against defendants Buddy J. Adelsberger and Gregory E. Shadowens are dismissed with prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Wa'il Mansur Muhannad's claims in Count 7 against defendants Kathleen Hawk-Sawyer, G.L. Hershberger, Bill Hedrick, Bobby Compton, William Chism Jr., David Benson, Randy Baggott, Nelson Beisner, and John Bryant without prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Wa'il Mansur Muhannad's claims in Count 8 against defendants James E. Tubb, Jr., Michael Beltz, Buddy Adelshberger, Gregory E. Shadowens, Ricky Ellet, Joseph Yonkman, Thomas B. Smith, Randy Baggott, Nelson Beisner, Terry Foster, H. Hopkins, Charles Young, D.L. Campbell Jr., E.A. Stepp, Bobby Compton, William Chism Jr., Kathleen Hawk-Sawyer, G.L. Hershberger, and HarrellWatts are dismissed with prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Wa'il Mansur Muhannad's claim in Count 9 against defendant Kathleen Hawk-Sawyer is dismissed with prejudice;

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Wa'il Mansur Muhannad's claims in Count 10 against defendants Kathleen Hawk-Sawyer, G.L Hershberger, Louis Ford and Harrell Watts are dismissed with prejudice; and

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Wa'il Mansur Muhannad's claims in Count 11 against defendants E.A. Stepp, Edward James Rivett, David Benson, and Dave Globun are dismissed with prejudice.

DATED: February 2, 2005

NORBERT JAWORSKI

By:s/Deborah Agans, Deputy Clerk

Approved: s/ J. Phil Gilbert
J. PHIL GILBERT
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

WA'IL MANSUR MUHANNAD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. 00-864-JPG
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

ORDER

This cause is before the Court on the parties' Joint Motion to Dismiss Individual Defendants and Substitute the United States of America (Doc. 78), Joint Motion to Dismiss (Doc. 79) and the Motion to Supplement the Joint Motion to Dismiss (Doc. 85). Having received no objection to the motion to supplement, the Court **GRANTS** the motion (Doc. 85).

The Court further **GRANTS** the Joint Motion to Dismiss Individual Defendants and Substitute the United States of America (Doc. 78), **DISMISSES** defendants Buddy Adelsberger, Randy Baggett, Nelson Beisner, Michael Beltz, Dave Benson, Bobby Compton, Rick Ellet, Dave Globun, Edward Rivett, Greg Shadowens, Bill Hedrick, E.A. Stepp, William Chism, Jr., and James Tubb from this case and **SUBSTITUTES** the United States of America for those defendants.

The Court further **GRANTS** the Joint Motion to Dismiss as supplemented (Docs. 79 & 85), **DISMISSES with prejudice** plaintiff's claims against defendant United States of America without costs, fees, or interest, and **DIRECTS** the Clerk of Court to enter judgment accordingly.

DATED: February 2, 2005.

s/ J. Phil Gilbert
J. PHIL GILBERT
UNITED STATES DISTRICT JUDGE

From: Paul Pepper
To: Moore, Chris
Date: 12/10/04 7:43AM
Subject: Fwd: Wa'il Mansur Muhannad v. U.S., et al., Civil Action No. 00-864-JPG

Thank you for sending me Austin's memo to you in which he states that he will have his aunt pay the court debts. I will take his word for it and go ahead and get his institution debts clear and see if we can reinstate his GCT.

>>> Paul Pepper 12/09/04 02:29PM >>>
Chris, thank you for coming down yesterday and resolving this case. I did get copies of the joint motions that were filed. Unfortunately, the way we structured the settlement caused a problem I did not foresee. It is explained in the attached draft of a memorandum to plaintiff. How does it sound to you? When do you think we should send it?

U. S. Department of Justice
Federal Bureau of Prisons
Consolidated Legal Center

Saint Louis, Missouri 63103

December 20, 2004

TO: Wa'il Mansur Muhannad, (a/k/a Anthony Austin), Reg. No. 12760-047

/s/
FROM: Paul Pepper, Senior Attorney Advisor, St. Louis CLC

SUBJECT: *Wa'il Mansur Muhannad v. U.S., et al.*, Civil Action No. 00-864-JPG

I am glad we were able to amicably settle this claim and wish you the best during the remainder of your incarceration and after your release. Please be assured that we will strictly follow the provisions of the stipulation for compromise settlement in accordance with your wishes. One of your aims in entering this settlement was to clear your institution account so you would be able to purchase items at the commissary. In discussing this issue with the business office, it was pointed out to me that $363.13 of this settlement was to pay your outstanding PLRA fees (see attached memorandum of 11/10/04).

When we were going to deposit the $1205 in your commissary account, this debt would have been paid automatically. However, since we honored your wishes to give you the check to be mailed to your aunt, the court debt will have to be taken care of in another manner. Although the administration can address your institution debt, the government does not have the authority to expend funds to pay your court debt or ignore court orders that a portion of any receipts to your commissary account be forwarded. Please advise as to how you would like to handle this matter. Thank you for your assistance and do not hesitate to contact me or AUSA Moore regarding any questions or concerns.

AO 440 (Rev. 10/93) Summons in a Civil Acti...

UNITED STATES DISTRICT COURT

CENTRAL District of ILLINOIS

GIBSON, CHARLES

V.

UNITED STATES OF AMERICA

SUMMONS IN A CIVIL CASE

CASE NUMBER: 02-1061

FILED
MAR 20 2002 cert.
U.S. ATTORNEY mail
PEORIA, IL

TO: (Name and address of Defendant)

UNITED STATES OF AMERICA
c\o John Ashcroft
Attorney General of United States
Department of Justice
Washington, DC 20530

UNITED STATES OF AMERICA
U.S. Attorney, C.D. Ill.
600 E. Monroe St., Ste. 312
Springfield, IL 62701

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

RICHARD L. STEAGALL
Nicoara & Steagall
416 Main Street, Ste. 815
Commerce Bank Building
Peoria, IL 61602

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

John M. Waters
CLERK

3/18/02
DATE

A Haynes
(By) DEPUTY CLERK

CIV-NCR-2002-02964 entered 3-26-02

FILED
FEB 26 2002
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

CHARLES GIBSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 02-1061

MAR 20 2002
U.S. ATTORNEY
PEORIA, IL
cert mail

COMPLAINT

Now comes the Plaintiff, CHARLES GIBSON, by RICHARD L. STEAGALL, his attorney, and complaining of the Defendant, UNITED STATES OF AMERICA, for a claim for relief states as follows:

I.
Jurisdiction & Venue

1. Jurisdiction is founded under 28 U.S.C. § 1346 (b)(1) to hear this claim under the Federal Tort Claims Act, 28 U.S.C. § 2674. Venue is founded under the provisions of 28 U.S.C. § 1391 (b)(2).

2. At all times material, plaintiff was incarcerated at the Federal Correctional Institution in Pekin, Illinois ("FCI-Pekin"), serving a criminal sentence.

3. The occurrence complained of occurred on the 1st day of March, 1999 at FCI-Pekin in the City of Pekin, County of Tazewell, and State of Illinois.

4. Plaintiff duly served by personal delivery on March 1, 2001, a Notice of Claim for Damage, Injury, or Death on the United States Department of Justice, Bureau of Prisons, in care of the Legal Advisor, North Central Regional Office, Gateway Complex Tower II, 8th Floor, 400 State, Kansas City, KS 66101-2421 as required by 28 U.S.C. § 2675 (a). A true and

correct copy of the Notice of Claim containing a "Received" stamp for Legal North Central Region showing March 1, 2001 is attached as Exhibit A.

5. Daryl Kosiak, Regional Counsel of the Bureau of Prisons, denied the plaintiff's claim in an August 31, 2001 letter. A true and correct copy of the letter is attached as Exhibit B. Plaintiff has filed this action on February 25, 2002, within six months of the August 31, 2001 mailing of the denial of that claim as required by 28 U.S.C. § 2401.

II.
The Occurrence Complained Of

6. Plaintiff has been paralyzed since July 2, 1988. His paralysis requires that he have a catheter inserted into his urethra to enable him to urinate. The catheter must be changed regularly by health care personnel.

7. Plaintiff went to the Health Services Department of FCI-Pekin on March 1, 1999. His catheter changed by Ms. L. Serrano, a Health Services employee. By 1:00 p.m., plaintiff realized he had not been urinating. He informed Unit Manager Rice of FCI-Pekin that he was not feeling well and received permission to return to Health Services.

8. Serrano against saw plaintiff. She told him she could fix it. She irrigated the catheter with water. The water went in, but did not flush out. Serrano then removed the catheter. Blood gushed from plaintiff's penis. Ms. Serrano told plaintiff she had placed 10 cc of water in the catheter, less the 5 cc that returned, so she had not placed the catheter all the way to his bladder. Plaintiff stopped bleeding at 1:30 p.m. Serrano apologized for the mistake with the catheter.

9. At 8:20 p.m., plaintiff realized he had not yet urinated. He received permission to go to Health Services where he saw Robert Jackson, a physician's assistant. The catheter was

irrigated; water went in, but did not come out. Jackson pushed the catheter in and claimant immediately began to urinate. Jackson told him Serrano had not placed the catheter in far enough.

10. At 1:00 a.m., plaintiff returned to Health Services. Mr. Rayes placed another catheter in him. The catheter fell out at 3:00 a.m. on March 2, 1999. He returned to Health Services. Ms. Rayes put in another catheter which caused plaintiff great pain.

11. Plaintiff returned to Health Services at 6:00 a.m. and was seen by Nurse Ted Wall. Wall told plaintiff something was seriously wrong, that he would not touch the catheter because he suspected the end of the tube was imbedded in the testicle. Wall told plaintiff to return at 8:00 a.m. to the FCI-Pekin physician, Thomas Webster, M.D.

12. Plaintiff returned at 8:00 a.m. Dr. Webster and Nurse Wall saw him. Dr. Webster took X-rays. While the X-rays were being taken, the catheter fell out and blood flowed from plaintiff's penis. The X-rays showed the tube had been inserted in his testicle.

13. Dr. Webster immediately referred him to Thomas Stansic of Peoria, Illinois, a urologist. Plaintiff was transported and admitted to Methodist Medical Center. Dr. Stansic preformed surgery to repair the plaintiff's damaged urethra at 5:30 p.m. on March 2, 1999.

III.
Plaintiff's Claim for Relief

14. At all times material, the United States acting through its FCI-Pekin employees were under a duty to possess and apply the skill and knowledge of reasonable health care practitioners of their particular training and specialty consistent with the accepted standard of care.

15. One or more of the agents of the United States involved in insertion and removal of the catheter were negligent in utilizing the device to insert the catheter in plaintiff so as to puncture his urethra and penetrate his testicle.

IV.
Plaintiff's Damages

16. As a direct and proximate result of the negligence of the agents of the United States, plaintiff has endured a punctured urethra and testicle; by reason thereof, plaintiff has in the past and will in the future endure great physical pain and suffering; plaintiff has in the past and will in the future be disabled, hindered, and hampered, from carrying on the ordinary affairs and duties of life had it not been for the injuries suffered.

V.
Prayer for Relief

WHEREFORE, Plaintiff, CHARLES GIBSON, prays for judgment against the Defendant, UNITED STATES OF AMERICA, in the amount of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000) plus costs.

CHARLES GIBSON, Plaintiff,

By: _____
RICHARD L. STEAGALL, his attorney

RICHARD L. STEAGALL
Nicoara & Steagall
416 Main Street, Suite 815
Commerce Bank Building
Peoria, IL 61602-1103
Telephone: (309) 674-6085

NICOARA & STEAGALL
Attorneys at Law
416 Main Street, Suite 815
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Peoria, Illinois 61602-1103
(309) 674-6085

John P. Nicoara
Richard L. Steagall

Facsimile: (309) 674-6032
E-Mail: 70754.3140@compuserve.com

March 18, 2002

Certified Mail, Return Receipt Requested
Jane Paul-Miller
United States Attorney, C.D. Ill.
600 E. Monroe Street, Suite 312
Springfield, IL 62701

RECEIVED
MAR 20 2002
U.S. ATTORNEY
PEORIA, IL

cert mail

Re: *Charles Gibson v. United States of America*
U.S. District Court, C.D. Ill. Case No. 02-1061

Dear U.S. Attorney Miller-Paul:

I enclose here with the following documents under Fed.R.Civ.Proc. 4 (i):

1. The original of this letter.

2. The summons issued against the defendant, United States of America, in this action filed in the United States District Court for the Central District of Illinois, Peoria Division as required by Fed.R.Civ.Proc. 4(i)(1)(B).

3. A file stamped copy of the complaint filed in the United States District court for the Central District of Illinois, Peoria Division against the defendant, United States of America, as required by Fed.R.Civ.Proc. 4 (i)(1)(B).

4. A copy of a transmittal letter forwarding the summons and file stamped copy of the complaint certified mail return receipt requested to The Honorable John Ashcroft, Attorney General of the United States, Department of Justice, Washington, DC as required by Fed.R.Civ.Proc. 4 (i)(1)(A).

This summons and complaint are being served upon you as required by Fed.R.Cia.Proc.4 (i). If you have any questions, Please let me know.

Very truly yours,

RICHARD L. STEAGALL

RLS\dlb
Enclosures
Pc: Jane Paul-Miller
United States Attorney
Central District of Illinois (w/o enclosures)

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF ILLINOIS

AT PEORIA

FILED
MAY 27 2004
JOHN M. WATERS, Clerk
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CHARLES GIBSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 02-1061

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the plaintiff, Charles Gibson, and the defendant, the United States of America, through their undersigned counsel, having come to a settlement on the issues involved in this case, hereby stipulate and agree that this action shall be dismissed with prejudice.

IT IS SO AGREED.

For Plaintiff:

Richard L. Steagall
Attorney at Law
NICOARA & STEAGALL
416 Main Street, Suite 815
Commerce Bank Building
Peoria, Illinois 61602-1193

For Defendant:

Gerard A. Brost
Assistant United States Attorney
One Technology Plaza
211 Fulton Street, 4th Floor
Peoria, Illinois 61602

U.S. ATTY. PEORIA, ILL.
2004 MAY 28 AM 10 17

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT PEORIA

CHARLES GIBSON,	)	
Plaintiff,	)	
vs.	)	Case No. 02-1061
UNITED STATES OF AMERICA,	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement Agreement and Release.

2. The United States of America agrees to pay the sum of TWENTY TWO THOUSAND DOLLARS ($22,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any kind and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this

settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation for Compromise Settlement and Release in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees, for any expenditure of funds resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they

are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for TWENTY TWO THOUSAND dollars ($22,000.00) and made payable to CHARLES GIBSON, plaintiff and RICHARD L. STEAGALL, plaintiff's attorney. The check will be mailed to plaintiff's attorney at the following address: Nicora and Steagall, 416 Main Street, Suite 815, Peoria, Illinois 61602. Plaintiff's attorney agrees to distribute the settlement proceeds and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any

additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

IT IS SO STIPULATED AND AGREED:

For the Plaintiff, Charles Gibson:

RICHARD L. STEAGALL
Nicora and Steagall
416 Main Street
Suite 815
Peoria, Illinois 61602
309.674.6085

For the Defendant, United States:

GERARD A. BROST
Assistant United States Attorney
One Technology Plaza
211 Fulton Street, 4th Floor
Peoria, Illinois 61602
309.671.7050

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Timothy Kenneth Ueland,

Plaintiff,

v.

United States of America,

Defendant.

COMPLAINT

I. JURISDICTION AND VENUE

1. Jurisdiction of the above-named court is invoked pursuant to the Federal Tort Claims Act, 28 U.S.C. § § 2671-2680. This Court is vested with jurisdiction pursuant to 28 U.S.C. § 1346 (b).

2. Venue of this action within the fourth division of the district of Minnesota is appropriate because Plaintiff Timothy Ueland is a citizen and resident of said state and district.

II. STATEMENT

1. On May 29, 1996, at approximately 10:00 a.m., plaintiff Timothy Kenneth Ueland was a passenger in a Federal Bureau of Prisons vehicle which was being followed by a second Federal Bureau of Prison vehicle near the intersection of I-55 North and I-294 near Springfield, Illinois. At said time and place, the vehicle in which plaintiff Timothy Kenneth Ueland was a passenger was rear-ended by the second Bureau of Prisons vehicle.

2. As a result of this accident, Plaintiff Timothy Kenneth Ueland sustained severe and permanent injuries to his back and neck as well as

other injuries; he has in the past and will in the future incur a loss of earnings and of earning capacity; he has in the past and will in the future suffer great physical and mental pain. Therefore, Plaintiff Timothy Kenneth Ueland has been damaged and injured in the amount of Seventy-five Thousand Dollars and no/100 ($75,000.00) Dollars.

III. CAUSE OF ACTION

1. The accident of May 29, 1996, causing severe and permanent injuries to Plaintiff Timothy Kenneth Ueland, occurred as a result of the carelessness and negligence of defendant and its employees in the operation of defendant's motor vehicles.

2. The May 29, 1996, accident was caused by United States of America Department of Justice Bureau of Prisons employees Brett Sommerville and Dave McDonough while in the course and scope of their employment.

3. On June 18, 1997, Plaintiff Timothy Ueland filed a claim with the Bureau of Prisons North Central Regional Office, an agency of the United States. On December 19, 1997, the United States Federal Bureau of Prisons denied his claim.

4. The negligence law of the state of Illinois governs this proceeding.

WHEREFORE, Plaintiff Timothy Ueland requests judgment against defendant Untics States of America as follows:

1. For compensatory damages, the sum of $75,000.00;

2. Interest as allowed by law;

3. Costs of suit; and

4. Such other and further relief as the Court may deem just and proper.

WHEREFORE, Plaintiff demands Judgment against Defendant in the amount of Seventy-five Thousand Dollars and no/100 ($75,000.00) Dollars compensatory damages, together with interest, costs and disbursements incurred herein.

SCHWEBEL, GOETZ, SIEBEN & MOSKAL, P.A.

By _____
John E. Vukelich (#113347)
James S. Ballentine (#209739)
ATTORNEYS FOR PLAINTIFF
5120 IDS Center
Minneapolis, Minnesota 55402-2246
(612) 333-8361

Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Blanche M. Manning	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	99 C 2960	DATE	8/12/2004
CASE TITLE	Ueland vs. USA		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ Local Rule 41.1 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] Pursuant to stipulation for compromise settlement, this case is dismissed with prejudice with leave to reinstate should the terms of the settlement not be satisfied.

(11) ☐ [For further detail see order (on reverse side of/attached to) the original minute order.]

	No notices required, advised in open court.		number of notices	Document Number
	No notices required.			
	Notices mailed by judge's staff.		AUG 13 2004 date docketed	
	Notified counsel by telephone.			
✓	Docketing to mail notices.		GMA docketing deputy initials	134
	Mail AO 450 form.	U.S. DISTRICT COURT CLERK 2004 AUG 13 AM 8:05		
	Copy to judge/magistrate judge.		date mailed notice	
rs	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials	

FILED
MAY 12 2004
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TIMOTHY UELAND, Plaintiff,	)	No. 99 C 2960
v.	)	Judge Manning
UNITED STATES OF AMERICA Defendant.	)	

DOCKETED
MAY 13 2004

RELEASE

A Stipulation For Compromise Settlement has been entered into between plaintiff, Timothy Ueland, and the defendant, United States of America, in the above entitled cause, wherein, defendant, United States of America agreed to pay plaintiff the sum of $4,500.00 inclusive of interest, costs and attorneys' fees.

Timothy Ueland, plaintiff, does hereby acknowledge full payment of the compromise settlement heretofore made and plaintiff's counsel, Steve Schulte and Michael A. Flomenhoft, Winston & Strawn hereby acknowledge that said payment includes their fees and costs.

132

Timothy Ueland, plaintiff, in consideration of the sum in hand paid, does here and now release and forever discharge the United States of America, its agencies, instrumentalities, its agents and servants, from any and all manners of action, suits, proceedings, debts, contracts, damages, claims, liens and demands whatsoever, in law or in equity, against the United States of America, its agencies, instrumentalities, agents and servants, which the plaintiff, Timothy Ueland, ever had and now has, or which he or his successors or assigns hereafter can, shall, or may have by reason of any manner, cause or things whatsoever, arising out of and limited to the incidents involved in this case.

3-17-04
Dated:

Timothy K Ueland
Timothy Ueland, plaintiff

Thomas D Hadtrath
NOTARY PUBLIC
My Commission Expires:

THOMAS D. HADTRATH
NOTARY PUBLIC
My Commission Expires 1-31-2005

KC

FILED

JUN 06 2005

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED

JUN - 3 2005

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

PETER FERNANDEZ JR.,

8723 W. 44TH PLACE,

LYONS ILLINOIS, 60534,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,, FEDERAL BRUEAU OF PRISONS,

WARDEN HEDRICK,
FEDERAL BUREAU OF PRISONS
MEDICAL CENTER,
SPRINGFIELD, MISSOURI,

WARDEN KEITH E. OLSON,
U.S. PENITENTIARY,
TERRE HAUTE, INDIANA,

ONE SPECIAL HOUSING UNIT CORRECTURAL OFFICER, U.S. PENITENTIARY, TERRE HAUTE, INDIANA.

Defendant's

Case No.:

05C 3288

Judge:

JUDGE HOLDERMAN

MAGISTRATE JUDGE SCHENKIER

Magistrate Judge:

LOSS OF PERSONAL PROPERTY BY FEDERAL EMPLOYEE'S

Prepared "Pro Se" by Plaintiff

COMPLAINT

Now comes Peter Fernandez Jr. (Plaintiff) and complaining of the Defendants the U.S. Department of Justice, Federal Bureau of Prisons; Warden Hedrick, Federal Bureau of Prisons Medical Center, Springfield, Missouri; Warden Keith E. Olson, U.S. penitentiary, Terre Haute, Indiana; and One Special Housing Unit Correctional Officer, Terre Haute, Indiana alleges and states as follows:

JURISDICTION

The jurisdiction of this court to hear and determine this action is predicated upon events surrounding the loss of authorized personal property of plaintiff Peter Fernandez Jr. while incarcerated under the U.S. Department of Justice Federal Bureau of Prisons.

THE PARTYS

This action is brought by Plaintiff Peter Fernandez Jr. and against the Defendants The Federal Bureau of Prisons, et al. This action stems from the intentional infliction of emotional

distress imposed on the plaintiff with regard to the treatment he received while incarcerated, and the events surrounding the loss and/or destruction of the plaintiffs authorized personal property, one cane used to assist in walking. The Plaintiff Peter Fernandez Jr., due his disabled and handicapped medical condition was allowed to keep his cane with him during his incarnation at the federal prison camp and also later at the Special Housing Unit (A.K.A. The SHUe and/or The Hole) in Terre Haute, Indiana. The loss of Plaintiffs cane was a deliberate and/or a negligent act on the part of the Federal Bureau of Prisons, et al (Defendants). Plaintiffs repeated pleas to retrieve his personal property through the administrative remedy process (B.P. 8 through B.P. 11) were timely and diligently pursued. The Federal Bureau of Prisons, et al intentionally misrepresented facts, incidences and rules in order to justify their acts as is evident in the denial responses that were submitted. (Exhibits A-U)

GENERAL ALLEGATIONS

1. Peter Fernandez Jr.(Plaintiff) was tried and sentenced to a five (5) year prison term for offences that included mail fraud, theft of funds, engaging in monetary transactions in

property derived from unlawful activity, and laundering of monetary instruments involving case no. 97CR 835-2.

2. Plaintiff self surrendered on May 17, 2000 and was incarcerated at the U.S. Penitentiary prison camp at Terre Haute, Indiana as inmate # 08107-424.
3. Plaintiffs' case is currently under appeal.
4. On the day the Plaintiff self surrendered he had in his possession one wooden cane that has been in his family for generations. The cane was used by the Plaintiff in order to assist him in walking and standing. The cane was listed on the "Inmate Personal Property Record-" (Exhibit A) upon entry to the prison and the disposition of said cane was marked "K" for "Keep in Possession" by a prison staff member.
5. On or about March 4, 2002 Plaintiff was taken from the prison camp in Terre Haute, Indiana and relocated to the Special Housing Unit in the U.S. Penitentiary section of the facility also in Terre Haute, Indiana.
6. On or about April 19, 2002 Plaintiff was transferred out of the Federal prison facility at Terre Haute, Indiana. At this time a correctional officer assisting in the transfer of the Plaintiff told said plaintiff that he could not take the cane onto the bus. The Plaintiff pleaded with the correctional officer to allow him to keep the cane as his medical condition required its use. The correctional

officer assured the Plaintiff that he would personally pack the cane with his other personal property and that it would be returned to him upon arrival at his final destination, which was to be the medical center in Springfield Missouri.

7. On or about April 26, 2002 Plaintiff arrived at the Federal Bureau of Prisons Medical Center in Springfield, Missouri via a one (1) week stay at the transfer center in Oklahoma City, Oklahoma.

8. On or about April 26, 2002 and while at the medical center in Springfield, Missouri Plaintiff received his personal property and found all to be accounted for with the exception of his cane.

9. After discovering that his cane was missing Plaintiff sought the assistance of his new case manager Ms. Darla Dunn and followed bureau procedure by submitting an "Inmate Request to Staff" dated April 28, 2002 (Exhibit B) in an attempt to locate the missing cane.

10. A response came from Mr. Bennett (new counselor for Fernandez Jr.) stating that the staff at Terre Haute told him that the cane with "*...some kind of ornate carving on the handle...*" was either returned to health services or destroyed. (exhibit B)

11. This response was unacceptable to the Plaintiff and he subsequently took the next step by filing an

"Administrative Remedy System Informal Resolution Form" A.K.A. BP-8 (Exhibit C).

12. The response to this form stated that "*...the cane in question was made by his* [the Plaintiffs'] *son in the wood shop at the camp, and that the inmates allegations are false.*"

13. Plaintiff filed on May 31, 2002 the next Request for Administrative Remedy, A.K.A. BP-9 (Exhibit D) which was directed to Warden Hedrick at the Missouri facility.

14. Some Time between June and July of 2002 Plaintiff was again transferred this time to the Federal Correctional Institution in Waseca Minnesota during which time he never received another correspondence from Warden Hedrick regarding the lost cane.

15. On July 12, 2002 while at the F.C.I. in Waseca, Mn. Plaintiff received at mail call an "extension of time for response" filed by prison employees at Springfield Mo. And dated July 10, 2002. (Exhibit E)

16. On or about August 8, 2002 and without a resolution to the BP-9 sent to warden Hedrick, the defendant filed a "Regional Administrative Remedy Appeal" A.K.A. BP-10. (Exhibit F)

17. Plaintiff received a rejection notice on his administrative remedy appeal dated August 27, 2002 from the

North Central Regional Office (Exhibit G) stating that documentation was missing.

18. Plaintiff responded with a resubmittle and a letter dated September 6, 2002 stating that "*1. Copies of my BP-8 and BP-9 Remedy Requests were both submitted…*" and "*2. I gave to you the only document I have ever received from Warden Hedricks office…*" (Exhibit H)

19. Another rejection notice was issued by the North Central Regional Office dated September 19, 2002 stating the same reasons as the previous rejection. (Exhibit I)

20. Plaintiff filed a "Central Office Administrative Remedy Appeal" dated September 29, 2002. (Exhibit J)

21. Plaintiff received a rejection notice dated October 10, 2002 (Exhibit K) essentially stating the same reasons for rejection as the regional response. (see Exhibit's G and I)

22. Plaintiff sent a letter of reconsideration to Ms. Kathleen Hawk, Director of the Federal Bureau of Prisons in Washington dated October 21, 2002 (Exhibit L) reiterating what he has been maintaining in all of his previous correspondences.

23. Plaintiff received another rejection notice dated October 31, 2002 still sighting the same reasons as before and adding "*The warden responded to your appeal on 07-02-02.*" (Exhibit M)

24. Plaintiff submitted an "Inmate to Staff Request" to his Case Manager Ms. Agrimson dated March 28, 2003 (Exhibit N) asking for direction in which manner to proceed. No reply was received by the Plaintiff from this staff member.

25. Plaintiff requested, received and filed a tort claim dated April 10, 2004 (Exhibit O) still attempting to re-acquire his cane.

26. On or about June 30, 2003 the Plaintiff was transferred to the Federal Prison Camp in Marion, Illinois.

27. Plaintiff had to re-submit this form (claim number TRT-NCR-2004-02937) with a dollar value inserted into section 12d in order for the tort claim to be processed. (Exhibits P,Q, & R)

28. The plaintiff Fernandez Jr. was released from the Federal Prison Camp to the Chicago Half Way House on or about May 11, 2004.

29. A response that was nearly two months in transit from the Legal Instruments Examiner dated June 22, 2004, was received by the Plaintiff via his half way house Resident Advisor, Ms. James on August 16, 2004, requesting that a receipt be produced by the Plaintiff for his cane (Exhibit S). The plaintiff reminded Defendant through a letter (Exhibit T) of the fact that the cane was a family heir loom and has been in his family for generations and therefore a receipt does not exist.

30. This tort claim was responded to with a notification of final denial under 28 CFR § 14.9. (Exhibit U)

31. Plaintiff, Peter Fernandez Jr. completely disagrees with the following reasons for denial;

a. "*Investigation of your claim did not reveal that you suffered any personal property loss as a result of the negligent acts or omissions of bureau of prison employees acting within the scope of their employment.*"

Evidence shows that the Plaintiff entered the prison with his cane in his possession and was allowed to keep it with him through the first part of his incarceration. (Exhibit A)

Terre Haute Camp personnel admitted remembering said cane with "ornate carvings" and admitted to having the cane destroyed or lost. (Exhibit B)

In a later correspondence (Exhibit C) *prison employees changed their position with the claim that "…the cane in question was made by his son…" and this brings us back to* Exhibit A *showing that the cane was carried into the prison camp in Terre Haute, Indiana by the Plaintiff.*

b. "*…review of this matter revealed that your allegations stem from incidents which occurred more than two years prior to the date of the proper filing of this claim.*"

The length of time it took to file the tort claim was due to the fact that all the informal resolutions and administrative remedies had to be followed according to the Federal Bureau of Prisons Program Statements. Although the duration was in fact more than two years each individual correspondence which was filed by the Plaintiff was filed in a timely fashion and within the time limits set forth for such filings.

32. WHEREFORE, for the foregoing reasons Plaintiff Peter Fernandez Jr. prays this court to enter a judgment against the Defendants The U.S. Department of Justice Federal Bureau of Prisons, Warden Hedrick Federal Bureau of Prisons Medical Center in Springfield Missouri, Warden Keith E. Olson Federal Bureau of Prisons U.S. Penitentiary in Terre Haute Indiana, and one special housing unit correctional officer Terre Haute Indiana as follows:

a. For actual damages in the amount of Eighty Five Thousand Dollars ($ 85,000.00) and for such other and further relief as this court deems just and equitable.

b. For compensatory and exemplary damages in the amount of One Hundred Thousand Dollars ($ 100,000.00) and for such other and further relief as this court deems just and equitable.

c. For Punitive damages in the amount of One Hundred Thousand Dollars ($ 100,000.00) and for such other and further relief as this court deems just and equitable.

Please accept this complaint prepared "Pro Se" by Plaintiff Peter Fernandez Jr. Thereto in light of Haines Vs. Kerner, 404 U.S. 519,520,925. CT. 594, 30 L. ED. 2d 652 (1972). PLAINTIFF DEMANDS A TRIAL BY JURY.

RESPECTFULLY SUBMITTED

By: _____

Peter Fernandez Jr.
Pro Se Plaintiff
8723 West 44th Place
Lyons, Illinois 60534

U.S. Department of Justice
Federal Bureau of Prisons

Inmate Personal Property Record—
Institution: USP THA

1. Name:	2. Register Number:	3. Unit:	4. Date and Time of Inventory:
Fernandez, Peter N, JR	08107-424	Camp	5/17/06 12:20PM

5. Purpose of Inventory (Check one that applies): Date and Time of Action: 5/12/06 12:30PM

a. ✓ Admission b. ___ Hospital c. ___ Writ d. ___ Transfer e. ___ Detention f. ___ Release
g. ___ Incoming package h. ___ Other (specify)

6. Disposition (Disp.)
D - Donated M - Mail S - Storage
K - Keep in Possession
C - Contraband (Attach BP-Record-102)

7. Type of Property:

a. Personally Owned Items

#	Article	Disp.
	Batteries	
	Belt	
	Billfold	
	Books, reading hard ___, soft ___	
	Books, religious hard ___, soft ___	
	Brassiere	
	Cap, Hat	
	Coat	
	Coins	
	Comb	
	Combination lock	
	Dress	
	Driver's license	
	Earplugs	
	Eyeglass case	
1	Eyeglasses	K
	Gloves	
	Hair brush/pick	
	Handkerchief	
1	Jacket	M
	Jogging suit	
	Legal Materials	
	Letters	
	Magazines	
	Mirror	
1	Nail Clippers	
1	Pant/slacks	M
	Pen, ballpoint	
	Pencils	
	Personal papers	
	Photo album	
	Photos	

#	Article	Disp.
	Plastic spoon, cup	
	Playing cards	
	Purse	
	Radio (w/earplug)	
1	Religious medals-chain	K
1	Ring Yellow	K
	Shirt/blouse	
1	Shoes DR. Leather	K
	Shoes, shower	
	Shoes, slippers	
	Shoes, tennis	
	Shorts	
	Skirt	
	Slip	
	Social security card	
	Socks	
	Socks, athletic	
	Stamps	
	Stockings	
	Sunglasses	
	Sweater	
	Sweat pants	
	Sweat shirt	
	Trophy	
1	T-Shirts	M
1	Underwear	M
	Watch/watch band	
	Wig	
1	Watch	M
1	Comb	M
1	Nail Clippers	M
1	Pen/Pencil	M
1	Envelopes	M

b. Hygiene, etc.

#	Article	Disp.
	Dental floss	
	Dentures	
	Deodorant	
	Hair oil	
	Manicure	
	Powder	
	Razor	
	Razor blades	
	Shampoo	
	Shaving lotion	
	Skin lotion	
	Soap	
	Soap dish	
	Toothbrush	
	Toothpaste	

c. Hobbycrafts

#	Article	Disp.

d. Food/Tobacco Items

#	Article	Disp.
	Canned tobacco	
	Chewing tobacco	
	Cigarettes	
	Cigars, snuff	
	Coffeemate	
	Cold drink mix, soda	
	Fruit	
	Honey, Hi-protein	
	Instant chocolate	
	Instant coffee	
	Instant tea	
	Pipe cleaner/filters	
	Pipes	

e. Miscellaneous (List any damaged property and from where it was received: e.g., U.S. Marshal)



8. Items Alleged by Inmate to Have Value Over $100.00

Description of Property	Value Alleged by Inmate

✓ No individual item over $100.00

9. Article(s) Listed as "Mail" (M) Are to be Forwarded to (Name and Address of Consignee): (708)447-1959
Barbara Fernandez 8723 W. 44th Place Lyons, IL. 60534

10. Claim Release: a. The receiving officer, as soon after receipt of the property as possible, will review the inventory with the inmate to verify its accuracy. Property that is stored, kept in possession of the inmate, mailed out of the institution, or donated is to be marked in the appropriate section of this inventory form. The receiving officer certifies receipt, review and disposition of the property by signing below. The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Receiving Officer: R. STARBUCK / R. Starbuck Date: 5/17/06 Time: 12:30PM

I have today reviewed the property returned to me. Signature of Inmate: P. Fernandez Reg No.: 08107-424 Date: 5/17/06 Time: 1220PM

b. Upon release of the inmate from the unit, detention, etc., the releasing officer is to give the inmate that property stored as a result of the inmate's housing. The inmate certifies release of the property, except as noted on this form, and receipt of a copy of the inventory by signing below. When the inmate claims a discrepancy in the inventory, the releasing officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Releasing Officer: _____ Date: _____ Time: _____

I have today reviewed the property returned to me. Signature of Inmate _____ Reg. No.: _____ Date: _____ Time: _____

Original — Inmate's Central File; CC: Inmate, R & D, Special Housing

USP LVN

Previous editions not usable

BP-383(58)
October 1982

BP-S148.055 INMATE REQUEST TO STAFF CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member)	DATE:
DARLA DUDU, CASE MGR.	28 APRIL 2002
FROM: PETER FERNANDEZ	REGISTER NO.: 08107-424
WORK ASSIGNMENT: MEDICAL	UNIT: 4-3

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DEAR MS. DUDU; I WILL BE HERE 1 WEEK OR 2 MAY 2002. I WAS IN OKLAHOMA CITY FOR ONE WEEK ALSO. PRIOR TO THIS I WAS IN THE S.H.U. (HOLE) FOR JUST OVER 6 WEEKS. ALL MY PROPERTY ARRIVED HERE FROM TERRE HAUTE CAMP ON FRIDAY 26 APR. 2002. I HAVE ALWAYS USED A CANE TO ASSIST ME IN GETTING ALONG WHILE AT CAMP FOR THE PAST 2 YEARS. THE CANE WAS WITH ME EVERY-WHERE. WHEN LEAVING TERRE HAUTE S.H.U. I WAS NOT ALLOWED TO BRING MY CANE WITH ME. THE OFFICER TOLD ME THAT HE WOULD BE SURE TO SHIP IT ALONG WITH THE REST OF MY PROPERTY. THIS CANE WAS HAND (OVER)

(Do not write below this line)

DISPOSITION:
I SENT A MESSAGE TO THE ISM AT TERRE HAUTE ON MAY 2, 02. I RECEIVED A REPLY FROM MR. STEPHEN GIBSON, THAT THE CANE IN QUESTION WAS RETURNED TO HEALTH SERVICES AND THAT YOU WERE NEVER INFORMED THAT YOU WOULD BE RECEIVING IT. MR. GIBSON STATED THAT THE CANE HAD SOME KIND OF ORNATE CARVING ON THE HANDLE HOWEVER, HE SPECULATED IT HAD BEEN DESTROYED. YOU WILL NEED TO PROVIDE A COPY OF YOUR FORM 40 WHICH WOULD IDENTIFY THIS ITEM AS YOUR PERSONAL PROPERTY. BRING IT WITH YOU TO OPEN HOUSE, AND I WILL CONTINUE TO PURSUE IF NEED BE.

Signature Staff Member: M. Brunt — Date: 5-3-02

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.0 and BP-S148.070 APR 94

REC'D 6 MAY 02

EXHIBIT B

MADE BY MY GRANDFATHER FOR MY GRANDMOTHER IN GERMANY AND IS OVER 80 YEARS OLD. MY MOTHER AND WIFE ALSO USED IT AND NOW FOR THE PAST FEW YEARS IT HAS BEEN MINE AND WITH ME EVERYWHERE. THIS WALKING STICK IS PRECIOUS TO ME AND MY FAMILY. I HAVE WAITED FOR ALMOST A WEEK IN THE HOPE THAT IT WOULD GET HERE TO R&D BUT SO FAR NOTHING. CAN YOU PLEASE CALL THE S.H.U. AT TERRE HAUTE AND ARRANGE FOR THEM TO FIND IT AND SHIP IT HERE AS THE PROMISED ME. EVERYONE THERE WAS TOTALLY FAR MILIAR WITH MY CASE, !!

THANKS SO MUCH FOR YOUR HELP

SINCERELY

Peter Fernandez

#08107-424

BP-8

Attachment A
SPG-1330.13b

U.S. MEDICAL CENTER FOR FEDERAL PRISONERS
SPRINGFIELD, MISSOURI

Administrative Remedy System
Informal Resolution Form

NOTICE TO INMATE/PATIENT: You are advised that prior to filing a Request for Administrative Remedy Form (BP-9), you MUST attempt to informally resolve your complaint through your Correctional Counselor. Please follow the three (3) steps listed below:

1. State below your specific complaint.
2. State below what efforts you have made to resolve your complaint informally.
3. State below what action or resolution you expect.

THE B.O.P. HAS LOST MY WALKING STICK - MUCH PAPER WORK HAS BEEN SUBMITTED TO GET IT BACK TO ME - I WANT MY 80 YEAR OLD WALKING STICK. IT SELF SURRENDERED WITH ME ON 17 MAY 2000. B.O.P. DOCUMENTATION WILL SHOW THAT THE WALKING STICK HAS BEEN WITH ME EVERYWHERE FROM THE START. THE B.O.P. PROMISED ME THAT IT WOULD BE CAREFULLY PACKED AND SHIPPED WITH MY PROPERTY WHEN LEAVING R&D TERRE HAUTE, INDIANA. I NEVER GOT IT. I WANT MY GRANDMATHERS WALKING STICK.

Peter Fernandez Jr. — Signature
08107-464 — Reg. No.
23 MAY 2002 — Date

Correctional Counselor's Comments (Including actual steps taken to resolve).

Counselor Contacted inmates Counselor at Terre Haute and was informed that the Care in Question was made by his son in the Food Shop at the Camp, and that the inmates allegations are false.

M. Bennett — Counselor's Signature
5-28-02 — Date

Distribution:

I. If complaint is informally resolved, forward original to Office of Attorney/Advisor (Attn: Administrative Remedy Clerk)
II. If complaint is NOT informally resolved, forward original attached to BP-9 Form to Office of Attorney/Advisor (Attn: Administrative Remedy Clerk)

	Form Returned To Counselor	BP-9 Given To Inmate	BP-9 Returned To Counselor	BP-9 Delivered To Atty/Advisor
Date	5-24-02	5-28-02		
Time		1205		
Counselor		M.B. [illegible]		

EXHIBIT C

Rec'd. Back From MR. BENNETT IN CAFT. ON TOES. 28 MAY 2002

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: FERNANDEZ, PETER N. 08107-424 3-2 MED. CNTR. FOR FED. PRISONERS
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT SPRINGF INSTITUTION MO.

Part A- INMATE REQUEST DEAR WARDEN HEDRICK: I WANT MY FAMILYS WALKING STICK, I STILL DON'T HAVE IT AFTER ALL THIS TIME AND IT WAS PROMISED TO ME. PREVIOUS ATTEMPTS TO RESOLVE THIS SIMPLE ISSUE HAVE FAILED AND FOR NO GOOD REASON. THIS HAS TO DO WITH MY PERSONAL PROPERTY THAT SEF SURRENDERED WITH ME ON 17 MAY 2000. THE WALKING STICK OF WHICH I SPEAK WAS ALLOWED TO STAY WITH ME AND IN MY POSSESSION FROM THE ABOVE WRITTEN DATE UNTIL I LAST SET MINE EYES TO IT ON 19 APRIL 2002. ON THAT DATE I WAS NOT ALLOWED TO TAKE MY WALKING STICK WITH ME ON ROUTE TO OKLAHOMA CITY. HOWEVER I WAS VEHEMENTLY PROMISED BY THE STAFF THAT MY WALKING STICK WOULD BE SAFELY PACKED AND SHIPPED ALONG WITH MY PROPERTY TO MY FINAL DESTINATION IN SPRINGFIELD, MO. IT WAS A SEVERE HARDSHIP TO ME TO FORCE ME TO WALK ALONG IN CHAINS AND SHACKLES WITHOUT THE ASSISTANCE OF MY

31 MAY 2002 DATE — SIGNATURE OF REQUESTER — #08107-424

Part B- RESPONSE

EXHIBIT D

DATE — WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE — CASE NUMBER:

CASE NUMBER:

Part C- RECEIPT

Return to: LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT:

DATE — RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP LVN

BP-229(13)
APRIL 1982

WALKING STICK. WHEN THE STAFF AT OKLAHOMA CITY SAW THE DIFFICULTIES I WAS HAVING BEING SO DIZZY AND JUST SIMPLY TRYING TO STAND UP THEY MADE CERTAIN THAT I WAS ISSUED A NEW CANE IMMEDIATELY. ON ALL EXISTING B.O.P. INMATE PROPERTY LISTS MY WALKING STICK IS ALWAYS LISTED. RIGHT FROM THE VERY START IN JUNE OF 2000 AT THE CAMP IN TERRE HAUTE, INDIANA I WAS ATTEMPTING TO NEGOTIATE THE REAR STEPS NEAR THE ICE MACHINE AND THE MAIN GYM ENTRANCE WHEN I SLIPPED ON THE WET STAIRS AND FELL DOWN ALL FIVE STEPS. THOSE REAR STAIRS TYPICALLY WERE ALWAYS WET AND THE FLOOR ALWAYS FLOODED WHEN IT RAINED. THE STORM WATER FLOODED THE AREA JUST INSIDE THE REAR DOOR ENTRANCE LEAVING A POTENTIALLY DEADLY SITUATION TO A HANDICAPPED PERSON. WITH MY WEIGHT THE FALL WAS SEVERE AND HARD AND HAD IT NOT BEEN FOR MY WALKING STICK I MIGHT HAVE CRACKED MY HEAD WIDE OPEN ON THE CONCRETE STAIRS OR SUFFERED EVEN SOMETHING WORSE. AS YOU ARE PROBABLY AWARE I SUFFER FROM ARTHERITUS AND BOTH MY KNEES TOOK A SEVERE JOLT IN THE FALL, ONE WORSE THAN THE OTHER. TO THIS DAY THE VIRICOS VAINS THAT I SUFFER WITH IN MY LEGS HAVE SWOLLEN BADLY BEHIND MY ONE KNEE AS A RESULT OF THAT FALL. I WAS TOLD BY THE MEDICAL STAFF AT THE CAMP TO DOUBLE UP ON THE ASPIRIN I TAKE UNTIL THE PAIN SUBSIDES. NO X-RAYS WERE EVER TAKEN OF MY KNEES EVEN THOUGH I ASKED FOR THEM. WHILE I WAS ON THE HEAVY REGIMENT OF ASPIRINS I DEVELOPED SEVERE BLEEDING WHEN GOING TO THE BATHROOM. I WAS BLEEDING FROM MY STOMACH AND IT TOOK THE MEDICAL STAFF AT CAMP MORE THAN A MONTH TO COMPLETELY STOP THE HEMORAGING. THE BLEEDING SCARE IS ANOTHER STORY. COUPLED WITH THE ARTHERITUS AND THE VIRICOS VAINS BEHIND THE INJURED KNEE THE PAIN IS SOMETIMES TO HORRIBLE TO LIVE WITH. I AM STILL SUFFERING FROM THIS INJURY TO THIS DAY. MY WALKING STICK WAS BROKEN ON THAT DAY BUT IT MIGHT HAVE SAVED MY LIFE. IT STAYED BROKE AND IN MY POSSESSION UNTIL MY SON PETER III ARRIVED AT THE CAMP IN JULY OF 2002. ONE DAY HE NOTICED MY GRANDMOTHERS WALKING STICK WAS BROKEN. IT WAS THEN THAT I ASKED HIM TO REPAIR IT FOR ME AT THE CARPENTER SHOP WHERE HE WAS A GRADE ONE CARPENTER. MY SON REPAIRED MANY THINGS FOR ME AND IN GENERAL HELPED ME VERY MUCH IN MY EXISTANCE AT THE CAMP. BEFORE ALL THE RECKLESS AND MISGUIDED INFORMATION STARTED TO ARISE IN THE EVENTS SURROUNDING MY WALKING STICK I WAS HAPPY ENOUGH TO JUST HAVE

31 MAY 2003 (CONT.)

THE B.O.P. GET MY WALKING STICK TO ME AS PROMISED. I ASKED NOTHING MORE. AT THIS POINT HOWEVER I AM COMPELLED TO TELL YOU SIR THAT I FEAR THAT MY WALKING STICK HAS BEEN TAKEN FROM ME IN A DELIBERATE ACT. FROM 4 MARCH 2003 TO 19 APRIL 2003 I WAS IN THE "HOLE" AT TERRE HAUTE, INDIANA. ON MORE THAN JUST A FEW TIMES THE C.O. STAFF MADE MANY COMMENTS AND MENTIONED MY UBIQUITOUS WALKING STICK AND HOW BEAUTIFUL IT WAS. THEY FUSSED OVER MY WALKING STICK MUCH. ALL OF THEM KNEW THAT THIS UNIQUE PIECE WAS MY GRANDMOTHERS AND THAT IT WAS VERY VERY PRECIOUS TO ME. WARDEN HEDRICK WON'T YOU PLEASE FAVOR ME WITH YOUR ASSISTANCE. I WANT MY FAMILYS WALKING STICK AS PROMISED, NOTHING MORE.

RESPECTFULLY SUBMITTED

[redacted] #08107-424

31 MAY 2003

EXTENSION OF TIME FOR RESPONSE - ADMINISTRATIVE REMEDY

DATE: JULY 10, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SPRINGFIELD USMCFP

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E04-006L

ADDITIONAL TIME IS NEEDED TO RESPOND TO THE ADMINISTRATIVE REMEDY REQUEST IDENTIFIED BELOW. WE ARE EXTENDING THE TIME FOR RESPONSE AS PROVIDED FOR IN THE ADMINISTRATIVE REMEDY PROGRAM STATEMENT.

REMEDY ID : 269402-F1
DATE RECEIVED : JUNE 4, 2002 — To 24 June (20 days)
RESPONSE DUE : JULY 14, 2002 — with 20 day extension response due here total 40 days
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

Rec'd. Friday at Mail call 12 July 2002

U.S. Department of Justice

Federal Bureau of Prisons

9-10

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From: Fernandez, Peter	08107-424	E	FCI-Waseca, MN
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A—REASON FOR APPEAL

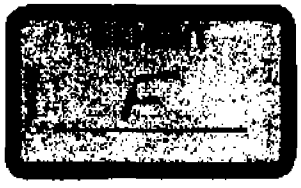
To whom it may concern:

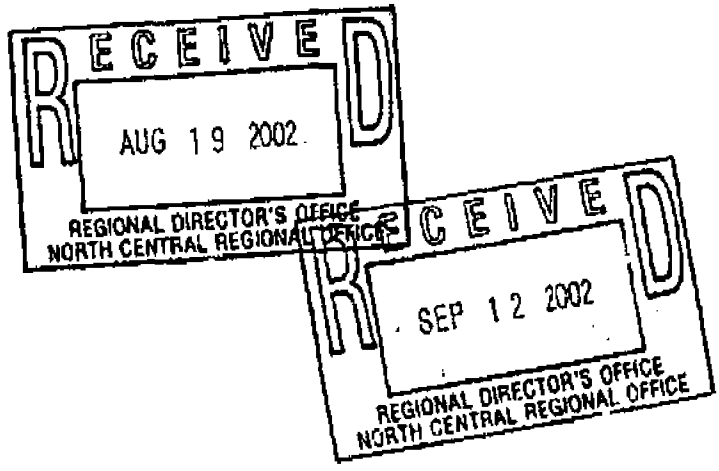
In the matter of my walking stick. On Friday, 12 July 2002 at mail call I received only a copy of an "extension of time for response - Administrative Remedy" notice. I received it at the Waseca, MN institution. (A copy is enclosed for your review.) Clearly the warden at Springfield, MO has elected not to respond to my BP-9. To reiterate, my request was only to get back my grandmother's walking stick and personal property. It has been with me since I self-surrendered on 17 May 2000 at the Terre Haute, IN camp. A more detailed description of the events surrounding my walking stick and its mysterious disappearance is evident in my BP-9. Copies of my property lists clearly show my walking stick with me from the very beginning. Sir, all I want is my family's walking stick that is my personal property, nothing more.

8 August 2002 — DATE

[signature] #08107-424 — SIGNATURE OF REQUESTER

Part B—RESPONSE





DATE — REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE — CASE NUMBER: 240402-R2

Part C—RECEIPT

CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

_____ (DATE) — _____ (SIGNATURE, RECIPIENT OF REGIONAL APPEAL)

USP LVN — Previous editions not usable — BP-230(13) APRIL 1982

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: AUGUST 27, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
NORTH CENTRAL REGIONAL OFFICE

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E02-001L
1000 UNIVERSITY DR, SW
WASECA, MN 56093

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 269402-R1 REGIONAL APPEAL
DATE RECEIVED : AUGUST 19, 2002
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

REMARKS : MAILED FROM USP-THA TO MCFP-SPG

Rec'd. on Friday
Mailroom 4:00 PM
30 August 2002

6 September 2002

Administrative Remedy Coordinator
North Central Regional Office
Gateway Complex Tower II
8th floor
4th and State Avenues
Kansas City, KS 66101-2492

Re: Rejection Notice Administrative Remedy I.D. #269402-R1
Regional Appeal

Dear Administrative Remedy Coordinator:

I am in receipt of your Administrative Remedy Rejection Notice dated 27 August 2002 that I received on Friday, 30 August 2002.

With all due respect, frankly, sir, I do not understand your two reject reasons. Both reject reasons are clearly incorrect as evident in my BP-10 filing.

1. Copies of my BP-8 and BP-9 Remedy Requests were both submitted to you with my file.
2. I gave to you the only document I have ever received from Warden Hedricks office with regard to this issue and that is the "Extension of Time for Response" cover sheet only.

In closing, please allow this letter to serve as my request for your reconsideration of my submittal. Notwithstanding your reject reasons, I must insist that my BP-10 submittal file is complete - it is all that I have to give. Thank you for your reconsideration, sir. I remain . . .

Respectfully yours,



Peter Fernandez
08107-424, Unit E
Federal Correctional Institution
P.O. Box 1500
Waseca, MN 56093

RECEIVED
SEP 12 2002
REGIONAL DIRECTOR'S OFFICE
NORTH CENTRAL REGIONAL OFFICE

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: SEPTEMBER 19, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
NORTH CENTRAL REGIONAL OFFICE

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E02-001L
1000 UNIVERSITY DR, SW
WASECA, MN 56093

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 269402-R2 REGIONAL APPEAL
DATE RECEIVED : SEPTEMBER 12, 2002
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

REMARKS : MAILED FROM USP-THA TO MCFP-SPG

PROVIDE A COPY OF YOUR BP-9 RESPONSE.

Rec'd. Monday
AT 4:00 PM MAIL ROOM
ON 23 SEPT. 2002

U.S. Department of Justice — BP-[redacted] — Central Office Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From: Fernandez, Peter	08107-424	E	FCI - Waseca, MN
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A—REASON FOR APPEAL

I am stunned at the second reject notice that I received from the Regional Office on Monday 23 Sept. 2002. Not only has the Regional Office rejected my BP-10 Submittal for the second time, they have also completely disregarded my personal plea to them by way of my letter dated 6 Sept. 2002 asking them for reconsideration.

I truly wanted to settle this issue at this BP-10 level. The resolution of it all is so simple.

My BP-10 submittal and subsequent letter for reconsideration outline the issues at hand as they happened. I have always maintained that my family's walking stick that surrendered with me on 17 May 2000 was taken by a staff member who obviously wanted it badly. A deliberate act unbecoming of any B.O.P. staff member.

While in the hole at the Terre Haute Institution much attention was always observed over my beautiful walking stick. I want what is rightfully mine - nothing more.

As outlined before the simplest solution to all this is for the Bureau of Prisons to return my property to me. My detailed reasons are all explained in my previous submittals. I hope you will take the time to read them. If a resolution ensues, all will be forgotten and never brought up again.

09 Sept. 2002 — 08107-424

DATE — SIGNATURE OF REQUESTER

Part B—RESPONSE

RECEIVED
OCT 8 2002
ADMINISTRATIVE REMEDY BRANCH

[redacted]

DATE — GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE — CASE NUMBER: 219402-A

Part C—RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT:

RECEIVED
OCT 29

DATE — SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN

BP-231(13)
APRIL 1982

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: OCTOBER 10, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
BOP CENTRAL OFFICE

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E02-001L
1000 UNIVERSITY DR, SW
WASECA, MN 56093

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 269402-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : OCTOBER 8, 2002
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: SEE REMARKS.

REJECT REASON 3: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

REMARKS : ~~WE CONCUR WITH THE REGIONAL OFFICIAL'S RATIONALE~~ FOR REJECTING YOUR APPEAL.

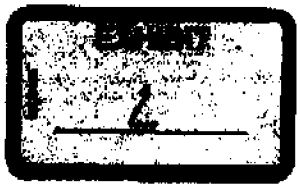
Recd. (WEDNESDAY) (AT MAIL CALL)
16 OCT. 2002—
IT MUST BE NOTED
THAT I AM RECEIVING
THIS NOTICE 6 DAYS
AFTER THE DATE SHOWN.

21

21 October 2002

Ms. Kathleen Hawk, Director, Federal Bureau of Prisons
Central Office
320 First Street, N.W.
Washington, D.C. 20534

RE: Peter Fernandez #08107-424
and rejection of my BP-11 #269402-A1 dated 10 Oct. 2002
and my Reconsideration Request.



Dear Ms. Hawk:

By now I am truly beside myself in trying to determine what exactly the Bureau of Prisons expects from me with regard to my BP-8, 9, 10, and 11 Administrative Remedy Appeal documents.

I have clearly stated before that whatever documentation I received from the staff at any of the Bureau of Prison's institutions was forwarded to you in all my submittals.

I will endeavor to clarify my documents to you with the hope that you will accept and understand what I have said all along.

In the Reject Notice dated 10 October 2002, the following should be noted:

Reject Reason #1 - I disagree totally with the statement that I did not submit a BP-9 to Warden Hedrick at the Springfield, MO medical center. My BP-9 has always been submitted with my Administrative Remedy submittals - always. With regard to Warden Hedrick's response, I have sent you a copy of the only document that I have ever received and that was a request for an extension of time to respond dated 10 July 2002. Is it possible that the Bureau of Prisons expects me to wait indefinitely for Warden Hedrick's response? I don't think so. It has been almost 4

months and all I have gotten was the enclosed extension of time request.

Reject Reason #2 states that the Central Office concurs with the Regional Office's rationale for rejecting my appeal. I yield to you, Ms. Hawk, to tell me please, what part of my submittal don't they understand? I do not know how to say what I have already said any other way. My statements as submitted are direct, precise, accurate, and true.

In closing, please favor me with my family's walking stick that is my property and surrendered with me on 17 May 2000. It is rightfully my property and it is all I have ever wanted, nothing more. Thanking you for your time and the Bureau's reconsideration, I remain always . . .

A partner in caring,

Peter Fernandez
#08107-424, Unit E
Federal Correctional Institution
P.O. Box 1500
Waseca, MN 56093

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: OCTOBER 31, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
BOP CENTRAL OFFICE

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E02-001L
1000 UNIVERSITY DR, SW
WASECA, MN 56093



FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 269402-A2 CENTRAL OFFICE APPEAL
DATE RECEIVED : OCTOBER 29, 2002
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: SEE REMARKS.

REJECT REASON 3: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

REMARKS : WE STILL CONCUR WITH THE REGION'S RATIONALE FOR REJECTING YOUR APPEAL. THE WARDEN RESPONDED TO YOUR APPEAL ON 07-02-02.

Rec'd. AT 4:00 PM MAIL ROOM
WEDNESDAY 6 NOV. 2002

BP-S148.070 [illegible] SEP 98

U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) Ms. Agrimson, Case Manager	DATE: 28 March 2003
FROM: Peter Fernandez	REGISTER NO.: 08107-424
WORK ASSIGNMENT: Medical	UNIT: E

Copy

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Dear Ms. Agrimson:

I was told by the staff at the medical center in Springfield, MO (from whence I came) that I needed to fill out a "tort claim" for my personal property that was lost by the Bureau of Prisons (Terre Haute staff). In a brief disposition, can you please direct and write me in the manner in which I am to proceed with this claim?

Fact: I was put in the hole at Terre Haute, Indiana on 4 March 2002.

Fact: I was transferred from Terre Haute, Indiana on 19 April 2002.

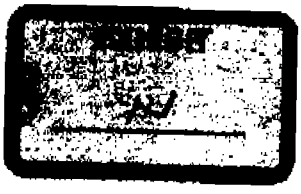
Fact: Mine eyes last saw my missing property at Terre Haute, Indiana on 19 April 2002.

Fact: I started my Administrative Remedy Process on 23 May 2002 while

(see back)

(Do not write below this line)

DISPOSITION:



Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-S148.070 dated Oct 86 and BP-S148.070 APR 94

at the medical center in Springfield, MO with the BP-8 form.

Fact: My BP-11 Administrative Remedy was written and submitted to Washington, D.C. on 29 Sept. 2002.

Fact: The conclusion of all the BP-11 Administrative Remedy correspondence did not conclude until 6 November 2002.

Please advise me on what official date the clock started to run on this claim.

Thank you for your assistance. I remain always...

Sincerely,

Copy

Peter Fernandez #08107-424
F.C.I. Waseca, MN

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Daryl Kosiak, Regional Counsel
North Central Regional Office
Gateway Tower II, 8th Floor
400 State Avenue
Kansas City, KS 66101

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
PETER FERNANDEZ #08107-424
MARION FEDERAL PRISON CAMP
ROUTE 5 - P.O. BOX 1000 "OLD DORM"
MARION, ILLINOIS 62959

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	6 MARCH 1941	MARRIED	19 APRIL 2002	AM

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.) ON THE DAY OF MY DEPARTURE FROM THE S.H.U. AT THE U.S. PENITENTIARY IN TERRE HAUTE, INDIANA I WAS TOLD BY THE S.H.U. GUARD THAT I WAS NOT ALLOWED TO TAKE MY CANE ON TO THE BUS MAKING IT IMPOSSIBLE FOR ME TO WALK WITHOUT ASSISTANCE. I TOLD HIM THAT THIS WAS MY PERSONAL PROPERTY AND THAT IT SELF SURRENDERED WITH ME ON 17 MAY 2000 AND WAS WITH ME EVERYWHERE I WENT. I NEED IT BADLY IN ORDER TO AMBULATE. THE GUARD PROMISED ME THAT HE WOULD PERSONALLY PACK MY CANE ALONG WITH MY OTHER PROPERTY SO THAT ALL MY PROPERTY WOULD BE SHIPPED TO MY NEW LOCATION AT THE MEDICAL CENTER IN SPRINGFIELD, MO. I WENT NOTHING FROM YOU ONLY WHAT WAS PROMISED TO ME AND WHAT WAS MINE. WHEN MY PROPERTY ARRIVED AT SPRINGFIELD, MO. MEDICAL CENTER, MY CANE WAS NOT THERE AS PROMISED.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) WALKING CANE (MY PROPERTY) STOLEN OR LOST - FEDERAL PENITENTIARY, SHU (SPECIAL HOUSING UNIT) TERRE HAUTE, INDIANA

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

EXHIBIT C

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
NAME UNKNOWN OF GUARD WHO TOOK CANE FROM ME WHEN I LEFT S.H.U. AT TERRE HAUTE, INDIANA	U.S. PENITENTIARY - S.H.U. TERRE HAUTE, INDIANA

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Peter Fernandez #08107-424		10 APRIL 2004

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046
Previous editions not usable.

STANDARD FORM 95 (Rev. 7-85) PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.2

This form was electronically produced by Elite Federal Forms, Inc.

n Fernandez
107-424
ION Federal Prison Camp
e 5 - P.O. Box 1000 - "old dorm"
ION, Illinois 62959

CERTIFIED MAIL™

7003 0500 0003 4002 3722

7003 0500 0003 4002 3722

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

DEFENDANT USE
[illegible] 62957

Postage	$ .37
Certified Fee	2.30
Return Receipt Fee (Endorsement Required)	1.45
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 4.42

Postmark Here

Sent to Darcy Kosiak, Regional Counsel
North Central Regional Office
Street, Apt. No.
or PO Box No. Gateway Tower II - 6th Floor
City, State, ZIP+4
400 State Ave. - Kansas City, KS. 66101

PS Form 3800, June 2002 See Reverse for Instructions

Daryl Kos
North Central
Gateway Towe
400 State Ave
Kansas City,

SENDER: COMPLETE THIS SECTION

COMPLETE THIS SECTION ON DELIVERY

7003 0500 0003 4002 3722

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region
Kansas City KS 66101

Copy

DATE: April 27, 2004

REPLY TO ATTN OF: M. Martinez
Legal Technician

SUBJECT: Your Claim for Damage, Injury or Death
Date Received: 04/14/04 Tort Claim #: TRT-NCR-2004-02937

TO: Peter Fernandez
08107-424
USP Marion



Your Standard Form 95 has been received in this office. The Federal Tort Claims Act affords the government six (6) months from the date that a properly submitted claim is filed with the agency in which to make an administrative determination.

Upon review of your SF-95, we find that the form is incomplete or that further information will be required to establish your submission as a claim for relief under the Federal Tort Claims Act. Accordingly, the following information is required pursuant to Title 28, Code of Federal Regulations, Section 14:

[X] Action needed to complete the attached claim form:

12d. There must be an amount entered in order to process this claim.tion. Please enter the amount and resubmit this claim, along with this sheet, to the address listed below.

[ ] The following additional information is requested:

_____

_____

_____

The completed form and/or information requested should be returned to:

FEDERAL BUREAU OF PRISONS
LEGAL DEPARTMENT - M. MARTINEZ
NORTH CENTRAL REGIONAL OFFICE
GATEWAY TOWER II 8TH FLOOR
400 STATE AVENUE
KANSAS CITY KS 66101-2492

PLEASE BE ADVISED THAT, ABSENT THE INFORMATION REQUESTED OR COMPLETION OF THE FORM AS INDICATED ABOVE, YOUR SUBMISSION WILL NOT BE CONSIDERED A PROPERLY SUBMITTED CLAIM FOR CONSIDERATION UNDER THE FEDERAL TORTS CLAIM ACT.

8 JUNE 2004

MR. M. MARTINEZ, LEGAL DEPARTMENT
FEDERAL BUREAU OF PRISONS, NORTH CENTRAL REGIONAL OFFICE
GATEWAY TOWER II 8TH. FLOOR
400 STATE AVENUE
KANSAS CITY, KANSAS 66101-2492

COPY

RE: PETER N. FERNANDEZ, JR. - TORT CLAIM NUMBER TRT-NCR-2004-02937

DEAR MR. MARTINEZ:

I HAVE TRIED WITH ALL OF MY BEING TO SETTLE THIS ISSUE IN THE MOST SIMPLEST WAY THAT I KNOW AND HAVE DONE SO, FOR ALMOST TWO YEARS. I HAVE SUBMITTED DETAILED ADMINISTRATIVE REMEDYS STARTING WITH THE BP-8 THROUGH THE BP-11 AND THE LAST BEING SENT TO KATHLEEN HAWK IN WASHINGTON, D.C. TO NO AVAIL. ALL I HAVE EVER ASKED FOR WAS MY PERSONAL (MY CANE) PROPERTY THAT SELF SURRENDERED WITH ME ON 11 MAY 2000. I WANT MY CANE BACK, NOTHING MORE. MY CANE WAS GIVEN TO MY MOTHER, WHO GOT IT FROM HER MOTHER. MY GRANDFATHER MADE IT FOR MY GRANDMOTHER. IT IS EXTREMELY DIFFICULT FOR ME TO PUT A DOLLAR AMOUNT ON A PIECE LIKE THIS. AFTER YOUR INSISTANCE OF A DOLLAR AMOUNT I CAN TELL YOU THAT I WOULD PUT A VALUE ON MY CANE OF $1 84,000.00.

IN CLOSING I AM SENDING ALONG MY ORIGINAL CLAIM FORM WITH THE DOLLAR AMOUNT YOU ASKED FOR. ALSO I AM SENDING YOU A COPY OF MY ORIGINAL PROPERTY LIST SHOWING MY CANE SELF SURRENDERING WITH ME ON 11 MAY 2000. ALSO I'M SENDING YOUR CORRESPONDENCE OF 27 APRIL 2004 BACK TO YOU AS PER YOUR REQUEST...

RESPECTFULLY SUBMITTED
Peter Fernandez Jr.

EXHIBIT 2

OFFICE OF REGIONAL COUNSEL
Federal Bureau of Prisons
North Central Regional Office
400 State Street, Tower II, 8th Floor
Kansas City, Kansas 66101

M. MARTINEZ

Read. Wednesday
5 MAY 2004 IN MAIL

Peter Fernandez
08107-424
USP Marion

J09-0011

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Daryl Kosiak, Regional Counsel
North Central Regional Office
Gateway Tower II, 8th Floor
400 State Avenue
Kansas City, KS 66101

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
PETER FERNANDEZ #08107-424
MARION FEDERAL PRISON CAMP
ROUTE 5 - P.O. BOX 1000 "OLD DORM"
MARION, ILLINOIS 62959

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	6 MARCH 1941	MARRIED	19 APRIL 2002	AM

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.) ON THE DAY OF MY DEPARTURE FROM THE S.H.U. AT THE U.S. PENITENTIARY TERRE HAUTE, INDIANA I WAS TOLD BY THE S.H.U. GUARD THAT I WAS NOT ALLOWED TO TAKE MY CANE ON TO THE BUS MAKING IT IMPOSSIBLE FOR ME TO WALK WITHOUT ASSISTANCE. I TOLD HIM THAT THIS WAS MY PERSONAL PROPERTY AND THAT IT SELF SURRENDERED WITH ME ON 17 MAY 2000 AND WAS WITH ME EVERY WHERE I WENT. I NEED IT BADLY IN ORDER TO AMBULATE. THE GUARD PROMISED ME THAT HE WOULD PERSONALLY PACK MY CANE IN WITH MY OTHER PROPERTY SO THAT ALL MY PROPERTY WOULD BE SHIPPED TO MY NEW LOCATION AT THE MEDICAL CENTER IN SPRINGFIELD, MO. I WANT NOTHING FROM YOU ONLY WHAT WAS PROMISED TO ME AND WHAT WAS MINE. WHEN MY PROPERTY ARRIVED AT SPRINGFIELD, MO. MEDICAL CENTER, MY CANE WAS NOT THERE AS PROMISED.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) WALKING CANE (MY PROPERTY) STOLEN OR LOST - FEDERAL PENITENTIARY, SHU (SPECIAL HOUSING UNIT) TERRE HAUTE, INDIANA

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

COPY

RECEIVED
APR 14 2004
LEGAL
NORTH CENTRAL REGIONAL OFFICE

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
NAME UNKNOWN OF GUARD WHO TOOK CANE FROM ME WHEN I LEFT S.H.U. AT TERRE HAUTE, INDIANA	U.S. PENITENTIARY - S.H.U. TERRE HAUTE, INDIANA

EXHIBIT 2

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
			$87,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Peter Fernandez #08107-424		10 APRIL 2004

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046
Previous editions not usable.

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

This form was electronically produced by Elite Federal Forms, Inc.

TRT-NAR-2004-2937

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.
A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.
B. *Principal Purpose:* The information requested is to be used in evaluating claims.
C. *Routine Use:* See the Notices of Systems of Records for the agency to whom yo are submitting this form for this information.
D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:
(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to

Director, Torts Branch
Civic Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, if yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☒ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

17. If deduction, state amount

18. If claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? *(It is necessary that you ascertain these facts)*

19. Do you carry public liability and property damage insurance? ☐ Yes, if yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☒ No

U.S. Department of Justice

Federal Bureau of Prisons

United States Penitentiary
Terre Haute, Indiana

Date: June 22, 2004

Reply To
Attn Of: R. L. Blackburn, Legal Instruments Examiner

Subject: Tort Claim #TRT-NCR-2004-02937

To: Peter Fernandez
Reg. No. 08107-424

Rec'd. FROM
MS. JAMES - 2 HALF
WAY HOUSE ON MONDAY
16 AUGUST 2004

Our office is in receipt of the above referenced Tort Claim filed by you for $84,000.00, in which you alleged your cane was lost by a staff member, as a result of being transferring from USP Terre Haute to the Federal Medical Center, Springfield on April 19, 2002. **Since you indicate that you purchased the cane before being incarcerated in the Bureau of Prisons, you need to provide me with a receipt for the purchase of the missing cane.**

Please provide this information to this office by July 19, 2004.
Please return too:

T. MARVEL, PARALEGAL SPECIALIST
UNITED STATES PENITENTIARY
4200 BUREAU ROAD NORTH
TERRE HAUTE, INDIANA 47802



U. S. Department of Justice
Federal Bureau of Prisons
U. S. Penitentiary
4200 Bureau Road North
P.O. Box 33
Terre Haute, IN 47808-0033

Official Business
Penalty for Private Use $300

RHG
LOL SUL

U.S. OFFICIAL MAIL

TERRE HAUTE
25 JUN 2004

REC'D JUN 28 2004

Peter Fernandez
Reg. NO. 08107-424
SALVATION ARMY FREEDOM CENTER
105 S. Ashland
Chicago, Illinois 60607

Rec'd From Ms. James @ Half Way House on Monday 16 August 2004

60607+2401

Red STAMP ON ENVELOPE INDICATES done BY HALF WAY HOUSE - MS. JAMES STAMP IS BLACK.

SPOKE TO MS. JAMES ON PHONE ON TUESDAY 17 AUG. 2004 @ 5:05 PM. AFTER MAKING 2 CALLS TO HER. SHE GOT SUBJECT LETTER IN HER BOX ON MONDAY 16 AUG 2004 FOR THE 1ST. TIME.

17 AUGUST 2004
R. L. BLACKBURN, LEGAL INSTRUMENT EXAMINER
U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
4200 BUREAU ROAD NORTH
TERRE HAUTE, INDIANA 47802

COPY

7003 2260 0003 2214 2704

RE: PETER FERNANDEZ, #08107-424-TORT
CLAIM # TRT-NCR-2004-02937

[redacted]

DEAR R. L. BLACKBURN:

I AM IN RECEIPT OF YOUR LETTER ADDRESSED TO ME DATED 22 JUNE 2004. YOUR LETTER OF 22 JUNE IS POST MARKED 25 JUNE 2004 OUT OF TERRE HAUTE, INDIANA. THE LETTER FOR ME IS ADDRESSED TO THE SALVATION ARMY FREEDOM CENTER (HALF WAY HOUSE IN CHICAGO, IL. - SEE ENCLOSED COPY OF ENVELOPE.) THE ENVELOPE IS DATE STAMPED BY THE HALF WAY HOUSE AS BEING RECEIVED ON 28 JUNE 2004. IT SHOULD BE NOTED AND IS EXTREMELY IMPORTANT THAT THE SUBJECT LETTER WAS FIRST HANDED TO ME IN FRONT OF WITNESSES BY MS. JAMES MY RESIDENT ADVISOR ON MONDAY 16 AUGUST 2004 AT APPROXIMATELY 10:30 AM. OUR MEETING TOOK PLACE IN THE OFFICE WHERE WE GENERALLY

R. L. BLACKBURN
17 AUGUST 2004
PAGE 2 OF 3

COPY

MEET WHEN I MAKE A TRIP TO THE HALF WAY HOUSE.

I OPENED YOUR LETTER WHEN I RETURNED HOME AND WAS SHOCKED TO FIND THAT THE LETTER WAS DATED 22 JUNE 2004. I HAD JUST RECEIVED IT FROM MS. JAMES ON 16 AUGUST 2004 - SOME MONTH AND A HALF AFTER IT WAS WRITTEN. I WAS ALSO SHOCKED AT THE CONTENT OF YOUR LETTER AND IN PARTICULAR #1. TO MY HAVING TO RESPOND TO THIS DATED MATERIAL BY 19 JULY 2004 WHILE I WAS TOTALLY UNAWARE THAT YOUR LETTER EVER EVEN EXISTED. #2. YOUR REMARK IN THE SECOND SENTENCE OF YOUR LETTER THAT I INDICATED THAT I PURCHASED MY CANE. I HAVE NEVER INDICATED TO ANYONE THAT IT HAD BEEN PURCHASED. (PLEASE SEE DOCUMENTS ONCE AGAIN ENCLOSED.)

IN CLOSING PLEASE UNDERSTAND THAT NO RECEIPT EXISTS FOR THIS FAMILY HEIRLOOM NOR HAVE I EVER CLAIMED THAT THEY

R. L. BLACKBOARD
17 AUGUST 2004
PAGE 3 OF 3

DO EXIST. THROUGHT MY BP-8 TO BP11 ADMINISTRATIVE REMEDY PROCESS, I HAVE ALWAYS MAINTAINED ONE ISSUE AND THAT WAS MY CASE - NOTHING MORE. SURELY YOUR COPIES OF MY ADMISISTRATIVE REMEDYS CLEARLY SHOW YOU THAT ALL I HAVE EVER WANTED WAS MY PROPERTY AND WHAT WAS MINE.

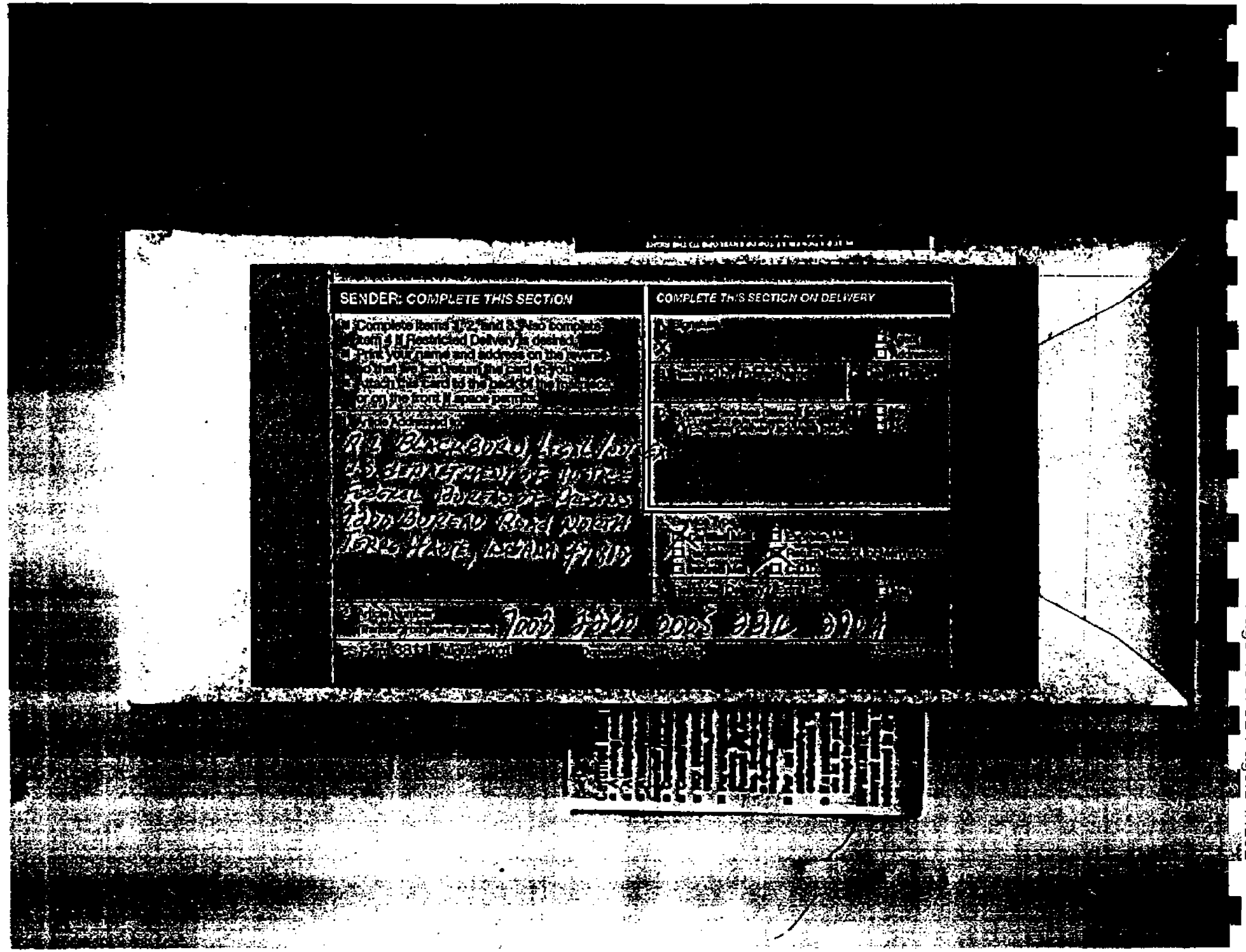
SINCERELY YOURS

COPY

PETER FERNANDEZ #08107-424
8723 WEST 44TH. PLACE
LYONS, ILLINOIS 60534

CC: T. MARUEL, PARALEGAL SPECIALIST
MS. JAMES, R.A. SALVATION ARMY FREEDOM CENTER - CHICAGO, ILLINOIS

ENCL; FOUR



Case: 1:05-cv-03288 Document #: 6 Filed: 06/06/05 Page 43 of 51 PageID #:101

Mr. Peter Fernandez
8723 44th Pl.
Lyons, IL 60534

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7003 2260 0005 2316 2704

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U.S. Dept. of Justice Posts
Street, Apt. No. or PO Box No. FCC Bureau of Prisons
City, State, ZIP+4 Terre Haute Indiana 47802

PS Form 3800, June 2002

See Reverse for Instructions

...L/Instruments Examiner
...nt of Justice
...isons
...orta
47802

U.S. Department of Justice

Federal Bureau of Prisons

United States Penitentiary
Terre Haute, Indiana

Date: June 22, 2004

Reply To
Attn Of: R. L. Blackburn, Legal Instruments Examiner

Subject: Tort Claim #TRT-NCR-2004-02937

To: Peter Fernandez
Reg. No. 08107-424

Rec'd. FROM MS. JAMES @ HOLF WAY HOUSE ON MONDAY 16 AUGUST 2004

Our office is in receipt of the above referenced Tort Claim filed by you for $84,000.00, in which you alleged your cane was lost by a staff member, as a result of being transferring from USP Terre Haute to the Federal Medical Center, Springfield on April 19, 2002. **Since you indicate that you purchased the cane before being incarcerated in the Bureau of Prisons, you need to provide me with a receipt for the purchase of the missing cane.**

Please provide this information to this office by July 19, 2004.
Please return too:

T. MARVEL, PARALEGAL SPECIALIST
UNITED STATES PENITENTIARY
4200 BUREAU ROAD NORTH
TERRE HAUTE, INDIANA 47802

Case 1:05-cv-02289 Document #: 6 Filed: 06/06/05 Page 46 of 51 PageID #:104

U. S. Department of Justice
Federal Bureau of Prisons
U.S. Penitentiary
4200 Bureau Road North
P.O. Box 33
Terre Haute, IN 47808-0033

Official Business
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TERRE HAUTE IN 478 PM JUN 25'04 25 JUN 2004

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U.S. POSTAGE

RECD JUN 28 2004

Peter Fernandez
Reg. NO. 08107-424
SALVATION ARMY FREEDOM CENTER
105 S. Ashland
Chicago, Illinois 60607

Reed From
Ms. James @ Half
Way House on Monday
16 August 2004

60607+2401

8 JUNE 2004

MR. M. MARTINEZ, LEGAL DEPARTMENT
FEDERAL BUREAU OF PRISONS, NORTH CENTRAL REGIONAL OFFICE
GATEWAY TOWER II 8TH FLOOR
400 STATE AVENUE
KANSAS CITY, KANSAS 66101-2492

COPY

RE: PETER N. FERNANDEZ, JR. - TORT CLAIM NUMBER
TRT-NCR-2004-02937

DEAR MR. MARTINEZ:

I HAVE TRIED WITH ALL OF MY BEING TO SETTLE THIS ISSUE IN THE MOST SIMPLEST WAY THAT I KNOW AND HAVE DONE SO, FOR ALMOST TWO YEARS. I HAVE SUBMITTED DETAILED ADMINISTRATIVE REMEDYS STARTING WITH THE BP-8 THROUGH THE BP-11 AND THE LAST BEING SENT TO KATHLEEN HAWK II WASHINGTON, D.C. TO NO AVAIL. ALL I HAVE EVER ASKED FOR WAS MY PERSONAL (MY CANE) PROPERTY THAT SELF SURRENDERED WITH ME ON 17 MAY 2000. I WANT MY CANE BACK, NOTHING MORE. MY CANE WAS GIVEN TO MY MOTHER, WHO GOT IT FROM HER MOTHER MY GRANDFATHER MADE IT FOR MY GRANDMOTHER. IT IS EXTREMELY DIFFICULT FOR ME TO PUT A DOLLAR AMOUNT ON A PIECE LIKE THIS. AFTER YOUR INSISTANCE OF A DOLLAR AMOUNT I CAN TELL YOU THAT I WOULD PUT A VALUE ON MY CANE OF $184,000^{00}$.

IN CLOSING I AM SENDING ALONG MY ORIGINAL CLAIM FORM WITH THE DOLLAR AMOUNT YOU ASKED FOR. ALSO I AM SENDING YOU A COPY OF MY ORIGINAL PROPERTY LIST SHOWING MY CANE SELF SURRENDERING WITH ME ON 17 MAY 2000. ALSO I'M SENDING YOUR CORRISPONDENCE OF 07 APRIL 2004 BACK TO YOU AS PER YOUR REQUEST...

RESPECTFULLY SUBMITTED
Peter Fernandez Jr.

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Daryl Kosiak, Regional Counsel
North Central Regional Office
Gateway Tower II, 8th Floor
400 State Avenue
Kansas City, KS 66101

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
PETER FERNANDEZ #08107-424
MARION FEDERAL PRISON CAMP
ROUTE 5 - P.O. BOX 1000 "old dorm"
MARION, ILLINOIS 62959

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	6 MARCH 1941	MARRIED	19 APRIL 2002	A.M.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.) ON THE DAY OF MY DEPARTURE FROM THE S.H.U. AT THE U.S. PENITENTIARY, LOCATED IN TERRE HAUTE, INDIANA I WAS TOLD BY THE S.H.U. GUARD THAT I WAS NOT ALLOWED TO TAKE MY CANE ON TO THE BUS MAKING IT IMPOSSIBLE FOR ME TO WALK WITHOUT ASSISTANCE. I TOLD HIM THAT THIS WAS MY PERSONAL PROPERTY AND THAT I HAD SURRENDERED WITH ME ON IT MAY 2000 AND WAS WITH ME COMING HERE. I WAS READY IN ORDER TO AMBULATE. THE GUARD PROMISED ME THAT HE WOULD PERSONALLY PACK MY CANE AND WITH MY OTHER PROPERTY SO THAT ALL MY PROPERTY WOULD BE SHIPPED TO MY NEW LOCATION AT THE MEDICAL CENTER IN SPRINGFIELD, MO. I WENT NOTHING FROM WHAT WAS PROMISED TO ME AND WHAT WAS HERE. WHEN MY PROPERTY ARRIVED AT SPRINGFIELD, MO. MEDICAL CENTER, MY CANE WAS NOT THERE AS PROMISED.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) WALKING CANE (MY PROPERTY) STOLEN OR LOST - FEDERAL PENITENTIARY, SHU (SPECIAL HOUSING UNIT) TERRE HAUTE, INDIANA

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

RECEIVED
APR 14 2004
LEGAL
NORTH CENTRAL REGIONAL OFFICE

Copy

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
NAME UNKNOWN OF GUARD WHO TOOK CANE FROM ME WHEN I LEFT S.H.U. AT TERRE HAUTE, INDIANA	U.S. PENITENTIARY - S.H.U. TERRE HAUTE, INDIANA

12. (See instructions on reverse) AMOUNT OF CLAIM (In dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
			$ 84,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Peter Fernandez #08107-424		10 April 2004

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046
Previous editions not usable.
This form was electronically produced by Elite Federal Forms, Inc.

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

TRT-NAR-2004-2937

U.S. Department of Justice
Federal Bureau of Prisons

Inmate Personal Property Record—
Institution: USP THA

1. Name: Fernandez, Peter N. Jr
2. Register Number: 08107-424
3. Unit: Camp
4. Date and Time of Inventory: 5/17/00 1230PM

5. Purpose of Inventory (Check one that applies): Date and Time of Action: 5/17/00 1230PM
a. ✓ Admission b. ___ Hospital c. ___ Writ d. ___ Transfer e. ___ Detention f. ___ Release
g. ___ Incoming package h. ___ Other (specify)

6. Disposition (Disp.)
D – Donated M – Mail S – Storage
K – Keep in Possession
C – Contraband (Attach BP-Record-102)

7. Type of Property:

a. Personally Owned Items

#	Article	Disp.
	Batteries	
	Belt	
	Billfold	
	Books, reading hard___, soft___	
	Books, religious hard___, soft___	
	Brassiere	
	Cap, Hat	
	Coat	
	Coins	
	Comb	
	Combination lock	
	Dress	
	Driver's license	
	Earplugs	
	Eyeglass case	
1	Eyeglasses	K
	Gloves	
	Hair brush/pick	
	Handkerchief	
1	Jacket	M
	Jogging suit	
	Legal Materials	
	Letters	
	Magazines	
	Mirror	
	Nail Clippers	
1	Pant/slacks	M
	Pen, ballpoint	
	Pencils	
	Personal papers	
	Photo album	
	Photos	

#	Article	Disp.
	Plastic spoon, cup	
	Playing cards	
	Purse	
	Radio (w/earplug)	
1	Religious medals	K
1	Ring	K
	Shirt/blouse	
1	Shoes	K
	Shoes, shower	
	Shoes, slippers	
	Shoes, tennis	
	Shorts	
	Skirt	
	Slip	
	Social security card	
	Socks	
	Socks, athletic	
	Stamps	
	Stockings	
	Sunglasses	
	Sweater	
	Sweat pants	
	Sweat shirt	
	Trophy	
1	T-Shirts	K
1	Underwear	K
	Watch/watch band	
	Wig	
1	satchel	M
1	cane	K
1	[illegible]	M
1	[illegible]	M
1	[illegible]	M

b. Hygiene, etc.

#	Article	Disp.
	Dental floss	
	Dentures	
	Deodorant	
	Hair oil	
	Noxzema	
	Powder	
	Razor	
	Razor blades	
	Shampoo	
	Shaving lotion	
	Skin lotion	
	Soap	
	Soap dish	
	Toothbrush	
	Toothpaste	

c. Hobbycrafts

#	Article	Disp.

d. Food/Tobacco Items

#	Article	Disp.
	Canned tobacco	
	Chewing tobacco	
	Cigarettes	
	Cigars, snuff	
	Coffeemate	
	Cold drink mix, soda	
	Fruit	
	Honey, Hi-protein	
	Instant chocolate	
	Instant coffee	
	Instant tea	
	Pipe cleaner/filters	
	Pipes	

e. Miscellaneous (List any damaged property and from where it was received; e.g., U.S. Marshal)

8. Items Alleged by Inmate to Have Value Over $100.00

Description of Property	Value Alleged by Inmate
☑ No individual item over $100.00	

9. Article(s) Listed as "Mail" (M) Are to be Forwarded to (Name and Address of Consignee): (708)447-1959
Barbara Fernandez 8723 W. 44th Place Lyons, Il. 60534

10. Claim Release: a. The receiving officer, as soon after receipt of the property as possible, will review the inventory with the inmate to verify its accuracy. Property that is stored, kept in possession of the inmate, mailed out of the institution, or donated is to be marked in the appropriate section of this inventory form. The receiving officer certifies receipt, review and disposition of the property by signing below. The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Receiving Officer: R. STARBUCK / R. Starbuck Date: 5/17/00 Time: 1230PM

I have today reviewed the property returned to me. Signature of Inmate: [signature] Reg. No.: 08107-424 Date: 5/17/00 Time: 1230PM

b. Upon release of the inmate from the unit, detention, etc., the releasing officer is to give the inmate that property stored as a result of the inmate's housing. The inmate certifies release of the property, except as noted on this form, and receipt of a copy of the inventory by signing below. When the inmate claims a discrepancy in the inventory, the releasing officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Releasing Officer: _____ Date: _____ Time: _____

I have today reviewed the property returned to me. Signature of Inmate _____ Reg. No.: _____ Date: _____ Time: _____

Original — Inmate's Central File; CC: Inmate, R & D, Special Housing

USP LVN

Previous editions not usable

BP-383(58)
October 1992

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101-2492

DEC 09 2004

Peter Fernandez, 08107-424
8724 W 44th Place
Lyons, IL 60534



RE: Administrative Claim T-NCR-2004-02937
Personal Property Loss: $84,000.00

Certified Mail No. 7004 0750 0002 4789 6391

Dear Mr. Fernandez:

Your above referenced tort claim has been considered for administrative review pursuant to 28 CFR § 0.172, Authority: Federal Tort Claims and 28 CFR Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal that you suffered any personal property loss as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment. Furthermore, review of this matter revealed that your allegations stem from incidents which occurred more than two years prior to the date of the proper filing of this claim.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 CFR § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than 6 months after the date of mailing of this notification.

Sincerely,

for Daryl Kosiak
Regional Counsel

CANE RESPONSE
Rec'd. SAT. 11 DEC. 2004

WALKING
STICK

CERTIFIED MAIL

7004 0750 0002 4787 6391

U.S. Department of Justice
Federal Bureau of Prisons
St. Louis Consolidated Legal Center
Robert A. Young Building
1222 Spruce Street - Suite 6, 200A
St. Louis, MO 63103
Official Business

TO SAINT LOUIS MO 63101
PM
08 DEC
2004

SAINT LOUIS MO
DEC-9'04

FOR DOMESTIC USE $3.00
U.S. METER 6505241

GREETINGS FROM Far Far Away

U.S.POSTAGE

Rec'd SPT.
11 Dec. 2004
(CAVE
RESPONSE)

Peter Fernandez, 08107-424
8724 W 44th Place
Lyons, IL 60534

WE CARE
THIS MAIL IS ADDRESSED INCORRECTLY
MAIL IS PROCESSED ON AUTOMATED EQUIPMENT
TO AVOID DELAY OR POSSIBLE RETURN OF
MAIL, PLEASE NOTIFY THE SENDER OF
CORRECT STREET NAME AND STREET NUMBER
UNITED STATES POSTAL SERVICE

60534+1613

Case: 1:05-cv-03288 Document #: 6 Filed: 06/06/05 Page 51 of 51 PageID #:109

KC

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
JUN - 3 2005
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

PETER FERNANDEZ JR.,

8723 W. 44TH PLACE,

LYONS ILLINOIS, 60534,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,, FEDERAL BRUEAU OF PRISONS,

WARDEN HEDRICK,
FEDERAL BUREAU OF PRISONS
MEDICAL CENTER,
SPRINGFIELD, MISSOURI,

WARDEN KEITH E. OLSON,
U.S. PENITENTIARY,
TERRE HAUTE, INDIANA,

ONE SPECIAL HOUSING UNIT CORRECTURAL OFFICER, U.S. PENITENTIARY, TERRE HAUTE, INDIANA.

Defendant's

Case No.:

05C 3288

Judge:

JUDGE HOLDERMAN

MAGISTRATE JUDGE SCHENKIER

Magistrate Judge:

LOSS OF PERSONAL PROPERTY BY FEDERAL EMPLOYEE'S

Prepared "Pro Se" by Plaintiff

COMPLAINT

Now comes Peter Fernandez Jr. (Plaintiff) and complaining of the Defendants the U.S. Department of Justice, Federal Bureau of Prisons; Warden Hedrick, Federal Bureau of Prisons Medical Center, Springfield, Missouri; Warden Keith E. Olson, U.S. penitentiary, Terre Haute, Indiana; and One Special Housing Unit Correctional Officer, Terre Haute, Indiana alleges and states as follows:

JURISDICTION

The jurisdiction of this court to hear and determine this action is predicated upon events surrounding the loss of authorized personal property of plaintiff Peter Fernandez Jr. while incarcerated under the U.S. Department of Justice Federal Bureau of Prisons.

THE PARTYS

This action is brought by Plaintiff Peter Fernandez Jr. and against the Defendants The Federal Bureau of Prisons, et al. This action stems from the intentional infliction of emotional

distress imposed on the plaintiff with regard to the treatment he received while incarcerated, and the events surrounding the loss and/or destruction of the plaintiffs authorized personal property, one cane used to assist in walking. The Plaintiff Peter Fernandez Jr., due his disabled and handicapped medical condition was allowed to keep his cane with him during his incarnation at the federal prison camp and also later at the Special Housing Unit (A.K.A. The SHUe and/or The Hole) in Terre Haute, Indiana. The loss of Plaintiffs cane was a deliberate and/or a negligent act on the part of the Federal Bureau of Prisons, et al (Defendants). Plaintiffs repeated pleas to retrieve his personal property through the administrative remedy process (B.P. 8 through B.P. 11) were timely and diligently pursued. The Federal Bureau of Prisons, et al intentionally misrepresented facts, incidences and rules in order to justify their acts as is evident in the denial responses that were submitted. (Exhibits A-U)

GENERAL ALLEGATIONS

1. Peter Fernandez Jr.(Plaintiff) was tried and sentenced to a five (5) year prison term for offences that included mail fraud, theft of funds, engaging in monetary transactions in

property derived from unlawful activity, and laundering of monetary instruments involving case no. 97CR 835-2.

2. Plaintiff self surrendered on May 17, 2000 and was incarcerated at the U.S. Penitentiary prison camp at Terre Haute, Indiana as inmate # 08107-424.
3. Plaintiffs' case is currently under appeal.
4. On the day the Plaintiff self surrendered he had in his possession one wooden cane that has been in his family for generations. The cane was used by the Plaintiff in order to assist him in walking and standing. The cane was listed on the "Inmate Personal Property Record-" (Exhibit A) upon entry to the prison and the disposition of said cane was marked "K" for "Keep in Possession" by a prison staff member.
5. On or about March 4, 2002 Plaintiff was taken from the prison camp in Terre Haute, Indiana and relocated to the Special Housing Unit in the U.S. Penitentiary section of the facility also in Terre Haute, Indiana.
6. On or about April 19, 2002 Plaintiff was transferred out of the Federal prison facility at Terre Haute, Indiana. At this time a correctional officer assisting in the transfer of the Plaintiff told said plaintiff that he could not take the cane onto the bus. The Plaintiff pleaded with the correctional officer to allow him to keep the cane as his medical condition required its use. The correctional

officer assured the Plaintiff that he would personally pack the cane with his other personal property and that it would be returned to him upon arrival at his final destination, which was to be the medical center in Springfield Missouri.

7. On or about April 26, 2002 Plaintiff arrived at the Federal Bureau of Prisons Medical Center in Springfield, Missouri via a one (1) week stay at the transfer center in Oklahoma City, Oklahoma.

8. On or about April 26, 2002 and while at the medical center in Springfield, Missouri Plaintiff received his personal property and found all to be accounted for with the exception of his cane.

9. After discovering that his cane was missing Plaintiff sought the assistance of his new case manager Ms. Darla Dunn and followed bureau procedure by submitting an "Inmate Request to Staff" dated April 28, 2002 (Exhibit B) in an attempt to locate the missing cane.

10. A response came from Mr. Bennett (new counselor for Fernandez Jr.) stating that the staff at Terre Haute told him that the cane with "*...some kind of ornate carving on the handle...*" was either returned to health services or destroyed. (exhibit B)

11. This response was unacceptable to the Plaintiff and he subsequently took the next step by filing an

"Administrative Remedy System Informal Resolution Form" A.K.A. BP-8 (Exhibit C).

12. The response to this form stated that "*...the cane in question was made by his* [the Plaintiffs'] *son in the wood shop at the camp, and that the inmates allegations are false.*"

13. Plaintiff filed on May 31, 2002 the next Request for Administrative Remedy, A.K.A. BP-9 (Exhibit D) which was directed to Warden Hedrick at the Missouri facility.

14. Some Time between June and July of 2002 Plaintiff was again transferred this time to the Federal Correctional Institution in Waseca Minnesota during which time he never received another correspondence from Warden Hedrick regarding the lost cane.

15. On July 12, 2002 while at the F.C.I. in Waseca, Mn. Plaintiff received at mail call an "extension of time for response" filed by prison employees at Springfield Mo. And dated July 10, 2002. (Exhibit E)

16. On or about August 8, 2002 and without a resolution to the BP-9 sent to warden Hedrick, the defendant filed a "Regional Administrative Remedy Appeal" A.K.A. BP-10. (Exhibit F)

17. Plaintiff received a rejection notice on his administrative remedy appeal dated August 27, 2002 from the

North Central Regional Office (Exhibit G) stating that documentation was missing.

18. **Plaintiff responded with a resubmittle and a letter dated September 6, 2002 stating that** *"1. Copies of my BP-8 and BP-9 Remedy Requests were both submitted…"* **and** *"2. I gave to you the only document I have ever received from Warden Hedricks office…"* **(Exhibit H)**

19. **Another rejection notice was issued by the North Central Regional Office dated September 19, 2002 stating the same reasons as the previous rejection. (Exhibit I)**

20. **Plaintiff filed a "Central Office Administrative Remedy Appeal" dated September 29, 2002. (Exhibit J)**

21. **Plaintiff received a rejection notice dated October 10, 2002 (Exhibit K) essentially stating the same reasons for rejection as the regional response. (see Exhibit's G and I)**

22. **Plaintiff sent a letter of reconsideration to Ms. Kathleen Hawk, Director of the Federal Bureau of Prisons in Washington dated October 21, 2002 (Exhibit L) reiterating what he has been maintaining in all of his previous correspondences.**

23. **Plaintiff received another rejection notice dated October 31, 2002 still sighting the same reasons as before and adding** *"The warden responded to your appeal on 07-02-02."* **(Exhibit M)**

24. Plaintiff submitted an "Inmate to Staff Request" to his Case Manager Ms. Agrimson dated March 28, 2003 (Exhibit N) asking for direction in which manner to proceed. No reply was received by the Plaintiff from this staff member.

25. Plaintiff requested, received and filed a tort claim dated April 10, 2004 (Exhibit O) still attempting to re-acquire his cane.

26. On or about June 30, 2003 the Plaintiff was transferred to the Federal Prison Camp in Marion, Illinois.

27. Plaintiff had to re-submit this form (claim number TRT-NCR-2004-02937) with a dollar value inserted into section 12d in order for the tort claim to be processed. (Exhibits P,Q, & R)

28. The plaintiff Fernandez Jr. was released from the Federal Prison Camp to the Chicago Half Way House on or about May 11, 2004.

29. A response that was nearly two months in transit from the Legal Instruments Examiner dated June 22, 2004, was received by the Plaintiff via his half way house Resident Advisor, Ms. James on August 16, 2004, requesting that a receipt be produced by the Plaintiff for his cane (Exhibit S). The plaintiff reminded Defendant through a letter (Exhibit T) of the fact that the cane was a family heir loom and has been in his family for generations and therefore a receipt does not exist.

30. This tort claim was responded to with a notification of final denial under 28 CFR § 14.9. (Exhibit U)

31. Plaintiff, Peter Fernandez Jr. completely disagrees with the following reasons for denial;

a. *"Investigation of your claim did not reveal that you suffered any personal property loss as a result of the negligent acts or omissions of bureau of prison employees acting within the scope of their employment."*

Evidence shows that the Plaintiff entered the prison with his cane in his possession and was allowed to keep it with him through the first part of his incarceration. (Exhibit A)

Terre Haute Camp personnel admitted remembering said cane with "ornate carvings" and admitted to having the cane destroyed or lost. (Exhibit B)

In a later correspondence (Exhibit C) prison employees changed their position with the claim that "...the cane in question was made by his son..." and this brings us back to Exhibit A showing that the cane was carried into the prison camp in Terre Haute, Indiana by the Plaintiff.

b. *"...review of this matter revealed that your allegations stem from incidents which occurred more than two years prior to the date of the proper filing of this claim."*

The length of time it took to file the tort claim was due to the fact that all the informal resolutions and administrative remedies had to be followed according to the Federal Bureau of Prisons Program Statements. Although the duration was in fact more than two years each individual correspondence which was filed by the Plaintiff was filed in a timely fashion and within the time limits set forth for such filings.

32. WHEREFORE, for the foregoing reasons Plaintiff Peter Fernandez Jr. prays this court to enter a judgment against the Defendants The U.S. Department of Justice Federal Bureau of Prisons, Wardan Hedrick Federal Bureau of Prisons Medical Center in Springfield Missouri, Warden Keith E. Olson Federal Bureau of Prisons U.S. Penitentiary in Terre Haute Indiana, and one special housing unit correctional officer Terre Haute Indiana as follows:

a. For actual damages in the amount of Eighty Five Thousand Dollars ($ 85,000.00) and for such other and further relief as this court deems just and equitable.

b. For compensatory and exemplary damages in the amount of One Hundred Thousand Dollars ($ 100,000.00) and for such other and further relief as this court deems just and equitable.

c. For Punitive damages in the amount of One Hundred Thousand Dollars ($ 100,000.00) and for such other and further relief as this court deems just and equitable.

Please accept this complaint prepared "Pro Se" by Plaintiff Peter Fernandez Jr. Thereto in light of Haines Vs. Kerner, 404 U.S. 519,520,925. CT. 594, 30 L. ED. 2d 652 (1972). PLAINTIFF DEMANDS A TRIAL BY JURY.

RESPECTFULLY SUBMITTED

By: _____

Peter Fernandez Jr.
Pro Se Plaintiff
8723 West 44th Place
Lyons, Illinois 60534

U.S. Department of Justice
Federal Bureau of Prisons

Inmate Personal Property Record—
Institution: USP THA

1. Name:	2. Register Number:	3. Unit:	4. Date and Time of Inventory:
Fernandez, Peter W, Jr	08107-424	Camp	5/17/00 1230PM

5. Purpose of Inventory (check one that applies): Date and Time of Action: 5/17/00 1230PM
a. ✓ Admission b. ___ Hospital c. ___ Writ d. ___ Transfer e. ___ Detention f. ___ Release
g. ___ Incoming package h. ___ Other (specify)

6. Disposition (Disp.)
D - Donated M - Mail S - Storage
K - Keep in Possession
C - Contraband (Attach BP-Record-102)

7. Type of Property:

a. Personally Owned Items

#	Article	Disp.
	Batteries	
	Belt	
	Billfold	
	Books, reading hard___, soft___	
	Books, religious hard___, soft___	
	Brassiere	
	Cap, Hat	
	Coat	
	Coins	
	Comb	
	Combination lock	
	Dress	
	Driver's license	
	Earplugs	
	Eyeglass case	
1	Eyeglasses	K
	Gloves	
	Hair brush/pick	
	Handkerchief	
1	Jacket	M
	Jogging suit	
	Legal Materials	
	Letters	
	Magazines	
	Mirror	
	Nail Clippers	
1	Pant/slacks	M
	Pen, ballpoint	
	Pencils	
	Personal papers	
	Photo album	
	Photos	

#	Article	Disp.
	Plastic spoon, cup	
	Playing cards	
	Purse	
	Radio (w/earplug)	
1	Religious medals-chain	K
1	Ring Valentine	K
	Shirt/blouse	
1	Shoes DK. brown	K
	Shoes, shower	
	Shoes, slippers	
	Shoes, tennis	
	Shorts	
	Skirt	
	Slip	
	Social security card	
	Socks	
	Socks, athletic	
	Stamps	
	Stockings	
	Sunglasses	
	Sweater	
	Sweat pants	
	Sweat shirt	
	Trophy	
1	T-Shirts	K
1	Underwear	K
	Watch/watch band	
	Wig	
1	watch	M
1	comb	K
1	Gold ring	K
1	Miscellaneous	M
1	Photographs	M

b. Hygiene, etc.

#	Article	Disp.
	Dental floss	
	Dentures	
	Deodorant	
	Hair oil	
	Nexzema	
	Powder	
	Razor	
	Razor blades	
	Shampoo	
	Shaving lotion	
	Skin lotion	
	Soap	
	Soap dish	
	Toothbrush	
	Toothpaste	

c. Hobbycrafts

#	Article	Disp.

d. Food/Tobacco Items

#	Article	Disp.
	Canned tobacco	
	Chewing tobacco	
	Cigarettes	
	Cigars, snuff	
	Coffeemate	
	Cold drink mix, soda	
	Fruit	
	Honey, Hi-protein	
	Instant chocolate	
	Instant coffee	
	Instant tea	
	Pipe cleaner/filters	
	Pipes	

e. Miscellaneous (List any damaged property and from where it was received; e.g., U.S. Marshal)

EXHIBIT 4

8. Items Alleged by Inmate to Have Value Over $100.00

Description of Property	Value Alleged by Inmate

✓ No individual item over $100.00

9. Article(s) Listed as "Mail" (M) Are to be Forwarded to (Name and Address of Consignee): (708)447-1959
Barbara Fernandez 8723 W. 44th Place Lyons, IL. 60534

10. Claim Release: a. The receiving officer, as soon after receipt of the property as possible, will review the inventory with the inmate to verify its accuracy. Property that is stored, kept in possession of the inmate, mailed out of the institution, or donated is to be marked in the appropriate section of this inventory form. The receiving officer certifies receipt, review and disposition of the property by signing below. The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Receiving Officer: R. STARBUCK & R. Starbuck Date: 5/17/00 Time: 1230PM

I have today reviewed the property returned to me. Signature of Inmate: P. Fernandez Reg. No.: 08107-424 Date: 5/17/00 Time: 1230PM

b. Upon release of the inmate from the unit, detention, etc., the releasing officer is to give the inmate that property stored as a result of the inmate's housing. The inmate certifies release of the property, except as noted on this form, and receipt of a copy of the inventory by signing below. When the inmate claims a discrepancy in the inventory, the releasing officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Releasing Officer: _____ Date: _____ Time: _____

I have today reviewed the property returned to me. Signature of Inmate: _____ Reg. No.: _____ Date: _____ Time: _____

Original — Inmate's Central File; CC: Inmate, R & D, Special Housing

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE — **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
DARLA DUNN, CASE MGR.	28 APRIL 2002
FROM: PETER FERNANDEZ	REGISTER NO.: 08107-424
WORK ASSIGNMENT: MEDICAL	UNIT: L-3

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DEAR MS. DUNN; I WILL BE HERE 1 WEEK ON 2 MAY 2002. I WAS IN OKLAHOMA CITY FOR ONE WEEK ALSO. PRIOR TO THIS I WAS IN THE S.H.U. (HOLE) FOR JUST OVER 6 WEEKS. ALL MY PROPERTY ARRIVED HERE FROM TERRE HAUTE CAMP ON FRIDAY 26 APR. 2002. I HAVE ALWAYS USED A CANE TO ASSIST ME IN GETTING ALONG WHILE AT CAMP FOR THE PAST 2 YEARS. THE CANE WAS WITH ME EVERY-WHERE. WHEN LEAVING TERRE HAUTE S.H.U. I WAS NOT ALLOWED TO BRING MY CANE WITH ME. THE OFFICER TOLD ME THAT HE WOULD BE SURE TO SHIP IT ALONG WITH THE REST OF MY PROPERTY. THIS CANE WAS HAND (OVER)

(Do not write below this line)

DISPOSITION:
I SENT A MESSAGE TO THE ISM AT TERRE HAUTE ON MAY 2, 02. I RECEIVED A REPLY FROM MR. STEPHEN GIDEN, THAT THE CANE IN QUESTION WAS RETURNED TO HEALTH SERVICES AND THAT YOU WERE NEVER INFORMED THAT YOU WOULD BE RECEIVING IT. MR. GIDEN STATED THAT THE CANE HAD SOME KIND OF ORNATE CARVING ON THE HANDLE HOWEVER, HE SPECULATED IT HAD BEEN DESTROYED. YOU WILL NEED TO PROVIDE A COPY OF YOUR FORM 40 WHICH WOULD IDENTIFY THIS ITEM AS YOUR PERSONAL PROPERTY. BRING IT WITH YOU TO OPEN HOUSE AND I WILL CONTINUE TO PURSUE IF NEED BE.

Signature Staff Member	Date
M. Bennett	5-3-02

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.0 and BP-S148.070 APR 94

REC'D 6 MAY 2002

Printed on Recycled Paper

EXHIBIT B

MADE BY MY GRANDFATHER FOR MY GRANDMOTHER IN GERMANY AND IS OVER 80 YEARS OLD. MY MOTHER AND WIFE ALSO USED IT AND NOW FOR THE PAST FEW YEARS IT HAS BEEN MINE AND WITH ME EVERYWHERE. THIS WALKING STICK IS PRECIOUS TO ME AND MY FAMILY. I HAVE WAITED FOR ALMOST A WEEK IN THE HOPE THAT IT WOULD GET HERE TO R&D BUT SO FAR NOTHING. CAN YOU PLEASE CALL THE S.H.U. AT TERRE HAUTE AND ARRANGE FOR THEM TO FIND IT AND SHIP IT HERE AS THE PROMISED ME, EVERYONE THERE WAS TOTALLY FOR WITH MY CANE,!!! MILIAR

THANKS SO MUCH FOR YOUR HELP

SINCERELY

Pedro Fernandez

#08107-424

BP-8

Attachment A
SPG-1330.13b

U.S. MEDICAL CENTER FOR FEDERAL PRISONERS
SPRINGFIELD, MISSOURI

Administrative Remedy System
Informal Resolution Form

NOTICE TO INMATE/PATIENT: You are advised that prior to filing a Request for Administrative Remedy Form (BP-9), you MUST attempt to informally resolve your complaint through your Correctional Counselor. Please follow the three (3) steps listed below:

1. State below your specific complaint.
2. State below what efforts you have made to resolve your complaint informally.
3. State below what action or resolution you expect.

THE B.O.P. HAS LOST MY WALKING STICK - MUCH PAPER WORK HAS BEEN SUBMITTED TO GET IT BACK TO ME - I WANT MY 80 YEAR OLD WALKING STICK. IT SELF SURRENDERED WITH ME ON 17 MAY 2000. B.O.P. DOCUMENTATION WILL SHOW THAT THE WALKING STICK HAS BEEN WITH ME EVERYWHERE FROM THE START. THE B.O.P. PROMISED ME THAT IT WOULD BE

Peter Fernandez Jr. | 08167-424 | 23 MAY 2002
Signature | Reg. No. | Date

CAREFULLY PACKED AND SHIPPED WITH MY PROPERTY WHEN LEAVING R & D FERRE HAUTE, INDIANA. I NEVER GOT IT. I WANT MY GRANDMOTHERS WALKING STICK.

Correctional Counselor's Comments (Including actual steps taken to resolve).

Counselor Contacted inmates Counselor at Terre Haute and was informed that the Cane in Question was sent by his Son to the front Steps of the Camp, and that the inmates allegations are false

M. Bennett | 5-28-02
Counselor's Signature | Date

Distribution:

I. If complaint is informally resolved, forward original to Office of Attorney/Advisor (Attn: Administrative Remedy Clerk)
II. If complaint is NOT informally resolved, forward original attached to BP-9 Form to Office of Attorney/Advisor (Attn: Administrative Remedy Clerk)

Form Returned To Counselor	BP-9 Given To Inmate	BP-9 Returned To Counselor	BP-9 Delivered To Atty/Advisor
Date 5-24-02	5-28-02		
Time	1205		
Counselor	M. Bennett		

EXHIBIT G

Tried back from me. Request in Oct. 02 Tors. 2002

Federal Bureau of Prisons

BP-9

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: FERNANDEZ, PETER N. 08107-424 2-J MED. CNTR. FOR FED. PRISONERS
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT SPRINGFIELD INSTITUTION MO.

Part A- INMATE REQUEST DEAR WARDEN HEDRICK: I WANT MY FAMILYS WALKING STICK. I STILL DON'T HAVE IT AFTER ALL THIS TIME AND IT WAS PROMISED TO ME. PREVIOUS ATTEMPTS TO RESOLVE THIS SIMPLE ISSUE HAVE FAILED AND FOR NO GOOD REASON. THIS HAS TO DO WITH MY PERSONAL PROPERTY THAT I SURRENDERED WITH ME ON 17 MAY 2000. THE WALKING STICK OF WHICH I SPEAK WAS ALLOWED TO STAY WITH ME AND IN MY POSSESSION FROM THE ABOVE WRITTEN DATE UNTIL I LAST SET MINE EYES TO IT ON 19 APRIL 2002. ON THAT DATE I WAS NOT ALLOWED TO TAKE MY WALKING STICK WITH ME ON ROUTE TO OKLAHOMA CITY. HOWEVER I WAS VEHEMENTLY PROMISED BY THE STAFF THAT MY WALKING STICK WOULD BE SAFELY PACKED AND SHIPPED ALONG WITH MY PROPERTY TO MY FINAL DESTINATION IN SPRINGFIELD, MO. IT WAS A SEVERE HARDSHIP TO ME TO FORCE ME TO MOVE ALONG IN CHAINS AND SHACKLES WITHOUT THE ASSISTANCE OF MY

31 MAY 2002 DATE

Peter Fernandez #08107-424 SIGNATURE OF REQUESTER

Part B- RESPONSE

D

DATE WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER:

Part C- RECEIPT CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP LVN

BP-229(13)
APRIL 1982

WALKING STICK. [illegible]EN THE STAFF AT OKLA[illegible]MA CITY SAW THE DIFFICULTIES I WAS HAVING BEING SO DIZZY AND JUST SIMPLY TRYING TO STAND UP THEY MADE CERTAIN THAT I WAS ISSUED A NEW CANE IMMEDIATELY. ON ALL EXISTING B.O.P. INMATE PROPERTY LISTS MY WALKING STICK IS ALWAYS LISTED. RIGHT FROM THE VERY START IN JUNE OF 2000 AT THE CAMP IN TERRE HAUTE, INDIANA I WAS ATTEMPTING TO NEGOTIATE THE REAR STEPS NEAR THE ICE MACHINE AND THE MAIN GYM ENTRANCE WHEN I SLIPPED ON THE WET STAIRS AND FELL DOWN ALL FIVE STEPS. THOSE REAR STAIRS TYPICALLY WERE ALWAYS WET AND THE FLOOR ALWAYS FLOODED WHEN IT RAINED. THE STORM WATER FLOODED THE AREA JUST INSIDE THE REAR DOOR ENTRANCE LEAVING A POTENTIALLY DEADLY SITUATION TO A HANDICAPPED PERSON. WITH MY WEIGHT THE FALL WAS SEVERE AND HARD AND HAD IT NOT BEEN FOR MY WALKING STICK I MIGHT HAVE CRACKED MY HEAD WIDE OPEN ON THE CONCRETE STAIRS OR SUFFERED EVEN SOMETHING WORSE. AS YOU ARE PROBABLY AWARE I SUFFER FROM ARTHERITUS AND BOTH MY KNEES TOOK A SEVERE JOLT IN THE FALL, ONE WORSE THAN THE OTHER. TO THIS DAY THE VIRICOS VAINS THAT I SUFFER WITH IN MY LEGS HAVE SWOLLAN BADLY BEHIND MY ONE KNEE AS A RESULT OF THAT FALL. I WAS TOLD BY THE MEDICAL STAFF AT THE CAMP TO DOUBLE UP ON THE ASPIRIN INTAKE UNTIL THE PAIN SUBSIDES. NO X-RAYS WERE EVER TAKEN OF MY KNEES EVEN THOUGH I ASKED FOR THEM. WHILE I WAS ON THE HEAVY REGIMENT OF ASPIRINS I DEVELOPED SEVERE BLEEDING WHEN GOING TO THE BATHROOM. I WAS BLEEDING FROM MY STOMACH AND IT TOOK THE MEDICAL STAFF AT CAMP MORE THAN A MONTH TO COMPLETELY STOP THE HEMORAGING. THE BLEEDING SCARE IS ANOTHER STORY. COUPLED WITH THE ARTHERITUS AND THE VIRICOS VAINS BEHIND THE INJURED KNEE THE PAIN IS SOMETIMES TO HORRIBLE TO LIVE WITH. I AM STILL SUFFERING FROM THIS INJURY TO THIS DAY. MY WALKING STICK WAS BROKEN ON THAT DAY BUT IT MIGHT HAVE SAVED MY LIFE. IT STAYED BROKE AND IN MY POSSESSION UNTIL MY SON PETER III ARRIVED AT THE CAMP IN JULY OF 2000. ONE DAY HE NOTICED MY GRANDMOTHERS WALKING STICK WAS BROKEN. IT WAS THEN THAT I ASKED HIM TO REPAIR IT FOR ME AT THE CARPENTER SHOP WHERE HE WAS A GRADE ONE CARPENTER. MY SON REPAIRED MANY THINGS FOR ME AND IN GENERAL HELPED ME VERY MUCH IN MY EXISTANCE AT THE CAMP. BEFORE ALL THE RECKLESS AND MISQUIDED INFORMATION STARTED TO ARISE IN THE EVENTS SURROUNDING MY WALKING STICK I WAS HAPPY ENOUGH TO JUST HAVE

31 MAY 2003 (CONT.)

THE B.O.P. GET MY WALKING STICK TO ME AS PROMISED. I ASKED NOTHING MORE. AT THIS POINT HOWEVER I AM COMPELLED TO TELL YOU SIR THAT I FEAR THAT MY WALKING STICK HAS BEEN TAKEN FROM ME IN A DELIBERATE ACT. FROM 4 MARCH 2003 TO 19 APRIL 2003 I WAS IN THE "HOLE" AT TERRE HAUTE, INDIANA. ON MORE THAN JUST A FEW TIMES THE C.O. STAFF MADE MANY COMMENTS AND MENTIONED MY UBIQUITOUS WALKING STICK AND HOW BEAUTIFUL IT WAS. THEY FUSSED OVER MY WALKING STICK MUCH. ALL OF THEM KNEW THAT THIS UNIQUE PIECE WAS MY GRANDMOTHERS AND THAT IT WAS VERY VERY PRECIOUS TO ME. WARDEN HEDRICK WON'T YOU PLEASE FAVOR ME WITH YOUR ASSISTANCE. I WANT MY FAMILYS WALKING STICK AS PROMISED, NOTHING MORE.

RESPECTFULLY SUBMITTED

[signature] #08107-424

31 may 2003

EXTENSION OF TIME FOR RESPONSE - ADMINISTRATIVE REMEDY

Exhibit E

DATE: JULY 10, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SPRINGFIELD USMCFP

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E04-006L

ADDITIONAL TIME IS NEEDED TO RESPOND TO THE ADMINISTRATIVE REMEDY REQUEST IDENTIFIED BELOW. WE ARE EXTENDING THE TIME FOR RESPONSE AS PROVIDED FOR IN THE ADMINISTRATIVE REMEDY PROGRAM STATEMENT.

REMEDY ID : 269402-F1
DATE RECEIVED : JUNE 4, 2002 — To 24 June (20 days)
RESPONSE DUE : JULY 14, 2002 — with 20 day extension response due here
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

Total 40 days

Rec'd. Friday at Mail call 12 July 2002

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From: Fernandez, Peter	08107-424	E	FCI-Waseca, MN
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A—REASON FOR APPEAL

To whom it may concern:

In the matter of my walking stick. On Friday, 12 July 2002 at mail call I received only a copy of an "extension of time for response - Administrative Remedy" notice. I received it at the Waseca, MN institution. (A copy is enclosed for your review.) Clearly the warden at Springfield, MO has elected not to respond to my BP-9. To reiterate, my request was only to get back my grandmother's walking stick and personal property. It has been with me since I self-surrendered on 17 May 2000 at the Terre Haute, IN camp. A more detailed description of the events surrounding my walking stick and its mysterious disappearance is evident in my BP-9. Copies of my property lists clearly show my walking stick with me from the very beginning. Sir, all I want is my family's walking stick that is my personal property, nothing more.

8 August 2002 — DATE

[signature] #08107-424 — SIGNATURE OF REQUESTER

Part B—RESPONSE

RECEIVED
AUG 19 2002
REGIONAL DIRECTOR'S OFFICE
NORTH CENTRAL REGIONAL OFFICE

RECEIVED
SEP 12 2002
REGIONAL DIRECTOR'S OFFICE
NORTH CENTRAL REGIONAL OFFICE

DATE — REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE — CASE NUMBER: 249402-R2

Part C—RECEIPT

CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

DATE — SIGNATURE, RECIPIENT OF REGIONAL APPEAL

BP-230(13)
APRIL 1982

USP LVN — Previous editions not usable

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: AUGUST 27, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
NORTH CENTRAL REGIONAL OFFICE

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E02-001L
1000 UNIVERSITY DR, SW
WASECA, MN 56093

EXHIBIT G

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 269402-R1 REGIONAL APPEAL
DATE RECEIVED : AUGUST 19, 2002
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

REMARKS : MAILED FROM USP-THA TO MCFP-SPG

Rec'd. on Friday
Mailcall 4:00 PM
30 August 2002

6 September 2002

Administrative Remedy Coordinator
North Central Regional Office
Gateway Complex Tower II
8th floor
4th and State Avenues
Kansas City, KS 66101-2492

Re: Rejection Notice Administrative Remedy I.D. #269402-R1
Regional Appeal

Dear Administrative Remedy Coordinator:

I am in receipt of your Administrative Remedy Rejection Notice dated 27 August 2002 that I received on Friday, 30 August 2002.

With all due respect, frankly, sir, I do not understand your two reject reasons. Both reject reasons are clearly incorrect as evident in my BP-10 filing.

1. Copies of my BP-8 and BP-9 Remedy Requests were both submitted to you with my file.
2. I gave to you the only document I have ever received from Warden Hedricks office with regard to this issue and that is the "Extension of Time for Response" cover sheet only.

In closing, please allow this letter to serve as my request for your reconsideration of my submittal. Notwithstanding your reject reasons, I must insist that my BP-10 submittal file is complete - it is all that I have to give. Thank you for your reconsideration, sir. I remain . . .

Respectfully yours,

[redacted]

Peter Fernandez
08107-424, Unit E
Federal Correctional Institution
P.O. Box 1500
Waseca, MN 56093

[redacted]

RECEIVED
SEP 12 2002
REGIONAL DIRECTOR'S OFFICE
NORTH CENTRAL REGIONAL OFFICE

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: SEPTEMBER 19, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
NORTH CENTRAL REGIONAL OFFICE

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E02-001L
1000 UNIVERSITY DR, SW
WASECA, MN 56093

EXHIBIT I

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 269402-R2 REGIONAL APPEAL
DATE RECEIVED : SEPTEMBER 12, 2002
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

REMARKS : MAILED FROM USP-THA TO MCFP-SPG

PROVIDE A COPY OF YOUR BP-9 RESPONSE.

Rec'd. Monday
AT 4:00 PM MBK CELL
ON 23 SEPT. 2002

U.S. Department of Justice — **Central Office Administrative Remedy Appeal**

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From: Fernandez, Peter	08107-424	E	FCI - Waseca, MN
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A—REASON FOR APPEAL

I am stunned at the second reject notice that I received from the Regional Office on Monday 23 Sept. 2002. Not only has the Regional Office rejected my BP-10 Submittal for the second time, they have also completely disregarded my personal plea to them by way of my letter dated 6 Sept. 2002 asking them for reconsideration.

I truly wanted to settle this issue at this BP-10 level. The resolution of it all is so simple.

My BP-10 submittal and subsequent letter for reconsideration outline the issues at hand as they happened. I have always maintained that my family's walking stick that surrendered with me on 17 May 2000 was taken by a staff member who obviously wanted it badly. A deliberate act unbecoming of any B.O.P. staff member.

While in the hole at the Terre Haute Institution much attention was always observed over my beautiful walking stick. I want what is rightfully mine - nothing more.

As outlined before the simplest solution to all this is for the Bureau of Prisons to return my property to me. My detailed reasons are all explained in my previous submittals. I hope you will take the time to read them. If a resolution ensues, all will be forgotten and never brought up again.

09 Sept. 2002 — #08107-424 — Peter Fernandez

DATE — SIGNATURE OF REQUESTER

Part B—RESPONSE

RECEIVED
OCT 8 2002
ADMINISTRATIVE REMEDY BRANCH

DATE — GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE — CASE NUMBER: 269402-A

Part C—RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT:

RECEIVED
OCT 29

DATE — SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN

Printed on Recycled Paper

BP-231(13)
APRIL 1982

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: OCTOBER 10, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
BOP CENTRAL OFFICE

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E02-001L
1000 UNIVERSITY DR, SW
WASECA, MN 56093



FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 269402-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : OCTOBER 8, 2002
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: SEE REMARKS.

REJECT REASON 3: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

REMARKS : WE CONCUR WITH THE REGIONAL OFFICIALS RATIONALE FOR REJECTING YOUR APPEAL.

Recd. (WEDNESDAY (AT MAIL CALL) 16 OCT. 2002—

IT MUST BE NOTED THAT I AM RECEIVING THIS NOTICE 6 DAYS AFTER THE DATE SHOWN.

2 /

20 October 2002

Ms. Kathleen Hawk, Director, Federal Bureau of Prisons
Central Office
320 First Street, N.W.
Washington, D.C. 20534

RE: Peter Fernandez #08107-424
and rejection of my BP-11 #269402-A1 dated 10 Oct. 2002
and my Reconsideration Request.

EXHIBIT 2

Dear Ms. Hawk:

By now I am truly beside myself in trying to determine what exactly the Bureau of Prisons expects from me with regard to my BP-8, 9, 10, and 11 Administrative Remedy Appeal documents.

I have clearly stated before that whatever documentation I received from the staff at any of the Bureau of Prison's institutions was forwarded to you in all my submittals.

I will endeavor to clarify my documents to you with the hope that you will accept and understand what I have said all along.

In the Reject Notice dated 10 October 2002, the following should be noted:

Reject Reason #1 - I disagree totally with the statement that I did not submit a BP-9 to Warden Hedrick at the Springfield, MO medical center. My BP-9 has always been submitted with my Administrative Remedy submittals - always. With regard to Warden Hedrick's response, I have sent you a copy of the only document that I have ever received and that was a request for an extension of time to respond dated 10 July 2002. Is it possible that the Bureau of Prisons expects me to wait indefinitely for Warden Hedrick's response? I don't think so. It has been almost 4

months and all I have gotten was the enclosed extension of time request.

Reject Reason #2 states that the Central Office concurs with the Regional Office's rationale for rejecting my appeal. I yield to you, Ms. Hawk, to tell me please, what part of my submittal don't they understand? I do not know how to say what I have already said any other way. My statements as submitted are direct, precise, accurate, and true.

In closing, please favor me with my family's walking stick that is my property and surrendered with me on 17 May 2000. It is rightfully my property and it is all I have ever wanted, nothing more. Thanking you for your time and the Bureau's reconsideration, I remain always . . .

A partner in caring,

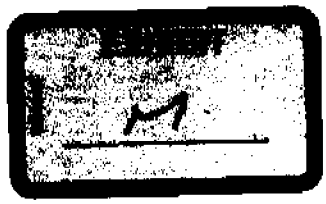
Peter Fernandez
#08107-424, Unit E
Federal Correctional Institution
P.O. Box 1500
Waseca, MN 56093

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: OCTOBER 31, 2002

FROM: ADMINISTRATIVE REMEDY COORDINATOR
BOP CENTRAL OFFICE

TO : PETER N FERNANDEZ JR, 08107-424
WASECA FCI UNT: UNIT B/E QTR: E02-001L
1000 UNIVERSITY DR, SW
WASECA, MN 56093



FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 269402-A2 CENTRAL OFFICE APPEAL
DATE RECEIVED : OCTOBER 29, 2002
SUBJECT 1 : PERSONAL PROPERTY - INCL. CONFISCATION OR DESTRUCTION
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: SEE REMARKS.

REJECT REASON 3: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

REMARKS : WE STILL CONCUR WITH THE REGION'S RATIONALE FOR REJECTING YOUR APPEAL. THE WARDEN RESPONDED TO YOUR APPEAL ON 07-02-02.

Rec'd. AT 4:00 PM MSM Dock
Wednesday 6 Nov. 2002

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) Ms. Agrimson, Case Manager	DATE: 28 March 2003
FROM: Peter Fernandez	REGISTER NO.: 08107-424
WORK ASSIGNMENT: Medical	UNIT: E

Copy

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Dear Ms. Agrimson:

I was told by the staff at the medical center in Springfield, MO (from whence I came) that I needed to fill out a "tort claim" for my personal property that was lost by the Bureau of Prisons (Terre Haute staff). In a brief disposition, can you please direct and write me in the manner in which I am to proceed with this claim?

Fact: I was put in the hole at Terre Haute, Indiana on 4 March 2002.

Fact: I was transferred from Terre Haute, Indiana on 19 April 2002.

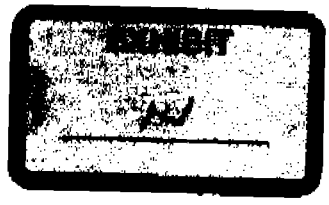
Fact: Mine eyes last saw my missing property at Terre Haute, Indiana on 19 April 2002.

Fact: I started my Administrative Remedy Process on 23 May 2002 while

(see back)

(Do not write below this line)

DISPOSITION:



Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

at the medical center in Springfield, MO with the BP-8 form.

Fact: My BP-11 Administrative Remedy was written and submitted to Washington, D.C. on 29 Sept. 2002.

Fact: The conclusion of all the BP-11 Administrative Remedy correspondence did not conclude until 6 November 2002.

Please advise me on what official date the clock started to run on this claim.

Thank you for your assistance. I remain always...

Sincerely,

Peter Fernandez #08107-424
F.C.I. Waseca, MN

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Daryl Koslak, Regional Counsel
North Central Regional Office
Gateway Tower II, 8th Floor
400 State Avenue
Kansas City, KS 66101

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
PETER FERNANDEZ #08107-424
MARION FEDERAL PRISON CAMP
ROUTE 5 - P.O. BOX 1000 "OLD DORM"
MARION, ILLINOIS 62959

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	6 MARCH 1941	MARRIED	19 APRIL 2002	AM

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.) ON THE DAY OF MY DEPARTURE FROM THE S.H.U. AT THE U.S. PENITENTIARY IN TERRE HAUTE, INDIANA I WAS TOLD BY THE S.H.U. GUARD THAT I WAS NOT ALLOWED TO TAKE MY CANE ON TO THE BUS MAKING IT IMPOSSIBLE FOR ME TO WALK WITHOUT ASSISTANCE. I TOLD HIM THAT THIS WAS MY PERSONAL PROPERTY AND THAT IT SELF SURRENDERED WITH ME ON 17 MAY 2000 AND WAS WITH ME EVERY WHERE I WENT. I NEEDED IT BADLY IN ORDER TO AMBULATE. THE GUARD PROMISED ME THAT HE WOULD PERSONALLY PACK MY CANE IN WITH MY OTHER PROPERTY SO THAT ALL MY PROPERTY WOULD BE SHIPPED TO MY NEW LOCATION AT THE MEDICAL CENTER IN SPRINGFIELD, MO. I WANT NOTHING FROM YOU ONLY WHAT WAS PROMISED TO ME AND WHAT WAS MINE. WHEN MY PROPERTY ARRIVED AT SPRINGFIELD, MO. MEDICAL CENTER, MY CANE WAS NOT THERE AS PROMISED.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) WALKING CANE (MY PROPERTY) STOLEN OR LOST - FEDERAL PENITENTIARY, SHU (SPECIAL HOUSING UNIT) TERRE HAUTE, INDIANA

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

EXHIBIT 1

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
NAME UNKNOWN OF GUARD WHO TOOK CANE FROM ME WHEN I LEFT S.H.U. AT TERRE HAUTE, INDIANA	U.S. PENITENTIARY - S.H.U. TERRE HAUTE, INDIANA

12. (See instructions on reverse) AMOUNT OF CLAIM (In dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Peter Fernandez #08107-424		10 APRIL 2004

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable. PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

This form was electronically produced by Elite Federal Forms, Inc.

n Fernandez
107-424
ION Federal Prison Camp
e 5 - P.O. Box 1000 - "Old Dorm"
ION, Illinois 62959

CERTIFIED MAIL™

7003 0500 0003 4002 3722

7003 0500 0003 4002 3722

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

Postage $ .37
Certified Fee 2.30
Return Receipt Fee (Endorsement Required) 1.75
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $ 4.42

Postmark Here

Sent To Darcy Kosiak, Regional Counsel
North Central Regional Office
Street, Apt. No.; or PO Box No. Gateway Tower II - 5th Floor
City, State, ZIP+4 400 State Ave. - Kansas City, KS. 66101

PS Form 3800, June 2002 See Reverse for Instructions

Daryl Kos
North Centra
Gateway Towe
400 State Ave
Kansas City,

SENDER: COMPLETE THIS SECTION

COMPLETE THIS SECTION ON DELIVERY

7003 0500 0003 4002 3722

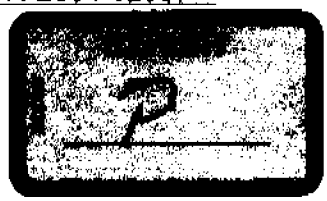
U.S. Department of Justice
Federal Bureau of Prisons
North Central Region
Kansas City KS 66101

COPY

DATE: April 27, 2004

REPLY TO ATTN OF: M. Martinez
Legal Technician

SUBJECT: Your Claim for Damage, Injury or Death
Date Received: 04/14/04 Tort Claim #: TRT-NCR-2004-02937



TO: Peter Fernandez
08107-424
USP Marion

Your Standard Form 95 has been received in this office. The Federal Tort Claims Act affords the government six (6) months from the date that a properly submitted claim is filed with the agency in which to make an administrative determination.

Upon review of your SF-95, we find that the form is incomplete or that further information will be required to establish your submission as a claim for relief under the Federal Tort Claims Act. Accordingly, the following information is required pursuant to Title 28, Code of Federal Regulations, Section 14:

[X] Action needed to complete the attached claim form:

12d. There must be an amount entered in order to process this claim.tion. Please enter the amount and resubmit this claim, along with this sheet, to the address listed below.

[ ] The following additional information is requested:

_____

_____

_____

The completed form and/or information requested should be returned to:

FEDERAL BUREAU OF PRISONS
LEGAL DEPARTMENT - M. MARTINEZ
NORTH CENTRAL REGIONAL OFFICE
GATEWAY TOWER II 8TH FLOOR
400 STATE AVENUE
KANSAS CITY KS 66101-2492

PLEASE BE ADVISED THAT, ABSENT THE INFORMATION REQUESTED OR COMPLETION OF THE FORM AS INDICATED ABOVE, YOUR SUBMISSION WILL NOT BE CONSIDERED A PROPERLY SUBMITTED CLAIM FOR CONSIDERATION UNDER THE FEDERAL TORTS CLAIM ACT.

8 JUNE 2004

MR. M. MARTINEZ, LEGAL DEPARTMENT
FEDERAL BUREAU OF PRISONS, NORTH CENTRAL REGIONAL OFFICE
GATEWAY TOWER II 8TH. FLOOR
400 STATE AVENUE
KANSAS CITY, KANSAS 66101-2492

COPY

RE: PETER N. FERNANDEZ, JR. - TORT CLAIM NUMBER TRT-NCR-2004-02937

DEAR MR. MARTINEZ:

I HAVE TRIED WITH ALL OF MY BEING TO SETTLE THIS ISSUE IN THE MOST SIMPLEST WAY THAT I KNOW AND HAVE DONE SO, FOR ALMOST TWO YEARS. I HAVE SUBMITTED DETAILED ADMINISTRATIVE REMEDYS STARTING WITH THE BP-8 THROUGH THE BP-11 AND THE LAST BEING SENT TO KATHLEEN HAWK IN WASHINGTON, D.C. TO NO AVAIL. ALL I HAVE EVER ASKED FOR WAS MY PERSONAL (MY CANE) PROPERTY THAT SELF SURRENDERED WITH ME ON 17 MAY 2000. I WANT MY CANE BACK, NOTHING MORE. MY CANE WAS GIVEN TO MY MOTHER, WHO GOT IT FROM HER MOTHER. MY GRANDFATHER MADE IT FOR MY GRANDMOTHER. IT IS EXTREMELY DIFFICULT FOR ME TO PUT A DOLLAR AMOUNT ON A PIECE LIKE THIS. AFTER YOUR INSISTANCE OF A DOLLAR AMOUNT I CAN TELL YOU THAT I WOULD PUT A VALUE ON MY CANE OF $84,000.00.

IN CLOSING I AM SENDING ALONG MY ORIGINAL CLAIM FORM WITH THE DOLLAR AMOUNT YOU ASKED FOR. ALSO I AM SENDING YOU A COPY OF MY ORIGINAL PROPERTY LIST SHOWING MY CANE SELF SURRENDERING WITH ME ON 17 MAY 2000. ALSO I'M SENDING YOUR CORRESPONDENCE OF 27 APRIL 2004 BACK TO YOU AS PER YOUR REQUEST...

RESPECTFULLY SUBMITTED
Peter Fernandez Jr.

EXHIBIT
2

OFFICE OF REGIONAL COUNSEL
Federal Bureau of Prisons
North Central Regional Office
400 State Street, Tower II, 8th Floor
Kansas City, Kansas 66101
M. MARTINEZ

Recd. Wednesday
5 MAY 2004 IN MAIL

Peter Fernandez
08107-424
USP Marion

J09-001L

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Daryl Kosiak, Regional Counsel
North Central Regional Office
Gateway Tower II, 8th Floor
400 State Avenue
Kansas City, KS 66101

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
PETER FERNANDEZ #08107-424
MARION FEDERAL PRISON CAMP
ROUTE 5 - P.O. BOX 1000 "OLD DORM"
MARION, ILLINOIS 62959

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	6 MARCH 1941	MARRIED	19 APRIL 2002	AM

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.) ON THE DAY OF MY DEPARTURE FROM THE S.H.U. AT THE U.S. PENITENTIARY IN TERRE HAUTE, INDIANA I WAS TOLD BY THE S.H.U. GUARD THAT I WAS NOT ALLOWED TO TAKE MY CANE ON TO THE BUS MAKING IT IMPOSSIBLE FOR ME TO WALK WITHOUT ASSISTANCE. I TOLD HIM THAT THIS WAS MY PERSONAL PROPERTY AND THAT IT SELF SURRENDERED WITH ME ON 17 MAY 2000 AND WAS WITH ME EVERY WHERE I WENT, I NEEDED IT BADLY IN ORDER TO AMBULATE. THE GUARD PROMISED ME THAT HE WOULD PERSONALLY PACK MY CANE IN WITH MY OTHER PROPERTY SO THAT ALL MY PROPERTY WOULD BE SHIPPED TO MY NEW LOCATION AT THE MEDICAL CENTER IN SPRINGFIELD, MO, I WANT NOTHING FROM YOU ONLY WHAT WAS PROMISED TO ME AND WHAT WAS MINE, WHEN MY PROPERTY ARRIVED AT SPRINGFIELD, MO. MEDICAL CENTER, MY CANE WAS NOT THERE AS PROMISED.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) WALKING CANE (MY PROPERTY) STOLEN OR LOST - FEDERAL PENITENTIARY, SHU (SPECIAL HOUSING UNIT) TERRE HAUTE, INDIANA

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

COPY

RECEIVED
APR 14 2004
LEGAL
NORTH CENTRAL REGIONAL OFFICE

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
NAME UNKNOWN OF GUARD WHO TOOK CANE FROM ME WHEN I LEFT S.H.U. AT TERRE HAUTE, INDIANA	U.S. PENITENTIARY - S.H.U. TERRE HAUTE, INDIANA

EXHIBIT E

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
			$84,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Peter Fernandez #08107-424		10 APRIL 2004

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable. PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

This form was electronically produced by Elite Federal Forms, Inc.

TRT-NCR-2004-2937

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom yo are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE REPRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to

Director, Torts Branch
Civic Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, if yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☒ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

17. If deduction, state amount

18. If claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? *(It is necessary that you ascertain these facts)*

19. Do you carry public liability and property damage insurance? ☐ Yes, if yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☒ No

U.S. Department of Justice

Federal Bureau of Prisons

United States Penitentiary
Terre Haute, Indiana

Date: June 22, 2004

Reply To Attn Of: R. L. Blackburn, Legal Instruments Examiner

Subject: Tort Claim #TRT-NCR-2004-02937

To: Peter Fernandez
Reg. No. 08107-424

Rec'd. FROM M.S. JAMES & HALF WAY HOUSE ON MONDAY 16 AUGUST 2004

Our office is in receipt of the above referenced Tort Claim filed by you for $84,000.00, in which you alleged your cane was lost by a staff member, as a result of being transferring from USP Terre Haute to the Federal Medical Center, Springfield on April 19, 2002. **Since you indicate that you purchased the cane before being incarcerated in the Bureau of Prisons, you need to provide me with a receipt for the purchase of the missing cane.**

Please provide this information to this office by **July 19, 2004.**
Please return too:

T. MARVEL, PARALEGAL SPECIALIST
UNITED STATES PENITENTIARY
4200 BUREAU ROAD NORTH
TERRE HAUTE, INDIANA 47802

EXHIBIT 5

Case: 1:05-cv-03[illegible] Document #: 1 Filed: 06/03/05 Page 39 of 51 PageID #:39

U. S. Department of Justice
Federal Bureau of Prisons
U[illegible]enitentiary
4200 Bureau Road North
P.O. Box 33
Terre Haute, IN 47808-0033

Official Business
Penalty for Private Use $300

U.S. OFFICIAL MAIL

PITNEY BOWES
25 JUN 2004

RECD JUN 28 2004

Peter Fernandez
Reg. NO. 08107-424
SALVATION ARMY FREEDOM CENTER
105 S. Ashland
Chicago, Illinois 60607

Reid From
Ms. James @ Half
Way House on Monday
16 August 2004

60607+2401

Red STAMP ON ENVELOPE INDICATES
done BY HALF-WAY HOUSE - MS. JAMES
STAMP IS BLACK.

SPOKE TO MS. JAMES ON PHONE
ON TUESDAY 17 AUG. 2004 @ 5:05 P.M.
AFTER MAKING 2 CALLS TO HER.
SHE GOT SUBJECT LETTER IN HER
BOX ON MONDAY 16 AUG 2004 FOR THE 1ST. TIME.

17 AUGUST 2004
R. L. BLACKBURN, LEGAL INSTRUMENTS EXAMINER
U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
4200 BUREAU ROAD NORTH
TERRE HAUTE, INDIANA 47802

COPY

7003 2260 0005 2216 2704

RE: PETER FERNANDEZ, #08107-424-TORT
CLAIM # TRT-NCR-2004-02937

[redacted]

DEAR R. L. BLACKBURN;

I AM IN RECEIPT OF YOUR LETTER ADDRESSED TO ME DATED 22 JUNE 2004. YOUR LETTER OF 22 JUNE IS POST MARKED 25 JUNE 2004 OUT OF TERRE HAUTE, INDIANA. THE LETTER FOR ME IS ADDRESSED TO THE SALVATION ARMY FREEDOM CENTER (HALF WAY HOUSE IN CHICAGO, IL. - SEE ENCLOSED COPY OF ENVELOPE.) THE ENVELOPE IS DATE STAMPED BY THE HALF WAY HOUSE AS BEING RECEIVED ON 28 JUNE 2004. IT SHOULD BE NOTED AND IS EXTREMELY IMPORTANT THAT THE SUBJECT LETTER WAS FIRST HANDED TO ME IN FRONT OF WITNESSES BY MS. JAMES MY RESIDENT ADVISOR ON MONDAY 16 AUGUST 2004 AT APPROXIMATELY 10:30 AM. OUR MEETING TOOK PLACE IN THE OFFICE WHERE WE GENERALLY

R. L. BLACKBURN
17 AUGUST 2004
PAGE 2 OF 3

COPY

MEET WHEN I MAKE A TRIP TO THE HALF WAY HOUSE.

I OPENED YOUR LETTER WHEN I RETURNED HOME AND WAS SHOCKED TO FIND THAT THE LETTER WAS DATED 23 JUNE 2004. I HAD JUST RECEIVED IT FROM MS. JAMES ON 16 AUGUST 2004 - SOME MONTH AND A HALF AFTER IT WAS WRITTEN. I WAS ALSO SHOCKED AT THE CONTENT OF YOUR LETTER AND IN PARTICULAR #1. TO MY HAVING TO RESPOND TO THIS DATED MATERIAL BY 19 JULY 2004 WHILE I WAS TOTALLY UNAWARE THAT YOUR LETTER EVER EVEN EXISTED. # 2. YOUR REMARK IN THE SECOND SENTENCE OF YOUR LETTER THAT I INDICATED THAT I PURCHASED MY CANE. I HAVE NEVER INDICATED TO ANYONE THAT IT HAD BEEN PURCHASED. (PLEASE SEE DOCUMENTS ONCE AGAIN ENCLOSED.)

IN CLOSING PLEASE UNDERSTAND THAT NO RECEIPT EXISTS FOR THIS FAMILY HEIRLOOM NOR HAVE I EVER CLAIMED THAT THEY

R. L. BLACKBOURN
17 AUGUST 2004
PAGE 3 OF 3

DO EXIST. THROUGHT MY BP-8 TO BP11 ADMINISTRATIVE REMEDY PROCESS, I HAVE ALWAYS MAINTAINED ONE ISSUE AND THAT WAS MY CASE - NOTHING MORE. SURELY YOUR COPIES OF MY ADMISISTRATIVE REMEDYS CLEARLY SHOW YOU THAT ALL I HAVE EVER WANTED WAS MY PROPERTY AND WHAT WAS MINE.

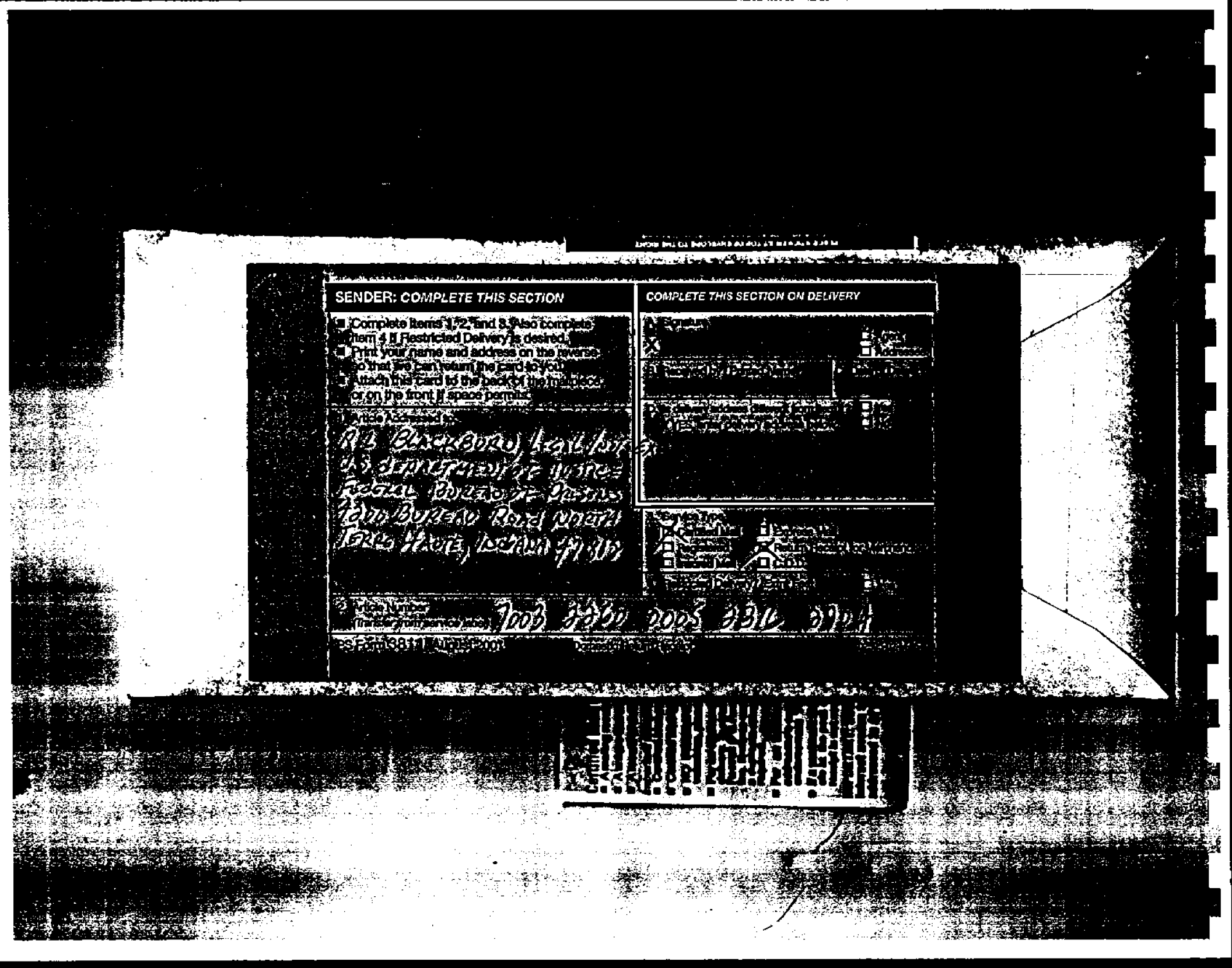
COPY

SINCERELY YOURS

PETER FERNANDEZ #08107-424
8723 WEST 44TH. PLACE
LYONS, ILLINOIS 60534

CC: T. MARVEL, PARALEGAL SPECIALIST
MS. JAMES, R.A. SALVATION ARMY FREEDOM CENTER - CHICAGO, ILLINOIS

ENCL: FOUR


SENDER: COMPLETE THIS SECTION
COMPLETE THIS SECTION ON DELIVERY

Mr. Peter Fernandez
8723 44th Pl.
Lyons, IL 60534

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Sent To R.L. BLACKBURN
U.S. DEPT. OF JUSTICE
Street, Apt. No.; or PO Box No. FEC, BUREAU OF PRISONS
City, State, ZIP+4 7300 BUREAU ROAD NORTH
TERRE HAUTE INDIANA 47802

PS Form 3800, June 2002

See Reverse for Instructions

...L/INSTROMENTS EXAMINER
...NT OF JUSTICE
...RISONS
...ORTH
47802

U.S. Department of Justice

Federal Bureau of Prisons

United States Penitentiary
Terre Haute, Indiana

Date: June 22, 2004

Reply To
Attn Of: R. L. Blackburn, Legal Instruments Examiner

Subject: Tort Claim #TRT-NCR-2004-02937

To: Peter Fernandez
Reg. No. 08107-424

Rec'd. FROM MS. JAMES @ HALFWAY HOUSE ON MONDAY 16 AUGUST 2004

Our office is in receipt of the above referenced Tort Claim filed by you for $84,000.00, in which you alleged your cane was lost by a staff member, as a result of being transferring from USP Terre Haute to the Federal Medical Center, Springfield on April 19, 2002. **Since you indicate that you purchased the cane before being incarcerated in the Bureau of Prisons, you need to provide me with a receipt for the purchase of the missing cane.**

Please provide this information to this office by July 19, 2004.
Please return too:

T. MARVEL, PARALEGAL SPECIALIST
UNITED STATES PENITENTIARY
4200 BUREAU ROAD NORTH
TERRE HAUTE, INDIANA 47802

U. S. Department of Justice
Federal Bureau of Prisons
U.S. Penitentiary
4200 Bureau Road North
P.O. Box 33
Terre Haute, IN 47808-0033

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TERRE HAUTE IN 478
PM JUN 25 '04
25 JUN 2004

REC'D JUN 28 2004

Peter Fernandez
Reg. NO. 08107-424
SALVATION ARMY FREEDOM CENTER
105 S. Ashland
Chicago, Illinois 60607

Rec'd From
Ms. James @ Half
Way House on Monday
16 August 2004

60607+2401

8 JUNE 2004

MR. M. MARTINEZ, LEGAL DEPARTMENT
FEDERAL BUREAU OF PRISONS, NORTH CENTRAL REGIONAL OFFICE
GATEWAY TOWER II 8TH FLOOR
400 STATE AVENUE
KANSAS CITY, KANSAS 66101-2492

COPY

RE: PETER N. FERNANDEZ, JR. - TORT CLAIM NUMBER TRT-NCR-2004-02937

DEAR MR. MARTINEZ:

I HAVE TRIED WITH ALL OF MY BEING TO SETTLE THIS ISSUE IN THE MOST SIMPLEST WAY THAT I KNOW AND HAVE DONE SO, FOR ALMOST TWO YEARS. I HAVE SUBMITTED DETAILED ADMINISTRATIVE REMEDY'S STARTING WITH THE BP-8 THROUGH THE BP-11 AND THE LAST BEING SENT TO KATHLEEN HAWK IN WASHINGTON, D.C. TO NO AVAIL. ALL I HAVE EVER ASKED FOR WAS MY PERSONAL (MY CANE) PROPERTY THAT SELF SURRENDERED WITH ME ON 17 MAY 2000. I WANT MY CANE BACK, NOTHING MORE. MY CANE WAS GIVEN TO MY MOTHER, WHO GOT IT FROM HER MOTHER. MY GRANDFATHER MADE IT FOR MY GRANDMOTHER. IT IS EXTREMELY DIFFICULT FOR ME TO PUT A DOLLAR AMOUNT ON A PIECE LIKE THIS. AFTER YOUR INSISTANCE OF A DOLLAR AMOUNT I CAN TELL YOU THAT I WOULD PUT A VALUE ON MY CANE OF $184,000.00.

IN CLOSING I AM SENDING ALONG MY ORIGINAL CLAIM FORM WITH THE DOLLAR AMOUNT YOU ASKED FOR. ALSO I AM SENDING YOU A COPY OF MY ORIGINAL PROPERTY LIST SHOWING MY CANE SELF SURRENDERING WITH ME ON 17 MAY 2000. ALSO I'M SENDING YOUR CORRESPONDENCE OF 27 APRIL 2004 BACK TO YOU AS PER YOUR REQUEST...

RESPECTFULLY SUBMITTED

Peter Fernandez Jr.

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Daryl Kosiak, Regional Counsel
North Central Regional Office
Gateway Tower II, 8th Floor
400 State Avenue
Kansas City, KS 66101

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
PETER FERNANDEZ #08107-424
MARION FEDERAL PRISON CAMP
ROUTE 5 - P.O. BOX 1000 "old dorm"
MARION, ILLINOIS 62959

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	6 MARCH 1941	MARRIED	19 APRIL 2002	AM

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.) ON THE DAY OF MY DEPARTURE FROM THE S.H.U. AT THE U.S. PENITENTIARY IN TERRE HAUTE, INDIANA I WAS TOLD BY THE S.H.U. GUARD THAT I WAS NOT ALLOWED TO TAKE MY CAGE ON TO THE BUS MAKING IT IMPOSSIBLE FOR ME TO WALK WITHOUT ASSISTANCE. I TOLD HIM THAT THIS WAS MY PERSONAL PROPERTY AND THAT I HAD SURRENDERED WITH ME ON 17 MAY 2000 AND WAS WITH ME EVERY WHERE I WENT. I NEEDED IT BADLY IN ORDER TO AMBULATE. THE GUARD PROMISED ME THAT HE WOULD PERSONALLY PACK MY CAGE AND WITH MY OTHER PROPERTY SO THAT ALL MY PROPERTY WOULD BE SHIPPED TO MY NEW LOCATION AT THE MEDICAL CENTER IN SPRINGFIELD, MO. I WANT NOTHING FROM YOU ONLY WHAT WAS PROMISED TO ME AND WHAT WAS MINE. WHEN MY PROPERTY ARRIVED AT SPRINGFIELD, MO. MEDICAL CENTER, MY CAGE WAS NOT THERE AS PROMISED.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) WALKING CANE (MY PROPERTY) STOLEN OR LOST - FEDERAL PENITENTIARY, SHU (SPECIAL HOUSING UNIT) TERRE HAUTE, INDIANA

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

COPY

RECEIVED
APR 14 2004
LEGAL
NORTH CENTRAL REGIONAL OFFICE

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
NAME UNKNOWN OF GUARD WHO TOOK CANE FROM ME WHEN I LEFT S.H.U. AT TERRE HAUTE, INDIANA	U.S. PENITENTIARY - S.H.U. TERRE HAUTE, INDIANA

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
			$84,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Peter Fernandez #08107-424		10 April 2004

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable. PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

This form was electronically produced by Elite Federal Forms, Inc.

TRT-NCR-2004-2937

U.S. Department of Justice
Federal Bureau of Prisons

Inmate Personal Property Record—
Institution: USP THA

1. Name: Fernandez, Peter N. Jr.
2. Register Number: 08107-424
3. Unit: Camp
4. Date and Time of Inventory: 5/17/00 1230PM

5. Purpose of Inventory (check one that applies): Date and Time of Action: 5/17/00 1230PM
a. ✓ Admission b.___ Hospital c.___ Writ d.___ Transfer e.___ Detention f.___ Release
g.___ Incoming package h.___ Other (specify)

6. Disposition (Disp.)
D - Donated M - Mail S - Storage
K - Keep in Possession
C - Contraband (Attach BP-Record-102)

7. Type of Property:

a. Personally Owned Items

#	Article	Disp.
	Batteries	
	Belt	
	Billfold	
	Books, reading hard___, soft___	
	Books, religious hard___, soft___	
	Brassiere	
	Cap, Hat	
	Coat	
	Coins	
	Comb	
	Combination lock	
	Dress	
	Driver's license	
	Earplugs	
	Eyeglass case	
1	Eyeglasses	K
	Gloves	
	Hair brush/pick	
	Handkerchief	
1	Jacket	M
	Jogging suit	
	Legal Materials	
	Letters	
	Magazines	
	Mirror	
	Nail Clippers	
1	Pant/slacks	M
	Pen, ballpoint	
	Pencils	
	Personal papers	
	Photo album	
	Photos	

#	Article	Disp.
	Plastic spoon, cup	
	Playing cards	
	Purse	
	Radio (w/earplug)	
1	Religious medals + chain	K
1	Ring Yellow	K
	Shirt/blouse	
1	Shoes DR. [illegible]	K
	Shoes, shower	
	Shoes, slippers	
	Shoes, tennis	
	Shorts	
	Skirt	
	Slip	
	Social security card	
	Socks	
	Socks, athletic	
	Stamps	
	Stockings	
	Sunglasses	
	Sweater	
	Sweat pants	
	Sweat shirt	
	Trophy	
1	T-Shirts	K
1	Underwear	K
	Watch/watch band	
	Wig	
1	satchel	M
1	cane	K
1	[illegible]	M
1	[illegible]	M
1	[illegible]	M

b. Hygiene, etc.

#	Article	Disp.
	Dental floss	
	Dentures	
	Deodorant	
	Hair oil	
	Nozzems	
	Powder	
	Razor	
	Razor blades	
	Shampoo	
	Shaving lotion	
	Skin lotion	
	Soap	
	Soap dish	
	Toothbrush	
	Toothpaste	

c. Hobbycrafts

#	Article	Disp.

d. Food/Tobacco Items

#	Article	Disp.
	Canned tobacco	
	Chewing tobacco	
	Cigarettes	
	Cigars, snuff	
	Coffeemate	
	Cold drink mix, soda	
	Fruit	
	Honey, Hi-protein	
	Instant chocolate	
	Instant coffee	
	Instant tea	
	Pipe cleaner/filters	
	Pipes	

e. Miscellaneous (List any damaged property and from where it was received; e.g., U.S. Marshal)

8. Items Alleged by Inmate to Have Value Over $100.00

Description of Property	Value Alleged by Inmate

☑ No individual item over $100.00

9. Article(s) Listed as "Mail" (M) Are to be Forwarded to (Name and Address of Consignee): (708)447-1959
Barbara Fernandez 8723 W. 44th Place Lyons, Il. 60534

10. Claim Release: a. The receiving officer, as soon after receipt of the property as possible, will review the inventory with the inmate to verify its accuracy. Property that is stored, kept in possession of the inmate, mailed out of the institution, or donated is to be marked in the appropriate section of this inventory form. The receiving officer certifies receipt, review and disposition of the property by signing below. The inmate by signing below certifies the accuracy of the inventory, except as noted on the form, relinquishing of all claim to articles listed as donated, receipt of all allowable items, and receipt of a copy of the inventory. When the inmate claims a discrepancy in the inventory, the receiving officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Receiving Officer: R. STARBUCK / R. Starbuck Date: 5/17/00 Time: 1230PM

I have today reviewed the property returned to me. Signature of Inmate: [signature] Reg. No.: 08107-424 Date: 5/17/00 Time: 1230PM

b. Upon release of the inmate from the unit, detention, etc., the releasing officer is to give the inmate that property stored as a result of the inmate's housing. The inmate certifies release of the property, except as noted on this form, and receipt of a copy of the inventory by signing below. When the inmate claims a discrepancy in the inventory, the releasing officer shall attempt to resolve that discrepancy. If the inmate states that there is missing or damaged property, this information should be noted under Comments.

Comments

Printed Name/Signature of Releasing Officer: _____ Date: _____ Time: _____

I have today reviewed the property returned to me. Signature of Inmate _____ Reg. No.: _____ Date: _____ Time: _____

Original — Inmate's Central File; CC: Inmate, R & D, Special Housing

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101-2492

DEC 09 2004

Peter Fernandez, 08107-424
8724 W 44th Place
Lyons, IL 60534

EXHIBIT 4

RE: Administrative Claim T-NCR-2004-02937
Personal Property Loss: $84,000.00

Certified Mail No. 7004 0750 0002 4789 6391

Dear Mr. Fernandez:

Your above referenced tort claim has been considered for administrative review pursuant to 28 CFR § 0.172, Authority: Federal Tort Claims and 28 CFR Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal that you suffered any personal property loss as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment. Furthermore, review of this matter revealed that your allegations stem from incidents which occurred more than two years prior to the date of the proper filing of this claim.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 CFR § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than 6 months after the date of mailing of this notification.

Sincerely,

for Daryl Kosiak
Regional Counsel

CANE RESPONSE Rec'd. SAT. 11 DEC. 2004

WALKING STICK

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7004 0750 0002 47[illegible] 6391

U.S. Department of Justice
Federal Bureau of Prisons
St. Louis Consolidated Legal Center
Robert A. Young Building
1222 Spruce Street - Suite 6, 200A
St. Louis, MO 63103

Official Business

Rec'd. SAT. 11 DEC. 2004 (CANE) RESPONSE 8723

10 SAINT LOUIS MO 631 PM 09 DEC 2004

SAINT LOUIS MO DEC-9'04

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Peter Fernandez, 08107-424
8724 W 44th Place
Lyons, IL 60534

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THIS MAIL IS ADDRESSED INCORRECTLY. YOUR MAIL IS PROCESSED ON AUTOMATED EQUIPMENT TO AVOID DELAY OR POSSIBLE RETURN OF YOUR MAIL, PLEASE NOTIFY THE SENDER OF YOUR CORRECT STREET NAME AND STREET NUMBER.
UNITED STATES POSTAL SERVICE

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 2.5
Eastern Division

Peter Fernandez Jr.

Plaintiff,

v.

Case No.: 1:05–cv–03288
Honorable James F. Holderman

United States of America, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, June 28, 2006:

MINUTE entry before Judge James F. Holderman dated 6/28/06: Pursuant to stipulation for dismissal and compromise agreement, the United States will pay the plaintiff $1,000.00. The settlement amount of $1,000 represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorneys' fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto. This action is dismissed with prejudice.Civil case terminated.Judicial staff mailed notice(gl,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

United States District Court
Northern District of Illinois
Eastern Division

Peter Fernandez Jr.

v.

The United States of America

JUDGMENT IN A CIVIL CASE

Case Number: 05 C 3288

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Pursuant to stipulation for dismissal and compromise agreement, the United States will pay the plaintiff $1,000.00. The settlement amount of $1,000 represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorneys' fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto. This action is dismissed with prejudice.

Michael W. Dobbins, Clerk of Court

Date: 6/28/2006

/s/ Gladys Lugo, Deputy Clerk

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James F. Holderman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 C 3288	DATE	12/8/2005
CASE TITLE	Peter Fernandez, Jr. vs. United States of America		

DOCKET ENTRY TEXT

Defendant United States' motion of September 6, 2005 (Dkt. No. 15), is granted to the extent that United States is substituted as the sole defendant in this matter but its request to dismiss for lack of subject matter jurisdiction, or in the alternative to limit Fernandez's damages claim to $100, is denied. Defendants Bureau of Prisons, Warden Hedrick, Warden Olson and the unknown correctional officer at the Terre Haute prison are dismissed as defendants in this matter. The United States is the sole remaining defendant in this case. The United States is ordered to file an answer to Fernandez's complaint on or before December 22, 2005. The parties are requested to hold a Rule 26(f) conference and file a jointly completed Form 35 signed by each party or counsel for each party on or before January 11, 2006. The parties are requested to submit a courtesy copy of the Form 35 to Chambers on the day of filing. This case is set for a report on status and entry of a scheduling order at 9:00am on January 17, 2006. The parties are encouraged to discuss settlement.

■[For further details see text below.] Notices mailed.

STATEMENT

On June 3, 2005, plaintiff Peter Fernandez Jr., ("Fernandez"), filed a *pro se* complaint against defendants U.S. Department of Justice Federal Bureau of Prisons, ("Bureau of Prisons"), Warden Hedrick of the Federal Prison Medical Center in Springfield, Missouri, ("Warden Hedrick"), Warden Keith E. Olson of the Federal Prison in Terre Haute, Indiana ("Warden Olson"), and an unknown correctional officer at the Terre Haute prison. (Dkt. No. 1). The United States filed the pending motion on September 6, 2005 to be substituted as party defendant and dismiss the case for lack of subject matter jurisdiction or, alternatively, to limit Fernandez's *ad damnum* to $100. (Dkt. No. 15). For the reasons set forth below, the United States' motion is granted to the extent that the United States is substituted as the sole defendant in this matter but its request to dismiss for lack of subject matter jurisdiction, or in the alternative to limit Fernandez's damages claim to $100, is denied.

Fernandez's complaint centers on a wooden walking cane that he alleges was lost or destroyed by the Bureau of Prisons when he was a federal prisoner. He alleges that he had the cane when he self surrendered at the Terre Haute, Indiana prison on May 17, 2000. (Dkt. No. 1 at pg. 2). On April 19, 2002, Fernandez was transferred from Terre Haute to the Federal Prison Medical Center in Springfield, Missouri. (*Id.* at pg. 3-4). He was transported to Springfield, Missouri via bus and the bus trip included a one week stop over in a prison facility in Oklahoma City, Oklahoma. (*Id.* at pg. 4). Fernandez claims that he was told by the unknown Terre Haute correctional official that he could not take his walking cane on the bus but that the official would pack the cane for the trip and the cane would be returned to Fernandez once he got to Springfield. (*Id.* at pg. 4-5). Fernandez alleges that he never received his walking stick when he arrived in

STATEMENT

Springfield. (*Id.* at pg. 5). He then filed a series of administrative grievances and appeals with the Bureau of Prisons over the cane. (*Id.* at pg. 5-8).

Although Fernandez does not cite to the Federal Tort Claims Act ("FTCA"), in his complaint, his allegations fall within the FTCA. Fernandez seeks $86,000 in actual damages, $100,000 in compensatory and exemplary damages, and $100,000 punitive damages for the loss of his cane and the resulting emotional distress.

The United States seeks to substitute itself as the sole defendant in place of the other named defendants. Under the FTCA, the United States can be substituted as the sole defendant when the Attorney General certifies that "the defendant was acting within the scope of his office or employment at the time the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). "The plaintiff may challenge the substitution of the United States as the sole defendant, however, by contesting the scope certification and arguing that the employee defendant was not acting within the scope of employment at the time the tortious conduct occurred." *Taboas v. Mlynczak*, 149 F.3d 576, 578 n.1 (7th Cir. 1998) (citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995)). The actions alleged by the defendants in Fernandez's complaint were taken within the scope of the defendants' employment. Fernandez's response to the government's pending motion does not dispute the government's position. The government's certification is proper and the United States is substituted as the sole defendant in this case.

Now that the United States is the sole defendant remaining in this case, the government argues that this court lacks subject matter jurisdiction. Rule 12(b)(1) "provides a defendant a procedural vehicle by which the defendant may move a federal court to dismiss a claim or suit on the ground that the court lacks subject-matter jurisdiction." *Davit v. Davit*, 366 F. Supp. 2d 641, 648-49 (N.D. Ill. 2004). "The standard of review for a 12(b)(1) motion to dismiss depends on how [the] defendant frames the motion. If the motion contends that the allegations of jurisdiction are facially insufficient to show jurisdiction, then the 12(b)(1) standard of review mirrors the standard applied for 12(b)(6) motions. But if the motion challenges the truth of the facts alleged, then the court may look beyond the face of the plaintiff's complaint to resolve the factual disputes." *Royal Towing, Inc. v. City of Harvey*, 350 F. Supp. 2d 750, 752 (N.D. Ill. 2004) (internal citations omitted). The United States contends that the jurisdictional allegations in the complaint are facially insufficient.

"The United States government may be sued only where Congress has waived its sovereign immunity and the existence of such a waiver is a 'prerequisite for jurisdiction.'" *LaBonte v. United States*, 233 F.3d 1049, 1051 (7th Cir. 2000) (citing *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *Kuznitsky v. United States*, 17 F.3d 1029, 1031 (7th Cir. 1994)). "The FTCA is a limited waiver of the sovereign immunity of the United States and imposes liability 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" *Warrum v. United States*, 427 F.3d 1048, 1049-50 (7th Cir. 2005) (citing 28 U.S.C. § 1346(b)(1); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Charlton v. United States*, 743 F.2d 557, 558 (7th Cir. 1984)). The United States' sovereign immunity under the FTCA is limited by multiple exceptions contained in 28 U.S.C. § 2680. *Ortloff v. United States*, 335 F.3d 652, 657 (7th Cir. 2003) (citing 28 U.S.C. § 2680).

The United States argues this court is deprived of subject matter jurisdiction in this case because the exception to the waiver of sovereign immunity contained in 28 U.S.C. § 2680(c) is applicable in this case. The United States properly notes that the Seventh Circuit in *Ortloff v. United States*, held that the exception reinstating sovereign immunity contained in 28 U.S.C. § 2680(c) does not apply to claims for destruction of properly brought against prison officials and a FTCA claim can proceed. 335 F.3d 652, 656-70 (7th Cir.

STATEMENT

2003).

The government attempts to distinguish *Ortloff* by arguing that *Ortloff* interpreted a prior version of 28 U.S.C. § 2680(c), *see* 335 F.3d at 657 n.2, and that the Seventh Circuit has not considered the issue anew since the most recent version of 28 U.S.C. § 2680(c) was enacted by Congress. The United States' argues that this court should follow the decisions from outside the Seventh Circuit that have evaluated the amended version of § 2680(c) and have held that exception to the sovereign immunity waiver is applied in this type of situation. *See Bramwell v. United States Bureau of Prisons*, 348 F.3d 804, 806 (9th Cir. 2003), *Chapa v. U.S. Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003); *Hatten v. White*, 275 F.3d 1208, 1210 (10th Cir. 2002).

This court must follow the Seventh Circuit's precedent, *Ortloff*, until otherwise instructed by the Seventh Circuit. *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) ("In a hierarchical system, decisions of a superior court are authoritative on inferior courts. ... [D]istrict courts must follow the decisions of [the Seventh Circuit] whether or not they agree."); *A Woman's Choice-East Side Women's Clinic, et al. v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002) ("[O]nly an express overruling relieves an inferior court of the duty to follow decision on the books."); *Gacy v. Welborn*, 994 F.2d 305, 310 (7th Cir. 1993) ("A district judge who thinks that new evidence or better argument 'refutes' one of [the Seventh Circuit's] decisions should report his conclusions while applying the existing law of the circuit.").

Additionally, this court would reject the government's arguments even if it had the authority to ignore *Ortloff*. The change to the statute does not address the Seventh Circuit's position, namely that the exception is limited to law enforcement officials in the customs and excise context. *Ortloff*, 335 F.3d at 657-60. The cases cited by the government, *Bramwell, Chapa*, and *Hatten*, do not particularly consider what effect, if any, Congress' amendment had on the statute. In *Ortloff*, the Seventh Circuit took a position that aligned it with a portion of the circuit courts of appeal while splitting it against some of the other circuit courts of appeal. Congress' amendment does not resolve the circuit split.

The government also argues that Fernandez's complaint should be dismissed pursuant to the statute of limitations. "[C]omplaints do not have to anticipate affirmative defenses to survive a motion to dismiss ... [but the plaintiff can plead himself out of court when] the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense." *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Leavell v. Kieffer*, 189 F.3d 492, 495 (7th Cir. 1999)).

There are factual questions as to whether Fernandez made his claim within the applicable statute of limitations period. However, this answer is not clearly determinable from the face of Fernandez's complaint and the documents that Fernandez includes with this complaint. *See Con't Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 731 n.3 (7th Cir. 2005) (noting that a copy of an written instrument which is an exhibit to a complaint is considered to be part of the pleadings). Additionally, Fernandez is a *pro se* plaintiff and pleadings by *pro se* parties are to be liberally construed and not held to the stringent standards expected of pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Gil v. Reed*, 381 F.3d 649, 658 n.2 (7th Cir. 2004); *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001). The United States may raise this issue later in the litigation once this court has moved beyond the pleading stage.

The United States' last argument is that in the alternative this court should enter an order limiting Fernandez's damage claim to $100. The government basis this argument on the inmate personal property form that Fernandez allegedly signed when he first entered the federal prison system. The parties are also engaging over factual arguments as to the validity of this form and whether it applies since Fernandez claims

STATEMENT

that he is legally blind and therefore should not be held accountable for the form. This matter is also better considered later in the litigation when the court has the ability to consider factual arguments that extend beyond the pleadings.

For the reasons set forth above, the United States' motion of September 6, 2005 (Dkt. No. 15), is granted to the extent that United States is substituted as the sole defendant in this matter but its request to dismiss for lack of subject matter jurisdiction, or in the alternative to limit Fernandez's damages claim to $100, is denied. Defendants Bureau of Prisons, Warden Hedrick, Warden Olson and the unknown correctional officer at the Terre Haute prison are dismissed as defendants in this matter. The United States is the sole remaining defendant in this case. United States is ordered to file an answer to Fernandez's complaint on or before December 22, 2005. The parties are requested to hold a Rule 26(f) conference and file a jointly completed Form 35 signed by each party or counsel for each party on or before January 11, 2006. The parties are requested to submit a courtesy copy of the Form 35 to Chambers on the day of filing. This case is set for a report on status and entry of a scheduling order at 9:00am on January 17, 2006. The parties are encouraged to discuss settlement.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PETER FERNANDEZ JR., Plaintiff,	)	No. 05 C 3288
v.	)	Judge Holderman
THE UNITED STATES OF AMERICA, Defendant.	)	

STIPULATION FOR DISMISSAL AND COMPROMISE AGREEMENT

It is hereby stipulated by and between plaintiff, PETER FERNANDEZ JR., and the defendant, United States of America, as follows:

1. This settlement is entered into for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation. The parties hereto agree to settle and compromise this action without further litigation upon the terms and conditions set forth below.

2. The United States of America, defendant, agrees to pay to the plaintiff the sum of one thousand dollars ($1,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the same subject matter that gave rise to the above-captioned lawsuit, including any claims for wrongful death, for which plaintiff or his heirs, executors, administrators, or assigns, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his successors and/or assigns hereby agree to accept the sum of one thousand dollars ($1,000.00) in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, including any future claim for wrongful death ("the Released Claims"). Plaintiff and his successors and/or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees ~~from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting~~ from further litigation or the prosecution of the Released Claims (including contribution claims) by plaintiff or his heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of the United States, its agents, servants, or employees, or an admission as to any lack of merit in plaintiff's claims, and is entered into by both parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

5. It is also agreed, by and among the parties, that the settlement amount of one thousand dollars ($1,000.00) represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorneys' fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. Payment of the settlement amount will be made by a check from the United States for one thousand dollars ($1,000.00) and made payable to PETER FERNANDEZ JR. The check will be mailed to plaintiff at the following address:

Peter N. Fernandez, Jr.
8723 W. 44th Place
Lyons, Illinois 60534

7. Plaintiff agrees and stipulates that this case shall be dismissed with prejudice.

8. This is a publicly available document, and plaintiff waives any claim that this or any other document filed in this case along with any information contained therein is subject to the Privacy Act of 1974, 5 U.S.C. § 552a.

6-13-06
PETER FERNANDEZ JR. Date

PATRICK J. FITZGERALD
United States Attorney

By: 6-13-06
JONATHAN C. HAILE Date
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-2055

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

MARK VINCENT BUCKLEY,

Plaintiff,

v.

C. HARDING, D. FELKER, C. LAMPE, and
LIEUTENANT D. WILSON,

Defendants.

Jury Trial Demanded

COMPLAINT

Plaintiff, Mark Vincent Buckley, by his attorney, Edmund B. Moran, Jr., for his complaint against the Defendants C. Harding, D. Felker, C. Lampe, and Lieutenant D. Wilson states as follows:

I.

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, Mark Vincent Buckley, currently resides in the Village of Forest Park, Cook County, Illinois. On March 8, 2004, and for several years prior to that date, plaintiff was an inmate assigned to the Federal Correctional Institution located in Florence, Colorado

2. Defendants C. Harding, D. Felker, C. Lampe, and Lieutenant D. Wilson upon

information and belief, all reside in the State of Colorado. C. Harding was the Unit Manager of the specific Otero Unit that contained the cell that plaintiff was housed in on March 8, 2004. C. Lampe was the Case Manager for the Otero Unit, and D. Felker was the counselor assigned to plaintiff in the Otero Unit. Lt. D. Wilson was a supervisory guard in the Special Housing Unit at Florence.

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 1331 in that it arises under the Constitution, laws, and treaties of the United States for redress of plaintiff's constitutional rights secured by the Fourth, Fifth, and Eighth Amendments to the United States Constitution.

4. Venue is proper in this Court under 28 U.S.C. Section 1391 (b) in that it presides in a judicial district where a substantial part of the acts or omissions giving rise to the complaint occurred or, alternatively, and upon information and belief, in a state where all the defendants reside.

II.

FACTUAL ALLEGATIONS

5. On or about March 8, 2004, plaintiff was incarcerated in the Federal Correctional Institution located in Florence, Colorado.

6. Prior to March 8, 2004, plaintiff had been threatened with physical harm, both with potential beating and/or stabbing, by numerous individuals who were inmates at the Florence Correctional Institution. Said individuals resided in the prison general population and in an area in the facility where their physical proximity to plaintiff allowed them the opportunity to carry out their threat to beat and/or stab plaintiff.

7. Plaintiff had, prior to March 8, 2004, gone to Defendants C. Harding, who was the Unit Manager of the cell plaintiff was then housed in. and D. Felker, the Unit Counselor, and told them of the above threats and requested that said defendants remove plaintiff from the 8-man cell he was then assigned to and where the threatening inmates had access to him so as to prevent them from carrying out their threats to beat and/or stab him. Plaintiff had reason to believe that he was in imminent physical danger from the other inmates.

8. Defendants Harding and Felker failed and refused to take the actions necessary to secure plaintiff's safety and insisted that he remain in the cell in which he was eventually attacked.

9. On March 8, 2004, the inmates who had previously threatened plaintiff with a beating carried out their threat. Four to six separate individuals combined to violently beat plaintiff by punching him and kicking him over his entire body. He was punched and kicked in the head, neck, spine, back, arms, legs, and hands. He lost consciousness several times during the beating.

10. In the wake of the beating and continuing to the present time, plaintiff suffered and has continued to suffer pain in his head, back, spine, legs, and kidney. Plaintiff also has suffered and continued to suffered extreme mental distress including symptoms consistent with post traumatic stress disorder including sleeplessness, violent flashbacks, and depression.

11. Plaintiff's warnings to the correctional facility staff of the threats that had been made to him had gone on for over a year prior to the attack. For a brief time, plaintiff was assigned to a special housing unit for protective custody within the correctional

facility where the threatening inmates did not have access to him. Correctional staff continued to insist that plaintiff return to the housing area where the threatening inmates would be able to attack him. On several occasions, plaintiff refused to go where he was directed for the sole reason that he believed that he would be beaten or otherwise attacked if he went there. When he refused, he was written up for allegedly refusing to "participate in programs." The sanctions for these violations included the loss of approximately 100 days of good conduct time that ultimately deprived him of an earlier release date from custody had the good conduct time not been withheld. Defendant Lieutenant D. Wilson was responsible for initiating several of these disciplinary proceedings.

12. In the wake of the severe beating of plaintiff, he was not taken to a local hospital or the prison infirmary. Rather, he was removed to a cell and kept there, without any medical attention, for nine days. Defendants Harding and Felker were responsible for seeing to it that plaintiff received reasonable and prompt medical care for his injuries but they failed to meet that responsibility. Because of their failure, plaintiff suffered more grievously than he should have as a result of the beating.

13. All of the above actions and/or omissions were done in deliberate and reckless disregard for plaintiff's constitutional and civil rights as set forth above.

COUNT I

FAILURE TO PROTECT PLAINTIFF FROM ATTACK

14. through 26. Plaintiff incorporates herein by reference thereto paragraphs 1. through 13. above as paragraphs 14. through 26. of this Count I.

27. Defendants Harding, Lampe, and Felker's actions and omissions were in deliberate and reckless disregard of plaintiff' constitutional right under the Eighth Amendment to the Constitution of the United States to not be subjected to cruel and unusual punishment and to be protected from violent attacks by fellow inmates.

COUNT II

FAILURE TO PROVIDE ADEQUATE MEDICAL TRATMENT

28. through 40. Plaintiff incorporates herein by reference thereto paragraphs 1. through 13. above as paragraphs 28. through 40. of this Count II.

41. Defendants' Harding, Lampe, and Felker's actions and omissions in failing to to secure for plaintiff's benefit adequate medical treatment in the wake of his beating and in light of his urgent need for medical care caused plaintiff to incur a tangible residual injury, including, but not limited to, his suffering from the effects of the beating that went unabated for nine days without the medical care that would have provided some relief from his injuries resulting from the beating itself.

COUNT III

LOSS OF GOOD CONDUCT TIME

42. through 54. Plaintiff incorporates herein by reference thereto paragraphs 1. through 13. above as paragraphs 42. through 54. of this Count III.

55. Defendant D. Wilson's initiation of disciplinary proceedings against plaintiff that led to the imposition of sanctions against plaintiff, including the loss of good conduct time, was in deliberate and reckless disregard of plaintiff's Fourth Amendment right to be free from unlawful seizure of his person, his Fifth Amendment right to due process of

law, and his Eight Amendment right to be free from cruel and unusual punishment when plaintiff was seeking protection from beatings by fellow inmates rather than "refusing to participate in programs."

56. To the extent that the facts show that any of the other defendants participated in the process resulting in the plaintiff's loss of good conduct time as set forth above, plaintiff requests that they be held liable similarly under this count.

WHEREFORE plaintiff prays that judgment be entered in his favor and against the defendants in the following respects:

1. Order that each of the Defendants Harding, Felker, and Lampe pay to plaintiff the sum of $75,000.00 as compensatory damages;

2. Order that Defendant Wilson pay to plaintiff the sum of $50,000.00 as compensatory damages;

3. Order that each of the Defendants Harding, Felker, and Lampe pay to plaintiff the sum of $50,0000.00 as punitive damages;

4. Order that Defendant Wilson pay to plaintiff the sum of $25, 000.00 as punitive damages;

5. Order the defendants to pay all costs incurred in the prosecution of this lawsuit, including reasonable attorney's fees; and

6. Such further relief as this Court deems just and proper.

Dated: March 8, 2006

The plaintiff's address is 1123 Circle Avenue, Forest Park, Illinois 60130

/s/ Edmund B. Moran, Jr
Edmund B. Moran, Jr.
Suite 857
53 West Jackson Boulevard

Chicago, Illinois 60604
Telephone: (312) 408-1544
FAX: (312) 408-1539
E-Mail: moran_law@earthlink.net
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Phillip S. Figa

Civil Action No. 06-cv-00413-PSF-MJW

MARK VINCENT BUCKLEY,

Plaintiff,

v.

C. HARDING,
D. FELKER, and
UNITED STATES OF AMERICA,

Defendants.

ORDER OF DISMISSAL

Pursuant to the Stipulation for Dismissal (Dkt. # 61) filed by the parties, it is hereby ORDERED, ADJUDGED AND DECREED that this action is DISMISSED WITH PREJUDICE, each party to pay that party's own costs and attorney's fees. The Court, as needed, shall retain jurisdiction of this matter solely for the purpose of effecting compliance with the settlement terms, if necessary.

DATED: August 24, 2007

BY THE COURT:

s/ Phillip S. Figa

Phillip S. Figa
United States District Judge

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2016-00383 **Short Description:** BUCKLEY V. HARDING ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	1:06-cv-00413-PSF-MJW	Date	08/24/2007
Short Description	BUCKLEY V. HARDING ET AL	Type	Settled
Classification	Civil	Reason	
Case Type	Bivens	Sought	
Case Sub-Type		Amount offered	$
Current Region	NORTH CENTRAL REGIONAL OFFICE	Total Amount Paid	$18,500.00
Current Institution		Description	SETTLED
Incident Region	NORTH CENTRAL REGIONAL OFFICE	Description	SETTLED
Incident Institution	Florence ADMAX (USP)	Court Fee Paid ?	No
Monetary Relief Sought	$200,000.00	Pro Se ?	
Estimated Amount	$		
Office	Denver	Date Received	03/08/2006
Jurisdiction	DISTRICT OF COLORADO		
Responsible Legal Office	FCC Florence	Date Filed	03/08/2006

Case Progress

Estimated Amount	$ -	Current Owner	APRIL CROMER
Estimated Outcome	No evaluation can be made at this time	Case Status	Open
		Timeline Status	Closed
		Monthly Report Status	
		Private Case	No

Long Description	28:1331 FEDERAL QUESTION: BIVENS ACT
Further Case Classification	
Comments	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK

Civil Case No. 03-cv-00236-LTB-KLM

YU KIKUMURA,

Plaintiff,

v.

ANTHONY OSAGIE,
MICHAEL VAIL,
KEITH SANDERS, and
UNITED STATES OF AMERICA,

Defendants.

ORDER OF DISMISSAL

THIS MATTER having come before the Court on the Stipulation of Dismissal (Doc 177 - filed November 5, 2008), and the Court being fully advised in the premises, it is therefore

ORDERED that this matter shall be **DISMISSED WITH PREJUDICE,** each party to pay their own fees and costs.

BY THE COURT:

s/Lewis T. Babcock
Lewis T. Babcock, Judge

DATED: November 6, 2008

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CASE DETAILS

Back to Case Results **Case Actions:**

Case ID: CIV-NCR-2016-00384 **Short Description:** KIKUMURA V. OSAGIE, ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	1:03-cv-00236-LTB-KLM	Date	08/24/2007
Short Description	KIKUMURA V. OSAGIE, ET AL	Type	Settled
Classification	Civil	Reason	
Case Type	FTCA & Bivens	Sought	
Case Sub-Type		Amount offered	$70,000.00
Current Region	NORTH CENTRAL REGIONAL OFFICE	Total Amount Paid	$30,000.00
Current Institution		Description	SETTLED
Incident Region	NORTH CENTRAL REGIONAL OFFICE	Description	SETTLED
Incident Institution	Florence ADMAX (USP)	Court Fee Paid ?	No
Monetary Relief Sought	$18,000.00	Pro Se ?	
Estimated Amount	$		
Office	Denver	Date Received	02/07/2003
Jurisdiction	DISTRICT OF COLORADO		
Responsible Legal Office	FCC Florence	Date Filed	02/07/2003

Estimated Amount	$ -	Current Owner	APRIL CROMER
Estimated Outcome	No evaluation can be made at this time	Case Status	Open
		Timeline Status	Closed
		Monthly Report Status	
		Private Case	No

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	
Comments	Medical Malpractice

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED
AUG 27 2004
GREGORY C. LANGHAM
CLERK

Civil Action No. 04- -1800
(To be supplied by the court)

Clinton Teague, Plaintiff,

v.

U.S. Government, J. Johnson, R. Hood, D. Duncan, J. Burrell,

J. Zuercher,

C. Chester,

L. Smith,

E. Hugeston,

T. Gomez,

and

M. Collins, Defendant(s).

RECEIVED
UNITED STATES DISTRICT COURT
GREGORY C. LANGHAM
CLERK

(List each named defendant on a separate line.)

PRISONER COMPLAINT

A. PARTIES

1. Clinton Teague #076977-029, U.S. Penitentiary-Max,
(Plaintiff's name, prisoner identification number, and complete mailing address)
P.O. Box 8500, Florence, Colorado 81226-8500

2. U.S. Government, Director, Federal Bureau of Prisons
(Name, title, and address of first defendant)
320 First Street, N.W., Washington, DC 20534

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? ___ Yes ✓ No (CHECK ONE). Briefly explain your answer:

Defendant was acting under color of federal law. They are being sued in their individual and official capacities!

3. J. Johnson, Correctional Officer, U.S. Penitentiary-Max,
(Name, title, and address of second defendant)
P.O. Box 8500, Florence, CO 81226-8500

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? ___ Yes ✓ No (CHECK ONE). Briefly explain your answer:

Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

4. B. Hood, Warden, U.S. Penitentiary-Max, P.O. Box 8500,
(Name, title, and address of third defendant)
Florence, CO 81226-8500

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? ___ Yes ✓ No (CHECK ONE). Briefly explain your answer:

Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

(If you are suing more than three defendants, use extra paper to provide the information requested above for each additional defendant. The information about additional defendants should be labeled "A. PARTIES.")

(Please see attached pages 2-A, 2-B and 2-C)

"Continuation Of Parties"

A. PARTIES

5. D. Duncan, Associate Warden (Custody), U.S. Penitentiary-Max, P.O. Box 8500, Florence, CO 81226-8500. At the time the claim(s) alleged in this complaint arose. Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

6. J. Burrell, Associate Warden (Programs), U.S. Penitentiary-Max, P.O. Box 8500, Florence, CO 81226-8500. At the time the claim(s) alleged in this complaint arose. Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

7. J. Zuercher, Associate Warden (Custody), U.S. Penitentiary-Max, P.O. Box 8500, Florence, CO 81226-8500. At the time the claim(s) alleged in this complaint arose. Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

8. C. Chester, Associate Warden (Programs), U.S. Penitentiary-Max, P.O. Box 8500, Florence, CO 81226-8500. At the time the claim(s) alleged

"Continuation Of Parties"
A. PARTIES

in this complaint arose. Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

9. L. Smith, Special Investigation Agent (S.I.A.), U.S. Penitentiary-Max, P.O. Box 8500, Florence, CO 81226-8500. At the time the claim(s) alleged in this complaint arose. Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

10. E. Hugeston, Captain, U.S. Penitentiary-Max, P.O. Box 8500, Florence, CO 81226-8500. At the time the claim(s) alleged in this complaint arose. Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

11. T. Gomez, Unit Manager, U.S. Penitentiary-Max, P.O. Box 8500, Florence, CO 81226-8500. At the time the claim(s) alleged in this complaint arose. Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

"Continuation Of Parties"
A. PARTIES

12. M. Collins, Unit Manager, U.S. Penitentiary-Max, P.O. Box 8500, Florence, CO 81226-8500. At the time the claim(s) alleged in this complaint arose. Defendant was acting under color of federal law. He is being sued in his individual and official capacities!

All Defendants Are Sued In Their Individual And Official Capacities!!!

B. JURISDICTION

1. I assert jurisdiction over my civil rights claim(s) pursuant to: (check one if applicable)

___ 28 U.S.C. § 1343 and 42 U.S.C. § 1983 (state prisoners)

√ 28 U.S.C. § 1331 and ***Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics***, 403 U.S. 388 (1971) (federal prisoners)

2. I assert jurisdiction pursuant to the following additional or alternative statutes (if any):

Retaliation & Discrimination Issues (Thaddeus-X v. Blatter) cited as 175 F.3d 378 "6th Cir. 1999

C. NATURE OF THE CASE

BRIEFLY state the background of your case. If more space is needed to describe the nature of the case, use extra paper to complete this section. The additional allegations regarding the nature of the case should be labeled "C. NATURE OF THE CASE."

Years prior to the U.S. Penitentiary-Max being built in Florence, Colorado! Racial wars between African American inmates and White inmates have been going on. Where inmates on both sides have been and still are being seriously injuried or killed! This is a proven fact and not allegations!! The officers, officials, executive officials here at the U.S. Penitentiary-Max. As well as officers and executive officials throughout the Bureau Of Prisons system are very much aware of this! An yet on several occasions. I've been placed in an all white group recreation group here at the U.S. Penitentiary-Max! This was done out of pure malice, retaliation and racial discrimination. Because of the following events the mentioned names in this complaint. Placed me in a life threatening situation. Where I was a lone African American in an all White group recreation group! With inmates known for and have been found guilty of killing and seriously African American inmates in the Bureau Of Prisons. An also who have taken part in murdering correctional officers (Please see attached pages 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G and 3-H)

"Continuation Of Nature Of The Case"
C. NATURE OF THE CASE

as well!

On December 11, 2000 Officer Jeff Johnson came to my cell (D06-#662) alone. After being strip searched I was handcuffed, hands cuffed behind my back. An physically assaulted by Officer Jeff Johnson! To try and cover up for his wrong doings. Officer Jeff Johnson wrote a false incident report. Accusing me of (3) different violations!! One of them being "assault on staff"! Officer Jeff Johnson not only did this to cover up. For his wrong doings toward me. But he was well aware of the consequences and the repercussions I'd be forced to endure!

On March 6, 2001 at 9:36 AM I went in front of the D.H.O. (Disciplinary Hearing Officer) and was cleared of the falsely written incident report by Officer Jeff Johnson! Even though I'd been cleared of the charges. In the eyes other officials and correctional officers here at the U.S. Penitentiary-Max. I was guilty and everyone (inmates, correctional officers

& officials) knew the outcome!! For any officer to state, "they had been assaulted by an inmate". That accusation alone marks the accused inmate!! Causing myself in this case. To be targeted for further threats, harassments and physical assaults by other officers. An to endure retaliations as well!!

Prior to placing me (Clinton Teague) in an all white group recreation group. The mentioned named individuals in this prisoner complaint. Were well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an African American inmate"! Had been assaulted here at the U.S. Penitentiary -Max. By a White inmate, who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! The White inmate did this during the recreation period. An at the time this assault took place. Inmate Robert Jones #13952-083 was not the only African American inmate on

the recreation yard! Theres documentation that can be provided on a later date. To prove this is actual facts!!. So all the individuals named in this complaint "posed a threat to the security and good orderly running of the institution by placing me in an all white group recreation group alone!!!

After being called racial slurs (niggers, black bitches and told that I was in a no win situation) by White inmates during the times I was in an all White group recreation group alone. To avoid trouble I brought these issues. To the attention of my unit team many times! An nothing was done and the racial slurs continued as if the administration /individuals named in this complaint were waiting to see me get hurt by one of the White inmate or ganged up on by several. Because it would not have been a fair fight by no means! The administration had placed me in this environment knowing there would be serious problems. That could've been very hazardous to my health.

But I contacted my attorney's and

"Continuation Of Nature Of The Case"
C. NATURE OF THE CASE

informed them of what was going on. My attorneys informed "Michael C. Johnson / United States Assistant Attorney" of all the retaliations and of the racial discrimination I'm forced to endure! An requested it be stopped and the matter be investigated.

In the meantime I had took it upon myself. To stop going to group recreation to avoid trouble. I had also requested several times. To be placed in a group recreation group with other African Americans. That request was denied repeatedly! My attorney's requested also to the United States Assistant Attorney that I be allowed group recreation with other African American's. Due to the seriousness and urgency of the situation!!

Due to outside sources inquiring of the wrong doings I'm forced to endure. I was removed from group recreation status, moved backwards in the program and privileges taken away that I've earned! When I've done nothing wrong to be punished!! I have documentation to prove

"Continuation Of Nature Of The Case"

C. NATURE OF THE CASE

I was and that I'm still programming in a positive manner. As required by my unit team and the individuals named in this complaint.

On several occasions when I discussed the matters with A.W. D. Duncan. Trying to resolve this matter. A.W. D. Duncan responded, Teague we (the administration) made bets you wouldn't last long and laughed!! But to me this was no laughing matter! My life was placed in serious jeopardy. The Warden (Warden R. Hood) told me himself, that a white inmate wouldn't be placed in an all black group recreation group and smiled as if he had told me a funny joke!!

My unit manager (Unit Manager T. Gomez) told me, "don't worry about it Teague you'll be alright". When he first put me in this all white group recreation group and smiled!

After I had refused to go outside to the all white group recreation

group. I was informed that I had been placed on investigation! That I'd be allowed to recreate with three range out in the single recreation cages. That I'd be informed if things changed. But none from the S.I.S. department (Special Investigation Services department) or S.I.A. L. Smith (Special Investigation Agent L. Smith) asked me any kind of questions during their so called investigation!

When I had requested to be placed in a group recreation group with other African American inmates. Unit Manager M. Collins told me personally, "Teague we don't move inmates to other group recreation groups". But that was a lie, because Unit Manager M. Collins allowed inmate Michael Birman to be moved to the other group recreation group! Because the mentioned named individual in this complaint put me in a very dangerous situation with racist inmates. Known for seriously injuring

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and even killing African American inmates! For a fact I know of (3) different white inmate. That are allowed the full privileges of the "group recreation program and the J-Unit program"! An these inmates are known to have been involved with "murdering correctional officers in the Bureau Of Prisons"!!! They have life sentences to serve and will never be released!

I'm scheduled to be released on June 28, 2008! I had no involvement in any type of murders. I've got a record stating, I'm doing all thats required of me in programming here at the U.S. Penitentiary-Max. An yet I'm denied to move forward in the program. Alleging that after an S.I.S investigation revealed that my participation in group recreation posed a threat to the security and good orderly running of the institution! The truth of the matter is I'm forced to endure retaliation and racial discrimination. All because I've filed a complaint against a co-worker and [redacted] other

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officers or officials for the wrong doings I'm forced to endure here.

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State concisely every claim that you wish to assert in this action. For each claim, specify the right that allegedly has been violated and state all supporting facts that you consider important, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific cases to support your claim(s). If additional space is needed to describe any claim or to assert more than three claims, use extra paper to continue that claim or to assert the additional claim(s). The additional pages regarding the cause of action should be labeled "D. CAUSE OF ACTION."

1. Claim One: U.S. Government "violated plaintiff's Eighth Amendment Rights and All other Constitutional Violations that fit this complaint".

Supporting Facts:

1). The U.S. Government was notified of all allegations of Correctional Officer Jeff Johnson wrong doings toward Plaintiff Clinton Teague. Prior to Teague filing this complaint.

2). Teague filed administrative remedy forms (concerning the threats, harassments, physical abuse and the false written incident report by Officer Jeff Johnson).

3). Teague filed a Civil Action No. 02-F-279 (BNB). That alone shows the U.S. Government was aware of the possibility of retaliation from officers and officials here at the U.S. Penitentiary-Max! An yet the U.S. Government did nothing to prevent or stop it!

4). Teague filed administrative remedy forms (concerning the continuation retaliation he was forced to enduee, due to Officer Jeff Johnsons false incident report).

5). Teague filed a Civil Action No. 04-F-731 (BNB). That alone shows the U.S. Government was aware of the ongoing / continuing retaliations forced upon Teague by officers and officials here at the U.S. Penitentiary-Max! An yet the U.S. Government did nothing to prevent or stop it!

6). Letters mailed to Assistant United Attorney Michael C. Johnson shows the U.S. Goeernmeht was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits-4 & 5).

2. Claim Two: Correctional Officer Jeff Johnson "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

7). On December 11, 2000 Officer Jeff Johnson came to Plaintiff Clinton Teague's cell (D06-#612) alone.

8). After being searched (strip searched) Plaintiff Teague was handcuffed, hands cuffed behind his back. An then physically assaulted by Officer Jeff Johnson!

9). To cover up for his wrong doings!! Officer Jeff Johnson wrote a false incident report. Accusing Plaintiff Teague of (3) violations. One of them being "assault on staff"!

10). Officer Jeff Johnson was well aware of the consequences and repercussions Plaintiff Teague would soon to be forced to endure. Due to him writing the false incident report!

11). On March 6, 2001 at 9:36AM Plaintiff Teague was cleared of the falsely written incident report by Officer Jeff Johnson! Even though Teague had been cleared of the charges. But in the eyes of other correctional officers and officials here at the U.S. Penitentiary - Max. I was guilty and everyone (inmates, correctional officers & officials) knew the outcome! For any officer to state, they had been assaulted by an inmate! That accusation alone marks the accused inmate!! Causing Teague in this case to be targeted for further threats, harassments and physical assaults by other officers! An to endure retaliations as well!!!

12). Because of Correctional Officer Jeff Johnson's false incident report! Plaintiff Teague has had to endure many forms of retaliations. Retaliations where unit team members, correctional officers as well as official here at the U.S. Penitentiary - Max have taken part in! Teague continued to program in a positive manner as required. An still faced many forms of retaliation by the individuals named in this complaint!!

Warden R. Hood "violated plaintiff's Eighth Amendment Rights and All Other Constitutional

3. Claim Three: Violations that fit this complaint".

Supporting Facts:

13). When this incident began Warden M. Pugh was the Warden. But due to him leaving this institution. Warden R. Hood replaced him and is still the Warden of the U.S. Penitentiary-Max.

14). Warden R. Hood failed to supervise the correctional officers, the unit team members and other officials at the U.S. Penitentiary-Max. Allowing his staff to place Teague, One lone African American in a all white group recreation group! Knowing before hand to do so would "pose a threat to the security and good orderly running of the institution"! Then when I respectively complained about the situation. I was removed from the group recreation program and denied the step down program of D-Unit/J-Unit completely!

15). Warden R. Hood was notified of the retaliations Teague was and is still forced to endure! An allowed it to continue repeatedly!!

16). Warden R. Hood was notified of all allegations of Correctional Officer Jeff Johnson wrong doings towards Teague. Prior to Teague filing this complaint.

17). Teague filed Civil Action No. 02-F-279 (BNB) and Civil Action No. 04-F-731 (BNB). An Warden R. Hood was aware of the possibility of retaliations from officers and officials! An yet Warden R. Hood did nothing to prevent or stop it!!

18). Warden R. Hood was aware and received copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows Warden R. Hood was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits - 4 & 5).

(Please See Attached Pages 6-A, 6-B, 6-C, 6-D, 6-E, 6-F, 6-G, 6-H, 6-I, 6-J, 6-K, 6-L, 6-M, 6-N, 6-O, 6-P, 6-Q, 6-R, 6-S, 6-T, 6-U, 6-V, 6-W, 6-X, 6-Y, 6-Z, 6-AA, 6-BB, 6-CC, 6-DD and 6-EE)

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19). Warden R. Hood was aware of the ongoing retaliations Teague was forced to endure! Warden R. Hood signed the administrative remedy form (BP-9) responding to my (plaintiff's) administrative remedy complaint. An yet the retaliations continued against Teague!!

Also Warden R. Hood received "request forms" dated April 16, 2004 & February 25, 2004! An "certified letters" dated March 16, 2004 & April 6, 2004 (Please See Attached Exhibits- F1, F2, G1, G2, G3, G4, G5, G6, H, H1, H2, H3, I and I1).

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4. Claim Four: Associate Warden D. Duncan "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

20). When this incident began! A/W D. Duncan was the Associate Warden of "Operations" at the U.S. Penitentiary-Max.

21). A/W D. Duncan's job title is "Associate Warden of Operations, the Supervisor of Facilities, Correctional Services, Safety, Employee Development and Custody"!

22). A/W D. Duncan was very much aware of the racial wars that have been going on throughout the Bureau of Prison System. Where inmates have been and are still seriously injuried or killed by other inmates.

23). A/W D. Duncan failed to supervise the correctional officers, the unit team members and other officials at the U.S. Penitentiary-Max. Allowing his staff to place Teague. One lone African American in a all white group recreation group! Knowing before hand to do so would

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"pose a threat to the security and good orderly running of the institution"!

24). AW D. Duncan personally told Teague, "we (the administration) made bets you wouldn't last long on group rec! Teague it's your word against ours! You got to prove it" and then smile as if it's a joke!!

25). AW D. Duncan was well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an African American inmate"! Had been assaulted here at the U.S. Penitentiary-Max. By a White inmate, who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! An at the time of this assault. Inmate Robert Jones #13952-083 was not the only African American inmate on the recreation yard! So AW D. Duncan "posed a threat to the security and good orderly running of the institution by placing Teague in an all white group recreation group alone"!!!

26). When Teague respectively complained about the dangerous position he was placed in.

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An outside sources wrote the Assistant United States Attorney. Teague was removed from the group recreation program and denied the step down program of D-Unit/J-Unit completely!

27). AW D. Duncan was notified of the retaliations Teague was and is still forced to endure! An yet he allowed it to continue repeatedly!!

28). AW D. Duncan was notified of all allegations of Correctional Officer Jeff Johnson wrong doings towards Teague. Prior to Teague filing this complaint.

29). Teague filed Civil Action No. 02-F-279 (BNB). An AW D. Duncan was aware of the possibility of retaliations from officers and officials! An yet he did nothing to prevent or stop if!!

30). AW D. Duncan was aware and received copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows A. W. D. Duncan was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits-4 & 5).

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5. Claim Five: Associate Warden J. Burrell "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

31). When this incident began! AW J. Burrell was the Associate Warden of "Programs" at the U.S. Penitentiary-Max.

32). AW J. Burrell's job title is "Associate Warden of Programs, the Supervisor of Recreation Offered to Inmates (to be allowed in a safe environment) and the Supervisor of the Unit Team Members (D-Units "Counselor, Case Manager and Unit Manager"). As well as the Education Departments!

33). AW J. Burrell was very much aware of the racial wars. That have been going on throughout the Bureau of Prisons System. Where inmates have been and are still seriously injuried or killed by other inmates.

34). AW J. Burrell failed to supervise the correctional officers, the unit team members and other officials at the U.S. Penitentiary-Max. Allowing his staff to place Teague. One lone African American

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in a all white group recreation group! Knowing before hand to do so would "pose a threat to the security and good orderly running of the institution"!

35) ALW J. Burrell was well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an Afrian American inmate"! Had been assaulted here at the U.S. Penitentiary-Max. By a White inmate, who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! An at the time of this assault. Inmate Robert Jones #13952-083 was not the only African American inmate on the recreation yard! So ALW J. Burrell "posed a threat to the security and good orderly running of the institution by placing Teague in an all white group recreation group alone"!!

36) When Teague respectively complained about the dangerous position he was placed in. An outside sources wrote the Assistant United States Attorney. Teague was removed from the group recreation program and denied the step down program of

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D-Unit/J-Unit completely!

37) ALJ J. Burrell was notified of the retaliations Teague was and is still forced to endure! An yet he allowed it to continue repeatedly!!

38) ALJ J. Burrell was notified of all allegations of Correctional Officer Jeff Johnson wrong doings towards Teague. Prior to Teague filing this complaint.

39) Teague filed Civil Action No. 02-F-279 (BNB). An ALJ J. Burrell was aware of the possibility of retaliations from officers and officials! An yet he did nothing to prevent or stop it!!

40) ALJ J. Burrell was aware and received copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows ALJ J. Burrell was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits-4&5).

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6. Claim Six: Associate Warden J. Zuercher "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

41). A/W J. Zuercher is the Associate Warden of "Operations" here at the U.S. Penitentiary - Max.

42). A/W J. Zuercher's job title is "Associate Warden of Operations, the Supervisor of Facilities, Correctional Services, Safety, Employee Development and Custody"!

43). A/W J. Zuercher is very much aware of the racial wars that have been going on throughout the Bureau of Prison System. Where inmates have been and are still seriously injuried or killed by other inmates.

44). A/W J. Zuercher is also one of the officials. Who decides if inmates are to proceed through the D-Unit/J-Unit step down programs!

45). A/W J. Zuercher failed to supervise the correctional officers, the unit team members and other officials at the U.S. Penitentiary - Max. Allowing his staff to

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place Teague. One lone African American in a all white group recreation group! Knowing before hand to do so would "pose a threat to the security and good orderly running of the institution"!

46) A.W.J. Zuercher is well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an African American inmate"! Had been assaulted here at the U.S. Penitentiary-Max. By a white inmate, who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! An at the time of this assault. Inmate Robert Jones #13952-083 was not the only African American inmate on the recreation yard! So A.W.J. Zuercher "posed a threat to the security and good orderly running of the institution by placing Teague in an all white group recreation group alone"!!

47) When Teague respectively complained about the dangerous position he was placed in. An outside sources wrote the Assistant United States Attorney. Teague was

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removed from the group recreation group program and denied the step down program of D-Unit/J-Unit completely!

48). A/W J. Zuercher was notified of all the retaliations Teague was and is still forced to endure! An yet he allowed it to continue repeatedly!!

49). A/W J. Zuercher was notified of all allegations of Correctional Officer Jeff Johnson wrong doings towards Teague. Prior to Teague filing this complaint.

50). A/W J. Zuercher is well aware of Teague's continuation to program in a positive manner as required by the administration! An yet Teague is being punished/denied the privileges because of retaliational reasons by the administration only!

51). Teague filed Civil Action No. 02-F-279 (BNB) and Civil Action No. 04-F-731 (BNB). An A/W J. Zuercher was aware of the possibility of retaliations from officers and officials! An yet A/W J. Zuercher did nothing to prevent or stop it!!

52). A/W J. Zuercher was aware and received

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copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows ALJ J. Zuercher was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits-4 & 5).

Also ALJ J. Zuercher received request forms dated May 20, 2004 from Teague (Please See Attached Exhibit-J).

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7. Claim Seven: Associate Warden C. Chester "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

53). AW C. Chester is the Associate Warden of "Programs" here at the U.S. Penitentiary-Max.

54). AW C. Chester's job title is "Associate Warden of Programs, the Supervisor of Recreation Offered to Inmates (to be allowed in a safe environment) and the Supervisor of the Unit Team Members (D-Units "Counselor, Case Manager and Unit Manager"). As well as the Education Departments!

55). AW C. Chester is very much aware of the racial wars. That have been going on throughout the Bureau of Prison System. Where inmates have been and are still seriously injuried or killed by other inmates.

56). AW C. Chester is also one of the officials. Who decides if inmates are to proceed through the D-Unit / J-Unit

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step down programs!

57). AW C. Chester failed to supervise the correctional officers, the unit team members and other officials at the U.S. Penitentiary- Max. Allowing his staff to place Teague. One lone African American in a all white group recreation group! Knowing before hand to do so would "pose a threat to the security and good orderly running of the institution"!

58). AW C. Chester is well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an African American inmate"! Had been assaulted here at the U.S. Penitentiary- Max. By a white inmate, who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! An at the time of this assault. Inmate Robert Jones #13952-083 was not the only African American inmate on the recreation yard! So AW C. Chester "posed a threat to the security and good orderly running of the institution by placing Teague in an all white group

recreation group alone"!!!

59). When Teague respectively complained about the dangerous position he was placed in. An outside sources wrote the Assistant United States Attorney. Teague was removed from the group recreation group program and denied the step down program of D-Unit/J-Unit completely!

60). A/W C. Chester was notified of all the retaliations Teague was and is still forced to endure! An yet he allowed it to continue repeatedly!!

61). A/W C. Chester was notified of all allegations of Correctional Officer Jeff Johnson wrong doings toward Teague. Prior to Teague filing this complaint.

62). A/W C. Chester is well aware of "Teague's continuation to program in a positive manner as required by the administration! An yet Teague is being punished/denied the privileges because of retaliational reasons by the administration only"!!

63). Teague filed Civil Action No. 02-F-279 (BNB) and Civil Action No. 04-F-731 (BNB). An A/W C. Chester was aware of the possibility

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of retaliations from officers and officials! An yet ALW C. Chester did nothing to prevent or stop it!!

64). ALW C. Chester was aware and received copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows ALW C. Chester was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits - 4 & 5).

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8. Claim Eight: Special Investigation Agent L. Smith "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

65). S.I.A. L. Smith is the "Special Investigation Agent" here at the U.S. Penitentiary -Max.

66). SIA L. Smith's job title is "Special Investigation Agent, the Supervisor of the entire Special Investigative Services (SIS) department, to investigate inmate and staff claims of serious misconduct, life threatening and institutional breach of securitys"! As well as to prevent any types of risks to inmates and officers. That will cause any type or kind of injury to either inmate or staff!!

67). SIA L. Smith is very much aware of the racial wars. That have been going on throughout the Bureau of Prison System. Where inmates have been and are still seriously injuried or killed by other inmates.

68). SIA L. Smith is also one of the

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officials. Who decides if it's safe for inmates to be around other inmates in the group recreation programs in D-Unit. An the J-Unit step down program as well!

69) SIA L. Smith failed to supervise/advise the correctional officers, the unit team members and other officials at the U.S. Penitentiary-Max. Allowing the administration to place Teague! One lone African American in a all white group recreation group! Knowing before hand to do so would "pose a threat to the security and good orderly running of the institution"!

70) SIA L. Smith is well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an African American inmate"! Had been assaulted here at the U.S. Penitentiary-Max. By a white inmate, who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! An at the time of this assault. Inmate Robert Jones #13952-083 was not the

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only African American inmate on the recreation yard! So SIA L. Smith "posed a threat to the security and good orderly running of the institution by placing Teague in an all white group recreation group alone"!!!

71). When Teague respectively complained about the dangerous position he was placed in. An outside sources wrote the Assistant United States Attorney. Teague was removed from the group recreation group program and denied the step down program of D-Unit/J-Unit completely!

72). SIA L. Smith was notified of all the retaliations Teague was and is still forced to endure! An yet he allowed it to continue repeatedly!!

73). SIA L. Smith was notified of all allegations of Correctional Officer Jeff Johnson wrong doings toward Teague. Prior to Teague filing this complaint.

74). SIA L. Smith is well aware of "Teague's continuation to program in a positive manner as required by the administration! An yet Teague is being punished/denied

the privileges because of retaliational reasons by the administration only"!!

75) Teague filed Civil Action No. 02-F-279 (BNB) and Civil Action No. 04-F-731 (BNB). An SIA L. Smith was aware of the possibility of retaliations from officers and officials! An yet SIA L. Smith did nothing to prevent or stop it!!

76) SIA L. Smith was aware and received copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows SIA L. Smith was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits - 4 & 5).

77) SIA L. Smith had Teague placed under investigation! Knowing Teague had done nothing wrong. But in fact Teague had only complained about the retaliations forced on him. The documentation "dated 12-8-03"! Shows SIA L. Smith knew of this alleged investigation (Please See Attached Exhibit - A).

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9. Claim Nine: Captain E. Hugeston "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

78) Captain E. Hugeston is the "Captain" here at the U.S. Penitentiary-Max. When this incident began he was and still is the Captain here!

79) Captain E. Hugeston's job title is "Captain", the Supervisor of the Correctional Officer and the Lieutenants at the U.S. Penitentiary -Max! As well as the Supervisor of Correctional Services, Safety and Custody!

80) Captain E. Hugeston is very much aware of the racial wars. That have been going on throughout the Bureau of Prison System. Where inmates have been and are still seriously injuried or killed by other inmates.

81) Captain E. Hugeston is also one of the officials. Who decides if it's safe for inmates to be around other inmates in the group recreation programs in D-Unit. An the J-Unit step down program as well!

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82) Captain E. Hugeston failed to supervise /advise the correctional officers, the unit team members and other officials at the U.S. Penitentiary-Max. Allowing the administration to place Teague! One lone African American in a all white group recreation group! Knowing before hand to do so would "pose a threat to the security and good orderly running of the institution"!

83) Captain E. Hugeston is well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an African American inmate"! Had been assaulted here at the U.S. Penitentiary-Max. By a white inmate, who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! An at the time of this assault. Inmate Robert Jones #13952-083 was not the only African American inmate on the recreation yard! So Captain E. Hugeston "posed a threat to the security and good orderly running of the institution by placing Teague in an all white group recreation group alone"!!!

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84). When Teague respectively complained about the dangerous position he was placed in. An outside sources wrote the Assistant United States Attorney. Teague was removed from the group recreation group program and denied the step down program of D-Unit / J-Unit completely!

85). Captain E. Hugeston was notified of all the retaliations Teague was and is still forced to endure! An yet he allowed it to continue repeatedly!!

86). Captain E. Hugeston was notified of all allegations of Correctional Officer Jeff Johnson wrong doings toward Teague. Prior to Teague filing this complaint.

87). Captain E. Hugeston is well aware of "Teague's continuation to program in a positive manner as required by the administration! An yet Teague is being punished / denied the privileges because of retaliational reasons by the administration only"!!

88). Teague filed Civil Action No. 02-F-279(BNB) and Civil Action No. 04-F-731(BNB). An Captain E. Hugeston was aware of the

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possibility of retaliations from officers and officials! An yet Captain E. Hugeston did nothing to prevent or stop it!!

89) Captain E. Hugeston was aware and received copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows Captain E. Hugeston was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits-4 &5).

90) Captain E. Hugeston was very much aware. That Teague had been placed under investigation! An knowing Teague had violated no policy, received no incident report and in fact had done nothing wrong. But in fact Teague had only complained about the retaliations forced on him. For proof of investigation (Please See Attached Exhibit-A).

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10. Claim Ten: Unit Manager T. Gomez "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

91). When this incident began! Unit Manager T. Gomez was the Unit Manager of "D-Unit" at the U.S. Penitentiary - Max.

92). Unit Manager T. Gomez's job title is "Unit Manager", the Supervisor of the runnings of D-Unit, the Supervisor of the Case Manager, the Counselor and the Correctional Officers of his unit! As well as the Supervisor of the Programming Of Inmates, the Custody Of Inmates and the Safety Of Inmates in his unit!!

93). Unit Manager T. Gomez is very much aware of the racial wars. That have been going on throughout the Bureau of Prison System. Where inmates have been and are still seriously injuried or killed by other inmates.

94). Unit Manager T. Gomez repeatedly denied Teague's request and pleas to be placed in another group recreation

group with other African American inmates!

95). Unit Manager T. Gomez is also one of the officials. Who decides if inmates are to proceed through the D-Unit/J-Unit step down programs!

96). Unit Manager T. Gomez failed to supervise the correctional officers, the unit team members and other officials at the U.S. Penitentiary-Max. Allowing staff/officials to place Teague. One lone African American in a all white group recreation group! Knowing before hand to do so would "pose a threat to the security and good orderly running of the institution"!

97). Unit Manager T. Gomez is well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an African American inmate"! Had been assaulted here at the U.S. Penitentiary-Max. By a white inmate, who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! An at the time of the assault.

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Inmate Robert Jones # 13952-083 was not the only African American inmate on the recreation yard! So Unit Manager T. Gomez "posed a threat to the security and good orderly running of the institution by placing Teague in an all white group recreation group alone"!!!

98). When Teague respectively complained about the dangerous position he was placed in. An outside sources wrote the Assistant United States Attorney. Teague was removed from the group recreation group program and denied the step down program of D-Unit / J-Unit completely!

99). Unit Manager T. Gomez was notified of all the retaliations Teague was and is still forced to endure! An yet he allowed it to continue repeatedly!!

100). Unit Manager T. Gomez was notified of all allegations of Correctional Officer Jeff Johnson wrong doings toward Teague. Prior to Teague filing this complaint.

101). Unit Manager T. Gomez is well aware of "Teague's continuation to program in a positive manner as required by the

"Continuation Of Cause Of Action"

D. CAUSE OF ACTION

administration! An yet Teague is being punished/denied the privileges because of retaliational reasons by the administration only"!!

102). Teague filed Civil Action No. 02-F-279(BNB) and Civil Action No. 04-F-731(BNB). An Unit Manager T. Gomez was aware of the possibility of retaliations from officers and officials! An yet Unit Manager T. Gomez did nothing to prevent or stop it!!

103). Unit Manager T. Gomez was aware and received copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows Unit Manager T. Gomez was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibits-4 & 5).

104). Unit Manager T. Gomez was aware Teague had been placed under investigation! An knowing Teague had violated no policy, received no incident report and in fact had done nothing wrong. Teague had only complained about the retaliations forced on him. For proof of investigation (Please See Attached Exhibit-A).

"Continuation Of Cause Of Action"

D. CAUSE OF ACTION

11. Claim Eleven: Unit Manager M. Collins "violated plaintiff's Eighth Amendment Rights and All Other Constitutional Violations that fit this complaint".

Supporting Facts:

105) Unit Manager M. Collins is <u>now</u> the Unit Manager of "D-Unit" at the U.S. Penitentiary - Max.

106) Unit Manager M. Collins job title is "Unit Manager", the Supervisor of the running of D-Unit / J-Unit, the Supervisor of the Case Manager, the Counselor and the Correctional Officers of his unit! As well as the Supervisor of the Programming Of Inmates, the Custody Of Inmates and the Safety Of Inmates in his unit!!

107) Unit Manager M. Collins is very much aware of the racial wars. That have been going on throughout the Bureau of Prison System. Where inmates have been and are still seriously injuried or killed by other inmates.

108) Unit Manager M. Collins repeatedly denied Teague's requests and pleas to be placed in another group recreation group with other African American inmates. Stating,

"Continuation Of Cause Of Action"

D. CAUSE OF ACTION

"no Teague, I don't move inmates from one group recreation group to another"! Was Unit Manager M. Collins response. But a white inmate was granted the move twice!!

109). Unit Manager M. Collins is also one of the officials. Who decides if inmates are to proceed through the D-Unit/J-Unit step down programs!

110). Unit Manager M. Collins failed to supervise the correctional officers, the unit team members and other officials at the U.S. Penitentiary-Max. Allowing staff/officials to place Teague. One lone African American in a all white group recreation group! Knowing before hand to do so would "pose a threat to the security and good orderly running of the institution"!

111). Unit Manager M. Collins is well aware of the danger of one lone African American inmate. Being placed in an all white group recreation group. Because Robert Jones #13952-083 "an African American inmate"! Had been assaulted here at the U.S. Penitentiary-Max. By a white inmate,

"Continuation Of Cause Of Action"

D. CAUSE OF ACTION

who in fact used a weapon to "slice/cut" inmate Robert Jones #13952-083 in the face! An at the time of the assault. Inmate Robert Jones #13952-083 was not the only African American inmate on the recreation yard! So Unit Manager M. Collins "posed a threat to the security and good orderly running of the institution by placing Teague in an all white group recreation group alone"!!!...

112. When Teague respectively complained about the dangerous position he was placed in. An outside sources wrote the Assistant United States Attorney. Teague was removed from the group recreation group program and denied the step down program of D-Unit/J-Unit completely!

113. Unit Manager M. Collins was notified of all the retaliations Teague was and is still forced to endure! An yet he allowed it to continue repeatedly!!

114. Unit Manager M. Collins was notified of all allegations of Correctional Officer Jeff Johnson wrong doings toward Teague. Prior to Teague filing this complaint.

"Continuation Of Cause Of Action"
D. CAUSE OF ACTION

115). Unit Manager M. Collins is well aware of "Teague's continuation to program in a positive manner as required by the administration! An yet Teague is being punished/denied the privileges because of retaliational reasons by the administration only"!!

116). Teague filed Civil Action No. 02-F-279(BNB) and Civil Action No. 04-F-731(BNB). An Unit Manager M. Collins was aware of the possibility of retaliations from officers and officials! An yet Unit Manager M. Collins did nothing to prevent or stop it!!

117). Unit Manager M. Collins was aware and received copies of the letters mailed to Assistant United States Attorney Michael C. Johnson. Which shows Unit Manager M. Collins was notified of the continuing retaliation forced upon Teague (Please See Attached Exhibit-4 & 5).

118). Unit Manager M. Collins was aware Teague had been placed under investigation! An knowing Teague had violated no policy, received no incident report and in fact had done nothing wrong. Teague had only complained about the retaliations forced on him. For proof of investigation (Please See Attached Exhibit-A).

E. PREVIOUS LAWSUITS

Have you ever filed a lawsuit, other than this lawsuit, in any federal or state court while you were incarcerated? ✓ Yes ___ No (CHECK ONE). If your answer is "Yes," complete this section of the form. If you have filed more than one lawsuit in the past, use extra paper to provide the necessary information for each additional lawsuit. The information about additional lawsuits should be labeled "E. PREVIOUS LAWSUITS."

1. Name(s) of defendant(s) in prior lawsuit: Eric Holder, et al., Defendants

2. Docket number and court name: Docket #599CV256/ 1:00CV770 "same case" Eastern District of Texas

3. Claims raised in prior lawsuit: Defendants deliberate indifference to plaintiff's needs for protection caused stabbing assault of plaintiff by other prisoner's.

4. Disposition of prior lawsuit (for example, is the prior lawsuit still pending? Was it dismissed?): No, the prior lawsuit is not still pending. It was dismissed!

5. If the prior lawsuit was dismissed, when was it dismissed and why? Feb. 7, 2001 because I was not appointed counsel as requested so my case was ruled frivolous!

6. Result(s) of any appeal in the prior lawsuit: N/A

(Please see attached pages 7-A and 7-B "Continuation of E. PREVIOUS LAWSUIT")

F. ADMINISTRATIVE RELIEF

1. Is there a formal grievance procedure at the institution in which you are confined?

✓ Yes ___ No (CHECK ONE).

2. Have you exhausted the available administrative remedies? Attach copies, if available.

✓ Yes ___ No (CHECK ONE). Briefly explain your answer:

Plaintiff filed administrative remedies forms "BP-8, BP-9 BP-10 and BP-11" (Please see attached page 7-B Continuation of F. ADMINISTRATIVE RELIEF)

"Continuation Of Previous Lawsuits"

E. PREVIOUS LAWSUITS

1. Name(s) of defendant(s) in prior lawsuit: Officer Jeff Johnson

2. Docket number and court name: 02-F-279(BNB), "United States District Court For The District Of Colorado" (Denver)

3. Claims raised in prior lawsuit: Defendant harassed, threatened and assaulted plaintiff!

4. Disposition of prior lawsuit (for example, is the prior lawsuit still pending? Was it dismissed?): Yes, this prior lawsuit is still pending! The Law firm "Holland & Hart LLP" has been appointed by the courts to represent me!

5. If the prior lawsuit was dismissed, when was it dismissed and why? N/A

6. Result(s) of any appeal in the prior lawsuit: N/A

"Continuation Of Previous Lawsuits"

E. PREVIOUS LAWSUITS

1. Name(s) of defendant(s) in prior lawsuit: U.S. Goeernment, J. Johnson, R. Hood, D. Duncan, E. Hugeston, P. Lee, P. Shaffer, J. Walters and L. Smith

2. Docket number and court name: (Teague v. U.S. Goeernment, etal) 04-F-731(BNB) "United States District Court For The District Of Colorado" (Denver)

3. Claims raised in prior lawsuit: Plaintiff was forced to endure many types of retaliations, due to Officer Jeff Johnson making a false statement about inmate Teague!

4. Disposition of prior lawsuit (for example, is the prior lawsuit still pending? Was it dismissed?): Lawsuit is pending!

5. If the prior lawsuit was dismissed, when was it dismissed and why? N/A

6. Result(s) of any appeal in the prior lawsuit: N/A

Continuation of "F. ADMINISTRATIVE RELIEF"

Plaintiff filed the appropriate administrative remedy forms. (Please see attached Exhibits-B, 1, 2, 3, 4 and 5 "BP-8 & Response" C and C1 "BP-9 & Response" D and D1 "BP-10 & Response" E and E1 "BP-11 & Response").

For proof administration placed Plaintiff under investigation (Please See attached Exhibit-A).

For proof Warden R. Hood received "Request Forms & Certified Letters (Please See attached Exhibits-F1, F2, G1, G2, G3, G4, G5, G6, H, H1, H2, H3, I and I1).

For proof ALJ J. Zuercher received "Request Form" (Please See attached Exhibit-J).

Exhibit-A

Teague: **12/8/03**

Mr. Gomez informed me that you were placed on single recreation status by the SIS department pending investigation. You will recreate with three range out in the cages and you will not lose your phone calls at this time. You will be informed if things change.

V. Sudlow

Exhibit-B

FLM 1330.13f
Attachment 1

USP ADMINISTRATIVE MAXIMUM
FLORENCE, COLORADO
INFORMAL RESOLUTION FORM

Inmate Name: Teague Reg. No. 06977-029
Unit: D03-#304 Date: 2-10-04

NOTICE TO INMATE: You are advised that normally prior to filing a Request for Administrative Remedy, (BP-DIR-13), you **must** attempt to informally resolve your complaint through your Correctional Counselor. Please follow the three steps listed below:

1. **State your complaint:** Recently I've been forced to endure "Retaliation and Racial Discrimination" by the following named individuals (Please see attachments Exhibits-1,2,3 4 and 5)

(If more space is needed, you may use up to one letter size (8 1/2 x 11) continuation page. You must also submit one copy of supporting exhibits. (Exhibits will not be returned with the response to BP-229(13) responses.))

2. **State what actions you have made to informally resolve your complaint:** Filed prior administrative remedy forms. Wrote the Warden (Warden Hood) letter given to Unit Manager Collin which I never received a response!
3. **State what resolution you expect:** To receive all privileges of group recreation and to be allowed to proceed forward in the program with other African American inmates. An not face any more retaliation or racial discrimination by the administration!

Inmate's Signature: Clinton Teague Date: February 10, 2004

Correctional Counselor's Comments (Steps to Resolve): YOU WERE REMOVED FROM GROUP RECREATION AFTER AN SIS INVESTIGATION REVEALED THAT YOUR PARTICIPATION IN GROUP RECREATION POSED A THREAT TO THE SECURITY AND GOOD ORDERLY RUNNING OF THE INSTITUTION

Counselor's Signature: [signature] **Date:** [redacted] TEA 2/11/04
Unit Manager's Review: [signature] **Date:** 2-11-04
Informally Resolved: _____ **Date:** _____

	BP-8 ISSUED	BP-8 RETURNED	BP-9 ISSUED	BP-9 RETURNED	EXECUTIVE STAFF
DATE	2-10-04	2-11-04	2-12-4	2-13-4	
TIME	908am	2:30 AM	8:15 AM	2:00 PM	
COUNSELOR	[illegible]	TEA	TEA	TEA	

Continuation Of BP-8 Administrative Remedy Form

Exhibit-1

Warden R. Hood, AW D. Duncan, Captain Hugeston, S.I.A. L. Smith, Unit Manager Gomez and Unit Manager Collins! Ive done all asked and required of me by the administration here at the ADX-Florence to follow the program in a positive and productive manner!

Ive been forced on several occasions to endure retaliation by officers, officials and the administration. Since filing Civil Action No. 02-F-279 (BNB) against Officer Jeff Johnson! I was placed in a group recreation group where I was the only African American! An the administration knew all throughout the Bureau Of Prison. There has been and still is racial wars going on! Where African American inmates are killed or seriously injured by white inmates!

Racial comments were made in my presents while I was on group recreation by white inmates! I ignored the comments and walked away! Later I told Case Manager V. Sudlow of what was stated to me. After nothing was done to resolve the matter and more racial comments were continually being made by white racial inmates. Who are known throughout the federal system for violence. I informed my attorney of the matter and stopped going to recreation on my own to avoid trouble!

Exhibit-2

My attorneys informed "Michael C. Johnson / United States Assistant Attorney" of all the retaliation and of the racial discrimination I'm forced to endure! An requested it be stop and the matter be investigated

Due to outside sources inquiring of the wrong doings I'm forced to endure. I was removed from group recreation status, placed on single recreation status, privileges taken away that I've earned and moved backwards in this program. When I've done nothing wrong to be punished!! African American inmates such as my can program in a positive manner here. But when one of us bring issues to the administrations attention. We are punished and placed backwards in the program for doing whats right. Then told to give 6 months more clear conduct Then I'll be considered for group recreation again! My progress review forms show that I've done all required of me by my unit team. To be allowed to proceed forward in the program and in a safe manner. White inmates have gotten incident reports while on group recreation and were never moved backwards in the program! I received no incident report and was moved backward. Because the administration put me in a dangerous situation with racist inmates. I can prove that the prior mentioned individuals have forced me to endure "retaliation and

racial discrimination here at the ADX-Florence! As well as forced other African American inmates to endure the same! What I've been forced to endure. Is in fact a violation of my constitutional rights in ways that can be proven in the courts of law!

← End Of Statement →

Clinton League #06977-029 Feb. 10, 2004

Exhibit - 4

HOLLAND & HART LLP
ATTORNEYS AT LAW

DENVER • ASPEN
BOULDER • COLORADO SPRINGS
DENVER TECH CENTER
BILLINGS • BOISE
CHEYENNE • JACKSON HOLE
SALT LAKE CITY • SANTA FE
WASHINGTON, D.C.

8390 EAST CRESCENT PARKWAY
SUITE 400
GREENWOOD VILLAGE, CO 80111-2800

TELEPHONE (303) 290-1600
FACSIMILE (303) 290-1606

Sarah W. Moore
(303) 290-1607
smoore@hollandhart.com
64087.0001

September 18, 2003

Michael C. Johnson
Assistant United States Attorney
1225 Seventeenth Street, Suite 700
Denver, CO 80202

Re: ***Clinton Teague v. Jeff Johnson***
Civil Action No. 02-MK-0279 (BNB)

Dear Michael:

This letter is to inform you of several incidents of harassment and threats directed toward my client, Clinton Teague, in retaliation for filing and pursuing the referenced action.

On June 18, 2003, Officer P. Lee struck Mr. Teague with a pair of handcuffs. Although Mr. Teague reported the assault, he was denied administrative relief and medical treatment. Further, on September 5, 2003, while two officers were preparing to escort Mr. Teague to group recreation, one officer told him that he was tired of Mr. Teague filing civil complaints against his friends. The officer then stated that it was his understanding that Defendant Johnson left a mark or two on Mr. Teague. Motioning to his nightstick, the officer then told Mr. Teague not to worry, that his nightstick was black, just like Mr. Teague, so it would not leave any marks. Finally, on September 10, 2003, Mr. Teague was denied group recreation. When he asked for an explanation, Mr. Teague was told – counterfactually – that he had refused to participate.

These are just three examples of the ongoing retaliation Mr. Teague has been enduring since filing the referenced action. We ask that you investigate these incidents and take whatever steps are necessary to ensure that any such harassing conduct does not continue in the future.

Sincerely,

Sarah W. Moore

Sarah W. Moore
for Holland & Hart LLP

SWM
cc: Mr. Clinton Teague

Exhibit-5

HOLLAND&HART LLP
THE LAW OUT WEST

Jose A. Ramirez
Phone (303) 295-8422
Fax (303) 383-5643
jramirez@hollandhart.com

November 21, 2003

Michael C. Johnson
Assistant U.S. Attorney
1225 17th Street, #700
Denver, CO 80202

Re: Clinton Teague vs. Jeff Johnson, Civil Action No. 02-MK-0279

Dear Michael:

As you are aware, Sarah Moore left our firm in September, and I have taken over assisting Mr. Hartley on this matter. I am writing to you concerning a couple of matters.

Previously, Sarah wrote to you regarding incidents of retaliation against Mr. Teague. In a telephone conversation with me yesterday morning, Mr. Teague advised of another incident that occurred on November 6, 2003. A guard at the prison asked Mr. Teague to hold a television cable while the guard went into a mechanical room. Within seconds, Mr. Teague was violently shocked, resulting in burns to his hands, chest pain and loss of feeling through parts of his body. Of additional concern is that Mr. Teague has been placed in an all-white recreational group, and he is in fear for his safety. The retaliation against Mr. Teague *must* stop! I am asking for you to look into this incident of retaliation as well as the possibility of allowing Mr. Teague to have recreational time with other African Americans. Due to the seriousness and urgency of this request, your prompt response is necessary.

Since a Rule 26(f) scheduling conference is next on the agenda, I am inquiring as to your availability during the next couple of weeks to confer about preparation of the scheduling order. I look forward to discussing this case with you in the near future. Thank you for your cooperation.

Sincerely yours,

Joe A. Ramirez

JAR:dmf
cc: James E. Hartley, Esq.
Clinton Teague

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Exhibit - C

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Teague Clinton 06977-029 D03-#304 ADX-Florence
LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

Part A- INMATE REQUEST I did nothing to pose a threat to the security and good orderly running of the institution. As stated in the response of the BP-8 response by my unit team! Prior to placing me in a all white group recreation group. The administration knew through out the (BOP)! Racial wars, killings and threats are still going on. An sooner or later by me being the only African American on the all white group rec group. A serious problem was sure to [redacted] happen. I avoided trouble and was punished anyway! There are (2) group rec groups here. I could have been placed in that group! I'm scheduled to be released in 2008! I posed no threat what so ever and the administration knows it!! This is pure "Retaliation & Racial Discrimination" for outside sources being notified of the problem and for me filing a civil case against staff! I want this matter corrected because I've done nothing wrong!

2-12-04
DATE — SIGNATURE OF REQUESTER: Clinton Teague

Part B- RESPONSE

SEE ATTACHED RESPONSE

DATE — WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE — CASE NUMBER: 324921-F1

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) — _____ (REG. NO.) — _____ (UNIT) — _____ (INSTITUTION)

SUBJECT: _____

DATE — RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP LVN

Printed on Recycled Paper

BP-229(13)
APRIL 1982

Exhibit-C1

BP-229 RESPONSE **Case Number: 324921-F1**

Name: Teague, Clinton **Register Number: 06977-029**

Your Request for Administrative Remedy dated February 12, 2004, and received in this office February 18, 2004, has been reviewed. You state you were removed from group recreation as a result of retaliation and racial discrimination. You request this matter be corrected.

A review of the issue raised in your Request for Administrative Remedy has been conducted. You were removed from group recreation because it was determined your continued presence in a group recreation environment posed a threat to the safety and security of the recreation area. You provide no evidence to support your allegations of retaliation and racial discrimination.

Accordingly, your Request for Administrative Remedy is denied. In the event you are not satisfied with this response and wish to appeal, you may do so within 20 calendar days of this response by submitting a BP-230(13) to the Regional Director, Federal Bureau of Prisons, North Central Regional Office, Gateway Complex, Tower II, 8th Floor, 400 State Avenue, Kansas City, Kansas 66101-2492.

Robert A. Hood

Robert A. Hood, Warden

2/23/04

Date

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Exhibit- D

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From: Teague Clinton (LAST NAME, FIRST, MIDDLE INITIAL) 06977-029 (REG NO) D03-304 (UNIT) ADX-Florence (INSTITUTION)

Part A—REASON FOR APPEAL My continued presence in a group recreation environment area was denied. Because racial slurs were stated to me by white inmates (Aryan Nation Members)! I informed the proper officials and my attorney because the administration was wrong. For placing one lone African American in an all white group rec area. knowing they would not place a white inmate in a all African American group rec area! Warden Hood stated on 2-24-04 to me, a white inmate would not go in a all black geoup rec area alone! I responded, then why are black inmates put in that situation? There 2 different [redacted] group rec areas! I shouldve been placed in one with ether african american inmates. Black inmate are discriminated against in the program here. I received no incident report, violated no policy and I was removed from the program because I reported the wrongs thatsdone to me! Clinton Teague

2-27-04
DATE

I earned the right to be in the program and these previleges!
SIGNATURE OF REQUESTER

Part B—RESPONSE

RECEIVED
MAR - [redacted]
REGIONAL DIRECTOR'S OFFICE
NORTH CENTRAL REGIONAL OFFICE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 324921-R1

Part C—RECEIPT

CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

USP / FPC DATE

Previous editions not usable

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

BP-230(13)
APRIL 1982

Exhibit-D1

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

Regional Administrative Remedy Appeal
Part B - Response

Name: TEAGUE, Clinton
Register Number: 06977-029
Admin Remedy Number: 324921-R1

This is in response to your Regional Administrative Remedy Appeal receipted March 8, 2004, wherein you state that you were removed from group recreation as a result of retaliation and racial discrimination. You request that you be allowed to participate in group recreation.

We have reviewed your institutional level complaint and the response provided to you by the Warden on February 23, 2004. As the Warden stated, you were removed from group recreation because it was determined your continued presence in a group recreation environment posed a threat to the safety and security of the recreation area. You provide no evidence to support your allegations of retaliation and racial discrimination.

Based on the above information, your Regional Administrative Appeal is denied. If you are dissatisfied with this response, you may appeal to the Office of General Counsel, Federal Bureau of Prisons, 320 First Street, NW, Washington, DC 20534. Your appeal must be received in the Office of General Counsel within 30 days from the date of this response.

3/17/04
Date

/s/ G. L. HERSHBERGER, Regional Director

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Exhibit - E

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From: Teague Clinton 06977-029 DO3 #304 ADX-Florence
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A—REASON FOR APPEAL There are (2) group recreation groups here! An one (1) african american (myself) was placed in an all white group recreation group. Racial comments were stated to me while I was in the all white recreation group. I reported it and was later removed from the group recreation program totally! I had done all that was required of me to be in the group recreation program I violated no policy nor had I received any type of incident report! I was placed with inmates who are known to have seriously hurt or killed african american inmate in the Bureau of Prisons The same inmates who have life sentences, racial tattoos all over their bodys and yet I was removed from the program. Another inmate (Michael Birman) was placed in another group rec group. But I was denied the placement in another group rec. group after I had requested several times. I can prove in the U.S courts that I've been retaliated and discriminated against by this administration!

3-31-04 Clinton Teague
DATE | SIGNATURE OF REQUESTER

Part B—RESPONSE

DATE | GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 304921-A1

Part C—RECEIPT

CASE NUMBER:

Return to:
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE | SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN

BP-231(13)
APRIL 1982

Exhibit-E1

Administrative Remedy No. 324921-A1
Part B - Response

You contend you were removed from group recreation status when you did nothing wrong. You contend you have been subject to retaliation and discrimination. You request a return to group recreation.

Our review of this matter reveals that both the Warden and the Regional Director have adequately addressed your concerns. You were removed from group recreation because your continued presence in the group setting posed a threat to institutional security. There is no evidence of retaliation or discrimination, or that the recreation group to which you were assigned was inappropriate. You have been removed from "rec alone" status, and it is anticipated that you will be permitted group recreation in the near future.

Your appeal is denied.

June 10, 2004
Date

Harrell Watts, Administrator
National Inmate Appeals

February 25, 2004 Exhibit-F1

Request Form

To: Warden Hood / ADX-Warden
From: Clinton League #06977-029 / D03-#304

Sir,

Yesterday when I told you, how one African American is placed in a all white group rec. group. Then explained the administration, would not place a white inmate in an all black group rec group! You stated, League the white inmat would not go in an all black group rec group! An I understand that. My point is this, why place African American in that same situation when we all know its <u>wrong</u>?

Then when I brought the racial comments stated to me. To my unit team and outside source wrote to the administration. Concerning the matter at hand. I was punished, placed on single rec status and lost privileges that I earned. An I never received any type of incident report or violated any policys! You said, its not retaliation or discrimination! Please tell me what is it and why African American inmates put in dangerous situations then? After all its a fact! The Asayon Brother

and African American inmates have been at war throughout the (BOP) for years. An on group rec are Aryan Brothers with life [redacted] sentences. Allowed the privileges of group rec inmates. With a history of very bad violence on their records (murder). I'm scheduled to be released in 2008! An yet "I'm denied and was removed from group recreation because it was determined. My presence in a group rec environment posed a threat to the safety and security of the recreation area"! You and your staff knew the threat of placing one African American in an all white group rec group. Was wrong prior to doing it!

No officer is present at all to watch / monitor the group rec inmates during their group rec periods! An yet in other units. A officer is present with a portable camera recording whats going on during these group rec periods! You yourself promised me that all inmates will be treated the same. As long as they followed the program and did not receive an incident report! Well thats not the case here in D-Unit!! Favoritism is shown to white inmates and black inmates moved back or denied the program. An I'm one of them! I'd very much appreciate. If you would right the wrong thats been done to me!

-2- Thank you!!

Exhibit-G1

Proof that Warden Hood was mailed a certified letter!

Re: Notification of Wrong Rulings, Racial Discrimination, Retaliations forced upon Teague #06977-029 by officers and officials here at U.S. Penitentiary - Max. An nothings done to stop it or correct it!!

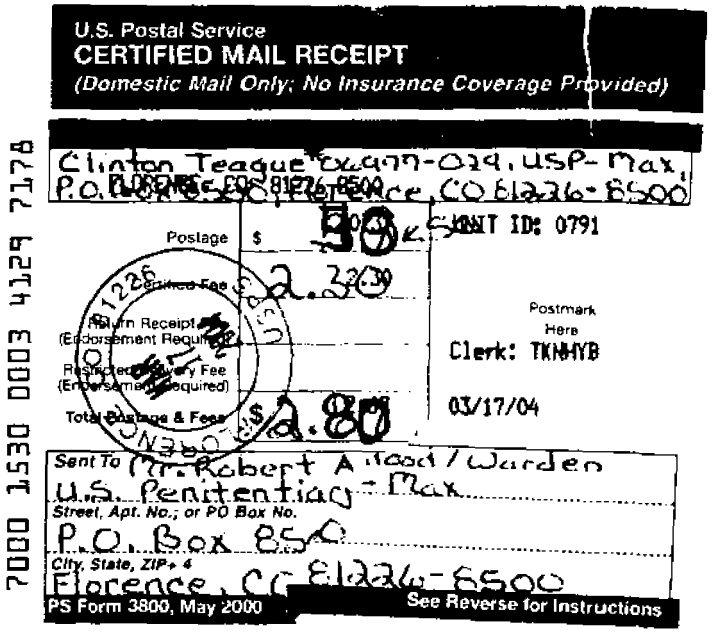


Exhibit-G2

March 16, 2004

Clinton Teague #06977-029
U.S. Penitentiary-Max
P.O. Box 8500
Florence, CO 81226-8500

Via U.S. Certified Mail

Robert A. Hood
Warden of U.S. Penitentiary-Max
P.O. Box 8500
Florence, CO 81226-8500

Re: Notification of Wrong Doings, Racial Discrimination, Retaliations forced upon Teague #06977-029 by officers and officials here at U.S. Penitentiary-Max. An nothings done to stop it or correct it!!!

Dear Warden Hood,

Pursuant to our brief conversation yesterday (March 15, 2004 in A-Unit) I've brought to your attention. The following issues "harassment, retaliation and the racial discrimination that I've been forced to endure. By filing administrative remedy forms, request forms addressed to you personally (handed to Unit Manager Collins to give you) and spoke

to you in person on several occasions.

You, yourself assured me that all inmates here at the U.S. Penitentiary-Max would be treated equally regardless of their race! As long as inmates followed the program and did what is required of inmates to move forward in a positive manner! Well I've done all that was required by my unit team, the administration and you! But I'm denied group recreation! I informed my unit team of the racial comments that were stated, to me on the group recreation (I was on range 5 at the time). Nothing was done for weeks and the racial slurrs continued! So I tried to avoid trouble by <u>not</u> going to recreation and requested to be moved to 6 range. To be allowed the group recreation privileges with other African American inmates. Because my unit team had placed me into an all-white recreation group, whos members proudly wear tattoos signifying the killing of an African American. These mentioned inmates called me racial names and when I brought the issue to the attention of the administration. Nothing was done! Then when my attorney notified Michael C. Johnson /Assistant U.S. Attorney! The administration here

retaliated against me for allowing outside sources to be notified of the wrong doings I'm forced to endure.

Warden Hood I didnt violate any policy, I didnt receive any type of incident report and yet I was removed from group recreation status totally!! I wasn't even given a chance to be allowed to have group recreation privileges with le range as I requested! You, yourself stated "one white inmate would not go into an all African-American group recreation group"! Remember? Then I responded, "why put me in that situation"? Its a proven fact white inmates and African American inmates have been at war with each other for years and years! Long before I came into the Bureau of Prisons system and it will no doubt continue long after I'm released!

The inmates that used racial slurs and made racial comments have 30 year, 50 year and life sentences! An yet this is the reason I was removed from group recreation. Words written by my unit team, "Teague you were removed from group recreation after an S.I.S. Investigation revealed

that your participation in group recreation posed a threat to the security and good orderly running of the institution"!

Warden Hood you know I'm scheduled to be released June 2008! I'm following the policy and programming as required! I have a future on to look forward to on the streets with my family!! I'm not going to throw my life away and stay in the Bureau of Prisons system any longer than June 2008! I've done as request of me here by my unit team and you! I'm again requesting to be placed in group recreation with other African-Americans. An not denied the privileges that I've earned and that were wrongly taken away!! I hope you will correct this matter and allow me to program and move forward Unit Manager Collins told me to give him 6 months clear conduct and he'll recommend I be placed back in group recreation! I've maintained a clear conduct record for over 2 years and followed the program. I should not be denied the privileges I've earned any longer!!

Thank you for your time and I hope to receive a written response

soon! Please allow me the privileges that I'm requesting and that I've earned!!

Sincerely
Clinton League

Copies of this letter also mailed to:

"Holland & Hart LLP"
The Law Out West
% Jose A. Ramirez / Attorney At Law
555 17th Street
Suite 3200
Denver, CO 80202

Exhibit-H

Proof that Warden Hood was mailed another certified letter!

Re: 2nd Notification of Wrong Doings, Racial Discrimination, Retaliations forced upon Clinton Teague #06977-029 by officers and officials here at the U.S. Penitentiary-Max. An still nothings done to stop it or correct it! The Warden continues to ignore my requests!!



U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

Clinton Teague # 06977-029, USP-Max
P.O. Box 8500, Florence, CO 81226-8500

Postage	$ .37
Certified Fee	2.30
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 2.67

UNIT ID: 0791
Postmark Here
Clerk: TKNHYB
04/07/04

FLORENCE CO APR 7 2004 81226 USPS

Sent To Mr. Robert A. Hood / Warden
U.S. Penitentiary-Max
Street, Apt. No.; or PO Box No.
P.O. Box 8500
City, State, ZIP+4
Florence, CO 81226-8500

PS Form 3800, May 2000 See Reverse for Instructions

7000 1530 0003 4129 7208

Exhibit-H1

April 6, 2004

Clinton League #06977-029
U.S. Penitentiary-Max
P.O. Box 8500
Florence, CO 81226-8500

Via U.S. Certified Mail
Robert A. Hood/Warden
U.S. Penitentiary-Max
P.O. Box 8500
Florence, CO 81226-8500

Re: "2nd Notification" of Wrong Doings, Racial Discrimination, Retaliations forced upon Clinton League #06977-029 by officers and officials here at the U.S. Penitentiary-Max. An nothings done to stop it or correct it!! After repeatedly bringing my complaints to the attention of Warden Hood himself!!!

Dear Warden Hood,

Pursuant to our brief conversation (March 15, 2004 in D-Unit) I've brought to your attention. By filing administrative remedy forms (BP-9), sent you request forms/cop-outs, (request form/cop-out was given to Unit Manager Collins by me personally) to be given to you and you informed me. That you

did not receive the mentioned request form/cop-out addressed to you! So on March 16, 2004 I mailed you a certified letter concerning the issues at hand. For some reason you would not respond to that certified letter either! An yet I'm still forced to endure the "wrong doings, racial discrimination and retaliations by your staff. I can prove everything that I've stated to you. Concerning me being denied the program and punished. When I've violated no policy and have in fact done all thats been required of me to program. An yet Unit Manager Collins continues to do everything in his power. To deny me the privileges I've earned and that were taken away from me for no reason!

This is the 2nd certified letter I've addressed and mailed to you concerning this matter! I hope you will correct your officials wrong doings towards me and give me back the privileges that I've earned! Everything that I've informed you of concerning this matter. I can prove in the United States Courts of Colorado! An with no disrespect meant towards you. I'm going to do just that!! I've tried to allow

staff many chances to right their wrongs. On each time I've been told a different lie! The documents of all my prior 6 month reviews, the facts of how long I've been incident report free and the facts that I'm still taking the courses (shown on the television) will show what I've complained about to be true and correct!

A man in your position (Warden of the ADX). Who ignores the wrong doings committed by his/your staff towards inmates! Is just as guilty as the officials committing the wrong doings! No matter what, I'm going to continue to program in a positive manner by your policy!

Sincerely
Clinton League

Copies of this letter also mailed to:

"Holland & Hart LLP"
The Law Out West
% Jose A. Ramirez / Attorney At Law
555 17th Street
Suite 3200
Denver, CO 80202

April 16, 2004 Exhibit-I

Request Form

To: Warden R. Hood / ADX-Warden
From: Clinton League #06977-029 / D03-#304

Warden Hood,

Sir! Today you came to D-Unit to make your rounds! An yet again for some reason. You failed to walk on our range (Range D03)! Other inmates as well as myself. Looked out our cell windows onto the recreation yard and saw <u>you</u> speaking to the inmates during their rec period!

Please tell me, what must I do to speak with you? I've sent you written request forms, mailed you two certified letters (the 1st on March 16, 2004 and the 2nd on April 6, 2004) and you continue to ignore my complaints! No disrespect meant, but the truth of the matter is this. The wrong doings I've repeatedly complained about concerning your officers and other administrative staff. They as well as everyone else here. Knows they can do whatever they want (meaning violating their own policys and the civil rights of [redacted] inmates) and you allow it to happen repeatedly

Because you for some strange reason. Continue to ignore the facts. When I bring them to your attention!! Considering you are aware of the wrong doings I've been forced to endure by your staff. I would sincerely appreciate. If you would stop on our range. When you make your next (visit) rounds and not avoid me!

Thank you for your time!!

Copies of this "request form" also mailed to:

"Holland & Hart LLP"
The Law Out West
c/o Jose A. Ramirez / Attorney At Law
555 17th Street
Suite 3200
Denver, CO 80202

May 20, 2004 Exhibit-J

Request form

to: A.W. J. Zuercher / A.W. of Custody-ADX
from: Clinton League #06977-029 / A03-#305

I was told for months now. that I pose a threat to the orderly running of the institution! I've violated no policy here at the ADX, I've continued to program in a [redacted] positive manner as required by my unit team, AW C. Chester and the Warden. An yet I'm still denied the group recreation program! I've been told many different excuses of why I'm denied group rec! since this is stated to be a custody issue! I'd appreciate if you would tell me, when it will be resolved or corrected?

Copies of this "request form" mailed to:

Holland & Hart LLP
% Mr. Jose A. Ramirez
555 17th Street
Suite 3200
Denver, CO 80202

G. REQUEST FOR RELIEF

State the relief you are requesting. If you need more space to complete this section, use extra paper. The additional requests for relief should be labeled "G. REQUEST FOR RELIEF."

WHEREFORE, Mr. Teague request this Court to enter judgment in his favor and against the United States Government, J. Johnson, R. Hood, D. Duncan, J. Burrell, J. Zuercher, C. Chester, L. Smith, E. Hugeston, T. Gomez and M. Collins, in both their official and individual capacities, as follows:

119). Award Teague compensatory damages for physical and emotional injury resulting from the U.S. Government, J. Johnson, R. Hood, D. Duncan, J. Burrell, J. Zuercher, C. Chester, L. Smith, E. Hugeston, T. Gomez and M. Collins actions.

120). Award Teague exemplary damages.

121). Award Teague pre-and post- judgment interest on the amount of damages incurred.

122). Award Teague his costs in pursuing this action.

123). Award Teague such other relief as the courts deem just and proper.

Demand For Trial By Jury

124). Mr. Teague hereby demands trial by jury.

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I am the plaintiff in this action, that I have read this complaint, and that the information in this complaint is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed on July 20, 2004
(Date)

Clinton Teague
(Prisoner's Original Signature)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Phillip S. Figa

Civil Action No. 04-cv-01800-PSF-BNB

CLINTON TEAGUE,

Plaintiff,

v.

J. JOHNSON;
R. HOOD;
D. DUNCAN;
J. BURRELL;
C. CHESTER;
L. SMITH;
T. GOMEZ; and,
M. COLLINS,

Defendants.

MINUTE ORDER

ORDER ENTERED BY JUDGE PHILLIP S. FIGA

THIS MATTER is before the Court on plaintiff's Motion for Voluntary Dismissal (Dkt. # 60). It is hereby ORDERED that the motion is GRANTED and this case be DISMISSED pursuant to F.R.Civ.P. 41(a)(2).

DATED: August 31, 2005

Welcome WILSON J MOORER | Logout

HOME | ALERTS | MY WORK | NEW CASE | SEARCH MAIN | EMAIL

CASE DETAILS

Back to Case R..s..ts Case Actions:

Case ID: CIV-..CR-2016-00385 Short Description: TEAGUE V. U.S. GOVERNMENT, ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	1:04-cv-01800-PSF-BNB	Date	08/31/2005
Short Description	TEAGUE V. U.S. GOVERNMENT, ET AL	Type	Settled
Classification	Civil	Reason	
Case Type	Bivens	Sought	
Case Sub-Type		Amount offered	$
Current Region	NORTH CENTRAL REGIONAL OFFICE	Total Amount Paid	$3,000.00
Current Institution		Description	SETTLED
Incident Region	NORTH CENTRAL REGIONAL OFFICE	Description	SETTLED
Incident Institution	Florence ADMAX (USP)	Court Fee Paid ?	No
Monetary Relief Sought	$	Pro Se ?	
Estimated Amount	$		
Office	Denver	Date Received	08/27/2004
Jurisdiction	DISTRICT OF COLORADO		
Responsible Legal Office	FCC Florence	Date Filed	08/27/2004

Estimated Amount	$ -	Current Owner	APRIL CROMER
Estimated Outcome	No evaluation can be made at this time	Case Status	Open
		Timeline Status	Closed
		Monthly Report Status	
		Private Case	No

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	
Comments	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 05-cv-00527-REB-MJW

LLOYD D. SLOAN,

Plaintiff,

v.

MICHAEL V. PUGH, and
RANDY M. WATSON,

Defendants.

ORDER OF DISMISSAL

Blackburn, J.

On February 6, 2006, the parties filed a **Stipulation to Dismiss With Prejudice** [#57]. After careful review of the stipulation and the file, the court has concluded that the stipulation should be approved and that this action should be dismissed with prejudice.

THEREFORE, IT IS ORDERED as follows:

1. That the **Stipulation to Dismiss With Prejudice** [#57] filed on February 6, 2006, is **APPROVED**;

2. That this action **IS DISMISSED WITH PREJUDICE** with the parties to pay their own attorney fees and costs;

3. That the Trial Preparation Conference set for August 18, 2006, is **VACATED**; and

4. That the trial to court set to commence September 4, 2006, is **VACATED**.

Dated February 6, 2006, at Denver, Colorado.

BY THE COURT:

s/ Robert E. Blackburn
Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 03-cv-0352-RPM-CBS

KEITH LEIGH SHANNON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Pursuant to the Stipulated Order of Dismissal filed by the parties, it is accordingly ORDERED, ADJUDGED AND DECREED that this action is dismissed with prejudice with each party to pay its own costs and attorney's fees.

DATED this 27th day of October, 2006.

BY THE COURT:

s/Richard P. Matsch

RICHARD P. MATSCH, JUDGE
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action 03-cv-0352-RPM-CBS

KEITH LEIGH SHANNON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

SETTLEMENT AGREEMENT

---

1. This settlement agreement is made by the parties to resolve and terminate the claims alleged by Plaintiff Keith Leigh Shannon against Defendant United States of America, and any of its employees, including Bryan Moon, Richard Catron, and Richard Reynolds individually, in the above-captioned case.

2. This settlement agreement resolves the above-captioned case, including but not limited to those claims filed pursuant to the Federal Tort Claims Act or for constitutional violations concerning Mr. Shannon's termination from the UNICOR factory at USP Florence on June 19, 2002 and for other outstanding matters raised through the administrative remedy process or any other means through which Mr. Shannon has raised claims concerning his termination from the UNICOR factory at USP Florence on June 19, 2002.

3. The parties hereto, without admitting any wrongdoing or violations, wish to avoid the uncertainty, expense and delay of litigation, and are thus willing to compromise the above-captioned case and all claims concerning Mr. Shannon's termination from the UNICOR factory

at USP Florence on June 19, 2002. This settlement agreement shall not constitute an admission of liability or fault on the part of the entities referenced herein, the parties hereto, or on the part of the United States' agencies, instrumentalities, officers, employees, agents or servants.

4. In consideration of the following, Mr. Shannon agrees to dismiss with prejudice the above-captioned case.

5. Mr. Shannon also agrees to release the parties hereto and any other entity of the federal government and its current and former employees from any and all claims concerning his termination from the UNICOR factory at USP Florence on June 19, 2002.

6. Upon the signing of this agreement, Mr. Shannon, through counsel, agrees to execute in conformance with Federal Rule of Civil Procedure 41(a) a Stipulated Motion to Dismiss the above-captioned case in its entirety with prejudice, with each party to bear its own costs and attorney's fees.

7. Upon dismissal of the above-captioned case, Mr. Shannon agrees not to file any motion pursuant to Federal Rule of Civil Procedure 60 or any other motion to reopen this case.

8. Upon dismissal of the above-captioned case, Mr. Shannon further agrees not to file any administrative claims under the Federal Tort Claims Act or other administrative remedy or bring further litigation concerning his termination from the UNICOR factory at USP Florence on June 19, 2002.

9. In settlement of the claims alleged in this case, the United States of America will pay to Mr. Shannon, through his counsel, the sum of $6,000.00. This sum shall be in full settlement and satisfaction of the claims alleged in the above-captioned case, and all other claims asserted or unasserted arising from Mr. Shannon's termination from the UNICOR factory at USP Florence on June 19, 2002.

10. In further settlement of the claims alleged in this case, the United States of America, through Harley G. Lappin, Director of the Bureau of Prisons, or his successor, shall within one week of the dismissal of this case: (a) add 55 months of employment to Mr. Shannon's longevity status; (b) promote Mr. Shannon to grade one in his current position in the UNICOR factory at USP Big Sandy; (c) expunge all of Mr. Shannon's work and central file records concerning Mr. Shannon's termination from his employment in the UNICOR factory at USP Florence on June 19, 2002, including, but not limited to, all records that were relied on or submitted to support the termination of Mr. Shannon from his employment at the UNICOR factory at USP Florence on June 19, 2002. The Bureau of Prisons will retain Mr. Shannon's lawsuit records including underlying exhaustion records pursuant to its record retention schedule.

11. In further settlement of the claims alleged in this case, the United States of America, through Harley G. Lappin, Director of the Bureau of Prisons, or his successor, shall return Mr. Shannon to USP Big Sandy and place him in the UNICOR factory where he will retain his current job, job status, and overtime hours as he had prior to his trial transfer from Big Sandy. The United States of America, through Harley G. Lappin, Director of the Bureau of Prisons, or his successor, further agrees that, when Mr. Shannon is eligible for transfer to another institution, and prior to release from custody, it will make every effort to place him in an institution in or near the Central District of Virginia that has an operative UNICOR factory.

12. This settlement agreement is specifically conditioned upon the Court's dismissal of the above-captioned case in its entirety with prejudice.

13. Mr. Shannon agrees not to petition the Court for attorney's fees or costs as a prevailing party or otherwise.

14. Mr. Shannon states that he has no outstanding indebtedness to the United States or any component thereof.

15. Mr. Shannon acknowledges that he has reviewed the terms of this agreement and enters into this settlement agreement voluntarily and agrees to all of its provisions. Except to the extent permitted by law and referenced herein, the terms of this settlement are not intended to alter, waive or amend any other provisions of law or legal obligations which would otherwise apply to the parties hereto.

16. Except as expressly stated herein, this agreement is not intended to limit the authority or actions of the Bureau of Prisons concerning Mr. Shannon's incarceration. Plaintiff's continued employment with UNICOR is conditional upon Mr. Shannon's continued UNICOR eligibility based upon continued satisfactory conduct as set forth by UNICOR policy.

17. The parties agree that any breach of the provisions of this settlement agreement will not entitle any party to reopen the underlying actions. A party may, however, pursue any appropriate administrative or judicial remedies that may be available to seek enforcement of the terms of this settlement agreement.

18. The United States of America, through the Bureau of Prisons, shall supply the attorneys for Mr. Shannon with written confirmation that the Bureau of Prisons has performed its obligations pursuant to this settlement agreement. Payment of funds will be processed through the United States Department of the Treasury, Judgment Fund following dismissal of this action.

19. Upon payment of the aforementioned sum and performance by the United States of its obligations pursuant to this settlement agreement, Mr. Shannon shall supply the attorneys for the defendants with an executed receipt and satisfaction of settlement.

20. Fax signatures may serve as originals.

21. This agreement consists of five pages, including the signature page.

DATED this 26th day of October, 2006.

TROY A. EID
United States Attorney

J. Benedict Garcia

By: J. Benedict García
Assistant United States Attorneys
1225 Seventeenth Street, Suite 700
Denver, CO 80202
(303) 454-0100

Defendants' Counsel

By: Antony M. Noble
The Joffe Law Firm
1776 South Jackson Street, Suite 602
Denver, CO 80210
(303) 757-6572

By: Paula M. Ray
Paula M. Ray, P.C.
1801 Broadway #1100
Denver, CO 80202-3839
(303) 292-0110

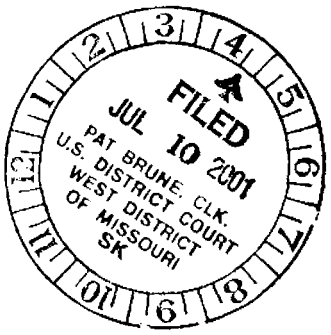
Plaintiff's Counsel

By: Theresa Montoya, Attorney Advisor
Federal Correctional Complex – Legal Services
5880 Highway 67 South
P.O. Box 8500
Florence, CO 81226

By: Keith Leigh Shannon
Plaintiff

IN THE UNITES STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

ARTHUR MITCHELL,	)	
	)	01-0742-CV-W-1
Plaintiff,	)	
	)	
vs.	)	Case No._____
	)	
U.S. Department of Justice	)	
Federal Bureau of Prisons	)	
	)	
	)	
Defendant.	)	



COMPLAINT

COMES NOW, Arthur Mitchell, by and through his attorneys, and states the following for his cause of action.

Parties

1. Plaintiff is a resident of Jackson County, Kansas City, Missouri.

2. At all times relevant to this action, Defendant, U.S. Department of Justice, Federal Bureau of Prisons, was and is an agency of the Federal Government of the United States of America.

Jurisdiction and Venue

3. This court has jurisdiction of the claim herein pursuant to 28 U.S.C. § 1346(b) and 42 U.S.C.§1983. This civil action arises under the Constitution and laws of the United States. Plaintiff alleges a violation of his rights under the

Federal Tort Claims Act, 28 U.S.C. §1346(b) and §2671 et. seq., 42 U.S.C. 1983 and the Eighth Amendment of the United States Constitution.

4. Venue properly lies in this Court pursuant to 28 U.S.C. § 1346(b)and 1402(b) in that the Plaintiff resides in this judicial district.

Jurisdictional Prerequisites

5. Plaintiff filed a timely Claim For Damages with the U.S. Department of Justice, Federal Bureau of Prisons alleging that he had been injured while incarcerated at the Federal Prison at Leavenworth and submitting his claim for damages. A copy of his claim is attached hereto and marked as Exhibit 1.

6. The U.S. Department of Justice, Federal Bureau of Prisons denied Plaintiff's Claim for Damages, and this action is being brought within six months of the receipt of such denial of Plaintiff's claim. A copy of said denial is attached hereto and marked as Exhibit 2.

7. Plaintiff has fulfilled all conditions precedent to the bringing of this claim under the Federal Tort Claims Act and has duly exhausted all administrative procedures prior to instituting this lawsuit in accordance with the law.

Factual Background

8. On or about September, 1994, plaintiff was incarcerated

in the Federal Prison Camp, located in the County of Leavenworth, State of Kansas.

9. On August 5, 1995, while playing a game of softball at the prison, plaintiff broke his left wrist.

10. Plaintiff's left wrist was set by a staff physician's assistant at the Leavenworth Federal Prison Camp hospital on August 5, 1995.

11. Despite numerous complaints by plaintiff of continued pain and difficulty with his left wrist, defendant knowingly failed and/or refused to provide urgently needed medical care and treatment.

12. On or about August 14, 1995, x-rays were taken of plaintiff's left wrist and hand which clearly showed the plaintiff's initial fracture was not properly set.

13. On October 2, 1995, plaintiff's left wrist and had were looked at by Dr. Baston, an orthopaedic surgeon. Dr. Baston recommended correction of the mal-alignment surgically "as soon as possible".

14. Despite Dr. Baston's recommendation, defendant failed and/or refused to provide this urgently needed treatment.

Count I

15. Plaintiff hereby incorporates by reference, as though

fully set forth herein, paragraphs 1 through 14 of his Complaint.

16. As a result of defendant knowingly failing and/or refusing to provide the urgently needed surgery, defendant has caused plaintiff to incur residual injury which could have been prevented with timely attention. More specifically, plaintiff's left hand and wrist continue to cause him severe pain with numbness in his fingers and difficulty in using his left hand for every day tasks.

17. The above-alleged acts of the defendant, coupled with the complete failure of the defendant to provide any positive medical treatment for plaintiff constituted a course of medical care so clearly inadequate as to amount to refusal to provide essential care. Such acts were so blatantly inappropriate as to show evidence of intentional maltreatment resulting in permanent disability, pain, and suffering, resulting in deprivation of Plaintiff's rights secured by the United States Constitution, including, but not limited to the right to be free from cruel and unusual punishment as protected by the Eighth Amendment to the United States Constitution.

18. The above-alleged actions of the defendant were of a malicious and intentional nature and manifested a deliberate indifference of the request for essential medical treatment.

WHEREFORE, plaintiff demands judgment against the defendant

in the sum of $150,000.00 in actual damages, plus the costs of this action, and such other and further relief as this court deems just and proper.

Count II

19. Plaintiff hereby incorporates by reference, as though fully set forth herein, paragraphs 1 through 18 of his Complaint.

20. Defendant undertook the care and treatment of individuals incarcerated at the Leavenworth Federal Prison Camp by providing and staffing a prison medical facility and providing medical care to such individuals.

21. On or about August 5, 1995 Plaintiff was taken to Defendant's medical facility to have his left broken wrist treated.

22. On or about August 5, 1995 Defendant, by and through its prison medical staff undertook the care and treatment of Plaintiff's left broken wrist.

23. Defendant owed a duty to Plaintiff to properly care for and treat Plaintiff's left broken wrist.

24. Defendant breached this duty owed to Plaintiff.

21. Further, on or about October 2, 1995, doctors at Defendant's medical facility were informed that immediate surgical correction of plaintiff's left wrist was recommended by Dr. Baston.

22. Despite the diagnosis of plaintiff's serious mal-alignment and need for immediate corrective surgery, defendant, knowingly failed and or refused to provide said corrective surgery to plaintiff.

23. Defendant owed plaintiff a duty of care to continue to provide medical treatment for plaintiff's condition, the failure of which has amounted to a breach of that duty, resulting in permanent disability, pain and suffering to plaintiff.

WHEREFORE, plaintiff demands judgement against Defendant in the sum of $150,000.00 in actual damages plus the costs of this action, and such other and further relief as this court deems just and proper.

Respectfully submitted,
WHIPPLE LAW FIRM, P.C.

By: _____
DAVID W. WHIPPLE #29102
818 Grand Avenue, Suite 400
Kansas City, MO 64106
(816) 842-6411
Fax: 842-6463

ATTORNEYS FOR PLAINTIFF

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues.

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008 EXPIRES 3-31-91

1. Submit To Appropriate Federal Agency:

Federal Bureau of Prisons
400 State Ave.
Kansas City, Kansas 66101

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)

Arthur L. Mitchell
3010 Mcgee, #4
Kansas City, MO 64108

3. TYPE OF EMPLOYMENT ☐ MILITARY ☐ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
	10/8/50	Widowed	Saturday, August 5, 1995	2:00 p.m.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.)

See attached

AUG 1 1997

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

Future medical treatment and permanent disability to left wrist and hand.

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	$150,000.00		$150,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Arthur Mitchell		7/3/97

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-108
Previous editions not usable.

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

EXHIBIT 1

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☒ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

17. If deductible, state amount

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☒ No

*U.S. Government Printing Office: 1993 — 342-199/80204

SF 95 (Rev. 7-85) BACK

ATTACHMENT TO CLAIM FOR DAMAGE, INJURY OR DEATH
Form 95

8. Basis of Claim

While incarcerated at the Federal Prison Camp at Leavenworth, Kansas, I broke my left wrist while I was playing a game of softball on August 5, 1995. I broke my left wrist when I slid into third base. I was treated at the prison hospital that day where my wrist was set in a cast by a physician's assistant. Following the placement of my wrist in a case, my wrist and hand continued to hurt badly, and continued to do so even after the cast was removed. I continued to complain about the pain and difficulty I was having with my wrist and hand. Despite my complaints, nothing more was done to my wrist and hand. Subsequently, X-rays were taken of my wrist and hand which clearly show that the fracture was not properly set when this fracture was initially treated. Finally, on October 2, 1995, my wrist and hand were looked at by an orthopaedic surgeon and he recommended correction of the malalignment surgically A.S.A.P. Despite this recommendation, surgery was not provided to me. I repeatedly requested and demanded this treatment but it was never provided to me. As a result of this failure to provide this necessary medical treatment, I now have a left wrist and hand that I believe is permanently injured. I continue to have extensive pain in my left wrist and hand with numbness in my fingers and I have much difficulty in using my left hand. I am requesting further medical treatment be provided to me as well as compensation for the pain and suffering and permanent loss of use of my left hand that resulted from the prison's failure to properly treat my injury in the first place and the prison's further refusal to provide me with proper medical treatment. Attached hereto are copies of the pertinent medical records from the Prison Health Services, along with a recent report from the VA Hospital in Kansas City, Missouri.

I am represented on this matter by attorney, David W. Whipple, 818 Grand Ave., Ste. 400, Kansas City, MO 64106. Phone number: (816) 842-6411.

U.S. Department of Justice

Federal Bureau of Prisons

North Central Regional Office

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

January 10, 2001

David W. Whipple
Attorney at Law
400 Scarritt Building
818 Grand Avenue
Kansas City, Missouri 64106

Re: Tort Claim No. T-NCR-97-517 (Personal Injury/$150,000.00)
MITCHELL, Arthur; Reg. No. 07076-045

CERTIFIED NUMBER 7000 0600 0023 9382 0619

Dear Mr. Whipple:

Your client's above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your client's claim did not reveal that he suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your client's claim is denied. This letter serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If your client is dissatisfied with our agency's action, he may file suit in the appropriate U.S. District Court no later than 6 months after the date of mailing of this notification.

Sincerely,

Daryl Kosiak
Regional Counsel

EXHIBIT 2

JS 44
(Rev. 3/99)

01-0742-CV-W-1

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

1. (a) PLAINTIFFS

Arthur Mitchell
8348 Locust
Kansas City, MO 64131

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Jackson
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

U.S. Department of Justice
Federal Bureau of Prisons
Tower II, 8th Floor
400 State
Kansas City, KS 66101

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)
NOTE. IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(C) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

David W. Whipple
818 Grand Ave
Kansas City, MO 64106

ATTORNEYS (IF KNOWN)

U.S. Attorney for the Western District of Missouri
400 E. 9th St.Fifth Floor
Kansas City, MO 64108

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (PLACE AN -X- IN ONE BOX ONLY)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 1 50 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 162 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefit
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 31 5 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☒ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 51 0 Motions to Sentence

HABEAS CORPUS:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt Relations
- ☐ 730 Labor/Mgmt. Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW(405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS -Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 81 0 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

☒ 1 Original Proceeding | ☐ 2 Removed from State Court | ☐ 3 Remanded from Appellate Court | ☐ 4 Reinstated or Reopened | ☐ 5 Transferred from another district (specify) | ☐ 6 Multidistrict Litigation | ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES IN DIVERSITY.)

Federal Tort Claims Act 28 USC §1346 (b)

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE
7/10/01

SIGNATURE OF ATTORNEY OF RECORD
David W. Whipple

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ARTHUR MITCHELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 01-0742-CV-W-SOW
	)	
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS,	)	
	)	
Defendant.	)	

ORDER

Before the Court is a Joint Stipulation to Dismissal With Prejudice (Doc. #19) filed by the parties in this case. Accordingly, pursuant to the Joint Stipulation, it is hereby

ORDERED that the above-captioned matter is dismissed with prejudice, each party to bear its own costs.

/s/Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Date: 1-23-03

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ARTHUR MITCHELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 01-0742-CV-W-SOW
	)	
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS,	)	
	)	
Defendant.	)	

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter "Agreement") is made and entered by and between plaintiff Arthur Mitchell (hereinafter "Plaintiff") and defendant the United States of America ("United States"), which includes without limitation the United States Department of Justice, Federal Bureau of Prisons (Plaintiff and the United States hereinafter "the parties").

Whereas Plaintiff has filed a complaint against the United States styled sometimes *Arthur Mitchell v. United States Department of Justice, Federal Bureau of Prisons* and sometimes *Arthur Mitchell v. The United States*, Case Number 01-0742-CV-W-SOW in the United States District Court for the Western District of Missouri ("the Action"), asserting claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2675 *et seq.*, arising from alleged negligent medical treatment or non-treatment in connection with a broken wrist suffered by Plaintiff on or about August 5, 1995; and

Whereas, the parties have agreed to compromise and settle the Action upon the terms set forth herein; and

Whereas, Plaintiff has been and is represented in the Action exclusively by attorney David W. Whipple of the Whipple Law Firm, P.C.;

Now therefore, it is hereby stipulated and agreed as follows:

1. The United States agrees to pay Plaintiff the sum of Forty-five Thousand Dollars ($45,000), in the form of a check payable to Arthur Mitchell and the Whipple Law Firm, P.C., which sum shall be in full settlement and satisfaction of any and all claims, demands, and causes of action released in this Agreement.

2. Plaintiff, for himself and for any present or future spouse, heir, executor, administrator or assign of his hereby releases the United States and all present and past employees and agents thereof of any and all claims, demands, or causes of action of any kind, whether known or unknown, arising directly or indirectly from any injury, damage or loss to Plaintiff (including but not limited to foreseen and unforeseen bodily, personal and emotional injuries and any property damage, expense, or loss of income) as a result of any acts or omissions in connection with Plaintiff's broken wrist occurring prior to the execution of this Agreement by Plaintiff; or arising directly or indirectly from any act, omission, or fault that was asserted or could have been asserted in the Action.

3. Plaintiff hereby holds harmless and indemnifies the United States of and against (1) any claim by Plaintiff or his heirs, executors, administrators, personal representatives, or assigns that is released as to Plaintiff in this Agreement; and (2) any claim for contribution, indemnity, or subrogation against the United States or its agents or employees arising from any act, omission, or fault to which this Agreement applies, which claim results from a claim or action by Plaintiff or his heirs, executors, administrators, personal representatives, or assigns against a third party.

4. This stipulation and agreement shall not constitute an admission of liability or fault on the part of the United States, its agents, servants, or employees. It is entered into by both parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of litigation.

5. It is also agreed, by and between the parties, that each party will bear its own costs, fees, and expenses and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. Upon execution of this Agreement, the parties will promptly file a stipulation for dismissal of the Action with prejudice, each party to bear its own costs incurred, in the form of attachment A hereto.

7. It is also understood by and between the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action (exclusive of expenses) shall not exceed 25 percent of the amount of the compromise settlement. The United States will not be liable to pay Plaintiff or his attorneys any sum separate from the settlement sum referred to in paragraph 1 for any fees or expenses incurred.

8. Plaintiff acknowledges that neither the United States nor its attorneys have made any representations regarding the tax consequences of this settlement, and that in entering this agreement, he has not relied on any representation of the United States or its attorneys except those representations set forth herein.

9. Plaintiff represents and warrants that there are no outstanding liens against the settlement proceeds provided for in this Agreement, and indemnifies the United States against any obligation that it may occur as a result of such lien.

10. This Agreement contains the entire agreement between the parties, and cannot be modified in any respect in the future except in a writing signed by the parties and attached hereto, specifically stating therein that it is an amendment to or a modification of the Agreement.

11. Plaintiff recognizes that the settlement check herein will be issued by the United States Department of the Treasury, and that issuance of such checks generally takes several weeks; and Plaintiff agrees that the United States will not be liable for interest or penalties for the delay involved in issuance of such check.

12. Plaintiff acknowledges that he consulted with counsel before executing this Agreement; that he has been afforded a reasonable time to consider this Agreement before executing same; that he has read and understood its provisions; and that he has executed the same knowingly, voluntarily, and of his own free will.

Date: 12/30/02

Arthur Mitchell
PLAINTIFF

State of Missouri)
) ss.
County of Jackson)

On this 30th day of December, 2002, before me personally appeared Arthur Mitchell to me known to be the person who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

Linda K. Taylor
NOTARY PUBLIC

My Commission Expires:
LINDA K TAYLOR
NOTARY PUBLIC STATE OF MISSOURI
CLAY COUNTY
MY COMMISSION EXP. MAY 30, 2003
(SEAL)

NOTARY PUBLIC NOTARY LINDA K TAYLOR SEAL STATE OF MISSOURI

On behalf of the United States:

Date: 12-30-02 By

Charles M. Thomas, # 28522
Assistant United States Attorney
400 E. 9th Street, Fifth Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3130
ATTORNEY FOR DEFENDANT

The undersigned agrees to the attorney fees and expense provisions of paragraph 7, and affirms that he is authorized to execute this Agreement on behalf of the Whipple Law Firm.

Date: 12/30/02 By

David W. Whipple, # 29102
Whipple Law Firm, P.C.
818 Grand Avenue, #400
Kansas City, Missouri 64106
Telephone: (816) 842-6411
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

ARTHUR MITCHELL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 01-0742-CV-W-SOW
	)	
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS,	)	
	)	
Defendant.	)	

JOINT STIPULATION TO DISMISSAL WITH PREJUDICE

Plaintiff and defendant have arrived at a compromise settlement of this action, as set forth in a fully executed Settlement Agreement and Release that has been filed with the Court. Plaintiff and defendant, through counsel, therefore stipulate to the dismissal of this action with prejudice, each party to bear its own costs and expenses incurred.

Respectfully submitted,

Todd P. Graves
United States Attorney

By _____
Charles M. Thomas, # 28522
Assistant United States Attorney
Charles Evans Whittaker Courthouse
400 East 9th Street, 5th Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3130
ATTORNEY FOR DEFENDANT

And _____
David W. Whipple, # 29102
Whipple Law Firm, P.C.
818 Grand Avenue, #400
Kansas City, Missouri 64106
Telephone: (816) 842-6411
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
SEP 19 2003
RALPH L. DeLOACH, Clerk
By _____ Deputy

MONTE A. FRITTS,

Plaintiff,

vs.

Chris Zych, Director of the Federal Prison Camp,
Warden M.E. Ray;
Warden N.L. Connor,
Dr. Judith Tharp, Medical Officer at USP/FPC-Leavenworth,

Defendants.

CIVIL ACTION

Case No. 03-3377-GTV

COMPLAINT

Monte Fritts brings this civil rights complaint by and through Karen Eager and B. Kay Huff, his undersigned attorneys, and alleges as follows:

Preliminary Statement

1. Plaintiff was a federal prison inmate confined in the Federal Prison Camp at Leavenworth, Kansas. He brings this civil rights action to redress the deprivation of rights, privileges, and immunities secured to him by provisions of the Fifth and Eighth Amendments to the United States Constitution. Plaintiff alleges that he was denied access to adequate and competent medical treatment and care; that the Defendants and their employees failed and refused to carry out or complete physician's treatment plans and orders; and defendants failed and refused to deliver prescribed medications. Plaintiff alleges further that the above-mentioned acts or policies and practices of the Defendants and their employees are knowing, deliberate and intentional, displaying callous indifference and disregard for the health and well-being of

Plaintiff and that such acts, policies, and practices are shocking to the conscience of civilized persons and intolerable in a society purportedly governed by laws and considerations of due process.

Jurisdiction

2. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331. The asserted rights and interests of the Plaintiff exceed $75,000.00 (Seventy-five Thousand Dollars), exclusive of interest and costs. The substantive claims in this action arise under the Fifth and Eighth Amendments to the United States Constitution.

Parties

3. Plaintiff Monte Fritts is a citizen of the United States and a resident of Kansas City, Kansas. At all times pertinent to this action Plaintiff Fritts was incarcerated at the Federal Prison Camp at Leavenworth, Kansas within the custody and control of the Defendants and their employees.

4. Defendant Chris Zych is a resident of the state of Kansas and is and always has been, at all times pertinent to this action, the Director of the Federal Prison Camp at Leavenworth [Hereinafter, "Camp"]. Defendant Zych is responsible for the administration, operation, and supervision of the Camp at Leavenworth. He was responsible for the administration, operation, and supervision of the Camp staff and facilities, the custody and control of inmates, and for the promulgation and enforcement of rules, regulations, policies, and practices relevant to them. Defendant Zych is sued individually for his actions while acting in his official capacity.

5. Defendant former Warden M.E. Ray was a resident of the state of Kansas and was the warden of the United States Penitentiary at Leavenworth at times relevant to this cause of

action. Warden Ray was aware of the Plaintiff's medical problems and issues concerning his treatment and care at the Camp but failed to remedy theses issues. The Camp's medical staff is based at the United States Penitentiary at Leavenworth, which is immediately adjacent to the Camp. As warden, M.E. Ray was responsible for the administration, operation and supervision of medical staff for the facilities. Defendant former Warden M.E. Ray is sued individually for his actions while acting in his official capacity.

6. Defendant Warden N.L. Connor was a resident of the state of Kansas and replaced Warden M.E. Ray as the warden of the United States Penitentiary at Leavenworth. Warden Connor was aware of the medical problems Plaintiff encountered but failed to correct these problems and to ensure that Plaintiff received proper medical treatment and prescriptions. The medical staff for the Camp is based at the United States Penitentiary at Leavenworth, which is immediately adjacent to the Camp. As warden, N.L. Connor was responsible for the administration, operation, and supervision of medical staff for the facilities. Defendant former Warden N.L. Connor is sued individually for his actions while acting in his official capacity.

7. Defendant Dr. Judith Tharp was a resident of Kansas and worked as a medical officer at the United States Penitentiary and at the Federal Prison Camp at Leavenworth, Kansas. Defendant Dr. Tharp at all times relevant to this action had a physician-patient relationship with plaintiff Monte Fritts and was responsible for Monte Fritts' medical care and treatment at the Camp as well as the supervision of medical staff at the Camp. Defendant Dr. Judith Tharp is sued individually for her actions while acting in her official capacity.

Facts

8. Plaintiff Monte Fritts was sentenced in the U.S. District Court for the District of

Kansas, to a 21-month sentence for weapons and dangerous drug offense charges. As part of his Judgment and Commitment Order, Judge Monti Belot ordered that Plaintiff should receive all medications that he had been receiving prior to incarceration. Plaintiff had advanced HIV/AIDS disease and was on numerous medications commonly known as an AIDS cocktail.

9. Upon the commencement of his federal prison sentence, Plaintiff was incarcerated at the Sedgwick County and Harvey County jails and CCA Leavenworth. On February 27, 2001, plaintiff was transferred to the Federal Medical Center, Rochester [Hereinafter, "FMC-Rochester]. While there, he saw an HIV/AIDS specialist, Dr. Rozonable, from the Mayo Clinic. Dr. Rozonable determined that the current medication regimen had failed and began a new course of treatment. While at FMC-Rochester, Plaintiff was timely given his HIV/AIDS and other medications. Dr. Rozonable wrote that at the time Plaintiff was transferred from FMC-Rochester he was in "optimal and stable condition."

10. On or about September 20, 2001, Plaintiff was transferred to the Camp. Plaintiff's medical chart from FMC-Rochester, specifically stated that plaintiff continue to receive his medications "indefinitely or until further evaluation by medical staff."

11. Defendants took Plaintiff off of the prescribed pain medications and substituted Tylenol 3. He was supposed to receive that medication four times a day, but no one was available at the Camp to dispense the fourth dose. Plaintiff experienced pain and severe withdrawal symptoms from the abrupt narcotics termination, which had been equivalent to 180 mg. of morphine per day.

12. Defendants also failed to regularly and timely dispense the medications necessary for treating Plaintiff's HIV/AIDS and other AIDS-related illnesses because medications were not

available, because the Camp delayed in refilling his prescriptions or because Plaintiff's physical condition rendered him unable to leave his bed to pick up the medications in the medication line. Dozens of doses were missed, despite Plaintiff's complaints and efforts to obtain medications in a timely manner.

13. An AIDS "cocktail" is a combination of antiviral medications that must be administered correctly or a patient's HIV infection can develop resistance to the medications included in the AIDS "cocktail." Patients must take the AIDS "cocktail" at strictly prescribed times throughout the day and cannot miss dosages. In order for the AIDS "cocktail" to be effective, patients must take at least 90% of prescribed dosages; if given less than 90% of the dosages, the drugs can be rendered ineffective. When dosage delivery falls below 90% the medication will fail and the patient's CT4 count will decrease; infections and mortality will occur. In addition to the critical AIDS "cocktail," HIV/AIDS patients must have their CT4 count and viral loads regularly monitored to insure the effectiveness of the medication and to monitor the patient's health.

14. Defendant Tharp and her staff failed to monitor plaintiff's medical situation and failed to conduct laboratory tests, which would have shown that Plaintiff's condition was deteriorating. When transferred from the FMC-Rochester, the Transfer Plan specifically ordered "Ongoing care, follow-up, laboratory tests." Plaintiff did not receive ongoing care, follow-up and laboratory tests as required by his known medical condition.

15. On or about March 15, 2002, Dr. Tharp requested an "urgent transfer" for "rescue management" of "HIV/AIDS inmate" Monte Fritts. Dr. Tharp noted that a specialist consultation locally had been denied. On or about April 15, 2002, Dr. Tharp again sent the request, because

Defendant Zych had not sent the transfer request to FMC-Rochester.

16. Plaintiff initiated and filed numerous grievances arising from the above, all of which have been denied or blatantly ignored by the Defendants and their employees. Plaintiff filed administrative remedies while at the Camp. On or about October 10, 2001, Plaintiff complained in a "BP-229" that he was not getting his medications in a timely manner and had missed six days out of the last eight days of medication. His prescriptions were not being refilled, allegedly because "there was no pharmacist on duty this week." Plaintiff wrote that this was "life or death" to him and requested laboratory tests to see if the medications were still working. Plaintiff also complained of severe pain and the lack of adequate treatment for pain.

17. Defendant Ray responded on October 19, 2001, that narcotic pain medication could only be utilized at federal medical centers. He did not address the issues of missed AIDS/antiviral medication but stated that diagnostic tests were ordered at the discretion of clinical staff. Plaintiff appealed that determination to the regional director in a "BP-230(13)." On November 28, 2001, G.L. Hershberger, Regional Director, wrote that "efforts will be made to provide your medications more timely" and that "diagnostic tests are ordered by clinical staff when appropriate."

18. Plaintiff then appealed to the Central Office in Washington, D.C., in a BP-231(13), writing that the problem with timely medication "has gotten worse." At that point, plaintiff had missed 54 doses of HIV/AIDS medications due to late refills. He was given a week's supply of medication, but it took up to three days to get a refill once he had used the medication. He was taking 20 different medications, and for some he received a one-month supply. For the important HIV/AIDS medications, he received only one week's supply. Plaintiff stated that he was taking

one of the last drug regimens available to him for treatment of HIV/AIDS, and it was critical not to miss even one dose. Plaintiff also requested laboratory tests to see if the current drug medications were still working, especially in light of his missed doses.

19. On November 19, 2001, plaintiff filed "an informal attempt to resolve" the dispute concerning more missed medications. He stated that the refills took days to obtain, which could result in failure of the medications. His correctional counselor replied that he was not able to handle the complaint at this level. Plaintiff then filed a request with Defendant Connor to get medications in a timely manner.

20. On December 26, 2001, Plaintiff's father, Kenneth Fritts, wrote to the current warden, Defendant Connor, that his son was not receiving proper medical care at the Camp and was not receiving prescribed medications. On January 9, 2002, Defendant Connor replied that although medication refills may have been delayed, there were only two occasions in the last four weeks where medications were not available or plaintiff failed to report to the clinic for administration of medications.

21. On or around March 15, 2002, Plaintiff's parents requested that the federal public defender in Wichita request a compassionate release on behalf of Plaintiff. The public defender office also sought to assist Plaintiff with obtaining a transfer to FMC- Rochester.

22. On April 9, 2002, Harrell Watts, the Administrator for National Inmate Appeals, granted Plaintiff's administrative appeal and wrote that "medical staff at Leavenworth would undertake an evaluation of his current medical situation. Genotyping would be considered if a change in medication regime was contemplated." Medical staff was ordered to supply 30 days of medication with each refill and to give him a 90-day supply of medication upon release.

23. Plaintiff was not notified of his successful appeal by Leavenworth staff until approximately one month later. Far from complying with the order and giving him 30 days supply of medications, the Camp ordered plaintiff to report to the "pill line" for each dose. Plaintiff was forced to report and to wait in line for each medication, up to two hours per dose. Plaintiff missed more medications after April 9, 2002 because of illness. Plaintiff was finally tested by the Camp's doctors, who found that his T-cell count had fallen to 39, and his viral load had escalated. Plaintiff believes, and upon such information and belief alleges, that the Defendants and their employees took virtually no actions to carry out the recommendations contained in the above-mentioned letter from Plaintiff's physician or from the Central Office in Washington, and that any such actions have been so delayed as to aggravate Plaintiff's medical problems.

24 On April 22, 2002, Dr. Sweet, who treated Plaintiff for many years prior to his incarceration and is a specialist dealing with HIV/AIDS, wrote to Defendants that Plaintiff's "current status" was a "most serious condition, possibly fatal" and required the attention of an HIV/AIDS specialist. Defendant Zych told Plaintiff that the only way Plaintiff would leave the Camp early was in a body bag.

25. Plaintiff was released on May 10, 2002, and his drug regimen was immediately modified. Since his release, Plaintiff has been placed on the final and only drug regimen currently available for treatment of HIV/AIDS.

Legal Claims
Count I

26. Defendants, their agents and employees, with knowledge of Plaintiff's medical needs

and with deliberate indifference to such medical needs, acted or failed to act in such a way as to deprive Plaintiff of necessary and adequate medical care, thus endangering the Plaintiff's health and well-being. Such acts and omissions of the Defendants violated rights secured to the Plaintiff under the Fifth and Eighth Amendments to the United States Constitution.

27. Defendants, their agents and employees, with knowledge of Plaintiff's medical needs and with deliberate indifference to such medical needs, acted or failed to act in such manner as to prevent Plaintiff from obtaining needed medical treatment and care, or to prevent needed medical treatment and care from reaching the Plaintiff, thus endangering the Plaintiff's health and well-being. Such acts and omissions of the Defendants violated rights secured to the Plaintiff under the Fifth and Eighth Amendments to the United States Constitution.

28. Defendants, their agents and employees, with knowledge of Plaintiff's medical needs have a duty under the Fifth and Eighth Amendments to the United States Constitution to provide needed medical care to inmates of the Camp in conformity with the standards for delivery of such medical care in the state of Kansas as a whole.

29. Defendants, their agents and employees, with knowledge of Plaintiff's medical needs or with deliberate indifference to such medical needs, acted or failed to act in such a way as to provide medical care to Plaintiff in conformity with the standard for delivery of such medical care in the state of Kansas as a whole and have in fact provided medical care which does not meet such standards, thus endangering the Plaintiff's health and well-being in violation of rights secured to Plaintiff by the Fifth and Eighth Amendments to the United States Constitution.

30. Defendants, knowing the medical needs of Plaintiff, and knowing also of the inadequacies and deficiencies in the medical facilities staffing and procedures at the Camp, have

a duty under the Fifth and Eighth Amendments to establish and implement policies, practices and procedures designed to assure that Plaintiff receive medical care and treatment in conformity with the standards for delivery of such medical care and treatment in the state of Kansas as a whole.

31. Defendants, knowing of Plaintiff's medical condition, and with deliberate indifference to the inadequacies and deficiencies in the medical facilities, staffing and procedures at the Camp, have failed and neglected to establish and implement policies, practices and procedures designed to assure that Plaintiff receive medical treatment and care at the standards in the state of Kansas as a whole, or have adopted policies, practices and procedures which Defendants knew, or reasonably should have known, would be ineffective in delivering medical treatment and care at such standards, thus endangering the Plaintiff's health and well-being in violation of rights secured to Plaintiff by the Fifth and Eighth Amendments to the United States Constitution.

32. Defendants, knowing the medical needs of Plaintiff, have a duty under the Fifth and Eighth Amendments of the Constitution of the United States to instruct, supervise, and train their employees and agents to assure the delivery of medical care to Plaintiff which is consistent with the standards of medical care in the state of Kansas as a whole.

33. Defendants, knowing of the medical needs of Plaintiff and with deliberate indifference to such needs, have failed to instruct, supervise, and train their employees and agents in such a manner as to assure the delivery of medical care to Plaintiff which is consistent with the standards of medical care in the state of Kansas as a whole, thus endangering the Plaintiff's health and well-being, in violation of rights secured to Plaintiff by the Fifth and Eighth

Amendments to the United States Constitution.

34. The Defendants' above-mentioned actions or omissions were deliberately negligent, recklessly indifferent, or intentional.

35. As a direct and proximate result of the above-described actions and omissions of Defendants, Plaintiff has suffered damages.

Count II

36. Defendants, their agents and employees, with knowledge of Plaintiff's medical needs, and with deliberate indifference to such medical needs, acted or failed to act in such a way as to deprive Plaintiff of necessary and adequate medical care, thus endangering the Plaintiff's health and well-being. Such acts and omissions of the Defendants were extreme and outrageous.

37. Defendants, their agents and employees, with knowledge of Plaintiff's medical needs and with deliberate indifference to such medical needs, acted or failed to act in such manner as to prevent Plaintiff from obtaining needed medical treatment and care or to prevent needed medical treatment and care from reaching the Plaintiff, thus endangering the Plaintiff's health and well-being. Such acts and omission of the Defendants were extreme and outrageous as defendants converted Plaintiff's 21-month sentence to a death sentence.

38. In depriving Plaintiff of necessary and essential medical care and treatment, the Defendants intentionally or recklessly inflicted upon Plaintiff bodily harm.

39. As a direct or approximate cause of the Defendants' extreme and outrageous conduct, Defendants caused severe emotional distress to the Plaintiff.

40. As a direct or approximate cause of the Defendants' extreme and outrageous conduct, Plaintiff has suffered damages.

WHEREFORE, Plaintiff prays for relief as follows:

That the Court award damages to Plaintiff;

That the Court award punitive damages to Plaintiff;

That the Defendants be required to pay the legal costs and expenses in this action, including reasonable provision for Plaintiff's attorneys' fees;

That the Court grant such further and additional relief that is appropriate.

Respectfully submitted,

SHAMBERG, JOHNSON & BERGMAN
CHARTERED

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ATTORNEYS FOR PLAINTIFF

DEMAND FOR JURY TRIAL

Plaintiff Monte Fritts, by and through Karen Eager and B. Kay Huff, his undersigned attorneys, demands a trial by jury as to all issues so triable in this action.

/s Karen A. Eager
Karen A. Eager

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MONTE A. FRITTS,

Plaintiff,

-vs- **Case No. 03-3377-JWL**

CHRIS ZYCH, Director, Federal Prison Camp, Leavenworth, Kansas; M.E. RAY, Former Warden, USP-Leavenworth; N.L. CONNER, Warden, USP-Leavenworth; and JUDITH THARP, Medical Officer, Federal Prison Camp and USP-Leavenworth,

Defendants.

MONTE A. FRITTS,

Plaintiff,

v. **Case No: 04-2300-JWL**

UNITED STATES OF AMERICA,

Defendant.

ORDER

Counsel for the parties listed above have orally confirmed they have settled and compromised the claims in this lawsuit.

IT IS THEREFORE ORDERED that the clerk administratively terminate this action without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation. On or before **February 28, 2005**, the parties shall file a stipulation of dismissal signed by the parties above

who have appeared in the action, under Rule 41(a)(1) of the Federal Rules of Civil Procedure. If no such stipulation is received within the specified time and the parties have not reopened for the purpose of obtaining a final determination, this order shall constitute, for purposes of Rule 58 of the Federal Rules of Civil Procedure, the Court's entry of final judgment of dismissal with prejudice under Rule 41(a)(2).

IT IS SO ORDERED.

Dated this 21st day of January, 2005, at Kansas City, Kansas..

s/ John W. Lungstrum
JOHN W. LUNGSTRUM
CHIEF DISTRICT JUDGE

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of the Freedom of Information and Privacy Act

SHAMBERG, JOHNSON & BERGMAN

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December 15, 2003

Mr. J.D. Crook
U.S. Department of Justice
Federal Bureau of Prisons
North Central Regional Office
Tower II, 8th Floor
400 State
Kansas City, KS 66101-2421

RECEIVED
DEC 17 2003
LEGAL
North Central Regional Office

Re: Monte Fritts

Dear Mr. Crook:

In general, I would refer you to Mr. Fritts' deposition to perpetuate his testimony, where the United States was represented by Mr. Christopher Allman. In addition, I would refer you to Mr. Fritts' medical records from the Federal Medical Center in Rochester, Minnesota and the Leavenworth Prison Camp—all of which are in the custody of the Federal Bureau of Prison. I would also refer you to the grievances filed by Mr. Fritts that were part of his administrative appeal which was ultimately granted by the Bureau of Prison's Central Office in Washington, D.C.

In reply to your question in paragraph 2, we offer the following:

(1) Who departed from the standard of care:

Dr. Judith Tharp
Physicians Assistant Sauderfield
Physicians Assistant Camps
Physicians Assistant Witt
Unknown Physicians Assistant on duty Wednesday evening 10/3/01
Unknown Physicians Assistant on duty Thursday evening 10/4/01
Unknown Physicians Assistant on duty Friday evening 10/5/01
Unknown Physicians Assistant on duty Saturday day 10/6/01

Camp Director Chris Zych
Warden Ray
Warden Connors
Pharmacists who failed to dispense medications on dates in question

(2) When the departure occurred:

Please refer to the deposition of Monte Fritts and to BOP-8,-9, -10 and -11 forms filled out by Mr. Fritts, and to his medical records, all of which are in the BOP's possession. The departure from the standard of care occurred during Mr. Fritts' incarceration at the Leavenworth Prison Camp.

(3) How the departure caused a distinct injury from the "advanced HIV/AIDS" condition:

Mr. Fritts came to BOP custody in a stable condition. He had been prescribed various anti-viral medications commonly known as an AIDS cocktail, to control the virus, and per doctor's orders, he was supposed to take these medications upon a strict time regimen. Mr. Fritts was doing very well while under the care of physicians at the Federal Medical Center in Rochester, Minnesota. Prior to his transfer from the Federal Medical Center, physicians there diagnosed Mr. Fritts' health as "optimal and stable." Mr. Fritts was transferred to the Leavenworth Prison Camp and the medical personnel and staff of the Prison Camp ignored medical orders and failed to give Mr. Fritts his medications in a timely manner. Medical personnel and staff at the Prison Camp failed to deliver medication to Mr. Fritts as prescribed. The daily regimen of anti-viral medication is a critical part of the treatment plan for HIV/AIDS. The medications must be taken following a strict schedule or it can cause the medications to fail. This is exactly what happened to Mr. Fritts. The medical personnel and staff at the Leavenworth Prison Camp failed to make medications available to Mr. Fritts according to the strict regime required for these medications. As a consequence, these medications failed and Mr. Fritts' health was seriously compromised. Mr. Fritts was also on strong pain medication, which was abruptly terminated by the Leavenworth Prison Camp.

(4) How appropriate care would have cured Mr. Fritts' condition:

Mr. Fritts is not claiming that appropriate care would have cured his condition, but with proper care, HIV/AIDS can be managed. The medical personnel and staff at the Prison Camp failed to give Mr. Fritts more than 60 doses of anti-viral medications. The medical personnel and staff at the Leavenworth Prison Camp caused or contributed to cause these medications to fail, thus, compromising Mr.

Fritts' health and forcing him to the seek out the last regime of medication available to him to fight the AIDS disease. The negligent and inappropriate medical care received by Mr. Fritts has lessened his medication options, has caused him a lost chance of a better recovery and ultimately, decreased his life expectancy.

With respect to your request regarding Mr. Fritts' complaint filed in federal court regarding his Fifth and Eighth Amendment rights, I have the following to say. First, you initially stated that the United States was "entitled to request basic information" under the CFR's relating to the FTCA. Accordingly, your questions regarding the pending federal complaint are better addressed in that forum under proper discovery requests, since your questions concern a pending matter.

A. Who committed malpractice:

1. Please identify every federal employee who was negligent or committed malpractice:

Dr. Judith Tharp
Physicians Assistant Sauderfield
Physicians Assistant Camps
Physicians Assistant Witt
Unknown Physicians Assistant on duty Wednesday evening 10/3/01
Unknown Physicians Assistant on duty Thursday evening 10/4/01
Unknown Physicians Assistant on duty Friday evening 10/5/01
Unknown Physicians Assistant on duty Saturday day 10/6/01
Camp Director Chris Zych
Warden Ray
Warden Connors
Pharmacists who failed to dispense medications on dates in question

2. Dates when negligent:

Mr. Fritts believes that there was a pattern of negligence over his incarceration, including but not limited to failing to follow doctor's orders, missing medications repeatedly, failure to conduct lab tests in a timely manner, and failure to transfer him to a facility or specialist more equipped and expert in HIV/AIDS treatment. Please refer to deposition of Monte Fritts, medical records of BOP; BOP-8, -9, -10, -11 grievance forms of Monte Fritts in BOP possession

3. Identify nature and extent of injuries, separate and distinct from pre-existing

HIV/AIDS disease, that were caused by the employee:

Mr. Fritts was transferred from the Federal Medical Center in Rochester, Minnesota in a stable condition. While he was at the Leavenworth Prison Camp, he suffered regularly and routinely from diarrhea, from shingles, from fever, from vomiting, weight loss, and other conditions. He was in constant pain. His viral load escalated and his T-cell count dropped. Before incarceration, he had received substantial pain relief medications (the equivalent of 180 mg. of morphine/day). The Leavenworth Prison Camp disallowed that, and as a result, Mr. Fritts suffered severe pain and severe withdrawal symptoms. He was ordered to receive four Tylenol 3 capsules a day, but never did so, allegedly because of lack of personnel to dispense the fourth capsule.

4. For every employee identified in answer to A1, identify whether an expert has provided a written opinion that supports your position that negligence or malpractice occurred as a result of the negligent or wrongful conduct.

Expert testimony is not required as to all matters of negligence in this case as the standard is ordinary negligence. It is ordinary negligence to fail to follow a physician's order. As to medical providers where expert testimony may be required, we do not have a written expert opinion at this time.

5. Please provide a copy of the written opinion.

We do not have a written opinion at this time.

B. What are your damages?

1. For your federal tort claim, are you requesting $2,075,000 as damages or $2 million as damages for your injuries?

Mr. Fritts claim for damages is $2,000,000.00

2. For the sum certain you provided in your answer to question B1, please identify whether your request includes punitive damages in addition to actual damages.

No.

3. If your request for damages includes a request for punitive damages, please identify the specific sum of punitive damages that you are requesting.

Not Applicable.

4. If your request for damages includes economic damages, please list in detail every economic loss you incurred as a result of the negligence or malpractice allegedly committed by each employee.

Medical damages, present and future, present lost earning capacity, and future lost earning capacity. The exact amount of these damages will be determined by experts to include an economist. Those opinions are not available at this time.

5. If your request for damages includes a request for noneconomic damages, please list in detail every noneconomic loss you incurred as a result of the negligence or malpractice allegedly committed by each employee.

Pain, suffering, disfigurement, mental anguish and loss of enjoyment of life, both present and future.

Lost chance of a better recovery.

6. Please provide copies of every medical bill you have incurred following your release from confinement that is directly related to the negligence of malpractice allegedly committed by such employee.

We are still gathering all of the relevant documents related to medical bills and expenses and will supplement this response.

C. Statements from witnesses

1. Any written statements to support allegations that negligence or malpractice occurred.

Statements taken by counsel from witnesses are attorney work product.

2. Copies of such statements

See above.

D. Distinct Injuries caused by defendants

1. How did Mr. Fritts acquire HIV?

Unknown

2. When was he first diagnosed as suffering from HIV?

1985

3. What treatment did he receive for HIV prior to his incarceration in the federal prison system?

Mr. Fritts was not treated for HIV until he received a diagnosis of HIV/AIDS.

4. What reduction in his CD4 count occurred while he was confined at USP Leavenworth Camp?

Please see Monte Fritts' Medical Records from the Federal Medical Center in Rochester, Minnesota and from Leavenworth Prison Camp.

5. When did he first receive a diagnosis of AIDS?

January 7, 1996.

6. What treatment did he receive for AIDS prior to his incarceration in the federal prison system?

Mr. Fritts received treatment from Dr. Sweet which included routine testing and monitoring of his immune system and various AIDS cocktail prescriptions. Also see Monte Fritts'medical records from the Federal Medical Center in Rochester, Minnesota which list the medications on admission.

7. What viral load was assigned to him prior to his incarceration in the federal prison system?

Please see the attached laboratory reports for Monte Fritts from May 8, 2000 to November 30, 2000.

8. What viral load level increase occurred during confinement at USP Leavenworth?

Please see Monte Fritts' Medical Records from the Federal Medical Center in Rochester, Minnesota and from Leavenworth Prison Camp.

9. What injuries has Mr. Fritts sustained as a result of the alleged failure to dispense medications in a timely manner?

Mr. Fritts developed resistance to the AIDS prescribed medications in part because of repeated missed dosages. These missed dosages and developed resistance rendered fewer treatment options available to him.

10. What laboratory tests should have been conducted in a more timely manner?

Before incarceration, Mr. Fritts underwent monthly testing for CD4 count, viral load, liver function, and so forth. Dr. Tran's transfer plan from Federal Medical Center in Rochester, Minnesota included "ongoing care follow-up, laboratory tests including CD4 count, viral load, liver function tests, creatinine, lipid, and CBC in four to six weeks. Leavenworth Prison Camp did not test him until 2/25/02 and lab results were apparently lost for some weeks.

11. What follow-up care do you contend should have been provided in a more timely manner to assess or treat his condition while he was confined at USP Leavenworth camp?

Namely, timely dispensation of medicine. Despite Mr. Fritts' complaints, staff did not always have his medication at the facility. When Mr. Fritts asked for refills of important anti-viral medications, refills sometimes took up to 3 days to arrive. Mr. Fritts filed written grievances, and appealed all the way to Washington, D.C. Leavenworth Prison Camp was ordered to give him a 30 day supply of medication, but instead Mr. Fritts was ordered to the pill line for each and every dosage Leavenworth Prison Camp did little or nothing to correct their deficiencies in delivery of medication. In addition, Dr. Tharp's failed to order and conduct tests to evaluate Mr. Fritts' CD4 count, viral loads, liver function, creatinine, lipid and CDC as is the standard of care for an AIDS patient. On or about March 15, 2002, Dr. Tharp applied for an urgent transfer on behalf of Mr. Fritts to Federal Medical Center in Rochester, Minnesota, but the application was lost for approximately 30 days, and Dr. Tharp re-submitted the application on April 15, 2002. Before Mr. Fritts was released, he had a discussion with Chris Zych about whether Mr. Fritts should go to Federal Medical Center in Rochester , Minnesota or try to get treatment from Dr. Sweet or other competent physician upon Mr. Fritts' release. Mr. Fritts replied that he wanted whatever treatment he could get the quickest. Mr. Zych indicated that release was imminent, so he canceled the request for a transfer to Federal Medical Center in Rochester, Minnesota. Shortly after canceling the request, Mr. Zych told Mr. Fritts that he

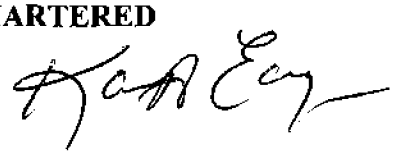
would not be released to seek treatment but that the transfer request had been canceled.

12. What ongoing care do you contend should have been provided in a more timely manner to assess or treat his condition while he was confined at Leavenworth Prison Camp?

Namely, timely dispensation of medicine. Despite Mr. Fritts' complaints, staff did not always have medication at the facility. When Mr. Fritts asked for refills of important anti-viral medications, refills sometimes took up to 3 days to arrive. Mr. Fritts filed written grievances, and appealed all the way to Washington, D.C. Leavenworth Prison Camp was ordered to give him a 30 day supply of medication, but instead Mr. Fritts was ordered to the pill line for each and every dosage. Leavenworth Prison Camp did little or nothing to correct their deficiencies in delivery of medication. On or about March 15, 2002, Dr. Tharp applied for an urgent transfer on behalf of Mr. Fritts to Federal Medical Center in Rochester, Minnesota, but the application was lost for approximately 30 days, and Dr. Tharp re-submitted the application on April 15, 2002. Before Mr. Fritts was released, he had a discussion with Chris Zych about whether Mr. Fritts should go to Federal Medical Center in Rochester, Minnesota or try to get treatment from Dr. Sweet or other competent physician upon Mr. Fritts' release. Mr. Fritts replied that he wanted whatever treatment he could get the quickest. Mr. Zych indicated that release was imminent, so he canceled the request for a transfer to Federal Medical Center in Rochester, Minnesota. Shortly after canceling the request, Mr. Zych told Mr. Fritts that he would not be released to seek treatment but that the transfer request had been canceled.

Very truly yours,

SHAMBERG, JOHNSON & BERGMAN, CHARTERED

By: 

Karen A. Eager

KAE:klr
Enclosures

U.S. District Court
District of Kansas (Topeka)
CIVIL DOCKET FOR CASE #: 5:03-cv-03377-JWL-JPO

Fritts v. Zych et al
Assigned to: Chief Judge John W. Lungstrum
Referred to: Magistrate Judge James P. O'Hara
Demand: $75000
Lead Docket: 5:03-cv-03377-JWL-JPO
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 09/19/2003
Jury Demand: Plaintiff
Nature of Suit: 555 Habeas Corpus (Prison Condition)
Jurisdiction: U.S. Government Defendant

Plaintiff

Monte A. Fritts

represented by **B. Kay Huff**
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V.

Defendant

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represented by **David D Zimmerman**
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ATTORNEY TO BE NOTICED

M E Ray, ***Former Warden, USP-Leavenworth***	represented by	**David D Zimmerman** (See above for address) *ATTORNEY TO BE NOTICED*
N L Conner, ***Warden, USP-Leavenworth***	represented by	**David D Zimmerman** (See above for address) *ATTORNEY TO BE NOTICED*
Judith Tharp, ***Medical Officer, Federal Prison Camp and USP-Leavenworth***	represented by	**David D Zimmerman** (See above for address) *ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
09/19/2003	1	COMPLAINT filed by Monte A Fritts with jury demand (smnd) Modified on 9/24/2003 (mb). (Entered: 09/23/2003)
09/19/2003	2	DESIGNATION OF PLACE OF TRIAL filed by Plaintiff Monte A Fritts - trial to be held in Kansas City, Kansas (smnd) (Entered: 09/23/2003)
09/19/2003		FILING FEE PAID in the amount of $150.00, receipt number 100479 (smnd) (Entered: 09/23/2003)
09/19/2003		Summons Issued as to United States Attorney General and Kansas Attorney General(smnd) (Entered: 09/23/2003)
10/21/2003	3	MINUTE ORDER REASSIGNING CASE: Case reassigned to Judge John W. Lungstrum for all further proceedings. Senior Judge G. Thomas VanBebber no longer assigned to case. Signed by Deputy Clerk on 10/21/03. (smnd) (Entered: 10/21/2003)
11/17/2003	4	MINUTE ORDER REFERRING CASE to Magistrate Judge James P. O'Hara for all further pretrial proceedings. Signed by deputy clerk on 11/17/2003. (ses) Modified text on 11/18/2003 (mb). (Entered: 11/17/2003)
11/25/2003	5	WAIVER OF SERVICE Returned Executed by Chris Zych. Chris Zych waiver sent on 10/16/2003, answer due 12/15/2003. (Eager, Karen) (Entered: 11/25/2003)
11/25/2003	6	WAIVER OF SERVICE Returned Executed by N L Conner. N L Conner waiver sent on 10/16/2003, answer due 12/15/2003. (Eager, Karen) (Entered: 11/25/2003)
11/25/2003	7	WAIVER OF SERVICE Returned Executed by Judith Tharp. Judith Tharp waiver sent on 10/16/2003, answer due 12/15/2003. (Eager,

		Karen) (Entered: 11/25/2003)
12/11/2003		Summons Issued as to U.S. Attorney (smnd) (Entered: 01/09/2004)
12/15/2003	8	MOTION for Extension of Time to File Answer re 1 Complaint by Defendants N L Conner, M E Ray, Judith Tharp, Chris Zych (Zimmerman, David) (Entered: 12/15/2003)
12/16/2003	9	ORDER granting 8 the unopposed motion of defendants for an extension to 2/9/2004 to answer or otherwise respond to plaintiff's complaint. Ordered by Magistrate Judge James P. O'Hara. (Order by docket-text entry only. No separate order will be issued.)(kg) (Entered: 12/16/2003)
01/07/2004	10	Eric F. Melgren, U.S. Attorney, District of Kansas Summons Returned Executed -- Personal Service by Monte A Fritts upon N L Conner served on 12/11/2003, answer due 2/9/2004; M E Ray served on 12/11/2003, answer due 2/9/2004; Judith Tharp served on 12/11/2003, answer due 2/9/2004; Chris Zych served on 12/11/2003, answer due 2/9/2004. (Eager, Karen) (Entered: 01/07/2004)
01/09/2004	11	ORDER SETTING SCHEDULING CONFERENCE: Scheduling Conference set for 3/8/2004 at 01:30 PM before Magistrate Judge James P. O'Hara. Report of Parties Planning Meeting deadline 2/27/2004. Signed by Judge James P. O'Hara on 1/9/04. (mt) (Entered: 01/09/2004)
02/09/2004	12	Unopposed MOTION for Extension of Time to File Answer re 1 Complaint by Defendants N L Conner, M E Ray, Judith Tharp, Chris Zych (Zimmerman, David) (Entered: 02/09/2004)
02/09/2004	13	Order granting the unopposed motion of defendants Chris Zych, Dr. Judith Tharp, and M.E. Ray for an extension to March 25, 2004 to answer or otherwise respond to plaintiff's complaint [doc. 12]. Ordered by Judge James P. O'Hara on 2/9/04.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (mt) (Entered: 02/09/2004)
02/13/2004	14	WAIVER OF SERVICE Returned Executed by M E Ray. M E Ray waiver sent on 11/24/2003, answer due 1/23/2004. (Eager, Karen) Modified text on 2/17/2004 (mb). (Entered: 02/13/2004)
03/01/2004	15	MINUTE ORDER. The completed report of parties' planning conference was due 2/27/2004. The report has not been timely submitted nor has any motion for an extension of time been filed. The parties are directed to immediately inform the court of the status of the report by sending an e-mail to

		ksd_ohara_chambers@ksd.uscourts.gov. Otherwise, the court may enter an order to show cause why sanctions should not be imposed. Signed by deputy clerk on 3/1/2004. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry)(kg) (Entered: 03/01/2004)
03/01/2004	16	Joint MOTION for extension of time *For Filing of Report of Parties' Planning Conference* by Plaintiff Monte A Fritts (Eager, Karen) (Entered: 03/01/2004)
03/02/2004	17	Order granting the joint motion of the parties 16 to extend the deadline to submit the Report of the Parties' Planning Conference to April 15, 2004, and to reschedule the telephone scheduling conference to April 27, 2004, at 10:30 a.m. Signed by Judge James P. O'Hara on 3/2/04.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (mt) (Entered: 03/02/2004)
03/25/2004	18	MOTION for Extension of Time to File Answer re 1 Complaint by Defendants M E Ray, Judith Tharp, Chris Zych (Zimmerman, David) (Entered: 03/25/2004)
03/26/2004	19	ORDER granting the unopposed motion of defendants Chris Zych, M.E. Ray, and Dr. Judith Tharp for an extension of time to April 6, 2004, to answer or otherwise respond to plaintiff's complaint 18. No further extensions of time will be granted. Signed by Judge James P. O'Hara on 3/26/04.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (hw) Modified text on 3/29/2004 (mb). (Entered: 03/26/2004)
04/06/2004	20	ANSWER to Complaint by M E Ray, Judith Tharp, Chris Zych. (Zimmerman, David) (Entered: 04/06/2004)
04/27/2004	21	SCHEDULING ORDER: Mediation deadline 7/26/2004. Discovery deadline 9/27/2004. Dispositive motion deadline set for 11/1/2004. Proposed Pretrial Order due by 10/15/2004. Final Pretrial Conference set for 10/25/2004 at 9:00 AM before Magistrate Judge James P. O'Hara. Jury Trial set for 3/1/2005 at 9:30 AM before Chief Judge John W. Lungstrum. Signed by Magistrate Judge James P. O'Hara on 4/27/2004. (kg) (Entered: 04/27/2004)
05/04/2004	22	Joint MOTION for Protective Order by Plaintiff Monte A Fritts, Defendants M E Ray, Judith Tharp, Chris Zych (Zimmerman, David) (Entered: 05/04/2004)
05/05/2004		Minute Entry for proceedings held before Magistrate Judge James P. O'Hara: Scheduling Conference held on 4/27/2004. (THIS IS AN ENTRY FOR STATISTICAL PURPOSES ONLY. There is no.pdf document associated with this entry) (kg) Modified text on 5/6/2004

		(mb). (Entered: 05/05/2004)
05/10/2004	23	PROTECTIVE ORDER AND ORDER granting 22 motion for protective order. SEE ORDER FOR DETAILS. Signed by Judge James P. O'Hara on 5/10/04. (mt) Modified file date and text on 5/10/2004 (mb). Modified on 5/10/2004 (mb). (Entered: 05/07/2004)
05/11/2004	24	NOTICE OF SERVICE by Monte A Fritts of Plaintiff's Initial Rule 26(a)(1) Disclosures (Eager, Karen) (Entered: 05/11/2004)
05/12/2004	25	CERTIFICATE OF SERVICE by M E Ray, Judith Tharp, Chris Zych *of Defendant's Initial Disclosures*. (Zimmerman, David) (Entered: 05/12/2004)
06/08/2004	26	Unopposed MOTION for extension of time *to file Motion to Dismiss* by Defendants M E Ray, Judith Tharp, Chris Zych (Zimmerman, David) (Entered: 06/08/2004)
06/09/2004	27	ORDER granting 26 unopposed motion of the defendants for an extension to 6/10/2004 to file their motion to dismiss. Ordered by Magistrate Judge James P. O'Hara on 6/9/2004.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (kg) (Entered: 06/09/2004)
06/10/2004	28	MOTION to Dismiss by Defendants M E Ray, Judith Tharp, Chris Zych (Zimmerman, David) (Entered: 06/10/2004)
06/10/2004	29	MEMORANDUM IN SUPPORT of 28 MOTION to Dismiss by Defendants M E Ray, Judith Tharp, Chris Zych (Zimmerman, David) (Entered: 06/10/2004)
06/25/2004	30	MEDIATION MINUTE ORDER - Upon review of the confidential settlement statements submitted to the court by the parties, the court vacates the July 26, 2004 deadline for mediation established in the April 27, 2004 Scheduling Order. Ordered by Magistrate Judge James P. O'Hara on 6/25/2004. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry)(kg) (Entered: 06/25/2004)
06/28/2004	31	Unopposed MOTION for extension of time *for Filing of Rule 26(a)(2) Expert Disclosures* by Plaintiff Monte A Fritts (Eager, Karen) (Entered: 06/28/2004)
06/29/2004	32	Order granting the unopposed motion of plaintiff 31 for an extension to July 13, 2004, for plaintiff to serve his Rule 26(a)(2) expert disclosure and to August 13, 2004, for defendants to serve their Rule 26(a)(2) expert disclosure. Signed by Magistrate Judge James P.

		O'Hara on 6/29/04.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (mt) (Entered: 06/29/2004)
07/01/2004	33	MEMORANDUM in Opposition by Plaintiff Monte A Fritts re 28 MOTION to Dismiss (Eager, Karen) (Entered: 07/01/2004)
07/13/2004	34	NOTICE OF SERVICE by Monte A Fritts of Plaintiff's Rule 26(a)(2) Expert Disclosure (Eager, Karen) (Entered: 07/13/2004)
07/21/2004	35	Joint MOTION to Consolidate Cases *and Temporarily Stay Proceedings* by Defendants N L Conner, M E Ray, Judith Tharp, Chris Zych, Plaintiff Monte A Fritts (Zimmerman, David) (Entered: 07/21/2004)
07/26/2004	36	Unopposed MOTION for Extension of Time to File Reply as to 28 MOTION to Dismiss by Defendants M E Ray, Judith Tharp, Chris Zych (Zimmerman, David) (Entered: 07/26/2004)
07/27/2004	37	ORDER entered granting 35 Motion to Consolidate Case with 04-2300-KHV and referring to Magistrate Judge James O'Hara the portion of the motion requesting a temporary stay of proceedings. Signed by Judge John W. Lungstrum on 07/27/04. (mh) (Entered: 07/27/2004)
07/27/2004	39	MINUTE ORDER DESIGNATING LEAD CASE. ***REGARDING CONSOLIDATED CASES #03-3377-JWL and #04-2300-JWL: As of 07/27/04, unless otherwise directed, ALL E-FILINGS SHOULD BE MADE IN THE DESIGNATED LEAD CASE ONLY. Questions should be directed to the Clerk's Office. Designated lead case is #03-3377-JWL. Signed by deputy clerk on 07/27/04. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry)(mg) (Entered: 07/30/2004)
07/28/2004	38	ORDER granting defendant's motion 35 to stay the proceedings in Case No. 03-3377 until defendant has filed an answer in consolidated Case No. 04-2300. Defendant is directed to contact the courtroom deputy at (913) 551-6710 once an answer is on file so that the court may set the scheduling conference. Signed by Magistrate Judge James P. O'Hara on 7/28/04.(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (hw) (Entered: 07/28/2004)
08/02/2004	40	REPLY to Response to Motion by Defendants M E Ray, Judith Tharp, Chris Zych re: 28 MOTION to Dismiss (Zimmerman, David) (Entered: 08/02/2004)
08/30/2004	41	ANSWER to Complaint by United States of America.(Zimmerman,

		David) (Entered: 08/30/2004)
09/07/2004	42	ORDER SETTING SCHEDULING CONFERENCE: Scheduling Conference set for 10/12/2004 at 09:00 AM before Magistrate Judge James P. O'Hara. Report of Parties Planning Meeting deadline 10/1/2004. Signed by Magistrate Judge James P. O'Hara on 9/7/04. (mt) (Entered: 09/07/2004)
09/07/2004	43	AMENDED INITIAL ORDER REGARDING PLANNING AND SCHEDULING: This amended order corrects order 42 filed September 7, 2004 in which the date and signature of Judge James P. O'Hara was inadvertently omitted. This amended order should be substituted for order 42. Signed by Magistrate Judge James P. O'Hara on 9/7/04. (mt) Modified text on 9/8/2004 (mb). (Entered: 09/07/2004)
09/15/2004	44	ORDER granting 36 Motion for Extension of Time to File Reply to 28 MOTION to Dismiss. Signed by Judge John W. Lungstrum on 09/15/2004. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (ses) (Entered: 09/15/2004)
09/15/2004	45	MEMORANDUM AND ORDER granting in part and denying in part 28 Motion to Dismiss. SEE ORDER FOR DETAILS. Signed by Judge John W. Lungstrum on 09/15/2004. (ses) Modified text on 9/16/2004 (mb). (Entered: 09/15/2004)
10/12/2004	46	SCHEDULING ORDER: Mediation deadline 1/19/05; Discovery deadline 4/19/05; Dispositive motion deadline 6/2/05; Proposed Pretrial Order due by 4/29/2005; Final Pretrial Conference set for 5/9/2005 at 9:00 AM before Magistrate Judge James P. O'Hara. Jury trial set for 9:30 AM on 10/3/05 before Judge Lungstrum. Signed by Magistrate Judge James P. O'Hara on 10/12/2004. (kg) Modified text on 10/13/2004 (mb). (Entered: 10/12/2004)
10/12/2004		Minute Entry for proceedings held before Magistrate Judge James P. O'Hara: Scheduling Conference held on 10/12/2004 (TEXT ENTRY FOR STATISTICAL PURPOSES ONLY. There is no.pdf document associated with this entry) (kg) (Entered: 10/12/2004)
10/15/2004	47	STIPULATION of Dismissal *of Defendant Warden N.L. Conner, Deceased* by N L Conner, Monte A. Fritts, M E Ray, Judith Tharp, United States of America, Chris Zych. (Eager, Karen) (Entered: 10/15/2004)
10/18/2004	48	Joint MOTION for Protective Order, *Amended to Govern the Consolidated Cases*, by Defendants M E Ray, Judith Tharp, Chris Zych, Consol Interested Dft United States of America (Zimmerman, David) Modified text on 10/20/2004 (mb). (Entered: 10/18/2004)

10/19/2004	49	AMENDED PROTECTIVE ORDER and order granting 48 motion for protective order. SEE ORDER FOR DETAILS. Signed by Magistrate Judge James P. O'Hara on 10/19/04. (mt) Modified text on 10/20/2004 (mb). (Entered: 10/19/2004)
10/19/2004	50	ORDER. Effective October 8, 2004, the judges of this court approved a revised standardized form of final pretrial order. Irrespective of the pretrial order form that may have been referenced in the scheduling order or previously provided by the court, the proposed pretrial order which is due to be submitted prior to the final pretrial conference in this case shall be in the new standardized form, which may be downloaded from the court's internet website, at www.ksd.uscourts.gov. If you do not have access to the court's website, please contact Kathy Grant, Judge O'Hara's administrative assistant, at 913-551-6710. Signed by Magistrate Judge James P. O'Hara on 10/19/2004. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry)(kg) (Entered: 10/19/2004)
11/04/2004	51	CERTIFICATE OF SERVICE by M E Ray, Judith Tharp, United States of America, Chris Zych *Re: Rule 26 Initial Disclosures in Consolidated Cases* (Zimmerman, David) (Entered: 11/04/2004)
11/10/2004	52	CERTIFICATE OF SERVICE by M E Ray, Judith Tharp, United States of America, Chris Zych *of Defendants' First Requests For Production of Documents, First Set of Interrogatories, and First Requests For Admissions* (Zimmerman, David) Modified text on 11/12/2004 (mb). (Entered: 11/10/2004)
11/15/2004	53	Unopposed MOTION for extension of time *to Respond to Settlement Offer* by Defendants N L Conner, M E Ray, Judith Tharp, Chris Zych, Consol Interested Dft United States of America (Zimmerman, David) (Entered: 11/15/2004)
11/15/2004	54	Order granting the unopposed motion 53 of the defendants for an extension to November 30, 2004, to respond to plaintiff's settlement proposal. Signed by Magistrate Judge James P. O'Hara on 11/15/04. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry) (mt) (Entered: 11/15/2004)
11/23/2004	55	NOTICE OF SERVICE by Monte A. Fritts of Plaintiff's Rule 26(a)(1) Disclosures. (This Notice was inadvertently filed on 11/04/04 in the consolidated member case, #04-2300, and is being re-filed in the lead case at direction of the Court.) (mg) (Entered: 11/23/2004)
11/23/2004	56	NOTICE OF SERVICE by Monte A. Fritts of Plaintiff's First Request for Production of Documents and Plaintiff's First Set of Interrogatories to Defendant Ray (Eager, Karen) (Entered:

		11/23/2004)

PACER Service Center			
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11/29/2004 17:13:15			
PACER Login:	fb0118	**Client Code:**	jdc
Description:	Docket Report	**Search Criteria:**	5:03-cv-03377-JWL-JPO
Billable Pages:	5	**Cost:**	0.35

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Monte A. Fritts,

Plaintiff,

v. **Case No. 03-3377-JWL**

Chris Zych; M.E. Ray;
N.L. Connor; and Dr. Judith Tharp,

Defendants.

MEMORANDUM & ORDER

Plaintiff filed this civil rights action asserting claims arising out of his incarceration in the Federal Prison Camp at Leavenworth, Kansas. Specifically, plaintiff, an individual with advanced HIV/AIDS, alleges that defendants denied him access to adequate and competent medical treatment and care; that defendants failed and refused to carry out or complete physicians' treatment plans and orders; and that defendants failed and refused to deliver prescribed medications. In that regard, plaintiff brings claims against Chris Zych, the Director of the Federal Prison Camp at Leavenworth; M.E. Ray, former Warden at the United States Penitentiary at Leavenworth; N.L. Connor, former Warden at the United States Penitentiary at Leavenworth; and Dr. Judith Tharp, medical officer at the Federal Prison Camp, in their individual capacities pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for the violation of plaintiff's Fifth and Eighth Amendment rights.

This matter is presently before the court on defendants Mr. Zych, Warden Ray and Dr. Tharp's motion to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure

12(b)(6) (doc. #28).[1] As set forth in more detail below, the motion is granted with respect to plaintiff's Fifth Amendment claim and is denied with respect to plaintiff's Eighth Amendment claim.

Background

The following facts are taken from plaintiff's complaint and the court, for purposes of analyzing defendants' motion to dismiss, assumes the truth of these facts. From September 2001 through May 2002, plaintiff Monte Fritts was incarcerated at the Federal Prison Camp at Leavenworth, Kansas. At the time he arrived at the Camp, plaintiff had advanced HIV/AIDS and was taking a combination of antiviral medications commonly referred to as an "AIDS cocktail." According to plaintiff, the AIDS cocktail must be administered at strictly prescribed times throughout the day (without missing doses); otherwise, the drugs can be rendered ineffective. Plaintiff alleges that the Federal Medical Center, Rochester (FMC-Rochester) transferred to the Camp plaintiff's medical charts which included specific instructions that plaintiff continue to receive his medications, including the AIDS cocktail and narcotic pain medication, as prescribed. The "transfer plan" also stated that plaintiff was to receive "ongoing care, follow-up, laboratory tests."

According to plaintiff, the medical staff at the Camp, including Dr. Tharp, immediately stopped providing plaintiff with the narcotic pain medication and substituted Tylenol 3 for

[1]Defendant N.L. Connor is now deceased.

plaintiff's pain. In addition, the medical staff failed to regularly and timely dispense plaintiff's AIDS cocktail. According to plaintiff, the Camp delayed in refilling his prescriptions and required him to pick up his medications in the "medication line," something that plaintiff was often unable to do because his physical condition left him unable to leave his bed. He alleges that he missed "dozens of doses" of the critical medicines despite numerous complaints to obtain his medications in a timely, consistent manner. Plaintiff further alleges that Dr. Tharp failed to monitor plaintiff's medical situation through the use of laboratory tests that would have shown that plaintiff's condition was deteriorating. According to plaintiff, such monitoring (including measuring an individual's CT4 count and viral loads) is critical for individuals with AIDS to ensure that the current medication regime is effective.

In October 2001, plaintiff filed a formal complaint with Warden Ray alleging that he was not getting his medications in a timely manner and that he had missed six days out of the last eight days of medication. He complained that his prescriptions were not getting refilled. He complained of severe pain. He advised Warden Ray that it was a "life or death" situation for plaintiff and he requested laboratory testing to ascertain whether the medications were still working. Although Warden Ray responded to plaintiff's complaint, he did not address plaintiff's concerns about receiving his antiviral medications. Ultimately, plaintiff appealed to the Central Office in Washington, D.C. By that time, plaintiff had missed 54 doses of his antiviral medications due to late refills coupled with the Camp's practice of providing plaintiff with only a week's supply of medicine at one time. He emphasized in his appeal the importance of not missing any doses in his medication regime.

In March 2002, Dr. Tharp requested an "urgent transfer" to FMC-Rochester for the "rescue management" of plaintiff. Plaintiff alleges that Mr. Zych ignored the request and failed to submit the request to FMC-Rochester. One month later, Dr. Tharp requested another urgent transfer of plaintiff. This request was similarly ignored.

In April 2002, plaintiff's appeal was granted and the medical staff at the Camp was ordered to supply 30 days of medication with each refill and to give plaintiff a 90-day supply of medication upon release. However, plaintiff alleges that the Camp did not notify him about his successful appeal until one month later and that the Camp refused to follow the directive of the Central Office. According to plaintiff, the Camp forced plaintiff to wait in line for each dose of medication, sometimes forcing him to wait up to two hours per dose. Finally, plaintiff received the laboratory testing that he had requested on numerous occasions and the tests revealed that his viral load had escalated and his T-cell count had dropped. According to plaintiff, his deteriorating health was a direct result of defendants' failure to provide adequate medical care to him.

Plaintiff was released from the Camp on May 10, 2002.

Sovereign Immunity

As an initial matter, defendants move to dismiss plaintiff's complaint in its entirety because, according to defendants, plaintiff's claims are asserted against defendants only in their official capacities. In support of this argument, defendants rely on plaintiff's allegations that each defendant is "sued individually for his [or her] actions while acting in his [or her] official capacity." *See* Complaint ¶¶ 4-7. In response, plaintiff concedes that his pleading "may have been

more artfully stated," but he emphatically asserts that he intended to sue defendants only in their individual capacities. The court construes plaintiff's complaint as asserting claims against the individual defendants in their individual capacities. While the phrase "acting in his official capacity" is "best understood as a reference to the capacity in which the . . . officer is sued," *see Hafer v. Melo*, 502 U.S. 21, 26 (1991), the court is unwilling to conclude from this isolated phrase in plaintiff's complaint that he intended to sue the individual defendants in their official capacities. Read in its entirety, plaintiff's complaint contains ample allegations that the individual defendants violated the United States Constitution under color of federal law or authority such that the individuals should be held liable in their individual capacities. *See Dry v. United States*, 235 F.3d 1249, 1255 (10th Cir. 2000) ("Under *Bivens*, an individual has a cause of action against a federal official in his individual capacity for damages arising out of the official's violation of the United States Constitution under color of federal law or authority.") (citing *Applewhite v. United States Air Force*, 995 F.2d 997, 999 n.8 (10th Cir. 1993)). Thus, the court rejects defendants' sovereign immunity argument. *See Pleasant v. Lovell*, 876 F.2d 787, 793 (10th Cir. 1989) (sovereign immunity does not bar suit for damages against a federal agent in his individual capacity acting under color of federal authority, insofar as certain constitutional claims are alleged).

Eighth Amendment Claim

Defendants move to dismiss plaintiff's Eighth Amendment claim on the grounds that the allegations in plaintiff's complaint fail to state a claim under the Eighth Amendment. Deliberate indifference to a prisoner's serious medical needs constitutes "unnecessary and wanton infliction

of pain" in violation of the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Thus, to establish a facial claim, a plaintiff must show that he has a serious medical need and that the defendants were deliberately indifferent to that need. Plaintiff's complaint easily satisfies this standard.

A medical need is serious if it has been diagnosed by a doctor, or if it would be obvious to a layperson that medical intervention was needed. *Thompson v. Gibson*, 289 F.3d 1218, 1222 (10th Cir. 2002). Any layperson reading the allegations in plaintiff's complaint would conclude that plaintiff has a serious medical need. He alleges that he suffers from the AIDS virus, that he is required to take a variety of medications to combat his condition and that his failure to take his medications as prescribed can result in infection and, ultimately, death. Plaintiff, then, has satisfied the first prong of his claim. *See, e.g., Holcomb v. Briley*, 2004 WL 816778, at *3 (N.D. Ill. Mar. 3, 2004) (plaintiff satisfied serious medical need element of claim by alleging that he suffered from AIDS and needed to take a variety of medications); *Soto v. Iacavino*, 2003 WL 21281762, at *1 (S.D.N.Y. June 4, 2003) (plaintiff satisfied serious medical need element of claim by alleging HIV-positive status and need for medication); *Rivera v. Alvarado*, 240 F. Supp. 2d 136, 142 (D.P.R. 2003) (AIDS diagnosis constitutes serious medical need); *Taylor v. Barnett*, 105 F. Supp. 2d 483, 487 (E.D. Va. 2000) (inmates suffering from AIDS virus have serious medical needs).

The court turns, then, to the issue of whether plaintiff's complaint adequately shows that defendants were deliberately indifferent to plaintiff's condition. A prison official is deliberately indifferent when he "knows of and disregards an excessive risk to inmate health or safety."

Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate indifference has both objective and subjective elements. An official must be aware of facts that objectively suggest an inference that a substantial risk of serious harm exists, and the official must subjectively draw that inference. *Id.* Subjective awareness can be inferred if the risk of harm is obvious. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). Therefore, plaintiff must allege sufficient facts to show that defendants were both objectively and subjectively aware of a substantial risk of serious harm and that they failed to take reasonable measures to abate it. *See MacKay v. Farnsworth*, 48 F.3d 491, 492 (10th Cir. 1995).

Plaintiff alleges that each of the defendants knew that he had AIDS and that he was not receiving his medications as prescribed but made no attempt to remedy the situation despite plaintiff's repeated requests. He further alleges that Dr. Tharp, with knowledge that plaintiff was not receiving his medications as prescribed, failed to monitor his medical situation and failed to conduct laboratory tests in direct violation of the Transfer Plan created by the Federal Medical Center in Rochester. Plaintiff also alleges that Mr. Zych, on two occasions, failed to act upon Dr. Tharp's request for an "urgent transfer" to have plaintiff transferred out of the camp for "rescue management." Finally, plaintiff alleges that he complained to Warden Ray that he was not receiving his medications in a timely manner; that he was missing doses; that his prescriptions were not being refilled; and that the situation was "life or death" to him. According to plaintiff, Warden Ray, in responding to plaintiff's complaint, wholly ignored the issue of plaintiff's antiviral medication. These allegations are sufficient to support the inference that defendants were both objectively and subjectively aware of a substantial risk to plaintiff's health and failed to take

reasonable measures to reduce that risk. *See Montgomery v. Pinchak*, 294 F.3d 492, 500-01 (3rd Cir. 2002) (plaintiff stated prima facie case of deliberate indifference to serious medical condition where plaintiff alleged that defendants refused to provide him with antiviral medication, refused to perform laboratory blood work and refused to provide him with prescription medication refills that were necessary for treating plaintiff's HIV condition); *Holcomb*, 2004 WL 816778, at *3.

Warden Ray and Mr. Zych also contend that plaintiff's Eighth Amendment claim must be dismissed as to them because plaintiff has not sufficiently alleged that these defendants personally participated in any alleged constitutional violation. *See Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1214 (10th Cir. 2003) (plaintiff must allege direct, personal participation on behalf of individual defendant in order to establish *Bivens* liability). The court disagrees. Plaintiff has alleged that he submitted a grievance to Warden Ray in which he complained that he was not getting his medication in a timely manner; that he had missed numerous doses; that his prescriptions were not being refilled; and that the situation was "life or death" to him in light of his condition. According to plaintiff, Warden Ray responded to his grievance but, in doing so, failed to address these specific issues raised by plaintiff; rather, Warden Ray addressed only plaintiff's request for narcotic pain medication and his request for laboratory testing. With respect to Mr. Zych, plaintiff has alleged that he deliberately ignored two "urgent transfer" requests submitted by Dr. Tharp for "rescue management" of plaintiff. At a minimum, then, plaintiff's allegations are sufficient to show Warden Ray's and Mr. Zych's actual knowledge of and acquiescence in the alleged constitutional deprivations. No more is required from plaintiff. *See*

Cimino v. Rowe, 1999 WL 228178, *2 (10th Cir. Apr. 20, 1999) ("A supervisor will not be held liable for the unconstitutional acts of her subordinates absent proof of actual knowledge and acquiescence in the constitutional deprivations.") (*Bivens* suit) (citing *Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992) (section 1983 suit)).

Qualified Immunity

Defendants also assert that they are entitled to qualified immunity with respect to plaintiff's Eighth Amendment claims. Qualified immunity protects government officials performing discretionary functions from individual liability under *Bivens* unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The purpose of qualified immunity is to avoid excessive disruption of governmental functions and to dispose of frivolous claims in the early stages of litigation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Supreme Court has reiterated that qualified immunity gives officials "a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Consequently, the Supreme Court has explained "that courts should resolve the 'purely legal question,' *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), raised by a qualified immunity defense 'at the earliest possible stage in litigation.'" *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)).

In evaluating a claim for qualified immunity, the court must first determine whether the

facts alleged, considered in the light most favorable to the plaintiff, state the violation of a constitutional right. *People for the Ethical Treatment of Animals v. Rasmussen*, 298 F.3d 1198, 1207 (10th Cir. 2002). If so, the court must go on to determine whether the constitutional right was clearly established at the time of injury. *Id.* If the answer to either of these questions is no, the defendant is entitled to qualified immunity. *Id.* As explained above, the court concludes that plaintiff has stated a claim for a violation of the Eighth Amendment. Thus, the court addresses whether the constitutional right was clearly established at the time of injury–an issue that is easily resolved in favor of plaintiff. Indeed, it is beyond dispute that the law was clearly established with respect to plaintiff's claims that defendants were deliberately indifferent to his serious medical needs. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002) (the right to custodial medical care is clearly established) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *Garrett v. Stratman*, 254 F.3d 946, 949 (10th Cir. 2001) ("A prison official violates an inmate's clearly established Eighth Amendment rights if he acts with deliberate indifference to an inmate's serious medical needs."). Defendants, then, have not shown that they are entitled to qualified immunity.

Fifth Amendment Claim

Defendants move to dismiss plaintiff's Fifth Amendment claim on the grounds that the claim is based on the same allegations as plaintiff's Eighth Amendment claim and, thus, the claim is duplicative of plaintiff's Eighth Amendment claim. Defendants are correct. In his complaint, plaintiff alleges that defendants' "deliberate indifference" to plaintiff's medical needs and their

delay in providing medical treatment to plaintiff violated plaintiff's Fifth Amendment rights as well as his Eighth Amendment rights. See, e.g., Compl. ¶¶ 26-27. Faced with similar allegations, the Tenth Circuit has rejected attempts to characterize such claims under the Fifth Amendment and has construed such claims as Eighth Amendment claims. *See Oxendine v. Kaplan*, 241 F.3d 1272, 1275 & n.6 (10th Cir. 2001) (although plaintiff's complaint referenced Due Process Clause of Fifth Amendment, his complaint was more accurately characterized as an Eighth Amendment claim, where plaintiff complained of inadequate medical treatment and delay in obtaining medical assistance). Thus, to the extent plaintiff asserts claims under the Fifth Amendment for defendants' alleged failure to provide adequate medical care and their deliberate indifference to his medical needs, those claims are dismissed with prejudice.

Plaintiff urges, however, that his Fifth Amendment claim is actually based on defendants' obstruction of plaintiff's efforts to utilize the BOP grievance procedures that he is required to use prior to filing suit in federal court. According to plaintiff, he had difficulty obtaining the proper forms necessary to file his grievance and, when he ultimately won his grievance, defendants did not advise him that his appeal was successful and they ignored the "directives" of the favorable decision. Plaintiff asserts that these facts are sufficient to state a claim under the Fifth Amendment for a violation of plaintiff's substantive due process rights as well as his procedural due process rights. The court disagrees. With respect to plaintiff's allegations that defendants did not advise him that his appeal was successful and ignored the directives of the decision, plaintiff contends in his complaint that defendants' conduct "aggravated Plaintiff's medical problems" by further delaying adequate medical care. These allegations, then, are governed by the standards of

the Eighth Amendment. *See Oxendine*, 241 F.3d at 1275 & n.6.

With respect to plaintiff's allegation that he had difficulty obtaining the proper forms (an allegation which does not appear in plaintiff's complaint but is made only in response to defendants' motion), the allegation simply does not indicate that defendants denied plaintiff due process. Significantly, plaintiff does not allege the nature of the difficulty he encountered and he does not suggest that defendants were responsible for the difficulty. In any event, even assuming defendants obstructed plaintiff's access to the requisite forms, he ultimately obtained the forms (and, in light of his allegation that he filed his grievance a mere 20 days after arriving at the Camp, did so quickly) and successfully pursued his appeal within a matter of months. Any delay that plaintiff experienced in obtaining the forms, then, does not constitute a cause of action. *See Mitchell v. Keane*, 974 F. Supp. 332, 343 (S.D.N.Y. 1997) (dismissing inmate's due process claims based on allegations that he was denied access to grievance system where inmate was able to file grievances and received responses to those grievances).

For the foregoing reasons, the court grants defendants' motion to dismiss plaintiff's Fifth Amendment claims.

IT IS THEREFORE ORDERED BY THE COURT THAT defendants' motion to dismiss (doc. #28) is granted in part and denied in part.

IT IS SO ORDERED this 15th day of September, 2004.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

SHAMBERG, JOHNSON & BERGMAN

Chartered

RECEIVED
2004 MAY 12 P 12: 03
KANSAS CITY, KANSAS

JOHN E. SHAMBERG*†
LYNN R. JOHNSON
VICTOR A. BERGMAN
JOHN M. PARISI
STEPHEN N. SIX
SCOTT E. NUTTER
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7300 West 110th Street
Suite 700
Overland Park, KS 66210

May 11, 2004

David Zimmerman, Assistant U.S. Attorney
United States Attorney's Office
District of Kansas
500 State Ave., Room 360
Kansas City, KS 66101

Re: Fritts v. Chris Zych, Warden M.E. Ray, Warden N. L. Connor, and Dr. Judith Tharp
Case No.: 03-3377-GTV

Dear Mr. Zimmerman:

Pursuant to the Scheduling Order in the above referenced matter, I am submitting this settlement demand in the amount of $850,000.00 on behalf of my client, Monte Fritts. I believe that this demand is reasonable and will hopefully result in a good faith offer of settlement from defendants.

I look forward to your timely response.

Sincerely,

SHAMBERG, JOHNSON & BERGMAN,
CHARTERED

By: Karen Eager
Karen A. Eager

KAE:klr

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

FILED
OCT 31 2005
RALPH DELOACH, Clerk
By Deputy

VINCENT EDWARD INGRAM)

PLAINTIFF,) No. 05 3420 SAC

V.)

) COMPLAINT UNDER TORT CLAIMS ACT

UNITED STATES OF AMERICA)

DEFENDANT,)

)

)

PLAINTIFF VINCENT E. INGRAM, Complains against Defendant, United States of America, alleges:

JURISDICTION

1. The jurisdiction of this Court is based upon the Federal Tort claim Act, 28U.S.C.§1346(b), 2671-2680 and 28 U.S.C.§1331.

2.Plaintiff Vincent E. Ingram is a citizen of the United States of America and currently incarcerated at the United States Penitentiary, Terre Haute, Indiana doing a term of life imprisonment for interstate travel to comit a crime of violence.

3. Plaintiff Vincent E. Ingram filed his original administrative claim with the Fedral Bureau of Prisons, North Central Regional office, Kansas City, Kansas, signed, dated, and mailed on November 5, 2004, and received by North Central Regional office on November 5, 2004, and assigned Administrative claim number TRT-NCR-2005-

00544 as required by 28 U.S.C. §2675(a). A copy of the letter receipting the claim, dated November 16,2004 is attached hereto as exhibit A.

4. The original claim filed by plaintiff on November 5, 2004 Administrative claim Number TRT-NCR-2005-00544 was denied by the lapse of the six months without disposition.

VENUE

5. Venue is proper under 28 USC §1402(b), because the accident and negligence which is the subject of this complaint occurred in this judicial District.

CLAIM FOR RELIEF

6. On September 5, 2004 during the authorized Bureau of prisons labor day basketball tournment plaintiff received a pass and fratured and cut open his right 5th distal phalanx.

7.Same day P/A or Dr. Camps negligently treated and bandaged plaintiff's fractured and cut 5th distal phalanx.

8. Thru negligence of P/A or Dr. Campsconsisted of medical negligence in the treatment and bandaging of plaintiff's fractured and cut right 5th distal phalanx, resulting in it becoming infected with gangrene and having to be amputated.

9. At the time of the negligent medical treatment, P/A or Dr. Camps was an amployee of the Federal Bureau of prisons and was acting within the scope of his employment.

10. As a proximate result of the medical negligence, plaintiff's 5-th distal phalanx (right small finger) had to be amputated, and was otherwise injured.

11.As a proximate result of defendant's medical negligence, and plaintiff's injuries, plaintiff suffer wage loss and great pain of body and mind after he is released from prison; and will incuare expense, in the sum of at least $50,000.00

Wherefore, plaintiff respectfully prays for judgement against the defendant as follows;

1. For damages in the sum of 50,000.00 plus interst and cost.

2. for such other and further relief as the court may deem just and proper.

Date 10-25-2005

Vincent E. Ingram

Vincent E. Ingram
Reg. No. 16883-039
P.O. Box 12015
Terre Haute, Indiana 47801

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101

Exhibit A

November 16, 2004

Vincent Ingram
16883-039
USP Leavenworth

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2005-00544 $ 50,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on November 05, 2004. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such proper claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until May 04, 2005.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et. seq., and §543.30.

Sincerely,

Daryl Kosiak
Regional Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VINCENT EDWARDS INGRAM,

Plaintiff,

vs. **No. 05-3420-SAC**

UNITED STATES OF AMERICA,

Defendant.

ORDER

This matter is before the court on a claim filed pursuant to the Federal Tort Claims Act (FTCA). Plaintiff, an inmate at the United States Penitentiary in Terre Haute, Indiana, seeks damages for alleged negligence in providing medical care while plaintiff was confined in the United States Penitentiary in Leavenworth, Kansas.

Plaintiff has paid the initial partial filing fee assessed by the court under 28 U.S.C. § 1915(b)(1), and is granted leave to proceed in forma pauperis. Plaintiff remains obligated to pay the remainder of the $250.00 district court filing fee in this civil action, through payments from his inmate trust fund account as authorized by 28 U.S.C. § 1915(b)(2).

Plaintiff has exhausted his administrative remedies under the FTCA and therefore may proceed in this action. Having examined the materials filed in this case, the court finds a responsive pleading is required.

IT IS THEREFORE ORDERED that plaintiff is granted leave to

proceed in forma pauperis and that summons issue according to law.

IT IS FURTHER ORDERED that plaintiff's motion for service of summons and complaint (Doc. 5) is granted.

IT IS FURTHER ORDERED that the defendant shall file a responsive pleading within sixty (60) days from the service of the summons and complaint. The clerk of the court is directed to transmit copies of this Order to plaintiff and to the office of the United States Attorney.

IT IS SO ORDERED.

DATED: This 13th day of December 2005 at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge

Other Orders/Judgments

5:05-cv-03420-SAC Ingram v. United States of America

U.S. District Court

District of Kansas

Notice of Electronic Filing

The following transaction was received from smnd, entered on 12/13/2005 at 2:14 PM CST and filed on 12/13/2005
Case Name: Ingram v. United States of America
Case Number: 5:05-cv-3420
Filer:
Document Number: 6

Docket Text:
ORDER ENTERED: Plaintiff is granted leave to proceed in forma pauperis and summons issue according to law. Plaintiff's motion [5] for service of summons and complaint is granted. The defendant shall file a responsive pleading within sixty (60) days from the service of the summons and complaint. The clerk of the court is directed to transmit copies of this order to plaintiff and to the office of the United States Attorney. Signed by Senior Judge Sam A. Crow on 12/13/05. (smnd)

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1028492125 [Date=12/13/2005] [FileNumber=805937-0
] [377afccdf78852562c6d45bd0f177a80fc7443d468a3c3b0c9bea18274bcdd8c8f9
eacfb04eee43a57694aded55a2aa4b1a3b8b708333fc09f2cce962e647f7b]]

5:05-cv-3420 Notice will be electronically mailed to:

5:05-cv-3420 Notice will be delivered by other means to:

Vincent Edwards Ingram
16883-039
USP-Terre Haute
PO Box 12015
Terre Haute, IN 47801

acm

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VINCENT EDWARDS INGRAM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-3420-JAR**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

ORDER

The Court has been advised by plaintiff that he has entered into an agreement with defendant settling this case in its entirety. The clerk shall administratively terminate this action with prejudice as requested by plaintiff in the Notice of Dismissal (Doc. 11).

IT IS SO ORDERED.

Dated this 1st day of March 2006.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

VINCENT EDWARDS INGRAM,
Plaintiff(s),

v. Civil Action No. 05-3420-SAC

UNITED STATES OF AMERICA,

Defendant.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiffs (meaning any person, other than the defendant, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of **$4,790.00**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiffs or their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiffs must obtain Court approval of the settlement at their expense. Plaintiffs agree to obtain such approval in a timely manner: time being of the essence. Plaintiffs further agree that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiffs fail to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for four thousand seven hundred ninety dollars ($4,790.00) and made payable to Vincent Edwards Ingram, Federal Register Number 16883-039. The check will be mailed to Vincent Edwards Ingram, Reg. No. 16883-039, P.O. Box 12015, Terre Haute, Indiana 47801. Plaintiff Vincent Edwards Ingram agrees to distribute the settlement proceeds among the plaintiffs, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 16 day of Febuary, 2006.

_____

Attorney for Defendant,
United States of America

Executed this _____ day of February, 2006.

Vincent E. Ingram

Vincent Edwards Ingram,
pro se Plaintiff

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

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Executed this 16TH day of FEBRUARY, 2006.

Attorney for Defendant,
United States of America

Executed this _____ day of February, 2006.

Vincent Edwards Ingram,
pro se Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

VINCENT EDWARDS INGRAM,
Plaintiff(s),

v. Civil Action No. 05-3420-SAC

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF DISMISSAL WITH PREJUDICE

Plaintiff, Vincent Edwards Ingram, pro se, hereby gives notice that he has entered into a settlement agreement with the Defendant in the above-captioned case and, pursuant to Federal Rule of Civil Procedure 41(a) and the terms of that settlement agreement, Plaintiff dismisses the above-captioned case with prejudice.

Respectfully submitted,

Vincent E. Ingram

Vincent Edwards Ingram
pro se Plaintiff
Reg. No. 16883-039
P.O. Box 12015
Terre Haute, IN 47801

CERTIFICATE OF SERVICE

I hereby certify that on this date, February 16, 2006, the foregoing was mailed by first-class mail to the following:

David Zimmerman
Assistant United States Attorney
500 State Avenue, Suite 360
Kansas City, KS 66101

Vincent E. Ingram
Vincent Edwards Ingram
pro se Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

VINCENT EDWARDS INGRAM,
Plaintiff(s),

v. Civil Action No. 05-3420-SAC

UNITED STATES OF AMERICA,

Defendant.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

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1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of **$4,790.00**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiffs or their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation o f Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiffs must obtain Court approval of the settlement at their expense. Plaintiffs agree to obtain such approval in a timely manner: time being of the essence. Plaintiffs further agree that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiffs fail to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for four thousand seven hundred ninety dollars ($4,790.00) and made payable to Vincent Edwards Ingram, Federal Register Number 16883-039. The check will be mailed to Vincent Edwards Ingram, Reg. No. 16883-039, P.O. Box 12015, Terre Haute, Indiana 47801. Plaintiff Vincent Edwards Ingram agrees to distribute the settlement proceeds among the plaintiffs, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 16 day of Febuary, 2006.

_____

Attorney for Defendant,
United States of America

Executed this _____ day of February, 2006.

Vincent E. Ingram

Vincent Edwards Ingram,
pro se Plaintiff

FILED
JAN - 7 2004
RALPH L. DeLOACH, Clerk
By _____ Deputy

In The United States District Court
For The District of Kansas

Derrick Williams
Plaintiff / Petitioner

- VS -

Correctional Officer Kellebaum (or Kellebach or Calebaum) and M. Miller RPA-C - Staff Physician Assistant, and Lt. Sinek and former officer Dixon

Docket no 04-3003-GTV

Civil Complaint Pursuant to 28 U.S.C. § 1346 2671-2680, of the Federal Tort Claim Act

I Jurisdiction

A. Plaintiff's mailing address and/or register number and present place of confinement

U.S.P. Leavenworth, P.O. Box 1000, Leavenworth, KS. 66048 #48426-066 (Special housing unit B-206)

B. Defendant Kellebaum is employed as Correctional officer With Bureau of Prisons at U.S.P. Leavenworth P.O. Box 1000, Leavenworth, KS. 66048

C. At the time the claims alleged in this complaint arose, was the defendants employed by the State, local or federal government

yes (X) no ( )

If your answer is "yes", briefly explain
Defendant Kellbaum is a correctional officer with the Bureau of Prisons

D. Defendant M. Miller is employed as staff physician assistant
With Bureau of Prisons, U.S.P. Leavenworth, P.O. Box 1000, Leavenworth, KS. 66048

E. At the time the claims alleged in this complaint arose, was the defendant employed by the state, local or federal government

yes (X) no ( )

If your answer is "yes", briefly explain
M. Miller is a staff physician assistant for the Bureau of Prisons.

F. Using the outline of the form provided, include the above information for any additional defendants
Lt. Smith is a correctional officer for the Bureau of Prisons, Dixon was a correctional officer working for the Bureau of Prisons at the time of the incident

II. Previous lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment

Yes ( ) No (X)

III. Grievance Procedure

A. Is there a prisoner grievance procedure in the institution (yes)

B. Did you present the facts relating to your complaint in the prisoner grievance procedure (yes)

C. If your answer is "yes"

1. What steps did you take?

A penative administrative remedy was filed by me on 4/23/03 and received and filed by the region on 4/25/03. It was rejected and sent back. Stating that I must file a BP-9 request through the institution first I then filed a SF 95 form under the Federal Tort Claim act with the region. It was filed on July 8, 2003 by the Regional Counsel (Daryl Kosiak) Claim # TRT-NER-2003-03426 I also filed a administrative grievance with the institution. One in the form of a BP-8 and a BP-9 that was given to Counselor Booth at U.S.P. Leavenworth. The BP-8 was given to the Special investigative agent at the institution, Ft. Busic. He stated to

Counselor Booth that he misplaced it.
Claim TRT-NCR-2003-03429 was denied Nov 7, 200

IV. Statement of Claim

On the morning of April 6 2003 around 9:10 a.m. I was being escorted to special housing unit by officer Kellubaum. Upon leaving out of the back entrance of the 1st. office to go to special housing unit. While handcuffed behind my back. Officer Kellubaum pushed me from behind down a set of metal steps. I was unable to move and officer Kellubaum kicked my shoulder and told me to get up. When I was unable to, officer Mc Donald came and began to help me up along with officer Kellubaum and took me to special housing unit. I requested to see a 1st. 1st. Smet appeared and he told me that before I began my statement to him. That it was the officers word "against mine. I told him what happened and he ordered then officer Dixon to take video pictures of the injury to my left shoulder, the left side of my head, left calf, and left knee, and right knee. He then ordered Physican assistant Navorro to take a injury assessment report, and when that was done. He took a copy from Navorro, and the video disk from then officer Dixon. He told me that a investigation would be done, but it wasn't. An investigation into the incident was not done until the Federa

Tort claim was filed with the region. I was constantly told by officer Dixon that "I know that it never happened" and I was constantly harassed by then officer Dixon and the Lt. of the special housing unit at that time, Lt. Carey. I was ordered to go back into general population. When I refused because of my fear of being assaulted again by officer Kellibrew. I received institution infractions. At the time of the incident. I had requested medical assistance from M. Miller because I was experiencing severe headaches and double vision. After two weeks had past, and I did not receive any medical attention. I filed an administrative grievance. M. Miller did not come to see me until two months later. At that time he prescribed motrin, and after further complaints he prescribed migrane medication. When that medication had expired. She took over a month to see me again after constant complaints that I was still experiencing headaches, and double vision. I had a seizure since the incident has happened, and the medical department said it was a seizure caused by a head injury. I am now subjected to taking medication for the seizures. It appears from the denial of the Tort Claim by the

Regional Counsel. That they claim that I suffered no injuries as a result of my be pushed down the steps by Officer Kellebaum, and the fact that Mr Miller was negligent and committed malpractice in handling my medical situation after incident on April 6, 2003. When in fact, I have been inflicted with personal injury and emotional distress. Kellibaum is a "law enforcement officer" 28 U.S.C. §2680(h).

V Request for Relief

I seek 1,000,000 in compensatory damages as well as punitive damages.

Declaration Under Penalty of Perjury

I, the undersigned, declare (or certify, verify, or state) under penalty of perjury that I am the plaintiff in the above action, that I have read the above action, above complaint and that the information contained therein is true and Correct 28 U.S.C. §1746 - 18 U.S.C. §1621

Signed this day of November 10, 2003

Signature of Plaintiff
Derrick Williams

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101

July 8, 2003

Derrick Williams
48426-066
USP Leavenworth

Re: Administrative Claim for Damages
Claim #: TRT-NCR-2003-03429 $ 1,000,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on July 01, 2003. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such proper claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until December 28, 2003.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et. seq., and §543.30.

Sincerely,

Daryl Kosiak
Regional Counsel

U.S. Department of Justice

Federal Bureau of Prisons

North Central Regional Office

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

NOV 07 2003

Derrick Williams
Register No. 48426-066
1300 Metropolitan
Leavenworth, Kansas 66048

Re: Administrative Claim Number TRT-NCR-2003-03429
Personal Injury: $1,000,000.00

CERTIFIED NUMBER 7001 0360 0003 8460 4662

Dear Mr. Williams:

Your above referenced tort claim has been considered for administrative review pursuant to 28 C.F.R. § 0.172, Authority: Federal Tort Claims and 28 C.F.R. Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 C.F.R. § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than 6 months after the date of mailing of this notification.

Sincerely,

Daryl Kosiak
Regional Counsel

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION (Sign each entry)
3/25/03 1300	Telemedicine Conference with Psychiatry Services at USMCFP SPG
	Kevin Donovan, Ph.D. Mental Illness Coordinator USP Leavenworth
3/26/03 1120 V72.9 311	Administrative note: See mental health clinic consult dated 3/25/03
	R.C. Pohl
	Effexor XR 75 gr po @ 0700 x 7 days
	then 150 gr po @ 0700 x 90 day
	Trazodone 200 gr po @ 2100 x 90 day
	CCC-MHC-90 day
	I. Ahlstrom, Pharm. D. LT, USPHS USP Leavenworth
	W. McCollum, MD USP Leavenworth
see date 4-6-03	where is the report See injury report
950 Time	P-Double Antibiotic oint + tid/5d
5H4	Motrin [illegible]
X-919	
	W. McCollum, MD USP Leavenworth
	D. NAVARRO, PA UMG

Written patient medication information was provided regarding use, precautions, and possible side effects.

7540-00-634-4175

AUTHORIZED FOR LOCAL REPRODUCTION

EDICAL RECORD | CHRONOLOGICAL RECORD OF MEDICAL CARE

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)
/16/03	Administrative note:
250	Chart reviewed - discussed
	c̄ psychology
	Continued to offer medication
	I. Ahlstrom, Pharm. D. T. USPHS USP Leavenworth
	W. McCollum, MD USP Leavenworth
	(I told you at last two months to see me!)
6-4-03	S- Pt c/o severe HA x 3-4 months, requesting Motrin
1215	O- exam deferred
784.0	A- cephalgia
	P- Motrin 400mg ii po TID x 15d
	Pt Ed - Dx, Rx
	M. MILLER RPA-C Staff Physician Assistant
	I. Ahlstrom, Pharm. D. LT, USPHS USP Leavenworth
	Written patient medication information was provided regarding use, precautions, and possible side effects.
7-15-03	S- Pt c/o continuing HA, Motrin helped but requesting
1215	stronger if possible
784.0	O- exam deferred - lockdown
	A- cephalgia
	P- Cafergot ii c̄ onset then ⊥ q̄ 2° do not exc. 5/d or 15/wk #1
	c̄ ii [illegible] Pt Ed - R[illegible]
	M. MILLER RPA-C Staff Physician Assistant
	I. Ahlstrom, Pharm. D. LT, USPHS USP Leavenworth
	Written patient medication information was provided regarding use, precautions, and possible side effects.

SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR

ENT'S IDENTIFICATION: (For typed or written entries, give: Name - last, first, middle; [illegible]) | REGISTER NO. | WARD NO.

MEDICAL RECORD **CONSULTATION REQUEST**

To: Telehealth Psychiatry From: Psychology Services USP Leavenworth Date of Request: 07-30-2003

REASON FOR REQUEST: The referral questions are as follows:

1) Mental status exam.
2) Diagnostic impression.
3) Treatment recommendations.
4) Medication renewal and adjustments.

PROVISIONAL DIAGNOSIS:

SUBJECTIVE: Depressed. Went off his meds and is again becoming depressed. Denies SI/HI

OBJECTIVE: Will continue on Effexor. Denies side effects

ASSESSMENT:

Axis I Psychiatric Disorders:	☐ 300.0 Anxiety	☐ 296.60 Bipolar NOS	☒ 311 Depression
	☐ 295.9 Schizophrenia	☐ 296.90 Mood D/O NOS	☐ 297.1 Delusional
	☐ 298.9 Psychotic NOS	☐ 309.81 PTSD	☐ Other:
Axis II Personality Disorders:	☐ 301.7 Antisocial	☐ 301.83 Borderline	☐ Other:

PLAN:

Patient Education:	☒ Medication Info	☐ Counseling Services	☐ Use of Support Groups
Follow Up:	☒ 30 Days	☐ 90 Days	☐ Other _____
	☐ 60 Days	☒ F/U by Psychology	☐ None at This Time

Presence of Medication Side Effects: ☒ **NONE** ☐ **OTHER**

MEDICATION: Effexor XR 150 mg QAM

Laboratory Studies: None ☐ Other

CONSULTANT SIGNATURE & NAME STAMP:	**ORGANIZATION NAME:**	**DATE:**
I BARRA PSY	LEAVENWORTH	7/30/03

INMATE NAME	**REGISTRATION NUMBER**	**BIRTH DATE/AGE**
WILLIAMS, DERRICK	48426-066	9-29-67

USP LEAVENWORTH, 1300 METROPOLITAN, LEAVENWORTH, KS 66048 7/30/03



USP Leavenworth
Medication Profile

Name Williams, Derrick

Registration # 48426-066

Allergies NKDA

Ord.Date 09/23/02 — WILLIAMS, DERRICK — 48426-066 — W. MCCOL — (0)Refills
Exp.Date 10/22/02 — TAKE ONE TABLET BY MOUTH AT 2100
Rx # 2068895 — PAROXETINE 30 MG TAB — #30

Ord.Date 10/10/02 — WILLIAMS, DERRICK — 48426-066 — M. MILLER — (3)Refills
Exp.Date 01/07/03 — INHALE 2 PUFFS ORALLY FOUR TIMES A DAY
Rx # 2070328 — ALBUTEROL INHALER 17 GM — #1

Ord.Date 11/20/02 — WILLIAMS, DERRICK — 48426-066 — W. MCCOL — (2)Refills
Exp.Date 02/17/03 — TAKE 50MG (40+10) AT 2100
Rx # 2072944 — PAROXETINE 40 MG TAB — #30

Ord.Date 11/20/02 — WILLIAMS, DERRICK — 48426-066 — W. MCCOL — (2)Refills
Exp.Date 02/17/03 — TAKE TWO TABLETS BY MOUTH AT 2100
Rx # 2072945 — TRAZODONE 100 MG TAB — #60

Ord.Date 12/20/02 — WILLIAMS, DERRICK — 48426-066 — W MCCOLLUM — (1)Refills
Exp.Date 02/17/03 — TAKE 50MG (40+10) AT 2100
Rx # 2074884 — PAROXETINE 40 MG TAB — #30

Ord.Date 12/20/02 — WILLIAMS, DERRICK — 48426-066 — W MCCOLLUM — (1)Refills
Exp.Date 02/17/03 — TAKE ONE TABLET BY MOUTH AT 2100
Rx # 2074885 — TRAZODONE 100 MG TAB — #30

Ord.Date 03/27/03 — WILLIAMS, DERRICK — 48426-066 — W. MCCOLLUM — (0)Refills
Exp.Date 04/02/03 — TAKE ONE TABLET BY MOUTH AT 0700 FOR 7 DAYS
Rx # 2082403 — VENLAFAXINE 75 MG TAB — #7

Ord.Date 04/03/03 — WILLIAMS, DERRICK — 48426-066 — W. MCCOLLUM — (2)Refills
Exp.Date 07/01/03 — TAKE TWO TABLETS BY MOUTH AT 0700
Rx # 2082404 — VENLAFAXINE 75 MG TAB — #60

Ord.Date 03/27/03 — WILLIAMS, DERRICK — 48426-066 — W. MCCOLLUM — (2)Refills
Exp.Date 06/24/03 — TAKE TWO TABLETS BY MOUTH AT 2100
Rx #

Ord.Date 04/07/03 — WILLIAMS, DERRICK — 48426-066 — D. NAVARRO — (1)Refills
Exp.Date 04/20/03 — TAKE TWO TABLETS BY MOUTH THREE TIMES DAILY FOR 14 DAYS
Rx # 2083215 — IBUPROFEN 400MG TAB — #42

Ord.Date 04/07/03 — WILLIAMS, DERRICK — 48426-066 — D. NAVARRO — (0)Refills
Exp.Date 04/11/03 — APPLY TO AFFECTED AREA AS DIRECTED THREE TIMES DAILY FOR 5 DAYS
Rx # 2083216 — BACITRACIN/POLYMIXIN B OINT GM — #1

Ord.Date 06/04/03 — WILLIAMS, DERRICK — 48426-066 — M. MILLER — (1)Refills
Exp.Date 06/18/03 — TAKE TWO TABLETS BY MOUTH THREE TIMES DAILY WITH FOOD
Rx # 2087460 — IBUPROFEN 400MG TAB — #42

Ord.Date 07/18/03 — WILLIAMS, DERRICK — 48426-066 — M. MILLER — (4)Refills
Exp.Date 08/16/03 — TAKE 2 TABLETS AT THE ONSET OF HEADACHE THEN TAKE 1 TABLET EVERY HOUR AS NEEDED UP TO A MAXIMUM OF 5 PER DAY OR 10 PER WEEK
Rx # 2090651 — ERGOTAMINE/CAFFEINE TAB — #10

Ord.Date 07/31/03 — WILLIAMS, DERRICK — 48426-066 — W MCCOLLUM — (1)Refills
Exp.Date 09/28/03 — TAKE TWO TABLETS BY MOUTH AT 0700
Rx # 2091622 — VENLAFAXINE 75 MG TAB — #60

Dear Mr. Kosek

10/20/03

On administrative Claim was filed on July 8, 2003.
The number is TRT-NCR-2003-03429. [illegible]
[illegible]
[illegible]
[

Mrs. Lovelace Medical Records 7/30/03

I am once again trying to receive my medical records for the month of April to [illegible] of [illegible] a Sort Claim filed with the [illegible] [illegible] copy of my records [illegible]

[illegible] 48[illegible]-06[illegible]

SHU [illegible]

To P.A. Miller 9/4/03

I have persistently stated that I am experiencing severe headaches and double vision. Ever since 4/6/03. You have proscribed pain killers, and migrane medication and the pain and the headaches persist. I have not been checked out yet either for my headaches or my problems with my vision. I am living constantly everyday in pain.

David W Williams

48126-066
SHU B-206

c.c. For personal Records

Mr. Lovelace (Records) 9/4/03

I requested my medical records from the month of Dec. to July. Upon receiving those records, I did not receive my injury assessment report from 4/6/03 I once again filled out a request and submitted it to you. Yesterday 9/3/03, I was seen by the psychiatrist. I notice that pages of my medical file were missing. The Chronological record starts at 5/1[illegible]/03 instead 12/20/02. Up to atleast 3 pages are absent along with the injury assessment report.

Derrick Williams 48426-066
SHU B-206

C.C. For personal Records

To P.A. Miller 9/22/03

I've repeatly written to you explaining that I am experiencing severe headaches and double vision you deferred an exam twice. Once for a lockdown the migrane medication was not helpful. Something is seriously wrong and I need professional attention. I haven't slept a full night in months I haven't read a book just as long. Can I receive help please!

[illegible]

cc For personal copy

P. A. Miller 10/02/[illegible]

Once again I am seeking to get medical help. I have been experiencing severe headaches for months now and I've been [illegible] in pain. My vision blurry [illegible] [illegible] visible vision. I [illegible] medical assistance. My eyes have been itching and burning.

[illegible] Williams
B-206

SHU
48426-066

B-206

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: APRIL 28, 2003

FROM: for N. Fields
ADMINISTRATIVE REMEDY COORDINATOR
NORTH CENTRAL REGIONAL OFFICE

TO : DERRICK WILLIAMS, 48426-066
LEAVENWORTH USP UNT: AL2 QTR: ADM DET
1300 METROPOLITAN
LEAVENWORTH, KS 66048

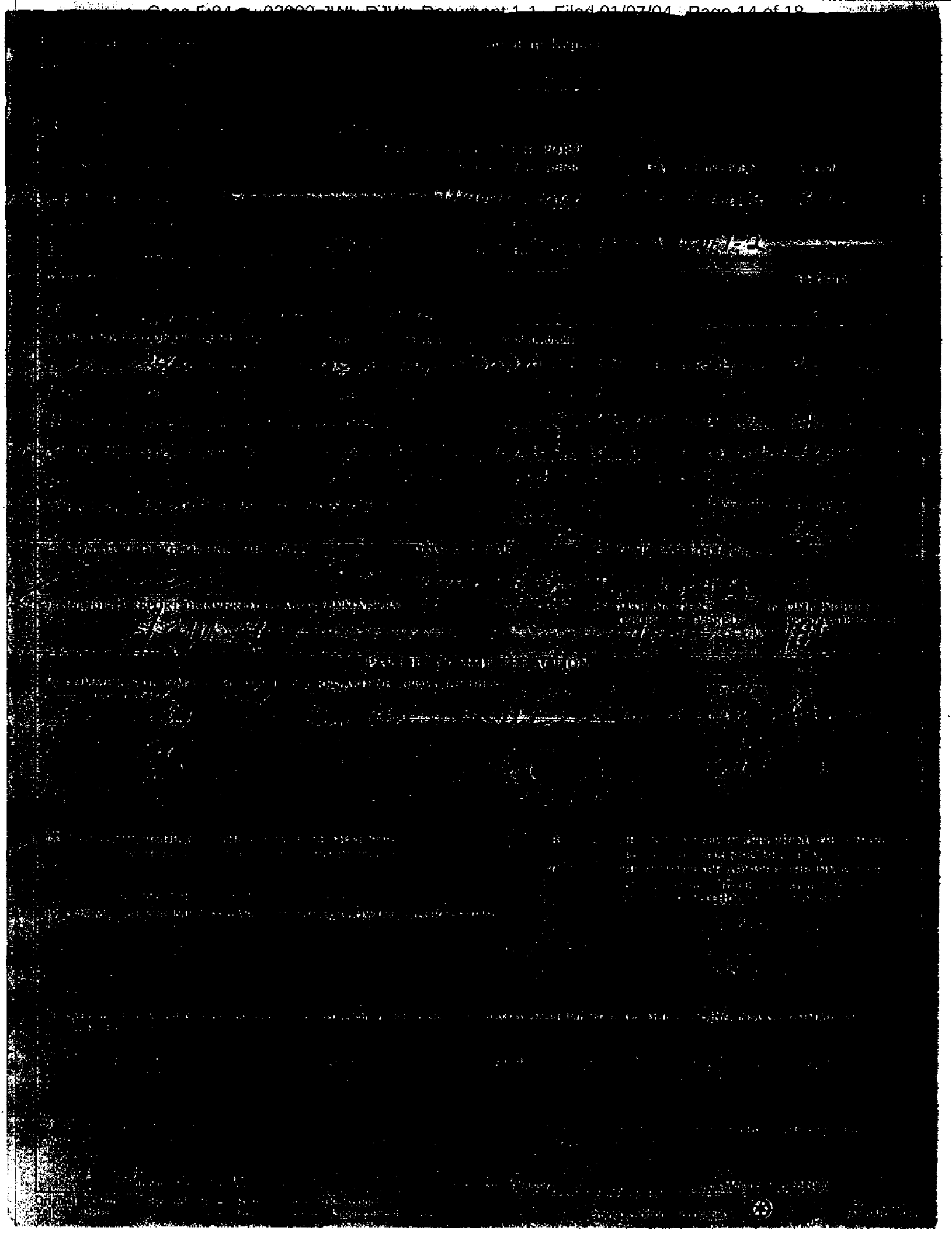
FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 297369-R1 REGIONAL APPEAL
DATE RECEIVED : APRIL 25, 2003
SUBJECT 1 : ASSAULT BY STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT ATTEMPT INFORMAL RESOLUTION PRIOR TO SUBMISSION OF ADMINISTRATIVE REMEDY, OR YOU DID NOT PROVIDE THE NECESSARY EVIDENCE OF YOUR ATTEMPT AT INFORMAL RESOLUTION.

REJECT REASON 2: YOU MUST FIRST FILE A BP-9 REQUEST THROUGH THE INSTITUTION FOR THE WARDEN'S REVIEW AND RESPONSE BEFORE FILING AN APPEAL AT THIS LEVEL.

RECEIVED
2003 MAY 12 AM 8:14
WARDEN'S OFFICE
USP LEAVENWORTH



BP-S288.052 **INCIDENT REPORT** CDFRM
MAY 1994
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

1. Name Of Institution: **UNITED STATED PENITENTIARY LEAVENWORTH, KANSAS**

Part I - Incident Report

2. Name Of Inmate	3. Register Number	4. Date Of Incident	5. Time
WILLIAMS, DERRICK	**48426-066**	**10-20-2003**	**10:38 A.M.**

6. Place Of Incident	7. Assignment	8. Unit
SPECIAL HOUSING UNIT, B-206	**SHU UNASS.**	**A LEVEL II**

9. Incident	10. Code
REFUSING PROGRAMS	**306**

11. Description Of Incident (Date: 09-29-03 Time: 1:38 p.m. Staff become aware of incident)

On October 20, 2003 at approximately 10:38 a.m. inmate Williams, Derrick #48426-066 was ordered to return to the general population and he refused by stating, "I'm not going". He was again ordered and instructed of the ramifications if he refused to return to the general population and he again refused.

12. Signature Of Reporting Employee	Date And Time	13. Name And Title (Printed)
	10-20-03 1:20PM	**P. Klein, Lieutenant**

14. Incident Report Delivered To Above Inmate By	15. Date Incident Report Delivered	16. Time Incident Report Delivered
	10/20/2003	1630

Part II - Committee Action

17. Comments Of Inmate To Committee Regarding Above Incident

18. A. It Is The Finding Of The Committee That You:
_____ Committed The Following Prohibited Act.

_____ Did Not Commit A Prohibited Act.

B. _____ The Committee Is Referring The Charge(s) To The DHO For Further Hearing.

C. _____ The Committee Advised The Inmate Of Its Finding And Of The Right To File An Appeal Within 15 Calendar Days.

19. Committee Decision Is Based On The Following Information

20. Committee action and/or recommendation if referred to DHO (Contingent upon DHO finding inmate committed prohibited act)

21. Date And Time Of Action _____ (The UDC Chairman's Signature Next To His Name Certifies Who Sat On The UDC And That The Completed Report Accurately Reflects The UDC Proceedings.)

Chairman (Typed Name/signature) _____ Member (Typed Name) _____ Member (Typed Name)

Record Copy - Central File Record; Copy - DHO; Copy - Inmate After UDC Action; Copy - Inmate Within 24 Hours Of Part I Preparation
(This Form May Be Replicated Via WP) Replaces BP-288(52) Of Jan 88

U.S. DEPARTMENT OF JUSTICE

REQUEST FOR ADMINISTRATIVE REMEDY

Federal Bureau of Prisons

[illegible]

From: [illegible] SHU Housing [illegible]

LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

Part A - INMATE REQUEST [illegible]

[illegible]

7/23/03

DATE

[illegible]

SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED

APR 25 2003

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL RETURN TO INMATE

CASE NUMBER 297239-21

CASE NUMBER

Part C - RECEIPT

Return to:

LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP LVN

Previous editions not usable

BP-229(13)
APRIL 1982

S.I.S. Lt. had never even come to speak to me. Lt. Darrow told me that "ain't no one going to come after you". I told him that he gave me a threat days ago and now you assure me of my safety. I've had constant chronic severe headaches and I have been seeing double vision every since the incident, and I landed on the left side of my head. I put cop out, after cop out after cop out on to the P.A. assigned to me at this institution P.A. Miller and yet he has not call me out to check on me once. I have been living with these headaches everyday constantly. I have constantly tried to get a letter to the Warden or someone in his office but he never receives them.

PATIENT MEDICATION INFORMATION

PROPRANOLOL HCL 10 MG TAB **WILLIAMS, DERRICK** **Rx # 2097396**

COMMON USES: This medicine is a beta blocker used to treat high blood pressure and angina pectoris (chest pain). It is also used after a heart attack. This medicine is also used to prevent migraine attacks and to treat other conditions as determined by your doctor.

BEFORE USING THIS MEDICINE: WARNING: If you have angina or have had heart problems, do not suddenly stop using this medicine without first consulting your doctor. If your doctor decides you should no longer use this medicine, you must stop this medicine gradually according to your doctor's instructions. Some medicines or medical conditions may interact with this medicine. INFORM YOUR DOCTOR OR PHARMACIST of all prescription and over-the-counter medicine that you are taking. DO NOT TAKE THIS MEDICINE if you are also taking mibefradil or theophylline. ADDITIONAL MONITORING OF YOUR DOSE OR CONDITION may be needed if you are taking amiodarone, barbiturates, cimetidine, clonidine, disopyramide, flecainide, indomethacin, insulin, ketanserin, phenothiazines, prazosin, quinidine, verapamil, or medicine for thyroid conditions. Inform your doctor of any other medical conditions, allergies, pregnancy, or breast-feeding. USE OF THIS MEDICINE IS NOT RECOMMENDED if you have a history of asthma or other breathing problems, heart block, heart failure, or other heart rhythm conditions. Contact your doctor or pharmacist if you have any questions or concerns about taking this medicine.

HOW TO USE THIS MEDICINE: Follow the directions for using this medicine provided by your doctor. This medicine may be taken on an empty stomach or with food. Take this medicine at the same time(s) each day. STORE THIS MEDICINE at room temperature, away from heat and light. IF YOU MISS A DOSE OF THIS MEDICINE, take it as soon as possible. If it is almost time for your next dose, skip the missed dose and go back to your regular dosing schedule. Do not take 2 doses at once.

CAUTIONS: DO NOT STOP TAKING THIS MEDICINE without checking with your doctor. BEFORE YOU HAVE ANY MEDICAL O DENTAL TREATMENTS, EMERGENCY CARE, OR SURGERY, tell the doctor or dentist that you are using this medicine. THIS MEDICINE MAY CAUSE drowsiness or dizziness. Do not drive, operate machinery, or do anything else that could be dangerous until you know how you react to this medicine. BEFORE TAKING ANY NEW MEDICINE, either prescription or over-the-counter, check with your doctor or pharmacist. This includes any medicines used to treat colds or congestion. IF YOUR DOCTOR HAS INSTRUCTED YOU TO CHECK your blood pressure and heart rate regularly, be sure to do so. FOR WOMEN: IF YOU PLAN ON BECOMING PREGNANT, discuss with your doctor the benefits and risks of using this medicine during pregnancy. THIS MEDICINE IS EXCRETED IN BREAST MILK. IF YOU ARE OR WILL BE BREAST-FEEDING while you are using this medicine, check with your doctor or pharmacist to discuss the risks to your baby. FOR PATIENTS WITH DIABETES MELLITUS: this medicine may mask signs of low blood sugar such as a rapid heartbeat. Check blood glucose levels regularly.

POSSIBLE SIDE EFFECTS: SIDE EFFECTS, that may go away during treatment, include mild drowsiness; lightheadedness or dizziness; or unusual tiredness or weakness. If they continue or are bothersome, check with your doctor. CHECK WITH YOUR DOCTOR AS SOON AS POSSIBLE if you experience difficulty breathing. If you notice other effects not listed above, contact your doctor, nurse, or pharmacist.

OVERDOSE: If overdose is suspected, contact your local poison control center or emergency room immediately. Symptoms of overdose may include slowed heartbeat and dizziness and weakness especially upon standing.

ADDITIONAL INFORMATION: DO NOT SHARE THIS MEDICINE with others for whom it was not prescribed. DO NOT USE THIS MEDICINE for other health conditions. KEEP THIS MEDICINE out of the reach of children. IF USING THIS MEDICINE FOR AN EXTENDED PERIOD OF TIME, obtain refills before your supply runs out.

Database Edition 03.3 - Expires October 2003
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

DERRICK WILLIAMS

Plaintiff,

v. **Case No. 04-3003-JWL**

UNITED STATES OF AMERICA

Defendant.

MEMORANDUM AND ORDER

This case concerns a Federal Tort Claims Act claim filed by Derrick Williams against the United States. This matter comes before the court on Mr. Williams' Motion to Reopen the Proceedings for Final Determination of the Litigation. For the reasons explained below, Mr. Williams' motion is denied.

1. Background

Mr. Williams alleges that he was injured on April 6, 2003, when he was pushed down some stairs by an officer at the United States Prison at Leavenworth. He then filed suit under the Federal Tort Claims Act, and this court ordered the parties to mediate their dispute. After a series of offers and counter-offers, the parties executed a settlement agreement entitled, "Notice of Voluntary Dismissal with Prejudice," which both parties signed on June 20, 2005.

On July 5, 2005, the court issued an order requiring the parties to file a stipulation of dismissal by August 1. On July 15, however, Mr. Williams moved the court to reopen the proceedings and set aside the settlement agreement based on alleged duress.[1] Although he

admits signing the settlement agreement, he alleges "he felt pressure and that his decision [to sign the agreement] was a result [of] pressure and undue influence." Specifically, he alleges that opposing counsel said that based on their experience, "both Honorable Judges would reject anything of proof as to [his] case because of [his] credibility in [his] prior act in the institution for indecent exposure."

2. Standard of Review

Mr. Williams titled his motion as "Motion to Reopen the Proceedings for Final Determination of the Litigation." Because no judgment has been entered, the court does not construe this motion as a motion to alter or amend a judgment under either Federal Rule of Civil Procedure 59(e) or 60. *Cf. Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000) (a motion to reconsider filed within ten days after entry of judgment is considered a Rule 59(e) motion). Instead, the court reviews Mr. Williams' motion under the standard for setting aside a settlement agreement under Kansas law, as explained below.

3. Mr. Williams Has Not Made the Substantial Showing for Setting Aside a Settlement Agreement under Kansas Law

---

[1] In his motion, Mr. Williams alleges both duress and undue influence, but the court has analyzed his motion as a claim for duress because undue influence ordinarily is used in the context of estates and trusts. *See, e.g., In re Hooper's Estate*, 61 P.2d 1335, 1338 (Kan. 1936) ("Actual undue influence may consist of threats of personal harm or duress, under the force of which a person makes a testamentary disposition of his property which is really against his will."); 25 Am. Jur. 2d Duress and Undue Influence § 36 ("Undue influence has been described as a species of duress, but it has also been described as a species of fraud or constructive fraud.").

The enforceability of a settlement agreement is governed by state law. *See United States v. McCall,* 235 F.3d 1211, 1215 (10th Cir. 2000). Under Kansas law, "in the absence of bad faith or fraud, when parties enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it." *Krantz v. Univ. of Kan.,* 271 Kan. 234, 21 P.3d 561, 567 (Kan. 2001). *See also Lewis v. Gilbert*, 14 Kan. App. 2d 201, 202, 785 P.2d 1367, 1368 (Kan. App. 1990) ("'The law favors the compromise and settlement of disputes, and when parties, in the absence of any element of fraud or bad faith, enter into an agreement settling and adjusting a dispute, neither party is permitted to repudiate it.") (citations omitted)). The court may not "look into the merits of the original controversy to discover which [party] was in the right." *Lewis*, 14 Kan. App. 2d at 202. In addition, "[a] trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *United States v. Hardage,* 982 F.2d 1491, 1496 (10th Cir.1993).

It is an issue of law whether the facts as alleged constitute duress. *White v. General Motors Corp., Inc.*, 908 F.2d 669, 673 (10th Cir. 1990) (citing *Hastain v. Greenbaum,* 205 Kan. 475, 470 P.2d 741, 746 (1970)). Examining the elements of duress in Kansas, this court has explained:

> In essence, a contract signed under duress is voidable because there is no actual mental agreement (assent) between the parties. The elements constituting duress by threats in Kansas are as follows:
> To constitute duress by threats the actor's manifestation must be made for the purpose of coercing the other; must have for its object the securing of undue advantage with respect to the other; must be of such a character that it is adapted to overpower the will of the other and is reasonably adequate for the purpose;

> must in fact deprive the other of free exercise of will; and must cause the other to act to his detriment.

Comeau v. Mt. Carmel Medical Center, Inc., 869 F. Supp. 858, 864 (D. Kan. 1994) (citing *Hastain*, 205 Kan. at 482)).

Mr. Williams' motion fails to allege facts that establish either duress or undue influence. Although he alleges that the attorneys for the United States urged him to accept the settlement agreement because of his alleged lack of credibility, this does not constitute duress under Kansas law. *Cf. Hastain*, 205 Kan. at 482 (emphasizing that "it is clear that not all threats, even if unlawful, will give rise to a defense of duress").

On the contrary, "Kansas courts have shown no indication to permit contracting parties to avoid the consequences of their bargains lightly, even where there has been some degree of compulsion or hard bargaining." *Comeau*, 869 F. Supp. at 864. There must be "substantial evidence" to establish duress, and "'[i]t would not be proper to simply hold that, merely because a person who has made a contract declares under oath that he was intimidated and acting under fear and duress when the contract was made by him, the contract should by reason of his mere statement be avoided. If that rule were adopted most contracts would be avoided.'" *Id.* (citation omitted).

In a case analogous to this one, the Kansas Supreme Court held that "[s]ummed up, all plaintiff's evidence established was that he preferred the immediate settlement on the terms made than the hazard of a lawsuit. Parties are confronted with that problem every day."

Comeau, 869 F. Supp. at 866 (quoting *Evans v. Aylward,* 166 Kan. 306, 317, 201 P.2d 1044 (1949)).

Mr. Williams does not offer any law or logic to the contrary. Accordingly, the court must enforce the parties' valid settlement agreement. *See United States v. Hardwell*, 80 F.3d 1471, 1492 (10th Cir. 1996) ("He has waived this issue by failing to make any argument or cite any authority to support his assertion.").

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's Motion to Reopen the Proceedings for Final Determination of the Litigation (doc. # 79) is denied. This case is hereby dismissed in its entirety.

IT IS SO ORDERED this 27th of September, 2005.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DERRICK WILLIAMS,

Plaintiff,

v. Case No. 04-3003-JWL-DJW

UNITED STATES OF AMERICA,

Defendants.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiffs (meaning any person, other than the defendant, signing this agreement, whether or not a party to this civil action), and the United States of America, appearing either pro se or by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of two thousand and no/100 dollars ($2,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiffs or their guardians, heirs, executors,

administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiffs must obtain Court approval of the settlement at their expense. Plaintiffs agree to obtain such approval in a timely manner: time being of the essence. Plaintiffs further agree that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiffs fail to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for two thousand and no/100 dollars ($2,000.00) and made payable to Derrick Williams, Federal Register Number 48426-066. The check will be mailed to Derrick Williams in care of the following address: Federal Bureau of Prisons, Derrick Williams, Reg. No. 48426-066, P.O. Box 474701, Des Moines, Iowa 50947-0001. Plaintiff Derrick Williams agrees to distribute the settlement proceeds among the plaintiffs, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

11. The United States agrees that it will designate the plaintiff, Derrick Williams, for transfer to USP Allenwood.

Executed this 20th day of June, 2005.

Attorney for Defendant,
United States of America

Executed this 20th day of June, 2005.

Derrick Williams
Plaintiff, pro se

IN THE United States District Court
FOR the District OF KANSAS

MACK JONES,
Plaintiff,
v.
United States OF AMERICA,
WARDEN, UNIT TEAM, USP, Defendant's,

Civil Action No. 01-3094 GTV

RECEIVED
2002 MAR -4 P 12:57
KANSAS CITY, KANSAS

Plaintiff, Motion; to Be Amended to Civil Complaint No. 01-3094 GTV, this is A Motion Against Defendant's, WARDEN, CONNER, U.S.P LEAVENWORTH, UNIT TEAM USP LEAVENWORTH, MR. PIERCE (UNIT MANAGER), MR. DWYER (CASEWORKER), MR. Boothe COUNSELER), MR. ONTIVEROS (COUNSELER) (Unit A-2), FOR CONSPIRICY, And HINDERING, AND TAMPERING, the OBSTRUCTIONS OF Justice, OF PLAINTIFF MOTION IN OPPOSITION to DEFENDANT's MOTION to DISMISS OR ALTERNATIVELY, FOR SUMMARY Judgment.

Now RESPECTFULLY COME the PLAINTIFF, MACK JONES, PROSE WITHOUT PREJUDICE to ANY OTHER MOTION FILED, AND HERE BY SUBMITS this MOTION to this HONORABLE COURT, FOR OBSTRUCTION OF Justice, CONSPIRICY, HINDERING AND TAMPERING, With PLAINTIFF, MOTION, Civil Action No. 01-3094 GTV, IN OPPOSITION to DEFENDANTS MOTION to DISMISS OR ALTERNATIVELY, FOR SUMMARY Judgment. This Motion PLAINTIFF, SUBMITS to, HONORABLE Judge G.T VANBEBBER, United States District Judge, thru the HONORABLE RALPH L. DELOACH, U.S CLERK OF COURT, District OF KANSAS.

). PLAINTIFF, STATES, that ON 2/21/02, AROUND 2:00 PM, COUNSELER, ONTIVEROS, BROUGHT PLAINTIFF LEGAL MAIL to the SEGREGATION UNIT (OCH), FROM the U.S District COURT FOR the District OF KANSAS, PLAINTIFF RECIEVED AN ORDER, FROM the COURT too RESPOND to DEFENDANT's MOTION FOR SUMMARY Judgment, this ORDER GIVES PLAINTIFF (20) days FROM the Mailing OF the COURTS ORDER, Which WAS dated 2/15/02, PLAINTIFF had FROM that DATE UNTIL 3/6/02, to RESPOND, PLAINTIFF, WROTE SEVERAL REQUEST (COP-OUT), to UNIT TEAM FOR ASST.

1/1

-o RECIEVE COPIES, AND NOTIRIZED, MY CASE IS A NOTIRIZER, MR. DUYER, THE UNIT CASE WORKER MR. DUYER WAS IN THE SEGREGATION UNIT (DCH), ON THIS PARTICULAR DAY 2/28/02, - SUMMON MR. DUYER TO MY CELL LOCATION, MR. DUYER TOOK N POSSESION PLAINTIFF, MOTION IN OPPOSITION OF DEFENDANTS SUMMARY JUDGMENT MOTION, PLAINTIFF, EXPLAINED THE COURTS DEADLINE TO MR DUYER, PLAINTIFF ONLY WANTED COPIES AND THE MOTION TO BE NOTARIZED, PLAINTIFF ASK MR. DUYER TO RETURNED THE MOTION, TO BE MAILED OUT ON 2/27/02 VIA LEGAL MAIL BOX, WHICH WOULD HAVE GIVEN PLAINTIFF ZENTY OF TIME TOWARD COURT DEADLINE AND ALSO VIA MAILED FROM CERTIFICATE OF SERVICE A COPY TO U.S ATTORNEY OFFICE OF KANSAS.

2). PLAINTIFF, STATES THAT HE HASN'T RECIEVED HIS COMPLAINT BACK AS OF THIS PRESENT DATE 2/28/02, MAIL does'nt LEAVE THE INSTITUTION ON FRIDAY, THAT WOULD BE MARCH 1, 02, MAIL do N.T LEAVE THE INSTITUTION UNTIL MONDAY 3/4/02, THIS MEANS THAT PLAINTIFF, COMPLAINT WILL BE UNTIMELY, BEING THAT THE DEADLINE IS 3/6/02, AND ACCORDING TO D. KAN RULE 7.4, CAN BE CONSIDERED AND DECIDED FOR DEFENDANTS, AS UNCONTESTED, AND GRANTED IN FAVOR OF DEFENDANTS WITHOUT FURTHER NOTICE.

3). PLAINTIFF TRUELY BELIEVES, THAT DEFENDANT HAS USED THIS TACTIC TO BLOCK PLAINTIFF FROM PUTTING FOURTH HIS MOTION TO THE HONORABLE COURT TO SEEK OR SEEKING THE D. KAN. RULE 7.4, BUT, PLAINTIFF IS GIVING NOTICE TO THIS HONORABLE COURT TO STAND WITH PLAINTIFF ON THIS CONSPIRICY AGAINST PLAINTIFF, THIS IS VIEWED BY THE PLAINTIFF, AS UNDER HANDED METHOD OF COWARDISM, WHICH IS PLACING A DISTRACTER TO THE PARTY'S CONVOLVED, AND THIS IS ENVOLVING THE HONORABLE COURT, PLAINTIFF, IS AT THE MERCY OF THE COURTS, AND HAVE KNOW

ONE to Assist PLAINTIFF With his LEGAL WORK, PLAINTIFF, is in SEGREGATION, and BEEN HERE SINCE 1/26/02, PLAINTIFF Hope this HONORABLE COURT CAN READ the PLAINTIFF WRITING, The Unit Team has BEEN KNOW help to PLAINTIFF, AS it STANDS they ARE TOTALLY AGAINST PLAINTIFF, PLAINTIFF don't KNOW WHERE to TURN, Accept to this HONORABLE COURT.

1). PLAINTIFF HAS BEEN Without his PAIN Medication SINCE 1/26/02, Health SERVICES don't WANT to RESPOND to PLAINTIFF, PLAINTIFF HAS Filed (COP-Outs TO HEALTH SERVICES FOR Medical And DENTAL, and All to KNOW AVAIL.

5). PLAINTIFF, NOW it's STAND STILL ON WEATHER TO Accept the Motion BACK WHEN it COME OR to JUST LET the COURT DECIDES, DEFENDANTS HAS PLACE its SELF Before the HONORABLE COURTS, And the FIRST OPTION to RENDING it FIRST.

6). PLAINTIFF, WILL NEED the ASSISTANT OF the UNIT TEAM FOR STAMPS to ANY FUTURE CORRESPONDENT to the COURT AND to the U.S ATTORNEYS HERE IN KANSAS.

CONCLUSION

PLAINTIFF SEEK JUSTICE, PLAINTIFF IS ASKING this HONORABLE COURT to dismiss DEFENDANT'S AND GRANT this CIVIL COMPLAINT IN FAVOR OF PLAINTIFF, AND PLAINTIFF IN SINCERE PRAYER, HOPE that EXPEDITIOUS RELIEF IS RENDER FROM this HONORABLE COURT.

EXECTED this 28 DAY FEBRUARY, 2002

RESPECTFULLY SUBMITTED
Mack Jones
MACK JONES, PLAINTIFF PROSE
REG NO. 48118-131

CERTIFICATE OF SERVICE

PLAINTIFF, MACK JONES HERE BY CERTIFIES THAT A COPY OF THE FOREGOING MOTION FROM PLAINTIFF WAS SERVED UPON MR. CHRISTOPHER ALLMAN, ASSISTANT UNITED STATES ATTORNEY, 500 STATE STREET, SUITE 360, KANSAS CITY, KANSAS 66101, BY PLACING IT IN THE HANDS OF STAFF MEMBER TO PLACE IT IN THE LEGAL MAIL BOX AT THE UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, POSTAGE PRE PAID, ON THIS 28 DAY OF FEBRUARY, 2002

/s/ Mack Jones

MACK JONES, PLAINTIFF
PRO SE

MR. MACK JONES
98178-131 (I) CH)
U.S PENITENTIARY
PO BOX 1000
LEAVENWORTH, KANSAS
66048-1000

LEGAL
MAIL





MR. CHRISTOPHER ALLMAN
ASSISTANT UNITED STATES ATTORNEY
500 STATE STREET, SUITE 360
KANSAS CITY, KANSAS
66101

66101+2400

P.O. BOX 1000
LEAVENWORTH, KANSAS 66048

DATE FEB 2 8 2002

The enclosed letter was processed through special mailing procedures for forwarding to you. The letter has been neither opened nor inspected. If the writer raises a question or problem over which this facility has jurisdiction, you may wish to return the material for further information or clarification. If the writer encloses correspondence for forwarding to another addressee, please return the enclosure to the above address.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RECEIVED

Mack Jones, Plaintiff
v
United States Of America, Defendant

Civil Action No. 01-3094-GTV

NOTICE:

Violation of Plaintiff, Constitutional Rights, By Defendants, And the Parties in Alliance with Defendants, U.S.P Leavenworth Staff, For the Obstruction of Justice.

1). Plaintiff; Shows Notice to this Honorable Court, as Referential Information, Defendants tactic to Obstruct the Progress of Plaintiff Civil Complaints, is in Violation, Plaintiff, has Viewed Defendants tactic, Since Plaintiff Began the Filing of (his), Plaintiff, Civil Complaint, By Defendants initiating the term (Untimely), Plaintiff, See the Ploy By Defendants or the Parties in Alliance, trying to Block Plaintiff, Motion in Opposition to Defendants Motion For Summary Judgment.

2) To Make All Parties Aware, Reacting From his Acuity, Plaintiff, Also is Looking At the Objective, Actuated A Quick Motion to Reach the Honorable Court in time to Show Cause, this Motion was Mailed to the Courts, Dated 2/28/02, with A Copy to Mr. Christopher Allman (Asst. U.S Attorney), The Motion in Opposition to Defendants Summary Judgment, was to Be Mailed By Plaintiff on the 27th, or 28 of February, 2002, Ahead of Court Deadline, Parties in Alliance with Defendants had Knowledge of Such, and Also Knowing that Mail do Not Leave U.S.P on Friday's, How-Ever, Plaintiff, waited Patiently Friday, and the Counseler Mr. Boothe Arrived with the Copies March 1, 02, Around 1:35 P.M; I Reiterated; to the Counseler, that Plaintiff was at the Court Deadline, The Counseler Stated, "(I didn't have Nothing to do with it, Im Just Delivering"). Plaintiff, Seek From this Honorable Court with-out inconvience, Notices, From the two Motion previously Filed, Civil Action No. 01-3094-GTV (Motion By Plaintiff, (Conspiracy)(Hindering), the Obstruction of Justice), Dated 2/28/02; And Civil Action No 01-3153-GTV dated 2/17/02.

Respectfully Plaintiff, Pro Se

Executed this 3 Day of March, 2002

Mack Jones #98178-131
United States Penitentiary Leavenworth

IN THE UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

2001 MAR 13 A 10: 16

RALPH L. DELOACH
CLERK
BY _____ DEPUTY
AT TOPEKA, KS.

Mack Jones

Plaintiff/Petitioner(s),

-vs-

Janet Reno-Former Attorney General
Kathleen Hawk-Director(BOP)

Phillip Hill-Chief Medical Officer

D. Shepard-Hospital Administrator

~~Mr. Garner- Supervisor of CMS~~

Defendant/Respondent(s).

Docket No. 01-3094-GTV
(To be supplied by the Clerk)

☐ CIVIL RIGHTS COMPLAINT pursuant to 42 U.S.C. §1983 (State Prisoner)

☐ CIVIL RIGHTS COMPLAINT pursuant to 28 U.S.C. §1331 (Federal Prisoner)

☒ CIVIL COMPLAINT pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346, 2671-2680

I. JURISDICTION

A. Plaintiff's mailing address and/or register number and present place of confinement.

P.O. Box 1000 #98178-131, United States Penitentiary,

~~Leavenworth, Kansas~~

B. Defendant Janet Reno is employed as
(Name of First Defendant)
Former U.S. Attorney General
(Position/Title)

with _____
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes (X) No ( )

If your answer is "yes", briefly explain:

She was the Attorney General Of the United States at the time that this complaint arose and the authority over the Bureau of Prisons.

SCANNED

C. Defendant Kathleen Hawk is employed as
(Name of Second Defendant)
Director of the Bureau of Prisons
(Position/Title)
with 320 First Street, N.W. Washington, D.C. 20534
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes (X) No ( )

If your answer is "yes", briefly explain:

Kathleen Hawk is the Director of the Bureau of Prisons and has the overall responsibility for the protection, care, and safe keeping of the inmates in her charge.

D. Using the outline of the form provided, include the above information for any additional defendant(s).

Phillip Hill, Former Chief Medical Officer, 1300 Metropolitan, Leavenworth, Kansas

D. Shepard, Former Hospital Administrator, 1300 Metropolitan, Leavenworth, Kansas

Mr. Garner, Supervisor of GMS, 1300 Metropolitan, Leavenworth, Kansas

II. PREVIOUS LAWSUITS

A. Have you begun any other lawsuits in state or federal court relating to your imprisonment?

Yes ( ) No (X)

B. If your answer to "A" is "yes", describe the lawsuit(s) in the space below. (If there is more than one (1) lawsuit, you must describe the additional lawsuits on another sheet of paper, using the same outline.) Failure to comply with this provision may result in summary denial of your complaint.

N/A

1. Parties to previous lawsuits:
Plaintiff(s) N/A

Defendant(s) N/A

2. Court (if Federal Court, name the District; if State Court, name the County)
N/A

3. Docket number

4. Name of Judge to whom case was assigned N/A

5. Type of case (for example: Was it a Habeas Corpus or Civil Rights action?)
N/A

6. Disposition of case (for example: Was the case dismissed? Was it appealed? Is it still pending?)
N/A

7. Approximate date of filing lawsuit N/A

8. Approximate date of disposition N/A

III. GRIEVANCE PROCEDURE

A. Is there a prisoner grievance procedure in the institution? Yes

B. Did you present the facts relating to your complaint in the prisoner grievance procedure?
Yes (X) No ( )

C. If your answer is "yes",
1. What steps did you take? I filed an Administative Remedy Form 95, 28. CFR 14.2 Administrative Claim Under Federal Tort Claim Act.

2. What was the result? The plaintiff was denied under 28 CFR §14.9 Final denial of claim.

D. If your answer is "no", explain why not. N/A

E. If there is no prisoner grievance procedure in the institution, did you complaint to prison authorities? Yes ( ) No ( ) N/A

F. If your answer is "yes",
1. What steps did you take? N/A

2. What was the result? N/A

G. If your answer is "no", explain why not. N/A

H. Attach copies of your request for an administrative remedy and the response(s) you received. If you cannot do so, explain why not:

IV. STATEMENT OF CLAIM

State here, as briefly as possible, the FACTS of your case. State who, what, when, where and how you feel your constitutional rights were violated. Do not cite cases or statutes. If you choose to submit legal arguments or citations, you must do so in a separate memorandum of law. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. If your claims relate to prison disciplinary proceedings, attach copies of the disciplinary charges and any disciplinary hearing summary as exhibits.

Only two (2) extra pages (8½ x 11") are permitted, if necessary, to complete your statement of claim. Additionally, attach any relevant, supporting documentation.

On May,5,1998, as the plaintiff was exiting the CMS building he step into a pothole that was left negligently in disrepair, resulting in the plaintiff injuring/fracturing his left lateral tibial plateau. Mr. Garner who is the Supervisor of CMS is directly responsible for insuring that his staff keep the institution in a constant state of repair to facilitate the safety and welfare of inmates and staff alike. Mr. Garner failed in his duty to prevent the plaintiff from fracturing his knee due to his negligence.

DR. Phillip Hill, FORMER (Chief Medical OFFICER WAS Negligent FOR Not INSURING that I RECIEVED PROPER therepy FOR MY INJURY that WAS SUSTAINED HERE AT U.S.P LEAVENWORTH, NOR did he GIVE ME A Follow UP EXAME toward my PERMERNANT Life SUFFERING INJURY.

D. SHEPARD, FORMER Hospital Administrator WAS Negligent IN HER CAPACITY By Not SHEduling ME FOR AN OVERALL EXAME ON my Left KNEE to determine the EXTENT of therepy NEEDED NOR did She OVERSEE the STAFF here At the U.S.P LEAVENWORTH to BRING fouth AN ACCIDENT Report ON MY INJURY

V. REQUEST FOR RELIEF

State exactly what you want the Court to do for you. If you are a state or federal prisoner, and seek relief which affects the fact or duration of your imprisonment (for example: illegal detention, restoration of good time, expungement of records or parole release), you must file your claim on a Habeas Corpus form, pursuant to 28 U.S.C. §2254, 28 U.S.C. §2255, or 28 U.S.C. §2241.

I would like For the Court to Reward Me in Monatary Damages due to the Nature of my Injury I have a Permanant injury For Life and will Suffer From this, Not only do this injury Affect My work But Overall Activitie Etc. I'm Seeking $500,000 Dollars (Five Hundred thousand Dollars

DECLARATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 11

I, the undersigned, certify to the best of my knowledge, information, and belief, that this complaint is in full compliance with Rule 11(a) and 11(b) of the Federal Rules of Civil Procedure. The undersigned also recognizes that failure to comply with Rule 11(a) and (b) may result in sanctions, monetary or non-monetary, pursuant to Federal Rule of Civil Procedure 11(c).

The plaintiff hereby requests the court issue all appropriate service and/or notices to the defendant(s).

Signed this 1 day of March, 2001

Case Manager

AUTHORIZED BY THE ACT OF
JULY 7, 1958, AS AMENDED, TO
ADMINISTER OATHS (28 USC, 1914)

Signature of Plaintiff

Signature of attorney, if any

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101

Date: 5.16.00

Mack Jones
99178-131
LVN

Re: Administrative Claim for Damages
Claim #: 01273 $ 500,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on 5.8.00. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such proper claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until 11.4.00.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et. seq., and §543.30.

Sincerely,

Daryl Kosiak
Regional Counsel

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101-2492

September 6, 2000

MEMORANDUM FOR JONES, Mack; Reg. No. 98178-131
USP Leavenworth

FROM: DARYL KOSIAK, Regional Counsel

SUBJECT: Tort Claim TRT-NCR-2000-01090
Personal Injury: $500,000

Certified Mail Receipt No: 7000 0600 0023 9382 5249

Your above referenced tort claim has been considered for administrative review pursuant to 28 CFR § 0.172, Authority: Federal Tort Claims and 28 CFR Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal that you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 CFR § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than 6 months after the date of mailing of this notification.

Z 138 417

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008 EXPIRES 4-30-94

1. Submit To Appropriate Federal Agency: Mr. John R. Shaw Regional Counsele North Central Region. Kansas City, Kansas 66101-2992

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
Mack Jones #Reg. No. 98178-131 United States Penitentiary P.O Box 1000 Leavenworth, Kansas 66048-1000

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	6-18-53	Single	5-5-98	10:15 A.M

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.) This is a personal Injury Claim being Filed Against, Attorney General Janet Reno, Mrs. Kathleen Hawk Sawyer (Director Federal Bureau of Prisons), Phillip Keith Hill (Chief Medical Officer), D. Shepar (Hospital Administrator), Mr. Garner (Supervisor of C.M.S). On Said date 5-5-98 10:15 A.M date of Injury, I walk out the Front door of C.M.S And Step into A hole in the Cement Walkway twisting My Ankle Causing my Left Knee to Break. Attending Physician Labie The Injury As A Fracture of the Left. Lateral Tibial Plateau.

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT. I Inmate Mack Jones Now Suffer Physica Pains And Mental Anguish, By Prison Medical Personel.

11. **WITNESSES**

NAME	ADDRESS (Number, street, city, State, and Zip Code)
Phillip Keith Hill (Chief Medical Officer) D. Shepard (Hospital Administrator) Mr. Garner (Supervisor of CMS)	United States Penitentiary 1300 Metropolitan Avenue Leavenworth, Kansas 66048-1254

12. (See instructions on reverse) **AMOUNT OF CLAIM** (In dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	Five Hundred Thousand Dollars		$500,000 (Dollars)

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Mack Jones	N/A	4-22-000

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000. plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or Imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☐ No

N/A

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☐ No

N/A

*U.S. Government Printing Office: 1991 — 281-782/40185

IN THE UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

2001 MAR 13 A 10: 16

RALPH L. DELOACH
CLERK
BY _____ DEPUTY
AT TOPEKA, KS.

Mack Jones

Plaintiff/Petitioner(s),

-vs-

Janet Reno-Former Attorney General
Kathleen Hawk-Director(BOP)

Phillip Hill-chief Medical Officer

D. Shepard-Hospital Administrator

~~Mr. Garner- Supervisor of CMS~~

Defendant/Respondent(s).

Docket No. _____
(To be supplied by the Clerk)

01-3094-GTV

☐ CIVIL RIGHTS COMPLAINT pursuant to 42 U.S.C. §1983 (State Prisoner)

☐ CIVIL RIGHTS COMPLAINT pursuant to 28 U.S.C. §1331 (Federal Prisoner)

☒ CIVIL COMPLAINT pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346, 2671-2680

I. JURISDICTION

A. Plaintiff's mailing address and/or register number and present place of confinement.

P.O. Box 1000 #98178-131, United States Penitentiary,

~~Leavenworth, Kansas~~

B. Defendant Janet Reno is employed as
(Name of First Defendant)
Former U.S. Attorney General
(Position/Title)

with _____
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes (X) No ( )

If your answer is "yes", briefly explain:

She was the Attorney General Of the United States at the time that this complaint arose and the authority over the Bureau of Prisons.

Rev. 2/97

SCANNED

C. Defendant Kathleen Hawk is employed as
(Name of Second Defendant)
Director of the Bureau of Prisons
(Position/Title)
with 320 First Street, N.W. Washington, D.C. 20534
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes (X) No ( )

If your answer is "yes", briefly explain:

Kathleen Hawk is the Director of the Bureau of Prisons and has the overall responsibility for the protection, care, and safe keeping of the inmates in her charge.

D. Using the outline of the form provided, include the above information for any additional defendant(s).

Phillip Hill, Former Chief Medical Officer, 1300 Metropolitan, Leavenworth, Kansas

D. Shepard, Former Hospital Administrator, 1300 Metropolitan, Leavenworth, Kansas

Mr. Garner, Supervisor of GMS, 1300 Metropolitan, Leavenworth, Kansas

II. PREVIOUS LAWSUITS

A. Have you begun any other lawsuits in state or federal court relating to your imprisonment?

Yes ( ) No (X)

B. If your answer to "A" is "yes", describe the lawsuit(s) in the space below. (If there is more than one (1) lawsuit, you must describe the additional lawsuits on another sheet of paper, using the same outline.) Failure to comply with this provision may result in summary denial of your complaint.

N/A

1. Parties to previous lawsuits:
Plaintiff(s) N/A

Defendant(s) N/A

2. Court (if Federal Court, name the District; if State Court, name the County)
N/A

3. Docket number N/A

4. Name of Judge to whom case was assigned N/A

5. Type of case (for example: Was it a Habeas Corpus or Civil Rights action?)
N/A

6. Disposition of case (for example: Was the case dismissed? Was it appealed? Is it still pending?)
N/A

7. Approximate date of filing lawsuit N/A

8. Approximate date of disposition N/A

III. GRIEVANCE PROCEDURE

A. Is there a prisoner grievance procedure in the institution? Yes

B. Did you present the facts relating to your complaint in the prisoner grievance procedure?
Yes (X) No ( )

C. If your answer is "yes",
1. What steps did you take? I filed an Administative Remedy Form 95, 28. CFR 14.2 Administrative Claim Under Federal Tort Claim Act.

2. What was the result? The plaintiff was denied under 28 CFR §14.9 Final denial of claim.

D. If your answer is "no", explain why not. N/A

E. If there is no prisoner grievance procedure in the institution, did you complaint to prison authorities? Yes ( ) No ( ) N/A

F. If your answer is "yes",
1. What steps did you take? N/A

2. What was the result? N/A

G. If your answer is "no", explain why not. N/A

H. Attach copies of your request for an administrative remedy and the response(s) you received. If you cannot do so, explain why not:

IV. STATEMENT OF CLAIM

State here, as briefly as possible, the FACTS of your case. State who, what, when, where and how you feel your constitutional rights were violated. Do not cite cases or statutes. If you choose to submit legal arguments or citations, you must do so in a separate memorandum of law. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. If your claims relate to prison disciplinary proceedings, attach copies of the disciplinary charges and any disciplinary hearing summary as exhibits.

Only two (2) extra pages (8½ x 11") are permitted, if necessary, to complete your statement of claim. Additionally, attach any relevant, supporting documentation.

On May, 5, 1998, as the plaintiff was exiting the CMS building he step into a pothole that was left negligently in disrepair, resulting in the plaintiff injuring/fracturing his left lateral tibial plateau. Mr. Garner who is the Supervisor of CMS is directly responsible for insuring that his staff keep the institution in a constant state of repair to facilitate the safety and welfare of inmates and staff alike. Mr. Garner failed in his duty to prevent the plaintiff from fracturing his knee due to his negligence.

DR. Phillip Hill, FORMER (Chief Medical OFFICER WAS Negligent FOR Not INSURING that I RECIEVED PROPER therepy FOR MY INJURY that WAS SUSTAINED here AT U.S.P LEAVENWORTH, Nor did he GIVE ME A Follow up EXAME toward my PERMERNANT LITE SUFFERING INJURY

D. Shepard, FORMER Hospital Administrator WAS Negligent IN HER CAPACITY By Not SHEduling ME FOR AN OVERALL EXAME ON My Left KNEE to determine the EXTENT of therepy NEEDED NOR did She OVERSEE the STAFF here AT the U.S.P LEAVENWORTH to BRING fouth AN ACCIDENT Report ON My INJURY

V. REQUEST FOR RELIEF

State exactly what you want the Court to do for you. If you are a state or federal prisoner, and seek relief which affects the fact or duration of your imprisonment (for example: illegal detention, restoration of good time, expungement of records or parole release), you must file your claim on a Habeas Corpus form, pursuant to 28 U.S.C. §2254, 28 U.S.C. §2255, or 28 U.S.C. §2241.

I would like For the Court to Keward Me in Monatary Damages due to the Nature of my Injury I have a Perm-ernant injury For Life And will Suffer From this, Not only do this injury Affect My work But Overall Activitie Etc. I'm Seeking $500,000 Dollars (Five Hundred thousand Dollars

DECLARATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 11

I, the undersigned, certify to the best of my knowledge, information, and belief, that this complaint is in full compliance with Rule 11(a) and 11(b) of the Federal Rules of Civil Procedure. The undersigned also recognizes that failure to comply with Rule 11(a) and (b) may result in sanctions, monetary or non-monetary, pursuant to Federal Rule of Civil Procedure 11(c).

The plaintiff hereby requests the court issue all appropriate service and/or notices to the defendant(s).

Signed this 1 day of March, ~~19~~ 2001

Case Manager

AUTHORIZED BY THE ACT OF JULY 7, 19[illegible], AS AMENDED, TO ADMINISTER OATHS ([illegible])

Signature of Plaintiff

Signature of attorney, if any

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101

Date: 5.16.00

Mack Jones
98178-131
LVN

Re: Administrative Claim for Damages
Claim #: 01273 $ 500,000.00

Dear Claimant:

This is to notify you of our receipt of your administrative claim for damages under provisions of the Federal Tort Claims Act, Title 28 USC §1346(b), 2671 et. seq., alleging liability of the United States Government.

Your properly completed claim was received on 5.8.00. The above referenced Act provides that the agency has 6 months to make an administrative determination on your claim from the date such proper claim was received by the appropriate agency. Accordingly, in the matter of the above referenced claim, the government's response is not due until 11.4.00.

Regulations that may be pertinent to your claim may be found at Title 28 C.F.R. Part 14 et. seq., and §543.30.

Sincerely,

Daryl Kosiak
Regional Counsel

U.S. Department of Justice
Federal Bureau of Prisons
North Central Region

Kansas City, KS 66101-2492

September 6, 2000

MEMORANDUM FOR JONES, Mack; Reg. No. 98178-131
USP Leavenworth

FROM: DARYL KOSIAK, Regional Counsel

SUBJECT: Tort Claim TRT-NCR-2000-01090
Personal Injury: $500,000

Certified Mail Receipt No: 7000 0600 0023 9382 5249

Your above referenced tort claim has been considered for administrative review pursuant to 28 CFR § 0.172, Authority: Federal Tort Claims and 28 CFR Part 14, Administrative Claims Under Federal Tort Claims Act. Investigation of your claim did not reveal that you suffered any personal injury as a result of the negligent acts or omissions of Bureau of Prisons employees acting within the scope of their employment.

As a result of this investigation, your claim is denied. This memorandum serves as a notification of final denial under 28 CFR § 14.9, Final Denial of Claim. If you are dissatisfied with our agency's action, you may file suit in an appropriate U.S. District Court no later than 6 months after the date of mailing of this notification.

Z 138 417

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008 EXPIRES 4-30-94

1. Submit To Appropriate Federal Agency: MR. John R. Shaw Regional Counsele North Central Region. Kansas City, Kansas 66101-2992

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code) MACK JONES #Reg. No. 98178-131 United States Penitentiary P.O Box 1000 Leavenworth, Kansas 66048-100

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	6-18-53	SINGLE	5-5-98	10:15 A.M

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NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

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Phillip Keith Hill (Chief Medical Officer) D. Shepard (Hospital Administrator) Mr. Garner (Supervisor of CMS)	United States Penitentiary 1300 Metropolitan Avenue Leavenworth, Kansas 66048-1254

12. (See instructions on reverse) **AMOUNT OF CLAIM** (In dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	Five Hundred Thousand Dollars		$500,000 (Dollars)

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
Mack Jones	N/A	4-22-000

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to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

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N/A

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N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance carrier *(Number, street, city, State, and Zip Code)* ☐ No

N/A

Page 1957 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1958 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1959 of 2033

Withheld pursuant to exemption

(b)(5)

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Page 1960 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

RECEIVED

2005 NOV 10 A 11:56

Shook, Hardy & Bacon L.L.P.
www.shb.com

J. Eugene Balloun

84 Corporate Woods
10801 Mastin, Suite 1000
Overland Park
Kansas 66210-1697
913.451.6060
913.451.8879 Fax
eballoun@shb.com

November 9, 2005

David D. Zimmerman
360 U.S. Courthouse
500 State Avenue
Kansas City, KS 66101

Re: **Mack Jones v. United States of America**
Case No. 01-3094-GTV

Dear David:

Pursuant to the Scheduling Order dated October 24, 2005, Plaintiff Mack Jones is hereby submitting a good faith settlement demand in the amount of $10,000.00 to Defendant United States of America.

We look forward to hearing from you. Thank you for your cooperation.

Sincerely,

J. Eugene Balloun

JEB:jrm

Page 1962 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1963 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1964 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1965 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Welcome WILSON J MOORER | Logout

HOME | ALERTS | MY WORK | NEW CASE | SEARCH MAIN | EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2001-01957 **Short Description:** JONES V. USA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	01-3094	Date	
Short Description	JONES V. USA	Type	
Classification	Civil	Reason	
Case Type	fromLP	Sought	Damages
Case Sub-Type	TORT	Amount offered	$
Current Region	NORTH CENTRAL REGIONAL OFFICE	Total Amount Paid	$
Current Institution		Description	
Incident Region		Description	
Incident Institution		Court Fee Paid ?	
Monetary Relief Sought	$500,000.00	Pro Se ?	
Estimated Amount	$		
Office		Date Received	
Jurisdiction	DISTRICT OF KANSAS		
Responsible Legal Office		Date Filed	

Estimated Amount	$ -	Current Owner	NCR0708
Estimated Outcome		Case Status	
		Timeline Status	
		Monthly Report Status	
		Private Case	No

Long Description	
Further Case Classification	FTCA GENERAL
Comments	12545

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FILED
IN CLERKS OFFICE
2006 JAN 24 P 4:09
U.S. DISTRICT COURT
DISTRICT OF MASS.

DANIEL MORGAN,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

06 CA 10155 GAO

MAGISTRATE JUDGE Alexander

C.A. No.

COMPLAINT

RECEIPT # 69822
AMOUNT $ 250.
SUMMONS ISSUED
LOCAL RULE 4.1
WAIVER FORM
MCF ISSUED
BY DPTY. CLK.
DATE 1/25/06

INTRODUCTION

1. This is an action for money damages brought against the United States of America pursuant to the Federal Torts Claims Act, 28 U.S.C. § 2671 *et seq.*, based on negligence of guards employed by the United States who worked at the Federal Prison in Leavenworth, Kansas. On or about January 18, 2003, the guards handcuffed the plaintiff in such a negligent manner as to cause serious and permanent damage to the plaintiff's shoulder.

JURISDICTION

2. This Court has jurisdiction to adjudicate federal questions of law under 28 U.S.C. § 1331 and, more specifically, the federal question of law that arises here under the Federal Torts Claims Act, 28 U.S.C. § 2671 *et seq.*, ("FTCA").

PARTIES

3. The plaintiff, Daniel Morgan ("Morgan"), is a citizen of the United States and resides in Ayer, Massachusetts.

4. The United States is named as defendant for the actions of its branch: The Federal Bureau of Prisons ("FBP"), an arm of the Federal Government.

FACTS

5. On January 17, 2003, Morgan, at that time a prisoner at the Federal Prison in Leavenworth, Kansas (the "Prison"), was cleaning the baseboards in the visitor's room of the Prison when he fainted and hit the back of a wooden chair and then the floor, knocking out two of his front teeth.

6. Morgan was driven by Counselor Williams from the Prison to St. John's Hospital in Leavenworth, Kansas, for treatment.

7. It was determined that Morgan would need his jaw wired for an upper nasal fracture and a front tooth pulled due to instability from hitting the back of the chair.

8. Morgan was "agitated" and was suffering from post-head trauma seizures and possible alcohol withdrawal. Morgan went in and out of a conscious state for the next twenty-four hours.

9. The Prison officers who were "guarding" Morgan at the hospital shackled both of Morgan's legs to the gurney.

10. The Prison officers also, in a highly negligent manner, handcuffed both of Morgan's wrists by first placing Morgan's arms over his head and then spreading them apart to both sides of the gurney, which caused Morgan to be like a butterfly pinned to a board.

11. Morgan's arms and wrists were maintained in this restrained and painful position for approximately 24-36 hours.

12. As a result of this highly negligent handcuffing of Morgan by the Prison officers, both of Morgan's shoulders repeatedly dislocated.

13. Morgan's wrists and ankles were also visibly raw and bruised.

14. Morgan awoke in a very coherent state on the morning of January 19, 2003, and Prison officers finally began to remove the restraints at the rate of approximately one per hour.

15. Morgan's shoulders were so severely injured that he could barely lift his arms to feed himself.

16. Morgan had unbearable pain in his shoulder and could hardly raise his arms.

17. Only after Morgan's incessant complaining of pain were x-rays finally taken of Morgan's shoulders, on April 12, 2003, and April 17, 2003, by Prison staff and a third-party orthopedic doctor, respectively. The x-rays revealed dislocation of the left shoulder with major deformities and a separated right shoulder with major deformities.

18. Despite the fact that the x-rays showed major shoulder problems, the Prison staff would not authorize proper pain medication to alleviate Morgan's pain. Morgan was never given any pain medication beyond glorified aspirin.

19. An MRI examination was eventually performed on Morgan, and an orthopedic surgeon whom the Prison had sent Morgan to stated, based on the MRI, that a replacement was necessary for Morgan's right shoulder and that his left shoulder needed a bone transfusion.

20. On August 21, 2003, Morgan was finally transferred to the Devens Federal Medical Center in Ayer, Massachusetts.

21. The orthopedic surgeon at the Lahey Clinic, Dr. Wilk, informed Morgan of his shock that Morgan's left shoulder had been left in a dislocated condition, at that time for twelve months. Dr. Wilk told Morgan that it would require two operations while the right shoulder would need to be replaced.

22. According to Dr. LeClaire of University of Massachusetts Medical Center, an MRI that had been taken in 2002 prior to Morgan's imprisonment revealed very minor problems to Morgan's right shoulder when compared to the more recent MRI, and there were no prior problems with Morgan's left shoulder.

23. On September 15, 2004, after Morgan's left shoulder had been dislocated for 21 months, Dr. LeClaire performed a four and one-half hour operation on it. The top of the humel head was removed and replaced with a stainless steel head, and the bone from the humel head was used to repair the glenoid socket. As a result of the surgery, a four-inch scar now runs down the front of Morgan's shoulder.

24. Due to the major delay in medical attention, the left and right shoulders continued to deteriorate and ultimately required similar procedures. On June 22, 2005, Dr. LeClaire performed a shoulder replacement on Morgan's right shoulder. The top humeral head was removed and replaced with a stainless steel head.

25. During a consultation on October 28, 2005, Morgan stated to Dr. LeClaire how unhappy he was with the outcome of his shoulder surgeries. Morgan's shoulders look, feel, and operate in a very deformed manner with considerable pain. Dr. LeClaire informed Morgan that additional major surgical procedures on both shoulders would be required in the near future resulting in complete shoulder replacements.

26. Morgan continues to suffer continued pain in both shoulders and is severely limited in his ability to use both shoulders.

27. Because of the gross negligence of the Prison officers, Morgan faces a lifetime of severe shoulder pain and extreme disability in the use of his shoulders. Furthermore, the negligence has taken an enormous emotional toll on Morgan, and caused great pain and suffering.

CAUSE OF ACTION

I. CLAIM UNDER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. § 2671 *ET SEQ.*, FOR NEGLIGENCE.

28. The plaintiff realleges paragraphs 1 through 27 and incorporates them herein.

29. Plaintiff filed a claim for damages that was received by the defendant on January 13, 2005. On August 2, 2005, the claim was denied. Plaintiff was informed in the denial letter that he had six months from that date to file suit.

30. Employees of the Federal Bureau of Prisons and the United States government owed a duty to Morgan to handle him with reasonable care.

31. This duty was violated by employees of the Federal Bureau of Prisons and the United States government in the negligent manner of handcuffing Morgan to the hospital gurney through the forcing of Morgan's arms backward and outstretched behind his head, and secured by his wrists to the gurney in such a fashion as to cause serious and permanent damage to both shoulders. Significant delays in medical attention attributed to the severity of injuries over time.

PRAYER FOR RELIEF

Wherefore the plaintiff asks this Honorable Court grant:

A. Monetary damages to compensate him for the negligently caused damage to his shoulders and also the pain and suffering resulting therefrom, now and in the future, as well as to compensate him for additional surgical procedures and physical therapy;

B. Costs; and

C. Any other relief that justice demands.

A jury trial is hereby demanded.

Respectfully submitted,
DANIEL MORGAN,
By his attorneys,

Stephen B. Hrones (BBO #242860)
HRONES GARRITY & HEDGES, LLP
Lewis Wharf — Bay 232
Boston, MA 02110-3927
(617) 227-4019

DATED: January 24, 2006.

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
DANIEL MORGAN

DEFENDANTS
UNITED STATES OF AMERICA

(b) County of Residence of First Listed Plaintiff MIDDLESEX, MA
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)
STEPHEN HRONES, HRONES, GARRITY & HEDGES LLP, LEWIS WHARF, BAY 232, BOSTON, MA 02110

Attorneys (If Known)

FILED
CLERKS OFFICE
2006 JAN 24 P 4:09
U.S. DISTRICT COURT
DISTRICT OF MASS.

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ■ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	■ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

06 10155 GAO

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	■ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	SOCIAL SECURITY	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other	☐ 861 HIA (1395ff)	☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	☐ 862 Black Lung (923)	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 863 DIWC/DIWW (405(g))	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 864 SSID Title XVI	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt. Reporting & Disclosure Act	☐ 865 RSI (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	FEDERAL TAX SUITS	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	☐ 871 IRS—Third Party 26 USC 7609	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General			☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty			☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other			☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights			☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

■ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
FEDERAL TORT CLAIMS ACT, 28 U.S.C. SEC. 2671 ET SEQ.
Brief description of cause:
NEGLIGENCE OF FEDERAL EMPLOYEES

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ■ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 1/24/06
SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Daniel Morgan v. U.S.A.

2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).

☐	I.	160, 410, 470, 535, R.23, REGARDLESS OF NATURE OF SUIT.
☐	II.	195, 196, 368, 400, 440, 441-444, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950. *Also complete AO 120 or AO 121 for patent, trademark or copyright cases
☑	III.	110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.
☐	IV.	220, 422, 423, 430, 460, 480, 490, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.
☐	V.	150, 152, 153.

3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.

4. Has a prior action between the same parties and based on the same claim ever been filed in this court?
YES ☐ NO ☑

5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)
YES ☐ NO ☑
If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?
YES ☐ NO ☑

6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?
YES ☐ NO ☑

7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).
YES ☑ NO ☐

A. If yes, in which division do all of the non-governmental parties reside?
Eastern Division ☑ Central Division ☐ Western Division ☐

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?
Eastern Division ☐ Central Division ☐ Western Division ☐

8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)
YES ☐ NO ☑

(PLEASE TYPE OR PRINT)
ATTORNEY'S NAME Stephen Hrones
ADDRESS Lewis Wharf, Bay 232, Boston, MA 02110
TELEPHONE NO. (617) 227-4019

(CategoryForm.wpd - 5/2/05)

IN THE UNITED STATES DISTRICT COURT

Robert R. Oleson

Plaintiff/Petitioner(s),

-vs-

U.S. Bureau of Prisons

F.C.I. Oxford

OXford Elect. Dept. Manager

Defendant Respondent(s).

Docket No. 04-3455-GTV
(To be supplied by the Clerk)

☐ CIVIL RIGHTS COMPLAINT pursuant to 42 U.S.C. §1983 (State Prisoner)

☐ CIVIL RIGHTS COMPLAINT pursuant to 28 U.S.C. §1331 (Federal Prisoner)

☒ CIVIL COMPLAINT pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346, 2671-2680

I. JURISDICTION

A. Plaintiff's mailing address and/or register number and present place of confinement.
U.S.P. Leavenworth, Robert R. Oleson, 07729-051
P.O.Box 1000, Leavenworth, KS 66048-1000

B. Defendant U.S. Bureau of Prisons is employed as
(Name of First Defendant)
(Position/Title)
with North Central Regional Office, 400 State St. Tower II
(Employer's Name and Address)
8th Floor, Kansas City, KS 66101

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?
Yes (X) No ( )
If your answer is "yes", briefly explain:
Orderly in Portage Unit at F.C.I. Oxford

Rev 2/97

C Defendant F.C.I. Oxford is employed as
(Name of Second Defendant)
The manager of the electrical department
(Position Title)
with P.O.Box 500, Oxford Wisconsin, 53952
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes (X) No ( )

If your answer is "yes", briefly explain:

He ran the electrical department.

D Using the outline of the form provided, include the above information for any additional defendant(s).

II. PREVIOUS LAWSUITS

A. Have you begun any other lawsuits in state or federal court relating to your imprisonment?

Yes ( ) No (x)

B. If your answer to "A" is "yes", describe the lawsuit(s) in the space below. (If there is more than one (1) lawsuit, you must describe the additional lawsuits on another sheet of paper, using the same outline.) Failure to comply with this provision may result in summary denial of your complaint.

1. Parties to previous lawsuits:
Plaintiff(s) _____

Defendant(s) _____

2. Court (If Federal Court, name the District; if State Court, name the County)
_____

3. Docket number _____

4. Name of Judge to whom case was assigned _____

5. Type of case (for example: Was it a Habeas Corpus or Civil Rights action?)
_____

6. Disposition of case (for example: Was the case dismissed? Was it appealed? Is it still pending?)
_____

7. Approximate date of filing lawsuit _____

8. Approximate date of disposition _____

III. GRIEVANCE PROCEDURE

A. Is there a prisoner grievance procedure in the institution? NO

B. Did you present the facts relating to your complaint in the prisoner grievance procedure?
Yes ( ) No (X)

C. If your answer is "yes",
1. What steps did you take? _____

2. What was the result? _____

D. If your answer is "no", explain why not. _____

E. If there is no prisoner grievance procedure in the institution, did you complaint to prison authorities? Yes ( ) No ( )

F. If your answer is "yes":

1. What steps did you take? _____

2. What was the result? _____

G. If your answer is "no", explain why not. _____

H. Attach copies of your request for an administrative remedy and the response(s) you received. If you cannot do so, explain why not: _____

IV. STATEMENT OF CLAIM

State here, as briefly as possible, the FACTS of your case. State who, what, when, where and how you feel your constitutional rights were violated. Do not cite cases or statutes. If you choose to submit legal arguments or citations, you must do so in a separate memorandum of law. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. If your claims relate to prison disciplinary proceedings, attach copies of the disciplinary charges and any disciplinary hearing summary as exhibits.

Only two (2) extra pages (8½ x 11") are permitted, if necessary, to complete your statement of claim. Additionally, attach any relevant, supporting documentation.

On the morning of October 28, 2003, I removed my cloths from the wash machine and put them in the dryer next to it. When I pushed the start button on the dryer, I received an electrical shock and was thrown against the wall opposite the dryer. I was taken to the medical department and examined. After a couple of hours, I was returned to Portage Unit. Since then, I have had blurred vision in my left eye, daily head aches, and pain in my left shoulder which limits the use of my left arm. I have to take indomiasen for pain three times a day.

V. REQUEST FOR RELIEF

State exactly what you want the Court to do for you. If you are a state or federal prisoner, and seek relief which affects the fact or duration of your imprisonment (for example, illegal detention, restoration of good time, expungement of records or parole release), you must file your claim on a Habeas Corpus form, pursuant to 28 U.S.C. §2254, 28 U.S.C. §2255, or 28 U.S.C. §2241.

I would like relief in the amount of $100,000 for being shocked with 220 volts of electricity, which could have been prevented by proper maintainance by the electrical department at F.C.I. Oxford.

DECLARATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 11

I, the undersigned, certify to the best of my knowledge, information, and belief, that this complaint is in full compliance with Rule 11(a) and 11(b) of the Federal Rules of Civil Procedure. The undersigned also recognizes that failure to comply with Rule 11(a) and (b) may result in sanctions, monetary or non-monetary, pursuant to Federal Rule of Civil Procedure 11(c).

The plaintiff hereby requests the court issue all appropriate service and/or notices to the defendant(s).

Signed this 8 day of December 2004

Robert R. Olson

Signature of Plaintiff

Signature of attorney, if any

Rev. 1/97

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE INFORMATION IS TRUE AND CORRECT. I UNDERSTAND THAT PROVIDING FALSE INFORMATION MAY SUBJECT ME TO CRIMINAL PROSECUTION, IMPOSITION OF A FINE, OR OTHER SANCTION THAT MAY ADVERSELY AFFECT MY ABILITY TO PURSUE THIS CASE OR OTHER CASES. I HAVE REVIEWED MY ANSWERS TO INSURE THEIR ACCURACY.

Executed (signed) this 8 day of December, 2004.

Robert K. Olson

(Signature of Plaintiff)

==========

Authorization for Release of Institutional Account Information and Payment of the Filing Fee

I, Robert K. Olson

(Name of Plaintiff) (Register Number)

authorize the Clerk of Court to obtain, from the agency having custody of my person, information about my institutional account, including balances, deposits and withdrawals. The Clerk of Court may obtain my account information from the past six months and in the future, until the filing fee is paid. I also authorize the agency having custody of my person to withdraw funds from my account and forward payments to the Clerk of Court, in accord with 28 U.S.C. § 1915.

Robert K. Olson

(Signature of Plaintiff)

12-8-04

(Date)

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

FEDERAL BUREAU OF PRISONS
INJURY REPORT — INMATE

1. Institution	2. Name of Injured	3. Register Number
FCI Oxford	Olson, Robert	07749-081

4. Injured's Duty Assignment	5. Injured's Duty Hours	6. Date and Time of Injury
Orderly, Portage	6:30am/3:00pm	10/29/03 9:45am

7. Where Did Injury Happen (be specific as to location)	8. Date and Time Injury Was REPORTED
Central Hallway Portage Cellhouse	10/29/03 10:00am

Completed by Interviewing Supervisor

9. In Your Opinion, Was This Injury: (a) ☐ Work Related ☐ Non Work Related

(b) ☐ Institution ☐ Industry ☐ Recreation ☐ Program or Activity

☒ Other (explain) Convenience item improperly connected.

10. To Whom Was Injury First Reported	11. Part of Body Involved (left knee, etc.)	12. Kind of Injury (burn, cut, etc.)
(b)(6)	Entire Body	Electrical Shock

13. Injured's alleged Witnesses to Injury (staff and inmates)

(b)(6)

14. Injured's Brief Statement as to How Injury Happened. Include Injured's Recommendation for Prevention. (Continue on additional blank sheets, if necessary.) Upon entering Porta - Cellhouse. I observed a washer lying into the central hallway. I notified the necessary departments of the problems. Before the maintenance could be made I observed inmate Olson approach the injury, lean against it and activate the fuse.

● Injured's Signature and Date: Refused to sign Declined to sign statement

15. Supervisor's Statement — Must include: a. Last Safety Talk Given, b. Safety Equipment Provided, c. Whether Safety Equipment in Use, d. Whether Proper Guarding Used, e. Corrective Action Taken. (Continue on additional blank sheets, if necessary)

A. Periodic maintenance by Porta - 1 x Year.
B. None required to use a Cloth Dryer
C. None required to use a Cloth Dryer
D. Post Review
E. Stopped, Unplugged with new dryer cord

● Supervisor's Signature, Title and Date:

16. Medical Description of Injury (refer to BP-Acm 73)

17. This Injury Required:
a. ☐ No Medical Attention
b. ☐ Minor First Aid
c. ☐ Hospitalization — from _____ to _____
d. ☐ Work Time Lost — from _____ to _____
e. ☐ Other (explain)
Total Lost Time Days:

Completed by Safety Manager

18. **COMPUTER CODING**

Inst. Code | Reg. No. | Name (Last, First, MI)

Date of Injury | Dept. | Area | Nature | Body Part | Source

Haz. Fac. | Haz. Act. | Body Type | Object | Activity | Environ.

Distribution — Original—Inmate file
Blue—Safety Office
[illegible] Regional Office
[illegible] Central Office
[illegible] Employee
[illegible] Inmate

BP-S[illegible]
SEP [illegible]

U.S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Institution

P O Box 0500

Oxford, Wisconsin 53952

Inmate Injury Report
Continuation Sheet.

Ref: Inmate Oleson #07729-051

Robert R. Oleson

Continuation of block 14...

Being that the washer was still leaking Inmate Oleson would have to stand in the puddle water that was again pooling in the hallway. Once Inmate Oleson activated the dryer I heard the crackling sound of electrical current and observed Inmate Oleson being tossed against the wall opposite the washer and dryer area. The inmate immediately clutched his chest and appeared to have a very confused look about him. I responded with general questioning "Are you OK, and You'll need to be seen by medical ASAP." Operations Lt and the On Duty PA were notified and the Inmate was assisted to medical by another inmate.*

About mid-afternoon a new washer was put into place and the old defective washer removed, stopping the leaks into the hallway. It was explained that the dryer was improperly installed being that the wires connecting the dryer to the wall socket were not connected properly allowing for a bad ground and the ends of each wire to burn. A new dryer cable was put in place stopping the risk of electrical shock to others.

*inmate

(b)(6)

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

INMATE INJURY ASSESSMENT AND FOLLOWUP

(Medical)

1. Institution	2. Name of Injured	3. Register Number
FCI OXFORD	OLESON, ROBERT	07729-051
4. Injured's Duty Assignment	**5. Housing Assignment**	**6. Date and Time of Injury**
NO -	PRTG.	10/25/03 0845
7. Where Did Injury Happen *(Be specific as to location)*	*Work Related?* ☐ Yes ☒ No	**8. Date and Time Reported for Treatment**
PRTG and LAUNDRY AREA		10/30/03 - 0915

9. Subjective: *(Injured's Statement as to How Injury Occurred/Symptoms as Reported to Patient)*

Patient Claim he got shock wire in his arm on the days of Laundry area. PRTG. Unit. He did not pass out.

H) N. of Stub 10 years ago.

Robert L Oleson
Signature of Patient

10. Objective: *(Observations or Findings from Examination)* X-Rays Taken _____ Not Indicated _____

BP: 130/90 P.R. Normal T. 98.8 **X-Ray Results**

Point Bone in R bicep, Contusion, Wound, Expand 1" quarter Circle, Tip raised, and tingling sensation. EENT-PERRLA

11. ~~Assessment~~ *(Analysis of Facts Based on Subjective and Objective Data)*

Alert, No distress, 4 apnea, No Joint disorg. Hx NSR Lungs clear - Pulses full bilat

~~Plan~~ *(Diagnostic Procedures with Results, Treatment and Recommended Follow-Up)*

Assessment = Referral for medical

Plan: Refer to Dr. Kim or Dr. Nelson.

F/U - Normal.

13. This Injury Required:

- ☐ a. No Medical Attention
- ☐ b. Minor First Aid
- ☐ c. Hospitalization
- ☐ d. Other *(explain)*

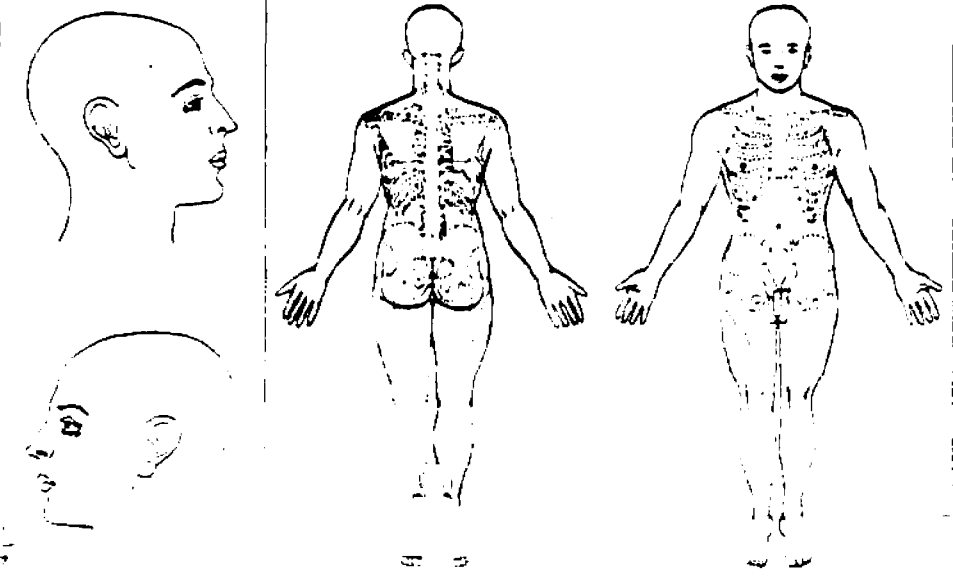
_____

_____

- ☐ e. Medically Unassigned
- ☐ f. Clinician First Aid Only
- ☐ g. Clinician Referred to Community Physician

R. Fuentes, PA-C

(Signature of Physician or Physician's Assistant)



Self Carbonless Form - No Carbon Paper Necessary PRESS HARD

Physician Initial Date

Date

Title Name (Printed) Work Telephone

Institutional Official Initial Date

BP-S298
OCT JANY 95

From: Vincent Shaw
To: Reed, James ; Varga, Andrew
Date: 6/2/2006 1:05:25 PM
Subject: Robert Oleson's Trial has been canceled

Dr. Reed and Mr. Varga,

The June 19th trial of inmate Robert Oleson's case has been canceled. We settled this case today for $3,500. After the final pre-trial conference today, I think he realized that accepting our prior settlement offer was his best option. Thanks for your assistance.

Vincent E. Shaw, Senior Attorney-Advisor
U.S. Department of Justice
Federal Bureau of Prisons
Metropolitan Correctional Center
71 W. Van Buren
Chicago, IL 60605
(work) (312) 322-0567 ext. 432
(fax) (312) 322-9968

CC: Bortz, Vickie

U.S. Department of Justice

Office of the
United States Attorney
Western District of Wisconsin

Telephone 608/264-5158
TTY 608/264-5006
Main Facsimile 608/264-5172
Criminal Division Facsimile 608/264-5054
Civil Division Facsimile 608/264-5724
Administrative Facsimile 608/264-5183

Address:
Suite 303, City Station
660 West Washington Avenue
Madison, Wisconsin 53703

Mailing Address:
United States Attorney's Office
P.O. Box 1585
Madison, Wisconsin 53701-1585

June 5, 2006

Mr. Robert R. Oleson
Register Number 07729-051
c/o United States Penitentiary
P.O. Box 12015
Terre Haute, Indiana 47801

RE: *Robert R. Oleson v. United States of America*
Case Number 05-C-0033-C (Western District of Wisconsin)

Dear Mr. Oleson:

Accompanying this letter is the Stipulation and Order for Settlement of this case.

I have signed on behalf of the United States. Please sign at the place indicated at the end of the agreement. When I have received the signed agreement, I will file it with the court for approval. I will also submit a request for payment of the settlement amount from the judgment fund. The proceeds will be mailed directly to the Bureau of Prisons Lockbox for deposit to your account. You should expect to see the deposit in six to eight weeks.

Very truly yours,

STEPHEN P. SINNOTT
United States Attorney

By:

STEVEN PRAY O'CONNOR
Assistant United States Attorney

SPOC/vld
Enclosures

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT R. OLESON, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. 05-C-0033-C

STIPULATION AND ORDER
FOR COMPROMISE SETTLEMENT AND RELEASE OF
FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff and the United States of America, by and through its undersigned counsel, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation and Order for Compromise and Settlement and Release of Claims (Hereinafter "Settlement Agreement").

2. The United States of America agrees to pay the sum of ThreeThousand Five Hundred Dollars ($3,500.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences

thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Settlement Agreement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Settlement Agreement is not, is in no way intended to be, and should not be construed as, an admission of liability on the part of the United States, its agents,

servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff, if any, will be paid out of the settlement amount and not in addition thereto.

6. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

7. Payment of the settlement amount will be made by check drawn on the United States Treasury for Three Thousand Five Hundred Dollars ($3,500.00) and made payable to Robert R. Oleson, Reg. No. 07729-051. The check will be mailed to the Bureau of Prisons Lockbox at the following address: Post Office Box 474701, Des Moines, Iowa 50947-0001, for deposit to the inmate account of Robert R. Oleson, Reg. No. 07729-051. Upon receipt of the settlement amount, the complaint will be dismissed with prejudice and without cost.

8. The parties agree that this Settlement Agreement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

9. It is contemplated that this Settlement Agreement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Dated this 5th day of June, 2006.

STEPHEN P. SINNOTT
UNITED STATES ATTORNEY

By

STEVEN PRAY O'CONNOR
Assistant United States Attorney
Attorney for Defendant,
United States of America

Dated this _____ day of _____, 2006.

_____
Robert R. Oleson, Plaintiff
Pro se

IT IS SO ORDERED:

By the Court

_____
BARBARA B. CRABB
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT R. OLESON, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 05-C-0033-C

STIPULATION REGARDING SETTLEMENT OF CLAIM

The parties, Plaintiff Robert R. Oleson, *pro se*, and United States of America, Defendant, by its attorneys Stephen P. Sinnott, United States Attorney for the Western District of Wisconsin, and Steven Pray O'Connor, Assistant United States Attorney for said district, stipulate and agree as follows:

1. Robert R. Oleson, the plaintiff in this pending action against the United States of America, has brought a claim pursuant to the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) seeking damages related to an electric shock he suffered at FCI Oxford, Wisconsin, on October 28, 2003.

2. The Defendant United States of America and Robert R. Oleson intend to resolve the claim without the need for a trial.

3. To resolve Mr. Olson's claim in the above-captioned case, the United States agrees to pay to Robert R. Oleson, Reg. No. 07729-051, the sum of Three Thousand Five Hundred dollars ($3,500.00).

4. In exchange for the payment of $3,500.00, Robert R. Oleson agrees to dismiss this action with prejudice and without costs.

5. The parties agree that counsel for the Defendant will prepare a formal settlement agreement and forward it to the plaintiff not later than June 5, 2006, for his immediate review and signature.

Dated this ___ day of June, 2006.

Robert R. Oleson, *pro se*
c/o United States Penitentiary
P.O. Box 12015
Terra Haute, Indiana 47801

Dated this ___ day of June, 2006.

United States of America

Stephen P. Sinnott
United States Attorney
Western District of Wisconsin

By:_____
Steven Pray O'Connor
Assistant United States Attorney
Attorney for Defendant
State Bar No. 1007192
Suite 303, City Station
600 West Washington Avenue
P.O. Box 1585
Madison, WI 53701-1585
(608) 264-5158
Fax: (608)264-5724

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 02-3670 JNE/RLE

GERALD SACHSENMAIER,

Plaintiff,

v.

UNITED STATES OF AMERICA)

Defendant.

ORDER OF DISMISSAL

Based upon the Stipulation of Dismissal executed by the parties hereto,

IT IS ORDERED that the above-entitled matter may be and it is hereby dismissed, with prejudice, and on the merits without further cost to either party.

Dated: July 20, 2004

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 02-3670 JNE/JGL

GERALD SACHSENMAIER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	STIPULATION FOR
	)	COMPROMISE SETTLEMENT
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

It is hereby stipulated by and between Gerald Sachsenmaier, Plaintiff, and the United States of America, Defendant, by and through their respective attorneys as follows:

1. The parties do hereby agree to settle and compromise the above-entitled action under the terms and conditions set forth herein.

2. The United States of America, Defendant, agrees to pay to the Plaintiff the sum of five thousand dollars ($5,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the same subject matter that gave rise to the above-captioned lawsuit, including any claims for wrongful death, for which Plaintiff or his heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire

against the United States of America, its agents, servants, and employees.

3. Plaintiff and his heirs, executors, administrators or assigns hereby agree to accept the sum of five thousand dollars ($5,000.00), in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which he may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, including any future claim for wrongful death. Plaintiff and his heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of the

United States, its agents, servants, or employees, and is entered into by both parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

5. It is also agreed, by and among the parties, that the settlement amount of five thousand dollars ($5,000.00) represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses and that any attorneys fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. Payment of the settlement amount will be made by a check drawn on the Treasury of the United States for five thousand dollars ($5,000.00) and made payable to Gerald Sachsenmaier, Plaintiff, and Jeff Scott Olson, Plaintiff's attorney. The check will be mailed to Plaintiff's attorney at the following address: 131 W. Wilson Street, Suite 1200, Madison, Wisconsin, 53203. Plaintiff's attorney agrees to distribute the settlement proceeds to the Plaintiff.

8. In consideration of the payment of five thousand dollars ($5,000.00) as set forth above, Plaintiff agrees that he will cause his attorney to execute and file with the court such documents as

shall be necessary to cause the above-styled action to be dismissed with prejudice from the docket of the court.

Executed this 9th day of June, 2004.

THOMAS B. HEFFELINGER
United States Attorney

s/ Gerald Sachsenmaier
GERALD SACHSENMAIER
Plaintiff

s/ Jeff Scott Olson
JEFF SCOTT OLSON
Attorney for Plaintiff

s/ Mary Jo Madigan
BY: MARY JO MADIGAN
Assistant U. S. Attorney
Attorney ID No. 66266
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600
Attorneys for Defendant,
United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOSEPH W. BUECHEL,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Civil No. **08-132-JPG-CJP**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

PROUD, Magistrate Judge:

Before the Court is plaintiff Joseph W. Buechel's motion for appointment of counsel. **(Doc. 8).** Plaintiff argues that, although he is being assisted by another inmate, counsel is necessary because he is functionally illiterate and dyslexic, the medical issues and discovery are beyond a layman's ken, and his efforts to secure counsel and litigate this action have been impeded by prison officials, who have now transferred him to another prison.

There is no constitutional or statutory right to appointment of counsel in a civil case, although the Court may in its discretion appoint counsel to represent indigent civil litigants. ***Jackson v. County of McLean*, 953 F.2d 1070, 1071 (7th Cir. 1992); *see also* 28 U.S.C. § 1915(d).** Nevertheless, the Court also has inherent authority to appoint counsel to ensure the orderly prosecution of litigation in the district. The Court must inquire whether, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" ***Farmer v. Haas,* 990 F.2d 319, 322 (7th Cir. 1993); *see also Greeno v. Daley*, 414 F.3d 645, 658(7th Cir. 2005); *see also Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007).** The Court of Appeals for the Seventh Circuit

clarified in *Pruitt v. Mote* that relevant inquiry is whether the difficulty of the case exceeds the particular plaintiff's capacity as a layperson to coherently litigate the case– pretrial and at trial. ***Id.***

Plaintiff has substantiate a single, unsuccessful attempt to secure representation, from the Illinois Bar Association. The Bar Association does not represent individuals, it is a professional organization. The Bar Association forwarded plaintiff's request to The Lawyer Finder Service, which informed plaintiff that none of its attorneys would take on the case since plaintiff was in West Virginia and could not meet with them. Therefore, the Court considers plaintiff to have reasonably attempted to secure counsel, to no avail.

Plaintiff, who is in federal custody, has filed a Federal Tort Claim Action (28 U.S.C. § 2671, et seq.) alleging medical malpractice and negligence related to a staph infection he contracted while housed at FCI-Greenville, in the Southern District of Illinois. After this action was filed, plaintiff was transferred to an institution in West Virginia, and he has most recently been transferred to an institution in Pennsylvania. Therefore, plaintiff's current ability to proceed pro se is unknown, with respect to legal research and whether he is being assisted in any manner now that he is in a new institution.

Insofar as plaintiff asserts that he is functionally illiterate and dyslexic, the Court notes that those facts were not made apart of the affidavits submitted in support of the motion. Plaintiff's affidavit does not indicate his level of education, whether he was in special education classes, and whether he has been formally diagnosed with dyslexia or other learning disability, or whether he is self-diagnosed. To date, plaintiff's pleadings have all been very cogent and well drafted, complete with citations to authority and analysis. However, the Court does note that

there appears to be a pleading defect regarding the absence of a certificate of merit (currently the subject of a motion to dismiss), that cannot necessarily be remedied by the appointment of counsel. In any event, all that the Court can discern at this juncture is that, as of the date of his transfer from West Virginia, his need for assistance of counsel was not evident.

IT IS THEREFORE ORDERED that plaintiff's motion for appointment of counsel **(Doc. 8)** is **DENIED**. In accordance with *Pruitt v. Mote*, the Court always remains open to appointing counsel, as circumstances change and upon the filing of another motion for appointment of counsel.

IT IS SO ORDERED.

DATED: December 11, 2008

s/ Clifford J. Proud
CLIFFORD J. PROUD
U. S. MAGISTRATE JUDGE

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2008-01348 **Short Description:** BUECHEL V. UNITED STATES OF AMERICA ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	3:08-cv-00132-JPG-CJP	Date	11/26/2014
Short Description	BUECHEL V. UNITED STATES OF AMERICA ET AL	Type	Settled
		Reason	
Classification	Civil	Sought	
Case Type	FTCA-Personal Injury	Amount offered	$
Case Sub-Type	Medical	Total Amount Paid	$14,000.00
Current Region	NORTH CENTRAL REGIONAL OFFICE	Description	
Current Institution	Greenville (FCI)	Description	
Incident Region	NORTH CENTRAL REGIONAL OFFICE	Court Fee Paid ?	No
Incident Institution	Greenville (FCI)	Pro Se ?	No
Monetary Relief Sought	$2,500,000.00		
Estimated Amount	$	Date Received	07/14/2008
Office	East St. Louis		
Jurisdiction	SOUTHERN DISTRICT OF ILLINOIS	Date Filed	02/25/2008
Responsible Legal Office	St. Louis, MO		

Estimated Amount	$ -	Current Owner	HEATHER MACCONNELL
Estimated Outcome	No evaluation can be made at this time	Case Status	Closed
		Timeline Status	Closed
		Monthly Report Status	SETTLEMENTS/AWARDS
		Private Case	No

Long Description	
Further Case Classification	COMPLAINS THAT HE CONTRACTED MRSA - ALLEGES FAILURE TO QUARANTINE - IMPROPER TREATMENT
Comments	

a22

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased	)	
Plaintiff,	)	
	)	**No. 09 C 2287**
v.	)	
	)	**Judge Ruben Castillo**
THE UNITED STATES OF AMERICA, UNKNOWN CORRECTIONAL OFFICER ONE, and UNKNOWN CORRECTIONAL OFFICER TWO,	)	
Defendants.	)	

ORDER

This Court expressly on the record enters factual and legal findings in favor of Plaintiff on liability and against the Defendants. Judgment on liability only is entered in favor of the Estate of Habib Solebo against the United States for all the reasons stated in open court. The Court expressly finds that Plaintiff established by a preponderance of the evidence that Defendants violated the appropriate standard of care to Mr. Solebo and that Defendants' negligent failure to comply with that standard proximately caused Mr. Solebo's death in a reasonably foreseeable manner during his ongoing treatment for a seizure disorder. Specifically, Plaintiffs offered evidence to a reasonable degree of medical certainty that Defendants' negligent failure to consult with Mr. Solebo after February 2007, obtain the results of a blood draw, and appropriately monitor whether Mr. Solebo was taking the prescribed medication to treat his seizure disorder lessened the effectiveness of the medical treatment Mr. Solebo received. The

temporal proximity of these events, coupled with a lack of informed consent, Dr. Jones' testimony, and her autopsy report all support the Court's proximate cause finding.

The Court expressly credits the testimony of Dr. Jones and Dr. Holtzman and discredits the testimony of Dr. Ebersole and Dr. Curlin to the extent stated in open court.

The Court further finds that Mr. Solebo bears some contributory negligence on his part for failure to take his prescribed medication. Said negligence, however, is less than 50% and a precise amount will be determined following the damages trial.

The Court will retain jurisdiction to enter a final and appealable judgment. Damages trial is set for June 4, 2012, at 9:45 A.M. A hearing on plaintiff's remaining motion in limine is set for April 3, 2012 at 10:00 A.M. A full, written and appealable decision will follow at the conclusion of the damages trial.

Entered: 

Judge Ruben Castillo
United States District Court

Date: March 15, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased.	)	
Plaintiff.	)	
-vs-	)	No.09CV2287
THE UNITED STATES OF AMERICA,	)	Chief Judge Castillo
	)	Magistrate Judge Denlow
Defendants.	)	

MOTION TO APPROVE DISTRIBUTION OF THE SETTLEMENT PROCEEDS

NOW COMES the Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, by her attorney's GOLDSTEIN, FLUXGOLD & BARON, P.C., and requests this Honorable Court for entry of an Order approving distribution of the settlement proceeds in the above-captioned matter. In support of this motion, Plaintiff states as follows:

INTRODUCTION and SETTLEMENT

1. That on September 3, 2013, the final judgment and memorandum in this case was entered in favor of the Plaintiff and awarding Plaintiff and decedent's minor child $1,615,000.00 in damages. Said amount was reduced by the Plaintiff's decedent's contributory negligence by 33% and an additional 10% reduction for risk of conviction. After the reduction, the net total Wrongful Death damages awarded to the Plaintiff and decedent's minor child was $920,500.00.

2. That pursuant to said final judgment, the total net judgment was apportioned as follows: $897,750.00 to the Plaintiff's daughter for loss of society and $22,800.00 to Plaintiff for loss of consortium.

3. That the judgment was rendered by this Honorable Court in the Northern District of Illinois pursuant to Section 1346(b) of the Federal Tort Claims Act. 28 USCS §1346(b).

4. That on November 1, 2013, the Defendant, THE UNITED STATES OF AMERICA, filed its Notice of Appeal appealing the September 3, 2013 final judgment with United States Court of Appeals for the Seventh Circuit.

5. That after settlement discussions in accordance with the Federal Rules of Appellate Procedure, this matter has been settled by the parties for a sum in the amount of seven hundred thousand dollars ($700,000.00).

6. That the settlement of this matter was made in accordance with 28 USCS §2677 of the Federal Tort Claims Act.

DISTRIBUTION OF PROCEEDS

(a) ATTORNEY'S FEES and COSTS

1. The Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, contracted to pay Plaintiff's attorneys, GOLDSTEIN, FLUXGOLD & BARON, P.C., an attorney's fee of ONE-THIRD (1/3) of the gross settlement and/or judgment plus costs. Pursuant to 28 USCS §2678 of the Federal Tort Claims Act, the attorney's fees shall not exceed "25 per centum" of any judgment or settlement made in accordance with 28 USCS §1346(b) or 28 USCS §2677.

2. Plaintiff's attorneys are entitled to attorney's fees equal to 25% of the gross settlement amount $700,000.00, for a sum in the amount of One Hundred Seventy-Five Thousand Dollars ($175,000.00 (reduced from $233,333.33)).

3. In addition to the aforementioned fee, the Plaintiff's attorneys incurred costs in the sum of Forty Six Thousand Four Hundred Ninety-Four Dollars and Ninety-One Cents ($46,494.91). Said expenses are itemized as follows:

• Alexandra Roth, CSR, Ltd., Transcript 7/15/10 hearing	$ 58.20
• Atkinson Baker, Dep. Trans. Dr. Spencer	$ 515.00
• Beth Astrowski, Reimbursement Trial Costs	$ 145.01
• Carlisle M. Strening & Son, Renewal Bond Probate Solebo	$ 50.00
• Chuhak & Tecson, Probate Estate Fees	$ 2,660.80
• Cindy Fluxgold, Reimbursement Trial Costs	$ 221.22
• Cook County Coroner, Habib Solebo autopsy report	$ 20.00
• Dr. Arthur Hoffman, Subpoena Witness travel fee	$ 40.00
• Dr. Arthur Hoffman, Trial Subpoena Fee	$ 53.00
• Dr. Nancy Jones, Trial Subpoena Fee	$ 45.00
• Federal District Complaint Filing Fee	$ 350.00
• Gunther Polak, Service Fees	$ 1,437.00
• Harold Washington College, school transcripts	$ 5.00
• Kathleen M. Fennell, RMR, FCRR, Trial Transcripts	$ 884.00
• Law Bulletin Publishing Company, Jury Verdict Reporter Search	$ 170.00
• Lisit Court Reporting Service, Deposition Transcripts	$ 252.50
• Lorenzo Valladolid, Reimbursement Trial Costs	$ 142.82

• Medical Consult	$ 500.00
• Michael Baron, Deposition Travel Expenses	$ 2,149.57
• Michael Baron, Reimbursement Trial Costs	$ 86.64
• Michael Rathsack, Trial Research and Appeal Costs	$ 7,417.95
• National Court Reporters, Deposition Transcript	$ 493.80
• Patti Blair Court Reporters, Deposition Transcripts and Appearance	$ 13,755.90
• Romanucci & Blandin, LLC, Prior File Reproduction	$ 1,393.89
• Sandra Wilson, subpoena travel fees	$ 150.00
• Scott Goldstein, Reimbursement Costs	$ 47.00
• Steven Holtzman, M.D., Trial Expert Fee and Costs	$ 13,389.40
• Thorek Hospital and Medical Center, Medical Records	$ 20.00
• Truman College, school transcripts	$ 5.00
• UPS, Costs	$ 36.21
TOTAL	**$ 46,494.91**

4. Petitioner's Attorney's Fees and Costs total in the amount of Two Hundred Twenty-One Thousand Four Hundred Ninety-Four Dollars and Ninety-One Cents ($221,494.91).

(b) LIENS

5. That during the pendency of this matter, Plaintiff, Dominique Ford-Sholebo, required and obtained loans with liens from Mordy's Kosher Express, LLC (lender) for a total repayment in the amount of Thirteen Thousand Fifty-Eight Dollars and Four Cents ($13,058.04). Said loans were needed to cover family and living expenses, including but not limited to money to pay rent to avoid eviction of Plaintiff and Plaintiff's daughter from their residence.

6. That Mordy's Kosher Express, LLC (lender) has an August 7, 2012 lien from a loan in this matter in the amount of seven thousand two hundred eight dollars and four cents ($7,208.04).

7. That Mordy's Kosher Express, LLC (lender) has an additional October 10, 2012 lien from a loan in this matter in the amount of Five Thousand Eight Hundred Fifty Dollars ($5,850.00).

8. That the total amount to be paid in satisfaction of Mordy's Kosher Express, LLC (lender) liens is Thirteen Thousand Fifty-Eight Dollars and Four Cents ($13,058.04).

SUMMARY and FINAL ACCOUNTING

9. Petitioner requests that this Court approve the following itemized distribution of proceeds from the settlement for Attorney's fees and expenses, and outstanding liens:

Goldstein, Fluxgold & Baron, P.C.- Attorneys' Fees reduced from $233,333.33.....	$ 175,000.00
Goldstein, Fluxgold & Baron, P.C.- Expenses and Costs	$ 46,494.91
Mordy's Kosher Express, LLC (lender)- Lien	$ 7,208.04
Mordy's Kosher Express, LLC (lender)- Lien	$ 5,850.00
TOTAL	**$ 234,552.95**

10. That after the aforementioned distribution of proceeds from the $700,000.00 settlement amount, the net proceeds available to the Plaintiff and Plaintiff's daughter, total in the amount of Four Hundred Sixty Five Thousand Four Hundred Forty-Seven Dollars and Five Cents ($465,447.05).

11. That per the prior apportionment by this Court's September 3, 2013 judgment order, Plaintiff's daughter's loss of society claim was awarded 97.5% of the total judgment ($897,750/$920,500). Plaintiff's loss of consortium claim was awarded 2.5% of the total judgment ($22,800.00//$920,500).

12. Accordingly, Plaintiff requests this Court to approve the distribution of 2.5% of the net proceeds in the amount of Eleven Thousand Six Hundred Thirty-Six Dollars and Seventy-Three Cents ($11,636.18) to the Plaintiff, Dominique Ford-Sholebo.

13. That the Plaintiff request that the Court approve payment of 97.5% of the net proceeds in the amount of Four Hundred Fifty-Three Thousand Eight Hundred Ten Dollars and Eighty-Seven Cents ($453,810.87) to Dominique Ford-Sholebo for the benefit Plaintiff's daughter, _____ _____, a minor. Said funds to be placed into a minor's estate opened in the Probate Court of Cook County and deposited into an account in the name of the minor to be held subject to further order of the Probate Court of the Circuit Court of Cook County.

Wherefore, Plaintiff, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, prays that this Honorable Court enter an Order to:

a. Approve the distribution of the aforementioned settlement proceeds as itemized below:

Goldstein, Fluxgold & Baron, P.C.- Attorneys' Fees reduced from $233,333.33.....	$ 175,000.00
Goldstein, Fluxgold & Baron, P.C.- Expenses and Costs	$ 46,494.91
Mordy's Kosher Express, LLC (lender)	$ 7,208.04

Mordy's Kosher Express, LLC (lender)	$ 5,850.00
Plaintiff, Dominique Ford-Sholebo	$ 11,636.18
Dominique Ford-Sholebo, for the benefit of Plaintiff's daughter, _____, a minor, subject to further order of the Probate Court in the Circuit Court of Cook County	$ 453,810.87
TOTAL	**$700,000.00**

b. For any additional relief deemed just by this Court.

By: _____
Dominique Ford-Sholebo

By: _____
One of Plaintiff's Attorneys

Atty. Name: Cindy G. Fluxgold
Firm Name: Goldstein, Fluxgold & Baron, P.C.
Atty. for Petitioner: Dominique Ford-Sholebo
Address: 33 N. Dearborn St., Suite 950
City/Zip: Chicago, IL 60602
Telephone: 312/726-7772

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased,	)	
Plaintiff,	)	
-vs-	)	No.09CV2287
THE UNITED STATES OF AMERICA,	)	Chief Judge Castillo Magistrate Judge Denlow
Defendants.	)	

NOTICE OF MOTION

On March 4, 2014 at 9:45 A.M., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Chief Judge Ruben Castillo or any Judge sitting in his/her stead in the Courtroom usually occupied by him in courtroom 2541 of the Everett McKinley Dirksen Building, 219 South Dearborn St., Chicago, Illinois, and shall then and there move this Honorable Court pursuant to the attached Motion.

CERTIFICATE OF FILING AND SERVICE

I, Lorenzo Valladolid, hereby certify that on February 27, 2014, I filed and served:

Notice of Motion
Plaintiff's Motion to Approve Distribution of the Settlement Proceeds

These documents were filed on February 27, 2014, with the Clerk of Court using the CM/ECF system which will send notification of such filings to the following:

Attorneys for THE UNITED STATES OF AMERICA.
Mr. Patrick J. Fitzgerald, United States Attorney
Mr. Jonathon Haile, Assistant United States Attorney
219 S. Dearborn Street,
Chicago, IL 60604
312/886-2055
312/886-4073 – Fax

GOLDSTEIN, FLUXGOLD & BARON, P.C.

Goldstein, Fluxgold & Baron, P.C.
33 N. Dearborn Street
Suite 950
Chicago, Illinois 60602

By /s/ Lorenzo Valladolid
One of the attorneys for plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, Plaintiff,	)	
-vs-	)	No.09CV2287
THE UNITED STATES OF AMERICA,	)	Chief Judge Castillo
	)	Magistrate Judge Denlow
Defendants.	)	

ORDER OF DISMISSAL PURSUANT TO SETTLEMENT

This cause coming to be heard before the Court on the Plaintiff's, DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased, Motion to Approve Distribution of the Settlement Proceeds in the above-captioned matter, due notice being given, and the Court being fully advised:

IT IS HEREBY ORDERED:

1. Findings of Fact and conclusions of law were entered on September 3, 2013, and the Defendant, THE UNITED STATES OF AMERICA, subsequently appealed the decision of the District Court to the Seventh Circuit Court of Appeals, No. 13-3450.

2. During the pendency of the appeal, the parties reached a settlement agreement in the amount of $700,000.00, and the Court of Appeals has remanded the case to the District Court for further findings and dismissal.

3. The District Court makes the following findings:

   a. The amount of the settlement is fair and reasonable;

   b. Litigation expenses of $46,494.91 are fair and reasonable;

   c. Attorneys' fees in the amount of $175,000.00 (25% of the settlement amount) are approved pursuant to 28 U.S.C. 2678;

   d. That the total amount of $13,058.04 to be paid in full and final satisfaction of the Mordy's Kosher Express, LLC (lender) liens is fair and reasonable;

   e. That the net settlement proceeds available to the Plaintiff and Plaintiff's daughter, $465,447.05, are to be distributed pursuant to the prior apportionment

found by this Court's September 3, 2013 judgment order;

f. The distribution of 2.5% of the net proceeds in the amount of $11,636.18 to the Plaintiff, Dominique Ford-Sholebo, is fair and reasonable;

g. The distribution of 97.5% of the net proceeds in the amount of $453,810.87 to Dominique Ford-Sholebo for the benefit Plaintiff's and Plaintiff's Decedent's daughter, ___REDACTED__, a minor, is fair and reasonable.

h. This Cause is dismissed in its entirety, with prejudice, pursuant to the settlement agreement, each party bearing its own costs.

i. The Court shall retain jurisdiction for the purposes of enforcing the settlement agreement.

j. The net proceeds distributable to Dominique Ford-Sholebo for the benefit Plaintiff's and Plaintiff's Decedent's daughter, ___REDACTED__, a minor, shall be placed into a minor's estate opened in the Probate Court of Cook County and deposited into an account in the name of the minor to be held subject to further order of the Probate Court of the Circuit Court of Cook County.

ENTER: _____

Chief Judge Ruben Castillo

DATED: _____

Atty. Name: Cindy G. Fluxgold

Firm Name: Goldstein, Fluxgold & Baron, P.C.
Atty. for Petitioner: Dominique Ford-Sholebo
Address: 33 N. Dearborn St., Suite 950
City/Zip: Chicago, IL 60602
Telephone: 312/726-7772

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOMINIQUE FORD-SHOLEBO, individually and as Administrator of the Estate of HABIB SOLEBO, deceased,	)	
Plaintiff,	)	No. 09 C 2287
v.	)	Judge Castillo
UNITED STATES OF AMERICA,	)	
Defendant.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of seven hundred thousand dollars ($700,000), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or

PLAINTIFF'S EXHIBIT B

plaintiff's guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and plaintiff's guardians, heirs, executors, administrators, and assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants, or employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and plaintiff's guardians, heirs, executors, administrators, and assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and between the parties that pursuant to 28 U.S.C. § 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

7. The persons signing this Stipulation for Compromise Settlement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. Plaintiff must obtain court approval of the settlement at her expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such court approval, the entire Stipulation for Compromise Settlement and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Citibank, NA
B. 69 W. Washington St.
C. Chicago, Illinois 60602
D. Routing Number: (b)(6)
E. Name of Account: Goldstein, Fluxgold & Baron, P.C.
F. Account No. (b)(6)

Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation for Compromise Settlement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

11. This stipulation contains the entire agreement between the parties with respect to the subject of this litigation and supersedes all prior negotiations and writings regarding this matter. Any modification of this stipulation may be made only in a writing signed by or on behalf of all parties.

Attorney for defendant:

ZACHARY T. FARDON
United States Attorney

By: s/ Jonathan C. Haile
JONATHAN C. HAILE
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois
(312) 886-2055
jonathan.haile@usdoj.gov

Executed this ____ day of February, 2014.

Attorney for plaintiff:

CINDY FLUXGOLD
GOLDSTEIN, FLUXGOLD & BARON, P.C.
33 N. Dearborn St., Suite 950
Chicago, Illinois 60602
(312) 726-7772
cfluxgold@gfblaw.net

Executed this 10 day of February, 2014.

Attorney for defendant:

ZACHARY T. FARDON
United States Attorney

By _____
JONATHAN C. HAILE
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois
(312) 886-2055
jonathan.haile@usdoj.gov

Executed this 11th day of February, 2014.

Attorney for plaintiff:

_____
CINDY FLUXGOLD
GOLDSTEIN, FLUXGOLD & BARON, P.C.
33 N. Dearborn St., Suite 950
Chicago, Illinois 60602
(312) 726-7772
cfluxgold@gfblaw.net

Executed this _____ day of February, 2014.

Welcome WILSON J MOORER | Logout

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2009-00691 **Short Description:** FORD-SHOLEBO V. THE UNITED STATES OF AMERICA ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:09-cv-02287
Short Description	FORD-SHOLEBO V. THE UNITED STATES OF AMERICA ET AL
Classification	Civil
Case Type	FTCA-Wrongful Death
Case Sub-Type	Medical
Current Region	NORTH CENTRAL REGIONAL OFFICE
Current Institution	Chicago (MCC)
Incident Region	NORTH CENTRAL REGIONAL OFFICE
Incident Institution	Chicago (MCC)
Monetary Relief Sought	$40,000,000.00
Estimated Amount	$
Office	Chicago
Jurisdiction	NORTHERN DISTRICT OF ILLINOIS - CM/ECF LIVE, VER 3.2.2
Responsible Legal Office	St. Louis, MO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Date	02/28/2014
Type	Settled
Reason	
Sought	
Amount offered	$700,000.00
Total Amount Paid	$700,000.00
Description	SETTLED PENDING APPEAL AFTER ADVERSE DECISION BY LOWER COURT
Description	SETTLED PENDING APPEAL AFTER ADVERSE DECISION BY LOWER COURT
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation

Date Received	04/22/2009
Date Filed	04/15/2009

Case Progression

Current Owner	AMY STANDEFER MALOTT
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SIGNIFICANT DECISIONS OR ADVERSE DECISIONS
Private Case	No

Additional Case Information

Long Description	42:1985 CIVIL RIGHTS
Further Case Classification	
Comments	

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Case No. 11-CV-2487 DWF/FLN

MATTHEW PHILLIP SHERIDAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
WARDEN R. RIOS, et al,	)	
	)	
Defendants.	)	

Upon Stipulation of the parties, no hearing hereon being deemed necessary, and for good cause shown, it is hereby

ORDERED that the pretrial order ECF No. 15 is and shall be amended to provide that the discovery and nondispositive motions shall be concluded on or before February 4, 2013, and dispositive motions shall be filed and served on or before March 4, 2013.

It is further

ORDERED that in all other respects ECF No. 15 is and shall remain in full force and effect.

Dated: September 27, 2012

s/ Franklin L. Noel
FRANKLIN L. NOEL
United States Magistrate Judge

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NCR-2011-01393 **Short Description:** SHERIDAN V. RIOS ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Reference Number	0:11-cv-02487-DWF-FLN	Date	05/01/2014
Short Description	SHERIDAN V. RIOS ET AL	Type	Settled
Classification	Civil	Reason	
Case Type	FTCA & Bivens	Sought	
Case Sub-Type		Amount offered	$
Current Region	NORTH CENTRAL REGIONAL OFFICE	Total Amount Paid	$15,000.00
Current Institution		Description	COMPROMISE SETTLEMENT
Incident Region		Description	COMPROMISE SETTLEMENT
Incident Institution		Court Fee Paid ?	No
Monetary Relief Sought	$1,000,000.00	Pro Se ?	No
Estimated Amount	$		
Office	DMN	Date Received	09/26/2011
Jurisdiction	DISTRICT OF MINNESOTA		
Responsible Legal Office	FMC Rochester	Date Filed	08/30/2011

Estimated Amount	$ -	Current Owner	JAKE BUSH
Estimated Outcome	No evaluation can be made at this time	Case Status	Closed
		Timeline Status	Closed
		Monthly Report Status	
		Private Case	No

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	DELIBERATE INDIFFERENCE TO MEDICAL NEEDS
Comments	

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 2030 of 2033

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

NERO

Northeast Regional Office Philadelphia PA

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-MXR-2013-00254 **Short Description:** BOOKER V. U.S.A.

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	
Short Description	BOOKER V. U.S.A.
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	Canaan (USP)
Monetary Relief Sought	$10,000,000.00
Estimated Amount	$
Office	USAO - Harrisburg
Jurisdiction	M.D. Pa.
Responsible Legal Office	FCC Allenwood

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	03/25/2013
Type	Settled
Reason Sought	
Amount offered	$40,000.00
Total Amount Paid	$40,000.00
Description	
Description	
Court Fee Paid ?	Yes
Pro Se ?	No

Case Initiation Dates

Date Received	02/01/2013
Date Filed	10/25/2007

Case Progress

Current Owner	KRISTA KLETT
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	
Further Case Classification	
Comments	

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United States Department of Justice - Office of General Counsel & Review

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DARRYL BOOKER, Plaintiff	:	
v.	:	CIVIL NO. 1:07-CV-1960
UNITED STATES OF AMERICA, Defendant	:	

O R D E R

AND NOW, this 25th day of March, 2013, following a settlement conference in this matter, and the Magistrate Judge having reported to the court that this matter has been settled, it is ORDERED that the above-captioned action is dismissed without costs and without prejudice to the right, upon good cause shown within sixty (60) days, to reinstate the action if the settlement is not consummated.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions: 

Case ID: CIV-NER-2007-00214 **Short Description: HAMMOND V. SHERMAN ET AL**

[redacted]

Case Login Information

Reference Number	1:05-cv-00339-SJM-SPB
Short Description	HAMMOND V. SHERMAN ET AL
Classification	Civil
Case Type	Bivens 8th Amend
Case Sub-Type	COC-Deliberate Indiff.
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	McKean (FCI)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	McKean (FCI)
Monetary Relief Sought	$1,000,000.00
Estimated Amount	$
Office	Erie
Jurisdiction	WESTERN DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	02/15/2007
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$18,000.00
Total Amount Paid	$18,000.00
Description	CASE CONVERTED TO FTCA BIVENS DEFENDANTS DISMISSED. INMATE ACCEPTED OFFER OF GOVERNMENT.
Description	CASE CONVERTED TO FTCA BIVENS DEFENDANTS DISMISSED. INMATE ACCEPTED OFFER OF GOVERNMENT.
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	02/21/2006
Date Filed	11/16/2005

Case Progress

Current Owner	JOYCE HORIKAWA
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1331 FED. QUESTION
Further Case Classification	ALLEGES EXCESSIVE USE OF FORCE
Comments	

CA 05-339 E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Donte Hammond #33578-037
P.O. Box 8000
Bradford, PA 16701
Enter above the full name and address
f the plaintiff in this action)

VS.

James F. Sherman (Warden) Donald. P. Reich (Captain) Barbara Roy (Lieutenant)
BOP Staff, etc, ALL, R. K Laiber (Specialist) G. Koch (Specialist) P. Eaton (Specialist)
P. O Box 5000 Bradford, PA 16701
Enter above the full name, title, and
usiness address of each defendant in
is action)

To be Filed under X 28 U.S.C § 1331/Bivens
Federal officials

aintiff brings this action against the above named and identified defendants on the following cause in this tion.

I. Where are you now confined? F.C.I. McKean PA

What sentence are you serving? 123 MONTH'S

What court imposed the sentence? United States District Court of Maryland

II. Previous Lawsuits

A. Describe any and all lawsuits in which you are a plaintiff which deal with the same facts involved in this action. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit
Plaintiffs N/A
Defendants

2. Court (if federal court, name the district; if state court, name the county) and docket number N/A

3. Name the judge to whom case was assigned N/A

4. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?) N/A

5. Approximate date of filing lawsuit N/A

6. Approximate date of disposition N/A

B. Prior disciplinary proceedings which deal with the same facts involved in this action:

Where? N/A
When?
Result:

III. What federal law do you claim was violated? 8th Amendment

IV. Statement of Claim
(State here as briefly as possible the facts of your case. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.)

A. Date of event: MARCH 7TH 2005

B. Place of event: Special Housing unit

C. Persons involved--name each person and tell what that person did to you:

① ON MARCH 7TH 2005 IN a CELL SIZE 12 BY 7 SQ FT, Warden James F. SHERMAN, CAPTAIN Donald P. REICH, LIEUTENANT Barbara Roy, Specialist R. Klaiber, Specialist SENIOR OFFICER G. KOCH, Specialist SENIOR OFFICER P. Eaton, Maliciously and sadistically use EXCESSIVE FORCE WHEN I WAS CONFINED TO MY CELL. THEY DISBURSED 4 STUN GRENADES AND 8 PAPPER BALLS HITTING ME IN THE FACE CAUSING PERMANENT FACIAL SCAR'S, migRANE HEADACHES, PSYCHOLOGY PROBLEM'S, AND HEARING LOSS

② I WAS DENIED THE RIGHTS AND MANDATES OF PROTECTION FROM WILFUL, INTENTIONAL AND MALICIOUS ASSUALTES BY BOTH KNOWN AND UNKNOWN STAFF

③ all supervisory and STAFF OF F.C.I ARE CURRENTLY acting TO COVER UP THE assualt BY: DESTROYING EVIDENCE (Video, documents.

④ medical and Psychological service denying me medical care and treatment

V. Did the incident of which you complain occur in an institution or place of custody in this District: If so, where? F.C.I. McKean, PA

and answer the following questions:

A. Is there a prisoner grievance procedure in this institution?
Yes(X) No( )

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?
Yes(X) No( )

C. If your answer is Yes,

1. What steps did you take? I filed administrative Remedy BP-8,9,10,11

2. What was the result? UNSatisFactory

D. If your answer is NO, explain why not: N/A

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? Yes( ) No( )

F. If your answer is Yes,

1. What steps did you take? N/A

2. What was the result? N/A

VI. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statues. THAT BoTH Compensatory and PUNITIVE damages Be awarded OF 500,000.00 EACH. THAT THE INCIDENT Report's Be Reviewed, INVESTigated and EXPUNdged PROCESSED during said CONSPIRACY (TIME 12/21/04 TO PRESENT) THAT I Be TRANSFE. EACH PERSON 90 TO ANGER ~~MANG~~ MANAGEMENT CLASS

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

11/9/05
(Date)

Donte Hammond
(Signature of Plaintiff)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONTE HAMMOND,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO. 05-339E
v.	)	
	)	HON. SEAN J. MCLAUGHLIN,
WARDEN JAMES SHERMAN, ET AL.,	)	U.S.D.J.
	)	
	)	HON. SUSAN PARADISE BAXTER,
	)	CHIEF U.S.M.J.
Defendants.	)	

O R D E R

AND NOW, this _____ day of _____, 2007, it is hereby **ORDERED** that the above-captioned case is dismissed with prejudice. This case is now **CLOSED**.

BY THE COURT:

Sean J. McLaughlin

Digitally signed by Sean J. McLaughlin
DN: cn=Sean J. McLaughlin, c=US, o=United States District Court, ou=United States District Judge
Date: 2007.02.15 16:01:18 -05'00'

UNITED STATES JUDGE

FORM TO BE USED BY FEDERAL PRISONERS IN FILING A CIVIL ACTION UNDER 28 U.S.C. § 1331 OR § 1346

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF Massachusetts

Boston **DIVISION**

Micheal Dantone

Case No. _____

(Jury Trial Demanded)

(Enter above the full name of the Plaintiff or Plaintiffs in this action)

VS.

David L. Winn, C.O. Solo(transportation Officer 1-18-05, Unknown C.O. Transportation Officer 1-18-05, H. Morales, Santana, Dr. Bhaddi, Miss Kildoff

(Enter above the full name of the Defendant or Defendants in this action)

A. Have you begun other actions in Federal Court dealing with the same facts involved in this Action? Yes_____ No X

B. If your answer to A is yes, describe the action in the spaces below. (If there is more than one action, describe the additional actions on the reverse side of this page).

1. Parties to the action: N/A
2. Court (Federal Court name the district): N/A
3. Docket Number: N/A
4. Name of Judge to whom case was assigned: N/A

5. Disposition: (Was case dismissed? Was it appealed? Is it still pending?) : N/A

C. 1. Did you present the facts relating to your complaint in the internal prison grievance procedure? Yes X No _____

2. If your answer is Yes, what was the result? Filed Tort claim. Result from tort claim was an offer of $100.00 to settle. Offer not accepted due to insufficient amount based on pain and suffering I have been dealing with.

3. If your answer is No, explain. N/A

D. 1. Did you present your claim to the Bureau of Prisons or other Federal agency for administrative action? Yes X No _____

2. If your answer is yes, state the date such claim was submitted and what action, if any has been taken. Tort claim submitted on or about March 1, 2005 See attached documentation, Tort Claim # TRT-NER-2005-2080

3. If your claim has been acted on, attach copies of any correspondence you have received from the Bureau of Prisons or other Federal agency concerning your claim.

E. 1. Are you suing for a work related injury? Yes _____ No X

2. If your answer is Yes, state the nature of the duties you were performing when the injury occurred. N/A

PARTIES

(In item I. Below, place our name in the first blank and place your present address in the second blank. Do the same for additional Plaintiffs, if any).

I. Name of Plaintiff: Micheal Dantone, Reg. No. 10157-067
Address: F.M.C. Devens H/A P.O. Box 879, Ayer, MA. 01432

(In item II. Below, place the full name of the defendant in the first blank, his / her official position in the second blank, and his / her place of employment in the third blank. Use the space below item II. for names, positions and places of employment of any additional defendants.)

II. Defendant SEE ATTACHED is employed as _____
_____ At _____

STATEMENT OF CLAIM

III. State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of different claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet(s), if necessary.)

SEE ATTACHED AMENDED STATEMENT OF CLAIM

RELIEF

IV. State what relief you seek from the Court. Make no legal arguments. Cite no cases or statutes.

Due to the extreme discomfort, mental anguish, pain and suffering that I have been force to tolerate by the inaction of the medical staff at F.M.C. Devens and by the pain and suffering I have suffered through by being tossed around in the back of the transportation van. The C.O.'s both knowing that the seat I was in was unsafe, I am seeking punitive and exemplary damages in an amount of no less than One Hundred Thousand Dollars ($100,000.00), and any other relief this Honorable Court deems appropriate.

Signed this 23 day of February 2006.

Micheal Dantone Reg. No. 10157-067
F.M.C. Devens/H-A P.O. Box 879
Ayer, MA. 01432
(Signature of Plaintiff or Plaintiffs)

DECLARATION

I, Micheal Dantone declare under penalty of perjury that I have read and subscribed to the above and state that the information contained therein is true and correct to the best of my knowledge.

Executed 2/23/06 at FMC Devens
Date Place

Signature of Plaintiff

Signature of Attorney (If Any)

CAUSE OF ACTION

1. Injury I received, due to negligence of duties, safety checks, and failure to protect me from unnecessary harm, by transport officers; C.O. Solo and unknown, unnamed transport drivers on January 18, 2005.

2. Deliberate indifference to my serious medical needs.

STATEMENT OF FACT

3. Michael Dantone, the Plaintiff, a federal inmate and Federal Medical Center, Devens (F.M.C. Devens), in Ayer, Massachusetts, was on the 18th day of January, 2005, being transported to the University of Massachusetts Medical Center, by C.O. Solo and an unknown, unnamed C.O., to have a surgical procedure done:

   a. Having been handcuffed and shackled I was told to climb into the van (Chevy-Astro van, year unknown), by C.O. Solo and an unkown, unnamed C.O..

   b. Upon entering the van I noticed the seats un the van had been removed and replaced with specially fabricated seating, designed and OK'd by the Bureau of Prisons and Warden David L. Winn (Warden, F.M.C. Devens).

   c. When I sat down the seat felt different and not very secure.

      (i) I informed the C.O.'s of the issue with the seat and how it felt unsecure. I was told by both C.O.'s that the seat was secure that it was ok.

4. Enroute to the hospital, as the driver, C.O. Solo and an unknown, unnamed C.O. turned onto the exit and while rounding a curve, the following occured:

   a. The seat I was sitting on gave way causing:

      (i) My being thrown out of the seat and across the van. (Due to being shackled and handcuffed, I was unable to brace and/or protect myself from injury).

      (ii) While being thrown around in the back of the van, I caught my leg on a piece of bracket sticking up from the floor.

      (iii) My head was slammed into the wall of the

van, and I have been suffering from head and neck pain, which at times has been severe and has caused many hours of lost sleep.

5. Both C.O. Solo and the Unknown/Unnamed C.O. both should have inspected the van prior to transporting me to the UMass Medical facility.

6. H. Morales should have ensured that the seating in the van was properly secured prior to allowing the van to be put into service.

7. Mr. Santana, as the supervisor of facilities, including the automobile garage in which the medical transport van I was riding in was serviced and modified with the seating that was not properly secured.

8. David L. Winn, as the Warden at F.M.C. Devens is the man that oversees all goings on and is responsible for any and all actions that take place within the fences of F.M.C. Devens. Warden Winn, ultimately permitted the use of the van as safe for medical transport.

9. I have complained numerous times to the medical staff here at F.M.C. Devens, this leading to:

   a. On July 26, 2005, I was given an M.R.I..

      (i) It took six (6) months to get this M.R.I.. There is no acceptable reason for this having taken so long.

      (ii) I have tried to meet with the medical staff at F.M.C. Devens to discuss my X-ray and M.R.I.. At this date, no one has spoken to me. The back and neck pain continue to cause me headaches, sleeplessness and discomfort.

10. The medical staff that I have repeatedly tried to meet with and discuss my injuries since the beginning of this incident are:

    a. Dr. Bhaddi

    b. M.L.P.; Ms. Killdoff

I feel I was treated very indifferently and received no meaningful medical assistance.

For these reasons the Plaintiff should be granted the relief sought.

PARTIES II

1. David L. Winn, Warden F.M.C.-Devens

2. H. Morales - Supervisor (C.O.) of Automobile garage. Responsible for all maintenance of all vans/autos used at F.M.C. Devens for official use.

3. Mr. Santana- Supervisor of Facilities, responsible for the overall operation of the facilities department, for which the automobile garage is a part of.

4. C.O. Solo- Medical Transportation Officer, Responsible for the overall safety of the medical transportation van, and required to do a full safety inspection of van prior to transporting any persons. (The seats should have been examined at this point by C.O. Solo.)

5. Unknown/Unnamed C.O.- Medical Transportation Officer, Responsible for overall safety of the medical transportation van, and required to do a full safety inspection of van prior to transporting any persons. (The seats of the van should have been checked during this inspection.)

6. Dr. Bhaddi- Doctor, F.M.C. Devens Medical Staff.

7. M.L.P.; Ms. Killdoff, Mid Level Practitioner at F.M.C. Devens

FORM TO BE USED BY FEDERAL PRISONERS IN FILING A CIVIL ACTION UNDER 28 U.S.C. § 1331 OR § 1346

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF Massachusetts

Boston **DIVISION**

Micheal Dantone

(Enter above the full name of the Plaintiff or Plaintiffs in this action)

06-40022 JLT

Case No. _____

(Jury Trial Demanded)

VS.

David L. Winn, et al.

(Enter above the full name of the Defendant or Defendants in this action)

A. Have you begun other actions in Federal Court dealing with the same facts involved in this Action? Yes_____ No X

B. If your answer to A is yes, describe the action in the spaces below. (If there is more than one action, describe the additional actions on the reverse side of this page).

1. Parties to the action: N/A
2. Court (Federal Court name the district): N/A
3. Docket Number: N/A
4. Name of Judge to whom case was assigned: N/A

5. Disposition: (Was case dismissed? Was it appealed? Is it still pending?) : N/A

C. 1. Did you present the facts relating to your complaint in the internal prison grievance procedure? Yes X No _____

2. If your answer is Yes, what was the result? Filed a Tort Claim. Result from the Tort Claim was an offer of $100.00 to settle. Offer was not accepted due insufficient amount based on pain and suffering I have been dealing with.

3. If your answer is No, explain. N/A

D. 1. Did you present your claim to the Bureau of Prisons or other Federal agency for administrative action? Yes X No _____

2. If your answer is yes, state the date such claim was submitted and what action, if any has been taken. Tort Claim submitted on See Attached Documentation

3. If your claim has been acted on, attach copies of any correspondence you have received from the Bureau of Prisons or other Federal agency concerning your claim.

E. 1. Are you suing for a work related injury? Yes _____ No X

2. If your answer is Yes, state the nature of the duties you were performing when the injury occurred. N/A

PARTIES

(In item I. Below, place our name in the first blank and place your present address in the second blank. Do the same for additional Plaintiffs, if any).

I. Name of Plaintiff: Micheal Dantone Reg. No. 10157-067
Address: F.M.C. Devens H/A. P.O. Box 879. Ayer. MA. 01432

(In item II. Below, place the full name of the defendant in the first blank, his / her official position in the second blank, and his / her place of employment in the third blank. Use the space below item II. for names, positions and places of employment of any additional defendants.)

II. Defendant David L. Winn is employed as Warden
At F.M.C. Devens 42 Patton Rd.
Ayer, MA. 01432

STATEMENT OF CLAIM

III. State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of different claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet(s), if necessary.)

SEE ATTACHED

RELIEF

IV. State what relief you seek from the Court. Make no legal arguments. Cite no cases or statutes.

Due to the extreme discomfort, mental anguish, pain and suffering that I have been forced to tolerate, by the inaction of the medical staff at F.M.C.-Devens I am seeking punitive and exemplary damages in an amount of no less than One Hundred Thousand Dollars ($100,000.00), and any other relief this Honorable Court deems appropriate.

Signed this 12 day of January 200 6.

Micheal Dantone Reg. No. 10157-067
F.M.C. Devens P.O. Box 879
Ayer, MA. 01432
(Signature of Plaintiff or Plaintiffs)

DECLARATION

I, Micheal Dantone declare under penalty of perjury that I have read and subscribed to the above and state that the information contained therein is true and correct to the best of my knowledge.

Executed 1/12/06 at F.M.C. Devens
Date Place

Signature of Plaintiff

Signature of Attorney (If Any)

STATEMENT OF CLAIM

III. My name is Micheal Dantone and I am currently a Federal inmate incarcerated at Federal Medical Center-Devens (F.M.C.-Devens), located in Ayer, Massachusetts. On the morning of January 18, 2005, I was to be medically transported to the University of Massachusetts Medical Center for a surgical procedure. Prior to leaving F.M.C.-Devens I was placed in handcuffs and had my legs placed into shackles. After being handcuffed and shackled I was asked to climb into a Chevy Astro-Van (year unknown). Upon entering the van I noticed that the original factory seats had been removed from the van and they were replaced by specially fabricated seating used and manufactured by or with the permission of the Federal Bureau of Prisons and also at the direction of David L. Winn. When I sat down in the seating provided, I did not feel that those seats were very safe. The two officers who were designated to transport me (their names are unknown at this time), then got into the van and proceeded to the University of Massachusetts Medical Center.

As the van proceeded down the highway and came upon the exit for the Medical Center, the officer driving turned onto the exit and while the van was rounding the curve, the seat I was sitting in gave way and I was thrown across to the other side of the van. Due to the fact that I was shackled and handcuffed I was unable to brace myself. As I was being thrown around the back of the van, I caught my leg on a piece of bracket that was protruding from the floor of the van. This bracket, I believe, was there to be used to secure another seat into the van, a seat which was not in place at the time of this incident. My head also struck

the inside wall of the van hard and I have been suffering through pain, sometimes severe, in my neck and back. As a result of this pain I have frequently lost many hours and even nights of sleep.

I have complained to the medical staff at F.M.C.-Devens numerous times since this incident. Finally, after seeing the medical staff and trying to get help for the pain and loss of sleep, on July 26, 2005 I had been given an M.R.I.. Shortly after the incident I was also given an X-ray. It had taken 6 months for the Medical staff to really look into my injuries and there is no reason it should have taken so long.

I have tried to get with the medical staff at F.M.C.-Devens to try to discuss the results of both the M.R.I. and the x-rays I had received. Yet, to date, no one from the medical staff at F.M.C.-Devens has given me any answers to my questions. The pain in my back and neck is still very bothersome and the headaches and sleeplessness have also continued to be a discomfort.

Since this incident, the van has been taken out of service and the fabricated seating has been welded and properly secured into the back of the van. I have consistently asked for the accident report along with the names of the transporting officers. I have been unable to get any of the things mentioned above. All parties involved knew that the seat I was getting into was not welded or bolted down properly, yet they allowed me to be transported anyway in complete and total disregard for my well being. I feel that transporting myself or any other inmate, in those unsafe conditions, was putting my life or any other inmates lives in danger. I have filed a tort claim and the response back was unsatisfactory for I am still suffering with pain.

UNITED STATES GOVERNMENT

Memorandum

Northeast Regional Office, Philadelphia, PA
FEDERAL BUREAU OF PRISONS

DATE: August 10, 2005

REPLY TO ATTN OF: Henry J. Sadowski, Regional Counsel

SUBJECT: Administrative Tort Claim No. TRT-NER-2005-02080

TO: Michael Dantone, Reg. No. 10157-067
FMC Devens

Your Administrative Tort Claim No. TRT-NER-2005-02080, properly received by this agency on March 4, 2005, has been considered for settlement as provided by the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2672, under authority delegated to me by 28 C.F.R. § 543.30. You seek compensatory damages in the amount of $4,000,000.00 for an alleged personal injury. Specifically, you claim you were injured while a passenger in a government vehicle because the seat was not properly bolted to the floor of the vehicle.

After careful review of this claim, I have decided to offer settlement in the amount of $100.00. This amount is based upon our assessment of the relative value of your claim and other factors. This is neither an admission nor denial of government liability in this matter.

If you are willing to accept this amount in complete settlement of your claim, you should sign the attached voucher and return it to staff. If the offer is unacceptable to you, you may bring suit against the United States in the appropriate United States District Court within six (6) months of the date of this memorandum.

cc: David L. Winn, Warden, FMC Devens

#10157-007

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10157-007

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VISIT NUMBER : 8-2500471-001

PATIENT NAME : DANTONE; MICHAEL

MEDICAL RECORD NUMBER : 8-039939

DATE OF BIRTH : 05/21/1976

DATE OF EXAM : 07/26/05

REFERRING PHYSICIAN : HOWARD; SANDRA G
42 PATTON ROAD
FEDERAL MEDICAL CENTER DEVENS
AYER, MA 01432

FILM PREFERENCE : FILMS & REPORTS/FAX TO 508-475-3267

MRI EXAM : MRI CERVICAL WITHOUT CONTRAST

CLINICAL HISTORY : NECK AND BACK PAIN, PREVIOUS MVA.

MRI TECHNIQUE : IMAGING WAS PERFORMED UTILIZING A HITACHI AIRIS II .3T OPEN SYSTEM. THE FOLLOWING SEQUENCES WERE PERFORMED: SAGITTAL T2-WEIGHTED, SAGITTAL T1-WEIGHTED, AXIAL T2* GRADIENT ECHO, AXIAL T2-WEIGHTED.

FINDINGS : The cervical spine demonstrates preservation of cervical lordosis. Minimal diffuse disc dessication is seen. No abnormal T2 brightening is seen within the cervical spinal cord.

Intervertebral discs demonstrate no significant disc bulge or herniation focal bony spinal canal stenosis. No neuroforaminal narrowing is seen.

CONCLUSION : NO FOCAL ABNORMALITIES SEEN IN THE CERVICAL SPINE.

PHYSICIAN : JOHN R KNORR, DO
(Signature on file)

07/26/05

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UMASS MEMORIAL MRI & IMAGING CENTER

VISIT NUMBER : 8-2500471-002

PATIENT NAME : DANTONE: MICHAEL

MEDICAL RECORD NUMBER : 8-039939

DATE OF BIRTH : 05/21/1976

DATE OF EXAM : 07/26/05

REFERRING PHYSICIAN : HOWARD: SANDRA G
42 PATTON ROAD
FEDERAL MEDICAL CENTER DEVENS
AYER, MA 01432

FILM PREFERENCE : FILMS & REPORTS/FAX TO 508-475-3267

MRI EXAM : MRI LUMBAR WITHOUT CONTRAST

CLINICAL HISTORY : BACK PAIN, SINCE MVA.

MRI TECHNIQUE : IMAGING WAS PERFORMED UTILIZING A HITACHI AIRIS II .3T OPEN SYSTEM. THE FOLLOWING SEQUENCES WERE PERFORMED: SAGITTAL T1-WEIGHTED, SAGITTAL T2-WEIGHTED, AXIAL T1-WEIGHTED, AXIAL T2-WEIGHTED.

FINDINGS : There is preservation of the lumbar lordosis. There is disc dessication at the L 4-5 level. The distal spinal cord appears unremarkable.

At L5 -S1 level mild facet degenerative changes are seen. No disc bulge or herniation, nor neuroforaminal narrowing is noted.

At the L 4-5 level a tiny central annular tear is seen with very tiny shallow central protrusion causes very minimal thecal impression. No spinal stenosis is seen, no neuroforaminal narrowing is noted.

At other levels no significant disc bulge or herniation is seen.

CONCLUSION : VERY SHALLOW TINY CENTRAL DISC PROTRUSION WITH DISC DEGENERATION IS SEEN AT THE L 4-5 LEVEL CAUSES VERY MINIMAL THECAL IMPRESSION, WITHOUT SPINAL STENOSIS NOTED.

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VISIT NUMBER : 8-2500471-002
PATIENT NAME : DANTONE; MICHAEL
PAGE NUMBER : 2 OF 2

MINIMAL DEGENERATIVE CHANGES SEEN OF L5 -S1 FACET JOINTS.

PHYSICIAN : JOHN R KNORR, DO
(Signature on file)

07/26/05

FMS Form 197
Department of the Treasury

AUTHORIZED FOR LOCAL REPRODUCTION

VOUCHER FOR PAYMENT

Voucher No. _____

WHERE A SETTLEMENT AGREEMENT HAS *NOT* BEEN EXECUTED AND ATTACHED OR WHERE A FINAL JUDGMENT IS *NOT* ATTACHED

Schedule No. _____

Claim No. _____

A. PAYMENT DATA: *(PLEASE TYPE OR PRINT CLEARLY)*

(1) Submitting Agency/Office: Federal Bureau of Prisons

(2) Agency/Office Mailing Address: FMC Devens

(3) Agency/Office Contact Person and Telephone No.: Controller

(4) Payee(s): (a) Michael Dantone, Reg. No. 10157-067
(b) _____

(5) Taxpayer Identification No., SSN, or EIN of each Payee: (a) N/A
(b) N/A

(6) Total Amount: One hundred and 00/100 dollars; ($100.00)

(7) Electronic Funds Transfer (EFT) Information:

(a) Payee Account Name: N/A
(b) ABA Bank # (9 digits): N/A
© Payee Account #: N/A
(d) Checking: N/A Savings: N/A

(d) Bank Name and Address: N/A

(8) Briefly Identify Claim: Alleged personal injury at FMC Devens
Administrative Tort Claim No. TRT-NER-2005-02080

B. ACCEPTANCE BY CLAIMANT(S). *(NOTE: For use ONLY where final judgment has NOT been entered or where claimant has NOT signed another agreement. Use FMS Form 197A where final judgment has been entered or another agreement has been signed by the claimant(s).)*

I, (We), the claimant(s) and beneficiaries, do hereby accept the within-stated award, compromise, or settlement as final and conclusive on me (us), on my (our) heirs, executors, administrators or assigns, and agree that said acceptance constitutes a complete release by me (us), my (our) heirs, executors, administrators or assigns of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising now or in the future from, and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries (including wrongful death), damages to property, breaches of contract or law, and any other acts or omissions, and the consequences thereof resulting, and to result, from the same subject matter that gave rise to the claim for which I (we) or my (our) heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States and against the employee(s) of the Government whose acts or omissions gave rise to the claim by reason of the same subject matter. I (We) further agree to reimburse, indemnify and hold harmless the United States, its agents, servants and employees from any and all claims or causes of action, including wrongful deaths, that arise or may arise from the acts or omissions that gave rise to the claim by reason of the same subject matter.

(SIGN ORIGINAL ONLY)

Date: _____, 2005 Returned TO Signed Pursuant.

(Claimant(s) sign above)

C. AGENCY APPROVING OFFICIAL: This claim has been fully examined in accordance with Statutory Cite 28 USC 2672 and approved in the amount of $100.00

Signed: _____

Title: REGIONAL COUNSEL

Date: _____

D. OTHER ACCOUNTING INFORMATION AND CERTIFICATIONS: (For use by Treasury only.)

FMS Form 197
12-96 (PREVIOUS EDITIONS ARE OBSOLETE)

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1/16/09
Case Terminated

MICHAEL DAVID DANTONE,
Plaintiff,

v.

DR. BHADDI and the
UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 06-40022-JLT

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties in the above-captioned matter, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), hereby stipulate that said action be dismissed with prejudice and without costs and all rights of appeal waived.

By the parties,

Pro se plaintiff,

MICHAEL DAVID DANTONE
123 Center Street
Hughestown, PA 18640
(570) 654-1931

Dated: 1-9-09

For all the defendants,

MICHAEL J. SULLIVAN
UNITED STATES ATTORNEY,

Christopher R. Donato
Assistant U.S. Attorney
John Joseph Moakley Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3303

Dated: 1/7/2009

CASREF, CLOSED

United States District Court
District of Massachusetts (Worcester)
CIVIL DOCKET FOR CASE #: 4:06-cv-40022-JLT

Dantone v. Winn
Assigned to: Judge Joseph L. Tauro
Referred to: Magistrate Judge Judith G. Dein
Demand: $100,000
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 01/23/2006
Date Terminated: 01/16/2009
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: U.S. Government Defendant

Plaintiff

Michael David Dantone

represented by **Michael David Dantone**
123 Center Street
Hughestown, PA 18640
PRO SE

V.

Defendant

Warden David L. Winn
TERMINATED: 08/16/2007

represented by **Christopher R. Donato**
United States Attorney's Office
1 Courthouse Way
Suite 9200
Boston , MA 02210
617-748-3303
Fax: 617-748-3972
Email: chris.donato@USDOJ.GOV
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

H. Morales
TERMINATED: 08/16/2007

represented by **Christopher R. Donato**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Mr. santana
TERMINATED: 08/16/2007

represented by **Christopher R. Donato**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Correctional Officer Solo

represented by **Christopher R. Donato**

TERMINATED: 08/16/2007

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Unnamed Correctional Officers
TERMINATED: 08/16/2007

represented by **Christopher R. Donato**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Dr. Bhaddi

represented by **Christopher R. Donato**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Ms. Kildoff
TERMINATED: 08/16/2007

represented by **Christopher R. Donato**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

United States

represented by **Christopher R. Donato**
United States Attorney's Office
John Joseph Moakley Federal Courthouse
1 Courthouse Way
Suite 9200
Boston , MA 02210
617-748-3303
Fax: 617-748-3972
Email: chris.donato@USDOJ.GOV
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/26/2006	1	COMPLAINT against David L. Winn Filing fee: Motion to proceed in forma pauperis filed by Michael David Dantone.(Jones, Sherry) (Entered: 01/26/2006)
01/26/2006	2	MOTION for Leave to Proceed in forma pauperis by Michael David Dantone. (Jones, Sherry) Modified on 1/30/2006 (Abaid, Kim). (Entered: 01/26/2006)
02/01/2006	3	Judge Joseph L. Tauro : MEMORANDUM AND ORDER entered: Plaintiff's Application to Proceed Without Prepayment of Fees (#2) is Allowed and the filing fee is assessed pursuant to 28 U.S.C. section 1915(b) as follows: a. Plaintiff is assessed an initial partial filing fee of $128.64, pursuant to 28 U.S.C. section 1915(b)(1); and b. The remainder of the fee $121.36 is to be assessed and collected in accordance with 28 U.S.C. section 1915(b)(2); and Within

		forty-two (42) of the date of this Memorandum and Order, Plaintiff shall show cause why his Complaint should not be dismissed for the reasons stated herein, or in the alternative, he shall file an Amended Complaint which cures the pleading deficiencies, specifying his asserted cause or causes of action, and identifying the Defendants in any claim. (PSSA, 1) (Entered: 02/02/2006)
02/01/2006	4	NOTICE: re payment of fee (prisoner filer) issued to the Treasurer at FMC Devens (PSSA, 1) (Entered: 02/02/2006)
02/27/2006	5	AMENDED COMPLAINT against David L. Winn, filed by Michael David Dantone.(Abaid, Kim) (Entered: 02/27/2006)
03/06/2006	6	Judge Joseph L. Tauro : MEMORANDUM AND ORDER RE: AMENDED COMPLAINT; ISSUANCE OF SUMMONSES entered: the Clerk is directed to amend the docket to include the following Defendants to this action: David Winn, Warden, H. Morales, Mr. Santana, C.O. Solo, Unknown/Unnamed C.O., Dr. Bhaddi, Ms. Killdoff, and the United States. Additionally, the Clerk shall issue summonses against each of these Defendants (with the exception of unknown correctional officers). It is Further Ordered that the U.S. Marshal shall bear all costs of service of the Defendants, as directed by the Plaintiff. Plaintiff is advised that, notwithstanding that his is a prisoner and that the U.S. Marshal is directed to bear costs of service, he is ultimately responsible for effectuating service of process on each Defendant in a timely fashion in compliance with the Federal Rules of Civil Procedure and this Court's Local Rules. Failure to effectuate proper service in a timely fashion will result in dismissal of this action. (PSSA, 1) (Entered: 03/06/2006)
03/06/2006		Summons Issued as to H. Morales, Mr. Santana, Correctional Officer Solo, Dr. Bhaddi, Ms. Kildoff, United States, David L. Winn. (PSSA, 1) (Entered: 03/06/2006)
03/27/2006	7	Letter re: dates of filing from Mike Dantone. (Abaid, Kim) (Entered: 03/27/2006)
03/28/2006		DOCKET SHEET sent to Mike Dantone. (Abaid, Kim) (Entered: 03/28/2006)
04/19/2006	8	US Marshal Process Receipt and Return for Civil Action. United States Attorney served Delivered on April 17, 2006.(Abaid, Kim) (Entered: 04/19/2006)
04/28/2006	9	Letter from Mike Dantone. (Abaid, Kim) (Entered: 05/01/2006)
05/02/2006	10	US Marshal Process Receipt and Return for Civil Action. US Attorney General served Delivered on April 19, 2006. (Abaid, Kim) (Entered: 05/03/2006)
05/12/2006	12	Letter from Mike Dantone. (Abaid, Kim) (Entered: 05/24/2006)
05/24/2006	11	Letter re: Service from Mike Dantone. (Abaid, Kim) (Entered: 05/24/2006)
07/14/2006	13	MOTION for Summary Judgment by Michael David Dantone. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H)(Abaid, Kim) (Entered: 07/14/2006)
07/28/2006	14	US Marshal Process Receipt and Return for Civil Action. Dr. Bhaddi unable to

		be served. (Abaid, Kim) (Entered: 07/31/2006)
07/28/2006	15	US Marshal Process Receipt and Return for Civil Action. Mr. Santana Unable to be Served. (Abaid, Kim) (Entered: 07/31/2006)
07/28/2006	16	US Marshal Process Receipt and Return for Civil Action. Ms. Kildoff Unable to be Served. (Abaid, Kim) (Entered: 07/31/2006)
07/28/2006	17	US Marshal Process Receipt and Return for Civil Action. Documents for H. Morales Served on May 17, 2006. (Abaid, Kim) Modified on 7/31/2006 (Abaid, Kim). (Entered: 07/31/2006)
07/28/2006	18	US Marshal Process Receipt and Return for Civil Action. Correctional Officer Solo served Delivered on July 14, 2006. (Abaid, Kim) (Entered: 07/31/2006)
07/28/2006	19	US Marshal Process Receipt and Return for Civil Action. David Winn, Warden served Delivered on May 17, 2006. (Abaid, Kim) (Entered: 07/31/2006)
08/09/2006	20	Opposition re 13 MOTION for Summary Judgment filed by all defendants. (Donato, Christopher) (Entered: 08/09/2006)
08/22/2006	21	REPLY to Opposition to Motion re 13 MOTION for Summary Judgment filed by Michael David Dantone. (Abaid, Kim) (Entered: 08/23/2006)
09/13/2006	22	Letter requesting docket from Michael Dantone. (Abaid, Kim) (Entered: 09/14/2006)
09/14/2006		DOCKET SHEET sent to Michael Dantone (Abaid, Kim) (Entered: 09/14/2006)
10/04/2006	23	Judge Joseph L. Tauro : ORDER entered 13 Motion for Summary Judgment is DENIED WITHOUT PREJUDICE to re-raising it at an appropriate time. Defendant Winn's request to dismiss some claims for failure to effect service is not in motion form and is not properly before the Court. Plaintiff's requests for an extension of time to effect service and for an entry of default with respect to those parties served are not in motion form and are not properly before the Court. In the future, the Parties shall request action by this Court by filing motions in separate documents that comply with the formalities of Local Rule 7.1. (Attachments: # Rule 7.1# Rule 55) (Abaid, Kim) Additional attachment(s) added on 10/4/2006 (Abaid, Kim). (Entered: 10/04/2006)
10/13/2006		Remark: Modified Nature of Suit for statistical purposes, to reflect a prisoner case filing. (PSSA, 1) (Entered: 10/13/2006)
10/27/2006	24	Affidavit OF CONSULTATION. (Abaid, Kim) (Entered: 10/30/2006)
10/27/2006	25	MOTION for Extension of Time for 120 days to Effect Service by Michael David Dantone.(Abaid, Kim) (Entered: 10/30/2006)
10/27/2006	26	MEMORANDUM in Support re 25 MOTION for Extension of Time to 120 days to Effect Service filed by Michael David Dantone. (Abaid, Kim) (Entered: 10/30/2006)
10/27/2006	27	MOTION for Default as to Defendants Winn, Morales, and Solo by Michael David Dantone. (Attachments: # 1 Certificate of Service)(Abaid, Kim)

		Modified on 10/31/2006 (Abaid, Kim). (Entered: 10/30/2006)
10/27/2006	28	MEMORANDUM in Support re 27 MOTION for Default as to Winn, Morales, and Solo filed by Michael David Dantone. (Abaid, Kim) Modified on 10/31/2006 (Abaid, Kim). (Entered: 10/30/2006)
11/07/2006	29	Judge Joseph L. Tauro : ORDER ON MOTIONS ## 25, 27 entered: [summary: Plaintiff's Motion for Default (#27) is Denied without prejudice. Unless a written objection is filed within 10 days of the date of this Order, the Court will construe any service made on a Defendant which was otherwise in order (apart from the timeliness issue), constituted proper service. In order to clarify the state of the record, the AUSA shall file, within 10 days, a "Notice of Appearance" which clearly indicates the names of each and every Defendant it represents in this action. The Notice of Appearance shall also contain a statement which reflects the names of those Defendants it claims has not been served properly, apart from any claim that service was not made in a timely fashion in accordance with Fed. R. Civ. P. 4(m). Within 20 days of the date of this Order, the AUSA shall file an Answer or other responsive pleading to Plaintiff's Amended Complaint, on behalf of any Defendant who has been served; and with respect to any Defendant who is unidentified or whose address is unknown, Plaintiff is permitted to conduct limited written discovery from the served Defendants, to obtain the requisite information. It is Further Ordered that Plaintiff's Motion for an Extension of Time for 120 days to Effect Service (#25) is hereby Allowed for 120 days, however, Plaintiff shall submit all required paperwork to the United States Marshal within 45 days. No further extensions of time will be Allowed, and failure to ensure the filing of a proof of service as to each unserved Defendant, within the 120 day period will result in dismissal of any unserved Defendants from this action.](PSSA, 1) (Entered: 11/13/2006)
11/16/2006	30	Letter requesting docket sheet from Michael Dantone. (Abaid, Kim) (Entered: 11/16/2006)
11/16/2006		DOCKET SHEET sent to Michael Dantone (Abaid, Kim) (Entered: 11/16/2006)
11/27/2006	31	NOTICE of Appearance by Christopher R. Donato on behalf of H. Morales, Correctional Officer Solo, Dr. Bhaddi, Ms. Kildoff, United States, David L. Winn (Donato, Christopher) (Entered: 11/27/2006)
11/28/2006	34	Letter requesting Process Receipt Forms from Michael Dantone. (Abaid, Kim) (Entered: 11/29/2006)
11/29/2006	32	MOTION to Dismiss for Lack of Jurisdiction by H. Morales, Mr. santana, Correctional Officer Solo, Unnamed Correctional Officers, Dr. Bhaddi, Ms. Kildoff, United States, David L. Winn.(Donato, Christopher) (Entered: 11/29/2006)
11/29/2006	33	MEMORANDUM in Support re 32 MOTION to Dismiss for Lack of Jurisdiction filed by all defendants. (Donato, Christopher) (Entered: 11/29/2006)
12/05/2006	35	Letter/request (non-motion) from Michael Dantone. (Abaid, Kim) (Entered:

		12/05/2006)
12/05/2006	36	MOTION for Discovery by Michael David Dantone.(Abaid, Kim) (Entered: 12/05/2006)
12/05/2006	37	MEMORANDUM in Support re 36 MOTION for Discovery filed by Michael David Dantone. (Abaid, Kim) (Entered: 12/05/2006)
12/05/2006	38	AFFIDAVIT by Michael David Dantone. (Abaid, Kim) (Entered: 12/05/2006)
12/07/2006		Notice of correction to docket made by Court staff. Correction: the "Remark" entered on 12/7/06 was deleted as docketed in wrong case: it should have been docketed in 06-40262-JLT. Case data revised in this action. (PSSA, 1) (Entered: 12/07/2006)
12/12/2006	39	AFFIDAVIT by Michael David Dantone. (Abaid, Kim) (Entered: 12/14/2006)
12/12/2006	40	RESPONSE to Motion re 32 MOTION to Dismiss for Lack of Jurisdiction filed by Michael David Dantone. (Abaid, Kim) (Entered: 12/14/2006)
12/12/2006	41	MEMORANDUM in Opposition re 32 MOTION to Dismiss for Lack of Jurisdiction filed by Michael David Dantone. (Abaid, Kim) (Entered: 12/14/2006)
12/13/2006	42	Copy of a Letter from Michael Dantone to the US Marshals. (Abaid, Kim) (Entered: 12/14/2006)
12/14/2006		Remark: Statistical Data (Nature of Suit) modified for statistical purposes to reflect a prisoner filing. (PSSA, 1) (Entered: 12/14/2006)
01/16/2007	43	MOTION for Order to to Comply with Order from the Court of Common Pleas of Luzerne County, PA by Michael David Dantone.(Abaid, Kim) (Entered: 01/17/2007)
01/16/2007	44	US Marshal Process Receipt and Return for Civil Action. Dr. Fazal Bhatti, Federal Bureau of Prisons served Delivered on December 21, 2006. (Abaid, Kim) (Entered: 01/17/2007)
01/18/2007		Judge Joseph L. Tauro : Electronic ORDER entered denying 43 Motion for Order (Abaid, Kim) (Entered: 01/18/2007)
01/30/2007	45	US Marshal Process Receipt and Return for Civil Action. Diane Kilduff unable to be served. (Abaid, Kim) (Entered: 02/01/2007)
01/30/2007	46	US Marshal Process Receipt and Return for Civil Action. Rafael Santana unable to be served. (Abaid, Kim) (Entered: 02/01/2007)
02/08/2007	47	Letter re: Being Transferred from Michael D. Dantone. (Abaid, Kim) (Entered: 02/08/2007)
03/22/2007	48	NOTICE of Change of Address by Michael David Dantone (Abaid, Kim) (Entered: 03/26/2007)
03/26/2007		DOCKET SHEET sent to Michael Dantone (Abaid, Kim) (Entered: 03/26/2007)

05/16/2007	49	AMENDED COMPLAINT against H. Morales, Mr. Santana, Correctional Officer Solo, Unnamed Correctional Officers, Dr. Bhaddi, Ms. Kildoff, United States, David L. Winn, filed by Michael David Dantone. (Attachments: # 1 Declaration# 2 Certificate of Service)(Abaid, Kimberly) (Entered: 05/16/2007)
05/16/2007		DOCKET SHEET sent to Michael Dantone (Abaid, Kimberly) (Entered: 05/16/2007)
08/06/2007	50	Letter re: Status from Michael Dantone. (Abaid, Kimberly) (Entered: 08/06/2007)
08/06/2007		DOCKET SHEET sent to Michael Dantone (Abaid, Kimberly) (Entered: 08/06/2007)
08/13/2007	51	Letter re: Status from Michael Dantone. (Abaid, Kimberly) (Entered: 08/13/2007)
08/16/2007	52	Judge Joseph L. Tauro : ORDER entered. MEMORANDUM AND ORDER 32 Motion to Dismiss is DENIED AS MOOT. 36 Motion for Discovery is DENIED WITHOUT PREJUDICE. Defendant Kildoff is DISMISSED WITHOUT PREJUDICE for failure to effect service of process. The remaining Defendants (United States and Dr. Bhaddi) shall file an answer by September 7, 2007. (Abaid, Kimberly) (Entered: 08/16/2007)
08/17/2007		Motions terminated: (Lovett, Zita) (Entered: 08/17/2007)
09/06/2007	53	First MOTION for Extension of Time to September 14, 2007 to File Answer by Dr. Bhaddi, United States.(Donato, Christopher) (Entered: 09/06/2007)
09/07/2007		Judge Joseph L. Tauro : Electronic ORDER entered granting 53 Motion for Extension of Time to Answer; no further extensions will be granted. (Lovett, Zita) (Entered: 09/07/2007)
09/13/2007	54	MOTION to Dismiss *or, in the Alternative, for Summary Judgment* by Dr. Bhaddi, United States.(Donato, Christopher) (Entered: 09/13/2007)
09/13/2007	55	MEMORANDUM in Support re 54 MOTION to Dismiss *or, in the Alternative, for Summary Judgment Declarations filed with Clerk's Office* filed by Dr. Bhaddi, United States. (Attachments: # 1)(Donato, Christopher) (Entered: 09/13/2007)
09/13/2007	56	APPENDIX re 55 Memorandum in Support of Motion by United States. Declaration of Cheryl Magnusson. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J# 11 Declaration of Jeffrey Schluter# 12 Exhibit A# 13 Exhibit B# 14 Exhibit C# 15 Exhibit D# 16 Exhibit E# 17 Exhibit F# 18 Exhibit G# 19 Exhibit H# 20 Declaration of Humberto Morales# 21 Exhibit A# 22 Exhibit B# 23 Declaration of Fazal Bhatti, M.D.)(Abaid, Kimberly) (Entered: 09/17/2007)
10/01/2007	57	MOTION for Order Establishing Time Deadline in Responding to Answer by Michael David Dantone.(Abaid, Kimberly) (Entered: 10/02/2007)
10/22/2007	58	Letter requesting Docket Sheet from Michael Dantone. (Attachments: # 1

		Duplicate Motion for Order)(Abaid, Kimberly) (Entered: 10/22/2007)
10/22/2007		DOCKET SHEET sent to Michael Dantone (Abaid, Kimberly) (Entered: 10/22/2007)
11/26/2007	59	RESPONSE to Motion re 54 MOTION to Dismiss *or, in the Alternative, for Summary Judgment* filed by Michael David Dantone. (Attachments: # 1 Exhibits)(Abaid, Kimberly) (Entered: 11/26/2007)
01/28/2008	60	Letter re: Request for docket from Michael Dantone. (Abaid, Kimberly) (Entered: 01/31/2008)
01/31/2008		DOCKET SHEET sent to Michael Dantone (Abaid, Kimberly) (Entered: 01/31/2008)
03/28/2008		Judge Joseph L. Tauro: Electronic ORDER entered finding as moot 57 Motion for Order (Lovett, Zita) (Entered: 03/28/2008)
04/08/2008		ELECTRONIC NOTICE of Case Assignment. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Dein (Abaid, Kimberly) (Entered: 04/08/2008)
04/08/2008	61	Judge Joseph L. Tauro: ORDER entered. REFERRING CASE to Magistrate Judge Judith G. Dein Referred for: Report and Recommendation Motions referred: 54 MOTION to Dismiss *or, in the Alternative, for Summary Judgment* (Abaid, Kimberly) Motions referred to Judith G. Dein. (Entered: 04/08/2008)
06/17/2008	62	Magistrate Judge Judith G. Dein: ORDER entered. REPORT AND RECOMMENDATIONS re 54 Defendants' MOTION to Dismiss or, in the Alternative, for Summary Judgment. Recommendation: that the Motion be denied. Objections to R&R due by 7/1/2008. (Dambrosio, Jolyne) (Entered: 06/17/2008)
06/17/2008		Case no longer referred to Magistrate Judge Judith G. Dein. (Dambrosio, Jolyne) (Entered: 06/17/2008)
06/25/2008	63	First MOTION for Extension of Time to July 11, 2008 to File a Response to Magistrate's Report and Recommendation by Dr. Bhaddi, United States. (Donato, Christopher) (Entered: 06/25/2008)
06/25/2008		Judge Joseph L. Tauro: Electronic ORDER entered granting 63 Motion for Extension of Time Objections to R&R due by 7/11/2008. NO FURTHER EXTENSIONS WILL BE GRANTED. (Lovett, Zita) (Entered: 06/25/2008)
06/27/2008	64	NOTICE of Change of Address by Michael David Dantone (Abaid, Kimberly) (Entered: 06/27/2008)
06/27/2008		DOCKET SHEET sent to Michael Dantone (Abaid, Kimberly) (Entered: 06/27/2008)
07/14/2008		Mail Returned as Undeliverable. Mail sent to Michael Dantone (Abaid, Kimberly) (Entered: 07/14/2008)
07/15/2008	65	Judge Joseph L. Tauro: ORDER entered. This Court ACCEPTS AND ADOPTS 62 Report and Recommendation of Magistrate Judge Dein. 54

		Motion to Dismiss, or in the alternative, for Summary Judgment, is treated as a motion to dismiss. 54 Motion to Dismiss is DENIED. (Abaid, Kimberly) (Entered: 07/15/2008)
07/16/2008	66	Judge Joseph L. Tauro: ORDER entered. REFERRING CASE to Magistrate Judge Judith G. Dein Referred for: Full Pretrial Case Management, including all dispositive motions (Abaid, Kimberly) (Entered: 07/16/2008)
07/21/2008	67	Magistrate Judge Judith G. Dein: ORDER entered. SCHEDULING ORDER: Discovery to be completed by 1/5/2009. Dispositive Motions due by 2/5/2009. (Dambrosio, Jolyne) (Entered: 07/21/2008)
07/24/2008	68	NOTICE of Change of Address and Request for Docket by Michael David Dantone (Abaid, Kimberly) (Entered: 07/24/2008)
07/28/2008		Mail Returned as Undeliverable. Mail sent to Michael Dantone. Mail sent to new address based on 68 Notice of Change of Address. (Abaid, Kimberly) (Entered: 07/28/2008)
07/29/2008		DOCKET SHEET sent to Michael Dantone (Abaid, Kimberly) (Entered: 07/29/2008)
08/22/2008	69	Letter re: Counsel from Michael Dantone. (Abaid, Kimberly) (Entered: 08/25/2008)
08/22/2008	70	MOTION to Appoint Counsel by Michael David Dantone.(Abaid, Kimberly) (Entered: 08/25/2008)
08/22/2008	71	DECLARATION In Support re 70 MOTION to Appoint Counsel by Michael David Dantone. (Abaid, Kimberly) (Entered: 08/25/2008)
08/22/2008	72	DECLARATION In Support of Request to Proceed IFP by Michael David Dantone. (Abaid, Kimberly) (Entered: 08/25/2008)
08/22/2008	73	CERTIFICATE OF SERVICE by Michael David Dantone re 72 Declaration, 71 Declaration, 70 MOTION to Appoint Counsel. (Abaid, Kimberly) (Entered: 08/25/2008)
08/26/2008		Magistrate Judge Judith G. Dein: Electronic ORDER entered regarding 70 Plaintiff's Motion to Appoint Counsel. Upon review of the record, this Court cannot find that exceptional circumstances exist which warrant appointment of pro bono counsel in this case, and Plaintiff is not constitutionally entitled to appointed counsel. *See DesRosiers v. Moran*, 949 F.2d 15, 23 (1st Cir. 1991). While the Court credits Plaintiffs statements in support of his motion that he lacks funds to retain his own counsel, and that he has made substantial efforts on his own to locate counsel to represent him in this action, his stated reasons for the request (i.e., that he is not trained in the law, that he relies on other inmates for assistance, and that he does not know how to complete the discovery and trial process at this point) are not unique; a large number of prisoners are faced with similar circumstances in connection with civil litigation. Moreover, there is nothing in this action which presents novel and/or complex issues of law or fact. Finally, it appears that Plaintiff has been able to proceed pro se in this litigation for the past two-plus years; he is proficient in the English language and is familiar with legal terms and concepts and legal

		proceedings. He concedes that he is always studying to learn more, and that he is familiarizing himself with the Federal Rules of Civil Procedure and this Court's Local Rules, as well as other legal self-help materials. In short, this is not the type of case which warrants the use of the scarce pro bono resources of the Court. For all these reasons, Plaintiff's Motion for Appointment of Counsel (Docket No. 70) is hereby DENIED. The discovery schedule previously set by this Court remains in effect. (Dambrosio, Jolyne) (Entered: 08/26/2008)
09/11/2008	74	Document disclosure - First Set of Interrogatories to the United States of America by Michael David Dantone.(Abaid, Kimberly) (Entered: 09/11/2008)
09/11/2008	75	Document disclosure - First Set of Admissions as Directed to the United States of America by Michael David Dantone.(Abaid, Kimberly) (Entered: 09/11/2008)
09/11/2008	76	Document disclosure - First Set of Interrogatories as Directed to Dr. Bhaddi by Michael David Dantone.(Abaid, Kimberly) (Entered: 09/11/2008)
09/11/2008	77	Document disclosure - First set of Admissions as Directed to Dr. Bhaddi by Michael David Dantone.(Abaid, Kimberly) (Entered: 09/11/2008)
09/11/2008	78	Document disclosure - First Request for Production of Documents by Michael David Dantone.(Abaid, Kimberly) (Entered: 09/11/2008)
10/09/2008	79	First MOTION for Extension of Time to October 27, 2008 to File Response/Reply *to Plaintiff's Request for Admissions* by Dr. Bhaddi, United States.(Donato, Christopher) (Entered: 10/09/2008)
10/09/2008		Judge Joseph L. Tauro: Electronic ORDER entered granting 79 Motion for Extension of Time to File Response/Reply re 79 First MOTION for Extension of Time to October 27, 2008 to File Response/Reply *to Plaintiff's Request for Admissions* Responses due by 10/27/2008 (Lovett, Zita) (Entered: 10/09/2008)
11/21/2008	80	MOTION for Extension of Time to January 28, 2009 to Complete Discovery by Michael David Dantone.(Abaid, Kimberly) (Entered: 11/24/2008)
11/25/2008		Magistrate Judge Judith G. Dein: Electronic ORDER entered granting 80 Plaintiff's Motion for Extension of Time. Discovery to be completed by 1/28/2009; Motions for Summary Judgment due by 3/2/2009; Opposition by 4/2/09; Reply by 4/17/09. (Dambrosio, Jolyne) (Entered: 11/25/2008)
12/08/2008	81	NOTICE of Change of Address by Michael David Dantone (Abaid, Kimberly) (Entered: 12/09/2008)
01/16/2009	82	STIPULATION of Dismissal *with Prejudice* by Dr. Bhaddi, United States. (Donato, Christopher) (Entered: 01/16/2009)
01/16/2009		Civil Case Terminated. (Abaid, Kimberly) (Entered: 01/20/2009)

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Description:	Docket Report	**Search Criteria:**	4:06-cv-40022-JLT
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL DAVID DANTONE, Plaintiff,	)	
v.	)	Civil Action No. 06-40022-JLT
DR. BHADDI and the UNITED STATES OF AMERICA,	)	
Defendants.	)	

SETTLEMENT AGREEMENT

It is hereby stipulated by and between the undersigned pro se plaintiff MICHAEL DAVID DANTONE and the defendants DOCTOR BHADDI (A/K/A FAZAL BHATTI, M.D.) and the UNITED STATES OF AMERICA by and through their attorney, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, including any counterclaim and cross-claim, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of three thousand dollars ($3,000) which sum shall be in full settlement and satisfaction of any and all claims, counterclaims, cross-claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting from the subject matter of this settlement for which plaintiff, or his heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against Doctor Bhaddi (a/k/a Fazal Bhatti, M.D.) and/or

the United States of America, its agents, servants, and employees.

3. Plaintiff and his heirs, executors, administrators and/or assigns hereby agree to accept the sum set forth in this Settlement Agreement in full satisfaction of any and all claims, counterclaims, cross-claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against Doctor Bhaddi (a/k/a Fazal Bhatti, M.D.) and/or the United States of America, its agents, servants and employees, on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his heirs, executors, administrators and/or assigns further agree to reimburse, indemnify and hold harmless Doctor Bhaddi (a/k/a Fazal Bhatti, M.D.) and the United States of America, its agents, servants, and employees, from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his heirs, executors, administrators and/or assigns against any third party not released herein.

4. This Settlement Agreement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of Doctor Bhaddi (a/k/a Fazal Bhatti, M.D.) and/or the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This Settlement Agreement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and ***all other claims which were or could have been alleged***, and avoiding the expenses and risks of further

litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. The parties agree to execute and file a Stipulation of Dismissal with Prejudice in the above-mentioned action.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by check from the United States for three thousand dollars ($3,000) and made payable to the pro se plaintiff Michael David Dantone.

9. The parties agree that this Settlement Agreement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. The interpretation and enforcement of this Settlement Agreement shall be construed under applicable federal law and jurisdiction shall remain in federal court.

11. This Settlement Agreement contains the entire agreement between the parties. All prior and contemporaneous oral and written negotiations, representations and statements are merged into this Settlement Agreement. It is expressly understood and agreed that this Settlement Agreement may not be altered, amended, modified or otherwise changed in any respect whatsoever, except by writing, duly executed by authorized representatives of all the parties to this Settlement Agreement, and such parties acknowledge and agree that they will

make no claim at any time or place that this Settlement Agreement has been orally altered or modified in any respect whatsoever.

By the parties,

Pro se plaintiff,

For all the defendants,

MICHAEL J. SULLIVAN
UNITED STATES ATTORNEY,

MICHAEL DAVID DANTONE
123 Center Street
Hughestown, PA 18640
(570) 654-1931

Christopher R. Donato
Assistant U.S. Attorney
John Joseph Moakley Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3303

Dated:_____

Dated:_____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL DAVID DANTONE, Plaintiff,	)	
v.	)	Civil Action No. 06-40022-JLT
DR. BHADDI and the UNITED STATES OF AMERICA,	)	
Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties in the above-captioned matter, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), hereby stipulate that said action be dismissed with prejudice and without costs and all rights of appeal waived.

By the parties,

Pro se plaintiff,

MICHAEL DAVID DANTONE
123 Center Street
Hughestown, PA 18640
(570) 654-1931

Dated:_____

For all the defendants,

MICHAEL J. SULLIVAN
UNITED STATES ATTORNEY,

Christopher R. Donato
Assistant U.S. Attorney
John Joseph Moakley Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3303

Dated:_____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL DAVID DANTONE,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 06-40022-JLT
	*	
DAVID L. WINN, H. MORALES, MR. SANTANA, CORRECTIONAL OFFICER SOLO, UNNAMED CORRECTIONAL OFFICERS, DR. BHADDI, MS. KILDORF, and the UNITED STATES of AMERICA,	*	
	*	
Defendants.	*	

MEMORANDUM & ORDER

August 16, 2007

TAURO, J.

Background

On January 26, 2006, Plaintiff filed a *pro se* Complaint in this court alleging that the Defendants negligently failed to transport him securely in a prison van, that this failure led to his injury, and that Defendants then failed to properly treat his injury. After a court order directed him to clarify his Complaint, Plaintiff filed an Amended Complaint on February 27, 2006. On November 29, 2006, Defendants filed a Motion to Dismiss [#32] some counts as to some Defendants. Though Defendants had yet to answer the Complaint, Plaintiff filed a Motion for Discovery [#36] on December 5, 2006. On May 16, 2007, Plaintiff filed another Amended Complaint ("the Second Amended Complaint"), without leave of court, explicitly asserting a cause of action under the Federal Tort Claims Act ("FTCA") as well a Bivens § 1983 claim for deliberate indifference to Plaintiff's medical needs.

Discussion

A. The Amended Complaint

The Federal Rules of Civil Procedure require Plaintiff to seek leave of court before filing a Second Amended Complaint.[1] But this court will accept Plaintiff's Amended Complaint in the interests of justice as Plaintiff is *pro se*, and Defendants have not objected. Though the filing of the Second Amended Complaint moots the earlier filed Motion to Dismiss,[2] this court may still consider whether any of Plaintiff's claims in the Second Amended Complaint may be dismissed if such claims fail to state a claim upon which relief can be granted.[3]

B. The FTCA Claims

Plaintiff's Amended Complaint alleges that Defendants Solo and other unnamed correctional officers should have checked the seating in the van to make sure he was secure. Plaintiff alleges Defendant Morales, as supervisor of the automobile garage, should have ensured the seating was safe before putting the van in service. Plaintiff further charges that Defendant Santana was responsible for service of the van's custom seating as supervisor of the facilities, and that Defendant Winn, as the then-warden of F.M.C. Devens "is ultimately responsible for any and all of the actions that take place with [sic] the fences of F.M.C. Devens."[4] In this way, Plaintiff charges all of these Defendants with negligence leading to his injury. But Plaintiff's claims against

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[1] See Fed. R. Civ. P. 15(a).

[2] Atl. Adm'rs Ins. Agency, Inc. v. Melcher & Prescott Agency, Inc., No. 06-230, 2007 U.S. Dist. LEXIS 47874, at *7 (D.N.H. June 29, 2007).

[3] 28 U.S.C. § 1915A (ordering the district court to screen all complaints in civil actions that seek redress from a governmental entity or officer as soon as practicable after filed).

[4] Am. Civil Compl., Paper #49, ¶ 9.

these individuals (including any unidentified correctional officers) are not cognizable under the FTCA. The FTCA is clear that a claim for negligent injuries against federal agents and agencies must proceed only against the United States.[5] Accordingly, the FTCA claims against all individual defendants are dismissed. Plaintiff's FTCA claim shall proceed only against Defendant United States.

C. The Bivens Claims

Plaintiff also brings a so-called Bivens actions pursuant to 42 U.S.C. § 1983 alleging that "the medical personnel that I attempted to contact seemed to treat my medical needs with indifference" and provided no "meaningful medical assistance."[6] Plaintiff alleges that the medical personnel he contacted are Defendant Bhaddi and Defendant Kildoff. Plaintiff does not allege that any other Defendant made specific acts or omissions that constitute deliberate indifference to Plaintiff's medical needs.

To the extent Plaintiff seeks to bring a claim against Defendant Winn in his role of supervisor over the entire facility, such a claim is not cognizable as there is no *respondeat superior* liability under Bivens.[7] Plaintiff's Bivens claim is, therefore, dismissed as to all

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[5] 28 U.S.C. § 1346(b)(1); McCloskey v. Mueller, 446 F.3d 262, 266 (1st Cir. 2006).

[6] Am. Civil Compl., Paper # 49, ¶ 12.

[7] See Polk County v. Dodson, 454 U.S. 312, 325 (U.S. 1981); Durmer v. O'Carroll, 991 F.2d 64, 69 (3d Cir. 1993). See, e.g., Pinto v. Nettleship, 737 F.2d 130, 132 (1st Cir. 1984) (no *respondeat superior* liability under § 1983; liability can only be imposed upon officials who were involved personally in the deprivation of constitutional rights); accord Guzman v. City of Cranston, 812 F.2d 24, 26 (1st Cir. 1987) (same); Rodriguez-Vazquez v. Cintron-Rodriguez, 160 F. Supp. 2d 204, 210-213 (D.P.R. 2001) (dismissing claims, allegation that defendant was "ultimately responsible for the selection and/or supervision and/or training and/or discipline of his subordinates" was insufficient).

Defendants except Defendants Bhaddi and Kildoff, for failure to state a claim upon which relief may be granted.

This court may *sua sponte* dismiss all claims against defendants who have not been timely served.[8] On November 7, 2006, this court entered an order giving Plaintiff an additional 120 days to complete service of process. The docket indicates that Plaintiff effected service against Defendant Bhaddi on December 21, 2006, but that Defendant Kildoff was unable to be served. As the 120 day extension has now elapsed, Plaintiff's claim against Defendant Kildoff is DISMISSED WITHOUT PREJUDICE. Plaintiff's Bivens action shall go forward only against Defendant Bhaddi.

Conclusion

Based on the foregoing, it is hereby ordered that:

1. Defendant's Motion to Dismiss [#32] is DENIED AS MOOT.

2. Plaintiff's Motion for Discovery [#36] is premature and is DENIED WITHOUT PREJUDICE.

3. Defendant Kildoff is DISMISSED WITHOUT PREJUDICE for failure to effect service of process.

4. The court will permit the FTCA claim to proceed against the United States, and the Bivens claim to proceed against Defendant Bhaddi, as set forth in the Second Amended Complaint. All other claims and parties are hereby DISMISSED. The clerk shall terminate David L. Winn, H. Morales Mr. Santana, Correctional Officer Solo, Unnamed Correctional Officers, and Ms. Kildoff from this action.

5. The remaining Defendants (i.e., the United States and Dr. Bhaddi) shall file an Answer by September 7, 2007.

IT IS SO ORDERED.

/s/ Joseph L. Tauro
United States District Judge

[8] D. Mass. R. 4.1(b).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1/16/09
Case Terminated

MICHAEL DAVID DANTONE,
Plaintiff,

v.

DR. BHADDI and the
UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 06-40022-JLT

STIPULATION OF DISMISSAL WITH PREJUDICE

The parties in the above-captioned matter, pursuant to Fed. R. Civ. P. 41(a)(1)(ii), hereby stipulate that said action be dismissed with prejudice and without costs and all rights of appeal waived.

By the parties,

Pro se plaintiff,

MICHAEL DAVID DANTONE
123 Center Street
Hughestown, PA 18640
(570) 654-1931

Dated: 1-9-09

For all the defendants,

MICHAEL J. SULLIVAN
UNITED STATES ATTORNEY,

Christopher R. Donato
Assistant U.S. Attorney
John Joseph Moakley Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3303

Dated: 1/7/2009

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

DARRYL ORRIN BAKER

Plaintiff,

VS.

CIVIL ACTION
CASE NO.# CA05-147 E

UNITED STATES OF AMERICA
GOVERNMENT OFFICIALS AT
FCI-MCKEAN, WARDEN, OFFICER
B. WESEMEN, MEDICAL DEPARTMENT

Defendants.

COMPLAINT

NOW COMES, The Plaintiff, DARRYL ORRIN BAKER (hereinafter "PLAINTIFF"), proceeding **PRO-SE**, and bring this complaint on behalf of himself and alleges negligence on the part of the Government Officials at Federal Correctional Institution Mckean County Pennsylvania (hereinafter "FCI MCKEAN or DEFENDANTS") and the United States of America for future damages and injuries plaintiff sustained from the Government Officials negligence.

JURISDICTION AND VENUE

(1) Plaintiff, **pro-se**, asserts that this Honorable Court has jurisdiction on this matter.

(2) Plaintiff, **pro-se**, asserts this Court is the appropriate venue.

(3) The named plaintiff in this complaint was a federal prisoner that was currently incarcerated at Federal Correctional Institution in Mckean County, Pennsylvania, FCI Mckean.

Parties

(4) Plaintiff was incarcerated at FCI Mckean in August 2002 and up to July 1, 2004. And was transferred to FSL Elkton Ohio, Lisbon Ohio another Federal Institution.

(5) Plaintiff at this time has remained incarcerated at FSL Elkton Ohio, Lisbon Ohio.

(6) The United States of America and the Government Employees or Officials are negligent for failure to protect plaintiff and the Medical Department negligent for causing plaintiff future injuries.

Factual Allegations

(7) The plaintiff allege, **inter alia**, that on February 27, 2004, at approximately 8:05 p.m., I inmate Baker, was assaulted by two (2) Latin King Gang Members at FCI Mckean.

(8) At the time of this attack, I was assigned to the ten (10) man cell where I shared my living quarters with (9) other inmates, and several of these inmates saw the attack being administered to me by the Latin King Gang Members.

(9) The assault lasted approximately between (7) to (10) minutes, leaving me battered and bruised very badly and in need of serious medical attention.

(10) I was in the ten (10) man cell setting in a chair listening to the radio with my head phones on with my eyes closed, and two (2) Latin King Gang Members entered the (10) man cell and started assaulting me.

(11) I suffered a bleeding and bruised nose, swollen left eye, swollen head, cuts, blurred vision, contusion, at the time of this attack by the Latin King Gang Members.

(12) Officer B. Weseman, was on duty working the evening shift and was not present in the Unit at the time this assault took place.

(13) Perhaps Officer Weseman, was asleep, or perhaps he left for a cigarette, or a snack, but he was not in the Unit when I was assaulted by the two (2) Latin King Gang Members, and Officer Weseman, was unaware what took place.

(14) Two (2) days later, on February 29, 2004, at approximately 9:10 a.m., I was awoke by Officer Zerowitzs, the morning shift Officer, and he requested to see my face for bruises.

(15) I was then immediately taken to the Lieutenant office and while I was there, pictures were taken of my face, left eye, back, hands, chest, where the two (2) Latin King Gang Members assaulted me.

(16) Then I was immediately taken to the Medical Department where I was seen by a Physician Assistant.

(17) The Physician Assistant, denied me any medication for my pain and suffering.

(18) The Physician Assistant, denied me medical attention to my left eye.

(19) The Physician Assistant was unaware that I had double vision, blurred vision, and that my left eye was of centered.

(20) The Physician Assistant, denied me to see a Eye Doctor, or a Eye Specialist, and did not recommend me to see one.

(21) Then I was immediately placed in Administrated Detention.

(22) While I was there, I made numerous complaints about my condition to my left eye, and my pain and suffering, and was denied any treatment.

(23) Then I made my complaint to the Warden and Assistant Warden and I still was denied medical attention for my left eye and pain and suffering.

(24) As a result of the Defendant's negligences at FCI Mckean I am suffering future pain and suffering and future ailments included, but are limited to:

(a) The left eye will not look up as far as the right eye.

(b) Some scarring on the floor of the orbit with possible adhesions to the inferior rectus muscle.

(c) Orbital floor fracture.

(d) Orbital floor fracture w/Entrapment.

(e) Blow out fracture.

(f) Can not look up with my left eye without experiencing a form of diplopia.

(g) Left eye is of centered.

(h) Pain in my left eye when I move to right and left.

(i) Numbness in my left side of my face.

(25) Plaintiff allege that the named Defendants negligence subjected the plaintiff to unusual punishment as a result of unreasonable risk of harm to plaintiff present and future general health, and well-being.

MEDICAL

(26) On February 27, 2004, I inmate Baker, was assaulted by two (2) Latin King Gang Members, as a result of this attack I sustained injuries to my nose, head, left eye, and contusion, and emotional pain and future suffering.

(27) Two (2) days later on February 29, 2004, at approximately 9:10 a.m. I was awoke by the morning shift Officer Mr. Zerowitz, were he ordered to see the injuries I had sustained, then I was immediately taken to the Lieutenant office where pictures where taken of my injuries and then I was seen by a Physician Assistant.

(28) I did not receive any medication or any treatment for my left eye or my injuries.

(29) Then I was taken to Administrative Detention.

(30) While I was in Administrative Detention I did not receive any medical attention for my left eye, and the injuries I sustained.

(31) I put in several sick call forms and was denied medical treatment by medical staff at FCI Mckean.

(32) On March 11, 2004, I was seen by Doctor Beam, and received some eye drops and was denied medical treatment for my left eye.

(33) I was released from Administrative Detention on March 26, 2004.

(34) After my release, I begain to put in sick call forms and and I was not seen by a Eye Specialist until two months after.

(35) I did not see a Eye Surgeon until April 16, 2004.

(36) This negligences by these Government Officials at FCI Mckean cause me future injuries to my left eye, and I will not be able to hold my job at General Motors when I am released form prison.

(37) This negligence by these Government Officials are the proximate cause and has caused me future injuries and future pain and suffering.

FIRST CAUSE OF ACTION

(38) Plaintiff allege that the named Defendant's Government Officials used nondiscretionary actions and was not in element of judgment or choice.

SECOND CAUSE OF ACTION

(39) Defendant's Government Officials "negligent" actions have created a direct liability for plaintiff in relationship to plaintiff's present and future health and well-being.

THIRD CAUSE OF ACTION

(40) Plaintiff was retaliated against fro filing his Tort Claim against Defendant's Government Officials.

FOURTH CAUSE OF ACTION

(41) Defendant's Government Officials "negligence" violated Discretionary Functional Exception.

FIFTH CAUSE OF ACTION

(42) Whether the Defendant's Government Officials used an element of judgment of choice when they failed to protect plaintiff.

SIXTH CAUSE OF ACTION

(43) Negligent acts of Defendant's Government Officials are proximate cause of the plaintiff's injuries.

SEVENTH CAUSE OF ACTION

(44) Negligent acts of Defendant's Government Officials denied the plaintiff duty of care owed to plaintiff.

EIGHTH CAUSE OF ACTION

(45) Plaintiff was denied medical treatment by Government Officials at FCI Mckean.

RELIEF REQUESTED

WHEREFORE, Plaintiff request that the court grant the following relief:

A. The Plaintiff demand for a Trial by a Jury, or a Bench Trial

B. Award Plaintiff $20 million for the claim submitted to the Federal Agency.

C. Award Plaintiff $20 million for compensatory damages against the Defendant's Government Officials.

D. Award Plaintiff $20 million for punitive damages against the Defendant's Government Officials.

E. Award Plaintiff $15 million for medical damages for pain and future suffering.

F. Award Plaintiff any applicable interest against the Defendant's until all judgment are satisfied.

G. Awarding Plaintiff any other relief that may be deemed just and fair against the Defendant's Government Officials.

Respectfully submitted

/s/ Darryl Baker

DARRYL ORRIN BAKER
REG. NO.# 19613-039
FSL ELKTON OHIO
P.O. BOX 10
LISBON, OHIO
44432-0010

EXECUTED MAY 11 ,2005.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL ORRIN BAKER,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 05-147E
	)	
v.	)	JUDGE SEAN J. McLAUGHLIN
	)	
UNITED STATES OF AMERICA,	)	CHIEF MAGISTRATE JUDGE
	)	SUSAN PARADISE BAXTER
Defendant.	)	
	)	

STIPULATION FOR COMPROMISE SETTLEMENT

It is hereby stipulated by and between Plaintiff, Darryl Orrin Baker (hereinafter "Plaintiff"), and the United States of America, on behalf of the United States Bureau of Prisons (BOP), by and through their respective attorneys, as follows:

1. That the parties do hereby agree to settle and compromise the above-entitled action upon the terms indicated below.

2. That Defendant, United States of America, on behalf of the BOP, will pay Plaintiff the sum of Ninety Thousand Dollars ($90,000.00) in full and complete satisfaction of the suit and of any and all claims of any kind whatsoever, both known and unknown, which was filed in the United States District Court for the Western District of Pennsylvania at Civil Action No. 05-147E.

3. That in exchange for the monetary payments as described above in paragraph two (2), Plaintiff hereby agrees to accept said sum in full and complete settlement and satisfaction of any and all claims and demands of any kind whatsoever, both known and unknown, including, but not limited to, attorney fees,

out-of-pocket expenses and costs which his heirs, executors, administrators, or assigns, individually or jointly, may have against Defendant, the United States of America, the Bureau of Prisons, its past or present officers, employees, and agents, either individually or in their official capacities, who acted within the scope of their employment on account of the incident or circumstances giving rise to this suit, namely, the medical care given to the Plaintiff during his incarceration within the Bureau of Prisons from 1995 to the present, for which suit was filed in the United States District Court for the Western District of Pennsylvania at Civil Action No. 05-147E.

4. The parties agree that this agreement shall not constitute an admission of liability or fault on the part of Defendant, United States of America, the United States Bureau of Prisons, or any of their past or present officers, employees, or agents, either in their individual or official capacities.

5. The settlement funds will be electronically wired to Arthur D. Martinucci, Esquire, Plaintiff's Counsel's IOLTA account.

6. That Plaintiff shall file with the Clerk of the above Court, a Stipulation of Dismissal of the above action with prejudice and without costs.

7. That Plaintiff also agrees that he shall furnish to Defendant, United States of America and the Bureau of Prisons, and their past or present officers, employees, and agents, a Release from any and all claims, both now known or unknown,

including claims from any and all insurance companies, subrogation claims and any other assigned claims arising out of or related to the subject matter of this suit and that Plaintiff shall defend, protect, indemnify and hold harmless the United States of America, the United States Bureau of Prisons, and their past and present officers, employees, and agents, either individually or in their official capacities, from any and all such claims, suits, actions, or proceedings of any kind whatsoever, both known and unknown.

8. Nothing set forth in this Stipulation or any related document shall constitute a waiver of Plaintiff's right to seek reimbursement for certain costs and expenses directly from the Court, nor shall anything set forth in this Stipulation or any related document impose liability for those costs on the Defendant.

Executed this 11th day of February, 2009.

ARTHUR D. MARTINUCCI, ESQUIRE
2222 West Grandview Boulevard
Erie, PA 16506-4509
(814) 833-2222

Attorney for Plaintiff

MARY BETH BUCHANAN
UNITED STATES ATTORNEY

PAUL E. SKIRTICH
Assistant U.S. Attorney
Western District of PA
U.S. Post Office & Courthouse
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
(412) 894-7418
PA ID No. 30440

Attorney for Defendant

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions: 

Case ID: CIV-NER-2007-00344 **Short Description:** JOHNSON V. MARTINEZ ET AL

[redacted]

Case Login Information

Reference Number	2:04-cv-01967-CMR
Short Description	JOHNSON V. MARTINEZ ET AL
Classification	Civil
Case Type	Bivens 8th Amend
Case Sub-Type	COC-Medical Condition
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	Philadelphia (FDC)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	Philadelphia (FDC)
Monetary Relief Sought	$10,000.00
Estimated Amount	$
Office	Philadelphia
Jurisdiction	EASTERN DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	05/11/2007
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$
Total Amount Paid	$40,000.00
Description	SETTLED AS FTCA
Description	SETTLED AS FTCA
Court Fee Paid ?	Yes
Pro Se ?	No

Case Initiation Dates

Date Received	06/28/2004
Date Filed	05/06/2004

Case Progress

Current Owner	JOYCE HORIKAWA
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	PHL INMATE ALLEGES INADEQUATE MED TREATMENT AFTER ASTHMA ATTACK
Comments	

CMR

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA INSTITUTIONAL LAW PROJECT
By: Angus R. Love, Esquire
Identification No. 22392
Suite 523, 924 Cherry Street
Philadelphia, PA 19107
Telephone: (215) 925-2966
Facsimile: (215) 925-5337

Attorney for Plaintiff

Jeffrey Johnson,

Plaintiff,

vs.

Arimus Martinez, Joseph Zagame and Patricia Hoffenrica,

Defendant(s).

CIVIL ACTION NO. 2:04-cv-01967

FILED
OCT 2 0 2004

AMENDED COMPLAINT

I. Introduction

1. This is a civil rights action filed pursuant to 42 U.S.C. §1983 by Jeffrey Johnson who is incarcerated in the federal prison system at the United States Penitentiary at Lewisburg, Pennsylvania. Mr. Johnson alleges that his Eighth Amendment right to proper medical care has been violated.

II. Jurisdiction

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and 1343(3), as well as 42 U.S.C. §1983 and 28 U.S.C. §§2201-02. Plaintiff's claims for injunctive relief are authorized by 28 U.S.C. §2283 and Rule 65 of the Federal Rules of Civil Procedure.

III. Parties

3. Plaintiff Jeffrey Johnson is an adult individual currently incarcerated at the United States Penitentiary at Lewisburg, PA, Post Office Box 1000, Lewisburg, PA 17837.

4. Defendant Arimas Martinez is the Chief Administrator of Medical Health Services at the Federal Detention Center in Philadelphia (FDC-Philadelphia), 700 Arch Street, Philadelphia, PA 19106.

5. Defendant Joseph Zagame was the Assistant Health Administrator at FDC-Philadelphia and is now employed at the United States Penitentiary at Lewisburg, Lewisburg, PA 17837-1000, in a similar capacity.

6. Defendant Patricia Hoffenrica is a registered nurse employed at FDC-Philadelphia, 700 Arch Street, Philadelphia, PA 19106.

7. All defendants are sued in their official and individual capacities. All defendants were acting under color of state law.

IV. Facts

8. Plaintiff Jeffrey Johnson has been an asthmatic since birth.

9. Plaintiff Johnson began serving his sentence in the federal system in October 2002.

10. During intake medical examination Plaintiff Johnson informed appropriate staff of his medical condition.

11. As a result of his condition, Plaintiff Johnson was allowed to keep an inhaler on his person at all times except for a few months in 2002.

12. On three occasions in 2002, Plaintiff Johnson suffered severe asthma attacks that required immediate medical attention.

13. These incidents occurred on or about January 4, 16 and May 6, 2002.

14. On July 5, 2002 Plaintiff Johnson suffered another severe asthma attack.

15. Plaintiff Johnson pushed the duress button in his cell while experiencing the asthma attack, requesting medical assistance.

16. Shortly thereafter Defendants Martinez, Zagame and Hoffenrica came to his cell.

17. Defendants placed handcuffs on Plaintiff Johnson's cellmate James Dorsey and then on Plaintiff Johnson.

18. Plaintiff Johnson requested a wheelchair.

19. Defendant Martinez told Plaintiff there was no wheelchair available and he would have to walk to the prison infirmary.

20. Defendants Martinez and Zagae ordered Plaintiff Johnson to walk to the prison infirmary.

21. Plaintiff Johnson indicated that he could not walk and again requested a wheelchair as he was in obvious discomfort.

22. Plaintiff Johnson's lungs were not checked with a stethoscope by Defendant Hoffenrica, as was the normal procedure on previous occasions.

23. Plaintiff Johnson was placed back in his cell where he remained for approximately four hours and received no further treatment.

24, Defendants Martinez, Zagame and Hoffenrica left and did not return.

25. After a shift change, Physician Assistant R. Ritler approached Plaintiff's cell.

26. Plaintiff's cellmate explained the medical problems of Plaintiff who was barely able to speak.

27. Plaintiff Johnson was then put in a wheelchair, taken to the infirmary and given medical treatment.

28. Plaintiff Johnson was given a shot of solumedral and breathing assistance.

29. When he did not respond to treatment, Johnson was taken to an outside hospital.

30. Plaintiff Johnson received treatment at the Emergency Room of Thomas Jefferson Hospital where he was intubated.

31. Johnson remained intubated for six days and was listed in critical condition.

32. Plaintiff Johnson remained in Jefferson Hospital for approximately eighteen (18) days under the care of Dr. Gregory Kane.

33. Plaintiff Johnson filed a grievance the day after his return from the hospital and completed the grievance procedures available to him.

34. Since this incident Plaintiff Johnson has been experiencing eye problems.

35. Plaintiff Johnson was recommended for physical therapy upon release from Jefferson Hospital but was refused such by prison officials.

V. Cause of Actions

36. Plaintiff Johnson incorporates by reference his initial *pro se* complaint and paragraphs 1 through 35 of this Amended Complaint.

37. Defendants' actions constitute a deliberate indifference to a serious medical need thereby violating Plaintiff's rights to be free of cruel and unusual punishment as prohibited by the Eighth Amendment of the United States Constitution.

VI. Relief

38. Plaintiff Johnson respectfully requests that this Court enter judgment for Plaintiff.

39. A declaration that Plaintiff's constitutional rights were violated by Defendants.

40. An injunction ordering Defendants to provide proper medical treatment including physical therapy to Plaintiff.

41. Compensatory damages jointly and severally against each Defendant.

42. Punitive damages jointly and severally against each Defendant.

43. Reasonable attorneys fees.

44. Such other relief as the Court deems necessary.

Respectfully submitted,

Pennsylvania Institutional Law Project

By: _____
Angus Love, Esquire
Attorney I.D. No. 22392

924 Cherry St., Ste. 523
Philadelphia, PA 19107
(215) 925-2966 (Telephone)
(215) 925-5337 (Facsimile)

Attorney for Plaintiff

Date: October 20, 2004

7

FORM TO BE USED BY A PRISONER FILING A 42 U.S.C. § 1983 CIVIL RIGHTS COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TO BE FILED UNDER 28 USC §1331 FEDERAL OFFICIALS!

I. CAPTION

JEFFREY JOHNSON (55397-066)
(Enter the full name of the plaintiff or plaintiffs)

FILED
JUN 28 2004
MICHAEL E. KUNZ, Clerk
Dep. Clerk

v.

MR. AZIMAR MACHNEZ (H.S.A)
MR. JOSEPH ZADANIC (A.H.S.A)
MRS. PATRICIA S. HOFFENBERG (R.N)
(Enter the full name of the defendant or defendants)

04 cv 1967

II. PARTIES

a. *Plaintiff*

Full name: JEFFREY JOHNSON

Prison identification number: 55397-066

Place of present confinement: UNITED STATES PENITENTIARY, LEWISBURG

Address: LEWISBURG PENNSYLVANIA 17837-1000

Place of confinement at time of incidents or conditions alleged in complaint, including address:

F.D.C PHILA. PHILA PA 19106 700 ARCH ST. (FEDERAL DETENTION CENTER)

Additional plaintiffs: Provide the same information for any additional plaintiffs on the reverse of this page or on a separate sheet of paper.

b. *Defendants: (list only those defendants named in the caption of the complaint, section I)*

1. *Full name including title:* MR. AZIMAR MACHNEZ (H.S.A OF HEALTH SERVICES)

   Place of employment and section or unit: F.D.C. PHILADELPHIA

2. *Full name including title:* JOSEPH ZADANIC (ASST. HEALTH SERVICE ADMINISTRATOR)

   Place of employment and section or unit: F.D.C PHILADELPHIA

3. *Full name including title:* PATRICIA S. HOFFENBERG REGISTERED NURSE

   Place of employment and section or unit: F.D.C. PHILADELPHIA.

4. *Full name including title:* _____

   Place of employment and section or unit: _____

Additional defendants: Provide the same information for any additional defendants on the reverse of this page or on a separate sheet of paper.

III. PREVIOUS LAWSUITS

Instructions:

If you have filed other lawsuits in any federal or state court dealing with the same facts as this complaint or other facts related to your imprisonment, you must provide the information requested below. If you have not filed other lawsuits, proceed to Section IV, Administrative Remedies, on this page.

If you have filed other lawsuits, provide the following information.

Parties to your previous lawsuit:

Plaintiffs JEFFREY JOHNSON

Defendants AZIMAS MARTINEZ, JOSEPH ZAGAMI, PATRICIA HOFFENZICK

Issues: DENIAL/DELAY OF MEDICAL TREATMENT

Court: if federal, which district? EASTERN DISTRICT

if state, which county? ____

Docket number: X *Date filed:* 3/04

Name of presiding judge: X

Disposition: (check correct answer(s)); Date: ____

Dismissed ___ *Reason?* I WAS DENIED DUE TO UNCERTIFIED NURSE'S SIGNATURE

Judgment ___ *In whose favor?* ____

Pending ___ *Current status?* ____

Other ___ *Explain* ____

Appeal filed? ___ *Current status?* ____

Additional lawsuits. *Provide the same information concerning any other lawsuits you have filed concerning the same facts as this action or other facts related to your imprisonment. You may use the back of this page or a separate sheet of paper for this purpose.*

IV. ADMINISTRATIVE REMEDIES

Instructions:

Provide the information requested below if there is an administrative procedure to resolve the issues you raise in this complaint. Examples of administrative procedures include review of grievances, disciplinary action, and custody issues. If no administrative procedures apply to the issues in this complaint, proceed to Section V, Statement of Claim, on page 4.

a. *Describe the administrative procedures available to resolve the issues raised in this complaint:*

Type of procedure. (grievance, disciplinary review, etc.)

BP-8 BP-9 BP-10 BP-11

Authority for procedure. (DC-ADM, inmate handbook, etc.)

UNIT TEAM (8) WARDEN (9) REGIONAL OFFICE (10) CENTRAL OFFICE (11)

Formal or informal procedure. INFORMAL

Who conducts the initial review? COUNSELOR (8) WARDEN (9) REGION (10) CENTRAL (11)

What additional review and appeals are available? AFTER EXHAUSTION OF ALL REMEDIES THERE'S NO ADDITIONAL APPEALS.

b. *Describe the administrative procedures you followed to resolve the issues raised in this complaint before filing this complaint:*

On what date did you request initial review? 7/23/02 BP-8

What action did you ask prison authorities to take? TO FIRE THE EMPLOYEES INVOLVED

What response did you receive to your request? NO I WAS DENIED ALL OF MY REQUESTS

What further review did you seek and on what dates did you file the requests?

BP-9 (8-13-02) BP-10 (9-15-02) BP-11 (10-27-02)

What responses did you receive to your requests for further review?

I WAS DENIED

c. *If you did not follow each step of the administrative procedures available to resolve the issues raised in this complaint explain why.*

I FOLLOWED ALL ADMINISTRATIVE PROCEDURES

V. STATEMENT OF CLAIM

Instructions:

*State here as **briefly** as possible the **facts** of your case. Use **plain language** and do not make legal arguments or cite cases or statutes. State how **each defendant** violated your constitutional rights. Although you may refer to any person, make claims only against the defendants listed in the Caption, Section I. Make only claims which are **factually related**. Each claim should be numbered and set forth in a separate paragraph with an explanation of how the defendants were involved. Use the **reverse** of this page or a separate sheet of paper if you need more space.*

Statement of claim:

(1) ON 7-5-02, WHILE IN SHU. (AROUND MID-NITE) I WAS HAVING A SERVERE ASHMATIC ATTACK MR ARIMAS MARTINEZ WAS 1 OF THE 3 MEDICAL PERSONNEL THAT SHOWED AT MY CELL. HE, ALONG WITH THE OTHER 2 MEDICAL STAFF, TRIED TO FORCE ME TO WALK ALL THE WAY TO A TREATMENT ROOM. I TOLD THEM "GET A WHEELCHAIR, I NEED A WHEELCHAIR, DON'T MAKE ME WALK". MR MARTINEZ RESPONDED "THERE ARE NO WHEELCHAIRS UP HERE, AND WE'RE NOT GETTING ONE" THEN THEY PLACED ME BACK IN MY CELL, AND NEVER RETURNED. I WAS LEFT IN AN EMERGENT STATE FOR 4 HOURS, UNTIL THE SHU PA (RIRITTER) NOTICED ME AND IMMEDIATELY CAME RIGHT BACK WITH A WHEELCHAIR. AFTER AN HOUR OF "USELESS" TREATMENTS I WAS RUSHED

CONTINUED...

VI. RELIEF

*Instruction: **Briefly** state exactly what you want the Court to do for you.*

Relief sought:

COMPENSATORY DAMAGES IN THE AMOUNT OF 10,000 DOLLARS AND PUNITIVE DAMAGES IN THE AMOUNT OF 10,000 DOLLARS PAID TO THE PLAINTIFF BY EACH DEFENDANT, AND FOR EACH DEFENDANT TO BE FIRED.

VII. DECLARATION AND SIGNATURE

I (we) declare under penalty of perjury that the foregoing is true and correct.

4/21/04
DATE

[signature]
SIGNATURE OF PLAINTIFF(S)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY JOHNSON ,	:	
Plaintiff,	:	
vs.	:	CIVIL ACTION NO. 04-1967
UNITED STATES OF AMERICA	:	Judge **RUFE**
Defendants.	:	(Filed via ECF)

SECOND AMENDED COMPLAINT

INTRODUCTION

Plaintiff brings this Federal Torts Claims Act action against the United States of America seeking compensation for injuries he suffered as a result of the negligence of employees of the United States at the Federal Detention Center in Philadelphia.

JURISDICTION

1. This Court has jurisdiction pursuant to the Federal Torts Claims Act, 28 U.S.C. §1346 and 28 U.S.C. §2671, et seq.
2. Venue is proper in the United States District Court for the Middle District of Pennsylvania under 28 U.S.C. § 1402(b).

PARTIES

3. Plaintiff, Jeffrey Johnson, is an inmate at the United States Penitentiary in Victorville, California. At all times relevant to the events described in this complaint, he was incarcerated at the Federal Detention Center in Philadelphia.
4. Defendant United States of America is an appropriate defendant under the Federal Tort Claims Act.

FACTS

5. Plaintiff, Jeffrey Johnson, has been an asthmatic since birth.
6. From December 5, 2001 through November 20, 2002, Mr. Johnson was incarcerated at the Federal Detention Center in Philadelphia (FDCP).
7. Medical staff at FDCP were aware of and familiar with Mr. Johnson's history as an asthmatic.
8. Prior to July, 2002, while at FDCP, Mr. Johnson had suffered from several asthma attacks, some of which were severe enough to require hospitalization.
9. While at FDCP, Mr. Johnson received treatment for his asthma on many occasions.
10. Late in the evening of July 4, 2002, Mr. Johnson began to suffer a severe asthma attack.
11. He pushed the duress button in his cell in order to obtain medical assistance.
12. At some point, either late in the evening of July 4 or early in the morning of July 5, Arimas Martinez, Joseph, Zagame, and Patricia Hofferica came to Mr. Johnson's cell.

13. At the time, Mr. Martinez was the Health Services Administrator at FDCP.

14. At the time, Mr. Zagame was the Assistant Health Services Administrator at FDCP.

15. At the time, Ms. Hofferica was a nurse at FDCP.

16. While Mr. Martinez, Mr. Zagame, and Ms. Hofferica were present, Mr. Johnson was placed in handcuffs and brought out of his cell to the hallway.

17. Mr. Johnson asked for medical treatment for his asthma.

18. Mr. Johnson was informed that in order to receive treatment, he would have to walk to the nearest examination room.

19. Mr. Johnson stated that he could not walk due to the asthma attack and requested a wheelchair.

20. Mr. Johnson was in obvious distress.

21. Either Mr. Martinez, Mr. Zagame, or Ms. Hofferica informed him that no wheelchairs were available and that if he wanted treatment he would have to walk to the examination room.

22. When Mr. Johnson again stated that he was unable to walk, he was placed back into his cell without receiving any treatment for his asthma attack.

23. Mr. Martinez, Mr. Zagame, and Ms. Hofferica left and did not return.

24. As a result of information in Mr. Johnson's medical file and Mr. Johsnon's symptoms and complaints on the evening in question, Mr. Martinez, Mr. Zagame, and Ms. Hofferica knew or should have known that he required immediate treatment for his asthma attack.

25. The failure of Mr. Martinez, Mr. Zagame, and Ms. Hofferica to provide Mr.

Johnson treatment for his asthma attack constituted an unwarranted departure from generally accepted standards of medical practice

26. The next morning, when the shift changed, Physician's Assistant (PA) Ritter came to Mr. Johnson's cell.

27. When Mr. Johnson's cellmate explained that Mr. Johnson was having a severe asthma attack, PA Ritter went to get a wheelchair.

28. Mr. Johnson was taken in the wheelchair to the main medical room in the prison.

29. After a brief attempt to treat the asthma attack on the spot, Mr. Johnson was taken by ambulance to Thomas Jefferson Hospital.

30. Mr. Johnson remained at Thomas Jefferson Hospital for more than two weeks.

31. For approximately six days, he was intubated and was listed in critical condition.

32. The trauma Mr. Johnson suffered as a result of the untreated asthma attack caused permanent damage to his eye.

33. As a direct and proximate result of the conduct of Mr. Martinez, Mr. Zagame, and Ms. Hofferica, plaintiff suffered substantial damages, including pain and suffering, permanent physical impairment, emotional distress and harm.

34. Mr. Martinez, Mr. Zagame, and Ms. Hofferica were at all times relevant to this Complaint employed as medical professionals by the BOP by the Bureau of Prisons.

35. At all times relevant to this Complaint, Mr. Martinez, Mr. Zagame, and Ms. Hofferica were acting within the scope and course of their employment with the Bureau of Prisons.

CAUSE OF ACTION

COUNT I

Federal Tort Claims Act – Negligence

1. Arimas Martinez, Joseph Zagame, and Patricia Hofferica owed a duty to Mr. Johnson, breached their duty to him, and, as such, were a direct and proximate cause and a substantial factor in bringing about Mr. Johnson's damages outlined above.

2. The actions of Mr. Martinez, Mr. Zagame, and Ms. Hofferica constitute the tort of negligence under the laws of the Commonwealth of Pennsylvania.

3. Under the Federal Tort Claims Act, defendant United States of America is liable for these actions.

Respectfully Submitted,

Angus Love, PAID#22932
Pennsylvania Institutional Law Project
718 Arch Street, Suite 304 South
Philadelphia, PA 19106
(215) 925-2966

Michael Cooke, PAID#91247
Burke Pyle LLC
4112 Station Street
Philadelphia, PA 19127
(215) 487-6593

Attorneys for Plaintiff

Date of filing: 3-7-07

VERIFICATION

I have read the foregoing complaint and hereby verify that the matters alleged therein are true. By my signature below, I declare under penalty of perjury the foregoing is true and correct. I make this declaration subject to the penalties of 28 USC §1746.

Executed at Florence, Colorado on the 18 day of JANUARY, 2007

Signature: _____
Jeffrey Johnson

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY JOHNSON,	:	
Plaintiff	:	**CIVIL ACTION**
	:	**NO. 04-1967**
v.	:	
	:	
ARIMAS MARTINEZ (H.S.A.), JOSEPH ZAGAME (A.H.S.A.), and PATRICIA HOFFENRICA (R.N.),	:	
Defendants	:	
	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **January 19, 2006**

Plaintiff Jeffrey Johnson ("Johnson"), an inmate in the federal prison system, brings this civil rights action against prison medical health officials and staff for their alleged failure to attend to a severe asthma attack he suffered on July 5, 2002. Presently before the Court is Defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment. For the reasons that follow, the Court denies the Motion.

I. FACTUAL BACKGROUND

Johnson is currently incarcerated at the United States Penitentiary in Beaumont, Texas. From December 5, 2001 to November 22, 2002, Johnson was incarcerated at the Federal Detention Center in Philadelphia, Pennsylvania (the "FDC"). Johnson has been an asthmatic since birth. Upon entering the FDC, Johnson underwent a routine medical examination. During the examination, Johnson informed the prison medical staff of his asthma. As a result, prison authorities

allowed Johnson to keep an inhaler on his person at all times, except for a few months in 2002.[1]

Prior to July 2002, Johnson suffered three asthma attacks for which he immediately required and received medical attention from FDC staff. At approximately midnight on July 5, 2002, Johnson suffered another severe attack. At that time, Johnson was in a segregated housing cell with another prisoner, James Dorsey ("Dorsey"), and he did have his inhaler. When Johnson began experiencing the asthma attack, he pushed the duress button in his cell to request medical assistance. Shortly thereafter, Defendants Arimas Martinez ("Martinez"), Joseph Zagame ("Zagame"), and Patricia Hoffenrica ("Hoffenrica")—all employees of the FDC's Medical Health Services Department—arrived at Johnson's cell and handcuffed Johnson and Dorsey. Johnson, showing obvious signs of discomfort, requested a wheelchair. Martinez denied Johnson's request, stating that no wheelchair was available and ordering Johnson to walk to the infirmary to receive treatment. Johnson indicated he could not walk and repeated his request for a wheelchair. Defendants again denied his request. They placed Johnson back in his cell and left. At no point did any of the Defendants check Johnson's lungs with a stethoscope, as had been the normal procedure for his previous attacks.

Four hours later, after a shift change, a physician's assistant approached Johnson's cell. Johnson was barely able to speak, so Dorsey explained Johnson's medical condition to the assistant. Johnson was immediately placed in a wheelchair, taken to the infirmary, and given a shot of solumedral and breathing assistance. When Johnson did not respond to this treatment, he was taken to the emergency room at Thomas Jefferson Hospital. There, he was intubated for six days

[1] The Amended Complaint and the papers relating to this Motion do not specify why Johnson was not allowed to have his inhaler during those months.

and listed in critical condition. He remained at the hospital under doctor's care for an additional twelve days.

On May 5, 2004, Johnson initiated this lawsuit by filing a motion for leave to proceed *in forma pauperis*. The Court granted his motion, and Johnson filed a *pro se* Complaint on June 28, 2004. The Court subsequently referred this matter to the Prisoner Civil Rights Panel for the Eastern District of Pennsylvania for possible appointment of counsel. Counsel was appointed, and Johnson's attorneys filed an Amended Complaint on October 20, 2004. Due to a lengthy delay in service of the Amended Complaint, Defendants' answers were not all filed until June 16, 2005.

On August 16, 2005, Defendants filed the Motion presently under consideration. By stipulated order, the parties agreed to postpone discovery until the Court's ruling on the Motion. Accordingly, although this case began in 2004, only limited discovery has occurred to date.

II. STANDARD OF REVIEW

Defendants' Motion seeks judgment on the pleadings or, in the alternative, summary judgment. The Court declines to entertain Defendants' request for summary judgment at this time because discovery has barely begun. "The [Third Circuit] has long recognized the importance of discovery in the successful prosecution of civil rights complaints."[2] In the absence of full discovery, it would be practically difficult, as well as unfair to Johnson, to entertain summary judgment at this early stage of the litigation. Therefore, the Court will only consider Defendants' request for

[2] Alston v. Parker, 363 F.3d 229, 232 (3d Cir. 2004). The special importance of discovery in this context arises from the informational disadvantage prisoner plaintiffs typically face: most evidence is in the exclusive possession of defendant officials. See id. at 233 n.6; Colburn v. Upper Darby Township, 838 F.2d 663, 666-67 (3d Cir. 1988).

judgment on the pleadings.

Judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c), is governed by the same standard of review as a Rule 12(b)(6) motion to dismiss.[3] That standard requires the Court to "accept as true all the allegations set forth in the complaint, and . . . draw all reasonable inferences in the plaintiff's favor."[4] The Court may dismiss the complaint "only if the plaintiff 'can prove no set of facts in support of his claim which would entitle him to relief.'"[5] The Court is not required, however, to credit a complaint's "bald assertions" or "legal conclusions."[6]

Furthermore, the Third Circuit has elaborated on this standard in the specific context of a motion to dismiss a prisoner civil rights complaint. In Alston v. Parker, the Third Circuit held that when reviewing a motion to dismiss a prisoner civil rights suit, the complaint must be "considered not under a heightened pleading requirement, but under the more liberal standards of notice pleading."[7] The court continued: "[A] plaintiff need not plead facts. To withstand a 12(b)(6) motion, a plaintiff need only make out a claim upon which relief can be granted. If more facts are necessary to resolve or clarify the disputed issues, the parties may avail themselves of the civil discovery mechanisms under the Federal Rules."[8]

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[3] See Turbe v. Gov't of Virgin Islands, 938 F.2d 427, 428 (3d Cir. 1991).

[4] Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998).

[5] Id. (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

[6] In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429-30 (3d Cir. 1997).

[7] Alston, 363 F.3d at 233 (explaining that prisoner civil rights complaints need only comply with Rule 8(a)'s simplified pleading standard).

[8] Id. at 233 n.6.

III. DISCUSSION

In his Amended Complaint, Johnson asserts a civil rights claim against Defendants based on Estelle v. Gamble, which held that federal employees' "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment.[9] "The standard enunciated in Estelle is two-pronged: '[i]t requires deliberate indifference on the part of the prison officials and it requires the prisoner's medical needs to be serious.'"[10]

Defendants argue that Johnson's complaint should be dismissed for three reasons: (1) sovereign immunity bars Johnson's claim against Defendants in their official capacity; (2) Johnson fails to state a claim because he has not alleged that Defendants were deliberately indifferent to his serious medical need; and (3) qualified immunity bars Johnson's claim against Defendants in their personal capacities.

Johnson concedes that sovereign immunity bars his claim against Defendants in their official capacity. The Court, therefore, is left only to examine Defendants' remaining two arguments.

A. Failure to State a Claim

Defendants argue that Johnson fails to state a claim under Estelle because he has not alleged that they were deliberately indifferent to his severe asthma, which Defendants concede is a serious medical need. Defendants contend that Johnson has, at best, pleaded "only such a non-actionable 'difference of opinion' or 'medical negligence' rather than a deprivation of Eighth

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[9] 429 U.S. 97, 104 (1976). Although the Amended Complaint premises its civil rights claim on 42 U.S.C. § 1983, Defendants correctly point out Johnson's claim should be premised on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), since Defendants are federal (not state) officials.

[10] Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) (quoting West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978)).

Amendment proportions."[11]

Although deliberate indifference is most clearly established when a federal employee intentionally inflicts pain on a prisoner, the Third Circuit has recognized other scenarios that satisfy Estelle.[12] In Monmouth County Correctional Institutional Inmates v. Lanzaro, the Third Circuit identified two such scenarios: (1) "[w]here prison authorities deny reasonable requests for medical treatment . . . and such denial exposes the inmate 'to undue suffering or the threat of tangible residual injury'"[13]; and (2) "where 'knowledge of the need for medical care [is accompanied by the] . . . intentional refusal to provide that care.'"[14]

Here, taking Johnson's allegations as true, the Amended Complaint sufficiently pleads "deliberate indifference" under the scenarios set forth in Monmouth County. Johnson's request for medical treatment of his asthma was reasonable, as he alleges he had suffered similar attacks in the past while in FDC custody and that those attacks had received treatment. Moreover, Johnson alleges he was in obvious discomfort during the attack. Accordingly, the Defendants' denial of treatment simply because Johnson requested a wheelchair, including the Defendants' failure to perform a routine check of Johnson's lungs with a stethoscope, exposed Johnson to undue suffering and tangible injury.

Since Johnson is not required to plead specific facts establishing deliberate indifference at this early stage, the Defendants' Motion is without merit. Given the well-pleaded

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[11] Defs.' Mot. for J. on the Pleadings [Doc. #33] at 11.

[12] See Spruill v. Gillis, 372 F.3d 218, 235 (3d Cir. 2004).

[13] Monmouth County, 834 F.2d at 346 (quoting Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976)).

[14] Id. (quoting Ancata v. Prison Health Servs., 769 F.2d 700, 704 (11th Cir. 1985)).

allegations of the Amended Complaint and the special importance of discovery in prisoner civil rights matters, there is no basis for dismissing Johnson's case for failure to state a claim.

B. Qualified Immunity

Defendants also argue that even if Johnson states a claim they are entitled to qualified immunity. Government officials performing discretionary functions are generally entitled to qualified immunity from liability provided their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[15] The Supreme Court has further clarified:

> For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see Mitchell [v. Forsyth, 472 U.S. 511,] 535, n. 12, 105 S.Ct. 2806, 86 L.Ed.2d 411; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).[16]

Courts have found qualified immunity where prison officials have adhered to BOP medical policy.[17] Defendants have the burden of showing they are entitled to qualified immunity.[18]

The essence of Defendants' qualified immunity argument is two-fold. First, the "deliberate indifference" jurisprudence does not "plainly require[] prison medical staff to provide an asthmatic inmate with a wheelchair notwithstanding the staff's judgment that the inmate is

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[15] Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982).

[16] Hope v. Pelzer, 536 U.S. 730, 739 (2002).

[17] See, e.g., Farmer v. Moritsugu, 163 F.3d 610, 614 (D.C. Cir. 1998).

[18] See Beers-Capitol v. Whetzel, 256 F.3d 120, 142 n.15 (3d Cir. 2001).

adequately breathing and capable of walking."[19] Second, Defendants were merely following FDC and/or Federal Bureau of Prisons ("BOP") policy when they insisted that Johnson be treated in the infirmary rather than his segregated housing cell.

Here, it is clear that failure to provide any checkup or treatment where a known asthmatic is in clear discomfort is unlawful in light of Estelle. Furthermore, although it may be the case that Defendants merely followed FDC or BOP policy, the Court lacks an adequate factual foundation upon which to assess that ground for qualified immunity. Defendants' argument is better addressed on summary judgment after full discovery.

IV. CONCLUSION

For the forgoing reasons, the Court denies Defendants' Motion with prejudice insofar as it seeks judgment on the pleadings. The Court further denies Defendants' Motion without prejudice insofar as it seeks summary judgment, since such a request is premature until discovery is complete.

[19] Defs.' Mot. for J. on the Pleadings at 19.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY JOHNSON,	:	
Plaintiff	:	**CIVIL ACTION**
	:	**NO. 04-1967**
v.	:	
	:	
ARIMAS MARTINEZ (H.S.A.), JOSEPH ZAGAME (A.H.S.A.), and PATRICIA HOFFENRICA (R.N.),	:	
Defendants	:	
	:	

ORDER

AND NOW, this 19th day of January 2006, upon consideration of Defendants' Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment [Doc. #33] and Plaintiff's Response thereto [Doc. #35], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendants' Motion is **DENIED** as follows:

1. Defendants' request for judgment on the pleadings is **DENIED** with prejudice; and

2. Defendants' request for summary judgment is **DENIED** without prejudice as premature.

It is further **ORDERED** that discovery shall resume and, in accordance with the Stipulated Order of August 29, 2005 [Doc. #34], all fact discovery shall be completed within ninety (90) days of this Order.

BY THE COURT:

CYNTHIA M. RUFE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY JOHNSON,	:	
Plaintiff,	:	
v.	:	**CIVIL NO. 04-CV-1967**
ARIMAS MARTINEZ, et al.,	:	
Defendants.	:	

O R D E R

AND NOW, TO WIT: This 23rd day of March, 2007, it having been reported that the issues between the parties in the above action have been settled and upon Order of the Court pursuant to the provisions of Rule 41.1(b) of the Local Rules of Civil Procedure of this Court , it is

ORDERED that the above action is **DISMISSED** with prejudice, pursuant to agreement of counsel without costs.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.

NO. DISTR

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U.S. DEPARTMENT OF JUSTICE
U.S. ATTORNEY'S OFFICE E.D. OF PA
2007 FEB 16 A 10:04

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY JOHNSON, Plaintiff, v. ARIMAS MARTINEZ,[1] JOSEPH ZAGAME, and PATRICIA HOFFENRICA,[2] Defendants.	:	CIVIL ACTION NO. 04-1967

STIPULATION FOR VOLUNTARY DISMISSAL WITH PREJUDICE OF ALL CLAIMS AGAINST DEFENDANTS MARTINEZ, ZAGAME, AND HOFFERICA

AND NOW, this month of January, 2007, plaintiff intending to file an amended complaint in this action naming only the United States of America as a defendant; and the parties desiring the docket to reflect, immediately after the filing of the amended complaint, the dismissal with prejudice and without costs of all claims against all previously named defendants; IT IS HEREBY UNDERSTOOD AND AGREED by, among, and between the undersigned counsel for all of the parties who have entered an appearance in the above-entitled action, and by plaintiff, that, with the filing of the amended complaint, all of plaintiffs' claims

[1] In his complaint, plaintiff misspelled defendant Martinez's first name, which is properly spelled "Aramis."

[2] In his complaint, plaintiff misspelled this defendant's surname, which is properly spelled "Hofferica."

ENTERED

MAR 06 2007

CLERK OF COURT

against defendants Aramis Martinez, Joseph Zagame, and Patricia Hofferica shall be dismissed with prejudice and without costs. Plaintiff shall proceed in this action only on his claims against the United States of America.

Respectfully submitted,

Counsel for Plaintiff

Angus Love, Esquire
Michael J. Cooke, Esquire
Pennsylvania Institutional
Law Project
The Cast Iron Bldg.
718 Arch Street
Suite 304 South
Philadelphia, PA 19106
(215) 925-2966

Jeffrey Johnson
Plaintiff

PATRICK L. MEEHAN
United States Attorney

Virginia A. Gibson
Assistant U.S. Attorney
Chief, Civil Division

Gerald B. Sullivan
Assistant U.S. Attorney
615 Chestnut Street, Ste. 1250
Philadelphia, PA 19106-4476
(215) 861-8786

THE AMENDED COMPLAINT HAVING BEEN FILED, THE STIPULATION IS APPROVED AND THE DISMISSAL WITH PREJUDICE OF ALL CLAIMS AGAINST PREVIOUSLY NAMED DEFENDANTS ARAMIS MARTINEZ, JOSEPH ZAGAME, AND PATRICIA HOFFERICA IS SO ORDERED:

March 5, 2007

HONORABLE CYNTHIA M. RUFE
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY JOHNSON,

Plaintiff, : CIVIL ACTION
NO. 04-1967

v.

ARIMAS MARTINEZ,[1] JOSEPH ZAGAME,
and PATRICIA HOFFENRICA,[2]

Defendants.

STIPULATION FOR VOLUNTARY DISMISSAL WITH PREJUDICE OF ALL CLAIMS AGAINST DEFENDANTS MARTINEZ, ZAGAME, AND HOFFERICA

AND NOW, this month of January, 2007, plaintiff intending to file an amended complaint in this action naming only the United States of America as a defendant; and the parties desiring the docket to reflect, immediately after the filing of the amended complaint, the dismissal with prejudice and without costs of all claims against all previously named defendants; IT IS HEREBY UNDERSTOOD AND AGREED by, among, and between the undersigned counsel for all of the parties who have entered an appearance in the above-entitled action, and by plaintiff, that, with the filing of the amended complaint, all of plaintiffs' claims

[1] In his complaint, plaintiff misspelled defendant Martinez's first name, which is properly spelled "Aramis."

[2] In his complaint, plaintiff misspelled this defendant's surname, which is properly spelled "Hofferica."

against defendants Aramis Martinez, Joseph Zagame, and Patricia Hofferica shall be dismissed with prejudice and without costs. Plaintiff shall proceed in this action only on his claims against the United States of America.

Respectfully submitted,

Counsel for Plaintiff

Angus Love, Esquire
Michael J. Cooke, Esquire
Pennsylvania Institutional
Law Project
The Cast Iron Bldg.
718 Arch Street
Suite 304 South
Philadelphia, PA 19106
(215) 925-2966

Jeffrey Johnson
Plaintiff

PATRICK L. MEEHAN
United States Attorney

Virginia A. Gibson
Assistant U.S. Attorney
Chief, Civil Division

Gerald B. Sullivan
Assistant U.S. Attorney
615 Chestnut Street, Ste. 1250
Philadelphia, PA 19106-4476
(215) 861-8786

THE AMENDED COMPLAINT HAVING BEEN FILED, THE STIPULATION IS APPROVED AND THE DISMISSAL WITH PREJUDICE OF ALL CLAIMS AGAINST PREVIOUSLY NAMED DEFENDANTS ARAMIS MARTINEZ, JOSEPH ZAGAME, AND PATRICIA HOFFERICA IS SO ORDERED:

HONORABLE CYNTHIA M. RUFE
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY JOHNSON ,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION NO. 04-1967
	:	
ARIMAS MARTINEZ, JOSEPH ZAGAME, and PATRICIA HOFFENRICA	:	Judge RUFE
	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the Stipulation for Voluntary Dismissal with Prejudice of All Claims Against Defendants Martinez, Zagame, and Hofferica was served on counsel for defendants as follows:

Gerald Sullivan
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476
Via: ECF

The original copy of the Stipulation has been mailed to chambers by 1st Class U.S. Mail

s/Michael Cooke
Michael Cooke, PAID#91247

Date: March 2, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL BRAMWELL,

Plaintiff,

-against-

LIEUTENANT MURRAY, COUNSELOR WINGATE, CASE MANAGER DIANE FORD, CORRECTIONAL OFFICER DANIEL M. HOPE, LIEUTENANT PATRICK J. HICKEY, LIEUTENANT EDWARD MULRONEY, ASSISTANT WARDEN MARTINEZ, WARDEN GREGORY PARKS, JOHN DOE 1, JOHN DOE 2, SPECIAL INVESTIGATIVE AGENT GLENN CARRINO, CAPTAIN ALLEN BEARD and THE UNITED STATES OF AMERICA,

Defendants.

05 Civ. 7504 (BSJ) (HBP)

ECF CASE
(Jury Trial Demanded)

THIRD AMENDED COMPLAINT

Plaintiff Michael Bramwell, by his attorneys, alleges upon personal knowledge with respect to his own actions and upon information and belief with respect to all other matters:

Nature of the Action

1. This action arises out of the vicious attack on inmate Michael Bramwell ("Plaintiff") by a correctional officer while Plaintiff was housed at the Metropolitan Correctional Center in New York, New York ("MCC") and the subsequent deliberate indifference by MCC officials to Plaintiff's serious need for medical attention as a result of the attack.

2. Plaintiff seeks relief for violations of the rights guaranteed him by the Fifth Amendment to the Constitution of the United States and for intentional and negligent torts.

Jurisdiction and Venue

3. This Court has subject matter jurisdiction over Plaintiff's constitutional claims pursuant to 28 U.S.C. § 1331 as those claims are brought pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) and arise under federal law.

4. This Court has subject matter over Plaintiff's common law claims pursuant to 28 U.S.C. § 1346(b) as those claims arise out of the negligent or wrongful acts of employees of the United States government acting within the scope of their office or employment.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) as it is the district in which a substantial part of the events or omissions giving rise to the claims occurred.

Parties

6. Plaintiff is an inmate in federal custody and has been incarcerated at facilities maintained and controlled by the Federal Bureau of Prisons. At the time of the events giving rise to this complaint, Plaintiff was detained, pre-trial, at the Metropolitan Correctional Center located in New York, New York.

7. Defendant Lieutenant Murray was, at the time of the events giving rise to this complaint, a senior correctional officer at Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates under his supervision.

8. Defendant Daniel M. Hope was, at the time of the events giving rise to this complaint, a correctional officer at Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates under his supervision.

9. Defendant Patrick J. Hickey was, at the time of the events giving rise to this complaint, a senior correctional officer at Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates under his supervision.

10. Defendant Edward Mulroney was, at the time of the events giving rise to this complaint, a senior correctional officer at Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates under his supervision.

11. Defendant John Doe 1 was, at the time of the events giving rise to this complaint, a correctional officer at Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates under his supervision.

12. Defendant John Doe 2 was, at the time of the events giving rise to this complaint, a correctional officer at Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates under his supervision.

13. Defendant Glenn Carrino was, at the time of the events giving rise to this complaint, a special investigative agent at Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates under his supervision.

14. Defendant Allen Beard was, at the time of the events giving rise to this complaint, a captain at Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates under his supervision.

15. Defendant Wingate was, at the time of the events giving rise to this complaint, a counselor at Metropolitan Correctional Center, located in New York, New York,

assigned to Plaintiff and was responsible for the care and custody of the inmates under her supervision.

16. Defendant Diane Ford was, at the time of the events giving rise to this complaint, a case manager at Metropolitan Correctional Center, located in New York, New York, assigned to Plaintiff and was responsible for the care and custody of the inmates under her supervision.

17. Defendant Martinez was, at the time of the events giving rise to this complaint, the Assistant Warden of Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates at Metropolitan Correctional Center.

18. Defendant Gregory Parks was at the time of the events giving rise to this complaint the Warden of Metropolitan Correctional Center, located in New York, New York, and was responsible for the care and custody of the inmates at Metropolitan Correctional Center.

Facts

The Attack

19. On or about August 24, 2003, Plaintiff was informed by a fellow inmate at MCC that an MCC correctional officer had referred to Plaintiff as a "chi chi man", a derogatory term for homosexual.

20. On or about August 26, 2003, Plaintiff reported the incident to Defendant Wingate, his counselor, and sought an administrative form, or "BP-9", in order to grieve the incident to the appropriate prison officials. Defendant Wingate gave Plaintiff a BP-9 form, but told Plaintiff that he should raise the incident with a lieutenant.

21. On or about August 27, 2003, Defendant Murray and Defendant John Doe 1 were in the officer's station adjacent to the kitchen area where Plaintiff and several other

inmates were gathered. Plaintiff observed Defendant Murray, and waited outside the officer's station in order to raise his grievance when Defendant Murray exited. As Defendant Murray and Defendant John Doe 1 exited the officer's station, Plaintiff approached him and said "Lieutenant". Defendant Murray responded "No".

22. At that time, Plaintiff attempted to explain to Defendant Murray that he wished to report a grievance, as he was instructed to do by Defendant Wingate. Defendant Murray then shouted at Plaintiff, "When I say no, I mean no", and threatened to place Plaintiff in Nine South, an administrative segregation unit at MCC.

23. Plaintiff attempted to explain to Defendant Murray that Defendant Wingate had advised him to report the grievance to a lieutenant. When Plaintiff made this attempt to speak to Defendant Murray, Defendant Murray grabbed Plaintiff and handcuffed his arms behind his back.

24. While Plaintiff was handcuffed, Defendant Murray drove him headlong into a concrete wall approximately six feet away.

25. Immediately after throwing Plaintiff into the wall for the first time, Defendant Murray took hold of Plaintiff, who remained handcuffed, and threw him again into the concrete wall.

26. Defendant Murray then grabbed Plaintiff's wrists, which remained handcuffed behind Plaintiff's back, forced them up towards Plaintiff's shoulders, and shouted, "If you fucking move, I am going to break your fucking hand and throw you to the floor".

27. Defendant John Doe 1 observed the entire August 27, 2003, incident described in paragraphs 20 through 25 herein, observed the violence of Defendant Murray's attack on Plaintiff, observed the pain that attack was causing Plaintiff, and reasonably could have

prevented the attack, either physically or by speaking with Defendant Murray, without compromising his safety or the safety of others around him. Nevertheless, Defendant John Doe 1 did nothing to prevent or stop the attack.

28. Immediately after his initial attack on Plaintiff, Defendant Murray walked Plaintiff, who remained handcuffed, out of the kitchen area, and escorted him to an elevator. While in the elevator, Defendant Murray again threw Plaintiff against the wall, slammed his fist into Plaintiff's back, placed his knee against Plaintiff's spine and repeated, "When I say no, I mean no".

29. When the elevator arrived at Nine South, Defendant Murray gave Plaintiff over to the custody of Defendant Hope, who escorted Plaintiff to a cell, removed Plaintiff's handcuffs, and locked the cell door.

30. Defendant Murray's attack fractured Plaintiff's shoulder and caused significant injuries to other parts of Plaintiff's body, including his neck, back, arms, wrists, and hands.

Failure to Treat Plaintiff's Injury

31. When Plaintiff was brought to the administrative unit at Nine South, it was apparent that he was seriously injured, in severe pain, and in need of immediate medical attention. Nevertheless, Defendant Hope, who escorted Plaintiff to a cell on Nine South, sought no medical attention for Plaintiff.

32. Approximately thirty minutes after being brought to Nine South, Plaintiff was escorted by correctional officer Defendant John Doe 2 back to Plaintiff's assigned cell in the Seven North unit. When Plaintiff arrived at Seven North, he informed the officer on duty, Defendant John Doe 1 (who had previously witnessed—but did not stop—Defendant Murray's attack on Plaintiff), of his pain and injuries, and asked to receive immediate medical attention.

33. Approximately one hour later, Plaintiff repeated his request for immediate medical attention to Defendant John Doe 1, and Defendant John Doe 1 informed Plaintiff that he would receive such medical attention later that night. Plaintiff received no medical attention on August 27, 2003.

34. On August 28, 2003, at approximately 10:00 in the morning, Plaintiff informed Defendant Wingate and Defendant Ford of Defendant Murray's attack and Plaintiff's injuries and again asked for immediate medical attention. At this time, it was still apparent that Plaintiff was seriously injured, in severe pain, and in need of immediate medical attention.

35. Shortly after speaking with Defendant Wingate and Defendant Ford, Plaintiff was brought to a meeting with Defendant Wingate, Defendant Ford, Defendant Hickey, Defendant Carrino and Defendant Beard. Plaintiff repeated his account of the attack and informed Defendant Wingate, Defendant Ford, Defendant Hickey, Defendant Carrino and Defendant Beard of his injuries and the serious pain he was in, and Plaintiff repeated his request for immediate medical attention. Plaintiff was then returned to his cell on Seven North.

36. Sometime after being returned to his cell on August 28, 2003, Plaintiff informed Defendant Mulroney, the officer on duty in the unit, that Plaintiff was suffering from serious injuries, that he was in significant pain and that he had not received medical treatment. Defendant Mulroney observed Plaintiff's injuries and the significant pain Plaintiff was suffering. Plaintiff requested immediate medical attention. Defendant Mulroney assured Plaintiff he would receive medical attention that day. Plaintiff received no medical attention on August 28, 2003.

37. Throughout the day on August 29, 2003, Plaintiff informed every officer on duty in his unit that he had serious injuries, that he was in significant pain, and that he had not

received medical treatment. Plaintiff also requested immediate medical attention. Plaintiff received no medical attention on August 29, 2003.

38. Throughout the day on August 30, 2003, Plaintiff informed every officer on duty in his unit that he had serious injuries, that he was in significant pain, and that he had not received medical treatment. Plaintiff also requested immediate medical attention. Plaintiff received no medical attention on August 30, 2003.

39. Throughout the day on August 31, 2003, Plaintiff informed every officer on duty in his unit that he had serious injuries, that he was in significant pain, and that he had not received medical treatment. Plaintiff also requested immediate medical attention. Plaintiff received no medical attention on August 31, 2003.

40. Throughout the day on September 1, 2003, Plaintiff informed every officer on duty in his unit that he had serious injuries, that he was in significant pain, and that he had not received medical treatment. Plaintiff also requested immediate medical attention. Plaintiff received no medical attention on September 1, 2003.

41. From August 28, 2003 through September 1, 2003, Plaintiff submitted nine written requests for medical attention, some of which were submitted to and received by Defendant Parks and Defendant Martinez. Only three of those nine requests were forwarded to MCC medical staff, and all of those requests were ignored.

42. From August 28, 2003 through September 1, 2003, it was apparent that Plaintiff was seriously injured, in severe pain, and in need of immediate medical attention. Nevertheless, none of the officers who had contact with Plaintiff sought medical attention on his behalf.

43. On September 2, 2003, after being allowed to remain in excruciating pain for over one hundred hours, Plaintiff was finally taken to the prison's medical department.

Harm to Plaintiff

44. Defendant Murray's attack on Plaintiff, as described herein, fractured Plaintiff's shoulder and caused other significant injury to Plaintiff, including to Plaintiff's neck, back, arms, wrists and hands.

45. Defendants failure to provide Plaintiff with medical treatment, as described herein, significantly exacerbated Plaintiff's injuries and prolonged his pain.

46. As a result of the attack on Plaintiff and the failure of the Defendants to provide him medical treatment, as described herein, Plaintiff has suffered, and continues to suffer, chronic and substantial physical pain and physical impairment, including loss of movement and severe arthritis, which prevents him from engaging in daily activities, including work-related activities.

47. As a result of the attack on Plaintiff and the failure of Defendants to provide him medical treatment, as described herein, Plaintiff currently needs, and will continue to need, extensive medical care.

48. As a result of the attack on Plaintiff and the failure of Defendants to provide him treatment, as described herein, Plaintiff has suffered serious emotional and mental harm.

Involvement of Martinez and Parks

49. Prior to attacking Plaintiff, Defendant Murray had, on several occasions, verbally abused and physically beaten other inmates. Defendant Martinez and Defendant Parks were aware of Murray's prior actions and of the danger that he posed to the inmate population in general and to Plaintiff specifically.

50. Prior to the attack on Plaintiff, similar attacks by corrections officer on inmates had taken place at MCC. Defendant Martinez and Defendant Parks were aware of these attacks but had not taken steps to train the officers, including Defendant Murray, in a manner that would have prevented Defendant Murray's attack of Plaintiff.

51. Defendant Martinez and Defendant Parks were aware that Murray was likely to use force against inmates and that, because of his past history and lack of adequate training, he was likely to use excessive and unjustifiable force.

52. Nevertheless, Defendant Martinez and Defendant Parks allowed Defendant Murray to occupy a position that would, and did, lead him to use excessive and unjustifiable force against inmates, and against Plaintiff specifically.

Exhaustion of Administrative Remedies

Prison Litigation Reform Act Exhaustion

53. Plaintiff has exhausted all administrative remedies required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e.

54. On or about September 7, 2003, after attempting informal resolution of his complaint, Plaintiff filed an administrative complaint with Defendant Parks, the warden of MCC, which was denied on or about September 16, 2003.

55. On or about September 27, 2003, Plaintiff filed an appeal of Defendant Parks' decision to the Regional Director of the Federal Bureau of Prisons, which was denied on or about October 31, 2003.

56. On or about November 11, 2003, Plaintiff filed an appeal of the Regional Director's decision to the Central Office of the Federal Bureau of Prisons, which was denied on or about February 7, 2004.

Federal Tort Claims Act Exhaustion

57. Plaintiff has exhausted all administrative remedies required by the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq.

58. On or about July 13, 2005, Plaintiff filed a tort claim with the Northeast Regional Office of the Federal Bureau of Prisons, which was denied on or about December 21, 2005.

Count One
(Against Defendant Murray for Violation of Plaintiff's Constitutional Rights — Excessive Force)

59. Paragraphs 1 through 58 above are repeated and realleged as if set forth herein.

60. Defendant Murray, perceiving no reasonable threat from Plaintiff, attacked Plaintiff wantonly, with a malicious and sadistic state of mind, and with intent to cause harm.

61. Defendant Murray's attack constituted excessive force resulting in the unnecessary and wanton infliction of pain on Plaintiff, depriving Plaintiff of his right to due process guaranteed by the Fifth Amendment to the United States Constitution.

62. Defendant Murray was at all times acting under color of federal law.

63. Defendant Murray's attack was motivated by evil motive or intent, or involved reckless or callous indifference to Plaintiff's federally protected rights.

64. As a direct result of Defendant Murray's attack, Plaintiff suffered significant injury, including serious physical harm, excruciating pain and emotional distress, entitling Plaintiff to damages in an amount to be determined at trial. In addition, Plaintiff is entitled to punitive damages.

Count Two
(Against Defendant John Doe 1 for Violation of Plaintiff's Constitutional Rights — Excessive Force)

65. Paragraphs 1 through 64 above are repeated and realleged as if set forth herein.

66. Defendant Murray, perceiving no reasonable threat from Plaintiff, attacked Plaintiff wantonly, with a malicious and sadistic state of mind, and with intent to cause harm.

67. Defendant Murray's attack constituted excessive force resulting in the unnecessary and wanton infliction of pain on Plaintiff, depriving Plaintiff of his right to due process guaranteed by the Fifth Amendment to the United States Constitution.

68. Defendant John Doe 1 observed the excessive force being used by Defendant Murray, had a realistic opportunity to prevent it, and yet failed to intervene to prevent or stop the attack on Plaintiff, thereby depriving Plaintiff of his right to due process guaranteed by the Fifth Amendment to the United States Constitution.

69. Defendant John Doe 1 was at all times acting under color of federal law.

70. Defendant John Doe 1's failure to intervene was motivated by evil motive or intent, or involved reckless or callous indifference to Plaintiff's federally protected rights.

71. As a direct result of Defendant John Doe 1's failure to intervene, Plaintiff suffered significant injury, including serious physical harm, excruciating pain and emotional distress, entitling Plaintiff to damages in an amount to be determined at trial. In addition, Plaintiff is entitled to punitive damages.

Count Three
(Against Defendant Martinez and Defendant Parks for Violation of Plaintiff's Constitutional Rights — Deliberate Indifference)

72. Paragraphs 1 through 71 above are repeated and realleged as if set forth herein.

73. Defendant Martinez and Defendant Parks knew to a moral certainty that Defendant Murray and Defendant John Doe 1 would confront a situation in which they would need to decide whether to use force and how much force to use.

74. Proper training under the supervision of Defendant Martinez and Defendant Parks would have reduced the risk that Defendant Murray or John Doe 1 would use excessive and unjustified force.

75. Defendant Martinez and Defendant Parks failed to provide adequate training to Defendant Murray, Defendant John Doe 1 and other correctional officers in the proper use of force.

76. Defendant Martinez and Defendant Parks were at all times acting under color of federal law.

77. The improper training supervised by Defendant Martinez and Defendant Parks has led to the deprivation of inmates' rights, including the rights of Plaintiff, to due process guaranteed by the Fifth Amendment to the United States Constitution.

78. The conduct of Defendant Martinez and Defendant Parks in failing to provide adequate training and supervision to Defendant Murray, Defendant John Doe 1 and other correctional officers was done with deliberate indifference, gross negligence and reckless disregard for an excessive risk to inmate health and safety, was done without lawful justification and was designed to and did deprive Plaintiff of his rights guaranteed by the Fifth Amendment to the United States Constitution.

79. The conduct of Defendant Martinez and Defendant Parks in failing to provide adequate training and supervision to Defendant Murray, Defendant John Doe 1 and other

correctional officers was motivated by evil motive or intent, or involved reckless or callous indifference to Plaintiff's federally protected rights.

80. As a direct result of Defendant Martinez and Defendant Parks' deliberate indifference to Defendant Murray's and Defendant John Doe 1's lack of proper training, Plaintiff suffered significant injury, including serious physical harm, excruciating pain and emotional distress. In addition, Plaintiff is entitled to punitive damages.

Count Four
(Against Defendant Murray, Defendant Hope, Defendant Wingate, Defendant Ford Defendant Hickey, Defendant Mulroney, Defendant John Doe 1, Defendant John Doe 2, Defendant Carrino and Defendant Beard for Violation of Plaintiff's Constitutional Rights — Deliberate Indifference)

81. Paragraphs 1 through 80 above are repeated and realleged as if set forth herein.

82. As a result of Defendant Murray's attack, Plaintiff suffered objectively serious injuries to his shoulder, neck, back, arms and hands that required immediate medical attention to avoid degeneration and extreme pain.

83. Defendant Murray, Defendant Hope, Defendant Wingate, Defendant Ford Defendant Hickey, Defendant Mulroney, Defendant John Doe 1, Defendant John Doe 2, Defendant Carrino and Defendant Beard were all aware of the severity of Plaintiff's injuries, that Plaintiff suffered from a condition of urgency that, if untreated, would lead to degeneration and extreme pain, that Plaintiff was in serious need of immediate medical attention and that he was not receiving such attention.

84. Defendant Murray, Defendant Hope, Defendant Wingate, Defendant Ford, Defendant Hickey, Defendant Mulroney, Defendant John Doe 1, Defendant John Doe 2, Defendant Carrino and Defendant Beard disregarded the excessive risk to Plaintiff's health and safety by not seeking any medical attention for Plaintiff.

85. The acts and omissions of Defendant Murray, Defendant Hope, Defendant Wingate, Defendant Ford, Defendant Hickey, Defendant Mulroney, Defendant John Doe 1, Defendant John Doe 2, Defendant Carrino and Defendant Beard in denying Plaintiff adequate medical care were undertaken with deliberate indifference, gross negligence and reckless disregard for an excessive risk to inmate health and safety, were done without lawful justification and were designed to and did deprive Plaintiff of his rights guaranteed by the Fifth Amendment to the United States Constitution.

86. The acts and omissions of Defendant Murray, Defendant Hope, Defendant Wingate, Defendant Ford, Defendant Hickey, Defendant Mulroney, Defendant John Doe 1, Defendant John Doe 2, Defendant Carrino and Defendant Beard in denying Plaintiff adequate medical care were under color of federal law.

87. The acts and omissions of Defendant Murray, Defendant Hope, Defendant Wingate, Defendant Ford, Defendant Hickey, Defendant Mulroney, Defendant John Doe 1, Defendant John Doe 2, Defendant Carrino and Defendant Beard in denying Plaintiff adequate medical care were motivated by evil motive or intent, or involved reckless or callous indifference to Plaintiff's federally protected rights.

88. As a direct result of the deliberate indifference of Defendant Murray, Defendant Hope, Defendant Wingate, Defendant Ford, Defendant Hickey, Defendant Mulroney, Defendant John Doe 1, Defendant John Doe 2, Defendant Carrino and Defendant Beard to Plaintiff's need for medical attention, Plaintiff suffered significant injury, including serious physical harm, excruciating pain and emotional distress, entitling Plaintiff to damages in an amount to be determined at trial. In addition, Plaintiff is entitled to punitive damages.

Count Five
(Against Defendant United States of America for Tortious Conduct of Defendant Murray — Assault and Battery)

89. Paragraphs 1 through 88 above are repeated and realleged as if set forth herein.

90. Defendant Murray is an employee of the United States Government.

91. Defendant Murray's intentional, unjustified actions on or about August 27, 2003, as described herein, placed Plaintiff in apprehension of imminent harmful or offensive contact.

92. Defendant Murray's intentional, unjustified actions on or about August 27, 2003, as described herein, resulted in harmful or offensive bodily contact with Plaintiff.

93. Defendant Murray's intentional, unjustified actions on or about August 27, 2003, as described herein, took place while he was acting within the scope of his office or employment.

94. As a direct result of Defendant Murray's intentional, unjustified actions, Plaintiff suffered significant injury, including serious physical harm, excruciating pain and emotional distress, entitling Plaintiff to damages in an amount to be determined at trial.

Count Six
(Against Defendant United States of America for Tortious Conduct of Defendant John Doe 1 — Negligence)

95. Paragraphs 1 through 94 above are repeated and realleged as if set forth herein.

96. Defendant John Doe 1 is an employee of the United States Government.

97. By virtue of his position as a correctional officer, Defendant John Doe 1 owed Plaintiff a duty of care.

98. Defendant John Doe 1's failure to prevent Defendant Murray's attack on Plaintiff breached the duty of care that Defendant John Doe 1 owed the Plaintiff.

99. Defendant John Doe 1's failure to prevent Defendant Murray's attack on Plaintiff took place while Defendant John Doe 1 was acting within the scope of his office or employment.

100. Defendant John Doe 1's failure to prevent Defendant Murray's attack on Plaintiff was not based on any policy considerations.

101. As a direct result of Defendant John Doe 1's inaction, Plaintiff suffered significant injury, including serious physical harm, excruciating pain and emotional distress, entitling Plaintiff to damages in an amount to be determined at trial.

Count Seven
(Against Defendant United States of America for Tortious Conduct of Defendant Martinez and Defendant Parks — Negligence)

102. Paragraphs 1 through 101 above are repeated and realleged as if set forth herein.

103. Defendant Martinez and Defendant Parks are employees of the United States Government.

104. By virtue of his position as Assistant Warden, Defendant Martinez owed Plaintiff a duty of care.

105. By virtue of his position as Warden, Defendant Parks owed Plaintiff a duty of care.

106. Defendant Martinez's and Defendant Parks' failure to provide adequate training and supervision of Defendant Murray and Defendant John Doe 1 and Defendant Martinez's and Defendant Parks' continued retention of Defendant Murray and Defendant John Doe 1 breached the duty of care owed by Defendant Martinez and Defendant Parks to Plaintiff.

107. Defendant Martinez's and Defendant Parks' failure to provide adequate training and supervision of Defendant Murray and Defendant John Doe 1 and Defendant Martinez's and Defendant Parks' continued retention of Defendant Murray and Defendant John Doe 1 took place while Defendant Martinez and Defendant Parks were acting within the scope of their office or employment.

108. Defendant Martinez's and Defendant Parks' failure to provide adequate training and supervision of Defendant Murray and Defendant John Doe 1 and Defendant Martinez's and Defendant Parks' continued retention of Defendant Murray and Defendant John Doe 1 were not based on any policy considerations.

109. As a direct result of Defendant Martinez's and Defendant Parks' acts and omissions, Plaintiff suffered significant injury, including serious physical harm, excruciating pain and emotional distress, entitling Plaintiff to damages in an amount to be determined at trial.

Count Eight
(Against Defendant United States of America for Tortious Conduct of All Individual Defendants — Negligence)

110. Paragraphs 1 through 109 above are repeated and realleged as if set forth herein.

111. Defendant Murray, Defendant Hope, Defendant Wingate, Defendant Ford, Defendant Hickey, Defendant Martinez, Defendant Parks, Defendant Mulroney, Defendant John Doe 1, Defendant John Doe 2, Defendant Carrino and Defendant Beard (the "Individual Defendants") are employed by the United States Government.

112. By virtue of their positions as correctional officers, the Individual Defendants owed Plaintiff a duty of care.

113. The Individual Defendants' failure to seek immediate medical attention for Plaintiff's serious injuries breached the duty of care owed by those defendants to Plaintiff.

114. The Individual Defendants' failure to seek immediate medical attention for Plaintiff's serious injuries took place while those defendants were acting within the scope of their office or employment.

115. The Individual Defendants' failure to seek immediate medical attention for Plaintiff's serious injuries was not based on any policy considerations.

116. As a direct result of the Individual Defendants' inaction, Plaintiff suffered significant injury, including serious physical harm, excruciating pain and emotional distress, entitling Plaintiff to damages in an amount to be determined at trial.

Prayer for Relief

WHEREFORE, Plaintiff prays that this Court enter judgment on his complaint in his favor and against the Defendants:

a. Awarding compensatory damages in an amount to be determined at trial;

b. Awarding punitive damages in an amount to be determined at trial;

c. Awarding pre- and post-judgment interest;

d. Awarding costs, expenses and reasonable attorneys' fees; and

e. Ordering such other relief as this Court deems just and proper.

Jury Demand

The Plaintiff demands a trial by jury on all issues so triable.

September 22, 2006

CRAVATH, SWAINE & MOORE LLP

by _____
Matthew L. Kutcher (MK-8332)
Samuel Bryant Davidoff (SD-9793)

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Plaintiff

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 12/18/07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MICHAEL BRAMWELL,

Plaintiff,

v.

LIEUTENANT MURRAY, COUNSELOR WINGATE, CASE MANAGER DIANE FORD, CORRECTIONAL OFFICER DANIEL M. HOPE, LIEUTENANT PATRICK J. HICKEY, LIEUTENANT EDWARD MULRONEY, ASSISTANT WARDEN MARTINEZ, WARDEN GREGORY PARKS, JOHN DOE 1, JOHN DOE 2, SPECIAL INVESTIGATIVE AGENT GLENN CARRINO, CAPTAIN ALLEN BEARD, and THE UNITED STATES OF AMERICA,

Defendants.

----------x

STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL

ECF CASE

05 Civ. 7504 (BSJ) (HBP)

WHEREAS, plaintiff Michael Bramwell ("Plaintiff") filed a complaint and three amended complaints (collectively, the "Complaints"), asserting claims relating to incidents that allegedly occurred between August 27, 2003 and September 2, 2003, during his incarceration at the Metropolitan Correctional Center in New York, New York;

WHEREAS, the undersigned parties now wish to resolve the issues raised in this litigation without further proceedings and without admitting any fault or liability;

IT IS HEREBY STIPULATED, between the parties, through their respective counsel, that Plaintiff's claims in this action shall be settled on the following terms:

1. This action is hereby dismissed with prejudice, and without costs or attorney's fees to any party, subject to the terms set forth herein.

2. The United States of America will pay to Plaintiff $50,000.00 (the "Settlement Amount") by check payable to "Cravath, Swaine & Moore LLP, as attorneys for Michael

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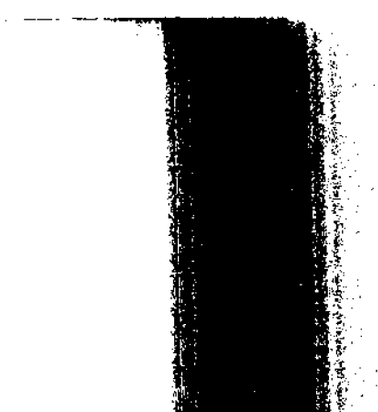
Bramwell," which sum shall be in full settlement of any claims that Plaintiff now has or may acquire against Ralph Murray, Wanda Wingate, Diane Ford, Daniel Hope, Patrick Hickey, Jerry Martinez, Gregory Parks, Glenn Carrino, Allen Beard, the defendants now labeled as John Doe 1 and John Doe 2 (collectively, the "Individual Federal Defendants") and Edward Mulroney (with the Individual Federal Defendants, the "Individual Defendants"), on account of the alleged facts, events and circumstances giving rise to this action. Payment of the Settlement Amount is likewise in full settlement of any claims that Plaintiff now has or may acquire against the United States, the Federal Bureau of Prisons ("BOP"), or any department, agency, agent, officer, or employee of the United States or the BOP (collectively the "Government"), on account of the alleged facts, events and circumstances giving rise to this action. Payment of the Settlement Amount will be made only after execution by the parties and entry by the Court of this Stipulation and Order of Settlement and Dismissal ("Stipulation and Order").

3. The Government stipulates and agrees that the BOP has no liens with respect to Plaintiff's incarceration in BOP facilities from December 23, 2002, through and including February 4, 2008, nor will it seek to enforce any liens now or in the future with respect to Plaintiff's incarceration in BOP facilities or medical treatment received from or performed at the direction of BOP staff or at BOP facilities from December 23, 2002, through and including February 4, 2008. This waiver does not include any other liens held by the Government.

4. This Stipulation and Order does not constitute an admission of liability or fault on the part of any of the Individual Defendants or the Government.

5. Plaintiff agrees to accept the Settlement Amount set forth in paragraph 2 above in full satisfaction of all claims that he or his heirs, executors, administrators, or assigns may have or acquire on account of the events giving rise to this lawsuit and all claims incident thereto,



including but not limited to any such claims asserted by Plaintiff in the Complaints, against the Individual Defendants or the Government. Plaintiff hereby releases the Individual Defendants and the Government from all claims and liabilities arising directly or indirectly from the incidents giving rise to this lawsuit and all claims incident thereto, including but not limited to any claims asserted by Plaintiff in the Complaints. Plaintiff's release shall be effective upon payment of the Settlement Amount according to the terms set forth in Paragraph 2.

6. Plaintiff agrees (a) to indemnify and hold harmless the Individual Defendants and the Government from any and all claims, rights, subrogated interests, or other claims brought against them by any third party purporting to assert such claim through or on behalf of Plaintiff and arising from the incidents alleged in the Complaints and all claims incident thereto, and (b) to reimburse or advance, at the option of counsel for the United States, any expense that may be incurred by the Individual Defendants or the Government, incident to or resulting from such further litigation or the prosecution of claims by any third party purporting to assert such claim through or on behalf of Plaintiff and arising from the incidents alleged in the Complaints.

7. This Stipulation and Order shall be construed in accordance with the laws of the State of New York and may be enforced in this Court.

8. This Stipulation and Order shall be binding upon and inure to the benefit of all parties and their principals, agents, representatives, heirs, successors, and assigns.

9. This Stipulation and Order may be signed in two or more counterpart originals, each of which shall be deemed to be an original.

10. This Stipulation and Order contains the entire agreement between the parties, and any statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or counsel that are not included herein shall be of no effect.



AGREED TO BY:

Dated: New York, New York
December 13, 2007

MICHAEL BRAMWELL, Plaintiff

Dated: New York, New York
December 13, 2007

MATTHEW L. KUTCHER, ESQ.
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019

Attorneys for Plaintiff Michael Bramwell

Dated: Brooklyn, New York
December __, 2007

BRETT H. KLEIN, ESQ.
Leventhal & Klein, LLP
45 Main Street, Suite 230
Brooklyn, New York 11201

Attorneys for Defendant Edward Mulroney

MICHAEL J. GARCIA
United States Attorney
Attorney for the Individual Federal Defendants and for the United States

Dated: New York, New York
December __, 2007

By: _____
MATTHEW L. SCHWARTZ
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007

SO ORDERED:

_____
HON. BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

AGREED TO BY:

Dated: New York, New York
December __, 2007

MICHAEL BRAMWELL, Plaintiff

Dated: New York, New York
December __, 2007

MATTHEW L. KUTCHER, ESQ.
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019

Attorneys for Plaintiff Michael Bramwell

Dated: Brooklyn, New York
December 14, 2007

BRETT H. KLEIN, ESQ.
Leventhal & Klein, LLP
45 Main Street, Suite 230
Brooklyn, New York 11201

Attorneys for Defendant Edward Mulroney

MICHAEL J. GARCIA
United States Attorney
Attorney for the Individual Federal Defendants and for the United States

Dated: New York, New York
December __, 2007

By:
MATTHEW L. SCHWARTZ
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007

SO ORDERED:

HON. BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

AGREED TO BY:

Dated: New York, New York
December _, 2007

MICHAEL BRAMWELL, Plaintiff

Dated: New York, New York
December _, 2007

MATTHEW L. KUTCHER, ESQ.
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019

Attorneys for Plaintiff Michael Bramwell

Dated: Brooklyn, New York
December _, 2007

BRETT H. KLEIN, ESQ.
Leventhal & Klein, LLP
45 Main Street, Suite 230
Brooklyn, New York 11201

Attorneys for Defendant Edward Mulroney

MICHAEL J. GARCIA
United States Attorney
Attorney for the Individual Federal Defendants and for the United States

Dated: New York, New York
December 13, 2007

By: _____
MATTHEW L. SCHWARTZ
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007

SO ORDERED:

Barbara S. Jones

HON. BARBARA S. JONES
UNITED STATES DISTRICT JUDGE
Dec. 18, 2007

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DOC #:
DATE FILED: 1/11/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

MICHAEL BRAMWELL,

Plaintiff,

v.

LIEUTENANT MURRAY, COUNSELOR WINGATE, CASE MANAGER DIANE FORD, CORRECTIONAL OFFICER DANIEL M. HOPE, LIEUTENANT PATRICK J. HICKEY, LIEUTENANT EDWARD MULRONEY, ASSISTANT WARDEN MARTINEZ, WARDEN GREGORY PARKS, JOHN DOE 1, JOHN DOE 2, SPECIAL INVESTIGATIVE AGENT GLENN CARRINO, CAPTAIN ALLEN BEARD, and THE UNITED STATES OF AMERICA,

Defendants.

----------x

STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL

ECF CASE

05 Civ. 7504 (BSJ) (HBP)

WHEREAS, plaintiff Michael Bramwell ("Plaintiff") filed a complaint and three amended complaints (collectively, the "Complaints"), asserting claims relating to incidents that allegedly occurred between August 27, 2003 and September 2, 2003, during his incarceration at the Metropolitan Correctional Center in New York, New York;

WHEREAS, the undersigned parties now wish to resolve the issues raised in this litigation without further proceedings and without admitting any fault or liability;

IT IS HEREBY STIPULATED, between the parties, through their respective counsel, that Plaintiff's claims in this action shall be settled on the following terms:

1. This action is hereby dismissed with prejudice, and without costs or attorney's fees to any party, subject to the terms set forth herein.

2. The United States of America will pay to Plaintiff $50,000.00 (the "Settlement Amount") by check payable to "Cravath, Swaine & Moore LLP, as attorneys for Michael

Bramwell," which sum shall be in full settlement of any claims that Plaintiff now has or may acquire against Ralph Murray, Wanda Wingate, Diane Ford, Daniel Hope, Patrick Hickey, Jerry Martinez, Gregory Parks, Glenn Carrino, Allen Beard, the defendants now labeled as John Doe 1 and John Doe 2 (collectively, the "Individual Federal Defendants") and Edward Mulroney (with the Individual Federal Defendants, the "Individual Defendants"), on account of the alleged facts, events and circumstances giving rise to this action. Payment of the Settlement Amount is likewise in full settlement of any claims that Plaintiff now has or may acquire against the United States, the Federal Bureau of Prisons ("BOP"), or any department, agency, agent, officer, or employee of the United States or the BOP (collectively the "Government"), on account of the alleged facts, events and circumstances giving rise to this action. Payment of the Settlement Amount will be made only after execution by the parties and entry by the Court of this Stipulation and Order of Settlement and Dismissal ("Stipulation and Order").

3. The Government stipulates and agrees that the BOP has no liens with respect to Plaintiff's incarceration in BOP facilities from December 23, 2002, through and including February 4, 2008, nor will it seek to enforce any liens now or in the future with respect to Plaintiff's incarceration in BOP facilities or medical treatment received from or performed at the direction of BOP staff or at BOP facilities from December 23, 2002, through and including February 4, 2008. This waiver does not include any other liens held by the Government.

4. This Stipulation and Order does not constitute an admission of liability or fault on the part of any of the Individual Defendants or the Government.

5. Plaintiff agrees to accept the Settlement Amount set forth in paragraph 2 above in full satisfaction of all claims that he or his heirs, executors, administrators, or assigns may have or acquire on account of the events giving rise to this lawsuit and all claims incident thereto,



including but not limited to any such claims asserted by Plaintiff in the Complaints, against the Individual Defendants or the Government. Plaintiff hereby releases the Individual Defendants and the Government from all claims and liabilities arising directly or indirectly from the incidents giving rise to this lawsuit and all claims incident thereto, including but not limited to any claims asserted by Plaintiff in the Complaints. Plaintiff's release shall be effective upon payment of the Settlement Amount according to the terms set forth in Paragraph 2.

6. Plaintiff agrees (a) to indemnify and hold harmless the Individual Defendants and the Government from any and all claims, rights, subrogated interests, or other claims brought against them by any third party purporting to assert such claim through or on behalf of Plaintiff and arising from the incidents alleged in the Complaints and all claims incident thereto, and (b) to reimburse or advance, at the option of counsel for the United States, any expense that may be incurred by the Individual Defendants or the Government, incident to or resulting from such further litigation or the prosecution of claims by any third party purporting to assert such claim through or on behalf of Plaintiff and arising from the incidents alleged in the Complaints.

7. This Stipulation and Order shall be construed in accordance with the laws of the State of New York and may be enforced in this Court.

8. This Stipulation and Order shall be binding upon and inure to the benefit of all parties and their principals, agents, representatives, heirs, successors, and assigns.

9. This Stipulation and Order may be signed in two or more counterpart originals, each of which shall be deemed to be an original.

10. This Stipulation and Order contains the entire agreement between the parties, and any statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or counsel that are not included herein shall be of no effect.



AGREED TO BY:

Dated: New York, New York
December 13, 2007

MICHAEL BRAMWELL, Plaintiff

Dated: New York, New York
December 13, 2007

MATTHEW L. KUTCHER, ESQ.
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019

Attorneys for Plaintiff Michael Bramwell

Dated: Brooklyn, New York
December __, 2007

BRETT H. KLEIN, ESQ.
Leventhal & Klein, LLP
45 Main Street, Suite 230
Brooklyn, New York 11201

Attorneys for Defendant Edward Mulroney

MICHAEL J. GARCIA
United States Attorney
Attorney for the Individual Federal Defendants and for the United States

Dated: New York, New York
December __, 2007

By: _____
MATTHEW L. SCHWARTZ
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007

SO ORDERED:

_____
HON. BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

AGREED TO BY:

Dated: New York, New York
December __, 2007

MICHAEL BRAMWELL, Plaintiff

Dated: New York, New York
December __, 2007

MATTHEW L. KUTCHER, ESQ.
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019

Attorneys for Plaintiff Michael Bramwell

Dated: Brooklyn, New York
December 14, 2007

BRETT H. KLEIN, ESQ.
Leventhal & Klein, LLP
45 Main Street, Suite 230
Brooklyn, New York 11201

Attorneys for Defendant Edward Mulroney

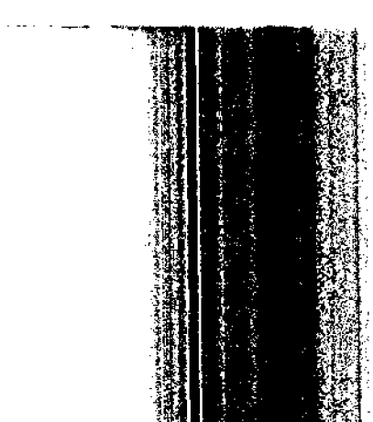
MICHAEL J. GARCIA
United States Attorney
Attorney for the Individual Federal Defendants and for the United States

Dated: New York, New York
December __, 2007

By:
MATTHEW L. SCHWARTZ
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007

SO ORDERED:

HON. BARBARA S. JONES
UNITED STATES DISTRICT JUDGE



AGREED TO BY:

Dated: New York, New York
December __, 2007

MICHAEL BRAMWELL, Plaintiff

Dated: New York, New York
December __, 2007

MATTHEW L. KUTCHER, ESQ.
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019

Attorneys for Plaintiff Michael Bramwell

Dated: Brooklyn, New York
December __, 2007

BRETT H. KLEIN, ESQ.
Leventhal & Klein, LLP
45 Main Street, Suite 230
Brooklyn, New York 11201

Attorneys for Defendant Edward Mulroney

MICHAEL J. GARCIA
United States Attorney
Attorney for the Individual Federal Defendants and for the United States

Dated: New York, New York
December 13, 2007

By: _____
MATTHEW L. SCHWARTZ
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007

SO ORDERED:

_____
HON. BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

1/9/08

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2007-00876 **Short Description: WILLIAMS V. WARMERDORF ET AL**

[redacted]

Case Login Information

Reference Number	3:07-cv-01283-JMM-EC
Short Description	WILLIAMS V. WARMERDORF ET AL
Classification	Civil
Case Type	Bivens 8th Amend
Case Sub-Type	Assault-Failure to Protect
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	Allenwood (USP)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	Allenwood (USP)
Monetary Relief Sought	$1,000,000.00
Estimated Amount	$0.00
Office	Scranton
Jurisdiction	MIDDLE DISTRICT OF PENNSYLVANIA
Responsible Legal Office	FCC Allenwood

Legal Liability Evaluation

[redacted]

Estimated Amount	$ - 0.00
Estimated Outcome	No evaluation can be made at this time

Case Resolution

[redacted]

Date	07/01/2011
Type	Settled
Reason	
Sought	
Amount offered	$1,500.00
Total Amount Paid	$1,500.00
Description	CASE SETTLED FOR $1,500.00 DUE TO ANTICIPATED COST OF GOING TO TRIAL. COURT PUSHED FOR NUISANCE VALUE. CONVERTED TO FTCA.
Description	CASE SETTLED FOR $1,500.00 DUE TO ANTICIPATED COST OF GOING TO TRIAL. COURT PUSHED FOR NUISANCE VALUE. CONVERTED TO FTCA.
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

[redacted]

Date Received	08/27/2007
Date Filed	07/16/2007

Case Progress

[redacted]

Current Owner	KEVIN SULLIVAN
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

[redacted]

Long Description	28:1331 FEDERAL QUESTION: OTHER CIVIL RIGHTS
Further Case Classification	INMATE DERRICK WILLIAMS ALLEGES THAT ON APRIL 26, 2006, HE REPORTED TO SENIOR OFFICER SPECIALIST GEORGE HOLTZAPPLE THAT HE WAS BEING ASSAULTED BY HIS CELLMATE, AND OFFICER HOLTZAPPLE FAILED TO REMOVE INMATE WILLIAMS FROM HIS CELL.
Comments	As a result of this failure, inmate Williams alleges that he was beat for the next hour until Warden Miner came by during rounds and ordered that inmate Williams be removed from the cell.

IN THE UNITED STATES DISTRICT COURT

FILED
SCRANTON
JUL 16 2007
PER DEPUTY CLERK

3: CV 07-1283

Mr. Derrick Williams
48426-066

Plaintiff/Petitioner(s),

-vs-

Lt. Warmendorf
Officer Holtzapple
Officer Hueys
Officer Westley
Officer Colley; Officer Kasinsky
Administrator Dewald
of Medical, PA Holtzapple

Defendant/Respondent(s).

Docket No. 1283
(To be supplied by the Clerk)

☒ CIVIL RIGHTS COMPLAINT pursuant to 42 U.S.C. §1983 (State Prisoner)

☒ CIVIL RIGHTS COMPLAINT pursuant to 28 U.S.C. §1331 (Federal Prisoner)

☐ CIVIL COMPLAINT pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346, 2671-2680

I. JURISDICTION

A. Plaintiff's mailing address and/or register number and present place of confinement.
Derrick Williams 48426-066 USP Allenwood
P.O. Box 3000, White Deer, Pa 17887

B. Defendant Lt. Warmendorf is employed as
(Name of First Defendant)
Correctional Officer (Lt.)
(Position/Title)
with Bureau of Prisons at USP Allenwood
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes ☒ No ( )

If your answer is "yes", briefly explain:
Defendant is employed as a Correctional Officer

C. Defendant Officer Holtzapple is employed as
(Name of Second Defendant)
Correctional officer
(Position/Title)
with Bureau of Prisons USP Allenwood
(Employer's Name and Address)

At the time the claim(s) alleged in this complaint arose, was the defendant employed by the state, local or federal government?

Yes (X) No ( )

If your answer is "yes", briefly explain:
Employed as a correctional officer

D. Using the outline of the form provided, include the above information for any additional defendant(s).
Officer Thiesp is employed as a correctional officer for the Bureau of Prisons at USP Allenwood
Officer Westley is employed as a correctional officer for the Bureau of Prison at USP Allenwood. Officer Collier is employed as a correctional officer at Bureau of Prisons at USP Allenwood, Officer Kazinski is employed as a correctional officer for the Bureau of Prisons administrator Dewald employed at USP Allenwood. PA Holtzapple employed at USP Allenwood

II. PREVIOUS LAWSUITS

A. Have you begun any other lawsuits in state or federal court relating to your imprisonment?

Yes (X) No ( )

B. If your answer to "A" is "yes", describe the lawsuit(s) in the space below. (If there is more than one (1) lawsuit, you must describe the additional lawsuits on another sheet of paper, using the same outline.) Failure to comply with this provision may result in summary denial of your complaint.
Assault by a correctional officer a U.S.P Leavenworth.

1. Parties to previous lawsuits:
Plaintiff(s) Mr. Derrick Williams 48426-064

Defendant(s) Officer Kellibaum and letter United States as Substitute

2. Court (if Federal Court, name the District; if State Court, name the County) In The United States District Court of Kansas

3. Docket number 04-3003-GTV

4. Name of Judge to whom case was assigned Chief U.S. Judge John W. Lungstrum

5. Type of case (for example: Was it a Habeas Corpus or Civil Rights action?) Civil action

6. Disposition of case (for example: Was the case dismissed? Was it appealed? Is it still pending?) Voluntarily dismissed by settlement

7. Approximate date of filing lawsuit January 7, 2004

8. Approximate date of disposition ~~June 21~~ July 5, 2005

III. GRIEVANCE PROCEDURE

A. Is there a prisoner grievance procedure in the institution? Yes

B. Did you present the facts relating to your complaint in the prisoner grievance procedure?
Yes (X) No ( )

C. If your answer is "yes",
1. What steps did you take? Plaintiff filed a BP8, BP9 BP10, and BP11 to the General Counsel in Washington D.C.

2. What was the result? That their review revealed that staff removed me from the as soon as they became aware and that I was medically assessed.

D. If your answer is "no", explain why not

E. If there is no prisoner grievance procedure in the institution, did you complaint to prison authorities? Yes ( ) No ( )

F. If your answer is "yes",

1. What steps did you take? _____

2. What was the result? _____

G. If your answer is "no", explain why not. _____

H. Attach copies of your request for an administrative remedy and the response(s) you received. If you cannot do so, explain why not: _____

IV. STATEMENT OF CLAIM

State here, as briefly as possible, the FACTS of your case. State who, what, when, where and how you feel your constitutional rights were violated. Do not cite cases or statutes. If you choose to submit legal arguments or citations, you must do so in a separate memorandum of law. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. If your claims relate to prison disciplinary proceedings, attach copies of the disciplinary charges and any disciplinary hearing summary as exhibits.

Only two (2) extra pages (8½ x 11") are permitted, if necessary, to complete your statement of claim. Additionally, attach any relevant, supporting documentation.

While in special housing unit on 4/26/06 on DS range in cell 105. I was being assaulted by inmate William McMullen another inmate. This took place around 12:30 that afternoon. During that entire time myself and other inmates were banging on the door and pushing the panic button yelling that there was a problem. Nearly a half hour later officer Holtzapple came to the door and I showed him my face and the blood in my mouth. I told him that I needed to be removed from the cell. He responded by telling me not now, staff are in a sea meeting. I asked him for Lt Warmendorf and he

told me that he is going to the staff meeting upon investigation of the incident when I filed the BP8. The issue was discussed with Lt Warmendorf in which the response was there was no evidence that I was assaulted. I was left in the cell nearly an hour after officers were made aware while I continued to be assaulted by inmate McMullen. Then officer Kazinski came on the range with razors and I told him about situation again and he told me that they know up front what's going on. It was not until Warden Miner and the Associate Warden came by the cell and recognize the situation and ordered officer Hueys to remove me from the cell. Staff were negligent in their duty and responsibility and they were deliberately indifferent to the urgency of the situation and my safety. I suffered serious head injury and emotional distress, and my jaw was bruised ~~and partial was broke for which they (medical) did not fix until a year later because they did not have a full time dentist~~. It took the medical department nearly 4 months after the incident to realize that I was suffering from a serious head injury to the right side of my brain as a result of the blows of the assault. I suffer headaches and blurry vision and ~~loss of small~~ emotional distress

V. REQUEST FOR RELIEF

State exactly what you want the Court to do for you. If you are a state or federal prisoner, and seek relief which affects the fact or duration of your imprisonment (for example: illegal detention, restoration of good time, expungement of records or parole release), you must file your claim on a Habeas Corpus form, pursuant to 28 U.S.C. §2254, 28 U.S.C. §2255, or 28 U.S.C. §2241.

Compensatory and punitive damages of $1,000,000

DECLARATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 11

I, the undersigned, certify to the best of my knowledge, information, and belief, that this complaint is in full compliance with Rule 11(a) and 11(b) of the Federal Rules of Civil Procedure. The undersigned also recognizes that failure to comply with Rule 11(a) and (b) may result in sanctions, monetary or non-monetary, pursuant to Federal Rule of Civil Procedure 11(c).

The plaintiff hereby requests the court issue all appropriate service and/or notices to the defendant(s).

Signed this 7 day of July, 2007.

Derrick Williams

Signature of Plaintiff

Signature of attorney, if any

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE INFORMATION IS TRUE AND CORRECT. I UNDERSTAND THAT PROVIDING FALSE INFORMATION MAY SUBJECT ME TO CRIMINAL PROSECUTION, IMPOSITION OF A FINE, OR OTHER SANCTION THAT MAY ADVERSELY AFFECT MY ABILITY TO PURSUE THIS CASE OR OTHER CASES. I HAVE REVIEWED MY ANSWERS TO INSURE THEIR ACCURACY.

Executed (signed) this 7 day of July, 2007

Derrick Williams
(Signature of Plaintiff)

==========

Authorization for Release of Institutional Account Information and Payment of the Filing Fee

I, Derrick Williams 48726-066
(Name of Plaintiff) (Register Number)

authorize the Clerk of Court to obtain, from the agency having custody of my person, information about my institutional account, including balances, deposits and withdrawals. The Clerk of Court may obtain my account information from the past six months and in the future, until the filing fee is paid. I also authorize the agency having custody of my person to withdraw funds from my account and forward payments to the Clerk of Court, in accord with 28 U.S.C. § 1915.

Derrick Williams
(Signature of Plaintiff)

7/7/07
(Date)

ALP-1330.13C
September 1, 2005
Attachment 1

United States Penitentiary
Allenwood, Pennsylvania

ADMINISTRATIVE REMEDY PROCEDURE FOR INMATES
INFORMAL RESOLUTION FORM

NOTE TO INMATE: You are advised that prior to receiving and filing a Request for Administrative Remedy Form BP-9 [BP-229(13)], you must ordinarily attempt to informally resolve your complaint through your Correctional Counselor. Briefly state **ONE** complaint below and list what efforts you have made to resolve your complaint informally and state the names of staff contacted.

Issued By: TG (Initials of Correctional Counselor)
Date Issued To The Inmate: 5-4-06

INMATE'S COMMENTS:

1. Complaint: On 4/20/06 while in special housing unit on DS C Range Cell 05, I was being assaulted by inmate William McMullen. This incident occured around 12:30 and the entire time while this was going on. Inmate James Brown

2. Efforts you have made to informally resolve: _____

3. Names of staff you contacted: Regional Director, and Dr. Mitchell

Date Returned to Correctional Counselor: 5/5/06

[signature] 48426-046 5/5/06
Inmate's Signature Reg. Number Date

Williams, D.

CORRECTIONAL COUNSELOR'S COMMENTS:

1. Efforts made to informally resolve and staff contacted: Discussed this issue with SHU Lieutenant. There is no evidence to support your claim of being assaulted.

Date BP-9 Issued: _____

[signature]
Correctional Counselor

D. Hautman, UM I/III
Unit Manager (Date)
5-11-06

Distribution: If complaint is NOT informally resolved - Forward original attached to BP-9 Form to the Executive Assistant.

00177-067, and Tyrone Martin number not known last 3 digits 066 who in 109 cell and James Brown in 210 cell. Banged on their doors and hit their panic buttons in the cell, also yelling to the C/O's that there was a problem in 105 cell. Nearly a half hour later officer Holtzapple came to the door and I showed him my face and blood in my mouth and told him that I need to be removed from this cell. He said not right now staff are in a seg meeting. I asked him for Lt. Warmendorf and he said that he is going to the seg meeting. I was left in the cell nearly an hour after officer Holtzapple came to the door. While I continued to be assaulted by Inmate McMullen. Then officer Kazinsky came on the range handing out razors and I told him the situation and he just walked by and stated that they know already up front what's going on. It was not until Warden Miner and the associate warden had come by the cell on their tour. That they immed-

iately recognize the situation and went and got officer Jump to remove me from the cell. My first point while up front. I told officer Jump and Westley (the number one that day) that I believed that my jaw was broke and to look at the swelling of my face. That McMillan had assaulted me and you left me in there. They then took pictures and sent me to the hospital for x rays. Mrs. Holtzapple took the assessment report and administration Dewald took the x rays both of them just as indifferent to my situation as the staff that was aware of the situation down the special housing. My jaw is still in pain and my vision in my right eye has become blurry and I suffer from severe headaches. Yet all I was given was 12 tabs of ibuprofen. The next as well as officer Jump Allen, Westley Holtzapple, Kuzinsky and the officer turning the gate door that day. (Name not available at this time) and Ad. Dewald and A. Holtzapple were negligent in their duty

and responsibility and they were deliberately indifferent to the urgency of the situation and my safety. For which I now suffer physical injury and suffer from emotional distress. I also informed D. Mitchell, and the Regional Director (by mail) and the office of Inspector General (by mail) of the other attempted assault by inmate McMillan. I seek $1,000,000 in Compensatory as well as Punitive damages and declaratory relief.

I

WILLIAMS, Derrick
Reg. No. 48426-066
Appeal No.: 414437-F1
Page 1

Part B - Response

This is in response to your Request for Administrative Remedy in which you allege an assault occurred on April 26, 2006, at approximately 12:30 p.m. in cell C-105 of the Special Housing Unit (SHU). Secondly, you allege the staff refused to respond to the incident.

An inquiry into your allegation reveals, on April 26, 2006, you were assaulted by your cell mate. The SHU staff upon recognizing the severity of the incident immediately removed you from the cell. You were medically assessed, interviewed and placed in a separate cell. This is standard protocol for all inmate on inmate incidents. The inmates you referenced in your allegation were interviewed. They deny knowing of any assault taking place on the day of the incident. After reviewing documentation and statements from the responding staff, the investigator concluded the staff acted appropriately to the incident. Therefore, your allegation of staff misconduct is not substantiated.

Accordingly, your Request for Administrative Remedy is denied. If you are not satisfied with this response, you may appeal to the Regional Director within 20 calendar days of this response.

Date 6/9/06

Jonathan C. Miner
Warden

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: Williams Derrick A. 48426-066 SHU D 204 USP Allenwood
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A - REASON FOR APPEAL Warden Miner in his response to my BP9 grievance. Stated that there was not any negligents on the officers part working on specific housing on that day. It took SHU officers nearly 1 hour or more to respond and remove me from the cell after they discovered I was in danger. It's stated that both prisoners that I mentioned were interviewed and deny knowing about an assault. I stated that they heard what was going on and banged on their door and told the officers to remove me from the cell. The prisoners were interviewed about the situation while SIS was not to come and see me. It was stated they said it's a lie. Also it was not the SHU officers who ordered that I be removed from the cell. It was the associate warden who told officers "I want to remove me after he and the warden recognized the situation. Camera's will confirm everything I stated. I suffer from headaches, loss of sleep memory loss and loss of smell. Contacted medical but have not been treated yet. I seek punitive as well as Compensatory damages of $1,000,000 & still suffer blurry vision in one eye. and emotional distress.

6/13/06 Derrick Williams
DATE SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: 414437-R1

Part C - RECEIPT

CASE NUMBER:

Return to:
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE SIGNATURE, RECIPIENT OF REGIONAL APPEAL

USP LVN PRINTED ON RECYCLED PAPER BP-230(13) JUNE 2002

WILLIAMS, Derrick
Reg. No. 48426-066
Appeal No. 414437-R1
Page One

Part B - Response

In your appeal, you state you were assaulted in your cell at USP Allenwood and allege staff working in the Special Housing Unit (SHU) refused to respond to the incident. You seek punitive and compensatory damages in the amount of $ 1,000,000.00 dollars.

A review of your appeal reveals, on April 26, 2006, you were assaulted by your cell mate while housed in the SHU. Although, you were not immediately removed from your cell, you were removed as soon as staff became aware the incident had occurred. Staff were not made aware of any conflicts between you and your cell mate prior to the incident and there was no evidence of an intentional or significant delay in the time staff responded. However, if you feel you have suffered a loss or personal injury due to staff negligence, you may request money damages by submitting a claim to the Regional Counsel under the Federal Tort Claims Act. Accordingly, your appeal is denied.

If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedy Section, Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534, within 30 calendar days of the date of this response.

FOR

Date: July 19, 2006

D. SCOTT DODRILL
Regional Director

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

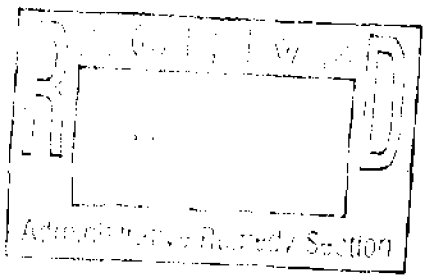
From: Williams Derrick A. | 48426-066 | 4B | USP Allenwood
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A - REASON FOR APPEAL On April 26, 2006 I was assaulted by my cell mate in special housing unit. The officers were negligent in their handling of the situation. Nearly over an hour after the officer were made aware of the incident. The officers were well awar that this prisoner had a history of assaulting his cell mates There was an intentional delay in staffs response. As a result I sufffer injury for which may affect me for life. My Constitutional rights were violated and as a result. I seek Compensatory and punitive damages.

8/29/06
DATE

Derrick Williams
SIGNATURE OF REQUESTER

Part B - RESPONSE



DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 414437

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN

PRINTED ON RECYCLED PAPER

BP-231(13)
JUNE 2002

Administrative Remedy No. 414437-A2
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal in which you claim staff were negligent in the handling of an incident in which you were assaulted. You request monetary compensation.

Our review reveals the Warden and Regional Director adequately responded to the issues you raised in your appeal. As noted in your response from the Regional Director, prior to the incident, staff were not aware of any conflicts between you and your cell mate. Staff removed you from your cell as soon as they became aware that the incident had occurred. You were medically assessed, interviewed and placed in a separate cell.

The Administrative Remedy Program does not provide for monetary relief. Your request for monetary compensation should be pursued through the appropriate statutorily mandated procedure to resolve this issue. You can obtain the proper forms from your unit team. Accordingly, your appeal is denied.

November 6, 2006
Date

Harrell Watts, Administrator
National Inmate Appeals

Mr. Derrick Williams 48426-060
U.S. Penitentiary Allenwood
P.O. Box 3000
White Deer, Pa 17887





RISBU 171 PM JUL 12 2007 HARRISBURG PA

RECEIVED
SCRANTON
JUL 16 2007
MARY E. D'ANDREA, CLERK
Per
DEPUTY CLERK

MAILED FROM
U.S. PENITENTIARY

JUL 11 2007

United States District Court
For The
Middle District of Pennsylvania
235 North Washington Ave
P.O. Box 1148
Scranton, Pa 18501

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

DERRICK WILLIAMS,	:	
Plaintiff	:	**CIVIL ACTION NO. 3:07-1283**
v	:	**(MANNION, M.J.)**
OFFICER HOLTZAPPLE; OFFICER KASINKSY	:	
Defendants	:	

O R D E R

Counsel for the parties having reported to the court that this case has been resolved and settled, **IT IS ORDERED THAT** this action be dismissed without costs and without prejudice to the right of either party, upon good cause shown, to apply for reinstatement of the action within ninety (90) days of the date of this order if settlement has not been consummated.

The final pre-trial conference scheduled for July 7, 2011 and jury trial scheduled for July 25, 2011 are cancelled.

s/ Malachy E. Mannion

MALACHY E. MANNION
United States Magistrate Judge

Dated: July 1, 2011
O:\shared\ORDERS\2007 ORDERS\07-1283-05.wpd

PD

ANGEL AVILES# 59399-066
F.C.I. SCHUYLKILL
P.O. BOX 759
MINERSVILLE, PA 17954-0759
PLAINTIFF, pro se

FILED
JUN [illegible] 2008
MICHAEL E. KUNZ, Clerk
By [illegible] Dep. Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGEL AVILES, PLAINTIFF	:	CIVIL CASE NO. 08cv2440
VS.	:	COMPLAINT FOR DAMAGES
TROY LEVI, WARDEN	:	
TRACEY BROWN, AW (P)	:	
CAPT. KNOX	:	
LT. DEMPSEY	:	
LT. HARRIS	:	
LT. GIBBS, SIS	:	
CO. PEREZ	:	
CO. GRIFFITH	:	
CO. JETZER, SIS	:	
CO. MUSE	:	
CO. WILLIAMS	:	
DOC. REYNOLDS	:	
NURSE DAVIS	:	
ISAM ELAYAN, ACTING HSA	:	
ODEIDA DALMAS, M.D., DEFENDANTS,et.al.,	:	

COMES NOW, ANGEL AVILES, PLAINTIFF, acting pro se and for his cause of action states the following:

1. That the Plaintiff was incarcerated at the Federal Detention Center in the Eastern District of Pennsylvania.
2. Defendants were at all times relevant hereto, officers and employees of the U.S. Department of Justice, Federal Bureau of Prisons withtheir official duty station at the Federal Detention Center.
3. This court has jurisdiction of this matter by virtue of 28 U.S.C. §1331 and **BIVENS V. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS**, 403 U.S. 388 (1971), Venue is vested by virtue of the provisions of 28 U.S.C. §1331 (b).
4. This court has jurisdiction of this matter in that the cause of action involves Federal officials acting under color of legal authority.

COUNT 1

1. Plaintiff re-alleges the allegations contained in paragraph 1 through 4 of the jurisdictional statement as though the same were fully set forth within.
2. Begining on or about July 11, 2005 and continuing upto on or about January 2007, the Defendant(s) did combine, conspire, and did confederate together and with divers others indentity of whom are unknown to the Plaintiff to punish the Plaintiff for practicing his religion, expressing how he feels, being an alleged gang member and a murderer and not being attentive to the Plaintiffs medical needs and keeping him in solitary confinement in violation of his constitutional rights.
3. At all times relevant hereto, The Defendant(s) knew or should

have known that the Plaintiff possessed the right to have legal access to the courts for redress of his grievances without incurring reprisal from the Defendant(s); The Defendant(s) did with bad purpose and evil motive embark upon a campaign of reprisal by transferring the Plaintiff from his living quarters to solitary confinement wherein the Plaintiff was locked up foe 24 hours a day as a pretrial detainee for several months, and by denying medical treatment to the Plaintiff.

4. The Plaintiff has been approved for surgery for his hernia for Two Years now and has been denied by B.O.P. Medical Staff and has been in constant pain since being placed in the "Special Housing Unit" since on or about July 2005 until on or about Febuary 2006; and fremeror about July 11, 2006 until on or about December 22, 2007.
5. It was the object of the conspiracy by the Defendant(s) to punish the Plaintiff because of the fact that the Plaintiff has been alleged to be a murderer and was not co-operating with the Goverment he was alleged to be a gang member, was practicing his religion of Santaria, had filed grievances remedy complaints against various individuals employed by the Bureau of Prisons, and because the Plaintiff contacted Members of the United States Congress.
6. At all times relevant hereto, the Defendant(s) and each of them in discharging their discretionary duties were acting under color of law and in furtherance of the conspiracy did commit the following acts, to wit:
   A. On or about March 2005, Plaintiff was seen by an independent doctor and examined for a hernia and was approved for surgery. The Defendant(s) involved were Odeida Dalmas, Isam

Elayan, Doctor Reynolds and all of F.D.C. Phila medical department known to the Plaintiff.

B. On or about July 11, 2005 Plaintiff was taken to the Lieutenants Office to see Lt. Harris by Griffith and was told to wait outside in the hallway in front of the office. Plaintiff then was observed by cruz and was told to enter the Lieutenants office. At this time, Lt. Harris asked the Plaintiff were he was from, A referrence to the Plaintiffs place of residence, Lt. Harris began to harras the Plaintiff by being very discrimanting, for example: Your a no good gang member you are going to get what you deserve and thats life in prison and here in the Feds we tell and if you dont co-operate I will make sure you do your time in the hole. What ever my officers tell me about you I will believe them and at this time Cruz told the Lieutenant to show him the Plaintiffs tatoo; so the lieutenant turned around looked in the computer and said take the Plaintiff to the "Special Housing Unit"

C. Cruz began to call the Plaintiff a devil worshipper and gang banger and was verbally abusive towards the Plaintiff.

D. On or about 2005, Plaintiff had a visit from his wife and she had to use the bathroom, because it was very cold up in the "Special Housing Unit" and the fact that the Plaintiff's wife is anemic, she was cold and had to use the bathroom real bad until she urinated on herself leaving her all the more embarrased. defendant Muse, who was working the visiting lobby, would not allow Plaintiff's wife use the bathroom nor would any other Defendant(s) known and unknown to the Plaintiff.

E. On or about July 2005, Plaintiff was taken to see the Disciplinary Hearing Officer. The DHO expunged the charges and the Plaintiff was remanded to the prisons general population. Lietenant Callanham said that the Plaintiff was not going any where, because he deserves to be in the "Special Housing Unit", because he is a gang member and thats what he gets for being apart of a gang, and if it were up to her the Plaintiff would never be removed from the "Special Housing Unit".

F. On or about August 2005, Plaintiff asks for a grievance and was told by Defendant(s) that the Plaintiff would be loosing his visits for six months. The Plaintiff then appeals the complaint and the Warden Troy Levi took the Plaintiff's visit for one year, stating that what the Plaintiff's wife did was nasty by going to the bathroom on herself, and as a result of the Plaintiff's wife being humilated by the whole situation at hand by urinating on herself in retaliation the Warden took the Plaintiff's visit for one year.

G. On or about September 2005, Plaintiff was told by Warden Troy Levi that the Plaintiff would not receive any visits and he would remian in the "Special Housing Unit" until he left the Federal Detention Center.

H. On or about October 2005, Plaintiff was seen by Defendant Doctor Reynolds and was given a physical, Plaintiff asked Doctor Reynolds about his surgery which had been approved for, because he was in constant pain. Doctor Reynolds told the Plaintiff that Plaintiff wouldn't be getting surgery while in the Federal Detention Center, because they didnt have eneough money in the institutional budget for the Plaintiff's surgery.

I. On or about January 10, 2006, Plaintiff started trial from the "Special Housing Unit". Plaintiff was denied all grooming and razors. Plaintiff was refused and denied access to all grooming materials and razors by the Defendant(s). Also Plaintiff was seperated from all other co-defendants who were going to trial. Plaintiff was deprived of anadequate oppurtunity to prepare for trial.

J. On or about January 13, 2006, Plaintiff told his attorney, Mr. William T. Cannon, Esq, how he was being mistreated by the Defendant(s) at the Federal Detention Center; and that he was suffering great depression because of being locked down in isolation for an extended period of time in the "Special Housing Unit". Plaintiff's attorney addressed complaints to the trial judge the Hon. GENE E.K. PRATTER, U.S.D.J.

K. On or about January 16, 2006, Plaintiff's trial judge, Hon. GENE E.K. PRATTER set up a meeting with the jail officials, because of the way the Defendant(s) were treating the Plaintiff, Defendant SIS officer Garraway admitted that he and/or the Defendant(s) at the Federal Detention Center had violated the Plaintiff's constitutional rights and that he was sorry.

L. On or about january 20, 2006, Defendant Muse began to harrass the Plaintiff's visitors and began to tell Plaintiff's wife that she was not on the visiting lists and Muse also made derogatory comments to Plaintiff's wife such as why do you want to visit a jail bird any way. Defendant Muse altered the Plaintiff's personal information in the computer and made it like his wife was from Las Vegas Nevada, resulting in Plaintiff's wife being disallowed to visit the Plaintiff.

M. On or about Febuary 16, 2006, Plaintiff was in great pain due to his hernia and notified the housing officer Defendant Gomez that he was in great pain suffering Defendant Gomez notified Defendant Nurse Davis and Nurse Davis said she would be going to the housing unit; Defendant Davis never did attend to the Plaintiff's medical needs.

N. On or about July 11, 2006, PLaintiff was again removed from general population and was taken to the "Special Housing Unit". Plaintiff was told that he was a threat to others and himself in general population, Staff and other inmates. Plaintiff was told that he wouldhave to remain in the "Special Housing Unit" pending review by the institutions Captain, The staff member who over saw security.

O. On or about July 2006, Plaintiff was taken out of his cell to see Captain Knox and Defendant(s) Lt. Gibbs, SIS officer Garraway and SIS officer Jetzer. Plaintiff was asked if he knew why he was being placed in the "Special Housing Unit" Plaintiff replied negatively because the Plaintiff had no disciplinary charge(s). captain Knox said because Plaintiff was part of a gang and this is what you get and you would never get out of the "Special Housing Unit" until the Plaintiff left the jail or was transferred. Capt. Knox also stated: That there hadn't been any murders in Lewisburg and that he was doing his job by keeping the Plaintiff in the "Special Housing Unit" Another of his reasons was that a co-defendant, Mr. Elvis Ortiz was in possession of an open razor in his cell.

P. On or about August 2006, Plaintiff was taken out of his cell in the "Special Housing Unit" and seen by Lt. Gibbs and Lt. Dempsey because the Plaintiff was grieving his conditions up in the "Special Housing Unit" and he hasn't

been interviewed every Thirty days in according to the Hewitt Process while the Plaintiff has been in the "Special Housing Unit" Lt. Gibbs began to harrass the Plaintiff by saying why are you making his job harder, your real problem is with the medical department. The Plaintiff told the Defendant Gibbs that he felt that his rights have been violated and that the Plaintiff is intitled to the relief in which he seeks through exuasting his complaints. Knowing that Defendant Lt. Gibbs violated the Plaintiff the Defendant began to bribe the Plaintiff with phone calls and Defenadnt told the Plaintiff to expunge his grievances thiers nothing that the Plaintiff can do.

Q. On or about September 2006, Plaintiff was seen again by Defendant(s) Lt. Gibbs and Lt. Dempsey and SIS officer Jetzer, Plaintiff was told to dispose of his grievance complaint or he would he remain in the "Special Housing Unit" for an indefinate period of time. Plaintiff began to tell the Defendant(s) that he had been in the "Special Housing Unit" for several months and never was seen by any one in means of a Hewitt Process to where the Defendant(s) have to interview you while you are in the "Special Housing Unit". Lt. Gibbs and Lt. Dempsey begun to utter profanities By calling the Plaintiff all racial slurs. Plaintiff responded by telling the Defendant(s) that he was only using his grievances that was available to him.

R. On or about June 2005, Defendant Perez was working the mail room, Defendant Perez would open up the Plaintiff's legal mail and would at times hold all of the Plaintiff's legal mail for months on end. Defendant Perez would even send the Plaintiff's mail back to the sender stating that this Plaintiff is no longer at the jail.

S. On or about October 2006, Defendant Muse was working the visiting front lobby while the Plaintiff receiveded a visit. This Defendant began to give the Plaintiff's mother difficulties and told the Plaintiff's mother that she was not the Plaintiff's mother and that she couldn't get in to the jail to see her son. The Plaintiff's mother began to ask for a security supervisor to resolve the problem. Defendant Muse begun to use profanties and discriminating racial slurs towards the Plaintiff's mother. Plaintiff's mother wrote the Warden complaining about how she was treated by the Defendant.

T. On or about November 8th, 2006, Plaintiff addressed Defendant Troy Levi, Warden to the fact that he had no seperations from the co-defendant(s) that the Plaintiff went to trial with and the Plaintiff asked why would he remove the Plaintiff from general population. The Plaintiff never had no displinary actions.

U. On or about December 13, 2006. Plaintiff requested assistance from the Regional Office, informing them of the abuse by the Defendant(s) and he has been placed in the "Special Housing Unit" for no disiplinary actions and that the Plaintiff's medical conditions aren't being met.

V. On or about November 27, 2006, Plaintiff complained of the great pain he was in due to his hernia the Plaintiff complained to Defendant(s) Nurse Davis, Doc. Reynolds, and Isam Elayan. Medical denied to respond. The Plaintiff was denied all medical attention, Plaintiff made officers all aware that he was in great pain. These officers are not Defendant(s) but they are aware of the great pain in which the Plaintiff sufered. These officers are: Thomas, Shoulders, and Gomez.

W. On or about November 2005, Plaintiff was seen by a psychiatrist Plaintiff told him that he suffered from anxiety attacks and depression; and being that the Plaintiff has been in the "Special Housing Unit" he could no longer gain control over his attacks. The Plaintiff was then prescribed Deserayl and Prozac.

X. On or about January 2006, Plaintiff was seen by Defendant Doc. Reynolds for his yearly medical exam. Dr. Reynolds begun to tell Plaintiff that Plaintiff should not be taken the psychiatrist medicine because it was making the Plaintiff delirious and was resulting in pre-mature death worsening the Plaintiffs mood by making him violent and having a negative aspect to all things around him and that the Plaintiff couldn't think properly.

7. As a direct and proximate result of the acts of the Defendant(s) and each of them, the Plaintiff lost his natural rest and sleep, suffered pain and emotional trauma, depression, anxiety, and apprehension; and wherein he was confined 24 hours of every day, all to his great damage.

8. Deliberately discriminating against a prisoner because of his religious or ethnic attributes; or giving a prisoner additional punishment without due process are acts which prison officials knew or should have known to be constitutional deprivations. **Bivens V. Six Unknown Agents Of The Federal Bureau Of Narcotics**, 403 U.S. 388 (1971).

9. As a direct and proximate result of the Defendant(s) and each of them, afore said, the Plaintiff has been damaged in the amount of $5,000,000.

10. Upon information and belief, Plaintiff as a pre-trial inmate at the time being placed in the "Special Housing Unit" should be treated different then inmates that are already sentenced.

11. Upon information and belief, Plaintiff while in administrative detention shall appear before the "Segregation Review Official" every Thirty days unless the inmate waives the right to appear.

12. Upon information and belief, Plaintiff is entitled to a hearing under what they call a "Hewitt Process" every Thirty days.
13. Upon information and belief, Plaintiff atleast every thirty days prior to seeing the "Segregation Review Official" unless waives the right to appear; Plaintiff never waived his rights nor signed any waiver of appearence BP-307 (52) that should be in Plaintiff's inmate **records.**
14. Upon information and belief, Plaintiff should be interviewed by a psychatric or by "Segreagation Review Official" when administrative detention continues beyond Thirty days.

EXHAUSTION OF LEGAL REMEDIES

15. Plaintiff, ANGEL AVILES, used the prisoner grievance procedure available at the Federal Detention Center to try and solve the problems. On Nov 14, 2006 Plaintiff, ANGEL AVILES. presented the facts relating to this complaint. On or about December 4, 2006 Plaintiff, ANGEL AVILES, received a response stating that the grievance had been denied. On December 18, 2006 Plaintiff appealed the denial of the grievance.
16. Plaintiff used the procedure pursuant to exhausting other remedies on the following dates: November 14, 2006; October 2, 2006; November 2, 2006; October 25, 2006.

LEGAL CLAIMS

17. Plaintiff realleges and incorporates by reference paragraphs 1 to 17.

18. The Defendant(s) at the Federal Detention Center showed a deliberate indifference to the Plaintiff's medical needs, cruel and unusual punishment, discrimination, and due process rights under the Eighth and Fourteenth amendments to the United States Constitution.
19. The Plaintiff has no plain adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the Defendant(s) unless this Court grants the declaratory and injunctive relief which Plaintiff seeks.

PRAYER FOR RELIEF

WHEREFORE, The Plaintiff prays judgment against the Defendant(s), and each of them, in the amount of $5,000,000 and because the acts of the Defendant(s) were wanton and willful the Plaintiff prays for an award of punitive damages in the amount of $5,000,000 as well as Court costs herein expended and for an allowance for reasonable attorney fees; the Court shall deem just and proper.

20. A declaration that the acts and omissions described herein violated Plaintiff's rights under the Constitution and laws of the United States.
21. Compensatory damages in the amount against each defendant in the amount of $2,500,000 each jointly and severally.
22. Punitive damages in the amount of $2,500,000 against each Defendant.
23. A jury trial on all issues triable by jury.

24. Plaintiff's costs in this suit.
25. Any additional relief this court deems just, proper, and equitable.

DATED: 5/20/08

RESPECTFULLY SUBMITTED,

Angel Aviles

ANGEL AVILES# 59399-066
PLAINTIFF, pro se

FILED
JUN 03 2008
MICHAEL E. KUNZ, Clerk
By Dep. Clerk

CERTIFICATE OF SERVICE

This is to verify that a true and correct copy of petitions Complaint for damages was properly furnished upon the person indicated below:

CLERK OF COURTS
U.S. COURT HOUSE
MICHAEL E. KUNZ
601 MARKET STREET, RM 21400
PHILA, PA 19106-1790

On This 20th Day Of May .2008

Angel Aviles
ANGEL AVILES, pro se

ATTESTATION

COMPLAINT FOR DAMAGES

UNITED STATES DISTRICT COURT)
EASTERN DISTRICT OF PENNSYLVANIA) SS.

COMES NOW, ANGEL AVILES, The Plaintiff in the above entitled action, and states under his oath and under the pains and penalities of perjury that the allegations contained in the foregoing complaint wherein he is the Plaintiff and Defendant(s) et.al., are joined as Defendant(s) are the truth according to his best knowledge, information and belief.

IN WITNESS WHEREFORE, He has signed his name hereto this 20th day of May .2008.

ANGEL AVILES
PLAINTIFF, pro se

LDD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGEL AVILES,
PLAINTIFF

-against-

TROY LEVI,ET.AL.,
DEFENDANT(S)

FILED
FEB 11 2009
MICHAEL E. KUNZ, Clerk
By PAR Dep. Clerk

CIVIL ACTION NO: 2:08-02440-LDD

PETITIONERS AMENDED COMPLAINT TO INCORPORATE TORT CLAIM TO PREVIOUSLY FILED AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 15(a)

COMES NOW, ANGEL AVILES, The plaintiff, acting pro-se, in the above entitled cause and moves this Honorable Court to amend this cause to incorporate Tort Claim to previously filed amended complaint filed under Bivens action construed as 42 U.S.C. §1983 Civil Rights complaint.

4. Petitioner has made medical aware of his medical conditions as to all of defendant(s) mentioned in this complaint that he has a left inguinal hernia. Petitioner has been approved by an independant doctor back in or about April 9,2005 for surgery and has been suffering irreparable harm in the form of continued physical and mental pain and suffering and increasing risk of gangerene; Medical records and physical evidence can show that these conditions still exists today. SEE: [EXHIBIT A.]
5. Petitioner since his incarceration at the Federal Detention Center

Philadelphia has been retaliated on by defendant(s) and various others unknown to him within the B.O.P. for exhausting his remedies and in results to being retaliated on, Petitioners medical needs to this day has not been met and his condition has worsen to where he now has not only a left inguinal hernia, but an abdominal hernia as well, and to this day as follow visitors have been harassed as well as the petitioner for exhausting all issues related to this complaint.

6. Petitioner has exhausted his remedy issues pursuant to 42 U.S.C. §1997 e (a) and has filed an [FTCA] Tort-Claim on or about April 21, 2008 Claim No: TRT-NER-2008-04530.

14. Petitioners medical needs has not been met and an inmate must rely on prison authorities to treat his medical needs; If the authorities fail to do so; Those needs wont be met. **ESTELLE V. GAMBLE**, 429 U.S. 97, 103 (1976); Defendant(s) where deliberately indifferent to the petitioners serious medical needs in that they knew of and disregarded an excessive risk to his health.

15. Some courts have held that a serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recongnize the necessity for a doctors attention. **HILL V. DEKALB REG'L YOUTH DET.CTR**, 40 F.3d 1176, 1187 (11th Cir.1994). In this petitioners case an inguinal hernia can become acutely incarcerated. An acutely incarcerated hernia that is not treated within 6 to 8 hours may become strangulated (i.e., the intestinal loop protruding through the abdominal wall becomes constricted), A condition that may result in serious injury or even death. A medical need left unattended pos[es] A substantial risk of serious harm. **TAYLOR V. ADAMS**, 221 F.3d 1254, 1258 (11th Cir.2000). In other words, If a doctor says you need treatment as to petitioners "surgery" for his **HERNIA** and his need is obvious, than it is probably serious.

17. Deliberate indifference standard is applicable to the petitioners claim that conditions of his bodily pain and suffering or other losses of life or lifestyle which cannot be definately measured in monetary terms or enjoyment due to his conditions constitute cruel and unusual punishment in violation of his Eighth Amendment right.

19. Petitioner during his criminal trial from January 10, 2006 Until March 15, 2006 has let his sentencing Judge as well as his attorney know all these issues thats presented in this complaint; Supporting this allegation as well as allegations in this complaint **SEE: [EXHIBIT B.]** On or about April 27,2006 Petitioner complained to his trial Judge GENE E.K. PRATTER of the pain and suffering in which was opposed upon him by the defendant(s).

20. Petitioner has been and will continue to be irreparably injured by the conduct of the defendant(s) and has complained in complaint of reprisal on or about March 16,2007 to Mr. H. Marshall Jarrett, Counsel of professional responsibility from the U.S. Department of Justice for his medical conditions and all other conditions furnished in his complaint.

21. On or about November 29,2006 Petitioner complained to medical department that he was in pain due to his hernia and they never responded to him. **SEE: [EXHIBIT C]**

22. On or about August 22,2008 An order was made by Hon. Paul S. Diamond that the case at hand was refered to the Clerks office; So counsel can be obtained; Due to the petitioners medical conditions it would be best for him to have counsel to better be able to attain all records as well as medical expert in furthering proof of evidence of the existing medical condition at hand.

23. Petioner has filed a Tort-Claim [FTCA ACTION] and is incorporating this complaint along with his Tort-Claim to be amended to his complaint under Civil Rights Complaint §1983.

24. Upon information and belief under program statement 7331.04 (c) physician assistant or other medical staff identified by the Warden

must conduct the screening in which petitioners condition was made aware of having a left inguinal hernia. The Warden then will establish procedures with the local United States Marshall service and other appropriate federal agencies for those new arrestes who need medical care beyond that available at the institution.

25. Under Bureau of Prisons Program statements for the Federal Bureau of Prisons Federal Detention Center Philadelphia defination s §551. 101 (a) **pretrial inmate**. Means a person who is legally detained but for whom the Bureau of Prisons has not received notifiaction of conviction. Thus, "pretrial inmate" ordinarilly includes a person awaiting trial, being tried, or awaiting a verdict.
26. Petitioner being a pretrial detainee at the time of his approved surgery at the Federal Detention Center was not to his knowledge and belief medically cleared to be transferred to another prison pending via his medical condition in which was approved for surgery at the Federal Detention Center Philadelphia while yet awaiting trial.

WHEREFORE, Petitioner would move this Honorable court to **GRANT** the following relief:

A. Issue a declaratory judgment stating that:
   1. The Cruel and unusual punishment the defendant(s) subjevted the petitioner to by not obtaining to his medical needs has violated the plaintiffs rights under the Eighth Amendment to the United States Constitution and constituted negligence and caused personal injury and damage under federal law.
   2. Defendant(s) Troy Levi, Tracey Brown, Doctor Reynolds, Nurse Davis, Isam Elayan, Capt Knox, Lt. Dempsey, Lt. Gibbs, Odeida Dalmas and defendant(s) unknown failure

to take action and treat the plaintiffs medical condition that significally affects his daily activities, and the existence of chronic and substantial pain are indications that he has a "serious" need for medical treatment and violated the plaintiffs rights under the Eighth Amendment to the United States Constitution and constituted deliberate indifference and caused personal injury and damage under federal law.

3. Defendant(s) Troy Levi, Tracey Brown, Doctor Reynolds, Nurse Davis, Isam Elayn, Capt. Knox, Lt. Dempsey, Lt. Gibbs, Odeida Dalmas, and defendant(s) unknown actions in failing to provide adequate medical care for the plaintiff violated and continue to violate the plaintiffs rights under the Eighth Amendment to the United States Constitution.

B. Issue an injunction ordering defendant(s) or thier agaents to:

1. Immediately arrange for the plaintiffs surgery to repair a left inguinal hernia and abdominal hernia by a qualified surgeon.
2. Immediately arrange for the plaintiffs need for physical therapy or other follow up medical treatment to be evaluated by a medical practitioner with experts in the treatment and restoration of hernia repair.
3. carry out without delay the treatment directed by such medical practitioner.

C. Issue an injunction ordering the Bureau of Prisons and Department of Justice to:

1. Surgically repair the hernias and restore the plaintiffs health; so he can function in his every day activities without discomfort and pain.

D. Award Compensatory damage jointly and severally against:

1. Defendant(s) Troy Levi, tracey Brown, Doctor Reynolds, Nurse Davis, Isam Elayan, and Odeida Dalmas Capt. Knox, Lt. Dempsey, Lt.Gibbs and defendant(s) unknown for the physical and emotional injury resulting from their failure to provide adequate medical care to the plaintiff.

E. Award punitive damages against defendant(s).

F. Grant such other relief as it may appear that the plaintiff is entitled.

Done This 9th Day Of February,2009

DEFIANT FURTHER SAYETH NAUGHT,

ANGEL AVILES, pro-se
PLAINTIFF
F.C.I. SCHUYLKILL
P.O. BOX 759
MINERSVILLE, P.A. 17954-0759
REG.NO. 59399-066

EXHIBIT A

Frankford Hospitals
Jefferson Health System

CONSENT TO OPERATION OR DIAGNOSTIC/THERAPEUTIC PROCEDURE

ANGEL AVILES

1. I authorize Dr. Horan and such physicians/assistants as may be selected by him/her to perform upon ANGEL AVILES the following operation or diagnostic procedure:

Repair of LEFT INGUINAL - SCROTAL HERNIA
MESH Repair

2. The benefits, risks and purpose of this operation or diagnostic/therapeutic procedure as well as the possible alternatives, have been explained to me. I am aware that the practice of medicine and surgery is not an exact science and I acknowledge that no guarantees have been made to me concerning the results of the operation or diagnostic/therapeutic procedure.

3. If, during the course of the operation or diagnostic/therapeutic procedure, unforeseen conditions may be revealed that necessitate change or extension of the original procedure(s) or different procedure(s) than those already explained above, I authorize and request that the above named physician, his/her assistants, or his/her designees perform such procedure(s) as are necessary and desirable in the reasonable exercise of his/her professional judgement.

4. I have been made aware that there are risks, discomforts and possible unforeseen or undesirable consequences associated with the treatment and diagnosis of my illness, including, but not limited to, severe blood loss, infection, heart complications, blood clots or death. I understand that additional risks are associated with the performance of the anticipated procedure and I understand them to be:

Bleeding, Pain, Infection, Urinary Tract
Nerve injury
Recurrence

SENSITIVE
BUT
UNCLASSIFIED

5. I understand that, in addition to the risks explained to me, the possibility of other risks and consequences may arise. I have been advised that if I ask for any further information, it will be given to me.

6. I understand that Frankford Hospital is a teaching hospital and that student observers may be present during my procedure. I authorize my physician to allow technical consultants associated with the equipment being used in my procedure to be present to observe and to provide technical advice at my physician's discretion.

7. I authorize appropriately credentialed physicians to administer or direct the administration of certain anesthetics as part of the operative procedure that I am about to undergo. This consent shall apply to the administration of such anesthetics as may be considered necessary or advisable with the exception of:

8. The risks, benefits and purpose of the administration of anesthesia have been or will be explained to me as well as the possible alternatives which are available. I will be given the opportunity to ask further questions regarding the administration of anesthesia at the time of the operation or diagnostic/therapeutic procedure.

9. I hereby authorize Frankford Hospital to perform necessary diagnostic testing on removed organs/tissues, use tissue not required for diagnostic testing for research and development purposes and to dispose of any remaining organs/tissues after completion of the these studies. I understand that samples collected and studied by an organization or person for research and development purposes will not contain my personal health information.

10. I have been given the opportunity to read this document. to ask any questions which I have of my doctor who has answered all of my questions to my satisfaction.

11. I have been told that I am free to withdraw any portion of my consent prior to the performance of the procedure. In addition, I have either completed or crossed off and initialed any unacceptable statements prior to my signing.

Patient

4/19/05 1500

Date Time

X [signature]

Signature of Patient

If consenting party is other than patient:

Date Time

Signature of Appropriate Surrogate/Relationship

If patient is unable to sign, please state reason: _____

Witness

4/9/05 1500

Date Time

X [signature]

Signature of Witness

SENSITIVE
BUT
UNCLASSIFIED

Date Time

Signature of Witness

Physician:

I have discussed the procedure described above with the patient or appropriate surrogate whose signature appears on this document. I have attempted to answer all questions asked by the patient or appropriate surrogate. It is my opinion that the patient (or appropriate surrogate) understands and comprehends all of the matters discussed.

4/9/05 1500

Date Time

[signature]

Physician's Signature

MEDICAL RECORD | CONSULTATION SHEET

REQUEST

TO: General Surgery

FROM: (Requesting physician or activity) M Anczarski, PA-C Physician Assistant FUC Philadelphia

DATE OF REQUEST 3-8-05

REASON FOR REQUEST (Complaints and findings)

35 y.o. ♂ ± (L) groin area hernia (inguinal). hernia is reducible, ± pain
Please evaluate, Thank you

PROVISIONAL DIAGNOSIS

DOCTOR'S SIGNATURE	APPROVED	PLACE OF CONSULTATION	☐ ROUTINE ☐ TODAY
		☐ BEDSIDE ☐ ON CALL	☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

RECORD REVIEWED ☐ YES ☐ NO PATIENT EXAMINED ☐ YES ☐ NO

35 40 WM ± long-standing (L) Ing hernia → ↑ on strain, tenderness - More difficult to reduce. Goes into scrotum. Occ N/V/groin pain which resolves ± reduction

(-) TB

PMH (-) DM (CAD) / HTN / Hyperlip / psoriasis / BPH (All WNL) PSH (-)
Surgs (-)
(+) Headaches
(+) Trauma (L) arm as child

SENSITIVE BUT UNCLASSIFIED

PE Genitals: Exam, (-) Hydro, NL cord, epididymis (-) CA/TE adenopathy
Ing: down to A-P
in MLF-SD
Left: RIH, OTH, WD Large but reducible (L) Ing-scrotal hernia (Right WNL - all tests)
Ext: CO

INFORMATIVE BOOK REVIEWED ± pt. Refused consent at this time will follow it

Imp: Reducible large (L) Ing-scrotal hernia
Plan: Repair under MAC → Use of mesh

(Continue on reverse side)

SIGNATURE AND TITLE [signature] MD, FACS DATE 4/15/05

LOCATION NO. | ORGANIZATION | REGISTER NO. | WARD NO.

PATIENT IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; rank; rate; hospital or medical facility)

Avilez, Angel
#59399-060
DOB 12-10-69
FCI FHL

3-19-05

CONSULTATION SHEET
Medical Record

STANDARD FORM 513 (REV. 8-92)
Prescribed by GSA/ICMR, 41 CFR 201-45.205-C

☆ U.S. GOVERNMENT PRINTING OFFICE 1995-402-215

EXHIBIT B

ANGEL AVILEZ#59399-066
FEDERAL DETENTION CENTER
P.O. BOX 562
PHILADELPHIA, PA 19105

Honorable Gene E.K. Pratter
United States District Court [redacted]
601 Market Street
Philadelphia, PA 19106

Dear Honorable Gene Pratter,

Its' on this day of April 27,2006. That I Mr. Angel Avilez#59399-066 come before your chambers in hopes that you will be opened to my plea inrequesting a "Bail" pending sentence and or if its' admissiable for me to be allowed to go home to get surgery done for my hernia. Your Honor I suffer a great deal of anxiety since I've been detained here at the Federal Detention Center and your word would be final and greatly appreciated inresponse to this letter. I pray you will take inconsideration my hardships, and the fact that I'm going to state Court for the same charge I was Aquitted on in your honorable Court room. I'm under a substantially amount of duress, and I ask may your heart be opened to the light of my words presented before you, Your Honor. I Thank You for your time as well as a response to this letter, and I look forward to your recommendations in the near future; Once again I Thank you for your consideration.

Sincerly Yours,

/S/ Angel Avilez

ANGEL AVILEZ#59399-066

EXHIBIT C

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
Medical Dept.	Nov 29, 06
FROM:	REGISTER NO.:
Angel Avilez	59399-066
WORK ASSIGNMENT:	UNIT:
N/A	(SHU)

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Im hereby requesting My Medical records that I've been trying to obtain for Several Months. I was approved for Surgery for My hernia Sometime around March of 2005. and I haven't heard of anything Since then. Due to the very poor Medical here at the F.D.C. Philadelphia I Never was treated on Many occasions officers and staff were Notified and aware the great pain I suffer from My intestines coming out of My stomache. Doctor and Medical staff have failed to respond Appropriately and its any past 20 days and I haven't heard of response to my BP 8's, due to these actions).

Angel Avilez
#59399-066

cc/file: 11-29-06

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

White Copy - File; Yellow - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

Printed on Recycled Paper

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Angel Aviles,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**CIVIL ACTION**
	:	
Troy Levi, Warden;	:	**No. 08-2440**
Gary Reynolds, M.D.;	:	
Nurse Davis;	:	**JURY DEMANDED**
Isam Elayan, Acting H.S.A.;	:	
Odeida Dalmasi, M.D.;	:	
D. Massa, M.D.	:	
Thomas R. Snieznek, Warden;	:	
Toa Chaw, M.D.;	:	
Joe Rush, P.A.;	:	
Maryse Wambach, M.L.P.;	:	
J. Justice, Head H.S.A.; and	:	
United States of America;	:	
	:	
Defendants.	:	
	:	

THIRD AMENDED COMPLAINT

Plaintiff Angel Aviles ("Aviles"), by and through his undersigned counsel, Cozen O'Connor, respectfully files this Third Amended Complaint. In support thereof, Aviles avers as follows:

NATURE OF THE ACTION

1. Mr. Aviles brings this civil rights action to redress the flagrant violation of his Eighth Amendment and Fourteenth Amendment right to timely medical treatment as a federal prisoner. In addition, Aviles seeks to redress violations to his First Amendment right to be free from retaliation. This action is against the United States of America ("United States") and the above-named present and former prison employees, who were deliberately indifferent to Aviles' medical needs. Aviles suffered from a left, inguinal hernia that caused him intense, chronic pain

and significantly limited his daily activities, e.g., he could not stand for long periods of times. Despite being medically indicated, Defendants failed to provide Aviles with hernia surgery in a timely manner, causing him additional injuries and needless pain and suffering. As a result of Defendants' inaction, Aviles seeks declaratory relief, compensatory damages, punitive damages, reasonable attorney's fees, costs, and such other relief as this Court deems just.

PARTIES

2. Plaintiff Aviles is currently incarcerated at the U.S. Penitentiary Beaumont ("USP Beaumont") in Beaumont, Texas. Plaintiff was previously detained at the Federal Detention Center Philadelphia ("FDC Philadelphia") in Philadelphia, Pennsylvania from January 2005 to January 2007. Aviles was previously detained at the Federal Correctional Institution Schuylkill ("FCI Schuylkill") in Minersville, Pennsylvania from January 2007.

3. Defendant United States of America is a party to this action under the Federal Tort Claims Act.

4. The Individual Defendants at all relevant times were officials, employees or agents of the U.S. Department of Justice, Federal Bureau of Prisons. The Individual Defendants had personal direction or actual knowledge and acquiescence of Aviles' prison conditions, including his medical care.

JURISDICTION AND VENUE

5. This court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. Aviles files this action pursuant to the Federal Tort Claims Act ("FTCA") and *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

6. Venue is proper pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred in this district.

FACTUAL BACKGROUND

THE PRISON STAFF WAS AWARE OF AVILES' HERNIA, BUT FAILED TO TREAT IT

7. Aviles suffered from a left, inguinal and abdominal hernia; as a result, Aviles' intestines were protruding from the lining of his stomach. Aviles continues to suffer from a right, inguinal hernia, which Defendants have failed to treat.

8. All Individual Defendants were aware of Aviles' hernia condition; however all Individual Defendants were deliberately indifferent to his serious medical needs. Aviles was denied physical therapy and access to timely surgery, despite repeated requests. Aviles informed Dr. Reynolds, the nurses, and the other Individual Defendants of the pain he was suffering from his hernia, but to no avail.

9. On or about January 28, 2005, during Aviles' intake at FDC Philadelphia, he complained of a left hernia on the Medical History Report he completed.

10. On or about February 18, 2005, Dr. D. Massa of FDC Philadelphia advised Aviles that his hernia would probably not be repaired at FDC Philadelphia unless it became strangulated.

11. Aviles informed the following Individual Defendants at FDC Philadelphia of his hernia problem, but they failed to attend to his serious medical needs:

a) Warden Troy Levi (through written requests)

b) Gary Reynolds, M.D.

c) D. Massa, M.D.

d) Nurse Davis

e) Isam Elayan, Acting H.S.A.

f) Odeida Dalmasi, M.D.

12. The FDC Philadelphia medical staff prescribed Motrin and ibuprofen to alleviate the pain from his hernia; however, medical staff, including Nurse Davis, never dispensed any medicine related to his hernia to him.

13. During or around March 2005, Dr. Reynolds examined Aviles and recommended him for hernia surgery. Defendants Odeida Dalmasi, Isam Elayan, and other FDC Philadelphia medical staff participated in his medical care.

14. Dr. Reynolds prescribed Aviles medication but never received them, except he only received psychiatric and cholesterol medications.

15. On or about March 8, 2005, Physician Assistant M. Anczarski diagnosed Aviles with a left groin area hernia (inguinal). That physician assistant opined that the hernia was reducible and referred Aviles for a general surgery consultation.

16. Nothing was done to correct his condition for over a month, until on or about April 19, 2005, when Dr. Horowitz, an independent physician at Frankford Hospitals, evaluated Aviles pursuant to Anczarski's referral. Dr. Horowitz diagnosed Aviles with a left, inguinal hernia that was reducible. Dr. Horowitz recommended and approved the surgical, hernia repair. Aviles, Dr. Horowitz, and a witness signed a "Consent to Operation or Diagnostic/Therapeutic Procedure", authorizing the surgical repair of his left inguinal-scrotal hernia.

17. FDC Philadelphia medical staff never approved of the hernia surgery repair. Aviles thus never received the medically indicated hernia surgery repair while at FDC Philadelphia, despite Dr. Horowitz's recommendation and approval.

18. On or about November 27, 2006, Plaintiff complained of the intense pain that he was suffering because of his hernia. He voiced this complaint to Defendants Davis, Reynolds, and Elayan. Despite his pain, the medical staff declined to respond.

19. Again, nothing was done to correct his condition, and Aviles was transferred to FCI Schuylkill in January 2007. Upon information and belief, Aviles was not medically cleared when they transferred him.

20. The following Individual Defendants at FCI Schuylkill knew of Aviles' hernia condition, but failed to treat him:

a) Warden Thomas R. Snieznek

b) Toa Chaw, M.D.

c) Joe Rush, P.A.

d) Maryse Wambach, M.L.P.

e) J. Justice, Head H.S.A.

21. Warden Thomas R. Snieznek received many complaints about Aviles' hernia condition, but failed to ensure that he received treatment for it. Warden Snieznek characterized the hernia surgery as being elective.

22. Dr. Chaw examined Aviles upon his arrival at FCI Schuylkill in January 2007. Aviles asked Dr. Chaw about his hernia, but Dr. Chaw advised that he did not see anything. Dr. Chaw did nothing except to advise Aviles to exercise and lose weight. He further advised that there was nothing wrong with Aviles and that he approved him for recreation.

23. Joe Rush, P.A. was assigned to Aviles when Aviles was transferred to the Special Housing Unit on or around September 3, 2009. Around the third week of September, Aviles asked Mr. Rush during his rounds for an update on whether he was receiving hernia surgery. Mr. Rush told Aviles that there had been no decision on that. Aviles complained that another hernia was coming. Mr. Rush examined him and referred to the hernias as being small.

24. Maryse Wambach, M.L.P. was Aviles' primary provider. Ms. Wambach was the gatekeeper who had the responsibility to decide whether Aviles should see a physician. Ms. Wambach, at the first encounter, advised Aviles that she did not see any hernias. Around September 2009, after diagnosing his hernia, Ms. Wambach advised that Aviles should sleep in the bottom bunk. Against medical advice, Aviles' counselor forced him to sleep on the top bunk, causing him to unnecessarily stretch himself. Aviles asked Ms. Wambach to rectify the situation, but she failed to answer his pleas in a timely manner.

25. Upon information and belief, J. Justice, Head H.S.A., is responsible for or oversees the approval of healthcare for inmates at FCI Schuylkill. Aviles complained to J. Justice on numerous occasions about his hernia condition. J. Justice failed to approve of Aviles' hernia surgery in a timely manner.

AVILES MOVES FOR TRO AND PRELIMINARY INJUNCTION

26. On or around December 2, 2009, Aviles moved this Court for a temporary restraining order (TRO) and preliminary injunction.

AVILES WAS FINALLY APPROVED FOR AND UNDERWENT SURGERY

27. On or around October 27, 2009, Dr. Carlos Villarreal, an outside physician, diagnosed Aviles with a large left inguinal/scrotal hernia and large umbilical hernia. Dr. Villarreal recommended Aviles for left inguinal/scrotal and umbilical hernia surgery and forwarded the recommendation to FCI Schuylkill's Utilization Review Committee.

28. Finally, around November 2009, Mr. Rush advised Aviles that he had been approved for surgery.

29. On or around December 2, 2009, FCI Schuylkill notified Aviles that the Utilization Review Committee approved his request for hernia surgery.

30. On or about April 1, 2010, Aviles finally underwent a left inguinal/scrotal hernia and umbilical hernia repair surgery.

THE PRISON STAFF WAS DELIBERATELY INDIFFERENT TO AVILES' MEDICAL NEEDS

31. Certain Defendants expressed an unwarranted animus toward Aviles because of his religious beliefs and his criminal history. Upon information and belief, Defendants failed to provide Aviles with medical care in retaliation for (1) his practice of Santaria; (2) his alleged status as a murderer; (3) his alleged status as a gang member; (4) his refusal to cooperate with government prosecutors, e.g., by failing to provide evidence against others; (5) his filing of grievance petitions against prison staff members; and (6) his complaints to members of Congress.

32. As a result of and as evidence of the animus toward Aviles, he was assigned to live in solitary confinement in the Special Housing Unit, where it was difficult to obtain proper medical help.

33. Dr. Dalmasi, at all relevant times, was the medical administrator at FDC Philadelphia. Dr. Dalmasi was responsible for scheduling medical appointments for prisoners.

34. Troy Levi is the Deputy Warden for Administration at FDC Philadelphia.

35. Upon information and belief, there is an informal policy at FDC Philadelphia in assigning inmates in solitary confinement a low priority in approval of medical needs. Further, upon information and belief, there is an informal policy that solitary confinement inmates are not given outside medical care unless their medical condition is life-threatening.

36. The Individual Defendants were acting outside of the scope of their duties or employment.

37. The chronology of alleged wrongs establishes a continuing violation of Aviles' constitutional rights. Dr. Gary Reynolds advised Aviles that he would not be provided with surgery at FDC Philadelphia due to budgetary constraints and that he wait until he was transferred to another prison. On or around September 15, 2006, Dr. Reynolds wrote in Aviles' chart, "If surgery for hernia [is] indicated, [it] will be performed at designated institution." Given Dr. Reynolds' representation of future medical care (that Aviles relied upon), any delay in filing this lawsuit is excusable.

AVILES EXPENDED GREAT EFFORT IN VOICING HIS CONCERNS, AND HE EXHAUSTED HIS ADMINISTRATIVE REMEDIES

38. On or around April 27, 2006, Aviles sent a letter to Judge Gene Pratter expressing his anxiety and duress because of the hernia.

39. Aviles informally presented his complaint to the prison staff of FDC Philadelphia and FCI Schulkill. He gave the staff an adequate amount of time to attempt to informally resolve the issue before filing a request for administrative relief. Aviles was unsuccessful at informal resolution.

40. On or around October 2, 2006, Aviles filed a regional appeal, numbered 431276-R1 complaining about his medical care.

41. On or about November 29, 2006, Aviles voiced his concerns to the FDC Philadelphia Medical Department. In relevant part, he complained as follows:

> I was approved for surgery for my hernia sometime around March of 2005, and I haven't heard of anything since then. Due to the very poor medical [care] here at the F.D.C. Philadelphia[,] I never was treated on many ocassions (*sic*). Officers and staff were notified and aware [of] the great pain I suffer from my intestines hanging out of my stomache (*sic*). Doctor and medical staff have failed to respond appropriately . . . .

The prison staff members never responded to his complaint.

42. On or around April 5, 2007, Aviles complained to J. Justice, Head H.S.A., as follows:

> . . . I guarantee you if you suffered all these years from the internal pain of having a hernia the si[z]e of your fist you would complain and take care of the problem real fast[.] [I]t don[']t take a rocket scien[tist] to see I need surgery for I [have] been waiting for two years now and people of your profession that work for the BOP always put me through the me[a]t grinder with prefabricated policies[.]

On or around April 12, 2007, J. Justice dismissed Aviles' complaint with: "So noted. Continue to seek medical care through your assigned provider."

43. On or around May 21, 2008, he raised his complaint with FCI Schuylkill Warden T. R. Snieznek. On or around May 30, 2008, Warden Snieznek denied Aviles' request for surgery. He promptly appealed the adverse decision to the Regional Office.

44. On or about June 5, 2008, Aviles filed an appeal to the Northeast Regional Office. On or about June 30, 2008, this appeal was denied.

45. Parallel to his efforts to administratively exhaust his claim, on or around June 3, 2008, Aviles sent a complaint of reprisal to H. Marshall Jarrett, Esquire, of the U.S. Department of Justice's Office of Professional Responsibility. Aviles complained of inadequate medical care at FDC Philadelphia and FCI Schuylkill.

46. On or about July 8, 2008, Aviles filed a "Central Office Administrative Remedy Appeal" with the Central Office of the Bureau of Prisons. On or around August 26, 2008,

Administrator Harrell Watts of National Inmate Appeals denied Aviles' appeal (Case No. 494515-A1). Therefore, Aviles exhausted his administrative remedies.

47. On or around March 25, 2010, Aviles filed another "Central Office Administrative Remedy Appeal." He complained as follows:

> I am tru[]ly dissatisfied with the region[']s response concerning my serious medical needs. I object to the false response that the physician only recommended surgical repair for a left inguinal hernia. The physician recommended surgical repair for a left inguinal hernia and umbilical hernia[.] . . . . Also, on Jan[.] 20, 2010 I was diagnosed with a third-hernia on my right side due to wearing a truss and being assigned a top-bunk. I was personally damaged and injured here at the FCI Schuylkill with [an] umbilical and right inguinal hernia. I only came to FCI Schuylkill with a left inguinal hernia. I[']m permanently [illegible] and in constant pain. Nothing can justify the years of pain and suffering for doing time in the Bureau of Prisons . . . . I wish the[re] w[as] a remedy to take away my pain.

48. On or around June 23, 2010, Harrell Watts, Administrator of the National Inmate Appeals, responded to Aviles' Central Office appeal stating, in relevant part, that the "record reflects you are receiving medical care and treatment in accordance with Bureau policy." Therefore, Aviles further exhausted his administrative remedies.

49. Aviles has also exhausted his administrative remedies for the FTCA claim. On or about April 21, 2008, Aviles filed a FTCA claim, numbered TRT-NER-2008-04530. Aviles presented the administrative tort claim to the Federal Bureau of Prisons Northeast Regional Office. On or about February 4, 2009, his claim was finally denied in writing by Henry J. Sadowski, the agency's regional counsel.

COUNT I: *BIVENS* EIGHTH AMENDMENT VIOLATION

(Plaintiff v. Individual Defendants)

50. Paragraphs 1 through 49 are incorporated by reference as if set forth in full herein.

51. In violation of the Eighth Amendment, Defendants failed to provide basic medical treatment to Aviles, causing unnecessary and wanton physical and mental pain and suffering contrary to contemporary standards of decency. Defendants' failure to timely treat his hernia condition caused (1) the ripping of the lining of his stomach, (2) the necessity for Aviles to constantly push his intestines back into his stomach, (3) needless embarrassment from sounds emanating from his intestines, and (4) an increased risk of health problems, such as gangrene and intestine strangulation. Further, Defendants' failure to timely treat the hernia caused Aviles to suffer from an abdominal hernia and a right, inguinal hernia.

52. Defendants were deliberately indifferent to Aviles' serious medical needs. Defendants intentionally denied and delayed access to medical care and intentionally interfered with the treatment once prescribed. Defendants exhibited wantonness in their conduct and a reckless or conscious disregard of a serious risk of injury to Aviles.

53. Defendants' significant delay in providing timely medical treatment for Aviles was an egregious omission that was both deliberate and intentional.

54. Therefore, Aviles is entitled to relief for violations to his Eighth Amendment rights.

COUNT II: *BIVENS* FOURTEENTH AMENDMENT VIOLATION

(Plaintiff v. Individual Defendants)

55. Paragraphs 1 through 54 are incorporated by reference as if set forth in full herein.

56. Individual Defendants at FDC Philadelphia violated Aviles' rights under the due process clause of the Fourteenth Amendment.

57. The conditions of Aviles' pre-trial confinement, including the failure to provide adequate medical care, amounted to punishment prior to an adjudication of guilt.

58. The Individual Defendants were deliberately indifferent to Aviles' serious medical needs.

59. Therefore, Aviles is entitled to relief for violations to his Fourteenth Amendment rights.

COUNT III: *BIVENS* FIRST AMENDMENT RETALIATION

(Plaintiff v. Individual Defendants)

60. Paragraphs 1 through 59 are incorporated by reference as if set forth in full herein.

61. Aviles' conduct and activities, including (1) his practice of Santaria; (2) his filing of grievance petitions against prison staff members; and (3) his complaints to members of Congress, are constitutionally protected.

62. Aviles suffered adverse action at the hands of the prison officials.

63. Upon information and belief, Aviles' constitutionally protected conduct was a substantial or motivating factor in the Individual Defendants' decision to take adverse action against him.

64. Therefore, Aviles is entitled to relief for violations to his First Amendment rights.

COUNT IV: *BIVENS* CONSPIRACY

(Plaintiff v. Individual Defendants)

65. Paragraphs 1 through 64 are incorporated by reference as if set forth in full herein.

66. Upon information and belief, Individual Defendants had an express or implied agreement amongst each other to deprive Aviles of his constitutional rights.

67. There was an actual deprivation of Aviles' rights resulting from that agreement.

68. Therefore, Aviles is entitled to relief for their conspiracy to deprive Aviles of his constitutional rights.

COUNT V: FEDERAL TORT CLAIMS ACT ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*

(Plaintiff v. United States of America)

69. Paragraphs 1 through 68 are incorporated by reference as if set forth in full herein.

70. The United States owed Aviles a duty to provide basic medical care during his detention.

71. By failing to provide Aviles with basic medical care, the United States breached its duty to Aviles. The United States failed to exercise reasonable care and diligence to protect Aviles from danger, known to or which might reasonably be apprehended by it, in violation of 18 U.S.C. § 4042.

72. The United States' breach of that duty was the proximate cause of Aviles' injury. This breach caused unnecessary injury and wanton physical and mental pain and suffering contrary to contemporary standards of decency. In addition, Defendants' failure to timely treat his condition caused an increased risk of gangrene.

73. Therefore, Aviles is entitled to relief under the FTCA.

JURY DEMAND

74. Aviles demands a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Angel Aviles requests that this court grant him the following relief:

1. Compensatory damages;

2. Punitive damages;

3. Declaratory judgment finding that Defendants violated Aviles' Eighth Amendment right to not be subjected to cruel and unusual punishment;

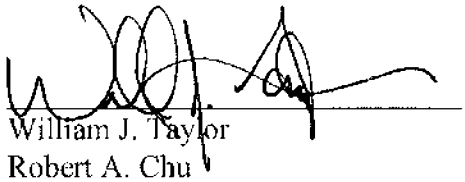
4. Reasonable attorneys' fees and costs; and

5. Such other and further relief as this court deems just.

Dated: August 6, 2010

Respectfully submitted,

COZEN O'CONNOR



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Attorneys for Plaintiff, Angel Aviles

CERTIFICATE OF SERVICE

I, Robert A. Chu, do hereby certify that a true and correct copy of the foregoing Third Amended Complaint has been served upon the persons listed below by placing the same in the U.S. Mail, properly addressed, this 6th day of August, 2010.

CARLTON L. JOHNSON, ESQUIRE
ARCHER & GREINER, P.C.
ONE LIBERTY PL 32ND FL
1650 MARKET ST
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COLIN MICHAEL F.X. CHERICO, ESQUIRE
US ATTORNEY'S OFFICE
615 CHESTNUT STREET
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CATHERINE M. CHAN, ESQUIRE
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1617 JOHN F. KENNEDY BLVD.
PHILADELPHIA, PA 19103

Robert A. Chu

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGEL AVILES, Plaintiff,	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA, Defendant.	:	NO. 08-CV-02440

ORDER

AND NOW, this **17th** day of **August, 2012**, after a bench trial on February 27 and 28, 2012, and upon consideration of the parties' proposed findings of fact and conclusions of law, it is hereby **ORDERED** that judgment is entered in favor of the plaintiff in the amount of $32,500.

BY THE COURT:

/s/ Timothy R. Rice
TIMOTHY R. RICE
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANGEL AVILES, Plaintiff,	:	CIVIL ACTION
v.	:	
UNITED STATES OF AMERICA, Defendant.	:	NO. 08-CV-02440

ORDER

AND NOW, this **22nd** day of **December, 2011**, upon consideration of Defendant United States of America's Motion for Summary Judgment (doc. 125), the accompanying memorandum of law and exhibits, Plaintiff Angel Aviles' response thereto, the Government's reply, and Aviles' sur-reply, it is hereby **ORDERED** that the motion is **DENIED** for the following reasons.

Entry of summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). I must "view the facts and draw inferences in the light most favorable to the nonmoving party." Ray v. Twp. of Warren, 626 F.3d 170, 173 (3d Cir. 2010). A genuine dispute as to a material fact exists when "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Here, a genuine dispute exists regarding whether agents of the federal prisons in which Aviles was incarcerated breached their duty to provide Aviles with necessary medical care.

The Government's motion is premised on a narrow view of Aviles' claim, which arises under the Federal Tort Claims Act and alleges the Government breached its "duty to provide basic medical care [to Aviles] during his detention," in violation of 18 U.S.C. § 4042. 3d Am. Compl.

at ¶¶ 70-71. According to the Government, Aviles has asserted only a medical malpractice claim, challenging the measures that were taken to treat his hernia, and has failed to provide a necessary expert opinion to support his claim. Aviles, however, argues he has stated a broader claim of ordinary negligence based on the actions of medical and non-medical personnel employed by two federal detention facilities. Such a claim, Aviles contends, requires no expert testimony.[1]

I agree with Aviles. Although he does complain prison medical staff failed to respond to his complaints of pain and his requests for surgery on his hernia over a five-year period, Aviles also asserts non-medical personnel failed to respond to his complaints and failed to provide pain medication prescribed by his doctors.[2] See, e.g., id. at ¶¶ 12, 18, 21. Claims such as Aviles' sound in negligence, with the relevant duty of care "fixed by 18 U.S.C. § 4042." United States v. Muniz, 374 U.S. 150, 165 (1963); accord Jones v. United States, 91 F.3d 623, 624 (3d Cir. 1996); Sash v. United States, Civ. No. 09-2074, 2011 WL 1322386, at *2 (D.N.J. Mar. 31, 2011). Pursuant to that duty, "the government must exercise ordinary diligence to keep prisoners safe and free from harm." Christian v. United States, 136 F. App'x 514, 515 (3d Cir. 2005). "[T]o avert

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[1]Aviles has provided reports in which his expert summarizes Aviles' medical records and opines the Government's actions caused Aviles pain and suffering. See Def.'s Mot. Summ. J. at Exs. 4-5. The Government has raised legitimate questions about the reliability and admissibility of those opinions, see id. at 15-17, but such questions are not appropriately resolved at this stage in the proceedings, see El v. Se. Pa. Transp. Auth., 418 F. Supp. 2d 659, 669 (E.D. Pa. 2005).

[2]Aviles "takes no issue with the eventual performance of the surgery, which greatly alleviated his hernia pain, but rather takes issue with the delay in providing that surgery and [with] the Government's failure to provide pain medications in the interim." Pl.'s Br. Opp'n Mot. Summ. J. at 1.

summary judgment, [Aviles is] not required to provide a further basis for his contention that defendant had a duty of care toward him."[3] Jones, 91 F.3d at 625.

Whether the Government breached its duty to Aviles will have to be determined at trial, as material factual disputes prevent me from resolving that issue now. For example, Aviles claims he was often in pain, consistently sought medication to alleviate it, and was never provided with medication despite prescriptions for it from his doctors. See, e.g., Aviles Dep.[4] at 89-97, 102-06, 109-17, 138, 141-42, 154-56. The Government argues Aviles' claims are undermined by his admission he engaged in strenuous physical activity during the relevant time period, see, e.g., id. at 53-58, and his failure to report to "sick call" to address his condition, see Def.'s Reply Br. at Ex. 8. Therefore, Aviles' ability to establish the elements of his "ordinary negligence claim" will largely turn on his own credibility when he testifies at trial about the severity of his condition and the efforts he undertook to secure treatment and medication for it.

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[3]The rules the Government cites in support of its contention Aviles must offer expert testimony apply only to "action[s] based upon an allegation that a licensed professional deviated from an acceptable professional standard." Pa. R. Civ. P. 1042.3(a). If Aviles were challenging the actions of the doctors who performed his surgery, the rules cited by the Government would be relevant. This, however, is not such an action. Even if it were, there is no blanket rule requiring expert testimony in every professional liability action. See Pa. R. Civ. P. 1042.3(a)(3) (pertaining to cases in which expert testimony "is unnecessary for prosecution of the claim"); Ditch v. Waynesboro Hosp., 917 A.2d 317, 323 (Pa. Super. Ct. 2007) (expert testimony not required in medical malpractice cases where negligence is obvious to a layperson).

[4]The deposition transcript is Exhibit 2 to the Government's Memorandum of Law.

Because Aviles' claim is not as narrow as the Government suggests, and because material factual disputes exist as to whether the Government breached the duty of care it owed Aviles, the Government is not entitled to summary judgment.

BY THE COURT:

/s/ Timothy R. Rice
TIMOTHY R. RICE
United States Magistrate Judge

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2008-02207 Short Description: MORRIS V. JONES ET AL

[redacted]

Case Login Information

Reference Number	2:08-cv-03842-LS
Short Description	MORRIS V. JONES ET AL
Classification	Civil
Case Type	Bivens 8th Amend
Case Sub-Type	COC-Medical Condition
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	Philadelphia (FDC)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	Philadelphia (FDC)
Monetary Relief Sought	$125,000,000.00
Estimated Amount	$
Office	Philadelphia
Jurisdiction	EASTERN DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	08/29/2011
Type	Settled
Reason	
Sought	Punitive Damages
Amount offered	$
Total Amount Paid	$75,000.00
Description	
Description	
Court Fee Paid ?	Yes
Pro Se ?	No

Case Initiation Dates

Date Received	09/02/2008
Date Filed	08/13/2008

Case Progress

Current Owner	JOYCE HORIKAWA
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	PHL I/M ALLEGES MEDICAL MALPRACTICE
Comments	

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEVON MORRIS,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	
THE UNITED STATES OF AMERICA, TROY LEVI, STEPHEN SPAULDING, ODEIDA DALMASI, ASHOK PATEL, HUSSAIN BOKHARI, ANTONIO FAUSTO, SADIE CARNEY,	)	Case No.: 08-3842
Defendants.	)	

THIRD AMENDED COMPLAINT

Plaintiff Devon Morris brings this action for damages against Defendants under the Eighth Amendment to the United States Constitution and under the Federal Tort Claims Act, demanding a trial by jury, and complaining and alleging as follows:

NATURE OF THE CASE

1. This is a civil action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), by Plaintiff against Defendants Warden Troy Levi, Stephen Spaulding, Dr. Odeida Dalmasi, Dr. Ashok Patel, Hussain Bokhari, Antonio Fausto, and Sadie Carney. Plaintiff also brings negligence claims against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Plaintiff has been in custody of the United States at the Federal Detention Center ("FDC") in Philadelphia, Pennsylvania, since February 2008. From February 2008 until August 21, 2008, the Defendants knew of Plaintiff's serious medical need relating to a potentially fatal heart condition and improperly and

without justification withheld appropriate treatment. After receiving further confirmation of Plaintiff's life-threatening condition from an independent cardiologist on August 22, 2008, Defendants improperly delayed the recommended treatment until October 21, 2008. The Defendants thus showed deliberate indifference to Plaintiff's serious medical need while in custody. As a result of these actions, Plaintiff suffered serious harm and physical pain, for which he seeks compensatory damages and punitive damages, along with reasonable attorney's fees, costs, and such other relief that this Court deems just and proper.

JURISDICTION AND VENUE

2. Plaintiff brings this action under the Eighth Amendment to the United States Constitution and Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388 (1971), and under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

3. Under 28 U.S.C. §§ 1331 and 1346(b)(1) Plaintiff invokes the Court's federal question jurisdiction.

4. Under 28 U.S.C. §§ 1391(b) and 1402, venue is proper in this district because a substantial part of the events or omissions giving rise to this action occurred in Philadelphia, Pennsylvania.

5. This Court has in personam jurisdiction over Defendants because, inter alia, each caused harm by an act or omission in the Commonwealth of Pennsylvania.

6. Plaintiff has exhausted the administrative remedy process.

PLAINTIFF

7. Plaintiff Devon Morris was at all relevant times an inmate at the FDC in Philadelphia, Pennsylvania.

DEFENDANTS

8. Defendant Troy Levi was at all relevant times the Warden at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Levi in his individual capacity.

9. Defendant Stephen Spaulding was at all relevant times the Health Services and Utilization Review Committee Coordinator at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Spaulding in his individual capacity.

10. Defendant Dr. Odeida Dalmasi was at all relevant times the Clinic Director at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Dr. Dalmasi in her individual capacity.

11. Defendant Dr. Ashok Patel was at all relevant times a medical doctor at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Dr. Patel in his individual capacity.

12. Defendant Hussain Bokhari was at all relevant times a medically licensed practitioner at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Bokhari in his individual capacity.

13. Defendant Antonio Fausto was at all relevant times a medically licensed practitioner at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Fausto in his individual capacity.

14. Defendant Sadie Carney was at all relevant times a certified physician's assistant at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Carney in her individual capacity.

15. Defendant the United States of America oversees the Federal Bureau of Prisons, which is responsible for the custody and care of federal inmates.

BASIS FOR ACTION

16. Plaintiff incorporates by reference as if fully set forth herein the allegations

contained in the preceding paragraphs of this Complaint.

17. On January 11, 2008, the Plaintiff was arrested. He was transferred to the FDC on February 11, 2008.

18. Upon his arrival at the FDC on February 11, 2008, Plaintiff informed an intake nurse of his condition, which was noted by FDC personnel in his file as "enlarged heart and in need of a pacemaker. History of fainting." Plaintiff also informed the intake nurse that he was suffering from chest pains, shortness of breath, dizziness, and fainting spells.

19. On or about February 21, 2008, ten days after Plaintiff's arrival at the FDC, Defendant Bokhari examined Plaintiff for an initial intake physical examination and recorded an abnormally high blood pressure.

20. During this examination, Plaintiff informed Defendant Bokhari that in October 2007 he had been diagnosed with a serious heart condition at the Tucson Medical Center ("TMC") in Tucson, Arizona, and that a physician there had informed him he was at significant risk of sudden cardiac death and recommended surgical implantation of an Implantable Cardioverter Defibrillator ("ICD"). Plaintiff also explained that he was suffering from persistent chest pains, shortness of breath, dizziness, and fainting spells.

21. Despite the information Plaintiff conveyed regarding his prior diagnosis in Tucson, Defendant Bokhari did not offer Plaintiff a medical records release form on February 21, 2008 in order for the TMC records to be obtained.

22. Defendant Bokhari consulted with Dr. Dalmasi and informed her of Plaintiff's condition and the prior diagnosis.

23. On March 20, 2008, Defendant Dr. Dalmasi administered an electrocardiogram ("EKG") test on Plaintiff.

24. The EKG showed extreme abnormalities prompting Dr. Dalmasi to recommend that the FDC provide Plaintiff with an examination by a cardiologist. At this time, Plaintiff was provided with a medical records release form so that the records from TMC could be obtained.

25. On information or belief, TMC sent the Plaintiff's medical records containing Plaintiff's diagnosis and treatment history to the FDC, specifically Defendant Dr. Dalmasi, on or about March 25, 2008.

26. The medical records in the FDC's possession on or about March 25, 2008, reflect that the Plaintiff was diagnosed at TMC with hypertrophic cardiomyopathy, a serious, life-threatening condition, and recommended for surgical implantation of an ICD.

27. On May 2, 2008, notwithstanding Defendant Dr. Dalmasi's recommendation that Plaintiff be seen by a cardiologist, and the recommendation of surgery by the TMC, Defendants Spaulding and Dr. Dalmasi informed Plaintiff that an FDC "Utilization Review Committee" had decided to "table" his request to be evaluated by a cardiologist.

28. Plaintiff continued to live in fear of sudden death due to his untreated heart condition and he persistently experienced the symptoms of chest pains, dizziness, shortness of breath, and fainting.

29. On May 22, 2008, Plaintiff's counsel in another proceeding sent a copy of the TMC medical records to Defendants Dr. Dalmasi and Spaulding, calling specific attention to the diagnosis of hypertrophic cardiomyopathy for which physicians recommended the implantation of an ICD.

30. On June 2, 2008, still suffering from his cardiac symptoms, Plaintiff was examined by Defendant Carney. During the examination Plaintiff explained that he was still suffering from the symptoms that led him to seek care at the TMC: chest pain, shortness of

breath, and fainting spells. Despite this information, and the fact that Defendants were in possession of the TMC medical records, Defendant Carney merely ordered an increase in Plaintiff's blood pressure medication.

31. Defendant Carney consulted with Defendant Dr. Patel, who cosigned Defendant Carney's "Clinical Encounter" report regarding Plaintiff's symptoms on June 3, 2008.

32. On June 5, 2008, still suffering from his cardiac symptoms and living in fear of sudden cardiac death, Plaintiff submitted an urgent administrative request to Defendant Levi asking for the heart surgery Plaintiff's physician at TMC said was necessary.

33. Finally, on August 21, 2008, six full months after he first arrived at the FDC and informed medical personnel of his condition, Plaintiff was taken for an evaluation by a Philadelphia cardiologist in private practice, Dr. Daniel J. Vile.

34. Dr. Vile examined Plaintiff and in an August 22, 2008 letter addressed to the FDC "Medical Director" warned that Plaintiff "could be at high risk for sudden cardiac death."

35. In his letter, Dr. Vile further recommended that Plaintiff be treated by an electrophysiologist, specifically Dr. Allan Greenspan of the Albert Einstein Medical Center in Philadelphia, for possible surgical implantation of an ICD.

36. By August 28, 2008, Defendants had not acted on Dr. Vile's recommendation of treatment by an electrophysiologist and surgical implantation of an ICD. Consequently, Plaintiff filed a request for administrative relief to Warden Levi requesting the urgently needed treatment.

37. Plaintiff's severe cardiac symptoms continued. On or about September 2, 2008, Plaintiff was seen by Defendant Fausto for chest pains, shortness of breath, dizziness, and fainting spells.

38. Despite full knowledge of Plaintiff's risk of sudden cardiac death and the clear

directive by Dr. Vile, the Defendants took no action for more than 40 days after Dr. Vile made his recommendations for treatment.

39. Finally, on October 22, 2008, Plaintiff underwent surgical implantation of an ICD by Dr. Greenspan, two full months after the recommendation by Dr. Vile.

40. Since his surgery, Defendants have failed to provide Plaintiff with adequate medical care, resulting in continued pain and suffering and requiring additional treatment.

COUNT I

EIGHTH AMENDMENT: DENIAL OF ADEQUATE MEDICAL CARE (AGAINST THE INDIVIDUAL DEFENDANTS)

41. Plaintiff incorporates by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

42. When he entered the FDC in February 2008, Plaintiff's right to be free from cruel and unusual punishment was clearly established.

43. Defendants, acting under color of federal law, deprived Plaintiff of his constitutional right to be free from cruel and unusual punishment.

44. Plaintiff had a serious medical need because he had a documented diagnosis of hypertrophic cardiomyopathy, which is a potentially fatal genetic heart disease, a family history of this disease, and he exhibited symptoms of heart disease such as high blood pressure, chest pains, frequent fainting spells, and dizziness.

45. Defendants Spaulding, Dr. Dalmasi, Dr. Patel, Bokhari, Fausto, and Carney were deliberately indifferent to that serious medical need because they had knowledge of his life-threatening heart condition by reviewing his medical records, examining him in the clinic, and receiving his complaints, but they nevertheless unjustifiably delayed proper treatment by a

cardiologist and surgical placement of an ICD.

46. Defendant Warden Levi was deliberately indifferent to Plaintiff's serious medical need because he knew that the FDC medical staff was not treating Plaintiff's hypertrophic cardiomyopathy and he improperly denied Plaintiff's requests for heart surgery.

47. The Defendants' deliberate indifference caused harm to Plaintiff because he did not receive the needed surgery for more than eight months after being admitted to the FDC. During this time he suffered physical pain and lived in daily fear of imminent death.

48. Therefore, Plaintiff is entitled to relief.

COUNT II

FEDERAL TORT CLAIMS ACT: NEGLIGENCE (AGAINST THE UNITED STATES OF AMERICA)

49. Plaintiff incorporates by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

50. Defendant the United States of America is responsible for the oversight of its employees, which includes medical personnel, officers, and administrative staff at federal correctional institutions. Pursuant to the Federal Tort Claims Act, the United States is liable for damages caused by the negligent or wrongful acts of its employees acting within the scope of their employment, under circumstances where the United States, if a private person, would be liable in accordance with the laws of the Commonwealth of Pennsylvania.

51. Prison medical doctors and staff have a duty to provide inmates with adequate medical care, to maintain adequate medical records, and to follow prevailing medical standards and practices. The Warden and his staff have a duty to provide a remedy where inmates are not afforded proper treatment. The staff at the FDC owed this duty to Plaintiff.

52. Defendants knew or should have known that Plaintiff had a serious medical need, but nevertheless unjustifiably delayed proper treatment and failed to provide Plaintiff with adequate medical care after his surgery. Defendants also failed to maintain adequate medical records and to follow prevailing medical standards and practices. Defendants thus breached their duty to provide Plaintiff with adequate medical care.

53. As a result of the Defendants' failure to respond to Plaintiff's medical needs, Plaintiff suffered documented symptoms including but not limited to severe chest pain, shortness of breath, high blood pressure, dizziness, anxiety, and emotional distress.

54. Plaintiff has exhausted his administrative remedies and received a final denial from the Federal Bureau of Prisons Northeast Regional Office on March 4, 2010.

JURY TRIAL DEMAND

55. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury for the claims asserted in this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

56. That Defendants' actions be adjudged to have violated Plaintiff's right under the Eighth Amendment of the United States Constitution to be free from cruel and unusual punishment, and under the Federal Tort Claims Act.

57. That judgment be entered for Plaintiff against Defendants for nominal, compensatory, and punitive damages, together with the costs of this litigation, including reasonable attorneys' fees, and any other relief that the case may require and that the Court may deem just and proper.

Dated: March 19, 2010

Respectfully Submitted:

s/ Irene Ayzenberg-Lyman
Stephen D. Brown (PA ID No. 27829)
Philip N. Yannella (PA ID No. 81111)
David J. Stanoch (PA ID No. 91342)
Irene Ayzenberg-Lyman (PA ID No. 206821)
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Main (215) 994-4000
Fax (215) 994-2222

Attorneys for Plaintiff
Devon Morris

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2010, I directed a true and correct copy of the foregoing Plaintiff's Third Amended Complaint to be served upon counsel listed below via U.S. mail and electronic mail.

David A. Degnan, Esquire
U.S. Department of Justice
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106-4476
Attorney for Defendants

s/ Irene Ayzenberg-Lyman
Irene Ayzenberg-Lyman

Dated: March 19, 2010

LS

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

DEVON MORRIS,
Plaintiff

.VS.

CIVIL CASE NO: 08cv3842

BRAD JONES, NURSE,
JANE DOE, PHYSICIAN ASSISTANT,
JOHN DOE, DOCTOR,
MARC MCDONALD, ARRESTING OFFICER,
B. ROSSLER, ARRESTING OFFICER,
BRIAN JONES, DEPORTING OFFICER,
SCHULTZ, OFFICER,
TROY LEVI, WARDEN,
O. DALMASI, CLINIC DIRECTOR,
S. SPAULDING, HEALTH ADMIN.,
A. PATEL, MEDICAL DOCTOR,
H. BOKHARI, MED. LIC. PRACT.,
A. FAUSTO, MED. LIC. PRACT.,
JOHN DOE, HEAD OF FACILITIES,
JANE DOE, INTAKE NURSE,
Defendants

ALL DEFENDANTS ARE SUED IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES.

COMPLAINT

JURY TRIAL IS DEMANDED

COMPLAINT

AND NOW, Comes, Plaintiff, Devon Paul Morris, whom complains against, Brad Jones, Nurse, Jane Doe, Physician Assistant, John Doe, Doctor, Marc McDonald, Arresting Officer, B. Rossler, Arresting Officer, Brain Jones, Deporting Officer, Schultz, Officer, Troy Levi, Warden, O. Dalmasi, Clinic Director, S. Spaulding, Health Service Administrator, A. Patel, Medical Doctor, H. Bokhari, Medical License Practitioner, A. Fausto, Medical License Practitioner, John Doe, Head of Facilities, and Jane Doe, Intake Nurse, as follows:

JURISDICTIONAL STATEMENTS

1. This Honorable Court has jurisdiction in this case pursuant to 28 U.S.C. § 1331 over the constitutional claims, for the admission/ommissions of constitutional violations arose from violating the United States Constitution.

2. This Honorable Court has venue, for which, these violations ended in the city of Philadelphia, although started in the Western District of Pennsylvania, it would serve the best interest of justice if the venue would remain in the Eastern District, for which, the plaintiff is in custody in the Eastern District, and some of the defendants, also are from the Eastern District.

3. All tort claims are proper to have this Honorable Court review, pursuant to 28 U.S.C. § 1367, for which, supplemental jurisdiction must be given, due to the original jurisdiction for the constitutional claims and as a result of the constitutional claim, arose violations of these torts claims as well.

4. Each defendant has acted under the color of the state, or of the territory of the United States, including the medical person, for which each medical personnel has required to follow their respective prison, facilities, policies.

5. Finally, each defendant has deprived the plaintiff of his rights, privileges under the constitution, and the laws of this state, while under the color of the State of Pennsylvania, or the territory of the United states, which gives jurisdiction pursuant to 42 U.S.C. § 1983.

PARTIES

6. Devon Paul Morris, the plaintiff, is being detained at the Federal Detention Center-Philadelphia, at 700 Arch Street, P.O. Box 562, Philadelphia, Pennsylvania, 19106, whom is awaiting the deposition of his criminal case number: 08-74.

7. Brad Jones, Nurse, is a Nurse from York County Prison, and he is being sued in his official and individual capacities.

8. Jane Doe, Physician Assistant, is a Physician Assistant from York County Prison, and she is sued in her official and individual capacities.

9. John Doe, Doctor, is a Doctor from York County Prison, and he is sued in his official and individual capacities.

10. Marc McDonald, Arresting Officer, is an Officer of (I.C.E.), and he is sued in his official and individual capacities.

11. B. Rossler, Arresting Officer, is an Officer of (I.C.E.), and he is sued in his official and individual capacities.

12. Brian Jones, Deporting Officer, is an Officer of (I.C.E.), and he is sued in his official and individual capacities.

13. Schultz, Officer, is an Officer of (I.C.E.), and he is sued in his official and individual capacities.

14. James Harding, Officer, is an Officer of (I.C.E.), and he is sued in his official and individual capacities.

15. Troy Levi, Warden, is the warden at the Federal Detention Center of Philadelphia, and he is sued in his official and individual capacities.

16. O. Dalmasi, is the Clinical Director for the Federal Detention Center of Philadelphia, and she is sued in her official and individual capacities.

17. S. Spaulding is the Health Care Administrator for the Federal Detention Center of Philadelphia, he is sued in his official and individual capacities.

18. A. Patel, is a Medical Doctor for the Federal Detention Center of Philadelphia, and he is sued in his official and individual capacities.

19. H. Bokhari is a Medical License Practitioner for the Federal Detention Center of Philadelphia, he is sued in his official and individual capacities.

20. A. Fausto is a Medical License Practitioner for the Federal Detention Center of Philadelphia, he is sued in his official and individual capacities.

21. John Doe, Head of Facilities is the Head of Facilities for the Federal Detention Center of Philadelphia, he is sued in his official and individual capacities.

22. Jane Doe, Intake Nurse, is a Nurse from Montgomery County Prison, and she is sued in her official and individual capacities.

CONSTITUTIONAL VIOLATIONS

A. Violation of the Eighth Emendment [Cruel and Unusual Punishment]

INADEQUATE MEDICAL CARE

23. On or about January 11, 2008, the plaintiff complain to the arresting officers, Marc McDonald and B. Rossler, (I.C.E. Agents) that he was having chest pains, dizziness and shortness of breath. While being arrested as he was being escorted out of the Microtel Motel, which they had done nothing for him.

24. The plaintiff was transported to the Montgomery County Prison, were he would complain to Jane Doe, Intake Nurse, of chest pains, dizziness and shortness of breath, however, she had did nothing for the plaintiff.

25. On or about January 13, 2008, the plaintiff was transported to the York County Prison, which the plaintiff had seen an intake Nurse Laura, about his chest pain, dizziness and shortness of breath; the plaintiff had told Nurse Laura of his heart disease and was admitted at the Tucson Medical Center in Tucson, Arizona in October 2007, under an alias name, which the plaintiff witness Nurse Laura fax Tucson Medical Center requesting medical records; The only thing that the plaintiff received was metoprolol medication for his high blood pressure.

26. Jane Doe, Physician Assistant from York County had seen the plaintiff, and place the plantiff in the Restricted Housing Unit for medical observation, however, the plaintiff was only observed by untrained correctional officers, and not by any medical personnel.

27. The plaintiff complained to Brad Jones, Nurse, about being placed in the restrict housing unit for medical observation, in which, the plaintiff complained that his eighth amendment was being violated; which, Jones responded with "the eighth amendment does not apply for immigrants such as yourself": Nurse Jones has down nothing to alleviate his chest pain.

28. Plaintiff would have an electrocardiogram, E.K.G., done on him while at York County Prison, in which they stated that his E.K.G. was normal.

29. After an examination by John Doe, Doctor at the York County Prison, he would do nothing to ease the chest pain of the plaintiff.

30. On or about January 28, 2008, the plaintiff's fiance call James Harding (I.C.E.) and informed him of the plaintiff's medical conditions, in which, eventhough being detained by immigration, he had done nothing to get the plaintiff proper medical treatment.

31. The plaintiff complained to Agent Schultz, Officer, while at York County Prison and he had done nothing to get the plaintiff proper medical treatment.

32. On or about February 11, 2008, the plaintiff was transported from York County Prison to the Federal Detention Center at Philadelphia, during the transportation, Deporting Officer, Brian Jones, (I.C.E. Agent) was informed by the plaintiff of his medical needs, the officer stated that his medical needs would be taken care of at the Federal Detention Center of Philadelphia.

33. On or about February 22, 2008, (a full eleven days since his arrival at the Federal Detention Center), [haven't seen any medical staff about his chest pains before this], the plaintiff would see H. Bokhari, Medical License Practitioner, for the initial intake physical examination, at which time, (Bokhari) documented a blood pressure of 151/91, the the plaintiff states that his heart is enlarged and was advised in 10/07 by Dr. Darren Peress at Tucson Medical Center that he needs a defibrillator, and that he had high blood pressure since 2002, (Bokhari) would order a chest x-ray, E.K.G. and blood work.

34. H. Bokhari would consult with O. Dalmasi, Clinical Director, during the initial intake of the plaintiff's, which,

O. Dalmasi, would prescribe metroprolol, and to have his blood pressure checked in two weeks, also the plaintiff would signed a medical release authorization form, so the medical department at Federal Detention Center-Philadelphia could get the medical records from Tucson, Arizona.

35. According to the little medical records provided by the Federal Detention Center-Philadelphia, the next time he had a blood pressure taken was on March 20, 2008, (almost a full month after the initial intake, his blood pressure was 150/100; also, at this time O. Dalmasi would do an E.K.G. [The E.K.G. that was ordered on February 22, 2008].

36. The E.K.G. showed an abnormal E.K.G., stating sinus rythm possible left atrial abnormality, LVH with secondary repolarization abnormality, extensive ST-T changes are probably due to ventricular hypertrophy, which O. Dalmasi would do nothing else to or for the plaintiff.

37. On or about March 27, 2008, O. Dalmasi would place a consultation sheet in for the plaintiff to see a cardiologist, which at sometime between February 22, 2008 to March 27, 2008, the plaintiff was prescribed Metroprolol, hydrochlorothiazide, and ASA, however the plaintiff has yet been seen by any cardiologist consultation as of the signing of this complain, which Dalmasi has failed to get appropriate consultation for the plaintiff.

38. On or about May 2, 2008, a memornadum to S. Spaulding from O. Dalmasi was concerning the review of clinical benefits as to the urgency and non-urgency of being referred to undergo additional diagnostic testing, and/or evaluation from a community specialist (e.g. cardiologist) in which, it was neither approved

disapproved, the plaintiff wouldn't receive this memorandum until May 29, 2008.

39. Periodically, the plaintiff would be seen by H. Bokhari and A. Fausto, for follow-ups and blood pressure checks, however, none of the medical staff here at Federal Detention Center-Philadelphia had provided adequate medical care for this heart problem.

40. In an administrative remedy response from Troy Levi, warden, in which he stated, "heart surgery was not necessary". Troy Levi is not qualified to give medical opinions of what is or is not necessary for which, Levi is not or ever been a medical doctor, nurse, E.M.T. or anything dealing with the medical field in any way.

INADEQUATE HEATING AND VENTILATION

41. On or about July 16, 2008, the plaintiff has been in Cell 655 on Unit 6 South, at the Federal Detention Center-Philadelphia, at which time, he would complain that the cell was to hot, and not enough air ventilation in his cell.

42. The Head of Facilities Department would come to check out the cell 655 on 6 South on July 17, 2008, at approximately 11:30 a.m., at which time, he even stated that it was hot and humid in that cell, however, he had done nothing to correct the problem.

43. The Head of Facilities Department would come again, to check cell 655 on 6 south on July 21, 2008, at approximately 8:00 a.m., at which time, he would take a temperature reading, which read 74° degrees, he would inform the plaintiff that they were allowed up to 78° degrees and that his cell wasn't at that degree.

44. However, the Head of Facilities Department came to check out the cell at approximately 8:00 a.m., and failed to note, that the block was cooler than the cell, that the cell door has been open to try to cool the cell down, and that the plaintiff was sitting outside of the cell, which all would have contributed to a lower temperature in the cell, then say if the plaintiff and his cellmate were locked in the cell, say at 4:00 p.m., count time, where the afternoon sun of 90° degrees plus ambrient temperature, would cause a substantial heat rise in the cell.

45. Without checking the cell when the most heat load would have been, and the proper volacity of the circulation of the air quality from the cell's vent, it has caused grounds to be alarmed, especially for a person with heart and breathing problems, in which, it causes the bodies heart to pump more to try to cool down the body, only places the plaintiff's health more at risk.

DELIBERATE INDIFFERENCE

46. Marc McDonald and B. Rossler, the arresting officers treated the plaintiff with deliberate indifference when they intentionally and maliciously failed to take him to get medical care, when he almost collapsed as they escorted the plaintiff from the Motel side walk.

47. The staff at York County Prison acted with deliberate indifference when they intentionally and maliciously lied about the E.K.G. say that is was normal when his history with E.K.G.'s shows several abnormalities on an E.K.G. Strip, then by deliberately and intentionally placing the plaintiff in the restrictive housing

Unit for observation only demonstrates more malicious conduct, for which, the plaintiff was only observed by untrained (medical staff), only correctional officers.

48. All the I.C.E. agents acted with deliberate indifference when they intentinally and deliberately ignored the plaintiff's cries for help with his chest pain and heart trouble.

49. The medical personnel at the Federal Detention Center of Philadelphia has acted with deliberate indifference when they had ignored the plaintiff's cries help for his heart problems, in which, they intentionally and maliciously waited almost a full month, from his initial intake examination, which showed extensive hypertension before they retook his blood pressure and gave him an E.K.G.

50. The medical personnel at Federal Detention Center of Philadelphia has further acted with deliberate indifference when they intentionally and maliciously ignored the severity of the abnormal E.K.G., maliciously depriving the plaintiff of a cardiologist consultation, then when they obtained the medical records from Tucson, Arizona, clearly showing that a recommendation by a cardiologist, (from Tucson Arizon) has recommended that the plaintiff be given a pacemakeer/defibillator implant as soon as possible, otherwise his chances of survival are small.

51. Troy Levi, warden has deliberately treated the plaintiff with indifference, when he intentionally and maliciously stated that the plaintiff did not need an operation, when in fact, Troy Levi does not have the medical training, or expertise to even make a statement to any medical needs, but he still continues to do so.

52. The staff members at Federal Detention Center-Philadelphia has acted with deliberate indifference, when they have intentionally and maliciously ignored the plaintiff's pleas on the excessive heat in the cell at 6 south at cell 655, when they intentionally and deliberately would take a temperature reading at a cooler part of the day, failing to take into account the smaller heat load for which, the door was open, the block was cooler than the cell, and the plaintiff was not in the cell, nor was the sun at it's hottest point hitting the outside wall, which made an improper temperature reading of a cell with a lesser heat load for that 74° degrees, only demonstrating that when the heat load increases as the sun warms the cell and the plaintiff with his cellmate get lock in, the cell would definitely increase in temperature, above the maximum limit of 78° degrees.

53. By failing to take proper steps to reduce the cell's temperature, the staff has treated the plaintiff with deliberate indifference when they fully knew that a warmer cell temperature would make a body work harder to cool itself off, which is intentionally and maliciously cause the plaintiff's heart condition to work harder and placing him at a greater risk of a heart attack, because of such a bad heart condition already.

TORT VIOLATIONS

B. Medical Negligence

54. Marc McDonald and B. Rossler, the arresting officers acted with negligence to the medical needs of the plaintiff, when they intentionally and malicously deprived the plaintiff of medical attention when he almost collapsed at the motel.

55. The staff at York County Prison acted with medical negligence when they intentionally and maliciously misread an E.K.G., in which, instead of getting proper medical treatment they intentionally and maliciously made him suffer sitting in a restricted housing unit, without proper treatment to be observed by Correctional Officers that had no medical training.

56. The Staff at Federal Detention Center-Philadelphia has acted with medical negligence when they intentionally and maliciously deprived the plaintiff in seeing a properly trained cardiologist, eventhough, the E.K.G. and the medical records from Tucson, Arizona warranted cardiologist intervention, which is intentionally and maliciously depriving the plaintiff a pacemaker/ defibillator to improve his chances of living a longer life.

57. The I.C.E. Agents, and Jane Doe, Nurse from Montgomery County Prison, has acted with medical negligence when they intentionally and maliciously deprived the plaintiff with any medical care while the plaintiff was in their custody.

C. Gross Negligence

58. The Head of Facilities at the Federal Detention Center has demonstrated gross negligence when he intentionally and maliciously ignored the excessive heat in cell 655 and in fact ignored the excessive heat in all the cells on that plenum (air duct system), which has caused the plaintiff's body to needlessly overwork the heart, just to cool down, instead of correcting the excessive heat.

D. Pain and Suffering

59. The Staff at York County Prison has intentionally and maliciously caused unnecessary pain and suffering on the plaintiff,

when they misread the E.K.G. strip, and placed the plaintiff in the restrictive housing unit for medical observation, causing undue stress and anxiety on the plaintiff's heart, causing more chest pain.

60. The I.C.E. Agents and the Intake Nurse from Montgomery County Prison, has deliberately cause unnecessary pain and suffering when the agents and intake nursed intentinally and maliciously done nothing for the plaintiff's cries for medical help, intentionally and maliciously causing undue stress and anxiety causing the plaintiff more undue chest pain.

61. Marc McDonald and B. Rossler the arresting officers has deliberately cause unnecessary pain and suffering, when the officers had to hold him under the armpits and physically assist him to the vehicle, in which, they intentionally and maliciously caused undue stress and anxiety, which was to much for the plaintiff's body to handle, and after viewing this, the arresting officers still had done nothing to get medical assistance for the plaintiff.

62. The medical staff at Federal Detention Center-Philadelphia had deliberately caused unnecessary pain and suffering when they intentionally and maliciously deprived the plaintiff with an unconsultation with professional medical staff, i.e. cardiologist, and hospital when the E.K.G. strip clearly showed abnormalities and the medical record from Tucson, Arizona clearly showed a plan for a pacemaker/defibillator, only added more intentionally induced stress and anxiety, only causing the plaintiff more chest pain.

63. The staff at Federal Detention Center-Philadelphia has deliberately caused unnecessary pain and suffer, when they

intentionally and maliciously refused to correct the heating in the plaintiff's cell, only causing the plaintiff unnecessary over pumping of the heart to regulate his body temperature, only causing more unnecessary stress on the plaintiff's heart, causing him more chest pain.

E. Mental Anguish

64. All defendants have intentionally and maliciously caused mental anguish within the plaintiff, for which, the plaintiff is being deprived the basic right to live a full and healthy life, to watch his children grow into adults, and to have the best country to do the operation on the plaintiff, by depriving the plaintiff the proper medical treatment that is needed, an operation.

CAUSE FOR ACTION

65. The plaintiff has a constitutional right under the eighth amendment to not be treated cruelly and unusually, when all the defendants have provided less then adequate medical care to the plaintiff with the deliberate indifference, as well as, less than adequate heating and ventilation, the defendants have deprived the plaintiff the basic of constitutional rights, by being them, treating the plaintiff with cruel and unusual punishment, does give rise for a cause for action under the eighth amendment.

66. The plaintiff has the right to be treated by adequate medical competency, when the defendants intentionally and maliciously ignored obvious signs of heart problem, and intentionally and malicioulsy deprive the plaintiff with the adequate medical personnel/ facility to treat the plaintiff has given rise for a cause of action under the tort of medical negligence.

67. The plaintiff has the right to be comfortable as possible without the gross negligence of staff, whom has a proper heating and ventilation system, only for the defendants to intentionally and maliciously to mis-maintain and correct any heating and ventilation problems gives rise for a cause for action under the tort of gross negligence.

68. The plaintiff has the right to be free from unnecessary pain and suffering, only to have the defendants to intentionally and maliciously has caused the plaintiff with unnecessary stress and anxiety, which increased the stress on his heart only providing more chest pain for the plaintiff, has given rise for a cause of action for the tort of pain and suffering.

69. The plaintiff has the right to live a full life, to be around in the world, to watch and help his children become adults, to be free from the mental anguish, in which, the defendants have been causing, by intentionally and maliciously depriving the plaintiff with the proper medical treatment, that will prolong his life, only causing the plaintiff to wonder if he will live long enough to get the proper operation, has given rised to a cause of action under the tort of mental anguish.

EXHAUSTION REQUIREMENTS

70 At York County Prison the plaintiff has filed a grievance against the medical staff, however, the plaintiff was transferred to the Federal Detention Center of Philadelphia, before the grievance was responded to, and they failed to send it to the plaintiff.

71. At the Federal Detention Center-Philadelphia, the plaintiff has filed the proper administrative remedies and appeals, being provided with case number 496648-F1 for the medical issues and case number 500983-F1 for the heating and ventilation issues. However the plaintiff still awaits responses from the regional and central offices on these matters.

RELIEF SOUGHT

The Plaintiff, Devon Morris, humbly hopes and prays that this Honorable Court will grant the following:

A. The plaintiff respectfully request that this Honorable Court punishes the defendants jointly with severity and harshness, and find that the defendants have violated the plaintiff's eighth amendment rights of cruel and unusual punishment and order the defendants to pay the plaintiff in a sum inexecess of Twenty-Five Million dollars ($25,000,000.00) for compensatory and punitive damages for this violation alone; and,

B. The plaintiff further respectfully request that this Honorable Court continue the severity and harshness of the punishment, jointly against the defendants, and find that the defendants have violated each of the tort actions, and order the defendants to pay the plaintiff in the sum, inexcess of Twenty Million dollars ($20,000,000.00) for each violated tort seperately for a grand total of inexcess of Eighty Million dollars ($80,000,000.00) for all violations of the torts for compensatory and punitive damages; and,

C. The plaintiff further respectfully request that this Honorable Court order the defendants to pay for all court cost, and any attorney fees that the plaintiff has incurred; and,

D. The plaintiff further respectfully request that this Honorable Court will order the defendants with any other sanctions, punishments that this Honorable Court sees fit.

JURY TRIAL IS DEMANDED

I, Devon Morris humbly hopes and prays that this complaint will be granted.

Respectfully Submitted,

DATED: July 30, 2008

Devon Morris
Fed. Reg. No: 23681-077
Federal Detention Center-Philadelphia
P.O. Box 562
Philadelphia, PA 19106

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEVON MORRIS,	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	
TROY LEVI, STEPHEN SPAULDING, ODEIDA DALMASI, ASHOK PATEL, HUSSAIN BOKHARI, ANTONIO FAUSTO, SADIE CARNEY,	)	Case No.: 08-3842
Defendants.	)	

SECOND AMENDED COMPLAINT

Plaintiff Devon Morris brings this action for damages against Defendants under the Eighth Amendment to the United States Constitution, demanding a trial by jury, and complaining and alleging as follows:

NATURE OF THE CASE

1. This is a civil action pursuant to Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388 (1971) by Plaintiff against Defendants Warden Troy Levi, Stephen Spaulding, Dr. Odeida Dalmasi, Dr. Ashok Patel, Hussain Bokhari, and Antonio Fausto. Plaintiff has been in custody of the United States at the Federal Detention Center ("FDC") in Philadelphia, Pennsylvania, since February 2008. From February 2008 until August 21, 2008, the Defendants knew of Plaintiff's serious medical need relating to a potentially fatal heart condition and improperly and without justification withheld appropriate treatment. After receiving further confirmation of Plaintiff's life-threatening condition from an independent

cardiologist on August 22, 2008, Defendants improperly delayed the recommended treatment until October 21, 2008. The Defendants violated the Eighth Amendment to the United States Constitution by showing deliberate indifference to Plaintiff's serious medical need while in custody. As a result of these actions, Plaintiff suffered serious harm and physical pain, for which he seeks compensatory damages and punitive damages, along with reasonable attorney's fees, costs, and such other relief that this Court deems just and proper.

JURISDICTION AND VENUE

2. Plaintiff brings this action under the Eighth Amendment to the United States Constitution and Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388 (1971).

3. Under 28 U.S.C. § 1331, Plaintiff invokes the Court's federal question jurisdiction.

4. Under 28 U.S.C. § 1391(b), venue is proper in this district because a substantial part of the events or omissions giving rise to this action occurred in Philadelphia, Pennsylvania.

5. This Court has in personam jurisdiction over Defendants because, inter alia, each caused harm by an act or omission in the Commonwealth of Pennsylvania.

6. Plaintiff has exhausted the administrative remedy process.

PLAINTIFF

7. Plaintiff Devon Morris was at all relevant times an inmate at the FDC in Philadelphia, Pennsylvania.

DEFENDANTS

8. Defendant Troy Levi was at all relevant times the Warden at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Levi in his individual capacity.

9. Defendant Stephen Spaulding was at all relevant times the Health Services and Utilization Review Committee Coordinator at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Spaulding in his individual capacity.

10. Defendant Dr. Odeida Dalmasi was at all relevant times the Clinic Director at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Dr. Dalmasi in her individual capacity.

11. Defendant Dr. Ashok Patel was at all relevant times a medical doctor at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Dr. Patel in his individual capacity.

12. Defendant Hussain Bokhari was at all relevant times a medically licensed practitioner at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Bokhari in his individual capacity.

13. Defendant Antonio Fausto was at all relevant times a medically licensed practitioner at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Fausto in his individual capacity.

14. Defendant Sadie Carney was at all relevant times a certified physician's assistant at the FDC in Philadelphia, Pennsylvania. Plaintiff sues Defendant Carney in her individual capacity.

BASIS FOR ACTION

15. Plaintiff incorporates by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

16. On January 11, 2008, the Plaintiff was arrested. He was transferred to the FDC

on February 11, 2008.

17. Upon his arrival at the FDC on February 11, 2008, Plaintiff informed an intake nurse of his condition, which was noted by FDC personnel in his file as "enlarged heart and in need of a pacemaker. History of fainting." Plaintiff also informed the intake nurse that he was suffering from chest pains, shortness of breath, dizziness, and fainting spells.

18. On or about February 21, 2008, ten days after Plaintiff's arrival at the FDC, Defendant Bokhari examined Plaintiff for an initial intake physical examination and recorded an abnormally high blood pressure.

19. During this examination, Plaintiff informed Defendant Bokhari that in October 2007 he had been diagnosed with a serious heart condition at the Tucson Medical Center ("TMC") in Tucson, Arizona, and that a physician there had informed him he was at significant risk of sudden cardiac death and recommended surgical implantation of an Implantable Cardioverter Defibrillator ("ICD"). Plaintiff also explained that he was suffering from persistent chest pains, shortness of breath, dizziness, and fainting spells.

20. Despite the information Plaintiff conveyed regarding his prior diagnosis in Tucson, Defendant Bokhari did not offer Plaintiff a medical records release form on February 21, 2008 in order for the TMC records to be obtained.

21. Defendant Bokhari consulted with Dr. Dalmasi and informed her of Plaintiff's condition and the prior diagnosis.

22. On March 20, 2008, Defendant Dr. Dalmasi administered an electrocardiogram ("EKG") test on Plaintiff.

23. The EKG showed extreme abnormalities prompting Dr. Dalmasi to recommend that the FDC provide Plaintiff with an examination by a cardiologist. At this time, Plaintiff was

provided with a medical records release form so that the records from TMC could be obtained.

24. On information or belief, TMC sent the Plaintiff's medical records containing Plaintiff's diagnosis and treatment history to the FDC, specifically Defendant Dr. Dalmasi, on or about March 25, 2008.

25. The medical records in the FDC's possession on or about March 25, 2008, reflect that the Plaintiff was diagnosed at TMC with hypertrophic cardiomyopathy, a serious, life-threatening condition, and recommended for surgical implantation of an ICD.

26. On May 2, 2008, notwithstanding Defendant Dr. Dalmasi's recommendation that Plaintiff be seen by a cardiologist, and the recommendation of surgery by the TMC, Defendants Spaulding and Dr. Dalmasi informed Plaintiff that an FDC "Utilization Review Committee" had decided to "table" his request to be evaluated by a cardiologist.

27. Plaintiff continued to live in fear of sudden death due to his untreated heart condition and he persistently experienced the symptoms of chest pains, dizziness, shortness of breath, and fainting.

28. On May 22, 2008, Plaintiff's counsel in another proceeding sent a copy of the TMC medical records to Defendants Dr. Dalmasi and Spaulding, calling specific attention to the diagnosis of hypertrophic cardiomyopathy for which physicians recommended the implantation of an ICD.

29. On June 2, 2008, still suffering from his cardiac symptoms, Plaintiff was examined by Defendant Carney. During the examination Plaintiff explained that he was still suffering from the symptoms that led him to seek care at the TMC: chest pain, shortness of breath, and fainting spells. Despite this information, and the fact that Defendants were in possession of the TMC medical records, Defendant Carney merely ordered an increase in

Plaintiff's blood pressure medication.

30. Defendant Carney consulted with Defendant Dr. Patel, who cosigned Defendant Carney's "Clinical Encounter" report regarding Plaintiff's symptoms on June 3, 2008.

31. On June 5, 2008, still suffering from his cardiac symptoms and living in fear of sudden cardiac death, Plaintiff submitted an urgent administrative request to Defendant Levi asking for the heart surgery Plaintiff's physician at TMC said was necessary.

32. Finally, on August 21, 2008, six full months after he first arrived at the FDC and informed medical personnel of his condition, Plaintiff was taken for an evaluation by a Philadelphia cardiologist in private practice, Dr. Daniel J. Vile.

33. Dr. Vile examined Plaintiff and in an August 22, 2008 letter addressed to the FDC "Medical Director" warned that Plaintiff "could be at high risk for sudden cardiac death."

34. In his letter, Dr. Vile further recommended that Plaintiff be treated by an electrophysiologist, specifically Dr. Allan Greenspan of the Albert Einstein Medical Center in Philadelphia, for possible surgical implantation of an ICD.

35. By August 28, 2008, Defendants had not acted on Dr. Vile's recommendation of treatment by an electrophysiologist and surgical implantation of an ICD. Consequently, Plaintiff filed a request for administrative relief to Warden Levi requesting the urgently needed treatment.

36. Plaintiff's severe cardiac symptoms continued. On or about September 2, 2008, Plaintiff was seen by Defendant Fausto for chest pains, shortness of breath, dizziness, and fainting spells.

37. Despite full knowledge of Plaintiff's risk of sudden cardiac death and the clear directive by Dr. Vile, the Defendants took no action for more than 40 days after Dr. Vile made his recommendations for treatment.

38. Finally, on October 22, 2008, Plaintiff underwent surgical implantation of an ICD by Dr. Greenspan, two full months after the recommendation by Dr. Vile.

39. Since his surgery, Defendants have failed to provide Plaintiff with adequate medical care, resulting in continued pain and suffering and requiring additional treatment.

COUNT I

EIGHTH AMENDMENT: DENIAL OF ADEQUATE MEDICAL CARE

40. Plaintiff incorporates by reference as if fully set forth herein the allegations contained in the preceding paragraphs of this Complaint.

41. When he entered the FDC in February 2008, Plaintiff's right to be free from cruel and unusual punishment was clearly established.

42. Defendants, acting under color of federal law, deprived Plaintiff of his constitutional right to be free from cruel and unusual punishment.

43. Plaintiff had a serious medical need because he had a documented diagnosis of hypertrophic cardiomyopathy, which is a potentially fatal genetic heart disease, a family history of this disease, and he exhibited symptoms of heart disease such as high blood pressure, chest pains, frequent fainting spells, and dizziness.

44. Defendants Spaulding, Dr. Dalmasi, Dr. Patel, Bokhari, Fausto, and Carney were deliberately indifferent to that serious medical need because they had knowledge of his life-threatening heart condition by reviewing his medical records, examining him in the clinic, and receiving his complaints, but they nevertheless unjustifiably delayed proper treatment by a cardiologist and surgical placement of an ICD.

45. Defendant Warden Levi was deliberately indifferent to Plaintiff's serious medical need because he knew that the FDC medical staff was not treating Plaintiff's hypertrophic

cardiomyopathy and he improperly denied Plaintiff's requests for heart surgery.

46. The Defendants' deliberate indifference caused harm to Plaintiff because he did not receive the needed surgery for more than eight months after being admitted to the FDC. During this time he suffered physical pain and lived in daily fear of imminent death.

47. Therefore, Plaintiff is entitled to relief.

JURY TRIAL DEMAND

48. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury for the claims asserted in this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

49. That Defendants' actions be adjudged to have violated Plaintiff's right under the Eighth Amendment of the United States Constitution to be free from cruel and unusual punishment.

50. That judgment be entered for Plaintiff against Defendants for nominal, compensatory, and punitive damages, together with the costs of this litigation, including reasonable attorneys' fees, and any other relief that the case may require and that the Court may deem just and proper.

Dated: February 27, 2009

Respectfully Submitted:



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Devon Morris

CERTIFICATE OF SERVICE

I, Gregg T. Nunziata, do hereby certify that on this 27th day of February 2009, a true and correct copy of Plaintiff's Second Amended Complaint was served on the following via U.S. Mail:

Thomas E. Brenner, Esquire
GOLDBERG. KATZMAN P.C.
320 E. Market Street
Strawberry Square, P.O. Box 1268
Harrisburg, PA 17108-1268

David Andrew Degnan, Esquire
U.S. Department of Justice
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106-4476

Dated: February 27, 2009

Gregg T. Nunziata

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEVON MORRIS,	:	**CIVIL ACTION**
Plaintiff	:	
	:	
v.	:	**NO. 08-cv-3842**
	:	
TROY LEVI, et al.,	:	
Defendant	:	

MEMORANDUM

Stengel, J. **November 23, 2009**

Plaintiff Devon Morris suffers from hypertrophic cardiomyopathy, a possibly fatal heart condition. While incarcerated at the Federal Detention Center, Mr. Morris informed the prison medical personnel of a prior diagnosis of this condition and a prior recommendation he undergo surgery to implant an implantable cardioverter defibrillator ("ICD"). In addition, he repeatedly complained of chest pains, shortness of breath, and dizziness. Mr. Morris arrived at the FDC in February 2008, but did not see a cardiologist until August 2008, and did not undergo the recommended surgery until October 2008. Mr. Morris alleges the FDC's delay in providing treatment for his condition was a violation of his Eight Amendment rights. Defendant filed this motion to dismiss Mr. Morris's second amended complaint, or, in the alternate, a motion for summary judgment. For the reasons explained below, I will deny the motion.

I. BACKGROUND

Plaintiff Devon Morris was arrested on January 11, 2008 and was transferred to the

Federal Detention Center ("FDC") in Philadelphia, Pennsylvania on February 11, 2008. Second Amended Complaint at ¶ 16. When he arrived at the FDC, Mr. Morris informed an intake nurse he suffered a heart condition, chest pains, shortness of breath, dizziness, and fainting spells. Id. at ¶ 17. After the intake evaluation, his FDC file noted "enlarged heart and in need of pacemaker. History of fainting." Id. at ¶ 17.

On February 21, 2008, defendant Hussain Bokhari, a medically licensed practitioner at the FDC, examined Mr. Morris for an initial intake physical examination. Id. at ¶ 18. Mr. Morris told Mr. Bakhari he had been diagnosed with a serious heart condition at the Tucson Medical Center in Tucson, Arizona the previous October and the Tucson physician had informed him there was a significant risk of sudden cardiac death and recommended surgical implantation of an ICD. Id. at ¶ 19. Mr. Morris also explained he suffered from chest pains, shortness of breath, dizziness, and fainting spells. Id. Mr. Bokhari noted Mr. Morris had an abnormally high blood pressure. Id. at ¶ 18.

Mr. Bokhari informed defendant Dr. Odeida Dalmasi, Clinic Director at the FDC, of Mr. Morris's condition and prior diagnosis. Second Amended Complaint at ¶ 21. On March 20, 2008, Dr. Dalmasi administered an electrocardiogram ("EKG") test on Mr. Morris. Id. at ¶ 22. The EKG showed extreme abnormalities, and Dr. Dalmasi recommended the FDC provide Mr. Morris with an examination by a cardiologist. Id. at ¶ 23. The FDC provided Mr. Morris with a medical release form to allow it to obtain Mr.

Morris's records from the Tucson Medical Center. Id.[1]

In late March 2008, the Tucson Medical Center sent Mr. Morris's medical records to the FDC. Second Amended Complaint at ¶ 24. These medical records confirmed Mr. Morris had been diagnosed with hypertrophic cardiomyopathy, and that the Tucson Medical Center had recommended surgical implantation of an ICD. Id. at ¶ 25.

On May 2, 2008, Defendant Stephen Spaulding, the Health Services and Utilization Review Committee Coordinator at the FDC, and Dr. Dalmasi informed Mr. Morris the FDC "Utilization Review Committee"[2] had tabled his request to be evaluated by a cardiologist. Id. at ¶ 26. Mr. Morris "continued to live in fear of sudden death due to his untreated heart condition," and he continued to experience chest pains, dizziness, shortness of breath, and fainting. Id. at ¶ 27.

On May 22, 2008, Mr. Morris's counsel from a different proceeding sent Dr. Dalmasi and Mr. Spaulding a copy of the medical records from the Tucson Medical Center, calling attention to the hypertrophic cardiomyopthy diagnosis and implantation

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[1] Even though the FDC had been aware of the prior diagnosis before the EKG, this was the first time the FDC provided Mr. Morris with a medical release form.

[2] Defendants explained the Utilization Review Committee is a Health Services committee. Memorandum of Law in Support of Defendants' Motion to Dismiss, or in the Alternate, for Summary Judgment at 3 n.1, Morris v. Levi, No. 08-3842 (E.D. Pa. filed Apr. 16, 2009) [hereinafter Defendants' Motion to Dismiss]. It is chaired by the Clinical Director, and includes the Health Services Administrator and the medical staff involved in the inmate's care. Id. The Committee reviews various requests from inmates, including requests for specialist evaluations, and either approves the request, disapproves the request, or tables the request for further in-house evaluation. Id.

recommendation. Id. at ¶ 28. On June 2, 2008, Sadie Carney, a certified physician's assistant at the FDC, examined Mr. Morris. Second Amended Complaint at ¶ 29. He again complained of chest pain, shortness of breath, and fainting spells, and referenced his prior diagnosis. Id. Ms. Carney, however, merely ordered an increase in Mr. Morris's blood pressure medication. Id. Dr. Askok Patel, a medical doctor at the FDC, cosigned Ms. Carney's "Clinical Encounter" report for Mr. Morris's visit.

On June 5, 2008, Mr. Morris submitted an urgent administrative request to defendant Troy Levi, warden at the FDC, requesting the recommended heart surgery. Second Amended Complaint at ¶ 31.

On August 21, 2008, six months following his arrival at the FDC, Mr. Morris was evaluated by Dr. Daniel J. Vile, a cardiologist in private practice. In an August 22, 2008 letter to the FDC "Medical Director," Dr. Vile warned Mr. Morris "could be at high risk for sudden cardiac death." Id. at 33. Dr. Vile recommended Mr. Morris be treated by an electrophysiologist for possible surgical implantation of an ICD. Id. at 34.

On August 28, 2008, after defendants had not acted on Dr. Vile's recommendations, Mr. Morris filed a request for administrative relief to Warden Levi. Id. at ¶ 35. On or about September 2, 2008, defendant Antonio Fausto, a medically licensed practitioner at the FDC, examined Mr. Morris for chest pains, shortness of breath, dizziness, and fainting spells. Second Amended Complaint at ¶ 36.

For 40 days following Dr. Vile's recommendations, defendants took no action. Id.

at ¶ 37. On October 22, 2008, Mr. Morris underwent surgical implantation of an ICD. Id. at ¶ 38. Following this surgery, defendants failed to provide plaintiff the proper care. Id. at ¶ 39.

II. MOTION TO DISMISS STANDARD

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure examines the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The factual allegations must be sufficient to make the claim for relief more than just speculative. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In determining whether to grant a motion to dismiss, a federal court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id.; see also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984).

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. Id. The "complaint must allege facts suggestive of [the proscribed] conduct." Twombly, 550 U.S. at 564. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern

Pennsylvania Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995). The claim must contain enough factual matters to suggest the required elements of the claim or to "raise a reasonable expectation that discovery will reveal evidence of" those elements. Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (quoting Twombly, 550 U.S. at 556).

III. THE EIGHTH AMENDMENT CLAIM

Mr. Morris alleges an Eight Amendment denial of adequate medical care claim against defendants in their individual capacities. He alleges he had a serious medical need, i.e., a documented diagnosis of hypertrophic cardiomyopathy, a potentially fatal genetic heart disease. Second Amended Complaint at ¶ 43. He maintains Mr. Spaulding, Dr. Dalmasi, Dr. Patel, Mr. Bokhari, Mr. Fausto, and Ms. Carney were deliberately indifferent to his serious medical need because they knew of his condition but delayed treatment by a cardiologist and delayed the surgical placement of an ICD. Id. at ¶ 44. Mr. Morris maintains Warden Levi was deliberately indifferent to Mr. Morris's serious medical need because he knew the FDC medical staff was not treating Mr. Morris's hypertrophic cardiomyopathy and improperly denied Mr. Morris's requests for heart surgery. Id. at ¶ 45. Mr. Morris alleges the defendants' deliberate indifference caused him harm because he did not receive the necessary surgery for more than eight months following his admission to the FDC, and during those eight months he suffered physical

pain and lived in fear of death. Id. at ¶ 46.

To state an Eight Amendment inadequate treatment claim, a plaintiff must state (1) he has a serious medical need, and (2) the defendants were deliberately indifferent to that need. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Monmouth Co. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1986). The defendants do not dispute Mr. Morris was suffering from a serious medical need. See Defendants' Memorandum of Law at 10. They maintain Mr. Morris failed to sufficiently plead the defendants were deliberately indifferent to that need.

Deliberate indifference "requires obduracy and wantonness which has been likened to conduct that includes recklessness or a conscious disregard of a serious risk." Rouse v. Plaintier, 182 F.3d 192, 197 (3d Cir. 1999) (internal citations omitted). The deliberate indifference standard is a subjective standard, Farmer v. Brennan, 511 U.S. 825, 837 (1994), and whether a defendant has the requisite level of knowledge is a question of fact, id. at 842.

"[C]onsiderable latitude" is afforded "to prison medical authorities in the diagnosis and treatment of the medical problems of inmate patients." Inmates of Allegheny Co. Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979). Medical malpractice and negligence do not establish the defendants are deliberately indifferent. Estelle, 429 U.S. at 106. Similarly, mere disagreement about the proper medical treatment will not support an Eight Amendment claim. Monmouth Co. Corr. Inst. Inmates, 834 F.2d at 346. However,

deliberate indifference may be established where prison officials "deny reasonable requests for medical treatment . . . and such denial exposes the inmate 'to undue suffering or the threat of tangible residual injury.'" Id. (quoting Westlake v. Lucas, 537 F.2d 857, 860 (6th Cir. 1976)). In addition, deliberate indifference is demonstrated where "prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment." Id. (quoting Inmates of Allegheny Co. Jail, 612 F.2d at 762).

Mr. Morris does not allege a mere disagreement of diagnosis or treatment. Rather, he alleges he was not provided treatment. Although he was examined by doctors and prescribed high blood pressure medication, the FDC did not permit him to be examined by a cardiologist until August 2008, six months after his incarceration. The Tucson Medical Center and Dr. Dalmasi both recommended Mr. Morris be permitted to visit a cardiologist. In addition, after Mr. Morris was examined by a cardiologist, the cardiologist concurred with the prior recommendation that an implantation of an ICD be considered. This surgery did not occur until October 2008.

I find Mr. Morris alleged sufficient facts to survive a motion to dismiss. He alleged each defendant knew of his serious medical need and each was deliberately indifferent to the need because the required medical treatment was delayed. See Second Amended Complaint at 43-46. The complaint contains sufficient factual matters to suggest the required elements of the claim and "raise a reasonable expectation that

discovery will reveal evidence of" those elements. See Phillips, 515 F.3d at 234 (quoting Twombly, 550 U.S. At 556).

IV. QUALIFIED IMMUNITY

Qualified Immunity shields government officials performing discretionary functions from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Courts apply a two-step inquiry to determine whether a defendant is entitled to qualified immunity. First, a court must determine whether a constitutional right was violated. Second, a court must determine whether the right was clearly established such that a reasonable officer would have known the "conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 201-02 (2001) (overruled on other grounds). To be "clearly established," the contours of the right must be sufficiently clear that a reasonable officer would understand his conduct violates the right. Anderson v. Creighton, 483 U.S. 635, 640 (1987).[3]

Mr. Morris's complaint sufficiently pled a constitutional right had been violated. See Part III. In addition, the complaint states sufficient facts to establish that the

[3] Defendants maintain failing to grant defendants qualified immunity "would undermine the ability of prison medical staff to exercise their discretion and make medical judgments in managing medical care for large prison populations." It would have a "chilling effect on the recruitment and retention of competent medical professionals for federal prison medical departments." Defendants' Memorandum of Law at 18.

constitutional right exists and that a reasonable person would understand his actions violated the right. The Tucson Medical Center and Dr. Dalmasi recommended Mr. Morris be seen by a cardiologist. After Mr. Morris was finally examined by a cardiologist, this cardiologist joined in the recommendation from the Tucson Medical Center that an ICD be implanted. This surgery did not occur for another two months.

I find the complaint sufficiently pled the constitutional right was clearly established and, taking the Mr. Morris's allegations as true, a reasonable person would have known they were violating the defendant's right. Therefore, I will deny the defendants' qualified immunity request at this stage.

V. SUMMARY JUDGMENT

Defendants maintain, if their motion to dismiss is denied, the court should consider materials outside the pleadings, grant defendants' motion for summary judgment, and enter judgment in favor of defendants under Rule 56(c). Defendants attached medical records in support of this motion.

Mr. Morris argues defendants' summary judgment motion is premature. Mr. Morris argues the motion should be denied pursuant to Federal Rule of Civil Procedure 56(f), which provides "[i]f a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained,

depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order." Mr. Morris claims he cannot present facts essential to justifying his opposition to the moiton without discovery, and, therefore, the motion should be denied pursuant to Federal Rule of Civil Procedure 56(f).

Mr. Morris's attorney, James Berger, Esquire filed a affidavit in support of this claim.[4] Mr. Berger maintained evidence concerning the state of mind and motivations of defendants regarding "their acts or omissions relating to the denial and delay in obtaining medical care for Mr. Morris is not otherwise available to him without further discovery." Affidavit of James Berger at ¶ 9. He maintains no discovery has occurred, and Mr. Morris must be afforded the opportunity to take discovery "including but not limited to, taking depositions of Defendants and other fact witnesses and serving interrogatories, to respond to Defendants' factual assertion that Defendants were not deliberately indifferent to Mr. Morris's alleged injury, and to demonstrate that there is a genuine issue of material fact." Id. at ¶ 10. In addition, Mr. Berger maintains Mr. Morris should be afforded the opportunity to "obtain paper discovery, including but not limited to, his full set of medical and administrative records; the proper procedures related to inmate Health Services at the [FDC]; and documentation relating to the decision of the Utilization Review Committee to table the request for Mr. Morris to obtain necessary cardiology consultation." Id. at ¶

[4] Mr. Berger was terminated from this case on August 6, 2009. However, at the time Mr. Morris's opposition to Defendants' motion was filed, Mr. Berger was counsel of record. Although Mr. Berger is no longer an attorney of record for this case, Mr. Morris is represented by counsel.

11.

Because discovery has not yet commenced, I will deny Defendants' motion for summary judgment and allow Mr. Morris to conduct discovery on his claim.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEVON MORRIS,	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
v.	:	
	:	
THE UNITED STATES OF AMERICA, ET AL.,	:	
	:	
Defendants.	:	**NO.: 08-03842**

ORDER

AND NOW, TO WIT: This 29th day of August, 2011, it having been reported that the issues between the parties in the above action have been settled and upon Order of the Court pursuant to the provisions of Rule 41.1(b) of the Local Rules of Civil Procedure of this Court, it is

ORDERED that the above action is **DISMISSED** with prejudice, pursuant to agreement of counsel without costs. The Court intends to retain jurisdiction for ninety (90) days from now, and any settlement agreement is approved and made a part of the record and this Order for enforcement purposes.

MICHAEL E. KUNZ, Clerk of Court

BY: /s/ Patricia A. Cardella
Patricia A. Cardella, Deputy Clerk to
Judge Lawrence F. Stengel

Copies e-mailed to the following
counsel on August 29, 2011:

David J. Stanoch, Esquire
Irene Ayzenberg-Lyman, Esquire
Philip N. Yannella, Esquire
Stephen D. Brown, Esquire
David Andrew Degnan, Esquire
Virginia A. Gibson, Esquire

KAF2, MB3

PREET BHARARA
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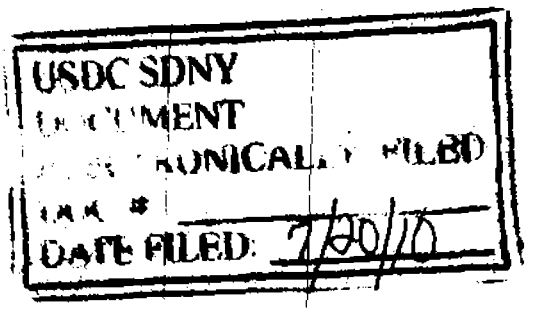

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK MANNINO, Plaintiff, -against- UNITED STATES OF AMERICA, Defendant.	ECF CASE STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL 08 Civ. 9646 (THK)

IT IS HEREBY STIPULATED AND AGREED by and between plaintiff Jack Mannino ("plaintiff"), and defendant the United States of America (the "United States"), by their respective counsel, that the above-titled action (the "Action"), brought against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, shall be resolved as follows:

1. This Action is hereby dismissed with prejudice and without interest, costs, attorneys' fees or disbursements to any party.

2. The United States will pay to plaintiff $225,000 (two hundred twenty-five thousand dollars) (the "Settlement Amount"), which includes attorney's fees, by check payable

to "Ronemus & Vilensky LLP and Jack Mannino." This check shall be issued only after execution by the parties and entry by this Court of this Stipulation and Order of Settlement and Dismissal ("Stipulation and Order").

3. Plaintiff hereby agrees that the Settlement Amount shall be in full settlement of any and all claims and demands that plaintiff or any of his heirs, executors, successors in interest, administrators or assigns have, may have, or may hereafter acquire against the United States, including the Federal Bureau of Prisons, or any other department, agent, officer, or present or former employee of the United States, on account of the facts, events, and circumstances giving rise to the Action, and any claims incident thereto.

4. This Stipulation and Order shall not constitute an admission of liability or fault on the part of the United States, any department or agency of the United States, or any present or former agent, officer or employee of the United States, including the Federal Bureau of Prisons.

5. Plaintiff hereby releases and forever discharges the United States, including any department, agency, agent, officer, or present or former employee of the United States, from any and all claims and demands that plaintiff or any of his heirs, executors, successors in interest, administrators or assigns have, may have, or may hereafter acquire against them, on account of the facts, events, and circumstances giving rise to the Action, and any claims incident thereto.

6. Plaintiff understands that taxes will not be withheld from the Settlement Amount. Plaintiff represents and warrants that he shall assume all responsibility for, and shall protect, indemnify, defend and hold the United States harmless from and against any and all claims, losses, liens, damages, liability, suits, actions, judgments, costs, penalties and expenses resulting from any liability or claim of liability for any amounts assessed by or due to any federal, state or local government or agency thereof, including, but not limited to, workers' compensation liens,

medical liens and federal, state and local taxes owed in connection with the payment of the Settlement Amount to them.

7. Payment of the Settlement Amount shall be made to plaintiff only after execution by the parties and entry by this Court of this Stipulation and Order.

8. Pursuant to the provisions of 28 U.S.C. § 2678, plaintiff's attorney's fees for the plaintiff's claim against the United States may not exceed twenty-five percent (25%) of the Settlement Amount, and such fees must be paid out of the Settlement Amount and not in addition thereto.

9. This Stipulation and Order may be signed in counterparts.

10. Plaintiff and the United States understand and agree that this Stipulation contains the entire agreement between them, and that no statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or their counsel that are not included herein shall be of any force or effect.

Dated: New York, New York
July 16, 2010

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: _____
TOMOKO ONOZAWA
Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Telephone: (212) 637-2721
Facsimile: (212) 637-2686

Dated: New York, New York
7/9/10, 2010

RONEMUS & VILENSKY
Attorneys for Plaintiff

By: _____
MICHAEL B. RONEMUS, ESQ.
112 Madison Avenue
New York, New York 10016
Telephone: (212) 779-7070
Facsimile: (212) 686-2490

Dated: Otisville, New York
7-07, 2010

_____
JACK MANNINO

SO ORDERED: 7/20/10

_____
THE HONORABLE THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE

Welcome JOHN E WALLACE | Logout

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NER-2009-00054 **Short Description:** WILLIAMS V. UNITED STATES OF AMERICA

Case Login Information

Reference Number	4:08-cv-02250-TIV
Short Description	WILLIAMS V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	Allenwood (USP)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	Allenwood (USP)
Monetary Relief Sought	$
Estimated Amount	$
Office	Williamsport
Jurisdiction	MIDDLE DISTRICT OF PENNSYLVANIA
Responsible Legal Office	FCC Allenwood

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	10/05/2010
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$43,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	12/30/2008
Date Filed	12/17/2008

Case Progress

Current Owner	KEVIN SULLIVAN
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	28:2671 FEDERAL TORT CLAIMS ACT
Further Case Classification	
Comments	

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CRAIG A. WILLIAMS, Plaintiff	:	CIVIL ACTION NO. _____
v.	:	(Electronically Filed)
THE UNITED STATES OF AMERICA, Defendant	:	

COMPLAINT

Plaintiff, CRAIG A. WILLIAMS, by and through his undersigned attorneys, sues defendant, THE UNITED STATES OF AMERICA, and alleges as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States and is premised on the acts and or omissions of defendant by and through its agents and or employees action under color of federal law as well as 28 U.S.C. § 1346 (b) (1) in that this is a claim against the United States of America and agencies of the United States of America for money damages accruing after January 1, 1945, for injury and personal injury caused by the negligent and wrongful acts and omissions of employees of the Government while acting within the scope of their office or employment, under circumstances where the United States of America, if a private person, would be liable in accordance with the laws of the places where the acts and or omissions occurred.

2. Jurisdiction founded upon the federal law is proper in that this action is

premised upon causes of action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, et. seq. the United States Supreme Court's ruling in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) as well as pursuant to the Eighth Amendment to the Constitution of the United States of America.

3. This is an action to redress under the color of statutes, ordinances, regulations, custom or usage of rights, privileges and immunities secured to the plaintiff by the Eighth Amendment to the Constitution of the United States, the "FTCA", 28 U.S.C. § 2671, et. seq. and arising under the laws and statutes of the State of Pennsylvania.

4. Venue is appropriate in this Court pursuant to 28 U.S.C. §§ 1391 (e)(3) in that this is an action against the United States of America and agents thereof and the acts and or omissions complained of occurred in the State of Pennsylvania.

5. Pursuant to the "FTCA", plaintiff on or about December 21, 2007 presented his claim via form SF95 to the appropriate federal agency for administrative settlement under the "FTCA" and by letter dated June 17, 2008, plaintiff's claim was finally denied by the agency.

6. This action is timely pursuant to 28 U.S.C. § 2401(b) in that it was presented to the agency within two (2), years of accrual of his claim and this action is filed within six (6) months of the date of the denial of plaintiff's claim.

7. 28 U.S.C. § 2679(b)(1) expressly waives immunity for the defendant, its agents and employees acting within the scope of their employment and allows plaintiff to proceed against the United States for violations of his rights guaranteed by the United

States Constitution.

8. Plaintiff brings this action within the appropriate statutes of limitations.

9. Plaintiff has been deprived of a right secured to him by the Constitution and the laws of the United States.

10. Plaintiff has been denied of his rights by defendant, their agents and employees acting under color of federal law.

PARTIES

11. At all times material hereto, plaintiff, CRAIG ALLAN WILLIAMS, was and is an inmate at the USP Allenwood.

12. At all times material hereto, defendant, UNITED STATES OF AMERICA, was and is a sovereign entity named properly herein under the "FTCA".

13. At all times material hereto, USP, Lewisburg and USP Allenwood were agencies of the Bureau of Prisons (BOP) which in turn was and is an agency of the United States of America.

STATEMENT OF FACTS

14. At all times material hereto, plaintiff was and is an inmate and under the full custody and control of defendant.

15. On or about, September, 1999, at USP Lewisburg, plaintiff requested a screening for colon cancer as a result of specified symptoms communicated to the medical staff.

16. At such time, a rectal exam was performed on plaintiff by medical staff personnel at USP Lewisburg and the result yielded a prostate found to have a firm, non-

tender mass on the left side along with other reported medical symptoms such as hesitancy in getting a urine stream started and a noted family history of prostate cancer. A PSA test yielded a prostate specific antigen level of 3.4.

17. On or about March, 2000, another PSA test was performed and yielded a specific prostate antigen level of 3.3

18. Despite these elevated levels found in screening of the plaintiff and the apparent history, no additional testing was performed on plaintiff for a significant period of time.

19. Despite the elevated levels of PSA and physical exam findings, no followup or additional testing was performed on plaintiff until on or about July 27, 2006, plaintiff again complained to the appropriate medical staff at USP Allenwood that he had observed change in stool color, advised them again of family history of prostate cancer.

20. A PSA test was ordered as well as a surgery consult ordered as of July 27, 2006.

21. Despite the complaints of plaintiff, the documented history of plaintiff's prior obviously elevated PSA levels and physical findings in plaintiff's medical history file, which defendant well knew of, no intervening testing was performed on plaintiff and no additional screening of plaintiff was ever performed on plaintiff until September, 2006.

22. Further, despite plaintiff's well documented history well-known to the medical staff, no action was taken on these requests until September 6, 2006 at which time the plaintiff's PSA level was now 8.49 and he was diagnosed with cancer of the

prostate.

23. Plaintiff's medical records reflect that the PSA levels known to prison officials from at least 2000 indicated a need for further testing by way of a biopsy or at the very least periodic PSA screening and monitoring.

24. Despite this knowledge by the prison officials, no such additional testing was performed between 2000 and 2006. The negligence of defendant was continuing in nature from 2000 until 2006.

25. Plaintiff, prior to on or about July 27, 2006, could not have discovered through the use of reasonable diligence that he had been injured due to the inadequate care provided to him by Defendant, its agents and employees.

26. The plaintiff has undergone radiation therapy, still has his cancer and is awaiting further treatment and or diagnosis.

COUNT I

PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT

FOR MEDICAL NEGLIGENCE

27. Plaintiff herein repeats, realleges and adopts each and every allegation in paragraphs 1 thru 26 above as if set forth specifically herein.

28. During all times material hereto plaintiff was in the custody, care and control and under the exclusive care and medical management of the agents and employees of the defendant and fully subject to any and all constraints and restrictions imposed by defendant upon plaintiff.

29. During the course of plaintiff's incarceration in defendant's institutions,

plaintiff did receive medical care and services from defendant through its medical staff.

30. During the course of plaintiff's incarceration from the year 1999 thru 2006, defendant, by and through its agents and employees negligently, carelessly and unskillfully rendered and failed to render proper medical care, services and treatment to the plaintiff by negligently, carelessly and unskillfully failing to provide plaintiff necessary and obvious follow up treatment from the period of 1999 thru 2006, despite defendant being at all times fully aware of the need and medical necessity for such treatment and followup procedures.

31. As a result of such negligent, careless and unskilled treatment or lack of treatment of plaintiff by defendant, plaintiff has developed cancer to a degree far in excess of that which would otherwise have been treatable and as a result, plaintiff has suffered in the past and will continue to suffer in the future permanent injury and damage.

32. As a further result of such negligent treatment of plaintiff by defendant, plaintiff was deprived of a substantial possibility and or probability of early diagnosis of his cancer and thus further deprived and denied the substantial possibility for a cure and or significant lessening of the permanent and lasting effects of this disease on plaintiff and his future life expectancy and capacity for the enjoyment of life and plaintiff has been forced to endure significant and severe physical pain and suffering and will continue to experience such pain and suffering in the future as well as a significant shortened life expectancy.

33. Pursuant to the foregoing and the negligent acts and or omissions of

defendant, Plaintiff has been damaged and herein demands judgment of money damages.

COUNT II

PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT

FOR DELIBERATE INDIFFERENCE

34. Plaintiff herein repeats, realleges and adopts each and every allegation in paragraphs 1 thru 32 above as if set forth specifically herein.

35. Plaintiff contends that defendant was at all times from 1999 thru 2006 fully aware of plaintiff's acute medical problem and plaintiff's need for urgent care and treatment during such time period.

36. Plaintiff was in need of urgent care and treatment from 1999 while in the full and exclusive care, custody and control of defendant.

37. Plaintiff was denied any medical treatment by defendant despite defendant's knowledge of the urgent need for such care and treatment during this extensive period of time.

38. The acts and omissions of defendant were sufficiently serious and blatant as to constitute a violation of plaintiff's rights.

39. Defendant was deliberately indifferent to the plaintiff's medical needs which indifference clearly exacerbated his condition leading directly to his current condition and resulting in his past and continuing pain and suffering.

40. As a further result of such deliberate indifference of plaintiff by defendant, plaintiff was deprived of a substantial possibility and or probability of early diagnosis of

his cancer and thus further deprived and denied the substantial possibility for a cure and or significant lessening of the permanent and lasting effects of this disease on plaintiff and his future life expectancy and capacity for the enjoyment of life and further plaintiff has been forced to endure significant and severe physical pain and suffering and will continue to experience such pain and suffering in the future as well as a significant shortened life expectancy.

41. As a further result of such deliberate indifference plaintiff has suffered and will continue to suffer significant expenses.

42. By reason of the foregoing, plaintiff has been damaged and in addition to other damages to which Plaintiff is entitled Plaintiff demands an award of punitive damages.

JURY DEMAND

43. Plaintiff demands a jury trial as to all issues so triable.

RELIEF SOUGHT

WHEREFORE plaintiff demands judgment against defendant as follows:]

1. As to Count I, plaintiff demands judgment against defendant of money damages plus interest, costs and any other relief to which the plaintiff may be entitled including attorney's fees.

2. As to Count II, Plaintiff demands judgment against defendant of money damages plus punitive damages, interest, costs and any other relief to which the plaintiff may be entitled including attorney's fees.

Respectfully submitted,

By: /s/Stephen M. Greecher, Jr.

Stephen M. Greecher, Jr.
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Bay Harbor, FL 33154
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ATTORNEYS FOR PLAINTIFF

DATE: 12/17/08
105054.1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CRAIG A. WILLIAMS,	:	
Plaintiff	:	4:CV-08-2250
v.	:	(Judge McClure)
UNITED STATES OF AMERICA,	:	
Defendant		

O R D E R

October 5, 2010

BACKGROUND:

On October 1, 2010 Stephen M. Greecher, Jr., Esquire, attorney for plaintiff, reported to the court that the above-captioned case has been settled (Rec. Doc. No. 36).

NOW, THEREFORE, IT IS ORDERED THAT:

1. This action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within sixty (60) days, to reinstate the action if the settlement is not consummated.

2. This order will constitute a final order dismissing the case with prejudice sixty-one (61) days from today if no motion is filed within sixty (60)

days to reinstate the case to active status or to extend the 60-day period to consummate the settlement.

s/ James F. McClure, Jr.
James F. McClure, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

KENNETH HOWARD,

Plaintiff,

v.

UNITED STATES OF AMERICA, JAMIE TORO, GLEN CUMMINGS, ELIZABETH TORRES, ANGEL PEREZ, and JOHN AND JANE DOE 1-10, all individually and in their official capacities,

Defendants.

----------X

09 CV 0096 (JBW)(RLM)

STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiff Kenneth Howard ("plaintiff") and defendant the United States of America (the "United States"), that plaintiff's claims in this action shall be settled and compromised on the following terms and conditions:

1. This action is hereby dismissed in its entirety with prejudice, without costs, interest, attorneys' fees, or disbursements to any party.

2. This Stipulation and Order of Settlement and Dismissal (the "Stipulation and Order") shall not constitute an admission of liability or fault on the part of the United States, the Federal Bureau of Prisons ("BOP"), or any of their present or former departments, agencies, agents, officials, or employees.

3. Defendant United States agrees to pay to plaintiff the sum of thirty thousand dollars ($30,000.00) (the "Settlement Amount"). The Settlement Amount is inclusive of all costs or attorneys' fees of any kind, and any and all liens and fees are to be satisfied by plaintiff out of the Settlement Amount.

4. Plaintiff agrees to accept the Settlement Amount in full settlement and satisfaction of any and all claims and demands that he or his heirs, executors, administrators, or assigns may have or hereafter acquire on account of the events, circumstances or incidents giving rise to this lawsuit and all claims incident thereto, including but not limited to any such claims asserted by plaintiff in the complaints he has filed in this action against the United States, BOP, or any of their present or former departments, agencies, agents, officials, or employees. Plaintiff hereby releases and forever discharges the United States, BOP, and any of their present or former departments, agencies, agents, officials, or employees, from any and all claims and liabilities arising directly or indirectly from the circumstances or incidents giving rise to this lawsuit and all claims incident thereto, including but not limited to any claims asserted by plaintiff in the complaints.

5. Plaintiff agrees to (a) indemnify and hold harmless the United States, the BOP, and any of their present or former departments, agencies, agents, officials, or employees, from any and all claims, rights, subrogated interests, or other causes of action brought against them by any third party arising directly or indirectly from the circumstances or incidents giving rise to this lawsuit and all claims incident thereto, including but not limited to any claims asserted by plaintiff in the complaint, and the payment of the Settlement Amount, and (b) to reimburse or advance, at the option of counsel for the United States, any expense or cost that may be incurred by the United States, the BOP, or any of their present or former departments, agencies, agents, officials, or employees, incident to or resulting from such further litigation or the prosecution of claims by any third party.

6. This Stipulation and Order shall be binding upon and inure to the benefit of plaintiff and defendant United States, and their principals, agents, representatives, heirs, successors, and assigns.

7. Plaintiff understands that taxes will not be withheld from the Settlement Amount. Plaintiff represents and warrants that he shall assume all responsibility for, and shall protect, indemnify, defend and hold the United States, BOP, and any of their present or former departments, agencies, agents, officials, or employees, harmless from and against any and all claims, losses, liens, damages, liability, suits, actions, judgments, costs, penalties and expenses resulting from any liability or claim of liability for any amounts assessed by or due to any federal, state or local government or agency thereof, including, but not limited to, medical liens and federal, state and local taxes owed in connection with the payment of the Settlement Amount to him.

8. Nothing in this Stipulation and Order shall limit the right or the ability of the United States to offset the Settlement Amount against any debt, assessment, or liability owed by plaintiff to the United States or any federal agency.

9. Payment of the Settlement Amount shall be made to plaintiff only after execution by plaintiff and the United States, and entry by this Court of this Stipulation and Order.

10. This Stipulation and Order may be signed in two (2) or more counterpart originals, each of which shall be deemed to be an original.

11. This Stipulation and Order contains the entire agreement between the plaintiff and the United States and any statements, representations, promises, agreements, or

negotiations, oral or otherwise, between the plaintiff and the United States, or counsel, that are not included herein shall be of no force or effect.

Dated: Brooklyn, New York
July 1, 2009

BRETT KLEIN, ESQ.
Leventhal & Klein, LLP
Attorney for Plaintiff
45 Main Street, Suite ~~820~~ 230
Brooklyn, New York 11201
Telephone: (718) 722-4100

Dated: Baltimore, Maryland
July ___, 2009

KENNETH HOWARD
Plaintiff

KIMBERLY DAWN TUCHEK
NOTARY PUBLIC- MINNESOTA
MY COMMISSION EXPIRES 1-31-2013

Kimberly Dawn Tuchek
6/30/09

Dated: New York, New York
July 7, 2009

LEV L. DASSIN
Acting United States Attorney for the
Southern District of New York
Attorney for Defendant United States

By: _____

NEIL M. CORWIN
EMILY E. DAUGHTRY
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Telephone: (212) 637-2707/1579

SO ORDERED.

Dated: Brooklyn, New York
June _, 2009

THE HONORABLE ROANNE MANN
United States Magistrate Judge

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2009-00598 **Short Description:** ROBERTS V. UNITED STATES OF AMERICA

[redacted]

Case Login Information

Reference Number	2:08-cv-05426-MMB
Short Description	ROBERTS V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Failure to Protect
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	Philadelphia (FDC)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	Philadelphia (FDC)
Monetary Relief Sought	$750,000.00
Estimated Amount	$
Office	Philadelphia
Jurisdiction	EASTERN DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	02/18/2011
Type	Settled
Reason	
Sought	Punitive Damages
Amount offered	$10,000.00
Total Amount Paid	$10,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	Yes

Case Initiation Dates

Date Received	04/07/2009
Date Filed	11/14/2008

Case Progress

Current Owner	JOYCE HORIKAWA
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1332 DIVERSITY-PERSONAL INJURY
Further Case Classification	FAILURE TO PROTECT INMATE FROM ASSAULT BY OTHER INMATES
Comments	

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRED ROBERTS, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 08-5426 Judge Michael M. Baylson

AMENDED COMPLAINT

Plaintiff Fred Roberts, by and through his undersigned counsel, files this Amended Complaint against Defendant United States of America and in support thereof avers as follows:

THE PARTIES

1. Plaintiff Fred Roberts, Federal Register Number 58713-066, is an individual currently confined at United States Penitentiary Coleman I in Coleman, Florida.

2. Defendant United States of America employs the staff at the Bureau of Prisons' Federal Detention Center ("FDC") Philadelphia. Defendant United States of America is a proper defendant pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674, *et seq.*

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1346(b) because Mr. Roberts asserts a cause of action under the Federal Tort Claims Act, 28 U.S.C. § 2674, *et seq.*, which provides the remedy of money damages against the United States of America where federal employees have engaged in tortious conduct within the scope of their employment on behalf of the United States of America.

4. Mr. Roberts has exhausted, constructively exhausted, or is excused from exhausting his administrative appeals prior to bringing this action.

5. Venue is appropriate in this judicial district under 28 U.S.C. §§ 1391(b) and 1402(b) because the events giving rise to Mr. Roberts' claim occurred in this judicial district.

FACTUAL BACKGROUND

6. At all times relevant hereto, Mr. Roberts was assigned to FDC Philadelphia's Special Housing Unit ("SHU").

7. On August 18, 2006, at 2:00 p.m., Mr. Roberts was the subject of a Discipline Hearing arising out of an incident between Mr. Roberts and another inmate. The prison official presiding over the Hearing was Hearing Officer J. McGinness. During the Hearing, Officer McGinness considered the declarations of six inmates which were adverse to Mr. Roberts. While reviewing these statements, Officer McGinness disclosed the identities of the inmates who made the statements to Mr. Roberts.

8. Among the individuals who provided a statement against Mr. Roberts was Inmate Harper (Federal Register Number 60040-066). Of course, because Officer McGinness revealed Mr. Harper's identity to Mr. Roberts during the Hearing, Mr. Roberts was aware that Inmate Harper provided prison authorities with an account of Mr. Roberts' conduct that was against Mr. Roberts' interests.

9. After reviewing the evidence against Mr. Roberts, including Inmate Harper's statement, Officer McGinness sanctioned Mr. Roberts and ordered him to serve a 60-day term in disciplinary segregation. A copy of the Discipline Hearing Report is attached hereto as Exhibit A.

10. Following the Discipline Hearing, Mr. Roberts was placed back in the SHU where he had a verbal altercation with Inmate Harper and his brother, Inmate Humbert (Federal Register Number 58542-066), regarding Inmate Harper's involvement in Mr. Roberts' Discipline Hearing. Inmates Harper and Humbert shared a cell in the SHU.

11. Given the fact that Inmate Harper provided a statement against Mr. Roberts in connection with the Discipline Hearing, as well as the fact that Mr. Roberts then had a verbal altercation with Inmates Harper and Humbert, FDC Philadelphia officials knew or should have known that Inmates Harper and Humbert were potential threats to Mr. Roberts' safety.

12. Three days later, on August 21, 2006, Officer M. Brand transported Mr. Roberts from his SHU cell to one of the SHU's recreation cages for an hour-long exercise period.

13. The recreation cages are small, confined areas that are enclosed by wire. The cages are kept completely empty and devoid of any objects ostensibly for the inmates' safety. Inmates are only permitted to enter or leave the cages when a prison official unlocks and opens the door located at one end of the enclosure.

14. Usually, once an inmate is secure in the cage, his hand restraints are removed by prison officials when the inmate places his hands through a small slot in the cage door.

15. Officer Brand placed Mr. Roberts in the recreation cage with approximately five other inmates, all of whom were already in the cage when Mr. Roberts entered. Among the men in the cage when Mr. Roberts arrived were Inmates Harper and Humbert.

16. When Mr. Roberts was placed in the recreation cage, his hands were in restraints and immobilized behind his back. Although Mr. Roberts was completely defenseless with his hands secured behind him, neither Inmate Harper nor Inmate Humbert were similarly restrained. Indeed, Inmate Humbert was not in any restraints at all and Inmate Harper's hands were merely handcuffed in front of him, allowing him to use them as weapons.

17. Almost immediately after Mr. Roberts was placed in the recreation cage, and before he had an opportunity to request that his hand restraints be removed, Inmates Harper and Humbert simultaneously and brutally attacked him.

18. Mr. Roberts was completely defenseless to protect himself against the brutal

attack because his hands remained restrained behind his back and there was nowhere in the cage in which he could run, hide or shield himself from his attackers' blows.

19. Inmates Harper and Humbert repeatedly and savagely punched and kicked Mr. Roberts. In addition, they mutilated Mr. Roberts with razor blades, causing numerous severe gashes to his face, upper body and legs. The beating that Inmates Harper and Humbert inflicted upon Mr. Roberts was so severe that he lost substantial amounts of blood and fell unconscious. Attached as Exhibit B are photographs depicting the disfiguring, permanent scars throughout his upper and lower body.

20. In addition, Mr. Roberts suffered significant emotional stress and injury as a result of the attack.

21. Because FDC Philadelphia officials knew or should have known that Inmates Harper and Humbert were potential threats to Mr. Roberts' safety, they were negligent in placing Mr. Roberts in the cage with Inmates Harper and Humbert.

22. Upon information and belief, the only means by which FDC Philadelphia personnel are able to observe the actions of inmates in the recreation cage is to either position themselves within one of the five other cages adjoining the cage or peer through a small window near the top of the door to the cage.

23. Upon information and belief, there were no prison officers in any of the other cages observing the activities in Mr. Roberts' cage, nor were there any prison personnel utilizing the cage door window to supervise the inmates in the cage at the time of the attack on Mr. Roberts. Prison personnel failed to supervise the inmates in the cage despite the fact that a prison officer had placed a defenseless and restrained prisoner in a confined cell with other inmates who were not similarly restrained and who possessed razor blades.

24. Had prison officers been adequately observing the recreation cage, the attack on

Mr. Roberts would have been prevented or cut short. The prison officers' failure to adequately observe the activities within the cage was negligent.

25. In addition, as stated above, during the attack on Mr. Roberts, Inmates Harper and Humbert were in possession of razor blades that they used to permanently disfigure Mr. Roberts.

26. Upon information and belief, the razor blades were checked out to Inmates Harper and Humbert by FDC Philadelphia officers as part of routine prison procedure, but FDC Philadelphia officers failed to ensure that they were returned. Alternatively, the razor blades were illegal contraband.

27. Regardless of how Inmates Harper and Humbert obtained the razor blades, FDC Philadelphia officials should have conducted a thorough search of Inmates Harper and Humbert to ensure they were not in possession of deadly weapons prior to placing them in the cage and allowing them to be in a position where they could viciously attack a defenseless Mr. Roberts.

28. Had FDC Philadelphia officials ensured that all issued razor blades had been returned and conducted a thorough search of Inmates Harper and Humbert, they would not have been in possession of razor blades in the recreation cage at the time of the attack on Mr. Roberts and therefore the razor blades would not have been used to maim and permanently disfigure him.

29. On or around March 17, 2008, Mr. Roberts mailed an administrative tort claim seeking compensatory damages for his personal injury to the Federal Bureau of Prisons' Northeast Regional Office.

30. The Northeast Regional Office received Mr. Roberts' claim on March 24, 2008. A copy of the Northeast Regional Office's confirmation of receipt is attached as Exhibit C.

31. On September 29, 2008, the Northeast Regional Office acknowledged that Mr. Roberts had been assaulted by two inmates after being placed in the recreation area, but denied Mr. Roberts' claim. A copy of the Northeast Regional Office's denial of Mr. Roberts' claim is

attached as Exhibit D.

32. Mr. Roberts initiated this action within six months after the Northeast Regional Office denied his claim.

COUNT I
(Federal Tort Claims Act)

33. The foregoing paragraphs 1 through 32 are incorporated by reference as if set forth fully herein.

34. The staff at FDC Philadelphia owed a duty to Mr. Roberts, including, but not limited to those duties imposed pursuant to 18 U.S.C. § 4042, to provide a safe environment, provide for Mr. Roberts' safekeeping, care and subsistence, and protect Mr. Roberts from unreasonable risks, as well as to provide basic living levels of decency and humane treatment.

35. The staff at FDC Philadelphia, while acting within the scope of their employment, violated that duty in numerous respects, including, but not limited to, by: (1) placing Mr. Roberts in a confined space with other inmates who they knew or should have known were potential threats to Mr. Roberts' safety; (2) placing Mr. Roberts, while in handcuffs, into a SHU recreation cage with other inmates who were not similarly restrained; (3) issuing razor blades to other inmates in the SHU, then not taking adequate measures to ensure that all razor blades were returned to FDC Philadelphia officials, thus allowing those inmates to use them in a vicious attack on Mr. Roberts; (4) failing to adequately and thoroughly search SHU inmates for weapons and other contraband prior to placing them in the SHU recreation cage with Mr. Roberts; (5) releasing the names and statements of the six inmates who gave witness statements, including Inmate Harper, in connection with Mr. Roberts' August 18, 2006 Discipline Hearing; and (6) failing to list a "keep away from" on Mr. Roberts' "Special Housing Unit Record" to separate Inmate Harper from Mr. Roberts after Inmate Harper gave a statement in connection with Mr. Roberts' August 18, 2006 Discipline Hearing.

36. The failure of the staff of FDC Philadelphia to fulfill their duties, as set forth above, resulted in significant harm to Mr. Roberts, including substantial physical pain and suffering, permanent disfigurement in the form of keloid scars all over his body, mental anguish, and a deterioration in his overall physical condition.

37. Mr. Roberts has suffered damages as a direct result of the negligence on the part of the staff of FDC Philadelphia to provide, among other things, a safe environment for Mr. Roberts.

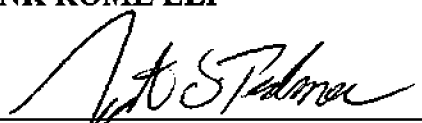
38. The United States, if a private person, would be liable for the damages suffered by Mr. Roberts in accordance with the laws of the Commonwealth of Pennsylvania.

39. Mr. Roberts seeks monetary relief from the United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674, *et seq.*

WHEREFORE, Plaintiff Fred Roberts respectfully requests that this Court enter judgment in his favor and against Defendant United States of America on Count I, award Plaintiff Fred Roberts compensatory damages in excess of $750,000, and award any and all other such relief as this Court deems just and proper.

Respectfully submitted,

BLANK ROME LLP



Grant S. Palmer (PA ID 57364)
Scott E. Coburn (PA ID 89841)
Tyler Brody (PA ID 93242)
One Logan Square
Philadelphia, PA 19103-6998
Tel.: (215) 569-5578
Fax: (215) 832-5578

Attorneys for Plaintiff Fred Roberts

Dated: July 31, 2009

CERTIFICATE OF SERVICE

I certify that on July 31, 2009, I caused a true and correct copy of the foregoing Amended Complaint to be served upon the following counsel via ECF and U.S. mail:

Susan Becker
Assistant U.S. Attorney
U.S. Attorney's Office
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106

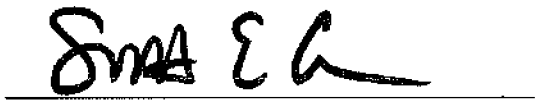


EXHIBIT A

DISCIPLINE HEARING OFFICER REPORT **BP-S305.052 MAY 94**
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

INSTITUTION	FDC Philadelphia	INCIDENT REPORT NUMBER			1476608
INMATE NAME	ROBERTS, Fred	REG NO	58713-066	UNIT	6 North
DATE OF INCIDENT	5/29/06	DATE OF INCIDENT REPORT			06/09/06
OFFENSE CODE(S)	101				
SUMMARY OF CHARGES	Assault (with Serious Injuries)				

I. NOTICE OF CHARGE(S)

A. Advanced written notice of charge (copy of Incident Report) was given to inmate on (date) 07-26-2006 at 04:00 pm (by staff A. Vero

B. The DHO Hearing was held on (date) 08-18-2006 at (time) 2:00 pm

C. The inmate was advised of his/her rights before the DHO by (staff member): S. White on (date) 07-30-06 and a copy of the advisement of rights form is attached.

II. STAFF REPRESENTATIVE

A. Inmate waived right to staff representative.	Yes:		No:	X

B. Inmate requested staff representative and appeared.

C. Requested staff representative declined or could not appear but inmate was advised of option to postpone hearing to obtain another staff representative with the result that: N/A

D. Staff representative	N/A	was appointed.

III. PRESENTATION OF EVIDENCE

A. Inmate admits		denies	X	the charge(s).

B. Summary of inmate statement:

The inmate was advised of his rights at the DHO Hearing and stated he was ready to proceed. The inmate had no documentation to present at the DHO Hearing. After being read the incident report by the DHO the inmate stated, "I made the statement before during the investigation, I did not assault him." Inmate Roberts made no complaints about procedural errors. All written witness statement were read, all photos and medical reports were read and presented to the inmate. The DHO notes the time line for the report is as follows: May 30, 2006, the incident was referred the FBI for investigation. June 9, 2006, Bureau of Prisons investigation was concluded and the incident report suspended pending FBI referral. July 26, 2006, AUSA David Webb declined prosecution and the incident report is released for institution discipline. July 30, 2006 the Unit Disciple Committee (UDC) referred the incident to the DHO for further disposition. The DHO hearing was convened on August 18, 2006. Inmate Roberts made no complaints about procedural errors.

C. Witness(es):

1. The inmate requested witness(es).	Yes:	X	No:	

2. The following persons were called as witnesses at this hearing and appeared. (Include each witnesses' name, title, reg number and statement as appropriate.)

Inmate Brown, W #41143-050

3. The following persons requested were not called for the reason(s) given.

N/A

4. Unavailable witnesses were requested to submit written	Yes		No		N/A	

D. Documentary Evidence: In addition to the Incident Report and Investigation, the DHO considered the following documents:

Medical Report,dated May 30, 2006, Frankford Hospital, T. Christensen, RN

E. Confidential information was used by DHO in support of his findings, but was not revealed to the inmate. The confidential information was documented in a separate report. The confidential information has been (confidential informants have been) determined to be reliable because:

N/A

IV. FINDINGS OF THE DHO

X	A. The act was committed as charged.	
	B. The following act was committed:	
	C. No prohibited act was committed: Expunge according to Inmate Discipline PS.	

V. SPECIFIC EVIDENCE RELIED ON TO SUPPORT FINDINGS (Physical evidence, observations, written documents, etc.)

The DHO finds that on May 29, 2006, at about 11:01 pm, in cell block 6 North, at FDC Philadelphia, you did commit the prohibited act, Assault, code 101.

The specific evidence relied upon to support this finding was the written statement of the reporting staff member, W. G. Jezoir, Special Investigation Officer, who states on May 29, 2006, a verbal confrontation between inmate Roberts and inmate Carafa occurred in the housing unit of 6 North. Inmate Roberts challenged inmate Carafa to return to his cell. Inmate Roberts called inmate Carafa a, "snitch ass white boy." Inmate Carafa refused to go immediately to the cell with inmate Roberts. Inmate Roberts stated that, "you will have to return sooner or later." Inmate Roberts walked up the stairs and entered inmate Carafa's cell and waited for him. When inmate Carafa returned to his cell, inmate Roberts was there waiting for him. Inmate Carafa attempted to flee from his cell, he observed inmate Harper through the cell door window. Inmate Harper was holding the door shut preventing inmate Carafa from exiting the cell.

The DHO considered witness statements from the following inmates:

Inmate Carafa, D. 410423-050, Inmate Carafa was shown an array of photos and inmate Carafa positively identified inmate Roberts as the assailant.

Inmate Ruiz D. 27374-180, Inmate Ruiz was asked if he thought it was Fred Roberts that did the beating, inmate Ruiz responded, yeah, Fred Roberts he has been in court. He is the one who did the beating.

Inmate Davis W. 40819-050, Yeah, I saw the whole thing, I was going up to my cell after the game, when I walked past Carafa's cell. I saw somebody open his door and I saw Fred Roberts standing over the boy beating him with both hands. There were a bunch of nut inmates standing around watching it.

Inmate Dunn J. 60378-066, was shown and array of photos and identified inmate Roberts as the assailant.

Inmate Harper, M 60040-066 I thought they were going to fight when Gabe went up to his cell. I am cool with them so I went up to watch their backs. I looked in the door and Gabe saw me. I never closed the door. I never saw anything. I went back and stood along the rail. I didn't have anything to do with it. I don't know why Roberts did it. He was stressing over court and wanted to hit someone.

Inmate Thomas, S 60378-066, When Carafa returned to his cell he was assaulted by a black male and during the assault he saw inmate Carafa's cell door open and shut by an inmate that was standing outside the cell.

(CONTINUED)

DISCIPLINE HEARING OFFICER REPORT
U.S. DEPARTMENT OF JUSTICE

BP-S305.052 MAY 94
FEDERAL BUREAU OF PRISONS

VI. SANCTION OR ACTION TAKEN

60 Day DS
54 FF NVGCT
365 Days LP Visit

VII. REASON FOR SANCTION OR ACTION TAKEN

The action/behavior on the part of any inmate to seriously assault or injure another person, poses a serious threat not only to himself but to the health and safety of others in the institution. As a serious assault was attempted and carried out, the charge was found to be appropriate.

The DHO is imposing a sanction of 60 days disciplinary segregation as punishment for attempted assault, The DHO also imposed sanctions of 365 days loss of visiting privilege and 54 days forfeiture of non vested good time, in hopes that it will prompt you to modify your behavior and to deter you and others from committing a similar act in the future.

It is hoped that you stop assaulting and fighting with others when they make you angry. Acting on impulse can lead to poor decisions.

VIII. APPEAL RIGHTS: The inmate has been advised of the findings, specific evidence relied on, action and reasons for the action. The inmate has been advised of his right to appeal this action within 20 calendar days under the Administrative Remedy Procedure. A copy of this report has been given to the inmate.

	Yes	X	No		

IX. DISCIPLINE HEARING OFFICER

Printed Name	Signature	Date
J. McGinness		8/14/06

DELIVERED TO INMATE	DATE		TIME	
T. Pappas	8-24-06			10:00 am

(This form may be replicated in WP) Replaces BP-304(52) of JAN 88

SECTION V ADDENDUM

SIS Investigation, W. G. Jezoir, inmate Carfa, stated, "When the game was over, I went up to my cell and Roberts was there. He said, What are you going to do now. I tried to run out of the cell but could not because inmate Harper was holding the door. The next thing you know I am hit from behind and I am going down and when I came to, I remember someone slamming the door on my ankle."

Inmate Brown, W. 41143-050, I had a cellie named Roberts, that's all I know. He went out to court and never came back.

Medical Report, dated May, 30, 2006, Frankford Hospital, T. Christensen, RN

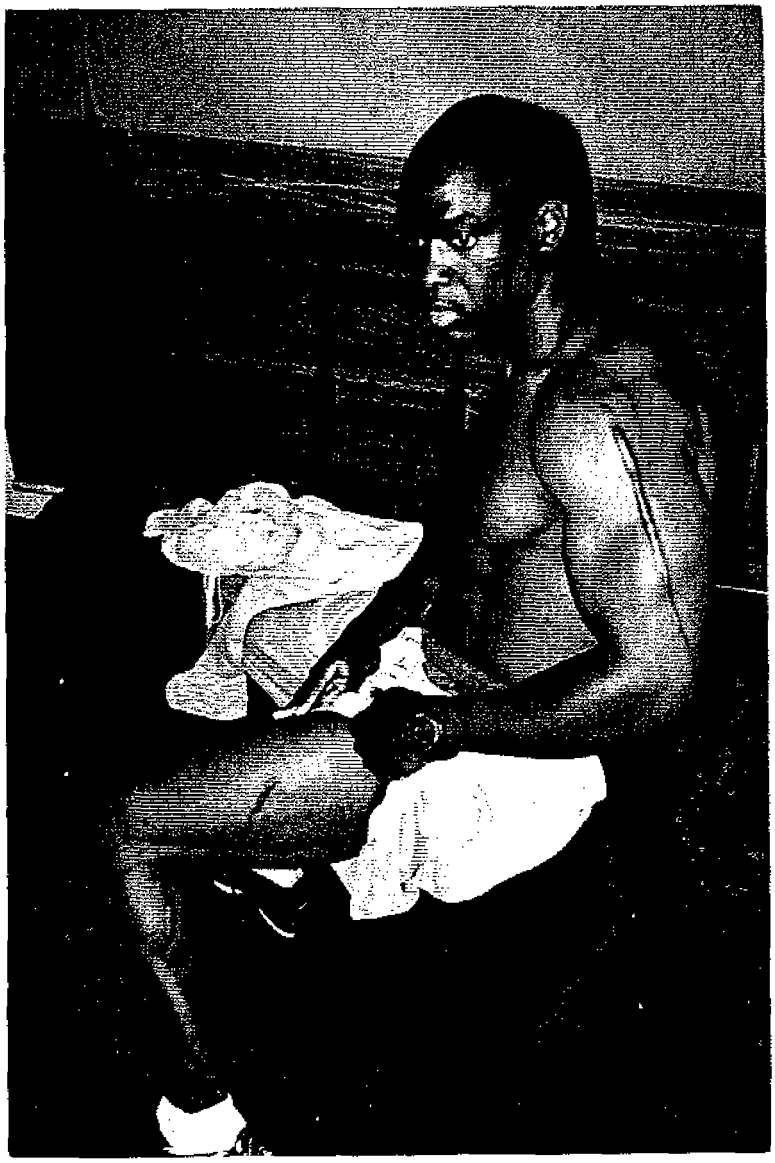
Time Line

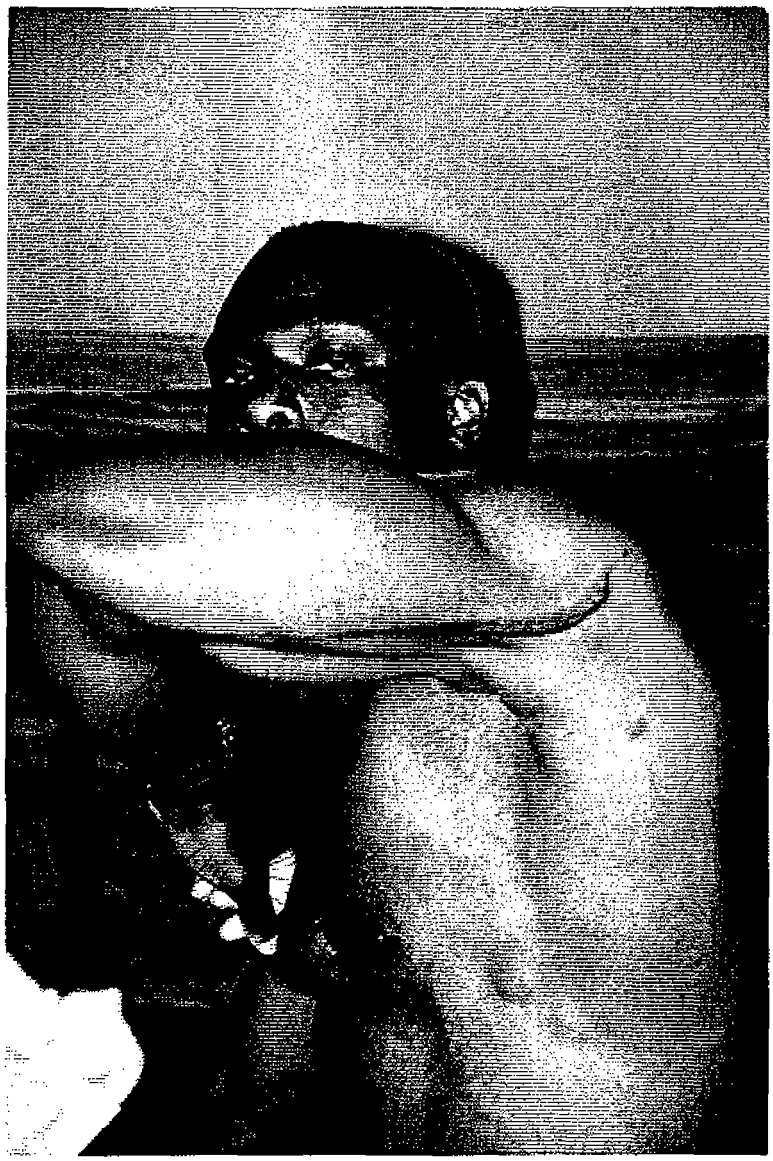
11:00.59	Inmate Roberts approaches victims cell
11:01.28	Inmate Carafa approaches his cell
11:01.34	Inmate Harper follows Carafa to his cell
11:01.57	Inmate Harper runs down the stairs.
11.02.00	Inmate Roberts runs down the stairs

You denied the charge. I did not assault him. Your statement is ambiguous and contradicts witness statements and accounts of the incidents. Time line and witness testimony indicate you followed inmate Carafa to his cell. There were eyewitness accounts that you were in inmate Carafa's cell beating him with your hands.

Having considered all the evidence in this case, the DHO finds the greater weight of the evidence supports you committed the prohibited act, Assault with Serious Injury, code 101

EXHIBIT B





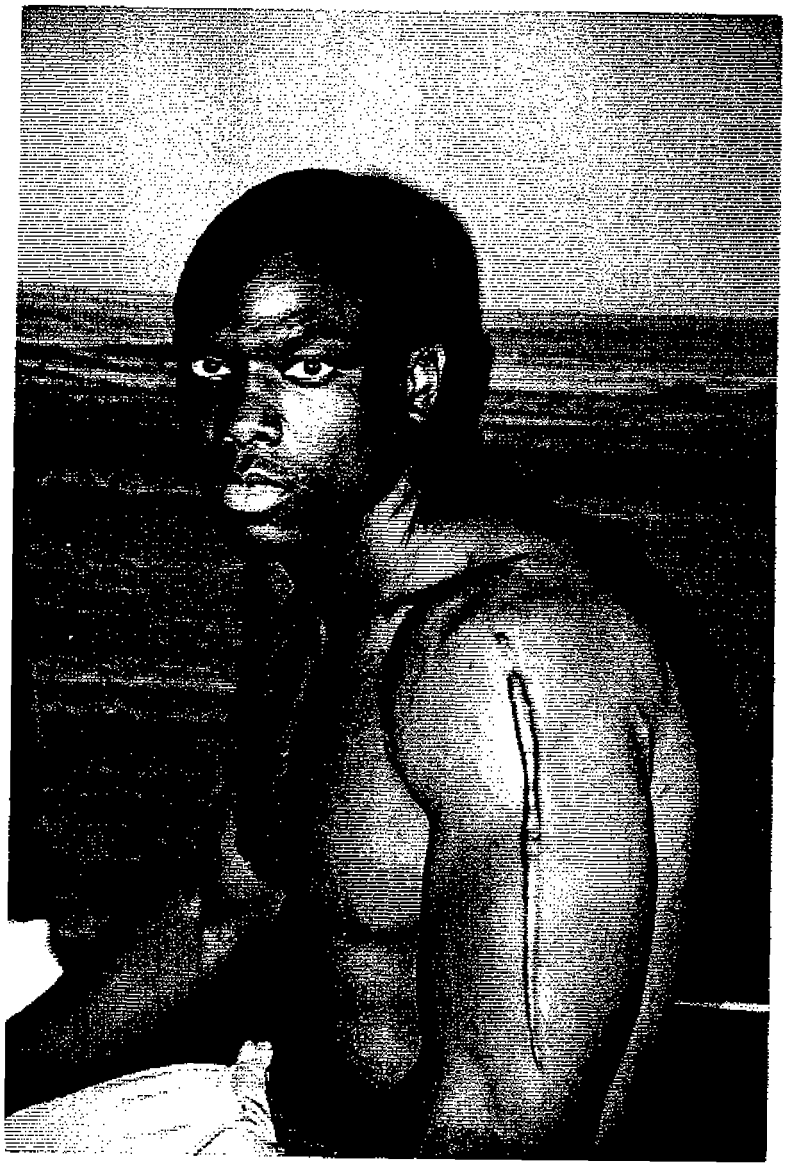


EXHIBIT C

U.S. Department of Justice

Federal Bureau of Prisons

Northeast Regional Office

U.S. Custom House
2nd & Chestnut Streets - 7th Floor
Philadelphia, PA. 19106

April 11, 2008

Fred Roberts
Reg. No. 58713-066
United States Penitentiary-Coleman I
P.O. Box 1023
Coleman, FL 33521-1033

Re: Administrative Tort Claim Received March 24, 2008
Claim No. TRT-SER-2008-03595

Dear Mr. Roberts:

This will acknowledge receipt of your administrative tort claim for alleged loss of personal property and/or personal injury suffered at the FDC Philadelphia on or about August 21, 2006.

Under the provisions of the Federal Tort Claims Act, 28 U.S.C. 2675, we have six months from the date of receipt to review, consider, and adjudicate your claim.

All correspondence regarding this claim should be addressed to me at: Federal Bureau of Prisons, Northeast Regional Office, Room 801, U.S. Custom House, 2nd & Chestnut Street, Philadelphia, Pennsylvania 19106. If the circumstances surrounding this claim change in any fashion, you should contact me immediately. Also, should your address change, you should advise me accordingly.

Sincerely,

Henry J. Sadowski
Regional Counsel

EXHIBIT D

UNITED STATES GOVERNMENT

Memorandum

Northeast Regional Office, Philadelphia, PA
FEDERAL BUREAU OF PRISONS

DATE: September 10, 2008

REPLY TO ATTN OF: Henry J. Sadowski, Regional Counsel

SUBJECT: Administrative Tort Claim No. TRT-SER-2008-03595

TO: Fred Roberts, Reg. No. 58713-066
USP Coleman I

Your Administrative Tort Claim No. TRT-SER-2008-03595, properly received by this agency on March 24, 2008, has been considered for settlement as provided by the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2672, under authority delegated to me by 28 C.F.R. § 543.30. You seek compensatory damages in the amount of $750,000.00 for an alleged personal injury. Specifically, you claim that staff failed to protect you from an attack by two inmates while housed at the Federal Detention Center (FDC) Philadelphia, on August 21, 2006.

After careful review of this claim, I have decided not to offer a settlement. Investigation reveals that you were assaulted by two inmates after being placed in the recreation area in the SHU at FDC Philadelphia on August 21, 2006. Although you were assaulted and incurred some injuries, there is no evidence that staff knew or should have known of a specific threat to you or a need to keep you separated from the other inmates. There is no evidence to suggest you experienced a compensable loss as the result of negligence on the part of any Bureau of Prisons' employee. Accordingly, your claim is denied.

If you are dissatisfied with this decision, you may bring an action against the United States in an appropriate United States District Court within six (6) months of the date of this memorandum.

cc: Troy Levi, Warden, FDC Philadelphia
Scott A. Middlebrooks, Warden, USP Coleman I

ACKNOWLEDGMENT OF RECEIPT

DENIAL OF TORT CLAIM

I, Fred Roberts, Reg. No. 58713-066, hereby acknowledge receipt this 29th day of September, 2008, of the September 18, 2008 memorandum from Henry J. Sadowski, Regional Counsel, Northeast Region, Federal Bureau of Prisons, informing me of the denial of my tort claim (TRT-SER-2008-03595).

Fred Roberts
Signature

Witnessed this 29th day of September, 2008.

Staff Witness

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRED ROBERTS	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 08-5426
UNITED STATES OF AMERICA	:	

ORDER

AND NOW, TO WIT: This 18th day of February, 2011, it having been reported that the issues between the parties in the above action has been settled and upon Order of the Court pursuant to the provisions of Rule 41.1(b) of the Local Rules of Civil Procedure of this Court , it is

ORDERED that the above action is **DISMISSED** with prejudice, pursuant to agreement of counsel without costs.

MICHAEL E. KUNZ, Clerk of Court

s/Lynn Meyer
BY:_____
Lynn Meyer
Deputy Clerk

cc: Grant Palmer, Esquire (e-mail)
Scott Coburn, Esquire (e-mail)
Tyler Brody, Esquire (e-mail)
Susan Becker, Esquire (e-mail)

O:\41(b) Orders to Dismiss\Roberts v. US 08-5426 - 41b order.wpd

Welcome JOHN E WALLACE | Logout

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NER-2009-01221 **Short Description: WARRENDER V. LAPPON ET AL**

Case Login Information

Reference Number	1:09-cv-02697-KAM-LB
Short Description	WARRENDER V. LAPPON ET AL
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	Philadelphia (CCM)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	Brooklyn (MDC)
Monetary Relief Sought	$525,000.00
Estimated Amount	$
Office	Brooklyn
Jurisdiction	EASTERN DISTRICT OF NEW YORK
Responsible Legal Office	MCC New York

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	
Comments	

Case Resolution

Date	05/22/2012
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$1,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	Yes

Case Initiation Dates

Date Received	07/24/2009
Date Filed	06/30/2009

Case Progress

Current Owner	KENNETH BORK
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

HERBERT F.WARRENDER
Plaintiff,

vs.

HARVEY LAPPON,HENRY SADOWSKI, CAMERON LINDSAY,JOHN DOE #1, MICHAEL BERECKY,JONN DOE #2, C.BROOKS

09 2697

BIVENS ACT/TORT
CIVIL ACTION NUMBER _____
COMPLAINT WITH
SUPPORTIVE MEMORANDUM
OF LAW

MATSUMOTO, J.

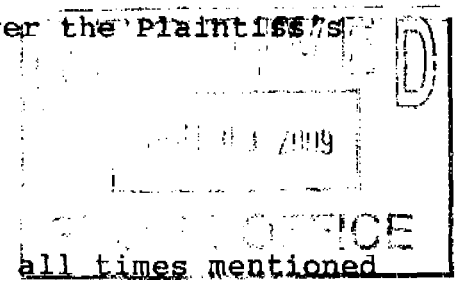
BLOOM, M.J.

JURISDICTION AND VENUE

1. This is a civil action authorized by 42 U.S.C. §1983 (Bivens Act, to redress the deprivation under the color of law, of rights secured by the United States Constitution of the United States. The Court has jurisdiction under Titles 28 U.S.C. §1331 and §1343(a)(3)).Plaintiff seeks declaratory relief pursuant to Title 28 U.S.C. §2201 and §2202.

2. The Eastern District of New York is appropiate venue under Title 28 U.S.C. §1391(b)(2), because it is where the events giving claim occured.

3. The Court has supplemental jurisdiction over the Plaintiff's State law claim under Title 28 U.S.C. §1367.



PLAINTIFF

Plaintiff, Herbert F.Warrender, is and was at all times mentioned herein is a prisoner of the UnitedeStates qnd is within the custody of the Federal Bureau of Prisons and is currently confined at the F.C.I.-2, located in Butner,North Carolina.

DEFENDANTS

Defendant, Harvey Lappon is the Director of the Federal Bureau of Prisons. He is legally responsible for the operations of the Federal

Bureau of Prisons within the United States and each institution under its jurisdiction, to include the Metropolitan Detention Center (M.D.C.), located in Brooklyn, New York.

Defendant, Henry Sadowski is the Regional Counsel for the Northeast Regional Office within the Federal Bureau of Prisons. He is legally responsible for all tort actions within the Northeast Region for the Federal Bureau of Prisons, and to include each institution under his jurisdiction, to include the M.D.C. in Brooklyn, New York.

Defendant, Cameron Lindsay is the Warden for the M.D.C. in Brooklyn, New York, under the control of the M.D.C.- Brooklyn. He is legally responsible for the operations of the M.D.C., and for the welfare, treatment of all prisoners of the institution.

Defendant, John Doe #1 is thewHealth Service Administrator for the M.D.C., under the control of the Federal Bureau of Prisons. He is legally responsible for the oversight of healthcare of all prisoners of the M.D.C. institution.

Defendant, Michael Berecky is a Medical Physican for the M.D.C. in Brooklyn, New York. He is legally responsible fortthe primary care at the M.D.C. for the prisoners of that institution. The Plaintiff seeks to also address that the Defendant is also placed under the claim in his individual capacity.

Defendant, John Doe #2 is a Physican Assistant at the M.D.C. located at the M.D.C. in Brooklyn, New York. He is legaàly responsible for the performance of medical treatment of all prisoners of that institution. He is also sought after in his individual caPacity.

Defendant, C. Brookes is a Physican Assistant at the M.D.C. in Brooklyn, New York. She is legally responsiblefor the medical treatment and care for the prisoners at the institution. She is also soght after in her individual capacity.

COMPLAINT

Count One: The following civil right(s) have been violated by one or more of the Defendants under the 8th and/or the 14th Amendment(s) of the United States Constitution forthe actions of denying the Plaintiff equal protection of law for the negligence of providing the safekeeping, healthcare and welfare to the Plaintiff.

Count Two: The deliberate indifference by the Defendant, C.Brookes constitutes cruel and unusual punishment clause for violating the 8th Amendment for the allegations of duty by creating medical indifference to the Plaintiff's serious medical needs and condition.

Count Three: The Federal Bureau of Prisons failed to provide the safekeeping and healthcare of the Plaintiff. The Federal Bureau of Prisons violated Title 18 U.S.C. §4042(a)(2).

Count Four: The intentional medical indifference for failure to dispense medications prescribed to maintain the Plaintiff's health, from a designated federally contracted detention facility in which the Plaintiff was recieving medical care and treatment; thereby constituting violations under the 8th Amendment.

Count Five: The denial of any compensation by the Federal Bureau of Prisons under the discretion of the Defendant, Henry Sadowski within his duties of Counsel under Tort Claim within Title 28 U.S.C. §2671 et. seq.

Count Six: Medical negligenge, and deliberate indifference by the Defendant, Michael Berecky, within the violation of both objective and subjective components, satisfying deliberate indifference clause.

Count Seven: The Plaintiff has no plan, adequate or complete remedy of law for the wrongs described within the 8th or 14th Amendments of the United States Constitution, the laws of the United States or the State of New York.

FACTS

Count One: On March 28,2008; the Plaintiff was recieved at the M.D.C., located in Brooklyn, New York, arriving from a federally contracted detention center (Wyatt).

The Plaintiff was processed and preliminary medically screened by the Defendant, John Doe #2. The intake process consisted of review of the medical summary from the detention center(Wyatt) and medication that were prescribed that were necessary to sustain the Plaintiff's health and life.

Count Two: Defendant, C.Brookes, in her official capacity as the actor of a Physican's Assistant, failed her duties on April 1,2008; at the M.D.C., that in her personal judgement caused medical harm to the Plaintiff, risking life, by her individual choice.

I informed C.Brookes, that I needed medications immediately because I was medically sustaining tremors (pre-warning that I was going to sustain a seizure,by aura that I was undergoing at the time) this was due to the fact that I had not recieved any medication since the early morning of March 28,2008, at the contracted detention facility (Wyatt).

C.Brookes expressed lack of concern or care, and stated, "I would have to wait my turn to be seen for a complete medical screening, that she was going to go by a alphabetical roster that had been updated, since there were prisoners that came into the housing unit on a later date, and that she was going to leave at 3:00 pm., she only entered the housing unit at 10:30 am; and that she was uncertain if I would be seen on April 1,2008."

As an outcome of deliberate medical indifference, the Plaintiff underwent a grand mal (tonic clonic) seizure episode that was caused by the lack of medications that were necessary to maintain the Plaintiff's seizure condition, and due to such action placed the Plaintiff at serious life-threatening staus (immediate) care was needed. The intentional negligence and poor judgement by C.Brookes almost cost the PLaintiff his life, and the Plaintiff had to be taken to a local hospital (Lutheran) to attempt to stablized the Plaintiff emergency medical crisis, that possibly would have caused the Plaintiff to lose his life.

Count Three: The Plaintiff was recieved on March 28,2008 with a medical summary and all medications from a federally contracted detention center (Wyatt).

The Plaintiff was processed was under the care of a physican at the contracted detention facility (Wyatt), and placed on medications to maintain the Plaintiff's health and life.

All medical records and medications were under the exchange of custody from the security personnel responsible for transport of the Plaintiff to the Defendant, John Doe #2, in which the Plaintiff did not have control or possession of the medications.

Previously, the Plaintiff was at this same facility on/or about April 26,2007; in which the Plaintiff had to be immediately transported to the local hospital (Lutheran) due to uncontrollable seiaures that were happening at the M.D.C. in which the Plaintiff had to be hospitalized due to the deliberate negligence to the point that the PLaintiff was in immediate life-threatening status, and hospitalized in the hospital's Intensive Care Unit until May 8,2007; in which the Plaintiff was stablized and safe, that the hospital lowered the care level of the Plaintiff to a critical-care unit in the Neurology Department. The Plaintiff was discharged from the hospital on May 11,2008; and returned to m.D.C. with a discharge summary and instructions as to the needed care for the Plainiff.

Also, on July 4,2007; the Plaintiff had to be hospitalized in a local hospital (West Maryland Medical Center) in Cumberland, Maryland from multiple seizures experienced at his Federally designated facility (F.C.I.- Cumberland). Again, the PLaintiff was hospitalized in the Intensive Care Unit, in which the Plaintiff had a central-line inserted in his chest, and on July 10,2007; the Plaintiff was discharged to his facility with a summary that the central-line was intact. The central-line was removed at the institution on July 19,2007, by the prison physican, and all information was entered in the Federal Bureau of Prisons (Sentry) medical records.

Here, we have two seperate ocassions that required the Plaintiff to be hospitalized in a Intensive Care Unit in local hospitals within

a period of seventy (70) days apart. Both hospitalizations were entered in the Sentry and were only accessible to medical personnel within the Federal Bureau pf Prisons.

On July 25,2007; the Plaintiff went out on a Writ for the District of Connecticut. Under transport, the Plaintiff in the distance of a F.D,C.- Philadelphia enroute to the contracted detention center (Wyatt) the Plaintiff experienced seizure episodes on a Federal BUreau of Prisons transport bus, under the custody of employees of the Federal Bureau of Prisons.

While the Plaintiff was actively seizing, a member of the transport team contacted the U.S. Marshals (Providence, Rhode Island), the Rhode Island 911 E.M.S., the contracted detention center, and the Rhode Island State Police. The Plaintiff was taken to a local hospital in Warwick, Rhode Island until he was stabilized, and then was transported to the detention facility, in which he had to transported to a secondary hospital in Providence, Rhode Island. The transport team had to file incident reports to the Federal Bureau of Prisons in New York.

So, as we can see, there was no lack of any previous availability of medical records under the Plaintiff's prison records (08886-014), and the medical personnel at the M.D.C. had first-hand knowledge and access to the PLaintiff's medical records by previous experience, and information inputted in Bureau's Sentry system of the Plaintiff's seizure disorder, in which caused hospitalization on April 26,2007, and April 1,2008, and dictated by immediate life-threatening status.

Count Four: The Plaintiff arrived with prescribed medications to maintain his health, from a federally contracted facility (Wyatt). The prescriptions were filled by Correct RX Pharmany of Linthicum, Maryland. The Plaintiff never recieved any medications at the M.DC. between the dates of March 28,2008 through April 7,2008; with the exception of the Plaintiff' hospitalization.

Count Five: The denial of compensation by Defendant, Henry Sadowski pursuant to the Federal Tort Act.

The Plaintiff filed on May 29,2008; at the F.C.I.- Cumberland, aadministrative Tort Claim in compliance of Title 28 U.S.C. §2671 et.seq.

On June 13,2008; Defendant sent the PLaintiff a official re-

ciept to the PLaintiff's complaint. The notification in which the Administrative Claim was filed on June 5,2008; and assigned the following claim number: TRT-NER_2008-04837; and further stated "that under Title 28 U.S.C. §2675, that the Government has six (6) months from the date of reciept to review, consider and adjudicate Plaintiff's claim."

On December 26,2008; PLaintiff recieves a copy of a memorandum from Regional Counsel, Henry Sadowski; that on December 2,2008; the Plaintiff's claim is denied.

On this same memorandum, it clearly states "if you disagree with this decision against the United States , you have six (6) months to file your complaint against the United States in the appropiate District Court.

It is the belief of the Plaintiff that he filed the Administrative Claim in compliance of 28 C.F.R. §543.31(c). It is further believed that once Regional Counsel denied the Administrative Claim, thatthe Plaintiff satisfied the Administrative Claim process after the Plaintiff was informed to file in court, as a actor on the behalf of the United States Attorney General designee, and serves as a waiver that excludes immunity protections under a Bivens action and the Tort for monetary compensation.

When the Plaintiff originally filed the Administrative Claim, the Plaintiff lacked evidence other than first-hand knowledge in which the Plaintiff had sought a lower compensation amount. The Plaintiff has sought evidence to support his claim, and has further obtained newly discovered evidence from the hospital that provided treatment.

Count Six: Defendant, Michael Berecky was my assigned primary medical physican, both in April 2007, and April 2008.

Defendant, Berecky committed medical malpractice under the color of New York State law for the cupable recklessness by committingaan act of deliberate indifference, by failing to notify emergency medical personnel after the Plaintiff was placed in a life-threatening staee, and on-going seizure beyond the safety zone of five (5) minutes, subjecting the Plaintiff to substancial risk and harm, at the time, he had knowledge of the Plaintiff's health problems. and the

seiaure disorder. Defendant, Berecky intentionally delayed making the determination to contact E.M.S. after allowing the PLaintiff undergo seizing for one (1) hour, disregarding the fact that the Plaintiff's life, health and safety, due to the lack of oxyegen and blood were not flowing into the PLaintiff's brain and that the Plaintiff's heart raTe had continually increased from the physical strain, in which the Plaintiff on the E.M.S. was transported to the local hospital with life-support, due to the lack and absence of medications necessary for the Plaintiff's health and life, due to such medical carelessness.

The lack of medications lead to the deteriation of the mental health,activated by triggering the degree exceeding the seizure threshold that ignited the Plaintiff into the immediate life-threatening threshold.

Count Seven: The Plaintiff has sought to remedy some of the claims within this suit by the Administrative Remedy Procedure by the way of the Federal Bureau of Prisons, and of the Federal Tort Claim, in which the Defendants continually steer the Plaintiff around by the claim that the Plaintiff has to filed his complaints into a differeat region, when in fact the events happened in the Northeast Region, and they continue to deny the Plaintiff's claims and the remedies available in the established Administrative Procedure designed by the Federal Bureau of Prisons.

After careful evaluation of newly found evidence, the only remedy for the Plaintiff is to address the violations of Constitutional and Federal Statutes, as also New York State law, is to bring forth the complaonts and violations within a Bivens action into the Court of Law, and to address the Tort action as well.

RELIEF SOUGHT

WHEREFORE, the Plaintiff, Herbert F.Warrender respectfully requests that this HonorableCourt enter judgement in the interest of the Plaintiff as sought:

1. A declaration that the acts and/or omissions described herein violated the Plaintiff's right(s) under the United States Constitution, Federal Statute, or New York laws.

2. Compensatory damages in the amount of one (1) hundred thousand dollars against each defendant jointly within the scope of acting under the color of law.

3. A jury trial on all issues that are triable by jury in belief that the Plaintiff will not be in custody after July 1, 2009.

4. Punitive damages in the amount of seventy-five (75) thousand dollars against each one of the defendants, to include the defendants in their individual capacity.

5. Plaintiff's cost incurred in this action before the Court.

6. Any additional relief that this Court deems just, proper and equitable for the Plaintiff for the harm that was caused and subjective to the Plaintiff's to his maintainence of safety, health, and life.

Dated: 4/1/09

Herbert F.Warrender
I.D. #08886-014
F.C.I.-2 P.O. Box #1500
Butner, North Carolina 27509

VERIFICATION

I, Herbert F.Warrender have read the foregoing complaints and hereby verify that all issues within are true and correct to the best of my knowledge.

I certify under the penalties of perjury that the foregoing instument is true and correct under Title 28 U.S.C. §1746. Executed this 1st day of April, 2009.

Herbert F. Warrender

SUPPORTIVE MEMORANDUM OF LAW

Venue: A lawsuit can be filed in a Federal District Court where: 1.) the PLaintiff resides and/or where the acts or omissions occurred, under Title 28 U.S.C. §1402(b), and 28 U.S.C. §1391.

The Court also retains supplemental jurisdiction over the Plaintiff's State law claims under Title 28 U.S.C. §1367.

Defendants:

Defendant, **Harvey Lappon** Director; is required to see that all Federal Bureau of Prisons institutions meet the compliance of the 8th and 14th Amendments of the United States Constitution, and within Title **18 U.S.C. §4042(a)(2)**, seeing that the laws provide equal protection of law, in the PLaintiff's case at large, avoiding any negligence of indifference that would violate the Federal Statutes. The compliance of law that the employees are to excercise "ordinary diligence to keep all prisoners from harm."

Being that this Defendant serves as Director has much responsibilty in which requires him to see that all federal statutes, regulations or policies are within compliance, in which the strict compliance lacked the protection for the Plaintiff.

A discretionary act exception does not apply when the statutes, regulations,laws or policies, when a employee fails a adequate standard of care. **Berkowitz vs. United States**, 486 U.S. 531, 536 (1988); **Barton vs. United States**, 609 F.2d 977, 979 (10th Cir. 1979) (existence of a "fixed or readily ascertained standard" of conduct means the official's actions are not discretionary). In other words, an act is discretionary only if a matter of choice for the acting employee.

In this instant case, it goes beyond the scope of a federal tort action, federal statutes have been violated, as has constitutional amendents, within the protections afforded to the Plaintiff (prisoner) under the 8th and 14th Amendments of the United States Constitution. See, **Zabala vs. United States**, 567 F.2d 1140 (1st Cir. 1977); **Leibowitz vs. United States Department of Justice**, 729 F.Supp. 556 (E.D. Mich. 1989), affirmed, 914 F.2d 256 (6th Cir. 1990).

It is the duty of the Federal Bureau of Prisons within the

components of **Title 18 U.S.C. §4042(a)(2)**, to provide the safe-keeping, care, health and welfare of all prisoners within the controlling custody of the federal prison system. See, **Jones vs. United States**, 91 F.3d 623 (3rd Cir. 1996); **United States vs. Muniz**, 374 U.S. 150 (1963).

Defendant, **Henry Sadowski**, is the legal counsel for the Federal Bureau of Prisons, the appointed designee for the Attorney Generals Office. He is acting designee for legal issues within the Northeast Region of the United States, in which the Plaintiff was within custody at a facility in his jurisdiction and control. The Plaintiff was in compliance in filing of the federal tort claims act pursuant to **Title 28 U.S.C. §2671 et.seq.**; for wrongful actions by Medical Personnel within the Metropolitan Detention Center (M.D.C.) located in Brooklyn, New York.

The Plaintiff was exhausting the tort for negligence, in which the four (4) elements to support the claim were met by (1) duty of care, (2) breached or Violated this duty, (3) the breach caused harm to the Plaintiff and (4) the Plaintiff suffered damage as a result. See, **Kirby vs. Carlisle**, 178 PA. Supr. 389, 116 A.2d 220 (1955).

When the Plaintiff had initiated his claim on May 192008; the Plaintiff had only sought personal injury compensation in the minute amount of two thousand five hundred (2,500) dollars, since the only evidence that the Plaintiff could introduce was a reciept when the Plaintiff recieved medications at the M.D.C. Pharmacy dated on April 7,2008.

The information that the Plaintiff stated ocurred between the dates of March 28,2008 through April 7,2008. The Plaintiff was recieved and processed with medical records and prescribed medications, and had filed official complaint that he never recieved medications that resulted in the Plaintiff be hospitalized for a serious medical disorder that has been exstant of recurring epileptic grand mal (tonic clonic) seizures, a status known as **"status epileptus"**. The seizures endangered the Plaintiff's life due to the lack of

'any necessary medications' that are used to maintain the PLaintiff's health and life, and that they are further needed to allow the Plaintiff to live day to day, with some control. See, **Jones vs. United States**, 91 F.3d 623 (3rd Cir. 1996); but yet, the Plaintiff had provided information adequate to determine whether settlement was justifiable. See, **Tidd vs. United States**, 786 F.2d 1565 (11th Cir. 1986); the Plaintiff was well within the allotted time frame of two (2) years in filing, in compliance of **Title 28 U.S.C. §2401(b).**

Defendant, Henry Sadowski had responded in behalf of the M.D.C., that my claim was **denied** on December 2,2008 pursuant to **Title 28 U.S.C. §2675(a).** At that time, I was directed by Mr. Sadowski that if I was dissatified that 'I could file in the United States District Court' in which brings legal action before the Court of jurisdiction. **McNeil vs. United States**, 964 F.2d 647, 648 (7th Cir. 1992) **affirmed**, 508 U.S. 106 (1993).

Defendant, **John Doe #1**, serves as the Health Service Administrator in which he/she is held accountable for all healthcare at the M.D.C., for the prisoners.

Here we will see violations of **Title 18 U.S.C. §4042(a)(2)** and the **8th Amendment** by John Doer#1, based upon the negligence of accessing of the Plaintiff's medical records within the **SENTRY** system that was easily accessible, in which contains extensive medical profile of the Plaintiff, and that the facility including medical personnel having had the Plaintiff medical needs at the M.D.C. previously less than a year ago, and required the PLaintiff to be hospitalized in a Intensive Care Unit at the same hospital for thirteen (13) days, in which between the security personnel, or the United States Marshal Service were required to maintain security on the Plaintiff, and that some of the security personnel had to be rescheduled to accomodate the security needed to maintain the custody of the Plaintiff at the hospital. As you can well see that this is not the first time that the PLaintiff had to be hospitalized for

seizures, thereby displaying that there was previous injury to the Plaintiff on April 28,2007; substanciating the requirements afforded under **Title 42 U.S.C. §1997(e); and 28 U.S.C. §1346(b)(2).** So, in this instant case any "qualified immunity" in behalf of the Defendants should be carefully examined over the liability issues as well. See, **Harlow vs. Fitzgerald**, 102 S.Ct. 2727 (1982); 457 U.S. 800 (1982).

With there being access to such medical records, such failure by the supervising official on the behalf of the medical department **'proximate cause'** is met, because he knew of the **'serious medical condition'** or, should have known, that could have effect to substahneial risks to the PLaintiff's health, if the PLaintiff was provided his regimental medications that had been either provided by physicans at the federally contracted detention facility (Wyatt) or directly from medical authorities at a Federal Bureau of Prisons facility (F.C.I.-Cumberland), it should have never reached the tragic event that lead to the Plaintiff being hospitalized at the local hospital. See, **Sealock vs. Colorado** 218 F.3d 1205 (10th Cir. 2000); **Jackson vs. Kelly**, 557 F.2d 735 (10th Cir. 1977); **Hunt vs. Uphoff**, 199 F.3d 1220, 1223-24 (10th Cir. 1999); **Boretti vs. Wiscomb**, 930 F.2d 1150 (6th Cir. 1991).

Defendant, **Michael Berecky**, serves as a primary care provider at the M.D.C., and has also serve as the assigned physican for the Plaintiff for both occurences, one on April 27,2007, and the other on March 28,2008.

Here we see, that the PLaintiff had experienced a hospitalization under the care of Berecky on the dates of April 27,2007 and May 11, 2007, so directly Berecky knew or should have known,by the way of

transfer roster signifying that the Plaintiff would be arriving from the contracted detention facility (Wyatt) to the M.D.C., since prisoner transport records are produced in advance to the prisoner's arrival.

In part, the Court need to see that a **'serious medical condition'** existed prior to the Plaintiff's second arrival, and that the Plaintiff was under directed medical care and that the Plaintiff was actively recieving medication to substanciate the Plaintiff' health, and yet' the failure of Berecky's disclosure both deliberate indifference to meet the Plaintiff' ongoing medical needs, and the intentional interfering with the treatment that was prescribed by either the contracted detention center and/of the Federal Bureau of Prisons, Bereckly's employer.

Berecky had knowledge or should have had knowledge by previous experience (April 2007) of the Plaintiff's medical issues, and that a medication breakdown within the body, and being a physican, should know, that some medications require a theraputic blood level, but we see that if there, that if those levels are not maintained, that the actions or omissions by Berecky would cause the Plaintiff substancial harm as a result.

A serious medical condition exists where failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Relevant factors in determining whether a serious medical condition existed, include the existence of an injury that a reasonable doctor or patient would find important and worthy of comment that significantly affects an individual's daily activities; or the existence of chronic or substancial pain.

If we look at **Estelle vs. Gamble**, 429 U.S. 97, 104-05(1976), the Court set out three general types of prohibited conduct, (1) indifference manifested by prison doctors in their response to a prisoner's need(s), (2) or by prison guards... intentionally interfering, delaying access to medical care, or (3) intentionally interfering with treatment once prescribed. "There is no need to show malice or purpose to harm, to establish deliberate indifference." **Farmer vs. Brennan** 511 U.S. 825 (1994).

Looking at **Sutton vs. U.S. Airlines,** 527 U.S. at 488, 119 S.Ct. 2149, epilepsy is defined as a "group of nervous system disorders that feature repeated episodes of convulsive seizures, abnormal behaviors, and blackouts. All types of epilepsy have an uncontrolled electrical

discharge from the nerve brain cells." **Signet/Mosby Medical Encylopedia, 211 (1985).** See also, **Merriam-Webster Medline Plus**, at **www.2merriam webster. com; Sutton**, identifies epilepsy as a type of impairment that may or may not be disabling with the use of medications.

In **Jones vs. United States**, 91 F.3d 623 (3rd Cir. 1996), the prisoner was withheld prescribed medication to treaT his condition Prison officials withheld his medication and he therefore suffered a stroke. The Court held that the government breached its legal duty of care under **Title 18 U.S.C. §4042.**

Serious conditions need not be life-threatening, **Washington vs. Dugger**, 860 F.2d 1018 (11th Cir. 1988). Serious medical need will have been diagnosed by a doctor as requiring treatment, or will be so obvious that even a layperson would see that treatment is needed. **Hunt vs, Uphoff**, 199 F.3d 1220 (10th Cir. 1999); unmedicated epilepsy is a **'serious threat'** to health. **Hudson vs. McHugh**, 148 F.3d 859 (7th Cir. 1998). **Hendricks vs. Coughlin**, 942 F.2d 109 (2nd Cir. 1991), the deliberate indifference test is applied in cases alleging prison officials failure to attend to an inmate; medical needs.

We see that the **8th Amendment of the United States Constitution** holds merit over the fact that cruel and unusal punishment is understood to guarantee a prisoner's right to necessary medical care. **Bell vs. Wolfish**, 441 U.S. 520 (1979).

In order for the Plaintiff to establish a United States Constitutional 8th Amendment claim arising out of inadequate medical care, a prisoner must prove deliberate indifference to hismedical needs.

The standard of deliberate indifference included both objective and subjective components. First, the alleged deprivation must be in objective terms, sufficeently serious. Second, the defendant must act with a sufficiently cupable state of mind. An offical acts with the requisite deliberate state of mind when the official knows of and disregards an excessive riskd to the inmate's health and safety; the official must both, be aware of the facts from inference can be drawn that a substancial risk of serious harm exists, and he must draw inference. **Hathaway vs. Coughlin**, 37 F.3d 63 (2nd Cir. 1994).

Defendant, **C. Brookes**, bears the title as Phyician's Assistant formerly of M.D.C.-Brooklyn, but is currently at F.C.I.-2 in Butner, North Carolina for the Federal Bureau of Prisons.

On April 1,2008; Ms. Brookes was working in housing Unit 41 (the

medical screening unit) for all new male prisoners at the M.D.C. Approxiamately around 10:30 am, the defendant entered the housing unit 41 and addressed the population that she was conducting the medical screening and if we should have any questions to raise our hands and that she would address them.

Well, the Plaintiff stood before numerous prisoners and addressed the issue that he was currently experiencing tremors (a sign of pre-aura for seizures) and that I have not had any medications (lisinopril, lovastatin, abuterol, vasotec, nitroglyercin, triamcinolone, or valporic acid) since my arrival on March 28,2008; and that each time any medical staff came into the unit,to dispense medications, I sought medications which were not available to me.

The Plaintiff further stated that he needed his medications immediately as for his health was deteriating, and it was necessary to sustain his health and safety. In **Jones vs. United States**,91 F.3d 623 (3rd Cir. 1996)(**Jones** alleged that Federal employees "failed tp supply Plaintiff with his medication, although they knew or should have known that [the medication] was necessary for his health. **Hudson vs. McHugh**, 148 F.3d 859 (7th Cir. 1998) unmedicated epilepsy is a serious threat of health. **Carnell vs. Grimm**, 872 F.Supp. 746, 755 (D. Haw. 1994) a serious medical need exists if the failure to treat the need could result in further significant injury or 'necessary and wanton pain'. **Blankenship vs. Kerr County Texas**, 878 F.2d 893 (5th Cir. 1989), arrestee known to be a epileptic had a seizure in a unpadded cell and was injured though a doctor was called, the Court held it to be 'deliberate indifference'.

She responded to my inquiry that "I must wait until my name was called on her alphabetical roster, and that she was leaving at 3:00 pm, and that I would have to wait until tomorrow when someone else came around". **Greeno vs. Daley**, 414 F.3d 645 (7th Cir. 2005), treatment so blatantly inappropiate as to evidence intentional mistreatment likely to seriously aggravate [plaintiff's] condition. Id. at 655. **Roman vs. Koehler**, 775 F.Supp 695 (S.D.N.Y. 1991), in order to state a claim of inadequate medical care against prison officials, a plaintiff must allege that his access to physicans for necessary medical care was unreasonably delayed or denied, or that prescribed medical treatment was not administered.

Miltier vs. Beorn, 896 F.2d 848 (4th Cir. 1990), doctors failed to respond to an inmate's complaint of chest pain, blackouts and breathing problems.

Defendant ignored the fact that the Plaintiff was experiencing a serious medical need, as in fact the Plaintiff was already suffering from tremors, in which the Defendant's actions displayed deliberate indifference, meeting all the components to substanciate cruel and unusual punishment in violation of the 8th Amendment. See, Hathaway vs. Coughlin, 37 F.3d 63 (2nd Cir. 1994).

Failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain". Gutierrez vs. Peters, 111 F.3d 1364 (7thCCir. 1997); Chance vs. Armstrong, 143 F.3d 698 (2nd Cir. 1998).

At this point, the Defendant met the terms that could and should be recognized as medical malpractice as a professional, in which any reasonable doctor or layperson could attest composing to a level of deliberate indifference, supported additionally under violation of Title 18 U.S.C. §4042 so blatantly. The failure to act with conscious disregard of a approaching substancial reisk or serious harm. Hathaway vs. Coughlin 99 F.3d 550 (2nd Cir. 1996).

Failure to treat a prisoner's condition could result in further significant injury or 'unecessary and wanton infliction of pain'. Gutierrez vs. Peters 111 F.3d 1364 (7th Cir. 1997); Chance vs. Armstrong, 143 F.3d 698 (2nd Cir. 1998).

At this point, Ms. Brookes met the terms that could and should be recognized as medical malpractice as a professional, in which any reasonable doctor or layperson could attest composing to a level of deliberate indifference, supported additionally under violation of Title 18 U.S.C. §4042 so blatantly. The failure to act with conscious disregard of approaching substancial risk or serious harm. Hathaway vs. Coughlin, 99 F.3d 550 (2nd Cir. 1996).

Direct actions by a medical employee whether government employee or a private party should remain in the same standards.

An inmate is denied medical care, deliberate indifference may be shown where there is inference with treatment or significant delay in providing treatment. The amount of delay typically depends on the urgency and magnitude of the need. The 10th Circuit has recently held that a delay constitutes deliberate indifference where the Plaintiff can show that the delay caused substancial harm, this harm can include unnecessarily prolonged suffering. Sealock vs. Colorado,

218 F.3d 1205 (10th Cir. 2000).

Consciously disregarding in inmate's legitimate medical needs is not 'mere medical practice', but of deliberate indifference. **Harrison vs. Barkley**, 219 F.3d 132 (2nd Cir. 2000).

Here we have that Ms. Brookes was apparemtly made aware of a serious medical need, and yet intentional negligence lead to failure of preventive healthcare and the safe well-being of the Plaintiff.

A serious medical need is addressed by a Court, **Hill vs. Dekalb Regional Youth Detention Center**, 40 F.3d 1176 (11th Cir. 1994), "a serious medical need is a condition that has been diagnosed by a physican mandating treatment or ... is so obvious that a layperson would easily recognize the necessity of a doctor's attention".

Significant injury, pain or loss of functions can constitute serious medical need even if they are 'not life-threatening'. **Pellman vs. Shelby County**, 902 F.Supp 797, 801-02 (W.D. Tenn. 1995); **Clement vs. Gomez**, 298 F.3d 898, 904 (9th Cir. 2002).

Defendant, **John Doe #2** is employed as a Physican's Assistant at the M.D.C.-Brooklyn for the Federal Bureau of Prisons.

On March 28,2008; John Doe #2 served as the incoming medical personnel in the R&D processing room at the M.D.C.-Brooklyn.

His position was to recieve from security personnel 'all incoming medications and medical records' and to conduct preliminary medical screenings, test for TB, amd review all medications in which John Doe #2 failed; to include the negligence to relay necessary medical records and medications that were recieved from the contracted detention facilty (Wyatt) in Central Falls, Rhode Island; in which lead to the initial 8th Amendment violation for cruel and unusual punishment. See, **Inmates of Occoquan vs. Barry**, 717 F.Supp 854 (D.DC 1989). lack of adequate initial screening contributed to constitutional violation.

The Plaintiff believes that the Defendants will attempt to move for summary judgemant for dismissal under the basis of immunity, which would be inappropiate forsuch defense by the actions that are attested. See, **Howell vs. Evans** 922 F.2d 712 (11th Cir. 1991), the relevant actions of a medical official, if the Plaintiff demostates that a reasonable doctor in the Defendant's position would have known that his/her actions were grossly incompetent by medical standards, a jury would find deliberate indifference and qualified immunity would be inappropiate.

Warren vs. Purcell, 2004 WL 197642 at #6 (S.D.N.Y. September 3, 2004)(unpublished)(holding that a baffling grievance response that left a prisoner with no clue what to do next was a special circumstance justifying failure to exhaust.

Under qualified immunity defense, officials may be liable only if they "knew or should have known" that their actions or inactions violated a "clearly established constitutional or statutory right". See, Harlow vs. Fitzgerald, 102 S.Ct. 2727 (1982).

The Plaintiff had sought to go through the Administrative Remedies as specified by the Federal Bureau of Prisons, and 1997(e), the Warden at the M.D.C.-Brooklyn, the Regional Director, had either failed to respond, or circumvented to a different region, in which clearly the issue belong in the Northeast Region; as seeing, that the Northeast Region had also failed to meet their on rules as established by the Federal Bureau of Prisons.

In Gomez vs. Winslow, 177 F.Supp.2d at 984 (N.D.Cal. 2001), the District Court noted that other courts have recognized that" inmates need not exhaust administrative remedies when doing so would be futile," and that "under some circumstances exhaustion should not be required when no remedy is available." It is quoted with apparent approval that another district court's comment that [t]hat it would be a strange rule thaT an inmate, who has recieved all he expects or reasonably expect, there is nothing to appeaL (his grievance to the highest possible within the administrative grievance process) even when there is nothing to appeal." Nitz vs. Correctional Officer French, 2001 U.S. District. LEXIS 9201, 2001 WL 747445 at #3 (N.D. Ill, 2001).

Other courts agree with Gomez and Ross (Ross vs County of Bernalillo 365 F.3d 1181 (10th Cir. 2004)), that "inmates need not exhaust administrative remedies when doing so would be entirely futile," and that [w]hen there is no possibility of any further relief, the prisoner's duty to exhaust available remedies is complete." Id. 177 F.Supp.2d 1098, 1106 (N.D. Cal. 2002)(prisoner is not required to exhaust further administrative appeals when all relief prison adminstrative appeal system could have been recieved), Brady vs. Attygala, 196 F. Supp. 2d 1016, 1021 (C.D. Cal. 2002).

Therefore, the Plaintiff moves this Court the obligation of providing all triable issues, to be heard, due to the fact there are no frivilous claims, and that the Plaintiff will be released from the custody of the Federal Bureau of Prisons within a minute timr period.

UNITED STATES GOVERNMENT

Memorandum

Northeast Regional Office, Philadelphia, PA
FEDERAL BUREAU OF PRISONS

DATE: December 2, 2008

REPLY TO ATTN OF: Henry J. Sadowski, Regional Counsel

SUBJECT: Administrative Tort Claim No. TRT-NER-2008-04837

TO: Herbert Warrender, Reg. No. 08886-014
FCI Butner - Medium II

Your Administrative Tort Claim No. TRT-NER-2008-04837, properly received by this agency on June 5, 2008, has been considered for settlement as provided by the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2672, under authority delegated to me by 28 C.F.R. § 543.30. You seek compensatory damages in the amount of $2,500.00. Specifically, you allege that while at MDC Brooklyn, you were not timely provided epilepsy medication, resulting in a seizure that caused pain and risk of permanent damage.

Brooklyn on March 28, 2008, and departed on April 15, 2008. [illegible] which necessitated your transportation to a local hospital. Upon return from the hospital, you were provided care and treatment as necessary and appropriate. You have not provided evidence that the MDC Brooklyn Health Services Department acted negligently or otherwise denied you appropriate medical care. There is no evidence to suggest you experienced a compensable loss as the result of negligence on the part of any Bureau of Prisons' employee. Accordingly, your claim is denied.

If you are dissatisfied with this decision, you may bring an action against the United States in an appropriate United States District Court within six (6) months of the date of this memorandum.

cc: Tracy W. Johns, Warden, FCI Butner - Medium II
Cameron Lindsay, Warden, MDC Brooklyn

COPY

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JUN 0 1 2009 ★
BROOKLYN OFFICE

Herbert F Warrender
I.D.# 08886-014
Fed. Corr. Inst - I
P.O. Box 1500
Butner, N.C. 27509

Dear Clerk,

I have enclosed my second copy of my Bivens / Tort Claim seeking to be filed within the Court.

On my Petition to Proceed without prepayment of fees and affidavit, I have included a copy of my inmate account, in which will also present that a $5.00 fee was distributed to the Court on 4/20/09 under secondary mailing by U.S. Treasury Dept. I have asked my correctional counselor to place a tracer on the check to see if it has been redeemed.

I had mailed it under the prisoner "mail box rule" on April 1, 2009; submitting it to the mailroom personnel, since it was considered under F.B.O.P. policy that all "legal" mail can be sealed after inspection by prison personnel.

I had filed less than the 6 month expiration of FTCA, as well.

Can you please send me an

acknowledgement that it has now
been recieved and docketed.
Thank you For your cooperation.

Sincerely

6/1/2009

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

☐ ORIGINAL

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
HERBERT F. WARRENDER, #08886-014

(b) County of Residence of First Listed Plaintiff (KINGS COUNTY)
(EXCEPT IN U.S. PLAINTIFF CASES)

FCI-2
P.O. BOX 1500
BUTNER, NC 27509

(c) Attorney's (Firm Name, Address, and Telephone Number)
(PRO SE: SEE ABOVE)

DEFENDANTS
HARVEY LAPPON, HENRY SADOWSKI, CAMERON LINDSAY, JOHN DOE #1,

County of Residence of First Listed Defendant (KINGS COUNTY)
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

MICHAEL BERECKY, JOHN DOE #2,

Attorneys (If Known)
C. BROOKS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☑ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

09 2697

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

MATSUMOTO, J.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

BLOOM, M.J.

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health		☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other		☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General		☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty		☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other			☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights			☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (**Do not cite jurisdictional statutes unless diversity**):
Brief description of cause: BIVENS ACTION, PURSUANT TO 42 USC 1983

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND $ CHECK YES only if demanded in complaint: JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions) JUDGE —RANDOM— DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE KAM MAG. JUDGE LB

09cv 2697

ARBITRATION CERTIFICATION

I, _____, counsel for _____ do hereby certify pursuant to the Local Arbitration Rule 83.10 that to the best of my knowledge and belief the damages recoverable in the above captioned civil action exceed the sum of $150,000 exclusive of interest and costs.
_____ Relief other than monetary damages is sought.

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more or its stocks:

_____

Please refer to NY-E Division of Business Rule 50.1(d)(2)

1.) Is the civil action being filed in the Eastern District of New York removed from a New York State court located in Nassau or Suffolk County: NO

2.) If you answered "no" above:

a.) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? NO

b.) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? YES

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County? _____

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

Yes_____ **No**_____

Are you currently the subject of any disciplinary action(s) in this or any other state or federal court?

Yes_____**(If yes, please explain)** **No**_____

_____

_____

Please provide your E-MAIL Address and bar code below. Your bar code consists of the initials of your first and last name and the last four digits of your social security number or any other four digit number registered by the attorney with the Clerk of Court.
(This information must be provided pursuant to local rule 11.1(b) of the civil rules).

ATTORNEY BAR CODE:_____

E-MAIL Address: _____

I consent to the use of electronic filing procedures adopted by the Court in Administrative Order No. 97-12, "In re Electronic Filing Procedures(EFP)", and consent to the electronic service of all papers.

Signature: _____

09 3036

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DAVID BERNARD ROCKETT,

Plaintiff,

-against-

UNITED STATES OF AMERICA; CAMERON LINDSAY, Warden, Metropolitan Detention Center Brooklyn; R. BEAUDOUIN, M.D., Medical Officer, MDC Brooklyn; M. BORECKY, M.D., Medical Officer, MDC Brooklyn; D. SCOTT DODRILL, Regional Director, Northeast Region, Federal Bureau of Prisons; and HARRELL WATTS, Administrator, National Inmate Appeals, Federal Bureau of Prisons, in their individual capacities and in their official capacities as employees of the Federal Bureau of Prisons and the United States of America,

Defendants.

----------X

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y
★ JUL 15 2009 ★
BROOKLYN OFFICE

COMPLAINT

JURY TRIAL DEMANDED

KORMAN, J.

NATURE OF THE ACTION AND JURISDICTION

1. Plaintiff, David Bernard Rockett, brings this action against defendant United States of America and the above-captioned individual defendants pursuant to 42 U.S.C. § 1983, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Tort Claims Act.

2. This Court has subject matter jurisdiction over the federal claims pursuant to 28 U.S.C. §1331 and 28 U.S.C. § 1346(b).

VENUE

3. Under 28 U.S.C. § 1391(b), venue is proper in the Eastern District of New York because the acts and omissions complained of occurred in this judicial district.

PARTIES

4. David Bernard Rockett ("Plaintiff") is currently incarcerated as a sentenced federal prisoner at Moshannon Valley Correctional Institution and, at all times relevant to the claims arising herein, was a pre-trial detainee at the Federal Bureau of Prisons Metropolitan Detention Center Brooklyn ("MDC Brooklyn").

5. Defendant Cameron Lindsay is and was at all times relevant to this complaint the Warden of MDC Brooklyn and, as such, is and was responsible for the supervision and administration of MDC Brooklyn, a facility operated and maintained by BOP, including but not limited to the provision of medical services and maintaining the facility in a clean and safe condition for all individuals who are or were within MDC Brooklyn at anytime. He is being sued in his individual capacity and in his official capacity.

6. Defendant R. Beaudouin is and was at all times relevant to this complaint a medical professional at MDC Brooklyn and, as such, is and was responsible for the delivery of medical care at MDC Brooklyn. Defendant Beaudouin is being sued in his individual capacity and in his official capacity.

7. Defendant M. Borecky is and was at all times relevant to this complaint a medical professional at MDC Brooklyn and, as such, is and was responsible for the delivery of medical care to inmates at MDC Brooklyn. Defendant Borecky is being sued in his or her individual capacity and in his or her official capacity.

9. Defendant D. Scott Dodrill is and was at all times relevant to this complaint the Regional Director for the Northeast Region of the Federal Bureau of Prisons and, as such, is and was responsible for the supervision and administration of MDC Brooklyn, a facility operated and maintained by BOP and located within the Northeast Region of the

BOP, including but not limited to the provision of medical services and maintaining the facility in a clean and safe condition for all individuals who are or were within MDC Brooklyn at anytime. In the above-described capacity, defendant Dodrill is and was at all times relevant to this complaint responsible for the proper evaluation and disposition of regional administrative appeals of grievances from inmate held in BOP facilities in the Northeast Region of the Federal Bureau of Prisons, which includes MDC Brooklyn. Defendant Dodrill is being sued in his individual capacity and in his official capacity.

10. Defendant Harrell Watts is and was at all times relevant to this complaint the Administrator of National Inmate Appeals for the BOP and, as such, is and was responsible for the proper evaluation and disposition of administrative appeals from inmates held in the custody of a BOP facility, including MDC Brooklyn.

11. Defendants Lindsay, Beaudouin, Borecky, Dodrill, and Watts (hereinafter "the individual defendants") were at all times relevant to this complaint, duly appointed and acting employees of defendant United States of America, the United States Department of Justice, and the Federal Bureau of Prisons, acting under color of federal law, to wit, under color of the statutes, ordinances, regulations, policies, customs and usages of the United States of America, the United States Department of Justice, and the Federal Bureau of Prisons.

ADMINISTRATIVE PROCEDURES AND CLAIMS

12. Plaintiff has complied with all prerequisites to a suit under the Federal Tort Claims Act and the Prison Litigation Reform Act.

13. On or about November 20, 2007, plaintiff filed an Inmate Request for Informal Resolution with the defendants for the matters in dispute in this action. Defendants

subsequently scheduled plaintiff to be seen by plaintiff's primary health care provider in MDC Brooklyn.

14. On or about November 27, 2007, plaintiff filed a Request for Administrative Remedy with the defendants seeking further treatment for the injuries that are the subject of this complaint and a copy of plaintiff's medical records. Plaintiff stated that he had visited the doctor three times and was feeling excruciating pain primarily in his lower back. Plaintiff also requested a more detailed X-Ray to determine why he was urinating blood and also requested some form of therapy.

15. On or about December 21, 2007, plaintiff received a response to this request from defendant Cameron Lindsay. In the response, defendant Lindsay claimed that plaintiff had stated during a medical evaluation that Motrin had relieved his lower back pain and that he denied any urinary bleeding. Defendant Lindsay also claimed that plaintiff had not submitted any further requests for medical treatment since November 5, 2007. Defendant Lindsay then stated that plaintiff would be placed on medical call-out to be seen, provided instructions on how plaintiff could obtain his medical records, and denied all other requests made by plaintiff in plaintiff's Request for Administrative Remedy.

16. On or about February 5, 2008, plaintiff filed a Regional Administrative Remedy Appeal. Plaintiff first explained that he sent this appeal to an address provided to him by a counselor at MDC Brooklyn, and that the appeal was returned to him on February 4, 2008, because it was sent to the wrong address. In his appeal, plaintiff stated that his lower back pain was not relieved and stated that it was not true that he denied any urinary bleeding. Plaintiff also explained that the reason he did not request additional medical treatment after November 5, 2007 was that he was told during that evaluation that he

would be scheduled for follow-up evaluations. Plaintiff stated that when the follow-ups did not occur he made a request for medical treatment and was subsequently seen on December 3, 2007, but was only given a blood test and was not treated or evaluated for his injuries. Plaintiff also stated that although defendant Lindsay claimed that plaintiff was placed on medical call-out, plaintiff had not been seen by any medical staff since December 3, 2007. Plaintiff stated that he was still suffering the injuries complained of in this complaint and requested that he be provided with all the necessary medical care to treat his injuries at MDC Brooklyn, or that he be provided with outside medical treatment if MDC Brooklyn was not equipped to provide the medical treatment he required.

17. On or about March 7, 2008, plaintiff received a response from defendant D. Scott Dodrill. In that response defendant Dodrill stated that plaintiff had been given Motrin, a back brace, assigned a bottom bunk, instructed to use warm water compresses, and was provided a pamphlet on low back pain. Defendant Dodrill also stated that the x-rays of plaintiff's pelvis and L-spine were negative for fracture, that plaintiff had not accessed sick call since November 5, 2007, and that the medical staff had advised that plaintiff was receiving appropriate medical care. Defendant Dodrill ultimately denied plaintiff's appeal.

18. On or about March 16, 2008, plaintiff filed a Central Office Administrative Remedy Appeal. In that complaint, plaintiff stated that he was still in pain. Plaintiff stated that the x-rays did reveal developmental anomalies that were not further evaluated at any of his other visits to medical call-out. Plaintiff stated that he did go to medical call-out on December 10, 2007, but that the developmental anomalies were not checked at this visit. Plaintiff continued to request proper medical treatment at MDC Brooklyn or

at an outside facility if MDC Brooklyn was not equipped to provide plaintiff with the required medical treatment.

19. On or about June 3, 2008, plaintiff received a response to his Central Office Administrative Remedy Appeal from defendant Harrell Watts. In that response, defendant Watts stated that plaintiff's medical records revealed that plaintiff's sick call complaints had been addressed. Defendant Watts claimed that plaintiff had not had any clinical encounters other than an intake physical on November 5, 2007, and stated that plaintiff should communicate with his assigned healthcare provider if plaintiff is having medical problems. No further action was ordered or suggested in defendant Watts' response.

20. On July 24, 2008, plaintiff timely filed an administrative tort claim with the Federal Bureau of Prisons. In that administrative tort claim, plaintiff restated his account of the incident that led to his injuries, and restated his complaints about the insufficient medical treatment he received at MDC Brooklyn for the injuries he had suffered. Plaintiff further stated that he was seeking damages in the amount of $5,000,000 (Five Million Dollars) with the Federal Bureau of Prisons.

21. Defendant United States of America, by and through its agency, the Federal Bureau of Prisons, denied plaintiff's administrative tort claim and, on or about March 2, 2009, mailed its notice of denial to plaintiff.

21. This action was timely commenced following the denial of plaintiff's administrative tort claim.

FACTS

22. On October 12, 2007, and for some time prior to that date, defendants United States of America and Cameron Lindsay had a duty to plaintiff and other inmates housed at MDC Brooklyn to maintain all areas of MDC Brooklyn in a clean, safe, and suitable condition and to exercise ordinary diligence and reasonable care to keep plaintiff and other prisoners safe and free from harm.

23. On October 12, 2007, defendants United States of America and defendant Lindsay negligently failed to maintain the hallways, walkways, and general area around the kitchen area of the G-41 housing unit at MDC Brooklyn in a clean, safe, and suitable condition that would keep plaintiff safe and free from harm in that said defendants allowed the dangerous condition of food grease or some other substance to remain on the floors around the said area; were negligent in failing to remove the grease or other substance that had accumulated in said area; and the defendants knew or should have known of the unreasonable risk of injury and harm created by such condition for plaintiff and others similarly situated.

24. On October 12, 2007, plaintiff David Rockett, while walking in the area around the kitchen of the G-41 housing unit at MDC Brooklyn going towards the 6 North housing unit at MDC Brooklyn, and while exercising due care for his own safety, slipped on food grease or some other substance that had accumulated in that area and fell onto the floor. Plaintiff's fall was a direct and proximate result of the negligent conduct of defendants United States of America and Lindsay in failing to maintain said area in a clean and safe condition.

25. As a result of the above-described slip and fall, plaintiff sustained excruciating lower back pain, numbness to his leg, blood in his urine, and extreme pain in performing ordinary, everyday functions such as standing, sitting, sleeping, and walking.

26. After slipping and falling as described above, on or about October 15, 2007, plaintiff went to medical call-out at MDC Brooklyn complaining of the above-described injuries. Defendant Beaudouin took x-rays of plaintiff and prescribed Motrin, but did nothing further to medically treat plaintiff's complained of injuries.

27. On or about October 31, 2007, plaintiff went to medical call-out at MDC Brooklyn and complained once again of excruciating lower back pain and his other above-described injuries. Plaintiff requested further medical care to treat his injuries and alleviate his pain. Defendant Beaudouin issued plaintiff a back brace, approved plaintiff for a bottom bunk assignment, gave plaintiff an education pamphlet about lower back pain exercises, and instructed plaintiff to place warm water compresses on his lower back. These actions of defendant Beaudouin did not do anything to alleviate plaintiff's pain or otherwise treat plaintiff's injuries.

28. On or about November 5, 2007, plaintiff again went to medical call-out at MDC Brooklyn. At that visit, plaintiff continued to complain about excruciating pain and his other above-described injuries. Plaintiff requested medical treatment that would sufficiently diagnose and treat plaintiff's injuries and alleviate plaintiff's pain. Defendant Beaudouin conducted a blood analysis and a urine analysis, but did not provide any further medical treatment for plaintiff's above-described injuries.

29. On or about December 10, 2007, plaintiff again went to medical call-out and complained of still suffering from excruciating lower back pain and his other above-

described injuries. Defendant M. Borecky conducted a blood analysis and a urine analysis, but did not provide any further medical treatment for plaintiff's above-described injuries.

30. Plaintiff subsequently filed the aforementioned grievances regarding the inadequate medical treatment he was receiving for his injuries and requesting that he be sent to a medical facility that could properly diagnose and treat his injuries if MDC Brooklyn was not equipped to provide plaintiff with the proper medical treatment for his injuries.

31. In his November 27, 2007 Request for Administrative Remedy, plaintiff complained of his excruciating lower back pain and blood in his urine, and requested some form of therapy for his above-described injuries. In his response to plaintiff's request, dated December 21, 2007, defendant Lindsay recklessly ignored plaintiff's complaints and request for therapy and instead scheduled plaintiff for another medical call-out.

32. In his February 5, 2008 Regional Administrative Remedy Appeal plaintiff expressed his disagreement with the response of defendant Lindsay, continued to complain of excruciating lower back pain and blood in his urine, and requested that he be provided with adequate outside medical care if MDC Brooklyn was not equipped to provide him with adequate medical care to treat his injuries. In his response to plaintiff's appeal, dated March 7, 2008, defendant Dodrill recklessly ignored plaintiff's complaints and request for outside medical care and denied plaintiff's appeal without taking any further action.

33. In his March 16, 2008 Central Office Administrative Remedy Appeal, plaintiff complained that he was still in pain and complained that developmental anomalies that were revealed in his x-rays were not further evaluated by the medical staff at MDC Brooklyn. Plaintiff once again requested that with outside medical care if MDC Brooklyn was not adequately equipped to provide plaintiff with the proper medical care to treat his injuries. In his response, defendant Watts recklessly ignored plaintiff's complaints and request for outside medical care and did not order or suggest any further action be taken regarding plaintiff's medical treatment.

34. As a direct and proximate result of the negligence and recklessness of defendants as alleged above, plaintiff David Bernard Rockett suffered the following injuries:

a. Excruciating lower back pain;

b. Numbness in his left leg;

c. Blood in his urine;

d. Pain and difficulty in walking, sitting, standing, bending, sleeping, lying down; and

e. Other injuries that will be proven at trial.

35. As a direct and proximate result of the injuries, plaintiff has been, and will continue to be, in great physical, mental, and emotional pain and distress.

36. As a further direct and proximate result of the injuries, plaintiff will incur, for an indefinite period of time in the future, medical expenses and obligations in amounts to be proven at trial.

37. As a further direct and proximate result of the negligence and recklessness of defendants and the injuries suffered by plaintiff, plaintiff believes and alleges that these

injuries will render plaintiff incapacitated from resuming and continuing his occupation as delivery van driver, as a result of which plaintiff will lose future earnings and suffer damages in amounts to be proven at trial.

FIRST CAUSE OF ACTION

38. Paragraphs 1 through 37 of this complaint are incorporated herein by reference as though fully set forth herein.

39. By way of their above-described negligent actions or omissions, defendant United States of America and defendant Cameron Lindsay caused plaintiff's above described personal injuries by breaching their duty to maintain all areas of MDC Brooklyn in a safe condition, and by negligently allowing food grease or some other substance to accumulate on the floor of the kitchen area of the G-41 housing unit at MDC Brooklyn.

40. Plaintiff claims compensatory and punitive damages in the amount of $5,000,000 against each above-named defendant, under 28 U.S.C. §§ 1346 and 2671, for the injuries set forth above, caused by the defendants' aforesaid negligent actions and omissions.

SECOND CAUSE OF ACTION

41. Paragraphs 1 through 37 of this complaint are incorporated herein by reference as though fully set forth herein.

42. By way of their above-described reckless actions, defendants Lindsay, Beaudouin, Borecky, Dodrill, and Watts exhibited deliberate indifference to plaintiff's physical well-being and medical needs, and recklessly denied or failed to provide plaintiff with the medical care plaintiff required for the proper diagnosis and treatment of plaintiff's above-described injuries. The above-described deliberate indifference of said defendants thereby

caused plaintiff to unnecessarily suffer prolonged periods of excruciating pain and otherwise exacerbated plaintiff's injuries.

43. Plaintiff claims compensatory and punitive damages in the amount of $5,000,000 against each of the above-named defendants, under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), for the injuries set forth above suffered by plaintiff as a result of the deliberate indifference of said defendants.

RELIEF

WHEREFORE, plaintiff demands a jury trial and respectfully requests that this Court, after a jury trial, enter an Order:

44. Granting plaintiff $5,000,000 on the first cause of action against the defendants jointly and severally;

45. Granting plaintiff $5,000,000 on the second cause of action against all defendants jointly and severally;

46. Granting plaintiff all reasonable attorney's fees, costs and disbursements; and

47. Granting such other and further relief as to this Court may seem just and proper.

Dated: July 14, 2009
New York, NY

Gregory A. Blackman

Gregory A. Blackman
Attorney for David Bernard Rockett
The Blackman Law Firm, P.C.
65 Broadway, 7th Floor
New York, New York 10006
(212) 430-6537

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOCKET NO.

DAVID BERNARD ROCKETT

Plaintiff,

- against -

UNITED STATES OF AMERICA; CAMERON LINDSAY, Warden, Metropolitan Detention Center Brooklyn; R. BEAUDOUIN, M.D., Medical Officer, MDC Brooklyn; M. BORECKY, M.D., Medical Officer, MDC Brooklyn; D. SCOTT DODRILL, Regional Director, Northeast Region, Federal Bureau of Prisons; and HARRELL WATTS, Administrator, National Inmate Appeals, Federal Bureau of Prisons, in their individual capacities and in their official capacities as employees of the Federal Bureau of Prisons and the United States of America,

Defendants.

COMPLAINT

To: UNITED STATES ATTORNEY
U.S. Attorney's Office
Eastern District of New York

ATTORNEY GENERAL OF THE UNITED STATES
United States Department of Justice
Washington, D.C.

PLEASE TAKE NOTICE that the within is a true copy of a Civil Complaint duly entered in the office of the clerk of the within named court on _____, 2009.

Dated:

Yours, etc.,

Attorney for Plaintiff
Gregory A. Blackman
THE BLACKMAN LAW FIRM, P.C.
65 Broadway, 7th Floor
New York, NY 10006
(212) 430-6537

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DAVID BERNARD ROCKETT,

Plaintiff,

- against -

Civil Action
No. CV-09-3036

(Mann, M.J.)

THE UNITED STATES OF AMERICA; CAMERON LINDSAY, Warden, Metropolitan Detention Center Brooklyn; R. BEAUDOUIN, M.D., Medical Officer, MDC Brooklyn; M. BORECKY, M.D., Medical Officer, MDC Brooklyn; D. SCOTT DODRILL, Regional Director, Northeast Region, Federal Bureau of Prisons; and HARRELL WATTS, Administrator, National Inmate Appeals, Federal Bureau of Prisons, in their individual capacities and in their official capacities as employees of the Federal Bureau of Prisons and the United States of America,

Defendants.

----------X

STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED, by and between the remaining parties to the above-entitled action, specifically plaintiff DAVID BERNARD ROCKETT and defendant UNITED STATES OF AMERICA, by their respective undersigned attorneys, that Plaintiff's complaint and all claims therein be and hereby are dismissed with prejudice pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

Each party hereto agrees that this dismissal is without costs or fees. The parties further agree that no further suit will be instituted for the same causes of action which have been

asserted herein, or for any other causes of action arising out of the incidents or circumstances which gave rise to this law suit.

Dated: New York, New York
~~June~~ July 5, 2011

GREGORY A. BLACKMAN, Esq.
The Blackman Law Firm, P.C.
Attorney for Plaintiff
65 Broadway, 7th Floor
New York, New York 10006

By: Gregory A. Blackman
GREGORY A. BLACKMAN
(212) 430-6337

Dated: Brooklyn, New York
~~June~~ Aug 2, 2011

LORETTA E. LYNCH
United States Attorney
Eastern District of New York
Attorney for Defendant
271 Cadman Plaza, 7th Floor
Brooklyn, New York 11201

By: Kelly Horan Florio
KELLY HORAN FLORIO
Assistant U.S. Attorney
(718) 254-6007

SO ORDERED this

_____ day of _____, 2011

_____
HONORABLE ROANNE L. MANN
United States Magistrate Judge

SO ORDERED:
/s/
Roanne L. Mann
U.S. Magistrate Judge
Dated: 8/3/11

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DAVID BERNARD ROCKETT,

Plaintiff,

- against -

Civil Action
No. CV-09-3036

(Mann, M.J.)

THE UNITED STATES OF AMERICA; CAMERON LINDSAY, Warden, Metropolitan Detention Center Brooklyn; R. BEAUDOUIN, M.D., Medical Officer, MDC Brooklyn; M. BORECKY, M.D., Medical Officer, MDC Brooklyn; D. SCOTT DODRILL, Regional Director, Northeast Region, Federal Bureau of Prisons; and HARRELL WATTS, Administrator, National Inmate Appeals, Federal Bureau of Prisons, in their individual capacities and in their official capacities as employees of the Federal Bureau of Prisons and the United States of America,

Defendants.

----------X

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2675 (a)

It is hereby stipulated by and between the undersigned plaintiff DAVID BERNARD ROCKETT, and defendant UNITED STATES OF AMERICA, by and through their respective counsel, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America, the proper party defendant in an action brought pursuant to the Federal Tort Claims Act, agrees to pay the sum of four thousand dollars ($4,000.00),

which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result from the subject matter of this settlement, including any claims for wrongful death or loss of consortium, for which plaintiff or its administrators or assigns, now have or may hereafter acquire against the United States of America or its agents, servants, and employees.

3. Plaintiff and his administrators or assigns hereby agree to accept the sums set forth in this stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights and causes of action of whatsoever kind and nature, including claims for wrongful death or loss of consortium, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America and its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, and its agents, servants, and employees from and against any and all such causes of action, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs and their administrators or assigns against any third party or against the United States of America, including claims for wrongful death or loss of consortium.

4. This stipulation for comprise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States of America, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risk of further litigations.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the parties on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by check in the sum of four thousand dollars ($4,000.00) and made payable to David Rockett, plaintiff, and Gregory Blackman, Esq., plaintiff's attorney. The check will be mailed to plaintiff's attorney at the following address: 65 Broadway, 7th Floor, New York, New York 10006. Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff, and to undertake any and all actions within his control to obtain a dismissal of the above captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements

relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together shall be deemed to be one document.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 30 2011 by:

David Rockett
DAVID BERNARD ROCKETT

AGREED AND CONSENTED TO:

Dated: New York, New York
~~June~~ July 5, 2011

GREGORY A. BLACKMAN, Esq.
The Blackman Law Firm, P.C.
Attorney for Plaintiff
65 Broadway, 7th Floor
New York, New York 10006

By: Gregory A. Blackman
GREGORY A. BLACKMAN
(212) 430-6537

Dated: Brooklyn, New York
~~June~~ aug. 2, 2011

LORETTA E. LYNCH
United States Attorney
Eastern District of New York
Attorney for Defendant
271 Cadman Plaza, 7th Floor
Brooklyn, New York 11201

By: Kelly Horan Florio
KELLY HORAN FLORIO
Assistant U.S. Attorney
(718) 254-6007

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD BALTER,	:	**Civil Action – Law**
	:	
Plaintiff(s)	:	**Case No.**
	:	
vs.	:	
	:	
UNITED STATES OF AMERICA	:	
and MEDICAL DEVELOPMENT	:	
INTERNATIONAL LTD, INC.	:	**[ELECTRONICALLY FILED]**
t/d/b/a MDI GOVERNMENT	:	
HEALTHCARE SERVICES,	:	**JURY TRIAL DEMANDED**
	:	
Defendant(s)		

COMPLAINT

1. At all times relevant to this matter Plaintiff Richard Balter was an inmate at the United States Penitentiary Allenwood, PO Box 3000, White Deer, PA 17887. Prior to his incarceration, Mr. Balter was a resident of New Jersey.

2. Defendants are the United States of America and Medical Development International Ltd, Inc. t/d/b/a MDI Government Healthcare Services.

3. Defendant Medical Development International Ltd, Inc., upon information and belief, is a Delaware corporation doing business in the Commonwealth of Pennsylvania.

4. MDI Government Healthcare Services, upon information and belief, is a fictitious name owned by Medical Development International Ltd, Inc., or, in the alternative, is a corporation incorporated in a state other than Pennsylvania or New Jersey.

5. Upon information and belief, Defendant Medical Development International Ltd, Inc. t/d/b/a MDI Government Healthcare Services provides medical scheduling services to the United States Penitentiary at Allenwood.

6. The Jurisdiction of the Court is based upon the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346(b) and 2671 et seq.

7. On or about November 7, 2008, Plaintiff, in compliance with the FTCA, filed a claim against the Federal Bureau of Prisons (BOP) for damages arising from negligence committed by the employees, servants, agents, and/or ostensible agents of the BOP.

8. On or about May 8, 2009, Plaintiff received notice from the BOP that his claim had been denied.

9. This Complaint is filed within the six-month time period from the date of denial of the claim by the BOP pursuant to 28 U.S.C. §2401(b).

10. Venue is proper in the Middle District of Pennsylvania based on 28 U.S.C. §1402(b).

11. Mr. Balter has a history of macular degeneration in both eyes being treated by eye specialists David A. Lightman, M.D. and Roy E. Tuller, D.O.

12. In 1997, Mr. Balter lost central vision in his right eye.

13. On August 28, 2007, Mr. Balter was seen by Roy E. Tuller, D.O. who noted a stable retinal exam but with increased intraocular pressure (IOP) in the left eye and wrote that he wanted to re-examine Mr. Balter in ten weeks (by November 6, 2007).

14. Prior to November 6, 2007, Mr. Balter made written requests to the prison staff asking to be seen by a specialist because his vision in his left eye was getting worse, he was squinting and he could suffer permanent vision loss if he was not seen by a specialist.

15. Mr. Balter's written requests were dated October 25, November 5, November 7, November 14, November 18, November 20, and December 4, 2007.

16. The prison responded to Mr. Balter's written requests by stating "You are scheduled."

17. Mr. Balter also made multiple verbal requests to be seen.

18. When Mr. Balter was finally seen by David A. Lightman, M.D. on December 5, 2007, he was diagnosed with a new hemorrhage in his left eye and loss of central vision.

19. Mr. Balter's vision in his left eye is now 20/400 and he is legally blind.

20. The failure to ensure that Mr. Balter was seen promptly following his written and verbal requests increased the risk of harm to the vision in Mr. Balter's left eye.

COUNT I
RICHARD BALTER V. UNITED STATES OF AMERICA

21. The preceding paragraphs are incorporated herein by reference as though fully set forth.

22. The carelessness and negligence of Defendant, acting by and through its agents, ostensible agents, servants and/or employees consisted of the following:

a. Failure to have Plaintiff examined when he complained of vision problems and vision loss;

b. Failure to schedule Plaintiff for re-examination, as directed by Roy E. Tuller, D.O., ten weeks following his August 28, 2007, appointment;

c. Failure to conform to the requisite standard of reasonable medical care and skill under the circumstances and at the time with respect to Plaintiff;

d. Failure to provide and render reasonable medical care to Plaintiff under the circumstances;

e. Failure to properly select, train and supervise its agents, ostensible agents, servants and/or employees to assure Plaintiff reasonable treatment and care under the circumstances;

f. Failure to diagnose and treat Plaintiff appropriately and expeditiously;

g. Failure to utilize appropriate and requisite laboratory, hospital and consulting physicians in treating Plaintiff;

h. Such other acts and/or omissions constituting carelessness, negligence and/or malpractice as may become evident during the course of discovery and/or at the trial of this action.

23. As a direct and proximate result of the conduct set forth, Plaintiff has suffered as follows:

a. Loss of vision;

b. Need for future medical care and treatment;

c. Future financial loss including general medical expenses and bills;

d. Future loss of wages and future lost wages;

e. Past, present and future loss of life's pleasures;

f. Past, present and future pain and suffering;

g. Mental anguish, upset, humiliation and embarrassment; and

h. Such other damages as are permitted by law or otherwise appear.

WHEREFORE Plaintiff demands judgment for a sum in excess of $75,000, exclusive of interest and costs to which Plaintiff is entitled.

COUNT II
RICHARD BALTER V. MEDICAL DEVELOPMENT INTERNATIONAL LTD, INC. t/d/b/a MDI GOVERNMENT HEALTHCARE SERVICES

24. The preceding paragraphs are incorporated herein by reference as though fully set forth.

25. The carelessness and negligence of Defendant ,acting by and through its agents, ostensible agents, servants and/or employees consisted of the following:

a. Failure to have Plaintiff examined when he complained of vision problems and vision loss;

b. Failure to schedule Plaintiff for re-examination, as directed by Roy E. Tuller, D.O., ten weeks following his August 28, 2007, appointment;

c. Failure to properly select, train and supervise its agents, ostensible agents, servants and/or employees to assure Plaintiff reasonable treatment and care under the circumstances; and

d. Such other acts and/or omissions constituting carelessness, negligence and/or malpractice as may become evident during the course of discovery and/or at the trial of this action.

26. As a direct and proximate result of the conduct set forth, Plaintiff has suffered as follows:

a. Loss of vision;

b. Need for future medical care and treatment;

c. Future financial loss including general medical expenses and bills;

d. Future loss of wages and future lost wages;

e. Past, present and future loss of life's pleasures;

f. Past, present and future pain and suffering;

g. Mental anguish, upset, humiliation and embarrassment; and

h. Such other damages as are permitted by law or otherwise appear.

WHEREFORE Plaintiff demands judgment for a sum in excess of $75,000, exclusive of interest and costs to which Plaintiff is entitled.

RIEDERS, TRAVIS, HUMPHREY, HARRIS,
WATERS & WAFFENSCHMIDT

s/Clifford A. Rieders, Esquire

Clifford A. Rieders, Esquire PA 20962
C. Scott Waters, Esquire PA 44181
Attorneys for Plaintiff
161 West Third Street
Williamsport, PA 17701
Phone: (570) 567-1025
Fax: (570) 567-1025
Email: crieders@riederstravis.com

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD BALTER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**3:09-cv-1409**
	:	**(JUDGE MARIANI)**
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

VERDICT

The Court finds that Plaintiff has established the following by a preponderance of the evidence:

1. That the failure of both the United States Government ("the Government") and Medical Development International Ltd., Inc. ("MDI") to schedule Plaintiff Richard Balter ("Mr. Balter") for his follow-up examination with Dr. Tuller within the period of time prescribed by Dr. Tuller for such follow-up examination, or within a reasonable period of time thereafter, constitutes negligent conduct under principles of ordinary negligence;
2. That the Government was negligent in failing to arrange for Mr. Balter to be seen at USP Allenwood by one of the two optometrists who came there on November 7, 14 and 22 and by removing him from the automatic call-out list;
3. That such negligence on the part of both the Government and MDI increased the risk of harm to Mr. Balter;

4. That such negligence on the part of both the Government and MDI was a factual cause of the hemorrhage that Mr. Balter sustained on December 5, 2007; and
5. That Mr. Balter was not comparatively negligent.

Consistent with these findings, the Court awards Mr. Balter the following damages:

1. For the failure of the Government and MDI to timely schedule Mr. Balter for his follow-up examination:

   $250,000.00, attributed as follows:

   MDI: $125,000.00

   Government: $125,000.00; and

2. For the failure of the Government to arrange for Balter to be seen by one of the two optometrists who visited USP Allenwood in November 2007 and by removing him from the automatic call-out list:

   $400,000.00.

Date: April 7, 2014

By the Court:

Robert D. Mariani
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD BALTER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**3:09-cv-1409**
	:	**JUDGMENT IN A CIVIL CASE**
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

___ Jury Verdict.

_XX_ Decision by Court.

The Court, having found the total amount of damages proven by Plaintiff to be in the amount of six hundred fifty thousand dollars ($650,000); of which

a. two-hundred-fifty thousand dollars ($250,000) is attributable in equal parts to the negligence of the (1) Government and (2) Medical Development International Ltd., Inc. ("MDI") in neglecting to timely schedule a follow-up examination for Plaintiff with Dr. Tuller, such that each defendant is liable for one-hundred-twenty-five thousand dollars ($125,000) of the aforesaid negligence; and

b. four hundred thousand dollars ($400,000) is attributable to the negligence of the Government in failing to arrange for Plaintiff to be seen at USP Allenwood by one of

the two optometrists who came there on November 7, 14 and 22 and in removing him from the automatic call-out list;

NOW, THIS 7TH DAY OF APRIL, 2014, in accordance with the principle of the Federal Tort Claims Act that MDI may be jointly and severally liable for the torts of the United States Government, but that the Government may not be jointly and severally liable for the torts of MDI; and, moreover, Plaintiff, Richard Balter, having an outstanding liability to the Government in the amount of one-hundred-twelve thousand five-hundred-eleven dollars ($112,511) as restitution payments in connection with his criminal conviction, which shall be deducted from the total amount of recoverable damages, **IT IS HEREBY ORDERED THAT** judgment is entered **IN FAVOR OF THE PLAINTIFF**, Richard Balter, and **AGAINST DEFENDANTS** the United States Government, in the amount of four hundred twelve thousand four hundred eighty nine dollars ($412,489), and MDI, in the amount of two-hundred fifty thousand dollars ($250,000).

Robert D. Mariani
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD BALTER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**3:09-CV-01409**
	:	**(JUDGE MARIANI)**
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

ORDER

AND NOW, THIS 15TH DAY OF MAY, 2014, following a conference call to discuss with counsel the method by which Plaintiff's criminal restitution obligations are to be set off from his final judgment, **IT IS HEREBY ORDERED THAT** the Court **AMENDS** its Judgment of April 7, 2014 (Doc. 156) as follows:

1. Judgment is **ENTERED** in favor of Plaintiff and against Defendant United States in the amount of $525,000.00.
2. Upon receipt of the judgment funds and prior to the disbursement to Plaintiff, Plaintiff's counsel of record will contact the Financial Litigation Unit of the United States Attorney's Office in the District of New Jersey to determine the amount of restitution and/or fines owed by the Plaintiff.
3. Plaintiff's counsel of record is further ordered to pay the balance of the restitution and/or fines owed by the Plaintiff from the $525,000.00 judgment against the United States prior to any disbursement of funds to the Plaintiff.



Robert D. Mariani
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD BALTER	:	
Plaintiff	:	**CIVIL ACTION 3: 09-CV-1409**
	:	**(Judge Mariani)**
v.	:	
UNITED STATES OF AMERICA	:	
Defendant	:	

JUDGMENT

Pursuant to Federal Rule of Civil Procedure 54(d)(1), judgment is entered against the defendant United States of America and in favor of the plaintiff Richard Balter in the amount of $9,307.47.

ATTEST:

s/ Maria E. Elkins
MARIA E. ELKINS
Clerk of Court

DATE: August 7, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD BALTER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**3:09-cv-1409**
	:	**(JUDGE MARIANI)**
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

I. Introduction

The Plaintiff in this matter, Richard Balter, was an inmate at in the United States Penitentiary ("USP") in Allenwood, Pennsylvania from December 1999 until January of 2010. In 1997, Mr. Balter was diagnosed with macular degeneration in his right eye which resulted in the complete loss of vision in his right eye. Sometime in 1999 or 2000, Mr. Balter was diagnosed with macular degeneration in his left eye. The particular type of macular degeneration which afflicts Mr. Balter is the form known as "wet" macular degeneration.

With wet macular degeneration, there occurs an abnormal growth of red blood cells underneath the epithelium of the retina. With this disease, certain waste products are deposited into the retina, called drusen. About ten percent of patients with macular degeneration who have these waste products in the retina form cracks in the retina. Through these cracks, or fissures, blood vessels then grow up from the layer underneath the retina called the choroid. These blood vessels can leak, or bleed, and, in some cases, can burst with a resulting hemorrhage of blood into

the retina. The hemorrhage from these new and abnormal blood vessels causes inflammation, scarring underneath the retina and blindness.

Mr. Balter was afforded treatment for his wet macular degeneration by Dr. Roy Tuller of Vitreoretinal Associates P.C. ("VRA") and received steroid injections beginning in 2003 with additional steroid injections in January, March and June of 2007. During this period Mr. Balter had four active leaks of blood into his left eye but experienced no vision loss over that four year period, with his left eye's vision remaining at 20/50 to 20/60.

On August 28, 2007, Dr. Tuller saw Mr. Balter as a result of a scheduled offsite visit to Dr. Tuller's offices. Dr. Tuller told Mr. Balter that his eye was beginning to stabilize following the June 2007 injection and that he would schedule a follow-up for him. Dr. Tuller did so. That same day, Dr. Tuller's office notified the administration at the Allenwood Federal Correctional Complex ("FCC") of Dr. Tuller's request that a follow-up examination of Mr. Balter be scheduled within ten weeks of the August 28, 2007 appointment. Dr. Tuller later testified that a window of an additional seven to ten days would have been acceptable.

USP Allenwood took seven weeks, from August 28, 2007 to October 16, 2007, to notify Medical Development International Ltd., Inc. ("MDI")—an entity with which FCC Allenwood had contracted to find medical providers in the area of FCC Allenwood to provide care to inmates and to schedule the appointments for medical care for those inmates with those outside medical providers—of the need to schedule Mr. Balter's appointment with Dr. Tuller. The Bureau of Prisons ("BOP") submitted a form to MDI on October 16, 2007 which indicated that USP Allenwood wanted

the appointment within a one month time frame, or on or before November 16, 2007. It was MDI's responsibility to schedule the appointment according to the requested time frame indicated on the form issued by USP Allenwood to it.

Mr. Balter's appointment was scheduled for December 11, 2007, outside of the time frame requested by USP Allenwood and outside of the ten week request of Dr. Tuller.

During the same time period, Mr. Balter had been on an "automatic call-out" list which permitted him to see the optometrists who came to USP Allenwood twice a month. On September 26, 2007, an optometrist ordered that Mr. Balter was to have his intraocular pressure ("IOP") tested every month by an optometrist. In November 2007, Mr. Balter was inexplicably removed from the automatic call-out list and did not see an optometrist despite the fact that one visited USP Allenwood on November 7, November 14 and November 22, 2007. Although not qualified to treat macular degeneration, the optometrists that visited the prisoner were qualified to identify the presence of any leakage or bleed in Mr. Balter's left eye and had done so previously.

On December 5, 2007, over fourteen weeks after Mr. Balter's August 28, 2007 appointment, Mr. Balter visited Dr. Tuller's office on an emergency basis. That morning, Mr. Balter was scheduled to be seen by an optometrist, Dr. David DeRose, at USP Allenwood. Dr. DeRose identified a "fresh leak" in Mr. Balter's left eye and directed that Mr. Balter should "see Dr. Tuller ASAP." Mr. Balter was then seen that same day by Dr. Tuller's associate, Dr. Lightman, who identified a massive hemorrhage in his left eye and complete loss of central vision.

On July 20, 2009, Mr. Balter initiated the instant action against the Government pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 and 28 U.S.C. § 2671, *et seq.*, and MDI based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. (Compl., Doc. 1, at ¶¶ 4, 6). Mr. Balter filed timely Certificates of Merit (Docs. 5; 6) pursuant to PA. R. CIV. P. 1042.3(a). By Order dated March 28, 2011, MDI was granted leave to join Roy E. Tuller, D.O., VRA and the Retinal Group of Pa., P.C., as Third Party Defendants. (*See* Doc. 63). Thereafter, Mr. Balter and MDI resolved Mr. Balter's claim against MDI on December 6, 2012, (*see* Doc. 111), and MDI in turn agreed to voluntarily discontinue its claims against the Third Party Defendants, (*see* Docs. 91; 112).

The remaining parties, Mr. Balter and the Government, filed pretrial memoranda on January 23, 2013. (*See* Docs. 124; 126). On February 25, 2013, the parties filed a forty-nine page document titled "Amended Comprehensive Statement of Agreed Upon Facts Submitted by the United States and Richard Balter" ("CSF") containing 338 numbered paragraphs. (*See* Doc. 132). The undersigned conducted a bench trial which commenced on February 26, 2013 and ended on February 28, 2013. The Court heard live testimony from the following witnesses:

1. Plaintiff Richard Balter, an inmate at USP Allenwood from December 1999 until January of 2010, (*see* CSF at ¶ 2);
2. Ron Laino, Health Service Administrator over the FCC Allenwood Complex from 2005 until his retirement in 2011, (*see id.* at ¶ 42);

3. Kelly Auman, Health Information Technician at FCC Allenwood between 1998 and June 2008, (*see id.* at ¶¶ 61, 63-64);

4. Kelley DeWald, Assistant Health Services Administrator at Allenwood since December 2003 or December 2004, (*see id.* at ¶ 88);

5. Lisa Rey, "Medical Records Technician at USP Allenwood since 2002," (*see id.* at ¶ 70);

6. Dr. Matthew Goren, Mr. Balter's medical expert, (*See* Trial Tr., Goren, Day 2, at 79:20-80:2); and

7. Dr. Adam Paul Beck, the Government's medical expert, (*See* Trial Tr., Beck, Day 3, at 7:11-21).

In addition, the Court received video deposition testimony from Dr. Roy Tuller, Mr. Balter's primary ophthalmologist while he was incarcerated at USP Allenwood, (*see* Trial Dep. Tr., Tuller, Doc. 139, Pl.'s Ex. 37; *see also* CSF at ¶¶ 167-168), and his partner Dr. David Lightman, who saw Mr. Balter twice in 2007—including on December 5, 2007, (*see* Trial Dep. Tr., Lightman, Doc. 139, Pl.'s Ex. 39; *see also* CSF at ¶¶ 208, 211).

The issues which this Court must resolve may be stated as follows:

A. Has Mr. Balter proved that the failure of the Government and/or MDI to schedule him for his follow-up examination by Dr. Tuller within the period prescribed by Dr. Tuller for such follow-up examination establishes negligent conduct under principles of ordinary negligence?

B. Has Mr. Balter proved that the Government was negligent in failing to arrange for Mr. Balter to be seen at USP Allenwood by one of the two optometrists who came to USP Allenwood on November 7, 14 and 22 by removing him from the automatic call-out list?

C. If Mr. Balter has proved negligence on the part of the Government and/or MDI, did such negligence increase the risk of harm to Mr. Balter—specifically, did such negligence cause any bleed or hemorrhage which may have occurred to go unnoticed and untreated until he was seen on December 5, 2007 by Dr. DeRose, who directed that Mr. Balter be sent to an ophthalmologist "ASAP"?

D. If Mr. Balter has proved negligence on the part of the Government and/or MDI, was such negligence a factual cause of the hemorrhage Mr. Balter sustained to the macula of his left eye which caused his vision to be reduced from 20/50 to 20/400?

E. If Mr. Balter has proved negligence on the part of the Government and/or MDI and has further shown that such negligence was a factual cause of the hemorrhage in the macula of his left eye, to what damages is Mr. Balter entitled?

Because Mr. Balter has proven all of the elements of his ordinary negligence claims, judgment will be entered in favor of the Plaintiff.

II. Findings of Fact

At the outset, the Court adopts the CSF. Many of the facts from the CSF are specifically incorporated below. The rest are incorporated insofar they are consistent with the findings below.

A. Background Facts

1. Mr. Balter was born on October 20, 1946 and was sixty-six years old at the time of trial. (CSF at ¶ 1).

2. On September 14, 1994, United States District Court for the District of New Jersey sentenced Mr. Balter to a term of life imprisonment. *See United States v. Balter*, Crim. A. No. 93–00536 (D.N.J. 1994), *aff'd*, 91 F.3d 427 (3d Cir. 1996).

3. While incarcerated in USP Lewisburg, sometime between 1994 and 1996, Mr. Balter "[w]as diagnosed with macular degeneration in his right eye." (CSF at ¶ 3).

4. In 1997, his condition rendered him legally blind in his right eye. (*See* Trial Tr., Balter, Day 1, at 25:12-14).

5. Eventually, Mr. Balter was transferred to UPS Allenwood, where he was housed from December 1999 until January of 2010. (*See* CSF at ¶ 2).

6. Mr. Balter "[w]as diagnosed with macular degeneration in his left eye in 1999 or 2000 while incarcerated" at USP Allenwood. (*Id.* at ¶ 4).

7. Although he experienced several leakages between 2003 and 2007, Mr. Balter was able to maintain his baseline vision of 20/50 to 20/60. (Trial Dep. Tr., Tuller, Doc. 139, Pl.'s Ex. 37, at 31:2-10). Mr. Balter is currently incarcerated at FCI Beaumont. (CSF at ¶ 2).

B. Wet Macular Degeneration

Understanding Mr. Balter's negligence claim requires background information about the nature of macular degeneration and how medical services at UPS Allenwood are administered.

8. "Mr. Balter has age related macular degeneration," a disease that "progresses and develops as a person ages" and can lead to vision loss. (CSF at ¶ 169; *see also* Trial Tr., Goren, Day 2, at 80:7-81:5).

9. "[M]acular degeneration is a disease that affects a very specific part of the retina called the macula, which is the central part of the retina where central vision is processed." (Trial Tr., Goren, Day 2, at 80:7-10).

10. "[T]here are two types of macular degeneration, . . . wet and . . . dry macular degeneration. Dry [macular degeneration] is a very slow gradual process. Everyone [with macular degeneration] will start with dry type, and perhaps 10% will progress to the wet type." (CSF at ¶ 170).

11. "What distinguishes dry from wet [macular degeneration] . . . is the formation of new and abnormal blood vessels that occur underneath the retina within the macula. The problem with these blood vessels is that they leak and they bleed abnormally. . . . [Ultimately,] when this happens, there's fluid that accumulates underneath the retina, causes inflammation, causes damage, and . . . can be a very aggressive condition that can and does lead to blindness." (Trial Tr., Goren, Day 2, at 80:20-81:5).

12. Wet, as opposed to dry, macular degeneration "is [a] more serious condition with regard to prognosis" as "[t]here . . . can be . . . sudden loss of vision" with wet macular degeneration. (CSF at ¶ 171).

13. "[W]hen one has wet macular degeneration, dramatic leakage can happen instantly." (*Id.* at ¶ 174).

14. "[W]et macular degeneration is an unpredictable condition." (*Id.* at ¶ 175).

15. "Hemorrhages can happen suddenly and without warning." (*Id.* at ¶ 176).

16. Moreover, "a person who loses central vision in one eye due to wet macular degeneration is at a 5% higher risk per year," and "[t]he risk would increase 5% every year moving forward once you lose vision in one eye due to macular degeneration." (*Id.* at ¶ 173).

17. With wet macular degeneration, there is no treatment that can "cure the underlying disease process; [doctors] can only act or react to occurrences of leakage or bleeding" but cannot "eliminate the risk of hemorrhage, even with treatment." (*Id.* at ¶ 172).

18. In order to prevent the progression of the disease, one treatment option is injections of "vascular endothelial growth factor inhibitors" which are "administered directly into the eye." (Trial Tr., Goren, Day 2, at 81:19-22, 82:19-21).

19. However, "even with timely injections, a person with wet macular degeneration can have loss of central vision." (CSF at ¶ 180).

C. UPS Allenwood's Medical Care Delivery System

20. UPS Allenwood is one of three institutions that encompass the FCC Allenwood Complex. (*Id.* at ¶ 42).

21. "In 2007, the Allenwood Complex had 4,500-5,000 inmates at any given time." (*Id.* at ¶ 43).

22. "Beginning in 2005, until the time of his retirement in 2011, Ron Laino was Health Service Administrator" ("HSA"), who oversaw the administration of medical services of the Allenwood Complex. (*See id.* at ¶ 42).

23. Below the HSA is the Assistant Health Services Administrator ("AHSA"). (*See id.* at ¶¶ 88-89). Kelley DeWald has been the AHSA since December 2003 or December 2004. (*See id.* at ¶ 88).

24. Separate from "the health service administrator, assistant health service administrator, [and] the administrative side of the medical department at the Allenwood Complex," is the Clinical Director. (*See id.* at ¶ 143).

25. "The clinical director overs[ees] all the other medical providers at the Allenwood Complex." (*Id.* at ¶ 142).

26. "Dr. Brady was clinical director at Allenwood in 2007." (*Id.* at ¶ 109).

Mainline

27. When inmates gather to eat their meals, extra prison officials "stand main line." (*See* Trial Tr., Laino, Day 1, at 111:13-24). As Ron Laino explained,

> The purpose of main line is two-fold. One to provide security there, since . . . there's a large amount of inmates. . . . The second one is to field any questions that the inmate might have. It's a lot easier to address a concern that the inmate may have, instead of going down the paper route in the sense of responding to inmate complaints via paper or responding to a complaint that you have to respond to for the Warden, so it's a lot easier to talk to the inmate, find out what his complaint is, and address it right then and there.

(*Id.*).

28. "Warden Martinez or someone on behalf of the Warden, the Assistant Warden ["AW"] or someone on behalf of the Assistant Warden, and Kelley DeWald or someone from medical were always at mainline." (CSF at ¶ 7).

29. "Inmates could voice complaints or bring up issues with Department heads at main line." (*Id.* at ¶ 93).

30. When Laino's office was located in USP Allenwood, he was primarily responsible to stand main line. (*See* Trial Tr., Laino, Day 1, at 110:21-111:11; Trial Tr., DeWald, Day 2, at 11:10-20).

31. "Mr. Laino['s] office moved to a Medium institution [within the Allenwood Complex] sometime in 2005," and Kelley DeWald became the primary medical representative to stand main line. (*See* Trial Tr., DeWald, Day 2, at 11:10-22).

32. As a result, Kelley DeWald became "responsible to stand main line every day." (*See id.*; CSF at ¶ 93).

33. However, even after "Ron Laino's office was located at the Medium [institution,] . . . he would visit USP Allenwood approximately once a week." (CSF at ¶ 44).

"When at USP Allenwood," Laino "would visit the segregation unit and stand mainline." (*Id.* at ¶ 45).

Sick Call

34. "[E]ach morning at USP Allenwood, except for Wednesdays," there is what is known as "sick call." (*See id.* at ¶¶ 8, 97).

35. Sick call affords inmates an opportunity to consult a medical provider. (*Id.* at ¶¶ 8, 97, 116).

36. Sick call "is where most requests to clinical staff would happen[,] . . . includ[ing] anything from refilling medications to appointments." (*Id.* at ¶ 116). 37. "Every other day, at 6:00 in the morning when their unit is released for mainline, inmates [are permitted to] come to Health Services and sign up for sick call." (*Id.* at ¶ 97).

38. Inmates come to the window at sick call, give [the Health Services staff] their ID card[,] and they take a seat until they are called by the provider." (*Id.* at ¶ 72).

39. "There are no restrictions for inmates going to sick-call with problems," and "[i]nmates are free to go to sick-call at any time and wait to be seen by a PA [Physician Assistant]." (*Id.* at ¶¶ 85, 86).

40. "The inmates had a lot of freedom in terms of accessing health services. An inmate could come up every day if he was having a particular issue . . . ." (*Id.* at ¶ 126.) There are "[u]sually around 4 PA's on duty at sick call." (*Id.* at ¶ 99).

41. "In terms of coming to sick call in the morning, if an inmate is not getting a response from one of the PAs, there is always someone else there." (*Id.* at ¶ 127).

42. "One at a time [inmates] would come in[,] . . . be evaluated by the PA, [and] tell them their problem[s]. The PA would triage them. If their problem was serious enough, they would be seen at that time. If not, they'd be given a date at a later time to be seen by their PA." (*Id.* at ¶ 97).

43. "It used to be that [a PA] would give [an inmate] a medical slip to come back at a different time . . . . Now, most of the time[, inmates are] put on a call out list, a piece of paper [prison officials] send around in the evening indicating when [the inmate is] supposed to go the following day." (*Id.* at ¶ 8).

Eye Care

44. As a general matter, "the BOP is sensitive about people having eye issues." (*Id.* at ¶ 135).

45. According to Dr. Brady, if an inmate was at risk of going blind, "[t]he BOP would try to do everything to maintain his vision. The last thing we really want to have in the BOP is somebody that is so impaired they're going to need to have extra attention." (*Id.* at ¶ 137).

46. "No optometrist or any eye specialist would be present at sick call." (*Id.* at ¶ 163).

47. Because "[e]ye care is specialized, Dr. Brady would do eye exams and sometimes prescribe drops and things for infections, but beyond that, [BOP] would refer to optometrist[s] and ophthalmologist[s]." (*Id.* at ¶ 124).

48. In order to receive eye care, inmates ordinarily would have to wait until an independent contractor optometrist visited USP Allenwood. (*See id.* at ¶¶ 69, 124, 163).

49. "Dr. DeRose . . . along with Dr. Weyand would go to USP Allenwood twice a month" as independent contractor optometrists. (*Id.* at ¶ 286).

50. However, "Dr. DeRose would make additional trips if there was an emergency." (*Id.* at ¶ 287).

51. "Inmates were always scheduled before seeing the optometrist when they came onsite." (*Id.* at ¶ 160).

52. Although "[t]here [we]re times when Dr. DeRose went to the institution and saw inmates that were not on the original call out list[,] . . . [so-]called add-ons," (*id.* at ¶ 296), generally, the optometrists would only see those inmates who were on the call-out list, (*id.* at ¶¶ 326-327).

53. "Dr. DeRose and Dr. Weyand do not make the call out list." (*Id.* at ¶ 320).

54. According to Dr. DeRose, "'[i]t's just somebody puts [inmates] on the list, and we see them.[']" (*See id.* at ¶ 320).

55. "To Dr. DeRose's recollection, there was not a time between August 2007 and December 2007 where he did not see an inmate that was on the call out list." (*Id.* at ¶ 331).

56. "An inmate could not just walk in and see the optometrist at the prison." (*Id.* at ¶ 326).

57. Instead, inmates would have to request that Kelly Auman place them on the call out list. (*See id.* at ¶¶ 69, 334).

58. Kelly Auman was the administrator at USP Allenwood responsible for scheduling inmates with an optometrist. (Trial Tr., Auman, Day 1, at 159:13-20).

59. "Kelly Auman was the health information technician that worked with the optometrist most of the time." (CSF at ¶ 333).

60. Typically, once Mr. Balter would make a request to see an optometrist, "Kelly Auman would refer to any supervisor[,] and [the supervisor] would say schedule him to see an optometrist." (*See id.* at ¶ 69).

61. Ms. Auman was also responsible for maintaining the call out list. (*See* Trial Tr., Auman, Day 1, at 159:23-25, 160:1-5). Decisions as to which inmates are to be placed on the call out list are made by either "the clinician, the physician, physician assistant, or [the health service administrator]." (See Trial Tr., Laino, Day 1, at 115:8-11).

62. "For a long period of time[,] Mr. Balter was automatically placed on the call out list [to be seen by an optometrist] twice a month." (*See* CSF at ¶ 338).

63. By virtue of being on the automatic call out list, inmates with "certain medical diseases, macular degeneration being one," would be "seen frequently by the optometrist, just for close monitoring." (*See* Trial Tr., Laino, Day 1, at 115:1-7).

64. As Mr. Balter explained, being on the automatic call out list enabled him to consult an optometrist every time one came to USP Allenwood without having to sign up for sick call the night before, like other inmates. (*See* Trial Tr., Balter, Day 1, at 30:12-25).

65. However, even during sick call, inmates do "not have access to Kelly Auman's office." (*See* CSF at ¶ 102).

66. "Ms. Auman's office was probably the most removed from the waiting area and main corridor where inmates were. The doors to get back there are locked[,] and an inmate would have to be escorted by someone and brought back into the department." (*Id.* at ¶ 117).

67. Because "the eye room is next door to the PA's rooms, . . . [an inmate] could have gone to the PA . . . [to] be put on list to be seen." (*See id.* at ¶ 295).

68. "If an inmate has requested to be placed on a call out list and has allegedly been told that he was on the call out list, the inmate has followed the appropriate steps to ensure that he will be seen by the optometrist." (*Id.* at ¶ 165).

69. Ultimately, "[i]t would be the prison's responsibility to have [an inmate] on the call out list for the next clinic." (*See id.* at ¶ 330).

70. "If Mr. Balter had complained to Dr. DeRose" that he had requested to be seen by the optometrist and that "those requests [were] not being granted, Dr. DeRose would not document that on the eye exam form or any other document." (*Id.* at ¶ 329).

71. "If Dr. DeRose saw an inmate at USP Allenwood who had issues or complications with wet macular degeneration, he would refer the inmate to a retinal specialist or an ophthalmologist." (*Id.* at ¶ 305).

72. There are no ophthalmologists on-site at USP Allenwood. (*See* Trial Tr., Laino, Day 1, at 122:10-16).

73. "In the prison system, there are not a lot of options for treating wet macular degeneration. . . . [D]uring the disease process, . . . it's all out of the optometrist's hands. The optometrists refer the inmate out for treatment of wet macular degeneration." (CSF at ¶ 307).

74. "Other than ophthalmoscopies, looking in the eye and seeing [that an inmate's] got a leak . . . [Dr. DeRose and Weyand] don't have any equipment" to treat wet macular degeneration. (*See id.* at ¶ 308).

Utilization Review Committee

75. In order to be scheduled for a medical appointment outside of USP Allenwood, the Utilization Review Committee ("URC") would have to first authorize the appointment. (*See id.* at ¶¶ 98, 146).

76. The Clinical Director is the "chair of the URC" and has "final authority for all URC decisions." (*Id.* at ¶ 112). As Clinical Director, Dr. Brady was the chair of the URC "at [the] Allenwood Complex in August through December 2007." (*See id.* at ¶ 144).

77. "Dr. Brady would decide what inmates could go for offsite medical appointments, but it was up to security to decide who went, when, where and why." (*Id.* at ¶ 147).

78. "Typically, the [FCC Allenwood] complex would have 8-10 inmates going out per day, with 2 of those inmates being from USP [Allenwood], unless there was an emergency." (*Id.* at ¶ 48).

79. "The [URC] would suggest a timeframe for medical treatment." (*Id.* at ¶ 148).

80. "If an offsite treating physician requested a specific timeframe for follow up treatment, the utilization review committee would generally go along with that requested timeframe." (*Id.* at ¶ 149).

81. "If an offsite doctor had an inmate patient with wet macular degeneration who needed to be seen in ten weeks for follow up, Dr. Brady would want him to be seen in ten weeks." (*Id.* at ¶ 150).

82. "There would usually be a note that came back with the inmate patient about what happened at the offsite medical appointment." (*Id.* at ¶ 151).

83. "The note would be converted into a consultation form usually by a prison nurse or EMT around the same time the inmate patient returned to the prison." (*Id.* at ¶ 152).

84. "Lisa Rey does paperwork at URC meetings." (*Id.* at ¶ 74).

85. "A consult that was approved would be given to Mrs. Rey," the Health Information Technician. (*See id.* at ¶¶ 100, 113).

86. "Lisa Rey takes the consult forms that are approved at URC, goes back to her desk and creates an [offsite referral] ["OSR"] and[,] in doing so, . . . puts in the specific instructions on what needed to be scheduled." (*Id.* at ¶ 76).

87. "Lisa Rey would create an OSR within a day or two, at most, from receiving the consult from the URC." (*Id.* at ¶ 78).

88. Ms. Rey would then send the OSR to MDI for scheduling. (*See id.* at ¶ 113).

MDI

89. "In 2007[,] MDI had a contract with FCC Allenwood to provide scheduling services for USP Allenwood." (*Id.* at ¶ 38).

90. "Prior to MDI, each separate institution [in the Allenwood Complex] would have their own scheduling person." (*Id.* at ¶ 47).

91. "MDI was a middleman." (*Id.* at ¶ 46).

92. "Under the contract with FCC Allenwood, it was MDI's responsibility to find medical providers and/or physicians in the area of FCC Allenwood to provide care to inmates." (*Id.* at ¶ 17).

93. "In August 2007, Vida Hall was the MDI scheduler for USP Allenwood." (*Id.* at ¶ 20).

94. "Brandon Fairbanks became the MDI scheduler for USP Allenwood in late November or early December of 2007." (*Id.* at ¶ 21).

95. "Lisa Rey would get an e-mail from Brandon Fairbanks, an MDI scheduler, letting her know when appointments were scheduled." (*See id.* at ¶ 80).

96. "At times[,] Lisa Rey would have to contact Brandon Fairbanks, an MDI scheduler, via e-mail and say ['I still have these consults pending, can you let me know if they are getting scheduled.']" (*Id.* at ¶ 82).

97. "MDI lets Lisa Rey know when an appointment is scheduled[,] and she types up the trip paper work that is routed to unit manager, HSA, AW and Warden for approval." (*Id.* at ¶ 83).

98. For security reasons, inmates are not apprised of the dates of their appointments. (*See id.* at ¶¶ 40, 147, 220, 229).

99. "Once the OSR is sent to MDI, Lisa Rey has no further contact with MDI about an appointment unless there are questions about it." (*Id.* at ¶ 79).

100. "The OSR form is then taken with the attached consults[,] and the medical provider is called." (*Id.* at ¶ 27).

101. "The scheduler will schedule the appointment according to the requested time frame that is indicated on the OSR form." (*Id.* at ¶ 28).

102. "If the BOP sends MDI an OSR with a time frame that differs from the one requested by the provider, the scheduler will indicate to the provider that the institution has requested a time that differs from the provider and then its decided with the physician if they are going to be able to get the appointment within the institution's time frame." (*Id.* at ¶ 29).

103. "The MDI schedulers are trained to provide the medical provider the pertinent information that's listed on the OSR form." (*Id.* at ¶ 30).

104. "According to Laurie Zeller, Director of Contract Services for MDI, as a 13-year employee, the section of the OSR that sets forth 'Pertinent Information' should be communicated to the physician's office when the appointment is being set up." (*Id.* at ¶ 31).

105. "As a routine, if a scheduler [from MDI] was told by the scheduler at the physician's office a date that was outside the requested time frame, the scheduler would have said, [']I need it sooner because the [BOP] is asking for a one month time frame.['] At that time, the physician's office would either move it up, if they could, and if their calendar was full, the first available appointment would be scheduled." (*Id.* at ¶ 33).

106. "When the MDI scheduler has to schedule the first available appointment, but that appointment is outside the requested time frame, whether or not it would specifically

notify the BOP depends on the nature of the appointment. If the OSR is an ASAP and they can't get it scheduled within that week, they would notify the institution. If it is a two week or one month OSR and it can't be scheduled within that timeframe, then it would not be routine to specifically inform the institution." (*Id.* at ¶ 39).

107. If MDI "could not schedule a particular appointment within a requested time frame," HSA Ron Laino "expected MDI to contact Lisa Rey and tell her." (*Id.* at ¶ 50).

108. "In past, MDI would contact Ron Laino with scheduling conflicts." (*Id.* at ¶ 51).

109. Mr. Laino testified that he was aware of some scheduling issues with MDI and that some inmates were not scheduled for offsite evaluations within the requested time frame made by the prison. (Trial Tr., Laino, Day 1, at 129:24-130:8).

110. Subsequently, MDI put a liaison onsite at USP Allenwood "to improve timeliness of scheduling." (CSF at ¶ 52).

111. "There were situations where follow up appointments with outside providers had to be cancelled or rescheduled due to scheduling conflict issues." (*Id.* at ¶ 159).

112. Although "[t]here was always pressure on the prison's calendar to schedule the number of offsite medical trips [,] there was usually enough availability." (*Id.* at ¶ 161).

113. Mr. Laino testified that he believed that the ultimate responsibility for ensuring that off-site appointments are appropriately scheduled resides with the prison. (Trial Tr., Laino, Day 1, at 140:2-5).

VRA

114. "MDI ha[d] a contract with Vitreoretinal Associates . . . to provide ophthalmological services to inmates at USP Allenwood," including for the year 2007. (*See* CSF at ¶¶ 19, 168).

115. Dr. Tuller and Dr. Lightman are partners at VRA. (*See id.* at ¶ 208).

116. Both Dr. Tuller and Dr. Lightman are ophthalmologists that specialize in vitreoretinal diseases. (*See id.* at ¶¶ 167, 208).

117. At VRA, "[i]nmates were not scheduled on-site when they left the office, their appointment would be scheduled after they leave." (*Id.* at ¶ 229).

118. "Vitreoretinal would fax a fee slip to MDI in late 2007 after an inmate's appointment . . . to show when the doctor wanted the inmate back" in order to trigger MDI to call VRA "to make the appointment." (*See id.* at ¶¶ 230-232).

119. "The [f]ee slip would be sent to MDI on the day of the [inmate's] visit" to VRA. (*Id.* at ¶ 233).

120. Aside from the fee slip, VRA would also send MDI "doctor's notes . . . via regular mail along with a bill." (*Id.* at ¶ 234).

121. According to VRA employee Karen Weimer, VRA also faxed MDI the doctor's notes "because MDI always loses them. They always lose copies. We send them numerous copies for every visit." (*Id.* at ¶ 235).

122. In fact, VRA subsequently "started sending everything certified mail to MDI" due to MDI's tendency to misplace documents. (*See id.* at ¶¶ 235-236).

123. "Karen Weimer knows that MDI lost documents because they [would] request [them] over and over again." (*Id.* at ¶ 237).

124. In terms of scheduling inmates,

> Karen Weimer does not recall any occasions, for whatever reason, an inmate could not be scheduled for follow-up within the time frame requested by the physician.
>
> According to Karen Weimer, if anyone at Vitreoretinal Associates was contacted about scheduling an appointment and that appointment could not be obtained within the requested time frame of the physician, they would put them in with another doctor or consult the physician about the situation.

(*Id.* at ¶¶ 240-241).

125. "If a patient needed to be seen on an urgent basis, both Dr. Tuller and Dr. Lightman would double book." (*Id.* at ¶ 239; *see also id.* at ¶ 279).

126. "An inmate could be seen at Vitreoretinal Associates on any day as long as there was a doctor available in an office that the prison was able to take the inmate to." (*Id.* at ¶ 253).

127. Although "no one in particular [at VRA] was tasked with the responsibility to schedule inmate appointments," "Valerie Cupp and Holly DeWald would be primarily responsible for scheduling appointments." (*See id.* at ¶¶ 246-247).

128. "All front desk staff members at Vitreoretinal Associates were aware of the protocol for scheduling appointments." (*Id.* at ¶ 257).

129. Moreover, "everyone at Vitreoretinal Associates who answers the phone is trained to ask the caller, whether it is a patient, MDI, or a prison, if the patient is experiencing any specific problems." (*Id.* at ¶ 242).

> 130. According to Valerie Cupp, when scheduling an appointment for an inmate, you would first, get into the patients account, look at their last medical record, look to see when the physician wanted them back at that time, ask them if that is the appointment they are scheduling or is the inmate having a problem that they need to be seen sooner. . . .
>
> The schedulers at Vitreoretinal Associates have a responsibility to go back to the physician who requested the follow-up and notify them that they cannot get the patient scheduled within that time frame and ask the physician what they want to do, and Valerie Cupp recalls this scenario happening.

(*Id.* at ¶¶ 254, 268).

131. "[N]ormally, an appointment could be made for an inmate on the day MDI called. In most cases, [an] appointment is made relatively quickly." (*Id.* at ¶ 273).

132. When scheduling conflicts occurred "on the prison's end regarding the ability to schedule a follow-up within the requested time frame, the staff at VRA is trained to go to the doctor to see what they should do." (*Id.* at ¶ 281).

133. "In Dr. Tuller's view, he believes his staff should notify him when a follow-up appointment cannot be scheduled within the requested timeframe;" and, "[t]ypically, Dr. Tuller is made aware when a follow-up appointment with an existing patient cannot be scheduled within the requested timeframe." (*See id.* at ¶¶ 196-197).

134. "According to Valerie Cupp, there were fewer scheduling conflicts before MDI became involved in the scenario of scheduling inmate patient appointments." (*Id.* at ¶ 285; *see also id.* at ¶ 283).

135. Indeed, "Valerie Cupp does not recall not being able to get an inmate seen during the requested time for follow-up appointments when she was dealing directly with the prison." (*Id.* at ¶ 284).

D. 2003-August 27, 2007

136. After being "diagnosed with macular degeneration in his left eye in 1999 or 2000," (*id.* at ¶ 4), Mr. Balter first required injections for his left eye in 2003, (*see id.*at ¶ 178).

137. "Dr. Tuller gave Mr. Balter two injections in 2003." (*Id.*)

138. "According to Dr. Tuller, [when] Mr. Balter had experienced acute problems with his eye in the past, . . . he was sent out to see Dr. Tuller in a timely fashion." (*Id.* at ¶ 206).

139. "[I]n July 2003[,] Mr. Balter noticed a change in vision that morning, and that very day that he told prison staff that he began experiencing dimming of his vision he was sent out to see Dr. Tuller." (*Id.* at ¶ 207).

140. Such timely treatment is consistent with the medical care Mr. Balter received prior to 2005, when Ron Laino was the primarily medical representative to stand main line.

(*See id.* at ¶ 206; Trial Tr., Laino, Day 1, at 110:21-111:11; Trial Tr., DeWald, Day 2, at 11:10-20).

141. "There were times at mainline where [Mr.] Balter would tell Ron Laino he feels a bleed in his eye and [Mr.] Laino would address the issue right then." (*See* CSF at ¶ 54).

142. "On a couple occasions[, Mr. Laino] sent Mr. Balter out for medical care the same day that he addressed him at mainline." (*Id.* at ¶ 55).

143. Mr. Balter would inform Mr. Laino that he felt leakage in his eye, and Laino would "rush" Mr. Balter "to see Dr. Tuller within the hour." (*Id.* at ¶ 12).

144. Mr. Laino testified that Mr. Balter did not "cry wolf" and that he could not recall "any instance" where Mr. Balter was mistaken when he had complained of a leakage. (Trial Tr., Laino, Day 1, at 116:18-24).

145. On another occasion, when Mr. Balter was experiencing "chest pains and sweating and aching in [his] arm," he insisted that a prison paramedic contact Mr. Laino. (*See* CSF at ¶ 11; Trial Tr., Balter, Day 1, at 31:17-32:17). Mr. Laino ensured that Mr. Balter was rushed to a local hospital. (*See* CSF at ¶ 11). In this instance, Mr. Balter had sustained a "massive heart attack." (Trial Tr., Balter, Day 1, at 32:13-14).

146. Dr. Tuller also testified that Mr. Balter's medical complaints were credible, stating that he was "very aware of any problem with his vision" and that Mr. Balter's beliefs about his vision were typically confirmed by subsequent exams. (Trial Dep. Tr., Tuller, Doc. 139, Pl.'s Ex. 37, at 14:15-23).

147. Mr. Laino further testified that if Mr. Balter had approached him in late 2007 complaining of a leak in his eye, Mr. Laino would have referred Mr. Balter out to Dr. Tuller or Dr. Lightman "within an hour," or at least "as soon as possible." (*See* Trial Tr., Laino, Day 1, at 116:13-117:8).

148. In 2004 through 2006, Mr. Balter required no injections. (CSF at ¶ 178). His vision in his left eye remained stable at 20/50 to 20/60 during this time. (Trial Dep. Tr., Tuller, Doc. 139, Pl.'s Ex. 37, at 31:2-10).

149. However, on January 23, 2007, Dr. Tuller identified leakage in Mr. Balter's left eye. (*See* Pl.'s Feb. 20, 2007 Letter to Dr. Tuller, Doc. 139, Pl.'s Ex. 3.5; Dr. Tuller's March 6, 2007 Letter to Pl., Doc. 139, Pl.'s Ex. 3.6). During his January 23, 2007 appointment, Mr. Balter received an Avastin injection in his left eye. (Trial Dep. Tr., Tuller, Doc. 139, Pl.'s Ex. 37, at 30:4-8).

150. On March 20, 2007, Mr. Balter met again with Dr. Tuller. (*See* CSF at ¶ 179). In his notes, Dr. Tuller indicated, "There has been progression of the subretinal disease in the left eye. In the past, there has been a nice response to intravitreal Kenalog and I will repeat this." (Pl.'s Mar. 20, 2007 Med. R., Doc. 140, Def.'s Ex. 1, at 52; *see also* CSF at ¶ 179). Mr. Balter received Kenalog injection in his left eye on March 20, 2007. (Pl.'s Aug. 28, 2007 Med. R., Doc. 139, Pl.'s Ex. 3.9).

151. As a follow up to his March 20, 2007 appointment, Mr. Balter visited Dr. Tuller on June 4, 2007. (Pl.'s June 6, 2007 Med. R., Doc. 140, Def.'s Ex. 1, at 53). Dr. Tuller

noted, "Richard does appreciate improvement in vision over the past 2 1/2 months. He comments that he feels the leakage has stopped but there is decreased vision due to cataract." (*Id.*) During this appointment, Mr. Balter received another Kenalog injection. (*Id.*)

152. Following his June 4, 2007 appointment, Dr. Tuller directed that Mr. Balter be returned in six to eight weeks. (*Id.* at 54). However, Mr. Balter complained that his vision became blurrier after the June 4, 2007 injection and was scheduled to see Dr. Lightman on June 25, 2007. (*Id.* at 55).

153. During his June 25, 2007 appointment, Dr. Lightman indicated that Mr. Balter was "concerned because [his vision] usually clears up quickly after the injection." (*Id.*) Dr. Lightman found no significant change in the subretinal hemorrhage and directed that Mr. Balter "[f]ollow-up with Dr. Tuller as scheduled." (*Id.*) "On the June 25, 2007 appointment with Dr. Lightman, Mr. Balter had active wet macular degeneration." (CSF at ¶ 222).

154. During this period, Mr. Balter was on the automatic call out list and was seen by an optometrist twice a month. (*See id.* at ¶ 338). "According to Dr. DeRose, Mr. Balter was in the clinic a million times. . . . [W]e saw Mr. Balter so many times, it was like every clinic for two years. . . . [S]omebody wanted us to see Mr. Balter a lot, so we saw him a lot." (*Id.* at ¶¶ 290-92). In fact, Mr. Balter was in clinic so often that Dr. DeRose speculated that "Mr. Balter could recognize my footsteps coming down the hall." (*Id.* at ¶ 293).

E. August 28, 2007 Appointment

155. "Mr. Balter's appointment of [August 28, 2007] was created on [August 14, 2007]." (*Id.* at ¶ 275).

156. On August 28, 2007, Dr. Tuller saw Mr. Balter and told him that "his eye was stable and that he would schedule a follow-up for him." (*Id.* at ¶¶ 5). Dr. Tuller ordered that Mr. Balter return in ten weeks. (*Id.* at ¶ 181).

157. During his trial deposition testimony, Dr. Tuller explained his rationale for the ten week follow-up, stating that

> . . . the activity that [Mr. Balter] was having [was] beginning to stabilize, I just felt that the . . . two and a half month follow-up would be appropriate. There were periods where . . . I was following him at five or six-month intervals when things were very quiet, and then more closely when there was active leakage that needed closer monitoring. And I think that this point, with a two and a half month follow-up, I felt that things were beginning to stabilize again.

(Trial Dep Tr., Tuller, Doc. 139, Pl.'s Ex. 37, 33:6-34:17).

158. "According to Dr. Tuller, if a patient is stable, has no complaints, then certainly a week on either side, a week and a half on either side, so that might give you a, in a sense, a two and a half month follow-up, perhaps a 3 week zone around that requested appointment. I don't expect it to be 10 weeks to the day. But that's the time frame that I am looking for." (CSF at ¶ 185).

159. As of August 28, 2007, Dr. Tuller "had no plan to provide an injection to Mr. Balter at the 10 week follow-up." (*See id.* at ¶ 186).

F. October 16, 2007

160. "The medical record from the August 28, 2007, appointment with Dr. Tuller was attached to the OSR submitted to MDI by Lisa Rey on October 16, 2007." (*Id.* at ¶ 23).

161. "The October 16, 2007, OSR submitted to MDI had the one month box checked indicating that USP Allenwood wanted the appointment within a one month time frame." (*Id.* at ¶ 24). "The one month begins to run from the day the OSR is submitted to MDI." (*Id.* at ¶ 25). "That means that USP Allenwood wanted Mr. Balter's appointment scheduled on or before November 16, 2007." (*Id.* at ¶ 26).

162. "According to Laurie Zeller, Director of contract services for MDI, Richard Balter's appointment with Dr. Tuller was not scheduled promptly by MDI[,] where MDI was provided with the OSR on October 16, 2007, and MDI did not schedule the appointment until 20 days later on November 5, 2007." (*Id.* at ¶ 36).

163. Mr. Balter's "appointment was scheduled by Vida Hall for December 11, 2007 at 1:00 p.m." (*Id.* at ¶ 34). "The December 11, 2007 appointment would be outside of the timeframe requested by USP Allenwood." (*Id.* at ¶ 35).

164. Dr. Brady, Clinical Director of USP Allenwood in 2007, could not explain why Mr. Balter was not timely scheduled for a follow-up with Dr. Tuller. (*See id.* at ¶¶ 107, 156).

165. "According to Dr. Brady[,] the 10-week follow-up for Mr. Balter would be like kind of a non-contested . . . no brainer. We would just do it." (*Id.* at ¶ 125).

166. "Wet macular degeneration is a condition that should be followed by an ophthalmologist, and whatever they're suggesting in terms of follow up, would make sense to comply with." (*Id.* at ¶ 141).

167. "If an offsite doctor had an inmate patient with wet macular degeneration who needed to be seen in ten weeks for follow up, Dr. Brady would want him to be seen in ten weeks." (*Id.* at ¶ 150).

168. "Dr. Brady does not know why it took from August 28, 2007, the day of the consultation sheet, until October 16, 2007, to get from the consultation sheet step to being referred offsite to be scheduled." (*Id.* at ¶ 156).

169. Mr. Laino, who oversaw the administration of medical services at FCC Allenwood during 2007, testified that he was unsure as to why it took the prison seven weeks to process a consultation sheet that ultimately provided the information to MDI to schedule an offsite appointment. (*See* Trial Tr., Laino, Day 1, at 127:11-16).

170. Mr. Laino further testified that such a lengthy time frame to schedule an appointment is unusual. (*Id.* at 127:17-20).

171. In addition, Mr. Laino testified that he was aware of some scheduling issues with MDI and that some inmates were not scheduled for offsite evaluations within the requested time frame made by the prison. (*See id.* at 129:24-130:8).

172. Likewise, AHSA Ms. DeWald testified that she did not know why it took over seven weeks to create an OSR for Mr. Balter with MDI. (*See* Trial Tr., DeWald, Day 2, at

9:21-22). Moreover, she could think of no other instance in which such a time period elapsed while attempting to schedule other prisoners. (*See id.* at 9:23-25).

G. November 2007

173. "For a long period of time[,] Mr. Balter was automatically placed on the call out list [to see an optometrist] twice a month." (CSF at ¶ 338).

174. Consistent with being on the automatic call out list, "Mr. Balter was seen by Dr. DeRose or Dr. Weyand on September 11, 2007, September 26, 2007, [and] October 17, 2007." (*See id.* at ¶ 322).

175. During the month of November 2007, an optometrist, either Dr. DeRose or Dr. Weyand, visited USP Allenwood on three occasions—November 7, November 14, and November 22. (*See* Trial Tr., Balter, Day 1, at 90:2-6).

176. However, Mr. Balter's optometry appointments inexplicably ceased as of October 17, 2007. (Auman June 4, 2008 Note, Doc. 139, Pl.'s Ex. 2).

177. As a result, Mr. Balter was unable to see an optometrist for several weeks, including the entire month of November 2007. (*Id.*).

178. Moreover, Dr. DeRose's September 26, 2007 exam sheet ordered that Mr. Balter have his IOP tested every month by an optometrist and required Mr. Balter to see a "retinal specialist on a regular basis." (*See* Pl.'s Sept. 26, 2007 Med. R., Doc. 139, Pl.'s Ex. 1.12).

179. Mr. Laino testified that he could not explain why Dr. DeRose's written request that Mr. Balter be evaluated at least every month by a retinal specialist was not complied with, and Mr. Laino expressed further concern that the prison failed to comply with orders from physicians requesting follow-ups for Mr. Balter. (*See* Trial Tr., Laino, Day 1, at 154:20-25, 155:1-14).

180. Likewise, Ms. DeWald could not recall why Dr. DeRose's request that Mr. Balter be monitored by an optometrist every month was disregarded. (*See* Trial Tr., DeWald, Day 2, at 31:3-11).

181. Ms. DeWald testified that orders from Dr. DeRose are generally followed. (*See id.* at 32:10-13).

182. Finally, Ms. Auman testified that she did not know why Mr. Balter was not seen by the optometrist between October 17, 2007 and December 5, 2007, even though his "eye exam sheet" required such appointments. (*See* Trial Tr., Auman, Day 1, at 168:1-169:24, 186:5-11).

183. At trial, Mr. Balter testified that in early November 2007 he felt that there was a leakage in his left eye. (*See* Trial Tr., Balter, Day 1, at 46:1-6).

184. By "the middle of the month," Mr. Balter began experiencing "a little blurriness in the eye . . . ." (*Id.* at 46:23-47:2).

185. According to Mr. Balter, he "went to Ms. DeWald several times at main line" complaining of these symptoms and the fact that he was no longer on the automatic call out list to see an optometrist. (*Id.* at 44:21-45:6).

186. Further, Mr. Balter testified that he made similar complaints to his physician assistant at the prison, Ms. Holtzapple, (*id.* at 38:11-17), as well as Ms. Auman and Ms. Rey, (*id.* at 50:9-21).

187. Mr. Balter also maintained that he made oral complaints to Warden Ricardo Martinez and assistant warden. (*Id.* at 70:4-11).

188. Mr. Balter voiced these complaints on a nearly daily basis between November 4, 2007 and December 4, 2007. (*Id.* at 70:12-71:5).

189. According to Mr. Balter, when he "went to the Warden, the AW, . . . they told [him] to see Medical." (*Id.* at 34:18-35:4).

190. When he went to Medical, Ms. DeWald "was a little annoyed" and told Mr. Balter, "You're being scheduled." (*See id.* at 35:3-6).

191. Mr. Balter protested, allegedly stating, "Come on, Ms. DeWald, what do you mean I'm being scheduled? I'm not seeing the eye doctor. When is he coming in? He's here at least twice a month, and . . . I'm still not seeing him. This is getting worse. Could you get me to Dr. Tuller? Where is Mr. Laino?" (*Id.* at 35:6-10).

192. According to Mr. Balter, Ms. DeWald's response "was basically, [']Balter, you're scheduled. Keep it up and you'll end up in SHU, [the] Special Housing [Unit].'" (*Id.* at 35:10-12).

193. Mr. Balter further testified that when he went to Medical and approached Ms. Auman, who scheduled inmate appointments with the optometrist, her response was "We'll take care of it and you'll be scheduled." (*See id.* at 33:15-34:5).

194. Balter testified when he subsequently complained, "the famous words were, [']You're scheduled.[']" (*See id.* at 46:25-47:3).

195. Although Mr. Balter was unable to see an optometrist during the month of November, Mr. Balter did see Dr. Pigos, a Medical Officer at FCC Allenwood in late 2007"for a chronic care appointment on November 16, 2007." (*See* CSF at ¶¶ 106, 110). "The appointment was related to all of his chronic problems, including macular degeneration." (*Id.* at ¶ 110). "Regarding his [m]acular degeneration, Dr. Pigos remembers asking Mr. Balter how things were going, and he said he was following up with the eye doctors and he didn't have any complaints." (*Id.* at ¶ 111).

196. On cross-examination, Mr. Balter was asked why he did not complain to Dr. Pigos on November 16, 2007, regarding the worsening of his condition and the alleged failure of the prison to send Mr. Balter to a specialist. (*See* Trial Tr., Balter, Day 1, at 79:1-7). Mr. Balter responded that he did not raise the issue with Dr. Pigos because "Dr. Pigos and any medical doctor in there had told me numerous times they do not go over or discuss

the eye, they do not have the knowledge they do not have the equipment they do not have the ability." (*Id.* at 79:13-16).

H. December 5, 2007

197. Mr. Balter was scheduled to see Dr. Tuller on December 11, 2007 at 1:00 P.M. (*See* CSF at ¶ 34).

198. On December 5, 2007, Mr. Balter sustained a "large hemorrhage" in his left eye. (*See* CSF at ¶ 217).

199. According to Mr. Balter, when he woke up on the morning of December 5, 2007, he noticed a significant decrease in his vision. (*See* Trial Tr., Balter, Day 1, at 47:12-24). Mr. Balter described that "it was terrible. . . . I could see only shadows." (*Id.* at 47:23-24).

200. "Dr. DeRose treated Mr. Balter on December 5, 2007." (CSF at ¶ 310).

201. "Dr. DeRose believes that he was most likely at the institution on December 5, 2007, for one of the regularly scheduled days." (*Id.* at ¶ 328).

202. "When Mr. Balter was seen by Dr. DeRose on December 5, 2007, Dr. DeRose noted . . . . 'He's got macular degeneration on the right [eye], and he has a fresh leak on the left and his pressures were normal.'" (*Id.* at ¶ 300).

203. "According to Dr. DeRose, fresh leak means currently bleeding, and means the wet macular degeneration is active." (*Id.* at ¶ 301).

204. "During the December 5, 2007 optometry appointment, Dr. DeRose indicated that Mr. Balter should 'see Dr. Tuller ASAP.'" (*Id.* at ¶ 311).

205. Mr. Balter testified that he explained to Dr. DeRose not only what his condition was that day but also that he had been trying to see him for the past month. (*See* Trial Tr., Balter, Day 1, at 102:12-15).

206. "If Mr. Balter had complained to Dr. DeRose of Mr. Balter requesting to [be] seen and those requests not being granted, Dr. DeRose would not document that on the eye exam form or any other document." (CSF at ¶ 329).

207. "Dr. DeRose does not recall anything specific about the December 5, 2007, appointment with Mr. Balter," nor does he "recall anything Mr. Balter said to him" at that appointment. (*See id.* at ¶¶ 315-316.)

208. VRA was contacted, and "Valerie Cupp made the December 5, 2007 appointment . . . that very same day." (*Id.* at ¶ 276).

209. As a result, Mr. Balter was examined by Dr. Lightman on December 5, 2007. (*See id.* at ¶ 211).

210. "Dr. Lightman has no independent recollection of Mr. Balter. Dr. Lightman's only recollection of Mr. Balter is what is documented in the medical notes." (*Id.* at ¶ 209).

211. As Dr. Lightman's notes indicate, "Mr. Balter suffered a significant decrease in vision between June 25, 2007, and December 5, 2007." (*See id.* at ¶ 221).

212. When Dr. Lightman last saw Mr. Balter on June 25, 2007, his vision in his left eye was 20/60. (Pl.'s June 25, 2007 Med. R., Doc. 139, Pl.'s Ex. 3.8.5).

213. On December 5, Mr. Balter's visual acuity dropped to 20/400. (Trial Dep Tr., Lightman, Doc. 139, Pl.'s Ex. 39, at 15:17-16:22).

214. During his trial deposition testimony, Dr. Lightman explained Mr. Balter's vision loss in practical terms, stating that it was "about seven times worse" on December 5 than it was on June 25. (*See id.* at 16:13-19). Dr. Lightman further explained,

> People can generally read with larger print with [20/60] vision. You can drive a car during daylight hours with 20/70 vision or better. . . .
>
> [S]omebody with 20/400 vision could just see the big E on the chart. . . . Navigation would be possible. Reading would be very difficult without low vision devices, including magnification or a real bright light.

(*Id.* at 14:3-5, 16:21-17:3).

215. Mr. Balter's vision loss was the result of a "large hemorrhage." (*See* CSF at ¶ 217; *see also id.* at ¶ 13).

216. "According to Dr. Lightman, you can't determine the timing of the leak by the size of the hemorrhage." (*Id.* at ¶ 218.)

217. Further, "[a]ccording to Dr. Lightman, usually when you see a hemorrhage that big, they're usually of sudden onset, but it is not a definite." (*Id.* at ¶ 219). "The bleed could have happened unpredictably and suddenly on December 5, 2007." (*Id.* at ¶ 195.)

218. In this instance, Dr. Lightman ordered photographs of Mr. Balter's left eye. (*See* Dec. 5, 2007 Color Eye Study, Doc. 139, Pl.'s Ex. 9.1).

219. According to Dr. Lightman, although the photographs cannot be used as a basis for "pinpointing" when Mr. Balter's eye began to leak, he acknowledged that the "hemorrhage could have began weeks before December 5th." (Trial Dep Tr., Lightman, Doc. 139, Pl.'s Ex. 39, at 24:4-20).

220. Moreover, Dr. Tuller testified that the photographs reveal "a dark area of blood [that is] surrounding a more tan area[,] . . . which looks like [it] has probably been there for a matter of weeks because the blood dehemoglobizes, so . . . this probably isn't completely fresh." (*Id.* at 24:11-20).

221. "Dr. Lightman doesn't recall Mr. Balter telling him at his appointment on December 5, 2007, that he had been experiencing vision loss in his left eye since late October and through November of 2007 and that he was making complaints with the [prison staff] but they ignored him. Had Mr. Balter told him this, it is something Dr. Lightman would have documented in his notes." (CSF at ¶ 212).

222. "According to Dr. Lightman[,] the length of time someone is experiencing symptoms in the context of macular degeneration is relevant to further treatment and you would document that information in your note." (*Id.* at ¶ 213).

223. Dr. Lightman got the "information contained in [his] note from December 5, 2007 . . . from . . . Mr. Balter." (*Id.*at ¶ 216).

224. "On December 5, 2007, Mr. Balter told Dr. Lightman that today he noted worsening of his vision in left eye and saw Dr. DeRose, . . . who noted leakage left eye." (*Id.* at ¶ 214).

225. "Dr. Lightman's general practice was to ask a patient about the details surrounding the length of time he experienced symptoms." (*Id.* at ¶ 215).

226. During his trial deposition testimony, Dr. Lightman acknowledged that "[i]t's possible" that "Mr. Balter relayed to [him] that he had symptoms maybe several days before." (Trial Dep. Tr., Lightman, Doc. 139, Pl.'s Ex. 39, at 19:18-24). Dr. Lightman further noted that the medical "histories that we take are not exhaustive. We try to say them as succinctly as we can." (*Id.* at 19:24-20:1).

227. Dr. Lightman testified that his medical notes capture only "the highlights of [a patient's] chief complaint . . . rather than a day-by-day description of what he's experienced." (*Id.* at 20:5-12).

I. June-July 2008

228. "The vision in Mr. Balter's left eye worsened as a result of another hemorrhage in June of 2008." (CSF at ¶ 14).

229. Mr. Balter testified that after the December 5, 2007 hemorrhage he "could see only shadows." (*See* Trial Tr., Balter, Day 1, at 47:23-24).

230. "In June, 2008, Mr. Balter's entire left eye filled up with blood, there was no light." (CSF at ¶ 13). Mr. Balter further testified that

> In June 4, I went up to see Dr. DeRose and I told him that my eye was hemorrhaging. . . . And he said, ["]Your eye is starting to hemorrhage.["] He said, ["]We'll get you to see Dr. Tuller right away, I'll let Ms. DeWald know.["] . . . [W]e expected it to be quick[,] because it was hemorrhaging[,] . . . [but] I then didn't go to see Dr. Tuller . . . for twelve days . . . . When I got to see Dr. Tuller on that day, my eye had filled up with [blood] . . . .Dr. Tuller then told me the only thing that could be done was he had to do a vitrectomy on me, and that was done in July.

(Trial Tr., Balter, Day 1, at 62:7-63:1).

231. On June 16, 2008, "Dr. Tuller noted 'Interval History' Richard comments that he had a sudden loss of vision in the left eye on June 10, 2008." (CSF at ¶ 190).

232. On the same date, "Mr. Balter had a severe decrease in vision secondary to progression of his disease. At that examination, there was bleeding into the center of the eye." (*Id.* at ¶ 191).

233. Further, on June 16, "there had been further subretinal bleeding, which led to blood in the center of the eye resulting in a severe decrease in vision." (*Id.* at ¶ 192).

234. "Dr. Tuller believes the severe loss of vision on [June 18, 2008] was an isolated and separate event. The event from December was stable with the treatment around that visit, and the June event was further progression of the disease." (*Id.* at ¶ 202).

235. On July 3, 2008, "Dr. Tuller operated on Mr. Balter and noted: [']Surgery note (Tuller 090) Operative findings: Most recently there has been hemorrhagic pigment epithelial detachment of the left eye with breakthrough vitreous hemmorhage. Talking about June event. There was subretinal hemorrhage as well as extensive peripheral scarring due to previous subretinal hemorrhage in 2008. The macular degeneration is very advanced

with poor prognosis for recovery of vision. The retina is nonfunctioning and scarred, so there is really no hope for recovery of vision.[']" (*Id.* at ¶ 193).

J. Expert (Medical) Testimony

Dr. Goren

236. Dr. Matthew Goren, Mr. Balter's medical expert, testified that persons experiencing wet macular degeneration should be able to recognize symptoms that would indicate a change in status of their condition. (*See* Trial Tr., Goren, Day 2, at 87:6-16).

237. Dr. Goren further testified that when certain symptoms exist, such as a distortion in vision, it is important to see the doctor as soon as possible. (*Id.* at 87:9-88:4).

238. Dr. Goren opined that an optometrist should be able to identify a leak in the eye of a patient diagnosed with wet macular degeneration. (*Id.* at 98:18-21).

239. Dr. Goren also provided testimony that patients who complain of an "acute visual change" should be seen by a doctor within twenty-four hours. (*Id.* at 98:1-17).

240. With regard to Mr. Balter's alleged complaint's that his eye was leaking, Dr. Goren testified that if Mr. Balter "requested or had notified prison staff that he believed he had a leak and he requested to see the optometrist or the ophthalmologist," such a request would be medically appropriate. (*Id.* at 99:6-11).

241. Dr. Goren opined that the complaints that Mr. Balter made in November 2007 concerning blurry vision and that he had to squint to read when coupled with Mr. Balter's

medical history should have compelled prison staff to ensure that Mr. Balter was seen by an optometrist within twenty-four hours, or forty-eight at most. (*Id.* at 101:21-102:12).

242. Dr. Goren's testimony was that a delay beyond forty-eight hours would "increase the risk of not being able to prevent the harm from occurring," which includes a loss of vision. (*Id.* at 102:1-10).

243. With regard to the ten week window for a follow-up with Dr. Tuller, Dr. Goren testified that a timely follow-up with Dr. Tuller would "likely have resulted in discovering some continual leakage." (*See id.* at 110:8-12).

244. Dr. Goren further testified that irrespective of Mr. Balter's recognition of symptoms of a possible leakage, the failure to abide by Dr. Tuller's request for a ten week follow-up increased the risk of harm to Mr. Balter. (*Id.* at 113:17-22).

245. Dr. Goren opined that both the failure to schedule a timely follow-up and a failure to address Mr. Balter's complaints regarding symptoms of a leak increased the risk of harm to Mr. Balter. (*See id.* at 130:1-9).

246. Dr. Goren testified that there was a significant leakage on December 5, 2007, but that there was "a process going on, prior to that day." (*See id.* at 134:11-21).

247. Dr. Goren testified that, to a reasonable degree of medical certainty, there was an ongoing leakage problem. (*Id.*)

248. While Dr. Goren agreed that there was a "sudden, massive hemorrhage on December 5, 2007," (*id.* at 144:12-18), he also stated there was a "leakage" prior to that December 5, 2007 hemorrhage, (*id.* at 144:19-145:6).

249. Dr. Goren testified that "it's unreasonable to assume that all of a sudden [Mr. Balter] had a completely brand new event that was unrelated to what was going on over the past seven or so years." (*Id.* at 142:20-143:2).

250. Again, Dr. Goren testified that the leaking was chronic, even if it was not always constant. (*See id.* at 142:17-143:2).

251. Dr. Goren also testified that although he believed the leaking was chronic, there was a sudden, "very seminal" event that occurred on December 5, 2007. (*See id.* at 144:17-18).

252. Dr. Goren opined that if there were leakage in Mr. Balter's eye as he believed there was based on the tan coloration in the photograph of Mr. Balter's eye after the hemorrhage, (*see* Dec. 5, 2007 Color Eye Study, Doc. 139, Pl.'s Ex. 9.1), that there was "a period of intervention" which provided "an opportunity" for treatment, (Trial Tr., Goren, Day 2, at 145:14-17).

253. Dr. Goren testified that a photograph of the bleed suggested that the blood may have been in Mr. Balter's eye for an extended period, and that it indicates an ongoing leakage. (*Id.* at 144:22-145:6).

254. Dr. Goren was then questioned as follows:

Q: Could that have prevented this massive event on December 5?

A: I believe so.

Q: What makes you believe that?

A: Well, anything is just a general principle that things are more effectively treated at earlier stages than late stages, that's true with everything.

(*Id.* at 145:18-24). Before Dr. Goren concluded his testimony, the following exchange occurred:

THE COURT: . . . is it your testimony that had Mr. Balter been seen, in accordance with the August 28, 2007 suggestion or directive, however you want to characterize it, that he be seen in 10 weeks, that that would have avoided the eye hemorrhage of December 5, had he been seen? Is that your testimony?

THE WITNESS: No, Your Honor, I can't say with certainty that that's the case. But I can say that he would have had a far better chance of a favorable outcome, but, no, I can't say with 100 percent certainty. . . .

MR. MOWRY: Doctor, with the question directed from the Judge, is it correct you're saying that, although, you can't determine what would it have shown, if that 10 weeks had been complied with, as Drs. Tuller and Lightman have testified, that nobody knows what it would have shown? Is it your position that the failure to have that requested follow-up, that it increased the risk of harm to Mr. Balter?

THE WITNESS: Yes, sir.

(*Id.* at 150:22-151:11, 152:1-9).

Dr. Beck

255. Defendant offered the expert testimony of Dr. Adam Paul Beck ("Beck").

256. Dr. Beck testified that patients suffering from age-related wet macular degeneration can have a stable eye exam and then suffer a sudden leak or hemorrhage that causes permanent vision loss the next day. (Trial Tr., Beck, Day 3, at 11:3-7).

257. Dr. Beck testified that there is no treatment available to "prevent macular degeneration from progressing." (*Id.* at 11:16-19.)

258. Dr. Beck's testimony was that there is no procedure available to prevent sudden hemorrhages, but that doctors are only able to react to them. (*Id.* at 11:20-12:2).

259. Specifically, Dr. Beck stated that injections of Kenalog, Avastin, or Lucentis do not eliminate the risk of hemorrhages. (*Id.* at 12:7-9).

260. With regard to Mr. Balter's case, Dr. Beck testified that large hemorrhages, such as the one experienced by Mr. Balter on December 5, 2007, are usually sudden. (*Id.* at 16:9-12).

261. Dr. Beck testified that the leak experienced by Mr. Balter on December 5, 2007 was "most likely within a reasonable degree of medical certainty, a sudden onset." (*Id.* at 16:23-17:2).

262. Dr. Beck opined that a photograph of the bleed suggested that it was a sudden occurrence. (*Id.* at 17:10-11).

263. Dr. Beck testified that he agreed with Dr. Tuller's testimony that even the receipt of timely injections does not necessarily stop a patient with wet macular degeneration from suffering a loss of central vision. (*Id.* at 17:18-22).

264. Dr. Beck testified that the fact that Mr. Balter was not seen in November 2007 "had no bearing" on his suffering a loss of central vision. (*See id.* at 18:15-16).

265. The Court questioned Dr. Beck concerning the purpose of the eye injections and the role they play in wet macular degeneration.

THE COURT: As I understand your testimony, when we talk about wet macular degeneration we are essentially speaking of the growth of red blood cells under the epithelium of the retina?

DR. BECK: Uh-hum.

THE COURT: And then apparently there's a [fissure] in the retina and the blood cells protrude and ultimately if they hemorrhage you have the event of December 5th in this case?

DR. BECK: Uh-hum.

THE COURT: Now let me take you out of your specialty for a moment and ask you, I want to try to compare this or, at least, attempt to draw an analogy between that process that I just described and what we sometimes see, in connection with aneurisms.

An artery has a bulge in it, the bulge, ultimately, if it ruptures, of course, it's an event that's usually fatal. But the aneurysm and the swelling in the artery is something that can be discerned by the appropriate diagnostic procedure.

Is there an appropriate analogy there, in the sense that, is there a way of anticipating, as you would with an aneurysm, its existence and its increase in size, such that you can reasonably anticipate the likelihood of a rupture? Do you have that kind of ability, through examination, to determine the enlargement of the blood vessels through the retina, leading to the ultimate rupture and blindness?

DR. BECK: That's a really good analogy. No, we do not have that technology, we don't have that ability. I remember back in medical school and during my general surgery internship I think it was a five-centimeter abdominal aortic aneurysm, at the time, that was the cutoff for when someone would get surgery versus observation. It's not like that with the retina. This is — in my practice, that's what I was talking about the Amsler grid sending a patient home with this.

It's a grid with a bunch of straight lines on it, they put it on the refrigerator and test each eye. There will be a wavy spot or wavy area, well, that's their baseline, and if they notice a change in this, then, I have the patient call me and I will see them back right away. But there's no five-centimeter rule in the retina like that.

THE COURT: So, again, if Mr. Balter had been seen, within the 10-week, give or take, 10 days that, originally, Dr. Tuller had requested, back on August 28, that examination, in your view, would not have disclosed any indication that a retinal bleed was imminent, is that right?

DR. BECK: Correct.

The COURT: . . . I've heard references to injections of Kenalog, Avastin and Lucentis. What do they do?

DR. BECK: They attack the blood vessels.

THE COURT: Pardon me. They're not preventative?

DR. BECK: No, they're not preventative. What causes problems in the retina, whether diabetic retinopathy or wet macular degeneration, is the production of vascular endothelial growth factor, the growth factor that causes formation of new blood vessels. We don't like new blood vessels. They bleed, they leak, we don't want new blood vessels in the retina. New blood vessels are bad.

All of these medications revolve around blocking the receptors for the production of vascular endothelial growth factors, so they attack the blood vessel.

(*See id.* at 51:18-54:2).

266. Dr. Beck testified that when Mr. Balter received treatment for past leakage, such treatments were effective in preventing the leakage from advancing to a substantially more harmful stage. (*Id.* at 35:3-6).

267. Dr. Beck testified that he does not only provide injections to patients with massive hemorrhages, but that injections are used to treat patients when there was activity that required a response. (*Id.* at 43:7-12).

268. Dr. Beck further testified that, hypothetically, if he had seen Mr. Balter within the recommended ten week follow-up window, and if during that follow-up he had noticed an increase in activity, he would have treated Mr. Balter in some manner. (*Id.* at 46:14-21).

III. Applicable Law

A. Jurisdiction

Mr. Balter's claim of negligence against the Government is brought under the FTCA, 28 U.S.C. §§ 1346, 2671, *et seq*. The FTCA "provides much-needed relief to those suffering

injury from the negligence of government employees," *United States v. Muniz*, 374 U.S. 150, 165, 83 S.Ct. 1850, 1859, 10 L.Ed.2d 805 (1963), by "remov[ing] sovereign immunity of the United States from suits in tort, and with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Podlog v. United States*, 205 F. Supp. 2d 346, 355 (M.D. Pa. 2002), *aff'd*, 85 F. App'x 873 (3d Cir. 2003) (quoting *Richards v. United States*, 369 U.S. 1, 6, 82 S.Ct. 585, 589, 7 L.Ed.2d 492 (1962)). In FTCA claims, courts must "apply the law of the state in which the act or omission occurred." *Hodge v. United States Dep't of Justice*, 372 F. App'x 264, 267 (3d Cir. 2010) (citing *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 179 (3d Cir. 2000)). Because all of the conduct giving rise to Mr. Balter's claim occurred at USP Allenwood, Pennsylvania state law will apply.

B. Ordinary versus Professional Negligence

Under Pennsylvania law, "[f]or a party to prevail in a negligence action, ordinary or professional, the elements are identical: the plaintiff must establish [1] the defendant owed a duty of care to the plaintiff, [2] that duty was breached, [3] the breach resulted in the plaintiff's injury, and [4] the plaintiff suffered an actual loss or damages." *Merlini ex rel. Merlini v. Gallitzin Water Auth.*, 602 Pa. 346, 354, 980 A.2d 502, 506 (Pa. 2009). Although the basic elements of both ordinary and professional negligence are the same, a medical malpractice claim is further defined as an "unwarranted departure from generally accepted standards of medical practice resulting in injury to a patient, including all liability-producing

conduct arising from the rendition of professional medical services." *Id.* (quoting *Grossman v. Barke*, 868 A.2d 561, 566 (Pa.Super.Ct. 2005)).

To determine whether a plaintiff's claim is one of ordinary or professional negligence, courts must look to the substance, rather than the form, of the complaint. *Id.* at 507; *see also Varner v. Classic Communities Corp.*, 890 A.2d 1068, 1074 (Pa.Super.Ct. 2006) (stating "that it is the substance of the complaint rather than its form which controls whether [a] claim . . . sounds in ordinary negligence or professional malpractice"). In *Merlini*, the Pennsylvania Supreme Court stated that whether a negligence claim is "professional versus ordinary negligence deals primarily with the breach of a professional standard of care." *Merlini*, 980 A.2d at 507. The Pennsylvania Superior Court distinguished medical malpractice from ordinary negligence as follows:

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only within the course of a professional relationship. Second, claims of medical malpractice necessarily raise questions involving medical judgment. Claims of ordinary negligence, by contrast, raise issues that are within the common knowledge and experience of the [fact-finder]. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

Ditch v. Waynesboro Hosp., 917 A.2d 317, 322 (Pa.Super.Ct.2007) (quoting *Grossman*, 868 A.2d at 570).

In sum, "a complaint 'sounds in malpractice' where 'the conduct at issue constituted an integral part of the process of rendering medical treatment.'" *Iwanejko v. Cohen & Grigsby, P.C.*, 249 F. App'x 938, 944 (3d Cir. 2007) (quoting *Ditch*, 917 A.2d at 323). Because the conduct giving rise to Mr. Balter's claim involves alleged administrative failures rather than medical malpractice, the Complaint sounds in ordinary negligence and Mr. Balter's claim will be treated as such.

C. Duty

Under 18 U.S.C. § 4042(a), the United States has a duty to "provide for the safekeeping, care and subsistence" and "for the protection . . . of all persons charged with or convicted of offenses against the United States." *Jones v. United States*, 91 F.3d 623, 624 (3d Cir. 1996) (quoting 18 U.S.C. § 4042(a)(2)-(3)). "The duty of care as provided by 18 U.S.C. § 4042 is that of ordinary diligence to keep prisoners safe from harm." *Grundowski v. United States*, 2012 WL 1721781, at *5 (M.D. Pa. 2012) (quoting *Hossic v. United States*, 682 F.Supp. 23, 25 (M.D .Pa. 1987) (internal quotation marks omitted)). This duty of care is heightened where an inmate is known to have a rare condition requiring special treatment. *See Berman v. United States*, 205 F. Supp. 2d 362, 365 (M.D. Pa. 2002) ("[I]t must be pointed out that plaintiff was not a run-of-the-mill prison patient with the usual complaints—he had a rare condition and, thus, prison officials should have been more alert to, and concerned with, the type of treatment he required.").

Because Mr. Balter was incarcerated at USP Allenwood and "was not a run-of-the-mill prison patient with the usual complaints," the Government owed a heightened duty to provide for the safekeeping, care, and protection of Balter. *See id.* By extension, MDI also owed Mr. Balter a duty of care pursuant to its contract with FCC Allenwood.[1]

D. Breach

"Courts of the Third Circuit, in limited circumstances, have recognized that certain acts or omissions by prison medical staff can constitute a breach of an ordinary negligence duty." *Grundowski*, 2012 WL 1721781, at *6; *see also id.* at *10 (finding that the government breached its duty of care by failing to reasonably treat a plaintiff-inmates' diabetes); *Jones*, 91 F.3d at 625 (holding that the denial of an inmate's prescribed medication can constitute a breach of care under 18 U.S.C. § 4042); *Hill v. Lamanna*, 2006 WL 2433773, at *9 (W.D. Pa. 2006) (finding possible breach of duty of care related to a plaintiff-inmate's tooth extraction). More specifically, a prison may breach its duty of care by failing to schedule an inmate for necessary medical treatment in a timely fashion. *See Aviles v. United States*, 2012 WL 3562370, at *6 (E.D. Pa. 2012).

E. Causation

The third element Balter must prove is that the Government's negligence caused his injury. *See Grundowski*, 2012 WL 1721781, at *6. "In limited circumstances, Pennsylvania

[1] Although it is an undisputed fact that MDI was contractually obligated "to provide scheduling services for USP" by finding outside "medical providers and/or physicians in the area of FCC Allenwood to provide care to inmates," (CSF at ¶¶ 17, 38), the contract itself was not incorporated into the record.

law permits recovery where a defendant's negligence increased the risk of harm to a plaintiff, even if plaintiff cannot show conclusively that no injury would have occurred in the absence of negligence." *Id.* at *7 (quoting *Lempke v. Osmose Util. Servs., Inc.*, 2012 WL 94497, at *3 (W.D. Pa. 2012)). When a plaintiff proceeds under a theory of increased risk, Pennsylvania law requires a two-stage inquiry. *See Hamil v. Bashline*, 481 Pa. 256, 269, 392 A.2d 1280, 1287 (Pa. 1978). First, a court must determine whether "a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position," and then "it becomes a question for the [fact-finder] whether that increased risk was a [factual cause] in producing the harm." *Feeney v. Disston Manor Pers. Care Home, Inc.*, 849 A.2d 590, 595 (Pa.Super.Ct. 2004).

Increased Risk

Where the issue of increased risk involves questions of medical causation that go "beyond the knowledge of the average layperson," the plaintiff is required to present expert testimony, "with a reasonable degree of medical certainty, that a defendant's conduct increased the risk of the harm actually sustained." *Vicari v. Spiegel*, 936 A.2d 503, 510 (Pa. Super.Ct. 2007), *aff'd*, 605 Pa. 381, 989 A.2d 1277 (Pa. 2010) (internal citations and quotation marks omitted). "In determining whether the expert's opinion is rendered to the requisite degree of certainty, we examine the expert's testimony in its entirety." *Id.* "The purpose of this standard is not, however, to render proof needlessly difficult, but to avoid

speculation under the rubric of 'expert opinion.'" *Betz v. Erie Ins. Exch.*, 957 A.2d 1244, 1258 (Pa.Super.Ct. 2008).

"That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty." *Id.* (quoting *Carrozza v. Greenbaum*, 866 A.2d 369, 379 (Pa.Super.Ct. 2004)). "Accordingly, an expert's opinion will not be deemed deficient merely because he or she failed to expressly use the specific words, 'reasonable degree of medical certainty.'" *Id.* (quoting *Commonwealth v. Spotz*, 562 Pa. 498, 756 A.2d 1139 (Pa. 2000) (indicating that "experts are not required to use 'magic words'" but, rather, "[courts] must look to the substance of [the expert's] testimony to determine whether his opinions were based on a reasonable degree of medical certainty rather than upon mere speculation")).

Factual Cause

Once a plaintiff demonstrates increased risk of harm to a reasonable degree of medical certainty, then the case may be submitted to the finder of fact to determine whether the increased risk of harm was a "factual cause" of the injury. *Grundowski*, 2012 WL 1721781, at *6-7 n.5 (quoting *Gorman v. Costello*, 929 A.2d 1208, 1213 n. 7 (Pa.Super.Ct. 2007) (noting that "[t]he term 'factual cause' has been adopted to replace the previously-used terms 'substantial factor' and 'legal cause'")); *see also* Pa. SSJI (Civ), § 13.20, Subcomm. Note.[2] During this second stage, the "factual cause" standard is intended to be a

[2] All of the jury instruction notes are from the Fourth Edition.

"relaxed standard." *Mitzelfelt v. Kamrin*, 526 Pa. 54, 67, 584 A.2d 888, 894 (Pa. 1990). To demonstrate factual cause, "a plaintiff is not required to show, to a reasonable degree of medical certainty, that the acts or omissions of the physician *actually* caused the harm to the plaintiff." *Qeisi v. Patel*, 2007 WL 527445, at *9 (E.D. Pa. 2007). Instead, "[t]o be a factual cause, the conduct must have been an actual, real factor in causing the harm, even if the result is unusual or unexpected. A factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm." *Grundowski*, 2012 WL 1721781, at *6 (citing Pa. SSJI (Civ), § 13.20); *see also Gorman*, 929 A.2d at 1212-13 (quoting same).

However, "the defendant's conduct need not be the only factual cause. The fact that some other causes concur with [the defendant's] negligence in producing an injury does not relieve [the defendant] from liability as long as [his] [her] own negligence is a factual cause of the injury." Pa. SSJI (Civ), § 13.20. "When a defendant's negligent conduct combines with [other circumstances] [conduct of other persons] the defendant is legally responsible if his or her negligent conduct was one of the factual causes of the harm." Pa. SSJI (Civ), § 13.150.

Moreover, a "defendant is not relieved from liability because another concurring cause is also responsible for producing injury. If a jury could reasonably believe that a defendant's actions were a factual cause in bringing about harm, then the fact that there is a concurrent cause does not relieve the defendant of liability." Pa. SSJI (Civ), § 13.150 Subcomm. Note; *see also Mitzelfelt*, 584 A.2d at 894 (noting that a "defendant cannot escape liability

because there was a statistical probability that the harm could have resulted without negligence"); *Jones v. Montefiore Hosp.*, 494 Pa. 410, 416, 431 A.2d 920, 923 (Pa. 1981) (stating that a plaintiff "need not exclude every possible explanation and the fact that some other cause concurs with the negligence of the defendant in producing an injury does not relieve defendant from liability unless he can show that such other cause would have produced the injury independently of his negligence"). Where a plaintiff's negligence claim involves an aggravation of a preexisting condition, "one can recover for an injury regardless of whether there exists a preexisting physical or mental condition as long as one can show that [negligence] was a [factual cause] in bringing about the aggravation of the condition." *Yosuf v. United States*, 642 F. Supp. 415, 430 (M.D. Pa. 1986) (citing *Boushell v. J.H. Beers*, 258 A.2d 682 (Pa.Super.Ct. 1969); *Hamil*, 392 A.2d at 1285).

E. Damages

"The final element a plaintiff must demonstrate to prevail on a negligence claim is that the breach of a legal duty caused the plaintiff to suffer harm." *Grundowski*, 2012 WL 1721781, at *7 (citing *Krentz v. Consol. Rail Corp.*, 589 Pa. 576, 588, 910 A.2d 20, 28 (Pa. 2006)). "Thus, the plaintiff must have incurred actual loss or damage." *Id.* (internal quotation marks, alterations, and citations omitted).

IV. Analysis

Because the Court has already determined that the Government and MDI each owed Mr. Balter a duty of care, (*see supra* Part III.C), the primary remaining issues are: (A)

whether the Government and/or MDI breached their duty of care by delaying Mr. Balter's medical treatment in contravention of Dr. Tuller's order that Mr. Balter be seen within ten weeks for a follow-up; (B) whether the Government breached its duty of care by failing to arrange for Mr. Balter to be seen at USP Allenwood by one of the two optometrists who came to USP Allenwood on November 7, 14 and 22, 2007; (C) if the Government and/or MDI breached their duty of care, whether the Government and/or MDI increased the risk of Mr. Balter's harm; and (D) if the Government and/or MDI increased the risk of Mr. Balter's harm, whether the Government and/or MDI's negligence was a factual case of Mr. Balter's harm; and (E) if the Government and/or MDI's negligence caused Mr. Balter's harm, whether Mr. Balter is entitled to damages.

As a preliminary matter, "it must be pointed out that [Mr. Balter] was not a run-of-the-mill prison patient with the usual complaints—he had a rare condition and, thus, prison officials [and MDI] should have been more alert to, and concerned with, the type of treatment he required." *See Berman*, 205 F. Supp. 2d at 365. This fact is relevant in resolving all of the above-identified issues.

F. Failure to Timely Schedule Ophthalmologist Appointment

The testimony provided by prison officials, as well as treating medical personnel, indicates that prison officials acted, together with MDI, in an inexcusable and unjustifiable manner when they did not timely schedule Mr. Balter for a follow-up appointment in accordance with Dr. Tuller's instructions.

The Government

The Court finds the testimony of Ms. Auman, Ms. Rey and Ms. DeWald to be less-than-credible given the seemingly evasive answers they provided during their appearances. The Court is particularly troubled that no prison official involved in the scheduling of inmates with outside medical care, including the three just named, could explain why Mr. Balter was not seen in a timely fashion. (*See* CSF at ¶ 156; Trial Tr., Laino, Day 1, at 127:11-16; Trial Tr., Auman, Day 1, at 181:23-182:4; Trial Tr., DeWald, Day 2, at 9:21-22). All parties agree that Mr. Balter should have been seen within the ten weeks provided by Dr. Tuller's directive and that, at the very most, an additional grace period of seven to ten days, i.e. to November 16, 2007, would have been acceptable. (*Cf.* CSF at ¶¶ 26, 181, 205). The Court is concerned by the inability, or unwillingness, of anyone at the prison to provide any reason whatsoever for the failure to have Mr. Balter evaluated in a timely manner.

The Court finds it incomprehensible that Ms. DeWald "does not recall any conversations Mr. Balter claims to have had with her, except one time when he wanted to see an optometrist and she checked and he was scheduled." (*Id.* at ¶ 96). This is especially the case since Balter appears to have been the lone prisoner among the prison population at USP Allenwood to be blind in one eye and losing sight in the other as a result of wet macular degeneration—a condition for which he had been fairly continuously treated during his incarceration. (*See* Trial Tr., Balter, Day 1, 25:12-14; Trial Dep. Tr., Tuller, Doc. 139, Pl.'s Ex. 37, at 31:2-10). The Court is disturbed by Ms. DeWald's apparent nonchalance

with regard to Mr. Balter's treatment, and is similarly unimpressed by her inability to provide any explanation for the delay in scheduling Mr. Balter's follow-up. (Trial Tr., DeWald, Day 2, at 17:17-18:1). Ms. DeWald's testimony is telling in that she can offer no reason as to why it took over seven weeks to create an OSR for Mr. Balter with MDI. (*See id.* at 9:21-22). This is particularly true given that Ms. DeWald was unable to point to a single separate instance where the time to create an OSR for another inmate was similarly as long. (*See id.* at 9:23-25).

Even Dr. Brady, Clinical Director at USP Allenwood, could offer no explanation as to why it took from August 28, 2007 to October 16, 2007, or 49 days, "to get from the consultation sheet step to being referred offsite to be scheduled." (*See* CSF at ¶ 156). It appears that no official from the prison is able to offer any explanation whatsoever as to why Mr. Balter was not timely scheduled for a follow-up or seen by an optometrist on site in November of 2007. (Trial Tr., Laino, Day 1, at 127:11-16; Trial Tr., Auman, Day 1, at 185:15-186:11, 170:4-8, 155:5-9; Trial Tr., DeWald, Day 2, at 9:21-22). Such a failure is unjustifiable, given the duty of care owed by the Government to Mr. Balter.

In sum, the Government breached its duty of care in failing to ensure that Mr. Balter was timely scheduled for his follow up appointment with Dr. Tuller.

MDI

The Government's negligence—in failing to create an OSR for over seven weeks and failing to ensure that Mr. Balter was scheduled in accordance with Dr. Tuller's order—

was compounded by MDI's failure to schedule Mr. Balter's appointment in accordance with the OSR. It is undisputed that:

(1) in 2007, "MDI had a contract with FCC Allenwood to provide scheduling services for USP Allenwood," (CSF at ¶ 38);

(2) "[u]nder the contract with FCC Allenwood, it was MDI's responsibility to find medical providers and/or physicians in the area of FCC Allenwood to provide care to inmates," (*id.* at ¶ 17);

(3) Lisa Rey, Medical Records Technician at USP Allenwood, (CSF at ¶ 70), submitted an OSR with Dr. Tuller's medical record from Mr. Balter's August 28, 2007 appointment to MDI on October 16, 2007, (*id.* at ¶ 23);

(4) the OSR had "the one month box checked indicating that USP Allenwood wanted the appointment within a one month time frame," (*id.* at ¶ 24);

(5) the "one month begins to run from the day the OSR is submitted to MDI," so "USP Allenwood wanted Mr. Balter's appointment scheduled on or before November 16, 2007," (*id.* at ¶¶ 25-26);

(6) "MDI did not schedule [Mr. Balter's] appointment until 20 days later on November 5, 2007," (*id.* at ¶ 36); and

(7) MDI scheduled the appointment for December 11, 2007, which "would be outside of the timeframe requested by USP Allenwood," (*id.* at ¶¶ 34-35).

Based on these undisputed facts, it is clear that MDI violated its responsibilities under its contract with FCC Allenwood. No MDI representative testified at trial to defend MDI's failure to timely schedule Mr. Balter. However, it is an undisputed fact that "[a]ccording to Laurie Zeller, Director of contract services for MDI, Richard Balter's appointment with Dr. Tuller was not scheduled promptly by MDI." (*Id.* at ¶ 36).

In sum, MDI breached its duty of care in failing to timely schedule Mr. Balter's follow-up appointment with Dr. Tuller.

G. Failure to Schedule Optometrist Appointment

The Government

There is also a complete failure by the Government to justify, defend or even attempt to explain why Mr. Balter was not seen by an optometrist when Drs. DeRose or Weyand visited the prison on November 7, November 14, and November 22, 2007. (*See* Trial Tr., Balter, Day 1, at 90:2-6). Mr. Balter was not seen by an optometrist in November 2007, (Auman June 4, 2008 Note, Doc. 139, Pl.'s Ex 2), despite the fact that Mr. Balter was previously placed on the automatic call-out list, (CSF at ¶ 338), and despite the fact that Dr. DeRose ordered that Mr. Balter was to have his IOP tested every month by an optometrist, (*id.* at ¶ 318). With regard to Mr. Balter's removal from the automatic call out list, the record clearly indicates that Mr. Balter was previously placed on the automatic call out list, (*see id.* at ¶ 338), and that prior to November 2007 was seen regularly by an optometrist, (*see id.* at ¶ 322). There is no question that he was no longer on the list as of November 2007, (*see* Trial Tr., Balter, Day 1, at 90:2-6), that Drs. DeRose and Weyand visited the prison on three occasions in November 2007 and that Mr. Balter was not scheduled to see either of them, (Auman June 4, 2008 Note, Doc. 139, Pl.'s Ex 2).

With regard to Dr. DeRose's order to have Mr. Balter's IOP tested monthly, it is undisputed that "[a]s of . . . September 26, 2007," Dr. DeRose's medical records indicate

that Mr. Balter was to have his "IOP [checked] every month and need[ed] a retinal specialist on a regular basis. In other words, routine follow up." (CSF at ¶ 318). When asked to explain why "Dr. DeRose's request to check [Mr. Balter's] IOP every month . . . would not have . . . been complied with," Ms. DeWald responded, "I cannot." (Trial Tr., DeWald, Day 2, at 29:24-30:2, 31:9-11). Similarly, Ms. Auman acknowledged Dr. DeRose's order to have Mr. Balter's IOP checked every month and stated, "I don't know why he wasn't seen." (Trial Tr., Auman, Day 1, at 185:15-186:11, 170:4-8).[3]

The Government utterly failed to explain why Mr. Balter was not seen by an optometrist on November 7, November 14, and November 22, 2007. The Court does not find Ms. Auman's testimony on this subject credible given her inability to recall any facts pertinent to this case. Specifically, the Court is troubled by her inability to remember if Mr. Balter was on the automatic call out list or why Mr. Balter may have been removed from such a list. (*See, e.g., id.* at 159-161, 169-170). It is difficult to believe that the person responsible for maintaining this list would not have any recollection of Mr. Balter's status given the seriousness of his condition, the rarity of that condition within the inmate population at Allenwood and the frequency with which he had previously visited Drs. DeRose and Weyand.

[3] The Government posits that "it's possible" that the reason Dr. DeRose's order to have Mr. Balter's IOP checked monthly was not followed is because Dr. DeRose subsequently gave an undocumented oral order negating his previous order. This "possible" explanation is purely speculation and not one offered by Ms. DeWald or Ms. Auman.

In sum, the Government breached its duty of care in failing to ensure that Mr. Balter was scheduled to see Dr. DeRose or Dr. Weyand when they visited USP Allenwood on November 7, November 14, or November 22, 2007.

H. Increased Risk

In limited circumstances—circumstances where "irrespective of the quality of the medical treatment, a certain percentage of patients will suffer harm," *Mitzelfelt*, 584 A.2d at 892—"Pennsylvania law permits recovery where a defendant's negligence increased the risk of harm to a plaintiff, even if plaintiff cannot show conclusively that no injury would have occurred in the absence of negligence." *Grundowski*, 2012 WL 1721781, at *7 (internal quotation marks removed); *see also Vicari*, 936 A.2d at 512 ("Of course it is impossible to determine if, had Mrs. Vicari undergone chemotherapy, she would have had 'a disease free interval and large survival life' . . . . However . . . all that Plaintiff needs to establish is that the defendants' conduct increased the risk of harm."). Here, it is undisputed that because of the negligence of the Government and MDI and the nature of wet macular degeneration, it is impossible for Mr. Balter to conclusively show that he would have not suffered a massive hemorrhage absent the Government's negligence. (*See* Trial Tr., Goren, Day 2, at 151:1-11). Moreover, it is clear that even if Mr. Balter received timely medical care, a certain

percentage of patients in his position would have lost their vision. (*Id.* at 127:22-128:1; *see also* CSF at ¶ 180). Therefore, Mr. Balter must proceed under a theory of increased risk.[4]

When a plaintiff proceeds under a theory of increased risk, Pennsylvania law requires a two-stage process. *See Hamil*, 392 A.2d at 1287. First, a plaintiff must present expert testimony, "with a reasonable degree of medical certainty, that a defendant's conduct increased the risk of the harm actually sustained." *Vicari*, 936 A.2d at 510. Whether the Government and/or MDI's negligence increased the risk of Mr. Balter's hemorrhage and resultant vision loss ultimately turns on whether the December 5, 2007 hemorrhage was the result of: (1) a sudden, unpredictable hemorrhage that was entirely independent of any previous leakage, as the Government asserts; or (2) a preexisting leak which eventually ruptured, as Mr. Balter contends.

As Dr. Goren acknowledged, it is impossible to say "with 100 percent certainty" whether Mr. Balter would not have suffered the December 5, 2007 hemorrhage if he was seen within the prescribed ten week period. (Trial Tr., Goren, Day 2, at 151:1-11). Although Dr. Goren testified that had Dr. Tuller "seen [Mr. Balter] in 10 weeks or 12 weeks, I think it's very likely that he would have seen additional leakage and would have treated him," (*id.* at 131:21-23), we will never definitively know what would have been found if Mr. Balter was examined in the month prior to December 5, 2007.

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[4] The fact that Mr. Balter's claim is one of ordinary negligence does not preclude him from proceeding under a theory of increased risk. *See Grundowski*, 2012 WL 1721781, at *18-19 (applying increased risk theory of causation to ordinary negligence action under the FTCA); *see also Fenney*, 849 A.2d at 594 (same, in a non-FTCA ordinary negligence action).

Indeed, it is impossible to know whether there was ongoing and/or increasing leakage between October 17 and December 5—and this impossibility is a direct result of the Government's and MDI's negligence. Had Mr. Balter been seen by Dr. Tuller within the prescribed ten week period or by Drs. DeRose or Weyand when they were at the prison on November 7, 14, and 22, medical records would have documented whether Mr. Balter's macular degeneration remained stable or whether there was evidence of ongoing or increased leakage. Indeed, the very examination of Balter conducted by Dr. DeRose on December 5, 2007, by which he identified the hemorrhage in Balter's left eye and on the basis of which Balter was sent to the ophthalmologist, Dr. Lightman, that same day, could have been done on November 7, 14 or 22 by Dr. DeRose (or Dr. Weyand). If the examination had been done on one of those earlier dates, it could reasonably be expected to have led to referral to Drs. Tuller or Lightman at a time when medical efforts could have been made to avoid the hemorrhage.

Although the Government and MDI's negligence rendered definitive proof impossible, other factors were offered as evidence of when Mr. Balter's eye began to bleed. First, significant portions of trial testimony were devoted to the issue of whether Mr. Balter complained about leakage in his left eye in the month prior to December 5, 2007. Mr. Balter testified that during this period he complained to everyone in the prison who could help him. (Trial Tr., Balter, Day 1, at 70:12-71:5). According to Mr. Balter, he did everything he could

do to been seen by an optometrist or ophthalmologist "short of going to the SHU." (*Id.* at 50:9-15).

The Government contests the credibility of Mr. Balter's complaints, arguing that Mr. Balter did not complain about leakage in November 2007, because he did not notice a decrease in his vision until December 5, 2007. (*See id.* at 89:12-16). Moreover, during the cross-examination of Mr. Balter, the Government cast some doubt on the credibility of his alleged complaints. (*See id.* at 71-89). The Court finds that Balter did make complaints about leakage in his left eye, as he indisputably had done in the past. Nonetheless, the Court does not need to resolve this credibility issue to determine that the leak in Balter's left eye pre-dated the December 5, 2007 hemorrhage. The Court need not decide whether such complaints were made as described by Balter because, as demonstrated in the remainder of this section, *infra*, the Court finds that the Government's negligence inexcusably increased the risk of Mr. Balter's harm even absent such complaints.[5]

A second source of evidence as to when Mr. Balter started experiencing leakage is the fundus photograph of Mr. Balter's eye that was taken during his emergency appointment with Dr. Lightman on December 5, 2007. (*See* Trial Dep. Tr., Lightman, Doc. 139, Pl.'s Ex. 39, at 23:15-24:3). Drs. Lightman and Goren both testified that based on the photograph alone one "couldn't pinpoint a time" when the bleed began. (*Id.* at 24:4-7; Trial Tr., Goren,

[5] If Mr. Balter was complaining during this period, then, given the nature of wet macular degeneration, there would be no doubt that the Government's negligence increased the risk of Mr. Balter's harm. (*See* Trial Tr., Goren, Day 2, at 130:1-9).

Day 2, at 107:19-22). However, both doctors indicated that, as Dr. Goren stated, "[t]here are some features of [the fundus photograph] that suggests that this blood may have been here for a little while." (Trial Tr., Goren, Day 2, at 107:23-24). Dr. Lightman testified that the photograph shows "a dark area of blood and it's surrounding a more tan area. And the tan area . . . looks like [it] has probably been there for a matter of weeks . . . ." (Trial Dep. Tr., Lightman, Doc. 139, Pl.'s Ex. 39, at 24:15-20). Dr. Lightman further explained that blood gets lighter over time "because the blood dehemoglobinizes." (*See id.*). Dr. Goren largely agreed with Dr. Lightman's analysis concluding that based on the photograph it is "unlikely" Mr. Balter's bleed began on December 5, 2007. (Trial Tr., Goren, Day 2, at 108:6-7).

The final factor that the parties' experts considered was Mr. Balter's overall medical history. It is undisputed that Mr. Balter had a "persistent leakage" predating his December 5, 2007 hemorrhage. (*See id.* at 107:19-22; Trial Tr., Beck, Day 3, at 24:14-25:10). In light of this preexisting leakage, Dr. Goren concluded that had Mr. Balter been examined in the month prior to December 5, 2007, as he should have been, it is "very likely" that additional leakage would have been found and that Mr. Balter would have been treated. (*See* Trial Tr., Goren, Day 2, at 131:21-23). When challenged on cross-examination, Dr. Goren stated:

> You're saying . . . ["]how can you say that he had [pre-existing] leakage then[?"], but I would posit, how could you say that he didn't? That would be the only time, over a period of six or seven years, that he didn't have leakage. I don't think there's any question that there was an ongoing problem with leakage. . . .

> I think it's completely unreasonable . . . [considering Mr. Balter's] history[,] to assume that, all of a sudden, he had a completely brand new event that was unrelated to what was going on over the past 7 or 8 years.

(*Id.* at 134:11-16, 142:23-143:2).

Based on the totality of these factors, Dr. Goren testified that because Mr. Balter likely experienced leakage prior to the December 5, 2007 hemorrhage, there was a "period of intervention where there was an opportunity to treat." (*Id.* at 145:14-17). Because Mr. Balter was not examined during this period, Dr. Goren opined that Mr. Balter lost an opportunity to prevent the December 5, 2007 hemorrhage. (*Id.* at 145:18-20). As a result, although he could not "say with certainty" that Mr. Balter would have avoided the hemorrhage if he had been properly monitored, Dr. Goren concluded that "the failure to have the requested follow-up increased the risk of harm to Mr. Balter." (*Id.* at 151:3-11, 152:2-9).[6]

Dr. Beck reached a contrary conclusion. According to Dr. Beck, Mr. Balter's December 5, 2007 leak was "most likely within a reasonable degree of medical certainty, a sudden onset." (*See* Trial Tr., Beck, Day 3, at 16:23-17:2). As a result, Beck testified that the fact that Mr. Balter was not seen in November 2007 "ha[d] no bearing" on his suffering a loss of central vision. (*See id.* at 18:15-16). However, Dr. Beck did acknowledge, hypothetically, that if Mr. Balter had been seen within the recommended ten week follow-up

[6] Dr. Goren testified that all of the opinions that he expressed at trial were to a reasonable degree of medical certainty. (*See* Trial Tr., Goren, Day 2, at 127:4-6). Based on the totality of Dr. Goren's testimony, the Court finds that Dr. Goren provided expert testimony to "a reasonable degree of medical certainty" that the Government and MDI negligence increased the risk of Mr. Balter's harm. *Cf. Vicari*, 936 A.2d at 510.

window, and if during that follow-up he had noticed an increase in activity, he would have treated Mr. Balter in some manner. (*See id.* at 46:19-21).

Taking all of the medical testimony into consideration, the Court finds that had Mr. Balter been seen by Dr. Tuller no later than November 16, 2007, or during one of the routine visits to the prison by the independent optometrists on November 7, 14 and 22, 2007, there is sufficient evidence upon which to find, to a reasonable degree of medical certainty, that active leakage could have been detected by such an earlier examination. In particular, the Court is persuaded by Dr. Lightman's testimony that the fundus photograph he ordered on December 5, 2007 indicates that the hemorrhage Mr. Balter suffered had been leaking "for a matter of weeks." (Trial Dep. Tr., Lightman, Doc. 139, Pl.'s Ex. 39, at 24:15-20). Moreover, the Court agrees with Dr. Goren that in light of the Mr. Balter's history of persistent leakage and the recent activity he had experienced, "it's completely unreasonable . . . to assume that, all of a sudden, [Mr. Balter] had a completely brand new event that was unrelated to what was going on over the past 7 or 8 years." (*See* Trial Tr., Goren, Day 2, at 142:23-143:2).

In sum, the Government's and MDI's failure to permit doctors to timely examine and monitor Mr. Balter undoubtedly increased the chance of a catastrophic hemorrhage.

I. Factual Cause

"Once a plaintiff has introduced evidence that a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position, and that the harm was

in fact sustained, it becomes a question for the [fact-finder] as to whether or not that increased risk was a [factual cause of] . . . the harm." *Hamil*, 392 A.2d at 1286. The finder of fact is permitted, but not required, "to find that the conduct which gave rise to an increased risk was the legal cause of a plaintiff-patient's injuries." *Corrigan v. Methodist Hosp.*, 234 F. Supp. 2d 494, 501 (E.D. Pa. 2002) (citing *Clayton v. Sabeh*, 594 A.2d 365, 367 (Pa.Super.Ct 1991)).

At this second stage of the increased-risk analysis, a plaintiff is not required to show that the defendant's negligence "*actually* caused the harm to the plaintiff." *Qeisi*, 2007 WL 527445, at *9 (citing *Mitzelfelt*, 584 A.2d at 894). Instead, Courts apply a "relaxed standard," *Mitzelfelt*, 584 A.2d at 894, requiring only that a plaintiff prove that the defendant's act or omissions were "an actual, real factor in causing the harm" as opposed to "an imaginary or fanciful factor having no connection or only an insignificant connection with the harm," *Grundowski*, 2012 WL 1721781, at *6.

The key factual inquiry for the Court to resolve at this stage is whether the Government's and MDI's negligence, which led to Mr. Balter's macular degeneration going unmonitored by an ophthalmologist for 97 days (between August 28 and December 5, 2007), and by an optometrist for 49 days (between October 17 and December 5, 2007) played more than an inconsequential or marginal role in causing the December 5, 2007 hemorrhage.

According to Dr. Beck, "the fact that [Mr. Balter] wasn't seen in November had no bearing on the outcome here." (*See* Trial Tr., Beck, Day 3, at 18:15-26). Dr. Beck opined that even if Mr. Balter was examined in a timely fashion and leakage was found, it is unlikely that Mr. Balter would have received an injection as his leakage would have probably been stable. (*See id.* at 18:15-19:4). However, the Court has already found (1) that Mr. Balter's eye was leaking prior to December 5, 2007 and (2) that Mr. Balter's December 5 hemorrhage was related to this preexisting leakage. As a result, the Court concurs with Dr. Goren's conclusion that had Mr. Balter been scheduled for a follow-up with Drs. Tuller and Lightman in a timely fashion, they would have discovered leakage that would have prompted treatment prior to December 5, 2007. (*See* Trial Tr., Goren, Day 2, at 109:17-110:12, 141:19-142:4). Likewise, had Balter been examined by Drs. DeRose or Weyand on November 7, 14 or 22, 2007, as he should have been and as he had consistently been in the past, the condition of Balter's eye could have been assessed with specific reference to the identification of any increase in leakage or outright bleed in the eye.

Second, Dr. Beck opined that even if Mr. Balter received an injection during the month of November 2007, it would not have prevented his December 5, 2007 hemorrhage. (*See* Trial Tr., Beck, Day 3, at 43:13-18). Dr. Beck testified that hemorrhages are unpredictable, (*id.* at 10:24-11:7, 20:7-9), and injections are not preventive, (*id.* at 11:20-12:9). As a result, Dr. Beck concluded that Mr. Balter's vision loss was not the result of the

prison negligence but the inevitable, natural progression of his disease. (*See id.* at 10:11-14, 22:2-15).

However, Dr. Beck's fatalistic conclusions run contrary to Mr. Balter's medical history. As Dr. Goren explained, "the natural progression of [Mr. Balter's] disease was being altered by his treatment. The natural progress of that disease . . . with no treatment would have meant that he probably would have been blind back in 2001, but he was getting appropriate treatment through this period of time." (Trial Tr., Goren, Day 2, at 135:3-7, 110:12, 144:22-145:6). During his cross-examination, Dr. Beck clarified that being diagnosed with wet macular degeneration does not necessarily entail going blind. (Trial Tr., Beck, Day 3, at 45:10-13). He stated that with timely treatment "there are a lot of cases where people [with wet macular degeneration] can preserve" their vision. (*Id.* at 45:23-46:2).

In Mr. Balter's case, Dr. Beck agreed that Mr. Balter's vision "remained fairly stable" prior to August 2007. (*Id.* at 28:16-22). As a result of timely treatment between 2003 and 2007, Mr. Balter experienced what Dr. Goren called "smoldering leaks." (Trial Tr., Goren, Day 2, at 137:9-10). In other words, during this time period, Mr. Balter had an ongoing problem with leakage, (*id.* at 129:13-23), where his macular degeneration would periodically flare up, leading to leakage in his left eye and, on several occasions, requiring injections. (*See* Trial Dep. Tr., Tuller, Doc. 139, Pl.'s Ex. 37, at 58:1-21). Dr. Tuller explained that "treatment [with injections] is geared toward causing these [leaking] vessels to regress and reduce the risk of hemorrhage." (*Id.* at 75:2-6). For Mr. Balter, it is undisputed that he had "a

history of responding nicely" to injections of vascular endothelial growth factor inhibitors (intravitreal Kenalog) between 2003 and 2007. (*Id.* at 74:11-16; Trial Tr., Beck, Day 3, at 46:3-7, 81:19-22, 82:19-21; *see also* Pl.'s Mar. 20, 2007 Med. R., Doc. 140, Def.'s Ex. 1, at 52).

Although past outcomes do not ensure future results, it is reasonable to conclude, as Dr. Goren does, that had Mr. Balter been afforded an opportunity to be examined and treated between November 4 and December 5, 2007, he "would have had a far better chance of a favorable outcome." (Trial Tr., Goren, Day 2, at 145:14-24, 151:9-10). By arguing that Mr. Balter's vision loss was unpreventable and unrelated to the Government and MDI's negligence, the Government essentially contends that it was a coincidence that Mr. Balter's hemorrhage occurred when it did. According to the Government, it was entirely coincidental that Mr. Balter was able to maintain 20/50 to 20/60 vision during the several years during which he received timely medical care, and it was equally coincidental that Mr. Balter suffered a massive hemorrhage with resulting blindness after several weeks of not receiving regular medical monitoring and treatment. The Court would have to ignore far too much evidence in the record, particularly with respect to the history of Balter's macular degeneration and the results of the treatment accorded him, to find that the blindness he sustained in his left eye as a result of the hemorrhage found on December 5, 2007, was no more than coincidental to the lapse of treatment that occurred in the period beginning August 28, 2007.

While it is impossible to know with certainty that the Government and/or MDI's negligence *actually caused* Mr. Balter's December 5, 2007 hemorrhage, (*see id.* at 151:3-11), such certitude is not required under Pennsylvania law. *See, e.g.*, *Qeisi*, 2007 WL 527445, at *9; *see also Mitzelfelt*, 584 A.2d at 894; *Vicari,* 936 A.2d at 512. Rather, Mr. Balter must prove by a preponderance of the evidence that the prison's negligence was "an actual, real factor in causing the harm" rather than "an imaginary or fanciful" one. *See Grundowski*, 2012 WL 1721781, at *6. In light of circumstances surrounding the Government and MDI's negligence—Mr. Balter's medical history and, in particular, the fact that he had responded so well to injections in the past that he was able to maintain his vision during the time period in which he received them, (*see* Trial Dep. Tr., Tuller, Doc. 139, Pl.'s Ex. 37, at 74:11-16)—Mr. Balter has proven that the Government and MDI's negligence was "an actual, real factor in causing" the December 5, 2007 hemorrhage and his resultant vision loss.

In sum, the Court finds that the Government and MDI's negligence is a factual cause of Mr. Balter's catastrophic hemorrhage of December 5, 2007.

V. Conclusions of Law

1. In FTCA claims, courts must "apply the law of the state in which the act or omission occurred." *Hodge v. United States Dep't of Justice*, 372 F. App'x 264, 267 (3d Cir. 2010) (citing *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 179 (3d Cir. 2000)). Because

all of the conduct giving rise to Mr. Balter's claim occurred at USP Allenwood, Pennsylvania, state law will apply.

2. Under Pennsylvania law, "[f]or a party to prevail in a negligence action, ordinary or professional, the elements are identical: the plaintiff must establish [1] the defendant owed a duty of care to the plaintiff, [2] that duty was breached, [3] the breach resulted in the plaintiff's injury, and [4] the plaintiff suffered an actual loss or damages." *Merlini ex rel. Merlini v. Gallitzin Water Auth.*, 602 Pa. 346, 354, 980 A.2d 502, 506 (Pa. 2009).

3. To determine whether a plaintiff's claim is one of ordinary or professional negligence, courts must look to the substance, rather than the form, of the complaint. *Merlini*, 980 A.2d at 507; *see also Varner v. Classic Communities Corp.*, 890 A.2d 1068, 1074 (Pa.Super.Ct. 2006) (stating "that it is the substance of the complaint rather than its form which controls whether [a] claim . . . sounds in ordinary negligence or professional malpractice").

4. Because the conduct giving rise to Mr. Balter's claim involves alleged administrative failures rather than medical malpractice, the Complaint sounds in ordinary negligence.

5. Under 18 U.S.C. § 4042(a), the United States has a duty to "provide for the safekeeping, care and subsistence" and to "provide for the protection . . . of all persons charged with or convicted of offenses against the United States." *Jones v. United States*, 91 F.3d 623,

624 (3d Cir. 1996) (quoting 18 U.S.C. § 4042(a)(2)-(3)). "The duty of care as provided by 18 U.S.C. § 4042 is that of ordinary diligence to keep prisoners safe from harm." *Grundowski v. United States*, 2012 WL 1721781, at *5 (M.D. Pa. 2012) (quoting *Hossic v. United States*, 682 F.Supp. 23, 25 (M.D. Pa. 1987) (internal quotation marks omitted)).

6. This duty is heightened where an inmate is known to have a rare condition requiring special treatment. *See Berman v. United States*, 205 F. Supp. 2d 362, 365 (M.D. Pa. 2002) ("[I]t must be pointed out that plaintiff was not a run-of-the-mill prison patient with the usual complaints—he had a rare condition and, thus, prison officials should have been more alert to, and concerned with, the type of treatment he required.").

7. Because Mr. Balter was incarcerated at USP Allenwood and "was not a run-of-the-mill prison patient with the usual complaints," the Government owed a heightened duty to provide for the safekeeping, care, and protection of Balter. *See id.* By extension, MDI also owed Mr. Balter a duty of care pursuant to its contract with FCC Allenwood.[7]

8. "Courts of the Third Circuit, in limited circumstances, have recognized that certain acts or omissions by prison medical staff can constitute a breach of an ordinary negligence duty." *Grundowski*, 2012 WL 1721781, at *6; *see also Jones*, 91 F.3d at 625 (holding that the denial of an inmate's prescribed medication can constitute a breach of care under 18 U.S.C. § 4042).

[7] MDI's duties of care are stated with the qualifications mentioned in note 1, *supra*.

9. Denial of access to medical treatment by medical staff can constitute ordinary negligence. *See Hill v. Lamanna*, 2006 WL 2433773, at *9 (W.D. Pa. 2006).

10. A prison may breach its duty of care by failing to schedule an inmate for necessary medical treatment in a timely fashion. *See Aviles v. United States*, 2012 WL 3562370, at *6 (E.D. Pa. 2012).

11. Balter must prove that the Government's negligence caused his injury. *See Grundowski*, 2012 WL 1721781, at *6. In limited circumstances, Pennsylvania law "permits recovery where a defendant's negligence increased the risk of harm to a plaintiff, even if plaintiff cannot show conclusively that no injury would have occurred in the absence of negligence." *Id.* at *7 (quoting *Lempke v. Osmose Util. Servs., Inc.*, 2012 WL 94497, at *3 (W.D. Pa. 2012)).

12. When a plaintiff proceeds under a theory of increased risk, Pennsylvania law requires a two-stage inquiry. *See Hamil v. Bashline*, 481 Pa. 256, 269, 392 A.2d 1280, 1287 (Pa. 1978). First, a court must determine whether "a defendant's negligent act or omission increased the risk of harm to a person in plaintiff's position," and then "it becomes a question for the [fact-finder] whether that increased risk was a [factual cause] in producing the harm." *Feeney v. Disston Manor Pers. Care Home, Inc.*, 849 A.2d 590, 595 (Pa.Super.Ct. 2004).

13. Where the issue of increased risk involves questions of medical causation that go "beyond the knowledge of the average layperson," the plaintiff is required to present

expert testimony, "with a reasonable degree of medical certainty, that a defendant's conduct increased the risk of the harm actually sustained." *Vicari v. Spiegel*, 936 A.2d 503, 510 (Pa.Super.Ct. 2007), *aff'd*, 605 Pa. 381, 989 A.2d 1277 (2010) (internal citations and quotations omitted).

14. "That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty." *Betz v. Erie Ins. Exch.*, 957 A.2d 1244, 1259 (Pa.Super.Ct. 2008) (quoting *Carrozza v. Greenbaum*, 866 A.2d 369, 379 (Pa.Super.Ct. 2004)).

15. "Accordingly, an expert's opinion will not be deemed deficient merely because he or she failed to expressly use the specific words, 'reasonable degree of medical certainty.'" *Id.* (quoting *Commonwealth v. Spotz*, 562 Pa. 498, 537, 756 A.2d 1139, 1160 (Pa. 2000) (indicating that "experts are not required to use 'magic words'" but, rather, "[courts] must look to the substance of [the expert's] testimony to determine whether his opinions were based on a reasonable degree of medical certainty rather than upon mere speculation")).

16. Once a plaintiff demonstrates increased risk of harm to a reasonable degree of medical certainty, then the case may be submitted to the finder of fact to determine whether the increased risk of harm was a "factual cause" of the injury. *Grundowski*, 2012 WL 1721781, at *6-7 n.5 (noting that "[t]he term 'factual cause' has been adopted to replace the previously-used terms 'substantial factor' and 'legal cause'") (citing *Gorman v. Costello*,

929 A.2d 1208, 1213 n. 7 (Pa.Super.2007)); *see also* Pa. SSJI (Civ), § 13.20, Subcomm. Note.

17. The "factual cause" standard is intended to be a "relaxed standard." *Mitzelfelt, v. Kamrin*, 526 Pa. 54, 67, 584 A.2d 888, 894 (Pa. 1990). To demonstrate factual cause, "a plaintiff is not required to show, to a reasonable degree of medical certainty, that the acts or omissions of the physician *actually* caused the harm to the plaintiff." *Qeisi v. Patel*, 2007 WL 527445, at *9 (E.D. Pa. 2007). Instead, "[t]o be a factual cause, the conduct must have been an actual, real factor in causing the harm, even if the result is unusual or unexpected. A factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm." *Grundowski*, 2012 WL 1721781, at *6 (quoting Pa. SSJI (Civ), § 13.20); *see also Gorman*, 929 A.2d at 1212-13 (same).

18. "[The defendant's] conduct need not be the only factual cause. The fact that some other causes concur with [defendant's] negligence in producing an injury does not relieve [defendant] from liability as long as [his] [her] own negligence is a factual cause of the injury." Pa. SSJI (Civ), § 13.20. "Where the negligent conduct of a defendant combines with [other circumstances] [conduct of other persons], the defendant is legally responsible if his or her negligent conduct was one of the factual causes of the harm." Pa. SSJI (Civ), § 13.150.

19. "A defendant cannot escape liability because there was a statistical probability that the harm could have resulted without negligence. The fact that some cause

concurs with the negligence of the defendant in producing an injury does not relieve the defendant from liability unless he can show that such other cause would have produced the injury independently of his negligence." *Mitzelfelt*, 584 A.2d at 894 (internal quotation marks and citation omitted); *see also Jones v. Montefiore Hosp.*, 494 Pa. 410, 416, 431 A.2d 920, 923 (1981) (stating that a plaintiff "need not exclude every possible explanation and the fact that some other cause concurs with the negligence of the defendant in producing an injury does not relieve defendant from liability unless he can show that such other cause would have produced the injury independently of his negligence") (internal quotation marks and citation omitted).

20. Where a plaintiff's negligence claim involves an aggravation of a preexisting condition, "one can recover for an injury regardless of whether there exists a preexisting physical or mental condition as long as one can show that [negligence] was a [factual cause] in bringing about the aggravation of the condition." *Yosuf v. United States*, 642 F. Supp. 415, 430-31 (M.D. Pa. 1986) (citing *Boushell v. J.H. Beers*, 215 Pa.Super. 439, 258 A.2d 682 (Pa.Super.Ct. 1969); *Hamil*, 392 A.2d at 1285).

21. "The final element a plaintiff must demonstrate to prevail on a negligence claim is that the breach of a legal duty caused the plaintiff to suffer harm." *Grundowski*, 2012 WL 1721781, at *7 (citing *Krentz v. Consol. Rail Corp.*, 589 Pa. 576, 588, 910 A.2d 20, 28 (Pa. 2006)). "Thus, the plaintiff [must have] incurred actual loss or damage." *Id.* (quoting *Phillips v. Cricket Lighters*, 576 Pa. 644, 658, 841 A.2d 1000, 1008 (Pa. 2003)).

22. The testimony provided by prison officials, as well as treating medical personnel, indicates that prison officials acted, together with MDI, in an inexcusable and unjustifiable manner when they did not timely schedule Mr. Balter for a follow-up appointment in accordance with Dr. Tuller's instructions.

23. The Government breached its duty of care in failing to ensure that Mr. Balter was timely scheduled for his follow up appointment with Dr. Tuller.

24. The Government's negligence—in failing to create an OSR for over seven weeks and failing to ensure that Mr. Balter was scheduled in accordance with Dr. Tuller's order—was compounded by MDI's failure to schedule Mr. Balter's appointment in accordance with the OSR.

25. MDI violated its responsibilities under its contract with FCC Allenwood. No MDI representative testified at trial to defend MDI's failure to timely schedule Mr. Balter. However, it is an undisputed fact that "[a]ccording to Laurie Zeller, Director of contract services for MDI, Richard Balter's appointment with Dr. Tuller was not scheduled promptly by MDI." (CSF at ¶ 36).

26. MDI breached its duty of care in failing to timely schedule Mr. Balter's follow-up appointment with Dr. Tuller.

27. The Government breached its duty of care in failing to ensure that Mr. Balter was scheduled to see Dr. DeRose or Dr. Weyand when they visited USP Allenwood on November 7, November 14, or November 22, 2007.

28. The Government's and MDI's failure to permit doctors to timely examine and monitor Mr. Balter increased the chance of a catastrophic hemorrhage.

29. Mr. Balter has proven that the Government and MDI's negligence was "an actual, real factor in causing" the December 5, 2007 hemorrhage and his resultant vision loss. *Cf. Grundowski*, 2012 WL 1721781, at *6.

30. The Court finds that the Government and MDI's negligence is a factual cause of Mr. Balter's catastrophic hemorrhage of December 5, 2007.

J. Damages

In assessing damages in this case, we begin with a proposition recognized by both the Plaintiff and the Government:

> The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, governs all claims against the United States for monetary damages, for injury or loss of personal property or personal injury or death caused by the negligent [*sic*], wrongful act, or omission of any employee of the United States while acting within the scope of his office or employment.

(Pl.'s Brief in Supp. of Claim for Damages, Doc. 145, at 2 (citing 28 U.S.C. 2675(a)); *see also* Def.'s Brief in Opp. to Pl.'s Claim for Damages, Doc. 146, at 2 (same)).

Further, the FTCA provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674.

Further, the parties to this suit agree that the United States cannot be held responsible for any negligence found to have been committed by its contractor, MDI. Thus, the Government, in its Brief in Opposition to Plaintiff's Claim for Damages, relying upon the definition set forth in the FTCA of the term "federal agency" and the express exclusion from that definition of "any contractor with the United States," asserts that "[b]ecause the United States has not waived its immunity, it cannot be sued for the negligent acts committed by an independent contractor." (Doc. 146 at 3 (citing *United States v. Orleans,* 425 U.S. 807, 814, 96 S.Ct. 1971, 1976, 48 L.Ed.2d 390 (1976)). The Government further argues that, for it "to be liable for the negligence of an employee of the independent contractor, [that person] must be shown to be an 'employee of the Government' as that term is used in the Federal Tort Claims Act." (*Id.* at 3). Citing *Logue v. United States,* 412 U.S. 521, 531-532 (1973), the Government argues that, under the FTCA, "only MDI can be liable to the Plaintiff for failing to schedule Plaintiff for a follow-up appointment in accordance with the OSR submitted by the BOP." (Doc. 146 at 7).

In a later Brief concerning damages Plaintiff recognizes that "[t]he FTCA expressly excludes a contractor under the definition of 'federal agency.'" (Doc. 152 at 4 (citing 28 U.S.C. § 2671)). Plaintiff thus acknowledges: "The United States can be held liable for its own negligence or the negligence of an employee; but cannot be held liable for the negligence of an independent contractor." (*Id.* at 4-5 (citing *Logue, supra*)). The Court also

recognizes this controlling principle and, accordingly, the United States shall not be held liable for the negligence of MDI.

This statement, however, does not serve to end the inquiry with respect to the failure to timely schedule Balter for an ophthalmologist appointment. This is so because the record evidence establishes that the scheduling of an inmate such as Balter required the fulfillment by the Government and MDI of separate but inter-dependent obligations. As previously noted herein, all parties agree that Mr. Balter should have been seen within the 10 weeks provided by Dr. Tuller's directive and that, at the very most, an additional grace period of 10 days, i.e., to November 16, 2007, would have been acceptable. (*See* CSF at ¶¶ 181, 205). Yet, USP Allenwood, although receiving Dr. Tuller's request for a follow-up appointment for Mr. Balter on August 28, 2007 waited until October 16, 2007, or 49 days, to generate the OSR and to submit it to MDI. (*See* Findings of Fact, Part II, *supra*, at ¶¶ 160-172). This delay was entirely unexplained by the Government. (*See id.* at ¶¶ 168-172). "Dr. Brady does not know why it took from August 28, 2007, the day of the consultation sheet, until October 16, 2007, to get from the consultation sheet step to being referred offsite to be scheduled." (CSF at ¶ 156). "Mr. Laino further testified that such a lengthy time frame to schedule an appointment is unusual." (Findings of Fact, Part II, *supra*, at ¶ 170). "Likewise, AHSA Ms. DeWaid testified that she did not know why it took over seven weeks to create an OSR for Mr. Balter with MDI. Moreover, she could think of no other instance in which such a

time period elapsed while attempting to schedule other prisoners." (*Id.* at ¶ 172). As the Court has further stated:

> The October 16, 2007 OSR submitted by USP Allenwood to MDI had the one month box checked indicating that USP Allenwood wanted the appointment within a one-month time frame. The one-month time frame began to run from the day the OSR was submitted to MDI. This meant that USP Allenwood wanted Mr. Balter's appointment scheduled on or before November 16, 2007.

(*Id.* at ¶ 161).

Nonetheless, as a result of the unexcused and unjustifiable 49-day delay in the submission by USP Allenwood to MDI of the OSR for a period 49 days, the Government's negligent failure operates to impose liability upon it for its negligent and unreasonable delay in submitting the OSR request for Mr. Balter to MDI.

Once MDI received the OSR on October 16, 2007, it was to schedule Richard Balter's appointment with Dr. Tuller promptly. But it did not do so. (*See id.* at ¶ 162 ("According to Laurie Zeller, Director of contract services for MDI, Richard Balter's appointment with Dr. Tuller was not scheduled promptly by MDI[,] where MDI was provided with the OSR on October 16, 2007, and MDI did not schedule the appointment until 20 days later on November 5, 2007.")). This is in marked contrast to Mr. Balter's appointment of August 28, 2007, which was created on August 14, 2007. (*Id.* at ¶ 155). Thus, it is undisputed that Lisa Rey, Medical Records Technician at USP Allenwood submitted an OSR with Dr. Tuller's medical record from Mr. Balter's August 28, 2007 appointment to MDI on October 16, 2007. (*See* CSF at ¶ 23).

MDI did not comply with the OSR's directive which, as discussed above, indicated that USP Allenwood wanted the appointment within a one-month time frame. Instead, MDI did not schedule Mr. Balter's appointment until 20 days later on November 5, 2007, (*id.* at ¶ 36), and when MDI finally did schedule Balter's appointment on that date, it scheduled the appointment for December 11, 2007, which was outside of the time frame requested by USP Allenwood, (*id.* at ¶¶ 35-36). MDI, by the admission of its Director of Contract Services, Laurie Zeller, failed to schedule Richard Balter's appointment with Dr. Tuller promptly. The final December 11 appointment date was 25 days after the latest date which would have been within the time period prescribed by Dr. Tuller for Mr. Balter's follow-up appointment. Thus, MDI's delay of 20 days in scheduling the appointment and its scheduling of the appointment 25 days after the last date which would have been acceptable shows it to be responsible for a 65-day delay in the scheduling of Mr. Balter's appointment.

In assessing damages for the harm sustained by Mr. Balter, the parties agree that he is not entitled to past, present or future lost wages or past or future medical expenses. (Doc 145 at 3; Doc. 146 at 7). However, Plaintiff does claim damages for loss of vision, past, present and future loss of life's pleasures; past, present and future pain and suffering; mental anguish, upset, humiliation and embarrassment; and any other damages permitted by law. (Doc. 145 at 3).

As Plaintiff points out, he is serving a life sentence without parole. (*Id.*) Mr. Balter's life imprisonment requires this Court to assess damages in light of Balter's peculiar

circumstances and to calibrate the calculation of damages to recognize the effect of his blindness on his daily life as a prisoner. In this vein, the "medical/surgical and psychiatric referral request submitted as Exhibit B to Plaintiff's Brief in support of its claim for damages contains the Federal Bureau of Prison's Statement, updated as of February 13, 2012:

> Inmate Balter has no usable vision; he is particularly vulnerable to injury, assault, or victimization by other inmates.
>
> Personal
>
> ●Unable to use washing machine and dryer independently.
> ●Unable to see medications, cannot take medications independently. Must depend on having someone else tell him what his medication cards contain. High risk for medication error/overdose.
> ●Unable to order requested items for commissary independently or verify that he has received items ordered.
> ●Unable to use computer independently.
>
> Housekeeping
>
> ●Unable to clean cell independently.
> ●When cell is searched items are moved from original location and he is unable to find them.
> ●Unable to use combination lock provided to secure personal property.
>
> Mobility
>
> ●Uses various other inmates to assist him with ambulation. None of these inmates have been assigned to him, nor have they been trained in working with a blind individual.
> ●Unable to move independently from building to building.
> ●Unable to move independently throughout housing unit.
> ●Cannot see tables in food service in order to put food tray down.
> ●Cannot see obstacles in his path when walking, runs into low lying objects repeatedly.
> ●With no usable vision has hit head repeatedly on upper bunk with resulting lacerations/abrasions to head.
> ●Unable to see other people around him.
> ○Cannot avoid running into people.

- Cannot avoid walking into areas that are not safe (incidents on yard)
- Unable to exercise (walking) for health maintenance.

Due to inmate Balter's extensive limitations, we feel he would best be suited for placement in a Medical Facility.

(Doc. 152, Ex. B, at 2-3).

Earlier in this Bureau of Prison's document, it is noted with respect to Balter:

On June 23, 2011, the optometrist evaluated inmate Balter, and provided a diagnosis of wet macular degeneration of both eyes. The optometrist indicated 24-hour care was needed, as inmate Balter has no depth perception while walking, he requires an escort to do all mobile activities, he is unable to read, write, and see to eat. He has no functional vision at distance. He also has lost his peripheral vision in both eyes.

(*Id.* at 2).

Balter's own testimony is in complete accord with the Bureau of Prison's observations above. When asked to describe "what an average day is like" for him, Balter testified:

It's terrible. I live in a cell with another individual, unable to defend myself if there's a confrontation. I can't clean the room. As far as using the facilities, sometimes you miss going to the bathroom. You're always dropping things and don't know where they are and you can't find them and you're dependent upon someone to help you, and if someone isn't in the room, you have to find someone who has a good enough heart to help you.

Any type of hygiene is hard because you have to put everything in an exact place so you remember where it is in the institutions. They have what's called a shake-down, and staff members go through your locker that they give you and move things all over the place, and I've got to get people to come in and help me try to re-locate it.

I can't secure any of my personal items and a lot of them are missing, because I don't have a lock that I can utilize. When I go out of the unit or

when I go anywhere in the unit, I've learned how to count steps wherever I am, so that I know at the institution where I am. It's 21 steps to the right against the wall to the shower, to the ice machine is 18, there's 17 steps to walk down. The railings on both sides are, etc., etc. To get a little exercise, I walk on the upper tier holding on to a railing to guide myself.

Downstairs there's tables, TV's mounted up where individuals play their cards and their games and the computer and everything else that I can't use and all their chairs and seats are there, so I can't function at that level because I trip over things and bump into them. There's a lot of inmates that don't know that you're blind and they take as, Where are you going? And it could cause a confrontation.

Anywhere I go in an institution, I have to have an escort with me to help me. I have trouble making my bed, filling the requirements of the normal inmate. I have to have people get my tray of food, tell me where the food is on it, and then eating it, trying to locate it, I have to taste it to see if I can eat it. I can't see anything I'm eating or have to ask people to get drinks for me and everything else. And not all inmates are willing to do those things.

I can't utilize the library, I can't do any reading, and there's nowhere that I have any facility that can help me with anything educationally. I can't do anything religiously, I can't see to do it. I can't go to the recreation yard and have any kind of recreation, because, in the institution where I am, more than others is what they would say is a gang-infested arena for gladiators. It's about 98 per cent gang-infested.

Q. Where is that?

A. Beaumont, it's a medium facility, Texas. There are more lockdowns than anything else. And functioning is a daily nightmare, because you have to wonder if someone is going to get annoyed, you never know when something is coming, you are constantly walking into things and tripping over things. A lot of other people are unaware. You can't use a cane for the blind because there's so many people around, you end up hitting them with the cane.

Leaving the unit, there's four units together, on any move, there's at least 300 people coming out at once, and I either get knocked over or trampled, it's a

> nightmare trying to live in the conditions where I am. And there's really not much that they can do medically, especially, at the facility where I am. . . ."

(Trial Tr., Balter, Day 1, at 65:1-66:11).

The Court notes that Balter was rendered legally blind in his right eye in 1997 as a result of macular degeneration. The Court further notes that the negligence of the United States and MDI affected Balter's vision in his left eye only. Yet the venerable principle that the Court must take the Plaintiff as it finds him has application here. The reality is that the negligence of the United States and MDI have placed Balter in the position where his term of life imprisonment has been made almost immeasurably worse. He is, by his blindness, subject to daily, if not constant, predation; he has lost the ability to read, write, eat without assistance and generally, to take care of the most basic of human functions, including caring for oneself.

Since the Court finds that Richard Balter bears no responsibility for the delays which were occasioned by the negligence of USP Allenwood and MDI, as explained herein, in fulfilling their separate but inter-dependent responsibilities to him, the Court finds no comparative negligence percentage should be assessed against Richard Balter.[8] Thus, the Court awards the Plaintiff the sum of $250,000.00 for the failures of USP Allenwood and MDI to timely schedule his appointment with Dr. Tuller and apportions responsibility for the

[8] Nor does the Court find that Vitreoretinal Associates or Drs. Tuller and Lightman, partners in VRA, were negligent.

harm caused to him by the separate negligent conduct of MDI and the United States as follows:

MDI	United States
50%	50%.

By Order filed November 1, 2013, this Court notified the parties that it "will issue a decision in accordance with Federal Rule of Civil Procedure 52 in which I will state the Court's Findings of Fact and, separately, its Conclusions of Law, and in which I will find in favor of the Plaintiff and against the Government and MDI." (Order of Nov. 1, 2013, Doc. 141 at, at 1). The Order then delineated the specific Findings that the Court would make with respect to the breach by the Government and by MDI of their respective duties of care owed to Balter. (*Id.* at 1-2). In that same Order, the parties were notified that the "issue of damages must now be resolved." (*Id.* at 2). Accordingly, the parties were directed to submit their positions with respect to the issues delineated by the Court which it deemed necessary for a determination of damages in this case. (*Id.* at 2-3.)

Plaintiff submitted his Brief in Support of his Claim for Damages and argued therein that with respect to the failure to timely schedule Balter in accordance with Dr. Tuller's request that Balter be seen within 10 weeks from August 28, 2007, requested that negligence as between the United States and MDI be apportioned as follows:

United States – 85%; MDI – 15%.

(Doc. 145 at 8). Plaintiff further argued that no portion of negligence should be apportioned to him. (*Id.* at 11).

Plaintiff, in response to the Court's Order that he do so, addresses the applicability of the joint and several liability provisions of the Pennsylvania Comparative Negligence Statute, 42 Pa. CONS. STAT. ANN. § 7102(a)(1)-(2). (*See* Doc. 145 at 11-12). The Plaintiff, relying on *Kohn v. School District of City of Harrisburg*, 2012 WL 5379283, at *7 (M.D. Pa. 2012), and on *Harris v. Kellogg Brown & Root Svs., Inc.*, 724 F.3d 458, 474 n.12 (3d Cir. 2013), asserts that because Plaintiff's cause of action accrued on or about December 5, 2007, the 2011 Amendments to Section 7102 made by Public Law 78, No. 17, were not applicable. (Doc. 145 at 13).

Plaintiff thus argues that the instant action is governed by the prior version of the Pennsylvania Comparative Negligence Statute, asserting: "'Pennsylvania law permits a plaintiff prevailing against multiple defendants for the same legal wrong to recover the full amount from any one defendant,' as long as the plaintiff is not barred from recovering against the other defendants." (*Id.* at 14) (quoting *Essex Ins. Co. v. Rayski, Inc.*, 2007 WL 1965537, at *2 (E.D. Pa. 2007).

The Government, in its Brief in Opposition to Plaintiff's Claim for Damages, asserts that "[b]ecause the United States has not waived its immunity, it cannot be sued for the negligent acts committed by an independent contractor." (Doc. 146 at 3).

Alternatively, the Government argues that, even if the Court were to disagree with its assertion that the Government had no liability for the failures of its contractor, "MDI is nonetheless responsible for the lion's share of the damages." (*Id.* at 8).

The Government also argues that the Plaintiff himself bore responsibility in that he was "negligent for failing to report to sick call and requesting to be put on the list to see the optometrist as an add-on in November of 2007, and, in this regard, his negligence was greater than the negligence of the United States and/or the combined negligence of the Defendants." *(Id.* at 14).

In subsequent filings with this Court pursuant to the Court's Order of February 10, 2014 (Doc. 148), the Plaintiff, agreeing with the position of the government, wrote that "if MDI is determined to be a joint tortfeasor, the United States' liability is to be reduced by MDI's percentage of liability." (Doc. 152 at 3).

Further, the Plaintiff also acknowledged that "[t]he United States can be held liable for its own negligence or the negligence of an employee; but cannot be held liable for negligence of an independent contractor." (*Id.* at 4-5 (citing *Logue*, 412 U.S. 521)). The Government's response to this Court's Order of February 10, 2014, asserts the Government's position that based on the terms of the Pro-Rata Joint Tortfeasor Release entered into between Plaintiff and MDI, "the United States believes it is entitled to a pro-rata reduction for the percentage of liability apportioned to MDI as a result of this Court's determination that MDI was a tortfeasor based on the evidence presented at trial." (Doc. 150 at 2).

VI. Conclusion

For the reasons set forth in this memorandum opinion, the Court finds in favor of Mr. Balter and assesses a finding of liability against Defendants the United States and MDI.

Furthermore, there appears to be no dispute between the parties that: (1) the United States may not be held liable for the negligence of a contractor, such as MDI; and (2) where, as here, MDI has been determined to be a joint tortfeasor, the United States' liability is to be reduced for the percentage of liability apportioned to MDI in this case. Thus, this Court's award of $250,000.00 against the United States for the failures of USP Allenwood and MDI to timely schedule Balter's appointment with Dr. Tuller shall be reduced by 50%, or $125,000.00.

With respect to the failure of the United States to schedule an optometrist appointment for Richard Balter in the month of November, 2007, the Court assesses damages solely against the United States since MDI had no role in ensuring that Balter was seen by the optometrists who visited the prison on November 7, November 14 and November 22, 2007. Here again, the United States offered no explanation why Mr. Balter was not seen by an optometrist on the aforesaid dates in November of 2007. This Court has already found that Mr. Balter's eye was leaking prior to December 5, 2007 and that his hemorrhage on that date was related to this pre-existing leakage. Had Balter been examined by Drs. DeRose or Weyand on November 7, 14 or 22, 2007, as he should have been and as he had been in the past, the condition of Balter's eye would have been

assessed and any increase in leakage or outright bleed in the eye would have been identified. This would have resulted in Mr. Balter being immediately sent to an outside ophthalmologist for treatment. Indeed, when Balter was finally seen by Dr. DeRose on December 5, DeRose identified the significant bleed or hemorrhage in Balter's left eye and Balter was immediately sent to Dr. Lightman, an ophthalmologist, outside of the facility, for treatment. This Court has found that the failure of the United States to have Mr. Balter examined by an optometrist was a factual cause of the massive hemorrhage sustained by Balter with resulting blindness in his left eye. It awards Mr. Balter the sum of $400,000.00 in damages against the United States.

Therefore, a verdict shall be entered in this case against the United States in the amount of $650,000.00, which shall be reduced by the sum of $125,000.00, which represents the percentage of negligence attributed to MDI in connection with the failures of the United States and MDI to timely schedule Balter's appointment as requested by Dr. Tuller; and which shall further be reduced by the off-set to which the United States is entitled for the restitution owed by Plaintiff in the amount of $112,511.00 in connection with his criminal conviction. Plaintiff acknowledges the Government's right to a set-off, acknowledging that "[t]he United States has the right to first off-set its lien – in this case for the amount of the outstanding restitution – prior to paying the judgment." (Doc. 145 at 15). Accordingly, judgment will be entered in favor of the Plaintiff and against the United States in the amount of $412,489.00.

Further, the Court will enter a verdict against MDI in the amount of $250,000.00, MDI having played no role whatsoever in the failure of the United States to arrange for Balter to be seen by the optometrist who visited the Prison on November 7, 14 and 22, 2007.

DATE: 4/7/14

Robert D. Mariani
United States District Judge

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2009-01715 Short Description: MITCHELL V. UNITED STATES OF AMERICA

[redacted]

Case Login Information

Reference Number	1:09-cv-00680-RBK-KMW
Short Description	MITCHELL V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	Fort Dix (FCI)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	Fort Dix (FCI)
Monetary Relief Sought	$
Estimated Amount	$
Office	Camden
Jurisdiction	DISTRICT OF NEW JERSEY [LIVE]
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	04/01/2013
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$
Total Amount Paid	$50,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	11/03/2009
Date Filed	02/13/2009

Case Progress

Current Owner	CHRISTINA CLARK
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:2671 FEDERAL TORT CLAIMS ACT
Further Case Classification	
Comments	medical negligence; eye care

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEFFREY A. MITCHELL Plaintiff, v. UNITED STATES OF AMERICA Defendant.	CIV. No. 1:09-cv-00680 (RBK) (Document Electronically Filed)

AMENDED COMPLAINT

Plaintiff Jeffrey A. Mitchell ("Plaintiff" or "Mr. Mitchell") in his Amended Complaint against Defendant United States of America, pleads the following:

JURISDICTION AND VENUE

1. This action arises under the Federal Tort Claim Act, 28 U.S.C. §2671, *et seq.*

2. This Court has jurisdiction pursuant to 28 U.S.C. §1346(b). Venue is proper under 28 U.S.C. §1391(e)(2).

PARTIES

3. Plaintiff Jeffery A. Mitchell, is an inmate in the custody of the Federal Bureau of Prisons, and is currently incarcerated at the Federal Correction Institution at Fort Dix, Burlington County, State of New Jersey ("FCI Fort Dix").

4. Defendant, the United State of America, operates the Federal Bureau of Prisons, an agency of the United States Department of Justice, United States of America. Defendant also operates the United States Marshals Service ("Marshals Service"), an agency of the Department of Justice, which houses and transports all federal prisoners from the time they enter federal custody until they are either acquitted or convicted and delivered to their designated federal Bureau of Prisons facility.

STATEMENT OF FACTS

5. On or about March 22, 2005, Mr. Mitchell was arrested on federal charges and placed in custody of the Marshals Service in Atlanta, Georgia. He was then transferred to the Oklahoma Transfer Center on or about March 23, 2005. He was subsequently transferred to the Regional Jail in Martinsburg, West Virginia.

6. Prior to his arrest and detention, Mr. Mitchell's vision condition was normal and his diabetes was fully controlled.

7. Mr. Mitchell had not been diagnosed with glaucoma prior to his arrest.

8. The Marshals Service is required to ensure that prisoners in its custody receive appropriate medical care.

9. The Marshals Service contracts with approximately 1,800 state and local governments to rent jail space. On average, more than 80 percent of the prisoners are detained in state, local and private facilities -- the remaining are housed in various Bureau of Prisons facilities. However, upon information and belief, outside medical treatment by specialists remains the responsibility of the Marshals Service and must be separately approved.

10. The Marshals Service uses the Prisoner Tracking System to track prisoners medical information, including whenever a prisoner receives outside medical treatment. In

addition, prisoner's case files should also contain medical information including records of all medical care provided to the prisoner.

11. Mr. Mitchell was in the Marshals Service's care from March 22, 2005 until he was ultimately transferred into the care of the Bureau of Prisons.

12. The Marshals Service has been unable to locate any medical records pertaining to Mr. Mitchell or the care he received while in its care. Upon information and belief, the Marshals Service failed to maintain Mr. Mitchell's medical records in the Prisoner Tracking System.

13. Between March of 2005 and the Fall of 2005, the Marshals Service transferred Mr. Mitchell to and from numerous facilities, including facilities in West Virginia, Ohio, Atlanta, Oklahoma City, and Philadelphia. Some of these facilities were federal prison facilities but some were state or local facilities that contracted with the Marshals Service. Upon information and belief, Mr. Mitchell's medical records were not transferred with him.

14. Each of the facilities that Mr. Mitchell was transferred to should have conducted an initial medical examination upon his entry into the facility. Such examination should have included a vision screening.

15. If the Marshals Service had appropriately monitored Mr. Mitchell's care as he was transferred from facility to facility and if the Marshals Service had provided his medical records to each facility, those records would have contained the results of the vision screenings and would have shown a progressive loss of vision in Mr. Mitchell's right eye and increased ocular pressure.

16. While in the Eastern Regional Jail in Martinsburg, West Virginia in March of 2005, Mr. Mitchell informed the employees who performed a medical exam that he was having vision problems and he had diabetes. Mr. Mitchell was told he needed to be seen by an

Ophthalmologist or eye specialist but that the Eastern Regional Jail employees informed Mr. Mitchell that they would not pay for such a visit because that was the Marshal Service's responsibility.

17. Upon information and belief, the Marshals Service did not approve or arrange for such specialized care. Rather, Mr. Mitchell was informed that he would be treated when he reached his designated facility. The Marshals Service did not ensure that medical personnel at the subsequent facilities it transferred Mr. Mitchell to were aware of the need for specialized medical treatment nor did it authorize such treatment.

18. Mr. Mitchell did not receive the recommended care by a specialist, despite numerous complaints and requests to prison staff at each of the numerous facilities he was transferred to. Only the Marshals Service could authorize such treatment.

19. At some point, Mr. Mitchell was diagnosed with glaucoma.

20. On September 30, 2005, Mr. Mitchell was transferred to a facility in Youngstown, where he again complained about his vision problems and the failure to be seen or treated by an ophthalmologist or eye specialist. Mr. Mitchell's vision was already declining at this point.

21. The facility in Youngstown refused to provide Mr. Mitchell with specialized medical care, but rather informed him that he would be treated and seen by a specialist when he arrived at his final destination.

22. On November 15, 2005, Mr. Mitchell arrived at his final destination -- FCI Fort Dix -- and immediately sought medical assistance. Upon information and belief, none of his medical records while in the care of the Marshals Service were provided to FCI Fort Dix.

23. Mr. Mitchell's medical intake screening at FCI Fort Dix revealed that he had been prescribed eye drops, specifically Brimonidine and Timolol Maleate. Brimonidine is prescribed

for the lowering of intraocular pressure in patients with open-angle glaucoma or ocular hypertension. Timolol maleate is also used in the treatment of elevated intraocular pressure in patients with glaucoma.

24. Mr. Mitchell informed the staff at the initial screening at FCI Fort Dix that his eyes were painful.

25. Notwithstanding this history, Mr. Mitchell was not referred to an Ophthalmologist nor does it appear that a vision screening was performed.

26. Mr. Mitchell's records at FCI Fort Dix do not mention or address the decline in Mr. Mitchell's eyesight in the prior months that he had been in care of Defendant.

27. On November 23, 2005, Mr. Mitchell was referred to the chronic care clinic at FCI Fort Dix and a vision screening was finally performed. An optometry consult was then finally requested.

28. However, on or about December 27, 2005, Mr. Mitchell's records indicate that he was again seen by FCI Fort Dix staff and again referred for an optometry consult. At that time, Mr. Mitchell complained that he had been unable to see in his left eye since May of 2005.

29. On January 6, 2006, Mr. Mitchell made yet another complaint that he was unable to see from his left eye.

30. Mr. Mitchell was again seen at the Chronic Care Clinic at FCI Fort Dix on February 29, 2005. He again complained that he was unable to see from his left eye. It was noted that a ophthalmology consult had already been requested yet Mr. Mitchell still had not seen an eye doctor. The treating physician was reached and changed his prescription for eye drops.

31. Mr. Mitchell was finally seen by an eye doctor on March 15, 2006.

32. The physician told Mr. Mitchell that there was nothing he could do for him and that he should have been seen and treated earlier. The physician chided the medical staff for the long delay in bringing Mr. Mitchell to an eye doctor. At that time, Mr. Mitchell was diagnosed with advanced glaucoma. Mr. Mitchell was then referred for a medical/surgical examination.

33. The medical/surgery consult resulted in a recommendation that Mr. Mitchell receive laser surgery with respect to his right eye.

34. There was nearly a one year delay after he was first incarcerated before he was seen by an eye doctor, who diagnosed the advanced glaucoma. Mr. Mitchell had by then lost 98% of his vision in his left eye.

35. Notwithstanding this diagnosis, on April 4, 2006, defendant noted that Mr. Mitchell had no permanent disabilities or vision impairment.

36. On June 6, 2006, Mr. Mitchell again complained about the lack of treatment for his eyes, noting that he had been seen by an eye doctor and had been referred for surgery. It was noted at that time, that Mr. Mitchell's prior medical records were not available. Mr. Mitchell's treatment was further delayed due to this lack of medical documentation.

37. Mr. Mitchell's surgery was not approved by defendants until August 3, 2006. At some point in early August of 2006, Mr. Mitchell finally had the required laser treatment for the advanced glaucoma.

38. The surgery was successful with respect to his right eye. However, surgery at that point was late to save the vision in Mr. Mitchell's left eye. Mr. Mitchell is now blind in that eye.

39. On July 27, 2007, Mr. Mitchell filed his Federal Tort Claim, under the Federal Tort Claim Act, with the Northeast Regional Office in Philadelphia, PA.

40. On September 4, 2008, Regional Counsel denied the claim. The assigned number to the tort claim was "TRT-NER-2007-05744." Plaintiff has exhausted his administrative remedies.

COUNT I
FEDERAL TORT CLAIMS ACT –
FAILURE TO PROVIDE CARE AND MAINTAIN MEDICAL RECORDS

41. Plaintiff incorporates by reference paragraphs 1-40 above, as if set forth fully herein.

42. Plaintiff brings this claim pursuant to the Federal Tort Claims Act.

43. Defendant owed a duty of care to Mr. Mitchell while he was in its care, custody and control.

44. Defendant was obligated to provide adequate medical care to Mr. Mitchell while he was in its care, custody and control.

45. Defendant was negligent in its provision of such medical care to Mr. Mitchell.

46. Defendant failed to maintain adequate medical records while Mr. Mitchell was under the care of the Marshals Service and failed to ensure that medical records for Mr. Mitchell, including treatment recommendations, were provided to the prison facilities the Marshals Service placed Mr. Mitchell in.

47. The Marshals Service failed to provide Mr. Mitchell's records to the Bureau of Prisons upon his transfer to the Bureau of Prisons' care.

48. The lack of adequate medical records which would have established the need for specialized medical treatment and shown the decline in Mr. Mitchell's care, was a cause of his loss of eyesight.

49. Defendant also breached its duty of care to Mr. Mitchell in failing to render the specialized medical care ordered or prescribed by treating physicians in a timely manner.

50. The failure to follow the treatment recommendations and the extension delay in permitting Mr. Mitchell to see an ophthalmologist were a cause of his loss of vision.

WHEREFORE, Plaintiff demands judgment in its favor and against Defendant, and seeks compensatory damages, attorney's fees and other costs of litigation; and such other further relief and remedies as are justified by the evidence presented at the hearings and ultimate trial in this proceeding.

DUANE MORRIS LLP

Date: April 13, 2012

By:/s/ Catherine L. Sakach

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CAMDEN DIVISION

JEFFERY A. MITCHELL,
Plaintiff,

vs.

UNITED STATES OF AMERICA
Defendant.

Civil Action No

THIS IS A COMPLAINT UNDER THE FEDERAL TORT CLAIM ACT. "FTCA" 28 U.S.C. §2671 et.seq.

COMES NOW, the Plaintiff Jeffery A. MItchell, pro se, file this complaint under the Federal Tort Claim Act, 28 U.S.C.§2671, the plaintiff request this court to grant his informa pauperis due to his indigency status and further invoke Rule 4 (m) that officer of the court will serve process the complaint upon the United States of America and its Attorney General. (attached copy of application to proceed informa pauperis).

I. JURISDICTION & VENUE:

1. This action arises under the "FTCA" §2671,et.esq.

2. This Court has original and exclusive jurisdcition pursuant to 28 U.S.C. §1346 (b). Venue is proper under Title 28 U.S.C. 1391 (e)(2).

II. PARTIES:

3. Plaintiff Jeffery A. Mitchell, is an inmate in the custody of the Federal Bureau of Prisons,"B.O.P." incarcerated at the Federal Correctional Institution at "FCI" Fort Dix, in the Burlington County, State of New Jersey.

4. Defendant, United States of America, is based in the District of Columbia. The "B.O.P." is a component of the department of Justice "D.O.J" which is an executive department of the United States of America.

III. STATEMENT OF FACTS:

5. On March 22,2005 the plaintiff was arrested on federal charges in violation of Title 21 §841 (crack cocaine) and was sentenced to 121 months.

6. While the arresting United States Marshals, took custody of the plaintiff he was placed at Martinberg Regional Jail, in West Virginia.

7. While in Martinberg Regional Jail, the plaintiff informed the U.S. Marshals of his vision problem and his medical condition as a whole of being diabetice and other chronic care ailements.

8. The Plaintiff was referred to an Opthalmologist, where he was diagnosed and prescribed treatment.

9. The Martinberg Regional Jail refused to follow the recomanded treatment by the Opthalmologist stating that once you reach your designated facility you will be treated.

10. On September 30,2005 the plaintiff was transferred to CDC in Youngstown, Ohio, the Plaintiff expressed his complains regarding his vision and the prescribed treatment was ordered by the Specialist "Ophthalmologist" the staff at the CDC, declined to treat the Plaintiff stating that once you arrive your final institution you will be treated.

11. On October 17,2005 the plaintiff was transferred from CDC Youngstown, Ohio through multiple stops in route to "FCI" Fort Dix, that was his final destination.

12. On November 15,2005 the Plaintiff arrived at the "FCI" Fort Dix, and immediately sought medical help and got nothing but "runaround" By the time I was seen by the Ophthalmologist it was too late and was informed that I had lost %98 of my sight in the left eye.

13. The eye specialist chided the medical staff and ask them why they take so long before letting him see me.

14. Plaintiff's medical record clearly support Prima Facia case of gross negligence, negligence, reckless disregard, and breach duty of care on the hands of the Bureau of Prisons Employees.

15. The medical records acknowledge a diagnosis of my eye condition, where an immediate medical care needed. But the medical records also show no action was taken and you will see that the medical staff continously delayed and prolonged the recomandations made by the Ophtalomogist.

16. From the begining of November, 2005 the medical records show that further Ophtalmological care was needed; the plaintiff was not seen by any medical specialist until March or 2006, a delay over four (4) months.

17. The delays and prolonging in the treatment of my eye condition made an advanced condition of "Glaucoma".

18. Non of the recomandations and istructions made by the Opthomology was followed by the medical staff.

19. Plaintiff's medical records show repeated requests for treatment and clear recognition of plaintiff's condition.

20. The Bureau of Prisons medical staff negligence and breach their duty of care is the proximate cause for the loss of the vision in my left eye.

21. Plaintiff under the following medication he has been receiving a) Amitripyline 100 MG Tap; b) Asprine 81 MG; c) Brimonidine ophth 5ML 0.15% ; d) Dorzolamide HCL 2%; e) Hydrochlorothiazide 5 MG; f) Insulin NPH (10) 100 UNITS; g) Insulin Reg (10ML) 100 UNITS; h) Lisinopril 20MG ; i) Metforman 1000 MG Tab; j) Sertalin HCI 100 MG Tab; k) Timolol Maleare Ophth Soln 0.5% (5ML); l) Travoprost Ophth;

22. Plaintiff suffers the following ailments; Colosterol, diabetese, hypertension, depresson, resperatory problems.

23. Plaintiff's vision condition was normal prior to his incarceration, his diabetese was checks on regular basis and fuly controlled.

24. On July 27,2007 the Plaintiff filed his Federal Tort Claim, under the "FTCA" to the Northeast Regional Office in Philadelphia, PA.

25. On September 4,2008 the Regional Counsel aknowledge the tort claim and denied the claim. The assigned number to the tort claim was "TRT-NER-2007-05744".

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES:

26. The exhaustion requirement has been met by the acknowledgment of the Regional Counsel denial dated 9-4-2008.

V. LIABILITY UNDER THE "FTCA":

27. The United States government cannot be sued unless it has specifically consented to be sued and has waived its sovereign immunity. Title 28 U.S.C. §1346(b) and §2671-2680, which waived with certain specified exceptions, the government's immunity for liability in tort. The "FTCA" makes the Federal Government liable under the doctrine of respondent superior for acts that would be common law torts in the State where they occured. The "FTCA" specifically allows for money damages aagainst the United States for injury or loss of property caused by negligent or wrongful acts or omission of any employess of the government while acting within the scope of his office or employment. 28 U.S.C. §2679 (b)(1).

VI. DUTY OF CARE:

28. A fundamental principle of federal law is that a federal agency must follow its own rules. Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. It is also well settled that validly issued administrative regulations have the force and effect of law.

As such, an inmate is entitled to expect the bureau of Prisons to follow its own policies. The duty of care owed by the federal government to its prisoners is found in Title 18 U.S.C. §4042, "Duties of the Bureau of Prisons" subsection (a) provide in pertinent part:

> **(a) In general- The Bureau of Prisons, under the direction of the attorney general, shall-**
>
> **(1) have charge of the management and regulation of all federal penal and correctional institutions;**
>
> **(2) provide suitable quarters and provide for the safe-keeping, care, and subsistence of all persons charged with or convicted of offenses against the United States.**

Incident to this duty of care, the "B.O.P." has promulgated mandatory regulations, program statements, institutional supplements and forms that allow no jufgment of choice regarding the handling and management of the institutions in maintaining safe and secured envirment to the prisoners and accomedate their medical needs .

To determine whether the government has breached that duty this court must look to the law of the place where the act or omission occured. In this case the court would look to the essential elements of a negligence claim in New Jersey, which include; 1) the defendants owed the plaintiff a duty; 2) the defendants breached that duty; and 3) such breach was the proximate cause of the plaintiff's injuries.

VII. FIRST CAUSE OF ACTION:

29. The actions of the defendants as stated in paragraphs 1 through 28 constitute negligence/gross negligence.

30. The defendants acted with reckless disregard when they consciously and voluntarily denied and prolonged plaintiff's repeated request to be seen and treated by eye specialist.

31. The defendants acted with gross negligence when any lay person should have known that diabetics have grater risk in loosing their sight and must be checked as needed.

32. The defendants actions and inactions were the proximate cause of the loss to plaintiff's sight. They delayed and prolonged the treatment to plaintiff's eye condition. The loss of his sight could have been prevented if was not for their delays.

33. Defendants are federal employees who were acting under color of law during the period in which plaintiff was subject to the injury to his eye at the FCI, Fort Dix.

34. The defendants owed a duty to the plaintiff to provide him with adequate medical care .

35. The failure of the defendants to fulfill their duty resulted in significant harm to the plaintiff's loss of one eye and physical pain and suffering, mental anguish.

36. Plaintiff has suffered damages as a direct result of the defendants breach of their duty to provide adequate and proper medical care, and their failure to carry out medical orders and referrals.

37. Plaintiff therefore, seeks monetary relief from defendants pursuant to the Federal Tort Claim Act. "FTC" 28 U.S.C. §2674 in the amount of Five Million ($5,000,000.00) U.S. Dollars

WHEREFORE, Plaintiff Jeffery A. Mitchell, requests that this court enter judgment in his favor against the United States of America, for compensatory damages, punitive damages, and such further relief as this court deems just and appropriate under the circumstances.

38. Pursuant to Rule 38 Fed.R.Civ.P. the plaintiff demand a trial by jury on all issues so triable.

On February 9,2009

Respectfully Yours

Jeffery A. Mitchell
Reg# 12569-171
FCI, Fort Dix
P.O.Box 2000
Fort Dix, NJ 08640

Clerk,

U.S. District Court
District of New Jersey
Camden Division
P.O.Box 2927
Camden, NJ 08101

Date: 2/9/2009

RE: Jeffery A. Mitchell vs. United States of America
Civil Action No:_____

09cv680

Dear Clerk:

Enclosed for filing please find One original and One copy of my complaint under the Federal Tort Claim Act, and One original of my informa pauperis application.

Please file the complaint and returned my copy stamped for my records. Your cooperation and assistance is greatly appreciated.

Respectfully Yours
Jeffrey A Mitchell

Jeffery A. Mitchell
Reg# 12569-171
FCI, Fort Dix
P.O.Box 2000
Fort Dix, NJ 08640

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

JEFFREY A. MITCHELL	:	
	:	CIVIL # 09-680 (RBK)
Plaintiff(s),	:	
-vs-	:	**ORDER OF DISMISSAL**
UNITED STATES OF AMERICA	:	
Defendant(s).	:	

It having been reported to the Court that the above-captioned action has been settled;

It is on this 1st **Day of** April ,**20** 13 ;

ORDERED that this action is hereby dismissed without costs and without prejudice to the right, upon good cause shown, within 60 days, to reopen this action if the settlement is not consummated. The terms of the settlement agreement are incorporated herein by reference and the Court shall retain jurisdiction over such agreement.

HON. ROBERT B. KUGLER, U.S.D.J.

cc: Hon. Karen M. Williams, U.S. Magistrate Judge
Frank A. Luchak, Esq.
John A. Ruymann, Esq.
File

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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(b)(5)

of the Freedom of Information and Privacy Act

PAUL J. FISHMAN
United States Attorney
BY: J. ANDREW RUYMANN
Assistant U.S. Attorney
402 East State Street, Room 430
Trenton, New Jersey 08608
(609) 989-2190
Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JEFFREY A. MITCHELL,	:	
Plaintiff,	:	
v.	:	Civ. Action No. 09-680 (RBK)
UNITED STATES OF AMERICA,	:	
Defendant.	:	

STIPULATION OF DISMISSAL

The matter in difference in the above-entitled action having been amicably settled by and between the parties, it is hereby stipulated and agreed by and between the attorneys for the parties that the same be and it is hereby dismissed with prejudice and with each party bearing its own fees, costs and expenses.

Dated: 3/29/13

DUANE MORRIS LLP
BY: CATHERINE L. SAKACH, ESQ.
Attorney for Plaintiff,
Jeffrey A. Mitchell

Dated: 5/30/13

PAUL J. FISHMAN
United States Attorney
BY: J. ANDREW RUYMANN
Assistant U.S. Attorney
Attorney for Defendant,
United States of America

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2010-00755 Short Description: MCINTOSH V. GLEN ET AL

[redacted]

Case Login Information

Reference Number	1:09-cv-00295-SPB
Short Description	MCINTOSH V. GLEN ET AL
Classification	Civil
Case Type	Bivens 8th Amend
Case Sub-Type	COC-Medical Condition
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	Otisville (FCI)
Incident Region	NORTHEAST REGIONAL OFFICE
Incident Institution	McKean (FCI)
Monetary Relief Sought	$1,000,000,000.00
Estimated Amount	$
Office	Erie
Jurisdiction	WESTERN DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	04/25/2014
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$7,000.00
Total Amount Paid	$7,000.00
Description	CASE SETTLED FOR $7,000
Description	CASE SETTLED FOR $7,000
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	04/21/2010
Date Filed	11/25/2009

Case Progress

Current Owner	JOYCE HORIKAWA
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983PR PRISONER CIVIL RIGHTS
Further Case Classification	I/M ALLEGES INADEUATE MEDICAL TREATMENT FOR DIABETES, HYPERTENSION ETC.
Comments	

IN THE UNITED STATES DISTRICT COURT
3rd. DISTRICT OF PENNSYLVANIA

CHARLES T. McINTOSH,

PLAINTIFF,

.V.

MRS.GLEN,RODNEY SMITH,DERRICK NEBANE,MR.STOFFER,MS.McNINCH, H.J.MAEBERRY,MISS.ROBARC, STEPHEN D.GAGNON,DENNISE A. HALE,FRANCISCO J. QUINTANA, ADMINISTRATION & MEDICAL ADMINISTRATION, D.SUMMER MD., MS.SULLIVAN HSA, M.BAKER HSA., J.M.KILLIAN, S.RUBICZ, B.SANCHEZ, R.TASSINARRI, N.SCHACHKOVSKY, JOHN & JANE DOES, #1 THROUGH #30; DR.OLSON

RESPONDANT(S),

COMPLAINT PURSUANT TO 42 U.S.C. § 1983

CASE NO. 09-295E

TRIAL BY JURY

REQUESTED:

RECEIVED

NOV 25 2009

CLERK, U.S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

THESE ABOVE DEFENDANT(S) ARE BEING SUED FOR A 8th AMENDMENT DELIBERATE INDIFFERENCE CONSTITUTION VIOLATION, ACTING IN THEIR OWN INDIVIDUAL CAPACITY BUT UNDER COLOR OF FEDERAL AUTHORITY. COMPLAINT UNDER THE CIVIL RIGHTS ACT, U.S.C. §§§ 1981,1983,1985-86 AND/OR BIVENS ACTION ALLEGING A VIOLATION OF U.S.C. CONSTITUTIONAL RIGHTS AND/OR CONSPIRACY TO VIOLATE CONSTITUTION RIGHTS.

This is a complaint alleging a violation of the constitution, laws or treaties of the United States as authorized under 42 U.S.C. §§§ 1981,1983,1985-86 or under BIVENS V. UNKNOWN AGENTS OF F.B.N., 403 U.S. 388, 91 S.Ct. 1999, 29 L.ED 2d 619, 1971 U.S. Lexis 23, seeking monetary and/or other damages or relief in excess of $100,000,000.00,.

UNITED STATES DISTRICT COURT
3rd DISTRICT OF PENNSYLVANIA

CHARLES T. McINTOSH,
Plaintiff,

Case No. _____

v.

Rodney Smith, Mrs. Glen,
et allis,
Defendant(s).

MEMORANDUM OF LAW

When considering whether or not a complaint states a claim, allegation are accepted as accurate and viewed in a light most favorable to a claim existing. Jenkins v. Mckeithen, 395 U.S. 411,421(1969); Dewalt v. Carter, 224 F.3d 607,611-12(7th cir.2000)

Pre-trial detainees like McIntosh have the same right to adequate medical care as convicts, Chaves v. Cady, 207 F.3d 901,904(7th cir.2000), although it's a 14th amendment claim, not an 8th amendment claim. Collignon v. Milwaukee county, 163 F.3d 982,988-89(7th cir.1998).

Failing to provide proper medical care,failing to test patient "McIntosh" befor stopping his high blood pressure medication that was prescribed by a doctor. Withdrawing a pear of personal purchased soft shoes for his medical reason's alone since the F.B.O.P failed to provide the proper medical necessatees as required by law for all medical needed government prisoners.

Failing to provide pain medication as well as proper medical care as prescribed by a doctor violates a prisoner's right to adequate medical care. Ralston v. McGovern, 1677 F.3d 1160,1161-62(7th cir.1999). Thus McIntosh hes a claim in this regard.

Subjecting McIntosh to conditions (an stoppage of doctored prescribed high blood pressure medication,pain medications,an refusing to allow shoe's that will protect and prevent the pain an swelling of McIntosh's feet's from the poor circulation he suffer's from diabetes,an the back injory that resulted from the fall caused by the blackout of lack of his high blood pressure medication) also violates McIntosh's 14th amendment right to adequate medical care. Hutto v. Finney, 437 U.S. 678,682(1978) (exposing prisoner to "infectious maladies" violates constitution); (Alboun v. Dtella 319 F.3d 936,940(7th cir.2003) (causing pain and suffering in prisoner violates the constitution); Roberson v. Bredshow, 198 F.3d 645,646,648(8th cir.1999) (Denial of care for diabetes, including special footwear,high blood pressure medication stopped weth out seen by a "Licensed Physician" is unconstitutional); Denying McIntosh his footwear and high blood pressure medication that is appropriate for a diabetic, problems caused by his deabetes also violates the constitution. Id,; Hudson v. Mchugh, 148 F.3d 859,864(7th cir.1998)

CONCLUSION

McIntosh must be allowed to pursue the relief he seeks on the claims he alleged.

Charles T. McIntosh

CHARLES T. McINTOSH

Dated: Nov 23, 2009

cc: File#.

JURISDICTION

This is a Civil Rights Action under the provisions of 42 U.S.C. §§§ 1981,1983,1985-86 or a Bivens action involving a federal question arising under the constitution laws or treaties of the United States. Thereby invoking the original jurisdiction of this court under Artical 3, U.S.C. Const., and 28 U.S.C. §§§ 1331,1346 or 1357. Instructions for filling complaint by prisoners under the Civil Rights Act, 42 U.S.C. §§§ 1981,1983,1985-86 or Bivens action.

This packet includes four copies of a complaint and two copies of an informa pauperis petition. To start an action you must file an original and one copy for your complaint for each defendant you name an one copy for the court. For exampl, if you name two defendants. You must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

The clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be hand or typed written. The plaintiff(s) must sign under penalty of perjury to the complaint. If you need additional space to answer a question, you may use an additional blank page.

Your complaint can be brought in this court only if one or more of the name defendants is located within this district. Further, it is necessary for you to file a seperate complaint for each claim that you have unless they are all related to the same incident or issue.

If you are unable to pay the filing fee and service cost for this action, you may petition the court for leave to proceed informa pauperis. Two blank petition for this purpose are located in this packet. One copy should be filed with your complaint; the other copy is for your records. After filing in the petition, you must have it signed by an authorized officer of

your institution verifying your inmate account balance and transaction history for the past six months. Then the petition must be signed under oath befor a notary or under penalty of perjury by you if you are the plaintiff prior to mailing it to the clerk of court.

Otherwise you must pay the filling fee of $350.00 and the cost of the United States Marshal to serve the complaint on each of the defendants.

You will note that you are requiered to give the facts in that section entitled the "statement of facts". However, in that section entitled "statement of claim," you must specify the constitutional or stautory right(s) that you are claiming to have been violated by the defendant(s).

When these forms are completed, mail the original and enough exact copies of the completed forms to the clerk of the United States District Court for the 3rd District OF Pennsylvania.

1. Previous lawsuits

A. Have you begun other lawsuits in state or federal cout dealing with the same facts involving in this action or otherwise relating to your imprisonment?

Yes ( ) No (x)

B. If you answer to A is yes, decribe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuit on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs_____

Defendants:_____

2. Court (If federal court, name the district; if states court, name the county):_____

3. Docet number:_____

4. Name of Judge to whom case was assigned:_____

5. Disposition (for example: was the case dismissed? was it appeal

ed? is it still pending?):_____

6. Approximate date of filling lawsuit:_____

7. Approximate date of disposition:_____

2. Did the event(s) or incident(s) complained of in this lawsuit take place while you were in a jail or prison?

Yes (x) No ( )

(1). Did the event(s) or incident(s) complained of in this lawsuit take place prior to your arrest or incarceration?

Yes ( ) No (x)

(2). If the event(s) or incident(s) took place while you were in a jail or prison or related to your current incarceration then you must answer the follwing questions under 42 U.S.C. § 1997 demostrating proof of the exhaustation of administrative remedies or the lack availability thereof:

Place of present confinement: F.C.I. OTISVILLE P.O. BOX 1000 OTISVILLE, NEW YORK. 10963.

A. Is there a prisoner grievance procedure in this institution or in the institution wherein the event(s) or incident(s) complained of in this lawsuit took place?

Yes (x) No ( )

B. Did you present the facts relating to your complaint in this grievance procedure of this institution?

Yes (x) No ( )

C. If your answer is Yes:

1. What steps did you take? I exhausted all my administrated remedies in the order of B.P 8-9 and 10's

2. What was the result? my grievances was denied

D. If your answer to "B" was No. explain why not:

_____

E. If the event(s) or incident(s) complained of in this lawsuit involve city or county muicipal employ's including municipal police officers, sheriff's deputies or a tort claim against any state or federal officer or agent or agency. Did you file a persuit notice of claim or a form 95 with that agency?

Yes ( ) No (x)

F. If you answered Yes:

1. What steps did you take?_____

What was the results?_____

(3). Parties

(In item "A" below, place your name in the first blank that say's "Plaintiff" and your present address of incarceration in the second blank that say's "Address". Do the same for additional plaintiff's if any.)

A. Name of plaintiff CHARLES T. McINTOSH Reg.# 08770-089

Address F.C.I. OTISVILLE P.O. BOX 1000 OTISVILLE, NEW YORK. 10963

In item "B" below, place the full name of the defendants in the first blank, his/her offical position in the second blank, and his/her place of employment in the third blank. Use additional paper following the same pattern if the total defendants exceed the space provided herein and below.

B. Defendant Mrs. Glen

Is employed as Physician Assistant

At M.C.I. McKEAN, PA.

C. Defendant Rodney Smith

Is employed as Health Services Addministration

At M.C.I. McKEAN, PA.

D. Defendant Derrick Mebane

Is employed as "A" unit manager

At M.C.I. McKEAN, PA

E. DEFENDANT Mr. Stoffer

Is employed as case manager

At M.C.I. McKEAN, PA.

F. Defendant Ms. Mcnitch

Is employed as Counseler

At M.C.I. McKEAN, PA.

G. Defendant H.J. Marberry

Is employed as Warden

At M.C.I. McKEAN, PA.

H. Defendant Ms. Robare
Is employed as A.W.
At M.C.I. McKEAN, PA.

I. Defendant Stephen D. Gagnon
Is employed as A.W.
At M.C.I. McKEAN, PA.

J. Defendant Denise A. Hale
Is employed as Operations, Acting A.W.
At M.C.I. McKEAN, PA.

K. Defendant Francisco J. Quintana
Is employed as Warden
At M.C.I McKEAN, PA.

L. Defendant Dr. Olson
Is employed as Head Doctor of the medical unit
At M.C.I. McKEAN, PA.

M. Defendant J.M. Killian
Is employed as warden
At F.C.I. Otisville, new york.

N. Defendant A. Dachisen
Is employed as A.W.
At F.C.I. Otisville, New York

O. Defendant J. Drumhellen
Is employed as A.W.
At F.C.I. Otisville, New York.

P. Defendant D. Summer
Is employed as M.D.
At F.C.I. Otisville, New York.

Q. Defendant Ms. Sullivan
Is employed as H.S.A.
At F.C.I. Otisville, New York.

R. Defendant M. Baker
Is employed as H.S.A.
At F.C.I. Otisville, New York.

S. Defendant S. Kubicz

Is employed as Physician Assit.

At F.C.I. Otisville, New York.

T. Defendant B. Sanchez

Is employed as Physician Assit.

At F.C.I.Otisville, New York

T. Defendant B. Tassinarri

Is employed as Physician Assit.

At F.C.I. Otisville, New York.

U. Defendant N. Schachnovsky

Is employed as Physician Assit.

At F.C.I. Otisville, New York.

V. Defendant Administration & Medical staff, John & Jane Does #1 through 30;

Is employed as Administration & Medical Staff's

At M.C.I. McKean, F.C.I. OTISVILLII F.B.O.P's

STATEMENT OF FACTS:

4. State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. You should number each paragraph and your facts should be as brief as possible in a narrative format. (Use as much space as you need. You may use additional blank or lined paper.)

1. The plaintiff, McIntosh, is a diabetic who was imprisoned in the F.B.O.P. M.C.I. McKean between the date of NOVEMBER 2007, through MARCH 2008,

2. McIntosh has a serious case of diabetes problems while in the F.B.O.P.

3. On the end of DEC. 2008 throught the beginning of FEB. 2008, McIntosh went to the M.C.I McKean medical unit to complain about the severe head pains he was recieving, and the swelling and pain in both of his feets.

4. McIntosh has made numerous atempt to the medical unit to P.A. GLEN and the Doctor along with medical staff requesting that he sould be tested for his diabetes and his other medical issues he was having, in which McIntosh was denied of every time he

requested.

5. On JAN 28, 2008, McIntosh filed a B.P-9 to the Warden stating that he requested to see a doctor and is repeatedly being denied by the P.A. and medical staff and " still has not been tested nor checked for his diabetes statis to judge his medications in which he was given and still taking not knowing if it's to low or high.

"6. On FEB 05, 2008, McIntosh walked out his living quarters ateempted to start walking down the second floor level stairs and automaticaly pasted out on the top from the first step he took to ateept to walk down to the first level of the unit falling face down ending up in a twisted possion. security cameras will show actual fall and the testimony from the unit staff as evidence to this incident.

7. McIntosh's blood and sugar testing did not begin until McIntosh's accident. The blood physician stated after McIntosh cane back from the hospital that P.A. Ms. Glen did not have him down as a diabetic in her files, and that the medical records will show that McIntosh's blood and sugar only started being tested after returning from the hospital.

8. On FEB 05, 2008 McIntosh was rushed to the emergency room, time 08:50 am at Kane Community hospital, Kane, PA. 16735. resulting damages to a slipped disk to his lower spine and a hurnia.

9. On DEC 11, 2007, McIntosh wrote a complaint to the A.W. stating that he was told to go to health serice for his medical issues including his diabetes, an feet issues because of the constant pain he stayed in, an the P.A. continue to do nothing. Also stating that the duty officer had loged it in that McIntosh did an is having medical issues. The reply form the A.W. feel free to come to sick call from mon - fri 6:35-7:05 am.

10. On NOV 24, 2007 McIntosh wrote the Assit.Warden Miss. Robarc stating that he was having physical problems an no one was paying serious attention to him about his diabetes an his flat foot and his history of swelling feet that he suffers from, also staing that the amount of pain that he's in an going through and that

his records will show that F.B.O.P. Oklahoma allowed him his shoes because of his medical diabetes issues. evidence will show that A.W. Miss. Robarc gave no reply and returned the complaint unanswered.

11. On FEB 12, 2008 at 7:pm McIntosh was told by the unit officer that H/S will not bring my medication to the unit A-B. This was because McIntosh's wheelchair pusher could not push him through the snow that was not shovled by the yard crew.

12. On FEB 12, 2008 P.A. Glen stoped the vicoden pain medication that was prescribed by doctor.

13. On FEB 13, 2007, 7:30 am. the kitchen refused my wheelchair pusher and another "Alexsander -n- Green" of giving 2# tray's of food for McIntosh -n- Willams Reid an elder gentalman in a wheelchair.

14. On FEB 13, 2008 Alexsander an Green was refused getting McIntosh an Willams Reid, their weekly rahons "tolet paper,soap,razers etc. at 7:45 am.

15. On FEB 13, 2008 McIntosh was refused his medication again while still being in server pain.

16. ON FEB 13, 2008, McIntosh asked the casemanager Mr. Stoffer to get the food trays to the unit due to the bad weather conditions that made it impossible for any wheelchair to be wheeled through. Mr. Stoffer replyed "it is nothing he can do about the situation etc. McIntosh went without his mandertory meal by the United States constitution federal laws that all imates recieve three meals every day.

16. On FEB 14, 2008, 6:30 am. McIntosh went an signed up for sick call for his headachs,body pain,feet etc., and was told by staff he will be seen when he's put on sickcall list an will be seen another date. Then was told to leave the medical unit in pain. At 12:noon midday McIntosh spoke to the unitmanager Mr. McBean an the male A.W. an informed them about the incident at the H/S unit. they reply was that they will handle it an get back to me. Nothing was done an no responce came back to Mr. McIntosh.

17. On FEB 20, 2008 7:am McIntosh went to see P.A. Glen after complaining to his counseler Miss. McNitch of his pain inwhich he had to indore since FEB 13, 2008,. When seen by P.A. Glen without doing any medical checkup's or diagnosis on McIntosh's past an presant medical injuries, P.A. Glen told McIntosh to get out of the wheelchair, McItosh then stated that he needed more time in it because his body an hipp's are still sore an he's still in alot of pain including his swollen feets. P.A. Glen still refused Mr. McIntosh of any check up or diagnosis an told McIntosh to leave the H/S unit.

18. ON FEB 21, 2008 7:30am I asked Miss. McNitch to call H/S and request that my wheelchair be brought back to McIntosh because he is in to much pain to walk up an down the hill from his unit inwhich he was living in. At 8:30am McIntosh asked Mr. Mcbain the same request for his wheelchair to be returned to him, at 10:30am lunch time No wheelchair. At 11:15am I was told by Miss. McNitch that H/S refused to bring a wheelchair to Mr. McIntosh an that he should walk down the hill to the dinning hall,storean to H/S for medications. At 12:afternoon McIntosh is seen by Dr. Olson an Gives McIntosh back a wheelchair after exzaming mcIntosh's leg's,feet joint's, an back. Dr. Olson prescribe a better pain pill "Prednisone 10mg tab,". But still refused McIntosh his propper soft shoe's and permit to get better shoe's even doe DR. Olson seen McIntosh's both feet swollen.

19. On Mar 6, 2008, McIntosh was told to go to H/S open house and speak to Dr. OLson and let him know that i'm still in servere pain and needed to be put back on the pain pills that he only prescribed to me for only " 5 days", and s medicsl autherizesation form to allow my shoe's to be sent back into M.C.I. McKean. As McIntosh began to explain his medical issues to DR. Olson he then stated to McIntosh that he was only there to answer questions and nothing more, and for McIntosh to sign up for sickcall in the morning. McIntosh stated that he has done that repeatedly and still P.A. Glen refusses to provide the propper medical needs McIntosh requires. Dr. OLson repeated his

self an ordered McIntosh to leave the H/S unit and opened the door to force McIntosh out the door.

20. On MAR 10, 2008 McIntosh signed up for sick call and seen P.A. Glen requesting pain pills for the pain he was indoring. P.A. Glen refussed staing an quoting " I am not going to you any pain pills nocatic's for you to get high, I don't give that out. If DR. OLson want's to sign for them for you then you'll have to go to him." as (quoted)

21. On APR 21, 2008, McIntosh again signed up for sickcall and was told by P.A. Glen " that his issues was not an emergancy " and ordered McIntosh to leave the H/S unit. McIntosh filed a B.P.-10 on APR 29, 2008, befor leaving M.C.I. McKean to F.C.I. Otisville. To this day no reply has been returned to Mr. McIntosh on his filing and has requested to the regional office about this matter, still no responce.

22. On MAY 6, 2008 McIntosh arrived at F.C.I. Otisville to find out from Mr. McGee,Thomas EMT-P that McIntosh was not listed with any restrictions from M.C.I. McKean, also stating that M.C.I. McKean did not have McIntosh down as medical idle or nothing in his medical records showing that Mcitosh's prevous injury left him in a physical health limitations an restrictions along with a cain for his stability in oreder to walk. Also McIntosh's medical records did not show that mcIntosh was to be on a low bunk. But Mr. McGee,Thomas EMT-P seen McIntosh walking with a cain an corrected McIntosh's health services medical duty status on MAY 8, 2008.

23. From MAY 8, 2008, Dr. Summer an medical staff, and F.C.I. Otisville administration has included them self in violating federal laws and Mr. McIntosh's medical an constitutional rights to adequate medical care in which F.C.I.Otisville continues to violate to this date " ".

24. McIntosh has continued to file the propper grievances as required by the F.B.O.P.'s an still being denied adequate medicl care for his feet an any physical theropy for his back injory an other medical issues.

25. Defendants John / Jane Does #1 through 30, are F.B.O.P. Administration / Medical / Officials who approved and/or created the F.B.O.P. Pratices/Policies noted above which allowed or required the other defendants to ignor or not reasonably treated McIntosh's health problems.

GENERAL ALLEGATIONS

26. The conditions, practices and actions described herein have resulted in gretuitous pain and suffering and pose in inmates danger of serious injury and death to the plaintiff.

27. The fornoted defendants have acted and will act with deliberate indifference to McIntosh serious basic health needs and to the risk that thier practices or actions had of causing serious injury or death, in taking thier action/refusals to act or creating /approving the practices.

28. McIntosh will or will not likely again be back in the F.B.O.P. again, and unless this court anjoins the defendants, the conditions described above will continue.

CAUSES OF ACTION

By causing McIntosh to be denied propper medical care for his diabetes an stopping McIntosh's high blood pressure mediction, withholding adequate footwear inwhich McIntosh provided for himself doe to his medical conditions an need. Causing McIntosh to be denied pain medication as prescribed by his docter (e.i. SUBBARAO,ARAGAN). Also causing a almost death situation by stopping McIntosh's high blood pressure medication without any medical testing done for the diabetes, poor circulations in McIntosh's feet, disregarding the swelling that was shown an seen numerous times. And refussing to allow and provide adequate footwear that would have provented Mcintosh from passing out and falling down the second story level steps in which resulted into his back injury for possible perminate damages. And causing pain, suffering,loss of sleep at night that possitions make the pain wurst causing lack of sleep from FEB 5,

2008 to this presant day. The defenants violated McIntosh's Social Securty and public welfare 241.95. Once F.B.O.P. began providing health care for indigent persons, it came within constitutional restrictions as to how it must be done, and medically necessary procedures, such as abortions, could not then be redefined to exclude treatment directed to a particuler condition treatments excluded that are necessary to meet a particular diagnosis. Social Security Act, §§ 401,1901 et seq., 42 U.S.C. §§ 601,1396 et seq.; 28 U.S.C. §2403(a); U.S.C.A. Const. Amends. %, 14; U.S.C.A. 1953, 55-15a-3. D R v. Mitchell.

Action taken by a private individual may be " under color of state law " where there is " significant " state involvement in the action ". Howerton V. Gabico, 708 F.2d. 380,382 (9th cir.1983). Dennis v. Sparks, 449 U.S. 24,27, 101 S.Ct. 183,186, 66 L.Ed.2d 185 (1980). Jackson v. Metropolitan Edison Co., 419 U.S. 345,351, 95 S.Ct. 449,353, 42 L.Ed.2d 477 (1974); ef. Edmonson v. Leeville Concrete Co., U.S. , 111 S.Ct. 2077,2082-84, 114 L.Ed.2d 660 (1991) (constitutional deprivation cause by private party involves state action if claim deprivation resulted from exercise of a right or privilege having it's sourcerin state authority); West v. Atkins, 487 U.S. 42, 54, 108 S.Ct. 2250,2258, 101 L.Ed.2d 40 (1988) the defendants also violated McIntosh's *th & 5th Amendment right to adequate medical care.

29. By causing McIntosh to be denied adeqate shoe's and withholding McIntosh's personal shoe's, and stopping medication without adequate testing and treatment for diabetes and other problems, basically ignoring health problems associated with diabetes an even taking actions that worsin this serious medical condition's, causing and threatening to caues more pain,injury and death in McIntosh.

30. defendant(s) are sued in thier individual offical capacities and acted under color of Pennsyluania and New York, law at all relevant times.

RELIEF REQUESTED

31. Given the above, the plaintiff seeks the following relief:
    a). Injunctive and declaratory relief sufficent to protect McINTOSH from the conditions noted herein.
    b). Normal, compensation and punitive damages;
    c). Cost and attorney fee's, purant to 42 U.S.C § 1988;
    d). Monetary and/or other damages or relief in the excess of $100,000,000.00 .

STATEMENT OF CLAIM(S):

(5)

State here abrief statement of each claim or cause of action agaibst the defendant(s) arising under the constitution, laws or treaties of the United states that contend that the defendant(s) have violated. You may point to a particuler constitutional amendment, federal code or treaty, you may use one or more of the following causes of action presented herein and below only if your facts qualify under those examples. Otherwise you must draft your own format. Each cause of action that you choose you must identify the particular act or omission of the defendant in nomore than one or two sentences that surpport your claim.

CAUSE OF ACTION

The acts or omission of the defendant(s) as out lined in the aforementioned " statement of fact " at paragraphs violated plaintiff(s)' rights under the 14th amendment of the United States constitution to " equal protection under the law " or not to " be deprived of life, liberty or property without due process of law ". When;

CERTIFICATE OF SERVICE

I HERBY DECLARE UNDER PENALTY OF PERJURY THAT I HAVE WRITTEN AND READ THE FOREGOING STATEMENT OF FACTS, STATEMENTS OF CLAIMS AS STATED HEREIN ARE TRUE AND CORRECT. SIGNED ON THIS Mon DAY OF Nov, 23, 2009. UNDER PENALTY OF PERJURY BY; Charles T. McIntosh

CHARLES T. McINTOSH

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHARLES T. McINTOSH,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 09-0295E
	)	
v.	)	MAGISTRATE JUDGE BAXTER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	*Electronically Filed*

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), it is hereby stipulated and agreed to between the respective parties that the above-captioned case be dismissed with prejudice, each party to bear his or its own costs, and the Court may enter an Order accordingly, notice by the Clerk being hereby waived.

Respectfully submitted,

REED SMITH LLP

/s Nellie E. Hestin
NELLIE E. HESTIN
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3627

Counsel for plaintiff Charles T. McIntosh

Dated: April 25, 2014

DAVID J. HICKTON
United States Attorney

/s Megan E. Farrell
MEGAN E. FARRELL
Assistant U.S. Attorney
Western District of PA
700 Grant St., Suite 4000
Pittsburgh, PA 15219
(412) 894-7429

Counsel for defendant the United States of America

ORDER

AND NOW, this ___ day of _____, 2014, IT IS SO ORDERED.

_____
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2010-01932 **Short Description:** BANKS V. UNITED STATES OF AMERICA ET AL

[redacted]

Case Login Information

Reference Number	1:10-cv-05308-NG -LB
Short Description	BANKS V. UNITED STATES OF AMERICA ET AL
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$
Estimated Amount	$
Office	Brooklyn
Jurisdiction	EASTERN DISTRICT OF NEW YORK
Responsible Legal Office	MCC New York

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	11/15/2012
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$
Total Amount Paid	$100,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	11/30/2010
Date Filed	11/17/2010

Case Progress

Current Owner	NICOLE MCFARLAND
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:2671 FEDERAL TORT CLAIMS ACT
Further Case Classification	
Comments	

FILED
CLERK
2010 NOV 17 PM 3:09
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Jury Trial Demanded

JOBIE BANKS,

Plaintiff,

-against-

Civil Action No.

CV 10-5308

COMPLAINT

GERSHON, J

BLOOM, M.J.

UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS, MICHAEL BORECKY, M. D., R. NEWLAND, M.D. and PETER ELLIOT GOLSTEIN, M.D.

Defendants.

Plaintiff, JOBIE BANKS, by his attorneys, HILL & MOIN LLP, as and for her Complaint, respectfully alleges, upon information and belief:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1346(b) (1) and § § 2671-2680, the First, Fifth and Eight Amendments to the United States Constitution, Section 202 of the American with Disabilities Act of 1990, Section 504 of the Rehabilitation Act and upon 28 U.S.C. Sections 1331, 1343 and 1367, and the foresaid statutory and constitutional provisions.

VENUE

2. The defendant FEDERAL BUREAU OF PRISONS (hereinafter the "BOP") was and still is a government agency of the defendant, UNITED STATES OF AMERICA, and had and still has a detention facility located in Brooklyn, New York 11232.

3. Venue is proper in this district under 28 U.S.C. § 1402(b) this being the district in which the events giving rise to the claims occurred, and the plaintiff and at least one of the defendants resides.

PARTIES

4. The plaintiff, JOBIE BANKS, at all times herein mentioned was and still is a resident of the County of Kings and the State of New York and resides at 224 York Street, Brooklyn, New York. At all times herein mentioned, plaintiff was and still is an insulin requiring diabetic who needs constant monitoring of his diabetes.

5. At all times material herein, the defendant UNITED STATES OF AMERICA, through its agency the defendant BOP maintained jails for the detention and incarceration of detainees and prisoners. At all times relevant hereto, UNITED STATES OF AMEICA, acting through the BOP, was responsible for the policy, practice, supervision and conduct of all its personnel at its detention facilities, including the defendants MICHAEL BORECKY, M.D., R. NEWLAND, M.D. and PETER ELLIOT GOLSTEIN, M.D. along with other various doctors, physician assistants, other medical personnel and detention officers. In addition, at all relevant times, UNITED STATES OF AMERICA, was responsible for enforcing the rules of the BOP, and for ensuring that BOP personnel obey the laws of the United States of America and the State of New York.

6. At all times material herein, the defendant UNITED STATES OF AMERICA, through the BOP, employed the defendants MICHAEL BORECKY, M.D., R. NEWLAND, M.D. and PETER ELLIOT GOLSTEIN, M.D. along with other medical personnel to provide medical aid and treatment of the prisoners housed and held at the facility located in Brooklyn, New York acting in the capacity of agents, servants and employees of UNITED STATES OF AMERICA through its agency, the BOP.

7. At all times material herein and in their actions described herein, the defendants were acting under color of law and under color of their authority as clinical directors, medical doctors and other medical personnel and detention officers of the BOP for the defendant, UNITED STATES OF AMERICA.

FACTS

8. On April 9, 2008, plaintiff, JOBIE BANKS, was in the custody of agents of UNITED STATES OF AMERICA when he was taken to New York Downtown Hospital for medical clearance prior to detention.

9. Beginning on April 9, 2008 through May 20, 2009, plaintiff was detained and or incarcerated at the BOP detention facility located at 100 29th Street, Brooklyn, New York 11232 (hereinafter "MDC Brooklyn"), and was given footwear that was inappropriate for his medical condition. During that period, plaintiff made complaints of pain in left foot and leg, which were not adequately addressed by defendants.

10. On April 14, 2008, plaintiff was seen by medical personnel at MDC Brooklyn who noted plaintiff had a painful neuropathy with a left foot diabetic ulcer. This report and notes were signed off by defendant R. NEWLAND, M.D., the medical clinic director at MDC Brooklyn

11. Between April 15, 2008 and April 28, 2008, plaintiff complained to defendants, their agents, servants and employees regarding the wounds to his left foot that were getting worse. These wounds were not adequately examined and treated by any medical personnel at MDC Brooklyn during this time.

12. On April 29, 2008, plaintiff was seen by defendant PETER ELLIOT GOLSTEIN, M.D. This doctor ordered the transfer of plaintiff to New York Downtown Hospital and gave admitting instructions to the hospital with his provisional diagnosis of diabetic ulcer and orders

to administer IV antibiotics and asked that they rule out osteomyelitis.

13. On the admission to New York Downtown Hospital on April 29, 2008, plaintiff had a 1 cm draining wound at the base of the fourth and fifth toes of his left foot with significant pus coming out from it. Plaintiff was diagnosed with gangrene in his left foot and on May 1, 2008, his fourth and fifth toes were amputated. Plaintiff was discharged back to MDC Brooklyn on or about May 7, 2008 with orders to change dressings daily. This medical treatment was not being followed in a timely, proper and safe manner.

14. On June 9, 2008, there was a hearing in the United States District Court, Eastern District of New York in the criminal case which was the underlying basis for plaintiff's detention to MDC Brooklyn. The purpose of the hearing was to determine the medical care the plaintiff was receiving at MDC Brooklyn. As a result of the hearing, a federal judge issued an order for MDC Brooklyn to provide periodic status reports to all parties and the court detailing the plaintiff's medical treatment.

15. Beginning on May 7, 2008 through April, 2009, the wounds from the amputation that took place on May 1, 2008 were not healing properly and other wounds and infections developed while in the care of the BOP at MDC Brooklyn. Defendants failed to properly treat the plaintiff during this time, causing increased injuries and an increased likelihood of amputation of his left leg. Defendants' failed to perform adequate dressing changes, evaluations, consultations and treatment necessary to avoid increased injury and failed to respond to plaintiff's request for treatment and assistance.

16. As a result of the failure of the medical personnel including defendants MICHAEL BORECKY, M.D., R. NEWLAND, M.D. and PETER ELLIOT GOLSTEIN, M.D. at MDC Brooklyn to properly treat the plaintiff, JOBIE BANKS, he was required to have an amputation

of the left leg in May, 2009.

17. The defendant UNITED STATES OF AMERICA through its agency the BOP, failed to maintain the appropriate policies, procedures and systems to properly treat plaintiff as a detainee or prisoner in its custody.

FIRST CAUSE OF ACTION

18. Plaintiff repeats and realleges paragraphs 1 through 17 as if set forth in full.

19. At all times herein mentioned, defendant, MICHAEL BORECKY, M.D., was and still is a physician duly licensed to practice medicine in the State of New York.

20. At all times herein mentioned, defendant, PETER ELLIOT GOLSTEIN, M.D. was and still is a physician duly licensed to practice medicine in the State of New York.

21. Subsequent to April 9, 2008, the plaintiff received medical care and treatment from the defendants, their agents, servants and employees at MDC Brooklyn.

22. The injuries to the plaintiff were caused by the negligence, carelessness and malpractice of the defendants, their agents, servants and/or employees, in that they either jointly or severally failed to render proper medical care to the plaintiff; failed to make a proper and adequate diagnosis; failed to render proper, adequate and immediate medical care and/or treatment; failed to heed plaintiff's complaints and condition; failed to perform indicated medical procedures; performed improper and/or contraindicated medical procedures; negligently and carelessly and in violation of good, sound medical custom and practice failed to exercise due and reasonable care under the circumstances, so as to avoid injuring the plaintiff.

23. By reason of the foregoing, the plaintiff was caused to suffer serious and permanent physical and emotional injuries, pain, discomfort, disability, humiliation, embarrassment and mental and emotional distress.

24. Due to defendants' negligence and malpractice, plaintiff is entitled to compensatory damages in a sum to be determined at trial.

SECOND CAUSE OF ACTION

25. Plaintiff repeats and realleges paragraphs 1 through 23 as if set forth in full.

26. The defendants' demonstrated deliberate indifference to plaintiff's serious medical needs, thereby depriving plaintiff of his rights, remedies, privileges and immunities guaranteed to every citizen of the United States of America, in violation of the First, Fifth and Eighth Amendments of the United States Constitution.

27. By their acts and omissions, including the deliberate indifference to plaintiff's serious medical needs, the defendants created a high degree of risk of physical harm to the plaintiff, and, in conscious disregard of that risk, deliberately refused to take steps to prevent harm to the plaintiff, thus resulting in amputation of plaintiff's toes and leg.

28. The aforesaid conduct of the defendants' medical personnel at the BOP facility at MDC Brooklyn was directly caused, tacitly authorized and ratified by the defendant UNITED STATES OF AMERICA through its agency the BOP through its policies, procedures, customs and practices. This deliberate indifference to properly treat plaintiff, an insulin dependent diabetic detainee and prisoner, was a result of the acts, omissions and conduct complained herein.

29. Defendants acted in their individual and official capacities and within the scope of their respective employments including in their deliberate indifference to plaintiff's serious medical needs, subjecting the plaintiff to cruel and unusual punishment under the laws of the United States and the First, Fifth and Eighth Amendments of the United States Constitution.

30. The aforesaid conduct amounts to cruel and unusual punishment under the laws of the United States and the First, Fifth and Eighth Amendments of the United States Constitution.

31. Due to defendants' acts of cruel and unusual punishment, plaintiff is entitled to compensatory damages in a sum to be determined at trial.

THIRD CAUSE OF ACTION

32. Plaintiff repeats and realleges paragraphs 1 through 30 as if set forth in full.

33. By reason of the foregoing, including the deliberate indifference to plaintiff's serious medical needs, defendants deprived plaintiff of rights, remedies, privileges and immunities guaranteed to every citizen of the United States of America, in violation of the First, Fifth and Eighth Amendments of the Constitution of the United States as well as Section 202 of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

34. By their acts and omissions in the deliberate indifference in the medical treatment of plaintiff, a disabled insulin dependant diabetic, the defendants created a high degree of risk of physical harm to the plaintiff, and, in conscious disregard of that risk, deliberately refused to take steps to prevent harm to the plaintiff.

35. The aforesaid conduct of the defendants' medical personnel at the BOP facility at MDC Brooklyn was directly caused, tacitly authorized and ratified by the defendant UNITED STATES OF AMERICA through its agency the BOP through its policies, procedures, customs and practices in the deliberate indifference to properly treat plaintiff, a disabled insulin dependent diabetic detainee and prisoner.

36. Defendants acted in their individual and official capacities and within the scope of their respective employments in their deliberate indifference to plaintiff's serious medical needs and disability.

37. The aforesaid conduct amounts to discrimination against the plaintiff that violates Section 202 of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

38. Due to defendants' acts of discrimination with regard to his medical treatment for his disability, plaintiff is entitled to compensatory damages in a sum to be determined at trial.

WHEREFORE, the plaintiff demands judgment and prays for the following relief, on each and every cause of action, jointly and severally, against the defendants as follows:

a) full and fair compensatory damages in an amount to be determined at trial;

b) reasonable attorney fees and the costs and disbursement of this action; and

c) such other and further relief as to this Court seems just and proper.

Dated: New York, New York
November 15, 2010



By: Melisande Hill - 1337
HILL & MOIN LLP

Attorneys for Plaintiff
2 Wall Street
Suite 301
New York, New York 10005
(212) 668-6000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No.

JOBIE BANKS,

Plaintiff,

-against-

UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS, MICHAEL BORECKY, M. D., R. NEWLAND, M.D. and PETER ELLIOT GOLSTEIN, M.D.

Defendants.

CERTIFICATE OF MERIT

Melisande Hill, an attorney admitted to practice in the State of New York, affirms the following under the penalties of perjury:

i) I am a member of the law firm of Hill & Moin LLP, the attorneys of record for the plaintiffs, and as such am thoroughly conversant with the facts and circumstances herein based upon the contents of the file maintained by this office.

ii) I have consulted with a physician licensed to practice in the State of New York, who is knowledgeable of the relevant issues involved herein.

iii) On the basis of this consultation, I have concluded that there is a reasonable basis for the commencement of this action against each of the defendants herein.

Dated: New York, New York
November 15, 2010

HILL & MOIN LLP
By: Melisande Hill

JOBIE BANKS,

Plaintiff,

-against-

UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS, MICHAEL BORECKY, M.D., R. NEWLAND, M.D. and P. GOLSTEIN, M.D.

Defendants.

COMPLAINT

HILL & MOIN LLP
Attorneys for Plaintiff
2 Wall Street
Suite 301
New York, New York 10005
(212) 668-6000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOBIE BANKS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendants.

Civil Action No.
CV-10-5308 (NG)(LB)

STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiff Jobie Banks ("Plaintiff"), and the United States of America ("Defendant"), by their respective undersigned attorneys, that pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii) all claims in this action are dismissed against the Defendant with prejudice without costs to either party as against the other.

IT IS FURTHER STIPULATED AND AGREED, that no further suit will be instituted against the Defendant for the same causes of action that have been asserted herein, or for any other causes of action arising out of the incidents or circumstances which gave rise to the instant action.

Dated: October 22, 2012
Brooklyn, New York

Hill & Moin LLP
Attorneys for Plaintiff Jobie Banks

By: _____

Melisande Hill, Esq.
2 Wall Street, Suite 301
New York, New York 10005
(212) 668-6000
MHill@hillmoin.com

Dated: October 22, 2012
Brooklyn, New York

Loretta E. Lynch
United States Attorney
Eastern District of New York
Attorney for Defendant

By: /s/ John Vagelatos

John Vagelatos, Esq.
Assistant United States Attorney
271 Cadman Plaza East
Brooklyn, New York 11201
(718) 254-6182
John.Vagelatos@usdoj.gov

SO ORDERED this
13 day of ~~October~~ November, 2012

s/NG

HONORABLE NINA GERSHON
United States District Judge

SCARTELLI, DISTASIO & KOWALSKI, P.C.
A Professional Corporation

By: **Peter Paul Olszewski, Jr., Esquire**
Melissa A. Scartelli, Esquire

ATTORNEYS FOR PLAINTIFF
411 Jefferson Avenue
Scranton, PA 18510
(570) 346-2600
IDENTIFICATION: PPO – #41286; MAS – #52441

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR.	:	
Plaintiff	:	MEDICAL PROFESSIONAL LIABILITY ACTION
vs.	:	
THE UNITED STATES OF AMERICA	:	
Defendant	:	NO.

PLAINTIFF'S COMPLAINT

The Plaintiff, VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., by and through her counsel, SCARTELLI, DISTASIO & KOWALSKI, P.C., hereby complains of the Defendant as follows:

I. JURISDICTION

1. Jurisdiction is based in the Federal Tort Claims Act, 28 U.S.C.A. §1346 et seq. and 1402(b).

2. Plaintiff, VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., has exhausted all administrative prerequisites to the filing of this suit by filing an administrative tort claim under the Federal Tort Claims Act 28 U.S.C.A. §2671 et seq. on March 26, 2010. By letter dated September 24, 2010, Defendant denied the within claim for wrongful death and survival action damages, a copy of which is attached hereto, made a part hereof, and incorporated by reference as Exhibit "A."

II. PARTIES

3. The Plaintiff, VETA B. FAISON, is an adult individual and citizen of the United States of America who is the widow of the decedent, LOUIS THOMAS FAISON, JR., who died on April 2, 2008, while an inmate at the United States Penitentiary, Lewisburg, Pennsylvania. On March 11, 2010, the Plaintiff, VETA B. FAISON, was named Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., deceased.

4. The Defendant, UNITED STATES OF AMERICA, has at all times material hereto, acted through its Bureau of Prisons and its federal government agencies, including but not limited to the Bureau of Prisons, through its agents, servants, and employees who were acting in the course and scope of their employment, and in furtherance of the interests of the Defendant and its governmental agencies located at U.S. Customs House, 7th Floor, 2nd and Chestnut Streets, Philadelphia, Pennsylvania 19106.

III. STATEMENT OF THE CASE

5. Plaintiff, VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., claims that the decedent, LOUIS THOMAS FAISON, JR., was subjected to damage, injury, and death as a result of the careless and negligent acts of the Defendant, through its agents, servants, and employees, who were acting in the course and scope of their employment and in furtherance of the interests of the Defendant and its governmental agencies in providing inadequate and improper medical care and treatment to the Plaintiff's decedent. The Plaintiff, VETA B. FAISON, claims harms and losses, including loss of consortium by reason of the untimely and unnecessary death of her husband, the Plaintiff's decedent, LOUIS THOMAS FAISON, JR.

6. On April 2, 2008, LOUIS THOMAS FAISON, JR., was sixty-three (63) years of age, having been born on February 6, 1945.

7. As of April 2, 2008, LOUIS THOMAS FAISON, JR. and VETA B. FAISON were married for some thirty-seven (37) years with a date of marriage on August 19, 1970.

8. LOUIS THOMAS FAISON, JR. was a 1963 graduate of Booker T. Washington High School in Norfolk, Virginia, and received a Bachelor of Arts degree in Physical Education from the Virginia State University in 1969.

9. For thirty-six (36) years, LOUIS THOMAS FAISON, JR. was employed as a high school teacher with the Virginia Beach City Public Schools in Virginia Beach, Virginia. He retired in 2004.

10. On or about December 14, 2006, LOUIS THOMAS FAISON, JR., was indicted by the Federal Government and charged with tax evasion.

11. LOUIS THOMAS FAISON, JR. pled guilty to tax evasion on February 28, 2007 and was sentenced to fifteen (15) months in Federal prison.

12. LOUIS THOMAS FAISON, JR. self-surrendered to the Federal Penitentiary in Lewisburg, Pennsylvania, in the Middle District of Pennsylvania, on September 5, 2007.

13. At the time of his incarceration, LOUIS THOMAS FAISON, JR. was in generally good health. He took medication for high blood pressure and hypertension. He had a past medical history of hypertension, glaucoma, and was status post-prostatectomy in 2006.

14. Up until the time of the incident in question, Mr. Faison's incarceration was generally uneventful.

15. On April 1, 2008, at approximately 10:37 A.M., LOUIS THOMAS FAISON, JR. reported to the prison infirmary and was seen by physician's assistant, Joseph Geragi, PA-C, for complaints of productive cough and generalized pain for the past three (3) to five (5) days.

16. LOUIS THOMAS FAISON, JR. reported to the physician's assistant, Joseph Geragi, PA-C, that his complaints of a productive cough were exacerbated by laying flat and that he had generalized pain of three (3) to five (5) days' duration. His temperature at that time was recorded as 97.7 Fahrenheit, pulse 81 beats per minute, respirations 14 per minute, and blood pressure 108/69 mmHg.

17. Physical examination by physician's assistant, Joseph Geragi, PA-C, was reported to reveal an erythematous pharynx, lymphadenophehy of the neck, and normal pulmonary percussion and auscultation.

18. At the time of the aforesaid examination by the physician's assistant, Joseph Geragi, PA-C, on April 1, 2008, no cardiovascular or neurologic examination was recorded. Further, no blood laboratory tests were ordered; no flu/viral cultures were obtained; and no chest x-ray was ordered. He was not examined by a physician.

19. Physician's assistant, Joseph Geragi, PA-C's assessment of LOUIS THOMAS FAISON, JR. on April 1, 2008 was that of upper respiratory infection of non-specific cause. He was advised to receive Tylenol, and cough and cold medications from the commissary, increase his fluids and rest. He was discharged back to his quarters.

20. The following morning, on April 2, 2008, the adjacent inmate reported to the Day Watch Officer William E. Shirk, SOS, that inmate Faison had a "tough time during the night with a flu bug."

21. During the morning of April 2, 2008, the Day Watch Officer Shirk made it a point to check on LOUIS THOMAS FAISON, JR., who reported to him he was not feeling well. Inmate Faison further asked him if he could arrange for him to be seen again by the physician's assistant sometime that day.

22. Thereafter, Day Watch Officer Shirk presented to the office of physician's assistant, Joseph Geragi, PA-C, and advised him of inmate Faison's symptoms, as well as the concern of the inmates who were familiar with him. Physician's assistant, Joseph

Geragi, PA-C, was aware of inmate Faison, and agreed to see him as soon as he could be brought to the office.

23. At about 8:53 A.M. on April 2, 2008, Day Watch Officer William E. Shirk, SOS, assisted inmate Faison to the physician's assistant's office, and noted him to be weak and slightly disoriented.

24. It is reported that at approximately 9:05 A.M., physician's assistant, Joseph Geragi, PA-C, took inmate Faison into his office and completed his evaluation and assessment by 9:30 A.M. that morning.

25. During the evaluation by physician's assistant, Joseph Geragi, PA-C, on April 2, 2008, he noted inmate Faison's cough had worsened and that he was having difficulty breathing.

26. The vital signs recorded on April 2, 2008 by physician assistant, Joseph Geragi, PA-C, demonstrated a profound change from the previous day; his temperature was 102, pulse 133/min, and respirations 25/min. Examination of the lungs now reported the presence of rhonchi.

27. LOUIS THOMAS FAISON, JR. reported to physician's assistant, Joseph Geragi, PA-C, that he felt weak, had chills, and was having difficulty breathing. Physician's assistant, Joseph Geragi, PA-C, also noted that LOUIS THOMAS FAISON, JR. had inflamed nasal and oral mucosa.

28. On April 2, 2008, despite the worsening symptoms and condition, as well as worsening clinical findings, no neurologic examination was recorded by physician's assistant, Joseph Geragi, PA-C.

29. On April 2, 2008, despite worsening symptoms and condition, as well as worsening clinical findings, physician's assistant, Joseph Geragi, PA-C, did not order a chest radiograph, nor did he order blood tests or blood cultures. He also did not see to it that inmate Faison was evaluated by a doctor.

30. On April 2, 2008, physician's assistant, Joseph Geragi, PA-C's assessment of LOUIS THOMAS FAISON, JR. was that of "acute bronchitis."

31. Following his examination on April 2, 2008, physician's assistant, Joseph Geragi, PA-C, prescribed Erythromycin and advised him to continue with Tylenol and fluids.

32. Following the above examination, physician's assistant, Joseph Geragi, PA-C, asked Day Watch Officer William E. Shirk, SOS, if he would accompany LOUIS THOMAS FAISON, JR. back to his cubicle as he seemed to be suffering from the flu, and he wanted to be sure that Mr. Faison did not experience any problems walking back.

33. Less than two (2) hours later, at approximately 10:56 A.M., LOUIS THOMAS FAISON, JR. was found unresponsive in his bed by another inmate, and attempts at resuscitation were unsuccessful.

34. Inmate Faison was transported to nearby Evangelical Hospital where he was pronounced dead at 11:27 A.M. on April 2, 2008.

35. On April 3, 2008, an autopsy was performed on LOUIS THOMAS FAISON, JR. at the request of the United States Government, and the autopsy showed heavy lungs with areas of consolidation, indicative of pneumonia.

36. The cause of death found upon autopsy was acute and organizing bronchopneumonia with a contributory cause of death listed as hypertensive cardiovascular disease.

37. Based upon the microscopic examination of the lungs performed upon autopsy, LOUIS THOMAS FAISON, JR. had bronchopneumonia as early as March 31, 2008.

38. The autopsy findings of the presence of micro-abscesses, hyaline membranes, and organization of the pneumonia indicates the inflammatory process had been occurring for some days prior to Inmate Faison's demise.

39. In light of LOUIS THOMAS FAISON, JR.'s rapidly worsening condition noted on the morning of April 2, 2008, including disorientation, difficulty breathing, a weakened state, worsening lung findings, and unstable vital signs, LOUIS THOMAS FAISON, JR. warranted immediate transfer to the local hospital for intensive monitoring and care and immediate x-ray.

40. Evangelical Hospital is within a thirty (30) minute drive of Lewisburg Federal Penitentiary in Lewisburg, Pennsylvania.

41. Given the autopsy findings and the proximity of Lewisburg Federal Penitentiary to Evangelical Hospital, had additional care/testing been provided earlier, LOUIS THOMAS FAISON, JR.'s unfortunate and untimely demise would have been avoided.

42. On April 2, 2008, LOUIS THOMAS FAISON, JR. was suffering from a curable condition which warranted prompt treatment which was readily available at a nearby facility, and the failure to recognize and treat and timely refer LOUIS THOMAS

FAISON, JR. for appropriate additional care, including radiographs, blood testing, and examination by a physician was below the standard of care, and resulted in the unfortunate and untimely demise of LOUIS THOMAS FAISON, JR.

43. To prescribe orally Erythromycin 500 mg. 2 x daily in the face of the clinical findings present on April 2, 2008, in LOUIS THOMAS FAISON, JR., did not meet the standard of care regarding the treatment of acute respiratory infections.

44. The delay in providing more intensive care in a timely manner led directly to the development of cardiopulmonary failure and the subsequent death of LOUIS THOMAS FAISON, JR.

45. Given the autopsy findings present in LOUIS THOMAS FAISON, JR., a careful and comprehensive examination of his lungs on April 1, 2008, would have revealed the presence of rales and rhonchi. In accordance with the standard of care, this should have triggered an urgent chest x-ray triggering timely and appropriate treatment of this rapidly escalating pneumonia.

46. The failure of the physician's assistant, Joseph Geragi, PA-C, to perform a comprehensive lung evaluation on April 1, 2008, leading to a delay in appropriate care of pneumonia further represents a breach in the standard of care and directly led to the worsening condition and the ultimate and untimely demise of LOUIS THOMAS FAISON, JR.

47. LOUIS THOMAS FAISON, JR.'s progressive illness, pain, suffering, anxiety, agitation, physical and emotional distress, were preventable had the physician's assistant, Joseph Geragi, PA-C, rendered appropriate, timely care, including the referral for physician evaluation and appropriate workup.

48. The Coroner's Certificate of Death, signed April 3, 2008, lists LOUIS THOMAS FAISON, JR.'s cause of death as bronchopneumonia.

49. At the time of his untimely death, LOUIS THOMAS FAISON, JR. was 63.15 age with an average statistical life expectancy of an additional 16.21 years.

50. At the time of his untimely and unfortunate death, LOUIS THOMAS FAISON, JR.

was scheduled to be released from Lewisburg Federal Penitentiary on or about October 6, 2008.

51. At the time of his untimely and unfortunate death, LOUIS THOMAS FAISON, JR.

had been receiving pension benefits of $3,115.00 per month, having been retired as a school teacher from the Virginia Retirement System. He had also intended to return to the labor market, more likely than not in real estate, after he was released from prison.

52. LOUIS THOMAS FAISON, JR. is survived by his wife, VETA B. FAISON, Executrix and Trustee of his estate, as well as three (3) adult children, INGA FAISON CAVITT, age 39; LOUIS FAISON, III, age 34; and LOWELL FAISON, also age 34.

53. VETA B. FAISON, individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., is asserting a Medical Professional Liability Action against physician's assistant, Joseph Geragi, PA-C, and the supervising physician for physician's assistant, Joseph Geragi, PA-C, as well as the United States of America.

54. The negligence, carelessness, and/or recklessness of the Defendant, UNITED STATES OF AMERICA, through its agents, ostensible agents, employees,

servants, and/or workmen, including physician's assistant, Joseph Geragi, PA-C, and his supervising physician, consisted of the following:

a. In failing to conduct an appropriate physical examination on April 1, 2008;

b. In failing to obtain an appropriate clinical history on April 1, 2008;

c. In failing to detect that LOUIS THOMAS FAISON, JR. was suffering from pneumonia on April 1, 2008;

d. In failing to conduct a careful and comprehensive examination of the lungs of LOUIS THOMAS FAISON, JR. on April 1, 2008, which should have revealed the presence of rales and rhonchi;

e. In failing to request a chest x-ray on April 1, 2008, as well as order appropriate treatment for pneumonia;

f. In failing to order blood laboratory tests on April 1, 2008;

g. In failing to order flu/viral cultures on April 1, 2008;

h. In failing to order immediate transfer to the local Evangelical Hospital on April 1, 2008;

i. In failing to have a physician evaluate Inmate Faison on April 1, 2008;

j. In failing to order immediate transfer to Evangelical Hospital on April 2, 2008;

k. In failing to request a physician evaluation on April 2, 2008, in view of the worsening clinical signs and symptoms on April 2, 2008;

l. In failing to perform a neurologic evaluation on April 2, 2008;

m. In failing to order stat chest radiographs on April 2, 2008;

n. In failing to order blood tests on April 2, 2008;

o. In failing to order blood cultures on April 2, 2008;

p. In failing to act upon the rapidly worsening condition evident on April 2, 2008, including disorientation, difficulty breathing, a weakened state, worsening lung findings, and unstable vital signs;

q. In failing to order intensive monitoring and care and an immediate chest x-ray on April 2, 2008;

r. In prescribing oral Erythromycin 500 mg. 2 x day in face of worsening pneumonia;

s. In performing an inadequate lung evaluation on April 2, 2008;

t. In failing to act upon LOUIS THOMAS FAISON, JR.'s worsening physical condition on April 2, 2008;

u. In increasing the risk of harm to LOUIS THOMAS FAISON, JR. on April 1, 2008;

v. In increasing the risk of harm to LOUIS THOMAS FAISON, JR. on April 2, 2008;

w. In failing to appropriately treat LOUIS THOMAS FAISON, JR. on April 1, 2008, under all of the circumstances then and there existing;

x. In failing to treat LOUIS THOMAS FAISON, JR. on April 2, 2008, under all of the circumstances then and there existing;

y. In failing to treat LOUIS THOMAS FAISON, JR. with due diligence and with the exercise, care and judgment of a reasonable physician's assistant under the same circumstances;

z. In failing to treat LOUIS THOMAS FAISON, JR. with due diligence and with the exercise, care and judgment of a reasonable physician in general medicine under the same circumstances therein;

aa. In failing to staff the Federal Penitentiary infirmary with health care providers capable of providing the standard of care required for reasonable and necessary health care, judgment and skill required under the circumstances;

bb. In failing to provide adequate staffing and physician coverage;

cc. In failing to adequately supervise physician's assistants at the Federal Penitentiary infirmary;

dd. In failing to order appropriate antibiotic treatment on April 1, 2008, and negligently and recklessly discharging LOUIS THOMAS FAISON, JR. from the infirmary on April 1, 2008, back to his cubicle, unattended and unmonitored;

ee. In failing to properly order, instruct, and supervise the physician's assistant, Joseph Geragi, PA-C, who was permitted to act as a primary care physician, and who was held to the same standard of care as a primary care physician under the circumstances then and there existing;

ff. In failing to take appropriate actions to diagnose, test, treat, and arrest the progression of LOUIS THOMAS FAISON, JR.'s acute respiratory infection and bronchopneumonia;

gg. In ignoring the symptoms and worsening physical condition of the Plaintiff, LOUIS THOMAS FAISON, JR.;

hh. In abandoning LOUIS THOMAS FAISON, JR. on April 1 and April 2, 2008;

ii. In failing to provide appropriate physician care to LOUIS THOMAS FAISON, JR.;

jj. In allowing the condition of LOUIS THOMAS FAISON, JR. to deteriorate, resulting in his continued pain, suffering, distress, anxiety, and ultimate death.

55. As a direct and proximate result of the negligence, carelessness, and recklessness of the Defendant, LOUIS THOMAS FAISON, JR. experienced a delay in diagnosis and proper treatment causing unnecessary pain, suffering, anxiety, confusion, and distress, during the hours of progressive deterioration of his physical condition, leading to his untimely and unfortunate death which was preventable had the Defendant, by and through its agents, ostensible agents, servants, workmen, and/or employees, acted in accordance with the standard of care applicable under the circumstances described herein.

COUNT I – WRONGFUL DEATH

VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR.
vs.
THE UNITED STATES OF AMERICA

56. The Plaintiff, VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., deceased, hereby incorporates as fully as though the same were herein set forth at length Paragraphs 1 through 55, inclusive.

57. The Plaintiff's decedent, LOUIS THOMAS FAISON, JR., is survived by his wife, VETA B. FAISON, who is entitled to recover damages from the Plaintiff's decedent's death pursuant to the Pennsylvania Wrongful Death Act, 42 Pa. C.S.A. §8301.

58. The Plaintiff's decedent, LOUIS THOMAS FAISON, JR., is also survived by the following adult children:

A. Inga Faison C Inga Faison Cavitt, age 39;

B. Louis Faison, III, age 34; and

C. Lowell Faison, also age 34.

59. By reason of the death of the Plaintiff's decedent, LOUIS THOMAS FAISON, JR., the aforesaid survivor claims damages for all hospital, funeral, burial, and estate administration expenses, and for any and all losses and damages allowed by law, including loss of consortium, comfort, society, companionship, and tutelage.

WHEREFORE, the Plaintiff, VETA B. FAISON, individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., claim all damages recoverable by law in an amount in excess of Seventy-Five Thousand ($75,000.00) Dollars against the Defendant, UNITED STATES OF AMERICA.

COUNT II – SURVIVAL ACTION

VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR.
vs.
THE UNITED STATES OF AMERICA

60. The Plaintiff, VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., deceased, hereby incorporates as fully as though the same were herein set forth at length Paragraphs 1 through 59 inclusive.

61. The Plaintiff, VETA B. FAISON, Individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., deceased, also brings this action on behalf of the Estate of LOUIS THOMAS FAISON, JR. pursuant to the Pennsylvania Survival Act, 42 Pa. C.S.A. §8302 and claim on behalf of the Estate all damages recoverable by law, including but not limited to the mental and physical pain, suffering

and inconvenience that the Plaintiff's decedent endured before his death and loss of earnings and earning capacity suffered by the Plaintiff's decedent, and a total limitation and deprivation of his activities, pursuits, and pleasures had he lived out the duration of his life expectancy with proper medical care and treatment.

62. The Plaintiff's decedent, LOUIS THOMAS FAISON, JR., is survived by his wife, VETA B. FAISON, who is entitled to recover damages from the Plaintiff's decedent's death pursuant to the Pennsylvania Survival Act, 42 Pa. C.S.A. §8302.

WHEREFORE, the Plaintiff, VETA B. FAISON, individually and as Executrix and Trustee of the Estate of LOUIS THOMAS FAISON, JR., deceased, claims all damages recoverable by law in an amount in excess of Seventy-Five Thousand ($75,000.00) Dollars against the Defendant, UNITED STATES OF AMERICA.

Respectfully submitted,

SCARTELLI, DISTASIO & KOWALSKI, P.C.

BY: _____
PETER PAUL OLSZEWSKI, JR., ESQUIRE

BY: _____
MELISSA A. SCARTELLI, ESQUIRE
Attorneys for Plaintiff

VERIFICATION

I, **VETA B. FAISON,** hereby certify that the facts and statements contained in the foregoing **COMPLAINT** are true and correct to the best of our knowledge, information and belief. The statements are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

12/5/2010
DATE

Veta B. Faison
VETA B. FAISON

EXHIBIT "A"

U.S. Department of Justice

Federal Bureau of Prisons

Northeast Regional Office

U.S. Custom House-7th Floor
2nd & Chestnut Streets
Philadelphia, PA. 19106

Via Certified and Return-Receipt Mail

September 24, 2010

Peter Paul Olszewski, Jr., Esq.
Scartelli, Distasio & Kowalski, P.C.
411 Jefferson Avenue
Scranton, PA 18510

RE: Administrative Tort Claim No. TRT-NER-2010-03624
Filed on behalf of The Estate of Louis Thomas Faison, Jr.
Reg. No. 57218-083

Dear Mr. Olszewski:

This is in response to the Administrative Tort Claim, No. TRT-NER-2010-03624, you filed on behalf of Veta B. Faison in the alleged wrongful death of Louis Faison, Jr. This claim was properly received by this agency on March 29, 2010, and has been considered for settlement as provided by the Federal Tort Claims Act (FTCA) 28 U.S.C. § 2672, under authority delegated to me by 28 C.F.R. § 543.30. You seek damages in the amount of $1,500,000.00 for the alleged wrongful death of Louis Faison, Jr., whom you allege was provided inadequate medical care and treatment while housed at USP Lewisburg, resulting in his death on April 2, 2008.

After careful review of this claim, I have decided not to offer a settlement. There is no evidence to suggest medical negligence on the part of any Bureau of Prisons' employee caused the death of Louis Faison, Jr. Accordingly, the claim for wrongful death is denied. If you are dissatisfied with this decision, you may bring an action against the United States in an appropriate United States District Court within six (6) months of the date of this letter.

Sincerely,

Henry J. Sadowski
Regional Counsel

cc: B.A. Bledsoe, Warden, USP Lewisburg

AGREEMENT FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby agreed by and between the Plaintiff's, VETA B. FAISON, individually and as Executrix of the Estate of LOUIS THOMAS FAISON, JR., and the Defendant, UNITED STATES OF AMERICA, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the medical treatment and care provided to Louis Thomas Faison, Jr., by the medical staff at the United States Penitentiary in Lewisburg, Pa.

2. The United States of America agrees to pay the sum of SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS ($750,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff or his

guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators, and assigns agree to and do accept this settlement in full settlement and satisfaction and release of any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation any claims for fees, costs, expenses, survival or wrongful death, arising from any and all known or unknown, foreseen or unforeseen bodily injuries, personal injuries, death, or damage to property, which they may have or hereafter acquire against the United States of America, its agents, servants, or employees on account of the subject matter of this claim, or that relate or pertain to or arise from, directly or indirectly, the subject matter of this claim. Plaintiff and his guardians, heirs, executors, administrators, and assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its agents, servants, and employees from and against any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, including without limitation claims for subrogation, indemnity, contribution, or lien of any kind, or for fees, costs, expenses, survival or wrongful death that relate or pertain to or arise from, directly or indirectly, any act or omission that relates to the subject matter of this claim.

4. This agreement for compromise settlement is not, is in no way intended to

be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this matter shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any Plaintiff is a minor or legally incompetent adult, the Plaintiff must obtain State Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event Plaintiff fails

to obtain such State Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. The parties agree that this Agreement for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

9. It is contemplated that this agreement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this _____ day of _____, 2 _____.

_____

G. Michael Thiel
Attorney for United States of America

Executed this _____ day of _____, 2 _____.

_____

Peter Paul Olszewski, Jr., Esquire
Attorneys for Plaintiff

Executed this _____ day of _____, 2 _____.

_____

Melissa A. Scartelli, Esquire
Attorneys for Plaintiff

Executed this _____ day of _____, 2 _____.

_____

Veta B. Faison
Plaintiff

Forrest, J

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: JUL 27 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CURTIS COLLINS,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA,

Defendant.

----------X

ECF Case

11-CV-03484 (KBF)

STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL

IT IS HEREBY STIPULATED AND AGREED by and between Plaintiff Curtis Collins ("Plaintiff") and the United States of America (the "United States"), that Plaintiff's claims against the Defendant in the above-titled action be settled and compromised on the following terms and conditions:

1. Plaintiff's claims against the United States in the above-captioned action are hereby dismissed with prejudice, and without costs, expenses, or fees to any party, except as specified in paragraph "2" below.

2. The United States agrees to pay Plaintiff the total sum of FIFTY THOUSAND DOLLARS ($50,000) (the "Settlement Amount").

3. Payment of the Settlement Amount as set forth in paragraph "2" shall be made only after execution by the parties and entry by the Court of this Stipulation.

4. Plaintiff agrees to accept the Settlement Amount in full settlement and satisfaction of any and all claims and demands that he, or his heirs, executors, administrators or assigns have, had or may hereinafter acquire against the United States, or any present or former department, agency, agent, official, or employee of the United States on account of

the events, circumstances, or incidents giving rise to this lawsuit and claims incident thereto; namely Plaintiff's injuries from being assaulted by his cellmate in the Special Housing Unit of the Metropolitan Correctional Center in New York City on November 8, 2009 (the "November 8 assault").

5. Plaintiff hereby releases and forever discharges the United States, including its departments, agencies, agents, officials, and employees, from any and all claims and liability arising directly or indirectly from the subject matter of this action.

6. Plaintiff agrees to indemnify and hold harmless the United States, including its departments, agencies, agents, officials, and employees from any and all causes of action, claims, rights, or subrogated interests arising directly or indirectly from the subject matter of this action, including any claims arising from the assignment of claims and liens upon the settlement proceeds, and further agrees to reimburse or advance, at the option of counsel for the United States, any expense or cost that may be incurred incident to or resulting from such further litigation or the prosecution of claims by Plaintiff against any third party.

7. Settlement of Plaintiff's claims against the United States is to be without interest or costs and inclusive of attorneys' fees in accordance with 28 U.S.C. § 2678, and all liens and fees are to be satisfied by Plaintiff out of the amount of this settlement.

8. Nothing contained in this Stipulation herein shall be deemed to be an admission of liability or fault on the part of the United States, or any of its present or former departments, agencies, agents, officials or employees, nor shall it be deemed to be an admission that they have acted in any manner or way that was negligent in connection with the November 8 assault, or were the cause of any injuries sustained by Plaintiff in connection

with that incident. This Stipulation shall not be admissible with respect to, nor is it related to, any other litigation or settlement negotiations.

9. Plaintiff and the United States understand and agree that this Stipulation contains the entire agreement between them, and that any statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or their counsel that are not included herein shall be of no force or effect.

10. This Stipulation may be executed in counterparts.

Dated: July 25, 2012
New York, New York

LAW OFFICE OF JOSEPH T. MULLEN, JR.

By: _____
Neil Zirlin, Esq.
30 Vesey Street, 15th Floor
New York, NY 10007
Attorney for Plaintiff

Dated: July 26 2012
New York, New York

PREET BHARARA
United States Attorney for the
Southern District of New York

By: _____
LOUIS A. PELLEGRINO
Assistant United States Attorneys
86 Chambers Street, 3rd floor
New York, New York 10007
Attorney for the United States

Dated: July 25, 2012
Willsboro, New York

Curtis Collins
CURTIS COLLINS

SO ORDERED:

K. B. Forrest 7/27/12
KATHERINE B. FORREST
UNITED STATES DISTRICT JUDGE

Date:

Forest.T

PREET BHARARA
United States Attorney for the
Southern District of New York
By: LOUIS A. PELLEGRINO
Assistant United States Attorney
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USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 7/9/12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CURTIS COLLINS, Plaintiff, -against- THE UNITED STATES OF AMERICA, Defendant.	ECF Case 11-CV-03484 (KBF) **STIPULATION OF PARTIAL VOLUNTARY DISMISSAL**

WHEREAS, on May 20, 2010, Plaintiff Curtis Collins ("Plaintiff") filed a complaint (the "Complaint") against Defendant the United States of America (the "Government") in this Court in the above-captioned action;

WHEREAS, the Complaint asserted three claims pursuant to the Federal Tort Claims Act ("FTCA"): (1) a claim alleging that corrections officers at the Metropolitan Correctional Center in New York, New York ("MCC"), where Plaintiff was incarcerated at the relevant time, were negligent with respect to their response to Plaintiff's alleged request to transfer to another cell due to an alleged threat Plaintiff had received from his cellmate, Jeremy Hamm (the "negligent handling" claim), *see* Complaint ¶¶ 25-35; (2) a claim alleging that it was negligent for MCC officers to place Plaintiff and Hamm in the same cell together (the "negligent housing" claim),

see id. ¶¶ 36-41; and (3) a claim alleging that certain high-level MCC officers were negligent in their hiring, training and/or retention of the MCC personnel who were responsible for monitoring Plaintiff and Hamm (the "negligent supervision" claim), *see id.* ¶¶ 42-26; and

WHEREAS, Plaintiff and the Government have engaged in substantial fact discovery regarding the claims in the Complaint;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiffs and the Government, by their respective counsel, as follows:

Pursuant to Federal Rule of Civil Procedure 41(a)(2), Plaintiff hereby withdraws his negligent housing claim and his negligent supervision claim with prejudice, without costs or attorney's fees.

Dated: June 29, 2012
New York, New York

LAW OFFICE OF JOSEPH T. MULLEN, JR.

By: _____
Neil Zirlin, Esq.
30 Vesey Street, 15th Floor
New York, NY 10007
Attorney for Plaintiff

Dated: June 29, 2012
New York, New York

PREET BHARARA
United States Attorney for the
Southern District of New York

By: _____
LOUIS A. PELLEGRINO
Assistant United States Attorneys
86 Chambers Street, 3rd floor
New York, New York 10007
Attorney for the Government

SO ORDERED:

Kan B. Forrest

KATHERINE B. FORREST
UNITED STATES DISTRICT JUDGE

Date: 7/9/12

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

JOSEPHINA DOMINGUEZ	)	
	)	CIVIL ACTION NO.
Plaintiff,	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA	)	
	)	
Defendant.	)	JULY 11, 2011

COMPLAINT

Josephine Dominguez, Plaintiff, by and through her attorneys, Philip Russell, LLC, now comes before this Court and complains of the United States Government, as follows:

I. JURISDICTION, VENUE, AND CONDITIONS PRECEDENT

1. The Plaintiff is an inmate at the Federal Correctional Institution located in Danbury, Connecticut, and thus is a resident of the District of Connecticut.

2. The claims herein are brought against the United States pursuant to the Federal Tort Claims Act (28 U.S.C. §2671, *et seq.*) and 28 U.S.C. §§1346(b)(1), for money damages as compensation for personal injuries that were causes by the negligent and wrongful acts and omissions of employees of the United States Government while acting within the scope of their offices and employment, under circumstances where the United States, if a private person, would be liable to the Plaintiff in accordance with the laws of the State of Connecticut.

3. Venue is proper in that all, or a substantial part of the acts and omissions forming the basis of these claims occurred in the District of Connecticut, and arose form the negligence of the United States Government and its agents, by its failure to remove snow and ice from the walkways of the Federal Correctional Institution where the Plaintiff resided.

4. Plaintiff has fully complied with the provisions of 28 U.S.C. §2675 of the Federal Tort Claims Act.

5. This suit has been timely filed, in that Plaintiff timely served notice of her claim on the Bureau of Prisons Northeast Regional Office on July 20, 2010. The U.S. Department of Justice Federal Bureau of Prison's Northeast Regional Office assumed responsibility for processing the claim on behalf of the Federal Correctional Institution located in Danbury, Connecticut and on January 18, 2011 rejected the claim.

II. EVENTS FORMING THE BASIS OF THE CLAIM

6. On or about January 7, 2010, at approximately 7:30 a.m., the Plaintiff was walking on her way to her job within the Federal Correctional Institution in Danbury, Connecticut when she was caused to slip and fall over an accumulation of ice and snow which had covered the outdoor walkway area.

7. At all times mentioned herein, the walkway was controlled, possessed, managed and/or maintained by employees of the United States employed by the Bureau of Prisons at the Federal Correctional Institution in Danbury, Connecticut.

8. Said occurrence was due to the negligence and carelessness of the Defendant, its servants, agents or employees acting within the scope of their employment in one of more the following ways:

a. In that it caused or allowed and permitted snow and ice to be and accumulate on said common walk, causing the same to be icy, slippery and dangerous for use by the Plaintiff;

b. In that it caused or allowed and permitted said walkway to be and become icy, slippery, and dangerous for use;

c. In that it failed to remedy said icy, slippery and dangerous sidewalk by placing sand, salt, sawdust or other abrasive substances thereon, when the same were reasonably necessary under the circumstances;

d. In that it failed to erect or maintain proper safeguards, warnings, signs, or failed to otherwise warn the Plaintiff of the aforesaid dangerous conditions;

e. In that it failed to remedy or repair said conditions when the same were reasonably necessary under the circumstances;

f. In that it failed to make proper and reasonable inspection of the premises; and

g. In that if maintained said walkway in the aforesaid conditions.

9. The Defendant knew or had it exercised due care and proper diligence, should have known of the aforesaid conditions.

10. As a result of the negligence and carelessness of the Defendant, the Plaintiff received, and suffered from fractures of the bones in her left hand with non-union healing which caused her to suffered permanent damage to her left hand.

11. As a result of having sustained these injuries, Plaintiff has been caused to suffer physical pain and disability.

12. As a further result of suffering these injuries, Plaintiff's normal daily activities and enjoyment of life have been impaired and may be impaired in the future.

III. FIRST CLAIM-NEGLIGENCE

13. Plaintiff incorporated by reference herein all allegations set forth above.

14. The acts and events set forth above constitute negligence under the laws of the State of Connecticut. Because these acts and events were undertaken and caused by agents of the United States, the United States Government is liable for all damages caused by such acts.

15. As a result of the foregoing, the Plaintiff claims damages.

IV. PRAYER FOR RELIEF

WHEREFORE, the Plaintiff is entitled to damages from the United States, and hereby prays that judgment be entered in her favor and against the United States Government after a trial by a jury of six (6) awarding her, *inter alia*

i. Compensatory damages in the amount of Seventy-Five Thousand and 00/100 ($75,000.00) Dollars;

ii. Interest;

iii. Costs; and

iv. Such other further and different relief as may in law or equity appertain.

THE PLAINTIFF
JOSEPHINA DOMINGUEZ

By _____
Louis J. Bonsangue
Philip Russell, LLC
Her Attorneys
66 Field Point Road
Greenwich, CT 06830
Federal Bar No. CT14586

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOSEPHINA DOMINGUEZ : Case No. 3:11CV1096 (VLB)

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant. October 3, 2014

STIPULATION FOR COMPROMISE SETTLEMENT

It is hereby stipulated by and between the undersigned plaintiff (meaning any person other than the defendant, signing this agreement, whether or not a party to this civil action), and the United States of America (defendant), by and through their respective attorneys as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America (defendant) agrees to pay the plaintiff the sum of nine thousand dollars ($9,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences

thereof, resulting and to result, from the same subject matter of this settlement including any claims for wrongful death for which plaintiff or his executors, administrators or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants and employees.

3. Plaintiff and her heirs, executors, administrators or assigns hereby agree to accept the sum of nine thousand dollars ($9,000.00), in full settlement and satisfaction of any and all claims, demands, rights and causes of action of any kind, whether known or unknown, including without limitation any claims for fees, costs, expenses, survival or wrongful death, arising from any and all known or unknown, foreseen or unforeseen bodily injuries, personal injuries, death or damage to property, which they may have or hereafter acquire against the United States of America, servants and employees on account of the same subject matter of this civil action or that relate or pertain to or arise from directly, indirectly, the subject matter of this civil action. Plaintiff and her heirs, executors, administrators or assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its agents, servants and employees from any and all such claims, demands, rights and causes of action of any kind, whether known or unknown, including without limitation claims for subrogation, indemnity, contribution, or lien of any kind, or for fees, costs, expenses, survival or wrongful death that relate or pertain to or arise from directly or indirectly, any act or omission that relates to the subject matter of this civil action.

4. Plaintiff stipulates and agrees that she is legally responsible for any and all liens or claims from payment or reimbursement, including any liens or claims by Medicaid

or Medicare or Workers' Compensation. Plaintiff and her attorney stipulate and agree that the plaintiff, by and through attorney, will satisfy or resolve any and all liens or claims for payment or reimbursement asserted by any individual or entity before distributing to plaintiff any portion of the amount paid pursuant to this Settlement Agreement.

5. This stipulation for compromise settlement is not, is in no way intended to be and should not be construed as an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. The settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Torts Claims Act and avoiding the expenses and risks of further litigation.

6. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition hereto.

7. It is also understood by and among the parties that pursuant to Title 28 United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed twenty-five (25) per centum of the amount of the compromise settlement.

8. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event that court approval of the settlement is required, plaintiff must obtain such approval at his expense. Plaintiff agrees to obtain such approval in a timely manner, time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not

obtained in a timely manner. In the event plaintiff fails to obtain such Court approval the entire Stipulation for Compromise Settlement is null and void.

9. Payment of the settlement amount will be made by a check drawn on the Treasury of the United States in the amount of nine thousand dollars and ($9,000.00) and made payable to the plaintiff Josephina Dominguez and Philip D.Russell, Esq., plaintiff's attorney, at the following address: Philip D. Russell, Esq., Philip Russell, LLC 66 Field Point Rd., 1st Fl., P.O. Box 1437, Greenwich, CT 06830, agrees to distribute the settlement proceeds to the plaintiff.

10. The parties agree that this Stipulation of Compromise Settlement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 522a b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this day of October, 2014

JOSEPHINA DOMINGUEZ
PLAINTIFF

Date

PHILIP D. RUSSELL, ESQ.
PHILIP RUSSELL, LLC
66 FIELD POINT RD., 1ST FL.
PO BOX 1437
GREENWICH, CT 06830

Date

ENDA M. GREEN
SSISTANT UN TED STATES ATTORNEY
FEDERAL BAR NO. CT19538
L TED STATES ATTORNEY'S OFFICE
00 LAFAYETTE BOULEVARD, 10TH FL
BR DGEPORT CT 06604
For the Defendant

Date

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Keena Stone Williams, Individually, and as Administratix of the Estate of Craig Williams, Deceased

(b) County of Residence of First Listed Plaintiff New Castle County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Anthony J. Baratta, Baratta, Russell & Baratta, The Loft at Woodmont, 3500 Reading Way, Huntingdon Valley, PA 19006,

DEFENDANTS

The United States of America, Antonio Fausto, MLP, Odeida Dalmasi, MD

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☒ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health		☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other		☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General	IMMIGRATION	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty	☐ 462 Naturalization Application	☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other	☐ 463 Habeas Corpus - Alien Detainee		☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights	☐ 465 Other Immigration Actions		☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (**Do not cite jurisdictional statutes unless diversity**):
28 U.S.C. § 1346(b)

Brief description of cause:
Denial of adequate medical care while incarcerated at federal prison.

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 9/6/11

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

JS 44 Reverse (Rev. 12/07)

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEENA STONE WILLIAMS, Individually, and as Administratrix of the ESTATE OF CRAIG WILLIAMS, Deceased 75 Mercer Drive Newark, Delaware 19713	:	JURY DEMANDED
vs.	:	
THE UNITED STATES OF AMERICA, ANTONIO FAUSTO, MLP, ODEIDA DALMASI, MD Office of the Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, Northwest Washington, D.C. 20530-0001	:	

CIVIL ACTION – COMPLAINT

Plaintiff, Keena Stone Williams, Individually and as Administratrix of the Estate of Craig Williams, deceased, by and through her attorney, Anthony J. Baratta, Esquire, says by way of Complaint against Defendants the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action as it is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671-2680, which grants U.S. district courts the exclusive jurisdiction of civil actions on claims against the United States for money damages for personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under

circumstances where the U.S., if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Plaintiff submitted an Administrative Claim for the claim set forth below to the U.S. Department of Justice, Federal Bureau of Prisons/Health Services Division. See Claim attached as Exhibit "A".

3. Plaintiff's Federal Tort Claim Act claim was received by the U.S. Department of Justice, Federal Bureau of Prisons, Northeast Regional Office on September 30, 2010.

4. By correspondence dated March 29, 2011, the U.S. Department of Justice denied Plaintiff's Claim. See Letter attached hereto as Exhibit "B".

5. Plaintiff has satisfied all of the 28 U.S.C. § 2675 prerequisites for instituting an action upon a claim against the United States of America.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and 1402(b) as the Eastern District of Pennsylvania is the judicial district in which the events or omissions giving rise to Plaintiff's claims occurred.

PARTIES

7. Plaintiff, Keena Stone Williams, is an adult female and citizen of the State of Delaware. Plaintiff was at all times relevant hereto and remained until his death the spouse of Craig Williams. Plaintiff, Keena Stone Williams, is also the Administratrix of the Estate of Craig Williams. See Letters of Administration attached as Exhibit "C".

8. Defendant, the United States of America, may be served with this action at the United States Attorney's Office, Eastern District of PA, 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106, and by certified or registered mail to the Office of the Attorney General,

U.S. Department of Justice, 950 Pennsylvania Avenue, Northwest, Washington, D.C. 20530-0001

9. Defendant United States of America is a sovereign entity. Liability for the acts described herein is based on actions of agents and employees of the Federal Bureau of Prisons, an agency of the United States, for which sovereign immunity is waived under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1) and 2674. Under sections 1346(b)(1) and 2674, which constitute a waiver of sovereign immunity, the United States is liable in the same manner and to the same extent as a private individual under like circumstances.

10. The Federal Detention Center, located at 700 Arch Street, Philadelphia, PA, is headed and supervised by the U.S. Department of Justice – Federal Bureau of Prisons.

11. Defendant, Antonio Fausto, MLP ("Fausto"), during all times relevant to the events described in this complaint, was employed as a healthcare provider by Defendant United States working at the Federal Detention Center - Philadelphia.

12. Defendant Odeida Dalmasi, MD ("Dalmasi"), during all times relevant to the events described in this complaint, was employed as a healthcare provider by Defendant United States working at the Federal Detention Center - Philadelphia.

13. Defendants Fausto and Dalmasi are employees, representatives and/or agents of the United States and are sued in their individual capacities pending certification by the U.S. Attorney General that the individual defendants were acting within the scope of their employment pursuant to 28 U.S.C. §2679 (d)(1).

OPERATIVE FACTS

14. Craig Williams was incarcerated at the Federal Detention Center (Philadelphia)("FDC") from November 2008 up and until the time of his death on December 5, 2008.

15. On December 3, 2010, Craig Williams presented to the Health Services Department at the FDC with complaints regarding his right leg.

16. Craig Williams was examined by Fausto, and it is alleged and therefore averred, by Dalmasi as well, on December 3, 2008.

17. The Bureau of Prisons Health Services report completed by Fausto and cosigned by Dalmasi, dated December 3, 2008, stated Craig Williams had a one week history of swelling and pain of his right lower leg and upon physical examination it was determined that his right lower leg was swollen, warm and tender to touch; he had no history of trauma, cellulitis or lacerations to the leg; he was advised to put warm compresses and take Naprosyn, as needed for pain.

18. Defendants Fausto and Dalmasi held themselves out to be healthcare providers who possess skill and knowledge to treat medical problems such as those presented by Craig Williams, and held themselves out as so qualified.

19. No imaging studies were requested or ordered to determine the cause of Craig Williams's pain and swelling by the aforementioned employees, representatives or agents of the facility.

20. No blood work was ordered to be performed on Craig Williams, by the aforementioned employees, representatives or agents of the facility.

21. No appropriate differential diagnosis was performed to rule out life threatening medical reasons for Craig Williams's symptoms.

22. On December 5, 2008, Mr. Williams returned back to the Health Services Department complaining of the acute onset of shortness of breath. Craig Williams, was found to have a bradycardic rhythm and CPR was initiated.

23. On December 5, 2008, Craig Williams was transferred to Hahnemann University Hospital, and was found to be dead on arrival.

24. The body of Craig Williams was received by the Medical Examiners Office on December 5, 2008. The autopsy report indicated Craig Williams died from a Pulmonary Thromboembolism resulting from a Deep Vein Thrombosis in his right leg.

25. At all relevant times, the Federal Bureau of Prisons owned, controlled and/or operated the FDC.

26. At all relevant times, the Federal Bureau of Prisons had a duty to provide adequate medical care to inmates at the FDC, pursuant to 18 U.S. C. § 4042.

27. At all relevant times, the Federal Bureau of Prisons was required to provide well-trained and competent personnel whose qualifications were commensurate with the responsibility of providing adequate medical care to the inmate population at the FDC.

28. At all relevant times, agents, servants and employees of the United States, acting within the course and scope of their employment, provided less than adequate medical care, and acted in a negligent fashion below the standard of care which actions or omissions caused Craig Williams's death.

29. All acts and omissions of employees, representatives and agents of the Federal Detention Center were done in the course and scope of their employment or agency for which Defendant United States is liable.

30. The death of Craig Williams resulted from the denial of adequate medical care at the Federal Detention Center.

31. The negligence, carelessness and recklessness of defendants, as set forth herein, was the factual, proximate and sole cause of the injuries and damages to Plaintiff's decedent.

COUNT I

KEENA STONE WILLIAMS, in her own right and as Administratrix of the Estate of CRAIG WILLIAMS, Deceased v. UNITED STATES of AMERICA

WRONGFUL DEATH ACT, 42 PA. C.S.A. § 8301

32. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 31 as if fully set forth at length herein.

33. Defendant's employees, agents and representatives, specifically Fausto and Dalmasi, and whatever other agent or employee discovery reveals, failed to satisfy Defendant's duty to provide proper and appropriate medical care to inmates, including Craig Williams, and thus were negligent.

34. The negligence, carelessness and recklessness of Defendants by and through its agents, servants, workmen and/or employees, consists of, but is not limited to the following:

(a) failing to provide necessary medical attention to an inmate in their care and custody;

(b) failing to adequately evaluate and treat the causes of Craig Williams' medical condition;

(c) failing to render timely, adequate and proper medical treatment which led to Craig Williams' death;

(d) failing to properly and timely provide follow-up care and treatment to Craig Williams;

(e) failing to properly supervise and monitor Craig Williams while in defendant's care;

(f) failing to ensure Craig Williams received adequate treatment for his obvious and serious medical needs;

(g) failing to use due care to diagnose and treat Craig Williams;

(h) failing to recognize the pain and swelling in plaintiff's leg for what it was, deep vein thrombus, and recommending further studies;

(i) failing to order a lower extremity Doppler study of Craig Williams's right leg to diagnose the DVT;

(j) failing to order any blood work such as a d-dimer to diagnose the lower extremity DVT;

(k) failing to properly diagnose Craig Williams's DVT;

(l) failing to place Craig Williams on anticoagulation to prevent the fatal pulmonary embolus;

(m) failure to properly supervise and train their employees to provide necessary medical attention to an inmate under their exclusive care and custody.

(n) failing to treat Craig Williams pursuant to the applicable standard of care;

(o) failing to properly perform a differential diagnosis;

(p) being otherwise careless, negligent and reckless as may be determined during the course of discovery or trial.

35. The negligence, carelessness and recklessness as set forth herein was the factual, proximate and sole cause of the injuries and damages to Craig Williams and expenses incurred.

36. Craig Williams's death on December 5, 2008, is a direct and proximate result of the aforementioned acts and omissions by Defendant's employees, representatives and agents.

37. As a direct and proximate result of the aforementioned acts and omissions by Defendant's agents, Craig Williams endured pain and suffering and his estate incurred funeral expenses and a loss of his earnings capacity, for which his estate is entitled to recover herein.

38. Decedent, Craig Williams brings this action pursuant to the Wrongful Death Act, 42 Pa.C.S.A §8301.

39. Decedent Craig Williams did not bring any action during his lifetime and Plaintiff Keena Stone Williams was duly appointed Administratrix of Craig Williams' Estate as has been alleged in the proceeding paragraphs of this Complaint

40. Plaintiff, Keena Stone Williams, as the spouse of Craig Williams, suffered a loss of the companionship, services, love and affection of her husband, for which Keena Stone Williams is entitled to recover herein.

41. Aniyah Williams and Amir Williams, the minor children of Craig Williams, suffered the loss of guidance, tutelage, services, companionship, love and affection of their father, for which they are entitled to recover herein, as a direct and proximate result of the aforementioned acts and omissions of Defendants.

42. Plaintiff seeks damages to the fullest extent allowed by the laws of the Commonwealth of Pennsylvania on behalf of the survivors of Decedent Craig Williams under and by virtue of the Wrongful Death Act, 42 Pa.C.S.A §8301.

COUNT II

KEENA STONE WILLIAMS, in her own right and as Administratrix of the Estate of CRAIG WILLIAMS, Deceased v. UNITED STATES OF AMERICA

NEGLIGENCE – SURVIVAL ACTION, 42 PA. C.S.A. § 8302

43. Plaintiff incorporates by reference the allegations of paragraphs 1 through 42 as if fully set forth at length herein.

44. Plaintiff brings this action pursuant to the Pennsylvania Survival Statute, 42 PA. C.S.A. § 8302.

45. As a direct and proximate result of the negligence of defendants, Decedent Craig Williams suffered severe pain, suffering and mental anguish prior to his expiration.

46. Plaintiff seeks damages for the pain, suffering and mental anguish endured by Decedent, Craig Williams prior to his death, and for all of the other losses suffered by his Estate as a result of his death, including, but not limited to, the loss of income, earnings and earning capacity, he would have earned had he survived.

COUNT III

KEENA STONE WILLIAMS, in her own right and as Administratrix of the Estate of CRAIG WILLIAMS, Deceased v. ANTONIO FAUSTO, MLP and ODEIDA DALMASI, MD

WRONGFUL DEATH ACT, 42 PA. C.S.A. § 8301

47. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 46 as if fully set forth at length herein.

48. Defendant's employees, agents and representatives failed to satisfy Defendant's duty to provide proper and appropriate medical care to inmates, including Craig Williams, and thus were negligent.

49. The negligence, carelessness and recklessness of Defendants consist of, but is not limited to the following:

(a) failing to provide necessary medical attention to an inmate in their care and custody;

(b) failing to adequately evaluate and treat the causes of Craig Williams' medical condition;

(c) failing to render timely, adequate and proper medical treatment which led to Craig Williams' death;

(d) failing to properly and timely provide follow-up care and treatment for Craig Williams;

(e) failing to properly supervise and monitor Craig Williams while in defendant's care;

(f) failing to ensure Craig Williams received adequate treatment for his obvious and serious medical needs;

(g) failing to use due care to diagnose and treat Craig Williams;

(h) failing to recognize the pain and swelling in Craig Williams's leg for what it was, deep vein thrombus, and recommending further studies;

(i) failing to order a lower extremity Doppler study of Craig Williams's right leg to diagnose the DVT;

(j) failing to order any blood work such as a d-dimer to diagnose the lower extremity DVT;

(k) failing to properly diagnose Craig Williams's DVT;

(l) failing to place Craig Williams on anticoagulation to prevent the fatal pulmonary embolus;

(m) failure to properly supervise and train their employees to provide necessary medical attention to an inmate under their exclusive care and custody.

(n) failing to treat Craig Williams pursuant to the applicable standard of care;

(o) failing to properly perform a differential diagnosis;

(p) being otherwise careless, negligent and reckless as may be determined during the course of discovery or trial.

50. The negligence, carelessness and recklessness as set forth herein was the factual, proximate and sole cause of the injuries and damages to Craig Williams and expenses incurred.

51. Craig Williams' death on December 5, 2008, is a direct and proximate result of the aforementioned acts and omissions by Defendant's employees, representatives and agents.

52. As a direct and proximate result of the aforementioned acts and omissions by Defendant's agents, Craig Williams endured pain and suffering and his estate incurred funeral expenses and a loss of his earnings capacity, for which his estate is entitled to recover herein.

53. Decedent Craig Williams brings this action pursuant to the Wrongful Death Act, 42 Pa.C.S.A §8301.

54. Decedent Craig Williams did not bring any action during his lifetime and Plaintiff Keena Stone Williams was duly appointed Administratrix of Craig Williams' Estate as has been alleged in the proceeding paragraphs of this Complaint

55. Plaintiff, Keena Stone Williams, as the spouse of Craig Williams, suffered a loss of the companionship, services, love and affection of her husband, for which Keena Stone Williams is entitled to recover herein.

56. Aniyah Williams and Amir Williams, the minor children of Craig Williams, suffered the loss of guidance, tutelage, services, companionship, love and affection of their father, for which they are entitled to recover herein, as a direct and proximate result of the aforementioned acts and omissions of Defendants.

57. Plaintiff seeks damages to the fullest extent allowed by the laws of the Commonwealth of Pennsylvania on behalf of the survivors of Decedent Craig Williams under and by virtue of the Wrongful Death Act, 42 Pa.C.S.A §8301.

COUNT IV

KEENA STONE WILLIAMS, in her own right and as Administratrix of the Estate of CRAIG WILLIAMS, Deceased v. ANTONIO FAUSTO, MLP and ODEIDA DALMASI, MD

NEGLIGENCE – SURVIVAL ACTION, 42 PA. C.S.A. § 8302

58. Plaintiff incorporates by reference the allegations of paragraphs 1 through 57 as if fully set forth at length herein.

59. Plaintiff brings this action pursuant to the Pennsylvania Survival Statute, 42 PA. C.S.A. § 8302.

60. As a direct and proximate result of the negligence of defendants, Decedent Craig Williams suffered severe pain, suffering and mental anguish prior to his expiration.

61. Plaintiff seeks damages for the pain, suffering and mental anguish endured by Decedent, Craig Williams prior to his death, and for all of the other losses suffered by his Estate as a result of his death, including, but not limited to, the loss of income, earnings and earning capacity, he would have earned had he survived.

WHEREFORE, Plaintiff, Keena Stone Williams, as Administratrix of the Estate of Craig Williams, Deceased, and in her own right respectfully requests the following judgment:

1. An award of damages against Defendant United States of America, Antonio Fausto, MLP and Odeida Dalmasi, MD, jointly and/or severally, in the sum of $1,500,000.00.

2. Recovery of all costs, interest and expenses incurred herein, including reasonable attorney fees; and

3. Any and all other relief to which Plaintiff may be entitled.

BARATTA RUSSELL & BARATTA

BY: _____
ANTHONY J. BARATTA
Attorney I.D. No. 56287
The Loft at Woodmont
3500 Reading Way
Huntingdon Valley, PA 19006
(215)914-2222

Date: 9/6/11

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: 75 Mercer Drive, Newark, Delaware 19713

Address of Defendant: Office of the Attorney General, U.S. Dept of Justice, 950 Pennsylvania Avenue, Northwest, Washington, DC

Place of Accident, Incident or Transaction: Federal Detention Center -- Philadelphia

(Use Reverse Side For Additional Space)

Does this civil action involve a nongovernmental corporate party with any parent corporation and any publicly held corporation owning 10% or more of its stock?

(Attach two copies of the Disclosure Statement Form in accordance with Fed.R.Civ.P. 7.1(a)) Yes☐ No☒

Does this case involve multidistrict litigation possibilities? Yes☐ No☒

RELATED CASE, IF ANY:

Case Number: _____ Judge _____ Date Terminated: _____

Civil cases are deemed related when yes is answered to any of the following questions:

1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes☐ No☒
2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes☐ No☒
3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes☐ No☒
4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual? Yes☐ No☒

CIVIL: (Place ✓ in ONE CATEGORY ONLY)

A. *Federal Question Cases:*

1. ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2. ☐ FELA
3. ☐ Jones Act-Personal Injury
4. ☐ Antitrust
5. ☐ Patent
6. ☐ Labor-Management Relations
7. ☐ Civil Rights
8. ☐ Habeas Corpus
9. ☐ Securities Act(s) Cases
10. ☐ Social Security Review Cases
11. ☒ All other Federal Question Cases
    (Please specify) Federal Tort Claims Act

B. *Diversity Jurisdiction Cases:*

1. ☐ Insurance Contract and Other Contracts
2. ☐ Airplane Personal Injury
3. ☐ Assault, Defamation
4. ☐ Marine Personal Injury
5. ☐ Motor Vehicle Personal Injury
6. ☐ Other Personal Injury (Please specify)
7. ☐ Products Liability
8. ☐ Products Liability — Asbestos
9. ☐ All other Diversity Cases
   (Please specify)

ARBITRATION CERTIFICATION

(Check Appropriate Category)

I, Anthony J. Baratta, counsel of record do hereby certify:

☒ Pursuant to Local Civil Rule 53.2, Section 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $150,000.00 exclusive of interest and costs;

☐ Relief other than monetary damages is sought.

DATE: 9/6/11 _____ Attorney-at-Law 56287 Attorney I.D.#

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 9/6/11 _____ Attorney-at-Law 56287 Attorney I.D.#

CIV. 609 (5/08)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CASE MANAGEMENT TRACK DESIGNATION FORM

Keena Stone Williams, Individually, and as Administratix of the ESTATE OF CRAIG WILLIAMS, Deceased	:	CIVIL ACTION
v.	:	
THE UNITED STATES OF AMERICA, ANTONIO FAUSTO, MLP, ODEIDA DALMASI, MD	:	NO.

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

(a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. ( )

(b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ( )

(c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ( )

(d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ( )

(e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) ( )

(f) Standard Management – Cases that do not fall into any one of the other tracks. (✓)

9/2/11	Anthony J. Baratta	Plaintiff
Date	**Attorney-at-law**	**Attorney for**
215-914-222	215-914-2118	tony@barattarussell.com
Telephone	**FAX Number**	**E-Mail Address**

(Civ. 660) 10/02

Civil Justice Expense and Delay Reduction Plan
Section 1:03 - Assignment to a Management Track

(a) The clerk of court will assign cases to tracks (a) through (d) based on the initial pleading.

(b) In all cases not appropriate for assignment by the clerk of court to tracks (a) through (d), the plaintiff shall submit to the clerk of court and serve with the complaint on all defendants a case management track designation form specifying that the plaintiff believes the case requires Standard Management or Special Management. In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a case management track designation form specifying the track to which that defendant believes the case should be assigned.

(c) The court may, on its own initiative or upon the request of any party, change the track assignment of any case at any time.

(d) Nothing in this Plan is intended to abrogate or limit a judicial officer's authority in any case pending before that judicial officer, to direct pretrial and trial proceedings that are more stringent than those of the Plan and that are designed to accomplish cost and delay reduction.

(e) Nothing in this Plan is intended to supersede Local Civil Rules 40.1 and 72.1, or the procedure for random assignment of Habeas Corpus and Social Security cases referred to magistrate judges of the court.

SPECIAL MANAGEMENT CASE ASSIGNMENTS
(See §1.02 (e) Management Track Definitions of the
Civil Justice Expense and Delay Reduction Plan)

Special Management cases will usually include that class of cases commonly referred to as "complex litigation" as that term has been used in the Manuals for Complex Litigation. The first manual was prepared in 1969 and the Manual for Complex Litigation Second, MCL 2d was prepared in 1985. This term is intended to include cases that present unusual problems and require extraordinary treatment. See §0.1 of the first manual. Cases may require special or intense management by the court due to one or more of the following factors: (1) large number of parties; (2) large number of claims or defenses; (3) complex factual issues; (4) large volume of evidence; (5) problems locating or preserving evidence; (6) extensive discovery; (7) exceptionally long time needed to prepare for disposition; (8) decision needed within an exceptionally short time; and (9) need to decide preliminary issues before final disposition. It may include two or more related cases. Complex litigation typically includes such cases as antitrust cases; cases involving a large number of parties or an unincorporated association of large membership; cases involving requests for injunctive relief affecting the operation of large business entities; patent cases; copyright and trademark cases; common disaster cases such as those arising from aircraft crashes or marine disasters; actions brought by individual stockholders; stockholder's derivative and stockholder's representative actions; class actions or potential class actions; and other civil (and criminal) cases involving unusual multiplicity or complexity of factual issues. See §0.22 of the first Manual for Complex Litigation and Manual for Complex Litigation Second, Chapter 33.

EXHIBIT "A"

BARATTA, RUSSELL & BARATTA
Aggressive Advocates and Trusted Advisors

www.barattarussell.com

* Also member of NJ Bar
† Board Certified Civil Trial Advocate by the National Board of Trial Advocacy
‡ Member Million Dollar Advocate Forum
Δ LLM in Taxation

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don@barattarussell.com

The Loft at Woodmont
3500 Reading Way
Huntingdon Valley, PA 19006
Phone: (215) 914-2222
Fax: (215) 914-2118

September 20, 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Federal Bureau of Prisons/Health Services Division
U.S. Department of Justice
Attention: Harley G. Lappin
320 First Street Northwest
Washington, DC 20534

RE: **My Client:** **Estate of Craig Williams**
Date of Death: **12/5/2008**
My File Number: **1100-1008-12168**

Dear Mr. Lappin:

I represent Keena Stone Williams, Administratrix of the Estate of Craig Lydell Williams, who was a prisoner at the Federal Detention Center from November 20, 2008 to December 5, 2008. Mr. Williams did not receive proper medical treatment at the Federal Detention Center which resulted in this death on December 5, 2008.

Enclosed please find a completed Claim for Damage, Injury or Death which is being submitted on behalf of Keena Stone Williams.

Kindly acknowledge receipt of the Claim and direct all correspondence to my attention.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

ANTHONY J. BARATTA

AJB:hf
Enclosure
cc: First Class Mail
Keena Stone Williams

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code)
Federal Bureau of Prisons/Health Services Division U.S. Department of Justice Attention: Harley G. Lappin 320 First Street Northwest Washington DC 20534	Keena Stone Williams as Adm. of Estate of Craig Williams 75 Mercer Drive Newark, DE 19713

3. TYPE OF EMPLOYMENT ☐ MILITARY ☒ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
	04/19/1972	Widow	Friday, 12/05/2008	1:05 pm

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.)

Craig Williams, while incarcerated at the Federal Detention Center at 700 Arch Street, Philadelphia, Pennsylvania, was not provided proper medical care which resulted in his death on 12/05/2008.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

Craig Williams, DOB 02/28/1970, while incarcerated at the Federal Detention Center at 700 Arch Street, Philadelphia, Pennsylvania, was not provided proper medical care which resulted in his death on 12/05/2008.

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
Unknown at present; records of treatment both at prison and hospital at which he died are being sought.	

12. (See instructions on reverse.) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
		$1,500,000.00	$1,500,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
Keena Stone-Williams	302-453-1695	9/4/10

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☒ No

16. Have you filed a claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

No.

17. If deductible, state amount.

N/A.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts.)

N/A.

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☒ No

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item #12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

EXHIBIT "B"

U.S. Department of Justice

Federal Bureau of Prisons APR 0 2011

Northeast Regional Office

Via Certified and Return-Receipt Mail

U.S. Custom House-7th Floor
2nd & Chestnut Streets
Philadelphia, PA. 19106

March 29, 2011

Anthony J. Baratta
Baratta, Russell & Baratta
The Loft at Woodmont
3500 Reading Way
Huntingdon Valley, PA 19006

RE: Administrative Tort Claim No. TRT-NER-2011-00108
Filed on behalf of Craig William, Register No. 61522-066

Dear Mr. Baratta:

Administrative Tort Claim No. TRT-NER-2011-00108, properly received in this office on September 30, 2010, has been considered for settlement as provided by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2672, under authority delegated to me by 28 C.F.R. § 543.30. You seek compensatory damages in the amount of $1,500,000.00 for alleged denial of adequate medical care. Specifically, you allege Craig Williams was denied adequate medical care at the Federal Detention Center (FDC) Philadelphia, which resulted in his death on December 5, 2008.

After careful review of this claim, I have decided not to offer a settlement. An investigation reveals Craig William was incarcerated at FDC Philadelphia, from November 20, 2008 to December 5, 2008. While incarcerated at FDC Philadelphia, Mr. William received appropriate and timely medical care. There is no evidence to suggest Mr. William experienced a compensable loss as the result of negligence on the part of any Bureau of Prisons' employee. Accordingly, the claim is denied.

If you are dissatisfied with this decision, you may bring an action against the United States in an appropriate United States District Court within six (6) months of the date of this memorandum.

Sincerely,

Henry J. Sadowski
Regional Counsel

cc: E. L. Tatum, Acting Warden, FDC Philadelphia

mcdl 9/24

EXHIBIT "C"

Office of the Register of Wills of Philadelphia County, Pennsylvania

File #: A5454-2009

Commonwealth of Pennsylvania
County of Philadelphia } **ss.**

I, **RONALD R. DONATUCCI, ESQUIRE,** Register for the Probate of Wills and Granting Letters of Administration in and for the County of Philadelphia, in the Commonwealth of Pennsylvania

DO HEREBY CERTIFY AND MAKE KNOWN That on the **21st** day of **August**

in the year of our Lord **2009** **LETTERS OF ADMINISTRATION**

on the Estate of **Craig Lydell Williams**

(AKA: Craig L. Williams)

Deceased, were granted unto **Keena Stone-Williams**

having first been qualified well and truly to administer the same. And I further certify that no revocation of said Letters appears of record.

Date of death **12/5/2008**

Given under my hand and seal of office, this **17th** day of **November**, 20 **10**

Louis A. Benz
Deputy Register

NOT VALID WITHOUT ORIGINAL SIGNATURE AND IMPRESSED SEAL

10-14 (Rev. 3/08)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEENA STONE WILLIAMS,	:	
Individually and as Administratrix of the	:	
Estate of CRAIG WILLIAMS, deceased	:	
v.	:	
	:	No. 2:11-CV-5612
THE UNITED STATES OF AMERICA	:	

ORDER

AND NOW, this 23rd day of August, 2012, upon consideration of Plaintiff's Petition for Approval of Settlement, Allocation of Proceeds and Distribution of Proceeds, it is hereby ORDERED and DECREED that the settlement is APPROVED. It is further ORDERED and DECREED that the proceeds of this settlement shall be allocated and distributed as follows:

1. The total gross settlement in the amount of $575,000.00 is approved as fair and reasonable.
2. Reimbursement for Costs to counsel is APPROVED.
3. A counsel fee of 25% of the gross settlement minus costs is APPROVED.
4. Eighty Percent (80%) of the recovery shall be allocated towards the wrongful death claim under the Pennsylvania Wrongful Death Statute, and Twenty Percent (20%) shall be allocated towards the Survival claim under the Survival Act.
5. The specific distribution of the $575,000.00 settlement shall be made as follows:

A. To: Baratta, Russell & Baratta (Reimbursement of Costs)	$ 18,744.49
B. To: Baratta, Russell & Baratta	
(Counsel Fees – 25% of the net award after costs)	$139,063.88
C. Wrongful Death Claim (80%)	$333,753.30

D. Survival Claim (20%)[1] $ 83,438.33

Since Craig Williams died intestate, the distribution of dollars is exactly the same regardless of whether recovery is made under the Wrongful Death or Survival Action; all recovery is distributed per the laws regarding intestacy which require payment of the first $30,000.00 to spouse and one-half of the remainder with the remaining one-half distributable to the children. *See* 20 Pa.C.S. §2102(3).

To: Spouse – Keena Stone-Williams ($223,595.82)

To: Minor Child

– Aniyah Williams, DOB: 8/30/02 ($96,797.91)

To Aniyah Williams, a minor, to be placed in a structured settlement to be placed by Ringler Associates, lump sum payouts to be made as follows:

- $34,360.00 at age 25 or August 30, 2027;
- $40,000.00 at age 27 or August 30, 2029;
- $42,860.00 at age 29 or August 30, 2031;
- $53,859.80 at age 31 or August 30, 2033.

To: Minor Child

– Amir Williams, DOB: 10/20/05 ($96,797.91)

To Amir Williams, a minor, to be placed in a structured settlement to be placed by Ringler Associates, lump sum payouts to be made follows:

- $40,000.00 at age 25 or 10/20/2030
- $44,400.00 at age 27 or 10/20/2032
- $48,535.00 at age 29 or 10/20/2034
- $58,384.69 at age 31 or 10/20/2036

BY THE COURT:

J.

[1] That all monies are properly distributed to the Wrongful Death and Survival Act Claim is evidenced by the approval of The Pennsylvania Department of Revenue pending this Court's consent. See Exhibit "D".

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEENA STONE WILLIAMS, Individually and as Administratrix of the Estate of CRAIG WILLIAMS, deceased	:	
v.	:	
	:	No. 2:11-CV-5612
THE UNITED STATES OF AMERICA	:	

ORDER

AND NOW, this 21st day of August, 2012, upon consideration of Plaintiff's Petition for Approval of Settlement, Allocation of Proceeds and Distribution of Proceeds, it is hereby ORDERED and DECREED that the settlement is APPROVED. It is further ORDERED and DECREED that the proceeds of this settlement shall be allocated and distributed as follows:

1. The total gross settlement in the amount of $575,000.00 is approved as fair and reasonable.
2. Reimbursement for Costs to counsel is APPROVED.
3. A counsel fee of 25% of the gross settlement minus costs is APPROVED.
4. Eighty Percent (80%) of the recovery shall be allocated towards the wrongful death claim under the Pennsylvania Wrongful Death Statute, and Twenty Percent (20%) shall be allocated towards the Survival claim under the Survival Act.
5. The specific distribution of the $575,000.00 settlement shall be made as follows:

A. To: Baratta, Russell & Baratta (Reimbursement of Costs)	$ 18,744.49
B. To: Baratta, Russell & Baratta	
(Counsel Fees – 25% of the net award after costs)	$139,063.88
C. Wrongful Death Claim (80%)	$333,753.30

D. Survival Claim (20%)[1] $ 83,438.33

Since Craig Williams died intestate, the distribution of dollars is exactly the same regardless of whether recovery is made under the Wrongful Death or Survival Action; all recovery is distributed per the laws regarding intestacy which require payment of the first $30,000.00 to spouse and one-half of the remainder with the remaining one-half distributable to the children. *See* 20 Pa.C.S. §2102(3).

To: Spouse – Keena Stone-Williams ($223,595.82)

To: Minor Child

– Aniyah Williams, DOB: 8/30/02 ($96,797.91)

To Aniyah Williams, a minor, to be placed in a structured settlement to be placed by Ringler Associates, lump sum payouts to be made as follows:

- $34,360.00 at age 25 or August 30, 2027;
- $40,000.00 at age 27 or August 30, 2029;
- $42,860.00 at age 29 or August 30, 2031;
- $52,959.39 at age 31 or August 30, 2033.

To: Minor Child

– Amir Williams, DOB: 10/20/05 ($96,797.91)

To Amir Williams, a minor, to be placed in a structured settlement to be placed by Ringler Associates, lump sum payouts to be made follows:

- $40,000.00 at age 25 or 10/20/2030
- $44,400.00 at age 27 or 10/20/2032
- $48,535.00 at age 29 or 10/20/2034
- $57,328.46 at age 31 or 10/20/2036

BY THE COURT:

J.

[1] That all monies are properly distributed to the Wrongful Death and Survival Act Claim is evidenced by the approval of The Pennsylvania Department of Revenue pending this Court's consent. See Exhibit "D".

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEENA STONE WILLIAMS,	:	
	:	
Plaintiff,	:	**CIVIL ACTION**
	:	**NO. 11-cv-5612**
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

STIPULATED ORDER THAT COUNTS III AND IV OF PLAINTIFF'S COMPLAINT ARE DISMISSED WITH PREJUDICE PURSUANT TO FED. R. CIV. P. 16

AND NOW, this 12th day of December, 2011, it is hereby agreed by and between the undersigned, who are all of the parties who have entered an appearance in the above-entitled Federal Tort Claims Act ("FTCA") proceeding, that COUNTS III AND IV OF PLAINTIFF'S COMPLAINT -- which are directed against now-dismissed defendants Antonio Fausto and Odeida Dalmasi -- are DISMISSED WITH PREJUDICE from this action pursuant to Federal Rule of Civil Procedure 16.

Respectfully submitted,

ANTHONY J. BARATTA, Esq.
The Loft at Woodmont
3500 Reading Way
Huntingdon Valley, PA 19006
(215) 914-2222
ATTORNEY I.D. No. 56287

Attorney for Plaintiff

GERALD B. SULLIVAN
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476
(215) 861-8786/(215) 861-8618 (fax)
ATTORNEY I.D. No. 57300

Attorney for Defendant United States

APPROVED BY THE COURT

John R. Padova J.

12-12-11

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEENA STONE WILLIAMS, Individually, and as Administratrix of the Estate of CRAIG WILLIAMS,	:	
Plaintiff,	:	**CIVIL ACTION NO. 11-cv-5612**
v.	:	
UNITED STATES OF AMERICA, ANTONIO FAUSTO, MLP, and ODEIDA DALMASI, MD,	:	
Defendants.	:	

STIPULATED ORDER THAT DEFENDANTS FAUSTO AND DALMASI ARE DROPPED AS DEFENDANTS PURSUANT TO FED. R. CIV. P. 21

AND NOW, this 29th th day of November, 2011, it is hereby agreed by and between the undersigned, who are all of the parties who have entered an appearance in the above-entitled Federal Tort Claims Act ("FTCA") proceeding, that defendants Antonio Fausto and Odeida Dalmasi are DROPPED AS PARTIES from this action pursuant to Federal Rule of Civil Procedure 21. Defendants Fausto and Dalmasi are not proper defendants under the FTCA, they cannot be sued personally, and they have absolute immunity from common law torts. Accordingly, plaintiff's claims against

Antonio Fausto and Odeida Dalmasi are DISMISSED WITH PREJUDICE.

Respectfully submitted,

ANTHONY J. BARATTA, Esq.
The Loft at Woodmont
3500 Reading Way
Huntingdon Valley, PA 19006
(215) 914-2222
ATTORNEY I.D. No. 56287

Attorney for Plaintiff

GERALD B. SULLIVAN
Assistant United States Attorney
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476
(215) 861-8786/(215) 861-8618 (fax)
ATTORNEY I.D. No. 57300

Attorney for the United States

APPROVED AND SO ORDERED.

FURTHER ORDERED that the Clerk is DIRECTED to amend the caption of this action by deleting Antonio Fausto and Odeida Dalmasi as defendants.

HONORABLE JOHN R. PADOVA
Judge, United States District Court

Dated: 11/29/2011

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEENA STONE WILLIAMS, Individually, and as Administratrix of the Estate of CRAIG WILLIAMS,	:	
Plaintiff,	:	**CIVIL ACTION NO. 11-cv-5612**
v.	:	
UNITED STATES OF AMERICA, ANTONIO FAUSTO, MLP, and ODEIDA DALMASI, MD,	:	
Defendants.	:	

CERTIFICATION OF SCOPE OF EMPLOYMENT

I, ZANE DAVID MEMEGER, the undersigned United States Attorney, pursuant to the provisions of 28 U.S.C. § 2679(d) and by virtue of the authority vested in me by the Attorney General of the United States under 28 C.F.R. Section 15.4(a), hereby certify that: (1) I have read the Complaint in this action; and (2) to the best of my knowledge, information, and belief, based on information supplied to me in my official capacity, defendant Antonio Fausto, who has been named and identified in the Complaint, was an employee of the United States by and through the Federal Bureau of Prisons, and was acting within the scope of his duties and employment at all times pertinent to the allegations relating to him in the Complaint.

Zane David Memeger /gm
ZANE DAVID MEMEGER
United States Attorney

Dated: Nov 2, 2011

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions: [redacted]

Case ID: CIV-NER-2013-00286 **Short Description:** PEREZ V. UNITED STATES OF AMERICA

[redacted]

Case Login Information

Reference Number	1:12-cv-02424-YK-MCC
Short Description	PEREZ V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$50,000.00
Estimated Amount	$
Office	Harrisburg
Jurisdiction	MIDDLE DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	01/15/2016
Type	Settled
Reason Sought	
Amount offered	$
Total Amount Paid	$2,500.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	02/14/2013
Date Filed	12/05/2012

Case Progress

Current Owner	ROBERT JENSEN
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1331 FEDERAL QUESTION: OTHER CIVIL RIGHTS
Further Case Classification	
Comments	

Jose A. Perez
Name and Prisoner/Booking Number
USP Canaan, Reg. No.: 56868-066
Place of Confinement
P.O. Box 300
Mailing Address
Waymart, PA 18472
City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

FILED
SCRANTON
DEC 0 5 2012
Per
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF

Jose A. Perez
(Full Name of Plaintiff) Plaintiff,

vs.

(1) United States of America
(Full Name of Defendant)

(2)

(3)

(4)

Defendant(s).

☐ Check if there are additional Defendants and attach page 1-A listing them.

CASE NO. 12-2424
(To be supplied by the Clerk)

CIVIL RIGHTS COMPLAINT BY A PRISONER

☒ Original Complaint
☐ First Amended Complaint
☐ Second Amended Complaint

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:
   - ☐ 28 U.S.C. § 1343(a); 42 U.S.C. § 1983
   - ☐ 28 U.S.C. § 1331; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).
   - ☒ Other: 28 U.S.C. § 2671 Federal Tort Claim Act § 1346

2. Institution/city where violation occurred: U.S Penitentiary Canaan, Waymart, Pa.

B. DEFENDANTS

1. Name of first Defendant: United States of America. The first Defendant is employed as: Federal Bureau of Prisons (Position and Title) at USP Canaan (Institution).

2. Name of second Defendant: _____. The second Defendant is employed as: _____ (Position and Title) at _____ (Institution).

3. Name of third Defendant: _____. The third Defendant is employed as: _____ (Position and Title) at _____ (Institution).

4. Name of fourth Defendant: _____. The fourth Defendant is employed as: _____ (Position and Title) at _____ (Institution).

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

1. Have you filed any other lawsuits while you were a prisoner? ☐ Yes ☒ No

2. If yes, how many lawsuits have you filed? N/A. Describe the previous lawsuits:

   a. First prior lawsuit:
      1. Parties: N/A v. _____
      2. Court and case number: _____.
      3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) N/A.

   b. Second prior lawsuit:
      1. Parties: N/A v. _____
      2. Court and case number: _____.
      3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) N/A.

   c. Third prior lawsuit:
      1. Parties: N/A v. _____
      2. Court and case number: _____.
      3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) N/A.

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

D. CAUSE OF ACTION

COUNT I

1. State the constitutional or other federal civil right that was violated: _____

2. **Count I.** Identify the issue involved. Check only one. State additional issues in separate counts.

☐ Basic necessities ☐ Mail ☐ Access to the court ☒ Medical care
☐ Disciplinary proceedings ☐ Property ☐ Exercise of religion ☐ Retaliation
☐ Excessive force by an officer ☐ Threat to safety ☐ Other: food poison

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count I. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

On June 25, 2011, Plaintiff consumed meals served by the institution at mainline at USP Canaan and contracted salmonella and was sick for approximately 14 days with numerous symptoms. Plaintiff is suiting the United states , not its employes.

The food was not prepared or served properly and safe

Plaintiff was denied medical treatment.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

Plaintiff will file a memorandum of law in support for his claim within 30 days.

5. **Administrative Remedies:**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐ Yes ☐ No

b. Did you submit a request for administrative relief on Count I? ☒ Yes ☐ No

c. Did you appeal your request for relief on Count I to the highest level? ☒ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____

COUNT II

1. State the constitutional or other federal civil right that was violated: N/A

2. **Count II.** Identify the issue involved. Check **only one.** State additional issues in separate counts.

☐ Basic necessities ☐ Mail ☐ Access to the court ☐ Medical care
☐ Disciplinary proceedings ☐ Property ☐ Exercise of religion ☐ Retaliation
☐ Excessive force by an officer ☐ Threat to safety ☐ Other: _____

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count II. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

N/A

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

N/A

5. **Administrative Remedies.**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐ Yes ☐ No

b. Did you submit a request for administrative relief on Count II? ☐ Yes ☐ No

c. Did you appeal your request for relief on Count II to the highest level? ☐ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. N/A

COUNT III

1. State the constitutional or other federal civil right that was violated: N/A

2. **Count III.** Identify the issue involved. Check **only one**. State additional issues in separate counts.

☐ Basic necessities ☐ Mail ☐ Access to the court ☐ Medical care
☐ Disciplinary proceedings ☐ Property ☐ Exercise of religion ☐ Retaliation
☐ Excessive force by an officer ☐ Threat to safety ☐ Other: _____

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count III. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

N/A

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

N/A

5. **Administrative Remedies.**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? ☐ Yes ☐ No

b. Did you submit a request for administrative relief on Count III? ☐ Yes ☐ No

c. Did you appeal your request for relief on Count III to the highest level? ☐ Yes ☐ No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. N/A

If you assert more than three Counts, answer the questions listed above for each additional Count on a separate page.

E. REQUEST FOR RELIEF

State the relief you are seeking:
Plaintiff is seeking a total of 50,000.00 for pain and suffering and long term health issues.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 28, 2012
DATE

SIGNATURE OF PLAINTIFF

(Name and title of paralegal, legal assistant, or other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

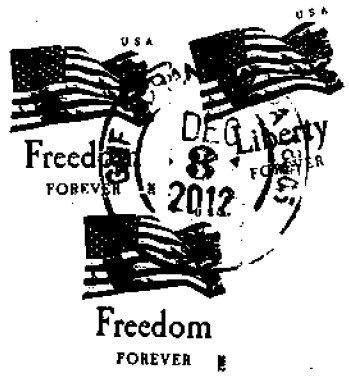
All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.

JOSE A PEREZ
USP CANAAN
REG NO 56868 066
P O BOX 300
WAYMART PA 18472

NO FEE
ENCLOSED

RECEIVED
SCRANTON
DEC 05 2012
LEGAL MAIL
MARY E. D'ANDREA, CLERK
Per
DEPUTY CLERK

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYVANIA
235 NORTH WASHINGTON AVENUE
P O BOX 1149
SCRANTON PA 18501 1148



Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-NER-2013-00975 **Short Description:** GLASSCHO V. FENSTERMAKER ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:13-cv-01115-JEJ-MCC
Short Description	GLASSCHO V. FENSTERMAKER ET AL
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$
Estimated Amount	$
Office	Harrisburg
Jurisdiction	MIDDLE DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	06/25/2015
Type	Settled
Reason	
Sought	
Amount offered	$2,000.00
Total Amount Paid	$2,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	06/07/2013
Date Filed	04/26/2013

Case Progress

Current Owner	ROBERT JENSEN
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983 CIVIL RIGHTS ACT
Further Case Classification	
Comments	

IN THE UNITED STATES DISTRICT COURT
(MIDDLE PENNSYLVANIA)

Kevin Glasscho

-vs-

U.S.P. Administrative Remedy Coordinator Erika Fenstermaker -and- The United States of America.

Civil case # 1:13-CV-1115

Federal judge; _____

FILED
SCRANTON
APR 26 2013
PER _____ DEPUTY CLERK

Authorization for the clerk office to receive a certified copy of my inmate trust account for the past six months as well as payments from the account in the amounts specified by §28 U.S.C. 1915(b)

I swear under title 28 U.S.C. 1746 the above is my true wishes to proceed on the prosecution of my Bivens civil suit.

Respectfully submitted,

#44166-037
Kevin Glasscho

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

Kevin Glasscho

-vs-

U.S.P. Administrative Remedy Coordinator Erika Fenstermaker, and United States of America.

FEDERAL TORT CLAIM ACT 28 U.S.C. 2676
AND BIVENS ACTION UNDER 42 U.S.C. 1983

1) Kevin Glasscho currently resides at F.C.I. Schuylkill, P/O Box 759 Minersville, P.A. 17954 The plaintiff is acting in pro-se cpacity and request that this claim be construed liberally under Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972) also; Doolittle v. Holmes, 306 Fed Appx 133 (2009).

INTRODUCTION

2) This is a civil action being filed in compliance with the Federal Tort Claim Act 28 U.S.C. 2676-79. Before this act was federally created agency's could be sued for it's torts if Congress had given the agency the power to "sue and be sued". Under the FTCA, however;

[the authority of any federal agency to sue or be sued in it's own name shall not be construed to authorize suits against such federal agency on claim which are cognizable under 28 U.S.C. 1346(b)]

Instead, the remedies provided by the FTCA are the exclusive remedy for claims that are cognizable under 28 U.S.C.A. 1346(b), which grants the federal district court jurisdiction over tort claims against the United States.

Under 28 U.S.C.A. 2679(a), the statutory authority of a federal agency to be sued does not permit a tort suit directly against the agency if the suit is based on conduct covered under the FTCA, Instead the United States must be named as the defendant. Moreover, the authority of a federal agency to sue or be sued in its own name does not constitute a waiver of the government's sovereign immunity separate and apart from the provision of the FTCA; and unless some other act provides a waiver of sovereign immunity, a federal agency may not be sued in tort even if the action is based on a tort that is not covered by the FTCA. The effect of 28 U.S.C.A. 2679(a) is that tort actions against suable federal agencies are placed on the same footing as actions against agencies that do not have the power to sue or be sued.

3) The FTCA was amended in 1988 to provide that the remedy against the United States under the FTCA "for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or ommission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action". This provision was intended to substitute the United States as the only permissible defendant in all common-law tort actions against federal employees who were acting in the scope of employment. The amendment also provides that "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against employee or the employee's estate is precluded without regard to when the act or omission occurred.

4) Under 28 U.S.C.A. 2679(b)(1), a tort claim against a federal employee who was acting within the scope of his or her employment must proceed exclusively against the United States under the Federal Tort Claims Act, even if this procedure leaves the plaintiff without a remedy. The plaintiff may be left without any remedy, for example, when the claim is based on acts for which the United States may not be sued under the FTCA, or when the FTCA claim is barred by the statute of limitations.

JURISDICTION

5) This action is being brought pursuant to the Federal Tort Claims Act under Title 28 U.S.C. 2671 thru 2679.

FACTS

6) The plaintiff listed above is currently residing at **F.C.I. Schuylkill P/O Box 759, Minersville, P.A. 17954** . The plaintiff has individually filed [i.e. exhausted remedy] standard 95 as required under the FTCA.

7) The defendant, United States is being sued directly for negligence, negligence per se, wrongful acts or omission of any employee of the government while acting within the scope of his office or employment. Can be served at Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N.W. Washington, D.C. 20530.

8) On or about 6-25-11. **Kevin Glasscho** and other inmates not mentioned went to mainline and consumed a poultry product [i.e. Chicken Fajitas] that was spoiled and/or contaminated with "Salmonella Bacterial Poisoning." **Kevin Glasscho** and other inmates not mentioned ingested the Salmonella bacterial poison by way of chicken fajitas.

9) On or about 6-26-11, **Kevin Glasscho** and other inmates not mentioned began to suffer excruciating pain and symptoms which included but were not limited to severe headache's, diarrhea, abdominal pains, nausea, chills, vomitting, inability to eat, and profuse sweating.

10) **Kevin Glasscho** was seen by medical staff here and was given a cup of Gatorade and two asprin. However, was still being fed meals from the contaminated kitchen which made the sickness [Salmonella bacteria poison] re-enter the plaintiff's body after being provided with Gatorade and asprin.

11) The Health Inspector after being notified by Wayne Memorial Hospital, following CDC policies and/or regulation came to USP Canaan and closed the kitchen here until they sanitized the food service department and passed inspection.

12) The institution at [U.S.P. Canaan] stayed on emergency lockdown and/or restrictive movement status from 6-26-11 thru 7-15-11. The institution failed two inspections and fired approximately 150 inmates who worked in the kitchen and were also poisoned.

13) On or about 7-11-11, the kitchen here passed it's third inspection and could now operate. On or about 7-13-11, the kitchen held an orientation for the remaining 60 kitchen workers (inmates).

14) The plaintiff's remained sick and disoriented during 6-26-11 thru 7-13-11. Neither of the plaintiff's was requested to provide a stool sample [for culture testing] and/or blood test in order to diagnos properly the plaintiff's illnesses. However, if an inmate did in fact work in food service and contracted the Salmonella food poisoning, that inmate had to take a stool sample in order to be cleared to work for food service once again. **See Exhibit A, B, and C.**

Salmonella poisoning, staff negligence, and deliberate refusal to treat plaintiff's for symtoms

Paragraph's 1 thru 14 are re-alleged here as if fully set forthe herein.

15) Under 18 U.S.C. 4041 & 4042(a)(2) the Bureau of Prisons has mandated duty to provide healthy and nutritious meals to all inmates here at U.S.P. Canaan.

16) On June 25, 2011, the B.O.P. was in breach of it's mandated duties under the policies and regulation implemented by Congress when they served the plaintiff and other inmates not mentioned, inadequate, spoiled and otherwise unhealthy food.

Bureau of Prisons
Health Services
Clinical Encounter

EXHIBIT A

Inmate Name: GLASSCHO, KEVIN			Reg #: 44166-037
Date of Birth: 09/12/1962	Sex: M Race: BLACK		Facility: CAA
Encounter Date: 07/14/2011 10:37	Provider: VanderHey-Wright, Jayne		Unit: E04

Sick Call/Triage encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** VanderHey-Wright, Jayne PA-C

Chief Complaint: Headache

Subjective: c/o headache denies taking any OTC pain reliever. States he believes that he is with a fever. He states that he had diarrhea from the food borne illness. He currently denies any diarrhea.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma:

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
07/14/2011	10:39 CAA	98.4	36.9	Oral	VanderHey-Wright, Jayne PA-C

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
07/14/2011	10:39 CAA	75			VanderHey-Wright, Jayne PA-C

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
07/14/2011	10:39 CAA	128/87	Left Arm			VanderHey-Wright, Jayne PA-C

Weight:

Date	Time	Lbs	Kg	Waist Circum.	Provider
07/14/2011	10:39 CAA	220.0	99.8		VanderHey-Wright, Jayne PA-C

Exam:

General

Appearance/Nutrition

Yes: Appears Well, NAD, WD/WN, Alert and Oriented x 3

Pulmonary

Auscultation

Yes: Clear to Auscultation Bilaterally

Cardiovascular

Auscultation

Yes: Regular Rate and Rhythm (RRR), Normal S1 and S2

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type

EXHIBIT B

Inmate Name: GLASSCHO, KEVIN
Date of Birth: 09/12/1962
Encounter Date: 07/14/2011 10:37
Sex: M Race: BLACK
Provider: VanderHey-Wright, Jayne
Reg #: 44166-037
Facility: CAA
Unit: E04

Description	ICD9	Status	Status Date	Progress	Type
Headache	784.0	Current	07/14/2011	Initial	Temporary/Acute

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Ibuprofen Tablet	07/14/2011 10:37	600mg Orally -three times a day PRN x 7 day(s)

Indication: Headache

Disposition:

Follow-up at Sick Call as Needed

Patient Education Topics:

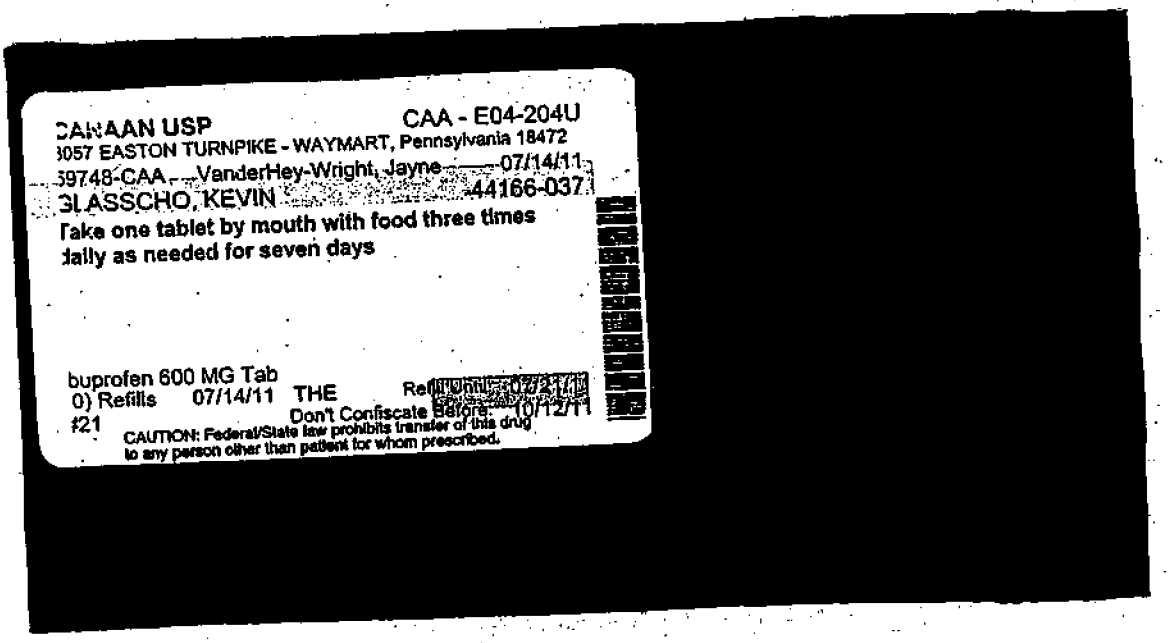
Date Initiated	Format	Handout/Topic	Provider	Outcome
07/14/2011	Counseling	Plan of Care	VanderHey-Wright,	Verbalizes Understanding

Return to normal diet and exercise. Maintain fluids. Take ibuprofen for headache.

Copay Required: Yes **Cosign Required:** No
Telephone/Verbal Order: No

Completed by VanderHey-Wright, Jayne PA-C on 07/14/2011 10:47 .

EXHIBIT C


CANAAN USP
CAA - E04-204U
3057 EASTON TURNPIKE - WAYMART, Pennsylvania 18472
59748-CAA VanderHey-Wright, Jayne 07/14/11
BLASSCHO, KEVIN 44166-037
Take one tablet by mouth with food three times daily as needed for seven days
buprofen 600 MG Tab
0) Refills 07/14/11 THE
f21
Don't Confiscate Before: 10/12/11
CAUTION: Federal/State law prohibits transfer of this drug to any person other than patient for whom prescribed.

17) As a proximate result from their negligence each of the above mentioned and other unmentioned inmates received Salmonella bacterial poisoning.

18) As a proximate result from this breach in mandated duties the plaintiff inmate's right's were violated.

A. Plaintiff has the right to expect that staff and/or other personel will treat the plaintiff as a human being in a respectful, impartial and fair manner.

B. Plaintiff has the right to be informed and know the rules and procedures and/or schedules concerning the operation of this institution.

C. Plaintiff has the right to health care which includes nutritious meals, etc. etc.

19) Paragraph 18(a) was breached when placed under "emergency lockdown quarantine" status and was denied adequate medical attention.

20) Paragraph 18(b) was breached when the warden failed to pass out memorandum's providing inmates with notices that the institution was on lockdown status and how long the status was going to last.

21) Paragraph 18(c) was breached when the plaintiff was served inadequate, spoiled and otherwise unhealthy food from an unsanitary kitchen that was contaminated and that contamination made the plaintiff ingest Salmonella poisoning.

22) As a direct and proximate result of plaintiff being infected with the Salmonella bacteria due to U.S.P. Canaan staff negligence, the plaintif suffered severe and extremely painful symptoms that included fever, vomiting, diarrhea, nausea, chills and bone and muscle pain. Further, each of the above plaintiff was forced to endure the pain associated with the above mentioned symptoms in which plaintiff suffered by being infected with "Salmonella bacteria."

23) The actions and omissions of U.S.P. Canaan staff on June 25, 2011 in preparing and serving food to the plaintiff and others in the inmate population in whole, amounts to gross negligence, a failure to adequately train and the denial of plaintiff's mandatory rights as provided under 18 U.S.C. 4042. Further, the intentional denial of providing me with necessary medical treatment for my illness constitute negligence, medical neglect.

24) The United States is responsible under FTCA for the acts described herein based on the wrongful acts or omissions of federal employees acting within the scope of he/she owes to his/her employer and the conduct is the type that he/she was hired to do.

25) Pursuant to 28 U.S.C. 2675(b) and 28 C.F.R.'s 142, the undersigned plaintiff is required to request a specific sum certain for the damages [he] sustained, and therefore each of the above mentioned plaintiff have requested specific damages and/or settlement with the agency responsible [Bureau of Prison] for Salmonella poisoning, staff negligence, and deliberate refusal to treat plaintiff for symptoms.

Damage Sought

Affidavit in support of claims made

For the facts stated in this civil complaint is within their personal knowledge and are true and correct.

The above name declare under the penalty of perjury under the laws of the United States of America that the above mentioned is true and correct.

Executed on this day April 23, of 2013.

Kevin Glassco #44166-037
FCI Schuylkill
P.O. Box 759
Minersville, P.A. 17954-0759

NO FEE
Enclosed
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SCRANTON
APR 26 2013
PER
DEPUTY CLERK

⇔44166

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KEVIN GLASSCHO,	:	1:13-cv-1115
	:	
Plaintiff,	:	
	:	Hon. John E. Jones III
v.	:	
	:	Hon. Martin C. Carlson
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

ORDER

October 14, 2014

AND NOW, upon consideration of the Report and Recommendation of Chief United States Magistrate Judge Martin C. Carlson (Doc. 44), recommending that the Plaintiff's motion for leave to amend the complaint (Doc. 40) be denied because the request to amend is untimely and amendment would be futile, and noting that neither party has filed objections and that there is no clear error on the record,[1] *see Nara v. Frank*, 488 F.3d 187, 194 (3d Cir. 2007) (explaining that

[1] When parties fail to file timely objections to a magistrate judge's report and recommendation, the Federal Magistrates Act does not require a district court to review the report before accepting it. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). As a matter of good practice, however, the Third Circuit expects courts to "afford some level of review to dispositive legal issues raised by the report." *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987). The advisory committee notes to Rule 72(b) of the Federal Rules of Civil Procedure indicate that "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." FED. R. CIV. P. 72(b), advisory committee notes; *see also Henderson*, 812 F.2d at 878-79 (stating that "the failure of a party to object to a magistrate's legal conclusions may result in the loss of the right to de novo review in

"failing to timely object to [a report and recommendation] in a civil proceeding may result in forfeiture of *de novo* review at the district court level") and the Court finding Judge Carlson's analysis to be thorough, well-reasoned, and fully supported by the record **IT IS HEREBY ORDERED THAT:**

1. The Report and Recommendation of Magistrate Judge Carlson (Doc. 44) is **ADOPTED** in its entirety.
2. The Plaintiff's Motion for Leave to Amend the Complaint (Doc. 40) is **DENIED**.
3. This matter is **REMANDED** to Magistrate Judge Carlson for further pre-trial management.

s/ John E. Jones III
John E. Jones III
United States District Judge

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the district court"); *Tice v. Wilson*, 425 F. Supp. 2d 676, 680 (W.D. Pa. 2006) (holding that the court's review is conducted under the "plain error" standard); *Cruz v. Chater*, 990 F. Supp. 375-78 (M.D. Pa. 1998) (holding that the court's review is limited to ascertaining whether there is "clear error on the face of the record"); *Oldrati v. Apfel*, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998) (holding that the court will review the report and recommendation for "clear error"). The Court has reviewed the magistrate judge's report and recommendation in accordance with this Third Circuit directive.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KEVIN GLASSCHO,	:	1:13-cv-1115
	:	
Plaintiff,	:	
	:	Hon. John E. Jones III
v.	:	
	:	Hon. Martin C. Carlson
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

ORDER

March 31, 2015

Currently before the Court is Chief United States Magistrate Judge Martin C. Carlson's Report and Recommendation (Doc. 69) recommending that the undersigned resume full management of the instant case and schedule pretrial and trial proceedings. Previously, on March 6, 2015 we issued an Order adopting a prior R&R of Judge Carlson's recommending that we deny Plaintiff's Motion for Summary Judgment, noting that genuine issues of disputed facts remained rendering the matter inappropriate for summary judgment. We adopted the recommendation, noting that Plaintiff had not filed objections thereto. Following our adoption of the recommendation, Plaintiff filed objections (Docs. 68, 70, 71 and 72). We have reviewed the Plaintiff's submissions and note that they do not alter our determination that factual issues remain in this matter such that summary

judgment is inappropriate. Further, we agree with the Magistrate Judge that this matter is now in a pre-trial posture. Accordingly, we will schedule a pre-trial conference so that the Plaintiff can be presented by videolink from USP-Lee, where he is currently incarcerated.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Report and Recommendation of Magistrate Judge Carlson (Doc. 69) is **ADOPTED** in its entirety.

2. A pre-trial conference shall be conducted on **May 18, 2015 at 10:00 a.m.** Counsel for the United States shall appear in Harrisburg Chambers and the Plaintiff shall be presented via videolink from USP-Lee.

s/ John E. Jones III
John E. Jones III
United States District Judge

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2013-01081 Short Description: WILKERSON V. UNITED STATES OF AMERICA

[redacted]

Case Login Information

Reference Number	3:13-cv-01499-MEM-MCC
Short Description	WILKERSON V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$
Estimated Amount	$
Office	Scranton
Jurisdiction	MIDDLE DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	07/06/2015
Type	Settled
Reason Sought	
Amount offered	$1,500.00
Total Amount Paid	$1,500.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	06/07/2013
Date Filed	06/04/2013

Case Progress

Current Owner	ROBERT JENSEN
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1331 FEDERAL QUESTION: OTHER CIVIL RIGHTS
Further Case Classification	
Comments	

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

SCRANTON

ANTHONY WILKERSON
(Reg. No.: 07999-007)
PLAINTIFF,

vs.

UNITED STATES OF AMERICA,

DEFENDANT.

Docket No.: 13-CV-1499

Civil Complaint Pursuant To The Federal Tort Claim Act, 28 U.S.C. §§ 1346, 2671, & 2680.

FILED
SCRANTON
JUN 04 2013
PER
DEPUTY CLERK

I. JURISDICTION

A) Plaintiff's mailing address, register number, and present place of confinement: United States Penitentiary P.O. BOX 300 E1 #104, WAYMART, PA 18472-0800.

ANTHONY WILKERSON #07999-007

B) Defendant: UNITED STATES of AMERICA.

C) Agent: RONNIE HOLT (WARDEN)

At the time of claim(s) alleged in this complaint arose, was the Agent employed by the Federal Government? The answer is YES.

In fact the Agent, RONNIE HOLT, was employed as WARDEN/CHIEF ADMINISTRATOR at the UNITED STATES PENITENTIARY CANAAN.

D) Agent: Doctor, W. DOBUSHAK, is employed as a Clinical Director/ Medical Department Supervisor with the FEDERAL BUREAU of PRISONS.

At the time of claim(s) alleged in this complaint arose, was the Agent employed by the Federal Government? The answer is YES.
In fact the Agent, Doctor, W. Dobushak, is employed by the Federal Government as the Clinical Director of the medical department at USP CANAAN.

E) Using the outline of the aforementioned Agents, I use this saection to include the above kind of information for the remaining Agents.

Angela P. Dunbar is employed as Associate Warden/Acting Warden with the Federal Bureau of Prisons. Agent is amployed by the Federal Government as Associate Warden/Acting Warden for USP CANAAN. B. Sullivan is employed by USP CANAAN as the Hospital Administrator with the Federal Bureau of Prisons. Agent is a Federal Governemnt employee at above mentioned facility (Hospital Administrator). Mr. Ryan is employed as the Food Service Administrator with the Federal Bureau of Prisons. Agent is employed by the Federal Government at USP CANAAN. Correctional counselor in Unit E1 is a unit counselor at USP CANAAN. HE is a Federal Bureau of Prisons employee. He's also employed by the Federal Government.

II PREVIOUS LAWSUITS

A) Have you begun any other lawsuits in State or Federal Court relating to your imprisonment? The answer to the above question is NO!

B) If the answer is Yes, describe the lawsuit in the space below. I know if I fail to comply with this provision, it may result in the summary denial of my complaint.

This section does not apply to me.

1) Parties to previous lawsuit(s): N/A Defendants: N/A.

2) Court: N/A

3) Docket Number: N/A

4) Name of Judge to whom case was assigned: N/A

5) Type of Case: N/A

6) Deposition of Case: N/A

7) Approximate date of lawsuit: N/A

8) Approximate date of disposition: N/A

A) Is there a prisoner grievance procedure in the institution?

YES!

B) Did you present the facts relating to your complaint in the prison grievance procedure? YES!

C) If your answer is "yes", what steps did you take?

I would like to state for the record that I utilized all B.O.P. Procedures Administrative Remedies Forms at this level, inmate request to staff, BP-8, BP-9; Regional Level, BP-10; and Central Office Level, BP-11. Please Note: For several months after pandemic breakout at USP CANAAN'S dining hall, I sent several requests to staff for updates of my medical condition to which I never received a response to any of them. What were the results? All administrative remedies were denied some were never responded to by Defendant.

D) If your answer is "no", explain why not: N/A

E) Did you complain to prison authorities? Yes I did!

F) If your answer is "yes", to the above question:

1) What steps did you take? Plaintiff has filed administrative remedies that are required by the B.O.P. (Tort Claim hasn't been answered so Plaintiff can't provide the filing number at this time).

G) If your answer is "no" explain why not: N/A

H) Attach copies of your request for administrative remedy and the responses you received. If you cannot do so explain why:

Plaintiff will send all copies of grievances/or attach any requests, and their respones that have been afforded to him. Please Note: Plaintiff has utilized the inmate grievance system to the fullest, and have been informed by F.B.O.P. E Unit Counselor that some remedies have been lost and/or misplaced, and some have been returned without responses.

IV STATEMENT OF CLAIM

I am the aforementioned Plaintiff listed on the beginning pages

of this moving motion (Civil Action) as ANTHONY WILKERSON #07999-007

On June 26th 2013, the Plaintiff had become extremely ill along with the rest of the inmate population here at USP CANAAN. Plaintiff and inmates were fed contaminated processed chicken cubes served in the meal to Plaintiff, which had caused Plaintiff to contract the Salmonella bacteria, along with the population and the staff members who ate the meal. The institution went on lockdown and Plaintiff was locked into the cell without knowing the cause of his sickness, and without any medical treatment whatsoever. Plaintiff had contacted the correctional officer who was on duty at the time, and notified him that he was feeling sick (vomiting, light-headedness, diarrhea). The next morning your humble Plaintiff was feeling even more ill, blood in the stool, hot/cold sweats and more vomiting. Plaintiff was beginning to panic from this unfortunate experience, and tried to get help from health services, only to be told that everybody is sick, so they will get to you when they can. Plaintiff was fed food that was reported to staff members on duty in the kitchen that the food not only had a bad oder, but was lefted out all night and should be threw out. The kitchen workers (inmates), had duly reported this fact to kitchen staff but was ignored. Stool samples were taken and tested. Salmonella Strain II had developed in the systems of thos tested. The staff members willfully, knowingly, and intentionally fed me contaminated food products. This was clear negligence on behalf of Defendant. The food service personnel were given a "warning" i.e., of the chicken cubes being bad or contaminated and still the staff served it anyway to Plaintiff and the inmate population here at USP CANAAN. Mr. Ryan, Food Service Administrator and his staff placed Plaintiff in danger and in harms way, causing pain and suffering, mental anguish, as

well as the fear of eating food served from the dinning hall while this lockdown status remained in effect. The Food Administrator Mr. Ryan as well as his staff should have known that "prison food must be prepared and served under conditions which don't present an immediate danger to the health and well being of inmates who consume it.

V REQUEST FOR RELIEF

State exactly what you want the Court to do for you. If you are a state prisoner or a federal prisoner, and seek relief which effects the facts or durartion of your imprisonment (for example: illegal detention, restoration of good time, expungment of records, or parole release), you must first file your claim on a habeas corpus form pursuant to 28 U.S.C. §§ 2241, 2254, or 2255.

Plaintiff is seeking a preliminary injunction against the Defendant to attain medical care, (extensive lab work, stool testing, blood test, etc...) and whatever the Court may deem just and proper. Plaintiff weeks to be compensated for pain and suffering, mental aguish, and compensatory damages. Also, for attorney fees and court costs to be paid by Defendant and/or any other unforeseen hidden costs and whatever the Court may deem just.

VI JURY DEMAND

The Plaintiff does "YES" request a trial by jury (see: Fed. R. Civ. P. 38).

Please Note: The Agents of the Defendant have acted standoffish, combative, and uncooperative when Plaintiff requested copies of medical status reports, results, or finding of their conducted test. So please forgive your humble Plaintiff for putting forth the results. Please take this complaint as a good faith effort while Plaintiff humbly waits on Defendant to turn over said documents.

DECLARATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 11

I, the undersigned, certify to the best of my knowledge, information, and belief, that this complaint is in full compliance with Rule 11(a) and (b) of the Federal Rules of Civil Procedure.

The undersigned also recognizes that the failure to comply with Rule 11(a) and (b) may result in sanction, monetary or non-monetary pursuant to Federal Rule of Civil Procedure 11(c).

The Plaintiff hereby requests the Court issue all appropriate service and/or notices to the Defendant.

PLEASE NOTE:

Your humble Plaintiff is not an attorney and should not be considered to be one, so please excuse any mistakes that may have been made during the production of this complaint.

May 28th 2013

ANTHONY WILKERSON
#07999-007
UNITED STATES PENITENTIARY
CANAAN, P.O. BOX 300 E1 #104
WAYMART, PA 18472-0800

CERTIFIED M

ANTHONY WILKERSON
#07999-007
united states penitentiar
Canaan, P.O. BOX 300 EI #
WAYMART, PA 18472-0800

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CONFIDENTIAL LEGAL MAIL
May 29th 2013

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY WILKERSON,	:	
	:	
Plaintiff	:	**CIVIL ACTION NO. 3:13-1499**
	:	
v.	:	**(MANNION, D.J.)**
UNITED STATES OF AMERICA,	:	**(CARLSON, M.J.)**
	:	
Defendant	:	

M E M O R A N D U M

Plaintiff Anthony Wilkerson is a prisoner housed at the United States Penitentiary, Canaan. He is one of several inmates who have filed suit in this district after allegedly contracting salmonella poisoning in June 2011 when the prison served fajitas that were made with bad chicken. At issue here is whether the administrative tort claim filed by plaintiff in taking steps to comply with an exhaustion requirement was insufficient because he failed to sign it, and whether plaintiff received notice that his claim had been rejected on technical grounds and given an opportunity to sign his administrative claim form.

Pending before the court is the report and recommendation of Judge Carlson, (Doc. 27), recommending that defendant's motion to dismiss for lack of jurisdiction, (Doc. 22), be denied because the factual record needs more development. Judge Carlson's report is **ADOPTED IN ITS ENTIRETY**.

I. STANDARD OF REVIEW

When objections are timely filed to the report and recommendation of a magistrate judge, the district court must review de novo those portions of the report to which objections are made. 28 U.S.C. §636(b)(1); Brown v. Astrue, 649 F.3d 193, 195 (3d Cir. 2011). Although the standard is de novo, the extent of review is committed to the sound discretion of the district judge, and the court may rely on the recommendations of the magistrate judge to the extent it deems proper. Rieder v. Apfel, 115 F.Supp.2d 496, 499 (M.D.Pa. 2000) (citing United States v. Raddatz, 447 U.S. 667, 676 (1980)).

For those sections of the report and recommendation to which no objection is made, the court should, as a matter of good practice, "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b), advisory committee notes; see also Univac Dental Co. v. Dentsply Intern., Inc., 702 F.Supp.2d 465, 469 (M.D.Pa. 2010) (citing Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987) (explaining judges should give some review to every report and recommendation)). Nevertheless, whether timely objections are made or not, the district court may accept, not accept, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. §636(b)(1); Local Rule 72.31.

II. DISCUSSION

As thoroughly explained by Judge Carlson, defendant's motion to dismiss (construed as a motion for summary judgment) argues that plaintiff has failed to exhaust his administrative remedies before filing his lawsuit under the Federal Tort Claims Act, 28 U.S.C. §2670 *et seq.* ("FTCA"). Defendant supports this motion by providing a declaration of a paralegal employed by the Bureau of Prisons, along with other exhibits, (Doc. 23-1), which reveal that plaintiff, although he submitted an administrative tort claim form SF-95 that was complete in most respects, failed to sign the form. A letter informing plaintiff of the rejection of his claim for his failure to sign it was sent. Plaintiff in turn submitted an affidavit, (Doc. 25), stating that he never received the rejection letter. He further noted "that if I did get this letter that is plainly explaining that all I needed to do was sign and resubmit my claim, I would have done just that." He does not dispute that the letter was sent, but avers he never received it.

Judge Carlson's report thoroughly discusses the exhaustion requirements and statute of limitations of the FTCA. In this case, plaintiff's failure to sign his form, and then respond to the letter informing him of that deficiency, caused him to fail to file a claim within two years of the alleged incident as required by the FTCA. However, equitable tolling is possible in some cases where a plaintiff "exercised due diligence in pursuing and preserving his claim." Santos ex rel. Beato v. U.S., 559 F.3d 189, 197 (3d Cir.

2009)(*citing* Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990)).

The court notes that defendant has filed objections, (Doc. 30), to Judge Carlson's report, arguing that the language of 28 C.F.R. §14.2 is plain and speaks for itself and requires an executed form, and that Bialowas v. U.S., 443 F.2d 1047 (3d Cir. 1971), requires that the technical requirements of the regulations be met. Defendant relies on Pa. v. Nat'l Assoc. of Flood Insurers, 520 F.2d 11 (3d Cir. 1975)(overturned on other grounds) for the same proposition. The court agrees with Judge Carlson that Bialowas is distinguishable because plaintiff there only partially filled out his form, failed to include a statement of sum certain, and then, when given notice of the deficiency via telephone conversation, failed to rectify the problems with his form. Moreover, the Third Circuit cases relied on by defendant, including White-Squire v. U.S. Postal Serv., 592 F.3d 453 (3d Cir. 2010), focus on plaintiff's failure to provide a "statement of a sum certain," something which plaintiff here completed properly.

Defendant's objections fail to address plaintiff's claims that he was not presented with an opportunity to amend his mistake, and by extension, fail to address the possibility that equitable tolling is appropriate here. Defendant contends that the failure of plaintiff to submit a signed form ends the inquiry, but Judge Carlson's report explains thoroughly that equitable tolling, though rare, is sometimes appropriate where a plaintiff has acted to preserve his claim. Here, there is a factual question regarding whether tolling is

appropriate, as there are facts on the record suggesting he was acting diligently to pursue his claim properly. The court agrees with Judge Carlson that there are factual issues and credibility determinations that need to be examined in order to determine if plaintiff's administrative claims were exhausted, and the related issue of whether equitable tolling is appropriate in this case.

III. CONCLUSION

Given the factual issues and credibility determinations necessary to determine whether plaintiff received notice of the deficiency, and is potentially entitled to equitable tolling, Judge Carlson's report and recommendation is **ADOPTED IN FULL**. Defendant's motion, (Doc. 22), is **DENIED** without prejudice to the resolution of the case on a more fully documented motion for summary judgment, or a plenary hearing to address the factual issues. The case is referred to Judge Carlson for further proceedings in accord with his recommendation that a hearing or more fully documented summary judgment motions are necessary.

s/ *Malachy E. Mannion*
MALACHY E. MANNION
United States District Judge

Date: April 24, 2014

O:\Mannion\shared\MEMORANDA - DJ\CIVIL MEMORANDA\2013 MEMORANDA\13-1499-01.wpd

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2014-00863 Short Description: BUSH V. UNITED STATES OF AMERICA

[redacted]

Case Login Information

Reference Number	1:14-cv-01057-SHR-MCC
Short Description	BUSH V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$
Estimated Amount	$
Office	Harrisburg
Jurisdiction	MIDDLE DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	07/07/2015
Type	Settled
Reason	
Sought	
Amount offered	$1,500.00
Total Amount Paid	$1,500.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	06/05/2014
Date Filed	06/02/2014

Case Progress

Current Owner	ROBERT JENSEN
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1331 FED. QUESTION
Further Case Classification	
Comments	

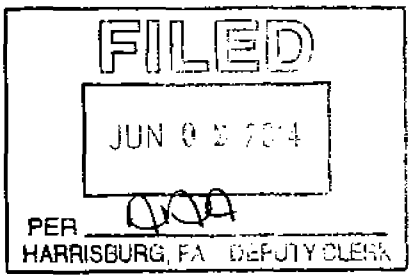
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DUMONT BUSH,
Plaintiff

v.

UNITED STATES OF AMERICA
Defendant

COMPLAINT
Civil Action No: 1:14-CV-1057



I. Jurisdiction & Venue

1. This is a civil action authorized by 28 U.S.C. §1331(a) to redress the deprivation, under color of federal law, of rights secured by the Constitution of the United States. This court has jurisdiction under 28 U.S.C. Section §1331. Plaintiff seeks declaratory relief pursuant to 28 U.S.C. Section §2201 and 2202. Plaintiff's claim for injunctive relief are authorized by 28 U.S.C. Section §2283 &2284 and Rule 65 of Federal Rules of Civil Procedure.

2. This cause of action arose in the Middle District of Pennsylvania. Therefore, venue is proper under 28 U.S.C. Section §1391(b)

II. Plaintiff

3. Dumont Bush is and was at all times mentioned herein an inmate at U.S.P. Canaan in the custody of the Bureau of Prison. He is currently at F.C.I. Schuylkill, P.O. Box 759, Minersville, PA.

III. Defendant

4. The United States of America (By Court's recommendation of Hon. Martin C. Carlson U.S.M.J.) Plaintiff using the named defendant as the United States of America. In it's inherent authority and legally responsible for the overall operation within the BOP and each institution under it's jurisdiction, including F.C.I. Schuylkill.

5. The above - named defendant, at all times mentioned in the complaint acted under color of federal law to deprive plaintiff of his, as set forth more fully below.

IV. Facts

6. Plaintiff asserts that he suffered from chicken tainted with salmonella bacteria which aggravated and worsen pre-existing medical condition. Re-occurring hemorrhoids (i.e. painful dilation of blood vessels in the anus, irritable bowel syndrome, blood in his stool excessive blood and bleeding, extreme gastro-intestinal discomfort). Upon information and belief, the entire prison population was placed on lockdown for approximately 20 days. During this time I requested for medical treatment to correction officers, care givers and the upper rankings of custodial personnel. (Ex 1 Newsletter in the Prison Legal News By Derek Gilna, an accurate and reliable source of media and journalistic coverage). Several websites are available concerning the salmonella poisoning at USP Canaan - GENUINE ISSUE

To preclude the misconception of the authenticity of this complaint, plaintiff submits medical reviews verifying a pre-existing medical complication: (Ex 2 - Documented medical evaluation, hemorrhoidectomy)

Chronological Order

Nov 1, 2012 Medical Review - Evaluation of recurrent hemorrhoids with bleeding

Feb 21, 2013 Medical Review - General Surgery or Anesthesia with Anoscopy

April 3, 2013 Lock-up Order - For Surgery

March 10, 2014 Request to Medical - Recurrent symptoms

V. Exhaustion of Legal Remedies

In accordance to court order dated May 21, 2014, the Hon. Sylvia H. Rambo, U.S.D.J. ordered plaintiff to file a seperate law suit no later then June 3, 2014.

VI. Legal Claim

The inadequate medical care, deliberate indifference, and cruel and unusual punishment voilated Dumont Bush rights. The constitutional provision of the Eight Amendment is related in this instant case. Cruel and unusual punishment under the Eight Amendment to the United States Constitution. An unjust, undeserved, infliction of suffering repugnant to the conscience of mankind. Having a pre-existing medical condition injurious in itself is likely to ripen eventually into a palpable physical injury. Due to no medical care provided to the plaintiff.

See:

Rhodes v. Chapman 452 U.S. 337, 347, 101 S.Ct. 2392,2399 69. L. Ed. 2d. 59,69 (1981).
Helling v. Mckinney 509 U.S. 25,35 113 S.Ct. 2475,2481, 125 L. Ed. 2d. 22,32 (1993).
Farmer v. Brennan 511 U.S. 825,837, 114 S.Ct. 1970,1979 128 L. Ed. 2d. 811,825 (1994).

The plaintiff has no plain, adequate or complete remedy at law to redress the wrong describe herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendant unless this court grants the declaratory and injunctive relief which the plaintiff seeks.

VII. Prayer For Relief

WHEREFORE, plaintiff respectfully prays that this court enter judgement granting plaintiff.

1) An order declaring that the defendant have acted in violation of the United States Constitution.
2) Plaintiff request an injunction compelling defendant to refer plaintiff to a specialist for corrective surgery of hemorrhoids and to perform the necessary surgery.
3) Plaintiff request compensatory damages in the amount of $120,000 against the defendant.
4) Punitive damages in the amount of $100,000 against the defendant.
5) A jury trial on all issues triable by jury.
6) Plaintiff's costs in this suit.
7) Any additional relief this court deems just, proper and equitable.

Respectfully Submitted,

DUMONT BUSH
Reg.No. 49590-066
F.C.I. Schuylkill
P.O. Box 759
Minersville, PA. 17954

Dated:

VERIFICATION

I have read the foregoing complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief. The exact number of days spent on lockdown are very near to the exact amount. I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

DUMONT BUSH, Pro Se

Dated: 5/30/14

CERTIFICATION OF SERVICE

I hereby certify that the foregoing Complaint Motion and Summons was postaged placed in the prison mail box to the following parties on this date under the penalty of perjury.

_____
(28 U.S.C. § 1746)

United States Attorney
P.O. Box 309
Scranton, PA. 18501-0309

Office of The Clerk
United States District Court
Middle District of Pennsylvania
U.S. Courthouse
228 Walnut Street
P.O. Box 983
Harrisburg, PA. 17108

Dated: 5/30/14

Dumont Bush
DUMONT BUSH, pro se



FCI/FPC SCHUYLKILL HEALTH SERVICES

Inmate Name: Bush Durrant

Inmate Number: 49590-066

Unit: 3B

Date: November 1, 2012

RE: Utilization Review Committee Decision Evaluation of recurrent hemorrhoids with bleeding.

Your case was reviewed and approved. Your consultation/ testing/procedure/surgery will be scheduled accordingly.

Your case was reviewed and will need a close follow up by your primary care physician at this time. If there is a change in your medical condition, a request will be re-submitted. Please watch your name on the call out for Health Services.

Your case was reviewed and considered an elective procedure and not medically necessary at this time. The request for the procedure is disapproved at this time. The medical staff will continue to monitor and provide treatment as necessary.

Your case was referred to the Northeast Regional Utilization Review Committee for final disposition. Approved

If you have any questions or concerns, please address it to your Primary Care Provider via cop-out or sign-up for triage between 6:30-6:45 a.m. on Monday, Tuesday, Thursday or Friday.

//signed//
E. Mace, D.O.. / Clinical Director
FCI/FPC Schuylkill

cc: Inmate Medical Record



FCI/FPC SCHUYLKILL HEALTH SERVICES

Inmate Name: Bush, Dumont

Inmate Number: 41590-066

Unit: 3B

Date: February 21 2013

RE: Utilization Review Committee Decision General surgery - CR Anesthesia with Anoscopy

Your case was reviewed and approved. Your consultation/ testing/procedure/surgery will be scheduled accordingly.

Your case was reviewed and will need a close follow up by your primary care physician at this time. If there is a change in your medical condition, a request will be re-submitted. Please watch your name on the call out for Health Services.

Your case was reviewed and considered an elective procedure and not medically necessary at this time. The request for the procedure is disapproved at this time. The medical staff will continue to monitor and provide treatment as necessary.

Your case was referred to the Northeast Regional Utilization Review Committee for final disposition.

If you have any questions or concerns, please address it to your Primary Care Provider via cop-out or sign-up for triage between 6:30-6:45 a.m. on Monday, Tuesday, Thursday or Friday.

//signed//
E. Mace, D.O.. / Clinical Director
FCI/FPC Schuylkill

cc: Inmate Medical Record

BP-S308.052 **ADMINISTRATIVE DETENTION ORDER** CDFRM MAY 94

U.S DEPARTMENTY OF JUSTICE **FEDERAL BUREAU OF PRISONS**

FCI Schuylkill
Institution

Date/Time: April 3, 2013 /10:30 pm

TO: Special Housing Unit Officer

FROM: T. Chmely / Lieutenant, (Name/Title)

SUBJECT: Placement BUSH, DUMONT (3 B) Reg. No. 49590-066
in Administrative Detention

_____ (a) Is pending a hearing for a violation of Bureau regulations;
_____ (b) Is pending investigation of a violation of Bureau regulations;
_____ (c) Is pending investigation or trial for a criminal act;
_____ (d) Is to be admitted to Administrative Detention

_____ (1) Since the inmate has requested admission for protection;

I hereby request placement in Administrative Detention for my own protection.

Inmate Signature/Register No.: _____

Staff Witness Printed Name/Signature: _____

_____ (2) Since a serious threat exists to individual's safety as perceived by staff, although person has not requested admission; referral of the necessary information will be forwarded to the UDC/DHO for appropriate hearing.

_____ (e) Is pending transfer or is in holdover status during transfer.
XXXXXXXXX (f) Is pending classification; or
_____ (g) Is terminating confinement in Disciplinary Segregation and has been ordered into Administrative Detention by the Warden's designee.

It is this officer's decision based on all the circumstances that the above named inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates, or to the security or orderly running of the institution because*
You are being placed in the Special Housing Unit per the Health Services Unit in preparation for Medical Treatment.

Therefore, the above named inmate is to be placed in Administrative Detention until further notice.
The inmate received a copy of this Order on (date/time) April 3, 2013 / 11:00 pm
Staff Witness Signature/Printed Name _____ / T. Chmely, Lieutenant Date 04-03-2013

*In the case of DHO action, reference to that order is sufficient. In other cases, the officer will make an independent review and decision, which is documented here.

Record Copy - Inmate Concerned (not necessary if placement is a result of holdover status); Copy - Captain; Copy - Unit Manager; Copy - Operation Supervisor - Administrative Detention Unit; Copy - Central File

(This form may be replicated via WP) Replaces BP-308(52) of JAN 88

BOP Settles Lawsuits Related to Food Poisoning at Pennsylvania Prison

by Derek Gilna

As previously reported in *Prison Legal News*, hundreds of federal prisoners at USP Canaan, a high-security federal prison northwest of Scranton, Pennsylvania, became sick after eating salmonella-contaminated chicken in June 2011. [See: *PLN*, August 2012, p.31].

Although Bureau of Prisons (BOP) officials denied reports of widespread food poisoning at the facility, saying at the time that there was "no truth in the rumors," the number of prisoners who had to be transported by ambulance to nearby medical centers resulted in coverage by the local news media.

Apparently, chicken that had been stored at room temperature for a week was used to prepare fajitas served to the prison population. Almost two hundred prisoners fell ill and dozens received some form of medical treatment. More than 90 food poisoning-related lawsuits were filed, resulting in average settlements of about $1,750 per claim according to an August 20, 2013 news report.

The BOP has long prided itself on how little it spends on prisoner food, noting that it saves money by buying food in bulk from brokers who know they have a ready market for expired and out-of-date commodities. Financial pressure means that prison staff sometimes serve food that probably should be thrown away.

"It is well known there was food poisonings and the staff here attempted to cover it up as well as cover up the fact that they did not give the proper medical treatment to everyone that became ill," said USP Canaan prisoner Timothy Daniels. He claimed he had suffered vomiting, abdominal pain and severe diarrhea, but received only minimal medical care. According to the Judgment Fund, which lists the federal government's litigation payouts, Daniels accepted $2,000 to settle his food poisoning suit.

Another USP Canaan prisoner, Calvin Smith, reported that 150 prisoners assigned to the kitchen were removed from their jobs after the salmonella outbreak. He settled his lawsuit against the BOP in May 2013 for $2,000. See: *Smith v. United States*, U.S.D.C. (M.D. Penn.), Case No. 3:13-cv-00323-JMM-MCC.

The largest settlement, in the amount of $5,000, went to prisoner Richard Randolph, who had to be hospitalized for three days due to salmonella poisoning. His case settled in January 2013. See: *Randolph v. United States*, U.S.D.C. (M.D. Penn.), Case No. 1:12-cv-00784-SHR-MCC.

There were no published reports indicating whether BOP kitchen staff had been disciplined as a result of the food poisoning incident, even though such employees are responsible for supervising all phases of kitchen operations – including the purchase and preparation of food for consumption by both prisoners and staff members. There were also no reports as to whether any prison employees suffered food poisoning.

Source: *http://legaltimes.typepad.com*

The "Invisible" Crisis of Correctional Health Care

by Cara Tabachnick

After 33 years behind bars, Alvin Entzminger, who was released in March, needed immediate medical attention for a host of chronic illnesses.

"I went into prison a healthy individual and came out suffering," claimed Entzminger, now in his late 50s.

Entzminger's story was one of several poignant testimonies provided by ex-prisoners at an October 9, 2013 conference on the health care challenges facing corrections systems.

As their stories demonstrated, such care is desperately needed by former prisoners like Edwin Lopez, 59, who had cycled in and out of jails and prisons since he was in his teens following the death of his mother. When he left prison, his HIV was untreated.

The lack of care has consequences far beyond its effect on an individual prisoner, Lopez warned.

"The community forgets we won't spend all of our life in prison – we will come home," Lopez told the conference. "If there is no medical or other support, we mostly will turn to violence and crime."

The prisoners were joined by correctional care physicians, researchers and academics from around the U.S. at the New York Public Library's Schomburg Center for Research in Black Culture in New York for a conference entitled, "Making the Invisible Visible: Addressing the Health Needs of the Formerly Incarcerated."

The conference, sponsored by the Spencer Cox Center for Health of St. Luke's and Roosevelt Hospitals, covered the broad range of health issues affecting incarcerated populations, including mental illness, HIV/AIDS and substance abuse.

Almost 85 percent of the 2.3 million people currently incarcerated and the almost 7 million people under correctional supervision (parole and probation) in the United States have chronic medical conditions like HIV or diabetes when released from prison, said Yale Assistant Professor Dr. Emily Wang, founder and co-director of Transitions Clinic.

Almost 40 percent of individuals are first diagnosed behind bars, noted Dr. Wang, whose clinic provides treatment for individuals with chronic diseases recently released from prison.

Yet while primary healthcare is a constitutional right in prisons and jails, the population is mostly served by a patchwork of providers and many don't have access to consistent care, the conference was told.

Burden on Hospitals

Over 85 percent of recently released prisoners are uninsured. Most utilize hospital emergency rooms for chronic care, severely overburdening public hospitals.

"There are significant health-related barriers to people returning home from

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DUMONT BUSH,
Plaintiff

v.

United States of America,
Defendant

Civil No. 14-CV-2412

(Judge Rambo)

(Magistrate Judge Carlson)

FILED
DEC 19 2014
PER
HARRISBURG, PA DEPUTY CLERK

Pursuant To The Federal Tort Claims Act, 28 U.S.C. 2675

Plaintiff, DUMONT BUSH, submits the instant motion pro se informa pauperis and relies upon the protection enunciated in Haines v. Kerner, 404 US 519 (1972); Estelle v. Gamble, 429 US 97 (1976)("That Pro Se, pleadings be held to less stringent standards then formal Pleadings drafted by licensed lawyers. Be liberally construed to do justice no matter how inartfully pleaded"); also see Fed. Rule. Civ. Proc. 8(f) ("All pleadings shall be Construed to do substantial justice").

Introduction

In compliance with Fed. Rule. Civ. Proc. 8 (a), Plaintiff submits this complaint.

Jurisdiction

Federal District Courts have jurisdiction over civil actions against the United States. 28. U.S.C. 1346 (b)(1).

Statement of facts and of the Case

The plaintiff is a federal prisoner housed in FCI-Schuylkill after being transferred from USP-Canaan. The plaintiff brings an action against the United States of America pursuant to the Federal Tort Claims Act ("FTCA") 28 U.S.C. 2675, et seq.

The Plaintiff's pro se complaint states that in June of 2011, the prison at USP Canaan, served plaintiff as well as other inmates not mentioned (chicken Fajitas). The chicken was spoiled and was contaminated and tainted with "Salmonella Bacteria Poisoning." (Id.) Consequently, the Plaintiff contracted food poisoning, and suffered excruciating pain and symptoms from or about 6-26-11 thru 7-15-11;

which included headaches, diarrhea, abdominal pains, nausea, chills, vomiting, inability to eat and profuse sweating. (Id.) The institution at (USP-Canaan) underwent an emergency lockdown from or about 6-26-11 thru 7-15-11. The plaintiff remained sick and disoriented during such time. As a direct and proximate result of plaintiff being infected with the salmonella bacteria due to USP-Canaan staff gross neligence in not treating him for the above mentioned symptons. Plaintiff has the right to health care which includes nutritious meals, etc.

Here, the Defendant has violated such rights by not providing plaintiff with any health care from such problem. The actions and omissions of USP-Canaan staff on June 25, 2011 in preparing and serving tainted food containing (Salmonella Bacteria) to Plaintiff and others in the inmate population in whole, and not given adequate medical treatment amounts to gross negligence. Further, the intertional denial of providing me with necessary medical treatment constituted cruel and unusual punishment under the 8th amendment. See Estelle v. Gamble, 429 U.S. 97 (1976). The Supreme Court first confronted a prisoner's claim that inadequacy of medical care constituted cruel and unusal punishment under the eight amendment.

Justice Marshall, writing for the majority, held that "deliberate indifference to serious medical needs of prisoners" constitutes the "unnecessary and wanton infliction of pain" proscribed by the eight amendment. Id. at 104. Justice Marshall reasoned that since incarceration denies prisoners the opportunity to care for themselves, the government has an obligation to provide medical care for them. Id. at 103.

Here, the United States is responsible under the FTCH for the acts described herein based on the wrongful acts or omissions of federal employees acting within the scope of his/her office or employment. After finding out the problem in which resulted in Salmonella Bacteria food poisoning to the plaintiff and other inmates, the prison staff still did not provide medical treatment to us.

As a result, Plaintiff underwent another serious medical problem. Plaintiff asserts that he suffered from salmonella poisoning which aggravated and worsen another medical complication, (i.e. painful dilation of blood vessels in the anus, excessive bleeding, irritable bowel syndrome and blood in his stool). Plaintiff medical history was well known by the staff who in turn provided "no" treatment for him. The Third Circuit has joined other courts in generally defining a serious medical need as one that has

been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention. See Monmouth County Correctional Institutional Inmates v. Lanzaro 834 F.2d 326, 347 (3rd Cir. 1987). Since the arrival from USP-Canaan to this institution, Plaintiff have underwent two (2) surgery's in which points to the side effects of having been contracted with salmonella bacteria and not treated for it.

As of this date, Plaintiff still have not been treated for the salmonella bacteria food poisoning, which the defendant knows will cause serious harm. Thus, under this definition, life-threatening emergencies and injuries or illnesses involving substantial pain suffering are indeed serious medical needs within the meaning of Estelle.

In conclusion, under these peculiar circumstances as rare as what the Plaintiff at least determines "genuine issue(s)" and "material fact(s)" which can not be successfully disputed. For the above-stated reasons, this court should adjudicate in the light most favorable to the party opposing motion. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 160 (1970).

Damage Sought

The Plaintiff ask this Honorable Court for relief from the defendant for violations of his constitutional rights mentioned in the above complaint. Plaintiff seeks relief for pain and suffering and compensatory damages in the amount of $150,000.00 from the defendant. Punitive damages in the amount of $100,000.00; and a licensed and trained physician to try and repair Plaintiff's ongoing medical problem. Plaintiff also seeks and request a jury trial on all issues triable by jury. Reimbursment of Cost of this suit, and such other and further relief as this Court deems just, proper and equitable.

Respectfully Submitted,

Dumont Bush

Dated: December 17, 2014

DUMONT BUSH, Pro Se
#49590-066
FCI-Schuylkill
P.O. Box 759
Minersville, PA. 17954

Affidavit in support of claims made

For the facts stated in this civil Complaint is within their personal knowledge and are true and correct.

The above name declare under the penalty of perjury under the laws of the United States of America that the above mentioned is true and correct

Executed on this day Dec 17, 2014

Respectfully submitted,

/Dumont Bush/

Certificate of Service

I hereby certify that the forgoing motion, FTCA Complaint 28 U.S.C. 2675 was postage and given to staff for out going mail on this date listed below to the following parties.

OFFICE OF THE CLERK
United States District Court
Middle District of Pennsylvania
U.S. Courthouse
228 Walnut Street
P.O. Box 983
Harrisburg, PA 17108

United States Att.
Middle District
P.O. Box 309
Scranton, PA
18501

/Dumont Bush/
DUMONT BUSH, Pro, se
49540-066
FCI-Schuylkill
P.O. Box 759
Minersville, PA. 17954

Dated. Dec. 17, 2014

DUNCAN BUSH # 49590-066
Federal Correctional Institution Schuylkill
P.O. Box 759
Minersville, PA 17954-0759

Mailed from
Federal Correctional Institution
Schuylkill, PA

Legal Mail

HARRISBURG PA 171
18 DEC 2014 PM 2 L

TO Office of the Clerk
United States District Court
Middle District, U.S. Courthouse
228 Walnut Street
P.O. Box 983
Harrisburg, PA. 17108

171080983

RECEIVED
HARRISBURG, PA
DEC 19 2014

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

Jamal Laurent

Plaintiff

v.

Officer A. Castellanos; et. al.

Defendant

Civil Action No. 1: 14-CV-3340 (JBW)(JMA)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

See Attached

A lawsuit has been filed against you.

Within ~~21 days~~ after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jamal Laurent
790-75-053
MDC Brooklyn
Metropolitan Detention Center
P.O. Box 329002
Brooklyn, NY 11232

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DOUGLAS C. PALMER

CLERK OF COURT

Date: 06/09/2014

W. Latka-Mucha

Signature of Clerk or Deputy Clerk

14-CV-3340 (JBW)(JMA)

1. Officer A. Castellanos
   MDC Brooklyn
   Metropolitan Detention Center
   80 29th Street
   Brooklyn, NY 11232

2. Officer Sheperd
   MDC Brooklyn
   Metropolitan Detention Center
   80 29th Street
   Brooklyn, NY 11232

3. Officer P. Naupari
   MDC Brooklyn
   Metropolitan Detention Center
   80 29th Street
   Brooklyn, NY 11232

4. D. Garcia (DHO)
   MDC Brooklyn
   Metropolitan Detention Center
   80 29th Street
   Brooklyn, NY 11232

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
JAMAL LAURENT,

Plaintiff,

ORDER
14-CV-3340 (JBW)(JMA)

- against -

OFFICER A. CASTELLANOS; OFFICER SHEPERD; OFFICER P. NAUPARI; D. GARCIA (D.H.O.),

Defendants.
----------X

AZRACK, United States Magistrate Judge:

Plaintiff's application to proceed *in forma pauperis* under 28 U.S.C. § 1915 is hereby granted. The United States Marshals Service is directed to serve the summonses and complaint upon the defendants without prepayment of fees.

Enclosed is a copy of the "Individual Rules of Magistrate Judge Joan M. Azrack." Both plaintiff and defendants are required to follow them, with one exception: *pro se* parties are automatically exempt from mandatory electronic filing. Parties represented by counsel in *pro se* cases must file all submissions electronically and mail the submission to the *pro se* litigant. Plaintiff is required to advise the Clerk of Court of any change of address. Failure to keep the Court informed of plaintiff's current address means the Court will not know where to contact plaintiff and may result in dismissal of the case. For information regarding court procedures, plaintiff may contact the Pro Se Office at the United States Courthouse by calling (718) 613-2665.

SO ORDERED.

/s/
JOAN M. AZRACK
United States Magistrate Judge

Dated: June 5, 2014
Brooklyn, New York

INDIVIDUAL RULES OF
MAGISTRATE JUDGE JOAN M. AZRACK

United States District Court
Eastern District of New York
225 Cadman Plaza East, Room 605N
Brooklyn, New York 11201

Telephone: (718) 613-2530
Fax: (718) 613-2535

REVISED NOVEMBER 2010

Unless otherwise ordered by Magistrate Judge Azrack in a specific case, matters before Judge Azrack shall be conducted in accordance with the following practices:

I. ELECTRONIC CASE FILING (ECF)

A. All documents must be filed electronically. Pursuant to Administrative Order 2004-08, dated June 22, 2004, Electronic Case Filing ("ECF") is mandatory in all cases other than *pro se* civil cases. ECF procedures are available from the district court's website at http://www.nyed.uscourts.gov. Questions regarding ECF filing or training should be directed to the Court's Docket Section at (718) 613-2610.

B. **Notifications and Orders by the Court:** Attorneys will receive notifications and orders from the court electronically. Hard copies will not be mailed to attorneys registered for ECF. Accordingly, attorneys are responsible for maintaining accurate, current email information with the Clerk's Office to ensure receipt of all ECF notifications.

C. **Exemptions:** Litigants proceeding *pro se* are exempt from ECF requirements. Requests by attorneys for an exemption to the mandatory ECF policy must be submitted to Magistrate Judge Azrack and must set forth good cause hardship reasons which state the specific technological or other reason why counsel is not able to utilize ECF. Such requests will be granted only in limited circumstances.

II. COURTESY COPIES

A. **Hard copies of documents filed by ECF should <u>not</u> be provided to Chambers unless the submission exceeds <u>20</u> pages, including exhibits.** Any courtesy copies submitted to Chambers must be clearly marked "Courtesy Copy," "Original Filed by ECF" <u>and</u> "Assigned Document Number [indicate document number from docket sheet]." Any exhibits or appendices should be clearly labeled and tabbed in the courtesy copy.

B. Courtesy copies of dispositive motions made to the presiding District Judge should not be provided to Magistrate Judge Azrack, **unless** the motion is referred to her. The parties must follow the individual rules of the District Judge regarding the filing of submissions and providing of courtesy copies.

III. COMMUNICATIONS WITH CHAMBERS

A. **Identification of Matters:** All submissions filed with the Court must indicate the name and docket number of the case followed by the initials of the District Judge assigned to the case, followed by Magistrate Judge Azrack's initials ("JMA").

B. **Telephone Calls:** Telephone calls to Chambers regarding scheduling, calendar or discovery matters are permitted between 9:00 a.m. and 5:00 p.m. at (718) 613-2530. Attorneys should review the ECF docket prior to contacting Chambers. Calls regarding new arrests, bail issues, arraignments and other matters handled by the magistrate judge on criminal duty should generally be directed to the Magistrate Clericals at (718) 613-2620.

C. **Requests for Adjournments or Extensions of Time:** All requests for adjournments of conferences or extensions of time must be made in the form of a letter motion filed by ECF at least **48 hours** before the deadline or conference. Attorneys should confer with the adversary and contact Chambers to identify a suitable alternative date prior to filing the letter. The request must indicate: (1) the original date and time; (2) the reason for the request; (3) how much additional time is requested; (4) the number of previous requests; (5) whether the adversary consents, and, if not, the reasons given by the adversary for refusing consent; (6) a proposed alternative date; and (7) whether the request affects any other scheduled deadline (in which case alternative dates must be proposed). See § IV(A), *infra*, for further details.

D. **Discovery Disputes:** Where the attorneys for the affected party or non-party witness cannot agree on a resolution of a discovery dispute, they shall initiate a telephone conference with Judge Azrack by contacting Chambers at (718) 613-2530. Attorneys are **not** permitted to submit letters or formal motions regarding the substance of discovery disputes unless specifically authorized to do so.

IV. MOTIONS

A. **Judge to Whom Motions Are to Be Made:** Unless otherwise specifically ordered, all non-dispositive pretrial motions are to be made to Magistrate Judge Azrack. All dispositive motions (e.g., motions to dismiss, change venue, amend pleadings, and for summary judgment) are to be made to the presiding District

Judge in accordance with his or her individual rules.

Any requests for extensions of time for the filing of joint pretrial orders should be made to the presiding District Judge unless the case has been referred to Magistrate Judge Azrack for all purposes, including the entry of judgment.

B. **Cases In Which Parties Have Consented to Magistrate Judge Azrack:** The parties may consent, in writing, to refer a civil case to Magistrate Judge Azrack for all purposes, including the entry of judgment, or for the limited purpose of a dispositive motion. See 28 U.S.C. § 636(c)(1). In such cases, a pre-motion conference with Magistrate Judge Azrack is required before making any dispositive motion, unless the moving party is not represented by counsel, or the case stems from a habeas corpus/prisoner petition or a Social Security or Bankruptcy appeal. The pre-motion conference may be conducted by telephone with the permission of the Court.

C. **Memoranda of Law:** Unless prior permission has been granted, memoranda of law in support of and in opposition to motions are limited to 25 pages, and reply memoranda are limited to 10 pages. Memoranda of 10 pages or more shall contain a table of contents. Case citations must contain pinpoint cites. All memoranda must use one-inch margins, double spacing and 12-point font. See also Local Civil Rule 7.1 and § II(A), *supra*. Parties are not to submit memoranda of any sort in advance of an initial conference, status conference, discovery conference, or settlement conference, unless previously authorized to do so. Should a time-sensitive issue arise, parties are directed to jointly contact Chambers at (718) 613-2530. **Any memoranda of law not complying with the requirements set forth herein will be rejected.**

D. **Filing of Motion Papers**

(1) No motion papers shall be filed until the motion has been fully briefed.

(2) Subject to Court approval, the parties are to set up their own briefing schedule. No changes to the approved schedule may be made without Court approval. Approval may be given at the pre-motion conference or by subsequent notification. No party is to serve any motion papers prior to obtaining Court approval for the schedule.

(3) The original moving party shall be responsible for filing all motion papers (via ECF) once fully briefed, along with a letter specifying each document filed in the motion package. The adversary is responsible for providing movant with both a hard copy and a PDF version of opposition papers. The movant must furnish Chambers with **one** courtesy copy of the motion papers, together with a cover letter specifying each document in the package. See § II(A), *supra*, for details regarding courtesy copies.

E. **Oral Argument on Motions:** Parties may request oral argument at the time their moving or opposing or reply papers are filed. The court will determine whether argument will be heard and, if so, will advise counsel of the argument date.

F. **Motion for Admission *Pro Hac Vice*:** A motion for admission *pro hac vice*, together with a proposed order admitting the attorney *pro hac vice*, shall be served and filed. This motion must comply with Local Rule 1.3(c) and Administrative Order 97-13, available on the Court's website along with sample forms.

V. PRETRIAL PROCEDURES

A. **Joint Pretrial Orders in Civil Cases where Parties Consent to Trial before Magistrate Judge Azrack** – As directed by the Court, upon completion of discovery in a civil case, the parties shall submit to the Court for its approval a joint pretrial order, which shall include the following:

1. A statement of stipulated facts.

2. The parties' claims and defenses on liability, including citations to relevant statutes, and a statement regarding damages and other relief sought.

3. Names of all witnesses, together with a brief narrative statement of the expected testimony of each witness. Only listed witnesses will be permitted to testify except when prompt notice has been given and good cause shown.

4. Schedule of exhibits to be offered in evidence by each party. To the extent practicable, counsel should identify any anticipated objections to an opposing party's exhibits. Exhibits admitted by stipulation are to be designated as such. Only exhibits listed shall be offered in evidence except when prompt notice has been given and good cause shown.

5. A designation by each party of deposition testimony to be offered in its case in chief, with any cross-designations.

B. **Filings Prior to Trial in Civil Cases where Parties Consent to Trial before Magistrate Judge Azrack** – Unless otherwise ordered by the Court, each party shall file **15 days** before the commencement of trial:

1. Proposed jury charges, *voir dire* questions, and verdict forms. Proposed

jury charges should be limited to the elements of the claims, the damages sought, and defenses. General instructions will be prepared by the Court. In addition to written versions, these materials should also be submitted on diskette or CD-ROM in WordPerfect format.

2. **Two** courtesy copies of all exhibits, which shall be appropriately labeled and indexed, including a table of contents. All exhibits must be pre-marked for trial and exchanged with the other parties at least ten (10) days before trial. Where exhibits are voluminous, they should be paginated and placed in binders with tabs.

3. In all cases, motions addressing any evidentiary or other issues, which should be resolved *in limine*.

4. In any case where such party believes it would be useful, a pretrial memorandum.

U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 6/5/2014 at 6:51 PM EDT and filed on 6/5/2014

Case Name: Laurent v. Castellanas et al

Case Number: 1:14-cv-03340-JBW-JMA

Filer:

Document Number: No document attached

Docket Text:

SCHEDULING ORDER: An Initial Conference will be held via telephone with Magistrate Judge Azrack on September 9, 2014, at 1:30 PM. Counsel for defendants is directed to coordinate a telephone conference with Metropolitan Detention Center ("MDC"), and initiate a call with Chambers at (718) 613-2530 when all parties are on the line. Any request for an adjournment must be made in the form of a letter motion filed on ECF at least forty-eight (48) hours before the scheduled conference and must indicate which parties consent to the adjournment.A copy of this order will be mailed to plaintiff at the MDC. Ordered by Magistrate Judge Joan M. Azrack on 6/5/2014. (D'Antonio, Elizabeth)

1:14-cv-03340-JBW-JMA Notice has been electronically mailed to:

1:14-cv-03340-JBW-JMA Notice will not be electronically mailed to:

CIVIL RIGHTS COMPLAINT
42 U.S.C. § 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

JAMAL LAURENT 79076053
Full name of plaintiff/prisoner ID#

Plaintiff,

JURY TRIAL DEMAND
YES X NO _____

-against-

Officer A Castellanos; Officer Sheperd; Officer P. Naopari; D. Garcia (DHO)

Enter full names of defendants
[Make sure those listed above are identical to those listed in Part III.]

Defendants.
----------x

I. Previous Lawsuits:

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes (X) No ( )

B. If your answer to A is yes, describe each lawsuit in the space below (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit:

Plaintiffs: JAMAL LAURENT

Defendants: Officer A Castellanos; Officer Sheperd Officer P. Naopari; Lt. Pasley; D. Garcia (DHO); PA Bernard DOC St. Rivex

2. Court (if federal court, name the district; if state court, name the county)
Eastern District of New York (Brooklyn)

3. Docket Number: 1:12-CV-05523

4. Name of the Judge to whom case was assigned: Jack B. Weinstein

5. Disposition: (for example: Was the case dismissed? Was it appealed? Is it still pending?)
Dismissed without prejudice

6. Approximate date of filing lawsuit: 11/08/2013

7. Approximate date of disposition: 01/08/2013

II. Place of Present Confinement: MDC Brooklyn

A. Is there a prisoner grievance procedure in this institution? Yes (X) No ( )

B. Did you present the facts relating to your complaint in the prisoner grievance procedure? Yes (X) No ( )

C. If your answer is YES,

1. What steps did you take? Filed grievance procedure (BP8; BP9; BP10; BP11)

2. What was the result? Investigation was conducted (See attachment A for grievances)

D. If your answer is NO, explain why not

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? Yes (X) No ( )

F. If your answer is YES,

1. What steps did you take? Spoke to Warden and other higher officials as well as agent from Department of Justice

2. What was the result? Investigation was conducted

Attachment A

Administrative

Remedy (Jan 27, 2013 Incident)

*Responses Included

DATED: February 29th 2012

UNICOR FEDERAL PRISON INDUSTRIES, INC.
LEAVENWORTH, KANSAS

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Laurent, Jamal	79076053	W-6HU	MDC-Brooklyn
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A- INMATE REQUEST On the 31th of January 2012 at 11:05am I was attacked due to offic isolations and officer shqeeds lack of care, custody, safley and control. I was led onto the rack dor ith another inmate who was not my cellmate. With handcuffs still applied I was assault by the other inmate who occupied the rack area. I have been suffering pain in my right hist (sprain), neck (extreme torsion and stiffness), upper back (stiffness and pain) and migraines due this tragic incident. I am traumatized by this current situation which causes flashbacks c leep trouble. The officers assigned to the post watched and failed to come to my safley. I u lassaited for approximately 15 minutes. When LT. Pasley and other officers responded to bac alarm they tried to make the other inmate "cuff up" and in doing so prolonged safley precaution measures. The individual(s) who witnessed what happened name is Tristan Gala 17899-053) who was my cellmate at the moment. He too experienced a situation in which fficers failed to attend to his rescue in which ended up with him being hospitalized. I ould respectfully like that these individuals be properly disciplined.

2/29/2012
DATE

Jamal Laurent
SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 675703-F2

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____
LAST NAME, FIRST, MIDDLE INITIAL

Inmate Name: LAURENT, Jamal
Register Number: 79075-053
Administrative Remedy No.: 675703-F2

This is in response to your Request for Administrative Remedy received February 29, 2012, wherein you allege you were assaulted by another inmate due to staff inattentiveness. Specifically, you allege while handcuffed, you were placed on a recreation deck which was occupied by another inmate. You claim the other inmate assaulted you while the officers watched and failed to open the door for your safety. You further allege you were assaulted for approximately 15 minutes and from the assault you received head, neck, and back injuries. Also, you state your elbow and face are slightly bruised.

It is the policy of the Federal Bureau of Prisons and the practice followed by this facility to treat all inmates in a fair and impartial manner. Allegations such as yours are taken seriously and will be forwarded to the appropriate authority for investigation. However, due to the privacy interest of the staff named in the allegation, we are unable to disclose to you any findings or results of the review of this matter.

If you are dissatisfied with this response, you may appeal to the Regional Director, Federal Bureau of Prisons, U.S. Custom House, 2nd and Chestnut Streets, Philadelphia, PA 19106, within 20 calendar days of the date of this response.

3/13/12
Date

Duke Terrell, Warden

Department of Justice — **Regional Administrative Remedy Appeal**

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: Laurent, Jamal — 79075063 — WSHU Range 2 — MDC-Brooklyn
LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

Part A - REASON FOR APPEAL This appeal is in reference to letter received from the warden on 13th of March in reference to the January 25th incident. On January 27th 2012 at approxima 11:05 I was brought unto the rec area. Failure to see that the rec area was occupie by another inmate, I was led out unto the rec area with handcuffs still applied. I sudden I was assulted by the other inmate while the officers Castellanos and Steppe watched and failed to open the door for my safety. Being assulted for approximat 15 minutes caused head, neck, and back injury. Arm (elbow) and face are slightly bu officers are placed upon post for inmates safety, care, custody, and control. I am requesting that these individuals be proporh disciplined.

3/28/2012
DATE

Jamal Laurent
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE — REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE — CASE NUMBER: 675703-R1

Part C - RECEIPT

CASE NUMBER:

Return to: _____
LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT:

DATE — SIGNATURE, RECIPIENT OF REGIONAL APPEAL

LAURENT, Jamal
Reg. No. 79075-053
Appeal No. 675703-R1
Page One

Part B - Response

You appeal the response from the Warden at MDC Brooklyn and allege staff misconduct. You claim, as a result of staff's failure to protect you, you were physically assaulted by another inmate for 15 minutes while you were still in hand restraints. You state you suffered physical injuries and request the staff be properly disciplined.

Program Statement 3420.09, Standards of Employee Conduct states, a staff member may not use brutality, physical violence or verbal abuse toward inmates. Moreover, all allegations of physical and verbal abuse shall be thoroughly investigated, and when appropriate, referred to authorities for prosecution. This office confirmed that your allegation was referred to the appropriate authority for investigation. A thorough investigation will be conducted. However, the results of the investigation will not be disclosed to you as you are not entitled to this information. You have access to medical sick call for any health issues. Accordingly, your appeal is denied.

If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedy Section, Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534, within 30 calendar days of the date of this response.

Date: May 3, 2012

J. L. NORWOOD
Regional Director

Central Office Administrative Remedy Appeal

...al Bureau of Prisons

...ype or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Laurent, Jamal — 79075053 — VHSHO — MDC

LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

Part A - REASON FOR APPEAL This appeal is in reference to appeal the denial from administrative remedy. As educated about the assult on Jan 27th by another inmate, I was suppose to speak with Stan Ferguson from the Department of Justice in which hasn't happened as of yet. When going out t the reck area in May (cannot recall date), when another inmate Wendel Jenkins spoke about the incident, officer Castellanos laughed like it w a joke that I got assulted. I am concerned as to why is this officer s able to come into contact with me. I am very uncomfortable with th situation and would like this matter appropriately addressed. Than you.

5/17/2012 — DATE

Jamal Laurent — SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED
MAY 22 2012
Administrative Remedy Section
Federal Bureau of Prisons

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 675703

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT:

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

UPN LVN

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JULY 24, 2012

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : JAMAL LAURENT, 79075-053
BROOKLYN MDC UNT: I QTR: Z08-914LDS
P.O. BOX 329001
BROOKLYN, NY 11232

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 675703-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : MAY 22, 2012
SUBJECT 1 : UNPROFESSIONAL, INAPPROPRIATE CONDUCT OR MISCONDUCT BY STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR, A COPY OF THE [illegible] FROM THE WARDEN.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN [illegible] OF THE DATE OF THIS REJECTION NOTICE.

REJECT REASON 3: SEE REMARKS.

REMARKS : ALL 4 COPIES OF THE BP-11 MUST BE LEGIBLE.

III. Parties:

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of plaintiff JAMAL LAURENT

Address MDC Brooklyn, PO Box 329002, Brooklyn NY 11232

(In item B below, place the full name and address of each defendant)

B. List all defendants' names and the addresses at which each defendant may be served. Plaintiff must provide the address for each defendant named.

Defendant No. 1 Officer A. Castellanos
Federal Bureau of Prisons
80-29th St; Brooklyn NY 11232

Defendant No. 2 Officer Shepard
Federal Bureau of Prisons
80-29th St; Brooklyn NY 11232

Defendant No. 3 Officer P. Nayyari
Federal Bureau of Prisons
80-29th St; Brooklyn NY 11232

Defendant No. 4 D. Garcia (DHO)
Federal Bureau of Prisons
80-29th St; Brooklyn NY 11232

Defendant No. 5 _____

[Make sure that the defendants listed above are identical to those listed in the caption on page 1].

IV. Statement of Claim:

(State briefly and concisely, the facts of your case. Include the date(s) of the event(s) alleged as well as the location where the events occurred. Include the names of each defendant and state how each person named was involved in the event you are claiming violated your rights. You need not give any legal arguments or cite to cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. You may use additional 8 ½ by 11 sheets of paper as necessary.)

See "Statement of Facts" Sheet → Back OF complaint

IV. A If you are claiming injuries as a result of the events you are complaining about, describe your injuries and state what medical treatment you required. Was medical treatment received?

Bruise to face and elbow with blood. Neck pain (extreme tension & stiffness). Pain in upper back area. Migraines from head hitting door during assault and when thrown to ground by officers; right wrist sprained with marks from handcuffs.

Medical Treatment - cleaning blood; taking of blood pressure; xray for wrist; Cleaning cuts & bruises; Ibuprofen was administered

V. Relief:

State what relief you are seeking if you prevail on your complaint.

Expungement of incident report from file; Restraining order from Officers involved in Assault.

Compensatory damages in amount of 100,000 dollars for physical injuries, mental & emotional injuries from spending excess time in solitary confinement, deprived of seeing family members; trauma.
Punitive damages in amount of 100,000 dollars
Monetary damages in amount of 100,000 dollars

I declare under penalty of perjury that on 5/23/2014 (Date), I delivered this complaint to prison authorities to be mailed to the United States District Court for the Eastern District of New York.

Signed this 23rd day of May, 2014. I declare under penalty of perjury that the foregoing is true and correct.

Signature of Plaintiff

MDC BROOKLYN
Name of Prison Facility

MDC BROOKLYN
PO BOX 329002
BROOKLYN NY 11232
Address

19076053
Prisoner ID#

STATEMENT OF FACTS

TRULINCS 79075053 - LAURENT, JAMAL - Unit: BRO-I-B

FROM: 79075053
TO:
SUBJECT: STATEMENT OF FACTS
DATE: 05/20/2014 02:37:46 PM

On the 27th of January 2012 at approximately 11:05am I was attacked by another inmate due to Officer Castellanos & Officer Shepherds' lack of care, custody, safety, & control. I was led onto the reck area in the segregation housing unit with another inmate, who was not my cellmate. Noticing another inmate in the reck pen, I yelled out & kicked the door to get the officers attention for them to come to my rescue. All of a sudden while my handcuffs were still applied, I was then assaulted by the other inmate who occupied the reck area. The officers assigned to the post watched & failed to come to my safety. I was assaulted for approximately (15) minutes.

I have been suffering pain in my right wrist (a sprain), neck, upper back & migraines due to this tragic incident. I am completely traumatized by this situation which causes flashbacks & constant sleep trouble. When Lt. Pasley & other officers responded to body alarm, they called for the inmate to "cuff up" & in doing so prolonged safety precaution measures. The individual who witnessed the assault is named Tristan Salazar (#77899-053). Mr.Salazar who was my cellmate at the time too experienced a situation in which officers failed to come to his rescue & as a result led to him being hospitalized. After being relieved of the attack I was the led to medical by Officers P. Naupari, Castellanos, Shepherd, Lt. Pasley & others.

I was feeling dizzy & was chocking on blood which had to be coughed up to get rid of. In doing so I was then thrown to the ground & accused of spitting on Officer P. Naupari who was behind escorting me. When thrown to the ground my head hit the floor & due to tightening of the cuffs, my circulation was being cut off. After being picked up & led to medical, I was then given minimum medical treatment which was that of securing blood pressure & cleaning of bruises. An hour later I was given an incident report for the alleged spitting on Officer P. Naupari (See attachment B). Days later I was interviewed by the Discipline Hearing Officer D. Garcia who threatened me with up to one year's D.S. time. After explaining the situation & requesting review of the cameras, He then told me that "The cameras were already checked & nothing was available. I then asked if the cameras does not work? Officer Garcia thus replied "Interpret it how you want". I said okay & waited for further instructions. However the videotape was said to be "lost". I have written to the Office of Regional Counsel in reagrds to a copy of the footage being sent to criminal lawyer Donna Newman. (See attachment C). If the cameras were reviewed in its entirety, it would show inmate Salazar standing by cell with officers who were ready to escort him to reck pen before assualt began. The cell in which Mr. Salazar & I resided #2 was at least 3 to 5 feet away from where I was assualted & accused of spitting on staff.

Well due to my witness Tristan Salazar not being present for transferring to another facility, the hearing was postponed until the DHO received a written statement before he proceeded with the matter. A few weeks later the hearing was again held & I was sentenced to 180 days D.S. & lost all phone, commissary, & visiting privileges. My witness was said not to be able to get into contact with, in which I find very inaccurate because I personally received a letter from him dated February 4th in which Mr. Salazar stated his location & provided me with a number & address to contact his mother. This letter was sent when filing administrative remedy to the Regional Directors Office only to have it not returned.(See attachment D)

My Criminal lawyer has contacted Ms.Mc Farlene from the legal department here at facility on behalf of this situation & for any medical problems that were affecting me (See attachment E). On the 10th of April 2012 my criminal lawyer sent me a letter advising me of an upcoming interview with agent Stan Ferguson from the Department Of Justice regarding the Jan. 2012 assault (See attachment F). By the 22nd of June 2012 I was finally interviewed by agent Stan Ferguson from the Department Of Justice. My criminal lawyer has also written a letter to criminal Judge Garaufis regarding confinement in the SHU, assault, & medical concerns (See attachment G). My father Peter laurent has also emailed criminal attorney in reference to mental health being compromised while detained in SHU & visiting privileges (See attachment H). Lastly the Senate for the State Of New York (Kevin S. Parker) has written to the Warden on my fathers behalf for an investigation to be conducted regardingthe Jan. 2012 assault. This letter was responded by the Warden on April 24th 2012 (See attachment I). Officer Castellanos was still permitted to work on the range whcih I found questionable since he took part in watching the assault. Officer P. Naupari at times was allowed to serve the food on the tier in which I was reluctant to eat.

The incident which occurred on January 27th 2012 & other incidents (which grievances were filed) here at facility has tremendously effected my emotional, physical & psychological state.

Attachment B

INCIDENT
REPORT
AND
NOTICE OF DISCIPLINE
HEARING BEFORE DHO

BP-A288.052
SEP 05

INCIDENT REPORT CDFRM

U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

Part I - Incident Report

1. Institution: MDC BROOKLYN DETENTION CENTER

2. Inmate's Name	3. Register Number	4. Date of Incident	5. Time
Laurent, Jamal	79075-053	01/27/2012	~~11:25 am~~ 11:05 AM

6. Place of Incident	7. Assignment	8. Unit
W-SHU Range 2	Unassigned	2W

9. Incident	10. Prohibited Act Code(s)
Assaulting any person	224

11. Description Of Incident (Date: 01/27/2012 Time: 11:05 am Staff became aware of incident)
I responded to a body alarm on range #2 in West Special Housing. I escorted Inmate Laurent off the rock deck and he began to get hostile. Inmate Laurent #79075-053 began spitting at officers as they walked pass him. Inmate Laurent spit in my direction with blood in his mouth and got me in my right eye, and in my mouth. Inmate Laurent was assisted to the floor.

12. Typed Name/Signature of Reporting Employee	13. Date And Time
P. Naupari	1/27/2012 ~~11:05 am~~ 12:25 pm

14. Incident Report Delivered to Above Inmate By (Type Name/Signature)	15. Date Incident Report Delivered	16. Time Incident Report Delivered
	1/28/12	925 hrs

Part II - Committee Action

17. Comments of Inmate to Committee Regarding Above Incident

18. A. It is the finding of the committee that you:
_____ Committed the Prohibited Act as charged.
_____ Did not Commit a Prohibited Act.
_____ Committed Prohibited Act Code(s) _____

B. ___ The Committee is referring the Charge(s) to the DHO for further Hearing.

C. ___ The Committee advised the inmate of its finding and of the right to file an appeal within 20 calendar days.

19. Committee Decision is Based on Specific Evidence as Follows:

20. Committee action and/or recommendation if referred to DHO (Contingent upon DHO finding inmate committed prohibited act)

21. Date And Time Of Action _____ (The UDC Chairman's signature certifies who sat on the UDC and that the completed report accurately reflects the UDC proceedings.)

Chairman (Typed Name/Signature) Member (Typed Name) Member (Typed Name)

Original - Central File Record; Yellow - DHO; Blue - Inmate After UDC Action;
Pink - Inmate within 24 Hours Of Part I Preparation

(This Form May Be Replicated Via WP)

Replaces BP-S288.052 Of MAY 94

BP-A0294
AUG 11

Notice of Discipline Hearing Before the (DHO) CDFRM

U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

MDC BROOKLYN
Institution

Date

TO: LAURENT, JAMAL | REG. NO.: 79075-053

ALLEGED VIOLATION(S): ASSAULTING W/O SERIOUS INJURY

DATE OF OFFENSE: 01/27/2012 | CODE NO.: 224

You are being referred to the DHO for the above charge(s).

The hearing will be held on: _____ at _____ (A.M./P.M.) at the following location:

You are entitled to have a full-time staff member represent you at the hearing. Please indicate below whether you desire to have a staff representative, and if so, his or her name.

I (do) ___ (do not) X wish to have a staff representative.

If so, the staff representative's name is: _____

You will also have the right to call witnesses at the hearing and to present documentary evidence in your behalf; provided, calling your witnesses will not jeopardize institutional safety. Names of witnesses you wish to call should be listed below. Briefly state to what each proposed witness would be able to testify.

I (do) X (do not) ___ wish to have witnesses.

NAME: Salazar Tristan 77899-053 | CAN TESTIFY TO: He saw what happen

NAME: | CAN TESTIFY TO:

NAME: | CAN TESTIFY TO:

The Discipline Hearing Officer will call those witnesses (Staff or Inmate) who are reasonably available, and who are determined by the DHO to have information relevant to the charge(s). Repetitive witnesses and repetitive character references need not be called. Unavailable witnesses may be asked to submit written statements.

If additional space is needed, use the reverse side of this form. Date, sign, and return this form to the DHO.

DATE: 1-31-12 | SIGNATURE: X Jamal Laurent

Notice of hearing before DHO given inmate _____ by L WILLIAMS / [signature]
Date/Time — Staff Printed Name/Signature

(This form may be replicated via WP) — *Replaces BP-294(52) of JAN 88*

Attachment C

LETTER(S)

TO: OFFICE OF REGIONAL COUNSEL

* RESPONSE(S) INCLUDED

DATE(S): May 7th 2013
July 4th 2013
SEPT 17th 2012

5/7/2012

To office of General counsel,

Greetings! My name is Jamal Laurent (79075053). I am currently residing at the Federal Facility in Brooklyn, NY (MDC). My purpose for writing this letter is in regards to access to a videotape in which will vindicate me of the incident in which I was accused for. On the 27th of January 2012 after being assulted by another inmate on the rock deck, I was escorted by officer P. Naupari and others to medical. Within seconds later I was slammed to the ground and accused on spitting on officer P. Naupari. At the hearing given by the DHO, I verbally requested that the cameras be thouroughly checked in which would prove the accusation false. He told me specifically that the "cameras were checked and nothing was available." I then stated "so the cameras don't work", He then replied interpret it how you want. Due to my witness being transferred to another facility the hearing was postponed until fother notice. Weeks later the hearing was again held and I was sentenced to 180 confinement in

the SHU as well as 250 days loss of privileges such as telephone, commissary, email, etc. While reviewing response from regional director it stated that no where in the record during the disciplinary process did I ask for the video to be reviewed. I as well as my lawyer have made complaints as to why haven't the video been properly reviewed if requested. This address was provided stating that a request for the video can be made. Below is the address of my criminal lawyer in which a copy of the video can be sent. Thank you for suiting my needs.

Sincerely,

[signature]

Criminal Attorney
Donna R. Newman, ESQ
The Law Offices of
Donna R. Newman, PA
111 Broadway, Suite 1805
New York, NY 10006

Federal Bureau of Prisons

Northeast Regional Office

U.S. Custom House - 7th Floor
2nd and Chestnut Streets
Philadelphia, PA 19106

June 18, 2012

Jamal Laurent
Reg. No. 79075-053
Metropolitan Detention Center Brooklyn
P.O. Box 329002
Brooklyn, NY 11232

RE: FOIA Request No. 2012-08713

Dear Requester:

The Federal Bureau of Prisons is in receipt of your Freedom of Information Act request. It has been assigned the number referenced above which you should include in any correspondence or inquiry regarding your request.

Due to the large number of requests received by the Bureau of Prisons for disclosure of records pursuant to the Freedom of Information Act, and due to the limited resources available to process such requests, the Bureau of Prisons has adopted a first-in/first-out practice of processing all incoming requests. Your request has been placed in chronological order based on the date of receipt and will be handled as expeditiously as possible when it is assigned for processing.

The submission of your request (unless you indicated otherwise) is deemed to constitute an agreement to pay fees up to $25.00, as stated in 28 C.F.R. 16.3(c). Please note that pursuant to 28 C.F.R. 16.11, we are required to charge fees for time spent searching for or duplicating responsive documents. For a typical requestor, there is no charge for the first two hours of search time or for the first 100 pages of duplication; however, if we anticipate your fees will be in excess of $25.00, we will notify you of the estimated amount. At that time, you will have the option of modifying your request to reduce fees. At this time, please do not submit any payment.

If you have questions regarding the status of your request, you may contact the Regional Counsel, Federal Bureau of Prisons, Northeast Regional Office, U.S. Customs House, 2nd & Chestnut Street, 7th Floor, Philadelphia, PA 19106, and reference the above request number.

Sincerely,

Michael D. Tafelski
Regional Counsel

cc: File

July 4th 2012

Dear Regional Counsel,

Greetings. My name is Jamal Lavent. My purpose for writing this letter is to inquire about the status of FOIA request NO. 2012-08713. I would like to know if any payments can be made as to this request. Thank you for your help.

Sincerely,
Jamal Lavent
179076-063

9/17/2012

BOP FOIA Request NO. 2012-08718

Dear Regional counsel,

Greetings! My name is Jamal Laurent (79076053). My purpose for writing this letter is in regards to a letter I wrote previously dated July 4th 2012 requesting the updates on the search for a copy of videotape from a January 27th 2012 incident. I was transferred to Rikers Island on the 3rd of August due to a pending State trial. I was then escorted back to the Metropolitan Detention Center on the 27th of August. My purpose for mentioning this is in regards to if your office had sent me a response to the July 4th 2012 letter. If so and it was returned I am requesting to know the updates of FOIA request NO. 2012-08718. Thank you for your cooperation and assistance. If you have any questions regarding this letter or any other thing please don't hesitate to contact me at Jamal Laurent (79076053), MDC Brooklyn, PO Box 329002, Brooklyn, NY 11232.

Sincerely,

Jamal Laurent

U.S. Department of Justice

Federal Bureau of Prisons

Northeast Regional Office

U.S. Custom House - 7th Floor
2nd & Chestnut Streets
Philadelphia, PA. 19106

November 8, 2012

The Law Offices of Donna B. Newman
111 Broadway, Suite 1805
New York, NY 10006
Attn: Donna B. Newman, Esq.

Re: Freedom of Information Request No. 2012-08713
Jamal Laurent - Register No. 79075-053

Dear Ms. Newman:

This is in response to a request from Jamal Laurent which was received by this agency on May 14, 2012. Mr. Laurent request that a copy of information captured on video surveillance pertaining to an incident he was involved in on January 27, 2012, be forwarded to you.

In response to his request, one (1) compact disk (CD) was received in this office for a determination of their releasability to you. Upon review, it has been determined the CD is being withheld in its entirety and has been preserved.

One (1) CD is being withheld in its entirety because it contains third-party information and information intended for staff use only. Release of this information would or could constitute an unwarranted invasion of personal privacy, would disclose techniques and procedures for law enforcement investigations or prosecutions, and could reasonably be expected to endanger the life or physical safety of any person. The statutory basis for these excisions and withholdings are 5 U.S.C. § 552 (b)(6), (b)(7)(C), (b)(7)(E) and (b)(7)(F).

I trust this has been responsive to your request. However, if you are dissatisfied with this response, you may appeal to the Attorney General by filing a written appeal within sixty days from the date of this letter in order to be considered timely. You may appeal to the Attorney General by filing a written appeal to : Attorney General, Office of Information Policy, United States Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530-0001. Both the envelope and the letter of appeal itself should be clearly marked: "Freedom of Information Act Appeal."

Sincerely,

Michael B. Rafelski
Regional Counsel

Attachment D

REGIONAL
ADMINISTRATIVE
REMEDY
APPEAL

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrat Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: Laurent, Jamal | 79075053 | West SHU Range 2 | MDC

LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A - REASON FOR APPEAL This request is in regards to appeal an incident report which eceived on the 27th of January. After being assulted by another inmate on the rea who was not my cellmate, I was escorted to medical by officer Naupari and ot I was dizzy and choking on blood which had to be coughed up to get rid of. In doin so I was thrown to the ground with head hitting floor and accussed of spitting on fficer Naupari (who was behind me) which was false. Days later I was seen by t DHO. After explaining the situation and asking the DHO to check the cameras, He t old me that the cameras were checked and nothing was available. I then aske so the cameras don't work?" He then replied "interpret it how you want. I sa okay and waited for further instructions. Due to my witness inmate Trio Tan Sal 77899053) not being present because of him being transferred to another facili GEO), the hearing was postponed until the DHO received a written statement from the witness. A few weeks later the hearing was give

3/19/2012 | Jamal Laurent

DATE | SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE | REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE | CASE NUMBER: 681558-R

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE | SIGNATURE, RECIPIENT OF REGIONAL APPEAL

and I was sentenced to 180 days DS as well as loss of phone, commissary, and other privileges. My witness was said to not be able to get into contact with in which I find to be false. The reason is because I received a letter from inmate Salazar dated the 4th of February in which he stated he was transferred to GEO. (enclosed is copy of letter (front) with date as well as copy of envelop. Officer Nagpari still works the range at times in which I find questionable espically if I was accussed of assulting him. Wouldn't he be moved off the range/area? I have been treated unfairly as to this situation and have not received the proper medical attention needed after the assault. I am unable to receive the spiritual, mental, and physical support from my family due to loss of privilges. I am requesting to be released under circumstances if necessary and be restored back privileges. Thank You.

8/19/2013
DATE

Jamal Laurent
Signature of requester

LAURENT, Jamal
Reg. No. 79075-053
Appeal No. 681558-R1
Page One

Part B - Response

You appeal the March 6, 2012, decision of the Discipline Hearing Officer (DHO) at MDC Brooklyn, finding you committed the prohibited act of Assault, Code 224, Incident Report No. 2261349. You contend the report is false. You contend you asked the DHO to check the cameras. You also complain you were denied a witness.

The DHO found you committed the prohibited act based on the following. On January 27, 2012, you spit blood and saliva on the reporting officer which went in his right eye and in his mouth.

Your claim the incident report is false is a challenge to the credibility of the information presented in the incident report. You were given the opportunity to present your version of the events to the DHO. He determined staff were more credible.

Your contention you asked the DHO to check the cameras is not credible. A review of the record reveals at no time during the disciplinary process did you ask for video to be reviewed.

Your contention you were denied a witness is without merit. The DHO postponed the hearing in an attempt to locate your witness who was removed from MDC Brooklyn prior to your hearing. Staff were unable to locate him. Nevertheless, the witness you requested was not present during the incident.

The record in this case reflects substantial compliance with Program Statement 5270.09, Inmate Discipline. The decision of the DHO was based upon the greater weight of the evidence and the sanctions imposed were consistent with the severity level of the prohibited act. The sanctions imposed: 180 days disciplinary segregation, $30.00 fine, 150 days loss of commissary, e-mail, telephone and visiting privileges and disallow 27 days good conduct time, were not disproportionate to your misconduct. Accordingly, your appeal is denied.

If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedy Section, Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534, within 30 calendar days of the date of this response.

Date: April 25, 2012

J. L. NORWOOD
Regional Director

Department of Justice
Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Laurent, Jamal — 790 75 053 — WSHU-B2 — MDC
LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

Part A - REASON FOR APPEAL My purpose for writing this appeal is in regards t
dministrative remedy being rejected. I was accussed of spitting
n officer which was false. It stated in the response that blood
aliva went into the officers right eye. It is evident here that
ad to be standing on the left side of me when escorting me
medical. If he was on the right side, then the left eye would
been effected as well. Well in order to spit on him I had to turn
his direction especially if his right eye was effected and he is in
back escorting me. As requested before that the camera be ch
n which would vindicate me of any wrongdoing was denie
stating that there was nothing available. When the orderly w

5/7/2012 — Jamal Laurent
DATE — SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED
JUL 02 2012
Administrative Remedy Section
Federal Bureau of Prisons

RECEIVED
MAY 14 2012
Administrative Remedy Section
Federal Bureau of Prisons

DATE — GENERAL COUNSEL

FIRST COPY: WASHINGTON FILE COPY — CASE NUMBER: 681558

Part C - RECEIPT

CASE NUMBER:

Return to:
LAST NAME, FIRST, MIDDLE INITIAL

Cleaning the blood from assault, he was cleaning the rack door as well as the right side of the wall. If cameras were properly checked, it would prove that I am telling the truth. A letter was written by my criminal lawyer (copy enclosed) requesting for video as well as to receive proper medical treatment. The DHO said he would find what facility the witness was residing at and get a written statement as to what occurred. My witness was said to not be in contact with and present of the assault. This I find false because inmate Tristan Salazar (11890067) wrote me a letter dated April 4th stating he was transferred to the facility in Queens. I sent this letter to the regional director as well as the ombudsperson (his name escapes me). And they failed to send it back. If carefully read, it would state his location as well as the time frame in which he wrote is at least a month apart from incident. How could the witness not be present if he witnessed me being assaulted? If cameras were reviewed it would show him standing by cell then later placed in cell by officers. The cell was cell 2 at the time in which is right across from where I was assaulted and at least 3 to 5 feet away from where officers stormed me. Officer Nieves stated I was getting hostile and spitting at officers as they walked past by. Why then is he the only one that seems to have this problem especially since there were at least 10 officers present and he was behind escorting me. Stan Ferguson from the Department of Justice is suppose to come and interview me on behalf of assault. Officer Nieves still escorts me, places and secures me in food in which I find to be questionable since I was accused of assaulting him. Why is this so? When the assault occurred, the officers responsible were immediately removed from the area and reassigned different locations. I am requesting that this matter be reviewed carefully and that righteous judgement be executed.

Thank You.

6/21/2013
Date

Signature of requester

THE LAW OFFICES OF
DONNA R. NEWMAN, PA

MEMBER:
NY BAR
NJ BAR

111 BROADWAY, SUITE 1805
NEW YORK, NY 10006
TEL: 212.229.1516
FAX: 212.676.7497
DONNANEWMANLAW@AOL.COM
WWW.NEWMANSLAW.NET

445 EAST BROAD STREET
WESTFIELD, NJ 07090
T. 908-232-0293
F. 908-232-9277

REPLY TO NY

March 26, 2012

via facsimile to (718) 840-4250
and first class mail
Metropolitan Detention Center
P O Box 329002
Brooklyn, New York 11232

Attn: Nicole McFarlen, Legal Department

Re: Jamal Laurent
Inmate No. 79075-053

Dear Ms. McFarlen:

I represent Jamal Laurent in his pending criminal matter. Mr. Laurent has advised me of an incident on January 27, 2012 at MDC in which he was assaulted by another inmate. Mr. Laurent also advised that after the assault while being taken for medical treatment by MDC officers, he was wrongfully accused of spitting on an officer. He was then brutally assaulted by the officers. Mr. Laurent applied through proper channels for a hearing and requested a copy of the prison videotape. He has been denied access to the videotape-which tape Mr. Laurent asserts will vindicate him of any wrongdoing. Kindly advise why Mr. Laurent has been denied the videotape he requested.

In addition, I seek your assistance in Mr. Laurent's receipt of proper medical care. He has consistently filled "cop outs" to see medical staff and has been denied. The few times he has actually seen a doctor, the treatment has been substantial. Mr. Laurent is in

DONNA R. NEWMAN
ATTORNEY AT LAW
MEMBER
NY AND NJ BAR

pain and needs proper medical care for his neck and foot.

I appreciate your kind cooperation in this matter.

Very truly yours,

Donna R. Newman/ad

Donna R. Newman
DRN/ad
cc: Jamal Laurent ✓

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JUNE 5, 2012

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : JAMAL LAURENT, 79075-053
BROOKLYN MDC UNT: I QTR: Z08-915LDS
P.O. BOX 329001
BROOKLYN, NY 11232

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 681558-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : MAY 14, 2012
SUBJECT 1 : DHO APPEAL - COMBINED (PROCEDURES, EVIDENCE & SANCTIONS)
SUBJECT 2 :
INCIDENT RPT NO: 2261340

REJECT REASON 1: [redacted] 2 - WARDEN'S LEVEL; 3 - REGIONAL LEVEL; [redacted] THE NUMBER CITED INCLUDES YOUR ORIGINAL.

REJECT REASON 2: [redacted].

REJECT REASON 3: [redacted] YOUR APPEAL IN PROPER FORM WITHIN [redacted] DAYS OF THE DATE OF THIS REJECTION NOTICE.

Recieved June 21, 2012
By Counselor
L. Williams

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JULY 18, 2012

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : JAMAL LAURENT, 79075-053
BROOKLYN MDC UNT: F QTR: Z08-912LDS
P.O. BOX 329001
BROOKLYN, NY 11232

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 681558-A2 CENTRAL OFFICE APPEAL
DATE RECEIVED : JULY 2, 2012
SUBJECT 1 : DHO APPEAL - COMBINED (PROCEDURES, EVIDENCE & SANCTIONS)
SUBJECT 2 :
INCIDENT RPT NO: 2261340

REJECT REASON 1: YOU DID NOT SUBMIT PROPER NUMBER OF CONTINUATION PAGES WITH YOUR REQUEST/APPEAL. 2 - WARDEN'S LEVEL; 3 - REGIONAL LEVEL; AND 4 - CENTRAL OFFICE LEVEL. THE NUMBER CITED INCLUDES YOUR ORIGINAL.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

Attachment 5

LETTER(S)

TO: NICOLAS MCFARLANE (LEGAL DEPARTMENT)

DATE(S): March 26th 2012
SEPT 18th 2012
DEC 4th 2012

THE LAW OFFICES OF
DONNA R. NEWMAN, PA

MEMBER:
NY BAR
NJ BAR

111 BROADWAY, SUITE 1805
NEW YORK, NY 10006
TEL: 212.229.1516
FAX: 212.676.7497
DONNANEWMANLAW@AOL.COM
WWW.NEWMANSLAW.NET

445 EAST BROAD STREET
WESTFIELD, NJ 07090
T. 908-232-0293
F. 908-232-3277

REPLY TO NY

March 26, 2012

via facsimile to (718) 840-4250
and first class mail
Metropolitan Detention Center
P O Box 329002
Brooklyn, New York 11232

Attn: Nicole McFarlen, Legal Department

Re: **Jamal Laurent**
Inmate No. 79075-053

Dear Ms. McFarlen:

I represent Jamal Laurent in his pending criminal matter. Mr. Laurent has advised me of an incident on January 27, 2012 at MDC in which he was assaulted by another inmate. Mr. Laurent also advised that after the assault while being taken for medical treatment by MDC officers, he was wrongfully accused of spitting on an officer. He was then brutally assaulted by the officers. Mr. Laurent applied through proper channels for a hearing and requested a copy of the prison videotape. He has been denied access to the videotape which tape Mr. Laurent asserts will vindicate him of any wrongdoing. Kindly advise why Mr. Laurent has been denied the videotape he requested.

In addition, I seek your assistance in Mr. Laurent's receipt of proper medical care. He has consistently filled "cop outs" to see medical staff and has been denied. The few times he has actually seen a doctor, the treatment has been substantial. Mr. Laurent is in

DONNA R. NEWMAN
ATTORNEY AT LAW
MEMBER
NY AND NJ BAR

pain and needs proper medical care for his neck and foot.

I appreciate your kind cooperation in this matter.

Very truly yours,

Donna R Newman/ad

Donna R. Newman
DRN/ad
cc: Jamal Laurent ✓

member:
NY Bar
NJ Bar

The Law Offices of
DONNA R. NEWMAN, PA
20 Vesey Street, Suite 400
New York, NY 10007
Tel: 212.229.1516
Fax: 212.676.7497
donnanewmanlaw@aol.com
www.donnanewmanesq.com

445 East Broad Street
WestField, NJ 07090
T. 908-232-0293
F. 908-232-3277

Reply to NY

September 18, 2012

via facsimile to (718) 840-4250
Metropolitan Detention Center
P O Box 329002
Brooklyn, New York 11232

Attn: Nicole McFarlen, Legal Department

Re: Jamal Laurent
Inmate No. 79075-053

Dear Ms. McFarlen:

I write to request the Metropolitan Detention Center ("MDC") to: (1) release Jamal Laurent into general population or in the alternative to allow Mr. Laurent email, telephone, and visitation privileges and (2) to take Mr. Laurent for an examination by an Orthopedist.

Mr. Laurent is detained at the MDC since March 21, 2011 and was placed in the Special Housing Unit since on or about April 2011. He has had no visitation privileges, no telephone privileges, and no email privilege during the time he has been detained at the MDC. He has not been allowed to visit the library. He is let out of his cell for one hour a day. Mr. Laurent's mental health has been effected by this isolation and segregation. I have noted a decided difference in his ability to concentrate during my visits with him. I fear that any further segregation will lead to his further decline and his inability to assist in his defense.

On August 7, 2012 Mr. Laurent was taken to Riker's Island relating to a State case which was pending. While at Riker's he was kept in the SHU. However, his father was

A R. NEWMAN
ORNEY AT LAW
MEMBER
NY AND NJ BAR

permitted to visit. His father telephoned counsel to advise that he notice a difference in his son and voiced grave concerns about his son's mental health. On August 28, 2012 Mr. Laurent was returned to federal custody and is in MDC. He was put back in the SHU. This isolation is inhumane, particularly since Mr. Laurent is a pretrial detainee. This issue must be addressed immediately before Mr. Laurent's mental health further deteriorates.

Mr. Laurent had constantly complained of pain in his left foot. He needs to be seen by an outside Orthopedist to properly diagnose and treat his condition. He was advised that a visit to an outside specialist had been authorized. Yet to date, he has not been taken for an appointment. It is imperative that this occur immediately. He was also told by the MDC physician that he needs special sneakers. To date, he has not received the required sneakers. Please advise if we can supply or how Mr. Laurent can obtain these sneakers.

Very truly yours,

Donna R. Newman /ad

Donna R. Newman
DRN/ad
cc: Hon. Nicholas G. Garaufis-via facsimile to 718-613-2330
AUSA Seth David DuCharme, Esq.-via email
AUSA Zainab Ahmad, Esq.-via email
Jamal Laurent-via first class mail ✓

member:
NY Bar
NJ Bar

The Law Offices of
DONNA R. NEWMAN, PA
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Tel: 212.229.1516
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445 East Broad Street
WestField, NJ 07090
T. 908-232-0293
F. 908-232-3277

Reply to NY

December 4, 2012

via facsimile to (718) 840-4250
Metropolitan Detention Center
P O Box 329002
Brooklyn, New York 11232

Attn: Nicole McFarlen, Legal Department

Re: Jamal Laurent
Inmate No. 79075-053

Dear Ms. McFarlen:

It was my recollection that at the court conference held on November 16, 2012, the Honorable Nicholas G. Garaufis requested that Jamal Laurent be allowed a visit with his family. Mr. Laurent is not faring well under the solitary confinement imposed by the Metropolitan Detention Center. He desperately needs this visit to lift his spirits.

Kindly advise when this can be arranged.

Very truly yours,

Donna R. Newman

Donna R. Newman
DRN/ad
cc: Avi Moskowitz, Esq.-via email
Jamal Laurent-via 1st class mail

Attachment (F)

LETTER

TO: JAMAL LAURENT

DATE: April 10, 2012

THE LAW OFFICES OF
DONNA R. NEWMAN, PA

MEMBER:
NY BAR
NJ BAR

111 BROADWAY, SUITE 1805
NEW YORK, NY 10006
TEL: 212.229.1516
FAX: 212.676.7497
DONNANEWMANLAW@AOL.COM
WWW.NEWMANSLAW.NET

445 EAST BROAD STREET
WESTFIELD, NJ 07090
T. 908-232-0293
F. 908-232-3277

REPLY TO NY

April 10, 2012

Jamal Laurent
Inmate No. 79075-053
Metropolitan Detention Center
P O Box 329002
New York, New York 11232

Re: United States v. Jamal Laurent
Docket No. 11-CR-303(S-2)(NGG)

Dear Mr. Laurent:

Stan Ferguson, a Senior Special Agent with the Department of Justice contacted me and advised that he would like to interview you with respect to your assault in the prison. I write to advise you that it is okay for you to speak with the agent.

If you have any questions, please do not hesitate to contact my office.

Very truly yours,

Donna R. Newman /ad

Donna R. Newman
DRN/ad

ATTACHMENT G

LETTER

TO: Judge Garaufis

DATE: November 6, 2012

member
NY Bar
NJ Bar

The Law Offices of
DONNA R. NEWMAN, PA
20 Vesey Street, Suite 400
New York, NY 10007
Tel: 212.229.1516
Fax: 212.676.7497
donnanewmanlaw@aol.com
www.donnanewmanesq.com

445 East Broad Street
Westfield, NJ 07090
T. 908-232-0293
F. 908-232-3277

Reply to NY

November 6, 2012

Via ECF & First Class Mail
The Honorable Nicholas G. Garaufis,
United States District Court Judge
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United States v. Jamal Laurent*
Docket No. 11 Cr. 303 (S-2)(NGG)

Dear Judge Garaufis:

We the undersigned counsel for Jamal Laurent write to request an order compelling the Metropolitan Detention Center ("MDC") to release Jamal into the general population or in the alternative to allow him access to e-mail, to the telephone and to allow him family visitation.

Jamal has been detained at the MDC since his arrest by Federal Agents on March 21, 2011. He was placed in the Special Housing Unit ("SHU") on or about April 2011. Thus, but for about a month when he was transferred to Riker's Island at the end of July to go to trial on a related state court matter (which resulted in his acquittal), Jamal has been under twenty-three hour lock-down every day for the past eighteen months! He is permitted to shower once a week and has limited to no interaction with other human beings, except for his visits with counsel. He has been without the ability to use the internet to communicate with counsel, without regular access to the telephone to call counsel or his family, and denied visits from his family. SHU only has one computer room/attorney visiting room and that computer has not worked for at least the past two months, making review of discovery with Jamal difficult. Notably, the federal case for which he was initially arrested in March 2011and detained pending trial, *United States v. Laurent*, 11Cr. 322 (JBW), also resulted in an acquittal after trial last December. Thus, despite two acquittals since his initial detention in March 2011, and despite the presumption of innocence in this case, Jamal has been jailed under severely harsh conditions.

I, Donna Newman, now know Jamal for over a year and I can personally report that the isolation he endures in SHU has adversely affected his ability to concentrate and his recall. I attach a copy of an email I received from Jamal's father, Peter Laurent, who had an opportunity to visit his son when Jamal was at Riker's Island this past summer. He also attests to the changes he observed during his visit with his son this August. He fears that his son's mental health is being compromised.

The continued detention of Jamal under these conditions, is just plainly punishment. He is, therefore, being denied his due process rights under the Fifth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 537 (1979). Moreover, keeping Jamal in the SHU for such an extended period of time constitutes "cruel and unusual punishment" and violates his rights under the Eighth Amendment to the United States Constitution. Indeed, his continued isolation, at this crucial stage in the proceeding violates his Sixth Amendment right to effective representation of counsel. We are now conducting a mitigation investigation in order to collect information to convince the Government not to seek the death penalty against Jamal. His lengthy stay in the SHU has caused his emotional deterioration and a corresponding deterioration of his mental functioning. This in turn has effectively limited his ability to communicate with his defense team and participate in his defense.

I recognize that the MDC is entitled to require strict compliance with its rules and regulations with respect to inmate behavior and understand that it enforces those rules by placement of inmates in the SHU. I am also cognizant that Jamal has been cited by several officers (actually a group of the same officers) for a variety of insubordinate behavior. Jamal has appealed all adverse rulings administratively, and has made every attempt to demonstrate that the officers contentions were not founded in fact. I mention this only to bring to the Court's attention that Jamal does not concede that he was insubordinate, as reported by the officers.

It is important to understand that most of the complaints against Jamal stem from his insistence that he receive medical treatment- treatment he was not receiving. Jamal dutifully put in requests for medical call (a/k/a "cop-outs"), most of which were ignored. He has complained about pain in his left for the last eight months and despite promises to him that he would be taken to see a specialist, he still has not been taken to see an orthopedist.

As Your Honor may recall, I wrote to the Court about his left foot disorder, plantar fasciitis, back in July and asked the Court's assistance in obtaining for Jamal the appropriate medical care, including his being taken to see a specialist. Your Honor requested the government assist me in this matter. I am aware that Assistant United States Attorney Seth DuCharme did reach out to the MDC and he was able to extract promises that Jamal would be seen by specialists. To date, he has been taken for x-rays of the chest but he has not been seen by a specialist for his plantar fasciitis of the left foot. The latter condition is painful and easily correctable with proper shoes. Without seeing a specialist and obtaining a prescription for an orthopedic device and/or the appropriate shoe, the MDC will not give Jamal's permission to receive from his family the proper foot gear. If it sounds frustrating, one can only imagine how frustrating it is to live it.

I have also written to the legal staff at MDC numerous times regarding Jamal's medical needs and his placement in the SHU for such an extended period of time. I did receive a response to one of my several letters from Warden Duke Terrell, PhD, dated April 25, 2012, and another from Warden Frank Strada, dated July 19, 2012. Both Warden Terrell and Warden Strada claimed Mr. Laurent had received all the necessary medical treatment. Warden Strada denied my request for at least one visit with his family.

We are deeply concerned that Jamal's continued detention in the SHU and continued isolation from his family will result in continued deterioration of his emotional and psychological state and will impede our ability both to conduct a thorough and comprehensive mitigation investigation and to defend him against the very serious charges against him. I therefore respectfully request that the Court order the MDC to release Jamal from the SHU immediately and return him to general population. Alternatively, and at a minimum, it is respectfully requested that the Court direct the MDC to restore Jamal's visitation and phone privileges so that he can maintain contact with his family during this crucial stage in his case.

Thank you in advance for your consideration of this application.

Respectfully submitted,

Donna Newman

/s/

Avraham C. Moskowitz

cc: AUSA Seth Ducharme via email & ECF
AUSA Zainab Ahmad via email & ECF
Jamal Laurent via first class mail

ATTACHMENT H

EMAIL

(NOTIFICATION)

TO: CRIMINAL Attorney - (DONNA NEWMAN)

DATE: September 21, 2012

From: Peter Laurent <growrichl@aol.com>
To: donnanewmanlaw <donnanewmanlaw@aol.com>
Subject: " ENOUGH IS ENOUGH " ITS TIME TO LEAVE THE BOX!!!
Date: Fri, Sep 21, 2012 1:45 am

September 20,2012

Good morning attorney.To day is my son's birthday and I am taking this time out to write you on his behalf. Jamal Laurent who have been in the SHU now for more than one year at MDC. Those in authority aught to know that my son has not yet been tried nor has he been sentence. And thought Jamal might have mouth those in his charge; is it ? justifiable to have kept him in such poor condition for so long;especially with his poor medical condition. As his father; I have been denied visitation rights from since April 2011. when He first got there he was only twenty one years of age, now he has spend two birthdays in there and when I last saw my son on September 6,2012 at Federal court he did not look the same.

He look disfigured; I reckon that it was due to lack of sunlight, But more disturbing than that he was not "all there" figuratively speaking the SHU has gotten to him. HE IS NOT THE SAME PERSON THAT I KNEW. My son wrote me a letter dated 9/10/2012 and began cursing me for no apparent reason. Something he has never done before. In fact he has address his name as JESSE which is clear that something is wrong. I do not know what the government has to gained in what they are doing but I want you to know that I have in tensions of taking this cruelty to the media at the APPROPRIATE time. In the mean while; attorney I am asking of you to write the judge and the warden in removing my son from this kind of CRUEL AND INHUMANE PUNISHMENT AND IN HARMS WAY. I await your response and I thank you in advance.

Respectfully yours Mr. Peter Laurent

Attachment I

LETTER

TO: Warden of MDC (DOKE TERRELL)

*RESPONSE INCLUDED

DATE: March 26, 2012

KEVIN S. PARKER
SENATOR, 21ST DISTRICT
RANKING MINORITY MEMBER
ENERGY & TELECOMMUNICATIONS
COMMITTEES
CRIME
COMMERCE, ECONOMIC DEVELOPMENT & SMALL BUSINESS
FINANCE
HIGHER EDUCATION
INSURANCE
RULES
NEW AMERICAN TASK FORCE

THE SENATE
STATE OF NEW YORK

ALBANY OFFICE
ROOM 406
LEGISLATIVE OFFICE BUILDING
ALBANY, NEW YORK 12247
PHONE: 518-455-2560
FAX: 518-426-6840

DISTRICT OFFICE
1360 FLATBUSH AVENUE
BROOKLYN, NEW YORK 11210
PHONE: 718-629-6401
FAX: 718-629-6405

e-mail:
parker@nysenate.gov

March 26, 2012

Duke Terrell
Warden
Metropolitan Detention Center
80 29th Street
Brooklyn, NY 11232

Re: Jamal Laurent
Inmate #: 79075053

Dear Warden Terrell:

I am writing to you on behalf of **Mr. Peter Laurent**, a constituent of my district and father of **Jamal Laurent**, a Metropolitan Detention Center (MDC) inmate. Due to an extenuating circumstance detailed below, I am requesting that a thorough investigation of his current case be conducted in efforts to resolve this matter.

According to Mr. Laurent, his son has been an inmate at MDC for approximately 11 months. On December 7, 2011 he was found "not guilty" at his trial: however, he remained incarcerated because of new charges brought up in a separate case. As Jamal awaits his second trial, he has informed his family of inhumane and unjust behavior that he has been experiencing at your facility from inmates and staff members. In January/February 2012, Jamal was left unattended in handcuffs in a unknown room at MDC with other un-cuffed inmates. While in this room, the inmates proceeded to viciously attack him. He had no way to protect himself due to the restraints. While notifying the security guards of the incident, he began to cough up blood as a result of his attack. Blood proceeded to get on the guards uniform. The guard proceeded to accuse him of purposely spitting on him while he accounted his story. Additionally, Jamal was gravely injured and did not get proper medical attention after the incident occurred. He now may be placed in "the hole" for six months for "spitting" on a prison official. Jamal has been pleading with prison staff members to review the camera tapes in order to prove his innocence. He is even willing to take a lie detector test to prove that he did not do what the guards are accusing him of. I am requesting that a thorough investigation in this incident be conducted in efforts to resolve this matter.

Thank you in advance for your prompt response and favorable consideration to this matter. If you have any questions or require additional information, please do not hesitate to contact Ms. Regine Roy, Constituent Affairs Liaison, at my district office at (718) 629-6401.

Yours in Partnership,

KEVIN PARKER

cc: Peter Laurent
Attorney General Eric H. Holder, U.S. Department of Justice

U.S. Department of Justice
Federal Bureau of Prisons

Metropolitan Detention Center
Office of the Warden
80 29th Street
Brooklyn, New York 11232

April 24, 2012

Honorable Kevin S. Parker
Senator, 21st District
1300 Flatbush Avenue
Brooklyn, New York 11210

Re: LAURENT, J.
Reg. No. 79075-053

Dear Senator Parker:

Thank you for your correspondence on behalf of Mr. Peter Laurent, father of Jamal Laurent, a federal inmate currently confined at the Metropolitan Detention Center (MDC), Brooklyn, New York.

Mr. Laurent is a twenty-two year old male from Brooklyn, New York, who arrived at MDC Brooklyn on April 12, 2011. Mr. Laurent is facing Possession of a Weapon charges in the Eastern District of New York. He is an "IN" custody, Pre-Sentenced inmate.

It is the policy of the Federal Bureau of Prisons and the practice followed by this facility to treat all inmates in a fair and impartial manner. Allegations such as those made by Mr. Laurent are taken seriously and are forwarded to the appropriate authority for investigation. Regarding the January 27, 2012 incident, there is presently an investigation being conducted by the Office of the Inspector General regarding possible misconduct. At this time I have not received the results of the investigation. Once I do, appropriate action will be taken in response.

I hope this addresses your concerns. Should you have any further questions, please do not hesitate to contact me.

Sincerely,

Duke Terrell, PhD
Warden

I & NIRS WHO IS ABOVE THE WARDEN

May 22nd 2014 Jamal Laurent #79078053

Pro Se Office
United States District Court
225 Cadman Plaza East
Brooklyn, NY 11201

MDC BROOKLYN
PO Box 329002
BROOKLYN, NY 11232

AZRACK, M.J. CV 14 3340
WEINSTEIN, J.

Dear Office Clerk,

Greetings! My name is Jamal Laurent. Previously on April 28th 2014 I wrote to the clerks office requesting the necessary documents to refile my 1983 civil claim which was filed by the EDNY office on May 1st 2014. Well my purpose for writing this letter is to notify you of the enclosed documents contained in this folder. The enclosed items are the original complaint and 2 identical copies which has some exhibits Stapled to them to help support my claim. Well I would like to thank the employees at the clerks office for their outstanding support to those incarcerated. If there are any questions or comments please feel free to ask. Have a wonderful day!

Best Regards,

Jamal Laurent

5/22/2014

FILED
IN CLERK'S OFFICE
US DISTRICT COURT E.D.N.Y.
★ MAY 27 2014 ★
BROOKLYN OFFICE

2014 JUN 13 AM 11 18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JAMAL LAURENT 7907053,

Plaintiff,

v.

OFFICER A. CASTELLANOS, OFFICER SHEPHERD, OFFICER P. NAUPARI, D. GARCIA, and UNITED STATES OF AMERICA,

Defendants.

----------x

Civil Action No.
14-CV-3340
(Weinstein, J.)
(Orenstein, M.J.)

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

In the interest of settling all claims brought by JAMAL LAURENT in the above-captioned legal action, Plaintiff JAMAL LAURENT and Defendants OFFICER A. CASTELLANOS, OFFICER SHEPHERD, OFFICER P. NAUPARI, D. GARCIA and the UNITED STATES OF AMERICA, hereby enter into this Stipulation for Compromise Settlement and Release (hereafter referred to as the "Agreement"), and agree as follows:

1. Pursuant to this Agreement, each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action will be dismissed with prejudice under the terms and conditions set forth in this Agreement.

2. The United States of America, the only proper party defendant in an action brought pursuant to the Federal Tort Claims Act, agrees to pay the sum of five thousand five hundred dollars and no cents ($5,500.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily

and personal injuries and damage to property, and the consequences thereof, resulting, and to result, from the subject matter of this action, including any claims for constitutional violations and wrongful death, for which plaintiff or his administrators or assigns, now have or may hereafter acquire against the United States of America, and its respective agents, officials, employees, servants, insurers, and assigns, including, but not limited to OFFICER ANTHONY CASTELLANOS, OFFICER MICHELLE SHEPHERD, P. NAUPARI AND DANIEL GARCIA.

3. Plaintiff and his administrators or assigns hereby agree to accept the sum set forth in this Stipulation for Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily and personal injuries and damage to property, and the consequences thereof, which they may now have or may hereafter acquire against the United States of America, its agents, servants, and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his administrators or assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff and his administrators or assigns against any third party or against the United States of America, including claims for constitutional violations and wrongful death.

4. This Agreement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States of America, its agents, servants, or employees, including but not limited to Defendants, and it is specifically denied that they are liable to plaintiff. This Agreement is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

7. The persons signing this Agreement warrant and represent that they possess full authority to bind the parties on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by check in the sum of five thousand five hundred dollars and no cents ($5,500.00), and made payable to Jamal Laurent in care of Peter Laurent. The check will be mailed to plaintiff at the following address: Jamal Laurent, in care of Peter Laurent, 633 East 42nd Street, Brooklyn, NY 11203.

9. The parties agree that this Agreement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation for Compromise Settlement may be

executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

AGREED AND CONSENTED TO:

JAMAL LAURENT

On the 13 day of April in the year 2016, before me, the undersigned, personally appeared Jamal Laurent, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

NOTARY PUBLIC

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
MICHAEL GYURKE JR
Usp Hazelton
PO Box 450, Bruceton Mills, WV 26525
My Commission Expires August 23, 2021

Dated: Hazelton, West Virginia
April 13, 2016

Jamal Laurent, 79075-053
Plaintiff
United States Penitentiary, Hazelton
P.O. Box 2000
Bruceton Mills, WV 26525

By: _____
JAMAL LAURENT

Dated: Brooklyn, New York
~~April __, 2016~~
May 2016

ROBERT L. CAPERS
United States Attorney
Counsel for Defendants
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

By: _____
DARA A. OLDS
Assistant U.S. Attorney
(718) 254-6148
dara.olds@usdoj.gov
Brooklyn, New York 11201

14CV2091

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Robert Ingram,

Plantiff,

v.

United States of America,
Dr. A. Bussanich, M.D.,
Dr. Robert Beaudouin, M.D.,
DOES 1-100, et al.
Defendants.

Case No. _____

COMPLAINT FOR DAMAGES
JURY DEMANDED

JURISDICTION
VENUE

1. Plaintiff, Robért Ingram, is a federal prisoner incarcerated at Federal Bureau of Prisons, U.S.P. Tucson, Tucson Satellite Camp, P.O. Box 24550, Tucson, AZ 85734, and is a citizen of the State of Arizona.

2. The Court has jurisdiction of the subject matter under 28 U.S.C Sections 1331, 1346 (a), and the Eighth Amendment to the Constitution and 42 U.S.C. Section 1983, and the Federal Torts Claim Act.

3. Venue is proper in this court under 28 U.S.C. Section 1391 (a) because a substaintial portion of the events or omissions giving rise to the claim asserted in this complaint occurred within this judicial district.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Robert Ingram,

Plantiff,

v.

United States of America,
Dr. A. Bussanich, M.D.,
Dr. Robert Beaudouin, M.D.,
DOES 1-100, et al.
Defendants.

Case No. _____

COMPLAINT FOR DAMAGES
JURY DEMANDED

MAR 19 2014

JURISDICTION
VENUE

1. Plaintiff, Robert Ingram, is a federal prisoner incarcerated at Federal Bureau of Prisons, U.S.P. Tucson, Tucson Satellite Camp, P.O. Box 24550, Tucson, AZ 85734, and is a citizen of the State of Arizona.

2. The Court has jurisdiction of the subject matter under 28 U.S.C Sections 1331, 1346 (a), and the Eighth Amendment to the Constitution and 42 U.S.C. Section 1983, and the Federal Torts Claim Act.

3. Venue is proper in this court under 28 U.S.C. Section 1391 (a) because a substaintial portion of the events or omissions giving rise to the claim asserted in this complaint occurred within this judicial district.

COMPLAINT

4. The Plaintiff has complied with all prerequisites to a suit under the Federal Torts Claims Act in that:

a. On March 14, 2013, the Plaintiff timely filed an administrative claim for the matters in dispute in this action in the amount of $5,000,000 with the Federal Bureau of Prisons, Northeast Regional Office, 2nd & Chestnut Street, 7th Floor, Phildelphia, PA 19106; Exhibit "A".

b. The defendant, by and through its agency, the U.S. Department of Justice Federal Bureau of Prisons denied plaintiff's administrative claim and on September 13, 2013 mailed its notice of denial, a copy of which is attached to this complaint as Exhibit"B".

c. This action was timely commenced following the denial of the administrative claim.

5. Plaintiff also brings this action against defendants, Dr. A. Bussanich, M.D., and Dr. Robert Beaudouin, M.D., physicians acting as agents, servants, and employees of defendant, the United States of America, in the course of their employment, who along with other agents, servants, and employees of the defendant, the United States of America, known to defendant, the United States of America, but unknown to plaintiff, committed the acts of negligence that are set forth more fully below.

6. As a result of the inadequate medical care and fault of the defendants, by and through their agents, servants and employees, acting within the scope of their employment, plaintiff suffered Stage III colon cancer, increased risk of death from colon cancer, physical degeneration of major bodily functions, acute mental anguish, post trumatic syndrom disorder, acute emotional pain and suffering, sleep deprivation, and fear of loss of life.

7. These injuries resulted from the negligence of the agents, servants and employees of defendants, acting within the scope of their employment, as follows:

a. On or about May 05, 2010, plaintiff was examined by defendant doctor at the Federal Bureau of Prisons, MCC, New York, NY, at which time, the plaintiff complained of rectal bleeding and blood in his stool. Plaintiff complained that he had a fear that the profuse amount of blood would continue each time he had a stool unless he pushed what felt like a small ball back into his anus. Plaintiff feared that if he could not push this ball back or if it tore that he would bleed to death.

b. At that time, defendant, Dr. A. Bussanich, M.D., diagnosed plaintiff with hemorrhoids. His diagnosis was based on a prostate examination.

c. On or about December 12, 2010, defendant, Dr. Robert Beaudouin, M.D., examined the plaintiff and concluded that plaintiffs' complaints of rectal bleeding and blood in his stools was caused by hemorrhoids by reviewing Dr. A. Bussanichs' medical notes. Dr. Robert Beaudouins' diagnosis was given without the benefit of any routine physical examinations or anyoother method of evaluation or tests.

d. On or about October 2011, plaintiff was examined by medical staff at FCI Safford, Safford, AZ, who ordered a colonoscopy examination after learning of plaintiffs complaints. The colonoscopy examination was conducted at Mt.Graham Hospital located in Safford, AZ. During the examination its was discovered that plaintiff had three cancerous polyps at the entrance of his anus and a 5 centimeter cancerous tumor in his upper rectum that was already malignant and plaintiffs body was severly degenerated.

e. Plaintiff was subsequently transfered to Mt.Graham Hospital where he underwent a complicated sugical procedure to remove the malignant tumor. This surgery was performed on or about November 2011.

f. Defendants, Dr. A. Bussanich, M.D., an Dr. Robert Beaudouin, M.D. were negligent in failing to diagnose the cancerous condition and were further negligent in failing to utilize other examinations or medical testing to diagnose and treat colon cancer caused by rectal bleeding, bloody stool which were frequently recurring. Their treatment plan consisted of prescribed suppositories for a hemorrhoid condition.

g. Defendant's, by their above actions, failed to follow generally accepted medical standards. Had they done so, an early detection of cancer would have prevented the plaintiff's body from degenerating and his bodily functions failing. Plaintiff would have not experianced the mental and physical pain and suffering which he now still suffers from. The defendant negligently chose an easier and less efficaious treatment plan which was the direct and proximate cause of plaintiff's suffering.

h. As a direct and proximate result of the combined negligence of defendant's agent's, servants, and employees, plaintiff has suffered a decreased life expectancy, increased risk of death from colon cancer physical degeneration of his bodily functions, acute mental anguish, post trumatic syndrom disorder, acute emotional pain and suffering, loss of sleep, and fear of loss of life. Plaintiff has been damaged as a result of defendant's acts and ommissions in the aggregate sum of $7,000,000.00

VIOLATION OF RIGHTS BY
Dr. A. Bussanich, M.D., and Dr. Robert Beaudouin, M.D.
42 U.S.C. Section 1983

Robert Ingram claims that Dr. A. Bussanich,M.D. and Dr. Robert Beaudouin, M.D., Violated his civil rights. To establish this claim, Robert Ingram must prove all of the following:

1. That Dr. A. Bussanich and Dr. Robert Beaudouin, with deliberate indifferance to plaintiff's serious medical needs repeatedly failed to provide proper medical care and treatment. Defendant doctor's knew of Plaintiff's profuse retal bleeding and continous bleeding in his stools and failed to treat, order further evaluations and examinations which resulted in further significant injury and unnecessary and wanton inflictio of physical and mental pain and suffering.

2. The defendant's refusal to order addition testing to determine the reason for the plaintiff's continuous bleeding after realizing that the

prescribed suppositories were not alleviating the serious medical symptoms of rectal bleeding and blood in his stools. The defendant's deprived the plaintiff of further medical treatment demonstrating cruel and unusual punishment. Defendant's culpable state of mind demonstrated an egregious and harmful intent to cause irreparable damage to plaintiff. As a result plaintiff's body degenerated, his serious medical condition escalated to Stage III colon cancer endangering his life and by the deliberate indifferance to plaitiff's serious medical needs increased the risk of death to plaintiff.

3. Plaintiff's constant complaints of such a serious nature that it shocks the evolving standards of decency that defendants deprived him of civil rights in violation of the Eigth Amendment constitutional protection against cruel and unusual punishment. Defendant's acts and failure to act to provide plaintiff with adequate medical care and treatment envinces a conscious disregard of substantial risk of serious harm. Defendant's deliberately with ill will chose an easier and less efficacious treatment plan to the detriment of plaintiff.

4. Defendant's Dr. A. Bussanich and Dr. Robert Beaudouin were acting or purporting to act at all times in the performance of their official duties.

5. Plaintiff was serious harmed by defendant's action to such extent that Plaintiff could not perform normal daily activities. Plaintiff could not control of his bodily functions which resulted in feces being released when urinating or passing gas. Plaintiff was in fear of eating because he could not hold his food. Plaintiff had to endure serious pain during times where he was confined to holding cell awaiting legal hearings and at times while being transported to detention facilities by bus or airplane in that plaintiff was handcuffed and could not relieve himself in the restroom area.

6. That Dr. A. Bussanich and Dr. Robert Beaudouin's conduct was a substantial factor in causing Plaintiff's harm. Plaintiff suffered in the past from post trumatic syndrom disorder due to his fear of death as a direct result of defendant's actions and continous to experiance this acute chronic disorder. Defendant's failed in their professional duty of providing adequate medical care and treat to plaintiff.

7. As a direct and proximate result of the combined negligence and deliberate indifferance to plaintiff's serious medical needs, the plaintiff has suffered a decreased life expextancy, an increased risk of death from colon cancer, physical degeneration of his bodily functions, acute mental anguish, post trumatic syndrom disorder, acute emotional pain and suffering, loss of sleep, and fear of loss of life. Plaintiff has been damaged as a result of the defendant's acts and ommissions in the aggregate sum of $7,000,000.00

JURY DEMAND

Plaintiff demands a jury trial of his constitutional claims against Dr. A. Bussanich, Dr. Robert Beaudouin, and the United States of America.

PRAYER

Plaintiff request that this Court render judgement against the defendants:

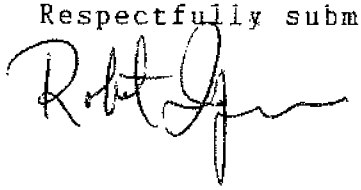
A. In the sum to be shown at trial, but in no event less than $7,000,000.00

B. Including whatever pre- and post judgement interest may be allowed by law; and that

C. Plaintiff be awarded costs of suit.

Dated: 3/10/2014

Respectfully submitted,



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT INGRAM,

Movant,

v.

UNITED STATES OF AMERICA

Respondent.

CERTIFICATE OF SERVICE

I affirm, under oath, that, on March 10 2014, I served a copy of this legal Complaint by first class United States mail, on United States mail, legal mail system at the Federal Bureau of Prisons, U.S.P. - Tucson Satellite Camp, P.O. Box 24550, Tucson, AZ 85734 with first-class postage fully prepaid, on the Clerk of Court-Pro se Office, Rm. 230, Southern District of New York, 500 Pearl Street, New York, NY 10007.

This declaration is signed and sworn to under penalty of perjury pursuant to 28 U.S.C. Section 1746.

Robert Ingram, Pro se

3/10/2014
Date

Exhibit "A"

CLAIM FOR DAMAGE, INJURY, OR DEATH	**INSTRUCTIONS:** Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit to Appropriate Federal Agency:	2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.
Federal Bureau of Prisons Northeast Regional Office 2nd & Chestnut St., 7th Floor Philadelphia, PA 19106	Robert P. Ingram, FMC Lexington, Federal Medical Center P.O. Box 14500, Lexington, KY 40512; John H. Fisher, Attorney-in-Fact for Robert P. Ingram, Mainetti, Mainetti & O'Connor, PC, 130 North Front St., Kingston, NY 12402

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☐ CIVILIAN	04/02/1954	single	05/19/2010 Wednesday	

8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).

Robert P. Ingram is the Claimant. The basis of the claim is a failure to diagnose and treat colon cancer. The claim arose when Claimant was an inmate at MDC Brooklyn, NY and MCC New York, NY. Claimant had complaints of rectal bleeding and blood in his stool. He was diagnosed with hemorrhoids. No further testing or follow-up was performed. Claimant was diagnosed with cancer in October 2011 after receiving a colonoscopy when he was an inmate at FCI Safford, AZ.

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

None

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).

None

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.

Stage 3 colon cancer, increased risk of death from colon cancer, physical pain, and mental anguish

11. **WITNESSES**

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
Medical care providers	MDC, Brooklyn, NY; MCC, New York, NY; FCI Safford, AZ; FMC Lexington, KY

12. (See instructions on reverse). **AMOUNT OF CLAIM** (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).
0.00	5,000,000	0.00	5,000,000

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side).	13b. PHONE NUMBER OF PERSON SIGNING FORM	14. DATE OF SIGNATURE
Attorney-in-fact for Robert P. Ingram	845-331-9434	03/15/2013

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).	Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

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PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

03/10/2014

Clerk of Court
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

RE: Robert Ingram v. United States, et al.
Civil Complaint Filing Fees/Request for In Forma Pauperis status

Dear Clerk of Court:

Enclosed please find my civil complaint for filing. Also find a pre-paid postage envelope, please date stamp a copy of the face sheet to the Civil Complaint as received by your Office and mail it back to me.

With respect to the waiver for civil complaint filing fees, I attached an application to the enclosed complaint to reflect the last six months income while incarcerated. I've been incarcerated since January 26, 2009, and I made an application for In Forma Pauperis status at that time for my criminal case, and I've been in that status ever since. I've filed in the lower court, on direct appeal, and have had legal representation appointed by the court due to my indigent status. I would hope that you would also grant such status in this civil matter.

Thank you for your kind attention and consideration regarding this matter of importance.

Sincerely,

Robert Ingram

U.S. Department of Justice

Federal Bureau of Prisons

Northeast Regional Office

U.S. Custom House-7th Floor
2nd & Chestnut Streets
Philadelphia, PA 19106

Exhibit "B"

Via Certified and Return Receipt Mail

September 13, 20

RECEIVED
SEP 30 2013

John H. Fisher, Esq.
Mainetti, Mainetti & O'Connor, PC
130 North Front Street
Kingston, NY 12402

RE: Administrative Claim No. TRT-NER-2013-03709
Robert Ingram, Reg. No. 88753-008

Dear Mr. Fisher:

Administrative Claim No. TRT-NER-2013-03709, filed on behalf of the above-referenced individual, was properly received on March 14, 2013, and has been considered for settlement as provided by the Federal Tort Claims Act (FTCA), 28 U.S.C. §2672, under authority delegated to me by 28 C.F.R. §543.30. Damages are sought in the amount of $5,000,000.00 based on a personal injury claim. Specifically, you allege MDC Brooklyn and MCC New York failed to diagnose Mr. Ingram with colon cancer while he was housed at the facilities on May 19, 2010. Pursuant to 28 U.S.C. § 2401(b), this claim had to be presented to the Bureau of Prisons within two years of accrual. As such, this claim will be accepted and considered only for the period of time Mr. Ingram was housed at MDC Brooklyn and MCC New York after March 14, 2011.

Investigation reveals from March 14, 2011, to May 4, 2011, Mr. Ingram was housed at MDC Brooklyn. He was seen by medical staff for complaints of lower back and hip pain, hemorrhoids, and kidney disease. Mr. Ingram received appropriate medical care and treatment for these concerns. There is no evidence to suggest he experienced a compensable loss as the result of negligence on the part of any Bureau of Prisons employee. Accordingly, your claim is denied.

If you are dissatisfied with this decision, you may bring an action against the United States in an appropriate United States District Court within six (6) months of the date of this memorandum.

Sincerely,

Michael D. Tafelski
Regional Counsel

cc: Catherine L. Linaweaver, Warden, MCC New York
Frank Strada, Warden, MDC Brooklyn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT INGRAM,

Plaintiff,

-against-

UNITED STATES OF AMERICA, et al.,

Defendants.

14 Civ. 2091 (JPO)(AJP)

ORDER OF DISMISSAL ON CONSENT

ANDREW J. PECK, United States Magistrate Judge:

The parties having informed the Court that they have reached a settlement agreement in principle and are finalizing settlement documents (see Dkt. No. 42), IT IS HEREBY ORDERED THAT this action is dismissed with prejudice and without costs, provided, however that any party may reinstate the action within 30 days hereof if the settlement is not fully effectuated. Any pending motions are to be terminated as moot.

SO ORDERED.

DATED: New York, New York
May 26, 2015

Andrew J. Peck
United States Magistrate Judge

Copies ECF to: All Counsel
Judge Oetken

07/07/2015 TUE 9:09 FAX 5205746405 CAMP 001/005

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC#
DATE FILED: 7/13/15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT INGRAM,

Plaintiff,

v.

UNITED STATES OF AMERICA, DR. A. BUSSANICH, M.D., DR. ROBERT BEAUDOUIN, M.D., DOES 1-100, ET. AL.,

Defendants.

ECF Case

14 Civ. 2091 (JPO) (AP)

STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL

WHEREAS, on or about March 19, 2014, Plaintiff Robert Ingram ("Plaintiff") filed a complaint (the "Complaint") commencing the above-captioned action (the "Action") against the United States of America ("the United States") and two employees of the Federal Bureau of Prisons (the "BOP"), namely, Dr. Anthony Bussanich, Dr. Robert Beaudouin, along with unnamed "Doe" defendants (together, the "*Bivens* Defendants"), asserting claims of negligence against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (the "FTCA Claims"), and claims under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 399 (1971) against the *Bivens* Defendants (the "*Bivens* Claims"), relating to a purported failure of the *Bivens* Defendants and the Metropolitan Correctional Center (the "MCC") and Metropolitan Detention Center (the "MDC") to provide Plaintiff with diagnostic testing that may have detected his colon cancer in an early stage;

WHEREAS, on November 18, 2014, the Defendants answered the Complaint;

WHEREAS, Plaintiff has decided to voluntarily dismiss the *Bivens* Claims against the *Bivens* Defendants pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure with prejudice, and all parties who have appeared in the Action consent to such dismissal; and

WHEREAS Plaintiff and the United States have reached a settlement of the FTCA Claims;

WHEREAS, Plaintiff was previously convicted of criminal violations and is subject to monetary restitution obligations imposed by a judgment of conviction in *United States v. Ingram*, 07 Cr. 961 (LBS) (S.D.N.Y.) (the "Criminal Matter"), which Plaintiff is presently challenging in a habeas proceeding titled *Ingram v. United States*, Index No. 13-cv-6613 (PGG) (KNF) (S.D.N.Y.);

WHEREAS, the parties contemplate that the Net Settlement Proceeds as defined in this Stipulation shall be made available for distribution to persons who are eligible for restitution payments in connection with the Criminal Matter unless Plaintiff's habeas petition is granted by this Court;

IT IS HEREBY STIPULATED AND AGREED by and between the Parties, that the above-captioned action shall be resolved as between them as follows:

1. This Action is hereby dismissed as against all Defendants with prejudice, without costs, interest, attorneys' fees or disbursements to any party.

2. This Stipulation and Order of Settlement and Dismissal (the "Stipulation and Order") shall not constitute an admission of liability or fault on the part of the United States or any of its present or former departments, agencies, agents, officials or employees.

3. The United States will pay the sum of eight hundred and fifty thousand dollars ($850,000.00) (the "Settlement Amount") in connection with Plaintiff's FTCA Claim as described in and subject to the terms of this Stipulation. As Plaintiff has agreed to voluntarily dismiss all of the *Bivens* Claims against the *Bivens* Defendants with prejudice and without payment, no portion of the Settlement Amount is attributable to the *Bivens* Claims. The Settlement Amount is inclusive of all costs or attorneys' fees of any kind, in accordance with 28 U.S.C. § 2678, and any

and all liens and fees are to be satisfied by Plaintiff out of the Settlement Amount. Pursuant to 28 U.S.C. § 2678, the counsel for Plaintiff may not charge, demand, receive or collect fees amounting to greater than 25% of the Settlement Amount.

4. Payment of the Settlement Amount set forth in paragraph three above shall be made by the United States, in the amount of $850,000, by check payable to John H. Fisher, as attorney for Robert Ingram (the "Check").

5. Within 24 hours of receiving the Check, John H. Fisher shall deposit the check in an attorney escrow account. Within 24 hours of the clearance of the check, John H. Fisher shall send, by overnight mail, a certified check, bank check or money order in an amount no less than six hundred and thirty-seven thousand five hundred dollars ($637,500) (the "Net Settlement Proceeds") payable to the "Clerk of the Court" with the following designation in the memorandum line, "Payment Toward Restitution in *United States* v. *Ingram*, 07 Cr. 961 (LBS)" ("Plaintiff's Check").

6. The United States shall request that Judge Sand, or another judge with jurisdiction over the Criminal Matter, direct that the Clerk of the Court to refrain from disbursing Plaintiff's Check until the United States District Court for the Southern District of New York adopts or declines, whether in whole or in part, the Report and Recommendation issued by Magistrate Judge Fox in the matter of *Robert Ingram v. United States*, Index No. 13-cv-6613 (PGG) (KNF), Dkt. No. 23. A copy of the proposed order that shall be submitted by the United States to Judge Sand, or another judge with jurisdiction over the Criminal Matter, is attached hereto as Exhibit A.

7. Plaintiff agrees that the Settlement Amount is in full settlement and satisfaction of any and all claims and demands that he or his heirs, executors, administrators or assigns may have

or hereafter acquire against the United States or any of its present or former departments, agencies, agents, officials or employees on account of the events, circumstances or incidents giving rise to this lawsuit and all claims incident thereto, including but not limited to any such claims asserted by Plaintiff in the Complaint. Plaintiff hereby releases and forever discharges defendant the United States and any of its present or former departments, agencies, agents, officials or employees from any and all claims and liabilities arising directly or indirectly from the circumstances or incidents giving rise to this lawsuit and all claims incident thereto, including but not limited to any claims asserted by Plaintiff in the Complaint.

8. Plaintiff further agrees to indemnify and hold harmless the United States, its departments, agencies, agents, officials and employees from any and all such causes of action, claims, rights or subrogated interests arising directly or indirectly from the subject matter of this Action, including any claims arising from the assignment of claims and liens upon the settlement proceeds, and further agrees to reimburse or advance, at the option of counsel for the United States, any expense or cost that may be incurred incident to or resulting from such further litigation or the prosecution of claims by the Plaintiff against any third-party.

9. This Stipulation and Order shall be binding upon and inure to the benefit of the parties and their principals, agents, representatives, heirs, successors and assigns.

10. The terms of this Stipulation and Order shall become effective upon entry of this Stipulation and Order by the Court.

11. The Parties understand and agree that this Stipulation and Order contains the entire agreement between them and that no statements, representations, promises, agreements or negotiations, oral or otherwise, between the parties or their counsel that are not included herein shall be of any force or effect.

Dated: Kingston, New York
June 19, 2015

JOHN H, FISHER, P.C.
Counsel for Plaintiff
Robert Ingram

By: _____
JOHN H. FISHER, ESQ.
278 Wall Street
Kingston, New York 12401
Telephone: (845) 802-0047
Facsimile: (845) 802-0052
Email: jfisher@fishermalpracticelaw.com

Dated: New York, New York
June ___, 2015

PREET BHARARA
United States Attorney for the
Southern District of New York
Counsel for Defendants

By: _____
JACOB M. BERGMAN
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2776
Facsimile: (212) 637-2686
E-mail: jacob.bergman@usdoj.gov

Dated: Tucson, Arizona
June 7, 2015

By: _____
ROBERT INGRAM
Tucson Satellite Camp
USP-Tucson
P.O. Box 24550
Tucson, AZ 85734

SO ORDERED:

7/13/15

_____
HON. ANDREW J. PECK
UNITED STATES MAGISTRATE JUDGE

HON. ANDREW J. PECK
United States Magistrate Judge
Southern District of New York

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DANIEL VARLEY	:	
Plaintiff (s)	:	Civil Action No. 14-3832(RMB/AMD)
v.	:	**ORDER OF DISMISSAL**
UNITES STATES OF AMERICA, ET AL.,	:	
Defendant (s)	:	

It having been reported to the Court that the above-captioned action has been settled;

IT IS on this 8th day of October, 2015,

ORDERED THAT:

(1) This action is hereby **DISMISSED** without costs and without prejudice to the right, upon motion and good cause shown, within 60 days, to reopen this action if the settlement is not consummated; and

(2) If any party shall move to set aside this Order of Dismissal as provided in the above paragraph or pursuant to the provisions of Fed. R. Civ. P. 60(b), in deciding such motion the Court retains jurisdiction of the matter to the extent necessary to enforce the terms and conditions of any settlement entered into between the parties.

s/RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE

Hon. Renée Marie Bumb
Hon. Ann Marie Donio

PAUL J. FISHMAN
United States Attorney
KRISTIN L. VASSALLO
Assistant United States Attorney
970 Broad Street, Suite 700
Newark, NJ 07102
Tel. (973) 645-2835
Fax. (973) 297-2010
email: kristin.vassallo@usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL VARLEY, *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	HON. RENÉE M. BUMB *Civil Action No.* 14-CV-3832 (RMB) (AMD) **STIPULATION AND ORDER OF DISMISSAL**

WHEREAS, plaintiff Daniel Varley ("plaintiff") and defendant the United States of America ("defendant" or the "United States") have amicably resolved all of plaintiff's claims against the United States, its agents, servants, and employees in the above-captioned action;

IT IS HEREBY STIPULATED AND AGREED by and between plaintiff and the United States, by their respective counsel, that all of plaintiff's claims against the United States, its

agents, servants, and employees in the above-captioned action are dismissed with prejudice and without costs, attorneys' fees, expenses, or disbursements to any party.

Dated: Cherry Hill, New Jersey
October 19, 2015

By: _____
CRAIG LEVIN, ESQ.
Attorney for Plaintiff

Dated: Newark, New Jersey
October 24, 2015

PAUL J. FISHMAN
United States Attorney for the
District of New Jersey
Attorney for United States of America

By: _____
KRISTIN L. VASSALLO
Assistant United States Attorney

SO ORDERED:

_____
HON. RENÉE M. BUMB
UNITED STATES DISTRICT JUDGE

PAUL J. FISHMAN
United States Attorney
KRISTIN L. VASSALLO
Assistant United States Attorney
970 Broad Street, Suite 700
Newark, NJ 07102
Tel. (973) 645-2835
Fax. (973) 297-2010
email: kristin.vassallo *a* usdoj.gov

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DANIEL VARLEY, *Plaintiff,* v. UNITED STATES OF AMERICA, *Defendant.*	HON. RENÉE M. BUMB *Civil Action No.* 14-CV-3832 (RMB) (AMD) STIPULATION OF COMPROMISE SETTLEMENT RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this settlement agreement (the "Settlement Agreement").

2. The United States of America agrees to pay the sum of two hundred forty thousand dollars ($240,000.00) (the "Settlement Amount"), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and

unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sum set forth in this Settlement Agreement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Settlement Agreement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This

settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorneys' fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys' fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner; time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Settlement Agreement and the compromise settlement are null and void.

8. Payment of the Settlement Amount will be made by check drawn on the United States for two hundred forty thousand dollars ($240,000.00) and made payable to "Daniel Varley and his attorney Craig Levin, Esq." The check will be mailed to plaintiff's attorney at the following address: Two Penn Center Plaza, 1500 John F. Kennedy Blvd., Suite 900, Philadelphia, Pennsylvania, 19102. Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Settlement Agreement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Settlement Agreement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Dated: Cherry Hill, New Jersey
October 19, 2015

By: _____
CRAIG LEVIN, ESQ.
Attorney for Plaintiff

Dated: Newark, New Jersey
October 26, 2015

PAUL J. FISHMAN
United States Attorney for the
District of New Jersey
Attorney for United States of America

By: _____
KRISTIN L. VASSALLO
Assistant United States Attorney

Dated: October 12, 2015

_____
DANIEL VARLEY

SO ORDERED:

_____
HON. RENEE M. BUMB
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE KOELTL

----------x

JOSEPH CHICARIELLI,

14 CV 6765

Plaintiff,

SUMMONS

--against--

THE UNITED STATES OF AMERICA,
U.S.DEPARTMENT OF JUSTICE (USDOJ),
FEDERAL BUREAU OF PRISON, (FBOP),
METROPOLITAN DETENTION CENTER (MDC NY),
METROPOLITAN CORRECTIONAL CENTER (MCC NY),
"JOHN DOES 1-3"

Defendants.

----------x

TO: ALL DEFENDANTS NAMED ABOVE

YOU ARE HEREBY SUMMONED AND REQUIRED TO SERVE UPON:

The Pawar Law Group, P.C.
20 Vesey, Suite 1210
New York, New York 10007
Attorneys for Plaintiffs

An answer to the complaint which is served on you with this summons, within 21 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

AUG 2 0 2014

RUBY J. KRAJICK

CLERK

DATE

Catherine Lapsley

By: DEPUTY CLERK

JUDGE RUSSELL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

14 CV 6765

JOSEPH CHICARIELLI,

Plaintiff,

--against--

THE UNITED STATES OF AMERICA,
U.S.DEPARTMENT OF JUSTICE (USDOJ),
FEDERAL BUREAU OF PRISON, (FBOP),
METROPOLITAN DETENTION CENTER (MDC NY),
METROPOLITAN CORRECTIONAL CENTER (MCC NY),
"JOHN DOE 1", (name fictitious), correctional officer,
"JOHN DOE 2", (name fictitious), correctional officer,
"JOHN DOE 3", (name fictitious), medical director/physician/MLP,
identities and numbers of whom is presently unknown,
individually and in their official capacities,

Defendants.

Civil Action No.:

COMPLAINT
JURY TRIAL DEMAND

RECEIVED
AUG 20 2014
U.S.D.C. S.D. N.Y.
CASHIERS

Plaintiff Joseph Chicarielli, by his attorney Laleh Zoughi, respectfully alleges as follows:

NATURE OF THE ACTION

1. This action is brought pursuant to Bivens, 28 U.S.C. § 2671 et seq. (Federal Tort Claims Act), the Fourth, Fifth and Eight Amendments to the United States Constitution, 28 U.S.C. §§ 1331 and 1346, 42 U.S.C. §2000dd (Treatment of persons under custody of the United States government) and 28 U.S.C. §2412 (The Equal Access to Justice Act).

2. Plaintiff seeks monetary damages (special, compensatory, and punitive) against defendants for personal injury, future medical expenses and loss of enjoyment of life, caused by the negligent and/or wrongful act or omission of defendants while acting within the scope of their office or employment in allowing unsafe conditions and denying medical treatment

to the plaintiff hosed at the Metropolitan Detention Center, (MDC), Brooklyn, New York and Metropolitan Correctional Center (MCC), Manhattan, New York.

JURISDICTION AND VENUE

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1346. Venue is properly within this District under 28 U.S.C. § 1391 as the acts complained of occurred in the Southern District of New York. The Court has personal jurisdiction over the defendant because the alleged incidents occurred within the confines of this Court.

NOTICE OF CLAIM

4. Plaintiff timely submitted an Administrative Claim for the claims set forth below to the BOP.

5. Six months having elapsed, all conditions precedent to a Federal Tort Claims Act have been met.

PARTIES

6. At all times here relevant, Plaintiff, Joseph Chicarielli, was an inmate held in custody of Federal Bureau of Prisons.

7. Defendant, THE UNITED STATES OF AMERICA, is appropriate defendant under Federal Tort Claims Act;

8. Defendant, U.S. DEPARTMENT OF JUSTICE (herein after referred as "DOJ"), is a Governmental Agency located at 950 Pennsylvania Avenue, NW Washington, DC 20530-0001;

9. Defendant, FEDERAL BUREAU OF PRISON, (herein after referred as "BOP"), is a subdivision of DOJ, located at 320 First Street, NW, Washington DC 20534.

10. Defendant, METROPOLITAN DETENTION CENTER (herein after referred as "MDC"), is an administrative housing facility of BOP, located at 80 29th Street, Brooklyn, NY 11232.

11. Defendant, METROPOLITAN CORRECTIONAL CENTER (herein after referred as "MCC"), is an administrative housing facility of BOP, located at 150 Park Row, New York, NY 10007.

12. Defendant, "JOHN DOE1", (name fictitious), at all times herein mentioned, was a correctional officer, employed at MDC by BOP under the direction of DOJ, acting in his individual and official capacity, and responsible, in whole or in part, for the day-to-day operation and conditions of MDC, and for the health and safety of inmates confined within.

13. Defendant, "JOHN DOE 2", (name fictitious), at all times herein mentioned, was a correctional officer, employed at MCC by BOP under the direction of DOJ, acting in his individual and official capacity, and responsible, in whole or in part, for the day-to-day operation and conditions of MCC, and for the health and safety of inmates confined within.

14. Defendant, "JOHN DOE 3", (name fictitious), at all times herein mentioned, was a medical director/physician/MLP, employed at MCC by BOP under the direction of DOJ, acting in his individual and official capacity, and responsible for the day-to-day oversight of medical examination, testing, treatment and general health of inmates confined within MCC.

FACTUAL ALLEGATIONS

15. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 14 of this complaint with the same force and effect as though fully set forth herein.

16. In or about November 2012, plaintiff was incarcerated at the Metropolitan Detention Center, a federal government holding facility in Brooklyn, New York (herein after referred as "MDC")

17. At the time of incarceration, Plaintiff was a cooperating witness, assisting the AUSA and DOJ against members of organized crime ("members").

18. In or about November 2012, Plaintiff's life was threatened by these members at the Metropolitan Detention Center in Brooklyn, due to his cooperation with the DOJ.

19. In or about November 2012, Plaintiff and his attorney, Joyce London, immediately informed the AUSA, who primarily handled Plaintiff's case, regarding the threats against Plaintiff's life.

20. Defendants did not provide Plaintiff with any protection and instead released him into general population.

21. In or about November 2012, plaintiff's cell at MDC was ransacked by the members and his belongings were stolen.

22. On November 18, 2012, Plaintiff was again attacked at MDC by the members due to his cooperation with the defendant DOJ and was called a "rat".

23. On November 18, 2012, plaintiff was put in solitary confinement at MDC.

24. Upon information and belief, plaintiff's attorney immediately informed the AUSA regarding the aforementioned attack and threats against plaintiff's life.

25. Shortly after the attack at MDC, plaintiff was transferred to MCC and once again released into general population.

26. On June 25, 2013, plaintiff was viciously attacked by the members in his cell and as the result sustained serious permanent injuries, specifically broken jaw.

27. Upon information and belief, after the attack, plaintiff was put in solitary confinement at MCC without any medical care.

28. Upon information and belief, immediately after the attack, plaintiff notified and informed the defendants, that the plaintiff was seriously injured and hurt, and that he did contemporaneous to the accident and at various times thereafter demanded and required immediate medical care.

29. Upon information and belief, plaintiff filed several written complaints with the defendant BOP, requesting medical care for over six weeks after the attack.

30. Upon information and belief, defendants, failed to provide necessary medical treatment and care to plaintiff and his urgent and serious medical needs within a reasonable time even though plaintiff's face was visibly swollen, causing exacerbation of plaintiff's injuries resulting in excessive pain and suffering, and a permanent worsening of his conditions, which would have not occurred had the plaintiff been treated in a timely manner.

31. On August 2, 2013, plaintiff's medical condition was presented to BOP's "Utilization Review Committee" to determine seriousness of his injury.

32. On August 2, 2013 plaintiff was finally approved to receive oral surgery.

33. At the medical facility, plaintiff was informed that his jaw had broken in three different places and had he came to the medical facility after the attack; his jaw would have been easily treated. Due to over six-week delay by defendants to provide Plaintiff with proper medical care, his jaw had to be wire-shut on both sides of his face for weeks.

34. Upon information and belief, defendants refused to provide plaintiff with any medication or liquid diet as prescribed by the treating physician.

35. Upon information and belief, plaintiff was not able to eat solid food for weeks after his jaw was wire-shut and defendants failed to provide plaintiff with proper nutrition and as the result plaintiff lost 25 pounds.

36. Upon information and belief, during all times mentioned in this complaint, the defendants were acting in their individual and official capacity, under color of law, to wit, under color of constitution, statute, ordinance, laws, rules, regulations, policies, customs and usages of the United States.

AS AND FOR A FIRST CAUSE OF ACTION
(FEDERAL TORT CLAIMS ACT)

37. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 36 of this complaint with the same force and effect as though fully set forth herein.

38. At all the times herein mentioned, the defendant BOP, was the owner of an administrative housing facility, MDC, located at 80 29th Street, Brooklyn, NY 11232.

39. At all the times herein mentioned, the defendant BOP, was the owner of an administrative housing facility, MCC, located at 150 Park Row, New York, NY 10007.

40. Plaintiff and his attorney had informed DOJ and BOP regarding threats by members to his life in MDC and MCC.

41. At all the times herein mentioned, plaintiff was an inmate in custody of the defendant, BOP, and housed at MDC and MCC.

42. At all the times herein mentioned, the defendant, BOP, its agents, servants and/or employees operated, maintained, managed and controlled MDC and MCC.

43. At all the times herein mentioned, it was the duty of the defendant, BOP, its agents, servants and/or employees to operate, maintain, and manage the said premises, protecting inmates against vicious and dangerous attacks.

44. The defendants, their agents, servants, and/or employees breached their duty to the plaintiff by failing to protect plaintiff and by improperly allowing and permitting the plaintiff to be viciously attacked and permanently injured by other inmates under their control, specifically on June 25, 2013.

45. On June 25, 2013, while lawfully on the aforementioned premises, plaintiff was unlawfully attacked in the area under controlled and managed by defendant, MCC and was caused to sustain serious, and permanent bodily injuries, great pain, shock, mental anguish, and loss of normal pursuits of happiness and pleasures of life.

46. The attack and resulting injuries to plaintiff were caused through no fault of his own but were solely and wholly by reason of defendants' failure to protect plaintiff's life and body against the vicious attacks by the members which they had prior knowledge of through information provided to defendants by plaintiff and his attorney.

47. Both actual and constructive notices are claimed. Actual notice in that defendants, their agents, servants and/or employees had actual knowledge that plaintiff life has been threatened by the members at MDC and MCC and were informed by plaintiff and his attorney regarding the impending attack; constructive notice in that defendants should have known that incarcerating a cooperating witness against the members deserved additional protection.

48. By reason of the foregoing, the above described actions of the defendants constitute negligent under the laws of the State of New York.

49. Under the Federal Torts Claims Act, defendants United States of America is liable for the above described actions of their agents, BOP, "JOHN DOE 1", "JOHN DOE 2", "JOHN DOE 3,"and AUSA, while acting within the scope of their employment.

50. By the reason of the foregoing, plaintiff has been damaged in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

AS AND FOR A SECOND CAUSE OF ACTION
(FEDERAL TORT CLAIMS ACT)

51. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 50 of this complaint with the same force and effect as though fully set forth herein.

52. At all times here in mentioned, the defendants, its agents, servants and/or employees were custodians of the plaintiff.

53. At all the times herein mentioned, it was the duty of reasonable care of the defendants, "JOHN DOE 1," "JOHN DOE 2", "JOHN DOE 3," to provide proper and adequate protection and medical treatment and care to the injured plaintiff within a reasonable time, and not to suffer and permit excessive punishment to the plaintiff.

54. The defendants and/or their employees, agents and/or servants, acting within the scope of his office or employment, breached their duty to the plaintiff by failing to properly protect plaintiff and failing to provide proper and adequate medical treatment and care to the plaintiff and his urgent and serious medical needs within a reasonable time despite numerous plaintiff's requests and despite the obvious risks of permanent worsening of plaintiff's conditions, and failing to implement most of these urgent and necessary treatments which, upon information and belief, would have otherwise been recommended.

55. By reason of the foregoing, the plaintiff was caused to sustain unnecessary pain and sufferings and exacerbation and permanent worsening of the plaintiff's injuries with resultant pain and suffering, which would not have occurred had they been treated in a timely manner, and loss of normal pursuits and pleasures of life.

56. The occurrence and the resulting personal injuries to the plaintiff were caused through no fault of his own, but were caused solely and wholly by reason of the defendants' failure to exercise a duty of reasonable care to report the accident and to provide proper and adequate medical treatment and care to the injured plaintiff within a reasonable time, as set forth above.

57. Both actual and constructive notices are claimed. Actual notice in that the defendants, their agents, servants and/or employees had actual knowledge and numerous plaintiff's requests regarding the complained of condition; constructive notice in that the condition existed for a long and unreasonable period of time despite numerous plaintiff's requests.

58. Such actions of the defendants were negligent, reckless, willful and wanton, unreasonable and unauthorized, and constitute negligence, wrongful act and/or omission under the laws of the State of New York.

59. Under the Federal Torts Claims Act, defendants United States of America is liable for the above described actions of their agents, "JOHN DOE 1," "JOHN DOE 2", "JOHN DOE 3," while acting within the scope of their employment.

60. By reason of the foregoing, the plaintiff has been damaged in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

AS AND FOR A THIRD CAUSE OF ACTION
(TREATMENT OF PERSONS UNDER U.S. CUSTODY)

61. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 60 of this complaint with the same force and effect as though fully set forth herein.

62. At all the times herein mentioned, the defendants and each of them, separately and in concert, in their official and individual capacities, have exhibited deliberate indifference to the health and safety of the plaintiff and repeatedly refused to properly review and investigate numerous plaintiff's requests for medical treatment despite the obvious risks to the plaintiff's health and failed to provide adequate medical treatment and services to plaintiff with serious medical needs that are known and/or obvious, and denied the plaintiff an access to adequate medical treatment and care.

63. Such actions of the defendants caused to subject the plaintiff in the custody or under the physical control of the United States Government to excessive punishment and caused to suffer severe and permanent personal injuries, extreme unnecessary pain and suffering, and sustained exacerbation and permanent worsening of his injuries and excessive harm to the detriment of his physical and emotional health, and loss of normal pursuits of happiness and pleasures of life.

64. By reason of the foregoing, the plaintiff has been damaged in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

AS AND FOR A FOURTH CAUSE OF ACTION
(CRUEL AND UNUSUAL PUNISHMENT and FAILURE TO PROTECT)

65. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 64 of this complaint with the same force and effect as though fully set forth herein.

66. At all the times herein mentioned, the defendants, "JOHN DOE 1", "JOHN DOE 2", "JOHN DOE 3," and each of them, separately and in concert, in their official and individual capacities, have exhibited deliberate indifference to the health and safety of the plaintiff.

67. At all the times herein mentioned, the defendants and each of them, separately and in concert, in their official and individual capacities, knew or should have known that their acts or omissions constitute violation of the plaintiff's rights, guaranteed to him under the laws of the United States. Despite being aware of the risks to plaintiff, the defendants failed to protect him from assault and were also deliberately indifferent to plaintiff's medical needs after his assault.

68. Such actions of the defendants were willful, wanton, malicious and oppressive and were motivated solely by a desire to harm the plaintiff and permit an excessive punishment to the plaintiff without regard for plaintiff's well being and were based on a lack of concern and ill-will towards the plaintiff.

69. Such actions of the defendants caused to subject the plaintiff in the custody or under the physical control of the United States Government to cruel, inhuman, or degrading treatment or punishment prohibited by the Eighth Amendments to the Constitution of the United States and constitute a blatant violation of plaintiff's civil rights secured by laws of the United States.

70. By reason of the foregoing, the plaintiff has been damaged in the sum of ONE MILLION ($1,000,000.00) DOLLARS.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment:

1. On the First Cause of Action award money damages against the defendants in the amount of One Million ($1,000,000.00) Dollars; and

2. On the Second Cause of Action award money damages against the defendants in the amount of One Million ($1,000,000.00) Dollars; and

3. On the Third Cause of Action award money damages against the defendants in the amount of One Million ($1,000,000.00) Dollars; and

4. On the Fourth Cause of Action award money damages against the defendants in the amount of One Million ($1,000,000.00) Dollars; and

5. Award costs of this action including attorney's fees to the plaintiff; and

6. For such other and further legal and equitable relief that the Court may deem just and proper and reasonable.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury as to all issues so triable.

Dated: August 6, 2014
New York, New York

Respectfully submitted,

/S/ Vik Pawar
VIKRANT PAWAR (VP 9101)
Attorney for Plaintiff
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/S/ Laleh Zoughi
LALEH ZOUGHI (LZ1941)
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
JOSEPH CHICARIELLI,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA,
U.S.DEPARTMENT OF JUSTICE (DOJ),
FEDERAL BUREAU OF PRISON, (BOP),
METROPOLITAN DETENTION CENTER (MDC),
METROPOLITAN CORRECTIONAL CENTER (MCC),
JOHN DOES 1-6,

Defendants.
----------x

FIRST AMENDED COMPLAINT

Jury Demand

14 CV 6765 (JGK)

Plaintiff Joseph Chicarielli (hereinafter "Plaintiff") by his attorney Vik Pawar respectfully alleges as follows:

NATURE OF THE ACTION

1. This action is brought pursuant to Bivens, 28 U.S.C. § 2671 et seq. (Federal Tort Claims Act), the Fourth, Fifth and Eight Amendments to the United States Constitution.

2. Plaintiff seeks monetary damages (special, compensatory, and punitive) against defendants for personal injury, future medical expenses and loss of enjoyment of life because of defendants'[1] conduct.

JURISDICTION AND VENUE

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1346. Venue is properly within this District under 28 U.S.C. § 1391 as the acts complained of occurred in the Southern District of New York.

[1] Unless otherwise noted, defendants refer to the parties named in the caption.

CONDITIONS PRECEDENT TO THIS LAWSUIT

4. Plaintiff timely submitted an Administrative Claim for the claims set forth below to the BOP.

5. Six months having elapsed, all conditions precedent to a Federal Tort Claims Act have been met. In addition, since plaintiff is no longer in custody, he is not required to exhaust his administrative remedies under PLRA.

PARTIES

6. At all times here relevant, Plaintiff was an inmate held in custody of Federal Bureau of Prisons.

7. Defendant, THE UNITED STATES OF AMERICA, is appropriate defendant under Federal Tort Claims Act.

8. Defendant, U.S. DEPARTMENT OF JUSTICE (herein after referred as "DOJ"), is a Governmental Agency located at 950 Pennsylvania Avenue, NW Washington, DC 20530-0001.

9. Defendant, FEDERAL BUREAU OF PRISON, (herein after referred as "BOP"), is a subdivision of DOJ, located at 320 First Street, NW, Washington DC 20534.

10. Defendant, METROPOLITAN DETENTION CENTER (herein after referred as "MDC"), is an administrative housing facility of BOP, located at 80 29th Street, Brooklyn, NY 11232.

11. Defendant, METROPOLITAN CORRECTIONAL CENTER (herein after referred as "MCC"), is an administrative housing facility of BOP, located at 150 Park Row, New York, NY 10007.

12. Defendants John Does 1-7 are individuals employed by the BOP under the direction of DOJ, acting in their individual and official capacities, and responsible and for the health and safety of inmates confined within.

FACTUAL ALLEGATIONS

13. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 12 of this complaint with the same force and effect as though fully set forth herein.

14. In or about November 2012, plaintiff was incarcerated at MDC.

15. Shortly after his arrest, plaintiff became a cooperating witness, assisting the AUSA and DOJ against members of organized crime ("members").

16. In or about November 2012, Plaintiff's life was threatened by these members at MDC because he was a cooperating witness and assisting the DOJ.

17. Immediately after these threats, Plaintiff and his attorney, Joyce London, immediately informed AUSA Steve Tishonne about plaintiff's predicament. Mr. Tishonne assured plaintiff and his attorney that he has spoken to staff at DOJ, BOP, MDC and MCC, and that plaintiff's safety was priority number 1 and that he would be in protective custody while at the BOP facilities.

18. Mr. Tishonne spoke with John Doe 1 (employee at BOP) and informed him about his assurances to plaintiff. However, John Doe 1 failed to take any actions to protect plaintiff.

19. Plaintiff's cell at MDC was ransacked by the members and his belongings were stolen and he was repeatedly called a "rat."

20. Few days later, on November 18, 2012, Plaintiff was attacked at MDC by the members due to his cooperation with the defendant DOJ and was again called a "rat".

21. Finally, on November 18, 2012, plaintiff was put in solitary confinement at MDC.

22. Plaintiff's attorney immediately informed the AUSA regarding the aforementioned attack and threats against plaintiff's life. Plaintiff was once again assured that John Doe 1 would be told to take steps to ensure his safety.

23. Shortly after the attack at MDC, plaintiff was transferred to MCC.

24. Instead of placing plaintiff in protective custody to maintain his safety, John Doe 1 released plaintiff into the general population.

25. John Doe 1 was repeatedly informed about the threats against plaintiff and that his well-being was a priority and plaintiff was given assurances by the AUSA that John Doe 1 had taken steps to ensure his safety.

26. On June 25, 2013, plaintiff was viciously attacked by the members in the general population, called a "rat" and as the result sustained serious permanent injuries, specifically broken jaw.

27. Plaintiff was taken for medical treatment, where John Doe 2 (the medical personnel) knew about his broken jaw and failed to give him adequate medical care.

28. John Doe 2 refused to alter plaintiff's diet, failed to provide any further treatment and denied him the most basic treatment for a broken jaw.

29. Instead of addressing plaintiff's medical problems, John Does 1-4 put him in solitary confinement and otherwise refused to provide needed medical care or address his conditions of confinement.

30. Plaintiff notified two guards John Does 5-6 that he needed medical care and that he was in severe pain.

31. Yet John Does 5-6 failed to notify the medical facilities about plaintiff's deteriorating condition and plaintiff's condition worsened. John Does 5-6 also assured plaintiff that his written complaints seeking medical treatment would reach the appropriate authorities.

32. Defendants, failed to provide necessary medical treatment and care to plaintiff and his urgent and serious medical needs within a reasonable time.

33. Six weeks later, on or about August 2, 2013, plaintiff's medical condition was finally addressed by defendants.

34. On August 2, 2013, plaintiff was approved to receive oral surgery.

35. At the medical facility, plaintiff was informed that his jaw had broken in three different places and had he came to the medical facility after the attack; his jaw would have been easily treated. Due to over six-week delay by defendants to provide Plaintiff with proper medical care, his jaw had to be wire-shut on both sides of his face for weeks.

36. Defendants John Does 1-6 refused to provide plaintiff with any medication or liquid diet as prescribed by the treating physician. Plaintiff was not able to eat solid food for weeks after his jaw was wire-shut and defendants failed to provide plaintiff with proper nutrition and as the result plaintiff lost 25 pounds.

AS AND FOR A FIRST CAUSE OF ACTION
(FEDERAL TORT CLAIMS ACT)

37. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 36 of this complaint with the same force and effect as though fully set forth herein.

38. At all the times herein mentioned, the defendant BOP, was the owner of an administrative housing facility, MDC, located at 80 29th Street, Brooklyn, NY 11232.

39. At all the times herein mentioned, the defendant BOP, was the owner of an administrative housing facility, MCC, located at 150 Park Row, New York, NY 10007.

40. Plaintiff and his attorney had informed DOJ and BOP regarding threats by members to his safety and well-being in MDC and MCC.

41. At all the times herein mentioned, plaintiff was an inmate in custody of the defendant, BOP, and housed at MDC and MCC.

42. At all the times herein mentioned, the defendant, BOP, its agents, servants and/or employees (John Does 1-7) operated, maintained, managed and controlled MDC and MCC.

43. At all the times herein mentioned, it was the duty of the defendant, BOP, its agents, servants and/or employees (John Does 1-7) to operate, maintain, and manage the said premises, protecting inmates against vicious and dangerous attacks.

44. The defendants, their agents, servants, and/or employees breached their duty to the plaintiff by failing to protect plaintiff and by improperly allowing and permitting the plaintiff to be viciously attacked and permanently injured by other inmates under their control.

45. On June 25, 2013, while lawfully on the aforementioned premises, plaintiff was unlawfully attacked in the area under controlled and managed by the defendants and was

caused to sustain serious, and permanent bodily injuries, great pain, shock, mental anguish, and loss of normal pursuits of happiness and pleasures of life.

46. The attack and resulting injuries to plaintiff were caused through no fault of his own but were solely and wholly by reason of defendants' negligence.

47. Defendants had a duty to plaintiff. Defendants assured plaintiff that they were aware of this duty. Defendants breached that duty. As a result of that breach, plaintiff suffered injures.

48. Both actual and constructive notices are claimed. Actual notice in that defendants, their agents, servants and/or employees had actual knowledge that plaintiff life has been threatened by the members at MDC and MCC and were informed by plaintiff and his attorney regarding the impending attack; constructive notice in that defendants should have known that incarcerating a cooperating witness against the members deserved additional protection.

49. By reason of the foregoing, the above-described actions of the defendants constitute negligent under the laws of the State of New York.

50. Under the Federal Torts Claims Act, defendants United States of America is liable for the above described actions of their agents, BOP, and John Does 1-7.

AS AND FOR A SECOND CAUSE OF ACTION
(FEDERAL TORT CLAIMS ACT)

51. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 50 of this complaint with the same force and effect as though fully set forth herein.

52. At all times here in mentioned, the defendants, its agents, servants and/or employees were custodians of the plaintiff.

53. At all the times herein mentioned, it was the duty of reasonable care of the defendants, John Does 1-7, to provide proper and adequate protection and medical treatment and care to the injured plaintiff within a reasonable time, and not to suffer and permit excessive punishment to the plaintiff.

54. The defendants breached their duty to the plaintiff by failing to properly protect plaintiff and failing to provide proper and adequate medical treatment and care to the plaintiff and his urgent and serious medical needs within a reasonable time despite numerous plaintiff's requests and despite the obvious risks of permanent worsening of plaintiff's conditions, and failing to implement most of these urgent and necessary treatments.

55. By reason of the foregoing, the plaintiff was caused to sustain unnecessary pain and sufferings and exacerbation and permanent worsening of the plaintiff's injuries with resultant pain and suffering, which would not have occurred had they been treated in a timely manner, and loss of normal pursuits and pleasures of life.

56. The occurrence and the resulting personal injuries to the plaintiff were caused through no fault of his own, but were caused solely and wholly by reason of the defendants' failure to exercise a duty of reasonable care to report the accident and to provide proper and adequate medical treatment and care to the injured plaintiff within a reasonable time, as set forth above.

57. Both actual and constructive notices are claimed. Actual notice in that the defendants had actual knowledge and numerous plaintiff's requests regarding the complained of condition; constructive notice in that the condition existed for a long and unreasonable period of time despite numerous plaintiff's requests.

58. Such actions of the defendants were negligent, reckless, willful and wanton, unreasonable and unauthorized, and constitute negligence, wrongful act and/or omission under the laws of the State of New York. Under the Federal Torts Claims Act, defendants United States of America is liable for the above described actions of their agents, defendants John Does 1-7, while acting within the scope of their employment.

AS AND FOR A THIRD CAUSE OF ACTION
(FAILURE TO PROTECT- BIVENS CLAIMS)

59. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 58 of this complaint with the same force and effect as though fully set forth herein.

60. Defendants were aware that plaintiff's safety and well-being were at risk.

61. Defendants knew that they had a duty to protect plaintiff from harm.

62. Defendants gave assurances to plaintiff that he would be protected and safe in their custody.

63. Despite knowing that plaintiff faced a significant risk of serious injury, defendants failed to take any reasonable measures to ensure plaintiff's safety.

64. Defendants in turn gave plaintiff and his attorney false hope that they had taken steps to protect plaintiff.

65. Despite being aware of this risk, defendants failed to protect plaintiff and exposed him to future harm.

66. Defendants failed to take any steps and plaintiff's jail cell was ransacked.

67. Defendants failed to take any steps and plaintiff was robbed and subjected to taunts and threats.

68. Defendants then transferred plaintiff to MCC knowing that plaintiff remained at risk.

69. Plaintiff was released into the general population and not in protective custody.

70. Plaintiff was attacked by individuals who were associated with the members.

71. Defendants despite being aware of the significant risk to plaintiff's health and safety, and despite giving assurances to plaintiff and his attorney, failed to protect him.

72. Defendants were given ample warning, were notified of instances when plaintiff's safety was continually threatened, but yet did nothing until plaintiff was attacked one more time resulting in severe injuries. Defendants had an opportunity to protect plaintiff and intervene to prevent further harm, but were still deliberately indifferent to plaintiff's safety and well-being.

73. As a result of defendants' individual and collective actions, plaintiff was exposed to harm and suffered injuries and had his constitutional rights violated.

AS AND FOR A FOURTH CAUSE OF ACTION
(DELIBERATE INDIFFERENCE TO MEDICAL NEEDS-BIVENS CLAIM)

74. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 73 of this complaint with the same force and effect as though fully set forth herein.

75. At all the times herein mentioned, defendants John Does 1-7, individually and collectively in their official and individual capacities, have exhibited excessive risk to the health and safety of the plaintiff.

76. On June 25, 2013, plaintiff was assaulted and suffered a broken jaw.

77. Plaintiff's injuries were evident to John Does 2-7 because they saw his medical reports and were aware of the seriousness and gravity of the injuries.

78. However, defendants failed to take reasonable steps to treat plaintiff.

79. Plaintiff lingered in pain with a broken jaw.

80. John Doe 2 refused to alter plaintiff's diet and plaintiff was unable to eat and lost 25 pounds.

81. John Does 2-7 gave Plaintiff assurances that his medical complaints would reach the appropriate channels and that he would be treated in a prompt manner. However, no one addressed plaintiff's deteriorating condition and plaintiff suffered for more than 6 weeks.

82. Plaintiff's mother barely recognized plaintiff when she visited him.

83. After six weeks or unnecessary and prolonged suffering plaintiff finally was given medical care.

84. However, due to the delay in treatment, plaintiff suffered unnecessary and additional medical surgery.

85. Medical providers informed plaintiff that had plaintiff been treated sooner, his jaw would not have been wired shut for weeks.

86. Defendants were deliberately indifferent to plaintiff's medical needs because they were aware of the seriousness of plaintiff's injuries, failed to provide timely treatment because of the serious risks faced by plaintiff, allowed plaintiff to suffer mentally and physically for a prolonged and unnecessary period and caused deprivation of his constitutional rights.

87. As a result of the foregoing, plaintiff suffered and continues to suffer serious and permanent emotional and physical injuries.

AS AND FOR A FIFTH CAUSE OF ACTION
(CONDITIONS OF CONFINEMENT)

88. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 87 of this complaint with the same force and effect as though fully set forth herein.

89. Defendants knew that plaintiff was supposed to be in protective custody.

90. However, instead of taking care of plaintiff's well-being, defendants simply put him in solitary confinement.

91. Instead of protecting plaintiff, defendants punished him by placing him in a punitive unit.

92. Because plaintiff was placed in a punitive unit, he did not enjoy easy access to medical treatment, phone calls to grieve his conditions and suffered because of his conditions of confinement.

93. Plaintiff was subjected to cruel and unusual punishment because he was a cooperating witness and defendants were deliberately indifferent by punishing plaintiff instead of protecting him.

94. Defendants knew that by placing plaintiff in a punitive unit, he would be denied the adequate access to medical needs and to air his grievances.

95. As a result of defendants' actions, plaintiff was subject to violation of his constitutional rights and he suffered permanent physical and mental injuries.

WHEREFORE, Plaintiff demands judgment and prays for the following relief, jointly and severally, against the Defendants:

(A) full and fair compensatory damages in an amount Five Hundred Thousand Dollars for each and every cause of action for Plaintiff against Defendants (individually or collectively) or as determined by a jury:

(B) punitive damages in an amount to be determined by a jury:

(C) reasonable attorney's fees and the costs, expenses and disbursements of this action; and

(D) such other and further relief as appears just and proper.

Dated: February 20, 2015
New York, New York 10007

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/s
Vik Pawar (VP9101)
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOSEPH CHICARIELLI,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA,
U.S.DEPARTMENT OF JUSTICE (USDOJ),
FEDERAL BUREAU OF PRISON, (FBOP),
METROPOLITAN DETENTION CENTER (MDC),
METROPOLITAN CORRECTIONAL CENTER (MCC),
WARDEN OF MCC, WARDEN OF MDC,
LENORA MURRAY (USMS), STEVE TISCIONE (AUSA),
AMIR TOOSSI (AUSA), KORI THIESSEN (BOP),
CASANOVA MADISON, MIGUEL MONGE,
MICHAEL WARDEN, G. FERMIN, A.E. SANTIAGO,
E. RAMOS, ROBERT BEAUDOUIN, C. EVANGELISTA,
OPHELIA JACKSON, A. BUSSANICH,

Defendants.

----------x

SECOND AMENDED COMPLAINT

Jury Demand

14 CV 6765 (JGK)

Plaintiff Joseph Chicarielli, by his attorneys Robert Blossner, Vik Pawar and Laleh Zoughi, respectfully alleges as follows:

NATURE OF THE ACTION

1. This action is brought pursuant to Bivens, 28 U.S.C. § 2671 et seq. (Federal Tort Claims Act), the Fourth, Fifth, Eight and Fourteenth Amendments to the United States Constitution.

2. Plaintiff seeks monetary damages (special, compensatory, and punitive) against defendants for personal injury, future medical expenses and loss of enjoyment of life, caused by the negligent and/or wrongful act or omission of defendants while acting within the scope

of their office or employment in allowing unsafe conditions and denying medical treatment to the plaintiff hosed at the Metropolitan Detention Center, (MDC), Brooklyn, New York and Metropolitan Correctional Center (MCC), Manhattan, New York.

JURISDICTION AND VENUE

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1346. Venue is properly within this District under 28 U.S.C. § 1391 as the acts complained of occurred in the Southern District of New York. The Court has personal jurisdiction over the defendant because the alleged incidents occurred within the confines of this Court.

CONDITIONS PRECEDENT TO THIS LAWSUIT

4. Plaintiff timely submitted an Administrative Claim for the claims set forth below to the BOP.

5. Six months having elapsed, all conditions precedent to a Federal Tort Claims Act have been met. In addition, since plaintiff is no longer in custody, he is not required to exhaust his administrative remedies under PLRA.

PARTIES

6. At all times here relevant, Plaintiff, Joseph Chicarielli, was an inmate held in custody of Federal Bureau of Prisons.

7. Defendant, THE UNITED STATES OF AMERICA, is appropriate defendant under Federal Tort Claims Act;

8. Defendant, U.S. DEPARTMENT OF JUSTICE (herein after referred as "DOJ"), is a Governmental Agency located at 950 Pennsylvania Avenue, NW Washington, DC 20530-0001;

9. Defendant, FEDERAL BUREAU OF PRISON, (herein after referred as "BOP"), is a subdivision of DOJ, located at 320 First Street, NW, Washington DC 20534.

10. Defendant, METROPOLITAN DETENTION CENTER (herein after referred as "MDC"), is an administrative housing facility of BOP, located at 80 29th Street, Brooklyn, NY 11232.

11. Defendant, METROPOLITAN CORRECTIONAL CENTER (herein after referred as "MCC"), is an administrative housing facility of BOP, located at 150 Park Row, New York, NY 10007.

12. Defendants SANTIAGO, HUGHES, WARD, MONGE, MADISON, MURRAY, TISCIONE, TOOSSI, and THIESSAN, "WARDEN MCC", "WARDEN MDC", ("Defendants 1") are employees of the DOJ, FBOP and work in different capacities including but not limited to AUSA, USMS, CSW, Correctional Officers. These individuals acting in their individual and official capacities were fully aware that Plaintiff was a cooperating witness ("CW"), had already been threatened and attacked and that his life and safety were concern. They individually and collectively assured Plaintiff and his criminal defense attorney that because plaintiff was a CW, he would be placed in protective custody so that he would not be further harmed or threatened. "Defendants 1" are responsible, in whole or in part, for the day-to-day operation and conditions of MDC and MCC, and for the health and safety of inmates confined within.

13. Defendants E. RAMOS, ROBERT BEAUDOUIN, C. EVANGELISTA, OPHELIA JACKSON, CHIN, A BUSSANICH ("Defendants 2") are medical personnel employed by the DOJ or FBOP sued in their acting individual and official capacities, and

responsible for the day-to-day oversight of medical examination, testing, treatment and general health of inmates confined at MDC and MCC.

FACTUAL ALLEGATIONS

13. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 14 of this complaint with the same force and effect as though fully set forth herein.

14. In or about November 2012, plaintiff was incarcerated at the Metropolitan Detention Center, a federal government holding facility in Brooklyn, New York (herein after referred as "MDC")

15. At the time of incarceration, Plaintiff was a cooperating witness, assisting the AUSA and DOJ against members of organized crime ("members").

16. In or about November 2012, Plaintiff's life was threatened by these members at the Metropolitan Detention Center in Brooklyn, due to his cooperation with the DOJ. In or about November 2012, plaintiff's cell at MDC was ransacked by the members and his belongings were stolen.

17. On November 18, 2012, Plaintiff was again attacked at MDC by the members due to his cooperation with the defendant DOJ and was called a "rat".

18. On November 18, 2012, plaintiff was put in solitary confinement at MDC.

19. In November 2012, Plaintiff and his attorney, Joyce London, immediately informed Defendants Toossi and Tiscione that there were threats leveled against Plaintiff. Defendants Toossi and Tiscione assured Plaintiff and his attorney that they would take this seriously and ensure that Plaintiff's safety would be number priority. Toossi and Tiscione further assured that steps would be taken to prevent further threats or harm to Plaintiff.

20. Defendant Thiessen was made aware of the foregoing threats to Plaintiff and was informed to take steps to ensure plaintiff's safety.

21. Defendant Santiago who did the intake form for Plaintiff was also aware that Plaintiff had been subjected to assault and that his safety was in danger.

22. Defendants Madison, Monge, Ward and Hughes were in charge of MCC and were fully aware that Plaintiff had been threatened, was a CW and that his safety was a concern.

23. These foregoing "Defendants 1" did not provide Plaintiff with any protection and instead released him into general population.

24. On June 25, 2013, plaintiff was viciously attacked by the members in his cell and as the result sustained serious permanent injuries, specifically broken jaw.

25. Defendants Ramos and Beaudouin examined Plaintiff and noted that the head and right frontal area, face and pre-orbital and right eyebrow area had redness and swelling. In addition, these two defendants noted multiple contusions and abrasions. Despite these injuries, these defendants simply gave plaintiff a prescription for ibuprofen. Plaintiff informed the defendants that his injuries were far more serious than they were suggesting that he needed to get an X-ray done for his face. His requests were denied.

26. After the attack, plaintiff was then put in solitary confinement at MCC without any further medical care.

27. On July 9, 2013, Plaintiff, after his previous repeated requests for medical attentions were ignored, was brought to the infirmary and seen by defendant Evangelista who noted that Plaintiff's right jaw was tender. Plaintiff complained that his jaw was possibly broken and that he needed more than an ibuprofen to treat it. Plaintiff's requests were ignored.

28. On July 15, 2013, Plaintiff, after his previous repeated requests for medical attentions were again ignored, was brought to the infirmary and seen by defendant Evangelista who once again became aware that Plaintiff was complaining about his right jaw being hurting and that he could barely open his mouth and not intake any solid foods. Plaintiff also notified that he was rapidly losing weight because of his inability to consume food. Defendant took no steps to quell Plaintiff's misery.

29. On July 24, 2013, Plaintiff, after his previous repeated requests for medical attentions were again ignored, was brought to the infirmary and seen by defendants Chin and Beaudouin and complained of similar pain as in the foregoing paragraph. Once again defendants failed to take any steps.

30. On July 31, 2013, despite request for medical attention and continuing injury, plaintiff was denied medical treatment by defendant Beaudouin.

31. On August 1, 2014, Plaintiff was again seen by Beaudouin and Ophelia Jackson. Plaintiff once again made similar complaints. Defendant Jackson told plaintiff that he should chew from his other side of the face because there does not appear to be anything wrong with his jaw and it was just swollen.

32. Upon information and belief, plaintiff filed several written complaints with the defendant BOP, requesting medical care for over six weeks after the attack. In addition, plaintiff's mother and his criminal defense lawyer also relayed these concerns to defendants.

33. Upon information and belief, defendants, failed to provide necessary medical treatment and care to plaintiff and his urgent and serious medical needs within a reasonable time even though plaintiff's face was visibly swollen, causing exacerbation of plaintiff's

injuries resulting in excessive pain and suffering, and a permanent worsening of his conditions, which would have not occurred had the plaintiff been treated in a timely manner.

34. On August 2, 2013, plaintiff's medical condition was belatedly presented to BOP's "Utilization Review Committee" to determine seriousness of his injury.

35. On August 2, 2013 plaintiff was finally approved to receive oral surgery.

36. At the medical facility, plaintiff was informed that his jaw had broken in three different places and had he came to the medical facility after the attack; his jaw would have been easily treated. Due to over six-week delay by defendants to provide Plaintiff with proper medical care, his jaw had to be wire-shut on both sides of his face for weeks. On August 6, 1013, after suffering with a broken jaw for nearly 8 weeks, plaintiff was seen by an Oral Surgeon and then his jaw was wired shut because of the broken jaw.

37. Upon information and belief, "defendants 2" refused to provide plaintiff with any medication or liquid diet as prescribed by the treating physician.

38. Upon information and belief, plaintiff was not able to eat solid food for weeks after his jaw was wire-shut and defendants failed to provide plaintiff with proper nutrition and as the result plaintiff lost 25 pounds.

39. Upon information and belief, during all times mentioned in this complaint, the "defendants 2" were acting in their individual and official capacity, under color of law, to wit, under color of constitution, statute, ordinance, laws, rules, regulations, policies, customs and usages of the United States.

AS AND FOR A FIRST CAUSE OF ACTION
(FEDERAL TORT CLAIMS ACT)

40. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 39 of this complaint with the same force and effect as though fully set forth herein.

41. At all the times herein mentioned, the defendant BOP, was the owner of an administrative housing facility, MDC, located at 80 29th Street, Brooklyn, NY 11232.

42. At all the times herein mentioned, the defendant BOP, was the owner of an administrative housing facility, MCC, located at 150 Park Row, New York, NY 10007.

43. Plaintiff and his attorney had informed DOJ and BOP regarding threats by members to his life in MDC and MCC.

44. At all the times herein mentioned, plaintiff was an inmate in custody of the defendant, BOP, and housed at MDC and MCC.

45. At all the times herein mentioned, the defendant, BOP, its agents, servants and/or employees operated, maintained, managed and controlled MDC and MCC.

46. At all the times herein mentioned, it was the duty of the defendant, BOP, its agents, servants and/or employees to operate, maintain, and manage the said premises, protecting inmates against vicious and dangerous attacks.

47. The defendants, their agents, servants, and/or employees breached their duty to the plaintiff by failing to protect plaintiff and by improperly allowing and permitting the plaintiff to be viciously attacked and permanently injured by other inmates under their control, specifically on June 25, 2013.

48. On June 25, 2013, while lawfully on the aforementioned premises, plaintiff was unlawfully attacked in the area under controlled and managed by defendant, MCC and was

caused to sustain serious, and permanent bodily injuries, great pain, shock, mental anguish, and loss of normal pursuits of happiness and pleasures of life.

49. The attack and resulting injuries to plaintiff were caused through no fault of his own but were solely and wholly by reason of defendants' failure to protect plaintiff's life and body against the vicious attacks by the members which they had prior knowledge of through information provided to defendants by plaintiff and his attorney.

50. Both actual and constructive notices are claimed. Actual notice in that defendants, their agents, servants and/or employees had actual knowledge that plaintiff life has been threatened by the members at MDC and MCC and were informed by plaintiff and his attorney regarding the impending attack; constructive notice in that defendants should have known that incarcerating a cooperating witness against the members deserved additional protection.

51. By reason of the foregoing, the above described actions of the defendants constitute negligent under the laws of the State of New York.

52. Under the Federal Torts Claims Act, "Defendants 1" are liable for their individual and collective actions.

AS AND FOR A SECOND CAUSE OF ACTION
(FEDERAL TORT CLAIMS ACT)

53. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 52 of this complaint with the same force and effect as though fully set forth herein.

54. At all times here in mentioned, the defendants, its agents, servants and/or employees were custodians of the plaintiff.

55. At all the times herein mentioned, it was the duty of reasonable care of the "defendants 2," to provide proper and adequate protection and medical treatment and care to the injured plaintiff within a reasonable time, and not to suffer and permit excessive punishment to the plaintiff.

56. The defendants and/or their employees, agents and/or servants, acting within the scope of his office or employment, breached their duty to the plaintiff by failing to properly protect plaintiff and failing to provide proper and adequate medical treatment and care to the plaintiff and his urgent and serious medical needs within a reasonable time despite numerous plaintiff's requests and despite the obvious risks of permanent worsening of plaintiff's conditions, and failing to implement most of these urgent and necessary treatments which, upon information and belief, would have otherwise been recommended.

57. By reason of the foregoing, the plaintiff was caused to sustain unnecessary pain and sufferings and exacerbation and permanent worsening of the plaintiff's injuries with resultant pain and suffering, which would not have occurred had they been treated in a timely manner, and loss of normal pursuits and pleasures of life.

58. The occurrence and the resulting personal injuries to the plaintiff were caused through no fault of his own, but were caused solely and wholly by reason of the defendants' failure to exercise a duty of reasonable care to report the accident and to provide proper and adequate medical treatment and care to the injured plaintiff within a reasonable time, as set forth above.

59. Both actual and constructive notices are claimed. Actual notice in that the defendants, their agents, servants and/or employees had actual knowledge and numerous plaintiff's requests regarding the complained of condition; constructive notice in that the

condition existed for a long and unreasonable period of time despite numerous plaintiff's requests.

60. Such actions of the defendants were negligent, reckless, willful and wanton, unreasonable and unauthorized, and constitute negligence, wrongful act and/or omission under the laws of the State of New York.

61. Under the Federal Torts Claims Act, defendants are liable for the foregoing conduct resulting in injuries to Plaintiff.

AS AND FOR A THIRD CAUSE OF ACTION
(FAILURE TO PROTECT AGAINST DEFENDANTS 1- BIVENS CLAIMS)

62. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 61 of this complaint with the same force and effect as though fully set forth herein.

63. Defendants were aware that plaintiff's safety and well-being were at risk.

64. Defendants knew that they had a duty to protect plaintiff from harm.

65. Defendants gave assurances to plaintiff that he would be protected and safe in their custody.

66. Despite knowing that plaintiff faced a significant risk of serious injury, defendants failed to take any reasonable measures to ensure plaintiff's safety.

67. Defendants in turn gave plaintiff and his attorney false hope that they had taken steps to protect plaintiff.

68. Despite being aware of this risk, defendants failed to protect plaintiff and exposed him to future harm.

69. Defendants failed to take any steps and plaintiff's jail cell was ransacked.

70. Defendants failed to take any steps and plaintiff was robbed and subjected to taunts and threats.

71. Defendants then transferred plaintiff to MCC knowing that plaintiff remained at risk.

72. Plaintiff was released into the general population and not in protective custody.

73. Plaintiff was attacked by individuals who were associated with the members.

74. Defendants despite being aware of the significant risk to plaintiff's health and despite giving assurances to plaintiff and his attorney, failed to protect him.

75. Defendants were given ample warning, were notified of instances when plaintiff's continually threatened, but yet did nothing until plaintiff was attacked one more time resulting in severe injuries. Defendants had an opportunity to protect plaintiff and intervene to prevent harm to plaintiff.

76. Defendants were deliberately indifferent to plaintiff's safety and as a result of their action or lack thereof, plaintiff's rights under the Eighth and Fourteenth Amendment were violated and he suffered serious injuries.

AS AND FOR A FOURTH CAUSE OF ACTION
(DELIBERATE INDIFFERENCE TO MEDICAL NEEDS AGAINST DEFENDANTS 2-BIVENS CLAIM)

77. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 76 of this complaint with the same force and effect as though fully set forth herein.

78. On June 25, 2013, plaintiff was assaulted and suffered a broken jaw.

79. Plaintiff's injuries were evident to Defendants because they saw his medical reports and were aware of the seriousness and gravity of the injuries.

80. However, defendants failed to take reasonable steps to treat plaintiff.

81. Plaintiff lingered in pain with a broken jaw.

82. Defendants refused to alter plaintiff's diet and plaintiff was unable to eat and lost 25 pounds.

83. Defendants gave Plaintiff assurances that his medical complaints would reach the appropriate channels and that he would be treated in a prompt manner. However, no one addressed plaintiff's deteriorating condition and plaintiff suffered for more than 6 weeks.

84. Plaintiff's mother barely recognized plaintiff when she visited him.

85. Medical providers informed plaintiff that had plaintiff been treated sooner, his jaw would not have been wired shut for weeks.

86. Plaintiff was assaulted in June 2013, but adequate medical care was not given to him until August 2013. The injuries and pain to the plaintiff were obvious and the individual Defendants should have known that the plaintiff was in excruciating pain.

87. The seriousness of the injury was finally realized after plaintiff, his mother and lawyer begged the defendants to take a closer look at his injuries and it was after that, plaintiff was approved for surgery.

88. But for defendants' deliberately indifference, plaintiff would not have suffered needlessly.

89. Plaintiff suffered a serious injury and was in pain for an extended period because defendants were deliberately indifferent to his medical need.

90. Had Defendants promptly given plaintiff the proper and adequate medical care, plaintiff's jaw would not have been wired-shut for an extended period and he would not have lost weight.

91. Yet despite being aware of the weight loss suffered by plaintiff, his complaints, the obviousness of his injuries, defendants were deliberately indifferent causing plaintiff unnecessary and prolonged pain.

92. Such actions of the defendants caused to subject the plaintiff in the custody or under the physical control of the United States Government to cruel, inhuman, or degrading treatment or punishment prohibited by the Eighth Amendments to the Constitution of the United States and constitute a blatant violation of plaintiff's civil rights secured by laws of the United States.

AS AND FOR A FIFTH CAUSE OF ACTION
(CONDITIONS OF CONFINEMENT)

93. Plaintiff repeats, reiterates, and realleges each and every allegation contained in paragraphs 1 through 92 of this complaint with the same force and effect as though fully set forth herein.

94. Defendants knew that plaintiff was supposed to be in protective custody.

95. However, instead of taking care of plaintiff's well-being, defendants simply put him in solitary confinement.

96. Instead of protecting plaintiff, defendants punished him by placing him in a punitive unit.

97. Because plaintiff was placed in a punitive unit, he did not enjoy easy access to medical treatment, phone calls to grieve his conditions and suffered because of his conditions of confinement.

98. Plaintiff was subjected to cruel and unusual punishment because he was a cooperating witness and defendants were deliberately indifferent by punishing plaintiff instead of protecting him.

99. Defendants knew that by placing plaintiff in a punitive unit, he would be denied the adequate access to medical needs and to air his grievances.

100. As a result of defendants' actions, plaintiff was subject to violation of his constitutional rights and he suffered permanent physical and mental injuries.

WHEREFORE, Plaintiff demands judgment and prays for the following relief, jointly and severally, against the Defendants:

(A) full and fair compensatory damages in an amount Five Hundred Thousand Dollars for each and every cause of action for Plaintiff against Defendants (individually or collectively) or as determined by a jury:

(B) punitive damages in an amount to be determined by a jury:

(C) reasonable attorney's fees and the costs, expenses and disbursements of this action; and

(D) such other and further relief as appears just and proper.

Dated: August 10, 2015
New York, New York

Respectfully submitted,

/S/ Vik Pawar
VIKRANT PAWAR (VP 9101)
Attorney for Plaintiff
20 Vesey Street, Suite 1210
New York, New York 10007
Tel: (212) 571-0805
vik@pawarlaw.com

/S/ Laleh Zoughi
LALEH ZOUGHI (LZ1941)
Attorney for Plaintiff
Zoughi Law Group, LLC
420 Lexington Avenue, Suite 300
New York, New York 10170
Tel: (212) 297-6274
info@zoughilaw.com

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 4/14/16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH CHICARIELLI,

Plaintiff,

- against -

THE UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER

14-CV-6765 (JGK) (RLE)

RONALD L. ELLIS, United States Magistrate Judge:

The above-captioned case was referred to the undersigned for settlement. (Doc. No. 42.) The Court is in receipt of the Defendants' March 21, 2016 and April 13, 2016 *in camera* submissions of discovery materials. Having reviewed the submissions, which were also disclosed to Plaintiff,

IT IS HEREBY ORDERED that by **April 20, 2016,** the Parties shall submit written *ex parte* statements explaining (1) their current settlement positions; and (2) the impact, if any, that the *in camera* submission had on the current positions.

SO ORDERED this 14th day of April 2016
New York, New York

The Honorable Ronald L. Ellis
United States Magistrate Judge

USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 5/17/2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH CHICARIELLI,

Plaintiff,

-v-

UNITED STATES OF AMERICA et al.,

Defendants.

14 Civ. 6765 (JGK)

STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL

WHEREAS, on or about August 20, 2014, Plaintiff Joseph Chicarielli ("Plaintiff") filed a complaint commencing the above-captioned action (the "Action") against Defendants United States of America ("the United States"), U.S. Department of Justice ("DOJ"), Federal Bureau of Prisons ("BOP"), Metropolitan Detention Center ("MDC"), Metropolitan Correctional Center ("MCC"; collectively with DOJ, BOP, and MDC, the "Agency Defendants"), and three unidentified individual defendants, relating to an injury Plaintiff allegedly sustained on June 25, 2013;

WHEREAS, on February 24, 2015, Plaintiff filed an amended complaint against the United States, DOJ, BOP, MDC, MCC, and six unidentified individual defendants, relating to an injury Plaintiff allegedly sustained on June 25, 2013;

WHEREAS, on August 10, 2015, Plaintiff filed a second amended complaint (the "SAC") against Defendants the United States, DOJ, BOP, MDC, MCC, and Frank Strada, Catherine Linaweaver, Lenora Murray, Steve Tiscione, Amir Toossi, Kori Thiessen, Casanova Madison, Miguel Monge, Michael Ward, Geis Fermin, Angelo Santiago, Shirlean Hughes, Erwin Ramos, Robert Beaudouin, Chito Evangelista, Ophelia Jackson, and Anthony Bussanich (together, the

"Individual Federal Defendants") and Tin Chin[1] (with the Individual Federal Defendants, the "Individual Defendants"), asserting claims under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, and claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), relating to an injury Plaintiff allegedly sustained on June 25, 2013;

WHEREAS, on January 12, 2016, the Agency Defendants and the Individual Federal Defendants moved to dismiss all claims against them in the SAC, and the United States answered the second cause of action in the SAC (the "FTCA Claim") and otherwise moved to dismiss the SAC;

WHEREAS, Plaintiff has decided to voluntarily dismiss with prejudice all claims against the Agency Defendants and the Individual Defendants, and all claims against the United States other than the FTCA Claim, pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, and all parties who have appeared in the Action consent to such dismissal; and

WHEREAS, Plaintiff and the United States have reached a settlement of the FTCA Claim;

IT IS HEREBY STIPULATED AND AGREED by and between Plaintiff and the United States that the above-captioned action shall be resolved as between them as follows:

1. This Action is hereby dismissed as against all Defendants with prejudice, without costs, interest, attorneys' fees, or disbursements to any party.

2. This Stipulation and Order of Settlement and Dismissal (the "Stipulation and Order") is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States or any of its present or former departments, agencies, agents, officials or employees, nor any of the Defendants in this Action. This

[1] Defendant Tin Chin was not served and has not appeared in this action.

Stipulation and Order is entered into by all parties thereto for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

3. The United States agrees to pay to Plaintiff the sum of thirty-six thousand five hundred dollars ($36,500.00) (the "Settlement Amount") in connection with the FTCA Claim. As Plaintiff has agreed to voluntarily dismiss all other claims against all Defendants with prejudice and without payment, no portion of the Settlement Amount is attributable to any claim other than the FTCA Claim. The Settlement Amount is inclusive of all costs or attorneys' fees of any kind, in accordance with 28 U.S.C. § 2678, and any and all liens and fees are to be satisfied by Plaintiff out of the Settlement Amount and not in addition thereto. Pursuant to 28 U.S.C. § 2678, counsel for Plaintiff may not charge, demand, receive, or collect fees amounting to greater than 25% of the Settlement Amount.

4. Plaintiff and his heirs, executors, administrators, or assigns agree to accept the Settlement Amount in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of any kind, whether known or unknown, that they may have or hereafter acquire against the United States or any of its present or former departments, agencies, agents, officials, or employees, including but not limited to all of the Defendants in this Action, on account of the events, circumstances or incidents giving rise to this Action and all claims incident thereto, including but not limited to any such claims asserted by Plaintiff in the SAC. Plaintiff hereby expressly releases and forever discharges the United States and any of its present or former departments, agencies, agents, officials, or employees, including but not limited to all of the Defendants in this Action, from any and all claims and liabilities arising directly or indirectly from the events, circumstances, or incidents giving rise to this lawsuit and all claims incident thereto, including but not limited to any claims asserted by Plaintiff in the SAC. Plaintiff and his heirs,

executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States and any of its present or former departments, agencies, agents, officials, or employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

5. Plaintiff understands that taxes will not be withheld from the Settlement Amount. Plaintiff represents and warrants that he shall assume all responsibility for, and shall protect, indemnify, defend and hold harmless the United States, including its present or former departments, agencies, agents, officials, and employees, including but not limited to all of the Defendants in this Action, from and against any and all claims, losses, liens, damages, liability, suits, actions, judgments, costs, penalties, and expenses resulting from any liability or claim of liability for any amounts assessed by or due to any federal, state, or local government or agency thereof, including, but not limited to, any liens of any kind (including but not limited to workers' compensation liens, medical liens, child support liens), and federal, state, and local taxes, if any, owed in connection with the payment of the Settlement Amount to Plaintiff.

6. This Stipulation and Order shall be binding upon and inure to the benefit of the parties and their principals, agents, representatives, heirs, successors, and assigns. The persons signing this Stipulation and Order warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the Stipulation and Order.

7. The terms of this Stipulation and Order shall become effective upon entry of this Stipulation and Order by the Court. Payment of the Settlement Amount shall be made to Plaintiff

only after execution by the parties and entry by the Court of this Stipulation and Order. If not approved and entered by the Court, this Stipulation shall be null and void, with no force or effect.

8. Payment of the Settlement Amount will be made by check drawn on the Treasury of the United States and made payable to Joseph Chicarielli (Plaintiff) and to Vik Pawar (Plaintiff's attorney). The check will be mailed to Plaintiff's attorney at the following address: 20 Vesey Street, Suite 1210, New York, New York 10007. Plaintiff's attorney agrees to distribute the settlement proceeds to Plaintiff.

9. All parties who have appeared in the Action understand and agree that this Stipulation and Order contains the entire agreement between them and that no statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or their counsel that are not included herein shall be of any force or effect.

10. It is contemplated that this Stipulation and Order may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

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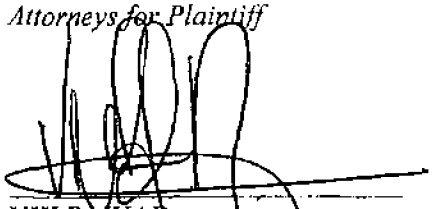
Dated: May 16, 2016
New York, New York

VIK PAWAR
LALEH ZOUGHI
Attorneys for Plaintiff

By: 
VIK PAWAR
20 Vesey Street, Suite 1210
New York, New York 10007
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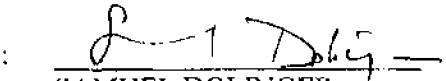
Fax: (212) 571-0938
E-mail: vik@pawarlaw.com

Dated: May 16, 2016
New York, New York

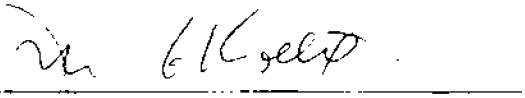
PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the Defendants
(excluding Defendant Tin Chin)

By: 
SAMUEL DOLINGER
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2677
Fax: (212) 637-2702
E-mail: samuel.dolinger@usdoj.gov

Dated: May 16, 2016
New York, New York


JOSEPH CHICARIELLI
Plaintiff

SO ORDERED:


HONORABLE JOHN G. KOELTL
UNITED STATES DISTRICT JUDGE

Dated: 5/17/16
New York, New York

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT

for the

Michael Luna, Jr.
Plaintiff

v.

D.H.O. Mr. A. Jordan, et. al.
Defendant

Civil Action No. 1:14-cv-2028

WAIVER OF THE SERVICE OF SUMMONS

To: Michael Luna, Jr.
(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from 12/15/2014, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: 12/15/2014

Signature of the attorney or unrepresented party

United States of America
Printed name of party waiving service of summons

Printed name

Address

E-mail address

Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

UNITED STATES DISTRICT COURT

for the

Michael Luna, Jr.
Plaintiff
v.
D.H.O. Mr. A. Jordan
Defendant

Civil Action No. 1:14-cv-2028

NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS

To: United States of America
(Name of the defendant or - if the defendant is a corporation, partnership, or association - an officer or agent authorized to receive service)

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within 30 days *(give at least 30 days, or at least 60 days if the defendant is outside any judicial district of the United States)* from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: 12/15/2014

s/Michael Luna, Jr.
Signature of the attorney or unrepresented party

Michael Luna
Printed name

36954-280 USP Allenwood
PO Box 3000
White Deer, PA 17887
Address

E-mail address

Telephone number

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL LUNA, JR.,	:	
	:	
Plaintiff	:	**CIVIL NO. 1:14-CV-02028**
	:	
v.	:	**(Judge Kane)**
	:	
D.H.O. A. JORDAN, et al.,	:	
	:	
Defendants	:	

ORDER

AND NOW, IT IS HEREBY ORDERED THAT:

Plaintiff's motion to proceed *in forma pauperis* (Doc. No. 2) is **GRANTED**. To effect service as expeditiously as possible, the Clerk of Court is specially appointed to serve a copy of the complaint, notice of lawsuit and request for waiver of service of summons, waiver, and this order on each Defendant. The Court requests that Defendants cooperate in efforts to simplify case administration by waiving service pursuant to Fed.R.Civ.P. 4(d)[1]. The waiver requests shall inform the Defendants both of the consequences of compliance and of failure to comply with the requests. The Defendants are permitted 30 days from the date the waiver requests are sent (60 days if addressed outside any judicial district of the United States) to return the signed waivers or electronically file them in the court's Electronic Case Filing (ECF) system. If a signed waiver is not returned or electronically filed within the required time, an order shall be issued directing the Clerk's office to transmit the summons and a copy of the complaint to the U.S. Marshals Service for immediate service under Fed.R.Civ.P. 4(c) (1).

IT IS FURTHER ORDERED THAT the Court must have the complete name and address for each and every Defendant named in the complaint in order to effect service. Any Defendant not properly identified will not be served. Therefore, if the complaint lists unknown Defendants or Defendants without proper mailing addresses, the Plaintiff shall provide to the Clerk's Office, the completed required Notice of Waiver of Summons, Waiver of Summons, and

---

[1] The intent of this order is to administer this matter in a manner consistent with Federal Rule of Civil Procedure 1, "to secure the just, speedy, and inexpensive determination of every action".

USM 285 forms, for each Defendant that cannot be properly served (unless the properly completed forms were sent to the Clerk with the complaint). If the Plaintiff does not have sufficient copies of the form to prepare one for each Defendant, he or she may obtain additional forms from the Clerk of Court. On this form the Plaintiff must give the full name and complete address of each individual Defendant. If Plaintiff fails to give the Clerk's Office correct instructions for mailing to any Defendant, his claims against that Defendant may be dismissed pursuant to Federal Rule of Civil Procedure 4(m). The Plaintiff is further advised that no Defendant is required to respond to the complaint until he or she has accepted a copy of the complaint and waived service, or has been served. Therefore, a motion for default cannot properly be filed unless the Defendant has failed to file an answer, a motion to dismiss, or a motion for additional time to respond, within sixty (60) days after the notice has been mailed (if service is waived pursuant to the notice) or twenty-one (21) days after being served the summons and complaint by the United States Marshal Service, which will be done for Defendants who do not waive service.

IT IS FURTHER ORDERED THAT the Plaintiff shall immediately advise the Court of any change in address. Failure to do so may result in dismissal for failure to prosecute if the Court and other parties are unable to serve pleadings, orders and other documents upon Plaintiff.

S/ Yvette Kane

YVETTE KANE, District Judge

Middle District of Pennsylvania

Date: December 15, 2014

UNITED STATES DISTRICT COURT
Middle District of Pennsylvania

FILED
OCT 20 2014
PER
HARRISBURG, PA DEPUTY CLERK

Michael Lula Jr. *
Plaintiff * Civil Case No.
* 1:14-CV-2028
vs. *
D.H.O. Mr. A. Jordan C.O. Ms. Housier
C.O. Mr. Steele C.O. Mr. R. Weaver * Complaint with
Warden Mr. J.E. Thomas and * Jury Demand
The United States *

1.) This is a Civil Rights Action filed by Michael Lula Jr. a federal prisoner for damages under Bivens v. Six Unknown named agents of Fed. Bureau of Narcotics 403 U.S. 388 (1971) alleging Cruel and Unusual Punishment in violation of the Eighth Amendment to the U.S. Constitution and Denial of Due Process in connection with D.H.O. proceedings in violation of the Fifth Amendment to the U.S. Constitution. Plaintiff also alleges "Excessive Force and Deliberate Indifference."

2.) The plaintiff Michael Lula Jr. also alleges the Tort of Personal Injury, Assault, Negligent, and Infliction of Emotional Distress under the Federal Tort Claim Act

I. Jurisdiction

3.) This court the Middle District of Pennsylvania has jurisdiction over the plaintiffs claim of violation of Federal Constitution Rights under U.S.C. § 1331 and 1343;

4.) This court also has jurisdiction over plaintiff's Tort Claim

under the Federal Tort Claim Act.

II. Plaintiff

5.) The plaintiff Michael Luna Jr., was incarcerated at the Special Management Unit (S.M.U.) at Lewisburg, Pennsylvania during the events discribed in this complaint. He is currently confined at the (S.M.U.) Stepdown at Allenwood in White Deer, Pennsylvania.

III. Defendants

6.) Defendant Mr. A Jordan He is the Disciplinary Hearing Officer (D.H.O.) at (S.M.U.) in Lewisburg, Pennsylvania. and is responsible for conducting disciplinary hearings for prisoner accused of breaking prison rules. He is being sued in his individual capacity.

7.) Defendant Mr. J.E. Thomas, is the Warden at (S.M.U.) in Lewisburg, Pennsylvania and is in charge of supervision and discipline of all correctional staff at Lewisburg. He is being sued in his individual capacity.

8.) Defendants Mr. R. Weaver, Ms. Housiel, and Mr. Steuer, are correctional officers employed at (S.M.U.) in Lewisburg, Pennsylvania. They are being sued in His/Her individual capacity.

9.) Defendant The United States, is being sued under the Federal Tort Claim Act.

10.) Each Defendant is being sued individual and in His/Her official capacity. At all times mentioned in this complaint each defendant acted under the color of Federal Law.

IV. Facts

11.) On June, 23, 2013 inmates Medina # 31547-013, and Manleiquez # 60095-065 engaged in a verbal altercation with defendants Ms. Housier, and Mr. Steuer, and another unidentified officer.

12.) On June, 24, 2013 while running recreation. Correctional Officers escorting plaintiff Michael Luna Jr. and his cellmate Robert Reyes # 30105-280. Attempted to place plaintiff and his cellmate into a recreational cage with inmates Medina # 31547-013 and Manleiquez # 60095-065 who had the verbal altercation with mentioned defendants Mr. Steuer Ms Housier and unknown officer. In hopes that plaintiff and his cellmate would impose punishment on inmates Medina and Manleiquez.

13.) Housier, associates of plaintiff interceded on plaintiff's behalf and told the officers that plaintiff and his cellmate did not belong in the recreational cage with Medina and Manleiquez and other associates of theirs. At this time officers complied and placed plaintiff and his cellmate in the proper cage.

14.) Based upon information and belief relevant to this complaint. There has been a pattern and series of incidents at (S.M.U.) Lewisburg Institution, support the general allegation. That if a prisoner gets into a verbal altercation or through other means comes to be in bad standing with a correctional officer. They "intentionally and Negligently" disregard the "Separatee Order" found in "Program Statement" and place prisoners in a cage/cell with rival groups so that "punishment and excessive force" can be imposed.

15.) On June, 25, 2013. plaintiff and his cellmate while being

escorted to recreation. Were once again intentionally separated from their associates and place inside an empty recreation cage. Plaintiff and his cellmate entered the cage without argument considering that the cage they were being placed into was empty at the time.

16.) After plaintiff and his cellmate were placed in the cage. It was at this time that defendant Officer Mr. R. Weaver, and another unidentified officer escorting inmates Medina* 31547-013 and Manriquez* 60045-066 attempted to place them into the recreation cage with plaintiff and his cellmate.

17.) Both inmates Medina and Manriquez stated/informed defendant Mr. R. Weaver that they were not compatible to enter recreation cage with plaintiff and his cellmate due to security concerns and a 'Separation Order.'

18.) Under (S.M.U.) "Program Statement" 5180.05 Central Monitoring System (CIM) Assignment Catagories section 542.72 (d) Disruptive Group and (A) Separation. The (S.M.U.) is governed by P.S. 5217.01 Special Management Unit."

19.) Defendant Mr. R. Weaver, then called back to C-Block where all mentioned inmate including plaintiff and his cellmate were being housed. He spoke to defendant Mr. Steiner to verify whether there was any security concerns and whether they Medina and Manriquez were compatible to enter recreation cage with plaintiff and his cellmate.

20.) Defendant Mr. Steiner then "Intentionally and Negligently" falsely verified that inmates were compatible and that there was no security concerns/threats.

21.) Thereafter, defendant Mr. R. Weaver with complete indifference to inmates Medina and Maldonado statement of there being a threat/concerns for their safety. Defendant Mr. R. Weaver, "Intentionally and Negligently" proceed to place both inmates into recreation cage.

22.) Furthermore, I plaintiff would like to stress this part. Upon them entering the cage. All (4) mentioned inmates mentioned so far. Decided to shake hands and declare a peace.

23.) Note: That defendant Mr. R. Weaver, and inmates Medina, and Maldonado statement is clearly documented in DHO. report that is attached as (Exhibit A) plus there is video tape that is recorded in each cage that will verify all mentioned statements.

24.) Shortly Thereafter, other unknown correctional officer. With complete disregard/indifference to the threat and safety of everyone involved. Brought yet another inmate Rivera Espinoza-Rodriguez #10584-067 and proceed to place him into recreation cage.

25.) This inmate is also a known "Separatee" of plaintiff and his cellmate. Upon entering the recreation cage he immediately attacked the plaintiff's cellmate. At which time inmates Medina, and Maldonado followed suit. It was now (3) on (2) and a full fledge brawl erupted.

26.) Prior and after this incident. Plaintiff and his cellmate were always placed recreation cage #(2) with (4) other associates. While inmates Medina and Maldonado were placed in recreation cage #(4) with (2) to (4) other associates of theirs.

27.) On this particular day June, 25, 2013 plaintiff and his cellmate were

supposed to be placed in cage #(2) with their associates. Although correctional officers escorting plaintiff and his cellmate by-passed not only cage #2 where their associates were placed. But cage #(3) which was empty as well was by-passed and plaintiff and his cell-mate were placed in cage #4.

28.) Therefore, it is upon belief by plaintiff and conformation to statement #14 of this complaint. That defendants Mr. R. Weaver, Mr. Steffee, Ms. Housier and other unknown officers. That this incident was planned, Intentionally Negligently, and with complete Indifference to all mentioned inmates health and safety. Not to mention a different Threat/danger to their lives.

29.) Officers then rushed the cage to restore order with their batons and shooting inmates with MK-4 O.C. In between, the Excessive force by correctional officers and the Assault by inmates/Separatees. Plaintiff was savagely beaten upon the head to the point of unconsciousness.

30.) As a result plaintiff substained critical life threating injuries. Plaintiff was savagely beaten upon the head by both officials with their batons and inmates with their fist and feet to the point of unconsciousness Resulting in a fractured skull which was split open and that required between (25) to (50) stitches to amend. A bruised and swollen face that later required (2) broken tooth to be removed and the body took a severe beating as well. Not to mention irreparable damage in the form of psychological and emotional distress. Medical Record attached as (Exhibit B).

31.) On June, 25, 2013 plaintiff Michael Luna Jr, was served with a disciplinary charges. Codes: 201- fighting with another person and

307- Refusing an order. Charges attached as (Exhibit C).

32.) The plaintiff requested that hearing officer Defendant Mr A. Jordan to call as witness inmate Robert Reyes # 30105-280 which was served with same charges.

33.) The plaintiff also requested that the hearing officer Defendant Mr A. Jordan to review the (SMU) segregation roster of all inmates involved that could reveal the inmates Separatee Order and their incompatibility.

34.) Defendant Mr A Jordan, failed / refused to review segregation roster as requested by plaintiff and he failed to consider plaintiff defense that the violations were unjustifiably caused by the defendants Mr R. Weaver, Mr. Stewee, and Ms. Housier's misconduct.

35.) After the hearing. Plaintiff Michael Luna Jr, asked disciplinary officer Mr A Jordan, How was it that he could find us plaintiff and his cellmate guilty of defending ourselves and not see the wrong that his officers committed. He stated: That he could only punish us for / hold us responsible for our actions. Although, he could not hold his officers responsible for their actions. Yet in Part III section (B) of disciplinary report states: Inmate Luna made no complaints of procedural errors during the hearing. Disciplinary report attached as (Exhibit A).

36.) Plaintiff Michael Luna Jr, and his cellmate Robert Reyes # 30105-280 were both found guilty and recieved identical sanctions. Although as a bargaining chip some of plaintiff's sanctions were suspended. See. Sanction in disciplinary report attached as (Exhibit A)

37.) After the hearing the plaintiff received a (D.H.O.) report signed by defendant Mr. A. Jordan, stating "Guilty as Charged" based on staffs statements. Which were "Contradictive and Untrue".

38.) According to Mr. J.L. Norwood, Regional Director in his statement: A thorough review of the record revealed questions concerning the disciplinary process. Based on this review it was determined this action and the sanction imposed will be expunged Both appeal No. 748996-R1 and Regions response are attached as (Exhibit D)

V. Exhaustion of Legal Remedies

39.) As stated behind the (BP-9) form. Plaintiff Michael Luna Jr., by-passed (BP-8 & BP-9) fearing for his life and Do to the fact that plaintiff felt his life would be in danger of retaliation and continued harrassment by both Administrative Staff and it's employees at (USMC) Lewisburg.

40.) Although pursuant to prison procedures and policies. The plaintiff Michael Luna Jr. filed an Administrative Appeal (BP-10) pointing out the facts that staff unjustifiably cause the violations by Intentionally and Negligently placing known inmates with "Separatee Order" in grave danger with complete indifference and total Negligents. Both appeal and response attached as (Exhibit D)

41.) On February, 28, 2014 plaintiff Michael Luna Jr., filed an Administrative Claim / Standard 95 form. In an attempted of exhausting all his Administrative Remedies.

42.) On September 1, 2014 plaintiff Michael Luna Jr received a letter dated August 27, 2014 denying plaintiff's claim. Stating: Insufficient evidence to support my claim. That plaintiff's injuries were not caused by any negligence on the part of any Bureau of Prison employee. Notice of denial attached as (Exhibit G.)

43.) defendant Mr. J.E. Thomas thereby continues to deny/ turns a blind eye to the continious. Wrongful Acting and Negligence of his employees there at (SMU) Lewisburg.

44.) In (Exhibit A) evidence clearly shows the statement of inmates Medina and Malequez letting defendant Mr. R. Weaver know of the impending threat. It also shows the false verification by Defendant Mr. Steiner to Defendant Mr. R. Weaver that there was no threat and that inmates were compatible to be in cage together. Then it shows defendant Mr. R. Weaver placing them in cage #4 with complete indifference and then just walking away.

45.) A few minutes later videos will later show that after all mentioned incidents happened in statement #44 of this complaint and there was still no fighting by inmates Medina, Malequez, Luna, and Reyes. Officers / Employees then deliberately and with complete indifference to the threat and safety of inmates already in recreation cage #4 placed yet another inmate Rivera Espinoza-Rodriguez with a "Separatee Order" against plaintiff and his cellmate Robert Reyes which then caused the whole brawl to take place.

VI. Claim of Relief

46.) The United States is liable under the doctrine of "Respondeat Superior" for the Federal Tort Claim Act of the

employees herein.

47.) The actions of defendants Mr Stevee, Mr R. J Deavee, and Ms. Housier in coordinating the "Beau" in recreation cage #4 in retaliation against inmates Medina # 31547-013 and Manriquez #60095-066 was done "Maliciously and Sadistically". It also constituted the claim of Cruel and Unusual Punishment with Excessive Use of Force and conspirationally planned discipline.

48.) The actions of defendants Mr R. Deavee, Ms Housier, and Mr Stevee in coordinating the "Beau" and Use of Force" incident in recreation cage #4 also constituted the Federal Tort Claim Act of "Assault and Personal Injury" by both Inmates and Staff/Employees under the laws of Pennsylvania.

49.) The actions of defendants Mr Stevee, and Ms Housier in coordinating the "Beau" by "Falsely Uerifing" the inmates compatibility also constituted the Federal Tort Claim Act of "Intentional Negligent and Emotional Distress".

50.) The actions of defendant Mr R. Deavee in failing to intervene to prevent the "Assault and Personal Injury" constituted the "Deliberate Indifference and Intentional Negligent" to plaintiffs and other prisoners health and safety. It also contributed too and proximately caused the above discribed violation of "Cruel and Unusual Punishment, Excessive Use of Force; and Due Process".

51.) The actions of defendant Mr A. Jordan in refusing to review the segregation roster requested by plaintiff and refusing

to consider plaintiff's defense to staff's misconduct, and to turning a blind eye with a complete "Indifference" to known patterns of conspiratorial planned assaults. Denied the plaintiff "Due Process of Law".

52) The failure of defendant Mr. J.F. Thomas to take disciplinary action or other means to curb the continuious known patterns & physical abuse of prisoners at (S.M.U.) Lewisburg. It also constituted the "Deliberate Indifference and Intentional Neligent" to plaintiff and other prisoners health and safety. It also contributed to and proximately caused the above discribed violation of Due Process, Cruel and Unusual Punishment, Excessive Use of Force, Assault, and Personal Injury"

VII. Prayer for Relief

Wherefore, plaintiff Michael Luna Jr prays for judgement in his favor and damages in his favor against all defendants in an amount sufficient to compensate him for the pain and mental anguish suffered by him due to the deliberate indifference, and intentional misconduct of defendants, but in no event less than $350,000, together with his attorney's fees and cost and such additional relief as this Court may deem just and proper.

Verification

Pursuant to 28 U.S.C. § 1746 I have read the foregoing complaint and hereby verify that the matters alleged therein are true, and correct. Except as to matters alleged on in-

Information and belief and as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Date on this 14 day of October 2014.

Respectfully Submitted
By: Michael Luna Jr.
Michael Luna Jr. #36954-280
United States Penitentiary Allenwood
P.O. Box 3000
White Deer, PA 17887

FILED
OCT 20 2014
PER
HARRISBURG, PA DEPUTY CLERK

Office of the Clerk
United States District Court
Middle District of Pennsylvania
United States Court House
228 Walnut Street
P.O. Box 983
Harrisburg, PA 17108

Dated: Oct, 14, 2014.

Re: Filing of Federal Action under
Bivens v. Six Unknown named Agents of Fed. Bureau of Narcotics
/Federal Tort Claim Act

Dear Clerk,

Enclosed for filing Please! find the following documents:

1- Authorization Form
2- Application to Process In Forma Pauperis
3- Complaint with Jury Demand
4- Motion for Appointment of Counsel

No CASE

As proof of receipt Please! place your file mark on a copy of this letter and return same in self addressed stamped envelope enclosed for your convenience.

Sincerely
Michael Luna Jr.
Michael Luna Jr.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL LUNA, JR., Plaintiff,	)	No. 1:CV-12-2028
v.	)	(Kane, J.)
DHO MR. A. JORDAN, C.O. MS. HOUSIER, C.O. MR. STEVEE, C.O. MR. WEAVER, WARDEN MR. J.E. THOMAS, and UNITED STATES OF AMERICA, Defendants	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF TORT CLAIMS

It is hereby stipulated by and between the undersigned Plaintiff and the United States of America (h

through its counsel, as follows:

1. The parties hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release.

2. The United States agrees to pay the sum of five-thousand dollars ($5,000.00) plus three-hundred fifty dollars ($350.00) for a total of five-thousand three-hundred fifty ($5,350.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation for Compromise Settlement and Release in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen

and unforseen bodily and personal injuries, damage to property and the consequences thereof which he may have or hereafter acquire against the United States as well as its respective agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agrees to reimburse, indemnify and hold harmless the United States as well as its respective agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States including claims for wrongful death.

4. The parties further understand and agree that all individual Defendants who have been named in this case are dismissed from the case with prejudice, and that no claims against any individual Defendants arising from the acts and allegations complained of in the

complaint survive this settlement agreement and release.

5. Plaintiff and his guardians, executors, administrators or assigns hereby agrees to discontinue with prejudice, upon payment of the settlement amount, any other actions which they brought arising out of the subject matter that gave rise to the above-captioned action.

6. This Stipulation for Compromise Settlement and Release is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States or its respective agents, servants, or employees, and it is specifically denied that it is liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

7. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses.

8. Payment of the settlement amount will be made by a check, drawn on the Treasury of the United States for five-thousand three-hundred fifty dollars ($5,350.00) and made payable to Michael Luna, Jr.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. §552a(b).

10. This agreement constitutes the entire agreement between the parties; the terms of this agreement are contractual and not a mere recital and are effective upon execution of this agreement by Plaintiff and counsel for Defendants. No promise or inducement that is not herein expressed has been made to any of the parties and the parties do not rely on any statement or representation made by any person not otherwise contained herein.

11. It is contemplated that this Stipulation for Compromise Settlement and Release may be executed in several counterparts, with a

separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

PETER J. SMITH
United States Attorney

MICHAEL LUNA, JR.
Reg. No. 36954-280
Plaintiff

J. JUSTIN BLEWITT, JR.
Assistant U.S. Attorney
P.O. Box 309
Scranton, PA 18501-0309
Justin.Blewitt@usdoj.gov
Phone: 570-348-2800
Attorney for the
United States of America

Dated: 1-27-, 2015

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL LUNA, JR., Plaintiff,	)	No. 1:CV-12-2028
v.	)	(Kane, J.)
DHO MR. A. JORDAN, et al., Defendant s	)	

STIPULATION OF DISMISSAL

Plaintiff, Michael Luna, Jr., and Defendant, the United States of America, by and through its respective attorney and pursuant to Federal Rule Civil Procedure 41(a)(1)(ii) and the Stipulation for Compromise Settlement and Release entered into by the parties, hereby stipulate to the dismissal of the above-captioned action with prejudice with no award of costs

PETER J. SMITH
United States Attorney

Michael Luna Jr
MICHAEL LUNA, JR.
Reg. No. 36954-280
Plaintiff

J. JUSTIN BLEWITT, JR.
Assistant U.S. Attorney
P.O. Box 309
Scranton, PA 18501-0309
Justin.Blewitt@usdoj.gov
Phone: 570-348-2800
Attorney for the
United States of America

Dated: 1-27-, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEVI RUFFIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 14-cv-761 (TSC)
	)	
UNITED STATES,	)	
	)	
Defendant.	)	
	)	

ORDER OF DISMISSAL

The Stipulation of Settlement filed by the parties (ECF No. 20) is hereby adopted and this action is hereby dismissed with prejudice.

Date: December 18, 2015

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEVI RUFFIN, PLAINTIFF vs. UNITED STATES, DEFENDANT	)	Civil Action No. 1:14-cv-761 (TSC)

STIPULATION OF SETTLEMENT AND ORDER OF DISMISSAL

Plaintiff, Levi Ruffin, and the United States, by their undersigned counsel, hereby agree and stipulate as follows:

1. The United States and Plaintiff do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, against the United States arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation.

2. The United States agrees to pay to Plaintiff the sum of THREE THOUSAND DOLLARS ($3,000). This payment shall be made by an electronic transfer of funds as specified in instructions provided to counsel for the United States by Plaintiff's counsel in writing. Payment shall be made as promptly as practicable, consistent with the normal processing procedures followed by the Department of Justice and the Department of the Treasury, following entry of this Stipulation on the docket as an order of the Court pursuant to paragraph 8 below. Plaintiff and Plaintiff's counsel shall cooperate with the United States to insure that all documentation required to process this payment is complete and accurate. This payment is inclusive of Plaintiff's attorneys' fees, costs, and other litigation expenses, and the United States

shall have no further liability for those fees, costs, and expenses. Plaintiff and Plaintiff's counsel shall be responsible for any distribution of the payment among themselves.

3. Plaintiff acknowledges that the payment set forth in paragraph 2 constitutes full and complete satisfaction of any and all claims which have been or could have been asserted by Plaintiff in the above-captioned action against the United States, its agents, servants, and employees, including, but not limited to, employees of the United States Bureau of Prisons (hereinafter, collectively the "Released Parties"), including any and all claims, demands, rights, and causes of action of whatsoever kind and nature arising from the events alleged in the above-captioned action, whether known or unknown, whether asserted or unasserted in the above-captioned action, for which Plaintiff or his heirs, distributees, executors, administrators, personal representatives, successors and/or assigns, and each of them, now have or may hereafter acquire against the Released Parties. Plaintiff and his heirs, distributees, executors, administrators, personal representatives, successors and/or assigns further agree to reimburse, indemnify and hold harmless the Released Parties, from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his heirs, distributees, executors, administrators, personal representatives, successors and/or assigns against any third party or against any of the Released Parties.

4. This stipulation is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, including any employee of the United States Bureau of Prisons, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by Plaintiff and the United States for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the Plaintiff and the United States, that they will each bear their own costs, fees, and expenses and that any attorneys' fees owed by the Plaintiff with respect to the amount paid in settlement by the United States will be paid out of the settlement amount set forth in paragraph 2 herein and not in addition thereto.

6. It is also understood by and among the Plaintiff and the United States that pursuant to Title 28, United States Code, Section 2678, any attorneys' fees owed by the Plaintiff with respect to the amount paid in settlement by the United States shall not exceed 25 per centum of the settlement amount set forth in paragraph 2 herein.

7. The persons signing this Stipulation warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the Stipulation.

8. Execution of this Stipulation by Plaintiff, counsel for Plaintiff and counsel for the United States shall constitute a dismissal with prejudice of all claims asserted against the United States in the above-captioned action, effective upon entry of this Stipulation on the docket as an order of the Court.

9. Following the execution of the Stipulation by the signatories for all parties, counsel for Plaintiff shall file the fully executed Stipulation with the Court. In the event additional action is necessary to obtain an order from the Court dismissing the claims and parties referenced in the preceding paragraph, Plaintiff agrees to take any such additional action, at his expense, and also to cooperate fully with the United States in that effort. Plaintiff agrees to seek to obtain a Court order of dismissal of the claims referenced in the preceding paragraph in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this Stipulation at its option in the event such an order is not obtained in a timely manner.

10. This Stipulation may not be used as evidence or otherwise in any civil or administrative action or proceeding against the United States Bureau Of Prisons, or the United

States and any of its agencies or officials or present or former employees or agents, either in their official or individual capacities, except for proceedings necessary to enforce the terms of this Stipulation.

11. Plaintiff represents that he has read this Stipulation, that he has been given a reasonable period of time within which to consider the terms of the Stipulation and to consult with an attorney of his choice about those terms, and that he has signed this Stipulation of his own free will, without threat, coercion, or promise of any future consideration, and with knowledge of the meaning and effect of its provisions.

12. This Stipulation may be executed in two or more counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same document. A facsimile or other duplicate of a signature shall have the same effect as a manually-executed original.

IN WITNESS WHEREOF, the parties hereto, by and through their authorized counsel, intending to be legally bound, have executed this Stipulation on the dates shown below.

Levi Ruffin, Plaintiff

Executed this 17 day of Dec, 2015

Jeffrey L. Light
D.C. Bar # 485360
LAW OFFICE OF JEFFREY L. LIGHT
1712 Eye St., NW Suite 915
Washington, DC 20006

Attorney for Plaintiff Levi Ruffin

Executed this 17th day of Dec, 2015

CHANNING D. PHILLIPS
D.C. Bar # 415793
United States Attorney

DANIEL F. VAN HORN
D.C. Bar # 924092
Chief, Civil Division

By:
ALEXANDER D. SHOAIBI
DC Bar # 423587
Assistant United States Attorney
555 Fourth Street, N.W.
Room E-4218
Washington, D.C. 20530
(202) 252-2511
alexander.d.shoaibi@usdoj.gov

Attorneys for Defendant United States

Executed this 7th day of December, 2015

SO ORDERED:

On this __ day of _____, 2015

United States District Judge

TRULINCS 43865053 - RAM, MOORTHY SRINIVAS - Unit: DEV-H-B

FILED
IN CLERKS OFFICE
2015 FEB 23 PM 3 32
U.S. DISTRICT COURT
DISTRICT OF MASS.

FROM: 43865053
TO:
SUBJECT: Tort Claim!
DATE: 02/16/2015 09:22:38 PM

United States District Court
District of Massachusetts

Moorthy S Ram
Plaintiff

v Civil Action No:

Director, Northeast Regional Center
Philadelphia, PA 19806

Complaint

Plaintiff, an inmate at the Federal Medical Center Devens, Ayer, MA 01432 hereby making a complaint, pro se, against the Director, Northeast Regional Office in Philadelphia, PA 19806

The Court has jurisdiction over the matter pursuant to 28 USC $ 1331

Facts of the Case

The inmate was a resident of the Unit H-A at the above mentioned institution in July of 2013. The unit had a functioning ice machine, located in the lobby of the unit. There is a camera facing it from one end of the lobby to the other facing the North and South direction.

On July 22nd, around 3 P.M., as the inmate was taking ice from the bottom of the machine, the door of the reservoir of the ice machine fell on his face and broke his upper right incisor. The tooth was normal before and no work had been done on the same in the past.

The ice machine's door has been "loose" for the past few months prior to the accident, causing numerous spills but never had any injuries on any one. The facilities division of the institution had put a velcro patch on the door and the upper half of the machine where the door rests so that the door will be "secure"

The Scottsman Ice Machine has two components, the top portion that makes (Exhibit 1) the ice and bottom reservoir where the ice accumulates for use. The reservoir has a door that swings out and rests on the top portion of the machine, in a

---

little more than 90degrees to the ground so that it will rest of the upper part of the machine. The upper part of the machine has usually a little space between it and where the door begins so that the door can swing a little bit more than 90 degrees for its stability. In this particular machine there was NO space between the door and the upper part of the machine.

The Plaintiff reported the accident to the Corrections Officer in the Unit and was told to go to the "dental sick call" in the morning since there was no injury by way of the soft tissues of the face except the tooth.

On Wednesday the 23rd of July (the next day) the inmate went to the dental sick call. Even though there was no sick call on Wednesdays, the dentist was kind enough to see him. He took an x-ray of the tooth and told him that he would extract the tooth since there was nothing else he could do. He assured the inmate that the roots were good and since the tooth had broken at the gum level, he could do a root canal, build a crown and a cap if it was his private practice. He himself was a Prosthodontist and told me it would have cost me $2500- $3000 for the entire procedure. Since, he said, the BOP did not allow him to do any restorative work, the only thing he could do was to remove the tooth and the inmate could get an implant at a later date at $200- $2500.

The inmate refused the extraction, signed the refusal form and thanked the dentist and left the office.

He promptly filed a Tort Claim with the Regional Office in Philadelphia, PA which was denied after 6 months. (Exhibit No 2 and 3)

The restorative work the denial report mentions refers to the cavities filled by the dentist at FCI Morgantown in W.VA in 2012. It is rather amusing that the same tooth filled was removed at FMC Devens in 2014. Every time the inmate had gone to the dentist at FMC Devens with a cavity (the inmate does have 2 cavities) the dentist would be happy to remove the tooth and NOT worry about doing restorative work. The inmate had refused such procedures twice.

Furthermore if only one looks at the number of teeth removed at FMC Devens in 2014

and compare it to all the restorative work done, the difference will be striking! Most of the inmates do complain that the dentist does not do anything but extractions of teeth!!

The inmate has been walking around the compound with a hideous smile for the past six months (imagine Tiger Woods without his front tooth for six months!) The inmate who was working at the Facilities at that time complained to the Refrigeration Unit of the facilities and on Thursday two inmates were sent to the Unit H-A to move the top half of the machine an inch backward so that the door will slant back and be stable. The velcro patches, which have worn were not changed! The two inmates are Mr. Sheppard and Mr. Michael Lewis (both refused to give affidavits for this complaint!)

RELIEF REQUESTED

Compensatory Damage

1. Cost of removal of the tooth and implant with a new one $3,000

or

2. Cost of Root Canal of the tooth - build a crown and a cap $2,500

Punitive Damage

$25,000

The Plaintiff demands a Jury Trial.

Respectfully submitted

Moorthy S Ram
43865-053
Federal Medical Center Devens
P O BOX 879
Ayer, MA 01432

PS. The inmate will be at the following halfway house beginning the 19th of February for 89 days!
Community Corrections Program
Riverside Regional Jail
400 Polar Trail
North Prince George, VA 23860
804 861 1190

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MOORTHY S. RAM, Plaintiff, v. UNITED STATES, Defendant.	)	Civil Action No. 15-cv-10355-JCB

NOTICE OF SETTLEMENT

The Parties hereby notify this Court that they have agreed to settle this matter. Kindly issue a 90-day Nisi Order.

Respectfully submitted,

PLAINTIFF,
Moorthy S. Ram

/s/ Moorthy S. Ram (by ms)
Moorthy S. Ram
1700 Johnson Road, Apt. 1B
Petersburg, VA 23805

CARMEN M. ORTIZ
United States Attorney

By: */s/ Michael Sady*
Michael Sady, B.B.O. #552934
Assistant United States Attorney
United States Attorney's Office
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3100
michael.sady@usdoj.gov

Dated: April 26, 2016

CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the Electronic Court Filing system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing. Paper copies will be sent via first class mail to *pro se* Plaintiff, Moorthy S. Ram, 1700 Johnson Road, Apt. 1B, Petersburg, VA 23802.

/s/ Michael Sady
Michael Sady
Assistant United States Attorney

Dated: April 26, 2016

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Moorthy S. Ram

V. **CIVIL ACTION NO. 4:15-cv-10355-JCB**

United States

SETTLEMENT ORDER OF DISMISSAL

BOAL, M.J.

The Court having been advised by counsel for the parties that the above-entitled action has been settled;

IT IS HEREBY ORDERED that this action is hereby dismissed without costs and without prejudice to the right, upon good cause shown within **ninety(90)days**, to reopen the action if settlement is not consummated.

April 26, 2016

/s/ Steve K. York

Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MOORTHY S. RAM, Plaintiff, v. UNITED STATES, Defendant.	)	Civil Action No. 15-cv-10355-JCB

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between Plaintiff Moorthy S. Ram and Defendant United States of America ("United States"), by and through their respective attorneys, as follows:

1. The parties agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims.

2. The United States agrees to pay the sum of Two Thousand Three Hundred Dollars ($2,300.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, including pain and suffering, damage to property, and the consequences thereof, resulting from the subject matter of this lawsuit and any and all other claims against the United States, whether known or unknown, or which hereinafter may arise, including any claims for negligence, as well as any claims Plaintiff has, may have had, or ever had against the United States, the Bureau of

Prisons ("BOP") and/or any of their current or former employees, for which the Plaintiff and all of his heirs, children, executors, trustees, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States, including but not limited to the BOP and their agents, servants, and current and former employees.

3. Plaintiff and all of his heirs, children, guardians, executors, trustees, administrators, or assigns hereby agree to accept the sum set forth in this Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims in full settlement and satisfaction of any and all claims, demands, rights, and causes of action whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, damage to property, and the consequences thereof that they may have, have ever had, or hereafter acquire against the United States and/or the BOP, their respective agents, servants, and current and former employees, including, without limitation, any and all claims that Plaintiff has alleged or could have alleged arising out of, or relating to, his custody with the BOP, including, the same subject matter that gave rise to the above-captioned action, as well as present or any future claims or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and all of his heirs, children, guardians, executors, trustees, administrators, or assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its respective agents, servants, and current and former employees, including those employed at the BOP, from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff and all of his heirs, children, guardians, executors, trustees, administrators, or assigns against any third party or against the United States and/or the BOP or its current and former employees.

4. This Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States and/or the BOP, their respective agents, servants, or current and former employees, and it is specifically denied that they are liable to Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that, pursuant to 28 U.S.C. § 2678, attorney's fees for services rendered in connection with this action shall not exceed twenty-five percent (25%) of the amount of the compromise settlement.

7. The persons signing this Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by check in the amount of Two Thousand Three Hundred Dollars ($2,300.00) and made payable to Moorthy S. Ram. This action will be dismissed with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise and Release of Federal Tort Claims Act Claims, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 522a(b).

10. It is contemplated that this Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims may be executed in counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

11. Plaintiff represents and warrants that he is the sole and lawful owner of all rights, title and interests in and to every claim and other matter which he purports to release herein, and that he has not heretofore assigned or transferred, or purported or attempted to assign or transfer to any person or entity any claims or other matters herein released.

12. This Agreement shall be binding upon and inure to the benefit of the Plaintiff and the Defendant and their respective heirs, executors, trustees, successors, assigns and personal representatives, including any person, entity, department, or agency succeeding to the interests or obligations of any party hereto, or having an interest herein.

13. This Agreement cannot be modified or amended except by an instrument in writing, agreed to and signed by all parties, nor shall any provision hereof be waived other than by a written waiver, signed by the parties.

14. This Agreement contains the entire agreement between the parties hereto, and Plaintiff acknowledges and agrees that no promise or representation not contained in this agreement has been made to him, and he acknowledges and represents that this Agreement contains the entire understanding between the parties, and contains all terms and conditions pertaining to the compromise and settlement of the disputes referenced herein. No statement, remark, agreement, or understanding, oral or written, that is not contained herein shall be recognized or enforced, nor does this Agreement reflect any agreed upon purpose other than the

desire of the parties to reach a full and final conclusion of the litigation and to resolve that suit without the time and expense of further litigation.

15. Compliance with all applicable federal, state, and local tax requirements shall be the sole responsibility of the Plaintiff. This Agreement is executed without reliance upon any representation by Defendant as to tax consequences, and Plaintiff is responsible for the payment of all taxes that may be associated with settlement payments.

ATTORNEYS FOR DEFENDANT,
United States of America

Michael Sady
Assistant United States Attorney
United States Attorney's Office
District of Massachusetts
One Courthouse Way, Suite 9200
Boston, Massachusetts 02210
(617) 748-3100 (telephone)
(617) 748-3969 (fax)

Executed this 27th day of April, 2016.

PLAINTIFF,
Moorthy S. Ram

Moorthy S. Ram
1700 Johnson Road, Apt. 1B
Petersburg, VA 23805

Executed this 26 day of April, 2016.

Page 829 of 848

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 830 of 848

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Welcome JOHN E WALLACE | Logout

[redacted]

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-NER-2015-00997 **Short Description:** DOUGLAS V. UNITED STATES OF AMERICA

[redacted]

Case Login Information

Reference Number	3:15-cv-00069-KRG
Short Description	DOUGLAS V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	NORTHEAST REGIONAL OFFICE
Current Institution	
Incident Region	
Incident Institution	
Monetary Relief Sought	$3,000,000.00
Estimated Amount	$
Office	Johnstown
Jurisdiction	WESTERN DISTRICT OF PENNSYLVANIA
Responsible Legal Office	NERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	04/14/2016
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$90,000.00
Description	
Description	
Court Fee Paid ?	Yes
Pro Se ?	No

Case Initiation Dates

Date Received	09/02/2015
Date Filed	03/16/2015

Case Progress

Current Owner	ROBERT JENSEN
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1346 TORT CLAIM
Further Case Classification	
Comments	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAMERON DOUGLAS,	:	
Plaintiff,	:	**CIVIL ACTION**
v.	:	**No. 15-69**
UNITED STATES OF AMERICA,	:	
Defendant.	:	

COMPLAINT

I. PRELIMINARY STATEMENT

1. On September 24, 2012, Plaintiff Cameron Douglas, while incarcerated at FCI Loretto, a Federal Bureau of Prisons ("BOP") facility, suffered a critical injury to his left leg: a compound fracture of his left femur, just above the knee. Medical staff at the prison, however, ignored the severity of the injury and left Mr. Douglas to suffer four days of agonizing pain without proper pain management medications.

2. Further, because Mr. Douglas's injured leg was not X-rayed for four days, his condition was not diagnosed in a timely fashion. This inexplicable delay resulted in further harm, as the immobilization of Mr. Douglas's injured leg caused him to suffer a dangerous and potentially life-threatening deep vein thrombosis.

3. Even after Mr. Douglas received necessary surgical treatment to address the fracture and the deep vein thrombosis, BOP medical staff continued to deny Mr. Douglas proper medical care by failing to make available to him the physical therapy and pain medication required to rehabilitate his injury.

4. Mr. Douglas brings this action against Defendant United States of America to seek compensation for the substantial damages he has suffered as a result of the extraordinary negligence of BOP medical staff.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this Complaint under 28 U.S.C. §§ 1331, 1346(b).

6. On or about March 21, 2014, Mr. Douglas submitted a timely Administrative Tort Claim to the BOP. In correspondence dated September 19, 2014, the BOP denied the claim.

7. Venue is proper in this District under 28 U.S.C. § 1402(b) as the actions at issue in this matter occurred principally in Loretto, Pennsylvania within the Western District of Pennsylvania.

III. PARTIES

8. Plaintiff Cameron Douglas was at all times relevant to this Complaint incarcerated in BOP facilities at either FCI Loretto or FCI Cumberland.

9. Defendant United States of America is the appropriate defendant under the Federal Tort Claims Act.

10. At all times relevant to this Complaint, all medical personnel mentioned below were employees of BOP and Defendant United States of America and were acting within the scope and course of their employment.

IV. FACTS

11. In September 2012, Mr. Douglas was a prisoner at FCI Loretto.

12. On the morning of Monday, September 24, 2012, Mr. Douglas was playing in a recreational handball game.

13. Upon planting his left leg in a cracked section of pavement, he felt a twisting and popping sensation and crumpled to the ground.

14. Mr. Douglas's left leg was in an unnatural position, and he could see a large protrusion under the skin slightly above his left knee.

15. Mr. Douglas experienced excruciating pain and immediately believed he had suffered a fracture.

16. Mr. Douglas was taken to the prison medical unit where he was seen by Physician's Assistant Robin Golden.

17. Mr. Douglas informed PA Golden that he was experiencing extraordinary pain and that he believed he had suffered a fracture.

18. PA Golden refused to believe that Mr. Douglas had a serious injury.

19. PA Golden noted in her chart that Mr. Douglas was exaggerating his pain, stating that he did not express pain when palpated "with distraction."

20. Further, PA Golden stated that Mr. Douglas was observed having a conversation with a fellow inmate "with no expression of pain."

21. Due to her refusal to believe Mr. Douglas's complaints of pain and the possibility of a fracture, PA Golden did not conduct a comprehensive examination, nor did she make any referrals for an evaluation by another practitioner.

22. Instead, PA Golden ordered a "routine" X-ray, placed Mr. Douglas in an immobilizer, prescribed ibuprofen for pain and gave him a wheelchair.

23. Further, despite the fact that Mr. Douglas complained of an injury in his femur and had an obvious deformity in that area of his leg, PA Golden improperly ordered X-ray studies of his knee.

24. PA Golden's actions were reviewed and approved by Michael Cash, D.O., who cosigned PA Golden's notes of her encounter with Mr. Douglas on September 25, 2012.

25. Each of the actions of PA Golden, approved by Dr. Cash, was grossly outside the standard of care for an orthopedic injury of the type suffered by Mr. Douglas.

26. The "routine" X-ray would not be conducted an on emergent basis, and, in fact, was not conducted until three days later, on September 27, 2012.

27. During the time period between his injury and X-ray, Mr. Douglas continued to suffer from extraordinary pain.

28. Further, because Mr. Douglas was provided with a wheelchair but no crutches, he was unable to stand and was, therefore, prevented from engaging in even the most basic day-to-day activities, including eating or relieving himself in a sanitary fashion.

29. Mr. Douglas's "routine" X-ray was taken on September 27, 2012.

30. The X-ray was taken of his knee, but a fracture could be seen in his femur. The reviewing radiologist recommended X-rays that focused specifically on the femur.

31. PA Golden and Dr. Cash were aware as of the morning of September 27, 2012 that the X-ray studies showed a fractured femur.

32. Still, neither PA Golden nor Dr. Cash took any action to ensure that Mr. Douglas would receive treatment for that obviously painful injury.

33. Instead, PA Golden, with Dr. Cash's approval, directed Mr. Douglas to keep his leg immobilized.

34. Further, PA Golden and Dr. Cash gave Mr. Douglas only over-the-counter pain medication to treat the extraordinary pain that he had been suffering for more than three days.

35. Mr. Douglas was informed that at some point his X-rays would be reviewed by an orthopedist.

36. Neither PA Golden nor Dr. Cash took any action to ensure the timely review of Mr. Douglas's X-ray images by an orthopedist.

37. As a result, Mr. Douglas's X-rays were not reviewed until nearly 24 hours later.

38. In the nearly 24 hours that had passed between the taking of the X-rays and the orthopedist's review of the X-ray studies, Mr. Douglas continued to suffer extraordinary pain that was not resolved by the over-the-counter medications he had been provided.

39. On September 28, 2012, Dr. Cash spoke to a consulting orthopedist at a local hospital, Indiana Regional Medical Center, and informed the orthopedist that he believed Mr. Douglas to have suffered a non-displaced fracture.

40. The information provided by Dr. Cash was incorrect as the X-ray images plainly showed that Mr. Douglas had suffered a much more serious displaced fracture.

41. Additionally, PA Golden minimized the severity of the injury shown on the X-ray images by telling Mr. Douglas that he had suffered a minor hairline fracture, and, further, telling him that there was no need for him to inform his family about his injury.

42. Once the orthopedist reviewed the X-rays on September 28, he immediately observed the serious nature of Mr. Douglas's injury and informed medical staff at FCI Loretto that Mr. Douglas should be transferred to the hospital as quickly as possible for treatment of the injury.

43. Mr. Douglas was transferred to Indiana Regional Medical Center on September 28, 2012, four days after his injury.

44. After an evaluation and further X-ray imaging—to develop films that showed Mr. Douglas's femur as opposed to his knee which was shown in the X-ray images taken at FCI Loretto—the orthopedist confirmed that Mr. Douglas had suffered a 22-centimeter oblique fracture of the distal third of the femur.

45. Because the fracture was displaced, the orthopedist determined that surgical treatment was required.

46. Before conducting any surgical procedure, however, the orthopedist noted that the four-day immobilization of Mr. Douglas's fractured leg, which was directed by PA Golden and Dr. Cash, placed Mr. Douglas at serious risk for clotting at or around the site of his injury.

47. An ultrasound examination was performed, and Mr. Douglas was found to indeed have a dangerous and large deep vein thrombosis near the injury site.

48. For this reason, the orthopedic surgery was delayed, and Mr. Douglas was required to undergo an emergent surgical procedure to implant a filter to prevent the thrombosis from becoming a pulmonary embolus.

49. Because it was not safe for Mr. Douglas's orthopedic injury to be treated until the deep vein thrombosis was resolved, treatment of his leg was delayed further.

50. On October 1, 2012, an entire week after Mr. Douglas suffered his injury, orthopedic surgery to repair the fracture, including the placement of a rod in Mr. Douglas's leg, took place.

51. Mr. Douglas was only permitted to stay at the hospital until October 3, 2012.

52. Mr. Douglas was discharged before he had the opportunity to begin hospital-based physical therapy and before his treating physicians could ensure his proper recovery from surgery.

53. Upon information and belief, Mr. Douglas was discharged prematurely based on the demands of medical and correctional staff at FCI Loretto.

54. Mr. Douglas was returned to FCI Loretto with orders that he receive a Coumadin regimen and undergo physical therapy.

55. Additionally, due to the highly invasive and painful surgery he had undergone, Mr. Douglas was discharged with a prescription for narcotic pain medication.

56. Upon his return to FCI Loretto, medical staff provided Mr. Douglas only with a significantly reduced amount of pain medication and cut him off from all such medication in a matter of weeks.

57. Further, from the date of his return to FCI Loretto in October 2012 through March 2013 when he was transferred to FCI Cumberland, Mr. Douglas never received any physical therapy treatment.

58. Even after his transfer to FCI Cumberland, Mr. Douglas was denied access to the physical therapy that is a necessity for the rehabilitation of his injury.

59. As a result of the actions and inactions of BOP medical staff, which violated generally accepted standards of care, Mr. Douglas suffered severe harms, including:

a. Prolonged physical pain and suffering and emotional trauma due to the excessively delayed treatment for his serious injury;

b. The aggravation of his injury due to a delay in the provision of care;

c. Additional injury, including a life-threatening deep vein thrombosis, as a result in the delay of care;

d. The need to undergo an additional surgery for resolution of his deep vein thrombosis condition and an orthopedic surgery that was more complicated

than what would have been otherwise required had treatment been provided in a timely fashion;

e. The need to follow a risky anti-coagulation medication regimen for the treatment of his deep vein thrombosis with associated side effects and limitations on activities;

f. Continued pain and suffering due to the failure to provide appropriate pain medication; and

g. Limitations on mobility and strength in his leg due to the lack of needed physical therapy.

60. As a result of the actions and inactions of BOP employees as described above, Mr. Douglas has suffered substantial damages, including physical pain and suffering, emotional trauma, loss of the enjoyment of life and financial damages, some or all of which may be permanent.

V. CAUSE OF ACTION

Count I
Plaintiff v. Defendant United States of America
Federal Tort Claims Act – Negligence

61. The BOP employees referenced above, including Physician's Assistant Robin Golden and Michael Cash, DO, owed a duty to plaintiff, breached their duty to plaintiff, and, as such, were a direct and proximate cause and a substantial factor in bringing about plaintiff's damages outlined above.

62. The actions of the BOP employees referenced above constitute the tort of negligence under the laws of the Commonwealth of Pennsylvania.

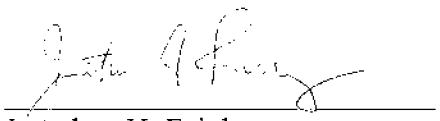
63. Under the Federal Tort Claims Act, defendant United States of America is liable for these actions.

Wherefore, plaintiff Cameron Douglas respectfully requests:

A. Compensatory damages;

B. Reasonable attorneys' fees and costs;

C. Such other and further relief deemed just and appropriate.



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JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Cameron Douglas

(b) County of Residence of First Listed Plaintiff Allegany, MD
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Jonathan H. Feinberg; Kairys, Rudovsky, Messing & Feinberg; 718 Arch St., Suite 501 S; Phila PA 19106; 215-925-4400

DEFENDANTS
United States of America

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
Federal Tort Claims Act, 28 USC 1346(b)

Brief description of cause:
Federal Tort Claims Act - Medical Malpractice

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:

JUDGE _____ DOCKET NUMBER _____

DATE
3/16/2015

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAMERON DOUGLAS,	)	
	)	
Plaintiff(s),	)	**CIVIL ACTION NO. 3:15-0069**
	)	
v.	)	**JUDGE KIM R. GIBSON**
	)	
UNITED STATES,	)	
	)	
Defendant(s).	)	

INITIAL SCHEDULING ORDER

NOW, this 28th day of October 2015, **IT IS HEREBY ORDERED** that the above-captioned civil action is placed under Rule 16.1 of the Local Rules of the United States District Court for the Western District of Pennsylvania for pretrial proceedings and all provisions of the Rule will be strictly enforced.

IT IS FURTHER ORDERED that counsel shall confer with their clients prior to the Post-Discovery Status Conference, or any other status conference, in order to obtain authority for the purpose of participating in settlement negotiations to be conducted by the Court. Counsel are encouraged to appear with their principals at all such conferences, or instruct the principals to be available by telephone to facilitate the amicable resolution of all litigation.

IT IS FURTHER ORDERED that compliance with the provisions of Local Rule 16.1 shall be completed as follows:

A. Initial Case Management Plan

1. The parties shall move to amend the pleadings or add new parties by December 1, 2015.

2. The parties shall make the required disclosures identified in Rule 26(a)(1)(A)(B)(C) and (D) on or before

November 2, 2015.

The parties are reminded that under the rule, a party shall make its initial disclosures based on the information then reasonably available, and is not excused from making its disclosures because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures.

3. Modifications of the times for, and extent of, any disclosures under Fed. R. Civ. P. 26(a) and 26(e)(1) shall be made by

Not applicable.

4. The following limits on the scope of discovery shall apply:

All presumptive limits set forth in the Federal Rules of Civil Procedure .

5. The parties shall complete all fact discovery by

April 1, 2016.

All interrogatories, notices of deposition, requests for admissions and requests for production shall be served within sufficient time to allow responses to be completed and filed prior to the close of discovery.

6. The parties shall complete all expert discovery by

April 1, 2016.

The parties shall make their disclosure of experts required by Rule 26(a)(2) by February 1, 2016 (Plaintiff); February 15, 2016 (Defendant).

The depositions of all experts shall be completed by

April 1, 2016.

7. The parties shall designate this case for arbitration, mediation, appointment of a special master, or other special procedure, if appropriate, by

April 1, 2016.

8. A Post-Discovery Status Conference is scheduled for

June 7 2016 at 9:30 A.M.

(Note: The Court will fill in this date after the IR 16 conference).

The parties shall be prepared to discuss settlement and the possibility of using a method of alternative dispute resolution. Seven days prior to the date of the Post Discovery Status Conference, counsel and unrepresented parties are jointly responsible for submitting to the Court a proposed Final Scheduling Order that includes: (1) dates by which dispositive motions should be filed and responded to; (2) dates by which the parties' pretrial statements should be filed; (3) dates by which motions *in limine* should be filed and responded to; (4) dates by which *Daubert* motions should be filed and responded to; (5) dates on which argument on *Daubert* motions and motions in limine shall be heard; (6) a date for the final pretrial conference; and (7) trial dates. *See* Exhibit "B" of Judge Gibson's Practice and Procedures.

9. The parties shall file any dispositive motions that are appropriate prior to the close of discovery on or before

_____.

The nonmoving party's response to any such motion is due on

_____.

Deadlines for dispositive motions that are only appropriate after the close of discovery will be set at the Post-Discovery Status Conference. Failure to file a dispositive motion before the close of discovery will not act as a waiver of any right to file an appropriate motion after the close of discovery.

B. Motion Practice

(1) Motions Not Requiring Briefs

No brief is required by either movant or respondent unless otherwise directed by the Court with respect to the following motions:

(a) For extension of time for the performance of an act required or allowed to be done;

(b) To continue a Post-Discovery Status Conference;

(c) To amend the pleadings;

(d) To file supplemental pleadings;

(e) For a substitution of parties; and

(f) To compel discovery.

Any of the above-motions not requiring briefs shall be accompanied by a proposed order stating the relief requested by said motion. All other motions and

responses thereto, must be accompanied by a brief. The Clerk shall not accept for filing any motion, application, or objection requiring a brief, which is not accompanied by such brief, without permission of the Court. Briefs in support of a motion and briefs in opposition to a motion shall be limited to twenty-five (25) pages excluding tables.

C. Procedure Governing Discovery Disputes

The Federal Rules of Civil Procedure allow for liberal discovery. In the absence of a privilege, relevancy is the test for determining whether material is discoverable. Fed. R. Civ. P. 26(b)(1). This rule is construed broadly and includes "any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Discovery is not limited to the issues raised only in the pleadings, but rather is designed to define and clarify the issues. *Id.* at 351. Nor is discovery objectionable on the ground that the information sought would be inadmissible at trial, so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Additionally, should it be determined that, given the needs of the case, compliance with a discovery request would be burdensome or expensive, this will not necessarily be grounds for nonproduction, but it may impact the Court's decision as to who must bear the cost of production.

In the event a dispute arises over a discovery request, all counsel are required to confer in good faith in an effort to resolve the issue without court intervention. It shall be the obligation of the attorney for the party seeking court intervention to initiate such conferences and to do so promptly. Refusal to confer in good faith may subject counsel to

sanctions, such as the imposition of costs, including the attorney's fees of opposing counsel, under Fed. R. Civ. P. 37(a)(4).

In the event, however, that the parties to this action are unable to informally resolve a discovery dispute and court intervention is sought, the movant shall file a Motion to Compel Discovery (or Protective Order). Attached to the motion shall be a proposed Order of Court in which the moving party shall set forth, in specific detail, its proposal for completely resolving the discovery dispute. Within fourteen (14) working days after receipt of the motion, the respondent, either singularly or in conjunction, shall file a written response. Attached to the response shall be respondent's proposed Order of Court.

BY THE COURT:



KIM R. GIBSON
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CAMERON DOUGLAS,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 3:15-cv-69
	)	
v.	)	JUDGE KIM R. GIBSON
	)	
UNITED STATES OF AMERICA,	)	*(Electronic Filing)*
	)	
Defendant.	)	

ORDER

AND NOW, this 28th day of January, 2016, upon consideration of the Consent Motion to Extend Discovery filed by Defendant,

IT IS HEREBY ORDERED that said Motion is GRANTED.

IT IS FURTHER ORDERED that discovery shall be extended as follows:

a. All fact discovery shall be completed by June 1, 2016;

b. The parties shall complete all expert discovery by July 1, 2016;

c. The parties shall make their disclosure of experts required by Rule 26(a)(2) by May 2, 2016 (Plaintiff) and May 16, 2016 (Defendant); and

d. The depositions of all experts shall be completed by July 1, 2016.

IT IS FURTHER ORDERED that the Status Conference, currently scheduled for June 7, 2016, is now rescheduled for August 5, 2016, at 1:00 ~~a.m.~~/p.m. All remaining dates, deadlines, and directives within the original Initial Scheduling Order (Doc. No. 14 (filed 10/21/15)) remain unchanged.

Kim R. Gibson
UNITED STATES DISTRICT JUDGE

cc: All parties

SCRO

South Central Regional Office Grand Prairie, TX

NORTHERN DISTRICT OF TEXAS
FILED
SEP - 2 2003
CLERK, U.S. DISTRICT COURT
By Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

PATRICK LANDERS	§	
	§	
VS.	§	CIVIL ACTION NO. _____
	§	
BUREAU OF PRISONS and	§	
U.S. PUBLIC HEALTH SERVICE	§	1-03CV-0169

RECEIVED
OCT 6 2003
CONSOLIDATED LEGAL CENTER
DALLAS, TEXAS

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

PATRICK LANDERS would respectfully show the following:

JURISDICTION

1. This Court has exclusive jurisdiction under 28 U.S.C. § 1346(b), the Federal Tort Claims Act.

VENUE

2. Venue is appropriate under 28 U.S.C. § 1402(b) in that the Plaintiff resides in this District and Division.

PARTIES AND SERVICE

3. One Defendant is the BUREAU OF PRISONS. This Defendant is part of the United States' Department of Justice Defendant may be served by serving Michael Hood, Regional Counsel, South Central Regional Office, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219.

4. The other Defendant is the U.S. PUBLIC HEALTH SERVICE. This Defendant is part of the United States Department of Health and Human Services. Defendant may be served by serving Arthur Simon, Claims Office, H.H.S., 5600 Fishers Lane, Room 5C-10, Rochville, Maryland 20857.

THE INCIDENT

5. Patrick Landers worked for Diagnostic Management Group, which had been hired by one of the Defendants to provide radiology or diagnostic services at the Federal Medical Center - Fort Worth (hereinafter FMC), which is a part of the Bureau of Prisons.

6. On February 14, 2001, Patrick Landers went to the FMC for the purpose of carrying out his duties for Diagnostic Management Group, as requested by the Defendants. At all relevant times he was a business invitee and Defendants owed him a duty of due care.

7. At the FMC, it was necessary for Patrick Landers to plug a mobile imaging unit into the electrical outlet provided by the FMC for this purpose. As Mr. Landers obtained power for the mobile imaging unit, he was electrocuted.

8. The area around the electrical outlet was a low area where water frequently stood.

9. Complaints had been made about the standing water before February 14, 2001. It is believed that the persons receiving the complaints were employees of the U.S. Public Health Service, but if not, then they were employees of the Bureau of Prisons.

10. The standing water and the low area were never corrected before the incident, in spite of the complaints. It is apparent that the complaints were not passed on to the persons who could deal with the problem, or the persons who could deal with the problem ignored the complaints. If the persons receiving the complaints did not pass those reports to the proper persons, then their employer would be responsible for their conduct. If the persons who could deal with the problem in fact ignored the complaints, their employer would be responsible for their conduct.

11. The electrical outlet had been worked on a short time before February 14, 2001. The work was done in an improper manner, resulting in the improper grounding of the electrical outlet and/or the energization of inappropriate objects.

12. The low area around the electrical outlet, and the improper wiring of the electrical outlet, each created an unreasonably dangerous condition of which Defendants were aware or should have been aware.

13. The electrocution and the injuries were caused by one or more of the following conditions/acts/omissions:

a. Improper wiring of the electrical outlet resulting in the energization of inappropriate objects;

b. Improper grounding of the electrical outlet;

c. The presence of a low spot and standing water in the area where Mr. Landers had to stand; or

d. Failing to inspect, failing to properly check the prior electrical work and failing to properly respond to the complaints about the standing water.

Each of these conditions/acts/omissions were negligence and were committed by one or more employees of Defendants, who were acting in the course and scope of their employment.

DAMAGES

14. As a direct result of the foregoing, Plaintiff has sustained injuries to his body and has and will experience or incur:

a. lost wages and lost earning capacity;

b. health care expenses;

c. physical pain and mental suffering;

d. physical impairment.

15. Plaintiff's claim against these Defendants was timely and properly presented to the Defendants as required by the Tort Claims Act. On February 20, 2003, Defendant U.S. Public Health Service, through the United States Department of Health and Human Services, indicated that

it would abide by the decision of the Bureau of Prisons. On August 6, 2003, the Bureau of Prisons denied Plaintiffs claim. This suit has been filed within six months of the denial.

PRAYER

16. WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited in terms of law to appear and answer herein, and that upon final trial of this cause he have judgment against Defendants in an amount to be set by the Court, which should not exceed $1,750,000.00; for pre judgment and post judgment interest at the legal rate; for costs of Court in this behalf expended; and for such other and further relief to which he is entitled.

Respectfully submitted,

STEINBURG, CARWILE, HERZIK & PRIETO

BY: John A. Carwile

JOHN A. CARWILE, Attorney in Charge
TBA No. 03952900
1001 Fannin, Suite 200
Houston, Texas 77002
(713) 654-7800
(713) 652-0110/Telecopier

ATTORNEYS FOR PLAINTIFF PATRICK LANDERS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 24 2004
CLERK, U.S. DISTRICT COURT
By _____
Deputy

PATRICK LANDERS,)
)
Plaintiff,)
)
v.)
)
BUREAU OF PRISONS and)
U.S. PUBLIC HEALTH SERVICE,)
) Civil Action No.
Defendants.) 1:03-CV-169-C

ORDER

The parties have indicated to the Court that they have settled this case. Accordingly, this case is administratively closed without prejudice to its being reopened to enter an order of dismissal or to enter other orders if the settlement is not consummated. Counsel in this case are ordered to file the papers necessary to dismiss this action on or before thirty (30) days from the date of this order.

SO ORDERED.

Dated September 24, 2004.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 27 2004
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT COURT OF TEXAS
ABILENE DIVISION

PATRICK LANDERS, Plaintiff,	§	
v.	§	No: 1:03-CV-0169-C
BUREAU OF PRISONS and U.S. PUBLIC HEALTH SERVICE, Defendants.	§	

NOTICE OF PROPOSED SETTLEMENT

PLAINTIFF, Patrick Landers, and his attorneys, and DEFENDANTS, Bureau of Prisons (BOP) and U.S. Public Health Service respectfully advise the Court that they have met[1] and believe that they have settled the above reference matter regarding claims under 28 U.S.C. § 1346(b), the Federal Tort Claims Act, resulting from injuries suffered on or about February 14, 2001 by Landers on the premises of Federal Medical Center (FMC) Fort Worth, Texas. Landers and the Defendants, Bureau of Prisons and U.S. Public Health Service will proceed to complete any necessary settlement agreements. Once the necessary agreements have been completed, circulated, and approved by Landers, his attorneys, and the Bureau of Prisons and U.S. Public Health Service; it is anticipated that an Agreed Order of Dismissal with Prejudice of this matter will then be filed with the Court. The parties request the Court to hold this case in abeyance for 60 days from the

[1] The parties mediated this matter on September 17, 2004, and a tentative settlement was reached. However, the settlement has to be approved by BOP Headquarters in Washington, so Defendants need additional time to gain full approval.

filing of this Notice in order for them to complete their preparation, circulation, and approval of the necessary agreements, and arrange for Landers to receive his settlement.

Wherefore, the PLAINTIFF, Patrick Landers, and his attorneys, and DEFENDANTS, Bureau of Prisons and U.S. Public Health Service requests that the Court hold this case in abeyance for 60 days.

Dated this the 24th day of September 2004.

Respectfully submitted,

RICHARD B. ROPER
UNITED STATES ATTORNEY

Charles O. Dobbs
Assistant United States Attorney
Texas Bar No. 0591950
United States Attorney's Office
Burnett Plaza, Suite 1700
801 Cherry St., Unit 4
Fort Worth, Texas 76102-6882
Telephone: 817.252.5200
Facsimile: 817.978.6351

Dated: 9-24-04

Rodney V. Steinberg
Attorney for Plaintiff, Patrick Landers

Dated: 9-24-04

Michael L. Herzik
Attorney for Plaintiff, Patrick Landers

CERTIFICATE OF CONFERENCE

This is to certify that on the 17th day of September 2004, the undersigned conferred with Plaintiffs Attorneys (indicated by the above signatures) and agreed to Notice the Court of Their Proposed Settlement and advise the Court that Plaintiff and Defendants will proceed to prepare, circulate, and approve the settlement agreements and proposed order of dismissal with prejudice.

Charles O. Dobbs
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on the 17th day of September 2004, a copy of the foregoing Notice of Proposed Settlement was hand delivered to:

Rodney V. Steinberg
Michael L. Herzik
Attorneys for Plaintiff
1001 Fannin, Suite 200
Houston, Texas 77002

Charles O. Dobbs
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 28 2004
CLERK, U.S. DISTRICT COURT
By _____ Deputy

PATRICK LANDERS,

Plaintiff,

v.

BUREAU OF PRISONS and
U.S. PUBLIC HEALTH SERVICE,

Defendants.

Civil Action No.
1:03-CV-169-C

ORDER

The above-styled and -numbered cause was administratively closed by previous order upon the announcement of settlement through mediation. The parties have filed a Notice of Proposed Settlement and request that this case be held in abeyance for 60 days to complete the settlement process.

IT IS, THEREFORE, ORDERED that the parties shall have sixty (60) days from the date hereof to file the papers necessary to dismiss this action.

Dated September 28, 2004.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

BURDIN
MEDIATIONS

September 20, 2004

Cause No. 1:03-CV-169-C; U.S. District Court - Northern Dist.- Lubbock

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 24 2004
CLERK, U.S. DISTRICT COURT
By _____ Deputy

RE:
PATRICK LANDERS, Plaintiff(s)
vs.
UNITED STATES OF AMERICA, Defendant(s)

TO THE HONORABLE JUDGE Sam R Cummings:

The Court is advised that the above case was referred to KATHY FRAGNOLI of Burdin Mediations on 7/29/2004. The following action has been conducted as follows:

{ ✓ } MEDIATED on 9/17/2004 and the results are marked below:

a. { ✓ } Settled at mediation { } Settled after mediation

b. { } Did not settle:_____

c. { } Recessed:_____

d. { } Partial settlement

Settled with:_____

Did not settle with:_____

{ } WAS NOT MEDIATED for the following reason:

a. { } Settled before mediation

b. { }Parties scheduled mediation with a mediator not affiliated with Burdin Mediations

c. { } Other_____

_____

Burdin Mediations will close their case file unless further action is required. However, for cases not settled at mediation, our mediator's policy is to keep an active file open and continue negotiations as necessary. The court will be notified with a revised report for further developments as they occur.

Respectfully,

Rian Hunter
Account Manager
rian@burdin-adr.com
Case 17332

BURDIN
MEDIATIONS

CAUSE NO. 1:03-CV-169-C
In the U.S. District Court - Northern Dist.- Lubbock
Case # 17332

PATRICK LANDERS, Plaintiff(s)
vs.
UNITED STATES OF AMERICA, Defendant(s)

Rule 11 and Settlement Agreement

1. The parties hereto agree to settle all claims and controversies between them, asserted or assertable in this case ~~except~~: _____.

2. The consideration to be given for this settlement is as follows: Patrick Landers shall receive the sum of $ 165,000, on or before 15 weeks, ~~which sum shall be paid by the following parties in the amounts~~ stated:
_____
_____
_____.

3. The above styled and numbered case shall be resolved by:
✓ (a) An Agreed Order of Dismissal with Prejudice with taxable court costs taxed to party incurring same; or
_____ (b) An Agreed Judgment providing as follows: _____
_____
_____
_____ (c) An Agreed Judgment shall be signed by the trial judge, but may not be abstracted or recorded or any collection effort made upon same so long as the following conditions are kept: _____
_____
_____

4. The Plaintiff(s) agree(s) to release, discharge, and forever hold, the Defendant(s) harmless from any and all claims, demands, or suits, known or unknown, fixed or contingent, liquidated or unliquidated whether or not asserted in the above case, as of this date, arising from or related to the events and transactions which are the subject of this case, ~~except for/including~~:
_____
_____
_____
_____

This release runs to the benefit of all attorneys, agents, employees, insurers, officers, directors, shareholders, and partners of the parties ~~except/including~~: _____.
"Party" as used in this release includes all named parties to this case, as well as _____,
and all related entities and affiliates of the parties ~~except/including~~: _____.

5. Each signatory hereto warrants and represents:
✓ (a) He or she has authority to bind the parties for whom that signatory acts.
✓ (b) The claims, suits, rights, and/or interests which are the subject matter hereto are owned by the party asserting same, have not been assigned, transferred or sold and are free of encumbrance.

6. It is contemplated that Charles Dobbs shall deliver drafts of any further settlement documentation to the other parties by 2 weeks. The parties agree to cooperate with each other in the drafting and execution of such additional documents.

7. If one or more disputes arise with regard to the interpretation and/or performance of this agreement or any of its provisions, the parties agree to attempt to resolve same by phone conference with the Mediator who facilitated the settlement. If the parties cannot resolve their differences by phone conference, then each agrees to schedule a one-half day of mediation with the Mediator within thirty (30) days to resolve the disputes and to share the costs of same equally. If a party refuses to mediate, then that party may not recover the attorneys fees or costs in litigation brought to construe or enforce this agreement. Otherwise, if mediation is unsuccessful, then the prevailing party or parties shall be entitled to recover reasonable attorneys fees and expenses, including the cost of the unsuccessful mediation.

8. Other terms of this settlement are:

✓ (a) The settlement monies are for personal injury tort damages.

✓ (b) Plaintiff shall indemnify and hold Defendant and its insurer harmless from any medical, hospital, insurance, or statutory liens and expenses related to this claim. including workers comp.

____ (c) The terms of the settlement shall be kept strictly confidential.

____ (d) Other

1. Settlement Conditioned upon approval by BOP Headquarters in Washington.

9. This agreement is made and performable in Dallas County, Texas and shall be construed in accordance with the laws of the State of Texas.

10. Each signatory to this settlement has been entered into same freely and without duress after having consulted with the attorneys of his/her choice. Each party acknowledges that the Mediator has not given legal or tax advice and is not the attorney for any party and that each party has had the opportunity to have this agreement reviewed by that party's attorney prior to executing same.

Signed this 17th day of September, 2004.

Plaintiffs:

Attorney for Plaintiff:

TAX I.D. # 766050555

Other Parties:

Approved Attorney for:

Defendants: Deputy Chief
Matt Stanton Compton, Chief
Jason A. Libbs, Deputy Regional Counsel-BOP

Attorney for Defendants:
Charles O. Dobbs
assistant U.S. Attorney

Other Parties:

Approved Attorney for:

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT COURT OF TEXAS
ABILENE DIVISION

PATRICK LANDERS, Plaintiff,	§ §	
v.	§	No: 1:03-CV-0169-C
BUREAU OF PRISONS and U.S. PUBLIC HEALTH SERVICE, Defendants.	§ § §	

NOTICE OF PROPOSED SETTLEMENT

PLAINTIFF, Patrick Landers, and his attorneys, and DEFENDANTS, Bureau of Prisons (BOP) and U.S. Public Health Service respectfully advise the Court that they have met[1] and believe that they have settled the above reference matter regarding claims under 28 U.S.C. § 1346(b), the Federal Tort Claims Act, resulting from injuries suffered on or about February 14, 2001 by Landers on the premises of Federal Medical Center (FMC) Fort Worth, Texas. Landers and the Defendants, Bureau of Prisons and U.S. Public Health Service will proceed to complete any necessary settlement agreements. Once the necessary agreements have been completed, circulated, and approved by Landers, his attorneys, and the Bureau of Prisons and U.S. Public Health Service; it is anticipated that an Agreed Order of Dismissal with Prejudice of this matter will then be filed with the Court. The parties' request the Court to hold this case in abeyance for 60 days from the

[1] The parties mediated this matter on September 17, 2004, and a tentative settlement was reached. However, the settlement has to be approved by BOP Headquarters in Washington, so Defendants need additional time to gain full approval.

filing of this Notice in order for them to complete their preparation, circulation, and approval of the necessary agreements, and arrange for Landers to receive his settlement.

Wherefore, the PLAINTIFF, Patrick Landers, and his attorneys, and DEFENDANTS, Bureau of Prisons and U.S. Public Health Service requests that the Court hold this case in abeyance for 60 days.

Dated this the _____ day of September 2004.

Respectfully submitted,

RICHARD B. ROPER
UNITED STATES ATTORNEY

Charles O. Dobbs
Assistant United States Attorney
Texas Bar No. 0591950
United States Attorney's Office
Burnett Plaza, Suite 1700
801 Cherry St., Unit 4
Fort Worth, Texas 76102-6882
Telephone: 817.252.5200
Facsimile: 817.978.6351

Dated:_____

Rodney V. Steinberg
Attorney for Plaintiff, Patrick Landers

Dated:_____

Michael L. Herzik
Attorney for Plaintiff, Patrick Landers

CERTIFICATE OF CONFERENCE

This is to certify that on the _____ day of September 2004, the undersigned conferred with Plaintiffs Attorneys (indicated by the above signatures) and agreed to Notice the Court of Their Proposed Settlement and advise the Court that Plaintiff and Defendants will proceed to prepare, circulate, and approve the settlement agreements and proposed order of dismissal with prejudice.

Charles O. Dobbs
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on the ____ day of September 2004, a copy of the foregoing Notice of Proposed Settlement was hand delivered to:

Rodney V. Steinberg
Michael L. Herzik
Attorneys for Plaintiff
1001 Fannin, Suite 200
Houston, Texas 77002

Charles O. Dobbs
Assistant United States Attorney

RECEIVED
MAIL ROOM
AUG 15 2005
U.S. DISTRICT COURT
E. DIST. OF ARKANSAS

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

EASTERN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
AUG 15 2005
JAMES W. McCORMACK, CLERK
By: DEP CLERK

MICHAEL HAAS,

Plaintiff,

vs.

LINDA SANDERS, ET AL.,

Defendants.

No. 2:05CV00112/HDY

REPLY TO COURT'S ORDER OF August 3, 2005 AND

PLAINTIFF'S FIRST AMENDED COMPLAINT

Pending before the Court is an order directing Plaintiff to clarify the full name of defendant "Weaver."

After some investigation by Plaintiff he has learned that the full name of the defendant to be served is **ROBERT WEAVER.** With this revelation, the Marshal's should be able to effect service without further delay. To this extent, Plaintiff's original complaint is amended to reflect the full name of defendant Weaver.

Secondly, Plaintiff herein amends his complaint to include his secondary Tort Action, in which Plaintiff has exhausted all available Administrative Remedies, as set forth under the Federal Tort Claims Act (FTCA); evidence of exhaustion is attached hereto and is incorporated by reference.

Plaintiff incorporates by reference, each and every allegation

as set forth in his original complaint as if fully pleaded herein; and in addition, incorporates the following torts, against each defendant as set forth below:

1. Defendant **Edna J. Prince,** Clinical Director, FCC Forrest City, Arkansas. In addition to this defendant's actions and inactions regarding the violations of Plaintiff's civil rights, as fully articulated in his original complaint, this defendant was and has been NEGLIGENT in her duties as a physician, in that she has permitted on more than one occasion, Plaintiff's chronic care medication to expire, thus, leaving him unprotected from the symptoms of his disease, to wit: Epilepsy, thereby, causing him to suffer seizures, and placing Plaintiff at high risk of seizure activity. In furtherance of this defendant's NEGLIGENCE, she has failed to assure that (1) injuries sustained during a verified seizure episode were treated; (2) that the records pertaining to examinations of Plaintiff after a seizure were maintained, and; (3) for permitting records to be altered regarding a seizure episode in May 2004, and the injuries suffered by Plaintiff during such an episode. In this regard, there have been intentional acts by this defendant in addition to her NEGLIGENT acts, in which this defendant has obstructed justice by altering medical records pertaining to the care of Plaintiff, and then by denying the alteration in reply to grievances submitted by Plaintiff, and where this defendant willfully and consciously gave false and misleading information in order to assure the denial of Haas' grievances, and

assure that the evidence of her NEGLIGENCE was not discovered. In short, this defendant was NEGLIGENT, OBSTRUCTED JUSTICE, was DERILICT IN HER DUTIES AS A PHYSICIAN, did willfully and wantonly, INTENTIONALLY INFLICT EMOTIONAL DISTRESS upon Plaintiff, and cause PAIN AND SUFFERING, these acts being tortious in nature. For each of these acts, collectively, and notwithstanding the civil rights action, Plaintiff is entitled to damages in excess of $75,000.00; actual, compensatory, nominal, and punitive.

2. Defendant, **LINDA SANDERS**, Warden, FCC Forrest City, Arkansas.

In addition to this defendants action and inactions regarding violations of Plaintiff's civil rights, as fully articulated in his original complaint, this defendant was and has been NEGLIGENT IN HER DUTIES AS Warden. This defendant is the Chief Executive of the Institution, and as such, is responsible for the care, custody and control, and overall well-being of Plaintiff. It was and is this defendant's ultimate responsibility to assure that all institutional records are accurate, and to adequately investigate claims of deliberate indifference made by Plaintiff. This defendant merely deferred Plaintiff's filed BP-9 (Request for Administrative Remedy) to The Unit Manager, who relied on the unsupported statements of Dr. Prince in regard to the May 2004, seizure episode. The Warden failed to investigate the claims of Plaintiff. It is also noteworthy, that neither the Warden or Unit Manager at any time took possession nor did they in any way examine the medical record, and in addition, once the Warden was Notified of the continued pain and suffering of Plainitff after the seizure, she declined to

assist or investigate the claims of Plaintiff, or to take any action at all to assist the Plaintiff, despite her obligation and duty to do so. Finally, this defendant had and has an obligation to assure the accuracy of institutional records, medical, disciplinary or otherwise. This defendant elected to do so, and elected to ignore the issue in regard to Plaintiff's records, and with this, was derilict in her duty when she failed to hold Dr. Prince, or any other person responsible for their actions. This defendant is also responsible for inflicting EMOTIONAL DISTRESS upon Plaintiff, and did so INTENTIONALLY. These acts being tortious in nature. For each of these acts, collectively, and notwithstanding the civil rights action, Plaintiff is entitled to damages in excess of $75,000.00; actual, compensatory, nominal, and punitive.

3. Defendant **Jose Jiminez**, Health Services Administrator. In addition to the actions and inactions of this defendant as fully articulated in Plaintiff's civil rights complaint, this defendant is an has been NEGLIGENT, in his duties as Health Services Administrator. This defendant is inter-alia, responsible for maintaining accurate health records of inmates including those records which pertain to Plaintiff.

This defendant has failed to maintain the accuracy and the integrity of medical records which pertain to Plaintiff, which have caused Plaintiff to (1) go without medication, and (2) to allow the alteration or destruction of records pertaining to treatment of Plaintiff and examinations by others, including but

limited to the time period beginning May and June, 2004. In this, this defendant is and has been NEGLIGENT. The actions and inactions of this defendant are tortious in nature. For each of these acts, collectively, and notwithstanding the civil rights action, Plaintiff is entitled to damages in excess of $75,000.00; actual, compensatory, nominal, and punitive.

4. Defendant, **Lisa James Young**, Institutional Legal Counsel, FCC Forrest City. In addition to this defendant's actions and inactions regarding the violations of Plaintiff's civil rights, as fully articulated in his original complaint, this defendant was and has been NEGLIGENT in her duties as Institutional Legal Counsel.

As fully set forth in Plaintiff's civil rights action, this defendant intentionally altered records, in that she tampered with Plaintiff's outgoing legal mail, and caused certain documents to be signed, and did sign certain documents pertaining to the Plaintiff's Tort Claim, as submitted to the Bureau of Prisons for review. This defendant not only tampered with the mail, but then directed the Unit Manager, Defendant Timothy Moore, to locate such evidence, and to take such evidence from the personal belongings of Plaintiff. In this regard, this defendant OBSTRUCTED JUSTICE, and caused an official government record to become altered, and further caused damage to Plaintiff's civil rights case, by having evidence of her inpropriety destoyed. This defendant is also responsible for the assurance that legal documents to be used as evidence in any administrative or Court proceeding are accurate

and true. This defendant has caused EMOTIONAL DISTRESS to Plaintiff AND HAS DONE SO INTENTIONALLY. These actions being tortious in nature. For each of these acts, collectively, and notwithstanding the civil rights action, Plaintiff is entitled to damages in excess of $75,000.00; actual, compensatory, and punitive.

5. Defendant, **Timothy Moore**, Unit Manger, FCC Forrest City.

This defendant is the Unit Manager of the Housing Unit were Plaintiff resides. As set forth in Plaintiff's original complaint, this defendant caused Plaintiff's locker to be searched, and caused evidence of inpropriety, and legal mail tampering to be removed and or destroyed. In this, this defendant OBSTRUCTED JUSTICE, and was NEGLIGENT in his duties as Unit Manager. This defendant admitted to takig possession of Plaintiff's legal belongings unlawfully, and in violation of policy, and returned a portion of these items in exchange for Plaintiff's dismissing his Request for an Administrative Remedy (BP-9) against he and Lisa James Young.

This defendant has caused EMOTIONAL DISTRESS to Plaintiff, and has done so, INTENTIONALLY. The actions and inactions of this defendant are tortious in nature. For each of these acts, collectively, and notwithstanding the civil rights action, Plaintiff is entitled to damages in excess of $75,000.00; actual, compensatory, nominal, and punitive.

Plaintiff incorporates these tortious acts of each defendant as fully set forth above, with his civil rights action as fully set forth in his original complaint.

VERIFICATION

I hereby verify that each and every allegation as is set forth in the above and foregoing instrument, to wit: Plaintiff's First Amended Complaint are true to the best of my knowledge and belief under penalty of perjury.

Respectfully submitted,

Michael E. Haas
Plaintiff
FCC Forrest City, (Low)
P.O. Box 9000
Forrest City, AR 72336-9000

CERTIFICATION

I hereby certify that a true and correct copy of the above and foregoing was mailed postage prepaid tot he Office of the U.S. Attorney, on this the 11 day of August, 2005.

U.S. Department of Justice

Federal Bureau of Prisons

South Central Regional Office

4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

JUL 13 2005

CERTIFIED MAIL

Michael Haas
Reg. No. 08498-045
Federal Correctional Institution
P.O. Box 9000
Forrest City, AR 72336

Re: Administrative Tort Claim No. TRT-SCR-2004-04568
(Reconsideration)

Dear Mr. Haas:

Your claim has been reconsidered for administrative settlement under the Federal Tort Claims Act, Title 28, United States Code, Section 2672 et seq., and authority granted by Title 28, Code of Federal Regulations, Section 0.172. You claim government liability in the amount of two thousand three hundred sixty dollars and 00/100 ($2,360.00) for alleged personal injury.

You have presented no new evidence in support of your request for reconsideration. You have only restated your claim Bureau of Prisons staff failed to provide necessary medication to control seizures while you were housed in the Special Housing Unit (SHU). You allege as a result of this negligence, you experienced a seizure and chipped a tooth on May 31, 2004.

Investigation into this matter previously revealed no evidence to indicate that you suffered any injuries caused by the negligent or wrongful acts or omissions of any Bureau of Prisons employee acting within the scope of his or her employment.

As stated in our October 19, 2004, adjudication letter, there is no evidence to support your claim of negligence. Although you claim to have spoken to medical staff about your seizure medication upon your arrival in SHU, there is no documentation in your medical record to indicate you requested medication until June 1, 2004. On that date, you notified staff you were not receiving your prescribed medication, which was provided to you later that day. Additionally, despite the conversation you admit

having with staff on June 1, 2004, there is no record you reported experiencing the claimed seizure of May 31, 2004, until June 3, 2004, at which time staff examined you and found no signs of a recent injury. Furthermore, it is noted there is no indication you reported a chipped tooth until you submitted an Inmate Request to Staff Member form on June 25, 2004.

Because you have presented no new evidence to support your allegations, your request for reconsideration is denied.

If you are dissatisfied with this decision, you have been previously informed that you may file a lawsuit in the appropriate United States District Court within six (6) months from the date of the mailing of this letter.

Sincerely,

Michael D. Hood
Regional Counsel

MDH/pi

cc: Linda Sanders, Warden
FCI Forrest City (Low)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

MICHAEL E. HAAS **PLAINTIFF**
Reg. # 08498-045

VS. **NO. 2:05CV00112-BD**

EDNA J. PRINCE, *et al.* **DEFENDANTS**

JUDGMENT

Consistent with the Order that was entered on this day, it is CONSIDERED, ORDERED, and ADJUDGED that this case is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 2nd day of March, 2009.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

MICHAEL E. HAAS **PLAINTIFF**
Reg. # 08498-045

VS. **NO. 2:05CV00112-BD**

EDNA J. PRINCE, *et al.* **DEFENDANTS**

ORDER

As a result of the settlement conference held on February 25, 2009 (docket entry #184), the parties have settled all remaining disputes between them. Accordingly, Plaintiff's claims are dismissed with prejudice. This constitutes a final order as to all of Plaintiff's claims and all pending motions (#159, #175, #179) are denied as moot.

IT IS SO ORDERED this 2nd day of March, 2009.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

MICHAEL E. HAAS **PLAINTIFF**
Reg. # 08498-045

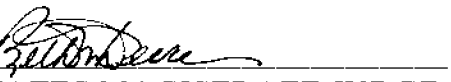
VS. **NO. 2:05CV00112-BD**

EDNA J. PRINCE, *et al.* **DEFENDANTS**

ORDER

Pending is Mr. Calhoun's application for disbursement of funds to cover out-of-pocket expenses (#187). Mr. Calhoun's application is GRANTED. The Court previously granted Plaintiff's applications to incur out-of-pocket expenses in excess of $500.00 (#87, 104). Having considered the pending application under the guidelines and policies of the Library Fund, the Court orders that the Clerk of the Court distribute to Calhoun Law Firm, the amount of $1,844.03 from the Fund. A copy of this Order, together with the application (#187), shall be placed in the Library Fund file maintained by the Clerk of the Court.

IT IS SO ORDERED this 2nd day of April, 2009.



UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS HELENA DIVISION

MICHAEL E. HAAS Plaintiff	)	
v.	)	2:05CV-112 HDY
EDNA J. PRINCE M.D., FCI-Forest City **LISA SANDERS**, Warden, **JOSE JIMENEZ**, Health Services Administrator, **LISA JAMES YOUNG**, Institutional Legal Counsel, **TIMOTHY MOORE**, Unit Manager, **YVONNE TORO**, Physician's Assistant, **ROBERT WEAVER**, Correctional Officer, and **FREDRICK GARRIDO**, Physician's Assistant, Defendants	)	

PLAINTIFF'S APPLICATION FOR DISBURSEMENT FOR PAYMENT OF EXPENSES OF APPOINTED COUNSEL

Plaintiff Michael E. Haas ("Plaintiff") through the undersigned appointed counsel of record, hereby moves the court pursuant to Local Rule 83.6 for an Order approving the disbursement of $1,844.03, payable to Calhoun Law Firm, for the following:

1. $1,000.00 for expert medical witness fees of Kathryn T. Chenault M.D.; and
2. $ 844.03 for lodging and travel expenses for depositions.

The fees owing for said medical expert were previously authorized by the Court, with an allotment of funds. All amounts were actually incurred and are believed to be reasonable and necessary for legal representation in this case, and otherwise in compliance with the guidelines

and policies of this Court for disbursement from the fund.

Respectfully submitted this 12 March 2009
on behalf of Plaintiff Michael E. Haas by:

CALHOUN LAW FIRM
P.O. Box 251504
Little Rock, AR 72225
Tel: 501-374-1700
Fax: 501-374-4234
JoeCalhoun@aristotle.net

Joe D Calhoun 3-13-09
Joe D. Calhoun [Ark. Bar. No. 85021]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date set forth below, I electronically filed the foregoing with the Clerk of Court using its CM/ECF System, which shall serve the same by electronic means or by mail upon the following:

Gwendolyn D. Hodge
Assistant United States Attorney
425 W. Capitol, Suite 500
Little Rock, AR 72201
Tel: 501-340-2600
Fax: 501-340-2730
Gwen.Hodge@usdoj.gov

Joe D Calhoun 3-13-09
Joe D. Calhoun date

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

MICHAEL E. HAAS **PLAINTIFF**
Reg. # 08498-045

VS. **NO. 2:05CV00112-BD**

EDNA J. PRINCE, *et al.* **DEFENDANTS**

ORDER

Pending is Mr. Calhoun's application for disbursement of funds to cover out-of-pocket expenses (#187). Mr. Calhoun's application is GRANTED. The Court previously granted Plaintiff's applications to incur out-of-pocket expenses in excess of $500.00 (#87, 104). Having considered the pending application under the guidelines and policies of the Library Fund, the Court orders that the Clerk of the Court distribute to Calhoun Law Firm, the amount of $1,844.03 from the Fund. A copy of this Order, together with the application (#187), shall be placed in the Library Fund file maintained by the Clerk of the Court.

IT IS SO ORDERED this 2nd day of April, 2009.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

MICHAEL E. HAAS **PLAINTIFF**
Reg. # 08498-045

V. **CASE NO. 2:05CV00112 BD**

EDNA J. PRINCE, et al. **DEFENDANTS**

ORDER

Pending is Defendants' Motion to Dismiss (docket entry # 144). Plaintiff has responded (#146) and Defendants have replied (#148). For the following reasons, Defendants' motion (#144) is DENIED.

In their motion, Defendants request dismissal of Plaintiff's claim brought under the Federal Tort Claims Act ("FTCA") for failure to state a sum certain, which is a jurisdictional requirement. Defendants state that because Plaintiff's Standard Form 95 contains language indicating that the sum presented is a settlement offer, expiring after sixty (60) days, it is not a sum certain, and the District Court lacks subject matter jurisdiction over the claim.

The FTCA requires that a plaintiff properly present a claim to the appropriate federal agency before instituting an action against the United States. 28 U.S.C. § 2675. The claimant properly presents a claim when: (1) an executed Standard Form 95 or other written notification of an incident is received by the appropriate Federal agency, and (2) a claim for money damages in a sum certain for injury to or loss of property, personal

injury, or death alleged to have occurred by reason of the incident has been made. 28 C.F.R. § 14.2(a).

Defendants' attempt to attack Plaintiff's Standard Form 95 language as uncertain lacks merit. Defendants correctly state that forms containing no sum certain are inadequate. *Lunsford v. U.S.*, 570 F.2d 221, 226 (8th Cir. 1977). A review of Plaintiff's Standard Form 95, however, provides sufficient information from which Defendants could ascertain a sum certain. It is true that Plaintiff provided surplusage when stating the basis of his claim in section 8 of his Standard Form 95. This is not, however, the section where a sum certain is required. Sections 12 and 12d of Plaintiff's Standard Form 95 explicitly provide a sum certain as required. Section 12d actually contains a warning that failure to specify an amount may result in forfeiture of the claim. In addition, Plaintiff certified that the amount provided is section 12d covered only damages, and that he would accept the amount provided in full satisfaction and final settlement of his claim.

Plaintiff properly certified a sum certain in his Standard Form 95. Accordingly, Defendants' motion to dismiss (#144) is DENIED.

IT IS SO ORDERED this 14th day of October, 2008.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS
Reg. #08498-045 PLAINTIFF

V. 2:05CV00112 HDY

EDNA J. PRINCE *et al.* DEFENDANTS

ORDER

Pending before the Court is the Defendants' Motion (docket entry #91) to substitute the United States of America in lieu of the named Defendants in this mixed *Bivens*/Federal Tort Claims Act cause of action. Plaintiff has filed a Response (docket entry #97) in opposition, asking that the Court deny the request pending the outcome of discovery in this matter. The Court agrees with Plaintiff's argument that such a substitution would be premature at this point in the case, and, accordingly, DENIES the request, without leave to Defendants' right to re-file the Motion at a later time.

IT IS SO ORDERED this 28 day of December, 2006.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

MICHAEL E. HAAS **PLAINTIFF**
Reg. # 08498-045

VS. **NO. 2:05CV00112-BD**

EDNA J. PRINCE, *et al.* **DEFENDANTS**

ORDER

On January 21, 2009, a hearing was held on the pending Motion for Reconsideration (docket entry #155) of the Order on Motion for Issuance of Funds, and Motion for Sanctions (#159). After hearing arguments of counsel, the motion for reconsideration (#155) is DENIED. The motion for sanctions will be taken under advisement.

IT IS SO ORDERED this 23rd day of January, 2009.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

MICHAEL E. HAAS **PLAINTIFF**
Reg. # 08498-045

V. **NO. 2:05CV00112-BD**

EDNA J. PRINCE, Doctor,
FCI-Forrest City, et al. **DEFENDANTS**

ORDER

On October 16, 2008, Defendants filed a Motion to Issue Funds (docket entry #150). Plaintiff responded on October 27, 2008 (#153).

Insofar as Defendants request dismissal of this matter, the Motion to Issue Funds (#150) is denied. The motion merely states that Defendants will issue funds in lieu of trial, but does not request any Court action.

Plaintiff's response to the motion assumes that the motion is an offer of judgment (#153). However, Defendants' motion is insufficient to resolve all remaining claims in the case, and does not qualify as an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure.[1] See *Thompson v. Southern Farm Bureau Cas. Ins. Co.*, 520 F.3d 902, 904 (8th Cir. 2008) (per curium) (principles of contract law control whether there has been a valid offer and acceptance under Rule 68). The parties may negotiate a final

[1] Plaintiff's response (#153) reflects the uncertainty of the terms of the potential offer.

settlement, if they so desire. The Court, however, will not invite future litigation between the parties by entering a judgment with uncertain, and possibly disputed, terms.

Also pending is Defendants' Motion to Extend Time (#152). Normally, the Court would deny Defendants' motion for failure to comply with Local Rule 6.2. The Court, however, will GRANT Defendants' motion (#152) and extend the time for Defendants to comply with the Court's Order (#147) until Monday, November 3, 2008. This case has been pending since May 16, 2005. The issues regarding the immediate discovery disputes have been pending since November 2, 2007 (#130). Accordingly, the Court does not anticipate granting any additional extensions of time.

IT IS SO ORDERED this 29th day of October, 2008.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS PLAINTIFF
Reg. #08498-045

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; LINDA SANDERS, Warden, FCI-Forrest City; JOSE JIMINEZ, Health Services Administrator, FCI-Forrest City; LISA JAMES YOUNG, Institutional Legal Counsel, FCI-Forrest City; TIMOTHY MOORE, Unit Manager, FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; WEAVER, Correctional Officer, FCI-Forrest City; and FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City DEFENDANTS

ORDER

Pending before the Court are Defendants' Motion for Summary Judgment and Plaintiff's Motion to Join the United States as an Indispensable Party. In their summary judgment motion, Defendants urge that Plaintiff's claims under the Federal Tort Claims Act must be dismissed because Plaintiff failed to name the United States as a party Defendant. Plaintiff responded by requesting leave to amend to add the United States as a party Defendant, which has raised in the Court's mind the issue of exhaustion of FTCA administrative remedies. The Eighth Circuit held in *Nerness v. Johnson*, 401 F.3d 874, 876 (8th Cir.2005)(per curiam) that exhaustion is an affirmative defense, which must be proved by defendants and need not be pleaded by the plaintiff. However, the failure of a plaintiff to fully exhaust his administrative remedies prior to filing suit subjects his entire case to dismissal, and the exhaustion of remedies for a *Bivens* claim will not suffice to exhaust the administrative remedies for a FTCA claim.

Therefore, Defendants are directed to file a Response to this Order, within fourteen (14) days

of the entry date of this Order, addressing the question whether Plaintiff has fully exhausted his FTCA claims, assuming for the sake of argument that Plaintiff had named the proper parties to those claims. Similarly, Plaintiff is directed to re-examine his request for leave to amend and inform the Court, also within fourteen (14) days, whether he wishes to proceed with his FTCA claims in light of the knowledge that unexhausted issues may result in the dismissal of the entire cause of action.

IT IS SO ORDERED this __17___ day of February, 2006.

H. Daniel Young

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

MICHAEL E. HAAS **PLAINTIFF**
Reg. # 08498-045

V. **CASE NO. 2:05CV00112 BD**

EDNA J. PRINCE, Doctor,
FCI-Forrest City, et al. **DEFENDANTS**

ORDER

Pending is Plaintiff's Second Motion to Compel Discovery (docket entry #130). Defendants have responded (#133) and Plaintiff has replied (#135). This ruling was delayed due to ongoing settlement discussions between the parties. It appears the settlement discussions have ended. Accordingly, the Court will now address the pending motion. For the following reasons, Plaintiff's Second Motion to Compel Discovery (#130) is GRANTED in part and DENIED in part.

Plaintiff requests production of a number of documents. Some of these requests relate back to Plaintiff's first Motion to Compel (#105). Each request will be addressed separately.

A. Previous Medical-Related Grievances against Defendant Toro:

Plaintiff requests production of medical-related complaints or grievances against Defendant Toro. In response, Defendants state an inability to search "Sentry" by name for grievances against an employee. Plaintiff, however, did not request grievances searchable only by employee name in a computer database. Accordingly, Plaintiff's

request is granted. Defendants must search all electronic and paper records for medical-related grievances against Defendant Toro and produce those records within thirty (30) days of the entry of this Order.

B. Daily Activities Log for Health Services:

Plaintiff requests production of Daily Activities Logs for Health Services. Defendants state that there are no logs to produce and that there exists a two-year retention policy. Plaintiff alleges he suffered injury on May 31, 2004. Plaintiff filed this action on May 16, 2005, within one year of his alleged injury (#2). The daily logs appear relevant to Plaintiff's alleged injury. It is unclear why these logs were not retained. If the logs were destroyed in violation of the retention policy, or Defendants knew or should have known of the relevance of the logs, then the Court may infer spoilation of evidence, unless Defendants can explain why these documents were not retained.

C. Inventory Sheet for Pharmacy Inventory:

Plaintiff requests inventory sheets for the pharmacy. Defendants respond that inventory sheets are not maintained for Phenytoin, Plaintiff's seizure medication, or any other non-DEA controlled medication. If there are no inventory sheets reflecting the pharmacy's stock of Phenytoin, obviously, Defendants cannot produce nonexistent documents. If there are no inventories produced, however, Defendants will be precluded from offering any documentary evidence that Plaintiff possessed his medications during the relevant time frame.

D. Time Sheets for Defendants' Witnesses:

Plaintiff requests a printout showing the dates and hours each of Defendants' witnesses worked in Health Services Unit from April 1, 2004, until May 15, 2005. Defendants respond that there is no such printout to provide Plaintiff. It seems unlikely that there is no record of the dates and hours Defendants' employee-witnesses worked during the relevant time frame. Defendants must produce the equivalent of Plaintiff's request within thirty (30) days of the entry of this Order, or certify that the Bureau of Prisons does not maintain a record of the time its employees work.

E. ACA Report regarding the Special Housing Unit:

Plaintiff requests all ACA Re-accreditation Reports referencing the Special Housing Unit. Defendants responded that Plaintiff was provided a redacted copy of the 2002 ACA Re-accreditation Report and that there is no separate ACA report of the Special Housing unit. Defendants' production appears responsive to Plaintiff's request. No further action is required by Defendants.

F. E-mails Between the Special Housing Unit and Health Services:

Plaintiff requests production of all e-mails between the Special Housing Unit and Health Services regarding medical requests between January 1, 2004 and May 15, 2005. Defendants state that no such emails were found and that there is a one-year retention policy. Plaintiff replies by referencing the archiving of emails. Defendants' position is that they do not have to search for personal copies of emails or personal files of

employees. Defendants are mistaken. If an employee has archived the requested e-mails, or even if official business was conducted over personal e-mail accounts, Defendants must make a good faith attempt to produce the requested e-mails. Defendants must make a good faith search for the requested e-mails and produce them within thirty (30) days of the entry of this Order.

G. Tracy Rogers's Personnel File:

Plaintiff requests production of Tracy Rogers's personnel file, transcripts of course work, and Special Housing Unit Daily Assignment Rosters. Mr. Rogers is not a defendant in this case. Defendants stated a willingness to review Mr. Rogers' file and produce documentation regarding training related to his job assignment in the Special Housing Unit. Beyond this documentation, Plaintiff's request does not appear reasonably calculated to lead to admissible evidence. Plaintiff may request production of specific information that may be contained in Mr. Rogers' personnel file. At this point, however, Defendants are not required to produce any material in addition to the training-related documentation.

H. List of Destroyed Documents:

Plaintiff has requested a list of all documents that have been destroyed, lost, misplaced, or are otherwise no longer in Defendants' possession. If the requested documents are no longer available, Defendants must indicate that the documents once existed. In addition, Defendants must disclose the reason the requested documents are no

longer available. Beyond the requested documentation, however, Defendants are not required to list all documents that have been destroyed, lost, misplaced, or are no longer in Defendants' possession.

IT IS SO ORDERED this 25th day of September, 2008.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS PLAINTIFF
Reg. #08498-045

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; ROBERT WEAVER, Correctional Officer, FCI-Forrest City; FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City; and UNITED STATES OF AMERICA DEFENDANTS

ORDER

Pending before the Court is Plaintiff's Motion to Compel and for Continuance of Trial (docket entry #105). Defendants have filed their Response (docket entry #108), Plaintiff has submitted a Reply (docket entry #109), and the matter is ripe for disposition.

Plaintiff contends in his Motion that certain specifically requested discovery has not been provided by the Defendants. The individual requests will be addressed in turn below.

A. Document Requests no. 25 & 26

In these requests, Plaintiff has sought "each and every document that evidences, refers, or directly relates to any claim or allegation that any Defendant individual interfered with the timely providing of medication" and "each and every document that evidences, refers, or directly relates to any emergency request of an inmate in the SHU during the SHU Detention." Defendants have responded that such information is not capable of determination under the existing computer system, which does not quantify inmate grievances by type or kind.

In the meantime, however, counsel for Defendants has offered to attempt further good-faith efforts to determine exactly what information is contained at the Unit as it relates to these requests, and how it may be categorized. Furthermore, some of the information sought by Plaintiff may be accessible to him through this Court's own CM/ECF electronic filing system records. Cases filed against the Defendants but dismissed prior to service, pursuant to the screening function of the Prison Litigation Reform Act, 28 U.S.C. § 1915A(a), may not be known to the Defendants or their counsel but might provide additional information about similar allegations against these Defendants.

B. Log Books

Plaintiff has sought access to three distinct log books that were apparently maintained at the FCI-FC unit at the time of the events in question. Plaintiff's counsel has been provided a copy of at least one of these documents, and another is apparently not available because it has been lost or mislaid by the Defendants or other employees of the Bureau of Prisons. The Court has been advised by counsel that the parties have agreed that Plaintiff may review the original logs that do exist at the Unit. As to the missing log or logs, counsel for the defense has advised that she will be going to the Unit personally to assist in the search for the missing documents, the loss of which hampers her own defense as well as the Plaintiff's prosecution. The missing information appears to include "SHU Visitors' Logbook," which would reveal who entered the unit during the relevant time period. Defendants are reminded of their duty in supplementation of discovery requests. To the extent that relevant information has simply disappeared from the Bureau of Prisons, Defendants are also reminded that they cannot seek to use such evidence in their own case at trial.

C. Program Statements

The Court has been advised by Defendants's counsel that the Program Statements sought by

Plaintiff's counsel, 6010.2, are on their way to him at this time, and that Program Statement 6000.05, which Plaintiff has, is the predecessor document that he has sought. Counsel for the defendants has indicated a willingness to stipulate that Program Statement 6000.05 reflects the "standard of care" for health care system in effect at the time of the events giving rise to this cause of action, which effectively resolves the discovery issue at hand. As to program statement 5580.06, it appears that there have been no changes to the policy document other than those provided to Plaintiff.

D. Health Services Manual

It appears that the parties are in agreement that this information will be provided and Defendants are taking steps to provide the relevant information to Plaintiff's counsel. Therefore, this issue has been resolved by the parties.

E. Evidence Related to Renovations of the SHU

One of the issues that has arisen relates to the location of the emergency call panel of the SHU Officer's Station, which was apparently moved or removed during a renovation that occurred sometime between the events in question in 2004 and the present. The attorneys have advised the Court that the location of the call panel today is the same as it was in May and June of 2004. As to "work orders" or other information relevant to the renovation, counsel for the defense has agreed to pursue other avenues in determining whether such documents exist. Apparently the Bureau of Prisons has pursued a policy of document-retention only for a two-year period of time, and counsel for the Defendants has agreed to provide to Plaintiff's counsel a copy of this policy.

F. Accreditation Reports

Counsel for the Defendants has been authorized by the relevant governing board responsible for overseeing prison accreditation to provide a copy of the most recent report, less certain redacted

portions necessary for security, and has indicated that she will provide same to counsel for the Plaintiff immediately.

G. After-Hours Medication Log

Counsel for the Defendants has reported that this particular log has been lost or mislaid by her clients, but the same information can be obtained from Plaintiff's inmate medical chart either in the Medication Administration Chart or from the medication labels which are retained in each individual's medical chart, both of which may be found near the back of the chart.

H. Other information

The identity of mid-level practitioners and copies of telephone conversation transcripts with Plaintiff's former cell mate have now been provided to the Plaintiff. In addition, Plaintiff's counsel has now found through the Bureau of Prison's website the inmate registry number of potential witness Xavier Livingston.

I. Request for Continuance of Trial

At this time, Plaintiff's request is DENIED. The parties appear to have successfully worked through many of their discovery issues. This case has twice before been continued for various reasons, and counsel are clearly both making dedicated efforts to prepare their case for trial. At this time, a continuance is not warranted. However, under the circumstances, the discovery deadline will be extended an additional two weeks, to August 7, 2007.

Conclusion

IT IS THEREFORE ORDERED that Plaintiff's Motion to Compel and for Continuance of Trial (docket entry #105) is GRANTED IN PART, DENIED IN PART.

Dated this 25 day of July, 2007.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS
Reg. #08498-045 PLAINTIFF

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; LISA
JAMES YOUNG, Institutional Legal Counsel, FCI-Forrest City;
TIMOTHY MOORE, Unit Manager, FCI-Forrest City;
YVONNE TORO, Physician's Assistant, FCI-Forrest City;
WEAVER, Correctional Officer, FCI-Forrest City; and
FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City DEFENDANTS

ORDER

In response to the Court's Order of February 14, 2006 (docket entry #46) and in anticipation of the Pre-Jury Evidentiary Hearing scheduled for Monday, April 3, 2006, at 10:00 a.m. in Room #444, in Little Rock, Arkansas, the Plaintiff has submitted a proposed witness list (docket entry #51). Because this scheduled hearing has a limited scope, witnesses other than the parties will not be permitted, as outlined in *Johnson v. Bi-State Justice Center*, 12 F. 3d 133, 135-36 (8th Cir. 1993). Accordingly, Defendants' Motion in *Limine* (docket entry #54) is GRANTED.

The Federal Bureau of Prisons is directed to ensure Plaintiff's attendance at the hearing, scheduled for Monday, April 3, 2006, at 10:00 a.m. in Room #444 of the Richard Sheppard Arnold U.S. Courthouse in Little Rock, Arkansas.

IT IS SO ORDERED this 9 day of March, 2006.

H. David Young

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS
Reg. #08498-045 PLAINTIFF

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; LINDA SANDERS, Warden, FCI-Forrest City; JOSE JIMINEZ, Health Services Administrator, FCI-Forrest City; LISA JAMES YOUNG, Institutional Legal Counsel, FCI-Forrest City; TIMOTHY MOORE, Unit Manager, FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; WEAVER, Correctional Officer, FCI-Forrest City; and FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City DEFENDANTS

ORDER

Pending before the Court is the Defendants' Motion for Summary Judgment (docket entry #30), to which Plaintiff has now filed his Response (docket entry ##43-45). Defendants have also filed a "Motion for Order" (docket entry #53) which will be construed as a Motion to Dismiss, because it seeks dismissal of Plaintiff's cause of action for alleged failure to exhaust administrative remedies. Plaintiff has also filed a "Motion to Join United States as Indispensable Party" (docket entry #43) in order to pursue claims under the Federal Tort Claims Act.

Having reviewed the Defendants' motions as well as the Brief in Support and Statement of Facts (docket entries #31 and 32) and their response to the Court's February 17, 2006 Order (docket entry #50), as well as Plaintiff's response (docket entry #56)and the accompanying affidavits, the Court grants Defendants' Motion for Summary Judgment in part, denies their Motion to Dismiss, and grants Plaintiff leave to amend his Complaint to include the United States of America as an indispensable party.

A. Summary Judgment Motion

"Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, demonstrates that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." *Clark v. Kellogg Co.*, 205 F.3d 1079, 1082 (8th Cir.2000); Fed.R.Civ.P. 56(c). If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). To avoid summary judgment, the non-moving party must "show that admissible evidence will be available at trial to establish a genuine issue of material fact." *Churchill Bus. Credit, Inc. v. Pacific Mut. Door Co.*, 49 F.3d 1334, 1337 (8th Cir.1995). "Once the motion for summary judgment is made and supported, it places an affirmative burden on the non-moving party to go beyond the pleadings and by affidavit or otherwise designate specific facts showing that there is a genuine issue for trial." *Commercial Union Ins. Co. v. Schmidt*, 967 F.2d 270, 271 (8th Cir.1992)(internal quotation marks and citations omitted). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In other words, if the evidence is so deficient that no reasonable juror could find in favor of the non-moving party, then summary judgment is appropriate. *See Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir.1990).

While prisoners are entitled to the benefit of liberal construction of their pleadings because of their pro se status, Fed.R.Civ.P. 56 remains applicable to them. *See Quam v. Minnehaha County Jail*, 821 F.2d 522 (8th Cir.1987). "Summary judgment is an extreme remedy, to be granted only when no genuine issue exists as to any material fact." *Moore v. Jackson*, 123 F.3d 1082, 1086 (8th

Cir.1997). A district court has no obligation, however, to "plumb the record in order to find a genuine issue of material fact." *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 260 (8th Cir.1996). Nor is the court "required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Id.* (internal quotation marks and citation omitted).

The affidavits submitted by Plaintiff in support of his response clearly show that he has gone beyond the pleadings to show that there is a genuine issue for trial as to his claims against Defendants Prince, James-Young, Moore, Toro, Weaver, and Garrido. As to Defendants Sanders and Jiminez, Plaintiff "concurs with the Defendants' argument that *respondeat superior* liability is unavailable in a *Bivens* action, and is unavailable presently" as to Defendants Sanders and Jiminez. Accordingly, Defendants' Motion for Summary Judgment will be GRANTED IN PART as to Defendants Sanders and Jiminez, and they shall be dismissed as party Defendants.

B. Motion to Dismiss

Defendants have added a Motion for Order (docket entry # 53) that states: "Given the fact that Plaintiff concedes that administrative remedies as to his allegations against Defendants James Young and Timothy Moore were not exhausted, Plaintiff's Complaint should be dismissed in its entirety." Defendants' motion cites page 12 of "Plaintiff's Motion and Memorandum in Opposition to Motion to Dismiss or Motion for Summary Judgment" as support for their contention that Plaintiff has conceded failure to exhaust as to these two Defendants.

Defendants apparently base this argument on the layout of Plaintiff's response, which follows Defendants' own summary judgment motion. However, after carefully reviewing both the Defendants' motion and Plaintiff's response, it is clear that Plaintiff's response concedes no such failure to exhaust administrative remedies. Plaintiff's response references Defendants' Motion at

page 11, wherein Defendants argue that Plaintiff has failed to state a claim, not a failure to exhaust. No where in the Plaintiff's response does the Court read a concession of failure to exhaust administrative remedies as to any Defendant or claim. Accordingly, Defendants' Motion to Dismiss (docket entry # 53) is DENIED.

C. Motion to Join Indispensable Party

Lastly, Plaintiff's Motion to join the United States as an indispensable party is GRANTED and the Clerk of the Court is directed to reflect this on the docket sheet and to serve this additional Defendant as directed in the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED that:

1) Defendants' Motion for Summary Judgment (docket entry #30) is GRANTED IN PART as to Defendants Sanders and Jiminez, and they are dismissed as party Defendants;

2) Defendants' Motion to Dismiss (docket entry # 53) is DENIED; and

3) Plaintiff's Motion to join the United States as an indispensable party (docket entry #43) is GRANTED and the Clerk of the Court is directed to reflect this on the docket sheet and to serve this additional Defendant as directed in the Federal Rules of Civil Procedure.

IT IS SO ORDERED this _9_ day of March, 2006.

H Daniel Young

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS
Reg. #08498-045 PLAINTIFF

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; WEAVER, Correctional Officer, FCI-Forrest City; and FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City; and UNITED STATES OF AMERICA DEFENDANTS

ORDER

The court has ordered that counsel be appointed in this case. In accordance with the provisions of Local Rule 83.7, the following attorney is now appointed to represent Plaintiff in this proceeding: G. Joe Cambiano, Post Office Box 9, Morrillton, Arkansas, 72110-0009. The Clerk shall enter Attorney West's name as the attorney of record for Plaintiff and shall send counsel a copy of this Order, the Order from the April 11, 2006 hearing, and a copy of Local Rule 83.7. Counsel is also directed to access and review Local Rule 83.7 regarding appointment of counsel, and Local Rule 83.6 regarding reimbursement of out-of-pocket expenses, through the Court's web site (www.are.uscourts.gov). Pursuant to Rule 83.7, counsel must make written application to withdraw within fifteen (15) days; otherwise, the appointment will be effective.

Plaintiff has also filed a Motion to Stay Discovery (docket entry #79) in this matter pending the appointment of counsel. Accordingly, Plaintiff's Motion is GRANTED; counsel for the Defendants is directed to defer further discovery action pending the effective date of this appointment.

DATED this __5__ day of May, 2006.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS
Reg. #08498-045 PLAINTIFF

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; WEAVER, Correctional Officer, FCI-Forrest City; and FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City; and UNITED STATES OF AMERICA DEFENDANTS

ORDER

Pending before the Court is the Motion of attorney G. Joe Cambiano (docket entry #82) to be relieved as appointed counsel in this case. For good cause shown, the request will be granted. In accordance with the provisions of Local Rule 83.7, the following attorney is now appointed to represent Plaintiff in this proceeding: Joseph Davidson Calhoun, III, Post Office Box 251504, Little Rock, Arkansas, 72225. The Clerk shall enter Attorney Calhoun's name as the attorney of record for Plaintiff and shall send counsel a copy of this Order, the Order from the April 11, 2006 hearing, and a copy of Local Rule 83.7. Counsel is also directed to access and review Local Rule 83.7 regarding appointment of counsel, and Local Rule 83.6 regarding reimbursement of out-of-pocket expenses, through the Court's web site (www.are.uscourts.gov). Pursuant to Rule 83.7, counsel must make written application to withdraw within fifteen (15) days; otherwise, the appointment will be effective.

DATED this 18 day of May, 2006.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS PLAINTIFF
Reg. #08498-045

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; ROBERT WEAVER, Correctional Officer, FCI-Forrest City; FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City; and UNITED STATES OF AMERICA DEFENDANTS

ORDER

Pending before the Court is Plaintiff's Motion for Reconsideration (docket entry #113) and Supplemental Motion (docket entry #114) to his previous Motion to Compel and for Continuance of Trial. Defendants have filed their Response (docket entry #115) and the matter is ripe for disposition.

The overriding issue at this stage is the request for a continuance of the trial date, which is now set for September 10, 2007. Plaintiff seeks more time in which to conduct discovery, on the grounds that supplemental discovery has led to other issues to explore in preparation of his case. Defendants object strenuously to any continuance, but the fact remains that, as of this date, apparently only two depositions have been conducted (and one of those is not yet completed.) Therefore, Plaintiff's requests for a continuance of the trial date (docket entries ## 113-114), and Defendants's Motion to Extend the Motions Deadlines (docket entry #116) are GRANTED. A new trial date will be set by separate Order. In the meantime, the discovery deadline is extended for thirty

(30) days from the entry date of this Order, and any and all dispositive motions are due to the Court on or before October 1, 2007. Each party will then have eleven days in which to provide their Response.

Also pending before the Court is Defendants's "Motion to Clarify or for Reconsideration" of the Court's Order of July 25, 2007 (docket entry #112) addressing the previous Motion to Compel. This "Motion" being more in the nature of a Response to the Court's July 25th Order, in that no particular relief is sought, the Clerk of the Court is directed to moot this pleading as a pending motion. If the parties continue to have problems with discovery that they believe warrant the Court's attention, they are directed to file Motions to Compel which plainly specify the information sought, and Responses which plainly answer the question whether the information can or will be provided.

IT IS SO ORDERED this 16 day of August, 2007.

H. David Young

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS PLAINTIFF
Reg. #08498-045

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; LINDA SANDERS, Warden, FCI-Forrest City; JOSE JIMINEZ, Health Services Administrator, FCI-Forrest City; LISA JAMES YOUNG, Institutional Legal Counsel, FCI-Forrest City; TIMOTHY MOORE, Unit Manager, FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; WEAVER, Correctional Officer, FCI-Forrest City; and FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City DEFENDANTS

ORDER

Pending before the Court are Defendants' Motion for Reconsideration (docket entry #63) of the Court's March 9, 2006 Order denying their request for dismissal of Plaintiff's Complaint for failure to fully exhaust administrative remedies, and Plaintiff's Response to Defendants' Motion for Order (docket entry #66) which sought that dismissal. In their Motion for Reconsideration, Defendants again urge the Court to read Plaintiff's response to their original summary judgment motion as conceding that he failed to exhaust his administrative remedies as to Defendants Lisa James Young and Timothy Moore. In response, Plaintiff has filed a document that will be construed as a Motion for Partial Voluntary Dismissal, in which he asks that the Court grant him leave to dismiss these Defendants from the pending action.

The Eight Circuit has held that if a plaintiff has not fully exhausted one or more of his claims,

he may amend his Complaint to dismiss those claims that are not fully exhausted to preserve his exhausted claims. *See Kozohorsky v. Harmon*, 332 F. 3d 1141 (8th Cir. 2003). Accordingly, the Court will grant Plaintiff leave to voluntarily dismiss Defendants Lisa James Young and Timothy Moore, and deny Defendants' Motion for Reconsideration as moot.

IT IS THEREFORE ORDERED that:

1. Plaintiff's Motion for Voluntary Dismissal (docket entry #66) is GRANTED; and

2. Defendants' Motion for Reconsideration (docket entry #63) is DENIED AS MOOT.

DATED this _21_ day of March, 2006.

H. David Young

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS
Reg. #08498-045

PLAINTIFF

V. 2:05CV00112 SWW/HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; LINDA SANDERS, Warden, FCI-Forrest City; JOSE JIMINEZ, Health Services Administrator, FCI-Forrest City; LISA JAMES YOUNG, Institutional Legal Counsel, FCI-Forrest City; TIMOTHY MOORE, Unit Manager, FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; WEAVER, Correctional Officer, FCI-Forrest City; and FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City
DEFENDANTS

ORDER

Pending before the Court is the Plaintiff's Motion (docket entry #118) to extend the discovery deadlines in this matter. For good cause shown, the request will be GRANTED, and the discovery deadline is extended until December 7, 2007. Dispositive motions will be due no later than January 18, 2008, and each party will then have eleven (11) days in which to file their Response.

IT IS SO ORDERED this 28 day of September, 2007.

H. David Young

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS
Reg. #08498-045 PLAINTIFF

V. 2:05CV00112 HDY

EDNA J. PRINCE, Dr., FCI-Forrest City; YVONNE TORO, Physician's Assistant, FCI-Forrest City; WEAVER, Correctional Officer, FCI-Forrest City; and FREDERICK GARRIDO, Physician's Assistant, FCI-Forrest City; and UNITED STATES OF AMERICA DEFENDANTS

ORDER OF PARTIAL DISMISSAL

Plaintiff alleges various constitutional claims against the defendants in his *pro se* Complaint pursuant to *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) and the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.* Plaintiff made a timely demand for a jury trial; however, before incurring the expense of money and manpower inherent in such a trial, the Court held a pre-jury evidentiary hearing on April 3, 2006, to determine whether this case should proceed to a jury trial. Pursuant to the standard set forth in *Johnson v. Bi-State Justice Center*, 12 F. 3d 1133 (8th Cir. 1993), the Court has considered Plaintiff's testimony during the April 3rd hearing to be true, drawn appropriate inferences in Plaintiff's favor, and refrained from making any credibility determinations. *Id.* at 1135-36. Viewing the evidence presented during the hearing in this light, the Court must now decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

Id., quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 251-2 (1986). Based upon the evidence introduced at the hearing, the Court finds the following:

1. Plaintiff, who is incarcerated at the Federal Correctional Institute in Forrest City (FCI-FC), has suffered seizures since October 23, 2000, likely as a result of a fall sustained in custody. He has been prescribed Dilantin, an anti-seizure medication, which he keeps on his person at FCI-FC.

2. On May 27, 2004, Plaintiff was moved to the Special Housing Unit (SHU) and his personal belongings, including his Dilantin, were packed away out of his access. Plaintiff immediately informed Defendant Weaver of the need for the medication, but he did not receive them.

3. The following day, when Plaintiff still had not received his medication, he began asking for "cop-out" forms to file an informal grievance request for the medication. He did not receive the forms or the medication.

4. On May 29, 2004, Plaintiff began "feeling strange" after two days without his medication. At the direction of an unidentified correctional officer, he used a blank piece of paper to write another grievance about the need for the medication. A physician's assistant identified only as B.J. told Plaintiff that he would leave a note with the infirmary about the medication.

5. The next day, the third without Dilantin, Plaintiff suffered a seizure in his SHU cell. He wrote another grievance and attempted to submit it to Defendant Weaver, but he declined to accept the form and instructed Plaintiff to leave them under the office door. According to Plaintiff, Defendant Weaver knew the forms were there, but failed to pick them up or deliver them to anyone who could act on them.

6. On May 31, 2004, Memorial Day, Plaintiff suffered a second seizure. His cellmate, inmate Carpenter, called for help by pushing the "call button," and an unidentified correctional officer said he would get help, but no medical personnel came and no accident/injury report was made of the incident.

7. Eventually, a case manager, Mr. Woods, not a named Defendant, came to Plaintiff's cell, where he reported that he had fallen and chipped a tooth as a result of the seizure. Woods told Defendant Toro that Plaintiff was without his medication, but she was apparently unable to obtain a refill of the prescription because of the holiday. According to Plaintiff, Defendant Toro told Woods that she would see about getting Plaintiff's on-person medication from his personal belongings, but never did so.

8. On June 1, Plaintiff received his medication from physician's assistant B.J. The next day, Defendant Garrido came to Plaintiff's cell and told him that he had been off duty for the holiday and "couldn't believe" that Plaintiff had not received his medication while in SHU. The following day Defendant Garrido prescribed Tylenol for Plaintiff's headache and chipped tooth, but Plaintiff did not receive those medications either.

9. Plaintiff finally saw a dentist for the chipped tooth in April of 2005, and only recently had the damage repaired.

10. The Eighth Amendment's proscription of cruel and unusual punishment prohibits conditions of confinement that pose unwarranted pain and suffering or that unreasonably threaten an inmate's health. *Farmer v. Brennan,* 511 U.S. 825 (1994). To succeed with an Eighth Amendment claim based on inadequate medical care, a plaintiff must prove: (1) he had objectively serious medical needs; and (2) prison officials subjectively knew of, but deliberately disregarded,

those serious needs. *Dulany v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997).

11. To prevail with this claim, Plaintiff must prove: (1) that he suffered objectively serious medical needs; and (2) that prison officials actually knew of but deliberately disregarded those needs. In order to satisfy the second component of the test, an inmate must show that the official had a "sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294 at 297 (1991). The inmate must establish that the official acted or failed to act with deliberate indifference to the inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837-838 (1994)(the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference).

12. Here, Plaintiff confirmed at the hearing that, as to Defendants Prince, Toro, and Garrido, he had no contact with them prior to his seizure that would have put them on notice that he was without his medication and therefore at a risk of harm. While Plaintiff attempted at the hearing to assert a denial or delay of adequate medical care for his chipped tooth, he also conceded that none of these Defendants were responsible for the provision of dental care. Therefore, Plaintiff's *Bivens* claims against these Defendants must fail.

13. However, as to his claims pursuant to *Bivens* against Defendant Weaver, Plaintiff has presented evidence showing a sufficient factual disagreement to require submission to a jury, as required by *Johnson v. Bi-State Justice Center*, 12 F. 3d 133, 135-36 (8th Cir. 1993).

14. As to Plaintiff's Federal Tort Claims Act claims against the Defendants, Plaintiff has only recently asserted those against the United States of America. While service has been completed as to this Defendant, no Answer has been filed, nor have the issues of negligence on the part of the Defendants been addressed by the Court at this hearing. The Plaintiff's claims pursuant to the

Federal Tort Claims Act should be allowed to proceed at this time. The causation issue which resulted in the dismissal of Plaintiff's *Bivens* claims against Toro, Prince and Garrido may result in the dismissal of any Federal Tort Claim against them. However, the Court will refrain from making such a ruling at this time.

IT IS THEREFORE ORDERED that:

1. Plaintiff's claims pursuant to *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) against Defendants Toro, Prince and Garrido are dismissed for failure to state a cognizable claim. Plaintiff will be permitted to proceed to jury trial as to his claims against Defendant Weaver.

2. Plaintiff will also be allowed to proceed with his Federal Tort Claims Act claims against Defendants Toro, Prince, Garrido, Weaver, and the United States of America, in a separate hearing without a jury. An attorney will be appointed by separate Order, and may seek leave of the Court to file an Amended Complaint on Plaintiff's behalf.

3. Defendants' pending Motion to Strike Witnesses (docket entry #69) and Amended Motion to Strike Witnesses (docket entry #70) are DENIED AS MOOT.

4. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal from this Order would not be taken in good faith.

DATED this _11_ day of April, 2006.

H. David Young

UNITED STATES MAGISTRATE JUDGE

COPY

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS **Reg. #08498-045** **Plaintiff,**	)	
v.	)	**Civil Action No. 2:05cv00112 HDY**
UNITED STATES OF AMERICA, ET AL **Defendants.**	)	

SETTLEMENT AGREEMENT

The parties have agreed to settle the FTCA, Bivens, and any and all other claims that might exist and to settle all pending motions, including but not limited to, plaintiff's Bill of Particulars and Motion for Sanctions. The settlement agreed to by the parties as it regards the FTCA, Bivens, and any and all other claims that might exist is set forth in a separate document titled "Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. 2677" executed on this date by the parties. Settlement of all pending motions, including but not limited to, plaintiff's Bill of Particulars and Motion for Sanctions is represented by this document.

1. After negotiations, the parties have agreed to settle all pending motions, including but not limited to, plaintiff's Bill of Particulars and Motion for Sanctions, in the amount of $4,640.00. Said amount will be paid directly to the plaintiff's attorney, for the Plaintiff's attorney, Calhoun Law Firm, P. O. Box 251504, Little Rock, AR 72225. Plaintiff's attorney will provide the agency with the necessary account

information and tax identification number to effectuate the transfer by the Federal Bureau of Prisons. Upon receipt of this information payment will be made by electronic funds transfer. The parties agree that the Agency is not responsible for any federal, state, or local tax liability arising from the payment of the amounts set forth in this paragraph, and that the Agency will be held harmless from any liability for such taxes which may be owing on account of the payment of such sums.

2. Plaintiff's attorney agrees to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

3. Plaintiff's counsel will not be foreclosed from applying to the Court for payment of costs and expenses from the "Library Fund" pursuant to Local Rule 83.6.

Gwendolyn D. Hodge
Assistant United States Attorney
Eastern District of Arkansas
Attorney for Defendant, United States
E-Mail: Gwen.Hodge@usdoj.gov

Executed this ____ day of February, 2009.

Joseph Davidson Calhoun
Calhoun Law Firm
Attorney for Plaintiff
Post Office Box 251504
Little Rock, AR 72225

Executed this 5 day of ~~February~~ March, 2009.

Michael E. Haas, Plaintiff
Reg. #08498-045

Executed this 25 day of February, 2009.

Received
APR 03 2009
Bureau of Prisons
Legal Department, SCRO

U.S. Department of Justice

United States Attorney
Eastern District of Arkansas

Post Office Box 1229
425 W. Capitol Avenue, Suite 500
Little Rock, Arkansas 72201

501-340-2600
FAX 501-340-2730

March 9, 2009

Jason A. Sickler
Regional Counsel
South Central Region
Federal Bureau of Prisons
4211 Cedar Springs Road
Dallas, TX 75219

RE: *Michael E. Haas v. United States of America et al.*
USDC Case No.: 2:05CV00112HDY

Dear Jason:

Enclosed please find the original executed Settlement Agreement in the above cited matter for the amount of $4,640.00 for your office to process. Additionally, enclosed is a copy of the Stipulation for the FTCA Claim in which our office is processing.

Should you have any questions or concerns, please do not hesitate to contact me at (501) 340-2629

Respectfully,

JANE W. DUKE
UNITED STATES ATTORNEY

BY: GWENDOLYN D. HODGE
Assistant United States Attorney

GDH/ma
Enclosures

cc: Joe Calhoun, Attorney for Plaintiff

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS	)	
Reg. #08498-045	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 2:05cv00112 HDY**
	)	
UNITED STATES OF AMERICA, ET AL	)	
	)	
Defendants.	)	

SETTLEMENT AGREEMENT

The parties have agreed to settle the FTCA, Bivens, and any and all other claims that might exist and to settle all pending motions, including but not limited to, plaintiff's Bill of Particulars and Motion for Sanctions. The settlement agreed to by the parties as it regards the FTCA, Bivens, and any and all other claims that might exist is set forth in a separate document titled "Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. 2677" executed on this date by the parties. Settlement of all pending motions, including but not limited to, plaintiff's Bill of Particulars and Motion for Sanctions is represented by this document.

1. After negotiations, the parties have agreed to settle all pending motions, including but not limited to, plaintiff's Bill of Particulars and Motion for Sanctions, in the amount of $4,640.00. Said amount will be paid directly to the plaintiff's attorney, for the Plaintiff's attorney, Calhoun Law Firm, P. O. Box 251504, Little Rock, AR 72225. Plaintiff's attorney will provide the agency with the necessary account

information and tax identification number to effectuate the transfer by the Federal Bureau of Prisons. Upon receipt of this information payment will be made by electronic funds transfer. The parties agree that the Agency is not responsible for any federal, state, or local tax liability arising from the payment of the amounts set forth in this paragraph, and that the Agency will be held harmless from any liability for such taxes which may be owing on account of the payment of such sums.

2. Plaintiff's attorney agrees to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

3. Plaintiff's counsel will not be foreclosed from applying to the Court for payment of costs and expenses from the "Library Fund" pursuant to Local Rule 83.6.

Gwendolyn D. Hodge
Assistant United States Attorney
Eastern District of Arkansas
Attorney for Defendant, United States
E-Mail: Gwen.Hodge@usdoj.gov

Executed this ____ day of February, 2009.

Joseph Davidson Calhoun
Calhoun Law Firm
Attorney for Plaintiff
Post Office Box 251504
Little Rock, AR 72225

Executed this 5 day of ~~February~~ March, 2009.

Michael E. Haas, Plaintiff
Reg. #08498-045

Executed this 25 day of February, 2009.

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

MICHAEL E. HAAS **Reg. #08498-045** **Plaintiff,**	)	
v.	)	**Civil Action No. 2:05cv00112 HDY**
UNITED STATES OF AMERICA, ET AL **Defendants.**	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. §2677 ("Stipulation").

2. The United States of America agrees to pay the sum of $2,360.00 which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by

reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or

against the United States, including claims for wrongful death.

4. This Stipulation is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This Stipulation is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that respective parties will each bear their own costs, fees, and expenses.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, any attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the Stipulation amount; however, the parties agree that **no** attorney fees are to paid as a part of this Stipulation.

7. The persons signing this Stipulation warrant and represent that they possess full authority to bind the person on whose behalf they are signing to the terms of the Stipulation. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the Stipulation at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation is null and void.

8. Payment of the Stipulation amount will be made via electronic funds transfer. Payment of the Stipulation amount of Two Thousand Three Hundred and Sixty dollars ($2,360.00) will be paid directly to the plaintiff's attorney by the Federal Bureau of Prisons via electronic funds transfer utilizing the following information:

- FEIN for Joseph D. Calhoun Ltd. dba Calhoun Law Firm, is (b)(6)
- Client trust account, Metropolitan Bank, routing number of (b)(6) account number (b)(6)

Plaintiff's attorney agrees to distribute the Stipulation proceeds to the plaintiff and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. Plaintiff's counsel will not be foreclosed from applying to the Court for payment of costs and expenses from the "Library Fund" pursuant to Local Rule 83.6. Any costs and expenses awarded shall not come from this Stipulation amount or the Judgment Fund.

10. The parties agree that this Stipulation, including all the terms and conditions of this Stipulation and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Gwendolyn D. Hodge
Assistant United States Attorney
Eastern District of Arkansas
Attorney for Defendant,
United States of America
E-Mail: Gwen.Hodge@usdoj.gov

Executed this 9th day of ~~February~~ March, 2009.

Joseph Davidson Calhoun, III
Calhoun Law Firm
Attorneys for Plaintiff
Post Office Box 251504
Little Rock, AR 72225

Executed this 5 day of ~~February~~ March, 2009.

Michael E. Haas, Plaintiff
Reg. #08498-045

Executed this 25 day of February, 2009.

U.S. Department of Justice
United States Attorney
Eastern District of Arkansas
425 W. Capitol Avenue, Suite 500
Little Rock, Arkansas 72201

Official Business
Penalty for Private Use $300

7008 0150 0001 5660 3648

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3.47
1.20

0450763006
$3.87
03/09/2009
Mailed From 722

U.S. Department of Justice
United States Attorneys Office
Eastern District of Arkansas
425 W. Capitol Ave., Ste.500
Little Rock, Arkansas 72201-3536

Official Business

Jason A. Sickler
Regional Counsel
South Central Region
Federal Bureau of Prisons
4211 Cedar Springs Road
Dallas, TX 75219

RETURN TO SENDER
1.20

U.S. Department of Justice

United States Attorney
Eastern District of New York

DOCKET & FILE

271 Cadman Plaza East
Brooklyn, New York 11201

September 8, 2008

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ SEP 15 2008 ★
BROOKLYN OFFICE

Honorable Steven M. Gold
Chief Magistrate Judge
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Brown v. United States
Civil Action No. CV-06-2639 (Townes, J.)

Dear Chief Magistrate Judge Gold:

Defendant respectfully advises the Court that the above case has been settled.

Respectfully submitted,

BENTON J. CAMPBELL
UNITED STATES ATTORNEY

By: _____
Leslie Brodsky
Assistant U.S. Attorney
(718) 254-6054

cc: Ryan Kane, Esq.
Simpson Thacher & Bartlett

The application is ☒ granted. ☐ denied.
SO ORDERED.

s/SLT
Sandra L. Townes, U.S.D.J.
Dated: September 12, 2008
Brooklyn, New York

This case is dismissed with prejudice as it has been settled.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
PRINCE CHARLES BROWN,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.
----------X

LB4263

Civil Action
No. CV-06-2639

(Townes, J.)
(Gold, M.J.)

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between **PRINCE CHARLES BROWN,** the undersigned plaintiff, and the **United States of America**, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Compromise Settlement.

2. The United States of America agrees to pay the sum of **ONE HUNDRED TWENTY FIVE THOUSAND DOLLARS AND NO CENTS ($125,000.00)**, to plaintiff **PRINCE CHARLES BROWN,** which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries,

damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff(s) or his/her/their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the **United States of America and/or the Bureau of Prisons and/or Department of Homeland Security**, or any other agency, their agents, servants, and employees, past and present.

3. Plaintiff(s) and his/her/their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the **United States of America and/or the Bureau of Prisons and/or Department of Homeland Security**, or any other agency, their agents, servants and employees, past and present, on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff(s) and his/her/their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the **United States of America and/or the Bureau of Prisons and/or Department of Homeland Security**, or any other agency, their agents, servants, and employees, past and present, from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident

to or resulting from further litigation or the prosecution of claims by plaintiff(s) or his/her/their guardians, heirs, executors, administrators or assigns against any third party or against the **United States of America and/or the Bureau of Prisons and/or Department of Homeland Security**, or any other agency, their agents, servants, and employees, past and present.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the **United States of America and/or the Bureau of Prisons and/or Department of Homeland Security**, or any other agency, their agents, servants, and employees, past and present, and it is specifically denied that they are liable to the plaintiff(s). This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff(s) will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Compromise Settlement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at their expense. Plaintiff(s) agree to obtain such

approval in a timely manner: time being of the essence. Plaintiff(s) further agree that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff(s) fail to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn by the United States for **ONE HUNDRED TWENTY FIVE THOUSAND DOLLARS AND NO CENTS ($125,000.00)** and made payable to **PRINCE CHARLES BROWN and SIMPSON, THACHER & BARTLETT,** plaintiff(s)' attorneys. The check will be mailed to plaintiff(s)' attorney at the following address: **425 Lexington Avenue, New York, NY 10017.** Plaintiff(s)' attorneys agree to distribute the settlement proceeds among the plaintiff(s), and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff(s) expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together,

shall be deemed to be one document.

Executed this 25th day of September, 2008.

BENTON J. CAMPBELL
United States Attorney
Eastern District of New York
Attorney for Defendant
United States of America
271 Cadman Plaza East, 7th Fl.
Brooklyn, New York

By: Leslie Brodsky
LESLIE BRODSKY
Assistant U.S. Attorney
(718) 254-6054

Executed this 10th day of October, 2008.

JOSEPH TRINGALI, ESQ.
SIMPSON, THACHER & BARTLETT
Attorneys for Plaintiff
425 Lexington Avenue
New York, NY 10017

PRINCE CHARLES BROWN, Plaintiff

Sworn to before me
this 10 day of October, 2008

Jessica Kerr
NOTARY PUBLIC

JESSICA KERR
NOTARY PUBLIC, State of New York
No. 01KE6172373
Qualified in Queens County
Commission Expires Aug. 6, 2011

US Clerks Office
US District Court
300 Fannin Street
Shreveport, La

Oct 25, 2005

RECEIVED
OCT 28 2005
ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

Steven Aubrey Burnette
#08307-084
US Penitentiary-Pollock
P.O. Box 2099
Pollock, LA 71467

RE: Civil Docket #1:05 CV 01804 DDD-JDK
and Request for Amendment.

Dear Sir or Ma'am

I recently received documentation concerning #05-1804 with a filed date of 10/11/05.

However, there seems to be a descrepancy or clerical error pertaining to the list of Defendants and the dollar amount of Demand sought.

Per the submitted Civil Rights Act 1983 Complaint and continuation page/attachments - pages #14 and #15 in affidavit specify the additional Defendants to be included as follows:

17) BOP Special Investigative Agent, John Feeney at US Penitentiary Pollock 1000 Airbase Rd Pollock, LA 71467

18) SIS Lieutenant, Elezar Garcia at US Penitentiary Pollock 1000 Airbase Rd Pollock, LA 71467

19) Disciplinary Hearing Officer, Milton B. White at US Penitentiary Pollock 1000 Airbase Rd. Pollock, La 71467

AND the requested Demand for Monetary, Compensatory, and Punitive damages should be $16,350,000.00

I also reserve the right to request a Jury pending the petitioned request for a Three-Judge Court or any applicable Sua Sponte.

I humbly remind the Clerks Office and Courts that

I am proceeding Pro Se and ask that a less stringent standard be applied in lieu of formal pleadings drafted by a lawyer.

I will be anxiously awaiting a confirmed Amendment as requested, and Thank You in advance for your patience and assistance in this matter.

From my segregation cell

Sincerely,

October 25, 2005

Steven Aubrey Burnette

Form to be used by a prisoner filing a civil rights complaint under THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

RECEIVED
OCT 11 2005
ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

SEC P

Steven Aubrey Burnette
Fed# 08307-084
Full Name of Plaintiff, Prisoner Number

CV05-1804 Sec A
Civil Action

JUDGE DRELL
Judge

VS. Dir, Harley LAPPIN

Bureau of Prisons / LT. Henry Bowers
Full Name of Defendant

MAGISTRATE JUDGE KIRK
Magistrate Judge

COMPLAINT

I. Previous Lawsuits

A. Have you begun any other lawsuit while incarcerated or detained in any facility?
Yes ✓ No ~~✓~~

B. If your answer to the preceding question is yes, provide the following information.

1. State the court(s) where each lawsuit was filed (if federal, identify the District; if state court, identify the county or parish):

Federal Tort Claim - Submitted to BOP Regional Counsel on Sept. 14, 2005 For Personal Injuries

2. Name the parties to the previous lawsuit(s):

Plaintiffs: Burnette, Steven (Prisoner) #08307-084

Defendants: Bureau of Prisons - Director, R Dir, Warden ~~Capt~~ others

3. Docket number(s): pending

4. Date(s) on which each lawsuit was filed: pending

5. Disposition and date thereof [For example, was the case dismissed and when? Was it appealed and by whom (plaintiff or defendant)? Is the case still pending?]:

Pending

C. Have you filed any lawsuit or appeal in any federal district court or appeals court which has been dismissed?
Yes ✓ No ✓

If your answer to the preceding question is yes, state the court(s) which dismissed the case, the civil action number(s), and the reason for dismissal (e.g., frivolity, malice, failure to state a claim, defendants immune from relief sought, etc.).

2255 motion to vacate and Correct / Criminal

NONE Concerning Civil Matters

II. A. Name of institution and address of current place of confinement:

USP-Pollock Air Base Rd. P.O. Box 2099 Pollock, LA 71467

B. Is there a prison grievance procedure in this institution?
Yes ✓ No ____

1. Did you file an administrative grievance based upon the same facts which form the basis of this lawsuit? # 375156
Yes ✓ No ____
If Yes, what is the Administrative Remedy Procedure number? 369161 367583

2. If you did not file an administrative grievance, explain why you have not done so.

~~Inmates in imminent danger, Inasmuch Inmates has made extraordinary Efforts.~~ Serious Emotional & Health problems

3. If you filed an administrative grievance, answer the following question.
What specific steps of the prison procedure did you take and what was the result? (For example, for state prisoners in the custody of the Department of Public Safety and Corrections: did you appeal any adverse decision through to Step 3 of the administrative grievance procedure by appealing to the Secretary of the Louisiana Department of Public Safety and Corrections? For federal prisoners: did you appeal any adverse decision from the warden to the Regional Director for the Federal Bureau of Prisons, or did you make a claim under the Federal Tort Claims Act?)

Appealed Wardens, Regional Director denial to Director of BOP in Washington, no relief - Was rejected on 2 separate occasions

Attach a copy of each prison response and/or decision rendered in the administrative proceeding.

III. Parties to Current Lawsuit:

A. Name of Plaintiff Steven A Burnette

Address USP-Pollock P.O. Box 2099, Pollock, La 71467

B. Defendant, Bureau of Prisons - Director Harley LAPPIN, is employed as Director of Prisons at Central Office BOP 320 First Street NW Wash. DC 20534

Defendant, BOP Regional Director, Ronald G. Thompson is employed as Regional Director at 4211 Cedar Springs Rd S. Central Regional Office Dallas, Texas 75219

Defendant, Warden Menefee & Warden R. Tapia, is employed as USP Pollock Warden at USP-Pollock 1000 Air Base Rd Pollock LA 71467

Additional defendants Captain Frederick Jefferson-USP-Pollock (same address) Lieutenant Henry Bowers, AW J.T. Rathman (SEE Attached Page For others)

IV. Statement of Claim

State the **FACTS** of your case. Specifically describe the involvement and actions of each named defendant. Include the names of all persons involved in the incident(s) or condition(s) giving rise to this lawsuit, and the dates upon which and the places where the incident(s) and/or condition(s) occurred. **YOU ARE REQUIRED TO SET FORTH ONLY FACTUAL ALLEGATIONS. YOU ARE NOT REQUIRED TO SET FORTH LEGAL THEORIES OR ARGUMENTS.**

Request Court Appointed Attorney per "Forma Pauperas" procedure/statutes

1) Prisoner seeks Preliminary Injunctive Relief to a Safe and Suitable FCI barring Penitentiary's. 2) Prospective Relief Per Prisoner Release/Compassionate Release and a deciding three-Judge Panel 3) Compensatory Monetary & Punitive damages of $16,350,000.00 4) Expungment of DHO Sanctions violating Rights Due Process Oct 19, 2004.

18 Defendants "Deliberately Indifferent For inmates safety, Care ON 8/30-31/04 Depriving inmate of humane basic necessities. Injuries Suffered ON Oct 13, 2004 and subsequent confinement to a "Strip-cell" imposing cruel & unusual punishment ON Oct 13-21, 2004 Wantonly Exposing prisoner to disease & ON Oct 19, 2004 Due Process Violations. Violation of 8th & 14th Amendments

(SEE Additional Pages & Exhibits)

V. Relief

State exactly what you want the court to provide to you or do for you. Make no legal arguments. Cite no cases or statutes.

victim transfer
InJunction Transfer to Suitable & Safe FCI Barring Penitentiary's
Prospective - Prisoner Release / Applicable Compassionate Release (three-Judge Panel)
Compensatory/Punitivie damages $16,350,000.00
DHO Sanctions Expunged (SEE Additional Pages)

VI. Plaintiff's Declaration

A. I understand that if I am transferred or released, I must apprise the Court of my address, and my failure to do so may result in this complaint being dismissed.

B. I understand that I may not proceed without prepayment of costs if I have filed three lawsuits and/or appeals that were dismissed on grounds that the action and/or appeal was frivolous or malicious, or failed to state a claim upon which relief may be granted, unless I am in imminent danger of serious physical injury.

Signed this 05 **day of** October, 2005.

#08307-084
Prisoner no. (Louisiana Department of Corrections or Federal Bureau of Prisons)

Steven A Burnette
Signature of Plaintiff

4/03

Oct 05, 2005

United States District Court
Western District of Louisiana

Steven Aubrey Burnette
#08307-084
USP-Pollock
P.O. Box 2099
Pollock, LA 71467

Civil Rights Act, 42 USC § 1983
Complaint

(Attachment pages)

I inmate Steven Aubrey Burnette hereby enter a complaint Pro Se against the Bureau of Prisons and United States Penitentiary-Pollock Officials for Civil Rights violations of the Eighth and Fourteenth Amendment of the Constitution, by Deliberate indifference of a prisoners Safety and health and deprivation of basic human needs, imposing unsafe and inhumane living conditions, by Cruel & unusual punishment on a Protective Custody inmate.

The following are to be listed as defendants per Section III of complaint form:

1) Bureau of Prisons 2) BOP Director, Mr. Harley Lappin at BOP Central Office 320 First St. NW Washington D.C. 20534

3) Regional Director, Ronald G Thompson at BOP South Central Regional Office 4211 Cedar Springs Rd Dallas, Texas 75219

4) Warden, Robert Tapia at US Penitentiary-Pollock 1000 Air base Rd. Pollock, LA 71467

5) Warden Fredrick Menifee at US Penitentiary Pollock

5) cont. USP-Pollock 1000 Airbase Rd. Pollock, LA 71467
6) Associate Warden, J.T. Rathman at USP-Pollock
1000 Airbase Rd. Pollock, LA 71467
7) Captain, Frederick Jefferson At USP-Pollock
1000 Air base Rd Pollock, LA 71467
8) Food Service Administrator-Acting Institutional Duty Officer,
Mr. Freeze at USP-Pollock
1000 Airbase Rd. Pollock, LA 71467
9) Health Services Administrator, Dr. Passao at USP-Pollock
1000 Airbase Rd. Pollock, LA 71467
10) Chief Psychologist, Randy Brandt Phd at USP-Pollock
1000 Airbase Rd. Pollock, LA 71467
11) Prison Lieutenant, Henry Bowers at USP-Pollock
1000 Airbase Rd Pollock, LA 71467
12) Prison Lieutenant, Mr. Bynum at USP-Pollock
1000 Air base Rd. Pollock, LA 71467
13) Prison Lieutenant, Mr. Taylor at USP-Pollock
1000 Airbase Rd. Pollock, LA 71467
14) Prison Lieutenant, Stephen Dixon at USP-Pollock
1000 Airbase Rd. Pollock, LA 71467
15) Prison Counselor, Diane Pruett, Dixon at USP-Pollock
1000 Airbase Rd. Pollock, LA 71467
16) Prison Officer, B. Bordelon at USP-Pollock
1000 Air base Rd Pollock, LA 71467

Inmate Steven Burnette was placed in Protective Custody-Special Housing Unit-segregation on 6/9/04 and

deemed to be "Victim of Assault", because of a vicious attack perpatrated by inmates with gang affiliation upon him. I inmate Burnette was ambushed in the Housing Unit, and struck repeatedly about the head, face, and back with a weapon- metal lock attached to a belt, causing Serious & Traumatic Injuries requiring Emergency Care and Reconstructive Surgery-insertion of endplates & screws, to repair the significant Numerous facial fractures, Eye and head injuries, resulting in disfigurement, nerve damage, retinal nerve damage with subsequent vision loss in Right eye and disability. The said Surgical Procedure was performed on or about 6/23/04 at Cabrini St Frances Hospital by Dr. Joseph Badeaux, Md at Alexandria, LA (see Exhibit D). I was returned to USP-Pollock on or about 6/25/04 to the "Hole" in the Special Housing Unit, and since I have been overwhelmed with unsafe conditions, repeatedly, and inadequate Medical Care - I voiced concerns repeatedly to Warden Tapia, Dr. Passao, and Officers, desperately Trying to heal from my wounds.

On or about 8/24/04 I was moved from a segregation cell at my request, because I and my current cell-mate was not getting along, coupled with the fact I am vulnerable and Physically unable to defend myself, due to above mentioned injuries and Post Operative healing.

I was assigned to a single segregation cell, However staff / Officers tormented me for 6 days - because of overcrowding conditions, Trying to force threatening

inmates into my assigned cell and subsequently on 8/30/04 (See Exhibit F) the Abuses of Power by Staff began by form of documented Incident Report (F) written by Officer B. Bordelon and served by Lieutenant Stephen Dixon, who ignored my pleas that I feared the inmate and that Physical harm would come to me as result of accepting this inmate into my cell.

On 8/30/04 for my refusing said inmate, my water to my cell was immediately shut off and my Recreation privileges/rights were canceled to punish me until I accepted a cell-mate. It was during this time I began receiving retaliatory & unwarented Incident Reports (which are relevant to my DHO Hearing compliants) soon after I relented - ultimately being forced to share a cell with 2 Mexicans with Texas roots and known gang ties to Mexican Mafia, and Texas Syndicate. Not only am I forced to cell with Threatening inmates - we are also faced with overcrowding, 3 in cell designed for only 2 at most.

I conveyed to several officers and my Counselor Diane Pruett Dixon several days before incident, that I was in danger of physical harm and needed to be moved - I was refused and as result on October 13, 2004 I was attacked and beaten in my segregation cell by my 2 cell-mates (Mexican) (Exhibits C, K, L, N, O, P, Q.)

Causing significant injury Compounding injuries and surgical devices inflicting serious head & facial injury.

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The Federal Prison inmates routinely divide themselves into groups based on the State in which we/they are from E.G. Texas inmate embrace one another and protect and clan up, often rivaling against neiboring or different States - inmates such as myself who has no gang ties and is from Virginia. These inmates were a known threat as d was initially on 6/9/04 assaulted by Texas inmates orchestrated by staff and prison Texas gang members. The record and SIS files show staffs, to include Prison Special Investigative Agent, John Feeney and SIS Lieutenant Elazar Garcia had documented prior knowledge of the numerous catagorical threats by Texas inmates and certainly gang associates. This was verbally conveyed to me by the SIS Lieutenant Garcia on 13 oct shortly after incident occured, he stated that d "should not even be at this institution", d "was supposed to be transfered long ago" and he was personally going to go to the Captain, Frederick Jefferson, first thing in the morning to get it straight. He then states d have seperatee's from all Texas and all gangs at this institution and tells me to be careful. Later that evening d conveyed what Lieutenant had told me to the SHU Lieutenant Henry Bowers hes says to me "d dont believe you", "and if Lieutenant Garcia told you about your seperatee's he wasn't supposed to." Here by's the delimma, Staffs assume the responsibility and the risk when it comes to my safety but

will not communicate it to me; or each other as policy directs therefore purposely and knowingly subjecting me to an unsafe environment. This coupled with their acts of putting me in a cage Rec. on 9/30/04 with a known and documented assailant involved in perpatrating the 6/9/04 serious assault on me, clearly establishes the intent by Captain Fredrick Jefferson and SHU Lieutenant Henry Bowers who are responsible for SHU reviews and cell assignments. Further Exhibit S Memorandom for Record, created by Lieutenant Bowers proves he knew of the inmate Tommy Kirk's threatening behavior but yet allows him to intermingle with Protective Custody Cases such as myself. The Exhibit S is partially withheld by the BOP - inmate has appealed for full disclosure of document as it will most certainly reveal and substanciate inmates allegations. Inmate request the Courts or delegated Officials review FOI exempted portion of document and SIS Case Files 4143 & 4257 as well as the 2 compact surveillance disc contain thereof, per 583 Reports. (See Exhibits R & S) & (Exhibits T & U).

The following Exhibits will confirm extent of seriousness as well as the culpable state of mind of Prison Officials: Special Investigative Agent, John Keeney, Captain Frederick Jefferson, SIS Lieutenant Elazar Garcia and especially Special Housing Lieutenant Henry Bowers who wantonly & unnecessarily repetitively exposed me to unsafe conditions and on Oct 13-21, 2004 depriving and

~~and~~ Deliberately denying even the minimal civilized measures of life necessities. The long duration of the cruel confinement and the horrid unsafe, unsanitary conditions posing further serious health risk and harm, coupled with said Lieutenants decision to use force to maintain such treatment of a prisoner, hence establishes knowledge and intent. And again on the morning of 20 oct, 04 inmate Burnette was yet again for a second time subjected to cruel & unusual punishment.

As stated per Memo N, O, P. Exhibits by Officers Stephens at approx. 8:00pm I notified passerby staffs of my injuries and that I needed to be moved given medical care and reassigned to another cell for my safety. At this time I am obviously significantly injured - Numerous Bruises & Contusion to face and laceration to leg (Exhibits C & L)

It was at this time Lieutenant Bowers made the culpable decision to deny medical care and impose cruel & unusual punishment by confining me to a unauthorized "Strip cell" under unsafe, unsanitary, and inhumane conditions for a prolonged period of 8 days. I inmate Burnette allege Lieutenant Bowers had purposely and knowingly violated me because I had previously alleged & accused Lt. Bowers of Civil Right Violations, Brutality, and the Negligent Homocide of inmate Sir Chadale Patton #19057-057 who was also confined in USP-Pollock-Special

Housing Unit and died in his segregation cell on 6/15/04 due to injuries sustained and refusal by staff to provide any medical care / staff criminal violations. (Exhibit V) As much Lt Bowers got his opportunity to inflict retaliatory punishment on me and he did so, as on Oct 13, 2004 by his orders I was placed in the said "Strip-cell" "Observation-cell" injured and with a mentally-ill homosexual inmate known to be a threat to self and others (inmate Scott Sharp) and a high risk of carrying infectious and deadly disease HIV/AIDS, Hepatitis Etc.. I were at no time combative nor was the "Strip-cell" linked to medical - the reason I was given for being housed in there was because of over-crowding and no available cells. The said Strip cell was not equipt with a bed, sink, or toilet - any basic essentials and The inmate and I were given no choice in the matter, we were reduced to having to urinate & defacate into plastic trash bags, provided by officers, for approx. 8 days I and the ~~Defend~~ said inmate squatted in the corner and relieved bodily waste urine & feces into plastic trash bags which were insufficient and would leak all over the cell floor. The officers would on occassion, slide a trash can to our food slot in the door, opening the slot allowing us to push out the human waste in a bag, but more times than not, they were grossed out and would refuse me referring my request to another shift or just plain refuse relief.

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The living & unsanitary health hazardous conditions forced upon me were horrid, there was no water nor any means to clean up the mess or ourselves. I ate and slept in deplorable conditions pleas for help were refused and the stentch would become so oppressive and strong the officers would routinely use duct tape to seal the outer portions of strip cell door jambs.

I lived amongst not only my own but the other inmates human waste/bodily fluids for 6 consecutive days 13th Oct - 19th Oct, and on the 19th of October I was afforded outdoor Recreation privilege in a cage. Once outside the cell and secured in the cage, I immediately informed staffs of my need to see the Captain and/or Warden conveying my discust, refusing to return to the Strip-cell and the inhumane conditions forced upon me. This began at approximately 7am and throughout the day several Lieutenants, Lt. Harrows and Lt. Bynum were made aware of conditions by me, as was the Institutional Chief Psychologist (See Exhibit E) who sympathized, but made no effort to intervene or provide an adequate SHU Review & evaluation as I laid unconscious on the floor in said Strip-cell on Oct 15, 2004 (Exhibit E)

Staff made the conscious decision to use force Team if necessary on 19 Oct to return me to those conditions.

Equally important and relevant per Admin. Remedy Appeal #'s 359154, 358655, and 358652, is that I was on the list for a DHO hearing on Oct 19 to answer to mentioned 3 unwarrented incident reports and was not afforded

opportunity to attend, nor was a Staff Representative present as provided by policy. My constitutional Rights and Due process rights were deliberately disregarded by Warden. Robert Tapia and (DHO) Duty Hearing Officer, Milton White who knew of my conditions, and deliberately tried me in my absence disregarding the safegards afforded to prisoners where punishment would be severe and a Major change in prisoners confinement substancial loss of good time, ~~loss~~ disciplinary-segregation and assignment to a 12 month pilot program was renewed applying further hardship on prisoner wantonly. It can not be said, that there was a Prison Official or Executive staffs, including Milton White, that was not aware of the Civil Rights violations imposed upon me for a prolonged period, without justification.

Again on oct 19th after spending all day with no food in the Rec. Cage late that evening Lt Bowers approached threatening use of force, by Force-team, iff I did not submit to restraints and re-enter the strip-cell (same).

I tried to reason and conveyed my Physical and Emotional Problems and the inhumane treatment by said confinement conditions, However, he cursed me and radioed the Operations Lt. Taylor for a Force Team.

As last resort by policy, before use of force, the (IDO) Institutional Duty Officer - FSA, Mr. Freeze who acts as the Warden in the evening ~~etc~~ hours attempts resolution. This was filmed by a VCR camera. At approx. 10pm on 19 oct IDO. Mr. Freeze and Lt. Taylor confirmed the unjust, wanton

and unnecessary confinement in the strip-cell ill-equipt with the basic human needs and with another inmate as described. As resolution a Holding cell in the Lt's office with a bed, sink, and toilet was offered by Mr. Freeze & Lt. Taylor and cl accepted - immediately taken to the said Holding cell. However, the relief was all to brief and temporary as the next morning 20ct, 04 cl was awaken and escorted back to the SHU, and into the same horrid conditions same strip-cell under the same inhumane conditions. No sink water or toilet facilities and again the same inmate and cl utilized plastic trash bags as a latrine as alternative. That evening IDO Mr. Freeze is making his rounds and comes to my cell door window (strip cell) and hear's my complaint and observes the once again, ongoing cruel confinement, he conveys his disapproval and says he will file a complaint to the Warden. However, he leaves me in those conditions for approx. 36 more hours. On Oct 21, 2004 a humanely equipt cell was provided, however Lt. Bowers was there to verbally assure me he was going to "make life difficult" for me. And he has such as withhold toilet paper refusing to provide me with adequate amount and cl would have to tear up my sheets/bedding to wipe with, after using toilet. This sounds meanial, but it just adds more unwarranted emotional distress to an already bad situation.

To back up a bit, on Oct 17, 2004 (or about) cl also appealed for help to A.W. J.T. Rathman, who was making

SHU rounds, he personally observed my living conditions in a strip-cell and my obvious injuries, I ask that he pull me out for conference. We talked in a neibboring room in private, and I conveyed allegations of Misconduct & Corruption by Lt. Bowers and other officers/staff, and specifically asked that he intervene and get me a decent and humane cell/improve my conditions, He conveyed sympathies but acted as though my hardships/living conditions were of no importance, within policy and refused to intervene. At this time my appearance reflected my injuries and Emotional state, it was obvious I had been victimized. Associate Warden J. J Rathman was made aware, petitioned for help and he refused to do so, therefore acting with Deliberate Indifference to my safety, Cruel & unusual confinement, and unsanitary/health risk.

I reiterate, the injuries I suffered were substancial - head, face, and eye injuries (both eyes) abrasions & lacerations and obviously victimized repeatedly. Lieutenant took photo's, and forwarded Memorandoms to Captain Fredrick Jefferson, and Warden Robert Tapia, who in turn routed a report of incident to the Regional Director Ronald G. Thompson and BOP Director, Mr. Harley Lappin. (See Exhibits K & P)

As memorandom K by Lt. Bowers states I "was temporarily housed in the "Observation cell", "No further problems and/or concerns noted" No mention of safety or unsanitary conditions overcrowding, Emergency or other However, officers through the entire BOP chain of Command to include BOP Director

were officially notified. No justification was given nor did any justification exist for the 8 day tortuous confinement imposed and said officials refused to intervene. The allegations of Deliberate Indifference by staff and Executive officials is evident where clearly established Constitutional Rights were reasonably known and violated. Further Lieutenant Henry Bowers & staff were all to ready to use force team to continue violations. It may be said that remedial action was taken on 19 Oct 04, however inmate Burnette was only to be returned for a second time on morning of 20 oct. to the same cruel & unusual conditions for an additional approx. 2 days. Petitioner points out the health hazzard of human waste / bodily fluids and the mentally ill homosexual who fit the high risk catagory of infecting others and again I was in an out of consciousness for approx 2-3 days and vulnerable to disease and subjected to unwanted sexual advances by said inmate. I am since Physically sickened and Emotionally distressed and in dire need of Medical testing/care and Psychological therapy to assist me in coping with the effects of my Special Housing Unit ordeals. Please note I was initially assigned to Admin. Detention / Protective Custody in SHU on 6/9/04 and was not disruptive, it was only after 8/30/04 and my allegations against staffs that staffs began initiating punitive retaliatory Abuses and fallacious incident Reports. Inasmuch my safety & security amongst USP-Pollock Special Housing Unit is without question severely at risk, and because Staffs continue to place me in harmful situations I am suppressed by fear and cannot safely participate

and should be transfered to a institution which can provide safe & suitable living conditions. I have numerous Physical & Emotional problems as result of my STH confinement, I have petitioned Medical & Psychological services to no avail, I go untreated and endure 16 months in a segregation cell as direct result of Deleberate Indifference by staff and Officials Prison Overcrowding and Tax payer burden/Budget cuts. I seek injunctive relief by courts to intervene and order a transfer to a Safe and suitable FCI one that can meet my Physical and Mental/Emotional needs.

I inmate Steven A Burnette hereby seek Preliminary

1) Injunctive Relief - Transfer barring prisoner be housed in a Penitentiary or gang institution, and immediate ~~Psychological~~ Psychological/Medical care.

2) Prisoner seeks Prospective Relief per Prison release order 18 USC 3626 a three-Judge panel and/or any applicable compassionate release inacted by Congress.

3) Prisoner seek Monetary Compensatory and Punitive Damages in the Amount of:

$ 16,350,000.00

4) Prisoner seeks Action Against DHO Milton White for Deliberately violating Constitutional Due process and other rights, recovery of all good time taken punishments sanctioned and expungements from record.

5) Prisoner Respectfully request a Court Appointed Attorney for myself who is proceeding "In forma Pauperous".

Inmate Submits this Claim pursuant The Civil Rights Act 42 USC §1983 and asks that the Clerk and

stringent standards than formal pleadings or petitions drafted by lawyers.

To be added to the list of defendants per Section III of complaint

(cont'd)

17) Special Investigative Agent, John. Feeney at US Penitentiary - Pollock 1000 Airbase Rd Pollock, LA 71467

18) SIS Lieutenant Elezar Garcia at US Penitentiary Pollock 1000 Airbase Rd Pollock, LA 71467

19) Duty Hearing Officer (DHO), Milton White at USP - Pollock 1000 Airbase Rd. Pollock, LA 71467

Petitioner has exhausted the Bureau of Prisons Administrative Remedy Appeals with no relief and the following copies are enclosed:

#375156, #367583, #359260, #369161, #358655, #359154, and 358652. along with 25 Exhibits referred to in claim Exhibits A-V

Petitioner submits claim pertaining to acaual events occurring on 8/30/04, 8/31/04 and the numerous closely related & relevant violations by Deliberate Indifference on Oct 13, 14, 15, 16, 17, 18, 19, 20, 21, 2004 and should not be confused with any other previous or future suits.

An honest good faith effort and sincerely submitted from my segregation cell Pro se.

with utmost Respect

October 05, 2005 Steven Aubrey Burnette

RECEIVED

OCT 1 0 2005

ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

Clerk, US District Court
Western District of Louisiana
300 Fannin St. Suite 1167
Shreveport, LA 71101-3083

Steven A. Burnette
08307-084
USP-Pollock
P.O. Box 2099
Pollock, LA 71467

Dear Sir or Ma'am

Enclosed is my prisoner lawsuit, Forma Pauperis, Exhibits, and requisite Exhausted Admin. Remedy Appeals.

Please be patient with me as I am in Segregation with limited resources.

Will you please send me Notice of reciept and any other relevant information.

at your earliest Convenience

Sincerely,

Oct 06, 2005

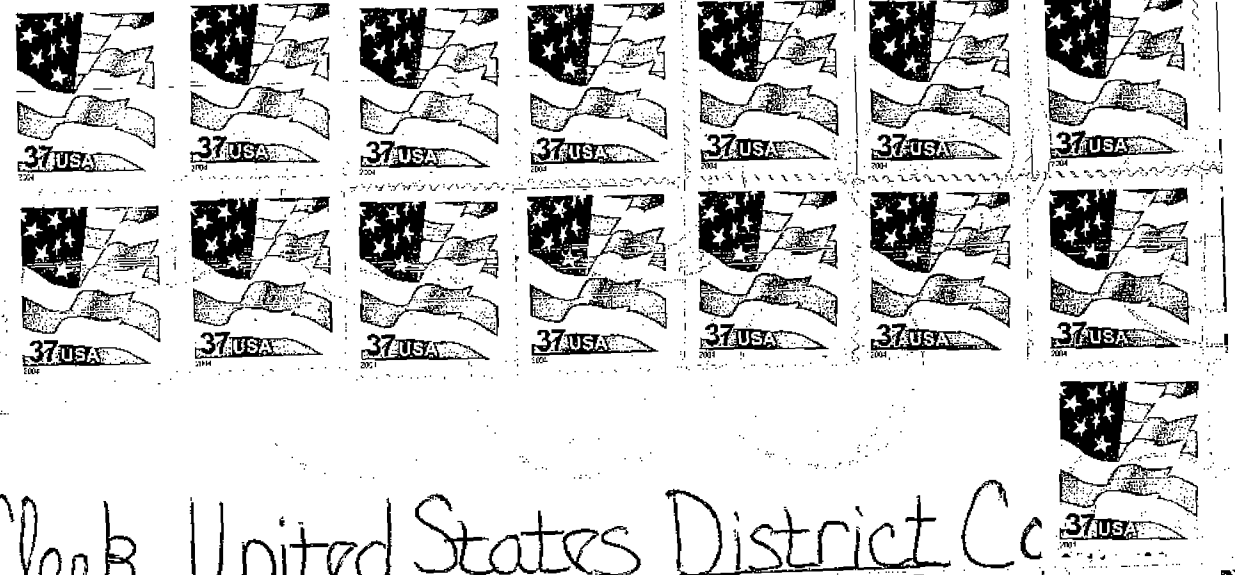
Steven A. Burnette

Steven Aubrey Burnette #08307-084

United States Penitentiary-Pollock

P.O. Box 2099

Pollock, LA 71467



Clerk, United States District Court

Western District of Louisiana

U.S. Courthouse

300 Fannin St. Suite 1167

Shreveport, LA 71101-3083

UNITED STATES PENITENTIARY
POLLOCK
POLLOCK, LA
DATE 10-07-05

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United States District Court
Western District of Louisiana
Magistrate Judge, James D. Kirk
Case# 1:05 C.V 01804
SEC P

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WESTERN DISTRICT OF LOUISIANA
SHREVEPORT LOUISIANA

Steven Aubrey Burnette
#08307-084
U.S. Penitentiary - Pollock
P.O. Box 2099
Pollock, LA 71467

RE: Plaintiff's Amendment per Judge Kirk's ORDER

I Steven Aubrey Burnette hereby submit the following requisite Amendment to my original 42 USC 1983/Bivens Complaint signed, dated, and submitted previously on 05, Oct 2005.

I Steven Aubrey Burnette, a Federal Prisoner incarcerated at United States Penitentiary - Pollock was tortured by Bureau of Prison - Pollock Prison Officials.

I the Plaintiff, accuse and submit Specific facts included in this petition to support my claim that the Bureau of Prisons / Pollock Officials violated my Civil Rights gaurateed by the Eighth and Fourteenth Amendment of the United States Constitution; 1) said Officials knowingly imposed Cruel and Unusual Punishment, inhumane treatment/conditions and "Prisoner Torture", by confining me, an injured Prisoner with untreated physical injuries to a "torture chamber"/Strip-cell, depriving me of the minimal civilized measures of lifes necessities and basic human needs.

2) Deprived of reasonable measures of protection and safety.

3) Deprived of adiquate Medical Care and Psychological Services/ Mental Health Care

4) Officials unconstitutionally imposed Disciplinary Action and Sanctions in retaliation of Prisoner exercising constitutional rights, further violating my Liberty interest and Due Process.

On 6/09/04 I became victim of an organized gang "hit", attacked in General Population and beaten severely with a weapon by a Texas Aryan Brotherhood gang and affiliates. As result of the attack, I suffered Serious head, face, and eye injuries - numerous lacerations and multiple facial fractures requiring extensive Reconstructive Surgery with the insertion of facial endplate devices and screws.
On 6/09/04 I was sutured and Xrayed at the local hospital Emergency Room and for unexplained reasons returned to Pollock, subsequently I was assigned to the Special Housing Unit as a Protection Case. However, I was afforded no meaningful Medical care, nor did staff take reasonable measures to provide protection. The ER Physicians recommendations were ignored, I was placed in the "hole" with potentially life threatening untreated injuries, in dangerously overcrowding conditions, and on an unconstitutionally deficient "Pilot Program" to suffer Physically and Mentally. On 8/30/04 staff abused their power and initiated Disciplinary Action, and imposed Cruel and Unusual punishment for inmates refusing to accept threatening inmate into his assigned Protective Custody cell. Staff turned my water off, cancelled my Recreation, confiscated my bedding and reading materials, and the SHU Lieutenant Henry Bowers verbally threatened to have me put in a Strip-cell Stating "I'll have you down in paper drawers pissin & shitin in a trash bag".

In view of the mentioned harsh conditions, I relented and accepted the cell mate. On 9/30/04 I was deliberately put into a SHU Rec Cage with a staff known, documented threat, said threatening inmate Tommy Kirk was a previous active participant in the Serious assault perpatrated against me on 6/09/04. A Physical altercation inevitably ensued causing me further injury. On or about Oct 06 a second Texas gang affiliate Mexican was forced into my cell and subsequently on 13 Oct 2004 I was attacked by the two of them, severely beaten for a third time in approx four months, resulting in significant head,

face, eye, and leg injuries.

On Oct. 13, 2004 I Steven Aubrey Burnette suffered a third physical assault, two assaults due to staff Deliberate Indifference for inmate safety while assigned to Protective Custody in the S.H.U. Inasmuch on 13 Oct, upon my request to officer Stephens and passerby officers, I was removed from my cell with obvious significant head and facial injuries, denied access to Medical care and placed in an unauthorized Strip-cell by SHU Lieutenant, Henry Bowers. It was from this point my confinement conditions exceeded cruel & unusual punishment, and became horrid inhumane Treatment amounting to "Prisoner Torture".

I inmate Burnette offer the following Specifics to support the conclusion that my Constitutional Rights were violated by Defendants as listed:

1.) SHU Lieutenant Henry Bowers with Deliberate Indifference and malicious intent personally removed me from my assigned cell injured, denied me medical care, and placed me in an unauthorized Strip-Cell, without a bed, sink, or toilet, in horrid unsanitary and inhumane conditions, with a Mentally-ill threatening inmate for a prolonged period of Eight days. Lt. Henry Bowers acting under the color of the law, unnecessarily and wantonly - with no Penological justification violated my Eighth and fourteenth Amendment of the US Constitution; My Right to be free from cruel & unusual punishment, inhumane Treatment and Prisoner Torture. Lt Bowers violated 18 USC 4042; 4081, and the Code of Federal Regulations 541.21 - 541.23. Depriving me of: Reasonable Safety, access to Medical care, Due Process, and the basic human needs which any reasonable person would have known defies any human decency; Lt Bowers Deliberate Indifference Conduct violates clearly established Prisoner Civil Rights reasonably known, and exceeds the exceptional circumstances to sufficiently strip him of any Qualified Immunity. On Oct 13, Lt Bowers kept me confined

to said strip-cell where said inmate and I were forced to share plastic trash bags as an only alternative to a latrine; urinating & defacating into plastic trash bags which were horribly deficient - clearly not designed for use in this manner, leaking our raw humane waste and bodily fluids onto the cell floor - in my living, eating, and sleeping quarters. Due to my open wounds this posed a serious health risk, coupled with the mentally-ill homosexuals high risk behavior known by staff, I was likely exposed to HIV/AIDS - Lt Bowers had prior knowledge of this inmates homosexual activity with another Pollock STLU inmate WILBert who had full blown AIDS - Therefore took active steps to suppress evidence/information knowingly subjecting me to deadly infectious disease. ~~and~~ Because of the head trauma and contusions, I was suffering a concussion, in and out consciousness, in a great deal of pain and Mentally traumatized by the unwanted sexual advances - unable to adequately protect myself. The said inmates sporadic behavior - yelling, pacing, and smearing feces with his sock deprived me of sleep, and created further health - bio hazzard risk and caused me significant mental anguish. From Oct 13-19, I had been allowed one out of cell shower, no cleaning supplies - nor fresh water to maintain hygiene and drink. I had to sneak my tooth brush to a Rec Cage where a inmate orderly would sneak me a bag of water. The filth, feces, and stentch became so oppressive the Officers avoided our cell and routinely used duct tape to seal the door jarals, often refusing to open our door or food slot to allow me to push out the bagged sewage, Nor would Officers provide a adequate supply of trash bags, my cell mate and I would re-use the same bag consistantly compiling multiple bowel movements and urine into said bag; creating a horrid bio hazzard, often I was forced to sleep with overflowing sewage, officers would not allow me to discard the waste, refering me to the next shift; so on & so forth. On Oct 14 I was removed and escorted to health Services for Xrays to determine if facial devices were still intact - Health Services Administrator, Dr. Passao ignored ENT Surgeons request for a follow-up exam, prescribed ibuprofen, provided no gauze or dressing for

open wounds, refused to house me in the infirmary, and [illegible] to the SHU Strip-cell. Oct 15 Dr. Brandt, the Chief Psychologist is making SHU rounds he personally observes my inhumane confinement, horrid conditions in the strip-cell with a mental patient, and ~~in~~ the filth I am lying in, the mere fact I am lying on the floor unresponsive, he does nothing to intervene and further records false 30 day SHU reviews. Oct 17 Associate Warden J.T. Rathman is making SHU rounds and

observes my obvious injuries, my inhumane conditions in the strip-cell and upon my verbal request he directs the officers to pull me, he takes me to a nearby conference (SHU) room. At this time I conveyed the SHU Lt's inappropriate behavior and formally accused Lieutenant Bowers and staff of the Negligent Homocide of inmate Patton, Sir Chadale Reg# 19057-057. I explained the Lt's brutality, officers and Medical staffs refusing to provide treatment to Patton - who vomitted blood for 2 days ~~[illegible]~~ lying in his segregation cell suffering internal injury and died a torturous death by his toilet. As I also conveyed the Lt's retaliatory misuse of power, by imposing maliciously, unwarrented incident reports, and confining me to the strip-cell without any reasonable justification. At this time my head & face are significantly swollen and both of my eyes are black with contusions and swollen. I conveyed my physical pain and Emotional distress, I explained the inhumane & unsanitary exposure to human waste and the Mentally-ill inmates threatening and buzzare behavior. I ask AW J.T. Rathman to remove me from those conditions, & said inmate and provide me with a humane cell - with a bed, sink, and toilet. He refused - my pleas were once again met with a blind eye and deaf ear, Mr. J.T. Rathman instructed the officer to put me back into the strip-cell. On Oct 19 after 6 consecutive days of strip-cell confinement - I was afforded outdoor Recreation privilege in a Rec Cage, Once inside the Cage I immediately notified the officer - Colburn I needed to speak with the Captain and Warden, ~~and~~ my request was refused, at this time I am emotionally distraut - and refused to exit the cage and re-enter said strip-cell under those conditions. I appealed to Lt Garrows and Lt Bynum - to no avail, nearly

12 hours later, and after speaking to several unsympathetic staff to include a passerby Psych Dr. Gallager, I am still in the Rec

P.6

Cage when Lt Bowers approaches - I convey my emotional state and inability to stand any further Strip-cell confinement - he orders me to submit to restraints and re-enter the strip-cell. I tried to reason with him, he states "Fuck you" and radios the Operations Lieutenant for a force team - to forcable remove me and put me back in Henry Bower's "torture chamber". As prerequisite to use of force team, the "on duty" Institutional Duty Officer Mr. Bruce Frea's is summoned - he films the conversation and agree's that I should not be subjected to such Strip-cell and inhumane confinement. Mr Freas defuses the situation by gauranteeing me a humane cell in the Lieutenants Office, and confirms the confinement imposed thusfar to be unacceptable, stating he would notify the warden to Remedy the situation. That night Oct 19 I was allowed a humane cell in the Lt's Office "holding tank", however the next morning approx 8 hrs later, I was awoken and escorted back to the very same SHU Strip-cell, with the same occupying inmate, in the same inhumane conditions. For approx. 36 more hours, I once again utilized the shared plastic trash bag / latrine enduring not only my own, but also the other said inmates urine & feces. On Oct 19 while being subjected to cruel & unusual punishment as mentioned, Duty Hearing Officer, Milton White unconstitutionally conducts a hearing for 3 unwarrented Incident Reports, in my absence, ~~and~~ without my consent, and without the required Staff Representative; finding me guilty and sanctioning me severely - substancial loss of Good conduct time / Disciplinary Segregation loss of visits Etc. Mr. White was well aware of my confinement and Emotional state as result, and knowingly violated my fourteenth Amendment, depriving me of Due process, and the Safegaards afforded when

punishment has a major changing effect on prisoners conditions of confinement. On 6/09/04 to present 12/20/05 BOP Director, Harley

Lappin with Deliberate Indifference implemented an unconstitutional Deficient "Pilot Program" designed and maliciously intended, to indescriminately warehouse prisoners in Segregation/A.D. Administrative Detention in the Special Housing Unit, specifically victims of violent assaults such as myself; creating dangerous overcrowding - unsanitary and inhumane confinement imposed per "Pilot" ranging from 12 to 18 month minimums. Punishing me a "victim" with systematic Indifference for my Safety, well being, The Code of Federal Regulations, 18 USC 4042, 18 USC 4081 - failing to initiate a transfer for prisoner who clearly can not be housed at USP-Pollock safely, due to Texas Gangs and affiliates. The Pilot program was implemented solely for Budget cut/Tax payer burden financial easment reasons, without regard for its deprivations and the long lasting Physical & Emotional effects it would cause for even a "normal" prisoner. The repetitive disregard for Separations/CIM's, deficient Protective Custody, overcrowding, and forcing threatening inmates to share cells has caused me significant Physical injuries and severe Emotional problems. The Pilot program so under staffed and/or staffed with ill-trained officers exhibits Deliberate Indifference depriving me of adequate Medical and Psychological Services, sunlight, fresh air, exercise & reasonable Safety. Director Harley Lappin ignored Routed Reports of Incidents on 6/09/04, 9/30/04, and 10/13/04 of the repetitive serious assaults, specifically on 10/13/04 the "Third Altercation", two of which transpiring in the SHU due to staff allowing threatening inmates to intermingle; And the mere fact that per Memorandom, I was placed injured into a Strip-cell with "no further concerns", and subjected to severe inhumane conditions for a unjustifiable prolonged period of Eight days exposed to further threat of Physical harm and disease by human waste. Mr. Harley Lappin turned a blind eye and deaf ear and stood by idly while USP-Pollock Officials Tortured prisoners in 5 seperate SHU Strip-cells - not on a "one time" basis

but for 3 to 4 years; ignored my Administrative Remedy Requests, denying cell- including the numerous "Sensitive" Appeals conveying lax in security, Corrupt Staff, and Inhumane treatment. The BOP and Director took active steps to suppress information and obstruct the Inspector Generals Office, his actions were adopted by Regional Director Ronald Thompson, Warden Tapia, Warden Menifee, S.I.A. John Feeney, Captain Jefferson and several Lieutenants, to include Henry Bowers. The Warden Robert Tapia and Captain Frederick Jefferson personally observed the use of sandbags,

"Stay-dry" and duct tape around the mentioned Strip-cells - designed to seal in and mask the oppressive stentch of raw human waste; each and every week they continued to turn a blind eye and deaf ear to these tortuous conditions, standing idly by allowing it to continue - for years, as they also witnessed my Strip-cell confinement, and did nothing.

On 8/30/04 & 13 Oct 04 Lieutenant Henry Bowers with deliberate & difference violated my 8th and 14th Amendment of the US Constitution, by depriving me a safe Protective Custody segregation cell, further forcing me to cell with known threatening inmates; Deliberately ignoring duties pertaining to The Code of Federal Regulation SEC 541 and Central Inmate Monitoring (CIM's), Overcrowding my cell against my will, with documented seperations, subsequently causing me to be attacked and Physically injured. On Oct 13, 2004 Lt Bowers with Deliberate & difference made the culpable and malicious decision to confine me "injured" with a threating Mentally-ill inmate, to an unauthorized "Strip-cell" - depriving me of Safety/Protection, Medical care, a bed, water, sink, toilet, adequate out of cell Showers, or cleaning supplies: imposing Cruel & unusual punishment & inhumane treatment unnecessarily and wantonly, without any Penalogical justification for 8 days - Subjecting me to raw human waste and unreasonable risk of harm by suspected virus and/or disease, sickness, Pain from head, face, eye, and leg injuries - visual disability/damage and Mental anguish amounting to Prisoner Torture. The mentioned deprivations by Lt Henry Bowers was done with malice and violates clearly established Prisoner Civil Rights and any human decency which a reasonable person would have known, exceeding exceptional circumstances to sufficiently strip him of any Qualfied Immunity. Cl bring action against Lt Bowers in his Official and Individual Capacity. On or about Oct 17 Associate Warden J.T. Rathman with Deliberate & difference violated my 8th and 14th Amendment, re-confining me to said Strip cell depriving me of the above mentioned minimal civilized measures of lifes necessities - Protection, bed, sink, toilet and humane sanitation; Turning a blind eye and deaf ear to my plea's for a humane cell and improved conditions. Mr Rathman was well aware of the degrading and dehumanizing routine and systematic trash bags being provided, forcing us inmates to utilize these as a latrine, subsequently causing severe health risks and bio-hazards. Cl Suffered significant physical pain, suspected disease/viral sickness and mental anguish as result. Cl bring action in his Official and Individual Capacity. On Oct 15, 2004 Chief Psychologist Dr. Bennett with Deliberate & difference violated my 8th & 14th Amendment - depriving me

USA 10

of Emergency Care/Psychological Services, falsifying records, and stood idly by while I am treated inhumanely - deprived of Protection, bed, sink toilet or Sanitation, which any reasonable person would know. I suffered from a concussion, physical pain and severe mental anguish. I bring suit in Dr Brandt's Official and Individual Capacity. 4) On Oct 19, 2004 Duty Hearing Officer, Milton White, with Deliberate Indifference violated my 8th & 14th Amendment of the US Constitution, depriving me of Due Process - while I was enduring Cruel & Unusual punishment in a Strip-cell (6 consecutive days) Mr. White knowingly & maliciously deprived me the opportunity to challenge the 3 Incident Reports per Admin. Remedy #'s 358655, 359154, 358652 nor was the requisite Staff Rep. assistance of counsel present. I was unconstitutional sanctioned essential to substancial loss of good time/Disciplinary Segregation. Mr. Milton White knowingly deprived me of the Safegards afforded where sanctions may have major changing effects on my conditions of confinement subsequently I have suffered significant prolonged confinement and mental anguish. I bring suit in his Official and Individual Capacity. 5) Warden Robert Tapia with Deliberate Indifference violated my 8th & 14th Amendment, as my keeper, deprived me of Safety while in Protective Custody deficiently enforcing the "Pilot Program" violating the Code of Federal Regulations Sec 541, 18 USC 4042 and 18 USC 4081; Refusing to ensure my CIM's/Seperations are documented implementing policy warehousing prisoners in the SHU in unsanitary and overcrowding conditions. Mr Tapia ignored Memorandems conveying my being housed in (Observation cell #1) Strip-cell, turn a blind eye and stood by idly on or about Oct 14 during his weekly SHU rounds to the Prisoner torture I was subjected to, further defied the CFR and directives to appoint me a Staff Rep per DHO hearing - due to the Cruel & Unusual confinement and my mental state violated my right to Due Process. Mr Robert Tapia on Oct 13-21, 2004 was well aware of the torturous confinement, and did nothing to halt it - causing me significant Physical pain from injuries to head, face, eyes and leg, suspected disease or virus, and severe mental anguish per Strip-cell Conditions. I bring suit in Individual and Official Capacity. On 8/30/04 & 10/13-21/04 6) Captain Frederick Jefferson violated my 8th & 14th Amendment depriving me Safety & Protection while confined to the SHU Deliberately indifferent to my injuries and subsequent Cruel & Unusual punishment/Strip-cell conditions personally allowing his SHU Lt Beavers to utilize Strip-cells to alleviate overcrowding & enforce punishment inhumanely. Individual and Official Capacity suit. 7) Regional Director, ~~et al~~

Ronald G Thompson and BOP Director Harley Lappin both violated my 8th and 14th Amendment by implementing the unauthorized Pilot Program depriving me the victim, the necessary transfer to a safe & suitable institution as dictated by the Code of Federal Regulations (See Admin Remedy #369161) knowingly with Deliberate Indifference warehousing me in a deficient Cost Cutter Pilot Program depriving me Safety, adequate Medical Care, Psychological Services and freedom from a Torture Chamber / Strip-cell - said two officials ignore the Routed Reports by Warden Tapia on Oct 13, 2004 conveying a "Third Alert" and my numerous Appeals for remedy, specifically the "Sensitive Appeals convey Corruption, lax in Security, and inhumane treatment. I wish to sue in there Official Capacity for the numerous injuries suffered on 10/13 and the ~~Pain~~ Viral & Mental Sickness caused by the inhumane Prisoner Torture here at USP-Pollock.

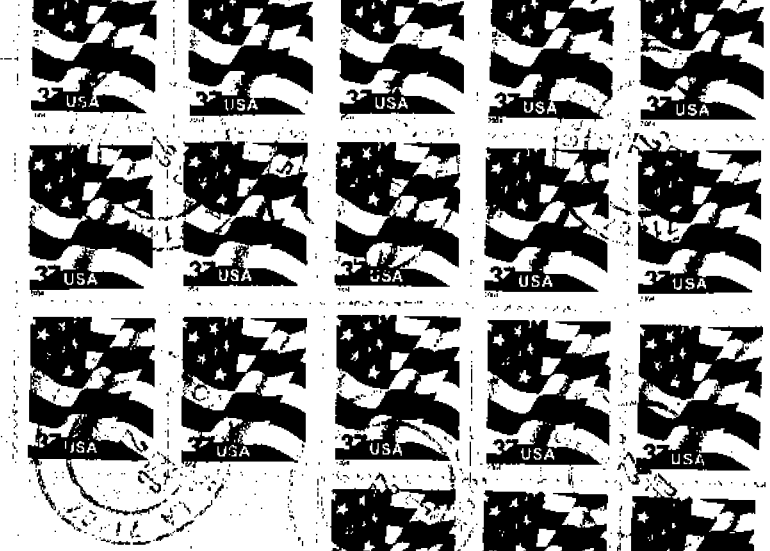
I inmate Steven Aubrey Burnette hereby seek Preliminary Injunctive Relief barring my being housed in a Penitentiary or Gang Institution - further a institution which can accomodate my Chronic Medical & Psychological needs. I also seek Prospective Relief per Prison Release Order 18 USC 3626 - A Three Judge Panel to preside - If three Judge Court is denied, prisoner then opts for a Jury trial. Prisoner seeks $16,350,000.00 for injuries sustained, Pain & Suffering / Mental Anguish

Plaintiff wishes to sue the Bureau of Prisons and the Eight Named Defendants in this Amendment; all other Defendants previously mentioned, but not Named in this Amendment shall be dismissed. Please See Exhibits A-V and the Exhausted Administrative Remedy Appeals #'s 375156, 367583, 359260, 369161, 358655, 359154, 358652 and Exhausted Psychological Services grievance Already in Courts Possession.

December 20, 2005 Sincerely, Steven Aubrey Burnette

United States Penitentiary-Pollock
P. O. Box 2099
Pollock, Louisiana 71467

7004 2890 0001 7855 1551



Special mail
Legal mail

Clerk, United States District Court
Western District of Louisiana
U.S. Courthouse
300 Fannin Street. Suite 1167
Shreveport, Louisiana 71101-3083

12/21/05
Return Receipt Requested"

Case 1:05-cv-01804-DDD-JDK Document 19 Filed 12/27/2005 Page 11 of 12

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

"Return Receipt Requested"



UNITED STATES PENITENTIARY
POLLOCK
POLLOCK, LA
DATE 12-22-05

THE ENCLOSED LETTER WAS PROCESSED THROUGH SPECIAL MAILING PROCEDURES FOR FORWARDING TO YOU. THE LETTER HAS BEEN NEITHER OPENED NOR INSPECTED. IF THE WRITER RAISES A QUESTION OR PROBLEM OVER WHICH THIS FACILITY HAS JURISDICTION, YOU MAY WISH TO RETURN THE MATERIAL FOR FURTHER INFORMATION OR CLARIFICATION. IF THE WRITER ENCLOSES CORRESPONDENCE FOR FORWARDING TO ANOTHER ADDRESSEE, PLEASE RETURN THE ENCLOSURE TO THE ABOVE ADDRESS.

11/09

RECEIVED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHEMWELL, CLERK
SHREVEPORT, LOUISIANA
DATE 11.09.05

amended complaint

RECEIVED
NOV 0 8 2005
ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

Clerk of Court
Western District of Louisiana
Attn: Honorable Robert Shemwell
Case # 1:05 CV01804 Sec P

Steven Aubrey Burnette #08307-084
United States Penitentiary-Pollock
P.O. Box 2099
Pollock, LA 71467

RE: Petitioners request to seek action against defendants in their Official and Individual Capacity.

Dear Sir,

I Steven Aubrey Burnette hereby request permission to clarify intent of the Civil Rights Act §1983 Complaint and/or amend such, to include the following previously named defendants in their Official and Individual Capacities.

1) Warden Robert Tapia
2) Associate Warden J.T. Rathman
3) Captain Frederick Jefferson
4) Lieutenant Henry Bowers
5) Lieutenant Mr. Bynum
6) Chief Psychologist Randy Brandt
7) HSA Dr. Passao
8) FSA/ Mr. Freeze

The above mentioned defendants actively participated in denying P/C Prisoner protection, making the culpable decision to confine Steven Burnette injured with a Mentally-ill homosexual inmate known to be a threat to self and others, and a high Risk carrier of potentially fatal infectious disease. Burnette and described inmate were forced to share an unauthorized "Strip-cell", denied a bed, sink, or toilet, exposed to disease by utilizing a Plastic trash bag as alternative to a latrine, urinating and defacating

into inefficient bags, enduring horrid unsafe, unsanitary, and inhumane treatment/conditions.

The said defendants conduct by Deliberate Indifference violates clear established Prisoner Civil Rights and any human decency which a reasonable person would have known, and exceeds exceptional circumstance to sufficiently strip the said Prison Officials of any Qualified Immunity.

I inmate Steven Aubrey Burnette request that the named defendants be listed not only in their Official Capacity but their individual capacity as well, and the damages sought are as specified per Complaint $16,350,000.00 to be shared equally. In the event that the sum certain requested exceeds the maximum allowed, then petitioner seeks the maximum, to include expenses and fee's incurred.

Prisoner respectfully submits request Pro-Se in hopes that the Clerk and Courts will apply a less stringent standard than formal pleadings or motions drafted by lawyers.

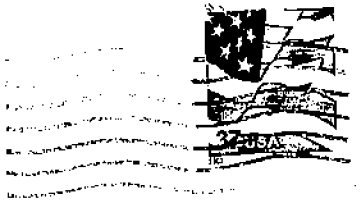
With utmost respect.

November 03, 2005 Sincerely, Steven Aubrey Burnette

Steven Aubrey Burnette #08307-084
United States Penitentiary Pollock
P.O. Box 2099
Pollock, LA 71467

"Special Mail"
"Legal Mail"





Clerk of Court
US District Court, Western District
300 Fannin Street
Shreveport, LA 71101-3083

71101+3141

UNITED STATES PENITENTIARY
POLLOCK
POLLOCK, LA
DATE 11-05-05

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RECEIVED
SEP 25 2006
ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

Form to be used by a prisoner filing a civil rights complaint under THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

Steven A. Burnette
Full Name of Plaintiff, Prisoner Number

1:06CV1396 SecP
Civil Action

VS.

Drell
Judge

US Bureau of Prisons, et al
Defendant

Kirk
Magistrate Judge

COMPLAINT

I. Previous Lawsuits

A. Have you begun any other lawsuit while incarcerated or detained in any facility?
Yes [X] No [ ]

B. If your answer to the preceding question is yes, provide the following information.

1. State the court(s) where each lawsuit was filed (if federal, identify the District; if state court, identify the county or parish):

U.S. District Court - Western District of Louisiana

2. Name the parties to the previous lawsuit(s):

Plaintiffs: Steven Aubrey Burnette

Defendants: Federal Bureau of Prisons Et. Al.

3. Docket number(s): 1:05 CV 1804

4. Date(s) on which each lawsuit was filed: Oct 11, 2005

5. Disposition and date thereof [For example, was the case dismissed and when? Was it appealed and by whom (plaintiff or defendant)? Is the case still pending?]:

USDC dismissed 4/06 - Pending US Court of Appeals

C. Have you filed any lawsuit or appeal in any federal district court or appeals court which has been dismissed?
Yes [X] No [ ]

If your answer to the preceding question is yes, state the court(s) which dismissed the case, the civil action number(s), and the reason for dismissal (e.g., frivolity, malice, failure to state a claim, defendants immune from relief sought, etc.).

Yes - USDC 1:05 CV1804 dismissed for failure to state a claim - Pending Appeal in 5th Circuit C of A.

II. A. Name of institution and address of current place of confinement:

US Penitentiary - Beaumont, P.O. Box 26030 Beaumont, Tx 77720

B. Is there a prison grievance procedure in this institution?
Yes [X] No [ ]

1. Did you file an administrative grievance based upon the same facts which form the basis of this lawsuit?
Yes [X] No [ ]
If Yes, what is the Administrative Remedy Procedure number? 378368 367583

2. If you did not file an administrative grievance, explain why you have not done so.

N/A

3. If you filed an administrative grievance, answer the following question.
What specific steps of the prison procedure did you take and what was the result? (For example, for state prisoners in the custody of the Department of Public Safety and Corrections: did you appeal any adverse decision through to Step 3 of the administrative grievance procedure by appealing to the Secretary of the Louisiana Department of Public Safety and Corrections? For federal prisoners: did you appeal any adverse decision from the warden to the Regional Director for the Federal Bureau of Prisons, or did you make a claim under the Federal Tort Claims Act?)

Exhausted All levels of Admin. Remedies And Follow-up with a Federal Tort Claim.

Attach a copy of each prison response and/or decision rendered in the administrative proceeding.

III. Parties to Current Lawsuit:

A. Name of Plaintiff Federal Bureau of Prisons

Address 320 First St. NW. Washington DC 20534

B. Defendant, UNKnown INsurance Co., is employed as General liability Insurer at _____.

Defendant, _____, is employed as

_____ at _____.

Defendant, _____, is employed as

_____ at _____.

Additional defendants _____

_____

IV. Statement of Claim

State the **FACTS** of your case. Specifically describe the involvement and actions of each named defendant. Include the names of all persons involved in the incident(s) or condition(s) giving rise to this lawsuit, and the dates upon which and the places where the incident(s) and/or condition(s) occurred. **YOU ARE REQUIRED TO SET FORTH ONLY FACTUAL ALLEGATIONS. YOU ARE NOT REQUIRED TO SET FORTH LEGAL THEORIES OR ARGUMENTS.**

I was deprived of a Safe & Suitable Housing Unit.

The Defendants were indifferent and grossly negligent. I aim to sue under the Federal Tort Claim Act For Negligent Supervison & personal Injury. Please See Attached Complaint.

V. **Relief**

State exactly what you want the court to provide to you or do for you. Make no legal arguments. Cite no cases or statutes.

Prisoner Seeks Compensatory and punitive damages for pain & suffering, Mental Anguish, and disability in the Amount of: $1,800,000.00 (One million eight Hundred Thousand)

VI. Plaintiff's Declaration

A. **I declare under penalty of perjury that all of the facts represented in this complaint and any attachments hereto is true and correct.**

B. I understand that if I am transferred or released, I must apprise the Court of my address, and my failure to do so may result in this complaint being dismissed.

C. I understand that I may not proceed without prepayment of costs if I have filed three lawsuits and/or appeals that were dismissed on grounds that the action and/or appeal was frivolous or malicious, or failed to state a claim upon which relief may be granted, unless I am in imminent danger of serious physical injury.

Signed this 20th **day of** September, 2006.

#08307-084
Prisoner no. (Louisiana Department of Corrections or Federal Bureau of Prisons)

Steven Aubrey Burnette
Signature of Plaintiff

4/06

FTCA
Tort Action - Negligent Supervision

Steven Aubrey Burnette Pro-Se
U.S. Penitentiary - Beaumont
P.O. Box 26030
Beaumont, Texas 77720

US District Court
Western District of Louisiana

Steven Aubrey Burnette

Civil Division

Vs.

Federal Bureau of Prisons
and
UNKNOWN General Liability Insurer

Civil Action - Personal Injury

Premises liability, Negligent Supervision, resulting in Physical Attack-causing Serious Injury with subsequent permanent disability.

1.) Plaintiff, Steven Aubrey Burnette is an adult individual and Prisoner incarcerated at USP-Beaumont P.O. Box 26030 Beaumont, Texas 77720.

2) The location and address where defendant was injured was USP-Pollock, US Penitentiary-Pollock Airbase Rd. Pollock, Louisiana 71467

3) The defendants, Federal Bureau of Prisons and their UNKNOWN Insurance Company are in the business

of housing Federal inmates.

4) ON or about June 09, 2004 at approximately 6:04 pm plaintiff was physically Attacked in the housing unit, and beaten Severely with a weapon. The perpatrators and gang affiliates, being unmonitored, easily hid in strategic areas - shower stalls and cells, and ambushed the unsuspecting victim/Plaintiff, subsequently carrying out a vicious attack with metal Combination locks attached to a belt/and in a sock.

5) The defendants knew or should have known these inmates, and their gang, Texas Aryan Brotherhood were dangerous, given their numerous attacks-"Hits" on several inmates thusfar. The defendants also should have known the dangers posed by an Unmonitored Housing Unit- The Unit Officer was not in his assigned Unit nor were the Surveillance Camera's beinging observed by Officers in Control.

6) ON the date and time aforesaid, the defendant had under its care, direction, and control of the said Housing Unit and had a duty to Monitor said area to ensure Safe passage and dwelling.
The mere presents of an assigned Housing Unit Officer would have deterred and prevented Such a planned and Savage attack which went unnoticed- lasting approx. 21 minutes.
The defendants have a duty to provide a Safe & Suitable Institution and reasonable measures of protection for

those lawfully traversing said area.

7.) ON the date and time aforesaid, plaintiff, Steven Aubrey Burnette was lawfully traversing in said area, at which time he was ambushed and savagely attacked by an inmate gang, thereby sustaining certain injuries which are hereafter more particularly set forth.

8.) The said Serious Assault was facilitated by and the result of the defendants negligence, and was due in no manner what so ever to any act or failure to act by the plaintiff.

9.) The negligence of the defendants consisted of the following:

a. Allowing threatening Gang members and affiliates to roam unmonitored.

b. Continuing to sell and/or make available Metal Combination locks which were commonly known as a weapon of Choice amongst inmate gangs.

C. Failing to ensure assigned Housing Unit Officer is in his assigned area.

D. Housing Unit Officer's Failure to monitor his assigned unit or make Security rounds at reasonable intervals

E. Supervising Lieutenants Failure to ensure delegated Officers were in assigned areas as reasonably expected.

F. Disregarding the rights and safety of plaintiff when traversing said area.

g. Violating Policy, and the Code of Federal Regulations pertaining to Security & Safety and monitoring the Housing Units and/or surveillance Camera's and provide reasonable protection.

H. Otherwise Failing to use due care, and take preventive measures under the circumstances, as well may be pointed out during the discovery and trial phases of this matter.

I. Directing the plaintiff to leave the confines and protection of the Special Housing Unit (SHU) to re-enter a virtually ungarded general population and unacceptable dangers.

J. Control's failure to recognize an inmate entering a Shower stall Fully clothed and armed with a lock on a belt as odd and potentially dangerous behavior.

K. Control's failure to radio the assigned unit officer or other, while assault was in progress, in plain view, for a prolonged period.

10.) The allegations contained in paragraphs 1 thru 9 above are incorporated by reference as though set forth in full.

11.) As result of defendants negligence, plaintiff, Steven Burnette sustained serious personal injuries to head, body, and limbs; more particularly, he suffered: right eye orbital fractures, Temporal Fractures, cheek bone Fracture: Crushed Sinus Cavity, Fractured jaw, two broken moler teeth,

(2) two lacerations to head, (2) two lacerations to right eye, laceration to mouth & lip, torn ligaments in right knee, multiple contussions, a cuncussion, shock and injury to his Nerves and nervous system and he was otherwise injured.

12.) All of the above injuries are serious and permanent except those of a superficial nature. All of the foregoing injuries have rendered plaintiff, Steven Burnette, Sick, Sore, lame, prostrate, disabled and disordered and have made him undergo great mental anguish and physical pain as a result of which he has suffered, yet suffers, and will continue to suffer for an indefinate time in the future.

13) As a further result of this attack and injury, plaintiff, Steven Burnette may in the future continue to suffer great pain and agony and he may be prevented from attending to his usual daily work and occupation to his great financial damage and loss.

14) As a further result of this attack, plaintiff has suffered an injury which is in full or part a casmetic disfigurement which may be permanent, irrepairable and severe

Wherefore, plaintiff, Steven Burnette demands judgement against the defendants, in an amount in excess of ONE Million Eight hundred thousand ($1,800,000.00) Dollars, plus cost of this suit.

Steven Aubrey Burnette

~~August 08, 2006~~

September 20, 2006

Steven Aubrey Burnette
Pro-SE

Case No. 1:06 CV 1396

To The Unite States Court my Name IS Cirilo Perez Iam Inmate Steven Burnettes Room mate We Are In The SHU, The Hole, Burnette IS Having Problems Getting Necessary Assistance from His Unit Team on any And All legal matters And They Have not Provided Him with The Proper financial Statement He Needs

Sincerely
Cirilo Perez

9-20-06 Cirilo Perez #86729-079

RECEIVED

SEP 25 2006

ROBERT H. SHEMWELL, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

District Court 1:06 cv 1396
Western District of Louisiana

I Steven Aubrey Burnette, under the penalty of perjury, swear that my Amended Complaint per Case # 1:06 cv 1396 was placed in the US Penitentiary Beaumont Institutional Mail on September 20, 2006.

Sept. 20, 2006

Steven Aubrey Burnette

Steven Aubrey Burnette
USP Beaumont
P.O. Box 26030
Beaumont, Texas 77720

Steven Aubrey Burnette #08307-084
United States Penitentiary - Beaumont
P.O. Box 26030
Beaumont, Texas 77720



Filed 09/25/2006
Document 5
Case 1:06-cv-01396-DDD-JDK

"Special Mail"
"Legal Mail"

United States District Court
Western District of Louisiana
Office of the Clerk
Attn: Suzanne Delgado, Deputy Clerk
300 Fannin St., Suite 1167
Shreveport, LA. 71101-3083

20 Pages

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
RECEIVED - ALEXANDRIA

MAY 15 2007

ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

STEVEN AUBREY BURNETTE	CIVIL ACTION NO. 06-1396-A
VERSUS	JUDGE DEE D. DRELL
U. S. BUREAU OF PRISONS	MAGISTRATE JUDGE KIRK

JUDGMENT

Plaintiffs have failed to comply with the Order of the Court issued on December 6, 2006.

Accordingly, this case is ORDERED DISMISSED WITHOUT PREJUDICE for failure to prosecute.

Alexandria, Louisiana, May 15, 2007.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

STEVEN AUBREY BURNETTE	CIVIL ACTION NUMBER 1:05-CV-1804
VERSUS	JUDGE DRELL
BUREAU OF PRISONS, ET AL	MAGISTRATE JUDGE KIRK

and

STEVEN AUBREY BURNETTE	CIVIL ACTION NUMBER 1:06-CV-1396
VERSUS	JUDGE DRELL
U S BUREAU OF PRISONS, ET AL	MAGISTRATE JUDGE KIRK

MINUTES OF SETTLEMENT CONFERENCE

Tuesday, April 27, 2010 Court Began: 9:00 AM Court Ended: 6:30 PM
Statistical Time: 9 hours and 30 minutes

PRESENT:	KAREN L. HAYES	MAGISTRATE JUDGE
	FTR Gold	Court Reporter
	Amy Crawford	Courtroom Deputy
	Steven A Burnette	Plaintiff
	Karen J. King	Attorney representing Defendants
	Jennifer Hansen	Attorney representing Bureau of Prisons

PROCEEDINGS: Settlement Conference

After mediation with all parties, a final settlement was reached in these matters.

Case number **1:06-CV-1396**:
Defendants agree to pay plaintiff $35,000, less restitution due of $4,449. Plaintiff agrees to accept the $35,000 payment, less the withheld restitution, in full settlement of the claims in this matter and his agreement to voluntarily dismiss case number **1:05-CV-1804**.

A settlement agreement signed by all parties will be submitted to the Judgment Fund and the Judgment Fund will electronically transfer the funds to the account of plaintiff's choice. Plaintiff's mother will contact AUSA Karen King with the proper account number.

Additionally the US Attorney agrees not to pursue charges against plaintiff for false statements made to a federal agent during the investigation of an alleged assault against him on or about August 2 and 4, 2006 in Beaumont, TX.

The funds received by plaintiff in settlement of this tort claim are not considered taxable income.

The Court will enter a 60 Judgment of Dismissal without prejudice and administratively close both cases, subject to either party reopening the cases to enforce settlement. The parties will file a Motion to Dismiss **with prejudice** within 60 days for final dismissal of these actions.

All counsel and parties acknowledged and agreed to the terms of the settlement as stated by Judge Hayes, Mr. Burnette, Ms. King and Ms. Hansen.

The settlement and terms thereof are public record.

RECEIVED
IN ALEXANDRIA, LA.
APR 28 2010
TONY R. MOORE, CLERK
BY DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

STEVEN AUBREY BURNETTE — **CIVIL DOCKET NO. 1:106-cv-01396**

-vs- — **JUDGE DRELL**

U. S. BUREAU OF PRISONS, et al. — **MAGISTRATE JUDGE KIRK**

ORDER OF DISMISSAL

The Court having been advised by counsel for the parties that this matter has been settled,

IT IS ORDERED that this action is DISMISSED, without prejudice to the right, upon good cause shown within sixty (60) days of the signing of this Order, to reopen the action if settlement is not consummated. **The Clerk is now requested to close this case.**

IT IS FURTHER ORDERED that the parties submit to the Court, in accordance with Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, a stipulation of dismissal signed by all applicable parties, together with a judgment for execution by the Court. Any motion that may be pending in this case is hereby denied as moot.

SIGNED on this 28th day of April, 2010, at Alexandria, Louisiana.

DEE D. DRELL
UNITED STATES DISTRICT JUDGE

ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG - 6 2007
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

HENRY LINDSEY, Plaintiff,	§	4-07CV-461-Y
VS.	§	CASE NO. _____
FEDERAL BUREAU OF PRISONS; COLE JETER, Warden; HERNAN REYES, M.D.; PAUL CELESTIN; and In their Individual and official capacities; Defendants; WILLY FELICIANO; Interested Party.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff, HENRY LINDSEY, pro se, complaining of the defendants deliberate indifference to his serious medical needs and negligence to provide adequate medical care while acting within their scope of their employment or office as prison officials.

A. Jurisdiction

1. This Court has jurisdiction over plaintiff's individual claims pursuant to the United States Constitution, Article III, § 2, cl. 1; and 28 U.S.C. § 1346(b) Federal Tort Claims Act. This civil rights action is brought pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

B. Venue

2. The Northern District of Texas is an appropriate venue 28 U.S.C. § 1391(b)(2), (e)(2); because a substantial part of the events or omissions giving rise to the claims occurred in this district.

C. Exhaustion of Administrative Remedies

3. Plaintiff has exhausted all available administrative remedies regarding the matters described in this complaint pursuant to the Prison Litigation Reform Act of 1996.

D. Conditions Precedent

4. Plaintiff has satisfied all conditions precedent.

E. The Parties

5. Plaintiff, HENRY LINDSEY, is a resident of the State of Texas and has been a federal inmate committed to the custody of the FEDERAL BUREAU OF PRISONS at the Federal Correctional Institute - Fort Worth at all times relevant to the acts or omissions that give rise to this action.

6. Defendant, FEDERAL BUREAU OF PRISONS, is an agency of the United States Department of Justice which operates a national prisons system and is responsible for the care, health, and welfare of all federal prisoners committed to its custody. All of the other defendants were employed by or contracted with defendant, FEDERAL BUREAU OF PRISONS, at all times relevant to the acts or omissions that give rise to this action.

7. Defendant, COLE JETER, at all times relevant to the acts and omissions relevant to this case, was the Warden at Federal Correctional Institute - Ft. Worth; and as such, was ultimately responsible for the safe operation of the institution and the general welfare of all inmates incarcerated therein. Defendant, COLE JETER, is a policy maker and the Chief Executive Officer at Federal Correctional Institute - Ft. Worth and is a member of the Institution Governing Board that reviews and authorizes appointments and privileges of staff, biomedical ethics, performance improvement activities, and "other pertinent health service issues." Defendant, COLE JETER, is no longer a Warden, having retired from his employment with the FEDERAL BUREAU OF PRISONS and was replaced by Rebecca Tamez. Defendant, COLE JETER, is sued in his Individual and official capacities.

8. Defendant, HERNAN REYES, M.D., at all times relevant to this case, was the Clinical Director at Federal Correctional Institute - Fort Worth; and as such, was responsible for: 1) clinical care provided at the institution; 2) implementing and monitoring in-house Continuing Professional Education training; 3) maintaining the quality of health records; 4) evaluating patient care through an on-going quality assurance program that identifies problems and their resolutions; 5) provide clinical supervision of mid-level practicioners and other personnel; 6) review all unusual and interesting cases; and 7) submit to defendant, PAUL CELESTIN, at least quarterly, Performance Log recommendations regarding each medical staff's performance. As Clinical Director, defendant, HERNAN REYES, M.D., was a member of the Institution Governing Board and is the person who made policy or administered

policy with and through some or all of the other defendants. Defendant, HERNAN REYES, M.D., is sued in his Individual and official capacities.

9. Defendant, Paul Celestin, at all times relevant to this case, was the Health Services Administrator at Federal Correctional Institute - Fort Worth; and as such, was responsible for: 1) planning, directing and controlling all aspects of the Health Services Division administration which includes housekeeping, sanitation, maintenance, personnel, fiscal, procurement, and supply; 2) supervision and direction of ancillary departments including pharmacy, nursing, laboratory, and health records; 3) provide administrative supervision and direction of health service staff, except the Clinical Director, including designation of shifts and assignments of general and specific duties; 4) administrative supervisory responsibility for mid-level practicioners and para-professional staff; and 5) maintains Performance Logs of all Health Services staff excluding the Clinical Director. As the Health Services Administrator, defendant Paul Celestin is a member of the Institution Governing Board and is responsible for administering policy with or through some or all of the other defendants. Defendant, PAUL CELESTIN, is sued in his Individual and official capacity.

10. Interested Party WILLY FELICIANO, at all times relevant to this case, was employed by or contracted with defendant, FEDERAL BUREAU OF PRISONS, as a mid-level practicioner; and as such, performed medical duties and procedures on plaintiff. WILLY FELICIANO, is responsible for the operation of "Sick Call", providing routine clinical and emergency medical care to inmates,

administering medications, and carrying out the policy of some or all of the other defendants. WILLY FELICIANO, is not licensed to provide medical care in the State of Texas or any other state in the United States of America.

F. Statement of Facts

11. WILLY FELICIANO, has not received proper and adequate training to examine, evaluate, diagnose, and treat persons with impaled or lodged foreign objects in an ear canal.

12. WILLY FELICIANO, does not have the skills necessary to treat persons with impaled or lodged foreign objects in an ear canal.

13. WILLY FELICIANO, has a well-established extended history of providing negligent medical care to inmates at Federal Correctional Institute - Fort Worth.

14. On March 28, 2006, defendants; FEDERAL BUREAU OF PRISONS; COLE JETER; HERNAN REYES, M.D.; and PAUL CELESTIN; knew that WILLY FELICIANO, was improperly and inadequately trained to examine, evaluate, diagnose, and treat persons with impaled or lodged foreign objects in an ear canal.

15. On March 28, 2006, defendants; FEDERAL BUREAU OF PRISONS; COLE JETER; HERNAN REYES, M.D.; and PAUL CELESTIN; knew that WILLY FELICIANO, was deficient in the skills necessary to treat persons with impaled or lodged foreign objects in an ear canal.

16. On March 28, 2006, or at any other time, defendants; FEDERAL BUREAU OF PRISONS; COLE JETER; HERNAN REYES, M.D.; and PAUL CELESTIN; did not restrict WILLY FELICIANO's medical privileges to prohibit him from examining, evaluating, diagnosing, or treating persons with an impaled foreign object in an ear canal.

17. On March 28, 2006, defendants; FEDERAL BUREAU OF PRISONS; COLE JETER; HERNAN REYES, M.D.; and PAUL CELESTIN; failed to provide adequate and necessary training to WILLY FELICIANO, on examining, evaluating, diagnosing, and treating persons with an impaled foreign object in an ear canal.

18. On March 28, 2006, plaintiff was taking a test in an educational program at Federal Correctional Institute - Ft. Worth.

19. On March 28, 2006, during the test, plaintiff inserted the eraser-end of a pencil into his right outer ear to scratch an itch.

20. When plaintiff was scratching his ear with the pencil eraser the pencil eraser separated from the pencil and became lodged in the entrance of plaintiff's right ear canal.

21. At approximately 11 a.m. on March 28, 2006, plaintiff reported the lodged pencil eraser to nurse V. Sayarath. Plaintiff informed nurse V. Sayarath that he was not in any pain. Nurse V. Sayarath instructed plaintiff to return to the clinic at 1 p.m. later that same date.

22. On March 28, 2006, at 1 p.m., plaintiff returned to the clinic as instructed. Plaintiff still suffered no pain from the lodged pencil eraser in his right ear.

23. On March 28, 2006, at 1 p.m., WILLY FELICIANO examined plaintiff's right ear and evaluated plaintiff's condition and decided to remove the lodged pencil eraser from the entrance of the right ear canal.

24. Immediately after examining plaintiff, WILLY FELICIANO attempted to remove the lodged pencil eraser with a forceps.

During the procedure WILLY FELICIANO did not use a suction device and pushed the pencil eraser deep into plaintiff's right ear canal causing a laceration to the ear canal wall resulting in immediate pain and swelling of plaintiff's right ear.

25. On March 28, 2006, nurses Kelly Mendias and V. Sayarath witnessed WILLY FELICIANO perform the failed procedure on plaintiff.

26. On March 28, 2006, after the failed procedure WILLY FELICIANO re-evaluated plaintiff's condition and determined plaintiff needed urgent care at an emergency department. Prison officials promptly transferred plaintiff via an institutional van to John Peter Smith hospital in Fort Worth, Texas.

27. On March 28, 2006, plaintiff was examined by a physician in the above named hospital's emergency department. The unknown physician angrily asked plaintiff why he pushed the pencil eraser into his ear canal. Plaintiff replied that WILLY FELICIANO pushed the pencil eraser so deep into the ear canal. The physician remarked that WILLY FELICIANO's failed procedure made it more difficult to remove the lodged pencil eraser. The physician then unsuccessfully attempted to remove the well-lodged pencil eraser from plaintiff's right ear canal. After the physician was unable to remove the pencil eraser from plaintiff's ear, he instructed the two (2) escorting officers of the FEDERAL BUREAU OF PRISONS to bring plaintiff back to the emergency department on March 29, 2006, to enable an ear, nose, and throat specialist to remove the lodged pencil eraser from deep within plaintiff's right ear canal before an infection developed.

28. On March 28, 2006, the plaintiff was returned from the

hospital to Federal Correctional Institute - Ft. Worth. WILLY FELICIANO reviewed the discharge instructions for plaintiff which instructed prison officials to return plaintiff to the emergency department on the next day.

29. On March 29, 2006, plaintiff was not transported back to the emergency department nor seen by any medical staff at Federal Correctional Institute - Ft. Worth.

30. On various dates and times, beginning on March 30, 2006, continuing through April 6, 2006, plaintiff advised defendant, PAUL CELESTIN, that he was suffering from headaches, dizziness, sleep deprivation, and pain around his eyes. Defendant, PAUL CELESTIN, told plaintiff that he could not keep paying officers to transfer plaintiff out to a community healthcare provider and that "we are going to get it out right here. A specialist will get it out right here."

31. Beginning on March 29, 2006, continuing through May 3, 2006, defendant, HERNAN REYES, M.D., knew of plaintiff's medical condition and need for surgery to remove the lodged pencil eraser; and that defendant, HERNAN REYES, M.D., intentionally delayed the surgery plaintiff needed.

32. On April 7, 2006, Randall R. Phillips, D.O., who is an ear, nose, and throat specialist, examined plaintiff at the institution. Randall R. Phillips, D.O. told plaintiff the pencil eraser must be removed while plaintiff is under general anesthesia and recommended to prison officials to schedule the pencil-eraser-removal surgery.

33. On April 7, 2006, after being examined by the ear, nose, and throat specialist, plaintiff notified defendant, COLE JETER,

he has been and was in pain and needed medical care. Defendant, COLE JETER, responded two (2) or three (3) separate times: "Mr. Lindsey, anyone who did what you did, it needed to hurt." Defendant, COLE JETER, also stated, "our schedule is not the same as the doctor's schedule."

34. Later that same day, on April 7, 2006, plaintiff also approached defendant, PAUL CELESTIN and informed defendant he is still in pain and his daily tasks are disrupted by his ear condition. Defendant, PAUL CELESTIN, told plaintiff to "hang-in there."

35. On April 19, 2006, plaintiff was examined by Dr. Huber, who is a medical officer employed by the FEDERAL BUREAU OF PRISONS. During the visit at Dr. Huber's office, Dr. Huber made two (2) telephone calls to health services staff to inquire what was causing the delay for plaintiff's eraser-removal procedure by the ear, nose, and throat specialist. After the second telephone call, Dr. Huber advised plaintiff the procedure had not even been scheduled yet.

36. On April 24, 2006, Dr. Huber told plaintiff that his eraser-removal procedure had been scheduled, "but not real soon. This is an on-going problem and you [plaintiff], must hold the [FEDERAL] BUREAU OF PRISONS responsible for all damage, pains, and suffering that it has caused you [plaintiff], and for staff acting unprofessionally with deliberate indifference."

37. On May 3, 2006, plaintiff underwent the eraser-removal procedure which was successful.

38. On May 25, 2006, Dr. Huber examined plaintiff's right ear, noted mild redness, and prescribed neomycin/poly B/HC Otic

suspension (prescription number 395039) for the right ear infection.

39. On June 8, 2006, plaintiff attended "Sick Call" because his right ear infection became more painful. Dr. Huber prescribed a more powerful medication, acetic acid 2% in aqueous acetate otic solution (prescription number 395861). Plaintiff advised Dr. Huber he now has diminished hearing in his right ear. Dr. Huber responded that plaintiff has scar tissue in the right ear canal caused by the eraser-removal procedure, and said scar tissue is causing the hearing loss which will be permanent and life-long.

G. Count 1 - Violation of Plaintiff's Eighth Amendment Right to Be Free From Cruel & Unusual Punishment

40. Plaintiff alleges and incorporates by reference paragraphs 1 through 39 as if fully set forth herein.

41. The defendant's deliberate indifference to plaintiff's serious medical needs violated plaintiff's rights, and constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

42. That as a consequence of the defendants deliberate indifference to plaintiff's serious medical needs, plaintiff sustained conscious pain and suffering, physical injury, great mental distress, great emotional distress, fright and humiliation, and has been rendered partially disabled and so remains.

H. Count 2 - Federal Tort Claims Act

43. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 39 as if fully set forth herein.

44. Plaintiff brings claims against defendant, FEDERAL BUREAU OF PRISONS, pursuant to the Federal Tort Claims Act for any and all damages attributable to the FEDERAL BUREAU OF PRISONS' own negligence or for any injury caused by the negligent or wrongful act or omission of any employee of the FEDERAL BUREAU OF PRISONS while acting within the scope of their employment or office.

45. That as a consequence of the defendants' negligence, plaintiff sustained conscious pain and suffering, physical injury, great mental distress, great emotional distress, fright and humiliation, and has been rendered partially disabled and so remains.

I. Damages

46. Plaintiff asks the Court to award him the following damages:

A. Compensatory damages;

B. Past pain and suffering;

C. Past mental anguish;

D. Physical impairment;

E. Exemplary damages;

F. Nominal damages;

G. Special damages;

H. All costs and fees to prosecute this case;

I. Declaratory relief; and

J. Any other relief the Court deems fair and just.

HEREWITH, the Plaintiff's Original Complaint is respectfully submitted on this, the 7/27/07 day of July, 2007.

Henry Lindsey

HENRY LINDSEY
No.
P.O. Box 15330
Ft. Worth, TX 76119-0330

Plaintiff, pro se

VERIFICATION

I, Henry Lindsey, verifies, under penalty of perjury that the facts stated in this complaint are true and correct pursuant to 28 U.S.C. § 1646(2). This attestation is made by the plaintiff having personal knowledge of the matters verified as being true and correct.

VERIFIED in Fort Worth, Texas on this 7/27/07 day of July, 2007.

Henry Lindsey

HENRY LINDSEY
Plaintiff, pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HENRY LINDSEY,	§	
(BOP No. 08239-002)	§	
VS.	§	CIVIL ACTION NO.4:07-CV-461-Y
	§	
	§	
UNITED STATES OF AMERICA, et al.	§	

FINAL JUDGMENT

In accordance with the Stipulation of Dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii) filed by all parties who have appeared and Federal Rule of Civil Procedure 58, all of Plaintiff's claims are DISMISSED WITH PREJUDICE. All costs of court are taxed against the party that incurred them.

SIGNED April 21, 2010.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 16 2009
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HENRY LINDSEY,	§	
(BOP No. 08239-002)	§	
VS.	§	CIVIL ACTION NO.4:07-CV-461-Y
	§	
	§	
FEDERAL BUREAU	§	
OF PRISONS, et al.	§	

ORDER GRANTING MOTION TO SEAL DEFENDANTS' EXHIBIT D TO THE MOTION FOR SUMMARY JUDGMENT

On April 15, 2009, Defendants filed a motion to file Exhibit D to the Appendix in support of the motion for summary judgment under seal. After review and consideration of the motion, the Court concludes that is should be granted.

Therefore, the motion to seal (docket no. 32) is GRANTED such that the Exhibit D attached to Defendants' Appendix filed in support of the motion for summary judgment shall be filed under seal.[1]

SIGNED April 16, 2009.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

[1]This Order and the motion to seal do not need to be placed under seal.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HENRY LINDSEY,	§	
(BOP No. 08239-002)	§	
	§	
VS.	§	CIVIL NUMBER . 4:07-CV-461-Y
	§	
FEDERAL BUREAU OF PRISONS,	§	
et al.	§	

ORDER GRANTING MOTION TO ENLARGE TIME

Came on for consideration the Motion to Enlarge Time to File Dispositive Motions filed by Defendants, the Federal Bureau of Prisons, Warden Cole Jeter, Dr. Hernan Reyes, and Paul Celestin. The Court, having considered said motion, the pleadings on file, and the arguments of counsel, is of the opinion that said motion is well taken and should be granted.

Therefore, the motion to enlarge time (docket no. 24) is GRANTED such that the time for Defendants to file any dispositive motions based upon their defense of qualified immunity or other defenses arising from the pleadings that they believe are ripe to assert is hereby extended to Wednesday, April 8, 2009.

Signed March 4, 2009.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HENRY LINDSEY, (BOP No. 08239-002)	§	
Plaintiff,	§	
v.	§	No. 4:07-CV-461-Y
FEDERAL BUREAU OF PRISONS, et al.,	§	
Defendant.	§	

ORDER GRANTING MOTION TO ENLARGE TIME

Came on for consideration the Motion to Enlarge Time to Answer or Otherwise Respond to Plaintiff Henry Lindsey's Complaint [doc. #15] filed by the United States on behalf of defendants Warden Cole Jeter, Dr. Hernan Reyes, and Paul Celstin, and "interested party" Willy Felicano. The Court, having considered said motion, the pleadings on file, and the arguments of counsel, determines that the motion should be granted. It is, therefore, ORDERED that Defendants' deadline to file an answer or otherwise respond to Plaintiff's Complaint is hereby extended to Monday, November 17, 2008.

Signed October 9, 2008.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HENRY LINDSEY,	§	
(BOP No. 08239-002)	§	
VS.	§	CIVIL ACTION NO.4:07-CV-461-Y
	§	
	§	
UNITED STATES OF AMERICA,[1] et al.	§	

ORDER RESOLVING PENDING MOTIONS
(With special instructions to the clerk of Court)

In this suit, inmate/plaintiff Henry Lindsey has two parallel causes of action, one against the United States of America under the Federal Tort Claims Act ("FTCA"), and another against individual defendants Cole Jeter, Hernan Reyes, and Paul Celestin for violation of his constitutional rights under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics ("Bivens")*.[2] Consistent with this Court's initial scheduling order for assertion of the defense of qualified immunity, the defendants collectively filed a motion for summary judgment.

Although the summary judgment motion asserts the defense of qualified immunity on behalf of each individual defendant, the motion also includes arguments in contest of Plaintiff's FTCA claim. Curiously, however, the motion also includes arguments on behalf of the Bureau of Prisons ("the BOP"), even though the Court already dismissed the BOP in its order of partial dismissal entered June 3,

[1] As a result of the directive in footnote 10 of this Court's June 3, 2008, Order of Partial Dismissal, the clerk of Court was to "add the United States of America as a defendant in this suit." The clerk of Court shall indicate this on the docket.

[2] 403 U.S. 388, 297 (1971).

2008, the BOP and substituted the United States of America on the FTCA claim. The Court also notes that the United States of America, although properly served, has not actually appeared in this case. As the BOP and the "United States Department of Justice," (non-parties) did appear in the summary judgment motion, the Court will treat those appearances as an appearance on behalf of the United States.

Rather than respond to the summary-judgment motion, plaintiff Lindsey filed a motion for an extension of time to respond.[3] Lindsey attached to the motion a proposed request for production of documents he seeks to send to defendant United States of America. Although the defendants cite precedent for limiting discovery in a qualified-immunity case, the Court rejects these arguments here for two reasons. First, the discovery sought is from the United States, not from the any of the individual defendants. Second, the proposed discovery relates both to Lindsey's claims under the FTCA and to his claims against the individual defendants and their defense of qualified immunity. As the Court may allow discovery limited to resolution of the issue of qualified immunity, and because the discovery is also necessary to the development of Lindsey's FTCA claims, the Court concludes that time should be provided to allow the proposed discovery before the Court resolves the motion for summary judgment. The Court will also issue a revised scheduling

[3]Lindsey also filed a motion to compel the defendants to produce copies of exhibits. As the defendants have assured the Court that all documents have been provided to Lindsey, the motion to compel must be denied.

order to quickly move the case towards resolution or trial.

Therefore, Lindsey's motion for continuance (docket no. 38) is GRANTED to the extent that the Court will issue a revised scheduling order to allow limited discovery before consideration of any motion for summary judgment.

The Motion for Summary Judgment (docket no. 28) is DISMISSED without prejudice to refiling within the time provided in the revised scheduling order issued this same day.

The Motion to Compel (docket no. 36) is DENIED.

SIGNED August 6, 2009.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SCR-2008-01664 **Short Description:** LINDSEY V. FEDERAL BUREAU OF PRISONS ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	4:07-cv-00461-Y
Short Description	LINDSEY V. FEDERAL BUREAU OF PRISONS ET AL
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	SOUTH CENTRAL REGIONAL OFFICE
Current Institution	Fort Worth (FCI)
Incident Region	SOUTH CENTRAL REGIONAL OFFICE
Incident Institution	Fort Worth (FCI)
Monetary Relief Sought	$
Estimated Amount	$
Office	Fort Worth
Jurisdiction	NORTHERN DISTRICT OF TEXAS
Responsible Legal Office	SCRO Dallas

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	04/21/2010
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$1,750.00
Total Amount Paid	$1,750.00
Description	FAILURE TO TIMELY TREAT
Description	FAILURE TO TIMELY TREAT
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	08/13/2008
Date Filed	08/06/2007

Case Progress

Current Owner	BRENDA VICTOR
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	
Comments	

Home Alerts My Work New Case Search Main Email

United States Department of Justice - Office of General Counsel & Review

U.S. Department of Justice

United States Attorney
Eastern District of Louisiana

Thomas L. Watson
Assistant U. S. Attorney
Chief, Civil Division

Hale Boggs Federal Building
500 Poydras Street, Room 210B
New Orleans, LA 70130

Telephone : (504) 589-3054
Fax : (504) 680-3184

Received
SEP 14 2009
Bureau of Prisons
Legal Department, SCRO

September 3, 2009

U. S. Bureau of Prisons
Office of General Counsel
320 First Street, NW, Room 754
Washington, DC 20534

Re: David Samuels v. United States
EDLA, USDC Civil Action No. 09-6080 "S"(2)

Gentlemen:

Enclosed are copies of the Summons and Complaint filed in the above-referenced matter, which were served on this office on September 2, 2009.

BY COPY OF THIS LETTER, THE CLIENT AGENCY is requested to notify this office of the file number the agency assigns to this case as soon as possible. The Department of Justice requires an agency file number for each new case.

Please prepare a litigation report and a draft Motion to Dismiss and/or for Summary Judgment, if applicable, and forward it to this office as soon as possible.

This case has been assigned to Assistant United States Attorney Brock D. Dupre for further handling (Telephone: 504-680-3005)

Yours very truly,

JIM LETTEN
UNITED STATES ATTORNEY

Thomas L. Watson

THOMAS L. WATSON
Assistant United States Attorney
Chief, Civil Division

TLW:ra
Enclosures
(cc's on next page)

cc: (w/Enclosures)

United States Department of Justice
Federal Bureau of Prisons
South Central Regional Office
4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

U. S. Department of Justice
Federal Tort Claims Act Litigation Staff
Civil Division
P.O. Box 888, Ben Franklin Station
Washington, DC 20044

Joe Lazar
Associate General Counsel
U. S. Marshal's Service
Washington, DC 20530-1000

United States Marshal's Office
Eastern District of Louisiana
500 Podyras Street, 7th Floor
New Orleans, Louisiana 70130

4:45 pm 9/2/09

AO 440 (Rev. 04/08) Civil Summons

UNITED STATES DISTRICT COURT

for the

EASTERN District of LOUISIANA

DAVID SAMUELS

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

Civil Action No. 09-6030

Summons in a Civil Action

To: *(Defendant's name and address)*

UNITED STATES OF AMERICA
through The Honorable Jim Letten
210 Hale Boggs Bldg
500 Poydras Street
New Orleans, LA 70112

SEC. S MAG. 2

A lawsuit has been filed against you.

Within 60 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

JAMES E. CAZALOT, JR.
H. Edward Sherman, APLC
1010 Common Street, Suite 1750
New Orleans, LA 70112

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

LORETTA G. WHYTE

Name of clerk of court

Date: SEP 0 2 2009

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

RECEIVED
U.S. DISTRICT COURT
EAST DISTRICT OF LA
2009 SEP -2 PM 4:28
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID M. SAMUELS	*	**CIVIL ACTION NO.** 09-6080
	*	
V.	*	
	*	**SECTION " "**
UNITED STATES OF AMERICA	*	
	*	SECT. S MAG. 2
* *		

COMPLAINT

NOW INTO COURT, through undersigned counsel, comes plaintiff, David Samuels, a person of the full age of majority, being domiciled in Louisiana within the jurisdiction of the court, who respectfully represents:

I.

Made defendant herein is the United States of America which is capable of suing and being sued in its own name under 28 U.S.C. § 1346(b).

II. JURISDICTION

Federal subject matter jurisdiction exists under 28 U.S.C. § 1331 as the plaintiff's claims arise under the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq., and jurisdiction is provided in 28 U.S.C. § 1346(b)(1).

III.

On September 11, 2008, the plaintiff filed a completed form 95 to assert an administrative claim against the Federal Bureau of Prisons.

IV.

On March 11, 2009, the Federal Burea of Prisons denied the plaintiff's administrative claim.

V. VENUE

Venue exists under 28 U.S.C. § 1391(e) and § 1402(b).

VI. FACTS OF CLAIM

On and before September 20, 2006, David Samuels was incarcerated in the Oakdale Federal Correctional Complex in Oakdale, Louisiana.

VII.

At all relevant times, the Federal Bureau of Prisons operated the Oakdale Federal Correctional Complex in Oakdale, Louisiana.

VIII.

At all relevant times, Senior Officer Wadley was employed by the Federal Bureau of Prisons at the Oakdale Federal Correctional Complex in Oakdale, Louisiana.

IX.

The Federal Bureau of Prisons is an agency of the United States of America.

X.

On September 20, 2006, David Samuels was walking outside a building, identified as Allen Unit, on his way to eat.

XI.

At all times, David Samuels was walking on a designated walkway.

XII.

At the same time, Senior Officer Wadley was operating a yard cart (similar to a golf cart).

XIII.

Senior Officer Wadley attempted to drive the yard cart across the designated walkway and suddenly and without warning struck David Samuels and knocked Samuels to the ground.

XIV.

At the time of the accident, Senior Officer Wadley was in the course and scope of his employment with the Federal Bureau of Prisons.

XV.

The accident resulted from the negligent acts and omissions of Senior Officer Wadley in one or more of the following particulars:

a. Failing to observe the plaintiff;

b. Failing to wear his glasses;

c. Failing to maintain control of the yard cart;

d. Driving too fast under the circumstances;

e. Operating the yard cart in a reckless manner;

f. Failing to use safe operating procedures;

g. Failing to yield the right of way to pedestrians on the walkway;

h. Any and all other negligent acts and omissions that are identified during discovery and proven at the trial of this matter.

XVI.

Additionally and/or alternatively, the accident resulted from the negligent acts and omissions of the Federal Bureau of Prisons in one or more of the following particulars:

a. Failing to properly supervise its employees;

b. Failing to properly train its employees;

c. Failing to maintain its vehicles; and

d. Any and all other negligent acts and omissions that are identified during discovery and proven at the trial of this matter.

XVII.

The defendant, the United States of America, is liable for the negligent acts and omissions of Senior Officer Wadley and the Federal Bureau of Prisons under the doctrine of *respondeat superior* as well as the Federal Tort Claims Act.

XVIII.

As a result of the accident, David Samuels sustained bodily injuries including but not exclusively the following injuries:

a. abrasions to his right knee;

b. pain to both elbows;

c. pain to right knee;

d. pain to groin area radiating to lower back;

e. numbness in testicles;

f. back pain;

g. neck pain;

h. numbness in both hands;

i. pain to the hands;

j. hip pain; and

k. joint pain.

XIX.

As a result of the above described injuries, David Samuels obtained medical treatment incurring medical bills.

XX.

As a result of the above described injuries, David Samuels' physical activities have been

limited.

XXI.

As a result of the accident and injuries, David Samuels sustained damages which he seeks to recover including but not exclusively the following:

$ 75,000.00 Physical Pain and Suffering;

$ 25,000.00 Mental Anguish;

$ 25,000.00 Permanent Disability;

$ 25,000.00 Loss of Earning Potential (Estimate at this time);

$ 25,000.00 Past Medical Bills (Estimate at this time); and

$ 10,000.00 Future Medical Bills (Estimate at this time).

WHEREFORE, plaintiff, David Samuels, prays that defendant, United States of America, be served with a copy of this Complaint, be duly ordered to appear and answer same, and after all legal delays and due proceedings be had, there be judgment herein in favor of plaintiff, David Samuels, and against the defendant, United States of America, awarding the plaintiff past and future damages as set out above totaling $185,000, including all damages reasonable in the premises, all costs of these proceedings including expert witness fees, and for all other legal and equitable relief appropriate to the circumstances, including pre and post judgment judicial and/or legal interest.

Respectfully submitted,

James E. Cazalot, Jr. (17510)

H. EDWARD SHERMAN, A.P.L.C.
1010 Common Street, Suite 1750
New Orleans, Louisiana 70112
Telephone: (504) 587-7100
Facsimile: (504) 587-7102

PLEASE SERVE:

1. **United States of America** by

   a. Hand Delivery of "a copy of the summons and of the complaint to the United States Attorney for the" Eastern District of Louisiana, The Honorable Jim Letten, or to an assistant United States attorney or clerical employee whom the United States attorney designated in a writing filed with the court clerk;

   and

   b. "registered or certified mail to the Attorney General of the United States, The Honorable Eric H. Holder, Jr., at U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DAVID M. SAMUELS	*	**CIVIL ACTION**
VERSUS	*	**NO. 09-6080**
UNITED STATES OF AMERICA	*	**SECTION "S" MAG 2**

* * * * * * *

ORDER

Considering the foregoing Joint Motion to Continue Trial, Deadlines and Discovery Cutoff,

IT IS HEREBY ORDERED that trial on the merits, pending deadlines and discovery cutoff are continued with new dates to be selected ~~in coordination with the Court's docket~~ at a scheduling conference with the case manager on June 10 at 10:45 a.m..

New Orleans, Louisiana, this 3rd day of June, 2010.

MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

H. EDWARD SHERMAN
A PROFESSIONAL LAW CORPORATION

H. EDWARD SHERMAN**
edsherman@edsherman.org
Direct Dial 587-7103 ext 24

1010 COMMON STREET, SUITE 1750
NEW ORLEANS, LA 70112
(504) 587-7100 / 1-800-551-1292 (Outside New Orleans)
FAX (504) 587-7102

JAMES E. CAZALOT, JR.
jimcazalot@edsherman.org
Direct Dial 587-7103 ext 15

** *A Professional Law Corporation*

February 15, 2011

Mr. Brock D. Dupre
US Attorney's Office
500 Poydras Street, Room B210
New Orleans, LA 70130

RE: David Samuels vs. United States of America
USDC 09-6080 "S" (2)

Dear Mr. Dupre:

We are forwarding to you the executed Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 USC §2677 in regard to the above referenced matter. Once you have signed the original, please send us a completely executed copy for our records.

Sincerely,

JAMES E. CAZALOT, JR.

JAMES E. CAZALOT, JR.

JEC/cac

F:\DSK.X\JEC\Samuels.David\FTCA\C\latty.wpd

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DAVID M. SAMUELS	*	**CIVIL ACTION**
VERSUS	*	**NO. 09-6080**
UNITED STATES OF AMERICA	*	**SECTION "S" MAG 2**

* * * * * * *

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between plaintiff, David M. Samuels, and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in the Settlement Agreement.

2. However, Plaintiff, David M. Samuels, currently owes restitution to the United States of America in excess of **$121, 541** in connection with Mr. Samuels' guilty plea and sentence in Criminal Action No. 04-321, Eastern District of Louisiana; Section "K".

3. Therefore, the United States of America agrees to place the sum of **$15,000** in the registry of the Clerk of Court, Eastern District of Louisiana, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen damage to property, bodily and personal injuries, and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his representatives, guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees in this captioned lawsuit.

4. Plaintiff and his representatives, guardians, heirs, executors, administrators or assigns hereby agree to accept and allow the settlement funds be placed in the registry of the court in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen damage to property, bodily and personal injuries, and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his representatives, guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and

hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his representatives, guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

6. Upon placing the total settlement proceeds of **$15,000.00** in the registry of the Clerk of Court, both parties will file contradictory briefs before the presiding district court judge in Criminal Action No. 04-321, Eastern District of Louisiana; Section "K". action so that the criminal Court can make a determination as to the allocation of the settlement proceeds.

7. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, it agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

8. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that no attorney's fees will be paid in addition hereto.

9. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the

terms of settlement. In the event any plaintiff is a minor or legally incompetent adult, the plaintiff must obtain Court approval of an administrator or tutrix who is legally entitled to enter into this legal and binding compromise agreement. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release and the compromise settlement are null and void.

10. Payment of the settlement amount will be made by a check drawn on the United States Department of the Treasury and made payable to: Clerk, United States District Court. The check will be hand delivered to the Clerk of Court at the following address: 500 Poydras Street, New Orleans, Louisiana 70130. Upon deposit of thee settlement funds, Plaintiff's attorney agrees to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs.

11. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552 a(b).

12. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed one document.

Executed this 17 day of Feb, 2010.

BROCK D. DUPRE
Assistant United States Attorney
LA Bar Roll No. 28563
Hale Boggs Federal Building
500 Poydras Street, Room 210 B
New Orleans, Louisiana 70130
Telephone: (504) 680-3005
Attorney for Defendant, United States of America

for approval form.

Executed this 10 day of February, 2010.

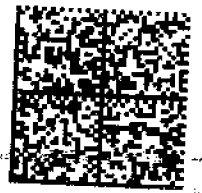
JAMES E. CAZALOT, JR.
LA Bar Roll No. 17510
H. EDWARD SHERMAN, APLC
1010 Common Street, Suite 1750
New Orleans, Louisiana 70112
Tel: (504) 587-7100
Attorney for Plaintiff, David M. Samuels

Executed this 10 day of Feb 2010, 2010.

DAVID M. SAMUELS
Plaintiff

JAMES E. CAZALOT, JR.
H. EDWARD SHERMAN, APLC
1010 COMMON STREET, SUITE 1750
NEW ORLEANS, LA 70112

Happy Mardi Gras



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US Attorney's Office
500 Poydras Street, Room B210
New Orleans, LA 70130

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U.S. Department of Justice
United States Attorney
District of Columbia

Judiciary Center
555 Fourth St. N.W.
Washington, D.C. 20530

USAO-DC
FAX
Cover

To:	Wanda M. Hunt, Chief, FOIA/PA Sect FOIA/Privacy Act Requests	From:	Sabrina Allen Legal Assistant
Fax:	202-307-0828	Phone:	202-514-7218
Date:	November 12, 2009		
Re:	**Benavides v BOP** case No: 09-2026		
Page(s):	including cover		

COMMENTS:

Please find a copy of the complaint.

answer due: November 30, 2009

Please call Special Assistant United States Attorney Jennifer Olkiewicz, when this case is assigned to an Attorney.

Please have the assigned Attorney provide SAUSA Jennifer Olkiewicz a draft Answer or draft Vaughn index and supporting declaration. Jennifer can be reached at 202-514-7185.

Thank you

U.S. ATTORNEY FACSIMILE COMMUNICATION

WARNING: Information attached to this cover sheet is U.S. Government Property. If you are not the intended recipient of this information, disclosure, reproduction, distribution, or use of this information is prohibited. Please notify the originator immediately to arrange for proper disposition.

U.S. Department of Justice

Channing D. Phillips
Acting United States Attorney

District of Columbia

Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530

November 12, 2009

Via First Class Mail and Facsimile
Wanda M. Hunt, Chief, FOIA/PA Section
FOIA/Privacy Act Requests
Federal Bureau of Prisons
Department of Justice
Room 841, HOLC Building
320 First Street, N.W.
Washington, DC 20534

Re: Eduardo Benavides v. Federal Bureau of Prisons
Civil Action No. 09-2026 (RWR)

Dear Ms. Hunt:

Attached is a copy of a Freedom of Information/Privacy Act (FOIA/PA) complaint received in this office on **October 30, 2009**. This case has been assigned to **Special Assistant United States Attorney Jennifer Olkiewicz**, who can be reached at **(202) 514-7158**. Our Answer or dispositive motion is due on **November 30, 2009**. In order to file a timely response with the Court, we must receive a draft Answer or draft Vaughn index and supporting declaration on or before **November 16, 2009**. Please note that, in general, in addition to addressing the exemptions claimed for any documents or information withheld, the declaration should address the adequacy of the search for records, the segregability of information and the manner in which any referral of documents was made.

As of January 1, 2003, all new Civil cases filed in the U.S. District Court for the District of Columbia are a part of the Electronic Case Filing System. Accordingly, any materials, including but not limited to, declarations, exhibits, administrative records, and other documents to be filed with the District Court should be provided to the undersigned in electronic format, i.e., scanned and saved in PDF, as well as provided in hard copy.

If you are unable to provide a draft Answer or draft Vaughn index and supporting declaration within the time specified, you may call me so we can develop a reasonable timetable, keeping in mind the time limits imposed by statute and by the Court.

Very truly yours,

CHANNING D. PHILLIPS
Acting United States Attorney

By: /s/
Jennifer Olkiewicz
Special Assistant United States Attorney

Enclosure

FILED
OCT 2 8 2009
Clerk, U.S. District and Bankruptcy Courts

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

#89008-132

EDUARDO BENAVIDES, §
POB 1010
Bastrop, TX
VS. Plaintiff, §
78602

FEDERAL BUREAU OF PRISONS,

Defendant. §

Case: 1:09-cv-02026
Assigned To : Roberts, Richard W.
Assign. Date : 10/28/2009
Description: FOIA/Privacy Act

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C § 552, to order the production of agency records consisting of billing records and recorded telephone conversations of phone calls plaintiff made in prison to his attorney Robert O. Switzer, to phone number (210) 299-1053, while he was incarcerated at FCC Beaumont-Medium, from 2/25/08 to 8/8/08, and FCI Bastrop from 8/8/08 to 6/23/09.

2. This court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

3. Plaintiff, EDUARDO BENAVIDES, is a prisoner presently incarcerated at FCC Edgefield, P.O. Box 725, Edgefield, S.C., 29824, he is the requester of the withheld records.

RECEIVED
OCT - 5 2009
Clerk, U.S. District and Bankruptcy Courts

4. Defendant Federal Bureau of Prisons (BOP) is an agency of the United States, and it has possession of and control over the records that plaintiff seeks.

5. On 5/5/09, plaintiff hand-delivered his request for billing records and telephone recorded conversations of calls he made in person to the ITS officers at FCI Bastrop, and instructed that BOP regulations required the request to be made to Regional Director. Plaintiff did submit the Request to the Regional Director, and then on 7/9/09, instructed to submit it to the Director for BOP, and did on 7/16/09.

6. Over ten working days have passed since the BOP received plaintiff's letters, and he has received no written response to his request. See copy of letters dated 5/5 and 7/16/09.

7. Plaintiff has a statutory right to the records that he seeks, and there is no legal basis for defendant's refusal to disclose them to him.

WHEREFORE, plaintiff prays that this Court:

(1) Declare that defendant's refusal to disclose the records requested by plaintiff is unlawful;

(2) Order defendant to make the requested records available to plaintiff;

(3) Award plaintiff his costs and reasonable attorneys' fees in this Action; and

(4) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

EDUARDO BERMUDES
89008-132
FCC Edgefield
P.O. Box 725
Edgefield, SC, 29824

OCT - 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDUARDO BENAVIDES,

Plaintiff,

v.

BUREAU OF PRISONS,

Defendant.

Civil Action No. 09-2026 (JEB)

MEMORANDUM OPINION AND ORDER

Plaintiff Eduardo Benavides, a federal prisoner, has narrowed his request under the Freedom of Information Act, to two June 2009 telephone calls the Bureau of Prisons recorded between Plaintiff and his then-attorney, Robert Switzer. As BOP now concedes that the content of the calls is not protected by any privacy interest and as Plaintiff is satisfied with a certified transcript of the conversations, the Court will order that BOP produce such transcript. Alternatively, it may produce recordings of the calls themselves.

I. Background

The background of this case and the proper legal standard for resolving FOIA disputes via summary judgment are both set forth in the Memorandum Opinion of March 30, 2011, authored by Judge Richard Roberts, to whom this case was previously assigned. The Court will rehash neither in addressing the parties' renewed Motions for Summary Judgment. For our purposes, it is sufficient to note that the sole remaining dispute centers around two telephone calls – one on June 5 and one on June 23, 2009 – placed by Plaintiff from federal prison to his former attorney. The recorded conversations total a little over eleven minutes. Upon the

Court's request, BOP has provided electronic copies of the conversations to the Court for *in camera* review, and the Court has now listened to both calls.

The parties have engaged in several rounds of briefing on a number of interesting issues – for example, whether such recordings constitute law-enforcement records under FOIA, whether an attorney has a privacy interest in his side of a conversation with his client, and whether an attorney has a privacy interest in matters beyond what he actually said, such as in his voice and its inflection. Given that the parties, in recent communications, have largely reached an agreement on what release is appropriate here, the Court need not resolve all these questions, but can, instead, narrowly determine the proper course here.

II. Analysis

In arguing against the release of the two calls, BOP relies on FOIA Exemption 7(C). "Exemption 7(C) authorizes the government to withhold 'records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" Boyd v. Criminal Div. of U.S. Dept. of Justice, 475 F.3d 381, 386 (D.C. Cir. 2007) (quoting 5 U.S.C. § 552(b)(7)(C)). Even if the two calls constitute law-enforcement records – a position Plaintiff disputes – BOP may only withhold them if their release would constitute an invasion of privacy. BOP agreed in both its Reply and in the telephone conference call with the Court on Jan. 27, 2012, that Plaintiff's former counsel has no privacy interest in the content of the conversations. See Def. Reply at 9 (BOP would have released transcript of calls if Plaintiff had requested and paid for it). What is protected instead, BOP contends, is the attorney's "voice inflections and other non-lexical information." Id. at 8.

While this may indeed be true for families' rights regarding audiotapes of their relatives' last moments before death, see New York Times Co. v. NASA, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (discussing cockpit recordings before explosion of Challenger spacecraft), such an argument appears strained in this context. BOP nonetheless argues, "One can easily imagine one of several reasons that Mr. Benavides's lawyer might have a privacy interest in the audio. Perhaps he became frustrated and raised his voice at his client. Perhaps he did not respond to questions. Or perhaps he fears that he may come across as sarcastic in the audio recordings." See Def. Resp. at 8. Having now listened to the recorded calls, the Court can say that none of these hypotheticals actually exists. The conversations, furthermore, contain no discussion of anything personal to the attorney, but instead only concern Plaintiff's case and counsel's representation.

In an attempt to find common ground, nonetheless, the Court in a conference call with the parties inquired of Plaintiff (through current counsel) whether he would be satisfied with the transcripts of the calls, which BOP did not oppose releasing. Plaintiff has now indicated that transcripts would suffice provided that they were accurate and authenticated by BOP and the Court. See Pl. Resp. (ECF No. 37). Given that both sides now agree on the propriety and sufficiency of releasing the transcripts, the Court will require their production.

BOP may follow its normal procedures in passing along any reasonable cost of transcription to Plaintiff. In the event BOP deems it easier to simply produce the recordings, that would obviously suffice as well. The Court will leave it to professional counsel to work out the details regarding timing and authentication, although the brevity of the calls suggests that production should be quickly accomplished. Once Plaintiff has received the transcripts or recordings, he may then dismiss the matter.

III. Conclusion

The Court, therefore, ORDERS that:

1. Defendant's Motion for Summary Judgment is DENIED; and

2. Plaintiff's Motion for Summary Judgment is GRANTED IN PART as set forth above.

IT IS SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: Feb. 9, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDUARDO BENAVIDES, Plaintiff, v. BUREAU OF PRISONS, Defendant.	:	Civil Action No. 09-2026 (JEB)

MEMORANDUM OPINION

This matter is before the Court on the parties' cross-motions for summary judgment. For the reasons discussed below, defendant's motion will be granted in part and denied in part, and plaintiff's motion will be denied.

I. BACKGROUND

Plaintiff submitted two separate requests under the Freedom of Information Act ("FOIA"), *see* 5 U.S.C. § 552, to the Federal Bureau of Prisons ("BOP"), a component of the United States Department of Justice ("DOJ"), for information pertaining to "billing records and recorded telephone conversations of phone calls plaintiff made in prison to his attorney Robert O. Switzer." Compl. ¶ 1.[1]

[1] For purposes of the FOIA, the term "agency" includes "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the Executive Branch of the Government . . ., or any independent regulatory agency." 5 U.S.C. § 552(f)(1). The (continued...)

A. May 5, 2009 Request

By letter dated May 5, 2009, addressed to the Director of the BOP's South Central Regional Office ("SCRO"), plaintiff sought information pertaining to telephone calls he made while incarcerated at two BOP facilities in Texas. Compl. ¶ 1. In relevant part, the request stated:

> I am requesting . . . a copy of the recorded telephone conversations I made while in BOP, and record of dates and times the telephone calls were made. The phone number that is the subject to my request is (210) 299-1053. The calls were made from February 25 to August 8, 2008 at [Federal Correctional Complex ("FCC")] Beaumont - Medium, and from August 8, to October 31, 2008 at [Federal Correctional Institution ("FCI")] Bastrop.

Id., Attach. (Freedom of Information Act Request). By letter dated July 9, 2009, SCRO staff notified plaintiff that his FOIA request must be submitted to the BOP's Director at the Washington, D.C. headquarters office. *Id.*, Attach. (letter from J.A. Sickler, Regional Counsel, SCRO).

B. July 16, 2009 Request

On July 16, 2009, plaintiff addressed a second letter to BOP's Director which both referenced his May 5, 2009 letter and requested additional information. Compl., Attach. (FOIA Request). In relevant part, the second requested stated:

---

[1](...continued)
DOJ is an executive agency to which the FOIA applies, and the Court considers the DOJ as the proper party defendant.

> I am . . . expanding my request to include (2) additional calls made on 6/5 and 6/23/09, while at FCI Bastrop. The records of the calls made on 10/30 and 10/31/08, and 6/5 and 6/23/09 are the most pressing and needed for filing in court.

Id. at 1.

C. FOIA Request 2009-10149

On July 30, 2009, the BOP's Central Office, FOIA Section, "received correspondence from [p]laintiff which contained letters dated June 19, July 12, and July 16, 2009, in addition to the May 5, 2009, letter and July 9, 2009, response." Def.'s Mem. of P. & A. in Supp. of the Mot. for Summ. J. ("Def.'s Mem."), Decl. of Larry Collins ("Collins Decl.") ¶ 5. "The separate letters . . . were processed as a single request as [they] were received on the same date, July 30, 2009, and the records sought by each letter were records [p]laintiff indicated he had previously requested from institution staff and been denied." *Id.* ¶ 9. The request was assigned a tracking number, 2009-10149, *id.*, and staff "forwarded electronic copies of these letters to the SCRO Regional Counsel's Office for response." *Id.* ¶ 5. The June 19, and July 12, 2009 letters, copies of which are submitted with defendant's dispositive motion, *see* Collins Decl., Attach. 4-5, are not mentioned in Plaintiff's complaint. The Court therefore addresses only the BOP's response to his requests for information pertaining to telephone calls which occurred on the dates set

forth in his complaint, "from 2/25/08 . . . to 6/23/09." Compl. ¶ 1.

SCRO's Regional Counsel learned that the requested recordings of telephone conversations which occurred while plaintiff was incarcerated at FCC Beaumont could not be produced because the Telephone Activity Recording System ("TARS") maintains recordings only for six months, a period which already had expired by the time staff conducted a search.[2] Collins Decl. ¶ 10. Instead, FCC Beaumont staff produced "a three-page computer print out containing transactional data for the responsive telephone calls[.]" *Id.* FCI Bastrop staff located "recordings of telephone calls made by [p]laintiff on June 6, and June 23, 2009," and explained that "recordings for the telephone calls made prior to six months of the date of the search were no longer available." *Id.* ¶ 11.[3] In addition, staff located "thirteen pages of computer printouts containing transactional data for all telephone calls [p]laintiff made while incarcerated at FCI Bastrop during the time frames noted on his request." *Id.*

---

[2] "Recorded telephone conversations are maintained digitally on [TARS] for a period of six months from the date created, at which time they are overwritten with new data." Collins Decl. ¶ 10 n.1.

[3] The Court presumes that the reference in the declaration to a recording of a telephone conversation occurring on June 6, 2009 is a typographical error. Based on representations elsewhere in the record, *see, e.g.*, Pl.'s Opp'n at 3; Collins Decl., Attach. 10 (*Vaughn* Index), Rec. No. 4, it appears that the telephone conversation occurred on June 5, 2009.

¶ 13. "No records were located in response to [p]laintiff's request for recorded telephone conversations for . . . calls he placed . . . between February 25, 2008, and October 31, 2008." *Id.* ¶ 14.

On November 24, 2009, "sixteen pages of telephone transactional data printouts . . . with the user identification codes redacted pursuant to [Exemption 2]" were released. *Id.* The recorded telephone conversations were withheld in full under Exemption 7(C), and plaintiff was notified that these recordings "could be forwarded to an un-incarcerated third party upon receipt of consent for the release of information from all parties to the telephone conversations." *Id.*; *see id.*, Attach. 9 (November 24, 2009 letter from J.A. Sickler) at 3. The declarant explained that the BOP "does not maintain equipment necessary for the editing of the digitally stored recordings," and for this reason it could not segregate plaintiff's non-exempt portion of the recordings from the exempt portion. *Id.* ¶ 18; *see id.*, Attach. 9 at 3.

Plaintiff represents that the "two recorded telephone conversations [which] took place on June 5, 2009 and June 23, 2009 . . . were conversations between [him] and Robert O. Switzer . . . [who] at the time [was plaintiff's] attorney in a criminal appeal." Pl.'s Mem. of P. & A. in Supp. of his Mot. for Summ. J. and in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n"), Ex. 3

(Benavides Decl.) ¶ 3. He further states that no other person participated in the calls, that Mr. Switzer acted solely as plaintiff's criminal attorney, and that the sole subject of the conversations was plaintiff's criminal appeal. *Id.* ¶¶ 3-4.

In this action, plaintiff demands a declaratory judgment, release in full of the requested records, and an award of costs and attorney's fees. Compl. at 2-3 (page numbers designated by the Court).

DISCUSSION

Summary Judgment in a FOIA Case[4]

Courts will grant a motion for summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "[A] material fact is 'genuine' . . . if

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[4] "Plaintiff challenges . . . only the withholdings of the June 5th and June 23rd recordings," Pl.'s Opp'n at 3, and the Court treats as conceded the BOP's arguments with respect to the adequacy of its search for records responsive to plaintiff's FOIA requests and its decision to withhold user identification codes under Exemption 2. In these respects, defendant's motion will be granted in part as conceded. *See Bonaccorsy v. Dist. of Columbia*, 685 F. Supp. 2d 18, 24 (D.D.C. 2010); *Buggs v. Powell*, 293 F. Supp. 2d 135, 141 (D.D.C. 2003) (citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997) (stating that if "a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded").

the evidence is such that a reasonable jury could return a verdict for the nonmoving party" on an element of the his claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Factual assertions in the moving party's affidavits or declarations may be accepted as true unless the opposing party submits his own affidavits or declarations or documentary evidence to the contrary. *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992). In opposing a summary judgment motion, a party may not "replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit," *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990), but rather must "set forth specific facts showing that there is a genuine issue for trial," *Anderson*, 477 U.S. at 248 (citation and internal quotation marks omitted).

In a FOIA case, the Court may grant summary judgment based on information provided in an agency's affidavits or declarations when they describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within [a] claimed exemption, and are not controverted by either contrary evidence in the record [or] by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Such affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by 'purely speculative claims

about the existence and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

Law Enforcement Records

Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes," but only to the extent that disclosure of such records would cause an enumerated harm. 5 U.S.C. § 552(b)(7); *see FBI v. Abramson*, 456 U.S. 615, 622 (1982). The fact that the relevant agency's principal purpose is the enforcement of criminal law does not absolve it of its obligation to demonstrate that the records at issue were compiled for a law enforcement purpose. *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982) (holding that the FBI "must meet the threshold requirements of Exemption 7 before [it] may withhold requested documents on the basis of any of its subparts"). To this end, the government generally "must identify a particular individual or incident as the object of the investigation and specify the connection of the individual or incident to a potential violation of law or security risk." *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1056 (3d Cir. 1995); *see Simon v. Dep't of Justice*, 980 F.2d 782, 783 (D.C. Cir. 1992) (quoting *Pratt*, 673 F.2d at 420-21). The "focus is on how and under what circumstances the requested files were compiled, and whether the

files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (citations and internal quotations omitted).

The BOP's declarant avers that the BOP is a law enforcement agency the employees of which "perform inherently law enforcement functions," such as making arrests, executing searches on inmates and visitors to its institutions, and seizing evidence. Collins Decl. ¶ 15. Referring to its authority under 18 U.S.C. § 4042, the BOP also "is tasked with the law enforcement mission of protecting inmates, staff, and the community," and the declarant states that "the files of federal inmates are essential to BOP

staff in carrying out the law enforcement mission of the BOP."[5] *Id.*

The BOP's TRUFONE computer system tracks, monitors, and records inmate telephone calls, Collins Decl. ¶ 16, and inmate telephone conversations are maintained digitally on TARS, *id.* ¶ 10 n.1. The TRUVIEW system "is an application used primarily by investigative staff to access information maintained on the TRUFONE system." *Id.* ¶ 16. The BOP's declarant states that recordings of inmate telephone conversations are "maintained on the TARS for the purpose of monitoring inmate telephone activity and conducting investigations regarding . . . illegal activities or suspected illegal activities being conducted, coordinated or directed from within a BOP facility." *Id.* ¶ 17. The BOP claims

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[5] Generally, the BOP shall:

> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
> (4) provide technical assistance to State and local governments in the improvement of their correctional systems; and
> (5) provide notice of release of prisoners[.]

18 U.S.C. § 4042(a).

to have "satisfie[d] the standard for invoking Exemption 7 . . . because of its law enforcement mission and responsibilities for protecting inmates, staff, and the community." Def.'s Mem. at 10.

Plaintiff counters that the BOP fails to meet its threshold requirement for withholding information under Exemption 7, that is, it fails to establish that the requested recordings were compiled for law enforcement purposes. Pl.'s Opp'n at 5. He maintains that the BOP "cannot merely point to its mission," *id.*, as a blanket reference to the agency's law enforcement duties does not establish that the recorded telephone conversations were compiled for law enforcement purposes. The Court concurs.

The D.C. Circuit has articulated a "two-part test whereby the government can show that its records are law enforcement records: the investigatory activity that gave rise to the documents is related to the enforcement of federal laws, and there is a rational nexus between the investigation at issue and the agency's law enforcement duties[,]" *Jefferson*, 284 F.3d at 177 (internal quotation marks and citation omitted), regardless of whether "the investigation . . . [led] to a criminal prosecution or other enforcement proceeding[,]" *Pratt*, 673 F.2d at 421. Here, the BOP suggests that its status as a law enforcement agency responsible for the welfare of inmates in its custody, its staff and the public at large, sufficiently

establishes that recordings of inmate telephone conversations are compiled for law enforcement purposes. Not so. The D.C. Circuit has rejected a *per se* rule of this sort. *See Pratt*, 673 F.2d at 416; *see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003) (stating that, notwithstanding DOJ's law enforcement specialty, "[t]o establish a law enforcement purpose, DOJ's declarations must establish (1) a rational nexus between the investigation and one of the agency's law enforcement duties; and (2) a connection between an individual or incident and a possible security risk or violation of federal law") (citation and quotation marks omitted)); *King v. Dep't of Justice*, 830 F.2d 210, 229 (D.C. Cir. 1987) (explaining that an FBI record did not automatically satisfy this threshold requirement "simply by virtue of the function the FBI serves").

"[W]hen an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007) (quoting *King*, 830 F.2d at 219) (internal quotation marks omitted). The BOP's supporting declaration neither identifies a particular individual or incident subject to an investigation nor connects a particular individual or incident to a potential violation of law. On this

record, without a declaration supplying "facts in sufficient detail to apply the *Pratt* rational nexus test," *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 32 (D.C. Cir. 1998), the Court cannot grant summary judgment for the BOP. *See, e.g., Banks v. Dep't of Justice*, 700 F. Supp. 2d 9, 18 (D.D.C. 2010) (denying summary judgment where the BOP "appear[ed] to rely solely on its status as a law enforcement agency as the premise from which the Court should conclude that any record it maintains was compiled for law enforcement purposes").

CONCLUSION

Defendant's motion for summary judgment will be granted in part and denied in part without prejudice and plaintiff's motion for summary judgment will be denied. There is no dispute that the BOP conducted a search reasonably calculated to locate records responsive to plaintiff's FOIA requests and that its decision to redact information under Exemption 2 is proper. However, because the BOP has not demonstrated that the requested recordings of telephone conversations were compiled for law enforcement purposes, defendant fails not only to justify its decision to withhold information under Exemption 7(C) but also to show that all reasonably segregable information has been released to plaintiff.

An Order accompanies this Memorandum Opinion.

Signed this 30th day of March, 2011.

/s/
RICHARD W. ROBERTS
United States District Judge
for
JAMES E. BOASBERG
United States District Judge-Designate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDUARDO BENAVIDES, Plaintiff, v. BUREAU OF PRISONS, Defendant.	:	Civil Action No. 09-2026 (JEB)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion for summary judgment [Dkt. #8] is GRANTED IN PART and DENIED IN PART WITHOUT PREJUDICE. The Federal Bureau of Prisons has conducted a search reasonably calculated to locate records responsive to plaintiff's Freedom of Information Act request and it properly has withheld certain information under Exemption 2. In all other respects, the motion is denied. It is further

ORDERED that plaintiff's motion for summary judgment [Dkt. #15] is DENIED. It is further

ORDERED that, not later than April 29, 2011, defendant shall file either a renewed motion for summary judgment, or the parties

jointly shall file a proposed schedule for further proceedings in this action.

SO ORDERED.

Signed this 30th day of March, 2011.

/s/
RICHARD W. ROBERTS
United States District Judge
for
JAMES E. BOASBERG
United States District Judge-Designate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDUARDO BENAVIDES,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 09-2026 (RWR)
	:	
BUREAU OF PRISONS,	:	
	:	
Defendant.	:	

ORDER

Defendant has filed a motion for summary judgment. Because resolution of the motion could potentially dispose of this case, the Court will advise the *pro se* plaintiff of his obligations under the Federal Rules of Civil Procedure and the rules of this Court. *See Fox v. Strickland,* 837 F.2d 507 (D.C. Cir. 1988); *Neal v. Kelly,* 963 F.2d 453, 456 (D.C. Cir. 1992).

The plaintiff's attention is also directed to Rule 56 of the Federal Rules of Civil Procedure, which states in pertinent part:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c)(2).

> (1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional

> affidavits.
>
> (2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

Fed. R. Civ. P. 56(e).

Motions for summary judgment are also governed by Local Civil Rule 7(h), which provides as follows:

> Each motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement . . .. In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

Local Civil Rule 7(h).

In other words, the Court will accept as true any factual assertions contained in affidavits or attachments submitted by the defendant in support of a motion for summary judgment unless the plaintiff submits affidavits or documentary evidence showing that the defendant's assertions are untrue. *See Neal,* 963 F.2d at 456. Further, the plaintiff's attention is directed to Local Civil Rule 7(b), which states:

> Within . . . such . . . time as the court may direct, an opposing party

> shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the court may treat the motion as conceded.

Local Civil Rule 7(b).

The Court may treat as conceded any motion not opposed within the time limits outlined above. Alternatively, the Court may consider on the merits any motion not opposed within the time limits outlined above. Thus, failure to respond to the defendant's motion in this case carries with it the risk that judgment will be entered for the defendant.

Accordingly, it is hereby

ORDERED that the plaintiff shall file his opposition or other response to the defendant's motion for summary judgment no later than **February 5, 2010**. If plaintiff does not respond by that date, the Court may treat the motion as conceded and enter judgment for the defendant.

/s/
RICHARD W. ROBERTS
United States District Judge

DATE: December 30, 2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDUARDO M. BENAVIDES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No: 09-2026 (JEB)
FEDERAL BUREAU OF PRISONS,	)	
	)	
Defendant.	)	

STIPULATION OF SETTLEMENT AND DISMISSAL

On May 11, 2012, the Court entered an order dismissing this Freedom of Information Act (FOIA) action with prejudice because Plaintiff, Eduardo M. Benavides, had "obtained the relief sought in the case." In that order, the Court noted that "the issue of attorney fees remains outstanding." The purpose of this Stipulation of Settlement and Dismissal is to resolve that remaining issue and to make clear that the case has been fully resolved.

Plaintiff and Defendant, the Federal Bureau of Prisons (BOP), by and through the United States Attorney for the District of Columbia, hereby agree and stipulate that the above-captioned civil action shall be settled and dismissed on the following terms:

1. Settlement Payment. Defendant shall pay Plaintiff the total sum of $12,500 (twelve thousand five hundred dollars). This payment shall be made by a check drawn on the account of the United States, made payable to the Institute for Public Representation. Counsel for Defendant agrees that, upon notification of the Court ordering this Stipulation, Defendant will promptly cause the documentation necessary to effectuate this payment to be completed and transmitted. Payment shall be made as promptly as practicable, consistent with the normal

processing procedures followed by the Department of Justice and the Department of the Treasury, following the dismissal of the above-captioned civil action. Plaintiff's counsel shall co-operate with Defendant to ensure that all documentation required to process this payment is complete and accurate. This payment is inclusive of Plaintiff's attorney's fees, costs, and other litigation expenses, and Defendant shall have no further liability for those fees, costs, and expenses. Plaintiff's counsel shall be responsible for the distribution of the payment among themselves.

2. Dismissal with Prejudice. Defendant's counsel may file the fully executed Stipulation with the Court promptly after the date on which the Stipulation is signed by both Plaintiff and Defendant, and such filing shall constitute a dismissal of the above-captioned civil action with prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), except that the Court shall retain jurisdiction to enforce the terms of this Stipulation. Promptly after the dismissal of the above-captioned civil action, Plaintiff shall dismiss any pending administrative complaints regarding Plaintiff's FOIA request in this case, with prejudice.

3. Release. This Stipulation provides for the full and complete satisfaction of all claims which have been or could have been asserted by Plaintiff in the above-captioned civil action and any pending administrative complaints regarding Plaintiff's FOIA request in this case.

4. No Assignment. Plaintiff represents and warrants that he is the sole lawful owner of all the rights and claims which it has settled and released herein, and that it has not transferred or assigned any of those rights and claims or any interest therein. Plaintiff shall indemnify, hold harmless, and defend the Defendant, the Agency, and the United States, its agencies and officials, and its present and former employees and agents, in their official and individual capacities, from and against any transferred, assigned, or subrogated interests in those rights and claims.

5. No Admission of Liability. This Stipulation has been entered into by Plaintiff and Defendant solely for the purposes of compromising disputed claims without protracted legal proceedings and avoiding the expense and risk of such litigation. Therefore, this Stipulation is not intended and shall not be deemed an admission by either party of the merit or lack of merit of the opposing party's claims and defenses. Without limiting the generality of the foregoing, this Stipulation does not constitute, and shall not be construed as, an admission that Defendant, the Agency, or any of the Agency's present or former employees or agents violated any of Plaintiff's rights or any laws or regulations, or as an admission of any contested fact alleged by Plaintiff in connection with this case or otherwise. This Stipulation may not be used as evidence or otherwise in any civil or administrative action or proceeding against Defendant, the Agency, or the United States or any of its agencies or officials or present or former employees or agents, either in their official or individual capacities, except for proceedings necessary to implement or enforce the terms hereof.

6. Tax Consequences. Plaintiff acknowledges that it has not relied on any representations by Defendant or Defendant's employees or agents as to the tax consequences of this Stipulation or any payments made by or on behalf of Defendant hereunder. Plaintiff shall be solely responsible for compliance with all federal, state, and local tax filing requirements and other obligations arising from this Stipulation, if any, that are applicable to Plaintiff.

7. Entire Agreement. This Stipulation contains the entire agreement between the parties hereto and supersedes all previous agreements, whether written or oral, between the parties relating to the subject matter hereof. No promise or inducement has been made except as set forth herein, and no representation or understanding, whether written or oral, that is not expressly set forth herein shall be enforced or otherwise be given any force or effect in connection

herewith.

8. Amendments. The terms of this Stipulation may not be modified or amended, and no provision hereof shall be deemed waived, except by a written instrument signed by the party to be charged with the modification, amendment, or waiver.

9. Construction. The parties acknowledge that the preparation of this Stipulation was collaborative in nature, and so agree that any presumption or rule that an agreement is construed against its drafter shall not apply to the interpretation of this Stipulation or any term or provision hereof.

10. Headings. The paragraph headings in this Stipulation have been inserted for convenience of reference only, and shall not limit the scope or otherwise affect the interpretation of any term or provision hereof.

11. Severability. The provisions of this Stipulation are severable, and any invalidity or unenforceability of any one or more of its provisions shall not cause the entire agreement to fail or affect the validity or enforceability of the other provisions herein, which shall be enforced without the severed provision(s) in accordance with the remaining provisions of this Stipulation.

12. Further Assurances. Each party agrees to take such actions and to execute such additional documents as may be necessary or appropriate to fully effectuate and implement the terms of this Stipulation.

13. Right to Cure. If either Plaintiff or Defendant at any time believes that the other party is in breach of this Stipulation, that party shall notify the other party of the alleged breach. The other party shall then have thirty (30) days to cure the breach or otherwise respond to the claim. The parties shall make a good faith effort to resolve any dispute arising from or

regarding this Stipulation before bringing the dispute to the Court's attention.

14. Notices. Any notice required or permitted to be given pursuant to this Stipulation shall be in writing and shall be delivered by hand, or transmitted by fax or by e-mail, addressed as follows or as each party may subsequently specify by written notice to the other:

If to Plaintiff:

Brian Wolfman
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, NW
Washington, DC 20001
202-661-6582
wolfmanb@law.georgetown.edu

If to Defendant:

Michael D. Frazier
Deputy Regional Counsel
U.S. Department of Justice
Federal Bureau of Prisons
South Central Regional Office
214-224-3411
mfrazier@bop.gov

with copy to:

J. Gregory Lennon
Special Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 514-8780 (fax)
greg.lennon@usdoj.gov

15. Execution. This Stipulation may be executed in two or more counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same agreement. A facsimile or other duplicate of a signature shall have the same effect as a manually-executed original.

16. Governing Law. This Stipulation shall be governed by the laws of the District of Columbia, without regard to the choice of law rules utilized in that jurisdiction, and by the laws of the United States.

17. Binding Effect. Upon execution of this Stipulation by all parties hereto, this Stipulation shall be binding upon and inure to the benefit of the parties and their respective heirs, personal representatives, administrators, successors, and assigns. Each signatory to this Stipulation represents and warrants that he or she is fully authorized to enter into this Stipulation.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed this Stipulation on the dates shown below.

Brian Wolfman

BRIAN WOLFMAN
Georgetown University Law Center
Institute for Public Representation
600 New Jersey Avenue, NW
Washington, D.C. 20001
202-661-6582

Plaintiff's Counsel

Date: 6/29/2012

RONALD C. MACHEN JR.
D.C. BAR #447889
Acting United States Attorney

DANIEL F. VAN HORN
D.C. Bar # 924092
Acting Chief, Civil Division

By: _____
J. GREGORY LENNON
Special Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 353-4024
greg.lennon@usdoj.gov

Defendant's Counsel

Date: 6/29/2012

It is SO ORDERED this _____ day of _____, 2012.

_____
United States District Judge

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0215 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

JOSE LUIS GONZALES
Reg. No. 24451-179
Federal Correctional Institution
Post Office Box 9000
Forrest City, Arkansas 72336-9000,

Plaintiff,

v.

J. Jiminez
Health Services Administrator
Federal Correctional Complex (Low)
Forrest City, Arkansas 72336

J. EDNA PRINCE, M.D.
Clinical Director
Federal Correctional Complex (Low)
Forrest City, Arkansas 72336

G. TOLIVER, R.N.
Health Services Department
Federal Correctional Complex (Low)
Forrest City, Arkansas 72336

F. Garrido, P.A.
Health Services Department
Federal Correctional Complex (Low)
Forrest City, Arkansas 72336

K. Levin, P.A.
Health Services Department
Federal Correctional Complex (Low)
Forrest City, Arkansas 72336

Y. Toro P.A.
Health Services Department
Federal Correctional Complex (Low)
Forrest City, Arkansas 72336,

UNITED STATES OF AMERICA,

Defendants.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
MAR 0 1 2006
JAMES W. McCORMACK, CLERK
By: DEP CLERK

Civil No. 2:05CV00269 SWW/JWC

PLAINTIFF'S FIRST AMENDED COMPLAINT FOR DAMAGES

COMES NOW JOSE LUIS CONZALES, pro se, for for his cause of

action against each of the named Defendants shows the Court as follows:

THE PARTIES

1. Plaintiff is an incarcerated inmate at the Federal Correctional Complex (Low) at Forrest City, Arkansas, within the Eastern District of Arkansas, pursuant to a judgment and commitment order of the United States District Court for the Southern District of Texas. Plaintiff is a citizen of the Republic of Mexico, and speaks only Spanish, his native language, and does not speak, read, write, or understand the English language.

2. Defendants J. Jiminez, J. Edna Prince, M.D., G. Toliver, R.N., F. Garrido, P.A.. K. Levin, P.A., and Y. Toro, P.A., are individuals employed by the United States Department of Justice, Bureau of Prisons, and are stationed, or at all relevant times hereto, were stationed at the Federal Correctional Complex (Low) at Forrest City, Arkansas. Each of these individual defendants are named as defendants in Count I hereof pursuant to the caselaw establishing a constitutional tort as provided in Bivens **v. Six Unknown Named Agents** of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

3. The United States of America is named as a Defendant in Count II herein under the provisions of the Federal Tort Claim Act.

JURISDICTION

4. This Court has jurisdiction over Count I hereinbelow by virtue of the provisions of 28 U.S.C. §1331 , and has jurisdiction over Count II by virtue of 28 U.S.C. §§ 1346(b) and 2672, et seq.

COUNT ONE

5. The allegations contained in paragraphs 1 through 4 are incorporated herein by reference as though fully set forth.

6. Defendant J. Jiminez is, and at all times relevant hereto, was the Health Services Administrator for the Health Services Department of the Federal Correctional Complex (Low), located at Forrest City, Arkansas.

7. Defendant J. Edna Prince, M.D., is and at all times relevant hereto, was the Clinical Director at in the Health Services Department at the Federal Correctional Complex (Low), and is the person responsible for the oversight of medical care and treatment provided to inmates of the Federal Correctional Complex (Low), and from time to time, renders medical care and services as she determines necessary.

8. Defendant G. Toliver, R.N., is, and at all times relevant hereto, was, employed as a Registered Nurse in the Health Services Department at the Federal Correctional Complex (Low), and who renders healthcare services to inmates at the Federal Correctional Complex (low).

9. Defendant F. Garrido, P.A., is, and at all times relevant hereto, was employed as a Physician's Assistant in the Health Services Department , and who at all times relevant hereto did have the responsibility to render care and treatment to inmates confined at the Federal Correctional Complex (Low) at Forrest City, Arkansas.

10. Defendant K. Levin, P.A., is and at all times relevant hereto, was employed as a Physician's Assistant in the Health

Services Department at the Federal Correctional Complex (Low) at Forrest City, Arkansas, and who, at all times relevant hereto, did have the responsibility to render care and treatment to inmates confined at the Federal Correctional Complex (Low) at Forrest City, Arkansas.

11. Defendant Y. Toro, P.A., is and at all times relevant hereto, was employed as a Physician's Assistant in the health Services Department at the Federal Correctional Complex (Low) at Forrest City, Arkansas, and did have the responsibility to render care and treatment to inmates confined at the Federal Correctional Complex (Low) at Forrest City, Arkansas.

12. Notwithstanding the duty of each of the Defendants named in paragraphs 6 through and including 11 of this complaint, did fail, refuse, and neglect to provide medical services to the Plaintiff herein, well knowing and believing that Plaintiff was in need of medical treatment and services, but, in each instance failed and neglected to provide the medical assistance the Plaintiff needed, but instead, while being well aware of the fact that Plaintiff was in need of medical care and assistance, failed, refused, and neglected to provide medical care and medical services to the Plaintiff, andwere deliberately indifferent to the medical needs of the Plaintiff, as shall more fully appear hereinafter.

13. Plaintiff utilized the Administrative Remedy Procedures, and filed grievances within the Bureau of Prisons consisting of Bp-8s, BP-9s, BP-10's and BP-11's, thus fully exhausting his administrative remedies as to each of the circumstances set forth in Count One, and did fully comply with the exhaustion requirements

of the Prisoner Litigation Reform Act (PLRA).

14. Between July28, 2004, and the present time, Plaintiff has been subjected to indifference by the defendants named in this Count in that Plaintiff was injured during a sanctioned baseball game on July 28, 2004, wherein he was severely injured, but in spite of having sustained a grievous injury was denied any medical care for a period of several weeks, even though he described his injury and the pain he was experiencing to Defendant Dr. J. Edna Prince, but no action was taken on the Plaintiff's complaint, Further, in October 2004, Plaintiff made a complaint of the existence of genital warts, but Defendant Dr. Prince failed and neglected to provide any treatment to the Plaintiff for the condition. Plaintiff attempted to communicate his needs in the Spanish language with Dr. Prince, but Dr. Prince returned his written requests, which had been written in Spanish, with the statement, "I don't understand Spanish," with no attempt to have the request translated by a member of her staff fluent in Spanish. Plaintiff thereby deliberately ignoring the Plaintiff's requests for medical services.

15. Defendant J. Jiminez who does speak Spanish, has received requests from the Plaintiff wherein Plaintiff has sought medical treatment from genital warts, for a skin rash, and for medical shoes as a result of his July 2004 injury which resulted in surgery, but Defendant Himinez has failed and neglected to address any of Plaintiff's requests, and has been deliberately indifferent to Plaintiff's medical needs with regard to receiving proper medical treatment for his physical condition, including

his continuing pain due to the July 2004 sports injury, the Plaintiff's request for genital wart treatment, and treatment for rash which has developed on Plaintiff's upper body, but Defendant Jiminez has failed and neglected to respond to Plaintiff's requests, and has failed to see to it that Plaitniff's legitimate medical needs were met, thereby demonstrating deliberate medical indifference to Plaintiff's medical needs and condition.

16. Defendant J. Edna Prince, M.D., has received numerous written requests from Plaintiff in Plaintiff's native language of Spanish, but Defendant Prince did not seek a translation of the written request, but, instead, returned the request to the Plaintiff with the notation to resubmit the request in English. Plaintiff, however, was unable to do so because of his lack of understanding of the English language.Defendant Prince's failure to obtain a translation of the written request from a member of her staff who is fluent in the Spanish language, constituted a deliberate indifference to Plaintiff's legitimate medical needs.

17. Defendant G. Toliver, R.N. failed to provide treatment to the Plaintiff when Plaintiff requested treatment for his leg injured in a sports game, and subsequently, for genital warts which developed, and for a rash which appeared on Plaintiff's upper body. Plaintiff communicated his medical needs to Defendant Toliver, but defendant Toliver failed and neglected to provide any treatment to the Plaintiff, thereby showing complete indifference to Plaintiff's legitimate medical needs.

18. Defendant F. Garrido, P.A., failed to provide treatment to the

Plaintiff when Plaintiff requested treatment from Defendant Farrido, P.A., for an injury he had sustained to his leg during a sports event, and when Plaintiff developed genital warts, and when Plaintiff developed a rash on his upper body. Each time Plaintiff requested medical treatment from Defendant F. Garrido, P.A., he failed, refused, and neglected to provide any treatment to the Plaintiff even though Defendant Garrido was advised of Plaintiff's medical condition, thereby demonstrating deliberate indifference to a known medical condition which afflicted the Plaintiff.

19. Defendant K. Levin, P.A., failed and neglected to properly read an X-ray which had been taken of Plaintiff's injured leg, and failed to properly diagnose his medical condition, that is, a broken leg, and failed to provide any treatment to the Plaintiff, although Defendant Levin was aware of the medical condition which afflicted the Plaintiff, thereby demonstrating deliberate indifference to the Plaintiff's legitimate medical needs.

20. Defendant Toro failed to provide treatment to the Plaintiff when Plaintiff requested treatment to the Plaintiff when Plaintiff requested treatment for his leg injured in a sports event, for genital warts which subsequently developed, for for a rash which has developed over his upper body. Plaintiff communicated his medical needs to Defendant Toro, but Defendant Toro failed and neglected to provide any treatment to the Plaintiff, even though he well knew the Plaintiff's need for medical treatment, thereby demonstrating a deliberate indifference to Plaintiff's legitimate medical needs.

21. As a result of the acts of the Defendants individually and

collectively, in the amount of $3,000,000.

WHEREFORE, Plaintiff prays judgment against each of the defendants, jointly and severally in the amount of $3,000,000.00 together with the costs of this action.

COUNT TWO

For his cause of action against Defendant United States of America, Plaintiff states as follows:

22. Plaintiff incorporates the allegations contained in paragraphs 1-21 herein as though fully set forth herein.

23. Plaintiff was subjected to injurious delays and inaccurate diagnosis of his medical condition following his injury to his leg in a sanctioned baseball game in July 2004, in that almost a month elapsed between the time the Plaintiff sustained his injury and the time he received any treatment for the condition. As a result of the delay, the injury to Plaintiff's person became much more acute and damaging than it would have otherwise have been had the Plaintiff received prompt and competent medical treatment for his medical condition.

24. At all times relevant to the events alleged herein, the officers and employees involved in the acts and omissions which aggravated the injury received by the Plaintiff on July 28, 1004, were acting within the course and scope of their duties as employees of the United States.

25. Plaintiff has submitted an administrative claim pursuant to the Federal Tort Claim Act, but the said administrative claim was denied.

26. Plaintiff has exhausted all available administrative remedies in connection with his claim for damages against the Defendant United States of America.

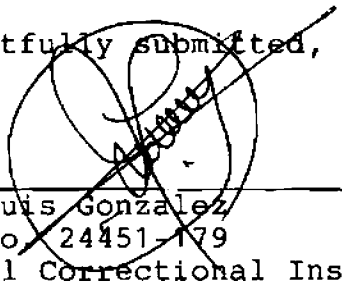
27. Commencing on July 28, 2004, and continuing thereafter, the officers, employees and agents of the United States, acting within the course and scope of their duties, did negligently ~~perform~~ report the injury sustained by the Plaintiff in the course of an officially sanctioned baseball game, and thereafter failed and neglected to detect the fact that plaintiff had sustained an injury through the exercise of either negligence or deliberate indifference.

28. As a result of the negligence or deliberate indifference on the part of the agents, officers, and employees of the United States, the injury sustained by the Plaintiff on July 28, 2004 was aggravated to the extent that it was necessary for the Plaintiff to submit to a surgical procedure for the repair of his foot, ankle, and leg, and as a direct and proximate result of the negligence of the agents, officers, and employees of the United States, plaintiff has sustained permanent damage to his foot, ankle, and leg, all to his great damage and distress.

29. As a direct and proximate result of the negligence of the Defendant United States of America's agents, officers, and employees, acting within the course and scope of their duties, the Plaintiff has been damaged in the amount of $3,000,000.

WHEREFORE, for the foregoing reasons, Plaintiff prays judgment against the United States in the amount of $3,000,000, together with the costs of this action.

Respectfully submitted,

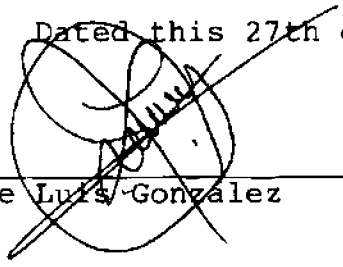


Jose Luis Gonzalez
Reg. No. 24451-179
Federal Correctional Institution
Post Office Box 9000
Forrest City, arkansas 72336-9000

State of Arkansas)
) ss.
County of St. Francis)

Plaintiff, Jose Luis Gonzalez, states under the pains and penalties of perjury, and upon his oath that the allegations which are contained in the foregoing PLAINTIFF'S FIRST AMENDED COMPLAINT FOR DAMAGES are true and correct.

Dated this 27th day of February, 2006, at Forrest City, Arkansas.



Jose Luis Gonzalez

FILED
EASTERN DISTRICT ARKANSAS
JUN - 8 2007
JAMES W. McCORMACK, CLERK
By: DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

JOSE LUIS GONZALES
Reg. # 244-51-179 PLAINTIFF

VS. Civil No. 2:05cv00269 SWW-JWC

UNITED STATES OF AMERICA,
ALBERTO GONZALES, Attorney General,
DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS;
LINDA SANDERS, an employee with the FBOP;
J. JIMINEZ, an employee with the FBOP;
J. EDNA PRINCE, an employee with the FBOP;
G. TOLIVER, an employee with the FBOP; and
YVETTE TORO, and employee with the FBOP. DEFENDANTS

SECOND AMENDED COMPLAINT

The Plaintiff, Jose Luis Gonzales, by and through his attorney, The Law Offices of Milton A. DeJesus, and for his Second Amended Complaint alleges as follows:

1. This is an action brought for the violation of Plaintiff's constitutional rights under the Eighth Amendment to the United States Constitution and for the negligent treatment of Plaintiff for a certain medical injury and medical condition. Plaintiff seeks compensatory and punitive damages in an amount to be proven at trial.

PARTIES

2. Plaintiff is and at all times relevant to this litigation was, an incarcerated inmate at the Federal Correctional Complex (Low) located in Forest City, Arkansas.

3. Defendant, Alberto Gonzales, is and at all times relevant to this litigation was, the Attorney General of the United States of America, and head of the Department of Justice and Federal Bureau of Prisons.

4. Defendant Linda Sanders is and at all times relevant to this litigation was, the Warden of the Federal Correctional Complex (Low), located in Forest City, Arkansas, which is

operated by the Federal Bureau of Prisons under the Department of Justice to the United States of America. Defendant is being sued in her individual capacity for actions performed in her official capacity; that is, in not providing the proper procedures for ensuring that medical injuries that are serious in nature and require immediate action are adequately handled.

5. Defendant J. Jiminez is and at all times relevant to this litigation was, the Heath Services Administrator for the Health Services Department of the Federal Correctional Complex (Low), located in Forrest City, Arkansas, which is operated by the Federal Bureau of Prisons under the Department of Justice to the United States of America. Defendant is being sued in his individual capacity for actions performed in his official capacity; in that, he failed to promulgate procedures whereby medical injuries that are serious in nature and require immediate action are adequately handled.

6. Defendant Edna Prince, M.D. is and at all times relevant to this litigation was, a licensed physician and the Clinical Director for the Health Services Department of the Federal Correctional Complex (Low), located in Forrest City, Arkansas, which is operated by the Federal Bureau of Prisons under the Department of Justice to the United States of America. Defendant is being sued in her individual capacity for actions performed in her official capacity; in that, she failed to promulgate procedures whereby medical injuries that are serious in nature and require immediate action are adequately handled.

7. Defendant G. Toliver, R.N. is and at all times relevant to this litigation was, a Registered Nurse in the Health Services Department of the Federal Correctional Complex (Low), located in Forrest City, Arkansas, which is operated by the Federal Bureau of Prisons under the Department of Justice to the United States of America. Defendant is being sued in his individual capacity for actions performed in his official capacity.

8. Defendant Yvette Toro, P.A. is and at all times relevant to this litigation was, a Physicians Assistant in the Health Services Department of the Federal Correctional Complex (Low), located in Forrest City, Arkansas, which is operated by the Federal Bureau of Prisons under the Department of Justice to the United States of America. Defendant is being sued in her individual capacity for actions performed in her official capacity.

JURISDICTION AND VENUE

9. This action arises under the Constitution and laws of the United States, including Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971) and the Federal Tort Claims Act (FTCA) 28 U.S.C. §§2671-2680. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §1331 and §1346(b), respectively. Venue in this Court is proper under 28 U.S.C. §1391 and §1402(b), respectively.

FACTUAL STATEMENT

10. Plaintiff's native language is Spanish. Defendant's Prince and Toliver do not speak Spanish. Defendants Jiminez and Toro speak and understand Spanish.

11. On or about July 28, 2004, Plaintiff was participating in a regulated softball game supervised by a Federal Corrections Officer.

12. While playing softball, Plaintiff injured his lower left leg and ankle. After complaining of his injury, Plaintiff was ruled unfit to play by the supervising officer. Plaintiff was in extreme pain due to this injury, but was not taken to the health department for treatment.

13. At approximately 8:00 a.m. the next day, July 29, 2004, Plaintiff self reported to the Health Services Department for medical care and treatment of his leg and ankle. Plaintiff explained his injury and pain to Defendant Toliver in Spanish; however, was told that walk-in's were not allowed, that he could not be treated at that time and to return the following day, July 30, 2004 at 6:30 a.m. during the departments "sick-call" hours. Plaintiff was not given crutches, a wheel chair

or pain medications. Since Plaintiff was not provided medical treatment, a record of this visit was not made.

14. On July 30, 2004, Plaintiff returned to the Health Services Department during "sick-call" hours for medical treatment of his left leg and ankle. Plaintiff again explained his injury and pain to Defendant Toliver in Spanish and with a translator present. Plaintiff was told that he could not be treated until the following week. Plaintiff was not provided crutches, a wheelchair or given pain medication. Since Plaintiff was not provided medical treatment, a record of this visit was not made.

15. On approximately August 2nd or 3rd, 2004, Plaintiff once again returned to the Health Services Department and was examined by Defendant Yvette Toro, P.A. Plaintiff explained to Defendant Toro that he was in extreme pain due to his leg injury. Defendant Toro completed a radiological consultation request form and told Plaintiff that x-rays would be taken at a later date. Plaintiff was given Ibuprofen for the pain, however, was not provided crutches or a wheelchair.

16. On August 3, 2004 Plaintiff was seen by Defendant Prince. Plaintiff had arranged for an interpreter in order to explain to Defendant Prince the severity of Plaintiffs injury and pain; however, the interpreter was not allowed to be present during the consultation. Plaintiff explained his injury and the severity of his pain and suffering to Defendant Prince in Spanish. No treatment was provided.

17. On approximately August 17th or 18th, 2004, Plaintiff was called into the Health Services Clinic to have an x-ray performed. The technician attempted to perform an x-ray of Plaintiff's chest instead of his leg, mistaking Plaintiff, Jose Luis Gonzalez for a former inmate of the facility, Jose Maria Gonzalez. When the mistake was discovered by the technician, Plaintiff was told that he would have to re-schedule another x-ray for his leg.

18. The above stated mistake in Plaintiff's identity was caused by Defendant Toro's negligence in completing the radiological consultation request and resulted in Plaintiff not receiving medical care at that time. The x-ray of Plaintiff's leg was rescheduled.

19. On August 26, 2004, an x-ray was finally performed on Plaintiff's lower left leg and ankle. The x-ray was reviewed by Defendant Prince. From the x-ray, it was discovered that Plaintiff suffered from four fractures to the left ankle and a torn ligament.

20. The injury sustained by Plaintiff was of such severity that on August 27, 2004, Plaintiff underwent surgery to repair his left leg. The repair required the placement of four screws to his left ankle and stitches to repair a torn ligament. Plaintiff's ankle was also placed in a cast.

21. Approximately 31 days passed from the time Plaintiff injured his left leg and ankle and the surgery that repaired the damage. During that entire time, Plaintiff was not provided crutches or a wheelchair and was forced to perform his daily activities in constant and agonizing pain.

22. In approximately October of 2004, Plaintiff self reported to the Health Services Department at the Federal Correctional Complex (Low) in Forest City, Arkansas with complaints of symptoms associated with and caused by the Human Papillomavirus (HPV), more commonly referred to as genital warts.

23. A staff member at the Health Services Department provided Plaintiff with a topical ointment to treat the warts.

24. Throughout the remainder of 2004 and through 2005, Plaintiff continued to suffer from the affects of HPV. Plaintiff routinely sought treatment for the disease with various staff members at the Health Services Department. With each request, Plaintiff was prescribed a topical ointment as treatment.

25. The topical ointment method of treatment prescribed by the staff at the Health Services Department was not effective in that it did not eliminate the warts and in fact caused them to spread to other areas of Plaintiffs body.

26. Plaintiff, on numerous occasions, explained the ineffectiveness of the topical ointment to the staff at the Health Services Department and requested alternative methods of treatment; including surgical and liquid nitrogen removal of the warts.

27. The surgical and liquid nitrogen removal of the warts are common methods of treatment and are accepted and routinely used by medical professionals.

28. Despite the commonality and acceptance by medical professions of surgical and liquid nitrogen removal, the staff at the Health Services Department failed to provide this method of treatment and instead continued to prescribe a treatment that was plainly ineffective.

29. Plaintiff asserts that he has fully exhausted all administrative procedures within the Bureau of Prisons in an attempt to remedy this situation, as required by 28 U.S.C. §2675.

COUNT 1

BIVENS ACTION

30. Plaintiff repeats and re-alleges the allegations and averments of paragraphs 1-29 as if fully set forth herein.

31. The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishments upon persons convicted of crimes.

32. The injury sustained on July 28, 2004 caused Plaintiff extreme pain and suffering to his left leg and was of such a severity as to require surgical repair.

33. Defendant's Toro and Toliver knew of the pain and suffering experienced by the Plaintiff and of the injury to his left leg. Despite having this knowledge, Defendants were

deliberately indifferent to the injury and Plaintiff's pain, and acted in a manner which caused a delay in proper medical treatment to the Plaintiff of approximately 31 days.

34. The acts and omissions of the Defendants caused Plaintiff unnecessary and wanton pain; in that, he was forced to perform his daily activities while suffering from the injury to his leg.

35. Defendant J. Edna Prince, M.D. is the Clinical Director of the Health Services Department and by virtue of that position is responsible for acts and omissions of the department's personnel.

36. Defendant Linda Sanders, is the Warden for the Federal Correctional Complex located in Forest City, Arkansas and by virtue of that position is responsible for ensuring that the departments and personnel within the prison perform their duties in accordance with proper procedures and the laws of the United States.

37. Upon information and belief, the actions and omissions of the named Defendants were carried out in a manner which is in violation of the Eighth Amendment.

COUNT 2

FTCA CLAIM

38. Plaintiff repeats and re-alleges the allegations and averments of paragraphs 1-37 as if fully set forth herein.

39. Plaintiff sustained an injury to his left leg and ankle on July 28, 2004 during a supervised regulation softball game, causing him severe pain and suffering.

40. After sustaining the injury, Plaintiff was not immediately taken to the prison's health services clinic. Plaintiff self reported to the health services clinic on July 29th and 30th of 2004, explained his injury and the pain that he was experiencing to a staff member; however, was denied medical treatment on both occasions.

41. Plaintiff was finally seen by a member of the health services clinic on August 2nd or 3rd, 2004 and an x-ray of Plaintiff's foot was ordered.

42. The x-ray of Plaintiff's foot was not performed until August 26, 2004; approximately 31 days from the date of the injury and 23 days from the date of the order.

43. The results of this x-ray showed that Plaintiff had sustained four fractures to his ankle and a torn ligament, which required surgery to repair.

44. As persons responsible for providing medical treatment and care, the staff at the Federal Correctional Complex' health services clinic owed a duty to the Plaintiff to possess and apply with reasonable care the degree of skill and knowledge ordinarily possessed and used by others in the same or related profession.

45. The Health Services Department at the Federal Correctional Complex, as an institution responsible for providing medical treatment and care, owes a duty to use ordinary care to furnish the Plaintiff with the type of care and attention reasonably required by his physical condition.

46. The clinical staff and the Health Service Department itself, breached their duty to Plaintiff by initially refusing to provide medical treatment and then when said treatment was provided, causing unreasonable delay in administering an x-ray and completing a proper diagnosis of Plaintiff's injury, and the subsequent repair of that injury.

47. The breach of duty and failures on the part of the clinical staff and Health Services Department was the proximate cause of the undue and unnecessary pain and suffering endured by the Plaintiff during the unreasonable delay in medical treatment.

48. The clinical staff of the Health Services Department, Federal Correctional Complex, are employees of the Federal Bureau of Prisons and were acting in their official duties; therefore the United States of America is properly named as a Defendant.

COUNT 3

FTCA CLAIM

49. Plaintiff repeats and re-alleges the allegations and averments of paragraphs 1 – 48 as if fully set forth herein.

50. In approximately October of 2004, Plaintiff went to the Health Services Department of the Federal Correctional Complex (Low) with complaints of symptoms associated with and caused by the Human Papillomavirus (HPV), more commonly referred to as genital warts.

51. In response to Plaintiff's complaint, the staff at the Health Services Department prescribed a topical ointment as a method of treating the warts.

52. The method of treatment prescribed by the Health Services Department staff was clearly ineffective, in that, it failed to eliminate the warts and in fact caused them to spread.

53. Plaintiff, on numerous occasions, informed the Health Services Department staff of the ineffectiveness of the topical ointment and requested alternative methods of treatment.

54. Although knowing that the topical ointment was ineffective, the Health Services Department staff continued to prescribe this method of treatment and refused the use alternative methods.

55. The Health Services Department at the Federal Correctional Complex, as an institution responsible for providing medical treatment and care, owes a duty to use ordinary care to furnish the Plaintiff with the type of care and attention reasonably required by his physical condition.

56. The clinical staff at the Health Services Department breached their duty to Plaintiff by continuing to prescribe a method of treatment that was ineffective and failing to prescribe alternative methods of treatment.

57. The breach of duty and failures on the part of the staff at the Health Services Department was the proximate cause of the undue and unnecessary discomfort and pain endured by the Plaintiff.

58. The staff of at the Health Services Department, Federal Correctional Complex, are employees of the Federal Bureau of Prisons and were acting in their official duties; therefore, the United States of America is properly named as a Defendant.

DAMAGES

59. Plaintiff seeks compensatory and punitive damages in an amount to be proven at trial.

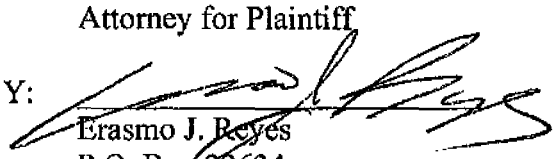
60. Plaintiff reserves the right to amend this Complaint and further plead.

WHEREFORE, Plaintiff seeks and award of compensatory and punitive damages, and for all other relief to which he is entitled by law. Furthermore, Plaintiff hereby demands a trial by jury.

Dated this 8th day of June, 2007

THE LAW OFFICES OF MILTON A. DEJESUS, P.A

Milton A. DeJesus,
Attorney for Plaintiff

BY: 

Erasmo J. Reyes
P.O. Box 22634
Little Rock, AR 72221
Bar Id. 06-246
501-374-4244 (Tel)
501-661-8150 (Fax)

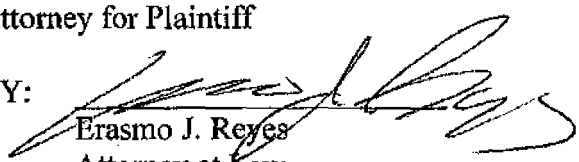
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 8th day of June, 2007 that I hand filed the foregoing Second Amended Complaint with the U.S. District Clerk for the Eastern District of Arkansas and that a copy was mailed to the named individual via United States Postal Service.

Ms. Gwendolyn Hodge
Assistant U.S. Attorney
P.O. Box 1229
Little Rock, AR 72203

THE LAW OFFICE OF MILTON A. DEJESUS, P.A.

Milton A. DeJesus
Attorney for Plaintiff

BY: 
Erasmo J. Reyes
Attorney at Law

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 10-3753

Jose Luis Gonzalez,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Arkansas.
United States of America,	*	
	*	
Appellant.	*	

Submitted: September 22, 2011
Filed: June 18, 2012

Before RILEY, Chief Judge, COLLOTON, and GRUENDER, Circuit Judges.

COLLOTON, Circuit Judge.

Jose Luis Gonzalez filed suit under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, alleging that employees of the United States negligently caused significant delay in the proper treatment of leg injuries that he suffered while an inmate at the Federal Correctional Institution in Forrest City, Arkansas. After a two-day bench trial, the district court[1] found the government liable and awarded compensatory damages of $813,000. On appeal, the government argues that the

[1]The Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas.

amount of damages is excessive. Under the deferential standard of review that applies to an award of damages in a bench trial, we affirm.

I.

On July 28, 2004, Gonzalez suffered an injury to his left leg and ankle in a prison-sanctioned softball game when another player slid into second base and struck Gonzalez. The next morning, Gonzalez self-reported to the prison's Health Services Department for medical treatment of his ankle and leg. Nurse G. Toliver told Gonzalez that "walk-ins" were not allowed and instructed him to return the next day. When Gonzalez returned on the morning of July 30, Nurse Toliver told him that he could not be treated and that he must make an appointment for August 2, 2004.

Gonzalez returned to the Health Services Department on August 3, 2004, and Physician's Assistant Yvette Toro examined him. According to Toro's notes, Gonzalez complained of pain in his left ankle "due to [a] sports injury" and assessed his pain level at a "6," noting that the pain is "worse at night." Toro requested x-rays of Gonzalez's left knee and ankle and gave him Motrin or Ibuprofen. Gonzalez requested crutches or a wheelchair, but the department did not provide them. Gonzalez also saw Dr. J. Edna Prince, the department's Clinical Director. While Gonzalez and Dr. Prince offered differing accounts of this meeting, Dr. Prince did not give Gonzalez a wheelchair or crutches or additional pain medication.

On August 17, 2004, Gonzalez returned to the Health Services Department for x-rays. A technician, however, attempted to perform an x-ray of Gonzalez's chest, because Toro's treatment order mistook Gonzalez for a similarly-named former inmate with a malady of the chest. Upon discovering the error, the technician told Gonzalez that he would have to reschedule the x-ray of his leg.

On August 26, 2004, the Health Services Department performed an x-ray of Gonzalez's leg, which revealed fractures of his fibula and ankle. After discovering the seriousness of Gonzalez's injury, Dr. Prince sent him to a local hospital where he was fitted with a supportive walking boot.

The next morning, Dr. Prince ordered Gonzalez to a hospital in Memphis, Tennessee, where a doctor performed surgery on Gonzalez's left leg and ankle. The operation—an "open reduction and internal fixation of medial malleolar fracture with closed treatment of proximal fibular fracture"—required the placement of two screws in Gonzalez's left ankle. With his ankle in a cast, Gonzalez returned to the prison that night. Upon his return, prison officials placed Gonzalez in a Special Holding Unit. Gonzalez referred to this unit as the "hole" or "punishment cell," and claimed that he suffered serious pain without adequate medical care. Dr. Prince, however, stated that the SHU was the appropriate place for Gonzalez until he was mobile.

After three to four weeks in a cast, and another four in a walking boot, Gonzalez was able to place weight on his ankle. The Bureau of Prisons later transferred Gonzalez to another institution and released him from custody on November 14, 2008. Gonzalez was then repatriated to Mexico.

Gonzalez filed suit under the Federal Tort Claims Act, alleging that the Health Services Department and its staff breached duties of care owed to Gonzalez by refusing medical treatment and causing unreasonable delay in the diagnosis and repair of his injury. Gonzalez alleged that the delay in treatment caused him "undue and unnecessary pain and suffering." He demanded $3,000,000 in compensatory damages. The demand for damages sought "at least $10,000 per day" for pain experienced from July 28 through August 3, 2004, and "at least $5,000 per day" for pain suffered from August 3 through August 26, 2004. For August 27 through August 30, 2004, the period immediately after surgery, Gonzalez demanded $20,000 per day. He sought $2000 per month for the rest of his lifetime, due to permanent

disability and arthritic pain. Gonzalez also demanded $2,170,000 to compensate for "mental anguish" suffered between August 2, 2004, and the trial in 2010, a larger proportion of which presumably occurred during the span in August 2004 when Gonzalez was denied treatment and "despaired of ever being treated." Pl.'s Demand for Damages under the Federal Tort Claims Act, at 6.

At a bench trial, the district court heard testimony from Gonzalez's expert witness, Dr. James Keever, a licensed orthopedic surgeon. Dr. Keever gave his opinion, based on a reasonable medical probability, that Gonzalez has developed permanent post-traumatic arthritis of the ankle. According to Dr. Keever, this condition was caused by the delay in treatment and will worsen with time.

The district court found that the government breached its duty of care by failing to treat Gonzalez's ankle in the four weeks prior to the taking of x-rays.[2] The court, relying on Dr. Keever's testimony, also found that Gonzalez "suffered a continuing injury following his surgery on August 27, 2004 that was proximately caused by the [government's] gross negligence." Regarding Gonzalez's pain and suffering, the district court observed:

> [Gonzalez] states that he experiences pain on a constant basis and that his left ankle will not support his normal day-to-day activities. He states he can't perform his work as a mechanic or a contractor because both jobs require prolonged standing, which he is unable to do. [Gonzalez] states that he walks in pain and sleeps in pain, that he can no longer

[2]Prior to trial, the government admitted that it breached the applicable standard of care by failing to obtain an x-ray of Gonzalez's ankle between August 3, 2004 and August 26, 2004. The district court, however, found that the breach began on the morning of July 29, 2004, when Gonzalez first reported to the Health Services Department, and ended on the afternoon of August 26, 2004, when x-rays were taken. The court found that Gonzalez failed to prove that the government breached the standard of care during his post-surgery care.

> participate in athletics, and that the left ankle doesn't have the same mobility as the right ankle. For example, [Gonzalez] states that when he stumbles he is unable to recover since the ankle doesn't respond with the same reflexes as his other ankle and he thus falls down, and he states that while he can go up a ladder the problem is going down as the left foot doesn't support his body weight. [Gonzalez] states the ankle is swollen and that he has to keep moving his foot forwards and backwards so that something will release from the pain. He states he can't walk that much and that he cannot carry anything due to the pain, and that when he kneels down he struggles to get up because of the ankle.

The district court awarded Gonzalez $813,000 in compensatory damages. The award consisted of $285,000 for Gonzalez's pain and suffering and mental anguish suffered from the morning of July 29, 2004 until x-rays were taken on August 26, 2004, and $528,000 for the "pain and suffering and mental anguish reasonably certain to be experienced" for the remainder of Gonzalez's expected life, which the court determined to be 22 years.

II.

The government's sole argument on appeal is that the amount of damages is excessive. The appeal does not challenge the sufficiency of the evidence to support the district court's finding of proximate causation, and the government does not dispute the procedural adequacy of the district court's findings of fact on liability or damages. We are asked only to set aside the district court's chosen award of $813,000.

This court has recognized that while "the amount of damages entered in a non-jury case is a finding of fact and therefore subject to the 'clearly erroneous' standard of review set forth in Fed. R. Civ. P. 52(a), any application of that general standard must take account of the special circumstances in which that kind of factual finding

is rendered." *Overton v. United States*, 619 F.2d 1299, 1304 (8th Cir. 1980). This court has "long subscribed to the view" that excessiveness of an award

> is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is "plain injustice" or a "monstrous" or "shocking" result.

Id. (quoting *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir. 1961)). This has been the law for decades, yet neither Congress nor the State of Arkansas has seen fit to establish guidelines or limits on awards for pain and suffering in this context.

The "special circumstances" and "obvious reasons" counseling in favor of this deferential review include the fact that "[t]here is no precise or exact measuring stick for calculating general damages for pain and suffering." *Taken Alive v. Litzau*, 551 F.2d 196, 198 (8th Cir. 1977). "[A]wards for pain and suffering are highly subjective," *Morrissey v. Welsh Co.*, 821 F.2d 1294, 1301 (8th Cir. 1987), and "[d]epending upon the fact situation, the range between an inadequate award for pain and suffering and an excessive award can be enormous." *Id.* Only if an award is so extreme as to fall outside this "enormous" range of discretion should appellate judges substitute their "highly subjective" valuation of pain and suffering for the district judge's conclusion. And there is no special standard of review for cases involving public funds. The government is treated the same as any other tortfeasor.

The award of $813,000 in this case is generous, but we cannot conclude that the decision of the experienced district judge was "monstrous" or "shocking" or that

it resulted in a "plain injustice." The government's appeal is based almost entirely on an effort to compare the award in this case with awards in other published decisions. We have observed that "comparisons to other jury verdicts are often not particularly helpful in claims involving noneconomic damages," and that a district court may even abuse its discretion by relying on such comparisons where the facts of the instant case "are not easily comparable to the facts of other cases." *McCabe v. Parker*, 608 F.3d 1068, 1080 (8th Cir. 2010) (internal quotations omitted). The facts of this case are unusual and distinguishable from the cases cited by the government. The proffered authorities do not provide us with an adequate foundation to conclude that the district court's award is so outside the mainstream that we should substitute our subjective evaluation of pain and suffering for the district court's assessment.

The judgment of the district court is affirmed.

RILEY, Chief Judge, dissenting.

As the result of the panel majority's decision, the United States will pay Gonzalez $813,000 in damages for delayed treatment of a broken ankle. These public funds will not reimburse Gonzalez for medical expenses, which the federal government already paid, nor wages lost. The sole purpose of the $813,000 is to compensate Gonzalez for the pain, suffering and mental anguish caused by the government's negligent delay in diagnosing his prison softball game injuries. Because I believe "the award [is] clearly erroneous and plainly unjust," Hysell v. Iowa Pub. Serv. Co., 534 F.2d 775, 787 (8th Cir. 1976), I respectfully dissent.

The district court's award consisted of two parts: (1) $285,000 to compensate for the pain, suffering and mental anguish Gonzalez experienced during the twenty-eight and one-half days his injury remained undiagnosed; and (2) $528,000 to compensate for the post-traumatic arthritis pain, suffering and mental anguish

Gonzalez is likely to experience for the remainder of his life. Both calculations trouble me.

The $285,000 award for past pain and suffering is troublesome because it is significantly more than the $170,000 Gonzalez indicated was just compensation for this period of time.[3] In his demand for damages, Gonzalez demanded "at least $10,000 per day" in compensation for the five days from July 29 to August 2, and "at least $5,000 per day" for the next twenty-four days. The district court noted this variance in the amounts Gonzalez demanded, but decided $10,000 per day was appropriate for the entire period "[g]iven the gross negligence of the United States . . . and its effect on [Gonzalez]."

But the degree of the government's negligence should not affect the amount of the award because the FTCA does not permit punitive damages. See 28 U.S.C. § 2674. The actual effect the government's negligence had on Gonzalez is thus the sole justification for awarding any damages throughout the time period at issue. Gonzalez admitted his pain was at its maximum during the five days immediately after his injury and thereafter diminished. As Gonzalez recognized in his demand, the daily award for pain, suffering and mental anguish likewise should diminish.

As the result of the district court's decision, Gonzalez received $115,000 more than he suggested was reasonable, a 67% increase. If there exists a justification for

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[3]I recognize Gonzalez demanded an additional $2,170,000 for the ancillary mental anguish he claimed he suffered. The district court presumably found little or no merit in this aspect of Gonzalez's request because the district court did not mention this demand nor cite it when announcing the award. Instead, the district court quoted and cited Gonzalez's more specific demand for the physical pain, suffering and mental anguish linked to the time period at issue. My focus is upon these specific demands, in which Gonzalez identified amounts totaling $170,000 as "just compensation."

such a result, the district court did not articulate that justification as required by Fed. R. Civ. P. 52(a)(1). See King v. United States, 553 F.3d 1156, 1161 (8th Cir. 2009) (explaining Rule 52(a)(1) requires the district court to provide sufficient factual findings for our court to engage in meaningful review); Arpin v. United States, 521 F.3d 769, 776 (7th Cir. 2008) (also explaining under Rule 52(a)(1), the district court must indicate its reasoning process connecting the evidence to the amount awarded). I would not affirm this unjustified portion of the award.

Even more troubling is the award of $528,000 for Gonzalez's future pain and suffering, which purports to compensate Gonzalez $2,000 each month for the remainder of his life, estimated at twenty-two years.[4] The district court reasoned $2,000 per month was justified "[c]onsidering the nature, extent, and permanency of [Gonzalez's] injury, and the pain and suffering and mental anguish reasonably certain to be experienced in the future." Other than this conclusory statement, the district court provides no explanation or description of *what* pain and suffering and *what* mental anguish Gonzalez is likely to experience or *why* $2,000 per month is an appropriate amount. The figure, taken from Gonzalez's demand for damages, appears to be "plucked out of the air, and . . . cannot be squared with the duty of reasoned, articulate adjudication imposed by Rule 52(a)." Arpin, 521 F.3d at 776.

The district court also failed to distinguish the future pain, suffering and mental anguish Gonzalez is likely to experience as the result of the government's delay in treatment from any pain, suffering and mental anguish caused by the fracture itself, for which the government bears no responsibility. I cannot determine if the district court distinguished between the two causes. Was all of Gonzalez's future pain,

[4]In all actuality, the lump-sum award will compensate Gonzalez more than $2,000 per month given the increased value of the award over time if Gonzalez prudently invests the money.

suffering and mental anguish related to post-traumatic arthritis caused by the delay in treatment? Did the fracture itself cause any of this future suffering?

Finally, I do not believe the evidence supports a $528,000 award. Aside from Gonzalez's subjective complaints made for this litigation, the only evidence I have found supporting the award are the affidavits and testimony of Dr. James Keever, who never treated Gonzalez, or even met Gonzalez, and whose hypothetical observations on the subject—formed before seeing Gonzalez's deposition—were general and non-specific to Gonzalez.

It is questionable whether such sparse evidence can support such a generous award under Arkansas law. See McGraw v. Jones, 238 S.W.3d 15, 21 (Ark. 2006) ("Evidence of future pain and suffering and permanent disability must be established with reasonable certainty and must not be left up to speculation or conjecture."). I am convinced $528,000 is unsupported on this record and overcompensates Gonzalez for any future pain, suffering or mental anguish he might experience as the result of post-traumatic arthritis of his ankle. See generally Thompson v. Amerada Hess Corp., No. 96-3265, 1998 WL 274260, at *7-8 (E.D. La. May 26, 1998) (remitting a jury award of $600,000 in non-economic damages to $300,000 for a plaintiff who suffered pain and suffering caused by a fractured tibia shaft and a fractured knee joint with subsequent surgery and complications related to the injuries, after not finding any "similar injuries where the general damages even come close to $600,000").

For these reasons, I would not affirm the $813,000 award, which I believe is a "shocking" windfall to Gonzalez and results in a "plain injustice" to the United States taxpayers. I would vacate Gonzalez's damage award and remand the case to the district court to enter a new judgment. See Hysell, 534 F.2d at 787-88.

United States Court of Appeals
For The Eighth Circuit
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June 18, 2012

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RE: 10-3753 Jose Gonzalez v. United States

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was William G. Cole, with the Department of Justice, Civil Division, Washington, DC. The following attorney also appeared on the appellant brief; Thomas M. Bondy, with the Department of Justice, Civil Division, Washington, DC.

Counsel who presented argument on behalf of the appellee was Milton A. DeJesus, of Little Rock, AR.

The judge who heard the case in the district court was Honorable Susan Webber Wright. The judgment of the district court was entered on October 15, 2010.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

MER

Enclosure(s)

cc: Lois Law
MO Lawyers Weekly

District Court/Agency Case Number(s): 2:05-cv-00269-SWW

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
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June 18, 2012

Mr. William G. Cole
U.S. DEPARTMENT OF JUSTICE
Civil Division, Appellate Staff
Room 7320
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

RE: 10-3753 Jose Gonzalez v. United States

Dear Counsel:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also entered today. The opinion will be released to the public at 10:00a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

MER

Enclosure(s)

cc: Mr. Thomas M. Bondy
Mr. Milton A. DeJesus
Mr. Jose Luis Gonzalez
Mr. Jim McCormack
Mr. Clarence Daniel Stripling
Mr. Ken Swindle

District Court/Agency Case Number(s): 2:05-cv-00269-SWW

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Eighth Circuit Court of Appeals

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Case Number: 10-3753
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Notice will be electronically mailed to:

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- Mr. Clarence Daniel Stripling, Assistant U.S. Attorney
- Mr. Ken Swindle

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

JOSE LUIS GONZALEZ,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	2:05cv00269 SWW-JJV
	*	
	*	
	*	
UNITED STATES OF AMERICA; J. JIMINEZ, Health Service Administrator, FCI-Forrest City; G. TOLIVER, R.N., FCI-Forrest City; J. EDNA PRINCE, Clinical Director, FCI-Forrest City; YVETTE TORO, an employee with the Federal Bureau of Prisons; and UNITED STATES BUREAU OF PRISONS,	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

Plaintiff Jose Luis Gonzalez, a Mexican national who was incarcerated at the Federal Correctional Institute (FCI) at Forrest City, Arkansas for drug-trafficking convictions, brings this action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (*Bivens*), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.*, seeking damages resulting from the delay in treatment of a fractured ankle and leg he suffered during his incarceration. On February 2, 2010, Magistrate Judge Joe J. Volpe entered Proposed Findings and Recommendations [doc.#136] in which he recommended that defendants' motion for summary judgment on Plaintiff's *Bivens* claim be granted but that summary judgment on Plaintiff's FTCA claim be denied. By Order entered February 23, 2010 [doc.#150], the Court adopted Judge Volpe's Proposed Findings and Recommendations, thereby allowing Plaintiff's

FTCA claim – the sole remaining claim in this action – to proceed to trial.[1] Plaintiff's FTCA claim was tried to the Court on August 30-31, 2010.[2] This Memorandum and Order constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I.

Plaintiff arrived at FCI Forrest City, Arkansas on January 12, 2004. Upon his arrival, Plaintiff was diagnosed with diabetes and he was also treated for varicose veins and related ulcers in his left lower leg. During the relevant time period, Dr. J. Edna Prince was the Clinical Director for the prison's Health Services Department.

On the evening of July 28, 2004, Plaintiff was playing second base in a sanctioned softball game at the prison when he suffered a serious injury to his left ankle and lower left leg due to another player sliding into second base and hitting him. According to Plaintiff's expert witness, Dr. James Keever, a licensed orthopedic surgeon, and not disputed by the United States, Plaintiff suffered a pronation and lateral rotation injury to the ankle with an avulsion type fracture of the medial malleolus and a fracture of the fibula proximal to the syndesmosis. *See* Keever Aff. at ¶ 11; Keever Supp. Aff. at ¶ 6. It is not clear, however, that Plaintiff reported feeling pain or requested medical attention immediately following his injury. Rather, Plaintiff states that after being hit by the other player, "[t]he guard comes over and asks me if I'm okay. I

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[1] Other claims and defendants were previously dismissed. As Plaintiff's FTCA claim is now the sole remaining claim, the only proper defendant is the United States. *Carter v. Ringwood*, No. 2:09CV00065 SWW, 2010 WL 796998 at *2 (E.D.Ark. March 8, 2010) (citing 28 U.S.C. § 1346(b)(1)).

[2] Before trial could commence, Plaintiff completed his sentence and authorities repatriated him to Mexico. Because of his criminal conviction, Plaintiff was unable to obtain a visa to return to the United States for trial and he accordingly appeared by video deposition, the Court having granted Plaintiff's unopposed motion [doc.#166] for leave to so appear.

reply I don't know. I'm lying on the ground. The manager and the guard check me and I'm taken out of the game. He sits me on the team's bench. The game is over and we go back to our homes or our units." Dr. Keever notes that while ankle fractures are "really a very, very painful fracture," and that there is "the initial pain of the broken bone," this pain "interestingly often doesn't play in a patient's memory that much." He states that "afterwards, particularly with any movement where the bone fragments move back and forth, there is pain that would be on the way top end of the scale." Dr. Keever states that Plaintiff would have had two pain zones as a result of his injury – pain near the knee where one break was located and pain in the ankle where the other break was located.[3]

While the record may not reveal that the severity of Plaintiff's injury was immediately apparent the night of July 28, 2004 or that Plaintiff requested medical attention at that time, the United States does not dispute that at approximately 8:00 a.m. on July 29, 2004, the day following his injury, Plaintiff self-reported to the Health Services Department for medical care and treatment of his ankle and leg. Plaintiff states he was assisted by fellow prisoners up to the door of the Health Services Department and then used the wall for support the rest of the way. Plaintiff, however, states he was told by G. Toliver, a nurse for the Health Services Department, that "walk-ins" were not allowed and that he was turned away and instructed to return the following day, July 30, 2004, at 6:30 a.m. during the Health Services Department's sick-call hours.

Plaintiff states that as instructed, he returned to the Health Services Department the next

[3] At the time of his injury, Plaintiff was on convalescence from July 16, 2004 to August 16, 2004. Additionally, Plaintiff had restrictions of no prolonged standing and a weight restriction of no lifting over 15 pounds indefinitely beginning February 9, 2004. Dr. Keever notes, however, that "there is absolutely nothing that would casually connect [his] condition [varicosities and varicose ulcers] to a traumatic fracture of the ankle." Keever Aff. at ¶ 10.

morning on July 30, 2004, during sick-call hours. Plaintiff, however, states he was told by Toliver that he could not be treated until the following week and must make an appointment for the next clinic day, August 2, 2004. Plaintiff states he told Toliver that "it's an emergency, that it's a probable fracture," and that he asked Toliver to "send me to x-rays," but that Toliver "tells me to go and says, next."

On August 3, 2004, Plaintiff returned to the Health Services Department and was examined by Yvette Toro, a Physician's Assistant for the Health Services Department who is also fluent in Spanish.[4] Toro reported in her note of this visit that Plaintiff complained of pain in his left ankle "due to sports injury," assessed the pain level at "6" – noting that the "pain is worse at night" – and noted edema, some marked discoloration and skin erosion, that dorsal flexion is slightly limited, and referenced dermatitis and arthralgia. Toro further reported that Plaintiff ambulates with no difficulty. Plaintiff, however, states that Toro could not have made such a determination as she did not see him enter or depart her presence, stating that Toro "couldn't say whether I walked or I didn't walk. She didn't – she couldn't see me." He states that Toro "has a room and you only take two steps and you sit on the chair in front of her. You get out through that door and she cannot see you anymore."[5] Plaintiff states he was never able to get to the Health Services Department without assistance, be it a wheelchair that he was able to procure himself or assistance from fellow inmates, and that he would otherwise have to hop

[4] The note of this visit apparently originally reflected a date of August 2, 2004 as the date of the visit but the note appears to have been altered, or "overwritten" as stated by Plaintiff, to reflect August 3, 2004 as the date of the visit. Because the correct date is of no real import for purposes of today's decision, the Court will assume that the date of Plaintiff's visit was August 3, 2004.

[5] Dr. Prince stated that Toro's desk "[u]sually" was closer to the door and that Plaintiff "would have to walk around the desk to get to the chair, to the exam table."

and use the wall for support. In any case, Toro requested x-rays of Plaintiff's left knee and ankle. Plaintiff was given Motrin or Ibuprofen for the pain and he states that he requested but was not provided crutches or a wheelchair.

In her Declaration dated July 28, 2006, Toro states that she requested x-rays of Plaintiff's left knee and ankle to determine whether a skin infection from which she states Plaintiff suffered had affected the bone and developed into osteomyelitis and whether he was arthritic. She states she did not suspect a bone fracture because Plaintiff was ambulating without difficulty and because the symptoms he presented, *i.e.*, peeling skin, discoloration and swelling, were consistent with his previous complaints relating to his skin infection and joint discomfort. Dr. Prince likewise states in her Declaration dated July 31, 2006 that Toro "had ordered x-rays to determine arthralgia and possible osteomyelitis." However, the Radiologic Consultation Requests prepared by Toro on August 3, 2004 contradict hers and Dr. Prince's stated reasons in July 2006 for requesting the x-rays. Specifically, Toro states in the August 3, 2004 Requests that the reason she requested an x-ray of Plaintiff's left knee was because of a "sports injury" and that the reason she requested an x-ray of Plaintiff's left ankle was because of a "twisted ankle (sports injury)." The Radiologic Consultation Requests do not mention arthralgia or osteomyelitis, and Dr. Prince states that she and Toro never discussed or previously ordered x-rays for arthralgia or osteomyelitis.[6] Dr. Keever states that based on a reasonable medical certainty the x-rays were ordered because of a sports injury to rule out an ankle injury.

Dr. Prince also saw Plaintiff on August 3, 2004, the same day Toro earlier saw Plaintiff. Dr. Prince states in her July 2006 Declaration that this visit was for a diabetes care follow-up and

[6] In this respect, nothing in the record indicates that x-rays were ever ordered of Plaintiff's ankle and leg based merely on edema and discoloration.

that during this visit, Plaintiff had brought an interpreter. Plaintiff states he did indeed have an interpreter for this visit – Toro – but that Dr. Prince "kicked her out" and wouldn't allow her to be his interpreter. Dr. Prince states she "can't imagine that – why that would happen" because she is "just trying to gather the information" and that an interpreter helps her understand what the patient is trying to tell her. Dr. Prince states she could "sometimes" communicate with Plaintiff in English but that on other occasions Plaintiff was unable to do so, although she later states that Plaintiff "has proven he can communicate in English when he is ready...." For her part, Toro states in her July 2006 Declaration that "[o]n occasions I serve as [Plaintiff's] interpreter during his visits with the Clinical Director." Toro does not, however, address whether she served as Plaintiff's interpreter during the August 3, 2004 visit with Dr. Prince or whether she attempted to serve as Plaintiff's interpreter but was not allowed to do so by Dr. Prince.

Certainly, Dr. Prince did not always utilize the services of an interpreter in her gathering of information to determine what the patient was trying to tell her. For example, with respect to certain of Plaintiff's requests for assistance that were written in Spanish, Dr. Prince simply noted in the section relating to the disposition of Plaintiff's request, "Cannot read Spanish." or "In English, please." or "What [specifically?] are you requesting? Please in English." As to why Dr. Prince made such notations, the following colloquy occurred:

> Q. Okay. Now, is it -- why is it, Doctor, that you were not able to respond to Mr. Gonzalez other than to state that the disposition on, let's say 158, "in English, please." Why is it that you were not able to get somebody to translate that for you?
>
> A. Because Mr. Gonzalez, in the past, has been able to get people to write these things for him in English, and that's what I was requesting that he do, for expediency. Like, if you look on page 177, there is an extensive complaint dated

September 8 2004 -- where he had assistance, I am sure -- and somebody wrote it all in English for him. All of his cop outs prior to his accident were in English, that I remember, and so I know that he has someone available who can do this for him. And I am asking him to do this for expediency so that I can sit down and read what he has to say. In privacy, I would like to. But even -- I mean, even the ones that -- he wrote one in dental in Spanish -- one in dental prior to the accident and they responded in English and he did not complain. So everything I had before then, he was able to get someone to help him, and I was requesting based on that that he continue to do that.

Q. Okay. All right. And, Dr. Prince, I want to be fair to you; so would you be fair to me?

A. Oh.

Q. Because I indicated I would let you talk, but I want you to answer my questions. Okay?

A. Okay.

Q. My question was, was there nobody available who could have translated this for you from this inmate?

A. It may have been, but I prefer for him to have it -- have him get someone to help him write -- as he had been doing.

Q. So you didn't even attempt to find out what he was saying?

A. I asked him to get it interpreted for me. That, I think, is part of his responsibility for communicating with medical staff.

Q. I understand. Doctor, please answer my questions. Please.

A. I said there might have been somebody available. I don't know, but I requested that he get somebody to interpret it for him.

Q. And, again, my question was, did you attempt to have anybody translate for you?

A. Some of them, I did.

Q. Okay. Let's talk at -- let's talk about No. 158, 00158. This is Gonzalez Exhibit 10.

A. Uh-huh.

Q. Did you attempt to have anybody read that or translate that to you in Spanish?

A. I expect I did not because I suspect -- I mean, you have to understand, Mr. DeJesus, I am very busy. Mr. Gonzalez can come over. He can speak to Spanish speaking people. He has proven that he can communicate in English when he is ready, and sometimes he just needs to do that. I am sorry.

Dr. Prince states that she didn't remember Plaintiff getting his requests translated to English becoming an issue until after he hurt his ankle and leg. She states that before that, he didn't really complain and was very cooperative but that after the accident with his ankle and leg, it became a real issue and that Plaintiff "made no attempt to communicate with me and refused to see me on multiple occasions."[7]

Concerning the August 3, 2004 visit with Dr. Prince, Plaintiff states he showed Dr. Prince his injured foot and "[w]ith signs, I told her that it hurt," to which he states Dr. Prince replied, "okay, okay," but that Dr. Prince doesn't speak Spanish and that "she didn't understand anything that I said" and for her to allow an interpreter. Dr. Prince reported in her note of the visit that Plaintiff reported a pain level of "0"; she did not remember seeing Toro's note of that same day wherein Plaintiff reported pain in his left ankle due to a sports injury. Plaintiff states Dr. Prince checked his foot "but only on top" and that he "told her several times that it hurt with my poor English. I wanted to say pain in English, pain, pain," and that he didn't understand why she put a "0" on the pain assessment graph when Toro earlier that same day had recorded a pain level of "6." Dr. Prince testified that she was only seeing Plaintiff for chronic care clinic for

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[7] As will be seen, Dr. Prince maintained for the longest that Plaintiff's fractured ankle and leg occurred on August 26, 2004 rather than one month earlier. Presumably, Dr. Prince is claiming that Plaintiff made no attempt to communicate with her and refused to see her on multiple occasions after August 26, 2004. In this respect, there are in the record several "Medical Refusal Treatment" forms with respect to Plaintiff that date from 2006 and 2007.

diabetes and that "[she] did not examine his ankle for any orthopedic abnormality." She states that Plaintiff did not have any complaints about his ankle and that she only looked at his foot with reference to his diabetes and his varicose veins and ulcer. She states that Plaintiff "didn't have any tenderness when I touched him," that she "could not assess that there was any problem with his walking," and that she "didn't see anything different than what I had been seeing [prior to the sports injury] as far as skin changes and varicose veins." Plaintiff was not provided a wheel chair or crutches, nor was he provided pain medication other than the Motrin or Ibuprofen that Toro had prescribed earlier that day.

On August 17, 2004, Plaintiff was called into the Health Services Department to have his x-rays performed that Toro had ordered on August 3, 2004. The technician performed or attempted to perform an x-ray of Plaintiff's chest instead of his leg because of an incorrect treatment order from Toro that mistook Plaintiff for a former inmate of the facility, Jose Maria Gonzalez. When the technician discovered the error, he told Plaintiff he would have to reschedule an x-ray for his leg.

According to Summer Birkhead, the Diagnostic Radiologic Technologist on duty, she straightened out the mistake with Toro and placed Plaintiff on a "call out" for August 26, 2004 to which she claims Plaintiff did not show. Birkhead states she then paged Plaintiff who appeared at around 1:00 p.m. Plaintiff, however, states he came out on the "call out" for x-rays at 9:00 a.m. but that they didn't take x-rays until 1:00 p.m. and that during that time, "they sent me out to eat." In any case, Birkhead took the x-ray, suspected a fracture, and claims that because the fracture did not show completely on the x-ray of the ankle and knee that she requested authorization to x-ray the tibia-fibula, to which Dr. Prince concurred, and issued a Radiologic

Consultation Request dated August 26, 2004.

The x-ray taken on August 26, 2004 was reviewed by Dr. Prince who saw the seriousness of Plaintiff's injury. She states that "because Ms. Toro ordered an x-ray of the left knee, that's where the fracture was of the fibula, it was at the knee and when we saw the fracture of the fibula, that's when we went ahead and ordered it all the way down and found the fracture of the ankle." Upon discovery of the fractures, Plaintiff was placed in a wheel chair and transported to a local hospital where he was fitted with a supportive walking boot. Plaintiff was returned to the prison on the night of August 26, 2004 and he was transported the following morning to St. Francis Hospital in Memphis, Tennessee.

On August 27, 2004, surgery was performed on Plaintiff's left leg and ankle at St. Francis Hospital by Dr. Frederick G. Wolf. The Emergency Physician Record from St. Francis Hospital indicates that Plaintiff's injury occurred 30 days prior to admittance and the Operative Report from St. Francis Hospital indicates that the surgical procedure performed on Plaintiff was an "open reduction and internal fixation of medial malleolar fracture with closed treatment of proximal fibular fracture." The repair required the placement of two screws in Plaintiff's left ankle.

Dr. Prince states that she initially thought Plaintiff's injury was a new fracture that had occurred on August 26, 2004, as she states in her July 2006 Declaration, but that she later changed her opinion based on "someone" who read the x-rays that noted a "callus formation" (new bone formation) on the x-rays and after reading Dr. Wolf's write-up. Dr. Prince states she

did not read Dr. Wolf's operative report prior to preparing her July 2006 Declaration.[8]

After surgery, Plaintiff's ankle was placed in a cast and he was prescribed Lortab 1-2 p.o.q.4h as needed for pain. Once Plaintiff was stabilized he was returned to prison that same night, close to midnight on August 27, 2004. Plaintiff was not given the prescribed medication but, per orders of Dr. Prince, was given Tylenol #3 for the pain, 2 tablets 3 times a day as needed.

Upon his return to the prison, Plaintiff was placed in a Special Holding Unit (SHU), which Plaintiff termed the "hole" or "punishment cell." Dr. Prince denies Plaintiff's claim that his placement in an SHU was punishment, stating that Plaintiff was placed in an SHU because while the institution has an outpatient ambulatory clinic, everything shuts down around 10:00 p.m. and in an SHU, he doesn't have to get up and walk because his toilet and bed are right there "and we bring him all of his medicines to him during the day and in the early evening." She states that "that was just the place to put him for the first two or three days until we felt like he was able to tolerate being up on crutches or in a wheelchair."

Plaintiff disputes Dr. Prince's explanation for placing him in an SHU, noting that the medical records indicate that he was only provided pain medication twice in 12-hour intervals, and that his vital signs were not taken, he was not checked for fever, he was not catheterized or provided assistance to use the facilities, and there is no indication that he was monitored by any medical personnel. Plaintiff states that other suitable arrangements could have been made, including allowing him to remain at St. Francis Hospital for several days or taking the time while

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[8] Dr. Prince denies that her statement that Plaintiff's fracture was a new fracture on August 26, 2004 would have affected investigations concerning complaints Plaintiff might have issued about his treatment. She states that prior to her July 2006 Declaration she nowhere reduced to writing her opinion that Plaintiff's fracture was new and occurred on August 26, 2004, and that her statement in her Declaration that the fracture was new was based on her memory.

he was in surgery to prepare a treatment plan and finding a suitable area at the prison for his recuperation. Plaintiff states he suffered alone in the "hole" for three days in serious pain following the surgery.[9]

Plaintiff was in a cast for three to four weeks following surgery, no weight bearing, and then placed back in a walking boot for approximately four weeks. The ankle thereafter was healed from the surgery and Plaintiff was allowed to place weight on it. Plaintiff was later transferred from FCI Forrest City, Arkansas to another institution and then released from the Bureau of Prisons on November 14, 2008. Plaintiff was thereafter repatriated to Mexico.

Plaintiff states that he experiences pain on a constant basis and that his left ankle will not support his normal day-to-day activities. He states he can't perform his work as a mechanic or a contractor because both jobs require prolonged standing, which he states he is unable to do. Plaintiff states that he walks in pain and sleeps in pain, that he can no longer participate in athletics, and that the left ankle doesn't have the same mobility as the right ankle. For example, Plaintiff states that when he stumbles he is unable to recover since the ankle doesn't respond with the same reflexes as his other ankle and he thus falls down, and he states that while he can go up a ladder the problem is going down as the left foot doesn't support his body weight. Plaintiff states the ankle is swollen and that he has to keep moving his foot forwards and backwards so that something will release from the pain. He states he can't walk that much and that he cannot carry anything due to the pain, and that when he kneels down he struggles to get up because of the ankle.

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[9] Plaintiff states that after being returned to the prison close to midnight on August 27, 2004 his level of pain was "10," and Toliver noted on September 3, 2004 that Plaintiff's pain assessment was level "10." Plaintiff states that two weeks after the surgery his pain level did go down.

Plaintiff seeks a total of $3,000,000 for the damages he claims was proximately caused by the negligence of the United States, namely the nature, extent, duration, and permanency of the injury, *see* Arkansas Model Jury Instructions Civil ("AMI Civ.") 2202, as well as damages for pain and suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future. *See* AMI Civ. 2205. Plaintiff also seeks attorney's fees and costs.

II.

A.

In actions brought under the FTCA, courts are bound to apply the law of the state in which the acts complained of occurred. *See, e.g., Goodman v. United States*, 2 F.3d 291, 292 (8th Cir. 1993) (citing 28 U.S.C. § 1346(b)). Here, the acts complained of occurred in Arkansas and so it is that state's law that will be applied to Plaintiff's claims.

Pursuant to Ark. Code Ann. § 16-114-206, the plaintiff in a medical malpractice case has the burden of proving by expert testimony (1) the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or speciality in the locality in which he or she practices or in a similar locality, (2) that the medical provider failed to act in accordance with that standard, and (3) that such failure was the proximate cause of the plaintiff's injuries. *Williamson v. Elrod*, 348 Ark. 307, 311, 72 S.W.3d 489, 492 (2002); *Reagan v. City of Piggott*, 305 Ark. 77, 79-80, 805 S.W.2d 636, 637 (1991). In such cases, it is not enough for an expert to opine there was negligence that was the proximate cause of the alleged damages. *Williamson*, 348 Ark. at 311, 72 S.W.3d at 492. The opinion must be stated within a reasonable degree of medical certainty or probability. *Id.* Expert testimony is not per se necessary in every malpractice case, however.

Haase v. Starnes, 323 Ark. 263, 268-69, 915 S.W.2d 675, 677-78 (1996). Rather, expert testimony is required only when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, when the applicable standard of care is not a matter of common knowledge, and when the jury must have the assistance of experts to decide the issue of negligence. *Id.*

Magistrate Judge Volpe concluded in his Proposed Findings and Recommendations that Plaintiff would clearly need expert testimony to establish the existence of a continuing injury following the surgery and treatment to repair his fractured ankle but that an expert is not required to prove the standard of care in failing to diagnose Plaintiff's fractured ankle and, importantly, the pain suffered while awaiting a proper diagnosis and treatment. On this point, concluded Judge Volpe, the question of negligence for failing to diagnose and treat Plaintiff's fractured ankle and liability for the pain suffered while awaiting treatment is a fact question for the trial court. As previously noted, the Court adopted Judge Volpe's Proposed Findings and Recommendations.

B.

1.

The Court first addresses the time period following Plaintiff's injury on July 28, 2004 up to the time he finally received treatment. On August 20, 2010, after years of vigorously contesting this action and less than two weeks before trial, the United States filed an Admission of Liability [doc.#176], admitting that it breached the applicable standard of care and is liable for the pain suffered by Plaintiff as a result of the failure to obtain an x-ray of Plaintiff's ankle

between August 3, 2004 and August 26, 2004.[10] It is not clear why the United States waited until just before trial to admit liability as the breach of the standard of care was clear given the nature of Plaintiff's fractured ankle and leg and the acts and omissions that resulted in the failure to treat Plaintiff's fractures in the four weeks prior to x-rays finally being taken. *Cf. Owens v. United States*, No. 5:04cv304-DCB-JCS, 2007 WL 1031644 at *4-5 (S.D.Miss. March 30, 2007) (delay in taking x-rays of inmate's fractured jaw constituted breach of duty to act with ordinary diligence in providing adequate treatment for inmate and caused inmate to endure pain for several months). Indeed, the failure to treat Plaintiff's fractured ankle and leg in the four weeks prior to x-rays finally being taken is nothing less than gross negligence.[11] The United States' belated admission has also consumed judicial resources over the years and caused Plaintiff to expend resources and incur expenses that he likely would not have incurred had the United States timely admitted the obvious breach of the standard of care that occurred in this case. Nevertheless, the Court accepts the United States' Admission of Liability. However, rather than August 3, 2004 being the date when the breach of the standard of care began, the Court determines that the breach of the standard of care began on the morning of July 29, 2004, when Plaintiff self-reported to the Health Services Department for medical care and treatment of his ankle and leg but was turned away, and ended on the afternoon of August 26, 2004, when x-rays

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[10] In a Supplemental Trial Brief [doc.#177] accompanying that pleading, the United States asserts that this Court affirmed Judge Volpe's dismissal of all claims "except those related to pain suffered as a result of [the Bureau of Prison's] failure to timely order an x-ray" and that "[g]iven the dismissal of all claims except the claim for suffering as a result of the delay in obtaining the x-ray and that defendant has now admitted that it breached the standard of care and is liable for pain suffered as a result of that delay, the only issue remaining for the Court's determination is the amount of damages." Contrary to the United States' understanding of Judge Volpe's Proposed Findings and Recommendations and this Court's Order adopting same, the Court did not in any way deny or limit Plaintiff's FTCA claim but only delineated the matters for which expert testimony would be required.

[11] Dr. Keever notes that Plaintiff would have had no range of motion given the fracture of the ankle and would not have been able to put any weight on the ankle at all, and that Plaintiff had obviously suffered a traumatic injury to his foot that would be clear to a general practitioner such as Dr. Prince and which is why Toro ordered the x-rays on August 3, 2004.

were finally taken and Plaintiff was transported to a hospital.[12]

2.

Plaintiff also claims there was a breach of the standard of care for the three days following surgery when he was placed in an SHU and not given the pain medication prescribed by the surgeon but instead given Tylenol #3. The Court is unable to locate in the record where Dr. Keever opined on the standard of care concerning post-surgery facilities or whether substituting Tylenol #3 for the medication prescribed by the surgeon to address Plaintiff's post-surgical pain was a breach of the applicable standard of care. The Court determines in these circumstances that the issues of proper post-surgery facilities and proper post-surgery pain medication are not matters of common knowledge and that expert testimony was required to establish a breach of the applicable standard of care for these matters.

3.

The Court now turns to the time period following Plaintiff's surgery on August 27, 2004 and Plaintiff's claim that he suffered a continuing injury that was proximately caused by the failure to earlier obtain an x-ray of his ankle. The United States argues that Plaintiff has not met his burden of proof on his claim of a continuing injury, but Dr. Keever specifically concluded that based on a reasonable medical probability, Plaintiff has suffered permanent post-traumatic arthritis of the ankle due to his not receiving treatment for a month and that the arthritis will get worse with time. Indeed, the United States' only witness, Dr. Prince, states that she defers to orthopedists about fractures and the pain of a fracture. Considering also Plaintiff's testimony

[12] Having considered the record, including Plaintiff's numerous attempts to get medical attention for his injury and the pain he was in, the Court credits Plaintiff's claim that he appeared for his x-rays at 9:00 a.m. on August 26, 2004 but that x-rays were not taken until 1:00 p.m. that afternoon.

about the difficulties he continues to experience with his ankle, which Dr. Keever notes is consistent with his opinion that Plaintiff has suffered permanent post-traumatic arthritis of the ankle, the Court finds that Plaintiff has met his burden of proof that he suffered a continuing injury following his surgery on August 27, 2004 that was proximately caused by the United States' gross negligence.[13]

C.

The Court now turns to damages, beginning first with the time period beginning on the morning of July 29, 2004, when Plaintiff self-reported to the Health Services Department for medical care and treatment of his ankle and leg but was turned away, and continuing up to the afternoon of August 26, 2004, when x-rays were finally taken of Plaintiff's ankle and leg. The Court credits Dr. Keever's testimony that ankle fractures are a very painful fracture and on the top end of the pain scale and that if the fracture is not mobilized there is significant swelling that itself causes pain. Plaintiff, of course, had no option of obtaining medical care elsewhere, and in light of the gross negligence of the United States during this time period, the Court finds that $10,000 per day for the pain and suffering and mental anguish Plaintiff suffered is reasonable.[14]

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[13] In addition to his testimony at trial, Dr. Keever also submitted an Affidavit dated February 4, 2010 and a Supplemental Affidavit dated July 17, 2010. Prior to the Court adopting Judge Volpe's Proposed Findings and Recommendations ruling on the summary judgment motion, the United States had not yet found or provided Plaintiff with the relevant x-rays. Those x-rays only surfaced after the Order ruling on the summary judgment motion. Upon disclosure of the x-rays, Dr. Keever supplemented his Affidavit to reflect that he has reviewed the relevant x-rays. Although Dr. Keever did not opine in his first Affidavit that Plaintiff actually has post-traumatic arthritis of the ankle, he notes that he did not have the x-rays at that time and did not know what the fracture actually looked like. Dr. Keever did note, however, that when a fracture such as Plaintiff's is allowed to remain displaced, there is a significant chance of damage to the weight bearing surface of the joint, leading to post-traumatic arthritis. Keever Aff. at ¶ 15(3). Dr. Keever states that with the additional information he has learned it is his opinion that Plaintiff does indeed have post-traumatic arthritis of the ankle. Following Dr. Keever's first Affidavit, the United States moved to strike expert testimony, which the Court denied by Order dated February 24, 2010 [doc.#154].

[14] Plaintiff submitted to the Court a "Demand for Damages Under the Federal Tort Claims Act" in which he states he seeks "at least" $10,000 per day in damages for the time period of July 28, 2004 to August 3, 2004, and "at least" $5,000 per day in damages for the time period of August 3, 2004 to August 26, 2004. *See* Pl.'s Demand for Damages Under the Federal Tort Claims Act at 4, 8, 10 (emphasis in original). Given the gross negligence of the United States in this case and its effect on Plaintiff, the Court determines that $10,000 per day in damages for the entire period beginning on the morning of July 29, 2004

Accordingly, for the time period beginning on the morning of July 29, 2004 and continuing through August 25, 2004 (28 total days), the Court awards Plaintiff $10,000 per day. For the morning of August 26, 2004, prior to the x-rays being taken that afternoon, the Court awards Plaintiff $5,000. Plaintiff is thus awarded $285,000 for the pain and suffering and mental anguish he suffered from the morning of July 29, 2004 up to the afternoon of August 26, 2004.

With respect to the permanent post-traumatic arthritis of Plaintiff's left ankle that was caused by the United States' gross negligence and will get worse with time, Plaintiff is currently 54 years old (having been born on February 28, 1956), and under the mortality table set forth in Ark. Code Ann. § 18-2-105, Plaintiff has a life expectancy of another 26.80 years. However, given Plaintiff's medical issues unrelated to his ankle, including diabetes, the Court will assume that Plaintiff has a life expectancy of another 22 years rather than the 25 years suggested by Plaintiff in his damages brief and the 26.80 years suggested by the mortality table. *See* AMI Civ. 2219 (mortality tables may be considered in connection with other evidence relating to the life expectancy of an individual, including evidence of his or her occupation, health, habits, and other activities, bearing in mind that some persons live longer than the average and some persons less than the average). *Cf. Oxford v. Hamilton*, 297 Ark. 512, 515, 763 S.W.2d 83, 85 (1989) (evidence of the appellant's habits – including use of alcohol and its damaging effects on body's organs – was useful and even necessary to assist the jury in determining life expectancy). Considering the nature, extent, and permanency of Plaintiff's injury, and the pain and suffering and mental anguish reasonably certain to be experienced in the future, the Court agrees with Plaintiff that $2,000 per month for the duration of his expected lifetime – which the Court

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and up to the afternoon of August 26, 2004 is reasonable.

determines to be 22 years – is reasonable, for a total of $528,000.[15]

III.

Finally, the Court turns to Plaintiff's motion for attorney's fees and costs [doc.#192]. Plaintiff recognizes that ordinarily, an award of attorney's fees with respect to his FTCA claim must be taken from the judgment awarded pursuant to the bench trial and are limited to 25% of the judgment. *See, e.g., Dockery v. United States*, 663 F.Supp.2d 111, 126 (N.D.N.Y. 2009) (citing 28 U.S.C. §§ 2412(d)(1)(A), 2678). Rather, Plaintiff seeks attorney's fees and costs under Rule 56(g) of the Federal Rules of Civil Procedure on grounds that on January 6, 2010, the United States caused to be filed a bad faith motion for summary judgment [doc.#128] founded on false and misleading declarations made by medical personnel who were employed by the United States at the time such declarations were made and that this bad faith motion resulted in the loss of his *Bivens* claim. Plaintiff argues that these declarations needlessly increased the cost and length of this litigation and he accordingly seeks $50,180 in attorney's fees and costs in the amount of $26,411.49 in prosecuting the *Bivens* claim that he states was lost through the bad faith summary judgment motion.

The Court agrees with Plaintiff that certain representations of Toro and Dr. Prince in their July 2006 Declarations could be considered evidence of bad faith. These representations include Toro and Dr. Prince blatantly misrepresenting the reasons that x-rays were requested on August 3, 2004, Dr. Prince's questionable assertion that Plaintiff's fracture was a fresh fracture on August 26, 2004 rather than one that occurred one month earlier, and Toro's and Dr. Prince's equally questionable assertions that Plaintiff was walking with no difficulty during the time

[15] Damages for future pain and suffering are not reduced to present value. *See* Comment to AMI Civ. 2205.

period at issue. In this respect, given the nature of Plaintiff's fractured ankle and leg and Dr. Keever's opinion that Plaintiff would not have been able to put any weight on the ankle at all, Toro's and Dr. Prince's assertions that Plaintiff was walking with no difficulty raise many questions.

Nevertheless, "[c]ase law makes clear that no sanctions will be imposed under Rule 56(g) unless the court relies on the false affidavit in ruling on the summary judgment motion." *Structural Polymer Group, Ltd. v. Zoltek Corp.*, No. 4:05cv321 CEJ, 2006 WL 2802202 at *2 (E.D.Mo. Sept. 25, 2006) (collecting cases). *See also Jaisan, Inc. v. Sullivan*, 178 F.R.D. 412, 416-417 (S.D.N.Y. 1998) (discussing cases denying Rule 56(g) motions where a litigant's actions, even though wrongful, did not affect the disposition of the summary judgment motion and concluding that plaintiff's conduct "even if it were 'egregious' as defined under that case law, it did not affect the outcome of the case and Rule 56(g) sanctions would be inappropriate for that reason"); *Sutton v. U.S. Small Business Administration*, 92 Fed.Appx. 112, 117-118 (6th Cir. 2003) (district court did not rely on affidavit in granting defendant's summary judgment motion and, thus, the affidavit, even if submitted in bad faith, did not prejudice plaintiffs). Here, defendants did not attach Toro's and Dr. Prince's July 2006 Declarations to their motion for summary judgment and they did not otherwise reference those Declarations in their arguments on Plaintiff's *Bivens* claim. Rather, defendants' motion for summary judgment on Plaintiff's *Bivens* claim was predicated on the fact that Toro's error in misidentifying the inmate on the Radiological Consultation Request thereby delaying the taking of x-rays of Plaintiff's ankle and

leg amounted only to negligence,[16] that Plaintiff did not at that time have an expert witness for his claim that the delay in treatment of his fractured ankle resulted in permanent injury that he otherwise would not have incurred, and that Warden Linda Sanders and Dr. Prince were named as defendants solely because of their supervisory position as Warden and Clinical Director.[17] In his response [doc.#133] to defendants' motion for summary judgment, Plaintiff did not address his *Bivens* claim but focused on his FTCA claim, and Judge Volpe's Proposed Findings and Recommendations do not reference any of the matters that could be considered evidence of bad faith, Judge Volpe having not been presented with such matters.[18] Accordingly, because the July 2006 Declarations of Toro and Dr. Prince (or any other possible instances of bad faith) did not at any time play a factor in the summary judgment proceedings on Plaintiff's *Bivens* claim, the Court must deny Plaintiff's Rule 56(g) motion for attorney's fees and costs. *Cf. Havrum v. United States*, 204 F.3d 815, 819 (8th Cir. 2000) (in addressing request for attorney's fees under Equal Access to Justice Act for bad-faith activity of the government in FTCA case, and

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[16] On this point, Plaintiff's Second Amended Complaint alleges with respect to his *Bivens* claim that the mistake in his identity was caused by Toro's negligence in completing the Radiological Consultation Request. 2nd Am. Compl. at ¶¶ 17-18 [doc.#86]. Negligence claims, however, are not cognizable under *Bivens*. *See, e.g., Sellers by and Through Sellers v. Baer*, 28 F.3d 895, 902-03 (8th Cir. 1994) (even gross negligence on the part of federal officials is not actionable under *Bivens*).

[17] On this point, Plaintiff's Second Amended Complaint alleges with respect to his *Bivens* claim that Linda Sanders is the Warden for the FCI and that Dr. Prince is the Clinical Director for the FCI and that these individuals, by virtue of their positions, are responsible for ensuring that the departments and personnel within the prison perform their duties in accordance with proper procedures and the laws of the United States. 2nd Am. Compl. at ¶¶ 35-36. These allegations clearly assert respondeat superior liability, which is not cognizable in a *Bivens* action. *Bonner v. Outlaw*, 552 F.3d 673, 678-79 (8th Cir. 2009). The Court notes that it is not clear why the United States moved for summary judgment on Plaintiff's *Bivens* claim with respect to Warden Sanders as she was earlier dismissed as a defendant on respondeat superior grounds by Order entered August 19, 2008 [doc.#100] adopting, without objections, Magistrate Judge Jerry W. Cavaneau's Proposed Findings and Recommendations [doc.#99] (prior to the case being reassigned to Judge Volpe). The defendants listed in the above caption, which does not include Warden Sanders, are those that remained following the Court's August 19, 2008 Order.

[18] Toro's and Dr. Prince's July 2006 Declarations *were* submitted with a previous summary judgment motion filed on August 1, 2006 when this action was still assigned to Magistrate Judge Cavaneau. Judge Cavaneau, however, issued Proposed Findings and Recommendations [doc.#71] in which he recommended *inter alia* that Plaintiff's *Bivens* claim, rather than being disposed of on summary judgment, be allowed to proceed. By Order dated March 26, 2007 [doc.#81], this Court adopted Judge Cavaneau's Proposed Findings and Recommendations.

assuming without deciding that such fees are available in FTCA actions, Court held that "[f]ees for bad-faith activity on the government's part are available only in exceptional circumstances ... and we think that cases in which the activity complained of had no substantial effect on the plaintiff's litigation efforts necessarily fall outside that category").[19]

IV.

For the foregoing reasons, the Court awards Plaintiff a total of $813,000 in compensatory damages on his FTCA claim and denies Plaintiff's motion for attorney's fees and costs under Rule 56(g) of the Federal Rules of Civil Procedure [doc.#192].[20]

IT IS SO ORDERED this 15th day of October, 2010.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

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[19] As previously noted, however, attorney's fees with respect to Plaintiff's FTCA claim may be taken from the judgment awarded pursuant to the bench trial in an amount up to 25% of the judgment. Concerning Plaintiff's request for costs, Rule 54(d) of the Federal Rules of Civil Procedure gives district courts the power to tax costs in favor of a prevailing party. *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 601 (8th Cir. 2009). These awards, however, must fit within 28 U.S.C. § 1920, which enumerates the costs that a district court may tax. *Id.* Plaintiff, however, does not seek costs under Rule 54(d) and 28 U.S.C. § 1920, but only seeks costs under Rule 56(g) as a sanction for prosecuting the lost *Bivens* claim, which the Court today denies. The Court notes that of the $26,411.49 Plaintiff seeks in costs, the vast majority of that amount – $22,789.25 – was for the cost of his expert witness, Dr. Keever. Even had Plaintiff moved for costs under Rule 54(d) and 28 U.S.C. § 1920, Dr. Keever was not Court appointed. Accordingly, under 28 U.S.C. §§ 1920(3) and 1821(b), Plaintiff would not be entitled to the $22,789.25 he seeks for the cost of his expert witness but would only be entitled to an award of witness fees in the amount of $80.00 and related expenses for Dr. Keever's attendance at trial for the two days. *See, e.g., Hull by Hull v. United States*, 978 F.2d 570, 572-573 (10th Cir. 1992) (citing *Crawford Fitting Co. v. J.T. Gibbons*, 482 U.S. 437 (1987)); *Martino v. United States*, No. Civ.95-748 (JRT/RLE), 2002 WL 459069 at *2 (D.Minn. March 20, 2002).

[20] Judge Volpe's Proposed Findings and Recommendations which recommended granting the United States' motion for summary judgment on Plaintiff's *Bivens* claim was issued without benefit of a transcript of Plaintiff's deposition, Dr. Keever's expert opinion, and the relevant x-rays. In addition, Judge Volpe was not presented with Toro's and Dr. Prince's July 2006 Declarations. Should the record in this case be reopened, the Court, in light of the evidence adduced at trial that would possibly support a finding of deliberate indifference to Plaintiff's serious medical needs, will consider revisiting the grant of summary judgment on Plaintiff's *Bivens* claim to the extent that he is alleging more than negligence and respondeat superior liability. *See Jolly v. Knudsen*, 205 F.3d 1094, 1096 (8th Cir. 2000) (interpreting deliberate indifference standard).

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-3753

Jose Luis Gonzalez

Plaintiff - Appellee

v.

J Jiminez, Health Service Administrator, FCI-Forrest City; J. Edna Prince, Clinical Director, FCI- Forrest City; G. Toliver, R.N., FCI - Forrest City; Yvette Toro, an employee with the Federal Bureau of Prisons

Defendants

United States of America

Defendant - Appellant

United States Bureau of Prisons

Defendant

Appeal from U.S. District Court for the Eastern District of Arkansas - Helena
(2:05-cv-00269-SWW)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 18, 2012

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

10-3753 Jose Gonzalez v. United States "judgment filed sua sponte affirmed " (2:05-cv-00269-SWW)
8cc-cmecf-nda to: 06/18/2012 08:26 AM

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Eighth Circuit Court of Appeals

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Case Name: Jose Gonzalez v. United States
Case Number: 10-3753
Document(s): Document(s)

Docket Text:
JUDGMENT FILED - The judgment of the Originating Court is AFFIRMED in accordance with the opinion. WILLIAM JAY RILEY, STEVEN M. COLLOTON and RAYMOND W. GRUENDER Hrg Sep 2011 [3922660] [10-3753] (Melissa Rudolph)

Notice will be electronically mailed to:

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[STAMP acecfStamp_ID=1105112566 [Date=06/18/2012] [FileNumber=3922660-0]
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3e02058db0250fb4b28ddc31e044689ebd802c9de493684]]
Recipients:

- Mr. Thomas Mark Bondy
- Mr. William George Cole
- Mr. Milton A DeJesus
- Mr. Jose Luis Gonzalez
- Mr. Jim McCormack, Clerk of Court
- Mr. Clarence Daniel Stripling, Assistant U.S. Attorney
- Mr. Ken Swindle

The following information is for the use of court personnel:

DOCKET ENTRY ID: 3922660
RELIEF(S) DOCKETED:
affirmed
DOCKET PART(S) ADDED: 4636863, 4636864, 4636865

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

JOSE LUIS GONZALEZ,	*	
	*	
Plaintiff,	*	
vs.	*	2:05cv00269 SWW-JJV
	*	
	*	
UNITED STATES OF AMERICA; J. JIMINEZ, Health Service Administrator, FCI-Forrest City; G. TOLIVER, R.N., FCI-Forrest City; J. EDNA PRINCE, Clinical Director, FCI-Forrest City; YVETTE TORO, an employee with the Federal Bureau of Prisons; and UNITED STATES BUREAU OF PRISONS,	*	
	*	
Defendants.	*	

JUDGMENT

Pursuant to the Memorandum and Order entered in this matter on this date, it is Considered, Ordered, and Adjudged that Plaintiff Jose Luis Gonzalez be awarded $813,000 in compensatory damages on his Federal Tort Claims Act claim; Plaintiff's motion for attorney's fees and costs under Rule 56(g) of the Federal Rules of Civil Procedure [doc.#192] is denied.

IT IS SO ORDERED this 15th day of October 2010.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

JOSE LUIS GONZALEZ
Reg. #24451-179 PLAINTIFF

V. NO. 2:05CV00269 SWW/JWC

LINDA SANDERS, Warden,
FCI, Forrest City, AR DEFENDANT

ORDER

Plaintiff is a pro se inmate currently confined to the Federal Correctional Institution in Forrest City, Arkansas ("FCI"). On October 28, 2005, Plaintiff filed an action that he entitled, and that was designated as, a petition for writ of habeas corpus. In fact, it is not a habeas action at all; rather, Plaintiff brings a Bivens action[1] pursuant to 28 U.S.C. § 1331 based on the alleged violation of his Eighth Amendment medical rights (see docket entry #1). Plaintiff did not submit the $250.00 statutory filing fee required to pursue such an action or an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

A prisoner who is permitted to file a civil action in forma pauperis still must pay the full statutory filing fee of $250. Id. § 1915(b)(1). Method and timing of payment is the only issue to be resolved. Ashley v. Dilworth, 147 F.3d 715, 716 (8th Cir. 1998) (stating that all prisoner-litigants are "required to pay filing fees in full . . . the only issue being whether the inmate pays the entire filing fee at the initiation of the proceeding or in installments over a period of time"). Furthermore, federal courts are required to screen

[1] Because Plaintiff is a federal inmate alleging a constitutional violation against federal defendants, his claims are brought pursuant to Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), which established that the victims of constitutional violations by federal agents have a right to recover damages against the official in federal court, just as 42 U.S.C. § 1983 provides redress for constitutional violations by state officials.

prisoner complaints seeking relief against a governmental entity or officer or employee of a governmental entity. Should Plaintiff's case be subsequently dismissed on the grounds that it is: 1) frivolous or malicious; 2) fails to state a claim upon which relief may be granted; or 3) seeks monetary relief against a defendant who is immune from such relief, **there is no provision for a refund of any portion of the filing fee to the prisoner**. 28 U.S.C. § 1915(e)(2)(B). In addition, this Court may sua sponte dismiss a prisoner's complaint at any time if it determines that the action fails to state a claim upon which relief can be granted. Id. § 1915(e)(2)(B)(ii), § 1915A(b)(1) and 42 U.S.C. § 1997e(c)(1).

So that the Court can determine how the $250.00 filing fee will be paid, Plaintiff is required to submit either the full statutory filing fee or a calculation sheet, along with an application to proceed in forma pauperis, prepared and executed by an authorized official at the incarcerating facility within thirty (30) days of this order's entry date. This calculation sheet reflects the deposits and monthly balances in the prisoner's account at the facility during the six-month period immediately preceding the filing of the complaint. 28 U.S.C. § 1915(a)(2). Based on this information, the Court will assess an initial partial filing fee if sufficient funds exist and will also direct the future collection of monthly installment payments from Plaintiff's account until the filing fee is paid in full. Id. 1915(b)(1) and (2). However, no prisoner will be prohibited from bringing a civil action because he "has no assets and no means by which to pay the initial partial filing fee." Id. 1915(b)(4).

In addition, as it now stands Plaintiff's complaint is too vague to enable the Court to determine whether it is frivolous or fails to state a claim for relief under § 1915A. Accordingly, Plaintiff is ordered to amend his complaint within thirty (30) days of this order's entry date and to specifically state: 1) the name of each individual in the FCI that was

personally involved in his denial of medical care claim; 2) how each individual was personally involved in the actions of which he complains; 3) how each individual violated his constitutional rights; 4) if he intends to name these specific individuals as Defendants and if so their position(s), place(s) of current employment, and address(es); 5) whether he intends to dismiss Linda Sanders as a Defendant to this action and, if not, why; and 6) whether he intends to sue these individuals in an individual capacity, official capacity, or both. Plaintiff must set forth specific facts concerning his allegations including, where applicable, dates, times and places.

In accordance with the above, IT IS, THEREFORE, ORDERED that:

1. The Clerk is directed to forward an in forma pauperis application and calculation sheet to Plaintiff.

2. Plaintiff is directed to submit either the $250.00 statutory filing fee OR to complete and sign the in forma pauperis application. At Plaintiff's request, an authorized official of the Federal Correctional Institution is directed to complete and sign the certificate portion of his in forma pauperis application, along **with the required calculation sheet.**

3. Plaintiff is directed to submit either the $250.00 statutory filing fee OR to file the completed in forma pauperis application within thirty (30) days of this order's entry date.

4. Service is NOT appropriate at this time. Plaintiff is directed to file, within thirty (30) days of this order's entry date, an amended complaint that contains only the information requested in this order.

5. The Clerk of the Court is hereby directed to re-designate the nature of suit as a "555" prison conditions suit.

Plaintiff is advised that his failure to make a timely and complete response to this Court's order will result in the recommended dismissal of his case without prejudice.[2]

IT IS SO ORDERED this 8th day of November, 2005.

UNITED STATES MAGISTRATE JUDGE

[2] Plaintiff is hereby notified of his responsibility to comply with Local Rule 5.5(c)(2) of the Rules of the United States District Court for the Eastern District of Arkansas, which provides that: "It is the duty of any party not represented by counsel to promptly notify the Clerk and the other parties to the proceedings of any change in his or her address, to monitor the progress of the case, and to prosecute or defend the action diligently. A party appearing for himself/herself shall sign his/her pleadings and state his/her address, zip code, and telephone number. If any communication from the Court to a pro se plaintiff is not responded to within thirty (30) days, the case may be dismissed without prejudice. Any party proceeding pro se shall be expected to be familiar with and follow the Federal Rules of Civil Procedure."

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

JOSE LUIS GONZALEZ PLAINTIFF
Reg. #24451-179

V. NO. 2:05cv00269 SWW-JWC

J. JIMINEZ, et al DEFENDANTS

ORDER

The Court has reviewed the Proposed Findings and Recommendations received from Magistrate Judge Jerry Cavaneau and the objections filed in response, and has further reviewed the relevant record de novo. The Findings and Recommendations are adopted in their entirety as this Court's findings.

Accordingly, Defendants' motion to dismiss/motion for summary judgment (docket entry #41) is hereby granted in part and denied in part. Plaintiff's skin rash and English translator claims are dismissed without prejudice for failure to exhaust his administrative remedies. Plaintiff's Federal Tort Claims Act claim shall be permitted to proceed at this time. Plaintiff's Eighth Amendment delay in medical treatment in connection with his broken leg, and inadequate treatment of his genital warts claims shall be permitted to proceed at this time. Defendants are not entitled to a qualified immunity defense.

Kenneth Levin is dismissed as a party to this action based on Plaintiff's contention that he was improperly named.

The Magistrate Judge should appoint to Plaintiff a Spanish-speaking attorney to flesh out his surviving claims and the appropriate parties involved.

IT IS SO ORDERED this 26th day of March, 2007.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

JOSE LUIS GONZALEZ PLAINTIFF
Reg. #24451-179

V. NO. 2:05CV00269 SWW/JWC

LINDA SANDERS, et al DEFENDANTS

ORDER

The Court has reviewed the Proposed Findings and Recommended Partial Disposition received from Magistrate Judge Jerry Cavaneau. There have been no objections. The Findings and Recommendations are adopted in their entirety as this Court's findings.

Accordingly, Defendants' motion to dismiss Defendants Garrido and Levin from Plaintiff's case (docket entry #35) is denied.

Service has been returned unexecuted on Defendants Garrido and Levin (see docket entries #29, #31). Plaintiff should attempt to determine the whereabouts of these Defendants through the use of discovery. Plaintiff is advised that he may file a motion pursuant to Fed. R. Civ. P. 34(c) and 45(d)(1) requesting the Clerk of the Court to issue a subpoena duces tecum to be served on Defendants through their counsel of record, Gwendolyn Dewees Hodge, with service by the United States Marshal, asking for production of any record reflecting the requested information (i.e., a last known or forwarding address). **Due to security and privacy concerns, counsel is directed to provide the requested information to the Court only, which in turn will order service under seal if applicable.**

Plaintiff is advised that if he fails to provide the Court with a current, and good, address for service on Defendants Garrido and Levin within one hundred twenty (120) days from the entry date of this order, it will be recommended that these Defendants be dismissed pursuant to Fed. R. Civ. P. 4(m).[1]

IT IS SO ORDERED this 7TH DAY OF AUGUST, 2006.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE

[1] Federal Rule of Civil Procedure 4(m) states in relevant part: "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff shall dismiss the action without prejudice as to that defendant . . . ." Id. This order serves as additional notice to Plaintiff of same.

FILED
2009 DEC 17 PM 4:47
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

Elizabeth Dollery,	§	
Plaintiff	§	
v.	§	**CA. No.**
The United States of America,	§	
Defendant	§	**A09CA914 LY**
(Bureau of Prisons, and	§	
Harley Lappin, the Director)	§	

To The Honorable District Judges of the Western District:

Plaintiff respectfully alleges:

1. This action arises under 28 United States Code[1] § 2671, *et sequitur,* and pursuant to 28 U.S.C. §§ 1346, 2672 and 2680. The court has jurisdiction under 28 U.S.C. § 1346. Venue is proper under 28 U.S.C. § 1391 in that all the occurrences, out of which this cause arose, took place within the Western District of Texas and the Austin Division, Venue, as all of the events out of which this cause of action arose took place in Bastrop County at or near the intersection of United States Highway 290 and State of Texas Highway 21.

[1] Hereinafter referenced as "U.S.C.".

2. Plaintiff is an adult citizen of the United States of America and the State of Texas, as well as, a domiciled resident of Bastrop County, Texas, which is within the Western District of Texas and within the Austin Division. Service of Process upon Plaintiff is effective by delivery of all pleadings, instruments, documents and discovery upon her counsel of record in this cause, Donald T. Cheatham at his law offices, located at 11512 Tin Cup Drive, Suite 212, Austin, Texas 78750 or to his mailing address, Post Office box 500169, Austin, Texas 78750. Her counsel of record may also be reached at (512) 494-1212 Telephone, (512) 494-1213 Telecopier, and email: cheathamlaw@aol.com.

3. Service of process of Summons and Complaint upon Defendant United States of America is effective by Delivery of the pleadings and Summons, as well as, instruments, documents and discovery upon Defendant Harley Lappin, the Director of the United States Bureau of Prisons, at his offices at 320 First St., N.W., Washington, D. C. 20534, through United States First Class Mail, postage prepaid, Certified, Return Receipt Requested.

4. Defendant's employee, was operating within the scope of that employee's official duties with the United States Bureau of Prisons a motor vehicle owned by Defendant on 5 August 2008. Said Defendant's employee in the aforesaid public highway in Bastrop County, Texas, negligently drove and collided with Plaintiff's vehicle on 5 August 2008.

5. As a direct and proximate result, Plaintiff suffered bodily injuries by which she was hospitalized and then confined to her home. Plaintiff's motor vehicle was damaged. Plaintiff suffered great pain and suffering of body and mind, as well as, incurred expenses for medical attention and will incur additional medical expenses in the future as a direct and proximate result of the aforesaid collision. Plaintiff also lost time from work as a direct and proximate result of the aforesaid collision.

6. Under the circumstances, the persons responsible for the operation of the United States government's motor vehicle, if they were private persons, would be liable to the Plaintiff for her damage resulting from the aforesaid collision.

7. The United States of America owned the motor vehicle which came into collision with Plaintiff's motor vehicle, and was at the time of the collision being used by the United States Bureau of Prisons, and the driver was acting in an official capacity on behalf of the United States Bureau of Prisons. The collision occurred while the driver was an employee of the United States Government acting in the scope of office and employment in behalf of the United States Bureau of Prisons.

7. Plaintiff has presented her claim in writing to the United States Bureau of Prisons, as is evinced by Exhibit "A" to this Complaint, which instrument this reference hereby incorporates herein its entireties. the Solicitor of the United States Bureau of Prisons denied Plaintiffs claim has by letter dated 31 July 2009.

WHEREFORE THE PREMISES CONSIDERED, Plaintiff prays that after a jury trial on the merits, that this Honorable Court award a judgment for the Plaintiff's consistent with any verdict for Plaintiff's proven damages, and that this Court enter all such other Orders which are deemed meet, just and proper for any and

all relief to which the Plaintiff might be entitled at law or in equity or the Nature of this cause might require.

Plaintiff prays for general relief.

Plaintiff demands a trial by jury.

Respectfully submitted,



Donald T. Cheatham
11512 Tin Cup Drive,
Suite 212
P. O. Box 500169
Austin, Texas 78750
TSB 24029925
(512) 494-1212 Telephone
(512) 494-1213 Telecopier
email: cheathamlaw@aol.com

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
ELIZABETH DOLLERY

DEFENDANTS
UNITED STSTES OF AMERICA

(b) County of Residence of First Listed Plaintiff Bastrop
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Bastrop
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)
Donald T. Cheatham, P.O. 500169, Austin, Texas 78750
Telephone, (512) 494-1212, Telecopier, (512) 494-1213, and email: cheathamlaw@aol.com

Attorneys (If Known) A09CA914 LY

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☒ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health		☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☒ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other	LABOR	☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	☐ 710 Fair Labor Standards Act	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 720 Labor/Mgmt. Relations	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 740 Railway Labor Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 790 Other Labor Litigation	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 791 Empl. Ret. Inc. Security Act	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:		FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General	IMMIGRATION	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty	☐ 462 Naturalization Application	☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other	☐ 463 Habeas Corpus - Alien Detainee		☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights	☐ 465 Other Immigration Actions		☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (**Do not cite jurisdictional statutes unless diversity**):
28 United States Code § 2671, et sequitur
Brief description of cause:

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 12/17/2009 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

DUPLICATE

Court Name: TEXAS WESTERN
Division: 1
Receipt Number: 100004739
Cashier ID: tkatzen
Transaction Date: 12/17/2009
Payer Name: DONLAD THOMAS CHEATHAM PLLC

CIVIL FILING FEE
For: DONLAD THOMAS CHEATHAM PLLC
Amount: $350.00

CHECK
Check/Money Order Num: 1250
Amt Tendered: $350.00

Total Due: $350.00
Total Tendered: $350.00
Change Amt: $0.00

1:09CV914 LY; ELIZABETH DOLLERY V.
USA

U. S. Department of Justice

Received
MAR 08 2010
Bureau of Prisons
Legal Department, 5C10

(b)(6)

Washington, D.C. 20530

Bureau of Prisons
320 First Street, N.W.
Room 958 HOLC
Washington, DC 20534

MAR - 2 2010

Attention: Honorable Kathleen Kenney

Re: Dollery, Elizabeth v US; Lappin, Harley BOP Dir
USDC, TXW, Civil No: 1:09CV00914-LY
Filing Date: 12/17/2009 AG Served: 1/13/2010
US Attorney Served:

Dear Sir or Madam:

Please prepare a litigation report for this case as soon as possible and send it directly to the U.S. Attorney, who should be advised if there is an unavoidable delay in making the report available. Do not send a copy to this office. The report should include all the facts and documents in your possession relating to administrative claims, possible insurance coverage of the Government or its agents, and any subrogation or other third-party interest in the claim.

Preserve Electronically Stored Information and Documentary Evidence.
Immediately undertake to preserve all information, including electronically stored information, that may relate to the claims and defenses at issue in this case as set forth in the attached complaint. Electronically stored information includes all information stored in any digital medium, including the agency's computer network, free-standing PCs laptop computers, and all back-up media, and includes without limitation emails, calendars, word processing documents, scanned documents, spreadsheets, photos, and drafts. **No records relating to the subject matter of this litigation should be discarded or destroyed.**

Notice of Litigation Hold.
Immediately issue a directive suspending the agency's records destruction protocol concerning all information that may be related to this case, including electronically stored information and all official information in the possession or control of individual employees who may be witnesses in this case. This directive must:

(a) be in writing;
(b) be designated as privileged and confidential;
(c) specify categories of documents that must be preserved; and
(d) identify agency employees who will be responsible for gathering and preserving these records ("Records Custodians").

This Notice of Litigation Hold must be issued immediately by you or another appropriate official to prevent any inadvertent discarding or destruction of records. The order must be sent to all Records Custodians and all employees who may have relevant information. This would include all potential witnesses, human resources personnel, and the agency's IT department. Periodic checks should also be made with the IT department and other Records Custodians as this litigation progresses to ensure that all information is being retained appropriately.

In addition, Rule 26(a) of the Federal Rules of Civil Procedure requires the parties, including the United States and its agencies, to supply information to opposing counsel, soon after suit is

commenced, and without the necessity for a discovery request. Information adequate to comply with this requirement should be forwarded with your litigation report. In order to avoid unnecessary litigation and the possibility of sanctions, please ensure that the information provided is sufficiently complete to comply with Rule 26(a).

All further communications between your agency and the Department of Justice should pass directly between your office and the U.S. Attorney without copies to this office. If the case is compromised or if there is a judgment in favor of the United States, you will be directly advised by the U.S. Attorney. Any final judgment adverse to the United States will be forwarded by the U.S. Attorney to the Appellate Staff of the Civil Division for review.

If it appears that this case presents novel or important questions of law or policy, which might make its handling by this office appropriate, prepare the litigation report in duplicate and send this office a copy. Please point out in your letter of transmittal the reasons which might justify this office retaining responsibility for the case.

Yours truly,

Phyllis J. Pyles
Director, Torts Branch
Civil Division

Enclosure

cc: United States Attorney (w/o enclosure)
John E. Murphy
Western District of Texas
601 N.W. Loop 410
Suite 600
San Antonio, TX 78216

FILED
2009 DEC 17 PM 4:47
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

Elizabeth Dollery, Plaintiff	§	
v.	§	CA. No.
The United States of America, Defendant	§	A09CA914 LY
(Bureau of Prisons, and Harley Lappin, the Director)	§	

To The Honorable District Judges of the Western District:

Plaintiff respectfully alleges:

1. This action arises under 28 United States Code[1] § 2671, *et sequitur,* and pursuant to 28 U.S.C. §§ 1346, 2672 and 2680. The court has jurisdiction under 28 U.S.C. § 1346. Venue is proper under 28 U.S.C. § 1391 in that all the occurrences, out of which this cause arose, took place within the Western District of Texas and the Austin Division, Venue, as all of the events out of which this cause of action arose took place in Bastrop County at or near the intersection of United States Highway 290 and State of Texas Highway 21.

[1] Hereinafter referenced as "U.S.C.".

2. Plaintiff is an adult citizen of the United States of America and the State of Texas, as well as, a domiciled resident of Bastrop County, Texas, which is within the Western District of Texas and within the Austin Division. Service of Process upon Plaintiff is effective by delivery of all pleadings, instruments, documents and discovery upon her counsel of record in this cause, Donald T. Cheatham at his law offices, located at 11512 Tin Cup Drive, Suite 212, Austin, Texas 78750 or to his mailing address, Post Office box 500169, Austin, Texas 78750. Her counsel of record may also be reached at (512) 494-1212 Telephone, (512) 494-1213 Telecopier, and email: cheathamlaw@aol.com.

3. Service of process of Summons and Complaint upon Defendant United States of America is effective by Delivery of the pleadings and Summons, as well as, instruments, documents and discovery upon Defendant Harley Lappin, the Director of the United States Bureau of Prisons, at his offices at 320 First St., N.W., Washington, D. C. 20534, through United States First Class Mail, postage prepaid, Certified, Return Receipt Requested.

4. Defendant's employee, was operating within the scope of that employee's official duties with the United States Bureau of Prisons a motor vehicle owned by Defendant on 5 August 2008. Said Defendant's employee in the aforesaid public highway in Bastrop County, Texas, negligently drove and collided with Plaintiff's vehicle on 5 August 2008.

5. As a direct and proximate result, Plaintiff suffered bodily injuries by which she was hospitalized and then confined to her home. Plaintiff's motor vehicle was damaged. Plaintiff suffered great pain and suffering of body and mind, as well as, incurred expenses for medical attention and will incur additional medical expenses in the future as a direct and proximate result of the aforesaid collision. Plaintiff also lost time from work as a direct and proximate result of the aforesaid collision.

6. Under the circumstances, the persons responsible for the operation of the United States government's motor vehicle, if they were private persons, would be liable to the Plaintiff for her damage resulting from the aforesaid collision.

7. The United States of America owned the motor vehicle which came into collision with Plaintiff's motor vehicle, and was at the time of the collision being used by the United States Bureau of Prisons, and the driver was acting in an official capacity on behalf of the United States Bureau of Prisons. The collision occurred while the driver was an employee of the United States Government acting in the scope of office and employment in behalf of the United States Bureau of Prisons.

7. Plaintiff has presented her claim in writing to the United States Bureau of Prisons, as is evinced by Exhibit "A" to this Complaint, which instrument this reference hereby incorporates herein its entireties. the Solicitor of the United States Bureau of Prisons denied Plaintiffs claim has by letter dated 31 July 2009.

WHEREFORE THE PREMISES CONSIDERED, Plaintiff prays that after a jury trial on the merits, that this Honorable Court award a judgment for the Plaintiff's consistent with any verdict for Plaintiff's proven damages, and that this Court enter all such other Orders which are deemed meet, just and proper for any and

all relief to which the Plaintiff might be entitled at law or in equity or the Nature of this cause might require.

Plaintiff prays for general relief.

Plaintiff demands a trial by jury.

Respectfully submitted,



Donald T. Cheatham
11512 Tin Cup Drive,
Suite 212
P. O. Box 500169
Austin, Texas 78750
TSB 24029925
(512) 494-1212 Telephone
(512) 494-1213 Telecopier
email: cheathamlaw@aol.com

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

ELIZABETH DOLLERY

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

Civil Action No. A09CA914 LY

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

UNITED STATES OF AMERICA
c/o Harley Lappin,
Director of the United States Bureau of Prisons
320 First St., N.W.,
Washington, D. C. 20534

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Donald T. Cheatham
11512 Tin Cup Drive, Suite 212
P.O. Box 500169
Austin, Texas 78750
(512) 494-1212 Telephone, (512) 494-1213 Telecopier, and
email: cheatham@aol.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

WILLIAM G. PUTNICKI
CLERK OF COURT

Date: JAN 7 2010

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Elizabeth Dollery

Plaintiff

v.

United States of America

Defendant

Civil Action No. 1:09 CV 914 LY

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States of America
c/o The Honorable Eric Holder
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Donald T. Cheatham
P.O. Box 500169
Austin, Texas 78750
(512) 494-1212 Telephone, (512) 494-1213 Telecopier
email: cheathamlaw@aol.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

WILLIAM G. PUTNICKI
CLERK OF COURT

JAN 7 2010

Date: _____

_____
Signature of Clerk or Deputy Clerk

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Elizabeth Dollery

Plaintiff

v.

United States of America

Defendant

Civil Action No. 1:09 CV 914 LY

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States of America
c/o Ms. Vernell Everett
Civil Process Clerk
Office of the United States Attorney
for the Western Dist. of Texas
601 N.W. Loop 410, Suite 600
San Antonio, TX 78216-5597

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Donald T. Cheatham
P.O. 500169
Austin, Texas 78750
(512) 494-1212 Telephone, (512) 494-1213 Telcopier
email: cheathamlaw@aol.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

WILLIAM G PUTNICKI
CLERK OF COURT

JAN 7 2010

Date: _____

Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ELIZABETH DOLLERY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. A-09-CA-914-LY
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

STIPULATION FOR COMPROMISE SETTLEMENT

It is hereby stipulated and agreed by, Elizabeth Dollery, hereinafter "Plaintiff", and the Defendant, United States of America, by and through their respective attorneys of record, as follows:

1. The parties do hereby agree to settle and compromise the above-captioned action on the terms indicated below.

2. The United States of America will pay to Plaintiff, and her counsel of record, Donald T. Cheatham, 11512 Tin Cup Drive, P.O. Box 500169, Austin, Texas 78750, the sum of $21,100.11, which sum shall be in full settlement and satisfaction of any and all claims which Plaintiff now has or may hereinafter acquire against the United States of America and/or its respective officers, agents, servants, employees, and representatives, on account of the incidents made the basis of this lawsuit, all as more fully described in the pleadings and papers already on file herein, as well as any outstanding claims by Plaintiff, Elizabeth Dollery, or anyone on her behalf to any agency, department or entity of or associated with or acting under the direction of the United States of America.

3. Plaintiff accepts the terms set forth in Paragraph 2 above as compensation and full settlement and satisfaction of any and all claims and demands, including costs and attorney fees, which they or she or her relatives or heirs, executors, administrators or assigns, now have or may

hereafter acquire, against the United States of America and/or its officers, agents, servants, representatives, or employees on account of the incidents made the basis of this lawsuit.

4. In consideration for the payment of the sum stated above, Plaintiff agrees that she will indemnify and hold harmless the United States of America from any and all claims, actions, or proceedings which are now or may hereafter be asserted or brought by or on behalf of any person or entity to recover from the United States and/or its officers, agents, servants, representatives, or employees for losses, damages, or recovery of any kind arising out of or related to the incidents made the basis of this lawsuit.

5. This agreement shall not constitute an admission of liability or fault on the part of the United States of America, by whom liability is expressly denied.

6. In exchange for the payment of the sum stated above and contemporaneously with the delivery of the check therefore, Plaintiff will execute a Release in favor of the United States, and will further authorize her attorney to execute a dismissal of the above action, with prejudice and without costs.

DATE: 9/16/10

Elizabeth L. Dollery

ELIZABETH DOLLERY
SOCIAL SECURITY NO. 458-85-7059

DATE: _____

DONALD T. CHEATHAM
11512 Tin Cup Drive
Suite 212
P.O. Box 500169
Austin, Texas 78750
Tel. 512-494-1212
Fax. 512-494-1213

ATTORNEY FOR PLAINTIFF

JOHN E. MURPHY
United States Attorney

DATE: 9/22/10

By: _____

DIMITRI N. ROCHA
Assistant United States Attorney
Florida State Bar No. 693332
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Telephone: (210) 384-7396
Facsimile: (210) 384-7358
ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2010 OCT 27 PM 3:56
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY

ELIZABETH DOLLERY, PLAINTIFF,	§	
V.	§	CAUSE NO. A-09-CA-914-LY
UNITED STATES OF AMERICA, DEFENDANT.	§	

FINAL JUDGMENT

Before the Court is the above-styled cause of action. On this date, the Court dismissed the claims in this cause with prejudice. Accordingly, the Court renders this final judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that all claims in this action are hereby **DISMISSED WITH PREJUDICE**.

FURTHER IT IS ORDERED that all attorney's fees and costs of court are taxed against the party incurring the same.

FINALLY IT IS ORDERED that this action is hereby **CLOSED**.

SIGNED this 27th day of October, 2010.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

FILED
2010 OCT 27 PM 3:56
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ELIZABETH DOLLERY, PLAINTIFF,	§	
V.	§	CAUSE NO. A-09-CA-914-LY
UNITED STATES OF AMERICA, DEFENDANT.	§	

ORDER DISMISSING CASE WITH PREJUDICE

Before the Court in the above styled and numbered cause is the parties' Stipulation of Dismissal filed October 26, 2010 (Clerk's Document No. 10), which provides that the parties stipulate to the dismissal with prejudice of this civil action pursuant to Federal Rule of Civil Procedure 41. In light of this stipulation,

IT IS ORDERED that all claims brought in this cause are **DISMISSED WITH PREJUDICE.**

SIGNED this 27th day of October, 2010.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

RECEIVED
AUG 13 2010
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA, LOUISIANA

1:10-CV-00359

Dear

Clerk of Court I am Amending my Complaint For the Specifics that was asked From the Court

1. Plaintiff should Amend his complaint to state whether he received a disciplinary conviction as a result of the incident on January 2, 2009 and whether he lost good time as a result. If plaintiff did receive a disciplinary conviction and loss of good time credits he should state whether the disciplinary conviction was expunged or overturned

Response/Amend

I was wrote a disciplinary shot which is on hold until I get done with court I havent seen DHO for my shot yet It is a 101 Assault resulting in serious bodily injury The DHO will find me guilty because I was found guilty in court and will take good time credits from me and will take privileges I dont Know the day the DHO will hear my disciplinary report.

2. Plaintiff should Amend his complaint to state whether the guards were armed or unarmed at the time of the incident. Plaintiff should also state whether the guards gave verbal orders to stop fighting and whether either guard called for assistance from other USP-P officials Finally, Plaintiff should state how the fight ended or was ultimately broken-up.

Response /Amend

In the BOP (Bureau of Prisons) /or at USP Pollock Guards are Unarmed unless an incident occurs and they need weapons

The officer J Valder gave an order to stop fighting and called on his walkie talkie a fight in B-1 Then a minute later called a fight in B1 with weapons The officers stood around and watch as I was stabed it was 4 officers there just watching They seen me getting stabed and decided not to do any thing Then 1 officer that didnt even work in the unit came and pled one inmate off of me This officer came from off of the Compound he didnt have any weapon None of the officers had weapons The 4 officers that was there watching me get stabed finally helped after one officer pulled the one inmate off only 2 of the 4 officers helped after I was stabed over 20 times I was then put in a room where I was bleeding from being stabed so many times I had to complain Just to be taken to the hospital.

3 Plaintiff should Amend his complaint to state:

A. whether on Plaintiff's body did John Doe #1 punch Plaintiff and what, if any, injuries Plaintiff suffered as a result of being punched by John Doe #1;

B Where on Plaintiffs body did John Doe #2 punch plaintiff and what, if Any injuries Plaintiff suffered as a result of being ponched by John Doe #2

C. whether Plaintiff received a disciplinary conviction as a result of the hospital incident

D. whether Plaintiff lost any good time as a result of the incident at the hospital

E. How long was plaintiff held in observation cell without a toilet or sink? Was plaintiff ever allowed out of the cell to shower and use the toilet

Response / Amend

John doe #1 punched me in my head and my arm There was no injury to be seen because I am dark skinned John Doe #2 threw milk on me and tried to pull me out the bed and hit me in my leg and Arm There was no injury to be seen because I'm dark skinned I already had enough bumps bruses sores and punctured wounds on my body Know one would of seen the difference and Know one paid me Any Attention except trying to get me out of the hospital I never recieved a disciplinary report for the hospital incident because I did nt do any thing I didnt lose any good time because I didnt get a disciplinary report. I was held in the observation cell for about 2 days without a toilet or sink I was never allowed out of the cell to shower or use the toilet I had to urinate on the floor.

My Conviction has not been over turned yet but I was found not guilty on Assault with a weapon

This is my Amended complaint, 1:10-CV-00359

Jerome L. Weathington

7/16/2010

Case 1:10-cv-00359-DDD-JDK Document 5 Filed 08/13/10 Page 4 of 4

Jerome Weathington 08121-028
USP Pollock
PO Box 2099
Pollock, LA 71467

ALEXANDRIA LA 713
12 AUG 2010 PM 1 T

Clerk of United States District Court
300 Fanin ST Suite1167
Shreveport, Louisiana 71101-3083

RECEIVED
AUG 13 2010
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

7110 1+3122

UNITED STATES DISTRICT COURT

for the

Western District of Louisiana

JEROME WEATHINGTON
Plaintiff
v.
USA ET AL
Defendant

Civil Action No. 1:10CV0359 SEC P

NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS

To: JOHN DOE #1
(Name of the defendant or - if the defendant is a corporation, partnership, or association - an officer or agent authorized to receive service)

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within 30 days *(give at least 30 days, or at least 60 days if the defendant is outside any judicial district of the United States)* from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: 08/19/2010

Signature of the attorney or unrepresented party

JEROME WEATHINGTON PRO SE PLAINTIFF
Printed name

USP POLLOCK
P O BOX 2099
POLLOCK, LA 71467
Address

E-mail address

Telephone number

UNITED STATES DISTRICT COURT

for the

Western District of Louisiana

JEROME WEATHINGTON
Plaintiff

v.

USA ET AL
Defendant

Civil Action No. 1:10CV0359 SEC P

WAIVER OF THE SERVICE OF SUMMONS

To: JEROME WEATHINGTON
(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from 08/19/2010, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: 08/19/2010

Signature of the attorney or unrepresented party

JOHN DOE #1
Printed name of party waiving service of summons

JOHN DOE #1
Printed name

Address

E-mail address

Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

IMPORTANT NOTICE: Courtesy copies of documents you file should NOT be provided to any judge. All communications with the court should ONLY be through documents filed with the Clerk of Court.

RECEIVED
IN ALEXANDRIA, LA
AUG 18 2010
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JEROME WEATHINGTON (#08121-028) — **DOCKET NO. 10-CV-359; SEC. P**

VERSUS — **JUDGE DEE D. DRELL**

UNITED STATES OF AMERICA, ET AL. — **MAGISTRATE JUDGE JAMES D. KIRK**

MEMORANDUM ORDER

Before the Court is the *pro se* complaint of Plaintiff Jerome Weathington, filed *in forma pauperis* and pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics[1] and the Federal Tort Claims Act. Plaintiff is an inmate in the custody of the United States Bureau of Prisons (BOP), and he is incarcerated at the United States Penitentiary in Pollock, Louisiana (USP-P). He names as defendants the United States of America, Warden Joe Keffer, R. Lonidier, J. Valdez, and three unknown officers at USP-P. Plaintiff alleges a tort claim under the Federal Tort Claims Act (FTCA) and also claims that his constitutional rights were violated by the defendants. The Bivens claims are being served pursuant to a separate order of the Court.

[1]In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized that certain circumstances may give rise to a private cause of action against federal officials that is comparable to the statutory cause of action permitted against state officials by 42 U.S.C.A. § 1983.

SERVICE OF PROCESS

In order to determine what further action should be taken with respect to Plaintiff's **FTCA CLAIM**,

THE CLERK IS DIRECTED to serve a summons, a copy of the complaint, exhibits, and amended complaint [Docs. #1, 5], along with a copy of this order by Certified Mail on:

1. **the United States through the United States Attorney for the Western District of Louisiana, and**
2. **the United States through the United States Attorney General** as provided in Rule 4(i) of the Federal Rules of Civil Procedure.

IT IS ORDERED that the defendant file an answer to the petition within sixty (60) days following the date of service.

The defendant shall also file a memorandum of law briefing the issues raised within their answer and citing applicable statutory and case law. After the defendant's responsive pleadings are filed, an additional sixty (60) days is allowed for all parties to complete all appropriate discovery.

Thereafter, if deemed appropriate, Plaintiff or Defendant may file a motion for summary judgment within thirty (30) days, to include material and relevant affidavits, certified records, interrogatories and answers, admissions and depositions, if any, and a supporting memorandum brief.

Any party not filing a motion for summary judgment SHALL FILE a Statement of Issues within the same period, which shall enumerate

each genuine issue of material fact perceived by that party which is relevant to this matter, or state that there are none. This statement will be used by the court to determine the necessity for an evidentiary hearing.

IT IS FURTHER ORDERED that, as a condition to their acceptance by the Clerk, all future filings by plaintiff and defendant shall include a certificate stating that a copy thereof has been mailed to all other parties.

Thus done and signed at Alexandria, Louisiana, this 18th day of August, 2010.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

IMPORTANT NOTICE: Courtesy copies of documents you file should NOT be provided to any judge. All communications with the court SHALL ONLY be through documents filed with the Clerk of Court.

RECEIVED
IN ALEXANDRIA, LA
AUG 18 2010
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JEROME WEATHINGTON (#08121-028) — **DOCKET NO. 10-CV-359; SEC. P**

VERSUS — **JUDGE DEE D. DRELL**

UNITED STATES OF AMERICA, ET AL. — **MAGISTRATE JUDGE JAMES D. KIRK**

MEMORANDUM ORDER

Before the Court is the *pro se* complaint of Plaintiff Jerome Weathington, filed *in forma pauperis* and pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics[1] and the Federal Tort Claims Act. Plaintiff is an inmate in the custody of the United States Bureau of Prisons (BOP), and he is incarcerated at the United States Penitentiary in Pollock, Louisiana (USP-P). He names as defendants the United States of America, Warden Joe Keffer, R. Lonidier, J. Valdez, and three unknown officers at USP-P. Plaintiff alleges a tort claim under the Federal Tort Claims Act (FTCA) and also claims that his constitutional rights were violated by the defendants.

[1]In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized that certain circumstances may give rise to a private cause of action against federal officials that is comparable to the statutory cause of action permitted against state officials by 42 U.S.C.A. § 1983.

STATEMENT OF THE CASE

Plaintiff has previously filed two civil rights lawsuits, which were dismissed as frivolous.[2] In this suit, Plaintiff alleges that:

1. On December 31, 2008, Plaintiff was threatened by two Department of Corrections inmates housed at USP-Pollock.

2. On January 2, 2009, Plaintiff covered his body with book covers and tray tops under his clothing because he believe he would be attacked. Plaintiff saw an inmate reach for a knife to stab him, so Plaintiff hit the inmate. The inmate then stabbed Plaintiff multiple times. Officers Valdez & Lonidier did nothing but lock down the other inmates in the unit.

3. Plaintiff alleges that on January 5, 2009, Officers John Doe #1 and #2 punched Plaintiff while he was handcuffed and shackled to his hospital bed at a hospital. Plaintiff alleges that the two officers caused him to be prematurely released from the hospital.

4. Upon returning to Pollock after being released from the hospital, Plaintiff was placed in an observation cell without a toilet or sink for two days.

3. Plaintiff complains that the doctor at the outside hospital, John Doe #3, subjected Plaintiff to cruel and unusual punishment by releasing him from the hospital before he was physically ready.

Plaintiff seeks damages from defendants for failing to protect him. Specifically, he claims that the defendants failed to properly intervene in a fight when Plaintiff was being stabbed by another inmate. Plaintiff was convicted of assault on the other

[2]Docket No. 09-cv-705 was dismissed with prejudice as frivolous; in Docket No. 09-cv-1183, the Bivens claims were dismissed as frivolous while the FTCA claims were served on the United States.

inmate following a trial by jury in this district court.[3]

In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the Supreme Court held that a civil rights plaintiff who seeks damages on a claim that necessarily implicates the constitutionality of the claimant's conviction or sentence must demonstrate that his conviction or sentence has been overturned, either judicially or by executive order. Although Heck was a Section 1983 case, its rule applies with equal force to Bivens claims. See Cardona v. U.S., 191 Fed. Appx. 327 (5th Cir. 2006). Although Plaintiff's conviction was not overturned, it is not clear from the complaint or amended complaint that success on Plaintiff's claim would necessarily implicate the constitutionality of his assault conviction. Additionally, the court cannot find that Plaintiff has failed to state a claim regarding the alleged acts of the guards at the hospital.

SERVICE OF PROCESS

In order to determine what further action should be taken with respect to Plaintiff's **BIVENS CLAIM:**

THE CLERK IS DIRECTED to prepare:

1. one (1) copy of the Original Complaint with exhibits [Doc. #1],

2. one (1) copy of the Amended Complaint [Doc. #5]

[3]USA v. Weathington, 09-cr-196 - Weathington found guilty of assault resulting in serious bodily injury, in violation of 18 U.S.C. §113(a)(6).

3. one (1) AO 398 Form **(NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS)** and,

4. one (1) AO 399 Form **(WAIVER OF THE SERVICE OF SUMMONS)**

for **THE FOLLOWING DEFENDANTS**, named and sued in their **INDIVIDUAL CAPACITY:**

1. **Joe Keffer**
2. **R. Lonidier**
3. **J. Valdez**
4. **John Doe #1**
5. **John Doe #2**
6. **John Doe #3**

and, that after the foregoing documents have been prepared as aforesaid:

THE CLERK IS FURTHER DIRECTED to serve a copy of the Original Complaint, Amended Complaint, and exhibits [Docs. #1, 5], the AO 398 Form **(NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS)**, the AO 399 Form **(WAIVER OF THE SERVICE OF SUMMONS)** and this Memorandum Order on the Defendant listed above by **FIRST CLASS U.S. MAIL** addressed as follows:

ATTENTION:
JUDY LUKE
UNITED STATES PENITENTIARY
POST OFFICE BOX 1000
POLLOCK, LA 71467

IT IS ORDERED THAT the defendant return the signed AO 399 **WAIVER OF THE SERVICE OF SUMMONS** form within **thirty (30)** days of the date indicated on the AO 398 **NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS** form.

THE CLERK IS FURTHER DIRECTED to prepare Summons for the Attorney General of the United States and the United States Attorney for the Western District of Louisiana; and,

THE CLERK IS FURTHER DIRECTED to serve said summons, along with a copy of the Complaint, amended complaint, and exhibits [Docs. #1, 5] and this Memorandum Order on the **ATTORNEY GENERAL OF THE UNITED STATES** at Washington, D.C., via **CERTIFIED MAIL** as provided by Rule 4(i) of the Federal Rules of Civil Procedure;

THE CLERK IS FURTHER DIRECTED to serve said summons, along with a copy of the Complaint, amended complaint, and exhibits [Docs. #1, 5] and this Memorandum Order on the **UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF LOUISIANA** via **FIRST CLASS UNITED STATES MAIL** as provided by Rule 4(i) of the Federal Rules of Civil Procedure and previous agreements entered into between the United States Attorney and the Court;

IT IS ORDERED that the defendant file a response within SIXTY (60) days after the date that the waiver of service is executed or SIXTY (60) days after service on the United States Attorney, whichever is later.

After the defendant's responsive pleading is filed, an additional sixty (60) days is allowed for all parties to complete all appropriate discovery.

Thereafter, if deemed appropriate, Plaintiff or the defendant may file a motion for summary judgment within thirty (30) days, to

include material and relevant affidavits, certified records, interrogatories and answers, admissions and depositions, if any, and a supporting memorandum brief.

Any party not filing a motion for summary judgment **SHALL FILE** a Statement of Issues, within the same period, which shall enumerate each genuine issue of material fact perceived by that party which is relevant to this matter, or state that there are none. This statement will be used by the court to determine the necessity for an evidentiary hearing.

IT IS FURTHER ORDERED that as a condition to their acceptance by the Clerk, all future filings by Plaintiff or Defendant shall include a certificate indicating that a copy thereof has been furnished to the other parties, specifically stating the name and address of each party (or his attorney) to whom a copy of the pleading was sent.

Failure to comply with this order will result in dismissal of this matter without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

Thus done and signed at Alexandria, Louisiana, this 18th day of August, 2010.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

no:

Form to be used by a prisoner filing a civil rights complaint under THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

RECEIVED
FEB 24 2010
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

Jerome L. Weathington 08121-028
Full Name of Plaintiff, Prisoner Number

1:10cv0359 Sec P

VS.

United states ETAL etc
Full Name of Defendant

_____
Magistrate Judge

COMPLAINT

I. Previous Lawsuits

A. Have you begun any other lawsuit while incarcerated or detained in any facility?
Yes V No _____

B. If your answer to the preceding question is yes, provide the following information.

1. State the court(s) where each lawsuit was filed (if federal, identify the District; if state court, identify the county or parish):

United states District Court for the Western District of Louisiana

2. Name the parties to the previous lawsuit(s):

Plaintiffs: Jerome Weathington

Defendants: United states ETAL LT Transou, Joe Keffer, etc

3. Docket number(s): 1:09CV705, 1:09-CV-1183

4. Date(s) on which each lawsuit was filed: 1:09CV705 April 27, 2009, 1:09CV1183 Jul 21, 2009

5. Disposition and date thereof [For example, was the case dismissed and when? Was it appealed and by whom (plaintiff or defendant)? Is the case still pending?]:

1:09CV705 (Dismissed Dec 30, 2009) 1:09CV1183 still pending

C. Have you filed any lawsuit or appeal in any federal district court or appeals court which

has been dismissed?
Yes ✓ No ____

If your answer to the preceding question is yes, state the court(s) which dismissed the case, the civil action number(s), and the reason for dismissal (e.g., frivolity, malice, failure to state a claim, defendants immune from relief sought, etc.).

District Court Western District of Louisiana 1:09 CV705 frivolous and failure to state a claim

[redacted]

II. A. Name of institution and address of current place of confinement:

USP Pollock Po Box 2099 Pollock, LA 71467

B. Is there a prison grievance procedure in this institution?
Yes ✓ No ____

1. Did you file an administrative grievance based upon the same facts which form the basis of this lawsuit?
Yes ✓ No ____
If Yes, what is the Administrative Remedy Procedure number? TRT-SCR-2009-02799 Apn # 525217, 522704 TRT SCR-2009-05566

2. If you did not file an administrative grievance, explain why you have not done so. TRT-NER 2009-02219

3. If you filed an administrative grievance, answer the following question.
What specific steps of the prison procedure did you take and what was the result? (For example, for state prisoners in the custody of the Department of Public Safety and Corrections: did you appeal any adverse decision through to Step 3 of the administrative grievance procedure by appealing to the Secretary of the Louisiana Department of Public Safety and Corrections? For federal prisoners: did you appeal any adverse decision from the warden to the Regional Director for the Federal Bureau of Prisons, or did you make a claim under the Federal Tort Claims Act?)

As a federal prisoner I did file my Administrative remedys & Appealed I also filed a claim under the FTCA

Attach a copy of each prison response and/or decision rendered in the administrative proceeding.

III. Parties to Current Lawsuit:

A. Name of Plaintiff Jerome Weathington

Address USP Pollock POBox 2099 Pollock, LA 71467

B. Defendant, Joe Keffer individual & official capacity is employed as Warden at USP Pollock.

Defendant, R. Lonidier individual & official capacity, is employed as Co at USP Pollock.

Defendant, J. Valdez individual & official capacity, is employed as Co at USP Pollock.

Additional defendants John doe #1 John doe #3 John doe #2 United States, All in individual and official capacity

IV. Statement of Claim

State the **FACTS** of your case. Specifically describe the involvement and actions of each named defendant. Include the names of all persons involved in the incident(s) or condition(s) giving rise to this lawsuit, and the dates upon which and the places where the incident(s) and/or condition(s) occurred. **YOU ARE REQUIRED TO SET FORTH ONLY FACTUAL ALLEGATIONS. YOU ARE NOT REQUIRED TO SET FORTH LEGAL THEORIES OR ARGUMENTS.**

Attached pages

IV Statement of Claim

On Aug 19, 2008 I requested protective custody. On this same day I was sent to the Special housing Unit. After being in the special housing unit from Aug 19 - Dec 9 I was sent to a special housing unit holdover which is one of the units on the compound in which I requested protection. While in the special housing unit holdover another inmate from general population worked in the unit as an orderly with another inmate who was housed in the unit. He would go back and forth to his unit, and the special housing unit holder, and outside with the general population. The unit was mixed with disciplinary and administrative Inmates letting out for recreation about 12 cells at one time. This was in violation of the BOP Program statement PS270, CFR, and policies and regulation, and 18USC 4042 A (3) (R). When I would come out to recreation we were not segregated it states in U.S. Department of Justice Federal Bureau of prisons Program statement PS270.07 Inmate Dissipline and Special housing Units Chapter 9 page 1 Administrative Detention status A form of seperation from the general population used when the continued presence of the inmate within general population would pose a serious threat to life, property, self, staff, or other inmates, or to the security, or orderly running of the institution. Before my placement in this special housing unit holdover I wrote Administrative remedys requesting protective custody (Protection) Some of my request was granted some was not. The difference between the original Special housing Unit and the Special housing unit holdover was We was Segregated in the special housing unit making it a safe place the Special housing unit holdover was unsafe conditions The Bop Pollock staff moved me to the Special housing unit holdover because of over crowding in the special housing unit. This special housing unit holdover was also unsafe because I requested protective custody and was mixed with Inmates who hit Inmates with locks, and stabed people with weapons.

On December 31, 2008 I was threatened by 2 DC inmates

IV. Statement of claim

So since I have already been stabed at another federal prison I made protection for my body (Book covers and Tray tops).

On January 2, 2009 I had these items attached to my body under my shirts and pants that I had on. The officers that worked the unit was J. Valdez and R Lonidier. One other officer was in the unit but he was just visiting the unit. Once these officers Let out about 12 cells for recreation. I watched these officers go in there office Then I watched another Inmate get a Knife from under one of the inmates door who threatend me. Then I was told by another Inmate to watch my back because he seen another Inmate get a Knife. I watched the pocket the inmate put his Knife in. Once the officers came out the office looked aroud and went back inside One of the Inmates had already told me he was trying to hollar at me So I went to the steps where both inmates was I seen one Inmate reaching for his Knife about to stab me I swung with my fist in self defense and grabed him while Attempting to grab him he stabed me in my neck and Left chest puncturing my lung we fell off the steps The other inmate Joined him and I tried to defend my self while doing so officer J. Valdez stood to the side and watched and never tried to intervene to break up the incident the other officer R. Lonidier began locking down other inmates while I was getting Jumped/stabbed by 2 inmates. It was another officer in the unit but I dont know what he was doing. I finally end up taking the Knife from one of the inmates and staff still failed to intervene and the inmates Kept Attacking me so I used it in self defense once the other inmate hit my hand it fell and he got the Knife back. The two inmates finally get me to the ground where they stabed me 9-12 times while all the officers just stood around and watched like they wanted me to die. officer J. Valdez did nothing. he violated my 8th Amendment right to the US Constitution which states Cruel and Unusual punishment shall not be imposed. He failed to

IV Statement of claim

to my safety I was stabed over 15 times in this officers face he did nothing. He also violated the Code of federal regulation and 18 USC 4042 Duties of bureau of prisons providing for the safety and security of all inmates who have crimes against the United states. This officer could of stoped the assault by coming between us inmates Know one threatened this officer with harm his actions could of caused my Death.

Officer R. Lonidier violated my 8th Amendment right to the US Constitution which states cruel and unusual punishment shall not be inflicted /imposed. She failed to protect me from other inmates. She also failed to intervene She seen I was getting stabed and ignored it She was just standing there watching the inmates slab me. She ignored the safety and security of an Inmate She decided she would go and lock down other inmates instead of trying to intervene to stop the fight Know one threatened this officer her Actions could of cost me my life. She has no excuse she violated the Code of federal regulation, Bop policy, 18USC 4042 Duties of bureau of prisons providing for the safety and security of all inmates who have crimes against the U.S This officer could of help stop the incident but decided to ignore danger She was deliberatly indifferent to my Safety

The Warden Joe Keffer violated my 8th Amendment right to the US Constitution by providing unsafe conditions and a failure to protect The Warden Knew I checked in from the Compound and sent me to a unit mixed with Protective Custody inmates and Punitive (Disciplinary) inmates and that the Federal officers in the B-1 unit/SHU holdover let out 12 cells at one time putting my life in Jeopardy. He also violated the code of federal regulation on special housing units; BOP policy on Administrative and Disciplinary Segregation, and 18USC 4042 Duties of

IV Statement of claim

He was deliberatly indifferent to my safety. The wardan made/approv this Special housing unit holdover unit because of over crowding issues. The warden Knows inmates are in the Special housing unit for multiple reasons some verified some not and he just mixed us all together in 1 unit without being Segregated. His actions cost me to be stabed over 20 times. The warden Joe Keffer Knows inmates in the SHU are to be seperated for multiple reasons like me requesting protective custody. If the warden wouldnt of ever transfered me from the original special housing unit which is segregated for over crowding issues This incident of me being stabed wouldnt of ever occured. For the special housing unit holdover to be a special housing unit it was understaffed. In the original special housing unit it is more officers in case a situation occurs. Because of understaffing the C/O's who worked the unit failed to come to my aid.

The Captain/AW/LT's anyone who had something to do with my transfer from the special housing unit to B-1 special housing unit holdover also violated my 8th Amendment right to the Constitution This goes for anyone under/over the warden or in the BOP

The BOP is also responsible because Ive been to 3 different United states Penitintary's and Officers do not intervene in Altercations when inmates have weapons Some officers is scared and some do help but overall majority of the officers is not breaking up incidents when they see an inmate with a weapon Ive been at institutions when Inmates was stabed to death because of under staffing these are unsafe conditions of confinement. This is not the punishment that I was found guilty to do. This institution has had a history of violence its to many Knives not enough officers and lives are being taken so I suffered mentally and emotionally because of over crowding negligence and officers being deliberatly indifferent

IV. statement of Claim

On January 5, 2009 while at an outside hospital for injuries I suffered on January 2, 2009. John Doe #1 and John Doe #2 punched me while at an outside hospital while I was handcuffed and shackled to the bed. They took my food threw milk on me etc. These 2 officers John Doe #1 and John Doe #2 violated my rights as a prisoners which states cruel and unusual punishment shall not be imposed. These ofc's John Doe #1 and John Doe #2 actions caused me to be discharged from the local hospital and brung back to the institution I was not able to breath right I had an irregular heart beat and I had shortness of breath. When I was brung back from the hospital I was put in an observation cell without a toilet or sink and I had to urinate on the floor because there was no toilet. I had to live in an unsanitary cell. I requested to go to the prison infirmary officers told me there wasnt a prison infirmary. I then requested to be in a cell alone because I was unfit to be in a cell with another inmate. I was having problems breathing by making noises because I couldnt breath right and my stomach would get real tight as if I was doing non stop sit ups. I was denied by LT Transou to go in a cell alone. He was getting the Team and he put the middle food slot on the outside of the door and told me I was on sack Lunch because I wouldnt go in a cell with another inmate. LT Transou also violated my 8th Amendment right to the Constitution of the United States which states cruel and unusual punishment shall not be imposed.

The doctor which is John Doe #3 discharged me from the hospital when I was not able to breath right. I had shortness of breath and I had an irregular heart beat. This is medical malpractice This doctor only released me because the officers and warden put pressure on the doctor to release me because of the situation with the officers this doctor subjected me to cruel and unusual punishment a violation of my United states Constitutional right 8th Amendment

IV Statement of claim

After these incidents I spoke with SIA McKinny whom I requested to be sepertee against DC inmates. He told me I was Seperatee against DC inmates. After other situations occurred I wrote my Administrative remedy requesting to be seperate from other inmates because I was attacked while in the SHU at Recreation and got found guilty for fighting when I just defended myself. The Warden responded to my request and said staff are aware of my seperation needs and will keep those needs in mind when moving me to recreation cell rotation etc. 12 days after this officers put a DC inmate in the same cell as me and he attacked me I held him and pushed the emergency button. I was wrote up for fighting and got found guilty. I Appealed and the region said I couldnt hold another inmate from Continuing to punch me. I filed my Administrative remedies again about this situation and they said I didnt have a seperatee from these DC inmates in which I was Just stabed over 20 times by these inmates These officers work for the BOP whom put the DC inmate in the cell with me They violated my 8th Amendment right to the United states Constitution which states Cruel and unusual punishment shall not be imposed/inflicted I am suffering mentally and emotionally from all of these events my life is in jeopardy These officers failed to protect me.

This is a Bivens action pursuant to Bivens v Six unKnown named Agents of Fed Bur. of Narcotics 403 US 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 (1971) an individual aggrieved by a federal officials violation of his constitutional rights can bring an action for monetary relief.

This is also a claim under the Federal tort claims act for injurys I suffered by being stabed while 4-5 officers Just stood there and watched. I dont Know all the officers that was there but they work for the BOP USP Pollock.

IV Statement of Claim

It says in 28 § 1343 (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or privilege of a citizen of the United states, by any act done in furtherance of any conspiracy mentioned in section 1985 of title 42.

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of title 42 which he had Knowledge were about to occur and power to prevent

(3) To redress the deprivation, under color of any State law, Statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the Jurisdiction of the united states

(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

The officers in this Civil action had the power to prevent each situation which occured they deprived me of my rights secured to me by the Constitution of the United states. These officers and Employees of the federal bureau of prisons violated the Constitution 8th Amendment by failing to prevent harm to me, failing to come to my aid, failure to protect, Excessive force, medical malpractice etc.

Joel Wetzel

V. **Relief**

State exactly what you want the court to provide to you or do for you. Make no legal arguments. Cite no cases or statutes.

Actual damages 4,000,000.00 nominal damages 500,000.00 punitive damages 500,000.00 Total monetary damages 5,000,000.00 Injective relief Time reduction or Sent to state Prison & Declaratory Judgement on the safety of Inmates All officers where vests to break up situations which involves weapons

VI. Plaintiff's Declaration

A. I understand that if I am transferred or released, I must apprise the Court of my address, and my failure to do so may result in this complaint being dismissed.

B. I understand that I may not proceed without prepayment of costs if I have filed three lawsuits and/or appeals that were dismissed on grounds that the action and/or appeal was frivolous or malicious, or failed to state a claim upon which relief may be granted, unless I am in imminent danger of serious physical injury.

Signed this 16 **day of** February, 2010.

08121-028
Prisoner no. (Louisiana Department of Corrections or Federal Bureau of Prisons or Alien registration number)

Signature of Plaintiff

5/2006

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From Jerome Weathington 08121-028
USP Pollock
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Pollock, LA 71467

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300 Fannin Street Suite 1167
Shreveport, LA 71101-3083

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U.S. Department of Justice

Federal Bureau of Prisons

South Central Regional Office

4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

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MAILED: **January 25, 2010**

1:10cv0359 Sec P

Jerome Weathington (Reg. No. 08121-028)
United States Penitentiary
P.O. Box 2099
Pollock, LA. 71467

RE: Administrative Tort Claim No. TRT-SCR-2009-05566

Dear Mr. Weathington

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, Title 28 U.S.C. Section 2672 et seq., and authority granted by 28 C.F.R. Section 0.172. You claim government liability in the amount of $100,000.00 for a personal injury.

Section 2672 of the Federal Tort Claims Act delegates to each federal agency the authority to consider, determine, and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You state that on July 12, 2009, you were injured at the United States Penitentiary (USP) Pollock, Louisiana. Specifically, you state you were assaulted by another inmate in the Special Housing Unit (SHU).

An investigation of your claim reveals on July 12, 2009, you were involved in a fight with your cellmate in SHU. Staff immediately responded to the fight and separated you and the other inmate. You and the other inmate were placed in separate cells. The investigation further revealed that you were not on separatee status from the other inmate at the time of the incident and that staff had no knowledge of any potential problems between you and the other inmate. You received an incident report charging you with violating Code 201, Fighting With Another Person. The Discipline Hearing Officer found that you had committed the prohibited act and sanctioned you to 27 days loss of good conduct time, 45 days of disciplinary segregation, and loss of commissary for one year.

WEATHINGTON, Jerome
Reg. No. 08121-028
TRT-SCR-2009-05566

You were examined by medical staff following the incident. Medical staff noted no injuries other than neck and rib pain for which you received appropriate treatment. You were seen by medical staff on several follow-up visits who noted continued back pain for which you continued to receive appropriate treatment.

An investigation could not establish that you experienced a personal injury or loss of property due to a negligent act or omission of a Federal Bureau of Prisons employee acting within the scope of his or her office or employment.

Based on these facts, your claim is denied. You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

Jason A. Sickler
Regional Counsel

cc: Joe Keffer, Warden
USP Pollock

U.S. Department of Justice

Federal Bureau of Prisons

South Central Regional Office

4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

CERTIFIED MAIL # 7005 1820 0002 2454 2345
MAILED: **September 2, 2009**

Jerome Weathington (Reg. No. 08121-028)
United States Penitentiary
P.O. Box 2099
Pollock, LA. 71467

RE: Administrative Tort Claim No. TRT-SCR-2009-02799

Dear Mr. Weathington

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, Title 28 U.S.C. Section 2672 et seq., and authority granted by 28 C.F.R. Section 0.172. You claim government liability in the amount of $5,000,000.00 for a personal injury.

Section 2672 of the Federal Tort Claims Act delegates to each federal agency the authority to consider, determine, and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You state that on January 2 and January 5, 2009, staff behaved in an unprofessional and inappropriate manner. Specifically, you allege you were being attacked by other inmates in the housing unit and staff did not respond in a timely manner. As a result of their untimely response, you suffered numerous injuries. You further allege staff behaved in an unprofessional manner while you were in a local hospital for treatment following the above attack.

An investigation of your claim reveals on the evening of January 2, 2009, you were involved in an incident with two other inmates in the B-1 Unit at USP Pollock. A review of available documentation indicates you initiated the incident by attacking another inmate with a homemade weapon. A second inmate joined in the incident. Staff arrived in a timely

manner and separated you and the other two inmates. Prior to being escorted from the housing unit, staff observed you removing protective equipment from your jumpsuit, which indicated to staff that you planned the attack and anticipated possible injuries to your self.

You were initially examined by medical staff at the institution. Following this examination, you were escorted to a local hospital for additional treatment. There is no evidence to indicate staff who were assigned to guard you in the hospital behaved in an unprofessional or inappropriate manner.

An investigation could not establish that you experienced a personal injury or loss of property due to a negligent act or omission of a Federal Bureau of Prisons employee acting within the scope of his or her office or employment.

Based on these facts, your claim is denied. You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

Jason A. Sickler
Regional Counsel

cc: Joe Keffer, Warden
USP Pollock

UNITED STATES PENITENTIARY
POLLOCK, LOUISIANA

PART B - RESPONSE- TO REQUEST FOR INFORMAL RESOLUTION ATTEMPT

WEATHINGTON, JEROME #08121-028

SUBJECT: TRANSFER

This is in response to your Informal Resolution Attempt, dated January 14, 2008, in which you claim that on January 2, 2009, you were stabbed several times by (2) inmates. You request to be transferred to the Indiana Department of Corrections because you don't feel protected while in Federal Custody.

Upon investigating your claim, it was found that a request has been made to transfer you to another Bureau of Prisons facility. At the present time you are awaiting routine designation through the Regional Office. You request to go to the Department of Corrections in Indiana is denied, due to you being sentenced to federal custody.

If you are not satisfied with this decision, you may appeal to the Warden on an Administrative Remedy Form BP-229.

D. [illegible], Correctional Counselor Unit A4 — Date 1/14/09

P. Townsend, Unit Manager - A Unit — Date 1/15/09

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Weathington Jerome L | 08121-028 | SHU | Pollock
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A– INMATE REQUEST I am Requesting that I be disgnated to Indiana Department of corrections because I am having a problem with DC inmates so I Know there isn't any DC inmates at the Indiana prisons I've gotten stabed in two different incidents Since I've been in the FBOP by This same group of inmates and because they dont have a prison in there State for them to go to this would be in my best intrest because I dont want to go to Know lock down place. Since I've been lock up My 8th Amendment right has been violated several times these ofc cannot protect me aguinst other inmates This is a right that I have on dits not being full field These inmates have Knives I had to take a Knife from another inmate so I wouldnt die also I seeking compensation in the Amount of 25,000 for the Negligence of Pollock Usp ofCs for other inmates stabing me with a Knife which they shoulant of had I am not protected

January 6, 2008 I received a puntured lung from this incident
DATE

[signature]
SIGNATURE OF REQUESTER

Part B– RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 522233-F1

CASE NUMBER:

Part C– RECEIPT

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP LVN

BP-229(13)
APRIL 1982

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Weathington Jerome J — 08121-028 — SHU — Pollock
LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

Part A- INMATE REQUEST I tried to infomally resolve Me being stabed by 2 inmates but what I requested for was denied so I am Requesting Compensation in the Amount of $5,000,000.00 for the following pages Attached to this BP9 There is 5 pages All of these incidents happend to lead up to this incident and incident after this incident At the outside hospital etc. These is from Jan 2, 2009 The day I was stabed The day I came from the hospital was Jan 5, 2009 and The day following that Jan 6, 2009
My Civil rights was violated as a prisoner Also I am requesting for you to Reserve the Camara in the Unit on Jan 2, 2009 in B1 Also reserve the Camara when I was brought back from the hospital on Jan 5, 2009 when I went to RED I only had on a Gown & A Blanket no socks or shoes or Boxers. Also Reserve The Camara when I came to the SHU on 1/5/09 I was put in an ~~[illegible]~~ Suicide Tank.

Feb 1, 2009
DATE

[signature]
SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 525217-F1

CASE NUMBER:

Part C- RECEIPT

Return to: LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

USP LVN

BP-229(13)
APRIL 1982

On January 2, 2009 I was stabed more than 20 Times I received a punctured lung. My rights as a prisoner was violated. Officers didnt wand or pat search Inmates in the Special housing Unit B-1, officers didnt break up the incident when it was first seen they where deliberatly different to my Safety, I was sent to a unit (B-1) that was mixed with PC and punitive Inmates, An inmate from the general population/another unit from the Compound was working in the unit as an orderly he had access to the yard with general population access to his unit (B-3) access to weapons Kites to pass etc, He did not live in B-1 Special housing unit, I was put in harms way because I checked in off the yard/compound I was Actually Considered a PC inmate, Officers let out around 12 different Cells at one time instead of Keeping us Segregated Knowing there is a risk that something is going to happen between PC and punitive inmates Each cell normally holds 2 inmates, Inmates had Knives in a Special housing Unit B-1 which are murder weapons

I had to take a Knife from one of the inmates and protect myself because the officers wasnt breaking the incident up, Officers unknown 1, 2, 3 LT medical prolonged my wait/call for the Ambulance after they noticed I had to go to the hospital because I was stabed in my chest/lung even after I Kept complaining about I couldnt breath and I was coughing There excuse was they had to do pill line My situation was a life threatning emergency, One of the officers unknown 4 punched me in my head at the hospital on 1/5/09 It was 2 officers working and at lunch time he tried to take my Food I told him I get one more portion because I was on Double portions. The officer unknown 4 had hit me in my head because I wouldnt give him my food I didnt even get to eat it he yanked my whole food Tray and it spilled every where, The other officer unknown 5 he hit me with a milk carton full of milk and it spilled everywhere all on me it was eggs all in my bed this was the other officer that was there during lunchtime on 1/5/09. These 2 officers had a grudge against me because the night shift officers that they had releived the shift before them was sleeping on the couch that was there in the room

and I couldnt breath and I was pushing my emergency button and the nurse never came and I told the officers and they asked me "you cant wait" I said no I cant wait I cant breath I'm about to die and know one ever came so I knocked my water Jug off of the counter and the nurses finally came after the noise in the room grew louder, The officers never got me my Double portion I never got to eat my lunch on 1/5/09, I was brung back to the institution manly because of this incident with the officers I could not breath right and I was discharged it even says on my medical report I had an irregular heart beat and I had shortness of Breath The warden was contacted and he told the officers to bring me back so that put force on the doctor to discharge me, The doctor never gave me anything for my shortness of breath I've had this problem before and the doctor gave me something to breath in that helped me get my breathing back on track I was just discharged and I complained but know one was trying to here Anything I had to say, I had an irregular heartbeat and shortness of breath and I was brung back to the institution, The doctor pulled the tube out of my chest tred and patched my wound and was like OK he can go now

I was gone lest than a couple of hours and I couldnt even breath right my stomach would get real tight and I couldnt hardly breath it was painful I thought I was going to die, The officers didnt get me any clothing

They didnt even care they treated me Cruel and unusual I asked for boxers, T-shirt, socks, pants etc They didnt give me anything I was shackeled put in a wheel chair with a hospital gown own which exposed my whole backside and the officers wrapped a blanket around me and rolled me threw the hospital and outside in the cold weather and we waited in the cold weather for the Van to come from around the corner ofc Jenkins was the driver he stated he didnt Know I didnt have on any clothing I had to stand up barefoot on the cold and wet ground and get help to get in the van. The officers at the hospital was cruel I dont know there name but these officers work for the Bureau of prisons I was humiliated The doctor at the hospital recommended that I be sent to the prison Infirmary instead I was put in a restraint room no toilet or sink no Camera no emergency button Just a Concrete block with a mattress

I couldnt walk I was in a wheel chair The same officers that was There at the hospital put me in that cell I requested to go to The medical room they told me there aint no medical room and the officers made me get out of the wheel chair and they took the wheel chair when pill line came I could not get up to get me meds They had to open my door and bring it to me even my food. I didnt want to go in the cell with nobody because I feared for my life I couldnt even protect myself LT Transou came and put a metal food slot on my observation cell door and put me on sack lunch because he said I refused to go in the cell with another inmate Ive had problems with LT Transou in the past. He even had the team ofc Crawford etc getting ready to remove me from that cell and I wasnt even a threat I wasnt in no shape to even defend my self. I was never given a Urine bottle to urinate in I had to pee on the floor.

All of the issues above where Cruel & Unusual punishment these incidents are a violation of my 8th Amendment right as a prisoner I am Seeking Compensation in the Amount of $15,000,000.00 Also officers was Negligent especially ofc Loridier who is one of the officers in the unit the day I was stabbed

FEDERAL CORRECTIONAL COMPLEX
POLLOCK, LOUISIANA

PART B - RESPONSE TO REQUEST FOR ADMINISTRATIVE REMEDY #525217-F1

Weathington, Jerome	08121-028	A-4
INMATE NAME	REGISTER NUMBER	UNIT

This is in response to your Request for Administrative Remedy 525217-F1, received in the Warden's Office on February 5, 2009, wherein you allege you attempted to informally resolve this issue which resulted after you were stabbed by two inmates and brought to an outside hospital for treatment. You contend you were denied compensation in the amount of $5,000,000.00. Specifically, you allege that on January 5, 2009, while being treated at an outside hospital for injuries sustained during an assault by another inmate on January 2, 2009, staff assaulted you by hitting you in the head and taking your food tray. You contend you have suffered cruel and unusual punishment and request that the cameras of the incident on January 2, 2009, and the camera on January 5, 2009, when you were returned to the institution from the outside hospital, be reserved to prove your allegations.

Allegations concerning staff misconduct are taken very seriously. This complaint has been referred to the appropriate authorities for proper review and disposition. At the conclusion of the review, appropriate action will be taken.

Also, be advised that the administrative remedy is not the proper documentation to file to request monetary compensation. You must complete an administrative tort claim form and file it with the South Central Regional Office.

If you are not satisfied with this decision, you may appeal to the Regional Director at: Bureau of Prisons, South Central Regional Office, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219. Your appeal must be received in the South Central Regional Office within 20 days of the date of this response.

Joe Keffer, Complex Warden

2/17/09
Date

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code)
Federal Bureau of Prisons	Jerome Weathington 08121-028 USP Pollock PO Box 2049 Pollock, LA 71467

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	March 20, 1985	N/A	Jan 2, 2009 – Jan 5, 2009	12 AM

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.)

ON January 2, 2009 I was stabed more than 20 times I received a punitured Lung My rights as a prisoner was violated Officers didnt wand or patsearch Inmates in the special housing Unit B-1, Officers Didnt Breakup the incident when it was first seen they were Deliberatly indifferent to my safety, I was sent to a Unit that was mixed with PC and punitive inmates, An Inmate from the Compound was working in the unit Attach

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

Punctured lung stabed 20 something times Medical Reports Attach
Punched in head at hospital = Mental and Emotional pain suffered
deprived of food = denied lifes necessity mental and Emotional pain suffered
Cruel and unusual Punishment

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)

12. (See instructions on reverse.) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	$5,000,000.00		$5,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
[signature]	N/A	Jan 31, 2009

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for the civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)	Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

3 Basis of Claim

On January 2, 2009 I was stabed more than 20 times. I received a punctured lung. My rights as a prisoner was violated. Officers didnt Wand or pat search Inmates in the special housing unit B-1, officers didnt break up the incident when it was first seen they where deliberatly indifferent to my safety, I was sent to a unit (B-1) that was mixed with PC and punitive Inmates, An Inmate from the General population/another Unit from the Compound was working in the unit as an orderly he had Access to the Yard with General population access to his unit B-3 Access to Weapons, Kites to pass etc, He did not live in B-1 Special housing unit, I was put in harms way because I checked in off the yard/Compound I was Actually Considered a PC inmate, Officers let out around 12 different Cells at one time instead of keeping us Segregated Knowing there is a risk that something going to happen between PC and Punitive inmates, Inmates →

Had Knives in a Special housing unit B-1 which are murder weapons," Offices Prolonged my wait/call for the Ambulance after they noticed I had to go to the hospital because I was stabed in my chest/lung even after I Kept Complaining about I couldnt breath and I was coughing There excuse was they had to do pill line My situation was a life threatning emergency)"One of the officers punched me in my head at the hospital on 1/5/09 It was two officers working and at lunchtime he tried to take my tray I told him I get one more portion because I was on Double portions. The officer had hit me in my head because I wouldnt give him my food I didnt even get to eat it he yanked my tray and it spilled every where," The ther officer he hit me with a milk Carton and it spilled every where ll on me this was the other officer that was there during lunch time on 1/5/09. These 2 officers had a grudge against me because the night shift fficers that came in before them was sleeping on the couch that as there in my room and I couldnt breath and I was pushing my

emergency button and the nurse never came and I told the officers and they asked me "You Cant wait" Naw I cant wait I'm about to die and Know one ever came so I Knocked my Water bottle off of the Counter and They finally came after the noise in the room grew louder;[12] The officers never got me my Double portion I never got to eat my lunch on 1/5/09;[13] I was brung back to the institution only because of this incident with the officers I could not breath right and I was discharged it even says on my medical report I had a irregular heart beat and I couldnt breath right. The warden was contacted and he told the officers to bring me back so that put force in the doctor to discharge me;[14] The Doctor never gave me nothing to make shore my breathing was @100 it is Something they suppose to give treats so there Breathing becomes normal I was Just discharged and I complained but Know One was trying to here Anything I had to say;[15] I had an irregular heart beat and I was brung back to the institution,

The doctor pulled the tub out of my chest and tied it up and was like he can go I was gone lest than an hour or two and I couldnt even breath right my stomach would get real tight and I couldnt hardly breath it was painful I thought I was going to die) The officers didnt get me any clothing They didnt even care they treated me Cruel and Unusual I asked for boxers T-shirt Socks or Shoes I didnt get nethier I was Put in a wheel chair with a Gown from the hospital on which exposed my whole Backside and They wraped a blanket around me and shackeled me up with hand cuffs and leg Irons Rolled me threw the hospital and outside in the cold weather and waited in the cold weather for the Van to come from around the corner of c Jenkins was the driver he told me he didnt know I didnt have on any clothing the officers + the hospital was Cruel I dont know there name but these officers ark for USP Pollock Bureau of Prisons I was humilated) The doctor at the hospital Recommended that I be sent to the Prison infirmary

instead I was put in a Restraint room no toilet Just a Concrete slaB with a flat mattress there wasnt a sink or nothing I couldnt walk I was in a wheel chair There wasnt an Emergency button to push in that cell there aint even a Camara looking at or in the cell The same officers was at the hospital put me in that cell that cell is in the SHU.

All of the issues above where cruel and unusual punishment. These incidents are a violation of my 8th Amendment right I am Seeking Compasation in the amount of $15,000,000.00 also these officers was Negligent especially the ofc R Ionidier who was one of the ofc in the Unit the day I was stabed

T.D. Wyatt

I will settle for $5,000,000.00 or/ 15 years off my Sentence

BY T.D. Wyatt

1175 DEVIN DR. STE 308
NORTON SHORES, MI 49441
RETURN SERVICE REQUESTED

888-703-3301
Monday - Thursday 8AM to 4:30 PM
Friday 9AM to 4:30PM CST
EMAIL: patient_services@embcc.com

IF PAYING BY CREDIT CARD, PLEASE FILL OUT BELOW
CHECK CARD USING FOR PAYMENT

☐ MASTERCARD ☐ VISA ☐ AMER. EXP

CARD NUMBER	AMOUNT
SIGNATURE	EXP. DATE

STATEMENT DATE	PAY THIS AMOUNT	ACCT.#
01/22/09	1190.00	10XF3506275

SHOW AMOUNT PAID HERE $

ADDRESSEE:

JEROME WEATHINGTON
POLLOCK UNITED STATES PENITIAR
POLLOCK, LA 71467

MAKE CHECKS PAYABLE TO:

EMERGENCY GROUP OF RAPIDES LLC
Affiliate of the Schumacher Group
PO Box 400
SAN ANTONIO, TX 78292-0400

☐ Please check box if above address is incorrect or insurance information has changed, and indicate change(s) on reverse side.

STATEMENT

PLEASE DETACH AND RETURN TOP PORTION WITH YOUR PAYME

THIS INVOICE IS FOR THE ER PHYSICIAN AT: RAPIDES REGIONAL MEDICAL CENTER

INVOICE #: 10X3678190
PHYSICIANS NAME: CARTER W QUAYLE MD

01/02/09	99291	860.0	CRITICAL CARE, FIRST HOUR	1168.00
01/02/09	99053	860.0	MED SERV 10PM-8AM, 24 HR F	22.00

INVOICE BALANCE: 1190.00

OUR RECORDS INDICATE THAT YOU HAVE: SELF PAY NO INS

IF THIS IS INCORRECT, PLEASE FILL OUT THE BACK OF THIS FORM, OR CALL OUR OFFICE AT THE NUMBER BELOW.

			BALANCE DUE
F3506275	JEROME WEATHINGTON		1190.00
331001673	888-703-3301		

MESSAGES

Please pay the amount shown above, or contact our office to make payment arrangements

Bureau of Prisons
Health Services
Consultation Request

Inmate Name: WEATHINGTON, JEROME | Reg #: 08121-028 | Complex: POX
Date of Birth: 03/20/1985 | Sex: M

Consultation/Procedure Requested: Emergency Room
Reason for Request:
On 1-2-08 inmate was transferred to local emergency department for multiple stab wounds.
Provisional Diagnosis:
multiple stab wounds
Current Medications:
Acetaminophen/Codeine 300/30MG Tab Exp: 01/16/2009 SIG: **crush/empty** Take two tablets by mouth at 0630 and 1830 for pain ***pill line***
Bacitracin/Poly B 28.4 GM oint Exp: 02/05/2009 SIG: Apply sparingly to the affected areas each day as needed for wounds
Hydrocortisone Cream 1%, 30 GM Exp: 03/08/2009 SIG: Apply sparingly to the affected areas twice daily as needed
Ibuprofen 800 MG Tab Exp: 02/05/2009 SIG: Take one tablet by mouth three times daily with food as needed for pain
Lisinopril 10 MG Tab Exp: 07/05/2009 SIG: Take one tablet by mouth each morning
Allergies:
No Known Allergies
Health Problems:
Oth symp involving skin and integumentary tissue, Infection by other and unspecified mycoses, Benign essential hypertension, Pneumothorax with open wound into thorax, Other acute pain, Alopecia, unspecified, Other local infections of skin and subcutan tissue, Dermatomycosis, unspecified, Other local infections of skin and subcutan tissue, Allergic rhinitis due to pollen, Other acute pain
Inmate Requires Translator: No **Language:**
Additional Records Required:

Comments:

Requested By: Vasquez, Willie PA-C
Due Date: 01/08/2009 00:00
Priority: Routine

CLINICAL NURSE/MID-LEVEL PRACTITIONER
EMERGENCY TRIP FLOW SHEET

DATE: 1/2/09 TIME: 2100

INMATE NAME: Weathington REG.# 08121028

REASON FOR TRANSFER: multiple stab wounds c̄ SOB

TRANSFERRED TO HOSPITAL via: Institution Vehicle_____ Ambulance X

HUEY P. LONG EMERGENCY RM. PH.# 473-6280
Contacted by: DLentz
Time: 2130
Person taking report: Chuck

RRMC
~~ST. FRANCIS CABRINI~~ EMERGENCY RM. PH.# 448-6750
Contacted by: ~~DLentz~~ void 1/2/09
Time: ~~2115~~ 1002
Person taking report: ~~Sarah RN~~

CLINICAL STAFF CONTACTED:

J. Alexandre, MD, CD ✓ T. Anthony, DDS_____
On-Call PA_____

HSU ADMINISTRATION CONTACTED:

HSA_____ AHSA ✓

INMATE ADMITTED TO HOSPITAL: Yes_____ No_____

(FORWARD COPY TO MEDICAL SECRETARY)

REVIEWED
JAN 06 2009
DR. JOEL D. ALEXANDRE
CLINICAL DIRECTOR

U8121-U28

Age/Sex:	23 M	WEATHINGTON,JEROME (ADM IN)	
Unit #:	E000954359	E.7A-E.703-A	Printed 01/05/09 at 133
Account#:	E00034060707	Lindsay,Philip C. M.D.	Period ending 01/05/09 at 133
Admitted:	01/02/09 at 2350	Rapides Reg Med Ctr Patient Car	DISCHARGE INSTRUCTION

Allergies

Type	Allergy - Severity/Comments	Updated Dt/Tm	Verified Dt/T
MEDICATION	No Known Drug Allergies	01/02/09 2242	01/03/09 0216
FOOD	No Known Food Allergies	01/02/09 2242	01/03/09 0216
CONTRAST MEDIA	No Known Contrast Allergies	01/02/09 2242	01/03/09 0216
OTHER	No Known Other Allergies	01/02/09 2242	01/03/09 0216

DISCHARGE INSTRUCTIONS

Reason for Hospitalization: STAB WOUNDS

Home Medications:

~~~ PATIENT'S HOME MEDICATION LIST ~~~

Medication-Strength	Dose/Route	Frequency
LISINOPRIL 20MG	1 PO	2 TIMES A DAY

~~~ End of Medication List ~~~

Sources Used For This Documentation: DISCHARGE ORDER WRITTEN

Routine Pharmacies Used: PRISON PHARMACY

Home Medication Disposition: NI
Prescriptions Given:
Safe/Effective Med. Use:
Drug/Food Interaction:
Drug/Drug Interaction:
Equipment/Supplies Needed:

Discharge Destination: PRISON

<><><> DIET <><><>
DIET: REGULAR

Fluid Restriction: N ML per Day:
Weight Monitoring: N Frequency:

<><><><> ACTIVITY LEVEL <><><><>
Activity Level: NO HEAVY LIFTING, BULLING OR STRAINING

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DR. JOEL D. ALEXANDRE
CLINICAL DIRECTOR

08121-038

DISCHARGE INSTRUCTIONS

<><> WOUND/INCISION/DRAIN/TUBE/OSTOMY CARE <><>
Wound/Incision/Drain/Tube/Ostomy Care: Y
: WASH WITH SOAP AND WATER. KEEP CLEAN AND DRY

Follow Up Testing with Date:

<><> Outside Referrals <><>
Agency or Facility Name:
Phone Number:
Special Instructions/Contact Person:

Agency or Facility Name:
Phone Number:
Special Instructions/Contact Person:

Indications for Further Treatment: SHORTNESS OF BREATH

Methods to Obtain Further Treatment: PRISON INFIRMARY

Additional Discharge Instructions:

<><><><> PHYSICIAN FOLLOW-UP APPOINTMENTS <><><><>

MD: PHONE:
Address: City: DATE: TIME:
Comment: REMOVE SUTURES IN 5 DAYS IN INFIRMARY
MD: PHONE:
Address: City: DATE: TIME:
Comment:
MD: PHONE:
Address: City: DATE: TIME:
Comment:
MD: PHONE:
Address: City: DATE: TIME:
Comment:

If you are a smoker, as part of our hospital's commitment to you and your health, upon admission you were provided information about quitting smoking.

* If you or someone in your home smokes, the BEST thing you (or they) can do for your health is to QUIT!
* Quitting often takes more than willpower. Check with your doctor about

REVIEWED
JAN 0 6 2009
DR. JOEL D. ALEXA
CLINICAL DIRECTO

08124-028

DISCHARGE INSTRUCTIONS

nicotine patches, gum or other medications.

* Quitting smoking programs can give you support and help you learn to handle cravings. If you would like to know more about such a program, please call the American Lung Association at (800)586-4872 for more information, or go online at www.lungusa.org and look at Freedom From Smoking Online.

I Have Been Instructed and Understand the Above. []Yes []No

I have received all of my belongings. []Yes []No

Patient or Responsible Person's Signature:_____

Nurse's Signature/Date/Time:_____

Reviewing Nurse's Signature/Date/Time:_____

It has been a pleasure to care for you.
Thank you for choosing our facility for your healthcare needs.

REVIEWED
JAN 06 2009
DR. JOEL D. ALEXANDER
CLINICAL DIRECTOR

MDI

Government Healthcare Services

MDI FACSIMILE

DATE: 1-5-09

TO: Dr. Alexandre **FAX:** 318-561-5547

FROM: Jennifer Winger, 800-862-1586, ext. 1407

RE: Jerome Weathington (update) 08/21-028

NO. OF PAGES INCLUDING COVER: 8

MESSAGE:

PRIVACY POLICY:
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MDIAttn: Privacy Officer, 822 Highway A1A North, Suite 310, Ponte Vedra Beach, FL 32082, 800-841-6288

Medical Development International
Central Region
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Fort Worth, TX 76137
Phone: 800/862-1586, ext. 1407
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jennifew@medint.com
Web site: http://www.medint.com

REVIEWED
JAN 6 2009
DR. JOEL D. ALEXANDRE
CLINICAL DIRECTOR

MDI

Inmate Status Report To: MDI and BOP

Attention: Carri Williamson Fax#: 904-394-2482 Phone#: 800-862-1586, Ext. 1406

Case Manager: Kim B. Clark Fax# 318-769-7641 Phone#: 318-419-2135

Hospital/Medical center: Rapides Regional Medical Center

Patient Name: Jerome Weathington Register #: 08121-028

Date(s) of review: 1/5/09

Hospital Unit Patient Resides in Today: X Med/Surg ___ICU ___CCU ___Telemetry ___SNF ___Swing Bed ___Rehab ___LTAC ___Psych ___Other:_____

Admitting / Current Diagnosis: Multiple stab wounds, (L) Pnemothorax

Past medical History: HTN, Bipolar disorder,

Medications: See MAR Faxed.

Clinical, current progress: 50% (L) Pnemothorax, Multiple superficial stab wounds to chest.

Action and Plan of Care: Chest tube to water seal, IV, Meds.

Diagnostic Procedure(s) (Performed): Fe K6, CXR, CT Chest, Labs

Diagnostic Procedure(s) (Pending): See reports

Discharge Plan(s):

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MDIAtm: Privacy Officer, 822 Highway A1A North, Suite 310, Ponte Vedra Beach, FL 32082, 800-841-6288

Revised 04/25/08; JK

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REVIEWED
JAN 06 2009
DR. JOSE D. ALEXANDRE
CLINICAL DIRECTOR

RAPIDES REGIONAL MEDICAL CENTER
P.O. BOX 30101 - 211 FOURTH STREET
ALEXANDRIA, LOUISIANA 71301

08121-028 HISTORY AND PHYSICAL EXAMINATION

NAME:	WEATHINGTON, JEROME	MR #:	E000954359
ACCT #:	E00034060707	ROOM/BED:	E.703-A
PT TYPE:	ADM IN	ADMIT DT:	01/02/09
ATTENDING:	Lindsay, Philip C. M.D.	DOB:	03/20/85
DICTATING:	Lindsay, Philip C. M.D.	MSV:	SUR
		DISCHARGED:	

JOB #: 12502

DATE OF ADMISSION: 01/02/09

HISTORY: This 23-year-old African-American inmate of Pollock Federal Prison was brought in after sustaining multiple stab wounds in an altercation in prison. The patient complained of left chest pain and his heart hurting. He was found to have at least a 50% left pneumothorax that was relieved with placement of chest tube in the ER. He had multiple other superficial stab wounds which were not at all life-threatening. The patient admitted for care at this time.

PAST MEDICAL HISTORY: No known allergies. History of hypertension and bipolar disorder although uncertain if he takes any medications for his bipolar disorder. He says he takes Lisinopril, dose unknown for his blood pressure control and it is usually well controlled but he has not been taking his pressure medicines for the last few days.

SOCIAL HISTORY: He denies smoking or drinking or use of illicit drugs.

FAMILY HISTORY: Noncontributory.

REVIEW OF SYSTEMS:
GENERAL: General health has been good.

PHYSICAL EXAMINATION

GENERAL: He is alert, oriented and cooperative He is sitting upright on the stretcher in the ER. He is complaining of pain in his left chest. He is not writhing about. He is oriented and cooperative.

VITAL SIGNS: BP 178/102, pulse 115 and regular, respirations 18, afebrile.

HEAD/NECK: Multiple superficial stab wounds by history. None are actively bleeding. There are no masses or any evidence of any major swelling about the head or neck.

LUNGS: Good breath sounds on the right, diminished on the left.

HEART: Regular rate and rhythm.

CHEST AND BACK: There is a stab wound on the back on the medial border of the left scapula.

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JAN 06 2009
DR. JOEL D. ALEXANDRE
CLINICAL DIRECTOR

RAPIDES REGIONAL MEDICAL CENTER
P.O. BOX 30101 - 211 FOURTH STREET
ALEXANDRIA, LOUISIANA 71301

0812-078 HISTORY AND PHYSICAL EXAMINATION

NAME: WEATHINGTON,JEROME MR #: E0000954359
ACCT #: E00034060707 ROOM/BED: E.703-A
DICTATING: Lindsay,Philip C. M.D.

There is a smaller wound in the low left axilla.

ABDOMEN: Negative for masses, tenderness or organomegaly.

GENITALIA AND RECTAL: Deferred.

EXTREMITIES: Multiple superficial stab wounds of the left leg and left arm. Pulses are intact and equal to extremities bilaterally.

NEUROLOGICAL: Cranial nerves II-XII are intact. The patient has full sensation and motor in his extremities.

Chest x-ray is not definitive for pneumothorax but on CT scanning with IV contrast it reveals large left pneumothorax mostly anterior and there is no evidence of extravasation of dye from any of the major blood vessels of the heart.

IMPRESSION:
1. TRAUMATIC LEFT PNEUMOTHORAX DUE TO STAB WOUND AND MULTIPLE SUPERFICIAL STAB WOUNDS.

PLAN: The patient is being admitted for care with the chest tube and once his pneumothorax is resolved the tube can be removed and he will be returned to prison.

cc:

\: PUL
DD: 01/03/09 0008
DT: 01/03/09 1118

Lindsay,Philip C. M.D.

REVIEWED
JAN 06 2009
DR. ROBERT G. ALEXANDRE
CLINICAL DIRECTOR

Original Copy / STATUS: Draft

08121-028

RAPIDES GENERAL HOSPITAL
Radiology Department

PHONE #: (318)473-3160
FAX #: (318)473-3685

Name: WEATHINGTON,JEROME
Phys: Lindsay,Philip C. M.D.
DOB: 03/20/1985 Age: 23 Sex: M
Acct: E00034060707 Loc: E.703 A
Exam Date: 01/04/2009 Status: ADM IN
Radiology No:
Unit No: E000954359

EXAMS:
001336161 CHEST AP ONLY (PORT)

SINGLE VIEW CHEST 1/04/09

HISTORY: 23 year old male with previous stab wound, pneumothorax, and chest tube. Follow up.

FINDINGS: Comparison to 1/03/09.

Left chest tube remains in good position. There is no pneumothorax seen on either side today. The lungs are clear and the heart is normal in size.

IMPRESSION: Chest tube in good position without pneumothorax. No new findings.

Reported by: PAUL R. SMITH, M.D.

CC: Huey P. Long Hospital; Philip C. M.D. Lindsay

Dictated Date/Time: 01/04/2009 (1906)
Technologist: ALA
Transcribed Date/Time: 01/04/2009 (1906)
Transcriptionist: ERD.BORGRA
Orig Print D/T: D: 01/05/2009 (0919)
BATCH NO: N/A

REVIEWED
JAN 06 2009
DR. JOEL D. ALEXANDRE
CLINICAL DIRECTOR

08121-028

RAPIDES GENERAL HOSPITAL
Radiology Department

PHONE #: (318)473-3160
FAX #: (318)473-3685

Name: WEATHINGTON,JEROME
Phys: Lindsay,Philip C. M.D.
DOB: 03/20/1985 Age: 23 Sex: M
Acct: E00034060707 Loc: E.703 A
Exam Date: 01/03/2009 Status: ADM IN
Radiology No:
Unit No: E000954359

EXAMS:
001336131 CHEST AP ONLY (PORT)

SINGLE CHEST DATED 1/03/09

CLINICAL HISTORY: 23 year old with stab wound. Follow up pneumothorax and chest tube.

FINDINGS: Comparison made to previous of 1/02/09.

A new left chest tube is noted in good position. A pneumothorax in the left today. No pneumothorax on the right is seen. No other significant findings.

IMPRESSION: Left chest tube in good position with resolution of left pneumothorax.

** Electronically Signed by M.D. PAUL R. SMITH **
** on 01/04/2009 at 1145 **
Reported and signed by: PAUL R. SMITH, M.D.

CC: Philip C. M.D. Lindsay

Dictated Data/Time: 01/03/2009 (1740)
Technologist: ALA
Transcribed Date/Time: 01/03/2009 (1740)
Transcriptionist: ERD.BORGRA
Electronic Signature Date/Time: 01/04/2009 (1145)
Orig Print D/T: S: 01/04/2009 (1333)
Reprint D/T: 01/05/2009 (0920) BATCH NO: 3627

REVIEWED
JAN 06 2009
DR. JOEL D. ALEXANDRE
CLINICAL DIRECTOR

0812-028

RAPIDES GENERAL HOSPITAL
Radiology Department

PHONE #: (318)473-3160
FAX #: (318)473-3685

Name: HEATHINGTON,JEROME
Phys: Quayle,Carter W., M.D.
DOB: 03/20/1985 Age: 23 Sex: M
Acct: E00034060707 Loc: E.703 A
Exam Date: 01/02/2009 Status: ADM IN
Radiology No:
Unit No: E000954359

EXAMS:
001336112 CT CHEST W/ CONTRAST

CT EXAMINATION CHEST.

HISTORY: Stab wound.

FINDINGS: Axial CT examination of the chest was performed. Intravenous contrast was utilized. There is evidence for a left anterior lateral chest wall stab wound injury with subcutaneous emphysema seen.

There is also a moderate to large left sided pneumothorax. There is some associated volume loss and atelectasis as would be expected. No significant pleural effusion or hemothorax seen. No significant pericardial effusion or hemopericardium is seen. The heart and great vessels demonstrate appropriate pattern of opacification. No evidence for mediastinal hematoma.

The right lung appears well expanded and otherwise unremarkable.

Images of the upper abdomen appear unremarkable, without convincing evidence for superimposed acute upper abdominal process.

The osseous structures appear intact.

IMPRESSION:
1. ***Left chest stab wound injury.***
2. ***Left sided pneumothorax.***

The findings were called to the ER at the time of dictation/TJD.

Report printed to ER.

** Electronically Signed by M.D. Timothy J. Dozier **
** on 01/04/2009 at 1628 **
Reported and signed by: Timothy J. Dozier, M.D.

REVIEWED
JAN 06 2009
DR. JOEL D. ALEXANDRE
CLINICAL DIRECTOR

01/05/09
0815

MEDICATION ADMINISTRATION RECORD

Rapides General Hospital

PAGE: 1

DIAGNOSIS: MULTIPLE STAB WOUNDS,L PNEUMOTHORAX
WT: 229lb 15.78oz (104.32kg) HT: 6ft 6in (198.12cm) BSA: 2.4m2
AGE: 23 SEX: M Serum Cr: 1.0 Est. CREATININE CL: 148.53 ML/MIN
ADMIT: 01/02/09
NOTES:

UNIT #: E000954359 E.7A
ACCT #: E00034060707 E.703-A

WEATHINGTON,JEROME
08/21-028

ALLERGIES: NO KNOWN DRUG ALLERGIES

ADMINISTRATION PERIOD: 0701 01/04/09 TO 0700 01/05/09	START/STOP	0701 - 1500	1501 - 2300	2301 - 0700
ESZOPICLONE (LUNESTA 2MG TAB) 2 MG ORAL AT BEDTIME DOSE INS: 2 MG RX #: 06138479 *** FLOOR STOCK ITEM ***	01/03/09		2146 CW 2 MG	
LISINOPRIL (PRINIVIL 20MG TABLET) 20 MG (1 UDTAB) ORAL TWICE DAILY COMMENTS: EQUIV. TO ZESTRIL RX #: 06138854 *** FLOOR STOCK ITEM ***	01/03/09	0738 EAF	2146 CW	
HYDROCODONE 7.5MG/APAP (HYDROCODONE/APAP 7.5/500 TAB) 1 TAB (1 TAB) ORAL Q 4HRS PRN RX #: 06138301 01:Pain Score: 02:: 03:: 04:Pain Med Ty *** FLOOR STOCK ITEM ***	01/03/09	0738 EAF 01:7 02:01/04/09 07 03:**0839** 04:0	2146 CW 01:7 02:01/04/09 21 03:**2246** 04:0	0121 CW 01:7 02:01/05/09 0 03:**0221** 04:0 0518 CW 01:8 02:01/05/09 0 03:**0619** 04:0
KETOROLAC TROMETHAMINE (TORADOL 15MG/ML VIAL) 15 MG INTRAVEN. EVERY 6 HOURS DOSE INS: 15 MG RX #: 06138647 *** FLOOR STOCK ITEM *** **** DISCONTINUED 01/04/09-1801	01/03/09 01/04/09	1211 ARM 15 MG SITE: LAN	1730 EGC 15 MG SITE: LAN	
HALOPERIDOL LACTATE (HALDOL 5MG/ML VIAL) 4 MG-0.8 ML (0.8 VIAL) INTRAVEN. NOW RX #: 06140372 *** FLOOR STOCK ITEM *** **** DISCONTINUED 01/05/09-0739	01/05/09 01/05/09			

********** FINAL PAGE **********

* = Meds not given
REASON CODES

USER NAME	INIT	USER NAME	INIT
Corner,Ernest RN	EGC	Firmin,Evelyn LPN	EAF
McNaughton,Amy R. RN	ARM	Willis,Carleen LPN	CW

SITES
LAN - LEFT ANTECUBITAL

REVIEWED
JAN 06 2009
DR. JOEL D. ALEXANDRE
CLINICAL DIRECTOR

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: WEATHINGTON, JEROME | Reg #: 08121-028
Date of Birth: 03/20/1985 | Sex: M | Race: BLACK
Encounter Date: 01/02/2009 22:52 | Provider: Lentz, Dalynn RN | Facility: POL

Injury Assessment encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Lentz, Dalynn RN

Chief Complaint: Altercation/Fight
Subjective: "I need morphine,I'm in pain"
Pain Location: Multiple Locations
Pain Scale: 6
Pain Qualities: Throbbing
History of Trauma: No
Onset: 1-5 Hours
Duration: 1-5 Hours
Exacerbating Factors: Touch and Movement
Relieving Factors: rest
Comments:

INJURY 1 **Provider:** Lentz, Dalynn RN

Date of Injury: 01/02/2009 19:15 **Date Reported for Treatment:** 01/02/2009 20:00
Work Related: No **Work Assignment:** B1 UNASSG
Where Did Injury Happen (Be specific as to location):
B-1 common area
Cause of Injury (Inmate's Statement of how injury occurred):
"I got stabbed."
Symptoms (as reported by Inmate):
"I need morphine, Im in pain."

ROS:

Pulmonary
Respiratory System
Dyspnea (yes), Shortness of breath (yes)

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
01/02/2009	20:00 POX	97.6	36.4	Oral	Lentz, Dalynn RN

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
01/02/2009	21:30 POX	104	Radial	Regular	Lentz, Dalynn RN
01/02/2009	21:15 POX	107	Radial	Regular	Lentz, Dalynn RN
01/02/2009	21:00 POX	105	Radial	Regular	Lentz, Dalynn RN
01/02/2009	20:45 POX	108	Radial	Regular	Lentz, Dalynn RN

Inmate Name: WEATHINGTON, JEROME Reg #: 08121-028
Date of Birth: 03/20/1985 Sex: M Race: BLACK
Encounter Date: 01/02/2009 22:52 Provider: Lentz, Dalynn RN Facility: POL

Date	Time	Rate Per Minute	Location	Rhythm	Provider
01/02/2009	20:30 POX	107	Radial	Regular	Lentz, Dalynn RN
01/02/2009	20:15 POX	121	Radial	Regular	Lentz, Dalynn RN
01/02/2009	20:00 POX	125	Radial	Regular	Lentz, Dalynn RN

Respirations:

Date	Time	Rate Per Minute	Provider
01/02/2009	21:30 POX	22	Lentz, Dalynn RN
01/02/2009	21:15 POX	22	Lentz, Dalynn RN
01/02/2009	21:00 POX	22	Lentz, Dalynn RN
01/02/2009	20:45 POX	24	Lentz, Dalynn RN
01/02/2009	20:30 POX	24	Lentz, Dalynn RN
01/02/2009	20:15 POX	26	Lentz, Dalynn RN
01/02/2009	20:00 POX	26	Lentz, Dalynn RN

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
01/02/2009	21:30 POX	143/85	Left Arm	Sitting	Adult-regular	Lentz, Dalynn RN
01/02/2009	21:15 POX	140/88	Left Arm	Sitting	Adult-regular	Lentz, Dalynn RN
01/02/2009	21:00 POX	145/86	Left Arm	Sitting	Adult-regular	Lentz, Dalynn RN
01/02/2009	20:45 POX	150/89	Left Arm	Sitting		Lentz, Dalynn RN
01/02/2009	20:30 POX	148/90	Left Arm	Sitting	Adult-regular	Lentz, Dalynn RN
01/02/2009	20:15 POX	138/94	Left Arm	Sitting	Adult-regular	Lentz, Dalynn RN
01/02/2009	20:00 POX	135/95	Left Arm	Sitting	Adult-regular	Lentz, Dalynn RN

SaO2:

Date	Time	Value(%)	Air	Provider
01/02/2009	21:30 POX	100		Lentz, Dalynn RN
01/02/2009	21:15 POX	100		Lentz, Dalynn RN
01/02/2009	21:00 POX	100		Lentz, Dalynn RN
01/02/2009	20:45 POX	100		Lentz, Dalynn RN
01/02/2009	20:30 POX	100		Lentz, Dalynn RN
01/02/2009	20:15 POX	100		Lentz, Dalynn RN
01/02/2009	20:00 POX	92	Room Air	Lentz, Dalynn RN

Exam:

General

Appearance/Nutrition

Appears Well (no), WD/WN (yes), NAD (no), Alert and Oriented x 3 (yes), Dyspneic (yes), Appears in Pain (yes), Appears in Distress (yes)

Affect

Cooperative (yes)

Pulmonary

Observation/Inspection

Tachypnea (yes)

Exam:

Auscultation

Diminished Breath Sounds (yes)

ASSESSMENT:

Bleeding-Traumatic

Injury assessment completed due to fight. Stab/puncture wounds are as follows: 2 to left side of head, 1 to right side of head, 2 to upper back, 1 to Left axilla and 1 to left hip area, 6 to left thigh and 6 to left lower leg, 6 to right upper arm, an 1 to right lower arm. I/M's lips bloody. A tooth was knocked out during fight. Wounds cleaned with betadine, TAO applied, and covered with bandage. I/M Alert and orientated X 3. No visual or auditory disturbances reported. I/M able t ambulate with assistance. I/M complaining of shortness of breath. Lung sounds diminished to left side. O2 at 10L face mask applied. A delay in calling ambulance due to staffing issues. Ambulance did arrive and bring inmate to Huey P.Long.

PLAN:

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
01/02/2009	Counseling	Access to Care	Lentz, Dalynn	Verbalizes Understanding

Copay Required: No **Cosign Required:** Yes

Telephone/Verbal Order: No

Clinical Encounter completed on WEATHINGTON, JEROME by Lentz, Dalynn RN on 01/02/2009 22:52.

Clinical Encounter requested to be cosigned by Alexandre, Joel MD CD.

Clinical Encounter cosigned by Alexandre, Joel MD CD on 01/05/2009 14:59.

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: WEATHINGTON, JEROME		Reg #: 08121-028
Date of Birth: 03/20/1985	Sex: M	Race: BLACK
Encounter Date: 01/05/2009 14:56	Provider: Vasquez, Willie PA-C	Facility: POL

Admin Note encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Vasquez, Willie PA-C

Chief Complaint: Other Problem
Subjective: Returned from Rapides Regional Hospital. Hx of multiple stab wounds with hemothorax.
Pain Location: Other
Pain Scale: 10
Pain Qualities: Aching
History of Trauma: No
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
01/05/2009	14:58 POX	98.6	37.0		Vasquez, Willie PA-C

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
01/05/2009	14:58 POX	106			Vasquez, Willie PA-C

Respirations:

Date	Time	Rate Per Minute	Provider
01/05/2009	14:58 POX	16	Vasquez, Willie PA-C

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
01/05/2009	14:58 POX	148/88				Vasquez, Willie PA-C

SaO2:

Date	Time	Value(%)	Air	Provider
01/05/2009	14:58 POX	97		Vasquez, Willie PA-C

Exam:

General

Appearance/Nutrition

WD/WN (yes), Alert and Oriented x 3 (yes)

Skin

General

Tenderness (yes)

Exam:

Dressings clean and dry.

Pulmonary

Auscultation

Clear to Auscultation Bilaterally (yes)

Cardiovascular

Auscultation

Regular Rate and Rhythm (RRR) (yes), Normal S1 and S2 (yes), M/R/G (no)

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Pneumothorax with open wound into thorax	860.1	Current	01/05/2009	Initial	Temporary/Acute

Health Problem Comments:

Discharged from local hospital today

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Acetaminophen/Codeine 300/30 MG Tablets	01/05/2009 14:56	300mg/30mg Orally -Two Times a Day x 10 day(s) Pill Line Only -- take two tabs po 2xdaily at pill line for pain
	Indication: Pneumothorax with open wound into thorax		
	Ibuprofen Tablet	01/05/2009 14:56	800mg Orally -three times a day PRN x 30 day(s) -- take one tab po 3xdaily with food prn pn
	Indication: Pneumothorax with open wound into thorax		
	Bacitracin/Polymyxin B ointment	01/05/2009 14:56	Double antibiotic oint Topically daily PRN x 30 day(s) -- aaa sparingly daily prn wounds.
	Indication: Pneumothorax with open wound into thorax		

New Radiology Request Orders:

Details	Frequency	End Date	Due Date	Priority
General Radiology-Chest-2 Views	One Time		01/09/2009	Routine

Specific reason(s) for request (Complaints and findings):

s/p pneumothorax---follow up plain films

Schedule:

Activity	Date Scheduled	Scheduled Provider
Suture Removal	01/12/2009 00:00	Nurse 09

Disposition:

Return Immediately if Condition Worsens

Other:

Daily self dressing changes--Duty RN to issue supplies.

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
01/05/2009	Counseling	Compliance - Treatment	Vasquez, Willie	Verbalizes Understanding

Wash wounds with soap and water. Keep clean and dry.

Copay Required: No **Cosign Required:** Yes

Telephone/Verbal Order: No

Clinical Encounter completed on WEATHINGTON, JEROME by Vasquez, Willie PA-C on 01/05/2009 14:56.

Clinical Encounter requested to be cosigned by Alexandre, Joel MD CD.

Clinical Encounter cosigned by Alexandre, Joel MD CD on 01/05/2009 15:24.

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	WEATHINGTON, JEROME			Reg #:	08121-028
Date of Birth:	03/20/1985	Sex:	M	Race:	BLACK
Note Date:	01/05/2009 15:45	Provider:	Vasquez, Willie PA-C	Facility:	POL

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Vasquez, Willie PA-C

Inmate returned from hospital

ASSESSMENTS:

Renew Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
POX-18170	Lisinopril 10 MG Tab	01/05/2009 15:45	Take one tablet by mouth each morning x 180 day(s)

Indication: Benign essential hypertension

Cosign Required: No

Telephone/Verbal Order: No

Administrative Note completed on WEATHINGTON, JEROME by Vasquez, Willie PA-C on 01/05/2009 15:45

Facility: POLLOCK USP

Medication Administration Record

January 2009

Medication Orders	Time	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
Ord. Date 01/06/09 08:01 Exp. Date 01/16/09 08:00 — WEATHINGTON, JEROME Alexandre, Joel CD 08121-028 (1) Refills "crush/empty" Take two tablets by mouth at 0630 and 1830 for pain ***pill line***	0630	x	x	x	x	x	x											x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
	1830	x	x	x	x	x											x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
19411 Acetaminophen/Codeine 300/30MG																																
Ord. Date — WEATHINGTON, JEROME Alexandre, Joel CD 08121-028 — Exp. Date — Order																																
Ord. Date — WEATHINGTON, JEROME Alexandre, Joel CD 08121-028 — Exp. Date — Order																																
Ord. Date — WEATHINGTON, JEROME Alexandre, Joel CD 08121-028 — Exp. Date — Order																																
Ord. Date — WEATHINGTON, JEROME Alexandre, Joel CD 08121-028 — Exp. Date — Order																																
	Time	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31

Documentation Codes: H - Hold; R - Refused; DC - Discontinued Order; S - Self Administered; NS - No Show; O - Other

DOB: 03/20/85 HT: _____ WT: _____ Allergies: No Known Allergies

Physician: Alexandre, Joel CD

Pt. Name: WEATHINGTON, JEROME Registration #: 08121-028 Unit: Z01-101LAD

Mo/Yr:	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31
Temperature																															
Pulse Rate																															
Respiration																															
Blood Pressure																															
Blood Sugar																															

Date	Hour	Medication and Dosage	Route	Reason	Results or Response	Hour	Nurse's Signature

Initials	Full Signature	Title	Initials	Full Signature	Title	Initials	Full Signature	Title
KN	Kimberly Nugent	[illegible]						

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

[redacted]

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Vasquez, Willie PA-C

On 1-2-08 inmate was sent to emergency department for stab wounds.

ASSESSMENTS:

New Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
Emergency Room	01/08/2009	Routine	No	

Reason for Request:

On 1-2-08 inmate was transferred to local emergency department for multiple stab wounds.

Provisional Diagnosis:

multiple stab wounds

Current Medications:

Acetaminophen/Codeine 300/30MG Tab Exp: 01/16/2009 SIG: **crush/empty** Take two tablets by mouth at 0630 and 1830 for pain ***pill line***

Bacitracin/Poly B 28.4 GM oint Exp: 02/05/2009 SIG: Apply sparingly to the affected areas each day as needed for wounds

Hydrocortisone Cream 1%, 30 GM Exp: 03/08/2009 SIG: Apply sparingly to the affected areas twice daily as needed

Ibuprofen 800 MG Tab Exp: 02/05/2009 SIG: Take one tablet by mouth three times daily with food as needed for pain

Lisinopril 10 MG Tab Exp: 07/05/2009 SIG: Take one tablet by mouth each morning

Cosign Required: No

Telephone/Verbal Order: No

Administrative Note completed on WEATHINGTON, JEROME by Vasquez, Willie PA-C on 01/08/2009 15:43

Bureau of Prisons
Health Services
Clinical Encounter

[redacted]

Wound Care encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Tisdale, Charles PA-C

Chief Complaint: Pain

Subjective: This inmate is complaining about pain on the L side of chest in area where the chest tube was removed. He recently returned from hospital where he was treated for pneumothorax and multiple stab wounds.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma: No

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

OBJECTIVE:

Exam:

General

Appearance/Nutrition

Appears Well (yes), NAD (yes)

Affect

Cooperative (yes)

Skin

Multiple stab wounds to L arm upper back/chest and to L leg. No evidence of infection. L chest tube site stable and no evidence of infection

Pulmonary

Observation/Inspection

Normal (yes)

Auscultation

Clear to Auscultation Bilaterally (yes)

No subcutaneous emphysema. Respirations regular and nonlabored. Inmate speaking without difficulty and walked from cell to medical room without difficulty.

Cardiovascular

Observation

Normal Rate (yes)

Auscultation

Regular Rate and Rhythm (RRR) (yes), Normal S1 and S2 (yes)

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type

Description	ICD9	Status	Status Date	Progress	Type
Pneumothorax with open wound into thorax	860.1	Current	01/05/2009	Improved	Temporary/Acute

Health Problem Comments:

Discharged from local hospital today

PLAN:

Disposition:

Follow-up at Sick Call as Needed
Return Immediately if Condition Worsens
Return To Sick Call if Not Improved

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
01/08/2009	Counseling	Wound Care	Tisdale, Charles	Verbalizes Understanding

Wounds redressed

Copay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

Clinical Encounter completed on WEATHINGTON, JEROME by Tisdale, Charles PA-C on 01/08/2009 14:54.

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JANUARY 26, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTH CENTRAL REGIONAL OFFICE

TO : JEROME WEATHINGTON, 08121-028
POLLOCK USP UNT: A QTR: Z01-109LAD
P.O. BOX 1000
POLLOCK, LA 71467

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 523610-R1 REGIONAL APPEAL
DATE RECEIVED : JANUARY 20, 2009
SUBJECT 1 : TRANSFER - OTHER
SUBJECT 2 : UNPROFESSIONAL, INAPPROPRIATE CONDUCT OR MISCONDUCT BY STAFF
INCIDENT RPT NO:

REJECT REASON 1: THE ISSUE YOU RAISED IS NOT SENSITIVE. HOWEVER, WE RETAINED YOUR REQUEST/APPEAL ACCORDING TO POLICY. YOU SHOULD FILE A REQUEST OR APPEAL AT THE APPROPRIATE LEVEL VIA REGULAR PROCEDURES.

REGNO: 08121-028 NAME: WEATHINGTON, JEROME
RSP OF...: POL UNT/LOC/DST: A QTR.: Z07-236LAD RCV OFC: POL
REMEDY ID: 525225-F1 SUB1: 34AS SUB2: DATE RCV: 02-05-2009
UNT RCV..: A QTR RCV.: Z01-109LAD FACL RCV: POL
UNT ORG..: A QTR ORG.: Z01-109LAD FACL ORG: POL
EVT FACL.: POL ACC LEV: POL 1 RESP DUE: WED 02-25-2009
ABSTRACT.: INAPPROPRIATE CONDUCT BY STAFF/RESERVE CAMERAS
STATUS DT: 02-18-2009 STATUS CODE: CLO STATUS REASON: XPL
INCRPTNO.: RCT: P EXT: DATE ENTD: 02-05-2009
REMARKS..:

CURRENT INVESTIGATIVE AND RELIEF TRACKING DATA

DATE DUE	DEPARTMENT	TO	DATE ASSN	TRK TYPE	DATE RETURNED
TUE 02-17-2009	CEO	JK	02-13-2009	SIG	02-17-2009
WED 02-18-2009	SIS	JM	02-05-2009	INV	02-12-2009

G0002 MORE PAGES TO FOLLOW . . .

REGNO: 08121-028 NAME: WEATHINGTON, JEROME
RSP OF...: POL UNT/LOC/DST: A QTR.: Z07-236LAD RCV OFC: POL
REMEDY ID: 522233-F1 SUB1: 10AS SUB2: DATE RCV: 01-12-2009
UNT RCV..: A QTR RCV.: Z01-109LAD FACL RCV: POL
UNT ORG..: A QTR ORG.: Z01-109LAD FACL ORG: POL
EVT FACL.: POL ACC LEV: RESP DUE:
ABSTRACT.: NEEDS TRANSFER FOR PROTECTION-SEEKS $$ COMPENSATION
STATUS DT: 01-12-2009 STATUS CODE: REJ STATUS REASON: INF RSF
INCRPTNO.: RCT: EXT: DATE ENTD: 01-12-2009
REMARKS..: YOU MUST ATTEMPT TO INFORMALLY RESOLVED THIS ISSUE P
RIOR TO FILING AN ADMIN REMEDY AND ATTACH A COPY OF
THE ATTEMPT & STAFF'S RESPONSE TO YOUR BP-9.

G0002 MORE PAGES TO FOLLOW . . .

POLBW *ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL * 04-17-2009
PAGE 017 * FULL SCREEN FORMAT * 15:54:59

REGNO: 08121-028 NAME: WEATHINGTON, JEROME
RSP OF...: POL UNT/LOC/DST: A QTR.: Z07-236LAD RCV OFC: POL
REMEDY ID: 525217-F1 SUB1: 34AS SUB2: DATE RCV: 02-05-2009
UNT RCV..: A QTR RCV.: Z01-109LAD FACL RCV: POL
UNT ORG..: A QTR ORG.: Z01-109LAD FACL ORG: POL
EVT FACL.: POL ACC LEV: POL 1 RESP DUE: WED 02-25-2009
ABSTRACT.: RIGHTS VIOLATED BY STAFF/RESERVE CAMERAS
STATUS DT: 02-18-2009 STATUS CODE: CLO STATUS REASON: XPL
INCRPTNO.: RCT: P EXT: DATE ENTD: 02-05-2009
REMARKS..:

CURRENT INVESTIGATIVE AND RELIEF TRACKING DATA

DATE DUE	DEPARTMENT	TO	DATE ASSN	TRK TYPE	DATE RETURNED
TUE 02-17-2009	CEO	JK	02-13-2009	SIG	02-17-2009
WED 02-18-2009	SIS	JM	02-05-2009	INV	02-12-2009

G0002 MORE PAGES TO FOLLOW . . .

POLBW *ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL * 04-17-2009
PAGE 012 * FULL SCREEN FORMAT * 15:54:59

REGNO: 08121-028 NAME: WEATHINGTON, JEROME
RSP OF...: POL UNT/LOC/DST: A QTR.: Z07-236LAD RCV OFC: POL
REMEDY ID: 522704-F1 SUB1: 26BS SUB2: 34DS DATE RCV: 01-15-2009
UNT RCV..: A QTR RCV.: Z01-109LAD FACL RCV: POL
UNT ORG..: A QTR ORG.: Z01-109LAD FACL ORG: POL
EVT FACL.: POL ACC LEV: POL 1 RESP DUE: TUE 02-24-2009
ABSTRACT.: ALLEGES STAFF ASSAULT @OUTSIDE HOSPITAL-INADEQ MED C
STATUS DT: 01-15-2009 STATUS CODE: ACC STATUS REASON:
INCRPTNO.: RCT: P EXT: P DATE ENTD: 01-15-2009
REMARKS..:

CURRENT INVESTIGATIVE AND RELIEF TRACKING DATA

DATE DUE	DEPARTMENT	TO	DATE ASSN	TRK TYPE	DATE RETURNED
MON 01-26-2009	SIS	JM	01-15-2009	INV	

G0002 MORE PAGES TO FOLLOW . . .

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

[redacted]

Admin Note encounter performed at Special Housing Unit.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Dunbar, Maxwell LPN

Sutures removed from left chest area. Wound appears well-healed.

ASSESSMENTS:

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
01/12/2009	Counseling	Wound Care	Dunbar, Maxwell	Verbalizes Understanding

Cosign Required: No

Telephone/Verbal Order: No

Administrative Note completed on WEATHINGTON, JEROME by Dunbar, Maxwell LPN on 01/12/2009 09:52

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

[redacted]

Admin Note encounter performed at Special Housing Unit.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Dunbar, Maxwell LPN

Request renewal on Bacitracin ointment for wounds he received during assault.

ASSESSMENTS:

Renew Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
POX-19412	Bacitracin/Poly B 28.4 GM oint	01/27/2009 11:22	Apply sparingly to the affected areas each day as needed for wounds x 30 day(s)

Indication:

Cosign Required: Yes

Telephone/Verbal Order: Yes **By:** Vasquez, Willie PA-C

Telephone or Verbal order read back and verified.

Administrative Note completed on WEATHINGTON, JEROME by Dunbar, Maxwell LPN on 01/27/2009 11:22

Requested to be cosigned by Vasquez, Willie PA-C.

Cosigned by Vasquez, Willie PA-C on 01/27/2009 12:25.

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

[redacted]

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Vasquez, Willie PA-C

Received copout stating drainage from previous stab wounds to leg. Duty RN confirms small amout of discharge noted.

ASSESSMENTS:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Cephalexin Capsule	02/04/2009 12:37	500mg Orally -three times a day x 7 day(s) – take one cap po 3xdaily for infectioin until gone

Indication: Infection by other and unspecified mycoses

Cosign Required: No

Telephone/Verbal Order: No

Administrative Note completed on WEATHINGTON, JEROME by Vasquez, Willie PA-C on 02/04/2009 12:37

STATEMENT

PATHOLOGY ASSOC OF LA 09-022
P O BOX 9600
TEXARKANA TX 75505-9600

(866)875-0415
PLEASE CHANGE ADDRESS IF INCORRECT

IF PAYING BY CREDIT CARD, FILL OUT BELOW
CHECK CARD USING FOR PAYMENT

VISA ☐ VISA MasterCard ☐ M/C

Card Holder's Name:
Number: Exp. Date:
Signature: Amount:

PLEASE MAKE CHECK PAYABLE TO:

PATHOLOGY ASSOC OF LA 09-022
P O BOX 9600
TEXARKANA TX 75505-9600

JEROME WEATHINGTON 2988
POLLOCK UNITED STATES PENITIAR
POLLOCK LA 71467

PDELTA01 60** **Y
RETURN TOP PORTION WITH YOUR REMITTANCE.

BILLING DATE	ACCOUNT NO.	TOTAL DUE	AMOUNT ENCLOSED
03-12-2009	R954359	58.00	$

THIS STATEMENTS REPRESENTS SERVICES PROVIDED BY PATHOLOGY ASSOCIATES OF MID-LA. WE ARE LOCATED IN SHREVEPORT, ALEXANDRIA AND MONROE, LOUISIANA. IF YOU HAVE ANY QUESTIONS PLEASE CONTACT OUR BILLING OFFICE AT 866-875-0415.

PATIENT	PHYSICIAN	DATE	REF	DESCRIPTION	INSURANCE RESOLUTION	INSURANCE	PAT. AMO
				BALANCE FORWARD			58.

PRIOR MONTH OUTSTANDING CLAIMS = .00
TOTAL OUTSTANDING CLAIMS = .00

THIS ACCOUNT IS PAST DUE. PAYMENT IS REQUIRED AT THIS TIME. PLEASE SUBMIT PAYMENT IN FULL.

CURRENT	[illegible] DAYS	[illegible] DAYS	[illegible] DAYS	[illegible] DAYS	OVER [illegible] DAYS	TOTAL DUE
.00	.00	58.00	.00	.00	.00	58.0

PATHOLOGY ASSOC OF LA 09-022
P O BOX 9600
TEXARKANA TX 75505-9600

(866)875-0415

NOTICE:
THIS IS A BILL. BASED UPON INFORMATION FRO
YOUR HEALTH PLAN, YOU OWE THE AMOUNT SHOWN.

R954359

RAPIDES REGIONAL MEDICAL CENTER
P.O. BOX 99400
LOUISVILLE, KY 40269

01458

National Patient Account Services
HON-FRI 8AM-5PM EST
TOLL-FREE: 1-800-635-3526
ESPANOL: 1-800-681-9692

WWW.RAPIDESREGIONAL.COM/BILL.ASP

023482-001509973- SP

NOTICE: THIS IS A BILL. BASED UPON INFORMATION FROM YOUR HEALTH PLAN, YOU OWE THE AMOUNT SHOWN.

Due to privacy laws; when calling please be prepared to provide the patient's date of birth, address, and Social Security Number.

730

Jerome Weathington
Pollock United States Pe
Pollock, LA 71467

Patient Name:	Jerome Weathington
Account Number:	34060707
Discharge Date:	01/05/09
Total Charges:	$14,432.00
Statement Date:	01/15/10
Pat Balance Due:	$4,671.76
Payment Due Date:	01/30/10

PAY THI AMOUN

Dear Jerome Weathington,

Thank you for selecting us for your medical services. We trust that you found our commitment to patient care to be of the highest standard.

Your insurance company was billed, leaving an unpaid balance in the amount shown above. Our records indicate this balance is your responsibility. Please send payment in full by the payment due date indicated below. We also offer the convenience of paying over the phone by check, credit card, or debit card through our automated payment system at no additional cost.

If you have additional insurance information not previously provided, please contact us at the toll-free number above. As a courtesy, we will bill your insurance. However, it is your responsibility to ensure payment is received.

In the event you are unable to pay the total balance at this time, please contact us to discuss resolution of your account.

If you have already sent payment in full, thank you.

RAPIDES REGIONAL MEDICAL CENTER
National Patient Account Services

Refer to back for additional billing information

Please Detach and Return This Portion With Your Payment

Statement Date 01/15/10

☐ If your address changed, check this box and complete form on back.

Jerome Weathington
Pollock United States Pe
Pollock, LA 71467

Account Number	34060707
Payment Due Date	01/30/10
Balance Due	$4,671.76
Payment Amount Enclosed	

We accept payment by credit card, check, or money order. If paying by check, please make check payable to the hospital and include your patient account number on the check to ensure proper credit. You may also pay by phone or online at our web site listed above.

SEND PAYMENT TO ADDRESS BELOW:

RAPIDES REGIONAL MEDICAL CENTER
P.O. BOX 740785
CINCINNATI, OH 45274-0785

Credit Card Authorization (please check one)

☐ MasterCard ☐ VISA ☐ DISCOVER ☐ AMERICAN EXPRESS

Credit Card Number | Exp. Date

Cardmember's Signature | $ Amount

NESTOR AYALA SERRANO, Plaintiff, Appellee, v. CRUZ LEBRON GONZALEZ, Defendant, Appellant
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
909 F.2d 8;1990 U.S. App. LEXIS 12142;17 Fed. R. Serv. 3d (Callaghan) 688
No. 89-1366
July 18, 1990

Editorial Information: Prior History

Appeal from the United States District Court for the District of Puerto Rico; Hon. Hector M. Laffitte, U.S. District Judge.

Counsel Reina Colon De Rodriguez, Assistant Solicitor General, with whom Jorge E. Perez Diaz, Solicitor General, and Norma Cotti Cruz, Deputy Solicitor General, were on brief for Appellant.

Luis Angel Lopez Olmedo, for Appellee.

Judges: Torruella and Selya, Circuit Judges, and Re, * Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant prison officer appealed from a judgment of the United States District Court for the District of Puerto Rico, which, after a bench trial, granted plaintiff inmate a damage award with costs for deprivation of his civil rights under 42 U.S.C.S. § 1983.Imposition of monetary liability on prison officer was proper because he was present during an assault upon an inmate and failed to intervene and his failure to act was clearly unreasonable thus he was not entitled to qualified immunity.

OVERVIEW: Plaintiff inmate alleged that while an inmate at a state penitentiary, he was assaulted and stabbed by two other inmates. Plaintiff also alleged that defendant prison officer, who was present at the time of the assault, violated plaintiff's constitutional rights by failing to take any action to prevent the assault. The district court, after a bench trial, granted plaintiff a damage award for deprivation of his civil rights under 42 U.S.C.S. § 1983. Defendant appealed and the court affirmed the judgment of the district court. The court held that the district court did not err in determining that the amendment of the complaint to add the prison officer as a defendant satisfied the requirements of Fed. R. Civ. P. 15(c), that defendant was not protected by qualified immunity, and that the district court had subject matter jurisdiction. The court also held that the factual findings of the district court were not clearly erroneous. Defendant failed to comply with a clearly established constitutional duty of protecting a prisoner from violence at the hands of other prisoners. Hence, the court agreed with the district court that defendant was not entitled to qualified immunity.

OUTCOME: The court affirmed the judgment of the district court that granted plaintiff inmate a damage award with costs for deprivation of his civil rights by defendant prison official. The court held that the district court did not err in denying defendant's motion for summary judgment, and that the factual findings of the district court were not clearly erroneous.

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LexisNexis Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Relation Back
Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Eligibility, Circumstances & Factors

Fed. R. Civ. P. 15(c) permits relation back to the time of the filing of the original complaint, of an amendment to add a defendant, if the following factors are met: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Civil Rights Law > Section 1983 Actions > Scope
Governments > Legislation > Statutes of Limitations > General Overview
Governments > Legislation > Statutes of Limitations > Time Limitations

The applicable statute of limitations for 42 U.S.C.S. § 1983 cases brought in the federal district court of Puerto Rico is one year.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Relation Back
Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview

In a Fed. R. Civ. P. 15(c) analysis the linchpin is notice, and notice within the limitations period. The courts have developed an "identity of interest" concept as a judicial gloss on Rule 15(c). Under this concept, an amendment to add a party as a defendant will relate back to the time of the filing of the original complaint if the named defendant and the party that the plaintiff actually intended to sue have an "identity of interest," and the other requirements of Rule 15(c) have been satisfied. In the United States Court of Appeals for the First Circuit, the parties have an "identity of interest" when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced.

Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies

When applicable, the doctrine of qualified immunity may shield public officers from liability when, in the course of their duties, they violate the constitutional rights of persons. Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If at the time of the alleged violation, the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Civil Rights Law > Prisoner Rights > Safety
Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment

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The U.S. Const. amend. VIII, which prohibits cruel and unusual punishment, was designed especially for the protection of those convicted of crimes. Furthermore, it is well established that prison officials have a constitutional duty to protect prisoners from violence at the hands of other prisoners.

Civil Rights Law > Immunity From Liability > Local Officials > Customs & Policies

A public official defendant is entitled to qualified immunity unless no reasonably competent public officer would have acted in the same manner.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Federal Questions > General Overview
Civil Procedure > Jurisdiction > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Governments > Legislation > Statutory Remedies & Rights

42 U.S.C.S. § 1983 provides for a broad and comprehensive civil rights jurisdiction, and was intended to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. While § 1983 provides plaintiffs with a cause of action, it does not confer subject matter jurisdiction on a federal district court. Federal jurisdiction over § 1983 claims is provided for by 28 U.S.C.S. § 1343(a)(3).

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Civil Procedure > Jurisdiction > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements

Fed. R. Civ. P. 8(a)(1) requires a pleading to set forth a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it. The court has recognized that federal subject matter jurisdiction may be established by a complete reading of a complaint, even though the jurisdiction expressly asserted was improper.

Civil Procedure > Parties > Self-Representation > General Overview
Civil Procedure > Parties > Self-Representation > Pleading Standards

Pro se pleadings are to be liberally construed in favor of the pro se party.

Opinion

Opinion by: RE

Opinion

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{909 F.2d 9} RE, Judge.

Defendant-appellant, Cruz Lebron Gonzalez (Lebron), a prison officer, appeals from a judgment of the District Court for the District of Puerto Rico which, after a bench trial, granted plaintiff-appellee Nestor **Ayala Serrano** (**Ayala**), an inmate, $ 20,000, with costs, for deprivation of his civil rights under 42 U.S.C. § 1983.

Ayala alleged that, on May 11, 1983, while an inmate at the State Penitentiary in Rio Piedras, Puerto Rico, he was assaulted and stabbed by two other inmates. **Ayala** also alleged that Lebron, who was present at the time of the assault, violated Ayala's constitutional rights by failing to take any action to prevent the assault.

On appeal, Lebron contends that the district court erred in not dismissing Ayala's claim because: the claim was barred by the applicable statute of limitations; Lebron was protected by qualified immunity; and the district court did not have subject matter jurisdiction. Lebron also contends that the decision should be reversed because the {909 F.2d 10} factual findings of the district court during the bench trial were clearly erroneous.

The questions presented on this appeal are whether:

1) the district court erred in denying Lebron's motion for summary judgment because it determined that the amendment of Ayala's complaint to add Lebron as a defendant satisfied the requirements of Fed. R. Civ. P. 15(c), and, hence, related back to the filing of Ayala's original complaint, which was within the applicable statute of limitations; Lebron was not protected by qualified immunity; the district court had subject matter jurisdiction over Ayala's claim, and

2) whether the judgment should be reversed because the factual findings of the district court during the bench trial were clearly erroneous.

We hold that the district court did not err in determining that the amendment of the complaint to add Lebron as a defendant satisfied the requirements of Fed. R. Civ. P. 15(c), that Lebron was not protected by qualified immunity, and that the district court had subject matter jurisdiction. Since we also hold that the factual findings of the district court were not clearly erroneous, the judgment of the district court is affirmed.

BACKGROUND

On May 11, 1983, Nestor **Ayala Serrano** (**Ayala**), an inmate in the Intensive Treatment Unit (UTI) of the State Penitentiary at Rio Piedras, Puerto Rico, left a workshop on the lower level of the UTI to return to his cell on the upper level. As **Ayala** approached the electronic iron gate separating the levels, he signalled to a prison officer sitting at the controls who opened the gate. After **Ayala** passed through the gate, he was assaulted by two fellow inmates who had been lying in wait for him. **Ayala** suffered seven stab wounds during the assault.

On November 28, 1983, **Ayala** filed a *pro se* complaint in the United States District Court for the District of Puerto Rico. The complaint, which was written in Spanish, alleged that **Ayala** had been subjected to serious physical injury. The *pro se* complaint sought damages for physical and mental injury, and transfer to a minimum security prison. **Ayala** named as defendants Jorge L. Collazo Torres, the Administrator of Corrections of the Commonwealth of Puerto Rico, and Carmelo Gonzalez Rivera, the Superintendent of the State Penitentiary at Rio Piedras.

Subsequently, **Ayala** obtained counsel, and, on June 28, 1984, an amended complaint was filed, adding as defendants the Commonwealth of Puerto Rico, its Department of Corrections, and Jaime Rivera Torres, a Department official. In his amended complaint, **Ayala** sought damages, under 42

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U.S.C. § 1983, for personal injury caused by the violation of his constitutional rights during the assault of May 11, 1983. On August 21, 1984, **Ayala** filed a second amended complaint, adding as a defendant Cruz Lebron Gonzalez (Lebron), a prison officer on duty in the UTI at the time **Ayala** was assaulted.

Alleging that it was immune from suit and that the complaint failed to state a claim upon which relief could be granted, the Commonwealth of Puerto Rico moved to dismiss Ayala's complaint. The district court entered an order granting the motion to dismiss as to all defendants. **Ayala** appealed to this court, and we affirmed the dismissal as to all the defendants except Lebron. We also remanded to the district court to determine whether Ayala's motion to amend the complaint by adding Lebron as a defendant satisfied the requirements of Rule 15(c) of the Federal Rules of Civil Procedure. *See* ***Serrano*** *v. Torres*, 764 F.2d 47, 50 (1st Cir. 1985).

On remand, Lebron moved for summary judgment. Lebron contended that the action should be dismissed because the amendment of the complaint to add Lebron as a defendant did not satisfy the requirements for relation back set by Rule 15(c), and, hence, was time barred by the applicable statute of limitations. Lebron also contended that he was entitled to qualified immunity. *See* ***Ayala Serrano*** *v. Collazo Torres*, 650 F. Supp. 722, slip op. at 2 (D.P.R. 1986).

{909 F.2d 11} The district court noted that, under Rule 15(c), a motion to add a defendant will relate back to the date of the filing of the original complaint if the party to be added "'received such notice of the . . . action that [the party] will not be prejudiced . . ., and . . . [the party] knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.'" *Id.* at 725 n.3 (quoting Fed. R. Civ. P. 15(c)). The district court found that it could be presumed that Lebron had notice of the filing of Ayala's original complaint, since Lebron "is an employee whose immediate superiors and colleagues were named and served as defendants in the initial action." *Id.* at 726. The court also noted that Lebron was present during the assault, assisted in the subsequent investigation, and continued to work in the UTI while **Ayala** was the subject of extensive special protection. *See id.* slip op. at 10. Hence, the court concluded that Lebron had notice of the filing of the original complaint, and that Lebron was not prejudiced by the delay caused by Ayala's failure to name him as a defendant in the original complaint. *See id.* slip op. at 10-11.

The court noted that the applicable statute of limitations period is one year, but determined that "Lebron knew or should have known that he was a proper party to the action within one year of the incident." *Id.* at 727. Hence, the court held that "Lebron was sufficiently apprised of plaintiff's suit to satisfy the relation-back provisions of Rule 15(c)." *Id.* at 729.

Since it was not the subject of the remand order, the court did not rule on the issue of Lebron's qualified immunity defense. *See id.* slip op. at 16. On the basis of his claimed qualified immunity defense, Lebron subsequently filed a new motion for summary judgment, and submitted affidavits. On April 6, 1988, the court denied Lebron's motion.

At the bench trial, on December 13, 1988, both **Ayala** and Lebron testified about the assault, and there was no other eyewitness testimony. The district court noted that "this case hinges upon the credibility of the parties." ***Ayala Serrano*** *v. Lebron Gonzalez*, Civil No. 83-2909 HL, slip op. at 4 (D.P.R. Dec. 22, 1988). According to Ayala's testimony, several prison officers, including Lebron, were present at the time the gate opened. **Ayala** testified that he saw the two inmates lying in wait for him, but proceeded through the gates nonetheless because of the presence of the prison officers. *See id.* at 4. **Ayala** stated that during the attack, all of the officers, including Lebron, did nothing to protect him or to prevent the assault. *See id.* at 4-5. **Ayala** stated that, even after the assault, the prison officers did not summon help or assist him to the prison dispensary. *See id.* at 5.

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In contrast to the testimony of **Ayala**, Lebron testified that, during the assault on **Ayala**, he was separated from **Ayala** by a glass divider and could not see past the iron gate. *See id.* at 5. The district court, however, noted that Lebron testified that after witnessing the closing of the iron gate Lebron "noticed a strange movement, like a noise, occurring behind the gate." *Id.* at 5. Lebron stated that after investigating, he saw the assault, and ordered another officer to open the gate. Lebron testified that he then halted the fight and, with another officer, brought **Ayala** to the prison dispensary. *See id.* at 5.

On cross examination, however, Lebron testified that as he attempted to stop the assault, he too was attacked by the two inmates. *See id.* at 6. Nevertheless, Lebron admitted that he had never reported the assault on himself to the investigators. *See id.* Lebron also stated on cross examination that, although **Ayala** had not been gagged by the assaulting inmates, **Ayala** remained silent throughout the assault. *See id.*

The court determined that Lebron's testimony was untrustworthy, noting that "on direct examination, he never stated that he was almost attacked by one of the assailants," *id.* at 7, and "failed to include said incident in his sworn affidavit attached to his motion for summary judgment." *Id.* at 8. The court "also [found] incredulous [Lebron]'s testimony that [**Ayala**] did not {909 F.2d 12} yell, scream, call out or complain of pain while [the attacker] was inflicting . . . seven stab wounds." *Id.* Hence, based on the testimony and demeanor of the parties, the district court disbelieved Lebron, and concluded that Ayala's testimony was more credible. *See id.* at 7.

On December 22, 1988, the district court entered judgment in favor of **Ayala**, and awarded him $ 20,000 for the deprivation of his constitutional rights by Lebron.

DISCUSSION

I. *Statute of Limitations*

The Supreme Court has stated that Rule 15(c) of the Federal Rules of Civil Procedure permits relation back to the time of the filing of the original complaint, of an amendment to add a defendant, if the following factors are met:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. *Schiavone v. Fortune*, 477 U.S. 21, 29, 91 L. Ed. 2d 18, 106 S. Ct. 2379 (1986). The applicable statute of limitations for section 1983 cases brought in the federal district court of Puerto Rico is one year. *See Altair Corp. v. Pesquera de Busquets*, 769 F.2d 30, 31 (1st Cir. 1985) (citing P.R. Laws Ann. tit. 31, § 5298(2) (1968)).

In order to satisfy the first prong of the *Schiavone* test, the basic claim against Lebron must arise out of the events set forth in Ayala's original, *pro se* complaint. Since **Ayala** sued *pro se*, it is important to note that his pleadings are to be liberally construed. *See Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); *Gilday v. Boone*, 657 F.2d 1, 2 (1st Cir. 1981).

Ayala's *pro se* complaint alleged mistreatment by prison officers and serious physical injury. Although the complaint did not contain the specificity that undoubtedly would have been present had it been prepared by an attorney, it nevertheless alleged the injury that could only have been caused by the assault of May 11, 1983. Lebron's amended complaints, drafted by counsel, contained specific

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allegations pertaining to the assault. In light of the liberal construction to be given *pro se* complaints, on the facts presented the district court did not err in its determination that the allegations against Lebron arose from the events alleged in Ayala's *pro se* complaint.

The second requirement established by the Supreme Court in *Schiavone* is that Lebron received sufficient notice of the lawsuit so that he will not be prejudiced in presenting his defense.

As noted in *Schiavone*, in a Rule 15(c) analysis "the linchpin is notice, and notice within the limitations period." 477 U.S. at 31. The courts have developed an "identity of interest" concept as a judicial gloss on Rule 15(c). *See Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102 (1st Cir. 1979). Under this concept, an amendment to add a party as a defendant will relate back to the time of the filing of the original complaint if "the named defendant and the party that the plaintiff actually intended to sue have an 'identity of interest,' . . . [and] the other requirements of Rule 15(c) have been satisfied." 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1499 (2d ed. 1990). In this circuit, the parties have an "identity of interest" "when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced." *Hernandez Jimenez*, 604 F.2d at 102-03.

In this case, the originally named defendants, the Administrator of Corrections of the Commonwealth of Puerto Rico, and the Superintendent of the State Penitentiary at Rio Piedras, were Lebron's superiors. {909 F.2d 13} Lebron was present during the assault on **Ayala**. After the complaint had been filed, Lebron remained a prison officer, and continued working in the UTI in Rio Piedras, where **Ayala** remained as an inmate. Indeed, after the filing of the complaint **Ayala** was the subject of special protective measures at the UTI.

Under these circumstances, it is entirely reasonable to assume that Lebron was notified or knew of the lawsuit commenced by **Ayala** as a result of the assault. Hence, we conclude that the district court did not err in its determination that Lebron must have received notice of Ayala's lawsuit within one year of the assault.

The third requirement established by *Schiavone* is that Lebron knew or should have known that, but for a mistake in identity, he would have been named as a defendant in the original complaint. Lebron maintains that "inasmuch as the emphasis of the original complaint was made on the petition for **Ayala** Serrano's transfer of prison, Cruz Lebron could very well have believed, that he was not named as party because he had no power to grant, deny or recomend [sic] inmates' petitions for prison transfers." (footnote omitted).

It is to be noted, however, that Ayala's original complaint clearly alleged that **Ayala** had suffered physical injury and serious bodily harm as a result of an assault. Lebron was present at the assault, was aware of the injuries suffered by **Ayala**, and knew of Ayala's subsequent hospitalization. Under these circumstances, we hold that the district court did not err in determining that Lebron knew, or had reason to know, that he, Lebron, was intended to be named as a defendant in the original complaint, founded upon the injuries suffered in the assault of May 11, 1983.

The fourth requirement for permitting the relation back of Ayala's complaint is that "the second and third requirements must have been fulfilled within the prescribed limitations period." *Schiavone*, 477 U.S. at 29. In this case, although the applicable period is one year, Lebron not only was aware of the assault and the injuries to **Ayala**, but he continued to work in the UTI after the assault on **Ayala**, and knew of the increased protective measures that were taken. On these facts we hold that the district court did not err in its determination that, within one year of the assault on **Ayala**, Lebron knew of Ayala's lawsuit and that, if not for a mistake in identity, he, too, would have been named as a

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defendant.

Hence, we hold that the district court did not err in determining that the addition of Lebron as a defendant satisfied the requirements of Rule 15(c).

II. *Qualified Immunity*

Lebron's second contention is that, since he was entitled to qualified immunity, the district court erred in denying his motion for summary judgment.

When applicable, the doctrine of qualified immunity may shield public officers from liability when, in the course of their duties, they violate the constitutional rights of persons. A recent articulation of the doctrine is found in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), wherein the Supreme Court stated that "government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In explaining the confines of the doctrine, the Supreme Court noted that "on summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Id.* at 818. The Court explained that, if at the time of the alleged violation, "the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19.

In this case, therefore, Lebron's qualified immunity claim should fail if, under clearly established law, **Ayala** had the constitutional right to have a prison guard, who was {909 F.2d 14} present at the scene, intervene in the assault of May 11, 1983.

The eighth amendment to the United States Constitution, which prohibits "cruel and unusual punishment," was designed especially for the protection of those convicted of crimes. *See Ingraham v. Wright*, 430 U.S. 651, 664, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977). Furthermore, it is well established that prison officials have a constitutional duty "'to protect prisoners from violence at the hands of other prisoners.'" *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.) (quoting *Leonardo v. Moran*, 611 F.2d 397, 398-99 (1st Cir. 1979)), *cert. denied*, 488 U.S. 823, 109 S. Ct. 68, 102 L. Ed. 2d 45 (1988). *See also Blankenship v. Meachum*, 840 F.2d 741, 742 (10th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir.), *cert. denied*, 484 U.S. 935, 98 L. Ed. 2d 269, 108 S. Ct. 311 (1987); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984); *Woodhous v. Commonwealth of Virginia*, 487 F.2d 889, 890 (4th Cir. 1973).

In this case, the credible evidence at trial indicates that Lebron, a prison officer who was present at the scene of an assault on **Ayala**, an inmate, failed to come to Ayala's aid. Hence, it seems clear that Lebron failed to comply with a clearly established constitutional duty of protecting a prisoner from violence at the hands of other prisoners. Lebron, however, maintains that "even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability from damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard."

In *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986), the Supreme Court clarified the standard of qualified immunity established by *Harlow*, and noted that a public official defendant is entitled to qualified immunity unless no reasonably competent public officer would have acted in the same manner. *See also Fontane-Rexach v. Puerto Rico Elec. Power Auth.*, 878 F.2d 1493, 1497 (1st Cir. 1988).

In this case, the evidence at trial indicated that Lebron stood by while **Ayala** was assaulted. Clearly, Lebron could have intervened either to stop the assault, or to have summoned the help of other

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guards. Under the circumstances, Lebron's failure to act was clearly unreasonable. Hence, we agree with the district court that Lebron was not entitled to qualified immunity.

III. *Subject Matter Jurisdiction*

Lebron's third contention is that the district court did not have subject matter jurisdiction over the action. In support of this contention, Lebron asserts that "by failing to plead that the District Court had jurisdiction over this suit pursuant to 28 USC 1343(3), **Ayala-Serrano** did not comply with the . . . Rule 8(a) (1) requirement that a short and plain statement of the grounds upon which the court's jurisdiction depends be included in the complaint."

It is clear that 42 U.S.C. § 1983 "provides for a broad and comprehensive civil rights jurisdiction, and was intended 'to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.'" *Freeman v. Rideout*, 808 F.2d 949, 950 (2d Cir. 1986) (quoting *Burnett v. Grattan*, 468 U.S. 42, 55, 82 L. Ed. 2d 36, 104 S. Ct. 2924 (1984)), *cert. denied*, 485 U.S. 982, 108 S. Ct. 1273, 99 L. Ed. 2d 484 (1988). While 42 U.S.C. § 1983 provides plaintiffs with a cause of action, it does not confer subject matter jurisdiction on a federal district court. *See Cervoni v. Secretary of Health, Educ. and Welfare*, 581 F.2d 1010, 1019 (1st Cir. 1978). Federal jurisdiction over section 1983 claims is provided for by 28 U.S.C. § 1343(a) (3). In this case, Ayala's *pro se* complaint, as well as his two amended complaints, alleged jurisdiction under 42 U.S.C. § 1983. The complaints did not allege jurisdiction under 28 U.S.C. § 1343(a)(3).

Rule 8(a)(1) of the Federal Rules of Civil Procedure requires a pleading to set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction {909 F.2d 15} and the claim needs no new grounds of jurisdiction to support it. . . ." This court has recognized that federal subject matter jurisdiction may be established by a complete reading of a complaint, "even though the jurisdiction expressly asserted was improper." *Commonwealth of Massachusetts v. United States Veterans Admin.*, 541 F.2d 119, 122 (1st Cir. 1976). *See also Hildebrand v. Honeywell, Inc.*, 622 F.2d 179, 181 (5th Cir. 1980); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1206 (1969).

Furthermore, we have noted that *pro se* pleadings are to be liberally construed, in favor of the *pro se* party. *See Estelle*, 429 U.S. at 106. A review of Ayala's *pro se* complaint leaves no doubt that it alleges personal injury as a result of mistreatment in a prison setting, a federal claim under 42 U.S.C. § 1983 and under 28 U.S.C. § 1343(a)(3). A liberal reading of Ayala's two amended complaints also plainly indicates that they comprise section 1983 claims which are cognizable in a federal court. Hence, since the cause of action was one over which the district court had subject matter jurisdiction, the court had jurisdiction over Ayala's claim.

IV. *Fact Findings of the District Court*

Lebron's final contention is that "[a] review of the entire record demonstrates, not only that there is no substantial evidentiary basis for the Court's determination but also that a mistake has been committed." Lebron asserts, therefore, that "the imposition of monetary liability on Cruz Lebron is a clearly erroneous determination that should be reversed."

At the bench trial, both Lebron and **Ayala** testified as to the events of May 11, 1983. No other eyewitnesses testified. The district court determined that Lebron's testimony was untrustworthy and noted that, on direct testimony, Lebron omitted his assertion that he had been assaulted by one of the inmates during the May 11 incident. The court also found incredible Lebron's testimony that **Ayala** did not call out during the assault, and noted that Lebron failed to call any corroborating witnesses. The court also commented that the demeanor evidence favored Ayala's testimony rather than Lebron's.

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Under the circumstances, the district court was within its discretion in its role as fact finder, in determining that Ayala's testimony was more trustworthy than Lebron's. Hence, we hold that the factual findings of the district court, were not clearly erroneous.

CONCLUSION

Since we hold that the district court did not err in denying Lebron's motion for summary judgment, and that the factual findings of the district court were not clearly erroneous, the judgment of the district court is affirmed.

Footnotes

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McKinley Robinson, Appellant, v. Morris Cavanaugh, Dining Room Sgt.; Dick Moore; Steve Long; Michael Groose; David Dormire, Appellees.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
20 F.3d 892; 1994 U.S. App. LEXIS 6380
No. 93-2114
April 5, 1994, Filed

Editorial Information: Prior History

Appeal from the United States District Court for the Western District of Missouri. District No. 91-4441-CV-C-5. Honorable Scott Wright, District Judge.

Summary:

Posture:
Appellant inmate sought review of an order of the United States District Court for the Western District of Missouri, which granted summary judgment dismissing his action under 42 U.S.C.S § 1983 against appellee prison officials who allegedly violated appellant's constitutional rights by reducing his prison wages and failing to protect him from an assault by another inmate.
Cite overview:
Inmate's action against prison officials was properly dismissed where the inmate failed to demonstrate a property interest in prison wages and failed to show that prison officials were indifferent to his right to be free of assaults by other inmates.
Overview:
Appellant inmate initiated an action against appellee prison officials under 42 U.S.C.S. § 1983 and alleged that appellees violated due process rights under U.S. Const. amend. XIV when they unilaterally and without prior notice instituted a new prison wage scale which resulted in the reduction of his wages and that appellees failed to protect him from an assault by another inmate in violation of U.S. Const. amend. VIII. Adopting the report and recommendations of a magistrate, the district court granted summary judgment dismissing appellant's claims. On appeal, the court affirmed the district court's order granting summary judgment. The court held that the district court did not abuse its discretion in dismissing appellant's wage claim as frivolous under 28 U.S.C.S. § 1915 (d) because appellant had no constitutional right to prison wages, and appellant failed to point to any other source of law granting him a property interest in such wages. In affirming the dismissal of appellant's failure to protect claim, the court held that appellant did not meet his burden of showing that appellees were deliberately indifferent to his constitutional right to be free of assaults by other inmates.
Outcome:
The court affirmed the summary judgment dismissing appellant inmate's action against appellee prison officials because appellant had no constitutional right to prison wages and failed to point to any other source of law granting him a property interest in such wages and because appellant did not meet his burden of showing that appellees were deliberately indifferent to his constitutional right to be free of assaults by other inmates.
Concepts:
The court reviews a district court's dismissal of a complaint under 28 U.S.C.S. § 1915 (d) for an abuse of discretion. A claim may be dismissed as frivolous if it is based on an indisputably meritless legal theory. There is no constitutional right to prison wages and any such compensation is by the grace of the state. Property interests are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.

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The court reviews de novo a trial court's summary dismissal of an inmate's claim that prison officials failed to protect him against assault by another inmate. Prisoners have a constitutional right to be free from attacks by other inmates. To prevail on his failure-to-protect claim, an inmate needs to show that prison officials were deliberately indifferent to his constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.
The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Disposition Affirmed

Counsel Appellant was not represented by Counsel.
Counsel who represented the appellee was Sara L. Trower, Assistant Attorney General, of Jefferson City, Missouri.

Judges: Before MAGILL, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and BEAM, Circuit Judge.

Opinion

Opinion by: PER CURIAM

{20 F.3d 893} PER CURIAM.

McKinley Robinson, a Missouri inmate, appeals the district court's1 order dismissing his 42 U.S.C. § 1983 claim that defendant prison officials, Morris Cavanaugh, Dick Moore, Steve Long, Michael Groose, and David Dormire violated Robinson's Fourteenth Amendment rights by reducing his prison wages. He also appeals a subsequent order granting summary judgment to defendants on his 42 U.S.C. § 1983 claim that defendants violated his Eighth Amendment rights when they allegedly failed to protect him from an assault by another inmate. For the reasons discussed below, we affirm the judgment of the district court.

Robinson alleged that prison officials violated his Fourteenth Amendment due process rights when they unilaterally and without prior notice instituted a new prison wage scale which resulted in the reduction of his wages from $ 30.00 per month to $ 7.50 per month for his work in the prison dining room. Robinson also alleged that prison officials failed to protect him from an assault by another inmate which occurred when Robinson could not pay his debts as a result of the wage cut.

In recommending the sua sponte dismissal of the wage reduction claim as frivolous under 28 U.S.C. 1915 (d), the magistrate judge stated that under *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), no constitutional due process violation occurred because of the existence in Missouri of adequate {20 F.3d 894} post-deprivation remedies. Robinson objected, contending that Missouri law created a protected interest in the full amount of his wages and that *Parratt* did not apply to his situation. After considering Robinson's objections and conducting de novo review, the district court adopted the magistrate judge's recommendation and dismissed Robinson's wage reduction claim.

Thereafter, defendants moved for summary judgment on the failure to protect claim, contending that Robinson had not informed them that he feared being attacked. Defendants also asserted that Robinson never provided the name of any inmate he thought would attack him and that qualified immunity shielded them because they acted in an objectively reasonable manner. Robinson moved for appointment of counsel. In response to defendants' summary judgment motion, Robinson

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contended that he had requested protective custody and had informed defendants that he feared someone would attack him. Robinson conceded, however, that when he requested protective custody, he did not provide the name of his would-be attacker because he did not want to be labelled as an informant. In reply, defendant Dormire averred that defendants could not place Robinson in protective custody without Robinson either providing the name of his potential attacker or some evidence that he was, indeed, in danger. According to Dormire, defendants cannot effectively protect an inmate without knowing the potential assailant and because a potential aggressor could feign needing protective custody in order to attack another inmate already there.

The magistrate judge denied Robinson's motion for appointment of counsel and recommended granting summary judgment to defendants on Robinson's failure to protect claim because Robinson failed to provide defendants with specific facts about his feared attack. After considering Robinson's objections and conducting de novo review, the district court adopted the magistrate judge's recommendations and granted summary judgment in favor of defendants.

In addition to reiterating the arguments he advanced to the district court, Robinson argues on appeal that the district court erred by not granting his motion for appointment of counsel.

We review a district court's dismissal of a complaint under 28 U.S.C. 1915 (d) for an abuse of discretion. *Denton v. Hernandez*, 118 L. Ed. 2d 340, 112 S. Ct. 1728, 1734 (1992). A claim may be dismissed as frivolous if it is "based on an indisputably meritless legal theory." *Neitzke v. Williams*, 490 U.S. 319, 327, 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989).

We conclude that the district court did not abuse its discretion in dismissing Robinson's claim concerning the reduction of his wages. While it is true that many section 1983 actions dealing with the random or unforeseeable loss of property can be resolved when an adequate state post-deprivation remedy exists, in this case, Robinson is arguing that the new prison wage scale itself deprived him of a protected property interest without due process of law. *See Zinermon v. Burch*, 494 U.S. 113 at 130-31, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990); *Weimer v. Amen*, 870 F.2d 1400, 1403-04 (8th Cir. 1989). Thus, in essence, he contends that he had "a legitimate claim of entitlement" to the higher wages. *Ervin v. Blackwell*, 733 F.2d 1282, 1285 (8th Cir. 1984).

We have previously stated that "there is no constitutional right to prison wages and any such compensation is by the grace of the state." *Hrbek v. Farrier*, 787 F.2d 414, 416 (8th Cir. 1986). In addition, as the Supreme Court has noted, "property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Robinson's wage claim fails because he cannot point to any Missouri law that grants him a property interest to the previous higher wage scale. We do not read sections 217.255 and 217.260 of the Missouri Revised Statutes as creating such a property interest.

Turning to Robinson's failure to protect claim, we review the district court's grant of summary judgment de novo, *United* {20 F.3d 895} *States ex rel. Glass v. Medtronic Inc.*, 957 F.2d 605, 607 (8th Cir. 1992), applying the same standards as the district court. *Kuhnert v. John Morrell & Co. Meat Packing*, 5 F.3d 303, 304 (8th Cir. 1993). Prisoners have a constitutional right to be free from attacks by other inmates. *See Butler v. Dowd*, 979 F.2d 661, 675 (8th Cir. 1992) (en banc), *cert. denied*, 124 L. Ed. 2d 297, 113 S. Ct. 2395 (1993). To prevail on his failure-to-protect claim, Robinson needed to show that prison officials "were deliberately indifferent to his constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates." *Branchcomb v. Brewer*, 669 F.2d 1297, 1298 (8th Cir. 1982) (per curiam); *see also Andrews v. Siegel*, 929 F.2d 1326, 1330 (8th Cir. 1991). The

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district court properly granted summary judgment to defendants because Robinson failed to demonstrate that defendants acted with deliberate indifference by not placing him in protective custody based on his general fear for his safety. *Cf. Ruefly v. Landon*, 825 F.2d 792, 794 (4th Cir. 1987) (defendants did not act with deliberate indifference when they had no reason to know that an inmate posed a "specific risk of harm" to plaintiff). Even if defendants denied his requests for protective custody, Robinson does not dispute that he declined to identify the inmate he feared would attack him nor does he dispute defendants' contention that they would not place an inmate in protective custody without knowing the identity of the potential assailant. "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Having carefully reviewed the record, we conclude that the magistrate judge did not abuse his discretion in denying Robinson's motion for appointment of counsel. *See Rayes v. Johnson*, 969 F.2d 700, 702-03 (8th Cir.) (standard of review), *cert. denied*, 121 L. Ed. 2d 584, 113 S. Ct. 658 (1992). Robinson's request for oral argument is denied.

Accordingly, the judgment of the district court is affirmed.

Footnotes

Footnotes

1 The Honorable Scott O. Wright, Senior United States District Judge for the Western District of Missouri, adopting the report and recommendations of the Honorable William A. Knox, United States Magistrate Judge for the Western District of Missouri.

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RECEIVED
AUG 13 2010
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT, LOUISIANA

1:10-CV-00359

Dear Clerk of Court I am Amending my Complaint For the Specifics that was asked From the Court

1. Plaintiff should Amend his complaint to state whether he received a disciplinary conviction as a result of the incident on January 2, 2009 and whether he lost good time as a result. If plaintiff did receive a disciplinary conviction and loss of good time credits he should state whether the disciplinary conviction was expunged or overturned

Response / Amend

I was wrote a disciplinary shot which is on hold until I get done with court I havent seen dHO for my shot Yet It is a 101 Assault resulting in serious bodily injury The DHO will find me guilty because I was found guilty in court and will take good time credits from me and will take privileges I dont Know the day the DHO will hear my disciplinary report.

2. Plaintiff should Amend his complaint to state whether the guards were armed or unarmed at the time of the incident. Plaintiff should also state whether the guards gave verbal orders to stop fighting and whether either guard called for assistance from other USP-P officials Finally, Plaintiff should state how the fight ended or was ultimately broken -up.

Response / Amend

In the BOP (Bureau of Prisons) /or at USP Pollock Guards are Unarmed unless an incident occurs and they need weapons

The officer J Valder gave an order to stop fighting and called on his walkie talkie a fight in B-1 Then a minute later called a fight in B1 with weapons The officers stood around and watch as I was stabed it was 4 officers there just watching They seen me getting stabed and decided not to do any thing Then 1 officer that didnt even work in the unit came and pled one inmate off of me This officer came from off of the Compound he didnt have any weapon None of the officers had weapons The 4 officers that was there watching me get stabed finally helped after one officer pulled the one inmate off only 2 of the 4 officers helped after I was stabed over 20 times I was then put in a room where I was bleeding from being stabed so many times I had to complain Just to be taken to the hospital.

3 Plaintiff should Amend his complaint to state:

A. whether on Plaintiff's body did John Doe #1 punch Plaintiff and what, if any, injuries Plaintiff suffered as a result of being punched by John Doe #1;

B. Where on Plaintiffs body did John Doe #2 punch plaintiff and what, if Any injuries Plaintiff suffered as a result of being ponched by John Doe #2

C. whether Plaintiff received a disciplinary conviction as a result of the hospital incident

D. whether Plaintiff lost any good time as a result of the incident at the hospital

E. How long was plaintiff held in observation cell without a toilet or sink? Was plaintiff ever allowed out of the cell to shower and use the toilet

Response / Amend

John doe #1 punched me in my head and my arm There was no injury to be seen because I am dark skinned John Doe #7, threw milk on me and tried to pull me out the bed and hit me in my leg and Arm There was no injury to be seen because I'm dark skinned I already had enough bumps bruses scres and punctured wounds on my body Know one would of seen the difference and Know one paid me Any Attention except trying to get me out of the hospital I never recieved a disciplinary report for the hospital incident because I did nt do any thing I didnt lose any good time because I didnt get a disciplinary report. I was held in the observation cell for about 2 days without a toilet or sink I was never allowed out of the cell to shower or use the toilet I had to urinate on the floor.

My Conviction has not been over turned yet but I was found not guilty on Assault with a weapon

This is my Amended complaint,
1:10-CV-00359

Jerome L. Weathington

7/16/2010

Jerome Washington [illegible]
USP Pollock
PO Box 2099
Pollock, LA 71467

ALEXANDRIA LA 713
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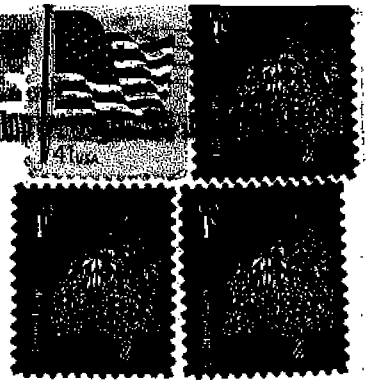

Clerk of United States District Court
300 Fanin ST Suite 1167
Shreveport, Louisiana 71101-3083

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WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA, LOUISIANA

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

JEROME L. WEATHINGTON,
Plaintiff

CIVIL ACTION 1:10-CV-00359
SECTION "P"

VERSUS

JUDGE DEE D. DRELL

UNITED STATES, et al.,
Defendants

MAGISTRATE JUDGE JAMES D. KIRK

J U D G M E N T

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after independent (de novo) review of the record including the objections filed herein, and having determined that the findings and recommendation are partially correct under the applicable law;

IT IS ORDERED that Weathington's motion for summary judgment (Doc. 36) is DENIED, his motion for a jury trial is denied as the remaining claims are under the Federal Tort Claims Act. The case will be set for trial by separate order from the undersigned.

THUS ORDERED AND SIGNED in Chambers at Alexandria, Louisiana, on this 8th day of February, 2012.

DEE D. DRELL
UNITED STATES DISTRICT JUDGE

IMPORTANT NOTICE: Courtesy copies of documents you file should NOT be provided to any judge. All communications with the court SHALL ONLY be through documents filed with the Clerk of Court.

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IN ALEXANDRIA, LA
AUG 18 2010
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JEROME WEATHINGTON (#08121-028) — **DOCKET NO. 10-CV-359; SEC. P**

VERSUS — **JUDGE DEE D. DRELL**

UNITED STATES OF AMERICA, ET AL. — **MAGISTRATE JUDGE JAMES D. KIRK**

MEMORANDUM ORDER

Before the Court is the *pro se* complaint of Plaintiff Jerome Weathington, filed *in forma pauperis* and pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics[1] and the Federal Tort Claims Act. Plaintiff is an inmate in the custody of the United States Bureau of Prisons (BOP), and he is incarcerated at the United States Penitentiary in Pollock, Louisiana (USP-P). He names as defendants the United States of America, Warden Joe Keffer, R. Lonidier, J. Valdez, and three unknown officers at USP-P. Plaintiff alleges a tort claim under the Federal Tort Claims Act (FTCA) and also claims that his constitutional rights were violated by the defendants.

---

[1]In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized that certain circumstances may give rise to a private cause of action against federal officials that is comparable to the statutory cause of action permitted against state officials by 42 U.S.C.A. § 1983.

STATEMENT OF THE CASE

Plaintiff has previously filed two civil rights lawsuits, which were dismissed as frivolous.[2] In this suit, Plaintiff alleges that:

1. On December 31, 2008, Plaintiff was threatened by two Department of Corrections inmates housed at USP-Pollock.

2. On January 2, 2009, Plaintiff covered his body with book covers and tray tops under his clothing because he believe he would be attacked. Plaintiff saw an inmate reach for a knife to stab him, so Plaintiff hit the inmate. The inmate then stabbed Plaintiff multiple times. Officers Valdez & Lonidier did nothing but lock down the other inmates in the unit.

3. Plaintiff alleges that on January 5, 2009, Officers John Doe #1 and #2 punched Plaintiff while he was handcuffed and shackled to his hospital bed at a hospital. Plaintiff alleges that the two officers caused him to be prematurely released from the hospital.

4. Upon returning to Pollock after being released from the hospital, Plaintiff was placed in an observation cell without a toilet or sink for two days.

3. Plaintiff complains that the doctor at the outside hospital, John Doe #3, subjected Plaintiff to cruel and unusual punishment by releasing him from the hospital before he was physically ready.

Plaintiff seeks damages from defendants for failing to protect him. Specifically, he claims that the defendants failed to properly intervene in a fight when Plaintiff was being stabbed by another inmate. Plaintiff was convicted of assault on the other

[2]Docket No. 09-cv-705 was dismissed with prejudice as frivolous; in Docket No. 09-cv-1183, the Bivens claims were dismissed as frivolous while the FTCA claims were served on the United States.

inmate following a trial by jury in this district court.[3]

In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the Supreme Court held that a civil rights plaintiff who seeks damages on a claim that necessarily implicates the constitutionality of the claimant's conviction or sentence must demonstrate that his conviction or sentence has been overturned, either judicially or by executive order. Although Heck was a Section 1983 case, its rule applies with equal force to Bivens claims. See Cardona v. U.S., 191 Fed. Appx. 327 (5th Cir. 2006). Although Plaintiff's conviction was not overturned, it is not clear from the complaint or amended complaint that success on Plaintiff's claim would necessarily implicate the constitutionality of his assault conviction. Additionally, the court cannot find that Plaintiff has failed to state a claim regarding the alleged acts of the guards at the hospital.

SERVICE OF PROCESS

In order to determine what further action should be taken with respect to Plaintiff's **BIVENS CLAIM:**

THE CLERK IS DIRECTED to prepare:

1. one (1) copy of the Original Complaint with exhibits [Doc. #1],

2. one (1) copy of the Amended Complaint [Doc. #5]

---

[3]USA v. Weathington, 09-cr-196 - Weathington found guilty of assault resulting in serious bodily injury, in violation of 18 U.S.C. §113(a)(6).

3. one (1) AO 398 Form (**NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS**) and,

4. one (1) AO 399 Form **(WAIVER OF THE SERVICE OF SUMMONS**)

for **THE FOLLOWING DEFENDANTS**, named and sued in their **INDIVIDUAL CAPACITY:**

1. **Joe Keffer**
2. **R. Lonidier**
3. **J. Valdez**
4. **John Doe #1**
5. **John Doe #2**
6. **John Doe #3**

and, that after the foregoing documents have been prepared as aforesaid:

THE CLERK IS FURTHER DIRECTED to serve a copy of the Original Complaint, Amended Complaint, and exhibits [Docs. #1, 5], the AO 398 Form (**NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS**), the AO 399 Form **(WAIVER OF THE SERVICE OF SUMMONS**) and this Memorandum Order on the Defendant listed above by **FIRST CLASS U.S. MAIL** addressed as follows:

ATTENTION:
JUDY LUKE
UNITED STATES PENITENTIARY
POST OFFICE BOX 1000
POLLOCK, LA 71467

IT IS ORDERED THAT the defendant return the signed AO 399 **WAIVER OF THE SERVICE OF SUMMONS** form within **thirty (30)** days of the date indicated on the AO 398 **NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS** form.

THE CLERK IS FURTHER DIRECTED to prepare Summons for the Attorney General of the United States and the United States Attorney for the Western District of Louisiana; and,

THE CLERK IS FURTHER DIRECTED to serve said summons, along with a copy of the Complaint, amended complaint, and exhibits [Docs. #1, 5] and this Memorandum Order on the **ATTORNEY GENERAL OF THE UNITED STATES** at Washington, D.C., via **CERTIFIED MAIL** as provided by Rule 4(i) of the Federal Rules of Civil Procedure;

THE CLERK IS FURTHER DIRECTED to serve said summons, along with a copy of the Complaint, amended complaint, and exhibits [Docs. #1, 5] and this Memorandum Order on the **UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF LOUISIANA** via **FIRST CLASS UNITED STATES MAIL** as provided by Rule 4(i) of the Federal Rules of Civil Procedure and previous agreements entered into between the United States Attorney and the Court;

IT IS ORDERED that the defendant file a response within SIXTY (60) days after the date that the waiver of service is executed or SIXTY (60) days after service on the United States Attorney, whichever is later.

After the defendant's responsive pleading is filed, an additional sixty (60) days is allowed for all parties to complete all appropriate discovery.

Thereafter, if deemed appropriate, Plaintiff or the defendant may file a motion for summary judgment within thirty (30) days, to

include material and relevant affidavits, certified records, interrogatories and answers, admissions and depositions, if any, and a supporting memorandum brief.

Any party not filing a motion for summary judgment **SHALL FILE** a Statement of Issues, within the same period, which shall enumerate each genuine issue of material fact perceived by that party which is relevant to this matter, or state that there are none. This statement will be used by the court to determine the necessity for an evidentiary hearing.

IT IS FURTHER ORDERED that as a condition to their acceptance by the Clerk, all future filings by Plaintiff or Defendant shall include a certificate indicating that a copy thereof has been furnished to the other parties, specifically stating the name and address of each party (or his attorney) to whom a copy of the pleading was sent.

Failure to comply with this order will result in dismissal of this matter without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

Thus done and signed at Alexandria, Louisiana, this 18th day of August, 2010.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

IMPORTANT NOTICE: Courtesy copies of documents you file should NOT be provided to any judge. All communications with the court should be through documents filed with the Clerk of Court.

RECEIVED
IN ALEXANDRIA, LA
AUG 18 2010
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JEROME WEATHINGTON (#08121-028) — **DOCKET NO. 10-CV-359; SEC. P**

VERSUS — **JUDGE DEE D. DRELL**

UNITED STATES OF AMERICA, ET AL. — **MAGISTRATE JUDGE JAMES D. KIRK**

MEMORANDUM ORDER

Before the Court is the *pro se* complaint of Plaintiff Jerome Weathington, filed *in forma pauperis* and pursuant to Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics[1] and the Federal Tort Claims Act. Plaintiff is an inmate in the custody of the United States Bureau of Prisons (BOP), and he is incarcerated at the United States Penitentiary in Pollock, Louisiana (USP-P). He names as defendants the United States of America, Warden Joe Keffer, R. Lonidier, J. Valdez, and three unknown officers at USP-P. Plaintiff alleges a tort claim under the Federal Tort Claims Act (FTCA) and also claims that his constitutional rights were violated by the defendants. The Bivens claims are being served pursuant to a separate order of the Court.

---

[1]In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized that certain circumstances may give rise to a private cause of action against federal officials that is comparable to the statutory cause of action permitted against state officials by 42 U.S.C.A. § 1983.

SERVICE OF PROCESS

In order to determine what further action should be taken with respect to Plaintiff's **FTCA CLAIM**,

THE CLERK IS DIRECTED to serve a summons, a copy of the complaint, exhibits, and amended complaint [Docs. #1, 5], along with a copy of this order by Certified Mail on:

1. **the United States through the United States Attorney for the Western District of Louisiana, and**
2. **the United States through the United States Attorney General**

as provided in Rule 4(i) of the Federal Rules of Civil Procedure.

IT IS ORDERED that the defendant file an answer to the petition within sixty (60) days following the date of service.

The defendant shall also file a memorandum of law briefing the issues raised within their answer and citing applicable statutory and case law. After the defendant's responsive pleadings are filed, an additional sixty (60) days is allowed for all parties to complete all appropriate discovery.

Thereafter, if deemed appropriate, Plaintiff or Defendant may file a motion for summary judgment within thirty (30) days, to include material and relevant affidavits, certified records, interrogatories and answers, admissions and depositions, if any, and a supporting memorandum brief.

Any party not filing a motion for summary judgment SHALL FILE a Statement of Issues within the same period, which shall enumerate

each genuine issue of material fact perceived by that party which is relevant to this matter, or state that there are none. This statement will be used by the court to determine the necessity for an evidentiary hearing.

IT IS FURTHER ORDERED that, as a condition to their acceptance by the Clerk, all future filings by plaintiff and defendant shall include a certificate stating that a copy thereof has been mailed to all other parties.

Thus done and signed at Alexandria, Louisiana, this 18th day of August, 2010.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

RECEIVED
IN ALEXANDRIA, LA.
MAR 30 2011
TONY R. MOORE, CLERK
BY: DEPUTY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

JEROME L. WEATHINGTON,
Plaintiff

VERSUS

UNITED STATES, et al.,
Defendants

CIVIL ACTION
SECTION "P"
1:10-CV-00359

JUDGE DEE D. DRELL
MAGISTRATE JUDGE JAMES D. KIRK

J U D G M E N T

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after independent (de novo) review of the record including the objections filed herein, and having determined that the findings and recommendation are correct under the applicable law;

IT IS ORDERED that Weathington's complaint against Lt. Transou is DISMISSED WITHOUT PREJUDICE pursuant to Fed.R.Civ.P. 4(m).

IT IS FURTHER ORDERED that defendants' motion for summary judgment on the Bivens claims is GRANTED and that Weathington's Bivens claims against Warden Keffer, Valdez, Lonidier (now Brown), Trull, and Stevens are DENIED AND DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the United States' motion for summary judgment is GRANTED and Weathington's request for punitive damages under the FTCA is DENIED AND DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the United States' motion for summary judgment as to Weathington's FTCA claim for assault/battery is GRANTED and Weathington's FTCA claim for assault/battery is DENIED AND DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the United States' motion for summary judgment as to Weathington's FTCA claim for failure to protect is DENIED.

THUS ORDERED AND SIGNED in Chambers at Alexandria, Louisiana, on this 30th day of March, 2011.

DEE D. DRELL
UNITED STATES DISTRICT JUDGE

Page 0420 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0421 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0422 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0423 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JEROME WEATHINGTON	*	CIVIL ACTION NO: 10-0359
	*	
	*	
VERSUS	*	JUDGE DRELL
	*	MAGISTRATE JUDGE KIRK
UNITED STATES OF AMERICA	*	

STIPULATION FOR COMPROMISE SETTLEMENT

It is hereby stipulated by and between JEROME WEATHINGTON, Plaintiff, appearing pro se, and the United States of America, Defendant, by and through its attorney, as follows:

I.

The parties do hereby agree to settle and compromise the above-entitled action and 1:12-cv-00578 under the terms and conditions set forth herein.

II.

The United States of America, Defendant, agrees to pay to the Plaintiff, JEROME WEATHINGTON, the sum of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, damage to property and the consequences thereof, resulting and to result from the same subject matter that gave rise to the above-captioned lawsuit, including any like or similar claims for personal injury arising out of the action styled "Jerome Weathington v. USA, 1:12-cv-00578" on the docket of this court.

III.

Plaintiff, and his heirs, executors, administrators or assigns, hereby agrees to accept the aforementioned sum in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, allegedly sustained by Plaintiff, and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, and including any like or similar claims for personal injury arising out of the action styled "Jerome Weathington v. USA, 1:12-cv-00578" on the docket of this court.

IV.

Plaintiff, JEROME WEATHINGTON, his heirs, executors, administrators or assigns, further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests, including but not limited to claims seeking recovery for services, medical, legal, financial, or otherwise, provided to or on behalf of Plaintiff by any person, organization, or entity, natural or legal, incident to or resulting from further litigation or the prosecution of claims by Plaintiff, JEROME WEATHINGTON, his heirs, executors, administrators, or assigns against any third party or against the United States of America, including claims for wrongful death.

V.

This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of the United States of America, its agents, servants, or employees, and is entered

into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

VI.

It is also agreed by and among Plaintiff, JEROME WEATHINGTON, and the United States of America, Defendant, that the aforementioned settlement amount represents the entire amount of this compromise settlement in both suits made subject to this agreement; that the respective parties will bear their own costs, fees, and expenses; and that any attorney fees owed by Plaintiff, JEROME WEATHINGTON, will be paid out of the settlement amount payable to Plaintiff, JEROME WEATHINGTON, and not in addition thereto.

VII.

It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys fees for services rendered in connection with this action shall not exceed 25 per centum (25%) of the amount of the compromise settlement.

VIII.

Payment of the settlement amount to JEROME WEATHINGTON in the sum of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) will be made by a check drawn on the Treasury of the United States and made payable to JEROME WEATHINGTON. No taxes will be deducted from this amount by the United States of America. However, the United States Department of Treasury, Internal Revenue Service, will be notified, and Plaintiff, JEROME WEATHINGTON, will be responsible for any taxes which may be due thereon. Said check will be mailed to John A. Broadwell, Assistant United States Attorney, Office of the United States Attorney, Western District of Louisiana, who will then forward said check to the appropriate BOP officials for deposit and/or credit into Plaintiff's account(s).

IX.

This settlement agreement is made by a duly authorized designee of the Attorney General pursuant to the authority of Title 28, United States Code, Section 2677.

X.

In consideration of the payment of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00), Plaintiff, JEROME WEATHINGTON, agrees that he will execute such documents as shall be necessary to cause the above-styled action and 1:12-cv-00578 to be dismissed with prejudice from the docket of the Court.

Executed this 15 day of January, 2013.

Jan 15, 2013
DATE

JEROME WEATHINGTON
PLAINTIFF PRO SE

Jan. 23, 2013
DATE

JOHN A. BROADWELL #1733
Assistant United States Attorney
300 Fannin Street, Suite 3201
Shreveport, LA 71101-3068
(318) 676-3610 // Fax: (318) 676-3642

COUNSEL FOR DEFENDANT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JEROME WEATHINGTON	*	CIVIL ACTION NO: 10-0359
	*	
	*	
VERSUS	*	JUDGE DRELL
	*	MAGISTRATE JUDGE KIRK
UNITED STATES OF AMERICA	*	

STIPULATION FOR COMPROMISE SETTLEMENT

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III.

Plaintiff, and his heirs, executors, administrators or assigns, hereby agrees to accept the aforementioned sum in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, allegedly sustained by Plaintiff, and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, and including any like or similar claims for personal injury arising out of the action styled "Jerome Weathington v. USA, 1:12-cv-00578" on the docket of this court.

IV.

Plaintiff, JEROME WEATHINGTON, his heirs, executors, administrators or assigns, further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests, including but not limited to claims seeking recovery for services, medical, legal, financial, or otherwise, provided to or on behalf of Plaintiff by any person, organization, or entity, natural or legal, incident to or resulting from further litigation or the prosecution of claims by Plaintiff, JEROME WEATHINGTON, his heirs, executors, administrators, or assigns against any third party or against the United States of America, including claims for wrongful death.

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into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

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Executed this 15 day of January, 2013.

Jan 15, 2013
DATE

J. O. Weathington
JEROME WEATHINGTON
PLAINTIFF PRO SE

Jan. 23, 2013
DATE

JOHN A. BROADWELL #1733
Assistant United States Attorney
300 Fannin Street, Suite 3201
Shreveport, LA 71101-3068
(318) 676-3610 // Fax: (318) 676-3642

COUNSEL FOR DEFENDANT

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SCR-2010-01832 **Short Description:** HALL, JESSE V. USA(10-239)(11-012)(FOM)

CASE DETAILS CASE DOCS CASE PERSONS CASE DATES CASE SUMMARY CASE BLOG

Case Login Information

Reference Number	3:10-cv-00239-bbc
Short Description	HALL, JESSE V. USA(10-239)(11-012)(FOM)
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	SOUTH CENTRAL REGIONAL OFFICE
Current Institution	Forrest City Medium (FCI)
Incident Region	SOUTH CENTRAL REGIONAL OFFICE
Incident Institution	Forrest City Medium (FCI)
Monetary Relief Sought	$350,000.00
Estimated Amount	$
Office	Madison
Jurisdiction	WESTERN DISTRICT OF WISCONSIN
Responsible Legal Office	FTC Oklahoma City

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	10/19/2012
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$125,000.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	11/15/2010
Date Filed	05/04/2010

Case Progress

Current Owner	BRENDA VICTOR
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1331 FEDERAL QUESTION: BIVENS ACT
Further Case Classification	
Comments	

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
JAN 19 2011
JAMES W. McCORMACK, CLERK
By: DEP CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DOC NO
REC'D/FILED
2010 AUG 17 AM 8:00
PETER OPPENEER
CLERK US DIST COURT
WD OF WI

CASE NO.: 10-CV239-BBC

2:11 cv00012 BSM/JTK

JESSE L. HALL,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.
_____/

FIRST AMENDED COMPLAINT

Plaintiff, JESSE L. HALL, pro se, sues THE UNITED STATES OF AMERICA, and alleges as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States and is premised on the acts and or omissions of defendant by and through its agents and or employees action under color of federal law as well as 28 U.S.C. § 1346 (b) (1) in that this is a claim against the United States of America and agencies of the United States of America for money damages accruing after January 1, 1945, for injury and personal injury caused by the negligent and wrongful acts and omissions of employees of the Government while acting within the scope of their office or employment, under circumstances where the United States of America, if a private person, would be liable in accordance with the laws of the places where the acts and or omissions occurred.

2. Jurisdiction founded upon the federal law is proper in that this action is premised upon causes of action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C.

§ 2671, et. seq. the United States Supreme Court's ruling in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) as well as pursuant to the Eighth Amendment to the Constitution of the United States of America.

3. This is an action to redress under the color of statutes, ordinances, regulations, custom or usage of rights, privileges and immunities secured to the plaintiff by the Eighth Amendment to the Constitution of the United States, the "FTCA", 28 U.S.C. § 2671, et. seq. and arising under the laws and statutes of the State of Wisconsin.

4. Venue is appropriate in this Court pursuant to 28 U.S.C. §§ 1391 (e)(3) in that this is an action against the United States of America and agents thereof and the acts and or omissions complained of occurred in the State of Wisconsin and or the plaintiff and or witnesses of plaintiff resided in the State of Wisconsin.

5. Pursuant to the "FTCA", plaintiff on or about May 4, 2009 presented his claim via form SF95 to the appropriate federal agency for administrative settlement under the "FTCA". No response to such claim is known to have been generated by the agency.

6. This action is timely pursuant to 28 U.S.C. § 2401(b) in that it was presented to the agency within two (2), years of accrual of his claim and this action is filed within six (6) months of the date of any presumed denial of plaintiff's claim.

7. 28 U.S.C. § 2679(2)(A) expressly waives immunity for the defendant, its agents and employees acting within the scope of their employment and allows plaintiff to proceed against the United States for violations of his rights guaranteed by the

United States Constitution.

8. Plaintiff brings this action within the appropriate statute of limitations of the respective state wherein the acts and or omissions of the defendant occurred.

9. Plaintiff has been deprived of a right secured to him by the Constitution and the laws of the United States.

10. Plaintiff has been denied of his rights by defendant, their agents and employees acting under color of federal law.

PARTIES

11. At all times material hereto, plaintiff, JESSE L. HALL, ("HALL") was an inmate at the FCC in Forrest City, Arkansas.

12. At all times material hereto, defendant, UNITED STATES OF AMERICA, was and is a sovereign entity named properly herein under the "FTCA".

13. At all times material hereto, FCC Forrest City ("FCC") was an agency of the Bureau of Prisons (BOP) which in turn was and is an agency of the United States of America.

STATEMENT OF FACTS

14. At all times material hereto, plaintiff was and is an inmate and under the full custody and control of defendant.

15. As of on or about, August, 2006, at FCC Forrest City, plaintiff had been complaining repeatedly to the medical staff of experiencing severe stomach pain and blood in his stool. In particular, plaintiff complained to M. Azumah, MLP, ("Azumah") a member of the FCC medical staff.

16. Azumah prescribed Zantac for HALL's complaints.

17. On December 19, 2006 HALL continued his complaints of severe stomach pain and blood in his stools, this time stating to Azumah, according to the medical records, that "he can't bare the pain". Azumah's response was to change HALL's medication to Rantidine.

18. On January 4, 2007 Plaintiff continued his complaints, however, Azumah was off that day and Plaintiff's complaints were made to APRN, Tonya Miller. She increased Plaintiff's dosage of the Rantidine to four (4) times per day.

19. On January 23, 2007 Plaintiff continued his complaints to the prison medical staff through MLP, Azumah of his pain and blood in his stools. This time Azumah diagnosed Plaintiff, as having GERD, a misdiagnosis of Plaintiff's condition. No blood tests or other objective tests were performed, nor was a medical doctor consulted for this diagnosis, despite these consistent complaints for over five (5) months.

20. Azumah, now discontinued the earlier prescribed medication of Rantidine and now prescribed Mylanta, an over the counter medication.

21. On January 25, 2007 Plaintiff again went to the medical staff for help, but his pain was so unbearable that he could not wait for time to be seen and left without being seen to return to his dorm and lie down.

22. On January 30, 2007, Plaintiff returned to the medical center with severe pain complaints and bleeding and requested of MLP, Azumah to be put back on the Rantidine instead of the Mylanta as had been prescribed by Azumah on January 23, 2007.

23. Azumah, maintaining his mis-diagnosis of GERD, for which he previously prescribed Mylanta, now discontinued the Mylanta at the request of Plaintiff and again prescribed Rantidine, again, with no objective tests being performed and no consultation with any medical doctor. Azumah allowed Plaintiff to self medicate as Azumah had no idea what to do, yet still failed to seek consultation from a staff medical doctor.

24. Plaintiff continued to complain of the same symptoms and finally on or about March 13, 2007 a blood test was ordered for the first time by a different member of the medical staff, R. Refendor, MLP, as Azumah had been reassigned.

25. On or about May 4, 2007 an outside consultation was ordered due to the plaintiff's continued bleeding and other symptoms, and plaintiff was transferred to a hospital on an emergency basis for GI bleeding.

26. On or about May 5, 2007, more than nine (9) months after plaintiff began complaining of these symptoms, plaintiff was finally diagnosed with squamous cell carcinoma in the stomach.

27. Approximately ten (10) days later plaintiff suffered through a surgical procedure for a sub-total gastrectomy.

28. Plaintiff has undergone substantial treatment and radical surgical procedures as a result of the negligence of the defendant and its' agents

29. Plaintiff suffered the removal of a substantial portion of his stomach.

30. This condition is permanent.

COUNT I

PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT FOR MEDICAL NEGLIGENCE

31. Plaintiff herein repeats, realleges and adopts each and every allegation in paragraphs 1 thru 30 above as if set forth specifically herein.

32. During all times material hereto plaintiff was in the custody, care and control and under the exclusive care and medical management of the agents and employees of the defendant and fully subject to any and all constraints and restrictions imposed by defendant upon plaintiff.

33. During the course of plaintiff's incarceration in defendant's institutions, plaintiff did receive medical care and services from defendant through its medical staff.

34. During the course of plaintiff's incarceration, defendant, by and through its agents and employees negligently, carelessly and unskillfully rendered and failed to render proper medical care, services and treatment to the plaintiff by negligently, carelessly and unskillfully failing to provide plaintiff necessary and obvious treatment during the period of plaintiff's incarceration.

35. As a result of such negligent, careless and unskilled treatment or lack or treatment of plaintiff by defendant, plaintiff has developed cancer to a degree far in excess of that which would otherwise have been treatable and as a result, plaintiff has suffered in the past and will continue to suffer in the future permanent injury, damage and disfigurement.

36. As a further result of such negligent treatment of plaintiff by defendant, plaintiff was deprived of a substantial possibility and or probability of early diagnosis of his cancer and thus further deprived and denied the substantial possibility for a cure

and or significant lessening of the permanent and lasting effects of this disease on plaintiff and his future life expectancy and capacity for the enjoyment of life and plaintiff has been forced to endure significant and severe physical pain and suffering and will continue to experience such pain and suffering in the future as well as a significant shortened life expectancy.

37. Pursuant to the foregoing and the negligent acts and or omissions of defendant, plaintiff has been damaged in an indeterminate sum of money and herein demands judgment of a sum of not less than Five Million ($5,000,000.00) Dollars.

COUNT II
PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT
FOR DELIBERATE INDIFFERENCE

38. Plaintiff herein repeats, realleges and adopts each and every allegation in paragraphs 1 thru 37 above as if set forth specifically herein.

39. Plaintiff contends that defendant was at all times material hereto, fully aware of plaintiff's acute medical problem and plaintiff's need for urgent care and treatment during such time period as communicated to Azumah, an employee of defendant.

40. Azumah, knew or should have known that Plaintiff was in need of urgent care and treatment yet failed to consult with a medical doctor at any time during his negligent treatment of plaintiff and merely treated the plaintiff's continued complaints with over the counter medication, all while in the full and exclusive care, custody and control of defendant.

41. Plaintiff was denied medical treatment by defendant despite defendant's knowledge, through Azumah, of the urgent need for such care and treatment during this

extensive period of time.

42. The acts and omissions of defendant were sufficiently serious and blatant as to constitute a violation of plaintiff's rights.

43. Defendant was deliberately indifferent to the plaintiff's medical needs which indifference clearly exacerbated his condition leading directly to his current condition and resulting in his past and continuing pain and suffering.

44. As a further result of such deliberate indifference of plaintiff by defendant, plaintiff was deprived of a substantial possibility and or probability of early diagnosis of his cancer and thus further deprived and denied the substantial possibility for a cure and or significant lessening of the permanent and lasting effects of this disease on plaintiff and his future life expectancy and capacity for the enjoyment of life and further plaintiff has been forced to endure significant and severe physical pain and suffering and will continue to experience such pain and suffering in the future as well as a significant shortened life expectancy.

45. As a further result of such deliberate indifference plaintiff has suffered and will continue to suffer significant expenses.

46. By reason of the foregoing, plaintiff has been damaged in an indeterminate sum of not less than Five Million ($5,000,000.00) Dollars and in addition, plaintiff claims and demands an award of punitive damages.

RELIEF SOUGHT

WHEREFORE plaintiff demands judgment against defendant as follows:]

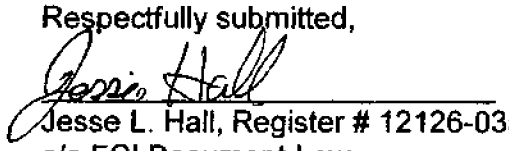
1. As to Count I, plaintiff demands judgment against defendant in an amount not

less than Five Million ($5,000.000.00) Dollars plus costs and any other relief to which the plaintiff may be entitled including attorney's fees in the event plaintiff is represented by an attorney.

2. As to Count II, plaintiff demands judgment against defendant in an amount not less than Five Million ($5,000.000.00) Dollars plus costs and any other relief to which the plaintiff may be entitled including attorney's fees in the event plaintiff is represented by an attorney.

3. Plaintiff demands a jury trial of issues so triable.

Respectfully submitted,



Jesse L. Hall, Register # 12126-035, pro se
c/o FCI Beaumont Low
P.O. Box 26020
Beaumont, TX 77720

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

JESSE L. HALL,
REG. #12126-035 **PLAINTIFF**

V. **NO: 2:11CV00012 BSM**

UNITED STATES OF AMERICA **DEFENDANT**

JUDGMENT

Consistent with the order that was entered this day, this case is dismissed with prejudice.

IT IS SO ORDERED this 19th day of October 2012.

Brian S Miller

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BORIS SHUSTER, Plaintiff, v. DR. ROBERT CABANAS, et al., Defendants.	Civil Action No. 11-1764 (RMB) **O R D E R**

The Court having screened the instant complaint to determine whether dismissal is warranted, pursuant to 28 U.S.C. §§ 1915(e) and 1915A; and the Court finding that dismissal of Plaintiff's claims is not warranted at this time; and the Court finding that Plaintiff has submitted an application to proceed in forma pauperis;

IT IS on this **16th** day of **September 2011**;

ORDERED that Plaintiff may proceed in forma pauperis without prepayment of the $350.00 filing fee pursuant to 28 U.S.C. § 1915(a) and (b); and it is further

ORDERED that the Clerk of the Court is directed to file the Complaint in the above-captioned action; and it is further

ORDERED that the Clerk of the Court shall serve a copy of this Order by regular mail on the United States Attorney for the State of Texas and on the warden of the Federal Correctional Institution, Bastrop, in Bastrop, Texas; and it is further

ORDERED that Plaintiff is assessed a filing fee of $350.00 and shall pay the entire filing fee in the manner set forth in this Order pursuant to 28 U.S.C. § 1915(b)(1) and (2), regardless of the outcome of the litigation; and it is further

ORDERED that in each month that the amount in Plaintiff's account exceeds $10.00, until the $350.00 filing fee is paid, the agency having custody of Plaintiff shall assess, deduct from Plaintiff's account, and forward to the Clerk of the Court payment equal to 20% of the preceding month's income credited to Plaintiff's account, pursuant to 28 U.S.C. § 1915(b)(2), and each payment shall reference the civil docket number of this action; and it is further

ORDERED that the Clerk of the Court shall issue summons, and the United States Marshal shall serve a copy of the Complaint, summons, and this Order upon the Defendants pursuant to 28 U.S.C. § 1915(d), with all costs of service advanced by the United States; and it is further

ORDERED that Defendants shall file and serve a responsive pleading within the time specified in Federal Rule of Civil Procedure 12, pursuant to 42 U.S.C. § 1997e(g)(2); and it is further

ORDERED that, pursuant to 28 U.S.C. § 1915(e)(1) and § 4(a) of Appendix H of the Local Civil Rules, the Clerk shall notify the Plaintiff of the opportunity to apply in writing to the assigned

judge for the appointment of pro bono counsel in accordance with the factors set forth in Tabron v. Grace, 6 F.3d 147 (3d Cir. 1993), cert. denied, 510 U.S. 1196 (1994), which sets forth the requirements for eligibility for appointment of pro bono counsel. Plaintiff is advised that such appointment is not automatic; and it is further

ORDERED that the Clerk shall enclose with such notice a copy of Appendix H and a form Application for Appointment of Pro Bono Counsel; and it is finally

ORDERED that, if at any time Plaintiff seeks the appointment of pro bono counsel, pursuant to Fed. R. Civ. P. 5(a) and (d), Plaintiff shall (1) serve a copy of the Application for Appointment of Pro Bono Counsel by regular mail upon each party at his last known address, or, if the party is represented in this action by an attorney, upon the party's attorney at the attorney's address, and (2) file a Certificate of Service with the Application for Pro Bono Counsel.

s/Renée Marie Bumb
RENÉE Marie BUMB
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BORIS SHUSTER #71065-053	:	**CIVIL ACTION NO.**
	:	
Pro-Se Plaintiff	:	
	:	**VERIFIED COMPLAINT**
v.	:	
	:	**pursuant to:**
Dr. ROBERT CABANAS, Dentist	:	
	:	**28 U.S.C. § 1331, and:**
Dr. ABIGAIL LOPEZ de LASALLE	:	
	:	***Bivens v. Six Unknown Named***
IBE CHIGOZIE, P.A. - C	:	
	:	***Agents of the Federal Bureau of***
Lieutenant KENNETH PERNELL	:	
	:	***Narcotics*, 403 U.S. 338 (1971)**
DOES # 1 TO # 10	:	
	:	**against the Individual Defendants**
All named above as Individuals	:	
	:	**and pursuant to the:**
and	:	
	:	**FEDERAL TORT CLAIMS ACT**
UNITED STATES OF AMERICA	:	
	:	**against Defendant UNITED STATES**
Defendants	:	

JURY TRIAL DEMANDED

PARTIES

9. Pro-Se Plaintiff Boris Shuster is an individual incarcerated at FCI-Bastrop serving a sentence imposed by the U.S. District Court. This cause of action does not challenge the length or legality of that sentence nor does it challenge the present conditions of confinement at FCI-Bastrop.

10. Defendant Dr. Robert Cabanas, D.D.S. was the Dentist at FCI Fort Dix at all times during the incidents alleged in this Verified Complaint and is named in his individual capacity.

11. Defendant Dr. Abigail Lopez de Lasalle, M.D. was the Medical Coordinator of FCI Fort Dix at all times during the incidents alleged in this Verified Complaint with prior knowledge of my medical problems, the reason for my hospital and for the medically necessary follow-up treatment that required I be housed in a sterile area and with the authority to order this medically necessary treatment and allowed a policy to be in place that allowed Defendant Kenneth Pernell to remove me from that sterile environment in contradiction to a documented medical necessity and placed me in the SHU and then failed to properly train and supervise Defendant Kenneth Pernell allowing this policy to continue and was at all times during the events alleged in this Amended Verified Complaint and is named in her individual capacity.

12. Defendant Ibe Chigozie was a Physician's Assistant ("C" designation) at FCI Fort Dix at all times during the events alleged in this Verified Complaint.

13. Defendant Kenneth Pernell was a Lieutenant at FCI Fort Dix at all times during the events alleged in this Verified Complaint and is named in his individual capacity.

14. Defendant Does # 1 to # 10, whose names are unknown to the Pro-Se Plaintiff at this time were at all times employees of the United States of America and assigned to FCI Fort Dix during the events alleged in this Verified Complaint and are named in their individual capacities.

15. The United States of America is named as a Defendant in this cause of action pursuant to the Federal Tort Claims Act.

FILING AND DENIAL OF TORT CLAIM

16. On May 19th, 2010 the Federal Bureau of Prisons, Northeast Regional Office by way of letter addressed to me by Henry J. Sadowski, Regional Counsel acknowledged receipt of a properly filed Tort Claim against Defendant United States of America. The date received per this letter is April 5th, 2010. The BOP "officially" denied me relief under the Federal Tort Claims Act allegedly as of October 1st, 2010. The 6-month period in which to file a civil action against Defendant United States therefore expires on April 1st, 2011. As this cause of action is filed before that date, the Honorable Court has Subject Matter Jurisdiction to adjudicate this lawsuit.

BACKGROUND

17. On December 5th, 2008 I reported to Sick Call[1] at FCI Fort Dix were I was at that time incarcerated. The complaint was dental pain. X-Rays were taken and medication for pain relief prescribed. A prescription was ordered for antibiotics but was not filled. I was scheduled to return to Dental for a restoration procedure on December 10th, 2008.

[1] Sick Call is held on certain days whereby inmates may report at a specific time to the Medical Unit regarding medical problems that are not regularly scheduled for treatment. Inmates may also report unusual incidents such as abnormal pain, fever or other medical conditions needing immediate attention.

18. On December 10th, 2008 I returned to Dental for the scheduled restoration procedure. During the procedure instruments were used by Defendant Cabanas that are alleged to not have been properly sterilized. After I returned to my housing unit, the Unit Officer had to call the Medical Unit to inform them that I was suffering from severe post operative pain.

19. On December 12th, 2008 I reported to Dental regarding the severe post operative pain I was still suffering from. Defendant Cabanas told me to return to my housing unit as he was unable to see me because he "had to go to a funeral." After leaving FCI Fort Dix Defendant Cabanas called into the Pharmacy (as per my BOP medical records) and extended the post operative pain medication for 5-days.

20. On December 16th, 2008 I again reported to Sick Call. At this time the pain was the highest it could be – level 10. My jaw was throbbing and had swollen. I was given an injection, additional pain medication and the December 5th, 2008 prescription for antibiotics was finally filled.

21. On December 17th, 2008 I returned to medical with difficulty breathing. The swelling in my jaw was expanding towards my airway. I was rushed to an outside hospital Emergency Room and admitted to the hospital.

22. On December 19th, 2008 (per my BOP medical records) Defendant Cabanas called the hospital for an update. The Defendant was told my condition was related to the dental procedure performed on December 10th, 2008.

23. On December 22nd, 2008 I was taken from the hospital to an Oral Surgeon's office to have 2 teeth extracted because of the resulting infection from the dental procedure performed by Defendant Cabanas on December 10th, 2008. After the procedure I was returned to the hospital.

24. Sometime between December 22nd, 2008 and December 23rd, 2008, Defendant Cabanas falsified my BOP medical records by entering that I had "an abscess drained" unrelated to the infection that resulted from the procedure the Defendant performed on December 10th, 2008. Correspondence with the doctors at the hospital confirmed that I never had an abscess and the only procedure performed on December 22nd, 2008 was the extraction of 2 teeth directly related to the infection resulting from the dental procedure performed by Defendant Cabanas.

25. On December 24th, 2008 Defendant Cabanas called the hospital for an update. The Defendant was informed that I could still not eat solid foods and that even taking liquids was difficult because of the swelling in my mouth.

26. On December 30th, 2008 Defendant Cabanas called the hospital for an update. The Defendant was informed that I was still on intravenous antibiotics.

27. On December 31st, 2008 Defendant Cabanas wrote a memorandum to the hospital to try and force an early discharge. The memorandum stated "Patient to be on antibiotics for 24 days. Our Clinical Director is networking with custody to arrange Staff coverage so that the patient can be returned to the Institution and remain on I.V. Antibiotics for 24 days as recommended by Saint Francis Hospital Infectious Disease Physician."

28. On January 2nd, 2009 Defendant Lopez de Lasalle made her first inquiry as to my condition and why I was still being hospitalized.

29. On January 5th, 2009 I was discharged from the hospital and retuned to FCI Fort Dix. I was seen by Defendant Cabanas and Defendant Lopez de Lasalle. I was informed that I needed an additional 19 days of I.V. antibiotic treatment and would be housed in the "observatory room" for those 19 days. When asked why I could not be returned to the general population Defendant Lopez de Lasalle stated that the I.V. line had to be sanitary at all times, and the "observatory room" was the only place the necessary sanitary conditions could be assured. I spent the night in the "observatory room" with an officer stationed there exclusively for me as there was no medical staff on duty from 10 PM to 6 AM the following morning.

30. On January 6th, 2009 Defendant Pernell ordered that I be moved out of the "observatory room" and be placed into a disciplinary cell in the SHU. The cell was dirty, a constant dust cloud blew into the cell from the vents and it stank of dried urine. All of the

officers who were working in the SHU told me that they had never seen an inmate with an I.V. line held in such conditions. I started writing the first of what would become numerous "cop-outs"[2] to Defendant Lopez de Lasalle (as the officers informed me that she was the only person who could have be sent back to the observatory room) and gave the cop-outs to the doctors and physician's assistants during their twice daily rounds for delivery to the Defendant. The Defendant never responded to any of them.

31. On January 8th, 2009 I complained to Nurse Christine Barton during her rounds of headaches and vomiting. I also complained that I could not eat the solid food they were providing me in the SHU because in the hospital I was still on a liquid diet. I would later learn (from requesting a copy of my BOP medical records) that Defendant Ibe Chigozie wrote that since "Inmate is a Dental Case. Morphine[3] is not indicated. There are other meds that we can give for severe pain." However, no medications were ever prescribed.

32. On January 9th, 2009 Defendant Cabanas was informed of my continued difficulty in eating solid foods. Defendant Cabanas said that he would discuss this situation with Defendant Lopez de Lasalle. No action was taken by either Defendant.

33. On January 10th, 2009 I renewed my complaints of nausea and difficulty eating solid foods. No action was taken by the medical staff.

---

[2] A "cop-out" is a term for an "Inmate Request to Staff" memorandum. It is written request regarding a problem requiring Staff intervention. It may be used to address medical problems when sick-call slips are not available.

[3] While in the hospital Morphine was prescribed for my pain which gave me some relief.

34. On January 11th, 2009 I renewed my complaint of nausea. No action was taken by the medical staff.

35. On January 13th, 2009 my I.V. line was cleaned by the medical staff for the first time since my return from the hospital on January 5th, 2009. A liquid nutritional supplement was finally prescribed for the next 7 days (2 cans twice per day).

36. On February 5th, 2009 I complained of severe stomach cramps. The diagnosis was that the I.V. antibiotics had eaten away my entire stomach lining.

37. On June 8th, 2009 I was taken to the outside Oral Surgeon for a follow up examination for continuing jaw pain every time I chewed my food or simply yawned. I was informed that I would require years of rehabilitation because of the previous infection caused by Defendant Cabanas. After the examination I was fitted for a night retainer to help partially alleviate the pain but was never provided the appliance.

COUNT I

DELIBERATE INDIFFERENCE BY THE NAMED DEFENDANTS

38. The Pro-Se Plaintiff incorporates by reference paragraphs # 1 through # 4 and # 7 through # 38 as if restated here in their entirety.

Defendant Cabanas:

39. On December 5th, 2008 I was seen by Defendant Cabanas pursuant to my attending sick-call. Clinical observation showed that restoration dental work was medically required. The work was scheduled for December 10th, 2008. Prescriptions were ordered to alleviate the pain and for antibiotics to combat a perceived (and/or diagnosed) infection. The antibiotic prescription was not filled. The Defendant failed to follow up and insure that the antibiotic treatment had begun thereby showing the Defendant's deliberate indifference to my condition and the proper and correct treatment thereof.

40. On December 10th, 2008 Defendant Cabanas performed the medically necessary restoration dental work. However the Defendant never verified that prescribed antibiotic treatment ordered on December 5th, 2008 was ever begun. This performance of the medically necessary restoration dental work without verification of prior antibiotic treatment is outside the scope of usual and customary treatment and can lead to additional infections or worse. This constitutes deliberate indifference to my medical requirements.

41. Based on information and belief the Dental Unit at FCI Fort Dix "employs" several inmates as "Dental Assistants." These inmates are responsible for sterilizing the instruments used by Defendant Cabanas. Based on information and belief, Defendant Cabanas does not always supervise these inmates nor does the Defendant insure that all sterilization procedures are followed. This constitutes that Defendant Cabanas is deliberately indifferent to operating in a medically necessary sterile environment with properly sterilized dental instruments and was deliberately indifferent to my medical needs.

42. On December 12th, 2008 Defendant Cabanas demonstrated his deliberate indifference to my post-operative problems by not seeing me on an emergency basis because the Defendant had "to go to a funeral." Although the Defendant did later call in an extension of the pain medication, the undiagnosed infection was not treated.

43. On December 22nd 2008 or December 23rd 2008 Defendant Cabanas tried to cover-up his previous deliberate indifference by falsifying my BOP medical records to indicate that I had "an abscess drained" while in the hospital. Hospital records prove otherwise.

44. On or about December 31st, 2008, Defendant Cabanas, in a conspiracy with other Defendant Does (names unknown at this time) issue a memorandum to the hospital that tried to coerce the hospital to release me back to FCI Fort Dix by falsely claiming that I could be kept in a sterile environment while on extended I.V. antibiotic treatment knowing that this

information regarding the sterile environment was false and all the Defendants involved were deliberately indifferent to my very serious medical condition.

45. From January 6th, 2009 through my release from the SHU after completion of the I.V. antibiotic treatment I sent numerous cop-outs to Defendant Cabanas complaining of the unsanitary conditions I was being kept in. The Defendant constantly and consistently demonstrated his deliberate indifference to my serious medical needs by not removing me from the unsterile environment. The Defendant conspired with Defendant Lopez de Lasalle, Defendant Pernell and other Defendant Does allegedly because of custody staffing shortages and not for any medical reasons.

Defendant Abigail Lopez de Lasalle:

46. From January 6th, 2009 through my release from the SHU after completion of the I.V. antibiotic treatment I sent numerous cop-outs to Defendant Lopez de Lasalle complaining of the unsanitary conditions I was being kept in. The Defendant constantly and consistently demonstrated her deliberate indifference to my serious medical needs by not removing me from the unsterile environment. The Defendant conspired with Defendant Cabanas, Defendant Pernell and other Defendant Does allegedly because of custody staffing shortages and not for any medical reasons.

Defendant Kenneth Pernell:

47. On January 6th, 2009, Defendant Pernell in complete disregard to the medical necessity of keeping the I.V. antibiotic line in a sterile deliberately, knowingly, without any medical knowledge or training and in complete deliberate indifference to my medical needs transferred me out of the sterile environment of the observatory room and placed me into the unsterile environment of the SHU. It is alleged that this was not done for medical reasons but for monetary reasons on not having to place an individual officer with me every night while I was on I.V. antibiotic treatment.

Defendant Ibe Chigozie:

48. On January 8th, 2009 in response to my complaints of continued post-operative pain, Defendant Chigozie took it upon himself to deny me necessary pain management medication because in the Defendant's own writing I was "a dental case..." This is prima facie evidence of the Defendant deliberate indifference to my serious medical needs.

COUNT II

DENIAL OF ACCESS TO A MEDICALLY NECESSARY STERILE ENVIRONMENT

Defendant Cabanas:

49. The Pro-Se Plaintiff incorporates by reference paragraphs # 1 through # 4: # 7 through # 38 and # 39 through # 45 as if restated here in their entirety.

50. As demonstrated above, Defendant Cabanas had full knowledge of the serious dental problems I was suffering from at FCI Fort Dix and the need to keep the I.V. antibiotic line in a sterile environment and also knew of the custody "staffing shortages" and "lack of resources" at FCI Fort Dix and has used these non medical reasons as an excuse to keep me in the SHU and deliberately place my life in danger by keeping me in an unsterile environment. This constitutes deliberate indifference and medical malpractice on the part of the Defendant.

Defendant Lopez de Lasalle:

51. The Pro-Se Plaintiff incorporates by reference paragraphs # 1 through # 4: # 7 through # 38 and # 46 as if restated here in their entirety.

52. As demonstrated above, Defendant Lopez de Lasalle had full knowledge of the serious dental problems I was suffering from at FCI Fort Dix and the need to keep the I.V. antibiotic line in a sterile environment and also knew of the custody "staffing shortages" and "lack of resources" at FCI Fort Dix and has used these non medical reasons as an excuse to keep me in the SHU and deliberately place my life in danger by keeping me in an unsterile environment. This constitutes deliberate indifference and medical malpractice on the part of the Defendant.

Defendant Pernell:

53. The Pro-Se Plaintiff incorporates by reference paragraphs # 1 through # 4: # 7 through # 38 and # 47 as if restated here in their entirety.

54. As demonstrated above, Defendant Pernell had full knowledge of the serious dental problems I was suffering from at FCI Fort Dix and the need to keep the I.V. antibiotic line in a sterile environment and also knew of the custody "staffing shortages" and "lack of resources" at FCI Fort Dix and has used these non medical reasons as an excuse to keep me in the SHU and deliberately place my life in danger by keeping me in an unsterile environment. This constitutes deliberate indifference and medical malpractice by an unlicensed medical practitioner on the part of the Defendant.

COUNT III

MEDICAL MALPRACTICE ON THE PART OF UNITED STATES EMPLOYEES PURSUANT TO THE FEDERAL TORT CLAIMS ACT

55. The Pro-Se Plaintiff incorporates by reference paragraphs # 1 through # 54 as if restated here in their entirety.

56. As demonstrated by the above paragraphs, Defendant United States' employees committed acts that constitute medical malpractice, deliberate indifference and cruel and unusual punishment.

RELIEF REQUESTED

57. It is respectfully prayed of this Honorable Court that I be awarded monetary damages against all of the Named Defendants as individuals for the Defendants' actions that amounted to deliberate indifference to my serious medically necessary dental problems in an amount that the Honorable Court deems to be fair and just.

58. It is respectfully prayed of this Honorable Court that I be awarded monetary damages against all of the Named Defendants as individuals for the Defendants' actions that amounted to medical malpractice, denial of proper and medically necessary dental treatment and cruel and unusual punishment in an amount that the Honorable Court deems to be fair and just.

59. It is respectfully prayed of this Honorable Court that I be awarded the amount of $250,000.00 against Defendant United States pursuant to the actions of the Defendant's employees as stated above and as claimed in the denied Tort claim filed pursuant to the Federal Tort Claims Act with the Federal Bureau of Prisons.

92. It is respectfully prayed of this Honorable Court that I be awarded any other relief that the Honorable Court deems to be fair and just and in the interest of justice.

VERIFICATION

I, Boris Shuster hereby affirm under the penalty of perjury pursuant to 28 U.S.C. § 1746 that the statements contained in this Amended Verified Complaint are true, of my own personal knowledge, except for those statements that are allegations, and as for those statements, which are based upon information and belief, I believe them to be true.

Dated: 3/23/11

Respectfully submitted:

Boris Shuster

Boris Shuster
Register Number 71065-053
FCI – Bastrop
P.O. Box 730
Bastrop, TX 78602

NOT FOR PUBLICATION [Dkt. No. 36]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

BORIS SHUSTER,

Plaintiff,

v.

DR. ROBERT CABANAS, DR. ABIGAIL LOPEZ DE LASALLE, IBE CHIGOZIE, P.A., LIEUTENANT KENNETH PERNELL, and UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 11-1764(RMB/JS)

OPINION

Appearances:

Charles P. Montgomery
Earp Cohn P.C.
20 Brace Road, 4th Floor
Cherry Hill, NJ 08034
Attorneys for the Plaintiff

Colette R. Buchanan
Office of the United States Attorney
970 Broad Street, Suite 700
Newark, NJ 07102
Attorneys for Defendants

Bumb, UNITED STATES DISTRICT JUDGE:

Plaintiff Boris Shuster ("Plaintiff") brings this suit against individual defendants Dr. Robert Cabanas ("Cabanas"), Dr. Abigail Lopez de LaSalle ("LaSalle"), Ibe Chigozie ("Ibe"), P.A., and Lieutenant Kenneth Pernell ("Pernell") (collectively, the "Individual Defendants") and the United States of America

(collectively, the "Defendants"). Defendants have moved to dismiss the claims and, in the alternative, summary judgment. For the reasons that follow, the Defendants' motion is GRANTED in part and DENIED in part.

I. Background

A. Factual

Plaintiff is a former inmate at the Federal Correctional Institution at Fort Dix, New Jersey ("FCI"). [Docket No. 2, First Amended Complaint ("FAC" or the "Complaint") at ¶ 18].

On December 5, 2008, Defendant Cabanas, a dentist and Captain in Public Health Services, performed a dental procedure to remedy the plaintiff's dental pain. Plaintiff alleges that Cabanas either: (1) failed to properly supervise the inmates who served as his assistants and were responsible for sterilizing his dental instruments; or (2) Cabanas was negligent in performing the actual operation. (FAC at ¶¶ 19, 42). Plaintiff alleges that, as a consequence of the procedure, he experienced post-operative pain and swelling necessitating hospitalization on December 17, 2008. (FAC at ¶¶ 21-22). There, the Plaintiff was diagnosed with an infection and had two teeth extracted. (FAC at ¶ 23).

Plaintiff was discharged from the hospital and returned to FCI on January 5, 2009. [FAC at ¶ 30]. LaSalle, the medical coordinator of FCI, recommended that Plaintiff be housed in

sanitary conditions and treated for 19 days with intravenous antibiotic. (FAC at ¶¶ 29-30). According to LaSalle, the observatory room was the "only place the necessary sanitary conditions could be assured" and LaSalle ordered that Plaintiff be held in the observatory room. (FAC at ¶ 30). LaSalle's directive was followed and Plaintiff was placed in the observatory room. (FAC at ¶ 30). However, after one night in the observatory room, Defendant Pernell, a Lieutenant at FCI, ordered the plaintiff moved to a disciplinary room in the Special Housing Unit ("SHU"). (FAC at ¶ 31). Plaintiff alleges that this room was "dirty," that "a constant dust cloud blew into the cell from the vents" and that "it stank of dried urine." (FAC at ¶ 31). Although the Plaintiff petitioned Defendant LaSalle for relocation back to the observatory room, he received no response and continued to be lodged in the SHU. (FAC at ¶ 31.)

Plaintiff experienced headaches and vomiting during his confinement and also appears to have requested morphine from Defendant Ibe, a physician assistant, to assist in pain management. (FAC at ¶¶ 32, 49). While the Plaintiff continued to complain of nausea and difficulty eating, the medical staff took no action. (FAc at ¶¶ 34-35). In the interim, the Plaintiff alleges that his i.v. was not cleaned until January 13, 2009, roughly two weeks from the moment of his discharge.

(FAC at ¶ 36). On February 5, 2009, the medical staff discovered that the i.v. antibiotics had eaten at his stomach lining. (FAC at ¶ 37). And, on June 8th, 2009, the Plaintiff was examined by an oral surgeon as a follow up for his infection and it was determined that the Plaintiff would require years of rehabilitation. (FAC at ¶ 38).

B. Procedural

On April 5, 2010, the Plaintiff filed a claims notice under the Federal Tort Claims Act with the Federal Bureau of Prisons ("BOP"). [Docket No. 43]. In the notice, Plaintiff alleged that: (1) he had suffered physical injuries as a result of "deprivation of medical care, negligence, mal-practice, and deliberate indifference to [his] medical needs under the . . . Federal Tort Claims Act"; (2) LaSalle was deliberately indifferent to his medical needs; (3) he complained of pain to Ibe of pain, but his complaint was ignored; (4) he was moved, by Pernell, to SHU despite the fact that he was supposed to remain in the observatory because it was a clean and sterile environment; (5). Id. On October 1, 2010, Regional Counsel for BOP denied Plaintiff's tort claim and indicated that Plaintiff was free to pursue his claim in federal district court. Plaintiff subsequently filed this action.

In this action, Plaintiff's alleges that: (1) the Individual Defendants violated Plaintiff's Eight Amendments

rights by exercising deliberate indifference to Plaintiff's serious medical needs and are liable under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); and (2) that the United States is liable for medical malpractice under the Federal Tort Claims Act. Defendants have moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) and, in the alternative, for summary judgment. Defendants submitted extrinsic evidence in support of their motion.

II. Standard

Defendants moved for dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and, in the alternative, for summary judgment. Because Defendants submitted evidence in support of their motion, and that evidence was extrinsic to Plaintiff's Complaint, this Court must treat Plaintiff's motion for summary judgment if it is to consider any of the extrinsic evidence. See Fed. R. Civ. Pro. 12(d)(stating "if on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion **must** be treated as one for summary judgment."); Johnson v. N.J. Dep't of Corr., 2013 U.S. Dist. LEXIS 64853 (D.N.J May 7, 2013)(citing Reyes v. Sobina, 333 F. App'x 661, 662 n.1 (3d Cir. 2009)). This Court can, and will, do so here because Plaintiff was on notice that this Court could treat Defendants' motion as one for summary judgment, given the Defendants' submission of outside

materials and their invitation to treat their motion as one for summary judgment. Latham v. United States, 306 F. App'x 716, 718 (3d Cir. 2009)(holding that court may do so, so long as the Plaintiff had sufficient notice that this Court could treat Defendants' motion as one for summary judgment).

Summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In evaluating the evidence, the Court must view the inferences to be drawn in the light most favorable to the nonmoving party. Curley v. Klem, 298 F. 3d 271, 276-77 (3d Cir. 2002). However, the non-moving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324.

III. Discussion

Defendants have moved for dismissal of all of Plaintiffs' claims. The Court first addresses the claims against the

Individual Defendants. It then addresses the claim against the United States.

A. Claims Against The Individual Defendants

Defendants argue that all of the claims against the Individual Defendants must be dismissed for failure to exhaust administrative remedies and on other grounds. Because this Court agrees that Plaintiff's failure to exhaust administrative remedies bars these claims, it only addresses Plaintiff's failure to exhaust and does not address Defendants' other grounds for dismissal.

Under the Prison Litigation Reform Act, inmates are required to exhaust their administrative remedies for all suits based on prison life, including Bivens suits. Perez v. Turner, 2013 WL 3216147, at *7 (D.N.J. June 25, 2013). Exhaustion of administrative remedies requires the completion of a four step process: (1) an inmate must first attempt to informally resolve his claim; (2) if dissatisfied, he must then file a written request to the warden within 20 days of the event at issue; (3) if dissatisfied with the warden's response, he must then appeal his complaint to the Regional Director of the Bureau of Prisons within 20 days of the warden's response; and (4) if dissatisfied with the Regional Director's response, he must then appeal to the BOP's General Counsel within 30 days of the response. Paulino-Duarte v. U.S., No. 11-1764, 2003 WL 22533401, at *3

(S.D.N.Y. Nov. 7, 2003); 28 C.F.R. §§ 542.13, 542.14, 542.15. Extensions of time are permitted where the inmate demonstrates a valid reason for delay. 28 C.F.R. §§ 542.14 and 542.15.

Here, Defendants argue, and Plaintiff does not dispute, that Plaintiff failed to follow the required administrative procedure. Plaintiff instead argues that: (1) he substantially complied with the administrative procedure; (2) his lack of compliance should be excused because, for a portion of the period at issue, until he was released from SHU, he was physically unable to avail himself of his administrative remedies; and (3) his lack of compliance should be excused because he erroneously believed, based on the BOP's denial notice's direction that he could pursue an action in federal district court, that he had exhausted his administrative remedies. With respect to Plaintiff's first argument, while "compliance with the administrative remedy scheme will be satisfactory if it is substantial" Plaintiff's compliance was not substantial. Nyhuis v. Reno, 204 F.3d 65, 77-78 (3d Cir. 2000). Plaintiff failed to avail himself of the second and fourth steps in the exhaustion process. While courts have relaxed the administrative exhaustion requirement where the merits were "fully examined" by the "ultimate administrative authority," Plaintiff's claims never reached the BOP's General Counsel's Office, the ultimate authority in the administrative

process. See Camp v. Brennan, 219 F.3d 279, 281 (3d Cir. 2000)(only excusing failure to administratively exhaust where allegations had been fully examined by "ultimate administrative authority"). Instead, Plaintiff's sole administrative effort was his filing of the FTCA notice, which was fielded by the BOP's Regional Counsel. That notice is insufficient to establish administrative exhaustion of a Bivens claim. Thrower v. United States, No. 12-4386, 2013 WL 2392823, at *2 n.3 (3d Cir. 2013)(finding that submission of FTCA claim, and response by Regional Counsel, was insufficient to satisfy administrative exhaustion requirement on Bivens claim). With respect to Plaintiff's second argument, courts will excuse compliance where inmates are rendered "unavailable" due to physical incapacity. See Barrick v. PrisonHealth Systems/Medical, 335 F. App'x 153, 155 (3d Cir. 2009). However, Plaintiff has failed to demonstrate why his alleged physical incapacity, which was limited in duration, should excuse his failure to follow the administrative process, given the regulations' accommodation for delay for "valid reason." With respect to Plaintiff's third argument, while courts will excuse a failure to exhaust if "special circumstances . . . justify the prisoner's failure to comply with administrative procedural requirements," no such special circumstances are present here. Dicks v. Chow, 382 F. App'x 28, 31 (2d Cir. 2010). Plaintiff does not explain why he

failed to attempt to avail himself of administrative remedies in the period after his alleged physical incapacity had ended, but before he received the notice from the Regional Counsel that allegedly led him astray. Plaintiff does not contend that he was unaware of the proper administrative process.

Accordingly, Plaintiff's Bivens claims are DISMISSED based on Plaintiff's failure to exhaust his administrative remedies.

B. Medical Malpractice Claim

Defendants raise two arguments for dismissal of Plaintiff's medical malpractice claim. First, Defendants argue that Plaintiff has partially failed to exhaust this claim. Second, Defendants argue that Plaintiff has failed to establish the elements of a medical malpractice claim. The Court addresses each argument in turn.

1. Exhaustion

Claims under the FTCA, like Plaintiff's Bivens claims must be administratively exhausted prior to suit. Miller v. United States, No. 12-2745, 2013 WL 1397163, at *1 (3d Cir. Apr. 8, 2013). A plaintiff may do so by presenting his claim to the appropriate federal agency and receiving a final denial in writing. Id. Notice is sufficient if the claimant gives the agency "written notice of his or her claim sufficient to enable the agency to investigate" and "places a value on his or her claim." Roma v. United States, 344 F.3d 352, 362-63 (3d Cir.

2003). Plaintiffs may not, however, present "one claim to the agency and then maintain suit on the basis of a different set of facts." Id. at 362.

Here, Defendants do not dispute that Plaintiff followed the proper procedure by submitting a written notice to the Regional Counsel. Rather, they argue that Plaintiff failed to provide notice of his complaints of nausea, inability to eat, stomach cramps, or damage to Plaintiff's stomach lining. They argue that, as a result, to the extent Plaintiff's claims are premised on these stomach-related issues, Plaintiff failed to exhaust these claims. While it is true that Plaintiff failed to detail these issues, Plaintiff's submission plainly described the alleged medical negligence that is purportedly at the root of these ailments. As such, Plaintiff put Defendants on notice of his claims sufficient to enable agency investigation of them. Accordingly, Defendants' motion for summary judgment on this basis is DENIED.

2. Medical Malpractice Elements

In suits under the FTCA, courts apply the substantive law of the state where the acts or omissions occurred. See Richards v. United States, 369 U.S. 1, 6 (1962); Ciccarone v. United States, 486 F. 2d 253, 257 (3d Cir. 1973); McLoyd v. United States, 2006 WL 2135837 (D.N.J. July 27, 2006). Because the alleged malpractice here occurred at FCI-Fort Dix in New Jersey,

New Jersey malpractice law governs. New Jersey law requires a malpractice claim plaintiff to show that:

1) a duty of care existed;

2) the Defendant breached that duty;

3) that breached caused his or her injures; and

4) that he or she suffered damages.

Natale v. Camden Correctional Facility, 318 F. 3d 575, 579 (3d Cir. 2003).

Defendants argue that Plaintiff failed to offer evidence of medical negligence and failed to offer evidence that he suffered an injury caused by that negligence, as required to establish medical malpractice under New Jersey law. In support of this argument, Defendants cite to medical records and a declaration from LaSalle questioning the cause, severity, and even the existence of some of Plaintiff's claimed injuries. See Brief in Support of Summary Judgment at pg. 27 (citing to LaSalle Decl.). Plaintiff argues that summary judgment should be denied because no discovery has been completed and he therefore has not had the opportunity to investigate the medical documents, retain his own medical expert, and depose the medical experts.[1]

Under Federal Rule of Civil Procedure 56(d), a party opposing summary judgment on the basis that additional discovery

[1] Plaintiff will also be required to timely submit an affidavit of merit. Olivares v. United States, 447 F. App'x 347, 353 (3d Cir. 2011)(requiring affidavit of merit for FTCA medical malpractice claim).

is warranted must "show by affidavit or declaration that . . . it cannot present facts essential to justify its opposition" and "indicate to the district court its need for discovery, what material facts it hopes to uncover and why it has not previously discovered the information." Abulkhair v. Citibank & Associates, 434 F. App'x 58, 61-62 (3d Cir. 2011); Fed. R. Civ. P. 56(d).

Here, Plaintiff has provided an affidavit indicating that he needs discovery to have the relevant medical records reviewed by a medical expert and the opportunity to depose the Individual Defendants. That discovery is: (1) necessary to enable Plaintiff to support his malpractice claim; and (2) largely unavailable to Plaintiff because key information is solely in the possession of the Defendants and Plaintiff has not had an opportunity to conduct any discovery. Accordingly, Plaintiff has satisfied the requirement that he demonstrate by affidavit or declaration that he cannot present facts essential to justify its opposition and summary judgment is not warranted at this time. Accordingly, Defendants' motion for summary judgment on this basis is DENIED.

II. Conclusion

For the foregoing reasons, Defendants' motion is GRANTED, in part, and DENIED, in part, as described above.

s/Renée Marie Bumb
RENÉE MARIE BUMB
UNITED STATES DISTRICT JUDGE

Dated: July 19, 2013

NOT FOR PUBLICATION [Docket No. 68]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

BORIS SHUSTER,

Plaintiff,

v.

DR. ROBERT CABANAS, DR. ABIGAIL LOPEZ DE LASALLE, IBE CHIGOZIE, P.A., LIEUTENANT KENNETH PERNELL, and UNITED STATES OF AMERICA,

Defendants.

Civil Action No. 11-1764(RMB/JS)

OPINION

Appearances:

Charles P. Montgomery
Earp Cohn P.C.
20 Brace Road, 4th Floor
Cherry Hill, NJ 08034
Attorneys for the Plaintiff

Colette R. Buchanan
Office of the United States Attorney
970 Broad Street, Suite 700
Newark, NJ 07102
Attorneys for Defendants

BUMB, UNITED STATES DISTRICT JUDGE:

I. Introduction

This matter comes before the Court upon a motion by Defendant, the United States of America, for summary judgment (Docket No. 68). For the reasons set forth below, Defendant's motion will be denied.

II. Factual and Procedural Background[1]

Plaintiff, Boris Shuster, is a former inmate at the Federal Correctional Institution at Fort Dix, New Jersey ("FCI"). (Def.'s R. 56.1 at ¶ 1). The only remaining claim in this case alleges medical malpractice by the Defendant in the treatment of a dental problem Plaintiff experienced while imprisoned at FCI. (Id. at ¶2). All other Defendants and Plaintiff's other claims were dismissed by this Court on July 19, 2013 [Docket Nos. 52 and 53].

Plaintiff's medical malpractice claim alleges negligence by Bureau of Prison health care providers in the performance of a dental procedure performed by Dr. Cabanas on December 10, 2008, and in the care Plaintiff received following that procedure. (Def.'s R. 56.1 at ¶ 3). This claim is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 346(b), 2671 et seq. (Id. at 4).

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[1] Where there are significant factual disputes between the parties, the facts should be construed in favor of the non-moving party. See Kopec v. Tate, 361 F.3d 772, 775 (3d Cir. 2004), cert. denied, 543 U.S. 956 (2004). That said, Plaintiff does not dispute the Defendant's submitted Local Rule 56.1 statement and the Court relies on that submission as appropriate. See Local Civ. R. 56.1 "any material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion." To the extent that additional facts were required to resolve this motion, this Court has relied in Plaintiff's pleading.

Plaintiff alleges that, as a consequence of the procedure, he experienced post-operative pain and swelling, but he was not seen for a follow-up appointment despite reporting "severe post-operative pain" until hospitalization became necessary on December 17, 2008. (First Amended Complaint at ¶¶ 21-22). Plaintiff avers that Dr. Cabanas refused to see him despite his post-operative pain because "he had to go to a funeral." (Id. at ¶ 20). Once hospitalized, the Plaintiff was diagnosed with an infection and had two teeth extracted. (Id. at ¶ 23). Plaintiff also alleges that he was provided a prescription for antibiotics on December 5, 2008 but that prescription was not filled until December 16th despite Plaintiff's complaints of pain and swelling. (Id. at 21).[2]

In a previous Opinion, Docket No. 52, this Court discussed Plaintiff's opposition to the Defendant's motion for summary judgment as to his medical negligence claim, and found that under Federal Rule of Civil Procedure 56(d), Plaintiff had properly indicated that he needed additional discovery to

[2] Plaintiff's First Amended Complaint also contains additional allegations of medical negligence - e.g., that instruments used for his dental procedure were not sterile, that he was not provided pain medication or a dental appliance to alleviate pain, and that intravenous antibiotics were improperly administered and had a deleterious effect on his stomach lining. (FAC at ¶¶ 19, 32, 36-38). From his opposition brief, however, Plaintiff appears to have abandoned these allegations and is pursuing only those allegations specifically discussed below.

properly oppose summary judgment. The Court also noted that Plaintiff "will also be required to timely submit an affidavit of merit." (Docket No. 52. At 12 n. 1) (citing Olivares v. United States, 447 F. App'x 347, 353 (3d Cir. 2011)(requiring affidavit of merit for FTCA medical malpractice claim)).

The parties later agreed to provide Plaintiff with more time to obtain an affidavit of merit. (See Docket No. 63). It is undisputed that Plaintiff has not provided the affidavit of merit, and this failure forms the basis for Defendant's instant motion for summary judgment.

III. Applicable Standard

Summary judgment shall be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it will "affect the outcome of the suit under the governing law . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is "genuine" if it could lead a "reasonable jury [to] return a verdict for the nonmoving party." Id. When deciding the existence of a genuine dispute of material fact, a court's role is not to weigh the evidence; all reasonable "inferences, doubts, and issues of credibility should be resolved against the moving party." Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307

n.2 (3d Cir. 1983). However, a mere "scintilla of evidence," without more, will not give rise to a genuine dispute for trial. Anderson, 477 U.S. at 252. Further, a court does not have to adopt the version of facts asserted by the nonmoving party if those facts are "utterly discredited by the record [so] that no reasonable jury" could believe them. Scott v. Harris, 550 U.S. 373, 380 (2007). In the face of such evidence, summary judgment is still appropriate "where the record . . . could not lead a rational trier of fact to find for the nonmoving party . . . ." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

IV. Analysis

As stated above, it is undisputed that Plaintiff has failed to provide an affidavit of merit with respect to his medical negligence claim. Typically, as pointed out by Defendant, this failure could result in a dismissal of Plaintiff's medical malpractice claims. See Olivares, 447 F. App'x at 353 ("In New Jersey, allegations of medical malpractice require, with few exceptions, the submission of an affidavit of merit as a precondition to filing suit. Failure to so file "shall be deemed a failure to state a cause of action.") (citing N.J. Stat. Ann. § 2A:53A-27 through 29).

There are, however, exceptions to this general rule, as noted by the Olivares court. Here, Plaintiff asserts that an affidavit of merit is not necessary because Plaintiff's allegations that he was not examined for six days following the procedure and that the prescribed post-operative antibiotics were not properly administered fall within the "common knowledge" exception to the affidavit of merit rule.[3]

Per the common knowledge exception, "[w]here . . . common knowledge makes apparent a claim's merit, an expert's affidavit is unnecessary." Natale v. Camden County Correctional Facility, 318 F.3d 575, 580 (3d Cir. 2003). "The common knowledge exception only applies where jurors common knowledge suffices to enable [the jurors], using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts." Fontanez v. United States of America et al., No. 11-2573, 2014 U.S. Dist. LEXIS 75831, at *10 (D.N.J. May 30, 2014) (internal quotations and citations omitted). Plaintiff contends that it is widely known that prompt follow-up care is necessary where there are

[3] Based on Plaintiff's representations in his brief, this Court finds that he has abandoned his other allegations, which would require the filing of an affidavit of merit, as the common knowledge exception is not asserted by Plaintiff to apply to said allegations of medical negligence.

complaints of post-operative pain and that failure to administer antibiotics constitutes an error.

In reply, the Defendant argues that the common knowledge exception should only be applied in "exceptionally obvious cases of medical malpractice." (Doc. No. 71 at 2). Defendant further argues that Plaintiff's allegations "- that Dr. Cabanas failed to examine plaintiff for six days following a dental procedure and that he failed to ensure that plaintiff was administered the prescribed antibiotics - are not analogous to the situations in which the courts have applied the common knowledge exception." Id. at 2.

This Court disagrees. In this case, a reasonable jury could conclude that Defendant was negligent absent expert testimony. Other courts have held that the common knowledge exception applies based upon similar allegations. See e.g., Jackson v. Fauver, 334 F. Supp. 2d 697, 743 (D.N.J. 2004)(applying the common knowledge exception where plaintiffs complained, inter alia, that they were not provided with prescribed medications in a timely fashion); Grimes v. Correctional Medical Servs., No. 08-567, 2010 U.S. Dist. LEXIS 10536, at *11-13 (D.N.J. Feb. 8, 2010)(finding that failure to provide plaintiffs with medications prescribed by their doctors "falls into the common knowledge exception to the affidavit of merit requirement, and summary judgment cannot be granted. . .

."); Hernandez v. Cullison, No. 05-3038, 2006 U.S. Dist. LEXIS 45505, at *50 n. 9 (D.N.J. June 26, 2006)(finding allegations that recommended surgical treatment was improperly delayed required no affidavit of merit and allowing plaintiff's medical malpractice claim to proceed).

Because the threshold merit of Plaintiffs allegations, as now specifically limited by Plaintiff to the failure to properly administer a prescription and failure to provide a prompt post-operative follow-up, are readily apparent from a reading of the Plaintiff's First Amended Complaint, the common knowledge exception applies and Plaintiff's medical negligence claim may proceed.[4]

V. Conclusion

For the reasons set forth above, this Court finds that Defendant's motion for summary judgment shall be denied. An appropriate Order will issue this date.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge

Dated: September 10, 2014

[4] Like the Court in Hernandez, 2006 U.S. Dist. LEXIS 45505, at * 50 n. 9, this Court notes that "while the common knowledge doctrine relieves Plaintiff of his obligation to comply with the Affidavit of Merit Statute, it does not relieve him of the burden of proving his case at trial."

PAUL J. FISHMAN
United States Attorney
By: J. ANDREW RUYMANN
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402 East State Street, Room 430
Trenton, New Jersey 08608
(609) 989-2190
Attorney for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BORIS SHUSTER,	:	
	:	
Plaintiff,	:	Hon. Renée Marie Bumb
	:	
v.	:	Civ. Action No. 11-1764(RMB)
	:	
DR. ROBERT CABANAS, et al.,	:	
	:	
Defendants.	:	

STIPULATION OF DISMISSAL

It is hereby stipulated and agreed, by and between the attorneys for the parties, that the claims against the individual defendants and the United States that gave rise to the above-captioned action, with the exception of plaintiff's claim of negligence against the United States based on his assignment and placement in the Special Housing Unit at the Federal Correctional Institution in Fort Dix, New Jersey, during the period January 6, 2008, to January 29, 2008, are hereby dismissed with prejudice and with each party bearing its own fees, costs and expenses.

CHARLES PATRICK MONTGOMERY, ESQ.
Attorney for Plaintiff

Dated: 12/30/14

PAUL J. FISHMAN
United States Attorney
By: J. ANDREW RUYMANN
Assistant U.S. Attorney
Attorney for Defendants

Dated: 12/30/14

PAUL J. FISHMAN
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Attorney for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BORIS SHUSTER,	:	
Plaintiff,	:	Hon. Renée Marie Bumb
v.	:	Civ. Action No. 11-1764(RMB)
DR. ROBERT CABANAS, et al.,	:	
Defendants.	:	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between plaintiff, Boris Shuster, and defendants, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release.

2. Plaintiff agrees that he will cause his attorney to sign a Stipulation of Dismissal dismissing with prejudice all of his claims against the individual defendants and the United States that gave rise to the above-captioned action, with the exception of his claim of negligence against the United States based on his assignment and placement in the Special Housing Unit ("SHU"), at the Federal Correctional Institution in Fort Dix, New Jersey ("FCI Fort Dix"), during the period January 6, 2008, to January 29, 2008.

3. After the above-identified Stipulation of Dismissal is signed and provided to counsel for defendants, defendant United States of America will pay the sum of Six Thousand, Two Hundred Fifty Dollars ($6,250.00) (hereinafter "the settlement amount") by check payable to "Boris Shuster."

4. It is understood and agreed that the check for the settlement amount will be mailed to plaintiff's attorney, Charles Patrick Montgomery, Esq., to the following address: Earp Cohn, P.C., 20 Brace Road, 4th Floor, Cherry Hill, New Jersey 08034.

5. Payment of the settlement amount shall be in full settlement and satisfaction of any and all claims, demands, rights, and cause of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damages to property and consequences thereof, resulting, and to result, from the subject matter of the above-captioned

action, including the claim of negligence based on his assignment and placement in the SHU at Fort Dix, New Jersey, during the period January 6, 2008, to January 29, 2008, and any claims for wrongful death, resulting from the subject matter of the above-captioned action, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against defendants and any and all of their officers, agents, servants and employees, current and former.

6. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless defendants and any and all of their officers, agents, servants and employees, current and former, from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims, arising from the subject matter of the above-captioned action by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party, any defendant and all of their officers, agents, servants or employees, current or former, including claims for wrongful death.

7. Further, payment of the settlement amount shall be in full settlement and satisfaction of all claims for attorney's fees and costs incurred in connection with the above-captioned action and any other complaints, grievances, requests for investigation, claims under other administrative procedures, appeals or lawsuits arising from the subject

matter of above-captioned matter, brought against defendants and any of their officers, agents, servants and employees, current or former, including all claims for attorney's fees or costs.

8. The parties agree that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by plaintiff will be paid out of the settlement amount and not in addition thereto.

9. It is understood by and among the parties that, pursuant to 28 U.S.C. § 2678, attorney's fees for services rendered in connection with the action against defendants shall not exceed 25 per cent of the settlement amount.

10. Plaintiff's attorney agrees to distribute the settlement proceeds to plaintiff.

11. Plaintiff agrees that after his attorney receives the check for the settlement amount he will cause his attorney to sign a Stipulation of Dismissal dismissing the above-captioned action with prejudice, with each party bearing its own fees, costs and expenses.

12. The persons signing this Stipulation for Compromise Settlement and Release warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event that plaintiff is a legally incompetent adult, the plaintiff must obtain Court approval of the

settlement at his expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that defendants and the Bureau of Prisons may void this settlement at their option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release and the compromise settlement are null and void.

13. This Stipulation for Compromise Settlement and Release is not, and is not intended to be, and should not be construed as, an admission of liability or fault on the part of defendants and their officers, agents, servants, or employees, current or former, and it is specifically denied that they are liable to plaintiff. This settlement is entered into by the parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

14. The terms of this Stipulation for Compromise Settlement and Release will not establish any precedent, nor will this Stipulation for Compromise Settlement and Release be used as a basis by plaintiff or any other person or entity to seek or justify similar terms in any subsequent case.

15. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety,

and plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

16. It is contemplated that this Stipulation for Compromise Settlement and Release may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

17. Plaintiff acknowledges that he has read this Stipulation for Compromise Settlement and Release, understands the contents thereof, and executes same of his own free act and deed.

Executed this 30th day of December, 2014.

PAUL J. FISHMAN
United States Attorney
BY: J. ANDREW RUYMANN
Assistant U.S. Attorney
Attorney for Defendants

Executed this 30 day of December, 2014.

CHARLES PATRICK MONTGOMERY, ESQ.
Attorney for Plaintiff

Executed this 15 day of DECEMBER, 2014.

BORIS SHUSTER, Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSÉ D. MEDRANO,

Plaintiff,

vs. **No. 11 cv742**

UNITED STATES OF AMERICA,
DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS,

and

LUZ LUJAN-GONZALEZ, in her Official capacity as an employee of The United States of America, Department of Justice, Bureau of Prisons,

Defendants.

COMPLAINT PURSUANT TO THE FEDERAL TORT CLAIMS ACT FOR NEGLIGENT OPERATION OF A MOTOR VEHICLE BY A GOVERNMENT EMPLOYEE

JOSÉ D. MEDRANO, Plaintiff herein, by and through his attorney, Santiago E. Juárez, for his Complaint states as follows:

PARTIES

1. JOSÉ D. MEDRANO, Plaintiff herein, is an adult resident of the federal judicial district of New Mexico;

2. The UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, is a governmental subdivision of the United States of America;

JURISDICTION AND VENUE

3. The acts and omissions complained of herein occurred within the geographical boundaries of the federal judicial District of New Mexico;

4. The claims brought herein are brought pursuant to the Federal Tort Claims Act, 28 USC §2671 et seq., which establishes, in relevant part, that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.";

5. Administrative prerequisites to the filing of this action, as established pursuant to 28 USC §2675 and elsewhere, have been satisfied;

6. This case is timely filed if filed with the Court;

7. Jurisdiction and venue in this case lie with the United States District Court within and for the District of New Mexico;

8. No jury is requested in this case, as trial by jury is not available pursuant to 28 USC §2402.

FACTS COMMON TO ALL COUNTS

9. On March 1, 2009, at approximately 3:00 p.m., Bureau of Prisons employee Luz Gonzales was operating a motor vehicle owned by the United States of America in the right lane of the highway.

10. At this time, Mr. Medrano was driving his 1998 Ford pickup in the left lane of the highway to the left of Ms. Lujan-Gonzalez. Both vehicles were traveling at or below the posted speed limit, which was 75 mph.

11. According to her statement given to a law enforcement officer as recorded in the police report, Ms. Lujan-Gonzalez did not see Mr. Medrano beside her and began to change from the right lane to the left.

12. According to Mr. Medrano's statement to the officer, he saw Ms. Lujan-Gonzalez move into his lane and attempted to slow his vehicle in order to avoid a collision, but was unable to do so and Ms. Lujan-Gonzalez' vehicle hit his pickup. Ms. Lujan-Gonzalez did not activate her turn signal or signal her lane change in any manner. Mr. Medrano's pickup was heavily damaged in the collision and he was injured. The estimate for repair of Mr. Medrano's pickup truck is $3,078.74.

13. The investigating police officer issued a citation for an unsafe lane change to Ms. Lujan-Gonzalez based upon her admission that she did not see Mr.

Medrano when she moved into his lane. According to the officer's report, Ms. Lujan-Gonzalez agreed to pay the citation.

CAUSE OF ACTION: NEGLIGENCE

14. The foregoing paragraphs are herein incorporated by reference as if fully set forth;

15. The Defendant, through its employee, Luz Lujan-Gonzalez, owed a duty of ordinary care to José D. Medrano to protect him, as a foreseeable motorist using the public thoroughfares, from known dangers to his property, health and well-being resulting from the improper operation of a motor vehicle by an authorized agent of the government of the United States;

16. The Defendant, in allowing José D. Medrano to be exposed to a known danger, to wit: the improper operation of a motor vehicle by Luz Lujan-Gonzalez, breached its duty of ordinary care and was negligent;

17. In addition and in the alternative, Luz Lujan-Gonzalez, while operating a motor vehicle owned and authorized by the Defendant, was negligent in the operation of said motor vehicle, and her negligence is attributable to the Defendant, who owned and authorized the use by Luz Lujan-Gonzalez, of said motor vehicle;

18. José D. Medrano, the Plaintiff, was harmed and injured, and has incurred damage to his property, loss of property, medical and related damages, past damages, ongoing damages, and expected future damages, as a direct and foreseeable result of the Defendant's negligence and the negligence of Luz Lujan-Gonzalez, for which he is entitled to recover in an action at law in an amount to be established at a trial on the merits of this case;

WHEREFORE, Plaintiff prays that the Court accept his Complaint and order trial on the merits hereof, and that after trial the Court order the award of compensatory damages and reasonable costs of this action, and for such other and further relief as may be just and equitable in the premises.

Respectfully Submitted:

By: ***Electronically Filed***

SANTIAGO E. JUÁREZ
Attorney for Plaintiff
1822 Lomas Boulevard, NW
Albuquerque, NM 87104
(505) 246-8499
(505) 246-8599 (Fax)
SJuarez@santiagojuarezlaw.com

Page 0524 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOSE D. MEDRANO,

Plaintiff,

v. CIV 11-0742 BB/KBM

UNITED STATES OF AMERICA
and LUZ LUJAN-GONZALES,

Defendants.

ORDER TO FILE CLOSING DOCUMENTS PER SETTLEMENT

The Court has been notified that the parties reached a negotiated resolution in this matter.

Wherefore,

IT IS HEREBY ORDERED THAT closing documents must be filed no later than April 8, 2012, absent a request showing good cause for an extension.

UNITED STATES CHIEF MAGISTRATE JUDGE

Page 0526 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSE D. MEDRANO,

Plaintiff,

v. No. CIV 11-742 BB/KBM

UNITED STATES OF AMERICA,
and LUZ LUJAN-GONALZES,

Defendants.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America and Luz Lujan-Gonzales, its employee, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of $25,000.00 which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or

assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff.

This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank: Wells Fargo Bank, NA

B. Street Address of Bank: 200 Lomas Blvd NW

C. City, State and Zip Code of Bank: Albuquerque, NM 87102

D. Federal Reserve Number:

E. Routing Number: (b)(6)

F. Name of Account: Santiago E. Juarez Attorney at Law Trust Account

G. Account Number: (b)(5)

Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiffs and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

JOSE D. MEDRANO, Plaintiff

SSN (b)(6)

STATE OF NEW MEXICO
ss.
COUNTY OF Bernalillo

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 9th day of March, 2012, by JOSE D. MEDRANO.

My Commission Expires:
May 21, 2012

OFFICIAL SEAL
Julie A. Schobey
NOTARY PUBLIC
STATE OF NEW MEXICO
My Commission Expires: 5-21-12

NOTARY PUBLIC

Date March 9, 2012

SANTIAGO E. JUAREZ
Attorney at Law
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Albuquerque, NM 87104
(505) 246-8499; Fax: (505) 246-8599
For Plaintiff
Tax ID No. 119-40-5367

Date 3/9/12

KENNETH J. GONZALES
United States Attorney

MICHAEL H. HOSES
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, NM 87103
(505) 346-7274; Fax (505) 346-7205
For Defendants

From: Eric Hammonds
To: Nelson, Ryan
Date: 1/10/2012 9:26 AM
Subject: Fw: Dale v. USA -- Fwd: Attached Image

Here's the case. We agreed this is a HOU CLC case, and we have informed everyone of our decision to accept it.

thanks

From: Jason Sickler
To: ehammonds@bop.gov
Date: 1/8/2012 2:57 PM
Subject: Fw: Dale v. USA -- Fwd: Attached Image

Eric, pse confirm your agreement.

>>> Lisa Sunderman 1/8/2012 2:10:19 PM >>>Jason and Mike,

Hope all is well. Our review indicates there is no SERO involvement except where this is filed. Please confirm that you guys will be handling this case. Pls cc all. THANKS!

Lisa M. Sunderman
Regional Counsel
Southeast Regional Office
Federal Bureau of Prisons

SENSITIVE/PRIVILEGED COMMUNICATION
The information contained in this electronic message and any and all accompanying documents constitutes sensitive information. This information is the property of the U.S. Department of Justice. If you are not the intended recipient of this information, any disclosure, copying, distribution, or the taking of any action in reliance on this information is strictly prohibited. If you received this message in error, please notify us immediately at the above number to make arrangements for its return to us.

>>> Zachary Kelton 1/6/2012 3:28 PM >>>
Lisa & Craig,

I received the below email, and attached documents, regarding a case filed in the M.D.Fla., wherein the medical care provided at, inter alia, the Oakdale Federal Detention Center is being challenged. I have contacted the local USAO to ask whether they will need BOP assistance, and they have responded in the affirmative. As the BOP's interest in the case solely involves the provision of medical care at Oakdale, I believe it should be assigned to the Houston CLC for litigation support.

Please let me know your thoughts, and if you agree, let me know if you would prefer to send it from SERO to SCRO, or have me send it from CLC Coleman to CLC Houston.

Thanks. As you will recall, I am out next week, so if your determination occurs then, please send your thoughts to Jeff and Janelle, who can take the necessary steps to follow through with your decision.

Zach

>>> Rick De Aguiar 1/6/2012 10:32 AM >>>
Jean - This litigation is out of the Middle District of Florida, so I'm guessing it was intended for Zach.

Zach - I read through it quickly and don't think it's a BOP case. Take a look.

Rick De Aguiar, Supervisory Attorney
Federal Bureau of Prisons, Consolidated Legal Center
Federal Prison Camp, 15801 SW 137 Avenue, Miami, FL 33177
(p) 305-259-2511 / (f) 305-259-2509 / (e) rdeaguiar@bop.gov

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any action in reliance on this information is strictly prohibited. If you received this message in error, please notify us immediately at the above number to make arrangements for its return to us.

>>> <serolegal@bop.gov> 1/6/2012 7:15 AM >>>

CC: mfrazier@bop.gov

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Middle District of Florida

CARLYLE LESLIE OWEN DALE

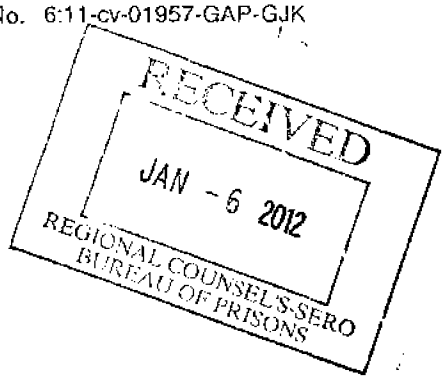
Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Civil Action No. 6:11-cv-01957-GAP-GJK



SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* UNITED STATES OF AMERICA
U.S. Attorney's Office
501 W. Church St., Suite 300
Orlando, FL 32805

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) - - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Lana Chiariello, Esquire
AMERICANS FOR IMMIGRANT JUSTICE
3000 Biscayne Blvd., Ste. 400
Miami, FL 33137

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 12/13/11

Signature of Clerk or Deputy Clerk

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

300 North LaSalle Street
Chicago, Illinois 60654

Douglas S. Curran
To Call Writer Directly:
(312) 862-2766
douglas.curran@kirkland.com

(312) 862-2000

www.kirkland.com

Facsimile:
(312) 862-2200

December 19, 2011

Via Certified Mail, Return Receipt Requested

Federal Bureau of Prisons
Office of General Counsel
Attn: Joyce Zoldak
320 First St., NW
Washington, DC 20534

Re: *Carlyle Leslie Owen Dale v. United States*, 6:11-cv-01957-GAP-GJK

Dear Ms. Zoldak:

Please take note that Mr. Carlyle Dale has brought suit against the United States of America in the U.S. District Court for the Middle District of Florida. Enclosed please find copies of (1) the complaint, (2) the summons sent to the Office of the U.S. Attorney General, and (3) the summons sent to the Office of the U.S. Attorney for the Middle District of Florida.

These documents are served pursuant to Federal Rule of Civil Procedure 4(i)(1)(c), as BOP may be an interested agency. You are receiving this notice because an individual in the BOP General Counsel's Office instructed us to direct these documents to your attention.

Sincerely,

Douglas S. Curran

DSC/tmb

Enclosures

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

CARLYLE LESLIE OWEN DALE,

(b) County of Residence of First Listed Plaintiff Orange
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Dana Chanelle, Americans for Immigrant Justice, 3000 Biscayne Blvd., Ste. 400, Miami, FL 33137 (305) 573-1106 x1080 [AND SEE ATTACHED]

DEFENDANTS

UNITED STATES OF AMERICA

6:11-CV-1957-ORL-31GJK

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881		☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	PROPERTY RIGHTS	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 820 Copyrights	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs	☐ 830 Patent	☐ 470 Racketeer Influenced & Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	☐ 840 Trademark	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other	LABOR	☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability		☐ 710 Fair Labor Standards Act	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury			☐ 720 Labor/Mgmt. Relations	☐ 850 Securities/Commodities/Exchange
☐ 195 Contract Product Liability				☐ 730 Labor/Mgmt. Reporting & Disclosure Act	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise				☐ 740 Railway Labor Act	☒ 890 OTHER Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		☐ 751 Family and Medical Leave Act	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence		☐ 790 Other Labor Litigation	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:		☐ 791 Empl. Ret. Inc. Security Act	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General	IMMIGRATION	FEDERAL TAX SUITS	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty	☐ 462 Naturalization Application	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other	☐ 463 Habeas Corpus - Alien Detainee	☐ 871 IRS - Third Party 26 USC 7609	☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights	☐ 465 Other Immigration Actions		☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. § 2671 et seq.

Brief description of cause:
Federal Tort Claims Act case alleging medical malpractice, intentional and negligent infliction of emotional distress, negligence, and gross negligence

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMANDS: To be determined at trial

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY (See instructions)

JUDGE: DOCKET NUMBER:

DATE: 12/07/2011

SIGNATURE OF ATTORNEY OF RECORD: Dana Chanelle

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Counsel for Plaintiff Carlyle Leslie Owen Dale

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Florida Bar No. 0152188
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Fax: (312) 660-1505
cvalenzuela@heartlandalliance.org
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARLYLE LESLIE OWEN DALE,	
Plaintiff,	
v.	Case No. 11 Civ. 6:11CV1957-ORL31GJK
	Hon. _____
UNITED STATES OF AMERICA,	
Defendant.	

COMPLAINT

Plaintiff Carlyle Leslie Owen Dale, by and through his attorneys, comes now into Court and states as follows:

NATURE OF THE ACTION

1. This is a civil action against the United States pursuant to the Federal Tort Claims Act. The plaintiff, Carlyle Leslie Owen Dale, seeks monetary damages for injuries he suffered while held in civil detention at the LaSalle Detention Facility ("LaSalle") in Jena, Louisiana, and the Oakdale Federal Detention Center ("Oakdale") in Oakdale, Louisiana.

2. Mr. Dale is a Jamaican national and a lawful permanent resident of the United States living in Orlando, Florida. Mr. Dale suffers from a variety of medical ailments that were well-known to the federal employees responsible for his care. These ailments were severely aggravated and Mr. Dale's health markedly declined as a result of the negligent medical treatment Mr. Dale received at LaSalle and Oakdale.

3. Mr. Dale's injuries arose while held in civil detention by Immigration and Customs Enforcement ("ICE"), an agency under the Department of Homeland Security ("DHS").

While detained, Mr. Dale was repeatedly subjected to both negligent medical treatment and intentional torts at the hands of the Public Health Service ("PHS") employees charged with providing Mr. Dale's medical care and looking after his physical and mental wellbeing. Mr. Dale has suffered and continues to suffer severe physical and mental injuries as a result of the PHS employees' medical malpractice and intentional misconduct.

THE PARTIES

4. Plaintiff Carlyle Leslie Owen Dale is a Jamaican national and a lawful permanent resident of the United States. From April 2005 to July 2010, Mr. Dale was held in civil detention by DHS pending the outcome of his deportation proceedings. At all times relevant to this action, Mr. Dale was an immigrant detainee in the legal custody of ICE, DHS, and the Federal Bureau of Prisons ("BOP"). PHS was charged with providing Mr. Dale's healthcare.

5. Mr. Dale has never been a federal prisoner, nor at any time relevant to this complaint was Mr. Dale being punished for any crime he had committed. Rather, Mr. Dale was at all relevant times a civil detainee in the care and custody of the United States.

6. Defendant United States of America is a sovereign governmental entity that acts through its agencies, including DHS, ICE, BOP, and PHS. Officials, officers, and employees of these entities are responsible for the acts and omissions that give rise to Mr. Dale's claims.

7. The federal employees acted within the scope of their employment in committing the actions and omissions that caused Mr. Dale's injuries.

JURISDICTION AND VENUE

8. Mr. Dale brings this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq*. As the FTCA creates a federal cause of action against the United States, this court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346(b)(1).

9. Mr. Dale has exhausted his administrative remedies as jurisdictionally required by 28 U.S.C. § 2675(a). DHS/ICE denied Mr. Dale's administrative claim on July 13, 2011. (*See* Exhs. A & B, attached hereto.) Accordingly, Mr. Dale's complaint is timely. *See* 28 U.S.C. § 2401(b).

10. Because Mr. Dale resides in the Middle District of Florida and brings this action against the United States, venue is proper in this court pursuant to 28 U.S.C. § 1391(e)(3) and 28 U.S.C. § 1402(b).

FACTS

The Federal Immigration-Detention System

11. Each year the United States detains almost 400,000 individuals in its immigration-detention system. DHS and ICE contract with both state and federal authorities to house non-citizen detainees in a variety of locations nationwide.

12. Almost 130 immigrants have died in ICE custody since 2003. Healthcare is especially poor for immigrant detainees suffering from chronic health conditions.[1]

Mr. Dale's Background

13. Mr. Dale entered the United States as a legal permanent resident on September 6, 1977. He was 28 years old at the time.

14. For more than twenty years, Mr. Dale lived and worked in the United States and encountered no criminal or immigration problems of any sort.

15. Upon arriving in the United States, Mr. Dale worked his way through community college as a gas station attendant and a taxi driver, before marrying and having three children.

---

[1] For instance, *see* Priest, Dana & Amy Goldstein, *In Custody, in Pain*, WASH. POST, May 12, 2008, at A1; Priest, Dana & Amy Goldstein, *System of Neglect*, WASH. POST, May 11, 2008, at A1.

Mr. Dale later worked jobs both at JFK International Airport and at an Oceanside, New York, advertising agency.

16. Mr. Dale eventually was able to start his own business, a halfway-house organization called the Safe Housing Project. Mr. Dale's business, which routinely worked with New York social-services agencies, provided housing to recovering substance abusers.

17. In September 1998, at a Safe Housing Project location in Uniondale, New York, a halfway-house resident threatened Mr. Dale at knifepoint. Mr. Dale was forced to defend himself. Despite the nature of the altercation, Mr. Dale was charged with a crime, and he ultimately pled guilty to attempted assault pursuant to N.Y.P.L. § 110.00. He was sentenced to four years in New York state prison.[2]

18. After Mr. Dale served his prison time, completed his parole, and paid $9,477.00 in restitution, he was released from the custody and supervision of the state of New York in 2005.

19. Immediately thereafter, the United States sought to deport Mr. Dale pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), alleging that Mr. Dale's conviction of attempted assault constituted an "aggravated felony" under 8 U.S.C. § 1101(43)(F).

20. ICE took Mr. Dale into custody and initiated removal proceedings. Mr. Dale was held first at Oakdale and then at LaSalle, before being finally transferred back to Oakdale. The events giving rise to Mr. Dale's claims took place at both the Oakdale and LaSalle facilities.

---

[2] Chief Judge Edith H. Jones of the U.S. Court of Appeals for the Fifth Circuit commented on Mr. Dale's conviction during a 2010 oral argument. Judge Jones stated, "That makes it sound more like a caricature of what Texans believe New York justice to be—that self-defense is a crime." *See* N. Bernstein, *Sick Detained Immigrant to Appeal to U.N. for Help*, N.Y. TIMES, June 24, 2010, *available at* http://www.nytimes.com/2010/06/25/nyregion/25detain.html.

Deportation Proceedings

21. On November 8, 2005, an Immigration Judge ("IJ") ruled that the offense to which Mr. Dale pleaded constituted an "aggravated felony" under federal law and ordered that he be deported. The Board of Immigration Appeals ("BIA") affirmed the IJ's ruling on May 31, 2006, and Mr. Dale appealed to the United States Court of Appeals for the Fifth Circuit. While the appeal was pending, the United States acknowledged the insufficiency of the evidence against Mr. Dale and moved to remand to the BIA. The Fifth Circuit granted the United States' motion on March 21, 2007, and the BIA in turn remanded the case back to the IJ—all while Mr. Dale remained in federal custody.

22. On October 12, 2007, after hearing additional evidence, the IJ again held that Mr. Dale should be deported, and on February 6, 2008, the BIA again affirmed the IJ's decision. This time, however, the BIA based its decision not on the evidence that the United States had presented, but instead on its own reading of New York statutes. Mr. Dale—having been in federal custody for almost three years—again appealed the BIA's decision to the Fifth Circuit.

23. On September 17, 2009, Mr. Dale filed a petition for writ of habeas corpus in the Western District of Louisiana, in which he requested immediate release or, in the alternative, a bail hearing to review the reasonableness of his continued detention in light of his rapidly deteriorating medical conditions.

24. On July 24, 2010, the Fifth Circuit granted Mr. Dale's appeal and vacated the BIA's ruling, holding that the BIA erred as a matter of law in affirming the IJ's removal determination. *See Dale v. Holder*, 610 F.3d 294, 303 (5th Cir. 2010). The Fifth Circuit remanded Mr. Dale's case to the BIA, which in turn remanded to the IJ, where it remains pending.

25. After being held in civil detention while his appeals languished for over *five years*—more than a year longer than he was initially incarcerated for the crime he pled guilty to—Mr. Dale was finally released from federal custody in 2010.

26. Mr. Dale agreed to dismiss his habeas-corpus petition after his release from federal custody.

27. Following his release from Oakdale, Mr. Dale moved to Orlando, Florida, where he now resides with his son and grandchildren.

Abuses and Inadequate Medical Care at LaSalle

28. Mr. Dale's detention at LaSalle began on September 25, 2008.

29. LaSalle is a state-run detention facility that has entered into an intergovernmental service agreement ("IGSA") with DHS/ICE for the purpose of housing immigrant detainees. Upon information and belief, PHS was responsible for providing medical care to Mr. Dale and other federal detainees at LaSalle.

30. Mr. Dale suffers from a number of medical conditions that have been well documented and were known to the medical staff at both LaSalle and Oakdale. Mr. Dale's ailments required skilled monitoring and treatment, as they made Mr. Dale susceptible to infection, illness, and further disease.

31. Mr. Dale is a diabetic who suffers from chronic asthma, advanced arthritis, high blood pressure, and pancreatitis.

32. Mr. Dale developed Hepatitis C while in federal immigration detention.

33. As a result of the defendant's failure to provide adequate medical care for these chronic illnesses, Mr. Dale required emergency hospitalization on several occasions while in immigration detention, sometimes for weeks at a time.

34. Mr. Dale was first hospitalized in September 2008 immediately after being transferred to LaSalle. Upon his arrival at LaSalle, Mr. Dale was stripped of the warm clothing he had been given to help alleviate his advanced arthritis—including his medically necessary thermal underclothes—and was held for hours in a cold holding area. The LaSalle staff, having also taken away Mr. Dale's medication, ignored Mr. Dale's repeated pleas for help, even when he banged on the door to get the staff's attention. The staff members continued to disregard Mr. Dale, telling him only, "That was Oakdale. You can't wear that in here." As a result, Mr. Dale suffered a severe asthma attack and bronchitis, which in turn led to a sixteen-day stay at LaSalle General Hospital.

35. A few weeks later, in November 2008, Mr. Dale was again admitted to LaSalle General Hospital after a nurse determined that the medical staff had allowed Mr. Dale's blood sugar to rise to abnormally high levels. Mr. Dale again stayed in the hospital for more than two weeks and was also treated for acute diabetic ketoacidosis, acute pancreatitis, liver disease, congestive heart failure, cardiomyopathy, and emphysema. The lack of proper preventative care and monitoring was taking a severe toll on Mr. Dale's health.

36. Mr. Dale was then hospitalized in March and April 2009 for an acute staphylococcus infection. During this hospital stay, Mr. Dale was also treated for necrotizing fasciitis and cellulitis that he had likewise contracted. These life-threatening bacterial infections only further compounded Mr. Dale's chronic medical conditions.

37. Upon information and belief, Mr. Dale contracted these infections as a result of the unsanitary and medically dangerous conditions at LaSalle. Mr. Dale was detained in a large, dirty bunk room with many other inmates. The toilets were rarely cleaned and were often overflowing with both liquid and solid waste. The shower rooms were likewise filthy, moldy,

and unsanitary. These and other similar conditions repeatedly exposed Mr. Dale to bacteria and other dangerous disease-causing contagions.

38. Despite his repeated hospitalizations, the preventative and palliative care Mr. Dale received did not improve. In fact, two months later, in June 2009, Mr. Dale was hospitalized yet again for another severe asthma attack, and was also treated for diabetes, hypertension, chronic obstructive pulmonary disease, and right-side heart failure.

39. In early July 2009, following one of his many hospital visits at LaSalle, Mr. Dale was held in solitary confinement in an air-tight cell allegedly because of a suspected swine-flu outbreak in the prison. At the time, Mr. Dale's limbs and torso had swollen to *twice their ordinary size* as a result of the fluids and medications he had been given at the hospital. But, despite his frail condition and obvious need for professional monitoring, the treating physician left Mr. Dale in the care of the ill-equipped infirmary staff because the physician insisted on taking a Fourth of July weekend vacation. Over the extended weekend, Mr. Dale was left alone for hours at a time, shackled to his wheelchair, dizzy, disoriented, weak, and afraid, and received no medical attention at all. Mr. Dale was forced to stay in a "no-human-contact isolation" room with bright lights and video cameras, which inflicted psychological damage on Mr. Dale, who was already infirm and unwell. Mr. Dale sincerely believed he would not survive.

40. Mr. Dale also endured devastating pain as a result of a complete lack of dental care while at LaSalle. Despite his repeated requests, the LaSalle medical staff flatly refused to permit Mr. Dale to receive treatment for severe tooth pain. Mr. Dale's overall oral health deteriorated as a result.

41. Faced with limited treatment options and inadequate medical facilities, Mr. Dale's health continued to deteriorate. And, to compound his physical ailments, Mr. Dale's frequent

illnesses and repeated hospitalizations caused Mr. Dale to develop continually deepening depression.

42. Mr. Dale's medical history is not based on conjecture, exaggeration, speculation, or unidentified symptoms. Rather, Mr. Dale was diagnosed with and was repeatedly hospitalized and received treatment for these afflictions, each of which contributed to his worsening health and each of which the medical staff knew about.

Abuses and Inadequate Medical Care at Oakdale

43. Mr. Dale was transferred from LaSalle to Oakdale on August 25, 2009.

44. Upon information and belief, Oakdale is a BOP-operated federal detention center; it houses immigration detainees on behalf of DHS/ICE in addition to federal prisoners. The PHS was responsible for providing medical care to Mr. Dale and the other federal detainees at Oakdale.

45. In early 2010, a few months after his arrival at Oakdale, Mr. Dale again suffered significant trouble breathing. Mr. Dale's respiratory problems came on suddenly during the night; he urgently sought and required immediate medical attention. But, because no overnight emergency medical personnel were staffed at the Oakdale facility, Mr. Dale had to endure pain and suffering for several hours until the medical staff arrived the next morning.

46. A few months later, on April 15, 2010, Mr. Dale again had extreme difficulty breathing during the night. The next morning, Mr. Dale asked to be examined by the physician's assistant ("PA") on duty at the time. Mr. Dale met with the PA and, in the course of explaining his history of chronic asthma and respiratory problems, Mr. Dale told the PA that he had previously been prescribed Prednisone, which, he explained, had helped with his breathing.

47. But the PA refused to prescribe Prednisone or any other medication and instead berated Mr. Dale and accused him of "using the hospital to try to get a vacation out of

[Oakdale]." The PA further mocked Mr. Dale by asking, "Why don't you just go home?" The PA, with full knowledge of and access to Mr. Dale's medical history, did nothing to help him and instead left him alone to suffer.

48. On April 21, 2010, Mr. Dale again suffered breathing difficulties and was referred to the Oakdale medical facility. The medical staff initially treated Mr. Dale with a nebulizer. While Mr. Dale had the nebulizer to his face and was inhaling the medication, one of the PAs on staff, Mr. Shalloby, became verbally abusive toward Mr. Dale. Shalloby, again with full access to Mr. Dale's medical history, accused Mr. Dale of faking his symptoms and of lying about his condition. Shalloby then interrupted Mr. Dale's treatment by forcibly stripping the nebulizer from Mr. Dale's face.

49. Shalloby then pulled Mr. Dale into an adjacent office and continued to accuse, belittle, and berate him. Shalloby shouted that there was nothing wrong with Mr. Dale, that he was lying about his symptoms, and that he should just "open [his] mouth and breathe." Shalloby then quipped that Mr. Dale should go back to his cell and do push-ups.

50. Mr. Dale requested that Shalloby permit him to put the nebulizer back on, but Shalloby refused. And, Shalloby added, if Mr. Dale reported the incident, Shalloby would "wipe [his] ass" with any complaint Mr. Dale filed.

51. Shaken and scared for his health, Mr. Dale was then forced to wait in the infirmary for *four hours* to see the physician. During this time, Mr. Dale was denied the benefit of a nebulizer, any sort of breathing aid, or any other treatment for his condition.

52. While he was waiting, Mr. Dale continued to have visible difficulty breathing. During this four-hour period, the Oakdale dentist noticed Mr. Dale's suffering and directed the

nurses on duty to attend to him. The nurses refused, telling the dentist that they had been ordered not to help Mr. Dale or even to touch him.

53. Mr. Dale was traumatized by these events and was frightened that he would be denied subsequent medical care. Mr. Dale became afraid to request medical assistance for his continued respiratory problems, despite his chronic asthma, for fear of abuse or retaliation by the Oakdale medical staff.[3]

54. Mr. Dale suffered several other asthmatic episodes, and each time Oakdale medical staff members were slow to respond and often berated Mr. Dale for his condition. On one occasion, while waiting inside the immigration courthouse at Oakdale, Mr. Dale again suffered severe breathing difficulty.[4] He was eventually taken to the treatment facility where he received medicine through a nebulizer. While struggling to regain his breath, the PA, Mr. Berkenholtz, repeatedly sneered to Mr. Dale, "Go home to your country if you want treatment because you're not going to get it here."

55. Berkenholtz often made such abusive and belittling statements, and even told Mr. Dale that there was "nothing anyone could do to improve or change the conditions at [the] facility." Berkenholtz told Mr. Dale that any grievance Mr. Dale filed would be useless and that the medical staff members "would continue to do what they want because they will get away with it." And as if to prove the point, Berkenholtz bragged that he had previously been called to testify in court about the conditions at Oakdale, but "nothing ever became of it."

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[3] Mr. Dale filed an administrative complaint with DHS following his mistreatment at the hands of Shalloby. Upon information and belief, the DHS did not take any corrective action.

[4] Upon witnessing Mr. Dale's asthma attack and the medical staff's slow response, the immigration judge expressed concern for Mr. Dale and permitted him to delay his hearing until his condition improved. When Mr. Dale appeared for his hearing the following month, the judge recalled Mr. Dale's suffering and again inquired as to his wellbeing.

56. Mr. Dale also suffered from a severe staphylococcus infection that went untreated for weeks, despite his repeated efforts to receive medical attention. This infection began with an open sore on Mr. Dale's inner thigh that rapidly swelled and caused intense pain. But, because of Oakdale's medical policies, Mr. Dale could not immediately receive treatment, as his condition was not deemed an "emergency," even though such an infection, if left untreated, could be fatal. Because of this policy, Mr. Dale was forced to wait for days until the prison held a "sick call," which permitted Mr. Dale to seek treatment from a PA.

57. It was not until *four weeks* later that a PA finally sent Mr. Dale to the staff doctor, who eventually gave Mr. Dale an injection that cleared up the painful infection. By this time, Mr. Dale's left foot and entire left leg were swollen and inflamed. The medical staff told Mr. Dale that his infection could have resulted in amputation or even death.

58. As a result of the inadequate medical care the United States provided to Mr. Dale, Mr. Dale's health has declined considerably. Mr. Dale now has significant difficulty breathing without the assistance of a nebulizer or other medication, and is often unable to sleep as a result. Mr. Dale also faces heightened risk of future illness and disease, including complications from diabetes, heart and kidney failure, and pancreatic diseases. And Mr. Dale continues to suffer from bouts of severe anxiety and depression as a result of his deficient medical care and repeated emotional abuse at the hands of PHS.

Applicable Standards

59. At all times relevant to Mr. Dale's claims, the medical treatment he received was deficient, negligent, and violated the applicable Louisiana standards of care. Indeed, the Oakdale medical staff even acknowledged that the Oakdale facilities were inadequate to effectively monitor and treat Mr. Dale's conditions.

60. At all times relevant to Mr. Dale's claims, LaSalle was an IGSA facility and thus the PHS personnel at that facility were required to abide by the ICE Performance Based National Detention Standards ("PBNDS"). The LaSalle employees' acts and omissions violated these standards.

61. At all times relevant to Mr. Dale's claims, Oakdale was a BOP facility and thus the PHS personnel at that facility were required to abide by the BOP Detention Standards. The Oakdale employees' acts and omissions violated these standards.

62. At all times relevant to Mr. Dale's claims, the BOP had a duty pursuant to 18 U.S.C. § 4042 to provide for Mr. Dale's care and safekeeping while he was in federal custody at Oakdale. The BOP violated this duty.

63. At all times relevant to Mr. Dale's claims, Mr. Dale was an ICE detainee. The ICE set forth the PBNDS in an effort to standardize the care provided to ICE detainees. The Oakdale employees' acts and omissions violated these standards as well.

COUNT I:
MEDICAL MALPRACTICE

64. Mr. Dale re-alleges and incorporates by reference Paragraphs 1–63 as if fully set forth herein.

65. While detained at LaSalle and Oakdale, Mr. Dale suffered from a variety of physical afflictions that required medical care. The treatment provided by the defendant was negligent and deficient and amounted to medical malpractice.

66. The defendant owed Mr. Dale a duty to provide medical treatment in accordance with the degree of knowledge and skill ordinarily possessed by healthcare providers actively practicing in a similar community or locale and under similar circumstances. The medical treatment provided by the defendant's employees was not provided in accordance with the

required degree of knowledge and skill, and the defendant's employees lacked this degree of knowledge and skill.

67. The defendant owed Mr. Dale a duty to exercise the degree of care ordinarily exercised by healthcare providers actively practicing in a similar community or locale and under similar circumstances. The defendant's employees failed to exercise such reasonable care and diligence.

68. The defendant's employees failed to use their best judgment in the application of their knowledge and skill.

69. The defendant's provision of healthcare was so obviously negligent that a non-medically trained lay person can perceive the negligent nature of the defendant's employees' conduct as well as any expert can.

70. The defendant's employees violated the defendant's duty of care by stripping Mr. Dale of his medically necessary warm clothing upon his arrival at LaSalle in September 2008. Despite their full knowledge of Mr. Dale's medical conditions, the defendant's employees nevertheless forced Mr. Dale to stay in a dangerously cold holding area, with the result that Mr. Dale suffered a severe asthma attack and bronchitis. Mr. Dale endured pain and suffering—and a sixteen-day hospital stay—as a result of the defendant's employees' negligence.

71. The defendant's employees violated the defendant's duty of care by exposing Mr. Dale to unsanitary and medically dangerous living conditions at LaSalle, including dirty bunk rooms, toilets overflowing with human waste, and filthy shower stalls. Upon information and belief, the combination of unsanitary conditions and inadequate medical care caused Mr. Dale to contract staphylococcus and necrotizing fasciitis infections.

72. The defendant's employees violated the defendant's duty of care by forcing Mr. Dale to remain in solitary confinement with no medical attention in July 2009. The defendant's employees left Mr. Dale in isolation, exposed to bright lights and insects, despite his urgent need for medical care and monitoring. Mr. Dale endured severe pain and suffering as a result.

73. The defendant's employees violated the defendant's duty of care by refusing and failing to provide *any* dental care to Mr. Dale while he was detained at LaSalle, despite Mr. Dale's urgent need for such care. This failure also violated the PBNDS. *See* 2008 OPS. MANUAL ICE PBNDS Pt. 4 (22)(II)(17) ("Detainees will have access to emergency and specified routine dental care provided under direction and supervision of a licensed dentist.").

74. The defendant violated its duty of care by failing to provide overnight emergency medical care at Oakdale. This failure also violated BOP policy, which states, "Each institution will devise a method to provide medical services 24 hours per day, seven days per week," and "Each institution will develop and follow a written plan to provide for 24 hour emergency medical, dental, and mental health care." BOP PROG. STMT. P6010.02(17) & (18). This failure likewise violated the PBNDS, which states, "Detainees will have access to specified 24-hour emergency medical, dental, and mental health services." 2008 OPS. MANUAL ICE PBNDS Pt. 4 (22)(II)(10). The PBNDS also requires all facilities to have a "Physician on call or available 24 hours per day." *Id.* at Pt. 4 (22)(V)(E)(3)(a). This violation was especially egregious given Mr. Dale's extensive and well-known history of medical complications.

75. The defendant's employees violated the defendant's duty of care by refusing to treat Mr. Dale's respiratory condition in April 2010. When Mr. Dale presented with symptoms, explained his condition, and requested treatment, the PHS employee on duty refused to provide Mr. Dale with a nebulizer, breathing medication, or any other sort of treatment. The PA instead

berated Mr. Dale and sent him back to his cell, saying, "Why don't you just go home?" Mr. Dale endured unnecessary pain, suffering, and deteriorating health as a result.

76. The defendant's employees violated the defendant's duty of care by repeatedly forcing Mr. Dale to wait unreasonably long periods of time before receiving treatment. For instance, in early 2010 Mr. Dale suffered for several hours after developing a severe respiratory condition during the night. Because Oakdale did not have emergency 24-hour medical staff, Mr. Dale did not receive treatment until the following morning.

77. Even more egregiously, Mr. Dale was forced to wait *four weeks* before receiving treatment for a severe staphylococcus infection while at Oakdale. Mr. Dale endured severe pain and suffering as a result of the defendant's employees' negligence.

78. Similarly, on April 21, 2010, PAs forced Mr. Dale to wait four hours to see a physician, even though he presented symptoms of extreme breathing difficulties, was in visible pain, and the PAs knew of Mr. Dale's medical conditions. The defendant's employees even ordered the nurses to refuse Mr. Dale's requests for assistance, as if punishing Mr. Dale for his illness.

79. These considerable delays in treatment also violated the BOP detention standards, *see* BOP PROG. STMT. P6270.01(2)(a) ("Timely and appropriate health care will be given for Federal inmates . . . ."), as well as the PBNDS, *see* 2008 OPS. MANUAL ICE PBNDS Pt. 4 (22)(II)(2) ("Health care needs will be met in a timely and efficient manner."); *id.* at Pt. 4 (22)(II)(15) ("Detainees with chronic conditions will receive care and treatment for conditions where non-treatment would result in negative outcomes or permanent disability as determined by the clinical medical authority."); *id.* at Pt. 4 (22)(V)(A) ("Every facility shall directly or contractually provide its detainee population . . . [t]imely responses.").

80. The defendant's employees violated the defendant's duty of care by refusing or failing to transfer Mr. Dale from Oakdale to a better-equipped detention facility. Despite Mr. Dale's requests, the defendant's employees insisted on holding Mr. Dale at Oakdale even though they knew that Oakdale's medical facilities were not properly equipped to treat Mr. Dale's conditions. This refusal to transfer Mr. Dale also violated both the BOP detention standards, *see* BOP PROG. STMT. P6270.01(5)(b) ("[The Office of Medical Designations and Transportation] will determine if there are sufficient community resources to handle a specific inmate or medical condition. If the community resources are not available, then a referral should be considered."), and the PBNDS, *see* 2008 OPS. MANUAL ICE PBNDS Pt. 4 (22)(II)(7) ("A detainee who needs health care beyond facility resources will be transferred in a timely manner to an appropriate facility where care is available.").

81. The defendant's employees violated the defendant's duty of care by failing to develop and implement a treatment plan for Mr. Dale that took into account his medical conditions. Mr. Dale received only intermittent sub-standard treatment; he was not put on a preventative regimen designed to address his particularized healthcare and medical needs. This failure also violated the PBNDS, which states, "A detainee who requires close, chronic or convalescent medical supervision will be treated in accordance with a written plan approved by licensed physician, dentist, or mental health practitioner that includes directions to health care providers and other involved medical personnel." *Id.* at Pt. 4 (22)(II)(9).

82. As a proximate result of the defendant's employees' lack of knowledge and skill and of their failure to exercise the proper degree of care, Mr. Dale suffered injuries that he would not have otherwise suffered.

83. Mr. Dale's physical conditions worsened as a result of the defendant's negligent provision of healthcare. Because the defendant forced Mr. Dale to regularly go without effective and necessary treatments while in federal immigration detention, he now suffers from a variety of additional health problems, including severe respiratory problems, insomnia, severe anxiety, and depression. The defendant's negligent care has also placed Mr. Dale at an increased risk of future illness and disease, including complications from diabetes, heart and kidney failure, and pancreatic diseases.

COUNT II: NEGLIGENCE

84. Mr. Dale re-alleges and incorporates by reference Paragraphs 1–83 as if fully set forth herein.

85. While holding Mr. Dale in custody, the defendant owed Mr. Dale duties of care to ensure that his chronic medical conditions were properly accounted for and that no actions were taken to exacerbate those chronic medical conditions.

86. While holding Mr. Dale in custody, the defendant owed Mr. Dale a duty of care to ensure that he was provided with safe and sanitary confinement conditions that would not exacerbate his existing health conditions or inflict new injuries.

87. The defendant owed Mr. Dale a duty to exercise the same degree of care as a reasonable person would in the defendant's circumstances.

88. In September 2008, the defendant's employees breached the defendant's duties of care to Mr. Dale both by permitting him to be detained in a dangerously cold holding area after stripping him of his medically necessary clothing, and by failing to prevent him from being detained in such a manner. Mr. Dale was detained in this way even after repeatedly stating that he would suffer without the warm underclothes.

89. In September 2008, the defendant's employees breached the defendant's duties of care to Mr. Dale both by permitting Mr. Dale's medication to be seized and by failing to prevent his medication from being seized upon his arrival at LaSalle.

90. The defendant's breaches directly and proximately caused injury to Mr. Dale. The defendant's failure to ensure Mr. Dale had access to medically necessary clothing and medicine directly and proximately forced Mr. Dale to endure severe pain and breathing difficulties for hours, which ultimately resulted in a serious asthma attack and bronchitis.

91. Throughout Mr. Dale's confinement, the defendant's employees breached their duties of care to Mr. Dale both by permitting Mr. Dale to be continuously subjected to dangerously filthy, unhygienic, and unsanitary confinement conditions, and by failing to ensure that Mr. Dale was not subjected to such conditions. These dangerous conditions regularly exposed Mr. Dale to harmful bacteria and other contagions.

92. The defendant's breaches directly and proximately caused injury to Mr. Dale. Upon information and belief, the defendant's failure to ensure Mr. Dale was detained in sanitary and safe living conditions directly and proximately caused Mr. Dale to contract an acute staphylococcus infection, necrotizing fasciitis, and cellulitis, among other things.

93. At all relevant times the risk of harm encountered by Mr. Dale fell within the protection of the legal duties the defendant owed to Mr. Dale.

94. As a result of the defendant's tortious conduct, Mr. Dale has suffered damages of a personal nature.

COUNT III: GROSS NEGLIGENCE

95. Mr. Dale re-alleges and incorporates by reference Paragraphs 1–94 as if fully set forth herein.

96. While holding Mr. Dale in custody, the defendant owed Mr. Dale duties of care as set forth in Paragraphs 66–67 and 85–87.

97. During Mr. Dale's detention, the defendant failed to exercise even slight care or diligence, as the defendant's employees' actions fell below the level of care and diligence that even careless people are accustomed to exercising.

98. The defendant and/or the defendant's employees failed to exercise even slight care or diligence by (i) permitting Mr. Dale to be stripped of his medically necessary warm clothing and medicine in September 2008; (ii) exposing Mr. Dale to dangerously unsanitary living conditions; (iii) forcing Mr. Dale to be held in solitary confinement with no medical care in July 2009; (iv) refusing to and failing to provide Mr. Dale with any dental care while detained at LaSalle; (v) failing to provide 24-hour medical care at Oakdale; (vi) refusing to treat Mr. Dale for his respiratory condition in April 2010 and instructing that he receive no treatment at all; (vii) forcing Mr. Dale repeatedly to wait unreasonably long periods of time for medical attention; (viii) refusing to or failing to transfer Mr. Dale to a better-equipped detention facility while knowing that Oakdale's medical resources were insufficient to address Mr. Dale's chronic conditions; and (ix) failing to develop and implement a treatment plan for Mr. Dale's chronic conditions.

99. The defendant's failure to exercise even slight care or diligence directly and proximately caused injury to Mr. Dale. In particular, the defendant's gross negligence proximately caused Mr. Dale's chronic conditions to dramatically worsen, with the result that he now suffers from a variety of additional health problems, including severe respiratory problems, insomnia, severe anxiety, and depression. The defendant's gross negligence has also directly placed Mr. Dale at an increased risk of future illness and disease, including complications from

diabetes, heart and kidney failure, and pancreatic diseases. The defendant's gross negligence further proximately caused Mr. Dale to suffer severe pain that he otherwise would not have suffered and to contract infections that he otherwise would not have contracted.

100. At all relevant times the risk of harm encountered by Mr. Dale fell within the protection of the legal duties the defendant owed to Mr. Dale.

101. The defendant and its employees acted with utter disregard for the dictates of prudence, which amounted to complete neglect of the rights of Mr. Dale and others.

102. As a result of the defendant's gross negligence, Mr. Dale has suffered damages of a personal nature.

COUNT IV:
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

103. Mr. Dale re-alleges and incorporates by reference Paragraphs 1–102 as if fully set forth herein.

104. The defendant's employees intentionally caused Mr. Dale severe emotional distress by forcing him to remain unattended in a "no-human-contact isolation" room while he was in urgent need of medical attention. As a result, Mr. Dale suffered extreme anxiety, panic, and psychological disturbance, as he believed he would not survive this solitary confinement.

105. The defendant's employees intentionally caused Mr. Dale severe emotional distress by refusing to provide him necessary treatment and by accusing him of "using the hospital to try to get a vacation out of [Oakdale]." Following this incident, Mr. Dale feared for his health and worried that he would be unable to obtain medical treatment in the future.

106. The defendant's employees intentionally caused Mr. Dale severe emotional distress by forcibly ripping the nebulizer from Mr. Dale's face on April 21, 2010. As a direct

result, Mr. Dale suffered physical pain and feared that he would suffocate, which resulted in panic and anxiety.

107. The defendant's employees intentionally caused Mr. Dale severe emotional distress by disparaging Mr. Dale and shouting that there was nothing wrong with him, that he was "faking" his symptoms, and that he should just "open [his] mouth and breathe."

108. The defendant's employees intentionally caused Mr. Dale severe emotional distress when the PA stated that he would "wipe [his] ass" with any complaint Mr. Dale filed with the detention authorities.

109. The defendant's employees intentionally caused Mr. Dale severe emotional distress when the PA—a federal employee entrusted with the care and wellbeing of Mr. Dale—***instructed the nurses on duty to not help Mr. Dale***. Instead of providing Mr. Dale with the care and compassion he needed, the Oakdale staff belittled and berated him and went out of their way to ***prevent*** him from receiving necessary treatment. Mr. Dale was afraid to report these incidents for fear of reprisals by the PA or other medical staff. Specifically, Mr. Dale feared that if he reported the PA's behavior he would be denied future medical treatment.

110. The defendant's employees intentionally caused Mr. Dale severe emotional distress by taunting him and telling him to "go home to [his] country if [he] needed treatment because [he] was not going to be treated here," and that there was "nothing anyone could do to improve or change the conditions at [the] facility." Even more egregiously, an employee of the defendant warned Mr. Dale that the medical staff members "would continue to do what they want because they will get away with it." These extreme and outrageous statements directly caused Mr. Dale severe anxiety, as he feared for his health and feared reprisals if he sought future treatment.

111. The defendant's employees' intentional conduct was extreme and outrageous and went beyond all bounds of decency such that it was utterly intolerable.

112. The defendant's employees' actions and words demonstrate that they intended to cause Mr. Dale severe emotional distress. The defendant's employees also knew that severe emotional distress was certain and/or substantially certain to result from their conduct.

113. The defendant's employees' conduct proximately caused Mr. Dale's emotional distress, which was so severe that no reasonable person could have been expected to endure it.

COUNT V:
IN THE ALTERNATIVE: NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

114. Mr. Dale re-alleges and incorporates by reference Paragraphs 1–113 as if fully set forth herein.

115. The defendant owed Mr. Dale duties of care, as set forth in Paragraphs 66–69 and 85–87.

116. The defendant breached those duties of care, as set forth in Paragraphs 70–81, 88–89, 91, and 104–110.

117. The defendant's breach of its duty of care was the actual and proximate cause of Mr. Dale's injuries, as set forth in Paragraphs 82–83, 90, 92, and 113.

118. The harm suffered by Mr. Dale is precisely the sort of harm the defendant's duty of care seeks to protect against.

119. Mr. Dale re-alleges and incorporates by reference Paragraphs 104–110, and states in the alternative that each of the defendant's employees' acts and omissions identified in those paragraphs, if not undertaken to intentionally cause Mr. Dale extreme and severe emotional distress, did in fact negligently cause Mr. Dale extreme and severe emotional distress.

120. Mr. Dale's extreme and severe emotional distress was and is accompanied by physical injury and illness, including insomnia, nervousness, anxiety, and severe stress.

121. The circumstances of Mr. Dale's detention and of the defendant's breach of its duty of care give rise to a special likelihood of genuine and serious mental distress. In particular, the defendant's negligence repeatedly forced Mr. Dale to endure circumstances in which he was actually in great fear for his personal safety and wellbeing.

PRAYER FOR RELIEF

WHEREFORE, Mr. Dale respectfully requests that this Court:

A. Award monetary damages to compensate Mr. Dale for his injuries in an amount to be determined at trial;

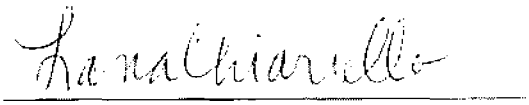
B. Award monetary damages to provide for Mr. Dale's future medical needs in an amount to be determined at trial;

C. Award reasonable costs and expenses to Mr. Dale; and

D. Grant such other and further monetary and/or equitable relief that this Court may deem just and proper.

Dated: December 7, 2011

Respectfully submitted,



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CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*
Department of Homeland Security (DHS) / Immigration and Customs Enforcement (ICE)	Claimant: Carlyle Dale, Orlando, FL Claimant's Representative: Claudia Valenzuela, National Immigrant Justice Center, 208 S. LaSalle Street, Suite 1818, Chicago, IL 60604

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. or P.M.)*
☐ MILITARY ☒ CIVILIAN	01/01/1949	Single	August 25, 2009 - July 2, 2010	See attached.

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)*

Between September 25, 2008 and July 1, 2010, while Mr. Dale was in the custody of the Department of Homeland Security (DHS)/ Immigration and Customs Enforcement (ICE), DHS/ICE officers, Bureau of Prison (BOP) officials, and Public Health Service (PHS) staff failed to provide Mr. Dale with an appropriate level of care for his multiple chronic health conditions, as required by federal and Louisiana state law or to institute policies, or provide training or supervision of its employees regarding the treatment of individuals with chronic conditions. During this time period., Mr. Dale was held in civil detention at Lasalle Detention Facility, in Jena, LA, and at Oakdale Federal Detention Center in Oakdale, LA. DHS/ICE officials failed to ensure that Mr. Dale received dental care, as required by the DHS/ICE National Detention Standard. PHS staff refused Mr. Dale's requests for medication, interrupted his medical treatment, and forced him to wait hours for urgent care, contrary to DHS/ICE National Detention Standards. Medical staff admitted that Oakdale did not have the resources to monitor and treat Mr. Dale's diabetes, yet DHS/ICE further refused to transfer him to a facility that did. See attached.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

As a result of the failure of DHS/ICE, BOP, and PHS to provide Mr. Dale with appropriate medical care, Mr. Dale suffered extraordinary and unnecessary physical pain. Mr. Dale now has difficulty breathing normally without the assistance of medication or a nebulizer. This lack of care caused Mr. Dale severe mental and emotional distress, and has put him at a heightened risk of future injury and illness. Mr. Dale also experiences bouts of anxiety and depression as a result of the treatment he received.

11. WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
Employees of DHS/ICE, BOP, PHS, the Department of Justice (DOJ), and Oakdale Federal Detention Center.	See attached.

12. *(See instructions on reverse)* AMOUNT OF CLAIM *(In dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
	5,000,000.00		5,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
		July 26, 2010

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

95-109
Previous editions not usable.

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85) (EG)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 38 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☐ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

17. If deductible, state amount

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* ☐ No

SF 95 (Rev. 7-85) BACK

Carlyle Dale Standard Form 95 Attachments

Basis of Claim (Continued From Form 95, Section 8):

Carlyle Dale suffers from a series of chronic illnesses, including diabetes, chronic asthma, severe arthritis, high blood pressure, and pancreatitis, which require special care and constant monitoring, and which make him susceptible to infection and illness. Mr. Dale was also diagnosed with Hepatitis C after coming into DHS/ICE custody.

On September 25, 2008, Mr. Dale was transferred from Oakdale Federal Detention Center (Oakdale) to the Lasalle Detention Center (Lasalle). Upon transfer, Mr. Dale was stripped of his warm clothing and kept in a cold holding pen for several hours. This caused his arthritis to flare up, and him to develop bronchitis, for which he had to be hospitalized. Over the following year, Mr. Dale was hospitalized three more times for chronic medical conditions.

As a result of DHS/PHS' failure to provide adequate medical care for Mr. Dale's chronic illnesses, Mr. Dale had to be hospitalized on an emergency basis on 3 occasions. From November 25 to December 5, 2008, Plaintiff was treated for acute diabetic ketoacidosis, acute pacreatitis, liver disease, congestive heart failure, cardiomyopathy, and emphysema. From March 30 to April 6, 2009 Mr. Dale was treated in hospital after being diagnosed with an acute staphylococcus infection, necrotizing fasciitis ("flesh-eating disease"), and cellulitis. From June 17 to July 1, 2009, Plaintiff was hospitalized yet again at LaSalle General Hospital for a severe asthma attack. During that stay, he was also treated for diabetes, hypertension, chronic obstructive pulmonary disease, and right heart failure.

These illnesses were documented in Mr. Dale's medical records – indeed, many of them developed while he was in DHS/ICE custody – and they were known to DHS/ICE and BOP officers, as well as state prison officials who were responsible for Mr. Dale. This information was also available to all medical staff who treated him.

For 11 months, while he was in custody at Lasalle, Mr. Dale's requests to see a dentist were repeatedly denied.

On August 25, 2009, Mr. Dale was transferred back to Oakdale. Oakdale is a federal detention center operated by the Bureau of Prisons (BOP). The Public Health Service (PHS) provides medical care to all detainees Oakdale. At all times relevant to this claim, as designated in Question 6, the care that Mr. Dale received fell below an ordinary standard of care, as required by federal and state law.

After his transfer, Oakdale medical staff admitted that the facility did not have the resources to address Mr. Dale's diabetic needs. DHS/ICE nevertheless refused to release him or to send him to a facility that did have the resources.

On at least six occasions, beginning in January 2009, Mr. Dale requested his release from custody, in part based on humanitarian grounds as a result of his worsening medical

condition. These requests (sent on the following dates: January 29, 2009; March 24, 2009; April 1, 2009; April 8, 2009; September 2, 2009; and March 23, 2010) were all rejected.

In approximately March 2010, Mr. Dale began to experience difficulty breathing. Because there is no medical staff at the Oakdale facility overnight, contrary to the National Detention Standards, Mr. Dale was only able to get medical relief during the day. On April 15, 2010, after one night of particularly difficult breathing, Mr. Dale requested to see the physician's assistant (PA). When he met with the PA, he mentioned that he had previously been on Prednisone while being held in detention at Lasalle and that this had helped his breathing. The PA refused to give Mr. Dale Prednisone, accused him of "using the hospital as an excuse to try get a vacation out of [Oakdale]," and asked him "why don't you just go home?"

On April 21, Mr. Dale again complained of difficulty breathing and was sent to Oakdale's medical facility, where he was treated with a nebulizer. While he was undergoing treatment, one of the PAs became verbally abusive toward Mr. Dale. He accused Mr. Dale of faking his condition and interrupted the treatment, pulling the nebulizer off Mr. Dale's face. He then pulled Mr. Dale into an office in the infirmary and continued to shout at Mr. Dale, telling him that there was nothing wrong with him, that he should "open [his] mouth and breathe." He then told Mr. Dale to go back to his cell and do push-ups. As the incident progressed, the PA advised Mr. Dale that he would "wipe [his] ass" with any complaint that Mr. Dale filed about the incident. Mr. Dale was then forced to wait in the medical facility for four hours to see the physician, contrary to National Detention Standards that require the detainees receive medical treatment in a timely manner. At one point, the medical facility's dentist asked the nurses on duty to attend to Mr. Dale. The nurses refused, indicating that they had been told not to touch him.

Mr. Dale was traumatized by the incident. The actions of medical staff at Oakdale caused him to experience extraordinary and unnecessary physical pain. These incidents also caused Mr. Dale severe mental and emotional distress, and put him at a heightened risk of future injury and illness. Afterward, he became afraid to request medical assistance, despite continued difficulty breathing, for fear of retaliation by medical facility staff. Plaintiff now has difficulty breathing normally without the assistance of medication or a nebulizer. Mr. Dale also experiences bouts of anxiety and depression as a result of the treatment he received.

Mr. Dale filed a complaint with ICE on April 21, 2010 over the incident. In DHS/ICE's May 4, 2010 response, Field Office Director Philip T. Miller dismissed the complaint as being "without merit."

Witness Names and Addresses (Question 11):

Oakdale Federal Detention Center
2105 East Whatley Road

Oakdale, LA 71463

Public Health Service
1101 Wootton Parkway, Plaza Level
Rockville, MD 20852

Phillip T. Miller
Field Office Director
Department of Homeland Security/Immigration and Customs Enforcement
1010 E. Whatley Road
Oakdale, LA 71463

Sherry Johnson
Deportation Officer
Department of Homeland Security/Immigration and Customs Enforcement
1010 E. Whatley Road
Oakdale, LA 71463

Terry Perkins
Deportation Officer
Department of Homeland Security/Immigration and Customs Enforcement
1010 E. Whatley Road
Oakdale, LA 71463

Matthew Reaves
Deportation Officer
Department of Homeland Security/Immigration and Customs Enforcement
1010 E. Whatley Road
Oakdale, LA 71463

Jamie Ballard
Acting Supervisory Detention and Deportation Officer
Department of Homeland Security/Immigration and Customs Enforcement
1010 E. Whatley Road
Oakdale, LA 71463

Joshua B. Stanton
Deputy Chief for Tort Litigation
Commercial & Administrative Law Division
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
500 12th Street SW, 9th Floor
Washington, DC 20024

Vanessa O. Lefort
Office of Immigration Litigation

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Jeffrey R. Leist
Office of immigration Litigation
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Jason Sickler
Regional Counsel
Federal Bureau of Prisons
CCM Dallas
Community Corrections Office

Exhibit B

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
500 12th Street SW
Washington, DC 20024

U.S. Immigration and Customs Enforcement

Certified Mail
Return Receipt Requested

July 13, 2011

Claudia Valenzuela
National Immigrant Justice Center
208 LaSalle Street
Suite 1818
Chicago, IL 60604

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARLYLE LESLIE OWEN DALE,

Plaintiff,

v. **Case No. 6:11-cv-1957-Orl-37GJK**

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER OF DISMISSAL WITH PREJUDICE

This cause is before the Court upon the Notice of Settlement filed July 9, 2013 (Doc 52). Accordingly, it is:

ORDERED AND ADJUDGED:

That the above-styled cause is hereby **DISMISSED WITH PREJUDICE,** subject to the right of any party to move the Court within sixty (60) days thereafter for the purpose of entering a stipulated form of final order or judgment; or, on good cause shown, to reopen the case for further proceedings. All pending motions are denied as moot. All hearings and deadlines are terminated.

The Clerk is hereby ordered to close this file.

DONE AND ORDERED at Orlando, Florida, this 10th day of July, 2013.

ROY B. DALTON, JR.
United States District Judge

Copies: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARLYLE LESLIE OWEN DALE,

Plaintiff,

v. **Case No: 6:11-cv-1957-Orl-37GJK**

USA,

Defendant.

ORDER

This cause came on for consideration, without oral argument, on the following motion:

MOTION:	**PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM DEFENDANT UNITED STATES OF AMERICA (Doc. No. 33)**
FILED:	**November 9, 2012**

THEREON it is **ORDERED** that the motion is **DENIED**.

I. BACKGROUND

On December 8, 2011, Plaintiff, Carlyle Leslie Owen Dale, filed a five count Complaint against Defendant, the United States of America. Doc. No. 1. Plaintiff alleges that he is a Jamaican national and lawful permanent resident of the United States. Doc. No. 1 at ¶ 2. Plaintiff alleges that he was imprisoned for four years in New York after pleading guilty to attempted assault. Doc. No. 1 at 4 ¶ 17. Plaintiff alleges that he was released from prison in 2005, and Immigration Customs Enforcement took him into custody and initiated removal proceedings. Doc. No. 1 at 4 ¶ 20.

Plaintiff alleges that he was detained at LaSalle Detention Facility (hereafter "LaSalle") beginning September 25, 2008, and the medical staff was aware he suffered from diabetes, chronic asthma, advanced arthritis, high blood pressure and pancreatitis. Doc. No. 1 at 6 ¶¶ 28, 30-31. Plaintiff alleges that he developed hepatitis C during his detention. Doc. No. 1 at 6 ¶ 32. Plaintiff alleges that he was hospitalized for sixteen days when, upon arriving, LaSalle staff stripped him of the warm clothing that helps alleviate his advanced arthritis and ignored his pleas for help. Doc. No. 1 at 7 ¶ 34. Plaintiff alleges that he was hospitalized for two weeks in November 2008, after a nurse determined that LaSalle medical staff allowed his blood sugar to rise to abnormally high levels. Doc. No. 1 at 7 ¶ 35. Plaintiff alleges that he was also treated for "acute diabetic ketoacidosis, acute pancreatitis, liver disease, congestive heart failure, cardiomyopathy, and emphysema." Doc. No. 1 at 7 ¶ 35.

Plaintiff alleges that, in March and April 2009, he was treated and hospitalized for an acute staphylococcus infection, necrotizing fasciitis and cellulitis that was contracted from the "unsanitary and medically dangerous conditions at LaSalle." Doc. No. 1 at 7 ¶¶ 36-37. Plaintiff alleges that he was hospitalized in June 2009, and treated for a severe asthma attack, diabetes, hypertension, chronic obstructive pulmonary disease and right side heart failure. Doc. No. 1 at 8 ¶ 38. Plaintiff alleges that in July 2009, he was placed in solitary confinement due to a suspected swine flu outbreak. Doc. No. 1 at 8 ¶ 39. Plaintiff alleges that his limbs were swollen to twice their normal size due to his medications and fluids, but he received no medical care over the Fourth of July weekend because the infirmary's treating doctor insisted on taking a vacation. Doc. No. 1 at 8 ¶ 39. Plaintiff alleges that his requests for treatment of severe tooth pain were refused. Doc. No. 1 at 8 ¶ 40. Plaintiff alleges that his health deteriorated and he developed depression as a result of his illnesses and hospitalizations. Doc. No. 1 at 8-9 ¶ 41.

Plaintiff alleges that, in August 2009, he was transferred to Oakdale Federal Detention Center (hereafter "Oakdale"). Doc. No. 1 at 9 ¶ 43. Plaintiff alleges that Oakdale staff knew of his medical conditions. Doc. No. 1 at 6 ¶¶ 30-31. Plaintiff alleges that in early 2010, he suffered sudden respiratory problems that made it difficult for him to breath. Doc. No. 1 at 9 ¶ 45. Plaintiff alleges that he endured "pain and suffering" for several hours because Oakdale does not staff overnight emergency medical personnel. Doc. No. 1 at 9 ¶ 45. Plaintiff alleges that in April 2010, he asked to be examined by a physician's assistant after having extreme difficulty breathing. Doc. No. 1 at 9 ¶ 46. Plaintiff alleges that the physician's assistant refused to prescribe any medication, provide other assistance and mocked him. Doc. No. 1 at 9-10 ¶ 47.

Plaintiff alleges that in April 2010, he once again experienced breathing difficulties and was being treated with a nebulizer when Mr. Shalloby, a physician's assistant, accused him of malingering and removed the nebulizer. Doc. No. 1 at 10 ¶ 48. Plaintiff alleges that Mr. Shalloby took him to an adjacent office, berated him, refused to provide the nebulizer and threatened to destroy any complaint Plaintiff filed. Doc. No. 1 at 10 ¶¶ 49-50. Plaintiff alleges that he waited four hours to see a physician and, while waiting, Oakdale nurses refused to treat him because they were ordered not to treat or touch Plaintiff. Doc. No. 1 at 10-11 ¶ 51-52.

Plaintiff alleges that he suffered other asthmatic episodes and the Oakdale staff was slow to respond and berated him. Doc. No. 1 at 11 ¶ 54. Plaintiff alleges that he began having difficulty breathing while at the immigration courthouse and while being treated, Mr. Berkenholtz, a physician's assistant, verbally abused him, belittled him and told him that it would be useless to file a complaint. Doc. No. 1 at 11 ¶¶ 54-55.

Plaintiff alleges that he waited days to be seen by a physician's assistant and four weeks to be seen by a doctor after developing a severe staphylococcus infection. Doc. No. 1 at 12 ¶¶

56-57. While waiting for treatment, Plaintiff alleges that his left foot and leg were swollen and inflamed, and he was told that the infection could have resulted in amputation or death. Doc. No. 1 at 12 ¶ 57. Plaintiff alleges that the deficient care at Lasalle and Oakdale has resulted in difficulty breathing without a nebulizer or medication, an inability to sleep, heightened risk of future illnesses, as well as severe anxiety and depression. Doc. No. 1 at 12 ¶ 58.

Plaintiff alleges that LaSalle and Oakdale violated the detention standards governing both facilities. Doc. No. 1 at 13 ¶¶ 60-63. As a result of the allegedly deficient medical care he received, Plaintiff asserts claims for medical malpractice, negligence, gross negligence, intentional infliction of emotional distress and negligent infliction of emotional distress. Doc. No. 1 at 13, 18-19, 21, 23. On March 16, 2012, Defendant filed its answer and affirmative defenses. Doc. No. 20.

On May 17, 2012, Plaintiff served a request for production on Defendant, seeking twenty-two categories of documents. Doc. Nos. 33 at 2 ¶ 1; 33-5. Defendant has served some responsive documents, but has either not provided or provided limited documents concerning requests 17-19. Doc. No. 33 at 2-3 ¶¶ 2, 5. On November 9, 2012, Plaintiff moved to compel (hereafter "Motion") Defendant to produce documents that are responsive to requests 17-19. Doc. No. 33.[1] On November 21, 2012, Defendant filed its response. Doc. No. 34.

II. LAW

Parties may obtain discovery on "any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). A party is entitled to the facts relevant to the

[1] Although Plaintiff represents that he complied with Local Rule 3.01(g) prior to filing the Motion, it is clear that Plaintiff "conferred" with Defendant via correspondence. Doc. No. 33 at 2-4, 8. Local Rule 3.01(g)'s requirement to confer prior to filing a motion is only fulfilled when the moving party has a "substantive conversation *in person or by telephone*;" exchanging faxes, e-mails or letters is insufficient. *See* Doc. No. 24 at 4 (emphasis in original). The Court will deny all future motions that do not strictly comply with Local Rule 3.01(g).

litigation. *Dunkin' Donuts, Inc. v. Mary's Donuts, Inc.*, 206 F.R.D. 518, 520 (S.D. Fla. 2002). The party seeking discovery has the threshold burden of demonstrating that the discovery requested is relevant. *Zorn v. Principal Life Ins. Co.*, 2010 WL 3282982 at *2 (S.D. Ga. Aug. 18, 2010) (citing *Canada v. Hotel Development-Texas, Ltd.*, 2008 WL 3171940 at *1 (N.D. Tex. July 30, 2008)). Relevant information need not be admissible at trial, but rather discovery must be "reasonably calculated to lead to the discovery of admissible evidence." *Id.*[2]

"The discovery process is designed to fully inform the parties of the relevant facts involved in their case." *U.S. v. Pepper's Steel & Alloys, Inc.*, 132 F.R.D. 695, 698 (S.D. Fla. 1990) (*referencing Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). "[A] party demanding discovery is required to set forth its requests simply, directly, not vaguely or ambiguously. . . ." *Treister v. PNC Bank*, 2007 WL 521935 at *2 (S.D. Fla. Feb. 15, 2007). Similarly, "[i]t is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence." *Dollar v. Long Mfg., N.C.,* Inc., 561 F.2d 613, 616 (11th Cir. 1977); *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 179-80 (1989); Fed. R. Civ. P. 26(b).

Rule 34, Federal Rules of Civil Procedure, provides that a party may serve a request to produce documents upon another party that are within that party's "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). "Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand." *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984). A request to produce pursuant to Rule 34 "must describe with reasonable

[2] Demonstrating relevance progresses in layers. "When the discovery sought appears relevant on its face, the party resisting it must show the lack of relevance by demonstrating that it: (1) does not come within the broad scope of relevance as defined under discovery rule; or (2) is of such marginal relevance that the potential harm the discovery may cause would outweigh the presumption in favor of broad disclosure. When relevancy of a discovery request is not apparent on the face of the request, then the party seeking discovery has the burden to show its relevancy." *Zorn*, 2010 WL 3282982 at *2 n. 3 (S.D. Ga. Aug. 18, 2010) (citing *Transcor, Inc. v. Furney Charters, Inc.*, 212 F.R.D. 588, 591 (D. Kan. 2003)).

particularity each item or category of items to be inspected." *Id.* The Handbook on Civil Discovery Practice in the United States District Court for the Middle District of Florida (hereafter "Handbook") similarly provides that a request for documents "should be clear, concise, and reasonably particularized." Middle District Discovery (2001) at 10, III.A.1.

When responding to a request for documents, "the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." Fed. R. Civ. P. 34(b)(2)(B). If the responding party objects to part of the request, the responding party "must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(C). The Handbook further provides that "[w]hen the scope of the document production is narrowed by one or more objections, this fact and the nature of the documents withheld should be asserted explicitly." Middle District Discovery (2001) at 11, III.A.7. A party that objects to a request as overbroad, when a narrower version would not be objectionable, should ordinarily produce documents responsive to the narrower version "without waiting for a resolution of the dispute over the scope of the request. When production is limited by a party's objection, the producing party should clearly describe the limitation in its response." Middle District Discovery (2001) at 11, III.A.8. The party producing documents "shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request . . . ." Fed. R. Civ. P. 34(b)(i).

A party who fails to assert objections to discovery within the time permitted by the rule, stipulation or court order, waives any objections and is precluded "from asserting the objection in a response to a motion to compel." *Id.* Furthermore, if a party objects to a discovery request, but then responds to the request without complying with the aforementioned rules allowing a clearly defined partial response, the party is deemed to have waived its objection. *See Sewell v.*

D'Alessandro & Woodyard, Inc., 2011 WL 1232347 at *2 (M.D. Fla. Mar. 30, 2011) (noting that courts deem an objection waived when it is accompanied by a response); *Riley v. United Air Lines, Inc.*, 32 F.R.D. 230, 234 (S.D.N.Y. 1962); *Meese v. Eaton Mfg. Co.*, 35 F.R.D. 162, 166 (N.D. Ohio 1964) ("Whenever an answer accompanies an objection, the objection is deemed waived and the answer, if responsive, stands."). Even if a party has waived its objections by voluntarily answering or clearly delineating its partial response, the court may still deny a motion to compel when the discovery request exceeds the bounds of fair discovery. *See Fifty-Six Hope Road Music, Ltd. v. Mayah Collections, Inc.*, 2007 WL 1726558 at *4 (D. Nev. June 11, 2007); *Carfagno v. Jackson Nat'l Life Ins. Co.*, 2001 WL 34059032 at *1 (W.D. Mich. Feb. 13, 2001); *Kolenc v. Bellizzi*, 1999 WL 92604 at *3 (S.D.N.Y. Feb. 22, 1999).

"Objections which state that a discovery request is 'vague, overly broad, or unduly burdensome' are, by themselves, meaningless, and are deemed without merit by this Court." *Milinazzo v. State Farm Ins. Co.*, 2007 WL 4350865 at 2 (S.D. Fla. 2007) (citing *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) ("[T]he mere statement by a party that the interrogatory was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection to an interrogatory.")). The party objecting to the discovery request has the burden to explain with specificity why the request is unduly burdensome, vague, or overly broad. *Id.*

III. ANALYSIS

Plaintiff requests the Court compel Defendant to produce documents that are responsive to Request Nos. 17-19. Doc. No. 33 at 7-8. **Request No. 17** seeks the following documents:

> All documents concerning any complaints made by detainees, prisoners, patients, co-workers, or any other person, entity or agency against Mr. Bergenholtz and/or Mr. Shalabi, Physician's Assistants at Oakdale, or anyone else who treated Plaintiff,

> including without limitation documents concerning any resulting investigations or findings.

Doc. No. 33 at 7 (emphasis added). Thus, Plaintiff requests Defendant produce all documents concerning any complaints against Messrs. Bergenholtz, Shalabi or other person who treated Plaintiff.

Defendant objected to Request No. 17 as being irrelevant, overbroad, vague and unduly burdensome. Doc. No. 33 at 7. Defendant indicated that complaints are organized by inmate, not staff member, and a search for responsive documents would require searching every inmate's file. Doc. No. 33 at 7. These objections notwithstanding, Defendant stated it would allow "inspection and copying of the redacted 'SIS' files on PA's Bergenholtz and Shalabi. The 'SIS' files include allegations of staff misconduct." Doc. No. 33 at 8. In its response to the Motion, Defendant indicates that it produced the "complaint files of Bergenholtz and Shalabi concerning the complaints filed against those staff members by Plaintiff." Doc. No. 34 at 4.

Request No. 17 is overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the Motion is **DENIED as to Request No. 17**.

Request No. 18 seeks the following documents:

> Copies of any employee files relating to the employment of Mr. Bergenholtz and Mr. Shalabi at Oakdale or any other facility under the operation of the Federal Bureau of Prisons.

Doc. No. 33 at 8. Thus, Plaintiff seeks Messrs. Bergenholtz and Shalabi's employee files relating to employment at Oakdale or other facility owned by the Federal Bureau of Prisons. Defendant objected on the basis that this request is vague, seeks irrelevant information and includes documents that are protected from disclosure pursuant to the Privacy Act. Doc. No. 33 at 8.

Request No. 18 is overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the Motion is **DENIED as to Request No. 18**.

Request No. 19 seeks the following documents:

> All documents concerning any discipline or termination of Mr. Bergenholtz, Mr. Shalabi, and/or anyone else who treated Plaintiff.

Doc. No. 33 at 8. Thus, Plaintiff seeks all documents concerning the discipline or termination of Mr. Bergenholtz, Shalabi or other person who treated Plaintiff. Defendant lodged the same objections as those raised to Request No. 18, but stated that it would permit "inspection and copying of any 'discipline or termination' files concerning PA Bergenholtz and Shalabi that concern Plaintiff, if such documents exist." Doc. No. 33 at 8. In its response to the Motion, Defendant represents that it produced the complaints Plaintiff filed against Messrs. Bergenholtz and Shalabi. Doc. No. 34 at 7.

Request No. 19 is overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the Motion is **DENIED as to Request No. 19**.

Based on the foregoing, the Motion is **DENIED**.

DONE and **ORDERED** in Orlando, Florida on December 3, 2012.

GREGORY J. KELLY
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARLYLE LESLIE OWEN DALE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 6:11-cv-1957-Orl-37GJK Hon. Roy B. Dalton, Jr.

STIPULATED CONFIDENTIALITY AGREEMENT

The parties having agreed and stipulated hereto, **IT IS HEREBY AGREED:**

1. All documents produced by the parties to this litigation are produced subject to this Agreement, and are hereby designated "Confidential Information."

2. For the purposes of this Agreement, "Confidential Information," shall include, but is not limited to, portions of personnel files for current or former government employees or agents, other personnel-related information, disciplinary files, financial records, medical records, detention records, training manuals and materials, investigative files, investigative analysis, reports and related materials, statements of individuals, internal memoranda and any other records that contain confidential or sensitive information.

3. In particular, "Confidential Information" also includes any records produced by a HIPAA covered entity, as defined by 45 C.F.R. 160.103, which has received a request or subpoena for protected health information from one of the parties to this litigation.

4. All Confidential Information disclosed by any entity, including but not limited to Plaintiff's health care providers, shall be used for the sole purpose of preparing for and conducting this litigation, including but not limited to investigation, consultation, discovery, depositions, trial preparation, trial, appeal, resolution, mediation, or uses incidental to the proceeding in this case and shall not be disclosed or revealed to anyone not authorized by this Agreement.

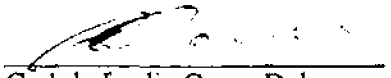
5. All Confidential Information may be disclosed without further notice by any covered entity or healthcare provider, party, or party's attorney, to:

a. The parties themselves, parties' attorneys, experts, consultants, any witness or other person retained or called by the parties, treating physicians, other healthcare providers, insurance carriers, or other entities from whom damages, compensation, or indemnity is sought and any entity performing, monitoring, or adjustment activities on behalf of such insurance carrier or other entity and/or their employees, agents, or third party administrators for any of the parties involved in the litigation; in any proceeding for health oversight activities as permitted under 45 C.F.R. 164.512, court reporters, copy services, other similar vendors to the parties and their attorneys, as well as the professional and support staff of the above.

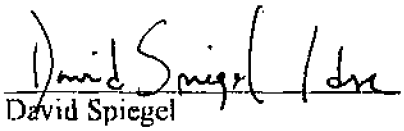
6. The parties, and each entity governed by this Agreement, shall either (i) destroy, or (ii) return to the entity who originally produced it, all Confidential Information, including all copies made; provided, however, that said protected Confidential Information may be retained in the files of the entities listed in paragraph (5)(a) above and may be destroyed pursuant to their regular file-retention policies so long as the Confidential Information is maintained in a secure environment.

7. No party shall file a document under seal without first having obtained an order granting leave to file under seal on a showing of particularized need.

AGREED:



Carlyle Leslie Owen Dale
Plaintiff



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501 W. Church St., Ste. 300
Orlando, FL 32805

Dated:_____

United States District Court
Middle District of Florida
Orlando Division

CARLYLE LESLIE OWEN DALE,

Case No. 6:11-cv-1957-J-37GJK

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.
_____ /

CASE MANAGEMENT AND SCHEDULING ORDER

Having considered the case management report prepared by the parties, *see* Fed. R. Civ. P. 26 (f) and Local Rule 3.05 (c), the Court enters this case management and scheduling order:

Mandatory Initial Disclosures (pursuant to Fed. R. Civ. P. 26(a)(1) as amended effective December 1, 2010)		immediately
Certificate of Interested Persons and Corporate Disclosure Statement		completed
Motions to Add Parties or to Amend Pleadings		July 18, 2012
Disclosure of Expert Reports	Plaintiff: Defendant:	November 2, 2012 December 17, 2012
Discovery Deadline		February 1, 2013
Dispositive Motions, *Daubert*, and *Markman* Motions		March 1, 2013
Meeting *In Person* to Prepare Joint Final Pretrial Statement		July 1, 2013
Joint Final Pretrial Statement (*Including* a Single Set of Jointly Proposed Jury Instructions and Verdict Form, also sent to Chamber's email [chambers_flmd_Dalton@flmd.uscourts.gov] in Microsoft Word®, Voir Dire Questions, Witnesses Lists, Exhibit Lists on Approved Form.); Trial Briefs		July 11, 2013

All Other Motions Including Motions *In Limine* (MULTIPLE MOTIONS IN LIMINE ARE NOT FAVORED. ALL REQUESTS TO LIMIT EVIDENCE SHALL THEREFORE BE INCLUDED IN A SINGLE MOTION NOT TO EXCEED 25 PAGES WITHOUT LEAVE OF COURT. RESPONSES ARE LIMITED TO 20 PAGES WITHOUT LEAVE OF COURT.)	June 27, 2013
Final Pretrial Conference	July 18, 2013 at 8:45 a.m.
Trial Term Begins	August 5, 2013 at 9:00 a.m.
Estimated Length of Trial	5 - 7 days
Jury/Non Jury	Non-Jury
Mediation Deadline: Mediator: Designated Lead Counsel shall contact opposing Address: counsel and the mediator to reserve a conference date and shall file a Notice with the Court within fourteen days of the date of this Order advising of the date. Telephone:	February 22, 2013 To Be Determined
Designated Lead Counsel Attorney Name: Pursuant to Local Rule 9.04(a)(3) Lead Counsel Telephone Number Telephone Number:	Lana Chiariello 305-573-1106

The purpose of this order is to discourage wasteful pretrial activities, and to secure the just, speedy, and inexpensive determination of the action. *See* Fed. R. Civ. P. 1; Local Rule 1.01(b). This order controls the subsequent course of this proceeding. Fed. R. Civ. P. 16(b), (e). Counsel and all parties (both represented and *pro se*) shall comply with this order, with the Federal Rules of Civil Procedure, with the Local Rules of the United States District Court for the Middle District of Florida, and with the Administrative Procedures for Case Management/Electronic Case Filing. A copy of the Local Rules and Administrative Procedures may be viewed at http://www.flmd.uscourts.gov. Counsel shall also comply with the *Ideals and Goals of Professionalism* adopted by the Board of

Governors of the Florida Bar on May 16, 1990 available at www.floridabar.org

(Professional Practice-Henry Latimer Center for Professionalism); Local Rule 2.04(g).

I. DISCOVERY

A. Certificate of Interested Persons and Corporate Disclosure Statement – This Court has previously ordered each party, governmental party, intervenor, non-party movant, and Rule 69 garnishee to file and serve a Certificate of Interested Persons and Corporate Disclosure Statement using a mandatory form. No party may seek discovery from any source before filing and serving a Certificate of Interested Persons and Corporate Disclosure Statement. A motion, memorandum, response, or other paper – including emergency motion – may be denied or stricken unless the filing party has previously filed and served a Certificate of Interested Persons and Corporate Disclosure Statement. Any party who has not already filed and served the required certificate shall do so within the time required by this order, or sanctions will be imposed.

B. Discovery Not Filed – The parties shall not file discovery materials with the Clerk except as provided in Local Rule 3.03. The Court encourages the exchange of discovery requests on diskette or by email. *See* Local Rule 3.03(e).

C. Limits on Discovery – Absent leave of Court, the parties may take no more than ten depositions per side (not per party). Fed. R. Civ. P. 30(a)(2)(A); Fed. R. Civ. P. 31(a)(2)(A). Absent leave of Court, the parties may serve no more than twenty-five interrogatories, including sub-parts. Fed. R. Civ. P. 33(a). Absent leave of the Court or stipulation by the parties, each deposition is limited to one day of seven hours. Fed. R. Civ. P. 30(d)(2). The parties may agree by stipulation on other limits on discovery within the context of the limits and deadlines established by this Case Management and Scheduling Order, but the parties may not alter the terms of this Order without leave of Court. *See, e.g.*, Fed. R. Civ. P. 29.

D. Discovery Deadline – Each party shall timely serve discovery requests so that the Rules allow for a response prior to the discovery deadline. The Court may deny as untimely all motions to compel filed after the discovery deadline.

E. Disclosure of Expert Testimony – On or before the date set forth in the above table for the disclosure of expert reports, the party shall fully comply with Fed. R. Civ. P. 26(a)(2) and 26(e). Expert testimony on direct examination at trial will be limited to the opinions, bases, reasons, data, and other information disclosed in the written expert report disclosed pursuant to this Order. Failure to disclose such information may result in the exclusion of all or part of the testimony of the expert witness.

F. Confidentiality Agreements – The parties may reach their own agreement regarding the designation of materials as "confidential." There is no need for the Court to

endorse the confidentiality agreement. The Court discourages unnecessary stipulated motions for a protective order. The Court will enforce stipulated and signed confidentiality agreements. *See* Local Rule 4.15. Each confidentiality agreement or order shall provide, or shall be deemed to provide, that "no party shall file a document under seal without first having obtained an order granting leave to file under seal on a showing of particularized need." *See also* "Motions to File Under Seal" below.

II. MOTIONS

A. Certificate of Good Faith Conference – *Before filing any motion in a civil case, the moving party shall* ***confer*** *with the opposing party in a good faith effort to resolve the issues raised by the motion, and shall file with the motion a statement certifying that the moving party has* ***conferred*** *with the opposing party, and that the parties have been unable to agree on the resolution of the motion.* Local Rule 3.01(g); Fed. R. Civ. P. 26(c). A certification to the effect that opposing counsel was unavailable for a conference before filing a motion is insufficient to satisfy the parties' obligation to confer. *See* Local Rule 3.01(g). No certificate is required in a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, or to involuntarily dismiss an action. Local Rule 3.01(g). Nonetheless, the Court expects that a party alleging that a pleading fails to state a claim will confer with counsel for the opposing party before moving to dismiss and will agree to an order permitting the filing of a curative amended pleading. Fed. R. Civ. P. 15. The term "counsel" in Rule 3.01(g) includes *pro se* parties acting as their own counsel, thus requiring movants to confer with *pro se* parties and requiring *pro se* movants to file Rule 3.01(g) certificates. The term "confer" in Rule 3.01(g) requires a substantive conversation *in person or by telephone* in a good faith effort to resolve the motion without court action and does not envision an exchange of ultimatums by fax, letter or email. Counsel who merely "attempt" to confer have not "conferred." Counsel must respond promptly to inquiries and communications from opposing counsel. Board of Governors of the Florida Bar, *Ideals and Goals of Professionalism*, ¶ 6.10 and *Creed of Professionalism* ¶ 8 (adopted May 16, 1990), available at www.floridabar.org (Professional Practice-Henry Latimer Center for Professionalism.) The Court will deny motions that fail to include an appropriate, complete Rule 3.01(g) certificate.

B. Extension of Deadlines

The deadlines established in this Case Management and Scheduling Order are not advisory but must be complied with absent approval of the Court.

1. Dispositive Motions Deadline and Trial Not Extended – Motions to extend the dispositive motions deadline or to continue the trial are generally denied. *See* Local Rule 3.05(c)(2)(E). The Court will grant an exception only when necessary to

prevent manifest injustice. A motion for a continuance of the trial is subject to denial if it fails to comply with Local Rule 3.09. The Court cannot extend a dispositive motion deadline to the eve of trial. In light of the district court's heavy trial calender, at least four months are required before trial to receive memoranda in opposition to a motion for summary judgment, and to research and resolve the dispositive motion.

2. Extensions of Other Deadlines Disfavored – Motions for an extension of other deadlines established in this order, including motions for an extension of the discovery period, are disfavored. The deadline will not be extended absent a showing of good cause. Fed. R. Civ. P. 16(b); Local Rule 3.09(a). Failure to complete discovery within the time established by this Order shall not constitute cause for continuance. A motion to extend an established deadline normally will be denied if the motion fails to recite that: 1) the motion is joint or unopposed; 2) the additional discovery is necessary for specified reasons; 3) all parties agree that the extension will not affect the dispositive motions deadline and trial date; 4) all parties agree that any discovery conducted after the dispositive motions date established in this Order will not be available for summary judgment purposes; and 5) no party will use the granting of the extension in support of a motion to extend another date or deadline. The filing of a motion for extension of time does not toll the time for compliance with deadlines established by Rule or Order.

C. Motions to Compel and for Protective Order – Motions to compel and motions for a protective order will be denied unless the motion fully complies with Local Rule 3.04, requiring the motion to quote in full each interrogatory, question, or request; to quote in full opposing party's objection and grounds, or response which is asserted to be insufficient; and to state the reasons the motion should be granted.

D. Motions to File Under Seal – Whether documents filed in a case may be filed under seal is a separate issue from whether the parties may agree that produced documents are confidential. Motions to file under seal are disfavored, and such motions will be denied unless they comply with Local Rule 1.09.

E. Memoranda in Opposition – Each party opposing any written motion, except a motion for summary judgment under Section II H below, shall file and serve, within fourteen days after being served with such motion, a legal memorandum with citation of authorities in opposition to the relief requested. Local Rule 3.01(b). Where no memorandum in opposition has been filed, the Court routinely grants the motion as unopposed. Motions titled as "unopposed" or "agreed" normally come to the Court's attention prior to the deadline for response.

F. Emergency Motions – The Court may consider and determine emergency motions at any time. Local Rule 3.01(e). Counsel should be aware that the designation "emergency" may cause a judge to abandon other pending matters in order to immediately address the "emergency." The Court will sanction any counsel or party who

designates a motion as "emergency" under circumstances that are not a true emergency. It is not an emergency when counsel has delayed discovery until the end of the discovery period. Promptly after filing an emergency motion, counsel shall place a telephone call to the chambers of the presiding judge to notify the court that an emergency motion has been filed.

G. Page Limits - No party shall file a motion and supporting memorandum in excess of twenty-five pages. Local Rule 3.01(a). No party shall file an opposing brief or memorandum in excess of twenty pages. Local Rule 3.01(b). A motion requesting leave to file either a motion in excess of twenty-five (25) pages, a response in excess of twenty (20) pages, or a reply or further memorandum shall not exceed three (3) pages, shall specify the length of the proposed filing, and shall not include, as an attachment or otherwise, the proposed motion, response, reply, or other paper. Local Rule 3.01(d). Motions for relief from page limitations are disfavored and will not be granted without a specific showing of good cause.

H. Motions for Summary Judgment

1. Required Materials – A motion for summary judgment shall specify the material facts as to which the moving party contends there is no genuine issue for trial, and shall include a memorandum of law, and shall be accompanied by affidavits and other evidence in the form required by Fed. R. Civ. P. 56. The motion for summary judgment and supporting memorandum of law shall be presented in a single document of not more than twenty-five pages. Local Rule 3.01(a). Each party opposing a motion for summary judgment shall serve, within **thirty** days after being served with such motion, a legal memorandum with citation of authorities in opposition to the relief requested as required by Local Rule 3.01(b) of not more than twenty pages. The memorandum in opposition shall specify the material facts as to which the opposing party contends there exists a genuine issue for trial, and shall be accompanied by affidavit(s) and other evidence in the form required by Fed. R. Civ. P. 56. The moving party may file a reply memorandum, not exceeding ten pages, within **fourteen** days after the response is served. Both the movant and the party opposing summary judgment shall provide pinpoint citations to the pages and lines of the record supporting each material fact. General references to a deposition are inadequate. On or before the date on which the memorandum in opposition is due, the parties may also file a stipulation of agreed material facts signed by the movant and the parties opposing summary judgment pursuant to Local Rule 4.15. Material facts set forth in the stipulation will be deemed admitted for the purposes of the motion.

2. Under Advisement – The Court takes a motion for summary judgment under advisement **forty-five** days from the date it is served, unless the Court orders a different date. Unless specifically ordered, the Court will not hold a hearing on the motion. Failure to oppose any motion for summary judgment may result in the entry of a judgment for the movant without further proceedings. *See Milburn v. United States*,

734 F.2d 762, 765 (11th Cir. 1984); *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) (*per curiam*); Fed.R.Civ.P. 56 (e). All requirements in this Order apply to *pro se* litigants as well as to parties represented by counsel.

I. **Daubert and Markman Motions** – On or before the date established in the above table for the filing of motions for summary judgment, any party seeking a ruling pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (admissibility of expert opinions) or pursuant to *Markman v. Westview Instruments, Inc.*, 517 U.S.370 (1996) (interpretation of a patent claim) shall file and serve an appropriate motion. The parties shall prepare a glossary of technical or scientific terms where appropriate for the Court.

J. All Other Motions Including Motions *In Limine* – On or before the date established in the above table, the parties shall file and serve all other motions including motions *in limine*. Local Rule 3.01(g) applies, and the parties shall confer to define and limit the issues in dispute.

III. JOINT FINAL PRETRIAL STATEMENT

A. Meeting *In Person* – On or before the date established in the above table, **lead trial counsel** for all parties and any **unrepresented parties** shall meet together ***in person*** pursuant to Local Rule 3.06(b) in a good faith effort to:

1. settle the case; the parties shall thoroughly and exhaustively discuss settlement of the action before undertaking the extensive efforts needed to conduct final preparation of the case for trial and to comply with the requirements of this order;

2. stipulate to as many facts and issues as possible; in order to assist the Court, the parties shall make an active and substantial effort to stipulate at length and in detail as to agreed facts and law, and to limit, narrow, and simplify the issues of fact and law that remain contested; as a rule, parties who have complied with this requirement in good faith will file a Joint Final Pretrial Statement listing far more agreed facts and principles of law than those that remain for determination at trial;

3. tag, mark, identify, examine, copy, and list all original trial exhibits (including actual document exhibits) that any party will offer in evidence or otherwise tender to any witness during trial [Local Rule 3.06(b)(3) and 3.07(a)] (instructions for pre-marking of exhibits attached to this order); and prepare and exchange a final exhibit list on the Clerk's approved form (attached to this order) bearing a description identifying each exhibit and sponsoring witness [Local Rule 3.07(b)]; it is anticipated that counsel will agree to the admission of the bulk of the opposing parties' exhibits without objection and shall designate on the exhibit list the exhibits which the Court may admit without objection at trial. Absent good cause, the Court will **not** receive in evidence over

objection any exhibits – including charts, diagrams, and demonstrative evidence – not presented to opposing counsel or unrepresented parties for inspection and copying at the required meeting or not listed in the joint final pretrial statement. Photographs of sensitive exhibits (*i.e.*, guns, drugs, valuables) and of non-documentary evidence, and reductions of documentary exhibits larger than 8 ½" by 14" to be substituted for original exhibits after conclusion of the trial must be presented to opposing counsel for examination at the meeting to prepare the Joint Final Pretrial Statement. Objections to such photographs or reductions of exhibits must be listed in the Joint Final Pretrial Statement. The parties are advised that the design of certain courtrooms may preclude the use of large exhibits and posters in a jury trial. The parties are directed to contact the trial judge's courtroom deputy clerk to discuss exhibits and equipment to be used during trial; and

4. exchange the names and addresses of all witnesses and state whether they will likely be called.

B. The Joint Final Pretrial Statement

1. Form of Joint Final Pretrial Statement – On or before the date established in the above table, the parties shall file a Joint Final Pretrial Statement that strictly conforms to the requirements of Local Rule 3.06(c) and this Order. **This case must be fully ready for trial at the time that the Joint Final Pretrial Statement is due.** Lead trial counsel for all parties, or the parties themselves if unrepresented, shall sign the Joint Final Pretrial Statement. The Court will strike pretrial statements that are unilateral, incompletely executed, or otherwise incomplete. Inadequate stipulations of fact and law will be stricken. Sanctions may be imposed for failure to comply, including the striking of pleadings. At the conclusion of the final pretrial conference, all pleadings are deemed to merge into the Joint Final Pretrial Statement, which will control the course of the trial. Local Rule 3.06(e).

2. Exhibit List – The exhibit list filed in compliance with Local Rules 3.06(c)(4) and 3.07(b) must be on the Clerk's approved form (attached to this order). Unlisted exhibits will not be received into evidence at trial, except by order of the Court in the furtherance of justice. See Local Rule 3.06(e). The Joint Final Pretrial Statement must attach each party's exhibit list on the approved form listing each *specific* objection ("all objections reserved" does *not* suffice) to each numbered exhibit that remains after full discussion and stipulation. Objections not made – or not made with specificity – are waived.

Ten (10) days prior to trial, the parties shall exchange a list of those exhibits they definitely intend to introduce in evidence at trial (the "A" list), and a list of those exhibits they may seek to introduce at trial (the "B" list). Benchbooks containing the "A" exhibits shall be supplied to the Court (these are the original exhibits which include the appropriate colored exhibit tags stapled to the upper right hand corner of the first page -

tags can be found at the bottom of this web-page), for the Judge and Witness Box at the outset of the trial, together with an index and matrix reflecting any objections thereto. The bench and witness sets do not require the exhibits tags however counsel shall use number tabs to tab out the exhibits for quick reference. All exhibits on the "A" list of the presenting party which are not objected to shall be introduced and admitted at the outset of that party's case. All exhibits shall be numbered consecutively, preferably with the "A" list exhibits being numbered first.

To avoid duplication of exhibits and to prevent confusion in the record, the parties are encouraged to submit all stipulated exhibits as joint exhibits in a single list rather than individually marked by each party. For example, if medical records or contract documents are being stipulated into evidence they should be marked as a Joint exhibit and not listed separately by both (all) parties. Each parties individual exhibit list would then include only those additional exhibits to which objections have been asserted with the specific objection noted on the exhibit tag.

3. Witness List – On the witness list required by Local Rule 3.06(c)(5), the parties and counsel shall designate which witnesses will definitely be called (the "A" List), and also designate which witnesses may be called (the "B" List). Absent good cause, the Court will not permit over objection testimony from unlisted witnesses at trial. This restriction does not apply to true rebuttal witnesses (*i.e.*, witnesses whose testimony could not reasonably have been foreseen to be necessary). Records custodians may be listed but will not likely be called at trial, except in the rare event that authenticity or foundation is contested. For good cause shown in compelling circumstances, the Court may permit presentation of testimony in open court by contemporaneous transmission from a different location. Fed.R.Civ.P. 43(a).

4. Depositions – The Court encourages stipulations of fact to avoid calling unnecessary witnesses. Where a stipulation will not suffice, the Court permits the use of depositions. At the required meeting, counsel and unrepresented parties shall agree upon and specify in writing in the Joint Final Pretrial Statement the pages and lines of each deposition (except where used solely for impeachment) to be published to the trier of fact. The parties shall include in the Joint Final Pretrial Statement a page-and-line description of any testimony that remains in dispute after an active and substantial effort at resolution, together with argument and authority for each party's position. The parties shall prepare for submission and consideration at the final pretrial conference or trial an edited and marked copy (as to the portion offered by each party) of any deposition or deposition excerpt which is to be offered in evidence.

Five (5) days prior to trial, the parties shall file with the Court color-coded copies of deposition transcripts (preferably mini-script versions), reflecting, in different highlighted colors, the deposition excerpts designated by each party to be read at trial, with objections noted in the margin. Unresolved objections to videotape depositions shall be submitted to the Court ten (10) days prior to trial.

5. Joint Jury Instructions, Verdict Form, Voir Dire Questions – In cases to be tried before a jury, the parties shall attach to the Joint Final Pretrial Statement **a single jointly-proposed set of jury instructions in order of presentation to the jury**, together with a single jointly-proposed jury verdict form. Local Rule 5.01(c). The parties should be considerate of their jury, and therefore should submit short, concise special verdict forms. The Court prefers pattern jury instructions approved by the United States Court of Appeals for the Eleventh Circuit. A party may include at the appropriate place in the single set of jointly-proposed jury instructions a contested charge, so designated with the name of the requesting party and bearing at the bottom a citation of authority for its inclusion, together with a summary of the opposing party's objection. The Court will deny outright a proposed instruction that is "slanted" in any way. The Court requires that the parties, send to the Chamber's email [chambers_flmd_Dalton@flmd.uscourts.gov] **the single set of jury instructions and verdict form, in Microsoft Word®**. The parties may include in the Joint Final Pretrial Statement a single list of jointly-proposed questions for the Court to ask the venire during voir dire.

C. Coordination of Joint Final Pretrial Statement – All parties are responsible for filing a Joint Final Pretrial Statement in full compliance with this order. Plaintiff's counsel (or plaintiff if all parties are proceeding *pro se*) shall have the *primary* responsibility to coordinate compliance with the sections of this order that require a meeting of lead trial counsel and unrepresented parties in person and the filing of a Joint Final Pretrial Statement and related material. *See* Local Rule 3.10 (relating to failure to prosecute). If the plaintiff is proceeding *pro se*, defense counsel shall coordinate compliance. If counsel is unable to coordinate such compliance, counsel shall timely notify the Court by written motion or request for a status conference.

D. Trial Briefs and Other Materials

Trial Briefs – In the case of a non-jury trial, on or before the date established above, each party shall file and serve a trial brief with proposed findings of fact and conclusions of law, and send it to the Chamber's email in Microsoft Word® format. The parties may file a trial brief on or before the same date in the case of a jury trial.

IV. MEDIATION

A. Purpose – To minimize costly pretrial procedures in a case that may be equitably settled, and to secure the just, speedy, and inexpensive determination of this action, all parties shall participate in good faith in mediation. *See* Fed.R.Civ.P. 1; Fed.R.Civ.P. 16(a)(5); Local Rules 1.01(b), 9.01(b).

B. The Mediator – This Court prefers to appoint the certified and approved mediator, if any, chosen by the parties in their Case Management Report. If no such mediator has been chosen, the Court designates the default mediator listed in the above table pursuant to Local Rule 9.04. The mediator shall conduct the mediation conference in the conference room of the mediator's law firm or office at a time and date selected by the mediator within the confines of this order.

C. Last Date to Mediate – The parties shall complete the mediation conference on or before the mediation date set forth earlier in the above table. Despite Local Rule 9.05(d), *neither the mediator nor the parties have authority to continue the mediation conference beyond this date* except on express order of the Court. In any Track Three case, complex case, or case involving multiple parties, the mediator has the authority to conduct the mediation in a series of sessions and in groups of parties so that mediation is complete by the last date to mediate.

D. Mediator's Authority – The mediator shall have all powers and authority to conduct a mediation and to settle this case as are described in Chapter Nine of the Local Rules, except as limited by this order. *The mediation shall continue until adjourned by the mediator.* In order to coordinate the mediation conference, the mediator may set an abbreviated scheduling conference prior to the scheduled mediation. At such time, the mediator may designate one or more coordinating attorneys who shall be responsible for conferring with the mediator regarding the mediation conference. If necessary, the coordinating attorney may coordinate the rescheduling of a mediation conference within the time allowed in this order.

E. General Rules Governing Mediation Conference

1. Case Summaries – Not less than **two days** prior to the mediation conference, each party shall deliver to the mediator a written summary of the facts and issues of the case.

2. Identification of Corporate Representative – As part of the written case summary, counsel for each corporate party shall state the name and general job description of the employee or agent who will *attend and participate with full authority to settle* on behalf of the corporate party.

3. Attendance Requirements and Sanctions – Each attorney acting as lead trial counsel, and each party (and in the case of a corporate party, a corporate representative) with full authority to settle, *shall* attend and participate in the mediation conference. In the case of an insurance company, the term "full authority to settle" means authority to settle for the full value of the claim or policy limit. The Court will impose sanctions upon lead counsel and parties who do not attend and participate in good faith in the mediation conference.

4. Authority to Declare Impasse – Participants shall be prepared to spend as much time as may be necessary to settle the case. No participant may force the early conclusion of a mediation because of travel plans or other engagements. Only the mediator may declare an impasse or end the mediation.

5. Restrictions on Offers to Compromise – Evidence of an offer to compromise a claim is not admissible to prove liability for or invalidity of the claim or its amount. Fed. R. Evid. 408 (includes evidence of conduct or statements made in compromise negotiations); Local Rule 9.07(b). All discussion, representations and statements made at the mediation conference are privileged settlement negotiations. Except in a supplemental proceeding to enforce a settlement agreement, nothing related to the mediation conference shall be admitted at trial or be subject to discovery. Local Rule 9.07; Fed. R. Evid. 408. A communication between a party and a mediator during a private caucus is also confidential, unless the party tells the mediator that it is not.

F. Compensation of Mediators – Absent agreement of the parties and the mediator, mediators shall be compensated at a reasonable hourly rate provided by order of the Court after consideration of the amount in controversy, the nature of the dispute, the resources of the parties, the prevailing market rate for mediators in the applicable market, the skill and experience of the mediator, and other pertinent factors. Unless altered by order of the Court, the cost of the mediator's services shall be borne equally by the parties to the mediator conference.

G. Settlement and Report of Mediator – A settlement agreement reached between the parties shall be reduced to writing and signed by the parties and their attorneys in the presence of the mediator. *See also* Local Rule 9.06(b) and 3.08. Within **seven days** of the conclusion of the mediation conference, the mediator shall file and serve a written mediation report stating whether all required parties were present, whether the case settled, and whether the mediator was forced to declare an impasse. *See* Local Rule 9.06. The mediator may report any conduct of a party or counsel that falls short of a good faith effort to resolve the case by agreement or fails to comply with this Order. *See* Local Rule 9.05(e), 9.06(a).

V. FINAL PRETRIAL CONFERENCE

A. Lead Trial Counsel and Parties – If a final pretrial conference is set, **lead trial counsel and local counsel for each party, together with any unrepresented party, must attend in person unless previously excused by the Court.** *See* Local Rule 3.06(d); Fed.R.Civ.P. 16(d).

B. Substance of Final Pretrial Conference – Since this case must be fully ready for trial at the time that the Joint Final Pretrial Statement is due, at the final pretrial conference, all counsel and parties must be prepared and authorized to accomplish the

purposes set forth in Fed.R.Civ.P. 16 and Local Rule 3.06, including formulating and simplifying the issues; eliminating frivolous claims and defenses; admitting facts and documents to avoid unnecessary proof; stipulating to the authenticity of documents; obtaining advance rulings from the Court on the admissibility of evidence; settling the dispute; disposing of pending motions; establishing a reasonable limit on the time allowed for presenting evidence; and such other matters as may facilitate the just, speedy, and inexpensive disposition of the action. *See* Fed.R.Civ.P. 16(c)-(d).

VI. SANCTIONS – The Court will impose sanctions on any party or attorney: 1) who fails to attend and to participate actively in the meeting to prepare the Joint Pretrial Statement, or who refuses to sign and file the agreed document; 2) who fails to attend the Final Pretrial Conference, or who is substantially unprepared to participate; 3) who fails to attend the mediation and actively participate in good faith, or who attends the mediation without full authority to negotiate a settlement, or who is substantially unprepared to participate in the mediation; or 4) who otherwise fails to comply with this order. Sanctions may include but are not limited to an award of reasonable attorney's fees and costs, the striking of pleadings, the entry of default, the dismissal of the case, and a finding of contempt of court. *See* Fed.R.Civ.P. 16(f) and 37; Local Rules 9.05(c), (e); 28 U.S.C. § 1927.

VI. TRIAL

A. Trial Before District Judge – A case scheduled for trial before a United States District Judge normally will be called for trial on the first day of the trial term indicated in the above table, or as soon after that date as is possible in light of the Court's felony and civil trial calender.[1] Cases not reached for trial in the month scheduled will be carried over to the following month on a trailing trial calendar, and issued subpoenas will continue in force. Counsel, parties, and witnesses ***shall be available on twenty-four hours notice*** for trial after the beginning of the trial term. A different District Judge or visiting judge may try the case. Local Rule 1.03(d). The case may be set for trial in the Orlando Division, Tampa Division, Fort Myers Division, Ocala Division, or Jacksonville Division of the Court. Local Rule 1.02(e). Absent a showing of good cause, any party whose turn it is to provide evidence will be deemed to have rested if, during the hours designated for trial, the party has no further evidence or witnesses available.

B. Trial Before Magistrate Judge – A case scheduled for trial before a United States Magistrate Judge will be called for trial on a date certain. With respect to a civil case that remains pending before a District Judge as of the date of this order, the

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[1]This case may be reassigned to a visiting District Judge at any time. In unusual and extraordinary circumstances, the Court may re-notice this case for trial shortly *before* the first day of the trial term if necessary to accommodate the trial schedule of the District Judge.

United States District Judges of the Middle District of Florida wish to afford the parties the opportunity to consent to proceed before a Magistrate Judge. Consent must be unanimous. A United States Magistrate Judge is available pursuant to 28 U.S.C. § 636(c) and Fed.R.Civ.P. 73(a) to conduct all further proceedings in this case (or specified motions in this case), to conduct a jury or non-jury trial ***beginning on a date certain***, and to enter final judgment. A party may appeal a final judgment of a Magistrate Judge to the United States Court of Appeals for the Eleventh Circuit in the same manner as an appeal from the district court. 28 U.S.C. § 636(c)(3); Fed.R.Civ.P. 73. A party is free to withhold consent without adverse substantive consequences. 28 U.S.C. § 636 (c)(2); Fed.R.Civ.P. 73(b). Consent forms are attached to this scheduling order. Fed.R.Civ.P. 73(b); Local Rule 6.05.

C. Settlement – Counsel shall immediately notify the Court upon settlement of any case. Local Rule 3.08(a). The parties shall notify the Court of any settlement or other disposition of the case which will eliminate the need for a jury by 11:30 a.m. on the last business day before the date scheduled for jury selection. Failure to do so will subject each party to joint and several liability for jury costs. Regardless of the status of settlement negotiations, the parties shall appear for all scheduled hearings, including the Final Pretrial Conference and for trial absent the filing of a stipulation of dismissal signed by all parties who have appeared in the action (or notice of dismissal if prior to answer and motion for summary judgment). Fed.R.Civ.P. 41(a).

DONE and **ORDERED** in Jacksonville, Florida on this 1st day of June, 2012

ROY B. DALTON, JR.
United States District Judge

Attachments: Exhibit List Form [mandatory form]

Instructions for Pre-Marking of Exhibits
Magistrate Judge Consent / Entire Case
Magistrate Judge Consent / Specified Motions

Copies to: All Counsel of Record

EXHIBIT LIST

___ PLAINTIFF ___ DEFENDANT ____ JOINT

___ GOVERNMENT___ COURT

CASE NO. _____

STYLE: _____

EXHIBIT NO.	DATE IDENTIFIED	DATE ADMITTED	SPONSORING WITNESSES	OBJECTIONS / STIPULATED ADMISSIONS[1]	DESCRIPTION OF EXHIBIT

[1] Use a code (e.g. "A"or "*") in this column to identify exhibits to be received in evidence by agreement without objection. Otherwise, specifically state each objection to each opposed exhibit. Please note that each date box on the left must be one inch wide to accommodate the Clerk's date stamp.

AO 85 (Rev. 8/98) Notice, Consent and Order of Reference - Exercise of Jurisdiction of United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

PLAINTIFF,

-VS- **CASE NO. 3:12-CV-**

DEFENDANT.

NOTICE OF AVAILABILITY OF A UNITED STATES MAGISTRATE JUDGE TO EXERCISE JURISDICTION

IN ACCORDANCE WITH THE PROVISIONS OF 28 U.S.C. 636(C) AND FED. R. CIV. P. 73, YOU ARE HEREBY NOTIFIED THAT A UNITED STATES MAGISTRATE JUDGE OF THIS DISTRICT COURT IS AVAILABLE TO CONDUCT ANY OR ALL PROCEEDINGS IN THIS CASE, INCLUDING A JURY OR NONJURY TRIAL, AND TO ORDER THE ENTRY OF A FINAL JUDGMENT. EXERCISE OF THIS JURISDICTION BY A MAGISTRATE JUDGE IS, HOWEVER, PERMITTED ONLY IF ALL PARTIES VOLUNTARILY CONSENT.

YOU MAY, WITHOUT ADVERSE SUBSTANTIVE CONSEQUENCES, WITHHOLD YOUR CONSENT, BUT THIS WILL PREVENT THE COURT'S JURISDICTION FROM BEING EXERCISED BY A MAGISTRATE JUDGE. IF ANY PARTY WITHHOLDS CONSENT, THE IDENTITY OF THE PARTIES CONSENTING OR WITHHOLDING CONSENT WILL NOT BE COMMUNICATED TO ANY MAGISTRATE JUDGE OR TO THE DISTRICT JUDGE TO WHOM THE CASE HAS BEEN ASSIGNED.

AN APPEAL FROM A JUDGMENT ENTERED BY A MAGISTRATE JUDGE SHALL BE TAKEN DIRECTLY TO THE UNITED STATES COURT OF APPEALS FOR THIS JUDICIAL CIRCUIT IN THE SAME MANNER AS AN APPEAL FROM ANY OTHER JUDGMENT OF A DISTRICT COURT.

CONSENT TO EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

IN ACCORDANCE WITH THE PROVISIONS OF 28 U.S.C. 636(C), AND FED.R.CIV.P. 73, THE PARTIES IN THIS CASE HEREBY VOLUNTARILY CONSENT TO HAVE A UNITED STATES MAGISTRATE JUDGE CONDUCT ANY AND ALL FURTHER PROCEEDINGS IN THE CASE, INCLUDING, THE TRIAL, ORDER THE ENTRY OF A FINAL JUDGMENT, AND CONDUCT ALL POST-JUDGMENT PROCEEDINGS.

SIGNATURES	PARTY REPRESENTED	DATE

ORDER OF REFERENCE

IT IS ORDERED THAT THIS CASE BE REFERRED TO THE UNITED STATES MAGISTRATE JUDGE FOR ALL FURTHER PROCEEDINGS AND THE ENTRY OF JUDGMENT IN ACCORDANCE WITH 28 U.S.C. 636(C), FED. R. CIV. P. 73 AND THE FOREGOING CONSENT OF THE PARTIES.

DATE **UNITED STATES DISTRICT JUDGE**

NOTE: RETURN THIS FORM TO THE CLERK OF THE COURT ONLY IF ALL PARTIES HAVE CONSENTED ON THIS FORM TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

PLAINTIFF,

-VS- CASE NO.

DEFENDANT.

CONSENT TO EXERCISE JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE OVER DISPOSITIVE MOTIONS DESCRIBED UNDER 28 U.S.C. § 636(B)(1)(B)

CONSENT TO EXERCISE OF JURISDICTION

IN ACCORDANCE WITH THE PROVISIONS OF 28 U.S.C. § 636(C) AND FED.R.CIV.P. 73, THE PARTIES IN THIS CASE CONSENT TO HAVE A UNITED STATES MAGISTRATE JUDGE CONDUCT ANY AND ALL PROCEEDINGS AND ENTER A FINAL ORDER AS TO EACH MOTION IDENTIFIED BELOW.

MOTION(S) _____

_____

PARTY REPRESENTED	SIGNATURES	DATE

ORDER OF REFERENCE

IT IS ORDERED THAT THE ABOVE MOTIONS(S) BE REFERRED TO THE UNITED STATES MAGISTRATE JUDGE ASSIGNED TO THIS CASE TO CONDUCT ALL PROCEEDINGS AND ENTER A FINAL ORDER ON SUCH MOTIONS(S) IN ACCORDANCE WITH 28 U.S.C. § 636(C) AND FED.R.CIV.P. 73.

_____ _____

DATE UNITED STATES DISTRICT JUDGE

NOTE: RETURN THIS FORM TO THE CLERK OF COURT ONLY IF ALL PARTIES HAVE CONSENTED ON THIS FORM TO THE EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE.

Full docket text for document 16:
ORDER granting [15] Motion to extend time. Signed by Judge Gregory A. Presnell on 2/21/2012. (TKW)

PACER Service Center			
Transaction Receipt			
02/22/2012 09:02:08			
PACER Login:	bp0409	**Client Code:**	
Description:	History/Documents	**Search Criteria:**	6:11-cv-01957-GAP-GJK
Billable Pages:	1	**Cost:**	0.08

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARLYLE LESLIE OWEN DALE,

Plaintiff,

v. Case No. 6:11-cv-01957-RBD-GJK

UNITED STATES OF AMERICA,

Defendant.
_____/

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASES OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned Plaintiff, and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle subject to court approval and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of $7,500.00 which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, that Plaintiff now has or may hereafter

acquire against the United States of America, its agents, servants, and employees. This sum does not represent the full value of the damages suffered but is a compromise based on the facts of this case.

3. Plaintiff hereby agrees to accept the sum set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death only to the extent that a valid lien is asserted and only to the extent of the valid lien. The Plaintiff agrees to satisfy or otherwise resolve any lien or subrogated interest for workers compensation and health care benefits paid or payable to the undersigned as a consequence of the occurrence settled pursuant to this agreement. The United States of America releases

any claims that it has, or may have, against Mr. D ale that relates to his time in detention at Oakdale and LaSalle and any claims that he asserted in the lawsuit.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, including but not limited to attorney's fees and expert fees and expenses, and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by Electronic Funds Transfer drawn on the Treasury of the United States for Seven Thousand Five Hundred Dollars ($7,500.00) and made payable to Carlyle Leslie Owen Dale. Plaintiff's attorney

agrees to obtain a dismissal of the above - captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Releases, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. The United States District Court for the Middle District of Florida has exclusive jurisdiction with respect to any claim or dispute arising out of the Stipulation for Compromise Settlement and Releases.

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

A. LEE BENTLEY, III
Acting United States Attorney

By: _____

Seth A. Gastwirth, Esquire (pro hac vice)
Kirkland & Ellis, LLP
300 N. LaSalle Street
Chicago, IL 60654
Tele: (312) 862-2000
Fax: (312) 862-2200

Ralph E. Hopkins
Assistant United States Attorney
Florida Bar No. 0972436
400 W. Washington Street, Suite 3100
Orlando, Florida 32801
Tele: (407) 648-7562
Fax: (407) 648-7588

_____ _____
Date Date

_____ _____
Carlyle Leslie Owen Dale, Plaintiff Date

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0610 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
JAN 03 2012
JAMES W. McCORMACK, CLERK
By: DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

KAPPELLE SIMPSON-EL PLAINTIFF

VS. NO. 2:12-CV-004 SWW

UNITED STATES OF AMERICA DEFENDANT

COMPLAINT This case assigned to District Judge Wright and to Magistrate Judge Volpe

COMES THE PLAINTIFF, by his attorneys, Sandy S. McMath & Associates, PA, and for his cause of action against the defendant states and alleges as follows:

I.

Plaintiff is a citizen of the United States presently a resident prisoner at the Federal Correctional Complex, El Reno, OK, but at all times relevant hereinbefore at the Federal Correctional Complex (FCC-Low), located in Forrest City, AR. FCC-Low is a Minimum Security Facility housing non-violent offenders whose histories indicate that they pose little or no ("Low") risk of escape or of harm to themselves, staff or others.

II.

Defendant is the United States of America, hereinafter "defendant", who is the operator of the said prison.

III.

This action is brought pursuant to the Federal Tort Claims Act, 28 USC Sec. 2671, et seq. This Court has jurisdiction hereof pursuant to 28 USC Sec. 1346(b). The negligence alleged in this Complaint occurred in St. Francis County, Arkansas, hence venue in this Division of this Court is proper pursuant to 28 USC Sec. 1402(b).

IV.

On December 15, 2010, plaintiff duly submitted, pro se, a timely administrative remedy tort claim, No. TRT-SCR-2011-01780, to the U.S. Department of Justice, Bureau of Prisons, receipt of which was acknowledged by one K. Summers, "Paralegal Specialist, South Central Region."

V.

On September 19, 2011, plaintiff's claim was denied by one James A. Alckler, Regional Counsel of the said South Central Region office.

VI.

WHEREUPON, this action is properly brought under the Federal Tort Claims Act, specifically 28 USC Sec. 2401(b) and 28 USC Sec. 1346, et seq.

VII.

As an inmate of the said FCC Low, Forrest City, plaintiff from time to time was encouraged and authorized to participate in open recreation athletics, including basketball, during one occasion of which, on or about September 1, 2009 at approximately 6:30 p.m., he sustained an injury to his lower left leg at the ankle causing severe pain and swelling and inhibiting his ability to walk. Plaintiff was sent by the recreation supervisor to Health Services, where he was ordered to report for Sick Call the following morning, September 2, 2009, which he did, being told to "watch the call out" for an appointment to have his leg examined. No such call ever came.

VIII.

With the pain and swelling in his foot increasing, yet with no examination appointment from Health Services, plaintiff made intermittent verbal requests to clinic

staff until at length, on or about October 26, 2009, he was finally seen by a paramedic or physician assistant (PA), who briefly examined his leg and ankle and informed him that all he had was an ankle sprain which would heal with time. Plaintiff was given aspirin and a prescription for pain medication by the PA and informed by the employee that no further intervention was necessary. However, the pain and swelling continued unabated, which plaintiff reported repeatedly to Health Services duty personnel, resulting in a re-examination of his injury on or about December 30, 2009, by a PA who told him that he had suffered a torn Achilles tendon, but no care was prescribed other than to continue with the aspirin and pain medication as before.

IX.

Plaintiff's distress continued, leading him to return regularly to Health Services seeking further care, including referral to an orthopedic surgeon, but to no avail. In spite of his pain, plaintiff attempted to resume recreation to maintain fitness, which efforts, on June 29, 2010, resulted in a re-injury, later determined to be an almost clear-through tear of his Achilles tendon resulting in even greater swelling and pain.

X.

Finally, on November 9, 2010, plaintiff was taken to a Forest City hospital and given an MRI, after which, on or about December 10, 2010, he was taken for the first time for examination by a physician, Bret Sokoloff, M.D., 3960 Knight Arnold Road, Memphis, TN 38118, a surgeon under contract with defendant's prison. Dr. Sokoloff quickly determined that plaintiff's left Achilles Tendon had sustained such severe tearing and dislocation that surgery offered the only possibility of pain alleviation and some

regaining of normal ambulation, though due to the exceptionally long delay from injury to referral, normally successful results were unlikely.

XI.

In the event, plaintiff elected to undergo the surgery, which was performed by Dr. Sokoloff January 27, 2011, and while the tendon remained intact and some of the pain subsided, significant tear and distention remain so that plaintiff will never again be able to walk, intermittent moderate to severe pain will recur, his ability to walk, run and compete in basketball and other athletic endeavors will remain impaired.

XII.

Defendant was negligent in the following particulars:

1. Hiring untrained and unqualified management and administrative personnel to operate its prison, in particular the FCC (Low) "Health Services Department", and failing properly to instruct and supervise those persons concerning proper responses to injured inmates, such as plaintiff, so as to reduce the hazard of their not receiving prompt and essential diagnoses and care for serious injuries, such as that at Bar.

2. Failing to operate its prison and, in particular, the said "Health Services Department", in accordance with accepted standards of medical practice so as to provide its captive patients, for whom the said clinic is the sole permitted provider, with proper and timely diagnoses and care of their injuries.

3. Failing accurately and promptly to diagnose plaintiff's torn or deformed Anchilles Tendon or, in the alternative, to transport him to a nearby hospital, clinic or other provider, such as Dr. . Sokoloff in Memphis, in an orderly and timely manner following his injury where such a diagnosis could be made and proper surgery and follow-up care

provided, or, in the alternative, to have the injury examined at the prison by a physician capable and competent to do so and render a diagnosis and plan of care.

4. Negligently engaging in a pattern and practice of arbitrary and spiteful delay, procrastination and postponement of timely transport of patients to essential outside care, such as that provided by Dr. Sokoloff, long after the necessity of such care was apparent, thus stymieing the ability of such physicians to provide proper care by substantially reducing its chances of success, such as occurred by the more than 14-month delay beetween plaintiff's injury and his MRI & X-rays and examination and surgery by Dr. Solokoff, in spite of his repeated requests, thereby resulting in a significant exacerbation of his injury and needlessly handicapping the chances of surgical success.

5. Failing to adopt and publish for its administrators and nurses and other health services personnel and their supervisors clear policies and procedures for dealing with first response and emergent care of injuries such as that sustained by plaihtiff so as to increase the likelihood that such patients are properly diagnosed and treated.

6. Failing properly to supervise the training and enforcement of its policies, practices and procedures so as to assure that all care personnel and prison administrative staff are familiar with proper emergent diagnosis, treatment and/or transport.

7. Intentionally delaying the provision of necessary medical care to patient inmates, such as plaintiff, in his case for more than 14 months, thereby substantially increasing the hazard of permanent injury and otherwise avoidable or ameliorable harm such as that which resulted to plaintiff.

8. Causing and/or permitting plaintiff to re-injure his Achilles Tendon, the hazard of which, had he been under proper care, would have been substantially reduced.

XIII.

Such actions, which the defendant and its subaltems knew, or upon the exercise of reasonable diligence should have known, would result in the exacerbation of plaintiff's injuries as alleged, constituted deviations from the standard of medical practice in this community or in similar communities, constituting thereby medical negligence or malpractice, the said fault being imputable to the defendant *respondeat superior*.

XIV.

At all relevant times herein, the staff and personnel of FCC-Low Forrest City were employees, agents and/or servants of the defendant and were acting within the course and scope of their employment and/or agency and pursuant to defendant's instructions, control and supervision, for all of whose actions the defendant is responsible in tort to plaintiff, both directly and *respondeat superior*

XV

As a direct and proximate result of the negligence of the defendant directly and, *respondeat superior*, through that fault ofits employees, agents and servants as set forth herein, plaintiff has sustained permanent and pronounced distention of his Achilles Tendon, a distortion and disfigurement of his left foot and leg at the right ankle, including an ugly bulging scar of some six (6") inches, has been impaired in his ability to walk, run, exercise and compete athletically in a normal manner and to perform tasks requiring extended ambulation or running, has been impaired in his ability to earn, has suffered a loss of future income, will incur future medical expenses in his care and treatment, and has sustained hedonic damage to his quality of life, for all of which he prays damages in an amount fully and fairly to compensate him up to and including the sum of three

million, five hundred thousand dollars ($3,500,000.00), for his costs herein and for all other appropriate relief to which he shall be entitled.

Sandy S. McMath, PA

711 West 3d Street
Little Rock, AR 72201
501-396-5414
sandymcmath@aol.com

BY _____
SANDY S. MCMATH
AR BAR NO. 66049

CERTIFICATE OF SERVICE

Pursuant to Rule 4(i)(1) of the Federal Rules of Civil Procedure, a file-marked copy hereof and a duly executed Summons, are being served this 3d day of January 2012 by Certified United States Mail, Return Receipt Requested, upon the following: Honorable Eric Holder, Attorney General of the United States, 5137 Robert F. Kennedy Building, 10th Street & Constitution Avenue NW, Washington, DC 20530; Honorable Christopher R. Thyer, United States Attorney, Eastern District of Arkansas, P.O. Box 1229, Little Rock, AR 72203, Ms. Jeffifer Niemeyer, Civil Process Clerk; U.S. Attorney's Office, E.D. AR, P.O. Box 1229, Little Rock, AR 72203; Honorable Charles S. Samuels, Jr., Director, United States Bureau of Prisons, 320 First Street NW, Washington D.C. 20534; and the Honorable Kathleen Kenney, General Counsel, United States Bureau of Prisons, 320 First Street NW, Washington D.C. 20534.

_____
SANDY S. MCMATH

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

KAPPELLE SIMPSON-EL,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	No. 2:12CV00004 SWW
	*	
UNITED STATES OF AMERICA,	*	
	*	
Defendant.	*	

OPINION AND ORDER

Before the Court is plaintiff's motion for declaratory judgment and protective order to enforce settlement agreement. The government responded to the motion and plaintiff filed a reply. The Court held a hearing on the motion on November 3, 2015. The parties submitted post-hearing briefs. For the reasons stated at the hearing, the motion is granted.

I.

Plaintiff Kappelle Simpson-El filed a lawsuit on January 3, 2012, alleging a claim under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* He injured his ankle in 2009 while he was a prisoner at the Bureau of Prisons facility in Forrest City, Arkansas, and complains that defendant failed to diagnose and appropriately treat his injury. The parties settled the case on June 26, 2014, the government agreeing to pay plaintiff $200,000.00.[1]

Shortly before settlement negotiations began, the government notified plaintiff that any

[1]Upon being notified that a settlement had been reached, the Court entered an Order of Dismissal on June 29, 2105, dismissing all claims against defendant with prejudice. The Court retained jurisdiction for 30 days to reopen the case if further litigation were necessary. ECF No. 33.

judgment he might obtain would be subject to offset the restitution he owed in accordance with the Judgment and Commitment entered by the United States District Court for the District of Kansas in his criminal case. That judgment ordered plaintiff to pay restitution to a number of victims, including car dealerships and insurance companies, in the amount of $432,930.00.

The government explains that before any settlement payment can be disbursed to plaintiff, the Judgment Section of the Bureau of the Fiscal Service of the United States Department of the Treasury must certify that such payment is appropriate. The government anticipates that once the Treasury Department certifies the payment, it will recognize that plaintiff has an outstanding debt and, through its centralized debt collection program known as the Treasury Offset Program ("TOP") , will withhold the settlement payment to pay restitution in the criminal case. In fact, on May 29, 2015, the United States Department of Justice issued a Notice of Intent to Offset to plaintiff, stating that the judgment for restitution entered against him was due and payable immediately.[2]

Plaintiff argues the TOP does not apply to his case and that it is against public policy to permit the government to seize money from a criminal defendant who successfully brings a claim of medical malpractice against it. The government asserts the Court lacks jurisdiction to consider plaintiff's motion, arguing the FTCA's limited waiver of sovereign immunity does not extend to claims against the government for failure to perform under a contract.

II.

The FTCA includes an express waiver of sovereign immunity, making the United States liable for the torts of its employees. 28 U.S.C. § 1346(b)(1). Section 1346(c) provides: "The

[2]As of the date of the notice, the balance due was $406,095.08. *See* ECF No. 36-3.

jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section." Pursuant to § 1346(c), the Court finds it has jurisdiction to consider the validity of the government's claim of entitlement to administrative offset under the TOP.

Under 31 U.S.C. §3716(c)(6), federal agencies that are owed a past due debt shall refer the delinquent debt to the Treasury Department for inclusion in TOP, provided the debt is eligible for administrative offset. A debt is eligible for administrative offset when it is: a) past due in the amount stated by the creditor agency; b) legally enforceable; c) more than $25 or other amount as prescribed by the Fiscal Service: and d) not secured by collateral subject to a pending foreclosure action, unless the creditor agency certifies the offset will not affect the government's rights. *See* 31 C.F.R. § 285.5(d)(3)(I). Plaintiff argues that because the restitution he owes in his criminal case is not owed to a federal agency but to used car dealers and their private insurance companies and is not past due, his settlement proceeds are not subject to administrative offset.

Title 18 U.S.C. § 3612, which addresses procedures for collection of a fine or restitution judgment, provides that the Attorney General shall be responsible for collection of an unpaid fine or restitution. 18 U.S.C. § 3612(c). The United States may enforce a criminal judgment of restitution "in accordance with the practice and procedures for the enforcement of a civil judgment under Federal law or state law." 18 U.S.C. § 3613(a), (f). An order of restitution made pursuant to the Mandatory Victim's Restitution Act ("MVRA"), 18 U.S.C. §§ 3663A-3664, is a lien in favor of the United States as if it were a liability for a tax assessed under the Internal Revenue Code. 18 U.S.C. § 3613(c).

Plaintiff's restitution was ordered pursuant to the MVRA, which provides that "[a]n order

of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title . . . ; or (ii) by all other available and reasonable means." 18 U.S.C. § 3664(m)(1)(A). Thus, under the MVRA, the government may enforce restitution in the manner that it enforces criminal fines.

The Treasury Department has statutory authority to collect delinquent non-tax debts owed to the federal government by administrative offset. 31 U.S.C. § 3716. An administrative offset means "withholding funds payable by the United States (including funds payable by the United States on behalf of a State government) to, or held by the United States for, a person to satisfy a claim." 31 U.S.C. § 3701(a). For purposes of the administrative offset process, the statute defines a "claim" or "debt" as

> any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency. A claim includes, without limitation -
> . . . .

Any amount the United States is authorized by statute to collect for the benefit of any person. 31 U.S.C. § 3701(b)(1)(D). The Court finds plaintiff's restitution is a debt owed to the government. The criminal judgment ordering plaintiff to pay restitution is a determination by an appropriate official of the United States, and the restitution is an amount the United States is authorized to collect for the benefit of another person.

The Court further finds that plaintiff's debt is not past due. The restitution schedule provided for "[p]ayment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of 3 years, to commence 30 days after release from imprisonment

to a term of supervision."[3] The government offers nothing to dispute that plaintiff is current on his payments under the restitution schedule. Instead, the government argues that the existence of a restitution payment plan does not prohibit it from pursuing other authorized means of collection, including garnishment.

Citing 18 U.S.C. § 3664(n), the government contends that even in cases not subject to administrative offset, the MVRA does not allow an individual under a restitution order to come into money yet continue on a minimum payment plan based upon prior circumstances. Section 3664(n) provides: "If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed." Plaintiff, however, is and was not incarcerated when this case was settled.

The MVRA provides:

> A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

18 U.S.C. § 3664. Under this provision, the sentencing court has jurisdiction to revise the restitution order. *See United States v, Dye*, 48 Fed. App'x 218, 220 (8th Cir. 2002)(affirming

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[3]Gov't's Resp. in Opp'n to Mot. for Decl. J., Ex. B at 8 (ECF No. 36-2).

grant of government's motion under 18 U.S.C. § 3664(k) to have cash and computer found after sentencing considered in revising restitution order). The Court agrees that the government has means other than the TOP to enforce restitution. But the Court finds the TOP is not applicable here because plaintiff's debt is not past due.

III.

IT IS THEREFORE ORDERED that plaintiff's motion for declaratory relief is granted. The Court finds that a referral by the Department of Justice of plaintiff to the TOP is not appropriate under the statute.

DATED this 1st day of December, 2015.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE

ORIGINAL

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR - 2 2012
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JIMMY LEE, # 50018-018, §
Plaintiff §

Vs. §

FNU FISCHER, Correctional Officer @ FCI Ft. Worth; and the UNITED STATES OF AMERICA, §
Defendants §

4-12CV-197-A
CIVIL ACTION NO. _____

JURY TRIAL DEMANDED

PLAINTIFF'S ORIGINAL COMPLAINT FOR DAMAGES

(Negligence and Violation of Eighth Amendment Rights)

Plaintiff Jimmy Lee alleges:

This action pertains to the negligent and deliberately indifferent actions or omissions committed by FNU Fischer (**"Fischer"**), an employee of the United States of America (**"United States"**), at the Federal Correctional Institution in Fort Worth (**"FCI FTW"**). On February 1, 2010, Fischer placed Plaintiff in a scalding hot shower for approximately ten minutes. Prior to and during this horrendous act of torture, Fischer ignored the desperate pleas from inmates who were being burned who were pleading Fischer to decrease the water temperature. Fischer callously disregarded their screams of agony. Plaintiff was and is a wheelchair-bound paraplegic

with substantial decreased feeling in his lower extremities. The nearly ten minutes of scalding water flowing over Plaintiff caused second and third degree burns to eighty percent of Plaintiff's left lower extremity and a smaller area of his right leg. The burns were so severe that the hair on Plaintiff's left leg was burned off and flaps of skin almost immediately sloughed off.

After being treated at the Level One trauma center at John Peter Smith Hospital in Fort Worth, Texas, Plaintiff was urgently transferred to the burn center at Parkland Hospital in Dallas, Texas. Despite the valiant efforts of the trauma and burn specialists, Plaintiff still suffered pain and suffering and permanent disfigurement of his lower extremities.

Plaintiff seeks actual and exemplary damages, post-trial interest, future medical expenses, all costs of suit, and declatatory and nominal relief.

JURISDICTION AND VENUE

1.) Plaintiff brings this action against the individually named Defendant, FNU Fischer, pursuant to **Bivens v. Six Unknown Named Agents**, 403 U.S. 388 (1971), so this Court has jurisdiction of the subject matter of this action under 28 U.S.C. § 1331 and the Eighth Amendment to the United States Constitution.

2.) Plaintiff brings this action against Defendant, United States, pursuant to the Federal Tort Claims Act **("FTCA")**, so this Court has jurisdiction of the subject matter of this action under 28 U.S.C. § 1346(b).

3.) On March 23, 2010, Plaintiff timely submitted an Administrative Claim on Form SF-95, Claim for Damage, Injury on Death, to the Federal Bureau of Prisons **("BOP")** requesting an "open" sum certain. Plaintiff subsequently amended his Administrative Claim on January 25, 2011, asserting government liability in the amount of seven hundred fifty thousand dollars ($750,000.00) for alleged personal injury. Defendant United States, by and through its agency, the BOP, denied Plaintiff's Administrative Claim and on October 25, 2011, mailed its notice of denial, a true copy of which is attached to this complaint as Exhibit "A".

4.) Venue is proper in the Northern District of Texas, Fort Worth Division, because the acts and omissions complained of occurred in this judicial district.

ADMINISTRATIVE REMEDIES & CONDITIONS PRECEDENT

5.) Plaintiff has exhausted all of his available administrative remedies and satisfied all conditions precedent before bringing this action against Fischer and the United States **(collectively, "the Defendants")**. A true copy of the administrative remedies are attached as Exhibit "B".

PARTIES

6.) Plaintiff, Jimmy Lee, is a resident of Texas and at all times relevant to this action was incarcerated at FCI FTW in the custody of the BOP.

7.) Defendant, FNU Fischer, was, at all relevant times, employed by the BOP as a Correctional Officer at FCI FTW. Fischer carried out the policy or customs of the BOP and is sued in his individual capacity.

8.) Defendant United States is sued under the FTCA for negligence committed by correctional officers of the BOP, an agency of the United States Department of Justice.

FACTS COMMON TO ALL CAUSES OF ACTION

9.) In 2005, prior to his incarceration, Plaintiff was shot in his upper back and became a paraplegic dependent upon a wheelchair for ambulation.

10.) Plaintiff experiences substantially decreased sensation in his lower extremities as a result of his paraplegia.

11.) At all times relevant to this action, Plaintiff was incarcerated at the FCI FTW which is an adult correctional facility.

12.) At all times relevant to this action, the American Correctional Association ("ACA") had an established standard and guideline for water temperature in adult correctional

facilities.

13.) At all times relevant to this action, it is BOP policy to comply with ACA standards and guidelines.

14.) At all times relevant to this action, it is BOP policy for all employees to ensure the safety and welfare of inmates in the custody of the BOP.

15.) At all times relevant to this action, the water temperature of the showers located in the Special Housing Unit **("SHU")** at FCI FTW is adjusted and set by correctional officers in the SHU.

16.) At all times relevant to this action, Darryl Gray was employed by the BOP as the Safety Manager at FCI FTW. As such, Darryl Gray was responsible for ensuring that each building at FCI FTW was inspected monthly for compliance with ACA and BOP standards and guidelines and also generally accepted conditions within the safety industry so that each building at FCI FTW was safe for inmates, visitors and staff to use or occupy.

17.) At all times relevant to this action, Carl Adams was employed by the BOP as a Safety Technician at FCI FTW. As such, Carl Adams was responsible for conducting monthly safety inspections of each building at FCI FTW for compliance with ACA and BOP standards and guidelines and also generally accepted conditions within the safety industry so that each

building at FCI FTW was safe for inmates, visitors and staff to use or occupy.

18.) At all times relevant to this action, it was an established BOP policy for the Safety Manager and/or the Safety Technician to conduct monthly safety inspections of every building at a BOP facility, including the SHU.

19.) Beginning on or about January 14, 2010, continuing through January 31, 2010, the water temperature of the showers in the SHU at FCI FTW were set at a temperature of approximately thirty-five degrees farhenheit to forty-five degrees farhenheit which is below the minimum standard established by the ACA in violation of BOP policy.

20.) Upon information and belief, the correctional officers assigned to the FCI FTW SHU set the water temperature of the SHU showers at a frigid level in violation of BOP policy to further punish inmates for being assigned to the SHU.

21.) Upon information and oelief, administrative prison officials and the Safety Manager and Safety Technician at FCI FTW knew of the custom to further punish inmates assigned to the SHU with frigid showers, and wantonly allowed the "conditions down" practice to continue.

22.) At no time prior to February 1, 2010, did the Safety Manager or Technician cite the SHU for being non-

compliant with ACA or BOP standards or guidelines because the water temperature of the SHU showers were too cold or hot and failing to have an adequate and functional thermometer to determine the water temperature of the SHU showers.

23.) Decreasing the level of comfort in a prisoner's conditions of confinement as described in paragraphs 20 and 21 is not a documented punishment or sanction in the BOP's disciplinary policy or any other BOP policy.

24.) Beginning on or about January 14, 2010, continuing through January 31, 2010, several inmates informed a number of different correctional officers, including defendant Fischer, that the water temperature in the SHU showers was far too frigid.

25.) After weeks of complaints from inmates, the water temperature of the SHU showers was reset on February 1, 2010.

26.) Upon information and belief, the correctional officers working in the SHU, including defendant Fischer, got tired of listening to the inmates' complaints of the frigid water in the showers and intentionally adjusted the water temperature to be hot.

27.) On February 1, 2010, after increasing the water temperature of the SHU showers, Defendant Fischer and other unidentified correctional officers negligently failed to test the water temperature of the SHU showers.

28.) After Defendant Fischer and other unidentified correctional officers increased the water temperature of the SHU showers on February 1, 2010, the water temperature was at a dangerous temperature exceeding 180°F that would scald human skin in seconds.

29.) On February 1, 2010, there was not a functional thermometer for the SHU correctional officers to use to determine the accurate temperature of the SHU shower water.

30.) On February 1, 2010, at about 5 p.m., Defendant Fischer escorted Plaintiff and at least four other inmates to the showers in the SHU.

31.) On February 1, 2010, Plaintiff used a hand-held shower nozzle to apply water on his legs first, while sitting in his wheelchair in the SHU shower. Due to Plaintiff's paraplegia, he did not feel the scalding hot water on his legs at first. Only after Plaintiff heard the screams of agony from the other inmates in the shower, and their desperate pleas to turn down the temperature of the scalding hot water, did he realize (by spraying scalding hot water on his hand) that the water was dangerously too hot.

32.) Defendant Fischer left Plaintiff and the other inmates in the scalding hot SHU showers for a torturous and barbaric ten (10) minutes.

33.) When Defendant Fischer arrived at the SHU shower at

about 5:10 p.m. on February 1, 2010 to take Plaintiff back to cell # 26, large pieces of Plaintiff's legs had sloughed off and blistered.

34.) Upon seeing the horrendous burns on Plaintiff's legs, Defendant Fischer arranged for Plaintiff to receive medical care at the FCI FTW Health Services Unit.

35.) On February 1, 2010, at 5:18 p.m., BOP nurse Deborah Snell, R.N., documented in Plaintiff's BOP medical record, attached as Exhibit C, that the cause of injury was "hot water in the shower left upper leg anterior and posterior side, right leg and left foot are burned. Skin removed and hair is off leg." Nurse Deborah Snell, R.N. also documented "left leg burn noted skin removed, area the size 12 inches by 4 inches."

36.) On February 1, 2010, at 6:07 p.m., BOP nurse Pam Jones documented in Plaintiff's BOP medical record:

> Inmate is being taken care of by jail nurse, starting I.V. This nurse called P.A. Gomez to give update and received order to send to JPS Emergency room due to burns 80% of left leg and unknown amount of burn on right leg. Burn was due to shower water and inmate paraplegic and unable to feel the degree of the water. Inmate to go to hospital via ambulance. Operations LT notified. (Also attached as Exhibit C).

37.) On February 1, 2010, at an unknown time between 5:18 p.m. and 7:36 p.m., BOP Mid-Level Practitioner Jose Gomez told Plaintiff that "the water had to exceed 180°F in order to burn so severely ... The water in my coffee doesn't get that hot!"

38.) On February 1, 2010, at 7:36 p.m., Plaintiff arrived at JPS Hospital via MedStar ambulance. After evaluating and assessing Plaintiff's painful condition in the Trauma Unit, at 8:43 p.m. Dr. Charles Huggins, M.D., ordered Plaintiff to be transferred to the Parkland Hospital Burn Unit via ambulance.

39.) Upon learning that he needed to be transferred to the famous Parkland Hospital Burn Unit, Plaintiff was terrified about his immediate condition and future.

40.) Upon arriving at the Parkland Hospital Burn Unit on February 1, 2010, medical providers painfully debrided Plaintiff's burned legs and left foot by using a brush to scrub the burned skin off. Medical personnel then dressed and bandaged Plaintiff's burns and discharged him back to FCI FTW. Plaintiff was instructed to continue to "[r]emove as much of the cheesy, yellow or white eschar as possible."

41.) At the Parkland Hospital Burn Unit, medical personnel diagnosed Plaintiff with second and third degree burns that may require skin grafts.

42.) After arriving at FCI FTW, Plaintiff developed a staph infection in his burns and had to be admitted to the Health Service Unit as an inpatient and receive intravenous antibiotics.

43.) On March 18, 2010, Plaintiff's burns were mostly healed. Medical personnel at the Parkland Hospital Burn Clinic determined that Plaintiff did not need skin grafts.

44.) As a direct result of Plaintiff's burns, he has large and obvious permanent life-long scars and his left thigh, left foot, and right thigh. These large areas of pink scarring is especially noticeable due to Plaintiff's African-American race.

CAUSES OF ACTION

First Cause of Action
Common-Law Claims Against UNITED STATES OF AMERICA (FTCA)
(Negligence)

45.) The actions of BOP Correctional Officer Fischer and other unknown unidentified correctional officers and prison officials set forth in paragraphs nine through forty-four above, constitute negligence in violation of Texas common law. Under the Federal Tort Claims Act, the defendant UNITED STATES OF AMERICA is liable to the Plaintiff for the wrongful or unlawful actions of its employees as they were working within the scope of their employment as law enforcement officers of the United States Department of Justice Federal

Bureau of Prisons. Defendant UNITED STATES OF AMERICA owed Plaintiff a duty of care to protect his health and welfare and the Defendant breached its duty; that is, the Defendant accidentally or intentionally inflicted second and third degree burns over eighty percent of Plaintiff's legs and left foot. The Defendant's breach proximately or directly caused serious injury to Plaintiff requiring emergent trauma and burn care, unnecessary pain and suffering, large obvious scars and permanent disfigurement of the left thigh and foot and right thigh. Under the Federal Tort Claims Act, the Defendant is liable to Plaintiff for actual damages in the amount of seven hundred-fifty thousand dollars.

Second Cause of Action
Constitutional Claims Against Officer FNU FISCHER
(Bivens Claim)

46.) The acts and omissions of defendant FNU FISCHER set forth in paragraphs nine through forty-four above, violated Plaintiff's right to be free from cruel and unusual punishment by deliberate indifference to Plaintiff's health or welfare under the Eighth Amendment to the United States Constitution. Defendant FNU FISCHER is liable to Plaintiff for the unlawful actions in violation of the Constitution.

DAMAGES

47.) The defendants failure to use reasonable care caused the following damages:

a.) Past pain and suffering.

b.) Past and future mental anguish.

c.) Past and future permanent disfigurement of Plaintiff's left and right thighs and left foot.

d.) Future medical expenses to care for permanent scars/disfigurement of Plaintiff's left and right thighs and left foot.

e.) Plaintiff seeks exemplary damages for personal injuries caused by the defendant's malice under Texas Civil Practice & Remedies Code § 41.003(a)(2), as defined by section 41.001(7).

f.) Plaintiff seeks exemplary damages for personal injuries caused by defendant FNU FISCHER's deliberate indifference.

g.) Plaintiff seeks nominal damages for personal injuries caused by defendant FNU FISCHER's deliberate indifference.

h.) Plaintiff seeks declaratory relief for personal injuries caused by defendant FNU FISCHER's deliberate indifference

DEMAND FOR JURY

48.) Plaintiff hereby demands a jury trial of his constitutional claim against defendant FNU FISCHER.

PRAYER

49.) For these reasons, Plaintiff asks that the defendants be cited to appear and answer and that Plaintiff have judgment against defendants for the following:

A.) On the claim stated in paragraph 45, the Plaintiff asks the Court to enter judgment against defendant UNITED STATES OF AMERICA.

B.) On the claim stated in paragraph 46, the Plaintiff asks the Court to enter judgment against defendant FNU FISCHER.

C.) For the injuries that the Plaintiff suffered as a result of the claims stated in paragraphs 45 and 46, the Plaintiff asks the Court to hold defendants jointly and severally liable for compensatory damages and all costs of this action.

D.) For the claims in paragraph 46, the Plaintiff asks the Court to hold defendant FNU FISCHER further liable for punitive damages.

E.) Past physical pain.

F.) Mental anguish in the past and future.

G.) Disfigurement in the past and future.

H.) Future medical expenses.

I.) Exemplary damages.

J.) Prejudgment interest for Plaintiff's constitutional

claim and postjudgment interest for all of Plaintiff's claims.

K.) Declaratory relief.

L.) Nominal damages.

M.) All other relief, in law and in equity, to which Plaintiff may be entitled.

Respectfully submitted this 18 day of March, 2012.

/s/ _____

JIMMY LEE
No. 50018-018
FCI Fort Worth
P.O. Box 15330
Ft. Worth, Texas 76119

Plaintiff, pro se

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I, Jimmy Lee, state, declare and verify under penalty of perjury that the foregoing facts are true and correct. With respect to facts alleged upon information and belief, said facts are based upon personal knowledge or information in my files.

EXECUTED in Tarrant County on this 18 day of March, 2012.

/s/ _____
JIMMY LEE

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
Federal Bureau of Prisons
Tort Claims Admin. # 300
4211 Cedar Springs
Dallas, TX 75219

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*
Jimmy Lee # 50018-018
P.O. Box 15330
Ft. Worth, TX 76119-0330

3. TYPE OF EMPLOYMENT ☐ MILITARY ☒ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
	01-31-82	Divorced	February 01, 2010	1700 hrs.

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.)* On or about 02-01-10, at approx. 1700 hrs., Correctional Officer (CO) Fisher came to room # 26 in Special Housing Unit (SHU) at FCI Ft. Worth where I was being housed (for disciplinary reasons) along with another inmate to escort us to the shower. For approx. two (2) weeks prior to the date mentioned above, several inmates had informed several COs (including CO Fisher) of the water temperature being far too frigid. After weeks of complaints, the thermostat was reset. Furthermore, on the date mentioned above, there were at least four (4) inmates in the shower. Several inmates tried desperately to inform CO Fisher that the water temperature was too high. CO Fisher completely ignored the inmate's distress calls. (See attachment)

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*
N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

see #8

Received
MAR 29 2010
Bureau of Prisons
Legal Department, SCRO

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
Nathniel Hood 09844-078	FCI Fort Worth PO Box# 15330 Ft Worth TX 76119

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
N/A	OPEN	N/A	OPEN

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND I[NJURIES] CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAI[M].

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)* | 13b. Phone number of signatory | 14. DATE OF CLAIM
3-23-10

Exhibit A

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of $2,000. plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

PRESENTING FRAUDULENT FALSE STATEMENTS
Imprisonment for not more than 5 years

5-109 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable. PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

AMENDMENT TO TORT CLAIM

Submitted To: *Federal Bureau of Prisons*
Tort Claims Admin., # 300
4211 Cedar Springs Road
Dallas, Texas 75219

Claimant: *Jimmy Lee, # 50018-018*
P.O. Box 15330
Fort Worth, Texas 76119-0330

Date of Original Claim: 3/23/2010

Received FBOP SCRO: 3/29/2010

Claimant hereby amends the basis of the original claim and the amount of the claim for personal injury.

Supplemental Basis of Claim: Claimant hereby alleges upon information and belief that he received second and third degree burns to his legs with permanent disfigurement as a direct or proximate result of the negligence or wrongful acts of the safety officers at FCI Fort Worth failing to be properly trained to inspect the SHU shower facility and failing to use due diligence when inspecting the SHU shower facility. Additionally, Claimant was harmed as a direct or proximate result of a lack of supervision of SHU personnel (such as correctional officer Fisher) and inadequate or no training on shower procedures for disabled inmates by employees of the Federal Bureau of Prisons.

Amended Nature of Injury: Claimant suffered second and third degree burns bilaterally to his anterrior legs resulting in pain and hospitalization and then in-patient care at FCI Fort Worth. Claimant contracted a staph infection in the raw lesions secondary to the burns requiring intravenous antibiotic therapy. Claimant now suffers life-long scarring of his legs as a direct result of the negligence or wrongful acts of employees of the United States acting within the scope of their work or office.

Amended Amount of Claim: Claimant amends his claim for personal injury from an "open" amount to a sum certain of $ 750,000.00 to include future medical expenses.

Date: January 25, 2011.

/s/ JIMMY LEE

NITED STATES DEPARTMENT OF JUSTICE
FEDERAL CORRECTIONAL INSTITUTION
3150 HORTON ROAD
FORT WORTH, TEXAS 76119

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Jimmy Lee
Reg. No. 50018-018
FCI Fort Worth
P. O. Box 15330
Fort Worth, TX 76119

76119033030

U.S. Department of Justice

Federal Bureau of Prisons

South Central Regional Office

4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

CERTIFIED MAIL

Jimmy Lee
Reg. No. 50018-018
FCI Fort Worth
P. O. Box 15330
Fort Worth, TX 76119

Re: Administrative Tort Claim No. TRT-SCR-2010-03285

Dear Mr. Lee:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, Title 28, United States Code, Section 2672 et seq., and authority granted by Title 28, Code of Federal Regulations, Section 0.172. You claim government liability in the amount of one million five hundred thousand and 00/100 dollars ($1,500,000.00) for alleged personal injury.

Section 2672 of the Federal Tort Claims Act delegates to each Federal agency the authority to consider, determine and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You claim on February 1, 2010, while you were showering in the showers located in Special Housing Unit (SHU) you suffered severe burns on your legs. You state that you are a paraplegic and do not have feelings in your lower extremities. You allege a correctional officer was negligent when he placed you in the shower because the correctional officer ignored yours and other inmates' pleas to remove you from the shower once you realized there was something wrong with the temperature of the shower in the Special Housing Unit (SHU).

An investigation into your claim revealed you were housed in Administrative Detention status in the Special Housing Unit (SHU) on February 1, 2010.

A correctional officer indicated that on February 1, 2010, he did place you in the shower at approximately 5:00 p.m., and removed you at approximately 5:10 p.m. The correctional officer also indicated that when removing you from the shower, you informed him that the water was too hot.

You informed the correctional officer that you had burns on your legs and you requested to be assessed by medical. The correctional officer indicated he immediately notified Health Services staff of your alleged injuries. There is no evidence that the correctional officer ignored the call from other inmates to remove you from the shower.

On September 12, 2009, approximately five months prior to the incident, a hand-held shower nozzle was placed in the handicap shower to replace the direct spray shower head, allowing inmates better accessibility to maneuver the water for handicapped inmates. The shower nozzle was designed and modified specifically not to spray directly on wheelchair inmates. The spray head hangs freely and is approximately two inches from the shower floor. An inmate has to pick up the sprayer and direct the water over his body.

On February 1, 2010, you were seen in the clinic by medical staff at approximately 5:17 p.m. due to the injury you allegedly sustained in the shower area on the AD range that same date.

Based on the above, there is no evidence to indicate you sustained an injury caused by the act or omission of a Bureau of Prisons' employee acting within the scope of his or her employment. Therefore, your claim is denied.

You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

Jason A. Sickler
Regional Counsel

JIMMY L LEE, 50018-018
FORT WORTH FCI UNT: DAL QTR: D01-025L
3150 HORTON ROAD
FORT WORTH, TX 76119

Exhibit
B

Administrative Remedy No. 583606-A1
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal, in which you allege due to staff negligence, you suffered second and third degree burns on your left and right legs while in the Special Housing Unit. You allege that staff was aware that the water temperature was too hot. You request staff be reprimanded and you be compensated for pain and suffering.

Our review of the matter reveals the Warden and the Regional Director adequately responded to the issue you raise in this appeal. The Bureau of Prisons takes allegations of staff misconduct seriously. Staff conduct is governed by Program Statement 3420.09, Standards of Employee Conduct. You were notified that your allegations were referred to the appropriate Bureau of Prisons' component for review. Investigations into your allegation may or may not include interviewing you. Inmates have no entitlement to the outcome or disposition of an investigation into staff misconduct. Accordingly, the results of the investigation and actions taken against staff, if any, will not be disclosed to you.

Monetary compensation is not available relief through the Administrative Remedy process. There are statutorily-mandated procedures in place for addressing such requests. Your unit team can provide more information if you require it. Moreover, with respect to your request for the discipline of staff, we remind you such matters are insulated from inmate involvement. Accordingly, such relief is not available relief through this program and will not be considered. Hence, we provide this response is for informational purpose only.

January 4, 2011
Date

Harrell Watts, Administrator
National Inmate Appeals

U.S. Department of Justice

Central Office Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From: Lee, Jimmy, L.	50018-018	Lubbock	FCI Ft. Worth
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A—REASON FOR APPEAL

On 02-01-10, due to BOP staff negligenge, I suffered 2ND & 3RD degree burns on my left and right legs and feet. I suffered the burns while being housed in Special Housing Unit C for disciplinary reasons). Furthermore, I am a parapalegic and have no feelings from my chest, down. Several correctional officers were informed of the water temperature being too hot. The correctional officers include, but aren't limited to, CO Fisher and others. Furtherstill, no one ever responded to the informal resolution attempt (BP-8). The COs on shift should be reprimanded, and I should be compensated for pain and suffering.

Thank you for your assistance.

06-28-10
DATE

SIGNATURE OF REQUESTER

Part B—RESPONSE

RECEIVED

JUL 12 2010

Administrative Remedy Section
Federal Bureau of Prisons

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 583606-A1

Part C—RECEIPT

CASE NUMBER:

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN

BP-231(13)
APRIL 1982

LEE, Jimmy REG. NO. 50018-018 RECEIPTED: 05/12/10

CASE NO. 583606-R1 PART B-RESPONSE

You are appealing the Warden's response to your Request for Administrative Remedy wherein you allege due to staff negligence, you suffered second and third degree burns on your left and right legs while in the Special Housing Unit. You further allege staff was aware the water temperature was too hot. You request the staff be reprimanded and you be compensated for pain and suffering.

We have reviewed your allegations and have determined the Warden at the Federal Correctional Institution in Fort Worth, Texas, appropriately responded to your Request for Administrative Remedy. This matter has been referred to the appropriate investigative component for a thorough investigation. At the conclusion of the investigation, appropriate action will be taken, if deemed necessary.

Monetary compensation is not available through the Administrative Remedy process. Should you wish to pursue such relief, you may do so by submitting an administrative claim under the Federal Tort Claims Act in accordance with the procedures specified in P.S. 1320.06, Federal Tort Claims Act. You may obtain the appropriate claim form from institution staff.

Therefore, your request is denied.

In the event you are dissatisfied with this response, you may appeal to the Bureau of Prisons, Administrative Remedy Section, 320 First Street, N.W., Washington, D.C. 20534. Your appeal must be received in that office within 30 days from the date of this response.

6/14/10
Date

G. Maldonado, Jr.
Regional Director

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

CS

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From: Lee, Jimmy — LAST NAME, FIRST, MIDDLE INITIAL
50018-018 — REG. NO.
Lubbock — UNIT
FCI Ft. Worth — INSTITUTION

Part A—REASON FOR APPEAL On 02-01-10, due to BOP staff negligence, I suffered 2ND & 3RD degree burns on my left and right legs and feet. I suffered the burns while being housed in Special Housing Unit (for disciplinary reasons). Furthermore, I am a parapalegic and have no feelings from my chest down. Several correctional officers were informed of the water temperature being too hot. The correctional officers include but aren't limited to CC Fisher and others. Furtherstill, no one has responded to the informal resolution attempt (BP-8). The CCs on shift then should be reprimanded, and I should be compensated for pain and suffering.

Thank you for your assistance.

05-10-10
DATE

SIGNATURE OF REQUESTER

Part B—RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

SECOND COPY: RETURN TO INMATE

CASE NUMBER: 583606-R1

Part C—RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL — REG. NO. — UNIT — INSTITUTION

SUBJECT:

BP-230(13)

LEE, Jimmy REG. NO. 50018-018 FILED: 03-30-10

REMEDY NO. 583606-F1 PART B - RESPONSE

This is in response to your Request for Administrative Remedy received March 30, 2010. You allege due to staff negligence, you suffered second and third degree burns on your left and right legs while in the Special Housing Unit. You also allege several staff members were told the water temperature was too hot.

The Bureau of Prisons takes allegations of staff misconduct very seriously. Your allegations have been referred to the appropriate Bureau of Prison's component for investigation. You may be interviewed regarding these allegations in the future.

Based on the above information, this response is for informational purposes only.

If you are not satisfied with this decision, you may appeal to the Regional Director at Bureau of Prisons, South Central Region, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219, via a BP-230(13). Your appeal must be received in the South Central Regional Office within 20 days of the date of this response.

Rebecca Tamez
Rebecca Tamez, Warden

5/6/10
Date

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A– INMATE REQUEST

_____ _____
DATE | SIGNATURE OF REQUESTER

Part B– RESPONSE

See Attachment

_____ _____
DATE | WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

SECOND COPY: RETURN TO INMATE CASE NUMBER: _____

CASE NUMBER: _____

Part C– RECEIPT

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

_____ _____
DATE | RECIPIENT'S SIGNATURE (STAFF MEMBER)

BP-229(13)
APRIL 1982

February 16, 2010

To whom it may concern:

On or about February 01, 2010, at approximately 1700 hours, Correctional officer (CO) Fisher came to room # 26 in Special Housing Unit (SHU) at FCI Ft. Worth where inmate Nathaniel Hood # 09844-078 and myself were housed (for disciplinary reasons) to escort us to the shower. (Showers are permitted/allowed three (3) times per week, i.e. Monday, Tuesday, and Wednesday).

For approximately two (2) weeks prior to the date mentioned above, several inmates had informed different COs that the water was far too frigid. The temperature of the water at the time was anywhere from 35°F - 45°F. The thermostat ~~of~~ was finally reset.

Furthermore, on the date mentioned in the first paragraph, there were at least four (4) inmates in the shower (the shower holds up to six (6) inmates at one time). Several inmates tried desperately to inform CO Fisher that the tempurature of the water was too hot. CO Fisher completely disreguarded the inmate's distress calls.

Furtherstill, I am paralyzed from the waist down. I was unable to sense the temperature of the water. I always wash my legs first. Due to CO Fisher's negligence, I received severe burns on my legs (second degree).

On Tuesday, February 16, 2010, while I was in the clinic, a doctor, whom is new at this facility, examined my wounds. The doctor stated, "The water had to exceed 180°F in order to burn so severly." He also said, "The water in my coffee doesn't get that hot!"

Please see to it that no one has to suffer such cruelty or negligence ever again.

Thank you for your assistance.

Respectfully yours,

Jimmy Lee # 50018-018

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: LEE, JIMMY L Reg.#: 50018-018
Date of Birth: 01/31/1982 Sex: M Race: BLACK
Encounter Date: 02/01/2010 17:18 Provider: Snell, Deborah RN Facility: FTW

Injury Assessment-Not Work Related encounter performed at Special Housing Unit.

SUBJECTIVE:

INJURY 1 **Provider:** Snell, Deborah RN

Date of Injury: 02/01/2010 17:20 **Date Reported for Treatment:** 02/01/2010 17:27
Work Related: No **Work Assignment:** ADM DET M
Where Did Injury Happen (Be specific as to location):
shower area AD range
Cause of Injury (Inmate's Statement of how injury occurred):
hot water in the shower left upper leg anterior and posterior side, right leg and left foot are burned. Skin removed and hair is off leg.
Symptoms (as reported by inmate):
Inmate is a paraplegia left leg burn noted skin removed. area the size 12 inches by 4 inches.

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
02/01/2010	17:30 FTW	98.6	37.0	Oral	Snell, Deborah RN

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
02/01/2010	17:30 FTW	80	Via Machine		Snell, Deborah RN

Respirations:

Date	Time	Rate Per Minute	Provider
02/01/2010	17:30 FTW	18	Snell, Deborah RN

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
02/01/2010	17:30 FTW	109/68	Left Arm	Sitting	Adult-regular	Snell, Deborah RN

SaO2:

Date	Time	Value(%)	Air	Provider
02/01/2010	17:30 FTW	99	Room Air	Snell, Deborah RN

Exhibit C

Exam:

ASSESSMENT:

Burn - Thermal-Major
S:" I burnt my legs and foot in the shower."
O; 98.6-80-18 109/68 O2 sat 99% Room Air.
A: Alteration in skin integrity
P: PA Gomez notified and orders received to transfer to JPS ER for evalulation.

Inmate Name: LEE, JIMMY L
Date of Birth: 01/31/1982
Encounter Date: 02/01/2010 17:18
Sex: M
Provider: Snell, Deborah RN
Reg #: 50018-018
Race: BLACK
Facility: FTW

PLAN:

Disposition:

Notify PA Duty Officer

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
02/01/2010	Counseling	Compliance - Treatment	Snell, Deborah	Verbalizes Understanding

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: Yes **By:** Gomez, Jose MLP

Telephone or Verbal order read back and verified.

Completed by Snell, Deborah RN on 02/01/2010 18:33

Requested to be cosigned by Gomez, Jose MLP.

Cosign documentation will be displayed on the following page.

Requested to be reviewed by Tubera, Butch MD, CD.

Review documentation will be displayed on the following page.

Bureau of Prisons
Health Services
Cosign/Review

Inmate Name:	LEE, JIMMY L			Reg #:	50018-016
Date of Birth:	01/31/1982	Sex:	M	Race:	BLACK
Encounter Date:	02/01/2010 17:18	Provider:	Snell, Deborah RN	Facility:	FTW

Cosigned by Gomez, Jose MLP on 02/02/2010 07:28.

Cosigner Comments:

Concur with note. Patient was transfered to local ER for treatment. Patient has now returned and will be followed at FMC Fort Worth.

Reviewed by Tubera, Butch MD, CD on 02/02/2010 12:39.

Reviewer Comments:

Foregoing notes reviewed, follow up in clinic as scheduled.

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	LEE, JIMMY L	Sex:	M	Reg #:	50018018
Date of Birth:	01/31/1982			Race:	BLACK
Note Date:	02/01/2010 18:07	Provider:	Jones, Pam RN	Facility:	FTW

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Jones, Pam RN

Inmate is being taken care of by jail nurse, starting IV . This nurse called P.A. Gomez to give update and received order to send to JPS Emergency room due to burns of 80% of left leg and unknown amount of burn on right leg. Burn was due to shower water and inmate paraplegic and unable to feel the degree of the water. Inmate to go to hospital via ambulance. Operations LT notified.

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: Yes **By:** Tubera, Butch MD, CD

Telephone or Verbal order read back and verified.

Completed by Jones, Pam RN on 02/01/2010 18:16

Requested to be cosigned by Tubera, Butch MD, CD.

Cosign documentation will be displayed on the following page.

Requested to be reviewed by Gomez, Jose MLP.

Review documentation will be displayed on the following page.

Bureau of Prisons
Health Services
Cosign/Review

Inmate Name:	LEE, JIMMY L			Reg#:	50018-018
Date of Birth:	01/31/1982	Sex:	M	Race:	BLACK
Encounter Date:	02/01/2010 18:07	Provider:	Jones, Pam RN	Facility:	FTW

Cosigned by Tubera, Butch MD, CD on 02/02/2010 12:17.

Cosigner Comments:

Foregoing notes reviewed, follow up as scheduled in the clinic.

Reviewed by Gomez, Jose MLP on 02/02/2010 07:15.

Reviewer Comments:

Orders given to send inmate to local hospital ER.

JPS
1575 S. Main Street
Fort Worth, TX 76104

Emergency Department
817-921-3431
Assessment Sheet

MR # 35806959 Sex: Male DOB: 01/31/1982
Name: Lee, Jimmy
Unit/Location: 3-RED/Trauma Bed 5
Address: 1412 MAY ST STE 108, FORT WORTH, TX 76104
Phone: (817)534-8488 Account # 300773472O8 Age: 28

Complaint: Burn
Arrival Date/Time: 19:36 02/01/2010
Arrived by: Ambulance
Mobility:
Resident: Unassigned,
Accompanied By:

Acuity: Priority 3
Insurance: UNT-HSC
Amb/Helicopter: *Medstar
Referring Facility:
Emergency Physician: Huggins MD, Charles

Complaint Code:
Treatment PTA: None

Triage Nurse: Fowler RN, Charlotte A

Special Needs:

Past Medical Hx:
Tetanus History:
Social History:
Weights:
LMP Date:

Medications

Medication	Dose/mg	Route	Ordering Phys	Given	By

Allergy

Allergy	Allergic Reaction
*None	

Vital Signs

	Pain	Pulse Ox	Pupils	Glasgow Coma
PTA 98.3 130/90 ..	22:07 6/10	PTA 100		PTA 14

Disposition Information
Primary Diagnosis: Burn (any degree) 10-19% BSA
Secondary Diagnosis:
Disposition: ER Transfer to Hospital
Report Called By:
Prescriptions:
Discharge Instructions: BURN CARE
Disability Statement:
Follow-up Care:
Discharge Time: 22:07 02/01/2010

Family Notification:
Report Given To:

Michael Nwude, MD

Appt Date/Time:

Initials	Name	Initials	Name

CMAXX: 35806959 - 300773472O8 - EDRFC - 20100203093

H 8/28/18

JPS
1575 S. Main Street
Fort Worth, TX 76104

Emergency Department
817-921-3431
Assessment Sheet

MR # 35806959 Sex: Male DOB: 01/31/1982
Name: Lee, Jimmy
Unit/Location: 3-REIVTrauma Bed 5
Address: 1412 MAY ST STE 108, FORT WORTH, TX 76104
Phone: (817)534-8400 Account # 300773472008 Age: 28

Triage/Initial Assessment

19:39 02/01/2010 - **Domestic Violence -- Charlotte Towler RN**
Hurt/threatened last year?: No
He slapped, punched, kicked?: No
Do you feel safe where you live?: Yes
19:39 02/01/2010 - **Dysphagia Screening -- Charlotte Towler RN**
Pt Cognitive function assessment: Able to swallow
FAST Stroke test: Facial Palsy: No
19:39 02/01/2010 - **Allergy Information -- Charlotte Towler RN**
Allergy: "None"
19:40 02/01/2010 - **Ambulance Triage -- Charlotte Towler RN**
Systolic: 130
Pulse Oximetry %: 100
Diabetic: (N)
Transport: PTA: None
Ambulance: "Medic"
Total GCS: 15
Chief Complaint: Burn
Presenting Complaints: Trauma Diner
Initial Triage Acuity: Priority 3
Pulse Rate: (R)
Respirations: 18
Temperature: 98.3
Mode of Arrival: Ambulance

Disposition

20:40 02/01/2010 - **Provider Screening -- Charles Huggins MD**
Med Reconciliation Screening: Yes
EKG Screening: N/A
Immunization Screening: Yes
Restraint Review: N/A
20:40 02/01/2010 - **Home Medications -- Charles Huggins MD**
Medication Reconciliation: Completed by ED Provider
20:42 02/01/2010 - **Discharge Condition -- Charles Huggins MD**
Condition: Good
Mobility at Discharge: Stretcher
Patient Teaching: Written discharge instructions reviewed w/ pt. Pt voiced understanding of plan of care. Follow-up plan of care reviewed w/ pt
Mode of Discharge: Ambulance

Assessment

19:36 02/01/2010 - **Charge Room -- Auto REG User**
Charge Room: Waiting for Triage
19:36 02/01/2010 - **Charge Physician -- Auto REG User**
ED Physician: Unassigned
Resident: Unassigned
Prim. Care Provider: Unassigned
Responsible Physician: Unassigned
2nd ED/UCC Provider: Unassigned
Attending Provider: Unassigned
19:39 02/01/2010 - **Charge Room -- Charlotte Towler RN**
Charge Room: Waiting for Triage
19:40 02/01/2010 - **Acuity -- Charlotte Towler RN**
Acuity: Priority 3
19:40 02/01/2010 - **Oximetry -- Charlotte Towler RN**
Pulse Oximetry %: 100
Taken: PTA
19:40 02/01/2010 - **Adult GCS - Triage -- Charlotte Towler RN**
Total GCS: 15
Taken: PTA
19:40 02/01/2010 - **Vital Signs -- Charlotte Towler RN**
Temp: 98.3
BP: 130/90
HR: 80
Resp: 18
19:41 02/01/2010 - **Charge Room -- Charlotte Towler RN**
Charge Room: Trauma Wait bed A
19:43 02/01/2010 - **Charge Room -- Alvin Ibana RN**
Charge Room: Trauma Bed 5
19:43 02/01/2010 - **Charge Nurse -- Alvin Ibana RN**
Primary Nurse: Ibana RN, Alvin
Secondary Nurse: Unassigned,
Responsible Nurse: Ibana RN, Alvin
20:16 02/01/2010 - **Charge Physician -- Charles Huggins MD**
ED Physician: Huggins MD, Charles
Resident: Unassigned
Prim. Care Provider: Unassigned
Responsible Physician: Huggins MD, Charles
2nd ED/UCC Provider: Unassigned
Attending Provider: Unassigned
Medical Screening Provider: Unassigned
20:41 02/01/2010 - **Discharge Diagnosis -- Charles Huggins MD**
Primary: Burn (any degree) 10-19% BSA
20:43 02/01/2010 - **Discharge Instructions -- Charles Huggins MD**
Discharge Instruction: BURN CARE
20:43 02/01/2010 - **Discharge Note -- Charles Huggins MD**
Note: You are being transferred to Parkland for further burn care and management. Follow up will be included with the burn center.
21:43 02/01/2010 - **Final Order Results -- Auto RIS User**
Type of Order: LAB
Placer Number: 00002
Child order number: 19865541
Note, Procedure: SL CBC/DIF
Result

WBC	9.22	/CCM	4.50-11.00	
RBC	5.58	/CMM	4.50-5.90	
HGB	15.7	G/DL	13.5-17.5	
HCT	46.3	%	41.0-53.0	
MCV	83.0	FI	80.0-94.0	
MCH	28.2	PG	27.0-31.0	
MCHC	34.7	%	32.0-36.0	
RDW-CV	14.3	%	11.0-16.0	
PLT	255	/CMM	150-500	
MPV	10.7	FI	9.0-13.0	
NEUT 10E3	6.16	/CMM	2.00-8.10	
LYMPH 10E3	2.50	/CMM	0.60-6.00	
MONO 10E3	0.50	/CMM	0.00-1.00	
EOS 10E3	0.04	/CMM	0.00-0.70	
BASOS 10E3	0.02	/CMM	0.00-0.20	
NEUT	66.9	%	50.0-66.0	H
LYMPHS	27.1	%	25.0-45.0	
MONOS	5.4	%	4.0-10.0	
EOS	0.4	%	0.0-5.0	
BASOS	0.2	%	0.0-1.0	
ANALY INFO	0			
SAMPLE INF	0			
ERR FUNC	0			
ERR RESULT	0			

21:56 02/01/2010 - **Final Order Results -- Auto HIS User**
Type of Order: LAB
Placer Number: 00003
Child order number: 19866596
Note, Procedure: SL CHEM 8
Result

SODIUM	140	MEQ/L	135-145	
POTASSIUM	4.5	MEQ/L	3.5-5.3	
CL	101	MEQ/L	98-110	
GLUCOSE	81	MG/DL	70-110	
CO2 VEN	24.0	MMOL	22.0-29.0	
BUN	11	MG/DL	6-25	
CREATININE	0.9	MG/DL	0.5-1.4	
CALCIUM	9.2	MG/DL	8.3-10.3	
BUN/CREAT	12.2	MG/DL		
OSMOLARITY	278	MOSM/K	272-305	
ANION GAP	12	MEQ/L	8-17	

Medical Nwude, MD

5018-018

JPS
1575 S. Main Street
Fort Worth, TX 76104

Emergency Department
817-921-3431
Assessment Sheet

MR # 35806959 Sex: Male DOB: 01/31/1982
Name: Lee, Jimmy 50018-018
Unit/Location: 3-RED/Trauma Bed 5
Address: 1412 MAY ST STE 108, FORT WORTH, TX 76104
Phone: (817)534-8400 Account # 30077347208 Age: 28

22:05 02/01/2010 - Discharge Summary -- Alvin Ibana RN
DC Condition: Good
Pain at Discharge: 1/10 - mild
IV DC: Not Applicable
Valuables returned: Yes
Mobility at Discharge: Stretcher
Mode of Discharge: Ambulance
DC Instructions Signed: No, pt admitted
Barriers to Learning: Unable to assess
Pt Learning Preference: Unable to Assess
Pt Response to Teaching: Unable to Assess: Unable to Assess
22:05 02/01/2010 - Nurse Observations -- Alvin Ibana RN
Acuity: Priority 3
Note: Pt transfered to Parkland Hospital, all documentation on trauma flow sheet
22:07 02/01/2010 - Property Inventory -- Alvin Ibana RN
Clothing Inventory: *See Additional Notes
Note: Pt in jail jumpsuit
22:07 02/01/2010 - Pain Assessment -- Alvin Ibana RN
Severity Score: 4/10
Pain Scale Used: Numeric Scale
Currently in Pain: Yes
22:07 02/01/2010 - Nutritional Screening -- Alvin Ibana RN
Appetite: Unable to assess

Orders

20:16 02/01/2010 - ER Physician Eval. -- Charles Huggins MD
Evaluate Patient - Charles Huggins MD at 02/01/2010 20:16
21:43 02/01/2010 - SI Cbc/dlf -- Auto HIS User
Obtain Specimen - Auto HIS User at 02/01/2010 21:43
Specimen in Lab - Auto HIS User at 02/01/2010 21:43
Review Results
21:56 02/01/2010 - SI Chem-8 -- Auto HIS User
Obtain Specimen - Auto HIS User at 02/01/2010 21:56
Specimen in Lab - Auto HIS User at 02/01/2010 21:56
Review Results

Provider Documentation

Lee, Jimmy
Reg # 50018-018

Michael Nwude, MD

2/18/10

DALLAS COUNTY HOSPITAL DISTRICT
DALLAS, TEXAS
PHYSICIAN'S ORDER SHEET

DOCTOR: Your orders are being automatically copied. Please write or print legibly. **USE A BLACK BALLPOINT PEN.**
NURSE: If the Doctor did not use all the lines in a segment, mark thru blank lines.
For non-floor stocked drugs indicate in the X column.
CLERK: Addressograph all four spaces before placing in the charts

MRN: 4370992 DOS: 2/4/10
LEE, JIMMY L
DOB: 01/31/1982 BL/M
BURN
HAR: 606732819
CSN: 321141157
#50018-018

DATE TIME		CHARGE CODE	QTY.	X	DATE:
2/4/10	Burn Wound Care:				
(1)	Wash wounds with soap and water.				
(2)	Remove as much of the cheesy, yellow or white eschar as possible				
(3)	Rinse off the soap.				
(4)	Gently pat dry.				
(5)	Apply layer of Silvadene Cream to open wounds only.				
(6)	Cover with guaze.				
(7)	Wrap/secure the guaze with Kerlix.				
(8)	Tape Kerlix to itself to hold in place.				
(9)	CALL KELLY, RN @ 214-590-0168 w/questions.				
	N.O. (Lawless, Shiv)				
	B. Tubera, MD Clinical Director 2/4/10				

MRN: 4370992 DOS: 2/4/10
LEE, JIMMY L
DOB: 01/31/1982 BL/M
BURN
HAR: 606732819
CSN: 321141157

DATE:

MRN: 4370992 DOS: 2/4/10
LEE, JIMMY L
DOB: 01/31/1982 BL/M
BURN
HAR: 606732819
CSN: 321141157

DATE:

MRN: 4370992 DOS: 2/4/10
LEE, JIMMY L
DOB: 01/31/1982 BL/M
BURN
HAR: 606732819
CSN: 321141157

FORM NO 55970 (REV. 6-77)

00

DALLAS COUNTY HOSPITAL DISTRICT **PROGRESS NOTES – OUTPATIENT DEPARTMENT**

GUARANTOR NAME	GUARANTOR PHONE	MEDICARE NO	MEDICAID NO
INSURANCE COMPANY	GROUP NUMBER	POLICY / CERTIFICATE NO.	CONTRACT NO.
NAME OF INSURED	EMPLOYER OF INSURED	PATIENT NAME	
INSURED EMPLOYER'S ADDRESS	STATE	ZIP CODE	ACCIDENT RELATED YES ☐ NO ☐

MRN: 4378992
LEE, JIMMY L DOS: 2/4/10
DOB: 01/31/1982 BL/M
BURN
HAR: 000732818
CSN: 321141157

DEPT.

SERVICE DATE

LOCATION

PHYSICIAN

DIAGNOSIS

CASHIER LOCATION

CLINIC CLERK

BURN CLINIC DATE 2/4/10 @ 2135

AGE 28 DATE OF BURN 2/1/10

T: 96.8 P: 93 R: 18 BP: 123/79

ALLERGIES: NKA

BMG DRESSINGS? Yes ⓒ leg.

SIGNATURE ~~Tonya Bailey CMA 1426~~

Pain-0
pain 0/10

2345 Arm & chest
dkw burn to LUE ~~TRUE~~ AND
~~LLE~~ LLE from burn
in shower today
(5am). pt is
in wheelchair 2/2 gow-
ing work (2/2 increase in sensation) below in LE, 5 yrs ago. ~~Wound dressed~~
~~was done to by burns pain to wrist to be painful.~~ Pain denies. Treated c
silvadene and dressings. (R) groin, pt has 3° burn to (R) ant thigh, (R) not
thigh, (L) knee, ankle & lat 3° burn to lateral edge (L) thigh. will consider split
by dermatome for next week pending progress & tissue stable. Also consider graft to 3°
burn area.

Ryan P. PA

B. Tubera, MD
Clinical Director

I GRANT PERMISSION TO THE MEDICAL STAFF OF DALLAS COUNTY HOSPITAL DISTRICT TO PERFORM ANY MEDICAL OR SURGICAL TREATMENT AND TO ADMINISTER SUCH ANESTHETICS AND/OR DRUGS AS MAY BE DEEMED NECESSARY IN THE DIAGNOSIS AND TREATMENT OF SAID PATIENT. I FURTHER STATE THAT THE ABOVE AND FOREGOING FACTS AND INFORMATION ARE TRUE AND CORRECT TO MY PERSONAL KNOWLEDGE.

SIGNATURE

WITNESS

I (WE) AUTHORIZE PAY PARKLAND MEMORIAL HOSPITAL ALL CHARGES ATTRIBUTED AS A RESULT OF THIS ADMISSION UPON RECEIPT OF STATEMENT. IT IS SPECIFICALLY UNDERSTOOD THAT ALL CHARGES NOT PAID BY THE INSURANCE COMPANY SHALL BE THE RESPONSIBILITY OF THE UNDERSIGNED. I (WE) ALSO AUTHORIZE PAYMENT DIRECTLY TO THE ABOVE NAMED HOSPITAL OF THE HOSPITAL INSURANCE BENEFITS OTHERWISE PAYABLE TO ME (US) NOT EXCEEDING THE AVERAGE PAID BY THE HOSPITAL FOR ALL CHARGES FOR THIS PERIOD OF HOSPITALIZATION. I UNDERSTAND I AM FINANCIALLY RESPONSIBLE TO THE HOSPITAL FOR THESE CHARGES, AND I HEREBY AUTHORIZE THE USE OR DISCLOSURE OF INFORMATION REQUESTED BY MY INSURANCE COMPANY(S).

SIGNATURE

PS 100 (Front) 6/95

Lee, Jimmy
#4370992
DOB: 1/31/82
#50018-018

PROGRESS NOTES - OUTPATIENT DEPARTMENT

PMR Note:
28 yoc T6/T7 Spinal Cord injury and resultant Paraplegia with hot water burn sustained 2 days ago, burn to (R) leg, (L) leg, (L) Thigh. ↓ ROM to extremities secondary to Spinal Cord injury ↓↓ sensation.
AP 15% BSA to (L) lower extremity, Continue to apply silvadene to wounds daily by Medical Staff in Jail.
RTC in 2 weeks to assess response to wound care or follow up with JPSmith if Prison Staff deems it appropriate.
PHX PAC / 78931.

PS: May need graft on area of lateral thigh that is full thickness.

B. Tubera, MD
Clinical Director
2/5/10

DALLAS COUNTY HOSPITAL DISTRICT **PROGRESS NOTES – OUTPATIENT DEPARTMENT**

GUARANTOR NAME	GUARANTOR PHONE	MEDICARE NO.	MEDICAID NO.
INSURANCE COMPANY	GROUP NUMBER	POLICY / CERTIFICATE NO	CONTRACT NO.
NAME OF INSURED	EMPLOYER OF INSURED		PATIENT HOME
INSURED EMPLOYER'S ADDRESS	STATE	ZIP CODE	ACCIDENT RELATED YES ☐ NO ☐

MRN: 4370992 DOS: 3/18/10
LEE, JIMMY L
DOB: 01/31/1982 BL/M
BURN
HAR: 606838782
CSN: 321331061

3/1/1982

#50018-018

DEPT.

PHYSICIAN

DIAGNOSIS

SERVICE DATE

CASHIER LOCATION

LOCATION

CLINIC CLERK

BURN CLINIC DATE 3/18/10 @ 0944

AGE 28 **DATE OF BURN** 2/1/10

T 96.0 P 66 R 18 BP 126/76

ALLERGIES: NKA

DOING DRESSINGS? @ leg.

SIGNATURE Tonya Burley CMA 19285

Fair pain 9/10

3/18/10 BURNS NP: 28 yo ♂ S/P Scald Burn 02/01/10 @ LE Scalded c hot water in shower. Has been Tx'd c SSD/FMG. Here today for scheduled f/u. Pt reports burn to (L) leg is completely healed. Burn to (L) leg mostly healed. ⊕ ambulatory activity evident. 2 small superficial open areas. Remainder of burn healed. Burn. (A) 2 ♀. T8S+ Burn. (P) D/C SSD. use Bacitracin to open areas.

I GRANT PERMISSION TO THE MEDICAL STAFF OF DALLAS COUNTY HOSPITAL DISTRICT TO PERFORM ANY MEDICAL OR SURGICAL TREATMENT AND TO ADMINISTER SUCH ANESTHETICS AND/OR DRUGS AS MAY BE DEEMED NECESSARY IN THE DIAGNOSIS AND TREATMENT OF SAID PATIENT. FURTHERMORE I STATE THAT THE ABOVE AND FOREGOING FACTS AND INFORMATION ARE TRUE AND CORRECT TO MY PERSONAL KNOWLEDGE.

SIGNATURE

WITNESS

I PROMISE AND AGREE TO PAY PARKLAND MEMORIAL HOSPITAL ALL CHARGES ACCRUING AS A RESULT OF THIS ADMISSION UPON RECEIPT OF STATEMENT. IT IS SPECIFICALLY UNDERSTOOD AND AGREED THAT ALL PAYMENTS WILL BE MADE TO THE BUSINESS OFFICE, PARKLAND MEMORIAL HOSPITAL, 5201 HARRY HINES BLVD., DALLAS, TEXAS AND I HEREBY AUTHORIZE PAYMENT DIRECTLY TO THE ABOVE NAMED HOSPITAL OF THE HOSPITAL INSURANCE BENEFITS OTHERWISE PAYABLE TO ME BUT NOT TO EXCEED THE BALANCE DUE OF THE HOSPITAL'S REGULAR CHARGES FOR THIS PERIOD OF HOSPITALIZATION. I UNDERSTAND I AM FINANCIALLY RESPONSIBLE TO THE HOSPITAL FOR THESE CHARGES, AND I HEREBY AUTHORIZE RELEASE BY THE HOSPITAL OF INFORMATION REQUESTED BY MY INSURANCE COMPANIES.

SIGNATURE

PS 190 (Front) 6/95

PROGRESS NOTES - OUTPATIENT DEPARTMENT

#50018-018

PM&R Burns PGY2

28 y/o M c̄ scalded hot water burn to RLE & LLE on 2/1/10. Pt reports no pain. state LLE burn healed, RLE mostly healed applying SSD to RLE burn

PE: healed ~~scar~~ burn [illegible] on medial thigh of RLE, & open areas

(L)LE post calf burn completed healed, no open areas, (L)LE lateral thigh scar mostly healed c̄ one blister. & 2-3 scattered ~~open~~ dry red areas & purulence/discharge

A/P 1) Apply bacitracin to affected red areas, D/C SSD, lotion to healed area around affected region, RTC prn

[illegible] 3-18-10

cc - [illegible]

S - [illegible]

O - [illegible] blister [illegible]

P - [illegible], no PT or OT needed, [illegible] lotion o/c to [illegible]

[signature]

Shannon Stults # 28354

B. Tubera, MD
Clinical Director

PS 190 (Back) 6/95

DALLAS COUNTY HOSPITAL DISTRICT
DALLAS, TEXAS

#50018-018

MRN: 4378892 DOS: 3/18/10
LEE, JIMMY L
DOB: 01/31/1982 BL/M
BURN
HAR: 886938792
CSN: 321331051

PROGRESS NOTES
OUTPATIENT DEPARTMENT

1. D/C Silvadene
2. Apply Bacitracin or triple antibiotic ointment of choice to open wounds.

Dens, ACNP
214-590-7050

B. Tubera, MD
Clinical Director

Form 52350 (Rev 2/02)

Federal Correctional Institution
3150 Horton Rd.
Fort Worth, TX 76119
Date 3/30/12

This enclosed letter was processed through special mailing procedures for forwarding to you. This letter has been neither open nor inspected. If the writer raises a question or problem over which this facility has jurisdiction, you may wish to return the material for further information or clirification. If the writer encloses correspondence for forwarding to another addressee, please return the enclosure to the above address.



U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 18 2012
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JIMMY LEE,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:12-CV-197-A
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

FINAL JUDGMENT AS TO CERTAIN DEFENDANT

Consistent with the order signed by the court on the date of the signing of this final judgment as to certain defendant,

The court ORDERS, ADJUDGES, and DECREES that all claims and causes of action asserted by plaintiff, Jimmy Lee, against defendant FNU Fischer in the above-captioned action, be, and are hereby, dismissed with prejudice.

SIGNED June 18, 2012.

JOHN MCBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 20 2013
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JIMMY LEE,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:12-CV-197-A
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

FINAL JUDGMENT

Consistent with the order signed by the court in the above-captioned action on the date of the signing of this final judgment,

The court ORDERS, ADJUDGES, and DECREES that all claims and causes of action asserted by plaintiff, Jimmy Lee, against defendant, United States of America, be, and are hereby, dismissed with prejudice.

The court further ORDERS, ADJUDGES, and DECREES that plaintiff have and recover his costs of court from defendant.

SIGNED May 20, 2013.

JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 20 2013
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JIMMY LEE,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:12-CV-197-A
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

ORDER

On May 17, 2013, a document titled "Notice of Settlement" was filed in the above case by defendant, United States of America. The Notice of Settlement informed the court that the parties have signed a settlement agreement, and that plaintiff, Jimmy Lee, will file a motion to dismiss this action upon his receipt of the settlement check. The court assumes that the dismissal is to be with prejudice and that the government is to bear costs of court. Accordingly, the court is rendering a final judgment, consistent with those assumptions.

Therefore,

The court ORDERS that all claims and causes of action brought in the above action by plaintiff, Jimmy Lee, against

defendant, United States of America, be, and are hereby, dismissed with prejudice.

SIGNED May 20, 2013.

JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY 21 2012
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JIMMY LEE,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:12-CV-197-A
	§	
FNU FISCHER, ET AL.,	§	
	§	
Defendants.	§	

ORDER

Came on for consideration the above-captioned action wherein the plaintiff is Jimmy Lee and the defendants are FNU Fischer ("Fischer"), alleged to be a correctional officer at Federal Correctional Institution in Fort Worth, and United States of America. The court finds that, pursuant to Rule 4(c)(3) of the Federal Rules of Civil Procedure, plaintiff is entitled to have the summons and complaint served by the United States Marshal. Rochon v. Dawson, 828 F.2d 1107, 1109-10 (5th Cir. 1987). In order to serve the complaint, the Marshal will need one form 285 and three summons forms to be filled out by the clerk for each defendant. The court is directing the clerk to fill out the required forms and then forward them, with a copy of plaintiff's complaint attached to each, to the Marshal for service.

Inasmuch as the parties to be served are United States of America and an officer of United States of America, service will be accomplished in the manner contemplated by the applicable

parts of Rule 4(i) of the Federal Rules of Civil Procedure, to wit:

> (1) *United States*. To serve the United States, a party must:
>
> > (A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought -- or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk--or
> >
> > (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;
> >
> > [and]
> >
> > (B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; . . .
> >
> > . . . .
>
> (3) *Officer or Employee Sued Individually*. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

Fed. R. Civ. P. 4(i)(1)(A)-(B) & (3).

Therefore,

The court ORDERS that the clerk complete appropriate and sufficient forms to facilitate service of summons and complaint on Fischer and United States of America. Upon completion of the

forms, the clerk is ORDERED to issue summons, with a copy of the complaint attached to each, for Fischer and United States of America, and deliver them to the United States Marshal for the Northern District of Texas for service on defendants.

The court further ORDERS that, upon receipt of such items from the clerk, the United States Marshal for the Northern District of Texas cause service of summons to be made on Fischer and United States of America in the manner contemplated by the rule set forth above.

SIGNED May 21, 2012.

JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT - 2 2012
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JIMMY LEE,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:12-CV-197-A
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

O R D E R

After having considered the motion filed by plaintiff, Jimmy Lee, on October 2, 2012, to amend his civil complaint, the court has concluded that the relief sought by such motion should be denied.

Apparently, the request for permission to amend the complaint is prompted by Lee's desire to name as additional defendants Darryl Gray and Carl Adams, for the purpose of asserting a Bivens[1] cause of action against each of them. The court concludes that the filing of an amended complaint to accomplish those goals would be futile. Apparently, the applicable statute of limitations already has run as to those claims; and, moreover, when the factual allegations of the complaint are considered, the court considers implausible that

[1]Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)

plaintiff has a Bivens cause of action against either of those persons. No facts are alleged that would cause the court to conclude that, if the facts were accepted as truthful, either of those parties violated any constitutional right of plaintiff.

Therefore,

The court ORDERS that such motion be, and is hereby, denied.

SIGNED October 2, 2012.

JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 18 2012
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JIMMY LEE,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:12-CV-197-A
	§	
FNU FISCHER, ET AL.,	§	
	§	
Defendants.	§	

ORDER

Came on for consideration the motion to voluntary dismiss filed in the above-captioned action by plaintiff, Jimmy Lee. Plaintiff in the motion states he no longer wishes to pursue his claims against defendant FNU Fischer ("Fischer"), who is alleged to be a correctional officer at Federal Correctional Institution in Fort Worth. Having considered the motion, the court concludes that it should be granted. Therefore,

The court ORDERS that all claims and causes of action asserted by plaintiff, Jimmy Lee, against defendant Fischer in the above-captioned action be, and are hereby, dismissed with prejudice.

The court further ORDERS that the caption of this action be changed by the removal of "FNU Fischer" from the title, so that from this point forward, the title shall read, "Jimmy Lee, Plaintiff, v. United States of America, Defendant."

The court determines that there is no just reason for delay in, and hereby directs, entry of final judgment as to such dismissal.

SIGNED June 18, 2012.

JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG - 1 2012
CLERK, U.S. DISTRICT COURT
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JIMMY LEE,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:12-CV-197-A
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

ORDER SETTING SCHEDULE
AND PROVIDING SPECIAL PRETRIAL INSTRUCTIONS

The court finds that the following order should be entered. In addition to fixing a schedule, this order provides important, special pretrial instructions that the parties must bear in mind as the trial date approaches.

The court ORDERS that:

1. Any motion for leave to join other parties to this action shall be filed by November 5, 2012. Any motion for summary judgment shall be filed at least seventy-five (75) days prior to the scheduled trial date. A motion for summary judgment will be filed separately and will not include any other motion. A motion for continuance pursuant to Fed. R. Civ. P. 56(d) will be filed separately and will not be included in a summary judgment response or any other document.

2. Any motion for leave to amend pleadings must be filed by February 25, 2013.

3. All discovery must be initiated in time to allow completion of discovery by April 29, 2013. After that date, no discovery may be conducted and no discovery motion, other than a motion under Fed. R. Civ. P. 37(d), may be filed without an order extending the discovery deadline upon a showing of good cause.

4. Any motion, other than the motions described in items 1-3 above and motions in limine, shall be filed at least thirty (30) days prior to the scheduled trial date.

5. This case is set for a non-jury trial the week of May 28, 2013, with docket call at 9:00 a.m. on that date.

6. No later than Monday one week prior to the scheduled trial date each party shall file with the Clerk (i) a witness list, (ii) an exhibit list, (iii) an agreed summary, accompanied by appropriate page and line references, of portions of each deposition, other than portions to be offered by video, to be offered at trial, and (iv), if set for non-jury trial, proposed findings of fact and conclusions of law, or, if set for jury trial, a proposed jury charge and verdict form.

7. The parties shall not file depositions or exhibits prior to trial, but shall have the originals and one copy thereof available immediately prior to trial. Each exhibit that will be

offered at trial shall bear the case number of this action in addition to the exhibit number and identity of offering party.

8. The witness list contemplated by paragraph 6 above will be accompanied, when it is filed, by a statement as to each witness of each subject matter upon which the witness will be asked to testify. The witness list will include two columns, one bearing the heading "Sworn" and the other bearing the heading "Testified" so that the court can keep track of the witnesses at trial.

9. The exhibit list contemplated by paragraph 6 above shall be accompanied, when it is filed, by a statement signed by counsel for each party, other than the party who will be offering the exhibit, stating as to each exhibit shown on the list either that the parties agree to the admissibility of the exhibit or the nature and legal basis of any objection that will be made to the admissibility of the exhibit and the identity of the party or parties who will be urging the objection. All parties are required to cooperate in causing such statements to be prepared in a timely manner for filing with the exhibit lists. The party proposing to offer an exhibit shall be responsible for coordinating activities related to preparation of such a statement as to the exhibit he proposes to offer. No exhibit will be offered at the trial of this case unless such a statement

has been timely filed as to the exhibit. The exhibit list will include two columns, one bearing the heading "Offered" and the other bearing the heading "Admitted."

10. No party will adopt any motion or pleading filed by any other party; and, the court will not entertain a motion to adopt. No party is permitted to adopt as, or in, the party's witness list or exhibit list all or any part of the witness list or exhibit list of another party.

11. All deposition testimony to be offered at trial shall be offered in summary, rather than question and answer, form. The offering party shall be responsible to obtain agreement of counsel[1] for all other parties to the accuracy of the proposed summary. Agreement of counsel as to proposed summaries shall be reached before the agreed summaries are filed, as required by paragraph 6 above.

12. If there is a possibility that a party will use at trial any video or audio recording, or any transcript of such a recording, such party shall notify the court of that fact no later than May 6, 2013, by the filing of a document advising of such possible use and describing each such item the party might use at trial.

---

[1]The term "counsel" as used herein includes pro se parties. For example, the term "plaintiff's counsel" means the plaintiff himself or herself if proceeding pro se.

13. Not more than fifteen minutes of videotaped deposition testimony will be offered by any party from any deposition. Counsel shall reach agreement in advance of trial as to any objections related to testimony to be offered by videotape or, if agreement cannot be reached, shall present the disagreement to the court for resolution at least two weeks prior to the scheduled trial date. If less than an entire videotaped deposition is offered, it will be offered by means of an appropriately edited tape to which all parties have agreed.

14. Each party shall designate experts by filing a written designation including the name, address, and telephone number of each expert who may be called to testify and make the disclosures required by Fed. R. Civ. P. 26(a)(2) by serving the required written reports at least 120 days before the trial date.

15. This case is not exempt from the requirements for scheduling orders, pretrial orders or any other orders of the court.

16. The court reminds the parties that a response and brief to an opposed motion must be filed within twenty (20) days from the date the motion is filed, Local Civil Rule LR 7.1(e), and that a reply brief may be filed within fifteen (15) days from the date the response is filed, Local Civil Rule LR 7.1(f). Each motion shall be deemed to be ripe for ruling by the court at the

end of such time period. If the court concludes that the motion should be granted, the court normally will not await a reply before ruling. As a general rule, motions will be ruled upon without hearing; however, hearings will be scheduled as appropriate.

17. All parties and attorneys in this action are reminded of the provisions of Fed. R. Civ. P. 11 and Local Civil Rules LR 7.1, LR 10.1, LR 83.7, LR 83.9, and LR 83.10. The rules do not contemplate that law firms are, or will be, admitted or authorized to practice before this court. Instead, the representation is to be provided by individual attorneys who qualify to practice before this court under the provisions of Local Civil Rules LR 83.7, LR 83.9, or LR 83.10. Nor do the rules contemplate that simulated signatures of attorneys of record can be used, instead of actual signatures, on pleadings, motions, etc.

The court ORDERS that from this point forward all parties to this action, and their counsel, shall strictly comply with the requirements of the above-mentioned rules, and that, in the course of doing so:

(a) Each attorney who participates in a conference contemplated by Local Civil Rule LR 7.1 shall be an attorney of record who is admitted to practice before this court

pursuant to the provisions of Local Civil Rules LR 83.7, LR 83.9, or LR 83.10;

(b) Each certificate of service and certificate of conference shall be signed by either a pro se party or an attorney of record who is admitted or authorized to practice before this court pursuant to the provisions of Local Civil Rules LR 83.7, LR 83.9, or LR 83.10;

(c) A simulated signature of an attorney or party is unacceptable and will not be used;

(d) None of the items filed with the papers in this action is to be signed by a law firm, as opposed to individual attorneys who are admitted or authorized to practice before this court pursuant to the provisions of Local Civil Rules LR 83.7, LR 83.9, or LR 83.10;

(e) None of the items filed with the papers in this action is to be signed by an attorney who is not authorized to practice before this court pursuant to the provisions of Local Civil Rules LR 83.7, LR 83.9, or LR 83.10; and

(f) Each pro se party shall sign each item filed by him or her on his or her own behalf.

The court will consider ordering the denial of the relief sought by any item that has not been properly prepared, signed or

filed or the ordering that such an item be stricken from the record of this case.

The court further ORDERS that: Each evidentiary item, including any exhibits, filed in connection with any pleading or other paper, shall be clearly marked by the exhibit number or letter, or other designation if any, assigned to the item. All such items shall be filed as attachments, or in a separate volume, bearing consecutive page numbers and appropriate index tabs so that the court can readily locate each item. Each collection of evidentiary items shall have at the front a table of contents giving the description of each item in the collection and the tab and page number where the item can be found. Evidentiary items shall not be put together in such a fashion as to make them unwieldy. An item or collection of items of more than fifty pages shall be spiral-bound on the side. Counsel shall highlight, as appropriate, those portions of the items that are of particular pertinence. Submission to the court of any collection of cases or other legal authorities will be handled in a manner comparable to the foregoing directions relative to evidentiary items.

Further, counsel are reminded that the federal rules contemplate only that statements in pleadings may be adopted by reference. Fed. R. Civ. P. 10(c). Attempted incorporation by

reference of any other material may not be considered by the court.

Strict compliance with the terms of this order is required. Should any party or counsel fail to cooperate in doing anything required by this order to be done, such party or counsel or both will be subject to sanctions, including dismissal or entry of default without further notice. See Fed. R. Civ. P. 16(f).

SIGNED August 1, 2012.

JOHN McBRYDE
United States District Judge

Welcome WILSON J MOORER | Logout

HOME ALERTS MY WORK NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SCR-2012-00727 **Short Description:** LEE V. FISCHER ET AL

CASE DETAILS CASE DOCS CASE PERSONS CASE DATES CASE SUMMARY CASE BLOG

Case Login Information

Reference Number	4:12-cv-00197-A
Short Description	LEE V. FISCHER ET AL
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	SOUTH CENTRAL REGIONAL OFFICE
Current Institution	Fort Worth (FCI)
Incident Region	SOUTH CENTRAL REGIONAL OFFICE
Incident Institution	Fort Worth (FCI)
Monetary Relief Sought	$750,000.00
Estimated Amount	$
Office	Fort Worth
Jurisdiction	NORTHERN DISTRICT OF TEXAS
Responsible Legal Office	SCRO Dallas

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	05/21/2013
Type	Settled
Reason Sought	
Amount offered	$
Total Amount Paid	$60,000.00
Description	
Description	
Court Fee Paid ?	Yes
Pro Se ?	Yes

Case Initiation Dates

Date Received	06/05/2012
Date Filed	04/02/2012

Case Progress

Current Owner	BRENDA VICTOR
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1983 CIVIL RIGHTS
Further Case Classification	
Comments	Inmate complains hot water from SHU shower burned his legs

Home Alerts My Work New Case Search Main | Email

United States Department of Justice Office of General Counsel & Review

1:12-cv-0578 Sec P

no $ sent

RECEIVED
MAR 05 2012
TONY R. MOORE, CLERK
BY _____ DEPUTY

Form to be used by a prisoner filing a civil rights complaint under THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

Jerome Weathington 08121-028 _____ Sec.P
Full Name of Plaintiff, Prisoner Number **Civil Action**

VS. **Judge**

United States of America ET AL
Full Name of Defendant **Magistrate Judge**

COMPLAINT

I. Previous Lawsuits

A. Have you begun any other lawsuit while incarcerated or detained in any facility?
Yes V No _____

B. If your answer to the preceding question is yes, provide the following information.

1. State the court(s) where each lawsuit was filed (if federal, identify the District; if state court, identify the county or parish):

United States District Court Western district of Louisiana

2. Name the parties to the previous lawsuit(s):

Plaintiffs: Jerome Weathington

Defendants: United states

3. Docket number(s): 1:09 CV 705, 1:09 cv 1183, 1:10 cv 00359

4. Date(s) on which each lawsuit was filed: 1:09 cv 705 Dont Remember (2009) 1:09 cv 1183 (2009) 1:10 cv 00359 (2010)

5. Disposition and date thereof [For example, was the case dismissed and when? Was it appealed and by whom (plaintiff or defendant)? Is the case still pending?]:

1:10 cv 00359 is being set for trial 1:09 cv 705 and 1:09 cv 1183 was dismissed
I dont Remember Date they were dismissed

C. Have you filed any lawsuit or appeal in any federal district court or appeals court which

has been dismissed?
Yes ✓ No ____

If your answer to the preceding question is yes, state the court(s) which dismissed the case, the civil action number(s), and the reason for dismissal (e.g., frivolity, malice, failure to state a claim, defendants immune from relief sought, etc.).

1:09 CV705, 1:09 CV1183 dismissed Failure to state claim

II. A. **Name of institution and address of current place of confinement:**

FCI Talladega PO Box 1000 Talladega, AL 35160

B. Is there a prison grievance procedure in this institution?
Yes ✓ No ____

1. Did you file an administrative grievance based upon the same facts which form the basis of this lawsuit?
Yes ✓ No ____
If Yes, what is the Administrative Remedy Procedure number? Trt scr 2011-03535
Administrative Remedies 516584, 512751, 522233, 543225, 542624
2. If you did not file an administrative grievance, explain why you have not done so.

3. If you filed an administrative grievance, answer the following question.
What specific steps of the prison procedure did you take and what was the result? (For example, for state prisoners in the custody of the Department of Public Safety and Corrections: did you appeal any adverse decision through to Step 3 of the administrative grievance procedure by appealing to the Secretary of the Louisiana Department of Public Safety and Corrections? For federal prisoners: did you appeal any adverse decision from the warden to the Regional Director for the Federal Bureau of Prisons, or did you make a claim under the Federal Tort Claims Act?)

I made a claim under the Federal Tort claims Act and I sent it in for Reconsideration and Received No Response 3 times
Attach a copy of each prison response and/or decision rendered in the administrative proceeding.

IV STAtement of Claim

History of Facts

On July 2007 I was Jumped and stabed by DC inmates in Allenwood, PA (USP Allenwood). I was Transferred For safety & Security Reasons To USP Beaumont in Beaumont, TX. I was Jumped agin within 4 weeks by Inmates who was Friends and/homeboys of the DC inmates That I was Jumped by in Allenwood. I was Tranferred to USP Pollock for close supervision

In the month of August of 2008 while at USP Pollock I requested Protective custody /Protection I checked in From the compound I was put in the Special housing Unit.

On NOV of 2008 I wrote an administrative remedy Requesting Protective custody

In Jan of 2009 I was involved in an incident with 2 DC inmates After the incidents happened and 2 of US inmates Received outside medical treatment For collapsed lungs All three of US Inmates was pending Prosecution. I filed on the incident and was later the only inmate indicted Also I filed a civil Action which is being set For Trial currently I was Keep away From all DC inmates Pursuant to SIS mcKinnely of USP Pollock

In June of 2009 I requested to be celled Alone and Rec Alone because I was not being Protected I filed an Administrative Remedy to the Warden who stated staff is aware of my Seperation needs and will Keep them in mind When moving me From Recreation and cell Rotation.

On July 2009 I requested Protective custody / Protection Again after I was involved in an Assault on me For Defending myself after the officers of the Bureau of Prisons put a DC inmate in my cell he Assaulted me and I held him and push the Emergency button and I had to Kick on the door. I was wrote up for Fighting The DHO Found me guilty and said at no time can an inmate use self defense.

Incident At HAND

On August 4, 2010 while still housed in the same special housing unit at USP Pollock I was Assaulted by 2 DC inmates at Recreation in the special housing unit. The Recreation officer put me in the same Recreational cage With the Same inmates I Requested Protective custody / Protection From "DC inmates". I was Punched on Kicked repeatedly and stabed in the Ear by these 2 inmates and I was seen by medical and my Ear was bleeding I was given medical Treatment and was Told I will have Temporary hearing lose.

Pursuant to 18 USC 4042 The Bureau of Prisons suppose to provide For the Protection and safe Keeping of all inmates with crimes against the United states. I requested Protective custody and / Protection from this group of Inmates from the "DC" area and was not given Any at All The Bureau of Prisons Failed every request after I repeatedly asked For Protection. I am under Imminent Personal danger Because the BOP will not Keep me Seperate From DC inmates This is a Failure to Protect claim

Jerome Weathington 08121028

Jerome Weathington

V. **Relief**

State exactly what you want the court to provide to you or do for you. Make no legal arguments. Cite no cases or statutes.

$2,000,000.00 in DAmages
$1,000,000.00 in Emotional injury
$2,000,000.00 Paint Suffering 5,000,000.00 Total

VI. Plaintiff's Declaration

A. I understand that if I am transferred or released, I must apprise the Court of my address, and my failure to do so may result in this complaint being dismissed.

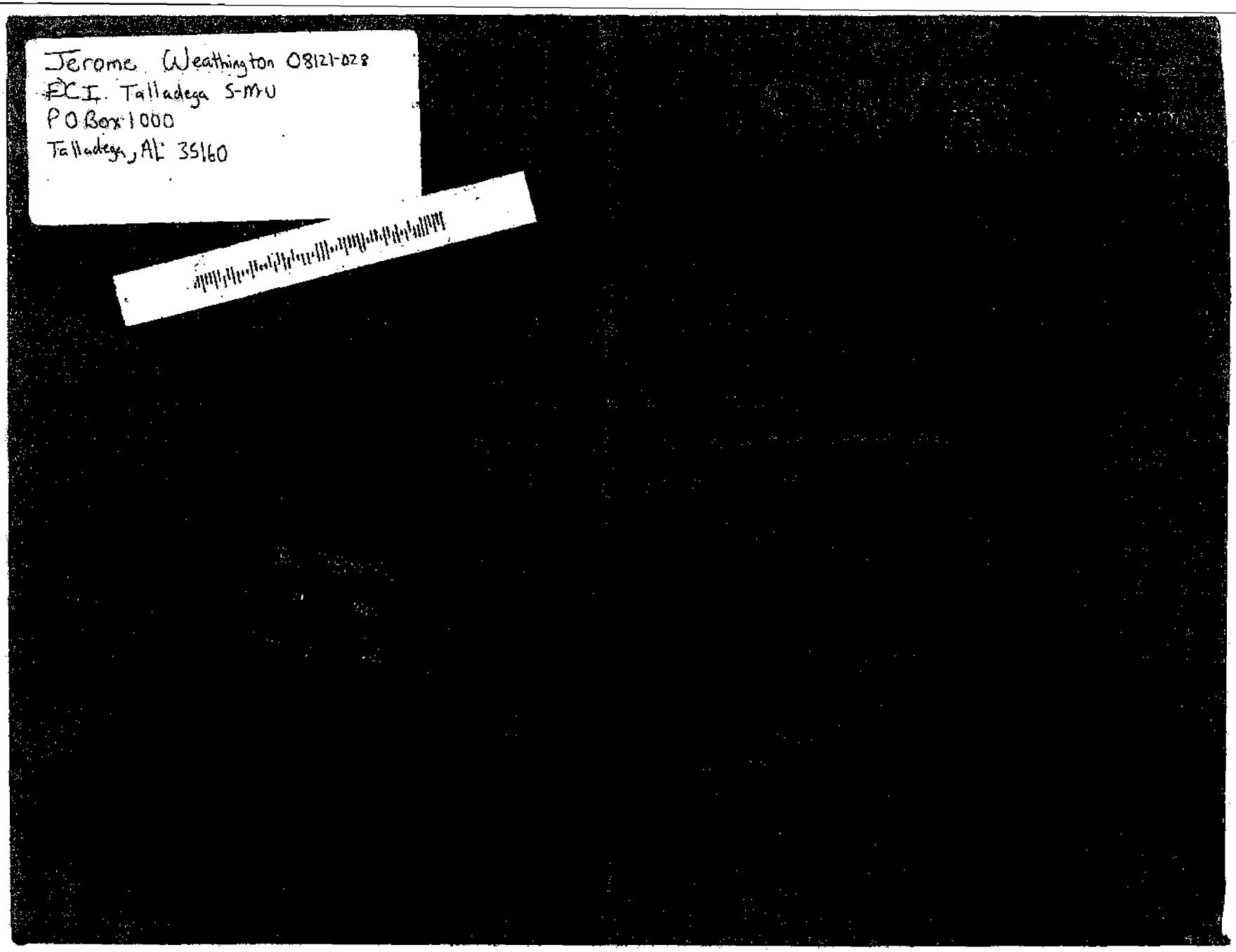
B. I understand that I may not proceed without prepayment of costs if I have filed three lawsuits and/or appeals that were dismissed on grounds that the action and/or appeal was frivolous or malicious, or failed to state a claim upon which relief may be granted, unless I am in imminent danger of serious physical injury.

Signed this 28 **day of** February, 2012.

08121-028
Prisoner no. (Louisiana Department of Corrections or Federal Bureau of Prisons or Alien registration number)

Signature of Plaintiff

5/2006


Jerome Weathington 08121-028
FCI. Talladega S-MU
PO Box 1000
Talladega, AL 35160

JS 44 (Rev. 09/11)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS #08121-028

Jerome Weathington

(b) County of Residence of First Listed Plaintiff XX US, Outside
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

F C I - Talladega

DEFENDANTS

1) United States of America
2) Bureau of Prisons
3) Unknown Recreational Officer of Special Housing Unit
4) Warden Keffer
5) Unknown Officers

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☒ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:

Brief description of cause: 42:1983pr

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ 5,000

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Case 1:12-cv-00576-DDD-JDK Document 1-2 Filed 03/05/12 Page 1 of 57 PageID #: 9

REMEDY-ID	SUBJ1/SUBJ2	ABSTRACT			
	RCV-OFC	RCV-FACL	DATE-RCV	STATUS	STATUS-D
511221-F1	34DS/	ALLEGES ASSAULTED BY OFFICER AUGUST 2008			
	POL	POL	10-07-2008	CLD	10-30-2
512751-F1	34ZM/	ASSAULTED AT ALLENWOOD-STAFF WERE NEGLIGENT 7-2			
	POL	POL	10-22-2008	REJ	10-22-2
512751-R1	34ZM/	ASSAULTED AT ALLENWOOD-STAFF WERE NEGLIGENT 7-2			
	SCR	POL	11-12-2008	REJ	11-12-2
511221-R1	34DS/	ALLEGES ASSAULTED BY OFFICER AUGUST 2008			
	SCR	POL	11-18-2008	REJ	11-18-2
516584-F1	22BS/34DS	REQ PROTECTION-ALLEGES STAFF ASSAULTED- REQ $$			
	POL	POL	11-21-2008	VOD	11-21-2
516584-F2	22BS/34DS	REQ PROTECTION-ALLEGES STAFF ASSAULTED- REQ $$			
	POL	POL	11-21-2008	CLO	12-12-2

G0002 MORE PAGES TO FOLLOW . . .

REMEDY-ID	SUBJ1/SUBJ2 RCV-OFC	ABSTRACT RCV-FACL	DATE-RCV	STATUS	STATUS-D
512751-A1	34ZM/ BOP	ASSAULTED AT ALLENWOOD-STAFF WERE NEGLIGENT 7-2 POL	12-02-2008	REJ	12-12-2
516584-R1	22BS/34DS SCR	REQ PROTECT-ALLEG AUG STAF ASSAULTED- REQ $$ POL	12-31-2008	CLD	01-27-2
522233-F1	10AS/ POL	NEEDS TRANSFER FOR PROTECTION-SEEKS $$ COMPENSA POL	01-12-2009	REJ	01-12-2
522700-F1	25DS/ POL	TENNIS SHOES & PROPERTY LOST W/PLACED IN SHU AU POL	01-15-2009	REJ	01-15-2
522704-F1	26BS/34DS POL	ALLEGES STAFF ASSAULT @OUTSIDE HOSPITAL-INADEQ POL	01-15-2009	CLD	10-21-2
523610-R1	10ZS/34AS SCR	WAIT REDESIG, OTHERS IN SHU AFTER-ALREADY LEFT POL	01-20-2009	REJ	01-20-2

G0002 MORE PAGES TO FOLLOW . . .

TDC * SANITIZED FORMAT * 01-10-2
PAGE 004 * 09:31:5

REMEDY-ID	SUBJ1/SUBJ2 RCV-OFC	ABSTRACT RCV-FACL	DATE-RCV	STATUS	STATUS-D
524593-F1	22CS/24AS POL	NO MEAL SERVED IN SHU 12-9-08-NO RESPONSE TO BP POL	01-30-2009	CLD	02-18-2
524595-F1	34DS/ POL	ALLEGES HE WAS ASSAULTED BY OFFICER IN SHU 12-8 POL	01-30-2009	CLO	02-18-2
524597-F1	25DS/ POL	PROPERTY LOST WHEN WENT TO OUTSIDE HOSPITAL 1-2 POL	01-30-2009	REJ	01-30-2
525217-F1	34AS/ POL	RIGHTS VIOLATED BY STAFF/RESERVE CAMERAS POL	02-05-2009	CLO	02-18-2
525225-F1	34AS/ POL	INAPPROPRIATE CONDUCT BY STAFF/RESERVE CAMERAS POL	02-05-2009	CLO	02-18-2
526920-F1	22DS/ POL	SHU STAFF DENIED FOOD 12-9-08 POL	02-19-2009	CLO	03-05-2

G0002 MORE PAGES TO FOLLOW . . .

TDGCR ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL * 01-10-2
PAGE 005 * SANITIZED FORMAT * 09:31:5

REMEDY-ID	SUBJ1/SUBJ2 RCV-OFC	ABSTRACT RCV-FACL	DATE-RCV	STATUS	STATUS-D
516584-A1	22BS/34DS BOP	REQ PROTECT-ALLEG AUG STAF ASSAULTED- REQ $$ POL	03-02-2009	REJ	03-11-2
529408-F1	27CS/ POL	REQ OUTSIDE DENTIST FOR FILLING IN TOOTH-WAIT > POL	03-10-2009	CLO	03-20-2
524593-R1	22CS/24AS SCR	NO MEAL SERVED IN SHU 12-9-08-NO RESPONSE TO BP- POL	03-16-2009	CLD	04-16-2
530781-F1	34DS/ POL	ALLEGES STAFF GRABBED ARM THROUGH FOOD SLOT-ASS POL	03-19-2009	CLD	04-10-2
535148-R1	20DS/ SCR	DHO HRNG 03/25/09, REHEARING 04/14/09 POL	04-13-2009	REJ	04-13-2
535148-R2	20DS/ SCR	04/14/09 DHO REHRNG FROM 03/25/09, CODE 224 2-1 POL	04-30-2009	CLD	06-11-2

G0002 MORE PAGES TO FOLLOW . . .

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* TDGCR                                                                    01-10-2
PAGE 006                  *                SANITIZED FORMAT                 *   09:31:5
 REMEDY-ID      SUBJ1/SUBJ2  ---------------------ABSTRACT---------------------
                RCV-OFC      RCV-FACL       DATE-RCV        STATUS      STATUS-D

537330-R1       20DS/         04/14/09 DHO REHRNG FROM 03/25/09, CODE 224 3-1
                  SCR          POL          04-30-2009       CLD         06-11-2

540610-R1       20BS/20CS     DHO HRNG 05-13-09, CODE 307
                  SCR          POL          05-21-2009       CLD         06-24-2

540611-R1       20BS/20CS     DHO HRNG 05-13-09, CODE 201
                  SCR          POL          05-21-2009       CLD         07-02-2

543225-R1       10ZS/34AS     ALLG PC - TRANS GO TO GEN POP; STAF REPRIMAND, I
                  SCR          POL          06-10-2009       REJ         06-10-2

542624-F1       22ZS/         REQUEST TO BE CELLED ALONE AND REC ALONE
                  POL          POL          06-11-2009       CLO         07-01-2

542645-F1       22ZS/         TOOTHBRUSHES NOT ADEQUATE & NOT AVAILABLE AT TI
                  POL          POL          06-11-2009       CLD         07-08-2

G0002          MORE PAGES TO FOLLOW . . .
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TDGCR * SANITIZED FORMAT * 04-10-2
PAGE 007 * SANITIZED FORMAT * 09:31:5

REMEDY-ID	SUBJ1/SUBJ2 RCV-OFC	ABSTRACT RCV-FACL	DATE-RCV	STATUS	STATUS-D
535148-A1	20DS/ BOP	04/14/09 DHO REHRNG FROM 03/25/09, CODE 224 2-1 POL	06-25-2009	REJ	07-16-2
537330-A1	20DS/ BOP	04/14/09 DHO REHRNG FROM 03/25/09, CODE 224 3-1 POL	06-25-2009	REJ	07-16-2
545087-F1	22CS/ POL	NO PILLOWS OR PROPER BEDDING IN SHU POL	06-29-2009	CLO	07-20-2
537330-A2	20DS/ BOP	04/14/09 DHO REHRNG FROM 03/25/09, CODE 224 3-1 POL	07-01-2009	REJ	07-20-2
543225-A1	10ZS/34AS BOP	ALLG PC - TRANS GO TO GEN POP; STAF REPRIMAND, POL	07-02-2009	REJ	07-22-2
535148-A2	20DS/ BOP	04/14/09 DHO REHRNG FROM 03/25/09, CODE 224 2-1 POL	07-02-2009	REJ	07-23-2

G0002 MORE PAGES TO FOLLOW . . .

REMEDY-ID	SUBJ1/SUBJ2	ABSTRACT			
	RCV-OFC	RCV-FACL	DATE-RCV	STATUS	STATUS-D
542624-R1	22ZS/	REQUEST TO BE CELLED ALONE AND REC ALONE			
	SCR	POL	07-13-2009	CLD	08-10-2
540610-A1	20BS/20CS	DHO APPEAL/ CODE 307 /HEARING 05-13-2009			
	BOP	POL	07-21-2009	CLD	10-23-2
540611-A1	20BS/20CS	DHO HRNG 05-13-09, CODE 201			
	BOP	POL	07-22-2009	REJ	09-01-2
537330-A3	20DS/	04/14/09 DHO REHRNG FROM 03/25/09, CODE 224 3-1			
	BOP	POL	08-04-2009	REJ	09-04-2
535148-A3	20DS/	04/14/09 DHO REHRNG FROM 03/25/09, CODE 224 2-1			
	BOP	POL	08-04-2009	REJ	09-04-2
551176-F1	22ZS/	REQ TOOTHBRUSES TO BE IN A SEALED PACKAGE NOT O			
	POL	POL	08-11-2009	CLD	08-28-2

G0002 MORE PAGES TO FOLLOW . . .

TDG 04-10-2
PAGE 009 * SANITIZED FORMAT * 09:31:5

REMEDY-ID	SUBJ1/SUBJ2 RCV-OFC	ABSTRACT RCV-FACL	DATE-RCV	STATUS	STATUS-D
551195-F1	16BS/ POL	REQ TO RECV MAIL WHILE IN SHU NOT PLACED IN PRO POL	08-11-2009	CLD	10-01-2
553639-R1	20BS/20CS SCR	DHO HRNG 08-04-09, CODE 201 POL	08-17-2009	CLD	10-16-2
535148-A4	20DS/ BOP	DHO APPEAL/ CODE 224 /RE-HEARING 04-14-2009 POL	08-20-2009	CLD	12-10-2
542624-A1	22ZS/ BOP	REQUEST TO BE CELLED ALONE AND REC ALONE POL	09-10-2009	REJ	11-02-2
540611-A2	20BS/20CS BOP	DHO APPEAL/ CODE 201 /HEARING 05-13-2009 POL	10-08-2009	CLD	01-19-2
537330-A4	20DS/ BOP	DHO APPEAL/ CODE 224 /REHEARING 04-14-2009 POL	10-08-2009	CLD	01-20-2

G0002 MORE PAGES TO FOLLOW . . .

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* TDG                                                                                  01-10-2
PAGE 010          *                SANITIZED FORMAT                          *          09:31:5
 REMEDY-ID      SUBJ1/SUBJ2   ---------------------ABSTRACT---------------------
                RCV-OFC       RCV-FACL       DATE-RCV        STATUS      STATUS-D

561087-F1       22ES/34AS     STAFF USED USE OF FORCE WHEN NOT NECESSARY
                  POL           POL          10-20-2009      CLD         11-02-2

561934-F1       27CS/         PROMISED TEETH BE CLEANS INCE 3/2008-NEVER HAPP
                  POL           POL          10-27-2009      CLO         11-10-2

551195-R1       16BS/         REQ RCV MAIL WHILE IN SHU, NOT PLACED IN PROPER
                  SCR           POL          10-30-2009      CLO         12-18-2

561087-R1       22ES/34AS     STAF RETAL - GASSED WHEN CUFFING UP
                  SCR           POL          11-13-2009      CLO         12-18-2

553639-A1       20BS/20CS     DHO HRNG 08-04-09, CODE 201
                  BOP           POL          11-18-2009      CLD         03-31-2

561934-R1       27CS/         PROMIS TEETH CLEAN SINCE MAR 08, STILL WAITING
                  SCR           POL          12-16-2009      CLO         01-22-2

G0002         MORE PAGES TO FOLLOW . . .
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REMEDY-ID	SUBJ1/SUBJ2 RCV-OFC	ABSTRACT RCV-FACL	DATE-RCV	STATUS	STATUS-D
573647-F1	34AS/33GS POL	C/O PUT TOOTHPASTE ON LEGAL DOCS- RUINED THEM POL	01-21-2010	CLD	02-18-2
561087-A1	22ES/34AS BOP	STAF RETAL - GASSED WHEN CUFFING UP POL	01-22-2010	REJ	02-23-2
551195-A1	16BS/ BOP	REQ RCV MAIL WHILE IN SHU, NOT PLACED IN PROPER POL	01-22-2010	REJ	02-23-2
561934-A1	27CS/ BOP	PROMIS TEETH CLEAN SINCE MAR 08, STILL WAITING POL	02-16-2010	CLO	04-28-2

58 REMEDY SUBMISSION(S) SELECTED

G0000 TRANSACTION SUCCESSFULLY COMPLETED

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

[redacted]

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Nordstrom, Paul NP

Inmate issued guaze for right ear. Wound care instructions given. Inmate instructed he may experience short term hearing loss. Inmate verbalized understanding.

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Nordstrom, Paul NP on 08/04/2010 10:34

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

[redacted]

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Nordstrom, Paul NP

s/p right ear trauma. Medication change.

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Antipyrine & Benzocaine Otic	08/04/2010 11:22	2-4gtts In Affected Ear(s) Ear, Right -Two Times a Day x 10 day(s)

Indication: Other ear problems

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Nordstrom, Paul NP on 08/04/2010 11:25

Bureau of Prisons
Health Services
Cosign/Review

[redacted]

Cosigned by Alexandre, Joel MD CD on 08/04/2010 15:43.

Bureau of Prisons
Health Services
Clinical Encounter

[redacted]

Follow-up encounter performed at Special Housing Unit.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Vasquez, Willie PA-C

Chief Complaint: Ears/Hearing Problem
Subjective: Inmate wanted his ear checked out again.
Pain Location: Ear-Right
Pain Scale: 7
Pain Qualities: Aching | Tender
History of Trauma:
Onset: 3-4 Weeks
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

OBJECTIVE:

Exam:

General

Appearance/Nutrition

Appears Well (yes), NAD (yes), WD/WN (yes), Alert and Oriented x 3 (yes)

Ears

Tympanic Membrane

Normal (yes)

Canal

Patent (yes), Draining (no), Erythema (yes), Swelling (no), Tenderness to Palpation (yes)

Hx of stab wound to ear—healing.
No signs of infection.

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Other ear problems	V41.3	Current	08/04/2010	Improved	Temporary/Acute

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order

[redacted]

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Naproxen Tablet	08/25/2010 12:16	500mg Orally -Two Times a Day PRN x 7 day(s) -- take one tab po 2xdaily with food pm pn

Indication: Other ear problems

Disposition:

Follow-up at Sick Call as Needed

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
08/25/2010	Counseling	Compliance - Treatment	Vasquez, Willie	Verbalizes Understanding

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Vasquez, Willie PA-C on 08/25/2010 12:19

U.S. Department of Justice

Federal Bureau of Prisons

South Central Regional Office

4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

CERTIFIED MAIL # 7010 1670 0000 9692 5337
MAILED: September 23, 2011

Jerome Weathington (Reg. No. 08121-028)
Federal Correctional Institution
P.O. Box 1000
Talladega, AL 35160

RE: Administrative Tort Claim No. TRT-SCR-2011-03535

Dear Mr. Weathington:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, Title 28 U.S.C. Section 2672 et seq., and authority granted by 28 C.F.R. Section 0.172. You claim government liability in the amount of $5,000,000.00 for personal injury.

Section 2672 of the Federal Tort Claims Act delegates to each federal agency the authority to consider, determine, and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You state that on August 4, 2010, at the United States Penitentiary (USP) Pollock you were assaulted by two "DC" inmates in the Special Housing Unit (SHU) recreation area. You allege you were to be separated from all "DC" inmates.

An investigation of your claim revealed that on August 4, 2010, you were involved in a physical confrontation with two other inmates in the SHU recreation area. SHU staff immediately called for assistance. Upon the arrival of responding staff, you and the two were restrained. You were then provided appropriate medical treatment, and placed in a

WEATHINGTON, Jerome
Reg. No. 08121-028
TRT-SCR-2011-03535

cell in SHU. There was no documentation that you were to be separated from the two inmates who assaulted you. Further, staff had no prior knowledge that these two inmates would assault you.

An investigation could not establish that you experienced an injury due to a negligent act or omission of a Federal Bureau of Prisons employee acting within the scope of his or her office or employment.

Based on these facts, your claim is denied. You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

Jason A. Sickler
Regional Counsel

cc: W. A. Sherrod, Warden
USP Pollock

Dec 21, 2011

Dear Bureau of Prisons Administrative Remedy Sec

This is my 3rd Time writing You and Requesting for a receipt concerning my Administrative Tort claim I requested for you to review I F I dont Receive a response back this time within 30 days of Today I am Filing my Civil Action in Court and This Letter will be Copied Just For Future Reference in Case you say You never received my Administrative Tort claim I will provide you a Copy with everything 1more time Just in Case you havent Received the last 2 Because on a Re-review of a Tort claim it is not mandatory I've Just Told you there mistake and as You see I dont have no problem with Filing to the Court for violating my Constitutional rights

Thank You Jerome Weathington
Certified Dec 21, 2011

PS I am Indigent so my Counselor will be mailing This letter to You For the 3rd Time and I will be signing for them to mail this to You in Washington, DC for the 3rd Time Also my Counselor says They dont issue Receipts for Tort claims he says I must write You

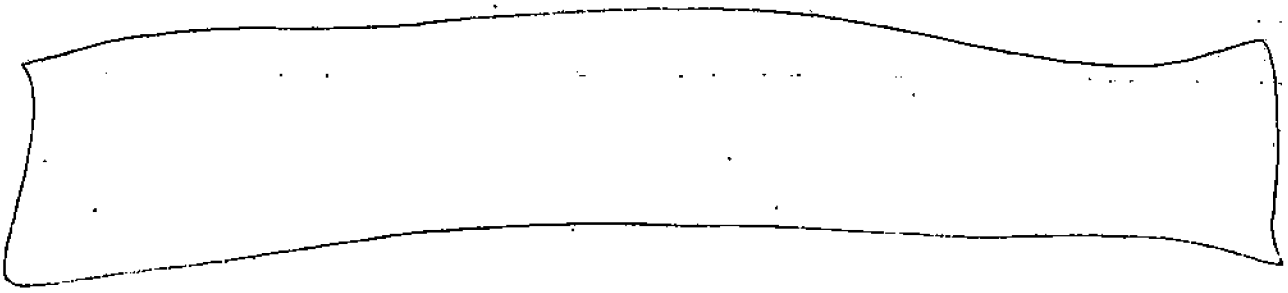
Dear

BOP ADmin Remedy Sec I am writing You to request for you to Review my Tort Claim response TRT-SCR-2011-035. I am requesting for you to do an Investigation On my Tort claim which was denied by The South Central Regional office The reason it was denied is because of In proper Investigations The response stated "There was no documentation that you were to be seperated from the Two inmates who assaulted you." I am saying There was documentation I have documentation on my Seperation status which is my Keep Away From status which is the same thing; I arrived at USP Pollock March 2008 & August I requested protective Custody January 2, 2009 I was involved in a fight with 2 dc inmates Where I was stabed over 20 times and The othe guys was stabed also SIS/SIA MKinnly Put me Keep away From status Against all DC inmates I was Indicted Got 5 more years before my sentening officers Put me with DC inmates I was stabed in the car and Jumped The other inmates was wrote an incident Report I didnt Get one because I was the victim The Recreation officer was wrote up For not following Policy and putting me in the Recreation Cage with DC inmates. Also I already filed several Tort claims for personal injury and Administrative Remedies For officers violating my rights as a prisoner by putting me with Inmates From D.C. Only thing you need to do is review my Administrative Remedies and Tort claims From BP-8 BP9 - BP10 - BP-11 To Tort claims I put in you will see several times Between Aug 2008 - Jan 2011 while I was in USP Pollock (SHU) Special housing unit I requested to Be seperated From DC inmates. It is on file. I even have a Civil Actinn

in Court which I provided with my Tort claim. That incident happened 1 year and 8 months before this incident and I was in the Same institution and SHU. I hope I provided you with enough information about my issue so we can resolve my claim I am willing to negotiate on my settlement

Also before I go this officer who was wrote up was in the Special housing unit before I came and he has been in the Special housing unit from 2008-2011 he was aware of Every incident I've been in and has been the Recreation officer on Several occasions So he Knew who I could and couldn't be around also he had a list of who could be around who for protection reasons.

I am providing a copy of my Seperation status when I was at USP Pollock an officer Gave me this paper when I was in the SHU at USP Pollock.



I have made my Personal copies Just in Case we have to take this to court

Thank You
Jerome Weathington

01-106LA/ WEATHINGTON, J 08121-028 USP D/S M1

KAF: ATER 31671-007; LIGGINS 32408-007; WILSON 50070-037; COLEMAN 22531-424
(KAF:ALL DC INMATES)

NOTICE FROM U.S. DISTRICT COURT - WESTERN DISTRICT OF LOUISIANA

Jerome Weathington (PrisID: #08121-028)
F D C - Oakdale
P O Box 5010
Oakdale, LA 71463

Case: 1:10-cv-00359 #23
35 pages. Printed: Thu Mar 3 17:01:02 2011

COPY From

My Civil Action

Which Happened on Jan 2, 2009

Just a Response The BOP

To Any. of My Seperation Status

RECEIVED
USDC, WESTERN DISTRICT OF LA
TONY R. MOORE, CLERK
ALEXANDRIA, LOUISIANA
DATE 3/3/11
BY

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

JEROME L. WEATHINGTON,
Plaintiff

VERSUS

UNITED STATES, et al.,
Defendants

CIVIL ACTION
SECTION "P"
1:10-CV-00359

JUDGE DEE D. DRELL
MAGISTRATE JUDGE JAMES D. KIRK

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the court is a complaint filed pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971),[1] and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, by Jerome L. Weathington ("Weathington") on February 24, 2010 (Doc. 1) and amended on August 13, 2010 (Doc. 5). The named defendants are the United States (FTCA claim) and, in the Bivens claim, Joe Keffer (former warden of the United States Penitentiary in Pollock, Louisiana ("USP-

[1] Bivens defendants are federal officials brought into federal court for violating the Federal Constitution. Bivens-type actions may be brought only against federal agents and not federal agencies. F.D.I.C. v. Meyer, 510 U.S. 471, 486, 114 S.Ct. 996, 1006, 127 L.Ed.2d 308 (1994); Whitley v. Hunt, 158 F.3d 882 885 (5th Cir. 1998). Under Bivens, a plaintiff may recover damages for any injuries suffered as a result of federal agents' violations of his constitutional rights. Channer v. Hall, 112 F.3d 214, 216 (5th Cir. 1997).

Pollock")), and R. Lonidier,[2] J. Valdez, Daniel Stevens, William O. Trull, Jr.,[3] and three unknown officers, all employed at USP-Pollock.[4] Weathington alleges that, on January 2, 2009, defendants failed to protect Weathington by not intervening and ending an assault on him by another inmate.[5] Weathington further alleges that, on January 5, 2009, two unnamed officers (Stevens and Trull) assaulted him when he was handcuffed and shackled to his hospital bed at an outside hospital. When he was returned to USP-Pollock, Weathington was placed in an observation cell without a toilet or sink. For relief, Weathington asks for monetary damages and injunctive relief. Weathington is presently confined in the Federal Detention Center in Oakdale, Louisiana.

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[2] According to defendants' motion to dismiss (Doc. 18), "R. Lonidier" is now known as "Regina Brown" (Doc. 18).

[3] Stevens and Trull were John Doe #1 and John Doe #2 (Docs. 14, 16). Trull's name is misspelled as "Trutt" on the docket sheet.

[4] A "Lt. Transou" was also named as a defendant, but a summons was not prepared for him and he was not served. Although the Clerk of Court was ordered to prepare the summons, instead of Weathington, Weathington has not complained about the lack of service on Transou. Therefore, I will recommend that the complaint against Transou be dismissed without prejudice under Fed.R.Civ.P. 4(m). See McGinnis v. Shalala, 2 F.3d 548, 550 (5th Cir. 1993), cert. den., 510 U.S. 1191, 114 S.Ct. 1293, 127 L.Ed.2d 647 (1994); Systems Signs Supplies v. U.S. Dept. of Justice, 903 F.2d 1011, 1013 (5th Cir. 1990); Kersh v. Derosier, 851 F.2d 1509, 1512 (5th Cir. 1988).

[5] Weathington contends he was charged and convicted in federal court of assault resulting in serious bodily injury and received a disciplinary report with loss of good time credits, as well. USA v. Weathington, 09-cr-0196 (W.D.La. 2009).

The individual defendants named in the Bivens claim filed a motion to dismiss (Doc. 18). The United States also filed a motion to dismiss the FTCA claim (Doc. 19). Weathington filed a response to the motions to dismiss (Doc. 21). The motions are now before the court for disposition.

It is noted that the defendants attached documentary exhibits and affidavits to their motions to dismiss Weathington's claims. Therefore, their motions to dismiss (Docs. 18 & 19) are actually motions for summary judgment, pursuant to Fed.R.Civ.P. rule 12, and will be treated as such by this court.

Law and Analysis

Motion for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure mandates that the court shall grant a summary judgment:

> "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Paragraph (e) of Rule 56 also provides the following:

> "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials-including the facts considered undisputed-show that the movant is entitled to it; or (4) issue any other appropriate order."

Local Rule 56.2W (formerly 2.10W) also provides that all material facts set forth in a statement of undisputed facts

submitted by the moving party will be deemed admitted for purposes of a motion for summary judgment unless the opposing party controverts those facts by filing a short and concise statement of material facts as to which that party contends there exists a genuine issue to be tried.

In this regard, the substantive law determines what facts are "material". A material fact issue exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. However, the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to preclude summary judgment; there must be evidence on which the jury could reasonably find for the plaintiff. Stewart v. Murphy, 174 F.3d 530, 533 (5th Cir. 1999), 528 U.S. 906, 120 S.Ct. 249 (1999), and cases cited therein.

If the movant produces evidence tending to show that there is no genuine issue of material fact, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish the existence of a genuine issue of material fact for trial. In this analysis, we review the facts and draw all inferences most favorable to the nonmovant. Herrera v. Millsap, 862 F.2d 1157, 1159 (5th Cir. 1989). However, mere conclusory allegations are not competent summary judgment evidence, and such allegations are insufficient, therefore, to defeat a motion for summary judgment. Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th

Cir.), cert. den., 506 U.S. 825, 113 S.Ct. 82(1992).

BIVENS CLAIMS

1. Exhaustion

Defendants contend Weathington's Bivens claims should be dismissed for failure to exhaust his administrative remedies.

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted. 42 U.S.C. § 1997e(a). Exhaustion is mandatory, irrespective of the forms of relief sought and offered through administrative remedies. Booth v. Churner, 532 U.S. 731, 741 n. 6, 121 S.Ct. 1819 (2001). The exhaustion requirement of 42 U.S.C. § 1997e applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter v. Nussle, 534 U.S. 516, 532, 122 S.Ct. 983, 992 (2002). Resort to a prison grievance process must precede resort to a court. Porter, 534 U.S. at 529, 122 S.Ct. at 990.

Since the amendment of § 1997e, the Fifth Circuit has taken a strict approach to the exhaustion requirement. Days v. Johnson, 322 F.3d 863, 866 (5th Cir. 2003). In Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001), the court stated that nothing in the PLRA prescribes appropriate grievance procedures or enables judges,

by creative interpretation of the exhaustion doctrine, to prescribe or oversee prison grievance systems. On the other hand, the Fifth Circuit has also stated that the exhaustion requirement imposed by amended § 1997e is not jurisdictional. Wendell v. Asher, 162 F.3d 887, *890 (5th Cir. 1998). The exhaustion requirement may be subject, in rare instances, to certain defenses such as waiver, estoppel, or equitable tolling. Wendell, 162 F.3d at 890.We have recognized, as a basis for excuse, circumstances where administrative remedies are inadequate because prison officials have ignored or interfered with a prisoner's pursuit of an administrative remedy. Holloway v. Gunnell, 685 F.2d 150, 154 (5th Cir. 1982). The Fifth Circuit has recognized that exhaustion requirements may be excused where dismissal would be inefficient and would not further the interests of justice or the purposes of the exhaustion requirement. Johnson v. Ford, 261 Fed.Appx. 752, 755 (5th Cir. 2008).

The administrative remedy procedures which must be followed by a federal prison inmate are set forth in 28 C.F.R. §§ 542.10, et seq. Those regulations provide for first step of an informal resolution attempt filed with the prison staff, a second step of a formal grievance filed with the warden, and appeals at the third and fourth steps as set forth below in Section 542.15; the third step is an appeal of the warden's decision to the Regional Director, and the fourth step is an appeal of the Regional

Director's decision to the General Counsel.

> § 542.15 Appeals.
> (a) Submission. An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP-10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP-11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. When the inmate demonstrates a valid reason for delay, these time limits may be extended. Valid reasons for delay include those situations described in § 542.14(b) of this part. Appeal to the General Counsel is the final administrative appeal.
> (b) Form.
> (1) Appeals to the Regional Director shall be submitted on the form designed for regional Appeals (BP-10) and accompanied by one complete copy or duplicate original of the institution Request and response. Appeals to the General Counsel shall be submitted on the form designed for Central Office Appeals (BP- 11) and accompanied by one complete copy or duplicate original of the institution and regional filings and their responses. Appeals shall state specifically the reason for appeal.
> (2) An inmate may not raise in an Appeal issues not raised in the lower level filings. An inmate may not combine Appeals of separate lower level responses (different case numbers) into a single Appeal.
> (3) An inmate shall complete the appropriate form with all requested identifying information and shall state the reasons for the Appeal in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8 ½ " x 11") continuation page. The inmate shall provide two additional copies of any continuation page and exhibits with the regional Appeal, and three additional copies with an Appeal to the Central Office (the inmate is also to provide copies of exhibits used at the prior level(s) of appeal). The inmate shall date and sign the Appeal and mail it to the appropriate Regional Director, if a Regional Appeal, or to the National Inmate Appeals Administrator, Office of General Counsel, if a Central Office Appeal (see 28 CFR part 503 for addresses of the Central Office and Regional Offices).

Defendants submitted an affidavit by Jennifer Hanson, a BOP

attorney (Doc. 18-4), to show Weathington failed to exhaust his administrative remedies with the BOP. Hanson stated in her affidavit (Doc. 18-4) that Weathington's administrative remedy request dated January 12, 2009, concerning his claim that BOP officers failed to protect him from an assault, was rejected on January 12, 2009 for failure to attempt to informally resolve the matter or provide evidence that he had done so. Hanson further states in her affidavit that Weathington never filed anything further on that claim.

Weathington submitted exhibits with his complaint which contradict Hansen's affidavit and show he filed an informal resolution attempt which was rejected on January 14, 2009 (Doc. 1, p. 5/69). On February 1, 2009, Weathington then filed a BP-9 requesting damages on the failure to protect claim, as well as for other claims including the alleged January 5, 2009 assault by BOP officers (Doc. 1, pp. 7-12/69). The warden responded to the BP-9 on February 17, 2009, stating the complaint regarding the assault by staff had been referred to "appropriate authorities for proper review and disposition" (Doc. 1, p. 13/69).

On June 31, 2009, Weathington filed a claim under the Federal Tort Claims Act regarding his claims for failure to protect and assault by BOP staff (Doc. 1, p. 14-19/69). On September 2, 2009, Weathington's tort claim was denied (Doc. 1, pp. 3-4/69). On January 24, 2010, Weathington's tort claim for failure to protect

was again denied.

It appears that Weathington attempted to exhaust his administrative remedies, but his BP-9 grievance was sent elsewhere, to "appropriate authorities," for review. No response on the merits of Weathington's BP-9 is reflected in the record before this court. Indeed, according to Hansen's affidavit, the BOP records do not include Weathington's informal resolution attempt and the BOP's response to it or Weathington's BP-9 and the BOP's the response to it.

In his response to defendant's motion (Doc. 21), Weathington states that he was told he had to file a tort claim instead of administrative remedies, so he stopped pursuing his administrative remedies. In fact, Warden Keffer's response to Weathington's BP-9 states that an administrative remedy is not the proper documentation to file to request monetary compensation, and that he "must complete an administrative tort claim form and file it with the South Central Regional Office" (Doc. 1, p. 13/69).

Defendants allege Weathington failed to pursue exhaustion of his Bivens after he was told he must attempt informal resolution, but Weathington showed he attempted informal resolution and then filed a BP-9 which was forwarded to the "proper authorities" for review but never answered again. Weathington also argues he was told by BOP officials that, since he was asking for money, he must pursue a tort claim instead of a Bivens claim, and Weathington

followed that instruction. Therefore, there are genuine issues of material fact as to whether defendants should be estopped from claiming exhaustion as to Weathington's Bivens claims[6] which preclude a summary judgment on this issue, and defendants' motion should be denied on the issue of exhaustion of the Bivens claims.

2. Heck Defense to Bivens Claims

Next, defendants contend Weathington's Bivens claims are barred by Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364 (1994), because his claims implicate the validity of Weathington's conviction for assault on Anthony Ater.

In order to recover damages for an allegedly unconstitutional conviction or imprisonment or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 or Bivens plaintiff must prove the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. §2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under §1983 or Bivens. Rather than engrafting an exhaustion requirement on §1983 or Bivens, the Supreme Court has held the plaintiff has no cause of

[6] Estoppel may provide a basis for excusing a prisoner's failure to exhaust administrative remedies. Dillon v. Rogers, 596 F.3d 260, 270 (5th Cir. 2010), and cases cited therein.

action under §1983 or Bivens, regardless of exhaustion, unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus. A § 1983 action or Bivens action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated. Boyd v. Biggers, 31 F.3d 279, 282 (5th Cir. 1994), citing Heck. Also, McGrew v. Texas Bd. of Pardons, 47 F.3d 158, 161 (5th Cir. 1995); Arvie v. Broussard, 42 F.3d 249, 250 (5th Cir. 1994).

Weathington contends (and the court records show) he was convicted of an assault on Anthony Ater; Weathington was not charged with or convicted of assaulting Liggins. U.S. v. Weathington, 1:09-cv-00196 (W.D.La., 2006).[7] Weathington contends Terry Liggins is another inmate who participated in the incident between Weathington and Ater; Weathington alleges that Liggins stabbed him and, as a result of the BOP officers' failure to intervene, Weathington was stabbed more than 20 times. Weathington argues this Bivens and FTCA action concerns the BOP officials' failure to intervene and protect him from the assault by Terry Liggins and, therefore, the validity of his conviction for assault on Ater is not implicated.

Since Weathington's Bivens suit concerns Liggins' assault on him and does not implicate his conviction for assault on Ater,

[7] An appeal is currently pending in that case.

Weathington's suit does not violate Heck and defendants' motion for summary judgment on this ground should be denied.

3. Respondeat Superior

Defendants next argue that, since Warden Keffer was not present during the January 2, 2009 assault, and was not at the hospital on January 5, 2009, he has been sued in his supervisory capacity only and, therefore, Weathington's action against him should be dismissed.

The doctrine of respondeat superior, which makes an employer or supervisor liable for an employee's alleged tort, is unavailable in suits under 42 U.S.C. §1983 or Bivens. Thompkins v. Belt, 828 F.2d 298, 303 (5th Cir. 1987). Well settled §1983 jurisprudence establishes that supervisory officials cannot be held vicariously liable for their subordinates' actions. Supervisory officials may be held liable only if: (1) they affirmatively participate in acts that cause constitutional deprivation; or (2) implement unconstitutional policies that causally result in plaintiff's injury. Mouille v. City of Live Oak, Tex., 977 F.2d 924, 929 (5th Cir. 1992); cert. den., 508 U.S. 951, 113 S.Ct. 2443, 124 L.Ed.2d 660 (1993); Thompkins, 828 F.2d at 303.

In the case at bar, Weathington contends he had requested protection and was being held in the segregated housing unit ("SHU") in order to protect him from gangs. Weathington further contends that Liggins, a gang member, was a general population

inmate who had been allowed into the SHU contrary to national policy, SHU Program Statement 5270, as well as the Code of Federal Regulations, but in accordance with a practice or policy implemented by Warden Keffer.

The court takes judicial notice (from the evidence filed in another case against the BOP[6]) of a policy memo posted in USP-Pollock by Warden Keffer:

> January 8, 2008
>
> **MEMORANDUM FOR ALL STAFF AND INMATES**
>
> FROM: Joe Keffer, Warden
>
> SUBJECT: Inmate Expectations; Rules
>
> The purpose of this memorandum is to serve as a reminder to all inmates of some basic rules and regulations which must be followed. I believe most inmates want to live in an institution where they can work and program without having to worry about being victimized or having their daily activities disrupted. Unfortunately, there are some inmates who continue to engage in behavior which negatively impacts everyone. These behaviors include assaults with weapons as well as destroying equipment and appliances meant for use by everyone. Consequently, these types of behaviors cannot be tolerated.
>
> In order to ensure everyone clearly understands my expectations, the following is a list of rules which, beginning immediately, will be enforced without question. These rules are not new, however, they have not been followed to my standards and greater restrictions appear to be necessary. Please read and familiarize yourself with these regulations. Your compliance with each of them is mandatory and there will be zero tolerance for anything less.

---

[6] Schreane v. Keffer, 2010 wl 4068782 (W.D.La. 2010), R&R adopted, 2010 wl 4068773 (W.D.La. 2010).

INMATE EXPECTATIONS/RULES
****

- Inmates are not allowed in any housing unit other than the one to which they are assigned."

The purpose behind the policy, of reducing inmate assaults and other misconduct, is stated and apparent. See Rose v. Carey, 2008 Wl 4443229, *5 (S.D.Ind. 2008)("Prisons are dangerous places, and require rigorous security measures to insure inmate and staff safety. Restricting inmate movement, and knowing where inmates are at any point in time, are integral components of providing for inmate and staff security."). According to the Bureau of Prisons' website,[9] USP-Pollock is a high security institution.

According to Weathington, Liggins was allowed into the SHU against national BOP policy. According to the evidence, of which the undersigned takes judicial notice, that policy had been posted by Warden Keffer for both the inmates and the prison officers to see, with a notice of stricter enforcement, the previous year. Therefore, Warden Keffer clearly did not promulgate a policy, custom or practice which allowed inmates to enter housing units to which they were not assigned.

Since Warden Keffer is not liable in a Bivens suit for the torts committed by BOP officers working under him, there are no genuine issues of material fact which would preclude a summary judgment. A summary judgment should be granted in favor of Warden

[9] See http://www.bop.gov/locations/institutions/pol/index.jsp.

Keffer, dismissing Weathington's Bivens claims against him.

4. Qualified Immunity

A. The Law as to Qualified Immunity

The defense of qualified immunity protects a public official from both litigation and liability, absent a showing that the official violated a constitutional right that was clearly established at the time of the incident. Woods v. Smith, 60 F.3d 1161, 1164 (5th Cir. 1995), cert. den., 516 U.S. 1084, 116 S.Ct. 800 (1996). Qualified immunity cloaks a law enforcement officer from personal liability for discretionary acts which do not violate well established law. Officers have qualified immunity if their actions could reasonably have been thought consistent with the right they are alleged to have violated. Richardson v. Oldham, 12 F.3d 1373, 1380-81 (5th Cir. 1994), and cases cited therein. Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508, 2515 (2002).

Invocation of the qualified immunity defense shifts the burdens of proof in federal civil rights (or Bivens) lawsuits brought against public officials for actions or omissions attending their performance of official duties:

> "The defendant official must initially plead his good faith and establish that he was acting within the scope of his discretionary authority. Once the defendant has done so, the burden shifts to the plaintiff to rebut this

> defense by establishing that the official's allegedly wrongful conduct violated clearly established law."

Bazan v. Hidalgo County, 246 F.3d 481, 489 (5th Cir. 2001), citing Salas v. Carpenter, 980 F.2d 299, 306 (5th Cir. 1992).

The bifurcated test for qualified immunity is: (1) whether the plaintiff has alleged a violation of a clearly established constitutional rights; and, (2) if so, whether the defendant's conduct was objectively unreasonable in the light of the clearly established law at the time of the incident. Hare v. City of Corinth, 135 F.3d 320, 325 (5th Cir. 1998), and cases cited therein.

The first step is to determine whether the plaintiff has alleged violation of a clearly established constitutional right. This analysis is made under the currently applicable constitutional standards. Hare, 135 F.3d at 325. A constitutional right is clearly established if, in light of pre-existing law, the unlawfulness is apparent. Officials must observe general, well-developed legal principles. Doe v. Taylor Independent School Dist., 15 F.3d 443, 445 (5th Cir.), cert. den., 513 U.S. 815, 115 S.Ct. 70 (1994). Prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Being violently assaulted in prison is simply not a part of the penalty that criminal offenders pay for their offenses against society. Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1976-1977 (1994). Therefore, Weathington has alleged the violation of a constitutional right that was clearly established in 2009.

Under the second prong of the qualified immunity test, the court must determine whether the conduct of the defendants was objectively unreasonable in the light of that then clearly established law. Hare, 135 F.3d at 325-36. Objective reasonableness is a question of law for the court. The analysis for objective reasonableness is different from that for deliberate indifference (the subjective test for addressing the merits). For qualified immunity, the subjective deliberate indifference standard serves only to demonstrate the clearly established law in effect at the time of the incident and, under that standard (the minimum standard not to be deliberately indifferent), the actions of the individual defendants are examined to determine whether, as a matter of law, they were objectively unreasonable. Hare, 135 F.3d at 328.

The qualified immunity doctrine does not protect an official whose subjective intent was to harm the plaintiff, regardless of the objective state of the law at the time of his conduct. Douthit v. Jones, 619 F.2d 527, 533 (5th Cir. 1980). A party seeking to avoid a qualified immunity defense must prove that the official either actually intended to do harm to him, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result. Douthit, 619 F.2d at 533.

B. The Eighth Amendment Right to Safety

The Eighth Amendment imposes duties on prison officials to provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of inmates. Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 1977 (1994). In particular, prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Being violently assaulted in prison is simply not a part of the penalty that criminal offenders pay for their offenses against society. Farmer, 114 S.Ct. at 1976-77.

For an inmate to succeed on a claim based on a failure to prevent harm, he must show that (1) he was incarcerated under conditions posing a substantial risk of serious harm, and (2) the prison official was "deliberately indifferent" to his health or safety. Failing to act with deliberate indifference to a substantial risk of harm is the equivalent of recklessly disregarding that risk. Farmer, 114 S.Ct. at 1978. Deliberate indifference is a subjective test and it must be shown that the official actually knew of the risk of harm to the inmate. It is insufficient to show solely that the official should have known of the risk. The official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference. Farmer, 114 S.Ct. at 1979.

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. A fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. It remains open to an official to prove that he was unaware of even an obvious risk to inmate health and safety. Farmer, 114 S.Ct. at 1981-82. Also, Hinojosa v. Johnson, 277 Fed.Appx. 370, 374 (5th Cir. 2008). However, a prison official who actually knew of a substantial risk to inmate health and safety may be found free from liability if he responded reasonably to the risk, even if the harm ultimately was not averted. Farmer, 114 S.Ct. at 1982-83.

The failure of a prisoner to give any advance notice to prison officials of potential danger to the prisoner's safety is not dispositive of the issue of the official's awareness, nor is advance notice of a substantial risk of assault posed by a particular fellow prisoner a prerequisite. Farmer, 114 S.Ct. at 1984-1985.

A prison guard has a duty to intervene and attempt to end an assault on an inmate. Buckner v. Hollins, 983 F.2d 119, 122 (8th Cir. 1993). Also, Hale v. Townley, 45 F.3d 914, 919 (5th Cir. 1995), citing Smith v. Dooley, 591 F.Supp. 1157, 1169 (W.D.La. 1984), aff'd, 778 F.2d 788 (5th Cir. 1985). The Eighth Amendment imposes the requirement on prison officials to restore control in

tumultuous situations, but officials who fail to prevent an injury inflicted by fellow prisoners are liable only where those officials possess the requisite mental state. The requisite mental state in situations where prison officials do not respond with the physical use of force is that of deliberate indifference. MacKay v. Farnsworth, 48 F.3d 491 (10th Cir. 1995).

A prison official acts with deliberate indifference to an inmate's safety when the official is present at the time of an assault and fails to intervene or otherwise act to end the assault. However, a correctional officer's failure to intervene in an inmate fight does not constitute an Eighth Amendment violation if there is evidence justifying the correctional officer's failure to intervene, such as when intervention would threaten the health and safety of all concerned (i.e. the guard is alone and unarmed or is another guard has been taken hostage). Williams v. Mueller, 13 F.3d 1214, 1215-16 (8th Cir. 1994), and cases cited therein.

Therefore, the law as to inmate safety was well-established at the time of the January 2009 assaults involved in this case.

C. Weathington's Failure to Protect Claim

Defendants argue they are entitled to qualified immunity on Weathington's claim that they failed to protect him from an assault by Terry Liggins. Defendants argue they had no idea that Liggins was an enemy of Weathington's or that there was a risk that Liggins would attack Weathington. Weathington contends that Valdez stood

by and Lonidier (Brown) began locking down the other inmates while Weathington was stabbed being by Liggins and Ater.

Weathington alleges Liggins is a member of the gang from which he requested protection and, because of that request, he was placed in the SHU for protection. Therefore, defendants were apparently aware that Weathington was at risk of attack by members of that gang.

Moreover, although defendants argue they did not know Weathington was at risk of an assault, that argument really does not address Weathington's claim. Weathington complains not only that Liggins was allowed to enter the SHU, a unit to which Liggins was not assigned, but that, after Liggins began stabbing him, defendants just stood by an watched and did not nothing to end the assault. As a result, Liggins was able to stab Weathington more than 20 times before he finally got up and left.

Defendants also postulate that Weathington "set the fight up" in order to give the BOP a reason to transfer him to another prison; Weathington had already requested a prison transfer. However, not only have defendants not offered any proof to support that specious hypothesis, but it is countered by the facts that Weathington had requested and received protection against an attack by the gang to which Liggins belongs, as well as the fact that he was stabbed over 20 times, receiving life-threatening injuries including a punctured lung (Doc. 1-2), as well as by Weathington's

allegation that Liggins, a general population inmate who was not housed in the SHU, was present in the SHU with a weapon in violation of BOP and USP-Pollock policy.

The court also takes judicial notice of the testimony at Weathington's trial for assaulting Ater. U.S. v. Weathington, 1:09-CR-00196.

At that trial, Joseph Valdez, the service officer specialist and officer in charge of the B-1 Unit on the date of the assault, testified there are typically up to 132 inmates and two unarmed guards on duty in B-1; Valdez also testified that he did not see which of the three inmates (Weathington, Liggins, and Ater) initiated the assault, but all three inmates had weapons and were using them (Doc. 48, pp. 137-138, 141-142). Valdez further testified that after he called in the fight, he yelled at the inmates to stop and put their weapons down (Doc. 48, p. 143). Valdez testified that no one broke up the fight because there was not enough staff to do so (Doc. 48, p. 146). Valdez testified that, after the fight, when Weathington stripped his clothes off, he saw Weathington was wearing armor made of food trays under his clothes (Doc. 48, Tr. pp. 146-147).

Regina Brown (formerly Lonidier), a correctional officer at USP-Pollock working in B-1 with Valdez on the day of the assault, testified that Liggins did not reside in the B-1 unit, but was there that day working as an orderly/janitor (Doc. 48, Tr. pp. 164-

166). Brown testified that she did not see who started the assault, she told the inmates to stop fighting and then waited for more staff to arrive because the inmates were armed and she was not (Tr. pp. 167-168). Brown testified the shanks were make from pieces of bunkbeds and that Weathington had a sock stuffed with pieces of porcelain from a sink or toilet (Doc. 48, Tr. pp. 171-172). Correctional Supervisor Bauserman testified that Weathington had a netted laundry bag, plastic food lids, and food trays under his clothes (Doc. 48, Tr. p. 179-181). The treating physician, Dr. Philip Lindsay, testified that Ater and Weathington each had numerous superficial wounds and each had one deep wound and a collapsed lung (Tr. pp. 153-162).

Weathington testified at his assault trial that he was serving a sentence for armed robbery in 2007, that was his only felony conviction (Tr. pp. 196-197). Weathington was incarcerated in the federal penitentiary in Allenwood, Pennsylvania, where he was attacked, while he was playing basketball, by members of a DC/Baltimore area gang and stabbed four times (Doc. 48, Tr. p. 197). Weathington was then transferred to the federal penitentiary in Beaumont, Texas, where, within three weeks, he was jumped and beaten in his cell by two guys who were friends of the guys who had stabbed him in Pennsylvania (Doc. 48, Tr. p. 198). Weathington was then transferred to USP-Pollock in March 2008 (Doc. 48, Tr. p. 199). Weathington popped the shower head and broke the toilet in

his cell because he was denied recreation; cells below him were flooded, which made several inmates angry at Weathington (Doc. 48, Tr. p. 199). Two inmates (one from DC, but neither was Liggins or Ater)) told Weathington they were going to stab him because he flooded their cells (Doc. 48, Tr. p. 219). Weathington had already requested protective custody due to fear of attack by DC inmates and had been place in the SHU for three months, then moved to B-1, a SHU holdover unit (Doc. 48, Tr. p. 200-203, 219, 221). Weathington testified that, after the other inmates threatened him, he did not tell the corrections officers, but he took lids from the food trays to wear as armor and prepared the sock (with pieces of the broken toilet in it) to protect himself (Doc. 48, Tr. pp. 204-205, 218, 220).

Weathington testified that, on the day of the assault, when he got to the floor of the rec area, Liggins, the orderly, called him to the steps so he and Ater could talk to him (Doc. 48, Tr. pp. 205-206); Weathington testified that both Liggins and Ater were from DC (Doc. 48, Tr. p. 206). Weathington testified that he walked over to Ater and began talking to him, but when he saw Ater begin to reach for his knife (Weathington had seen Ater get a knife and put it in his pocket), Weathington swung his sock at him and Ater stabbed Weathington in the face (Doc. 48, Tr. pp. 206-207). Weathington testified that, later in the fight, he grabbed a knife that Ater threw at him, cutting his hand in the process; he did not

have a knife when the fight started (Doc. 48, Tr. pp. 210-211, 213). Both Liggins and Ater stabbed at Weathington, but some of the blows struck his armor; Ater also bit Weathington's face (Doc. 48, Tr. p. 210).

As already discussed, Weathington's failure to inform the officers of the threat made against him by two inmates whose cells were flooded by Weathington's activities is not dispositive of the issues herein, particularly since those inmates did not attack him. Weathington was already in the SHU for protective custody, so there was always the possibility of an attack on him. Therefore, every officer in the SHU knew or should have known Weathington could be attacked.

The officers who witnessed the attack, Valdez and Brown (Lonidier), testified they were the only two guards assigned to the unit, they were unarmed, and they called and had to wait for additional officers to arrive to stop the fight; therefore, their failure to intervene was justified. Since there are no genuine issues of material fact which would preclude a summary judgment, Valdez is entitled to qualified immunity, his motion for summary judgment should be granted, and Weathington's Bivens action against Valdez and Lonidier/Brown for failing to intervene to stop the attack should be dismissed.

D. Weathington's Excessive Force Claim

Defendants argue that they are entitled to a summary judgment

because the use of force on Weathington by the guards, Trull and Stevens, at the hospital was not excessive. Weathington contends that, while he was handcuffed and shackled in the hospital bed, Trull and Stevens punched him threw milk on him, and took his food. Weathington contends they caused him to be discharged from the hospital early.

To prevail on an eighth amendment excessive force claim, a plaintiff must establish that force was not applied in a good faith effort to maintain or restore discipline, but maliciously and sadistically to cause harm, and that he suffered an injury. Eason v. Holt, 73 F.3d 600, 602 (5th Cir. 1996).

The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm. LeBlanc v. Foti, 487 F. Supp. 272, 275 (E.D.La. 1980), citing Johnson v.

Glick, 481 F.2d 1028 (2d Cir. 1973), cert. den., 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 32 (1973).

The law of the Fifth Circuit is that to support an Eighth Amendment excessive force claim a prisoner must have suffered from the excessive force a more than de minimis physical injury, but there is no categorical requirement that the physical injury be significant, serious, or more than minor. Gomez v. Chandler, 163 F.3d 921, 924 (5th Cir. 1999). However, the Eighth Amendment's prohibition of cruel and unusual punishment excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind. The absence of serious injury, while relevant to the inquiry, does not preclude relief. Siglar v. Hightower, 112 F.3d 191, 193-94 (5th Cir. 1997). Trull and Stevens state in their affidavits (Doc. 19), that they was assigned as hospital officer on January 5, 2009. Trull and Stevens state in their affidavits that, when they went on duty at 8:00 a.m., they found Weathington agitated and had already thrown water at the hospital staff, then Weathington yelled at Trull and Stevens that he was supposed to receive two breakfast trays instead of just one and threw his food at them (his left hand was not restrained, so he could eat) (Doc. 19). Stevens states he then told Weathington he was going to be placed in full restraints (Doc. 19). Trull and Stevens state in their affidavits that

Weathington then tried to get out of the hospital bed, and tried to spit at, bite, hit and kick them (Doc. 19). Trull and Stevens state in their affidavits that Weathington is 6'6" tall and weighs about 240 pounds (Doc. 19). Trull and Stevens deny punching or injuring Weathington, but admits additional officers and force were required to subdue and restrain Weathington (Doc. 19).

Weathington claims Trull and Stevens are lying in their affidavits, and that he could not have gotten out of the bed even if he had tried because he was having difficulty breathing (Doc. 21). Weathington contends that, while he was blocking punches with his left hand, one of the officers dropped his cell phone, then they all walked out of the room; Weathington claims he then called his stepfather, which the phone records will prove. Weathington has never claimed the officers injured him and there is no evidence that he suffered an injury due to his altercation with the officers. Even without determining whether Weathington misbehaved and whether the officers overreacted, it is clear that there are no genuine issues of material fact as to the fact that Weathington was not injured. Therefore, Weathington does not have a claim for use of excessive force, Trull and Stevens are entitled to qualified immunity, defendants' motion for summary judgment should be granted, and Weathington's Bivens claim against Trull and Stevens for the use of excessive force should be dismissed with prejudice.

FTCA CLAIMS

1. Punitive Damages Under the FTCA

First, defendant contends it cannot be liable for punitive damages (which Weathington has requested) under the FTCA.

Although punitive damages may be awarded in a Bivens suit, Bivens, 403 U.S. at 397, 91 S.Ct. at 2005, they are statutorily prohibited in an FTCA action, 28 U.S.C. § 2674, Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468 (1980). Therefore, to whatever extent that Weathington has asked for punitive damages for his FTCA claim, an award of such damages is precluded. Weathington's request for punitive damages under the FTCA should be dismissed.

2. Physical Injury

Next, defendant contends that, since damages may not be awarded for mental or emotional injury suffered while in custody without a prior showing of physical injury, under both 28 U.S.C. 1346 and 42 U.S.C. 1997e, physical injury is thus a jurisdictional prerequisite in both Bivens and FTCA cases.

Defendant's comparison and analysis via Bivens and Section 1983 is puzzling. The FTCA applies substantive state law to tort claims, not federal laws such as civil rights law.[10] Therefore,

[10] Under the FTCA, a plaintiff may recover monetary awards from the United States for injury, property loss, or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of employment. The United States may be held liable only if the conduct complained of amounts to negligence in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b).

defendants argument has no basis in law.[11]

Accordingly, Weathington's tort claims must be evaluated in accordance with Louisiana tort law. Under Louisiana tort law, a physical injury is not a necessary corequisite for claiming damages for an emotional injury. See La.C.C. arts. 2315, et. seq. Therefore, the United State's motion for summary judgment on this basis should be denied.

3. Heck Defense

Defendant also argues that Heck should apply to bar Weathington's FTCA claims. However, as discussed above, Weathington's Bivens and FTCA suits for failure to protect him from assault by Liggins do not affect his conviction for assault on

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Substantive state law determines whether a cause of action exists. Johnston v. U.S., 85 F.3d 217, 219 (5th Cir. 1996).

To prevail on a negligence claim under La. Civil Code arts. 2315 and 2316, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) actual damages (the damages element). Brown v. Lee, 94-CA-104 (La.App. 5 Cir. 7/13/94), 639 So.2d 897, 898-899, writ den., 94-2127 (La. 11/18/94), 646 So.2d 378, citing Roberts v. Benoit, 605 So.2d 1032 (La. 1991); Fowler v. Roberts, 556 So.2d 1, 4 (La. 1989); Scott v. State, 618 So.2d 1053 (La. App. 1st Cir.), writ den., 620 So.2d 881 (La. 1993). Also, La.C.C. art. 2315.

[11] Defendant cites Section 1983 cases for the proposition that physical injury is a jurisdictional prerequisite in both Bivens and FTCA cases. Again, those cases are not applicable to FTCA cases.

Ater. Therefore, this argument is meritless.

4. Assault/Battery Claim Under the FTCA

Defendant also contends Weathington has not stated a claim for assault/battery.

The intentional tort exception to the waiver of sovereign immunity applies to FTCA claims for assault/battery by a prison guard who was *not* acting in a law enforcement capacity at the time (for example, making an arrest or investigating something).[12] See Devillier v. U.S., 2010 WL 476722, *3 (W.D.La. 2010), citing Castro v. U.S., 560 F.3d 381 (5th Cir. 2009), on reh'g, 608 F.3d 266 (5th Cir. 2010), cert. den., 131 S.Ct. 902 (U.S. 2011). Since Weathington alleges the guards punched him (in retaliation for his having thrown his food tray at them) when he was in the hospital, they clearly were acting as prison security officers at that time and not in a law enforcement/investigative capacity. Therefore, Weathington's FTCA claim for assault/battery by the guards when he

[12] The intentional tort exception to the waiver of sovereign immunity set forth in 28 U.S.C. § 2680(h) is limited by the "law enforcement proviso," which relinquishes sovereign immunity against claims arising out of torts enumerated in Section 2680(h) (including assault and battery) if the claim resulted from the act or omission of a federal investigative or law enforcement officer. See Sutton v. U.S., 819 F.2d 1289 (5th Cir. 1987). BOP employees are considered law enforcement officers for purposes of Section 2680(h) if they are acting within the scope of law enforcement functions (as opposed to security functions) at the time the tort is committed. Castro, 560 F.3d at 387. Therefore, had the prison guards in the case at bar been acting in a law enforcement capacity at the time that Weathington alleges they punched him, the law enforcement exception to sovereign immunity would apply.

was in the hospital should be dismissed as barred by sovereign immunity.

Therefore, defendant's motion for summary judgment to dismiss Weathington's FTCA claim for assault/battery should be granted and its motion for summary judgment as to Weathington's FTCA claim for failure to protect should be denied.

Conclusion

Based on the foregoing discussion, IT IS RECOMMENDED that Weathington's complaint against Lt. Transou BE DISMISSED WITHOUT PREJUDICE pursuant to Fed.R.Civ.P. 4(m).

IT IS FURTHER RECOMMENDED that defendants' motion for summary judgment on the Bivens claims be GRANTED and that Weathington's Bivens claims against Warden Keffer, Valdez, Lonidier (now Brown), Trull, and Stevens be DENIED AND DISMISSED WITH PREJUDICE.

IT IS FURTHER RECOMMENDED that the United States' motion for summary judgment be GRANTED and Weathington's request for punitive damages under the FTCA be DENIED AND DISMISSED WITH PREJUDICE.

IT IS FURTHER RECOMMENDED that the United States' motion for summary judgment as to Weathington's FTCA claim for assault/battery be GRANTED and Weathington's FTCA claim for assault/battery be DENIED AND DISMISSED WITH PREJUDICE.

IT IS FURTHER RECOMMENDED that the United States' motion for summary judgment as to Weathington's FTCA claim for failure to protect be DENIED.

Under the provisions of 28 U.S.C. § 636(b)(1)(c) and Fed.R.Civ.P. 72(b), the parties have **fourteen (14) days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the district judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN FOURTEEN (14) CALENDAR DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this 3rd day of March, 2011.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

STAMP dcecfStamp_ID=1045083339 [Date=3/3/2011] [FileNumber=2456617-0]
592a50d6baedb34c7afc89f887cb63f8d4595b13120298d6800801b494a59e46cd81b43cd8
25e90b12e4ea6cd215e7fa73af3611800a8ea5d72dce19a854683]]

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U.S. District Court
Western District of Louisiana

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Case Name: Weathington v. United States et al
Case Number: 1:10-cv-00359-DDD-JDK
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Docket Text:
REPORT AND RECOMMENDATIONS re [1] Complaint, [5] Amended Complaint filed by Jerome Weathington, [19] Motion to Dismiss and [18] Motion to Dismiss. It is recommended Weathington's complaint against Lt Transou be DISMISSED without prejudice. Further recommended defendants motion for summary judgment on the Bivens claims be GRANTED and Weathington's Bivens claims against Warden Keffer, Valdez, Lonidier (now Brown), Trull, and Stevens be DENIED AND DISMISSED WITH PREJUDICE. It is recommended the U S Motion for Summary Judgment be GRANTED and Weathington's request for punitive damages under the FTCA be DENIED AND DISMISSED WITH PREJUDICE. It is recommended the U S Motion For Summary Judgment as to Weathington's FTCA claim for assault/battery be GRANTED and Weathington's FTCA claim for assault/battery be DENIED AND DISMISSED WITH PREJUDICE. Further recommended the U S Motion for Summary Judgment as to Weathington's FTCA claim for failure to protect be DENIED. Objections to R&R due by 3/21/2011. Signed by Magistrate Judge James D Kirk on 03/03/2011. (crt,Leleux, M)

1:10-cv-00359-DDD-JDK Notice has been electronically mailed to:
Thomas B Thompson thomas.thompson@usdoj.gov

1:10-cv-00359-DDD-JDK Notice will not be electronically mailed to:
Jerome Weathington
#08121-028
F D C - Oakdale
P O Box 5010
Oakdale, LA 71463

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Electronic document Stamp:

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ALEXANDRIA, LOUISIANA

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

JEROME WEATHINGTON — **CIVIL DOCKET NO. 10-0359**

-vs- — **JUDGE DRELL**

UNITED STATES OF AMERICA — **MAGISTRATE JUDGE KIRK**

* * *

JEROME WEATHINGTON — **CIVIL DOCKET NO. 12-0578**

-vs- — **JUDGE DRELL**

UNITED STATES OF AMERICA — **MAGISTRATE JUDGE KIRK**

MINUTE ENTRY

As discussed during a telephone conference held this date, a two day bench trial is set in both cases, one to immediately follow the other, for January 31, 2013 at 9:30 A.M. Counsel and plaintiff should be present at 8:30 A.M. on the first day of trial. The plaintiff was advised to contact the Clerk of Court's office 30 days prior to trial in order to request the presence (by writ) of any incarcerated witness he intends to call for trial. By December 15, 2012, counsel for defendant must furnish, for in camera inspection, all documents previously requested by plaintiff, but denied via discovery response.

Another telephone status conference is set for January 24, 2013 at 1:30 P.M. Counsel for the United States shall initiate the call and secure the participation of plaintiff, who is incarcerated.

SIGNED on this 20th day of November, 2012, at Alexandria, Louisiana.

DEE D. DRELL, CHIEF JUDE
UNITED STATES DISTRICT COURT

U.S. Department of Justice

United States Attorney
Western District of Louisiana

United States Courthouse
300 Fannin Street, Suite 3201
Shreveport, Louisiana 71101-3068
18-676-3600

Branch Office
United States Courthouse
800 Lafayette Street, Suite 2200
Lafayette, Louisiana 70501
337-262-6618

July 18, 2012

Federal Programs Branch
Civil Division
Department of Justice
Main Justice Bldg., Rm 3525
10th & Constitution Avenue
Washington, DC 20530

Federal Bureau of Prisons
Office of the General Counsel
HOLC Building
320 First Street NW
Washington, DC 20534

Federal Bureau of Prisons
Southern Central Regional Office
ATTN: Jason Sickler
Regional Counsel
4211 Cedar Springs Road, Suite 300
Dallas, TX 75219

Via Email Only phyllis.pyles@usdoj.gov
Phyllis J. Pyles, Director
Civil Division – Torts Branch
U. S. Department of Justice
P. O. Box 888-Room 9401
Washington, DC 20044

Re: Jerome Weathington v USA, *et al*
Civil Action No: 12-0578, USDC/WDLA/Alexandria Division

Dear Colleagues:

This is to inform you that the United States Attorney's Office for the Western District of Louisiana was served **July 12, 2012**, with the attached Summons, Memorandum Order, and Complaint filed in the referenced case.

Please direct the preparation of a litigation report and suggested answer as soon as possible to **Assistant United States Attorney John Broadwell** at our Shreveport office. **Please also place a litigation hold on all documents, tangible evidence or electronically stored information that may be related to this claim ensuring that the same is not destroyed or altered pending the final disposition of this claim.** Mr. Broadwell is the attorney within our district who will handle these cases. You may telephone him at (318) 676-3600 or write to the Shreveport address shown above.

Sincerely,

STEPHANIE A. FINLEY
UNITED STATES ATTORNEY

KATHERINE W. VINCENT
Chief - Civil Division
Lafayette Office - (337) 262-6618

Received
AUG 6 2012
Bureau of Prisons
Legal Department, SCRO

KWV/wdp
Enclosures
cc: Eric Hammonds, BOP Houston (via email)
AUSA John Broadwell

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Louisiana

Jerome Weathington 08121-028

Plaintiff

v.

USA et al

Defendant

Civil Action No. 1:12-cv-00578

Judge Dee D Drell

Magistrate Judge James D Kirk

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

U. S. Attorney
800 Lafayette, Suite 2200
Lafayette, LA 70501-6832

A lawsuit has been filed against you.

Within _60_ days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Jerome Weathington
08121-028
F C I - Talladega
P O Box 1000
Talladega, AL 35160
PRO SE

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

TONY R. MOORE
CLERK OF COURT

Date: 7/11/2012

Signature of Clerk or Deputy Clerk

NG/kh

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

NOTICE TO PARTIES/COUNSEL

- In accordance with FRCP 10 and LR 10.1W, all pleadings must include the name of the Judge and the Magistrate Judge (when one is assigned).

- A request for a jury demand must be indicated in the caption and included in the pleading. See LR 38.1. Indication of a jury demand on the civil cover sheet is not a valid request for a jury trial.

- Under LR 83.2.5 pleadings will only be filed when signed by an attorney admitted to practice before this Court or a pro se litigant. Each attorney shall place his attorney identification number under his signature on any pleading. The attorney identification number is the same as the number assigned by the Louisiana Supreme Court or for visiting attorneys appearing pro hac vice, the number assigned by this office. When more than one attorney appears for a single party, one attorney shall be designated TA or "trial attorney."

- Your attention is also directed to LR16.3.1W which requires the parties to consider the use of Alternative Dispute Resolution no later than 200 days after the initial filing in this court.

- If deadlines cannot be met, extensions may be sought under FRCP 6(b). Voluntary extensions of time between counsel are not recognized by the Court. Any extensions must be granted or approved by the Court.

- Your attention is also directed to LR 16.3.1 W which requires the parties to consider the use of Alternative Dispute Resolution no later than 200 days after the initial filing in this court.

- Counsel and parties are reminded of their obligation to notify the court of any proceedings directly related to or "involving subject matter that comprises all or a material part of the subject matter or operative facts of another action" as provided by LR 3.1.

TONY R. MOORE
Clerk of Court

NOTE: This court has an internet web site at www.lawd.uscourts.gov where you can obtain our Guide To Practice and our local rules, including those referenced above. You can also download forms and maps to our courthouses ~~and, electronically file your pleading. PACER users my also view the docket sheet and imaged pleadings on-line.~~

LAW101 (Rev. 3/08)

RECEIVED
USDC, WESTERN DISTRICT OF LA
TONY R. MOORE, CLERK
DATE 7/11/12

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JEROME WEATHINGTON

VERSUS

USA

DOCKET NO. 12-CV-578; SEC. P

JUDGE DEE D. DRELL

MAGISTRATE JUDGE JAMES D. KIRK

MEMORANDUM ORDER

Before the Court is a pro se complaint filed by Plaintiff Coray Owens pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680. [Doc. #1, p.3] Plaintiff is an inmate in the custody of the Federal Bureau of Prisons, and he is currently incarcerated at the Federal Correctional Institution in Talladega, Alabama. Plaintiff alleges that he was injured due to the negligence of officers at the United States Penitentiary in Pollock, Louisiana (USP-Pollock).

Factual Background

Plaintiff has another suit pending in this district filed pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the FTCA regarding, in part, an alleged January 2009 failure to protect Plaintiff by intervening and ending an assault on him by another inmate. The matter is currently awaiting trial. In that case, Plaintiff claims that he requested protection from Washington, D.C. inmates housed at USP-Pollock. He was placed in segregation for protection; however, while there, he was attacked by two D.C. inmates.

In this suit, Plaintiff claims that over one year from the

original attack, while still housed in the special housing unit, Plaintiff was again attacked by D.C. inmates from whom he requested protection. He states that he was punched and kicked repeatedly and stabbed in the ear by two D.C. inmates.

Service of Process

In order to determine what further action should be taken with respect to Plaintiff's claim,

THE CLERK IS DIRECTED to serve a summons, a copy of the complaint, and a copy of this order by Certified Mail on:

1. **the United States through the United States Attorney for the Western District of Louisiana, and**
2. **the United States through the United States Attorney General** as provided in Rule 4(i) of the Federal Rules of Civil Procedure.

IT IS ORDERED that the defendant file an answer to the petition within sixty (60) days following the date of service.

The defendant shall also file a memorandum of law briefing the issues raised within their answer and citing applicable statutory and case law. After the defendant's responsive pleadings are filed, an additional sixty (60) days is allowed for all parties to complete all appropriate discovery.

Thereafter, and not before, if deemed appropriate, Plaintiff or Defendants may file a motion for summary judgment within thirty (30) days of the end of discovery, to include material and relevant affidavits, certified records, interrogatories and answers,

admissions and depositions, if any, and a supporting memorandum brief.

Any party not filing a motion for summary judgment SHALL FILE a Statement of Issues within the same period, which shall enumerate each genuine issue of material fact perceived by that party which is relevant to this matter, or state that there are none. This statement will be used by the court to determine the necessity for an evidentiary hearing.

IT IS FURTHER ORDERED that, as a condition to their acceptance by the Clerk, all future filings by plaintiff and defendant shall include a certificate stating that a copy thereof has been mailed to all other parties.

Thus done and signed at Alexandria, Louisiana, this 11th day of July, 2012.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JEROME WEATHINGTON	*	CIVIL ACTION NO: 10-0359
	*	
	*	
VERSUS	*	JUDGE DRELL
	*	MAGISTRATE JUDGE KIRK
UNITED STATES OF AMERICA	*	

STIPULATION FOR COMPROMISE SETTLEMENT

It is hereby stipulated by and between JEROME WEATHINGTON, Plaintiff, appearing pro se, and the United States of America, Defendant, by and through its attorney, as follows:

I.

The parties do hereby agree to settle and compromise the above-entitled action and 1:12-cv-00578 under the terms and conditions set forth herein.

II.

The United States of America, Defendant, agrees to pay to the Plaintiff, JEROME WEATHINGTON, the sum of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, damage to property and the consequences thereof, resulting and to result from the same subject matter that gave rise to the above-captioned lawsuit, including any like or similar claims for personal injury arising out of the action styled "Jerome Weathington v. USA, 1:12-cv-00578" on the docket of this court.

III.

Plaintiff, and his heirs, executors, administrators or assigns, hereby agrees to accept the aforementioned sum in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, allegedly sustained by Plaintiff, and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, and including any like or similar claims for personal injury arising out of the action styled "Jerome Weathington v. USA, 1:12-cv-00578" on the docket of this court.

IV.

Plaintiff, JEROME WEATHINGTON, his heirs, executors, administrators or assigns, further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests, including but not limited to claims seeking recovery for services, medical, legal, financial, or otherwise, provided to or on behalf of Plaintiff by any person, organization, or entity, natural or legal, incident to or resulting from further litigation or the prosecution of claims by Plaintiff, JEROME WEATHINGTON, his heirs, executors, administrators, or assigns against any third party or against the United States of America, including claims for wrongful death.

V.

This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of the United States of America, its agents, servants, or employees, and is entered

into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

VI.

It is also agreed by and among Plaintiff, JEROME WEATHINGTON, and the United States of America, Defendant, that the aforementioned settlement amount represents the entire amount of this compromise settlement in both suits made subject to this agreement; that the respective parties will bear their own costs, fees, and expenses; and that any attorney fees owed by Plaintiff, JEROME WEATHINGTON, will be paid out of the settlement amount payable to Plaintiff, JEROME WEATHINGTON, and not in addition thereto.

VII.

It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys fees for services rendered in connection with this action shall not exceed 25 per centum (25%) of the amount of the compromise settlement.

VIII.

Payment of the settlement amount to JEROME WEATHINGTON in the sum of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) will be made by a check drawn on the Treasury of the United States and made payable to JEROME WEATHINGTON. No taxes will be deducted from this amount by the United States of America. However, the United States Department of Treasury, Internal Revenue Service, will be notified, and Plaintiff, JEROME WEATHINGTON, will be responsible for any taxes which may be due thereon. Said check will be mailed to John A. Broadwell, Assistant United States Attorney, Office of the United States Attorney, Western District of Louisiana, who will then forward said check to the appropriate BOP officials for deposit and/or credit into Plaintiff's account(s).

IX.

This settlement agreement is made by a duly authorized designee of the Attorney General pursuant to the authority of Title 28, United States Code, Section 2677.

X.

In consideration of the payment of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00), Plaintiff, JEROME WEATHINGTON, agrees that he will execute such documents as shall be necessary to cause the above-styled action and 1:12-cv-00578 to be dismissed with prejudice from the docket of the Court.

Executed this 15 day of January, 2013.

Jan 15, 2013
DATE

JEROME WEATHINGTON
PLAINTIFF PRO SE

Jan. 23, 2013
DATE

JOHN A. BROADWELL #1733
Assistant United States Attorney
300 Fannin Street, Suite 3201
Shreveport, LA 71101-3068
(318) 676-3610 // Fax: (318) 676-3642

COUNSEL FOR DEFENDANT

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
AUG 17 2012
JAMES W. McCORMACK, CLERK
By: _____ DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
8:29

ROBERT H. LAMER, JR. **PLAINTIFF**
(Reg. # 11438-033)

vs. **CIVIL ACTION NO.** 2:12 cv171 KGB·JTK

UNITED STATES OF AMERICA **DEFENDANT**

COMPLAINT FOR DAMAGES
UNDER THE FEDERAL TORT CLAIMS ACT

Plaintiff, **ROBERT H. LAMER, JR.**, by his attorneys, **THE LAW OFFICES OF DARREN O'QUINN PLLC**, for his Complaint, states:

This case assigned to District Judge Baker
and to Magistrate Judge Kearney

I. JURISDICTION, VENUE, AND CONDITIONS PRECEDENT

1. **ROBERT H. LAMER, JR.** was at all times relevant to this litigation an incarcerated inmate at the Federal Correctional Institution (Low) located in Forrest City, St. Francis County, Arkansas. This institution is located in the Eastern District of Arkansas and is operated by Federal Bureau of Prisons, a part of the **UNITED STATES** Department of Justice, as provided by ***18 U.S.C. § 4042***. **MR. LAMER** is currently an incarcerated inmate at the Federal Correctional Institution in Big Spring, Texas.

2. The claims herein are brought against the **UNITED STATES OF AMERICA** pursuant to the Federal Tort Claims Act ***(28 U.S.C. § 2671, et. seq.)*** and ***28 U.S.C. §1346(b)(1)*** for money damages for personal injuries that were caused by the negligent and wrongful acts and omissions of employees of the **UNITED STATES** government while acting in within the course and scope of their offices and employment, under circumstances where the **UNITED STATES**, if a private person, would be liable to **MR. LAMER** in accordance with the laws of the state of Arkansas as set forth in its common law, the **Arkansas Medical Malpractice Act** ***(Ark. Code Ann. §16-114-201 et seq.)***, and other applicable laws for medical and ordinary negligence.

3. Venue is proper ***28 U.S.C. § 1391(b)(2)*** in that all, or a substantial part, of the acts and omissions forming the basis of these claims occurred in the Eastern District of Arkansas, and arose from the medical and ordinary negligence inflicted upon **MR. LAMER** while he was an incarcerated inmate at the Federal Correctional Institution (Low) in Forrest City, St. Francis County, Arkansas.

4. **MR. LAMER** has fully complied with the provisions of ***28 U.S.C. § 2675*** of the Federal Tort Claims Act. This suit has been timely filed, in that on November 18, 2011, **MR. LAMER** timely served notice of his claims on the Federal Bureau of Prisons, an agency of the **UNITED STATES** responsible for the custody and care of sentenced federal inmates, but in spite of telephone calls and other contacts with the Federal Bureau of Prisons over the following eight months requesting a decision, no decision was ever rendered by the government.

II.

EVENTS FORMING THE BASIS OF THIS CLAIM

5. **MR. LAMER** was playing in a supervised and prison sanctioned softball game on August 21, 2010, at the Federal Correctional Institution (Low) in Forrest City, St. Francis County, Arkansas, when he suffered a severe fracture of his right ankle. He was referred by the prison health clinic to an orthopedic surgeon, Khosrow Maleki, M.D., on August 23.

6. Dr. Maleki saw **MR. LAMER** on August 27 and diagnosed him as suffering from a severe bimalleolar fracture of the right ankle. An open reduction, internal fixation surgery was scheduled for August 30.

7. Against the medical advice of Dr. Maleki, however, prison officials insisted on rescheduling **MR. LAMER'S** necessary surgery for September 7.

8. Moreover, the prison also missed the rescheduled surgery on September 7. The surgeon, Dr. Maleki, then refused to further treat **MR. LAMER** because the prison's delay in approving and obtaining the necessary surgery had caused the window for a successful surgery to close.

9. **MR. LAMER** has obtained an opinion by orthopedic surgeon James E. Keever, M.D., which is attached as Exhibit "A" hereto, and states as follows:

> There is no question that the standard of care anywhere in the United States, and, in fact, in any place except a third world country, for a displaced intra-articular fracture, particular of a weight bearing joint, is a surgical procedure to obtain anatomic reduction and rigid internal fixation. There simply is no other acceptable method of treatment in this century. This was recognized by the

> prison doctor, Dr. Pelkar, in his 8/23/10 office note. This was recognized by Dr. Maleki, who scheduled the patient for the surgery on 8/30/10. Unfortunately, evidently because of administrative reasons, the surgery was delayed. Dr. Maleki attempted to reschedule the surgery for 9/7/10, a time which was far enough out from the original injury that the quality of the result would probably have been somewhat compromised, but at a time when surgery was still the best option. Unfortunately, once again there seems to have been some type of administrative difficulty that prevented the surgery from going forward. At that point, Dr. Maleki very understandably withdrew from the case. Had Dr. Maleki gone ahead with surgery that now would have been delayed some three weeks post injury, the chances of complications would have made non-operative treatment a much safer option.
>
> This patient is going to develop post-traumatic arthritis of the ankle joint unnecessarily. Let me say again, unnecessarily. The chances of a very satisfactory result had this ankle been treated surgically within the first ten days of injury would approach 95-100%. At three weeks those chances would go down precipitously, even with surgery, and in light of the fact that this fracture was allowed to heal, if it has healed, in a displaced manner makes post-traumatic arthritis of this ankle not only foreseeable, but certain.

10. To this day, **MR. LAMER** has still not received proper treatment of his injuries thereby inflicting further damages upon him. Moreover, since the date of his severe fracture, **MR. LAMER** has been required to perform his daily activities in constant and agonizing pain without proper treatment, medications, and assistive devices.

11. These acts and omissions are a pattern and practice of the Federal Correctional Institution (Low) in Forrest City, St. Francis County, Arkansas, as evidenced by almost identical facts and findings in ***Gonzalez v. United States, 681***

F.3d 949, 2012 U.S. App. LEXIS 12270, 2012 WL 2203401 (8th Cir. Ark. 2012) (upholding an award of $813,000 under the Federal Tort Claims Act by the Honorable Susan Webber Wright, United States District Court for the Eastern District of Arkansas, to an inmate who injured his ankle in a softball game at the Federal Correctional Institution (Low) in Forrest City and whose medical treatment was thereafter delayed). Indeed, **MR. LAMER** tried to bring these matters to the attention of institution officials, but he was repeatedly ignored and his care fell through the cracks after being told "I will check into it."

12. On all occasions complained of herein, **MR. LAMER** was under the care, custody, supervision, and treatment of agents and employees of the **UNITED STATES** acting within the course and scope of their offices and employment and the injuries complained of herein were directly and proximately caused by the acts and omissions of the **UNITED STATES**.

III.
CLAIMS FOR RELIEF

First Claim: Medical Negligence

13. **MR. LAMER** incorporates by reference herein and re-alleges all of the above allegations.

14. The **UNITED STATES** deviated from the acceptable standard of medical care and did not apply the skill and learning the law required in the following respects:

a) Failure to provide the necessary care and services and sufficient staff to meet the total needs of **MR. LAMER** after his injuries on a 24-hour, 7-day a week basis to attain or maintain his highest practicable physical, mental, and psychosocial well-being as determined by timely assessments and an individual plan of care;

b) Failure to provide the necessary care and services to **MR. LAMER** to prevent him from missing of treatment and surgeries as prescribed by Dr. Maleki;

c) Failure to provide the necessary care and services to **MR. LAMER** for proper follow-up evaluations and treatment after missing surgeries as prescribed by Dr. Maleki;

d) Failure to protect and promote **MR. LAMER'S** right to a safe environment, to be free from abuse and neglect, and access to basic and necessary medical care;

e) Failure to adequately assess, evaluate, and supervise the staff to ensure that **MR. LAMER** received appropriate care in accordance with professional standards of quality, facility policy and procedure, and the laws, regulations, and rules applicable to the facility;

f) The failure to provide, implement, and assure an adequate, comprehensive, and accurate care plan based on the needs and functional capacity of **MR. LAMER** that met his physical, mental, and psychosocial needs as identified in a comprehensive assessment with revisions and modifications, as his needs changed;

g) The failure to maintain clinical records on **MR. LAMER** in accordance with accepted professional standards that are complete, accurate, timely, and organized;

h) The failure to adequately and appropriately monitor **MR. LAMER** and recognize significant changes in his condition and properly and timely notify and consult with his physician and family regarding those changes;

i) The failure to take reasonable steps to prevent, eliminate, and correct problems in **MR. LAMER'S** care;

j) The failure to listen to and evaluate the complaints of **MR. LAMER** when he brought these failures to the attention of prison officials and medical care providers;

k) The failure to use the degree of skill and care required of a correctional institution providing basic and necessary medical services to an injured inmate when faced with the conditions of **MR. LAMER;**

l) Other failures as set forth in the expert opinion and deposition testimony taken in this action.

15. A reasonably prudent correctional institution operating under the same or similar conditions, as well as one following the standards of care as set forth in the ***Arkansas Medical Malpractice Act*** and ***AMI 1501***, would not have failed to provide the care listed above and would have foreseen that the failure to provide this care would result in devastating injuries to **MR. LAMER**. Each of the foregoing acts of negligence on the part of the **UNITED STATES** was a proximate cause of **MR. LAMER'S** injuries that were foreseeable to the **UNITED STATES** and it is liable for all damages caused by such acts as provided by ***28 U.S.C. § 2674*** of the Federal Tort Claims Act and other applicable laws.

Second Claim: Ordinary Negligence

16. **MR. LAMER** incorporates by reference herein and re-alleges all of the above allegations.

17. The **UNITED STATES** owed a non-delegable duty to **MR. LAMER** to hire, train, and supervise employees in its medical clinic and correctional institution so that such employees deliver care and services to injured inmates in a safe and beneficial manner in order to meet their basic medical and healthcare needs.

18. The **UNITED STATES** was under a duty to exercise ordinary care and to render care and services as a reasonably prudent and similarly situated correctional institution would render, but the **UNITED STATES** breached its duty of care to **MR. LAMER** by failing to meet and abide by the standards set forth herein and this failure amounts to ordinary negligence. Specifically, many of the acts and omissions set forth herein involve basic non-medical, rather than professional, issues such as:

a) Transporting **MR. LAMER** to his scheduled surgeries;

b) Scheduling follow-up appointments;

c) Listening to and following-up on the complaints of **MR. LAMER** when he tried to tell officials that his treatment had fallen through the cracks;

d) Supervising injured inmates;

e) Allowing non-medical personnel to decide whether necessary medical care and treatment was indicated;

f) Failure to perform its duties under ***18 U.S.C. § 4042*** to provided protection, safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States;

g) Other non-medical acts as set forth in the testimony and depositions taken in this matter.

19. A reasonably prudent correctional institution operating under the same or similar conditions, as well as one following the standards of care as set forth in ***AMI 1504*** and other applicable laws, would not have failed to provide the ordinary care listed above and would have foreseen that the failure to provide this care would result in devastating injuries to **MR. LAMER**. Each of the foregoing

acts of negligence on the part of the **UNITED STATES** was a proximate cause of **MR. LAMER'S** injuries that were foreseeable to the **UNITED STATES** and it is liable for all damages caused by such acts as provided by ***28 U.S.C. § 2674*** of the Federal Tort Claims Act and other applicable laws.

IV.
DAMAGES

20. As a proximate result of the above conduct, **MR. LAMER** is entitled to damages that will reasonably and fairly compensate him for medical expenses and the nature, extent, duration, and permanency of his pain, suffering, mental anguish, grief, loss of earning capacity, disfigurement, visible results of injury, disability, trauma, loss of enjoyment of life, loss of quality of life and personal dignity, humiliation, fright, emotional distress, and other injuries as described herein, in an amount exceeding the minimum amount required for federal court jurisdiction in diversity of citizenship cases (the amount of the claim on the SF-95 Claim Form was $1,000,000 and any award should be for at least this amount).

V.
PRAYER FOR RELIEF

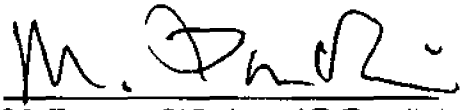
THEREFORE, plaintiff, **ROBERT H. LAMER, JR.,** respectfully requests the following relief:

(A) A judgment against defendant, **UNITED STATES OF AMERICA,** for all general and special compensatory damages caused by the conduct of its agents and employees in an amount exceeding the minimum amount required for federal court jurisdiction in diversity of citizenship cases and as proven at trial (the amount of the claim on the SF-95 Claim Form was $1,000,000 and any award should be for at least this amount);

(B) All costs and attorney fees expended herein;

(C) All other relief to which he is entitled or that the Court deems just and proper.

Respectfully submitted,



M. Darren O'Quinn, AR Bar #87-125
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Attorney for Plaintiffs

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September 30, 2011

M. Darren O'Quinn, AR. Bar No. 87-125
LAW OFFICES OF DARREN O'QUINN PLLC
Plaza West Building
415 N. McKinley, Suite 1000
Little Rock, AR 72205

Re: Robert Lamar

Dear Mr. O'Quinn,

You have asked me to review the medical records of Robert Lamar and offer my opinions as to his treatment by the Federal Bureau of Prisons regarding his fractured right ankle. I have reviewed the medical records from the Bureau of Prisons, the offices of Delta Orthopedics, and the offices of Orthonow. The latter two offices are those of orthopedic surgeons, Dr. Malecki and Dr. Sokoloff, respectively, in Memphis, Tenn. I have also seen x-rays taken by the Bureau of Prison on 8/23/10, and by Orthonow on 10/1/10 and 11/19/10.

My review of the records shows the following:

- 8/21/10 Prison Injury assessment, provider Barker, Amy RN. Cause of injury: playing softball and sliding into first base. Symptoms (as reported by inmate) right ankle pain and swelling. Contacted Dr. Pelkar and treated by splinting and crutches, ice and both Tylenol with codeine and Ibuprofen given, x-ray scheduled for two days hench (8/23/2010).
- 8/23/10 prison clinic visit shown as chronic care encounter performed at Health Services, showing Provider as Pelkar, Nader M.D., stating inmate with traumatic injury while playing soft ball to right distal lower extremity with Tib/Fib fracture, refer to Ortho for surgical stabilization
- 8/27/10 VISIT TO DR. MALECKI in Memphis, plan for ORIF of displaced bimalleolar fracture of the right ankle on 8/30/2010
- 8/27/10 prison clinic visit after ortho appointment with a recommendation for surgery on 8/30/10
- 8/27/10 Surgery Scheduling form stating that surgery to be 8/30/10, signed by Dr. Pelkar
- 8/27/10 administrative note saying that "Inmate seen per ortho today for right ankle fx. Ortho recommends ORIF (open reduction and internal

EXHIBIT
A

fixation). Discussed with MD. Will generate consult per his V.O. Will inform town trip coordinator

- 8/31/10—Interpretation of x-rays from 8/23/10 showing bimalleolar fracture
- 9/3/10—Note in Dr. Malecki's chart of a call from "Mitchell" (1-800-862-1495 (Ext 1131) to re-schedule surgery. Dr. Malecki's nurse told Michell that delaying the surgery for two weeks would probably make the result poor, but the surgery was rescheduled for 9/7/10.
- 9/7/10—Note that Dr. Maecki's office tried to call Mitchell on two occasions
- 9/8/10—Mitchell returned call to dr. Malecki's office stating prison was unable to transport patient to hospital due to security reasons. Dr. Malecki then stated that he would no longer treat this patient because the prison has delayed treatment.
- 10/01/10 Seen by Dr. Sokoloff, placed in short leg cast.
- 10/01/10 prison clinic visit, returned after ortho appointment and told by MD to return in three weeks for cast removal
- 10/03/2010 prison clinic visit after ortho apt on 10/1/10. Notes that will continue with non operative treatment since 6 weeks out from time of injury. Notes follow up appointment with ortho in three weeks with x-ray out of cast
- 11/16/2010 prison clinic visit complaining of right knee and ankle pain
- 11/19/10 Seen by Dr. Sokoloff and placed in ankle brace
- 11/19/2010 clinic visit , back from ortho apt and given ankle brace.

The x-rays taken on 8/23/10 show a bimalleolar fracture of the right ankle with mild displacement. The films taken at Orthonow on 10/1/10 and 11/19/10 show a healing bimalleolar fracture with mild displacement, and mild widening of the ankle joint.

There is no question that the standard of care anywhere in the United States, and, in fact, in any place except a third world country, for a displaced intra-articular fracture, particular of a weight bearing joint, is a surgical procedure to obtain anatomic reduction and rigid internal fixation. There simply is no other acceptable method of treatment in this century. This was recognized by the prison doctor, Dr. Pelkar, in his 8/23/10 office note. This was recognized by Dr. Malecki, who scheduled the patient for the surgery on 8/30/10. Unfortunately, evidently because of administrative reasons, the surgery was delayed. Dr. Malecki attempted to reschedule the surgery for 9/7/10, a time which was far enough out from the original injury that the quality of the result would probably have been somewhat compromised, but at a time when surgery was still the best option. Unfortunately, once again there seems to have been some type of administrative difficulty that prevented the surgery from going forward. At that point, Dr. Malecki very understandably withdrew from the case. Had Dr. Malecki gone ahead with surgery that now would have been delayed some three weeks post injury, the chances of complications would have made non-operative treatment a much safer option.

This patient is going to develop post traumatic arthritis of the ankle joint unnecessarily. Let me say again, unnecessarily. The chances of a very satisfactory result had this ankle been treated surgically within the first ten days of injury would approach 95-100% At three weeks those chances would go down precipitously, even with surgery, and in light of the fact that this fracture was allowed to heal, if it has healed, in a displaced manner makes post-traumatic arthritis of this ankle not only foreseeable, but certain.

Please let me know if you have any questions.

Sincerely,

James E. Keever,M.D.

United States District Court
Eastern District of Arkansas
Helena Division

ROBERT H LAMER, JR — PLAINTIFF

Vs. — 2:12-cv-00171 KGB/JTK

UNITED STATES OF AMERICA — DEFENDANT

MINUTES
of Settlement Conference
held before U.S. Magistrate Judge Jerry W. Cavaneau
Wednesday, September 11, 2013, 9:00 am, Little Rock, AR

Settlement Conference held. parties reached a settlement. Agreement read into the record.

FOR PLAINTIFF

M. Darren O'Quinn present with plaintiff(via telephone f/ FCI Big Spring(Texas) and Dr. Jim Keever

FOR DEFENDANT:

Lindsey Mitcham Lorence and Jamie Dempsey, U.S. Attorney's Office and J.D. Crook, counsel, Bureau of Prisons.

Court Time: 7.20 hrs
CRD/ECRO: S. Bostic

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

ROBERT H. LAMER, JR. **PLAINTIFF**

v. **Case No. 2:12-cv-171 KGB/JTK**

UNITED STATES OF AMERICA **DEFENDANT**

ORDER

In accordance with the Court's Order entered in this case on September 16, 2013 (Dkt. No. 11), no objections being filed thereto, it is ordered that plaintiff's pending claims are dismissed with prejudice.

SO ORDERED this 11th day of October, 2013.

Kristine G. Baker
United States District Judge

JD Crook - Judgment Fund Payment Notification

From: Judgment Fund <Judgment.Fund@fms.treas.gov>
To: "jd.crook@usdoj.gov" <BOP25816@bop.gov>
Date: 3/29/2014 8:12 AM
Subject: Judgment Fund Payment Notification

The following payment was made by the Judgment Fund Staff. If the payment has not been received within 7 days from the payment sent date, please contact the Judgment Fund at 202-874-6664.

Control #: 201400331
Payment ID #: 029312014
Responsible Agency File #: 2:12CV00171
Submitting Agency File #: 2:12CV00171
Docket #: 2:12CV00171
Total Payment Amount: $155,000.00
Date Payment Sent: 03/25/2014
Alias: CAR

Page 0782 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0783 of 1390

Withheld pursuant to exemption

(b)(5)

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A Personal Injury Law Firm

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WWW.BROUSSARD-HART.COM

December 20, 2012

Via Certified Mail

U.S. Attorney
Western District of Louisiana
Attention: Civil Process Clerk
800 Lafayette St, Suite 2200
Lafayette, LA 70501-6832

2012 DEC 26 A 11: 23

Re: Brandi Baker, et al
Vs. No. 2:12-CV-02337
United States of America

United States District Court
Western District of Louisiana

Dear Sir/Madam:

Enclosed please find a copy of the Complaint and the First Supplemental and Amending Complaint filed in the above referenced matter against the United States of America, along with a Summons in a Civil Action.

Sincerely,

AARON BROUSSARD

AB/lpr
Enclosures

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

BRANDI BAKER, ET AL Plaintiff	)
v.	) Civil Action No. 2:12-CV-02337-JTT-KK) Judge James T Trimble, Jr
USA Defendant	)

SUMMONS IN A CIVIL ACTION

To:
U.S. ATTORNEY
WESTERN DISTRICT OF LOUISIANA
800 LAFAYETTE ST., STE: 2200
LAFAYETTE, LA 70501-6832

2012 DEC 26 A 11:

A lawsuit has been filed against you.

Within the time required by law*, normally 60 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

Aaron James Broussard
Broussard & Hart
1301 Common St
Lake Charles, LA 70601

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

TONY R. MOORE

CLERK OF COURT

/s/ – Tony R. Moore

ISSUED ON 2012-09-19 13:33:54 , Clerk USDC WDLA

** (60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States.) Rule 12(a)(3).*

2:12-CV-02337-JTT-KK

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for **U.S. ATTORNEY**
WESTERN DISTRICT OF LOUISIANA
800 LAFAYETTE ST., STE: 2200
LAFAYETTE, LA 70501-6832 was received by me on *(date)*_____.

- I personally served the summons on **U.S. ATTORNEY**
  WESTERN DISTRICT OF LOUISIANA
  800 LAFAYETTE ST., STE: 2200
  LAFAYETTE, LA 70501-6832 at *(place)*_____
  _____ on *(date)*_____; or

- I left the summons at the individual's residence or usual place of abode with *(name)* _____
  _____, a person of suitable age and discretion who resides there, on *(date)*
  _____, and mailed a copy to the individual's last known address; or

- I served the summons on *(name of individual)* _____, who is designated by law to accept service of process on behalf of *(name of organization)* _____
  _____ on *(date)* _____; or

- I returned the summons unexecuted because _____
  _____; or

- Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attemped service, etc:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

NOTICE TO PARTIES/COUNSEL

- In accordance with FRCP 10 and LR 10.1, all pleadings must include the name of the Judge and the Magistrate Judge (when one is assigned).

- A request for a jury demand must be indicated in the caption and included in the pleading. See LR 38.1. Indication of a jury demand on the civil cover sheet is not a valid request for a jury trial.

- Under LR 83.2.5 pleadings will only be filed when signed by an attorney admitted to practice before this Court or a pro se litigant. Each attorney shall place his attorney identification number under his signature on any pleading. The attorney identification number is the same as the number assigned by the Louisiana Supreme Court or for visiting attorneys appearing pro hac vice, the number assigned by this office. When more than one attorney appears for a single party, one attorney shall be designated TA or "trial attorney."

- Your attention is directed to LR 41.3 which governs dismissal of actions for failure to prosecute.

- If deadlines cannot be met, extensions may be sought under FRCP 6(b). Voluntary extensions of time between counsel are not recognized by the Court. Any extensions must be granted or approved by the Court.

- Your attention is also directed to LR 16.3.1 which requires the parties to consider the use of Alternative Dispute Resolution no later than 200 days after the initial filing in this court.

- Counsel and parties are reminded of their obligation to notify the court of any proceedings directly related to or "involving subject matter that comprises all or a material part of the subject matter or operative facts of another action" as provided by LR 3.1.

TONY R. MOORE
Clerk of Court

NOTE: This court has an internet web site at www.lawd.uscourts.gov where you can obtain our Guide To Practice and our local rules, including those referenced above. You can also download forms and maps to our courthouses and, electronically file your pleading. PACER users my also view the docket sheet and imaged pleadings on-line.

LAW101 (Rev. 6/12)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BRANDI BAKER, RANDI BAKER **CIVIL CASE NO.**
HALLIE BAKER AND KENNY BAKER

VERSUS **COMPLAINT**

UNITED STATES OF AMERICA
****

COMPLAINT

Plaintiffs, Brandi Baker, Randi Baker, Hallie Baker, and Kenny Baker, hereby complain of the United States of America ("Defendant"), and would respectfully show the Court the following:

I.

PARTIES, JURISDICTION, SERVCE OF PROCESS AND VENUE

1.1 This case arises out of an inmate's death while detained in a federal prison.

1.2 Plaintiffs Brandi Baker, Randi Baker, Hallie Baker, and Kenny Baker are the children of decedent Kenneth Ray Baker, who at the time of death resided in the Federal Detention Center – Oakdale, within the jurisdiction of this court.

1.3 The Defendant is the United States of America.

1.4 This Federal District Court has jurisdiction of this cause, because this action is brought pursuant to and in compliance with 28 U.S.C. §1346(b), 2671-2680 et seq., commonly known as the "Federal Tort Claims Act", and 39 U.S.C. §409(c) which vests exclusive subject matter jurisdiction of Federal Tort Claims litigation in the Federal District Court.

1.5 The United States of America may be served with process in accordance with Rule 4(I) of the Federal Rules of Civil procedure by serving a copy of the Summons and of the Complaint on the United States Attorney Stephanie A. Finley, United States Attorney for the

Western District of Louisiana, 300 Fannin Street, Suite 3201, Shreveport, Louisiana 71101, to the attention of the Civil Process Clerk, and by serving a copy of the Summons and Plaintiff's Original Complaint on Eric Holder, Attorney General of the United States by certified mail, return receipt requested, at the Attorney general's Office, 10th and Constitution Avenue, N.W., Washington, DC 20530, to the attention of the Civil Process Clerk.

1.6 Venue is proper in this district pursuant to 28 U.S.C §1391(e), and 28 U.S.C. §1402(b), as the United States is a Defendant and the decedent was domiciled in this district at the time of death. Further, venue is proper in this district pursuant to 28 U.S.C. §1391(e), and §1402(b) as the United States is a Defendant and a substantial part of the events or omission giving rise to this claim occurred in this district.

II.

LIABILITY OF THE UNITED STATES OF AMERICA

2.1 This case is commenced and prosecuted against the United States of America pursuant to and in compliance with Title 28 U.S.C. §§2671-2680, commonly referred to as the "Federal Tort Claims Act." Liability of the United States is predicate especially on Title 28 U.S.C §§1346(b)(1) and 2674 because the wrongful death and resulting damages of which complain is made, were proximately caused by the negligence, wrongful acts, and/or omissions of employees of the United States of America, while acting within the scope of their employment as medical staff for the Federal Bureau of Prisons, under the United States Department of Justice. Under these circumstances, the United States of America, if a private person, would be liable to the Plaintiff in the same manner and to the same extent as a private individual.

III.

JURISDICTIONAL PREREQUISITES

3.1 Plaintiffs plead pursuant to Title 28 U.S.C. §§ 2672 and 2675(a), that the claims set forth herein were filed with and presented administratively to the Defendant's agency the Federal Bureau of Prisons on May 18, 2011. Greater than six (6) months has passed since these claims have been presented, and the Federal Bureau of Prisons has failed to resolve the claims. Accordingly, all claims are deemed denied and Plaintiffs have complied with all jurisdictional prerequisites and conditions precedent to commencement and prosecution of this litigation.

IV.

THE FEDERAL BUREAU OF PRISONS IS AN AGENCY OF THE UNITED STATES OF AMERICA

4.1 The Federal Bureau of Prisons is an agency of the United States of America. The Federal Bureau of Prisons is an agent of the United States Department of Justice. The United States of America, Defendant herein, through its agency, the Federal Bureau of Prisons, at all times material hereto, operated and controlled the Oakdale Federal Detention Center in Oakdale, Louisiana and staffed said facilities with its agents, servants, and/or employees.

V.

EMPLOYMENT AND COURSE AND SCOPE

5.1 At all times material hereto, all persons involved in assessment and medical treatment in question were agents, servants, and/or employees of the United States of America, or some other agency thereof, and were at all times material hereto, acting within the course and scope of such employment.

VI.

FACTS

6.1 This is a Federal Tort Claims Action for monetary damages sustained by the Plaintiffs resulting from the wrongful death of Kenneth Ray Baker as a result of the negligent care of employees of the Federal Bureau of Prisons (FBP).

6.2 This claim concerns FBP employees' failure to properly assess and medically treat Kenneth Ray Baker, resulting in his death. In December of 2007, Kenneth Ray Baker was transferred to the Oakdale Federal Detention Center, located in Oakdale, Louisiana. In April of 2008, Kenneth Ray Baker started having chest pains. In September of 2008, Kenneth Ray Baker had a triple bypass and an O-ring placed on a heart valve. On June 4, 2009, Kenneth Ray Baker was seen by Salvador Villalon, M.D. for follow-up on recent laboratory tests. A decrease in the hemoglobin to 9.1 was noted and a diagnosis of unspecified anemia was added.

6.3 On June 15, 2009, Kenneth Ray Baker was seen by R. Shalibi, MLP during a sick-call visit for a right axilla abscess. On or about June 18, 2009, Kenneth Ray Baker's conditioned worsened. He complained daily to, and asked for help from, the medical department, physician's assistant, and prison staff. He complained specifically to Kevin Coldman, Mark Edinfield, and Amanda Dunsky. Kenneth Ray Baker was dizzy, was too weak to walk, required a wheelchair, and eventually could not get out of bed. The food service manager sent Kenneth Ray Baker's meals, snacks, and bottled water to his bed and eventually had to feed him.

6.4 On June 22, 2009, Kenneth Ray Baker complained to Tammy Rodriguez, R.N. of dizziness, weakness, and shortness of breath when sitting or standing for the last three (3) days. On June 23, 2009, Kenneth Ray Baker was seen by Shalibi during a sick-call visit, at which time

he complained of dizziness. On June 26, 2009, Kenneth Ray Baker was seen for a routine Chronic Care Clinic visit by Isaac Freeborn, M.D. At that time, Kenneth Ray Baker complained of dizziness for one (1) week. His May 14, 2009, laboratory results were reviewed during his visit. A diagnosis of unspecified anemia was added after vital signs revealed a decrease from his normal blood pressure.

6.5 On July 2, 2009, at approximately 13:40, Kenneth Ray Baker was examined by Villalon after complaining to the Assistant Health Service Administrator of feeling dizzy and short of breath for the last two (2) weeks. During the assessment, Kenneth Ray Baker stated he had been experiencing sharp left chest pain with radiation to his left shoulder and left arm for the past two (2) weeks. Kenneth Ray Baker was referred to the local community hospital for further evaluation and management. Kenneth Ray Baker was transferred via ambulance to Oakdale Community Hospital.

6.6 Kenneth Ray Baker arrived at Oakdale Community Hospital emergency room at approximately 15:20. He became hypotensive and was given IV fluids. At 16:10, Kenneth Ray Baker became lethargic and his blood pressure dropped to 46/28. He was given two (2) pints of blood in less than one (1) hour. Ventricular fibrillation was noted at 16:50 and chest compressions began. He had no pulse at 17:00. Emergency medications were administered and chest compressions continued. Resuscitation attempts ended and Kenneth Ray Baker was pronounced dead at 17:22.

6.7 The medical staff of the Oakdale Federal Detention Center knew of Kenneth Ray Baker's heart condition and surgery and ignored obvious signs of impending heart attack and requests for treatment for two weeks prior to his death. The staff should have made a proper assessment and given Kenneth Ray Baker the opportunity to receive the treatment necessary to

save his life.

6.8 Baker's records document he was experiencing all the symptoms of critical anemia:

- **Paleness**
- **Pallor**
- **Shortness of breath**
- **Fatigue**
- **Dizziness**
- **Chest Pain**

6.9 Baker's records document he was experiencing all the classic symptoms of angina:

- **Chest pain on exertion and dissipation of pain with rest**
- **Fatigue/Weakness**
- **SOB**
- **Dizziness**

6.10 According to available medical records, Baker's symptoms began on June 20, 2009, reporting these symptoms to Tammy Rodriguez on June 22, 2009.

6.11 Baker's demise, although he had stenosis of his coronary grafts, was directly related to his extreme electrolyte imbalance – Hypokalemia – resulting in a fatal arrhythmia, perhaps chemically induced by a combination of Lasix and Amoxicillin. His extreme anemia was a causal factor in the reduction in the available oxygen to the heart muscle, via the coronary arteries.

VII.

CAUSE OF ACTION AGAINST THE UNITED STATES OF AMERICA

7.1 Defendant, the United States of America, was negligent in one or more of the following respects:

1. Failing to monitor Kenneth Ray Baker's condition specifically as it relates to the signs and symptoms of a heart attack.

2. Failing to provide timely and proper treatment for Kenneth Ray Baker's condition;

3. Negligent administration of medication;

4. Failing to recognize impending heart attack;

5. Failing to train and supervise employees;

6. Negligent screening and hiring off employees; and

7. Any other acts of negligence which may be proven at the trial of this case.

7.2 At all times mentioned herein, the employees, agents, and/or representatives of the United States Government were negligent and causative of the injuries and damages sustained by Plaintiffs.

VIII.

DAMAGES

8.1 As a proximate result of the defendant's negligent acts or omissions, Plaintiffs Brandi Baker, Randi Baker, Hallie Baker, and Kenny Baker, suffered the wrongful death of their father Kenneth Ray Baker, which would not otherwise have occurred. Brandi Baker, Randi Baker, Hallie Baker, and Kenny Baker hereby plead for all damages available under Louisiana state law, federal law, and equity including but not limited to, loss of support, consortium, service and society of their father, Kenneth Ray Baker. As children of the deceased, **PETITIONERS** seek wrongful death and survival damages pursuant to Louisiana Civil Code article 2315.1 and 2315.2.

IX.

PRAYER

Plaintiffs request that Defendant be cited in terms of law to appear and answer herein; that Plaintiffs have judgment against Defendant, for the amount of actual damages, and all other damages under applicable federal and state law to which they are entitled; for post judgment interest at the applicable legal rate; for all recoverable Court costs incurred in this litigation; and for such other and further relief, to which Plaintiffs may show themselves entitled.

Respectfully submitted,

AARON BROUSSARD
BROUSSARD & HART, L.L.C.
1301 COMMON STREET
LAKE CHARLES, LA 70601
PHONE: 337/439-2450 / FAX: 439-3450
EMAIL: aaron@broussard-hart.com
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of September, 2012, I electronically filed the forgoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

AARON BROUSSARD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

BRANDI BAKER, RANDI BAKER HALLIE BAKER AND KENNY BAKER — **CIVIL CASE NO.**

VERSUS — **COMPLAINT**

UNITED STATES OF AMERICA

****

FIRST SUPPLEMENTAL & AMENDING COMPLAINT

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I.

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1.3 The Defendant is the United States of America.

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1.5 The United States of America may be served with process in accordance with Rule 4(I) of the Federal Rules of Civil procedure by serving a copy of the Summons and of the Complaint on the United States Attorney Stephanie A. Finley, United States Attorney for the

Western District of Louisiana, 300 Fannin Street, Suite 3201, Shreveport, Louisiana 71101, to the attention of the Civil Process Clerk, and by serving a copy of the Summons and Plaintiff's Original Complaint on Eric Holder, Attorney General of the United States by certified mail, return receipt requested, at the Attorney general's Office, 10th and Constitution Avenue, N.W., Washington, DC 20530, to the attention of the Civil Process Clerk.

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3.2 This matter was submitted to the Louisiana Patient's Compensation Fund board on May 12, 2011. Plaintiffs were informed by certified mail on June 15, 2012 that none of the defendants were qualified and did not have coverage in the Patient's Compensation Fund under the provisions of Louisiana Revised Statues 40:1299.41 *et seq.*

IV.

THE FEDERAL BUREAU OF PRISONS IS AN AGENCY OF THE UNITED STATES OF AMERICA

4.1 The Federal Bureau of Prisons is an agency of the United States of America. The Federal Bureau of Prisons is an agent of the United States Department of Justice. The United States of America, Defendant herein, through its agency, the Federal Bureau of Prisons, at all times material hereto, operated and controlled the Oakdale Federal Detention Center in Oakdale, Louisiana and staffed said facilities with its agents, servants, and/or employees.

V.

EMPLOYMENT AND COURSE AND SCOPE

5.1 At all times material hereto, all persons involved in assessment and medical treatment in question were agents, servants, and/or employees of the United States of America, or some other agency thereof, and were at all times material hereto, acting within the course and scope of such employment.

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chest compressions continued. Resuscitation attempts ended and Kenneth Ray Baker was pronounced dead at 17:22.

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was a causal factor in the reduction in the available oxygen to the heart muscle, via the coronary arteries.

VII.

CAUSE OF ACTION AGAINST THE UNITED STATES OF AMERICA

7.1 Defendant, the United States of America, was negligent in one or more of the following respects:

1. Failing to monitor Kenneth Ray Baker's condition specifically as it relates to the signs and symptoms of a heart attack.

2. Failing to provide timely and proper treatment for Kenneth Ray Baker's condition;

3. Negligent administration of medication;

4. Failing to recognize impending heart attack;

5. Failing to train and supervise employees;

6. Negligent screening and hiring off employees; and

7. Any other acts of negligence which may be proven at the trial of this case.

7.2 At all times mentioned herein, the employees, agents, and/or representatives of the United States Government were negligent and causative of the injuries and damages sustained by Plaintiffs.

VIII.

DAMAGES

8.1 As a proximate result of the defendant's negligent acts or omissions, Plaintiffs Brandi Baker, Randi Baker, Hallie Baker, and Kenny Baker, suffered the wrongful death of their

father Kenneth Ray Baker, which would not otherwise have occurred. Brandi Baker, Randi Baker, Hallie Baker, and Kenny Baker hereby plead for all damages available under Louisiana state law, federal law, and equity including but not limited to, loss of support, consortium, service and society of their father, Kenneth Ray Baker. As children of the deceased, **PETITIONERS** seek wrongful death and survival damages pursuant to Louisiana Civil Code article 2315.1 and 2315.2.

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PRAYER

Plaintiffs request that Defendant be cited in terms of law to appear and answer herein; that Plaintiffs have judgment against Defendant, for the amount of actual damages, and all other damages under applicable federal and state law to which they are entitled; for post judgment interest at the applicable legal rate; for all recoverable Court costs incurred in this litigation; and for such other and further relief, to which Plaintiffs may show themselves entitled.

Respectfully submitted,

AARON BROUSSARD
BROUSSARD & HART, L.L.C.
1301 COMMON STREET
LAKE CHARLES, LA 70601
PHONE: 337/439-2450 / FAX: 439-3450
EMAIL: aaron@broussard-hart.com
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of September, 2012, I electronically filed the forgoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

AARON BROUSSARD

1/20/15
MB

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

BRANDI BAKER, RANDI BAKER, HALLIE BAKER AND KENNY BAKER	)	**CIVIL ACTION NO: 12-2337**
	)	**JUDGE TRIMBLE**
VERSUS	)	
	)	**MAGISTRATE JUDGE KAY**
UNITED STATES OF AMERICA	)	

JUDGMENT OF DISMISSAL

Considering the Joint Motion to Dismiss filed by the parties in this case,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' claims against Defendant, the United States of America, and this action in its entirety, are hereby **DISMISSED** with prejudice, with each party to bear their own costs.

THUS DONE AND SIGNED this 20th day of January, 2015, at Alexandria, Louisiana.

HONORABLE JAMES T. TRIMBLE, JR.
UNITED STATES SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

BRANDI BAKER, RANDI BAKER, HALLIE BAKER, AND KENNY BAKER	)	**CIVIL ACTION NO. 12-2337**
	)	**JUDGE TRIMBLE**
VERSUS	)	
	)	
UNITED STATES OF AMERICA	)	**MAGISTRATE JUDGE KAY**

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiffs (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of **FORTY THOUSAND AND NO/100THS ($40,000.00) DOLLARS**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiffs or their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above -captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiffs must obtain Court approval of the settlement at their expense. Plaintiffs agree to obtain such approval in a timely manner: time being of the essence. Plaintiffs further agree that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiffs fail to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A.	Name of Bank:	J P Morgan Chase Bank
B.	Street Address of Bank:	One Lakeside Plaza
C.	City, State and Zip Code of Bank:	Lake Charles, LA 70601
D.	Routing Number:	(b)(6)
E.	Name of Account:	Broussard & Hart, L.L.C. Trust Account
F.	Account Number:	(b)(6)

Plaintiffs' attorney agrees to distribute the settlement proceeds among the plaintiffs, and to obtain a dismissal of the above -captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 23 day of November, 2014.

Brandi Baker

BRANDI BAKER, PLAINTIFF

Executed this 23 day of November, 2014.

Randi Baker

RANDI BAKER, PLAINTIFF

Executed this 20 day of November, 2014.

HALLIE ~~BAKER~~, PLAINTIFF

Executed this 22 day of November, 2014.

Kenny Baker

KENNY BAKER, PLAINTIFF

Executed this 26th day of November, 2014.

BROUSSARD & HART

BY: _____

AARON JAMES BROUSSARD (#30134)
1301 Common St
Lake Charles, LA 70601
Telephone: (337) 439-2450
Facsimile: (337) 439-3450
Email: aaronbroussard@gmail.com
Attorney for Plaintiffs, Brandi Baker, Randi Baker, Hallie Baker and Kenny Baker

Executed this 1st day of December, 2014.

STEPHANIE A. FINLEY
United States Attorney

BY: _____

JENNIFER B. FREDERICK (#23633)
Assistant United States Attorney
800 Lafayette Street, Suite 2200
Lafayette, Louisiana 70501
Telephone: (337) 262-6618
Facsimile: (337) 262-6693
Email: Jennifer.frederick@usdoj.gov
Attorney for Defendant, United States of America

Page 0825 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0826 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0827 of 1390

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Page 0831 of 1390

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of the Freedom of Information and Privacy Act

Page 0832 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0833 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

The Penn Law Firm, P.C.

ATTORNEYS AT LAW

ERIC T. PENN
eric@thepennlawfirm.com

516 E. Commerce
P.O. Box 1309
Jacksonville, Texas 75766-1309

Telephone: (903)586-2544
Telecopier: (903)586-6529

June 7, 2013

Received
JUN 10 2013
Bureau of Prisons
Legal Department, SCRO

CERTIFIED MAIL 7008 0150 0002 6376 9206
Mr. Jason A. Sickler
U.S. Department of Justice - Federal Bureau of Prisons
South Central Regional Office
4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

Re: Brandi Baker, Randi Baker, Hallie Baker and Kenney Baker
vs
United States of America
No. 2:12-CV-02337

Dear Mr. Sickler:

As you know, Aaron Broussard is withdrawing from this case, and I now represent Brandi Baker, Randi Baker, and Hallie Baker. Mr. Ryan Fowler now represents Kenny Baker and he is copied on this letter. I hope to address three topics in this letter:

1. Prescription – Statute of limitations issue;
2. Choice of law issue; and
3. Settlement Discussions

1) **PRESCRIPTION – STATUTE OF LIMITATIONS ISSUE:** From visiting with previous counsel, I understand you are considering taking the position that this case is time barred by Louisiana's three year limitation on medical malpractice actions. For two reasons, I do not believe there is a time limitation issue.

First, Louisiana's three year limitation is "prescriptive" and not "peremptive." The term "prescription" is equivalent to a "statute of limitations" in the common law and the term "peremption" is equivalent to a "statute of repose." In Borel v. Young, 2007-0419 (La. 11/27/07), 989 So.2d 42, the Louisiana Supreme Court held that Louisiana's three year time limitation on medical malpractice action is prescriptive, not peremptive. Therefore, any argument based on a statute of repose has no basis.

Second, even if Louisiana's three year term limitation was a statute of repose, the claim was timely filed. Louisiana law requires that every medical malpractice action be submitted to the

Medical Review Panel prior to filing a lawsuit. If the medical providers are qualified, then the time limitation to file suit is suspended until a Medical Review Panel renders a decision. If the medical providers are not qualified, as in this case, then the claimant has 90 days from the date of notification to file suit. Mr. Baker died on July 7, 2009. Plaintiffs submitted their claim to the Federal Bureau of Prisons on May 12, 2011 (22 months). Plaintiffs submitted their claim to the Louisiana Medical Review Board on May 24, 2012 (34 months). Plaintiffs received notice that the involved medical providers were not qualified a few days after June 12, 2012. Plaintiffs filed suit on September 7, 2012, within the 90 day time limit.

2) **CHOICE OF LAW ISSUE:** As you know, Brandi Baker, Hallie Baker, and Randi Baker were adopted by their grandmother. Louisiana does not allow them to make a wrongful death claim or a survival claim. However, Texas law does still allow them to make a survival claim. In FTCA claims, the law of the forum typically applies, however, the conflicts law of the forum state also applies. In this case, Louisiana law clearly applies to the conduct that caused the injury. However, the Louisiana conflicts of law articles provide an argument that Texas law should apply to determine who is entitled to make a claim. See the relevant articles below:

LSA-C.C. Art. 3515

Art. 3515. Determination of the applicable law; general and residual rule

Currentness

> Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
>
> That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

LSA-C.C. Art. 3542

Art. 3542. General rule

Currentness

> Except as otherwise provided in this Title, an issue of delictual or quasi-delictual obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the events giving rise to the dispute, including the place of conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered; and (2) the policies referred to in Article 3515, as well as the policies of deterring wrongful conduct and of repairing the consequences of injurious acts.

La. Civ. Code Ann. art. 3542.

LSA-C.C. Art. 3543

Art. 3543. Issues of conduct and safety

Currentness

Issues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.

In all other cases, those issues are governed by the law of the state in which the injury occurred, provided that the person whose conduct caused the injury should have foreseen its occurrence in that state.

The preceding paragraph does not apply to cases in which the conduct that caused the injury occurred in this state and was caused by a person who was domiciled in, or had another significant connection with, this state. These cases are governed by the law of this state.

La. Civ. Code Ann. art. 3543.

LSA-C.C. Art. 3544

Art. 3544. Issues of loss distribution and financial protection

Currentness

Issues pertaining to loss distribution and financial protection are governed, as between a person injured by an offense or quasi-offense and the person who caused the injury, by the law designated in the following order:

(1) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in the same state, by the law of that state. Persons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state.

(2) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in different states: (a) when both the injury and the conduct that caused it occurred in one of those states, by the law of that state; and (b) when the injury and the conduct that caused it occurred in different states, by the law of the state in which the injury occurred, provided that (I) the injured person was domiciled in that state, (ii) the person who caused the injury should have foreseen its occurrence in that state, and (iii) the law of that state provided for a higher standard of financial protection for the injured person than did the law of the state in which the injurious conduct occurred.

La. Civ. Code Ann. art. 3544.

LSA-C.C. Art. 3547

Art. 3547. Exceptional cases

Currentness

The law applicable under Articles 3543-3546 shall not apply if, from the totality of the circumstances of an exceptional case, it is clearly evident under the principles of Article 3542, that the policies of another state would be more seriously impaired if its law were not applied to the particular issue. In such event, the law of the other state shall apply.

La. Civ. Code Ann. art. 3547.

Instead of litigating the issue, the children have reached a compromise amongst themselves to apportion by agreement any potential settlement in this cause. Since the value of the survival claim does not change with the number of claimants, this should not affect our ability to settle, which brings me to the next section.

3) **SETTLEMENT DISCUSSIONS:** I think Mr. Broussard has previously explained the medical basis for the claim so I won't re-hash that here. It appears to me that Mr. Baker's last two weeks on earth were filled with pain and discomfort. The children are unified and are ready to discuss unconditional global settlement demands to settle the whole case. I think I have a general understanding of the settlement negotiations that have taken place to date, and I would like to confirm that we are on the same page and discuss progressing forward. Please give either me or Mr.

Fowler (713-520-8833) a call upon receipt of this letter so we can talk. I look forward to hearing from you.

Sincerely,

ERIC T. PENN

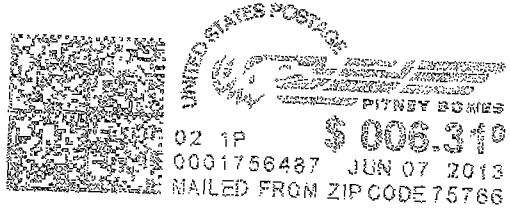
ETP/kla

c: J. Ryan Fowler, Esq.

THE PENN LAW FIRM, PC.
Attorneys at Law
P.O. Box 1309
JACKSONVILLE, TEXAS 75766

CERTIFIED MAIL

7008 0150 0002 6376 9206



Mr. Jason A. Sickler
U.S. Department of Justice - Federal Bureau of Prisons
South Central Regional Office
4211 [illegible]
Dallas [illegible]

750 07E 1000513100006/08/13
NOTIFY SENDER OF NEW ADDRESS
SOUTH CENTRAL REGIONAL OFFICE
344 MARINE FORCES DR
GRAND PRAIRIE TX 75051-2412

BC: 75051241244 *1834-03959-07-45

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

TIBAL CLARKE **PLAINTIFF**

V. **Case No. 2:13-cv-0026 KGB/JTR**

HIPOLITO MATOS, M.D.
NADER PEIKAR, M.D.
UNITED STATES OF AMERICA **DEFENDANTS**

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned Plaintiff (meaning any person, other than the Defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of Eight Hundred Thousand Dollars ($800,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to

property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff, Tibal Clarke, or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. The Plaintiff, Tibal Clarke, and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation for Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff, Tibal Clarke, and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his

guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by the parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, § 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any Plaintiff is a minor or a legally incompetent adult, the Plaintiff must obtain Court approval of the settlement at her expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United

States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event Plaintiff fails to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank: Centennial Bank

B. Address of Bank: Post Office Box 16270
Little Rock, AR 72231

C. Routing Number: (b)(6)

D. Name of Account: Tim Dudley LTD Lawyer

E. Account Number: (b)(6)

Plaintiff's attorney agrees to distribute the settlement proceeds among the Plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such

counterparts and signature pages, together, shall be deemed to be one document.

Executed this 18th day of April, 2016.

Lindsey Mitcham Lorence
Assistant United States Attorney
Attorney for Defendant, United States of America

Executed this 18th day of April, 2016.

Timothy O. Dudley
Attorney for Plaintiff, Tibal Clarke

Executed this 12th day of April, 2016.

Tibal Clarke
Plaintiff Tibal Clarke

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
JUN 03 2014
JAMES W. McCORMACK, CLERK
By: DBrown DEP CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

Tibal Clarke, Plaintiff,	)	
v.	)	Case No. 2:13-cv-0026-KGB/JTR
T.C. Outlaw, Warden, et al, Defendants.	)	

PLAINTIFF'S ADDENDUM (AMENDMENT) TO HIS COMPLAINT

In pleadings submitted to the Court dated March 20 and 24, 2014, Plaintiff sought permission to amend his Complaint. In an Order dated May 8, 2014, the Court wrote that, "Plaintiff must file, **on or before June 30, 2014, ...** any Motions to Amend the Complaint." (Emphasis in Original.) Below, the Court and the Defendants will find the information and assertions with which Plaintiff asks his Complaint be amended. Unfamiliar with the specific protocol for amending a civil complaint (and proceeding pro se), Plaintiff asks that what follows be construed as **in addition to** and **not in place of** the information and assertions contained in his original Complaint.

ADDITIONAL ASSERTIONS/INFORMATION

1. Because Plaintiff's colorectal cancer went undiagnosed and untreated for so long when he finally had a colonoscopy it showed a "rectal mass (large fungating mass occupying **more than 50% of the rectal wall**)." Exhibit C, attached.

2. Because Plaintiff's colorectal cancer went undiagnosed and untreated for so long, the risk that the cancer would metastasize to other areas of Plaintiff's body was significantly heightened.

3. Plaintiff's colorectal (colon) cancer has metastasized to his lung. A "Surgical Pathology" conducted by Duke Medicine, Duke University, North Carolina, has concluded the following regarding analysis of a tissue sample taken during resection of Plaintiff's lung.

> [Plaintiff] with a history of stage 3 colon cancer found to have an enlarging right lower lobe lung nodule, which radiographically **suspicious for metastatic disease....**
>
> Diagnosis
> A. 'Right Lower Lobe' (Wedge Biopsy of Lung) Pulmonary Tissue, Positive for Adenocarcinoma, Consistent with **Metastasis from Colonic Primary. Metastatic Adenocarcinoma, Consistent with Colon Primary.**

Exhibit A (attached)(Emphasis Added.)

4. In a "Clinical Encounter" Report dated 3-17-2014, Dr. Andres Carden, Plaintiff's BOP Oncologist, wrote:

> Recurrent stage IV colorectal cancer s/p wedge biopsy of the RUL... which shows adenocarcinoma **consistent with colon primary.**

Exhibit B (attached)(Emphasis Added.)

5. On information and belief and drawing inferences that would seem logical and appropriate to any layperson, Plaintiff asserts that **(a)** his risk of metastatic cancer was significantly heightened by the failure of Defendants to timely diagnose and properly treat his colorectal (colon) cancer; **(b)** his colon cancer has metastasized to his lung; **(c)** the metatastic cancer has resulted in pain, suffering, and emotional distress for Plaintiff; and **(d)** actuarial data would indicate that the metatastic cancer in his lung has significantly reduced Plaintiff's life expectancy.

Respectfully submitted,

Tibal Clarke

Tibal Clarke, Pro Se
97273-071 Wake B
LSCI Butner
P.O. Box 999
Butner, NC 27509

Dated this 1st day of June, 2014.

EXHIBIT A

Clark, Tibel (MR # MA2764)

Results — **Surgical Pathology (Order 174522720)**

Result Data

ACCESSION
00SF14007991

Entry Date
3/5/2014

Component Results

Component	L&b
Clinical History	SPT

Pulmonary metastases. Per maestro care, 50-year-old male with a history of stage 3 colon cancer found to have an enlarging right lower lobe lung nodule, which radiographically suspicious for metastatic disease.

Gross Examination SPT

A. "Lung, right lower lobe wedge resection", received fresh and placed in formalin on 3/3/14 at 1 pm is a 21 gm, 7.5 x 3.2 x 2.5 cm wedge resection of lung. The pleural surface is smooth and glistening with a focal area of induration. Directly underneath the induration, there is a 1.6 x 1.3 x 0.9 cm ill defined white mass. The mass is 0.5 cm away from the parenchymal margin. The remainder of the lung appears unremarkable with no areas of fibrosis or emphysema. Representative sections of the tumor closest to the parenchymal resection margin are submitted in A1-A2.

B. "Lymph node level 7", received fresh and placed in formalin on 3/3/2014 at 2 pm is a 2.5 x 1.5 x 0.5 cm aggregate of tan soft tissue submitted in B1.

Dr. Tang/Dr. Bentley/slides to Dr. Tang

Intraoperative Consultation SPT

A. "RLL, wedge": AF1 (rep, nodule)-adenocarcinoma, consistent with metastatic colon cancer. (Dr. Madden)

Microscopic Examination SPT

Microscopic examination is performed.

Diagnosis SPT

A. "RIGHT LOWER LOBE" (WEDGE BIOPSY OF LUNG):

PULMONARY TISSUE, POSITIVE FOR ADENOCARCINOMA, CONSISTENT WITH METASTASIS FROM COLONIC PRIMARY.
SIZE: 1.6 X 1.3 X 0.9 CM IN GREATEST DIMENSION.
LYMPHOVASCULAR INVASION PRESENT.
OPERATIVE MARGINS ARE FREE OF TUMOR.
SEE COMMENT.

COMMENT: Confirmatory immunostains have been ordered, results will follow in an addendum.

B. "LYMPH NODE LEVEL 7" (EXCISION):

METASTATIC ADENOCARCINOMA, CONSISTENT WITH COLON PRIMARY.

Comment.
I certify that I personally conducted the diagnostic evaluation of the above specimen(s) and have rendered the above diagnosis(es).
Thomas A. Sporn, M.D.
Electronically signed: 03/05/14

Testing Performed By

Clark, Tibel
Reg # 97273-071

FCC-Butner

EXHIBIT B

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL			Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M Race: BLACK		Facility: BUH
Encounter Date: 03/17/2014 09:18	Provider: Carden, Andres MD		Unit: S02

Follow-up encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Carden, Andres MD

Chief Complaint: Oncology

Subjective: Recurrent stage IV colorectal cancer s/p wedge biopsy of the RUL and regional LN which shows adenocarcinoma consistent with colon primary. Pt feels well. He has no complaints. No SOB.

Plan: Pt will need to start systemic chemotherapy with biweekly CAPRIRI.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma:

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

ROS:

General

Constitutional Symptoms

No: Anorexia, Chills, Easily Tired, Fatigue, Fever, Night Sweats, Weakness

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
03/17/2014	08:34 BUX	97.5	36.4	Tympanic	Rogers, Heidi RN

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
03/17/2014	08:34 BUX	55	Via Machine		Rogers, Heidi RN

Respirations:

Date	Time	Rate Per Minute	Provider
03/17/2014	08:34 BUX	18	Rogers, Heidi RN

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
03/17/2014	08:34 BUX	124/64				Rogers, Heidi RN

SaO2:

Date	Time	Value(%)	Air	Provider
03/17/2014	08:34 BUX	100	Room Air	Rogers, Heidi RN

Height:

Date	Time	Inches	Cm	Provider

EXHIBIT C

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	09/17/2010 11:47	Provider:	Rivero, Josef PA-C	Facility:	BUH

Admission Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Rivero, Josef PA-C

Mr. Tibel Clark is a 46 yo AA male (Jamaican descent) with moderate to poorly differentiated adenocarcinoma of rectum 12 cm from the anal verge.

PMH: BPH
PSURGHX: none
PSocHX: denies use of cigarrettes, illicit drugs and weekend 4x beer.
PFamHx: noncontributory
Allergies: none
Date of Arrival: 9/16/2010
Date of REIease: 10/15/2019

Mr. Clark came from Forest City Arkansas. According to patient, last March 09 while at Oklahoma transfer center developed rectal bleeding and reported to medical however not followed since he was transfer to Forest City. He continue to have intermittent rectal bleeding. ON September 23, 2009, he was seen by medical and found to have guiac positive stool. Lab work cbc was ordered and this showed h/h of 12.5/38. He was seen again on 12/02/2009 for continued BRBPR and givensteriod suppository and antiacid medication-ranitidine. He was also referred to Gastroenterologist however not seen. He was re-evaluated in 2/2010 and referred to local general surgeon for colonoscopy. According to patient he was seen by Gastroenterologist in house and scheduled for colonoscopy. He underwent EGD which showed small submucosal mass 1 cm x 1 cm in diameter and colonoscopy showed rectal mass (large fungating mass occupying more than 50% of the rectal wall) 12 cm from the anal verge. Multiple biopsy obtained and pathology reports showed MODERATELY TO POORLY DIFFERENTIATED INVASIVE ADENOCARICONA.

On exam PE normal, no blood on rectal exam, stable weight at 155 (from 160).

PLANS:

Order labs- cbc, cmp, pt/ptt, CEA, iron panel
Staging studies: PET scan, Ct chest, abdomen, pelvis, Rectal US
Consults- GI, Surgeon

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: No

Completed by Rivero, Josef PA-C on 09/17/2010 12:27
Requested to be cosigned by Winston, James MD.
Cosign documentation will be displayed on the following page.

CERTIFICATE OF SERVICE

Good and true copies of Plaintiff's Addendum (Amendment) To His Complaint were sent by first class United States mail, postage prepaid, to:

Lindsey Lorence, AUSA
P.O. Box 1229
Little Rock, Arkansas 72203

David Glover
200 W. Capitol, Suite 2300
Little Rock, Arkansas 72201

Tyler Bone
400 W. Capitol, Suite 2000
Little Rock, Arkansas 72201

Tibal Clarke
Tibal Clarke, Plaintiff

Dated this 1st day of June, 2014.

FILED
OCT 03 2012
ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

TIBAL CLARKE,
Plaintiff/Petitioner,

v.

FEDERAL TRANSFER CENTER
OKLAHOMA CITY,
JOHN DOE(S), WARDEN,
JOHN DOE(S), MEDICAL DIRECTOR,
JOHN DOE(S), CLINICAL DIRECTOR,
L. WALKER, PA,
FCC FORREST CITY (LOW)
WARDEN OUTLAW,
ELLA TAYLOR, RN,
AMY BARKER, RN,
JERALD JONES, PA,
JACK VITUITSKY, PA,
CATHIE WINKLER, RN,
KATHLEEN MAPLES, RN,
H. MATOS, MD,
NADER PEIKAR, MD,

UNITED STATES OF AMERICA,
Defendants/Respondents.

Case No. CIV-12-1094 W

CIVIL SUIT FOR DAMAGES

Now comes Petitioner/Plaintiff Tibal Clarke, pro se, who asks that this Honorable Court determine that the named Defendants violated Petitioner's rights by being "deliberately indifferent" to his serious medical needs and by failing to provide Plaintiff with proper medical care. Plaintiff is therefore entitled to compensatory and punitive damages.

Defendants failed to properly diagnose Petitioner's cancer. As a result of Defendant's multiple acts of omission and commission, Petitioner developed colorectal cancer that metastasized to his lymph nodes. Petitioner is suing the Defendants in

both their official and individual capacities.

The Court has jurisdiction to hear this matter and Petitioner is authorized to submit this matter under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); the Federal Tort Claim Act (FTCA) 28 U.S.C. 2671; 42 U.S.C. 1983; and 18 U.S.C. 3553(a)(2)(D).

To state a claim in a civil suit for damages, a complaint must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1940, 173 L.Ed.2d 868 (2009)(quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Pro se complaints should be liberally construed and not held to the same standards as would be applied to a pleading prepared by a professional attorney. See Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1967); see also Haines v. Kerner, 404 U.S. 519 (1972). Plaintiff's complaint should be read with "special solicitude" and interpreted as raising the "strongest [claims] that they suggest." Triestman v. Federal Bureau of Prisons, 470 F.3d 471, 474-75 (2nd Cir. 2006)(per curiam).

LAW

In support of his Civil Suit for Damages, Complaint, Plaintiff/Petitioner states the following:

1. The named and unnamed Defendants are being sued in both their official and private capacities.

2. The named and unnamed Defendants are being sued under Title 42 Section 1983, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999,

29 L.Ed.2d 619 (1971), and 18 U.S.C. 3553(a)(2)(D).

3. The United States of America is being sued under the Federal Tort Claims Act (FTCA) Title 28 Section 2671.

4. Plaintiff/Petitioner has complied with the Prison Litigation Reform Act (PLRA) and controlling case law by having exhausted his administrative remedies before initiating his Civil Suit for Damages. Exhibit A (BP-9, 10, 11, the responses and Tort Claim).

5. The FTCA grants the Federal Courts jurisdiction over:

> civil actions on claims against the United States for money damages . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment.

28 U.S.C. 1346(b)(1).

6. A claim under the FTCA must be filed within two (2) years after such claim occurs. See 28 U.S.C. 2401(b).

7. Plaintiff's claim accrued on August 20, 2010, the date on which Plaintiff was informed that he had colon cancer.

8. "[I]n certain instances, particularly in medical malpractice cases, accrual may be postponed until the plaintiff has . . . discovered the critical facts of his injury and its cause." Barrett v. United States, 518 F.3d 173, 177 (2nd Cir. 2008).

9. Plaintiff's tort claim identifies two causes of action: a) negligence and medical malpractice in diagnosing and timely treating Plaintiff's cancer, and b) "deliberate indifference" to Plaintiff's medical needs.

10. Inmates can sue the United States under the FTCA for injuries sustained because of employee negligence. See United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); and United States v. Demko, 385 U.S. 149, 152-54, 87 S.Ct. 382, 17 L.Ed.2d 258 (1966).

11. "The United States is the only proper defendant in a FTCA action." Oxendine v. Kaplan, 241 F.3d 1272, 1275 n.4 (10th Cir. 2001).

12. 42 U.S.C. 1983 states that:

> Every person who . . . causes to be subjected any citizen . . . or other person within the jurisdiction [of the United States] to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

13. The named and un-named Defendants in this action deprived Plaintiff of his rights under the Constitution and laws of the United States by subjecting him to improper medical care and "deliberate indifference" to his serous medical needs.

14. A Bivens claim is an implied private cause of action for damage against a federal official for violation of a plaintiff's constitutional rights.

15. Bivens actions are available against individual officials. See Correctional Services Corp. v Lamako, 534 U. S. 61, 70-72, 122 S. Ct. 515, 151 L.Ed.2d 456 (2001).

PLaintiff/Petitioner has both a factual and legal basis for bringing his Civil Suit for damages.

Respectfully Submitted,

Tibal Clarke, pro se
Reg. #: 97273-071
LSCI-Butner
P. O. Box 999
Butner, NC 27509-0999

Dated: September 18th, 2012

1. **FIRST CLAIM**

The Health Services Medical Staff actually knew that Plaintiff's medical condition, continuous bleeding, bleeding from his rectum, represented a substantial medical risk and they consistently failed to treat Plaintiff and this failure constitutes deliberate indifference.

FACTUAL PREDICATE

(a) Plaintiff told the Health Services Staff at the Federal Transit Center, located in Oklahoma, that there was "bleeding from his rectum" in March, 2009 and was having difficulty breathing.

Plaintiff's legal pleadings, including this one, will use the acronym "BFMA", which translates to "bleeding from my anus" in order to have legal counterparties visualize the pain and suffering (physical and emotional), as well as the life threatening medical danger Plaintiff has been subjected to, because of the Defendant's deliberate indifference.

(b) Plaintiff was told by Physician Assistant (PA) L. Walker, that Plaintiff's medical condition was due, both to a lack of exercise, and an insufficient amount of water in Plaintiff's body, and was directed to drink more water everyday.

(c) Plaintiff was not given a medical examination by PA Walker. There was not even a cursory blood pressure test or evaluation if Plaintiff had a fever, and as Plaintiff's vital signs were not examined, PA Walker's directive to treat Plaintiff's medical symptoms was nothing more than idle chatter.

(d) Two days later, Plaintiff's "BFMA" was worse, and Plaintiff reported the identical medical symptoms to PA Walker and Plaintiff was instructed again to drink water as before (see paragraph 16).

(e) Also, as before, there was no basic medical evaluation conducted by PA Walker, much less a doctor.

Plaintiff was subsequently transferred to the Federal Correctional Complex, Forest City, Arkansas (Low Custody), and for the next 1 year plus, the Health Services Staff and the Prison Administration failed to provide medical treatment that addressed Plaintiff's medical symptoms with deliberate indifference.

2a) While Plaintiff continued to flush his system with water, the "BFMA" did not abate; consequently, Plaintiff completed an Inmate Request Form (captioned a cop-out in early April, 2009) to health services, describing the directive given by PA walker, and additionally, requesting an examination of his colon and prostate. Nurse Taylor's file note regarding Plaintiff's "BFMA" problem was generalized under the terminology, "Observation for other spec. suspected conditions," plus the nurse ordered a blood test. There was no reference to have a doctor examine Plaintiff.

2b) On 4/13/2009, Plaintiff initiated contact with Health Services, and asked Ms. Ella Taylor, R. N., during sick call, about the status of his "inmate request form" (identified in paragraph 2a), that described "BFMA," and the need for a colon and prostate examination. Plaintiff was instructed to watch the "call-out" list (a call-out listing is nomenclature for inmate appointments scheduled for a given day). As Nurse Taylor determined without a medical examination that Plaintiff's "BFMA" was not serious.

See Exhibit 1

2c) On 6/29/2009, Plaintiff initiated contact with Health Services and reported continual "BFMA", with abdominal pain and diarrhea to Nurse Amy Barker. Again, the Medical Staff did nothing other than instruct Plaintiff to monitor his condition, without any staff follow-up. Furthermore, there was no physical examination to assess Plaintiff's "BFMA's" complaint. Nurse Barker stated in the file notation that she will or did notify Dr. Molina. There was never any further intervention by Dr. Molina regarding a medical examination. The Nurse's file notation identifies "an order to keep hydrated and 2 days off work."

See Exhibit 2

2d) On 7/15/2009, at a sick call visit initiated by Plaintiff. NP Johnson was asked about Plaintiff's requested medical examination, regarding his colon and prostrate, due to "BFMA", and rather than conduct a medical examination or notify a doctor, PA Johnson ordered blood tests. Plaintiff had other medical issues such as elevated blood pressure and muscular/joint pain.

An elaborate 14-page file notation was prepated. However, it has a number of discrepancies, such as prescribing narnoxen but listing no joint pain, listing Plaintiff was circumcised when he was not; having an EKG when he did not nor is there any such complaint, and listing no blood in stool when there was.

2e) On 8/24/2009, at a sick call visit initiated by Plaintiff, PA Jones told Plaintiff that rectal bleeding did not necessarily mean it was an indicator of cancer. This statement was made in response to Plaintiff's request to be tested for cancer because of "BFMA." PA Jones did not conduct a rectal examination nor was a doctor notified. PA Jones file notation referred to Plaintiff's complaint as "other problem."

See Exhibit 3

2f) On 9/23/2009, at a sick call visit initiated by Plaintiff with Health Services, PA Jones made a file notation that Plaintiff's chief complaint was "bleeding from rectum." Accordingly, PA Jones notation stated Plaintiff needed an evaluation by a "Gastro" meaning Gastrointestinal Specialist. Also, it was noted that there was "blood in stools."

"BFMA" identified on his form

See Exhibit 4

2g) On 12/2/2009, at a sick call initiated by Plaintiff, PA Vitvitsky's file notation stated that Plaintiff's complaint of "bleeding from rectum" happened every time there was toilet use for the past 3 months. Also, the PA observed that:

> "Rectal stool sample showed positive for occult blood with sample only from rectal canal. He was too uncomfortable to push all the way in without lubrication generous on the glove (two more [stool] cards to be returned in a few days)."

Blood Tests

This assessment was "hemorrage of gastro-intestinal tract, unspecified." The PA wanted additional stool cards returned and ordered blood tests. There was no referral to staff doctor. The PA's directive was to continue milk of magnesia.

See Exhibit 5

26) On 12/4/2009, at a sick call visit whereby Plaintiff returned more stool samples to PA Vitvitsky, consistent with the directive in paragraph 2g, the PA's assessment remained as "hemorrage of gastrointestinal tract, unspecified." The PA noted that the "consultation procedure" is "gastroenterology."

See Exhibit 6

2i) On 12/22/2009, at a sick-call visit initiated by Plaintiff, PA Winkler arbitrarily chose not to believe Plaintiff was "BFMA", nor that the stool specimens were legitimate. PA Winkler wanted to extract the feces samples herself for placement on the stool card; but Plaintiff was in too much pain to proceed, and PA Winkler could not complete a finger probe to retrieve feces samples. It is apparent that PA Winkler never read the file notation of PA Vitvitsky contained in paragraphs 2g and 2h.

Nevertheless, PA Winkler prescribed a hemorrhoidal suppository without a medical conclusion that Plaintiff had hemorrhoids. There is no file notation that a visual inspection for apparent hemorrhoids had been conducted.

PA Winkler did make a file notation for a referral to a "GI" specialist ("GI" means Gastrointestinal Specialist). Also, Winkler prescribed rantidine tablets. This medication is a histamine blocker used to treat and prevent ulcers, and to treat gastroesophagel reflux disease. This prescription was made without a doctor's examination nor by a gastro-internest specialist.

See Exhibit 7

2j) On 1/12/2010, at a sick call visit initiated by Plaintiff, PA Winkler was informed by Plaintiff that "BFMA" was more severe and intense. PA Winkler's file notation only identifies the treatment as of 12/22/09 (paragraph 21). PA Winkler ignores her own file notation on 12/22/2009 regarding a gastrointestinal specialist. There is no medical examination by a staff doctor.

See Exhibit 8

2k) On 2/22/2010, at a sick call visit initiated by Plaintiff, PA Kathleen Maple made a file notation that Plaintiff had complained about "BFMA" for 1-year, and that on this visit, Plaintiff said that the bleeding was worse than before. PA Maple did conduct a cursory rectal examination sufficient to observe that Plaintiff's prostrate was enlarged. Additionally, PA Maples made a notation that a colonoscopy is needed for a diagnosis of possible cancer. Also, a basic hemorrhoid examination was given and the conclusion was that there were none. The PA stopped the rantidine medication. By the PA's file notation that Plaintiff had indeed been complaining about "BFMA" for a year, the PA documented and validated Plaintiff's prior continual medical complaints and corrected the superficial omissions by other health services staff which included constipation and diarrhea. There was a description of Plaintiff's medication.

See Exhibit 9

21) On 3/15/2010, at a sick-call visit initiated by Plaintiff, Health Services Staff member, Kathleen Maples, APN-FNP, upon the recommendation of the URC Committee (The URC Committee is The Utilization Review Committee and is usually composed of the Bureau of Prisons Chief Institutional Doctor and the Health Service Administrator), was to provide Plaintiff with iron, folic acid, vitamin B, and multi-vitamins, to off-set Plaintiff's loss of blood and weight loss. This medical evaluation by a gastro-intestinal specialist despite prior file notation (paragraph 2h). Furthermore, the file notation indicates that Plaintiff is to be given a "ferrous gluconate tablet" for "hemorrhage of gastrointestinal tract, unspecified."

See Exhibit 10

2m) Plaintiff identified a file notation generated 4/1/2010, whereby Rachel Johnson, NP, documents that the recommendation of the URC Committee was not followed as there was not vitamin B nor multi-vitamins provided to Plaintiff. However, more critically important. Plaintiff's medical problem is now listed formallyas "hemorrhage of gastrointestinal tract" even though there was no medical examination conducted by a doctor or a gastrointestinal specialist.

See Exhibit 11

2n) On 4/13/2010, at a sick-call visit initiated by Plaintiff, PA Wingo made a file notation that Plaintiff had "blood in stool X 1 year." The anus and rectum examination was deferred without explanation. Plaintiff informs the PA that he does not have hemorrhoids (see paragraph 21). Apparently, PA Wingo never checked PA Maples' file notation of 2/22/2010 which stated no hemorrhoids. Furthermore, there is a file notation that Plaintiff is suppose to be seen by a gastrointestinal specialist. The medical assessment continued to be "hemorrhage of gastrointestinal tract, unspecified."

See Exhibit 12

2o) On 8/20/2010, 1-year and 5-months after Plaintiff first reported "BFMA", a colonoscopy was done and a "rectal mass" was identified.

See Exhibit 13

2p) On 8/23/2010, Dr. Peimar Nasser told Plaintiff that he had cancer. The pathology report stated that Plaintiff had "rectal carcinoma and multiple lymph nodes invasion. Also, positive for 4-pylori." The doctor informed Plaintiff that an urgent transfer form has been completed.

See Exhibit 14

2q) On 8/26/2010, Nurse Winkler made file notations listing various medications to treat "hipylori." There was also a new consultation request to consult "oncology" and "general surgery" regarding the diagnosis and treatment of rectal carcinoma.

See Exhibit 15

2r) On 8/27/2010, Nurse Winkler's file notations listed additional medication and the cancellation of other dosages of medicine. The general surgery consultation was cancelled as Plaintiff was to be transferred. The "hemorrhage of gastrointestinal tract, unspecified" was changed from assessment to an indication.

See Exhibit 16

2s) On 9/16/2010, Plaintiff was transferred to the Federal Medical Center at Butner, North Carolina for medical treatment of the cancer that was the cause of "BFMA."

2t) Plaintiff provides the results of blood tests taken at Forest City's Health Services:

1) On 9/18/2009, there were 4 low indications listed by the laboratory. There is no file notation of any discussion with Plaintiff. There is no evaluation by Health Service Staff.

2) On 12/11/2009, there were 5 low indications listed by the laboratory and 1-item that was listed as high. Again, there is no file notation of discussion or evaluation by Health Service Staff, nor is there any file notation of any communication of results to Plaintiff.

3) On 6/15/2010, a PSA Blood Test was given, but not a "CEA" Blood Test which is the indicator for colon cancer.

See Exhibit 17

2u) Plaintiff provides the result of the initial blood test completed at the Federal Medical Center:

On 9/28/2010, less than two weeks after Plaintiff was transferred to the Federal Medical Center, an initial blood test was completed with 5-items indicating low and 3-items indicating high. These various tests included the "CEA" test which is positive for colon cancer. There was a complete review of the test results by the medical staff.

See Exhibit 18

APPLICATION TO PLAINTIFF

"Additional Arguments"

FIRST CLAIM

i. ANEMIA - Compare Low Blood Tests (iron pills)

No connection to a diagnosis for cancer

No file notation that would lead to a prompt examination, or

a "CEA' Blood Test

j. Medical Apathy

The Health Services Staff just didn't care, did not follow up, did not order the relevant blood test, never did a rectal examination, properly violated a medical oath of "Do No Harm."

k. Compare the Medical Records and File Notations with the complete documentation at the Medical Center (in 1 and 2 sub-parts). They are people with the same job titles and professional education: doctors, physician assistants, and nurses. Yet, there is detailed examination, evaluation treatment, and communication, as oppose to the circular motion which involved doing nothing in paragraphs 1 and 2, including sub-parts.

SECOND CLAIM

II. The Medical Treatment by the Health Services Staff, identified in the factual predicate paragraph 1 and 2 including sub-parts, was totally meaningless and inadequate, and was done with deliberate indifference, because they knew better... they knew that "BFMA" is a symptom for colon cancer as evidenced in the Inmate's Handbook.

III. The delays and inadequate medical treatment, almost 1 1/2 years, represented a direct causation in Plaintiff's medical condition becoming more acute and life threatening.

IV. The Administrative Grievance Procedure was hopelessly non-responsive, as the executive staff at the institution, region, and central office levels simply gave Health Services meaningless response, and they should have been put on notice by adopting a standard that if they were "BFMA", their intervention would have directly saved Plaintiff's "pain and suffering", the absolute cost for medical treatment at the Medical Center and the resulting cost to the tax-payer.

A. LEGAL STANDARD

A.1) Deliberate indifference does not require you to show that an official intended to hurt you or make you suffer.

The deliberate indifference requirement

"is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."

Farmer v Brennan, 511 U. S. 825 (1994) at 835

A.2) An inmate "need not show that a prison official acted or failed to act believing that harm would actually befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."

Id at 842;

See Also: Patrick v Miffin, 90 F. 3d 205, 208 (7th Cir. 1996)

A.3) As the Supreme Court put it:

"Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact-finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Farmers, 511 U. S. at 842

See Also: Vance v Peters, 97 F.3d, 987, 992 (7th Cir. 1996)

Spruce v Sargent, 149 F. 3d 783, 785-786 (8th Cir. 1998)

A.4) The Risk was obvious.

A risk is obvious if it is longstanding, pervasive, well documented...

See Protecting Your Health & Safety

by Robert E. Toone, Southern Poverty Law Center, Copyright, 2002, Page 50

Therefore, as a medical official without specialized training should not make decisions about conditions that requite a specialist's attention.

B. DELAYS

B.1) As a General Rule, a delay violated the constitution if it is:

1) Medically unjustified and

2) Clearly likely to make the inmate's medical problem worse or result in a life-long handicap or a permanent loss.

B.2) An official acts with deliberate indifference when he intentionally delays providing an inmate with access to medical treatment, knowing that the inmate has a life-threatening condition or an urgent medical condition that would be exacerbated by delay.

Estelle 429 U. S. at 105-106

Hunt v Uphoff, 199 F.3d 1220, 1224 (10th Cir. 1999)

Lancaster V Monroe County, 116 F. 3d 1419, 1425 (11th Cir. 1997)

B.3) Once an official actually knows about a substantial risk of serious harm, [the official] must respond reasonably to it.

In deciding whether an official's response was reasonable, a court will most likely ask whether the official made a good faith effort to investigate the problem and then fix it.

It is not enough for an official to say "only noted" and then do nothing.

See Vance v Peters, 97 F.3d 987, 993 (7th CIr. 1996)

Reed v McBride, 178 F.3d 849, 855 (7th Cir. 1999)

B.4) A jury could find that week long delays by inmates to see a doctor were product of deliberate indifference.

See McEllcott v FOley, 182 F.3d at 1256 N.6

C. **Summary - Legal Standard**

C.1) To be construed deliberately indifferent, an official must both

1) Know about a risk to an inmate, and

2) Failed to respond reasonably

Knowledge of a risk and an unreasonable response are elements of all failure to protect medical care and condition claims.

C.2) In Farmer, the Supreme Court emphasized that deliberate indifference is a "subjective", not an objective requirement.

This means that it is not enough to show that the officials whom you sue, "should have known" about a particular risk, or that a "reasonable person" would have known about it. Instead, you must show that the officials in your case actually knew about the risk.

D. **INMATE HANDBOOK**

D.1) The Federal Bureau of Prisons issues to an inmate a handbook describing the prison's rules and regulations at a formal orientation session. The only exception is at the Federal Transit Center because the inmates are being transferred, and will receive a handbook at his final destination.

The basic language used by all federal prisons is the same. The quoted sections regarding Health Services represent materials and pertinent data as it relates to plaintiff's claims:

"Colon Cancer: Testing for blood in your stool every year beginning at age 50 (sooner if you are higher risk for colon cancer)"

See Page 19

EXHIBIT

D.2) "You have the right to report complaints of pain to your Health Care Provider, have your pain assessed and managed in a timely and medically acceptable manner, be provided information about pain and pain management, as well as information on the limitation and side effects of pain treatments.

See Your Health Rights, Page 31

EXHIBIT

D.3) "You have the responsibility to communicate with your health care provider honestly regarding your pain and your concerns about your pain. You also have the responsibility to adhere to the prescribed treatment plan and medical restrictions. It is your responsibility to keep your provider informed of both positive and negative changes in your condition to assure timely follow up."

See Your Responsibilities, Page 31

EXHIBIT

E. LEGAL STANDARD

E.1) The allegations of the complaint are taken as true and are construed in the light most favorable to the plaintiff.

See Thaeter v Palm Beach County Sheriff's Office,
449 F.3d 1342, 1352 (11th Cir. 2006)

E.2) The complaint may be dismissed if plaintiff has not stated enough facts to state a claim for relief that is plausible on its face.

See Bell Atlantic Corp v Tooney,
127 S.Ct. 1955, 1973, 1974 (2007)

F. EIGHTH AMENDMENT STANDARD

F.1) The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments"

> "Prison personnel may not subject inmates to acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs... Such deliberate indifference by a correctional system to serious medical needs of its prisoners constitute the kind of unnecessary and wanton infliction of pain that is proscribed by the Eighth Amendment."

See Harris V Thigpen,
941 F.2d 1498, 1504-1505 (11th Cir, 1991).

G. **LEGAL STANDARD**

G.1) In Estelle v Gamble, 429 U. S. 97, 105-106, 97 S. Ct. 285, 50 L.Ed 2d 251 (1976), The Supreme Court explained that:

> A complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a provider must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend evolving standards of decency in violation of the Eighth Amendment.

DELIBERATE INDIFFERENCE

G.2) To show that a prison official acted with deliberate indifference to an inmate's serious medical needs, a plaintiff must satisfy both an objective and subjective inquiry.

See Farrow v West, 320 F.3d 1235, 1243 (11th Cir. Cir. 2003).

G.3) First, a plaintiff must establish that he had an objective serious medical need.

Id

G.4) Second, a plaintiff must show that a prison official acted with an attitude of deliberate indifference to that serious medical need.

Id

G.5) A prison official cannot be found deliberately indifferent in violation of the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate's health or safety.

Id at 1245 (citing
Farmer v Brennan, 511 U. S. 825, 835,
114 S. Ct. 1970, 128 L. Ed 811 (1994).

G.6) The Eleventh Circuit has explained that deliberate indifference has three components:

"1) Subjective knowledge of a risk of serious harm;
2) Disregard of that risk;
3) By conduct that is more than mere negligence."

Id (quoting McElliott v Foley,
182 F. 3d 1248, 1255 (11th Cir. 1999).

G.7) A delay in the treatment of a serious medical need may amount to deliberate indifference depending upon the reason for the delay.

Id at 1246.

As to the Warden,

> "It is well established in this Circuit that supervisory officials are not liable under (Bivens) for the unconstitutional acts of their subordinates on the basis of respondent supervision or vicarious liability.
>
> See Dalrymple v Reno, 334 F.3d 991, 995 (11th Cir. 2003).
>
> There must be a causal connection between actions of the supervisory official and the alleged constitutional violation.

There was sufficient evidence to permit a jury to conclude that medical personnel were deliberately indifferent to plaintiff's medical need for further diagnosis of treatment for the severe pain. "BFMA"

Plaintiff seeks compensatory damages of not less than $1,000.00 per day between the first time he reported rectal bleeding (March 26, 2009) and the day prison officials allowed a colonoscopy 8-20-10), a total of 547 days equaling not less than $547,000.00. Plaintiff seeks compensatory damages of not less than $10,000.00 per day for pain and suffering and untreated growth and metastasizing of his cancer for each day from 3-26-09 up until 8-20-10 to a total of 547 days and a total equaling not less than $5,470,000.00. Plaintiff seeks punitive damages in an amount to be determined by the trier of facts. In sum, Plaintiff seeks not less than $6,017,000.00 in compensatory damages and an unspecified amount in punitive damages.

Respectfully Submitted,

Tibal Clarke

Tibal Clarke, pro se
Register #: 97273-071
P. O. Box 999
Butner, NC 27509-0999

Dated: September 18th, 2012

I. **APPLICATION TO PLAINTIFF**

I.1) "The symptom most often associated with colon cancer is blood in the stool."

Understanding Colon Cancer, (Page 49)

by A. Richard Adrouny, M. D., F. A. C. P.

Copyright 2002

University Press of Mississippi

I2) "Constant bleeding may lead to anemia, a condition in which there is a deficiency of hemoglobin or red blood cells."

ID (Page 50)

I3) "Therefore, when a person becomes anemic, common feelings in the early stages are fatigue that comes easily or lack of stamina. As anemic becomes worse, a person may become noticeably pale and may experience breathlessness..."

Id

I4) "Lower abdominal pain, bloating, and cramping are some of the symptoms of colon cancer."

Id (Page 51)

I5) "... Patients may present with alternating constipation and diarrhea that may mimic the irritable bowel syndrome."

Id (Page 53)

I6) "If cancer spreads to other organs, symptoms that may follow include general effects such as weight loss, weakness, malaise, loss of appetite and fever."

Id (Page 53)

I7) Plaintiff provides this citations from a book designed by the author "For the General Reader." It is not a medical book written for Health Service Professionals, who are suppose to know it by virtue of their training. The Bureau of Prisons notifies every federal inmate that "blood in your stool" could be a sign of colon cancer.

See Paragraph D1

I8) The Bureau of Prisons notifies every federal inmate that medical complaints, particularly involving pain, should be reported to Health Services Medical Staff so that medical condition can be "assessed and managed in a timely and medically acceptable manner."

See Paragraph D2

I9) Plaintiff alleges that in support of Plaintiff's first claim, the Health Services Staff failed in their duty as Health Service professionals to treat plaintiff's medical condition which was "BFMA", and consistently did so, knowing that "BFMA" was a potential indicator of colon cancer (as stated in the Inmate Handbook):

a) Plaintiff's "BFMA" exceeded well over one year which represents a risk that is "obvious", if it "longstanding, pervasive, well-documented..."

See Paragraphs A3 and A4; Also, Paragraphs (a) to (e) inclusive and Paragraphs 2a) to 2m) (inclusive).

b) The delay in properly treating Plaintiff constituted deliberate indifference because a delay of over a year cannot be justified.

See Paragraphs B1, B2, and B4; Also, Paragraphs (a) to (e) inclusive and Paragraphs 2a) to 2m) inclusive

c) There was no good faith effort to investigate and treat Plaintiff's medical condition; rather, there was a plethora of file notations without follow-up examinations by either a doctor or gastrointernist specialist.

See paragraphs AT, B3, and C1; also Paragraphs (a) to (e) inclusive and Paragraphs 2a to 2m inclusive

d) There was a prescription for hemorrhoids, a suppository, without even a visual inspection, which was later documented to be totally in error as Plaintiff did not have hemorrhoids.

See paragraphs 2i and 2m

e) There was a prescription for ranitidine, a histamine blocker, which was summarily cancelled, and was given to Plaintiff in error (without a doctor's examination).

See Paragraphs 2i and 2k

f) The basic digital rectal examination was not conducted properly, and to the extent that it was, the Health Services Staff failed to notify a staff doctor about Plaintiff "BFMA"; and if there was a file notation supposedly notifying the staff doctor, nothing happened.

See Paragraphs 2g, 2h, 2i, 2j and 2k

The most important test for colorectal cancer that a physician performs during a physical examination is the digital rectal exam (DRE).

Understanding Colon Cancer

at Page 30

The "DRE" can give a wealth of other information to the physician.

Id at Page 31

After performing the digital examination, the examiner wipes some stool from the examineing glove onto a filter paper containing a peroxide-sensitive chromogen and then places drops of a developing solution containing hydrogen peroxide on it. If any amount of the enzyme peroxidase is present, it causes the hydrogen peroxide to break down to water an doxygen. Oxygen produced in this reaction in turn causes the chromogen to turn blue.

Id

The presence of blue color indicates that there is bleeding somewhere in the gastrointestinal tract. This is called the fecal occult blood test.

Id

There are no file notations to indicate that any Health Service Staff who met with Plaintiff or any laboratory ever performed the basic fecal occult blood test properly.

g) The blood tests ordered by the Health Service Staff were apparently never reviewed, and to the extent there was any trangential connection, any health service reaction was superficial because a "CEA" blood test was never ordered by the medical staff.

See Paragraphs 2a, 2d, 2t

The blood test that is "the major tumor marker for colorectal cancer is "CEA", which stands for carcinoembryonic antigen.

See Understanding Colon Cancer

at Page 34

No tumor marker has been used as frequently as has "CEA" for colorectal cancer.

Id at Page 35

The blood tests identified in Paragraph 2t have various high and low indicators; however, there is no file notation regarding any communication of results to Plaintiff

A comparison of the blood tests identified in Paragraph 2t, with the comprehensive blood test completed at the Federal Medical Center cited as Paragraph 2u, which includes a "CEA" test is illuminating as it shows the deliberate indifference of the Health Services Staff.

A "PSA" test was completed on 6/15/2010 which is a blood test marker for prostate cancer; however, the Health Services Staff failed to order a "CEA' blood test which is the primary marker when there is "BFMA."

h) Plaintiff argues that on 8/20/2010, 1 year and 5 months after Plaintiff reported "BFMA", a colonoscopy was done, and within 30 days, Plaintiff was transferred to the Federal Medical Center. It took the Health Services Staff over 6-months to act on PA Maples file notation of 2/22/2010

See Paragraphs 2o, 2p, 2q, 2r, and 2s; also 2k

SUMMARY

Plaintiff's "First Claim" is based upon a simple premise. If you, a Judge, a Judicial Law Clerk, an Assistant United States Attorney, a Jury Member, were "BFMA", what would they do? Perhaps switch doctors; but, that option is not available to Plaintiff. The Health Services Staff failed to treat Plaintiff's "BFMA" period.

See Paragraphs 1a and 1e inclusive and

Paragraphs 2a to 2m inclusive; Also, see Paragraphs A1 and A2.

Tibal Clarke

PLAINTIFF'S EXHIBIT LIST

HEALTH SERVICES FILE DOCUMENTATION

EXHIBIT 1 - File Notation of Sick Call Visit	4/13/2009	Paragraph	2b
EXHIBIT 2 - File Notation of Sick Call Visit	6/29/2009	Paragraph	2c
EXHIBIT 3 - File Notation of Sick Call Visit	8/24/2009	Paragraph	2e
EXHIBIT 4 - File Notation of Sick Call Visit	9/23/2009	Paragraph	2f
EXHIBIT 5 - File Notation of Sick Call Visit	12/2/2009	Paragraph	2g
EXHIBIT 6 - File Notation of Sick Call Visit	12/4/2009	Paragraph	2h
EXHIBIT 7 - File Notation of Sick Call Visit	12/22/2009	Paragraph	2i
EXHIBIT 8 - File Notation of Sick Call Visit	1/12/2010	Paragraph	2j
EXHIBIT 9 - File Notation of Sick Call Visit	2/22/2010	Paragraph	2k
EXHIBIT 10 - File Notation of Sick Call Visit	3/15/2010	Paragraph	2l
EXHIBIT 11 - File Notation	4/1/2010	Paragraph	2m
EXHIBIT 12 - File Notation of Sick Call Visit	4/13/2010	Paragraph	2n
EXHIBIT 13 - File Notation	8/20/2010	Paragraph	2o
EXHIBIT 14 - File Notation	8/23/2010	Paragraph	2p
EXHIBIT 15 - File Notation	8/26/2010	Paragraph	2q
EXHIBIT 16 - File Notation	8/27/2010	Paragraph	2r
EXHIBIT 17 - File Notation (various blood tests/Forest City)		Paragraph	2t
EXHIBIT 18 - File Notation (blood test/Federal Medical Center)			

CERTIFICATE OF SERVICE

I, hereby, certify that a copy of the foregoing pleading was served upon the below named persons by placing the same in the regular institutional depository at L.S.C.I.-Butner, NC designated for first-class U. S. Mail, postage pre-paid on this 18th day of September, 2012.

United States District Court
Attn: Office of the Clerk
Western District of Oklahoma
200 N. W. 4th Street
Oklahoma City, OK 73102-3092

Tibal Clarke

Tibal Clarke

Register #: 97273-071
L.S.C.I. - Butner
P. O. Box 999
Butner, NC 27509-0999

Pursuant to the "mailbox rule", this pro se pleading, filed by a prisoner in custody is considered "filed" when mailed on or before the last day of filing. See: Houston v Lack, 101 L.Ed 2d 245 (1988).

EX. A

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Tibal Clarke	97273-071	4-B	FMC Butner
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A- INMATE REQUEST I reported blood in my stool in March of 2009 while at the Oklahoma Transportation Center. During the following 17 months, I went to sick call numerous times and submitted several cop-outs complaining of blood in my stool and severe pain. It was not until August of 2010 that a proper diagnosis was made -- colorectal cancer. I have suffered unnecessary pain and anxiety during the time that I did not receive proper medical care. Early detection and treatment would have avoided the suffering and complications I have experienced. I want to be appropriatedly compensated for my suffering and I want the B.O.P. to take steps to ensure that other men don't have to go through what has happened to me.

February 10, 2011
DATE

Tibal Clarke
SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: 628439-F1

CASE NUMBER: 628439-F1

Part C- RECEIPT

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

3-1-11

A

U.S. Department of Justice
Federal Bureau of Prisons
FCC Butner

Request for Administrative Remedy
Part B - Response

Admin Remedy Number: 628439-F1

This is in response to your Request for Administrative Remedy received on March 1, 2011, in which you are requesting compensation for suffering where you feel you did not receive proper medical care.

We have reviewed your request and it has been determined that the Administrative Remedy Program does not provide monetary compensation of this nature. If you feel you need to be compensated, you may follow the procedures in the Federal Tort Claims Act. Submit an Inmate Request to Staff Member to your Unit Team requesting a Claim for Damage, Injury or Death (Standard Form 95). After you complete the form, send it to the FCC Butner Legal Center, PO Box 1600, Butner, NC 27509.

As in response to your receipt of inadequate medical care, a review of your medical records revealed, you were seen at FCI Forrest City for rectal bleeding beginning in September, 2009. A referral was made to Gastroenterology on September 23, 2009; however local policy, at FCI Forrest City, requires patients who require a colonoscopy see General Surgery. This referral was corrected on February 22, 2010, and you were seen by General Surgery on April 23, 2010. The General Surgeon ordered a colonoscopy which was performed August 20, 2010. A definitive diagnosis of colon cancer was made and you were referred to FCC Butner for Oncology treatment.

You arrived at FCC Butner September 16, 2010, and had your initial consultation with Oncology September 24, 2010. You were treated with radiation and surgical interventions. Currently you are receiving chemotherapy. You will continue to be followed by Oncology at FMC Butner in addition to your primary care team.

Based on the above information, your Request for Administrative Remedy is denied.

If you are dissatisfied with this response, you may appeal to the Regional Director, Federal Bureau of Prisons, Mid-Atlantic Regional Office, 302 Sentinel Drive, Suite 200, Annapolis Junction, MD 20701. Your appeal must be received in the Regional Office within 20 calendar days from the date of this response.

5/23/2011
Date

Sara M. Revell, Complex Warden

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: Clarke, Tibal	97273-071	4B	FMC Butner
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL My BP-09 is incorporated herein by reference. My life-threatening pervasive cancer that has caused me immeasurable pain and suffering is a direct result of gross medical negligence and malpractice on the part of BOP staff members. My condition deteriorated, too, as a consequence of deliberate indifference to my serious medical needs. I understand the futility of the administrative remedies process, but alas the process must be exhausted before I can file for relief in the courts. I want appropriate financial compensation; release from incarceration so I can pursue the full range of cancer treatments; a fully paid health insurance policy that covers all future costs; and assurance that a comprehensive review of BOP medical practices will be undertaken and resulting recommendations implemented so that other prisoners will not suffer my fate in the future.

5-26-11
DATE

Tibal Clarke
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 628439-R1

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

ADMINISTRATIVE REMEDY REGIONAL APPEAL
PART B - Response

Date Filed: June 6, 2011 **Remedy ID No.: 628439-R1**

You appeal the Warden's response to your request for administrative remedy. You contend that your life threatening pervasive cancer that has caused you pain and suffering is a direct result of gross medical negligence and malpractice on the part of BOP staff members. You request compensation for suffering as you believe you did not receive proper and timely medical care for your condition.

Investigation of your complaint reveals that you arrived at FMC Butner on September 16, 2010. Clinical staff evaluated you on the same date as part of the intake screening process. Upon completion of the evaluation, you were instructed on how to obtain medical, dental and mental health care. In September 2010, you had your initial consultation with the Oncologist and you were treated with radiation and surgical intervention. You are currently receiving chemotherapy. Your condition will continue to be monitored and treated by Oncology at FMC Butner in addition to your primary care team appointments.

Your medical plan of care, developed and implemented by your primary care provider team, is adequate and complete. Your condition has been sufficiently addressed and prescribed medication and treatment is appropriate. There is no evidence to support your allegation of gross medical negligence and malpractice on the part of BOP staff members. You are encouraged to continue to work with your primary care provider team for other health care related issues and concerns. As for your request for compensation, we find that the Administrative Remedy Program does not provide monetary compensation of this nature. You may refer to the Federal Tort Claims Act for that purpose.

Your appeal of the Warden's response is denied. If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons, 320 First Street, NW, Washington, DC 20534. Your appeal must be received in the General Counsel's Office within 30 days from the date of this response. NOV - 2 2011

Date

C. Eichenlaub
Regional Director
Mid-Atlantic Region

U.S. Department of Justice

Central Office Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Clarke, Tibal	97273-071	4-B	FMC Butner
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL My BP-09, BP-10, and previously submitted BP-11 are incorporated herein by reference. I previously submitted a BP-11 after the Region Office had not responded to my BP-10 and more than three (3) months had passed since the extended response date the Region Office had sought. (See enclosed receipt.) I finally received a Region Office Response dated November 22, 2011, thus this second BP-11.

My complaint has nothing to do with the medical care I have received at Butner FMC. My complaint concerns the failure of BOP personnel at the Oklahoma Transportation Center and at Forest City FCI to properly diagnose and treat my concer. I am attempting to exhaust my administrative remedies. I understand that the administrative remedy process cannot result in the monetary compensation that I seek; however, this process should alert BOP leadership to the growing, almost desparate need to greatly improve medical diagnoses procedures (especially as it relates to cancer) at every non-hospital facility inthe system.

12-30-2011
DATE

Tibal Clarke
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 628139-R1

Part C - RECEIPT

CASE NUMBER:

Return to:
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

BP-231(13)

Administrative Remedy No. 628439-A2
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal where you contend that your life threatening pervasive cancer that has caused you pain and suffering is a direct result of gross medical negligence and malpractice on the part of BOP staff members. You request compensation for suffering as you believe you did not receive proper and timely medical care for your conditon.

Our investigation and review of documentation related to your appeal reveals you have received chemotherapy and radiation therapy and completed treatment for your cancer and awaiting surgical consult for reversal of the anastomy and ileostomy. On August 7, 2011, a whole body PET CT scan was completed. The general surgeon evaluated you and recommended reversal of the anastomy and ileostomy. You were diagnosed with locally advanced rectal carcinoma s/p proctectomy with coloanal anastomy and diverting loop ileostomy. You completed treatment for the cancer and medically clear for port removal. On January 25, 2012, the portacath was removed.

Based on this information, there is no evidence to substantiate your contention of gross medical negligence and malpractice on the part of BOP staff members. Medical staff advised you are receiving appropriate medical assessment and treatment for your cancer.

The Administrative Remedy Program does not provide for monetary relief. Your request for monetary compensation should be pursued through the appropriate statutorily mandated procedure to resolve this issue.

The record reflects you received medical care and treatment in accordance with evidence based standard of care and within the scope of services of the Federal Bureau of Prisons.

Accordingly, this response is denied.

April 11, 2012
Date

Harrell Watts, Administrator
National Inmate Appeals

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROROVED
OMB NO. 1105-0008
EXPIRES 5-31-65

1. Submit To Appropriate Federal Agency:
[illegible]

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
[illegible]

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
MILITARY CIVILIAN	[illegible]	[illegible]	N/A	N/A

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

During the following 12 months, I went to [illegible] numerous times and submitted several reports complaining of blood in my stool and severe pain. It was not until August of 2010 that a proper diagnosis was made -- colorectal cancer. I have suffered unnecessary pain and anxiety during the time that I did not receive proper medical care. Early detection and treatment would have avoided the suffering and complications I have experienced. I want to be appropriately compensated for my suffering and I want the BOP to take steps to ensure that other men don't have to go through what has happened to me.

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side)

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT My life-threatening pervasive cancer that has cuased me immeasurable pain and suffering is a direct result of gross medical negligence and malpractice on the part of BOP staff members. My condition deteriorated, too, as a consequence of deliberate indifference to my serious medical needs. I understand the

(see #10 continued on the attached sheet)

11. **WITNESSES**

NAME	ADDRESS (Number, street, city, State, and Zip Code)	
L. Walker, PA	Federal Transfer Center, OK	[illegible]
Michelle Wingo, PA	Forrest City, AR	[illegible]
Kathleen Maule	Forrest City, AR	[illegible]

12. (See instructions on reverse) **AMOUNT OF CLAIM** (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
[illegible]	[illegible]	[illegible]	[illegible]

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
[illegible]		

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Imprisonment for not more than five years and shall be subject to a fine of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. (See 18 U.S.C.A. 287.)

95-108 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT; THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item #12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? Yes, if yes give name and address of insurance company (*Number, street, city, State, and Zip Code*) and policy number. (No)

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (*It is necessary that you ascertain these facts*)

N/A

19. Do you carry public liability and property damage insurance? Yes, If yes, give name and address of insurance carrier (*Number, street, city, State, and Zip Code*) (No)

SF 95 (Rev. 7-85) BACK

* U.S. GOVERNMENT PRINTING OFFICE: 1989--241-175

[illegible]

futility of the administrative tort claim process, [illegible] alas, the process must be [illegible] in the courts. I want appropriate financial compensation; release from incarceration so I can pursue the full range of cancer treatments; a fully paid health insurance policy that covers all future costs; and assurance that a comprehensive review of Bop medical practices will be undertaken and resulting recommendations implemented so that other prisoners will not suffer my fate in the future.

PLAINTIFF'S EXHIBIT LIST

HEALTH SERVICES FILE DOCUMENTATION

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EXHIBIT 17 - File Notation (various blood tests/Forest City)		Paragraph	2t
EXHIBIT 18 - File Notation (blood test/Federal Medical Center)			

EX. 1 B

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL		Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M	Race: BLACK
Encounter Date: 04/13/2009 08:37	Provider: Taylor, Ella NP	Facility: FOR

Sick Call/Triage encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Taylor, Ella NP

Chief Complaint: Skin Problem
Subjective: present to sick call requesting clearance for clipper and want cholesterol check.
Pain Location:
Pain Scale:
Pain Qualities:
History of Trauma: No
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

OBJECTIVE:

Exam:

General

45 yr old b/m present today requesting personal clippers for what he reports a allergic to the razors. He was infomed that medial will not allow for person clippers -- if do for one will have to do for all. Informed that he has the opportunity to clipper cut by the barber shop and to use a gurad. As for cholesterol check will order baseline labs -age specific.

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Observation for other spec suspected conditions	V71.89	Resolved	04/13/2009	Initial	History/Resolved

PLAN:

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Profile tests-General-Lipid Profile Profile tests-General-Comprehensive Metabolic Profile (CMP) Profile tests-General-CBC and WBC Differential	One Time		04/15/2009 06:00	Routine

Additional Information:

reports hx of high cholesterol

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
04/13/2009	Counseling	Plan of Care	Taylor, Ella	Verbalizes Understanding

at this time there is no permit for personal clippers

Inmate Name: CLARK, TIBEL		Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M	Race: BLACK
Encounter Date: 04/13/2009 08:37	Provider: Taylor, Ella NP	Facility: FOR

Copay Required: Yes **Cosign Required:** No

Telephone/Verbal Order: No

Clinical Encounter completed on CLARK, TIBEL by Taylor, Ella NP on 04/13/2009 08:37.

EX. 2

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL			Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M		Race: BLACK
Encounter Date: 06/29/2009 14:20	Provider: Barker, Amy RN		Facility: FOR

Emergency encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Barker, Amy RN

Chief Complaint: Diarrhea
Subjective: Pt c/o diarrhea that started this morning. Pt states he has had 5 episodes of diarrhea today.
Pain Location: Abdomen - Diffuse
Pain Scale: 6
Pain Qualities: Intermittent
History of Trauma: No
Onset: 6-12 Hours
Duration: <30 Minutes
Exacerbating Factors:
Relieving Factors:
Comments:

ROS:

GI

General

Diarrhea (yes)

Pt c/o diarrhea that started this morning. Pt denies any nausea or vomting.

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
06/29/2009	14:21 FOX	98.6	37.0	Oral	Barker, Amy RN

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
06/29/2009	14:21 FOX	79	Via Machine		Barker, Amy RN

Respirations:

Date	Time	Rate Per Minute	Provider
06/29/2009	14:21 FOX	18	Barker, Amy RN

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
06/29/2009	14:21 FOX	134/87	Left Arm	Sitting	Adult-regular	Barker, Amy RN

SaO2:

Date	Time	Value(%)	Air	Provider
06/29/2009	14:21 FOX	100	Room Air	Barker, Amy RN

Exam:

Inmate Name: CLARK, TIBEL Reg #: 97273-071
Date of Birth: 09/20/1963 Sex: M Race: BLACK
Encounter Date: 06/29/2009 14:20 Provider: Barker, Amy RN Facility: FOR

Exam:

General

Appearance/Nutrition

Appears Well (yes), Alert and Oriented x 3 (yes)

Affect

Pleasant (yes), Cooperative (yes)

ASSESSMENT:

Diarrhea

PLAN:

Disposition:

Return To Sick Call if Not Improved

Other:

Notified Dr. Molina of pt status. Orders given to keep hydrated and 2 days off work.

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
06/29/2009	Counseling	Plan of Care	Barker, Amy	Verbalizes Understanding

Copay Required: No **Cosign Required:** Yes

Telephone/Verbal Order: No

Clinical Encounter completed on CLARK, TIBEL by Barker, Amy RN on 06/29/2009 14:20.

Clinical Encounter requested to be cosigned by Molina, Andre MD.

Clinical Encounter cosigned by Molina, Andre MD on 06/29/2009 15:33.

EX. B

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL		Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M	Race: BLACK
Encounter Date: 08/24/2009 08:43	Provider: Jones, Jerald PA-C	Facility: FOR

Sick Call/Triage encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Jones, Jerald PA-C

Chief Complaint: Other Problem
Subjective: inmate had an elevated BP reading, here for recheck
Pain Location:
Pain Scale:
Pain Qualities:
History of Trauma: No
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

OBJECTIVE:

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
08/24/2009	08:44 FOX	48			Jones, Jerald PA-C

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
08/24/2009	08:44 FOX	132/68	Left Arm	Sitting	Adult-large	Jones, Jerald PA-C

Exam:

General

Appearance/Nutrition

Appears Well (yes), NAD (yes), Alert and Oriented x 3 (yes)

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Elev blood pressure reading w/o hypertension	796.2	Current	07/15/2009	Marked Improvement	Chronic
Enthesopathy of knee, unspecified	726.60	Current	08/24/2009	Not Assessed	Temporary/Acute

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order

Inmate Name: CLARK, TIBEL			Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M		Race: BLACK
Encounter Date: 08/24/2009 08:43	Provider: Jones, Jerald PA-C		Facility: FOR

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	PrednISONE Tablet	08/24/2009 08:43	40 mg Orally each morning x 10 day(s)

Indication: Osteoarthrosis, generalized

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
08/24/2009	Counseling	Plan of Care	Jones, Jerald	Verbalizes Understanding

Copay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

Clinical Encounter completed on CLARK, TIBEL by Jones, Jerald PA-C on 08/24/2009 08:43.

Ex. 4

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL		Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M	Race: BLACK
Encounter Date: 09/23/2009 09:39	Provider: Jones, Jerald PA-C	Facility: FOR

Sick Call/Triage encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Jones, Jerald PA-C

Chief Complaint: Bleeding from Rectum
Subjective: Inmate had 3 positive guiacs recently, needs CBC and eval by gastro
Pain Location:
Pain Scale:
Pain Qualities:
History of Trauma: No
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

ROS:

GI

General

Blood in Stools (yes)

No real discomfort

OBJECTIVE:

Exam:

General

Appearance/Nutrition

NAD (yes), Alert and Oriented x 3 (yes)

Affect

Pleasant (yes), Cooperative (yes)

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Hemorrhage of gastrointestinal tract, unspecified	578.9	Current	09/23/2009	Initial	Temporary/Acute

PLAN:

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Profile tests-General-Comprehensive Metabolic Profile (CMP) Profile tests-General-CBC and WBC Differential	One Time		09/23/2009 00:00	Today

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome

Inmate Name: CLARK, TIBEL Reg #: 97273-071
Date of Birth: 09/20/1963 Sex: M Race: BLACK
Encounter Date: 09/23/2009 09:39 Provider: Jones, Jerald PA-C Facility: FOR

Date Initiated	Format	Handout/Topic	Provider	Outcome
09/23/2009	Counseling	Plan of Care	Jones, Jerald	Verbalizes Understanding

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Clinical Encounter completed on CLARK, TIBEL by Jones, Jerald PA-C on 09/23/2009 09:39.

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL		Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M	Race: BLACK
Encounter Date: 12/02/2009 12:40	Provider: Vitvitsky, Jack PA-C	Facility: FOR

Sick Call/Triage encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Vitvitsky, Jack PA-C

Chief Complaint: Bleeding from Rectum
Subjective: Blood in stool for 3 months states every time uses toilet
Pain Location:
Pain Scale:
Pain Qualities:
History of Trauma: No
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

ROS:

General

States blood in every stool -= rather dark since about September and thought it was food problem. Also notes he runs about 2 times per week and walks every day - some acheing of right foot - after soccer injury to knee - with lump behind knee. Taking one aspirin per day per doctor to prevent blood problems - but this may be contributing to problem.

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
12/02/2009	12:40 FOX	97.6	36.4	Oral	Vitvitsky, Jack PA-C

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
12/02/2009	12:40 FOX	64	Via Machine		Vitvitsky, Jack PA-C

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
12/02/2009	12:40 FOX	122/72	Left Arm	Sitting	Adult-regular	Vitvitsky, Jack PA-C

SaO2:

Date	Time	Value(%)	Air	Provider
12/02/2009	12:40 FOX	99		Vitvitsky, Jack PA-C

Exam:

General

Rectal stool sample showed positive for occult blood with sample only from rectal canal - he was too uncomfortable to push all the way in with out lubrication generous on glove. (Two more cards to be returned in a few days.

Inmate Name: CLARK, TIBEL
Date of Birth: 09/20/1963
Encounter Date: 12/02/2009 12:40
Sex: M
Provider: Vitvitsky, Jack PA-C
Reg #: 97273-071
Race: BLACK
Facility: FOR

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Hemorrhage of gastrointestinal tract, unspecified	578.9	Current	09/23/2009	Not Improved/Same	Temporary/Acute

PLAN:

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Profile tests-General-CBC (Complete Blood Count)	One Time		12/02/2009 00:00	Routine

Disposition:

Follow-up at Sick Call as Needed

Other:

Await (continue) for consult regardign blood in stool, return two cards Friday, continue Milk of Mag to provide regularity. Blood tests being ordered.

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
12/02/2009	Counseling	Plan of Care	Vitvitsky, Jack	Verbalizes Understanding

Copay Required: No
Cosign Required: No
Telephone/Verbal Order: No

Completed by Vitvitsky, Jack PA-C on 12/02/2009 13:19

Ex. 6

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL
Date of Birth: 09/20/1963
Encounter Date: 12/04/2009 13:43
Sex: M
Provider: Vitvitsky, Jack PA-C
Reg #: 97273-071
Race: BLACK
Facility: FOR

Admin Note encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Vitvitsky, Jack PA-C

Chief Complaint: Bleeding from Rectum

Subjective: testing two more samples of stool for occult blood. These are samples he has obtained in last two days to add to sample obtained 2 days ago and tested then as well as 3 samples previously.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma: No

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

ROS:

General

see dec 2, 2009 encounter

OBJECTIVE:

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
12/04/2009	13:52 FOX	63	Via Machine		Vitvitsky, Jack PA-C

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
12/04/2009	13:52 FOX	115/72	Left Arm	Sitting	Adult-regular	Vitvitsky, Jack PA-C

SaO2:

Date	Time	Value(%)	Air	Provider
12/04/2009	13:52 FOX	100		Vitvitsky, Jack PA-C

Exam:

General

see dec 2, 2009 encounter

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Hemorrhage of gastrointestinal tract, unspecified	578.9	Current	09/23/2009	Not Improved/Same	Temporary/Acute

Inmate Name: CLARK, TIBEL
Date of Birth: 09/20/1963
Encounter Date: 12/04/2009 13:43
Sex: M
Provider: Vitvitsky, Jack PA-C
Reg #: 97273-071
Race: BLACK
Facility: FOR

Description	ICD9	Status	Status Date	Progress	Type

PLAN:

New Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
Gastroenterology	12/04/2009	Routine	No	

Reason for Request:
Now six stool speciments testing

Disposition:
Follow-up at Sick Call as Needed

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
12/04/2009	Counseling	Plan of Care	Vitvitsky, Jack	Verbalizes Understanding

Copay Required: No
Cosign Required: No
Telephone/Verbal Order: No

Completed by Vitvitsky, Jack PA-C on 12/04/2009 13:54

 Ex. 7

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	12/22/2009 15:57	Provider:	Winkler, Cathie RNP	Facility:	FOR

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Winkler, Cathie RNP

Rectal bleed, bright red over normal stool. Refused physical exam. Lab results from previous exams not available. Tx with rectal steriod, if available. Obtain results... Tx hypermotility
GI distress. Refer to GI specialist.

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Hemorrhoidal Suppository 0.25%	12/22/2009 15:57	1 suppository Rectally -three times a day x 14 day(s) -- insert past external rectal sphincter and retain. Report dark tarry stool prompty.
	Indication: Hemorrhage of gastrointestinal tract, unspecified		
	Ranitidine Tablet	12/22/2009 15:57	150mg Orally daily x 60 day(s) -- report joint pain
	Indication: Hemorrhage of gastrointestinal tract, unspecified		

Diet Orders:

Start Date		Expiration Date
12/22/2009	Other - High fiber, Special Instructions - report bloating or abdominal pain.	01/22/2010

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Winkler, Cathie RNP on 12/22/2009 16:21

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			**Reg #:**	97273-071
Date of Birth:	09/20/1963	**Sex:**	M	**Race:**	BLACK
Note Date:	01/12/2010 16:00	**Provider:**	Winkler, Cathie RNP	**Facility:**	FOR

Sick Call/Triage encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Winkler, Cathie RNP

Treated on 12/22/2009

Copay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

Completed by Winkler, Cathie RNP on 01/12/2010 16:02

Ex. 9

Bureau of Prisons
Health Services
Consultation Request

[redacted]

Consultation/Procedure Requested: General Surgery
Reason for Request:
46 y/o with history ob blood in stopl for one year. Symptoms have been worse for three months. No hemorrhoids on exam. Guaics are positive x 3. Needs colonoscopy to r/o cancer.
Provisional Diagnosis:
Rectal bleeding.
Medications (As of 06/22/2010)
Docusate Sodium 100 MG Cap Exp:08/21/2010 Sig:Take one capsule by mouth twice daily as needed
Ferrous Gluconate (5GR) 324 MG Tab Exp:09/11/2010 Sig:Take one tablet by mouth three times daily
Folic Acid 1 MG Tab Exp:09/11/2010 Sig:Take one tablet by mouth each day
Terazosin HCl 2 MG Cap Exp:10/10/2010 Sig:Take one capsule (2mg) by mouth at bedtime

Allergies (As of 06/22/2010)
No Known Allergies
Health Problems (As of 06/22/2010)
Other conjunctivitis, Osteoarthrosis, generalized, Elev blood pressure reading w/o hypertension, Pain in joint, multiple sites, Other specif diseases of hair and hair follicles, Entheseopathy of knee, unspecified, Other unsatisfactory restoration of existing tooth, Hemorrhage of gastrointestinal tract, unspecified, Benign localized hyperplasia of prostate NOS
Inmate Requires Translator: No **Language:**
Additional Records Required:

Comments:

Requested By: Maples, Kathleen APN-FNP
Due Date: 02/22/2010 00:00
Priority: Routine

F/u General Surgeon colonoscopy & EGD

N. PEIKAR, MD
FCC FOREST CITY, AR
5/3/11

 Ex. 9

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL		Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M	Race: BLACK
Encounter Date: 02/22/2010 09:25	Provider: Maples, Kathleen APN-	Facility: FOR

Follow-up encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Maples, Kathleen APN-FNP

Chief Complaint: Urinary Problem
Subjective: Difficulty stopping stream. And stomach growling, blood from rectum.
Pain Location:
Pain Scale:
Pain Qualities:
History of Trauma: No
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

ROS:

General

Constitutional Symptoms

Anorexia (no), Chills (no), Fatigue (no), Fever (no), Hypersomnolence (no), Insomnia (no), Night Sweats (no)

GI

General

Abdominal Pain or Colic (yes), Appetite Changes (no), Belching (no), Blood in Stools (yes), Constipation (yes), Diarrhea (yes), Flatulence (yes)

Thinks most symptoms are from the ranitidine, was not having anything but rectal bleeding and stomach growling prior to starting ranitidine in Dec.

OBJECTIVE:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
02/22/2010	09:26 FOX	98.4	36.9		Maples, Kathleen APN-FNP

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
02/22/2010	09:26 FOX	66			Maples, Kathleen APN-FNP

Respirations:

Date	Time	Rate Per Minute	Provider
02/22/2010	09:26 FOX	16	Maples, Kathleen APN-FNP

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
02/22/2010	09:26 FOX	139/77				Maples, Kathleen APN-FNP

Inmate Name: CLARK, TIBEL | Reg #: 97273-071
Date of Birth: 09/20/1963 | Sex: M | Race: BLACK
Encounter Date: 02/22/2010 09:25 | Provider: Maples, Kathleen APN- | Facility: FOR

Exam:

General

Appearance/Nutrition

Appears Well (yes), NAD (yes)

Genitourinary

Prostate

Tenderness on Palpation (no), Mass(es) (no), Nodules (no), Hardness (no), Symmetric Enlargement (yes)

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Benign localized hyperplasia of prostate NOS	600.20	Current	02/22/2010	Initial	Chronic
Hemorrhage of gastrointestinal tract, unspecified	578.9	Current	09/23/2009	Worsened	Chronic

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Docusate Sodium Capsule	02/22/2010 09:25	100mg Orally -Two Times a Day x 180 day(s)

Indication: Hemorrhage of gastrointestinal tract, unspecified

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Blood tests-o-p-Prostate Specific Antigen (PSA)	One Time		02/22/2010 00:00	Routine

New Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
General Surgery	02/22/2010	Routine	No	

Reason for Request:

46 y/o with history ob blood in stool for one year. Symptoms have been worse for three months. No hemorrhoids on exam. Guaics are positive x 3. Needs colonoscopy to r/o cancer.

Provisional Diagnosis:

Rectal bleeding.

Discontinued Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
Gastroenterology	12/04/2009	Routine	No	

Reason for Request:

Now six stool speciments testing

Disposition:

Follow-up at Sick Call as Needed

Other:

Advised to stop ranitidine, see if urinary problem and constipation/diarrhea subside, Will re-evaluate through sick call if needed.

Patient Education Topics:

Inmate Name: CLARK, TIBEL
Date of Birth: 09/20/1963
Encounter Date: 02/22/2010 09:25
Sex: M
Provider: Maples, Kathleen APN-
Reg #: 97273-071
Race: BLACK
Facility: FOR

Date Initiated	Format	Handout/Topic	Provider	Outcome
02/22/2010	Counseling	Plan of Care	Maples, Kathleen	Verbalizes Understanding

Copay Required: No
Cosign Required: No
Telephone/Verbal Order: No

Completed by Maples, Kathleen APN-FNP on 02/22/2010 09:50

 EX. 10

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	03/15/2010 12:50	Provider:	Maples, Kathleen APN-	Facility:	FOR

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Maples, Kathleen APN-FNP

Per urc recommendations, will start iron, folic acid, vit b and multi vitamin

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Ferrous Gluconate Tablet	03/15/2010 12:50	324 mg Orally -three times a day x 180 day(s)
	Indication: Hemorrhage of gastrointestinal tract, unspecified		
	Folic Acid Tablet	03/15/2010 12:50	1mg Orally daily x 180 day(s)
	Indication: Hemorrhage of gastrointestinal tract, unspecified		

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Maples, Kathleen APN-FNP on 03/15/2010 12:55

EX. 11

Bureau of Prisons
Health Services
Consultation Request

Inmate Name: CLARK, TIBEL **Reg #:** 97273-071 **Complex:** FOX
Date of Birth: 09/20/1963 00:00 **Sex:** M

Consultation/Procedure Requested: Optometry
Reason for Request:
decreased visual acuity
Provisional Diagnosis:
decreased visual acuity od 20/40 os 20/40 ou 20/40
Medications (As of 04/01/2010)
Docusate Sodium 100 MG Cap Exp:08/21/2010 Sig:Take one capsule by mouth twice daily as needed
Ferrous Gluconate (5GR) 324 MG Tab Exp:09/11/2010 Sig:Take one tablet by mouth three times daily
Folic Acid 1 MG Tab Exp:09/11/2010 Sig:Take one tablet by mouth each day

Allergies (As of 04/01/2010)
No Known Allergies
Health Problems (As of 04/01/2010)
Benign localized hyperplasia of prostate NOS, Hemorrhage of gastrointestinal tract, unspecified, Other unsatisfactory restoration of existing tooth, Osteoarthrosis, generalized, Elev blood pressure reading w/o hypertension, Pain in joint, multiple sites, Other specif diseases of hair and hair follicles, Enthesopathy of knee, unspecified, Other conjunctivitis, Observation for other spec suspected conditions
Inmate Requires Translator: No **Language:** English
Additional Records Required:

Comments:

Requested By: Johnson, Rachel NP
Due Date: 07/15/2009 00:00
Priority: Routine

Myopia Prescription
OU Full time over
4-2-10

Dale Morris, Optometrist
FCI Forrest City, Arkansas

PEIKAR, MD
FOREST CITY, AR
5/11/11

EX. 12

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: CLARK, TIBEL		Reg #: 97273-071
Date of Birth: 09/20/1963	Sex: M	Race: BLACK
Encounter Date: 04/13/2010 10:45	Provider: Wingo, Michelle PA-C	Facility: FOR

Sick Call/Triage encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Wingo, Michelle PA-C

Chief Complaint: Bleeding from Rectum

Subjective: blood in stool x 1 year. suppositories without relief. notes occasional constipation. none current. notes "brown looking" blood in stool. no h/o hemorrhoids per inmate. no pain with BM. no real c/o nausea/vomiting. reports lack of entergy.

Pain Location:

Pain Scale: 0

Pain Qualities:

History of Trauma:

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

ROS:

GI

General

Blood in Stools (yes)

GU

General

Hesitancy (yes), Nocturia (no), Urinary Frequency (yes), Urinary Retention (yes)

OBJECTIVE:

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
04/13/2010	10:49 FOX	45			Wingo, Michelle PA-C

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
04/13/2010	10:49 FOX	129/80				Wingo, Michelle PA-C

Exam:

General

Appearance/Nutrition

Appears Well (yes), NAD (yes), Alert and Oriented x 3 (yes)

Affect

Pleasant (yes), Cooperative (yes)

GastroIntestinal

Anus and Rectum

Deferred (yes)

recent exam in 2/10

Genitourinary

EX. 12

Inmate Name: CLARK, TIBEL
Date of Birth: 09/20/1963
Encounter Date: 04/13/2010 10:45
Sex: M
Provider: Wingo, Michelle PA-C
Reg #: 97273-071
Race: BLACK
Facility: FOR

Exam:

deferred. recent exam in 2/10

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Benign localized hyperplasia of prostate NOS	600.20	Current	02/22/2010	Not Improved/Same	Chronic
Hemorrhage of gastrointestinal tract, unspecified	578.9	Current	09/23/2009	Not Improved/Same	Chronic

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Acetaminophen Oral Tablet	04/13/2010 10:45	325mg Orally every 4 hours PRN x 7 day(s) -- take with food. do not take on empty stomach.
	Indication: Osteoarthrosis, generalized		
	Terazosin Capsule	04/13/2010 10:45	2 mg Orally at bedtime x 180 day(s)
	Indication: Benign localized hyperplasia of prostate NOS		

Disposition:

Return Immediately if Condition Worsens

Other:

currently approved to see GS for blood in stool.

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
04/13/2010	Counseling	Plan of Care	Wingo, Michelle	Verbalizes Understanding

Copay Required: No
Cosign Required: No
Telephone/Verbal Order: No

Completed by Wingo, Michelle PA-C on 04/13/2010 11:08

Ex. 13

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	08/20/2010 14:04	Provider:	McDaniel, Jamie RN	Facility:	FOR

Post-Consultation Visit encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** McDaniel, Jamie RN

Inmate returned from hospital today. Diagnosed with esophageal and rectal mass. NAD noted. FCMC Dr. recommends:
1. protonix 40mg PO daily for 8 wks
paperwork placed in MD tray for review.

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: No

Completed by McDaniel, Jamie RN on 08/20/2010 14:08

Requested to be cosigned by Peikar, Nader MD.

Cosign documentation will be displayed on the following page.

Bureau of Prisons
Health Services
Cosign/Review

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	08/20/2010 14:04	Provider:	McDaniel, Jamie RN	Facility:	FOR

Cosigned by Peikar, Nader MD on 08/20/2010 14:51.

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	08/20/2010 14:58	Provider:	Peikar, Nader MD	Facility:	FOR

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Peikar, Nader MD

meds refill and also pending esophageal and rectal mass biopsy result

Renew Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
67370-FOX	Docusate Sodium 100 MG Cap	08/20/2010 14:58	Take one capsule by mouth twice daily as needed x 180 day(s)
	Indication: Hemorrhage of gastrointestinal tract, unspecified		
73062-FOX	Terazosin HCl 2 MG Cap	08/20/2010 14:58	Take one capsule (2mg) by mouth at bedtime x 180 day(s)
	Indication: Benign localized hyperplasia of prostate NOS		
61216-FOX	Ranitidine 150 MG TAB	08/20/2010 14:58	Take one tablet by mouth each day x 180 day(s)
	Indication: Hemorrhage of gastrointestinal tract, unspecified		

Discontinued Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Profile tests-General-Lipid Profile (collected) *Profile tests-General-Urinalysis (collected)* *Profile tests-General-Comprehensive Metabolic Profile (CMP) (collected)* *Blood tests-d-e-f-Erythrocyte Sedimentation Rate (ESR) (collected)* *Blood tests-t-Thyroid Stimulating Hormone (TSH) (collected)* *Stool tests-General-Fecal Occult Blood Test (collected)* *Blood tests-o-p-Prostate Specific Antigen (Free) (collected)* *Profile tests-General-CBC (Complete Blood Count) (collected)*	*One Time*		*07/15/2009 00:00*	*Routine*

Additional Information:

guiac time three

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Profile tests-General-Lipid Profile Profile tests-General-Urinalysis Profile tests-General-Comprehensive Metabolic Profile (CMP)	One Time		08/20/2010 00:00	Routine

 Ex. 13

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	08/20/2010 14:58	Provider:	Peikar, Nader MD	Facility:	FOR

Profile tests-General-Hepatic Profile
Profile tests-General-CBC and WBC Differential

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Peikar, Nader MD on 08/20/2010 15:07

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	08/23/2010 15:35	Provider:	Peikar, Nader MD	Facility:	FOR

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Peikar, Nader MD

per forrest city hospital speaking with general surgeon per pathology report inmate with rectal carcinoma and multiple lymph nodes invasion, also positive for h-pylori, form 770 for urgent transfer on board

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Peikar, Nader MD on 08/23/2010 15:39

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	08/26/2010 12:14	Provider:	Winkler, Cathie RNP	Facility:	FOR

Medication Renewal/Review encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Winkler, Cathie RNP

V.O. from Dr. Peikar to initiate Tx for H. pylori. Also Consult General Surgery r/t recent dx rectal carcinoma.

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Omeprazole Capsule	08/26/2010 12:14	20 mg Orally -Two Times a Day x 10 day(s) -- for H. pylori treatment. Take with other H. pylori medicatins also.
	Indication: Hemorrhage of gastrointestinal tract, unspecified		
	Amoxicillin Capsule	08/26/2010 12:14	1000 mg Orally -Two Times a Day x 10 day(s) -- for H. pylorii. Take with other H. pylori meds.
	Indication: Hemorrhage of gastrointestinal tract, unspecified		
	Clarithromycin Tablet	08/26/2010 12:14	500 mg Orally -Two Times a Day x 10 day(s) -- for H. pylori. Take with other H. pylori medication.
	Indication: Hemorrhage of gastrointestinal tract, unspecified		

New Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
Oncology	08/26/2010	Routine	No	

Reason for Request:

48 YO male recent diagnosis of rectal carcinoma for evaluation and recommendation.

Other:

Med x 3 : H. pylori
Consult Oncology

Disposition:

Will Be Placed on Callout

Inmate Name:	CLARK, TIBEL			**Reg #:**	97273-071
Date of Birth:	09/20/1963	**Sex:**	M	**Race:**	BLACK
Note Date:	08/26/2010 12:14	**Provider:**	Winkler, Cathie RNP	**Facility:**	FOR

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: No

Completed by Winkler, Cathie RNP on 08/26/2010 12:28
Requested to be cosigned by Peikar, Nader MD.
Cosign documentation will be displayed on the following page.

Ex. 15

Bureau of Prisons
Health Services
Cosign/Review

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	08/26/2010 12:14	Provider:	Winkler, Cathie RNP	Facility:	FOR

Cosigned by Pelkar, Nader MD on 08/26/2010 15:10.

 Ex. 15

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	08/26/2010 15:09	Provider:	Peikar, Nader MD	Facility:	FOR

Admin Note encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Peikar, Nader MD

treat H-pylori at least 14 days with multiple x4 medications, this inmate already is diagnosed with rectal ca with pathology report available on BMER, cancel general surgery and request oncology f/up

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Peikar, Nader MD on 08/26/2010 15:15

Requested to be reviewed by Winkler, Cathie RNP.

Review documentation will be displayed on the following page.

 Ex. 15

Bureau of Prisons
Health Services
Cosign/Review

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	08/26/2010 15:09	Provider:	Peikar, Nader MD	Facility:	FOR

Reviewed by Winkler, Cathie RNP on 08/27/2010 13:13.

Reviewer Comments:

Noted. Will add Metronidazole if not contraindicated. Oncology ordered. Will cancel general surgery request.

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	08/27/2010 13:25	Provider:	Winkler, Cathie RNP	Facility:	FOR

Medication Renewal/Review encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Winkler, Cathie RNP

Add metronidazole, if no contraindication. Cancel general surgery consult.

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Clarithromycin Tablet	08/27/2010 13:25	500 mg Orally -Two Times a Day x 14 day(s) -- Take with other H. pylori meds.
	Indication: Hemorrhage of gastrointestinal tract, unspecified		
	Amoxicillin Capsule	08/27/2010 13:25	1000 mg Orally -Two Times a Day x 14 day(s) -- Take two 500 mg tablets twice a day. Take with other H. pylori meds.
	Indication: Hemorrhage of gastrointestinal tract, unspecified		
	METRONIDazole Tablet	08/27/2010 13:25	250 mg Orally -four times a day x 14 day(s) -- Take with other H. Pylori meds.
	Indication: Hemorrhage of gastrointestinal tract, unspecified		

Discontinued Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
87420-FOX	*Amoxicillin 500 MG Cap*	*08/27/2010 13:25*	*Take two capsules by mouth twice daily for 10 days*
	Discontinue Type: *When Pharmacy Processes*		
	Discontinue Reason: *Order changed*		
87421-FOX	*Clarithromycin 500 MG Tab*	*08/27/2010 13:25*	*Take one tablet by mouth twice daily for 10 days*
	Discontinue Type: *When Pharmacy Processes*		
	Discontinue Reason: *Order changed*		

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Note Date:	08/27/2010 13:25	Provider:	Winkler, Cathie RNP	Facility:	FOR

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: No

Completed by Winkler, Cathie RNP on 08/27/2010 16:02
Requested to be cosigned by Peikar, Nader MD.
Cosign documentation will be displayed on the following page.

 EX. 16

Bureau of Prisons
Health Services
Cosign/Review

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	08/27/2010 13:25	Provider:	Winkler, Cathie RNP	Facility:	FOR

Cosigned by Peikar, Nader MD on 08/30/2010 11:36.

FEDERAL MEDICAL CENTER CLINICAL LABORATORY

OLD HIGHWAY 75
BUTNER, NC 27509
(919) 575-3900

Laboratory Supervisor:
Bob Latina

Printed: 09/18/2009 @ 00:03

ON DEMAND REPORT
*** SENSITIVE - LIMITED OFFICIAL USE ***

Name: CLARK, TIBEL Lab #: 100338 ID: 97273-071

Test	Result	Flag	Reference Range/Units
CHEMISTRY			
Lipid Panel			
Triglycerides	101		0 - 149 mg/dL
HDL Ultra	38	LO	40 - 100 mg/dl
LDL Cholesterol	125		0 - 130 mg/dL
PSA	0.83		0.00 - 4.00 ng/mL
TSH	1.55		0.35 - 4.94 uIU/mL
HEMATOLOGY			
CBC w/DIFF			
WBC	6.0		4.0 - 11.0 10^3/uL
RBC	4.16	LO	4.50 - 6.00 10^6/uL
Hemoglobin	12.5	LO	13.5 - 18.0 g/dL
Hematocrit	38.1	LO	40.0 - 52.0 %
MCV	91.5		80.0 - 100.0 fL
MCH	30.0		25.4 - 34.6 pg
MCHC	32.8		31.0 - 37.0 g/dL
RDW	13.3		11.0 - 15.0 %
Platelet Count	160		150 - 400 10^3/uL
MPV	10.5		7.0 - 11.0 fL
Neutrophils %	58.9		40.0 - 75.0 %
Lymphocytes %	25.6		15.0 - 45.0 %
Monocytes %	10.8		6.0 - 15.0 %
Eosinophils %	4.1		0.0 - 7.0 %
Basophils %	0.6		0.0 - 2.0 %
Neutrophils #	3.5		1.5 - 7.1 10^3/uL
Lymphocytes #	1.5		0.9 - 3.3 10^3/uL
Monocytes #	0.6		0.3 - 1.1 10^3/uL
Eosinophils #	0.2		0.0 - 0.7 10^3/uL
Basophils #	0.0		0.0 - 0.2 10^3/uL

Dr. A. Molina
Staff Physician
FCC Forrest City
Date 10-15-09

Ex. 17

Legend
High = HI Low = LO Critical = CR Abnormal = AB

ID: 97273-071
Name: CLARK, TIBEL
Ordered By: JOHNSON
Collected: 09/09/09@ 08:08

DOB: 09/20/1963 Age: 45yr Sex: M
Lab Accn: 100338

Reviewed_____

Location: FCC Forrest City LSC

FEDERAL MEDICAL CENTER CLINICAL LABORATORY

Laboratory Supervisor:
Bob Latina

OLD HIGHWAY 75
BUTNER, NC 27509
(919) 575-3900

Printed: 09/18/2009 @ 00:03

ON DEMAND REPORT
***** SENSITIVE - LIMITED OFFICIAL USE *****

Name: CLARK, TIBEL | Lab #: 100338 | ID: 97273-071

CHEMISTRY

Test	Result	Flag	Reference Range/Units
Comp Met Pnl -CO			
Glucose	81		70 - 109 mg/dL
Sodium	143		136 - 145 mmol/L
Potassium	4.4		3.5 - 5.1 mmol/L
Chloride	106		98 - 107 mmol/L
BUN	11		7 - 26 mg/dL
Creatinine	1.2		0.6 - 1.3 mg/dl
Calcium	9.5		8.4 - 10.2 mg/dl
Cholesterol	183		0 - 200 mg/dl
Total Protein	6.5		6.4 - 8.3 g/dL
Albumin	3.7		3.5 - 5.0 g/dL
AST	26		5 - 34 u/l
ALT	17		8 - 35 U/L
ALKP	72		40 - 140 U/L
TOTAL BILIRUBIN	0.9		0.2 - 1.0 mg/dL

Dr. A. Molina
Staff Physician
FCC Forrest City
Date 10-15-09

Legend
High = HI Low = LO Critical = CR Abnormal = AB

ID: 97273-071
Name: CLARK, TIBEL
Ordered By: JOHNSON
Collected: 09/10/090 08:08

DOB: 09/20/1963 Age: 45yr Sex: M
Lab Accn: 100338
Location: FCC Forrest City LSC

Reviewed

FEDERAL MEDICAL CENTER CLINICAL LABORATORY

OLD HIGHWAY 75
BUTNER, NC 27509
(919) 575-3900

Laboratory Supervisor:
Bob Latina

Printed: 12/11/2009 @ 15:05

FINAL REPORT
*** SENSITIVE - LIMITED OFFICIAL USE ***

Name: CLARK, TIBEL Lab #: 110277 ID: 97273-071

Test	Result	Flag	Reference Range/Units
CHEMISTRY			
Comp Met Pnl -CO			
Glucose	102		70 - 109 mg/dL
Sodium	141		136 - 145 mmol/L
Potassium	4.1		3.5 - 5.1 mmol/L
Chloride	104		98 - 107 mmol/L
BUN	11		7 - 26 mg/dL
Creatinine	1.0		0.6 - 1.3 mg/dl
Calcium	9.3		8.4 - 10.2 mg/dl
Cholesterol	194		0 - 200 mg/dl
Total Protein	6.6		6.4 - 8.3 g/dL
Albumin	3.4	LO	3.5 - 5.0 g/dL
AST	27		5 - 34 u/l
ALT	16		8 - 35 U/L
ALKP	88		40 - 140 U/L
TOTAL BILIRUBIN	0.3		0.2 - 1.0 mg/dL
HEMATOLOGY			
CBC w/DIFF			
WBC	5.6		4.0 - 11.0 10^3/uL
RBC	4.01	LO	4.50 - 6.00 10^6/uL
Hemoglobin	12.1	LO	13.5 - 18.0 g/dL
Hematocrit	35.3	LO	40.0 - 52.0 %
MCV	88.1		80.0 - 100.0 fL
MCH	30.0		25.4 - 34.6 pg
MCHC	34.1		31.0 - 37.0 g/dL
RDW	14.3		11.0 - 15.0 %
Platelet Count	142	LO	150 - 400 10^3/uL
MPV	9.8		7.0 - 11.0 fL
Neutrophils %	45.6		40.0 - 75.0 %
Lymphocytes %	31.4		15.0 - 45.0 %
Monocytes %	12.2		6.0 - 15.0 %
Eosinophils %	10.4	HI	0.0 - 7.0 %
Basophils %	0.4		0.0 - 2.0 %
Neutrophils #	2.5		1.5 - 7.1 10^3/uL
Lymphocytes #	1.7		0.9 - 3.3 10^3/uL
Monocytes #	0.7		0.3 - 1.1 10^3/uL
Eosinophils #	0.6		0.0 - 0.7 10^3/uL
Basophils #	0.0		0.0 - 0.2 10^3/uL

Legend
High = HI Low = LO Critical = CR Abnormal = AB

N. PEIKAR, MD
FCC FORREST CITY, AR

ID: 97273-071
Name: CLARK, TIBEL
Ordered By: JONES
Collected: 12/10/090 12:35

DOB: 09/20/1963 Age: 46yr Sex: M
Lab Accn: 110277

Reviewed_____

Location: FCC Forrest City LSC

FEDERAL MEDICAL CENTER CLINICAL LABORATORY

OLD HIGHWAY 75
BUTNER, NC 27509
(919) 575-3900

Laboratory Supervisor:
Bob Latina

Printed: 06/15/2010 @ 15:05

FINAL REPORT
*** SENSITIVE - LIMITED OFFICIAL USE ***

Name: CLARK, TIBEL Lab #: 150554 ID: 97273-071

Test	Result	Flag	Reference Range/Units
CHEMISTRY			
PSA	1.33		0.00 - 4.00 ng/mL

reviewed as above, pt to be given today
M. Wingo, PA-C

MICHELLE WINGO,
FCC FORREST CITY

T J Bullins
7/14/10

ORIGINAL

Legend
High = HI Low = LO Critical = CR Abnormal = AB

ID: 97273-071
Name: CLARK, TIBEL
Ordered By: JONES
Collected: 06/14/10@ 08:46

DOB: 09/20/1963 Age: 46yr Sex: M
Lab Accn: 150554
Reviewed_____
Location: FCC Forrest City LSC

 Ex. 18

FEDERAL MEDICAL CENTER CLINICAL LABORATORY

Laboratory Supervisor:
Bob Latina

OLD HIGHWAY 75
BUTNER, NC 27509
(919) 575-3900

Printed: 09/28/2010 @ 09:00

FINAL REPORT
*** SENSITIVE - LIMITED OFFICIAL USE ***

Name: CLARK, TIBEL Lab #: 210049 ID: 97273-071

Test	Result	Flag	Reference Range/Units
CHEMISTRY			
CMP w/ CO2			
Lipid Panel			
Glucose	85		70 - 109 mg/dL
Sodium	144		136 - 145 mmol/L
Potassium	4.1		3.5 - 5.1 mmol/L
CHLORIDE	105		98 - 107 mmol/L
BUN	9		7 - 26 mg/dL
Creatinine	1.0		0.6 - 1.3 mg/dl
CALCIUM	9.6		8.4 - 10.2 mg/dl
Carbon Dioxide	30		21 - 32 mmol/L
CHOLESTEROL	191		0 - 200 mg/dl
Triglycerides	108		0 - 149 mg/dL
HDL ULTRA	46		40 - 100 mg/dl
LDL CHOLESTEROL	123		0 - 130 mg/dL
Total Protein	6.7		6.4 - 8.3 g/dL
ALBUMIN	3.5		3.5 - 5.0 g/dL
AST	29		5 - 34 u/l
ALT	21		8 - 35 U/L
ALKP	67		40 - 140 U/L
TOTAL BILIRUBIN	0.9		0.2 - 1.0 mg/dL
TIBC	411		237 - 450 ug/dl
CEA	36.34	HI	0.50 - 5.00 ng/ml
Ferritin	18.9	LO	20.0 - 250.0 ng/ml
Folate	15.2		7.2 - 15.4 ng/mL
HEMATOLOGY			
CBC w/DIFF			
WBC	4.6		4.0 - 11.0 10^3/uL
RBC	**4.38**	LO	4.50 - 6.00 10^6/uL
Hemoglobin	**12.4**	LO	13.5 - 18.0 g/dL
Hematocrit	**37.3**	LO	40.0 - 52.0 %
MCV	85.2		80.0 - 100.0 fL
MCH	28.3		25.4 - 34.6 pg
MCHC	33.2		31.0 - 37.0 g/dL
RDW	**15.1**	HI	11.0 - 15.0 %
Platelet Count	206		150 - 400 10^3/uL
MPV	8.6		7.0 - 11.0 fL
Neutrophils %	32.5	LO	40.0 - 75.0 %

Legend
High = HI Low = LO Critical = CR Abnormal = AB

James Wilson MD 9-29-10

ID: 97273-071
Name: CLARK, TIBEL
Ordered By: RIVERO
Collected: 09/21/10@ 06:35

DOB: 09/20/1963 Age: 47yr Sex: M
Lab Accn: 210049

Location: FMC 4B

Reviewed
Room: Bed:

FEDERAL MEDICAL CENTER CLINICAL LABORATORY

Laboratory Supervisor:
Bob Latina

OLD HIGHWAY 75
BUTNER, NC 27509
(919) 575-3900

Printed: 09/28/2010 @ 09:00

FINAL REPORT
*** SENSITIVE - LIMITED OFFICIAL USE ***

Name: CLARK, TIBEL Lab #: 210049 ID: 97273-071

Test	Result	Flag	Reference Range/Units
HEMATOLOGY			
Lymphocytes %	52.2	HI	15.0 - 45.0 %
Monocytes %	9.8		6.0 - 15.0 %
Eosinophils %	4.8		0.0 - 7.0 %
Basophils %	0.7		0.0 - 2.0 %
Neutrophils #	1.5		1.5 - 7.1 10^3/uL
Lymphocytes #	2.4		0.9 - 3.3 10^3/uL
Monocytes #	0.4		0.3 - 1.1 10^3/uL
Eosinophils #	0.2		0.0 - 0.7 10^3/uL
Basophils #	0.0		0.0 - 0.2 10^3/ul
URINALYSIS			
UA w/o Micro			
Color	Yellow		Yellow
URINE APPEARENCE	Clear		Clear
URINE GLUCOSE	Negative		Negative
Urine Bilirubin	Negative		Negative
Urine Ketones	Negative		Negative
Urine Sp. gravit	< or = 1.005		1.003 - 1.029
URINE BLOOD	Negative		Negative
Urine pH	7.0		4.5 - 7.8
UROBILINOGEN	0.2 E.U./dL		0.1 - 1.0 mg dl
URINE NITRITE	Negative		Negative
Urine Leukocytes	Negative		Negative
Urine Protein	Negative		Negative

James Wilkerson MD
9-29-10

Legend
High = HI Low = LO Critical = CR Abnormal = AB

ID: 97273-071
Name: CLARK, TIBEL
Ordered By: RIVERO
Collected: 09/21/10@ 06:35

DOB: 09/20/1963 Age: 47yr Sex: M
Lab Accn: 210049

Location: FMC 4B

Reviewed
Room: Bed:

FEDERAL MEDICAL CENTER CLINICAL LABORATORY

Laboratory Supervisor:
Bob Latina

OLD HIGHWAY 75
BUTNER, NC 27509
(919) 575-3900

Printed: 09/28/2010 @ 09:00

FINAL REPORT
*** SENSITIVE - LIMITED OFFICIAL USE ***

Name: CLARK, TIBEL Lab #: 210049 ID: 97273-071

Test		Result	Flag	Reference Range/Units
COAGULATION				
Prothrombin	aa	13.0		12.4 - 14.7 Seconds
INR	bb	0.99		0.89 - 1.11

James WINSTON MD
9-29-10

aa Reference Range changed from 10.8 - 13.3 sec to 12.4 - 14.7 sec effective 03-30-2009.

bb Reference interval is for non-anticoagulated patients. Suggested INR therapeutic ranges for anticoagulant therapy:
Standard Dose (moderate intensity therapeutic range)
2.0-3.0
Higher intensity therapeutic range
2.5-3.5
Reference Range changed from 0.79 - 1.13 to 0.89 - 1.11 effective 03-30-2009.

Legend
High = HI Low = LO Critical = CR Abnormal = AB

ID: 97273-071
Name: CLARK, TIBEL
Ordered By: RIVERO
Collected: 09/21/10@ 06:35

DOB: 09/20/1963 Age: 47yr Sex: M
Lab Accn: 210049
Location: FMC 4B

Reviewed
Room: Bed:

FEDERAL MEDICAL CENTER CLINICAL LABORATORY

Laboratory Supervisor:
Bob Latina

OLD HIGHWAY 75
BUTNER, NC 27509
(919) 575-3900

Printed: 09/28/2010 @ 09:00

FINAL REPORT
*** SENSITIVE - LIMITED OFFICIAL USE ***

Name: CLARK, TIBEL Lab #: 210049 ID: 97273-071

Test		Result	Flag	Reference Range/Units
COAGULATION				
PTT Activate	aa	29.2		20.9 - 34.2 Seconds
SEROLOGY				
Hep B Surf AG		Nonreactive		Negative
Hepatitis C	bb	Nonreactive		Negative

James Winston MD
9-29-10

aa Reference Range changed from
20.2 - 32.0 sec to 20.9 - 34.2 sec
effective 03-30-2009.
This test is not to be used for
monitoring heparin therapy.
bb Reactive Results Need To Be Confirmed

Legend
High = HI Low = LO Critical = CR Abnormal = AB

ID: 97273-071
Name: CLARK, TIBEL
Ordered By: RIVERO
Collected: 09/21/10@ 06:35

DOB: 09/20/1963 Age: 47yr Sex: M
Lab Accn: 210049
Location: FMC 4B

Reviewed
Room: Bed:

Bureau of Prisons
Health Services
History & Physical

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Seizures: Denied

Diabetes: Denied

Cardiovascular: Denied

CVA: Denied

Hypertension: Denied

Respiratory: Denied

Sickle Cell Anemia: Denied

Carcinoma/Lymphoma: Denied

Allergies: Denied

Tuberculosis:

When Last PPD: < 1 year
Last PPD Result:
Hx of Previous Disease: No
Blood-tinged Sputum: No
Night Sweats: No
Weight Loss: No
Fever: No
Cough: No
Comments:

Infectious Disease Risk Factors:

IV Drug Use: No
IV Drug Use Needles:
Sexual Partner IV Drug Use: No
Sexual Partner IV Drug Use Needles:
Female Sexual Partners (Last 5 Yrs): None
Male Sexual Partners (Last 5 Yrs): None
Condom Use: Never
Sexual Contact With HIV+ Individual: No
Blood Product Transfusion: No
Travel Outside US: Yes
Tattoos: No
Comments:

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

HIV History:

When Tested: 2002
Test Result: Negative
When Diagnosed AIDS:
Last CD4:
Comments:

Hepatitis: Denied

Other Infectious Diseases: Denied

Abuse History: Denied

Physical: No

Emotional: No

Sexual: No

Comments: non reported

Mental Health:

Level of Consciousness: Alert and Oriented
Psychomotor Activity: Normal
General Appearance: Normal
Behavior: Cooperative
Mood: Appropriate to Content
Thought Process: Goal Directed
Thought Content: Normal
Hx of Mental Health Treatment: None
Hx of Head Injury: None
Current Mental Health Treatment: No
Current Mental Health Complaint: No
Hx of Loss of Consciousness: No
Past History of Suicide Attempt: No
Current Suicide Ideation: No
Suicide Prevention Initiated: No
Comments:

Substance Use History: Denied

Current Painful Condition:

Location: osteoarthritis

Other Health Issues:

Current Medical Conditions: osteoarthritis

Other Current Treatments:

Pregnant: N/A

Dental Assessment: Denied

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Observations:

Draining Skin Lesions: No
Signs of Lice: No
Signs of Scabies: No
Signs of Recent Trauma: No
Recent Tattoos: No
Needle Marks: No
Signs of Rash: No
Open Sores: No
Wounds: No
Body Deformities: No
Tremors: No
Sweating: No
Comments:

Temperature:

Date	Time	Fahrenheit	Celsius	Location	Provider
07/15/2009	12:34 FOX	97.0	36.1		Johnson, Rachel NP

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
07/15/2009	12:34 FOX	57			Johnson, Rachel NP

Respirations:

Date	Time	Rate Per Minute	Provider
07/15/2009	12:34 FOX	20	Johnson, Rachel NP

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
07/15/2009	12:34 FOX	150/92	Left Arm			Johnson, Rachel NP

Weight:

Date	Time	Lbs	Kg	Waist Circum.	Provider
07/15/2009	12:34 FOX	150.0	68.0		Johnson, Rachel NP

Prosthetic Devices/Equipment:

Device/Equipment	Obtained From
Brace - knee	BOP
Comments:	
Brace - knee	BOP
Comments:	

Tobacco Usage: Denied

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Immunization History:

Tetanus:

Td Series: Completed

Last Booster:

MMR:

Series: Completed

Last Booster:

Other Immunizations:

Hepatitis A Series: Unknown

Hepatitis B Series: Unknown

Varicella Series: Unknown

Small Pox: Unknown

Last Pneumovax:

Last Influenza:

General Social History:

Foreign Travel: Jamaca

Occupation: plumbing

Family History - Father:

Age at Death:

Cause of Death:

Significant Illnesses:

Hypertension

Comments:

Family History - Mother:

Age at Death:

Cause of Death:

Significant Illnesses:

Diabetes

Comments:

Family History - Sibling:

Number of Siblings: 6

Significant Illnesses:

Comments:

ROS:

Breasts

General

Lumps (no), Pain (no), Swelling (no), Discharge (no), Skin Changes (no)

General

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

ROS:

Constitutional Symptoms

Anorexia (no), Chills (no), Fatigue (no), Fever (no), Hypersomnolence (no), Insomnia (no), Night Sweats (no), Unexplained Weight Loss (no), Weakness (no), Weight Gain (no)

Integumentary

Hair

Abnormal Growth (no), Excessive Hair Loss (no)

Nails

Brittleness (no), Color Changes (no), Curvature (no), Pitting (no)

Skin

Eczema (no), Sores that won't heal (no), Tumors (no), Acne (no), Bleeding (no), Bruising (no), Changing Moles (no), Eruptions (no), Hives (no), Keloid (no), Pruritus (no), Rashes (no)

HEENT

Ears

Decreased Hearing (no), Discharge (no), Hx Ear Aches (no), Hx Mastoiditis (no), Operations (no), Tinnitus (no), Vertigo (no), Hx Recurrent Infections (no), Hearing Aids (no)

Eyes

Blurred Vision (no), Changes in Vision (no), Hx Contact Lenses (no), Hx Eye Glasses (no), Hx Glaucoma (no), Itching (no), Pain (no), Photophobia (no), Redness (no), Cataracts (no), Color Blindness (no), Diplopia (no), Discharge/Matting (no), Hx Dry Eyes (no), Inflammation (no), Prosthesis (no), Trauma (no), Visual Loss (no)

Head

Headaches (no), Migraine (no), Trauma (no)

Mouth

Bad Breath (no), Changes in Taste (no), Gum pain (no), Tooth pain (no), Bleeding Gums (no), Hx Dry Mouth (no), Hx of Ulcers (no), Hx Dentures (no)

Neck

Pain (no), Stiffness (no), Enlargement of Lymph Nodes (no), Goiter (no), Swelling (no)

Nose

Allergies (no), Discharge (no), Fracture (no), Nasal Congestion (no), Epistaxis (no), Hx of Sinus Infection (no), Obstruction (no), Rhinitis (no), Hx Polyps (no), Hx of Frequent Colds (no)

Throat

Dysphagia (no), Hoarseness (no), Tonsillitis (no), Voice Changes (no)

Sinuses

Dental Pain (no), Pain Over Sinus - Frontal (no), Pain Over Sinus - Maxillary (no), Sinus Congestion (no)

Cardiovascular

Arteries and Veins

Claudication (no), Phlebitis (no), Raynaud's Phenomenon (no), Varicose Veins (no), Hx DVT (no)

General

Angina (no), Cold Extremities (no), Cough (no), Cyanosis (no), Edema (no), Exertional dyspnea (no), Intermittent Claudication (no), Orthopnea (no), Paroxysmal Nocturnal Dyspnea (no), Palpitation (no), Syncope (no), Hx Hypertension (no), Hx of Heart Disease (no), Hx of Heart Surgery (no), Hx Phlebitis (no), Hx Murmur (no), Hx of Rheumatic Fever (no)

Pulmonary

Respiratory System

Cough - Dry (no), Cough - Productive (no), DOE (no), Dyspnea (no), Hemoptysis (no), Hoarseness (no), Hx Asthma (no), Hx Bronchitis (no), Hx of COPD (no), Hx Pneumonia (no), Hx Tuberculosis (no), Night Sweats (no), Orthopnea (no), Pleurisy (no), Shortness of breath (no), Sputum - Blood Tinged (no), Sputum - Change (no), Tobacco Use (no), Wheezing (no)

GI

General

Abdominal Pain or Colic (no), Appetite Changes (no), Belching (no), Bloating (no), Blood in Stools (no), Constipation (no), Diarrhea (no), Dyspepsia (no), Dysphagia (no), Flatulence (no), Hematemesis (no),

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

ROS:

Hemorrhoids (no), Hx of Hepatitis (no), Hx of PUD (no), Incontinence of Stool (no), Jaundice (no), Nausea (no), Odynophagia (no), Rectal Bleeding (no), Rectal Itching (no), Rectal Pain (no), Stools Black (no), Vomiting (no), Weight Gain (no), Weight Loss (no)

GU

General

Dysuria (no), Hematuria (no), Hesitancy (no), Hx Kidney Stones (no), Incontinence (no), Infections (no), Nocturia (no), Oliguria (no), Pain or Colic (no), Testicular Pain (no), Urgency (no), Urinary Frequency (no), Urinary Retention (no)

Musculoskeletal

General

Ankle Pain (no), Elbow Pain (no), Hip Pain (no), Joint pain (no), Knee Pain (no), Low Back Pain (no), Mid-back Pain (no), Muscle Aches (no), Neck Pain (no), Shoulder Pain (no), Spasm (no), Wrist Pain (no), Arthritis (no), Dislocations (no), Fractures (no), Gait Abnormality (no), Hx of Amputation (no), Muscular Weakness (no), Spinal Injury (no), Sprains (no), Stiffness (no), Swelling (no), Wasting or Atrophy (no)

Neurological

Autonomic System

Syncope (no), Control of Urination (no), Facial Numbness (no), Hx Seizures (no), Reaction to Heat/Cold (no), Sweating (no)

Endocrine

General

Coarseness of Skin/Hair (no), Excessive Sweating (no), Exophthalmos (no), Goiter (no), Hair Changes (no), Hx of Diabetes (no), Hx of Polycystic Ovarian Dx (no), Hx of Thyroid Dx (no), Infertility (no), Intolerance to Heat/Cold (no), Nail Changes (no), Palpitations (no), Polydipsia (no), Polyphagia (no), Polyuria (no), Silky & Fine Hair (no), Skin Changes (no), Tremor (no)

Psychiatric

General

Anxiety-Moderate (yes), Appetite-Normal (yes), Energy-Normal (yes), Hallucinations-Auditory (no), Hallucinations-Olfactory (no), Hallucinations-Tactile (no), Hallucinations-Visual (no), Homicide/Other Harm Thoughts (no), Memory-Decreased (no), Memory-Normal (yes), Mood-Normal (yes), Sleep-Normal (yes), Suicide/Self-Harm Thoughts (no), Nightmares (no), Psychiatric Hospitalizations (no), Weight Loss (no)

Lymphatics

General

Axillary Nodes (no), Cervical Nodes (no), Inguinal Nodes (no), Lymphedema (no), Localized Edema (no), Pedal Edema (no), Swollen Glands (no)

Head:

Normal: Yes

Comments:

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Eyes:

EOMI: Yes
Icterus: No
Conjunctival Inflammation: No
Pupils PERRLA: Yes
Pupil Size Rt:
Pupil Size Lt:
Pupils Comments:
Fundi Vessels Nicking: No
Fundi Vessels Discs Flat: Yes
Fundi Vessels Discs Sharp Margins: Yes
Fundi Vessels Grounds Abnormal: No
Eyes Comments:

Vision Screen 07/15/2009 12:45

Blindness:				**With Corrective**		
Distance	OD: 40	OS: 40	OU: 40	OD:	OS	OU:
Near Vision:	OD:	OS:	OU:	OD:	OS:	OU:

Ishihara Color Test: Normal

Tonometry: L: R:

Comments:

Ears:

Right Ear: Canal patent
Left Ear: Canal patent
Ears Comments:

Nose:

Nares Patent: Yes
Septum Midline: Yes
Septum Intact: Yes
Drainage/Discharge: No
Polyps: No
Nose Comments:

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Mouth

Lesions: No

Oral/Buccal Mucosa: Yes

Gums Normal: Yes

Tonsils Present: Yes

Tonsils Normal: Yes

Pharynx: Normal Color

Teeth Poor Dentition: No

Teeth Count: Mostly Present

Dentures: No

Mouth Comments:

Cranial Nerves:

Intact II-XII: Yes

Cranial Nerves Comments:

Neck:

Full ROM: Yes

Masses/Nodes: No

Trachea: Midline

Thyroid: Normal Size

Comments:

Breasts:

Normal: Yes

Masses: No

Tenderness: No

Scars: No

Dimpling: No

Nipple Discharge: No

Nipple Retraction: No

Instructions for Self Breast Exam Given: No

Comments:

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Thorax:

Contour Normal: Yes

Increased AP Diameter: No

Asymmetrical Expansion: No

Lungs Clear: Yes

Wheezes: No

Crackles: No

Rhonchi: No

Rales: No

Accessory Muscle Use: No

Comments:

Spine:

Deformity: No

Full ROM: Yes

Tenderness: No

Comments:

Cardiovascular:

RRR: Yes

Normal S1/S2: Yes

Murmurs: No

Carotid Bruits: No

JVD: No

Arteries:	**Right**	**Left**
Radial:	2	2
Femoral:	2	2
Dorsalis Pedis:	2	2
Post. Tibialis:	2	2

Comments:

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Abdomen:

Normal Contour: Yes
Scaphoid: No
Obese: No
Gravid: No
Hernias: No
Bruits: No
Masses: No
Scars: No
Tenderness: No
Organomegaly: No
Active Bowel Sounds: Yes
Comments:

Extremities:

Nails Clubbing: No
Nails Cyanosis: No
Lower Extremity Edema - Right: None
Lower Extremity Edema - Left: None
Atrophy: No
Amputations: No
Other Deformities: No
Varicosities: No
Calf Tenderness: No
Pulse Deficit: No

Strength:	**Right**	**Left**
Arm:	Normal	Normal
Leg:	Normal	Normal
Full ROM:	**Right**	**Left**
Arm:	Yes	Yes
Leg:	Yes	Yes

Comments: noted herbens nodes to left foot, noted pain with passive Rom to the right knee with associated popping with active ROM.

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Reflexes:

	Right	Left
Biceps:	2/4	2/4
Patellar:	2/4	2/4
Brachioradialis:	2/4	2/4
Achilles:	2/4	2/4

Sensation:

Vibratory: Yes

Light Touch: Yes

Pin Prick: Yes

Comments:

GU:

Chaperoned By:

Rectum:

Ostomy: No

Normal Tone: Yes

Masses: No

Hemorrhoids: No

Stool Hemoccult:

Prostate Normal Size: Yes

Prostate Nodules: No

Comments:

Male Genitalia:

Penis:

Circumcised: Yes

Lesions: No

Discharge: No

Testicles:

Masses: No

Hernias: No

Size: Normal Size

Atrophy Location:

Varicocele/Spermatocele:

Comments:

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Skin:

Normal: Yes

Rash: No

Redness: No

Abnormal Pigmentation: No

Abnormal Lesions/Growths: No

Comments:

Lymphatics:

Adenopathy: No

Comments:

Schedule:

Activity	Date Scheduled	Scheduled Provider	Priority
EKG	07/15/2009	Nurse 01	Normal

Potential Items For Follow-up:

Item
Travel Outside US
Current Medical Conditions
Current Painful Condition
Brace - knee
PPD Administration Not Performed

Cleared For Food Services: Yes

Health Problems Newly Identified During This Encounter:

Type	Health Problem	Status
Chronic	Osteoarthrosis, generalized	Current
Chronic	Elev blood pressure reading w/o hypertension	Current
Chronic	Pain in joint, multiple sites	Current
Chronic	Other specif diseases of hair and hair follicles	Current

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Naproxen Tablet	07/15/2009 12:32	500mg Orally Mouth -Two Times a Day x 180 day(s)

Indication: Osteoarthrosis, generalized

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
Profile tests-General-Lipid Profile Profile tests-General-Urinalysis Profile tests-General-Comprehensive Metabolic Profile (CMP) Blood tests-d-e-f-Erythrocyte Sedimentation Rate (ESR) Blood tests-t-Thyroid Stimulating Hormone (TSH) Stool tests-General-Fecal Occult Blood Test Blood tests-o-p-Prostate Specific Antigen (Free) Profile tests-General-CBC (Complete Blood Count)	One Time		07/15/2009 00:00	Routine

Additional Information:
guiac time three

New Radiology Request Orders:

Details	Frequency	End Date	Due Date	Priority
General Radiology-Chest-PA/Lateral	One Time		07/15/2009	Routine

Specific reason(s) for request (Complaints and findings):
physical, h/o elevated blood pressure

New Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
Optometry	07/15/2009	Routine	No	English

Reason for Request:
decreased visual acuity

Provisional Diagnosis:
decreased visual acuity od 20/40 os 20/40 ou 20/40

Podiatry	07/15/2009	Routine	No	

Reason for Request:
evlaution for a soft shoe due to herbens nodes to left foot causing pain due to improper foot wear.

Provisional Diagnosis:
osteoarthritis, chronic left foot pain from herbens nodes and improper foot wear.

Device and Equipment Orders:

Device/Equipment	Start Date	Stop Date	Obtained From
Brace - knee	07/15/2009		BOP

Schedule:

Activity	Date Scheduled	Scheduled Provider

Inmate Name:	CLARK, TIBEL			Reg #:	97273-071
Date of Birth:	09/20/1963	Sex:	M	Race:	BLACK
Encounter Date:	07/15/2009 12:32	Provider:	Johnson, Rachel NP	Facility:	FOR

Activity	Date Scheduled	Scheduled Provider
EKG	07/15/2009 00:00	Nurse 01

Disposition:

Follow-up at Sick Call as Needed
Will Be Placed on Callout
Return Immediately if Condition Worsens

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
07/15/2009	Counseling	Plan of Care	Johnson, Rachel	Verbalizes Understanding

Instructed inmate how to obtain medical, dental, and mental health care.

Copay Required: No **Cosign Required:** No

Telephone/Verbal Order: No

History & Physical screen completed on CLARK, TIBEL by Johnson, Rachel NP on 07/15/2009 12:32.



Patient: CLARK, TIBEL MA2764

Dictated Rpt: Final 12/08/2010 00:00

General Surgery Clinic Note

MRN: MA2764

CLARK, TIBEL
Date: 12/08/2010

DOB: 09/20/1963 Age: 47
General Surgery Clinic Note
Attending: JOHN MIGALY, MD
Dictating: KATHERINE ANNE SHARPE, PA-C

REFERRING PHYSICIAN:
Paul Jowell, MD at Duke University.

HISTORY OF PRESENT ILLNESS:
Mr. Clark is a 47-year-old pleasant gentleman who is a prisoner in the Federal Corrections Complex in Butner, North Carolina who is being referred to Dr. Migaly today for surgical management of a rectal carcinoma. The patient notes that he was diagnosed on August 20, 2010 via colonoscopy after 18 months of bright red blood per rectum in his stool. The patient notes that he was having quite a bit of bleeding with every bowel movement but denied any pain. He had his colonoscopy in August and a biopsy confirmed a poorly differentiated adenocarcinoma of the rectum approximately 9-15 cm proximal to the anal verge. Following diagnosis of rectal cancer, the patient underwent a PET scan of chest, abdomen and pelvis that extended from the skull base to mid thigh. There were areas of FDG uptake in the skull base and vertebrae but these appear benign. In addition, there was uptake in the rectal mass. No evidence of metastatic lymph nodes or mets to other organs. The patient began neoadjuvant chemoradiation in early October 2010 and finished on November 12, 2010. He is now being referred to us for resection of his tumor. Currently the patient denies any pain and also denies any family medical history of colon cancer. He has approximately 2 to 3 bowel movements daily and prior to his chemo radiation, he had noted some constipation and thinner-caliber stools. Since finishing his chemoradiation, the patient reports that his bright red blood per rectum has improved and only notices bleeding with bowel movements occasionally. He has also noted that his stools have gotten larger in caliber. Currently denies any nausea, vomiting, fever or chills and denies any weight loss.

PAST MEDICAL HISTORY:
The patient reports no past medical history.

PAST SURGICAL HISTORY:
The patient reports no past surgical history.

SOCIAL HISTORY:
The patient denies smoking or alcohol.

FAMILY MEDICAL HISTORY:
The patient does not know but does not believe that there is any contributing family medical history or history of colon cancer or inflammatory bowel disease.

97273-011 12/8 BUH 4B

ALLERGIES:
No known drug allergies.

CURRENT MEDICATIONS:
None.

REVIEW OF SYSTEMS:
A 12-point review of systems was performed. The patient denied any difficulty with vision, muscular pain, shortness of breath, chest pain or abdominal pain. Pertinent positives included bright red blood per rectum and thinner caliber stools.

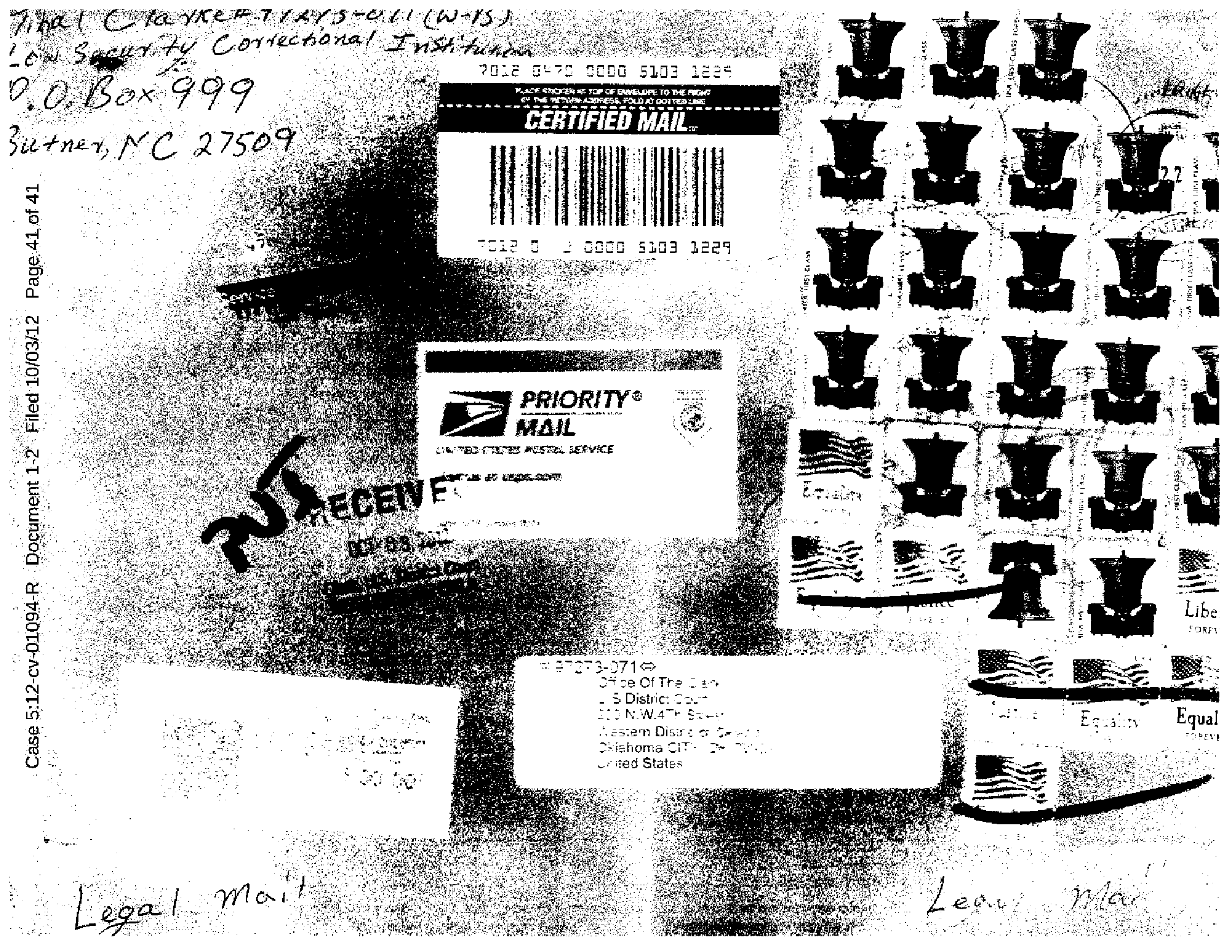
PHYSICAL EXAMINATION:
Temperature 98.2, blood pressure 122/73, pulse 66, weight 156. In general this is a well-nourished, well-developed male in no acute distress. HEENT: Normocephalic, atraumatic. Eyes: PERRL. Extraocular motions intact. Neuro: Cranial nerves II through XII grossly intact. No focal neurological deficits. Psych: Alert and oriented x3. Answers questions appropriately and is pleasant. Neck: Supple without lymphadenopathy or bruits. Lungs: Clear to auscultation bilaterally. Heart: Regular rate and rhythm. No murmurs, rubs or gallops. Abdomen: Soft, nontender, nondistended with positive bowel sounds and a reducible umbilical hernia. Extremities: No clubbing, cyanosis or edema. Pulses 2+ throughout.

Digital Rectal Exam: no masses or lesions were noted or fissures. The patient had normal sensation and digital rectal tone. A proctoscope was inserted to approximately 9-10 cm and at 9 cm past the anal verge there was a large hemi circumferential, fungating, bleeding mass on the left side of the patient's rectum that appeared fixed.

REVIEW OF REPORTS:
We had the opportunity to review the patient's reports as well as a PET scan from September 2010. The CT scan of abdomen and pelvis did indeed reveal a large hemi circumferential mass in the rectum on the left which is patent. Furthermore, we had a chance to review his medical records and his ultrasound that was done on October 20 that staged the mass as a T3 N0 and also noted that the mass was approximately 9 cm and extending to 15 cm beyond the anal verge that was large and hemi circumferential on the left side.

IMPRESSION AND PLAN:
This is a 47-year-old gentleman with no significant past medical history who presented with bright red blood per rectum x18 months and had a colonoscopy which revealed a large, hemi circumferential rectal mass that was biopsied and consistent with adenocarcinoma. The patient was staged as a T3 N0 rectal cancer and underwent neoadjuvant chemoradiation. He is now presenting for surgical management of his rectal cancer and has finished chemoradiation as of 11/12/2010. We explained to the patient that we could do a two-stage operation and offered him a laparoscopic, possible open, proctectomy with coloanal versus colorectal anastomosis with a diverting loop ileostomy or less likely, a possible permanent stoma. We explained to the patient the risks and benefits to include bleeding, infection, injury to adjacent structures, risks of anesthesia, anastomtic leakage, sexual dysfunction, death, possible stricture, possible ventral hernia, possible need for reoperation. The patient understands the risks and benefits and has elected to proceed and signed consent. We will set him up 6-10 weeks past his last chemoradiation day and will plan his surgery for either December 28 or January 13. In addition, during his surgery, he will need cystoscopy and stents placed and also prior to his surgery will need stoma marking. Dr. Migaly was present, interviewed, evaluated and formulated the plan for this patient.

Jihad Clarke #T1275-011 (W-15)
Low Security Correctional Institution
P.O. Box 999
Butner, NC 27509



Legal Mail

Leave Mail

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

TIBAL CLARKE,
Reg. #97273-071 **PLAINTIFF**

v. **Case No. 2:13-cv-00026-KGB-JTR**

ELLA TAYLOR,
Registered Nurse, FCI-FC, *et al.* **DEFENDANTS**

ORDER

The Court has received Proposed Findings and Recommended Partial Disposition from United States Magistrate Judge J. Thomas Ray (Dkt. No. 127). No objections have been filed. After careful consideration, the Court finds that the Proposed Findings and Recommended Partial Disposition should be, and hereby are, approved and adopted in their entirety as this Court's findings in all respects.

It is therefore ordered that:

1. The Court grants in part and denies in part the motion for summary judgment filed by the individual defendants (Dkt. No. 107). The Court grants the motion as to defendants Ella Taylor, Amy Barker, and Kathleen Maples and denies the motion as to defendants Dr. Hipolito Matos and Dr. Nader Peikar.

2. The Court dismisses with prejudice plaintiff Tibal Clarke's *Bivens* claims against Ms. Taylor, Ms. Barker, and Ms. Maples.

3. Mr. Clarke may proceed with his *Bivens* claims against Dr. Matos and Dr. Peikar and his Federal Tort Claim Act ("FTCA") negligence claim against the United States of America.

4. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal from the Order would not be taken in good faith.

SO ORDERED this the 30th day of March, 2015.

Kristine G. Baker
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

TIBAL CLARKE,
Reg. #97273-071 **PLAINTIFF**

v. **Case No. 2:13-cv-00026-KGB-JTR**

ELLA TAYLOR,
Registered Nurse, FCI-FC, et al. **DEFENDANTS**

OPINION AND ORDER

Plaintiff Tibal Clarke is a federal prisoner and brings this *pro se* action alleging that, while he was incarcerated in the Federal Correctional Institution at Forrest City ("FCI Forrest City"), he received inadequate medical care for his complaints of rectal bleeding that resulted in him receiving a delayed diagnosis of colon cancer. Mr. Clarke asserts a *Bivens*[1] Eighth Amendment claim against the individual defendants and a negligence claim against the United States of America pursuant to the Federal Tort Claims Act ("FTCA").

Before the Court is the motion to dismiss filed by separate defendant Timothy Outlaw, the former warden of FCI Forrest City (Dkt. No. 81). Mr. Clarke has not responded, despite being ordered to do so (Dkt. No. 100). Also before the Court are the motions for summary judgment filed by separate defendants Jack Vitvitsky, P.A., and Cathie Winkler, R.N., employees of an independent medical contractor at FCI Forrest City (Dkt. Nos. 83, 88). Mr. Clarke has responded to Mr. Vitvitsky's and Ms. Winkler's motions collectively (Dkt. No. 94), and Ms. Winkler has replied (Dkt. No. 99). For the following reasons, the Court grants Mr. Outlaw's motion to dismiss and Mr. Vitvitsky's and Ms. Winkler's motions for summary judgment (Dkt. Nos. 81, 83, 88). The Court has under advisement the motion for summary judgment filed by

[1] *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). A *Bivens* cause of action is analogous to a claim under 42 U.S.C. § 1983.

defendants Ella Taylor, R.N., Amy Barker, R.N., Kathleen Maples, R.N., Hipolito Matos, M.D., and Nader Peikar, M.D. (Dkt. No. 107).

I. Factual Background

On April 3, 2009, Mr. Clarke was transferred from FTC Oklahoma City to FCI Forrest City (Dkt. No. 111, Ex. A, ¶2). At that time, Mr. Clarke underwent a health screen that did not indicate any abnormalities or health problems other than a prior positive tuberculosis test (*Id.*, Attch. 2). On April 13, 2009, Mr. Clarke saw Ella Taylor, a Registered Nurse, in a "sick call triage encounter" (Dkt. No. 111, Attch. 3). He requested hair clippers and a cholesterol check (*Id.*). On June 29, 2009, Mr. Clarke saw Amy Barker, another Registered Nurse, in an "[e]mergency encounter performed at Health Services" (Dkt. No. 111, Attch. 4). Mr. Clarke complained of abdominal pain and multiple episodes of diarrhea (*Id.*). Ms. Barker assessed Mr. Clarke with diarrhea and instructed him to "keep hydrated [with] 2 days off work." (*Id.*).

On July 15, 2009, Mr. Clarke underwent a full history and physical performed by Rachel Johnson, a Nurse Practitioner (Dkt. No. 111, Attch. 5). Although Mr. Clarke denied any blood in his stool, Ms. Johnson ordered a "guaiac [test] time[s] three," a test for fecal occult blood (*Id.*, Attch. 5 at pp. 5, 13). Based on this physical, Mr. Clarke was assessed with osteoarthritis, elevated blood pressure, and joint pain (*Id.*, Attach. 5 at p. 12).

On August 24, 2009, Mr. Clarke saw physician's assistant Jerald Jones for a recheck of an elevated blood-pressure reading and for complaints of knee pain (Dkt. No. 111, Attch. 6). On September 23, 2009, Mr. Clarke returned to Mr. Jones in a "sick call/triage encounter" (Dkt. No. 83-1, at 5). Mr. Clarke complained of rectal bleeding and stated that he had recently had three guaiac tests that were positive for fecal occult blood (*Id.*). After an examination, Mr. Jones

assessed "[h]emorrhage of the gastrointestinal tract, unspecified" (*Id.*). Mr. Jones noted that "[Mr. Clarke] needs CBC and eval by gastro[enterologist]" (*Id.*).

On December 2, 2009, Mr. Vitvitsky, a physician's assistant, treated Mr. Clarke in a sick call/triage encounter (Dkt. No, 83-1, at 1, 7). During that visit, Mr. Clarke complained that, for the last three months, he had observed blood in his stool every time he used the toilet. He also reported taking an aspirin a day for a knee injury, which Mr. Vitvitsky noted "may be contributing to problem." (*Id.* at 7). Mr. Vitvitsky recorded: "Rectal stool sample showed positive for occult blood with sample only from rectal canal — [Mr. Clarke] was too uncomfortable to push all the way in without lubrication generous on glove. Two more cards to be returned in a few days." (*Id.*). Mr. Vitvitsky assessed "[h]emorrhage of the gastrointestinal tract, unspecified" (*Id.* at 8). Mr. Vitvitsky's plan of care included a CBC blood test and for Mr. Clarke to follow up at sick call as needed. Mr. Vitvitsky further recorded under his plan of care: "Await (continue) for consult regarding blood in stool, return two cards Friday, continue Milk of Mag to provide regularity. Blood tests being ordered." (*Id.*).

Mr. Clarke returned to Mr. Vitvitsky on December 4, 2009. Both of Mr. Clarke's stool sample cards tested positive for occult blood (Dkt. No. 83-1, at 9). Mr. Vitvitsky noted that Mr. Clarke now had a total of six stool samples that were positive for blood and listed gastroenterology consultation under his plan of care (*Id.*, at 10). Mr. Vitvitsky states that he did see Mr. Clarke as a patient after December 4, 2009 (Dkt. No. 91, ¶ 4), and Mr. Clarke does not claim otherwise in his response to Mr. Vitvitsky's motion for summary judgment.

On December 22, 2009, Mr. Clarke saw Ms. Winkler, a Registered Nurse, in a "health services encounter" (Dkt. No. 88-1, at 1). Ms. Winkler noted: "Rectal bleed, bright red over normal stool. Refused physical exam. Lab results from previous exams not available. Tx with

rectal steroid, if available. Obtain results . . . Tx hypermotility GI distress. Refer to GI specialist." (*Id.*). Ms. Winkler prescribed a hemorrhoid suppository, reflux medicine, and a high-fiber diet (*Id.*). She instructed Mr. Clarke to report bloating or abdominal pain (*Id.*). Ms. Winkler states in her summary judgment papers that she did not see Mr. Clarke again until August 26, 2010 (Dkt. No. 89, ¶ 10). Mr. Clarke does not challenge this in his response to Ms. Winkler's motion for summary judgment.

Over the next few months, Mr. Clarke saw other Bureau of Prison ("BOP") medical personnel and continued to complain of rectal bleeding (Dkt. No. 111, Attchs. 13-15). On April 22, 2010, Mr. Clarke was seen by a general surgeon who recommended a colonoscopy and an EGD (*Id.*, Attch. 16). On August 20, 2010, Mr. Clarke underwent a colonoscopy and an EGD, which showed a rectal mass (*Id.*, Attch. 20). The biopsy results indicated a rectal carcinoma with "multiple lymph nodes invasion, also positive for h-pylori" (*Id.*, Attch. 21). BOP physician Nader Peikar initiated a medical transfer for Mr. Clarke, and, on September 17, 2010, Mr. Clarke was transferred to a BOP medical facility in Butler, North Carolina (*Id.*, Attch. 24).

II. Mr. Outlaw's Motion To Dismiss

Mr. Outlaw moves to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Mr. Clarke has not stated a viable Eighth Amendment claim against him and that he is entitled to qualified immunity. Although the Court ordered Mr. Clarke to respond to Mr. Outlaw's motion (Dkt. No. 100), he has failed to do so. For that reason alone, Mr. Clarke's claims against Mr. Outlaw are subject to dismissal pursuant to Local Rule 5.5(c)(2) for failing to comply with the Court's Order. However, the Court will consider the merits of Mr. Outlaw's motion to dismiss.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (alteration in original) (citation omitted). "When ruling on a motion to dismiss, the district court must accept the allegations contained in the complaint as true and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001).

As a threshold matter, Mr. Outlaw's motion correctly points out that Mr. Clarke's official capacity claim for damages against him is barred by the doctrine of sovereign immunity. *See Baker v. Chisom*, 501 F.3d 920, 925 (8th Cir. 2007) ("the real party in interest in an official-capacity suit is the governmental entity and not the named official."). Moreover, the Western District of Oklahoma previously dismissed Mr. Clarke's official capacity claims against the individual defendants when transferring the case to this District (Dkt. No. 21).

As to Mr. Clarke's individual capacity claim against Mr. Outlaw, Mr. Outlaw argues that Mr. Clarke's allegations amount to a claim of *respondeat superior* or supervisory liability. A supervisor may not be held vicariously liable in a *Bivens* or § 1983 action for the constitutional violations of their subordinates on a theory of *respondeat superior*. *Iqbal*, 556 U.S. at 676.

Rather, a plaintiff "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* "It is settled . . . that 'a warden's general responsibility for supervising the operations of a prison is insufficient to establish personal involvement.'" *Reynolds v. Dormire*, 636 F.3d 976, 981 (8th Cir. 2011) (quoting *Ouzts v. Cummins,* 825 F.2d 1276, 1277 (8th Cir. 1987)); *see also Crooks v. Nix*, 872 F.2d 800, 803 (8th Cir. 1989) (stating that a warden or prison director lacking professional medical expertise would not be liable on agency principles for the alleged wrongful diagnostic judgment of a physician).

In his complaint, Mr. Clarke alleges that "Prison Administration failed to provide medical treatment that addressed Plaintiff's medical symptoms with deliberate indifference." (Dkt. No. 1, at 6). He further alleges that "executive staff at the institution" provided "meaningless responses" in the administrative grievance process (*Id.*, at 15). These conclusory allegations of supervisory liability are not supported by any accompanying facts, and there are no allegations suggesting what role, if any, Mr. Outlaw played in Mr. Clarke's medical treatment or the grievance process. Mr. Clarke's supervisory liability claims against Mr. Outlaw fail to meet the pleading requirements set forth in *Iqbal* and *Twombly.*

Because Mr. Clarke's allegations against Mr. Outlaw do not amount to a constitutional violation, Mr. Outlaw is entitled to qualified immunity. *See Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 812-13 (8th Cir. 2008) (stating that qualified immunity extends to *Bivens* actions and, if the allegations do not amount to a constitutional violation, there is no necessity for further inquiries concerning qualified immunity). The Court grants Mr. Outlaw's motion to dismiss (Dkt. No. 81), and Mr. Clarke's claims against Mr. Outlaw are dismissed without prejudice.

III. Mr. Vitvitsky's And Ms. Winkler's Motions For Summary Judgment

Mr. Vitvitsky and Ms. Winkler move for summary judgment. Both assert that Mr. Clarke has not met his burden of showing deliberate indifference to his medical needs and that, therefore, they are entitled to qualified immunity (Dkt. Nos. 83, 88). Ms. Winkler further asserts that, to the extent Mr. Clarke may allege a medical malpractice claim under state law, Mr. Clarke's claim is barred by the statute of limitations and that Mr. Clarke has not met his burden of proof to establish a medical malpractice claim under Arkansas law (Dkt. No. 88).

Summary judgment is proper if the evidence, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A factual dispute is genuine if the evidence could cause a reasonable jury to return a verdict for either party. *Miner v. Local 373*, 513 F.3d 854, 860 (8th Cir. 2008). "The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under prevailing law." *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989). However, parties opposing a summary judgment motion may not rest merely upon the allegations in their pleadings. *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). The initial burden is on the moving party to demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The burden then shifts to the nonmoving party to establish that there is a genuine issue to be determined at trial. *Prudential Ins. Co. v. Hinkel*, 121 F.3d 364, 366 (8th Cir. 2008). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

To prevail on his Eighth Amendment inadequate medical care claims against Mr. Vitvitsky and Ms. Winkler, Mr. Clarke must prove that: (1) he had objectively serious medical needs; and (2) those two defendants subjectively knew of, but deliberately disregarded, those serious needs. *See Langford v. Norris*, 614 F.3d 445, 460 (8th Cir. 2010); *see generally Estelle v. Gamble*, 429 U.S. 97 (1976) (establishing that deliberate indifference to a serious medical needs constitutes a violation of the Eighth Amendment).

The parties do not dispute that Mr. Clarke's rectal bleeding was an objectively serious medical need. Thus, the issue is whether Mr. Vitvitsky and Ms. Winkler were deliberately indifferent in the medical treatment they rendered to Mr. Clarke. Deliberate indifference is a higher standard than gross negligence and "requires proof of a reckless disregard of the known risk." *Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) (quoting *Jackson v. Everett*, 140 F.3d 1149, 1152 (8th Cir. 1998)). "There must be actual knowledge of the risk of harm, followed by deliberate inaction amounting to callousness." *Bryan v. Endell*, 141 F.3d 1290, 1291 (8th Cir. 1998) (citing *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994)).

Mr. Vitvitsky argues that he saw Mr. Clarke only twice, on December 2 and 4, 2009. According to his medical notes, he performed a physical examination of Mr. Clarke, ordered a complete blood count, requested that Mr. Clarke submit additional stool samples, and requested a consultation with a gastroenterologist. In his supporting affidavit, Mr. Vitvitsky states that, shortly after December 4, 2009, he was transferred to another building at FCI Forrest City and never treated Mr. Clarke again (Dkt. No. 83-1, ¶13). Mr. Vitvitsky adds that he "had no control over when or if an inmate qualified for or received outside consultations by a specialist" and that he "played no role in determining which [BOP] inmates received outside consultants by specialists or when such consultations were to occur." (*Id.*, ¶¶ 15, 17). In addition, Mr.

Vitvitsky has submitted a letter from Dr. L. F. Anderson, a board-certified family practitioner in Lonoke, Arkansas, in which Dr. Anderson opines that Mr. Vitvitsky acted within the standard of care in treating Mr. Clarke (Dkt. No. 83-2).

In her summary judgment papers, Ms. Winkler states that she only saw Mr. Clarke once prior to his colonoscopy on December 22, 2009. According to her notes, Ms. Winkler attempted to examine Mr. Clarke, prescribed a hemorrhoid suppository and reflux medicine, and instructed him to report promptly any dark tarry stool. (Dkt. No. 88-1, at 1). Ms. Winkler recorded in her notes that Mr. Clarke needed to be seen by a gastroenterology specialist (*Id.*; *see* Dkt. No. 89, at 1-3). In her statement of material facts to which she contends there is no genuine dispute, Ms. Winkler states that BOP policy only allows her to recommend a consultation with a specialist, Ms. Winkler states that she has no role or other involvement in determining if or when an inmate is seen by a specialist (Dkt. No. 89, at 3).

In his response to Mr. Vitvitsky's and Ms. Winkler's motions for summary judgment, Mr. Clarke argues that both Mr. Vitvitsky and Ms. Winkler: (1) should have ordered a "CEA" blood test for a cancer marker which would have been the "normative procedure" for a patient reporting rectal bleeding; and (2) had a "medical/ethical responsibility" to follow up on their recommendations for a gastroenterologist consultation (Dkt. No. 94, ¶8). Mr. Clarke has come forward with no evidence to substantiate his subjective opinion that Mr. Vitvitsky and Ms. Winkler should have ordered additional blood testing, much less that their failure to do so was deliberate indifference. *See Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995) ("[M]ere disagreement with treatment decisions does not rise to the level of a constitutional violation"). The undisputed facts establish that both Mr. Vitvitsky and Ms. Winkler had brief and limited medical contact with Mr. Clarke, prescribed medication for his problems, and noted

referrals to a gastroenterology specialist. Nothing about these facts suggests that Mr. Vitvitsky or Ms. Winkler were deliberately indifferent in the medical treatment they provided to Mr. Clarke.

Mr. Vitvitsky and Ms. Winkler both fail to address the reason for the nine-month delay between their notations that Mr. Clarke needed to be seen by a gastroenterologist and his colonoscopy on August 20, 2010. The Court acknowledges that Mr. Vitvitsky and Ms. Winkler both claim they did not treat Mr. Clarke again during that period and maintain that they had no role or other involvement in determining if or when Mr. Clarke was seen by a specialist. However, when Mr. Clarke pursued this matter through the BOP administrative grievance process, an "administrative remedy response" from a warden at FMC Butler explained the reason for this delay as follows: "A referral [by Mr. Jones] was made to Gastroenterology on September 23, 2009; however local policy, at FCI Forrest City, requires patients who require a colonoscopy [to] see General Surgery. This referral was corrected on February 22, 2010, and you were seen by General Surgery on April 23, 2010. The General Surgeon ordered a colonoscopy which was performed August 20, 2010." (Dkt. No. 1-1, at 2).

Assuming that FCI policy did require that a patient with rectal bleeding and blood in his stool be referred to general surgery, rather than a gastroenterologist, such a referral error by Mr. Vitvitsky and Ms. Winkler does not establish deliberate indifference. Further, Mr. Vitvitsky only saw Mr. Clarke twice over three days, and Ms. Winkler only saw Mr. Clarke once prior to August 2010. Mr. Clarke has not controverted Mr. Vitvitsky's and Ms. Winkler's statements that they have no role in determining whether an inmate sees a specialist. Viewing the evidence and facts in the light most favorable to Mr. Clarke, Mr. Vitvitsky's and Ms. Winkler's alleged

failures to follow up on their recommendations for Mr. Clarke to see a gastroenterologist do not rise to the level of deliberate indifference.

The Court finds no genuine issue of material fact on Mr. Clarke's claims of deliberate indifference against Mr. Vitvitsky and Ms. Winkler, and Mr. Vitvitsky and Ms. Winkler are entitled to qualified immunity on Mr. Clarke's Eighth Amendment claims against them. The Court grants Mr. Vitvitsky's and Ms. Winkler's motions for summary judgment (Dkt. No. 83, 88).

Ms. Winkler argues that, to the extent Mr. Clarke "may assert" a state-law medical negligence claim against her under the Arkansas Medical Malpractice Act, she is entitled to summary judgment (Dkt. No. 88, ¶4). Although Mr. Clarke has asserted a negligence claim against the government pursuant to the FTCA (Dkt. No. 1, at 2-3), his complaint does not plead state law claims for medical negligence against the individual defendants. Accordingly, the Court need not consider Ms. Winkler's argument on this issue.

* * *

For the foregoing reasons, the Court grants Mr. Outlaw's motion to dismiss (Dkt. No. 81) and dismisses without prejudice Mr. Clarke's claims against Mr. Outlaw. The Court also grants Mr. Vitvitsky's and Ms. Winkler's motions for summary judgment (Dkt. Nos. 83, 88) and dismisses with prejudice Mr. Clarke's claims against Mr. Vitvitsky and Ms. Winkler. The Court has under advisement the motion for summary judgment filed by defendants Ella Taylor, R.N., Amy Barker, R.N., Kathleen Maples, R.N., Hipolito Matos, M.D., and Nader Peikar, M.D. (Dkt. No. 107). The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal from this Opinion and Order would not be taken in good faith.

SO ORDERED this the 29th day of September, 2014.

Kristine G. Baker
United States District Judge

(Post: 08/03/2015)

United States District Court

Eastern District of Arkansas

TIBAL CLARKE,
Reg #97273-071

V.

ELLA TAYLOR, et al.

NOTICE

CASE NUMBER: 2:13CV00026 KGB-JTR

TYPE OF CASE: ☒ **CIVIL** ☐ **CRIMINAL**

☒ TAKE NOTICE that a proceeding in this case has been set for the place date, and time set forth below:

PLACE: Richard Sheppard Arnold United States Courthouse
500 West Capitol
Little Rock, Arkansas 72201

ROOM NO.: 1C

DATE AND TIME: April 5, 2016 at 10:00 a.m.

TYPE OF PROCEEDING:

SETTLEMENT CONFERENCE before U.S. Magistrate Judge J. Thomas Ray pursuant to Order [135]. Pursuant to General Order 54, counsel for both parties and their clients will be allowed to bring electronic devices, including cell phones, laptop computers or PDA type devices into the Courthouse. Please show a copy of this notice to the Court Security Officers upon entry into the building.

☐ TAKE NOTICE that a proceeding in this case has been continued as indicated below:

PLACE	ROOM NO.	CONTINUED TO, DATE AND TIME
Richard Sheppard Arnold United States Courthouse 500 West Capitol Little Rock, Arkansas 72201		

James W. McCormack, CLERK
U.S. MAGISTRATE JUDGE OR CLERK OF COURT

3/9/2016
DATE

/s/ Sherry Justice
(BY) DEPUTY CLERK

To: Hon. Kristine G. Baker
Hon. J. Thomas Ray
Mr. Timothy O. Dudley
Ms. Lindsey Mitcham Lorence
CSO

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
12 MAY 17 PM 3:12
CLERK-SANTA FE

JOSEPH J. RUIZ

Plaintiff,

NO. CV 12-521 ACT LFG

Vs.

U.S. ATTORNEY GENERAL ERIC HOLDER
KAREN EDENFIELD, WARDEN FCI BIG SPRING
JORGE PARTIDA, MD. FCI BIG SPRING

DEFENDANTS.

Amended **COMPLAINT FOR PERSONAL INJURY, PAIN AND SUFFERING AND PERMANENT PAIN DUE TO MEDICAL MAL PRACTICE.**

Comes Now Plaintiff, Pro Se states:

1. Plaintiff was a federal prisoner under the custody of the Bureau of Prisons at the Federal Satellite Camp in Big Springs, Texas from September 17, 2008 until September 13, 2011 and then at the Dierson Charities Halfway House in Albuquerque, New Mexico from September 13, 2011 until October 18, 2011 and then while under Home Confinement from October 18, 2011 until February 23, 2012 and then again at Dierson from February 23, 2012 until he was released from the Custody of Bureau of Prisons to his own custody on March 9, 2012.

2. On or about the third or fourth week of May 2010, immediately following the 4:00 PM "count" all Camp inmates were release for dinner. During this mad daily rush to exit the dormitory building, all 150-175 inmates funnel through a single door opening to get to the outside and then rush to the dining hall. On the day that my accident happened, I felt a push from behind as I was making my way out the building. This push caused me to lose my balance and fall causing immediate pain to both wrists. The Guards on duty, Officer Sanchez and Officer Ibanez were notified. They advised that I see the nurse when I went for my daily medications at 6:00 PM.

3. On the day of the accident I advised nurse Chang as the Guards advised, Nurse Chang saw the swelling in both wrists, asked to wiggle my fingers. I did as he asked. His response was, "no damage, as you would not be able to wiggle your fingers if your wrists were broken." He offered nothing for the pain

4. A few days later, I filled out a "Sick Call" form that is required if one has a medical issue and wants to see a doctor. The pain and swelling was intense.

5. A few days after the Sick Call form was sent, I was on the Call-Out Report on the bulletin board for the next day.

6. At Sick Call, Nurse Skaggs saw the swelling which had not gone down. She asked if I wanted a few days off from work. I told her that I was still doing my daily job of buffing the floor in "B" dorm. She issued a one week "Lay-In." She also said that she would send me some Ibuprofen the next day. None were sent. She said she wanted to wrap my wrists, but couldn't find any tape to wrap them. The wrists remained untreated and the intense pain continued.

7. I kept writing and submitting Sick Call forms every week as the swelling and intense pain continued.

8. I was finally placed on the Call-Out several weeks later to go "behind the fence" (the main prison facility that houses over 1,000 inmates) for an x-ray. I went and was told that my left wrist was to be x-rayed. I asked why my right wrist was not going to be x-rayed and was told by the x-ray technician that she only had orders for the left. After taking a series of x-rays on my left wrist the x-ray tech took them to the Chief Medical MD., Dr. Partida. Upon her return, I was told that there was no damage to my wrists and asked if I had a high tolerance to pain. I replied that I did.

9. More time (weeks) passed and more Sick Call forms were filed out.

10. Sometime later, I was paged by the Guard and was told when I reported to him that I was to instructed to report to the Camp Medical office to see a doctor. It was not a doctor but the x-ray technician. She used the small portable x-ray machine in the Camp Office and x-ray my left wrist again. Again I asked about the right one and showed her the swelling on both wrists. She said, again, that she only had orders to do the left one. She took the x-rays and we both left.

11. Later that same day, I was paged again. I was told to report to the Camp Medical building again. When I arrived, I was told that she had been given to OK to x-ray my right wrist, so she did and we both left.

12. Later on that same day, I was paged for the third time to report to the Camp Medical building. This time, in addition to the x-ray tech, Nurse Smith was there waiting for me. I was told that they had "good news and bad news." The good news was that they were giving me a 30 day Lay-in and the bad news was that both wrists were broken. They then put both arms and wrists in a "mold-to fit" plastic planks that went from my wrists to my elbows. Again, I was not given anything for pain which continued as did the swelling.

13. I continued to complain about the pain and swelling so more Sick Call forms were filled out.

14. One morning sometime later, I was paged to the Camp Officers (CO) office and was told to put my uniform on and go with a CO that was waiting for me. I asked where I was being taken to and was told that I was being taken to see a Dr. Hayes who was an private Orthopedic doctor in town. When we arrived at his office, which is located inside the local Big Spring Hospital, I was told to report to the facilities x-ray laboratory for more x-rays. I did as I was directed and then reported to Dr. Hayes' office to see him.

15. I showed the doctor my wrists, told him about the pain and told him that I was concerned as my left wrist was now asymmetrical and looked deformed. I also told the doctor that in addition to the pain in both wrists, my thumbs were also hurting and felt as though they had been jammed. He asked how severe my pain was on a 1-10 point scale. I replied that the pain was the same since the accident, which was a ten (10). The doctor said that I might have to be operated on to correct the damage, but he would have to wait as he would have to submit his report to Dr. Partida. He replaced the molded planks with wrist (steel reinforced) support braces. Dr. Hayes said that he would see me at Dr. Partida's office (behind the fence) in a couple of weeks. Two weeks came and went by.

16. Many more weeks passed. The pain and swelling continued. I had not heard back from Dr. Hayes. I filled out the Administrative Remedy Complaint form seeking assistance.

17. Weeks turned to months. One evening, I was told by the Camp CO to not drink or eat anything after midnight and to report to Control at 7:00 AM the next morning. I did as directed. I was taken to Dr. Hayes' office and had more x-rays taken. The doctor came in, told me that he had an Operating Room reserved but wanted me to know that if the operation was done, I would lose all my mobility that I had before the accident in my left wrist as he was going to have to re-break the wrist, shave some bone from my Pelvis, fuse it into my left wrist and then put in a metal plate and secure it with screws. Dr. Hayes recommended that we try injecting the wrists with steroids and see if that pain would cease, and if it did not, we could consider surgery. He also said that he was prescribing some pain medication. The drug Indomethacin was waiting for me at Pill Line about two or three days later. The Injection did ease the pain for a couple of weeks before it returned. The pain in my right wrist was now tolerable with the exception of my thumb. The left wrist pain was still intense. My system had had an adverse reaction to Indomethacin in the past and I had reported it before when it had been prescribed for back pain. I am surprised that the bad reaction that I had reported was not available in my file so Dr. Hayes would have known. I did not take Indomethacin and returned the pills, unused, to the nurse at Pill Line the following morning.

18. On or about February 14, 2012, I was on the Call-Out to go behind the fence to see Dr. Hayes and Dr. Partida. At the appointed time of the appointment, Fellow inmate Andrew Bernal and myself were escorted to the medical building and were placed in a waiting room. Andrew was taken in first to see the doctor (s). Around one-half hour later, he Andrew returned and I was taken in. Dr's. Hayes and Partida were there as was the x-ray tech. Dr. Hayes asked if my pain had ceased. I told him about the short-time relief that followed after the injection and my not taking Indomethacin due to the adverse reaction which I explained as very fast and strong heart beats and cold sweats. He agreed that it was good that I had not taken any. I asked for some Naproxen which had helped my back pain. He agreed and prescribed some. He then repeated that we still had the surgery option but stressed the loss of mobility. I told the doctor that have had 24/7 pain now for nine months since the accident that I thought that I could stand the pain for another five months to my release date to a Halfway house in Albuquerque so that I could get a second opinion from doctors there or in Santa Fe which was my home. I also stated that, in my opinion, that if my injuries had been treated some nine months before, my wrists would have healed correctly and that if I did require surgery after the second opinion, it was only right that the Bureau of Prisons pay for it. Dr. Hayes' head nodded as if he was agreeing with me but stopped when Dr. Partida exploded in anger.

19. Dr. Partida, who had been silent, ordered me to follow him. We left his office and in the hallway he began shouting, ranting and waving his hands in absolute rage and anger. He told me that knew I was implying malpractice and was going to send me to the "hole" for it. He then ordered me into the small room where Andrew Bernal was waiting. I asked Andrew to try to get word to my wife if I was taken to the hole. Two or three guards and a Capitan (or Lt.) arrived. The Capitan asked me what happened. I told him. I was relieved that one of the guards was the one who had taken me to see Dr. Hayes in town. He told the Capitan that he knew that I had been "jacked around" by medical since my injury. The Capitan told this kind CO to escort us out of the medical building so that we could return to the Camp. We did. My pain and swelling continued.

20. Plaintiff saw Dr. Samuel Chun in early November 2011 when he returned to Santa Fe who said that he indeed needed surgery but his recommended procedure would not lead to any loss of mobility.

21. Surgery was performed on November 30, 2011. Several Post Operation visits and hard casts later led to therapy. I am now left with thumb pain and a somewhat weakened left wrist which may never get any better. I still have some pain when holding an object in my left hand for a while such as a book, bowl or tool.

22. Plaintiff attempted in good faith, to negotiate a reasonable settlement through the Administrative Remedy route. I send the required forms to the local area only to be told that they had been lost so with no local copying machine availability because it was "broken" down. I would have to do them again.

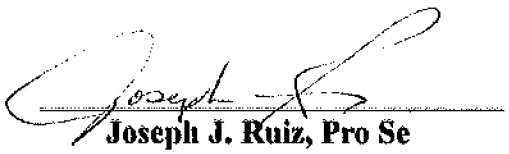
The BOP Regional office advised me to send a copy to the Washington office which I did in March of 2010. I was also given a Tort Claim form to fill out and send to the DC office. I telephoned them in April as I had not received any form of reply. I was advised by their Washington office that they had six months from the date they received it to investigate and reply so They had until October of 2010 to do so. Sadly, no response was ever received.

As a direct and proximate result of defendants negligence and malpractice, Plaintiff sustained three years of pain and suffering. The pain although less intensive continues and I am advised by my doctors in Santa Fe that the pain may be with me for the rest of my life.

Plaintiff seeks trial by jury if allowed.

WHEREFORE, Plaintiff requests a reasonable award for damages in an amount to be proven at trial and such other and further relief as the Court deems just and proper.

Respectfully submitted:



Joseph J. Ruiz, Pro Se

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOSEPH J. RUIZ,

Plaintiff,

vs. No. CIV 12-0521 JB/LFG

KAREN EDENFIED, Warden,
FCI Big Spring: JORGE PARTIDA,
MD., FCI Big Spring: and ERIC HOLDER,
U.S. Attorney General,

Defendants.

SECOND AMENDED COMPLAINT FOR PERSONAL INJURY, PAIN AND SUFFERING AND PERMANENT PAIN DUE TO MEDICAL MALPRATICE

COMES NOW Plaintiff, Joe Ruiz, by and through his attorney, Daniel Sanchez, Esq. and hereby files this Second Amended Complaint for Personal Injury, Pain and Suffering and Permanent Pain Due to Medical Malpractice pursuant to this Courts Order Adopting Report and Recommendation But Allowing Plaintiff to File Amended Complaint filed on September 29th, 2012 and states:

VENUE AND JURISDICTION

1. This Court has jurisdiction over the parties and the subject matter herein.
2. Plaintiff amends his Amended Complaint for Personal Injury, Pain and Suffering and Permanent Pain Due to Medical Malpractice, filed May 17, 2012, so that he may bring this action under the Federal Tort Claims Act (hereinafter "FTCA"), 28 U.S.C. §§ 1346(b), 2671, *et. seq.* and so alleges.

3. Plaintiff amends his Amended Complaint for Personal Injury, Pain and Suffering and Permanent Pain Due to Medical Malpractice to include the United States of America (and so alleges) pursuant to 28 U.S.C. §1346(b)(1), which provides that this Court has exclusive jurisdiction over civil actions for "injury, or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *See* 28 U.S.C. §1346(b)(1).
4. Venue is proper as the Plaintiff has lived in New Mexico for at least the past six (6) consecutive months and he continues to reside in New Mexico.
5. Plaintiff filed an administrative tort claim on April 27, 2011, and more than six (6) months passed without Plaintiff receiving any decision in writing from the agency since the filing of the administrative complaint, and thus Plaintiff has exhausted his administrative remedies granting this Court subject matter jurisdiction over this matter. *See* 28 USC § 2675. Complaint ¶ 22.

COUNT ONE: NEGLIGENCE UNDER THE FEDERAL TORT CLAIMS ACT 28 § 2671 *et. seq.*

6. Plaintiff contends that the Unites States is liable for acts or omissions committed by the Defendants and/or their employees, officials, contractors, agents or workers as they were negligent:
    a) In the operation of a hospital, infirmary, clinic, dispensary or like facilities;
    b) In the provision of health care services;

c) In the supervision and operation of their penitentiary building;

d) Or, as medical practitioners (or medical examiners) and law enforcement officers, in the negligent deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States;

proximately causing Plaintiff pain and suffering and permanent damages.

7. Pursuant to 28 USC § 2674 the United States shall be liable for tortious acts committed by it's agencies to the extent and in the same manner as private individual(s) who commit tortious acts under similar circumstances. *See* 28 USC § 2674.

8. The United States and it's agents owed a duty to Plaintiff, and failed by not providing the proper care and aid to Plaintiff for injuries he sustained while he was incarcerated. *See* Amended Complaint ¶¶ 3-19 which are incorporated herein by reference.

9. Plaintiff amends a date in the previous Amended Complaint filed May 17, 2012, in paragraph 18 regarding the date of February 14, 2012, to read February 14, 2011, as this was in inadvertent typographical error.

INCORPORATION BY REFERENCE

The Plaintiff hereby incorporates by reference the factual statements set forth in the body of Plaintiff's Amended Complaint for Personal Injury, Pain and Suffering and Permanent Pain Due to Medical Malpractice filed herein on May 17th, 2012.

REQUEST FOR RELIEF

Wherefore, Plaintiff prays to this Court for:

A. Allowing the Amendment of this Complaint to reflect the proper parties and that the Caption so reflect and for the inclusion of the proper jurisdictional statement.

B. Compensatory damages in an amount sufficient to make Plaintiff whole, jointly and severally against all Defendants;

C. Punitive damages in an amount sufficient to punish and deter, against the individual Defendants on the federal claims;

D. Equitable relief including but not limited to return of Plaintiff's property;

E. Plaintiff's costs, expenses and attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. § 1988; and

F. Such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands trial by jury on all counts so triable.

Respectfully submitted,

/s/
Daniel Sanchez
2304 Middle Court
Santa Fe, New Mexico 87505
(505) 946-8394/Fax (505) 473-4270

I hereby certify that I caused a true and correct copy of the foregoing to be mailed to Opposing Party on this 16th day of October, 2012 via electronic mail.

/s/
Daniel Sanchez

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
12 MAY 16 PM 2:08
CLERK-SANTA FE

JOSEPH J. RUIZ

Plaintiff,

Vs.

UNITED STATES OF AMERICA
BUREAU OF PRISONS
KAREN EDENFIED, WARDEN
JORGE PARTIDA, MD.

CIV 12-521 ACT LFG

DEFENDANTS.

COMPLAINT FOR PERSONAL INJURY, PAIN AND SUFFERING AND PERMANENT PAIN DUE TO MEDICAL MAL PRACTICE.

Comes Now Plaintiff, Pro Se states:

1. Plaintiff was a federal prisoner under the custody of the Bureau of Prisons at the Federal Satellite Camp in Big Springs, Texas from September 17, 2008 until September 13, 2012 and then at the Dierson Charities Halfway House in Albuquerque, New Mexico from September 13, 2011 until October 18, 2012 and then while under Home Confinement from October 18, 2012 until February 23, 2012 and then again at Dierson from February 23, 2012 until he was released from the Custody of Bureau of Prisons to his own custody on March 9, 2012.

2. On or about the third or fourth week of May 2010, immediately following the 4:00 PM "count" all Camp inmates were release for dinner. During this mad daily rush to exit the dormitory building, all 150-175 inmates funnel through a single door opening to get to the outside and then rush to the dining hall. On the day that my accident happened, I felt a push from behind as I was making my way out the building. This push caused me to lose my balance and fall causing immediate pain to both wrists. The Guards on duty, Officer Sanchez and Officer Ibanez were notified. They advised that I see the nurse when I went for my daily medications at 6:00 PM.

3. On the day of the accident I advised nurse Chang as the Guards advised, Nurse Chang saw the swelling in both wrists, asked to wiggle my fingers. I did as he asked. His response was, "no damage, as you would not be able to wiggle your fingers if your wrists were broken." He offered nothing for the pain

4. A few days later, I filled out a "Sick Call" form that is required if one has a medical issue and wants to see a doctor. The pain and swelling was intense.

5. A few days after the Sick Call form was sent, I was on the Call-Out Report on the bulletin board for the next day.

6. At Sick Call, nurse Skaggs saw the swelling which had not gone down. She asked if I wanted a few days off from work. I told her that I was still doing my daily job of buffing the floor in "B" dorm. She issued a one week "Lay-In." She also said that she would send me some Ibuprofen the next day. None were sent. She said she wanted to wrap my wrists, but couldn't find any. The wrists remained untreated and the intense pain continued.

7. I kept writing and submitting Sick Call forms every week as the swelling and intense pain continued.

8. I was finally placed on the Call-Out several weeks later to go "behind the fence" (the main prison facility that houses over 1,000 inmates) for an x-ray. I went and was told that my left wrist was to be x-rayed. I asked why my right wrist was not going to be x-rayed and was told by the x-ray technician that she only had orders for the left. After taking a series of x-rays on my left wrist the x-ray tech took them to the Chief Medical MD., Dr. Partida. Upon her return, I was told that there was no damage to my wrists and asked if I had a high tolerance to pain. I replied that I did.

9. More time (weeks) passed and more Sick Call forms were filed out.

10. Sometime later, I was paged by the Guard and was told when I reported to him that I was to instructed to report to the Camp Medical office to see a doctor. It was not a doctor but the x-ray technician. She used the small portable x-ray machine in the Camp Office and x-ray my left wrist again. Again I asked about the right one and showed her the swelling on both wrists. She said, again, that she only had orders to do the left one. She took the x-rays and we both left.

11. Later that same day, I was paged again. I was told to report to the Camp Medical building again. When I arrived, I was told that she had been given to OK to x-ray my right wrist, so she did and we both left.

12. Later on that same day, I was paged for the third time to report to the Camp Medical building. This time, in addition to the x-ray tech, nurse Smith was there waiting for me. I was told that they had "good news and bad news." The good news was that they were giving me a 30 day Lay-in and the bad news was that both wrists were broken. They then put both arms and wrists in a "mold-to fit" plastic planks that went from my wrists to my elbows. Again, I was not given anything for pain which continued as did the swelling.

13. I continued to complain about the pain and swelling so more Sick Call forms were filled out.

14. One morning sometime later, I was paged to the Camp Officers (CO) office and was told to put my uniform on and go with a CO that was waiting for me. I asked where I was being taken to and was told that I was being taken to see a Dr. Hayes who was an private Orthopedic doctor in town. When we arrived at his office, which is located inside the local Big Spring Hospital, I was told to report to the facilities x-ray laboratory for more x-rays. I did as I was directed and then reported to Dr. Hayes' office to see him.

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4. Plaintiff seeks trial by jury if allowed.

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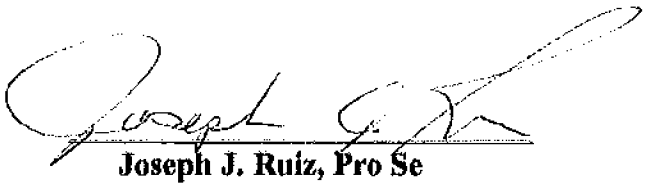
Respectfully submitted:



Joseph J. Ruiz, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing pleading was attached to the Complaint for service to the defendants, through the Wardens office via the United States Postal Service and was sent as Certified Return Receipt Requested.



Joseph J. Ruiz, Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH J. RUIZ,

Plaintiff,

No. CIV 12-521 JB/CEG

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION OF DISMISSAL

The Parties, by their undersigned attorneys, hereby stipulate and agree that this action is dismissed with prejudice, with the parties to bear their own costs.

This Stipulation is entered into in accordance with the provisions of Rule 41(a)(1)(A)(ii), Federal Rules of Civil Procedure.

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Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOSEPH J. RUIZ,

Plaintiff,

vs. No. CIV 12-0521 JB/CEG

UNITED STATES OF AMERICA,

Defendant.

FINAL JUDGMENT

THIS MATTER comes before the Court on the Stipulation of Dismissal, filed December 22, 2014 (Doc. 52). The Stipulation of Dismissal dismissed all claims and parties in the action with prejudice pursuant to rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure. The Court now enters final judgment.

IT IS ORDERED that all claims and parties in this action are dismissed with prejudice, and final judgment is entered.

UNITED STATES DISTRICT JUDGE

Counsel:

Daniel A. Sanchez
Daniel J. Sanchez
Sanchez Law Group, LLC
Santa Fe, New Mexico

Attorneys for the Plaintiff

Damon P. Martinez
United States Attorney
Jan Elizabeth Mitchell
Ruth Fuess Keegan
Erin Langenwalter
Assistant United States Attorneys
United States Attorney's Office
Albuquerque, New Mexico

Attorneys for the Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOSEPH J. RUIZ,

Plaintiff,

vs. No. CIV 12-0521 JB/CEG

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER
ADOPTING PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court on the Magistrate Judge's Proposed Findings and Recommended Disposition, filed February 5, 2014 (Doc. 30)("PFRD"). In the PFRD, the Honorable Carmen E. Garza, United States Magistrate Judge, recommended that Karen Wedenfield's, Jorge Partida's, and Eric Holder's requests in the Motion and Memorandum to Dismiss Plaintiff's Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) for Lack of Jurisdiction, filed October 30, 2012 (Doc. 23)("MTD"), be denied, and that Plaintiff Joseph J. Ruiz' request to amend the caption of this case pursuant to the Second Amended Complaint for Personal Injury, Pain and Suffering and Permanent Pain Due to Medical Malpractice, filed October 16, 2012 (Doc. 22), be granted. The parties were notified that written objections to the PFRD were due within fourteen days. See PFRD at 5. No objections have been filed, and the deadline of February 24, 2014, has passed. Because the Court concludes that Judge Garza's PFRD is not clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion, the Court will adopt it.

LAW REGARDING PROPOSED FINDINGS AND RECOMMENDATIONS

Where no party objects to the Magistrate Judge's proposed findings and recommended disposition, the Court has, as a matter of course in the past and in the interests of justice, reviewed the Magistrate Judge's recommendations. In Workheiser v. City of Clovis, No. CIV 12-0485 JB/GBW, 2012 WL 6846401 (D.N.M. Dec. 28, 2012)(Browning, J.), where the plaintiff failed to respond to the Magistrate Judge's proposed findings and recommended disposition, although the Court determined that the plaintiff "has waived his opportunity for the Court to conduct review of the factual and legal findings in the [proposed findings and recommended disposition]," the Court nevertheless conducted such a review. 2012 WL 6846401, at *3. The Court generally does not, however, review the Magistrate Judge's proposed findings and recommended disposition *de novo*, and determine independently necessarily what it would do if the issues had come before the Court first, but rather adopts the proposed findings and recommended disposition where "[t]he Court cannot say that the Magistrate Judge's recommendation . . . is clearly erroneous, arbitrary, [obviously][1] contrary to law, or an abuse of discretion." Workheiser v. City of Clovis, 2012 WL

[1] The Court previously used as the standard for review when a party does not object to the Magistrate Judge's proposed findings and recommended disposition whether the recommendation was "clearly erroneous, arbitrary, contrary to law, or an abuse of discretion," thus omitting "obviously" in front of contrary to law. Solomon v. Holder, CIV 12-1039 JB/LAM, 2013 WL 499300, at *4 (D.N.M. Jan. 31, 2013)(Browning J.)(adopting the recommendation to which there was no objection, stating: "The Court determines that the PFRD is not clearly erroneous, arbitrary, contrary to law, or an abuse of discretion, and accordingly adopts the recommendations therein"); O'Neill v. Jaramillo, CIV 11-0858 JB/GBW, 2013 WL 499521 (D.N.M. Jan. 31, 2013)(Browning, J.)("Having reviewed the PRFD under that standard, the Court cannot say that the Magistrate Judge's recommendation is clearly erroneous, arbitrary, contrary to law, or an abuse of discretion. The Court thus adopts Judge Wormuth's PFRD.")(citing Workheiser v. City of Clovis, 2012 WL 6846401, at *3); Galloway v. JP Morgan Chase & Co., CIV 12-0625 JB/RHS, 2013 WL 503744 (D.N.M. Jan. 31, 2013)(Browning, J.)(adopting the Magistrate Judge's recommendations upon determining that they were not "clearly contrary to law, or an abuse of discretion."). The Court does not believe that "contrary to law" reflects well the deferential standard of review that the Court intends to use when there is no objection. Finding that a

6846401, at *3. This review, which is deferential to the Magistrate Judge's work when there is no objection, nonetheless provides some review in the interest of justice, and seems more consistent with the intent of the waiver rule than no review at all or a full-fledged review. Accordingly, the Court considers this standard of review appropriate. See Thomas v. Arn, 474 U.S. 140, 151 (1985)("There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate's report than the court considers appropriate."). The Court is reluctant to have no review at all if its name is going to go at the bottom of the order adopting the Magistrate Judge's proposed findings and recommendations.

ANALYSIS

The Court has reviewed the PFRD to determine whether the recommendations are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion. The Court has determined that they are not. Accordingly, the Court will adopt the PFRD as its own.

IT IS ORDERED that: (i) Karen Wedenfield, Jorge Partida, and Eric Holder's requests in the Motion and Memorandum to Dismiss Plaintiff's Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) for Lack of Jurisdiction, filed October 30, 2012 (Doc. 23), be denied; and (ii) the caption of this case be amended to reflect the proper parties pursuant to the Second Amended Complaint for Personal Injury, Pain and Suffering and Permanent Pain Due to Medical

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Magistrate Judge's recommendation is contrary to law would require the Court to analyze the Magistrate Judge's application of law to the facts or the magistrate judge's delineation of the facts -- in other words performing a *de novo* review, which is required when a party objects to the recommendations only. The Court believes adding "obviously" reflects better that the Court is not performing a *de novo* review of the Magistrate Judges' recommendations. Going forward, therefore, the Court will review Magistrate Judges' recommendations to which there are no objections for whether the recommendations are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion.

Malpractice, filed October 16, 2012 (Doc. 22); Karen Wedenfield, Jorge Partida, and Eric Holder shall be removed as Defendants; and Defendant United States of America shall be added as the sole Defendant in the caption. All parties should comport their filings accordingly. The Clerk of the Court shall terminate Karen Wedenfield, Jorge Partida, and Eric Holder from the case docket, and add the United States as the Defendant in this matter.

UNITED STATES DISTRICT JUDGE

Counsel:

Daniel A. Sanchez
Santa Fe, New Mexico

Attorney for the Plaintiff

Kenneth J. Gonzales
United States Attorney
Ruth Fuess Keegan
Jan Elizabeth Mitchell
Assistant United States Attorneys
United States Attorney's Office
Albuquerque, New Mexico

Attorneys for the Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOSEPH J. RUIZ,

Plaintiff,

vs. No. CIV 12-0521 JB/LFG

KAREN EDENFIED, Warden,
FCI Big Spring; JORGE PARTIDA,
MD, FCI Big Spring; and ERIC HOLDER,
U.S. Attorney General,

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION BUT ALLOWING PLAINTIFF TO FILE AMENDED COMPLAINT

THIS MATTER comes before the Court on the Magistrate Judge's Report and Recommendation, filed September 5, 2012 (Doc. 17)("R&R"). The Honorable Lorenzo F. Garcia, United States Magistrate Judge, recommends that the Court dismiss Plaintiff Joseph J. Ruiz's Amended Complaint, filed May 17, 2012 (Doc. 3), without prejudice, or alternatively, allow him to file another amended complaint to name the sole proper party Defendant, see R&R at 3-4 . On September 24, 2012, Ruiz filed objections. See Objections to Report and Recommendation, filed Sep. 24, 2012, (Doc. 20)("Objections").

The Court conducted a *de novo* review of those portions of Judge Garcia's R&R to which Ruiz objects. In his Objections, Ruiz states that he inadvertently omitted the United States of America as a party Defendant and now understands that the United States is the proper Defendant. In addition, Ruiz notes that he has retained counsel, who now represents him in this matter.

Ruiz asks that the Court deny the recommendation to dismiss, without prejudice, and that he be allowed to file an amended complaint naming the proper Defendant. Having found good grounds to allow the amendment, the Court adopts the R&R to the extent that Ruiz is allowed to file an

amended complaint naming the proper Defendant within twenty days after entry of this Order.

IT IS ORDERED that the Magistrate Judge's Report and Recommendation is granted to the extent the Plaintiff Joseph J. Ruiz is allowed to file an amended complaint naming the proper Defendant within twenty days after this Order.

UNITED STATES DISTRICT COURT

Counsel

Daniel A. Sanchez
Santa Fe, New Mexico

Counsel for Plaintiff Joseph J. Ruiz

Jan Elizabeth Mitchell
Assistant United States Attorney
United States Attorneys Office
Albuquerque, New Mexico

Counsel for Defendants Karen Edenfied, Jorge Partida, and Eric Holder

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SCR-2013-01173 **Short Description:** RUIZ V. UNITED STATES OF AMERICA BUREAU OF PRISONS ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:12-cv-00521-JB-LFG
Short Description	RUIZ V. UNITED STATES OF AMERICA BUREAU OF PRISONS ET AL
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	SOUTH CENTRAL REGIONAL OFFICE
Current Institution	
Incident Region	SOUTH CENTRAL REGIONAL OFFICE
Incident Institution	Big Spring (FCI)
Monetary Relief Sought	$
Estimated Amount	$
Office	Albuquerque
Jurisdiction	DISTRICT OF NEW MEXICO
Responsible Legal Office	SCRO Dallas

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	02/19/2015
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$132,500.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	07/10/2013
Date Filed	05/16/2012

Case Progress

Current Owner	BRENDA VICTOR
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	28:1391 PERSONAL INJURY
Further Case Classification	
Comments	

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United States Department of Justice - Office of General Counsel & Review

JUDGE DAVID BRIONES

RECEIVED
OCT 24 2013
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
ELSA ALEXANDER,
RACHEL CHAPA,
PHILLIP DUNIGAN,
ELIAS HERNANDEZ,
DALE J. KERSTEEN,
NORMA AVILA-MUNOZ,
STEVEN D. NILES, and
JUAN PELL,
Defendants.

§

Civil Action No. EP13CV0337

COMPLAINT FOR DAMAGES

JURY TRIAL DEMANDED

COMES NOW the Plaintiff, Gary Charles Smith, in pro se, and pursuant to Rule 3 of the Federal Rules of Civil Procedure alleges the following:

JURISDICTION and VENUE

1. This Court has jurisdiction of the subject matter of this cause of action pursuant to 28 U.S.C. §§ 1331, 1346(a) & (b); the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq.; and the Eighth Amendment to the United States Constitution.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1402, in that the acts or omissions complained of occurred within this judicial district, and the Plaintiff resides in this judicial district.

CONDITIONS PRECEDENT TO SUIT

3. On March 13, 2013, Plaintiff submitted an administrative claim for damage, injury, or death, to the Federal Bureau of Prisons' South Central Regional Office.

4. The claim was deemed denied by operation of law because the Federal Bureau of Prisons failed finally to dispose of the claim within six months after its submission.[1]

5. This suit was duly and timely commenced within six (6) months of the denial of the claim.

6. With respect to the Bivens claim incorporated in this complaint, Plaintiff avers that he has exhausted the administrative remedies available to him.

PARTIES

7. Plaintiff, an inmate confined at the La Tuna Federal Correctional Institution in Anthony, TX/NM, is a legal resident of the State of North Carolina.

8. Defendant United States of America is sued under the Federal Tort Claims Act for negligence by law enforcement officers of the Federal Bureau of Prisons.

9. Defendant Elsa Alexander was, at all times relevant in this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in her official capacity.

10. Defendant Rachel Chapa was, at all times relevant in this complaint, an employee and officer of the Federal Bureau

[1]The Bureau of Prisons, which had six months from March 13, to make an administrative decision concerning the matter, notified Plaintiff by letter dated October 1, 2013, that the claim had been denied.

of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in her individual capacity.

11. Defendant Phillip Dunigan was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in his individual capacity.

12. Defendant Elias Hernandez was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in his official capacity.

13. Defendant Dale J. Kersteen, R.N., was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in his official and individual capacity.

14. Defendant Norma Avila-Munoz was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in her official capacity.

15. Defendant Steven D. Niles was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in his individual capacity.

16. Defendant Juan Pell was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States. This defendant is sued in his official capacity.

FACTS

17. At approximately 2:30 p.m. on Monday, November 26, 2012, Plaintiff, who was confined in the Special Housing Unit (SHU) at the La Tuna Federal Correctional Institution, was escorted to the shower located on the second floor of the SHU, along with his then-cellmate, by Correctional Officer Juan Pell.

18. The protocol established and set forth in the post orders for the SHU requires that inmates confined either in Administrative Detention or Disciplinary Segregation must be restrained behind their backs whenever they are out of their assigned cells.

19. Ordinarily, two correctional officers escort two inmates at a time to and from the shower; however, on this date Officer Pell was the only staff member on duty. Thus, he first escorted Plaintiff to the shower, secured the door thereto, and returned to escort Plaintiff's cellmate.

20. After Plaintiff and his cellmate had finished showering, the process of conveying them to their cell reversed: Glenn returned first, Pell secured the cell door, and then went back to the shower room to escort Plaintiff to the cell numbered 220, which was a distance of not more than 15 feet from the shower room.

21. The SHU protocol also directs staff, whenever they are escorting inmates anywhere in the SHU, to hold the inmate's arm to minimize the risk of the inmate's falling.

22. On this date, Officer Pell opened the door so Plaintiff could exit, but he offered Plaintiff no assistance.

23. Plaintiff stepped out of the shower room onto an intermediate concrete block, and then down upon a highly waxed concrete

floor. His feet flew from under him, which caused him to fall backward on the floor and land on his right arm that was secured with handcuffs behind his back.

24. At the time, there were no slip resistant mats or other materials on the floor to prevent one from slipping and falling, nor were there any wet floor signs in place.

25. Staff's usual practice whenever inmates showered was to place blankets and articles of soiled, discarded clothing on the floor, a makeshift effort to minimize the risk of inmates slipping and falling on a wet floor. On the date in question, however, Plaintiff and his cellmate were among the first inmates escorted to the shower, so there were no blankets or soiled clothing yet available to be placed on the floor.

26. The impact of Plaintiff's fall was of such a magnitude that his head hit the concrete floor, and handcuffs applied to his wrists and secured behind his back lacerated his left wrist.

27. Experiencing immediate and horrendous pain, Plaintiff implored Pell, who was standing nearby, to remove the handcuffs, maintaining, "My arm is broken, my arm is broken."

28. Defendant Alexander, who was in the SHU speaking to another inmate, came to where Plaintiff was lying on the floor and instructed him to get up. She then undertook to assist Plaintiff from off the floor by grabbing his already fractured arm and insisting, "No, your arm is not broken."

29. Officer Pell summoned medical assistance, while nevertheless directing Plaintiff to get off the floor. Pell then brought a chair and placed it beside Plaintiff and continued to maintain that Plaintiff must get off the floor.

30. Plaintiff eventually was able to comply with Pell's instructions, and without assistance rose from the floor and sat briefly in the chair. Pell then escorted Plaintiff back to his cell. Only after Plaintiff was back in his cell and the door thereto had been secured did Pell remove the restraints.

31. Defendant Kersteen, the on-duty nurse, arrived soon after Plaintiff arrived at his cell. Instead, however, of entering the cell to examine Plaintiff, Kersteen opened the metal slot in the cell door, instructed Plaintiff to get off his bunk and extend his left arm through the slot so that Kersteen could take a blood pressure reading.

32. After obtaining Plaintiff's vital signs, Kersteen left the SHU. He never examined Plaintiff, although he observed the laceration on Plaintiff's left wrist and thereafter made not of that in his report.

33. Lieutenant Barraza, the on-duty activities lieutenant, arrived to photograph Plaintiff's injuries. Although initially concerned about the laceration and how it occurred, Plaintiff indicated to Barraza that the minor laceration was the least of his problems, because his right arm had been injured.

34. Lt. Barraza then observed an obvious deformity to the mid-shaft of Plaintiff's right arm. The fractured humerus was protruding through the muscle in such a manner that it looked as though Plaintiff's shoulder had dislocated, but palpation of the shoulder revealed it was intact.

35. Lt. Barraza radioed Kersteen and directed him to return to the SHU.

36. Upon Kersteen's arrival, he entered Plaintiff's cell,

performed a visual examination of Plaintiff's injured arm, and rather glibly remarked to Lt. Barraza, "Oh, he's just torn his rotator cuff; that's all."

37. Thereafter, Kersteen arranged to have Plaintiff transported to the emergency room at Providence Memorial Hospital in El Paso, TX. Before sending Plaintiff to the emergency room, Kersteen neither splinted nor immobilized Plaintiff's injured arm.

38. It is commonly known that an obviously injured limb requires immobilization and stabilization, particularly before a person is moved, and that failure to splint or otherwise immobilize an injured lim puts the injured person at risk for further injury and increased pain.

39. In preparation for transporting Plaintiff to the hospital, Defendant Elias Hernandez restrained Plaintiff's wrists and ankles with handcuffs attached to and secured by a Martin chain, and shackles that were applied in such a fashion that Plaintiff sustained contusions and scars on his ankles, which are still visible.

40. Plaintiff, escorted by Defendant Hernandez and Correctional Officer R. Merritt, arrived at Providence Memorial Hospital, holding his fractured arm with his left hand. He was admitted to the emergency room at 5:29 p.m.

41. At 7:34 p.m., Nurse Practitioner John Skory, designated as Plaintiff's primary healthcare provider, immediately upon a visual examination of Plaintiff's arm said, "You have a fracture."

42. Nurse Skory then ordered a radiographic study of Plaintiff's right humerus, which revealed "an acute fracture of the midshaft of the right humerus [with] a 14 millimeter distraction,

moderate posterior medial angulation, and one[-]third shaft width lateral displacement."

43. Nurse Skory prescribed and ordered a nurse, Steven Quigley, R.N., to dispense and administer a one-time dosage of Motrin (600 mg.) and Vicodin (5 mg.).

44. Plaintiff's arm was installed in a long-arm splint by an orthopaedic technician.

45. Plaintiff was then discharged from the emergency room; however, prior to his leaving the emergency room, Nurse Quigley handed Plaintiff four sheets of paper: the diagnosis of the injury, prescriptions for Motrin and Narco, instructions for care and maintenance of the splint, and a referral to see Hector Pacheco, M.D., within two to three days (emphasis added).

46. Defendant Hernandez took the four sheets of paper from Plaintiff and indicated he would convey the documents to the appropriate personnel at FCI La Tuna.

47. The following day, November 27, 2012, Plaintiff, who described his pain level at being ten on a scale of one to ten, requested pain medication. Medical staff told him there were no orders for any medications to be administered, because the discharge orders from the hospital had either been misplaced or lost.

48. At 4:08 p.m. on November 28, 2012, Providence Memorial Hospital transmitted to FCI La Tuna via facsimile Plaintiff's emergency room records, including the diagnosis, prescriptions, and the radiologist's report.

49. Still without pain relievers and in excruciating pain,

Plaintiff spoke with Dolores Rios, R.N., who brought Plaintiff from the pharmacy's night stock a packet containing a three-day supply of Motrin (800 mg.), although there were still no orders for any medications to be dispensed to Plaintiff.

50. Twenty-four hours later, after Plaintiff still had no medications dispensed to him, he spoke with PA Stanton Hawkes, who was unaware of Plaintiff's having been injured. In the notes of the clinical encounter, Hawkes recorded that Plaintiff was "writhing in pain," and he thereafter wrote a three-day prescription for Tylenol #3.

51. FCI La Tuna medical personnel had apparently ignored the recommendation to have Plaintiff seen by an orthopaedic surgeon within two to three days of his having been injured. On Friday, December 7, 2013, Plaintiff spoke with the warden, Defendant Rachel Chapa, who told Plaintiff she was aware of his situation, and that he would be seen shortly by the contract orthopaedic specialist.

52. On Tuesday, December 11, 2012, fifteen (15) days after Plaintiff's injury, he was taken to the Health Services Department for an xray, the intent of which was to "rule out" a fracture of the humerus.

53. The xray was transmitted to DIANAssociates at the University of Maryland and revealed, consistent with the findings of the radiologist at Providence Memorial Hospital, an "acute [fracture] at midshaft of the humerus with caudal dislocation of the distal fragment and medial angulation."

54. On Monday, December 17, 2012, exactly three weeks to the day after Plaintiff's injury, he was seen at the El Paso Orthopaedic Surgery Group and Center for Sports Medicine by Andrew J. Palafox, M.D., who after viewing another xray and performing a physical examination recorded that Plaintiff's "right arm show[ed] an obvious mid[-]shaft deformity," and that xrays show[ed] a mid[-]shaft 90 degree angulated fracture of the humerus, which indicated that Plaintiff's condition had worsened from the time of his injury until he was seen by Dr. Palafox.

55. Dr. Palafox discussed with Plaintiff various treatment options, but he opined that because of the position of Plaintiff's arm, an open reduction with internal fixation and intramedullary nailing would be the course of treatment that would best address the injury, which already had been exacerbated by the inordinate and unsupportable delay.

56. Plaintiff specifically inquired of Dr. Palafox when he would perform the recommended surgery, and Dr. Palafox responded, "Within a week," though that prediction was contingent upon the timeliness of FCI La Tuna staff's response.

57. The Christmas and New Year's holidays passed without Plaintiff's undergoing surgery. After January 1, 2013, Plaintiff inquired of Defendant Chapa why the surgery hadn't occurred, only to have her respond, "Well, you know, that doctor had to chew on some turkey during Christmas."

58. The physicians at El Paso Orthopaedic Surgery Group and Center for Sports Medicine with whom Dr. Palafox practices own the El Paso Specialty Hospital, which has an emergency room

staffed by an orthopaedic surgeon around the clock, seven days a week. Assuming that Dr. Palafox could not schedule the surgery Plaintiff required because of his having "to chew on some turkey" during the Christmas holidays, the very medical practice with which the Bureau of Prisons contracts for orthopaedic services would most likely have been able to treat Plaintiff's serious and already compounded injury.

59. It was not until Tuesday, January 15, 2013, four weeks after the initial consultation with Dr. Palafox, that Plaintiff was taken for surgery. The procedure had to be delayed, however, because FCI La Tuna medical and correctional personnel failed to advise Plaintiff that he must not eat or drink anything after midnight before the procedure. Plaintiff was given breakfast on the morning of January 15, 2013, and told almost immediately thereafter that he would be going into the hospital for the surgery.

60. The surgery was rescheduled for the afternoon of Thursday, January 17, 2013. Dr. Palafox visited Plaintiff in the pre-operative room and commented, "I wanted to do this a month ago, but..."

61. Following the surgery, Plaintiff was admitted to the hospital, where he remained overnight and discharged the following day, January 18, 2013, with instructions to see Dr. Palafox one week later.

62. Upon his return to FCI La Tuna, Plaintiff was placed back on a medication regimen of Tylenol #3 and Motrin.

63. On Tuesday, January 22, 2013, Plaintiff noticed what appeared to be blood on the dressing applied to his arm following

the surgery five days earlier. He requested that medical staff at FCI La Tuna merely change the dressing on the surgical wound, but Defendant Avila-Munoz, a mid-level provider, decided to remove entirely the dressing the splint from Plaintiff's arm. During that encounter, Defendant Munoz expressed an intention to remove the sutures, but Plaintiff strenuously objected.

64. Instead of being seen by Dr. Palafox in accordance with his orders one week after Plaintiff's discharge from the hospital, it was not until February 22, 2013, exactly five weeks later, that Plaintiff went for a follow-up appointment. Dr. Palafox advised Plaintiff that the fracture had not begun to heal, and that he would see Plaintiff again approximately six weeks later.

65. On March 14, 2013, Plaintiff filed a request for administrative remedy in which he complained that since he had been injured, he had yet to be seen and examined by a Bureau of Prisons physician. Plaintiff stated that given the seriousness of the injury he sustained, professional prudence would seem to dictate that the Bureau of Prisons' physician should see and consult with him. Plaintiff opined in his administrative remedy request that the Bureau's failure to follow his case evidenced incompetence and indifference by Health Services staff at FCI La Tuna.

66. Defendant Chapa responded to the request for administrative remedy on April 18, 2013, by informing Plaintiff he was being followed by the contract orthopaedist, Dr. Palafox.

67. On April 3, 2013, Plaintiff returned to see Dr. Palafox and learned that a surgical revision of the open reduction internal fixation would be required, because there had been a loss of

reduction and a loosening of at least two of the seven screws installed during the January 17, 2013, surgical procedure.

68. Plaintiff specifically inquired of Dr. Palafox what likely conditions converged and precipitated the need for an additional surgery. Dr. Palafox opined that the significant delay in Plaintiff's being treated for an injury, the seriousness of which Dr. Palafox rated as being seven on a scale of one to ten, created serious obstacles to the proper alignment of the fractured humerus.

69. A second surgical procedure was performed on Tuesday, May 7, 2013, during which synthetic material was grafted onto the humerus and eight screws were installed, in an attempt to achieve proper alignment and union of the bone.

70. Plaintiff saw Dr. Palafox in post-surgical follow-up office visits on May 15, 31, July 2, and August 19, 2013. During the August 19, 2013, office visit, Dr. Palafox indicated that xrays revealed a "slight improvement" in the condition of Plaintiff's arm, but that there also appeared to be a loosening of at least one of the screws installed on May 7. Of particular concern to Dr. Palafox was that there remained a non-union of the humerus.

71. During the office visits with Dr. Palafox on July 2 and August 19, Plaintiff was told specifically that he would remain under the physician's care "until [he] is fully healed." Dr. Palafox cautioned Plaintiff that he was "not out of the woods yet," and to "keep his fingers crossed."

72. Plaintiff saw Dr. Palafox on September 25, 2013, during which the surgeon said Plaintiff's arm was worse than during the August 19, 2013, appointment, and that a further surgical

intervention would be required, which will entail harvesting bone from Plaintiff's hip and grafting it onto the humerus, along with repairing the further loss of reduction in the arm.

73. On September 27, 2013, Plaintiff had a verbal encounter with Defendant Steven D. Niles, during which Plaintiff asked Niles if he were aware Plaintiff faces a third surgical procedure. Niles responded, "Yes, and we're going to get our attorney involved with your outside doctor," a statement Plaintiff inferred as constituting an intention by FCI La Tuna personnel to influence Dr. Palafox to withdraw his recommendation and discharge Plaintiff from his service, thereby removing any obstacles to Plaintiff's being transferred from FCI La Tuna to another Bureau of Prisons facility.

74. Following Plaintiff's visit with Dr. Palafox on August 19, 2013, Defendants Niles and Dunigan sought permission from the Bureau of Prisons' South Central Regional Health Services staff to transfer Plaintiff away from FCI La Tuna before he had been medically cleared and discharged, which was a deliberate and unveiled attempt to compromise and undermine Plaintiff's treatment, and in blatant contravention of Defendant Chapa's averment that is set forth in paragraph 66 of this complaint.

75. Plaintiff is presently awaiting the third surgical procedure.

COMMON-LAW CLAIMS AGAINST THE UNITED STATES

76. The actions of Defendants Chapa, Niles, Dunigan, Kersteen, Avila-Munoz, Hernandez, Pell, and Alexander, set forth in paragraphs 17 through 75 constitute the torts of negligence, fault,

and malpractice. Under the Federal Tort Claims Act, the Defendant United States of America is liable to the Plaintiff for the negligence, fault, and malpractice of the aforementioned officers, as they were acting within the scope of their employment as officers of the Federal Bureau of Prisons.

77. As a direct and proximate result of the defendants' negligence, fault, malpractice, Plaintiff has suffered irreparable physical harm, inordinate pain and suffering, mental anguish, and emotional distress, all to Plaintiff's damage.

78. The actions of Defendant Elias Hernandez, set forth in paragraph 39 of this complaint, constitute negligence. The officer had a duty to the Plaintiff not to place ankle restraints on the Plaintiff's ankles so that the mere placement of the shackles caused Plaintiff pain and injury. Officer Hernandez breached his duty when he placed the ankle restraints on Plaintiff's ankles in a manner that caused Plaintiff pain and injury. The breach of his duty was a direct and proximate cause of the Plaintiff's pain and injury. Under the Federal Tort Claims Act, the Defendant United States of America is liable to the Plaintiff for the unlawful actions of Officer Hernandez, as he was acting within the scope of his employment as a law enforcement officer of the Federal Bureau of Prisons.

CONSTITUTIONAL (BIVENS) CLAIMS AGAINST DEFENDANTS CHAPA, NILES and DUNIGAN

79. Plaintiff realleges and incorporates by reference paragraphs 10-11, 15, and 17-75 of this complaint.

80. The U.S. Supreme Court held in Estelle v. Gamble, 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285 (1976), that elementary

principles of the Eighth Amendment establish the government's obligation to provide medical care for prisoners.

81. Deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain and suffering, and courts in every judicial district of the United States have acknowledged that bleeding cuts and broken bones constitute serious medical needs.

82. Deliberate indifference may be manifested by a showing that prison officials deny, delay, or intentionally interfere with medical treatment.

83. Defendants Chapa, Dunigan, and Niles were well aware that Plaintiff had sustained a serious injury, yet they ignored the need for him to see an orthopaedic specialist, and as a result of their indifference, Plaintiff suffered substantial harm.

84. The defendants had a subjective knowledge of the risk of serious harm arising out of Plaintiff's medical need, and they deliberately disregarded that risk.

85. Plaintiff's injury did not involve a broken finger or toe, but rather one of the major bones in his arm. For the defendants to advance that there was no documentation from the emergency room at Providence Memorial Hospital that Plaintiff needed to be seen by an orthopaedic surgeon when they knew full well Plaintiff had sustained a serious fracture of his humerus. Defendant Dunigan is a licensed physician's assistant, who is fully aware that leaving a fracture untreated puts a patient at significant risk or neurovascular compromise and other serious

medical complications.

86. Although FCI La Tuna personnel were aware of the extent of Plaintiff's injuries from the information received that was transmitted by Providence Memorial Hospital on November 28, 2012, it nevertheless took them two weeks to order an xray, the objective of which was to "rule out" a fracture, something that had been confirmed already by a qualified radiologist.

87. FCI La Tuna Health Services staff received on December 12, 2012, the report from the xray transmitted to the University of Maryland, which essentially repeated the findings of the radiologist at Providence Memorial Hospital on November 26, 2012. Upon receipt of the findings from the University of Maryland, another five days passed before Plaintiff's initial consultation with Dr. Palafox.

88. Additional evidence of defendants' deliberate indifference to Plaintiff's serious medical needs occurred following Plaintiff's August 19, 2013, appointment with Dr. Palafox. Defendants Dunigan and Niles conspired and confederated to have Plaintiff removed and transferred from FCI La Tuna before he had been medically cleared and discharged by Dr. Palafox. The actions of Dunigan and Niles, likely with the imprimatur of Defendant Chapa, deliberately attempted to interfere with the course of Plaintiff's treatment prescribed by Dr. Palafox.

89. The actions of Defendants Chapa, Dunigan, and Niles constitute evidence of crassly self-serving, crudely opportunistic interests, and a blatant disregard for Plaintiff's welfare, and only furthered the deliberate indifference that has characterized Plaintiff's entire ordeal.

90. It is quite simply unthinkable -- and unconscionable -- that any human being should have lain for nearly two months with a seriously untreated fractured limb.

91. As a direct and proximate result of the defendants' deliberate indifference and their scandalous and outrageous acts, Plaintiff has suffered irreparable physical harm, inordinate pain, mental anguish, and emotional distress, all to Plaintiff's damage.

JURY DEMAND

Plaintiff demands a trial by jury on both the Federal Tort Claims and Bivens actions.

PRAYER

Plaintiff requests that he recover from the defendants, and have judgment:

A. on the claims stated in paragraphs 17 - 75, the Plaintiff asks the Court to enter judgment against The United States of America in the sum to be shown at trial, but in no event less than fifteen million dollars ($15,000,000.00);

B. for the sum of one million dollars ($1,000,000.00) as and for punitive or exemplary damages against Defendant Rachel Chapa;

C. for the sum of one million dollars ($1,000,000.00) as and for punitive or exemplary damages against Defendant Phillip Dunigan;

D. for the sum of one million dollars ($1,000,000.00) as and for punitive or exemplary damages against Defendant Steven D. Niles;

E. for an award of costs incurred and reasonable attorney's fees; and

F. for an award for any and all other relief that the Court may consider to be just and proper under the circumstances.

G. Plaintiff reserves the right to rely on the doctrine of res ipsa loquitor.

Respectfully submitted,

October 22, 2013

Gary Charles Smith, Plaintiff
Register Number 05147-058
Federal Correctional Institution
Post Office Box 3000
Anthony, NM 88021-3000

JUDGE DAVID BRIONES

RECEIVED
OCT 24 2013
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
ELSA ALEXANDER,
RACHEL CHAPA,
PHILLIP DUNIGAN,
ELIAS HERNANDEZ,
DALE J. KERSTEEN,
NORMA AVILA-MUNOZ,
STEVEN D. NILES, and
JUAN PELL,
Defendants.

§

Civil Action No. EP13CV0337

COMPLAINT FOR DAMAGES

JURY TRIAL DEMANDED

COMES NOW the Plaintiff, Gary Charles Smith, in pro se, and pursuant to Rule 3 of the Federal Rules of Civil Procedure alleges the following:

JURISDICTION and VENUE

1. This Court has jurisdiction of the subject matter of this cause of action pursuant to 28 U.S.C. §§ 1331, 1346(a) & (b); the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq.; and the Eighth Amendment to the United States Constitution.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1402, in that the acts or omissions complained of occurred within this judicial district, and the Plaintiff resides in this judicial district.

CONDITIONS PRECEDENT TO SUIT

3. On March 13, 2013, Plaintiff submitted an administrative claim for damage, injury, or death, to the Federal Bureau of Prisons' South Central Regional Office.

4. The claim was deemed denied by operation of law because the Federal Bureau of Prisons failed finally to dispose of the claim within six months after its submission.[1]

5. This suit was duly and timely commenced within six (6) months of the denial of the claim.

6. With respect to the Bivens claim incorporated in this complaint, Plaintiff avers that he has exhausted the administrative remedies available to him.

PARTIES

7. Plaintiff, an inmate confined at the La Tuna Federal Correctional Institution in Anthony, TX/NM, is a legal resident of the State of North Carolina.

8. Defendant United States of America is sued under the Federal Tort Claims Act for negligence by law enforcement officers of the Federal Bureau of Prisons.

9. Defendant Elsa Alexander was, at all times relevant in this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in her official capacity.

10. Defendant Rachel Chapa was, at all times relevant in this complaint, an employee and officer of the Federal Bureau

[1]The Bureau of Prisons, which had six months from March 13, to make an administrative decision concerning the matter, notified Plaintiff by letter dated October 1, 2013, that the claim had been denied.

of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in her individual capacity.

11. Defendant Phillip Dunigan was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in his individual capacity.

12. Defendant Elias Hernandez was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in his official capacity.

13. Defendant Dale J. Kersteen, R.N., was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in his official and individual capacity.

14. Defendant Norma Avila-Munoz was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in her official capacity.

15. Defendant Steven D. Niles was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States of America. This defendant is sued in his individual capacity.

16. Defendant Juan Pell was, at all times relevant to this complaint, an employee and officer of the Federal Bureau of Prisons, Department of Justice, an agency of the United States. This defendant is sued in his official capacity.

FACTS

17. At approximately 2:30 p.m. on Monday, November 26, 2012, Plaintiff, who was confined in the Special Housing Unit (SHU) at the La Tuna Federal Correctional Institution, was escorted to the shower located on the second floor of the SHU, along with his then-cellmate, by Correctional Officer Juan Pell.

18. The protocol established and set forth in the post orders for the SHU requires that inmates confined either in Administrative Detention or Disciplinary Segregation must be restrained behind their backs whenever they are out of their assigned cells.

19. Ordinarily, two correctional officers escort two inmates at a time to and from the shower; however, on this date Officer Pell was the only staff member on duty. Thus, he first escorted Plaintiff to the shower, secured the door thereto, and returned to escort Plaintiff's cellmate.

20. After Plaintiff and his cellmate had finished showering, the process of conveying them to their cell reversed: Glenn returned first, Pell secured the cell door, and then went back to the shower room to escort Plaintiff to the cell numbered 220, which was a distance of not more than 15 feet from the shower room.

21. The SHU protocol also directs staff, whenever they are escorting inmates anywhere in the SHU, to hold the inmate's arm to minimize the risk of the inmate's falling.

22. On this date, Officer Pell opened the door so Plaintiff could exit, but he offered Plaintiff no assistance.

23. Plaintiff stepped out of the shower room onto an intermediate concrete block, and then down upon a highly waxed concrete

floor. His feet flew from under him, which caused him to fall backward on the floor and land on his right arm that was secured with handcuffs behind his back.

24. At the time, there were no slip resistant mats or other materials on the floor to prevent one from slipping and falling, nor were there any wet floor signs in place.

25. Staff's usual practice whenever inmates showered was to place blankets and articles of soiled, discarded clothing on the floor, a makeshift effort to minimize the risk of inmates slipping and falling on a wet floor. On the date in question, however, Plaintiff and his cellmate were among the first inmates escorted to the shower, so there were no blankets or soiled clothing yet available to be placed on the floor.

26. The impact of Plaintiff's fall was of such a magnitude that his head hit the concrete floor, and handcuffs applied to his wrists and secured behind his back lacerated his left wrist.

27. Experiencing immediate and horrendous pain, Plaintiff implored Pell, who was standing nearby, to remove the handcuffs, maintaining, "My arm is broken, my arm is broken."

28. Defendant Alexander, who was in the SHU speaking to another inmate, came to where Plaintiff was lying on the floor and instructed him to get up. She then undertook to assist Plaintiff from off the floor by grabbing his already fractured arm and insisting, "No, your arm is not broken."

29. Officer Pell summoned medical assistance, while nevertheless directing Plaintiff to get off the floor. Pell then brought a chair and placed it beside Plaintiff and continued to maintain that Plaintiff must get off the floor.

30. Plaintiff eventually was able to comply with Pell's instructions, and without assistance rose from the floor and sat briefly in the chair. Pell then escorted Plaintiff back to his cell. Only after Plaintiff was back in his cell and the door thereto had been secured did Pell remove the restraints.

31. Defendant Kersteen, the on-duty nurse, arrived soon after Plaintiff arrived at his cell. Instead, however, of entering the cell to examine Plaintiff, Kersteen opened the metal slot in the cell door, instructed Plaintiff to get off his bunk and extend his left arm through the slot so that Kersteen could take a blood pressure reading.

32. After obtaining Plaintiff's vital signs, Kersteen left the SHU. He never examined Plaintiff, although he observed the laceration on Plaintiff's left wrist and thereafter made not of that in his report.

33. Lieutenant Barraza, the on-duty activities lieutenant, arrived to photograph Plaintiff's injuries. Although initially concerned about the laceration and how it occurred, Plaintiff indicated to Barraza that the minor laceration was the least of his problems, because his right arm had been injured.

34. Lt. Barraza then observed an obvious deformity to the mid-shaft of Plaintiff's right arm. The fractured humerus was protruding through the muscle in such a manner that it looked as though Plaintiff's shoulder had dislocated, but palpation of the shoulder revealed it was intact.

35. Lt. Barraza radioed Kersteen and directed him to return to the SHU.

36. Upon Kersteen's arrival, he entered Plaintiff's cell,

performed a visual examination of Plaintiff's injured arm, and rather glibly remarked to Lt. Barraza, "Oh, he's just torn his rotator cuff; that's all."

37. Thereafter, Kersteen arranged to have Plaintiff transported to the emergency room at Providence Memorial Hospital in El Paso, TX. Before sending Plaintiff to the emergency room, Kersteen neither splinted nor immobilized Plaintiff's injured arm.

38. It is commonly known that an obviously injured limb requires immobilization and stabilization, particularly before a person is moved, and that failure to splint or otherwise immobilize an injured lim puts the injured person at risk for further injury and increased pain.

39. In preparation for transporting Plaintiff to the hospital, Defendant Elias Hernandez restrained Plaintiff's wrists and ankles with handcuffs attached to and secured by a Martin chain, and shackles that were applied in such a fashion that Plaintiff sustained contusions and scars on his ankles, which are still visible.

40. Plaintiff, escorted by Defendant Hernandez and Correctional Officer R. Merritt, arrived at Providence Memorial Hospital, holding his fractured arm with his left hand. He was admitted to the emergency room at 5:29 p.m.

41. At 7:34 p.m., Nurse Practitioner John Skory, designated as Plaintiff's primary healthcare provider, immediately upon a visual examination of Plaintiff's arm said, "You have a fracture."

42. Nurse Skory then ordered a radiographic study of Plaintiff's right humerus, which revealed "an acute fracture of the midshaft of the right humerus [with] a 14 millimeter distraction,

moderate posterior medial angulation, and one[-]third shaft width lateral displacement."

43. Nurse Skory prescribed and ordered a nurse, Steven Quigley, R.N., to dispense and administer a one-time dosage of Motrin (600 mg.) and Vicodin (5 mg.).

44. Plaintiff's arm was installed in a long-arm splint by an orthopaedic technician.

45. Plaintiff was then discharged from the emergency room; however, prior to his leaving the emergency room, Nurse Quigley handed Plaintiff four sheets of paper: the diagnosis of the injury, prescriptions for Motrin and Narco, instructions for care and maintenance of the splint, and a referral to see Hector Pacheco, M.D., within two to three days (emphasis added).

46. Defendant Hernandez took the four sheets of paper from Plaintiff and indicated he would convey the documents to the appropriate personnel at FCI La Tuna.

47. The following day, November 27, 2012, Plaintiff, who described his pain level at being ten on a scale of one to ten, requested pain medication. Medical staff told him there were no orders for any medications to be administered, because the discharge orders from the hospital had either been misplaced or lost.

48. At 4:08 p.m. on November 28, 2012, Providence Memorial Hospital transmitted to FCI La Tuna via facsimile Plaintiff's emergency room records, including the diagnosis, prescriptions, and the radiologist's report.

49. Still without pain relievers and in excruciating pain,

Plaintiff spoke with Dolores Rios, R.N., who brought Plaintiff from the pharmacy's night stock a packet containing a three-day supply of Motrin (800 mg.), although there were still no orders for any medications to be dispensed to Plaintiff.

50. Twenty-four hours later, after Plaintiff still had no medications dispensed to him, he spoke with PA Stanton Hawkes, who was unaware of Plaintiff's having been injured. In the notes of the clinical encounter, Hawkes recorded that Plaintiff was "writhing in pain," and he thereafter wrote a three-day prescription for Tylenol #3.

51. FCI La Tuna medical personnel had apparently ignored the recommendation to have Plaintiff seen by an orthopaedic surgeon within two to three days of his having been injured. On Friday, December 7, 2013, Plaintiff spoke with the warden, Defendant Rachel Chapa, who told Plaintiff she was aware of his situation, and that he would be seen shortly by the contract orthopaedic specialist.

52. On Tuesday, December 11, 2012, fifteen (15) days after Plaintiff's injury, he was taken to the Health Services Department for an xray, the intent of which was to "rule out" a fracture of the humerus.

53. The xray was transmitted to DIANAssociates at the University of Maryland and revealed, consistent with the findings of the radiologist at Providence Memorial Hospital, an "acute [fracture] at midshaft of the humerus with caudal dislocation of the distal fragment and medial angulation."

54. On Monday, December 17, 2012, exactly three weeks to the day after Plaintiff's injury, he was seen at the El Paso Orthopaedic Surgery Group and Center for Sports Medicine by Andrew J. Palafox, M.D., who after viewing another xray and performing a physical examination recorded that Plaintiff's "right arm show[ed] an obvious mid[-]shaft deformity," and that xrays show[ed] a mid[-]shaft 90 degree angulated fracture of the humerus, which indicated that Plaintiff's condition had worsened from the time of his injury until he was seen by Dr. Palafox.

55. Dr. Palafox discussed with Plaintiff various treatment options, but he opined that because of the position of Plaintiff's arm, an open reduction with internal fixation and intramedullary nailing would be the course of treatment that would best address the injury, which already had been exacerbated by the inordinate and unsupportable delay.

56. Plaintiff specifically inquired of Dr. Palafox when he would perform the recommended surgery, and Dr. Palafox responded, "Within a week," though that prediction was contingent upon the timeliness of FCI La Tuna staff's response.

57. The Christmas and New Year's holidays passed without Plaintiff's undergoing surgery. After January 1, 2013, Plaintiff inquired of Defendant Chapa why the surgery hadn't occurred, only to have her respond, "Well, you know, that doctor had to chew on some turkey during Christmas."

58. The physicians at El Paso Orthopaedic Surgery Group and Center for Sports Medicine with whom Dr. Palafox practices own the El Paso Specialty Hospital, which has an emergency room

staffed by an orthopaedic surgeon around the clock, seven days a week. Assuming that Dr. Palafox could not schedule the surgery Plaintiff required because of his having "to chew on some turkey" during the Christmas holidays, the very medical practice with which the Bureau of Prisons contracts for orthopaedic services would most likely have been able to treat Plaintiff's serious and already compounded injury.

59. It was not until Tuesday, January 15, 2013, four weeks after the initial consultation with Dr. Palafox, that Plaintiff was taken for surgery. The procedure had to be delayed, however, because FCI La Tuna medical and correctional personnel failed to advise Plaintiff that he must not eat or drink anything after midnight before the procedure. Plaintiff was given breakfast on the morning of January 15, 2013, and told almost immediately thereafter that he would be going into the hospital for the surgery.

60. The surgery was rescheduled for the afternoon of Thursday, January 17, 2013. Dr. Palafox visited Plaintiff in the pre-operative room and commented, "I wanted to do this a month ago, but..."

61. Following the surgery, Plaintiff was admitted to the hospital, where he remained overnight and discharged the following day, January 18, 2013, with instructions to see Dr. Palafox one week later.

62. Upon his return to FCI La Tuna, Plaintiff was placed back on a medication regimen of Tylenol #3 and Motrin.

63. On Tuesday, January 22, 2013, Plaintiff noticed what appeared to be blood on the dressing applied to his arm following

the surgery five days earlier. He requested that medical staff at FCI La Tuna merely change the dressing on the surgical wound, but Defendant Avila-Munoz, a mid-level provider, decided to remove entirely the dressing the splint from Plaintiff's arm. During that encounter, Defendant Munoz expressed an intention to remove the sutures, but Plaintiff strenuously objected.

64. Instead of being seen by Dr. Palafox in accordance with his orders one week after Plaintiff's discharge from the hospital, it was not until February 22, 2013, exactly five weeks later, that Plaintiff went for a follow-up appointment. Dr. Palafox advised Plaintiff that the fracture had not begun to heal, and that he would see Plaintiff again approximately six weeks later.

65. On March 14, 2013, Plaintiff filed a request for administrative remedy in which he complained that since he had been injured, he had yet to be seen and examined by a Bureau of Prisons physician. Plaintiff stated that given the seriousness of the injury he sustained, professional prudence would seem to dictate that the Bureau of Prisons' physician should see and consult with him. Plaintiff opined in his administrative remedy request that the Bureau's failure to follow his case evidenced incompetence and indifference by Health Services staff at FCI La Tuna.

66. Defendant Chapa responded to the request for administrative remedy on April 18, 2013, by informing Plaintiff he was being followed by the contract orthopaedist, Dr. Palafox.

67. On April 3, 2013, Plaintiff returned to see Dr. Palafox and learned that a surgical revision of the open reduction internal fixation would be required, because there had been a loss of

reduction and a loosening of at least two of the seven screws installed during the January 17, 2013, surgical procedure.

68. Plaintiff specifically inquired of Dr. Palafox what likely conditions converged and precipitated the need for an additional surgery. Dr. Palafox opined that the significant delay in Plaintiff's being treated for an injury, the seriousness of which Dr. Palafox rated as being seven on a scale of one to ten, created serious obstacles to the proper alignment of the fractured humerus.

69. A second surgical procedure was performed on Tuesday, May 7, 2013, during which synthetic material was grafted onto the humerus and eight screws were installed, in an attempt to achieve proper alignment and union of the bone.

70. Plaintiff saw Dr. Palafox in post-surgical follow-up office visits on May 15, 31, July 2, and August 19, 2013. During the August 19, 2013, office visit, Dr. Palafox indicated that xrays revealed a "slight improvement" in the condition of Plaintiff's arm, but that there also appeared to be a loosening of at least one of the screws installed on May 7. Of particular concern to Dr. Palafox was that there remained a non-union of the humerus.

71. During the office visits with Dr. Palafox on July 2 and August 19, Plaintiff was told specifically that he would remain under the physician's care "until [he] is fully healed." Dr. Palafox cautioned Plaintiff that he was "not out of the woods yet," and to "keep his fingers crossed."

72. Plaintiff saw Dr. Palafox on September 25, 2013, during which the surgeon said Plaintiff's arm was worse than during the August 19, 2013, appointment, and that a further surgical

intervention would be required, which will entail harvesting bone from Plaintiff's hip and grafting it onto the humerus, along with repairing the further loss of reduction in the arm.

73. On September 27, 2013, Plaintiff had a verbal encounter with Defendant Steven D. Niles, during which Plaintiff asked Niles if he were aware Plaintiff faces a third surgical procedure. Niles responded, "Yes, and we're going to get our attorney involved with your outside doctor," a statement Plaintiff inferred as constituting an intention by FCI La Tuna personnel to influence Dr. Palafox to withdraw his recommendation and discharge Plaintiff from his service, thereby removing any obstacles to Plaintiff's being transferred from FCI La Tuna to another Bureau of Prisons facility.

74. Following Plaintiff's visit with Dr. Palafox on August 19, 2013, Defendants Niles and Dunigan sought permission from the Bureau of Prisons' South Central Regional Health Services staff to transfer Plaintiff away from FCI La Tuna before he had been medically cleared and discharged, which was a deliberate and unveiled attempt to compromise and undermine Plaintiff's treatment, and in blatant contravention of Defendant Chapa's averment that is set forth in paragraph 66 of this complaint.

75. Plaintiff is presently awaiting the third surgical procedure.

COMMON-LAW CLAIMS AGAINST THE UNITED STATES

76. The actions of Defendants Chapa, Niles, Dunigan, Kersteen, Avila-Munoz, Hernandez, Pell, and Alexander, set forth in paragraphs 17 through 75 constitute the torts of negligence, fault,

and malpractice. Under the Federal Tort Claims Act, the Defendant United States of America is liable to the Plaintiff for the negligence, fault, and malpractice of the aforementioned officers, as they were acting within the scope of their employment as officers of the Federal Bureau of Prisons.

77. As a direct and proximate result of the defendants' negligence, fault, malpractice, Plaintiff has suffered irreparable physical harm, inordinate pain and suffering, mental anguish, and emotional distress, all to Plaintiff's damage.

78. The actions of Defendant Elias Hernandez, set forth in paragraph 39 of this complaint, constitute negligence. The officer had a duty to the Plaintiff not to place ankle restraints on the Plaintiff's ankles so that the mere placement of the shackles caused Plaintiff pain and injury. Officer Hernandez breached his duty when he placed the ankle restraints on Plaintiff's ankles in a manner that caused Plaintiff pain and injury. The breach of his duty was a direct and proximate cause of the Plaintiff's pain and injury. Under the Federal Tort Claims Act, the Defendant United States of America is liable to the Plaintiff for the unlawful actions of Officer Hernandez, as he was acting within the scope of his employment as a law enforcement officer of the Federal Bureau of Prisons.

CONSTITUTIONAL (BIVENS) CLAIMS AGAINST DEFENDANTS CHAPA, NILES and DUNIGAN

79. Plaintiff realleges and incorporates by reference paragraphs 10-11, 15, and 17-75 of this complaint.

80. The U.S. Supreme Court held in Estelle v. Gamble, 429 U.S. 97, 50 L.Ed.2d 251, 97 S.Ct. 285 (1976), that elementary

principles of the Eighth Amendment establish the government's obligation to provide medical care for prisoners.

81. Deliberate indifference to serious medical needs of prisoners constitutes unnecessary and wanton infliction of pain and suffering, and courts in every judicial district of the United States have acknowledged that bleeding cuts and broken bones constitute serious medical needs.

82. Deliberate indifference may be manifested by a showing that prison officials deny, delay, or intentionally interfere with medical treatment.

83. Defendants Chapa, Dunigan, and Niles were well aware that Plaintiff had sustained a serious injury, yet they ignored the need for him to see an orthopaedic specialist, and as a result of their indifference, Plaintiff suffered substantial harm.

84. The defendants had a subjective knowledge of the risk of serious harm arising out of Plaintiff's medical need, and they deliberately disregarded that risk.

85. Plaintiff's injury did not involve a broken finger or toe, but rather one of the major bones in his arm. For the defendants to advance that there was no documentation from the emergency room at Providence Memorial Hospital that Plaintiff needed to be seen by an orthopaedic surgeon when they knew full well Plaintiff had sustained a serious fracture of his humerus. Defendant Dunigan is a licensed physician's assistant, who is fully aware that leaving a fracture untreated puts a patient at significant risk or neurovascular compromise and other serious

medical complications.

86. Although FCI La Tuna personnel were aware of the extent of Plaintiff's injuries from the information received that was transmitted by Providence Memorial Hospital on November 28, 2012, it nevertheless took them two weeks to order an xray, the objective of which was to "rule out" a fracture, something that had been confirmed already by a qualified radiologist.

87. FCI La Tuna Health Services staff received on December 12, 2012, the report from the xray transmitted to the University of Maryland, which essentially repeated the findings of the radiologist at Providence Memorial Hospital on November 26, 2012. Upon receipt of the findings from the University of Maryland, another five days passed before Plaintiff's initial consultation with Dr. Palafox.

88. Additional evidence of defendants' deliberate indifference to Plaintiff's serious medical needs occurred following Plaintiff's August 19, 2013, appointment with Dr. Palafox. Defendants Dunigan and Niles conspired and confederated to have Plaintiff removed and transferred from FCI La Tuna before he had been medically cleared and discharged by Dr. Palafox. The actions of Dunigan and Niles, likely with the imprimatur of Defendant Chapa, deliberately attempted to interfere with the course of Plaintiff's treatment prescribed by Dr. Palafox.

89. The actions of Defendants Chapa, Dunigan, and Niles constitute evidence of crassly self-serving, crudely opportunistic interests, and a blatant disregard for Plaintiff's welfare, and only furthered the deliberate indifference that has characterized Plaintiff's entire ordeal.

90. It is quite simply unthinkable -- and unconscionable -- that any human being should have lain for nearly two months with a seriously untreated fractured limb.

91. As a direct and proximate result of the defendants' deliberate indifference and their scandalous and outrageous acts, Plaintiff has suffered irreparable physical harm, inordinate pain, mental anguish, and emotional distress, all to Plaintiff's damage.

JURY DEMAND

Plaintiff demands a trial by jury on both the Federal Tort Claims and Bivens actions.

PRAYER

Plaintiff requests that he recover from the defendants, and have judgment:

A. on the claims stated in paragraphs 17 - 75, the Plaintiff asks the Court to enter judgment against The United States of America in the sum to be shown at trial, but in no event less than fifteen million dollars ($15,000,000.00);

B. for the sum of one million dollars ($1,000,000.00) as and for punitive or exemplary damages against Defendant Rachel Chapa;

C. for the sum of one million dollars ($1,000,000.00) as and for punitive or exemplary damages against Defendant Phillip Dunigan;

D. for the sum of one million dollars ($1,000,000.00) as and for punitive or exemplary damages against Defendant Steven D. Niles;

E. for an award of costs incurred and reasonable attorney's fees; and

F. for an award for any and all other relief that the Court may consider to be just and proper under the circumstances.

G. Plaintiff reserves the right to rely on the doctrine of res ipsa loquitor.

Respectfully submitted,

October 22, 2013

Gary Charles Smith, Plaintiff
Register Number 05147-058
Federal Correctional Institution
Post Office Box 3000
Anthony, NM 88021-3000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

2015 DEC -2 PM 4:22

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-337-DB**
	§	
UNITED STATES OF AMERICA et al.,	§	
Defendants.	§	

FINAL JUDGMENT

On December 1, 2015, the parties in the above-captioned cause filed a joint "Stipulation of Dismissal," dismissing with prejudice all claims pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The Court now enters Final Judgment under Federal Rule of Civil Procedure 58.

Accordingly, **IT IS HEREBY ORDERED** that the above-captioned cause is **DISMISSED WITH PREJUDICE**.

SIGNED this **2nd** day of **December 2015**.

DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	)	
v.	)	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, ELSA ALEXANDER, RACHEL CHAPA, PHILLIP DUNIGAN, ELIAS HERNANDEZ, DALE J. KERSTEEN, NOMRA AVILA-MUNOZ, STEVEN D. NILES, JUAN PELL, Defendants.	)	

ORDER GRANTING APPLICATION TO PROCEED *IN FORMA PAUPERIS* AND ORDERING SERVICE OF PROCESS

On this day, the Court considered Plaintiff Gary Charles Smith's "Application to Proceed *In Forma Pauperis*," filed on October 24, 2013, in the above-captioned cause. After due consideration, the Court is of the opinion that Plaintiff's Motion should be granted.

Accordingly, the Court enters the following **ORDERS**:

1. The Court **GRANTS** Plaintiff's *pro se* application to proceed, without prepaying costs or fees, with his civil complaint.

2. The Court **ORDERS** the District Clerk to file Plaintiff's civil complaint.

3. The Court **ASSESSES** and **DIRECTS** Plaintiff to pay an initial partial fee of $10.00. The agency having custody of Plaintiff shall collect this amount from Plaintiff's trust fund account or institutional equivalent ("account"), when funds are available, and forward it to the Clerk of the District Court.

4. The Court **FURTHER DIRECTS** Plaintiff to pay the balance of the fees in periodic installments. Plaintiff shall make payments of twenty percent (20%) of the preceding month's income credited to his account, provided the account exceeds $10.00, until he has paid the total fees of $350.00. The agency having custody of Plaintiff shall collect this amount from Plaintiff's account, when funds are available and when permitted by 28 U.S.C. § 1915(b)(2), and forward it to the Clerk of the District Court.

5. The Court **FURTHER DIRECTS** the Clerk of the District Court to mail a copy of this order to the accounting office or other person(s) or entity with responsibility for collecting and remitting to the District Court interim filing payments on behalf of prisoners, as designated by the facility in which Smith is currently or subsequently confined. Plaintiff is currently confined at FCI La Tuna in Anthony, Texas. Thus, such should be mailed to U.S. Armed Forces Reserve Complex, 346 Marine Forces Dr., Grand Prairie, Tx. 75051.

6. The District Clerk shall furnish the United States Marshal with copies of the complaint, the summons, and the order granting leave to proceed *in forma pauperis*, and that the Marshal shall **SERVE** the same upon Defendants herein at FCI La Tuna, P.O. Box 1000, Anthony, New Mexico/Texas 88021. All costs of service shall be advanced by the United States.

SIGNED and **ENTERED** on November 8, 2013.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§ §	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, ELSA ALEXANDER, RACHEL CHAPA, PHILLIP DUNIGAN, ELIAS HERNANDEZ, DALE J. KERSTEEN, NORMA AVILA-MUNOZ, STEVEN D. NILES, JUAN PELL, Defendants.	§ § § § § § § § §	

ORDER GRANTING PLAINTIFF'S MOTION TO EXTEND TIME TO FILE

Plaintiff filed a motion to extend his time to file a response to Defendants' Motion to Dismiss and Motion for Summary Judgment. (Doc. 45)

It is **ORDERED** that Plaintiff file his response to Defendants' Motion to Dismiss and Motion for Summary Judgment (Doc. 45) no later than June 1, 2014.

SIGNED and ENTERED on May 2, 2014.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, ELSA ALEXANDER, RACHEL CHAPA, PHILLIP DUNIGAN, ELIAS HERNANDEZ, DALE J. KERSTEEN, NORMA AVILA-MUNOZ, STEVEN D. NILES, JUAN PELL, Defendants.	§ § § § § § § § §	

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE

Defendants' filed a Motion to Strike Plaintiff's Amended Complaint (Doc. 39). (Doc. 52). Plaintiff failed to seek leave of court to file a second amended pleading. Further, the only difference between Plaintiff's first amended pleading (Doc. 16) and his second (Doc. 39) is the Certificate of Service. (Doc. 52:3) Moreover, Plaintiff did not intend to file a second amended complaint. (*Id.*) The Court is of the opinion that Defendants' motion to strike should be and is hereby granted.

Therefore, it is **ORDERED** that Plaintiff's Amended Complaint (Doc. 39) be stricken from the record.

SIGNED and ENTERED on May 2, 2014.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, ELSA ALEXANDER, RACHEL CHAPA, PHILLIP DUNIGAN, ELIAS HERNANDEZ, DALE J. KERSTEEN, NORMA AVILA-MUNOZ, STEVEN D. NILES, JUAN PELL, Defendants.	§ § § § § § § §	

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE

Defendants' filed a Motion to Strike Plaintiff's Amended Complaint (Doc. 39). (Doc. 52). Plaintiff failed to seek leave of court to file a second amended pleading. Further, the only difference between Plaintiff's first amended pleading (Doc. 16) and his second (Doc. 39) is the Certificate of Service. (Doc. 52:3) Moreover, Plaintiff did not intend to file a second amended complaint. (*Id.*) The Court is of the opinion that Defendants' motion to strike should be and is hereby granted.

Therefore, it is **ORDERED** that Plaintiff's Amended Complaint (Doc. 39) be stricken from the record.

SIGNED and ENTERED on May 2, 2014.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, ELSA ALEXANDER, RACHEL CHAPA, PHILLIP DUNIGAN, ELIAS HERNANDEZ, DALE J. KERSTEEN, NORMA AVILA-MUNOZ, STEVEN D. NILES, JUAN PELL, Defendants.	§ § § § § § § § §	

ORDER GRANTING DEFENDANTS' MOTION TO STAY

Defendants filed an opposed motion to stay all further proceedings in this cause until the Court has considered and ruled upon Defendants' Motion to Dismiss and for Summary Judgment in which Defendants raise the issue of qualified immunity. (Docs. 36, 53) Plaintiff opposes this motion, indicating his intent to notice depositions of several witnesses. (Doc. 53:3)

Qualified immunity, which protects officials from the burdens of litigation such as discovery in addition to ultimate liability, must be resolved "at the earliest possible stage in litigation" and until such issue is resolved, discovery should not be allowed. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Because Defendants have raised the issue of qualified immunity and this Court has not yet ruled on the issue, it is appropriate that discovery and all other proceedings in this cause not specifically ordered by the Court be stayed.

Therefore, it is **ORDERED** that the Motion to Stay is granted and that this cause shall be stayed and all further proceedings except those specifically ordered by the Court, be abated until further ordered by the Court.

SIGNED and **ENTERED** on May 2, 2014.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, ELSA ALEXANDER, RACHEL CHAPA, PHILLIP DUNIGAN, ELIAS HERNANDEZ, DALE J. KERSTEEN, NORMA AVILA-MUNOZ, STEVEN D. NILES, JUAN PELL, JOHN DOE, and JANE DOE, Defendants.	§ § § § § § § § § §	

ORDER DENYING PLAINTIFF'S MOTION FOR *SPEARS*[1] HEARING

Before the Court is Plaintiff's motion for a *Spears* hearing. (Doc. 66) This lawsuit, brought pursuant to the Federal Tort Claim Act and *Bivens*,[2] alleges, *inter alia*, that Plaintiff has been the victim of cruel and unusual punishment because Defendants were both negligent and deliberately indifferent to Plaintiff's fractured arm, and delayed and interfered with prescribed treatment to the extent that it caused significant additional serious harm. For the reasons set forth below, Plaintiff's motion for a hearing is denied.

A *Spears* hearing allows the Court to flesh out conclusional allegations of a *pro se* complaint, to ascertain what the prisoner alleges occurred and the legal basis of the claims. *Spears*, 766 F.2d at 180. Specifically, it is intended to assist the court in determining "whether *in forma pauperis* status is warranted or whether the compliant, lacking an arguable basis in law or fact, should be

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[1] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985) (abrogated on other grounds by *Neitzke v. Williams*, 490 U.S. 319 (1989)).

[2] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971).

dismissed summarily as malicious or frivolous under section 1915(d)." *Eason v. Holt*, 73 F.3d 600, 602 (5th Cir. 1996). It is not a trial on the merits or a mini-trial. *Id.* The section 1915 determination must be made at the earliest point possible after a case has been filed, and "is often made *sua sponte* prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints." *Flores v. Cook*, 421 F. App'x 426, 427 (5th Cir. 2011) (citing *Wilson v. Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991)). A *Spears* hearing is not a prerequisite to dismissing a prisoner's civil rights action, nor do "all or even most prisoner claims require or deserve a *Spears* hearing." *Perez v. United States*, 481 F. App'x 203, 206-207 (5th Cir. 2012) *cert. denied*, 133 S.Ct. 953 (2013).

Plaintiff requests a *Spears* hearing in order for the Court to ascertain what Plaintiff alleges occurred and the legal bases for his claims. (Doc. 66:2) Plaintiff believes such a hearing is "necessary to a proper determination [of Plaintiff's complaint], particularly as it is related to the qualified immunity defense asserted by Defendants." *Id.* Plaintiff suggests that testimony taken at the *Spears* hearing would be helpful in the Court's consideration of Defendants' motion to dismiss. *Id.* Defendants argue both that Plaintiff is not entitled to a *Spears* hearing and that the purpose of a *Spears* hearing would not be served in this case. (Doc. 69:2)

The Court granted Plaintiff's motion to proceed *in forma pauperis* on November 8, 2013. (Doc. 2) Plaintiff filed an amended complaint on November 15, 2013. (Doc. 16) In his amended complaint, Plaintiff provided thirteen pages of specific factual allegations, including names, locations, dates and in some cases times. (Doc. 16:7-20) Plaintiff set out the legal arguments of his claims in five pages, including some legal citation. (Doc. 16:20-24) Defendants filed a motion to dismiss or in the alternative for summary judgment, recognizing and addressing both Plaintiff's *Bivens* claims and his FTCA claims, arguing that some improper defendants should be dismissed,

and asserting qualified immunity for the other *Bivens* defendants. (Doc. 36) Plaintiff has filed a response to Defendants' dispositive motions. (Doc. 65) As the Court has previously noted, Plaintiff has demonstrated that he is articulate, competent, and fully capable to present his arguments to prosecute his case. (Doc. 55) The Court does not require a more definite statement from Plaintiff in order to ascertain his claims. Nor does the Court believe Plaintiff would be better able to express himself in a hearing than he has done on paper.

Plaintiff's motion for a *Spears* hearing is in fact a request for a hearing on Defendants' dispositive motions. Plaintiff refers to testimony that would be taken during the hearing as being salient to the Court's consideration of Defendants' dispositive motions. (Doc. 66:2) However, a *Spears* hearing does not involve the taking of testimony from anyone except the Plaintiff himself. District courts are not required to hold an oral hearing on a summary judgment motion. *Jackson v. Widnall*, 99 F.3d 710, 713 (5th Cir. 1996). Moreover, discovery has been stayed pending the Court's resolution of the Defendants' qualified immunity defense. (Doc. 58) The Court's review of the qualified immunity issue takes into consideration the fact that Plaintiff has not had an opportunity to conduct discovery.

CONCLUSION

For the reasons stated above, Plaintiff's motion for *Spears* hearing or a hearing on Defendants' dispositive motions is hereby **DENIED**.

SIGNED and **ENTERED** on July 7, 2014.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

FILED
2014 SEP 12 AM 10:21
CLERK, WESTERN DISTRICT COURT OF TEXAS
BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-337-DB**
	§	
UNITED STATES OF AMERICA,	§	
ELISA ALEXANDER, RACHEL CHAPA,	§	
PHILLIP DUNIGAN, ELIAS HERNANDEZ,	§	
DALE J. KERSTEEN, NORMA	§	
AVILA-MUNOZ, STEVEN D. NILES,	§	
JUAN PELL, JOHN DOE, and JANE DOE,	§	
Defendants.	§	

ORDER ACCEPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE AND DISMISSING PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUALLY NAMED DEFENDANTS

In an amended complaint for damages (ECF No. 16), Plaintiff Gary Charles Smith, federal register number 05147-058,[1] asserts claims under the Federal Tort Claims Act ("FTCA")[2] and *Bivens*[3] arising from the medical care he received while a prisoner at the La Tuna Federal Correctional Institution in Anthony, Texas, after he slipped and fell in a shower on November 26, 2012, and fractured his right humerus. In his FTCA claim, Smith contends Defendants' alleged actions—including their failure to provide adequate safety measures for reducing the likelihood of injuries from falls and their failure to provide timely medical care—constitute the torts of negligence and medical malpractice.[4] In his *Bivens* claim, Smith maintains Defendants were

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[1] *See United States v. Smith*, 464 F, App'x 179, 2012 WL 402028 (4th Cir. 2012).

[2] 28 U.S.C. §§ 1346, 2671–80 (2006).

[3] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[4] Pl.'s Am. Compl. 3, 20–21, ECF No. 16, Nov. 15, 2013.

deliberately indifferent to his serious medical needs, thereby violating his Eighth Amendment right to be free from cruel and unusual punishment.[5] In a motion to dismiss, or in the alternative, motion for summary judgment (ECF No. 36), Defendants assert the United States is the only proper defendant in a FTCA claim; Smith cannot recover damages from Defendants in their official capacities under *Bivens*; Smith cannot show "Defendants refused to treat him, purposefully gave him improper treatment, ignored his medical complaints, 'or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs' "[6]; and because Smith cannot show a violation of a constitutional right, Defendants are entitled to qualified immunity in their individual capacities. In a response, Smith concedes "the United States is the only proper defendant in [a] suit pursuant to the FTCA" and "Stipulates That Defendants Cannot Be Sued in Their Official Capacities Under *Bivens*."[7] He then argues, however, he "has met the burden of showing Defendants' deliberate indifference to his serious medical needs, thereby obviating any defense of qualified immunity."[8]

In a report and recommendation (ECF No. 73), the United States Magistrate Judge to whom the Court referred this matter opines the Court should grant the Defendant's motion to dismiss, or in the alternative, motion for summary judgment.[9] The Magistrate Judge explains

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[5] *Id.* at 21–23.

[6] Defs.' Mot. to Dismiss 17, ECF No. 36, Feb 21, 2014 (quoting *Gobert v. Caldwell*, 463 F.3d 346 (5th Cir. 2006)).

[7] Pl.'s Resp. 4, ECF No. 65, June 23, 2014 (caps in original).

[8] *Id.* at 11.

[9] Report and Recommendation 2, ECF No. 73, Aug. 21, 2014. *See* 28 U.S.C. § 636(b)(1)(B) (2006) (permitting a district court, on its own motion, to refer a pending matter to a

"[t]o prove a claim of deliberate indifference, a prisoner must establish that (1) he was deprived of a medical need that is, objectively, 'sufficiently serious,' and (2) the defendant knew of and disregarded 'an excessive risk to inmate health or safety.' "[10] He adds "[u]nsuccessful medical treatment, acts of negligence, [neglect], or medical malpractice do not constitute deliberate indifference, nor does a prisoner's disagreement with his medical treatment, absent exceptional circumstances.' "[11] Moreover, he notes " '[m]edical records of sick calls, examinations, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference,' "[12] and in this case, "Defendants summarize that between November 26, 2012, and November 19, 2013, [Smith] was seen by BOP medical staff on numerous occasions, prescriptions were filled, medical restrictions were followed, and he was escorted to see contract health professionals 16 times."[13] Further, he explains Defendants who performed administrative duties, as opposed to medical duties, could "rely on the medical department to handle the medical needs of the inmates."[14] Accordingly, the Magistrate Judge concludes the record does not support a conclusion that Defendants' actions met the extremely high standard required for a Court to find deliberate indifference necessary to establish a constitutional violation, and that they are entitled

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United States Magistrate Judge for a report and recommendation).

[10] *Id.* at 9 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

[11] *Id.* at 10 (quoting *Gobert v. Coldwell*, 463 F.3d 339, 346 (5th Cir. 2006) (citation omitted)).

[12] *Id.* (quoting *Gobert*, 463 F.3d at 346 n.24).

[13] *Id.* at 10 (citing Defs.' Mot. to Dismiss 16–17, ECF No. 36, Feb 21, 2014).

[14] *Id.* at 9 (citing *Vasquez v. Dretke*, 226 F. App'x 338 (5th Cir. 2007); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004)).

to qualified immunity.

The Magistrate Judge gave the parties fourteen days to file written objections to his proposed findings, conclusions, and recommendations.[15] A party who files timely written objections to a magistrate judge's report is entitled to a "de novo" review of those portions of the report to which the party objects.[16] As to other portions of the report or when a party does not file written objections, the Court applies a "clearly erroneous, abuse of discretion and contrary to law" standard of review.[17] After completing its review, the Court may accept, reject, or modify the report, in whole or in part.[18] To date, neither party has responded to the report.[19]

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[15] *Id.* at 23. *See also* 28 U.S.C. § 636(b)(1) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court."); FED. R. CIV. P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.").

[16] *See* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); FED. R. CIV. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.").

[17] *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989) ("[T]he 'clearly erroneous, abuse of discretion and contrary to law' standard of review . . . is appropriate . . . where there has been no objection to the magistrate's ruling.").

[18] *See* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions."); FED. R. CIV. P. 72(b) ("The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.").

[19] *See Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988) ("[A] party is not entitled to de novo review of a magistrate's finding and recommendations if objections are not raised in writing by the aggrieved party . . . after being served with a copy of the magistrate's report.").

After carefully reviewing the report, the Court finds that the Magistrate Judge's proposed findings of fact and conclusions of law are neither clearly erroneous nor contrary to law.[20] Therefore, the Court enters the following orders:

1. The Court **ACCEPTS** the Magistrate Judge's report and recommendations (ECF No. 73).

2. The Court **GRANTS** Defendants' motion to dismiss, or in the alternative, motion for summary judgment (ECF No. 36) and **DISMISSES WITH PREJUDICE** Smith's claims against all individually named Defendants.[21]

3. The Court **ORDERS** the remaining parties—Smith and the United States of America—to file dispositive motions on or before **November 3, 2014**.

4. The Court **REFERS** this matter back to the Magistrate Judge for further proceedings.

SO ORDERED.

SIGNED this 12th day of September 2014.

DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

[20] *Wilson*, 864 F.2d at 1221.

[21] *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962); *see also McCullough v.Lynaugh*, 835 F.2d 1126, 1127 (5th Cir. 1988) (stating that a district court has inherent authority to dismiss an action *sua sponte* for failure to prosecute or to comply with a court order).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
2014 SEP 16 AM 10: 21
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-337-DB**
	§	
UNITED STATES OF AMERICA,	§	
ELISA ALEXANDER, RACHEL CHAPA,	§	
PHILLIP DUNIGAN, ELIAS HERNANDEZ,	§	
DALE J. KERSTEEN, NORMA	§	
AVILA-MUNOZ, STEVEN D. NILES,	§	
JUAN PELL, JOHN DOE, and JANE DOE,	§	
Defendants.	§	

AMENDED ORDER ACCEPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE AND DISMISSING PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUALLY NAMED DEFENDANTS

In an amended complaint for damages (ECF No. 16), Plaintiff Gary Charles Smith, federal register number 05147-058,[1] asserts claims under the Federal Tort Claims Act ("FTCA")[2] and *Bivens*[3] arising from the medical care he received while a prisoner at the La Tuna Federal Correctional Institution ("FCI La Tuna") in Anthony, Texas, after he slipped and fell in a shower on November 26, 2012, and fractured his right humerus. In his FTCA claim, Smith alleges Defendants' actions—including their failure to provide adequate safety measures for reducing the likelihood of injuries from falls and their failure to provide timely medical care—constitute the torts of negligence, neglect, and medical malpractice.[4] In his *Bivens* claim, Smith maintains three

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[1] *See United States v. Smith*, 464 F. App'x 179, 2012 WL 402028 (4th Cir. 2012).

[2] 28 U.S.C. §§ 1346, 2671–80 (2006).

[3] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[4] Pl.'s Am. Compl. 3, 20–21, ECF No. 16, Nov. 15, 2013.

of the Defendants—Rachel Chapa, Warden, FCI La Tuna; Steven D. Niles, Associate Warden for Operations, FCI La Tuna; and Phillip Dunigan, Health Services Administrator, FCI La Tuna—violated his Eighth Amendment right to be free from cruel and unusual punishment when they were deliberately indifferent to his serious medical needs.[5] In a motion to dismiss, or in the alternative, motion for summary judgment (ECF No. 36), Defendants assert the United States is the only proper defendant in a FTCA claim; Smith cannot recover damages from Defendants in their official capacities under *Bivens*; Smith cannot show "Defendants refused to treat him, purposefully gave him improper treatment, ignored his medical complaints, 'or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs,' "[6] thereby violating his Eighth Amendment rights; and because Smith cannot show a violation of a constitutional right, Defendants are entitled to qualified immunity in their individual capacities. In a response, Smith concedes "the United States is the only proper defendant in [a] suit pursuant to the FTCA" and "Stipulates That Defendants Cannot Be Sued in Their Official Capacities Under *Bivens*."[7] He then argues, however, he "has met the burden of showing Defendants' deliberate indifference to his serious medical needs, thereby obviating any defense of qualified immunity."[8]

In a report and recommendation (ECF No. 73), the United States Magistrate Judge to

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[5] *Id.* at 21–23.

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[7] Pl.'s Resp. 4, ECF No. 65, June 23, 2014 (caps in original).

[8] *Id.* at 11.

whom the Court referred this matter opines the Court should grant the Defendant's motion to dismiss, or in the alternative, motion for summary judgment.[9] The Magistrate Judge first explains "[q]ualified immunity is evaluated under a two-part test: (1) 'whether the facts that a plaintiff has alleged ... make out a violation of a constitutional right,' and (2) 'whether the right at issue was clearly established at the time of defendant's alleged misconduct.' "[10] The Magistrate Judge then explains "[t]o prove a claim of deliberate indifference, a prisoner must establish that (1) he was deprived of a medical need that is, objectively, 'sufficiently serious,' and (2) the defendant knew of and disregarded 'an excessive risk to inmate health or safety.' "[11] He adds "[u]nsuccessful medical treatment, acts of negligence, [neglect], or medical malpractice do not constitute deliberate indifference, nor does a prisoner's disagreement with his medical treatment, absent exceptional circumstances.' "[12] Moreover, he notes " '[m]edical records of sick calls, examinations, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference,' "[13] and in this case, "Defendants summarize that between November 26, 2012, and November 19, 2013, [Smith] was seen by BOP medical staff on numerous occasions, prescriptions were filled, medical restrictions were followed, and he was escorted to see contract

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[9] Report and Recommendation 2, ECF No. 73, Aug. 21, 2014. *See* 28 U.S.C. § 636(b)(1)(B) (2006) (permitting a district court, on its own motion, to refer a pending matter to a United States Magistrate Judge for a report and recommendation).

[10] *Id.* at 8 (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

[11] *Id.* at 9 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

[12] *Id.* at 10 (quoting *Gobert v. Coldwell*, 463 F.3d 339, 346 (5th Cir. 2006) (citation omitted)).

[13] *Id.* (quoting *Gobert*, 463 F.3d at 346 n.24).

health professionals 16 times."[14] Further, he explains Defendants who performed administrative duties, as opposed to medical duties, could "rely on the medical department to handle the medical needs of the inmates."[15] Accordingly, the Magistrate Judge concludes the record does not support a conclusion that Defendants' actions met the extremely high standard required for a Court to find the deliberate indifference necessary to establish a constitutional violation, and that they are entitled to qualified immunity.

The Magistrate Judge gave the parties fourteen days to file written objections to his proposed findings, conclusions, and recommendations.[16] A party who files timely written objections to a magistrate judge's report is entitled to a "de novo" review of those portions of the report to which the party objects.[17] As to other portions of the report or when a party does not file written objections, the Court applies a "clearly erroneous, abuse of discretion and contrary to law" standard of review.[18] After completing its review, the Court may accept, reject, or modify

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[14] *Id.* at 10 (citing Defs.' Mot. to Dismiss 16–17, ECF No. 36, Feb 21, 2014).

[15] *Id.* at 9 (citing *Vasquez v. Dretke*, 226 F. App'x 338 (5th Cir. 2007); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004)).

[16] *Id.* at 23. *See also* 28 U.S.C. § 636(b)(1) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court."); FED. R. CIV. P. 72(b)(2) ("Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.").

[17] *See* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); FED. R. CIV. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.").

[18] *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989) ("[T]he 'clearly erroneous, abuse of discretion and contrary to law' standard of review . . . is appropriate . . . where there has been no objection to the magistrate's ruling.").

the report, in whole or in part.[19]

In his objections to the report and recommendation (ECF No. 76), Smith asserts the Magistrate Judge did not address Defendants' delay in treating his fractured arm:

> The underpinning issue in this case is that Defendants' delaying medical treatment for a serious medical need constituted the constitutional tort of deliberate indifference, in violation of Amendment VIII to the U.S. Constitution. ... A physician at Providence Memorial Hospital who saw x-rays of Plaintiff's injured arm recommended that Plaintiff consult an orthopaedic surgeon within two to three days of his discharge from the emergency room. It was not until exactly three weeks later that Plaintiff saw an orthopaedic surgeon, who has opined (and has expressed a willingness to do so in a deposition) that by that time "it was too late." ... Because the magistrate judge's analysis did not address the delay in Plaintiff's being treated in a timely manner, the district court cannot conclude that a genuine issue of material facts did not exist, and thus cannot adopt the recommendation with regard to Plaintiff's Eighth Amendment deliberate indifference claim.[20]

Delayed medical treatment may constitute an actionable Eighth Amendment violation.[21] In order to maintain a viable claim for delayed medical treatment, however, a plaintiff must show a defendant's deliberate indifference to his serious medical needs resulted in harm.[22] Deliberate

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[19] *See* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions."); FED. R. CIV. P. 72(b) ("The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.").

[20] Objections 5, ECF No. 76, Sept. 11, 2014.

[21] *Estelle v. Gamble*, 429 U.S. 97, 105–07 (1976); *Jackson v. Cain*, 864 F.2d 1235, 1244 (5th Cir. 1989).

[22] *Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990) (explaining delay must constitute "deliberate indifference").

indifference is an extremely high standard to meet.[23] Medical malpractice or negligent treatment do not necessarily constitute deliberate indifference.[24] "[D]eliberate indifference encompasses only unnecessary and wanton infliction of pain repugnant to the conscience of mankind."[25] Furthermore, the plaintiff must show that the defendant had a sufficiently culpable state of mind.[26] In essence, a plaintiff must demonstrate that a prison official "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs."[27]

Contrary to Smith's assertion, the Magistrate Judge did discuss the delays in his medical treatment:

> Plaintiff does not allege that he received no medical treatment; he contends that Defendants were aware that Plaintiff had sustained a serious injury, but ignored and delayed his seeing an orthopedic specialist for weeks, causing Plaintiff to suffer untreated for nearly two months, resulting in substantial harm to Plaintiff in the form of permanent disfigurement, inordinate pain and suffering, mental anguish, and emotional distress. He maintains that Defendants delayed and interfered with treatment for his serious medical injury such that he did not receive necessary medical treatment within a reasonable time frame. Plaintiff asserts that he should have been seen by an orthopedic specialist within three days of his injury and obtained the necessary surgery and follow up treatment and surgeries in a much shorter time frame; he posits that the unnecessary delay in having him evaluated by the specialist and allowing the specialist to perform the surgery created a

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[23] *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir.2001).

[24] *Mendoza v Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993).

[25] *McCormick v. Stadler*, 105 F.3d 1059, 1061 (5th Cir.1997) (citing *Estelle*, 429 U.S. at 105–06).

[26] *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (noting at a minimum prisoner must allege deliberate indifference to serious medical needs).

[27] *Domino*, 239 F.3d at 756.

> substantial risk of serious harm and caused irreparable harm. Plaintiff summarizes that he was not given pain management medication for three days after returning from the Emergency Room, was not referred to an orthopedic surgeon for three weeks, and was not scheduled for surgery until fifty-three days after the injury occurred. He argues that the delays were the result of deliberate indifference and resulted in substantial harm.[28]

The Magistrate Judge also explained that "vicarious liability and the doctrine of *respondeat superior* [were] inapplicable to *Bivens* suits.[29] Therefore, "[a] federal official acting in a supervisory position may be held liable only if either (1) the supervisor was personally involved in the constitutional deprivation or (2) the supervisor 'implement[ed] a policy so deficient that the policy itself act[ed] as a deprivation of a constitutional rights.' "[30]

The Magistrate Judge then examined the role of each of the three Defendants named in Smith's *Bivens* claim. He noted that Smith did "not allege that Warden Chapa had any personal involvement in making the actual medical determinations about how, when, or where Plaintiff would be treated, or by whom, or that she interfered with or prevented medical staff from treating Plaintiff."[31] He explained that Assistant Warden Niles's "attempt to transfer [Smith] to accommodate [Smith's] request to be released from [the Special Housing Unit], and [Smith's] disagreement with Defendants as to what housing facility and medical care were appropriate, or the course of treatment determined by Defendants [did] not evince deliberate indifference to

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[28] Report and Recommendation 11–12, ECF No. 73, Aug. 21, 2014 (citations omitted).

[29] *Id.* at 12 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)).

[30] *Id.* (citing *Cronn v. Buffington*, 150 F.3d 538, 544 (5th Cir. 1998)).

[31] *Id.* at 14.

serious medical needs."[32] Moreover, the Magistrate Judge observed that it was "reasonable for wardens to rely on the medical department to handle the medical needs of the inmates."[33] Finally, the Magistrate Judge pointed out that Smith's "only factual allegation against [Health Services Administrator] Dunigan ... [was] that [Dunigan] sought permission from the BOP, along with [Assistant Warden] Niles, to transfer [Smith] before he had been medically cleared by Dr. Palafox."[34] The Magistrate Judge concluded, therefore, that Smith had not made out a violation of a constitutional right, and Defendants Chapa, Niles, and Dunigan were entitled to qualified immunity. After carefully reviewing the record, the Court agrees with the Magistrate Judge, and will overrule Smith's objections.

Furthermore, the Court concludes that the Magistrate Judge's other proposed findings of fact and conclusions of law are correct, and that it should adopt his recommendations. The Court therefore enters the following orders:

1. The Court **OVERRULES** Smith's objections to the Magistrate Judge's report and recommendations (ECF No. 76).

2. The Court **ACCEPTS** the Magistrate Judge's report and recommendations (ECF No. 73).

3. The Court **GRANTS** Defendants' motion to dismiss, or in the alternative, motion for summary judgment (ECF No. 36) and **DISMISSES WITH PREJUDICE** Smith's claims

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[32] *Id.* at 16.

[33] *Id.* at 14 (citing *Vasquez v. Dretke*, 226 F. App'x 338, 340 (5th Cir. 2007); *Johnson v. Johnson*, 385 F.3d 503, 526 (5th Cir. 2004)).

[34] *Id.* at 17.

against all individually named Defendants.[35]

4. The Court **ORDERS** the remaining parties—Smith and the United States of America—to file dispositive motions on or before **November 3, 2014**.

5. The Court **REFERS** this matter back to the Magistrate Judge for further proceedings.

SO ORDERED.

SIGNED this 16th day of September 2014.

DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

[35] *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962); *see also McCullough v.Lynaugh*, 835 F.2d 1126, 1127 (5th Cir. 1988) (stating that a district court has inherent authority to dismiss an action *sua sponte* for failure to prosecute or to comply with a court order).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
2014 OCT 21 AM 10:10
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-0337-DB**
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

ORDER

On this day came to be considered Defendant United States' Motion to Lift Stay, to continue the dispositive motion deadline, and to allow the parties an opportunity to submit a proposed scheduling order, in the above-styled and numbered cause, and the Court, after considering the Motion, is of the opinion that the motion should be GRANTED.

IT IS, THEREFORE, ORDERED that the stay in this case be VACATED.

IT IS FURTHER ORDERED that the dispositive motion deadline of November 3, 2014 is continued.

IT IS FURTHER ORDERED that the parties submit their proposed scheduling order on or before Nov. 20, 2014.

SIGNED and ENTERED this 21st day of Oct., 2014.

THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-0337-DB**
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

PROPOSED SCHEDULING ORDER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Pursuant to Rule 16, Federal Rules of Civil Procedure, the Court issues the following Scheduling Order:

1. A report on alternative dispute resolution in compliance with Local Rule CV88 shall be filed by ~~November 10, 2014~~ November 17, 2014

2. The parties asserting claims for relief shall submit a written offer of settlement to opposing parties by ~~November 10, 2014~~, and each opposing party shall respond, in writing, by ~~November 24, 2014~~ November 17 and December 1, 2014.

3. The parties shall file all motions to amend or supplement pleadings or to join additional parties by **November 24, 2014**.

4. All parties asserting claims for relief shall FILE their designation of potential witnesses, designation of testifying experts, and a list of proposed exhibits, and shall SERVE on all parties, but not file the materials required by Fed. R. Civ. P. 26(a)(2)(B) by **December 15, 2014**. Parties resisting claims for relief shall FILE their designation of potential witnesses, designation of testifying experts, and list of proposed exhibits, and shall SERVE on all parties, but not file the materials required by Fed. R. Civ. P. 26(a)(2)(B) by **February 2, 2015**. All designation of rebuttal experts shall be FILED within 15 days of receipt of the report of the opposing expert.

5. An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion, specifically stating the basis for the objection and identifying the objectionable testimony, within 10 days of receipt of the written report of the expert's proposed testimony, or within 10 days of the expert's deposition, if a deposition is taken, whichever is later.

6. The parties shall complete all discovery on or before **February 23, 2015**. Counsel may by agreement continue discovery beyond the deadline, but there will be no intervention by the Court except in extraordinary circumstances, and no trial setting will be vacated because of information obtained in post-deadline discovery.

7. All dispositive motions shall be filed no later than **April 6, 2015**. Dispositive motions as defined in Local Rule CV-7(h) and responses to dispositive motions shall be limited to 20 pages in length.

8. This case is set for trial _____, at 8:30 a.m. The parties should consult Local Rule CV-16(e) regarding matters to be filed in advance of trial.

SIGNED AND ENTERED this _____ day of _____, 2014.

THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Respectfully submitted,

ROBERT PITMAN
UNITED STATES ATTORNEY

/s/ Magdalena G. Jara
MAGDALENA G. JARA
Assistant United States Attorney
Texas State Bar No. 10573100
700 E. San Antonio, Ste. 200
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Office (915) 534-6884
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Attorney for Defendant

AND

Gary C. Smith 11-3-2014

GARY CHARLES SMITH
Pro Se Plaintiff
Federal Correctional Institution Fort Worth
3150 Horton Road
Fort Worth, TX 76119

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
2014 NOV 20 AM 10: 21
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

GARY CHARLES SMITH, **Plaintiff,**	§	
v.	§	**EP-13-CV-0337-DB**
UNITED STATES OF AMERICA, **Defendant.**	§	

PROPOSED SCHEDULING ORDER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Pursuant to Rule 16, Federal Rules of Civil Procedure, the Court issues the following Scheduling Order:

1. A report on alternative dispute resolution in compliance with Local Rule CV88 shall be filed by ~~November 10, 2014~~ November 17, 2014

2. The parties asserting claims for relief shall submit a written offer of settlement to opposing parties by ~~November 10, 2014~~, and each opposing party shall respond, in writing, by ~~November 24, 2014~~ November 17 and December 1, 2014.

3. The parties shall file all motions to amend or supplement pleadings or to join additional parties by **November 24, 2014**.

4. All parties asserting claims for relief shall FILE their designation of potential witnesses, designation of testifying experts, and a list of proposed exhibits, and shall SERVE on all parties, but not file the materials required by Fed. R. Civ. P. 26(a)(2)(B) by **December 15, 2014**. Parties resisting claims for relief shall FILE their designation of potential witnesses, designation of testifying experts, and list of proposed exhibits, and shall SERVE on all parties, but not file the materials required by Fed. R. Civ. P. 26(a)(2)(B) by **February 2, 2015**. All designation of rebuttal experts shall be FILED within 15 days of receipt of the report of the opposing expert.

5. An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion, specifically stating the basis for the objection and identifying the objectionable testimony, within 10 days of receipt of the written report of the expert's proposed testimony, or within 10 days of the expert's deposition, if a deposition is taken, whichever is later.

6. The parties shall complete all discovery on or before **February 23, 2015**. Counsel may by agreement continue discovery beyond the deadline, but there will be no intervention by the Court except in extraordinary circumstances, and no trial setting will be vacated because of information obtained in post-deadline discovery.

7. All dispositive motions shall be filed no later than **April 6, 2015**. Dispositive motions as defined in Local Rule CV-7(h) and responses to dispositive motions shall be limited to 20 pages in length.

8. This case is set for trial May 14, 2015, at 9:00 ~~9:30~~ a.m. The parties should consult Local Rule CV-16(e) regarding matters to be filed in advance of trial.

SIGNED AND ENTERED this 20th day of Nov., 2014.

THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Respectfully submitted,

ROBERT PITMAN
UNITED STATES ATTORNEY

/s/ Magdalena G. Jara
MAGDALENA G. JARA
Assistant United States Attorney
Texas State Bar No. 10573100
700 E. San Antonio, Ste. 200
El Paso, Texas 79901
Office (915) 534-6884
Facsimile (915) 534-3490
Attorney for Defendant

AND

Gary C. Smith 11-3-2014

GARY CHARLES SMITH
Pro Se Plaintiff
Federal Correctional Institution Fort Worth
3150 Horton Road
Fort Worth, TX 76119

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-337-DB**
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

ORDER GRANTING PLAINTIFF'S MOTION TO STAY PROCEEDINGS

In a *pro se* motion dated November 18, 2014 (ECF No. 95), Plaintiff Gary Charles Smith, a federal prisoner, requests a forty-nine day stay in the instant proceedings due to his transfer from Fort Worth, Texas, to Butner, North Carolina. In a response, Defendant United States of America indicates that it does not object, but asks the Court to extend the deadlines in the Scheduling Order (ECF No. 90) beginning with the deadline to amend pleadings. Accordingly, after due consideration, the Court **GRANTS** Plaintiff's motion, stays the proceedings for forty-nine days, and extends all deadlines by forty-nine days. This case is now set for a bench trial on

July 9, 2015, at 9:00 a.m.

SIGNED this 5th day of December 2014.

SO ORDERED.

DAVID BRIONES
UNITED STATES DISTRICT JUDGE

FILED
2014 DEC -5 AM 10:28
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

FILED
2015 MAR 20 AM 10: 14
CLERK, U.S. DIST. COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-0337-DB**
	§	
UNITED STATES OF AMERICA, et al	§	
Defendants.	§	

ORDER

On this day came on to be considered Defendant's Motion for Extension of Time to extend the discovery deadline only for the purposes of allowing Defendant to take the deposition of Plaintiff, for filing dispositive motion, and for trial in the above-styled and numbered cause. The Court, having considered the motion, finds that the following orders should be entered.

It is ORDERED that the Motion for Extension of Time be, and it is hereby, GRANTED.

It is further ORDERED that the discovery deadline for the purpose of allowing Defendant to take the deposition of Plaintiff be extended to April 22, 2015.

It is further ORDERED that dispositive motions be filed no later than June 26, 2015.

It is further ORDERED that this cause be, and it is hereby, RESCHEDULED for a bench trial on Aug. 13, 2015 @ 9:00 A.M. The parties should consult Local Rule CV-16(e) regarding matters to be filed in advance of trial.

SIGNED this 20th day of March, 2015.

THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

FILED
2015 MAR 20 AM 10: 14
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-0337-DB**
	§	
UNITED STATES OF AMERICA,	§	
RACHEL CHAPA, Warden,	§	
ELSA ALEXANDER, PHILLIP DUNIGAN,	§	
ELIAS HERNANDEZ, DALE J.	§	
KERSTEEN, NORMA AVILA-MUNOZ,	§	
STEVEN D. NILES, JUAN PELL,	§	
JOHN DOE, and JANE DOE,	§	
Defendant.	§	

ORDER

On this day came to be considered Defendant United States' Second Motion for Leave to Depose Person Confined in Prison, pursuant to Rule 30, Federal Rules of Civil Procedure, in the above-styled and numbered cause, and the Court, after considering the Motion, finds that the following order should be entered:.

IT IS ORDERED that the motion by Defendant United States of America for leave to take the deposition of Plaintiff Gary Charles Smith be, and it is hereby, GRANTED.

IT IS FURTHER ORDERED that the deposition of Plaintiff Gary Charles Smith shall be taken within the confines of the Federal Correctional Institution-Butner Low, Old NC Highway 75, Butner, North Carolina and Defendant shall contact the appropriate Federal Bureau of Prisons ("BOP") officers to make the arrangements necessary for the taking of the deposition.

SIGNED this 20th day of MARCH, 2015.

THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-337-DB**
	§	
UNITED STATES OF AMERICA,	§	
ELISA ALEXANDER, RACHEL CHAPA,	§	
PHILLIP DUNIGAN, ELIAS HERNANDEZ,	§	
DALE J. KERSTEEN, NORMA	§	
AVILA-MUNOZ, STEVEN D. NILES,	§	
JUAN PELL, JOHN DOE, and JANE DOE,	§	
Defendants.	§	

ORDER

This matter is before the Court on Plaintiff Gary Charles Smith's motion for an extension of the discovery deadline (ECF No. 114). Smith requests a twenty-eight day extension due to the loss of his documents associated with this case. The United States of America ("the Government"), the remaining defendant in this matter, does not oppose a thirty-day extension.[1] The Court, having considered the motion and the Government's response, finds that the following orders should be entered:

IT IS ORDERED that Smith's motion for an extension of the discovery deadline is **GRANTED**.

IT IS FURTHER ORDERED that the discovery deadline is extended until July 23, 2015.

IT IS ALSO ORDERED that dispositive motions shall be filed no later than September 25, 2015.

---

[1] Gov't's Resp. 3, ECF No. 115, Apr. 17, 2015.

IT IS FINALLY ORDERED that his cause is **RESCHEDULED** for a bench trial on Nov. 19, 2015 @ 9:00 A.M. . The Parties should consult Local Rule CV-16(e) regarding matters to be filed in advance of trial.

SIGNED this 21ST day of April 2015.

DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, Defendant.	§ §	

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL IN PART AND DENYING IN PART

Before the Court is Plaintiff's motion to compel Defendant to produce the videotape and photographs relevant to Plaintiff's claims or assess monetary sanctions against Defendant. (Doc. 130) Defendant opposes the motion to compel, arguing that it has not refused to produce the requested materials, but has as yet been unable to locate them, and is continuing its efforts to do so. (Doc. 134) For the reasons set forth below, Plaintiff's motion is granted in part.

Plaintiff contends that on May 11, 2015, Defendant notified Plaintiff that the video surveillance tape and photographs taken at the La Tuna Federal Correctional Institution on Monday, November 26, 2012, which Plaintiff had requested be produced, had been lost or "recycled." (Doc. 130:1) Specifically, Plaintiff contends that Defendant responded that such videotapes are normally recycled every thirty days and therefore the videotape was presumed to have been recycled. (Doc. 130:3) Although the photographs taken by Lieutenant Lorenzo Barraza prior to Plaintiff's being transported to Providence Memorial Hospital should have been included in the incident report made following Plaintiff's injury, Plaintiff contends, Defendant was unable to account for them. *Id.* Plaintiff contends that he put Warden Chapa and Captain Ted Bonnell on notice before he filed his

complaint that he would be requesting the production of the videotape and photographs in the course of the litigation. *Id.*

Defendant responds that Defendant did not refuse to produce the requested video and photographs, but responded to Plaintiff's request by stating that the items could not be located, but that to the extent they were located, the responses would be supplemented. (Doc. 134:2) Defendant indicated that, as of June 9, 2015, Defendant continued to search for the requested items, had not yet exhausted those efforts, and hoped to have a more definite idea as to the location of such items in the next few weeks or a possible explanation as to what happed to the items by the discovery deadline of July 23, 2015. *Id.* Defendant indicated that it would supplement its response to Plaintiff's motion with the results of the search. *Id.* Defendant urged that an order compelling Defendant to produce the requested items would be futile until its search was complete. *Id.* Over two months and the discovery deadline have passed and Defendant has not supplemented its response to Plaintiff's motion to compel. As far as the Court is aware, no supplemental discovery response has been provided to Plaintiff regarding the requested production of these items.

In responding to Federal Rule of Civil Procedure 34 discovery requests, a reasonable inquiry must be made, and if no responsive documents or tangible things exist, the responding party should so state with sufficient specificity to allow the court to determine whether the party made a reasonable inquiry and exercised due diligence. *Heller v. City of Dallas*, 303 F.R.D. 466, 485 (N.D. Tex. Nov. 12, 2014). If a party fails to produce the requested document or tangible thing, the requesting party may move the Court to compel production. Fed. R. Civ. P. 37. An incomplete response is treated as a failure to respond. Fed. R. Civ. P. 37(a)(4).

Defendant has failed to provide a complete response to Plaintiff's request and is therefore deemed to have failed to respond. It is proper, therefore, that this Court compel Defendant to either produce the requested items or supplement its response, confirming that the search has been exhausted, detailing the search that was undertaken, and the details uncovered in the search regarding how and when the items were lost or destroyed in the normal course of business or otherwise. In other words, Defendant should respond with sufficient specificity to allow the court to determine whether the party made a reasonable inquiry and exercised due diligence.

Sanctions are not be appropriate at this time.

It is therefore **ORDERED** that Plaintiff's motion to compel be, and it is hereby, **GRANTED** in part and **DENIED** in part.

Specifically, Plaintiff's motion for sanctions is **DENIED**.

Plaintiff's motion to compel production of the video surveillance and photographs requested is **GRANTED**. Defendant shall produce the requested items or supplement its response to the request with the specificity outlined above, and provide notice to the Court detailing its compliance, no later than **September 15, 2015.**

SIGNED and ENTERED on August 19, 2015.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA Defendants.	§ §	

ORDER GRANTING DEFENDANT'S MOTION TO COMPEL RETURN OF INADVERTENTLY DISCLOSED MATERIAL

Before the Court is Defendant's motion to compel Plaintiff to return inadvertently disclosed material. (Doc. 139) Plaintiff filed a response. (Doc. 144) After reviewing the arguments and for the reasons set forth below, Defendant's motion is granted.

On approximately March 7, 2014, Defendant provided 800 pages of Plaintiff's medical records as a courtesy in response to Plaintiff's request before discovery had officially commenced in this cause. (Doc. 139:1) Shortly thereafter, it was discovered that seven pages of medical records unrelated to Plaintiff had been misfiled in Plaintiff's medial files and inadvertently included in the materials provided to Plaintiff. *Id.* On March 25, 2014, when the BOP retrieved the medical records from Plaintiff, Plaintiff indicated that he had not yet reviewed the records. *Id.*, at 1-2. On March 31, 2014, Plaintiff was advised by letter that he was prohibited from retaining or disseminating the inadvertently disclosed records. *Id.*, at 2. On April 11, 2014, Plaintiff filed a letter with the Court regarding the alleged HIPAA violation, indicating that he had photocopied the documents and mailed them to an attorney in Washington, D.C. *Id.* Plaintiff reiterated this at his deposition on May 21, 2015, where he refused to agree to return the records. *Id.* On June 1, 2015, Plaintiff was advised by letter that disclosure of such records was inadvertent and was asked to return such records. *Id.* On June 22, 2015, Plaintiff again refused. *Id.*

Federal Rule of Evidence 502 addresses the inadvertent disclosure of materials covered by the attorney-client and work product privileges. Federal Rule of Civil Procedure 26(b)(5)(B) also specifically

addresses the privilege or protection of trial-preparation materials that have been inadvertently disclosed during discovery. The standard to determine if such inadvertent disclosure constitutes waiver of privilege precluding return of the discovery is whether: (1) the disclosure is inadvertent, (2) the reasonableness of precautions taken to prevent disclosure; (3) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issues of fairness. *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993).

All of these factors favor Defendant. The disclosure was inadvertent. Defendant produced over 800 pages of medical records from Plaintiff's file, less than ten pages of which were someone else's medical records that had been misplaced in his file. Defendant discovered the error and took immediate action to remedy the error when it was discovered. The inadvertently disclosed documents were not discoverable by Plaintiff and are entirely irrelevant to him and his cause of action. There is no private cause of action under HIPPA. *Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006). Further, 42 U.S.C. § 1320d-6 (2010) addressing the offense of and penalty for wrongful disclosure requires that a person act knowingly; Plaintiff has not alleged that Defendant knowingly disclosed the medical records of another.

For the reasons stated above, it is **ORDERED** that Defendant's motion to compel the return of inadvertently disclosed material be, and is hereby, **GRANTED**. Plaintiff has until September 15, 2015 to return the inadvertently disclosed materials to Defendant, including any originals Plaintiff retained or any copies Plaintiff made or had made of such documents regardless of who he may have transferred them to or where they are currently stored. Plaintiff shall notify the Court when this has been accomplished.

SIGNED and ENTERED on August 19, 2015.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
UNITED STATES OF AMERICA,	§	**EP-13-CV-337-DB**
Defendant.	§	
	§	
	§	

ORDER SETTING MEDIATION

This case has been referred for a mediation. The Court hereby **ORDERS** the parties to appear for a mediation on **Wednesday, October 7, 2015.** The settlement conference will take place at **9:00 a.m.** in Courtroom #612, United States Courthouse, 525 Magoffin Street, El Paso, Texas.

The parties must be present and in person at the settlement conference. Arrangements are being made to assure Plaintiff's presence via teleconference or video conference. In the case of an entity, such as a corporation or governmental entity, an officer or other representative with complete authority to enter into a binding settlement must be present in person. A person with "complete authority" is someone who has the experience and judgment to exercise that authority without having to consult with anyone who is not in attendance at the settlement conference.[1] Attendance by the attorney for a party **is not sufficient**. The parties should take note that the conference may take the entire day.

[1] This requirement will only be waived upon a showing of exceptional circumstances. If counsel believes that such circumstances exist, a letter detailing why the Court should excuse the representative from personal attendance should be electronically filed for consideration at least ten days before the scheduled settlement conference or immediately upon learning of the extenuating circumstances, whichever event is earlier.

IT IS FURTHER ORDERED that the parties will submit a short letter candidly setting forth the following **on or before Wednesday, September 30, 2015**:

1. The name and position of the individuals who will be attending the mediation;
2. Facts that each side believes they can prove at trial;
3. The major weaknesses in each side's case, both factual and legal;
4. An evaluation of the maximum and minimum damage awards believed to be likely;
5. The history of any settlement negotiations to date; and
6. An estimate of attorney's fees and costs of litigation through trial.

The letters may be submitted *ex parte* and will be solely for the Court's use in preparing for the mediation. The Court will also review the pleadings in the docket. Should either party want the Court to review any case authorities believed to be critical to a just evaluation of the case, the parties should identify them. Moreover, if the parties wish the Court to review any exhibits or deposition excerpts, they should attach a copy to the letter.[2]

Mediations before the Court have proven more productive when the parties have previously exchanged demands and offers and have made a good faith effort to settle the case on their own.

IT IS THEREFORE FURTHER ORDERED that Plaintiff will submit a written itemization of damages and a settlement demand to Defendant **on or before Wednesday, September 30, 2015**, with a copy to the Court.

[2] Please note that the American Bar Association Standing Committee on Ethics and Professional Responsibility has issued a Formal Opinion (No. 93-370) that precludes a lawyer, **ABSENT INFORMED CLIENT CONSENT**, from revealing to a judge the limits of the lawyer's settlement authority or the lawyer's advice to the client regarding settlement. The opinion does not preclude a judge, in seeking to facilitate a settlement, from inquiring into those matters. Therefore, please discuss these items with your client before appearing for the mediation.

IT IS THEREFORE FURTHER ORDERED that Defendant will likewise submit a written offer and any alternate itemization of damages to Plaintiff **on or before Monday, October 5, 2015**, with a copy to the Court.

To avoid surprise, the parties should be aware that at the outset of the mediation, the Court will usually ask each party to give a brief, five minute overview of the trial, including expected witnesses and documentary evidence, any crucial evidentiary issues, and any controversial jury instructions. Most importantly, the parties are reminded that the mediation process will be confidential and disclosure of confidential dispute resolution communications is prohibited. *See* 28 U.S.C. § 652(d).

SO ORDERED.

SIGNED and **ENTERED** on August 18, 2015.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, Defendant.	§ §	

ORDER GRANTING PLAINTIFF'S MOTION TO DEPOSE PARTIES IN PART AND DENYING IN PART

Before the Court is Plaintiff's motion to depose nonparty witnesses, in whatever manner the Court deems appropriate, at Defendant's expense, (Doc. 128), and Defendant's response (Doc. 136). For the reasons set forth below, Plaintiff's motion is granted in part and denied in part.

Plaintiff seeks to depose the following five nonparty witnesses: Andrew J. Palafox, M.D. (Plaintiff's private treating physician); Racheal Chapa, Warden; Stanton Hawkes, PA-C; Philip I. Dunigan, Former Health Services Administrator (retired); and Victoria Santos, Health Information Technician. (Doc. 128:2) Defendant does not oppose Plaintiff's request to conduct depositions of any of these nonparty witnesses, but requests that the depositions be done by written questions and objects to Plaintiff's request that Defendant bear the costs. (Doc. 136) Plaintiff's motion to depose the witnesses listed is granted. This, however, does not fully address the issues raised in the motion.

Plaintiff is incarcerated out of state and is unable to appear in person to depose the witnesses at their place of employment. (Doc. 128:2) Plaintiff cannot afford (Doc. 128:3) nor could he require the witnesses be deposed where he is incarcerated, because they work over 100 miles from his prison. Fed. R. Civ. P. 45(b)(2). Plaintiff seeks leave to depose the parties in whatever manner and

fashion the Court deems appropriate. (Doc. 128:3-4) Under the Federal Rules of Civil Procedure, Plaintiff may conduct the depositions via telephone or other remote electronic means under Rule 30(b)(4) or by written questions under Rule 31. Defendant asserts that conducting such depositions by telephonic or other remote electronic means such as video conference would present logistical problems and requests that such depositions be taken upon written questions. (Doc. 136:3) This is a reasonable request, one which Plaintiff has not opposed. Thus, Plaintiff shall depose the witnesses by written questions.

Plaintiff does not specifically address whether he would be able to afford to take depositions of the requested individuals by written questions, but his motion suggests that he would not. Plaintiff requests that the costs of deposition in whatever manner it is done be assessed against the United States pending final determination and resolution of this case. (Doc. 128:3)

Although Plaintiff reminds the Court that he was granted *in forma pauperis* status to proceed with this suit, such status does not entitle him to avoid or delay the costs of discovery.

> An inmate proceeding *in forma pauperis* in a civil action may not issue subpoenas without paying the required fees. Consequently, Plaintiff must still pay fees associated with any witness depositions he seeks to conduct. These deposition costs would include not only any fees, but the cost of the court reporter's services as well as the cost for copies of the transcripts. Plaintiff may not expect the Court or defendants to pay for these fees and expenses simply because he is an indigent inmate proceeding *pro se* in this action.

Brown v. Carr, 236 F.R.D. 311, 313 (S.D. Tex. 2006) (internal citations and footnotes omitted). Although Plaintiff's *in forma pauperis* status may affect whether Plaintiff is ultimately able to take the depositions, the Court grants Plaintiff leave to do so, if he is able. Before such fees and expenses are incurred, Plaintiff shall demonstrate how the fees and expenses of the deposition will be paid.

Mindful that the deadline for discovery was July 23, 2015, and also that the deadline to file motions is September 25, 2015, and that the case is set for mediation on October 7, 2015 and for trial on November 19, 2015, the Court Orders that Plaintiff has until September 20, 2015 to complete the depositions by written questions.

It is therefore **ORDERED** that Plaintiff's motion for leave to depose the witnesses listed is hereby **GRANTED** in part and **DENIED** in part consistent with this order.

SIGNED and ENTERED on August 20, 2015.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§ §	
v.	§	NO. EP-13-CV-337-DB-RFC
UNITED STATES OF AMERICA, Defendant.	§ §	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL

Before the Court is Defendant's motion to compel, (Doc. 123), Plaintiff's response with his initial discovery responses (Doc. 131) and Plaintiff's supplemental discovery responses (Doc. 129), and Defendant's reply (Doc. 135). Defendant asks this Court to compel Plaintiff to respond to Defendant's discovery requests and to deem any objection to such requests waived by Plaintiff's untimely response. (Docs. 123, 135) For the reasons set forth below, Defendant's motion is granted in part and denied in part.

Defendant filed this motion to compel Plaintiff to serve his initial disclosures, to fully answer Defendant's first set of interrogatories, and to produce documents in response to Defendant's first request for production of documents. (Doc. 123) Defendant served Plaintiff with its First set of interrogatories and request for production of documents on November 25, 2014. *Id.*, at 3. Defendant re-sent the written discovery on February 10, 2015 with Plaintiff indicating that he would respond no later than March 9, 2015. *Id.* On March 19, 2015, Plaintiff indicated in a phone conversation with Defendant that he had not mailed his discovery responses because they were not typed; Defendant told Plaintiff his responses need not be typed and Plaintiff indicated that he would mail

his responses. *Id.*, at 4. On April 17, 2015, Defendant sent another letter to Plaintiff asking Plaintiff to provide his discovery responses by April 24, 2015. *Id.*

Defendant's motion to compel argues that any grounds for objecting to an interrogatory or request for production of documents is waived if not timely made, unless the court, for good cause excuses the failure. (Doc. 123:4 citing Fed. R. Civ. P. 33(b), 34(b)) Defendant asserts that the discovery propounded to Plaintiff seeks information regarding non-privileged matters that are relevant to the claims and defenses at issue and as such are permissible under Rule 26. (Doc. 123:5)

Attached to Plaintiff's response to Defendant's motion to compel, filed on June 1, 2015, is a copy of Plaintiff's discovery responses, dated March 20, 2015. (Doc. 131-1) Plaintiff alleges that he deposited his discovery responses in the inmate mail on March 20, 2015, because he was unable to access the legal mail system due to the quarantine at his facility, which lasted through March 24, 2015. (Doc. 131:2) When he received Defendant's letter demanding a response by April 24, 2015, Plaintiff assumed his responses had been received by Defendant after Defendant placed its letter in the mail, and therefore did not respond. *Id.*, at 3. When he was deposed on May 21, 2015, Plaintiff asserts that Defendant did not notify Plaintiff that the responses had not been received or that a motion to compel had been filed on May 13, 2015. *Id.* Plaintiff does not, however, contend that he ever attempted, in any way, to confirm that his responses had been received. Plaintiff further contends that he did not receive Defendant's motion to compel until May 26, 2015.

In its reply, Defendant asserts that the first time Defendant saw Plaintiff's discovery responses was on June 1, 2015. (Doc. 135) Defendant asserts that Plaintiff's discovery responses are therefore untimely, that Plaintiff has failed to establish good cause for failing to respond timely, and that therefore all of his objections should be deemed waived. *Id.*

On June 1, 2015, Plaintiff filed his Supplemental Objections and Responses to Defendant's First Request for Production, dated May 19, 2015. (Doc. 129)

Any grounds for objecting to an interrogatory or request for production of documents is waived if not timely made, unless the court, for good cause, excuses the failure. *See* Fed. R. Civ. P. 33(b); *RE/MAX Int'l, Inc. v. Trendsetter Realty, LLC*, Civ. No. H–7–2426, 2008 WL 2036816, at *5 (S.D. Tex. May 9, 2008) ("Courts have held that Rule 34 implicitly incorporates both the waiver and 'good cause' provisions of Rule 33(b)(4)."); *Clewis v. Medco Health Solutions*, Inc., No. 3:12-CV-5208, 2013 WL 5354574, at *3 (N.D. Tex. Sep 25, 2013), *citing In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1989). "Any other result would . . . completely frustrate the time limits contained in the Federal Rules and give a license to litigants to ignore the time limits for discovery without any adverse consequences." *Krewson v. City of Quincy*, 120 F.R.D. 6, 7 (D. Mass. 1988) (citation omitted). In both *RE/MAX* and *Krewson*, the courts declined to find that the late response waived a claim of privilege.

The Court finds that Plaintiff did not timely respond to Defendant's propounded discovery. While the parties conferred a number of times and agreed to later response dates than required by the rules, Plaintiff failed to take any steps to ensure that his responses had been received by the latest agreed date.

Plaintiff's objections are numerous and include attorney-client or work-product privilege, ambiguous, over-broad, unduly burdensome, duplicative, unable to respond without discovery from Defendant, and asked and answered. (Doc. 131-1:4-14) The Court finds that Plaintiff's late response waives all of the objection except those based on attorney-client and work-product privilege. Further, Plaintiff's general objection, asserted in his supplemental response, to any materials

requested that might be subject to attorney-client or work-product privilege is not a proper objection and is also waived or overruled. (Doc. 129:3)

Plaintiff asserts attorney-client or work-product privilege with respect to the following requests: 2, 4, 5, 7, 8, 13, 14, 15, 20, 25, and 28. (Doc. 129, 131-1) The Court will not find these objections waived at this time. Plaintiff, however, is reminded that additional steps must be taken when claiming privilege or protecting trial preparation materials. *See* Fed. R. Civ. P. 26(b)(5)(A). The documents responsive to the request must be provided to the extent privilege is not claimed, and to the extent privilege is claimed and documents are withheld, Plaintiff must provide a privilege log describing the nature of the responsive documents withheld for each request in such a way, but without revealing information itself privileged or protected, that the parties can assess the claim of privilege. *Id.* To the extent Plaintiff has not provided such privilege log, he is ordered to do so.

If Defendant wishes to challenge the assertion of privilege regarding a specific item(s) in the privilege log, Defendant may do so through a separate motion to compel after conferring in good faith with Plaintiff to resolve the dispute without court intervention.

It is therefore **ORDERED** that Defendant's motion to compel is hereby **GRANTED in part** and **DENIED in part**. Plaintiff is ordered to respond, or supplement his responses, to Defendant's Requests and Interrogatories in accordance with this order by September 21, 2015.

SIGNED and ENTERED on August 21, 2015.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY SMITH	§	
	§	
v.	§	**EP-13-CV-337-DB-RFC**
	§	
UNITED STATES OF AMERICA	§	

ORDER

Before the Court is Attorney Stephen A. Saltzburg's "Motion for Admission Pro Hac Vice," filed in the above-captioned cause on September 27, 2015. Therein, Attorney Saltzburg asks the Court to allow him to appear *pro hac vice* in the Western District of Texas on behalf of Plaintiff Gary Smith. After due consideration, **IT IS HEREBY ORDERED that:**

1. Attorney Stephen A. Saltzburg's "Motion for Admission Pro Hac Vice" is **GRANTED**;

2. Attorney Attorney Stephen A. Saltzburg is **GRANTED LEAVE** to appear *pro hac vice* as attorney of record for Plaintiff Gary Smith in this cause;

3. Attorney Stephen A. Saltzburg submit an application for admission to practice in the United States District Court for the Western District of Texas, in compliance with Local Court Rule for the Western District of Texas AT-1, within sixty days of the entry of this Order, and diligently pursue that application until admitted to practice before this Court. Should Attorney Stephen A. Saltzburg choose not to pursue admission, he will not be allowed to appear in any other action in the Western District of Texas until he has been admitted formally to practice; and

4. Attorney Stephen A. Saltzburg **REGISTER** as a filing user with the Court's Case Management/Electronic Case Files (CM/ECF) Program within ten days of the entry of this Order, in compliance with the administrative policies and procedures for electronic filing in the Western District of Texas.

SIGNED this **29th** day of **September 2015**.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASOEL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL NO. EP-13-CA-00337-DB**
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

ORDER

Before this Court is Defendant's second motion to compel Plaintiff to return inadvertently disclosed material. (Doc. 183) On August 19, 2015, this Court granted Defendant's Motion to Compel and ordered that Plaintiff return the documents in question to Defendant by September 15, 2015, and to notify the Court when such was accomplished. (Doc. 150) Plaintiff's response consists of a sworn affidavit stating under penalty of perjury, *inter alia*, that "[t]he records no longer exist." (Doc. 185:1, 7) He explains that although during his deposition on May 21, 2015 he represented that his friend was still in possession of the copies Plaintiff had made of the inadvertently disclosed material, his friend had in fact, unknown to Plaintiff, destroyed the documents Plaintiff had mailed to him. *Id.*

The Court cannot compel the return of documents that do not exist. Therefore, the Court denies Defendant's second motion to compel as MOOT.

SIGNED and ENTERED this 10th day of November, 2015.

ROBERT F. CASTANEDA
UNITED STATES MAGISTRATE JUDGE

Sonya Cole - FW: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Motion to Appoint Expert

From: "Castillo, Eddie (USATXW)" <Eddie.Castillo@usdoj.gov>
To: Sonya Cole <scole@bop.gov>
Date: 8/12/2015 4:50 PM
Subject: FW: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Motion to Appoint Expert
CC: "Riley, Ruth (USATXW)" <Ruth.Riley@usdoj.gov>, "Jara, Magdalena (USATXW)...

FYI

From: TXW_USDC_Notice@txwd.uscourts.gov [mailto:TXW_USDC_Notice@txwd.uscourts.gov]
Sent: Wednesday, August 12, 2015 3:43 PM
To: cmecf_notices@txwd.uscourts.gov
Subject: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Motion to Appoint Expert

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U.S. District Court [LIVE]

Western District of Texas

Notice of Electronic Filing

The following transaction was entered on 8/12/2015 at 4:43 PM CDT and filed on 8/12/2015
Case Name: Smith v. United States of America et al
Case Number: 3:13-cv-00337-DB-RFC
Filer:
Document Number: No document attached

Docket Text:
Text Order DENYING [140] Motion to Appoint Expert entered by Judge Robert F. Castaneda. Plaintiff is not entitled to the appointment of an expert under either 28 U.S.C. 1915 or Fed. R. Evid. 706 to assist in establishing his claim. See Hannah v. U.S. 523 F.3d 597, 600-601 (5th Cir. 2008). (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm)

3:13-cv-00337-DB-RFC Notice has been electronically mailed to:

Eduardo R. Castillo eddie.castillo@usdoj.gov, amanda.adkins@usdoj.gov, priscilla.roldan@usdoj.gov

Magdalena G. Jara magdalena.jara@usdoj.gov, amanda.adkins@usdoj.gov, priscilla.roldan@usdoj.gov

3:13-cv-00337-DB-RFC Notice has been delivered by other means to:

Gary Charles Smith
#05147-058
FCI BUTNER MEDIUM II
FEDERAL CORRECTIONAL INSTITUTION
P.O. BOX 1500
BUTNER, NC 27509

Sonya Cole - FW: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Motion for Miscellaneous Relief

From: "Castillo, Eddie (USATXW)" <Eddie.Castillo@usdoj.gov>
To: Sonya Cole <scole@bop.gov>
Date: 8/12/2015 4:50 PM
Subject: FW: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Motion for Miscellaneous Relief
CC: "Riley, Ruth (USATXW)" <Ruth.Riley@usdoj.gov>, "Jara, Magdalena (USATXW)...

Sonya,

FYI, the Court denied Smith's Motion to Enjoin the BOP from transferring him. The Court also denied, in a text order, Smith's motion for appointment of an expert.

Eddie

From: TXW_USDC_Notice@txwd.uscourts.gov [mailto:TXW_USDC_Notice@txwd.uscourts.gov]
Sent: Wednesday, August 12, 2015 3:01 PM
To: cmecf_notices@txwd.uscourts.gov
Subject: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Motion for Miscellaneous Relief

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U.S. District Court [LIVE]

Western District of Texas

Notice of Electronic Filing

The following transaction was entered on 8/12/2015 at 4:00 PM CDT and filed on 8/12/2015
Case Name: Smith v. United States of America et al
Case Number: 3:13-cv-00337-DB-RFC
Filer:
Document Number: No document attached

Docket Text:
Text Order DENYING [127] Motion entered by Judge Robert F. Castaneda. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm)

3:13-cv-00337-DB-RFC Notice has been electronically mailed to:

Eduardo R. Castillo eddie.castillo@usdoj.gov, amanda.adkins@usdoj.gov, priscilla.roldan@usdoj.gov

Magdalena G. Jara magdalena.jara@usdoj.gov, amanda.adkins@usdoj.gov, priscilla.roldan@usdoj.gov

3:13-cv-00337-DB-RFC Notice has been delivered by other means to:

Gary Charles Smith
#05147-058
FCI BUTNER MEDIUM II
FEDERAL CORRECTIONAL INSTITUTION
P.O. BOX 1500
BUTNER, NC 27509

Sonya Cole - FW: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Ex Parte Motion

From: "Jara, Magdalena (USATXW)" <Magdalena.Jara@usdoj.gov>
To: Sonya Cole <scole@bop.gov>
Date: 6/19/2014 9:46 AM
Subject: FW: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Ex Parte Motion
CC: "Riley, Ruth (USATXW)" <RRiley@usa.doj.gov>, "Adkins, Amanda (USATXW)" <...

Sonya, I'm not sure why Smith filed an Ex Parte Motion but the court granted it. He has until July 1, 2014 to file his response to the MSJ.

Maggie

AUSA Magdalena G. Jara
700 E. San Antonio, Ste. 200
El Paso, Texas 79901
(915) 534-6555
Direct (915) 534-3457

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From: TXW_USDC_Notice@txwd.uscourts.gov [mailto:TXW_USDC_Notice@txwd.uscourts.gov]
Sent: Thursday, June 19, 2014 8:08 AM
To: cmecf_notices@txwd.uscourts.gov
Subject: Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Ex Parte Motion

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U.S. District Court [LIVE]

Western District of Texas

Notice of Electronic Filing

The following transaction was entered on 6/19/2014 at 9:07 AM CDT and filed on 6/19/2014
Case Name: Smith v. United States of America et al
Case Number: 3:13-cv-00337-DB-RFC
Filer:
Document Number: No document attached

Docket Text:
Text Order GRANTING [63] Ex Parte Motion entered by Judge Robert F. Castaneda. Plaintiff has until July 1, 2014 to file his Response to Defendants' Motion to Dismiss and in the alternative Motion for Summary Judgment [36]. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm)

3:13-cv-00337-DB-RFC Notice has been electronically mailed to:

Magdalena G. Jara magdalena.jara@usdoj.gov, amanda.adkins@usdoj.gov, ruth.riley@usdoj.gov

3:13-cv-00337-DB-RFC Notice has been delivered by other means to:

Gary Charles Smith
#05147-058
FORT WORTH
FEDERAL MEDICAL CENTER
P.O. BOX 15330
FORT WORTH, TX 76119

Adkins, Amanda (USATXW)

From:	TXW_USDC_Notice@txwd.uscourts.gov
Sent:	Tuesday, March 03, 2015 9:36 AM
To:	cmecf_notices@txwd.uscourts.gov
Subject:	Activity in Case 3:13-cv-00337-DB-RFC Smith v. United States of America et al Order on Motion for Miscellaneous Relief

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U.S. District Court [LIVE]

Western District of Texas

Notice of Electronic Filing

The following transaction was entered on 3/3/2015 at 10:36 AM CST and filed on 3/3/2015
Case Name: Smith v. United States of America et al
Case Number: 3:13-cv-00337-DB-RFC
Filer:
Document Number: No document attached

Docket Text:
Text Order GRANTING [100] Motion by United States of America for Leave to Depose Person Confined in Prison entered by Judge Robert F. Castaneda. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm)

3:13-cv-00337-DB-RFC Notice has been electronically mailed to:

Eduardo R. Castillo eddie.castillo@usdoj.gov, amanda.adkins@usdoj.gov, priscilla.roldan@usdoj.gov

Magdalena G. Jara magdalena.jara@usdoj.gov, amanda.adkins@usdoj.gov, priscilla.roldan@usdoj.gov

3:13-cv-00337-DB-RFC Notice has been delivered by other means to:

Gary Charles Smith
#05147-058
FMC BUTNER
FEDERAL MEDICAL CENTER

P.O. BOX 1600
BUTNER, NC 27509

Text Order GRANTING 168 Motion for Extension of Time to File entered by Judge Robert F. Castaneda. Dispositive Motions will be due by October 2, 2015.(This is a text-only entry generated by the court. There is no document associated with this entry.) (mm) (Entered: 09/23/2015)

Sonya Cole - Activity in Case 3:13-cv-00337-DB Smith v. United States of America et al To be Referred to EP Mag Judge

From: <TXW_USDC_Notice@txwd.uscourts.gov>
To: <cmecf_notices@txwd.uscourts.gov>
Date: 10/25/2013 3:31 PM
Subject: Activity in Case 3:13-cv-00337-DB Smith v. United States of America et al To be Referred to EP Mag Judge

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U.S. District Court [LIVE]

Western District of Texas

Notice of Electronic Filing

The following transaction was entered on 10/25/2013 at 3:31 PM CDT and filed on 10/24/2013
Case Name: Smith v. United States of America et al
Case Number: 3:13-cv-00337-DB
Filer:
Document Number: No document attached

Docket Text:
If ordered by the court, all referrals will be assigned to Magistrate Judge Castaneda (da)

3:13-cv-00337-DB Notice has been electronically mailed to:

3:13-cv-00337-DB Notice has been delivered by other means to:

Gary Charles Smith
#05147-058
FCI LA TUNA
Inmate Mail/Parcels
P.O. BOX 3000
ANTHONY, TX 88021

U.S. Department of Justice
United States Attorney
Western District of Texas

MAGDALENA G. JARA
Assistant United States Attorney
Civil Division

700 E. San Antonio, Ste. 200
El Paso, Texas 79901

(915) 534-6555 (Civil Section)
(915) 534-6884 (General Line)
(915) 534-3490 (Fax)

Received
DEC 04 2015
Bureau of Prisons
Legal Department, SCRO

December 1, 2015

Via Certified Mail No. 9214 7969 0099 9790 1605 1030 80
Return Receipt Requested

Sonya Cole
Senior Counsel
Federal Bureau of Prisons
U.S. Armed Forces Reserve Complex
344 Marine Forces Drive
Grand Prairie, Texas 75051

RE: Smith v. United States
EP-13-CV-0337-DB

Dear Ms. Cole:

Enclosed please find an original set of executed settlement documents for the above referenced case. Thank you for the litigation support provided.

Kind regards,

RICHARD L. DURBIN, JR.
UNITED STATES ATTORNEY

By: _____
MAGDALENA G. JARA
Assistant United States Attorney

MGJ:aa

Enclosures: as stated

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-0337-DB**
	§	
UNITED STATES OF AMERICA, *et al.*,	§	
Defendants.	§	

RELEASE

Plaintiff GARY CHARLES SMITH for the total consideration of ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($150,000.00), paid to Plaintiff, receipt of which is hereby acknowledged, does hereby release and forever discharge, and for his guardians, heirs, administrators, and assigns, does hereby release and forever discharge the UNITED STATES OF AMERICA, and any of its officers, agents, servants, and employees, past or present, of and from any and all claims for all damages resulting, or to result, on account of the events giving rise to the above-captioned action, all as set forth in detail in the pleadings and papers on file in this lawsuit, and agrees to indemnify and hold harmless the UNITED STATES OF AMERICA, and its officers, agents, servants, and employees, past or present, from and against any and all such causes of actions, claims, liens, including but not limited to, any hospital liens for medicaid bills, medical liens of any type whatsoever, and any and all medical bills, damages, costs, and expenses whatsoever, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators, or assigns against any third party or against the United States, including claims for wrongful death.

It is acknowledged that said sum is paid in compromise and settlement of disputed claims, and that payment thereof shall not be construed as an admission of any liability whatsoever by the UNITED STATES OF AMERICA, by whom liability is expressly denied.

This Release is to be considered as complementary to the Stipulation for Compromise Settlement entered into herein by and between the Parties and their counsel. This Release is contractual and not a mere recital.

SIGNED AND DATED this 3rd day of November, 2015

Gary C. Smith

GARY CHARLES SMITH, *Plaintiff*

SWORN TO AND SUBSCRIBED before me this the _____ day of _____, 2015.

Notary Public in and for
The State of Florida

My Commission expires:

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH, Plaintiff,	§	
vs.	§	EP-13-CV-0337-DB-RFC
UNITED STATES OF AMERICA, et al., Defendants.	§	

RELEASE

It is acknowledged that said sum is paid in compromise and settlement of disputed claims, and that payment thereof shall not be construed as an admission of any liability whatsoever by the UNITED STATES OF AMERICA, by whom liability is expressly denied. This Release is to be considered as complementary to the Stipulation for Compromise Settlement entered into herein by and between the Parties and their counsel. This release is contractual and not a mere recital.

SIGNED AND DATED this 19th day of November, 2015.

GARY CHARLES SMITH, Plaintiff

CERTIFICATE OF NOTARY PUBLIC

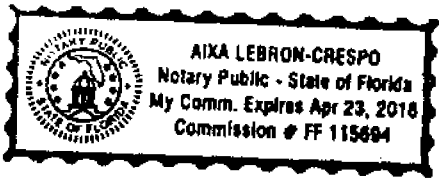
Before me, A. Lebron-Crespo, a Notary Public in and for the State of Florida, County of Sumter, appeared Gary Charles Smith, who executed the foregoing Release in my presence this 19th day of November, 2015, at the Low Security Federal Correctional Institution in Coleman, Florida.

A. Lebron

Signature of Notary Public

My Commission Expires: April 23, 2018

SEAL



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-0337-DB**
	§	
UNITED STATES OF AMERICA, *et al.*,	§	
Defendants.	§	

STIPULATION FOR COMPROMISE AGREEMENT

It is hereby stipulated by and between the undersigned Plaintiff, GARY CHARLES SMITH, and the UNITED STATES OF AMERICA, Defendant, (herein after referred to as "the Parties"), by and through their respective attorneys as follows:

1. The Parties do hereby agree to settle and compromise the above-entitled action under the terms and conditions set forth herein.

2. The United States of America, Defendant, agrees to pay to the Plaintiff the sum of ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($150,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the same subject matter that gave rise to the above-captioned lawsuit, including any claims for wrongful death, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its officers, agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators, or assigns hereby agree to accept the sum of ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($150,000.00), in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its officers, agents, servants and employees, on account of the same subject matter that gave rise to the above-captioned lawsuit, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators, or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its officers, agents, servants, and employees, from and against any and all such causes of action, claims, liens, including but not limited to, any hospital liens for medicaid bills, medical liens of any type whatsoever, and any and all medical bills, damages, costs, and expenses whatsoever, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators, or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as an admission of liability or fault on the part of the United States of America, its agents, servants, or employees, and it is specifically denied that they are liable to Plaintiff. This settlement is entered into by all Parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the Parties, that the settlement amount of ONE HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS ($150,000.00) represents the entire amount of the compromise settlement and that the respective Parties will each bear their own costs, fees, and expenses, and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the Parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank: Citibank
B. Street Address of Bank: 1775 Pennsylvania Avenue, N.W.
C. City, State, and Zip Code of Bank: Washington, D.C. 20006
D. Routing Number (b)(6)
E. Name of Account: Mr Stephen A. Saltzburg Escrow Account
F. Account Number (b)(6)

Plaintiff's attorneys agree to distribute the settlement proceeds to the Plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The Parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional

agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 3rd day of November, 2015.

GARY CHARLES SMITH, *Plaintiff*
Social Security No. 224-84-9394

Executed this 2nd day of October, 2015.

STEPHEN A. SALTZBURG
State Bar No.: District of Columbia # 156844
2000 H. Street N.W.
Washington, D.C. 20052
(202) 994-7089
(202) 994-7143 Facsimile
Tax ID No. 190-34-1005
Lead Attorney for Plaintiff

Executed this 27th day of November, 2015.

VALENZUELA LAW FIRM
221 N. Kansas, Ste. 1200
El Paso, Texas 79901
T: 915 209-2619
F: 915 493-2404

FELIX VALENZUELA
State Bar No. 24076745
Tax ID No. 46-4767525
Local Counsel for Plaintiff

Executed this 24th day of November, 2015.

RICHARD L. DURBIN, JR.
UNITED STATES ATTORNEY

MAGDALENA G. JARA
Assistant United States Attorney
Texas State Bar No. 10573100
700 E. San Antonio, Ste. 200
El Paso, Texas 79901
Phone: (915) 534-6555
Facsimile: (915) 534-3490
Attorney for Defendant

Executed this 25th day of November, 2015.

RICHARD L. DURBIN, JR.
UNITED STATES ATTORNEY

EDUARDO R. CASTILLO
Assistant United States Attorney
Texas State Bar No. 03984803
700 E. San Antonio, Ste. 200
El Paso, Texas 79901
Phone: (915) 534-6555
Facsimile: (915) 534-3490
Attorney for Defendant

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of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,	§	
Plaintiff,	§	
	§	
v.	§	**EP-13-CV-0337-DB**
	§	
UNITED STATES OF AMERICA,	§	
Defendant.	§	

DEFENDANT'S ALTERNATIVE DISPUTE RESOLUTION REPORT

COMES NOW, Defendant, the United States of America, acting by and through the United States Attorney for the Western District of Texas, and files this Report on Alternative Dispute Resolution ("ADR") in compliance with the Parties' Proposed Scheduling Order and Local Rule CV-88, and would show the Court the following:

1. The parties have not discussed settlement of the case.

2. The persons responsible for settlement negotiations: Assistant United States Attorney Magdalena G. Jara for the Defendant and Gary Charles Smith, Pro Se Plaintiff.

3. Defendant does not believe ADR is appropriate in this case at this time, but would be willing to participate in non-binding ADR if the Court deems it appropriate.

Respectfully submitted,

ROBERT PITMAN
UNITED STATES ATTORNEY

/s/ Magdalena G. Jara
MAGDALENA G. JARA
Assistant United States Attorney
Texas State Bar No. 10573100
700 E. San Antonio, Ste. 200
El Paso, Texas 79901
Telephone (915) 534-6884
Facsimile (915) 534-3490

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and I have mailed by certified mail, return receipt requested, the document to the following non-CM/ECF participant: Gary Charles Smith, Register No. 05147-058, Federal Correctional Institution Fort Worth, 3150 Horton Road, Fort Worth, Texas 76119, *Pro Se* Plaintiff.

/s/ Magdalena G. Jara
MAGDALENA G. JARA
Assistant United States Attorney

Gary Charles Smith, Plaintiff
Register Number 05147-058
Federal Correctional Institution
Post Office Box 15330
Fort Worth, TX 76119-5330

FILED
2014 NOV 20 PM 4:01
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GARY CHARLES SMITH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

EP-13-CV-0337-DB-RFC

ALTERNATIVE RESOLUTION REPORT

TO THE HONORABLE JUDGE OF SAID COURT:

In accordance with the Joint Proposed Scheduling Order and in compliance with Local Rule CV-88, the Plaintiff, Gary Charles Smith, pro se, submits the following Alternative Dispute Resolution Report:

(a) The ADR method Plaintiff suggests is that a court-facilitated settlement conference would be an appropriate and satisfactory method for exploring a resolution to this litigation;

(b) Plaintiff will submit a settlement offer to Defendant United States of America on or before November 17, 2014, and Defendant will respond thereto by December 1, 2014;

(c) Plaintiff is responsible for settlement negotiations. Defendant's counsel, Magdalena Gurany Jara, Assistant United States Attorney is responsible for negotiations with Plaintiff on behalf of the United States;

(d) Because Plaintiff is incarcerated in a location outside of the Western District of Texas, he would be unable to attend any ADR session in person, so he respectfully asks that Court allow him to attend any and all settlement conferences via telephone or video conferencing;

(e) Plaintiff has read and familiarized himself with the confidentiality requirements of the Rule, and will abide by them.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that this Honorable Court approve Plaintiff's suggestion of a court-facilitated settlement conference as the appropriate means of resolving this case. Because Plaintiff is a federal inmate, he has not consulted with Defendant's counsel as to the ADR method the United States might suggest.

Respectfully submitted,

November 13, 2014.

GARY CHARLES SMITH, Plaintiff
Register Number 05147-058
Federal Correctional Institution
Post Office Box 15330
Fort Worth, TX 76119-5330

CERTIFICATE OF SERVICE

This is to certify that I, Gary Charles Smith, Plaintiff in the foregoing styled and numbered cause, have this 14th day of November, 2014, served a true and correct copy of the Alternative Resolution Report upon Defendant's counsel, Magdalena Gurany Jara, Assistant United States Attorney, whose address is 700 E. San Antonio Avenue, Suite 200, El Paso, TX 79901, by placing said document in the United States Mail at Fort Worth, TX, with sufficient postage affixed thereto to ensure delivery.

Gary Charles Smith, Plaintiff
Register Number 05147-058
Federal Correctional Institution
Post Office Box 15330
3150 Horton Road
Fort Worth, TX 76119

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VLF
VALENZUELA
LAW FIRM

THIS IS A DEMAND LETTER
PURSUANT TO EVIDENCE RULE 408

September 30, 2015

Eduardo R. Castillo
Assistant United States Attorney
700 East San Antonio
El Paso, Texas 79901
VIA HAND DELIVERY

Magdalena G. Jara
Assistant United States Attorney
700 East San Antonio
El Paso, Texas 79901
VIA HAND DELIVERY

Re: Gary Charles Smith v. United States of America, EP-13-CV-337-DB

Counsel,

Pursuant to the Court's Order of August 19, 2015, ECF No. 151, and my discussions with my clients, I am authorized to tender the following written offer of settlement:

a. Eight million dollars, tax exempt, for pain and suffering, to be paid in a single lump sum payment;
b. an agreement by the United States that it will join in a Rule 35(b) motion;
c. a stipulation that 27 days of earned good conduct time will be restored;
d. placement in the Witness Protection Program; and
e. a recommendation that, once an order is entered by the Court in the Middle District of North Carolina pursuant to the Rule 35 motion, Plaintiff will be immediately placed in a halfway house.

Please do not hesitate to contact me, should you have any questions about this communication.

Warm regards,

Felix Valenzuela

221 N. KANSAS, STE. 1201 | EL PASO | TEXAS | 79901 | 915-209-2719 | FAX: 915-493-2404

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U.S. Department of Justice

United States Attorney
Western District of Louisiana

United States Courthouse
300 Fannin Street, Suite 3201
Shreveport, Louisiana 71101-3068
18-676-3600

Branch Office
United States Courthouse
800 Lafayette Street, Suite 2200
Lafayette, Louisiana 70501
337-262-6618

November 20, 2013

Via Email Only Jason.Sickler@usdoj.gov
Jason Sickler, Regional Counsel
Federal Bureau of Prisons
Southern Central Regional Office
U.S. Armed Forces Reserve Complex
344 Marine Forces Drive
Grand Prairie, TX 75051

Via Email Only James.Touhey@usdoj.gov
James Touhey, Director
Civil Division - Torts Branch
U. S. Department of Justice
P. O. Box 888 - Ben Franklin Station
Washington, DC 20044

Re: Joseph Collins v USA, *et al*
Civil Action No: 13-2979, USDC/WDLA/Alexandria Division

Dear Colleagues:

This is to inform you that the United States Attorney's Office for the Western District of Louisiana was served **November 13, 2013**, with the attached Summons and Complaint filed in the referenced case.

Please direct the preparation of a litigation report and suggested answer as soon as possible to **Assistant United States Attorney Jennifer B. Frederick** at our Lafayette office. **Please also place a litigation hold on all documents, tangible evidence or electronically stored information that may be related to this claim ensuring that the same is not destroyed or altered pending the final disposition of this claim.** Mrs. Frederick is the attorney within our district who will handle these cases. You may telephone her at (337) 262-6618 or write to the Lafayette address shown above.

Sincerely,

STEPHANIE A. FINLEY
UNITED STATES ATTORNEY

KATHERINE W. VINCENT
Chief - Civil Division
Lafayette Office - (337) 262-6618

KWV/lgw
Enclosures

cc: Eric Hammonds, BOP Houston (via email)
AUSA Jennifer B. Frederick

LACROIX, LEVY & BARNETT, L.L.C.

Attorneys at Law
1101-B BOLTON AVENUE
ALEXANDRIA, LOUISIANA 71301
Telephone: (318) 443-7615
Facsimile: (318) 443-0074

Charles O. LaCroix*
Robert G. Levy*
Barry M. Barnett

**Board Certified Family Law Specialist*

Mailing Address:
Post Office Box 1105
Alexandria, LA
71309-1105

November 6, 2013

U.S. ATTORNEY
WD LA LAFAYETTE
2013 NOV 13 P 12: 37
ASSIGNED

Stephanie A. Finley
U.S. Attorney
Western District of Louisiana
800 Lafayette St., Ste 2200
Lafayette Ka 70501-6832

Certified Mail Return Receipt:
70102780000075079221

RE: Joseph Collins vs. USA
United States District Court: Western District of Louisiana
Civil Suit Number: 1:13-CV-02979-JTT-JDK

Dear Madam:

This letter will serve to inform you that the above captioned matter was filed in the United States District Court, Western District of Louisiana, on November 1, 2013. Service of process in accordance to Rule 4 of the Federal Rules of Civil Procedure is being made on you as a result of that filing.

I have enclosed a copy of a summons and the Complaint for Damages as required by Rule 4. I trust this matter will be promptly forwarded to the appropriate person for action within the prescribed time.

Sincerely,

BARRY M. BARNETT

BMB/kb

Enc

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

JOSEPH COLLINS	)	
Plaintiff	)	
v.	)	Civil Action No. 1:13–CV–02979–JTT–JDK
	)	Judge James T Trimble, Jr
USA	)	
Defendant	)	

U.S. ATTORNEY
WD LA LAFAYETTE
2013 NOV 13 P 12: 37
ASSIGNED_____

SUMMONS IN A CIVIL ACTION

To:
U.S. ATTORNEY
WESTERN DISTRICT OF LOUISIANA
800 LAFAYETTE ST., STE: 2200
LAFAYETTE, LA 70501–6832

A lawsuit has been filed against you.

Within the time required by law*, normally 60 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

Barry M Barnett
LaCroix Levy &Barnett
P O Box 1105
Alexandria, LA 71309–1105

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

TONY R. MOORE

CLERK OF COURT

/s/ – Tony R. Moore

ISSUED ON 2013–11–04 09:38:28 , Clerk USDC WDLA

** (60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States.) Rule 12(a)(3).*

1:13-CV-02979-JTT-JDK

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for **U.S. ATTORNEY**
WESTERN DISTRICT OF LOUISIANA
800 LAFAYETTE ST., STE: 2200
LAFAYETTE, LA 70501-6832 was received by me on *(date)*_____.

- I personally served the summons on **U.S. ATTORNEY**
  WESTERN DISTRICT OF LOUISIANA
  800 LAFAYETTE ST., STE: 2200
  LAFAYETTE, LA 70501-6832 at *(place)*_____
  _____ on *(date)*_____; or

- I left the summons at the individual's residence or usual place of abode with *(name)* _____
  _____, a person of suitable age and discretion who resides there, on *(date)*
  _____, and mailed a copy to the individual's last known address; or

- I served the summons on *(name of individual)* _____, who is designated by law to accept service of process on behalf of *(name of organization)* _____
  _____ on *(date)* _____; or

- I returned the summons unexecuted because _____
  _____; or

- Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ _____ .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attemped service, etc:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

NOTICE TO PARTIES/COUNSEL

- In accordance with FRCP 10 and LR 10.1, all pleadings must include the name of the Judge and the Magistrate Judge (when one is assigned).

- A request for a jury demand must be indicated in the caption and included in the pleading. See LR 38.1. Indication of a jury demand on the civil cover sheet is not a valid request for a jury trial.

- Under LR 83.2.5 pleadings will only be filed when signed by an attorney admitted to practice before this Court or a pro se litigant. Each attorney shall place his attorney identification number under his signature on any pleading. The attorney identification number is the same as the number assigned by the Louisiana Supreme Court or for visiting attorneys appearing pro hac vice, the number assigned by this office. When more than one attorney appears for a single party, one attorney shall be designated TA or "trial attorney."

- Your attention is directed to LR 41.3 which governs dismissal of actions for failure to prosecute.

- If deadlines cannot be met, extensions may be sought under FRCP 6(b). Voluntary extensions of time between counsel are not recognized by the Court. Any extensions must be granted or approved by the Court.

- Your attention is also directed to LR 16.3.1 which requires the parties to consider the use of Alternative Dispute Resolution no later than 200 days after the initial filing in this court.

- Counsel and parties are reminded of their obligation to notify the court of any proceedings directly related to or "involving subject matter that comprises all or a material part of the subject matter or operative facts of another action" as provided by LR 3.1.

TONY R. MOORE
Clerk of Court

NOTE: This court has an internet web site at www.lawd.uscourts.gov where you can obtain our Guide To Practice and our local rules, including those referenced above. You can also download forms and maps to our courthouses and, electronically file your pleading. PACER users my also view the docket sheet and imaged pleadings on-line.

LAW101 (Rev. 6/12)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

JOSEPH COLLINS
Plaintiff

CIVIL ACTION

NO. _____

VERSUS

JUDGE: _____

UNITED STATES OF AMERICA
Defendant

COMPLAINT FOR DAMAGES

THE COMPLAINT FOR DAMAGES of JOSEPH COLLINS, a person of the full age of majority who is domiciled in Florida, respectfully represents that:

1.

Made defendant herein is:

a) The UNITED STATES OF AMERICA.

2.

The jurisdiction of this Court is based on 28 U.S.C. 1346(b) as the claims herein are presented pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. 2671, et seq. Venue is appropriate in this District and Division under 28 U. S.C. §1402(b) as the accident which forms

the basis of this Complaint occurred in LaSalle Parish, Louisiana.

3.

On October 13, 2010, at the public landfill in LaSalle Parish, Louisiana Plaintiff, JOSEPH COLLINS and his friend, Jesse R. Welch, were unloading trash from a trailer attached to Welch's vehicle. A garbage truck belonging to the United States Bureau of Prisons and being driven by a Bureau of Prisons employee, JAVIER SALINAS, backed in next to the passenger side the vehicle and trailer being unloaded by Plaintiff. Accompanying JAVIER SALINAS was Bureau of Prisons employee, FRANCISCO MORENO, JR. The rear doors of the garbage truck were open and its bed was being raised to dump its load of trash. While it was backing in, the door of the garbage truck adjacent to Plaintiff's trailer swung violently away from the truck, striking the trailer, and causing Plaintiff injury.

4.

The accident was caused by the negligence and fault of JAVIER SALINAS and/or FRANCISCO MORENO, JR. This negligence and fault included:

a) Positioning the garbage truck too closely to the trailer being unloaded by Plaintiff;

b) Failing to properly secure the door of the garbage truck;

c) Improperly unloading the garbage truck by backing the vehicle and then stopping suddenly;

d) Failing to warn Plaintiff of the danger posed by their actions; and

e) Allowing the door of the garbage truck to strike the trailer being unloaded by Plaintiff.

5.

At the time of the above described accident, JAVIER SALINAS and FRANCISCO MORENO, JR. were employees of the United States Bureau of Prisons and acting within the scope of their office or employment at the time of the above-mentioned incident; therefore, the UNITED STATES OF AMERICA is responsible for their actions.

6.

The accident was also caused by the negligence and fault of the UNITED STATES OF AMERICA acting through the Bureau of Prisons. This negligence and fault included:

a) Failing to properly train its employees or other performing work on its behalf;

b) Failing to properly supervise its employees or others performing work on its behalf; and

c) Failing to properly maintain its vehicle.

7.

As a result of the foregoing collision, JOSEPH COLLINS sustained the following, among other, injuries:

a) Injuries to his ribs, lower back, neck and right arm;

b) Aggravation of a pre-existing lower back condition; and

c) Injuries to his neck and spine requiring surgery.

8.

As a result of the foregoing injuries, petitioner, JOSEPH COLLINS, is entitled to recover past and future damages for the following categories of loss, totaling THREE HUNDRED NINETY-FOUR THOUSAND, SEVEN HUNDRED NINETY-TWO AND 66/100THS ($394,792.66) DOLLARS:

a) Physical pain and suffering;

b) Mental anguish and emotional distress;

c) Loss of enjoyment of life;

d) Disability;

e) Medical expenses; and

f) Loss of earnings and/or loss of earnings capacity.

9.

Plaintiff has complied with the provisions of the Federal Tort Claims Act, 28 U.S.C. 2671, et seq.

10.

Plaintiff demands trial by jury on all issues in this action.

WHEREFORE, PETITIONER PRAYS that after due proceedings are had herein, there be judgment rendered herein in favor of petitioner, JOSEPH COLLINS, and against the UNITED STATES OF AMERICA, for the amounts as set forth herein, together with legal interest

thereon, until paid, for all costs of this proceeding and for all other relief to which he may be entitled.

RESPECTFULLY SUBMITTED
LACROIX, LEVY & BARNETT, LLC

By: s/ Barry M. Barnett
BARRY M. BARNETT, T. A.
(La. Bar # 17456)
Post Office Box 1105
1101 Bolton Avenue
Alexandria, LA 71309
(318) 443-7615
ATTORNEYS FOR PLAINTIFF, JOSEPH COLLINS

PLEASE ISSUE DUPLICATE SUMMONS (TWO) FOR SERVICE ON THE UNITED STATES OF AMERICA

United States Department of Justice

United States Attorney's Office
Western District of Louisiana

United States Courthouse
300 Fannin Street, Suite 3201
Shreveport, Louisiana 71101
Telephone: 318-676-3600
Facsimile: 318-676-3660

United States Courthouse
800 Lafayette Street, Suite 2200
Lafayette, Louisiana 70501
Telephone: 337-262-6618
Facsimile: 337-262-6693

November 23, 2015

Barry M. Barnett
LaCroix, Levy & Barnett, L.L.C.
Post Office Box 1105
Alexandria, LA 71309-1105

VIA EMAIL ONLY
bbarnett@llbattorneys.com

RE: *Joseph Collins v. United States of America*
Civil Action No: 13-2979

Dear Mr. Barnett:

I have received and thank you for your offer to settle this matter for $95,000.00. Defendant will not agree to settle for this sum and, instead, makes a counteroffer in the sum of $30,000.00 in full and final settlement of this matter. This offer will remain open until noon tomorrow, November 24, 2015.

If you have any questions or need any additional information, please do not hesitate to contact me at any time.

Very truly yours,

STEPHANIE A. FINLEY
United States Attorney

BY: *s/Jennifer B. Frederick*
JENNIFER B. FREDERICK
Assistant United States Attorney
Lafayette Office - (337) 262-6897

JBF

cc: Gerard R. Rawls, BOP

LaCroix, Levy & Barnett, LLC

[illegible]

1101 B Bolton Avenue • Alexandria, LA 71301

Charles G. LaCroix*
Robert G. Levy
Barry M. Barnett

Telephone (318) 443-[illegible]
Facsimile (318) 443-[illegible]

Mailing address
[illegible]
Alexandria, LA
[illegible]

*Board Certified Family Law Specialist

November 19, 2015

SETTLEMENT OFFER

Jennifer Frederick
Assistant United States Attorney
800 Lafayette Street, Suite 2200
Lafayette, LA 70501-0800

Via email only

RE: *Joseph Collins vs. United States of America*
United States District Court; Western District of Louisiana
Civil Suit Number: 1:13-CV-02979-JTT-JDK

Dear Ms. Fredrick:

As you know there are deadlines coming up soon in this case and I recently spoke with your assistant regarding the scheduling of depositions. However, before we start gearing up for the trial, I'd like to explore settlement.

As you know, our SF-95 sought nearly $395,000 in damages. However, plaintiff recognizes that there will be difficulties with certain aspects of the case. In light of this, I have spoken with Mr. Collins and have authority to settle this in its entirety for $95,000.

Looking forward to hearing from you, I remain

Very truly yours,

BARRY M. BARNETT
kbb

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

JOSEPH COLLINS	)	**CIVIL ACTION NO. 13-2979**
	)	
VERSUS	)	**JUDGE TRIMBLE**
	)	
UNITED STATES OF AMERICA	)	**MAGISTRATE JUDGE KIRK**

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiffs (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of **FORTY-NINE THOUSAND FIVE HUNDRED AND NO/100 ($49,500.00) DOLLARS**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims

for wrongful death, for which plaintiffs or their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs.

This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiffs must obtain Court approval of the settlement at their expense. Plaintiffs agree to obtain such approval in a timely manner: time being of the essence. Plaintiffs further agree that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiffs fail to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A.	Name of Bank:	Regions Bank
B.	Street Address of Bank:	803 Sixth Street
C.	City, State and Zip Code of Bank:	Alexandria, Louisiana 71301
D.	Routing Number:	(b)(6)
E.	Name of Account:	LaCroix, Levy & Barnett Trust Account
F.	Account Number:	(b)(6)

Plaintiffs' attorney agrees to distribute the settlement proceeds among the plaintiffs, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 30th day of December, 2015.

STEPHANIE A. FINLEY
United States Attorney

BY: Jennifer Frederick

JENNIFER B. FREDERICK (#23633)
Assistant United States Attorney
800 Lafayette Street, Suite 2200
Lafayette, Louisiana 70501
Telephone: (337) 262-6618
Facsimile: (337) 262-6693
Email: jennifer.frederick@usdoj.gov

Attorney for Defendant,
United States of America

Executed this 24th day of December, 2015.

Joseph V Collins

JOSEPH V. COLLINS, PLAINTIFF

Executed this 21st day of December, 2015.

LACROIX, LEVY, & BARNETT, LLC

BY: _____

Barry M. Barnett (917456)
Post Office Box 1105
Alexandria, LA 71309-1105
Telephone: (318) 443-7615
Facsimile: (318) 443-0074
Email: bbarnett@sudden[illegible]link.net

Attorney for Plaintiff, Joseph Collins

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF

EAST...

CIVIL COMPLAINT PURSUANT TO 28 U.S.C. § 1346 3671-80

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
APR 16 2014
JAMES W. McCORMACK, CLERK
By: DEP CLERK

JAMES RAY BIKER

CLAIMANT

Reg. No. 14354-026

(Enter above the full name of plaintiff or plaintiffs, include register number.)

vs.

UNITED STATES OF AMERICA, et. al.

DEFENDANT

(Enter above the full name of defendant or defendants in this action.)

NO. 2:14-CV-052 KGB/JJV

This case assigned to District Judge Baker
and to Magistrate Judge Volpe

* * * * * * * * * * * *

I. Place of present confinement of plaintiff or plaintiffs:

FCC FORREST CITY, MEDIUM, P.O. BOX 3000, FORREST CITY, AR 72336

II. Previous Civil Actions:

A. Have you begun other civil actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your confinement? Yes [ ] No [X]

B. If your answer is "yes", list the (1) style or name of the case; (2) the court where filed; (3) the case number and citations; (4) the basic claims raised in the action; (5) the disposition of the action; and (6) the date the action was filed and the date of disposition. If the case is presently pending, please indicate.

(If there is more than one civil action, provide the information requested above for each civil action on additional attached sheets, using the same outline form.)

(1) Style or name: Plaintiff _____

Defendant _____

(2) Court where filed: _____

(3) Case Number and Citation: _____

(4) Basic Claim made: _____

(5) Disposition: _____
(Dismissed? Appealed? Pending?)

(6) Date Filed: _____ Date of Disposition: _____

III. Parties to this Civil Action:

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff: James Ray Piker / Reg. No. 14354-026

Address: FCC Forrest City, Medium

P.O. Box 3000

Forrest City, AR 72336

(In Item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions and places of employment of any additional defendants.)

B. Defendant United States Of America is employed as

District Attorney

at 224 S. Spring St. Little Rock, AR 72201

C. Additional Defendants: _____

IV. Statement of Claim:

(State here as briefly as possible the facts of your claim. Describe how each named defendant is involved. Include the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. [Use as much space as you need to state the facts. Attach extra sheets if necessary.] Unrelated separate claims should be raised in a separate civil action.)

On or about August 12, 2012, while being housed in the Federal Correctional Institution Forrest City, Medium, the Claimant who is wheelchair bound informed Institutional Staff that the handicap accessible shower was broken and needed repair. Staff informed the facilities Department of the need for the repair. The needed repair was not conducted for a period of ten days leaving handicapped persons with no way to shower. On August 22, 2012 the Claimant attempted to shower in a non-handicapped shower and fell breaking his hip. Staff at FCI Forrest were grossly negligent in not effecting repairs in a timely manner and are responsible for the injury incurred.

(SEE ATTACHED MEMORANDUM OF LAW AND BRIEF IN SUPPORT OF THIS CLAIM)

V. Relief:

State briefly exactly what you want the Court to do for you.

Make no legal arguments. Cite no cases or statutes.

Hold a Bench Trial and find that agents of the United States Government exhibited extreme negligence in their conduct.

VI. Do you claim the wrongs alleged in your complaint are continuing to occur at the present time?

Yes [ ] No [X]

VII. Do you claim actual or punitive monetary damages for the acts alleged in your complaint?

Yes [X] No [ ]

If you answered yes, state the amounts claimed and the reasons you claim you are entitled to recover money damages.

$500,000.00 for pain and suffering and future care.

VIII. Counsel:

Do you have an attorney to represent you in this civil action?

Yes [ ] No [X]

A. Have you made any effort to contact a private attorney to determine if he or she would represent you in this civil action?

Yes [ ] No [X]

B. If you answered yes, state the names and addresses of the attorneys contacted, and give the results of those efforts.

C. If you answered no, state your reasons why no such efforts have been made.

D. Have you previously had counsel representing you in a civil action in this Court? Yes [ ] No [X]

E. If you answered yes, state his name and address.

IX. Grievance Procedures:

A. Have the claims which you make in this civil action been presented through any type of Grievance Procedure within the institution?

Yes [X] No [ ]

B. If you answered yes, state the date your claims were so presented, how they were presented, and the result of that procedure.

On or around June 27, 2013, Petitioner filed and administrtive claim with the Federal Bureau of Prisons South Central Regional Office in Grand Prairie Texas

C. If you answered no, state the reasons, if any, why the claims made in this action have not been presented through Grievance Procedures.

Signed this 4th (date) day of April (month), 2014 (year).

James R. Piker

[Signature of Plaintiff or Plaintiffs]

VERIFICATION

State of ARKANSAS)
) ss.
County of ST. FRANCIS)

James R. Piker, being first duly sworn under oath, presents that he is the plaintiff in this action; that he knows the contents of the complaint; and that the information contained therein is true to the best of his knowledge and belief.

James R. Piker

[Signature of Plaintiff or Plaintiffs]
ALL PLAINTIFFS MUST VERIFY

SUBSCRIBED AND SWORN TO before me this 4th day of April, 2014.

B. Hank Correctional Counselor
NOTARY PUBLIC

~~My commission expires~~:

Counselor

Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

Find negligence and award damages in the amount of $500,000.00.....

I declare under penalty of perjury (18 U.S.C. § 1621) that the foregoing is true and correct.

Executed on this 2 day of April, 2014.

James K. Tiber

Signature(s) of plaintiff(s)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

JAMES RAY PIKER **PLAINTIFF**

v. **Case No. 2:14-cv-00052-KGB-JJV**

UNITED STATES OF AMERICA **DEFENDANT**

ORDER

Before the Court is defendant United States of America's motion to dismiss (Dkt. No. 24). For good cause shown, the Court grants the motion and dismisses this case with prejudice based on the parties' settlement. The Court will maintain jurisdiction over this case for 180 days, as defendant requests.

SO ORDERED this 18th day of February, 2015.

Kristine G. Baker
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

JAMES RAY PIKER, PLAINTIFF
REG. # 14345-026

v. No: 2:14CV00052 KGB/JJY

UNITED STATES OF AMERICA, RESPONDENT

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned Plaintiff (meaning any person, other than the Defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of Seventy Thousand Dollars ($70,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement for which Plaintiff, James Ray Piker or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. The Plaintiff, James Ray Piker, and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation for Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff, James Ray Piker, and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States.

4. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. The parties recognize that Plaintiff James Ray Piker is *pro* se and therefore Title 28, United States Code, § 2678 regarding attorney's fees for services rendered is not applicable.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any Plaintiff is a minor or a legally incompetent adult, the Plaintiff must obtain Court approval of the settlement at her expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event Plaintiff fails to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer to James Ray Piker's BOP TrustFund Account.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

11. The Court will retain jurisdiction of this matter for 180 days following execution of this Settlement Agreement to allow sufficient time for payment from the Judgment Fund.

Executed this 9th day of February, 2015.

Stacey McCord
Assistant U.S. Attorney
Attorney for Defendant, United States of America

Executed this 9th day of February, 2015

Plaintiff, James Ray Piker

Executed this 9th day of February, 2015.

U.S. Magistrate Judge Joe Volpe, Mediator

FOIA Summons
1/13

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACOB STONE
Plaintiff

v

FEDERAL BUREAU OF PRISONS
Defendant

Civil Action No. 14-625 -RMC

SUMMONS IN A CIVIL ACTION

RECEIVED
APR 2 2 2014
Administrative Remedy Office
Federal Bureau of Prisons

To: *(Defendant's name and address)* FEDERAL BUREAU OF PRISONS
320 First Street, N.W.
Washington, D.C. 20534

A lawsuit has been filed against you.

Within 30 days after service of this summons on you (not counting the day you received it) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Daniel J. Stootter
Stotter & Associates LLC
408 SW Monroe Ave. - Ste. M210E
Corvallis, OR 97333

RECEIVED
APR 2 3 2014
FEDERAL BUREAU OF PRISONS
OGC/LITIGATION BRANCH

If you fail to respond, judgment by default may be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Received
MAY 30 2014
FOIA/PA Section
Federal Bureau of Prisons

Date: 4/17/2014

ANGELA D. CAESAR, CLERK OF COURT

/s/ Reginald D. Johnson
Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACOB STONE Federal Corrections Institute Oakdale 1507 East Whatley Road Oakdale, LA 71463 Plaintiff, v. FEDERAL BUREAU OF PRISONS 320 First Street, N.W. Washington, DC 20534 Defendant.	) Case Number: 14-625

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Plaintiff Jacob Stone ("Plaintiff") hereby brings this action seeking declaratory and injunctive relief to redress violations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et. seq.*, by Defendant Federal Bureau of Prisons, in failing to provide Plaintiff with records responsive to his FOIA request dated August 23, 2012, sent to the Federal Bureau of Prisons, seeking 2010 and 2011 financial records pertaining to the commissary operation at the Federal Bureau of Prisons' Federal Corrections Institute in Oakdale, Louisiana.

II. JURISDICTION

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA citizen suit provision) and 28 U.S.C. § 1331 (federal question).

III. VENUE

3. Venue in this Court is proper pursuant to 5 U.S.C. § 552(a)(4)(B).

IV. PARTIES

4. Plaintiff Jacob Stone, is an individual who, at all times relevant herein, has resided in Oakdale, Louisiana, which is located in Allen County, Louisiana.

5. Defendant Federal Bureau of Prisons is a federal agency of the United States, and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(f).

V. LEGAL FRAMEWORK OF FOIA

6. FOIA requires, *inter alia*, that all federal agencies must promptly provide copies of all non-exempt agency records to those persons who make a request for records that reasonably describes the nature of the records sought, and which conform with agency regulations and procedures in requesting such records. 5 U.S.C. § 552(a)(3)(A).

7. FOIA requires federal agencies to make a final determination on all FOIA requests that it receives within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such request, unless the agency expressly provides notice to the requester of "unusual circumstances" meriting additional time for responding to a FOIA request. 5 U.S.C. § 552(a)(6)(A)(I).

8. FOIA also requires federal agencies to make a final determination on FOIA administrative appeals that it receives within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal, unless the agency expressly provides notice to the requester of "unusual circumstances" meriting additional time for responding to a FOIA request. 5 U.S.C. § 552(a)(6)(A)(ii).

9. FOIA expressly provides that a person shall be deemed to have constructively exhausted their administrative remedies if the agency fails to comply with the applicable time limitations provided by 5 U.S.C. § 552(a)(6)(A)(I) - (ii). *See* 5 U.S.C. § 552(a)(6)C).

10. FOIA provides that any person who has not been provided the records requested pursuant to FOIA, after exhausting their administrative remedies, may seek legal redress from the Federal District Court to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant,

11. Under FOIA, the federal agency has the burden to sustain its actions. 5 U.S.C. § 552(a)(4)(B).

12. Pursuant to FOIA, this Court may assess attorney fees and litigation costs against the United States if the Plaintiff prevails in this action. 5 U.S.C. § 552(a)(4)(E).

VI. FACTUAL ALLEGATIONS FOR PLAINTIFF'S FOIA REQUEST CLAIM

13. On or about August 23, 2012, Plaintiff sent a FOIA request to the Bureau of Prisons Office of General Counsel, in Washington, D.C., seeking copies of 2010 and

2011 financial records pertaining to the commissary at the Federal Bureau of Prisons Federal Corrections Institute in Oakdale, Louisiana.

14. On or about October 29, 2012, Jason A. Sickler, Regional Counsel for the Federal Bureau of Prisons' South Central Regional Office sent a response to Plaintiff, indicating that Plaintiff's FOIA request had been received, and noting that it had been assigned by the agency as Freedom of Information Request Number 2012-11902. This agency response requested that Plaintiff advise the agency of his willingness to pay the estimated fee associated with processing this FOIA request, or to otherwise advise the agency if he sought to modify his FOIA request in order to obtain a lower cost in providing responsive records..

15. On or about November 1, 2012, Plaintiff sent a response to the Federal Bureau of Prisons' South Central Regional Office, indicating his intent and willingness to pay the estimated amount of $112.00 to acquire the requested agency records for his August 23, 2012 FOIA request. Plaintiff's November 1, 2012 letter also requested that the agency provide information advising him "as soon as possible who to make payment towards, methods of payment that are acceptable, and any other pertinent information that is needed."

16. On or about May 31, 2013, after having received no further response from the Federal Bureau of Prisons regarding his August 23, 2012 FOIA request, Plaintiff mailed an administrative appeal to the U.S. Department of Justice's Office of Information

and Policy, dated May 30, 2013, in response to the Bureau of Prisons failure to timely respond, and the agency's continued failure to provide Plaintiff with any responsive records, to his August 23, 2012 FOIA request.

16. On or about June 28, 2013, Priscilla Jones, Supervisory Administrative Specialist with the U.S. Department of Justice's Office of Information Policy, sent a letter to Plaintiff confirming that his FOIA administrative appeal had been received by that office on June 10, 2013, and had been assigned as appeal number AP-2013-03796.

17. On or about August 27, 2013, Plaintiff wrote a letter to Priscilla Jones, Supervisory Administrative Specialist with the U.S. Department of Justice's Office of Information Policy, requesting information on the status of his FOIA appeal.

18. On or about September 18, 2013, Sean R. O'Neill, the Chief of the U.S. Department of Justice's Office of Information Policy Administrative Appeals Staff, sent a letter to Plaintiff, remanding his appeal to the Bureau of Prisons (BOP) for further processing of his FOIA request, and indicating that BOP would be contacting him directly as to further processing matters for this FOIA request.

19. On or about October 31, 2013, Plaintiff sent a follow-up letter to the FOIA Office of the Bureau of Prisons, indicating that he had not still not received any follow-up response from that agency on his August 23, 2012 FOIA request after this request had been remanded back to the agency by the Department of Justice's September 18, 2013 remand, and requesting information from the agency as to the status of his FOIA request.

20. On or about December 16, 2013, Plaintiff sent another follow-up letter to the FOIA Office of the Bureau of Prisons, indicating that he had not still not received any follow-up or response from that agency on his August 23, 2012 FOIA request after this request had been remanded back to the agency for processing by the Department of Justice's September 18, 2013 remand, and requesting information as to the status of his FOIA request.

21. As of the date of the filing of this action, Plaintiff has not received a response or any responsive records from the FOIA Office of the Bureau of Prisons for his August 23, 2012 FOIA request

22. Plaintiff has fully exhausted his administrative remedies, as required by FOIA, prior to seeking judicial review in this matter.

VII. CLAIM FOR RELIEF

Violation of FOIA

23. Plaintiff realleges, as if fully set forth herein, paragraphs 1 - 22 previously set forth herein.

24. Defendant Bureau of Prisons has violated FOIA by failing to provide Plaintiff with all non-exempt responsive records for his August 23, 2012 FOIA request, and by failing to failing to perform an adequate search for records responsive to this FOIA request in a manner reasonably calculated to locate all responsive records.

25. By failing to provide Plaintiff with all non-exempt responsive records to his FOIA request of August 23, 2012, and failing to perform an adequate search for responsive records, Defendant has denied Plaintiff's right to this information as provided by law under the Freedom of Information Act

26. Unless enjoined by this Court, Defendant will continue to violate Plaintiff's legal rights to be provided with copies of the records that he has requested in his FOIA request of August 23, 2012

23. Plaintiff is directly and adversely affected and aggrieved by Defendant's failure to provide all responsive records to his August 23, 2012 FOIA request described above.

24. Plaintiff has been required to expend costs and to obtain the services of a law firm, consisting of attorneys, law clerks, and legal assistants, to prosecute this action.

25. Plaintiff is entitled to reasonable costs of litigation, including attorney fees pursuant to FOIA 5 U.S.C. § 552(a)(4)(E)..

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter Judgment for Plaintiff providing the following relief:

1. Declare Defendant Bureau of Prisons has violated FOIA by failing to provide Plaintiff with all non-exempt records responsive to his August 23, 2012 FOIA request, and by failing to perform an adequate search for responsive records to this FOIA request.

2. Direct by injunction that Defendant Bureau of Prisons provide Plaintiff with all non-exempt responsive records to Plaintiff's August 23, 2012 FOIA request.

3. Grant Plaintiff's costs of litigation, including reasonable attorney fees, as provided by FOIA, 5 U.S.C. § 552(a)(4)(E); and,

4. Provide such other relief as the Court deems just and proper.

DATED: This 16th day of April, 2014.

Respectfully submitted,

/S/

Daniel J. Stotter (WI0015)
STOTTER & ASSOCIATES LLC
408 SW Monroe Ave., Ste. M210E
Corvallis, Oregon 97333
(541) 738-2601
dstotter@qwestoffice.net
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACOB STONE	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FEDERAL BUREAU OF PRISONS	)	Civil Action No. 14-625 (TSC)
	)	
	)	
Defendant.	)	
	)	

JOINT STIPULATION OF SETTLEMENT AND DISMISSAL

The parties, by and through their respective counsel, hereby stipulate and agree as follows:

1. The parties agree to settle and compromise the above-entitled action under the terms and conditions set forth herein.

2. Defendant shall pay Plaintiff a lump sum of Two Thousand Nine Hundred Seventy-Two Dollars ($2,972.75) in fees and costs in this matter.

3. Payment of the amount in Paragraph 2 will be made by a check drawn on the account of the United States and made payable to Oregon Law Foundation Stotter & Associates LLC Lawyer Trust Account, by an electronic transfer of funds to the Umpqua Bank account specified by Plaintiff's counsel. Plaintiff and Plaintiff's counsel agree to cooperate with Defendant's counsel in promptly providing reasonable information needed for requesting payment and transmission of funds. This payment is in full and final satisfaction of all Plaintiff's claims in this case, including but not limited to those for attorney's fees, costs, and other litigation expenses in this case, and for interest or other compensation for delay in this case, and Defendant shall have no further liability for any amounts.

4. Execution of this Joint Stipulation of Settlement by counsel for Plaintiff and by counsel for Defendant shall constitute a dismissal of this action with prejudice, effective upon order of the Court, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

5. Plaintiff agrees to forever discharge, release, and withdraw any claims of access to records or portions of records sought in FOIA Request 2012-11902 and any claims associated with Defendant's response to FOIA request 2012-11902. Defendant agrees not to seek any fees from Plaintiff in connection with its response to the Freedom of Information Act request that gave rise to the Complaint in this case.

6. This Joint Stipulation of Settlement shall represent full and complete satisfaction of all claims arising from the allegations set forth in the Complaint filed in this action, including full and complete satisfaction of all claims for costs, attorney's fees, search, review, or processing fees that have been, or could be, made in this case. In particular, this Joint Stipulation of Settlement shall resolve all claims for attorneys' fees and costs, as well as search, review and processing fees incurred by both Plaintiff and Defendant in connection with the administrative Freedom of Information Act process, the District Court litigation process, and any other proceedings involving the claims raised in this action.

7. This Joint Stipulation of Settlement shall not constitute an admission of liability or fault on the part of the Defendant or the United States or their agents, servants, or employees, and is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation. This Joint Stipulation of Settlement is understood not to preclude or prevent the Plaintiff from seeking, through the Freedom of Information Act or other means, any records from the Federal Bureau of Prisons, or from any

other federal agency subject to FOIA, including any future record requests seeking similar or identical records to those sought by the Plaintiff in FOIA Request 2012-11902.

8. This Joint Stipulation of Settlement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

9. Plaintiff acknowledges that it has not relied on any representations by Defendant or Defendant's employees or agents as to the tax consequences of this Joint Stipulation or any payments made by or on behalf of Defendant hereunder. Plaintiff shall be solely responsible for compliance with all federal, state and local tax filing requirements and other obligations arising from this Stipulation, if any, that are applicable to Plaintiff.

10. This Joint Stipulation contains the entire agreement between the parties hereto and supersedes all previous agreements, whether written or oral, between the parties relating to the subject matter hereof. No promise or inducement has been made except as set forth herein, and no representation or understanding, whether written or oral, that is not expressly set forth herein shall be enforced or otherwise be given any force or effect in connection herewith.

11. The terms of this Joint Stipulation may not be modified or amended, and no provision hereof shall be deemed waived, except by a written instrument signed by the party to be charged with the modification, amendment, or waiver.

12. The parties agree that the Court retains jurisdiction in this action to ensure compliance with the terms of this agreement.

Dated: August 27, 2014
Washington, DC

Respectfully submitted,

/s Daniel J. Stotter

DANIEL J. STOTTER
Stotter & Associates LLC
408 SW Monroe Ste. M 210E
Corvallis, OR 97333
(541) 738-2601

Attorney for Plaintiff

RONALD C. MACHEN JR.
United States Attorney
For the District of Columbia
D.C. Bar No. 447889

DANIEL F. VAN HORN,
D.C. Bar No. 924092
Chief, Civil Division

by /s Shannon L. Fagan

SHANNON L. FAGAN
CA Bar No. 209318
Special Assistant United States Attorney
555 Fourth Street, N.W.- Civil Division
Room E4905
Washington, D.C. 20530
(202) 252-2575

Attorneys for Defendant

SO ORDERED:

On this _____ day of _____, 2014.

_____
United States District Judge

TRULINCS 10579062 - STILLEY, OSCAR AMOS - Unit: FOR-M-D

FROM: 10579062
TO:
SUBJECT: SF95_Pierce.CharlesComplaint
DATE: 05/07/2014 12:09:22 PM

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
MAY 16 2014
JAMES W. McCORMACK, CLERK
By: DEP CLERK

IN THE US DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS, LITTLE ROCK DIVISION

CHARLES J. PIERCE #08610-026 PLAINTIFF

V. CASE NO. 2:14-CV-067 JLH-JJV

UNITED STATES DEFENDANT

This case assigned to District Judge Holmes and to Magistrate Volpe

PLAINTIFF'S VERIFIED COMPLAINT

Comes now Plaintiff Charles J. Pierce (Plaintiff) and for his verified complaint states:

1. Plaintiff brings this complaint pursuant to the Federal Tort Claims Act, 28 USC 2672 et. seq., (the Act) which provides for a bench trial.

2. The Act provides that jurisdiction shall lie in US District Court.

3. Venue is lodged where the act occurred or where the Defendant resides, pursuant to 28 USC 1402(b). In this case the act occurred in the Eastern District of Arkansas, and Plaintiff resides there as well.

COUNT 1 -- FAILURE TO PROVIDE ORDINARY AND NECESSARY DENTAL SERVICES IN A REASONABLE TIME AND A REASONABLE MANNER

4. Plaintiff filed an improvised SF 95 Tort Claim, a copy of which is attached hereto as Exhibit "1", and incorporated herein as if set forth word for word. This Tort Claim was accompanied by a cover letter to Charles E. Samuels, a copy of which is attached, marked Exhibit "2", and incorporated herein as if set forth word for word.

5. Plaintiff has waited some 3 years for necessary and customary dental care. It has become apparent that the promises of competent dental care at some future time are hollow and meaningless. Such promises will not be kept. DOJ-FBOP personnel continue to lobby the Plaintiff for permission to divest him of his teeth. Each time Plaintiff goes to clean his teeth, he is advised that the affected teeth can be pulled.

6. Plaintiff would certainly secure appropriate dental care for himself, if he was not incarcerated. Plaintiff would secure dental care for himself, using his own funds, despite his incarceration, but for the fact that he is not allowed access to competent providers of dental care.

7. Government employees at this prison (FCC Forrest City Low) have failed and neglected to provide the ordinary and necessary dental care, despite repeated polite request. On information and belief,this prison will lie and deceive inmates and their families about future prospects for dental care, but will not comply with their statutory obligations with respect to prisoners.

8. The Department of Justice-Federal Bureau of Prisons (DOJ-FBOP) has responded by a letter dated April 10, 2014, to the Plaintiff's Tort Claim. A copy of this "Right to Sue Letter" is attached hereto as Exhibit "3" and incorporated herein as if set forth word for word.

9. The DOJ-FBOP has responded to the effect that Plaintiff has 1) is elderly, 2) has poor oral hygiene, and 3) has "progressive wear and tear and periodontal disease." It is true that Plaintiff has at times past failed to brush his teeth sufficiently. Plaintiff was advised that he should brush his teeth better, on September 10, 2013. Plaintiff has heeded this advice.

10. Plaintiff was incarcerated at Pittsfield County Jail, in Pike County, Illinois, before being transferred to FCC Forrest City Low.

11. Authorities at Pittsfield County Jail procured the replacement of two missing dental fillings in April of 2010. Thus it cannot

reasonably be said that all correctional authorities routinely make a mockery of their Congressionally mandated obligation to provide dental care to incarcerated federal prisoners.

12. Plaintiff lost another dental filling on June 1, 2010. Despite persistent polite request, made on the proper forms and also orally to the dental staff, Plaintiff cannot get this filling replaced at FCC Forrest City Low.

13. The "Right to Sue Letter" includes information gleaned from Plaintiff's dental files, showing that the responsible federal employees at FCC Forrest City Low know that Plaintiff is in need of replacement of the original filling, and also that he now needs additional dental work.

14. The security function of FCC Forrest City Low is known as "Operations."

15. FCC Forrest City Low Operations commonly treats inmates as subhuman, not deserving of the ordinary and customary dental or medical treatment mandated by the acts of Congress. Operations prevents the Medical department from getting enough resources to do its job properly, and furthermore interferes with the use of those scarce resources in a manner that could fairly be called "efficient."

16. Operations does nothing to encourage or require inmates to preserve their teeth or general health.

17. Operations treats elderly inmates as even more subhuman than younger inmates, such that they should not be allowed access to even basic care.

18. It is no defense that an inmate has at some point in time acted negligently, thus possibly contributing to (or even causing) a condition requiring medical or dental services.

19. The DOJ-FBOP has a duty to provide reasonable and appropriate medical and dental care to all inmates within its custody, regardless of the reason for the need.

20. The DOJ-FBOP has the power of issuing formal disciplinary "incident reports" or otherwise punishing inmates who fail to adequately care for their own physical health, whether dental or otherwise.

21. The DOJ-FBOP furthermore has the power to provide incentives and inducements to inmates, to encourage and achieve the lowest costs and the best health outcomes. Such incentives and inducements are in the best interests of the taxpayers, who are liable to replenish the Treasury, when depleted due to the poor health habits of prison inmates. Such inducements also reduce the costs imposed on the Treasury, for subsidized medical or dental care required by recently released inmates. Most federal inmates will eventually be released.

22. On information and belief, the DOJ-FBOP has the legal authority to require inmates to pay some portion of the cost of dental care, if in the judgment of the DOJ-FBOP the dental care is not the "usual and customary" dental care that would be used by an economically secure private person who takes his health and dental care seriously. Plaintiff is not opposed to such requirements, so long as 1) all inmates in the custody of the DOJ-FBOP have a reasonable opportunity to earn the money necessary for such care, and 2) the DOJ-FBOP ensures that all information, goods, and services necessary for protection and maintenance of health are available to inmates. At the present time, the DOJ-FBOP routinely crushes virtually all meaningful economic opportunities, that might otherwise be available to supplement payment from the treasury, for inmate dental and medical care. Inmates are routinely denied access to information, goods, and services that would allow inmates to maintain the best health at least taxpayer cost.

23. This prison routinely provides altogether unsatisfactory, cheap toothbrushes to indigent inmates. While Plaintiff is not indigent, acts of this nature tend to estop the government from complaining about oral hygiene. Unless and until they provide good quality toothbrushes to indigent inmates, they are wasting taxpayer dollars by wasting inmate teeth, and have no basis for complaining that others do the same.

24. This prison essentially wages a war on personal hygiene. For example, all the soap dispensers have been ripped out of the bathroom sinks. Three telltale screw holes next to each sink, patched over but still visible, are mute reminders of the fact that this prison would happily spend large sums of money treating drug resistant staff, rather than allow inmates fair opportunities to earn money for their own plain hand soap. Civic minded inmates who try to get "state soap" to put in the bathrooms are persecuted for it. Clothes washers and dryers were taken out ~~of the housing units, rather than~~ vent the dryers to the outside, as was promised to an inmate who had complained. A full listing of the myriad acts this prison routinely engages in, contrary to personal hygiene, the rights of taxpayers, and the rights of inmates, is not reasonably possible in light of the

mandate that a federal civil complaint consist of a "short, plain statement of facts showing entitlement to relief."

25. This prison also wages a war on the mental health of inmates. This prison deliberately and systematically foments hatred, strife, discontent, and competition for resources amongst inmates. This prison deliberately acts to cause depression and other mental problems in the inmates, particularly in the elderly and those otherwise vulnerable for one reason or another. When depression sets in, the prison then assigns the associated personal behaviors, such as poor personal hygiene, as a reason to deny dental and medical care, further cut back on resources such as shower curtains and microwaves, etc.

26. The deprivation of competent dental care has caused pain, suffering, loss of function, difficulty chewing food, poor efficiency in the digestion of food, loss of the normal pleasure of eating, etc.

27. Operations personnel routinely close the dining room, "chow hall" in as little as 5 minutes after the last inmate is served.

28. Operations personnel often mock and harass persons who have dental problems, which prevent them from gobbling the food down in the absurdly short time periods allowed to the last inmates to eat.

29. Meals are taken in "rotation." There are 12 housing units. Each week a different rotation is used. This ensures that all the units will be last some of the time.

30. Operations' practice of closing the chow hall mere minutes after the last inmate is served is simply another way of inflicting arbitrary and capricious cruelty upon inmates that they have denied adequate dental care.

31. Both Regional Offices and National Offices personnel, including Warden C. V. Rivera, Regional Director R. A. Keller, and National Director Charles E. Samuels, Jr., are well aware of the massive backlog of dental needs, yet choose to divert resources to such ridiculous follies as ensuring that all inmates, including those who are violent and mentally ill, must wear steel toed boots.

32. All the acts and omissions complained of herein arise from no less than negligence, if not "gross negligence," or "studied neglect" or other such mental state, all of which are sufficient to support a claim under the federal statutes, common law, or a combination thereof, consistent with the Act.

WHEREFORE, Plaintiff prays the sum of $17,500; costs to the extent authorized by law; and for such other and further relief as may be appropriate whether or not specifically prayed.

VERIFICATION

I Charles J. Pierce, pursuant to appropriate federal statute, hereby state that the forgoing is true and correct, under penalty of perjury.

)
)
) Charles J. Pierce

Charles J. Pierce, Plaintiff

5-8-14
Date

FCC Forrest City Low
PO 9000
Forrest City, AR 72336-9000

TRULINCS 10579062 - STILLEY, OSCAR AMOS - Unit: FOR-M-D

FROM: 10579062
TO:
SUBJECT: Pierce SF 95
DATE: 09/28/2013 12:24:35 PM

Plaintiff's Exhibit "4"

IMPROVISED ELECTRONIC STANDARD FORM 95 (OMB # 1105-0008)

1. SUBMIT TO APPROPRIATE FEDERAL AGENCY:

Charles E. Samuels, Jr., Director
US DOJ-FBOP
320 1st Street NW
Washington, DC 20534

2. NAME, ADDRESS OF CLAIMANT OR CLAIMANT'S PERSONAL REPRESENTATIVE, IF ANY:

Charles J. Pierce, Inmate # 08610-026
FCC Forrest City Low
PO 9000
Forrest City, AR 72336-9000

3. TYPE OF EMPLOYMENT: CCS-AM (prison job)

4. DATE OF BIRTH: 12-13-1937

5. MARITAL STATUS: Single

6. DATE AND DAY OF ACCIDENT: I lost a dental filling on 6-1-2010. It fell out of the tooth while I was in the Pittsfield County Jail in Illinois. I promptly reported this and was told I would get dental services. I got no care at the jail, nor have I gotten any fillings in this prison.

7. TIME: N/A

8. BASIS OF CLAIM:

The US Department of Justice-Federal Bureau of Prisons (DOJ-FBOP) has a statutory duty to provide medical care, including dental, mental, etc., as appropriate and warranted. This must be done in a reasonable and timely manner.

I lost a filling shortly after being locked up. I reported it but did not receive the necessary dental care. Soon after my arrival at this prison, a dentist evaluated my teeth. Also, I told them I needed a replacement filling. They full well knew, and told me I would be placed on a list.

It is negligence per se to fail to provide a filling for a tooth for more than 3 years. In fact, it is charitable to characterize their behavior as negligence. Furthermore, I have gotten more cavities, which they know about but neglect and refuse to fix.

9. PROPERTY DAMAGE: N/A

10. STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM:

My teeth are cleaned on an annual basis. Every time, I ask about getting a replacement filling. They say I'm still on the list. They also ask me if I want them to pull the tooth. I tell them no.

I am missing a number of teeth, but I am still able to chew my food well enough to survive. I can't afford to lose more teeth. I need all the teeth that remain, for basic functioning. The DOJ-BBOP's failure to provide care causes me anxiety and interferes with chewing and with my attempts to preserve the remaining teeth. I don't know how much longer I can go without dental care, without suffering catastrophic losses. I know the DOJ-FBOP is trying to cause a catastrophic loss for me, because they speak of nothing but pulling the tooth. That's what they want to do to me.

TRULINCS 10579062 - STILLEY, OSCAR AMOS - Unit: FOR-M-D

I suffer all the other discomforts associated with a tooth that has a cavity, on a daily basis. Now of course I have several cavities. I want all of them filled. I want to protect all the teeth that I have left.

11. WITNESSES:

Ms. Cates, all other dental personnel who have worked at this prison at any time in the 5 years next past.
Ms. Hoy, Assistant Medical Director
Every person having any role whatsoever in scheduling dental work, monitoring the schedule, maintaining the list of persons on the dental care list, recording the outcomes of persons asking for dental work, putting persons who need dental work on the "callouts," accessing the list for the purpose of calling persons to medical for dental work over the public address system or otherwise, or otherwise having knowledge of the dental backlog, for the 5 years next past.
All persons who have had hiring or firing authority for dental personnel for the 5 years next past.
All persons who have knowledge of the overall budget and expenditures of this prison for the 5 years next past.
All persons from Regional or National involved in dealing with claims of denial of dental services, in any capacity, for the 5 years next past to this claim.

12. AMOUNT OF CLAIM:

12a. Property damage: N/A
12b. Personal injury: $17,500
12c. Wrongful death: N/A
12d. Total: $17,500

13. SIGNATURE OF CLAIMANT

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJUIRIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

)

13a. Charles J Pierce 11-2-13
Charles J. Pierce, Claimant 14. Date

13b. Phone number of claimant: No phone, prison switchboard is 870.630.6000

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM -- The claimant shall forfeit and pay to the United States the sum of $2,000 and double the amount of damages sustained by the United States. (see 31 USC 3729)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIMS OR MAKING FALSE STATEMENTS -- Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 USC 287, 1001)

INSURANCE COVERAGE

15-18. DO YOU CARRY ACCIDENT INSURANCE?

ANSWER: I do not have insurance coverage, and thus have no relevant information for questions 16-18.

19. DO YOU CARRY PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE?

ANSWER: No. Thus I have no name and address of such company.

MEDICAL RECORDS

By my signature above, I authorize any custodian of my medical records to release same to the DOJ-FBOP on condition that I also receive a copy. Any custodian of records is entitled to presume the good faith of the DOJ-FBOP and assume that I will be provided a set of the medical records reasonably contemporaneously with their receipt, and will be held harmless for operating under that assumption. I will provide signed releases and further assurances as necessary, upon request.

TRULINCS 10579062 - STILLEY, OSCAR AMOS - Unit: FOR-M-D

FROM: 10579062
TO:
SUBJECT: Pierce SF95 letter
DATE: 09/28/2013 12:25:25 PM

9-5-2013

Charles E. Samuels, Jr., Director
DOJ-FBOP
320 1st Street NW
Washington, DC 20534

Re: Charles J. Pierce -- Tort claim for failure to provide dental care

Dear Mr. Samuels:

Herewith please find a tort claim. I'd be inclined to send this directly to Ms. Joyce Zoldak, associate counsel, or some other lawyer on your staff, except for one thing. I have somewhat to say to you.

I'm 75 years old. I came to prison in late 2010. I've been begging for dental care since that time, but I have gotten nothing except the annual cleaning of my teeth. Every time, I ask for fillings, and they ask if I'm ready to pull the tooth. If someone did this to your mother or father, or to an elderly person you cared about, you'd be furious. You would not allow your parent to stay in a facility, of any kind, that denied its victims ordinary and necessary dental care.

If the DOJ-FBOP doesn't have the money to maintain the teeth of an inmate, put that inmate on home confinement. You have that power by statute. The statutes give you a non-negotiable duty of ensuring the provision of dental care for inmates in your custody. You've failed to discharge that duty. I'm old, but I could get the resources necessary for my dental care in some legal and honorable way, and maintain my health.

It's not a matter of inadequate funding. It is a matter of greed, incompetence, fraud, waste, abuse, and rank callousness to the value of human life. They haven't had a working thermostat on the HVAC system in this prison for 5 years, at least. They waste massive amounts of electricity for the most stupid and frivolous reasons. They reject help from the inmates, choosing instead to cheat the inmates out of their due, and heap abuse on their heads.

The buck stops with you. I'm putting this on your desk for a reason - to deprive you of "plausible deniability" with respect to the cruel policies of this prison. My case is BY NO MEANS an anomaly. This prison shells the teeth out of inmates as a matter of DE FACTO policy.

A policy prohibiting inmates from receiving eyeglasses from home was published over your name. What is your reason for squandering money making eyeglasses for inmates who already have them, and want to get them shipped in from their family at no taxpayer cost? It is the height of cruelty and absurdity to waste money making glasses for inmates who don't want them or need them, while other inmates lack basic dental care. By the way, the DOJ-FBOP is woefully behind on providing their obsolete, often defective eyeglasses to inmates who actually need them.

Please promptly write your warden Anthony Haynes and tell him that you expect him to ensure that all inmates in his custody have high quality, permanent, non-toxic, reasonably state of the art fillings and/or crowns within a reasonable time of the initial request. Please ask for a detailed report on the age of all dental requests, along with the final outcome - e.g. permanent repair, temporary fix, or extraction. You'll see the pattern - deny, delay, then pull the tooth.

I look forward to your written response.

Kindest personal regards,

Charles J. Pierce

Plaintiff's Exhibit "2"

U.S. Department of Justice

Federal Bureau of Prisons

South Central Regional Office

344 Marine Forces Drive
Grand Prairie, Texas 75051

DATE MAILED: APR 10 2014

CERTIFIED MAIL
7012 1010 0003 5287 5392

Charles Pierce
Reg. No. 08610-026
FCC Forrest City, Low
P. O. Box 9000
Forrest City, AR 75051

Re: Administrative Tort Claim Number TRT-SCR-2014-00611

Mr. Pierce:

You have filed the above-styled administrative tort claim. This claim has been considered for administrative settlement under the Federal Tort Claims Act, Title 28, United States Code, Section 2672 *et seq.*, and authority granted by Title 28, Code of Federal Regulations, Section 0.172. You claim government liability in the amount of seventeen thousand five hundred and no/100 dollars ($17,500.00) for alleged personal injury. You allege you have experienced three missing teeth, at least five missing fillings, a broken tooth, and unnecessary and unwarranted deterioration of your teeth due to the failure of FCC Forrest City dental staff to provide ordinary and reasonable dental care. You claim you have suffered pain, embarrassment, difficulty chewing food, and loss of dental functionality from the injured teeth and the manner in which you chew food, all resulting from the failure of dental staff to provide proper care.

The Federal Tort Claims Act § 2672 delegates to each Federal agency the authority to consider, determine and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

Investigation into your claim reveals you have been seen on numerous occasions for dental examinations, fluoride and other dental treatment, dental education, and regular cleanings at FCC Forrest City. Your dental records show you had a history of poor dental hygiene, tooth decay, and periodontal disease. Your initial examination on October 27, 2010, noted tooth no. 10 was

Plaintiff's Exhibit "3"

diseased and needed treatment. At this examination you were found to have twelve teeth missing. On March 8, 2011, you were seen for a dental cleaning and comprehensive examination which found tooth no. 10 had a cavity and needed a composite restoration, and teeth nos. 31 and 18 had cavities which needed amalgam restorations. On June 29, 2011, you were found to have excessive tooth wear from grinding, so an occlusal mouth guard was made for you. A dental examination and cleaning on September 10, 2013, revealed you had poor oral hygiene and redness and slight swelling of the gums. You stated you brushed only every other day, and were instructed to brush twice a day and floss daily. Teeth nos. 6, 11, and 26 were found to have cavities and needed restorations.

Based on a review of your dental records, there is no evidence a lack of or inappropriate dental care by the Bureau of Prisons caused the conditions which are the basis of this claim. You are currently 76 years of age and the dental problems you are experiencing are unfortunately the result of lifelong dental self-care issues, progressive wear and tear and periodontal disease. You reported to FCC Forrest City with a history of poor dental hygiene and related dental and gum issues, including missing and diseased and decayed teeth which continued while you have been at FCC Forrest City.
In summation, there is no evidence to indicate you sustained any injuries caused by the negligent or wrongful act or omission of any government employee acting within the scope of employment. Therefore, your claim is denied.

If you are dissatisfied with the determination in this matter, you are afforded six months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

Jason A. Sickler
Regional Counsel

cc: C. V. Rivera, Warden
FCC Forrest City

Case Settlement - Charles Pierce v. US, No. 214CV00067 JLH]JV EDAR (FOR - Dental)
From: Jason Sickler
To: Ballom, Dr. Te Cora
CC: jxowen@bop.gov
Date: 4/27/2016 1:40 PM
Subject: Case Settlement - Charles Pierce v. US, No. 2:14CV00067 JLH/JJV ED/AR (FOR - Dental)

Dr. Ballom:

We settled the ligation case filed by inmate Charles Pierce, Reg. No. 08610-026.

(b)(5)

The case settled on April 20, 2016 for $5,000.00.

(b)(5)

In order to have an opportunity to administrative settle claims warranting settlement, we are impressing upon FOR the need for timely and quality tort investigations. Likewise, this objective will also be more attainable given recent OQM routing changes that will speed up the process.

Please let me know if you have questions or concerns.

Jason

Jason A. Sickler
Regional Counsel
South Central Region
Federal Bureau of Prisons
U.S. Armed Forces Reserve Complex
344 Marine Forces Drive
Grand Prairie, TX 75051
972-730-8920
972-730-8929 (fax)

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Page 1227 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1228 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1229 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1230 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1231 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
JUN 30 2014
JAMES W. McCORMACK, CLERK
By: DEP CLERK

LARRY SIMPSON	)	
CLAIMANT	)	
V.	)	Case No. 4:14-CV-387 SWW-JTR
UNITED STATES OF AMERICA	)	
DEFENDANT	)	

MEMORANDUM AND BRIEF IN SUPPORT

OF A COMPLAINT BROUGHT PURSUANT TO

TITLE 28 U.S.C. § 1346, 2671-80

COMES NOW, Larry Simpson, pro se Claimant (hereinafter Claimant), and humbly requests this Honorable Court accept this complaint against the United States of America, due to the action of their employees for negligent actions brought under Title 28 U.S.C. § 2671, Federal Tort Claims Act (FTCA).

LIBERAL INTERPRETATION

Claimant brings this Habeas Petition as a pro se litigant. A pro se pleading is held to less stringent standards than formal petitions drafted by lawyers. HAINES V. KERNER, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed 2d 652 (1972).

COMPLAINT HISTORY

Claimant is a Federal Prisoner being housed in the Federal Correctional Complex, Medium Security Institution at Forrest City, Arkansas, in the care, custody, and control of the Attorney General, while being housed in a Federal Bureau of Prison Facility.

Claimant filed an administrative claim pursuant to Title 28 U.S.C. § 2761, which was submitted to the South Central Regional Office of the Federal Bureau of Prisons, from whom he has received no further response, contrary to administrative remedy timeliness, procedures and policies.

NEGLIGENCE UNDER ARKANSAS LAW

The essential "elements" of a cause of action for negligence are that the plaintiff demonstrates a duty owed and a duty breached, and that the defendant's negligence was a proximate cause of plaintiff's damages. SCOTT V. CENT. ARK. NURSING CTRS., INC., 101 Ark. App. 424, 434, 278 S.W. 3d 587 (2008). Proximate cause is generally a question of fact, unless the evidence is such that reasonable minds cannot differ. Proximate cause is defined, for purposes of negligence, as that which in a natural and continous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. WAL-MART STORES, INC. V. KILGORE, 85 Ark. 231, 236-237, 148 S.W. 3d 754 (2004). Here, federal employees had a responsiblity to act within a set of facts. The employees within these facts acted with gross negligence by ignoring the duty owed to the Claimant. By this negligent conduct, the Claimant continues to suffer with no viable option open to him.

CLAIM AND SUPPORTING FACTS

On May 15, 2013, Claimant suffered an injury from a slip and fall, due in part to the Federal Bureau of Prison's negligence in their upkeepof facilities within my housing unit, inter alia stairs, handrails, faulty nonskid flooring

and inadequate.

Athough Claimant alerted medical staff and sought treatment, their negligence in facilities and medical care manifested my injury, continuing pain and suffering an deterioration in my mobility, function and health.

After an initial examination in the Forrest City Correctional Complex, Medium Security medical unit, officers transferred Claimant to the Delta Medical Center, in Memphis, TN. There, Mr. Bret Sokoloff, M.D. acted to 'pre-authorize treatment and affect surgery because of a left interior pole patellar fracture, in accordance with his recommendation of an open reduction and internal fixation.

After surgery (treating an arthrotomy caused by trauma, a ruptured patellar tendon with a central third avulsed from the tibia and the medical and lateral thirds ruptured from the patella, as well as a small fracture of the lateral patella; his postoperative dianosis included: right small lateral facet fracture, avulsion fracture tibial tubercle and quad patellar tendon rupture), and an overnight stay, Dr. Sokoloff prescribed a knee immobilizer and crutches with limited weightbearing instructions. He documented the required follow up as "Will need to see him back in the office in 10 to 14 days". Furthermore, he added that, "In 6 days the dressing should be removed and daily incision care started. In 2 weeks the staples should be ready to come out".

Doctor Dr. Sokoloff's indication for the follow up within 14 days (ut supra), Claimant was not returned to his office until July 24, 2013, roughly seventy days after my initial injury and woefully past the follow up needed, per his

notation.

On July 24, 2013, with my sleep disturbed by pain and my activity limited by pain, Claimant underwent "injection of left knee and manipulation under anesthesia'. Dr. Sokoloff prescribed additional treatment as "Patient needs physical therapy or continuous passive motion machine. Adequate pain control important for regaining motion", - neither of which were administered.

10: PERSONAL INJURY, NATURE AND EXTENT OF INJURY- CONTINUED FROM FORM

Due to the FBOP's failure to provide a follow up transfer to Dr. Sokoloff, in accordance with Dr. Sokoloff's prescribed indication, Claimant suffered continuing pain, inadequate medical treatment contraindicated by Dr. Sokoloff's directive, deteriorating health, mobility and ability, among other things.

The FBOP due and through the negligent act of failing to have me seen in the alloted amount of time and treatment administered caused me to be prematurely disabled as now Claimant have a continuous limp and pain daily. Claimant as an inmate is unable to follow the doctor's orders unless the institution allows the proper care. Through gross negligence did the FBOP not return Claimant to see a doctor for 70 days. The negligent conduct by the FBOP caused Claimant to be required a second procedure all unnecessary if proper protocol would have been followed.

The United States is responsible under the F.C.T.A for the behavior of federal employees while acting within the scope of his or her employment. 28 U.S.C. § 2679(b)(1). In

general, an employee acts within the scope of his employment when he is doing something to further the duties he owes to his employer and the conduct is the type that he is hired to do. Negligence in this case needs no further explaination than to ask the question of why did trained medical staff neglect through gross incompetance fail to have the Claimant treated as instructed by the treating physican.

DEMAND FOR DAMAGE

Pursuant to Title 28 U.S.C. § 2657 the claimant is required to ask, under the Federal Tort Claim Act, for a specific amount of damages and therefore, the claimant demands the United States Government remits $106,000.00 for the gross negligent conduct of its agencts. Claimant demands payment for pain and suffereing and to off set future medical costs and care upon his release.

Claimant submits that ths settlement would foreclose any future law suit against individual actors involved in this action, any futher damages against the United States of America.

DECLARATION

I, Larry Simpson, do hereby declare under the penalty of perjury, pursuant to Title 28 U.S.C. § 1746, that the foregoing information is true and correct to the best of my knowledge. Signed on this 18th day of June, 2014.

Respectfully Submitted,

Larry Simpson

Reg. No.

FCC Forrest City-Med

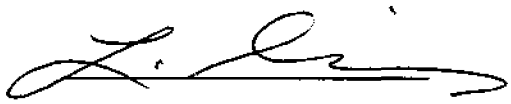
P.O. Box 3000

Forrest City, AR 72336

CERTIFICATE OF SERVICE

I, Larry Simpson, do hereby certify that I have sent one true copy via United States Mail with First Class Postage affixed to the Clerk of the Court for the United States District Court in the Eastern District of Arkansas at 600 West Capitol, Rm A-149 in Little Rock, AR 72201. Signed this 18th day of JUNE, 2014.

Respectfully Submitted,



Larry Simpson

Reg. No. 08800-029

FCC Forrest City, Medium

P.O. Box 3000

Forrest City, AR 72336

RECEIVED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

2014 JUN 30 AM 10:08

JAMES W. [illegible]

BY: _____

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF EASTERN ARKANSAS

CIVIL COMPLAINT PURSUANT TO 28 U.S.C. § 1346(b), 2671et seq.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

JUN 30 2014

JAMES W. McCORMACK, CLERK
By: _____ DEP CLERK

LARRY SIMPSON

REG. NO. 08800-029

(Enter above the full name of plaintiff or plaintiffs, include register number.)

vs.

UNITED STATES OF AMERICA

(Enter above the full name of defendant or defendants in this action.)

NO. 4:14-CV-389 SWW-JTR

This case assigned to District Judge Wright
and to Magistrate Ray

* * * * * * * * * * * *

I. Place of present confinement of plaintiff or plaintiffs:

FCC FORREST CITY MEDIUM
P.O. BOX 3000, FORREST CITY, AR 72336

II. Previous Civil Actions:

A. Have you begun other civil actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your confinement? Yes [ ] No [X]

B. If your answer is "yes", list the (1) style or name of the case; (2) the court where filed; (3) the case number and citations; (4) the basic claims raised in the action; (5) the disposition of the action; and (6) the date the action was filed and the date of disposition. If the case is presently pending, please indicate.

(If there is more than one civil action, provide the information requested above for each civil action on additional attached sheets, using the same outline form.)

(1) Style or name: Plaintiff _____

Defendant _____

(2) Court where filed: _____

(3) Case Number and Citation: _____

(4) Basic Claim made: _____

(5) Disposition: _____
(Dismissed? Appealed? Pending?)

(6) Date Filed: _____ Date of Disposition: _____

III. Parties to this Civil Action:

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff: Larry Simpson

Address: FCC Forrest City, Medium

P.O. Box 3000

Forrest City, AR 72336

(In Item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions and places of employment of any additional defendants.)

B. Defendant United States of America is employed as

Attorney General of Arkansas Representative

at Little Rock, Arkansas

C. Additional Defendants: N/A

IV. Statement of Claim:

(State here as briefly as possible the facts of your claim. Describe how each named defendant is involved. Include the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. [Use as much space as you need to state the facts. Attach extra sheets if necessary.] Unrelated separate claims should be raised in a separate civil action.)

On May 15, 2013, Claimant suffered an injury from a slip and fall due in part to the Federal Bureau of Prison's negligence to upkeep the facilities and housing units. Claimant alerted the staff, was evaluated by medical staff and transferred to Delta Medical Center for surgery by Dr. Bret Sokoloff. Upon releasing the Claimant after a successful surgery, Dr. Sokoloff prescribed the Claimant a knee immobilizer and crutches with limited weight-bearing instructions. He stated "Patient will need to come back in the office for follow-up in 10-14 days". He added that "in 6 days, the dressing should be replaced and daily incision care started. In 2 weeks the staples should be ready to come out". These orders were ignored and Claimant wasn't returned to see the doctor until July 24, 2013, about 70 days after the injury and well past when the well-educated and knowledgeable Dr. Sokoloff had ordered. Claimant has suffered ongoing and undue pain due to the BOP's blatant disregard for a Professional Physician's Medical Advice. Claimant is a prisoner of the Federal Bureau of Prison. As such he is in the care, custody and control of the facility he is being housed in and is at the mercy of said facility to provide the necessary and correct medical care. Said facility failed to do that in this instance.

V. Relief:

State briefly exactly what you want the Court to do for you.

Make no legal arguments. Cite no cases or statutes.

Claimant requests that the appropriate entities be held accountable, and therefore, the Claimant demands the United States Government remits $106,000.00 for the gross negligent conduct of its agents. Claimant demands payment for pain and suffering and to off-set future medical costs and care upon his release. Claimant submits that this settlement would foreclose any future lawsuit against individual actors involved in this action and any further damages against the United States.

VI. Do you claim the wrongs alleged in your complaint are continuing to occur at the present time?

Yes [ ] No [XX]

VII. Do you claim actual or punitive monetary damages for the acts alleged in your complaint?

Yes [XX] No [ ]

If you answered yes, state the amounts claimed and the reasons you claim you are entitled to recover money damages.

Claimant is require to ask under the Federal Tort Claim Act pursuant to Title 28 U.S.C. § 2657, for a specific amount of damages and therefore demands damages in the amount of $106,000.00 for pain andsuffering and to off-set any future medical costs and care upon release.

VIII. Counsel:

Do you have an attorney to represent you in this civil action?

Yes [ ] No [X]

A. Have you made any effort to contact a private attorney to determine if he or she would represent you in this civil action?

Yes [ ] No [XX]

B. If you answered yes, state the names and addresses of the attorneys contacted, and give the results of those efforts.

C. If you answered no, state your reasons why no such efforts have been made.

Claimant is financially unable to afford the representation ofa private attorney.

D. Have you previously had counsel representing you in a civil action in this Court? Yes [ ] No [XX]

E. If you answered yes, state his name and address.

IX. Grievance Procedures:

A. Have the claims which you make in this civil action been presented through any type of Grievance Procedure within the institution?

Yes [X] No [ ]

B. If you answered yes, state the date your claims were so presented, how they were presented, and the result of that procedure.

Filed a Federal Tort Claim and sent to BOP South Central Regional Office and have yet to recieve a response nearly 6 months later. The claim was filed in September of 2013.

C. If you answered no, state the reasons, if any, why the claims made in this action have not been presented through Grievance Procedures.

Signed this 18th (date) day of JUNE (month), 2014 (year).

[Signature of Plaintiff or Plaintiffs]

VERIFICATION

State of ARKANSAS)
) ss.
County of ST. FRANCIS)

LARRY SIMPSON, being first duly sworn under oath, presents that he is the plaintiff in this action; that he knows the contents of the complaint; and that the information contained therein is true to the best of his knowledge and belief.

[Signature of Plaintiff or Plaintiffs]
ALL PLAINTIFFS MUST VERIFY

SUBSCRIBED AND SWORN TO before me this 18 day of June, 2014.

K. Hawkins, Case Manager
NOTARY PUBLIC

My Commission expires:

(name) K. Hawkins (title) Case Manager
Authorized by the Act of July 7, 1955, as amended, to administer oaths (18 U.S.C. § 4004).

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LARRY SIMPSON, PLAINTIFF

v. 4:14CV00389 JTR

UNITED STATES OF AMERICA DEFENDANT

JUDGMENT

Consistent with the Order of Dismissal that was entered separately today, this case is VOLUNTARILY DISMISSED, WITH PREJUDICE. *Doc. 31.* The case is closed. It is certified, pursuant to 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal would not be taken in good faith.

IT IS SO ORDERED THIS 1st day of October, 2015.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LARRY SIMPSON, PLAINTIFF

v. 4:14CV00389 JTR

UNITED STATES OF AMERICA DEFENDANT

ORDER OF DISMISSAL[1]

For good cause shown, Defendant's Motion to Dismiss this case pursuant to a settlement is GRANTED, and this case is VOLUNTARILY DISMISSED, WITH PREJUDICE. *Doc. 31.* It is certified, pursuant to *See* 28 U.S.C. § 1915(a)(3), that an *in forma pauperis* appeal would not be taken in good faith.

IT IS SO ORDERED THIS 1st day of October, 2015.

UNITED STATES MAGISTRATE JUDGE

[1] On December 3, 2014, the parties consented to proceed before a United States Magistrate Judge. *Doc. 14.*

Page 1247 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1248 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1249 of 1390

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 1250 of 1390

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 1251 of 1390

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 1252 of 1390

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 1253 of 1390

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 1254 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SCR-2014-01142 **Short Description:** SIMPSON V. USA (CLARK)(14-389)(FOR)(FTCA)

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	4:14-cv-00389-SWW-JTR
Short Description	SIMPSON V. USA (CLARK)(14-389)(FOR)(FTCA)
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	SOUTH CENTRAL REGIONAL OFFICE
Current Institution	Forrest City Low (FCI)
Incident Region	SOUTH CENTRAL REGIONAL OFFICE
Incident Institution	Forrest City Low (FCI)
Monetary Relief Sought	$
Estimated Amount	$
Office	Little Rock
Jurisdiction	EASTERN DISTRICT OF ARKANSAS
Responsible Legal Office	FTC Oklahoma City

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	10/01/2015
Type	Settled
Reason Sought	
Amount offered	$
Total Amount Paid	$37,500.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	09/03/2014
Date Filed	06/30/2014

Case Progress

Current Owner	ROBERT CLARK
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	NEW CASES
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	
Comments	

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
RECEIVED

JUL 06 2007

ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY
SHREVEPORT

07-0915 SecP

Complaint

Suporting facts: Plaintiff asserts that for Statement of Claim, that on or about July 08 2005, the plaintiff received an incident report for minor assault on Correctional officer D. Stevens and interfering with Staff in the performance of duties (Please See Exhibit "R").

Both Correction officer D. Stevens and other Special Housing unit officers took the incident of July 08, 2005 very personally.

On or about the mid month of August 18, 2005 approximately 40 days after the incident of July 08, 2005, the plaintiff was seriously assulted and injure in the Special Housing unit while Sitting within a Secure Recreation Cage. The Special Housing unit (SHU) is a tightly Control Maximum Security lockdown unit which leaves no room for mistakes, neglect or mismanagement Which Can result in escapes, assaults, and other incidents Which Jeopardize institutional Security and inmate Safety. Plaintiff asserts that on the mid month of august 18, 2005 B.O.P. Special housing unit recreational officer Seada left the recreation yard unattended without any officers to monitor the inmates Safety or health, Clearly in breach of B.O.P. policy.

Doing this absent of a recreation officer presence, a inmate acting as a SHU orderly was allowed

to boil a pitcher of Scorching hot water/ oil and other unknown liquid Subsistence unmonitored. Allowed to walk down the restrictive recreation Cage unsecure, and unescorted by Special housing unit officers, allowed to dumped a pitcher of Scorching hot water/ oil all over the plaintiffs body.
Plaintiff asserts that inmates acting as SHU orderly are restricted from the recreational Special housing unit Cage/yard dong active recreation hours while the plaintiff and other inmates are having their recreation.
Officer Seada has failed to implement policy which affords Segregated inmates Safety from physical injury and property damage, officer Seada did risk the plaintiffs health and Safety, his negligent actions Constitute breach of duty of Care owed by Bureau of Prison (B.O.P.) in the Special housing unit.
The illegal acts and omissions of officer Seada had directly Contributed to the physical injury and property damage in violation of the 4th Amendment rights, Wanton infliction of pain under the 8th Amendment, Cruel and unusual punishment in violation of the 8th Amendment, Deliberate indifference to plaintiff health and Safety, Denied of

equal protection of the law that was clearly established at time of the injury in violations of the 14th Amendment rights, and the 5th Amendment violation of exclusion of policy rights.

These injuries would not have been possible if a recreation officer was present for the following resons:

(1). The officer would have notice the orderly and asked him why was he attempting to enter the restricted recreational yard while other inmates are out there.

(2). The officer would have notice the large pitcher with boiling or Scorching hot watery oilly liquid Subsistence and would have order the orderly to leave or order the orderly to take the pitcher of liquid Subsistence back inside

(3). If the orderly had refused the order of this officer and enter the Special housing unit recreational yard, the recreation officer Could have Sounded an alarm for other inmates already in the recreational Cages to be aware of any possible danger and.

(4). The recreation officer Could have attempted

to physically stop the orderly from entering the Special housing unit recreational yard, while Sounding the alarm for backup help from other staff. The plaintiff asserts that whether officer Seada actions of neglect was out of pure ignorance and unattentiveness to his duties which did Constitute the major part of the liability and voilated plaintiff Constitutional rights, or Whether officer Seada actions of neglect was a retaliated act, which Stamped from the July 08, 2005 altercation between the plaintiff and Correctional officer O. Steven (Please see Exhibit "R") Comfirms both officer Seada and the Bureau of prison as the liable party in this Suit, and the plaintiff legitimate demands for Seeking both Compensatory and punitive award for physical damage (Please see Exhibit "L") and emotional damage (Please see Exhibit "N", Exhibit "O", Exhibit "P", and Exhibit "Q").

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Court enter Judgment granting plaintiff:

(1). A declaration that the acts and omissions described herein violated plaintiff rights under the

Constitution and laws of the United States.

(2). Compensatory damages in the amount of $1,000,000^{00}$ (one million dollars) against each defendant, Jointly and Severally.

(3). Punitive damages in the amount of $500,000^{00}$ (Five hundred thousand) against each defendant

(4). A Jury trial on all issues triable by Jury

(5). Plaintiff Costs in this Suit and interest from the time of injury.

(6). Any additional relief this Court deems Just, proper, and equitable.

Dated: 7/01/07

Respectfully Submitted,

George A. Bynum Jr. #06613-078
United States Penitentiary
P.O. Box 305
Jonesville, VA. 24263-0305

VERIFICATION

I have read the foregoing Complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I Certify under penalty of perJury that the foregoing is true and Correct.

Executed at Jonesville Lee County VA. on July 01, 2007

George A. Bryant Jr.

Complaint

Supporting facts: Plaintiff asserts that for Statement of Claim, that on or about the mid month of august 18, 2005 bureau of Prison Special housing unit officer David neglected the plaintiffs repeated Calls for emergency help or assistance from the medical department minutes after the assult by an orderly Carrying out a bit. Officer David failed to report and or intervene upon notice of the seriousness of the injury in deliberate indifference to the plaintiffs rights under the Constitution. Officer Davids actions helped Contributed to the wanton infliction of pain, Cruel and unusual punishment, Mental anguish and mental breakdown, Pain and Suffering, and denial of the plaintiffs rights of duty of Care under the bureau of prison policy Statements. Officer David totally ignored Clearly established laws and policy Concerning Correctional officers reporting emergency injuries in knowledge that the policy required him to afford the plaintiff with Such assistance.

The plaintiff asserts that as a direct refusal and neglected action from Officer David to alert other (SHU) Staff or the medical department of the plaintiff repeated Calls or Cry's for an emergency assistance the plaintiff Was left neglected by Special housing unit officers and medical department Staff. This neglect Caused the pain, the Suffering, and the burns to be left unnotice and untreated for approximately 21 minutes

These injuries inflicted upon the plaintiff Could have been notice and treated by the institutional Staff at it's early Stage if Correctional officer David would have been attentive to duty and responded to the plaintiff emergency Calls for help. But instead, the plaintiff had to undergo 21 minutes of neglect, extreme agonizing pain, Suffering and hopeless mental anguish. Plaintiff asserts he Suffered from a first, Second, and third degree burns which got worst with blistering as the minutes passes on, Some of the plaintiffs brown Skin Covering plaintiffs right Shoulder blade Completely fell away exposing raw white tissue to the open hot air. (Please See Exhibit "L")

After the 21 minutes of neglecting the plaintiff Pain and Suffering, When Special housing unit officers finally did become aware of the plaintiffs injured Condition. The plaintiff was removed from the recreation Cage in which the physical injury had occured and taken to the Special housing unit hospital for treatment, photograph of the injuries, and a injury assessment report (Please See Exhibit "L") The plaintiff asserts that due to the Seriousness of the injury of August 18, 2005, the plaintiff now Suffered and Still is Continuing to Suffer from Post Traumatic Stress Syndrome.

The plaintiff has been place on anti-depressive medication Called prozac for mental breakdown, fear, lack of Sleep and mental anguish. The plaintiff is still Continuing to take these anti-depression medication to help deal with the function of day to day activity without the benefit of an outside psychologist. (Please see Exhibit "N-Q").

The plaintiff is unable to function without the aid of anti-depressive medication due to the post traumatic Stress as plaintiff once was able to function independently without the aid of Such anti-depression drugs before the injury plaintiff Suffered on august 16, 2005.

The plaintiff asserts that whether officer David actions of neglect and refusal was out of malice, ignorance, or unattentiveness to his duties, all of which did Constitute direct negligent and liability that voilated plaintiff Constitutional rights, or Whether officer David did Conspire with officer Seada in Sitting up the Conditions which did Cause the lack in the institution Security and the assult which Cause the plaintiff irreparable damage to occur, Still leaves the plaintiff permanently injured by these liabilities.

Plaintiff asserts that he has Suffered the following damages:

1). Pain and Suffering due to blister, Soars, puss, and lack of protective Skin Covering
2). Fear
3). Threat of death and bodily harm
4). mental anguish and mental break down
5). 8th Amendment of wanton infliction of pain under Cruel and unusual punishment
6). Stress (P.T.S.)
7). Permanent Skin disfigurement and Scaring
8). Embarassment and Shame
9). 4th Amendment right violations of property or bodily injury
10). Migraines from Stress
11). 14th amendment right of equal protection of the law as described and not limited there to

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Court enter Judgment granting plaintiff:

(1). A declaration that the acts and omissions

described herein violated plaintiff's rights under the Constitution and laws of the United States.

(2). Compensatory damages in the amount of $1,000,000^{00}$ (one million dollars) against each defendant, Jointly and Severally.

(3). Punitive damages in the amount of $500,000^{00}$ (five hundred thousand dollars) against each defendant.

(4). A Jury trial on all issues triable by Jury

(5). Plaintiff Costs in this Suit

(6). Any additional relief this Court deems Just, proper, and equitable.

Dated: July 01, 2007
Respectfully Submitted

George A. Bynum Jr. #06013-078
United States Penitentiary
Post Office Box 305
Jonesville, Virginia. 24263-0305

(Exhibit "A") SecP

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
C-Unit Manager O. Mott	6/27/05
FROM:	REGISTER NO.:
B. Jones	06013-078
WORK ASSIGNMENT:	UNIT:
N/A	SHU Range-2 Cell # 120

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Miss Mott, Enclosed within this request form are two BP-9 Complaints Concerning the incident which took place on 8/18/05.

As I already have given the BP-8 which I have filed Concerning the incident which took place on 8/18/05 to the USP-Pollock S.I.A. and stated that "the BP-8 Can not be informally resolved, file a BP-9 Concerning the Complaint."

I am now filing two BP-9 relating to direct issues and Complaints as stated and filed within my BP-8 Complaint which you stated "Can not be informally resolved.

Please process the BP-9 forms and attach Copies of the BP-8 to the back of the BP-229 forms and forward them to the warden office for processing at that level.

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

DOCUMENTATION OF INFORMAL RESOLUTION ATTEMPT

Bureau of Prisons Program Statement 1330.13, Administrative Remedy Program, requires in most cases that inmates attempt informal resolution of grievances prior to filing a formal written complaint. This form shall be used to document your efforts toward informally resolving your grievance.

Inmate Name: Bryant George **Reg. No.:** 06013-078 **Unit:** C1

Specific Complaint and Requested Relief: Please See Attachment (A) At the back of this informal resolution attempt Concerning officer David illegal acts and Omissions to report my repeated Calls for an emergency assistance from the SHU Staff and medical department. (Please See Attachment at back

Efforts Made By Inmate To Informally Resolve Grievance (be specific):

Counselor's Comments: See attached response.

Inmate Signature / Date 12/21/05 — Correctional Counselor / Date 12-26-05 — Unit Manager / Date 12/27/05

NOTE: Attach any pertinent documentation related to the inmate's complaint.

	BP-8 Issued to Inmate	BP-8 Received by Counselor
Date:		12-22-05
Counselor:		

On August 19, 2005, B.O.P. S.H.U. officer David neglected my repeated calls for an emergency help or assistance from the medical department when I was assulted by an inmate carrying out a paid hit. Officer David failed to report and intervene upon notice of the seriousness of the injury, and contributed to the wanton infliction of pain, deny me with rights of duty of care, Officer David totally ignored clearly established laws and policy concerning officers reporting emergency injuries in knowledge that the policy required him to afford inmates with such assistance. As a direct refusal and neglected from officer David to alert other SHU staff or the medical department of my repeated calls for emergency assistance. I was left un-notice by special housing unit officers and medical department causing the burns to be lefted untreated for 21 minutes, suffering from a 1st, 2nd, and 3rd degree burns which was getting worsen by the second. The illegal acts and omissions of officer David had directly contributed to the physical injury and property damage, wanton infliction of pain, cruel and unusual punishment, and equal protection of the injury. I seek compensation for the illegal acts and neglected of assistance & reporting my emergency injuries.

12/21/2005

George Bynum
Reg. no. 06613-078

INFORMAL RESOLUTION ATTEMPT

December 26, 2005

BYNUM, George
Reg No. 06013-078

RE: BP-8 Response

This is in response to you request for informal resolution in which you claim that you did not receive a effective emergency response from medical and SHU staff after being assaulted.

An investigation into this matter has revealed the following: On August 18, 2005, you were assaulted by another inmate in the Special Housing Unit. When staff became aware of the incident, assistance was called for and medical staff was notified. There is no evidence to support your claim that staff intentionally did not respond to your situation.

If you are not satisfied with this response, you may file a BP-9 with the Warden.

Staff Signature _____
L. Gremillion, Counselor

07-0915 sec P

(Exhibit "B")

RECEIPT - ADMINISTRATIVE REMEDY

DATE: JANUARY 11, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
POLLOCK USP

TO : GEORGE BYNUM, 06013-078
POLLOCK USP UNT: C QTR: Z05-213UAD

THIS ACKNOWLEDGES THE RECEIPT OF THE ADMINISTRATIVE REMEDY REQUEST IDENTIFIED BELOW:

REMEDY ID : 400172-F1
DATE RECEIVED : JANUARY 10, 2006
RESPONSE DUE : JANUARY 30, 2006
SUBJECT 1 : UNPROFESSIONAL, INAPPROPRIATE CONDUCT OR MISCONDUCT BY STAFF
SUBJECT 2 : MEDICAL CARE - DELAY OR ACCESS TO
INCIDENT RPT NO:

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Bryant George A. | 06013-078 | C-1 | (USP) Pollock
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A– INMATE REQUEST On August 18, 2005, B.O.P. SHU officer David neglected my repeated calls for an emergency help or assistance from the medical department whe. I was assulted by an inmate carrying out a paid hit. Officer David failed to report and intervene upon notice of the seriousness of the injury, and contributed to the wanton infliction of pain, deny me with rights of duty of care. Officer David totall ignored clearly established laws and policy concerning officers reporting emergency injuri in knowledge that the policy required him to afford inmates with such assistance. As a direct refusal and neglected from officer David to "Alert" other SHU staff or medica staff of my repeated calls for emergency assistance, I was left un-notice by Special housing unit officers and medical staff. officer David refusal actions caused the burns to be left untreated for 21 minutes, while suffering from a 1st, 2nd, and 3rd degree bu which was getting worsen by the second. The illegal acts and omissions of officer David had directly contributed to the physical injury and property damage, wanton infliction pain, cruel and unusual punishment, and equal protection of the law. I seek Compensatio for the illegal acts and neglected assistance of officer "DAVID" refusal to report my Emergency Condition. (Please see attachments)

January 03, 2006
DATE

SIGNATURE OF REQUESTER

Part B– RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 400172-F1

Part C– RECEIPT

CASE NUMBER:

Return to:
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

BP-229(13)

Attachment to BP-9
Administrative Remedy

On December 21, 2005, I filed an informal resolution attempt Concerning the illegal actions of officer David refusal to provide me with emergency assistance.

On December 26, 2005, I received a response to my filed BP-8 form, in which Counselor L. Greenillion Stated: "This is in response to your request for informal resolution in which you claim that you did not receive a effective emergency response from medical and SHU staff after being assaulted."

Counselor L. Greenillion misunderstand my informal resolution attempt because it Clearly Stated: "Officer David neglected my repeated Calls for an emergency assistance from medical. totally ignored Clearly established laws and policy Concerning officers reporting emergency injuries in knowledge that policy require him to afford inmates with Such assistance. And that officer David direct refusal to (Alert other SHU Staff or medical Staff) of my repeated Calls for an emergency assistance, I was left un-notice for 21 minutes without treatment." I never Stated that I did not received a effective emergency response from medical. My BP-8 is about only officer David actions alone.

Counselor L. Greenillion also Stated: "An investigation into this matter has revealed that I was assaulted by another inmate in Special Housing unit. When staff became aware of the incident, assistance was called for and medical staff was notified. There is no evidence to support your Claim that Staff intentionally did not respond to your Situation.

If Counselor L Greenillion did his investigation the right way by reviewing the SHU Surveillance Cameras on the date of the incident, he would not make these falsify Statements within his response to my BP-8 form. There is evidence to Support my claim that officer David intentionally did not respond to my Situation and I was left without assistance for 21 minutes. (See the SIS report, SIA report & investigation, and SHU Camera

UNITED STATES PENITENTIARY
POLLOCK, LOUISIANA

INMATE NAME: **Bynum, George**
INMATE NO: **06013-078**
ADMINISTRATIVE REMEDY NO: **400172-F1**

PART B - RESPONSE TO REQUEST FOR ADMINISTRATIVE REMEDY

This is in response to your Request for Administrative Remedy filed January 10, 2006, in which you allege on August 18, 2005, while housed in the Special Housing Unit (SHU), you were the victim of an assault by another inmate. You allege a Correctional Officer "failed to report and intervene upon notice of the seriousness of the injury and contributed to the wanton infliction of pain." You are seeking a non specified amount of compensation for alleged illegal acts and neglected assistance of staff.

Your complaint has been referred to the appropriate officials for review and disposition. At the conclusion of this review, appropriate action will be taken.

Based on the above findings, your Request for Administrative Remedy is for informational purposes only.

If you are not satisfied with this decision, you may appeal to the Regional Director at: Bureau of Prisons, South Central Regional Office, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219. Your appeal must be received in the South Central Regional Office within 20 days of the date of this response.

1/26/06
Date

Fredrick Menifee
Fredrick Menifee, Warden

(Exhibit "C") 07-0915 SecP

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: MARCH 29, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTH CENTRAL REGIONAL OFFICE

TO : GEORGE BYNUM, 06013-078
LEE USP UNT: L QTR: L01-313U
P.O. BOX 900
JONESVILLE, VA 24263

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 400172-R1 REGIONAL APPEAL
DATE RECEIVED : MARCH 27, 2006
SUBJECT 1 : UNPROFESSIONAL, INAPPROPRIATE CONDUCT OR MISCONDUCT BY STAFF
SUBJECT 2 : MEDICAL CARE - DELAY OR ACCESS TO
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. REGIONAL APPEALS (BP-10) MUST BE RECEIVED WITHIN 20 DAYS OF THE WARDEN/CCM RESPONSE OR RECEIPT OF THE DHO REPORT. THIS TIME INCLUDES MAIL TIME.

REJECT REASON 2: SEE REMARKS.

REMARKS : YOU ARRIVED AT YOUR CURRENT FACILITY 02-14-06. IN THE FUTURE FILE YOUR CLAIMS TO THE REGION YOU ARE HOUSED, CURRENTLY THE MID-ATLANTIC REGION.

U.S. Department of Justice
Federal Bureau of Prisons
United States Penitentiary
P.O. Box 1000
Pollock, LA 71467-1000
Official Business $300.00 Penalty - Private Use



George Bynum, 06013-078
USP Lee
P.O. Box 305
Jonesville, VA 24263

U.S. Department of Justice

Federal Bureau of Prisons

United States Penitentiary Lee County

P.O. Box 900, Jonesville, Virginia 24263

May 22, 2006

MEMORANDUM FOR RECORD

FROM: T. Pulver, Counselor

SUBJECT: BYNUM, George
Reg. No. 06013-078

Inmate Bynum received an administrative remedy response at USP Lee, post marked March 9, 2006, which was forwarded from USP Pollock. The Administrative Remedy, #400172-F1, was signed by the Warden on January 26, 2006, at USP Pollock. However, it was not forwarded to USP Lee until March 9, 2006. Please adjust his response deadline accordingly.

U.S. Department of Justice

Regional Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: Bynum George A	06013-078	L Code	(USP) Lee
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL on August 18, 2005, B.O.P. SHU officer David neglected my repeated Calls for an emergency help or assistance from the medical department when I was assulted b an inmate Carrying out a paid hit. Officer David failed to report and intervene upon notice of the seriousness of the injury, and contributed to the wanton infliction of pain, deny me with rights of duty of Care. Officer David totally ignored clearly established laws and policy Concerning officers reporting emergency injuries in knowledge that the policy required him to afford inmates with such assistance. As a direct refusal and neglected from offic David to "Alert" other SHU Staff or medical staff of my repeated calls for emergency assistance, I was left un-notice by special housing unit officers and medical staffs. Officer David Refusal actions caused the burns to be lefted untreated for 21 minutes, whi Suffering from a 1st, 2nd, and 3rd degree burns which was getting worsen by the second. The illegal acts and omissions of officer David had directly contributed to the physical injur and property damage, wanton infliction of pain, cruel and unusual punishment, and equal protection of the law. I seek compensation for the illegal acts and neglected assistance officer David refusal to report my "Emergency Condition."

March 17 2006
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

MAR 27 2006

CASE NUMBER: 400172-R1

Part C - RECEIPT

CASE NUMBER:

Return to:

LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

SUBJECT:

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

(Exhibit "D")

GEORGE BYNUM, 06013-078
LEE USP UNT: L QTR: L01-314U
P.O. BOX 900
JONESVILLE, VA 24263

Inmate received his BP-10 through USP Lee institutional mail system on Jn 21, 2006 at about 3:35 p.m.

RECEIPT - ADMINISTRATIVE REMEDY

DATE: JUNE 19, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
MID-ATLANTIC REGIONAL OFFICE

TO : GEORGE BYNUM, 06013-078
LEE USP UNT: L QTR: L01-314U

THIS ACKNOWLEDGES THE RECEIPT OF THE REGIONAL APPEAL IDENTIFIED BELOW:

REMEDY ID : 400172-R2
DATE RECEIVED : MAY 31, 2006
RESPONSE DUE : JULY 30, 2006
SUBJECT 1 : UNPROFESSIONAL, INAPPROPRIATE CONDUCT OR MISCONDUCT BY STAFF
SUBJECT 2 : MEDICAL CARE - DELAY OR ACCESS TO
INCIDENT RPT NO:

EXTENSION OF TIME FOR RESPONSE - ADMINISTRATIVE REMEDY

DATE: JUNE 19, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
MID-ATLANTIC REGIONAL OFFICE

TO : GEORGE BYNUM, 06013-078
LEE USP UNT: L QTR: L01-314U

ADDITIONAL TIME IS NEEDED TO RESPOND TO THE REGIONAL APPEAL IDENTIFIED BELOW. WE ARE EXTENDING THE TIME FOR RESPONSE AS PROVIDED FOR IN THE ADMINISTRATIVE REMEDY PROGRAM STATEMENT.

REMEDY ID : 400172-R2
DATE RECEIVED : MAY 31, 2006
RESPONSE DUE : JULY 30, 2006
SUBJECT 1 : UNPROFESSIONAL, INAPPROPRIATE CONDUCT OR MISCONDUCT BY STAFF
SUBJECT 2 : MEDICAL CARE - DELAY OR ACCESS TO
INCIDENT RPT NO:

U.S. Department of Justice

Regional Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From:			
Brown George A	06013-078	L Code	(USP) Lee
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL on August 18, 2005, B.o.P. SHU officer David neglected my repeated Calls for an emergency help or assistance from the medical department when I was assulted by an inmate carrying out a paid hit. officer David failed to report and intervene upon notice of the seriousness of the injury, and Contributed to the wanton infliction of pain, deny me with rights of duty of care. Officer David totally ignored clearly established laws and policy Concerning officers reporting emergency injuries in knowledge that the Police required him to afford inmates with such assistance. As a direct refusal and neglected from Officer David to "Alert" other SHU staff or medical staff of my repeated Calls for emergency assistance, I was left un-notice by special housing unit officers and medical staff. Officer David Refusal actions caused the burns to be lefted untreated for 21 minutes, while suffering from a 1st, 2nd, and 3rd degree burns which was getting worsen by the second. The illegal acts and omissions of officer David had directly Contributed to the physical injury and property damage, wanton infliction of pain, cruel and unusual punishment and equal protection of the law. I seek Compensation for the illegal acts and neglected assistance of officer David refusal to report my "Emergency Condition."

May 25, 2006
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED
MAY 3 1
MARO Regional Counsel

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 400172-R2

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

Regional Administrative Remedy Appeal
Part B - Response

Date Filed: May 31, 2006 Remedy ID #400172-R1

You appeal the Warden's response to your Request for Administrative Remedy. You allege unprofessional conduct by staff.

The Bureau of Prisons takes allegations of staff misconduct very seriously. Your allegation was referred to the appropriate Bureau of Prisons component for investigation.

Your appeal of the Warden's response is denied. If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons, 320 First Street, N.W., Washington, D.C. 20534. Your appeal must be received in the General Counsel's Office within 30 days from the date of this response

JUL 14 2006

Date

For W. A. Phillips

K. M. White
Regional Director
Mid-Atlantic Regional Office

RECEIPT - ADMINISTRATIVE REMEDY

07-0915 Sec P

(Exhibit "E")

DATE: AUGUST 13, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : GEORGE BYNUM, 06013-078
LEE USP UNT: L QTR: L01-314U

THIS ACKNOWLEDGES THE RECEIPT OF THE CENTRAL OFFICE APPEAL IDENTIFIED BELOW:

REMEDY ID	: 400172-A1
DATE RECEIVED	: AUGUST 4, 2006
RESPONSE DUE	: SEPTEMBER 13, 2006
SUBJECT 1	: UNPROFESSIONAL, INAPPROPRIATE CONDUCT OR MISCONDUCT BY STAFF
SUBJECT 2	: MEDICAL CARE - DELAY OR ACCESS TO

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From:			
Bynum George A	06013-078	L-Code	(USP) Lee
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL On August 18, 2005, B.O.P. SHU officer David neglected my repeated calls for an emergency help or assistance from the medical department when I was assulted by an inmate carrying out a paid hit within (S.H.U.). Officer David failed to report and or intervene upon notice of the seriousness of the injury, and contributed to the wanton infliction of pain, deny me with rights of duty of care. Officer David totally ignored clearly established laws & policy concerning officers reporting emergency injuries in knowledge the policy required him to afford inmates with such assistance. As a direct refusal and neglected from officer David to "Alert" other SHU staff or medical staff of my repeated calls for emergency assistance, I was left unnotice by special housing unit officers & medical staff. Officer David refusal actions caused the burns to be lefted untreated for 21 minutes, while suffering from a 1st, 2nd, & 3rd degree burns which was getting worsen by the second.

The illegal acts and omissions of officer David had directly contributed to the physical injury and property damage, wanton infliction of pain, cruel and unusual punishment, and equal protection of the law. (see SHU surveillance camera, SIS & SIA investigation, and medical reports) I request all evidence in this matter preserve & seek compensatio for the illegal acts & neglected assistance of officer David refusal to report my "Emergency Condition"

7/23/06
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED
AUG - 4 2006
Administrative Remedy Section

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 400172

Part C - RECEIPT

CASE NUMBER:

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

BP-231(13)

Administrative Remedy No. 400172-A1
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal in which you allege inappropriate conduct by a staff member while housed at USP Pollock. Specifically, you allege that on August 18, 2005, a Special Housing Unit officer neglected your repeated calls for emergency medical assistance after being assaulted by another inmate. You request "compensation" for the actions of this officer.

Staff conduct is governed by Bureau of Prisons' Program Statement 3420.09, Standards of Employee Conduct. The Bureau of Prisons takes allegations of staff misconduct seriously. You have been informed that your allegations were referred to the appropriate component for investigation and disposition. We concur with the responses provided and find them appropriate.

As to your request for "compensation," the Administrative Remedy Program does not ordinarily provide for monetary relief. Your request for monetary compensation should be pursued through the appropriate statutorily mandated procedure such as the Federal Tort Claims Act to resolve this issue.

This response is provided for informational purposes only.

10/2/2006
Date

FIC
Harrell Watts, Administrator
National Inmate Appeals

07-0915 (Exhibit "F") secP

RECEIPT - ADMINISTRATIVE REMEDY

DATE: DECEMBER 15, 2005

FROM: ADMINISTRATIVE REMEDY COORDINATOR
POLLOCK USP

TO : GEORGE BYNUM, 06013-078
POLLOCK USP UNT: C QTR: Z03-133LAD

THIS ACKNOWLEDGES THE RECEIPT OF THE ADMINISTRATIVE REMEDY REQUEST IDENTIFIED BELOW:

REMEDY ID	: 394492-F2
DATE RECEIVED	: NOVEMBER 8, 2005
RESPONSE DUE	: NOVEMBER 28, 2005
SUBJECT 1	: OTHER COMPLAINT AGAINST STAFF
SUBJECT 2	:
INCIDENT RPT NO:	

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

USP POLLOCK

2005 NOV -3 PM 3:14

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

LEGAL DEPARTMENT

From: Blaum George A. | 06013-078 | C-1 | (USP) Pollock
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A- INMATE REQUEST On August 18, 2005. The B.o.P SHU Recreational officer Seuda left the recreation yard unattended without any officers to monitor the inmates safety or health. Doing this absent a inmate was allowed to boil a pitcher of scorching hot watery oil and other unknown liquid Subsistence, allowed to walk down the recreation Cage unsecure, unescorted by officers, allowed to dumped a pitcher of scorching hot watery oil all over my body. Special housing unit officers simply ignored clearly established laws, and B.o.P. Policy Statement, Risking threat of death and serious injury to the special housing inmates as a class of persons. Officer Seuda have failed to implement policy which affords segregated inmates safety from physical injury and property damage, risk to inmates health and safety, negligent acts which breach duty of care owed by bureau of prison in the special housing Unit. The illegal acts and omissions of officer Seuda had directly contributed to the Physical injury and property damage, wanton infliction of pain, cruel and unusual Punishment, and equal protection of the law that were clearly established at time of the injury.

10/12/05
DATE

SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 394492-F2

CASE NUMBER:

Part C- RECEIPT

Return to:
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

Attachment A

Furthermore, after the Attacks on my life of both May 12, 2005 and August 18, 2005 incidents which resulted in serious bodily injuries due to breach of Security, Safety and Care owed by bureau of prison 18 U.S.C. § 4042 and Bureau of prison policy Statements. You would think these institutional Staff at USP-Pollock would take alternative Security measures to Safeguard my health and Safety or to protect my health and Safety from more injuries by Simply transfering me from this negligent institution and it's Staff. Their lack of Concerned toward my Security and Safety by officers of USP Pollock is a Continuous breach of my Safety. All officers have Knowledge of the risk or danger to my Safety, but Still refused to take Corrective actions.

UNITED STATES PENITENTIARY
POLLOCK, LOUISIANA

INMATE NAME: **BYNUM, George**
INMATE NO: **06013-078**
ADMINISTRATIVE REMEDY NO: **394492-F2**

PART B - RESPONSE TO REQUEST FOR ADMINISTRATIVE REMEDY

This is in response to your Request for Administrative Remedy dated October 12, 2005, in which you allege that on August 18, 2005, a Correctional Officer left the Recreation Yard unattended which allowed another inmate to assault you. You allege that the officer ignored Bureau of Prison policy statement which contributed to your being injured.

Your complaint has been referred to the appropriate authorities for review and disposition. At the conclusion of this review, appropriate action will be taken.

This response to your Request for Administrative Remedy is for informational purposes only.

If you are not satisfied with this decision, you may appeal to the Regional Director at: Bureau of Prisons, South Central Regional Office, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219. Your appeal must be received in the South Central Regional Office within 20 days of the date of this response.

12-14-05
Date

Fredrick Menifee, Warden

07-0915 Sec P

(Exhibit "G")

RECEIPT - ADMINISTRATIVE REMEDY

DATE: JANUARY 11, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTH CENTRAL REGIONAL OFFICE

TO : GEORGE BYNUM, 06013-078
POLLOCK USP UNT: C QTR: Z05-213UAD

THIS ACKNOWLEDGES THE RECEIPT OF THE REGIONAL APPEAL IDENTIFIED BELOW:

REMEDY ID : 394492-R1
DATE RECEIVED : JANUARY 3, 2006
RESPONSE DUE : FEBRUARY 2, 2006
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

U.S. Department of Justice

Regional Administrative Remedy Appeal

Federal Bureau of Prisons

Educ

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From:			
Bynum George	06013-078	C-1	(USP) Pollock
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL on August 18, 2005. The B.O.P. SHU Recreational officer Seaja lefted the recreation yard unattended without any officers to Monitor the inmates Safety or health. Doing this absent, an inmate was allowed to boil a pitcher of scorching hot watery oil and other unknown liquid Subsistence, allowed to walk down the / recreation Cage unsecure, unescorted by officers, allowed to dumped a pitcher of scorching hot watery oil all over my body. Special housing unit officer Simply ignored Clearly established laws, and B.O.P. Policy Statement, Risking threat of death and serious injury to the special housing inmates as a Class of persons. Officer Seaja have failed to implement policy which affords Segregated inmate Safety from physical injury and property damage, risk to inmates health and safety, negligent act which breach duty of care owed by bureau of prisons in the Special housing unit. The illegal acts and omissions of officer Seaja had directly Contributed to the physical injury and property damage, wanton infliction of pain, Cruel and unusual punishment, and equal protection of the law that were clearly established at time of the injury.

12/25/05
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

SECOND COPY: RETURN TO INMATE

CASE NUMBER: 394492-R1

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ _____ _____ _____

LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

BYNUM, George REG. NO. 06013-078 RECEIPTED: 01/03/06

CASE NO. 394492-R1 PART B - RESPONSE

You are appealing the Warden's response to your complaint that on August 18, 2005, an officer left the Recreation Yard unattended. You allege that this resulted in another inmate assaulting you.

A review of this matter reveals that this complaint has been referred to the appropriate authorities for review and disposition. At the conclusion of this review, appropriate action will be taken.

This response is for informational purposes only.

In the event you are dissatisfied with this response, you may appeal to the Bureau of Prisons, Administrative Remedy Section, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in that office within 30 days from the date of this response.

01/20/06
Date

G. Maldonado, Jr.
Regional Director

SENSITIVE - LIMITED OFFICIAL USE

07-0915 SecP

(Exhibit "H")

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: JULY 20, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : GEORGE BYNUM, 06013-078
LEE USP UNT: L QTR: L01-314U
P.O. BOX 900
JONESVILLE, VA 24263

(L)

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 394492-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : JULY 13, 2006
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. CENTRAL OFFICE APPEALS MUST BE RECEIVED WITHIN 30 DAYS OF THE REGIONAL DIRECTOR'S RESPONSE. THIS TIME LIMIT INCLUDES MAIL TIME.

REJECT REASON 2: YOU DID NOT PROVIDE A COPY OF YOUR REGIONAL OFFICE ADMINISTRATIVE REMEDY APPEAL (BP-10) FORM AND A COPY OF THE (BP-10) RESPONSE FROM THE REGIONAL DIRECTOR.

REMARKS : RECORDS INDICATE REGIONAL RESPONSE WAS ISSUED ON 1-20-2006, PROVIDE STAFF VERIFICATION ON BOP LETTER-HEAD THAT UNTIMELY FILING WAS NOT YOUR FAULT.

EXHIBIT A

6/19/06

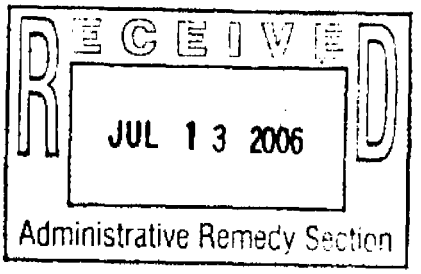
RESPONSE TIME §542.18.

If accepted, a request or appeal is considered filed on the date it is logged into the Administrative remedy Index as received. Once filed, response shall be made by the warden or CCM within 20 calendar days; by the regional director within 30 calendar days; and by the General counsel within 40 calendar days. If the request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the warden shall respond not later than the third calendar day after filing. If the time period for response to a request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the central office level. Staff shall " **respond** " in writing to " **all** " filed requests or appeals."**If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a DENIAL at that level**"

In light of the response time concerning my Appeal process, I am viewing the absence of a response to be a direct **DENIAL** of my request or appeal at the reional director level. I'm now **processing** to file this Appeal with the general counsel.

SINCERELY.

GEORGE A. BYNUM #06013-078



U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From:	LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION
	Bynum, George A.	06013-078	C-1	USP Lee

Part A—REASON FOR APPEAL

On August 18, 2005 the BOP SHU recreational officer Seaja lefted the recreation yard unattended without any officers to monitor the inmates safety or health. Doing this absent an inmate was allowed to boil a pitcher of scorching hot watery oil and other unknown liquid subsistence, allowed to walk down the recreation cage unsecure, unescorted by officers, allowed to dumped a pitcher of scorching hot watery oil all over my body. Special housing unit officers simply ignored clearly established laws, and BOP policy statement, risking threat of death and serious injury to the special housing inmates as a class of persons. Officer Seaja have failed to implement policy which affords segregated inmates safety from physical injury and property damage, risk to inmates health and safety, negligent acts which breath duty of care owed by bureau of prison in the special housing unit. The illegal acts and omissions of Officer Seaja had directly contributed to the physical injury and property damage, wanton infliction of pain, cruel and unusual punishment and equal protection of the law that were clearly established at time of the injury.

6/29/06
DATE

SIGNATURE OF REQUESTER

Part B—RESPONSE

RECEIVED
JUL 13 2006
Administrative Remedy Section

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 394492

Part C—RECEIPT

CASE NUMBER:

Return to:

LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

SUBJECT:

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

BP-231(13)

BP #0945 SCCP

(Exhibit "I")

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U. S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (NAME AND TITLE OF STAFF MEMBER)	DATE:
Counselor Pulver	8/02/06
FROM: Byrum George	REGISTER # : 06013-078
WORK ASSIGNMENT: AM/Mine Cooradoor	UNIT: I 314U

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Please See Attachment at Back

(Do not write below this line)

DISPOSITION:

SEE ATTACHED. THIS IS THE ONLY INFORMATION I CAN PROVIDE. BP10 AND BP11 ARE NOT MY RESPONSIBILITY. COUNSELORS ONLY PROVIDE RECEIPTS GENERATED BY REGION AND CENTRAL OFFICE. ALL OTHER QUESTIONS OR CONCERNS YOU WILL HAVE TO WRITE THE RESPECTIVE OFFICE.

Signature of Staff Member:	Date: 8-6-

Record Copy - File; Copy - Inmate
(This form may be replicated via WP) This form replaces BP-148.070 dated OCT 86 and BP-S148.070 dated APR 94

I'm requesting a full Check on my Administrative Remedy BP-10 ID No. 345176-R1 & BP-10 ID No. 344442-R1. 345176-R1 was Received december 14, 2005 by the regional level and it's response was due february 12, 2006. 344442-R1 was received January 3, 2006 by the regional level and it's response was due february 2, 2006.
I only received an acknowledgement from regional level Concerning both BP-10's 345176-R1 & 344442-R1.
Till this date 8/02/06 I have not yet received a response back. (please See Response Time § 542.18.).
The Central office level stated that response was issued from regional level 1/24/2006 for 345176-R1 and a response was issued from regional level 1/20/2006 for 344442-R1.
I'm requesting a Check on the above information along with a memo of your findings and Copy of Such finding from records.
I would also like to have this request from and it's attachment Stamped and return to me along with memo & Copies of records

Thank you for any help
Sincerely George A. Byrums
L-unit Cell 314 Reg. No. 06013-078 Date 8/02/06
Time 3:38 pm

LEEE9 *ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL * 08-06-2006
PAGE 026 * FULL SCREEN FORMAT * 09:19:24

REGNO: 06013-078 NAME: BYNUM, GEORGE
RSP OF...: LEE UNT/LOC/DST: L QTR.: L01-314U RCV OFC: POL
REMEDY ID: 394492-F1 SUB1: 34ZM SUB2: DATE RCV: 11-08-2005
UNT RCV..: C QTR RCV.: Z03-131LAD FACL RCV: POL
UNT ORG..: C QTR ORG.: Z03-131LAD FACL ORG: POL
EVT FACL.: POL ACC LEV: POL 2 SCR 1 RESP DUE:
ABSTRACT.: ALLEGES STAFF WAS INATTENTIVE TO DUTIES
STATUS DT: 11-08-2005 STATUS CODE: REJ STATUS REASON: CON INF RSF
INCRPTNO.: RCT: EXT: DATE ENTD: 11-09-2005
REMARKS..:

G0002 MORE PAGES TO FOLLOW . . .

LEEE9 *ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL * 08-06-2006
PAGE 027 * FULL SCREEN FORMAT * 09:19:24

REGNO: 06013-078 NAME: BYNUM, GEORGE
RSP OF...: LEE UNT/LOC/DST: L QTR.: L01-314U RCV OFC: POL
REMEDY ID: 394492-F2 SUB1: 34ZM SUB2: DATE RCV: 11-08-2005
UNT RCV..: C QTR RCV.: Z03-131LAD FACL RCV: POL
UNT ORG..: C QTR ORG.: Z03-131LAD FACL ORG: POL
EVT FACL.: POL ACC LEV: POL 2 SCR 1 RESP DUE: MON 11-28-2005
ABSTRACT.: ALLEGES STAFF WAS INATTENTIVE TO DUTIES
STATUS DT: 12-15-2005 STATUS CODE: CLO STATUS REASON: XPL
INCRPTNO.: RCT: P EXT: DATE ENTD: 12-13-2005
REMARKS..:

G0002 MORE PAGES TO FOLLOW . . .

```
LEE69          *ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL *          08-08-2006
PAGE 031       *                FULL SCREEN FORMAT          *          09:19:24

REGNO: 06013-078 NAME: BYNUM, GEORGE
RSP OF...: LEE UNT/LOC/DST: L                          QTR.: L01-314U   RCV OFC: SCR
REMEDY ID: 394492-R1       SUB1: 34ZM SUB2:            DATE RCV:   01-03-2006
UNT RCV..: C             QTR RCV.: Z03-135LAD          FACL RCV: POL
UNT ORG..: C             QTR ORG.: Z03-131LAD          FACL ORG: POL
EVT FACL.: POL    ACC LEV:  POL  2 SCR  1              RESP DUE:  THU  02-02-2006
ABSTRACT.: ALLEGES STAFF WAS INATTENTIVE TO DUTIES
STATUS DT: 01-20-2006  STATUS CODE: CLO STATUS REASON: XPL
INCRPTNO.:           RCT: P EXT:    DATE ENTD: 01-11-2006
REMARKS..:



G0002        MORE PAGES TO FOLLOW . . .
```

LEE29 * ADMINISTRATIVE REMEDY GENERALIZED RETRIEVAL * 08-08-2006
PAGE 037 OF 037 * FULL SCREEN FORMAT * 09:19:24

REGNO: 06013-078 NAME: BYNUM, GEORGE
RSP OF...: LEE UNT/LOC/DST: L QTR.: L01-314U RCV OFC: BOP
REMEDY ID: 394492-A1 SUB1: 34ZM SUB2: DATE RCV: 07-13-2006
UNT RCV..: L QTR RCV.: L01-314U FACL RCV: LEE
UNT ORG..: C QTR ORG.: Z03-131LAD FACL ORG: POL
EVT FACL.: POL ACC LEV: POL 2 SCR 1 RESP DUE:
ABSTRACT.: ALLEGES STAFF WAS INATTENTIVE TO DUTIES
STATUS DT: 07-19-2006 STATUS CODE: REJ STATUS REASON: UTA RAP
INCRPTNO.: RCT: EXT: DATE ENTD: 07-19-2006
REMARKS..: RECORDS INDICATE REGIONAL RESPONSE WAS ISSUED ON
1-20-2006, PROVIDE STAFF VERIFICATION ON BOP LETTER-
HEAD THAT UNTIMELY FILING WAS NOT YOUR FAULT.

36 REMEDY SUBMISSION(S) SELECTED
G0000 TRANSACTION SUCCESSFULLY COMPLETED

(Exhibit "J")

GEORGE BYNUM, 06013-078
POLLOCK USP UNT: C QTR: Z05-213UAD
P.O. BOX 1000
POLLOCK, LA 71467

I/M Bynum received this on 10/18/06

S.O. D. Dep

U.S. Department of Justice — **Regional Administrative Remedy Appeal**

Federal Bureau of Prisons

Educ

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From:				
Bryant George	06013-078	C-1	(USP) Pollock	
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION	

Part A - REASON FOR APPEAL On August 18, 2005. The B.O.P. SHU Recreational officer Seaja lefted the recreation yard unattended without any officers to Monitor the inmates Safety or health. Doing this absent, an inmate was allowed to boil a pitcher of Scorching hot watery oil and other unknown liquid Subsistence, allowed to walk down the recreation Caye unsecure, unescorted by officers, allowed to dumped a pitcher of Scorching hot watery oil all over my body. Special housing unit officer Simply ignored Clearly established laws, and B.O.P. Policy Statement, Risking threat of death and Serious injury to the special housing inmates as a Class of persons, officer Seaja have failed to implement policy which affords Segregated inmate Safety from physical injury and property damage, risk to inmates health and Safety, negligent act which breach duty of care owed by bureau of prison in the Special housing unit. The illegal acts and omissions of officer Seaja had directly Contributed to the physical injury and property damage, wanton infliction of pain, Cruel and unusual punishment, and equal protection of the law that were clearly established at time of the injury.

12/25/05
DATE

Jerry James
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 394492-R1

Part C - RECEIPT

CASE NUMBER:

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT: _____

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

RECEIVED
JAN - 3 2006
BUREAU OF PRISONS
LEGAL DEPARTMENT, SCRO

USP LVN

BP-230(13)
JUNE 2002

BYNUM, George | REG. NO. 06013-078 | RECEIPTED: 01/03/06

CASE NO. 394492-R1 | PART B - RESPONSE

You are appealing the Warden's response to your complaint that on August 18, 2005, an officer left the Recreation Yard unattended. You allege that this resulted in another inmate assaulting you.

A review of this matter reveals that this complaint has been referred to the appropriate authorities for review and disposition. At the conclusion of this review, appropriate action will be taken.

This response is for informational purposes only.

In the event you are dissatisfied with this response, you may appeal to the Bureau of Prisons, Administrative Remedy Section, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in that office within 30 days from the date of this response.

01/20/06
Date

M. Maldonado, Sr.
Regional Director

U.S. DEPARTMENT OF JUSTICE

Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Bryant George A.	06013-078	C-1	(USP) Pollock
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A- INMATE REQUEST On August 18, 2005. The B.o.P SHU Recreational officer Seaja lefted the recreation yard unattended without any officers to monitor the inmates safety or health. Doing this absent a inmate was allowed to boil a pitcher of scorching hot water/oil and other unknown liquid substistence, allowed to walk down the recreation cage unsecure, unescorted by officers, allowed to dumped a pitcher of scorching hot water/oil all over my body. Special housing unit officers simply ignored clearly established laws, and B.o.P. Policy Statement, Risking threat of death and serious injury to the special housing inmates as a class of persons. Officer Seaja have failed to implement policy which affords segregated inmates safety from physical injury and property damage, risk to inmates health and safety, negligent acts which breach duty of care owed by bureau of prison in the special housing unit. The illegal acts and omissions of officer Seaja had directly contributed to the physical injury and property damage, wanton infliction of pain, cruel and unusual punishment, and equal protection of the law that were clearly established at time of the injury.

10/12/05
DATE

SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

THIRD COPY: RETURN TO INMATE

CASE NUMBER: 394492-F1

CASE NUMBER:

Part C- RECEIPT

Return to:
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

Attachment A

Furthermore, after the Attacks on my life of both May 12, 2005 and August 16, 2005 incidents which resulted in Serious bodily injuries due to breach of Security, Safety and Care owed by bureau of prison 18 U.S.C. § 4042 and Bureau of prison policy Statements. You would think these institutional Staff at USP Pollock would take alternative Security measures to Safeguard my health and Safety or to protect my health and Safety from more injuries by Simply transfering me from this negligent institution and its Staff. Their lack of Concerned toward my Security and Safety by officers of USP Pollock is a Continuous breach of my Safety. All officers have knowledge of the risk or danger to my Safety, but Still refused to take Corrective actions.

UNITED STATES PENITENTIARY
POLLOCK, LOUISIANA

INMATE NAME: **BYNUM, George**
INMATE NO: **06013-078**
ADMINISTRATIVE REMEDY NO: **394492-F2**

PART B - RESPONSE TO REQUEST FOR ADMINISTRATIVE REMEDY

This is in response to your Request for Administrative Remedy dated October 12, 2005, in which you allege that on August 18, 2005, a Correctional Officer left the Recreation Yard unattended which allowed another inmate to assault you. You allege that the officer ignored Bureau of Prison policy statement which contributed to your being injured.

Your complaint has been referred to the appropriate authorities for review and disposition. At the conclusion of this review, appropriate action will be taken.

This response to your Request for Administrative Remedy is for informational purposes only.

If you are not satisfied with this decision, you may appeal to the Regional Director at: Bureau of Prisons, South Central Regional Office, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219. Your appeal must be received in the South Central Regional Office within 20 days of the date of this response.

12-14-05
Date

Fredrick Menifee, Warden

Case 1:07-cv-00915-DDD-JDK Document 5-4 Filed 07/06/07 Page 7 of 47 PageID #: 36

(Exhibit "K")

U.S. Department of Justice
Federal Bureau of Prisons
South Central Region
4211 Cedar Springs Rd., Suite 300
Dallas, Texas 75219

OFFICIAL BUSINESS

$ 00.39

George Bynum
Reg. No. 06013-078
U. S. Penitentiary
P. O. Box 900
Jonesville, VA 24263

24263+0300

U.S. Department of Justice

Federal Bureau of Prisons

South Central Regional Office

4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

January 25, 2007

George Bynum
Reg. No. 06013-078
U. S. Penitentiary
P. O. Box 900
Jonesville, VA 24263

Re: Administrative Tort Claim - TRT-SCR-2007-01544

Dear Mr. Brynum:

This is to acknowledge receipt of your two tort claims dated October 28, 2006 and November 4, 2006, totalling $7,000,000.00 for alleged loss or damage to personal property and personal injury. The claims were received by the Department of Justice, Civil Division, Torts Branch on November 16, 2006, and they were received in our office on January 22, 2007, for processing.

The Federal Tort Claims Act affords the government six (6) months from the date the claim was filed (**November 16, 2006**) to make an administrative decision in this matter. A response will be mailed to you via certified mail on or before May 15, 2007.

Sincerely,

Linda G. Nutt
Paralegal Specialist

/jw

Case 1:07-cv-00915-DDD-JDK Document 5-4 Filed 07/06/07 Page 9 of 34 PageID #: 38

CERTIFIED MAIL™

7005 3110 0000 0703 2708

U.S. Department of Justice
Federal Bureau of Prisons
South Central Region
4211 Cedar Springs Rd., Suite 300
Dallas, Texas 75219

OFFICIAL BUSINESS

SCRO Legal

U.S.P. LEE COUNTY, VA
ISM DEPARTMENT
2007 MAY 23 AM 10:40
MAIL ROOM
RECEIVED

U.S. OFFICIAL MAIL
PRIVATE USE $300
PITNEY BOWES
02 1P $ 03.06⁰
0002305827 MAY 18 2007
MAILED FROM ZIPCODE 75219

L-34

George Bynum
Reg. No. 06013-078
United States Penitentiary
P.O. Box 900
Jonesville, VA 24263

24263+0900

U.S. Department of Justice

Federal Bureau of Prisons

South Central Regional Office

4211 Cedar Springs Road, Suite 300
Dallas, Texas 75219

May 18, 2007

CERTIFIED MAIL (to follow electronic transmission)

George Bynum
Reg. No. 06013-078
United States Penitentiary
P.O. Box 900
Jonesville, VA 24263

Re: Administrative Tort Claim No. TRT-SCR-2007-01544 (amended)

Dear Mr. Bynum:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, Title 28, United States Code, Section 2672 et seq., and authority granted by Title 28, Code of Federal Regulations, Section 0.172. You claim government liability in the amount of seven million dollars and 00/100 ($7,000,000.00) for personal injury.

Section 2672 of the Federal Tort Claims Act delegates to each Federal agency the authority to consider, determine and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You claim on August 18, 2005, staff at the United States Penitentary (USP) in Pollock, Louisiana, failed to take appropriate measures to protect you and responded in an untimely manner to your calls for assistance after another inmate burned you with a hot liquid. You indicate approximately twenty minutes passed before you were able to communicate to staff your need for assistance. You state as a result of this assault, you sustained severe burns and skin damages. You allege you also experienced an infection and mental distress.

After a thorough review of this matter, I am prepared to offer you six hundred fifty and 00/100 dollars ($650.00) in final settlement of your claim. If you desire to accept this offer, please sign the enclosed voucher presented to you by institution staff.

If you are dissatisfied with this decision, please consider this a denial of your claim. You then are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

Jason A. Sickler
Regional Counsel

JAS/pi

cc: Fredrick Menifee, Warden
USP Pollock

(Exhibit "L")

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008 EXPIRES 3-31-91

1. Submit To Appropriate Federal Agency:
Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC. 20530

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
Gecory A. Bynum Jr. Reg. No 06013-078
P.O. Box 900
USP Lee County
Jonesville VA. 24263

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	5/22/78	S	08/18/05	19:49 - 20:10

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurence and the cause thereof) (Use additional pages if necessary.) ON or about August 18, 2005. Recreational officer Seaju breach duty of Care Owed by the bureau of prison (Sec 18 U.S.C. § 4042) and Procedures required in the Correctional Services manual concerning duty of special housing recreational officer. Policy Statement 3420.09 which States "Inattention to duty in a Correctional environment can result in escapes, assaults, and other incidents. Therefore, employees are required to remain fully alert and attentive during duty hours". was also ignored, by and through failure to implement policy which affords segregated inmates in special housing unit Recreational cage Safeguard measures which protect inmates health or Safety from injuries and did Jeopardize Institutional security and inmate Safety. officer seaju action of negligent directly Contributed to the physical injury being inflicted on inmate Bynum Reg. No. 06013-078. From the negligent and mismanagement of the special housing unit at Pollock, provided a good opportunity for physical injury to occurred.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)
N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) Property is George A. Bynum Jr. Reg. No. 06013-078 6Feet 2inch 224 LBS, Brown eyes Dark hair, located at USP. Lee County, virginia. Injury Consist of

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT. physical injury and property damage, Pain and Suffering due to blistering Sores and lack of protective outter skin. Blistering Sores and pus from infected tissue due to filthy cells / without Cleaning Supplies passed out. 1st, 2nd, and 3rd degree burns and lasting bruises. Discoloration and rashes from unclean water. mental anguish and mental breakdown. Fear and the threat of death. Stress from (P.T.S.). Headaches (migraines) from stress. Several nightmares and lack of sleep from body Sores. Damage and loss of protective outter skin covering. Damage to hair growth around burnt area. and family /stress, hardships, and anguish of physical injuries. Cramps and muscle fatigue.

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)
Institutional S	USP Pollock, P.O. Box 2099, Pollock, LA. 71467
Inmate Boris G. Bynum #06014-078	USP Lee, P.O. Box 900, Jonesville, Virginia. 24263-0900
Inmate Raul Espinoza # 28876-180	USP Lee, P.O. Box 900, Jonesville, virginia. 24263-0900
Inmate W S	USP
Lt. Bynum	USP Pollock, P.O. Box 2099, Pollock, LA. 71467

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
$ Two million	$ Two million	N/A	$ Four million

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
George Bynum 06/3078	N/A	10/08/06

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of $2,000. plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

BP-S362.060 INMATE INJ[illegible] ASSESSMENT AND FOLLOWUP [illegible]dical) CDFRM
FEB 05

U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

1. Institution USP POLLOCK , LA	2. Name of Injured Bynum George	3. Register Number 06013-078
4. Injured's Duty Assignment SHU	5. Housing Assignment SHU	6. Date and Time of Injury 8-18-05 2
7. Where did Injury Happen (Be specific as to location) Rec. Cage. SHU	Work Related? ☐ Yes ☐ No	8. Date & Time Reported for Treatment 8-18-05 2010

9. Subjective, A) Cause of Injury (Inmate's Statement of how injury occurred):

"Hot water was thrown on me from behind." Requested Inmates

B) Symptoms (as reported by inmate):

for the guard to help me". LOP noted. 7/10

Injured unable to sign:
Signature of Patient

10. Objective: (Observations or Findings from Examination)

X-Rays Taken _____ Not Indicated _____
X-Ray Results

No x3. Burns noted to R ear stage III
post R. neck stage II. R shoulder, R side, scrotum stage II-III. Extending
down R. leg. Thigh area 1/2" stage II burns. R posterior arm stage II. 6" x 16"

11. Assessment: (Analysis of Facts Based on Subjective and Objective Data)

Inmate scalded c hot substance c scrotum stage II-III burns &
stage III to R posterior arm. R foot c stage III. Blisters intact @ present

12. Plan: (Diagnostic Procedures with Result, Treatment and Recommended Follow-up)

Ms Dean called @ time. Clean burns NS apply silvadene & Duoderm
to c: Ibuprofen 600mg x 5 days & Duoderm change x 5 days & PRN
ordered until. See LOP from in Chart for complete Assessment.

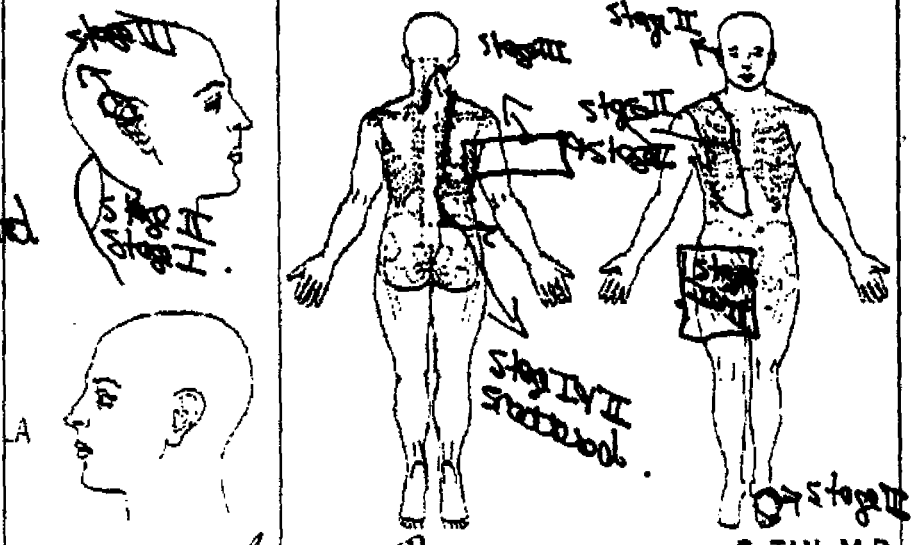
a. No Medical Attention (Check applicable)

- ☐ a. No Medical Attention
- ☑ b. Minor First Aid
- ☐ c. Hospitalization
- ☑ d. Other (Explain) Ms Dean called
- ☐ e. Pain assessment: (Optional)

Mild Moderate Severe
1--2--3--4--5--6---7--8--9--10

[illegible] 8/20/05
[illegible]Carter, MD
USP/FPC Pollock, LA

[illegible] 8.20.05
Signature of Physician or Physician Assistant



This [illegible] be completed via VP)

P. Frazier, RN
USP/FPC Pollock, LA

CDR B. Dean, ANP
USP/FPC Pollock, LA

E. TAN, M.D.
CLINICAL DIRECTOR
USP/FPC POLLOCK

Attention (Check

lical Attention

First Aid

alization

(Explain) Ms Dean called

assessment: (Optional)

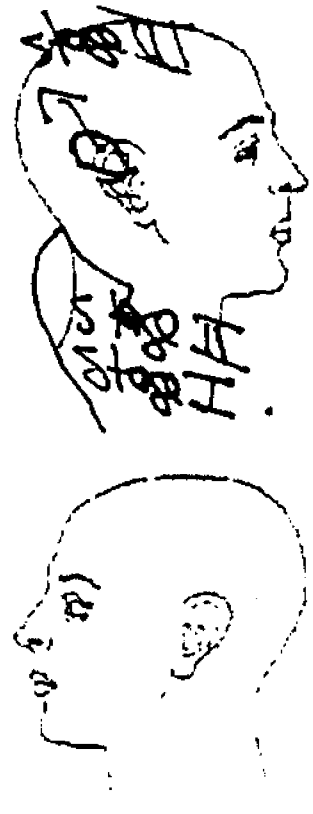
Moderate Severe

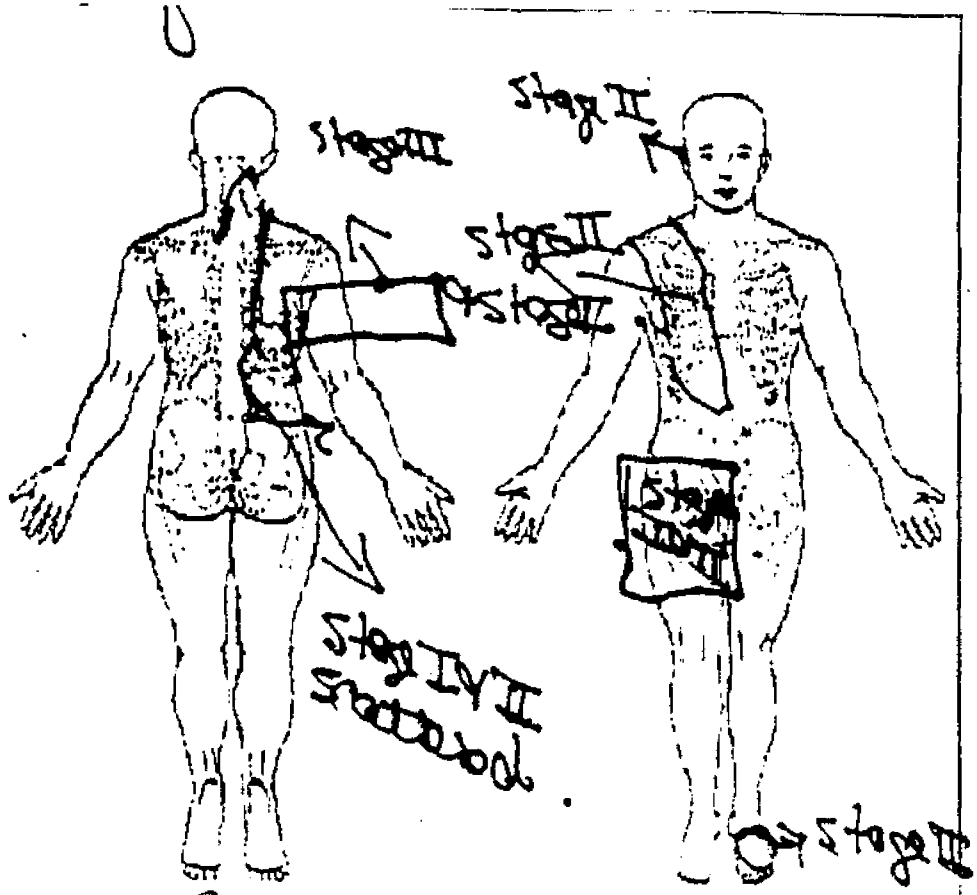
--6---7--8--9--10

Gatter, MD
USP/FPC Pollock, LA

ysician or Physician

Frazier, RN
C Pollock, LA





CDR B. Dean, ANP
USP/FPC Pollock, LA

E. TAN, M.D.
CLINICAL DIRECTOR
USP/FPC POLLOCK

(Exhibit M)

07-0915 SecP

Inmate Statement

Inmate Reg #:	06013078	**Current Institution:**	Lee USP
Inmate Name:	BYNUM, GEORGE	**Housing Unit:**	LEE-L-A
Report Date:	06/16/2007	**Living Quarters:**	L01-314L
Report Time:	4:27:38 PM		

Alpha Code	Date/Time	Reference#	Payment#	Receipt#	Transaction Type	Transaction Amount	Encumbrance Amount	Ending Balance
LEE	6/12/2007 5:09:05 PM	3			Sales	($47.98)		$29.34
LEE	6/12/2007 2:11:24 PM	33318207			Western Union	$50.00		$77.32
LEE	6/12/2007 2:11:24 PM	GLEED033 - 1530			Debt Encumbrance		($10.00)	--------
LEE	6/12/2007 2:11:24 PM	GLEED034 - 1531			Debt Encumbrance		($10.00)	--------
LEE	6/11/2007 9:32:33 PM	ITS0611			Phone Withdrawal	($2.00)		$27.32
LEE	6/8/2007 1:25:11 PM	GIPP0507			Payroll - IPP	$19.32		$29.32
LEE	6/8/2007 1:25:11 PM	GLEED033 - 1500			Debt Encumbrance		($3.86)	--------
LEE	6/8/2007 1:25:11 PM	GLEED034 - 1501			Debt Encumbrance		($3.86)	--------
LEE	6/1/2007 12:10:42 AM	GLEED034 - 1414			Debt Encumbrance - Released		$15.16	--------
LEE	6/1/2007 12:10:42 AM	GLEED033 - 1413			Debt Encumbrance - Released		$15.16	--------
LEE	6/1/2007 12:10:42 AM	GLEED033 - 1419			Debt Encumbrance - Released		$10.00	--------
LEE	6/1/2007 12:10:42 AM	GLEED034 - 1420			Debt Encumbrance - Released		$10.00	--------
LEE	6/1/2007 12:10:42 AM	GLEED034	2134		PLRA Payment	($16.78)		$35.16
LEE	6/1/2007 12:10:42 AM	GLEED033	2135		PLRA Payment	($25.16)		$10.00
LEE	5/31/2007 8:57:08 PM	66			Sales	($3.25)		$51.94
LEE	5/31/2007 8:55:50 PM	65			Sales	($15.00)		$55.19
LEE	5/27/2007 9:39:20 PM	ITS0527			Phone Withdrawal	($2.00)		$70.19
LEE	5/23/2007 7:13:04 PM	44			Sales	($56.81)		$72.19
LEE	5/22/2007 8:17:53 PM	ITS0522			Phone Withdrawal	($1.00)		$129.00
LEE	5/21/2007 8:14:45 PM	33316607			Western Union	$50.00		$130.00
LEE	5/21/2007 8:14:45 PM	GLEED033 - 1419			Debt Encumbrance		($10.00)	--------
LEE	5/21/2007 8:14:45 PM	GLEED034 - 1420			Debt Encumbrance		($10.00)	--------
LEE	5/18/2007 5:12:54 PM	33316507			Western Union	$75.80		$80.00
LEE	5/18/2007 5:12:54 PM	GLEED033 - 1413			Debt Encumbrance		($15.16)	--------
LEE	5/18/2007 5:12:54 PM	GLEED034 - 1414			Debt Encumbrance		($15.16)	--------
LEE	5/15/2007 2:23:26 PM	GLEED034	2030		Initial PLRA Pymt	($20.59)		$4.20
LEE	5/9/2007 5:16:37 PM	3			Sales	($70.89)		$24.79
LEE	5/2/2007 7:05:18 PM	43			Sales	($91.88)		$95.68
LEE	4/30/2007 7:18:28 PM	33315107			Western Union	$50.00		$187.56
LEE	4/30/2007 11:10:59 AM	33315107			Western Union	$50.00		$137.56
LEE	4/26/2007 8:10:23 PM	70			Sales	($35.78)		$87.56
LEE	4/6/2007 9:31:44 AM	GIS2032			Payroll - UNICOR	$5.01		$123.34
LEE	4/6/2007 9:26:12 AM	66			Sales	($3.65)		$118.33

"AUTHORIZED BY THE ACT OF JULY 27, 1955, TO ADMINISTER OATHS (18 USC 4004)."

C. R. [illegible]
Correctional Treatment Specialist

6-19-07
Date

LEE	3/23/2007 9:11:15 PM	33312507	Western Union	$100.00	$121.98
LEE	3/23/2007 9:01:48 AM	46	Sales	($22.24)	$21.98
LEE	3/18/2007 10:57:37 AM	ITS0318	Phone Withdrawal	($1.00)	$44.22
LEE	3/16/2007 8:46:07 PM	ITS0316	Phone Withdrawal	($3.00)	$45.22
LEE	3/16/2007 9:00:42 AM	19	Sales	($19.55)	$48.22
LEE	3/9/2007 9:58:04 AM	45	Sales	($28.89)	$67.77
LEE	3/9/2007 6:07:26 AM	GFRP0307	FRP Excess With	$10.49	$96.66
LEE	3/8/2007 5:12:18 PM	33311407	Western Union	$50.00	$86.17
LEE	3/7/2007 1:15:49 PM	GIS2029	Payroll - UNICOR	$71.56	$71.95
LEE	3/7/2007 1:15:49 PM	GIS7011	FRP Unicor Pymt	($35.78)	$36.17
LEE	3/2/2007 8:37:24 AM	8	Sales	($0.40)	$0.39
LEE	2/26/2007 6:41:55 PM	ITS0226	Phone Withdrawal	($1.00)	$0.79
LEE	2/20/2007 6:50:19 PM	45	Sales	($14.25)	$1.79
LEE	2/12/2007 9:17:21 PM	ITS0212	Phone Withdrawal	($4.00)	$16.04
LEE	2/11/2007 4:48:18 PM	ITS0211	Phone Withdrawal	($8.00)	$20.04
LEE	2/10/2007 7:33:57 PM	ITS0210	Phone Withdrawal	($3.00)	$28.04
LEE	2/9/2007 5:18:30 PM	ITS0209	Phone Withdrawal	($2.00)	$31.04

1 2 3

Total Transactions: 130

Totals: $28.98 ($27.72)

Current Balances

Alpha Code	Available Balance	Pre-Release Balance	Debt Encumbrance	SPO Encumbrance	Other Encumbrance	Outstanding Instruments	Administrative Holds	Account Balance
LEE	$1.62	$0.00	$27.72	$0.00	$0.00	$0.00	$0.00	$29.34
Totals:	**$1.62**	**$0.00**	**$27.72**	**$0.00**	**$0.00**	**$0.00**	**$0.00**	**$29.34**

Inmate Statement

Inmate Reg #:	06013078	**Current Institution:**	Lee USP
Inmate Name:	BYNUM, GEORGE	**Housing Unit:**	LEE-L-A
Report Date:	06/16/2007	**Living Quarters:**	L01-314L
Report Time:	4:27:54 PM		

Alpha Code	Date/Time	Reference#	Payment#	Receipt#	Transaction Type	Transaction Amount	Encumbrance Amount	Ending Balance
LEE	2/9/2007 1:21:48 PM	GIPP0107			Payroll - IPP	$6.72		$33.04
LEE	2/8/2007 6:26:11 PM	41			Sales	($16.70)		$26.32
LEE	2/7/2007 5:13:29 PM	33309307			Western Union	$25.00		$43.02
LEE	2/7/2007 1:30:26 PM	IS2015			Payroll - UNICOR	$17.26		$18.02
LEE	2/7/2007 1:30:26 PM	IIS7009			FRP Unicor Pymt	$0.00		$18.02
LEE	1/29/2007 9:42:53 PM	ITS0129			Phone Withdrawal	($2.00)		$0.76
LEE	1/28/2007 8:45:30 PM	ITS0128			Phone Withdrawal	($1.00)		$2.76
LEE	1/28/2007 2:48:24 PM	ITS0128			Phone Withdrawal	($1.00)		$3.76
LEE	1/27/2007 9:58:45 PM	ITS0127			Phone Withdrawal	($1.00)		$4.76
LEE	1/27/2007 7:36:45 PM	ITS0127			Phone Withdrawal	($1.00)		$5.76
LEE	1/26/2007 8:52:28 PM	ITS0126			Phone Withdrawal	($2.00)		$6.76
LEE	1/25/2007 7:11:04 PM	59			Sales	($46.60)		$8.76
LEE	1/24/2007 8:27:58 PM	ITS0124			Phone Withdrawal	($2.00)		$55.36
LEE	1/24/2007 7:36:59 PM	ITS0124			Phone Withdrawal	($2.00)		$57.36
LEE	1/23/2007 9:19:03 PM	ITS0123			Phone Withdrawal	($1.00)		$59.36
LEE	1/23/2007 3:10:39 PM	33308207			Western Union	$60.00		$60.36
LEE	1/13/2007 8:58:45 AM	ITS0113			Phone Withdrawal	($1.00)		$0.36
LEE	1/11/2007 6:33:01 PM	20			Sales	($26.90)		$1.36
LEE	1/10/2007 9:34:55 AM	GIPP1206			Payroll - IPP	$28.20		$28.26
LEE	1/6/2007 8:28:01 PM	ITS0106			Phone Withdrawal	($3.00)		$0.06
LEE	1/5/2007 9:58:35 PM	ITS0105			Phone Withdrawal	($3.00)		$3.06
LEE	1/4/2007 9:06:05 PM	112			Sales	($7.95)		$6.06
LEE	1/2/2007 7:17:52 PM	ITS0102			Phone Withdrawal	($2.00)		$14.01
LEE	12/31/2006 11:44:49 AM	ITS1231			Phone Withdrawal	($6.00)		$16.01
LEE	12/31/2006 8:00:04 AM	ITS1231			Phone Withdrawal	($3.00)		$22.01
LEE	12/30/2006 7:13:36 PM	33306507			Western Union	$25.00		$25.01
LEE	12/28/2006 9:21:15 PM	ITS1228			Phone Withdrawal	($1.00)		$0.01
LEE	12/28/2006 8:21:50 PM	88			Sales	($4.10)		$1.01
LEE	12/28/2006 8:20:38 PM	87			Sales	($34.45)		$5.11
LEE	12/25/2006 3:11:43 PM	ITS1225			Phone Withdrawal	($6.00)		$39.56
LEE	12/25/2006 1:30:32 PM	ITS1225			Phone Withdrawal	($2.00)		$45.56
LEE	12/23/2006 8:08:07 PM	ITS1223			Phone Withdrawal	($3.00)		$47.56
LEE	12/23/2006 2:15:02 PM	33306007			Western Union	$50.00		$50.56

LEE	12/13/2006 9:15:22 AM	IIS7006	FRP Quarterly Pymt	($25.00)	$0.56
LEE	12/13/2006 8:58:45 AM	GIPP1106	Payroll - IPP	$15.96	$25.56
LEE	12/12/2006 9:51:32 PM	ITS1212	Phone Withdrawal	($2.00)	$9.60
LEE	12/11/2006 9:21:49 PM	ITS1211	Phone Withdrawal	($2.00)	$11.60
LEE	12/10/2006 1:52:36 PM	ITS1210	Phone Withdrawal	($3.00)	$13.60
LEE	12/9/2006 3:06:44 PM	ITS1209	Phone Withdrawal	($6.00)	$16.60
LEE	12/9/2006 2:55:55 PM	ITS1209	Phone Withdrawal	($2.00)	$22.60
LEE	12/7/2006 9:53:24 PM	ITS1207	Phone Withdrawal	($2.00)	$24.60
LEE	12/7/2006 9:27:56 PM	68	Sales	($28.45)	$26.60
LEE	12/6/2006 8:51:16 PM	ITS1206	Phone Withdrawal	($3.00)	$55.05
LEE	12/5/2006 8:56:55 PM	ITS1205	Phone Withdrawal	($3.00)	$58.05
LEE	12/5/2006 7:52:36 PM	ITS1205	Phone Withdrawal	($3.00)	$61.05
LEE	12/4/2006 8:13:27 PM	ITS1204	Phone Withdrawal	($3.00)	$64.05
LEE	12/2/2006 3:16:52 PM	33304507	Western Union	$50.00	$67.05
LEE	12/1/2006 8:20:02 PM	ITS1201	Phone Withdrawal	($3.00)	$17.05
LEE	12/1/2006 5:37:28 AM	70171701	Lockbox - CD	$20.00	$20.05
LEE	11/18/2006 5:22:21 PM	ITS1118	Phone Withdrawal	($3.00)	$0.05

1 2 3

Total Transactions: 130

Totals: $28.98 ($27.72)

Current Balances

Alpha Code	Available Balance	Pre-Release Balance	Debt Encumbrance	SPO Encumbrance	Other Encumbrance	Outstanding Instruments	Administrative Holds	Account Balance
LEE	$1.62	$0.00	$27.72	$0.00	$0.00	$0.00	$0.00	$29.34
Totals:	**$1.62**	**$0.00**	**$27.72**	**$0.00**	**$0.00**	**$0.00**	**$0.00**	**$29.34**

07-0915 Sec P
(Exhibit "N")

RECEIPT - ADMINISTRATIVE REMEDY

DATE: NOVEMBER 7, 2005

FROM: ADMINISTRATIVE REMEDY COORDINATOR
POLLOCK USP

TO : GEORGE BYNUM, 06013-078
POLLOCK USP UNT: C QTR: Z03-131LAD

THIS ACKNOWLEDGES THE RECEIPT OF THE ADMINISTRATIVE REMEDY REQUEST IDENTIFIED BELOW:

REMEDY ID : 392536-F2
DATE RECEIVED : NOVEMBER 2, 2005
RESPONSE DUE : NOVEMBER 22, 2005
SUBJECT 1 : MENTAL HEALTH TREATMENT - DELAY OR ACCESS TO
SUBJECT 2 :
INCIDENT RPT NO:

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Byrum George A.	06013-078	C-1	Pollock
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A– INMATE REQUEST This institution has inadequate services for the psychology department to provide inmates in SHU adequate assistance. The psychology department claimed it is staffed with only two psychologists which are inadequate to deal with approximately 1400 inmates on a daily basis, therefore it is impossible for me to be pulled out of my cell to speak with a psychologist every time I request to be seen. Aside from dealing with inmates, the psychology department claims it's inadequate staff must regularly attend training sessions which take them away from ther regular duties. The above listed facts prove that I don't have adequate assistance from the psychology department. I can't reciere any type of satisfie. adequate services when psychology staff are making their weekly rounds and only afford me time to request only service while every body on the range are talking lo both inmates and staff members. I have had only two private meeting with the psych logy staff since may 12, 2005 till now 10/20/05. The opinion of the investigator that I did recieve adequate services from the psychology department is false, incorrect, and wrong.

10/20/05
DATE

SIGNATURE OF REQUESTER

Part B– RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 392586-R1

CASE NUMBER:

Part C– RECEIPT

Return to:

LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

SUBJECT:

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

UNITED STATES PENITENTIARY
POLLOCK, LOUISIANA

INMATE NAME:	**BYNUM, GEORGE**
INMATE NO:	**06013-078**
ADMINISTRATIVE REMEDY NO:	**392536-F2**

PART B- RESPONSE TO REQUEST FOR ADMINISTRATIVE REMEDY

This is in response to your Request for Administrative Remedy filed October 31, 2005, in which you contend Psychology Services at USP Pollock does not provide adequate services because you can not be pulled out of your cell to be seen by a psychologist every time you request to be seen, and due to training taking them away from the institution a staff psychologist is not available to you at all times.

An investigation into your complaint revealed that you have been seen by Psychology Services each time you have requested to be seen. Due to various activities in the Special Housing Unit and schedule conflicts with Psychology Services, it may not have occurred at the specific time you desired. Furthermore, you have been provided reading material, various relaxation techniques, and have been placed on the waiting list to see the contract psychiatrist. Someone from Psychology Services is in the Special Housing Unit at the minimum of once per week conducting rounds. While conducting rounds the past two months, you have either been asleep, or you denied current problems or a need to be seen. Should you desire psychological services, you should notify the psychologist during these rounds and you will be seen at the first available time. In an emergency situation, notify an officer, who will immediately contact Psychology Services.

Based on the above findings, you have received proper and adequate care from Psychology Services. This response to your Request for Administrative Remedy is for informational purposes only.

If you are not satisfied with this decision, you may appeal to the Regional Director at: Bureau of Prisons, South Central Regional Office, 4211 Cedar Springs Road, Suite 300, Dallas, Texas 75219. Your appeal must be received in the South Central Regional Office within 20 days of the date of this response.

11/18/05
Date

Fredrick Menifee
Fredrick Menifee, Warden

(Exhibit "O")

EXTENSION OF TIME FOR RESPONSE - ADMINISTRATIVE REMEDY

DATE: DECEMBER 23, 2005

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTH CENTRAL REGIONAL OFFICE

TO : GEORGE BYNUM, 06013-078
POLLOCK USP UNT: C QTR: Z03-135LAD

ADDITIONAL TIME IS NEEDED TO RESPOND TO THE REGIONAL APPEAL IDENTIFIED BELOW. WE ARE EXTENDING THE TIME FOR RESPONSE AS PROVIDED FOR IN THE ADMINISTRATIVE REMEDY PROGRAM STATEMENT.

REMEDY ID : 392536-R1
DATE RECEIVED : DECEMBER 9, 2005
RESPONSE DUE : FEBRUARY 7, 2006
SUBJECT 1 : MENTAL HEALTH TREATMENT - DELAY OR ACCESS TO
SUBJECT 2 :
INCIDENT RPT NO:

RECEIPT - ADMINISTRATIVE REMEDY

DATE: DECEMBER 20, 2005

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTH CENTRAL REGIONAL OFFICE

TO : GEORGE BYNUM, 06013-078
POLLOCK USP UNT: C QTR: Z03-135LAD

THIS ACKNOWLEDGES THE RECEIPT OF THE REGIONAL APPEAL
IDENTIFIED BELOW:

REMEDY ID : 392536-R1
DATE RECEIVED : DECEMBER 9, 2005
RESPONSE DUE : JANUARY 8, 2006
SUBJECT 1 : MENTAL HEALTH TREATMENT - DELAY OR ACCESS TO
SUBJECT 2 :
INCIDENT RPT NO:

U.S. Department of Justice

Federal Bureau of Prisons

Regional Admi ative Remedy Appeal

psych

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: Bynum George A	06613-078	SHU	(USP) Pollock
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL The institution at USP Pollock his inadequate services for the psychology department to provid inmates in SHU adequate assistance I can't receive any type of satisfied adequate services when psychology staff are making their weekly rounds. I'm only afforded time to request service from the psychology staff at my cell door in (SHU), while every body on the range are talking loud (both inmates & staff members). I have had only two private meeting with the psychology department since may 12, 2005 till now 12/01/05. All of my other requested to be seen by the psychology department has been denied. I'm suffering from lack of sleep, Post tromatic Syndrome and stress Mental anguish, fear, threat of death and did sustain serious bodily injuries from the incidents of 5/12/05 and 8/18/05. (Please see attachments at back of this form)

12/01/05
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 392536-R1

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

BP-230(13)

RP-1a Attachment

The warden office stated that an investigation was done into my Complaint which revealed that I have been seen by psychology services each time I have requested to be seen. This above statement is incorrect. The facts are, I have had only two private meetings with the psychology department since May 12, 2005 till now December 07, 2005. Those meetings took place on September 09, 2005 with Dr. Hughes and September 30, 2005 with Dr. Gallagher. The warden office stated that "Someone from the psychology services is in the special housing unit at the minimum of once per week Conducting rounds. And while Conducting rounds the past two months, I have either been asleep, or I denied Current problems or a need to be seen." This above statement is false. It is a fact Someone from the psychology services is in the special housing unit at the minimum of once per week just to make their rounds within the (S.H.U.), which housed up to 184 to 200 inmates. It is not factious for the psychology services to see all those inmates Concerning adequate services of the individual mental problems or simply to provide treatment of mental therapy. I have never at any time denied any mental Complication or a need to bee Seen by the psychology services within the past eight months, in fact I am Suffering from lack of Sleep, post traumatic Syndrome and Stress, mental anyuish, fear, threat of death and did Sustain Serious bodily injuries, pain and suffering to my body. Up to this very date December 07, 2005 and Concerning any of the above stated mental Complications and problems Within eight months of my Suffering and post traumatic Syndrome, I have not received treatment from psychology services.

Ep-b Attachment

All that the psychology department and the warden office has to say is "I'm on the waiting listed to see a Contract psychiatrist." Both my P.S.I. and the administration at USP Pollock aknowledge the fact that I'm unable to read. The opinion of the investigation from the warden office that I did receive adequate Care from psychology Services, Simply because the psychology department provided two pamphlets that I'm unable to read is false, incorrect, and wrong. Furthermore if I was provided with adequate Care or treatment from the institutional psychiatrist as Claim by this administration at pollock, I would not be on a waiting listed to see a professional Contract psychiatrist for adequate Care and treatments.
This institution have been unable to provide me with adequate Care and treatment for eight months. Instead it his placed my life in threat of death and risk my health and Safety on two different occasions which has resulted in me Sustaining Serious bodily injuries pain and Suffering to my body and Sustaining mental Complications. This administration at USP Pollock have Kept me within over Crowded Cells in the (S.H.U) on a phot program over an eight month period under extremely depressive Conditions.
It is my opinion that this administration at USP Pollock is the leasted interested in providing adequate treatment and Care to me, Their actions thus far has Shown this indifferent

BYNUM, George REG. NO. 06013-078 RECEIPTED: 12/09/05

CASE NO. 392536-R1 PART B - RESPONSE

You are appealing the Warden's response to your complaint Psychology Services staff provide inadequate services for Special Housing Unit (SHU) inmates and are non responsive to your requests for service. You list specific personal stresses and implicitly request greater attention from staff.

Review of this matter reveals that during the period in which you have been housed in SHU, psychology staff have been available to you on at least a weekly basis, and you have been seen in response to any request you made for services. Additionally, you have been provided self help materials and placed on the waiting list to see the contract psychiatrist. Should you desire additional services, you should notify the psychologist during routine weekly rounds, through cop-outs or the SHU officer (in emergency situations). Arrangements will then be made for you to be seen as appropriate.

This response is for informational purposes only.

In the event you are dissatisfied with this response, you may appeal to the Bureau of Prisons, Administrative Remedy Section, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in that office within 30 days from the date of this response.

01/31/06
Date

G. Maldonado, Jr.
Regional Director

(Exhibit "P")

EXTENSION OF TIME FOR RESPONSE - ADMINISTRATIVE REMEDY

DATE: MAY 17, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : GEORGE BYNUM, 06013-078 L 418U
LEE USP UNT: L QTR: ~~804-215L~~

ADDITIONAL TIME IS NEEDED TO RESPOND TO THE CENTRAL OFFICE APPEAL IDENTIFIED BELOW. WE ARE EXTENDING THE TIME FOR RESPONSE AS PROVIDED FOR IN THE ADMINISTRATIVE REMEDY PROGRAM STATEMENT.

REMEDY ID : 392536-A2
DATE RECEIVED : APRIL 5, 2006
RESPONSE DUE : JUNE 4, 2006
SUBJECT 1 : MENTAL HEALTH TREATMENT - DELAY OR ACCESS TO
SUBJECT 2 :
INCIDENT RPT NO:

RECEIPT - ADMINISTRATIVE REMEDY

DATE: APRIL 7, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : GEORGE BYNUM, 06013-078
LEE USP UNT: L QTR: L01-313U

THIS ACKNOWLEDGES THE RECEIPT OF THE CENTRAL OFFICE APPEAL IDENTIFIED BELOW:

REMEDY ID : 392536-A2
DATE RECEIVED : APRIL 5, 2006
RESPONSE DUE : MAY 15, 2006
SUBJECT 1 : MENTAL HEALTH TREATMENT - DELAY OR ACCESS TO
SUBJECT 2 :
INCIDENT RPT NO:

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: MARCH 13, 2006

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : GEORGE BYNUM, 06013-078
LEE USP UNT: L QTR: L01-313U
P.O. BOX 900
JONESVILLE, VA 24263

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 392536-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : MARCH 6, 2006
SUBJECT 1 : MENTAL HEALTH TREATMENT - DELAY OR ACCESS TO
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR INSTITUTION ADMINISTRATIVE REMEDY REQUEST (BP-9) FORM OR A COPY OF THE (BP-09) RESPONSE FROM THE WARDEN.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Blasm George A. (LAST NAME, FIRST, MIDDLE INITIAL) 06013-078 (REG. NO.) L (UNIT) USP Lee (INSTITUTION)

Part A - REASON FOR APPEAL

The Regional Director Mr. Maldonado Jr. states that "Review of this matter reveals that during the period in which I have been housed in SHU, psychology staff have been available to me on at least a weekly basis, and I have been seen in response to request made for services." The psychology department at USP Pollock are not able to be of service concerning the level of complication involved with my mental disorder and stresses. They have seen me twice concerning these mental disorders and only provided me with two reading materials and stated that I deal with these mental complication of (P.T.S.) disorder by myself. Only after extensive filing of complaints was I placed on the waiting list to see the contract psyciatrist concerning the seriousness of my P.T.S. disorder. I'm requesting regular treatment with an outside contract psychiatrist concerning the complication of my P.T.S. disorder which require serious and careful attention from a specialist.

3/30/06
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED
MAR - 1
Administrative Remedy Section

RECEIVED
APR -5 2006
Administrative Remedy Section

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 394536-A2

Part C - RECEIPT

CASE NUMBER:

Return to: (LAST NAME, FIRST, MIDDLE INITIAL) (REG. NO.) (UNIT) (INSTITUTION)

SUBJECT:

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

© LVN

PRINTED ON RECYCLED PAPER

BP-231(13)
JUNE 2002

Administrative Remedy No. 392536-A2
Part B - Response

You contend you have not received adequate psychology services while in the Special Housing Unit (SHU). You request regular treatment by an outside psychology consultant.

Our review of this matter reveals both the Warden and Regional Director have adequately addressed your concerns. Psychology staff make regular rounds through the SHU. When you have requested psychology services, such has been provided to the degree and in the manner clinically-indicated. Referral to an outside psychologist is not warranted.

It is noted you have been transferred to another prison. We recommend you work with prison psychology staff to address your mental health concerns.

Your appeal is denied.

May 16, 2006
Date

Harrell Watts, Administrator
National Inmate Appeals

PATIENT MEDICATION INFORMATION

FLUOXETINE 20 MG UD **BYNUM, GEORGE** Rx # 72093

(Exhibit "Q")

GENERIC NAME: FLUOXETINE (floo-OX-uh-teen)

COMMON USES: This medicine is a selective serotonin reuptake inhibitor (SSRI) used to treat depression, panic disorder, obsessive-compulsive disorder (OCD), or bulimia. It may also be used to treat other conditions as determined by your doctor.

BEFORE USING THIS MEDICINE: WARNING: ANTIDEPRESSANT MEDICINES MAY INCREASE THE RISK OF SUICIDAL THOUGHTS OR BEHAVIOR IN CHILDREN AND ADOLESCENTS AND YOUNG ADULTS WHO HAVE SEVERE DEPRESSION OR CERTAIN OTHER MENTAL OR MOOD DISORDERS. Children, adolescents, and adults who take this medicine should be monitored daily for any worsening of their condition, thoughts of hurting themselves, or any other sudden or unusual changes in mood or behavior, especially during the first few months after starting this medicine and after any change in the dose of this medicine. If any of these serious side effects occur, contact the doctor immediately. Some medicines medical conditions may interact with this medicine. INFORM YOUR DOCTOR OR PHARMACIST of all prescription and over-the-counter medicine that you are taking. DO NOT TAKE THIS MEDICINE if you are also taking astemizole, dexmethylphenidate, lemborexant, solriamfetol, terfenadine, thioridazine, or tramadol. DO NOT TAKE THIS MEDICINE with, or within 14 days of taking, a monoamine oxidase inhibitor (MAOI). MAOIs include furazolidone, isocarboxazid, linezolid, moclobemide, phenelzine, procarbazine, selegiline, and tranylcypromine. If you are currently taking any of the medicines mentioned above, tell your doctor or pharmacist before taking this medicine. ADDITIONAL MONITORING OF YOUR DOSE OR CONDITION may be needed if you are taking nonsteroidal anti-inflammatory medicines such as aspirin or ibuprofen, cisapride, clozapine, cyclobenzaprine, cyproheptadine, lithium, propafenone, salicylates, tricyclic antidepressants, or medicine for seizures. DO NOT START OR STOP any medicine without doctor or pharmacist approval. Inform your doctor of any other medical conditions including any mental or mood disorders, such as bipolar disorder; allergies; pregnancy; or breast-feeding. Contact your doctor or pharmacist if you have any questions or concerns about taking this medicine.

HOW TO USE THIS MEDICINE: Follow the directions for using this medicine provided by your doctor. THIS MEDICINE MAY COME WITH A PATIENT INFORMATION LEAFLET OR MEDICATION GUIDE. Read it carefully. Ask your doctor, nurse, or pharmacist any questions that you may have about this medicine. TAKE THIS MEDICINE WITH FOOD if it upsets your stomach. CONTACT THE MEDICINE at room temperature, away from heat and light. CONTINUE TO TAKE THIS MEDICINE even if you feel better. Do not miss any doses. IF YOU MISS A DOSE OF THIS MEDICINE, skip the missed dose and go back to your regular dosing schedule. Do not take 2 doses at once.

CAUTIONS: DO NOT TAKE THIS MEDICINE if you have had an allergic reaction to it or are allergic to any ingredient in this product. Up to 4 WEEKS MAY PASS before this medicine reaches its full effect. Do not stop taking this medicine without checking with your doctor. KEEP ALL DOCTOR AND LABORATORY APPOINTMENTS while you are taking this medicine. ADDITIONAL MONITORING OF YOUR CONDITION is recommended at the start of treatment with this medicine and whenever a change to your dose is made. If you experience anxiety, agitation, panic attacks, difficulty sleeping, irritability, hostility, impulsive feelings, severe restlessness, or worsening of depression contact your doctor as soon as possible. These may perhaps that your condition is worsening or that your treatment with this medicine should be evaluated. If you are a parent or caregiver of a patient that is taking this medicine, it is important for you to watch for these symptoms. Contact the doctor as soon as possible if any of these symptoms occur. Contact your doctor for more information. DO NOT DRIVE, OPERATE MACHINERY, OR DO ANYTHING ELSE THAT COULD BE DANGEROUS until you know how you react to this medicine. Using this medicine alone, with other medicines, or with alcohol may lessen your ability to drive or to perform other potentially dangerous tasks. THIS MEDICINE WILL ADD TO THE EFFECTS of alcohol and other depressants. Ask your pharmacist if you have questions about which medicines are depressants. BEFORE YOU BEGIN TAKING ANY NEW MEDICINE, either prescription or over-the-counter, check with your doctor or pharmacist. This includes any medicines that contain dextromethorphan. CAUTION IS ADVISED WHEN USING THIS MEDICINE IN CHILDREN OR ADOLESCENT PATIENTS because they may be more susceptible to the effects of this medicine. FOR WOMEN: IF YOU PLAN OR BECOME PREGNANT, discuss with your doctor the benefits and risks of using this medicine during pregnancy, especially during the first trimester. THIS MEDICINE IS EXCRETED IN BREAST MILK. DO NOT BREAST-FEED while taking this medicine.

POSSIBLE SIDE EFFECTS: SIDE EFFECTS that may go away during treatment, include nervousness, headache, drowsiness, fatigue, nausea, vomiting, diarrhea, loss of appetite, dry mouth, sweating, dizziness, lightheadedness, muscle spasms, or changes in sexual function. If they continue or are bothersome, check with your doctor. CONTACT YOUR DOCTOR IMMEDIATELY if you experience severe nervousness or anxiety, agitation, panic attacks, difficulty sleeping, feelings of irritability or hostility, impulsive behavior or other unusual changes in behavior, severe restlessness, worsened feelings of depression, thoughts of hurting yourself, or any other mental or mood changes. AN ALLERGIC REACTION to this medicine is unlikely, but seek immediate medical attention if it occurs. Symptoms of an allergic reaction include rash, itching, swelling, severe dizziness, or trouble breathing. If you notice other effects not listed above, contact your doctor, nurse, or pharmacist.

OVERDOSE: If overdose is suspected, contact your local poison control center or emergency room immediately. Symptoms of overdose may include nausea, vomiting, seizures, restlessness, fast or irregular heartbeat, and fainting.

ADDITIONAL INFORMATION: DO NOT SHARE THIS MEDICINE with others for whom it was not prescribed. DO NOT USE THIS MEDICINE for other health conditions. KEEP THIS MEDICINE out of the reach of children and pets. IF USING THIS MEDICINE FOR AN EXTENDED PERIOD OF TIME, obtain refills before your supply runs out.

Database Edition 06.1 - Expires April 2006
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#139148 07-0915 Sec P

JUSTICE FEDERAL BUREAU OF PRISONS

Institution: USP POLLOCK (Exhibit "R")

Part I - Incident Report

2. Name Of Inmate	3. Register Number	4. Date Of Incident	5. Time
Bynum, George	06013-078	07-08-05	2100 pm
6. Place Of Incident	7. Assignment	8. Unit	
SHU RANGE 1 CELL 105	UNASSIGNED	C-1	

9. Incident 224 Assaulting any person(minor assault), 398 Interfering with staff in the performance of duties(moderate severity).

11. Description Of Incident (Date:07-08-05 Time: 1845 PM Staff become aware of incident)

On the above date and time,I, officer Stevens, was feeding the evening meal on range one in the special housing unit. When I got to cell 105 inmate Bynum asked if I was going to give inmate Butler #03019-000 his clothing. I stated to Bynum that I had given Inmate Butler his issue the day prior and that I was not going to give him more cloths. Inmate Bynum stated, "he was going to shit me down when I picked up the trays." After feeding the range I returned to pick up trays, once I got to cell 105 I open the food slot trap to receive the food trays. At this time inmate Bynum began throwing his food trays, shower shoes, and bottles filled with an unknown liquid substance. One of the food trays struck me on my right arm, and an unkown liquid substance hit my left leg. Because of this incident I was unable to complete all of my normal duties on range one. I was unable to pass out sheets to all the cells, unable to pass out cleaning supplies, unable to move the phone to the cells I had scheduled to use the phone.

12. Signature Of Reporting Employee	Date And Time	13. Name And Title (Printed)
D. Stevens	07-08-05 2115pm	D. STEVENS CORRECTIONAL OFFICER
14. Incident Report Delivered To Above Inmate By	15. Date Incident Report Delivered	16.time Incident Report Delivered
	7-16-05	7:26 AM

Part II - Committee Action

17. Comments Of Inmate To Committee Regarding Above Incident

18. A. It Is The Finding Of The Committee That You:	B. _____ The Committee Is Referring The Charge(s) To The DHO For Further Hearing.
_____ Committed The Following Prohibited Act.	C. _____ The Committee Advised The Inmate Of Its Finding And Of The Right To File An Appeal Within 15 Calendar Days.
_____ Did Not Commit A Prohibited Act.	

19. Committee Decision Is Based On The Following Information

20. Committee action and/or recommendation if referred to DHO (Contingent upon DHO finding inmate committed prohibited act)

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
RECEIVED
JUL 06 2007
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY
SHREVEPORT

Form to be used by a prisoner filing a civil rights complaint under THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

George A Bynum Jr. — **Full Name of Plaintiff, Prisoner Number** #06013-078

07-0915 — **Civil Action**

Drell — **Judge**

VS.

Federal Bureau of Prisons — **Defendant**

Kirk — **Magistrate Judge**

COMPLAINT

I. Previous Lawsuits

A. Have you begun any other lawsuit while incarcerated or detained in any facility?
Yes [✓] No [ ]

B. If your answer to the preceding question is yes, provide the following information.

1. State the court(s) where each lawsuit was filed (if federal, identify the District; if state court, identify the county or parish):
United States District Court Western District of Louisiana

2. Name the parties to the previous lawsuit(s):
Plaintiffs: George A Bynum Jr
Defendants: Fredrick Menifee

3. Docket number(s): 1:07CV764

4. Date(s) on which each lawsuit was filed: 5/04/2007

5. Disposition and date thereof [For example, was the case dismissed and when? Was it appealed and by whom (plaintiff or defendant)? Is the case still pending?]:
Case is still pending

C. Have you filed any lawsuit or appeal in any federal district court or appeals court which has been dismissed?
Yes [✓] No [ ]

If your answer to the preceding question is yes, state the court(s) which dismissed the case, the civil action number(s), and the reason for dismissal (e.g., frivolity, malice, failure to state a claim, defendants immune from relief sought, etc.).

U.S. District Court Eastern District of Texas
Class Action lawsuit No. 4:96CR352

II. A. Name of institution and address of current place of confinement:
United States Penitentiary, Post office Box 305
Jonesville, VA 24263-0305

B. Is there a prison grievance procedure in this institution?
Yes [✓] No [ ]

1. Did you file an administrative grievance based upon the same facts which form the basis of this lawsuit?
Yes [✓] No [ ]
If Yes, what is the Administrative Remedy Procedure number? 344492-F2/R1/A1
400172-F1/R1/R2/A1
342536-F2/R1/A1/A2
TRT-SCR-2007-01544

2. If you did not file an administrative grievance, explain why you have not done so.

N/A

3. If you filed an administrative grievance, answer the following question.
What specific steps of the prison procedure did you take and what was the result? (For example, for state prisoners in the custody of the Department of Public Safety and Corrections: did you appeal any adverse decision through to Step 3 of the administrative grievance procedure by appealing to the Secretary of the Louisiana Department of Public Safety and Corrections? For federal prisoners: did you appeal any adverse decision from the warden to the Regional Director for the Federal Bureau of Prisons, or did you make a claim under the Federal Tort Claims Act?)

I have exhausted all necessary administrative grievance from the warden to the Regional Director & the Federal Tort Claims Act (see Exh.b.t A-L)

Attach a copy of each prison response and/or decision rendered in the administrative proceeding.

III. Parties to Current Lawsuit:

A. Name of Plaintiff George A. Byrum III

Address (USP) Lee County, P.O Box 305, Jonesville, VA. 24263

B. Defendant, Fredrick Meriffee, is employed as Warden at (USP) Pollock, Louisiana

Defendant, Henry Bowers, is employed as (SHU) Lieutenant at (USP) Pollock, Louisiana.

Defendant, Seuda, is employed as Former B.O.P. Correctional Officer at _____.

Additional defendants Officer David Correctional officer (USP) Pollock, Louisiana

IV. Statement of Claim

State the **FACTS** of your case. Specifically describe the involvement and actions of each named defendant. Include the names of all persons involved in the incident(s) or condition(s) giving rise to this lawsuit, and the dates upon which and the places where the incident(s) and/or condition(s) occurred. **YOU ARE REQUIRED TO SET FORTH ONLY FACTUAL ALLEGATIONS. YOU ARE NOT REQUIRED TO SET FORTH LEGAL THEORIES OR ARGUMENTS.**

The information within this Complaint is far too long to be included on this page. Please see Attached Complaint at the back of page five (5) for Statement of Claim.

V. **Relief**

State exactly what you want the court to provide to you or do for you. Make no legal arguments. Cite no cases or statutes.

Also, please see attached Complaint for the relief plaintiff wants the Court to provide

VI. Plaintiff's Declaration

A. **I declare under penalty of perjury that all of the facts represented in this complaint and any attachments hereto is true and correct.**

B. I understand that if I am transferred or released, I must apprise the Court of my address, and my failure to do so may result in this complaint being dismissed.

C. I understand that I may not proceed without prepayment of costs if I have filed three lawsuits and/or appeals that were dismissed on grounds that the action and/or appeal was frivolous or malicious, or failed to state a claim upon which relief may be granted, unless I am in imminent danger of serious physical injury.

Signed this 29 **day of** June, 2007.

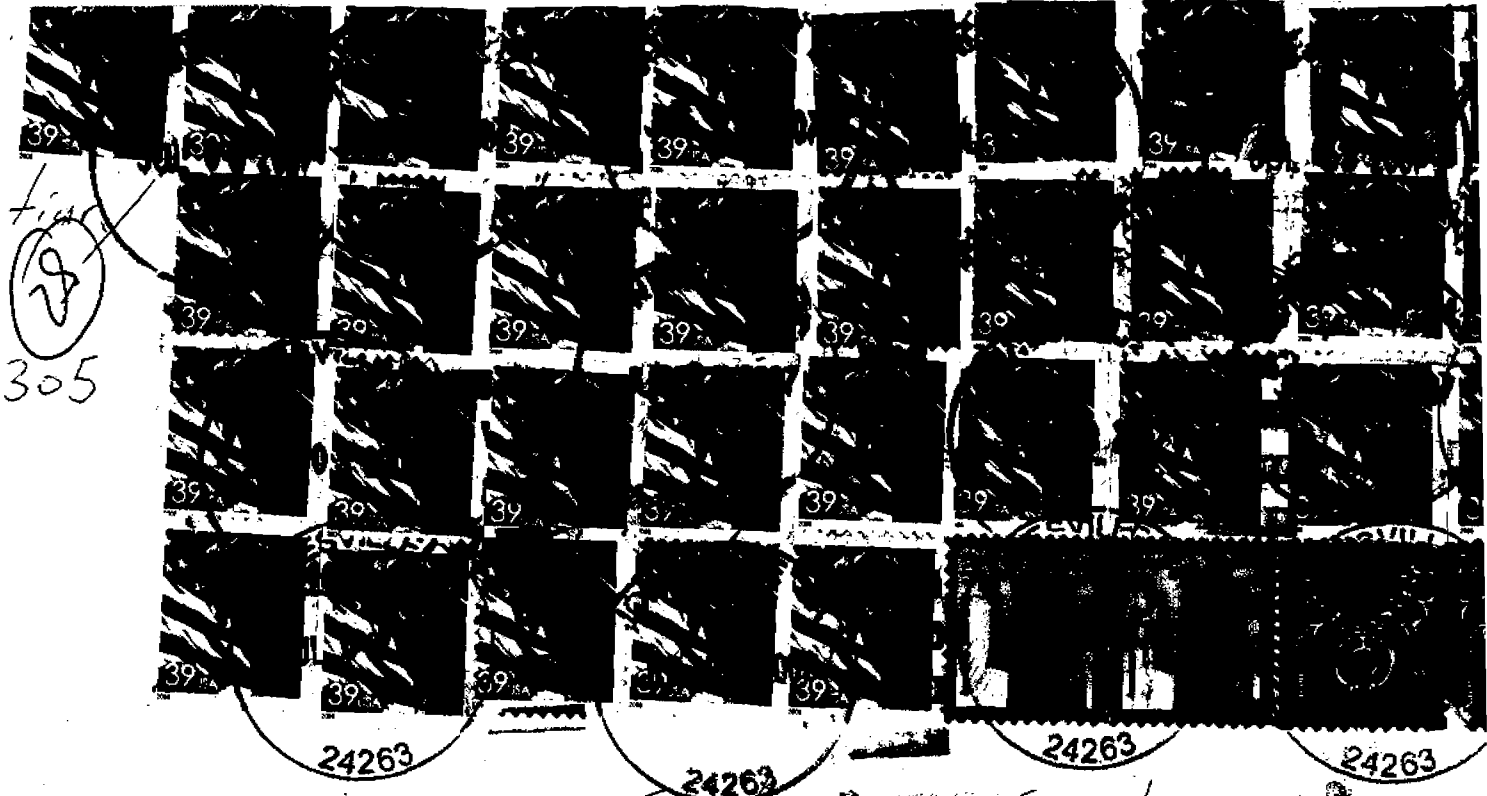
Reg. No. 06013-078
Prisoner no. (Louisiana Department of Corrections or Federal Bureau of Prisons)

Signature of Plaintiff

5/97

Case 1:07-cv-00915-DDD-JDK Document 1-1 Filed 07/10/07 Page 5 of 5 PageID #: 29

George A. Bynum Jr.
Reg No. 06013-078
United States Penitentiary
P.O. Box 305
Jonesville, VA. 24263-0305



7004 2890 0001 7855 3845

PRIORITY MAIL
UNITED STATES POSTAL SERVICE
www.usps.com
Label 107B, February 2006

Clerk of Court
300 Fannin Street, Suite 1167
Shreveport, LA. 71101-3083

Legal mail

U. S. PENITENTIARY - LEE COUNTY
PO Box 305 - Jonesville, VA 24263
DATE 7/3/07

"Special / Legal Mail"

The enclosed letter was processed through special mailing procedures for forwarding to you. The letter has been neither opened or inspected. If the writer raises a question or problem over which this facility has jurisdiction you may wish to return the material for further information or clarification. If the writer encloses correspondence for forwarding to another addressee, please return the

RECEIVED
USDC WESTERN DISTRICT OF LA
TONY R. MOORE, CLERK
DATE 8/27/14

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

GEORGE A. BYNUM	DOCKET NO. 07-cv-0915; Sec. P
VERSUS	JUDGE DRELL
FEDERAL BUREAU OF PRISONS	MAGISTRATE JUDGE KIRK

MEMORANDUM ORDER

Before the court is a civil rights complaint filed on May 29, 2007, by pro se plaintiff George A. Bynum, pursuant to the provisions Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics[1]. Plaintiff attached copies of a response to an administrative tort claim, wherein he was offered six hundred fifty dollars as compensation for his claim. [Doc. #5] The Bivens claim was denied and dismissed. [Doc. #10] Plaintiff appealed. On appeal, the Fifth Circuit stated, "By our reading of the pleadings, Bynum asserted a Federal Tort Claims Act claim." Because this Court did not consider an F.T.C.A. claim, the Fifth Circuit found that the judgment was not "final" and dismissed the appeal on that basis.

In order to assess the merit of Plaintiff's F.T.C.A. claim, **THE CLERK IS DIRECTED to serve a summons, a copy of the complaints**

[1] In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court recognized that certain circumstances may give rise to a private cause of action against federal officials that is comparable to the statutory cause of action permitted against state officials by 42 U.S.C.A. § 1983. See Zuspann v. Brown, 60 F.3d 1156, 1157 n. 2 (5th Cir.1995).

[Docs. #1, 5], without exhibits, and a copy of this order by Registered or Certified Mail on:

1. the United States through the United States Attorney for the Western District of Louisiana, and

2. the United States through the United States Attorney General as provided in Rule 4(i) of the Federal Rules of Civil Procedure.

IT IS ORDERED that the defendant file an answer to the FTCA claim within SIXTY (60) days after the date of service.

After the defendant's answer is filed, an additional sixty (60) days is allowed for all parties to complete all appropriate discovery.

After the sixty day period of discovery, if deemed appropriate, Plaintiff or Defendant may file a motion for summary judgment within thirty (30) days of the end of discovery, to include material and relevant affidavits, certified records, interrogatories and answers, admissions and depositions, if any, and a supporting memorandum brief. All documentary exhibits accompanying the motion, including medical records, MUST BE APPROPRIATELY BOUND AND THE PAGES MUST BE NUMBERED. An index describing each item attached to the response and showing each item's page number shall also be attached.

If a motion for summary judgment or alternative motion for summary judgment is filed prematurely, the discovery period above

shall being on the date of filing the motion, and the response shall not be due until thirty (30) days after the close of discovery.

Any party not filing a motion for summary judgment SHALL FILE a Statement of Issues, within the same period, which shall enumerate each genuine issue of material fact perceived by that party which is relevant to this matter, or state that there are none. This statement will be used by the Court to determine the necessity for an evidentiary hearing.

Additionally, within twenty-one (21) days of Defendants' first appearance (filing of an answer or motion), or within thirty (30) days after service of the summons and complaint if Defendant(s) have made no appearance, Defendants or their counsel shall provide to Plaintiff all medical records, warden's unusual occurrence reports, and any other documents pertinent to the issues in this case, that are in Defendants' possession. See Fed.R.Civ.P. 26(a)(1). Defendants or their counsel shall contemporaneously file a copy of these documents under seal with the court, together with a Notice of Compliance attesting to the fact that the requirements of this Order have been met.

Any physician, medical facility, or other health care provider which has examined or administered treatment of any kind to plaintiff relative to the complaint alleged is ordered to release

to any party herein, pursuant to any request of that party, and at that party's expense, any and all such medical records that it may possess.

IT IS FURTHER ORDERED that as a condition to their acceptance by the Clerk, all future filings by Plaintiff or Defendant shall include a certificate indicating that a copy thereof has been furnished to the other parties, specifically stating the name and address of each party (or his attorney) to whom a copy of the pleading was sent.

Thus done and signed at Alexandria, Louisiana, this 26th day of August, 2014.

JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

RECEIVED
OCT 15 2014
TONY R. MOORE, CLERK
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA, LOUISIANA

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

GEORGE A. BYNUM, JR.	)	CIVIL ACTION NO: 07-0915
	)	
VERSUS	)	SECTION: P
	)	
FEDERAL BUREAU OF PRISONS	)	JUDGE DRELL
	)	
	)	MAGISTRATE JUDGE KIRK

ORDER

Upon consideration of the amended motion filed on behalf of Defendant for an extension of time to file an Answer to Plaintiff's Complaint, and good cause having been shown,

IT IS HEREBY ORDERED that Defendant's Motion for Extension of Time to File an Answer to Plaintiff's Complaint is **GRANTED**, and Defendant, the United States of America, be and is hereby **GRANTED** an extension of time of sixty (60) days from October 28, 2014 up to and including December 28, 2014, in which to file its Answer to Plaintiff's Complaint.

IT IS HEREBY FURTHER ORDERED that Defendant, the United States of America, be and is hereby granted an additional twenty-one (21) days from December 28, 2014, or until January 16, 2015, to provide Plaintiff with the documents outlined in the Court's August 27, 2014 Memorandum Order (Doc 30), and to file same under seal with a Notice of Compliance.

THUS DONE AND SIGNED in Chambers in Alexandria, Louisiana, this 15th day of October, 2014.

HONORABLE JAMES D. KIRK
UNITED STATES MAGISTRATE JUDGE

Page 1347 of 1390

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

GEORGE A. BYNUM, JR.	)	CIVIL ACTION NO: 07-0915
	)	
VERSUS	)	SECTION: P
	)	
FEDERAL BUREAU OF PRISONS	)	JUDGE DRELL
	)	
	)	MAGISTRATE JUDGE KIRK

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned Plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement.

2. The United States of America agrees to pay the sum of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Stipulation for Compromise Settlement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any Plaintiff is a minor or a legally incompetent adult, the Plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event Plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS and made payable to George A. Bynum, Jr., Plaintiff. The check will be mailed to the appropriate BOP official for deposit to Plaintiff's account at the following address: P. O. Box 474701, Des Moines, IA, 50947-0001. Plaintiff agrees to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 7th day of Nov., 2014.

GEORGE A. BYNUM, JR., PRO SE
#06013-078
USP – Canaan
P. O. Box 300
Waymart, PA 18472

Executed this 7th day of November, 2014.

STEPHANIE A. FINLEY
United States Attorney

BY:
JENNIFER B. FREDERICK (# 23633)
Assistant United States Attorney
800 Lafayette Street, Suite 2200
Lafayette, Louisiana 70501
Telephone: (337) 262-6618
Facsimile: (337) 262-6693
Email: jennifer.frederick@usdoj.gov

Counsel for the United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

CHARLES HARRIST	)(	
	)(	
Plaintiff,	)(	
	)(	
v.	)(	No.
	)(	
UNITED STATES OF AMERICA,	)(	
	)(	
Defendant.	)(	

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CHARLES HARRIST complaining of the UNITED STATES OF AMERICA, hereinafter referred to as Defendant, and would respectfully show the Court the following:

I.

This action arises under the Federal Tort Claims Act, 28 U.S.C., Section 1346(b) and 2661 et seq.

II.

Plaintiff resides in the above entitled judicial district. The acts of negligence occurred in various cities in the state of Mississippi and in the State of Texas.

III.

At all relevant times, Defendant, by and through the Department of Justice owned and operated the Federal Correctional Institutions in Yazoo City, Mississippi and Beaumont, Texas.

IV.

Plaintiff received ophthalmologic care from Defendant approximately in October 2009 and continuing to date. In December 2009 the cornea in his eye ruptured or perforated but was not correctly diagnosed until sometime in March 2010. Since that time, Plaintiff has been basically untreated except for prescriptions for eye drops. Plaintiff requires continuing and further ophthalmologic care for his eyes, to include the probability of surgery for cataracts and a cornea transplant.

V.

At all times herein mentioned, Plaintiff was treated by doctors, nurses and other medical staff, some of which are unknown to the Plaintiff, all of whom were employed as doctors, nurses, and other medical assistants at the Federal Correctional Institutions in Yazoo City, Mississippi and Beaumont, Texas. In doing or omitting to do all of the things alleged herein, the agents of the Defendant were acting within the course and scope of their employment, and with the permission and consent of the Defendant.

VI.

Agents of the Defendant were careless, reckless, and negligent in that they failed to adhere to the standard of care observed by physicians, nurses and their assistants in Yazoo City, Mississippi and Beaumont, Texas, area in that they:

1. Failed to timely diagnose and treat a cornea rupture or perforation;
2. Failed to perform the appropriate ophthalmology surgery;
3. Failed to provide standard care for a cornea rupture or perforation;
4. Failed to provide follow up care on his eyes;

5. Failed to treat Fuch's Dystrophy;

6. Failed to treat glaucoma;

7. Failed to operate on Plaintiff's cataracts;

8. Failed to timely and properly test the Plaintiff's eyes; and

9. Failed to refer the Plaintiff to a qualified surgeon and facility.

VII.

Plaintiff suffered the following damages, both past and future:

a. Physical pain and mental anguish;

b. loss of earning capacity;

c. disfigurement and loss of vision;

d. physical impairment; and

e. medical care and expense.

VIII.

By reason of the foregoing the Plaintiff has been damaged in the sum of $10,000,000.00.

IX.

Plaintiff's claim was timely filed with the Department of Veterans Affairs. The claim was finally denied on July 11, 2012. This lawsuit is brought within six months of the final denial.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited and served to appear and answer, and upon final trial of this cause, Plaintiff have judgment

against the Defendant in the sum of $10,000,000.00 and for such other and further relief, both general and special, at law and in equity to which plaintiff may be justly entitled.

Respectfully submitted,

/s/

WILLIAM B. HARRELL
803 Pine Street
Texarkana, Texas 75501-5111
Tel: 903-793-1041
Fax 903-793-6449
Texas Bar No. 09042250

WALTER L. BOYAKI
4621 Pershing Drive
El Paso, Texas 79903-1017
Tel: 915-566-8688
Fax 915-566-5906
Texas Bar No. 02759500

ATTORNEYS FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CHARLES HARRIST,	§	
	§	
Plaintiff,	§	CIVIL ACTION No. 1:15CV69
	§	
v.	§	
	§	
UNITED STATES OF AMERICA,	§	JUDGE RON CLARK
	§	
Defendant.	§	

JOINT MOTION FOR ORDER APPROVING SETTLEMENT

Plaintiff Charles Harrist and Defendant United States of America have settled all of the claims in this case. The terms of the settlement are set forth in the Compromise Settlement and Release of Federal Tort Claims Act Claims Under 28 U.S.C. § 2677 (Settlement Agreement), attached to this motion as Exhibit A. The parties ask that the Court enter the proposed order approving the settlement that is attached to this joint motion.

Respectfully submitted,

JOHN M. BALES
UNITED STATES ATTORNEY

/s/ Andrea L. Parker
ANDREA L. PARKER
Assistant United States Attorney
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Attorney for Defendant
United States of America

/s/ Walter L. Boyaki (with permission)
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Attorney for Plaintiff
Charles Harrist

CERTIFICATE OF SERVICE

I certify that on October 7, 2015, a copy of this document was served on counsel of record through use of the Court's electronic-notification system.

/s/ Andrea L. Parker
ANDREA L. PARKER
Assistant United States Attorney

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CHARLES HARRIST,	§	
	§	
Plaintiff,	§	CIVIL ACTION No. 1:15CV69
	§	
v.	§	
	§	
UNITED STATES OF AMERICA,	§	JUDGE RON CLARK
	§	
Defendant.	§	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT SUIT PURSUANT TO 28 U.S.C. § 2672

It is hereby stipulated by and between the undersigned Plaintiff (meaning any individual or entity, other than the United States of America and the attorneys signing this agreement, whether or not an administrative claim has been filed on their behalf), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the administrative claims, e.g., [Plaintiff brought this suit based on ophthalmologic care he received during his incarceration at the Federal Correctional Institutions in Yazoo City, Mississippi and Beaumont, Texas], under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of $20,000.00, which sum shall be full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the administrative claims, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and

employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this matter shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by the Department of the Treasury, Financial Management Service, Judgment Fund Branch in the amount of Twenty Thousand and 00/100 dollars ($20,000.00), payable to Charles Harrist and his attorney, Walter L. Boyaki.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

JOHN M. BALES
UNITED STATES ATTORNEY

/s/ Andrea L. Parker
ANDREA L. PARKER
Assistant United States Attorney
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Attorney for Defendant
United States of America

Executed this 7th day of October, 2015

WALTER L. BOYAKI
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Email: wboyaki@boyakilawfirm.com
Attorney for Plaintiff Charles Harrist

Executed this ___ day of October, 2015

CHARLES HARRIST
Plaintiff

Executed this ___ day of October, 2015

WALTER L. BOYAKI
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4621 Pershing Drive
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Tel: (915) 566–8688
Fax: (915) 566–5906
Email: wboyaki@boyakilawfirm.com
Attorney for Plaintiff Charles Harrist

Executed this ___ day of October, 2015

Charles Harrist

CHARLES HARRIST
Plaintiff

Executed this 15th day of October, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CHARLES HARRIST,	§	
	§	
Plaintiff,	§	CIVIL ACTION No. 1:15CV69
	§	
v.	§	
	§	
UNITED STATES OF AMERICA,	§	JUDGE RON CLARK
	§	
Defendant.	§	

AGREED ORDER OF DISMISSAL WITH PREJUDICE

CAME ON to be considered the Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677 of Plaintiff CHARLES HARRIST and Defendant UNITED STATES OF AMERICA, to dismiss with prejudice the above-entitled lawsuit filed by Plaintiff CHARLES HARRIST against the UNITED STATES OF AMERICA, and the Court, having reviewed the Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677, and the same having been in all things fully considered, it is accordingly

ORDERED, ADJUDGED AND DECREED that all claims of Plaintiff CHARLES HARRIST in the above action be, and the same is hereby and in all things dismissed with prejudice to the refiling of same pursuant to Rule 41(a)(1) of the

Federal Rules of Civil Procedure; and that all costs incurred herein be borne by the party incurring same.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CHARLES HARRIST	§	
	§	CASE NO.: 1:15-CV-69
V.	§	
	§	
UNITED STATES OF AMERICA	§	BRC
	§	

ORDER

The court anticipates setting time limits for each party to present its case. The **final pretrial is scheduled for October 19, 2015**, and a **Trial is scheduled on October 26, 2015** in Beaumont, Texas**.** It is, therefore, **ORDERED** that by **August 28, 2015, at 4:00 p.m.**, the parties shall each submit to the court an estimate of the time that party needs to complete the presentation of testimony in this case. The statement shall list each of the witnesses the party contemplates calling in its case in chief, and for each witness the amount of time the party anticipates using in direct examination of that witness. This statement shall also list each of the witnesses the party anticipates will be called by opposing counsel and for each such witness, an estimate of the time the party believes will be necessary for cross-examination of each witness.

Following the name of each witness listed and the estimated time, state briefly the general subject matter of testimony that witness is expected to give. For example: "Bob Smith - 30 minutes. Mr. Smith was in the vehicle following plaintiffs and witnessed the accident." If a party expects a witness to take an unusual amount of time, briefly explain the reasons for that time. For example: "Dr. Johnson – 1.5 hours. Dr. Johnson treated plaintiff for two years and will be summarizing hundreds of medical records, the testimony of two other doctors, and a lengthy billing history."

The estimate of time for a party's own witnesses should include time for direct examination and redirect. The estimate of time for opposing witnesses should include time for cross-examination and re-cross. If a party anticipates calling rebuttal witnesses, those should also be listed and an estimate of time for their testimony given as provided above.

The amount of time an attorney plans to use in presenting a witness or in cross-examining could be information in the nature of trial strategy. **Accordingly, the required statements should not be filed with the clerk, but should be submitted only to the court at 300 Willow, Jack Brooks Federal Building, Suite 221, Beaumont, Texas 77701, or faxed to chambers at (409) 654-6280.** Copies do not have to be served on opposing counsel. The statement will be preserved and filed as part of the record only in the unusual event that time becomes an actual issue. The court intends to notify the parties of the total time each is allotted by September 18, 2015.

So **ORDERED** and **SIGNED** this **20** day of **July, 2015.**

Ron Clark, United States District Judge

** NOT PRINTED FOR PUBLICATION **

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CHARLES HARRIST,	§	
	§	
Plaintiff,	§	CIVIL ACTION No. 1:15-cv-69
	§	
v.	§	JUDGE RON CLARK
	§	
UNITED STATES OF AMERICA,	§	BRC
	§	
Defendant.	§	

ORDER OF DISMISSAL WITH PREJUDICE

The court previously approved the parties' settlement agreement in the above-referenced case. [Dkt. # 108]. The parties have now filed a joint motion to dismiss with prejudice. [Dkt. # 109]. Having reviewed the motion to dismiss, the court is of the opinion that it should be granted.

It is therefore ORDERED that all claims of Plaintiff CHARLES HARRIST in the above action be, and the same is hereby and in all things dismissed with prejudice to the refiling of same pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure; and that all costs incurred herein be borne by the party incurring same.

So **ORDERED** and **SIGNED** this **14** day of **October, 2015.**

Ron Clark, United States District Judge

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
SEP 30 2003
JAMES W. McCORMACK, CLERK
By: _____ DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DONALD P. GOODMAN PLAINTIFF

VS. CASE NO. 4-03-CV-00790 JMM

UNITED STATES OF AMERICA DEFENDANT

COMPLAINT This case assigned to District Judge Moody
and to Magistrate Judge Ray

Comes the plaintiff, Donald P. Goodman, and for his complaint against the defendant, United States of America, alleges and states:

1. That he is a citizen and resident of Fort Worth, Texas, and has so resided for more than ten (10) years.

2. That the defendant, the United States of America, is a party to this action by virtue of provisions of 28 U.S.C. §2674.

3. The incident which gives rise to this cause of action occurred at the Federal Correctional Institution in Forest City, Arkansas (FCI), on May 8, 2002.

4. The plaintiff (Mr. Goodman) pursued his claim for damages against the U.S. Department of Justice, Federal Bureau of Prisons, administratively, and said claim was denied on May 2, 2003, thus exhausting his administrative remedies.

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CONSOLIDATED LEGAL CENTER
DALLAS, TEXAS

5. This Court has jurisdiction over the parties and subject matter of this cause of action pursuant to provisions of 28 U.S.C. §2672 and §2674, the Federal Torts Claims Act.

6. Service of Process herein can be effected by service on Hon. John Ashcroft, Attorney General of the United States, 5111 Main Justice, 10th Street and Constitutional Ave., N.W., Washington, DC 20530, and on Hon. H.E. "Bud" Cummins, United States Attorney for the Eastern District of Arkansas, 425 Capitol Avenue, Suite 500, Little Rock, AR 72201.

7. On May 8, 2002, Mr. Goodman was an invitee on the premises of FCI for the purpose of conducting a labor arbitration hearing.

8. That at approximately 10:30 on May 8, 2002, during a break in the hearing, Mr. Goodman walked out the door to the outside sidewalk carrying a legal pad and suddenly stumbled over a concrete urn (ashtray) that had been placed on the sidewalk just outside the doorway. He fell forward, breaking the impact of the fall with both hands, and fracturing both of his wrists. He remained on the floor until the paramedics assisted him to an

ambulance and transported him to the emergency room at Baptist Memorial Hospital, Forest City Arkansas. He has been under the care of physicians and other health care providers in Arkansas and Texas since the accident.

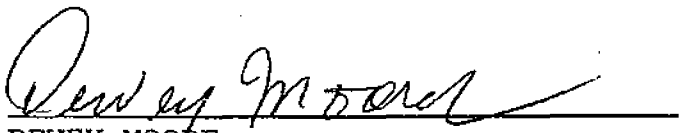
9. That the placement of the concrete ashtray in the walkway, just outside a doorway, and the failure to move the said ashtray, rendered the walkway dangerous to persons who might use the walkway, including visitors/invitees such as Mr. Goodman. The negligent placement of the concrete ashtray in the walkway was a proximate cause of the accident at issue and the cause of Mr. Goodman's injuries.

10. That the employee(s) and agent(s) of FCI placed the concrete ashtray at issue on the sidewalk and said negligence, if any, should be imputed to the defendant.

11. That as a result of the unsafe condition of the FCI's premises and the negligence in the placement of the concrete ashtray on the walkway, Mr. Goodman was seriously and permanently injured, requiring surgery on both wrist, post-op care and treatment, therapy, medication, and related expenses. He should be compensated by the defendant for the permanency of his serious

injuries, pain and suffering, past and future, loss of income and loss of capacity to earn income, past and future, medical expenses, past and future, and related expenses, totalling $822,231.00.

WHEREFORE, the plaintiff prays that this court enter a judgment against the defendant, United States of America, in the amount of Eight Hundred Twenty-Two Thousand, Two Hundred Thirty-One and 00/100 ($822,231.00), for his costs, post-judgment interest, and all other proper relief.



DEWEY MOORE
ATTORNEY FOR THE PLAINTIFF
THREE FINANCIAL CENTRE, SUITE 300
900 SOUTH SHACKLEFORD ROAD
LITTLE ROCK, AR 72211
TEL: 501-224-3700
AR BIN: 70049

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DONALD P. GOODMAN PLAINTIFF

V. 4:03CV00790 JMM

UNITED STATES OF AMERICA DEFENDANT

AMENDED AND SUBSTITUTED JUDGMENT

Pursuant to the Court's findings of facts and conclusions of law set forth in an Order entered May 18, 2005, it is hereby CONSIDERED, ORDERED, and ADJUDGED that Donald P. Goodman is hereby entitled to recover from the United States of America the sum of $107,163.30, together with post-judgment interest as provided by law, *see*, 28 U.S.C. §1961 and 31 U.S.C. §1304(b)(1)(A) and costs as the Court may find allowable.

DATED this 13th day of July, 2005.

James M. Moody
United States District Judge

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
MAY 18 2005
JAMES W. McCORMACK, CLERK
By: DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DONALD P. GOODMAN **PLAINTIFF**

V. **4:03CV00790 JMM**

UNITED STATES OF AMERICA **DEFENDANT**

JUDGMENT

Pursuant to the Court's findings of facts and conclusions of law set forth in an Order entered this date, it is hereby CONSIDERED, ORDERED, and ADJUDGED that Donald P. Goodman is hereby entitled to recover from the United States of America the sum of $107,163.30, together with post-judgment interest thereon from this date until paid accruing at the rate of 2.4% per annum as provided by law and costs as the Court may find allowable.

DATED this 17 day of May, 2005.

James M. Moody
James M. Moody
United States District Judge

THIS DOCUMENT ENTERED ON
DOCKET SHEET IN COMPLIANCE
WITH RULE 58 AND/OR 79(a) FRCP
ON 5/19/05 BY

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
MAY 18 2005
JAMES W. McCORMACK, CLERK
By: DEP CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DONALD P. GOODMAN PLAINTIFF

V. 4:03CV00790 JMM

UNITED STATES OF AMERICA DEFENDANT

ORDER

This case was tried to the Court on April 18 and 19, 2005. Based on the evidence adduced at trial and the arguments of counsel in their excellent trial briefs, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On May 8, 2002, Donald P Goodman was a business invitee on the premises of the Federal Correctional Institution-Forrest City (FCI) for the purpose of arbitrating a labor dispute.

2. Goodman exited the room where the arbitration was taking place onto a sidewalk outside the building to discuss a proposed stipulation with the advocates.

3. As Goodman proceeded through the door and turned to his right, he fell over a concrete urn which had been placed in the middle of the sidewalk. As a result of the fall, he sustained Colles fractures to both wrists.

4. Defendant admitted that employees of FCI placed the urn in the middle of the sidewalk.

5. Barney Totten, Safety Manager for FCI, admitted that the usual and proper location for the urn was against the building and not in the middle of the sidewalk.

6. Although disputed by Goodman, the Court finds that he was reading from his papers at the time of the accident or otherwise failed to keep a proper lookout for his own safety.

7. Goodman was treated initially in Forrest City, Arkansas and Memphis, Tennessee. Upon his return to his home in Fort Worth, Texas, he was seen by orthopedists Dr. Richard Wilson and Dr. D. O. Raulston. He underwent a closed reduction of the wrist fractures and was placed in casts which almost completely denied him the use of his hands for a matter of weeks. Dr. Wilson also noted onset of carpal tunnel syndrome.

8. After his release by Drs. Wilson and Raulston, Goodman consulted Dr. Glen Bixler, a Physical Medicine and Rehabilitation specialist, for an impairment rating and supportive treatment.

9. Goodman was later evaluated by Dr. Earl Peeples on behalf of the Defendant. Dr Peeples rated Goodman`s impairment as 5-8% to each upper extremity but opined that such an impairment would have minimal to no effect on Goodman`s ability to perform as an arbitrator and that it would not prevent him from doing his household chores and gardening.

10. Goodman has incurred reasonable and necessary medical expenses as a result of his injuries in the amount of $24,352.40.

11. Goodman continues to experience pain in his wrists requiring Naproxin and supportive treatment by Dr Bixler. The Court finds that the sum of $5,000.00 will reasonably and fairly compensate Goodman for future medical expenses. Although there is a possibility that Goodman will require a carpal tunnel release in the future, the chances of this occurring are too speculative to form a basis for an award of damages.

12. Goodman has lost income from his employment as an arbitrator and his physical impairment has affected his capacity to earn in the future. The Court has considered the Plaintiff`s age, education and all other circumstances of his employment and finds that the loss described by Dr. Ralph Scott in the first two years after the injury in the amount of $48,533.00

represents a reasonable amount for lost income.

13. The Court finds that the loss of capacity to earn based on Dr. Peeples impairment rating and the Plaintiff's testimony as to the actual effect his ability to travel and draft awards entitles the Plaintiff to compensation of $30,000.00.

14. Goodman was very active in performing household chores before the accident and possessed the talent to make meaningful contributions. The Court finds $10,000.00 to be reasonable compensation for what Goodman can no longer do in this endeavor.

15. Goodman's wife, Maudine, was required to provide nursing services beyond that normally provided by a wife and Goodman is entitled to an award of $5,000.00 for these services.

16. Goodman suffers from pain resulting from the fractures to his wrists and the carpel tunnel syndrome. This pain has persisted since the accident and will likely worsen over the next 11 years of Goodman's life expectancy. The Court finds $20,000.00 to be reasonable compensation for past and future pain.

CONCLUSIONS OF LAW

1. Plaintiff properly and timely filed his claim against the Defendant.

2. Plaintiff's administrative claim was denied by the Department of Justice, effectively exhausting Plaintiff's administrative remedies.

3. The Court has jurisdiction over the parties and the subject matter of this cause of action.

4. Plaintiff was an invitee on the premises of the Defendant at the time fo the accident

5. The actions of placing the urn in the middle of the sidewalk amounts to negligence on the part of employees of FCI which is imputed to the Defendant and which caused or contributed

to Plaintiff's injuries and damages.

6. Plaintiff had a duty to use ordinary care for his own safety and failed to do so by not keeping a proper lookout and in obstructing his vision with his papers.

7. The Arkansas Comparative Fault law, Ark. Code Ann. § 16-64-122, applies to this case and the Court must apportion fault as between the responsible parties. The Court finds the Defendant's fault to be 75% and the Plaintiff's fault to be 25% and will reduce the damage award accordingly.

8. The Court finds the Plaintiff is entitled to be compensated for nursing services performed by Maudine Goodman on authority of *Jackson v. United States*, 526 F.Supp 1149 (ED Ark 1981).

CONCLUSION

The Court finds in favor of the Plaintiff on the issue of liability and awards $107,163.30 in damages.

IT IS SO ORDERED this 17 day of May 2005.

James M. Moody
United States District Judge

THIS DOCUMENT ENTERED ON
DOCKET SHEET IN COMPLIANCE
WITH RULE 58 AND/OR 79(a) FRCP
ON 5/19/05 BY

F I L E C O P Y

bt

UNITED STATES DISTRICT COURT
Eastern District of Arkansas
U.S. Court House
600 West Capitol, Suite 402
Little Rock, Arkansas 72201-3325

May 19, 2005

* * MAILING CERTIFICATE OF CLERK * *

Re: 4:03-cv-00790.

True and correct copies of the attached were mailed by the clerk to the following:

Dewey Moore Jr., Esq.
Attorney at Law
Three Financial Centre
900 South Shackleford Road
Suite 300
Little Rock, AR 72211-3845

Gwendolyn Dewees Hodge, Esq.
U. S. Attorney's Office
Eastern District of Arkansas
Post Office Box 1229
Little Rock, AR 72203-1229

press, post

James W. McCormack, Clerk

Date: 5/19/05

BY: BTyree

18 Sep 03

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LUIS ALEJANDRO GARZA	*	
	*	
VS.	*	CIVIL ACTION NO. B-02-154
	*	FEDERAL TORT CLAIMS ACT
THE UNITED STATES OF AMERICA	*	
	*	

FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, LUIS ALEJANDRO GARZA, Plaintiff, complaining of THE UNITED STATES OF AMERICA, Defendant, and for cause of action would respectfully show as follows:

1.

This suit is brought under the Federal Torts Claims Act, 28 U.S.C. section 2671 et. seq., alleging that the negligence of employees of the Bureau of Prisons was a proximate cause of severe, personal injuries suffered by Plaintiff.

2.

PARTIES

Plaintiff is a resident of Brownsville, Cameron County, Texas is presently in prison in the federal penitentiary at Pollock, Louisiana.

3.

JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. section 1346 (b) (1) as this is a civil action for money damages against the United States of America.

4.

VENUE

Venue is appropriate in this court pursuant to 28 U.S.C. section 1402 (b) as Plaintiff resides within this district and division.

5.

PREREQUISITES TO SUIT

Pursuant to 28 U.S.C. section 2675 Plaintiff's claim was presented to the Bureau of Prisons within two years of the occurrence in question and this suit was filed within six months of the denial of Plaintiff's claim by correspondence from the Bureau of Prisons dated March 4, 2002.

6.

FACTUAL ALLEGATIONS

On or about February 6, 2001, Plaintiff was a prisoner at Defendant's Three Rivers Correctional Facility at Three Rivers, Texas. Then and there he was attacked and severely beaten by multiple inmates.

7.

The attack was later determined by prison officials to be gang related i.e. members of a gang called the "Border Brothers" were reportedly retaliating against Plaintiff and four others inmates they believed were part of another prison gang called the "Texas Syndicate".

8.

At all relevant times employees of the Federal Bureau of Prisons knew that gang violence was and is a real and continuing threat to the safety and welfare of inmates and prison employees at the Three Rivers Facility and other penitentiaries.

9.

At the time Plaintiff was beaten he was in the facility's recreation yard where over a hundred inmates were to be supervised by one guard.

10.

During the time in question the guard responsible for supervising inmates in the recreational yard was under specific post orders to patrol and supervise the recreation yard and to prevent inmates from gathering into large groups.

11.

In contravention of these orders, the guard was not patrolling the recreation yard or supervising the inmates. Over the period of about an hour approximately 70 inmates gathered in a group, first near the basketball courts and then the handball courts.

12.

After amassing, the group of inmates split into two parts, with one group of about 35 inmates attacking Plaintiff and the other group attacking other Inmates, one of which was also severely injured.

13.

DUTY AND BREACH OF DUTY

Pursuant to 18 U.S.C Section 4042 and the Eighth amendment to the United States Constitution Defendant is obligated to keep Plaintiff safe and free from harm. The failure of the guard at the recreation yard to follow specific post orders pertaining patrolling and supervising and prohibiting the gathering of inmates into large groups was a proximate cause of the assault on Plaintiff and the serious and permanent injuries he suffered.

14.

DAMAGES

As a proximate result of Defendant's negligence Plaintiff was injured, and although he is not trained in the medicine or the healing arts and is unable to describe with particularity his injuries, he alleges to have suffered a fracture of his skull, loss of hearing in his left ear, severe

headaches, misalignment of his jaw and frequent, excruciating headaches.

15.

As a proximate result of Defendant's negligence, Plaintiff has suffered severe physical pain and mental anguish in the past and, in reasonable probability, will suffer pain and mental anguish for the rest of his life.

16.

As a further proximate result of Defendant's negligence, Plaintiff has suffered a loss of earnings in the past and, in reasonable medical probability, will suffer a loss of earning capacity in the future.

17.

As a further proximate result of Defendant's negligence, Plaintiff has suffered disfigurement in the past and, in reasonable medical probability, will suffer disfigurement for the rest of his life.

18.

As a further proximate result of Defendant's negligence, Plaintiff has suffered physical impairment and loss of enjoyment in life and, in reasonable medical probability, will suffer physical impairment and loss of enjoyment of life in the future.

19.

PRAYER

WHEREFORE, Plaintiff prays that after final hearing that he have and recover from Defendant judgment in the sum of $500,000.00, costs of court, and such further relief to which he may be justly entitled.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LUIS ALEJANDRO GARZA	*	
	*	
VS.	*	CIVIL ACTION NO. B-02-154
	*	FEDERAL TORT CLAIMS ACT
THE UNITED STATES OF AMERICA	*	
	*	

PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Luis Alejandro Garza, Plaintiff in the above-entitled and numbered cause, and moves this court for leave to amend his Original Complaint and in support thereof would respectfully show as follows:

1.

Plaintiff filed his complaint before he had the opportunity to obtain documents and information in discovery to more fully understand his claim. Now that he has obtained some information in the discovery process, Plaintiff wishes to amend his complaint to be more specific in his allegations.

2.

Attached hereto as Exhibit 1 is Plaintiff's proposed Plaintiff's proposed First Amended Complaint which he asks to file with the court.

States Attorney's
motion.

EXTRA PAGE. 001

Barry R. Benton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of September, 2003, the foregoing Plaintiff's First Amended Original Complaint was hand-delivered to counsel of record, to wit:

Ms. Nancy L. Masso — *Hand Delivery*
United States Assistant Attorney
600 E. Harrison Ave., No. 201
Brownsville, Texas 78520

Barry R. Benton

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HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SCR-2016-00357 **Short Description:** LUIS GARZA V USA

CASE DETAILS CASE DOCS CASE PERSONS CASE DATES CASE SUMMARY CASE BLOG

Case Login Information

Reference Number	1:05-CV-00273
Short Description	LUIS GARZA V USA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Assault-Other Inmate
Current Region	SOUTH CENTRAL REGIONAL OFFICE
Current Institution	Three Rivers (FCI)
Incident Region	SOUTH CENTRAL REGIONAL OFFICE
Incident Institution	Three Rivers (FCI)
Monetary Relief Sought	$500,000.00
Estimated Amount	$
Office Jurisdiction	
Responsible Legal Office	FDC Houston

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	07/26/2002
Type	Settled
Reason Sought	
Amount offered	$350,000.00
Total Amount Paid	$350,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	07/26/2002
Date Filed	07/26/2002

Case Progress

Current Owner	BRENDA VICTOR
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	ALLEGES HE WAS ATTACKED AND INJURED BY OTHER INMATES AND STAFF WAS NEGLIGENT
Further Case Classification	
Comments	

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United States Department of Justice - Office of General Counsel & Review

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HENRY LINDSEY,	§	
(BOP No. 08239-002)	§	
	§	
VS.	§	CIVIL NUMBER . 4:07-CV-461-Y
	§	
FEDERAL BUREAU OF PRISONS,	§	
et al.	§	

ORDER GRANTING MOTION TO ENLARGE TIME

Came on for consideration the Motion to Enlarge Time to File Dispositive Motions filed by Defendants, the Federal Bureau of Prisons, Warden Cole Jeter, Dr. Hernan Reyes, and Paul Celestin. The Court, having considered said motion, the pleadings on file, and the arguments of counsel, is of the opinion that said motion is well taken and should be granted.

Therefore, the motion to enlarge time (docket no. 24) is GRANTED such that the time for Defendants to file any dispositive motions based upon their defense of qualified immunity or other defenses arising from the pleadings that they believe are ripe to assert is hereby extended to Wednesday, April 8, 2009.

Signed March 4, 2009.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HENRY LINDSEY, (BOP No. 08239-002)	§	
Plaintiff,	§	
v.	§	No. 4:07-CV-461-Y
FEDERAL BUREAU OF PRISONS, et al.,	§	
Defendant.	§	

ORDER GRANTING MOTION TO ENLARGE TIME

Came on for consideration the Motion to Enlarge Time to Answer or Otherwise Respond to Plaintiff Henry Lindsey's Complaint [doc. #15] filed by the United States on behalf of defendants Warden Cole Jeter, Dr. Hernan Reyes, and Paul Celstin, and "interested party" Willy Felicano. The Court, having considered said motion, the pleadings on file, and the arguments of counsel, determines that the motion should be granted. It is, therefore, ORDERED that Defendants' deadline to file an answer or otherwise respond to Plaintiff's Complaint is hereby extended to Monday, November 17, 2008.

Signed October 9, 2008.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SCR-2008-01664 **Short Description:** LINDSEY V. FEDERAL BUREAU OF PRISONS ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	4:07-cv-00461-Y
Short Description	LINDSEY V. FEDERAL BUREAU OF PRISONS ET AL
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	SOUTH CENTRAL REGIONAL OFFICE
Current Institution	Fort Worth (FCI)
Incident Region	SOUTH CENTRAL REGIONAL OFFICE
Incident Institution	Fort Worth (FCI)
Monetary Relief Sought	$
Estimated Amount	$
Office	Fort Worth
Jurisdiction	NORTHERN DISTRICT OF TEXAS
Responsible Legal Office	SCRO Dallas

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	04/21/2010
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$1,750.00
Total Amount Paid	$1,750.00
Description	FAILURE TO TIMELY TREAT
Description	FAILURE TO TIMELY TREAT
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	08/13/2008
Date Filed	08/06/2007

Case Progress

Current Owner	BRENDA VICTOR
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS
Further Case Classification	
Comments	

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United States Department of Justice - Office of General Counsel & Review

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Southeast Regional Office Atlanta GA

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: TRT-SER-2006-05625 **Short Description:** TAYLOR, NORMA PELT

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Inmate Reg No.	Civilian
Short Description	TAYLOR, NORMA PELT
Classification	Administrative Tort
Case Type	FTCA-Personal Injury
Case Sub-Type	SAF-Civilian
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Marianna (FCI)
Incident Region	SOUTHEAST REGIONAL OFFICE
Incident Institution	Marianna (FCI)
Incident Date	05/28/2005
Monetary Relief Sought	$100,000.00
Estimated Amount	$
Responsible Legal Office	HDC Miami

Legal Liability Evaluation

Estimated Amount	$
Estimated Outcome	

Case Resolution

Date	05/11/2007
Type	Money
Reason	Settled
Sought	Money
Amount Offered	$
Total Amount Paid	$3,000.00
Description	SETTLEMENT OFFERED.
Pre Se ?	

Case Initiation Dates

Date Received	09/27/2006
Six Month Date	03/26/2007

Case Progress

Current Owner	GERELENE GOODEN
Case Status	Closed
Timeline Status	
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	SETTLEMENT OFFERED - $3,000 - MNA
Further Case Classification	
Comments	119779

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CASE NO.: 5:07-cv-00264-RS/AK

NORMA PELT TAYLOR,

Plaintiff,

v.

UNITED STATES OF AMERICA
THE UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

Defendant.
_____/

COMPLAINT

COMES NOW Plaintiff, NORMA PELT TAYLOR, and sues Defendant, UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, and alleges:

1. This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code.

2. This Court is vested with jurisdiction pursuant to Section 1346(b) of Title 28 of the United States Code.

3. Plaintiff resides in the City of Tallahassee, Leon County, Florida, and the acts and omissions referenced in this Complaint occurred in Marianna, Jackson County, Florida, which is within the Panama City Division of the Northern District of Florida.

OFFICE OF CLERK
U.S. DISTRICT CT.
NORTHERN DIST. FLA.
PANAMA CITY, FLA.

2007 NOV -6 AM 11:19

KMC
FILED

4. On or about May 28, 2005 Plaintiff was lawfully upon property of Defendant, the Federal Correctional Institution in Marianna, Jackson County, Florida to visit her Uncle who was an inmate at the facility.

5. At that time and place, Defendant and/or its' employee(s) acting within the scope and course of their employment at all times material hereto, allowed a chair in the visitor's room to be placed and remain therein which was in a poor state of repair and condition and dangerous to sit upon.

6. The negligent condition was known to Defendant or had existed for a sufficient length of time so that Defendant should have known of it.

7. Plaintiff sat upon the subject chair and the back of the chair suddenly broke apart and off, causing Plaintiff to fall backwards and onto her right shoulder.

8. As a result of Defendant's negligence, Plaintiff suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of the capacity for the enjoyment of life, medical expenses, loss of the ability to earn money, loss of earning capacity and aggravation of a prior existing condition. The injuries are either permanent or continuing in nature and Plaintiff will suffer the losses and impairment in the future.

9. On September 20, 2006, Plaintiff submitted a claim of $100,000.00 to the United States of America, United Sates Department of Justice, Bureau of Federal Prisons. (See Exhibit "A").

10. As of the date of the filing of this Complaint, Defendant has denied Plaintiff's claim. (See Exhibit "B" Page 3)

WHEREFORE, Plaintiff requests judgement against Defendant as follows:

1. Damages in the amount of $100,000.00.

2. The cost of this action

3. Such other and further relief as the Court may deem just and proper, as well as trial by jury on all issues so triable.

JACQUELINE J. BIRD, Esq.
Florida Bar No. 0762695
254 East Sixth Avenue
Tallahassee, FL 32303
Telephone: 850- 561-0707
Facsimile: 850-561-0708
E Mail: JJE545@aol.com
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

NORMA PELT TAYLOR,

Plaintiff,

vs. CASE NO. 5:07cv264/RS-AK

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE FEDERAL
BUREAU OF PRISONS,

Defendant.
_____/

ORDER

The relief requested by Defendant's Motion For Extension Of Time To File Answer (Doc. 3) is **granted**.

.

ORDERED on January 17, 2008.

/S/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

NORMA PELT TAYLOR,

Plaintiff,

vs. CASE NO. 5:07cv264/RS-AK

UNITED STATES DEPARTMENT OF
JUSTICE FEDERAL BUREAU OF PRISONS,

Defendants.
_____/

NOTICE OF PRELIMINARY CASE MANAGEMENT CONFERENCE

A case management conference has been scheduled in this case for **Monday, March 31, 2008, at 10:00 a.m. (CST), in the Jury Deliberation Room, Second Floor, United States Courthouse, 30 West Government Street, Panama City, Florida**. The attorneys for the parties and any unrepresented parties are required to appear prepared to discuss the following matters and with authority to enter into stipulations and to make admissions:

(1) Jurisdiction.

(2) The factual basis of all claims and defenses.

(3) Narrowing the legal issues to those genuinely in dispute. Are there positive and dispositive issues appropriate for resolution by motion or by agreement?

(4) Motions. What motions are anticipated?

(5) Discovery. What discovery does each party anticipate? Can discovery be limited in any manner? Potential problems with discovery. The possibility of phase discovery.

(6) Relief. What relief do the parties seek?

(7) What is the amount of damages? Explain how damages are computed.

(8) Discouraging wasteful pretrial activity.

(9) Expediting disposition of the case. Facilitating settlement.

(10) Trial. Jury or by the court? Bifurcation? The anticipated length of trial. Possibility of reducing the length of trial by stipulation, use of summaries or statements, or other expedited means of presenting evidence.

(11) Related cases. Are there any related cases pending in this court or another court?

(12) Suggestions for the fair, speedy, and inexpensive resolution of this case.

(13) Standard scheduling orders.

ORDERED on March 24, 2008.

/S/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

***** **In the event it is necessary for counsel for any party to attend the conference by telephone, counsel is responsible for advising the deputy clerk not later than 48 hours prior to the conference at (850) 769-4556 and providing a telephone number where they can be reached for the conference. The court will initiate the call.**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

NORMA PELT TAYLOR,

Plaintiff,

vs. CASE NO. 5:07cv264/RS-AK

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE FEDERAL
BUREAU OF PRISONS,

Defendant.
_____/

SCHEDULING AND MEDIATION ORDER

Before me is the Parties' Joint Report (Doc. 10). Upon consideration,

IT IS ORDERED:

1. Jury trial is set for November 3, 2008, beginning at 8:30 a.m., **in Panama City, Florida**. A pretrial conference will be scheduled by separate order; however, counsel are advised that the pretrial conference usually will be scheduled for the Monday prior to trial. All trial counsel are required to attend the pretrial conference in-person. Continuance of the pretrial conference or waiver of the in-person appearance will be granted only for compelling reasons.

2. The Parties' Joint Report (Doc. 10) will control the matters set forth therein, except as otherwise provided in this Order. The discovery deadline is August 22, 2008. Depositions to be used at trial must be completed not later than

twenty days after the discovery deadline. Final Rule 26(e)(1) disclosures shall be served no later than twenty-one days before the discovery deadline. With respect to matters not addressed in the parties' joint report, the Initial Scheduling Order remains in effect.

3. The deadline for filing potentially dispositive motions is ten (10) days after the discovery deadline. Extensions of this deadline will rarely be granted and only for compelling reasons. Responsive memoranda shall be filed not later than fourteen (14) days after filing of a dispositive motion. *The filing of potentially dispositive motions need not, however, await the deadline for such motions. Potentially dispositive motions should be filed at the earliest appropriate time. It is rarely necessary that such motions await the completion of all discovery.*

4. In circumstances when the Federal Rules of Civil Procedure would require leave of court for adding parties or amending pleadings, parties may be added or pleadings amended only with leave of court, even if leave is sought prior to the deadline established by the Parties' Joint Report.

5. The deadlines established by this Order for disclosures under Federal Rule of Civil Procedure 26(a)(2) abrogate the deadlines set forth in Rule 26(a)(2)(C) and thus apply regardless of whether proposed testimony is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B). Leave of court must be sought, for good cause, prior to addition of testimony for which timely disclosures were not made, even if the testimony is intended solely to

contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B).

6. By separate Order for Pretrial Conference to be issued later, a deadline will be set for an attorney conference leading to the filing of a pretrial stipulation and related papers. The deadline for the attorney conference (as established by the Order for Pretrial Conference) also will be the deadline for disclosures under Federal Rule of Civil Procedure 26(a)(3). The deadline for objections under Federal Rule of Civil Procedure 26(a)(3) is five (5) days thereafter.

7. Any motion in limine or other pretrial motion shall be filed no later than ten days prior to the pretrial conference. Responses to those motions shall be filed no later than five days thereafter.

8. The parties shall mediate this case in accordance with the following procedures:

(a) The parties are directed to select a mediator certified by the Supreme Court of Florida as a Circuit Court Mediator or a person otherwise mutually agreeable to the parties. If the parties are unable to agree upon a mediator by a date three weeks prior to the discovery deadline, the plaintiff shall immediately file a notice so indicating, and I will appoint a mediator.

(b) Unless otherwise agreed, the fee of the mediator shall be paid equally by the parties. The fee shall be paid in the manner required by the mediator.

(c) The mediator shall set the initial mediation conference with due regard to schedules and other commitments of the parties and counsel and may continue or adjourn the mediation conferences in his or her discretion within

the time constraints set out in this order.

(d) The following persons MUST attend the mediation conference:

(1) Counsel of record primarily responsible for the conduct of this matter on behalf of each party.

(2) All parties. In the case of a corporation, governmental entity, or other organization, or officer in his or her official capacity, the party must attend through a representative having full authority to settle the entire case for the party without further consultation. In his or her discretion, however, the mediator may waive the requirement that the attending representative's full authority to settle be "without further consultation." Unless the mediator directs otherwise, the parties by agreement may also waive the requirement that the attending representative's full authority to settle be "without further consultation."

(3) If a party is insured, a representative of the insurer having full authority to settle without further consultation. In his or her discretion, however, the mediator may waive the requirement that the insurer's representative's full authority to settle be "without further consultation." Unless the mediator directs otherwise, the parties by agreement may also waive the requirement that the attending insurer's representative's full authority to settle be "without further consultation."

(e) Failure of any person to attend the mediation conference as required shall result in the imposition of sanctions.

(f) The parties shall confer in advance on the submission of written materials to

the mediator and shall proceed in accordance with any agreement they reach or the instructions of the mediator. In the absence of agreement of the parties or instructions from the mediator, no written submissions to the mediator are required, but either party may submit materials as it deems appropriate, which the mediator may consider as he or she deems appropriate.

(g) The mediator shall have authority to control the procedure to be followed in mediation, may adjourn the mediation conference and set times for reconvening, and may suspend or terminate mediation whenever, in the opinion of the mediator, the matter is not appropriate for further mediation.

(h) All discussions, representations, and statements made at the mediation conference shall be off the record and privileged as settlement negotiations. Mediation proceedings shall not be recorded by a court reporter or by an electronic recording device, except as necessary to memorialize any settlement that may be reached.

(i) This referral to mediation does not automatically toll the time for completion of any other matter in this case.

(j) The parties are encouraged to settle as many issues during mediation as possible. Partial or complete settlements shall immediately be reduced to writing in the presence of the mediator and shall be signed by all parties and their counsel.

(k) Mediation in this case must be completed on or before a date twenty-eight (28) days after the discovery deadline. The mediator or parties shall file a

report within five (5) days thereafter indicating when mediation was conducted and the outcome of the mediation (that is, whether the matter was settled or impasse was declared). If the matter is settled in full, notice to the court shall be immediate.

(l) Counsel for each party shall, within ten (10) days of the date of this Order, consult with his or her client about the advantages (including savings of costs and attorney's fees) and disadvantages of proceeding with mediation immediately rather than awaiting the deadlines set in this Order. On motion of any party, the court will consider ordering that mediation commence immediately or at a time earlier than otherwise required by this Order. With or without such an order, the parties by agreement may commence mediation at any time before the deadlines set in this Order.

ORDERED on April 8, 2008.

/S/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

NORMA PELT TAYLOR,

Plaintiff,

v. CASE NO. 5:07CV264-RS/AK

UNITED STATES OF AMERICA
THE UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS,

Defendants.

_____/

PRETRIAL ORDER

The following pretrial schedule and procedure is established:

I. DATES FOR COMPLIANCE WITH PRETRIAL PROCEDURES

A. This case is set for pretrial conference at **PANAMA CITY,** Florida on, **October 27, 2008** at **10:30 A.M. (C.D.T.)**. All trial counsel are required to attend in-person. Continuance of the pretrial conference or waiver of the in-person appearance will be granted only for compelling reasons. Counsel are advised that the trial courtroom has an Evidence Presentation System (EPS). Counsel should bring any exhibits or equipment (i.e. video tapes, DVD's, laptops, etc.) to the pretrial conference for testing with the EPS and should allow time either before or after the conference to receive training on the EPS system.

B. The attorney's conference required by paragraph II shall be held no

later than **October 3, 2008**.

C. The pretrial stipulation and other papers required by paragraphs III and IV shall be filed with the Clerk of the Court on or before **October 17, 2008.**

D. This case will be tried in the trial term that begins: *(Jury Trial)*

(✔) On **November 3, 2008** at **8:30 a.m. C.D.T.**

PANAMA CITY, FLORIDA

( ) On a date set at the pretrial conference.

II. ATTORNEYS TO CONFER

Counsel for all parties shall meet together on or before the date specified in Paragraph I(B) for the following purposes:

A. To discuss the possibility of settlement or mediation;

B. To stipulate to as many facts and issues as possible;

C. To draw up the pretrial stipulation in accordance with Paragraph III of this order;

D. To examine all exhibits proposed to be used in the trial;

E. To furnish opposing counsel the names and addresses of all witnesses, including possible rebuttal witnesses and experts;

F. To discuss the question of damages, including matters of evidence and proof which either party proposes to present at trial and the law in regard thereto; and

G. To complete all other matters which may expedite both the pretrial and the trial of this case.

H. Counsel for plaintiff shall initiate arrangements for the attorneys' conferences. However, all attorneys in this cause are charged with the duty of meeting in such conferences and of complying with the schedule set forth in this order. If the schedule is not kept by any counsel, it is the duty of other counsel to insist upon the necessary meeting or meetings to effect the pretrial stipulation, and failing to succeed, to advise the court by motion seeking sanctions against any party failing or refusing to meet as directed after request.

III. PRETRIAL STIPULATION

The pretrial stipulation shall contain;

A. The basis of federal jurisdiction;

B. A concise statement of the nature of the action;

C. A brief general statement of each party's case;

D. A list of all exhibits to be offered at the trial,

noting any objections thereto and the grounds for each objection. Any objections not listed will be deemed waived.

E. A list of names and address of all witnesses, including rebuttal and expert, intended to be called at the trial by each party. Expert witnesses shall be labeled as such;

F. A concise statement of those facts which are admitted and will require no proof at trial, together with any reservations directed to such admissions;

G. A concise statement of those issues of law upon which there is agreement;

H. A concise statement of those issues of fact which remain to be litigated;

I. A concise statement of those issues of law which remain for determination by the court;

J. A concise statement of any disagreement as to the application of rules of evidence or of the Federal Rules of Civil Procedure;

K. A list of all motions or other matters which require action by the court;

L. A statement whether this is now a jury or a non-jury case;

M. Counsel's respective estimates of the length of the trial; and

N. The signature of counsel for all parties.

IV. PAPERS TO BE SUBMITTED

No later than the date specified in Paragraph I(C), the parties shall file with the Clerk of the Court:

A. The pretrial stipulation prepared in accordance with Paragraph III of this order.

B. Each side shall submit to the Clerk of the Court for filing, with copy to opposing counsel, a trial brief or memorandum with citation of authorities and arguments in support of that side's position on all disputed issues of law.

C. Counsel for each party in any jury trial shall submit to the Clerk of the Court for filing, with copies to opposing counsel, written request for instructions to the jury, proposed forms of verdict, and proposed voir dire

questions. Upon good cause shown, supplemental requests for instructions may be submitted at any time prior to the arguments to the jury. All requests for instructions shall be plainly marked with the name and number of the case, shall contain citations of supporting authorities, shall designate the party submitting the same, and in the case of multiple requests by a party shall be numbered in sequence. Requests for instructions taken verbatim from the Pattern Jury Instructions - Civil Cases issued by the U.S. Eleventh Circuit District Judges Association or from the Florida Standard Jury Instructions in Civil Cases may be made by reference; the requested instructions need not be set forth in full.

D. Counsel for each party in any non-jury case shall submit to the clerk of the court for filing, with copies to opposing counsel, proposed written findings of fact and conclusions of law, or, in lieu thereof, a proposed opinion or memorandum of decision in which such proposed findings of fact and conclusions of law appear, with complete citation of authorities where appropriate (See Rule 52, FRCP).

E. Prior to trial, counsel for each party in any case shall arrange with the clerk for marking for identification, as nearly as possible in the sequence proposed to be offered, all exhibits intended to be offered by such party.

F. Counsel representing both sides in a jury trial shall make a good faith attempt to resolve any disagreement about jury instructions and shall jointly submit a full-text agreed-upon copy of instructions no later than seven days prior to trial. Should there remain any proposed jury instruction for which there is no agreement,

the proffering party shall identify such instruction and provide a brief explanation why that jury instruction is appropriate along with citations of authority no later than seven days prior to trial. The same procedure shall be followed for the verdict forms as well. In addition to filing the jury instructions and verdict forms on CMECF, the parties shall e-mail full-text copies in WordPerfect format to Andrew_Collinson@flnd.uscourts.gov (even-numbered cases) and Lindsay_Hunter@flnd.uscourts.gov (odd-numbered cases).

G. Demonstrative aids intended to be used at trial must be made available to all counsel for inspection prior to the pretrial conference.

V. CONDUCT OF THE PRETRIAL CONFERENCE

A. Counsel who will conduct the trial are required to be present for the pretrial conference. They will be prepared to act with final authority in the resolution of all matters. Counsel will be prepared to discuss the prospects of settlement and mediation.

B. The court will ordinarily dispose of all motions and other matters then at issue. The court will review all matters contained in the pretrial stipulation and consider any other matters which may be presented with a view towards simplifying the issues and bringing about a just, speedy and inexpensive determination of the case.

VI. PRETRIAL ORDER

A. Unless the court orders otherwise at the pretrial conference, counsel for all parties, with counsel for plaintiff taking the initiative, shall submit a

proposed pretrial order for the court's approval within ten (10) days after the pretrial conference. The pretrial order so prepared shall incorporate and modify the pretrial stipulation in light of any additional agreements reached and rulings made at the pretrial conference.

B. After the pretrial order is entered by the court, the pleadings will be merged therein and the pretrial order will control the course of the trial and may not be amended except by order of the court in the furtherance of justice.

VII. NEWLY DISCOVERED EVIDENCE OR WITNESSES

Except as provided in this paragraph, witnesses not timely listed in the pretrial stipulation will not be allowed to testify, and exhibits not timely listed in the pretrial stipulation will not be admitted into evidence. If any new witness is discovered after submission of the pretrial stipulation, the party desiring to call the witness shall immediately file with the clerk and serve on all counsel notice of the witness's name and address and the substance of the witness's proposed testimony, together with the reason for the late discovery. If any new exhibit is discovered after submission of pretrial stipulation, the party desiring to use it shall immediately disclose the exhibit to the court and all other counsel together with the reason for late discovery. Use of such newly-discovered witnesses or evidence shall be allowed only by order of the court in the furtherance of justice.

VIII. ADDITIONAL PRETRIAL CONFERENCE

If necessary or advisable, the court may adjourn the pretrial conference from time to time or may order additional pretrial conferences.

IX. TRIAL PROCEDURES AND CONDUCT

_____A. Each party shall provide all other counsel with a list of anticipated witnesses for the next day of trial and the order in which the witnesses are expected to be called.

B. All electronic media - DVD's, CD's, tape recordings, etc. - shall be thoroughly tested prior to trial. It shall be the sole responsibility of the presenting party to ensure that its media is compatible with the Court's equipment. With appropriate notice, the Clerk's Office is available to answer any questions regarding the equipment of the courtroom.

C. All parties shall strictly adhere to the customary and traditional conduct of this Court as specified in the Local Rules.

X. SPECIAL MATTERS

A. No motion for summary judgment or other motion filed after the date of this order will be grounds for cancellation or postponement of the pretrial conference or non-compliance with any other requirement of this order. The parties will be expected to comply with this order as fully and to the same extent as though no such motion had been filed. Absent prior court approval, a motion for summary judgment not served in time to permit the party opposing the same to make its written response prior to the pretrial conference will not be heard or considered during that pretrial conference. Parties will submit memoranda regarding any such motion to the court in accordance with N.D. Fla. Loc. R. 7.1.

B. If the case is settled, it is the responsibility of the parties to see that the

court is immediately advised.

C. Should a party or a party's attorney fail to appear at a pretrial conference or otherwise fail to comply with this order, a judgment of dismissal or default or other appropriate judgment may be entered, and sanctions or other appropriate relief may be imposed.

D. Counsel, as used herein, includes any party who is appearing pro se.

ORDERED on August 25, 2008.

/S/ Richard Smoak
RICHARD SMOAK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

NORMA PELT TAYLOR,

Plaintiff,

vs. CASE NO. 5:07cv264/RS-AK

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS,

Defendant.
_____/

ORDER

The parties are directed to file a mediation report as required by Paragraph 8(k) of the Scheduling and Mediation Order (Doc. 11) not later than October 15, 2008.

ORDERED on October 8, 2008.

/S/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

NORMA PELT TAYLOR,

Plaintiff,

vs. CASE NO. 5:07cv264/RS-AK

UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS,

Defendants.
_____/

ORDER

The relief requested by Defendant's Motion To Extend Date For Report Of Mediation (Doc. 20) is **granted**. The parties are directed to file a mediation report not later than October 29, 2008.

ORDERED on October 17, 2008.

/S/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

NORMA PELT TAYLOR,

Plaintiff,

vs. CASE NO. 5:07cv264/RS-AK

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE FEDERAL
BUREAU OF PRISONS,

Defendant.
_____/

ORDER

Before me is the Notice of Settlement (Doc. 25). Pursuant to Local Rule 16.2(D), it is ordered:

1. This case is dismissed from the active docket of the court.

2. In the event that the settlement is not consummated, the court reserves jurisdiction, upon motion filed by any party within sixty (60) days of the date of this Order, to amend or vacate and set aside this Order and reinstates the case.

3. The clerk is directed to close the file of this case for administrative purposes, and upon the expiration of sixty (60) days without activity, the clerk is directed to close the case in its entirety for all purposes.

ORDERED on October 24, 2008.

/S/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MIRIAM RAMOS-GRATEROLES,
PLAINTIFF

CIVIL No. 08-2037 (JAF)

v.

UNITED STATES OF AMERICA,
DEFENDANT

AMENDED COMPLAINT

TO THE HONORABLE COURT:

COMES NOW the Plaintiff of caption through her undersigned attorneys and respectfully states and prays:

1. This action arises under the Federal Tort Claim Act (FTCA), 28 U.S.C. sec. 1346 (b), 2671-80, as hereunder appears more fully.

2. Plaintiff Miriam Ramos-Grateroles is of legal age, single and an attorney at law who resides in the Commonwealth of Puerto Rico.

3. On May 10, 2007, defendant, United States of America, maintained and was in possession and control of the Metropolitan Detention Center (MDC), a medium security center for preventive detention of individuals charged with the commission of a criminal offense. Inmates at MDC are customarily visited by family, friends and relatives as well as those members of the bar who are their legal representatives. Such visits of inmates, by their relatives and attorneys take place at MDC's visiting room.

4. On that date, the defendant, through its employees acting within the scope of their employment, placed wax or some other slippery substance on the floor of the visiting room at MDC making it dangerous to walk upon, and negligently permitted it to remain there. Although defendant knew or should have known of the dangerous condition of the floor, and in the exercise of ordinary care would have had a reasonable opportunity to remove such substance and dangerous condition before the accident herein described occurred, it negligently failed to remove same and negligently failed to give plaintiff Ramos Grateroles or other persons any warning thereof.

5. On that date, while plaintiff Ramos Grateroles, a practicing attorney and distinguished member of this bar, was in the visiting room for the purpose of visiting and interviewing several of her clients –inmates at MDC- and walking in a careful manner over the floor, she slipped upon such wax or slippery substance.

As a result, plaintiff fell down and suffered cuts to her face, bruises to her knees and legs and was otherwise injured, was prevented from transacting her business at MDC and suffered great pain of body and mind, and incurred expenses for medical attention. Damages related to the above incident at MDC are estimated in the sum of $100,000.00. MDC custody officials, visiting attorneys and inmates witnessed plaintiff's fall. The aforestated injuries were caused solely by defendant, its agents, servants, or employees, and without any negligence on the part of the plaintiff contributing thereto. (See Claim for Damages, Standard Form 95, filed on or about December 5, 2007).

6. If the defendant were a private person, it would be liable to the plaintiff in accordance with the laws of Puerto Rico.

7. Pursuant to 28 U.S.C. sec. 2675 (a), the claim set forth herein was presented to the United States Department of Justice. The Department of Justice denied the claim on May 23, 2008.

WHEREFORE, plaintiff Ramos Grateroles demands judgment against defendant for the sum of $100, 000.00 and costs and legal fees.

CERTIFICATE OF SERVICE: I hereby certify that on this date, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to all attorneys of record.

RESPECTFULLY SUBMITTED,

In San Juan, PR, this, 21st day of November, 2008.

s/ Enrique Velez-Rodriguez s/ Benito Rodriguez-Masso

USDC-PR 120304
Attorney for Plaintiff
PO Box 70351
San Juan, PR 00936
(787) 751-1912 (x2093)
(787) 751-3991 (fax)
evelez@inter.edu

USDC-PR
Attorney for Plaintiff

ENTERED ON DOCKET
9/8/09 PURSUANT
TO FRCP RULES 58 & 79a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Miriam Ramos-Grateroles

Plaintiff(s)

vs.

U.S. Department of Justice, et al

Defendant(s)

CIVIL CASE 08-2037 (JAF)

JUDGMENT

Pursuant to Court's Order (docket #39) Judgment is entered incorporating the terms and conditions of the Settlement Agreement by reference, the court retaining jurisdiction to enforce any of such terms if necessary.

In San Juan, Puerto Rico, this 8th day of September, 2009.

Frances Rios de Moran, Esq.

Clerk of Court

s/Diana Villavicencio

Diana Villavicencio
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Miriam Ramos-Grateroles, et al., Plaintiffs Vs. United States of America Defendant	Civil No. 08-2037 (JAF)

STIPULATION FOR SETTLEMENT AND COMPROMISE

TO THE HONORABLE COURT:

COMES NOW, Plaintiff Miriam Ramos-Grateroles and Defendant United States of America, through their respective undersigned attorneys and very respectfully STATE, ALLEGE AND PRAY:

1. The parties do hereby agree to settle and compromise the above-titled action under the terms and conditions set forth herein.

2. The United States of America, defendant, agrees to pay to the plaintiffs Miriam Ramos Grateroles the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, be it physical or mental and the consequences thereof, resulting, and to result, from the same subject matter that gave rise to the above-captioned lawsuit, including any future claims under Federal law, for which the plaintiffs or their heirs, executors, administrators, or assignees, and each of them, now have or may hereafter acquire against the defendant, its past and present agents, servants, and employees in both their official and personal capacities.

3. The plaintiffs and their heirs, executors, administrators or assignees hereby agree to accept the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00) in full settlement and satisfaction of any and all claims,

demands, expenses, rights, medical expenses, attorneys' fees, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and mental injuries, and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit. The plaintiffs and their heirs, executors, administrators or assignees further agree to reimburse, indemnify and hold harmless the United States of America, its past and present agents, servants, and employees from any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by the plaintiff or his heirs, executors, administrators or assignees against any third party or against the United States of America.

4. This Stipulation for Compromise Settlement shall not constitute an admission of liability or fault on the part of the United States of America, its past and present agents, servants, or employees, and is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the settlement amount of FIFTEEN THOUSAND DOLLARS ($15,000.00) represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses. All attorneys' fees owed by the plaintiffs, if any will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, any attorneys fees for service rendered in connection with this action shall not exceed 25 percent of the amount of the Compromise Settlement.

7. Once judgment is entered approving this stipulation, payment of the settlement amount will be

ordered from the Treasury of the United States for the amount of FIFTEEN THOUSAND DOLLARS ($15,000.00) and a check made payable to Miriam Ramos Grateroles. The check will be mailed for delivery purposes to defendant's attorney, Assistant U.S. Attorney Hector E. Ramirez-Carbo, at the following address: United States Attorney's Office, Torre Chardón, Suite 1201, 350 Carlos Chardón Street, San Juan, Puerto Rico 00918. Plaintiffs' attorney agrees to distribute the settlement proceeds to the plaintiffs herein once they receive the check from the United States Attorney's Office.

8. In consideration of the payment of FIFTEEN THOUSAND DOLLARS ($15,000.00), as set forth above, the plaintiffs agree that the instant agreement will serve as a request to the Honorable Court to cause the above-styled action to be dismissed with prejudice from the docket of the court.

WHEREFORE, all parties in the case of caption respectfully request this Honorable Court, to enter judgment approving the foregoing settlement agreement and ordering dismissal of this cause of action with prejudice.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 2 day of September, 2009.

Enrique Velez-Rodriguez, Esq.
Benito Rodriguez-Masso, Esq.
Attorneys for Plaintiff

s/ Enrique Velez-Rodriguez
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Rosa Emilia Rodriguez-Velez
United States Attorney
Attorneys for Defendant United States

s / Hector E. Ramirez-Carbo
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Email: hector.e.ramirez@usdoj.gov

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HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SER-2009-00562 **Short Description:** BROWN V. BLOCKER ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	2:09-cv-00434-RBH-RSC
Short Description	BROWN V. BLOCKER ET AL
Classification	Civil
Case Type	Bivens
Case Sub-Type	
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Edgefield (FCI)
Incident Region	SOUTHEAST REGIONAL OFFICE
Incident Institution	Edgefield (FCI)
Monetary Relief Sought	$
Estimated Amount	$
Office	Charleston
Jurisdiction	DISTRICT OF SOUTH CAROLINA
Responsible Legal Office	FCI Edgefield

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	11/15/2010
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$15,000.00
Description	SETTLED TWO CASES SEE ALSO 2:06-390 BROWN V LAMANNA
Description	SETTLED TWO CASES SEE ALSO 2:06-390 BROWN V LAMANNA
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	04/07/2009
Date Filed	02/23/2009

Case Progress

Current Owner	RONNA PETTIT
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS, FEDERAL FILERS (BIVENS)
Further Case Classification	
Comments	

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United States Department of Justice - Office of General Counsel & Review

United States District Court

RECEIVED
USDC. CLERK, CHARLESTON, SC
2009 FEB 24 P 2:06

For the District of South Carolina

Lloyd Eugene Brown

V

Rex Blocker MD;
Lousia Rosario HSA;
in their individual
Capacities

Complaint

2:09-434-RBH-RSC

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USDC CLERK, COLUMBIA, SC
2009 FEB 19 A 11:24

Jury Demand

I Jurisdiction

1. This court has Jurisdiction over plaintiff's federal claims pursuant to 28 USC 1331 and 1343 (a)(3) and; Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 US 388 (1971).

II Venue

Venue lies in the district of South Carolina under 28 USC 1391(b)(2) and (e)(2) because A substantial part of the events giving rise to the claims occured in that district

III Parties

1) Plaintiff is; Lloyd Eugene Brown ; P.O. Box 1000 Butner, North Carolina 27509

2) Defendents are; Rex Blocker ; Employed At Edgefield Federal Prison @ 501 Gary Hill Blvd, Edgefield, South Carolina, 29824 As the Clinical Director of Medical Services And; Louisa Rosario ; employed At Edgefield Federal Prison @ 501 Gary Hill Blvd, Edgefield, South Carolina, 29824. She is the Health Services Administrator And A Medical Mid level provider

IV Exhaust of Remedies

All available Federal Bureau of Prisons Administrative remedies have been exhausted for Work restriction; Unassignment due to disability

V Issues Litigated

1) Violations of the Eight Amendment, Cruel And unusual punishment clause

2) Violations of the Fifth Amendment, Due process clause, liberty interest in physical Safety

VI Facts Common to All Counts

1) Plaintiff recieved an Orthopedic consultation in August, 2006 showing failed back syndrome

2) Dr. Holford, Orthopedic Surgeon requested a Ct-Scan to confirm pseudoarthrosis and or spinal stenosis

3) Plaintiff in September 2006 requested a work unassignment due to numerous physical handicaps causing pain, consistant with the disability determination and the Orthopedic Assessment. That request was declined by Jose Serrano

4) Plaintiff, at all times was required to use a wheelchair due to his inability to walk or stand without assistance

5) Plaintiff had, has, extreme difficulty laying on his back due to the immediate onset of pain.

6) Lousia Rosario, Answering for the retired Clinical Director, refused to give plaintiff A work unassignment due to plaintiff's objective disabilities.

7) Lousia Rosario, through Warden John Lamanna refused plaintiff A medical unassign-ment for work.

8) Lousia Rosario was given A copy of the Social Security determination and A copy of the Orthopedic consult As part of the letter with Attachments given to the Warden John J. Lamanna in which the Warden had Ms Rosario Answer for him.

9) Rex Blocker refused to give plaintiff pain medication so that plaintiff could lay on his back

10) Plaintiff recieved A Ct-Scan of the lumbar Spine on December 27, 2006.

11) Plaintiff suffered Extreme pain while laying on his back for the testing procedure

12) Rex Blocker Knew of Plaintiff's back pain.

13) Plaintiff was made to wait Almost one And one-half years to have the Ct-Scan preformed on his back.

14) Plaintiff At the Cronic Care Visit discussed medical matters relating to high blood pressure, diAbetes And pAin.

15) Rex Blocker At this meeting, Noted Contractures in both of plAintiff's hAnds, that caused pAin when plAintiff opened And closed his hAnds

16) Rex Blocker noted right Arm pAin with A lAck of movement

17) Rex Blocker noted right Arm pAin which was severe when Arm was moved

18) Rex Blocker did not order any test of plaintiffs right arm while At Edgefield Prison.

19) Rex Blocker made A pain Assessment of 9 out of A scale of 1-10, 1 being no pain, 10 being totally unbearable pain At this Appointment

20) Rex Blocker told plaintiff that the Ct-scan showed mild bulging discs.

21) Rex Block told plaintiff that there were was nothing in the Ct-scan that the Orthopedic doctor was looking for.

22) Plaintiff asked Rex Blocker for A work unassignment due to the results of the physical exam of plaintiffs right arm, both hands and the bulging discs and being in A wheelchair.

23) Rex Blocker told plaintiff he "needed exercise" And would not give plaintiff an unassignment for work or restricted duty from physical labor

24) Plaintiff told Rex Blocker he could not preform the physical work Assignment given to plaintiff.

25) Rex Blocker told plaintiff to tell prison officers to give plaintiff something else to do.

26) Rex Blocker did not write A release for work duty

27) Since Rex Blocker did not write A release from work duty, plaintiff was required to do Any work that was requested by prison staff

28) Plaintiff was required to wheel out in his wheelchair to the recreation yard And bend down lower than his feet And pick up rocks And stones on four different occasions for several hours between September And the end of March 2007

29) All work was done under the supervision of the detail officer. Plaintiff requested other duty, but was told to go to medical for A release from work.

30) Refusal to preform work objectives would result in the loss of privileges.

31) The loss of priviledges include; No visits by your family, No commissary, No phone calls to your family, loss of your room.

32) Refusal to preform work objectives would Also include being put in the Special Housing Unit were there Are No privileges or very few. Locked in A small cell with 2 other inmates. Sleeping on the floor. And locked down 23 hours Aday.

33) The Warden, John J. Lamanna with the Advice of Ms Rosario refused to lower or restrict duty status in responce to plaintiff's Administrative remedy (Bp-9) saying that regular duty is Appropriate.

34) Plaintiff filed A remedy request with the Regional Director, which was rejected by the medical Staff citing, Ct-Scan findings minimal And "gainful employement should no be precluded".

35) Plaintiff Asked Rex Blocker when the Orthopedic Doctor would review the plaintiffs Ct-Scan. At the January Cronic Care Visit.

36) Rex Blocker told plaintiff that Dr. Holford the Orthopedic Doctor would see him the next time he came to the prison.

37) Plaintiff wrote A request to staff Asking when the Orthopedic Doctor was coming back to the prison.

38) Plaintiffs Cronic Care Visit was on January 9, 2007.

39) Dr. Holford came to the prison on January 10, 2007 Plaintiff had no appointment

40) Plaintiff recieved the request of Staff back from Ms Rosario saying that Dr. Holford would see me when he comes to the prison, January 11, 2007 was on the request

41) Plaintiff recieved A copy of his medical records At the end of January And it contained the Ct-Scan results

42) Rex Blocker deceived plaintiff in regards to the Ct-Scan test results

43) Ct-Scan results show A fracture through the fusion; moderate interspace narrowing, migrating material in the joint space

44) Rex Blocker refused to see plaintiff Agian while At Edgefield Federal prison

45) Dr. Holdford was scheduled to come to the prison for consultations on March 31, 2007

46) Plaintiff, Agian was not scheduled to see Dr. Holdford

47) Plaintiff wrote cop-out to Ms Rosario but she was not At work that day so plaintiff spoke with. Mr Greverra; Assistant Health services Administrator.

48) Plaintiff was Allowed to see Dr Holford on March 21, 2007, per Mr Greverra.

49) Prison medical services did not have the Ct-Scan or plaintiff's medical records for Dr. Holford to review

50) Plaintiff brought his copy of the Ct-Scan for Dr. Holford's review

51) Dr. Holford in his consultation notes wrote that he only review the Ct-Scan report And his previous notes supplied by plaintiff.

52) Dr. Holford recommended extensive surgery of plaintiff's back

53) Defendents never issued A work unassignment for plaintiff. G. Link gave unassignment on 4/2/07 but it was not entered into the computer

54) Dr. Holford wrote in his consultation report that surgery may help but cronic pain would persist.

55) Plaintiff was found to have the following documented objective findings

1) Fractured fusion or pseudoarthrosis of the spine
2) Bulging discs of the spine
3) Spinal interspace narrowing of the spine
4) diffused discs of the spine
5) soft tissue projecting into disc space of the spine
6) Neuropathy of the legs
7) Contractures of both hands
8) Unidentified right Arm pain
9) Severe excruciating pain
10) Ulnar Neuropathy of left Arm
11) High blood pressure (not controlled)

56) These objective medical findings constitues An obvious And serious medical condition.

57) Plaintiff Asked for And recieved help from other inmates with his daily meals by getting food tray, beverages And putting tray up for cleaning

58) Plaintiff paid other inmates to wash, dry and fold his cloths and to sweep and mop the floor of his cell for inspections

59) Plaintiff's handicaps were blatant and obvious

60) The plaintiff at his present location recieves help from prison officials with sanitation, personel care and food service

61) Defendents knew or reasonably should have known of plaintiff's serious medical conditions and deliberately ignored them in callous disregard, and in a way that shocks the conscience

62) All allegations of this complaint hereby are incorporated by this allegation in all other averments of this complaint

VII Causes of Action

Count I

Defendent Rex Blocker through his deliberate indifference to plaintiff's physical deterioration caused physical harm to plaintiff by refusing to restrict the physical demands of work which the defendent knew and/or should have known would and did injure plaintiff.

Count II

Defendent Lousia Rosario thru her deliberate indifference to plaintiff's physical deterioration caused physical harm to plaintiff by refusing to restrict the physical demands of work which the defendent knew and/or should have known would and did injure plaintiff

VIII Prayer for Relief

1) Entry of Judgment in favor of plaintiff of nominal or compensatory, and punitive, damages According to proof against each defendent, Jointly And severally;

2) Costs and fee's As Allowed by law

3) Such other relief As is Just And proper

4) Trial by Jury of All issues is demanded

Pursuant to 28 USC 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true And correct to the best of my Knowledge And belief.

Executed on February 17, 2009

Lloyd Eugene Brown
P.O. Box 1000
Butner NC 27509

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

LLOYD EUGENE BROWN Plaintiff, vs. JOHN LAMANNA, Warden of FCI Edgefield, WAYNE SMITH, Camp Administrator, BRIAN FINNERTY, Special Housing Unit Lieutenant, and JASON KAPRAL, Special Housing Unit Officer, Defendants.	C/A No. 2:06-390-RBH
Lloyd Eugene Brown, Plaintiff, v. Rex Blocker MD, and Louisa Rosario HSA in their individual capacities, Defendants.	C/A No. 2:09-434-RBH

ORDER OF DISMISSAL

It appearing to the Court that the compromise settlement heretofore agreed upon and stipulated in the titled cases by and between Lloyd Eugene Brown, Plaintiff, and the named Defendants, has been consummated,

NOW, THEREFORE, on motion of the attorneys for the named Defendants, and by and with the consent of Lloyd Eugene Brown, *pro se* Plaintiff, it is hereby

ORDERED, DECREED AND ADJUDGED that these actions, be, and the same are hereby dismissed with prejudice.

IT IS SO ORDERED this 15th day of November, 2010.

s/ R. Bryan Harwell
R. BRYAN HARWELL
UNITED STATES DISTRICT JUDGE

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HOME ALERTS MY WORK NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SER-2009-01830 **Short Description:** EDENFIELD V. UNITED STATES OF AMERICA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:09-cv-01384-ODE
Short Description	EDENFIELD V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Atlanta (USP)
Incident Region	SOUTHEAST REGIONAL OFFICE
Incident Institution	Atlanta (USP)
Monetary Relief Sought	$500,000.00
Estimated Amount	$
Office	Atlanta
Jurisdiction	NORTHERN DISTRICT OF GEORGIA
Responsible Legal Office	SERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	05/31/2012
Type	Settled
Reason	
Sought	Punitive Damages
Amount offered	$5,000.00
Total Amount Paid	$3,000.00
Description	AUTHORIZED $5,000 BASED ON THE COSTS OF LITIGATING THE MATTER.
Description	AUTHORIZED $5,000 BASED ON THE COSTS OF LITIGATING THE MATTER.
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	11/10/2009
Date Filed	05/21/2009

Case Progress

Current Owner	JIMI BAILEY
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1346 TORT CLAIM
Further Case Classification	
Comments	

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United States Department of Justice - Office of General Counsel & Review

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta
MAY 21 2009
JAMES N. HATTEN, CLERK
By: Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHEASTERN DISTRICT OF GEORGIA

JEFFREY EDENFIELD,
Plaintiff,

vs.

Case No. _____

UNITED STATES OF AMERICA,
Defendant.

_____/

1:09-CV-1384

BBM

COMPLAINT

COMES NOW the Plaintiff, Jeffrey Edenfield, and for his cause of action states and alleges as follows:

1. This is a cause of action for damages within the jurisdictional limits of this Court, is within the jurisdiction of this Court pursuant to 28 U.S.C. § 1331, and is a case of personal injury within the exclusive jurisdiction of this District Court pursuant to the Federal Tort Claims Act, Title 28 U.S.C. § 1346 (b) and Title 28 U.S.C. § 2671 et seq., as more fully appears herein.

2. The sovereign immunity of the United States of America is waived pursuant to the Federal Tort Claims Act, Title 28 U.S.C. § 2671 et seq.

3. All conditions precedent to the filing of this cause have occured, been performed, or have been waived. In particular, plaintiff has duly filed an administrative claim against the United States' Federal Bureau of Prisons and said claim has been denied, a copy which is attached hereto and made a part

hereof as **Exhibit "A"**. This cause has been filed within six (6) months of said denial as provided by law.

4. Plaintiff Jeffrey Edenfield, (hereinafter, "Edenfield"), is an individual and is currently an inmate at the Butner Federal Correctional Institution, located in Butner, State of North Carolina.

5. In late January 2008, Plaintiff Edenfield was a prisoner at the United States Penitentiary Atlanta located at 601 McDonough Blvd., Atlanta, Georgia, which is located in the Southeastern District of Georgia.

6. Defendant, UNITED STATES OF AMERICA, is a governmental entity with various agencies including the Federal Bureau of Prisons.

7. The Federal Bureau of Prisons, an agency of the United States of America, as part of it's functions and duties, maintains a prison known as United States Penitentiary Atlanta located at 601 McDonough Blvd., Atlanta, Georgia 30315, wherein Federal prisoners are incarcerated while serving various terms of imprisonment.

8. On November 29, 2007, and while imprisoned at United States Penitentiary Atlanta, Plaintiff Edenfield was issued by Physicians-Assistant Perez an institutional restriction which required, for medical reasons, a bottom bunk assignment. (See Inmate Medical History submitted herein under **Exhibit "B"**)

9. Physicians-Assistant Perez, a health care professional employed by the Federal Bureau of Prisons to administer medical services to inmates, made a clinical determination to issue to Plaintiff Edenfield the bottom bunk restriction based on physical examination and review of patient medical history.

10. On January 11, 2008, unknown institutional staff of United States Penitentiary Atlanta relocated Plaintiff Edenfield from a supervised housing unit to Housing Unit A-2, and, despite the standing medical restriction referred to in paragraphs #1 and #2 which required the provision of a bottom bunk, assigned him to a top bunk that had no ladder or other type of assistive device.

11. On the same day of relocation, January 11, 2008, Plaintiff Edenfield notified Mr. Branch, the Captain at that time of United States Penitentiary Atlanta, that he was assigned to a top bunk that had no ladder or other assistive device despite having a standing medical restriction which required assignment to a bottom bunk. Captain Branch, at this juncture, undertook no corrective action to remedy the dangerous situation but instead referred Plaintiff Edenfield to his unit counselor for assistance.

12. On the same day of relocation, January 11, 2008, Plaintiff Edenfield notified Ms. Hawkins, a Unit Counselor at that time of United States Penitentiary Atlanta, that he was assigned to a top bunk that had no ladder or other assistive device despite having a standing medical restriction which required assignment to a bottom bunk. Ms. Hawkins, at this juncture, undertook no corrective action to remedy the dangerous situation but instead advised Plaintiff Edenfield to complete

an Inmate Request form asking for assignment to a bottom bunk and when one became available she would relocate him at that time.

13. On the same day of relocation, January 11, 2008, Plaintiff Edenfield notified Mr. Stewart, a Unit Manager at that time of United States Penitentiary Atlanta, that he was assigned to a top bunk that had no ladder or other assistive device despite having a standing medical restriction which required assignment to a bottom bunk, and of Unit Counsellor Hawkins' failure or refusal to relocate him to a bottom bunk. Mr. Stewart, at this juncture, undertook no corrective action to remedy the dangerous situation but instead indicated that he did not get involved with problems that were within Unit Counselor Hawkins' job description.

14. On an everyday basis, beginning on January 11, 2008 and continuing through January 23, 2008, Plaintiff Edenfield personally communicated to Unit Counselor Hawkins the difficulty experienced as a result of nerve damage in his feet and back when ascending to the top bunk without a ladder or other assistive device but was continually denied a bottom bunk by her.

15. On the morning of January 24, 2008, Plaintiff Edenfield, while attempting to descend from the top bunk assigned to him by defendant's employees, which had no ladder or other assistive device, felt his leg and feet become unable to lower himself because of nerve damage and, due to the height of the top bunk and lack of ladder or other type of assistive safety device, he fell to the floor and became injured.

16. Plaintiff Edenfield, pursuant to Federal Rule of Civil Procedure 7 (b)(1), hereby states with particularity the claim entitling him to judgment against Defendant, UNITED STATES OF AMERICA.

CLAIM

Defendant, UNITED STATES OF AMERICA, negligently breached it's duty of care owed to Plaintiff Edenfield by depriving him of a medically ordered and necessary bottom bunk, as is more fully outlined in the administrative claim, which is presented herein under Exhibit "C", incorporated herewith and made a part hereof by reference, causing him to fall from a top bunk and become injured.

17. As a result, Plaintiff Edenfield was injured in and about his body and extremities, the full extent of which has yet to be determined because of the impediment posed by incarceration, suffered pain therefrom, suffered physical handicap and disfigurment that is progressive in nature, and his working ability was impared; the injuries are either permanent or continuing and he will suffer the losses including future medical expenses and his impairment in the future.

WHEREFORE, Plaintiff Edenfield, demands judgment against the Defendant, UNITED STATES OF AMERICA, as follows:

a. Compensatory damages in the amount of $500,000.00 dollars for physical injury, disfigurment, loss of ability to earn money, loss of ability to enjoy life, emotional suffering, physical suffering, future medical expenses and other out-of-pocket expenses and future lost earnings; and

b. Post-judgment interest at the Statutory rate until fully paid, all costs of this action and for such other relief which this Court finds just and equitable.

Dated this 18th day of May, 2009.

Respectfully submitted,

Jeffrey Edenfield, Plaintiff
Fed. Reg. No. 05365-017

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:

Federal Bureau of Prisons
Southeast Regional Office
3800 Camp Creek Parkway, Suite 2000
Atlanta, GA, 30331-6226

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and ZIP Code)

Jeffrey Edenfield # 05365-017
P.O. Box 1000 / F.C.I. Butner # 1
Butner, N.C., 27509

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
[ ] MILITARY [XX] CIVILIAN	02-05-64	Divorced	01-24-2008	05:30 A.M.

8. Basis of Claim (State in detail the known the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

* Please see attached basis of claim

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and ZIP Code)

N/A Personal Injury Only

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on the reverse side.)

N/A Personal Injury Only

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

* Please see attached Nature and Extent of Injury

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and ZIP Code
P.A. Perez	Physician's Assistant, Atlanta, U.S.P.
P.A. Castell	Physician's Assistant, Atlanta, U.S.P.

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
N/A	$500,000.00	N/A	$500,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on revere side.)	13b. Phone number of signatory	14. DATE OF CLAIM
[signature]	MOTHER (850) 482-1139	11/07/08

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, if yes, give the name and address of insurance company (Number, street, city, State, and ZIP Code) and policy number. ☒ XX No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

N/A

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? (It is necessary that you ascertain these facts)

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, if yes, give name and address of insurance carrier (Number, street, city, State, and ZIP Code) ☒ XX No

BASIS OF CLAIM

On November 29, 2007, and while imprisoned at United States Penitentiary Atlanta, Physicians Assistant Perez of Health Services issued to me a bottom bunk pass because of pre-existing nerve damage in my back and feet. (See attached Inmate Medical History)

On January 11, 2008, unknown prison staff at Atlanta relocated me from the Supervised Housing Unit to Housing Unit A-2 and, despite having the above-mentioned lower bunk pass, assigned me to a top bunk which had no ladder or assisting safety device. On the very same day that I was relocated, I approached Captain Branch and told him that I had a bottom bunk pass but was mistakenly placed on a top bunk after being released from the Supervised Housing Unit.

Captain Branch instructed me at this point to go to my counselor and she (Counselor Hawkins) would be able to move me to a lower bunk. Following my discussion with Captain Branch, I went to counselor Hawkins and informed her that I required a bottom bunk for medical reasons and showed her my medical pass. She then reached for a cop-out or Inmate Request, handed it to me and told me to fill it out for a bottom bunk and when one became available, she would move me at that time. I left and completed the cop-out. A short time later, I returned the cop-out to counselor Hawkins and explained to her that I could not get up and down from a top bunk, especially so without a ladder, because of pre-existing nerve damage in my back and feet. I again showed counselor Hawkins my medical pass in addition to relevant portions of my Presentence Investigative Report which documented the extent of nerve damage in my spine.

On this occasion, counselor Hawkins became agitated and stated to me: "Get out of my office or I will not give you a bottom bunk when one becomes available!" Following this statement, I left her office and went to the Unit Manager (Mr. Stewart) and explained to him my situation regarding counselor Hawkins' refusal to relocate me to a bottom bunk. Mr. Stewart advised me that he did not handle problems such as this and that it was the counselor's (Hawkins') job.

Everyday after January 11, 2008, I would stop by counselor Hawkins' office and inquire as to whether or not a bottom bunk had become available. At these times, I informed counselor Hawkins that I was having extreme difficulty getting up and down from the top bunk and that there was no ladder to help me or anything to hold on to. During the last of these daily visits, counselor Hawkins became irate and ordered me out of her office and threatened to have me locked-up in the Supervised Housing Unit for pestering her.

On the morning of January 24, 2008, I started to descend from the top bunk when my leg and feet gave out on me and I fell to the floor hitting my head and arms.

I immediately notified the Unit Officer and counselor Hawkins that I had fell from the top bunk and injured myself, but both officials refused to refer me to Health Services and stated that they could do nothing about it. I then proceeded to the Lieutenants Office for assistance but no one was there. When leaving the Lieutenants Office, I observed the Warden (Grayer) standing at the rear corridor door. I went to Warden Grayer and told him what had occurred, that I was injured and needed medical care. Warden Grayer at once ordered me to be seen by Health Services.

Upon arrival at Medical, I was examined by P.A. Castell who documented my injuries to my head, back and arm. P.A. Castell, following consultation with Dr. Bonnet, stated to me that my medical pass for a bottom bunk was supposed to be honored and I should go back to the Warden for correction of my top bunk dilemma.

On January 25, 2008, I reported to sick-call and seen P.A. Perez who became angry about the bottom bunk pass not being honored. After administering to me an injection for pain and writing a prescription, he re-wrote a bottom bunk pass and underscored on it Must to emphasize that I had to have a bottom bunk, and be on a lower housing tier. P.A. Perez instructed me to by-pass counselor Hawkins and take the medical pass he just wrote directly to the Warden myself.

Acting on Mr. Perez's direction, I started to approach Warden Grayer at Mainline but was stopped by Unit Manager Stewart and questioned as to what I wanted to talk to the Warden about. When I explained to Mr. Stewart that I was told to give the Warden my bottom bunk pass, Mr. Stewart advised me that he would take care of it. Mr. Stewart then made a phone call, hung up and told me to go see counselor Hawkins. As soon as I arrived at counselor Hawkins' office, she instructed me to pack up my property and move to cell 124-L, which is a bottom bunk located on the first floor.

As a result of the negligence of the Federal Prison Officials described herein, I have suffered injury and re-injured my back. The nature and extent of my injuries are not yet fully known because I have not seen a specialist and incarceration prevents me from acquiring medical care at this time. I have been to sick call 12 times in Atlanta and 3 times here at Butner for the same back pain caused by the fall from the top bunk but still have not been seen.

Jeffrey Edenfield, Complaintant

NATURE AND EXTENT OF INJURY

My injuries include, but are not limited to, head trauma, arm contusions and re-injured spinal nerves. The full extent of my injuries have yet to be determined because I have not been permitted to see a specialist or doctor. Despite having attended sick-call for the injuries sustained in the fall from the top bunk, on at least 12 occasions in Atlanta and 3 here at Butner, I have still not been seen by a doctor but only a Physicians Assistant. The impediment presented by my current incarceration prevents me from seeking and acquiring medical care on my own, or providing any information relating to written reports of the attending physician, treatment, degree of permanent disability, prognosis, or other data of this category.

Jeffrey Edenfield, Complaintant

BP-A148.055 INMATE REQUEST TO STAFF CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member)	DATE:
Ms. Hawkins (Counselor)	1/11/2008
FROM: Jeffrey Edenfield	REGISTER NO.: 05365-017
WORK ASSIGNMENT: Unassigned	UNIT: A-2

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.

Ms. Hawkins,
I was just released from the Shu and they have me assigned to a Top Bunk. I have a Medical pass for a Low Bunk with my Medical condition I cannot climb up and down from a Top Bunk especially without a ladder, you told me to write you this request and you would find me a Bottom Bunk. I also have copies of my PSF showing my Medical Problems.
Thank You.

(Do not write below this line)

DISPOSITION:

Signature Staff Member | Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

FILE IN SECTION 6 UNLESS APPROPRIATE FOR PRIVACY FOLDER

SECTION 6

BP-A148.055
SEP 98

INMATE REQUEST TO STAFF CDFRM

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Ms Hawkins (counselor)	DATE: 1/21/08
FROM: Jeffrey Edinfield	REGISTER NO.: 05365-017
WORK ASSIGNMENT: unAssigned	UNIT: A-2

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.

Ms. Hawkins

You Told me not to bring my white ASS back to your office Asking for A bottom Bunk and if I did you would have me locked backup in the Shu for pestering you and that you would not give me a bottom bunk a talk. You are not Following Medical Rules and you are not honoring my Medical pass for A bottom bunk. You are putting me in danger by making me climb up and down from a Top bunk. I am having Medical Problems From climbing up and down from the Top bunk there is No Ladders on the Beds. Plus I need A Bottom Bunk as soon as possible Thank You

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

FILE IN SECTION 6 UNLESS APPROPRIATE FOR PRIVACY FOLDER

SECTION 6

HEALTH RECORD — **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (sign each entry)
1-25-08	S: Complains of :(Circle one) itching / fungal rash / headache / dyspepsia/ cough
1025	cold / nasal congestion / constipation / toothache / dandruff / hemorrhoid / diarrhea
	Other: Fell down, got re-injured, Law trying to get all my restrictions re-issued
	Mild Mod Severe Pain Scale: 1-2-3-4-5-6-7-8-9-10 Med Allergies:
	location description of pain frequency
	duration worsening factors alleviating factors
	Current Medications: N/a
	O: Temp BP Pulse 68 Resp 16 Wt SpO2 FBS
	GEN: Alert, oriented x3, discomfort HEENT: no anomalies noted
	Chest & Lungs: C.T.A. Heart: Reg. S1S2
	Abdomen: S/NT, (+) BS, some bloating in section Extremities: (-) leg lentrg, slight edema, (-) ROM Pt. c chronic illness, previous condition
	Last seen for this condition: (Date or N/A)
	A: S/P fall injury
	(1). Depo-medrol Pack use as indicated on insert (Gina)
	(2) Ibuprofen 75mg mg. at bedtime x 30d-
	(3). Pt take all MDS and limitations.
	(4). Return to clinic if needed.
	Patricia Wiggins Staff Pharmacist USP/FPC Atlanta — E. Perez, MLP USP/FPC Atlanta

RECORDS MAINTAINED AT	FCI ATL '04
PATIENT'S NAME (Last, First, Middle Initial)	Enfield, Jeffrey — SEX M
RELATIONSHIP TO SPONSOR	STATUS — RANK/GRADE
SPONSOR'S NAME	ORGANIZATION BOP
DEPART./SERVICE	SSN/IDENTIFICATION NO. 05365-017 — DATE OF BIRTH 5-5-64

ADMIN REVIEW

Do Not Use Abbreviations

UPDATE PROBLEM LIST

CO-PAY: Yes/No

CHRONOLOGICAL RECORD OF MEDICAL CARE

STANDARD FORM 600 (REV. 5-84)
Prescribed by GSA and ICMR
FIRMR (41 CFR) 201-45.505

MEDICAL REPORT OF DUTY STATUS

NAME: Edenfield, Jeffrey

HOSPITAL REGISTRATION NUMBER: 05365-017

ADDRESS:

INPATIENT	INCLUSIVE DATES OF TREATMENT FROM:		THROUGH:	
OUTPATIENT	DATE	TIME ARRIVED A.M./P.M.	TIME DEPARTED A.M./P.M.	
	Can resume usual occupation	DATE	Can perform limited duties as specified under REMARKS	DATE
DISPOSITION	To return to clinic	DATE	To be hospitalized	DATE
	OTHER(Specify)			

REMARKS

Low Bunk X 90 days - (due to Medication)

NAME AND LOCATION OF HOSPITAL OR CLINIC

SIGNATURE OF MEDICAL OFFICER OR MEDICAL RECORD LIBRARIAN: C Mitchell

IHS-131 (1/89)

UNITED STATES PENITENTIARY
ATLANTA, GEORGIA

IDLE, CONVALESCENT AND CHANGE IN WORK CLASSIFICATION STATUS

TO: All Concern **Unit:** A3 **Date:** 10/11/07

Inmate's Name: Edenfield Jeffrey **Detail:** _____ **Reg. No.:** 05365-017

For medical purposes, the inmate named above has been authorized the work and/or activity status listed below the reason(s) and the time shown.

() **IDLE:** Reason: _____ Thru 12 Midnight _____ 20__

() **CONVALESCENCE:** List any restricted activity for medical reasons. _____

_____ Thru 12 Midnight _____ 20__

() **RESTRICTED DUTY:** Specify exact restriction and reason: _____

_____ Thru 12 Midnight _____ 20__

() **TOTAL DISABILITY:**

() **FULL DUTY:**

no prolong standing, fewer [illegible] + 6 MO

Physician or Physician Assistant

N.I. Natal, Staff Physician
FCC Yazoo City
IDV Physician
USP/FPC Atlanta

DEFINITION AND INSTRUCTIONS

IDLE STATUS: Temporary disability not to exceed three days duration including weekend and holidays. Restricted to room except for meals, barbering, religious services, sick call, visit s and call outs. No recreational activities.

CONVALESCENT STATUS: Recovery period for operation , injury or serious illness. Not less than four days and not to exceed thirty days, subject to renewal. Excused from work and may not participate in any recreational activities outside the unit.

RESTRICTED DUTY: Restricted from specific activities because of physical or mental handicap. List handicap, work limitation and time period, either specific date or indefinite.

TOTALLY DISABLED: Totally unemployable and unassigned because of mental or physical reasons. Condition generally expected

Records

Dr. Gaver
Dr. Wyoo
Dr. Fisher
Dr. Silverbe
Unit Manager
Mr. True
Case manager
Mrs. Davis
Counselor
Mr. Haugen

BUTWR 531.01 * INMATE HISTORY * 09-15-2008
PAGE 001 * MED DY ST * 13:22:43

REG NO..: 05365-017 NAME....: EDENFIELD, JEFFERY JEROME
CATEGORY: MDS FUNCTION: DIS FORMAT:

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
BUT	ATH RESTR	NO SPORTS/NO WEIGHT LIFTING	07-18-2008 1000	CURRENT
BUT	REG DUTY W	[redacted] MEDICAL RESTR--REGULAR DUTY	08-18-2003 1229	CURRENT
BUT	SOFT SHOES	SOFT SHOES ONLY	07-18-2008 1000	CURRENT
BUT	WGT 15 LB	WEIGHT-NO LIFTING OVER 15 LBS	07-18-2008 1000	CURRENT
BUT	YES F/S	CLEARED FOR FOOD SERVICE	08-18-2003 1230	CURRENT
ATL	LOWER BUNK	LOWER BUNK REQUIRED	07-18-2008 1000	07-25-2008 0001
ATL	STAND RSTR	NO PROLONGED STANDING	07-18-2008 1000	07-25-2008 0001
ATL	LOWER BUNK	LOWER BUNK REQUIRED	01-25-2008 1405	05-28-2008 0001
ATL	STAND RSTR	NO PROLONGED STANDING	01-25-2008 1406	05-28-2008 0001
ATL	STAND RSTR	NO PROLONGED STANDING	01-25-2008 1405	01-25-2008 1406
ATL	STAND RSTR	NO PROLONGED STANDING	11-29-2007 0821	04-12-2008 0001
[redacted]				
ATL	LOWER BUNK	LOWER BUNK REQUIRED	11-29-2007 0821	11-29-2007 0821
ATL	LOWER BUNK	LOWER BUNK REQUIRED	10-11-2007 1019	11-29-2007 0821

G0002 MORE PAGES TO FOLLOW . . .

UNITED STATES PENITENTIARY
ATLANTA, GEORGIA

IDLE, CONVALESCENT AND CHANGE IN WORK CLASSIFICATION STATUS

TO: All Concern **Unit:** 5Hy **Date:** 11-28-07
Inmate's Name: Edenfield, Jeffrey **Detail:** n/a **Reg. No.:** 05365-017

For medical purposes, the Inmate named above has been authorized the work and/or activity status listed below the reason(s) and the time shown.

( ) **IDLE:** Reason: _____ Thru 12 Midnight _____ 20__

( ) **CONVALESCENCE:** List any restricted activity for medical reasons. _____ Thru 12 Midnight _____ 20__

(X) **RESTRICTED DUTY:** Specify exact restriction and reason: (1) No prolonged standing (2) Lower bunk. Thru 12 Midnight 5-27-2008

( ) **TOTAL DISABILITY:** (3) elevator pass

( ) **FULL DUTY:** (4) 4th meal (snack)

X 6 months

Physician or Physician Assistant
E. Perez, MLP
USP/FPC Atlanta

DEFINITION AND INSTRUCTIONS

IDLE STATUS: Temporary disability not to exceed three days duration including weekend and holidays. Restricted to room except for meals, barbering, religious services, sick call, visit s and call outs. No recreational activities.
CONVALESCENT STATUS: Recovery period for operation , injury or serious illness. Not less than four days and not to exceed thirty days, subject to renewal. Excused from work and may not participate in any recreational activities outside the unit.
RESTRICTED DUTY: Restricted from specific activities because of physical or mental handicap. List handicap, work limitation and time period, either specific date or indefinite.
TOTALLY DISABLED: Totally unemployable and unassigned because of mental or physical reasons. Condition generally expected to last indefinitely.
FULL DUTY: No work restrictions because of physical, medical or mental disability.

UNITED STATES PENITENTIARY
ATLANTA, GEORGIA

IDLE, CONVALESCENT AND CHANGE IN WORK CLASSIFICATION STATUS

TO: All Concern **Unit:** A-2 **Date:** 1-25-08
Inmate's Name: Edenfield, Jeffrey **Detail:** n/a **Reg. No.:** 05365-017

For medical purposes, the Inmate named above has been authorized the work and/or activity status listed below the reason(s) and the time shown.

( ) **IDLE:** Reason: _____ Thru 12 Midnight _____ 20__

( ) **CONVALESCENCE:** List any restricted activity for medical reasons. _____

(1) Must have lower Bunk and lower tier (1st. floor) Thru 12 Midnight _____ 20__

(X) **RESTRICTED DUTY:** Specify exact restriction and reason: _____

(2) No prolonged standing, stooping, bending Thru 12 Midnight 7-24- 2008

( ) **TOTAL DISABILITY:** (3) elevator pass

( ) **FULL DUTY:** (4) 4th meal (snack, fruit, etc) - (5) - No lifting over 10 lbs

X 6 months -

Physician or Physician Assistant
E. Perez, MLP
USP/FPC Atlanta

DEFINITION AND INSTRUCTIONS

IDLE STATUS: Temporary disability not to exceed three days duration including weekend and holidays. Restricted to room except for meals, barbering, religious services, sick call, visit s and call outs. No recreational activities.
CONVALESCENT STATUS: Recovery period for operation , injury or serious illness. Not less than four days and not to exceed thirty days, subject to renewal. Excused from work and may not participate in any recreational activities outside the unit.
RESTRICTED DUTY: Restricted from specific activities because of physical or mental handicap. List handicap, work limitation and time period, either specific date or indefinite.
TOTALLY DISABLED: Totally unemployable and unassigned because of mental or physical reasons. Condition generally expected to last indefinitely.

A-1 Ord

Bureau of Prisons
Health Services
Medical Duty Status

Reg #: 05365-017 Inmate Name: EDENFIELD, JEFFERY

Housing Status

__ confined to the living unit except for: __meals __pill line __treatments Exp. Date: _____

__ on complete bed rest: __bathroom privileges only Exp. Date: _____

X cell: X cell on first floor __single cell X lower bunk __airborne infection isolation Exp. Date: 01/17/2009

X other: authorized for elevator pass Exp. Date: 01/17/2009

Physical Limitation/Restriction

X all sports Exp. Date: 01/17/2009

__ weightlifting: __upper body __lower body Exp. Date: _____

__ cardiovascular exercise: __running __jogging __walking __softball Exp. Date: _____
__football __basketball __handball __stationary equipment

__ other: _____ Exp. Date: _____

May have the following equipment in his / her possession:

Equipment	Start Date	End Date
Soft Shoes	07/18/2008	09/18/2008

Work Restriction / Limitation:

Cleared for Food Service: Yes

Restriction	Expiration Date
No Lifting More Than 15 Pounds	01/17/2009
No Prolonged Standing	01/17/2009
No Bending at Waist	01/17/2009
No Ladders/No Upper Bunk	01/17/2009
No Squatting	01/17/2009

Restraint Restrictions:

__cuff only front __no leg irons __no face down position in four-point restraints

__no CN gas __no pepper spray

__no cuff: __right arm __left arm __right leg __left leg

__ other: _____ Exp. Date: _____

Comments: N/A

Perez, Edwin MLP 07/18/2008
Health Services Staff Date

Inmate Name: EDENFIELD, JEFFERY Reg #: 05365-017 Quarters: A04

Federal Correctional Complex - Butner, North Carolina

MEDICAL LOWER BUNK / STAIR RESTRICTION

Name: Engfred, Jeffrey **Register Number:** 05365-017 **Date:** 9/15/08

Listed below are medical/physical conditions which require consideration for approval of stair and/or lower bunk restrictions. Restrictions are/may be time dependent and should have a finite time listed with the specific limiting factor warranting the restriction. Determination of the restriction and time factor will be made during a clinic visit with written approval provided to the inmate and documented in the medical record.

The below listed medical/physical conditions are placed in one of two categories: **Absolute or Temporary Indications** for lower bunk or stair restriction. The categories were developed to provide a reference point for our healthcare providers.

ABSOLUTE

☐ **GI/Metabolic**
- Morbid Obesity 300 ± lbs
- Chronic Diarrhea/Inflammatory Bowel Disease

☐ **Musculoskeletal**
- Severe arthritis (upper extremities, shoulder, spine, hips lower extremities)
- Absence of limb or portion of limb
- Cervical spondylosis with cord impingement
- ACL or MCL deficient knee
- S/P total joint replacement
- Shoulder instability

☐ **Eye**
- Uncorrected vision of 20/200 or less in both eyes

☐ **Cardiac**
- CHF on medication
- Coronary artery disease, symptomatic
- Arrythmias

☐ **Liver**
- Cirrhosis with ascites

☐ **Pulmonary**
- Severe COPD on medication
- Oxygen dependent

☐ **Neuro**
- Seizure disorder
- CVA
- Paresis of any degree
- Movement disorders
- Diabetes with documented neuropathy
- Myelopathy from any cause
- Brain damage

☐ _____

J. PHILLIP, M.D
MEDICAL OFFICER

TEMPORARY - this category is for a post-operative condition or disease entity known to be self-limiting.

Start Date: _____ **Stop Date:** _____

☐ S/P ortho-spinal surgery (per ortho/neurosugery)
☐ S/P ACL reconstruction (6 months)
☐ Adhesive capsulitis (6 weeks - 12 months)
☐ Vestibular dysfunction
☐ MMK (bladder suspension) (6weeks)
☐ Laparoscopy/cholecystectomy (2 weeks)
☐ Acute infective polyneuritis (Guillain-Barre Syndrome)
☐ Cast or equivalent applied to upper or lower extremity
☐ Adhesive capsulitis of the shoulder
☐ S/P Arthroscopy (2-6 weeks)
☐ S/P rotator cuff repair (3-6 months)
☐ Abdominal hernia repair (6 weeks)
☐ TAH/BSO (4 weeks)
☐ S/P tendon repair (6 weeks - 6 months)
☐ S/P fracture
☐ _____

White - chart copy Canary - Health Information Pink - unit copy Goldenrod - inmate

FCCBUT-08

UNICOR, FEDERAL PRISON INDUSTRIES, INC.
LEAVENWORTH, KANSAS

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
Mr. Kilpatrick Medical	11/06/08
FROM:	REGISTER NO.:
Jeffrey Edenfield	05365-017
WORK ASSIGNMENT:	UNIT:
Cloth Room	N.C Cell # 145L

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Mr. Kilpatrick, I talked with you before about my back problem. I am in real bad pain, I Fell From A Top Bunk back on Jan 24th and Re-Hurt my Back. I have signed up For Sick Call 2 Times since I seen Dr. Phillip on 9/15/08. I signed up on 9/26/08 and 10/06/08. and I still have not been seen. Dr. Phillip told me on 10/3/08 that he ordered My Ibuprofen 800mg, but I had A Nurse to Look it up For me on the Computer and They could not Find where Dr. Phillip had ordered it and as of today I Still have not gotten it. I take them For my Back pain and For Migrain Headaches. I would Appreciate your help on these Matters. Thank you.

(Do not write below this line)

DISPOSITION:

You will be seen this week (week of Nov 24th) for your complaints of pain.

Signature Staff Member	Date
[illegible] AHSA	11-24-08

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
Dr. Phillips / AHSA Kilpatrick	11/13/08
FROM:	REGISTER NO.:
Jeffrey EdenField	05365-017
WORK ASSIGNMENT:	UNIT:
Laundry	NC

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Dear Sirs,

I am currently having severe backpain which stems from the January 24, 2008 day I fell from my top bunk while at U.S.P. Atlanta. I have repeatedly signed-up for sick call, some (4) occasions, but still have not been seen. The pain is of such an intensity that I am unable to sleep and my job function suffers. I have spoken to Commander Payne who advised me to write this Inmate Request for a referral in order that he can have me evaluated by a specialist.

Please schedule to see me immediately or in the alternative have Commander Payne evaluate my condition.

Thank you for your prompt attention,
Jeffrey EdenField.

(Do not write below this line)

DISPOSITION: You will be seen the week of Nov. 24th for your complaint of pain

Signature Staff Member	Date
AHSA	11-24-08

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

Printed on Recycled Paper

Bureau of Prisons
Health Services
Device and Equipment Report

Equipment	Inmate Name	Reg#	Start Date	Stop Date	Date Returned	Comments
Soft Shoes	EDENFIELD, JEFFERY	05365-017	07/18/2008	09/18/2008		Pt. pending for podiatry consult.
Medical Shoes	EDENFIELD, JEFFERY	05365-017	10/15/2008			Propet Pedwalker 1 size 9.5 wide
Bed Wedge	EDENFIELD, JEFFERY	05365-017	04/03/2009			For use to support back with bed positioning. Indefinite pass.
TENS Unit	EDENFIELD, JEFFERY	05365-017	04/03/2009			Extended pass to indefinite use.
Mattress Overlay	EDENFIELD, JEFFERY	05365-017	04/23/2009			eggcrate. Indefinite pass.
Cane	EDENFIELD, JEFFERY	05365-017	04/23/2009			Indefinite pass.

Total: 6

Dr. A. Rogers, PT
Dr. Artresiah Rogers, PT
Physical Therapist
FCC Butner

JEFFREY EDENFIELD # 05365-017
F.C.I. BUTNER # 2
P.O. BOX 1500
BUTNER N.C. 27509

RECEIVED IN CLERK'S OFFICE
U.S.D.C. - Atlanta
MAY 21 2009
JAMES N. HATTEN, Clerk
By: Deputy Clerk

DATE 5/18/09

1:09-CV-1384

TO WHOM IT MAY CONCERN ,

PLEASE FIND THE FOLLOWING DOCUMENTS ENCLOSED ;

1) INFORMAL PAUPIS

2) INMATE ACCOUNT ACTIVITY FOR THE LAST SIX MONTHS.

3) RECEIPT ACKNOWLEDGING TORT CLAIM

4) DENIAL OF TORT CLAIM

5) COMPLAINT

6) TORT CLAIM

7) COPIES OF TWO REQUEST FORMS (cop-outs) TO COUSELOR HAWKINS REQUESTING BOTTOM BUNK.

8) MEDICAL RECORDS DOCUMENTING THE ACCIDENT 1-25-08

9) FIVE (5) COPIES OF BOTTOM BUNK PASSES

10) TWO (2) REQUEST FORMS (cop-outs) REQUESTING TO BE SEEN ABOUT MY INJURIES IN REGARD TO THE FALL.

11) PHYSICAL THERAPY EQUIPMENT PASS

CERTIFICATE OF SERVICE

I the undersigned , being over the age of eighteen (18) hereby certify that the above said documents was depositted with the UNITED STATES POSTAL SERVICE in properly addressed envelope with adequate first class postage.

JEFFREY EDENFIELD

CIVIL COVER SHEET FOR A PRISONER CASE

1:09-CV-1384

JUDGE _____ DIVISION ATLANTA

MAG. JUDGE _____ IFP ✓ FEE _____

DATE FILED May 21, 2009 PREVIOUS CASES NO

NAME Jeffrey Idenfield I.D. # 05365-017

PRO SE ✓ ATTORNEY _____

PLACE OF INCARCERATION FCI Butner

CITY Butner STATE NC COUNTY _____

BBM

JURISD.	NOS	CAUSE	DESCRIPTION
3	530	___ 28:2254	Habeas action by a State prisoner challenging state convictions or sentence.
3	535	___ 28:2254d	Habeas action by a State prisoner under a DEATH sentence. ____ SEND TO DISTRICT JUDGE.
3	530	___ 28:2241st	Habeas action by a State prisoner or detainee challenging matters other than conviction or sentence (e.g. parole revocation, loss of good time-credit, etc.).
2	530	___ 28:2241fd	Habeas action by a Federal prisoner or detainee challenging matters other than conviction or sentence (e.g. parole revocation, loss of good time-credit, etc.).
3	550	___ 42:1983pr	State or Federal prisoner civil rights action suing state officials not involving prison conditions. (A/K/A "Bivens action").
2	550	___ 28:1331pr	Prisoner civil rights action suing federal officials not involving prison conditions. (A/K/A "Bivens actions").
3	555	___ 42:1983pr	State prisoner civil rights action involving prison conditions.
2	555	___ 28:1331pr	Prisoner civil rights action suing Federal officials involving prison conditions. (A/K/A "Bivens action").
2	540	___ 28:1346	Prisoner Federal Tort Claim. (Against U.S.)
2	540	___ 28:1361pr	Action to compel U.S. officer to perform a duty MANDAMUS.
4	540	___ 28:1332	Any prisoner action based on diversity.
___	540	___ _____	OTHER: _____

_____ DOCKER CLERK: Place cover sheet in acco on top of docket sheet and file, and FORWARD to Magistrate Judge assigned for IFP and/or frivolity determinations.

_____ STAFF LAW CLERK:

___ Pauper's affidavit insufficient or no affidavit

___ Complaint or petition not signed or is incomplete

___ No copies

___ Other: _____

BBM

RCW

540

28:1346 tc SLC8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEFFREY EDENFIELD,

Plaintiff,

v.

UNITED STATES OF AMERICA, UNIT MANAGER J.E. STEWART, in his official and individual capacity; and COUNSELOR HAWKINS, in her official and individual capacity,

Defendants.

CIVIL ACTION FILE

NO. 1:09-cv-1384-SCJ

JUDGMENT

This action having previously come before the court, Honorable Orinda D. Evans, United States District Judge, for consideration of defendants Stewart and Hawkins' Motion to Dismiss, and the court having granted said motion on January 4, 2011, and the court, Honorable Steve C. Jones having dismissed this action without prejudice on May 31, 2012 as to the remaining defendant United States of America as settlement is pending, it is

Ordered and Adjudged that defendants J.E. Stewart and Counselor Hawkins recover their costs of this action, and the action be, and the same hereby, is **dismissed without prejudice.**

Dated at Atlanta, Georgia, this 31st day of May, 2012.

JAMES N. HATTEN
CLERK OF COURT

By: s/Amanda Querrard
Deputy Clerk

Prepared and Entered
in the Clerk's Office
June 1, 2012
James N. Hatten
Clerk of Court
By: s/Amanda Querrard
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEFFREY EDENFIELD, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CIVIL ACTION FILE NO. 1:09-CV-1384-SCJ-LTW

ORDER

The Court having been notified that the parties to this action have reached a settlement in principal following mediation, but it appearing that documentation of the settlement has not yet been concluded, it is therefore **ORDERED** that this action be **DISMISSED** without prejudice to the right, upon good cause shown within 120 days, to reopen the action if settlement is not consummated. The Clerk is **DIRECTED** to **ADMINISTRATIVELY TERMINATE** this action. If this matter is not reopened by the parties within 120 days of the entry of this Order, it will be deemed to have been dismissed with prejudice.

IT IS SO ORDERED, this 31st day of May, 2012.

s/Steve C. Jones
STEVE C. JONES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEFFREY EDENFIELD,	:	FEDERAL TORT CLAIMS ACT
BOP No. 05365-017,	:	28 U.S.C. §§ 2671 *et seq.*
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	1:09-CV-1384-BBM-RGV
	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

ORDER

Jeffrey Edenfield, an inmate in the Federal Correctional Institution in Butner, North Carolina, filed a complaint seeking damages relating to an alleged slip and fall while he was a prisoner in the United States Penitentiary in Atlanta, Georgia (Doc. 1). Edenfield also filed an Affidavit and Authorization for Withdrawal from Inmate Account (Doc. 2) seeking leave to proceed *in forma pauperis*. Edenfield's affidavit indicates that he "has a current balance of $.68 in her/her account" (Doc. 2 at 3). Edenfield's request for leave to proceed *in forma pauperis* is **GRANTED**.

Pursuant to the provisions of 28 U.S.C. § 1915(b)(2), the $350 filing fee shall be paid by, or on behalf of, Edenfield in "monthly payments of 20 percent of the preceding month's income credited to [Edenfield's] account . . . each time the amount in the account exceeds $10 until the filing fee" is paid in full. 28 U.S.C.

§ 1915(b)(2). Those payments shall continue until the Clerk verifies by a separate notice to the warden of the institution in which Edenfield is confined that the filing fee has been paid in full.

IT IS FURTHER ORDERED that:

1. The Clerk of the Court transmit a copy of this Order to the warden of the institution where Edenfield is confined; and

2. The warden of the institution, or his designee, collect the aforesaid monthly payments from Edenfield's inmate account and remit such payments to the Clerk of the United States District Court for the Northern District of Georgia until the $350 filing fee is paid in full; and

3. Edenfield keep the Court advised of his current address at all times during the pendency of this suit.

IT IS SO ORDERED, this 4th day of June, 2009.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEFFREY EDENFIELD, BOP No. 05365-017, Plaintiff,	: : :	FEDERAL TORT CLAIMS ACT 28 U.S.C. §§ 1346(b), 2671 *et seq.*
v.	: :	CIVIL ACTION NO. 1:09-CV-1384-BBM
UNITED STATES OF AMERICA, Defendant.	: :	

ORDER

Jeffrey Edenfield ("Mr. Edenfield"), a federal prisoner, filed a complaint under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* (the "FTCA") [Doc. 1] and an Affidavit and Authorization for Withdrawal from Inmate Account [Doc. 2]. The Honorable Russell G. Vineyard granted Mr. Edenfield leave to proceed *in forma pauperis* [Doc. 3]. Mr. Edenfield then filed a motion to amend his complaint [Doc. 5]. That motion is **GRANTED**. *See* Fed. R. Civ. P. 15(a)(1)(A). Mr. Edenfield's amended complaint is now before the Court for screening pursuant to 28 U.S.C. § 1915A.[1]

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[1] Mr. Edenfield also filed a letter that the Clerk docketed as a Motion for Direction [Doc. 4], inquiring about the tolling of statutes of limitation and how to amend his complaint. This Court may not properly act as Mr. Edenfield's legal advisor. *See, e.g., Pliler v. Ford*, 542 U.S. 225, 231 (2004) ("District judges have no obligation to act as counsel or paralegal to *pro se* plaintiffs."). He must seek

In all civil actions in which "a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," this Court is required to screen the complaint "before docketing, if feasible or, in any event, as soon as practicable." 28 U.S.C. § 1915A(a). The complaint must be dismissed if it "is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b).

Mr. Edenfield alleges that:

> On November 29, 2007, and while imprisoned at United States Penitentiary Atlanta, Plaintiff Edenfield was issued by Physicians-Assistant Perez an institutional restriction which required, for medical reasons, a bottom bunk assignment. . . . On January 11, 2008, [Plaintiff Edenfield was relocated and] assigned . . . to a top bunk that had no ladder or other type of assistive device. . . . On an everyday basis, beginning on January 11, 2008, and continuing through January 23, 2008, Plaintiff Edenfield personally communicated to Unit Counselor Hawkins . . . but was continually denied a bottom bunk by her. On the morning of January 24, 2008, Plaintiff Edenfield . . . fell to the floor and became injured.

[Doc. 1 at 2-4]. Mr. Edenfield alleges that he was "injured in and about his body and extremities, . . . suffered pain therefrom, suffered physical handicap and disfigurment [sic] that is progressive in nature, and his working ability was

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advice elsewhere. Mr. Edenfield's Motion for Direction [Doc. 4] must be DENIED.

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impared [sic]" [Id. at 5]. Mr. Edenfield seeks "[c]ompensatory damages in the amount of $500,000" [Id. at 6].

"It is axiomatic that the United States may not be sued without its consent." *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *see also United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."). However, the FTCA waives the United States' sovereign immunity in part, providing that "[t]he United States shall be liable . . . relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. In light of Mr. Edenfield's allegations:

IT IS ORDERED that this case is **ALLOWED TO PROCEED** as any other civil action. The Clerk is **DIRECTED** to send Mr. Edenfield USM 285 forms and summonses for the United States Attorney General and for the United States Attorney for the Northern District of Georgia. Mr. Edenfield is **DIRECTED** to complete and return those documents to the Clerk of Court within eighteen (18) days of the entry date of this Order. Mr. Edenfield is **ADVISED** that failure to comply in a timely manner could result in the dismissal of this civil action. *See* LR 41.3A(2), N.D. Ga. The Clerk is **DIRECTED** to resubmit this action to the undersigned if Mr. Edenfield fails to comply.

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Upon receipt of the completed forms, the Clerk **SHALL** prepare and transmit to the U.S. Marshals Service two service packages, as described in Federal Rule of Civil Procedure 4(i)(1). Each service package must include the USM 285 form and copies of the summons and complaint. Upon receipt of the service packages, the U.S. Marshals Service **SHALL** serve the United States as provided in Rule 4(i)(1). Each completed USM 285 form **SHALL** be filed with the Clerk.

Mr. Edenfield is **DIRECTED** to keep the Court advised of his current address at all times during the pendency of this action. Failure to do so may result in the dismissal of this action. *See* LR 41.2C, N.D. Ga.

Although this case is being allowed to proceed, the Court notes that the FTCA effects only a partial waiver of sovereign immunity, subject to certain limitations on damages, *see* 28 U.S.C. § 2674, and exceptions from liability, *see* 28 U.S.C. § 2680. In particular, the FTCA includes an exception from liability for "discretionary acts." *See* 28 U.S.C. § 2680(a). It is unclear whether that exception from liability applies to the United States' actions in this case. Because "[s]overeign immunity is jurisdictional in nature," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994), and this Court is "obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking," *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005) (quoting *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d

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405, 410 (11th Cir. 1999)), this Court **ORDERS** the United States to file within sixty (60) days of its receipt of Mr. Edenfield's Complaint a brief discussing whether the "discretionary function" exception applies in this case. Mr. Edenfield shall have eleven (11) days to file a reply to the United States' brief once it is filed.

IT IS SO ORDERED, this 7th day of October, 2009.

s/Beverly B. Martin
BEVERLY B. MARTIN
UNITED STATES DISTRICT JUDGE

FILED IN CHAMBERS
U.S.D.C. - Atlanta

AUG 0 5 2010

James N. Hatten, Clerk
By: A. M. Cannon
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEFFREY EDENFIELD, Plaintiff,	::	
v.	::	CIVIL ACTION NO. 1:09-CV-1384-ODE
UNITED STATES OF AMERICA; UNIT MANAGER J.E. STEWART, in his official and individual capacity; COUNSELOR HAWKINS, in her official and individual capacity; WARDEN GRAYER, in his official and individual capacity, Defendants.	::	

ORDER

Plaintiff, *pro se*, filed this action under the Federal Tort Claims Act ("FTCA") based on events that occurred during his incarceration at the U.S. Penitentiary ("USP") in Atlanta, Georgia. Plaintiff is currently incarcerated at the USP in Butner, North Carolina.

The Court previously conducted a frivolity review of Plaintiff's complaint under 28 U.S.C. § 1915A and allowed Plaintiff's FTCA claim to proceed. (Doc. No. 7.) In that Order, the Court directed Defendant United States of America ("USA") to file a brief discussing whether the FTCA's discretionary function

exception applies to Plaintiff's claims. (Id.) In response, Defendant USA filed a motion to dismiss this action for lack of subject-matter jurisdiction, contending that the FTCA's discretionary function exception bars Plaintiff's claim. (Doc. No. 14.) Plaintiff filed a response opposing the motion. (Doc. No. 18.) For the reasons discussed in Part I below, the Court concludes that Plaintiff's FTCA claim that he was denied prescribed medical treatment is not barred by the discretionary function exception. Accordingly, Defendant USA's motion to dismiss is **DENIED**.

Before discussing the FTCA claim, the Court notes that Plaintiff also has fairly alleged in this case a claim under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), for the same conduct that forms the basis of his FTCA claim. The Court previously granted both of Plaintiff's motions to amend his complaint, the second of which sought not only to amend Plaintiff's allegations regarding damages, but to add three federal prison officials as defendants to this action in both their official and individual capacities. (Doc. No. 13, at 5; see also Orders, Doc. Nos. 7 & 19.) Although Plaintiff did not expressly mention Bivens in his original complaint, his motion for direction filed prior to his motions to amend his complaint did mention Bivens and indicated that

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he was going to seek to add a Bivens claim. (Doc. No. 4.) Pursuant to the Court's May 3, 2010 Order granting Plaintiff's most recent motion to amend, there is, in addition to Plaintiff's FTCA claim against Defendant USA, a Bivens claim against Defendants Stewart, Hawkins, and Grayer in this action.[1] Because there has been no frivolity review of Plaintiff's Bivens claim as required by 28 U.S.C. § 1915A, the Court conducts the review in Part II of this Order.

I. Defendant USA's Motion to Dismiss Plaintiff's FTCA Claim

A. Background Facts[2]

On November 28, 2007, while incarcerated at the Atlanta USP, Plaintiff was examined by a Physician Assistant and given medical restrictions. Specifically, the Physician Assistant determined that, for six months, Plaintiff was to be: (1) restricted to a bottom bunk bed; (2) restricted from prolonged standing; (3) given

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[1] The docket does not list these three individuals as defendants. The Court **DIRECTS** the Clerk to correct the docket by adding the following individuals as defendants in their official and individual capacities: J.E. Stewart, Counselor Hawkins, and Warden Grayer.

[2] The background facts are taken from Plaintiff's complaint and the records he submitted with it and the Declaration of Warden Loren Grayer that Defendant USA submitted. Defendant USA has made a factual challenge to subject-matter jurisdiction as to any claim regarding the failure to install ladders or other assistive devices on bunk beds. Thus, the Court may look beyond the pleadings and consider evidence relevant to the jurisdictional issue. Morrison v. Amway Corp., 323 F.3d 920, 924-25 & n.5 (11th Cir. 2003).

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an elevator pass; and (4) given a snack as a fourth meal each day. The Physician Assistant documented these restrictions on an "Idle, Convalescent and Change in Work Classification Status" form in the "Restricted Duty" section of the form.[3] The bottom of the Medical Prescription contains "Definitions and Instructions," which defines "Restricted Duty" as: "Restricted from specific activities because of physical or mental handicap. List handicap, work limitation and time period, either specific date or indefinite." The Physician Assistant signed and dated the Medical Prescription on November 28.[4] Plaintiff contends that pre-existing nerve damage in his back and feet led to the Medical Prescription.

On January 11, 2008, Plaintiff was transferred out of the Special Housing Unit at the Atlanta USP and placed in housing unit A-2. Plaintiff was assigned to a top bunk bed in unit A-2 that had no ladder or other assistive device. On the day of his reassignment, Plaintiff notified Captain Branch that he had a standing medical restriction requiring assignment to a bottom bunk, but that he had been

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[3] For convenience, the Court will refer to this form as the "Medical Prescription" in this Order.

[4] Plaintiff's inmate medical history and another Medical Prescription he filed with his complaint indicate that he was initially restricted to a bottom bunk on October 11, 2007.

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assigned a top bunk. Captain Branch referred Plaintiff to his unit counselor, Ms. Hawkins.

Plaintiff notified Counselor Hawkins on January 11, 2008 of his medical restriction to a bottom bunk, and she told him to complete an inmate request form for the bottom bunk. Plaintiff completed the form and, later that same day, gave it to Counselor Hawkins and showed her his Medical Prescription. Upon receipt of the request form, Counselor Hawkins told Plaintiff that if he did not immediately leave her office she would not give him a bottom bunk when one became available. Plaintiff left and complained to Unit Manager J.E. Stewart about Counselor Hawkins not assigning Plaintiff to a bottom bunk despite his Medical Prescription. Unit Manager Stewart replied that he did not handle such problems as that was Counselor Hawkins' job.

On a daily basis following January 11, Plaintiff asked Counselor Hawkins for a bottom bunk and informed her that he was having extreme difficulty getting in and out of the top bunk. On one of these occasions, Counselor Hawkins became irate with Plaintiff, ordered him out of her office, and threatened to have him confined in the Special Housing Unit for pestering her about obtaining a bottom bunk. Plaintiff documented Counselor Hawkins' statements and direction

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on an inmate request form dated January 21, 2008 and gave the form to Counselor Hawkins.[5] On that form, Plaintiff also stated that Counselor Hawkins was putting him in danger by not assigning him a bottom bunk as required by his Medical Prescription.

On the morning of January 24, 2008, while descending from the top bunk, Plaintiff's legs and feet gave out and he fell to the floor, injuring himself. Plaintiff immediately reported his fall and injury to Counselor Hawkins and a unit officer, both of whom referred him to Health Services. Plaintiff then reported his fall and injury to Warden Grayer, who also referred him to Health Services.

Plaintiff went to Health Services and was examined by a Physician Assistant, who told Plaintiff that his Medical Prescription for a bottom bunk must be honored and that he should talk with Warden Grayer about correcting his bunk assignment. The next day, the Physician Assistant who issued the Medical Prescription in November gave Plaintiff another Medical Prescription, indicating on this one that Plaintiff "must have bottom bunk and bottom tier (1st floor)." The

[5] Plaintiff submitted with his complaint both the January 11 and January 21 inmate request forms that he gave to Counselor Hawkins.

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Physician Assistant instructed Plaintiff to bypass Counselor Hawkins and take the Medical Prescription directly to Warden Grayer.

Plaintiff approached Warden Grayer, but was stopped by Unit Manager Stewart before reaching the Warden. Unit Manager Stewart told Plaintiff that he would take care of the bottom bunk issue, made a phone call, and then told Plaintiff to see Counselor Hawkins. Plaintiff reported to Counselor Hawkins, who promptly moved him to a bottom bunk in a cell on the first floor.

Plaintiff contends that since his fall from the top bunk on January 25, 2008, he has been treated by prison medical staff at both the Atlanta and Butner USPs on numerous occasions. He contends that as a result of the fall, he sustained permanent injuries; has chronic back pain; and must use a cane, walker, and other supportive equipment.

B. The Parties' Arguments

Defendant USA has moved to dismiss this action for lack of subject-matter jurisdiction, contending that the discretionary function exception to the FTCA's waiver of sovereign immunity applies. Defendant USA characterizes Plaintiff's claim as challenging the failure to provide a ladder or other assistive device to

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access the top bunk bed to which Plaintiff was assigned when he fell and injured himself.

Defendant USA submitted a declaration from Warden Grayer, who avers that there are no federal Bureau of Prisons ("BOP") rules, regulations, or policies governing the use of ladders on prison bunk beds and that the decision whether to use ladders is left to the discretion of each prison's administrators. Warden Grayer further avers that ladders raise safety and security concerns and, thus, are not appropriate in all housing units. Relying on this evidence, Defendant USA argues that the decision of whether to install ladders or other assistive devices on prison bunk beds is a discretionary one of the type that Congress intended to shield from liability under the FTCA.

Plaintiff responds that Defendant USA has mis-characterized his claim. Plaintiff contends that he is challenging correction officers' refusal to assign him a bottom bunk despite their knowledge of the Medical Prescription restricting him to a bottom bunk. It is this action (or inaction) that Plaintiff contends caused his injuries, although he also states that having a ladder or other assistive device might have prevented him from falling off the top bunk. Plaintiff argues that prison officials could have left him in the Special Housing Unit, where he was in

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a bottom bunk, or moved an inmate who did not need a bottom bunk out of a bottom bunk in housing unit A-2, but did not have discretion to deny him a bottom bunk altogether given his Medical Prescription. Plaintiff contends that BOP Program Statements 6013 and 6001.03 support his contention that prison officials were not exercising a discretionary function when they refused to honor his Medical Prescription.[6]

C. Legal Standard

Defendant USA challenges only this Court's jurisdiction over Plaintiff's FTCA claim and presents evidence – Warden Grayer's declaration – in support of its challenge. The challenge is therefore a factual one, allowing the Court to consider Warden Grayer's declaration and other evidence in the record in determining whether it has subject-matter jurisdiction over Plaintiff's FTCA claim. Morrison, 323 F.3d at 924-25 & n.5. Because there is a factual challenge to subject-matter jurisdiction, Plaintiff bears the burden of proving that jurisdiction exists, and the Court need not accept Plaintiff's allegations as true. See id. at 925; OSI, Inc. v. United States, 285 F.3d 947, 951 (11th Cir. 2002).

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[6] The Court has reviewed the BOP's Program Statements, but has not found one numbered "6001.03."

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The FTCA waives the federal government's sovereign immunity from suit for the negligent actions of its employees, with certain exceptions. United States v. Gaubert, 499 U.S. 315, 322 (1991); Cohen v. United States, 151 F.3d 1338, 1340 (11th Cir. 1998). The most notable exception is the one that precludes liability for "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). If the discretionary function exception applies, the Court lacks subject-matter jurisdiction over the FTCA claim. Cohen, 151 F.3d at 1340.

There is a two-part test for determining whether the discretionary function exception applies. First, a court must consider the nature of the conduct that the claim is "based upon" and determine whether that challenged conduct involves an element of judgment or choice. Gaubert, 499 U.S. at 322. Government conduct does not involve an element of judgment or choice, and thus is not discretionary, "if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive." Id. (citation and internal quotations omitted); Cohen, 151

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F.3d at 1341. To apply this first step of the test, the challenged conduct must be clearly identified. Gaubert, 499 U.S. at 322; Autery v. United States, 992 F.2d 1523, 1527 (11th Cir. 1993) ("Before we address whether the government's conduct violated a mandatory regulation or policy, we must determine exactly what conduct is at issue.").

Second, if the challenged conduct involves an element of judgment or choice, a court must determine if that judgment is of the kind that the discretionary function exception was designed to shield, i.e., judgment grounded in considerations of public policy. Gaubert, 499 U.S. at 322-23. "[T]he purpose of the exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id. at 323 (internal citations and quotations omitted). The inquiry here is not whether the government official actually weighed policy considerations before acting, but whether the nature of the actions taken are susceptible to policy analysis. Id. at 323-25. The discretionary function exception "protects only governmental actions and decisions based on considerations of public policy." Id. at 323 (citation and internal quotations omitted).

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D. Analysis

1. The Conduct At Issue

The conduct Plaintiff challenges in this case is the prison officials' – primarily Counselor Hawkins – denial of prescribed medical treatment when Plaintiff was placed in housing unit A-2 on January 11, 2008. In his complaint, after setting out his factual allegations, Plaintiff included the following in bold font and centered on the page:

CLAIM

> **Defendant, UNITED STATES OF AMERICA, negligently breached it's [sic] duty of care owed to Plaintiff Edenfield by depriving him of a medically ordered and necessary bottom bunk, as is more fully outlined in the administrative claim, which is presented herein under Exhibit "C", incorporated herewith and made a part hereof by reference, causing him to fall from a top bunk and become injured.**

(Compl. at unnumbered p. 5.)

Thus, it is clear from Plaintiff's initial filing in this case that he contends the prison officials' failure to honor the Medical Prescription restricting him to a bottom bunk was negligence that violated the FTCA. Nonetheless, Defendant USA did not address this alleged conduct in its motion to dismiss and instead addressed only what it characterized as Plaintiff's claim – a challenge to the

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prison's decision not to install ladders or other assistive devices on all bunk beds. Warden Grayer's declaration, the only evidence Defendant USA has presented, likewise addresses only the issue of ladders on bunk beds.[7]

2. The Discretionary Function Exception

The corrections officers' decision not to assign Plaintiff to a bottom bunk despite his Medical Prescription did not involve an element of judgment or choice given the BOP's governing regulations and policies. Congress requires the BOP to "provide suitable quarters and provide for the safekeeping, care, and subsistence" of all federal inmates and to provide for the inmates' protection. 18 U.S.C. § 4042(a). The Eleventh Circuit has held that § 4042 imposes on the BOP only a general duty of care and that the BOP retains discretion in the means it uses to fulfill that general duty. Cohen, 151 F.3d at 1342-43. Thus, § 4042, alone, does not "specifically prescribe[] a course of action for a [prison official] to follow" that would render decisions regarding inmates' care non-discretionary. Id. at 1341-43.

[7] To the extent Plaintiff also challenges the decision not to install ladders or other devices that would enable inmates to access the top bunk, the Court finds that the discretionary function exception applies to that decision, as discussed more fully below.

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BOP regulations and Program Statements and the Medical Prescription, itself, however, contain sufficiently specific language that precludes prison officials, particularly lower-level ones like Counselor Hawkins, from exercising discretion as to whether to provide an inmate with prescribed medical treatment. BOP policies provide that all federal inmates "have the right to health care, which includes . . . medical and dental treatment." 28 C.F.R. § 541.12. BOP policies further describe this right as including "the right to receive prescribed medications and treatments in a timely manner, consistent with the recommendations of the prescribing health care provider." U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement 6013.01, Attach. B, at 3 (2005), available at http://www.bop.gov/DataSource/execute/dsFormLoc ("PS 6013.01"). The BOP has designated the right to receive prescribed medical treatment as a "basic" one that must be provided at all federal prisons. PS 6013.01 at 6 ("The [inmates'] rights and responsibilities are to be based on the scope of [medical] services provided at the institution, but they must contain the basic rights and responsibilities as outlined in Attachment B."). Finally, the Medical Prescription form, on which Plaintiff's bottom bunk restriction was documented, contains a section for the healthcare professional to prescribe "Restricted Duty" by listing the

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"exact restriction" and a duration for the restriction. According to the Medical Prescription's "Definition[s] and Instructions," "Restricted Duty" means that the inmate is "[r]estricted from specific activities because of physical or mental handicap."

These BOP regulations and policies, when read together, do not provide prison officials with a choice as to whether to adhere to a healthcare professional's instructions, documented on a Medical Prescription, that an inmate receive certain treatment or care for medically necessary reasons. Indeed, the "basic right" to healthcare and prescribed medical treatment that the BOP policies afford inmates would be of little value if lower-level prison officials could, in their discretion, choose whether to follow a physician's prescription for medical care.[8] As one court noted,

> the decision whether to provide prescribed treatment – be it in the form of medication, a low altitude housing assignment, or something else – is not something which nonphysician, BOP employees can make. Indeed, to endow such employees with the discretion to

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[8] There is no evidence in the record concerning the Atlanta USP's internal policies regarding prescribed medical treatment and bunk assignments or if any such policies exist. Cf. Bultema v. United States, 359 F.3d 379, 381 (6th Cir. 2004) (noting that USP at issue had policy that medical assignments to a bottom bunk took priority over normal bunk assignment procedure "even if there are no vacant bottom bunks").

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> decide whether prescribed treatment should be given is arguably contrary to public policy and therefore is not the type of judgment or choice which the discretionary function exception is intended to shield.

Ajaj v. United States, No. 03cv01959MSKPAC, 2006 WL 1305198, at *4 (D. Colo. May 11, 2006) (holding that discretionary function exception did not apply to federal inmate's claim that prison officials negligently failed to follow medical instructions that he be housed in a smoke free, low-altitude facility);[9] see also Mahler v. United States, No. Civ. 97-1457-KI, 2001 WL 204833, at *5 (D. Or. Feb. 1, 2001) (observing that government's contention that there was discretion "requires a closer look when there is an allegation that a correctional counselor chose to disobey a medical 'order' from a prison physician").

Here, Plaintiff has alleged that Counselor Hawkins and Unit Manager Stewart knew of Plaintiff's Medical Prescription for a bottom bunk (indeed, Plaintiff showed the Medical Prescription to Counselor Hawkins) but refused to honor the medical restriction until after Plaintiff fell and injured himself on

[9] In Ajaj, as here, "[t]he United States [did] not contend that the discretionary function exception should apply when prison officials negligently fail to provide prescribed medical treatment." Ajaj, 2006 WL 1305198, at *4.

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January 24.[10] The Court concludes that these prison officials did not have the discretion to deny Plaintiff the medical treatment they knew he had been prescribed. Accordingly, the discretionary function exception does not apply.

Even if the prison officials had discretion to deny Plaintiff his prescribed medical treatment, that judgment is not the type that the discretionary function exception was intended to shield. As the court in Ajaj observed, not only is there no sound public policy for endowing prison officials, particularly lower-level correctional officers, with discretion to decide whether inmates should be given prescribed medical treatment, but doing so arguably would *violate* public policy. See Ajaj, 2006 WL 1305198, at *4. Such discretion also arguably would violate the BOP's own policies, which state – without qualification – that inmates have the right to receive prescribed medical care. See Bultema, 359 F.3d at 385

[10] As noted in Part I.C, supra, the Court need not accept Plaintiff's allegations as true when a defendant presents evidence as part of a factual challenge to subject-matter jurisdiction. Defendant USA has not presented any evidence regarding Plaintiff's allegations that he was negligently denied prescribed medical treatment, however, despite Plaintiff providing evidence of same. Thus, for purposes of resolving Defendant USA's motion to dismiss, the Court accepts as true Plaintiff's allegation that Defendants Hawkins and Stewart knew of Plaintiff's Medical Prescription when they denied him a bottom bunk.

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(finding that failure to direct inmate to give bottom-bunk pass to unit management arguably violated prison policy).

Moreover, "[t]he relevant inquiry in these cases is whether the government expects the employee who is making the choice in question to consider the policy implications of that choice." Ochran v. United States, 117 F.3d 495, 502 (11th Cir. 1997) (citations omitted). The Court can discern no legitimate reason to expect correctional officers like Counselor Hawkins to weigh policy in deciding whether to give an inmate prescribed medical care. Nor can the Court discern any policy considerations that might influence a judgment as to whether inmates should receive prescribed medical care. Thus, the Court concludes that the provision or denial of prescribed medical care is not an action susceptible to policy analysis.[11]

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[11] There is potentially another reason why the discretionary function exception applies here. As discussed in Part II, infra, Plaintiff states a claim, under Bivens, that Counselor Hawkins and Unit Manager Stewart were deliberately indifferent to a serious medical need and, thus, violated Plaintiff's constitutional rights. Another District Judge of this Court recently held that "to the extent that the Plaintiffs' FTCA claims . . . involve unconstitutional conduct, the claims do not fall under the discretionary function exception" because "[t]here is no reason to believe that Congress ever intended to commit to an agency's discretion the question of whether or not to act constitutionally." Mancha v. ICE, No. 1:06-CV-2650-TWT, 2009 WL 900800, at *4 (N.D. Ga. Mar. 31, 2009) (Thrash, J.) (denying motion to dismiss FTCA claim). That reasoning is

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The Court notes that this case is not like those in which courts concluded that the discretionary function exception applied to the denial of a bottom bunk to an inmate who did not have a medical prescription for the bottom bunk, but merely requested it. See Harper v. United States, No. 5:08-CV-403-KKC, 2009 WL 3190377, at *4-*5 (E.D. Ky. Sept. 30, 2009); Chavez v. Driver, No. C-04-618, 2005 WL 1879053, at *1, *4-*5 (S.D. Tex. Aug. 9, 2005) (observing that the only purported need for a bottom bunk was the plaintiff's "representation of pre-incarceration injuries"); Paulino-Duarte v. United States, No. 02 Civ. 9499(RCC), 2003 WL 22533401, at *1-*2 (S.D.N.Y. Nov. 7, 2003); Mahler, 2001 WL 204833, at *4-*6 (holding that exception applied where prison physician's testimony revealed that he merely requested, rather than directed, that the plaintiff be assigned to a first-floor unit). Plaintiff had a clear medical prescription for a bottom bunk, and the prison officials at issue were aware of that prescription. Thus, the cases other than Ajaj are factually distinguishable and unpersuasive. Because the discretionary function exception does not apply to Plaintiff's claim that he was denied prescribed medical treatment, Defendant USA's motion to dismiss is **DENIED.**

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persuasive.

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Finally, to the extent Plaintiff also challenges the Atlanta USP's failure to install ladders or other devices on all bunk beds for access to the top bunk, the Court finds that the discretionary function exception applies to such action. The Court has found no statute, regulation, or policy governing the use of ladders or other devices on bunk beds, much less anything specifically requiring a federal prison to install such devices for access to top bunks.

Warden Grayer avers in his declaration that such decisions are made independently by each prison's administrators and require consideration of safety and security concerns because ladders or other assistive devices could be used as weapons. Plaintiff has presented no evidence to the contrary and has pointed to no statute, regulation, or policy removing prison officials' discretion as to whether to install ladders or other devices on bunk beds. Accordingly, the discretionary function exception applies to, and the Court lacks subject-matter jurisdiction over, any challenge to the Atlanta USP's decision not to install ladders or other assistive devices on all bunk beds. See Bultema, 359 F.3d at 384 (holding that the exception applied to decision not to install bed rails on top bunks because that decision implicated valid safety and security concerns); Jackson v. United States, No. 06-88 Erie, 2007 WL 2033902, at *6-*9 (W.D. Pa. July 12, 2007) (holding

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that the warden's decision not to install ladders on bunk beds "is precisely the type of policy decision that is protected" by the exception); Harris v. United States, No. 1:05CV17, 2006 WL 2583435, at *11-*12 (N.D.W. Va. Sept. 6, 2006) (same as to guard rails on top bunks); Paulino-Duarte, 2003 WL 22533401, at *2 (same).

II. Frivolity Review of Plaintiff's Bivens Claim

Pursuant to the Court's May 3, 2010 Order granting Plaintiff's most recent motion to amend his complaint (Doc. No. 13), Counselor Hawkins, Unit Manager Stewart, and Warden Grayer are now Defendants in this action. Plaintiff has fairly alleged that these individual prison officials were deliberately indifferent to his serious medical needs. Because Plaintiff is a prisoner, the Court must conduct a frivolity review of his claims against these individual Defendants. 28 U.S.C. § 1915A. For purposes of this review, the Court must accept Plaintiff's allegations as true and liberally construe Plaintiff's complaint because he is *pro se*. See Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990).

A. Legal Standard

A federal court must dismiss a prisoner's claim if the court determines, at any time, that the claim: (1) is frivolous or malicious or fails to state a claim on which relief may be granted; or (2) seeks monetary relief against a defendant who

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is immune from such relief. 28 U.S.C. § 1915A. A claim is frivolous when it "lacks an arguable basis either in law or in fact." Miller v. Donald, 541 F.3d 1091, 1100 (11th Cir. 2008). A complaint fails to state a claim when it does not include "enough factual matter (taken as true)" to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007) (noting that "[f]actual allegations must be enough to raise a right to relief above the speculative level" and that the complaint "must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"); see also Ashcroft v. Iqbal, 556 U.S. __, 129 S. Ct. 1937, 1951-53 (2009) (holding that Twombly "expounded the pleading standard for all civil actions").

To state a claim for relief under Bivens, a plaintiff must allege that: (1) an act or omission deprived him of a right, privilege, or immunity secured by the Constitution or a statute of the United States; and (2) the deprivation occurred under color of law. See Bivens, 403 U.S. at 389, 397; Powell, 914 F.2d at 1463. If a plaintiff fails to satisfy these requirements or to provide factual allegations supporting a viable cause of action, the claim may be dismissed. See Chappell v. Rich, 340 F.3d 1279, 1283-84 (11th Cir. 2003) (affirming district court's dismissal

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of § 1983 complaint because factual allegations were insufficient to support alleged constitutional violation); see also Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000) (per curiam) (noting that "as a general matter federal courts incorporate § 1983 law into *Bivens* actions" (citation omitted)).

B. Analysis

Plaintiff has alleged facts sufficient to state a claim of deliberate indifference to a serious medical need against Defendants Hawkins and Stewart, but not Defendant Grayer. A deliberate indifference claim is cognizable under Bivens.[12] Powell, 914 F.2d at 1463.

The Eighth Amendment to the Constitution prohibits deliberate indifference to a serious medical need. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976). If prison officials delay or deny access to medical care or intentionally interfere with prescribed treatment for an objectively serious medical need, the Constitution is violated. Id. at 104-05; McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999); Lancaster v. Monroe Cnty., Ala., 116 F.3d 1419, 1425 (11th Cir. 1997)

[12] Bivens claims can be brought only against federal officials in their *individual* capacities, however. Thibeaux v. U.S. Att'y Gen., 275 F. App'x 889, 893 (11th Cir. 2008). Plaintiff's claims against the individual Defendants in their official capacities are not cognizable and must be dismissed.

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("[A]n official acts with deliberate indifference when he intentionally delays providing an inmate with access to medical treatment, knowing that the inmate has . . . an urgent medical condition that would be exacerbated by delay.").

Plaintiff has alleged that he has a serious medical need for a bottom bunk bed and other accommodations because of nerve damage in his back and feet. Healthcare professionals at the Atlanta USP acknowledged Plaintiff's medical condition and his need for various accommodations on multiple occasions. Plaintiff was prescribed a bottom bunk, among other things, to treat his condition. These allegations, if true, support a finding that Plaintiff had an objectively serious medical need.

Plaintiff has further alleged that immediately upon being assigned to a top bunk he informed Counselor Hawkins and Unit Manager Stewart of his medical condition and the physician assistant's conclusion that Plaintiff needed a bottom bunk and other accommodations. Plaintiff contends that these Defendants refused to honor the Medical Prescription and ignored his repeated requests until he fell from the top bunk and injured himself two weeks later. Plaintiff contends that he complained to Counselor Hawkins on a daily basis about his medical need for a bottom bunk, but that she ultimately told him he was pestering her and that she

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would have him confined to the Special Housing Unit if he continued to press the issue. Plaintiff's allegations, if true, support a finding that Defendants Hawkins and Stewart knowingly refused to provide Plaintiff with the medical care he had been prescribed for a serious medical condition. Plaintiff alleges that he fell and suffered serious injuries that have required extensive medical treatment as a result of the refusal to honor his Medical Prescription. At this stage of the proceedings, therefore, the Court finds that Plaintiff has stated a viable deliberate indifference claim against Defendants Hawkins and Stewart. See Keller v. Williams, No. 09-60272-CIV, 2009 WL 1689302, at *4 (S.D. Fla. June 17, 2009) (allowing deliberate indifference claim to proceed where the plaintiff alleged that two corrections officials "both refused to honor a physician prescribed special diet pass for treatment of his diabetes, and he suffered numbness, pain and sickness as a result of their refusal").

Plaintiff has not stated a viable claim against Warden Grayer, however, because he alleges no facts suggesting that Warden Grayer played any role in denying Plaintiff his prescribed medical treatment. A warden cannot be vicariously liable under Bivens for his subordinates' alleged unconstitutional acts, but instead must have personally participated in the acts or taken action that is

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causally connected to the alleged constitutional violation. Dalrymple v. Reno, 334 F.3d 991, 995 (11th Cir. 2003). Plaintiff's only allegations regarding Warden Grayer are that: (1) Plaintiff informed Warden Grayer that he fell from the top bunk on January 24, 2008; and (2) he planned to talk with Warden Grayer about his Medical Prescription on January 25, but did not do so because Unit Manager Stewart intervened. Plaintiff does not allege that he had any contact with Warden Grayer after being assigned to the top bunk on January 11 and before his fall on January 24. Nor does he allege that Warden Grayer knew about Plaintiff's Medical Prescription or the bunk issue prior to the fall. Plaintiff therefore fails to state a Bivens claim against Warden Grayer.[13]

III. Conclusion

For the foregoing reasons, Defendant United States of America's Motion to Dismiss (Doc. No. 14) is **DENIED**. The Clerk is **DIRECTED** to correct the

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[13] It is not clear from Plaintiff's complaint whether he exhausted his administrative remedies regarding his Bivens claims. Once served with process, Defendants Hawkins and Stewart may raise any lack of administrative exhaustion, which is an affirmative defense. See Okpala v. Drew, 248 F. App'x 72, 73 (11th Cir. 2007); see also Lambert v. United States, 198 F. App'x 835, 840 (11th Cir. 2006) (noting that there are separate procedures for exhausting Bivens claims and FTCA claims).

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docket by adding the following individuals as defendants in their official and individual capacities: J.E. Stewart, Counselor Hawkins, and Warden Grayer.

Plaintiff's Bivens claims against Defendant Warden Grayer, in both his official and individual capacities, and Defendants J.E. Stewart and Counselor Hawkins in their official capacities are **DISMISSED** under 28 U.S.C. § 1915A. Plaintiff's Bivens claims against Defendants J.E. Stewart and Counselor Hawkins in their individual capacities are **ALLOWED TO PROCEED** like any other civil action.

A plaintiff who sues an officer or employee of the United States must serve both the individual defendant and the United States. See Fed. R. Civ. P. 4(i)(2), (3). Accordingly, the Clerk **SHALL** send Plaintiff one USM 285 form and one summons each for: (1) the United States Attorney General; (2) the United States Attorney for the Northern District of Georgia; (3) Defendant Hawkins; and (4) Defendant Stewart. Plaintiff **SHALL** complete each USM 285 form and summons and return the forms to the Clerk of Court within twenty (20) days of the date this Order is entered. Plaintiff is warned that failure to comply in a timely manner may result in dismissal of this civil action. The Clerk **SHALL** resubmit this action to the Court if Plaintiff fails to comply.

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Upon receipt of the completed forms from Plaintiff, the Clerk **SHALL** prepare and transmit to the U.S. Marshal's Service two service packages for the United States, as described in Fed. R. Civ. P. 4(i)(1).[14] Each service package must include the USM 285 form and a copy of the summons and of the complaint. Upon receipt of the service packages, the U.S. Marshal's Service **SHALL** serve the United States as provided in Rule 4(i)(1). Each completed USM 285 form **SHALL** be filed with the Clerk.

For Defendants Hawkins and Stewart, the Clerk **SHALL** prepare a service waiver package.[15] Each service waiver package must include two (2) Notice of Lawsuit and Request for Waiver of Service of Summons forms (prepared by the

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[14] "To serve the United States, a party must: (A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought–or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk–or (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office"; and also "(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C." Fed. R. Civ. P. 4(i)(1).

[15] "To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must . . . serve the officer or employee under Rule 4(e), (f), or (g)." Fed. R. Civ. P. 4(i)(3). "Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d)." Rule 4, Advisory Comm. Notes, 2000 Amend. ¶ 1.

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Clerk), two (2) Waiver of Service of Summons forms (prepared by the Clerk), an envelope addressed to the Clerk of Court with adequate first class postage for return of the waiver form, one (1) copy of the complaint (with amendments and exhibits), and one (1) copy of this Order. The Clerk **SHALL** retain the USM 285 form and summons for each Defendant.

Upon completion of a service waiver package for Defendants Hawkins and Stewart, the Clerk **SHALL** complete the lower portion of the Notice of Lawsuit and Request for Waiver form and mail a service waiver package to each of those Defendants. Defendants have a duty to avoid unnecessary costs of serving the summons. If a Defendant fails to comply with the request for waiver of service, that Defendant must bear the costs of personal service unless good cause can be shown for failure to return the Waiver of Service form.

In the event a Defendant does not return an executed Waiver of Service form to the Clerk of Court within thirty-five (35) days following the date the service waiver package is mailed, the Clerk **SHALL** prepare and transmit to the U.S. Marshal's Service a service package for each such Defendant. Each service package must include the USM 285 form and a copy of the summons and of the complaint. Upon receipt of the service package, the U.S. Marshal's Service

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SHALL personally serve each Defendant who failed to waive service. The executed waiver form or the completed USM 285 form **SHALL** be filed with the Clerk.

Plaintiff **SHALL** serve upon Defendants or Defendants' counsel a copy of every additional pleading or other document that he files with the Clerk of Court. Each pleading or other document filed with the Clerk **SHALL** include a certificate stating the date on which an accurate copy of that paper was mailed to Defendants or Defendants' counsel. This Court will disregard any submitted papers that have not been properly filed with the Clerk or that do not include a certificate of service.

Plaintiff also **SHALL** keep the Court and Defendants advised of his current address at all times during the pendency of this action. Plaintiff is admonished that the failure to do so may result in the dismissal of this action.

Finally, this case **SHALL** proceed on a four (4) month discovery track, beginning thirty (30) days after the appearance by answer of either Defendant Hawkins or Defendant Stewart. See LR 26.2(A)-(B), NDGa.

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SO ORDERED, this 5 day of August, 2010.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

RECEIVED
2010 MAY 21 A 10:20

FREDERICK IRVIN,
PLAINTIFF

CASE NO: 9:10CV1336HFFBM

V

1) JOHN OWENS, WARDEN
FCI WILLIAMSBURG

2) HOLMES, CORRECTIONAL RECREATION OFFICER
FCI WILLIAMSBURG

3) BROWN, CORRECTIONAL RECREATION OFFICER
FCI WILLIAMSBURG

4) UNITED STATES

_____ /

BIVENS ACTION and 28 U.S.C. § 1346, 2671-2680
BIVENS VS 6 UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS, 403 U.S. 388, 91 S. Ct. 199, 29 L Ed 2d 619 (1971)

1) Violation of 8th Amendment
2) Intentional Infliction of Emotional Distress
3) Pain and Suffering
4) Negligence, 28 USC § 1346, 2671-2680
5) Punitive Damages
6) Compensatory Damages

Date: May 14, 2010

Frederick Irvin

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

1) Capacity- All defendants are being sued in there individual capacity.

2) Bivens- All defendants were employed by the government when the incident occurred.

3) Frederick Irvin- Plaintiff.

4) John Owens, Warden of FCI WIlliamsburg- Defendant.

5) Holmes, Correctional Recreation officer at FCI Williamsburg- Defendant.

6) Brown, Correctional Recreation Officer at FCI Williamsburg- Defendant.

7) United States- Defendant.

8) Damages- Money, 5 million dollars.

JURISDICTION

Bivens action and pendant State Law claims; 28 USC § 1346, 2671-2680.

STATEMENT AND FACTS

On May 30, 2009, while officiating a prison summer league basketball game, Plaintiff frederick irvin, was attacked and assaulted by another inmate Bobby Addison. When the assault occurred prison staff failed to be present to monitor the game, nor was there any staff present to ensure the safety of the inmate officials who was previously threatened with physical harm on numerous occasions by inmate bobby Addison. (See Tort Claim Attached) Inmate Bobby Addison was known to be violent due to past conduct such as fracturing inmate Carl McNeil's jaw, (Ex. A & G), and due to his previous threating conduct inside the gym towards other officials, (Ex. C, D & G), a fact known to prison staff prior to the May 30, 2009 summer league basketball game.

Prison staff placed Addison in special housing behind the assault of Carl McNeil. Despite all these incidents involving violence or threats of violence by Addison, prison staff STILL allowed Addison to continue to participate in

approved recreational sports. Furthermore, staff even failed to monitor the sporting events.

In this instance, plaintiff Irvin, herein, while officiating, tried to stop the basketball game because of Addison's threatening behavior. (Ex. G) Addison attacked the plaintiff as he walked away and was defenseless. The attack and assault led the plaintiff to fight for his life as his skull hit the cement from his fall from the attack.

Inmate Donald Vanderhorst (Ex. B) ran to find any staff to report that the plaintiff was seriously hurt from the assault. When prison staff arrived the plaintiff was lying in a large puddle of blood, having problems breathing and was unconscious.

In all, the plaintiff was transported to Williamsburg Regional Medical Center in which it was determined that the plaintiff had life threatening injuries. The plaintiff was transfered to MUSC for bleeding of the brain. The plaintiff sustained a nasal, jaw and mastoid fractures, a sub arachnoid hemmorrhages along the bilateral frontoparietal lobes, a sub dural hematoma extending from the frontal lobe anteriorly to the occipital lobe, fluid scattered through the left mastoid cells, right brain contusion, 6 staples to the back of the head, sutured laceration to the lip, lost of taste and smell senses and problems with the memory.

While this assault/attack was occurring, Officer Holmes and Officer Brown did nothing to protect the plaintiff. In fact, the defendant's is resposible for the assault/attack since staff was not on the sideline during the game to resolve all conflicts according to policy. (Ex. E) Staff was aware that multiple assaults have occurred at this prison and that being an inmate official poses danger to the plaintiff.

CLAIM 1

PLAINTIFF'S EIGHT AMENDMENT RIGHTS WERE VIOLATED BY CO HOLMES AND CO BROWN FAILING TO PROTECT HIM FROM ATTACK/ASSAULT BY INMATE

The Eighth Amendment imposes a duty on prison officials "to protect prisoners from violence at the hands of other prisoners.: Farmer v Brennan, 511 US 825, 833 (1994)(citation omitted). To establish a claim for failure to protect from violence, an inmate must show: (1) " that he is incarcerated under conditions posing a substantial risk of serious harm," Id. at 834, and (2) that the prison officials had a "sufficiently culpable state of mind." Id. (internal citations and quotations omitted.) "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." Id. (internal citations omitted). To be deliberately indifferent, a prison official must " know of and disregard an excessive risk to inmate health and safety." Id. at 837.

"Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including circumstantial evidence, ... amd a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

A prison official also may not "escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." Id. at 843. See Davidson v Cannon, 474 US 344, 347 (1986); Grayson v Peed, 195 F. 3d 692, 695 (4th Cir. 1999). The plaintiff must also show he suffered a serious or significant physical or mental injury as a result of the defendant's conduct. Strickler v Waters, 989 F. 2d 1375, 1380-81 (4th Cir. 1993).

Prison supervisors with knowledge of "a persuasive and unreasonable risk of harm" to the prisoners, fail to take remedial steps to prevent such harm, their conduct may be properly characterized as "deliberate indifference".... Moore v Winebrenner, 927 F. 2d 1312, 1315 (4th Cir. 1991).

A) PLAINTIFF FREDERICK IRVIN IS/WAS INCARCERATED AT FCI WILLIAMSBURG UNDER CONDITIONS POSING A SUBSTANTIAL RISK OF SERIOUS INJURY

Plaintiff, Frederick Irvin, was housed at FCI Williamsburg on May 30, 2009 in South Carolina. FCI Williamsburg is excessively overcrowded which had led to violent attacks/assaults on inmates and staff.

Therefore, due to the overcrowding stabbings, assaults, fights and violence occurring frequently, it is clear that the plaintiff is incarcerated under conditions posing a substantial risk of serious harm, thus satisfying the 1st prong of the Farmer v Brennan test.

B) DEFENDANT'S HOLMES AND BROWN ACTED WITH "DELIBERATE INDIFFERENCE" TO THE PLAINTIFF'S SAFETY

As with the 2nd prong of Brennan, it is evident that Holmes and Brown acted with Deliberate Indifference to plaintiff's safety where as they knew that there was excessive risk to the inmates health or safety by the procedures they employed by not monitoring an approved recreational game. The defendant's knew the obvious that being a inmate official in prison is dangerous and they disregarded the risk. Furthermore, the defendants had knowledge that Addison was participating in the game. The defendant's was aware of Addison violent rages as he has assaulted an inmate before. The plaintiff had informed staff of supervising games for the protection of the referees. Staff was aware of the obvious but failed to intervene in the initial disruption of Addison. Because of defendant's disregard to the

substantial and safety risk, the plaintiff was seriously injured in which he nearly lost his life.

Clearly the defendant's was aware of the risk of serious harm that existed, by not supervising/monitoring the scheduled approved game. it is truly obvious that this type of risk existed when being in a overcrowded violent prison you have inmate referees not being protected by staff by not monitoring the game according to policy.

In addition, defendant's Homes and Brown did not respond reasonable to the known risk or try to minimize it since this was the only scheduled approved game going on at the time the assault/attack occurred. (Ex. H) In fact, the defendant's was aware of Addison's violent behavior toward inmate referees. By there being no other scheduled game being played there were no reason for the defendant's **NOT** to monitor the game. donald Vanderhorst had to run to find one of the defendants to tell then that the plaintiff have been assaulted. The defendant's were no where near the vicinity. The plaintiff was unconscious laying in a puddle of blood, bleeding profusely from the mouth, making gurgling sounds and having problems breathing when one of the defendant's arrived.

Therefore, with all the facts taken into consideration, plaintiff has stated a claim under the Eigth Amendment and the Farmer v Brennan theory. It should be known that defendant's Brown and Holmes was aware that being a prison official is dangerous and that the prison was violent.

CLAIM 2
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In South Carolina, to establish the claim for intentional infliction of emotional distress, a plaintiff must show:

1) Defendant intentionally or recklessly inflicted severe emotional distress or

substantially certain that such distress would result from his conduct.

2) The conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community.

3) The actions of the defendant caused the plaintiff emotional distress.

4) The emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. See Ford v Hutson, 276 S.C. 157, 162, 276 S.E. 2d 776, 778 (1981).

In this case at bar, the defendant's Holmes and Brown were aware that Addison had fractured Carl McNeil's jaw intentionally in which Addison was isolated from general population because of the assault. Addison was allowed to continue to participate in intramural sports even after policy states that any physical alteration they are suspended for a minimum of one year. (See Ex. E) Furthermore, defendant's knew of the risk, posed by being an inmate referee. Addison has threated other inmate referee's in which staff was aware of. The defendant's had information in knowing that Addison was participating in the game. The conduct they employed was extreme and outrageous in which lead to serious harm to the plaintiff by not following policy in which consist of but not limited to being present at all games to resolve all conflicts. Instead, defendant's Holmes and brown relied on the plaintiff to do their job by trying to resolve a conflict in which the plaintiff was seriously injured. This conduct was intentional or reckless.

The conduct of the defendant's of not following their policy caused the plaintiff to suffer emotional distress. The plaintiff has anxiety, depression and their conduct has caused problems with the plaintiff's family relationships. The emotional distress which was severe, affected the plaintiff mentally and physically from his injuries in which plaintiff was hospitalized, left with

physical disabilities and nearly died.

The conduct was extreme and utterly intolerable in a civilized community for failure to monitor and supervise the action of dangerous inmates and to rely on plaintiff, Frederick Irvin, to resolve conflicts of dangerous inmates knowing that if defendants followed the policy of supervising the game, they would have minimized the risk. Because of the defendant's conduct, the plaintiff was left helpless and defenseless as the plaintiff was blindisighted as Addison attacked the plaintiff while his back was turned to him. (Ex. F) Furthermore, the plaintiff was attacked in the presence of other inmates which caused additional emotional distress.

DAMAGES

The plaintiff request 5 million dollars from the defendant's Holmes and brown for their conduct in this claim.

CLAIM 3
PAIN AND SUFFERING

The plaintiff request to be compensated for the pain and suffering he suffered as a result of the injuries he received due to the conduct of defendant's Holmes and Brown. Plaintiff request $500,000 dollars for the Pain and Suffering.

CLAIM 4
NEGLIGENCE

Section 3672 of Federal Tort Claims Act delegates to each Federal Agency the authority to consider, determine and settle any claim for money damages against the U.S. for loss of personal property or injury caused by the negligent or

wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

In this case, the U.S. is a defendant where as the defendant's Holmes and Brown was an employee of the Federal Bureau of prison when they committed the negligence, and omission which caused the injuries of plaintiff.

Defendant's Holmes and brown was acting within the scope of their employment when they committed the negligence or omission complained of herein.

The defendant's Holmes and Brown, U.S., failed to exercise a standard duty of care and negligently filed to monitor a schedule summer league basketball game according to policy. (Ex. E) The defendant's knew the risk, for failure to monitor the actions of dangerous inmates could and would harm another inmates health. The defendant's knew of the risk, posed by being an inmate referee, was dangerous but failed to stop all conflicts by not following policy.

These specifics acts of defendant's Holmes and brown, U.S., led to the plaintiff being attacked and viciously assaulted and led to permanent physical, mental and psychological injuries. See 276 Fed. Appx 339 Allen v Choice Hotels.

The plaintiff herein assert that defendant's Holmes and Brown, U.S., is liable where as they knew or should have known that harm to the health of plaintiff would result by failing to monitor game according to policy. Furthermore, defendant's was aware of inmate Bobby Addison prior assaults during scheduled recreational sports and continued to let him participate knowing that Addison was violent. Furthermore, the defendant's are liable by relying on plaitiff to do their job to resolve conflicts between dangerous inmates which led to the injuries to the plaintiff.

The plaintiff request 2 million dollars for the negligence of defendant's Homes, brown, u.S., which led to his injuries.

CLAIM 5
PUNITIVE DAMAGES

The plaintiff request Punitive Damages herein where the defendant's Holmes and Brown conduct was reckless and taken in disregard of plaintiff's rights. In this case, the plaintiff was harmed due to the defendant's Holmes and Brown conduct of recklessly allowing a scheduled summer league game to be unsupervised and relying on plaintiff to do their job of resolving conflicts of dangerous inmates.

Furthermore, the defendant's was aware of the danger of not supervising the game. The defendant's conduct led to the plaintiff being attacked and assaulted.

Under the facts and evidence of this case, the plaintiff is entitled to Punitive Damages in the amount of 1.5 million dollars. This amount will deter defendant's or the actual defendant's Holmes and Brown from further omissions of this kind of complaint herein. See Smith v Wade, 461 US 30, 75 L Ed 2d 632.

CLAIM 6
COMPENSATORY DAMAGES

The plaintiff request Compensatory Damages in the amount of 2 million dollars due to his physical, mental and emotional injuries, future medical expenses, future economic earnings as well as pain.

The plaintiff is entitled to this considering he was brutally assaulted, hospitalized and have permanent scars, physically, metally and economically. See medical record (Discovery).

Plaintiff request 2 million dollars.

REQUEST FOR A JURY TRIAL

The plaintiff herein request the honorable court grant him a Jury Trial on all the claims and damages presented herein. The plaintiff asserts he is entitled to a Jury Trial on his issues and damages alleged in the complaint.

CONCLUSION

Plaintiff request this Honorable Court to grant him a trial or claims herein whereas he can receive the Damage amount he request herein.

Date: May 14, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

CERTIFICATE OF SERVICE

I, Frederick Irvin, swear under the penalty of perjury that this brief was given to prison authorities on May 14, 2010, for mailing to the following:

Clerk of Court
District of south Carolina
P.O. Box 2317
Florence, SC 29503

Date: May 14, 2010

Frederick Irivn #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

AFFIDAVIT OF FREDERICK IRVIN

I, Frederick Irvin, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed at FCI Elkton in Lisbon, Ohio. I was incarcerated in FCI Williamsburg in South Carolina from December 2007 til January 2010.

2) On May 30, 2009 an approved summer league basketball game was scheduled to play after the 5 minute recreation movement had ended. The game was scheduled at this particular time so that the game will be over in time for the other scheduled softball game that was scheduled to start at 6:30pm.

3) I was the league commissioner/official that worked for staff to overlook the league.

4) Being the league commissioner, staff relied on me to be present at every game, keep staff informed of the problems that arises, train officials and whatever is needed to oversee the league for staff. I have also had to resolve conflicts of dangerous inmates which I was required to suspend them from play.

5) Staff was aware of Addison's threats and violent rage against me and others. I have told staff the importance of supervising the games and suspending inmates under their policy. staff knew their presence have and would prevent assaults, attacks and any altercations.

6) I have suspended Addison several times for his violent rage and Addison has threatened me because of the suspension.

7) On May 30, 2009, during the summer league basketball game, Addison became disruptive and went into his violent rage.

8) Staff was not present to resolve the conflict so I stopped the game to try to calm down Addison. Addison became unruly, threatening and insulting. At that point I ended the game.

9) Addison threatened me and others but I walked away from the confrontation to gather the equipment. Addison struck me from behind while my back was turned to him.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned

Affiant certifies that the above are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the Untied States.

Date: May 14, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

BP-A0943 Small Claims for Property Damage or Loss (31 U.S.C. § 3723) CDFRM MAY 09

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

1. Location where the property loss or damage occurred:	2. Name, address of claimant (Register number, street, city, state, and zip code):
Federal Correctional Institution Williamsburg P.O. Box 340 Salters, SC 29590	Frederick Irvin #16620-039 Federal Correctional Institution Elkton P.O. Box 10 Lisbon, OH 44432
3. Date and Day of Incident: May 30, 2009	4. Time: (A.M. or P.M.): Approximately 5:30-5:45 P.M.

5. Basis of Claim (State in detail the known facts and circumstances of the damage to, or loss, of privately owned property, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages, if necessary.): On May 30, 2009, while at FCI Williamsburg, claimant was supervising/officiating a scheduled summer recreational summer league basketball game and was attacked and assaulted by inmate Bobby Addison. Correctional Recreational Officers Holmes and Brown knew of the risk posed by being an inmate referee and failed to monitor/supervise the scheduled game according to policy. The claimant suffered a nasal, jaw and mastoid fractures, a sub arachnoid hemmorhages along the bilateral frontoparietal lobes, a subdural hematoma extending from the frontal lobe anteriorly to the occipital lobe, fluid scattered through the left mastoid cells, right brain contusions, 6 staples to the back of the head, sutured laceration to the lip, lost of taste and smell senses and continued damage to memory. The claimant was hospitalized because of the assault.

6. Witnesses (Please provide the name and address (number, street, city, state, and zip code of each witness)):

Jermaine Pickett #16285-171
FCI Williamsburg
P.O. Box 340
Slaters, SC 29590

Greg Uzzell #24862-056
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

D'shun Rucker #13252-171
MCFP Springfield
P.O. Box 400
Sprigfield, MO 65801

Donald Vanderhorst
#95301-071
FCI Fort Dix
Fort Dix, NJ 08640

7. Amount of Claim for Damage to, or loss of, privately owned property (in dollars) (Sum Certain Amount - Total Amount Of Claim):

$ 2 million dollars

8. MAIL OR DELIVER CLAIM TO THE REGIONAL OFFICE WHERE THE CLAIM OCCURRED

I CERTIFY THAT THE AMOUNT OF THE CLAIM COVERS ONLY DAMAGE TO, OR LOSS OF PRIVATELY OWNED PROPERTY CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

9. Signature of Claimant or Authorized Representative	10. Date
Frederick Irvin	5-05-10

WPD Prescribed by PS 1320

Ex. A

AFFIDAVIT OF CARL McNEIL JR.

I, Carl McNeil Jr, a breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in Salters, South Carolina.

2) On October 12, 2008 I was playing in a scheduled recreational Flag Football game.

3) During the football game inmate Bobby Addison, also known as Bilal, was in a violent rage as he and my teammate, inmate Hutchinson, started arguing. Mr. Addison threatened Mr. Hutchinson by stating, "I'll get you."

4) The very next play, after the whistle was blown and the play was over, Mr. Addison charged towards Mr. Hutchinson where I was also standing after the play was over.

5) Mr. Addison intentionally dove off his feet at Mr. Hutchinson. Mr. Hutchinson ducked and I was struck in the face with Mr. Addison's forearm. I was knocked unconscious.

6) I was taken to the hospital in which the impact, from Mr. Addison's rage, fractured my upper and lower jaw and a plate was inserted.

7) Staff was aware of Mr. Addison's aggressive and violent behavior and his intentions to hurt someone and put him in SHU (Special Housing Unit).

8) Staff released Mr. Addison from SHU knowing he had a violent rage and Recreational Staff let Mr. Addison continue to play in the rest of the 2008 Flag Football season and other recreational sports.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: September 7, 2009

Carl McNeil 21196-056
Carl McNeil #21196-056
Affiant
FCI Williamsburg - POB 340
Salters, SC 29590

Ex. B

AFFIDAVIT OF DONALD VANDERHORST

I, Donald Vanderhorst, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was actively participating in a scheduled recreational summer league basketball game which include inmate Bobby Addison.

3) During the course of the game, inmate Bobby Addison had become disruptive and threatening in which the game was stopped by an inmate basketball official Frederick Irvin.

4) After the end of the game, Mr. Addison behavior became violent in which he hit Mr. Irvin which caused Mr. Irvin's head to hit the concrete. Mr. Irvin was unconcious and bleeding profusely.

5) There was no Reacreation Staff or Correctional Staff supervising the game nor in the vicinity of the court where the assault happened so I ran to find any Staff for assistance.

6) Rec Staff Holmes was on the other side of the yard by the handball courts when I told him Mr. Irvin had been hit by Mr. Addison and Mr. Irvin was laying on the court hurt badly.

7) I have witnessed Mr. Addison on several occassions being disruptive and his constant threats towards inmate officials/referees.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

DATE: August 3, 2009

Donald Vanderhorst

Donald Vanderhorst #95301-071-AFFIANT
FCI Williamsburg
PO BOX 340
Salters, SC 29590

Ex. C

AFFIDAVIT OF LANCE POUGH

I, Lance Pough, a living breathing man, competent to give testimony, do hereby say and declare the following facts are True and Correct:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) I am a prison recreational basketball referee.

3) I was threatened by inmate Bobby Addison on many occassions while officiating the winter indoor Basketball League games in 2008.

4) Inmate Addison on multiple occassions not only threatened me but also Inmate Frederick Irvin who would be officiating with me.

5) Inmate Addison would become uncontollable and violent during different games which result in him being rejected from the games and in return he would make threats that he was gonna get us (the referees) one day.

6) Recreation Staff here in this prison was aware of Inmates Addison conduct, behavior and threats yet still failed to act or supervise the games.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: November 22, 2009

Lance Pough

Lance Pough #53277-060
Affiant
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

EX. D

AFFIDAVIT OF DESHAUN RUCKER

I, Deshaun Rucker, a living breathing man, competetnt to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was watching a basketball game of the summer outdoor leauge.

3) During this particular game, an incident arose where an inmate had become disruptive and threatening other inmate players, as well as Frederick Irvin who was an inmate official.

4) The inmates name is Bobby Addison, also known as Bilal that was disruptive.

5) As the game came to an end, Mr. Addison behavior became uncontrollable and violent in which he attacked Mr. Irvin by punching Mr. Irvin in the face where as Mr. Irvin fell to the cement and hit his head on the pavement. Mr. Irvin was unconscious and bleeding profusely.

6) There was no recreational staff, or correctional staff supervising the game nor in the vicinity of the court where the assault occurred.

7) I seen Donald Vanderhorst, another inmate, go retrieve Rec Staff Holmes who returned to the court.

8) Rec Staff Holmes was on the otherside of the recreational field by the last handball court about 150 yards away.

9) I witnessed hearing and seeing, inmate Addison violent disruptions, and threats casted towards the inmate officials Irvin and Lance Pough on numerous occassions while playing in the previous indoor basketball league while Addison was on my team.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: August 4, 2009

D'Shaun Rucker

Deshaun Rucker # 13252-171
Affiant
FCI Williamsburg - POB 340
Salters, SC 29590

Ex. E

FCI WILLIAMSBURG INTRAMURAL CODE OF CONDUCT

The primary purpose for our intramural sports program is to provide an organized, safe, and enjoyable form of recreation for all interested inmates. Emphasis is placed on creating a positive non-threatening atmosphere in which players, coaches, officials, and spectators can relax and enjoy the social interaction and physical benefits of athletic competition.

THERE WILL BE NO TOLERANCE FOR UNSPORTSMANLIKE LIKE CONDUCT. Those inmates who cannot maintain control of their actions and/or emotions will be removed from the intramural program, **without hesitation**. The integrity of the Recreation Department's intramural program **will not** be compromised by inmates who cannot conform to general rules of sportsmanship, as well as posted intramural rules.

ALL PARTICIPANTS ARE ADVISED THAT VIOLATIONS OF INTRAMURAL RULES, IN MANY CASES, CONSTITUTES A VIOLATION OF BUREAU POLICY AND MAY RESULT IN DISCIPLINARY ACTION ABOVE AND BEYOND THOSE STATED IN THE FOLLOWING INTRAMURAL RULES AND REGULATIONS.

RULES OF CONDUCT

1. **Any player or coach ejected from a game is suspended from <u>all</u> intramural competition for a minimum of two (2) games. Any subsequent ejection from a game will result in a six (6) month suspension from any league. A participant suspended from one league, cannot play in another league (basketball, volleyball, soccer, football, or softball) while under suspension. A violation of this rule will result in suspension from intramural program for a minimum period of one (1) year.**

2. **Any player or coach placed on suspension a second time, from any intramural sport, within six(6) months from the date of eligibility from the previous suspension is suspended from all intramural participation for a minimum period of one (1) year. This includes soccer, basketball, volleyball, football, and softball regular seasons, practice games, jamborees, special tournaments, etc.**

3. Participants will treat staff, officials, other participants, and spectators with respect at all times. Abusive language, threatening gestures or behavior **will not be tolerated.** Violations will result in an immediate expulsion from the game and a minimum two (2) game suspension. Such incidents may involve additional disciplinary action as determined by Recreation Staff, Correctional Services, Unit Team, or Disciplinary Hearing Officer (DHO).

4. All players and coaches under suspension must remain outside gym, soccer field, softball field, and volleyball court area while any league game is in progress, during warm-ups, and while teams are practicing. A violation will result in suspension from the intramural program for a minimum period of six (6) months from the date of the violation.

5. Any player or coach ejected from a game (for any reason) is, in addition to the minimum two (2) game suspension, ineligible to compete in the varsity competition for a minimum period of six (6) months.

6. If any recreation property (i.e. jerseys, whistles, gloves, balls, shin guards, etc.) is confiscated from an inmates's person or property, that inmate is suspended from all intramural sports for a minimum period of six (6) months, and is subject to receiving an incident report for possession of contraband.

7. Any coercive action (i.e. threats, bribes, etc.) made to any official before, during, or after a game by any player or coach may result in suspension from all intramurals for up to one (1) year.

8. Officials who threaten players or coaches are subject to the same disciplinary actions as players.

9. A staff member is present on the sideline during all games. He/She resolves all conflicts and his/her decision is final. Staff have the authority to over rule all calls, make calls, and take any and all action to maintain control and the integrity of the game.

10. Only inmates on the team rosters may sit on the team bench during games. Violation(s) may result in forfeiture of the game, as determined by the League Commissioner.

11. Coaches are responsible for their teams "conduct" while participating in the league. The coach may be assessed fouls or ejected from a game if they cannot control their players demeanor. Coaches ejected are subject to the same penalty as players.

12. Any player involved in any type of physical altercation is subject to disciplined action and suspension from all intramural activities for a minimum of one (1) year.

13. Players and coaches attending games as spectators may be disciplined for unsportsman like conduct, to include warnings, technical fouls, ejections, and incident reports. The same standard of conduct required of players and coaches applies when spectating.

14. Participants who throw or kick basketballs, softballs, soccer balls, or volleyballs against the walls, ceilings, etc. are suspended for a minimum of two (2) games and may be held financially responsible for any damage to property and/or equipment.

15. All participants must acknowledge, by signing, that they have read and understand the intramural code of conduct prior to playing in any game.

16. Participation without signing the code of conduct may result in a minimum two (2) game suspension and forfeiture of all games played prior to signing.

17. Any coach, official, or score keeper with a problem or complaint needs to first address it with the League Commissioner before taking it to higher authority. Failure to comply may result in dismissal of the complaint.

18. Official protests may only be filed on **Rule Interpretations, Roster Infractions, and Player Eligibility.** Coaches who attempt to file protests outside of these areas, or who file frivolous protests are subject to removal from the league.

19. Team names are limited to the name of the Unit or the name of an official NBA, MLB, MISL, team.

I have read and understand the intramural code of conduct.

TEAM NAME:_____ DATE:_____

PLAYERS	REGISTRATION #	DATE
COACH:_____	_____	_____
1._____	_____	_____
2._____	_____	_____
3._____	_____	_____
4._____	_____	_____
5._____	_____	_____
6._____	_____	_____
7._____	_____	_____
8._____	_____	_____
9._____	_____	_____
10._____	_____	_____
11._____	_____	_____
12._____	_____	_____
13._____	_____	_____
14._____	_____	_____
15._____	_____	_____

V SPECIFIC EVIDENCE RELIED ON TO SUPPORT FINDINGS (physical evidence, observations, written documents, etc.)

Your due process rights were read and reviewed with you by the DHO at the time of the hearing. You stated you understood your rights, had no documentary evidence to present, and requested no witnesses or a staff representative to appear on your behalf to refute the charge against you.

The DHO finds you committed the prohibited act of Assaulting Any Person (Serious), code 101, when you struck inmate Irvin #16620-039, causing him to fall on the basketball court striking his head.

The DHO bases this finding on the written statement of the reporting staff member that on May 30, 2009, at approximately 5:50 p.m., you assaulted inmate Irvin by striking him from behind on the left side of his face with a clenched fist. When you struck him, you caused him to fall to the ground where he struck his head on the basketball court in the outside recreation area. Three inmate witnesses provided statements they had observed you assault inmate Irvin. On May 30, 2009, inmate Irvin was transported to the local hospital where he received treatment consistent with someone who had a brain contusion. The medical reports indicated inmate Irvin sustained nasal bone and mastoid fractures, a sub arachnoid hemorrhages along the bilateral frontoparietal lobes, a sub dural hematoma extending from the frontal lobe anteriorly to the occipital lobe, and fluid scattered through the left mastoid air cells. The report indicated there was a possible right brain contusion. A supporting memorandum from the Operations Lieutenant indicated inmate Irvin was lying in a large pool of blood, bleeding profusely from his mouth and making a gurgling sound, was having problems breathing and was incoherent. An injury assessment conducted on you revealed you sustained a laceration to your left first knuckle. The injuries sustained are indicative a serious assault was inflicted.

The DHO considered your statement that you did not commit this act. However, you were positively identified by three inmate witnesses. You also indicated you had a right to confront your witnesses. Although the witnesses did not appear at your hearing, their identities and statements were revealed during the hearing. Inmate Salters #62137-004, stated you were having a verbal altercation with two other inmates while you were playing a basketball game and inmate Irvin cancelled the game to prevent further problems. You proceeded to call inmate Irvin names, approached him, and struck him from the left side. Inmate Riley #70098-056, indicated you were arguing with him, and inmate Irvin called the game to prevent further disruption. You proceed to run up behind him and "sucker punch," him on the side of the head causing him to fall to the ground. Inmate Pickett #16285-171, indicated you were arguing with another inmate and inmate Irvin attempted to stop the argument. After you and the inmate walked away from each other, you approached inmate Irvin and punched him. Therefore, it is apparent you had retaliated against inmate Irvin during the basketball game. You hit inmate Irvin due to his call to cancel the game because you and inmate Riley #70098-056 were arguing and demonstrating poor sportsmanship.

Therefore, the DHO relies on the greater weight of evidence, the injuries sustained by inmate Irvin which required outside medical attention, the witnesses to the incident who provided similar testimonies, and the detailed description reported by the reporting staff member. As a professional staff member, he is legally and morally obligated to provide truthful statements.

Based on the reporting officer's statement, the supporting memorandums, the injury assessment conducted on the victim, inmate Irvin, the fact you had blind sighted inmate Irvin causing him to fall to the court and hit his head requiring outside medical attention, and the SIS investigation revealing the witnesses' statements regarding your role in this incident, the DHO finds you did commit the prohibited act of Assaulting Any Person (Serious), code 101.

VI SANCTION OR ACTION TAKEN

Disallowance of Good Conduct Time	No. of Days	40	Suspended	Y/N	N	No. Days	
Forfeit Non Vested Good Conduct Time	No. of Days	40	Suspended	Y/N	N	No. Days	
Loss of Telephone Privileges	No. of Days	365	Suspended	Y/N	N	No. Days	
Loss of Commissary Privileges	No. of Days	365	Suspended	Y/N	N	No. Days	
Disciplinary Segregation	No. of Days	60	Suspended	Y/N	N	No. Days	
Recommend Disciplinary Transfer		XXX					

VII REASON FOR SANCTION OR ACTION TAKEN

Seriously assaulting another and refusing to cease your actions in a correctional environment will not be tolerated. You participation in this behavior jeopardizes the security of this institution and may have resulted in further injury to staff and other inmates.

EX. G

AFFIDAVIT OF GREGORY UZZELL

I, Gregory Uzzell, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was an official during a summer league basketball game that started at 5-5:30pm.

3) Approxiamtely 10minutes in to this game, inmate Bobby Addison, also known as Bilal, began verbally insulting a member of his team. Another inmate spoke up about Mr. Addison's disruptive behavior.

4) Because of Mr. Addison's disruptive and threatening behavior the head commissioner/referee, Frederick Irvin, ended the game. Without warning Mr. Addison struck Mr. Irvin, while his back was turned, with a vicious blow in which caused Mr. Irvin's skull to hit the pavement. Mr. Irvin was unconscious and bleeding excessively.

5) There was no recreational or correctional staff supervising the scheduled summer league basketball game. There was no other scheduled recreational activities going on at this time.

6) Mr. Irvin layed on the ground unconscious for several minutes before staff arrived. Recreational Staff allowed an inmate to move Mr. Irvin's head in which caused more blood to pour. It took Health Service Staff several additional minutes to show up.

7) I have observed inmate Addison's unruly and violent display of physical intimidation several times during a scheduled game. Mr. Addison is approximately 6'4 in height and weigh approxiamtely 270 pounds massive muscle.

8) I have witnessed Mr. Addison threaten to hit inmate officials because of minor rule infractions.

9) During the 2008 Flag Football season, which I was officiating, Mr. Addison was arguing with a member of the opposite team. After a play was over Mr. Addison physically assaulted another inmate that left the inmate unconscious and with a broken jaw.

10) The administration was aware of Mr. Addison's violent behavior and isolated him fromgeneral population. A few days later administration let him out on the compound knowing this inmate has a history of violent behavior.

That pursuant to the provisons of Title 28 U.S.C. § 1746 the undersigned Affiant certifies tha the above are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: August 15, 2009

Gregory Uzzell #24862-056
AFFIANT
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

Ex. H

AFFIDAVIT OF JERRY HILL

I, Jerry Hill, a living breathing man, competent to givetestimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was on the Recreation Yard waiting to participate in a scheduled softball game that started at 6:30pm.

3) The only activity on the recreation yard was a summer league basketball game. The game started between 5-5:30pm.

4) The scheduled softball game at 6:30pm was cancelled because of an assualt on Frederick Irvin.

5) All softball games are scheduled for6:30pm after the 4:00pm institutional count.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: November 30, 2009

Jerry Hill

Jerry Hill #39027-007
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

RECEIVED CLERK'S OFFICE
2010 NOV -1 A 10:15
DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

FREDERICK IRVIN, PLAINTIFF	*	Civil No. 9:10-01336-RMG-BM
V	*	
JOHN OWENS, WARDEN FCI WILLIAMSBURG; NFN HOLMES, CORRECTIONAL RECREATION OFFICER FCI WILLIAMSBURG; NFN BROWN, CORRECTIONAL RECREATION OFFICER FCI WILLIAMSBURG; UNITED STATES OF AMERICA DEFENDANTS	*	

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

COMES NOW, Plaintiff, Frederick Irvin, pro se, pursuant to Rule 15(a) Fed. R. Civ. P. request to file an amended complaint to place numbered paragraphs in the body of the complaint.

The court should grant leave freely to amend complaint. Foman v Davis, 371 U.S. 178, 182 (1962).

Date: October 27, 2010

Frederick Irvin #16620-039
FCI Eklton-POB 10
Lisbon, OH 44432

CERTIFICATE OF SERVICE

I, Frederick Irvin, swear under the penalty of perjury that a copy of the MOTION FOR LEAVE TO FILE AMENDED COMPLAINT, AMENDED COMPLAINT, was given to prison authorities for mailing purposes 1st class on October , 2010 for mailing to the following parties:

CLerk of COurt
United States District Court
P.O. Box 835
Charleston, SC 29402

Barbara M. Bowens
AUSA
1441 Main Street, Suite 500
Columbia, SC 29201

Date: October 27, 2010

Frederick Irvin #16620-039
FCI ELkton - POB 10
Lisbon, OH 44432

RECEIVED CLERK'S OFFICE
2010 NOV -1 A 10: 17
DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

FREDERICK IRVIN, *
PLAINTIFF * Civil No. 9:10-01336-RMG-BM
*
V *
*
JOHN OWENS, WARDEN FCI WILLIAMSBURG; *
NFN HOLMES, CORRECTIONAL RECREATION *
OFFICER FCI WILLIAMSBURG; NFN BROWN, *
CORRECTIONAL RECREATION OFFICER FCI *
WILLIAMSBURG; UNITED STATES OF AMERICA *
DEFENDANTS *
**

*****AMENDED COMPLAINT*****
BIVENS ACTION and 28 U.S.C. § 1346, 2671-2680
BIVENS VS UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS, 403 U.S. 388, 91 S. Ct. 199, 29 L. Ed 2d 619 (1971)

1) Violation of 8th Amendment
2) Intentional Infliction of Emotional Distress
3) Pain and Suffering
4) Negligence, 28 USC § 1346, 2671-2680
5) Punitive Damages
6) Compensatory Damages

Date: October 27, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

1.

1) Capacity- All defendants are being sued in their individual capacity.

2) Bivens- All defendants were employed by the government when the incident occurred.

3) Frederick Irvin- Plaintiff.

4) John Owens, Warden of FCI Williamsburg- Defendant

5) Holmes, Correctional Recreation Officer at FCI Williamsburg- Defendant.

6) Brown, Correctional Recreation Officer at FCI Williamsburg- Defendant.

7) United States- Defendant.

8) Damages- Money, 5 million dollars.

JURISDICTION

2.

Bivens action and pendant state Law claims; 28 USC § 1346, 2671-2680.

STATEMENT AND FACTS

3.

3. On May 30, 2009, while officiating a prison summer league basketball game, Plaintiff Frederick Irvin, was attacked and assaulted by another inmate Bobby Addison. When the assault occurred prison staff failed to be present to monitor the game, nor was here any staff present to ensure the safety of the inmate officials who was previously threatened with physical harm on numerous occasions by inmate Bobby Addison. (See Tort Claim Attached). Inmate Bobby Addison was known to be violent due to past conduct such as fracturing inmate Carl McNeil's jaw, (Ex. A & G), and due to his previous threatening conduct inside the gym towards other officials, (Ex. C, D & G), a fact known to prison staff prior to the May 30, 3009 summer league basketball game.

4. Prison staff placed Addison in special housing behind the assault of Carl McNeil. Despite all these incidents involving violence or threats of violence by Addison, prison staff STILL allowed Addison to continue to participate in

approved recreational sports. Furthermore, staff even failed to monitor the sporting events.

5. In this instance, plaintiff Irvin, herein, while officiating, tried to stop the basketball game because of Addison's threatening behavior. (Ex. G) Addison attacked the plaintiff as he walked away and was defenseless. The attack and assault led the plaintiff to fight for his life as his skull hit the cement from his fall from the attack.

6. Inmate Donald Vanderhorst (Ex. B) ran to find any staff to report that the plaintiff was seriously hurt from the assault. When prison staff arrived the plaintiff was lying in a large puddle of blood, having problems breathing and was unconscious.

7. In all, the plaintiff was transported to Williamsburg Regional Medical Center in which it was determined that the plaintiff had life threatening injuries. The plaintiff was transfered to MUSC for bleeding of the brain. The plaintiff sustained a nasal, jaw and mastoid fractures, a sub arachnoid hemmorrhages along the bilateral frontoparietal lobes, a sub dural hematoma extending from the frontal lobe anteriorly to the occipital lobe, fluid scattered through the left mastoid cells, right brain contusion, 6 staples to the back of the head, sutured laceration to the lip, lost of taste and smell senses and problems with the memory.

8. While this assault/attack was occurring, Officer Holmes and Officer Brown did nothing to protect the plaintiff. In fact, the defendant's is resposible for the assault/attack since staff was not on the sideline during the game to resolve all conflicts according to policy. (Ex. E) Staff was aware that multiple assaults have occurred at this prison and that being an inmate official poses danger to the plaintiff.

CLAIM 1

PLAINTIFF'S EIGHT AMENDMENT RIGHTS WERE VIOLATED BY CO HOLMES AND CO BROWN FAILING TO PROTECT HIM FROM ATTACK/ASSAULT BY INMATE

9. The Eighth Amendment imposes a duty on prison officials "to protect prisoners from violence at the hands of other prisoners.: Farmer v Brennan, 511 US 825, 833 (1994)(citation omitted). To establish a claim for failure to protect from violence, an inmate must show: (1) " that he is incarcerated under conditions posing a substantial risk of serious harm," Id. at 834, and (2) that the prison officials had a "sufficiently culpable state of mind." Id. (internal citations and quotations omitted.) "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." Id. (internal citations omitted). To be deliberately indifferent, a prison official must " know of and disregard an excessive risk to inmate health and safety." Id. at 837.

10. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including circumstantial evidence, ... amd a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

11. A prison official also may not "escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." Id. at 843. See Davidson v Cannon, 474 US 344, 347 (1986); Grayson v Peed, 195 F. 3d 692, 695 (4th Cir. 1999). The plaintiff must also show he suffered a serious or significant physical or mental injury as a result of the defendant's conduct. Strickler v Waters, 989 F. 2d 1375, 1380-81 (4th Cir. 1993).

12. Prison supervisors with knowledge of "a persuasive and unreasonable risk of harm" to the prisoners, fail to take remedial steps to prevent such harm, their conduct may be properly characterized as "deliberate indifference".... Moore v Winebrenner, 927 F. 2d 1312, 1315 (4th Cir. 1991).

A) PLAINTIFF FREDERICK IRVIN IS/WAS INCARCERATED AT FCI WILLIAMSBURG UNDER CONDITIONS POSING A SUBSTANTIAL RISK OF SERIOUS INJURY

13. Plaintiff, Frederick Irvin, was housed at FCI Williamsburg on May 30, 2009 in South Carolina. FCI Williamsburg is excessively overcrowded which had led to violent attacks/assaults on inmates and staff.

14. Therefore, due to the overcrowding stabbings, assaults, fights and violence occurring frequently, it is clear that the plaintiff is incarcerated under conditions posing a substantial risk of serious harm, thus satisfying the 1st prong of the Farmer v Brennan test.

B) DEFENDANT'S HOLMES AND BROWN ACTED WITH "DELIBERATE INDIFFERENCE" TO THE PLAINTIFF'S SAFETY

15. As with the 2nd prong of Brennan, it is evident that Holmes and Brown acted with Deliberate Indifference to plaintiff's safety where as they knew that there was excessive risk to the inmates health or safety by the procedures they employed by not monitoring an approved recreational game. The defendant's knew the obvious that being a inmate official in prison is dangerous and they disregarded the risk. Furthermore, the defendants had knowledge that Addison was participating in the game. The defendant's was aware of Addison violent rages as he has assaulted an inmate before. The plaintiff had informed staff of supervising games for the protection of the referees. Staff was aware of the obvious but failed to intervene in the initial disruption of Addison. Because of defendant's disregard to the

substantial and safety risk, the plaintiff was seriously injured in which he nearly lost his life.

16. Clearly the defendant's was aware of the risk of serious harm that existed, by not supervising/monitoring the scheduled approved game. it is truly obvious that this type of risk existed when being in a overcrowded violent prison you have inmate referees not being protected by staff by not monitoring the game according to policy.

17. In addition, defendant's Homes and Brown did not respond reasonable to the known risk or try to minimize it since this was the only scheduled approved game going on at the time the assault/attack occurred. (Ex. H) In fact, the defendant's was aware of Addison's violent behavior toward inmate referees. By there being no other scheduled game being played there were no reason for the defendant's **NOT** to monitor the game. donald Vanderhorst had to run to find one of the defendants to tell then that the plaintiff have been assaulted. The defendant's were no where near the vicinity. The plaintiff was unconscious laying in a puddle of blood, bleeding profusely from the mouth, making gurgling sounds and having problems breathing when one of the defendant's arrived.

18. Therefore, with all the facts taken into consideration, plaintiff has stated a claim under the Eigth Amendment and the Farmer v Brennan theory. It should be known that defendant's Brown and Holmes was aware that being a prison official is dangerous and that the prison was violent.

CLAIM 2
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

19. In South Carolina, to establish the claim for intentional infliction of emotional distress, a plaintiff must show:

1) Defendant intentionally or recklessly inflicted severe emotional distress or

substantially certain that such distress would result from his conduct.

2) The conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community.

3) The actions of the defendant caused the plaintiff emotional distress.

4) The emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. See Ford v Hutson, 276 S.C. 157, 162, 276 S.E. 2d 776, 778 (1981).

20. In this case at bar, the defendant's Holmes and Brown were aware that Addison had fractured Carl McNeil's jaw intentionally in which Addison was isolated from general population because of the assault. Addison was allowed to continue to participate in intramural sports even after policy states that any physical alteration they are suspended for a minimum of one year. (See Ex. E) Furthermore, defendant's knew of the risk, posed by being an inmate referee. Addison has threated other inmate referee's in which staff was aware of. The defendant's had information in knowing that Addison was participating in the game. The conduct they employed was extreme and outrageous in which lead to serious harm to the plaintiff by not following policy in which consist of but not limited to being present at all games to resolve all conflicts. Instead, defendant's Holmes and brown relied on the plaintiff to do their job by trying to resolve a conflict in which the plaintiff was seriously injured. This conduct was intentional or reckless.

21. The conduct of the defendant's of not following their policy caused the plaintiff to suffer emotional distress. The plaintiff has anxiety, depression and their conduct has caused problems with the plaintiff's family relationships. The emotional distress which was severe, affected the plaintiff mentally and physically from his injuries in which plaintiff was hospitalized, left with

physical disabilities and nearly died.

22. The conduct was extreme and utterly intolerable in a civilized community for failure to monitor and supervise the action of dangerous inmates and to rely on plaintiff, Frederick Irvin, to resolve conflicts of dangerous inmates knowing that if defendants followed the policy of supervising the game, they would have minimized the risk. Because of the defendant's conduct, the plaintiff was left helpless and defenseless as the plaintiff was blindisighted as Addison attacked the plaintiff while his back was turned to him. (Ex. F) Furthermore, the plaintiff was attacked in the presence of other inmates which caused additional emotional distress.

DAMAGES

23. The plaintiff request 5 million dollars from the defendant's Holmes and brown for their conduct in this claim.

CLAIM 3
PAIN AND SUFFERING

24. The plaintiff request to be compensated for the pain and suffering he suffered as a result of the injuries he received due to the conduct of defendant's Holmes and Brown. Plaintiff request $500,000 dollars for the Pain and Suffering.

CLAIM 4
NEGLIGENCE

25. Section 3672 of Federal Tort Claims Act delegates to each Federal Agency the authority to consider, determine and settle any claim for money damages against the U.S. for loss of personal property or injury caused by the negligent or

wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

26. In this case, the U.S. is a defendant where as the defendant's Holmes and Brown was an employee of the Federal Bureau of prison when they committed the negligence, and omission which caused the injuries of plaintiff.

27. Defendant's Holmes and brown was acting within the scope of their employment when they committed the negligence or omission complained of herein.

28. The defendant's Holmes and Brown, U.S., failed to exercise a standard duty of care and negligently filed to monitor a schedule summer league basketball game according to policy. (Ex. E) The defendant's knew the risk, for failure to monitor the actions of dangerous inmates could and would harm another inmates health. The defendant's knew of the risk, posed by being an inmate referee, was dangerous but failed to stop all conflicts by not following policy.

29. These specifics acts of defendant's Holmes and brown, U.S., led to the plaintiff being attacked and viciously assaulted and led to permanent physical, mental and psychological injuries. See 276 Fed. Appx 339 Allen v Choice Hotels.

30. The plaintiff herein assert that defendant's Holmes and Brown, U.S., is liable where as they knew or should have known that harm to the health of plaintiff would result by failing to monitor game according to policy. Furthermore, defendant's was aware of inmate Bobby Addison prior assaults during scheduled recreational sports and continued to let him participate knowing that Addison was violent. Furthermore, the defendant's are liable by relying on plaitiff to do their job to resolve conflicts between dangerous inmates which led to the injuries to the plaintiff.

31. The plaintiff request 2 million dollars for the negligence of defendant's Homes, brown, u.S., which led to his injuries.

CLAIM 5
PUNITIVE DAMAGES

32. The plaintiff request Punitive Damages herein where the defendant's Holmes and Brown conduct was reckless and taken in disregard of plaintiff's rights. In this case, the plaintiff was harmed due to the defendant's Holmes and Brown conduct of recklessly allowing a scheduled summer league game to be unsupervised and relying on plaintiff to do their job of resolving conflicts of dangerous inmates.

33. Furthermore, the defendant's was aware of the danger of not supervising the game. The defendant's conduct led to the plaintiff being attacked and assaulted.

34. Under the facts and evidence of this case, the plaintiff is entitled to Punitive Damages in the amount of 1.5 million dollars. This amount will deter defendant's or the actual defendant's Holmes and Brown from further omissions of this kind of complaint herein. See Smith v Wade, 461 US 30, 75 L Ed 2d 632.

CLAIM 6
COMPENSATORY DAMAGES

35. The plaintiff request Compensatory Damages in the amount of 2 million dollars due to his physical, mental and emotional injuries, future medical expenses, future economic earnings as well as pain.

36. The plaintiff is entitled to this considering he was brutally assaulted, hospitalized and have permanent scars, physically, metally and economically. See medical record (Discovery).

37. Plaintiff request 2 million dollars.

REQUEST FOR A JURY TRIAL

38. The plaintiff herein request the honorable court grant him s jury Trial on all the claims and damages presented herein. The plaintiff asserts he is entitled to a jury trial on his issues and damages alleged in the complaint.

CONCLUSION

39. Plaintiff request this HOnorable Court grant him a trial or claims herein whereas he can receive the Damage amount he request herein.

Date: October 27, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

CERTIFICATE OF SERVICE

I, Frederick Irvin, Swear under the penalty of perjury that this AMENDED COMPLAINT was given to prison authorities on OCtober , 2010, for mailing to the following parties:

Clerk Of COurt
United States District Court
P.O. Box 835
Charleston, SC 29402

Barbara M. Bowens
AUSA
1441 Main street, suite 500
Columbia, SC 29201

Date: October 27, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

AFFIDAVIT OF FREDERICK IRVIN

I, Frederick Irvin, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed at FCI Elkton in Lisbon, Ohio. I was incarcerated in FCI Williamsburg in South Carolina from December 2007 til January 2010.

2) On May 30, 2009 an approved summer league basketball game was scheduled to play after the 5 minute recreation movement had ended. The game was scheduled at this particular time so that the game will be over in time for the other scheduled softball game that was scheduled to start at 6:30pm.

3) I was the league commissioner/official that worked for staff to overlook the league.

4) Being the league commissioner, staff relied on me to be present at every game, keep staff informed of the problems that arises, train officials and whatever is needed to oversee the league for staff. I have also had to resolve conflicts of dangerous inmates which I was required to suspend them from play.

5) Staff was aware of Addison's threats and violent rage against me and others. I have told staff the importance of supervising the games and suspending inmates under their policy. staff knew their presence have and would prevent assaults, attacks and any altercations.

6) I have suspended Addison several times for his violent rage and Addison has threatened me because of the suspension.

7) On May 30, 2009, during the summer league basketball game, Addison became disruptive and went into his violent rage.

8) Staff was not present to resolve the conflict so I stopped the game to try to calm down Addison. Addison became unruly, threatening and insulting. At that point I ended the game.

9) Addison threatened me and others but I walked away from the confrontation to gather the equipment. Addison struck me from behind while my back was turned to him.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned

Affiant certifies that the above are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the Untied States.

Date: May 14, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

BP-A0943 'Small Claims for Property Damage or Loss (31 U.S.C. § 3723) CDFRM
MAY 09

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

1. Location where the property loss or damage occurred:	2. Name, address of claimant (Register number, street, city, state, and zip code):
Federal Correctional Institution Williamsburg P.O. Box 340 Salters, SC 29590	Frederick Irvin #16620-039 Federal Correctional Institution Elkton P.O. Box 10 Lisbon, OH 44432
3. Date and Day of Incident:	4. Time: (A.M. or P.M.):
May 30, 2009	Approximately 5:30-5:45 P.M.

5. Basis of Claim (State in detail the known facts and circumstances of the damage to, or loss, of privately owned property, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages, if necessary.): On May 30, 2009, while at FCI Williamsburg, claimant was supervising/officiating a scheduled summer recreational summer league basketball game and was attacked and assaulted by inmate Bobby Addison. Correctional Recreational Officers Holmes and Brown knew of the risk posed by being an inmate referee and failed to monitor/supervise the scheduled game according to policy. The claimant suffered a nasal, jaw and mastoid fractures, a sub arachnoid hemmorhages along the bilateral frontoparietal lobes, a subdural hematoma extending from the frontal lobe anteriorly to the occipital lobe, fluid scattered through the left mastoid cells, right brain contusions, 6 staples to the back of the head, sutured laceration to the lip, lost of taste and smell senses and continued damage to memory. The claimant was hospitalized because of the assault.

6. Witnesses (Please provide the name and address (number, street, city, state, and zip code of each witness)):

Jermaine Pickett #16285-171
FCI Williamsburg
P.O. Box 340
Slaters, SC 29590

Greg Uzzell #24862-056
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

D'shun Rucker #13252-171
MCFP Springfield
P.O. Box 400
Sprigfield, MO 65801

Donald Vanderhorst
#95301-071
FCI Fort Dix
Fort Dix, NJ 08640

7. Amount of Claim for Damage to, or loss of, privately owned property (in dollars) (Sum Certain Amount - Total Amount Of Claim):

$ 2 million dollars

8. MAIL OR DELIVER CLAIM TO THE REGIONAL OFFICE WHERE THE CLAIM OCCURRED

I CERTIFY THAT THE AMOUNT OF THE CLAIM COVERS ONLY DAMAGE TO, OR LOSS OF PRIVATELY OWNED PROPERTY CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

9. Signature of Claimant or Authorized Representative	10. Date
Frederick Irvin	5-05-10

Ex. A

AFFIDAVIT OF CARL McNEIL JR.

I, Carl McNeil Jr, a breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in Salters, South Carolina.

2) On October 12, 2008 I was playing in a scheduled recreational Flag Football game.

3) During the football game inmate Bobby Addison, also known as Bilal, was in a violent rage as he and my teammate, inmate Hutchinson, started arguing. Mr. Addison threatened Mr. Hutchinson by stating, "I'll get you."

4) The very next play, after the whistle was blown and the play was over, Mr. Addison charged towards Mr. Hutchinson where I was also standing after the play was over.

5) Mr. Addison intentionally dove off his feet at Mr. Hutchinson. Mr. Hutchinson ducked and I was struck in the face with Mr. Addison's forearm. I was knocked unconscious.

6) I was taken to the hospital in which the impact, from Mr. Addison's rage, fractured my upper and lower jaw and a plate was inserted.

7) Staff was aware of Mr. Addison's aggressive and violent behavior and his intentions to hurt someone and put him in SHU (Special Housing Unit).

8) Staff released Mr. Addison from SHU knowing he had a violent rage and Recreational Staff let Mr. Addison continue to play in the rest of the 2008 Flag Football season and other recreational sports.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: September 7, 2009

Carl McNeil 21196-056

Carl McNeil #21196-056
Affiant
FCI Williamsburg - POB 340
Salters, SC 29590

Ex. B

AFFIDAVIT OF DONALD VANDERHORST

I, Donald Vanderhorst, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was actively participating in a scheduled recreational summer league basketball game which include inmate Bobby Addison.

3) During the course of the game, inmate Bobby Addison had become disruptive and threatening in which the game was stopped by an inmate basketball official Frederick Irvin.

4) After the end of the game, Mr. Addison behavior became violent in which he hit Mr. Irvin which caused Mr. Irvin's head to hit the concrete. Mr. Irvin was unconcious and bleeding profusely.

5) There was no Reacreation Staff or Correctional Staff supervising the game nor in the vicinity of the court where the assault happened so I ran to find any Staff for assistance.

6) Rec Staff Holmes was on the other side of the yard by the handball courts when I told him Mr. Irvin had been hit by Mr. Addison and Mr. Irvin was laying on the court hurt badly.

7) I have witnessed Mr. Addison on several occassions being disruptive and his constant threats towards inmate officials/referees.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

DATE: August 3, 2009

Donald Vanderhorst

Donald Vanderhorst #95301-071-AFFIANT
FCI Williamsburg
PO BOX 340
Salters, SC 29590

Ex. C

AFFIDAVIT OF LANCE POUGH

I, Lance Pough, a living breathing man, competent to give testimony, do hereby say and declare the following facts are True and Correct:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) I am a prison recreational basketball referee.

3) I was threatened by inmate Bobby Addison on many occassions while officiating the winter indoor Basketball League games in 2008.

4) Inmate Addison on multiple occassions not only threatened me but also Inmate Frederick Irvin who would be officiating with me.

5) Inmate Addison would become uncontollable and violent during different games which result in him being rejected from the games and in return he would make threats that he was gonna get us (the referees) one day.

6) Recreation Staff here in this prison was aware of Inmates Addison conduct, behavior and threats yet still failed to act or supervise the games.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: November 22, 2009

Lance Pough

Lance Pough #53277-060
Affiant
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

EX. D

AFFIDAVIT OF DESHAUN RUCKER

I, Deshaun Rucker, a living breathing man, competetnt to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was watching a basketball game of the summer outdoor leauge.

3) During this particular game, an incident arose where an inmate had become disruptive and threatening other inmate players, as well as Frederick Irvin who was an inmate official.

4) The inmates name is Bobby Addison, also known as Bilal that was disruptive.

5) As the game came to an end, Mr. Addison behavior became uncontrollable and violent in which he attacked Mr. Irvin by punching Mr. Irvin in the face where as Mr. Irvin fell to the cement and hit his head on the pavement. Mr. Irvin was unconscious and bleeding profusely.

6) There was no recreational staff, or correctional staff supervising the game nor in the vicinity of the court where the assault occurred.

7) I seen Donald Vanderhorst, another inmate, go retrieve Rec Staff Holmes who returned to the court.

8) Rec Staff Holmes was on the otherside of the recreational field by the last handball court about 150 yards away.

9) I witnessed hearing and seeing, inmate Addison violent disruptions, and threats casted towards the inmate officials Irvin and Lance Pough on numerous occassions while playing in the previous indoor basketball league while Addison was on my team.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: August 4, 2009

D'Shaun Rucker

Deshaun Rucker # 13252-171
Affiant
FCI Williamsburg - POB 340
Salters, SC 29590

Ex. E

FCI WILLIAMSBURG INTRAMURAL CODE OF CONDUCT

The primary purpose for our intramural sports program is to provide an organized, safe, and enjoyable form of recreation for all interested inmates. Emphasis is placed on creating a positive non-threatening atmosphere in which players, coaches, officials, and spectators can relax and enjoy the social interaction and physical benefits of athletic competition.

THERE WILL BE NO TOLERANCE FOR UNSPORTSMANLIKE LIKE CONDUCT. Those inmates who cannot maintain control of their actions and/or emotions will be removed from the intramural program, **without hesitation**. The integrity of the Recreation Department's intramural program **will not** be compromised by inmates who cannot conform to general rules of sportsmanship, as well as posted intramural rules.

ALL PARTICIPANTS ARE ADVISED THAT VIOLATIONS OF INTRAMURAL RULES, IN MANY CASES, CONSTITUTES A VIOLATION OF BUREAU POLICY AND MAY RESULT IN DISCIPLINARY ACTION ABOVE AND BEYOND THOSE STATED IN THE FOLLOWING INTRAMURAL RULES AND REGULATIONS.

RULES OF CONDUCT

1. **Any player or coach ejected from a game is suspended from <u>all</u> intramural competition for a minimum of two (2) games. Any subsequent ejection from a game will result in a six (6) month suspension from any league. A participant suspended from one league, cannot play in another league (basketball, volleyball, soccer, football, or softball) while under suspension. A violation of this rule will result in suspension from intramural program for a minimum period of one (1) year.**

2. **Any player or coach placed on suspension a second time, from any intramural sport, within six(6) months from the date of eligibility from the previous suspension is suspended from all intramural participation for a minimum period of one (1) year. This includes soccer, basketball, volleyball, football, and softball regular seasons, practice games, jamborees, special tournaments, etc.**

3. Participants will treat staff, officials, other participants, and spectators with respect at all times. Abusive language, threatening gestures or behavior **will not be tolerated.** Violations will result in an immediate expulsion from the game and a minimum two (2) game suspension. Such incidents may involve additional disciplinary action as determined by Recreation Staff, Correctional Services, Unit Team, or Disciplinary Hearing Officer (DHO).

4. All players and coaches under suspension must remain outside gym, soccer field, softball field, and volleyball court area while any league game is in progress, during warm-ups, and while teams are practicing. A violation will result in suspension from the intramural program for a minimum period of six (6) months from the date of the violation.

5. Any player or coach ejected from a game (for any reason) is, in addition to the minimum two (2) game suspension, ineligible to compete in the varsity competition for a minimum period of six (6) months.

6. If any recreation property (i.e. jerseys, whistles, gloves, balls, shin guards, etc.) is confiscated from an inmates's person or property, that inmate is suspended from all intramural sports for a minimum period of six (6) months, and is subject to receiving an incident report for possession of contraband.

7. Any coercive action (i.e. threats, bribes, etc.) made to any official before, during, or after a game by any player or coach may result in suspension from all intramurals for up to one (1) year.

8. Officials who threaten players or coaches are subject to the same disciplinary actions as players.

9. A staff member is present on the sideline during all games. He/She resolves all conflicts and his/her decision is final. Staff have the authority to over rule all calls, make calls, and take any and all action to maintain control and the integrity of the game.

10. Only inmates on the team rosters may sit on the team bench during games. Violation(s) may result in forfeiture of the game, as determined by the League Commissioner.

11. Coaches are responsible for their teams "conduct" while participating in the league. The coach may be assessed fouls or ejected from a game if they cannot control their players demeanor. Coaches ejected are subject to the same penalty as players.

12. Any player involved in any type of physical altercation is subject to disciplined action and suspension from all intramural activities for a minimum of one (1) year.

13. Players and coaches attending games as spectators may be disciplined for unsportsman like conduct, to include warnings, technical fouls, ejections, and incident reports. The same standard of conduct required of players and coaches applies when spectating.

14. Participants who throw or kick basketballs, softballs, soccer balls, or volleyballs against the walls, ceilings, etc. are suspended for a minimum of two (2) games and may be held financially responsible for any damage to property and/or equipment.

15. All participants must acknowledge, by signing, that they have read and understand the intramural code of conduct prior to playing in any game.

16. Participation without signing the code of conduct may result in a minimum two (2) game suspension and forfeiture of all games played prior to signing.

17. Any coach, official, or score keeper with a problem or complaint needs to first address it with the League Commissioner before taking it to higher authority. Failure to comply may result in dismissal of the complaint.

18. Official protests may only be filed on **Rule Interpretations, Roster Infractions, and Player Eligibility.** Coaches who attempt to file protests outside of these areas, or who file frivolous protests are subject to removal from the league.

19. Team names are limited to the name of the Unit or the name of an official NBA, MLB, MISL, team.

I have read and understand the intramural code of conduct.

TEAM NAME:_____ DATE:_____

PLAYERS	REGISTRATION #	DATE
COACH:_____	_____	_____
1._____	_____	_____
2._____	_____	_____
3._____	_____	_____
4._____	_____	_____
5._____	_____	_____
6._____	_____	_____
7._____	_____	_____
8._____	_____	_____
9._____	_____	_____
10._____	_____	_____
11._____	_____	_____
12._____	_____	_____
13._____	_____	_____
14._____	_____	_____
15._____	_____	_____

DISCIPLINE HEARING OFFICER REPORT Ex. F BP-S305.052 MAY 94

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

V SPECIFIC EVIDENCE RELIED ON TO SUPPORT FINDINGS (physical evidence, observations, written documents, etc.)

Your due process rights were read and reviewed with you by the DHO at the time of the hearing. You stated you understood your rights, had no documentary evidence to present, and requested no witnesses or a staff representative to appear on your behalf to refute the charge against you.

The DHO finds you committed the prohibited act of Assaulting Any Person (Serious), code 101, when you struck inmate Irvin #16620-039, causing him to fall on the basketball court striking his head.

The DHO bases this finding on the written statement of the reporting staff member that on May 30, 2009, at approximately 5:50 p.m., you assaulted inmate Irvin by striking him from behind on the left side of his face with a clenched fist. When you struck him, you caused him to fall to the ground where he struck his head on the basketball court in the outside recreation area. Three inmate witnesses provided statements they had observed you assault inmate Irvin. On May 30, 2009, inmate Irvin was transported to the local hospital where he received treatment consistent with someone who had a brain contusion. The medical reports indicated inmate Irvin sustained nasal bone and mastoid fractures, a sub arachnoid hemorrhages along the bilateral frontoparietal lobes, a sub dural hematoma extending from the frontal lobe anteriorly to the occipital lobe, and fluid scattered through the left mastoid air cells. The report indicated there was a possible right brain contusion. A supporting memorandum from the Operations Lieutenant indicated inmate Irvin was lying in a large pool of blood, bleeding profusely from his mouth and making a gurgling sound, was having problems breathing and was incoherent. An injury assessment conducted on you revealed you sustained a laceration to your left first knuckle. The injuries sustained are indicative a serious assault was inflicted.

The DHO considered your statement that you did not commit this act. However, you were positively identified by three inmate witnesses. You also indicated you had a right to confront your witnesses. Although the witnesses did not appear at your hearing, their identities and statements were revealed during the hearing. Inmate Salters #62137-004, stated you were having a verbal altercation with two other inmates while you were playing a basketball game and inmate Irvin cancelled the game to prevent further problems. You proceeded to call inmate Irvin names, approached him, and struck him from the left side. Inmate Riley #70098-056, indicated you were arguing with him, and inmate Irvin called the game to prevent further disruption. You proceed to run up behind him and "sucker punch," him on the side of the head causing him to fall to the ground. Inmate Pickett #16285-171, indicated you were arguing with another inmate and inmate Irvin attempted to stop the argument. After you and the inmate walked away from each other, you approached inmate Irvin and punched him. Therefore, it is apparent you had retaliated against inmate Irvin during the basketball game. You hit inmate Irvin due to his call to cancel the game because you and inmate Riley #70098-056 were arguing and demonstrating poor sportsmanship.

Therefore, the DHO relies on the greater weight of evidence, the injuries sustained by inmate Irvin which required outside medical attention, the witnesses to the incident who provided similar testimonies, and the detailed description reported by the reporting staff member. As a professional staff member, he is legally and morally obligated to provide truthful statements.

Based on the reporting officer's statement, the supporting memorandums, the injury assessment conducted on the victim, inmate Irvin, the fact you had blind sighted inmate Irvin causing him to fall to the court and hit his head requiring outside medical attention, and the SIS investigation revealing the witnesses' statements regarding your role in this incident, the DHO finds you did commit the prohibited act of Assaulting Any Person (Serious), code 101.

VI SANCTION OR ACTION TAKEN

Disallowance of Good Conduct Time	No. of Days	40	Suspended	Y/N	N	No. Days	
Forfeit Non Vested Good Conduct Time	No. of Days	40	Suspended	Y/N	N	No. Days	
Loss of Telephone Privileges	No. of Days	365	Suspended	Y/N	N	No. Days	
Loss of Commissary Privileges	No. of Days	365	Suspended	Y/N	N	No. Days	
Disciplinary Segregation	No. of Days	60	Suspended	Y/N	N	No. Days	
Recommend Disciplinary Transfer		XXX					

VII REASON FOR SANCTION OR ACTION TAKEN

Seriously assaulting another and refusing to cease your actions in a correctional environment will not be tolerated. You participation in this behavior jeopardizes the security of this institution and may have resulted in further injury to staff and other inmates.

Ex. G

AFFIDAVIT OF GREGORY UZZELL

I, Gregory Uzzell, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was an official during a summer league basketball game that started at 5-5:30pm.

3) Approxiamtely 10minutes in to this game, inmate Bobby Addison, also known as Bilal, began verbally insulting a member of his team. Another inmate spoke up about Mr. Addison's disruptive behavior.

4) Because of Mr. Addison's disruptive and threatening behavior the head commissioner/referee, Frederick Irvin, ended the game. Without warning Mr. Addison struck Mr. Irvin, while his back was turned, with a vicious blow in which caused Mr. Irvin's skull to hit the pavement. Mr. Irvin was unconscious and bleeding excessively.

5) There was no recreational or correctional staff supervising the scheduled summer league basketball game. There was no other scheduled recreational activities going on at this time.

6) Mr. Irvin layed on the ground unconscious for several minutes before staff arrived. Recreational Staff allowed an inmate to move Mr. Irvin's head in which caused more blood to pour. It took Health Service Staff several additional minutes to show up.

7) I have observed inmate Addison's unruly and violent display of physical intimidation several times during a scheduled game. Mr. Addison is approximately 6'4 in height and weigh approxiamtely 270 pounds massive muscle.

8) I have witnessed Mr. Addison threaten to hit inmate officials because of minor rule infractions.

9) During the 2008 Flag Football season, which I was officiating, Mr. Addison was arguing with a member of the opposite team. After a play was over Mr. Addison physically assaulted another inmate that left the inmate unconscious and with a broken jaw.

10) The administration was aware of Mr. Addison's violent behavior and isolated him fromgeneral population. A few days later administration let him out on the compound knowing this inmate has a history of violent behavior.

That pursuant to the provisons of Title 28 U.S.C. § 1746 the undersigned Affiant certifies tha the above are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: August 15, 2009

Gregory Uzzell #24862-056
AFFIANT
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

Ex. H

AFFIDAVIT OF JERRY HILL

I, Jerry Hill, a living breathing man, competent to givetestimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was on the Recreation Yard waiting to participate in a scheduled softball game that started at 6:30pm.

3) The only activity on the recreation yard was a summer league basketball game. The game started between 5-5:30pm.

4) The scheduled softball game at 6:30pm was cancelled because of an assualt on Frederick Irvin.

5) All softball games are scheduled for6:30pm after the 4:00pm institutional count.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: November 30, 2009

Jerry Hill

Jerry Hill #39027-007
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

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DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

FREDERICK IRVIN,
PLAINTIFF

V

JOHN OWENS, WARDEN FCI WILLIAMSBURG; NFN HOLMES, CORRECTIONAL RECREATION OFFICER FCI WILLIAMSBURG; NFN BROWN, CORRECTIONAL RECREATION OFFICER FCI WILLIAMSBURG; UNITED STATES OF AMERICA
DEFENDANTS

Civil No. 9:10-01336-RMG-BM

*****AMENDED COMPLAINT*****

BIVENS ACTION and 28 U.S.C. § 1346, 2671-2680

BIVENS VS UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS, 403 U.S. 388, 91 S. Ct. 199, 29 L. Ed 2d 619 (1971)

1) Violation of 8th Amendment
2) Intentional Infliction of Emotional Distress
3) Pain and Suffering
4) Negligence, 28 USC § 1346, 2671-2680
5) Punitive Damages
6) Compensatory Damages

Date: October 27, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

1.

1) Capacity- All defendants are being sued in their individual capacity.

2) Bivens- All defendants were employed by the government when the incident occurred.

3) Frederick Irvin- Plaintiff.

4) John Owens, Warden of FCI Williamsburg- Defendant

5) Holmes, Correctional Recreation Officer at FCI Williamsburg- Defendant.

6) Brown, Correctional Recreation Officer at FCI Williamsburg- Defendant.

7) United States- Defendant.

8) Damages- Money, 5 million dollars.

JURISDICTION

2.

Bivens action and pendant state Law claims; 28 USC § 1346, 2671-2680.

STATEMENT AND FACTS

3. On May 30, 2009, while officiating a prison summer league basketball game, Plaintiff Frederick Irvin, was attacked and assaulted by another inmate Bobby Addison. When the assault occurred prison staff failed to be present to monitor the game, nor was here any staff present to ensure the safety of the inmate officials who was previously threatened with physical harm on numerous occasions by inmate Bobby Addison. (See Tort Claim Attached). Inmate Bobby Addison was known to be violent due to past conduct such as fracturing inmate Carl McNeil's jaw, (Ex. A & G), and due to his previous threatening conduct inside the gym towards other officials, (Ex. C, D & G), a fact known to prison staff prior to the May 30, 3009 summer league basketball game.

4. Prison staff placed Addison in special housing behind the assault of Carl McNeil. Despite all these incidents involving violence or threats of violence by Addison, prison staff STILL allowed Addison to continue to participate in

approved recreational sports. Furthermore, staff even failed to monitor the sporting events.

5. In this instance, plaintiff Irvin, herein, while officiating, tried to stop the basketball game because of Addison's threatening behavior. (Ex. G) Addison attacked the plaintiff as he walked away and was defenseless. The attack and assault led the plaintiff to fight for his life as his skull hit the cement from his fall from the attack.

6. Inmate Donald Vanderhorst (Ex. B) ran to find any staff to report that the plaintiff was seriously hurt from the assault. When prison staff arrived the plaintiff was lying in a large puddle of blood, having problems breathing and was unconscious.

7. In all, the plaintiff was transported to Williamsburg Regional Medical Center in which it was determined that the plaintiff had life threatening injuries. The plaintiff was transfered to MUSC for bleeding of the brain. The plaintiff sustained a nasal, jaw and mastoid fractures, a sub arachnoid hemmorrhages along the bilateral frontopariental lobes, a sub dural hematoma extending from the frontal lobe anteriorly to the occipital lobe, fluid scattered through the left mastoid cells, right brain contusion, 6 staples to the back of the head, sutured laceration to the lip, lost of taste and smell senses and problems with the memory.

8. While this assault/attack was occurring, Officer Holmes and Officer Brown did nothing to protect the plaintiff. In fact, the defendant's is resposible for the assault/attack since staff was not on the sideline during the game to resolve all conflicts according to policy. (Ex. E) Staff was aware that multiple assaults have occurred at this prison and that being an inmate official poses danger to the plaintiff.

CLAIM 1

PLAINTIFF'S EIGHT AMENDMENT RIGHTS WERE VIOLATED BY CO HOLMES AND CO BROWN FAILING TO PROTECT HIM FROM ATTACK/ASSAULT BY INMATE

9. The Eighth Amendment imposes a duty on prison officials "to protect prisoners from violence at the hands of other prisoners.: Farmer v Brennan, 511 US 825, 833 (1994)(citation omitted). To establish a claim for failure to protect from violence, an inmate must show: (1) " that he is incarcerated under conditions posing a substantial risk of serious harm," Id. at 834, and (2) that the prison officials had a "sufficiently culpable state of mind." Id. (internal citations and quotations omitted.) "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." Id. (internal citations omitted). To be deliberately indifferent, a prison official must " know of and disregard an excessive risk to inmate health and safety." Id. at 837.

10. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including circumstantial evidence, ... amd a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

11. A prison official also may not "escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." Id. at 843. See Davidson v Cannon, 474 US 344, 347 (1986); Grayson v Peed, 195 F. 3d 692, 695 (4th Cir. 1999). The plaintiff must also show he suffered a serious or significant physical or mental injury as a result of the defendant's conduct. Strickler v Waters, 989 F. 2d 1375, 1380-81 (4th Cir. 1993).

12. Prison supervisors with knowledge of "a persuasive and unreasonable risk of harm" to the prisoners, fail to take remedial steps to prevent such harm, their conduct may be properly characterized as "deliberate indifference".... Moore v Winebrenner, 927 F. 2d 1312, 1315 (4th Cir. 1991).

A) PLAINTIFF FREDERICK IRVIN IS/WAS INCARCERATED AT FCI WILLIAMSBURG UNDER CONDITIONS POSING A SUBSTANTIAL RISK OF SERIOUS INJURY

13. Plaintiff, Frederick Irvin, was housed at FCI Williamsburg on May 30, 2009 in South Carolina. FCI Williamsburg is excessively overcrowded which had led to violent attacks/assaults on inmates and staff.

14. Therefore, due to the overcrowding stabbings, assaults, fights and violence occurring frequently, it is clear that the plaintiff is incarcerated under conditions posing a substantial risk of serious harm, thus satisfying the 1st prong of the Farmer v Brennan test.

B) DEFENDANT'S HOLMES AND BROWN ACTED WITH "DELIBERATE INDIFFERENCE" TO THE PLAINTIFF'S SAFETY

15. As with the 2nd prong of Brennan, it is evident that Holmes and Brown acted with Deliberate Indifference to plaintiff's safety where as they knew that there was excessive risk to the inmates health or safety by the procedures they employed by not monitoring an approved recreational game. The defendant's knew the obvious that being a inmate official in prison is dangerous and they disregarded the risk. Furthermore, the defendants had knowledge that Addison was participating in the game. The defendant's was aware of Addison violent rages as he has assaulted an inmate before. The plaintiff had informed staff of supervising games for the protection of the referees. Staff was aware of the obvious but failed to intervene in the initial disruption of Addison. Because of defendant's disregard to the

substantial and safety risk, the plaintiff was seriously injured in which he nearly lost his life.

16. Clearly the defendant's was aware of the risk of serious harm that existed, by not supervising/monitoring the scheduled approved game. it is truly obvious that this type of risk existed when being in a overcrowded violent prison you have inmate referees not being protected by staff by not monitoring the game according to policy.

17. In addition, defendant's Homes and Brown did not respond reasonable to the known risk or try to minimize it since this was the only scheduled approved game going on at the time the assault/attack occurred. (Ex. H) In fact, the defendant's was aware of Addison's violent behavior toward inmate referees. By there being no other scheduled game being played there were no reason for the defendant's **NOT** to monitor the game. donald Vanderhorst had to run to find one of the defendants to tell then that the plaintiff have been assaulted. The defendant's were no where near the vicinity. The plaintiff was unconscious laying in a puddle of blood, bleeding profusely from the mouth, making gurgling sounds and having problems breathing when one of the defendant's arrived.

18. Therefore, with all the facts taken into consideration, plaintiff has stated a claim under the Eigth Amendment and the Farmer v Brennan theory. It should be known that defendant's Brown and Holmes was aware that being a prison official is dangerous and that the prison was violent.

CLAIM 2
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

19. In South Carolina, to establish the claim for intentional infliction of emotional distress, a plaintiff must show:

1) Defendant intentionally or recklessly inflicted severe emotional distress or

substantially certain that such distress would result from his conduct.

2) The conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community.

3) The actions of the defendant caused the plaintiff emotional distress.

4) The emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. See Ford v Hutson, 276 S.C. 157, 162, 276 S.E. 2d 776, 778 (1981).

20. In this case at bar, the defendant's Holmes and Brown were aware that Addison had fractured Carl McNeil's jaw intentionally in which Addison was isolated from general population because of the assault. Addison was allowed to continue to participate in intramural sports even after policy states that any physical alteration they are suspended for a minimum of one year. (See Ex. E) Furthermore, defendant's knew of the risk, posed by being an inmate referee. Addison has threated other inmate referee's in which staff was aware of. The defendant's had information in knowing that Addison was participating in the game. The conduct they employed was extreme and outrageous in which lead to serious harm to the plaintiff by not following policy in which consist of but not limited to being present at all games to resolve all conflicts. Instead, defendant's Holmes and brown relied on the plaintiff to do their job by trying to resolve a conflict in which the plaintiff was seriously injured. This conduct was intentional or reckless.

21. The conduct of the defendant's of not following their policy caused the plaintiff to suffer emotional distress. The plaintiff has anxiety, depression and their conduct has caused problems with the plaintiff's family relationships. The emotional distress which was severe, affected the plaintiff mentally and physically from his injuries in which plaintiff was hospitalized, left with

physical disabilities and nearly died.

22. The conduct was extreme and utterly intolerable in a civilized community for failure to monitor and supervise the action of dangerous inmates and to rely on plaintiff, Frederick Irvin, to resolve conflicts of dangerous inmates knowing that if defendants followed the policy of supervising the game, they would have minimized the risk. Because of the defendant's conduct, the plaintiff was left helpless and defenseless as the plaintiff was blindisighted as Addison attacked the plaintiff while his back was turned to him. (Ex. F) Furthermore, the plaintiff was attacked in the presence of other inmates which caused additional emotional distress.

DAMAGES

23. The plaintiff request 5 million dollars from the defendant's Holmes and brown for their conduct in this claim.

CLAIM 3
PAIN AND SUFFERING

24. The plaintiff request to be compensated for the pain and suffering he suffered as a result of the injuries he received due to the conduct of defendant's Holmes and Brown. Plaintiff request $500,000 dollars for the Pain and Suffering.

CLAIM 4
NEGLIGENCE

25. Section 3672 of Federal Tort Claims Act delegates to each Federal Agency the authority to consider, determine and settle any claim for money damages against the U.S. for loss of personal property or injury caused by the negligent or

wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

26. In this case, the U.S. is a defendant where as the defendant's Holmes and Brown was an employee of the Federal Bureau of prison when they committed the negligence, and omission which caused the injuries of plaintiff.

27. Defendant's Holmes and brown was acting within the scope of their employment when they committed the negligence or omission complained of herein.

28. The defendant's Holmes and Brown, U.S., failed to exercise a standard duty of care and negligently filed to monitor a schedule summer league basketball game according to policy. (Ex. E) The defendant's knew the risk, for failure to monitor the actions of dangerous inmates could and would harm another inmates health. The defendant's knew of the risk, posed by being an inmate referee, was dangerous but failed to stop all conflicts by not following policy.

29. These specifics acts of defendant's Holmes and brown, U.S., led to the plaintiff being attacked and viciously assaulted and led to permanent physical, mental and psychological injuries. See 276 Fed. Appx 339 Allen v Choice Hotels.

30. The plaintiff herein assert that defendant's Holmes and Brown, U.S., is liable where as they knew or should have known that harm to the health of plaintiff would result by failing to monitor game according to policy. Furthermore, defendant's was aware of inmate Bobby Addison prior assaults during scheduled recreational sports and continued to let him participate knowing that Addison was violent. Furthermore, the defendant's are liable by relying on plaitiff to do their job to resolve conflicts between dangerous inmates which led to the injuries to the plaintiff.

31. The plaintiff request 2 million dollars for the negligence of defendant's Homes, brown, u.S., which led to his injuries.

CLAIM 5
PUNITIVE DAMAGES

32. The plaintiff request Punitive Damages herein where the defendant's Holmes and Brown conduct was reckless and taken in disregard of plaintiff's rights. In this case, the plaintiff was harmed due to the defendant's Holmes and Brown conduct of recklessly allowing a scheduled summer league game to be unsupervised and relying on plaintiff to do their job of resolving conflicts of dangerous inmates.

33. Furthermore, the defendant's was aware of the danger of not supervising the game. The defendant's conduct led to the plaintiff being attacked and assaulted.

34. Under the facts and evidence of this case, the plaintiff is entitled to Punitive Damages in the amount of 1.5 million dollars. This amount will deter defendant's or the actual defendant's Holmes and Brown from further omissions of this kind of complaint herein. See Smith v Wade, 461 US 30, 75 L Ed 2d 632.

CLAIM 6
COMPENSATORY DAMAGES

35. The plaintiff request Compensatory Damages in the amount of 2 million dollars due to his physical, mental and emotional injuries, future medical expenses, future economic earnings as well as pain.

36. The plaintiff is entitled to this considering he was brutally assaulted, hospitalized and have permanent scars, physically, metally and economically. See medical record (Discovery).

37. Plaintiff request 2 million dollars.

REQUEST FOR A JURY TRIAL

38. The plaintiff herein request the honorable court grant him s jury Trial on all the claims and damages presented herein. The plaintiff asserts he is entitled to a jury trial on his issues and damages alleged in the complaint.

CONCLUSION

39. Plaintiff request this HOnorable Court grant him a trial or claims herein whereas he can receive the Damage amount he request herein.

Date: October 27, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

CERTIFICATE OF SERVICE

I, Frederick Irvin, Swear under the penalty of perjury that this AMENDED COMPLAINT was given to prison authorities on OCtober , 2010, for mailing to the following parties:

Clerk Of COurt
United States District Court
P.O. Box 835
Charleston, SC 29402

Barbara M. Bowens
AUSA
1441 Main street, suite 500
Columbia, SC 29201

Date: October 27, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

AFFIDAVIT OF FREDERICK IRVIN

I, Frederick Irvin, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed at FCI Elkton in Lisbon, Ohio. I was incarcerated in FCI Williamsburg in South Carolina from December 2007 til January 2010.

2) On May 30, 2009 an approved summer league basketball game was scheduled to play after the 5 minute recreation movement had ended. The game was scheduled at this particular time so that the game will be over in time for the other scheduled softball game that was scheduled to start at 6:30pm.

3) I was the league commissioner/official that worked for staff to overlook the league.

4) Being the league commissioner, staff relied on me to be present at every game, keep staff informed of the problems that arises, train officials and whatever is needed to oversee the league for staff. I have also had to resolve conflicts of dangerous inmates which I was required to suspend them from play.

5) Staff was aware of Addison's threats and violent rage against me and others. I have told staff the importance of supervising the games and suspending inmates under their policy. staff knew their presence have and would prevent assaults, attacks and any altercations.

6) I have suspended Addison several times for his violent rage and Addison has threatened me because of the suspension.

7) On May 30, 2009, during the summer league basketball game, Addison became disruptive and went into his violent rage.

8) Staff was not present to resolve the conflict so I stopped the game to try to calm down Addison. Addison became unruly, threatening and insulting. At that point I ended the game.

9) Addison threatened me and others but I walked away from the confrontation to gather the equipment. Addison struck me from behind while my back was turned to him.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned

Affiant certifies that the above are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the Untied States.

Date: May 19, 2010

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

BP-A0943 Small Claims for Property Damage or Loss (31 U.S.C. § 3723) CDFRM MAY 09

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

1. Location where the property loss or damage occurred:	2. Name, address of claimant (Register number, street, city, state, and zip code):
Federal Correctional Institution Williamsburg P.O. Box 340 Salters, SC 29590	Frederick Irvin #16620-039 Federal Correctional Institution Elkton P.O. Box 10 Lisbon, OH 44432
3. Date and Day of Incident:	4. Time: (A.M. or P.M.):
May 30, 2009	Approximately 5:30-5:45 P.M.

5. Basis of Claim (State in detail the known facts and circumstances of the damage to, or loss, of privately owned property, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages, if necessary.): On May 30, 2009, while at FCI Williamsburg, claimant was supervising/officiating a scheduled summer recreational summer league basketball game and was attacked and assaulted by inmate Bobby Addison. Correctional Recreational Officers Holmes and Brown knew of the risk posed by being an inmate referee and failed to monitor/supervise the scheduled game according to policy. The claimant suffered a nasal, jaw and mastoid fractures, a sub arachnoid hemmorhages along the bilateral frontoparietal lobes, a subdural hematoma extending from the frontal lobe anteriorly to the occipital lobe, fluid scattered through the left mastoid cells, right brain contusions, 6 staples to the back of the head, sutured laceration to the lip, lost of taste and smell senses and continued damage to memory. The claimant was hospitalized because of the assault.

6. Witnesses (Please provide the name and address (number, street, city, state, and zip code of each witness)):

Jermaine Pickett #16285-171 FCI Williamsburg P.O. Box 340 Slaters, SC 29590	Greg Uzzell #24862-056 FCI Williamsburg P.O. Box 340 Salters, SC 29590	D'shun Rucker #13252-171 MCFP Springfield P.O. Box 400 Sprigfield, MO 65801	Donald Vanderhorst #95301-071 FCI Fort Dix Fort Dix, NJ 08640

7. Amount of Claim for Damage to, or loss of, privately owned property (in dollars) (Sum Certain Amount - Total Amount Of Claim):

$ 2 million dollars

8. MAIL OR DELIVER CLAIM TO THE REGIONAL OFFICE WHERE THE CLAIM OCCURRED

I CERTIFY THAT THE AMOUNT OF THE CLAIM COVERS ONLY DAMAGE TO, OR LOSS OF PRIVATELY OWNED PROPERTY CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

9. Signature of Claimant or Authorized Representative	10. Date
Frederick Irvin	5-05-10

WPD Prescribed by PS 1320

Ex. A

AFFIDAVIT OF CARL McNEIL JR.

I, Carl McNeil Jr, a breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in Salters, South Carolina.

2) On October 12, 2008 I was playing in a scheduled recreational Flag Football game.

3) During the football game inmate Bobby Addison, also known as Bilal, was in a violent rage as he and my teammate, inmate Hutchinson, started arguing. Mr. Addison threatened Mr. Hutchinson by stating, "I'll get you."

4) The very next play, after the whistle was blown and the play was over, Mr. Addison charged towards Mr. Hutchinson where I was also standing after the play was over.

5) Mr. Addison intentionally dove off his feet at Mr. Hutchinson. Mr. Hutchinson ducked and I was struck in the face with Mr. Addison's forearm. I was knocked unconscious.

6) I was taken to the hospital in which the impact, from Mr. Addison's rage, fractured my upper and lower jaw and a plate was inserted.

7) Staff was aware of Mr. Addison's aggressive and violent behavior and his intentions to hurt someone and put him in SHU (Special Housing Unit).

8) Staff released Mr. Addison from SHU knowing he had a violent rage and Recreational Staff let Mr. Addison continue to play in the rest of the 2008 Flag Football season and other recreational sports.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: September 7, 2009

Carl McNeil 21196-056

Carl McNeil #21196-056
Affiant
FCI Williamsburg - POB 340
Salters, SC 29590

Ex. B

AFFIDAVIT OF DONALD VANDERHORST

I, Donald Vanderhorst, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was actively participating in a scheduled recreational summer league basketball game which include inmate Bobby Addison.

3) During the course of the game, inmate Bobby Addison had become disruptive and threatening in which the game was stopped by an inmate basketball official Frederick Irvin.

4) After the end of the game, Mr. Addison behavior became violent in which he hit Mr. Irvin which caused Mr. Irvin's head to hit the concrete. Mr. Irvin was unconcious and bleeding profusely.

5) There was no Reacreation Staff or Correctional Staff supervising the game nor in the vicinity of the court where the assault happened so I ran to find any Staff for assistance.

6) Rec Staff Holmes was on the other side of the yard by the handball courts when I told him Mr. Irvin had been hit by Mr. Addison and Mr. Irvin was laying on the court hurt badly.

7) I have witnessed Mr. Addison on several occassions being disruptive and his constant threats towards inmate officials/referees.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

DATE: August 3, 2009

Donald Vanderhorst

Donald Vanderhorst #95301-071-AFFIANT
FCI Williamsburg
PO BOX 340
Salters, SC 29590

Ex. C

AFFIDAVIT OF LANCE POUGH

I, Lance Pough, a living breathing man, competent to give testimony, do hereby say and declare the following facts are True and Correct:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) I am a prison recreational basketball referee.

3) I was threatened by inmate Bobby Addison on many occassions while officiating the winter indoor Basketball league games in 2008.

4) Inmate Addison on multiple occassions not only threatened me but also Inmate Frederick Irvin who would be officiating with me.

5) Inmate Addison would become uncontollable and violent during different games which result in him being rejected from the games and in return he would make threats that he was gonna get us (the referees) one day.

6) Recreation Staff here in this prison was aware of Inmates Addison conduct, behavior and threats yet still failed to act or supervise the games.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: November 22, 2009

Lance Pough

Lance Pough #53277-060
Affiant
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

EX. D

AFFIDAVIT OF DESHAUN RUCKER

I, Deshaun Rucker, a living breathing man, competetnt to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was watching a basketball game of the summer outdoor leauge.

3) During this particular game, an incident arose where an inmate had become disruptive and threatening other inmate players, as well as Frederick Irvin who was an inmate official.

4) The inmates name is Bobby Addison, also known as Bilal that was disruptive.

5) As the game came to an end, Mr. Addison behavior became uncontrollable and violent in which he attacked Mr. Irvin by punching Mr. Irvin in the face where as Mr. Irvin fell to the cement and hit his head on the pavement. Mr. Irvin was unconscious and bleeding profusely.

6) There was no recreational staff, or correctional staff supervising the game nor in the vicinity of the court where the assault occurred.

7) I seen Donald Vanderhorst, another inmate, go retrieve Rec Staff Holmes who returned to the court.

8) Rec Staff Holmes was on the otherside of the recreational field by the last handball court about 150 yards away.

9) I witnessed hearing and seeing, inmate Addison violent disruptions, and threats casted towards the inmate officials Irvin and lance Pough on numerous occassions while playing in the previous indoor basketball league while Addison was on my team.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: August 4, 2009

D'Shaun Rucker

Deshaun Rucker # 13252-171
Affiant
FCI Williamsburg - POB 340
Salters, SC 29590

Ex. E

FCI WILLIAMSBURG INTRAMURAL CODE OF CONDUCT

The primary purpose for our intramural sports program is to provide an organized, safe, and enjoyable form of recreation for all interested inmates. Emphasis is placed on creating a positive non-threatening atmosphere in which players, coaches, officials, and spectators can relax and enjoy the social interaction and physical benefits of athletic competition.

THERE WILL BE NO TOLERANCE FOR UNSPORTSMANLIKE LIKE CONDUCT. Those inmates who cannot maintain control of their actions and/or emotions will be removed from the intramural program, **without hesitation**. The integrity of the Recreation Department's intramural program **will not** be compromised by inmates who cannot conform to general rules of sportsmanship, as well as posted intramural rules.

ALL PARTICIPANTS ARE ADVISED THAT VIOLATIONS OF INTRAMURAL RULES, IN MANY CASES, CONSTITUTES A VIOLATION OF BUREAU POLICY AND MAY RESULT IN DISCIPLINARY ACTION ABOVE AND BEYOND THOSE STATED IN THE FOLLOWING INTRAMURAL RULES AND REGULATIONS.

RULES OF CONDUCT

1. **Any player or coach ejected from a game is suspended from all intramural competition for a minimum of two (2) games. Any subsequent ejection from a game will result in a six (6) month suspension from any league. A participant suspended from one league, cannot play in another league (basketball, volleyball, soccer, football, or softball) while under suspension. A violation of this rule will result in suspension from intramural program for a minimum period of one (1) year.**

2. **Any player or coach placed on suspension a second time, from any intramural sport, within six(6) months from the date of eligibility from the previous suspension is suspended from all intramural participation for a minimum period of one (1) year. This includes soccer, basketball, volleyball, football, and softball regular seasons, practice games, jamborees, special tournaments, etc.**

3. Participants will treat staff, officials, other participants, and spectators with respect at all times. Abusive language, threatening gestures or behavior **will not be tolerated.** Violations will result in an immediate expulsion from the game and a minimum two (2) game suspension. Such incidents may involve additional disciplinary action as determined by Recreation Staff, Correctional Services, Unit Team, or Disciplinary Hearing Officer (DHO).

4. All players and coaches under suspension must remain outside gym, soccer field, softball field, and volleyball court area while any league game is in progress, during warm-ups, and while teams are practicing. A violation will result in suspension from the intramural program for a minimum period of six (6) months from the date of the violation.

5. Any player or coach ejected from a game (for any reason) is, in addition to the minimum two (2) game suspension, ineligible to compete in the varsity competition for a minimum period of six (6) months.

6. If any recreation property (i.e. jerseys, whistles, gloves, balls, shin guards, etc.) is confiscated from an inmates's person or property, that inmate is suspended from all intramural sports for a minimum period of six (6) months, and is subject to receiving an incident report for possession of contraband.

7. Any coercive action (i.e. threats, bribes, etc.) made to any official before, during, or after a game by any player or coach may result in suspension from all intramurals for up to one (1) year.

8. Officials who threaten players or coaches are subject to the same disciplinary actions as players.

9. A staff member is present on the sideline during all games. He/She resolves all conflicts and his/her decision is final. Staff have the authority to over rule all calls, make calls, and take any and all action to maintain control and the integrity of the game.

10. Only inmates on the team rosters may sit on the team bench during games. Violation(s) may result in forfeiture of the game, as determined by the League Commissioner.

11. Coaches are responsible for their teams "conduct" while participating in the league. The coach may be assessed fouls or ejected from a game if they cannot control their players demeanor. Coaches ejected are subject to the same penalty as players.

12. Any player involved in any type of physical altercation is subject to disciplined action and suspension from all intramural activities for a minimum of one (1) year.

13. Players and coaches attending games as spectators may be disciplined for unsportsman like conduct, to include warnings, technical fouls, ejections, and incident reports. The same standard of conduct required of players and coaches applies when spectating.

14. Participants who throw or kick basketballs, softballs, soccer balls, or volleyballs against the walls, ceilings, etc. are suspended for a minimum of two (2) games and may be held financially responsible for any damage to property and/or equipment.

15. All participants must acknowledge, by signing, that they have read and understand the intramural code of conduct prior to playing in any game.

16. Participation without signing the code of conduct may result in a minimum two (2) game suspension and forfeiture of all games played prior to signing.

17. Any coach, official, or score keeper with a problem or complaint needs to first address it with the League Commissioner before taking it to higher authority. Failure to comply may result in dismissal of the complaint.

18. Official protests may only be filed on **Rule Interpretations, Roster Infractions, and Player Eligibility.** Coaches who attempt to file protests outside of these areas, or who file frivolous protests are subject to removal from the league.

19. Team names are limited to the name of the Unit or the name of an official NBA, MLB, MISL, team.

I have read and understand the intramural code of conduct.

TEAM NAME:_____ DATE:_____

PLAYERS	REGISTRATION #	DATE
COACH:_____	_____	_____
1._____	_____	_____
2._____	_____	_____
3._____	_____	_____
4._____	_____	_____
5._____	_____	_____
6._____	_____	_____
7._____	_____	_____
8._____	_____	_____
9._____	_____	_____
10._____	_____	_____
11._____	_____	_____
12._____	_____	_____
13._____	_____	_____
14._____	_____	_____
15._____	_____	_____

DISCIPLINE HEARING OFFICER REPORT Ex. F BP-S305.052 MAY 94

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

V SPECIFIC EVIDENCE RELIED ON TO SUPPORT FINDINGS (physical evidence, observations, written documents, etc.)

Your due process rights were read and reviewed with you by the DHO at the time of the hearing. You stated you understood your rights, had no documentary evidence to present, and requested no witnesses or a staff representative to appear on your behalf to refute the charge against you.

The DHO finds you committed the prohibited act of Assaulting Any Person (Serious), code 101, when you struck inmate Irvin #16620-039, causing him to fall on the basketball court striking his head.

The DHO bases this finding on the written statement of the reporting staff member that on May 30, 2009, at approximately 5:50 p.m., you assaulted inmate Irvin by striking him from behind on the left side of his face with a clenched fist. When you struck him, you caused him to fall to the ground where he struck his head on the basketball court in the outside recreation area. Three inmate witnesses provided statements they had observed you assault inmate Irvin. On May 30, 2009, inmate Irvin was transported to the local hospital where he received treatment consistent with someone who had a brain contusion. The medical reports indicated inmate Irvin sustained nasal bone and mastoid fractures, a sub arachnoid hemorrhages along the bilateral frontoparietal lobes, a sub dural hematoma extending from the frontal lobe anteriorly to the occipital lobe, and fluid scattered through the left mastoid air cells. The report indicated there was a possible right brain contusion. A supporting memorandum from the Operations Lieutenant indicated inmate Irvin was lying in a large pool of blood, bleeding profusely from his mouth and making a gurgling sound, was having problems breathing and was incoherent. An injury assessment conducted on you revealed you sustained a laceration to your left first knuckle. The injuries sustained are indicative a serious assault was inflicted.

The DHO considered your statement that you did not commit this act. However, you were positively identified by three inmate witnesses. You also indicated you had a right to confront your witnesses. Although the witnesses did not appear at your hearing, their identities and statements were revealed during the hearing. Inmate Salters #62137-004, stated you were having a verbal altercation with two other inmates while you were playing a basketball game and inmate Irvin cancelled the game to prevent further problems. You proceeded to call inmate Irvin names, approached him, and struck him from the left side. Inmate Riley #70098-056, indicated you were arguing with him, and inmate Irvin called the game to prevent further disruption. You proceed to run up behind him and "sucker punch," him on the side of the head causing him to fall to the ground. Inmate Pickett #16285-171, indicated you were arguing with another inmate and inmate Irvin attempted to stop the argument. After you and the inmate walked away from each other, you approached inmate Irvin and punched him. Therefore, it is apparent you had retaliated against inmate Irvin during the basketball game. You hit inmate Irvin due to his call to cancel the game because you and inmate Riley #70098-056 were arguing and demonstrating poor sportsmanship.

Therefore, the DHO relies on the greater weight of evidence, the injuries sustained by inmate Irvin which required outside medical attention, the witnesses to the incident who provided similar testimonies, and the detailed description reported by the reporting staff member. As a professional staff member, he is legally and morally obligated to provide truthful statements.

Based on the reporting officer's statement, the supporting memorandums, the injury assessment conducted on the victim, inmate Irvin, the fact you had blind sighted inmate Irvin causing him to fall to the court and hit his head requiring outside medical attention, and the SIS investigation revealing the witnesses' statements regarding your role in this incident, the DHO finds you did commit the prohibited act of Assaulting Any Person (Serious), code 101.

VI SANCTION OR ACTION TAKEN

Disallowance of Good Conduct Time	No. of Days	40	Suspended	Y/N	N	No. Days
Forfeit Non Vested Good Conduct Time	No. of Days	40	Suspended	Y/N	N	No. Days
Loss of Telephone Privileges	No. of Days	365	Suspended	Y/N	N	No. Days
Loss of Commissary Privileges	No. of Days	365	Suspended	Y/N	N	No. Days
Disciplinary Segregation	No. of Days	60	Suspended	Y/N	N	No. Days
Recommend Disciplinary Transfer		XXX				

VII REASON FOR SANCTION OR ACTION TAKEN

Seriously assaulting another and refusing to cease your actions in a correctional environment will not be tolerated. You participation in this behavior jeopardizes the security of this institution and may have resulted in further injury to staff and other inmates.

Ex. G

AFFIDAVIT OF GREGORY UZZELL

I, Gregory Uzzell, a living breathing man, competent to give testimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was an official during a summer league basketball game that started at 5-5:30pm.

3) Approxiamtely 10minutes in to this game, inmate Bobby Addison, also known as Bilal, began verbally insulting a member of his team. Another inmate spoke up about Mr. Addison's disruptive behavior.

4) Because of Mr. Addison's disruptive and threatening behavior the head commissioner/referee, Frederick Irvin, ended the game. Without warning Mr. Addison struck Mr. Irvin, while his back was turned, with a vicious blow in which caused Mr. Irvin's skull to hit the pavement. Mr. Irvin was unconscious and bleeding excessively.

5) There was no recreational or correctional staff supervising the scheduled summer league basketball game. There was no other scheduled recreational activities going on at this time.

6) Mr. Irvin layed on the ground unconscious for several minutes before staff arrived. Recreational Staff allowed an inmate to move Mr. Irvin's head in which caused more blood to pour. It took Health Service Staff several additional minutes to show up.

7) I have observed inmate Addison's unruly and violent display of physical intimidation several times during a scheduled game. Mr. Addison is approximately 6'4 in height and weigh approxiamtely 270 pounds massive muscle.

8) I have witnessed Mr. Addison threaten to hit inmate officials because of minor rule infractions.

9) During the 2008 Flag Football season, which I was officiating, Mr. Addison was arguing with a member of the opposite team. After a play was over Mr. Addison physically assaulted another inmate that left the inmate unconscious and with a broken jaw.

10) The administration was aware of Mr. Addison's violent behavior and isolated him fromgeneral population. A few days later administration let him out on the compound knowing this inmate has a history of violent behavior.

That pursuant to the provisons of Title 28 U.S.C. § 1746 the undersigned Affiant certifies tha the above are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: August 15, 2009

Gregory Uzzell #24862-056
AFFIANT
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

Ex. H

AFFIDAVIT OF JERRY HILL

I, Jerry Hill, a living breathing man, competent to givetestimony, do hereby say and declare the following facts are true:

1) I am currently housed and incarcerated at FCI Williamsburg in South Carolina.

2) On May 30, 2009 I was on the Recreation Yard waiting to participate in a scheduled softball game that started at 6:30pm.

3) The only activity on the recreation yard was a summer league basketball game. The game started between 5-5:30pm.

4) The scheduled softball game at 6:30pm was cancelled because of an assualt on Frederick Irvin.

5) All softball games are scheduled for6:30pm after the 4:00pm institutional count.

That pursuant to the provisions of Title 28 U.S.C. § 1746 the undersigned Affiant certifies that the above statements are true and correct to the best of his knowledge and belief under the penalty of perjury under the laws of the United States.

Date: November 30, 2009

Jerry Hill

Jerry Hill #39027-007
FCI Williamsburg
P.O. Box 340
Salters, SC 29590

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Frederick Irvin,	)	CIVIL ACTION NO. 9:10-01336-RMG
	)	
Plaintiff,	)	
	)	
vs.	)	**SECOND AMENDED COMPLAINT**
	)	
United States of America,	)	
	)	
Defendant.	)	
	)	

The Plaintiff, Frederick Irvin, complaining of the Defendant above-named hereby states:

1. Plaintiff Frederick Irvin, Inmate # 16620-039, is a resident of FCI Elkton, Ohio, under the custody and care of the Bureau of Prisons.

2. Plaintiff is an American citizen incarcerated within the United States prison system and the acts alleged herein occurred while Plaintiff was housed at the Williamsburg Correctional Institution ("FCI Williamsburg") in Salters, South Carolina.

3. Plaintiff Frederick Irvin brings this action under the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, for damages sustained by the negligent failure of Bureau of Prisons personnel (hereinafter "prison staff") to comply with their mandatory recreation policy causing Plaintiff to become severely injured while under their care at FCI Williamsburg.

4. Defendant United States of America is the appropriate defendant subject to suit under the Federal Tort Claims Act, 28 USC § 1346(b). The Bureau of Prisons is a federal agency existing under the laws of the United States of America with offices and facilities throughout the United States and, specifically, a prison in Williamsburg County, South Carolina.

5. Jurisdiction and venue are proper in this Court and in accordance with the Federal Tort Claims Act.

6. Plaintiff has properly given notice and has exhausted the administrative remedies under the Federal Tort Claims Act for the negligent acts and/or omissions by Defendant's

employees as described herein, which resulted in Plaintiff suffering severe and permanent injuries.

7. This Complaint seeks damages under 28 U.S.C § 1346, Federal Tort Claims Act, for money damages and personal injury caused by the negligent or wrongful acts or omissions of employees of the United States Government (Bureau of Prisons) while acting within the scope of their office or employment under circumstances where the United States, if it were a private person, would be liable to the Plaintiff in accordance with the laws of the State of South Carolina.

8. Under the provisions of the Federal Tort Claims Act, the Defendant, the United States of America, is liable for the actions described herein of the correctional officers who were acting within the scope of their employment when they failed to adequately supervise and/or be present at an organized basketball event as required by FCI Williamsburg's Intramural Code of Conduct.

9. John Owens was an employee of the Bureau of Prisons, and at all times relevant in this Complaint, was acting within the course and scope of his employment at FCI Williamsburg in the role of the Warden.

10. Eugene Holmes was an employee of the Bureau of Prisons, and at all times relevant in this Complaint, was acting within the course and scope of his employment at FCI Williamsburg as a Recreational Director.

11. Derrick Brown was an employee of the Bureau of Prisons, and at all times relevant in this Complaint, was acting within the course and scope of his employment at FCI Williamsburg as a Recreational Director.

12. Daniel Mercado was an employee of the Bureau of Prisons, and at all times relevant in this Complaint, was acting within the course and scope of his employment at FCI Williamsburg as a Recreational Director.

13. Upon information and belief, there may be other unknown employees of the Bureau of Prisons who may also be responsible for Plaintiff's physical and medical care, not specifically named in this Complaint.

14. The Defendant United States, its servants, agents and employees John Owens, Eugene Holmes, Derrick Brown, and Daniel Mercado, while within the course and scope of their employment at FCI Williamsburg, violated their duties as announced within their policies and procedures, the FCI Williamsburg Intramural Code of Conduct, and Defendant United States of America has waived its sovereign immunity under the facts and circumstances described herein.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

15. Plaintiff repeats and re-alleges each and every allegation set forth above as if repeated verbatim herein.

16. On May 30, 2009, Plaintiff, while acting in his official capacity as Recreation Commissioner of basketball at FCI Williamsburg, was attacked and assaulted by Bobby Addison, Inmate #38253-007, out of the presence of correctional officers.

17. As part of Plaintiff's responsibilities as Recreation Commissioner, Plaintiff was required by staff at FCI Williamsburg to educate and train the referees for the inmate intramural basketball program. As part of the referee training program, Plaintiff was charged with the responsibility to organize games so the referees could learn through experience.

18. Plaintiff, as Recreation Commissioner, created the schedule, conducted meetings, facilitated trades among teams, distributed flyers, created a weekly newsletter, trained the referees, supervised the games, and acted as liaison between inmates and staff to communicate any complaints or concerns regarding the intramural basketball league sponsored by staff at FCI Williamsburg.

19. On May 30, 2009, Plaintiff went to the staff office at FCI Williamsburg and was given equipment to conduct the first pre-season game of the year by FCI Williamsburg officers.

20. The FCI Williamsburg officers provided Plaintiff with whistles, jerseys, a scorebook, and an electronic clock to keep score and time during the basketball game.

21. FCI Williamsburg staff acknowledged Plaintiff's authority to initiate the organized game and were effectively put on notice that an organized game was about to commence when they gave him the necessary equipment.

22. No prison staff officials were present and/or on the sidelines as required by FCI Williamsburg's Intramural Code of Conduct policy once the game began.

23. Upon information and belief, the basketball game that Plaintiff was officiating and/or supervising was the only recreational activity going on at the time, which started approximately between 5:00 and 5:30 pm.

24. Acting in his capacity as Recreation Commissioner and charged with the responsibility to facilitate a safe recreational environment, Plaintiff interrupted the basketball game due to the unruly, disruptive, and threatening behavior of Bobby Addison, Inmate #38253-007.

25. Shortly after the basketball game was interrupted by Plaintiff in an attempt to diffuse a disagreement over a referee's call, Bobby Addison attacked the Plaintiff outside the presence of prison staff.

26. Bobby Addison had a prior record and history of violent conduct in recreational activities sponsored and supervised by prison staff.

27. Inmate Bobby Addison's propensity and history of violence during official recreational activities was known by prison employees.

28. Prior to the attack on May 30, 2009, inmate Bobby Addison had injured and threatened other inmates which prison staff was aware of and of which prison staff had previously reprimanded Inmate Bobby Addison.

29. Specifically, Plaintiff is informed that prior to the attack on May 30, 2009, Inmate Bobby Addison caused severe injury to another inmate, Carl McNeil, by breaking his jaw during a violent rage in an official football game at FCI Williamsburg.

30. Plaintiff and other inmates directly communicated their concerns to prison staff regarding Inmate Bobby Addison's violent and threatening behavior during recreational sponsored activities.

31. In further violation of the FCI Williamsburg Intramural Code of Conduct, prison staff officials failed to suspend and/or prevent Inmate Addison from participating in further official recreation sponsored activities after causing an inmate to suffer a severe injury on a prior occasion.

32. As a result of prison staff's lack of presence and failure to monitor the basketball game, Plaintiff was assaulted and repeatedly beaten while unconscious.

33. Numerous inmates participating in the basketball game witnessed the attack on Plaintiff. Upon information and belief, other inmates sought the assistance of prison staff to help Plaintiff while he was lying defenseless on the ground.

34. By the time prison staff arrived at or near the sideline of the basketball court, Plaintiff had been severely beaten by Inmate Bobby Addison and was lying in a puddle of blood, gasping for breath, and unconscious.

35. As a result of the attack, Plaintiff, among other things, suffered a brain bleed, nasal, jaw, and mastoid fractures, a subarachnoid hemorrhage along the bilateral frontoparietal lobes, a subdural hematoma extending from the frontal lobe anteriorly to the occipital lobe, and had fluid scattered through the left mastoid cells. Additionally, he suffered a right brain contusion, had six staples inserted into the back of his head, a sutured laceration to the lip, and has lost his sense of taste and smell. Furthermore, Plaintiff suffers memory problems, chronic headaches, and has problems with his cerebral executive functioning, all of which has caused and will continue to cause Plaintiff to seek medical care for these permanent injuries.

CAUSES OF ACTION

(Negligence, Gross Negligence, Negligence Per Se, and Negligent Supervision)

36. Plaintiff repeats and re-alleges each and every allegation set forth above as if repeated verbatim herein.

37. At all times pertinent hereto, the Defendant United States of America and Federal Bureau of Prisons had a duty to Plaintiff to prevent him from being injured by a known danger and, among other things, had a duty to adhere to the Intramural Code of Conduct as set forth at FCI Williamsburg.

38. Plaintiff relied on the security and assistance of staff when training the basketball referees and facilitating an organized basketball game.

39. The FCI Williamsburg Intramural Code of Conduct requires a staff member to be present on the sidelines during all games and they are responsible for resolving all conflicts and making final decisions. Further, staff has authority to overrule all calls, make calls, and take any and all action to maintain control and the integrity of the game.

40. At all times pertinent hereto, Bureau of Prisons employees were acting within the course and scope of their employment when they failed to supervise and/or have a presence at the basketball game which constitutes negligence, gross negligence, recklessness, and carelessness.

41. Plaintiff's injuries and resulting damages were directly due to and proximately caused by the gross negligence, carelessness, recklessness, willfulness, and wantonness on the part of the agents and employees of the Bureau of Prisons including, but not limited to, one or more of the particulars:

a. In failing to monitor the basketball game in accordance with the mandatory policies and procedures after Defendants knew or should have known of the potential harm to Plaintiff;

b. In failing to follow their own policies and procedures;

c. In violating their duties owed to Plaintiff and other inmates;

d. In failing to comply and/or adequately enforce the Intramural Code of Conduct policy;

e. In failing to have any staff present at the recreation basketball game;

f. In failing to adequately monitor the basketball game;

g. In failing to maintain a presence at recreational activities to prevent an outbreak of violence directed at inmates who volunteer to referee and coordinate basketball games;

h. In failing to create a positive, nonthreatening atmosphere in which players, coaches, officials, and spectators can relax and enjoy the social interaction and physical benefits of athletic competition while incarcerated and clearly set forth in FCI Williamsburg's Intramural Code of Conduct;

i. In tolerating and/or ignoring the unsportsmanlike, violent, and threatening behavior of Inmate Bobby Addison;

j. In failing to recognize the danger to an inmate who is acting as a recreational official or referee;

k. In failing to take disciplinary action toward Inmate Bobby Addison on prior occasions;

l. In providing Plaintiff, the Recreation Commissioner, with equipment to engage in a recreational activity and then failing to supervise and/or be present to resolve or prevent injury to referees, inmates, or other individuals responsible for facilitating the prison's recreational activities;

m. In failing to have staff present as required by the Intramural Code of Conduct;

n. In allowing Inmate Bobby Addison to participate in intramural activities after prior physical altercations and threats of which prison staff was aware;

o. In failing to supervise the prison staff officials;

p. In failing to ensure prison staff officials comply with the policies and procedures and Intramural Code of Conduct;

q. In failing to have a staff member available at the basketball game to resolve conflicts which are known or should have been known to arise during competitive recreational activities; and

r. In failing to do what a reasonable prison staff official would do or would not do under the same or similar circumstances.

42. That as a direct and proximate cause of the acts and omissions or both of the Defendants, Plaintiff was injured and suffered great and permanent physical harm which has

caused, and in the future will cause, him to suffer one or more of the following elements of damage:

a. Physical and mental anguish;

b. Pain and suffering;

c. Loss of future earning capacity;

d. Loss of Plaintiff's enjoyment of life;

e. Substantial expenses for medical services;

f. Expenses for transportation to and from medical services;

g. Future medical expenses;

h. Permanent injury to his body; and

i. Others that may be discovered prior to trial

43. Due to the reckless, willful, and wanton conduct of the Defendant as well as its violations of the prison's own internal policies and procedures, the Plaintiff is entitled to actual damages in such amount as to be determined by the trier of fact.

44. Section 3672 of the Federal Tort Claims Act delegates to each federal agency the authority to consider, determine, and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

WHEREFORE, Plaintiff prays unto the Honorable Court as follows:

a. For an award of damages in an amount to be determined at trial;

b. For a bench trial;

c. For all attorneys fees, costs, expenses, and damages allowed by law; and

d. For such other and further relief as this Court may deem just and proper.

Yarborough Applegate LLC
210 Wingo Way, Suite 301
Mount Pleasant, SC 29464
(843) 972-0150
(843) 277-6691 fax

s/ Douglas E. Jennings
Douglas E. Jennings, Fed ID # 11348
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Jennings Law Firm, LLC
Douglas Jennings, Jr., Fed ID# 2168
PO Box 995
Bennettsville, SC 29512
843-479-2865

Attorneys for the Plaintiff

June 29, 2012
Mt. Pleasant, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Frederick Irvin, Plaintiff, vs. **John Owens,** et al., Defendants.	Civil Action No. **9:10-cv-01336-RMG -BM** **ORDER**

A motion for summary judgment has been filed in this case that was brought originally by a prisoner who is without counsel. The motion is based substantially on matters outside the pleadings. Because the prisoner has no attorney, the Clerk is directed to send him or her by mail a copy of this Order, an explanation of summary judgment procedure, and a copy of pertinent extracts from Rule 12 and Rule 56 of the Federal Rules of Civil Procedure.

The prisoner shall have a period of **thirty-four (34) days** from the date of this Order to file any material he or she wishes to file in opposition to the motion for summary judgment in accordance with the requirements explained in Rule 56, and if he or she fails to respond adequately, the motion for summary judgment may be granted, thereby ending this case.[1] Careful attention[2] should be given to the requirements of Rule 56(e) concerning the necessity for affidavits filed in opposition to summary judgment to be based on personal knowledge, to contain facts admissible in evidence, and to be executed by a person who would be competent to testify as to matters contained in the affidavit if he or she were called to the witness stand. Affidavits or exhibits pertaining to matters that are not involved in this case will not be considered by the Court, nor will affidavits that contain only conclusory statements or argument of facts or law.

A person who is representing himself or herself in federal court may submit a brief or memorandum containing argument if he or she desires to do so, but this is not required. However, submission of a brief, or even the filing of a reply to an answer or return, will not be sufficient to withstand a properly supported motion for summary judgment.

This order is entered at the direction of the Court.

Nov 1
October ____, 2010
Charleston, South Carolina

Bristow Marchant
United States Magistrate Judge

[1] This is one (1) month plus four (4) days mail time, and the time will not be enlarged unless highly persuasive reasons are submitted under oath to support a motion to enlarge time.

[2] In a §2254 case, the petitioner's attention is directed to the provisions of 28 U.S.C. § 2254(d) which require that the findings of the state court be presumed correct unless the petitioner establishes by convincing evidence that the state's factual determination was erroneous or it otherwise appears to be flawed. See also Sumner v. Mata, 449 U.S. 539 (1981). [This reminder is applicable only in habeas corpus cases.]

EXCERPTS FROM RULE 12 AND RULE 56

Federal Rules of Civil Procedure[3]

Rule 12(b) provides, in part:

> "* * * If, on a motion asserting the defense...to dismiss for failure of the pleading [this means the complaint, motion or petition] to state a claim upon which relief can be granted, matters outside the pleading [here meaning the answer or return] are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent [that is, having some connection with the matter or matters in dispute] to such a motion by Rule 56."

Rule 56 provides, in part:

> "(b). . . A party against whom a claim...is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."
>
> "(e) * * * When a motion for summary judgment [and this includes a Rule 12(b) motion to dismiss] is made and supported as provided in this rule, an adverse party [this is the plaintiff(s) or petitioner(s)] may not rest upon the mere allegations or denials of his pleading [meaning the complaint, motion or the petition], but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. [Emphasis added to show that specific facts are required, not conclusory allegations or argument.] If he does not so respond, summary judgment, if appropriate, shall be entered against him."

See attached explanation of summary judgment procedure for a quotation of a part of Rule 56(e) as to the form and sufficiency of affidavits filed in support of or in opposition to a motion for summary judgment. Rule 56(e) also requires that copies of all papers referred to in an affidavit must be attached to the affidavit, and that such copies must be sworn to or certified.

[3]In a §2255 case, the material contained within brackets is inserted by way of explanation of terms used, and is not a part of the Rules quoted. These extracts are prepared for the use of state and federal prisoners who submit complaints, petitions or § 2255 motions to the United States District Court in their own behalf (pro se). The United States Court of Appeals for the Fourth Circuit has expressly or impliedly approved the application of Rules 12 and 56 to petitions for post-conviction relief in federal court pursuant to Title 28, United States Code, Sections 2254 and 2255, as well as to civil rights actions based on Title 42, United States Code, Sections 1983 and 1985.

EXPLANATION OF SUMMARY JUDGMENT PROCEDURE

(For plaintiffs or petitioners who do not have counsel)[4]

Most pro se litigants are prisoners who seek federal habeas corpus relief or relief available under civil rights statutes, 42 U.S.C. § 1983 et seq. Generally, the only issues federal courts entertain in such cases are alleged violations of rights secured by the Constitution. The Federal Rules of Civil Procedure apply in all civil rights cases, and the rules applicable to pleadings and motions apply for the most part in federal habeas cases started by state (or federal) prisoners.

When a defendant (or a respondent) moves or pleads for summary judgment under Rule 56, or sets up in a motion or pleading a defense that the plaintiff (or petitioner) has failed to state a claim upon which relief can be granted, he is arguing, in effect, that a constitutional claim has not been shown by the plaintiff's complaint (or the petitioner's petition). If affidavits or other material are submitted by a defendant (or respondent) to support that defense, and if the court accepts such matters outside the pleading, the court treats the submission as a request for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Whenever one or more affidavits or other material outside the pleading of a defendant (or respondent) are served on a pro se plaintiff (or a pro se petitioner), he cannot rest upon the allegations or denials of his own pleadings. He has a right to file one or more opposing affidavits or other exhibits, and indeed must do so if his action is to survive. If this is not done, the court may very well grant summary judgment against him. [This is true also if the parties are all represented by counsel.]

All affidavits submitted by pro se litigants must meet the standards required by Rule 56, which standards can be determined from the following quotation of a portion of Rule 56(e):

> "(e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

If a pro se litigant does not fully understand what facts would be admissible, and who would be competent to testify, he should not withhold affidavits, for the court will determine whether these standards are met by his affidavit(s).

Under Rule 56(f), if a person served with affidavits cannot obtain opposing affidavits, he must submit to the court his own affidavit, stating why he cannot present by affidavit facts essential to justify his opposition to the facts set out in the affidavits served by the opposing party. Under Rule 56(g), all affidavits submitted to the court must be made in good faith (and, obviously, the facts sworn to must be true),[5] and appropriate action will be taken by the court if it is satisfied that affidavits are presented in bad faith, or solely for the purpose of delay.

UNITED STATES MAGISTRATE JUDGE

[4]This explanation, or one of similar import, is required by Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), which was a civil rights case. The same procedure applies in federal habeas corpus cases under Webb v. Garrison, No. 77-1855 (4th Cir., decided July 6, 1977).

[5]All affidavits submitted in a federal case are submitted under penalties of perjury or subornation of perjury (18 U.S.C. §§ 1621 and 1622), and the federal statute which makes use of the mail to defraud a crime (18 U.S.C. § 1341) has been applied to convict a person who transmitted false averments by mail in a civil rights suit seeking damages. United States v. Murr, 681 F.2d 246 (4th Cir. 1982), cert. denied, 459 U.S. 973 (1982).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Frederick Irvin, #16620-039, Plaintiff, v. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer; United States of America; and NFN Brown, Correctional Recreation Officer, Defendants.	CIVIL ACTION NO. 9:10-1336-RMG-BM **ORDER**

This action has been filed by the Plaintiff, pro se, alleging violations of his constitutional rights by the named Defendants, as well as violations of the Federal Tort Claims Act (FICA). This matter is before the Court pursuant to a motion filed by the Defendants to stay discovery.

A review of the file in this matter shows that this action was filed on May 24, 2010, with an order authorizing service of process thereafter being entered on July 1, 2010. However, rather than file an answer, the Defendants filed a motion for summary judgment on October 27, 2010. Defendants assert the defense of qualified immunity, but also seek summary judgment on the merits of Plaintiff's claim, which is based on failure to protect and deliberate indifference by the Defendants to his safety as a prison inmate.

In Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982), the Supreme Court noted that discovery should not ordinarily be permitted until the Court has had an opportunity to rule on the question of qualified immunity. However, in the case at bar, the Defendants have submitted a motion for summary judgment in which the defense of qualified immunity is only a part of the motion. Defendants also fully address Plaintiff's claim on the merits in their motion, and have attached exhibits and affidavits as evidence to support their argument that no genuine issue of material fact exists in this case, and that they are entitled to summary judgment. Further, Defendants' argument that they are entitled to qualified immunity is predicated on their argument that the evidence submitted shows that no violation of Plaintiff's constitutional rights occurred.

Since the Defendants filed their motion for summary judgment without ever filing an answer in this case, Plaintiff has not enjoyed any discovery period in which to seek or obtain evidence to support his claims. See Local Rule 26.04, D.S.C. [providing for discovery in pro se cases to be completed within a period of ninety (90) days following the joinder of issues]. Therefore, the Court does not find that it would be proper to allow the Defendants to submit exhibits of an evidentiary nature in support of their motion for summary judgment addressing the merits of Plaintiff's claims, while not allowing the Plaintiff an opportunity to obtain his own evidence through discovery to support his claims. Therefore,

IT IS ORDERED that the Defendants' motion for a stay of discovery is **denied**. Plaintiff's companion motion to compel (Court Docket No. 40), to the extent Plaintiff seeks an order requiring Defendants to respond to his discovery requests, is hereby **granted**. Defendants shall respond to Plaintiff' discovery requests within thirty (30) days, and Plaintiff shall have sixty (60) days from the date of this order to complete his discovery in this case. Once the discovery period

in this case has expired, Plaintiff will be allowed twenty (20) days to file any material he wishes to file to supplement his opposition to the Defendants' motion for summary judgment.[1]

IT IS SO ORDERED.

Bristow Marchant
United States Magistrate Judge

December 21, 2010
Charleston, South Carolina

[1]The Court notes that Plaintiff has already been issued a Roseboro order, and has filed a memorandum in opposition to the motion for summary judgment, with exhibits.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Frederick Irvin, #16620-039, Plaintiff, v. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer; United States of America; and NFN Brown, Correctional Recreation Officer Defendants.	)	CIVIL ACTION NO. 9:10-1336-RMG-BM **ORDER**

This action has been filed by the Plaintiff, pro se, pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging a violation of his constitutional rights. This matter is before the Court on a second motion of the Plaintiff for appointment of counsel.

As Plaintiff has previously been advised, there is no right to appointed counsel in civil rights cases. Cf. Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975). While the Court is granted the power to exercise its discretion to appoint counsel for an indigent in a civil action, 28 U.S.C. § 1915(e)(1); Smith v. Blackledge, 451 F.2d 1201 (4th Cir. 1971), such appointment "should be allowed only in exceptional cases." Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975).

The Plaintiff in his motion has not shown that any exceptional circumstances exist in this case. Rather, Plaintiff simply states that he is hindered as a prisoner, has no prior experience to litigate his case, and has been unable to obtain private counsel to represent him. These are typical of complaints by prisoners seeking to pursue civil cases pro se in federal court, and after a review of the

file, this Court has determined that there are no exceptional or unusual circumstances presented which would justify the appointment of counsel, nor would the Plaintiff be denied due process if an attorney were not appointed. Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984). In most civil rights cases, the issues are not complex, and whenever such a case brought by an uncounseled litigant goes to trial the Court outlines proper procedure so the uncounseled litigant will not be deprived of a fair opportunity to present his or her case.

Accordingly, the Plaintiff's request for a discretionary appointment of counsel under 28 U.S.C. § 1915 (e)(1) is **denied.**

IT IS SO ORDERED.

Bristow Marchant
United States Magistrate Judge

January 12, 2011

Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Frederick Irvin, Plaintiff, vs. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer FCI Williamsburg; NFN Brown, Correctional Recreation Officer FCI Williamsburg; United States of America, Defendants.	)	CIVIL ACTION NO. 9:10-1336-RMG-BM **ORDER**

Pursuant to Fed. R. Civ. P. 30(a)(2)(B), the Defendants have moved to conduct the deposition of Frederick Irvin on January 21, 2011, in Lisbon, Ohio. For good cause shown, the motion to depose Plaintiff Frederick Irvin is granted.

BRISTOW MARCHANT
UNITED STATES MAGISTRATE JUDGE

Charleston, South Carolina

January 13, 2011

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Frederick Irvin, #16620-039, Plaintiff, v. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer; United States of America; and NFN Brown, Correctional Recreation Officer Defendants.	CIVIL ACTION NO. 9:10-1336-RMG-BM **ORDER**

This action has been filed by the Plaintiff, pro se, alleging violations of his constitutional rights by the named Defendants, as well as violations of the Federal Tort Claims Act (FTCA). This matter is before the Court pursuant to motions to compel and to extend discovery filed by the pro se Plaintiff.

I.

With respect to Plaintiff's motion to compel, Plaintiff first argues that the Defendants waived any objections to his discovery requests by failing to timely respond. However, pursuant to the Court's previous orders, the Defendants were to respond to Plaintiff's discovery requests by January 26, 2011. See Court Docket No. 41. Although Plaintiff argues that he did not receive Defendants' discovery responses until after that date, they were mailed prior to that date. See Defendants' Response, Exhibit 1. Therefore, this argument is without merit.

Plaintiff's motion to compel addresses several discovery requests. Plaintiff first

discusses what are assumed to be Requests for Production of Documents. However, while Plaintiff has attached to his motion copies of Defendants' responses to his Requests for Interrogatories and to Admit, he has not provided a copy of the Defendants' response to any Request for Production. Further, while the Defendant has provided a copy of Plaintiff's second Request for Production of Documents as an attachment to their response memorandum, that is not the Request for Production referenced by the Plaintiff in his motion. Hence, with respect to these requests, the Court has nothing to review, and Plaintiff's motion to compel with respect to these discovery requests is therefore **denied**. See Local Rule 37.01(B), D.S.C. [[R]elevent discovery requests and responses, if any, shall be filed as supporting documentation . . ." to any motion to compel].

Plaintiff also seeks an order compelling the Defendants to more completely respond to his Interrogatory No. 4, which asks;

> What areas does the cameras on the recreation yard covers and what mandates the reviewing of the footage of the camera?

Defendants' response to this interrogatory was as follows:

> Video coverage is not mandated to specific areas of the institution. Numerous areas of the institution are not covered by video surveillance. Video coverage is reviewed by staff following notification of an incident, if available.

As an attachment to their response memorandum, the Defendants have also submitted an affidavit from James Patterson, who is employed as a Lieutenant at the subject Federal Correctional Institution, who attests that there is no video available of the incident alleged in Plaintiff's complaint because the camera was out of range. Plaintiff complains in his motion, however, that the Defendants have not disclosed what areas of the recreation yard at the prison are covered by cameras. Defendants argue in their response that, to the extent Plaintiff seeks the specific location of video surveillance cameras

and their range, that it would be imprudent, if not dangerous, to provide such information to prison inmates, and the Court is constrained to agree. Plaintiff's motion to compel with respect to this interrogatory is therefore **denied**.

Plaintiff also complains that the Defendants did not deny or admit Requests to Admit numbers 7, 8, 10, 11, 15, 16 and 17. However, the Court has reviewed Plaintiff's requests and Defendants responses thereto as are set forth in the exhibit attached to Plaintiff's motion, and finds the Defendants' responses to be proper. Plaintiff's motion to compel with respect to these Requests to Admit is therefore **denied**.

Finally, Plaintiff complains that the Privilege Log provided by the Defendants is inadequate, as it does not describe the nature of the documents, communications, or tangible things not produced or disclosed. See Rule 26(b)(5)(A), Fed.R.Civ.P. The Court has reviewed the Privilege Log provided by the Defendants (attached to Defendants' response), and agrees with the Plaintiff that this Privilege Log is inadequate and does not comply with the applicable rule. Even after reading the Defendants' response, the Court is unable to determine what documents are being withheld and why based on the limited information contained in the Privilege Log. See Defendants' Response, Exhibit 3. Therefore, to the extent Plaintiff seeks in his motion to compel the Defendants to provide a more complete and responsive Privilege Log describing the nature of the documents, communications, or tangible things not produced or disclosed, Plaintiff's motion is **granted**. Defendants are instructed to provide Plaintiff with a proper Privilege Log by March 11, 2011.

II.

With respect to Plaintiff's motion to extend time, as additional time is necessary for the production of the Privilege Log and for Plaintiff to file objections to the Log, if any, Plaintiff's

motion to extend the discovery time is **granted** for that purpose, and the current dispositive motions deadline is therefore suspended. Plaintiff shall file any motion with respect to the revised Privilege Log by March 18, 2011. If the Plaintiff does not file any motion with respect to the revised Privilege Log, the new deadline for filing disposive motions will be Friday, April 8, 2011. If, however, Plaintiff does file a motion with respect to the revised Privilege Log, a new dispositive motions deadline will be set after the Court enters an order on that motion.

Finally, with respect to any discovery requests Plaintiff may have served on the Defendants on January 28, 2011, those requests were untimely under the Court's previous Order. See Rules 33(b)(2) and 34(b)(2)(A), Fed.R.Civ.P. The docket further reflects that Plaintiff has had ample time to pursue discovery in this case, to include the Court previously denying motions to stay discovery filed by the Defendants. No valid justification or argument has been presented to show why additional time, and even more discovery, should be allowed at this point, and the Court therefore declines to extend the discovery in this case beyond what is already set forth in this Order.

IT IS SO ORDERED.

Bristow Marchant
United States Magistrate Judge

March 3, 2011

Charleston, South Carolina

Tami Rippon Cassaro - Activity in Case 9:10-cv-01336-RMG -BM Irvin v. Owens et al Order on Motion for Reconsideration

From: <SCDDFilingstats@scd.uscourts.gov>
To: <scd_ecf_ncf@scd.uscourts.gov>
Date: 5/27/2011 9:40 AM
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U.S. District Court

District of South Carolina

Notice of Electronic Filing

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Case Name: Irvin v. Owens et al
Case Number: 9:10-cv-01336-RMG-BM
Filer:
Document Number: 68(No document attached)

Docket Text:
TEXT ORDER denying [59] Motion for Reconsideration. Plaintiff was allowed to file a motion with respect to Defendants' privilege log, and the remainder of the issues raised in Plaintiff's motion have already been addressed. Signed by Magistrate Judge Bristow Marchant on 5/27/11. (rpol,)

9:10-cv-01336-RMG -BM Notice has been electronically mailed to:

Barbara Mercier Bowens barbara.bowens@usdoj.gov, falisha.melamore@usdoj.gov, jgrundy@bop.gov, roy.lathrop@usdoj.gov, saleedra.revander@usdoj.gov, saundra.woods@usdoj.gov, tami.rippon@usdoj.gov

9:10-cv-01336-RMG -BM Notice will not be electronically mailed to:

Frederick Irvin
16620-039
FCI Elkton
PO Box 10
Lisbon, OH 44432

Tami Rippon Cassaro - Activity in Case 9:10-cv-01336-RMG -BM Irvin v. Owens et al Order on Motion to Compel

From: <SCDEfilingstat@scd.uscourts.gov>
To: <scd_ecf_ntf@scd.uscourts.gov>
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U.S. District Court

District of South Carolina

Notice of Electronic Filing

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Case Name: Irvin v. Owens et al
Case Number: 9:10-cv-01336-RMG -BM
Filer:
Document Number: 70(No document attached)

Docket Text:
ORDER granting in part and denying in part [61] Motion to Compel. Defendants are ordered to provide pages #10, 12-14, 15-16, 18, 22, 42-43, 46, 48-50, 53-57, 124 and 126 from Defendants' privilege log to the Court for in camera review by no later than June 10, 2011. Plaintiff's motion to compel with respect to the remainder of Defendants' privilege log is denied. Signed by Magistrate Judge Bristow Marchant on 5/27/11. (rpol,)

9:10-cv-01336-RMG -BM Notice has been electronically mailed to:

Barbara Murcier Bowens barbara.bowens@usdoj.gov, falisha.mcamore@usdoj.gov, jgrandy@bop.gov, roy.lathrop@usdoj.gov, sateedra.revander@usdoj.gov, saundra.woods@usdoj.gov, tami.rippon@usdoj.gov

9:10-cv-01336-RMG -BM Notice will not be electronically mailed to:

Frederick Irvin
16620-039
FCI Elkton
PO Box 10
Lisbon, OH 44432

Tami Rippon Cassaro - Activity in Case 9:10-cv-01336-RMG -BM Irvin v. Owens et al Order on Motion to Appoint Counsel

From: <SCDEfilingstate@scd.uscourts.gov>
To: <scd_ecf_ne@scd.uscourts.gov>
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U.S. District Court

District of South Carolina

Notice of Electronic Filing

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Case Name: Irvin v. Owens et al
Case Number: 9:10-cv-01336-RMG -BM
Filer:
Document Number: 71(No document attached)

Docket Text:
TEXT ORDER denying [66] Motion to Appoint Counsel. Plaintiff's filings with the Court show that he is well capable of representing himself. See also Court Docket No. [19]. Signed by Magistrate Judge Bristow Marchant on 5/27/11.(rpol,)

9:10-cv-01336-RMG -BM Notice has been electronically mailed to:

Barbara Mercier Bowens barbara.bowens@usdoj.gov, falisha.mclamore@usdoj.gov, jgrandy@bop.gov, roy.lathrop@usdoj.gov, sateedra.revander@usdoj.gov, saundra.woods@usdoj.gov, tami.rippon@usdoj.gov

9:10-cv-01336-RMG -BM Notice will not be electronically mailed to:

Frederick Irvin
26620-039
FCI Elkton
PO Box 10
Lisbon, OH 44432

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Frederick Irvin, #16620-039, Plaintiff, v. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer; United States of America; and NFN Brown, Correctional Recreation Officer Defendants.	CIVIL ACTION NO. 9:10-1336-RMG-BM **ORDER**

This action has been filed by the Plaintiff, pro se, alleging violations of his constitutional rights by the named Defendants, as well as violations of the Federal Tort Claims Act (FTCA). This matter is before the Court pursuant to documents produced by the Defendants *in camera* in response to this Court's order filed May 27, 2011.

Based upon the Court's initial review of the documents produced *in camera*, the following portions of the relevant documents may be subject to production:

Bates No. 000010 - Section numbered (11.)
Bates No. 000013 - The second and third paragraphs which start with "The DHO finds you committed . . ." and conclude with "The injuries are indicative a serious assault was inflicted." Also, the fifth paragraph beginning "Therefore, the DHO . . . " and concluding with "provide truthful statements."
Bates No. 000015 - The entire section titled "Brief Synopsis of Key Elements of Offense:"
Bates No. 000018 - The following sentence (with the prisoner's name redacted) which begins "[A prisoner] stated . . ." and ends "on Irvin".
Bates No. 000022 - The following sentence which begins and ends with "Blou (sic) was . . .

compound."
Bates No. 000042 - The first complete sentence which begins "In the summer of 09 . . ." The first and second sentences of the second paragraph which begins "This is when Fred . . . " The last paragraph of the document which begins "Blood started oozing . . . ."
Bates No. 000046 - The last full paragraph that begins "There where (sic) no" and ends "to his dorm."
Bates No. 000049 - Section numbered (11)
Bates No. 000053 - Same sections as Bates No. 000010
Bates No. 000055 - Same sections as Bates No. 000013
Bates No. 000057 - Entire document

However, prior to an order requiring production of these excerpts of the relevant documents, the Defendant shall have ten (10) days from the date of this order to file any specific objections relating to the production of these excerpts. In the event that Defendants do not have any additional objections to the production of these excerpts, they shall produce them to the Plaintiff within ten (10) days of the date of this order and notify the Court of such production.

IT IS SO ORDERED.

Bristow Marchant
United States Magistrate Judge

June 21, 2011

Charleston, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

RECEIVED CLERK'S OFFICE
2011 JUN 27 A 9:52
DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON, SC

FREDERICK IRVIN,
PLAINTIFF,

CIVIL NO. 9:10-cv-01336-RMG-BM

Hon. Richard M. Gergel

V

JOHN OWENS, et al.,
DEFENDANT.
_____/

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S OBJECTION TO THE MAGISTRATE JUDGE'S DENIAL OF PLAINTIFF'S MOTION TO APPOINT COUNSEL

COMES NOW, Plaintiff, Frederick Irvin, in his reply to defendant's response. The defendants claims that Plaintiff failed to making a showing of exceptional circumstances.

Plaintiff was assaulted and sustained a traumatic brain injury. The plaintiff was diagnosed with traumatic brain injury what resulted in problems with memory, learning, reasoning, problem solving and speed of mental processing. It is documented that plaintiff has complications with his memory. This injury will not allow plaintiff to properly represent himself.

The defendants avoided addressing obstruction of justice. It is evident the defendants harassed and used other methods to intimidate Lance Pough. The defendants even used bribery to persuade Lance Pough to provide an affidavit to recant his statements. The plaintiff has provided an affidavit of LAnce Pough and the magistrate never addressed this argument. There are other federal inmate witnesses who may have been subjected to the same conduct. Plaintiff has been able to investigate furthermore, plaintiff asked the court for assistance.

Plaintiff cannot get a fair trial when the defendants are intimidating and harassing his witnesses.

CONCLUSION

A witness was harassed and bribed by defendants to recant his story. The plaintiff's traumatic brain injury caused significant damage in which plaintiff will not be able to properly represent himself. These are exceptional and/or unusual circumstances. As pointed out by plaintiff, he is currently receiving assistance from jailhouse lawyers.

Based on foregoing, the plaintiff prays that the court grant motion for appointment of counsel.

Date: June 24, 2011

Frederick Irvin #16620-039
FCI Elkton
P.O Box 10
Lisbon, OH 44432

CERTIFICATE OF SERVICE

I, Frederick Irvin, swear under the penalty of perjury that a copy of this brief was given to prison authorities for mailing purposes 1st class on June 24, 2011 for mailing to the following parties:

Clerk of Court
United States District Court
P.O. Box 835
Charleston, South Carolina 29402

Barbara M. Bowens
AUSA
1441 Main Street, Suite 500
COlumbia, South Carolina 29201

Date: June 24, 2011

Frederick Irvin #16620-039
FCI Elkton
P.O. Box 10
Lisbon, OH 44432

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

RECEIVED
USDC, CLERK, CHARLESTON, SC
2011 JUN 28 P 1:19

Frederick Irvin, Plaintiff, v. John Owens, et al., Defendants.	)	CA No. 9:10-cv-01336-RMG **ORDER**

This matter is before the court upon Plaintiff Frederick Irvin's ("Plaintiff" or "Irvin") appeal of an order by the Honorable Bristow Marchant, United States Magistrate Judge, on May 27, 2011. (Dkt. No. 74.) Magistrate Judge Marchant denied Plaintiff's Motion to Appoint Counsel. (Dkt. No. 71.) This court affirms Magistrate Judge Marchant's order denying Plaintiff's request to appoint counsel.

I

Plaintiff, who is proceeding *pro se*, filed the instant action on or about May 24, 2010, and he filed an Amended Complaint on or about December 6, 2010. (See Dkt. No. 1; Dkt. No. 37.) Plaintiff alleges violations of his constitutional rights by the named Defendants, as well as violations of the Federal Tort Claims Act ("FTCA"). (See generally Am. Compl.) Plaintiff claims, *inter alia*, that he was seriously and permanently injured when Defendants failed to protect him from an assault by another inmate who had a violent history. (See Am. Compl. ¶¶ 3-8.) Plaintiff alleges claims for violation of 42 U.S.C. § 1983, intentional infliction of emotional distress, and negligence. (See generally Am. Compl., Dkt. No. 37.)

On or about September 7, 2010, Plaintiff filed his first Motion to Appoint Counsel. (Dkt. No. 18.) In it, Plaintiff contended that his imprisonment "will greatly limit his ability to litigate" and that he has limited access to the law library and limited knowledge of the law," as well as a head injury "which has affected his memory." (Dkt. No. 18.) Magistrate Judge Marchant denied Plaintiff's motion, stating that Plaintiff "has not shown any exceptional circumstances exist in this case." (Dkt. No. 19 at 1.)

Defendants filed a Motion for Summary Judgment on October 27, 2010. (Dkt. No. 29.) Plaintiff filed a Motion to Amend his Complaint on or about November 1, 2010, and a Response in Opposition to the Motion for Summary Judgment on November 16, 2010. (Dkt. No. 32; Dkt. No. 33.) Magistrate Judge Marchant granted Plaintiff's Motion to Amend, and Plaintiff filed an Amended Complaint on or about December 6, 2010. (See Dkt. No. 36; Dkt. No. 37.) A few days later, Defendants filed a Motion for Summary Judgment with respect to the Amended Complaint. (See Dkt. No. 38.)

On or about January 7, 2011, Plaintiff filed his Second Motion to Appoint Counsel. (Dkt. No. 43.) Plaintiff contends his motion should be granted because, *inter alia*, (a) the case is factually complex and may require medical experts; (b) his ability to investigate is limited because he is "currently incarcerated . . . in Ohio," while the incident in question occurred in Williamsburg, South Carolina; (c) the record reveals that testimony will likely be conflicting; (d) Plaintiff has no legal training and has "physical and mental disabilities that would make it difficult to present the case"; (e) the case is legally complex because a jury trial has been requested; (f) the case is meritorious; and (g) he has sought to obtain counsel by writing letters to numerous attorneys. (See Dkt. No. 43.) Plaintiff also filed a Declaration in support of this

motion. (See Dkt. No. 43 at 13-14 of 14.) On January 12, 2011, Magistrate Judge Marchant entered an Order denying Plaintiff's Second Motion to Appoint Counsel. (See Dkt. No. 44.) Magistrate Judge Marchant again stated that Plaintiff "in his motion has not shown that any exceptional circumstances exist in this case." (Dkt. No. 44.)

On January 28, 2011, Magistrate Judge Marchant entered a Text Order giving Plaintiff sixty days to complete discovery, with an additional twenty days thereafter to file supplemental materials in opposition to the Defendants' pending Motion for Summary Judgment. (Dkt. No. 49.) Several discovery motions were filed, and on May 16, 2011, Plaintiff filed his Third Motion to Appoint Counsel. (Dkt. No. 66.) In this motion, Plaintiff contends that "exceptional and unusual circumstances" warrant the appointment of counsel. (Id. at 2.) Specifically, Plaintiff contends that counsel should be appointed because (a) Plaintiff's injuries from the assault has affected his long term and short term memory, "which makes it difficult for plaintiff to represent himself"; (b) Plaintiff's ability to investigate is limited because the case "requires access to witnesses plaintiff cannot get to"; and (c) justice is being obstructed because Plaintiff's witnesses are "being harassed and threatened in retaliation for being a witness . . . for plaintiff against the defendants." (Id. at 2-3.)

Plaintiff attached to this third motion a Request to Staff Form, wherein on April 3, 2011, Plaintiff requested correspondence with Inmate Lance Pough "to prepare for trial." (Dkt. No. 66 at 4 of 6.) Plaintiff's request was denied, and the denial stated, "The discovery period is over and you have already provided a statement from the above inmate [Pough]." (Id.) Plaintiff attached a document that appears to be signed by Inmate Pough purporting to be an Affidavit. (Id. at 5-6.) Pough states that he is a witness in the instant lawsuit and that since the lawsuit has been

pending, prison officials in FCI Williamsburg "have been harassing me and retaliating against me due to me being a witness." (Id. at 5.) Pough states that prison officials "hold up all [of his] emails (incoming and outgoing) for 3-4 days despite other inmates getting and receiving their emails daily" and that they hold up his "outgoing/incoming mail for 2 days." (Id.). Pough contends that the officials were not taking such actions prior to the lawsuit and that "they have told me they will continue to do this until the lawsuit is over." (Id.) Pough also states, "They told me if I gave them an affidavit they would leave me alone. I refused." (Id. at 6.) Plaintiff attached his Declaration to this motion. (Dkt. No. 66-1.)

On May 27, 2011, Magistrate Judge Marchant entered a Text Order denying Plaintiff's Third Motion to Appoint Counsel, stating that "Plaintiff's filings with the Court show that he is well capable of representing himself." (Dkt. No. 71.)

On or about June 13, 2011, Plaintiff filed a Notice of Appeal regarding Magistrate Judge Marchant's Order on Plaintiff's Third Motion to Appoint Counsel. (Dkt. No. 74.) Defendants filed a response seeking an Order affirming Magistrate Judge Marchant's Order. (Dkt. No. 78.)

II

Rule 72(a) of the Federal Rules of Civil Procedure provides that, with respect to nondispositive matters, a party may file and serve objections to a magistrate judge's order within fourteen days after being served with a copy of that order. FED. R. CIV. P. 72(a). The Rule further provides that a party "may not assign as error a defect in the order not timely objected to," and the district judge reviewing the timely objections must "modify or set aside any part of the order that is *clearly erroneous* or *contrary to law*." Id. (emphasis added); see also 28 U.S.C. § 636(b)(1)(A) (stating that a judge may "reconsider any pretrial matter under subparagraph (A) where it has been

shown that the magistrate judge's order is clearly erroneous or contrary to law"); Dixon v. Francis, 3 Fed. App'x 186, 187 (4th Cir. 2001) (noting the standard of review under § 636(b) will either be de novo review or under the clearly erroneous standard, "depending upon the nature of the ruling appealed"). Because the issue in question is a nondispositive matter, this Court must uphold the ruling of the Magistrate Judge unless the ruling was clearly erroneous or contrary to law. See 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a); see also Seaberry v. Stalder, No. 05-1960-P, 2006 WL 1635707, at *1 (W.D. La. June 13, 2006).

III

As Magistrate Judge Marchant noted in his first Order denying Plaintiff's request for appointed counsel, there is no right to appointed counsel in civil rights cases. See 28 U.S.C. § 1915(e)(1); see also Smith v. Blackledge, 451 F.2d 1201, 1203 (4th Cir. 1971). However, the court has discretion to appoint counsel for an indigent in a civil action. See 28 U.S.C. § 1915(e)(1); Smith, 451 F.2d at 1203. "[I]t is well settled that in civil cases the appointment of counsel should be allowed only in exceptional cases . . . ." Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975) (citing United States v. Madden, 352 F.2d 792 (9th Cir. 1965)). The Fourth Circuit has stated that the existence of exceptional circumstances "will turn on the quality of two basic factors–the type and complexity of the case, and the abilities of the individuals bringing it." Brock v. City of Richmond, 983 F.2d 1055, at *2 (4th Cir. 1993) (unpublished table decision) (quoting Whisenant v. Yaum, 739 F.2d 160, 163 (4th Cir. 1984)).

This Court concludes that the Magistrate Judge's Order denying Plaintiff's Third Motion to Appoint Counsel must be affirmed, as that Order was not clearly erroneous or contrary to law. While Plaintiff claims he has suffered serious injuries, his claims are not complex. Moreover, as Magistrate

Judge Marchant noted, Plaintiff has demonstrated–in numerous court filings–that he has the ability to represent himself. Furthermore, while he claims he is unable to gather information from witnesses, his filings belie that assertion, as he is able to present information from other inmate witnesses to the Court. Accordingly, Magistrate Judge Marchant's Order denying Plaintiff's Third Motion to Appoint Counsel is affirmed. See Hall v. Holsmith, 340 Fed. App'x 944, 946 (4th Cir. 2009) (concluding the district court did not abuse its discretion in denying the plaintiff's motions for appointment of counsel in his § 1983 case because "[t]he claims presented in Hall's complaint are not complicated and Hall has demonstrated the capacity to present those claims adequately in numerous court filings."); see also Harris v. Salley, 339 Fed. App'x 281, 284 (4th Cir. 2009); Howard v. Ozmint, No. 6:08-cv-3171-GRA-WMC, 2009 WL 1544753, at *2-3 (D.S.C. June 3, 2009) ("After a complete review of the pleadings, this Court is confident that the plaintiff's intelligence and experience will allow him to adequately pursue this claim. Accordingly, this Court holds that the magistrate properly rejected the plaintiffs request for appointed counsel.").

CONCLUSION

It is therefore **ORDERED**, for the foregoing reasons, that the Order of the Magistrate Judge denying Plaintiff's Third Motion to Appoint Counsel (Dkt. No. 71) is **AFFIRMED**.

AND IT IS SO ORDERED.

The Honorable Richard Mark Gergel
United States District Judge

Charleston, South Carolina
June 28, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Frederick Irvin, Plaintiff, vs. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer FCI Williamsburg; NFN Brown, Correctional Recreation Officer FCI Williamsburg; United States of America, Defendants.	)	CIVIL ACTION NO. 9:10-1336-RMG-BM **DEFENDANTS' OBJECTION TO COURT'S ORDER (ECF NO. 79)**

COME NOW the Defendants, by and through William N. Nettles, United States Attorney and the undersigned Assistant United States Attorney, and makes the following objection to the Court's Order regarding the production of documents based on its *in camera* review. (ECF No. 79). Pursuant to 5 U.S.C. § 552(b)(6), which exempts personnel and medical files and similar files to preclude a clearly unwarranted invasion of personal privacy surrounding other individuals and § 552(b)(7)(C), which exempts from disclosure records or information compiled for law enforcement purposes which could reasonably be expected to constitute an unwarranted invasion of personal privacy, the Defendants object to the release of the names of the inmates and the inmate numbers of persons, other than the Plaintiff, in the production. While Plaintiff knows the names of the inmates involved, once filed, the information will enter the public domain and will be a part of the public record. At that point, any privacy interest of the named inmates regarding the release of that

information will have been violated. Accordingly, the Defendants propose to provide the documents and excerpts authorized by the court with the names, inmate number and nicknames redacted.

Respectfully submitted,

WILLIAM N. NETTLES
UNITED STATES ATTORNEY

By: *s/Barbara M. Bowens*
BARBARA M. BOWENS (#4004)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, South Carolina 29201
Telephone: (803) 929-3000

June 30, 2011

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that she has caused service of the attached **DEFENDANTS' OBJECTION TO COURT'S ORDER (ECF NO. 79)** by a legal assistant employed in the Office of the United States Attorney for the District of South Carolina and is a person of such age and discretion as to be competent to serve papers.

That on June 30, 2011, my legal assistant served a copy of the foregoing document by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es), and by depositing said envelope and contents in the United States Mail at U.S. Attorney's Office, 1441 Main Street, Suite 500, Columbia, SC 29201, to the following:

Frederick Irvin
Inmate #16620-039
FCI Elkton
Post Office Box 10
Lisbon, OH 44432

s/Barbara M. Bowens
BARBARA M. BOWENS (#4004)
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Frederick Irvin, #16620-039, Plaintiff, v. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer; United States of America; and NFN Brown, Correctional Recreation Officer Defendants.	CIVIL ACTION NO. 9:10-1336-RMG-BM **ORDER**

This action has been filed by the Plaintiff, pro se, alleging violations of his constitutional rights by the named Defendants, as well as violations of the Federal Tort Claims Act (FTCA). This matter is before the Court pursuant to documents produced by the Defendants *in camera* in response to this Court's order filed May 27, 2011. On June 21, 2011, the Court issued an order outlining specific portions of the relevant documents which may be subject to production. The Order allowed the Defendants ten (10) days to file any specific objections to the production of these excerpts.

On June 30, 2011, Defendants filed an objection to the release of the names of inmates and inmate numbers of persons, other than Plaintiff. While the Defendants acknowledged that Plaintiff knows the names of the inmates involved, the Defendants expressed concern that this information could enter the public domain and be part of a pubic record, if filed. Defendants express

concern that such a filing could result in these inmates being generally known, and personally subject to retaliatory conduct. Accordingly, Defendants proposed to provide the excerpts of the documents as set forth in the Court's order of June 21, 2011, with the names, inmate numbers, and nicknames redacted.

Based upon a review of the matter, the Court finds this request to be reasonable and orders the document excerpts as set forth in the Court's order of June 21, 2011, be produced within ten (10) days of the date of this order with these redactions. The Court does not find such redactions will hinder Plaintiff's ability to otherwise prosecute his claims under the facts presented.

IT IS SO ORDERED.

Bristow Marchant
United States Magistrate Judge

July 5, 2011

Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Frederick Irvin, Plaintiff, vs. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer FCI Williamsburg; NFN Brown, Correctional Recreation Officer FCI Williamsburg; United States of America, Defendants.	)	CIVIL ACTION NO. 9:10-1336-RMG-BM **DEFENDANTS' RESPONSE TO COURT'S ORDER (ECF NO. 86) AND NOTICE OF SERVICE**

COME NOW the Defendants, by and through William N. Nettles, United States Attorney and the undersigned Assistant United States Attorney, and make the following Response to the Court's Order (ECF No. 86) filed July 5, 2011, and notify the Court of the provision of the documents to the Plaintiff.

On June 30, 2011, Defendants filed an objection to the release of the names of inmates and inmate numbers of persons, other than Plaintiff. While the Defendants acknowledged that Plaintiff knows the names of the inmates involved, the Defendants expressed concern that this information could enter the public domain and be part of a pubic record, if filed. Defendants proposed to provide the excerpts of the documents as set forth in the Court's order of June 21, 2011, with the names, inmate numbers, and nicknames redacted. The Court found this request to be reasonable and ordered the document excerpts as set forth in the

Court's order of June 21, 2011, be produced within ten (10) days of the date of the order with these redactions. (ECF No. 86).

Pursuant to the Court's order, the Defendants hereby provide notice to the Court that the following properly redacted pages: 10, 13, 15, 18, 22, 42, 46, 49, 53, 55, and 57 from the Defendants' privilege log are hereby sent to Frederick Irvin vis U.S. Mail. As the responsive documents are provided pursuant to a discovery request, the documents will be served on the Plaintiff, but will not be filed with the court.

Respectfully submitted,

WILLIAM N. NETTLES
UNITED STATES ATTORNEY

By: *s/Barbara M. Bowens*
BARBARA M. BOWENS (#4004)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, South Carolina 29201
Telephone: (803) 929-3000

July 11, 2011

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that she has caused service of the attached **Defendants' Response to Court's Order (ECF NO. 86) and responsive documents 10, 13, 15, 18, 22, 42, 46, 49, 53, 55, and 57** by a paralegal specialist employed in the Office of the United States Attorney for the District of South Carolina and is a person of such age and discretion as to be competent to serve papers.

That on July 11, 2011, my paralegal specialist served a copy of the foregoing document by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es), and by depositing said envelope and contents in the United States Mail at U.S. Attorney's Office, 1441 Main Street, Suite 500, Columbia, SC 29201, to the following:

Frederick Irvin
Inmate #16620-039
FCI Elkton
Post Office Box 10
Lisbon, OH 44432

s/Barbara M. Bowens
BARBARA M. BOWENS (#4004)
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Frederick Irvin, Plaintiff, vs. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer FCI Williamsburg; NFN Brown, Correctional Recreation Officer FCI Williamsburg; United States of America, Defendants.	CIVIL ACTION NO. 9:10-1336-RMG-BM **DEFENDANTS' REPLY TO PLAINTIFF'S OBJECTIONS TO THE DEFENDANTS' RESPONSE TO THE COURT'S ORDER**

COME NOW the Defendants, by and through William N. Nettles, United States Attorney and the undersigned Assistant United States Attorney, and make the following Reply to the Plaintiff's Objections to the Defendants' Response to the Court Order. (ECF No. 92.) On June 21, 2011, the Court issued its Order regarding the production of documents based on its *in camera* review. (ECF No. 79.) The Order identified portions of the documents which "may be subject to production." (Id.) The Order provided the Defendants with the opportunity to file specific objections to the production prior to issuance of a final order. (Id.)

On June 30, 2011, the Defendants specifically objected to providing the release of the names of the inmates and the inmate numbers of persons, other than the Plaintiff, in the production. (ECF No. 85.) The Defendants proposed to provide the documents and excerpts authorized by the court with the names, inmate number and nicknames redacted. (Id.) On July 5, 2011, the court found the Defendants request to be reasonable and ordered the document excerpts "as set forth in the Court's order of June 21, 2011, be produced within ten (10) days of the date of this order with these

redactions." (ECF No. 86.) Accordingly, the Defendants provided the redacted documents ordered by the Court with the names, inmate numbers, and nicknames redacted.

On July 18, 2011, Plaintiff filed the instant Objections. (ECF No. 92.) Attached to Plaintiff's Objections are copies of the redacted documents provided to the Plaintiff pursuant to the Court's Order. (ECF No. 92-1-12.) As shown by ECF No. 92-1-12, the Defendants provided the documents in accordance with ECF No. 79 and redacted the inmate names, numbers, and nicknames. As previously pointed out in ECF No. 85, redaction of the above information was necessary since the information has now been filed and has entered the public domain.

Plaintiff's filings clearly indicate that the identity of his assailant. The witnesses were, as stated in the documents, a referee and spectators. Two of the witnesses provided affidavits which were filed with the Plaintiff's complaint. The third witness has not been cited in any prior filings, but lived in the housing unit with Irvin during the relevant time period. Due to the privacy concerns, under separate cover without filing in the Court, the identity of the third inmate will be provided to Mr. Irvin.

Respectfully submitted,

WILLIAM N. NETTLES
UNITED STATES ATTORNEY

By: *s/Barbara M. Bowens*
BARBARA M. BOWENS (#4004)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, South Carolina 29201
Telephone: (803) 929-3000

July 26, 2011

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that she has caused service of the attached **DEFENDANTS' REPLY TO PLAINTIFF'S OBJECTIONS TO THE DEFENDANTS' RESPONSE TO THE COURT'S ORDER** by a paralegal employed in the Office of the United States Attorney for the District of South Carolina and is a person of such age and discretion as to be competent to serve papers.

That on July 26, 2011, my paralegal served a copy of the foregoing document by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es), and by depositing said envelope and contents in the United States Mail at U.S. Attorney's Office, 1441 Main Street, Suite 500, Columbia, SC 29201, to the following:

Frederick Irvin
Inmate #16620-039
FCI Elkton
Post Office Box 10
Lisbon, OH 44432

s/Barbara M. Bowens
BARBARA M. BOWENS (#4004)
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Frederick Irvin, Plaintiff, vs. John Owens; NFN Holmes; United States of America; NFN Brown, Defendants.	C/A No. 9:10-CV-1336-RMG-BM *Roseboro* Order to Plaintiff

One or more defendants filed a motion to dismiss (pursuant to Fed. R. Civ. P. 12) or a motion for summary judgment (pursuant to Fed. R. Civ. P. 56) asking the court to dismiss your case. Because you are not represented by counsel, this "*Roseboro* Order"[1] is issued to advise you of the dismissal/summary judgment procedures and the possible consequences if you fail to respond adequately to defendant's motion. Please carefully review this information, including the attached excerpts of the Federal Rules of Civil Procedure regarding motions to dismiss and motions for summary judgment.

You have 34 days from the date of this order to file any material in opposition to the motion that defendant filed. If you fail to respond adequately, the court may grant the defendant's motion, which may end your case.

Explanation of Motions to Dismiss

Motions to dismiss can be filed pursuant to Fed. R. Civ. P 12. Many motions to dismiss are filed under Fed. R. Civ. P. 12(b)(6), in which defendants usually argue that the law does not provide a right to relief for claims that a plaintiff makes in his case. For example, in a civil rights case brought under 42 U.S.C. § 1983, a defendant may argue in a motion to dismiss that claims for emotional distress are not recognized under the statute and the plaintiff is therefore not entitled to relief. Because motions to dismiss usually concern questions of law and not questions of fact, the court presumes as true the plausible facts of the complaint for the purpose of a motion to dismiss.

[1] The court enters this order in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).

The court decides a motion to dismiss solely on the basis of the law and the pleadings, meaning the complaint, defendant's answer (if any), the exhibits attached to the complaint, documents that the complaint incorporates by reference (provided they are both undisputed and pertinent to the pleaded claims), and materials of which the court may take judicial notice. In some cases, the parties present materials outside of the pleadings, such as affidavits or declarations in support of or in opposition to the motion to dismiss. If the court, in its discretion, considers materials outside of the pleadings, the motion to dismiss is converted to a motion for summary judgment. Fed. R. Civ. P. 56(d).

Explanation of Motions for Summary Judgment

Motions for summary judgment filed by defendants pursuant to Fed. R. Civ. P. 56 argue that the plaintiff's claims are not supported by the specific facts of the case. For example, in a civil rights case brought under 42 U.S.C. § 1983, a defendant may argue in a motion for summary judgment that the facts in the plaintiff's case do not rise to the level of a constitutional violation that would entitle him to relief. Because motions for summary judgment concern both questions of law and questions of fact, if the court finds that there is not any genuine dispute as to any material fact on a claim, the court will determine which party is entitled to judgment under the law. The court decides a motion for summary judgment on the basis of the pleadings, discovery, affidavits, declarations, and any other properly submitted evidence.

Your Response to the Defendant's Motion

Your filing in opposition to the defendant's motion should be captioned either as "Response to Motion to Dismiss" or "Response to Summary Judgment," as applicable, and should include the following: (1) an explanation of your version of the facts, if different from defendant's version of the facts; and (2) your legal argument regarding why the court should not grant the motion and end your case. Rule 56(c) requires that you support your version of all disputed facts with material such as documents, affidavits, declarations, or responses to discovery. Your failure to support facts in dispute with such material may result in the court granting the motion. Any affidavits or declarations you file in opposition to summary judgment must be based on personal knowledge, contain facts admissible in evidence, and be signed by a person who would be competent to testify on matters contained in the affidavit if called to testify about them at trial. The court will not consider affidavits, declarations, or exhibits that are unrelated to this case, nor will it consider affidavits or declarations that contain only conclusory statements or argument of facts or law. If you fail to dispute the defendant's version of the facts with proper support of your own version, the court may consider the defendant's facts as undisputed.

All affidavits or declarations you submit to the court must be made in good faith and the facts sworn to in the affidavit or affirmed in the declaration must be true. All affidavits and declarations submitted in this case are submitted under penalties of perjury or subornation of perjury. 18 U.S.C. §§ 1621 and 1622. If the court finds that a party has presented affidavits or declarations in bad faith or only to delay the action, the court may order sanctions, payment of fees, or hold that party in contempt of court.

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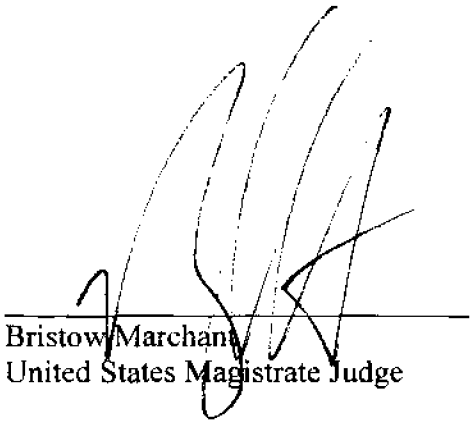
IT IS SO ORDERED.



Bristow Marchant
United States Magistrate Judge

September 14, 2011
Charleston, South Carolina

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EXCERPTS OF FEDERAL RULES OF CIVIL PROCEDURE
Rule 12 and Rule 56 (effective December 1, 2010)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions, Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading. [OMITTED]

. . .

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

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(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;
(2) allow time to obtain affidavits or declarations or to take discovery; or
(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;
(2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or
(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or
(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Frederick Irvin, #16620-039, Plaintiff, vs. John Owens, Warden FCI Williamsburg; NFN Holmes, Correctional Recreation Officer; United States of America; and NFN Brown, Correctional Recreation Officer, Defendants.	)	Civil Action No.: 9:10-01336-RMG **ORDER**

Plaintiff, an inmate with the Federal Bureau of Prisons proceeding *pro se*, alleges violations of his federal constitutional rights pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as well as a separate claim under the Federal Tort Claims Act ("FTCA"). In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(d), D.S.C., this matter was referred to United States Magistrate Judge Bristow Marchant for all pretrial proceedings. Defendants filed a motion for summary judgment. (Dkt. No. 96). Plaintiff filed a response in opposition. (Dkt. No. 102). The Magistrate Judge thereafter filed a Report and Recommendation, recommending that the Court grant summary judgment as to Plaintiff's federal constitutional claims and deny summary judgment as to Plaintiff's FTCA claim, finding that material factual disputes existed. (Dkt. No. 104). Plaintiff and Defendants filed objections and replies to the R & R. (Dkt. Nos. 107, 109, 110, 112).

In the Government's objection to the R & R, the Government argued that the discretionary function exception applies to the Plaintiff's FTCA claim. (Dkt. No. 107). As this

issue goes to the subject matter jurisdiction of the Plaintiff's FTCA claim, the Government may raise this argument at any point in the pleadings. *See, e.g., Patel v. U.S.*, 2009 WL 636532 at *1 n.3 (N.D. Texas 2009). On April 9, 2012, the Court issued an Order stating that the Plaintiff would have until April 20, 2012 to file a supplemental response addressing the discretionary function exception. (Dkt. No. 111). The Plaintiff did not file a response addressing this issue.

After a careful review of the record, all of the parties' briefs and the applicable legal standards, as set forth further below, the Court grants Defendants' motion for summary judgment as to Plaintiff's federal constitutional claims and grants in part and denies in part Defendants' motion for summary judgment as to Plaintiff's FTCA claim.

Legal Standard

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). This Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made. Additionally, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). This Court may also "receive further evidence or recommit the matter to the magistrate with instructions." *Id.*

In a motion for summary judgment, the movant is entitled to relief only if he or she can show "that there is no genuine dispute as to any material fact" and the moving party is thus "entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). A fact is deemed "material" if proof of its existence or non-existence would affect the disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of "material fact" is

"genuine" if the evidence offered is of the type from which a reasonable jury might return a verdict for the non-moving party. *Id.* at 257. The evidence must be viewed in a light most favorable to the non-moving party, and all inferences and ambiguities are read in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Plaintiff's *Bivens* claim is asserted against Defendants Owens, Holmes and Brown.[1] To hold a prison official liable under the Eighth Amendment, the prison official must know of and disregard an excessive risk to inmate health or safety – "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "Actual knowledge or awareness on the part of the alleged inflicter thus becomes essential to proof of deliberate indifference because prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment." *Brice v. Virginia Beach Correctional Center*, 58 F.3d 101, 105 (4th Cir. 1995). A plaintiff may rely on circumstantial evidence that a prison official knew about the risk to inmate health or safety but the evidence must show that the risk "was so longstanding and pervasive that the official must have been aware of this danger." *Adames v. Perez*, 331 F.3d 508, 512 (5th Cir. 2003).

The FTCA provides for a limited waiver of the Government's sovereign immunity from suit by allowing a plaintiff to recover damages in a civil action caused by the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission

[1] The Magistrate Judge noted that a *Bivens* claim cannot lie against the United States or the individual Defendants in their official capacities. *See Doe v. Chao*, 306 F.3d 170, 184 (4th Cir. 2002).

occurred." 28 U.S.C. § 1346(b)(1). This waiver of immunity, however, is subject to exceptions, including the "discretionary function exception." *See McMellon v. United States*, 387 F.3d 329, 335 (4th Cir. 2004)(*en banc*)(describing § 2680(a)'s exception as "the most important"). The discretionary function exception preserves sovereign immunity even if the Government was negligent, *see Blakey v. U.S.S. Iowa*, 991 F.2d 148, 152 (4th Cir. 1993), and even if the government employee abused his or her discretion. 28 U.S.C. § 2680(a). Further, if the discretionary function exception applies, then the claim is outside the limited waiver of immunity created by the FTCA, and this Court is without subject matter jurisdiction to adjudicate it. *See Medina v. United States*, 259 F.3d 220, 223-24 (4th Cir. 2001).

The Supreme Court has articulated a two-part test in determining whether the discretionary function exception applies. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988). First, "the exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment of choice.'" *Gaubert*, 499 U.S. at 322; *Berkovitz*, 486 U.S. at 536. If the action is not a matter of choice by the government employee, the discretionary function exception does not apply. *Berkovitz*, 486 U.S. at 536. The exception is not applicable "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* Then, if the conduct does involve discretionary judgment, the court must decide "whether that judgment is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23.

Discussion

Plaintiff alleges that on May 30, 2009, while officiating a prison summer league basketball game, he was attacked and assaulted by another inmate, Bobby Addison, and suffered serious injuries to his face and head. (Dkt. No. 37 at 2, 12). Plaintiff alleges that Addison was

known to the prison staff to be violent and previously hit inmate Carl McNeil's jaw and threatened prison officials. (Dkt. No. 102-3 at 1-3). Plaintiff asserts that as league commissioner of the summer basketball league, he had personally suspended Addison several times for his violent rage and that Addison thereafter threatened him. (Dkt. No. 37 at 12). Plaintiff produced affidavits from other inmates corroborating his allegations about Addison's temperament and the previous incident involving McNeil. (Dkt. No. 37 at 15-18, 23-24).

Defendants allege that Addison had no prior history of disciplinary infractions before this incident and that following the incident he was transferred to another facility and a separation assignment was put on both inmates to ensure that they will never be housed in the same BOP facility. (Dkt. No. 29-16 at 3). Defendants filed an affidavit from James Patterson, who asserts that there was no record of any incidents in prison records involving Addison other than the May 30, 2009 incident nor was there any information that Plaintiff and Addison had problems prior to the incident. (Dkt. No. 96-1 at 2).

Plaintiff alleges that there were no prison officials present at the basketball game, which was required in accordance with the FCI Williamsburg Intramural Code of Conduct ("Code of Conduct"). The Code of Conduct requires that "[a] staff member is present on the sideline during all games." (Dkt. No. 29-10 at 2). Plaintiff presented affidavits of other prisoners corroborating his assertion that it was a league recreational game and that no staff was supervising the game. (Dkt. No. 37 at 16-18, 23, 25). Plaintiff submitted a document entitled "Unit League Basketball General Information" which states that pre-season will begin Saturday,

May 30 and Sunday, May 31 at 5:30 PM and regular season will begin Friday June 12, 2010. (Dkt. No. 35 at 22).[2]

Defendants do not dispute that the basketball game was not being monitored but allege that because the game was unofficial and not sponsored by the Recreation Department, there was no requirement that a prison official be present. Defendants presented an affidavit from the Recreation Department Supervisor that the Recreation Department sponsored basketball league was not scheduled to start until June 12, 2009 and a flyer advertising the start of the unit basketball league as June 12, 2009. (Dkt. No. 29-6 at 3; Dkt. No. 29-9 at 1). Because it was not a sponsored game, the Supervisor attests that Defendants Holmes and Brown were required to walk around and monitor the entire Recreation Department but not supervise any specific game.

Defendant Holmes attests that he was summoned to the basketball court on May 30, 2009 by an inmate and saw Plaintiff on the ground apparently unconscious, bleeding from the mouth and the back of the head. (Dkt. No. 29-7 at 2). Holmes alleges that he promptly called a medical emergency, medical staff arrived to assist and that Plaintiff was taken out of the recreation area without further incident. *Id.* Holmes further alleges that he had no knowledge of Addison's alleged threatening behavior to other inmates while playing sports. *Id.* at 3. Defendant Brown was summoned to the basketball court by Holmes, assisted in responding to the incident and also alleges that he had no knowledge of Addison's alleged threatening behavior. (Dkt. No. 29-8).

After Defendants filed their motion for summary judgment, Plaintiff filed an affidavit with his response stating that "[s]taff disregarded the known threats and contrary to defendants declaration, I talked to every staff (including defendants Holmes and Brown) about my concerns

[2] Defendant alleges that this document is not relevant because it references the 2010 and not the 2009 season. The Court highlights this document because it raises the inference that the game in question may have been a pre-season game and thus arguably covered under the Code of Conduct.

of Addison [sic] threatening and violent rage against me and other officials." (Dkt. No. 102-3 at 2). In his new affidavit, Plaintiff also stated that there were "preseason games played for the referee official class" that were approved by recreation every season and that the "[s]taff relied on [him] to organize these games with their approval and support." *Id.* at 2. Plaintiff alleges that in May 2009, he was the basketball clinic instructor and "required to hold a[] basketball clinic for the upcoming summer league season" that was "sponsored and approved by recreation for their Intramural program." *Id.* Plaintiff further alleges that on May 30, 2009, he reminded Defendants Holmes and Brown of the "scheduled summer league game" and that upon Plaintiff's request, the game was announced in the units before the recreation period. *Id.* Finally, Plaintiff alleges that any organized game that involves using recreation equipment has to be approved by the recreation staff and that Defendants Holmes and Brown provided such equipment from their office for the game in question. *Id.* Plaintiff also filed several additional affidavits from inmates, including one from Lance Pough stating that prison officials were aware of Addison's "violent nature and conduct yet and still failed to supervise or monitor the basketball games or restrict his participation." (Dkt. No. 102-5 at 7).

Eighth Amendment Claim

Plaintiff argues that his Eighth Amendment rights were violated because the conditions of overcrowding at the prison created a substantial risk of serious harm[3] and that Defendants Holmes and Brown acted with deliberate indifference to his safety, as they were "aware of Addison [sic] violent rages as he has assaulted an inmate before." (Dkt. No. 37 at 5). The Court finds that the evidence in the record is not sufficient to create a genuine issue of material fact that

[3] As Plaintiff has not exhausted his claims regarding prison overcrowding, those claims are not properly before the Court at this time. *Jones v. Bock*, 549 U.S. 199, 211 (2007); Dkt. No. 29-3 at 2.

Defendants Holmes and Brown knew of any risk posed to Plaintiff specifically by Addison. As discussed by the Magistrate Judge, Plaintiff's new affidavit submitted after Defendant's motion for summary judgment was filed states that he had spoken to "every staff (including defendants Holmes and Brown)" about Addison being a threat – but this general statement is not specific enough to rise to the level of a constitutional violation. (Dkt. No. 102-3 at 2).

Plaintiff argues in his objections that the Court should deny summary judgment on the basis of his new affidavit which mentions Holmes and Brown, and Lance Pough's affidavit, which alleges general knowledge on the part of recreation staff. (Dkt. No. 109 at 2). However, as the Magistrate Judge noted, "[d]eliberate indifference is a very high standard—a showing of mere negligence will not meet it." *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999). Moreover, the Court finds that the Magistrate Judge properly recommended granting summary judgment as to Defendant Owen, as there is no evidence in the record that he had personal knowledge of Addison being a potential danger at all nor can he be liable for the acts of others based on the doctrine of vicarious liability or respondeat superior. (*See* Dkt. No. 29-18; Dkt. No. 104 at 19-20). The Court therefore adopts the portion of the R & R addressing Plaintiff's Eighth Amendment claims and grants Defendants' motion for summary judgment as to those claims.

FTCA Claims

Plaintiff alleges tort claims based on theories of intentional infliction of emotional distress and negligence as a result of the assault.[4] As the incident occurred in South Carolina, the Court applies South Carolina tort law. For the reasons discussed herein, the Court grants in part and denies in part Defendants' motion for summary judgment as to the FTCA claims.

[4] As the Magistrate Judge discussed, Plaintiff's FTCA claims cannot lie against the individual Defendants, but only against the United States.

Plaintiff alleges that the Defendants were negligent in allowing Addison to participate in recreational sports knowing that he was violent. Plaintiff alleges that 18 U.S.C. § 4042 creates a legal duty to Plaintiff on the part of the prison system, which provides that the Bureau of Prisons ("BOP") shall "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States. . ." and "provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States." 18 U.S.C. § 4042(a)(2), (3).

The Government argues that the discretionary function exception protects decisions about whether Addison was properly placed in the general population and allowed to participate in recreational activities. (Dkt. No. 107). The Government further argues that the applicable statutory provisions, 18 U.S.C. § 4042, 18 U.S.C. § 3621[5] and 18 U.S.C. § 4081[6], grant the BOP discretion in determining classification and levels of custody and clearly involve judgment or choice. Moreover, the Government asserts that this judgment calls for policy considerations in that inmate housing and classification require weighing "health, safety, and security standards" against the "physical and fiscal restraints" of prison operation. (Dkt. No. 107 at 9).

A number of courts examining these statutory provisions have found them to be discretionary. The Eleventh Circuit reasoned that they "do not mandate a specific, non-discretionary course of conduct for the BOP to follow in classifying prisoners. . ." but rather "they give the BOP ample room for judgment by listing a non-exhaustive set of factors for the

[5] 18 U.S.C. § 3621(b) provides that the BOP "shall designate the place of the prisoner's imprisonment" and outlines the relevant factors to be considered in doing so.

[6] 18 U.S.C. § 4081 provides that "[t]he Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions." 18 U.S.C. § 4081.

BOP to consider and leaving to the BOP what weight to assign to any particular factor." *Cohen v. U.S.*, 151 F.3d 1338, 1343 (11th Cir. 1998). Moreover, when considering the second prong of the analysis, the court reasoned "[d]eciding how to classify prisoners and choosing the institution in which to place them are part and parcel of the inherently policy-laden endeavor of maintaining order and preserving security within our nation's prisons." *Id.* at 1344; *see also, Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791 (8th Cir. 1998); *Carter v. U.S.*, 2002 WL 32332081 at *5 (D.S.C. 2002).

The Court finds that these statutory provisions leave discretion to the BOP officials as to classification decisions and are not mandatory. Further, as to the second prong of the discretionary function analysis, "it is clear that balancing the need to provide inmate security with the rights of the inmates to circulate and socialize within the prison involves considerations based upon public policy." *Calderon v. U.S.*, 123 F.3d 947, 951 (7th Cir. 1997). Therefore, the Court grants Defendants' motion for summary judgment as to Plaintiff's claim that allowing Addison to participate in recreation was negligent.

Plaintiff next alleges that the prison officials were negligent in failing to monitor a scheduled summer league basketball game pursuant to prison policy. For the discretionary function exception to apply, "the challenged act must involve an element of judgment" and "the Government needs to establish there was 'room for choice' in making the allegedly negligent decision." *Ashford v. U.S.*, 511 F.3d 501, 505 (5th Cir. 2007)(Court reversed district court's grant of summary judgment in favor of Government, finding there was a factual dispute as to whether a prison policy was triggered that required an inmate be placed in solitary confinement); *Parrott v. U.S.*, 536 F.3d 629, 638 (7th Cir. 2008)("As long as a valid separation order is in effect, there is no discretion left to operate on that narrow question."). The Court finds the

reasoning of the Fifth Circuit in *Garza v. U.S.*, 161 Fed.Appx. 341 (5th Cir. 2005), which involved similar facts, persuasive. In *Garza*, the court found that a post order instruction to patrol the prison recreation yard "prescribes a set course of action for the post guard on duty to follow to maintain order and safety during her shift" and that the instruction was "straightforward and unambiguous." *Id.* at 344. The court found that the Plaintiff's allegations that the prison guard did not patrol the yard and disperse congregated inmates during the open recreation period violated a "specific directive" and therefore was not protected by the discretionary function exception. *Id.* at 343-44.

In the case sub judice, Plaintiff alleges that the Code of Conduct requires a staff member to be present at all league games. (Dkt. No. 29-10 at 2). Defendant does not dispute this policy, but argues that the game in question was not an official league game as the official season had not started yet and Defendants Holmes and Brown were required to walk around the recreation area but not supervise the game. The Court finds that the policy requiring a staff member to be on the sidelines during intermural sports is mandatory. *See Brembry v. U.S.*, 2011 WL 121741 at *3-7 (W.D. Va. 2011)("While the discretionary function exception may very well apply to the prison administrators who formulated and adopted the post orders, it cannot apply to the conduct of [the prison guard] . . ."). Plaintiff's filings create an inference that the game in question may have been a pre-season game or a training game in preparation for the season that was approved by the recreation staff and therefore covered by the Code of Conduct.

In addition to there being a factual issue as to whether this was an "official" game, there is also a question of fact as to whether the Code of Conduct was limited only to official games as the policy states that the primary purpose is for the entire "intramural sports program." (Dkt. No. 29-10 at 1). Viewing the claim in a light most favorable to the Plaintiff, the Code of Conduct

may have broader applicability. The Court finds that the Code of Conduct is a mandatory policy and there is a genuine issue of material fact as to whether Defendants' Brown and Holmes complied with the policy. The Court therefore finds that the discretionary function exception does not apply to this aspect of the Plaintiff's FTCA claim.

To prove negligence in South Carolina, Plaintiff must show "1) the Defendant had a legal duty of care; 2) the Defendant failed to discharge that duty; and 3) the Defendant's breach proximately caused him injury." *Ajaj v. U.S.* 479 F.Supp. 501, 549 (D.S.C. 2007). Plaintiff has demonstrated that the Defendant United States had a duty created by the Code of Conduct to have a staff member oversee basketball games played during the recreation period and that there is a question of fact as to whether this duty was breached and that breach proximately caused Plaintiff's injuries. The Defendants' motion for summary judgment is therefore denied as to Plaintiff's FTCA negligence claim as to the duty of the recreation officers to supervise the basketball game pursuant to the Code of Conduct.

Under South Carolina law, in order to proceed on an intentional infliction of emotional distress theory, Plaintiff must establish that the Defendants "intentionally or recklessly inflicted severe emotional distress, or [were] certain, or substantially certain, that such distress would result from [their] conduct." *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 356 (S.C. 2007). Moreover, Plaintiff must establish that Defendants' conduct was "extreme and outrageous." *Id.* The Court finds that Defendants' actions in not complying with the Code of Conduct were not extreme and outrageous and do not meet the requisite level of intent for Plaintiff to proceed on this claim. *See Hernandez-Martinez v. Pyatt*, 2008 WL 220630 at *5-6 (D.S.C. 2008). Defendants' motion for summary judgment on Plaintiff's FTCA claim is granted as to Plaintiff's intentional infliction of emotional distress claim.

Conclusion

Based upon the foregoing, Defendants' motion for summary judgment is **GRANTED** as to Plaintiff's federal constitutional claims and the Court **ADOPTS** that portion of the Magistrate Judge's R & R. (Dkt. No. 96). The Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion for summary judgment as to Plaintiff's FTCA claims. Plaintiff's FTCA claims are **DISMISSED** as to Defendants' Owens, Holmes and Brown. Defendants' motion for summary judgment is **DENIED** as to Defendant United States as to Plaintiff's FTCA claim regarding the negligence of the United States in enforcing its Intramural Code of Conduct policy and **GRANTED** as to Defendant United States as to Plaintiff's remaining negligence and intentional infliction of emotional distress claims.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Judge

Charleston, South Carolina
April 30, 2012

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Frederick Irvin, #16620-039, Plaintiff, vs. United States of America, Defendants.	Case No. 9:10-cv-01336-RMG **CONSENT ORDER**

Pursuant to the Federal Rules of Civil Procedure, the parties consent and the Court GRANTS Plaintiff's motion to amend the Complaint in this matter. This Order is entered in a manner consistent with the ends of justice to allow Plaintiff, who is now represented by counsel, to amend the Complaint.

IT IS SO ORDERED.

Richard M. Gergel
United States District Judge

July 2, 2012
Charleston, South Carolina

WE CONSENT:

Yarborough Applegate LLC
210 Wingo Way, Suite 301
Mt. Pleasant, SC 29464
843-972-0150

s/ Douglas E. Jennings
Douglas E. Jennings. (Fed. ID# 11348)

Jennings Law Firm, LLC
151 Broad Street
Bennettsville, SC 29512
843-479-2865

s/ Douglas Jennings, Jr.
Douglas Jennings, Jr. (Fed. ID# 2168)

Attorneys for Plaintiff

Date: June 29 , 2012

Mt. Pleasant, SC
Bennettsville, SC

WE CONSENT:

U.S. Department of Justice
United States Attorney's Office
1441 Main Street, Suite 500
Columbia, SC 29201

s/ Barbara Murcier Bowens
Barbara Murcier Bowens (Fed. ID # 4004)

Attorney for Defendants

Date: June 29 , 2012

Columbia, SC

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Frederick Irvin, Plaintiff, vs. United States of America, Defendant.	No. 9:10-cv-1336-RMG **ORDER**

This matter comes before the Court on Plaintiff Frederick Irvin's motion for partial summary judgment, (Dkt. No. 156), and Defendant United States of America's motion for summary judgment, (Dkt. No. 158). The Court narrowed the scope of this case considerably when it addressed an earlier summary judgment motion by Defendant, filed on September 13, 2011. (Dkt. Nos. 96, 116). As a result, all that remains is Plaintiff's Federal Tort Claims Act ("FTCA") claim, and that claim is the subject of these cross-motions for summary judgment. After a thorough review of the entire record in this case, the Court denies both summary judgment motions.

Background

Plaintiff Frederick Irvin, an inmate with the federal Bureau of Prisons, alleges that while he was officiating a pre-season prison league basketball game on May 30, 2009, he was attacked by another inmate and suffered serious injuries to his face and head as a result. (Dkt. No. 37 at 2, 12). He asserts that there were no correctional officers present to supervise the basketball game, though the correctional institution's Intramural Code of Conduct states that "[a] staff member is present on the sideline during all games" and advises that violations of the Code of Conduct constitute

violations of Bureau of Prisons policy "in many cases." (Dkt. No. 29-10 at 1–2). Plaintiff claims negligence on the part of Defendant due to this alleged failure to comply with prison policy.

In its Order of April 30, 2012, addressing Defendant's original motion for summary judgment, the Court found "that the policy requiring a staff member to be on the sidelines during intramural sports is mandatory." (Dkt. No. 116 at 11). It further found that "there is a genuine issue of material fact as to whether [prison officials] complied with the policy," since there is an underlying dispute about whether the Intramural Code of Conduct applied to the basketball game in which Plaintiff was injured. (*Id.* at 12). Based on these findings, the Court denied Defendant's summary judgment motion with respect to Plaintiff's claim of negligence under the FTCA. Cross-motions for summary judgment on that claim are now before the Court.

Legal Standard

Summary judgment is appropriate if a party "shows there is no genuine dispute as to any issue of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is deemed "material" if proof of its existence or non-existence would affect the disposition of the case, and an issue of material fact is "genuine" if a reasonable jury presented with the evidence might return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 257 (1986). "In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities in favor of the nonmoving party." *HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1008 (4th Cir. 1996). Put another way, summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987).

Plaintiff's claim is brought under the FTCA. The FTCA, enacted in 1946, "was designed primarily to remove the sovereign immunity of the United States from suits in tort." *Richards v. United States*, 369 U.S. 1, 6 (1962). The Act gives federal district courts exclusive jurisdiction over claims against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1). Substantively, the FTCA makes the United States liable "to the same extent as a private individual under like circumstances," *id.* § 2674, under the law of the place where the tort occurred, *id.* § 1346(b)(1), subject to several enumerated exceptions, *id.* §§ 2680(a)–(n). In the Fourth Circuit, the "specific exceptions outlined in the Act . . . [are] considered jurisdictional." *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005).

Discussion

The Court has before it cross-motions for summary judgment, each of which the Court will address separately on its own merits. *See Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quotation marks and citation omitted). Though it was the later of the two motions filed, the Court will address Defendant's motion first because it raises the threshold jurisdictional question of whether the FTCA's discretionary function exception applies here. *See Chang-Williams v. Dep't of the Navy*, 766 F. Supp. 2d 604, 612 (D. Md. Feb. 2, 2011).

A. Defendant's Motion for Summary Judgment (Dkt. No. 158)

Defendant offers two reasons for why it should be granted summary judgment. First, it argues that the "discretionary function" exception bars Plaintiff's negligence-based FTCA claim. *See* 28 U.S.C. § 2680(a). Second, Defendant asserts that Plaintiff cannot establish negligence under South Carolina law, the relevant body of substantive law on his FTCA claim. *See id.* § 1346(b)(1).

i. Discretionary Function Exemption to the FTCA

The Court has, of course, already addressed the discretionary function issue once. In its Order of April 30, 2012, the Court found "that the policy requiring a staff member to be on the sidelines during intramural sports is mandatory," such that prison officials had no choice about their posting during the game. (Dkt. No. 116 at 11). Based on this initial determination, the Court concluded that the discretionary function exception did not apply to these officials' conduct.

Defendant now disputes the characterization of the Code of Conduct as mandatory. As Defendant puts it, "[a]lthough the court found that the Code is a mandatory policy, this finding was done . . . without any briefing on the issue from the parties." (Dkt. No. 158 at 6). In its motion, Defendant argues that "the Code is not policy" but instead "only provides guidelines for inmate participants to follow." (*Id.* at 6, 30). The Court is open to Defendant's line of argument, but remains unpersuaded that summary judgment based on the discretionary function exception is appropriate on this record.

To fall within the discretionary function exception, the governmental conduct at issue must have: (1) involved an element of judgment or choice; and (2) been of the kind based on considerations of public policy. *See United States v. Gaubert*, 499 U.S. 315, 322–23 (1991). "The discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow because the employee has no rightful option but to adhere to the directive." *Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009) (quotation marks omitted). Plaintiff bears the burden of showing that the discretionary function exception does not apply. *Id.* (citation omitted).

Though Defendant makes much of the fact that the Code of Conduct did not undergo the

Bureau of Prisons' formal rulemaking process, (Dkt. No. 158 at 6–7), *Gaubert* does not impose any formality requirement on the type of policies that might constrain or remove officials' judgment. *See id.* at 325 (stating that "an agency may rely on internal guidelines rather than on published regulations" to establish policy); *see also Irving v. United States*, 162 F.3d 154, 164 (1st Cir. 1998). To be sure, the formality of a rule may bear on whether it bound an official, but that factor is not conclusive here.

The law is clear that the discretionary function exception does not apply when prison officials are subject to a specific, mandatory directive regarding their posting location. *See, e.g., Brembry v. United States*, No. 7:10-cv-388, 2011 WL 121741, at *6 (W.D. Va. Jan. 13, 2011) (holding that the discretionary function exception does not apply when a prison guard's "orders left him no room to determine his self-positioning during controlled inmate movements"); *see also Garza v. United States*, 161 F. App'x 341, 344–46 (5th Cir. 2005). So, while Defendant correctly points out that "the decision [about] where staff is positioned at any given time is based on several economic, social and political policy considerations," (Dkt. No. 158 at 29), Defendant fails to appreciate the question here: whether prison officials chose to actualize those policy considerations in the form of a mandatory directive of some kind, such as the Code of Conduct. *Cf. Chang-Williams*, 766 F. Supp. 2d at 618 ("[T]he real issue in this case is not whether the decision to protect is discretionary, but whether the agents of the United States performed a discretionary function when they disregarded their own specific assurances . . . ."). If such a judgment were made, then prison officials' adherence to that policy would no longer have been a matter of choice and would, therefore, no longer have been discretionary.

On this question, Defendant is perhaps understandably less assertive. In addition to the fairly

explicit text of the Code of Conduct itself, the record evidence also includes the deposition testimony of a prison official stating that the Code was covered during his orientation for the position of "recreation specialist." (Dkt. No. 159-4 at 16). Moreover, though Defendant now argues that Daniel Mercado, Supervisor of Recreation for Defendant, has been "consistent in denying that the Code is . . . policy," (Dkt. No. 158 at 6), Defendant did not in its original motion for summary judgment dispute that the Code of Conduct reflected the institution's policy, (Dkt. No. 116 at 11). Indeed, Mercado stated in his affidavit attached to that original motion that "[t]he Intramural Code of Conduct sets forth that a staff member is required to be present on the sidelines during all sponsored games." (Dkt. No. 29-6 at 3). Viewing the record in the light most favorable to Plaintiff, the Court finds that there remains a question as to whether the institution's internal policies and procedures removed discretionary judgment from the line prison official surveilling the prison yard and required him to be on the sideline for an intramural game. *Cf. Ricketts v. AW of UNICOR*, No. 1:CV-07-49, 2009 WL 2232467, at *8 (M.D. Pa. July 24, 2009) (denying a motion for summary judgment on a prisoner's FTCA claim because the Court could not conclusively determine whether the defendants' conduct "involved an element of judgment").

ii. Negligence under South Carolina Law

Defendant also argues that Plaintiff cannot prove negligence under South Carolina law, the relevant body of substantive law governing Plaintiff's FTCA claim. *See* 28 U.S.C. § 1346(b)(1). Under South Carolina law, negligence requires that the defendant had a duty to the plaintiff, that the defendant breached that duty, and that the breach was the proximate cause of an injury to the plaintiff. *Bloom v. Ravoira*, 529 S.E.2d 710, 712 (S.C. 2000).

The Court addressed this issue in its earlier order on summary judgment as well. In that

Order, the Court found that "Plaintiff has demonstrated that the Defendant United States had a duty created by the Code of Conduct to have a staff member oversee" intramural basketball games and there questions of fact "as to whether this duty was breached and that breach proximately caused Plaintiff's injuries." (Dkt. No. 116 at 12).

In rearguing this point, Defendant again primarily relies on its assertion that the Code of Conduct is not a "policy." Specifically, Defendant argues that, because the Code of Conduct is not a "policy," Defendant owed Plaintiff no duty to adhere to the Code. (Dkt. No. 158 at 20). The Court has already concluded, above, that a question of fact exists on this point. To the extent the Code is found to be a "policy," it would very likely create a duty with respect to the prisoners living under it, whose well-being and safety such policies are, at least in part, intended to protect. Accordingly, the Court finds that a question of material fact remains as to whether Defendant owed Plaintiff a duty under these circumstances.

Further, if such a duty were found to exist, there would remain a disputed factual issue as to whether that duty was breached, since Defendant appears to contest whether the game was covered by the Code and whether a violation of the Code by failing to post a staff member on the sideline was a proximate cause of Plaintiff's injuries. Thus, viewing the record in the light most favorable to Plaintiff, the Court concludes that there remain genuine disputes as to issues of material fact, precluding judgment as a matter of law for Defendant.

B. Plaintiff's Motion for Partial Summary Judgement (Dkt. No. 156)

The arguments that Plaintiff puts forth in his motion for partial summary judgment largely mirror those made by Defendant. He argues that there is no genuine dispute as to any material fact establishing that Defendant was negligent under South Carolina law. *See Bloom*, 529 S.E.2d at 712.

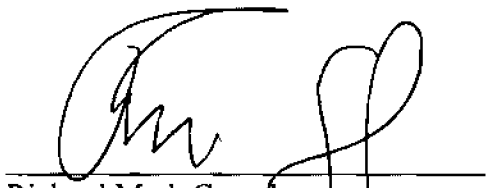
As set forth in the above section, however, there remain disputes about several material facts, including: (1) whether the Code of Conduct reflects a mandatory policy requiring a prison official to be on the sideline of every basketball game; (2) whether the game in which Plaintiff was injured was covered by the mandatory policy, if one is found to exist; and (3) whether the injuries Plaintiff suffered were proximately caused by the fact that no officer was present to supervise the game directly. Now viewing the record in the light most favorable to Defendant, it is clear that Plaintiff is not entitled to judgment as a matter of law.

Conclusion

Both parties present substantial arguments, supported by record evidence, for why they should prevail in this matter. The very strength of each side's position is, perhaps, the best indication that there remain disputes concerning the basic facts of this controversy and the inferences to be drawn from these facts. *See Pulliam Inv. Co.*, 810 F.2d at 1286. Thus, at this time, it appears these disputes should be resolved at trial.

For the reasons set forth above, the Court DENIES Plaintiff Frederick Irvin's motion for summary judgment, (Dkt. No. 156), and DENIES Defendant United States of America's motion for summary judgment, (Dkt. No. 158), as well.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Judge

Charleston, South Carolina
March 21, 2013

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

RECEIVED
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Frederick Irvin,	)	
	)	
Plaintiff,	)	Civil Action No. 9:10-1336-RMG
	)	
United States of America,	)	
	)	
Defendant.	)	**ORDER**
	)	
	)	

The parties to this action have moved jointly before the Court for review and approval of a proposed settlement in this matter. The case, arising under the Federal Tort Claims Act, involves injuries to Plaintiff while incarcerated by the United States Bureau of Prisons in which Plaintiff alleges Defendant failed to adhere to existing written policies regarding the provision of security personnel at intramural basketball games. Defendant has denied all liability. The Court previously denied Defendant's motion for summary judgment regarding the Federal Tort Claims Act cause of action and the case was set for trial on June 3, 2013.

The parties recently reached a proposed settlement agreement in this matter in which Defendant would pay Plaintiff $ 465,000 in full and complete satisfaction of all claims. Plaintiff seeks Court approval of the settlement amount as well for a 25% attorneys' fee of $ 116,250 and litigation costs of $ 37,526.46. Thus, the Plaintiff's net recovery would be $ 311,223.54.

The Court conducted a hearing on this matter on June 4, 2013 in which counsel for all parties and Plaintiff were present. Plaintiff confirmed to the Court he was fully aware of the settlement amount, attorney's fees and litigation costs and requested Court approval.

The Court, after fully reviewing the proposed Settlement Agreement, finds the settlement amount fair and reasonable and approves the settlement as requested. The Court has also reviewed the proposed 25% attorney's fee and the itemized litigation costs and find they are also fair and reasonable. Therefore, the Court hereby approves the Settlement Agreement, including the settlement amount, attorney's fees and litigation costs. The case is hereby dismissed with prejudice, with each party to bear its own costs.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Judge

June 4, 2013
Charleston, South Carolina

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FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

NOV 23 2009

JAMES N. HATTEN, CLERK
By: Deputy Clerk

Plaintiff's Name Gerald A. West
Inmate No. 54421-060
Address USP-P.O. Box 33
Terre Haute, Indiana 47808

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GERALD A WEST
(Name of Plaintiff)

(Case Number)

vs.

COMPLAINT 1 09-CV-3328

Bivens Action [403 U.S. 388 (1971)]

1. C/O C. PEOPLES
2. C/O ROSA

(Names of all Defendants)

I. **Previous Lawsuits (list all other previous or pending lawsuits on back of this form):**

A. Have you brought any other lawsuits while a prisoner? Yes ✓ No ___

B. If your answer to A is yes, how many? ONE
Describe previous or pending lawsuits in the space below.
(If more than one, use back of paper to continue outlining all lawsuits.)

1. Parties to this previous lawsuit:

Plaintiff Gerald A. West

Defendants 1. John Doe 1; John Doe 2; and John Doe 3

2. Court (if Federal Court, give name of District; if State Court, give name of County)
U.S. District Court, Eastern District of California

3. Docket Number 1:09-CV-01277 4. Assigned Judge Lawrence J. O'Neil

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)
Still Pending

6. Filing date (approx.) 09-27-2009 7. Disposition date (approx.) Still Pending

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ORG:

II. Exhaustion of Administrative Remedies

A. Is there an inmate appeal or administrative remedy process available at your institution?

Yes ✓ No___

B. Have you filed an appeal or grievance concerning **ALL** of the facts contained in this complaint?

Yes ✓ No___ A Tort Claim was timely file in Regional Office.

If your answer is no, explain why not___

C. Is the process completed?

Yes ✓ If your answer is yes, briefly explain what happened at each level.

I filed grievances, which went unanswered, so I filed a Tort Claim No. TRT-SER-2009-01517, with the FBOP's South Regional Office. That Tort Claim was subsequently denied on May 22, 2009.

No___ If your answer is no, explain why not.

NOTICE: Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). If there is an inmate appeal or administrative remedy process available at your institution, you may not file an action under Section 1983, or any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.S. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1999 (9th Cir. 2002). **Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit.** Booth, 532 U.S. at 734.

III. **Defendants**

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant C. Peoples is employed as an Correctional Officer at USP/FCI Atlanta, Federal Bureau of Prisons.

B. Additional defendants Ms. Rosa, is employed as an Correctional Officer at the USP/FCI Atlanta, Federal Bureau of Prisons.

IV. **Statement of Claim**

(State here as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

On 10-03-2007, while I was being housed at the USP/FCI Atlanta, OCU II Cell 336, I complained to Correctional Officer, C. Peoples, that I had not had a shower in 6 days and wanted to speak to a Lt., because C. Peoples had refused to give me a shower. C. Peoples became rude and threatened to beat me and then frame me for assaulting him. When I put my arm outside of the Food Slot to retrieve some ice, C. Peoples slammed my arm in the Food Slot injuring my arm. C. Peoples then rushed into my cell and grabbed me around my neck very tightly using excessive force, and severly injured my neck. I had to receive medical attention to my neck. See: Exhibit #A (Medical incident Report & treatment verification). I still suffer from the -

"go to page # 2 of Statement of Claim."

V. **Relief.**

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

• I'm seeking $100,000.00 from the defendants in there individual and offical capacities; as compensatory and or punitive damages for my injuries sustained.

• I'm requesting that all filing fees, and attorney fees be paid by the defendants.

• I'm requesting that my neck be medically repaired, and the defendants pay all medical bills for said repair.

I declare under penalty of perjury that the foregoing is true and correct.

Date 11/02/09 Signature of Plaintiff X [signature]

(Revised 2/15/2006)

neck injury. which has caused permanent injury, and a growth on My neck. Ms. Rosa, Stood guard at My Cell door and Watched Peoples assault Me. Then I was paraded down the hallway by Peoples while he continued to forcebly hold My neck. Peoples took Me into an empty room where he further assaulted Me, while Ms. Rosa Stood guard at the door as a look out causing her to be liable for the assault and injury I Sustained from the excessive force.

Internal Affairs from the FBOP done an investigation but I was not Made aware as to their full findings. Staff at USP/FCI Atlanta has done nothing but try to Sweep the incident under the rug. See: Exhibit # B pages 1-3, (Internal Affair Report).

C/O C. Peoples, filed a false incident report against Me as well, in an attempt to cover up his Misconduct, but the incident report was Subsequently dismissed by the DHO. See: Exhibit # C (the false incident report filed by C. Peoples).

I filed a BP8 and BP9 (grievances) but they were never answered. So I filed a BP10 and BP11, but they weren't answered either, So I filed a Tort Claim. See: Exhibits # C and # D (BP10 and BP11 grievances in which I filed).

I filed a Tort Claim as an exhaustion of remedies, and in an effort Seeking Compensation for My injuries Sustained. See: (Tort Claim filed on November 20, 2008, labelled as Exhibit # E pages 1-4).

"go to Page # 3 of Statement of Claim."

Case 1:09-cv-03328-RLV Document 1 Filed 11/23/09 Page 4 of 19

Case 1:09-cv-03328-RLV Document 1 Filed 11/23/09 Page 5 of 19

The Tort Claim was subsequently denied by the Southeast Regional office on May 22, 2009. See: Exhibit #F (Tort Claim denial - Tort Claim No. TRT-SER-2009-01512).

The Claimant now files a Bivens Action against the defendants for violating his 8th Amendment Constitutional rights for use of excessive force, and for causing a personal injury to his arm, neck, and back, by use of unauthorized excessive force. Excessive force constitutes Cruel and Unusual Punishment which violates the Eighth Amendment. See: Hudson V. McMillian, 503 U.S. 1 (1992). The force used by C. Peoples was unauthorized, he cannot put his hand around my neck and choke me severely; he cannot slam my arm in a food slot; and he cannot beat or assault me. And Ms. Rosa cannot stand guard at the door for him as a look out and allow the excessive force to take place without intervening. C. Peoples used wanton and malicious means to choke and beat me, and his intent was clearly to harm me. I was already restrained and in compliance when he choked and beat me. This violated the Eighth Amendment. And he and Rosa (C. Peoples and Rosa), must be held liable for my physical injuries. See: Estate of Davis by Ostenfeld V. Dela [redacted] G.W. → 115 F.3d 1388 (8th Cir. 1997). Wherefore, the Claimant is requesting that he be awarded damages sought.

Date: 11, 02, 09. x Gerald West

Copy

BP-A362.060 SEP 05 **INMATE INJURY ASSESSMENT AND FOLLOWUP (Medical)** CDFRM

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

1. Institution: USP Atlanta	2. Name of Injured: Gerald West	3. Register Number: 54421-060
4. Injured's Duty Assignment: Dcu Inmate	5. Housing Assignment: DCU II 336	6. Date and Time of Injury: 10-3-07 1700
7. Where did Injury Happen (Be specific as to location): DCU II 334	Work Related? ☐ Yes ☑ No	8. Date & Time Reported for Treatment: 10-3-07 1925

9. Subjective, A) Cause of Injury (Inmate's Statement of how injury occurred):
Officer hand cuffed me feting on back and grabbed
B) Symptoms (as reported by inmate): One by the neck

Signature of Patient

10. Objective: (Observations or Findings from Examination)
Noted abrasion & redness to neck area no other noted injuries no trauma noted to trachea no complications

X-Rays Taken ____ Not Indicated ____
X-Ray Results

11. Assessment: (Analysis of Facts Based on Subjective and Objective Data)
Noted abrasion & redness to neck area

12. Plan: (Diagnostic Procedures with Result, Treatment and Recommended Follow-up)
Inmate return to cell

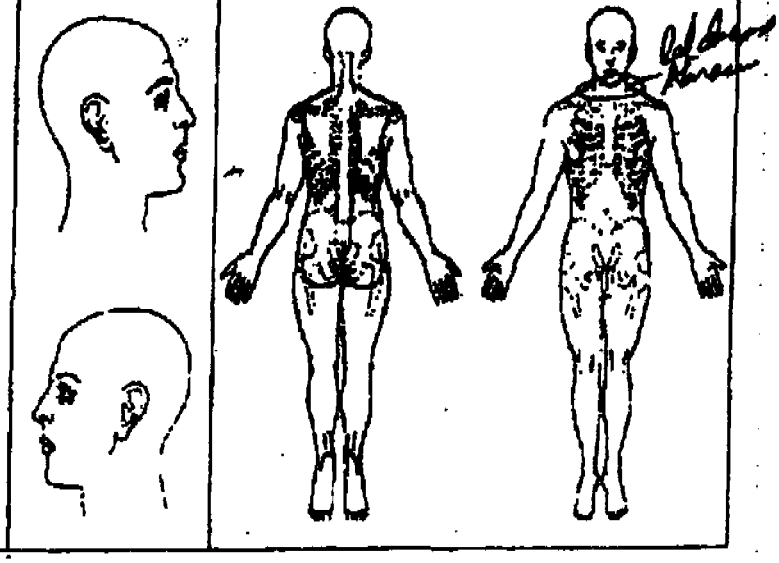
a. No Medical Attention (Check applicable)

☑ a. No Medical Attention
☐ b. Minor First Aid
☐ c. Hospitalization
☐ d. Other (Explain)

☐ e. Pain assessment: (Optional)

Mild Moderate Severe
1--2--3--4--5--6---7--8--9--10

Signature of Physician or Physician Assistant



Original- Medical File; Canary - Safety; Pink - Supervisor; Goldenrod - Correctional Supervisor

(This form may be replicated via WP) Replaces BP-A362.060 of FEB 05

(b)(6), (b)(7)c

Exhibit # A [redacted] G.W.

FEDERAL BUREAU OF PRISONS

Office of Internal Affairs

09 - 16 - 2008

Matter ID OIA-2008-01279 OIG Case Number 2008001845 Name (b)(6), (b)(7)c Field Office STL

Region SER Institution ATL Open Date 01/15/2008 Number of Subjects 2

Date Allegation Rptd. 01/08/2008 Investigated By OIG Category 1

CASE DESCRIPTION

(b)(6), (b)(7)c Physical Abuse of an Inmate

CASE SUMMARY

In a letter dated January 8, 2008, inmate Gerald West, #54421-060, claims that on October 3, 2007, he ask(b)(6), (b)(7)c (b)(6), (b)(7)c if he could speak to a lieutenant regarding showers and recreation(b)(6), (b)(7)c allegedly refused. West claims that when he reached through the food slot in his cell to get a cup of ice(b)(6), (b)(7)c slammed his arm in the food slot. West then asked to see a nurs(b)(6), (b)(7)c legedly refused and told West if he asked again he would "beat him down" and write an assault charge on him. West states he again asked to see a nurse. He clain(b)(6), (b)(7)c can opened his cell door and ordered him to lay down on the floor and submit to restraints. West clain(b)(6), (b)(7)c can grabbed his neck and started choking him. West clain(b)(6), (b)(7)c can removed him from cell and began parading him up and down the unit chanting, "This is what happens to stupid niggers." West claims he was escorted to an empty cell, we(b)(6), (b)(7)c cked and beat him while (b)(6), (b)(7)c watched. West claims he was left handcuffed in the cell for 1/2 hour. West currently is incarcerated at USP Atwater. An Inmate Injury Assessment and Follow Up dated October 3, 2007, indicates West sustained abrasions and redness to his neck. No medication attention was needed.

OTHER COMMENTS

FINAL DISPOSITION

(b)(6), (b)(7)c

(b)(6), (b)(7)c

Accordingly, the allegation of Physical Abuse of an Inmate against (b)(6), (b)(7)c is not sustained.

COMPLAINANT INFORMATION

Complainant Name WEST, GERALD A. Title/Inmate Reg. No. 54421-060

VICTIM INFORMATION

Victim Name WEST, GERALD A. Title/Inmate Reg. No. 54421-060

OIG DISPOSITION

Referred Date 01/09/2008 Deferred Date Deferred By MIAMI FIELD OFFICE

Disposition INVE Comments

EVENTS

Date Scheduled 01/09/2008 Suspense/Due Date 02/09/2008 Description PENDING DEFERRAL BY OIG

Comments

Date Scheduled 01/30/2008 Suspense/Due Date 05/29/2008 Description ON-GOING OIG INVESTIGATION

Comments

Date Scheduled 07/09/2008 Suspense/Due Date Description ON-GOING OIG INVESTIGATION

Comments (b)(6), (b)(7)c advised ongoing investigat(b)(6), (b)(7)c

CASE STATUS

Status CLOS Disposition NSUS Close Date 09/16/2008

Exhibit #B - Page 1 of 3

FEDERAL BUREAU OF PRISONS
OFFICE OF INTERNAL AFFAIRS
SUBJECT REPORT

01/17/2008

Matter ID: OIA-2008-01279 Agent: (b)(6),(b)(7)c

SUBJECT INFORMATION

Name: (b)(6), (b)(7)c
Region:
Duty

REPORTED ALLEGATIONS

Allegation Master Code	101	Allegation Sub-Code	001D	Reported Date	01/15/2008	Legal Action	Sentence Date

Offense
Comments

SUSTAINED ALLEGATIONS

STATUS

Disposition: Close Date: Disciplinary Action: Days Suspended:
Comments:

DEMOGRAPHIC INFORMATION

(b)(6), (b)(7)c

Exhibit #B - Page 2 of 3

FEDERAL BUREAU OF PRISONS
OFFICE OF INTERNAL AFFAIRS
SUBJECT REPORT

01/17/2008

SUBJECT INFORMATION

(b)(6), (b)(7)c

REPORTED ALLEGATIONS

Allegation Master Code 101 Allegation Sub-Code 001D Reported Date 01/15/2008 Legal Action Sentence Date

Offense Comments

SUSTAINED ALLEGATIONS

STATUS

Disposition: Close Date: Disciplinary Action: Days Suspended:

Comments:

DEMOGRAPHIC INFORMATION

(b)(6), (b)(7)c

Exhibit #B - Page 3 of 3

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A - REASON FOR APPEAL

_____
DATE

_____
SIGNATURE OF REQUESTER

Part B - RESPONSE

_____
DATE

_____
REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

THIRD COPY: WARDEN'S ADMINISTRATIVE REMEDY FILE

CASE NUMBER: _____

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

_____
DATE

_____
SIGNATURE, RECIPIENT OF REGIONAL APPEAL

Exhibit #C

BP-230(13)

U.S. Department of Justice

Central Office Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A - REASON FOR APPEAL

[illegible]

_____ _____
DATE | SIGNATURE OF REQUESTER

Part B - RESPONSE

_____ _____
DATE | GENERAL COUNSEL

THIRD COPY: WARDEN'S ADMINISTRATIVE REMEDY FILE CASE NUMBER: _____

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT _____

_____ _____
DATE | SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

Exhibit #D

BP-231(13)

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:

Federal Bureau of Prisons
South Central Regional Office
4211 Cedar Springs Road
Dallas, Texas 75219

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*

Mr. Gerald West
Fed. Reg. # 54421-060
P.O. Box 33
Terre Haute, Indiana 47808

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. or P.M.)*
☐ MILITARY ☒ CIVILIAN	01 July '66	single	03 October 2007	5:07 p.m.

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)*

" SEE ATTACHED "

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

N/A

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

N/A

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT. Multiple lacerations to the neck, neck and back strain and continued pain and suffering.

11. WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
John/Jane Doe Medical Personnel	USP Atlanta, Atlanta, Georgia
C/o Rosa	USP Atlanta, Atlanta, Georgia

12. *(See instructions on reverse)* AMOUNT OF CLAIM *(In dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	$100,000.00	N/A	$ 100,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
	N/A	20 Nov 2008

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

95-109
Previous editions not usable.

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85) (EG)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

Exhibit # E. - Page 1 of 4

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 38 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim

INSTRUCTIONS

Complete all items - Insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A **SUM CERTAIN** FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN **TWO YEARS** AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in Item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in Item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☐ No

N/A

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

NO

17. If deductible, state amount

N/A

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *(It is necessary that you ascertain these facts)*

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* ☐ No

N/A

SF 95 (Rev. 7-85) BACK

Exhibit E - Page 2 of 4

SF-95 Continuation Sheet

PREAMBLE

This SF-95 Administrative Tort Claim involves the brutal attack upon the person of prisoner Gerald West, one committed to the care, custody and control of the Federal Bureau of Prisons (FBOP), by employees and/or officers of the United States Government. The Claimant has suffered and continues to suffer unnecessarily as a direct result of the unprofessional actions of said employees/officers.

STATEMENT OF CLAIM

On or about 03 October 2007, while confined at the United States Penitentiary at Atlanta, Georgia, Claimant, Gerald West asked S.O.S. C. Peoples (hereinafter " Peoples " or " tortfeasor " as the context may, from time to time, require) for a shower.

West had not had a shower in approximately six (6) calendar days. West was not in any way attempting to incite trouble with Peoples. When Peoples became beligerent toward West, West requested to speak to a lieutenant, which is the custom when a subordinate officer is intent upon running afoul of policies, customs or practices put in place to insure the orderly operation of the institution.

While waiting for the lieutenant, West stuck his arm through the food slot to receive some ice. Upon seeing West's arm, Peoples slammed the slot closed, injuring West's arm. When West asked to be seen by medical for his arm, Peoples threatened to beat him down and use the disciplinary process to frame West for assault.

When West again asked for medical attention, Peoples ran in West's cell, ordering him into restraints. Instead of simply restraining (although even that restraint was unnecessary since West was non-combative and locked in a closed cell where he was no threat to himself or others) West, Peoples proceeded to assault West by applying an unauthorized choke hold to West's neck, inhibiting West's ability to breathe.

Peoples then, in a rage, paraded the limp body of West up and down the walkway as an example to other prisoners saying " This is what happens to stupid niggers. "

DISCUSSION

Peoples was not authorized by FBOP policy regarding the use of force to come into the cell of West and apply any choke hold as a punishment for asking about a shower that he was otherwise entitled to. The result of this unauthorized use of force is that Mr. West was significantly injured by Peoples and subjected to victimization under the Hate Crimes legislation by one of the same race. This treatment is abhorrent to the concept of ordered liberty and runs afoul of basic concepts of fairness and decency that

Exhibit #E -Page #3 of 4

SF-95 Continuation Sheet

mark the progress of our maturing society.

Prisoners of these United States are not to be treated as inhuman trophies for attention-starved corrections officials to vindicate their manliness. Persons are sent to correctional facilities, away from the society at large, as punishment for crime -- not to be punished. If Mr. West had done something to violate a rule or procedure of the institution or of the FBOP, certainly there is a mechanism in place called a disciplinary process that Peoples could have utilized without resort to violent acts and demeaning taunting in violation of the FBOP Standard of Employee Conduct found at PS 3420.09.

But there is a long-standing custom or usage of unnecessary violence towards prisoners in the FBOP that operates with the force and effect of a written law without ever being memorialized in any official writing. It is this custom or usage that is at the heart of the violence perpetrated against Mr. West.

Mr. west has sustained significant injuries and should be compensated in the amount of $ 100,000.00 (one-hundred thousand dollars).

There is currently a cover-up of the incident taking place at the USP Atlanta. However, a prudent review of the record will indicate that the foregoing took place on the date and time herein described.

Thanking you in advance for your valuable time and attention in this matter.

Respectfully,

11/20/09
(date)

X _____
Mr. Gerald West

Exhibit # E Page 4 of 4

U.S. Department of Justice
Federal Bureau of Prisons

Incident Report (12)

1. NAME OF INSTITUTION

PART I – INCIDENT REPORT

2. NAME OF INMATE	3. REGISTER NUMBER	4. DATE OF INCIDENT	5. TIME

6. PLACE OF INCIDENT	7. ASSIGNMENT	8. UNIT

9. INCIDENT 10. CODE

11. DESCRIPTION OF INCIDENT (Date: _____ Time: _____ Staff became aware of incident)

12. SIGNATURE OF REPORTING EMPLOYEE	DATE AND TIME	13. NAME AND TITLE (Printed)

14. INCIDENT REPORT DELIVERED TO ABOVE INMATE BY	15. DATE INCIDENT REPORT DELIVERED	16. TIME INCIDENT REPORT DELIVERED

PART II – COMMITTEE ACTION

17. COMMENTS OF INMATE TO COMMITTEE REGARDING ABOVE INCIDENT

18. A. IT IS THE FINDING OF THE COMMITTEE THAT YOU:
_____ COMMITTED THE FOLLOWING PROHIBITED ACT.

_____ DID NOT COMMIT A PROHIBITED ACT.

B. _____ THE COMMITTEE IS REFERRING THE CHARGE(S) TO THE DHO FOR FURTHER HEARING.

C. _____ THE COMMITTEE ADVISED THE INMATE OF ITS FINDINGS AND OF THE RIGHT TO FILE AN APPEAL WITHIN 15 CALENDAR DAYS.

19. COMMITTEE DECISION IS BASED ON THE FOLLOWING INFORMATION

20. COMMITTEE ACTION AND/OR RECOMMENDATION IF REFERRED TO DHO (CONTINGENT UPON DHO FINDING INMATE COMMITTED PROHIBITED ACT)

21. DATE AND TIME OF ACTION _____ (THE UDC CHAIRMAN'S SIGNATURE NEXT TO HIS NAME CERTIFIES WHO SAT ON THE UDC AND THAT THE COMPLETED REPORT ACCURATELY REFLECTS THE UDC PROCEEDINGS.)

Chairman (Typed Name/Signature) Member (Typed Name) Member (Typed Name)

Original – Central File Record *Blue – To Inmate after UDC Action*
Yellow – DHO Pink – To Inmate within 24 hours of Part I preparation

Previous editions not usable

BP-288(52)
JANUARY 1988

U.S. Department of Justice

Federal Bureau of Prisons

Southeast Regional Office

Building 2000
3800 Camp Creek Parkway, S.W.
Atlanta, Georgia 30331-6226

May 22, 2009

CERTIFIED MAIL
7007 1490 0001 9020 1872

Gerald A. West
Reg. No. 54421-060
USP THP
P.O. Box 33
Terre Haute, IN 47808

RE: Administrative Tort Claim Number TRT-SER-2009-01517

Dear Claimant:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), Title 28 United States Code (U.S.C.) Section 2672 et seq., and authority granted by Title 28 Code of Federal Regulations (C.F.R.) Section 0.172. Section 2672 of the FTCA delegates to each federal agency the authority to consider, determine and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

Your claim dated November 20, 2008, asserts that on October 3, 2007, at the U.S. Penitentiary in Atlanta, Georgia, you asked for a shower and a correctional officer became belligerent toward you, so you asked to see a Lieutenant. While waiting for the Lieutenant, you stuck your arm through a food slot in your cell door to get some ice, and the officer slammed the slot's door on your arm injuring it. You allege he also threatened to beat you and to frame you for assault. Further, you allege when you asked for medical attention, the officer ran into your cell, ordered you into restraints, and applied a choke hold to your neck, causing significant injuries. You allege the officer then paraded your limp body in front of other inmates and told them "[t]his is what happens to stupid niggers." You assert you suffered multiple lacerations to your neck, back strain and pain. You want $100,000 from the United States as damages.

We have reviewed your claim along with reports from appropriate staff members. Staff report that after serving you a tray with the dinner meal through a food slot in your cell door, a correctional officer was trying to close the slot cover when you began kicking it to prevent him from closing it, resulting in an injury to the officer. You eventually submitted to placement in

restraints and were moved to another cell by that officer and another. Both you and the injured officer were given medical evaluations by a physician assistant. He observed an abrasion and redness to your neck area with no other injuries, and no trauma to your trachea or complications. He determined you needed no medical attention. The officer was found to have sustained an injury to his hand, an abrasion to one of his knuckles with mild swelling, and he was given minor first aid. There is no information the officer made the statement you attribute to him or displayed you to other inmates as an example.

Based on the above information, there is no evidence of staff negligence. To the extent you raise constitutional claims for excessive use of force and other mistreatment, civil rights claims are not within the purview of the FTCA. In accordance with 28 U.S.C. § 1346(b), the FTCA is a limited waiver of sovereign immunity providing compensation for property loss or personal injury which results from the negligent or wrongful act or omission of an employee of the United States who is acting within the scope of his employment. This statute does not establish a compensatory scheme or cause of action against the United States for violations of the U.S. Constitution.

Therefore, based on the above information, other than your own self-serving assertion, there is no evidence to support your allegations that you have suffered any injuries due to the negligent acts or omissions by the United States. Therefore, your claim is denied.

You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

Lisa M. Sunderman
Regional Counsel

cc: USP Atlanta / ATTN: FTCA Coordinator

Exhibit # F 2 of 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

GERALD A. WEST
PLAINTIFF'S

-VS-

1. C/O E. PEOPLES

2. C/O ROSA

DEFENDANT'S

PROOF OF SERVICE

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

NOV 23 2009

JAMES N. HATTEN, CLERK
By: Deputy Clerk

NOTICE OF FILING AND CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES THAT HE FILED THIS BIVENS ACTION (403 U.S. 388 (1971); WITHIN THE U.S. DISTRICT COURT; ON 11/17/09; AND SERVED A COPY OF IT ON THE FEDERAL BUREAU OF PRISONS, 320 FIRST ST N.E. WASHINGTON D.C. 20534

DATED 11/17/2009

MR GERALD A. WEST
54721-060
P.O. BOX 33
TERRE HAUTE, INDIANA
47808
PRO SE PLAINTIFF

Filed11/20/09 USDC Flnd4pm1134

CIVIL COVER SHEET FOR A PRISONER CASE

1 09-CV-3328

JUDGE _____ DIVISION Atlanta

MAG. JUDGE _____ IFP ✓ FEE _____

DATE FILED 11-23-09 PREVIOUS CASES NO

NAME Gerald A. West I.D. # 54421-060

PRO SE ✓ ATTORNEY _____

PLACE OF INCARCERATION USP

CITY Terre Haute STATE IN COUNTY _____

-RLV

JURISD.	NOS	CAUSE	DESCRIPTION
3	530	___ 28:2254	Habeas action by a State prisoner challenging state convictions or sentence.
3	535	___ 28:2254d	Habeas action by a State prisoner under a DEATH sentence. ____ SEND TO DISTRICT JUDGE.
3	530	___ 28:2241st	Habeas action by a State prisoner or detainee challenging matters other than conviction or sentence (e.g. parole revocation, loss of good time-credit, etc.).
2	530	___ 28:2241fd	Habeas action by a Federal prisoner or detainee challenging matters other than conviction or sentence (e.g. parole revocation, loss of good time-credit, etc.).
2	463	___ 28:2241fd	Habeas action by a Federal alien detainee.
3	550	___ 42:1983pr	State or Federal prisoner civil rights action suing state officials not involving prison conditions. (A/K/A "Bivens action").
2	550	___ 28:1331pr	Prisoner civil rights action suing federal officials not Involving prison conditions. (A/K/A "Bivens actions").
3	555	___ 42:1983pr	State prisoner civil rights action involving prison conditions.
2	555	___ 28:1331pr	Prisoner civil rights action suing Federal officials involving prison conditions. (A/K/A "Bivens action").
2	540	___ 28:1346	Prisoner Federal Tort Claim. (Against U.S.)
2	540	___ 28:1361pr	Action to compel U.S. officer to perform a duty MANDAMUS.
4	540	___ 28:1332	Any prisoner action based on diversity.
____	540	___ _____	OTHER: _____

_____ DOCKET CLERK: Place cover sheet in acco on top of docket sheet and file, and FORWARD to Magistrate Judge assigned for IFP and/or frivolity determinations.

RLV

_____ STAFF LAW CLERK:

___ Pauper's affidavit insufficient or no affidavit

___ Complaint or petition not signed or is incomplete

___ No copies

___ Other: _____

ECS

550

42:1983PR

SLC 7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Gerald A. West,	:	
Plaintiff,	:	
	:	**CIVIL ACTION**
vs.	:	
	:	**NO. 1:09-cv-3328-RWS**
United States of America,	:	
Defendant.	:	

NOTICE OF DISMISSAL

COMES NOW Defendant the United States of America ("Defendant" or the "United States") and, on behalf of the United States and Plaintiff Gerald West ("Plaintiff") hereby files this Notice of Dismissal, showing the Court as follows:

1.

Plaintiff filed this Federal Tort Claims Action against the United States on or about November 23, 2009. *See* Docket No. 1.

2.

Plaintiff and the United States reached a settlement agreement that fully resolves all claims brought by Plaintiff in this lawsuit.

3.

APPROVED this 31st day of July, 2015

U.S. District Judge
RICHARD W. STORY

In accordance with the Stipulation for Compromise Settlement and Release entered into and signed by the parties, Plaintiff was required to file a dismissal with prejudice, within seven days of the undersigned counsel's receiving payment of any settlement proceeds. In the event that Plaintiff fails to file the aforementioned dismissal with prejudice, the Stipulation for Compromise Settlement and Release authorizes Defendant to notify the court that the matter should be dismissed with prejudice.

4.

The undersigned counsel previously wrote to Plaintiff (who is still incarcerated) and requested that he file the dismissal with prejudice.

5.

Plaintiff responded by stating "I hope you have already filed a dismissal with prejudice." *See* July 23, 2015, Letter, attached hereto as Exhibit A.

6.

In accordance with the Stipulation for Compromise Settlement and Release and as evidenced by the July 23, 2015, Letter from Plaintiff, the United States is filing the instant Notice of Dismissal and is requesting that the Court fully dismiss the instant action with prejudice and terminate all proceedings pending before

the Court.

This 30th day of July, 2015.

Respectfully submitted,

JOHN A. HORN
ACTING U.S. ATTORNEY

/s/ Darcy F. Coty
DARCY F. COTY
ASSISTANT U.S. ATTORNEY
600 U.S. Courthouse
75 Spring Street, SW
Atlanta, Georgia 30303
(404)581-6043
Ga. Bar No. 259280
darcy.coty@usdoj.gov

FILED IN CHAMBERS
U.S.D.C. Rome

JUN 28 2010

JAMES N. HATTEN, Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GERALD A. WEST, Inmate No 54421-060, Plaintiff,	:	FEDERAL TORT CLAIMS ACT 28 U.S.C. § 1346
v.	:	CIVIL ACTION NO. 1:09-CV-3328-RLV
C. PEOPLES; ROSA, Defendants.	:	

ORDER

Plaintiff, Gerald A. West, an inmate at the United States Penitentiary ("USP") in Lewisburg, Pennsylvania, has submitted the instant pro se civil action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346 et seq. ("FTCA") and 28 U.S.C. § 1331. Plaintiff has been granted in forma pauperis status, and the matter is now before the Court for a 28 U.S.C. § 1915A frivolity screening.

Title 28 U.S.C. § 1915A requires a federal court to review and dismiss any prisoner complaint seeking redress against a governmental entity or officer if the court determines that the action (1) is frivolous, malicious or fails to state a claim on which relief may be granted or (2) seeks monetary relief against a defendant who is immune from such relief. Under this standard, a district court must review the complaint and dismiss sua sponte those claims premised on meritless legal theories

or that clearly lack any factual basis. Denton v. Hernandez, 504 U.S. 25, 27 (1992). A claim is frivolous "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). A complaint may be dismissed for failure to state a claim on which relief may be granted when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

I. Plaintiff's Allegations

Plaintiff sues Officers C. Peoples and Rosa, alleging that he was subjected to excessive force and denied proper medical attention during his incarceration in 2007 at the Federal Correctional Institution in Atlanta, Georgia. According to Plaintiff, on October 3, 2007, he complained to Officer Peoples that he had not showered in six days and wanted to speak to a lieutenant. Plaintiff contends that Officer Peoples "became rude and threatened to beat me and then frame me for assaulting him." Plaintiff alleges that, when he put his arm outside the food slot on his cell door to retrieve some ice, Officer Peoples slammed his arm in the slot, injuring it. Plaintiff contends that Officer Peoples then rushed into his cell and grabbed him "very tightly" around the neck, causing injury to it. Plaintiff further alleges that Officer

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Rosa "stood guard" at his cell door and watched Officer Peoples assault Plaintiff. According to Plaintiff, Officer Peoples removed him from his cell and "paraded [him] down the hallway" while still holding Plaintiff by the neck. Plaintiff contends that he was taken to an empty room, where Officer Peoples further assaulted him and Officer Rosa stood guard. Plaintiff seeks damages and proper medical attention for his neck.

II. Discussion

A. Bivens Claims

Plaintiff raises claims against these two federal officers under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Bivens, the Supreme Court held that the violation of a person's constitutional rights by a federal official may give rise to a damages action in federal court, brought pursuant to 28 U.S.C. § 1331. Because "[t]he effect of Bivens was, in essence, to create a remedy against federal officers, acting under color of federal law, that was analogous to the section 1983 action against state officials," courts generally apply section 1983 law to Bivens cases. Abella v. Rubino, 63 F.3d 1063, 1065 (11th Cir. 1995).

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In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege that: (1) an act or omission deprived him of a right, privilege, or immunity secured by the Constitution of the United States or a federal statute; and (2) the act or omission was committed by a person acting under color of state law. See Hale v. Tallapoosa County, 50 F.3d 1579, 1581 (11th Cir. 1995).

The United States Supreme Court has stated, "Whenever prison officials stand accused of using excessive physical force constituting 'the unnecessary and wanton infliction of pain' violative of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 1-2 (1992) (internal citations omitted). The facts alleged in the instant complaint support an inference that the use of force exceeded that which was necessary to restore discipline and rose to the level of retaliation against Plaintiff. Accordingly, Plaintiff's excessive force claim should be allowed to **PROCEED** against Defendants Officer Peoples and Officer Rosa.

Plaintiff also alleges that he did not receive proper medical treatment for his neck. Prison officials violate an inmate's Eighth Amendment rights when they are deliberately indifferent to his serious medical needs. Estelle v. Gamble, 429 U.S. 97

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(1976); see also Adams v. Poag, 61 F.3d 1537 (11th Cir. 1995). To establish deliberate indifference, "the prisoner must prove three facts: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than mere negligence." Brown v. Johnson, 387 F.3d 1344, 1351 (11th Cir. 2004).

Plaintiff's allegations do not indicate that Defendants were deliberately indifferent to any injuries suffered by him as a result of the alleged incident. Plaintiff's complaint and attached documents indicate that he received medical attention following the alleged altercation. [Doc. 1 at 6]; See Carroll v. Correctional Medical Services, 160 F. App'x 848 (11th Cir. 2005) (holding prisoner failed to show that medical service acted with deliberate indifference, as prisoner was examined, monitored, evaluated, and cared for regularly by physicians and nurses at the prison and local outside facilities). It is not within the province of this Court to insinuate itself into the treatment decisions of prison medical personnel. Haskew v. Wainwright, 429 F.2d 525, 526 (5th Cir. 1970) ("Federal courts will not inquire into the adequacy or sufficiency of medical care of state prison inmates unless there appears to have been an abuse of the broad discretion which prison officials possess

in this area."). Plaintiff's allegations at most state a negligence claim, which is not actionable here. See Faison v. Rosado, 129 F. App'x 490 (11th Cir. April 18, 2005) (holding staff physician's failure to follow recommendation of orthopedist and refer inmate to a physical therapist amounted only to negligence, not a cognizable constitutional claim). Accordingly, Plaintiff has failed to state a claim of deliberate indifference to his serious medical needs.

B. FTCA Claim

The FTCA provides in relevant part that the United States can be sued for personal injury resulting from the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

Before a district court may entertain an FTCA action, a plaintiff must present his claim to the appropriate federal agency and wait for the agency to deny it. 28 U.S.C. § 2675(a); Burchfield v. United States, 168 F.3d 1252, 1254-55 (11th Cir. 1999). To satisfy this prerequisite to filing suit, an FTCA claimant must (1) give the

appropriate federal agency written notice of his claim sufficient enough for that agency to investigate; and (2) provide a value on his claim. Burchfield, 168 F.3d at 1255.

Plaintiff's complaint and attached exhibits reflect that he has satisfied the prerequisites for bringing his FTCA claim involving the alleged use of excessive force. Plaintiff presented his claim to the appropriate federal agency with a damages amount, and the claim was denied by the agency in writing on May 22, 2009. [Doc. 1 at 17-18]. In light of Plaintiff's compliance with the provisions of the FTCA, and in deference to his pro se status, the Court cannot find that Plaintiff's FTCA claim is "clearly baseless" or that the legal theories are "indisputably meritless." Carroll v. Gross, 984 F.2d 392, 393 (11th Cir. 1993).

III. Conclusion

Based on the foregoing, **IT IS ORDERED** that Plaintiff's Bivens claim regarding the alleged denial of proper medical attention be **DISMISSED** pursuant to 28 U.S.C. § 1915A for failure to state a claim upon which relief may be granted.

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In light of the facts presented and in deference to his pro se status, **IT IS FURTHER ORDERED** that Plaintiff's Bivens claim regarding excessive force and his FTCA claim[1] are **ALLOWED** to **PROCEED**.

A Plaintiff who sues an officer or employee of the United States must serve both the individual Defendant and the United States. See Fed. R. Civ. P. 4(i)(2), (3). Accordingly, the Clerk **SHALL** send Plaintiff one USM 285 form and one summons each for (1) the United States Attorney General, (2) the United States Attorney for the Northern District of Georgia, and (3) the remaining individual Defendants. Plaintiff **SHALL** complete each USM 285 form and summons and return the forms to the Clerk of Court within 20 days of the entry date of this Order. Plaintiff is warned that failure to comply in a timely manner could result in the dismissal of this civil action. The Clerk **SHALL** resubmit this action to the Court if Plaintiff fails to comply.

Upon receipt of the forms, the Clerk **SHALL** prepare and transmit to the U.S. Marshal's Service two service packages for the United States, as described in Fed.

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[1]The proper defendant in an action under the FTCA is the United States. See 28 U.S.C. § 1346(b)(1). Therefore, the Clerk is **DIRECTED** to add the United States as a named Defendant in this action.

R. Civ. P. 4(i)(1).[2] Each service package must include the USM 285 form and a copy of the summons and of the complaint. Upon receipt of the service packages, the U.S. Marshal's Service **SHALL** serve the United States as provided in Rule 4(i)(1). Each completed USM 285 form **SHALL** be filed with the Clerk.

For each Defendant, the Clerk **SHALL** prepare a service waiver package.[3] Each service waiver package must include two Notice of Lawsuit and Request for Waiver of Service of Summons forms (prepared by the Clerk), Waiver of Service of Summons forms (prepared by the Clerk), an envelope addressed to the Clerk of Court with adequate first class postage for return of the waiver form, one copy of the

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[2] "To serve the United States, a party must: (A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought–or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk–or (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office"; and also "(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C." Fed. R. Civ. P. 4(i)(1).

[3] "To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must . . . serve the officer or employee under Rule 4(e), (f), or (g)." Fed. R. Civ. P. 4(i)(3). "Invocation of the individual service provisions of subdivisions (e), (f), and (g) invokes also the waiver-of-service provisions of subdivision (d)." Rule 4, Advisory Comm. Notes, 2000 Amend. ¶ 1.

complaint, and one copy of this Order. The Clerk **SHALL** retain the USM 285 form and summons for each Defendant.

Upon completion of a service waiver package for each such Defendant, the Clerk **SHALL** complete the lower portion of the Notice of Lawsuit and Request for Waiver form and mail a service waiver package to each Defendant. Defendants have a duty to avoid unnecessary costs of serving the summons. If a Defendant fails to comply with the request for waiver of service, that Defendant must bear the costs of personal service unless good cause can be shown for failure to return the Waiver of Service form.

In the event a Defendant does not return an executed Waiver of Service form to the Clerk of Court within 35 days following the date the service waiver package is mailed, the Clerk **SHALL** prepare and transmit to the U.S. Marshal's Service a service package for each such Defendant. Each service package must include the USM 285 form and a copy of the summons and of the complaint. Upon receipt of the service package, the U.S. Marshal's Service **SHALL** personally serve each Defendant sued in an individual capacity who failed to waive service. The executed waiver form or the completed USM 285 form **SHALL** be filed with the Clerk.

Plaintiff **SHALL** serve upon Defendants or Defendants' counsel a copy of

every additional pleading or other document that is filed with the Clerk of Court. Each pleading or other document filed with the Clerk **SHALL** include a certificate stating the date on which an accurate copy of that paper was mailed to Defendants or Defendants' counsel. This Court will disregard any submitted papers which have not been properly filed with the Clerk or which do not include a certificate of service.

Plaintiff also **SHALL** keep the Court and Defendants advised of his current address at all times during the pendency of this action. Plaintiff is admonished that the failure to do so may result in the dismissal of this action.

This case **SHALL** proceed on a four month discovery track, beginning no later than 30 days after the appearance of the first Defendant by answer to the complaint, subject to extension by motion filed prior to the expiration of the discovery period. See LR 26.2(A)-(B), NDGa.

IT IS SO ORDERED this 28th day of June, 2010.

Robert L. Vining, Jr.

ROBERT L. VINING, JR.
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Gerald A. West,	:	
Plaintiff,	:	**CIVIL ACTION**
vs.	:	**NO. 1:09-cv-3328-RWS**
United States of America,	:	
Defendant.	:	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. ' 2677

It is hereby stipulated by and between the undersigned *pro se* plaintiff (meaning any person, other than the defendant and the defendant's attorney, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through *pro se* plaintiff and defendant's attorney, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to settle this matter for Four Thousand Five Hundred Dollars ($4,500.00), as full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property

and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agrees to accept this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff.

This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of this settlement will be made by check drawn on the Treasury of the United States for four thousand five hundred dollars ($4,500.00) and made payable to Gerald A. West, Federal Register #54421-060. The check will be mailed to the following address:

Darcy F. Coty
Assistant U.S. Attorney
United States Attorney's Office
Richard B. Russell Building
75 Spring Street, S.W., Suite 600
Atlanta, GA 30303

Upon receipt of the check by Assistant U.S. Attorney Darcy F. Coty, the U.S. Attorney's Office for the Northern District of Georgia shall mail the check to Gerald A. West directed to the address provided by Gerald A. West. Such address shall be provided *in writing* by Gerald A. West to Assistant U.S. Attorney Darcy F. Coty.

9. Plaintiff agrees to file a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses, within seven (7) days of Assistant U.S. Attorney Darcy F. Coty receiving payment of any settlement proceeds. If Plaintiff fails to file the aforementioned dismissal with prejudice within seven (7) days of Assistant U.S. Attorney Darcy F. Coty receiving payment of any settlement proceeds, Plaintiff hereby authorizes the defendant to notify that the court that the matter should be dismissed with prejudice in accordance with the terms of this Settlement Agreement.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. ' 552a(b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Gerald A. West
Plaintiff

6/11/2015
Date

Witness to Gerald A. West's signature
Printed Name: Joseph D McNulty
Title: Counselor

6/11/2015
Date

Darcy F. Coty
Assistant United States Attorney
Attorney for United States of America

6/23/2015
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Gerald A. West,	:	
	:	
Plaintiff,	:	
	:	**CIVIL ACTION**
vs.	:	
	:	**NO. 1:09-cv-3328-RWS**
United States of America,	:	
	:	
Defendant.	:	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. ' 2677

It is hereby stipulated by and between the undersigned *pro se* plaintiff (meaning any person, other than the defendant and the defendant's attorney, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through *pro se* plaintiff and defendant's attorney, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to settle this matter for Four Thousand Five Hundred Dollars ($4,500.00), as full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property

and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agrees to accept this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff.

This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of this settlement will be made by check drawn on the Treasury of the United States for four thousand five hundred dollars ($4,500.00) and made payable to Gerald A. West, Federal Register #54421-060. The check will be mailed to the following address:

Darcy F. Coty
Assistant U.S. Attorney
United States Attorney's Office
Richard B. Russell Building
75 Spring Street, S.W., Suite 600
Atlanta, GA 30303

Upon receipt of the check by Assistant U.S. Attorney Darcy F. Coty, the U.S. Attorney's Office for the Northern District of Georgia shall mail the check to Gerald A. West directed to the address provided by Gerald A. West. Such address shall be provided *in writing* by Gerald A. West to Assistant U.S. Attorney Darcy F. Coty.

9. Plaintiff agrees to file a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses, within seven (7) days of Assistant U.S. Attorney Darcy F. Coty receiving payment of any settlement proceeds. If Plaintiff fails to file the aforementioned dismissal with prejudice within seven (7) days of Assistant U.S. Attorney Darcy F. Coty receiving payment of any settlement proceeds, Plaintiff hereby authorizes the defendant to notify that the court that the matter should be dismissed with prejudice in accordance with the terms of this Settlement Agreement.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. ' 552a(b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

_____ _____

Gerald A. West
Plaintiff

Date

_____ _____

Witness to Gerald A. West's signature
Printed Name: _____
Title: _____

Date

_____ _____

Darcy F. Coty
Assistant United States Attorney
Attorney for United States of America

Date

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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CASE DETAILS

Back to Case Results **Case Actions:**

Case ID: CIV-SER-2011-00052 **Short Description:** HENSARLING V. WARDEN, FCC COLEMAN - USP II

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	5:10-cv-00344-VMC-MAP
Short Description	HENSARLING V. WARDEN, FCC COLEMAN - USP II
Classification	Civi
Case Type	Bivens 8th Amend
Case Sub Type	Assault Failure to Protect
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Coleman (FCC)
Incident Region	
Incident Institution	
Monetary Relief Sought	$
Estimated Amount	$
Office	Ocala
Jurisdiction	MIDDLE DISTRICT OF FLORIDA
Responsible Legal Office	FCC Coleman

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	06/11/2015
Type	Settled
Reason	
Sought	
Amount offered	$62,500.00
Total Amount Paid	$62,500.00
Description	
Description	
Court Fee Paid ?	Yes
Pro Se ?	No

Case Initiation Dates

Date Received	01/11/2011
Date Filed	02/28/2010

Case Progress

Current Owner	CAIXA SANTOS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	CLAIMS DEFENDANT INTRODUCED CONTRABAND (BEER) RESULTING IN HIS ASSAULT BY OTHER INMATES.
Further Case Classification	
Comments	

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

RICHARD E. HENSARLING,

Plaintiff,

v Case No. 5:10-cv-344-OC-10PRL

THE UNITED STATES OF AMERICA,
et al,

Defendants.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned Plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of SIXTY-TWO THOUSAND FIVE HUNDRED DOLLARS [$62,500.00], which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them,

now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any Plaintiff is a minor or a legally incompetent adult, the Plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner, time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event Plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by Electronic Fund Transfer as per the following:

Name of Bank:	Chase Bank
City, State and Zip Code of Bank:	Orlando, FL 32837
Routing Number	267084131
Name of Account:	Bagley Langan and Associates PLLC IOLTA Trust Account
Account Number:	0863607131

Executed this 28th day of April, 2015

A. LEE BENTLEY, III
United States Attorney

LAURA G. LOTHMAN, ESQUIRE
Assistant United States Attorney
Florida Bar No. 0053809
United States Courthouse
300 North Hogan Street, Suite 700
Jacksonville, Florida 32202-4270
Telephone Number (904) 301-6336/6300
Facsimile Number (904) 301-6310
Email: Laura.Lothman@usdoj.gov
Attorney for Defendants

cc: Jeffrey Middendorf, Esq.
Supervisory Attorney
Bureau of Prisons
Post Office Box 1029
Coleman, FL 33521-1029

Plaintiff's attorney agrees to distribute the settlement proceeds to the Plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this ____ day of April, 2015

RICHARD E. HENSARLING, PLAINTIFF

Executed this 22nd day of April, 2015.

BAGLEY & LANGAN, P.L.L.C.

EDWARD R. GUERRETTE, II, ESQUIRE
Florida Bar No. 84227
~~707 Celebration Avenue~~ 1530 Celebration Blvd, Ste 405
Celebration, FL 34747
Telephone Number (407) 566-7171
Facsimile Number (407) 566-7173
Email: eguerrette@bagleylangan.com
Attorneys for Plaintiff Richard E. Hensarling

Administrative Remedy
I.D. numbers.
#556980
#590746

FILED
2010 JUL 28 AM 11:40
U.S. DISTRICT COURT
OCALA, FLORIDA

July 20, 2010

Motion
Notice of Action

I Richard E. Hensarling Jr. Reg. No. 09991-018 While being housed at the Federal Correctional Complex Coleman Florida United States Penitentiary Number Two (2) on 4-17-09 was the Victim of a Aggravated Assault. Due to the Weapon used (Dial Face Combination Master lock) on 5-5-09 I had to have my left eyeball Surgically Removed leaving me Disfigured and Handicap for Life.

From 4-17-09 till 10-15-09/so for (181) days I was denied access to the S.H.U. Special housing unit Law Library. On 10-15-09 I was placed on the Compound at F.C.C. Coleman Medium. On 6-1-2010 I was placed back in S.H.U. Pending S.I.S. investigation for Violation of Bureau Regulations. On 6-5-2010 I was interviewed by the S.I.S Lieutenant at which time he determined that I could return to the Compound. On 6-29-2010 S.H.U. Lieutenant told me that I was being transfered I would not return to compound. The Resources provided here in the S.H.U. Law Library are limited. I am having a very hard time understanding this LEGAL Jargon. They only allow me one hour a couple times a week. And with this new handicap, I'm slow with my RESEARCH.

Your Honor I Know that a crime has been Committed against ME. I am still under the Care and Custody of the U.S. Government. I have aprox 36 months left on a 160 month sentence. I am returning to my family in worse condition than when I came. The future expenses of this tragedy should rest on the Federal Bureau of Prisons not the taxpayers.

I have unsccessfully completed my first attempt at Exhausting my Administrative Remedy Process all the way to the General Counsel of the Bureau of Prisons. Out of Good faith I am attempting my second attemp at Exhausting my Administrative Remedy Process. I feel that it is because I am claiming officer Negligence, Deliberate Indiffrence, and Liability on part of the Weapon used. The Federal Bureau of Prisons is Stone-Walling my Administrative Remedy Process and Futhermore trying to block me from entering Circut Court. Due to my Ignorance of the Law, My inability to hire an attorney. The F.B.O.P. is hampering ability to bring this matter to the Circut Court, before my Statue of limitations runs out.

I ask that the Courts interuene in this matter due to the Criminal nature and appoint me counsEL or Provide me time I've lost.

"I declare (or certify, verify or state), under Penalty of Periury, that the foregoing is true and correct. Executed on (date). 7-22-2010 Richard C. Hensley I.

All Transactions

PRINT

Inmate Reg #:	09991018	**Current Institution:**	Coleman FCC
Inmate Name:	HENSARLING, RICHARD	**Housing Unit:**	COM-Z-A
Report Date:	07/06/2010	**Living Quarters:**	Z03-018UAD
Report Time:	11:22:59 AM		

Date/Time	Transaction Type	Amount	Ref#	Payment#	Balance
7/4/2010 6:27:28 PM	Phone Withdrawal	($1.00)	TFN0704		$67.11
7/1/2010 1:06:59 PM	Western Union	$50.00	33336010		$68.11
6/21/2010 6:10:59 PM	Sales - No FP (Non-FP Institution)	($14.10)	65		$18.11
6/17/2010 10:55:25 AM	Inmate Co-pay	($2.00)	JICP0610		$32.21
6/7/2010 2:31:36 PM	Sales - No FP (Non-FP Institution)	($11.00)	59		$34.21
6/4/2010 9:13:16 AM	Payroll - IPP	$44.66	JIPP0510		$45.21
5/27/2010 1:47:42 PM	Phone Withdrawal	($3.00)	TFN0527		$0.55
5/27/2010 1:28:56 PM	Sales - No FP (Non-FP Institution)	($3.70)	30		$3.55
5/27/2010 1:28:30 PM	Sales - No FP (Non-FP Institution)	($14.65)	29		$7.25
5/24/2010 5:10:32 PM	Phone Withdrawal	($3.00)	TFN0524		$21.90
5/23/2010 9:03:26 AM	Phone Withdrawal	($1.00)	TFN0523		$24.90
5/20/2010 6:45:47 PM	Sales - No FP (Non-FP Institution)	($64.65)	140		$25.90
5/20/2010 9:38:29 AM	Phone Withdrawal	($1.00)	TFN0520		$90.55
5/19/2010 11:22:06 AM	Sales - No FP (Non-FP Institution)	($12.50)	36		$91.55
5/19/2010 9:53:14 AM	Phone Withdrawal	($1.00)	TFN0519		$104.05
5/18/2010 8:58:18 AM	Phone Withdrawal	($1.00)	TFN0518		$105.05
5/17/2010 5:06:11 PM	Western Union	$50.00	33332710		$106.05
5/17/2010 11:38:01 AM	Phone Withdrawal	($2.00)	TFN0517		$56.05
5/17/2010 7:17:09 AM	Phone Withdrawal	($1.00)	TFN0517		$58.05
5/16/2010 11:26:18 AM	Phone Withdrawal	($3.00)	TFN0516		$59.05
5/16/2010 10:59:45 AM	Phone Withdrawal	($1.00)	TFN0516		$62.05
5/15/2010 11:01:25 AM	Phone Withdrawal	($4.00)	TFN0515		$63.05
5/15/2010 8:53:46 AM	Phone Withdrawal	($1.00)	TFN0515		$67.05
5/14/2010 6:24:41 PM	Phone Withdrawal	($2.00)	TFN0514		$68.05
5/14/2010 11:49:52 AM	Phone Withdrawal	($2.00)	TFN0514		$70.05
5/12/2010 12:02:23 PM	Phone Withdrawal	($1.00)	TFN0512		$72.05
5/12/2010 11:38:47 AM	Phone Withdrawal	($2.00)	TFN0512		$73.05
5/10/2010 11:32:31 AM	Phone Withdrawal	($1.00)	TFN0510		$75.05
5/10/2010 8:37:49 AM	Phone Withdrawal	($2.00)	TFN0510		$76.05
5/9/2010 9:23:22 AM	Phone Withdrawal	($5.00)	TFN0509		$78.05
5/9/2010 7:48:09 AM	Phone Withdrawal	($1.00)	TFN0509		$83.05
5/8/2010 2:05:38 PM	Western Union	$50.00	33332110		$84.05
5/7/2010 11:47:18 AM	Phone Withdrawal	($10.00)	TFN0507		$34.05
5/7/2010 9:05:24 AM	Phone Withdrawal	($2.00)	TFN0507		$44.05
5/7/2010 9:02:34 AM	Payroll - IPP	$44.66	JIPP0410		$46.05
5/6/2010 1:28:47 PM	Sales - No FP (Non-FP Institution)	($1.00)	25		$1.39
5/6/2010 1:28:35 PM	Sales - No FP (Non-FP Institution)	$1.55	24		$2.39
5/6/2010 1:27:11 PM	Sales - No FP (Non-FP Institution)	($30.60)	23		$0.84
5/6/2010 10:58:29 AM	Phone Withdrawal	($1.00)	TFN0506		$31.44
5/6/2010 8:23:50 AM	Phone Withdrawal	($4.00)	TFN0506		$32.44
5/5/2010 5:25:37 PM	Phone Withdrawal	($1.00)	TFN0505		$36.44
5/5/2010 9:25:06 AM	Phone Withdrawal	($3.00)	TFN0505		$37.44
5/4/2010 11:52:03 AM	Phone Withdrawal	($9.00)	TFN0504		$40.44
5/4/2010 9:09:10 AM	Phone Withdrawal	($1.00)	TFN0504		$49.44
4/30/2010 1:05:39 PM	Western Union	$50.00	33331610		$50.44
4/22/2010 2:55:44 PM	Phone Withdrawal	($6.00)	TFN0422		$0.44
4/22/2010 1:05:32 PM	Sales - No FP (Non-FP Institution)	($48.95)	10		$6.44
4/21/2010 11:37:40 AM	Phone Withdrawal	($2.00)	TFN0421		$55.39
4/21/2010 10:26:17 AM	Phone Withdrawal	($1.00)	TFN0421		$57.39
4/20/2010 11:05:45 AM	Phone Withdrawal	($1.00)	TFN0420		$58.39

1 2 3 4

All Transactions

PRINT

Inmate Reg #:	09991018	**Current Institution:**	Coleman FCC
Inmate Name:	HENSARLING, RICHARD	**Housing Unit:**	COM-Z-A
Report Date:	07/06/2010	**Living Quarters:**	Z03-018UAD
Report Time:	11:23:18 AM		

Date/Time	Transaction Type	Amount	Ref#	Payment#	Balance
4/19/2010 4:06:10 PM	Western Union	$50.00	33330710		$59.39
4/18/2010 12:18:39 PM	Phone Withdrawal	($1.00)	TFN0418		$9.39
4/18/2010 9:07:43 AM	Phone Withdrawal	($1.00)	TFN0418		$10.39
4/17/2010 8:00:05 PM	Phone Withdrawal	($4.00)	TFN0417		$11.39
4/16/2010 2:52:03 PM	Phone Withdrawal	($6.00)	TFN0416		$15.39
4/16/2010 12:26:43 PM	Phone Withdrawal	($1.00)	TFN0416		$21.39
4/15/2010 4:47:26 PM	Phone Withdrawal	($2.00)	TFN0415		$22.39
4/15/2010 12:46:52 PM	Sales - No FP (Non-FP Institution)	($34.15)	22		$24.39
4/15/2010 8:35:47 AM	Phone Withdrawal	($1.00)	TFN0415		$58.54
4/14/2010 11:13:51 AM	Sales - No FP (Non-FP Institution)	($10.50)	8		$59.54
4/14/2010 10:33:51 AM	Phone Withdrawal	($2.00)	TFN0414		$70.04
4/14/2010 10:11:04 AM	Phone Withdrawal	($1.00)	TFN0414		$72.04
4/13/2010 8:57:58 PM	Phone Withdrawal	($1.00)	TFN0413		$73.04
4/13/2010 8:26:54 AM	Phone Withdrawal	($1.00)	TFN0413		$74.04
4/12/2010 7:25:09 AM	Phone Withdrawal	($2.00)	TFN0412		$75.04
4/11/2010 7:27:10 PM	Phone Withdrawal	($2.00)	TFN0411		$77.04
4/11/2010 9:34:41 AM	Phone Withdrawal	($1.00)	TFN0411		$79.04
4/10/2010 10:49:56 AM	Phone Withdrawal	($5.00)	TFN0410		$80.04
4/10/2010 8:47:33 AM	Phone Withdrawal	($2.00)	TFN0410		$85.04
4/9/2010 2:05:15 PM	Western Union	$50.00	33330110		$87.04
4/9/2010 11:46:06 AM	Phone Withdrawal	($5.00)	TFN0409		$37.04
4/9/2010 8:24:24 AM	Phone Withdrawal	($3.00)	TFN0409		$42.04
4/9/2010 8:07:33 AM	Payroll - IPP	$44.66	JIPP0310		$45.04
4/8/2010 2:01:01 PM	Sales - No FP (Non-FP Institution)	($19.35)	28		$0.38
4/8/2010 12:22:47 PM	Phone Withdrawal	($1.00)	TFN0408		$19.73
4/7/2010 9:43:19 AM	Phone Withdrawal	($2.00)	TFN0407		$20.73
4/7/2010 9:19:26 AM	Phone Withdrawal	($3.00)	TFN0407		$22.73
4/6/2010 9:21:01 AM	Phone Withdrawal	($1.00)	TFN0406		$25.73
4/6/2010 8:34:50 AM	Phone Withdrawal	($6.00)	TFN0406		$26.73
4/5/2010 9:24:34 AM	Phone Withdrawal	($3.00)	TFN0405		$32.73
4/5/2010 8:32:32 AM	Phone Withdrawal	($2.00)	TFN0405		$35.73
4/4/2010 9:45:53 AM	Phone Withdrawal	($3.00)	TFN0404		$37.73
4/4/2010 7:38:31 AM	Phone Withdrawal	($2.00)	TFN0404		$40.73
4/1/2010 5:46:18 PM	Sales - No FP (Non-FP Institution)	($68.50)	75		$42.73
3/28/2010 2:05:02 PM	Western Union	$100.00	33329210		$111.23
3/24/2010 6:21:43 PM	Sales - No FP (Non-FP Institution)	($34.60)	176		$11.23
3/20/2010 4:30:07 AM	Bills	$45.00	3923-C		$45.83
3/19/2010 7:40:51 PM	Phone Withdrawal	($1.00)	TFN0319		$0.83
3/17/2010 6:27:38 PM	Sales - No FP (Non-FP Institution)	($84.65)	137		$1.83
3/15/2010 7:50:13 PM	Phone Withdrawal	($2.00)	TFN0315		$86.48
3/14/2010 8:01:08 PM	Phone Withdrawal	($1.00)	TFN0314		$88.48
3/14/2010 11:19:23 AM	Phone Withdrawal	($1.00)	TFN0314		$89.48
3/13/2010 11:38:27 AM	Phone Withdrawal	($1.00)	TFN0313		$90.48
3/5/2010 12:48:43 PM	Sales - No FP (Non-FP Institution)	($17.60)	113		$91.48
3/5/2010 12:13:58 PM	Sales - No FP (Non-FP Institution)	($18.00)	85		$109.08
3/5/2010 8:30:23 AM	Phone Withdrawal	($50.00)	TFN0305		$127.08
3/5/2010 8:20:42 AM	Payroll - IPP	$44.66	JIPP0210		$177.08
3/5/2010 8:15:04 AM	Phone Withdrawal	($4.00)	TFN0305		$132.42
3/4/2010 11:01:05 AM	Phone Withdrawal	($3.00)	TFN0304		$136.42
3/4/2010 9:54:52 AM	Phone Withdrawal	($3.00)	TFN0304		$139.42

1 2 3 4

All Transactions

PRINT

Inmate Reg #:	09901018	Current Institution:	Coleman FCC
Inmate Name:	HENSARLING, RICHARD	Housing Unit:	COM-Z-A
Report Date:	07/06/2010	Living Quarters:	Z03-018U AD
Report Time:	11:23:29 AM		

Date/Time	Transaction Type	Amount	Ref#	Payment#	Balance
3/3/2010 3:15:35 PM	Sales - No FP (Non-FP Institution)	($5.00)	83		$142.42
3/3/2010 3:10:24 PM	Sales - No FP (Non-FP Institution)	($52.90)	82		$147.42
3/1/2010 5:08:51 PM	Western Union	$100.00	33327210		$200.32
2/24/2010 7:05:37 PM	Western Union	$100.00	33326910		$100.32
2/24/2010 5:46:59 PM	Phone Withdrawal	($3.00)	TFN0224		$0.32
2/24/2010 5:31:40 PM	Sales - No FP (Non-FP Institution)	($24.35)	167		$3.32
2/18/2010 6:23:23 PM	Phone Withdrawal	($1.00)	TFN0218		$27.67
2/17/2010 3:05:45 PM	Sales - No FP (Non-FP Institution)	($38.90)	108		$28.67
2/16/2010 10:25:29 AM	Phone Withdrawal	($4.00)	TFN0216		$67.57
2/16/2010 8:04:47 AM	Phone Withdrawal	($1.00)	TFN0216		$71.57
2/13/2010 8:32:25 PM	Phone Withdrawal	($2.00)	TFN0213		$72.57
2/13/2010 11:33:01 AM	Phone Withdrawal	($2.00)	TFN0213		$74.57
2/12/2010 1:53:43 PM	Bills	($45.00)		3923	$76.57
2/10/2010 6:23:53 PM	Sales - No FP (Non-FP Institution)	($42.85)	125		$121.57
2/5/2010 5:08:26 PM	Western Union	$50.00	33325610		$164.42
2/3/2010 4:06:14 PM	Western Union	$100.00	33325410		$114.42
2/3/2010 12:48:06 PM	Sales - No FP (Non-FP Institution)	($55.70)	47		$14.42
1/28/2010 10:01:02 AM	Phone Withdrawal	($3.00)	TFN0128		$70.12
1/27/2010 2:24:26 PM	Phone Withdrawal	($50.00)	TFN0127		$73.12
1/27/2010 1:58:05 PM	Sales - No FP (Non-FP Institution)	($117.65)	29		$123.12
1/25/2010 3:06:10 PM	Western Union	$100.00	33324710		$240.77
1/24/2010 7:50:01 AM	Phone Withdrawal	($10.00)	TFN0124		$140.77
1/24/2010 5:13:28 AM	Lockbox - CD	$100.00	70150502		$150.77
1/24/2010 5:13:24 AM	Lockbox - CD	$50.00	70150502		$50.77
1/20/2010 8:43:54 PM	Phone Withdrawal	($1.00)	TFN0120		$0.77
1/20/2010 2:57:58 PM	Sales - No FP (Non-FP Institution)	($19.72)	89		$1.77
1/19/2010 9:05:01 PM	Phone Withdrawal	($4.00)	TFN0119		$21.49
1/19/2010 5:15:17 PM	Phone Withdrawal	($2.00)	TFN0119		$25.49
1/18/2010 1:44:34 PM	Phone Withdrawal	($5.00)	TFN0118		$27.49
1/18/2010 11:18:16 AM	Phone Withdrawal	($4.00)	TFN0118		$32.49
1/17/2010 8:59:55 AM	Phone Withdrawal	($3.00)	TFN0117		$36.49
1/17/2010 7:32:43 AM	Phone Withdrawal	($1.00)	TFN0117		$39.49
1/16/2010 3:30:42 PM	Phone Withdrawal	($10.00)	TFN0116		$40.49
1/16/2010 5:16:06 AM	Lockbox - CD	$50.00	70150101		$50.49
1/15/2010 1:33:59 PM	Phone Withdrawal	($10.00)	TFN0115		$0.49
1/15/2010 6:26:42 AM	Phone Withdrawal	($8.00)	TFN0115		$10.49
1/14/2010 5:21:50 PM	Phone Withdrawal	($2.00)	TFN0114		$18.49
1/14/2010 2:42:02 PM	Phone Withdrawal	($5.00)	TFN0114		$20.49
1/14/2010 2:05:10 PM	Western Union	$25.00	33324010		$25.49
1/8/2010 4:53:44 PM	Phone Withdrawal	($2.00)	TFN0108		$0.49
1/7/2010 6:14:32 PM	Phone Withdrawal	($4.00)	TFN0107		$2.49
1/6/2010 7:14:53 PM	Phone Withdrawal	($3.00)	TFN0106		$6.49
1/6/2010 6:57:49 PM	Sales - No FP (Non-FP Institution)	($4.40)	93		$9.49
1/6/2010 6:55:50 PM	Sales - No FP (Non-FP Institution)	($26.15)	92		$13.89
1/6/2010 10:36:15 AM	Phone Withdrawal	($2.00)	TFN0106		$40.04
1/2/2010 11:01:55 AM	Phone Withdrawal	($2.00)	TFN0102		$42.04
1/1/2010 12:16:18 PM	Phone Withdrawal	($1.00)	TFN0101		$44.04
12/31/2009 7:17:06 PM	Phone Withdrawal	($3.00)	TFN1231		$45.04
12/31/2009 6:33:29 PM	Phone Withdrawal	($2.00)	TFN1231		$48.04
12/31/2009 2:06:36 PM	Western Union	$50.00	33323010		$50.04

1 2 3 4

RECEIVED

2010 JUL 28 AM 11:39

CLERK, U.S. DISTRICT COURT
OCALA FLORIDA

July 20, 2010

RE: Administrative Remedy
I.D. numbers
#556980
#590746

Clerk of The Court

Be advised that I am in the S.H.U. (special housing unit) better known as the hole. They (the staff) say that I am pending transfer. I have not violated any Bureau of Regulations Policies. They are not denying me access to a S.H.U. LAW Library, but they are hindering my ability to file my Civil Suit with these Courts.

The S.H.U. LAW Library is very limited here at F.C.C. Coleman Medium. I have no way to make copies of my papers without handing them to a officer, and my complaint is against officers.

Also I have no LAW Clerk available to explain to me or help me in Filing my application to these Courts. I do not understand the LEGAL JARGON. I do not want to make any mistakes on filing my Suit because it is far from Frivouls.

A serious Crime has been Committed Against Me. Upon Transfering me I am not sure where I will end up, when I will end up, or if they will allow me on the Compound. The F.B.O.P. has already detained me in the S.H.U. and the Statue of limitations is running out.

I declare (or certify, verify, or state) under penalty of Perjury that the foregoing is true and correct
Executed on (date) 7/2010
Rene E. Hernandez

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

CIVIL RIGHTS COMPLAINT FORM

TO BE USED BY PRISONERS IN ACTIONS UNDER 28 U.S.C. § 1331 or § 1346

FILED
2010 OCT 12 PM 12:02
CLERK US DISTRICT COURT
OCALA FLORIDA

Richard E. Hensarling Jr.,
Inmate # 09991-018.
(Enter full name of Plaintiff)

vs.

CASE NO: 5:10cv344-0C-33MAP
(To be assigned by Clerk)

D.B.DREW WARDEN U.S.P. II (OFFICAL & INDIVDUAL CAPACITY)

L.WILLIAMS DEPUTY CAPTAIN (OFFICAL & INDIVDUAL CAACITY)

Mr.GRADY UNICOR FACTORY MANAGER (OFFICAL & INDIVDUAL CAPACITY)

Mr.MOODY UNICOR FOREMAN (OFFICAL & INDIVDUAL CAPACITY)

Mr.HADAWAY UNICOR FOREMAN (OFFICAL & INDIVDUAL CAPACITY)

(Enter name and title of each Defendant.
If additional space is required, use the
blank area below and directly to the right.)

Mr.HIGINBOTHAM UNICOR FOREMAN (OFFICAL & INDIVDUAL CAPACITY)

Ms.McGLOTHERN I-2 COUNSLER (OFFICAL & INDIVDUAL CAPACITY)

Ms.JEFFERSON I-2 CASE MANAGER (OFFICAL & INDIVDUAL CAPACITY)

I-2 UNIT OFFICER Eve.OF 4-17-09 NAME UNKNOWN (OFFICAL & INDIVDUAL CAPACITY)

ANSWER ALL QUESTIONS ON THE FOLLOWING PAGES:

Harley G. Lappin Director F.B.O.P.(OFFICAL & INDIVDUAL CAPACITY)

Newton E. Kendig RADM M.D. (OFFICAL & INDIVDUAL CAPACITY)

Gloria Whitlock Psychiatrist F.C.C.Coleman Complex (OFFICAL & INDIVDUAL CAPACITY)

I. PLAINTIFF:

State your full name, inmate number (if applicable), and full mailing address in the lines below.

Name of Plaintiff: RICHARD E. HENSARLING Jr.
Inmate Number # 09991-018
Prison or Jail: F.C.C. COLEMAN MEDIUM
Mailing address: P.O.BOX # 1032
COLEMAN, FLORIDA
33521

II. DEFENDANT(S):

State the name of the Defendant in the first line, official position in the second line, place of employment in the third line, and mailing address. Do the same for every Defendant:

(1) Defendant's name: D.B. DREW
Official position: WARDEN F.C.C. COLEMAN U.S.P. II
Employed at: COLEMAN FEDERAL CORRECTIONAL COMPLEX
Mailing address: 846 NE.54th TERRACE
Coleman,Fla. 33521

(2) Defendant's name: L. WILLIAMS
Official position: DEPUTY CAPTAIN F.C.C.COLEMAN U.S.P. II
Employed at: COLEMAN FEDERAL CORRECTIONAL COMPLEX
Mailing address: 846 NE. 54th TERRACE
Coleman,Fla. 33521

(3) Defendant's name: Mr. GRADY
Official position: S.O.I. UNICOR
Employed at: F.C.I. HERLONG
Mailing address: P.O. BOX #900
HERLONG,CA.96113

ATTACH ADDITIONAL PAGES HERE TO NAME ADDITIONAL DEFENDANTS

I. PLAINTIFF:

State your full name, inmate number (if applicable), and full mailing address in the lines below.

Name of Plaintiff: RICHARD E. HENSARLING Jr.
Inmate Number #09991-018
Prison or Jail: F.C.C. COLEMAN MEDIUM
Mailing address: P.O.BOX #1032
Coleman, Florida
33521

II. DEFENDANT(S):

State the name of the Defendant in the first line, official position in the second line, place of employment in the third line, and mailing address. Do the same for every Defendant:

(1) Defendant's name: Mr. MOODY
Official position: UNICOR FOREMAN
Employed at: F.C.C.COLEMAN MEDIUM
Mailing address: 846 NE. 54th TERRACE
Coleman, Fla.33521

(2) Defendant's name: Mr. HADAWAY
Official position: UNICOR (CURRENT POSITION UNKNOWN)
Employed at: F.C.I. BEAUMONT MEDIUM
Mailing address: P.O.BOX #26045
BEAUMONT,TX.77720

(3) Defendant's name: Mr. HIGINBOTHAM
Official position: LAST KNOWN UNICOR FOREMAN
Employed at: F.C.C. COLEMAN COMPLEX
Mailing address: 847 NE. 54th TERRACE
Coleman,Fla, 33521

ATTACH ADDITIONAL PAGES HERE TO NAME ADDITIONAL DEFENDANTS

I. PLAINTIFF:

State your full name, inmate number (if applicable), and full mailing address in the lines below.

Name of Plaintiff: RICHARD E. HENSARLING Jr.
Inmate Number #09991-018
Prison or Jail: F.C.C.COLEMAN MEDIUM
Mailing address: P.O.BOX #1032
Colemman,Fla.
33521

II. DEFENDANT(S):

State the name of the Defendant in the first line, official position in the second line, place of employment in the third line, and mailing address. Do the same for every Defendant:

(1) Defendant's name: Ms. McGLOTHERN
Official position: I-2 UNIT COUNSLER
Employed at: F.C.C.COLEMAN U.S.P.II
Mailing address: 846 NE. 54th TERRACE
Coleman,Fla. 33521

(2) Defendant's name: Ms.Jefferson
Official position: I-2 CASE MANAGER
Employed at: F.C.C.COLEMAN U.S.P. II
Mailing address: 846 NE. 54th TERRACE
Coleman,Fla.33521

(3) Defendant's name: I-2 UNIT OFFICER ON THE 3:30PM to 11:30PM SHIFT ON 4-17-09
Official position: HOUSING UNIT OFFICER
Employed at: F.C.C.COLEMAN U.S.P.II
Mailing address: 846 NE.54th TERRACE
Coleman,Fla. 33521

ATTACH ADDITIONAL PAGES HERE TO NAME ADDITIONAL DEFENDANTS

I. PLAINTIFF:

State your full name, inmate number (if applicable), and full mailing address in the lines below.

Name of Plaintiff: RICHARD E. HENSARLING Jr.
Inmate Number # 09991-018
Prison or Jail: F.C.C. COLEMAN MEDIUM
Mailing address: P.O.BOX #1032
COLEMAN, FLORIDA
33521

II. DEFENDANT(S):

State the name of the Defendant in the first line, official position in the second line, place of employment in the third line, and mailing address. Do the same for every Defendant:

(1) Defendant's name: HARLEY G. LAPPIN
Official position: DIRECTOR F.B.O.P.
Employed at: FEDERAL BUREAU of PRISONS
Mailing address: 320 FIRST STREET, NW.
WASHINGTON, DC 20534

(2) Defendant's name: NEWTON E. KENDIG
Official position: RADM - M.D.
Employed at: FEDERAL BUREAU of PRISONS
Mailing address: 320 FIRST STREET, NW.
WASHINGTON, DC 20534

(3) Defendant's name: Ms.Gloria Whitlock
Official position: PSYCHIATRIST
Employed at: COLEMAN F.C.C.
Mailing address: 846 NE. 54th TERRACE
Coleman, Fla. 33521

ATTACH ADDITIONAL PAGES HERE TO NAME ADDITIONAL DEFENDANTS

NOTE: THE COURT WILL NOT REVIEW THE COMPLAINT UNLESS THE FOLLOWING QUESTIONS HAVE BEEN ANSWERED IN FULL.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Pursuant to 42 U.S.C. § 1997e(a), exhaustion of administrative remedies is required prior to initiating a civil rights action which alleges unlawful conditions or events in any prison, jail, or detention center. Copies of all grievances, appeals, and responses must be submitted to verify exhaustion. Failure to demonstrate exhaustion may be grounds for dismissal.

A. DOES YOUR COMPLAINT CONCERN EVENTS OCCURRING WITHIN THE FEDERAL BUREAU OF PRISONS?

Yes(X) No( )

[If your answer is NO, proceed to Question B. If your answer is YES, answer all of the following questions in this subsection.]

1. Informal Grievance

a. Did you submit an informal grievance?

Yes(X) No( )

❖ If so, you must attach a copy of the grievance and response; exhibit SEE OFFICAL TIMELINE ATTACHED

b. If not, why? _____

2. Formal Grievance

a. Did you submit a formal grievance?

Yes(X) No( )

❖ If so, you must attach a copy of the grievance and response; exhibit SEE OFFICAL TIMELINE ATTACHED

b. If not, why? _____

3. Appeal to the Regional Director of the Bureau of Prisons

a. Did you submit an appeal to the Regional Director?

Yes(X) No( )

❖ If so, you must attach a copy of the appeal and response; exhibit SEE OFFICAL TIMELINE ATTACHED

b. If not, why? _____

4. Appeal to the General Counsel of the Bureau of Prisons

a. Did you submit an appeal to the General Counsel of the Bureau of Prisons?

Yes(X) No( )

❖ If so, you must attach a copy of the appeal and response; exhibit SEE OFFICAL TIMELINE ATTACHED

b. If not, why? _____

5. Disciplinary Actions

a. Did you have a disciplinary hearing concerning this matter?

Yes( ) No(X)

❖ If so, you must attach a copy of the disciplinary report and disciplinary hearing team's findings and decision to this form; exhibit _____.

b. Did you lose good time as a result of the disciplinary hearing?

Yes( ) No(X)

c. Has the good time since been restored?

Yes( ) No( )

B. DOES YOUR COMPLAINT CONCERN EVENTS OCCURRING WITHIN A COUNTY JAIL OR DETENTION CENTER?

Yes( ) No(X)

[If your answer is NO, proceed to Section IV of the complaint form.
If your answer is YES, answer the following questions.]

1. Is there a grievance procedure at your institution or jail?

Yes( ) No( )

[If your answer is NO, proceed to Section IV of the complaint form. If your answer is YES, answer all of the following questions in this subsection.]

2. Did you submit a grievance concerning the facts relating to your complaint?

Yes( ) No( )

3. If your answer to the above question is YES:

a. What steps did you take? X X X X X X X X X X X

b. What were the results? X X X X X X X X X X

◆ If so, you must attach a copy of the grievance and response; exhibit X.

4. If your answer is NO, explain why not: X X X X X X X X

X X X X X X X X X X X X X X

● ● ● ● ● ● ● ● ● ● ● ● ● ●

NOTE: FAILURE TO DISCLOSE ALL PRIOR CIVIL CASES
MAY RESULT IN THE DISMISSAL OF THIS CASE.

IV. PREVIOUS LAWSUITS

A. Have you initiated other actions in state court dealing with the same or similar facts/issues involved in this action?

Yes(X) No( )

1. Type of action (civil rights, habeas corpus, etc.): Civil
2. Parties to previous action:
   a. Plaintiff(s): Richard E. Hensarling #09991-018
   b. Defendant(s): Eric Azotea #17252-074
3. County and judicial circuit: Sumter FIFTH JUDICIAL CIRCUT
4. Case docket #: 2010CA000430
5. Approximate filing date: April 14,2010
6. If not still pending, date of dismissal: XXXXXXXXXXXXXXXXXX
7. Basis of dismissal: XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
8. Facts and claims of case: Aggravated Assault,Personal Bodily Injury

(Attach additional pages as necessary to list state court cases.)

B. Have you initiated other actions in **federal court** dealing with the same or similar facts/issues involved in this action?

Yes( ) No(X)

1. Type of action (civil rights, habeas corpus, etc.): ----------
2. Parties to previous action:
   a. Plaintiff(s): ----------
   b. Defendant(s): ----------
3. District and judicial division: ----------
4. Case docket #: XXXXXXXXXXX 5. Approximate filing date: XXXXXXX
6. If not still pending, date of dismissal: ----------
7. Basis of dismissal: ----------
8. Facts and claims of case: ----------

(Attach additional pages as necessary to list other federal court cases.)

C. Have you initiated other actions (*besides those listed above in Questions (A) and (B)*) in **either state or federal court** that relate to the fact or manner of your incarceration (including habeas corpus petitions) or the conditions of your confinement (including civil rights complaints about any aspect of prison life, whether it be general circumstances or a particular episode, and whether it involved excessive force or some other wrong)?

Yes(X) No( )

If YES, describe each action in the space provided below. If more than one, describe all additional cases on a separate piece of paper, using the same format as below.

1. Type of action (civil rights, habeas corpus, etc.): INSTITUTION TORT CLAIM
2. Parties to previous action:
   a. Plaintiff(s): Richard E. Hensarling #0999-018
   b. Defendant(s): Federal Bureau of Prisons
3. District and judicial division: Washington D.C.

TRT-SER-2010-00883

4. Case docket #: TRT-SER-2010-00883 Approximate filing date: _____
6. If not still pending, date of dismissal: Arril 12,2010
7. Reason for dismissal: SEE ATTACHED
8. Facts and claims of case: SEE ATTACHED

(Attach additional pages as necessary to list cases.)

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Complex
P.O. Box 1029
Coleman, Florida 33521-1029

RETURN RECEIPT
7008 3230 0002 5015 3106

Richard Hensarling, Jr.
Reg. No. 09991-018
Federal Correctional Complex
Medium Security Institution
P.O. Box 1032
Coleman, FL 33521

RE: Administrative Tort Claim Numbers TRT-SER-2010-00883

Dear Claimant:

Your claims have been considered for administrative settlement under the Federal Tort Claims Act (FTCA), Title 28 United States Code (U.S.C.) Section 2672 et seq., and authority granted by Title 28 Code of Federal Regulations (C.F.R.) Section 0.172. Section 2672 of the FTCA delegates to each federal agency the authority to consider, determine and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You are seeking monetary damages in the amount of $2,000,000. Specifically, you claim you were assaulted on April 17, 2009, by another inmate causing your eye to be surgically removed leaving you disfigured, handicapped for life, and unable to work. Lastly, you claim deliberate indifference and a violation to your constitutional rights.

We have reviewed your claim along with reports from appropriate staff members. To the extent you believe there is staff misconduct, your allegation has been referred for appropriate investigation.

The investigation conducted into this matter reveals that on April 17, 2009, you were escorted to the Health Services department for evaluation and treatment of your left eye. You informed staff that you had fallen down the stairs because you were drunk since you had been drinking a homemade intoxicant, approximately two cups. Upon medical examination, your eye was found

to be protruding from the socket and you also you had a cut on your right side of the scalp. You were immediately transferred to the outside local hospital.

NEVER MADE NO SUCH Statement

Further investigation reveals you returned from the outside local hospital on April 19, 2009. Upon your return from the hospital, you informed staff you were "blindsided." Staff reviewed the video dated April 17, 2009, and discovered that you had in fact been assaulted by another inmate inside your cell. Although it now seems you claim staff were negligent for their alleged failure to protect, there is no evidence that staff knew or should have known that a threat existed against your safety. In fact, you failed to provide staff with truthful and accurate information after the assault. Therefore, there is no negligence in this regard.

It is noted that in addition to your negligence claim, you allege deliberate indifference. The FTCA is a limited waiver of sovereign immunity for certain tort actions, and does not provide a vehicle for the presentation of constitutional claims. As such, your claim of deliberate indifference is not cognizable in this forum.

To the extent you raise constitutional claims, civil rights claims are not within the purview of the FTCA. In accordance with 28 U.S.C. § 1346(b), the FTCA is a limited waiver of sovereign immunity providing compensation for property loss or personal injury which results from the negligent or wrongful act or omission of an employee of the United States who is acting within the scope of his employment. This statute does not establish a compensatory scheme or cause of action for alleged violations of the Constitution of the United States.

Based on the above, there is no evidence to indicate that you have sustained an injury or loss caused by the negligent or wrongful act or omission of any Bureau of Prisons employee acting within the scope of his or her employment. Therefore, your claim is denied.

You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

Jeffrey Campbell
Supervisory Attorney

4/22/10
Date

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:
SOUTHEAST REGIONAL COUNSEL'S OFFICE
3800 CAMP CREEK PKWY SW
BDLG 2000
ATLANTA, GA 30331

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code) RICHARD E. HENSARLING Jr.
FEDERAL CORRECTIONAL COMPLEX
P.O.BOX#1032 MEDIUM
COLEMAN, FL. 33521

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	5-18-64	DIVORCED	4-17-09 Friday	P.M.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.) I WAS THE VICTIM OF AN ASSAULT DUE TO THE NEGLIGENCE OF B.O.P. STAFF AT COLEMAN F.C.C. U.S.P.#2 ON ABOVE DATE IN UNIT I-2 BY INMATE ERIC AZOTEA. THIS ASSAULT CAUSED ME TO HAVE MY LEFT EYE SURGICALLY REMOVED, LEAVING ME DISFIGURED AND HANDICAP FOR LIFE.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code). NONE

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.) MY LEFT EYE IS GONE, THE DAMAGE IS ON MY PERSON.

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT. THIS INJURY HAS CAUSED ME GREAT PAIN, SUFFERING, AND MENTAL ANGUISH. THIS DISABILITY WILL NOW RENDER ME UNABLE TO WORK IN MY CHOSEN PROFESSION AS A INDUSTRIAL CARPENTER.

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
JIMMY WILSON TROY STAFFORD MIKE OSTRANDER SHAWN ZILEM	LAST KNOWN ADDRESS: COLEMAN F.C.C. U.S.P.#2 P.O.BOX #1034 COLEMAN, FL. 33521

12. (See instructions on reverse.) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
punitive jury decide	$2,000,000.00	NONE	$2,000,000.00 plus

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
Richard E. Hensarling Jr.	NONE AVAILABLE	11-13-09

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant is liable to the United States Government for the civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046 STANDARD FORM 95 PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.2

MY COPY

(43)

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☒ No

NONE AVAILABLE CURRENTLY INCARCERATED

16. Have you filed a claim on your insurance carrier in this instance, and if so, is it full coverage or deductible? ☐ Yes ☒ No

NONE AVAILABLE CURRENTLY INCARCERATED

17. If deductible, state amount.

zero

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts.)

NONE AVAILABLE CURRENTLY INCARCERATED

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☒ No

NONE AVAILABLE CURRENTLY INCARCERATED

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item #12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) **Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

SF 95 BACK

My Copy

D. Have you ever had, either while you were incarcerated or while you were not incarcerated, any actions in **federal court** dismissed as frivolous, malicious, failing to state a claim, or prior to service? If so, identify each and every case so dismissed:

Yes( ) No(X)

1. Type of action (civil rights, habeas corpus, etc.): ----------
2. Parties to previous action:
   a. Plaintiff(s): ----------
   b. Defendant(s): ----------
3. District and judicial division: ----------
4. Name of judge: XXXXXXXXXX Case Docket # XXXXXXX
5. Approximate filing date: XXXXXXX Dismissal date: XXXXXXX
6. Reason for dismissal: ----------

(Attach additional pages as necessary to list cases.)

- Continue to next page -

V. STATEMENT OF FACTS:

State briefly the FACTS of this case. Describe how each Defendant was involved and what each person did or did not do which gives rise to your claim. In describing what happened, state the names of persons involved, dates, and places. Do not make any legal arguments or cite to any cases or statutes. You must set forth separate factual allegations in separately numbered paragraphs. You may make copies of this page if necessary to supply all the facts. Barring extraordinary circumstances, no more than five (5) additional pages should be attached. (If there are facts which are not related to this same basic incident or issue, they must be addressed in a separate civil rights complaint.)

1.) In September 2005 while being housed at F.C.C.Coleman Medium I VOLUNTEERED for a WORK CADRE PROGRAM we were to be TRANSFERED to F.C.C.Coleman U.S.P. II in order to assist STAFF with the STATE INMATES from Louisanna who were being TEMPORARLY HOUSED there after the DEVASTATION from HURRICANE KATRNIA.

2.) In December 2008 while working in the UNICOR PRISON INDUSTRY at F.C.C. Coleman U.S.P. II Three (3) Officers CONSPIRED to INTRODUCE a ITEM of CONTRABAND into my LIFE that was the FACTOR that ALTERED MY LIFE FOR-EVER.

3.) These Three OFFICERS are UNICOR FACTORY MGR.Mr.GRADY,UNICOR FOREMAN Mr.MOODY, UNICOR FOREMAN Mr.HADAWAY. The item of CON-TRABAND that they INTRODUCED INTO MY LIFE was a (BLACK VELCRO INDUTRAIL TYPE BELT WITH BRIGHT NEON GREEN SIDES) The reason I refer to this ITEM as CON-TRABAND is because I was told by the FACTORY MGR.MR.GRADY that due to LEGAL REASONS UNICOR COULD "NOT FURNISH" BELTS TO INMATES. One (1) of the Three (3) Officers named above BROUGHT THAT BELT INTO THAT INSTITUTION. When the belt was HANDED to me ALL Three (3) Officers told me not to tell anyone where I got the BELT. The REASON THEY TOLD ME THAT,IS BECAUSE THEY KNEW THAT EVERY OTHER 100 plus INMATES IN THAT FACTORY WOULD WANT A BELT ALSO. It wasnt hard to figure out that out of that 100 plus INMATES one or more was really gonna want that BELT, and sense you couldnt purchase it through the COMMISSARY,and UNICOR could no longer ISSUE them to you. One INMATE inparticular was so ENVIOUS of me having this BELT that it caused SERIOUS PROBLEMS BETWEEN US.

4.) We went on INSTITUION LOCKDOWN from 1-25-09 till 3-4-09

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orlandosentinel.com/news/local/lake/os-lk-coleman-prison-tries-to-burnish-ima20100123,0,2675324.story

OrlandoSentinel.com

Federal prison boosts security, builds relations

By Martin E. Comas, Orlando Sentinel

11:55 PM EST, January 23, 2010

COLEMAN — In hopes of polishing its image after a series of corruption scandals, riots and inmate abuses, the nation's largest federal prison kicked off the new year with a community outreach effort during which wardens gave an overview of beefed-up security measures.

Learn more about HUMIRA (adalimumab)
Full Prescribing Information Medication Guide
HUMIRA is used to treat moderate to severe chronic (lasting a long time) plaque psoriasis in adults who are under the ongoing care of a physician, have the condition in many areas of their body, and who may benefit from taking injections or pills (systemic therapy) or phototherapy (treatment using ultraviolet light alone or with pills). When considering HUMIRA, your physician will determine if other systemic therapies are medically less appropriate.
Important Safety Information About HUMIRA® (adalimumab)
What is the most important information I should know about HUMIRA? You should discuss the potential benefits and risks of HUMIRA with your doctor. HUMIRA is a TNF-blocker medicine that can lower the ability of your immune system to fight infections. You should not start taking HUMIRA if you have any kind of infection.
• Serious infections have happened in patients taking HUMIRA. These infections include tuberculosis (TB) and infections caused by viruses, fungi, or bacteria that have spread

The enhanced security comes in the wake of two uprisings, a fight in January 2009 that left eight inmates seriously hurt with stab and gunshot wounds and a March brawl that seriously injured 14 inmates.

New measures at the Federal Correctional Complex in Sumter County include:

•Deploying special search squads that collect homemade weapons and other contraband by randomly searching inmates.

•State-of-the-art perimeter-detection camera systems.

•High-tech body-scan machines to prevent inmates from bringing in or taking out contraband from the facility.

•A Crime Stoppers program at its two high-security wings to allow inmates to use cellblock phones to anonymously report tips about other inmates.

"We took a look [at our facility] and came up with ideas on how to improve our security," associate warden Bill Bechtold said. He said the prison plans to add two additional body-scan machines this year.

With just over 7,100 inmates, the sprawling complex has five sections: two high-security institutions and separate low- and medium-security facilities – all for males – and a camp for female inmates.

'Part of the community'

In the past, prison officials have been tight-lipped about problems, but officials say they are trying to

(10)

be more open and accessible. For example, quarterly community relations board meetings typically draw a smattering of mostly prison administrators and local business people.

But more than 75 people took part in the most recent meeting earlier this month including members representing a variety of business, social, educational, public-safety and government agencies.

The chicken and steak meal was prepared by inmates enrolled in job-skills training program.

"This is an opportunity for us to build relations with the community and let them know that we're part of the community, too," said Tamyra Jarvis, warden of the low-security institution.

Officials followed up that event last week by inviting news-media representatives for a prison tour that included briefings from top brass and a question-and-answer session.

Dogged by bad publicity

The prison is trying to repair an image tarnished by corruption and bad publicity in recent years.

In October, a former corrections officer was sentenced to life in prison after arranging to have an inmate killed. Erin Sharma, a 33-year-old wife and mother who worked at the prison in 2005, sought revenge against inmate Richard Delano because he grabbed her arm and bruised her, according to records. She then put Delano into a cell with a known violent inmate who beat him to death, prosecutors said.

In September, a U.S. Justice Department study of 93 federal corrections facilities showed that the Coleman prison led the nation in reports of sexual misconduct – including rapes and affairs – between prisoners and workers. From 2001 through 2008, the Coleman complex had 80 reports of sexual abuse of inmates during that time, according to the report.

In 2008, nine employees, an inmate and a correctional officer's girlfriend were charged as part of a smuggling operation at the Coleman prison.

'I was impressed'

The prison has about 1,320 employees and hired 106 new corrections officers in the past year, with salaries starting at $38,700. It currently has about two dozen vacancies for corrections officers, officials said.

"We are currently hiring," said Kevin Rison, the prison's employee services manager.

Dianne Sharpless, of the prison's employee-services department, said the facility also hopes to fill additional medical positions this year, including nurses, paramedics, doctors and dental hygienists.

Sumter Commissioner Dick Hoffman noted that the prison is the second-largest employer in the county.

"I was impressed," Hoffman said after this month's luncheon. "They are an important part of our community."

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due to a RIOT on the yard between two(2) Mexican Gangs. While we were on LOCKDOWN the Staff went around and rounded up all Mexicans that had any type of Gang affiliation. One of the UNICOR tool room workers was a ex-gang member. I knew right then that UNICOR Staff was going to want me to work in the Tool Room with a INMATE that was ENVIOUS that the UNICOR Staff had given ME a BELT and not him. My OPPORTUNITY was coming up for me to TRANSFER back to a MEDIUM SECURITY INSTITUION. I did not want to mess this chance up. I discussed my problem with my CELL-MATE. He told me to just BEAR-IT. That was not good enough for me. Right before we came off lockdown I SUBMITTED A BP-S148.055 INMATE REQUEST TO STAFF(see attached) seeking to QUIT UNICOR and get a JOB CHANGE that way they would have to move me to a diffrent HOUSING UNIT AWAY FROM THE INMATE THAT I HAD PROBLEMS WITH.

5.) We returned back to UNICOR AFTER COMING OFF LOCKDOWN around 3-5-09 and just as I thought, they placed me in the tool room with the inmate that had a problem with me,but I did not say anything.I worked my job and kept doing everything that I could to get a job change and to get my transfer started. "THERE IS A UNSPOKEN RULE IN A PENITENTIARY SOCIETY, I CAN NOT SAY THAT I KNOW OR UNDERSTAND THEM ALL, BUT I DO KNOW BEING LABLED A SNITCH OR A RAT WILL GET YOU KILLED." Therefore I kept my problem to myself out of fear of being labled a RAT. In time it went to far, It was so OBVIOUS that there was a PROBLEM BETWEEN MYSELF AND THIS INMATE THAT WE HAD TO BE "SEPARATED." And it was not just a SEPARATION for the day,or a few hours. It was so BAD that Three(3) UNICOR OFFICERS HAD TO "SEPERATE" US COMPLETLY. They put US on SEPARATE SHIFTS. I then took that OPPORTUNITY since STAFF was AWARE of the "PROBLEM,AND POTENTIAL THREAT",and I asked them.

BP-S148.55 INMATE REQUEST TO STAFF CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member)	DATE:
Dr. Whitlock (Head Psychology Dept.)	2-27-09 Received 3/4/09
FROM:	REGISTER NO.:
Richard Hensarling	09991-018
WORK ASSIGNMENT:	UNIT:
UNICOR - Mill #2	I-2

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

At your convenience I would like to meet and discuss with you the possibilities working for you in the Psc, Dept. Again in my life I'm at some-what of a crossroads, I don't want to work in UNICOR anymore, and your Dept is the onl, other place I would prefer to work. Thank you for your time in this matter.

DISPOSITION:

Thank you for your interest in the orderly position in Psychology. We received many cop-outs for this position and wanted to inform you that another inmate was selected.

Previous work experience, related knowledge and skills of the inmate selected was a closer match to the experience needed for this position.

We appreciate your interest in working for Psychology and encourage you to continue to seek positive jobs in other work details here at FCC Coleman - USP 2.

Record Copy – File; Copy – Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86
and BP – S148.070 APR 94

Signature Staff Member	Date
[signature]	3/10/09

Good Luck in UNICOR.

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"THATS GREAT THAT YOU SEE THE CONFLICT AND THAT YOU SEPARATED US, BUT WHAT ABOUT BACK AT THE HOUSING UNIT." THEY SAID "THAT IS NOT OUR PROBLEM." I say it was because we were housed in a DESIGNATED UNICOR HOUSING UNIT WHICH WAS I-2, the overflow UNICOR INMATES were HOUSED in I-1.

6.) Therefore I FEEL that there was a DELIBERATE INDIFFERENCE SHOWN TOWARDS ME and MY SAFETY BY UNICOR STAFF MEMBERS MR.GRADY, MR.MOODY, MR.HADAWAY, and MR.HIGINBOTHAM. Not only through to lack of intrest towards my SAFETY, but through the INTRODUCTION OF CON-TRABAND that the OFFICERS INTRODUCED INTO my life.

7.) I went to my UNIT TEAM On a few diffrent Occasions to get moved to another unit on the first Two Weeks of April 2009, Ms Jefferson I-2 Case Manager and Ms.McGLOTHERN I-2 Counsler, and there take on the matter was "WE ARE TO BUSY WITH BIGGER PROBLEMS, WE JUST HAD OUR FIRST RIOT WHERE A OFFICER SHOT ANOTHER INMATE." I am AFRAID TO SAY that I am now and forever PERMANENTLY DISFIGURED, AND HANDICAP FOR LIFE DUE TO THE LACK OF STAFF, AND THEIR NEGLIGENCE TO REMOVE ME FROM MY PROBLEM.

8.) The EVE. of 4-17-09 the officer(name unknown) working I-2 on the 3:30pm. to 11:30pm. shift was made aware that there was a problem, and at the time the INCIDENT was taking place he was in a SECONDARY OFFICE ON THE COMPUTER SURFING THE INTERNET WITH THE DOOR CLOSED AND THE DESKTOP SPEAKERS TURNED UP TO FULL VOLUME, AND TALKING ON THE PHONE, AS I REMEMBER. I had to go locate him.

9.) As this INCIDENT UNFOLDED WITHIN THE HOUSING UNIT

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..I dont recall seeing the HOUSING UNIT OFFICER all NIGHT. I AM NOT SURE AT WHAT POINT OR WHOS DECEISION IT WAS TO PROVIDE F.B.O.P. HOUSING UNIT OFFICERS WITH INTERNET ACCESS. I AM SURE THAT THE F.B.O.P. WILL COME UP WITH A LOGICAL ENOUGH REASON, BUT I HAVE NOT BEEN ABLE TO PROVIDE MY FAMILY OR LOVED ONES WITH A GOOD REASON AS TAXPAYING CITIZENTS.

10.) All CELLS at F.C.C.Coleman are EQUIPED with a DURESS BUTTON WITIN THE CELL LOCATED ON THE WALL. This Button is for EMERGENCIES it sends off a very HIGH-PITCHED ALARM THROUGH THE CELL-BLOCK it is the Officers RESPONSIBILITY to go and INVESTIGATE the cell in which this ALARM was SOUNDED. The outside of the door has a KEY-PAD that can only be DEACTIVATED by the Officer using their KEY. And then the Officer must CONTACT CONTROL AND REPORT THEIR FINDINGS The ALARM in MY CELL WAS ACTIVATED. The Officer did not INVESTIGATE.

11.) I am going to change course here and tell these Courts that to SOME DEGREE I MUST EXCEPT RESPONSIBILITY. ON THE EVE.OF 4-17-09 I WAS IN VIOLATION OF A F.B.O.P.REGULATION.I HAD BEEN DRINKING A HOMEMADE INTOXICATE. I HAVE REASONS TO BELIEVE THAT...THAT IS WHAT GAVE THE INMATE THE COURAGE TO ATTACK ME.VICON SERCURITY CAMERA WILL CLEARLY SHOW THAT I WAS SITTING WITHIN THE CONFINES OF MY ASSIGNED CELL EATING A SOUP, I WAS NOT PRESENTING ANY DANAGER. INMATE CROSSED THRESHOLD INTO MY HOUSE(CELL) ARMED WITH A WEAPON (that the F.B.O.P. is in the care and custody of) WITH THE INTENT TO CAUSE GREAT BODILY HARM. I REGRET THAT I WAS NOT MORE ALERT. AND HOUSING UNIT OFFICER SHOULD HAVE BEEN ON HIS JOB!

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THAT STILL DOES NOT CHANGE THE FACT THAT I PERSONALLY HAVE SOME DEGREE OF RESPONSIBILITY. I WISH THE F.B.O.P. WOULD EXCEPT RESPONSIBILITY FOR THEIR ACTIONS, OR LACK OF.

12.) I NEVER RECEIVED A DISCIPLINARY WRITE UP FOR MY VIOLATION (maybe they felt sorry for me, and felt that they were responsible to some degree). The F.B.O.P. will say that I lied and gave false information. The F.B.O.P. SAYS THAT I SAID "I FELL DOWN THE STAIRS". CAPTAIN L.WILLIAMS TOLD MY MOTHER on a SECHDULED VISIT THAT THEY MADE HER SECHDULE(do to staff shortage is what they told her)WAS THAT I WAS DRUNK AND FELL DOWN THE STAIRS. This is after they already VIEWED THE SECURITY CAMERAS FROM THE HOUSING UNIT.

13.) What I said was "I THINK I FELL DOWN THE STAIRS". (see attached report from medical) The reason that I made that statement is because I had several INMATES AROUND ME YELLING, "YOU ARE LOSSING WAY TO MUCH BLOOD, YOUR EYEBALL IS HANGING OUTSIDE THE SOCKET, TAKE A SHOWER, CLEAN THE BLOOD UP, GO TO MEDICAL, YOU CANT TELL THE POLICE WHATS UP!" I was in shock, my body was in shock, my mind could not grasp the extent of what just happened to me. YES I LIED, I WAS TOLD NOT TO SNITCH, OR I WOULD BE PUNISHED WHEN I RETURNED.

14.) To this day I have not made any statement to any F.B.O.P. Officer. One of the reasons I have not made any statement to anyone is because one of the officers that transported me to the Hospital the night of the incident who has known me for (9) nine years in this complex. Told me "NOT TO TRUST, OR TALK TO ANYONE. TO GET MY FAMILY TO FIND ME A ATTORNEY THAT A CRIMINAL ACT HAS BEEN COMITTED AGAINST ME.

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: HENSARLING, RICHARD EARL JR		**Reg #:** 09991-018
Date of Birth: 05/18/1964	**Sex:** M	**Race:** WHITE
Encounter Date: 04/17/2009 22:10	**Provider:** Flagg, Helen RN	**Facility:** CLP

Emergency encounter performed at Health Services.

SUBJECTIVE:

INJURY 1 **Provider:** Flagg, Helen RN

Date of Injury: 04/17/2009 22:00 **Date Reported for Treatment:** 04/17/2009 22:10

Work Related: No **Work Assignment:** UNC MILL 2

Where Did Injury Happen (Be specific as to location):

I-2

Cause of Injury (Inmate's Statement of how injury occurred):

Inmate fell down a flight of stairs and landed on a concrete floor

Symptoms (as reported by Inmate):

I think I fell

OBJECTIVE:

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
04/17/2009	22:14 COX	73	Apical		Flagg, Helen RN

Respirations:

Date	Time	Rate Per Minute	Provider
04/17/2009	22:14 COX	16	Flagg, Helen RN

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
04/17/2009	22:14 COX	117/81	Left Arm	Standing	Adult-regular	Flagg, Helen RN

Exam:

Eyes

Left eye protruding from socket. 2 cm cut on right side of scalp.

ASSESSMENT:

Bleeding-Traumatic

Inmate had been drinking homemade intoxicant, Stated approximately two cups. Wet saline gauze applied to left eye.

Dr. Roman notified. Received telephone order to transport to local hospital.

Inmate cognitive of person, place, day and age.

VS stable. Complained of nausea, no vomiting.

Other

addendum- Inmate began vomiting at 2220

PLAN:

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome

Inmate Name: HENSARLING, RICHARD EARL JR
Reg #: 09991-018
Date of Birth: 05/18/1964
Sex: M
Race: WHITE
Encounter Date: 04/17/2009 22:10
Provider: Flagg, Helen RN
Facility: CLP

Date Initiated	Format	Handout/Topic	Provider	Outcome
04/17/2009	Counseling	Access to Care	Flagg, Helen	Verbalizes Understanding

Copay Required: No
Cosign Required: Yes
Telephone/Verbal Order: No

Clinical Encounter completed on HENSARLING, RICHARD EARL JR by Flagg, Helen RN on 04/17/2009 22:10.
Clinical Encounter requested to be cosigned by Roman, Rafael MD.
Clinical Encounter cosigned by Roman, Rafael MD on 04/20/2009 14:06.

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15.) The WEAPON that the INMATE USED WAS A (BLACK DIAL FACE COMBINATION LOCK) PURCHASED OUT OF THE PRISON COMMISSARY. These locks have been UTILIZED AS WEAPONS, PROBALLY ON MANY DIFFRENT OCCASIONS. PROBALLY CAUSING WAY MORE DAMAGE ON OTHERS. MOST PRISONS IN THE U.S.A. WONT EVEN ALLOW THESE TYPE LOCKS IN GENERAL POPULATION BECAUSE THEY ARE USED, AS KNOWN WEAPONS, COSTING TAX-PAYERS MILLIONS IN UN-NECESSARY MEDICAL BILLS.

16.) The F.B.O.P. DIRECTOR Harely G.Lappin is ultimately RESPONSIBLE for EVERY ITEM SOLD THROUGH COMMISSARY. THEREFORE HE ALLOWS A KNOWN POTENTIAL WEAPON TO BE SOLD THAT THE F.B.O.P. is in the care and custody. He also ALLOWS Officers within the HOUSINGING UNITS COMPUTERS WITH INTERNET ACCESS IN A CREATED SECONDARY OFFICE WITH DESK-TOP SPEAKERS CAUSING THE MEANS FOR A GREAT DISTRACTION.

17.) Warden Drew and Captain Williams are in charge of the SECURITY and CUSTODY and Managment of all STAFF ENTERING. Knowing they are SHORT STAFFED and over-worked is a WILLFULLY NEGLIGENT RUNNING OF THE INSTITUTION.

18.) Ms.Whitlock in Psychology was AWARE that I had a pressing issue with my JOB and within my HOUSING UNIT and KEPT TELLING ME THAT SHE WOULD PUT ME ON THE CALL-OUT to come TALK TO HER TOMARROW.....TOMARROW NEVER CAME.

19.) ALL UNICOR OFFICERS SHOWED A DELIBERATE INDIFFRENCE INTO MY SAFETY THROUGH THE INTRODUCTION OF CON-TRABAND INTO MY LIFE AND NOT AFFORDING ALL OTHER INMATES WITHIN THE FACTORY THE SAME ITEM. ALSO BY SEPARATING US ONLY IN THE WORK PLACE,AND NOT HOUSING UNIT.

Chart: 64904
Date: 4/21/2009 Age: 44 Years

64904-1

Physician: S.H. ReferringDoctor: _____

Chief Complaint:

PRESENTS TODAY BLUNT FORCE TRAUMA OS LAST FRIDAY ASSAULTED C̄ A MASTER LOCK,

Current Eye Medications

Patient History form dated: _____ Reviewed: ☐ No changes noted ☐ Changes noted

* Va. Dist.< 20/00 BANDAGED PH< MD Va.Near <

* Ta. < Time: _____

S. Lee, MD
Surg K. Lee, MD
4/21/09

W<

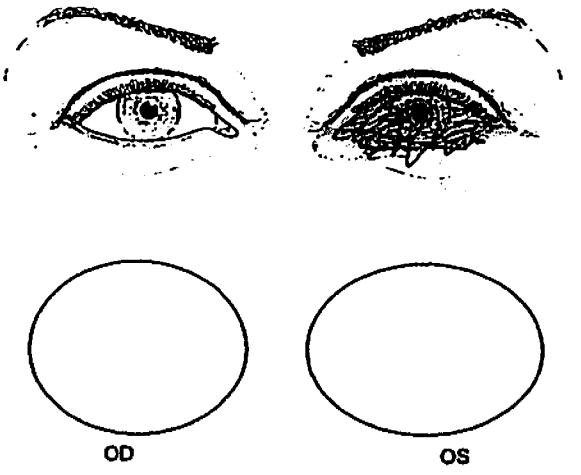
Comments:(Abnormal Findings)

M<

GLARE	MED	HIGH	KERATOMETRY
OD			OD_____
OS			OS_____

PF	MRD	LE
OD		
OS		

	OD		OS	
*Pupils	NL	ABN	NL	ABN
Shape				
Reaction				
Size				
Dilation				
*Conf. VF				
*Motility				
*Adnexa				
lids	/	/		/
lashes	/		/	
orbits	/		/	
*Conjunctiva				
Bulbar	/		/	
palpebral	/		/	
*Cornea	/		/	



Dilation Orders: *OD OS OU* MYD 1% 1/2% NEO 2.5% Other:_____ Time:_____

AFFIDAVIT OF FACT

I was present the night of April 17, 2009 at F.C.C. Coleman U.S.P. II, Housing Unit I-2 and witnessed the weapon, a black face dial combination lock attached to a belt, the accused inmate used to cause blunt force trauma to inmate Ricky E. Hensarling, Jr. resulting in the loss of inmate Hensarling's left eye.

"I declare(or certify, verify or state), under penalty of perjury that the foregoing is true and correct."

Executed this 5th day of august, 2010.

Inmate Signature Michael Shawn Zilem

Inmate Register Number 26664-180

Inmate Full Printed Name Michael Shawn Zilem

(11)

AFFIDAVIT OF FACT

I was present the night of April 17, 2009 at F.C.C. Coleman U.S.P. II, Housing Unit I-2 and witnessed the weapon, a black face dial combination lock attached to a belt, the accused inmate used to cause blunt force trauma to inmate Ricky E. Hensarling, Jr. resulting in the loss of inmate Hensarling's left eye.

"I declare(or certify, verify or state), under penalty of perjury that the foregoing is true and correct." Under Title 18 § 1746 JES

Executed this 10th day of August, 2010.

Inmate Signature Troy Eugene Stafford

Inmate Register Number 07526-025

Inmate Full Printed Name TROY Eugene Stafford

Also it need be, I will come to court due to the circumstances and nature of said criminal activity. Troy E Stafford

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20.) The MEDICAL TREATMENT from the outside Doctors has been GREAT. The TREATMENT from within the INSTITUTION IS ANOTHER STORY. THAT RESPONSIBILITY FALLS UNDER Newton E. Kendig RADM M.D. The INCIDENT HAPPENED ON 4-17-09 the REMOVAL of the DEAD EYE was on 5-5-09. I WASNT TAKEN BACK TO SEE A DOCTOR UNTIL 1-6-2010 He was the Doctor that was to make the PROSTHETIC EYE. He said that it was VERY UNFORTUNATE that the F.B.O.P. HAD WAITED SO LONG TO START THE PROCESS because he was going to have to reform my EYESOCKET that it had RECEDED WAY BACK INTO MY SKULL.

21.) The RECEDING of the FACIAL MUSCLES INTO THE SKULL was caused by the DELIBARATE NEGLIGENCE of MEDICAL TREATMENT for TWO-HUNDRED FOURTY SIX (246) DAYS, DURING THIS TIME I SAT IN S.H.U.(special housing unit) UNDER EXTREME UNSAINITARY CONDITIONS FOR SOMEONE WHO JUST HAD HIS EYEBALL REMOVED.

22.) At my first Doctors appt. with the Doctor making the PROSTHETIC EYE. It was in my BEST INTREST to ask alot of QUESTIONS. The Doctor told me that because of the CONDITION of the area around the eyesocket that HE was going to have to bring me back for (3) Three diffrent fittings to get the eyesocket area back to its original form before he could even make the eye. I know that for security reasons the Doctor could not give me the exact dates for each fitting, but could he give me a GENERAL IDEA. He said NO MORE THAN (30) Thirty days a piece. That was on 1-6-2010. Twenty Seven (27) days later they took me BACK for the SECOND (2nd) fitting on 2-3-2010. IT IS NOW 9-17-2010 its been (227)

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days and they (F.B.O.P.) has not taken me back for my (3) Third and final fitting before my permanent eye can even be made. Am I in ALOT of PAIN ! No, It does cause me alot of UN-COMFORT. Im having alot of strain and irritation in my right eye. The PAIN comes from the MENTAL AND EMOTIONAL SUFFERING, and my Family coming to see me asking questions "WHY ALMOST (2) TWO YEARS LATER ARE YOU STILL WALKING AROUND WITH A PROSTHETIC EYE THAT DOES NOT FIT?" These are answers I have tried to find the answers to with no success. It has been hinted to me by Staff "DROP THE LAWSUIT,AND GET YOUR MEDICAL NEEDS MET." The last time I went to Medical Dept. here at the Prison was on 8-24-2010 COMPLAINING ABOUT HEADACHES AND THE EYE BEINING TO LOOSE. I was told to pick up some Motrin and Eyedrops the next day. When I picked them up on 8-25-2010 I seen Ms.BUGS the Hospital Adim. here,I asked her why the PROCESS FOR MY EYE HAD STOPPED? She said that "I HAD TO BE APPROVED BY THE COMMITTE." That was when I heard the COMMENT be made"DROP THE LAWSUIT." I was told back in 5-5-09 that the COMMITTE HAD TO APPROVE ME." The INSTITUTION did have me see a OPTOMITRIST on 9-2-2010 He laughed and said I needed a OCULARIST NOT A OPTOMITRIST.

23.) I could go on and on. I just want my day in Court with a JURY TRIAL. Please Give ME That Right As A Citizent of The U.S.A. I Deserve the 160 months for the crime I committed,but not the 160 months and the losse of my eye,DUE TO POOR UNDER-STAFFING INTERNET DISTRACTIONS,NEGLIGENCE,DELIBIRATE INDIFFRENCE.

Note: This is a Internet conversation from one F.B.O.P. Correctional officer at Coleman, While on Duty with a potential Future Officer

6

Police Forums & Law Enforcement Forums @ Officer.com > Officers and Law Enforcement Professionals ONLY > The Big House: Corrections Forums > Fed Bureau of Prisons - Florida - Coleman

PDA
View Full Version : Fed Bureau of Prisons - Florida - Coleman

dannmann105001-29-2009, 09:34 PMAnyone have any idea what a day in the life is like in Fed. Pen.?? I've done County Jail scenes... **just wondering what it's like at the Fed level since they are hurting pretty bad from what I have read/seen..**

Thanks!!

BE SAFE!!!

LS101-29-2009, 09:55 PM**They just had a recent major disturbance earlier this week. Staff and multiple inmate injuries- one inmate with a GSW from a tower officer. Lots of scumbags imprisoned at Coleman.** Lots of gangs. Lots of lockdowns. I know someone who recently transferred down there and they say it's nuts. Nothing but problems: avoid.

Coleman is the largest prison complex in America, and the largest in the Fed. There are 2 USPs, 2 FCIs, and a large camp.

dannmann105001-29-2009, 09:58 PMThanks for the response.. I live about an hour away and saw all that nonsense that happened on the news... Only reason I along with some others are considering it, good money and full-time.. Economy has killed the road jobs.. so.. in the mean time.. gotta consider plan B..

LS101-29-2009, 10:02 PMThanks for the response.. I live about an hour away and saw all that nonsense that happened on the news... Only reason I along with some others are considering it, good money and full-time.. Economy has killed the road jobs.. so.. in the mean time.. gotta consider plan B..

Consider very carefully. :cool:

Iowa #160301-29-2009, 11:24 PMAccording to my sources in the BOP

ANY federal BOP institution=
Very Good money
pretty good equipment
No mace/OC/Batons inside the walls/fence
You are considered Federal Law Enforcement

lots of BS treatment by supervisors/managers
lousey training

Of those who I have talked to that have prior CO experience.....
the only reason to go to the feds is $$$$$$$$$$$$$$$$$$$$$$$$$$$$
Everything else is better in the state ranks.

dannmann105001-29-2009, 11:34 PMdoes anyone know the kinds of shifts they work..8/10/12's?? I've seen

"several options" but nothing that says work schedule, rotation or perm. shifts..

Heck.. I even saw a website for BOP uniforms...do they have to buy their stuff or is it issued??

LS101-30-2009, 08:16 AMdoes anyone know the kinds of shifts they work..8/10/12's?? I've seen "several options" but nothing that says work schedule, rotation or perm. shifts..

Heck.. I even saw a website for BOP uniforms...do they have to buy their stuff or is it issued??

5/2 schedule. Some institutions (such as mine) have limited 6-2 , 1-9, and 2-10 posts. All others are 8-4, 4-12, 12-8. Plenty of OT and mandates (forced OT) at Coleman, so the money can be good. I disagree that the money is good, however. But it depends on your area.

For your probationary year, you are on monthly schedules. After your probie year is up, you can bid for posts and days off that change every quarter. Without any seniority, you're pretty much doomed to the crap posts with crap days off that nobody wants.

We are given $400 per year for uniforms.

dannmann105001-30-2009, 09:52 AMexcellent info... anything else one should "know"??

LS101-30-2009, 04:04 PMexcellent info... anything else one should "know"??

Training is weak, but if you have prior experience, you're all set. First, you get two weeks at the home institution called "Institutional Familiarization" which is pretty much a snooze. The main training you'll go to GA for. It's a 3 week keg party.. I mean, program, down in Glynco, GA at the FLETC. Cakewalk. Down there you'll have to pass a PT consisting of:

1/4 mile run and cuff in 2:30.
Ladder climb in 7.5 seconds.
75 lbs. dummy drag for 700 ft.
Obstacle course in 60 seconds.
Stair climb with 20 lbs. duty belt in 45 seconds

If you can tie your shoes, you'll pass. You also have to pass three exams and show proficiency in contraband search and firearms. **It's designed so nobody's feelings are hurt and everyone passes. Just don't get arrested and you'll go home with nothing more than a hangover and empty wallet.**

The background check is your standard SSBI. With few exceptions, **they go back 7 years.** As long as you have no convictions for felonies or domestic violence, or any other red flags, you can pass the BI. They take credit VERY seriously, so if you've had trouble paying your bills within the last 7 years, you're out. Defaulting on loans (especially federal loans) is an automatic DQ. I've seen a couple staff members forced to resign or get walked-out after credit checks revealed they weren't paying their bills.

If you have any other questions, let me know...

dannmann105001-30-2009, 07:51 PMAre the shifts perm. once you get past probie?? or do they rotate with set days off?? For the pay stucture..Do you get steady raises; or what you see now is what you'll see in 10 years kinda stuff? On Site.. **Is there ample co-workers to get the job done, or are you working solo and letting the**

(8)

prisoners run the hen-house persay?? LOL.. i've read that BOP is under HORRIBLE staffing at certain locations..

For the forced OT... Is it double's or just holdover for 4... Is it everyday you have OT issues, or do they (admin) rotate the wealth so that the same person doesn't get screwed day after day after day?

Thanks for all the info...

LS101-30-2009, 08:35 PMAre the shifts perm. once you get past probie??

No. You bid against other officers for posts every quarter. So if you're high in seniority, you get the good picks and good days off. You must do "sick and annual" once per year; so you cover vacation and sick time and work various posts during that time. The BOP expects you to rotate through every shift every three year period.

For the pay stucture..Do you get steady raises; or what you see now is what you'll see in 10 years kinda stuff?

Corrections officers are GL-5/6/7. That means you move from 5 to 7 each year until you reach 7. You must compete for GL-8/9/11/12/13. You start as either a GL-05 or GL-06, step 1 (depending upon experience). The next year, you move up one grade (From GL-5 to 6, or GL-6 to 7), and move up one step. So if you start as a GL-06, step 1, after three years, you'll be a GL-07 step 4. After step 5, it takes two years to move up a step. Again, you have to compete to move up another grade. GL-8's are rank "Senior Officer Specialist", which is just an experienced officer. GL-9/11 are Lieutenants. GL-11/12/13 are Captains.

On Site.. Is there ample co-workers to get the job done, **or are you working solo and letting the prisoners run the hen-house persay?? LOL.. i've read that BOP is under HORRIBLE staffing at certain locations..**

Depends upon the institution and post. For example, the Special Housing Units often have more than two officers on duty at a time. That amount may change with each shift. Medium security units may only have two **officers for every 100 inmates.** I had no previous experience in corrections and my first day involved running a low security cubicle-style unit on 255 inmates by myself. Also, all BOP employees are considered "correctional officers first", which means all employees, regardless of job title (case worker, chaplain, business officer, medical, etc.) are "required" to respond to incidents as if they were corrections officers.

For the forced OT... Is it double's or just holdover for 4... Is it everyday you have OT issues, or do they (admin) rotate the wealth so that the same person doesn't get screwed day after day after day?

A mandate can be anywhere from 2 hours to 8 hours. Some institutions have mandate problems due to staffing levels, or inmate problems. Example: Coleman is on lockdown. That means 12 hour shifts until they come off lockdown. So you're mandated for 4 hours each day until the lockdown is called-off.

dannmann105001-30-2009, 08:43 PMThanks LS1..

To get up in Senority.. does hell have to freeze over, or is the turnover/turnaround about average?? **Are you allowed to bring a laptop if your on a out-lying post.. or do you have to just sit and watch your life fade away?**

Does have the Fed. Pen experience on the ol' resume help with other Federal agencies, or nobody on the Fed

(9)

level care about the BOP crew? And.. This one I can't seem to get a straight answer on..

As you have read.. I'm looking at Coleman.. Can you be a RESERVE LEO outside of Fed. Pen life?? I have heard yes and no.. I don't know if your in Florida or not.. But the Reserves here are on vol. status for the most part and not a "scheduled job".. just a kinda when you roll in/out to get your hours forthe month..

LS101-30-2009, 09:19 PMTo get up in Senority.. does hell have to freeze over, or is the turnover/turnaround about average??

Depends on the joint. Some joints are the stereotypical "Club Fed" types where officers get comfortable and don't like to leave or promote out. If you haven't heard of them, there's a reason for that. Other joints (particularly the notorious USPs) are revolving doors where staff leave for personal reasons, or transfer to other prisons for promotions, or get hired by other federal agencies. You'd move up fairly quickly at a joint like Coleman.

Are you allowed to bring a laptop if your on a out-lying post.. or do you have to just sit and watch your life fade away?

The BOP has "Internet-connected computers. You are not allowed to bring in any laptops, iPods, diskettes, USBs, pern drives, or any other writable media. There is a policy regarding appropriate use of computers.

Does have the Fed. Pen experience on the ol' resume help with other Federal agencies, or nobody on the Fed level care about the BOP crew? And.. This one I can't seem to get a straight answer on..

It would definitely help if you want to move up in the BOPverse. If you ever want to see Lieutenant, or especially Captain, you must have experience at a USP. It;s somewhat of an "unwritten rule". If you are mobile and want to move up, the BOP is the place. If you bounce from join-to-joint, you will move up in pay and promote quickly. Many of the top brass in the DC offices who make ungodly amounts of money started off as mere entry-level corrections officers.

As for other agencies, the BOP is one of the dregs of federal law enforcement. We're not exactly viewed as the greatest group of people at the FLETC. The actions of a few dopes have tarnished the BOP image in the FLE community. That hasn't stopped many of us (me included), from applying and getting hired by other federal agencies. Many ex-BOP have gone on to work for the Border Patrol, Federal Air Marshal Service, the DEA, ICE, FBI, CBP, USMS, and many local and state agencies. 4 guys from my facility were recently hired by ICE. After 9/11, 50 guys left my joint for the FAMS; 20 more in 2005. If you do your job and can relate your law enforcement experience, you have a good chance of going anywhere. The sky is the limit.

As you have read.. I'm looking at Coleman.. Can you be a RESERVE LEO outside of Fed. Pen life??

The answer is a solid NO. The BOP will tell you this exact statement: "The BOP is your primary job. The needs of the institution are priority". You cannot hold any other armed law enforcement position while employed with the BOP. Military reserves are a different story. You may hold a second job with approval from the Warden.

dannmann105001-30-2009, 09:34 PMHmm.. Well.. The LEO issue has just dampened the interest level.. actually.. that just burst the balloon

(10)

Thanks again for all the information.. You have provided a ton more than anything I can google.

Jimmooch02-01-2009, 06:09 PMCan Fed Officers carry off duty Im also looking at Coleman trying to weigh it against county prison. State pays too little in Florida

LS102-01-2009, 07:38 PMCan Fed Officers carry off duty

Yes.

dannmann10502-02-2009, 01:15 PMFor those in "urgent need" of CO's.. What is a ideal timeline for hiring??

LS102-02-2009, 01:43 PMFor those in "urgent need" of CO's.. What is a ideal timeline for hiring??

I've heard as little as 3 weeks.

Patrio7202-04-2009, 03:53 PM1) What does a new hire do at the prison for 2 weeks before reporting to academy?

2) I scored an 88 on my application. Based on that score, what are my chances of being added to the certificate of eligible candidates? I am hoping to get picked up by Milan but the staff level is small compared to Coleman. (I did contact both locations via email but haven't heard back yet.)

3) Even though I selected FCI Milan first and FCI Coleman second, will I still be considered for Coleman or do they only look at the first choice?

Thanks!
Patriot72

TheKansan02-04-2009, 04:15 PMDepends upon the institution and post. For example, the Special Housing Units often have more than two officers on duty at a time. That amount may change with each shift. Medium security units may only have two officers for every 100 inmates. I had no previous experience in corrections and my first day involved running a low security cubicle-style unit on 255 inmates by myself. Also, all BOP employees are considered "correctional officers first", which means all employees, regardless of job title (case worker, chaplain, business officer, medical, etc.) are "required" to respond to incidents as if they were corrections officers.

That explains a lot. I was wondering why all positions with the BOP listed on USAJOBS offer the law enforcement retirement. I also was wondering why all positions with the BOP were required to attend fletc.

LS1

VI. STATEMENT OF CLAIMS:

State what rights under the Constitution, laws, or treaties of the United States you claim have been violated. Be specific. Number each separate claim and relate it to the facts alleged in Section V. **If claims are not related to the same basic incident or issue, they must be addressed in a separate civil rights complaint.**

1.) First Amendment- Right to EQUAL PROTECTION

2.) Eighth Amendment- Right to be FREE from CRUEL and UNUSUAL PUNISHMENT.

3.) PLEASE LET THESE COURTS BE ADVISED THAT I DO NOT FULLY UNDERSTAND THE ABOVE QUESTION.

VII. RELIEF REQUESTED:

State briefly what relief you seek from the Court. Do not make legal arguments or cite to cases/ statutes.

1.) PLEASE SEE ATTACHED SHEETS

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS OF FACT, INCLUDING ALL CONTINUATION PAGES, ARE TRUE AND CORRECT.

10-6-2010
(Date)

Raul C. Hemaley Jr.
(Signature of Plaintiff)

IF MAILED BY PRISONER:

I declare (or certify, verify, or affirm) under penalty of perjury that this complaint was (check one):
☑ delivered to prison officials for mailing or ☐ deposited in the prison's internal mail system on:
the 6 day of OCTOBER, 2010.

Raul C. Hemaley
(Signature of Plaintiff)

Revised 07/02

RELIEF- REQUESTED

1.) I WANT ALL MEDICAL COST PERTAINING TO THE LOSS OF MY LEFT EYE TO BE PAID FOR BY THE FEDERAL BUREAU OF PRISONS/U.S.GOVERNMENT FOR THE REMAINDER OF MY LIFE.

2.) I WANT THE FEDERAL BUREAU OF PRISONS/U.S.GOVERNMENT TO PAY EITHER FOR ME TO FINISH COLLEGE and or SEND ME TO A VOCATIONAL TRAINING SCHOOL UPON MY RELEASE.SEEING HOW I CAN NO LONGER WORK IN MY CHOSEN PROFESSION AS A INDUSTRAIL CARPENTER. TO MUCH OVER-HEAD CRANE WORK.

3.) I WANT TO SEE MY S.S.I. BENEFITS FOR MY NEW DISABILITY TO BE APPROVED,AND TO START BEING PAID TO MY FAMILY IMMEDIATELY. SEEING HOW THE COST OF MY INCARCERATION IS A BURDEN ON THEM.

4.) I WANT **$546,000.00 dollars plus 10% ten percent cost of living** on top of that. I arrived at this dollar figure by my future potential loss of income that I could have provided for my family had it not been for the loss of this eye due to the NEGLIGENCE of **F.B.O.P. STAFF.** See attached sheet out of **P.S.I. REPORT ON JOB HISTORY, AND EDUCATIONAL HISTORY.**

Richard E. Hartley L.

RE: Hensarling, Jr., Richard Earl

PART C. OFFENDER CHARACTERISTICS (continued)

Education and Vocational Skills

78. According to records, the defendant obtained his GED while he was in custody at the Federal Penitentiary in Atlanta, Georgia, on September 5, 1991, through the Georgia Board of Technical and Adult Education. He stated that he attended some college courses through Mercer University through the Bureau of Prisons and at Daytona Beach Community College in 1994. According to records from Daytona Beach Community College, the defendant attended classes from January 1995 through May 1995. He completed 9 credit hours. The defendant indicated that he has special training in construction and safety management. Records confirm the defendant completed classes through Mercer University in 1991 and 1992.

Employment

79. The defendant has been in custody since August 31, 2001, and has been unemployed.

80. According to employment records, the defendant was employed with Granite Construction Company in Volusia County, Florida, from January 22, 2001 to February 19, 2001. He was a carpenter on the Sanford-Greenway Project and earned $12 per hour. Records indicated that the defendant quit because he was not making enough money. It was also reported that he missed six days out of one month of work. He would not be eligible for re-hire.

81. According to Social Security records, the defendant was employed with EBY Construction in Sanford, Florida, during 2000. He earned $3,780.47 for that year. Employment records indicate that the defendant was employed from November 8, 2000 through January 19, 2001, as a carpenter. He earned $13 per hour. Records indicated that the defendant quit without giving a reason and would be eligible for rehire.

82. The defendant stated that from January to June 2001, he was employed with Castle Design in Orlando, Florida, as a superintendent. He reported earning $17.50 per hour. Social Security records confirmed this employment in 1999 and 1998. He earned $8,250 and $9,560, respectively.

83. Social Security records confirmed that the defendant was employed with Walker Construction in Orlando, Florida. He was a superintendent and earned $3,750 for that year.

RECEIVED

2010 OCT 12 PM 12:01

CLERK, U.S. DISTRICT COURT
OCALA FLORIDA

COVER-SHEET

Richard E.Hensarling Jr.
#09991-018

Plaintiff,

-v-

CASE No. 5:10cv-344-OC-33MAP

TWELVE(12) FEDERAL BUREAU OF PRISONS EMPLOYEES- OFFICAL & INDIVDUAL CAPACITY

Defendants,

I Regret to Notify theses Courts that this First(1st.) Attempt at Exhausting my Administrative Remedies has become Overwhemingly Complex Regarding a Situation that should have been Exhausted at this level.

If these Courts will Pay Close Attention to **EXHIBITS(G)** and **EXHIBITS(L)** these Courts will see that **I WAS NEVER UNTIMELY IN MY ADMINISTRATIVE REMEDY PROCESS.**

In my last attempt to Exhaust this matter at this level these Courts will see that I mailed my **BP-11** to **Central Offices Washington on 8-8-2010.** The Central level has **(40) fourty days to Respond.according to their Program Policy Statement §542.18. Response Time.** If they do not Respond in said time they are to give **Written Reason advising you that they need EXTRA TIME.**

They are **Currently Over Their (40)fourty day time-frame. 9-22-2010** and I have not heard back from them. Their Policy that I Quoted states that you are to take that as a **AUTOMATIC REFUSAL.** Therefore I am bringing this matter to these Courts.

Richard E.Hensarling Jr.
#09991-018

Richard E. Hensarling Jr.

1ST ADMINISTRATIVE REMEDY Attempt

ADMINISTRATIVE REMEDY
TIMELINE

Richard E. Hensarling, Jr.
Register NO:09991-018
Federal Correctional Complex
Coleman (Medium)
P.O. Box 1032
Coleman, Florida
33521-1032

1) On **4-17-09**, I Richard E. Hensarling, Jr., Bureau of Prisons Register Number #09991-018, was Assaulted by inmate Eric Azotea, due to staff negligence while being housed at F.C.C. Coleman Florida, in the United States Penitentiary at Coleman Number #2.

2) I started my Administrative Remedy Process while being housed at F.C.C. Coleman U.S. Penitentiary #2. I initially started by filing what was a BP-8, stateing that I was suffering from severe and adverse Psychological effects, and undue pain and suffering by my being housed in the **Special Housing Unit (S.H.U.)** or what is more aptly known as the **HOLE.** At that time I had just undergone the loss of my left eye, and was awaiting surgery to have it surgically removed.

* **NOTE: That BP-8 was filed on June 17, 2009. I received a response to that complaint on July 24th, 2009. Thirty-Seven (37) days later, saying I was pending transfer. *(SEE EXHIBIT A)***

3) On 7-11-09, I submitted a **BP-S148.005.** An inmate Request to Staff, requesting access to receive a number to use the Law Library Legal Research computer, in order to research how to proceed with Administrative Remedy Process. I was granted a password, but, was **NEVER ALLOWED ACCESS** to the use of the Law Library Facility from **July 11th, 2009 until October 15th, 2009. *(SEE EXHIBIT B)***

4) From July 24th, 2009 until August 3rd, 2009, I did **NOT** see anyone from my Unit Team. So, I had another inmate in the SHU across from me, tell me I should write a handwritten letter to Washington pleading for help and intervention on my behalf. I mailed that out in a letter format on August 3rd, 2009. I received a response to that letter on September 17th, 2009, Forty-Five (45) days later.

* **NOTE: Washington's Response told me I needed to persue my Administrative Remedy Process within this Institution. I clearly stated in my letter that Staff was avoiding me while I was in the SHU, without any way of making contact while incarcerated there, and could not even obtain a simple Inmate to Staff Request Form while there at that time. *(SEE - EXHIBIT C)***

ADMINISTRATIVE REMEDY
TIMELINE

5) While awaiting the response from Washington, concerning my letter from August 3rd, 2009,(**See Exhibit C,**) another inmate also locked in the SHU, that was being housed on the same floor or (Tier), observed the way I was being treated by the staff ignoring all of my needs and requests. Took it upon himself to obtain a BP-11 from his Unit Team on my behalf, and sent it to me on a fishing line under my door. He told me to file the BP-11 as a "Sensetive 11" due to the nature of my issues and my complaint, and due to the way that I was being shunned by my own Team and other staff members.

* **NOTE: This was in fact a sensetive issue, since I was being treated as a non-person throughout my ordeal after the fact that "I was the "victim." Also, I filed the BP-11 on August 23, 2009, and it was not returned with a response until October 20th, 2009. Fifty-Eight (58) days later. *(SEE EXHIBIT D)***

6) While "Exhibit (D)" was still in Washington. My Unit Counseler had finally walked down my Tier I was being housed on. I got a BP-8 from her and filed that on August 18, 2009, claiming that staff negligence was the cause of me loseing my eye by the Assault on myself by inmate Eric Azotea. Her response was returned to me on September 10th, 2009. Thirty-Three (33) days later. ***(SEE EXHIBIT E)***

7) On September 3rd, 2009, I was moved (transferred) from the SHU at USP Coleman #2, to the SHU at F.C.C. Coleman (Low). I was told it was in fact due to overcrowding.

8) I received my response to my BP-8 in **"EXHIBIT "E"** on September 10th, 2009 while in the SHU at the F.C.C. Coleman Low Facility. I then filed my BP-9 to Warden Drew at the USP Coleman #2 on September 14th, 2009. Warden Drew received the BP-9. On September 18th, 2009, and responded to the BP-9 on that very same day. ***(SEE EXHIBIT F)***

9) Although warden Drew signed off on my Official BP-9 on September 18th, 2009. i did not receive his response until **October 14th, 2009. Twenty-Seven (27) days later.** ***(SEE EXHIBIT G)***

* **NOTE: REGION ONLY ALLOWS TWENTY (20) DAYS TO APPEAL, INCLUDING MAILING TIME.**

10) This is where the **BREAKDOWN BEGINS!!!** While in the S.H.U. at F.C.C. Coleman (Low), and receiving the Warden's response **LATE.** I had the SHU Lieutenant Mr. S. Duden, come to my cell door, and witness the untimely reciept and delivery of my BP-9 concerning Warden Drew's response from Twenty-Seven (27) days before. The SHU Lieutenant, S.Duden, signed and dated one copy of the Wardens response underneath a hand written paragraph in my handwriting, witnessing and verifying the date, time and location when I received the document. ***(SEE EXHIBIT G)***

ADMINISTRATIVE REMEDY
TIMELINE

11) That same night that I received the Wardens response was delivered to me on October 14th, 2009, and this is the same date and time that I (myself) and Lieutenant S. Duden signed verifying that the Warden's response was in fact delivered to me on this date **10-14-09!** While I was being housed in the SHU pending transfer. According to the date from the Wardens response at the bottom right hand corner, the Warden's response was delivered to me Twenty-Seven (27) days after he signed off on it!

Region only allows me Twenty (20) days to respond, and this includes mailing time. That same night, on **10-14-09,** after my getting the SHU Lieutenant, S. Duden, to sign and verify under color of his employment as a Federal Employee of the Federal Bureau ofPrisons, that I received a required document needed in order to timely file my Administrative Remedy, and his signature that my paperwork arrived late, and on the specified date listed on the paper. I then sat down and wrote a handwritten letter to the Region explaining my situation, and asked that I be granted an extension of time due to extenuateing circumstances beyond my control. I received a response to that handwritten letter on November 2nd, 2009. Nineteen (19) days after I had mailed it, but only the Rejection Notice was returned to me along with the Warden's response that Lieutenant S. Duden andmyself had signed and the handwritten letter was**NOT INCLUDED! *(SEE EXHIBIT H)***

12) While in the SHU at F.C.C. Coleman (Low). And while going through the only avenue I knew available to me, by advising Region of my situation, I was transferred the very next day, on **October 15th, 2009** to F.C.C. Coleman (Medium).. I was released to the Compound at 3:30 P.M. on **10-15-09,** and that night I went to the Commissary and purchased the items (Typing Wheel, Typing Ribbon, Correction Ribbon, Copy Card) I needed to move on with my Administrative Remedy Process. I "Did not wait" for a reply to the handwritten request that I wrote to Region asking for an extension of time, because I knew I was still within my alloted timeline. By rights, I received the Warden's Response while in the SHU pending transfer on October 14, 2009. Iwas transferred the very next day, on October 15, 2009. This was on a Thursday, therefore, my Twenty (20) day appeal process **should have started on 10-16-09.** Region stamped that they received my very first appeal try on November 5th, 2009. From October 16th, 2009 until November 5th, 2009 is Twenty (20) days, ***(SEE EXHIBIT I)***

13) In my Second rejection Notice, Region says that I am not only "Untimely," but will also have to provide them with Official Bureau of Prison's Letterhead, from a staff member, stating that I am not at "fault" for my being "Untimely." I was under the impression that was in fact just what I did with the S.H.U. Lieutenant, S. Duden, when he signed off on the paperwork I received in **"EXHIBIT G."** Region knows it is nearly impossible for an inmate to get staff to give any type of Official letterhead, concerning an Adminstrative Remedy against the F.B.O.P...

ADMINSTRATIVE REMEDY
TIMELINE

At that time, I was on the compund, and I went to my Unit Team, and I requested thisletterhead as I was instructed to do from Region. My Unit Team told me emphaticlly **"NO."**

I then typed a letter to the Region, explaining the S.H.U. Lieu-. tenant's signature, thinking that maybe there was a communication misunderstanding. I also typed up twomore letters to various Government Departments, and included them in with my third(3rd) submittal of my BP-10. This was received by me on November 16th, 2009. I had it back in the U.S. Mail to the Region no later than November 20th, 2009, this was Four (4) days later. ***(SEE EXHIBIT J)***

14) I received my third (3rd) rejection Notice to my BP-10 on January 14th, 2010. It sat in my Unit Team's Office from December 21, 2009, until January 14, 2010.

I once again tryed an honest attempt to get the required B.O.P. letterhead that Region had requested of me from my Unit Team. My Unit Team even signed an Inmate Request From stating that the Legal Department here at F.C.C. Coleman (Medium) advised them **NOT TO PROVIDE ME WITH THIS LETTERHEAD!!** Therefore, I submitted my BP-10 in good faith for the Fourth (4th) time on January 26th, 2010, I had received it on January 14th, 2010, and that would make the timeline Nineteen (19) days that I had it back into Region. Timely by a day. ***(SEE EXHIBIT K)***

15) I received the attempt at my Fourth (4th) BP-10, back in the mail on March 1st, 2010. It had been backin this Institution since February 7th, 2010. but, this time, I am living in a different cell and housing location, and a different Unit Manager. This Unit Manager had no problem providing me with a B.O.P. letterhead, stating the day he gave it to me. I am now awaiting the Captains assistance "Captain McManus," on this date, March 8th, 2010, to obtain the proper paperwork, with the required letterhead as requested by Region, from Lieutenant S. Duden. This will be enclosed with my BP-11 to Washington, with all Exhibits listed previously. Proper letterhead will be listed as, ***(SEE EXHIBIT L)***

CONCLUSION

I would like to conclude this timeline with this thought, and facts. I have done everything in my power, to obtain all of the proper paperwork and documentation as pertains to this matter. I have been shortstopped, and prohibited at every attempt to act within the bureau's proscribed format. I wish to state that I intend to proceed with this matter into Civil litigation, and I intend to name and list all parties privy to this attempt at denying me my right to informal remedy.

Richard E. Hensarling, Jr.

March 8th, 2010.

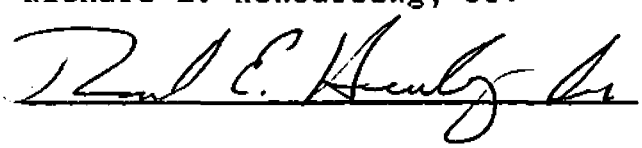


EXHIBIT--(A)

COC 1330.16.A
Janaury 16, 2008
Attachment A

INFORMAL RESOLUTION FORM

NOTICE TO INMATE: Bureau of Prisons Program Statement 1330.13 requires that except as provided in 542.13(b) an inmate shall first present an issue of concern informally to staff and staff shall informally attempt to resolve the issue prior to submitting a BP-9. A separate form must be used for each issue.

****

INSTRUCTIONS: Counselors will complete and attach this form to each Request for Administrative Remedy Form (BP-9) submitted, if not informally resolved.

HENSARLING, R.	09991-018	I-2	R. Hensarling Jr.
Inmate Name	Register No.	Qtrs./Unit	Inmate Signature

1. Specific complaint (one 8 ½" x 11" continuation page may be attached):
THE PSYCHOLOGICAL EFFECTS THAT I AM EXPIERENCING BY BEING DETAINED IN THE S.H.U. AFTER THE LOSS OF MY EYE CAUSE ME UNDUE PAIN AND SUFFERING

2. What efforts have been made by the inmate to resolve the complaint informally? To whom has the inmate spoken?
WARDEN, CAPTAIN, LIEUTENANT, UNIT TEAM, BESIDES LT. LEWIS TOLD ME HIS INVESTIGATION WAS OVER AND DUE 5-29-09. THEN HE GOES ON A 2 WEEK VACATION. SO I SIT HERE 2 ADDITIONAL WEEKS BEING PUNISHED

3. What action does the inmate wish to be taken to correct the issue?
TO BE RETURNED BACK TO THE COMPOUND, OR TRANSFERED IMMEDIATELY TO A COMPOUND I CAN GO ON.

Correctional Counselor's Comments (including actual steps taken to resolve):

Your paper work has already been processed for a transfer

[signature]	7-22-09
Correctional Counselor	Date

Staff Circle One:

Informally Resolved Not Informally Resolved

Unit Manager's Review

[signature]	7-27-09
Unit Manager	Date

Distribution by Correctional Counselor:

1. If complaint is informally resolved, maintain original on file in the Unit.

2. If complaint is not informally resolved, attach original to BP-9 Form and forward to Administrative Remedy Clerk for processing.

	Inf. Resolution Form Issued to Inmate	Inf. Resolution Form Returned to Counselor	BP-9 Issued to Inmate	BP-9 Returned to Counselor	BP-9 Delivered to Admin Remedy Clerk
Date:	6-17-09	6-26-09	7-24-09		
Time:	9:00	10:00am	4:19pm		
Counselor:	[initials]	[initials]	[initials]		

205
209

23

EXHIBIT--(B)

BP-S148.055
SEP 98

INMATE REQUEST TO STAFF CDFRM

U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member)	DATE:
EDUCATION DEPT.	7-11-09
FROM: RICHARD HENSARLING	REGISTER NO.: 09991-018
WORK ASSIGNMENT: UNA	UNIT: S.H.U. C-RANGE CELL # 209

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request. I NEED A ACCESS NUMBER IN ORDER TO BE ABLE TO USE THE COMPUTER IN THE S.H.U. LAW LIBRARY. I'VE ALREADY BEEN CLEARED FOR V.T. AUTOCAD AND ALSO UNIGOR C.N.C.

CLT

C-9

(Do not write below this line)

DISPOSITION:

Never was allowed access to the law library from 4-17-09 to 10-15-09

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

FILE IN SECTION 6 UNLESS APPROPRIATE FOR PRIVACY FOLDER

SECTION 6

Hensarling # 09991-018
ELECTRONIC LAW LIBRARY (ELL)

Please read all steps below in their entirety prior to logging in....

USE OF THE ELL:

1. Type in your USER ID: 09991-018
2. Type in your PASSWORD: **123456789**
3. After your first login, you will be required to change your password. Your new password must be **at least 9 characters in length.**
4. Once you enter your new password, you must confirm on the next line by **re-typing your new password.**
5. On the desktop use the mouse to click Start, then Lexis Nexis to conduct research.
6. Once you are finished with ELL use, click Start, then "Log-out", you will be prompted again whether you want to log-out, click yes.
7. You are done!

UNACCEPTABLE USE OF ELL

- Destruction of, or damage to, equipment, software, or data belonging to the library or other users
- Disruption or unauthorized monitoring of electronic communications
- Unauthorized access, including "hacking"
- Any display of images, sounds or text which intentionally or unintentionally create an atmosphere of discomfort or harassment of others
- Sharing of passwords or use of a terminal logged in under any other user
- Unauthorized reproduction or dissemination of copy-right protected material
- Unauthorized disclosure, use, and dissemination
- Any use of information that may disrupt the orderly running of the institution

Unacceptable use of the computer as outlined above will result in disciplinary action.

EXHIBIT--(C)

UNITED STATES GOVERNMENT
MEMORANDUM
FEDERAL BUREAU OF PRISONS

DATE September 14, 2009

REPLY TO ATTN OF Administrative Remedy Coordinator
National Inmate Appeals, Central Office

SUBJECT Administrative Remedy Appeal - Case No. #

Richard Henisaring, Reg. No.# 09991-018
FCC Coleman, FL - USP #2

M-1 Copy

_____1. Your appeal was answered on _____. If you have not received your copy by now, you may ask the institution Administrative Remedy Coordinator to provide you with a copy from the Warden's Administrative Remedy File.

_____ 2. The appeal you reference was filed on _____response is still in progress. If more than 40 days have elapsed since the filing date, you are entitled to consider your appeal denied. However, some cases cannot be decided within this time period. In that event, the time for response may be extended for an additional 20 days. Staff will provide you with a computer-generated notice of extension to inform you of the extension.

_____ 3. Our records indicate that the appeal you reference has not been filed with this office.

_____4. You have not provided sufficient information for us to respond to your inquiry. If your inquiry concerns an administrative remedy, please provide the case number, the date filed in this office or date mailed by you, your name and register number, and the subject of your administrative remedy. If you cannot provide all of this information, please provide as much as possible.

__X__5. A review of your inquiry reveals it contains issues you should first bring to the attention of institution staff. If you are unable to resolve the issue(s) informally, you may present your complaint to the Warden via the Administrative Remedy Procedure. This procedure is available to inmates confined in federal facilities to complain about any aspect of their confinement.

_____6. Extensions are granted only if an inmate's submission is untimely by no fault of his own. Requests for extensions are only considered when submitted with the complete appeal packet.

_____7. Central Office Administrative Remedy Appeal responses are the final agency position. If you are dissatisfied with the response, you may pursue any legal recourse you deem appropriate.

_____8. We can only address issues within the jurisdiction of the Federal Bureau of Prisons. Your issue is one for _____ jurisdiction.

_____9. This appeal was rejected and returned to you on _____.

____10. Other:

(25)

RICHARD HEWSARLING
#09991-018
F.C.C. U.S.P. #2
P.O. BOX # 1034
COLEMAN, FL. 33521

RECEIVED
AUG 19 2009
Administrative
Remedies

AUGUST 3, 09

FEDERAL BUREAU OF PRISONS
OFFICE OF GENERAL COUNSEL
320 FIRST ST., N.W.
WASHINGTON, D.C. 20534

DEAR SIR,

IM CURRENTLY BEING HOUSED IN S.H.U. AT U.S.P. COLEMAN #2. I AM BYPASSING THE ADMINISTRATIVE REMEDIES PROCESS BECAUSE I CANT EVEN GET STAFF HERE TO ANSWER A BP-S148.005 (COP-OUT) I HAVE BEEN RULED THE VICTIM OF AN ASSAULT WHICH CAUSED ME TO HAVE MY LEFT EYE SURGICALLY REMOVED BACK IN 05-05-09 THERE HAS BEEN NO FORWARD PROGRESS MADE SINCE THEN. THE MEDICAL DEPT. IS SO FAR OUT OF THE LOOP THAT THEY ARE PRESCRIBING ME MEDIATION TO APPLY TO A PROSTHETIC EYE. I DONT HAVE AN EYE, WHAT I HAVE IS A BIG HOLE IN MY HEAD. ALL BECAUSE OF THE INCOMPETENCE, AND INEXPERIENCE OF THE STAFF HERE AT COLEMAN USP #2. THE HYGIENE CONDITIONS ARE HORRENDOUS HERE.

RICHARD HEWSARLING
#09991-018

(26)

EXHIBIT--(D)

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: OCTOBER 8, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN LOW FCI UNT: A-3 QTR: 203-005LAD
P.O. BOX 1021
COLEMAN, FL 33521

3-2

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 556980-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : AUGUST 31, 2009
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: THE ISSUE YOU RAISED IS NOT SENSITIVE. HOWEVER, WE RETAINED YOUR REQUEST/APPEAL ACCORDING TO POLICY. YOU SHOULD FILE A REQUEST OR APPEAL AT THE APPROPRIATE LEVEL VIA REGULAR PROCEDURES.

REMARKS : RECORDS INDICATE YOU HAVE ADDRESSED THIS ISSUE AT THE INSTITUTION LEVEL. SUBMIT YOUR APPEAL TO THE REGION FOR RESPONSE.

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: HENSARLING, RICHARD, E (LAST NAME, FIRST, MIDDLE INITIAL) 09991-018 (REG. NO.) I-2 (UNIT) F.C.C. COLEMAN U.S.P #2 (INSTITUTION)

Part A - REASON FOR APPEAL

I'VE ELECTED TO BYPASS THE STANDARD ADMINISTRATIVE REMEDY PROCESS AND FILE THIS AS A SENSITIVE (BP-11) DUE TO THE NATURE OF ITS CONTEXT. ON 4-17-09 I WAS ASSAULTED BY INMATE ERIC AZOTEA WHILE SITTING IN MY CELL (#232/I-2). WITH A WEAPON HE MADE OUT OF A COMINATION LOCK AND BELT. STAFF MEMBERS WERE AWARE OF HIS VIOLENT DISPOSITION TOWARDS ME, AND FAILED TO REPORT OR DO ANYTHING ABOUT IT. THEIR LACK OF EXPIERENCE, PROFESSIONAL BEHAVIOR, AND ABILITY TO DUE THEIR JOB. CAUSED ME TO LOSE MY LEFT EYE.

8-23-09
DATE

Richard E. Hensarling
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

GENERAL COUNSEL

FIRST COPY: WASHINGTON FILE COPY

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: (LAST NAME, FIRST, MIDDLE INITIAL) (REG. NO.) (UNIT) (INSTITUTION)

SUBJECT:

(SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL)

28

EXHIBIT--(E)

COC 1330.16.A
Janaury 16, 2008
Attachment A

INFORMAL RESOLUTION FORM

NOTICE TO INMATE: Bureau of Prisons Program Statement 1330.13 requires that except as provided in 542.13(b) an inmate shall first present an issue of concern informally to staff and staff shall informally attempt to resolve the issue prior to submitting a BP-9. A separate form must be used for each issue.

****

INSTRUCTIONS: Counselors will complete and attach this form to each Request for Administrative Remedy Form (BP-9) submitted, if not informally resolved.

Hensarling	09991-018	I-2	[signature]
Inmate Name	Register No.	Qtrs./Unit	Inmate Signature

1. Specific complaint (one 8 ½" x 11" continuation page may be attached)
F.C.C. COLEMAN U.S.P.#2 STAFF HAS NEGLECTED TO PROVIDE ME ANY PROTECTION, WHICH HAS CAUSED ME TO LOSE MY LEFT EYE.

2. What efforts have been made by the inmate to resolve the complaint informally? To whom has the inmate spoken?
CERTAIN STAFF MEMBERS WERE AWARE OF INMATE ERIC AZOTEAS VIOLENT DISPOSITION TOWARDS ME, AND FAILED TO ACT OR REPORT IT.

3. What action does the inmate wish to be taken to correct the issue?
MY LEFT EYE REPLACED WITH A PROSTHETIC VERSION, AND TO AGREE ON SOME TYPE MONETARY COMPESATION, FOR FUTURE REHAB AND MEDICAL COST.

Correctional Counselor's Comments (including actual steps taken to resolve):

There is no indication that staff had any knowledge prior to the incident between you and the other inmate.

[signature] 9-9-09
Correctional Counselor Date

Staff Circle One:
Informally Resolved Not Informally Resolved

Unit Manager's Review
[signature] 9/9/09
Unit Manager Date

Distribution by Correctional Counselor:

1. If complaint is informally resolved, maintain original on file in the Unit.

2. If complaint is not informally resolved, attach original to BP-9 Form and forward to Administrative Remedy Clerk for processing.

	Inf. Resolution Form Issued to Inmate	Inf. Resolution Form Returned to Counselor	BP-9 Issued to Inmate	BP-9 Returned to Counselor	BP-9 Delivered to Admin Remedy Clerk
Date:	8/8/09	Unknown	9-10-09	9-13-09	
Time:	10:50	Unknown	845	1:45	
Counselor:	[initials]	Unknown	[initials]	[initials]	

24

EXHIBIT---(F)

DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: HENSARLING RICHARD E. | 09991-018 | I-2 | U.S.P. #2 COLEMAN
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A- INMATE REQUEST

COUNSLERS RESPONSE TO MY BP-8 AND UNWILLINGNESS TO INVESTIGATE AND SEEK OUT THE TRUTH. IS A PRIME EXAMPLE AS TO WHY I WAS ASSAULTED ON 4-17-09 CAUSING THE LOSS OF MY LEFT EYE. UNICOR FOREMAN WERE AWARE, PSYCHOLOGY WAS AWARE, AND THE UNIT OFFICER WORKING I-2 ON THE NIGHT OF 4-17-09 HAD HE BEEN ON THE FLOOR MAKING ROUNDS COULD HAVE PREVENTED THE INCIDENT.

9-14-09
DATE

Richard E. Hensarling
SIGNATURE OF REQUESTER

Part B- RESPONSE

BP-9

See attached response.

Rec'd 9/18/09

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 556980-F1

CASE NUMBER: 556980-F1

Part C- RECEIPT

Return to: _____ | _____ | _____ | _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

FCC COLEMAN
BP-9 Response

CASE NUMBER: **556980-F1**

This is in response to your Request for Administrative Remedy, receipted in this office on September 18, 2009, in which you requested administrative assistance regarding alleged staff misconduct. You allege staff were aware of the inmate violent disposition toward you and also, staff not making rounds in unit, is the cause of you losing your eye.

Allegations of staff misconduct are taken seriously. Your request was reviewed and forwarded to an appropriate office for further disposition. Complaints against staff are never ignored; however, inmates are not advised of the outcome of these investigations.

Based on the above information, this response is for **Informational Purposes Only.**

If you are dissatisfied with this response, you may appeal by filing a BP-10 to the BUREAU OF PRISONS, SOUTHEAST REGIONAL OFFICE, ATTN: REGIONAL DIRECTOR, 3800 Camp Creek Parkway, SW, Building 2000, Atlanta, GA 30331-6226, within (20) calender days from the date of this response.

D. B. Drew, Warden

9/18/09
Date


EXHIBIT (G)

RECEIPT - ADMINISTRATIVE REMEDY

DATE: FEBRUARY 16, 2010

FROM: ADMINISTRATIVE REMEDY COORDINATOR
COLEMAN LOW FCI

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: A 3-4 QTR: A06-050U

THIS ACKNOWLEDGES THE RECEIPT OF THE ADMINISTRATIVE REMEDY REQUEST IDENTIFIED BELOW:

REMEDY ID : 556980-F1
DATE RECEIVED : SEPTEMBER 18, 2009
RESPONSE DUE : OCTOBER 8, 2009
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

I received this Paper from A-House Sec. on Feb. 16th 2010 at 2:30 PM

FCC COLEMAN
BP-9 Response

RICHARD HENSARLING
#09991-018
CASE NUMBER: **556980-F1**

This is in response to your Request for Administrative Remedy, receipted in this office on September 18, 2009, in which you requested administrative assistance regarding alleged staff misconduct. You allege staff were aware of the inmate violent disposition toward you and also, staff not making rounds in unit, is the cause of you losing your eye.

Allegations of staff misconduct are taken seriously. Your request was reviewed and forwarded to an appropriate office for further disposition. Complaints against staff are never ignored; however, inmates are not advised of the outcome of these investigations.

Based on the above information, this response is for **Informational Purposes Only.**

If you are dissatisfied with this response, you may appeal by filing a BP-10 to the BUREAU OF PRISONS, SOUTHEAST REGIONAL OFFICE, ATTN: REGIONAL DIRECTOR, 3800 Camp Creek Parkway, SW, Building 2000, Atlanta, GA 30331-6226, within (20) calender days from the date of this response.

D. B. Drew, Warden

Date

I RICHARD E. HENSARLING JR. RECEIVED THIS PAPERWORK WHILE IN THE S.H.U. AT COLEMAN F.C.C. LOW THE EVENING OF 10-14-09. I AM PENDING TRANSFER AND HAVE ALREAD, BEEN RE-DESIGNATED, THEREFORE I AM REQUESTING A EXTENSION, THANK YOU.

S. DUDEN SHO LT.
10/14/2009

RECEIVED
OCT 20
REGIONAL COUNSEL'S OFFICE
BUREAU OF PRISONS

S.H.U. LIEUTENANT INITIALED AND VERIFIED THAT THIS WAS THE DATE I RECEIVED THIS RESPONSE

EXHIBIT--(H)

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: OCTOBER 21, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: B 1-2 QTR: B03-980L
P.O. BOX 1022
COLEMAN, FL 33521

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 556980-R1 REGIONAL APPEAL
DATE RECEIVED : OCTOBER 20, 2009
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. REGIONAL APPEALS (BP-10) MUST BE RECEIVED WITHIN 20 DAYS OF THE WARDEN/CCM RESPONSE OR RECEIPT OF THE DHO REPORT. THIS TIME INCLUDES MAIL TIME.

I RECEIVED THE WARDENS RESPONSE TO MY BP-9 27 DAYS FROM THE DATE THAT HE SIGNED SIGNED OFF ON IT

3-7-8J

FCC COLEMAN
BP-9 Response

RICHARD HENSARLING
#09991-018
CASE NUMBER: **556980-F1**

This is in response to your Request for Administrative Remedy, receipted in this office on September 18, 2009, in which you requested administrative assistance regarding alleged staff misconduct. You allege staff were aware of the inmate violent disposition toward you and also, staff not making rounds in unit, is the cause of you losing your eye.

Allegations of staff misconduct are taken seriously. Your request was reviewed and forwarded to an appropriate office for further disposition. Complaints against staff are never ignored; however, inmates are not advised of the outcome of these investigations.

Based on the above information, this response is for **Informational Purposes Only.**

If you are dissatisfied with this response, you may appeal by filing a BP-10 to the BUREAU OF PRISONS, SOUTHEAST REGIONAL OFFICE, ATTN: REGIONAL DIRECTOR, 3800 Camp Creek Parkway, SW, Building 2000, Atlanta, GA 30331-6226, within (20) calender days from the date of this response.

D. B. Drew, Warden

9/30/09
Date

I RICHARD E. HENSARLING JR. RECEIVED THIS PAPERWORK WHILE IN THE S.H.U. AT COLEMAN F.C.C. LOW THE EVENING OF 10-14-09. I AM PENDING TRANSFER AND HAVE ALREADY BEEN RE-DESIGNATED, THEREFORE I AM REQUESTING A EXTENSION, THANK YOU.
S. DUDEN SHU LT.
10/14/2009

RECEIVED
OCT 20 2009

S.H.U. LIEUTENANT INITIALED AND VERIFIED THAT THIS WAS THE DATE I RECEIVED THIS RESPONSE

4TD

EXHIBIT--(I)

OCTOBER 28,09

RICHARD E. HENSARLING Jr.
#09991-018
FEDERAL CORRECTIONAL COMPLEX
MEDIUM
P.O.BOX #1032
COLEMAN, FLORIDA 33521

REGIONAL DIRECTOR

On 10-14-09 I sent you the wardens response to my BP-9 from the S.H.U. at F.C.C. COLEMAN LOW asking for a extension. On 10-15-09 they transfered me to F.C.C. COLEMAN MEDIUM. I will not wait on your response granting my extension because I had sufficent grounds for it to be granted. I will at this point move forward because I have received my property and am in a position to continue my ADMINSTRATIVE REMEDY PROCESS. I soon wait your decision and reply to my BP-10. THANK YOU.

RESPECTFULLY
RICHARD E. HENSARLING Jr.
#09991-018

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: HENSARLING RICHARD E. (LAST NAME, FIRST, MIDDLE INITIAL) 09991-018 (REG. NO.) B-2 (UNIT) COLEMAN MED. (INSTITUTION)

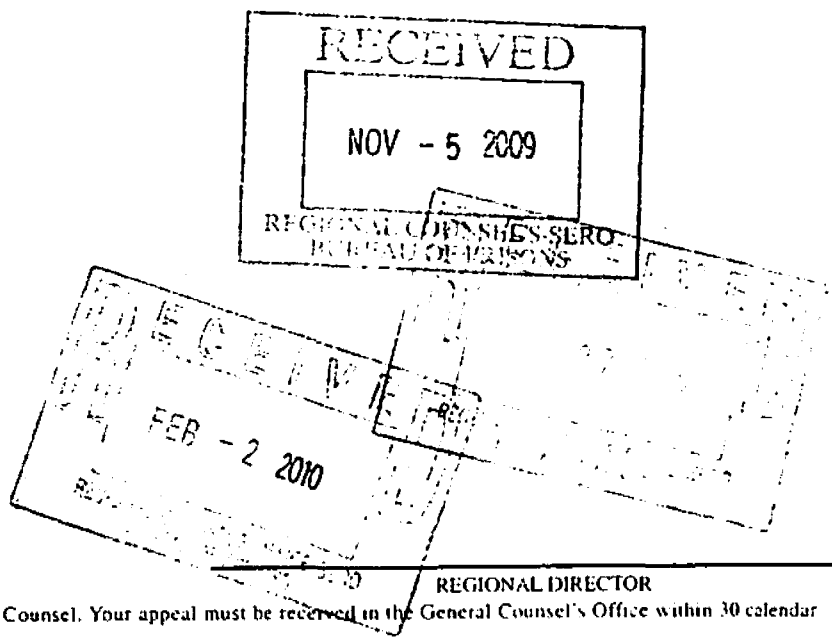
Part A - REASON FOR APPEAL

I UNDERSTAND AND AGREE THAT MY ALLEGIATIONS AS TO STAFF BEING AWARE THAT THERE WAS A PONTENTIAL THREAT TOWARDS ME BY INMATE ERIC AZOTEA IS NOT AND SHOULD NOT BE TAKEN LIGHTLY. JUST AS THE PERMANET DAMAGE HE INFLICTED UPON ME THROUGH HIS ACT OF VIOLENCE CAUSING A CASE OF "MAYHEM" IN MY LIFE SHOULD BE TAKEN JUST AS SERIOUS. WHEN A VIOLENT CRIME HAS BEEN MADE AGAINST A PERSON CAUSING THEM SEVERE PERMANET DAMAGE, AND THAT PERSON DOES NOT HAVE THE FINANCIAL MEANS TO HIRE PROFESSIONAL COUNSEL, AND CAN NOT BE APPOINTED ONE BECAUSE OF THE POISTION THAT HIS OR HER LIFE IS IN (INCARCERATED) DOES NOT MEAN THAT THEY SHOULD BE TAKEN ADVANTAGE OF. I MUST REPERSENT MYSELF IN THIS CRIMINAL MATTER, AND THAT IS WHY CONGRESS INACTED LAWS SUCH AS THE FREEDOM OF INFORMATION AND PRIVACY OF 1974.

10-28-09
DATE

Richard E. Hensarling
SIGNATURE OF REQUESTER

Part B - RESPONSE



DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: (LAST NAME, FIRST, MIDDLE INITIAL) (REG. NO.) (UNIT) (INSTITUTION)

SUBJECT:

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

BP-229(13)

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: NOVEMBER 6, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: B 1-2 QTR: B03-980L
P.O. BOX 1022
COLEMAN, FL 33521

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 556980-R2 REGIONAL APPEAL
DATE RECEIVED : NOVEMBER 5, 2009
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. REGIONAL APPEALS (BP-10) MUST BE RECEIVED WITHIN 20 DAYS OF THE WARDEN/CCM RESPONSE OR RECEIPT OF THE DHO REPORT. THIS TIME INCLUDES MAIL TIME.

REJECT REASON 2: SEE REMARKS.

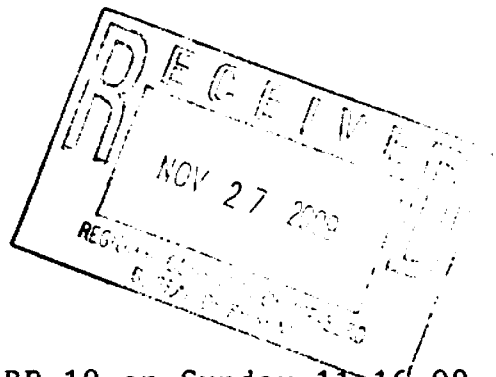
REMARKS : YOU MUST PROVIDE STAFF VERIFICATION ON BOP LETTERHEAD THAT YOU ARE NOT RESPONSIBLE FOR THE UNTIMELY FILING OF THIS APPEAL.

Since this Rejection I have Resubmitted my BP-10 no answer as of date 1-5-2010

EXHIBIT--(J)

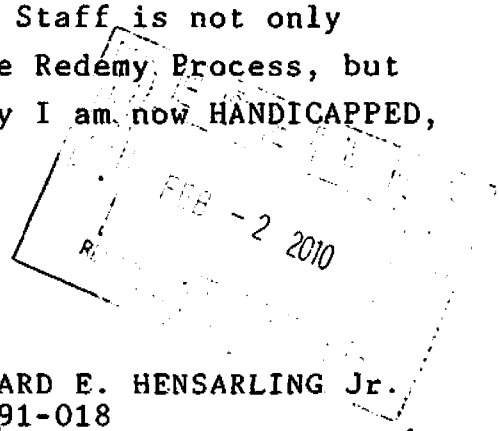
RICHARD E. HENSARLING Jr.
#09991-018
FEDERAL CORRECTIONAL COMPLEX
MEDIUM B-2
P.O. BOX#1032
COLEMAN,FLA. 33521

Nov. 20,09



REGIONAL DIRECTOR:

Sir I received your response to my BP-10 on Sunday 11-16-09. In your REMARKS AS TO WHY MY 10 WAS DENIED, you said that I must provide staff verification as to why I am not responsible for the untimely receival of my BP-10. Attached you will find (4) four copies of the Wardens response to my BP-9. If you will notice his response to my BP-9 is dated 9-18-09. Below that you will see written in my handwriting the location of where I was at when I received his response and the date, and to verify that the information that I provided is true and correct you will find the signature of S.H.U. Lieutenant S.Duden on the date he provided. I feel that S.H.U. Lt. Duden being a sworn officer of the law, an employe of the B.O.P., and Representing the Department Of Justice should be verification enough that my claim is true and correct. Staff is not only RESPONSIBLE for IMPEDING my Administrative Redemy Process, but THEY are also the causing factor as to why I am now HANDICAPPED, and DISABLED for the rest of my LIFE.



RICHARD E. HENSARLING Jr.
#09991-018

FCC COLEMAN
BP-9 Response

RICHARD HENSARLING
#09991-018
CASE NUMBER: **556980-F1**

This is in response to your Request for Administrative Remedy, receipted in this office on September 18, 2009, in which you requested administrative assistance regarding alleged staff misconduct. You allege staff were aware of the inmate violent disposition toward you and also, staff not making rounds in unit, is the cause of you losing your eye.

Allegations of staff misconduct are taken seriously. Your request was reviewed and forwarded to an appropriate office for further disposition. Complaints against staff are never ignored; however, inmates are not advised of the outcome of these investigations.

Based on the above information, this response is for **Informational Purposes Only.**

If you are dissatisfied with this response, you may appeal by filing a BP-10 to the BUREAU OF PRISONS, SOUTHEAST REGIONAL OFFICE, ATTN: REGIONAL DIRECTOR, 3800 Camp Creek Parkway, SW, Building 2000, Atlanta, GA 30331-6226, within (20) calender days from the date of this response.

D. B. Drew, Warden

9/18/09
Date

I RICHARD E. HENSARLING QR RECEIVED THIS PAPERWORK WHILE IN THE S.H.U. AT COLEMAN F.C.C. LOW THE EVENING OF 10-14-09. I AM PENDING TRANSFER AND HAVE ALREAD, BEEN RE-DESIGNATED, THEREFORE I AM REQUESTING A EXTENSION, THANK YOU.

S. DUDEN SHU LT.
10/14/2009

RECEIVED
OCT 20
REGIONAL COUNSEL'S OFFICE
BUREAU OF PRISONS

S.H.U. LIEUTENANT INITIALED AND VERIFIED THAT THIS WAS THE DATE I RECEIVED THIS RESPONSE

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: HENSARLING RICHARD E. (LAST NAME, FIRST, MIDDLE INITIAL) 09991-018 (REG. NO.) B-2 (UNIT) COLEMAN MED. (INSTITUTION)

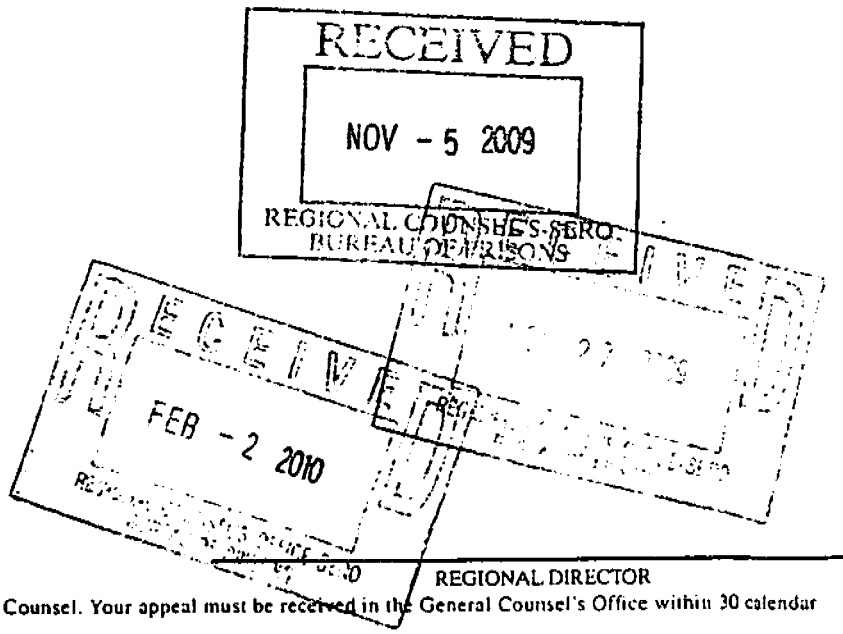
Part A - REASON FOR APPEAL

I UNDERSTAND AND AGREE THAT MY ALLEGIATIONS AS TO STAFF BEING AWARE THAT THERE WAS A PONTENTIAL THREAT TOWARDS ME BY INMATE ERIC AZOTEA IS NOT AND SHOULD NOT BE TAKEN LIGHTLY. JUST AS THE PERMANET DAMAGE HE INFLICTED UPON ME THROUGH HIS ACT OF VIOLENCE CAUSING A CASE OF "MAYHEM" IN MY LIFE SHOULD BE TAKEN JUST AS SERIOUS. WHEN A VIOLENT CRIME HAS BEEN MADE AGAINST A PERSON CAUSING THEM SEVERE PERMANET DAMAGE, AND THAT PERSON DOES NOT HAVE THE FINANCIAL MEANS TO HIRE PROFESSIONAL COUNSEL, AND CAN NOT BE APPOINTED ONE BECAUSE OF THE POISTION THAT HIS OR HER LIFE IS IN (INCARCERATED) DOES NOT MEAN THAT THEY SHOULD BE TAKEN ADVANTAGE OF. I MUST REPERSENT MYSELF IN THIS CRIMINAL MATTER, AND THAT IS WHY CONGRESS INACTED LAWS SUCH AS THE FREEDOM OF INFORMATION AND PRIVACY OF 1974.

10-28-09
DATE

Richard E. Hensarling
SIGNATURE OF REQUESTER

Part B - RESPONSE



DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

REJECTION NOTICE - ADMINISTRATIVE REMEDY 1352

DATE: DECEMBER 21, 2009

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: B 1-2 QTR: B03-980L
P.O. BOX 1022
COLEMAN, FL 33521

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 556980-R3 REGIONAL APPEAL
DATE RECEIVED : NOVEMBER 27, 2009
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. REGIONAL APPEALS (BP-10) MUST BE RECEIVED WITHIN 20 DAYS OF THE WARDEN/CCM RESPONSE OR RECEIPT OF THE DHO REPORT. THIS TIME INCLUDES MAIL TIME.

REJECT REASON 2: SEE REMARKS.

REMARKS : YOU MUST PROVIDE STAFF VERIFICATION ON BOP LETTERHEAD THAT YOU ARE NOT RESPONSIBLE FOR THE UNTIMELY FILING OF THIS APPEAL.

My Copy

RICHARD E. HENSARLING Jr.
#09991-018
FEDERAL CORRECTIONAL COMPLEX
MEDIUM
P.O.BOX #1032
COLEMAN,FLORIDA 33521

DEAR:

My request for an extension on my ADMINISTRATIVE REMEDY PROCESS BP-10 was denied due to UNTIMELY SUBMITTAL! I CLEARLY SHOWED that the WARDENS RESPONE was delivered to me in a untimely fashion. In the submittal of my BP-10 I provided a a WRITTEN SIGNATURE from a sworn officer of the law stating the date that I received the WARDENS RESPONSE TO MY BP-9, yet I am still being denied access to the courts. Therfore I say that the B.O.P.s ADIMINSTRATIVE REMEDY PROCESS is not only FLAWED, but PREJUDICE as well. I have followed all guidelines required by the B.O.P. in filing my ADMINISTRATIVE REMEDIES, only to be RIDICULOUSLY DENIED !

Received Wardens Respone on 10-14-09 MAILED BP-10 CERTIFIED MAIL (TRACKING # 7009 1680 0002 1804 0291) on 10-30-09 thats exactlly 17 days from the date I received the Wardens Response while in S.H.U. awaiting transfer. Records will reflect that I didnt even get my property until 10-21-09.

It is a SHAME that the B.O.P. has to result in INTIMADATION METHODS to DISCOURAGE INMATES from PURSUING THEIR LEGAL RIGHTS. When a CRIMINAL ACT has been COMMITTED AGAINST THEM due to the NEGLIGENCE OF B.O.P. STAFF !

Im HERE, Iam the one that this CRIMINAL ACT WAS COMMITTED UPON, I AM NOT GOING AWAY !

RICHARD E. HENSARLING Jr.
#09991-018

CC:WARDEN DARRYL B. DREW
F.B.I. TAMPA OFFICE
PROSECUTORS OFFICE OCALA
SENATOR D. CRIST
SENATOR CHARELS S. DEAN Sr.
SENATOR ANDY GARDINER
SENATOR ARTHENIA L. JOYNER
SENATOR EVELYN J. LYNN
F.A.M.M. WASHINGTON D.C.

My Copy

RICHARD E. HENSARLING Jr.
#09991-018
FEDERAL CORRECTIONAL COMPLEX
MEDIUM
P.O.BOX#1032
COLEMAN,FLORIDA 33521

DEAR: Senators / F.B.I. / Prosecutors

I AM A Resident of the STATE OF FLORIDA, And are currently in custody at the FEDERAL CORRECTIONAL COMPLEX COLEMAN FLORIDA. On 4-17-09 while being housed at one of the two UNITED STATES PENITENTIARIES, I SUFFERD FROM A BLATANT CASE OF "MAYHEM". The Institution conducted a Investigation into this matter. Their final conclusion was that I was the VICTIM OF A ASSAULT. I am not satisfied with the way that this Investigation was conducted, I feel that it was not Investigated THOROUGHLY by the staff at COLEMAN U.S.P.#2. The reason that I say this is because, I MYSELF NEVER GAVE A STATEMENT. I Refused to do so for two reasons. The first being that I was in FEAR for my life, And second being I feel that a CRIMINAL ACT has been committed against me,and not only can I not afford LEGAL REPERSENTATION.There has been none present throughout the course of this matter for me to seek advice from. This matter consist of more than just another inmate assaulting me. STAFF MEMBERS WERE AWARE OF THE POTENTIAL THREAT AND DANGER THAT THIS INMATE POSED DAYS BEFORE THE ASSAULT TOOK PLACE. Why didnt I just advise staff that I was in fear and have tham place me in PROTECTIVE CUSTODY ? It isnt as easily done as you would think in this enviorment. The CHECK IN (as we call it) rate at COLEMAN U.S.P.#2 is astronomical. The SPECIAL HOUSING UNIT (the hole) stays full to capacity so much that they have to use the SPECIAL HOUSING UNIT at the LOW facility here to house PEN#1 and PEN#2 inmates.

MY RESPONSIBILITY NOW is to bring this matter to the proper OUTSIDE LAW ENFORCEMENT AUTHORITIES for a thorough and unbiased Investigation. I will show that B.O.P. OFFICERS in their inability to ensure a SAFE AND SECURE ENVIORMENT. Allowed a UNSTABLE DISTRAUGHT INMATE TO BRUTALLY ATTACK ME.

(45)

This attack resulted in me being airlifted out of the Institution to a local Hospital. At a latter date I had to return to have my LEFT EYE SURGICALLY REMOVED. This assault inflicted on me has left me PERMANTELY DISFIGURED AND WITH A DISABILITY FOR THE REST OF MY LIFE.

That is why I am requesting a outside Investigation into this matter. I have started the ADMINISTRATIVE REMEDY PROCESS REQUIRED BY THE B.O.P., NOT ONLY DO I NOT HAVE ANY FAITH IN THEIR PROCESS, I AM ALREADY BEING SHUNED AND TAKEN ADVANTGE OF. In His first written response to me WARDEN DREW; COLEMAN U.S.P.#2 has stated to my claim of staff knowledge QUOTE "COMPLAINTS AGAINST STAFF ARE NEVER IGNORED; HOWEVER, INMATES ARE NOT ADVISED TO THE OUTCOME OF THESE INVESTIGATIONS".

FOR THE SAKE OF GOD ! I was BRUTALLY ATTACKED BY A INMATE WHILE SITTING IN THE CONFINES OF MY ASSIGNED CELL.AND YOU ARE GOING TO TELL ME THAT I AM NOT PRIVY TO THE OUTCOME OF THIS INVESTIGATION. HOW CAN THE BURDEN OF PROOF TO PROVE MY CLAIM REST ON ME WHEN THE CARDS ARE STACKED AGAINST ME ? They are going to protect their own kind.

Inside each housing unit there are SEVERAL SECURITY CAMERAS. One was right outside my cell door. My cell door was open when this incident took place. I know that the cameras caught all of the incident on tape because Lieutenant Lewis from S.I.S. Investigation came to my Hospital room saturday morning and asked me what happened. I told him " THAT I FELL DOWN THE STAIRS" I did so because I was in fear of my life if they put me back on the compound. Lieutenant Lewis asked me that if he went back and rolled the security cameras back is that what he would see? I told him I was not sure. He then left the hospital only to return a few hours later at which time he told me QUOTE " I HAVE IT ALL ON FILM, ERIC AZOTEA CAME TO YOUR CELL AND HIT YOU IN THE FACE WITH A LOCK." From that point on I knew that a crime had been committed against me, and I have made no other statement. That same lieutenant that came to the hospital later confirmed on 6-24-09 that I was the victim of an assault.

Having suffered this BRUTAL ATTACK and undergoing this legal battle by myself I am asking that YOU as a PUBLIC OFFICAL assist me in securing the EVIDENCE IN THIS MATTER, such as the security camera tapes, and the computer log on off times that the unit officer was on the computer the evening of 4-17-09. I would also be requesting to see any B.O.P. CORRECTIONAL OFFICER OPERATIONS MANUAL that exsist. I have had veteran officers tell me that in a HIGH SECURITY MAXIMUM PENITENTIARY ENVIORMENT that there are suppose to be TWO OFFICERS working each cell block where there are a 128 inmates housed. I have also been told by staff members that due to budget cuts, lack of people wanting to work that position, and the problems that the BUREAU OF PRISIONS are expiercing with having to lower their hiring standards to attract employes is causing a big strain on the security measures. I would hate to know that I suffered PERMANET DAMAGE due to the lack of professional-ism ! But that is exactly the case. All this information should be available to me under the FREEDOM of Information Act and Privacy Act of 1974. But as I stated earlier, through my ADIMINSTRATIVE REMEDY PROCESS the system is trying to cut me off.

The TREATMENT that I have received from STAFF and MEDICAL DEPT. at COLEMAN U.S.P.#2 through out this ordeal has been INHUMANE as well as HORRENDOUS. Iv̀e undergone major PHYSICAL DAMAGE as well as MENTAL DAMAGE, And still seven months later I have a EMPTY EYE SOCKET. The MEDICAL DEPT. tells me that I have to wait to be approved by a MEDICAL COMMITTE for a PROSTHETIC EYE.

As a REPERSENTIVE OF THE STATE OF FLORIDA AND UNITED STATES GOVERNMENT "PLEASE" IVESTIGATE THIS MATTER FOR ME, And any parities involed see that they are brought up on CRIMNIAL CHARGES OR REPERMAINEDED. I will await your reply. THANK YOU!

RESPECTFULLY:
RICHARD E. HENSARLING Jr.
#09991-018

EXHIBIT--(K)

"Excessive bail shall not be required, nor excessive fines imposed, nor any cruel and unusual punishment should not be given."
U.S. CONSTITUTION: EIGHTH AMENDMENT

U.S. Department of Justice

Regional Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal

From: HENSARLING RICHARD E. | 09991-018 | B-2 | COLEMAN MED.
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A - REASON FOR APPEAL

I UNDERSTAND AND AGREE THAT MY ALLEGIATIONS AS TO STAFF BEING AWARE THAT THERE WAS A PONTENTIAL THREAT TOWARDS ME BY INMATE ERIC AZOTEA IS NOT AND SHOULD NOT BE TAKEN LIGHTLY. JUST AS THE PERMANET DAMAGE HE INFLICTED UPON ME THROUGH HIS ACT OF VIOLENCE CAUSING A CASE OF "MAYHEM" IN MY LIFE SHOULD BE TAKEN JUST AS SERIOUS. WHEN A VIOLENT CRIME HAS BEEN MADE AGAINST A PERSON CAUSING THEM SEVERE PERMANET DAMAGE, AND THAT PERSON DOES NOT HAVE THE FINANCIAL MEANS TO HIRE PROFESSIONAL COUNSEL, AND CAN NOT BE APPOINTED ONE BECAUSE OF THE POISTION THAT HIS OR HER LIFE IS IN (INCARCERATED) DOES NOT MEAN THAT THEY SHOULD BE TAKEN ADVANTAGE OF. I MUST REPERSENT MYSELF IN THIS CRIMINAL MATTER, AND THAT IS WHY CONGRESS INACTED LAWS SUCH AS THE FREEDOM OF INFORMATION AND PRIVACY OF 1974.

10-28-09
DATE

Richard E. Hensarling
SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED
NOV - 5 2009
REGIONAL COUNSEL-SERO
BUREAU OF PRISONS

RECEIVED
NOV 27 2009
REGIONAL COUNSEL SOUTHEAST REGION
BUREAU OF PRISONS

RECEIVED
FEB - 2 2010
REGIONAL COUNSEL SOUTHEAST REGION
BUREAU OF PRISONS

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to:
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

BP-230(13)

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: FEBRUARY 2, 2010

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: B 1-2 QTR: B03-980L
P.O. BOX 1022
COLEMAN, FL 33521

A-3 Com

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 556980-R4 REGIONAL APPEAL
DATE RECEIVED : FEBRUARY 2, 2010
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. REGIONAL APPEALS (BP-10) MUST BE RECEIVED WITHIN 20 DAYS OF THE WARDEN/CCM RESPONSE OR RECEIPT OF THE DHO REPORT. THIS TIME INCLUDES MAIL TIME.

REJECT REASON 2: SEE REMARKS.

REMARKS : YOU MUST PROVIDE STAFF VERIFICATION ON BOP LETTERHEAD THAT YOU ARE NOT RESPONSIBLE FOR THE UNTIMELY FILING OF THIS APPEAL.

RICHARD E. HENSARLING Jr.
#09991-018
FEDERAL CORRECTIONAL COMPLEX
MEDIUM B-2
P.O.BOX#1032
COLEMAN,FLORIDA 33521

JANUARY 25,2010

BUREAU OF PRISONS
SOUTHEAST REGIONAL OFFICE
Att:REGIONAL DIRECTOR
3800 CAMPCREEK Pwky.
S.W.Bld.2000
Atlanta,Ga.30331-6226

Dear,Regional Director

I have decided to resubmitt this BP-10 one more time in a honest effort to allow the BUREAU OF PRISONS to investigate this matter in the way that it should have been handled from the onset of this incident.

Attached you will find documents where I have made a attempt to provide you with the B.O.P. letterhead that you are asking for. Unfortunatley I did not succeed,but not from a lack of not trying. I believe that you in your attempt to IMPEDE my Administrative Remedy Process has lead me on a WILD GOOSE CHASE.

You will find a copy of a BP-S148.055 INMATE REQUEST TO STAFF FORM that was signed by my unit counsler stating that the LEGAL DEPT. has advised them not to provide any letterhead in this case.

Theretore my Administrative Remedy Process is being IMPEDED by the BUREAU OF PRISONS and you are in violation of my rights to exhaust this process betore moving into Circut Court.

I have read your PROGRAM STATEMENT No.P1330.16 Dated 12-31-07 and according to this statement none of the measures set tourth by these guidelines are being used here at F.C.C.Coleman,Fla.

In closing I will ask that you follow your own guidelines that you have designed tor this matter so that I may move torward. Although I have all intentions to do that anyway.

Respecttully:
RICHARD E. HENSARLING Jr.

cc: A.C.A.

U. S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Complex

846 N.E. 54th Terrace
Coleman, Florida 33521-1021

March 1, 2010

Administrative Remedy Coordinator
Southeast Regional Office

Re: HENSARLING JR, Richard
Reg. No. 09991-018
Case Number-556980-R4

Please accept this as verification that the above-listed Administrative Remedy response was received in the unit via mail on March 1, 2010, and issued to inmate Hensarling on that date. Please allow him ample time to resubmit his response based upon this date.

If more information is needed please contact me at 352-689-5173.

Sincerely,

R. Martin
Unit Manager

FCC Coleman, Florida Sumter County

Subscribed and sworn before me this 1st day of March 20 10.

R. Martin R. Martin
Case Manager

Authorized by the Act of July 7, 1955, as amended, to administer oaths (18 USC§4004.)

Read Policy Statement
In regards to an extension on filing your Administrative Remedy request.

Administrative Remedy Log

Inquiry						
Herbsman	0991-08	12-21-09	536980-R3	01-14-10		

BP-S148.055
SEP 98

INMATE REQUEST TO STAFF CDFRM

U.S. DEPARTMENT OF JUSTICE — FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) Mr. Aguirre - Unit Mgr. B-house	DATE: 1-19-2010
FROM: Richard Hensarling	REGISTER NO.: 09991-018
WORK ASSIGNMENT: unAssigned	UNIT: B-2 cell #80

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.

In order to resubmitt My BP-10 on my Administrative Remedy Process, Region Requires that I get a B.O.P. Letterhead. I need you to provide me with this letterhead, so that I can resubmitt, Already I have lost valuable time. Therefore the sooner the better. Thank you.

This B.O.P. letterhead must merely state that Lt. Duden F.C.C. Coleman low delievered my BP-9 to me in the S.H.U. on 10-14-09

(Do not write below this line)

DISPOSITION:

Counselor Davis to issue Letterhead legal has advised us not to provide any documents with signature or letterhead

Signature Staff Member	Date
	1-18-10

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

FILE IN SECTION 6 UNLESS APPROPRIATE FOR PRIVACY FOLDER

SECTION 6

ard Hensarling
991-018
al Correctional Complex
un B-2
ox # 1032
man, Florida 33521



ADDED one more stamp
mailed - 11-26-2010
from B-2 unit General Mail

Special Legal
MAIL

to Copy front
envelope

Bureau of Prisons
Southeast Regional Office
Att: Regional Director
3800 Camp Creek Parkway
S.W. Building 2000
Atlanta, GA. 30331-6226



"Excessive bail shall not be required, nor excessive fines imposed, nor any cruel and unusual punishment should not be given."
U.S. CONSTITUTION: EIGHTH AMENDMENT

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: FEBRUARY 2, 2010

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: B 1-2 QTR: B03-980L
P.O. BOX 1022
COLEMAN, FL 33521

A-3 Com

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 556980-R4 REGIONAL APPEAL
DATE RECEIVED : FEBRUARY 2, 2010
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. REGIONAL APPEALS (BP-10) MUST BE RECEIVED WITHIN 20 DAYS OF THE WARDEN/CCM RESPONSE OR RECEIPT OF THE DHO REPORT. THIS TIME INCLUDES MAIL TIME.

REJECT REASON 2: SEE REMARKS.

REMARKS : YOU MUST PROVIDE STAFF VERIFICATION ON BOP LETTERHEAD THAT YOU ARE NOT RESPONSIBLE FOR THE UNTIMELY FILING OF THIS APPEAL.

UNICOR FEDERAL PRISON INDUSTRIES, INC
LEAVENWORTH, KANSAS

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: HENSARLING RICHARD E. (LAST NAME, FIRST, MIDDLE INITIAL) 09991-018 (REG. NO.) B-2 (UNIT) COLEMAN MED. (INSTITUTION)

Part A - REASON FOR APPEAL

I UNDERSTAND AND AGREE THAT MY ALLEGIATIONS AS TO STAFF BEING AWARE THAT THERE WAS A PONTENTIAL THREAT TOWARDS ME BY INMATE ERIC AZOTEA IS NOT AND SHOULD NOT BE TAKEN LIGHTLY. JUST AS THE PERMANET DAMAGE HE INFLICTED UPON ME THROUGH HIS ACT OF VIOLENCE CAUSING A CASE OF "MAYHEM" IN MY LIFE SHOULD BE TAKEN JUST AS SERIOUS. WHEN A VIOLENT CRIME HAS BEEN MADE AGAINST A PERSON CAUSING THEM SEVERE PERMANET DAMAGE, AND THAT PERSON DOES NOT HAVE THE FINANCIAL MEANS TO HIRE PROFESSIONAL COUNSEL, AND CAN NOT BE APPOINTED ONE BECAUSE OF THE POISTION THAT HIS OR HER LIFE IS IN (INCARCERATED) DOES NOT MEAN THAT THEY SHOULD BE TAKEN ADVANTAGE OF. I MUST REPERSENT MYSELF IN THIS CRIMINAL MATTER, AND THAT IS WHY CONGRESS INACTED LAWS SUCH AS THE FREEDOM OF INFORMATION AND PRIVACY OF 1974.

10-28-09
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: _____

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

U. S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Complex

846 N.E. 54th Terrace
Coleman, Florida 33521-1021

March 1, 2010

Administrative Remedy Coordinator
Southeast Regional Office

Re: HENSARLING JR, Richard
Reg. No. 09991-018
Case Number-556980-R4

Please accept this as verification that the above-listed Administrative Remedy response was received in the unit via mail on March 1, 2010, and issued to inmate Hensarling on that date. Please allow him ample time to resubmit his response based upon this date.

If more information is needed please contact me at 352-689-5173.

Sincerely,

R. Martin
Unit Manager

FCC Coleman, Florida Sumter County

Subscribed and sworn before me this 1st day of March 20 10.

R. Martin R. Martin
Case Manager

Authorized by the Act of July 7, 1955, as amended, to administer oaths (18 USC§4004.)

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: APRIL 9, 2010

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: A 3-4 QTR: A06-061U
P.O. BOX 1022
COLEMAN, FL 33521

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 556980-A2 CENTRAL OFFICE APPEAL
DATE RECEIVED : MARCH 18, 2010
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. CENTRAL OFFICE APPEALS MUST BE RECEIVED WITHIN 30 DAYS OF THE REGIONAL DIRECTOR'S RESPONSE. THIS TIME LIMIT INCLUDES MAIL TIME.

REMARKS : PROVIDE STAFF VERIFICATION ON BOP LETTERHEAD DOCUMENTING THAT THE UNTIMELY FILING OF THIS APPEAL WAS NOT YOUR FAULT.

NOTES

EXHIBIT (L)

After Receiving my (4th) fourth attempt back on my BP-10, I turned around and sent out my (2nd) second BP-11 on this matter. The reason that I did this was because I felt that after (4) four **HONEST** attempts at the Region level maybe at the central level I would get some response.

Also another inmate told me that I should put together a formated **DETAILED TIMELINE** explaining all the steps that I had taken so far.

As you will see that did not work at the Central level. I had hoped that in Washingtion they would have seen in **EXHIBIT (G)** and in **EXHIBIT (L)** that I had made a honest attempt to show that I was not and have not been **UNTIMELY** in this matter.

While trying to obtain this letterhead that Region was requesting the officer I was trying to obtain it from was working at F.C.C. Coleman LOW. I was at F.C.C. Coleman MEDIUM. Although they are only across the street from one another, to me trying to obtain this information they might as well have been a million miles apart.

Department of Justice

Central Office Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Richard E. Hensarling, Jr.	#09991-018	A-3 #61	F.C.C. Coleman(Med)
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL Inmate was exposed to a brutal attack by another inmate, while he was incarcerated at United States Penitentiary at Coleman #2, Coleman, Florida. He was attacked by another inmate, to-wit; Eric Azotea, due to the willful negligence by Unit Officer on duty at the time of incident, because he was surfing the Internet when he was supposed to be making required rounds of the Unit, and was unaware of the attack by inmate Eric Azotea. Staff failed to remove either of the two inmates that friction was with, and it is documented (or was, and was removed from records) that there were issues here. Coleman #2 staff failed to make a proper investigation by the F.B.I., and there were never any charges filed concerning this inmates attack on Richard E. Hensarling, Jr.

NOTE: PLEASE SEE ATTACHED STATEMENT OF FACT, OFFICIAL TIMELINE, AND EXHIBITS HERETO!

3-12-2010
DATE

Richard E. Hensarling Jr.
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 556980

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

BP-231(13)

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Coleman, Florida 33521

MEMORANDUM FOR THE RECORD

FROM: C.L. Shurette, Unit Secretary

SUBJECT: **Inmate's Receipt of Documentation**

On April 12, 2010, I gave inmate Richard E. Hensarling, Reg. No.: 09991-018 a Rejection Notice- Administrative Remedy, ID#: 556980-A2

Richard E. Hensarling, Jr.
#09991-018
Federal Correctional Complex
Medium
P.O. Box 1032
Coleman, Florida 33521

March 10th, 2010

ADMINISTRATIVE REMEDY PROCESS
PERTAINING TO BP-11 GUIDELINES AND PROCEDURES

STATEMENT OF FACT:

I feel that by being denied access to the Segregated Housing Unit's (S.H.U.) Law Library, from the dates of July 11, 2009 until October 15, 2009, as is shown in Exhibit "B" of the attached "Timeline." Thereby denying me information of how the Administrative Process works, was obstruction of my right to timely and correctly file my appeal.

I feel that Bureau of Prison staff here at F.C.C. Coleman, United States Penitentiary Number #2, hampered, blocked, and interfered with my Administrative Remedy Process. This being the reason that After three(3) seperate attempts to file my BP-10 to the Regional Office, all three times denied, because my timeliness was affected by the staff at USP-Coleman #2. Intentionaly hindering my right to appeal.

* **NOTE:** Pending the required paperwork, on **"Official Bureau of Prison's Letterhead,"** as was requested by the Regional Director's Office, concerning the Time, Date, and Official Signature, of S.H.U. Lieutenant, S. Duden. **(See Exhibit "G" #10 of Timeline, Pg.#2)** This BP-11 will be filed so as to be timely, while awaiting the proper paperwork from Captain McManus, here at F.C.C. Coleman(Med), and therefore, asks the Central Office of Administrative Remedy, to process this BP-11, and to take into consideration that this inmate has made every effort to obtain a piece of paperwork that the Regional Director's Office said he **MUST HAVE!**, but by all rights, know full well that it is, and will be almost impossible to obtain on an inmate to staff level. I am still trying to collect it.

Please See: **Boyd v. Corr.Corp. of America**,380 F.3d 989, 996 (CA.6 2004)(holding that - "Administrative Remedies are exhausted when prison officials **fail to timely respond** to a properly filed grievance."); **Powe v. Ennis**, 177 F.3d 393, 394 (CA.5 1999)("A prisoner's administrative remedies are deemed exhausted when a valid grievance has been filed and the respondent's time for responding thereto has expired); **Whitington v. Ortiz**, 472 F.3d 804, 807-08 (CA. 10 2007)(same); **Long v. Lafko**, 2001 U.S. Dist. LEXIS 10808, @ *5 (SDNY-2001)(stating that "if the prisoner's documents 'a reasonable attempt to exhaust' this is 'deliberately disregarded or otherwise not responded to,' the court will deem the administrative remedies exhausted, and the court **will deny** the motion to dismiss filed by the defendants."); **Lane v. Doan**, 207 F.Supp.2d 212 (WDNY 2003)(same).

This inmate has been guilty of one thing only! Ignorance of the Administrative Remedy Process. No, there is no excuse for ignorance, unless, it is caused by B.O.P. Staff in exercising they're Official dutys, when access was granted to review material in the Law Library, but the inmate was **NEVER AFFORDED TIME** in said Law Library to gain proper knowledge.

"A prisoner doesn't shed his constitutional rights at the prison gate."
U.S. SUPREME COURT JUSTICE THURGOOD MARSHALL
Johnson vs. Avery, 393 U.S. 483 (1969)

Richard E. Hensarling, Jr.
#09991-018
Federal Correctional Complex
Medium
P.O. Box 1032
Coleman, Florida 33521

March 10th, 2010

ADMINISTRATIVE REMEDY PROCESS
PERTAINING TO BP-11 GUIDELINES AND PROCEDURES

CONCLUSION

SENSITIVE ISSUES. (4.)[d](1); If the inmate **reasonably** believes the issue is sensitive, **(as I stated in Exhibit's "C" and "D")** and the inmates safety or well-being would be placed in danger if the request became known at the institution, the inmate may submit the request directly to the appropriate Regional Director. The inmate shall clearly mark "Sensitive," (again, see **Exhibit's "C" and "D")** upon request, and explain in writing the reason for not submitting the request at the institution. If the Regional Adminstrative Remedy Coordinator agrees that the request is sensitive, the request should be accepted. Otherwise, the request will not be accepted, and the inmate shall be advised in writing of that determination, without a return of the request. The inmate may pursue the matter by submitting an Administrative Remedy locally to the Warden. The Warden shall allow a reasonable extension of time for such resubmission.

This submission of all steps in the administrative remedy process, though at the outset, they may have been out of order, only due to denial of access to the Prison Law Library. Show, that in all good faith, inmate has acted in an honest and forthright manner, tried beyond all levels available to him, to provide all proper paperwork, and official documentation.

There is nothing this Office can give inmate in his quest for closure, concerning this incident. The Central Office cannot send me another eye, and heal the damage that was incurred during this violent and brutal attack on himself. They cannot grant me any amount of money , that can undo the loss of my eye. No amount of money to make up for my pain and suffering. What this office **can do**, is to process this paperwork, with the right decision being that inmate tryed to diligently do all the things that he was required to do, and allow him to proceed to the Civil Courts. Because at the end of the day, when it is all said and done, inmate Hensarling acted in good faith, while he was hindered at every step of the way, to do all of the things required of him in the Official Administrative Remedy Process.

Therefore, I, Richard E. Hensarling, ask this Office, to review all of the paperwork, and the documentation provided, and to rule that this issue was, and is indeed, an issue that this inmate felt was of the utmost serious and sensitive issue, as pertained to him at the occurance of this attack on him by inmate Eric Azotea. Allowing him the next step in this process, and to proceed to Civil Court under **Bivens**.

Respectfully submitted,

_____

"A prisoner doesn't shed his constitutional rights at the prison gate."
U.S. SUPREME COURT JUSTICE THURGOOD MARSHALL
***Johnson vs. Avery*, 393 U.S. 483 (1969)**

NOTES

EXHIBIT(L)

The very next day after the Central office received my (2nd) attempt at my BP-11 level Captain Mcmanus at F.C.C. Coleman MEDIUM finally obtained the B.O.P. letterhead that Region had been requesting.

I now had the **PROOF** that I needed to Region that I was never **UNTIMELY** and it I was it was beyond my control.

When my BP-11 returned from Central office they had rubber stamped it as untimely, but I was undetered because after a long and hard road I had finally gotten the evidence I needed.

I then sent my (5th) fifth attempt at my BP-10 to Region with the Material attached. You will see from the Photocopy of the envelope and the letterhead from my Unit Manager Mr.Martin I had a hard time trying to get it out.

Once again Region failed to take a close review of the Material I had provided and they rubber stamped it.

This is **EXACTLLY WHY I NEED JUDICAL INTERVENTION INTO THIS MATTER!**

REJECTION NOTICE - ADMINISTRATIVE REMEDY

A-3-61

DATE: MAY 12, 2010

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: A 3-4 QTR: A06-061U
P.O. BOX 1022
COLEMAN, FL 33521

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 556980-R5 REGIONAL APPEAL
DATE RECEIVED : MAY 7, 2010
SUBJECT 1 : OTHER COMPLAINT AGAINST STAFF
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOUR APPEAL IS UNTIMELY. REGIONAL APPEALS (BP-10) MUST BE RECEIVED WITHIN 20 DAYS OF THE WARDEN/CCM RESPONSE OR RECEIPT OF THE DHO REPORT. THIS TIME INCLUDES MAIL TIME.

April 26,2010

ADMINISTRATIVE REMEDY COVER SHEET

Richard E.Hensarling Jr.
#09991-018
Federal Correctional Complex
Medium A-3
P.O. Box#1032
Coleman,Florida 33521-1032

April 26,2010

Federal Bureau of Prisons
Southeast Regional Office
Att:Regional Director
3800 Campcreek Pwky. S.W. bldg. 2000
Atlanta, Ga. 30331-6226

Dear:Regional Director

Sir once again I am resubmitting this **BP-10** in a honest attempt to allow the **F.B.O.P.** to **CURE** this matter and moving into **CIRCUT COURT** and **COSTING THE TAXPAYERS MONEY.** Attached you will find (4) four copies of the **B.O.P. LETTERHEADS** that you have been requesting.

As you will see I have not once been **UNTIMELY** in any of my **SUBMITTALS.** This is a very serious matter and a very **SENSITIVE ONE AS WELL.** Can we please **RESOLVE THIS MATTER** before moving into Circut Court.

THANK YOU VERY MUCH FOR YOUR TIME AND CONCERN IN THIS MATTER I WILL BE AWAITING YOUR RESPONSE.

7009 1680 0002 1804 0802

7008 3230 0002 5018 3547

RESPECTFULLY:
RICHARD E. HENSARLING Jr.
#09991-018

ATTACHMENT (1)

REGIONAL ADMINISTRATIVE REMEDY APPEAL

With Honesty and Good Faith I am **RESUBMITTING THIS BP-10 TO YOUR OFFICES SEEKING A CURE.** This is the (5) and final time I will submit this. Attached to this page you will find (2) two B.O.P. letterheads. One is the one that your office has been requesting since my second attempt at **EXHAUSTING THIS ADMINISTRATIVE REMEDY PROCESS.** The **B.O.P. LETTERHEADS WILL PROVIDE PROOF THAT I HAVE NEVER BEEN UNTIMELY.**

You must also **READ THE ADMINISTRATIVE REMEDY TIMELINE THAT I HAVE PROVIDED IN ORDER TO UNDERSTAND THE STEPS THAT I HAVE TAKEN TO EXHAUST THIS MATTER.** AGAIN THANK YOU FOR YOUR TIME AND COCERN IN THIS MATTER !

In closing I would like to add that I am claiming **STAFF NEGLIGENCE, AND A INDIFFRENCE SHOWED TOWARDS MY SAFETY BY STAFF WHETHER OR NOT IT WAS DELIBERATE IS FOR THE JUDGE, COURTS, AND JURY TO DECIDE. ME AND MY FAMILY FEEL THAT IT WAS. ALSO THE WEAPON USED AGAINST ME WAS SOLD AND SUPPLIED BY THE F.B.O.P.**

I have not and will not name any Staff in this matter until I have made a **RECORDED STATEMENT TO A LAW ENFORCEMENT AGENCY, OR UNTIL I SUBMIT MY COMPLAINTS TO THE COURTS. THE STAFF INVOLVED KNOW WHO THEY ARE, AS WELL AS THE F.B.O.P. PROVIDED THEY HAVE DONE A THROUGH AND COMPENT INVESTIGATION.**

THIS MATTER AND THE COST OF THIS MATTER IS THE RESPONSIBILITY OF THE F.B.O.P. NOT THE TAXPAYERS.

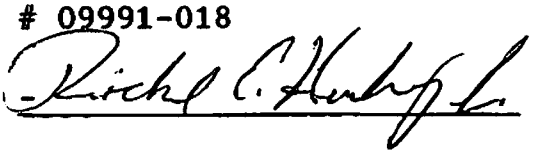
11. RESUBMISSION §542.17
(3) Criteria for Rejection

When deciding whether or not to reject a submission,coordinators, especially at the Institution level,should be flexible,keeping in **MIND THE MAJOR PURPOSE OF THIS PROGRAM ARE TO RESOLVE PROBLEMS AND TO BE RESPONSIVE TO ISSUES INMATES RAISE.** Thus for example,consideration should be given to excepting a request or appeal that rasies a **SENSITIVE or PROBLEMATIC ISSUE. (is this not what i have been trying to tell the F.B.O.P. since i handwrote a request to Washington 7-24-09 see exhibit C in Adimin. Timeline)**

such as medical treatment, sentence computation, **STAFF MISCONDUCT** even though that submission may be somewhat **UNTIMELY** !

If you read the **TIMELINE** that I have provided you will see that I have not once lied nor have I falsely made any statements. I am merely seeking **JUSTICE IN THIS MATTER**.

RESPECTFULLY:
RICHARD E. HENSARLING Jr.
 # 09991-018



U.S. Department of Justice

Regional Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: HENSARLING RICHARD E. | 09991-018 | B-2 | COLEMAN MED.
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A - REASON FOR APPEAL

I UNDERSTAND AND AGREE THAT MY ALLEGIATIONS AS TO STAFF BEING AWARE THAT THERE WAS A PONTENTIAL THREAT TOWARDS ME BY INMATE ERIC AZOTEA IS NOT AND SHOULD NOT BE TAKEN LIGHTLY. JUST AS THE PERMANET DAMAGE HE INFLICTED UPON ME THROUGH HIS ACT OF VIOLENCE CAUSING A CASE OF "MAYHEM" IN MY LIFE SHOULD BE TAKEN JUST AS SERIOUS. WHEN A VIOLENT CRIME HAS BEEN MADE AGAINST A PERSON CAUSING THEM SEVERE PERMANET DAMAGE, AND THAT PERSON DOES NOT HAVE THE FINANCIAL MEANS TO HIRE PROFESSIONAL COUNSEL, AND CAN NOT BE APPOINTED ONE BECAUSE OF THE POISTION THAT HIS OR HER LIFE IS IN (INCARCERATED) DOES NOT MEAN THAT THEY SHOULD BE TAKEN ADVANTAGE OF. I MUST REPERSENT MYSELF IN THIS CRIMINAL MATTER, AND THAT IS WHY CONGRESS INACTED LAWS SUCH AS THE FREEDOM OF INFORMATION AND PRIVACY OF 1974.

10-28-09
DATE

SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

42

U. S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Complex

846 N.E. 54th Terrace
Coleman, Florida 33521-1021

May 2, 2010

Administrative Remedy Coordinator
Southeast Regional Office

Re: HENSARLING JR, Richard
Reg. No. 09991-018
Case Number-556980-R4

Please accept this as verification that the above-listed Administrative Remedy response was taken to the mail room by the Unit Staff for weighing to determine postage and mailed on April 26, 2010. It was later sent back to the Unit Team for additional postage. There was a mistake by staff in the amount of postage needed. It was mailed out again on May 2, 2010. Please allow him inmate Hensarling ample time to resubmit his response based upon this date.

If more information is needed please contact me at 352-689-5173.

Sincerely,

R. Martin
Unit Manager

FCC Coleman, Florida Sumter County

Subscribed and sworn before me this 2nd day of May 2010.

R. Martin R. Martin
Case Manager

Authorized by the Act of July 7, 1955, as amended, to administer oaths (18 USC§4004.)

1991-018

eral Correctional Complex
ium A-3
Box # 1032
non, Florida 33521

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS, FOLD AT DOTTED LINES

CERTIFIED MAIL

7009 1680 0002 1804 0802

7009 1680 0002 1804 0802

U.S. Postal Service
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

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Sent To S.E. Regional Office
Street, Apt. No.; or PO Box No. 3800 Camp Creek Pkwy S.W. Bldg. 200
City, State, ZIP+4 Atlanta, Ga. 30331-6226

PS Form 3800, August 2006 See Reverse for Instructions

Bureau of Prisons
S.E. Regional OFFICE
Att# Regional Director
3800 Camp Creek Pwky. S.W. Bldg. 20
Atlanta, GA. 30331-6226

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RECEIPT
ESTED

$4.36

March 21st, 2009

ADDENDUM TO ADMINISTRATIVE TIMELINE
OFFICIAL LETTERHEAD FROM BUREAU OF PRISONS ADMINISTRATION
SWORN DECLARATION FROM LIEUTENANT S. DUDEN

(AS PERTAINS TO " EXHIBIT G ")

Richard E. Hensarling, Jr.
Register No:09991-018
Federal Correction Complex
Coleman (Medium)
P.O. Box 1032
Coleman, Florida
33521-1032

****

RE:Signature verification by Lieutenant S.Duden, S.H.U. Lieutenant, at the time inmate received late response as to Adminstrative Procedure while in the Special Housing Unit at Coleman (Low).

****

To the effect that this paperwork, as per request by the Regional Office, as to the authenticity of the Officer in question, **(Lieutenant S. Duden)** Special Housing Unit, at Coleman, Florida, (Low). Shows that on Official Letterhead, as from Federal Bureau of Prisons Staff, concerning this Officer's statement of fact, that he was in fact present at the time that this inmate received his response, to-wit, a BP-9 from the Warden, (Drew) was delivered to this inmate on October 14th, 2009. Yet, it was actually signed off on by the Warden (Drew) on September 18th, 2009. **(See EXHIBIT G)**

This was the only document missing from this inmate's paperwork, that was hinged on his Adminstrative Remedy being denied, time and time again, by the Regional Director's Office.

This paperwork in fact proves that this inmate never misled orlied concerning this paperwork, or the fact that it was delivered late to this inmate while in the S.H.U. at Coleman (Low).

I swear under the penalty of perjury that all statements in this document are in fact true, and correspond exactly as I outlined them in my BP-11 to your office.

Respectfully submitted,

_____

Richard E. Hensarling, Jr.

March 21st, 2010

ADDENDUM TO ADMINISTRATIVE REMEDY
BP-11 FILED ON MARCH 10, 2010

***NOTE:** This paperwork was delivered to this inmate by Captain McManus, at F.C.C. Coleman, (Medium) on March 19, 2010. This being a Friday, leaving inmate to file this as Institution Policy permits, on a Wednesday, March 24, 2010.

(THIS IS ADDENDUM TO TIMELINE, AND EXHIBIT "G")

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Coleman, Florida 33521

MEMORANDUM FOR: G. Mcmanus, Captain

FROM: S. Duden, Lieutenant
DATE: March 7, 2010

SUBJECT: Inmate Hensarling #09991-018 Case # 556980-F1

This is my signature n the BP-9 response, Case Number: 556980-F1. This inmate did receive this piece of mail on the date indicated by my signature.

Inmate received this memorandum on 3-19-2010 1330pm. From Capt G. McMan
G. McManus

2nd. Administrative Remedy Attempt

ADMINISTRATIVE REMEDY
PROCESS 2nd ATTEMPT

This is a entirely new Admin. Pros. I started over pertaining to the same incident.

I was so afraid that these Courts would agree with the F.B.O.P. and find that I was untimely. Forgive my lack of confidence,but this has been a very tolling expierence on me mentally.

In this package you will see that I filed my BP-8 and BP-9 from the compound. Then on 6-1-2010 I was placed in S.H.U.(special housing unit) pending ivestigation due to a Adminstrative Remedy Process I have been filing due to my personal property being stolen. I was told that I was being Transfered,but 79 days later they returned me to the compound.

I continued to try to follow through with my Admin. Pros. pretaing to the loss of my eye, but gave up on the issues with my personal property.

Once I sent in my BP-10 to Region I had made a Calendar and kept a close watch on the dates,and marked them all down as well. I have Calendars made from the start of this incident. My Father God Rest His Soul, is Retired U.S. AirForce he taught me to always keep track of dates.

I mailed my BP-10 from S.H.U. on 6-9-2010 Region has (30) thirty days to respond unless they ask for an extension through the form of a letter according to their Policy Program Statement [Response time §542.18] 12. I may add that since finding out these rules about the Admin. Pros. In my first attempt they failed to follow their own Policy but I did not know this at the time.

While still in S.H.U. and not hearing back on my BP-10 I moved forward with my BP-11 as not to be untimely. Policy Program Statement says "If you do not get a response back in the alloted time at any level you are to take that as a refusal."

That is why in this package there is no response to a BP-10, but there was a copy to the BP-10 enclosed. They say there was not.

If they were to read the Policy I stated on the BP-11 sheet they will understand what my purpose was.

Two days later I received my Response to my BP-10 see next package.

April 1, 1996
Attachment A

INFORMAL RESOLUTION FORM
(BP-8)

NOTICE TO INMATE: Bureau of Prisons Program Statement 1330.13 requires that except as provided in §42.13(b) an inmate shall first present an issue of concern informally to staff and staff shall informally attempt to resolve the issue prior to submitting a BP-9.

****

INSTRUCTIONS: Counselors will complete and attach this form to each Request for Administrative Remedy Form (BP-9) submitted, if not informally resolved.

Richard E. Hensarling Jr.	# 09991-018	Cell#61--A-3	5-10-2010
Inmate Name	Register No.	Qtrs./Unit	Date Initiated

1. Specific complaint (one 8 ½" x 11" continuation page may be attached):
On 4-17-09 I was BRUTALLY ASSAULTED while being housed at F.C.C. Coleman U.S.P. #2 This assault has gone uninvestigated and unpunished. I am requesting to press criminal charges against my assailant. I have been refused this right(s)

2. What efforts have been made by the inmate to resolve the complaint informally? To whom has the inmate spoken?
I have not given a formal statement yet. This matter involves a criminal act by both staff and attacker. Request F.B.I. INVESTIGATION

3. What action does the inmate wish to be taken to correct the issue?
For PARTIES INVOLVED TO BE PUNISHED UNDER FEDERAL SENTENCING (LAWS) GUIDELINES, and for VICTIM to be COMPENSATED. Also if the State laws are required to attached for prosecution, then State Law prosecution also.

Correctional Counselor's Comments (including actual steps taken to resolve):

We cannot Answer your Complaint on this level. We are Advising that you Intitate this complaint with a Sensitive BP 9.

R. Martin — Correctional Counselor — 05-16-10 — Date

Staff Circle One: Informally Resolved / (Not Informally Resolved)

Unit Manager's Review: R. Martin — Unit Manager — 05-16-10 — Date

Distribution by Correctional Counselor:

1. If complaint is informally resolved, forward original to Administrative Remedy Clerk for filing.

2. If complaint is <u>not</u> informally resolved, attach original to BP-9 Form and forward to Administrative Remedy Clerk for processing.

	BP-8 Issued to Inmate	BP-8 Returned to Counselor	BP-9 Issued to Inmate	BP-9 Returned to Counselor	BP-9 Delivered to Admin. Remedy Clerk
Date:	5/9/10	5/10/10	5/10/10	5/11/10	5/11/10
Time:					
Counselor:					

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Richard E. Hensarling Jr. (LAST NAME, FIRST, MIDDLE INITIAL) # 09991-018 (REG. NO.) A-3 (UNIT) Coleman MED. (INSTITUTION)

Part A- INMATE REQUEST

I Submitted a BP-8 to request that I be entitled to PRESS CRIMINAL CHARGES against my ASSAILANT. In which I have been previously DENIED! The Correctional Counsler and Unit Manager Mr.Martin DENIED my BP-8 stating the following.
"We can not answer your COMPLAINT on this level.We are advising that you inatiate this COMPLAINT with a SENSITIVE BP-9"
This is not a SENSITIVE MATTER and I have every right to obtain a CRIMINAL INVESTIGATION in this MATTER TO PROSECUTE MY ASSAILANT. The STAFF has not appropriately resolved my COMPLAINT nor have they conducted a appropriate INVESTIGATION INTO THIS MATTER.

5-11-2010
DATE

Richard E. Hensarling Jr.
SIGNATURE OF REQUESTER

Part B- RESPONSE

See attached response

Rec 5/11/10

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 590746-F1

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

DATE

SIGNATURE (STAFF MEMBER)

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Coleman, Florida 33521

MEMORANDUM FOR THE RECORD

FROM: S. Johnson, Case Manager

SUBJECT: **Inmate's Receipt of Documentation**

On June 2, 2010, I gave inmate Richard E. Hensarling, Reg. No.: 09991-018 a Response- Administrative Remedy, ID#: 590746-F1

Response to Administrative Remedy Case Number: 590746-F1

This is in response to your Request for Administrative Remedy receipted on May 11, 2010, in which you request to press criminal charges against your assailant.

Investigation of this matter reveals staff cannot assist you in private legal matters. It is suggested you refer to the "Prisoners' Legal Assistance Directory" located in the library.

Accordingly, this response is for Informational Purposes Only.

If you are dissatisfied with this response, you may appeal by filing a BP-10 to the Bureau of Prisons, Southeast Regional Office, Attn: Regional Director, 3800 Camp Creek Parkway, SW, Building 2000, Atlanta, Georgia 30331-6226, within 20 calendar days from the date of this response.

Jorge L. Pastrana, Warden

Date 5/27/10

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: HENSARLING Richard E. (LAST NAME, FIRST, MIDDLE INITIAL) 09991-018 (REG. NO.) A-3 (UNIT) Coleman-MED. (INSTITUTION)

Part A - REASON FOR APPEAL WARDENS to my BP-9 States that this is a Private Matter. I was under the CARE and Custody, OF the Federal Bureau OF Prisons when this incident occurred The Federal Bureau OF Prisons is Responsible and "Liable" For Every insturment they place on the compound. Therefore The F.B.O.P. is held Liable for the damages inflicted upon me causing me Permanent Disfigurement and left Handicapped for life. F.B.O.P. Supplied inmate with the weapon he used. Due to Staff Negligence.

DATE _____ SIGNATURE OF REQUESTER _____

Part B - RESPONSE

DATE _____ REGIONAL DIRECTOR _____

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: _____

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

DATE _____ SIGNATURE, RECIPIENT OF REGIONAL APPEAL _____

RECEIPT - ADMINISTRATIVE REMEDY

DATE: JULY 6, 2010

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: A 3-4 QTR: Z03-018UAD

THIS ACKNOWLEDGES THE RECEIPT OF THE REGIONAL APPEAL IDENTIFIED BELOW:

REMEDY ID : 590746-R1
DATE RECEIVED : JUNE 17, 2010
RESPONSE DUE : JULY 17, 2010
SUBJECT 1 : LEGAL PHONE CALLS
SUBJECT 2 :
INCIDENT RPT NO:

U.S. Department of Justice
Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: HENSARling Richard E. (LAST NAME, FIRST, MIDDLE INITIAL) 09991-018 (REG. NO.) S.H.U (UNIT) Coleman Med. (INSTITUTION)

Part A - REASON FOR APPEAL Region, ignored failed to respond. As stated in (Response Time § 542.18).12 Now I am bringing this matter to the General Counsel. Again this is not a Private or personal Matter. I was at the time and still am in the care and custody of the F.B.O.P. Therefore they are responsible and Liable for this MAtter.

As of date pending Transfer

7-27-2010
DATE

Richard E. Hensarling Jr.
SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED
AUG 03 2010
Administrative Remedy Section
Federal Bureau of Prisons

DATE

GENERAL COUNSEL

FIRST COPY: WASHINGTON FILE COPY

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER: 591046-A

Return to: (LAST NAME, FIRST, MIDDLE INITIAL) (REG. NO.) (UNIT) (INSTITUTION)

SUBJECT:

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

UPN LVN

BP-231(13)
JUNE 2002

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: AUGUST 17, 2010

FROM: ADMINISTRATIVE REMEDY COORDINATOR
CENTRAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: A 3-4 QTR: Z03-014UAD
P.O. BOX 1022
COLEMAN, FL 33521

FOR THE REASONS LISTED BELOW, THIS CENTRAL OFFICE APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 590746-A1 CENTRAL OFFICE APPEAL
DATE RECEIVED : AUGUST 3, 2010
SUBJECT 1 : LEGAL PHONE CALLS
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU DID NOT PROVIDE A COPY OF YOUR REGIONAL OFFICE ADMINISTRATIVE REMEDY APPEAL (BP-10) FORM OR A COPY OF THE (BP-10) RESPONSE FROM THE REGIONAL DIRECTOR.

REJECT REASON 2: YOU MAY RESUBMIT YOUR APPEAL IN PROPER FORM WITHIN 15 DAYS OF THE DATE OF THIS REJECTION NOTICE.

Received 8/27/10

3rd. Administrative Remedy Attempt

ADMINISTRATIVE REMEDY
PROCESS LAST ATTEMPT

This is what I hope to be my last and final stage at **EXHAUSTING** this Admin. Rem. Pros.

As you will see the date on the BP-11 I maild from S.H.U. was dated 8-8-2010. At the Central level they have (40) fourty days to Respond. That would be 9-17-2010 unless they write me and inform me that they are seeking an extension.

Due to the time bases that Washingtion has placed on me because of the TORT CLAIM I filed I have to have this matter into your courts no later than 10-12-2010.

As of date 10 / 6 / 2010 I do not have X I do have ____ a response to this most recent attempt at EXHAUSTING this unfortunate matter.

EITHER WAY I WILL ASK THESE COURTS TO ACCEPT THIS AS A NONE FRIVOULS MATTER. AND SEE THAT I HAVE MADE EVERY ATTEMPT TO EXHAUST THIS MATTER AT THIS LEVEL, AND AM NOW SEEKING JUDICIAL INTERVENTION.

Richard C. Hendrix

12. [RESPONSE TIME §542.18. If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's

immediate health or welfare, the Warden shall respond not later than the third calendar day after filing. If the time period for response to a Request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall

respond in writing to all filed Requests or Appeals. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.]

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INFORMAL RESOLUTION FORM
(BP-8)

NOTICE TO INMATE: Bureau of Prisons Program Statement 1330.13 requires that except as provided in 542.13(b) an inmate shall first present an issue of concern informally to staff and staff shall informally attempt to resolve the issue prior to submitting a BP-9.

****

INSTRUCTIONS: Counselors will complete and attach this form to each Request for Administrative Remedy Form (BP-9) submitted, if not informally resolved.

Richard E. Hensarling Jr.	# 09991-018	Cell#61--A-3	5-10-2010
Inmate Name	Register No.	Qtrs./Unit	Date Initiated

1. Specific complaint (one 8 ½" x 11" continuation page may be attached):
On 4-17-09 I was BRUTALLY ASSAULTED while being housed at F.C.C. Coleman U.S.P. #2 This assault has gone uninvestigated and unpunished. I am requesting to press criminal charges against my assailant. I have been refused this right(s)

2. What efforts have been made by the inmate to resolve the complaint informally? To whom has the inmate spoken?
I have not given a formal statement yet. This matter involves a criminal act by both staff and attacker. Request F.B.I. INVESTIGATION

3. What action does the inmate wish to be taken to correct the issue?
For PARTIES INVOLVED TO BE PUNISHED UNDER FEDERAL SENTENCING (LAWS) GUIDELINES, and for VICTIM to be COMPENSATED. Also if the State laws are required to attached for prosecution, then State Law prosecution also.

Correctional Counselor's Comments (including actual steps taken to resolve):

We can not Answer your Complaint on this level. We are Advising that you Initiate this complaint with a Sensitive BP 9.

Correctional Counselor — Date: 05-10-10

Staff Circle One: Informally Resolved / (Not Informally Resolved)

Unit Manager's Review

Unit Manager — Date: 05-10-10

Distribution by Correctional Counselor:

1. If complaint is informally resolved, forward original to Administrative Remedy Clerk for filing.

2. If complaint is not informally resolved, attach original to BP-9 Form and forward to Administrative Remedy Clerk for processing.

	BP-8 Issued to Inmate	BP-8 Returned to Counselor	BP-9 Issued to Inmate	BP-9 Returned to Counselor	BP-9 Delivered to Admin. Remedy Clerk
Date:	5/10	5/10/0	5/10/0		
Time:					
Counselor:					

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Richard E. Hensarling Jr. | # 09991-018 | A-3 | Coleman MED.
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A- INMATE REQUEST

I Submitted a BP-8 to request that I be entitled to PRESS CRIMINAL CHARGES against my ASSAILANT. In which I have been previously DENIED! The Correctional Counsler and Unit Manager Mr.Martin DENIED my BP-8 stating the following.
"We can not answer your COMPLAINT on this level.We are advising that you inatiate this COMPLAINT with a SENSITIVE BP-9"
This is not a SENSITIVE MATTER and I have every right to obtain a CRIMINAL INVESTIGATION in this MATTER TO PROSECUTE MY ASSAILANT. The STAFF has not appropriately resolved my COMPLAINT nor have they conducted a appropriate INVESTIGATION INTO THIS MATTER.

5-11-2010
DATE

Richard E. Hensarling Jr.
SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: _____

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____ | _____ | _____ | _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

UNITED STATES GOVERNMENT

memorandum

FEDERAL BUREAU OF PRISONS
Federal Correctional Complex
Coleman, Florida 33521

MEMORANDUM FOR THE RECORD

FROM: S. Johnson, Case Manager

SUBJECT: **Inmate's Receipt of Documentation**

On June 2, 2010, I gave inmate Richard E. Hensarling, Reg. No.: 09991-018 a Response- Administrative Remedy, ID#: 590746-F1

Response to Administrative Remedy Case Number: 590746-F1

This is in response to your Request for Administrative Remedy receipted on May 11, 2010, in which you request to press criminal charges against your assailant.

Investigation of this matter reveals staff cannot assist you in private legal matters. It is suggested you refer to the "Prisoners' Legal Assistance Directory" located in the library.

Accordingly, this response is for Informational Purposes Only.

If you are dissatisfied with this response, you may appeal by filing a BP-10 to the Bureau of Prisons, Southeast Regional Office, Attn: Regional Director, 3800 Camp Creek Parkway, SW, Building 2000, Atlanta, Georgia 30331-6226, within 20 calendar days from the date of this response.

Jorge L. Pastrana, Warden

Date 5/27/10

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

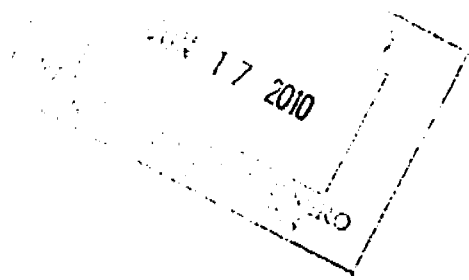
From: HENSARLING Richard E. (LAST NAME, FIRST, MIDDLE INITIAL) 09991-018 (REG. NO.) A-3 (UNIT) Coleman-MED. (INSTITUTION)

Part A - REASON FOR APPEAL WARDENS to my BP-9 States that this is a Private Matter. I was under the CARE and Custody, OF the Federal Bureau of Prisons when this incident occurred The Federal Bureau of Prisons is Responsible and "Liable" For Every insturment they place on the Compound. Therefore The F.B.O.P. is held Liable for the damages inflicted upon me causing me Permanent Disfigurement and left Handicapped for life. F.B.O.P. Supplied inmate with the weapon he used. Due to Staff Negligence.

6-9-2010
DATE

Richard E. Hensarling Jr.
SIGNATURE OF REQUESTER

Part B - RESPONSE



DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 590746-R1

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

Given to I/M
In SHU
8/3/10 [signature]
CSW

EXTENSION OF TIME FOR RESPONSE - ADMINISTRATIVE REMEDY

DATE: JULY 19, 2010

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : RICHARD EARL HENSARLING JR, 09991-018
COLEMAN MED FCI UNT: A 3-4 QTR: Z03-003LAD

ADDITIONAL TIME IS NEEDED TO RESPOND TO THE REGIONAL APPEAL IDENTIFIED BELOW. WE ARE EXTENDING THE TIME FOR RESPONSE AS PROVIDED FOR IN THE ADMINISTRATIVE REMEDY PROGRAM STATEMENT.

REMEDY ID : 590746-R1
DATE RECEIVED : JUNE 17, 2010
RESPONSE DUE :, AUGUST 16, 2010
SUBJECT 1 : LEGAL PHONE CALLS
SUBJECT 2 :
INCIDENT RPT NO:

On Aug. 3rd a F.B.O.P. Staff member slid this paper under my Door in the S.H.U. and Kept walking before I had time to respond. It is dated July 19th its 15 days getting to me. I have already mailed out my BP-11 on this matter. I had the inmate in the cell with me at the time to sign it.

"I declare (or certify, verify or state) under Penalty of Purjury, that the foregoing is true and correct. Executed on (date)." 8-3-2010

Signature: [signature]

Print full name and Prison Reg. No. Curtis Grant 27416-018

Regional Administrative Remedy Appeal No. 590746-R1
Part B - Response

This is in response to your Regional Administrative Remedy Appeal receipted June 17, 2010. You allege staff at the Federal Correctional Complex (FCC) in Coleman, Florida, allowed items of contraband on the compound which gave an inmate the ability to assault and injure you. You also request to bring criminal charges against the inmate that assaulted you, and allege the institution failed to hold this inmate accountable.

A review of this matter revealed staff conduct searches of inmates, inmates living, work, and common use areas in an effort to eliminate dangerous contraband which can be used for illicit activity. Even with all of these efforts, all contraband cannot be eliminated, due to the hiding by inmates and searches by staff for this contraband is an ongoing never ceasing activity. Thus, staff are taking action to remove as much contraband from the institution as possible. All appropriate cases are referred to the United States Attorney for prosecution. However, decisions on which cases to prosecute are not made by the Federal Bureau of Prisons. Proper separation assignments were applied between you and the assailant(s) in the assault. The institution followed established protocol and procedures in taking proper administrative action with regard to the inmate(s) involved in the assault.

Accordingly, this response to your Regional Administrative Remedy Appeal is for informational purposes only. If dissatisfied with this response, you may appeal to the Office of General Counsel, Bureau of Prisons, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in the Office of General Counsel within 30 calendar days of the date of this response.

7/22/10
Date

Regional Director, SERO

This Response was delivered to me through General Mail By officer Colon in the S.H.U. at the Medium on 8-6-2010 thats 15 days alread, lapsed from the date on this Paper 7-22-2010 Therefore that gives me 15 days which includes mail time to Appeal to General Counsel. I've asked the inmate in the cell with me to sign this according to Program Statement a.) Unsworn Declarations.

Curtis A. Grant
Print full name
27416-018
Prison No. #

"I declare (or certify, verify or state) under penalty of perjury, that the foregoing is true and correct. Executed on (date)." 8/6/2010

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: HENSARling Richard E. (LAST NAME, FIRST, MIDDLE INITIAL) 09991-018 (REG. NO.) A-3/S.H.U. (UNIT) Coleman mec (INSTITUTION)

Part A - REASON FOR APPEAL

1.) Region claims that I Allege Staff allowed a item of CONTRABAND on the Compound which gave the inmate the ability to assault me causing Severe bodily injury.

2.) My CLAIM is that the F.B.O.P. not only provided the inmate with the insturment used to cause me serve disfigurment for life. They sold it to him. With the Knowledge that that particular insturment is a Known Weapon.

(SEE Attached Sheet

8-7-2010
DATE

Richard E. Hensarling
SIGNATURE OF REQUESTER

Part B - RESPONSE

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

BP-11 Attachment

Response to BP-10# 590746 dated 6-17-2010

3.) Not only do I request to bring Criminal Charges against the inmate that assaulted me, but also the three Unicor officers Grady, Hadaway, Moody that introduced the contraband into my life putting into Motion the severe bodily injuries I suffered.

4.) I Also claim that the Housing unit officer name unknown working the eve. of the incident 4-17-09 be punished for his Negligence in his Duties.

5.) I hold the F.B.O.P. Liable and Responsible for allowing the irresponsibility, negligence, and unprofessional behavior of F.B.O.P. Staff at Coleman U.S.P.#2

6.) At Some point the F.B.O.P. has found it necessary to provide housing unit officers with a SECONDARY OFFICE behind a closed door furnished with Computer, Internet Access, exterior desk top speakers causing a great distraction from the officers Responsibilites while at Work. Which was the case on 4-17-09 Housing unit I-2 F.C.C. Coleman U.S.P. #2.

7.) Unicor officers, Psychology Staff, Housing Unit officer working I-2/4-17-09 3:30 to 11:30 pm shift and I-2 unit staff were all aware of the imminent and potential Threat Inmate Eric Azotea caused towards my Safety. They were Also made aware that I was trying to change jobs and Housing units to avoid any altercation. Staff failed to take action necessary to maintain Security.

"I declare (or certify, verify, or state), under penalty of perjury that the foregoing is true and correct. [signature]

Executed on (date). 8-8-2010

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

RICHARD E. HENSARLING,

Plaintiff,

v. **Case No: 5:10-cv-344-Oc-10PRL**

BRANNON GRADY, JAMES MOODY, HARLAN HADAWAY, ERIC HIGINBOTHAM, ROBIN MCGLOTHERN, MAIA JEFFERSON, USA and KENNETH HARRIAGE

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's Order entered on June 9, 2015, this case is hereby dismissed with prejudice and without an award of interest costs or attorneys fees.

SHERYL L. LOESCH, CLERK

s/L. Burget, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

RICHARD E. HENSARLING, JR.,

Plaintiff,

v. Case No. 5:10-cv-344-Oc-33PRL

UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER

Plaintiff Richard Earl Hensarling, Jr. (Plaintiff or Hensarling), while a federal prisoner of the United States government in the custody of the Federal Bureau of Prisons (BOP) and housed at the Coleman Federal Correctional Complex (FCC), United States Penitentiary (USP) II in Coleman, Florida,[1] initiated this action by filing a pro se Motion/Notice of Action (Doc. #1) on July 28, 2010. Thereafter, Hensarling filed two Amended Complaints (Docs. #8, #46). He is now proceeding on the

[1] Hensarling was released from incarceration on May 31, 2013. See http://www.bop.gov.

Amended Complaint (Complaint) (Doc. #72), filed by counsel, on March 12, 2013.[2] In this operative Complaint, Plaintiff names the following Defendants: (1) the United States of America (USA), who owned and operated FCC USP II and the adjoining UNICOR[3] factory; (2) Grady, the factory manager of UNICOR at FCC USP II; (3) Moody, a UNICOR factory foreman; (4) Higinbotham, a UNICOR factory foreman; (5) McGlothren, an I-2 unit counselor at FCC USP II; (6) Jefferson, an I-2 case manager at FCC USP II; (7) Hadaway, a UNICOR factory foreman; and (8) John Doe, the I-2 unit correctional officer on duty from approximately 3:30 p.m. until 11:30 p.m. on April 17, 2009, at the time and place of the alleged incident.

Hensarling presents two claims: (1) Defendants Moody and Grady forced him to work under conditions adverse to his health needs, and Defendants Moody, Grady, Higinbotham, Hadaway, McGlothren, Jefferson and John Doe violated his Eighth Amendment right to be free from cruel and unusual punishment when they failed to protect him from harm inflicted upon him by another inmate, pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and (2) Defendant USA, pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b) and 2671, is liable for money damages as compensation for Plaintiff's injuries that were caused by the negligent and wrongful acts and omissions

---

[2] On February 25, 2013, Edward R. Guerrette, II, filed a Notice of Appearance (Doc. #68) as counsel of record for Plaintiff.

[3] "UNICOR" is simply the trade name for Federal Prison Industries, Inc. See http://www.unicor.gov.

of agents and employees of the United States government, while acting within the scope of their offices and employment. Complaint at 1, paragraphs 1 and 2. As relief, Hensarling requests compensatory damages from Defendants Moody, Grady, Higinbotham, Hadaway, McGlothren, Jefferson and John Doe in an amount to be determined at trial and in the amount of two million dollars from Defendant USA. Id. at 10, 12.

This cause is before the Court on Defendants Moody, Grady, Higinbotham and Hadaway's Second Motion to Dismiss and Memorandum of Law (Motion to Dismiss) (Doc. #77), filed April 15, 2013. Plaintiff, through counsel, has responded. See Plaintiff's Memorandum in Opposition to Defendants' Second Motion to Dismiss (Response) (Doc. #78), filed April 29, 2013.

I. Summary of Plaintiff's Complaint

Hensarling alleges the following facts in support of his claims. During the time period at issue, Hensarling was housed at FCC USP II. Complaint at 3, paragraph 14. Hensarling was employed at the UNICOR factory at FCC, where his assignments included working in the factory tool room and running the Computerized Numerical Center (CNC) under the supervision of Defendants Grady, Moody, Hadaway and Higinbotham. Id., paragraph 15. In late 2008, Hensarling told Moody that he had aggravated a pre-existing umbilical hernia and needed to quit his position at UNICOR due to the heavy lifting required of his position. Id., paragraph 16. Moody brought Hensarling to Grady's office where Hensarling informed Grady

of his hernia and again requested to transfer out of the factory. Id., paragraph 17. In response, Defendants Moody and Grady told Hensarling that he was one of only four inmates who could run the CNC, and therefore, the factory could not function effectively without him. Id. at 3-4, paragraph 17. Thus, they denied Hensarling's request to transfer out of the factory, but instructed Hensarling to go to the medical facility and request a hernia belt to aid in the heavy lifting. Id. at 4, paragraph 17. Grady also stated that a hernia belt would have to be obtained from medical personnel since it was against UNICOR policy to provide hernia belts or back braces to inmates. Id.

Approximately two days later, Hensarling was given permission to go to the medical facility for his injury. Id., paragraph 18. The medical staff informed Hensarling that his hernia was not serious enough for issuance of a hernia belt. Id. On or about the following day, Hensarling informed Moody that the medical staff had denied him a hernia belt and that he would have to quit his position at the UNICOR factory. Id., paragraph 19. Moody again rejected Hensarling's attempt to quit his position and brought Hensarling to the factory office to again meet with Grady. Id.

In the presence of Hensarling, Moody informed Grady that Hensarling was unable to obtain a hernia belt from the medical staff. Id., paragraph 20. Grady again informed Hensarling that it was against UNICOR policy to issue a hernia belt to inmates. Id. Nevertheless, Grady instructed Moody to find a hernia belt at a warehouse facility located outside of the UNICOR factory and bring it to Grady's

office. Id. Subsequently, a riot broke out at FCC, resulting in an approximate three-month lock down. Id., paragraph 21.

On approximately April 10, 2009 (after the lock down had ended), Grady summoned Hensarling to his office and pointed to "a bright green industrial type back brace" and instructed Hensarling to wear the brace, but not to tell anyone where he got it. Id. at 4-5, paragraph 22. That same day, Hensarling resumed his position at the factory and "reluctantly donned" the back brace. Id. at 5, paragraph 23. Very soon, inmates began confronting Hensarling about where he had obtained the back brace and why he had been issued a back brace when they had not. Id.

Approximately four days later, two inmates informed Hensarling that Eric Azotea (a fellow inmate and UNICOR factory worker) had attempted to steal the back brace from the UNICOR factory tool room, where Hensarling was storing the brace between shifts, but that one of the guards prevented Azotea from removing the brace from the UNICOR factory. Id., paragraph 24. After hearing about Azotea's attempt to steal the brace, Hensarling "peacefully confronted" Azotea regarding Azotea's intentions. Id., paragraph 25. Azotea informed Hensarling that some inmates offered him money for the brace. Id. Hensarling "pleaded" with Azotea to leave Hensarling and the brace alone. Id. Azotea then informed Hensarling that there would not be any trouble and that he would not pursue the brace against Plaintiff's will. Id. In an abundance of caution, Hensarling informed an unknown UNICOR officer of Azotea's attempt to steal the brace and inquired as to whether

Hensarling could store the brace in his cell. Id., paragraph 26. That UNICOR officer granted permission to Hensarling to bring the belt back and forth between housing and the UNICOR factory. Id.

On or about April 15, 2009, Hensarling allowed Steve (a fellow inmate whose last name is unknown) to borrow the back brace to wear to Steve's kitchen job. Id. at 6, paragraph 27. Later that day, Azotea obtained the brace from Steve and brought the brace to Hensarling's cell. Id. Azotea informed James Wilson (Hensarling's cellmate) that Hensarling had stolen the brace from the factory and should bring it back. Id. Hensarling suspected that Azotea's reason for returning the brace to Hensarling was that Azotea's only opportunity to steal the brace was if the brace was left unattended in the factory. Id., paragraph 28.

On or about April I7, 2009, Defendant Hadaway informed Hensarling that he had seen Steve with the brace. Id., paragraph 29. Hensarling told Hadaway that he had been given permission to take the brace back to his cell because Azotea had tried to steal it. Id. Hadaway told Hensarling that he would keep the brace in his office desk drawer for Hensarling's use to prevent Azotea from taking it. Id.

When exiting Hadaway's office, Azotea's cell mate (name unknown) warned Hensarling that Azotea was planning to stab Hensarling. Id., paragraph 30. Hensarling immediately informed Hadaway and Higinbotham of the "specific and imminent threat of harm." Id. Hadaway and Higinbotham told Hensarling that they would immediately separate him from Azotea at the factory by putting them on

separate shifts. Id., paragraph 31. Additionally, they instructed Hensarling to see his unit team to request a housing transfer away from Azotea. Id. at 6-7, paragraph 31. Hadaway and Higinbotham neither requested the housing change on Hensarling's behalf nor followed up with Hensarling's unit team as to whether the housing transfer had occurred. Id. at 7, paragraph 31.

Immediately, Hensarling went to housing and informed Defendants McGlothren and Jefferson about Azotea's "imminent plan to stab" him. Id., paragraph 32. McGlothren and Jefferson replied that they were too busy dealing with the aftermath of the riot and that Hensarling needed "to deal with the situation on his own." Id.

On April 17, 2009, at approximately 5:30 p.m., Hensarling volunteered for a breathalyser performed by Defendant John Doe (the on-duty housing correctional officer at the officer station located in I-2). Id., paragraph 33. Hensarling volunteered for the breathalyser to privately inform John Doe about Azotea's imminent plan to stab him. Id. Hensarling privately told John Doe so other inmates would not label him a snitch, which would have placed him in more danger. Id. Hensarling also requested that John Doe keep a close watch on him and Azotea that evening to ensure Hensarling's safety. Id. Despite Hensarling's "extraordinary efforts" to warn John Doe of the imminent threat of harm, John Doe failed to make rounds that evening, departed from his assigned guard station and went completely

unseen and unheard from for the remainder of the evening, leaving the prisoners to police themselves. Id., paragraph 34.

At about 8:30 p.m. that same evening, Hensarling was inside his cell when he was "abruptly attacked without notice" by Azotea who struck Hensarling's head and face repeatedly with a prison-issued metal combination lock attached to a belt. Id., paragraph 35. Immediately after the attack, Hensarling's left eye was hanging from its socket, and he was bleeding profusely. Id. at 8, paragraph 36. While disoriented, Hensarling eventually managed to make his way to the officer's station located at the center of I-2. Id. However, John Doe was neither sitting at the assigned officer station nor making rounds on the wing. Id. After searching for John Doe, Hensarling finally found him in a makeshift office/utility closet behind a solid closed door, where he was surfing the Internet, talking on the phone and listening to music. Id. As a result of Defendants' actions and omissions, Hensarling lost total vision in his left eye and was forced to have his eye surgically removed. Id., paragraph 37.

As his first claim, Hensarling asserts that Defendants Moody, Grady, Higinbotham, Hadaway, McGlothren, Jefferson and John Doe violated his Eighth Amendment right when they were deliberately indifferent to his health, safety and welfare. Id., paragraphs 39, 40. As to Defendants Moody and Grady, Hensarling states that they violated his Eighth Amendment right when: (a) knowing of his hernia, they forced him to continue working in at the factory, which caused him pain and

discomfort, and (b) they knowingly and purposefully introduced contraband (a nonprison-issued back brace) and then forced him to wear the device. Id., paragraph 41. Hensarling states that Moody and Grady knew or should have known that introducing contraband in the from of a back brace that was not available to other inmates and then forcing Hensarling to wear the device in full view of other inmates working under similar factory conditions would cause jealousy among the inmates and hostility toward Hensarling. Id. at 8-9, paragraph 42. Hensarling asserts that Defendants Moody, Grady, Higinbotham, Hadaway, McGlothren, Jefferson and John Doe, all federal officials, violated his Eighth Amendment right when, after he informed each of the respective defendants about Azotea's imminent plan to stab him, they deliberately refused to conduct a reasonable investigation into the matter or to ensure that Hensarling was separated from Azotea. Id. at 9, paragraph 43. Moreover, Hensarling states that Defendant John Doe further violated his Eighth Amendment right when, after Hensarling informed John Doe about Azotea's imminent plan to stab him, Doe abandoned his assigned officer station, failed to make rounds and closed himself in a make shift office/utility closet out of site and sound of the inmates housed in his post, leaving the inmates to police themselves and ultimately creating an environment where Azotea could and did carry out his plan to inflict bodily harm on Hensarling. Id., paragraph 44.

As his second claim, Hensarling sues Defendant USA under the Federal Tort Claims Act, asserting that the described acts constitute negligent and wrongful acts and omissions of agents and employees of the United States government, while acting within the scope of their offices and employment. Id. at 10, paragraph 50. He states that Defendant USA breached its duty to him by: (a) forcing him to continue to work in a position at UNICOR that was aggravating his hernia; (b) issuing him contraband (a back brace); (c) showing him favoritism and differential treatment; (d) creating hostility among him and other factory co-corkers; (e) failing to investigate Azotea's threat; (f) failing to separate Hensarling and Azotea; (g) failing to guard the inmates housed in I-2; (h) creating and occupying a makeshift office for the guards on duty in I-2 that was out of sight and sound of inmates; (i) failing to occupy the guard station and make rounds after Hensarling's warnings of Azotea's threat; (j) failing to provide appropriate medical attention to Hensarling after the incident; (k) locking Hensarling in the special housing unit for an unreasonable time period after the attack; (l) obstructing Hensarling's right to administrative relief by denying him access to required forms and preventing him from accessing legal information and services; and (m) refusing Hensarling necessary medical attention from the time he was held in the special housing unit and continuing through the date of filing this Complaint. Id. at 11-12, paragraph 53. As a result of Defendant USA's acts and

omissions, Hensarling sustained intense pain and suffering including, but not limited to, a brutal inmate on inmate attack, the loss of his left eye, physical pain and discomfort, emotional distress, degenerative vision in his right eye and the inability to obtain gainful employment in his field of work. Id. at 12.

II. Summary of Defendants' Motion to Dismiss and Plaintiff's Response

Defendants Moody, Grady, Higinbotham and Hadaway deny Plaintiff's allegations of wrongdoing. In their Motion to Dismiss, they request that this Court dismiss Plaintiff's Bivens action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted "as Plaintiff has failed to alleged sufficient facts to support his constitutional claims and the Defendants are immune from suit." Motion to Dismiss at 2, 6. Plaintiff responded that Defendants are not entitled to qualified immunity, were not acting within their discretionary authority, and violated Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment.

III. Motion to Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6) empowers a court to grant a motion to dismiss when a complaint fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v.

Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Twombly, 550 U.S. at 555).

IV. Law and Conclusions

As previously stated, Plaintiff filed this action against Defendant USA and various employees of the federal BOP, asserting claims under Bivens for violations of the Eighth Amendment and the Federal Tort Claims Act (28 U.S.C. §2671). Four Defendants (Moody, Grady, Higinbotham and Hadaway) filed a Motion to Dismiss, requesting that the Court dismiss the Bivens action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Plaintiff failed to assert sufficient facts to support his constitutional claims and that the Defendants are entitled to qualified immunity.[4]

[4] The remaining Defendants (USA, McGlothren and Jefferson) filed an Answer and Affirmative Defenses (Doc. #76) on April 15, 2013.

The Eleventh Circuit has stated:

> A government official acting in the course and scope of his employment is shielded from suit against him in his individual capacity if, while performing a discretionary function, his conduct did not violate a clearly established constitutional right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). To survive a motion to dismiss based upon qualified immunity, the plaintiff must have alleged sufficient facts to support a finding of a constitutional violation of a clearly established law. See Oliver v. Fiorino, 586 F.3d 898, 905 (11th Cir. 2009). Although we take the allegations of the complaint to be true on motion to dismiss, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Furthermore, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Chandler v. Sec'y of Fla. Dep't of Transp., 695 F.3d 1194, 1198-99 (11th Cir. 2012) (per curiam). The Eleventh Circuit set forth the parties' respective burdens.

> To claim qualified immunity, a defendant must first show he was performing a discretionary function. Mercado v. City of Orlando, 407 F.3d 1152, 1156 (11th Cir. 2005) (citation omitted). The burden then shifts to the plaintiff to show that: (1) the defendant violated a constitutional right; and (2) the right was clearly established at the time of the violation. Id. at 1156.

Barnes v. Zaccari, 669 F.3d 1295, 1303 (11th Cir. 2012).

Thus, the Defendants first must show that they were engaged in discretionary functions when they performed the acts of which the Plaintiff complains. It appears

that the Defendants were acting within the scope of their discretionary authority in that the acts they undertook are the type that fell within their job responsibilities. See Chandler, 695 F.3d at 1199 n.3 (citation omitted); Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1265-66 (11th Cir. 2004) (setting forth the two-fold inquiry). Assuming that the Defendants were performing discretionary functions when the allegedly wrongful conduct occurred, the burden shifts to Plaintiff to show that the Defendants violated a constitutional right and that right was clearly established at the time of the violation. Following the United States Supreme Court's decision in Pearson v. Callahan, 555 U.S. 223, 236 (2009), this Court is "free to consider these elements in either sequence and to decide the case on the basis of either element . . . ." Youmans v. Gagnon, 626 F.3d 557, 562 (11th Cir. 2010).

Taking Plaintiff's assertions in the Complaint as true, this Court opines that Plaintiff has sufficiently alleged an Eighth Amendment violation that is plausible on its face. Thus, Defendants' Motion to Dismiss is due to be denied without prejudice at this time. Moreover, at this stage of the litigation, discovery is necessary to further develop the facts underlying Plaintiff's Eighth Amendment claims.

Therefore, it is now

ORDERED AND ADJUDGED:

1. Defendants' Motion to Dismiss (Doc. #77) is **DENIED** without prejudice.

2. Defendants Moody, Grady, Higinbotham and Hadaway shall respond to Plaintiff's Third Amended Complaint (Doc. #72) **on or before October 4, 2013.**

DONE AND ORDERED at Tampa, Florida, this 3rd day of September, 2013.

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

sc 8/30
c:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

RICHARD E. HENSARLING,

Plaintiff,

-vs- Case No. 5:10-cv-344-Oc-10PRL

UNITED STATES OF AMERICA,

Defendant.

ORDER

The Court has been advised by the Defendant that the above-styled action has been settled (Doc. No. 122). Accordingly, pursuant to Local Rule 3.08(b) of the Middle District of Florida, it is **ORDERED and ADJUDGED** that this cause is hereby **DISMISSED** without prejudice subject to the right of any party to re-open the action within sixty (60) days, upon good cause shown, or to submit a stipulated form of final order or judgment. All pending motions are DENIED as moot. The Clerk is directed to CLOSE the file.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 25th day of March 2015.

UNITED STATES DISTRICT JUDGE

Copies to:
Richard E. Hensarling
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

RICHARD E. HENSARLING,

Plaintiff,

-vs- Case No. 5:10-cv-344-Oc-10PRL

UNITED STATES OF AMERICA,

Defendant.

ORDER

On March 25, 2015, the Court entered an Order dismissing this case without prejudice to the right of any party to re-open the action within sixty (60) days, upon good cause shown, or to submit a stipulated form of final order or judgment. (Doc. 123). The Court closed the case. On or about June 27, 2015, the Parties filed a joint stipulation of dismissal. (Doc. 125). The Parties stipulate that the action has been settled and is dismissed with prejudice and without an award of interest, costs or attorney fees. Id.

Accordingly, this case is hereby **DISMISSED with prejudice** and without an award of interest, costs or attorney fees. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

DONE and ORDERED at Ocala, Florida this 9th day of June 2015.

UNITED STATES DISTRICT JUDGE

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(b)(5)

of the Freedom of Information and Privacy Act

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CASE DETAILS

[redacted]

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Case ID: CIV-SER-2011-00273 **Short Description:** BECK ET AL V. UNITED STATES OF AMERICA

CASE DETAILS CASE DOCS CASE PERSONS CASE DATES CASE SUMMARY CASE BLOG

Case Login Information

Reference Number	1:11-cv-20511-UU
Short Description	BECK ET AL V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Other
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Miami (FDC)
Incident Region	SOUTHEAST REGIONAL OFFICE
Incident Institution	Miami (FDC)
Monetary Relief Sought	$3,500,000.00
Estimated Amount	$50,000.00
Office	Miami
Jurisdiction	SOUTHERN DISTRICT OF FLORIDA
Responsible Legal Office	FDC Miami

Legal Liability Evaluation

Estimated Amount	$10,000.00 - 50,000.00
Estimated Outcome	Probable

Case Resolution

Date	01/18/2012
Type	Settled
Reason Sought	
Amount offered	$10,000.00
Total Amount Paid	$10,000.00
Description	AFTER REVIEWING ALL EXPERT REPORTS, IT WAS DETERMINED THIS CASE SHOULD BE SETTLED RATHER THAN RISK AN ADVERSE JUDGEMENT AT TRIAL WHICH COULD BE SIGNIFICANTLY HIGHER.
Description	AFTER REVIEWING ALL EXPERT REPORTS, IT WAS DETERMINED THIS CASE SHOULD BE SETTLED RATHER THAN RISK AN ADVERSE JUDGEMENT AT TRIAL WHICH COULD BE SIGNIFICANTLY HIGHER.
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	02/17/2011
Date Filed	02/15/2011

Case Progress

Current Owner	ELIZABETH GARCIA
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	28:1346 TORT CLAIM
Further Case Classification	
Comments	Audit complete 1/25/2011 EG

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[redacted] United States Department of Justice - Office of General Counsel & Review

rec'd
James A. Weinkle
2/17/2011 3:03 pm

AO 440 (Rev. 02/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

2/17/11
#1951
3:03 pm
James Weinkle
AO SA

LESLIE GARY BECK and BARBARA P. BECK
Plaintiff
v.
UNITED STATES OF AMERICA,
Defendant

Civil Action No. **11-20511-CIV-UNGARO/SIMONTON**

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* UNITED STATES OF AMERICA
BY SERVING HONORABLE JEFFREY H. SLOMAN
UNITED STATES ATTORNEY, SOUTHERN DISTRICT OF FLORIDA
99 NE 4 Street
Miami FL 33132

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: ARTHUR W. TIFFORD, ESQ., TIFFORD AND TIFFORD, P.A.
1385 NW 15 STREET, MIAMI FL 33125
(305) 545-7822 TELEPHONE; (305) 325-1825 TELEFAX
email: tiffordlaw@bellsouth.net

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: **February 15, 2011**

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Steven M. Larimore
Clerk of Court

SUMMONS

s/Jose Conway
Deputy Clerk
U.S. District Courts

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ _____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(MIAMI DIVISION)

CASE NO. 11-20511-CIV-UNGARO/SIMONTON

LESLIE GARY BECK and BARBARA P. BECK,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

COMPLAINT

The Plaintiffs, LESLIE GARY BECK and BARBARA P. BECK, sue the Defendant, UNITED STATES OF AMERICA, BY AND THROUGH ITS DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, and state and aver the following:

PARTIES

1. Plaintiff, LESLIE GARY BECK ("BECK"), is a citizen of the state of Florida and is *sui juris*.

2. Plaintiff, BARBARA P. BECK ("MRS. BECK"), is a citizen of the state of Florida, is sui *juris*, and has been and is the lawful wife of BECK. MRS. BECK is a derivative party-plaintiff.

3. Defendant, UNITED STATES OF AMERICA, BY AND THROUGH ITS DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, is an agency and instrumentality of the United States of America, and is *sui juris*.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the Plaintiffs' claims asserted here pursuant to 28 *U.S.C.* §§1331, 1346, 1357, 2412, and 2671.

5. Venue in the Southern District of Florida, and its Miami Division, is proper based upon the acts of which complaint are hereinafter made occurred or failed to occur, as appropriate, in this district, and one or more of the causes of action alleged occurred in this district.

FACTS APPLICABLE TO ALL COUNTS

6. Plaintiffs have complied with all prerequisites necessary to filing a federal tort claim as more fully set forth in 28 *U.S.C.* §2671.

7. On January 25, 2008, the Hon. William Peter Dimitrouleas sentenced BECK to one year and one day imprisonment among other terms.

8. The Bureau of Prisons assigned BECK to the Federal Detention Center in Miami, Florida ("FDC Miami").

9. On March 10, 2008, BECK was 63 years old.

10. On March 10, 2008, BECK was transferred from a lower floor to the Eleventh Floor of FDC Miami and was assigned, over his objection, the upper bed of the bunk bed despite his age.

11. On March 10, 2008, BECK objected to being assigned the upper bed of the bunk bed as a result of his age and physical difficulties getting up and getting down from the upper bunk bed. Mr. Beck raised his objections to a guard whose name, as of the date of the service of his administrative claim prior to the commencement of this civil action, is unknown.

12. At approximately 8:00 p.m., while preparing his bed, BECK fell backwards off the upper bed of the bunk bed, his back slamming into the physical table in the cell room adjacent to and in close proximity of the bunk bed; Mr. Beck ultimately landed on the floor of the cell room.

13. As a result of the fall, BECK fractured 6 ribs.

14. BECK notified the guard of the fall and requested medical assistance, complaining of extreme pain and difficulty breathing. The guard informed BECK that "it was too late to see a doctor," or words to that effect. The guard told BECK that he "logged in" the accident and complaints of extreme pain and difficulty breathing.

15. On March 11, 2008, between 5:00 a.m. and 6:00 a.m., BECK again reported the fall and resulting injuries to a Ms. Nelson and requested medical attention. Ms. Nelson told BECK that he would not be sent to obtain medical attention.

16. On March 11, 2008, at approximately 9:00 a.m. BECK telephoned his wife, MRS. BECK and informed her of the fall and injuries and the denial of access to medical attention.

17. On March 11, 2008, MRS. BECK telephoned Carla Hanes of the Southeast Regional Office of the Bureau of Prisons in Atlanta, Georgia and complained of the apparent serious injuries and lack of medical attention. Ms. Hanes informed MRS. BECK that BECK would be seen by a doctor that day.

18. On March 11, 2008, BECK was seen by a radiation technician who performed an X-ray(s) on BECK. Thereafter, BECK was seen by Dr. Lopez. Dr. Lopez inquired of BECK of the injury and without even observing the x-ray, told BECK "I'm sure nothing is broken." Again, Dr. Lopez did not look at the X-ray(s) in the presence of BECK

before uttering the foregoing words. Also on March 11, 2008 Dr. Ginart, for the first time, provided BECK with a bottom bunk pass.

19. On March 12, 2008, BECK reported to a female guard whose last name is Nelson that he could not sleep as a result of extreme pain. Guard Nelson told BECK to complete a "cop out" form and report his complaint to medical. BECK, however, continued to be denied medical attention.

20. During the next two weeks of March 2008, BECK completed multiple "cop out" forms repeating the same complaints but did not receive medical attention.

21. On either March 25, 2008, MRS. BECK telephoned Carla Hanes of the Southeast Regional Office of the Bureau of Prisons, notifying Ms. Hanes that BECK completed four "cop outs," but continued to be denied medical attention.

22. On March 26, 2008, BECK was sent to medical for "lab work" even though "lab work" was done one week prior.

23. On April 18, 2008, BECK was seen by Dr. Lopez. Dr. Lopez notified BECK that he will be sent to an outside medical facility for additional X-rays and a CAT Scan.

24. Between March 26, 2008 and April 18, 2008, BECK again completed additional, multiple "cop out" forms containing basically the same complaints seeking medical attention.

25. On May 21, 2008, blood was drawn from BECK which, he was told, was being drawn to determine whether he had osteoporosis. Dr. Lopez told BECK that the pain BECK was experiencing was the result of his age combined with his confinement.

26. At some point between May 21, 2008 and May 27, 2008, a female (name and title are currently unknown) in the medical office advised BECK that he was suffering from a calcium deficiency and would be issued calcium pills.

27. On May 27, 2008, BECK was taken to Larkin Hospital in South Miami, Florida. A CAT Scan and a bone scan were performed on BECK.

28. Upon his return to FDC Miami, BECK was placed in the Special Housing Unit ("SHU"), and remained there for 17 days.

29. For the first week BECK was in the SHU he was denied all of his medications and medication to alleviate the continuing pain he was experiencing.

30. On June 12, 2008, BECK was released from the SHU and assigned to the 6th Floor of the FDC, and to a lower bunk.

31. On July 24, 2008, BECK filled out and submitted a Form 9.

32. On July 27, 2008, BECK was sent to see an orthopedic specialist at FDC-Miami for the first time. The orthopedist informed BECK that he had 6 fractured ribs. Dr. Genart prescribed a brace for BECK to wear.

33. On August 11, 2008, BECK finally received the previously prescribed back brace.

34. On September 24, 2008, BECK was released from FDC Miami to a half-way house.

35. On November 3, 2008, BECK was permitted to go to the Social Security Administration to complete paperwork for Social Security Disability benefits.

36. On December 5, 2008, BECK was released from the half-way house, completing the confinement component of his sentence.

37. On December 15, 2008, the Social Security Administration sent BECK for X-rays.

38. The Social Security Administration rated BECK permanently disabled from his broken ribs injuries, entitling him to receive maximum benefits. The effective date of BECK's disability is November 14. 2008.

COUNT I
NEGLIGENCE
(Plaintiff Leslie Gary Beck v. Defendant)

39. Plaintiff, BECK, incorporates by reference paragraphs 1 through 38 as though fully alleged *haec verba*.

40. The Defendant owed a duty to Plaintiff BECK to use reasonable care and medical care and was negligent in the treatment of Plaintiff.

41. The Defendant negligently breached the duty it owed to the Plaintiff to provide reasonable care and medical care in the following particulars:

a. The Defendant carelessly and negligently caused and directed the Plaintiff to be assigned a top bunk despite his age and over his complaint and objection;

b. The Defendant failed and neglected to take proper precautions to avoid and minimize the injuries to the Plaintiff as a result of his being assigned a top bunk despite his age and over his complaint and objection;

c. Grossly and unduly delaying medical treatment and examination of the Plaintiff despite complaints of extreme pain and difficulty breathing after falling off the top bunk and striking the physical table located in the cell;

d. Failing to attempt to make a medical diagnosis of and misdiagnosing why the Plaintiff was experiencing severe pain and difficulty breathing after falling from the top bunk and striking the physical table located in the cell;

e. Providing inappropriate treatment and medication to the Plaintiff after suffering his injury;

f. Inappropriately placing the Plaintiff in the Special Housing Unit after being treated by a physician outside of the Federal Detention Center and thereafter denying him appropriate medical care and treatment for his injuries;

g. Failing and neglecting to apply and provide the Plaintiff the proper remedies to avoid or diminish the injuries and damage to the Plaintiff

42. As a direct and proximate result of the negligence and unskillful acts of the Defendant, the Plaintiff suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, loss of earnings, and loss of ability to earn money.

Wherefore, the Plaintiff, BECK requests compensatory damages for extreme, continuous pain and suffering, mental and emotional pain and suffering, total disability (rated by the Social Security Administration), loss of enjoyment of life, increased depression and anxiety, loss of sleep, diminished ability to participate in spousal intimacy, and other conditions more carefully described in the medical records in the amount of $3,000,000.00, attorneys' fees pursuant to 28 *U.S.C.* §2412 (Equal Access to Justice Act), the costs of this action, and such other and further relief as is just in this cause.

COUNT II
LOSS OF CONSORTIUM
(Plaintiff Barbara P. Beck v. Defendant)

43. Plaintiff, MRS. BECK, incorporates by reference paragraphs 1 through 38 as though fully alleged *haec verba*.

44. The Defendant owed a duty to plaintiff, BECK, to use reasonable care and medical care and was negligent in the treatment of Plaintiff, BECK.

45. While in the Bureau of Prisons' care, BECK was injured when the Defendant negligently assigned BECK a top bunk despite his age and over his complaint and objection and negligently medically treated and misdiagnosed BECK after his injury.

46. As a direct and proximate result of the Defendant's negligent conduct, plaintiff, BECK, suffered extreme bodily injuries and resulting pain and suffering, permanent disability, permanent disfigurement, mental anguish, loss of capacity for the enjoyment of life, loss of earnings, and loss of ability to earn money. The losses are either permanent or continuing and plaintiff will suffer the losses in the future.

47. Before suffering these injuries, plaintiff, BECK, was able to and did perform all the duties of a husband and did perform all these duties, including assisting in maintaining the home, and providing love, companionship, affection, society, sexual relations, moral support, and solace to plaintiff.

48. As a direct and proximate result of the injuries, plaintiff, BECK, has been unable to perform the duties of a husband in that plaintiff, BECK, can no longer assist with housework, participate to the same extent as formerly in family, recreational, and social activities with plaintiff, MRS. BECK, and is contributing to a lesser extent to the household income. Due to the nature of the injuries sustained by plaintiff, BECK, and

the severe physical and psychological strains they cause and caused him, plaintiff, BECK, is no longer able to provide plaintiff with love, companionship, affection, society, moral support, and solace. Because of these injuries, plaintiff, BECK, will be unable to perform these duties in the future. Plaintiff, MRS. BECK, is therefore deprived and will be permanently deprived of her spouse's consortium, all to plaintiff's damage, in a total amount to be established by proof at trial.

WHEREFORE, the plaintiff, MRS. BECK, requests compensatory damages for her loss of consortium in the amount of $500,000.00, attorneys' fees pursuant to 28 *U.S.C.* §2412 (Equal Access to Justice Act), the costs of this action, and such other and further relief as is just in this cause.

DEMAND FOR TRIAL BY JURY

Plaintiffs demand trial by jury on all issues so triable as of right.

Dated: 31 January 2011.

Respectfully submitted,

TIFFORD AND TIFFORD, P.A.
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BY s/Arthur W. Tifford
ARTHUR W. TIFFORD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 11-20511-CIV-UNGARO

LESLIE G. BECK, *et al.*,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER ON MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss, filed on April 18, 2011. (D.E. 15.)

THE COURT has reviewed the Motion and the pertinent portions of the record and is otherwise fully advised in the premises.

I

Plaintiffs bring two negligence counts against the United States of America under the Federal Tort Claims Act (FTCA), 28 U.S.C §1346(b)(1), stemming from Plaintiff Leslie Beck's ("Mr. Beck") incarceration in the Federal Detention Center in Miami, Florida ("FDC Miami").

The following facts underlying Plaintiffs' claim are taken from their Complaint. (D.E. 1.) On March 10, 2008, Mr. Beck fell off the upper bunk of his prison bed, slammed into a table, and landed on the floor. Mr. Beck had objected to his being assigned to the top bunk given his age of sixty-three and physical difficulties. Those objections were ignored.

After the fall, Mr. Beck complained of extreme pain and difficulty breathing, but was informed it was "too late to see the doctor." On March 11, 2008, x-rays were performed on Mr.

Beck. Shortly thereafter, a prison doctor reviewed the x-rays and notified Mr. Beck, he was "sure nothing [was] broken." Also on March 11, 2008, another prison doctor provided Mr. Beck with a bottom bunk pass.

From March 12 until March 25, 2008, Mr. Beck completed four "cop-out" forms complaining of extreme pain and attendant sleeplessness and seeking medical attention. Mr. Beck was denied medical care during this period. On March 26, Mr. Beck was sent to the medical unit in FDC Miami for lab work. From March 26 until April 18, Mr. Beck completed additional "cop-out" forms, but was again denied medical attention.

On April 18, 2008, Mr. Beck was seen by a prison doctor who notified him he would be sent to an outside medical facility for x-rays and a CAT scan. On May 21, 2008, the prison doctor told Mr. Beck that his pain was a result of his age combined with his confinement. On May 27, 2008, Mr. Beck was taken to Larkin Hospital in South Miami, Florida where a CAT Scan and a bone scan were performed. Upon his return, Mr. Beck was placed in the Special Housing Unit ("SHU") for a period of seventeen days where he was denied medication during the first week. On June 12, 2008 Mr. Beck was released from the SHU and was assigned to a lower bunk in the FDC.

On July 27, 2008, Mr. Beck saw an orthopedic specialist at FDC Miami. The specialist informed Mr. Beck he had six fractured ribs. A back-brace was delivered to Mr. Beck on August 11, 2008. Mr. Beck was designated as permanently disabled by the Social Security Administration on November 14, 2008.

Plaintiff Barbara P. Beck ("Mrs. Beck") is Mr. Beck's wife; since Mr. Beck's injury, Mr. Beck can no longer perform the duties of a husband.

Plaintiffs claim the United States breached its general duty of reasonable care and its duty to provide reasonable medical care, and as a result that they have both been damaged. Specifically, Plaintiffs allege the United States was negligent in assigning Mr. Beck to the top bunk which caused his fall and injury on March 10, 2008, and that the United States negligently failed to provide or negligently provided medical care from the date of his injury, at least until he was properly diagnosed with fractured ribs, months later, on July 27, 2008.

In Count I of the Complaint, Mr. Beck contends that as a direct and proximate result of the United States's negligence, he suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for enjoyment of life, loss of earnings, and loss of ability to earn money. Mr. Beck seeks compensatory damages. In Count II of the Complaint, Mrs. Beck contends that as a direct and proximate result of the United States's negligence, Mr. Beck is no longer able to perform the functions and duties of a husband previously enjoyed by Mrs. Beck. Mrs. Beck seeks derivative damages including loss of consortium and society of the claimant, diminishment of spousal intimacy, loss of household support activities, and mental and emotional pain and suffering.

In response, the United States moves to dismiss the Complaint for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), on the grounds that Plaintiffs failed to comply with the strict administrative claim procedures of the FTCA. The Court discussed the United States's motion below.

II

The FTCA is a specific, congressional exception to the United States's Sovereign Immunity for tort claims, under which the government may be sued by certain parties under

certain circumstances for particular tortious acts committed by employees of the government. 28 U.S.C. §§ 1346, 2671 *et seq*. The act functions as a specific exception to the general rule of the United States's historical Sovereign Immunity, which can be waived only by the sovereign. *Suarez v. U.S.*, 22 F.3d 1064 (11th Cir. 1994). Thus, the courts are required to strictly enforce the statutory conditions necessary to invoke the exception and its application must be scrupulously observed and not expanded by courts. *See id.*

As a prerequisite to any action brought under the FTCA, a plaintiff is required to present the claim to the appropriate federal agency. *See* § 2675(a). For purposes of § 2675, the appropriate federal agency is considered to be "the Federal agency whose activities gave rise to the claim." *See* 28 C.F.R § 14.2(b)(1). A claim is deemed to have been "presented" when the appropriate agency *receives* the claim. *See* 28 C.F.R. §14.2(a). Further, each federal agency may designate the appropriate branch or office within the agency where claims are to be presented. Claims against the Federal Bureau of Prisons (the "B.O.P.") are to be sent to its regional office in the region where the claim occurred. *See* 28 C.F.R. § 543.31(c). "A tort claim against the United States shall be forever barred unless it is 'presented' in writing to the appropriate federal agency within two years after such claim accrues." *See* 28 U.S.C. § 2401.

Generally, a claim accrues for purposes of the FTCA at the time of the plaintiff's injury. *United States v. Kubrick*, 444 U.S. 111,115 (1979). However, there are at least two exceptions to the general rule.

Under the "discovery rule," an otherwise undiscoverable cause of action accrues when the injury and the person who caused the injury are discovered or could have been discovered through reasonable diligence. *Mullinex v. McElheney*, 817 F.2d 711, 716 (11th Cir. 1987). For

instance, medical malpractice claims under the FTCA accrue, for limitations purposes, when plaintiff is, or in exercise of reasonable diligence should be, aware of both his injury and its connection with some act of defendant; plaintiff need only know of "critical facts" concerning his injury and its cause, and need not know that acts inflicting his injury were negligent. *St. John v. U.S.*, 54 F. Supp. 2d 1332 (S.D Fla. 1999).

Under the "continuous tort rule," also known as the continuing violation doctrine, a plaintiff's action is not time-barred where some of the alleged violations occurred within the statutory period, even though other violations did not, if the earlier acts were part of a continuous wrong. *See, e.g.*, *Price v. Owens*, 634 F. Supp. 2d 1349 (N.D. GA. 2009). The doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of law occur within the statutory period. *See Hipp v Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1221 (11th Cir. 2001). When the violation alleged involves continuing injury, the cause of action accrues and the limitations period begins to run at the time the unlawful conduct ceases. *Donaldson v O'Connor*, 493 F.2d 507,529 (5th Cir. 1974),[1] *vacated on other grounds by, O'Connor v Donaldson*, 422 U.S. 563 (1975).

The mandatory language of § 2675(a) requires that each claim and each claimant meet the prerequisites for maintaining a suit against the government. *Turner v. U.S*, 514 F.3d 1194 (11th Cir. 2008). The court only has jurisdiction over an FTCA action if the plaintiff has met § 2675(a)'s requirements. *See Bush v. U.S*, 703 F.2d 491, 494 (11th Cir. 1983). Jurisdictional prerequisites to suit under the FTCA are not technical procedures to be disregarded at the whim

[1]Decisions of former fifth circuit handed down before October 1, 1981 are binding precedent in Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) *(en banc)*.

or discretion of the court, but are to be strictly construed and cannot be waived. *Hitchman v. U.S.*, 585 F. Supp. 256 (S.D. Fla. 1984). When a claim made under FTCA does not comply with any of the previously mentioned statutory prerequisites, the plaintiff fails to maintain a suit against the government and leaves the court without jurisdiction to hear the case. *See Suarez v. U.S.*, 22 F.3d 1064 (11th Cir. 1994).

III

In order determine whether Plaintiff claims are time-barred, the Court must first determine when they accrued, and then determine when they were presented.

A

Both of Plaintiffs' claims arise from distinct negligence theories with distinct accrual dates—the United States's negligent assignment of Mr. Beck to the top bunk and the United States's negligent failure to provide or negligent provision of medical care.

With respect to the alleged negligent bunk assignment, the Complaint clearly alleges that Mr. Beck fell and was injured on March 10, 2008. And the claims arising therefrom, therefore, accrued on March 10, 2008. *See U.S v. Kubrick*, 444 U.S. 111, 352 (1979).

The alleged failure to provide or negligent provision of medical care is slightly more complicated. The essence of either breach is the failure to diagnose and treat Mr. Beck's broken ribs suffered as a result of the fall. These claims accrued on July 27, 2008, the date Mr. Beck was informed that he had six broken ribs and, therefore, was able to discover the failure or unreasonableness of his previous medical care. *See Mullinex*, 817 F.2d at 716. Morever, this alleged failure was continuous from the time of Mr. Beck's injury. *See Donaldson*, 493 F.2d at 529.

B

In order to have been timely as to both claims, Plaintiffs' administrative claim must have been presented prior to March 10, 2010, and in order to have been timely as to the medical negligence claims only, Plaintiffs' administrative claim must have been presented prior to July 27, 2010.

The United States does not dispute that by April 8, 2010 Plaintiffs presented their claims to the B.O.P. Thus, there is no question as to whether Plaintiffs' medical negligence claim was timely presented—it was. The parties, however, dispute whether Plaintiffs' presented their claim to the B.O.P. on or before March 10, 2010.

On March 5, 2010, Plaintiffs sent their initial administrative tort claim, accompanied by a Standard Form 95[2] to the Honorable Eric Holder (Attorney General of the United States), Harley Lappin (the Director of the B.O.P.), and John T. Rathman, (the Warden at the FDC). All three received the claim on March 8, 2010. None, however, was designated by statute or regulation as the person or agency office to whom claims against the B.O.P were to be delivered. *See* 28 C.F.R. § 543.31. Accordingly, as required by 28 C.F.R. § 14.2(b)(1), Plaintiffs' claim was forwarded to the appropriate agency office, the Southeastern Regional Office of the B.O.P. which received it on March 18, 2010. The parties dispute whether, under these facts, the claim was presented on March 8 or March 18, 2010—a question which is dispositive of Plaintiffs' negligence bunk-assignment claim.

Unfortunately for Plaintiff, the answer is quite clear; the claim was not presented until

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[2] The Standard Form 95 is the form prescribed by the Dept. Of Justice pursuant to 28 C.F.R 14.2 to file a claim under the FTCA.

March 18, 2010, when it was received by the Southeastern Regional Office of the B.O.P. The Court of Appeals for the Eleventh Circuit has already resolved this debate in an almost identical factual scenario. *See Martinez v. Minnis*, 257 F. App'x. 261, 264 (11th Cir. 2007) (affirming dismissal for lack of subject matter jurisdiction where the plaintiff timely presented claim to the Director of the B.O.P., but failed to timely present the claim to the appropriate branch of the B.O.P. under 28 C.F.R. § 543.31), *cert. denied*, 522 U.S. 1321 (2008). The Court is wholly unpersuaded by Plaintiffs argument that the Department of Justice in promulgating 28 C.F.R. § 543.31 exceeded its statutory authority and unlawfully secreted away its requirements deep in the heart of the Code of Federal Regulations.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion (D.E. 15) is GRANTED IN PART. Plaintiffs' claims regarding the United States's negligent assignment of Mr. Beck to a top bunk are DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

DONE AND ORDERED in Chambers, in Miami, Florida this 16th day of June, 2011.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SER-2011-00606 **Short Description:** HERNANDEZ V. USA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	11-21309-Civ-Jordan/McAliley
Short Description	HERNANDEZ V. USA
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Miami (FDC)
Incident Region	SOUTHEAST REGIONAL OFFICE
Incident Institution	Miami (FDC)
Monetary Relief Sought	$75,000.00
Estimated Amount	$
Office	Southern District of Florida
Jurisdiction	Southern District of Florida
Responsible Legal Office	FDC Miami

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	09/13/2012
Type	Settled
Reason	
Sought	
Amount offered	$5,000.00
Total Amount Paid	$5,000.00
Description	09/13/2012
Description	09/13/2012
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	04/21/2011
Date Filed	04/13/2011

Case Progress

Current Owner	MARY KIWANUKA
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	NONE
Private Case	No

Additional Case Information

Long Description

Further Case Classification

Comments

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-21309-CIV-COOKE/TURNOFF

LAZARO HERNANDEZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before me upon Defendant's Motion for Summary Judgment ("MSJ") (ECF No. 35). I have reviewed the MSJ, the Parties' arguments, the record, and the relevant legal authorities. For the reasons provided herein, the Defendant's MSJ is denied.

I. BACKGROUND

When determining whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the nonmoving party. *Skrtich v. Thornton*, 280 F.3d 1295, 1299 (2002). That is, courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party and "when conflicts arise between the facts evidenced by the parties, we credit the nonmoving party's version." *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005) (emphasis omitted). Even though the "'facts,' as accepted at the summary judgment stage of the proceedings, may not be the 'actual' facts of the case," *Priester v. City of Riviera Beach*, 208 F.3d 919, 925 n.3 (11th Cir. 2000), our analysis for purposes of summary judgment must begin with a description of the facts in the light most favorable to the plaintiff, *Skrtich*, 280 F.3d at 1299. Therefore, the facts set forth herein, while taken from the record in its entirety, are

presented in the light most favorable to the Plaintiff, the nonmoving party.[1]

Plaintiff Leonardo Hernandez, a former inmate, brings suit against the United States of America pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and § 2671, *et seq.*, alleging that Bureau of Prisons ("BOP") guards, while in their custody, negligently failed to supervise him, which led to him falling and suffering serious injuries. *See generally* Compl., ECF No. 1.

At the time of the incident, on January 24, 2008[2], Plaintiff was in the custody of the BOP at the Federal Detention Center in Miami. Compl. ¶¶ 4-5; Def.'s Statement of Undisputed Facts ¶ 1. BOP personnel accompanied Plaintiff by ambulance to the emergency room at Jackson Memorial Hospital for treatment of chest pain. Compl. ¶ 7; Def.'s Statement of Undisputed Facts ¶ 1; Hernandez Dep. 76:22, 88:16-17, Oct. 31, 2011. Plaintiff was later moved to an emergency hospital room within Ward D (the secured area of the hospital). Def.'s Statement of Undisputed Facts ¶ 2; Little Dep. 14:5-7, Mar. 28, 2012. At all times, Plaintiff was bilaterally restrained to the gurney[3], right wrist and left leg handcuffed to the bed. Hernandez Dep. 85:14-25, 86:1-2, 22-24; Def.'s Statement of Undisputed Facts ¶ 2. Further, BOP personnel were required to maintain 24/7 surveillance of Plaintiff, even while he was sleeping. Compl. ¶ 11; Molinos Dep. 10:8-10, 11:24-25, 12:1-3, Apr. 2, 2012; Little Dep. 16:22-25, 17:1-15; Quiles

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[1] Except where otherwise indicated, both Parties agree to the facts as set forth herein. *See* Pl.'s Resp. in Opp'n Def.'s Mot. Summ. J. at 1.

[2] Plaintiff is unsure when the incident giving rise to this suit occurred, testifying at his depositions that it may have been January 24 or 26, 2008. *See* Hernandez Dep. 72:3-17, Oct. 31, 2011. Nonetheless, Defendants recall the incident occurred on January 24, 2008, which is not disputed by Plaintiff as evidenced in his filings. *See generally* Compl. ¶ 5; Pl.'s Resp. in Opp'n Def.'s Mot. Summ. J. at 1.

[3] Plaintiff described the hospital bed as a "gurney" although noting that the head of the "gurney" adjusted up and down and had side rails. Hernandez Dep. 87:10-14, 89:13-24. To be consistent with Plaintiff's description, the term "gurney" will be used throughout this Order.

Dep. 7:20-23, 8:10-13, Mar. 28, 2012; Edwards Dep. 9:5-9, 13-15, Apr. 2, 2012.

Additionally, per BOP policy, BOP personnel are required to keep a contemporaneous log of events that occur while supervising an inmate, noting the time and description of the circumstances. Quiles Dep. 15:4-5; Edwards Dep. 10:15-17. Log entries are generally made every half hour to an hour. Molinos Dep. 22:14-15; Little Dep. 18:1-2; Edwards Dep. 11:13-15. If something unusual or noteworthy occurs, however, the entry describing the event is made immediately. Molinos Dep. 22:19-23; Little Dep. 21:4-9, Quiles Dep. 14:16-25, 15:1-3.

Following Plaintiff's initial treatment, a nurse lowered the bed rail in order to give Plaintiff food. Compl. ¶ 9. The bed rail was never raised. Compl. ¶ 10. At, or about, 5:00 p.m., while still handcuffed at his right wrist and left leg, Plaintiff fell from the gurney onto the ground, with the gurney landing on top of him. Compl. ¶ 13; Hernandez Dep. 83:5-8, 85-87. Plaintiff does not recall falling, or being aware that he was about to fall. Hernandez Dep. 83:15-18. He recalls only waking up on the floor with the gurney atop of him. Hernandez Dep. 83:18, 84:16-19, 85:6-13; 87:3-6. Officers Molinos and Edwards, the BOP officers on duty at the time of the incident, as well as Plaintiff, do not recall Plaintiff making any movement while Plaintiff was sleeping or prior to the fall. *See* Molinos Dep. 24-25; Edwards Dep. 15, 18.

The BOP log makes two references to a fall(s).[4] The first entry at 5:00 p.m., authored by Officer Molinos, states, "Inmate Given Dinner/ Stated he fell to the floor." Corrections Log, ECF No. 39-1; Molinos Dep. 23:15-16. The second entry at 6:00 p.m., authored by Officer Edwards, states, "Inmate Asleep, Falls Out Of Bed." Corrections Log, ECF No. 39-1; Edwards Dep. 13:21-23, 15:12-15. Officer Edwards states while he made that notation, he does not recall Plaintiff falling out of bed, and he may have intended that Plaintiff told him that he (Plaintiff) fell

[4] It is unclear from the record whether the Plaintiff seeks an inference that one fall or two occurred.

out of bed. Edwards Dep. 15:17-19, 18:25, 19:1. Plaintiff does not mention falling twice in his deposition (*see generally* Hernandez Dep.); however, Plaintiff asserts in his Response to Defendant's MSJ that he fell twice and "establishes that the guards had notice as of 5:00 p.m. that Hernandez had expressed concerns about falling." Pl.'s Resp. to Def's. Mot. Summ. J. at 4.

Other than the BOP guards, Officers "Montelo" and Edwards[5], Plaintiff does not recall anyone present immediately prior to and during the fall(s).[6] Hernandez Dep. 71:14-17; 75:13-16; 79:3-4. However, after the fall(s), several people, including nurses and doctors came into the Plaintiff's room to aid him in getting off of the floor. Hernandez Dep. 78:16-18; 79:5-7; 82:18-20. Plaintiff suffered severe injuries to his right arm as a result of the fall(s), including but not limited to, disability, disfigurement, and aggravation of a preexisting condition. Compl. ¶ 14; Hernandez Dep. 56-68.

II. LEGAL STANDARD

A court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he plain language of [Rule 56(a)] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U .S.

[5] The depositions of Officers Pablo Molinos, Jack Little, Adam Quiles, and Derrick Edwards were taken in connection with this matter. They reported that the guards on duty with Plaintiff at the time of the fall(s) were Officers Pablo Molinos and Derrick Edwards. *See generally* Edwards Dep.; Molinos Dep. Officers Adam Quiles and Jack Little relieved Officers Pablo Molinos and Derrick Edwards. Quiles Dep. 5: 6-20. Other than Plaintiff's deposition, there is no other mention in the record before me of a guard by the name of "Montelo".

[6] Although being assured that BOP guards "Montelo" and Edwards were present during his fall(s), later in his deposition, Plaintiff recants and states that he is unsure whether the BOP guards were in his room at the time of the fall(s). Hernandez Dep. 104:2-6.

317, 322 (1986).

"The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Rule 56(c) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Thus, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

III. ANALYSIS

In order to state a claim for negligence, Plaintiff must demonstrate that Defendant owed him a duty, Defendant breached that duty, which resulted in an injury to the Plaintiff and damages flowing from the injury. *See Meyers v. City of Jacksonville*, 754 So. 2d 198, 202 (Fla. Dist. Ct. App. 2000). Defendant bases its MSJ upon the premise that Plaintiff fails to satisfy the first element of the claim for negligence. Specifically, Defendant asserts that its BOP officers had no duty to prevent Plaintiff's fall from occurring because "no duty arises until there is notice of the danger," and "[s]udden and unexpected falls are, by definition, unpredictable." Def.'s Mot. Summ. J. at 5,3. Plaintiff appears to concede that a duty arises only when the potential harm is foreseeable. *See* Pl.'s Resp. Opp. Def.'s Mot. Summ. J. at 2, 6. However, Plaintiff refutes the

suggestion that the BOP officers had insufficient notice of a potential danger to Plaintiff in order to trigger their duty not only to "prevent incidents from occurring between the inmate and the public," but to also to "protect the safety of the inmate." *Id.* at 2.

The Parties do not dispute, and it is undisputable, that "[a] person taken into custody… 'is owed a common law duty of care.'" *Dep't of Health & Rehab. Servs.*, 574 So. 2d 100, 103 (Fla. 1991) (quoting *Kaisner v. Kolb*, 543 So. 2d 732, 734 (Fla. 1989)). It is likewise a tenet of tort law that "[t]o find that a custodian breached the duty of reasonable care, a plaintiff must show the injury to have been a reasonably foreseeable consequence of the custodian's negligence." *Dep't of Health & Rehab. Servs.*, 574 So. 2d at 103-04 (citing *Spann v. State, Dep't of Corr.*, 421 So. 2d 1090 (Fla. Dist. Ct. App. 1982); Restatement (Second) of Torts § 320 (1965)). This is because, "no man is required to take measures against a danger which the circumstances as known to him to not suggest as likely to happen." *Marsh v. City of St. Petersburg*, 106 So. 2d 567, 569 (1958) (internal citation omitted).

In this case, Plaintiff was under 24-hour surveillance while in the custody of the BOP officers. They watched him at all times, including when he was sleeping. Molinos Dep. 10:8-10, 11:24-25, 12:1-3; Edwards Dep. 9:5-9, 13-15, Apr. 2, 2012. If Plaintiff attempted any behavior that would have endangered a third-party's safety, or his own, the guards would have observed it and could have taken some action to intervene. Given Plaintiff's status at the time as an inmate, the BOP guards were, or should have been, on alert for any activity by Plaintiff because any behavior could have been "a trap." Quiles Dep. 10:2-11. On such high alert, it is difficult to imagine any suspicious behavior being unforeseeable to the BOP officers.

Further, all BOP guards deposed in this matter state that it is impossible for an inmate who is bilaterally restrained by a wrist and the opposing leg to fall from a bed. *See* Molinos Dep.

24:13-15; Little Dep. 21: 17-25, 22:1-23; Quiles Dep. 18:13-17; Edwards Dep. 18:15-17. In fact, all guards deposed testified that they have never in their careers as correctional officers seen nor heard of an inmate suffering a fall when properly restrained. *See* Molinos Dep. 28:5-10; Quiles Dep. 18:20-25, 19:1-6; Edwards Dep. 22:17-21. And further, they did not witness and were never told of such in this case, other than by Plaintiff himself. *See* Molinos Dep. 33:5-12; Little Dep. 25:16-25; Quiles Dep. 16:19-25, 17:1-7; Edwards Dep. 15:17-19. Based on this testimony, it is apparent that Defendant wants to fit a square peg into a round hole.

Rather than failing to foresee a fall, which would relate to the "duty" element of negligence, Defendant's accurate position is that the fall(s) claimed by Plaintiff could not, and did not, happen. Thus, the true issue presented by this case is not whether a duty exits, but a factual dispute whether a breach of that duty occurred. This sole factual dispute arises because Defendant's log entries contradict the testimony of the BOP officers. Absent the log entries, and without the deposition testimony of any of the nurses who came to Plaintiff's aid following the fall(s), Plaintiff would have a tenuous stance to maintain that without being awake prior to the fall(s) and being completely restrained, he conjured enough strength to fall out of, and topple, the gurney.

Yet, because a genuine dispute of a material fact remains, and I am unable to make a credibility determination based solely upon the record before me without the benefit of a bench trial, Defendant's MSJ must be denied. *See, e.g., Emerson Elec. Co. v. Gen. Elec. Co.*, 564 F.2d 1324, 1326 (11th Cir. 1988) (holding that a successor judge must retry a bench trial where the predecessor judge did not issue findings of fact and conclusions of law, and credibility issues remain).

IV. CONCLUSION

For the reasons provided in this Order, Defendant United States of America's Motion for Summary Judgment (ECF No. 35) is **DENIED**.

DONE and ORDERD in chambers at Miami, Florida, this 21st day of August 2012.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
William C. Turnoff, U.S. Magistrate Judge
Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE No. 11-21309-CIV-JORDAN

LAZARO HERNANDEZ.
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant

ORDER

Mr. Hernandez filed the complaint on April 13, 2011. This order provides notice that if the defendant is not served 120 days after the date the complaint was filed, the action will be dismissed without prejudice for failure to effect service of process under Rule 4(m).

DONE and ORDERED in chambers in Miami, Florida, this 18th day of April, 2011.

Adalberto Jordan
United States District Judge

Copy to: All Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE No. 11-21309-CIV-JORDAN

LAZARO HERNANDEZ.
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant

DISCOVERY PROCEDURE FOR MAGISTRATE JUDGE JOHN J. O'SULLIVAN

The following discovery procedures apply to all civil cases assigned to United States District Judge Adalberto Jordan.

If parties are unable to resolve their discovery disputes without Court intervention, Magistrate Judge John J. O'Sullivan will set the matter for a hearing. Discovery disputes are generally set for hearings on Tuesdays and Thursdays in the 5th Floor Courtroom, United States Courthouse, 301 N. Miami Avenue, Miami, Florida.

If a discovery dispute arises, the moving party must seek relief within fifteen (15) days after the occurrence of the grounds for relief, by contacting Magistrate Judge O'Sullivan's Chambers and placing the matter on the next available discovery calendar. Magistrate Judge O'Sullivan's telephone number is (305) 523-5920.

After a matter is placed on the discovery calendar, the movant shall provide notice to all relevant parties by filing a Notice of Hearing. The Notice of hearing shall briefly specify the substance of the discovery matter to be heard and include a certification that the parties have complied with the pre-filing conference required by Southern District of Florida Local Rule 7.1(a)(3). Generally, no more than ten (10) minutes per side will be permitted.

No written discovery motions, including motions to compel and motions for protective order, shall be filed unless the Court is unable to resolve the dispute at the motion calendar, or unless requested by Magistrate Judge O'Sullivan. It is the intent of this procedure to minimize the necessity of motions.

The Court expects all parties to act courteously and professionally in the resolution of their discovery disputes and to confer in an attempt to resolve the discovery issue prior to setting the hearing. The Court may impose sanctions, monetary or otherwise, if the Court determines discovery is being improperly sought or is not being provided in good faith.

DONE and ORDERED in Chambers in Miami, Florida, this10th day of August, 2011.

Adalberto Jordan
United States District Judge

cc: Magistrate Judge O'Sullivan
All counsel of record

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Page 0572 of 1341

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Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-SER-2011-01022 **Short Description:** ALVARADO V. FEDERAL BUREAU OF PRISONS

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	1:11-cv-21450-FAM
Short Description	ALVARADO V. FEDERAL BUREAU OF PRISONS
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Miami (FCI)
Incident Region	SOUTHEAST REGIONAL OFFICE
Incident Institution	Miami (FCI)
Monetary Relief Sought	$1,000,000.00
Estimated Amount	$350,000.00
Office	Miami
Jurisdiction	SOUTHERN DISTRICT OF FLORIDA
Responsible Legal Office	FDC Miami

Legal Liability Evaluation

Estimated Amount	$150,000.00 - 350,000.00
Estimated Outcome	Probable

Case Resolution

Date	02/13/2012
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$265,000.00
Total Amount Paid	$265,000.00
Description	LOSS OF VISION IN LEFT EYE DUE TO STAFF FAILURE TO PROVIDE APPROPRIATE CARE.
Description	LOSS OF VISION IN LEFT EYE DUE TO STAFF FAILURE TO PROVIDE APPROPRIATE CARE.
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	05/12/2011
Date Filed	04/25/2011

Case Progress

Current Owner	JEANELLE FERRIL
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	UPDATES ON CASES PREVIOUSLY REPORTED
Private Case	No

Additional Case Information

Long Description	28:2671 FEDERAL TORT CLAIMS ACT
Further Case Classification	
Comments	AUDIT COMPLETE JLF 3/1/12

Home | Alerts | My Work | New Case | Search Main | Email

United States Department of Justice - Office of General Counsel & Review

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 11-21450-CV-Moreno/Brown

LESLIE A. ALVARADO,

Plaintiff,

vs.

FEDERAL BUREAU OF PRISONS,

Defendant.
_____/

NOTICE OF FILING EXHIBIT "A" TO PLAINTIFF'S COMPLAINT

Plaintiff, LESLIE A. ALVARADO, through his undersigned counsel, hereby files the attached Exhibit "A" to his Complaint herein.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was sent by mail to: **(1)** U.S. Dept. Of Justice, Federal Bureau of Prisons, Southeast Region Attn: Lisa M. Sunderman, Esq. - Regional Counsel, Building 2000, 3800 Camp Creek Parkway, SW, Atlanta, Georgia 30331-6226; **(2)** U.S. Attorney - Southern District of Florida, C/O Civil Process Clerk - Wilfredo A. Ferrer, Esq., 99 N.E. 4th Street, Miami, FL 33132; and **(3)** to the Attorney General of the U.S. - Eric Holder, Esq., U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC, 20530-0001 on April 26, 2011.

Respectfully submitted,

By:_____

John W. McLuskey, Esquire
Florida Bar No. 331171
jmcl@mmlawmiami.com
John E. Hughes, III, Esquire
Florida Bar No. 0181099
jehughes3@mmlawmiami.com
McLuskey & McDonald, P.A.
The Barrister Building
8821 S.W. 69th Court
Miami, Florida 33156
Telephone: (305) 662-6160
Facsimile: (305) 662-6164
Attorneys for Plaintiff, Leslie A. Alvarado

LAW OFFICES
McLUSKEY & McDONALD
PROFESSIONAL ASSOCIATION

THE BARRISTER BUILDING
8821 S.W. 69th COURT
MIAMI, FLORIDA 33156

John E. Hughes, III
Writer's Ext: 230
Email: jehughes3@mmlawmiami.com

TELEPHONE (305) 662-6160
FACSIMILE (305) 662-6164

August 30, 2010

FEDERAL EXPRESS AND
CERTIFIED MAIL RETURN RECEIPT REQUESTED
Bureau of Prisons Southeast Regional Office
Attention: Regional Counsel
3800 North Camp Creek Parkway SW, Building 2000
Atlanta, GA 30331-5099

RE: FEDERAL TORT CLAIMS ACT CLAIM
Claimant : Leslie A. Alvarado
Date of Injury : November 2008
Our File No.: : 0400-1410

Dear Sir/Madam:

We are submitting the following Form 95 Claim for Damage, Injury or Death pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 1346, 2671 *et seq.* This Claim is submitted on behalf of **Leslie A. Alvarado** who suffered a detached retina at the Federal Correctional Institution in Miami, Florida ("FCI") and lost the vision in his eye due to a lengthy delay in treatment. The incident occurred on or about November of 2008, and was caused by the reckless and negligent acts and omissions committed by FCI's agents in failing to allow Mr. Alvarado to be treated, as well as failing to adopt and implement proper policies, protocols and procedures. Mr. Alvarado became aware of the permanent loss of vision and the result of FCI's actions/inactions in or about August 2010.

If your office is not the correct office and/or agency for the submission of this Claim Form, or we have provided a deficient notice of this Claim, please advise immediately so that we may revise and resend accordingly.

Very truly yours,

McLUSKEY & McDONALD, P.A.

John E. Hughes, III
For The Firm

JEH/sdp
Enclosure

PLAINTIFF'S EXHIBIT A

FedEx Express **US Airbill** FedEx Tracking Number 8729 9222 4650

Sender's Copy

1 From Please print and press hard.

Date 8/30/10 Sender's FedEx Account Number

Sender's Name John E. Hughes, III, Esq Phone 305 662-6160

Company MCLUSKEY & MCDONALD & PA

Address 9821 SW 69TH CT

Dept./Floor/Suite/Room

City MIAMI State FL ZIP 33156-1609

2 Your Internal Billing Reference First 24 characters will appear on invoice. Alvarado - 0900 - 1460.

3 To

Recipient's Name Regional Counsel. Phone ( )

Company Bureau of Prisons S.E. Regional Office

Address 3800 N. Camp Creek Parkway SW

We cannot deliver to P.O. boxes or P.O. ZIP codes. Dept./Floor/Suite/Room

HOLD Weekday FedEx location address REQUIRED. NOT available for FedEx First Overnight.

Address Building 2000

Use this line for the HOLD location address or for continuation of your shipping address.

HOLD Saturday FedEx location address REQUIRED. Available ONLY for FedEx Priority Overnight and FedEx 2Day to select locations.

City Atlanta State GA ZIP 30331-5099

0421849475

Try FedEx® QuickShip at fedex.com
Access the shipping tools you need directly from Microsoft Office Outlook.

4a Express Package Service *To most locations. Packages up to 150 lbs.

- [X] FedEx Priority Overnight — Next business morning.* Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- [ ] FedEx Standard Overnight — Next business afternoon.* Saturday Delivery NOT available.
- [ ] FedEx First Overnight — Earliest next business morning delivery to select locations.*
- [ ] FedEx 2Day — Second business day.* Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- [ ] FedEx Express Saver — Third business day.* Saturday Delivery NOT available.

4b Express Freight Service *To most locations. Packages over 150 lbs.

- [ ] FedEx 1Day Freight — Next business day.** Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected. CALL 1.800.332.0807 FedEx 1Day Freight Booking No.
- [ ] FedEx 2Day Freight — Second business day.** Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- [ ] FedEx 3Day Freight — Third business day.** Saturday Delivery NOT available.

5 Packaging *Declared value limit $500.

- [X] FedEx Envelope*
- [X] FedEx Pak* — Includes FedEx Small Pak and FedEx Large Pak.
- [ ] FedEx Box
- [ ] FedEx Tube
- [ ] Other

6 Special Handling and Delivery Signature Options

- [ ] SATURDAY Delivery — NOT available for FedEx Standard Overnight, FedEx Express Saver, or FedEx 3Day Freight.

Service Area

- [ ] No Signature Required — Package may be left without obtaining a signature for delivery.
- [ ] Direct Signature — Someone at recipient's address may sign for delivery. Fee applies.
- [ ] Indirect Signature — If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential delivery only. Fee applies.

Does this shipment contain dangerous goods?

One box must be checked.

- [X] No
- [ ] Yes — As per attached Shipper's Declaration.
- [ ] Yes — Shipper's Declaration not required.
- [ ] Dry Ice — Dry Ice, 9, UN 1845 ____ x ____ kg

Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.

- [ ] Cargo Aircraft Only

7 Payment *Bill to:*

- [X] Sender — Acct. No. in Section 1 will be billed.
- [ ] Recipient
- [ ] Third Party
- [ ] Credit Card
- [ ] Cash/Check

Enter FedEx Acct. No. or Credit Card No. below.

FedEx Acct. No. / Credit Card No. Exp. Date

Total Packages	Total Weight	Total Declared Value†
1	lbs.	$ .00

†Your liability is limited to $100 unless you declare a higher value. See back for details. By using this Airbill you agree to the service conditions and limitations on the back of this Airbill and in the current FedEx Service Guide, including terms that limit our liability.

Rev. Date 08/10 Part #150940 ©1994-2010 FedEx PRINTED IN U.S.A. SRM

605

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For delivery information visit our website at www.usps.com®

OFFICIAL USE

Postage	$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

Postmark Here

Sent To Bureau of Prisons, SE Reg. Office
Street, Apt. No.; or PO Box No.
City, State, ZIP+4

PS Form 3800, August 2006 See Reverse for Instructions

7010 1060 0002 3096 0759

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: Bureau of Prisons, SE Reg. Office Attn: Regional Counsel 3800 N. Camp Creek Parkway SW, Building 2000 Atlanta GA 30331-5099

COMPLETE THIS SECTION ON DELIVERY

A. Signature X ☑ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery 9/2/10

D. Is delivery address different from item 1? ☐ Yes ☑ No
If YES, enter delivery address below:

3. Service Type ☑ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7010 1060 0002 3096 0759

PS Form 3811, February 2004 Domestic Return Receipt

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED
OMB NO.
1105-0008

1. Submit To Appropriate Federal Agency:

Federal Correctional Institution Miami, Florida
c/o Bureau of Prisons Southeast Regional Office
Attention: Regional Counsel
3800 North Camp Creek Parkway SW, Building 2000
Atlanta, GA 30331-5099

2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code)
Leslie A. Alvarado, Claimant
c/o McLuskey & McDonald, P.A.
8821 S.W. 69th Court
Miami, FL 33156

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	02/16/1970	Single	November 2008	

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.)

SEE ATTACHED ADDENDUM.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).
NONE.

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

NONE.

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

SEE ATTACHED ADDENDUM.

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
SEE ATTACHED ADDENDUM.	

12. (See instructions on reverse.) AMOUNT OF CLAIM (In dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
NONE	$1,000,000.00	NONE	$1,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
Leslie Alvarado Alvarado	305-662-6160	8/30/2010

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant is liable to the United States Government for the civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☒ No

16. Have you filed a claim on your insurance carrier in this instance, and if so, is it full coverage or deductible? ☐ Yes ☒ No

17. If deductible, state amount.

N/A

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts.)

N/A

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☒ No

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item #12 of this form

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

8. Basis of Claim (Operational Negligence and Denial of Civil Rights - Medical Care at Federal Prison Camp "FPC" Miami).

In November of 2008 I sustained an injury to my left eye while at the Federal Prison Camp located at 15801 SW 137th Ave, Miami, Florida 33177. After many months of delay in allowing me to seek medical attention to my left eye I was finally seen on July 1, 2009 by Louis Kasner, M.D., of the Center for Excellence in Eye Care, at 8940 N. Kendall Drive, Miami, FL 33176 and diagnosed with a detached retina. Dr. Kasner ordered immediate surgery. Upon my return to the facility, I repeatedly requested to be allowed to return to Dr. Kasner and have this necessary surgery performed as Dr. Kasner said I needed immediate emergency care. I contacted health services routinely and repeatedly - after my initial examination in July of 2009 requesting and actually pleading for this necessary surgery to be ordered. I emailed the Warden. I filed a request for Administrative Remedy, I pleaded with anyone that would listen and was ignored. Simply stated, all of the aforementioned was to no avail. I repeatedly made it clear to the agents and representatives of the facility that if my eye was not attended to immediately I would loose my site. I was not timely cared for and ultimately the delay in medical care caused injury. I have now been told by the doctor that failing to do proper surgery timely resulted in a permanent loss of vision in the eye. The basis of the claim is operational negligence and a denial of civil rights on behalf of the federal facility though its agents. Despite being told that I was in need of immediate emergent medical care the officers, directors and other personnel of the facility refused and/or ignored the repeated requests for treatment to occur which resulted in substantial and permanent injuries.

10. Personal injury.

Leslie A. Alvarado, C/O McLuskey & McDonald, P.A. - Injured person. Due to a lengthy delay in treatment and necessary surgery, as recommended by my treating doctor, my vision was permanently lost and I am blind in my left eye. My damages are $1,000,000.00.

11. Witnesses:

Louis Kasner, M.D. - 8940 N. Kendall Drive, Suite 400E, Miami, FL 33176

Mr. Antonio Houed - fellow inmate - address unknown at this time

Mr. Albert Tellechea -fellow inmate - c/o McLuskey & McDonald, P.A.,

Mr. Ralph Suarez - fellow inmate - address unknown at this time

Mr. Jenkins - Camp Administrator

Mr. Davis - Counselor at Camp

Mr. Kenny Atkinson -Warden at Camp

Ms. Lisa Rivera - c/o McLuskey & McDonald, P.A

Ms. Gertrudis Cheecchi - c/o McLuskey & McDonald, P.A.

Mr. Anthony Masilotti - fellow inmate - address unknown at this time

Mr. Julio Jeveles - fellow inmate - address unknown at this time

Mr. Frank Archer - fellow inmate - address unknown at this time

Ms. Gwyen - corrections officer at Camp

CENTER FOR EXCELLENCE IN EYE CARE

ACCT. 274097 R/S 423694

NAME: Olivarado, Leslie AGE: 39 B AT 900

OCCUPATION: OT 1000 TT

REFERRED BY: FAMILY DR: TT

DT

DATE: 7/1/09 OT

CHIEF COMPLAINT AND PRESENT ILLNESS: Pet Eval poss Pet Def (OS) .672

C/O VVA (OS) x 8 months

HX Blunt trauma (OS) c Raquet Ball (11/2008)

CONTACT LENS Rx

⊖

⊖DM ⊖EYE SX

⊖HTN

⊖cholesterol

MEDS

⊖

VISION W/O CORRECTION: RIGHT ___ NEAR ___ LEFT ___ NEAR ___

VISION W/ PRESENT CORRECTION: RIGHT 20/20 NEAR ___ LEFT ___ NEAR ___

PRESENT GLASSES (AGE OF REFRACTION NKDA): R. ___ L. ___ Rx →

	WNL	
PUPILS	☐	4mm
EOM	☐	
MB	☐	7mm (non reactive)
CONF/ FIELDS	☐	

MTW Ocu @ 11:45

TONOMETRY: R 12 / 02 / 11:45

REFRACTION ☐M ☐C: R. (K) L. (K) Deferred

BEST VISION: R. ___ L. ___

SLIT LAMP

R WNL		L WNL
☐	LIDS	☐
☐	CONJ	☐
☐	CN	☐
☐	AC	☐
☐	IRIS	☐
☐	LENS	☐
☐	ANT./VIT.	☐

R: tiny nuclear cat

LENS

Sectoral Syncline 2+ flare 1+ cell

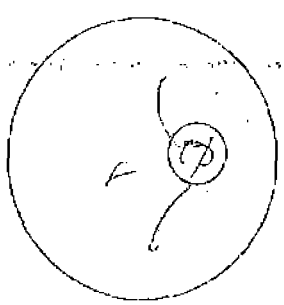
L

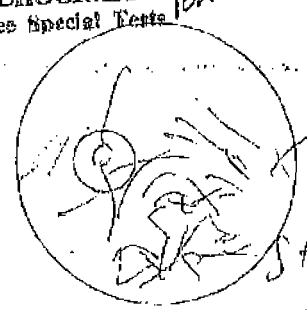
LENS

ECHOGRAPHY See Special Tests

OS RN

FUNDUS:





Star fold

DIAGNOSIS: chronic MD c PVR possible surgical candidate

MANAGEMENT: Discussed limited potential uncertain prognosis wants surgery SBP MD/MP phone

RETURN:

CENTER FOR EXCELLENCE IN EYE CARE

ACCT: 27409 R/S 423094

NAME: Alvarado, Leslie AGE: 39 F AT 900

OCCUPATION: CT 1000

REFERRED BY: FAMILY DR: TT

DATE: 7/1/09 DT

CHIEF COMPLAINT AND PRESENT ILLNESS: Pet Eval poss Det (OS) - 6/7x OT

c/o VA (OS) x 8 months

Hx Blunt trauma (OS) c Rague Bx 11/11/2008

CONTACT LENS Rx

OD/OS

OD/OS

Occlusion

VISION W/O CORRECTION

RIGHT NEAR

LEFT NEAR

VISION W/ PRESENT CORRECTION

RIGHT 20/20

LEFT 20/25

PRESENT GLASSES (AGE OF REFRACTION 7/1/09

R. R.

L. L.

Rx →

	WNL	
PUPILS	☐	4mm
EOM	☐	
MB	☐	7mm (non reactive)
CONF/ FIELDS	☐	

TONOMETRY

R 12 @ 11:45

L 02 @ 11:45

REFRACTION ☐ M ☐ C

R. (K

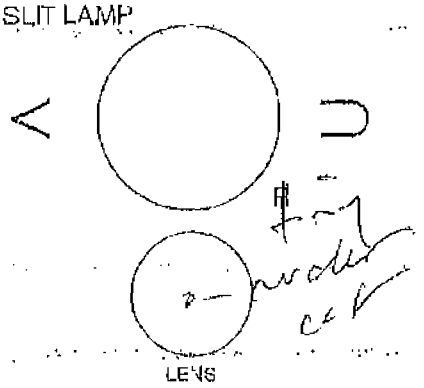
L. (K

BEST VISION

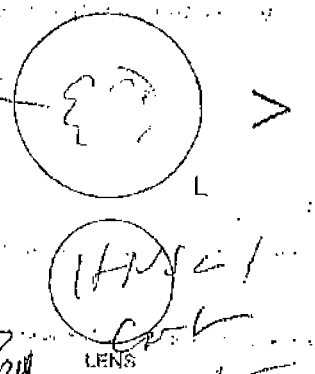
R.

L.

SLIT LAMP



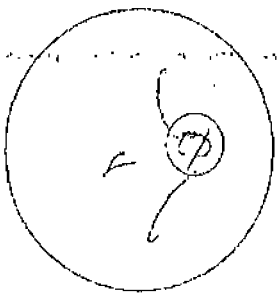
R WNL		L WNL
☐	LIDS	☐
☐	CONJ	☐
☐	CN	☐
☐	AC	☐
☐	IRIS	☐
☐	LENS	☐
☐	ANT./VIT.	☐

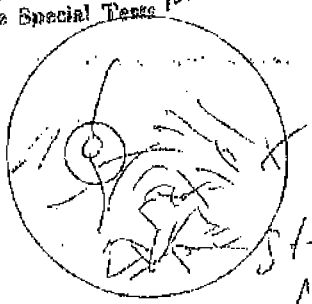


ECHOGRAPHY OS

See Special Tests

FUNDUS:





DIAGNOSIS:

Uncorr Myopia

poss tbi surgical candidate

MANAGEMENT:

Discuss limited potential

vision improvement

with surgery

RETURN:

CENTER FOR EXCELLENCE IN EYE CARE

Echography is a diagnostic test providing important information to assist the physician in formulating a diagnosis. The impression provided by the echographer must always be correlated with clinical findings by the referring physician.

[redacted] Echography Report

GENERAL AND SURGICAL OPHTHALMOLOGY
Carlos Buznego, M.D.
Eugene M. Elsner, M.D.
Jack L. Gaboy, M.D.
Charles J. Kaiser, M.D.
Louis Kasner, M.D.
Richard B. Simon, M.D.
Frank E. Spektor, M.D.
Henry L. Trattler, M.D.
William B. Trattler, M.D.
David Kasner, M.D.
1927-2001

RETINA AND VITREOUS DISEASES
Pedro F. Lopez, M.D., Director
Louis Kasner, M.D.

PEDIATRIC OPHTHALMOLOGY AND STRABISMUS
Richard B. Simon, M.D.

CORNEAL AND EXTERNAL DISEASES
William B. Trattler, M.D.

GLAUCOMA
Lourdes A. Casuso, M.D.

OCULO-PLASTIC SURGERY
Junnee Lee, M.D.

OPTOMETRY AND LOW VISION
Jerome Hernandez, O.D.
Carolina Pedroletti, O.D.

ADMINISTRATOR
Lesley A. Spektor

Baptist Medical Arts Building, East Tower
8940 N. Kendall Drive
Suite 400-E
Miami, FL 33176
(305)598-2020
(305)274-0426 FAX
Web Site:
www.centerforeyecare.com

Louis Kasner, M.D.
Medical Arts Bld.
8940 N. Kendall Drive
Suite 400 East
Miami, FL 33176

Re: ALVARADO, Leslie

MRN:274097 Echo#:E9-792 Exam Date:Jul 1, 2009

INDICATION FOR EXAM:

Light perception vision OS: Evaluate for retinal detachment.

ECHOGRAPHIC FINDINGS:

OS: There are mild to moderate vitreous opacities, some membranes and possibly partial detachment of the posterior hyaloid. The retina is almost totally detached, there may be some attached retina superiorly. The maximal elevation is 4 to 5 mm temporally and is shallow elsewhere. It is thickened and stiff with fixed folds temporally and suggestion of a break posterior to the equator at about 4:00. The choroid is moderately thickened and there is shallow choroidal detachment anteriorly at about 7:00.

IMPRESSION:

1. Vitreous opacities and partial PVD
2. Subtotal retinal detachment with PVR and a break posterior temporally
3. Diffuse choroidal thickening and shallow detachment inferotemporally

Randy Hughes, B.S., RDMS

PHYSICIAN ASSESSMENT:

Louis Kasner, M.D.

CENTER FOR EXCELLENCE IN EYE CARE

Echography is a diagnostic test providing important information to assist the physician in formulating a diagnosis. The impression provided by the echographer must always be correlated with clinical findings by the referring physician.

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Web Site:
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Louis Kasner, M.D.
Medical Arts Bld.
8940 N. Kendall Drive
Suite 400 East
Miami, FL 33176

Re: ALVARADO, Le

MRN:274097 Echo#:

INDICATION FOR EXA

Light perception vision C

ECHOGRAPHIC FINDI

OS: There are mild to m
detachment of the poste
some attached retina su
shallow elsewhere. It is
break posterior to the e
is shallow choroidal det

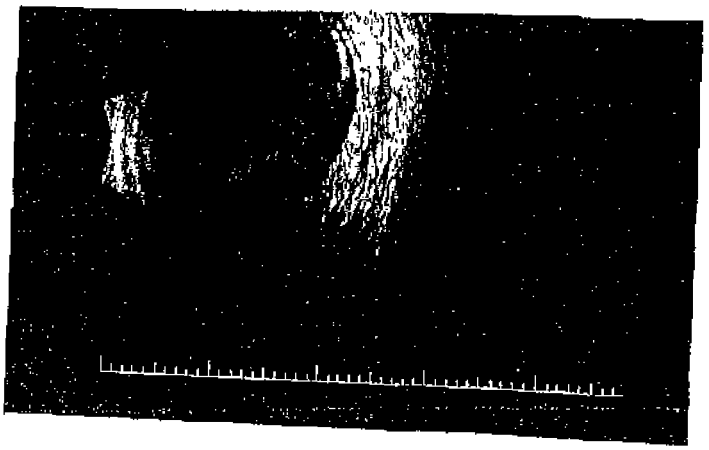
IMPRESSION:

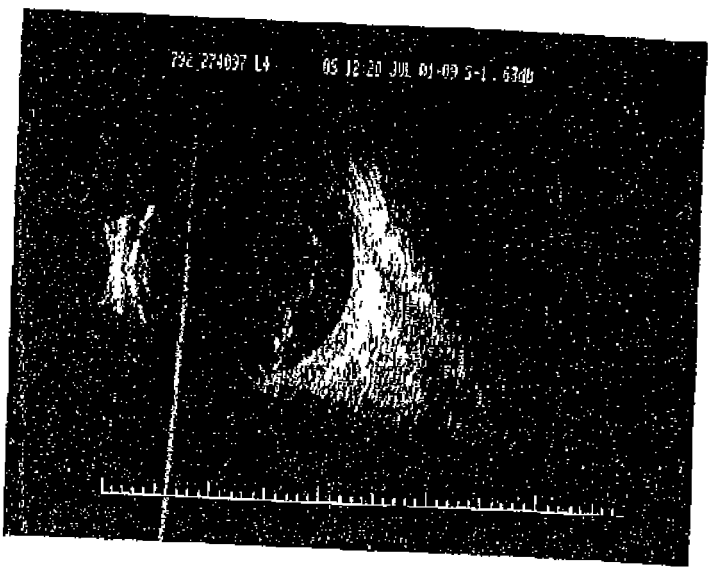
1. Vitreous opacities ar
2. Subtotal retinal deta
3. Diffuse choroidal thi

Randy Hughes, B.S., R

PHYSICIAN ASSESSI

Louis Kasner, M.D.





	LESLIE ALVARADO # 274097	
DATE	TREATMENT RECORD	CHARGE
10/1/2009	SOUTH FLORIDA SURGERY CENTER- LEFT PARS PLANA VITRECTOMY WITH	
	SCLERAL BUCKLE PROCEDURE, LEFT PHACOEMULSIFICATION [redacted]	
RIS	[redacted].	
447124	MAC ANESTHESIA	
	DX: RETINAL DETACHMENT, CATARACT	
	NO CHARGES UNTIL 1/1/2010	
	LOUIS KASNER, MD	

ALVARADO, LESLIE
MRN:0032715 DOB:02/16/70
DR:KASNER, LOUIS AGE.39 Y
DOS:10/01/09

#41 [illegible]
[illegible]

NAME: Alvarado Leslie *Center for Excellence in Eye Care* Review History: ☐

MEDS

DATE: 10/2/09 CC/HISTORY:

AT:
CT:
TT:
DT:
OT:

PO Day 1
c/o discomfort

VA s R: VA c R Near R: T/A R:

R/S#

Age: L: L: Hm L: L 23 PRK/LK? Y N

Refr: R: 20/
L: 20/
Add:

Old Rx: R:
L:
Add:

Gonio:

Fields:

WNL Dilated: OD OS

OD	OS	
		Ext:
		Cornea:
		Pupils:
		Iris:
		A/C:
		Lens:
		Vit:
		Fundus:

opposed
Kcl
AC 2-3 + cell
capsule intact

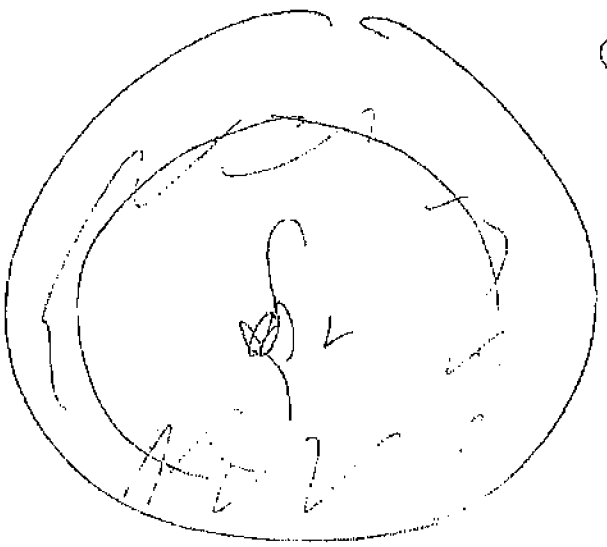
Mental Status:

Motility:

Dx: Dry well [illegible] Rx: PF Q2 Max [illegible] Ret: Dr:

Prednisone 60 QD x 5 days

T3 [illegible]



So
Pt c
SB d
[illegible]

Next week

NAME: Leslie Alvarez

Center for Excellence in Eye Care

Review History: ☐

DATE: 10/23/09 CC/HISTORY: S BP, PGIO PPV OS

AT: PO c/o Pain - Vc same

CT: discomfort no ↑

TT: Cones/gas

DT:

OT: 11:14 VA s R: VA c R: Near R: T/A R:

RS#

Age: L: L: CF L: 30,32 @ 10 PRK/LK? Y N

MEDS

gtt

⊖ Post few days

Refr: R: 20/

L: Ticco 20/ 4 ago slow

Add:

Old Rx: R:

L:

Add:

Gonio:

Fields:

WNL

Dilated: Mtn OS.

OD OS

Ext:

Cornea:

Pupils:

Iris:

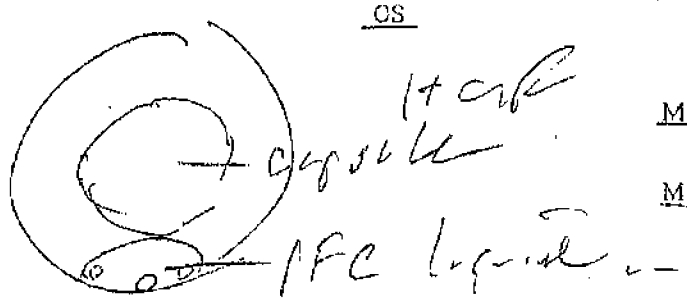
A/C:

Lens:

Vit:

Fundus:

OD OS



Mental Status:

Motility:

Dx: Typical AL in ≤ 27 Rx: (PFC ≈ betadine) AL Ret: Dr:

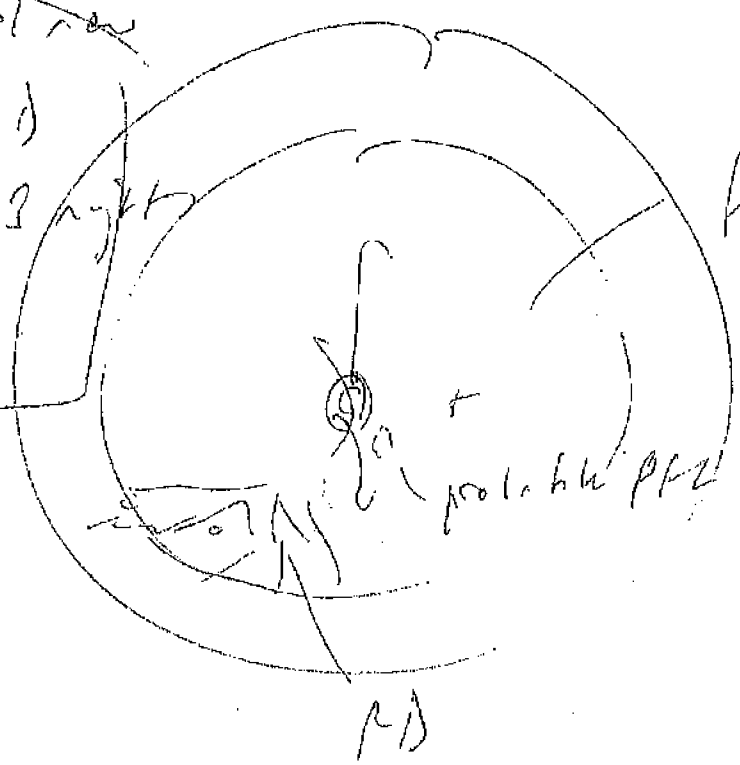
~~removed 80% of PFC~~

Vigamox x1 new

Resume PF q.d.

Resume Max 3 night

10 days



SOUTH FLORIDA
SURGERY CENTER

DISCHARGE INSTRUCTIONS

MEDICATIONS	ACTIVITY/EXERCISE
☑ The medication which was used to put you to sleep will be acting in your body for the next 24 hrs; so you may feel sleepy, but this will gradually wear off. Because the medication is still in your system: **FOR 24 HOURS DO NOT:** (a) drive a car, operate machinery or power tools (b) drink any alcoholic beverages (not even beer or wine) (c) make any important decisions, such as: signing important documents. ☐ If you plan to take a nonprescription pain reliever, make sure it is aspirin free. Check the label on the bottle. ☐ Prescription for pain medication. This medication can cause drowsiness and constipation. Do not drive, operate machinery, power tools or drink any alcoholic beverages until 12 hrs after the last dose. ☐ Start today and finish all prescribed antibiotics. If you have any rash, itching or problem with the antibiotic, call your physician. ☐ Other_____	☑ Rest remainder of the day. ☑ No bending, lifting, straining. ☐ Elevate operative extremity. ☐ Use ice bag or cryocuff. ☐ Wear sling when out of bed. ☐ Use crutches or walker as instructed. ☐ Weight bearing_____. ☑ Do not engage in exercise, sports, heavy lifting or heavy work until your doctor give permission. ☑ Other Must sleep face down.
DIET	**SAFETY**
☐ Liquids; progress to soft, then your usual diet ☑ Resume your usual diet. ☐ Drink a lot of fluids today ☐ Other:	We strongly urge that a responsible adult stay with you today and tonight for your protection and safety. Other:
WOUND CARE	**FOLLOW UP CARE**
You are not expected to have an elevated temperature. However if you feel ward, take your temperature. If it is 101 degrees orally, call your physician. ☑ Keep dressing clean and dry. ☐ No shower/tub bath ☐ No sex, douching, tampons. ☐ For heavy vaginal bleeding or clotting, count the number of pads used daily and notify physician. ☐ Other:	☑ See Dr. Kasner Phone #_____ on Tomorrow ☐ Call for appointment 10/2/09 @ 2 pm. ☑ If any questions, call your physician. ☑ In case of emergency go to the nearest ER or call 911. ☐ Additional instructions attached._____ ☑ If you are unable to urinate notify your doctor. If you are unable to reach your doctor and have bladder discomfort go to the nearest hospital ER. ☑ If you have difficulty breathing, continuous nausea and vomiting or headache notify your doctor.

EYE CARE

☑ Do not touch operative eye	☑ Leave eye shield on	☐ Apply eye shield before sleep
☐ Start eye drops today	☑ Tylenol for discomfort as directed	☑ With one eye patched you need to be careful walking

Leslie Alvarado — Patient's Signature

[signature] — Nurse's Signature

10-1-09 — Date

Discharge instructions also given to: _____ _____
Relationship

Dischinst2005

ALVARADO, LESLIE
MRN:0032715 DOB:02/16/70
DR:KASNER, LOUIS AGE:39 Y
DOS:10/01/09

SOUTH FLORIDA
SURGERY CENTER

PRIVACY NOTICE

THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.

This Privacy Notice is being provided to you as a requirement of a federal law, the Health Insurance Portability and Accountability Act (HIPAA). This Privacy Notice describes how we may use and disclose your protected health information to carry out treatment, payment or health care operations and for other purposes that are permitted or required by law. It also describes your rights to access and control your protected health information in some cases. Your "protected health information" means any written and oral health information about you, including demographic data that can be used to identify you. This is health information that is created or received by your health care provider and that relates to your past, present or future physical or mental health condition.

I. Uses and Disclosures of Protected Health Information

The South Florida Surgery Center may use your protected health information for purposes of providing treatment, obtaining payment for treatment and conducting health care operations. Your protected health information may be used or disclosed only for these purposes unless the facility has obtained your authorization or the use of disclosure is otherwise permitted by the HIPAA privacy regulations or state law. Disclosures of your protected health information for the purposes described in this Privacy Notice may be made in writing, orally or by facsimile.

A. Treatment. We will use and disclose your protected health information to provide, coordinate or manage your health care and any related services. This includes the coordination or management of your health care with a third party for treatment purposes. For example, we may disclose your protected health information to a pharmacy to fill a prescription or to a laboratory to order a blood test. We may also disclose protected health information to physicians who may be treating you or consulting with the facility with respect to your care. In some cases, we may also disclose your protected health information to an outside treatment provider for purposes of the treatment activities of the other provider.

B. Payment. Your protected health information will be used, as needed, to obtain payment for the services that we provide. This may include certain communications to your health insurance company to get approval for the procedure that we have scheduled. For example, we may need to disclose information to your health insurance company to get prior approval for the surgery. We may also disclose protected health information to your health insurance company to determine whether you are eligible for benefits or whether a particular service is covered under your health plan. In order to get payment for the services we provide to you, we may also need to disclose your protected health information to your health insurance company to demonstrate the medical necessity of the services or, as required by your insurance company, for utilization review. We may also disclose patient information to get another provider involved in your care for the other provider's payment activities. This may include disclosure of demographic information to anesthesia care providers for payment of their services.

C. Operations. We may use or disclose your protected health information , as necessary, for our own health care operations to facilitate the function of the South Florida Surgery Center and to provide quality care to all patients. Health care operations include such activities as: quality assessment and improvement activities, employee review activities, training programs including those in which students, trainees or practitioners in health care learn under supervision, accreditation, certification, licensing or credentialing activities, review and auditing, including compliance reviews, medical reviews, legal services and maintaining compliance programs, and business management and general administrative activities. In certain situations, we may also disclose patient information to another provider or health plan for their health care operations.

D. Other Uses and Disclosures. As part of our treatment, payment and health care operations, we may also use or disclose your protected health information for the following purposes: to remind you of your surgery date, to inform you of potential treatment alternatives or options, to inform you of health-related benefits or services that may be of interest to you.

II. Uses and Disclosures Beyond Treatment, Payment and Health Care Operations Permitted Without Authorization or Opportunity to Object

Federal privacy rules allow us to use or disclose your protected health information without your permission or authorization for a number of reasons including the following:

A. When Legally Required. We will disclose your protected health information when we are required to do so by any federal, state or local law.

B. When There are Risks to Public Health. We may disclose your protected health Information for the following public activities and purposes:

- To prevent, control or report disease, injury or disability as permitted by law.
- To report vital events such as birth or death as permitted or required by law.
- To conduct public health surveillance, investigations and interventions as permitted or required by law.
- To collect or report adverse events and product defects, track FDA regulated products, enable product recalls, repairs or replacements to the FDA and to conduct post marketing surveillance.
- To notify a person who has been exposed to a communicable disease or who may be at risk of contracting or spreading a disease as authorized by law.
- To report to an employer information about an individual who is a member of the workforce as legally permitted or required.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.:

LESLIE A. ALVARADO,

Plaintiff,

vs.

FEDERAL BUREAU OF PRISONS,

Defendant.
_____/

COMPLAINT FOR DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT

Plaintiff, LESLIE A. ALVARADO ("Alvarado"), by and through his undersigned attorneys, hereby sues Defendant, FEDERAL BUREAU OF PRISONS ("FBOP"), and alleges as follows:

JURISDICTION, VENUE, AND CONDITIONS PRECEDENT

1. Plaintiff, Alvarado, is a resident of the state of Florida, thus a resident of the Southern District of Florida and is otherwise *sui juris*.

2. The claims herein are brought against the FBOP pursuant to the Federal Tort Claims Act (28 U.S.C. §2671, et seq.) and 28 U.S.C. §§ 1346(b)(1), for money damages as compensation for personal injuries caused by the negligent, wrongful acts and omissions of employees and agents of FBOP while acting within the scope of their offices and employment, under circumstances where the FBOP, if a private person, would be liable to the Plaintiff in accordance with the laws of the State of Florida.

3. Venue is proper in that all of the acts and omissions forming the basis of these claims occurred in the Southern District of Florida, and arose on or about late

McLUSKEY & McDONALD, P.A.
THE BARRISTER BUILDING • 8821 S.W. 69TH COURT • MIAMI, FLORIDA 33156
TELEPHONE (305) 662-6160 • FACSIMILE (305) 662-6164 • EMAIL inquiry@mmlawmiami.com

October/early November of 2008 when Alvarado suffered a detached retina at FBOP's facility known as the Federal Correctional Institution in Miami, Florida ("FCI") and lost the vision in his eye due to a lengthy delay in treatment.

4. The loss of vision was caused by the negligent acts and omissions committed by FBOP's employees and agents at FCI in failing to allow Alvarado to be medically treated, as well as failing to adopt and implement proper policies, protocols and procedures all of which resulted in substantial injuries to the Plaintiff.

5. Plaintiff has fully complied with the provisions of 28 U.S.C. § 2675 of the Federal Tort Claims Act.

6. This suit has been timely filed, in that Plaintiff timely served notice of his claim on the Bureau of Prisons Southeast Regional Office in August of 2010 (Exhibit A). The FBOP assumed responsibility for processing the claim, and despite the fact that more than 6 months has gone by since the claim was presented, FBOP has failed to render a decision.

7. Accordingly, Plaintiff may proceed with this lawsuit and seek damages in this Court.

8. All conditions precedent have either been complied with or have been waived.

EVENTS FORMING THE BASIS OF THE CLAIMS

9. Alvarado was incarcerated at FBOP's facility, FCI in about late October/early November of 2008.

10. During Alvarado's incarceration, he was permitted by FBOP's agents and employee's to participate in various exercise activities.

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11. While in the course of engaging in FBOP permitted and sanctioned exercise activities, Alvarado's left eye was severely injured.

12. Alvarado felt immediate pain to his left eye and promptly reported his injuries to BOP's agents and employees requesting immediate medical attention.

13. Despite the fact that Alvarado reported he could not see out of his left eye, he was repeatedly denied access to medical care and when medical care was finally allowed, such was too late to save his vision.

14. At all times material hereto Plaintiff, Alvarado, lost the vision in his left eye because of the Defendant, FBOP's negligence as it owed a duty to use reasonable care under the circumstances and breached that duty in that it failed to allow Plaintiff, Alvardo timely access to competent and appropriate medical care and treatment.

15. As a direct result of Defendant's negligence, the Plaintiff, Alvarado, sustained serious and permanent personal injuries and damages.

COUNT I

NEGLIGENCE OF FBOP

16. The Plaintiff, Alvarado, realleges and reavers paragraphs 1-15 as if specifically set forth herein.

17. At all times material the Defendant, FBOP, operated, managed, maintained and/or controlled FCI which included Alvarado's access to medical care if he became injured while incarcerated at the facility.

18. At the above-described time and place, Defendant, FBOP, had a duty to use reasonable care under the circumstances and breached that duty by negligently and

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carelessly denying Alvarado's access to medical care so that Plaintiff, Alvarado, sustained injuries to his body, including the permanent loss of vision in his left eye.

19. On or about late October/early November of 2008, Plaintiff, Alvarado, was legally upon Defendant, FBOP's premises at FCI as an inmate, and was conducting himself in a reasonably safe manner and in a manner which was sanctioned and allowed by FBOP when his eye was severely injured.

20. At all times material, Defendant, FBOP owed Plaintiff, Alvarado, a duty to use ordinary reasonable care under the circumstances.

21. At all times material, Defendant breached its' duty to use reasonable care under the circumstances in that it knew and/or had reason to know (via its agents and employee's) that Alvarado had sustained a severe injury to his eye, could not see out of it, chose to ignore Alvarado's pleas for help and medical care; instead acting in a dangerous and unreasonable manner so that its actions/inactions caused serious injuries to Plaintiff, Alvarado.

22. Defendant, FBOP, breached its duty to use reasonable care under the circumstances by one or more of the following affirmative acts or omissions of negligence:

A. Failing to operate its facility with reasonable care under the circumstances;

B. Failing to timely and/or properly supervise its agents and employees when reasonable care under the circumstances required such;

C. Failing to adopt and implement proper policies, protocols and procedures so that FBOP's inmates, such as Alvarado would be provided proper and appropriate medical care on a timely and reasonable basis;

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D. Allowing an ongoing dangerous or hazardous mode of operation to occur by permitting FBOP's employees/agents to engage in a negligent, deliberate and/or intentional activity in failing to recognize, arrange, or allow for the treatment of Alvarado's severe eye injury despite being specifically placed on notice of it.

23. At all times material hereto, it was foreseeable to the Defendant had it used reasonable care under the circumstances that an inmate such as Alvarado had sustained a serious injury and that emergency medical care was required to save the vision in his eye.

24. The Defendant's negligence as stated in this Complaint was either known or should have been known by the Defendant had it used reasonable care under the circumstances.

25. As a direct result of Defendant, FBOP's negligence, Plaintiff, Alvarado was permanently injured in and about his body and sustained the following damages:

A. Disability;

B. Disfigurement;

C. Pain and suffering;

D. Inconvenience;

E. Loss of capacity for the enjoyment of life;

F. Expense of hospitalization;

G. Medical and nursing care and treatment;

H. Lost wages; and

I. Earning capacity both past and future.

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These losses are either permanent or continuing in nature and Plaintiff, Alvarado will continue to suffer such losses in the future.

WHEREFORE, Plaintiff, Alvarado, demands judgment for damages against Defendant, FBOP, in the amount of One Million Dollars ($1,000,000.00), exclusive of interest and costs which he prays for in addition thereto.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was sent via certified mail to: **(1)** U.S. Dept. Of Justice, Federal Bureau of Prisons, Southeast Region Attn: Lisa M. Sunderman, Esq. - Regional Counsel, Building 2000, 3800 Camp Creek Parkway, SW, Atlanta, Georgia 30331-6226; **(2)** U.S. Attorney - Southern District of Florida, C/O Civil Process Clerk - Wilfredo A. Ferrer, Esq., 99 N.E. 4th Street, Miami, FL 33132; and **(3)** to the Attorney General of the U.S. - Eric Holder, Esq., U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001 on April 25, 2011.

Respectfully submitted,

By:_____

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Attorneys for Plaintiff
Leslie A. Alvarado

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 11-21450-CV-Moreno/Brown

LESLIE A. ALVARADO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

AMENDED COMPLAINT FOR DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT

Plaintiff, LESLIE A. ALVARADO ("Alvarado"), by and through his undersigned attorneys, hereby sues Defendant, UNITED STATES OF AMERICA ("U.S.") which operates and controls the Federal Bureau Of Prisons ("FBOP") and alleges as follows:

JURISDICTION, VENUE AND CONDITIONS PRECEDENT

1. Plaintiff, Alvarado, is a resident of the Southern District of Florida and otherwise *sui juris*.

2. The claims herein are brought against the U.S. pursuant to the Federal Tort Claims Act (28 U.S.C. §2671, *et seq.*) and 28 U.S.C. §§ 1346(b)(1), for money damages as compensation for personal injuries caused by the negligence, wrongful acts and omissions of employees and agents of the U.S.'s agency, the FBOP, while acting within the course and scope of their offices and employment, under circumstances where the U.S., if a private person, would be liable to the Plaintiff in accordance with the laws of the State of Florida.

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3. Venue is proper in that all of the acts and omissions forming the basis of these claims occurred in the Southern District of Florida, and arose when Alvarado suffered a permanent eye injury resulting in lost vision at the U.S.'s facility being operated by the FBOP, known as the Federal Correctional Institution in Miami, Florida ("FCI") due to the U.S.'s refusal and delay in providing medical treatment which resulted in substantial injuries to Plaintiff.

4. The loss of vision was caused by the negligent acts and omissions committed by the U.S. via FBOP's employees, agents, physicians – including Dr. Juan Ramon Monserrate ("Dr. Monserrate")[1], nurses and medical providers at FCI in failing to allow Alvarado to receive proper and reasonable medical which resulted in substantial injuries to Plaintiff.

5. Plaintiff, Alvarado was medically treated by Defendant, U.S.'s employees/agents/nurses/medical providers – including but not limited to Dr. Monserrate pursuant to 42 U.S.C. § 233(g)(1)(A) while at FCI and which said treatment – or lack thereof – caused Alvarado's current condition.

6. Plaintiff has fully complied with the provisions of 28 U.S.C. § 2675 of the Federal Tort Claims Act.

7. This suit has been timely filed, in that Plaintiff timely served notice of his claim on the Bureau of Prisons Southeast Regional Office in August of 2010 (the Notice of Claim was previously filed of record in this Court). The U.S. via the FBOP assumed responsibility for processing the claim, and despite the fact that more than 6 months has gone by since

[1]Dr. Monserrate was subjected to all of the pre-suit requirements in accordance with Florida law for medical negligence and said documents were previously provided to the Defendant and are available to the Defendant if necessary. It has been stipulated by the Defendant's counsel that Dr. Monserrate is at all times hereto an employee or agent of the U.S.

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the claim was presented, the U.S. via FBOP and Plaintiff are unable to agree to an acceptable resolution.

8. All conditions precedent have been satisfied and Plaintiff may proceed with this lawsuit and seek damages in this Court.

EVENTS FORMING THE BASIS OF THE CLAIMS

9. Alvarado was incarcerated at FCI and was permitted by the U.S. via FBOP's agents and employee's to participate in various exercise activities.

10. While in the course of engaging in the U.S. via FBOP permitted and sanctioned exercise activities. During a sanctioned exercise activity Alvarado's left eye was severely injured.

11. Alvarado felt immediate pain to his left eye and promptly reported his injuries to the U.S. via FBOP's agents and employees requesting immediate medical attention.

12. Despite the fact that Alvarado reported that his eye was hurt and he could not see out of it, the U.S. repeatedly denied him access to appropriate medical care and deviated from the standard of care through FBOP's employees, agents, physicians – including Dr. Monserrate, nurses, and medical providers.

13. When appropriate medical care was finally allowed such was too late to save Alvarado's vision.

14. At all times material hereto Plaintiff, Alvarado, lost the vision in his left eye because of the Defendant, U.S.'s negligence.

15. As a direct result of Defendant, U.S.'s negligence, Plaintiff, Alvarado, sustained serious and permanent personal injuries and damages.

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COUNT I

NEGLIGENCE OF U.S.

16. The Plaintiff, Alvarado, realleges and reavers paragraphs 1-15 as if specifically set forth herein.

17. At all times material the Defendant, U.S. via its agency FBOP, operated, managed, maintained and/or controlled FCI which included Alvarado's access to medical care if he became injured while incarcerated at the facility.

18. At all times related hereto the Defendant, U.S., had a duty to use reasonable care under the circumstances and breached that duty by negligently and/or carelessly denying Alvarado's access to appropriate medical care which proximately caused Alvarado to sustain injuries his body, including the permanent loss of vision in his left eye.

19. Plaintiff, Alvarado, was legally upon Defendant, U.S.'s premises at FCI as an inmate, was conducting himself in a manner sanctioned by U.S.'s agency, FBOP when his left eye was injured.

20. At all times material, Defendant, U.S. breached the duty to use reasonable care under the circumstances in that it knew and/or had reason to know (via its agents and employee's, physicians – including Dr. Monserrate, nurses, guards, medical providers and other agents/employees) that Alvarado had sustained an injury to his eye. Despite having such knowledge the U.S. chose to ignore Alvarado's pleas for medical care and treatment, instead failing in its duties by one or more of the following affirmative acts of negligence:

A. Failing to operate its facility with reasonable care under the circumstances;

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B. Failing to timely and/or properly supervise its agents and employees when reasonable care under the circumstances required such;

C. Failing to adopt and implement proper policies, protocols and procedures so that U.S.'s (via its agency, FBOP) inmates, such as Alvarado would be provided proper and appropriate medical care on a timely and reasonable basis;

D. Allowing an ongoing dangerous or hazardous mode of operation to occur by permitting the U.S.'s agency, FBOP's employees/agents to engage in a negligent, deliberate and/or intentional activity in failing to recognize, arrange, or allow for the treatment of Alvarado's severe eye injury despite being specifically placed on notice of it.

E. Failed to properly treat Alvarado's medical condition; and/or,

F. Failed to properly diagnose and/or treat a then-existing emergency condition experienced by the Alvarado when the symptoms were present or when the symptoms should have been known; and/or,

G. Failed to familiarize itself with the Alvarado's ongoing medical conditions; and/or,

H. Failed to order any emergency diagnostic testing; and/or,

I. Failed to order emergency surgery; and/or,

J. Failed to order appropriate diagnostic procedures; and/or,

K. Failed to adequately instruct nursing personnel at FCI as to the method and mode of emergency treatment needed by the Alvarado; and/or,

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L. Failed to order appropriate consultations with other medical specialties, including but not limited to other surgical and/or Opthamological consults; and/or,

M. Or otherwise committed negligence in its care and treatment of the patient, Alvarado by deviating from the standard of care.

N. Deviating from accepted standards of care for the practice of medicine in Miami-Dade County, Florida, or other similar medical communities.

21. At all times material hereto, had the U.S. used reasonable care under the circumstances Alvarado would not have sustained serious injury.

22. The Defendant's negligence as stated in this Amended Complaint was either known or should have been known by the Defendant, U.S. had it used reasonable care under the circumstances.

23. As a direct result of Defendant, U.S.'s negligence, Plaintiff, Alvarado was permanently injured in and about his body and sustained the following damages:

A. Disability;

B. Disfigurement;

C. Pain and suffering;

D. Inconvenience;

E. Loss of capacity for the enjoyment of life;

F. Expense of hospitalization;

G. Medical and nursing care and treatment;

H. Lost wages; and

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These losses are either permanent or continuing in nature and Plaintiff, Alvarado will continue to suffer such losses in the future.

WHEREFORE, Plaintiff, Alvarado, demands judgment for damages against Defendant, U.S., in the amount of One Million Dollars ($1,000,000.00), exclusive of interest and costs which he prays for in addition thereto.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was sent via e-mail & mail to: CHARLES S. WHITE, Esquire, email charles.white@USDOJ.gov, Attorney for Defendant U.S., Assistant United States Attorney, 99 N.E. 4th Street, Suite 300, Miami, Florida 33132 on June 22, 2011.

By: *s/ John W. McLuskey*

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Attorneys for Plaintiff
Leslie A. Alvarado

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 11-21450-CIV-MORENO

LESLIE A. ALVARADO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER GRANTING MOTION TO EXTEND DISCOVERY CUT-OFF DEADLINE

THIS CAUSE came before the Court upon the Defendant's Motion to Extend Discovery Cut-off Deadline **(D.E. No. 27)**, filed on **January 6, 2012**.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED. The parties shall complete discovery on or before **January 31, 2012**.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of January, 2012.

FEDERICO A. MORENO
CHIEF UNITED STATES DISTRICT JUDGE

Copies provided to:
Counsel of Record

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 11-21450-CIV-MORENO

LESLIE A. ALVARADO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

CLOSED CIVIL CASE

FINAL ORDER OF DISMISSAL AND ORDER DENYING ALL PENDING MOTIONS AS MOOT

THIS CAUSE came before the Court upon the Mediator's Report **(D.E. No. 30)** filed on **January 31, 2012**. It is

ADJUDGED that in light of the parties settling this action this case is **DISMISSED** in accordance with the settlement agreement. The Court shall retain jurisdiction to enforce the terms of the settlement agreement if it is filed in its entirety by **March 13, 2012**. It is also

ADJUDGED that all pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 13 day of February, 2012.

FEDERICO A. MORENO
CHIEF UNITED STATES DISTRICT JUDGE

Copies provided to:
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-21450 CV MORENO

LESLIE A. ALVARADO,

Plaintiff,

vs.

UNITED STATES OF AMERICA

Defendant.
_____/

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between the undersigned Plaintiff, Leslie A. Alvarado, ("Plaintiff") and Defendant, United States of America ("Defendant"), by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release.

2. The United States of America agrees to pay the sum of Two Hundred Sixty Five Thousand dollars ($265,000.00) which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees. THIS STIP. AND RELEASE DOES NOT CONCERN OR RELEASE ANY OF MR. ALVARADOS RIGHTS OR BENEFITS WITH RESPECT TO HIS GOVERNMENT BENEFITS - SUCH AS THE V.A., MEDICARE OR MEDICAID, OR S.S.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, which he may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States of America, its agents, servants, or employees, and, it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their costs, fees, and expenses and that any such attorneys' fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys' fees for services rendered in connection with this action shall not exceed 25 per cent of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Money to be paid by the United States as a result of this settlement is subject to available funding. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank: _____
B. Street Address of Bank: _____
C. City, State and Zip Code of Bank: _____
D. Federal Reserve Number: _____
E. Routing Number: _____
F. Name of Account: _____
G. Account Number: _____

Plaintiff's attorneys agree to satisfy, resolve or to place in escrow sufficient funds to satisfy all liens on claims for payment or reimbursements asserted by any individual or entity before making any distribution to the Plaintiff. Plaintiff's attorneys agree to distribute the settlement proceeds to Plaintiff and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. §552a(b).

By: _____

John E. Hughes, Esq.
Attorney for Plaintiff
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Miami, FL 33156
Tel.: (305) 662-6160
Fax: (305) 662-6164
JEHughes3@mmlawmiami.com

Dated: 1/31/12

Charles S. White
Assistant United States Attorney
99 N.E. 4th Street, Suit 300
Miami, Florida 33132
Tel. (305) 961-9286
Fax. (305) 530-7139
charles.white@usdoj.gov
Counsel for Defendant

Dated: 1/31/12

Leslie A. Alvarado
Plaintiff

Dated: 1/31/12

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CASE DETAILS

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Case ID: CIV-SER-2012-00402 **Short Description:** CRUZ-GONZALEZ V. UNITED STATES OF AMERICA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	3:12-cv-01015-DRD
Short Description	CRUZ-GONZALEZ V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Jesup (FCI)
Incident Region	
Incident Institution	
Monetary Relief Sought	$
Estimated Amount	$
Office	San Juan
Jurisdiction	DISTRICT OF PUERTO RICO
Responsible Legal Office	SERO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	09/24/2013
Type	Settled
Reason	
Sought	
Amount offered	$5,000.00
Total Amount Paid	$5,000.00
Description	NUISANCE SETTLEMENT VALUE
Description	NUISANCE SETTLEMENT VALUE
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	03/12/2012
Date Filed	01/12/2012

Case Progress

Current Owner	AIXA PEREZ
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	FTCA PERSONAL INJURY ACTION LACK OF MEDICAL CARE
Further Case Classification	
Comments	

Home | Alerts | My Work | New Case | Search Main | Email

United States Department of Justice - Office of General Counsel & Review

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, street, city, State and Zip Code)
RE HOH Southeast Regional Office BOP 3800 Camp CRK SW / Building 2000 Atlanta GA 30331	Hector Manuel Cruz-Gonzalez Calle Union #377 Puerto Real, PR 00740 33494-069

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. or P.M.)
☐ MILITARY ☒ CIVILIAN	5/23/80	Single	2/24/2009	

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

See Exhibit # 1

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See Exhibit # 1

RECEIVED JAN 14 2011 REGIONAL COUNSEL'S OFFICE SEAL BUREAU OF PRISONS

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	$10,000,000.00		$10,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
x [signature]	787-801-5382	1/4/11

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-109
Previous editions not usable.
NSN 7540-00-634-4046
STANDARD FORM 95 (Rev. 7-85) (EG)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

T-SER-2011-02422

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim

INSTRUCTIONS

Complete all items - insert the word NONE where applicable

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Any instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplemental regulations also. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights.

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden,

to Director, Torts Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530

and to the
Office of Management and Budget
Paperwork Reduction Project (1105-0008)
Washington, DC 20503

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* and policy number. ☐ No

16. Have you filed claim on your insurance carrier in this instance, and if so, is it full coverage or deductible?

17. If deductible, state amount

18. If claim has been filed with your carrier, what action has your insurer taken or proposes to take with reference to your claim? *It is necessary that you ascertain these facts*

19. Do you carry public liability and property damage insurance? ☐ Yes, If yes, give name and address of insurance company *(Number, street, city, State, and Zip Code)* ☐ No

HECTOR M. CRUZ-GONZALEZ
CLAIM FOR INJURY
MDC-GUAYNABO
EXHIBIT # 1

Mr. Cruz-González was incarcerated at the Metropolitan Detention Center-Guynabo on December 20, 2008. At that time he suffered from sleep apnea and high blood pressure.

Since his incarceration Mr. Cruz-González informed to the MDC-Guaynabo personnel about his medical conditions and requested his daily medications. MDC-Guaynabo personnel failed to provide Mr. Cruz with his medications and he began to deteriorate inmediately.

Mr. Cruz-González was constantly complaining about his medical condition to the medical staff and other MDC-Guyanabo personnel but he was ignored.

On February 24, 2009 due to the lack of medical attention and medications, Mr. Cruz suffered a seizure at his cell and lost conscience. He was not transferred to the hospital for treatment and was left without medical attention.

Due to the lack of medical care and deliberate indifference of MDC-Guaynabo staff and/or personnel, Mr. Cruz suffered serious damages including:

1. Paralysis of the left side of his body
2. Has become hemiplegic;
3. Loss of vision;
4. Permanent disability;
5. Among others.

Mr. Cruz condition became so serious that he was released on March 5, 2009 to serve his sentence under home confinement.

U.S. Department of Justice
Federal Bureau of Prisons
Southeast Regional Office
Building 2000
3800 Camp Creek Parkway, SW
Atlanta, Georgia 30331-6226

April 28, 2011

Luz Gonzalez Sisco
Calle Union # 377
Puerto Real, PR 00740

Re: Administrative Tort Claim: TRT-SER-2011-02424
Luz Gonzalez Sisco, Civilian

Dear Claimant:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), 28 United States Code (U.S.C.) § 2672, and the authority granted by 28 Code of Federal Regulations (C.F.R.) § 0.172. Constitutional claims are not cognizable under the FTCA. You claim government liability in the amount of three million dollars ($3,000,000.00) for injuries you allege occurred while you were incarcerated at the Metropolitan Detention Center (MDC) Guaynabo due to lack of medical care and deliberate indifference of MDC Guaynabo staff.

Specifically you claim that you are the mother of former inmate Hector Cruz Gonzalez. You claim that Mr. Cruz was incarcerated at MDC Guaynabo December 20, 2008 and at that he suffered from sleep apnea and high blood pressure. You claim that since his incarceration he informed MDC Guaynabo staff about his medical condition and requested daily medications. You claim MDC Guaynabo staff failed to provide him with his medications and he began to deteriorate immediately. You claim that he constantly complained about his medical condition to medical staff and other MDC Guaynabo staff but he was ignored. You claim that on February 24, 2009 due to the lack of medical attention and medications he suffered a seizure at his cell and lost conscience. You claim he was not transferred to the hospital for treatment and that he was left without medical attention. You claim that due to the lack of medical care and deliberate indifference of MDC Guaynabo staff and/personnel he suffered serious damages including;

1. paralysis of the left side of the body,
2. has become hemiplegic,
3. loss of vision,
4. permanent disability, and
5. among others.

You claim due to the lack of medical care and deliberate indifference of MDC-

Guaynabo staff and/or personnel, you suffered the following damages;

1. mental anguishes,
2. medical expenses for the continuous medical treatment of her son, and
3. Expenses in the habilitation of her house due to the medical needs of her son.

Finally, you claim that Mr. Cruz condition became so serious that he was released on March 5, 2009 to serve his sentence under home confinement.

Your claim was reviewed and an investigation regarding the allegations was conducted. The investigation revealed that Mr. Cruz arrived at MDC Guaynabo on December 20, 2008 with a history of hypertension since age 25 on medications. He referred a history of being involved in a motorcycle accident in 1998 with residual pains over his right shoulder and leg. He provided a history of suicide attempt during the past year prior to his arrival. The investigation further revealed that when he arrived at MDC Guaynabo his medications were unknown. By February 23, 2009 he was started on medications even though he could not identify what medications he was taking prior to his incarceration. In March he was seen by medical staff and found to have possible hemiparesis of the left side of the body. Arrangements were made for direct admission to the hospital for diagnostic testing. He was admitted on April 1, 2009 and returned on April 4, 2009 with only a recommendation for physical therapy. Copies of his diagnostic tests were received and were all negative. There was no diagnosis. On April 30, 2009 he was seen in the Chronic Care Clinic (CCC) and the results of all diagnostic tests were discussed with him. He was seen repeatedly in sick call and followed very closely in the CCC throughout his incarceration and up until his release. Specialty consultations were obtained along with physical therapy sessions. Cervical and Brain MRIs were done twice. However, a definite diagnosis was not reached. The investigation does not corroborate your claim that MDC Guaynabo staff ignored complaints about Mr. Cruz' medical condition. In fact the record establishes staff made constant contact with him. Furthermore, at no time is there documented evidence that any seizures occurred. MDC staff provided appropriate action when required.

The investigation did not conclude evidence that staff's alleged lack of medical care or alleged deliberate indifference caused any of the enumerated damages listed in your complaint. The documents and reports reviewed show that the care provided to Mr. Cruz was medically appropriate and evidence based. His alleged injuries were not a result of lack of appropriate medical care. The decision to release Mr. Cruz was made by the court. However, he had the required medical care available to him at the institution he was designated to and to where he was awaiting transport. Furthermore, in your claim you have concluded that staff acted with deliberate indifference however, you have not properly raised this claim and you have not properly substantiated this conclusion.

Additionally, you have not provided any record to review in which the damages you lists pertaining to mental anguishes, medical expenses for continuous medical treatment of Mr. Cruz or expenses in the habilitation of your house to the medical needs of Mr. Cruz can be corroborated. Finally, you have not provided proof of your relationship to Mr. Cruz which authorizes you to file this claim and request damages as a result of his

alleged injuries. In light of all of the above, there is no evidence to indicate you sustained an injury caused by the negligence of any Bureau of Prisons' employee acting within the scope of his or her employment. Please accept this communication as a denial of the claim. You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of mailing of this communication within which to bring suit in the appropriate United States District Court. If you can provide evidence staff negligence was the cause of any injury, then you may submit such evidence for reconsideration in accordance with the appropriate regulation.

Sincerely,

Lisa M. Sunderman
Regional Counsel

cc: Warden, MDC Guaynabo
ATTN: FTCA Coordinator

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

HECTOR MANUEL CRUZ-GONZALEZ	*	CIVIL NO.
	*	
Plaintiff	*	
V.	*	
	*	FTCA CLAIM
	*	
UNITED STATES OF AMERICA	*	
	*	
Defendant	*	

* *

COMPLAINT

TO THE HONORABLE COURT:

COMES NOW, plaintiff through the undersigned attorney and most respectfully **STATES** and **PRAYS** as follows:

I. JURISDICTION

This Honorable Court has jurisdiction over the parties and the subject matter of this litigation pursuant to 28 U.S.C. § 1331 and under the Federal Torts Claim Act 28 U.S.C. § 2680, inasmuch the United States federal employees at the Metropolitan Detention Center-Guaynabo failed to protect the health and well-being of plaintiff Héctor Manuel Cruz-González while incarcerated in their facilities.

Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(a) since the claims alleged arose in this judicial district.

II. NATURE OF THE ACTION

This is a civil action to recover from damages suffered by plaintiff Héctor Manuel Cruz-González while he was incarcerated in the Metropolitan Detention Center, Guaynabo.

III. PARTIES

1. Plaintiff Héctor Manuel Cruz-González is a USA citizen, resident of San Juan, Puerto Rico and was an inmate at the **METROPOLITAN DETENTION CENTER-GUAYNABO** on February 24, 2009.

2. Defendant **UNITED STATES OF AMERICA** is the entity in charge of overseeing the funding and administration of an agency known as **BUREAU OF PRISONS** which consists of institutions housing male and female federal inmates. One of its institutions is the **METROPOLITAN DETENTION CENTER-GUAYNABO**, a confinement facility located in Guaynabo, Puerto Rico.

IV. FACTS

3. Plaintiff Héctor Cruz-González was incarcerated at the Metropolitan Detention Center-Guaynabo (herein after "MDC-Guaynabo") on December 20, 2008. At that time he suffered from sleep apnea and high blood pressure.

4. Since his incarceration plaintiff Héctor Cruz-González informed to the MDC-Guaynabo personnel about his medical conditions and requested his daily medications.

5. At all times, MDC-Guaynabo personnel failed to provide plaintiff Cruz - González with his medications and he began to deteriorate immediately. He felt weak and malaise.

6. Plaintiff Héctor Manuel Cruz-González was constantly complaining about his medical condition to the medical staff and other MDC-Guaynabo personnel but he was

ignored.

7. On February 24, 2009 due to the lack of medical attention and medications, plaintiff Héctor Manuel Cruz-González suffered a seizure at his cell and lost conscience. He was not transferred to any medical facility for treatment and was left without medical attention.

8. On October 15, 2009, former Chief Judge José A. Fusté entered an order on Criminal Case Number: 09-006 (JAF) *(Docket #41)* stating:

> *"The Defendant is a young male obviously sick and impaired. He is suffering from paralysis of the left side of the boy accruing after incarceration. We strongly urge the Bureau of Prisons to designate the Defendant to a medical facility for care and treatment."*

9. Plaintiff Héctor Manuel Cruz-González condition became so serious that he was released to serve his sentence under home confinement.

V. CAUSE OF ACTION

10. The allegations contained in paragraph No.1 through No. 9 of this Complaint are incorporated by reference as is fully set forth herein by plaintiff Héctor Manuel Cruz-González.

11. Under the Federal Tort Claims Act, the United States is liable for all the damages caused to Plaintiff by the negligence and medical malpractice of the MDC-Guaynabo's agents, physicians and/or medical personnel who treated him while incarcerated.

12. Plaintiff's damages were caused due to the lack of appropriate care and

treatment by the MDC-Guaynabo's agents, doctors and/or medical personnel.

13. The medical staff of MDC-Guaynabo had a duty to utilize due care an follow accepted medical standards in providing medical treatment and care to Plaintiff.

14. Said medical staff breached their duty, were negligent and committed medical malpractice because the treatment of Plaintiff deviated from accepted standards of care.

VI. DAMAGES

15. The allegations contained in paragraph No.1 through No.14 of this complaint are incorporated by reference as is fully set forth herein by plaintiff Héctor Manuel Cruz-González.

16. As a direct result of the lack of medical care, negligence and omissions of MDC-Guaynabo's staff and/or personnel, plaintiff Héctor Manuel Cruz-González suffered serious damages including:

a. Paralysis of the left side of his body;
b. Has become hemiplegic;
c. Loss of vision;
d. Permanent disability;
e. Aggravation of pre-existing medical conditions;
f. Loss of potential wages and marginal benefits;
g. Neurological damages;
h. Past, present and future medical expenses;
i. Mental anguishes and distress

17. Plaintiff Héctor Manuel Cruz-González damages are estimated in the amount of ten million dollars ($10,000,000.00).

VI. PRAYER FOR RELIEF

WHEREFORE, it is respectfully requested that Judgment be entered by this Honorable Court in favor of the Plaintiff and against the Defendant:

A. Granting the plaintiff all the sums requested in the complaint, for a total of ten million dollars ($10,000,000.00);

B. Imposing upon the defendant the payment of all costs and expenses to be incurred in this lawsuit;

C. Granting the plaintiff any other relief that they may be entitled to as a matter of law; And,

D. Awarding plaintiff a reasonable amount for attorney's fees.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico, this 12th day of January, 2012.

LUIS RAFAEL RIVERA LAW OFFICE
CAPITAL CENTER BLDG.1
SUITE 401
239 ARTERIAL HOSTOS AVENUE
SAN JUAN, PUERTO RICO 00918
PHONE: 787-763-1780
FAX: 787-763-2145
E-MAIL: luiswichyrivera@hotmail.com

By: S/MICHELLE ANNET RAMOS-JIMENEZ
MICHELLE ANNET RAMOS-JIMENEZ
USDC-PR 225303
E-mail: michellean2000@yahoo.com

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CATEGORY SHEET

You must accompany your complaint with this Category Sheet, and the Civil Cover Sheet (JS-44).

Attorney Name (Last, First, MI): Ramos-Jiménez, Michelle A.

USDC-PR Bar Number: 225303

Email Address: michellean2000@yahoo.com

1. Title (caption) of the Case (provide only the names of the first party on each side):

   Plaintiff: Héctor Manuel Cruz-González

   Defendant: United States of America

2. Indicate the category to which this case belongs:

   ☒ Ordinary Civil Case

   ☐ Social Security

   ☐ Banking

   ☐ Injunction

3. Indicate the title and number of related cases (if any).

   N/A

4. Has a prior action between the same parties and based on the same claim ever been filed before this Court?

   ☐ Yes

   ☒ No

5. Is this case required to be heard and determined by a district court of three judges pursuant to 28 U.S.C. § 2284?

   ☐ Yes

   ☒ No

6. Does this case question the constitutionality of a state statute? (See, Fed.R.Civ. P. 24)

   ☐ Yes

   ☒ No

Date Submitted: 1/12/2011

rev. Dec. 2009

Print Form Reset Form

JS 44 (Rev. 09/11)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Héctor Manuel Cruz-González

DEFENDANTS
United States of America

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Michelle Annet Ramos-Jimenez / Luis Rafael Rivera Law Offices / Capital Center Bldg., Suite 401, 239 Arterial Hostos Ave., San Juan, Puerto Rico 00918 / 787-763-1780

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☒ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence
- Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
Brief description of cause:

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND $ 10,000,000.00
CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____

DATE
01/12/2011

SIGNATURE OF ATTORNEY OF RECORD
Michelle A. Ramos Jiménez

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Puerto Rico

Héctor Manuel Cruz-González *Plaintiff* v. United States of America *Defendant*	)	Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States of America
Torre Chardón, Suite 401
350 Carlos Chardón Avenue
San Juan, Puerto Rico 00918

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Michelle Annet Ramos-Jiménez, Esq.
Luis Rafael Rivera Law Offices
Capital Center Bldg., Suite 401
239 Arterial Hostos Avenue
San Juan, Puerto Rico 00918
787-763-1780

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

HECTOR MANUEL CRUZ-GONZALEZ, Plaintiff, v. **UNITED STATES OF AMERICA,** Defendant.	Civ. No. 12-1015(DRD)

JUDGMENT

Pursuant to Plaintiff's decision to voluntarily dismiss the instant action (Docket No. 33), and Defendant's acquiescence thereto (Docket No. 35) in compliance with Rule 41, the Court hereby enters a final judgment **DISMISSING THE INSTANT CASE WITH PREJUDICE.**

THIS CASE IS NOW CLOSED FOR ALL ADMINISTRATIVE AND STATISTICAL PURPOSES.

IT IS SO ORDERED, ADJUDGED AND DECREED.

In San Juan, Puerto Rico, this 9th day of December, 2013.

S/ DANIEL R. DOMÍNGUEZ

DANIEL R. DOMÍNGUEZ
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Héctor Manuel Cruz-González, Plaintiff, v. United States of America, Defendant.	Civil No. 12-1015 (DRD)

MOTION IN COMPLIANCE

TO THE HONORABLE COURT:

COMES NOW the defendant through the undersigned attorneys and in compliance with this Court's Order at **D.E. 34**, affirmatively states that it has no objection to plaintiff's voluntary dismissal with prejudice of this action in view of the Settlement Agreement reached between the parties.

WHEREFORE, the defendant respectfully requests from this Honorable Court that it take notice of the above and of the appearing party's compliance with the Court Order at **D.E. 34**.

I HEREBY CERTIFY that the foregoing document was filed with the Clerk of the Court using CM/ECF system, which will send notification of such filing to Michelle Annet Ramos-Jiménez, Esq.

RESPECTFULLY SUBMITTED in San Juan, Puerto Rico, this 9th day of December , 2013.

Rosa Emilia Rodríguez-Vélez
United States Attorney

S/Fidel A. Sevillano-Del Río
FIDEL A. SEVILLANO-DEL RIO
Assistant U.S. Attorney
U.S.D.C.-P.R. 117812
Torre Chardón, Suite 1201
350 Carlos Chardón St.
San Juan, Puerto Rico 00918
Tel. (787) 766-5656
Fax (787) 766-6219
E-mail fidel.sevillano@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

HECTOR M. CRUZ-GONZALEZ	*	**CIVIL NO. 12-1015(DRD)**
	*	
Plaintiff	*	
V.	*	
	*	
	*	
UNITED STATES OF AMERICA	*	
	*	
Defendant	*	

* *

NOTICE OF VOLUNTARY DISMISSAL

TO THE HONORABLE COURT:

COMES NOW, plaintiff through their undersigned attorney and most respectfully **STATES** and **PRAYS** as follows:

Plaintiff informs to this Honorable Court that asettlement agreement has been reached with the Defendant in the caption case and there are no more controversies to be tried in the case.

WHEREFORE, plaintiff hereby requests to this Honorable Court the dismissal with prejudice of the caption case.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 6th day of December, 2013.

WE HEREBY CERTIFY that on this same date we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will provide notice to all parties

involved in this case.

LUIS RAFAEL RIVER LAW OFFICES
CAPITAL CENTER BLDG.1
SUITE 401
ARTERIAL HOSTOS AVENUE 239
HATO REY, PUERTO RICO 00918
PHONE: (787) 763-1780
FAX: (787) 763-2541
E-MAIL: lrriver@coqui.net

S/ MICHELLE A. RAMOS JIMENEZ
MICHELLE A. RAMOS JIMENEZ
USDC-PR NO. 22530

S/LUIS RAFAEL RIVERA
LUIS RAFAEL RIVERA
USDC-PR NO. 129411

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JURY TRIAL DEMANDED

CARL BENNETT
PLAINTIFF,

CASE NO.: 5:12-CV-00016-DCB-RHW

VS.

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 27 2012
J. T. NOBLIN, CLERK
BY _____ DEPUTY

HARRELL WATTS, NATIONAL INAMTE APPEAL COORDINATOR.

REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR R.E. HOLT.

BRUCE PEARSON, WARDEN.

DR. ROBERTO MARTINEZ, STAFF PHYSICIAN.

DR. ANTHONY CHAMBERS, MD CLINICAL DIRECTOR.

DEFENDANTS IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY.
_____/

AMENDED COMPLAINT BY FEDERAL PRISONER, UNDER THE CIVIL RIGHTS. 28. U.S.C. § 1331 or 1346 BIVENS CLAIM

This complaint brought by Plaintiff Carl Bennett. A Federal prisoner, is brought against the defendants herein for their violations of Plaintiff Bennett's Constitutional right to the Eighth Amendment against cruel and unusual punishment through negligence and as grounds would say the following:

JURISDICTION

Jurisdiction is invoked pursuant to Hess V. United States 361 U.S. 314. 317-18. 80 S.ct 431.4L 2d305 (1960) (Quoting 28 U.S.C. § 1346 (b)).

And all other acts, statues and Constitutional clauses that may be applicable, to have his Federal quested heard.

PARTIES

A. **PLAINTIFF**

1. Carl Bennett # 12198-021

Federal Correctional Institution Jesup

2680 Highway 310 South

Jesup Georgia 31599

B. **DEFENDANTS**

1. Harrell Watts.

National Inmate Appeals Coordinator General Counsel

Federal Bureau Of Prisons

320 First Street N.W

Washington DC 20534;

2. R.E. HOLT.

Regional Administrative Remedies Coordinator

Federal Bureau Of Prisons

3800 Camp Creek Parkway S.W

Building 2000

Atlanta Georgia 30331

3. Bruce Pearson, Warden.

Federal Bureau Of Prisons

F.C.I Yazoo City Medium Facility Complex

Federal Correctional Institution

P.O Box 5888

Yazoo City Mississippi 39194

4. Dr. Roberto Martinez. Staff Physician

Federal Bureau Of Prisons

F.C.I Yazoo Medium Complex

Federal Correctional Institution

P.O Box 5888

Yazoo City Mississippi 39194

5. Dr.ANTHONY CHAMBERS MD CLINICAL DIRECTOR.

F.C.I Yazoo City Medium Facility Complex

Federal Correctional Institution

P.O Box 5888

Yazoo City Mississippi 39194

INTRODUCTION

The plaintiff. **Carl Bennett.** Move this Honorable court not let or permit form to override substance or procedural technicalities to defeat fairness and justice needed for the relief the court may have deem just and proper. As the court in **Hall V. Bellman, 935 F.2d 1106. 1110. (11th Cir 1991)** Stated. " A Pro-se litigant pleadings are to be held to less stringent standards than formal pleadings drafted by lawyers." If a court can reasonably read a pleading to state a valid claim of which a defendant could prevail. It should do so despite the defendant's failure to cite proper legal theories, his poor syntax and sentence construction, or familiarity with pleading requirements. See: **Boag V. McDougall. 454, U.S. 364, 102, S.ct 700 (1982) : Haines V. Kerner, 404 U.S. 364, 925.ct. 594 (1972) Cangloff V. Poccia. 888 F.supp. 1549 (MD. Fla 1995): Powell V. Lennon, 914 F.2d 1495.1463 (11th Cir 1990)** "We liberally construe Pro-se litigants pleadings.

Plaintiff-Petitioner. **Carl Bennett** below. Will be referred to by name or as the " Plaintiff." Defendant's-Respondant's below, will be referred to as " Defendant's." Or by "Name" or by" FBOP."

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Plaintiff **Carl Bennett** has exhausted all stages of the administrative remedy system within the Federal Bureau Of Prisons. As Set forth at title 28, code of Federal Regulations (CFR) . §542/et,.seq,. and title 28 U.S.C. § 2675 in furtherance of his claim for relief. Through the office of the national and regional administrative remedies.

OTHER ACTIONS PENDING

Plaintiff **Carl Bennett** brought forth the facts as set forth below, to:

1. Regional Counsel Southeast Regional Office
3800 Camp Creek Parkway S.W
Building 2000
Atlanta Georgia 30331
2. Tortis Claim,
3. **Docket No: TRT-SER-2011-02892**
4. Name: Lisa M. Sunderman, Regional Counsel
5. Disposition: Action denied
6. No further actions has been brought forward as set fore below to any count alleging the facts of this matter.

STATEMENT OF THE CASE FACTS

1. Plaintiff **Carl Bennett** is currently serving an 18 years and 4 month sentence for a violation of Title 18 U.S.C 922(g)(1) Firearm violation of Title 18 U.S.C 924(e). Plaintiff filed a direct appeal in the United States court of appeals for the Eleventh Circuit number 07-11316F and it was reversed and remanded for which the plaintiff was resentenced to 194 months BOP. Plaintiff is scheduled for release on or about 10-24-2019.

2. **Plaintiff Carl Bennett** a Federal Prisoner incarcerated at Federal Correctional Institution Jesup Georgia 2680 U.S Highway 301 South. Is an inmate who was suffering from skin compilations. Went to the Medical Department seeking medical relief for which the BOP by and through it's agency negligently disregarded the plaintiff serious medical condition in violation of the plaintiffs 8th amendment constitutional rights against cruel and unusual punishment.

3. On 10-6-2009 Plaintiff **Carl Bennett** filed a BP-8-Yaz1330.13G with correction counsel Mr. W.Lychard. Since July 2009. He had a condition on his upper left ankle which was eaten into the muscle and was causing a great deal of constant pain. This condition was getting worse daily. And he seems to not be able to get any medical help. Which is effective, in what appears to be a staff infection. Actions requesting to resolve the complaint, was adequate and competent medical attention to stop the spread of what ever was eating into his leg and something for pain. **(See: Exhibit "A" BP-9).**

4. On 11-4-2009.The Plaintiff **Carl Bennett** received a response attempt at informal resolution denying plaintiff's requested relief, more specifically. A review of this matter reveals that you received a Doppler Ultrasound which revealed arterial venues insufficiency in your left lower extremity. Also, a consultation has been generated for a vascular surgeon. This consultation will be review by the utilization review committee and you will be notified of their decision. I trust I have been responsive to your concerns. **(See Exhibit "B" BP-8 Response.)**

5. Inmate **Carl Bennett** filed a BP-9 remedy No:565112-F1, which he appealed the denial of his informal resolution in which he statement medical attention to my left ankle as the condition is eating into the muscle and I am in constant pain. This appears to be a staff infection: And numerous attempts at trying to have the Medical staff at Yazoo treat this has meet with no effective result. **(See Exhibit "C" BP-9)**

6.On 12-3-2009. A response was received by the Warden where he have a vague response to my BP-9 which he stated a review of you medical record reveals that you are being treated for stasis venous abrasive lesions to your lower left extremity with purists and superficial thread like varcose veins on the anterior and lateral aspect of your foot. You have been receiving treatment is medical for approximately seven months without a positive outcome. Your abrasive lesions are not healing in spite of occlusive dressing TeD hosiery and ancillary measures such as elevating your leg. A consultation for an arteriovenous Doppler Ultrasound has been approved to rule out arteriovenous insufficiency. This diagnostic test is scheduled for mid December 2009. **(See Exhibit "D" response of BP-9)**

7. On 12-11-2009 Inmate **Carl Bennett** filed a appeal on his denial of his BP-9, with the Regional Administrative office in Atlanta Georgia by way of BP-10. In his appeal he augured; Likewise, as stated in prior request/grievances. I once again request medical attention in the case of my left ankle as the condition is eating into the muscle in that area and I am in constant pain. Furthermore. I once again contend that this appears to be a staph infection in that sense. I also provide that numerous attempts at trying to have the medical staff at Yazoo treat said condition has recurrently been met with adverse harshness and in some pustances. No results at all. **(See Exhibit "E")**

8. On 1-20-2010. The regional Director issued a response alleging a review of your medical records revealed the wardens response to your request for Administrative remedy number 656112-F1 is correct. You have been receiving treatment for approximately seven month's for stasis venous abrasive lesions to your lower left extremity. No improvement has been noted despite frequent occlusive dressings/wound care. TeD hosiery and leg elevation. Therefore the staff physician recommended a venous sonogram and an arterial Doppler Ultrasound for further diagnosis. You underwent the venous sonogram on December 30 2009. And your arterial Doppler Ultrasound is pending. **(See Exhibit "F")**

9. On 6-18-2010 Plaintiff **Carl Bennett** filed a BP-11, **(Exhibit "G")** in which he requested a second opinion form another certified physician, relating to his suffering combition. He futhered complained "my skin continue to worsen and proper or better medical attention is immediately needed. It is obvious that the current treatment for "arterial venous insufficiency" Is not helping my condition because my illness is misdiagnosed.

10. On October 25 2010. Mr Harrell Watts Administrator or national inmate appeals issued response statements ." Relevant portions of your medical record have been reviewed which reveal you have been diagnosed with stasis dermatitis, A common inflammatory skin disease that occurs on the lower extremities in patients with chronic venous insufficiency with venous hypertension. It is usually the earliest cutaneous sequela of venous insufficiency. and it may be a precursor to more problematic conditions. Such as venous leg ulceration and lipodermatosclerosis.you recieve appropriate medical care and treatment for your condition. There is no clinical indication which would warrant you undergoing a consultant skin and bone specialist evaluation. The record reflects you are receiving medical care and treatment in accordance with Bureau policy. **(See Exhibit "H")**

11. On 3-7-2011. The Plaintiff **Carl Bennett,** Filed a tort claim, TRT-SER-2011-02892 alleging mental stress, and physical injury, due to a staff infection, that was not treated properly nor in time. **(Se Exhibit "I")**

12. On September 26 2011, Lisa M. Sunderman Regional counsel, Issued a response stating: " Based on the above there is no evidence indicating that you suffered a loss of injury caused by the negligent or wrongfully act or omission of any Bureau of Prisons employee acting within the scope of his or her employment. Additionally, you received medical treatment consistent with evidence based medical standards.

Consequently, your claim must be denied. **(See Exhibit "J")**

13. This timely complain follows.

COUNTS

1. The Federal Bureau Of Prisons. By it's executors, caused plaintiff to suffer mental stress, and physical injury, bue to staph infection that was not treated properly or in a timely manner.

1. On 10-6-2009. Plaintiff **Carl Bennett** filed a BP-8 with his counsel Mr. W. Lynchard, stating that he had a skin condition on his left upper ankle. The condition was getting worse daily and that he was not getting any medical attention.

2. On 11-11-2009. **Mr. Bennett** filed a BP-9 appealing the denial of his request seeking proper, adequate and competent medical attention, as his medical was getting worse.

3. ON 12-3-2009. The Warden **Bruce Pearson** stated that he was denying treatment stasis venous abrasive lesions to your lower left extremity with prutitus and superficial thread like varsose veins on the anterior and laterak aspect of your foot and as for seven month's of treatment he was now being approved for an arteriovenous Doppler Ultrasound.

4. On 12-11-2009 **Mr. Bennett** filed a BP-10 requesting medical attention as the conditon was getting worse despite of the on going medical attention he was receiving.

5. ON 1-22-2010 Regional Director stated that the medical department was waiting for the results of the venous sonogram.

6. On 6-18-2010. **Mr. Bennett** was still suffering from server pain and an escalating skin abnormality that was progressing well into upper body. Mr. Bennett requested a second medial opinion.

7. On 10-25-2010. **Mr. Harrell Watts** administrator of national inmate appeal in Washington responded that Mr. Bennett was receiving appropriate medical care and treatment and therefore no second opinion was needed.

THIS TIMELY MOTION FOLLOW

The plaintiff's sole argument that defendant's didn't provide adequate, timely medical attention that has caused permanent visual marks on the plaintiff's body, in direct result of the failure the properly, in timely treat the plaintiff. As a result of the permanent marks on his body the plaintiff argues that he has to look at himself on a daily basis with a disgust, causing mental, emotional, psychological distress, which has cause the plaintiff to become impotent.

Prior to the plaintiff's condition, the plaintiff was sexually active, and that we was used to maintaining his sexual need's while incarcerated. The plaintiff is 49 years old. With only or about 7 years left to be released, and will not be able to become intimate in any future relationships.

RELEASE REQUESTED

The plaintiff is requesting that no retaliatory conduct occur against plaintiff for the bring of this action. As plaintiff **Bennett** has been disciplinary free or even allegations of improper conduct.

And as such, any such allegations of wrong doing should be frowned upon by this court.

To award compensatory damages in the amount of $1.5 million dollars. and to award punitive damages in the amount of $1.5 million dollars.

RESPECTFULLY SUBMITTED

Carl Bennett

Carl Bennett# 12198-021
Federal Correctional Institution
2680 Highway 301 South
Jesup, Georgia 31599

DECLARATION

I **CARL BENNETT**, Declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed This 1 Day Of 19, 2012

Carl Bennett

CARL BENNETT # 12198-021

CERTIFICATE OF SERVICE

I Hereby **CERTIFY** that a true and correct Copy of the foregoing motion has been furnished to the clerk of court with the attached copies to the be served upon the Defendant's in this case, on this 1 day of 19 2012.

RESPECTFULLY SUBMITTED,

Carl Bennett

CARL BENNETT 12198-021
Federal Correctional Institution
2680 Highway 301 South
Jesup Ga, 31599

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JAN 25 2012
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURY TRIAL DEMANDED

5:12cv16-DCB-RHW

CASE NO:

CARL BENNETT
PLAINTIFF,

VS.

HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR.

REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR JOHN DOE.

BRUCE PEARSON, WARDEN.

DR. ROBERTO MARTINEZ, STAFF PHYSICIAN.

DR. ANTHONY CHAMBE, MD CLINICAL DIRECTOR.

DEFENDANTS IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY./

COMPLAINT BY FEDERAL PRISONER, UNDER THE CIVIL RIGHTS ACT. 28. U.S.C § 1331 OR 1346 BIVENS CLAIM.

This complaint brought by Plaintiff Carl Bennett. A Federal Prisoner, is brought against the defendants herein for their violations of plaintiff Bennett's Constitutional rights to the Eighth Amendment against cruel and unusual punishment through negligence and as grounds would say the following:

JURISDICTION

Jurisdiction is invoked pursuant to **Hess V. United States 361 U.S 314. 317-18. 80 S.ct 431.4L Ed 2d305 (1960) (Quoting 28 U.S.C § 1346 (b)).**

And all other acts, statues and Constitutional clauses that may be applicable, to have his Federal quested heard.

PARTIES

A. **PLAINTIFF**

1. Carl Bennett # 12198-021

Federal Correctional Institution Jesup

2680 Highway 310 South

Jesup Georgia 31599

B. **DEFENDANTS**

1. Harrell Watts.

National Inmate Appeals Coordinator General Counsel

Federal Bureau Of Prisons

320 First Street N.W

Washington DC 20534

2. John Doe

Regional Administrative Remedies Coordinator

Federal Bureau Of Prisons

3800 Camp Creek Parkway S.W

Building 2000

Atlanta Georgia 30331

3. Bruce Pearson, Warden.

Federal Bureau Of Prisons

F.C.I Yazoo City Medium Facility Complex

Federal Correctional Institution

P.O Box 5888

Yazoo City Mississippi 39194

4. Dr. Roberto Martinez. Staff Physician

Federal Bureau Of Prisons

F.C.I Yazoo Medium Complex

Federal Correctional Institution

P.O Box 5888

Yazoo City Mississippi 39194

5. Dr. Anthony Chambes. MD Clinical Director

F.C.I Yazoo City Medium Facility Complex

Federal Correctional Institution

P.O Box 5888

Yazoo City Mississippi 39194

INTRODUCTION

The plaintiff. **Carl Bennett.** Move this Honorable court not let or permit form to override substance or procedural technicalities to defeat fairness and justice needed for the relief the court may have deem just and proper. As the court in **Hall V. Bellman, 935 F.2d 1106. 1110. (11th Cir 1991)** Stated. " A Pro-se litigant pleadings are to be held to less stringent standards than formal pleadings drafted by lawyers." If a court can reasonably read a pleading to state a valid claim of which a defendant could prevail. It should do so despite the defendant's failure to cite proper legal theories, his poor syntax and sentence construction, or familiarity with pleading requirements. See: **Boag V. McDougall. 454, U.S. 364, 102, S.ct 700 (1982) : Haines V. Kerner, 404 U.S. 364, 925.ct. 594 (1972) Cangloff V. Poccia. 888 F.supp. 1549 (MD. Fla 1995): Powell V. Lennon, 914 F.2d 1495.1463 (11th Cir 1990)** "We liberally construe Pro-se litigants pleadings.

Plaintiff-Petitioner. **Carl Bennett** below. Will be referred to by name or as the " Plaintiff." Defendant's-Respondant's below, will be referred to as " Defendant's." Or by "Name" or by" FBOP."

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Plaintiff **Carl Bennett** has exhausted all stages of the administrative remedy system within the Federal Bureau Of Prisons. As Set forth at title 28, code of Federal Regulations (CFR) . §542/et,.seq,. and title 28 U.S.C. § 2675 in furtherance of his claim for relief. Through the office of the national and regional administrative remedies.

OTHER ACTIONS PENDING

Plaintiff **Carl Bennett** brought forth the facts as set forth below, to:

1. Regional Counsel Southeast Regional Office

3800 Camp Creek Parkway S.W

Building 2000

Atlanta Georgia 30331

2. Tortis Claim,

3. **Docket No: TRT-SER-2011-02892**

4. Name: Lisa M. Sunderman, Regional Counsel

5. Disposition: Action denied

6. No further actions has been brought forward as set fore below to any count alleging the facts of this matter.

STATEMENT OF THE CASE FACTS

1. Plaintiff **Carl Bennett** is currently serving an 18 years and 4 month sentence for a violation of Title 18 U.S.C 922(g)(1) Firearm violation of Title 18 U.S.C 924(e). Plaintiff filed a direct appeal in the United States court of appeals for the Eleventh Circuit number 07-11316F and it was reversed and remanded for which the plaintiff was resentenced to 194 months BOP. Plaintiff is scheduled for release on or about 10-24-2019.

2. **Plaintiff Carl Bennett** a Federal Prisoner incarcerated at Federal Correctional Institution Jesup Georgia 2680 U.S Highway 301 South. Is an inmate who was suffering from skin compilations. Went to the Medical Department seeking medical relief for which the BOP by and through it's agency negligently disregarded the plaintiff serious medical condition in violation of the plaintiffs 8th amendment constitutional rights against cruel and unusual punishment.

3. On 10-6-2009 Plaintiff **Carl Bennett** filed a BP-8-Yaz1330.13G with correction counsel Mr. W.Lychard. Since July 2009. He had a condition on his upper left ankle which was eaten into the muscle and was causing a great deal of constant pain. This condition was getting worse daily. And he seems to not be able to get any medical help. Which is effective, in what appears to be a staff infection. Actions requesting to resolve the complaint, was adequate and competent medical attention to stop the spread of what ever was eating into his leg and something for pain. **(See: Exhibit "A" BP-9).**

4. On 11-4-2009.The Plaintiff **Carl Bennett** received a response attempt at informal resolution denying plaintiff's requested relief, more specifically. A review of this matter reveals that you received a Doppler Ultrasound which revealed arterial venues insufficiency in your left lower extremity. Also, a consultation has been generated for a vascular surgeon. This consultation will be review by the utilization review committee and you will be notified of their decision. I trust I have been responsive to your concerns. **(See Exhibit "B" BP-8 Response.)**

5. Inmate **Carl Bennett** filed a BP-9 remedy No:565112-F1, which he appealed the denial of his informal resolution in which he statement medical attention to my left ankle as the condition is eating into the muscle and I am in constant pain. This appears to be a staff infection: And numerous attempts at trying to have the Medical staff at Yazoo treat this has meet with no effective result. **(See Exhibit "C" BP-9)**

6.On 12-3-2009. A response was received by the Warden where he have a vague response to my BP-9 which he stated a review of you medical record reveals that you are being treated for stasis venous abrasive lesions to your lower left extremity with purists and superficial thread like varcose veins on the anterior and lateral aspect of your foot. You have been receiving treatment is medical for approximately seven months without a positive outcome. Your abrasive lesions are not healing in spite of occlusive dressing TeD hosiery and ancillary measures such as elevating your leg. A consultation for an arteriovenous Doppler Ultrasound has been approved to rule out arteriovenous insufficiency. This diagnostic test is scheduled for mid December 2009. **(See Exhibit "D" response of BP-9)**

7. On 12-11-2009 Inmate **Carl Bennett** filed a appeal on his denial of his BP-9, with the Regional Administrative office in Atlanta Georgia by way of BP-10. In his appeal he augured; Likewise, as stated in prior request/grievances. I once again request medical attention in the case of my left ankle as the condition is eating into the muscle in that area and I am in constant pain. Furthermore. I once again contend that this appears to be a staph infection in that sense. I also provide that numerous attempts at trying to have the medical staff at Yazoo treat said condition has recurrently been met with adverse harshness and in some pustances. No results at all. **(See Exhibit "E")**

8. On 1-20-2010. The regional Director issued a response alleging a review of your medical records revealed the wardens response to your request for Administrative remedy number 656112-F1 is correct. You have been receiving treatment for approximately seven month's for stasis venous abrasive lesions to your lower left extremity. No improvement has been noted despite frequent occlusive dressings/wound care. TeD hosiery and leg elevation. Therefore the staff physician recommended a venous sonogram and an arterial Doppler Ultrasound for further diagnosis. You underwent the venous sonogram on December 30 2009. And your arterial Doppler Ultrasound is pending. **(See Exhibit "F")**

9. On 6-18-2010 Plaintiff **Carl Bennett** filed a BP-11, **(Exhibit "G")** in which he requested a second opinion form another certified physician, relating to his suffering combition. He futhered complained "my skin continue to worsen and proper or better medical attention is immediately needed. It is obvious that the current treatment for "arterial venous insufficiency" Is not helping my condition because my illness is misdiagnosed.

10. On October 25 2010. Mr Harrell Watts Administrator or national inmate appeals issued response statements ." Relevant portions of your medical record have been reviewed which reveal you have been diagnosed with stasis dermatitis, A common inflammatory skin disease that occurs on the lower extremities in patients with chronic venous insufficiency with venous hypertension. It is usually the earliest cutaneous sequela of venous insufficiency. and it may be a precursor to more problematic conditions. Such as venous leg ulceration and lipodermatosclerosis.you recieve appropriate medical care and treatment for your condition. There is no clinical indication which would warrant you undergoing a consultant skin and bone specialist evaluation. The record reflects you are receiving medical care and treatment in accordance with Bureau policy. **(See Exhibit "H")**

11. On 3-7-2011. The Plaintiff **Carl Bennett,** Filed a tort claim, TRT-SER-2011-02892 alleging mental stress, and physical injury, due to a staff infection, that was not treated properly nor in time. **(Se Exhibit "I")**

12. On September 26 2011, Lisa M. Sunderman Regional counsel, Issued a response stating: " Based on the above there is no evidence indicating that you suffered a loss of injury caused by the negligent or wrongfully act or omission of any Bureau of Prisons employee acting within the scope of his or her employment. Additionally, you received medical treatment consistent with evidence based medical standards.

Consequently, your claim must be denied. **(See Exhibit "J")**

13. This timely complain follows.

COUNTS

1. The Federal Bureau Of Prisons. By it's executors, caused plaintiff to suffer mental stress, and physical injury, bue to staph infection that was not treated properly or in a timely manner.

1. On 10-6-2009. Plaintiff **Carl Bennett** filed a BP-8 with his counsel Mr. W. Lynchard, stating that he had a skin condition on his left upper ankle. The condition was getting worse daily and that he was not getting any medical attention.

2. On 11-11-2009. **Mr. Bennett** filed a BP-9 appealing the denial of his request seeking proper, adequate and competent medical attention, as his medical was getting worse.

3. ON 12-3-2009. The Warden **Bruce Pearson** stated that he was denying treatment stasis venous abrasive lesions to your lower left extremity with prutitus and superficial thread like varsose veins on the anterior and laterak aspect of your foot and as for seven month's of treatment he was now being approved for an arteriovenous Doppler Ultrasound.

4. On 12-11-2009 **Mr. Bennett** filed a BP-10 requesting medical attention as the conditon was getting worse despite of the on going medical attention he was receiving.

5. ON 1-22-2010 Regional Director stated that the medical department was waiting for the results of the venous sonogram.

6. On 6-18-2010. **Mr. Bennett** was still suffering from server pain and an escalating skin abnormality that was progressing well into upper body. Mr. Bennett requested a second medial opinion.
7. On 10-25-2010. **Mr. Harrell Watts** administrator of national inmate appeal in Washington responded that Mr. Bennett was receiving appropriate medical care and treatment and therefore no second opinion was needed.

THIS TIMELY MOTION FOLLOW

The plaintiff's sole argument that defendant's didn't provide adequate, timely medical attention that has caused permanent visual marks on the plaintiff's body, in direct result of the failure the properly, in timely treat the plaintiff. As a result of the permanent marks on his body the plaintiff argues that he has to look at himself on a daily basis with a disgust, causing mental, emotional, psychological distress, which has cause the plaintiff to become impotent.
Prior to the plaintiff's condition, the plaintiff was sexually active, and that we was used to maintaining his sexual need's while incarcerated. The plaintiff is 49 years old. With only or about 7 years left to be released, and will not be able to become intimate in any future relationships.

RELEASE REQUESTED

The plaintiff is requesting that no retaliatory conduct occur against plaintiff for the bring of this action. As plaintiff **Bennett** has been disciplinary free or even allegations of improper conduct.

And as such, any such allegations of wrong doing should be frowned upon by this court.

To award compensatory damages in the amount of $1.5 million dollars. and to award punitive damages in the amount of $1.5 million dollars.

RESPECTFULLY SUBMITTED

Carl Bennett

Carl Bennett# 12198-021
Federal Correctional Institution
2680 Highway 301 South
Jesup, Georgia 31599

DECLARATION

I **CARL BENNETT**, Declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed This 1 Day Of 19, 2012

Carl Bennett

CARL BENNETT # 12198-021

CERTIFICATE OF SERVICE

I Hereby **CERTIFY** that a true and correct Copy of the foregoing motion has been furnished to the clerk of court with the attached copies to the be served upon the Defendant's in this case, on this 1 day of 19 2012.

RESPECTFULLY SUBMITTED,

Carl Bennett

CARL BENNETT 12198-021
Federal Correctional Institution
2680 Highway 301 South
Jesup Ga, 31599

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

CARL BENNETT,
PLAINTIFF,

CASE NO:_____

VS.

HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR.

REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR JOHN DOE.

BRUCE PEARSON, WARDEN.

DR. ROBERTO MARTINEZ, STAFF PHYSICIAN.

DR. ANTHONY CHAMBES, MD CLINICAL DIRECTOR.

IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES./

LEGAL ARGUMENT IN SUPPORT OF CLAIM

There is no dispute that the plaintiff has under taken all prerequisite administrative action necessary to maintain this suit **(See 28 U.S.C § 2675** requiring claimants against the United States to present their claim to the appropriate administrative agency and receive a final disposition of the claim from such agency before bringing a lawsuit.) Therefore jurisdiction over this action is proper moreover. Because the alleged acts and omissions occurred in Mississippi. The law of Mississippi will govern this action.

The Federal Tort Claims Act grants the district courts jurisdiction of civil actions against the United States for injury or loss of property, or personal injury or death caused buy the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office of employment.

Under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred. "**Hess v. United States 361 U.S 314. 317-18. 80 S.ct 341. 4. L. Ed 2d 305 21960) (Quoting 28 U.S.C § 1346(b)).**

A plaintiff must establish four elements to prove negligence. (1) The defendant owed to the plaintiff a duty. Recognized by law to conform to a certain standard of conduct. (2) A breach of that duty. (3) A reasonably close cause connection between the defendant's conduct and the resulting innury; and (4) Actual loss or damage to the plaintiff. **Carpenter v. Nobile, 620 So 2d 961. 964 (Mis.1993)** as previously mentioned. The Bureau of Prisons has a statutory duty to provide inmates with adequate and timely medical treatment **See U.S.C § 4042.** In performing this duty, Governmental employees must exercise " ordinary diligence " in keeping Federal prisons safe from harm. **Jones v. United States. 534 F2d 53. 54 (5th Cir 1976); Cowart v. United States, 617. F2d 112. 116 (5th Cir 1976).** Under this standard Federal Prisoners may recover against the government for injuries sustained. Federal prisoners may recover against the government for injuries sustained during confinement in prison so long as their damages were caused by the negligence of a Federal Employee. **United States v. Muniz, 374 U.S 150/ 150 83 S.ct 1850. 10 L.Ed 2d 805 (1963).** The central issue in this case is whether the government exercised ordinary diligence in it's care of **Mr. Bennett.** First Mr. Bennett claims that the time lapses between treatment amount to a breach of the governments

duty to provide timely treatment. Second, Mr. Bennett alleges that he was not afforded adequate and timely treatment since he never received any corrective treatment for his staph infection.

The Yazoo City F.C.I's medical department more specifically, Dr. Roberto Martinez, Staff physician, was responsible for Mr. Bennett's well being, because Mr. Bennett was under his care, custody and control, while Mr. Bennett resided at Yazoo City F.C.I. Mr. Martinez's treatment of Mr. Bennett was from 10-6-2009 through on or about 10-2010. During that time Mr. bennett complained of having a staph infection. Mr. Martinez was treating Mr. Bennett for Arteriovenous insufficiency, and a ultrasound was ordered to reform and reveal whether Mr. Bennett was in fact suffering from arteriovenous insufficiency. Mr. Anthony Chambes. MD. Clinical director, was orally and writtenly requested to have Me. bennett treated for his medical condition that was getting worse and Mr. Chambes delegated to Mr. Bennett to convey to Mr. Bennett a response. MR. Bruce Pearson. Warden, was orally and writtenly informed by Mr. Bennett about Mr. Bennett's acute worsening condition, for which off the record, The warden told mr bennett " Sue me "However. Mr. Pearson was responsible for Mr. Bennett's well being, because Mr. Bennett was under Mr. Pearson's direct care, custody, and control. The 8th Amendment provides that no person shall receive cruel and unusual punishment.

John Doe, Regional administrative remedies coordinator. Mr. Doe was informed writtenly by Mr. Bennett by a BP-10 that was not receiving adequate medical treatment.

And that his condition was worsening. Mr. John Doe's response was vague as it just informed Mr. Bennett that an ultrasound test result was pending. However. Mr. John doe was responsible for Mr. Bennett's well being, as John doe was responsible for Mr. Bennett's care, custody and control. The 8th Amendment provides that no person shall receive cruel and unusual punishment. Mr. Harrell Watts. National inmate appeal coordinator. Was writtenly informed by Mr. Bennett about his poor medical treatment and the worsening condition and that Mr. Bennett requested a second medical opinion from another doctor relating to his condition as believed that his illness was and is being misdiagnosed. Mr. Watts refused to properly address Mr. Bennett's complaint and brushed him off by stating that he was receiving medical treatment in accordance with policy. However Mr. Watts was responsible for Mr. bennett's well being because Mr. Bennett was under Mr. Watts care, custody and control. The 8th Amendment provides that no person shall receive cruel and unusual punishment.

The denial of adequate treatment has caused, and is still causing Mr. bennett to suffer pain, emotionally, and physically. Especially when he has to look at himself which is constantly. Over three year's have passed with out Mr. bennett receiving any corrective treatment. Consequently, Mr. Bennett will suffer for the rest of his life as a result of being denied adequate treatment by the F.C.I.

It is well settled that " [i]n an action under the Federal Tort Claims Act **28 U.S.C. A § 1346(b).** The law states where the cause of action arose is binding as to the measure of damages.

"Simpson v. United States. 322 F,2d 688. 690 (5th Cir 1963) Under Mississippi law, Bennett must prove damages by a preponderance of evidence. Adams v. U.S Homecrafters. Inc. 744 So 2d 736. 740 (Miss 1999). Although the plaintiff need not prove the monetary value of his damages which is sufficient " to remove [The measure of damages] From the realm of mere speculation or conjecture." Evans v. Clemons. 872 So 2d 23. 29 (Miss Ct. App 2003) (Citing Adams v. U.S Homecrafters). Sentinel Indus Contracting Corp, v. Kimming Indus, Serv. Corp. 743 So. 2d 954; 966-67 (Miss 1999) Moreover, Bennett is required to offer the best evidence available to support each of his claims for damages, Puckett Mach, Co. v. Edwards. 641 So 2d 29. 37. (Miss 1994).

The Eight Amendment's proscription against cruel and unusual punishment imposes a constitutional duty upon prison officials take reasonable measures to guarantee the safety of prison inmates. This duty to safeguard also embodies the principle expressed by the supreme court in Estelle v. gamble. 429 U.S 97. 104. 97. S.ct 285. 50 L.2d 251 (1976) Forbidding prison officials from demonstrating deliberate indifference to the serious medical needs of inmates. Farmer v. Brennan, 511 U.S. 825. 832. 114S.ct. 1970, 128. L.ed.2d 811 (1994).

Mr. Bennett seeks the following damages: (1) Past and present pain and suffering, (2) Future medical expenses for the removal of the marks on his body.

The reasons contained herein, supra, the plaintiff should be entitled to have judgement entered on his behalf accordingly.

RESPECTFULLY SUBMITTED

Carl Bennett

CARL BENNETT # 12198-021
Federal Correctional Institution
2680 Highway 301 South
Jesup, Ga, 31599

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURY TRIAL DEMANDED

CARL BENNETT, CASE NO:_____
PLAINTIFF,

VS.

HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR.

REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR JOHN DOE.

BRUCE PEARSON, WARDEN.

DR. ROBERTO MARTINEZ, STAFF PHYSICIAN.

DR. ANTHONY CHAMBES, MD CLINICAL DIRECTOR.

DEFENDANTS IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES./

APPENDIX

1, Exhibit "A" Informal resolution BP-8.

2, Exhibit "B" BP-8 Request to attempt at informal resolution.

3, Exhibit "C" BP-9 Request for administrative remedy.

4, Exhibit "D" BP-9 Response to request for administrative remedy.

5, Exhibit "E" BP-10 Regional administrative remedy appeal.

6, Exhibit "F" BP-10 Regional administrative remedy appeal response.

7, Exhibit "G" BP-11 Central office administrative rememdy appeal.

8, Exhibit "H" BP-11 administrative remedy response.

9, Exhibit "I" Torts Claim File.

10, Exhibit "J" Torts Claim response docket NO: TRT-SER-2011-02892.

EXHIBIT "A"

Administrative Remedy Program
YAZ1330.13G
Attachment A

Federal Correctional Institution, Yazoo City, Mississippi
Request for Administrative Remedy
Attempt at Informal Resolution

Inmate Name: BENNETT, CARL

Register No: 12198-021 Unit: ECHO 4

TO BE COMPLETED BY INMATE:

1. Briefly state your complaint. Include all details and facts which support your request and the date on which the complaint occurred. Since July 2009, I have had a condition on my upper left ankle which is eating into the mussel and causing me a great deal of consistant pain. This condition is getting worse daily and I seem to NOT be able to get any medical help, which is effective, in what appears to be a staff infection.

2. What actions are you requesting to resolve your complaint? Adequate and competent medical attention to stop the spread of whatever is eating into my leg and something for pain.

TO BE COMPLETED BY STAFF:

3. Indicate below the efforts made to resolve the matter. Be specific but brief. Include names of staff contacted to attempt resolution. (Use back of this form if necessary.)

PLEASE SEE ATTACHED RESPONSE

[signature] 11-4-09
Correctional Counselor/Date

Inmate Signature/Date

[signature]
Unit Manager Review/Date

NOTE: Attach any pertinent documentation related to the inmate's complaint.

	BP-8 Issued to Inmate	BP-8 Returned to Counselor	BP-9 Issued to Inmate	BP-9 Returned to Counselor	BP-9 Delivered to Admin. Remedy Clerk
Date:	10-7-09	10-30-09	11-7-09	11-12-09	11-12-09
Counselor:	[signature]	[signature]	[signature]	[signature]	[signature]

EXHIBIT "B"

Response to Attempt at Informal Resolution
RE: **Bennett, Carl**
Reg. No. 12198-021

This is in response to your Attempt at Informal Resolution received on October 30, 2009. You claim that you have had a condition on your upper left ankle which is eating into the muscle and causing you a great deal of pain. You state that this condition is getting worse daily and that you seem not to be able to get any medical help. You request that adequate and competent medical attention to stop the spread of whatever is eating into your leg. You further request something for pain.

A review of this matter reveals that you were last seen on 11-03-2009 by your Doctor and the Clinical Director. You are being submitted for an arterial venous study. This request will be reviewed by the Utilization Review Committee and you will be notified of their decision. I trust I have been responsive to your concerns. Please address any further concerns to the Health Services Department or your Unit Team.

W. Lynchard
Correctional Counselor

11-4-09
Date

EXHIBIT "C"

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

BP-9

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A- INMATE REQUEST

_____ _____
DATE | SIGNATURE OF REQUESTER

Part B- RESPONSE

_____ _____
DATE | WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

SECOND COPY: RETURN TO INMATE | CASE NUMBER: _____

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

_____ _____
DATE | RECIPIENT'S SIGNATURE (STAFF MEMBER)

BP-229(13)
APRIL 1982

EXHIBIT "D"

U.S. Department of Justice
Federal Bureau of Prisons

RESPONSE TO REQUEST FOR ADMINISTRATIVE REMEDY

From:	Bennett, Carl	12198-021	E-4	FCC Yazoo City
	LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part B- RESPONSE

Remedy ID - 565112-F1

This is in response to your Request for Administrative Remedy dated November 11, 2009. You state that you have a sore on your left ankle that is eating into the muscle and causing you constant pain.

A review of your medical record reveals that you are being treated for stasis venous abrasive lesions to your lower left extremity with pruritus and superficial thread like varicose veins on the anterior and lateral aspect of your foot. You have been receiving treatment in medical for approximately seven months without a positive outcome. Your abrasive lesions are not healing in spite of occlusive dressings, TED hosiery and ancillary measures such as elevating your leg. A consultation for an Arteriovenous Doppler ultrasound has been approved to rule out Arteriovenous insufficiency. This diagnostic test is scheduled for mid December 2009.

This response is provided for **INFORMATIONAL PURPOSES ONLY**. If dissatisfied with this response, you may appeal to the Regional Director, Southeast Regional Office, at 3800 Camp Creek Parkway, SW, Building 2000, Atlanta, Georgia 30331-6226. Your appeal must be received in the Regional Director's Office within 20 calendar days of the date of this response.

Bruce Pearson, Warden

12-3-09
Date

EXHIBIT "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CARL BENNETT, CIVIL ACTION NO. 5:12-cv-16-DCB-RHW

Plaintiff,

vs.

HARRELL WATTS, ET AL.,

Defendants.
_____/

PLAINTIFF'S
NOTICE OF FILING

COMES NOW, the Plaintiff, Carl Bennett, who respectfully files with this Honorable Court a copy of the Settlement Agreement proposed by Defendants and executed by Plaintiff on November 2, 2012.

Dated: November 3, 2012 Respectfully Submitted,

Carl Bennett
Plaintiff, pro se
Register No. 12198-021
FCI Jesup
2680 US Hwy 301 South
Jesup, GA 31599

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Assistant U.S. Attorney Edward O. Pearson at 501 E. Court Street, Suite 4.430, Jackson, Missippi 39201, by U.S. Mail, this 5th day of November 2012.

/s/ Carl Bennett
Carl Bennett
Plaintiff, pro se

Attachment:

Settlement Agreement
(endorsed by Plaintiff only)

⇔12198-021⇒
Carl Bennett
Federal Correction Institution
2680 Highway 301 South
Jesup, GA 31599
United States

JACKSONVILLE FL 320

05 NOV 2012 PM 3 L

NOV 08 2012

⇔12198-021⇒
Southern District Of Ms
Clerk,U.S. District Court
501 E Court ST Suite 2.500
Jackson, MS 39201
United States

(LEGALMAIL

9201502825

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CARL BENNETT, **Reg. No. 12198-021,** **Plaintiff,** **v.** **HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR, IN INDIVIDUAL AND OFFICIAL CAPACITY; *et al.*,** **Defendants.**	**CIVIL ACTION NO. 5:12-cv-16-DCB-RHW**

PLAINTIFF'S ACKNOWLEDGMENT OF RECEIPT OF SETTLEMENT FUNDS

I hereby acknowledge receipt of check in the amount of $10,350.00 in accordance with the settlement terms of the above-captioned civil action.

WITNESS MY SIGNATURE on this the 11th day of January, 2013.

/S/ CARL BENNETT

CARL BENNETT
Reg. No. 12198-021
Federal Correctional Institution Jesup
Medium Facility Housing Unit C-2
2680 Highway 301 South
Jesup , GA 31599

CERTIFICATE OF SERVICE

I, EDWARD O. PEARSON, Assistant United States Attorney, hereby certify that I this day electronically filed the foregoing document with the Clerk of the Court using the ECF system, and I further certify that a true copy of the above and foregoing document has been mailed via United States Mail, postage prepaid, to the following non-participant in the ECF system:

Carl Bennett
Reg. No. 12198-021
Federal Correctional Institution Jesup
Medium Facility Housing Unit C-2
2680 Highway 301 South
Jesup, GA 31599

This the 18th day of January, 2013.

/S/ EDWARD O. PEARSON

EDWARD O. PEARSON
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CARL BENNETT, **Reg. No. 12198-021,** **Plaintiff,** **v.** **HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR, IN INDIVIDUAL AND OFFICIAL CAPACITY; *et al.*,** **Defendants.**	**CIVIL ACTION NO. 5:12-cv-16-DCB-RHW**

ORDER

This cause came on for hearing on [39] the Defendants' Motion to File Excess Pages. Having considered the motion requesting eighty (80) pages within which to submit the Defendants' Memorandum of Points and Authorities in Support of the Motion to Dismiss or, in the Alternative, for Summary Judgment and Defendants' rebuttal memorandum, is hereby granted.

Accordingly, Defendants are granted a total of eighty (80) pages within which to submit their Memorandum of Points and Authorities in Support of the Motion to Dismiss or, in the Alternative, for Summary Judgment and Defendants' rebuttal memorandum.

SO ORDERED, this the 1st day of August, 2012.

/s/ *Robert H. Walker*
ROBERT H. WALKER
UNITED STATES MAGISTRATE JUDGE

Submitted by:
/S/ Edward O. Pearson
EDWARD O. PEARSON
Assistant U.S. Attorney
Mississippi Bar No. 4080
501 East Court Street, Suite 4.430
Jackson, Mississippi 39201
Telephone No.: 601/965-4480
Facsimile No.: 601/965-4409
E-mail: eddie.pearson@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CARL BENNETT, **Reg. No. 12198-021,** **Plaintiff,** **v.** **HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR, IN INDIVIDUAL AND OFFICIAL CAPACITY; *et al.*,** **Defendants.**	**CIVIL ACTION NO. 5:12-cv-16-DCB-RHW**

ORDER SEALING DEFENDANTS' DISPOSITIVE MOTION AND BRIEF

This matter is before the Court on [40] the *ex parte* motion of the Defendants, Harrell Watts, National Inmate Appeal Coordinator, In Individual and Official Capacity; Bruce Pearson, Warden, in Individual and Official Capacity; Dr. Roberto Martinez,, Staff Physician, In Individual and Official Capacity; and Dr. Anthony Chambers, Clinical Director, In Individual and Official Capacity, also known as Anthony Chambe, for an order sealing Defendants' Motion to Dismiss Or, In the Alternative, for Summary Judgment and Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Or, In the Alternative, for Summary Judgment. The Court being fully advised in the premises finds that in this lawsuit, Plaintiff claims he received constitutionally inadequate medical care, and of necessity, the Defendants' dispositive motion and supporting memorandum must address personal and sensitive information about the Plaintiff (his medical conditions, treatment and care) which should be protected from public disclosure. The Court therefore finds Motion [40] is well taken and should be GRANTED.

To avoid any possibility of inadvertent disclosure of personal and sensitive information, the Court will require that instead of counsel for Defendants personally filing their dispositive

motion and memorandum in support of same, they shall convert said documents into pdf format and email them to the Clerk for filing under seal in accordance with this order.

SO ORDERED, this the 1st day of August, 2012.

/s/ *Robert H. Walker*
ROBERT H. WALKER
UNITED STATES MAGISTRATE JUDGE

Submitted by:
/S/ Edward O. Pearson
EDWARD O. PEARSON
Assistant U.S. Attorney
Mississippi Bar No. 4080
501 East Court Street, Suite 4.430
Jackson, Mississippi 39201
Telephone No.: 601/965-4480
Facsimile No.: 601/965-4409
E-mail: eddie.pearson@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CARL BENNETT, **Reg. No. 12198-021,** **Plaintiff,** **v.** **HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR, IN INDIVIDUAL AND OFFICIAL CAPACITY; *et al.*,** **Defendants.**	**CIVIL ACTION NO. 5:12-cv-16-DCB-RHW**

ORDER GRANTING DEFENDANTS'
THIRD MOTION FOR ADDITIONAL TIME

This cause is before the Court on [43] the Third Motion for Additional Time submitted by the United States Attorney on behalf of the Defendants, Harrell Watts, National Inmate Appeal Coordinator, In Individual and Official Capacity; Bruce Pearson, Warden, in Individual and Official Capacity; Dr. Roberto Martinez, Staff Physician, In Individual and Official Capacity; and Dr. Anthony Chambers, Clinical Director, In Individual and Official Capacity, also known as Anthony Chambe. Having considered the Third Motion and having concluded that Plaintiff will not be prejudiced by such a short extension of time, the Court finds that the Third Motion for Additional Time is well taken and should be granted.

IT IS THEREFORE ORDERED that the Third Motion for Additional Time submitted by the Defendants should be and hereby is granted. The Defendants shall file an answer or otherwise respond to the Plaintiff's Complaint and Amended Complaint, on or before August 16, 2012.

SO ORDERED this the 2nd day of August, 2012.

/s/ *Robert H. Walker*
ROBERT H. WALKER
UNITED STATES MAGISTRATE JUDGE

PRESENTED BY:
/S/ EDWARD O. PEARSON
EDWARD O. PEARSON
ASSISTANT UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CARL BENNETT, # 12198-021 **PLAINTIFF**

VERSUS **CIVIL ACTION NO. 5:12CV16-DCB-RHW**

HARRELL WATTS, R.E. HOLT, BRUCE PEARSON, ROBERTO MARTINEZ, and ANTHONY CHAMBERS **DEFENDANTS**

OPINION AND ORDER

This cause is before the Court on Plaintiff's Motion for Reconsideration [**docket entry no. 27**] of this Court's April 2, 2012 Order [docket entry no. 16], wherein the Court denied Plaintiff's motion styled as a motion to proceed before an Article III judge [docket entry no. 12]. The Court denies Plaintiff's 59(e) Motion for Reconsideration because he has not shown any manifest errors of law or fact or presented newly discovered evidence. Waltman v. Int'l Paper Co., 875 F.2d 468, 473 (5th Cir. 1989). It is apparent, however, that Plaintiff misunderstands the Court's April 12 Order, and therefore the Court will briefly rearticulate why it denied Plaintiff's previous motion in an effort to alleviate his concerns.

Plaintiff appears to believe that a magistrate judge must have his consent in order to determine *any* matters in his case. Contrary to this belief, a magistrate judge has the statutory authority to resolve certain pretrial matters without a plaintiff's consent. 28 U.S.C. § 636(b)(1)(A). Consent is required in order for a magistrate judge to "conduct any or all proceedings in a jury or nonjury civil matter and *order the entry of judgment in the case*,"

but in this case Plaintiff has not given his consent. 28 U.S.C. § 636(c)(1) (emphasis added). The undesigned Article III judge will resolve all dispositive matters in this case, including ruling on Defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment [docket entry no. 48] after the magistrate judge has submitted a report and recommendation.[1] Inasmuch as Plaintiff asks this Court to ignore the Magistrate Act, that request cannot be granted.

IT IS THEREFORE HEREBY ORDERED THAT Plaintiff's Motion for Reconsideration [**docket entry no. 27**] is **DENIED**.

SO ORDERED, this the 24th day of September, 2012.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE

[1] A magistrate judge does not need a plaintiff's consent to submit proposed findings of fact and recommendations for the disposition of any motion by a district court judge. 28 U.S.C. § 636(b)(1)(B).

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
NOV 08 2012
J. T. NOBLIN, CLERK
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CARL BENNETT,
Reg. No. 12198-021,

Plaintiff,

v.

HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR, IN INDIVIDUAL AND OFFICIAL CAPACITY; *et al.*,

Defendants.

CIVIL ACTION NO. 5:12-cv-16-DCB-RHW

SETTLEMENT AGREEMENT

It is hereby agreed by and between Carl Bennett (hereinafter the Plaintiff) and Harrell Watts, National Inmate Appeal Coordinator, In Individual and Official Capacity; Bruce Pearson, (former) Warden of Federal Correctional Complex, Yazoo City, Mississippi, in Individual and Official Capacity; Dr. Roberto Martinez, Staff Physician, In Individual and Official Capacity; and Dr. Anthony Chambers, Clinical Director, In Individual and Official Capacity, also known as Anthony Chambe, (hereinafter the Defendants), that the parties have consummated their agreed settlement as follows:

1. That Plaintiff, Carl Bennett, will be compensated, and Carl Bennett agrees to accept, the amount of Ten Thousand, Three Hundred Fifty and No/100 Dollars ($10,350.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature arising from, and by reason of any and all known and unknown, foreseen and unforeseen, bodily and personal injuries and the consequences thereof, resulting, and to result, from the same subject matter that gave rise to the above-captioned lawsuit. Payment will be accomplished in accordance with 28 U.S.C. § 2414, and is in full and final settlement and no further appellate review will be sought.

2. Payment will be accomplished by check made out in the name of Carl Bennett from the United States Department of the Treasury, Judgment Fund Branch and mailed directly to him. Carl Bennett understands that this entire payment will be reported to the Internal Revenue Service (IRS) and that the question of his tax liability or other liability to the United States Government, if any, as a result of this payment is a matter solely between him and the IRS and/or such other United States Government agency to whom he may be indebted at the time of payment.

3. This agreement is to settle and resolve claims and is not an admission of liability on the part of any of the Defendants, and is entered into by all parties for the purpose of compromising claims and avoiding the expenses and risks of litigation. Carl Bennett and the Defendants have agreed to fully and finally settle all claims of any nature against the Defendants and the United States, Federal Bureau of Prisons, their agents, and their employees arising out of the subject matter of this entire judicial complaint.

4. It is also agreed by and between the parties that the settlement amount for Carl Bennett represents the entire amount of the compromise settlement and that the respective parties will each bear their own costs, fees, and expenses.

5. The Court retains jurisdiction for the sole purpose of enforcing this Settlement Agreement. If any party fails to consummate this settlement within ninety (90) days, any aggrieved party may reopen the case for enforcement of the settlement agreement within fifteen (15) days thereafter; and if successful, any costs from this date shall be awarded such aggrieved party or parties against the party failing to consummate the agreement.

6. The authorization by the Attorney General of the United States, or his designee, to enter into settlement for the amount and conditions agreed upon by the parties does not make this agreement binding upon the United States unless and until the other conditions and requirements of this agreement have been fulfilled.

As evidence of our agreement and stipulation as set forth above, witness our signatures on the dates indicated.

Carl Bennett
CARL BENNETT, PLAINTIFF

Date: 11-2-2012

HARRELL WATTS, NATIONAL INMATE APPEAL COORDINATOR, IN INDIVIDUAL AND OFFICIAL CAPACITY; BRUCE PEARSON, (FORMER) WARDEN OF FEDERAL CORRECTIONAL COMPLEX, YAZOO CITY, MISSISSIPPI, IN INDIVIDUAL AND OFFICIAL CAPACITY; DR. ROBERTO MARTINEZ, STAFF PHYSICIAN, IN INDIVIDUAL AND OFFICIAL CAPACITY; AND DR. ANTHONY CHAMBERS, CLINICAL DIRECTOR, IN INDIVIDUAL AND OFFICIAL CAPACITY, ALSO KNOWN AS ANTHONY CHAMBE

DEFENDANTS

GREGORY K. DAVIS
UNITED STATES ATTORNEY

By: _____

EDWARD O. PEARSON
Assistant United States Attorney
Mississippi Bar No. 4080
501 East Court Street, Suite 4.430
Jackson, Mississippi 39201
Telephone No.: 601/965-4480
Facsimile No.: 601/965-4409
E-mail: eddie.pearson@usdoj.gov

Date: 11-8-2012

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO.

MICHAEL CRUZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

COMPLAINT

Plaintiff, MICHAEL CRUZ ("CRUZ"), sues Defendant, UNITED STATE SOF AMERICA, and states:

1. This is an action for money damages brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b) and §2671 *et seq.*

2. Venue is proper in this forum.

3. All conditions proceeding to the filing of this action have been fulfilled. Specifically, Plaintiff timely filed an Administrative Claim with the Department of Justice, Federal Bureau of Prisons ("BOP"), which claim was denied by way of letter dated October 24, 2010.

4. At all times material, CRUZ was an inmate in BOP custody; as is relevant to this claim, he was housed at FDC Miami.

5. At all times material, BOP was a federal agency, and all acts complained of herein by BOP agents or employees were undertaken within the course and scope of that agency.

6. BOP has a duty to provide adequate and timely medical care to persons in its custody, including CRUZ.

7. CRUZ was taken into custody on December 3, 2008, and placed at FDC Miami.

8. In early January of 2009, CRUZ began experiencing vision problems. Unbeknownst to him, he had suffered a detached retina.

9. Over the course of the month of January, CRUZ made several sick call requests, which went unanswered. His vision began to deteriorate as a result of the detached retina.

10. Finally, in early February, CRUZ was able to convince a BOP physician's assistant to place him on medical callout. This was done on February 11, 2009. CRUZ was seen briefly by an optometrist, on February 12, 2009, who found a refractory error and told CRUZ that he needed to be seen by an opthalmologist.

11. On February 25, 2009, Dr. Ginart noted this in CRUZ's chart. In another note dictated by Dr. Ginart on 2/27/09, specific reference is made to CRUZ's deteriorating vision in the left eye.

12. CRUZ followed up repeatedly with BOP staff regarding this referral, but his requests were ignored. Over the next four months, his vision continued to deteriorate.

13. CRUZ continued to complain, and in June of 2009, he filed a BP-8 form requesting administrative help. This was ignored.

14. Finally, on June 23, 2009, CRUZ was taken to an opthalmologist, who formally diagnosed the retinal detachment.

15. CRUZ was then taken to Miami's Bascom Palmer Eye Institute emergency services unit on July 1, 2009; on July 2, he was noted to be in immediate need of surgery.

16. On July 13, 2009, CRUZ had surgery, but his condition had deteriorated to the point that he suffered a near total loss of vision on his eye.

17. CRUZ was also prescribed certain post-operative care, including certain medications.

18. However, beginning on July 27, 2009, BOP denied CRUZ access to his necessary medications. CRUZ was then transferred to FPC Montgomery the following day.

19. Over the course of August 2009, CRUZ presented twice to optometrists, who noted additional problems with the eye and the lack of follow up care.

20. Again, the need for follow up was noted and requested, but again CRUZ was denied appropriate follow up care and medication.

21. The post-surgery actions of BOP caused CRUZ additional medical complications and tremendous pain and suffering.

22. Had BOP responded initially and timely to CRUZ' complaints, and provided him with his necessary care, it is likely that CRUZ' vision could have been saved.

23. Further, had BOP provided adequate follow up care, and not denied CRUZ necessary medication, he likely would not have suffered the additional damage to the eye, or the attendant pain and suffering.

24. The actions of BOP, as described, were negligent.

25. As a direct and proximate result of the negligence of BOP as described, CRUZ was injured and suffered damages, including bodily injury resulting in pain and suffering, medical expenses, disability, disfigurement, mental anguish, loss of capacity for enjoyment of life, loss of ability to earn money in the future, and aggravation of preexisting condition. These losses are either permanent or continuing in nature and the Plaintiff will suffer these losses in the future.

WHEREFORE, CRUZ demands judgment against Defendant for money damages, court costs, prejudgment interest on liquidated damages, and all other relief the court sees fit to grant.

RESPECTFULLY SUBMITTED on April 23, 2012.

FEILER & LEACH, P.L.
Attorneys for Plaintiff
901 Ponce de Leon Blvd., Penthouse Suite
Coral Gables, FL 33134-3009
Tel. (305) 441-8818 Fax (305) 441-8081
mbf@flmlegal.com

By: /s/ Michael B. Feiler
Michael B. Feiler
Board Certified Civil Trial Lawyer
Fla. Bar No. 098477

JS 44 (Rev. 2/08)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974 is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.) **NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.**

I. (a) PLAINTIFFS

MICHAEL CRUZ

(b) County of Residence of First Listed Plaintiff HILLSBOROUGH
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

FEILER & LEACH, P.L. (305) 441-8818
901 PONCE DE LEON BLVD., PH SUITE
CORAL GABLES, FL 33134

DEFENDANTS

UNITED STATES OF AMERICA

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED

Attorneys (If Known)

(d) Check County Where Action Arose: ☑ MIAMI-DADE ☐ MONROE ☐ BROWARD ☐ PALM BEACH ☐ MARTIN ☐ ST. LUCIE ☐ INDIAN RIVER ☐ OKEECHOBEE ☐ HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☑ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881		☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	PROPERTY RIGHTS	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 820 Copyrights	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 830 Patent	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health	☐ 840 Trademark	☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other		☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	■ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General		☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty	IMMIGRATION	☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities Employment	☐ 540 Mandamus & Other	☐ 462 Naturalization Application		☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities Other	☐ 550 Civil Rights	☐ 463 Habeas Corpus-Alien Detainee		
	☐ 440 Other Civil Rights	☐ 555 Prison Condition	☐ 465 Other Immigration Actions		☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Re-filed- (see VI below) ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. RELATED/RE-FILED CASE(S). (See instructions second page): a) Re-filed Case ☐ YES ☑ NO b) Related Cases ☐ YES ☑ NO

JUDGE DOCKET NUMBER

VII. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause **(Do not cite jurisdictional statutes unless diversity):**

Federal Tort Claims Act, 28 U.S.C. §1346(b) and §2671 et seq.

LENGTH OF TRIAL via _____ days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND $ CHECK YES only if demanded in complaint: JURY DEMAND: ☐ Yes ☑ No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE SIGNATURE OF ATTORNEY OF RECORD DATE 04-23-2012

FOR OFFICE USE ONLY

AMOUNT _____ RECEIPT # _____ IFP _____

UNITED STATES DISTRICT COURT

Southern District of Florida

MICHAEL CRUZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

SUMMONS IN A CIVIL CASE

CASE NO:

To Defendant: Attorney General of the United States of America
Eric H. Holder, Jr.
U.S. Attorney for the Defendant, UNITED STATES OF AMERICA
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY

Michael B. Feiler, Esq.
Feiler & Leach, P.L.
901 Ponce de Leon Blvd.
Penthouse Suite
Coral Gables, Florida 33134
(305) 441-8818
(305) 441-8081 - fax

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

_____ _____
CLERK DATE

_____
(BY) DEPUTY CLERK

UNITED STATES DISTRICT COURT

Southern District of Florida

MICHAEL CRUZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

SUMMONS IN A CIVIL CASE

CASE NO:

To Defendant: Mr. Wifredo A. Ferrer
U.S. Attorney for the Defendant
UNITED STATES OF AMERICA
99 N.E. 4TH Street
Miami, FL 33132
(305) 961-9001

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY

Michael B. Feiler, Esq.
Feiler & Leach, P.L.
901 Ponce de Leon Blvd.
Penthouse Suite
Coral Gables, Florida 33134
(305) 441-8818
(305) 441-8081 - fax

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

_____ _____
CLERK DATE

_____
(BY) DEPUTY CLERK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-21518-CIV-MORENO/OTAZO-REYES

MICHAEL CRUZ,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.
_____/

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned Plaintiff, Michael Cruz, and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677 (herein after referred to as "Stipulation for Compromise Settlement").

2. The United States of America agrees to pay the sum of three hundred twenty-five thousand dollars ($325,000.00) (the "Settlement Amount"), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this Stipulation for Compromise Settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns,

and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation for Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States of America, including claims for wrongful death.

4. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States of America, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This Stipulation for Compromise Settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the Settlement Amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to 28 U.S.C. § 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the Settlement Amount.

7. The persons signing this Stipulation for Compromise Settlement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the Stipulation for Compromise Settlement. In the event Plaintiff is a minor or a legally incompetent adult, Plaintiff must obtain Court approval of the Stipulation for Compromise Settlement at Plaintiff's expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States of America may void this Stipulation for Compromise Settlement at its option in the event such approval is not obtained in a timely manner. In the event Plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement is null and void.

8. Payment of the Settlement Amount will be made by government wire transfer as per the following:

A.	Name of Bank:	Sabadell United Bank
B.	Street Address of Bank:	2109 Ponce de Leon Blvd.
C.	City, State and Zip Code of Bank:	Coral Gables, FL 33134
D.	Federal Reserve Number:	
E.	Routing Number:	(b)(6)
F.	Name of Account:	Feiler & Leach, P.L. trust account
G.	Account Number:	(b)(6)

Plaintiff's attorney agrees to satisfy, resolve or to place in escrow sufficient funds to satisfy all liens or claims for payment or reimbursements asserted by any individual or entity before making any

distribution to the plaintiff. Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement, including all the terms and conditions of this Stipulation for Compromise Settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation for Compromise Settlement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 6th day of September, 2013.

Attorney for Defendant,
United States of America
ANTHONY ERICKSON-POGORZELSKI
ASSISTANT U.S. ATTORNEY
99 N.E. 4th Street, 3rd Floor
Miami, Florida 33132
Tel: (305) 961-9296
Fax: (305) 530-7139

Executed this 12 day of Sept, 2013.

Attorney for Plaintiff Michael Cruz
Michael B. Feiler
Feiler & Leach, P.L.
901 Ponce de Leon Blvd., Penthouse Suite
Coral Gables, FL 33134-3061
Tel: 305-441-8818

Executed this ____ day of _____, 2013.

Plaintiff
MICHAEL CRUZ

Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

[redacted]

Back to Case Results Case Actions:

Case ID: CIV-SER-2012-01171 **Short Description:** CRUZ V. BUREAU OF PRISONS ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	5:12-cv-02149-CMC-KDW
Short Description	CRUZ V. BUREAU OF PRISONS ET AL
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	SOUTHEAST REGIONAL OFFICE
Current Institution	Bennettsville (FCI)
Incident Region	SOUTHEAST REGIONAL OFFICE
Incident Institution	Bennettsville (FCI)
Monetary Relief Sought	$
Estimated Amount	$
Office	Orangeburg
Jurisdiction	DISTRICT OF SOUTH CAROLINA
Responsible Legal Office	FCI Edgefield

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	05/21/2015
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$45,000.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	09/14/2012
Date Filed	08/01/2012

Case Progress

Current Owner	TAMI CASSARO
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	NEW CASES
Private Case	No

Additional Case Information

Long Description	BIVENS/FTCA
Further Case Classification	SUBSTITUTION, DUTY TO PROTECT, ASSAULT, SHU
Comments	

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

EDWIN CRUZ
USM#39327-054
JESUP F.C.I.
2680 HWY 301 S.
JESUP, GEORGIA 31599,

Plaintiff,

vs.

BUREAU OF PRISONS,
UNITED STATES OF AMERICA,

Defendants.
_____/

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COMPLAINT

Jurisdiction and Venue

1. The Court has jurisdiction under 28 U.S.C. §§1331, the Fourth, Fifth and Eight Amendment to the United States Constitution, and the Federal Tort Claims Act.

2. Plaintiff's Administrative Claim Form for Damages were denied on April 4, 2012, and June 20, 2012, respectively. Plaintiff have exhausted his remedies.

Parties

3. Plaintiff is a federal prisoner currently residing in the State of Georgia. However, at the time of the tortuous acts Plaintiff was residing at the Federal Prison, Bennetsville, South Carolina.

4. Defendant United States of America and the Bureau of Prisons is sued under the Federal Tort Claim Act for assault and battery, failure to protect, failure to provide adequate medical care, and negligence by law enforcement officer of the United States Department of Justice(Bureau of Prisons).

5. Defendant Jones, Johnson, and Robinson, was, at all times, an employee and officer of the United States Department of Justice, Bureau of Prisons, an agency of the United States of America, These Defendants are sued in his individual capacity.

FACTS

6. On August 5, 2011, a flood occurred in the Special Housing Unit(SHU) on the lower B range. As a direct and proximate cause of said flood the entire range was flooded with feces and urine. Despite the unsanitary conditions employees of the Bureau of Prisons continued to serve meals while attired with contaminated gloves. As a direct and proximate cause of said action Plaintiff was forced to eat the contaminated food which resulted in Plaintiff suffering from internal bleeding, diarrhea, emotional and mental trauma and weight loss. That despite requesting medical assistance to address the aforementioned same was denied. **See Sworn Affidavit(attached)**

7. On August 15, 2011, I was instructed to "cuff-up" by Lt. Jones as required by policy for any movement of inmates assigned to the Special Housing Unit("SHU"). After placement in the new cell Lt. Jones contrary to policy and procedures entered the cell while officers Johnson and Robinson remained standing outside the cell door. Lt. Jones proceeded to assault Plaintiff

although Plaintiff was handcuffed behind his back. As a direct and proximate cause of said acts Plaintiff suffered a bruise ribbed cage, one chipped tooth, lower back problems, mental and emotional trauma resulting in Plaintiff requesting and receiving psychological help.

8. At all times relevant in this complaint the defendants and each of them separately and in concert with each other, engaged in acts and omissions that constituted deprivation of rights, privileges and immunities of Plaintiff, they had no excuse in law, and were instead gratuitous, illegal, improper and unrelated to any penological goals to which the Bureau of Prisons may appropriately and legally engaged in while enforcing the lawful judgment of a court of law.

9. The actions of Lt. Jones, Johnson and Robinson as set forth in paragraphs 6-8 constitute assault and battery in violation of South Carolina common law, Under the Federal Tort Claims Act, the defendant United States of America is liable to the Plaintiff for the unlawful non-discretionary actions of Lt. Jones; C/o's Johnson and Robinson as they were acting within the scope of their employment as a law enforcement officer of the Bureau of Prisons.

10. The actions of Lt. Jones as setforth above constitute negligence in violation of South Carolina common law. The officers had a duty to not inflict corporal injury on Plaintiff while he was handcuffed with his hand behind his back or in any manner. The officers(Johnson and Robinson) breached their duty when they failed to protect Plaintiff from the direct assault of

Lt. Jones. This breach of their duty constitutes negligence in violation of South Carolina common law and was the direct and proximate cause of the Plaintiff's pain, suffering and injury. Under the Federal Tort Claims Act the defendant United States of America is liable to the Plaintiff for the unlawful actions of Lt. Jones, C/O Johnson and Robinson, as they were acting within the scope of their employment as law enforcement officers of the Bureau of Prisons.

11. That the Bureau of Prisons tacit failure to properly train its employees in the use of force techniques resulted in a violation of Plaintiff's constitutional and statutory rights; constitute a deliberate indifference to the right of Plaintiff whom is entrusted to the care of the Bureau of Prison and as a direct and proximate cause of the Bureau of Prison to adequately train its employees serve as the catalyst which resulted in the violation of Plaintiff constitutional and statutory rights.

12. That Defendants' failed to follow its own policy and procedures which requires that all use of force must be videotaped, tabulated and reviewed and retain for a period of 2½ years. **See Program Statement** 5566.06 and **28 C.F.R. §552.27**(requiring that when a threat to the safety of the inmate, staff or others, or property, requires an immediate response, staff are obligated to obtain a camera and begin recording the event as soon as feasible, As soon as control of the situtation has been obtained. Staff must record information on: (1) injuries; (2) circumstances that required the need for immediate use of force; and (3) identification of the inmates,

staff and officers involved). Defendants' failure to follow its own policy and procedures resulted in a violation of Plaintiff's due process rights.

Constitutional Claims Against Defendants

(Bivens Claim)

13. The actions of BOP employees Jones, Johnson and Robinson set forth in paragraphs 6-12 violated Plaintiff's right to be free and secure in his person under the Fourth Amendment and Eighth Amendement to the U.S. Constitution. Defendants Jones, Johnson and Robinson are liable to Plaintiff for these unlawful violations in violation of the Constitution.

PRAYER FOR RELIEF

A. On the claims stated in paragraphs 6-12, the Plaintiff asks the Court to enter judgment against defendant United States of America.

B. On the claims stated in paragraph 6-12, the Plaintiff asks the Court to enter judgment against defendant United States of America and to hold the defendant United States of America liable to the Plaintiff for compensatory damages in the amount of $250,000.00.

C. On the claims stated in paragraphs 6-12, the Plaintiff asks the Court to enter judgment against defendants officer Jones, Johnson and Robinson.

D. For the injuries that the Plaintiff suffered as a result of the claims stated herein, the Plaintiff asks the Court to hold defendants United States of America and Officers Jones, Johnson and Robinson jointly and severally liable for compensatory damages in the amount of $500,000.00 and the cost of this action.

compensatory damages in the amount of $500,000.00 and the cost of this action.

Submitted by,

Edwin Cruz

VERIFICATION

I, Edwin Cruz, Hereby aver under pains and penalty of perjury that I have read the complaint herein and declare that the allegations as stated therein and accompanying affidavit are true and correct to the best of my knowledge and recollection.

Edwin Cruz

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on 24 day of July 2012, I personally hand delivered the original and one copy of a Complaint seeking monetary damages against the United States and certain employees to prison officials for delivery via U.S. FIrst Class Mail(Certified) for delivery upon the Office of the Clerk, for the District of South Carolina.

Submitted by,

Edwin Cruz

Edwin Cruz

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

EDWIN CRUZ,
Plaintiff,

vs.

UNITED STATES OF AMERICA, ET. AL.,
Defendants.

RECEIVED
USDC CLERK, FLORENCE S
2012 JUL 30 A 10:1

AFFIDAVIT

I, Edwin Cruz, USM#39327-054, a federal prisoner currently incarcerated at the Federal Correctional Institution, Jesup, Georgia, being of sound mind and body, over the age of eighteen(18) having personal knowledge of the facts **HEREBY AVER** under pains of penalty of perjury, 28 U.S.C. §1746, that the facts as stated herein are true and correct and if called upon to testify in a court of law would testify under oath as follows:

1. That on August 5, 2011, I was assigned to the Special Housing Unit, Bennettsville F.C.I. in the state of South Carolina.

2. That on August 5, 2011, a flooding occurred in the Special Housing Unit resulting in raw sewage been expelled through the commode in the cells spilling over unto the range.

3. That despite the unsanitary conditions that existed Bureau of Prison employee proceeded to dispensed open feeding trays while attired in contaminated gloves. Having no means to feed

INT: e c

myself I was forced to consume the meal.

4. That as a result of forcibly consuming said meal I suffered various health problems. Attempts to grieve this matter was frustrated. **See Ex. A.**

5. That on August 15, 2011, I was given a direct order to "cuff-up" meaning couched in a stoop position backwards and place one's hand through a slot in the door in order to be secured by handcuffs. This is required by policy for all movements while confined to the Special Housing Unit.

6. That after being secured I was removed to another cell at which time Lieutenant Jones contrary to policy and procedures entered the cell outside the view of the cameras and began to assault Affiant with a close fist and his feet resulting in Affiant sufferring a bruise rib cage, chipped tooth, lower back problems and other related problems.

7. That at all times during this assault C/O Robinson and Johnson remained outside the cell looking on while their superior Lt. Jones continued to kick, thump and leveled verbal racist and impunging homosexual remarks directed at Affiant.

8. That at all times during the assault, my hands were handcuffed behind my back and I was in no position to help myself. Despite cries for help Robinson and Johnson merely looked on acting as spectators while smiling. Approximately two hours thereafter the handcuffs were removed by C/O Johnson who stated Affiant should desist from complaining to the Warden whenever she make her weekly rounds or else I would receive the same treatment.

INT. e c

9. That I requested medical attention and that the S.I.S. Lieutenant to take pictures of my visible injuries. **See Exhibit B.** While I was eventually seen by medical S.I.S. falied to take pictures of my injuries.

10. That during my stay in the Special Housing Unit inmates were routinely assaulted on a constant basis without intervention by the Warden, Captain and S.I.S. Lieutenant.

I, further aver and states that the above statements outlined in paragraphs 1-10 are true and correct and are made pursuant to 28 U.S.C. §1746.

Submitted By,

Edwin Cruz Affiant

I, HEREBY CERTIFY that the above named affiant signed this document in my presence, a person authorize by Congress to administer oath and attestation.

Case Manager

_____, _____, Authorized by Act of July 7, 1955, as amended, to administer oaths (18 U.S.C.§ 4004)

U.S. Department of Justice

Federal Bureau of Prisons

South Carolina Consolidated Legal Center

501 Gary Hill Road
P.O. Box 723
Edgefield, SC 29824

June 20, 2012

Edwin Cruz
Reg. No. 39327-054
Federal Correctional Institution
2680 301 South
Jesup, GA 31599

Certified Receipt
7011157000034652778 4

RE: Tort Claim Number **TRT-SER-2012-01820**

Your claim has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2672, and the authority granted by 28 C.F.R. § 0.172. Section 2672 of the FTCA, 28 U.S.C. § 2672 et seq., and authority by 28 C.F.R. § 0.172, delegates to each federal agency the authority to consider, determine, and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You seek damages in the amount of $250,000.00, alleging on August 15, 2011, you suffered a bruised ribcage, two chipped teeth, lower back problems, and mental and emotional trauma, as a result of staff at the Federal Correctional Institution (FCI) in Bennettsville, South Carolina assaulting you. You claim that after you were escorted from one cell in the Special Housing Unit (SHU) to another cell, the SHU Lieutenant (Lt.) assaulted you in the cell. You state that other SHU staff held the door to the cell closed so you wouldn't escape from the cell while the Lt. was assaulting you by hitting you in the ribcage, and the face, loosening two of your teeth.

We have reviewed your claim along with reports from the appropriate staff members, and all the available documentation and video. Allegations such as this are taken seriously by the Bureau of Prisons (BOP). The matter was referred for investigation; however, you will not be advised of the outcome.

Our investigation has revealed on August 15, 2011, you were escorted from your assigned cell in the SHU to another cell, as a result of your refusal to accept a cellmate. You were escorted by the SHU Lt. and two other SHU officers. Staff placed you in the new cell, with the Lt. remaining in the cell, and the two officers standing outside the cell. The two officers reported that they maintained full view of you and the Lt., while the Lt.

was in the cell, and until the Lt. left the cell. Staff reported that at no time did anyone assault you.

A review of your medical records revealed no record of you having requested medical attention until August 16, 2011, the day after the alleged incident. Medical staff reported you had swelling and tenderness to your left lower ribcage; however, there was no trauma to your face, nor did you have any loose teeth. It was at this time that you reported to staff that you had been assaulted.

In your claim, you refer to a video recording in the area that you were being housed, as a witness to the alleged assault. There is no recording available.

As a result of our investigation, there is no evidence to indicate that you have sustained any injury caused by any retaliatory, negligent or wrongful act or omission of any BOP employee acting within the scope of his or her employment. Therefore, this claim is denied.

Please accept this communication as a denial of your claim. You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court.

Sincerely,

T Cassaro

Tami Cassaro
Supervisory Attorney

cc: Regional Counsel
Warden

U.S. Department of Justice

Federal Bureau of Prisons

South Carolina Consolidated Legal Center

501 Gary Hill Road
P.O. Box 723
Edgefield, SC 29824

April 4, 2012

Edwin Cruz
Reg. No. 39327-054
Federal Correctional Institution
2680 301 South
Jesup, GA 31599

Certified Receipt
70111570000346927241

RE: Tort Claim Number **TRT-SER-2012-1383**

The Bureau of Prisons (BOP) has considered your administrative claim you submitted pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § § 1346(b), 2671-2680. You claim government liability in the amount of $250,000.00, as compensation for personal injury. You allege on or about August 5, 2011, a flood occurred in the Special Housing Unit (SHU) on the lower B-range. You claim the flood contained feces and urine and you assert staff fed you using gloves contaminated by the flood. You indicate you have suffered vomiting, headaches, and a fear of drinking water from your sink. You state you have suffered mental and emotional trauma, as well as internal bleeding, diarrhea, and loss of appetite. You allege you submitted several sick call requests regarding your ailments, but you claim those requests were ignored by the Health Services Department.

We have reviewed your claim along with any available documentation and reports from appropriate staff members. An investigation was conducted and a plumbing problem did occur in the SHU on August 5, 2011. Staff were directed not to feed inmates until the plumbing issues were resolved and the range cleaned. Staff did as instructed and food was provided after the range was cleaned. No staff member used contaminated gloves while dispensing food.

A review of your medical history indicates you signed up for sick call two times after August 5, 2011. On August 16, 2011, you complained you were assaulted by staff during a cell move. You did not complain of any of the symptoms you allege to have been suffering. On December 7, 2011, you submitted a sick call slip claiming you had suffered from diarrhea for four days and you had bloody stools. You were seen by medical staff that day and you made no reference to the flood that had occurred almost four months earlier. Your vital signs were normal and you had no blood in your stool. You were given nausea medication and escorted back to your unit.

Please accept this communication as a denial of your claim. You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of the mailing of this communication within which to bring suit in the appropriate United States District Court regarding any personal injury.

Sincerely,

Tami Cassaro
Supervisory Attorney

cc: Warden

REJECTION NOTICE - ADMINISTRATIVE REMEDY

DATE: NOVEMBER 1, 2011

FROM: ADMINISTRATIVE REMEDY COORDINATOR
SOUTHEAST REGIONAL OFFICE

TO : EDWIN CRUZ, 39327-054
BENNETTSVILLE FCI UNT: UNIT A-4 QTR: Z02-117L
696 MUCKERMAN ROAD
BENNETTSVILLE, SC 29512

FOR THE REASONS LISTED BELOW, THIS REGIONAL APPEAL IS BEING REJECTED AND RETURNED TO YOU. YOU SHOULD INCLUDE A COPY OF THIS NOTICE WITH ANY FUTURE CORRESPONDENCE REGARDING THE REJECTION.

REMEDY ID : 662974-R1 REGIONAL APPEAL
DATE RECEIVED : OCTOBER 18, 2011
SUBJECT 1 : ADMINISTRATIVE DETENTION CONDITIONS
SUBJECT 2 :
INCIDENT RPT NO:

REJECT REASON 1: YOU MUST FIRST FILE A BP-9 REQUEST THROUGH THE INSTITUTION FOR THE WARDEN'S REVIEW AND RESPONSE BEFORE FILING AN APPEAL AT THIS LEVEL.

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

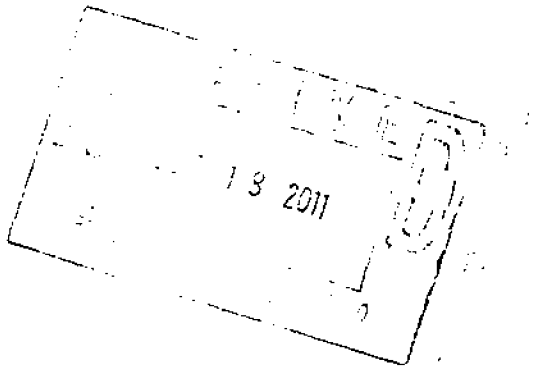
From:	CRUZ EDWIN	39327-054	S.H.U.	F.C.I. BENNETTSVILLE
	LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL ON AUG 5, 2011 C/O G.PARKER COMMITTED A VIOLATION BY ENDAGERING M HEALTH BY FEEDING ME AND OTHER INMATE ON MENTIONED DATE ABOVE WHILE A MAJOR FLOODING O FIECES ALONG WITH DIRTY WATER FLOATING AROUND IN S.H.U. 6-LOWER BECAUSE THE DRAIN WAS STOP UP. C/O G.PARKER PUT MY HEALTH AT A GREAT RISK WHEN HE VIOLATED B.O.P. POLICY AND PROCEDU IT WAS UNLAWFUL WHEN C/O G.PARKER COMMITTED THE PROHIBIT ACT BY FEEDING ME AND OTHERS UNDER THOSE CONDITION. F.C.I BENNETTSVILLE SECURITY CAMARA IN S.H.U. 6-LOWER, WILL PROOF THAT C/O G.PARKER COMMITTED THE PROHIBIT ACT ON AUG 5, 2011. I FOLLOWED THE PROPER PROCEDURE IN THIS MATTER going THROUGH EACH STEP AS SPECIFIED WHILE WAITING ON A RESPOND ON THE B.P.8 I SUBMITTED. IT WAS BROUGHT TO MY ANTTENTION BY THE ASSISTANT WARDEN THAT IN A SITUATION AS SENSITIVE AS THE ONE I FILED THE B.P.8 ON I WOULDNT RECEIVE A RESPOND. SO MY NEXT STEP OR CAUSE OF ACTION WOULD BE TO PROCEED WITH THE B.P.9

10-12-11
DATE

Edwin Cruz
SIGNATURE OF REQUESTER

Part B - RESPONSE



DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

Part C - RECEIPT

CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT:

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: EDWIN CRUZ (LAST NAME, FIRST, MIDDLE INITIAL) 39327-054 (REG. NO.) S.H.U (UNIT) F.C.I BENNETTSVILL (INSTITUTION)

Part A- INMATE REQUEST ON AUG 5, 2011 C/O G.PARKER COMMITTED A VIOLATION BY ENDANGERING MY HEALTH BY FEEDING ME AND OTHER INMATE ON MENTIONED DATE ABOVE WHILE A MAJOR FLOODING [redacted] OF FECES ALONG WITH DIRTY WATER FLOATING AROUND IN S.H.U. B-LOWER BECAUSE THE DRAIN WAS STOP UP. C/O G.PARKER PUT MY HEA AT A GREAT RISK WHEN HE VIOLATED B.O.P. POLICY AND PROCEDURE, IT WAS UNLAWFUL WHEN C/O G.PARKE COMMITTED THE PROHIBIT ACT BY FEEDING ME AND OTHER UNDER THOSE CONDITION. F.C.I BENNETTS SECURITY CAMARA IN S.H.U. B-LOWER WILL PROOF THAT C/O G.PARKER COMMITTED THE PROHIBIT ACT ON AUG 5, 2011. I FOLLOWED THE PROPER PROCEDURE IN THIS MATTER GOING THROUGH EACH STEP AS SPECIFIED WHILE WAITING ON A RESPOND ON THE B.P.8 I SUBMITED. IT WAS BROUGHT TO MY ATTENTION BY THE ASSISTANT WARDEN THAT IN A SITUATION AS SENSITIVE AS, THE ONE I FI THE B.P.8 ON I WOULDNT RECEIVE A RESPOND. SO MY NEXT STEP OR COURSE OF ACTION WOULD BE TO PROCEED WHITH THE B.P.-9.

THIS IS THE ONE THE GOT REJECTED

09-20-11 (DATE) edwin Cruz (SIGNATURE OF REQUESTER)

Part B- RESPONSE

DATE WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: _____

CASE NUMBER: _____

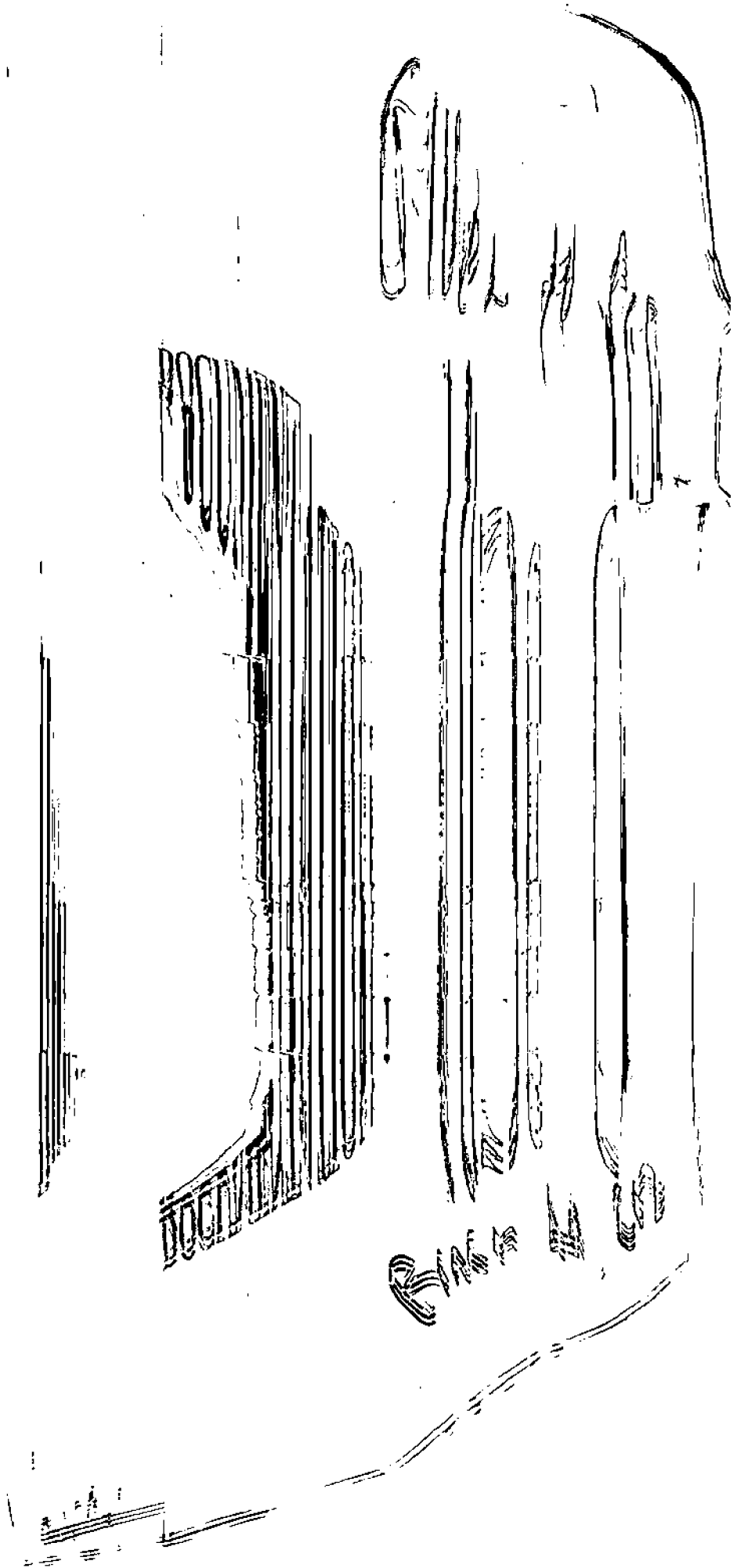
Part C- RECEIPT

Return to: _____ (LAST NAME, FIRST, MIDDLE INITIAL) _____ (REG. NO.) _____ (UNIT) _____ (INSTITUTION)

SUBJECT: _____

DATE RECIPIENT'S SIGNATURE (STAFF MEMBER)

BP-229(13)



Given to SIS 10-28-11 S.H.U

December 28, 2005
Attachment A

DOCUMENTATION OF INFORMAL RESOLUTION ATTEMPT

Bureau of Prisons Program Statement No. 1330.13, Administrative Remedy Program, (December 22, 1995), requires, in most cases, that inmates attempt informal resolution of grievances prior to filing a formal written complaint. This form will be used to document your efforts toward informally resolving your grievance.

Inmate Name: EDWIN CRUZ **Reg. No.:** 39327-054 **Unit:** S.H.U

Specific Complaint and Requested Relief: I BEEN REQUESTING FOR MY RECREATION FOR A WHILE, AND IS BEEN DENIED TO ME A FEW TIME BY THE SAME OFFICER. THE FIRST COUPLE OF TIME, I LET IT GO BECAUSE I DIDN'T WANTED TO CAUSE TROUBLE BUT I JUST REALIZE THIS OFFICER, C/O ROBINSON HAVE SOMETHING PERSONAL AGAINST ME. WHEN I CONFRONTED HIM ABOUT IT. HE USED RACIAL SLUR AND LIE ABOUT ME NOT BEING READY REC. LAST FRIDAY C/O ROBINSON DID THE SAMETHING, BUT L.T. LEE WAS WORKING IN S.H.U. THAT DATE AN I EXPLAINT TO HER WHATS GOING ON. SHE SEEN THE MY CELL WAS CLEAN AND READY FOR "REC". CONT IN

Efforts Made by Staff Informally Resolve Grievance (be specific): _____

Comments: THIS IS YOUR COPY AS IS THE ORIGINAL THEY WILL GIVE YOU YOUR ANSWER

Correctional Counselor's Review / Date **Unit Manager's Review / Date**

Date Informal Resolution Given to Inmate	10-28-11	Date Informal Resolution Received		Date BP-9 Given to Inmate	
Staff Initials	CFT	Staff Initials		Staff Initials	

AND INSTRUCTED THE OTHER OFFICES TO TAKE ME TO "REC". WHEN C/O ROBINSON SEEN THE
L.T. LEE WAS ALLOWING ME TO GO FOR REC, HE CAUGHT A FIT AND WHEN ON A [redacted] VERBAL RAMPA
ON L.T. LEE. THIS HAPPEN ON FRONT OF STAFF AND INMATES SO IS PLENTY WITNESS ON THAT.
ALL FOR WHAT? BECAUSE C/O ROBINSON IS UNPROFESSIONAL AND THINK BECAUSE HE GOT SOME
KEYS OF THIS DOORS CAN DENIED ME "REC". PEOPLE LIKE THAT SHOULDNT BE WORKING IN TI
TYPE OF ENVIRONMENT IF THEY CAN'T CONTAIN THEIR EMOTIONS. I REQUESTED TO SPEAK
TO THE S.H.U. L.T., L.T. JONES. TO NOTIFY HIM ABOUT THE MATTER BUT OFCOURSE LIKE ALWA
HE NEVER CAME. IETHER C/O ROBINSON IS BACKED BY L.T. JONES ON THIS OR PERHAPS SEN
BY HIM. ATLEAST THATS WHAT IT LOOK LIKED.

(1)

10-12-11

MY NAME IS EDWIN CRUZ #39327-054. ON AUG 8, I MADE SEVERAL STAFF MEMBERS THE WARDEN AWARE OF A MAJOR VIOLATION OF SANITATION POLICY. I BEEN FILING THE PROPER PAPER WORK EVER SINCE THE DATE ABOVE. THE ADMINISTRATION CLAIMS NEVER RECEIVING IT. EVERY TIME I HANDOVER MY PAPER WORK I DO IT THRU MY UNIT TEAM. MY UNIT MANAGER ADMITTED SEEN THEM, BUT NEVER RESPONDED BACK. SO HOW THE ADMINISTRATION HAVENT RECEIVING IT. OUT OF ALL THE B.P.8 I HAD SENDEN, I ONLY GOT BACK TWO OF THEM THEY RESPOND WAS THAT THE MATTER WAS REFER TO THE S.I.S. DEPARMENT. F.C.I BENNETTSVILLE IS BLOCKING ME FROM going ABOVE THEM ON THIS MATTER. THEREFORE THEY COMMITTING A PROHIBIT ACT.

ON AUG 15, I WAS ASSAULTED by THE S.H.U. STAFF, WHILE I WAS ON HANDCUFF. BASICALLY FOR WRITING THE INSTITUTION UP, AND FOR BEING TO PERSISTENT ON THE SANITATION INCIDENT. ONCE AGAIN I TOOK THE PROPER STEP WITH THE PAPER WORK AND THEY PLAY THE SAME GAMES CLAIMING THEY DIDNT RECEIVE IT. I CONTACT MY PEOPLE ON THE STREETS AND THEY MADE A FEW PHONE CALLS TO THE PRISION. MEAN WHILE I KEPT WRITING EVERY BODY UP, [redacted] FROM THE WARDEN ALL THE WAY DOWN TO MY UNIT TEAM, FOR COVERING STAFF MISCONDUCT AND NOT HANDLING MY PAPER WORK. OUT OF ALL THOSE B.P.8 I DID ON THEM, NOT ONE OF THOSE WERE RESPONDED TO ME.

I SPOKE TO SEVERAL STAFF MEMBERS ON THIS MATTER AND MANY TRY TO DISCOURAGE ME AND MISGUIDE ME. ONTO I SPOKE TO THE ASSISTAN WARDEN, SHE EXPLAINT TO ME THE ON A MATTER THIS SENSITIVE THEY NEVER RESPOND BACK. THEN SHE ADVICE ME TO DO A B.P.9. I DID TWO B.P.9 ON EACH ONE OF THE INCIDENT. ONE OF THEM GOT REJECTED, THE ONE OF SANITATION VIOLATION, BECAUSE SOPPOSELLY I DIDNT DO A B.P.8 ON IT AND BECAUSE I DIDNT FILED ON TIME. THEY ALSO SEND ME A REJECTION FORM STATING, THE IF I WANT TO APPEAL I MOST INCLUDE A COPY OF THE REJECTION FORM

(2)

REJECTION FORM. So I CAN PUT IT WITH MY APPEAL, AND THE I NEEDED MY COPY BACK FOR PROOF. IS BEEN ALMOST 3 WEEKS I DIDN'T GET NEITHER A COPY OR A RESPOND. ON THE APPEAL I STATED WHY THEY REJECTED MY B.P.9 ON THE SANITATION VIOLATION AND ACCEPTED THE OTHER ONE, THE ASSAULT. KNOWING BOTH INCIDENT GO TOGETHER, IS NO EVE WITH OUT ADAM. AND THE SIMPLE FACT, I HAVE A B.P.8 THE WAS REFER TO THE S.I.S DEPARMENT [redacted] DATED AND THE MENTION BOTH INCIDENT. THE REASON I WON'T SEND YOU A COPY IS BECAUSE I FEAR IF GIVE IT TO MY UNIT TEAM I WON'T GET IT BACK AND THATS MY ONLY PROOF. BUT ONE THING I'M SENDING YOU IS A COPY OF THE B.P.9 THE GOT REJECTED WITH A B.P.10 TO SEE IF YOU CAN APPROVED BECAUSE IS OBVIOUS F.C.I. BENNETTSVILLE DON'T WANT ME TO GO OVER THEY HEAD WITH THIS MATTER, THEREFORE THEY COMMITTING A CRIME AND COVERING STAFF MISCONDUCT. PLEASE LOOKING TO THIS MATTER BECAUSE EVER SINCE AUG 5. MY STOMACH NEVER BEEN THE SAME, I HAVE A INTERNAL BLEEDING I SUBMITED SEVERAL COP OUT TO MEDICAL BUT NEVER BEEN CALL FOR SICK CALL. I ALSO BEEN TRYING TO GET THE REGION ADDRESS FOR A WHILE NOW BUT DIDN'T HAD ANY LUCK INTO NOW. SO I CAN MAKE YA'ALL AWARE OF WHATS GOING ON HERE ON F.C.I. BENNETTSVILLE. I ALSO GOT THE ADDRESS OF THE JUSTICE DEPARMENT, I'M WRITING THEM A LETTER TOO ON THIS MATTER. WHILE I WAS WRITING THIS LETTER TO YOU MY COUNSELOR JUST APPEAR OUT OF THE BLUE, A MAN THE BEEN DUCKING ME FOR WEEKS NOW, CLAIMING HE TURN IN ALL MY B.P.8. TO THE S.I.S DEPARMEN THE HE DON'T HAVE ANY PART ON NOTHING. WELL I DON'T KNOW WHO DOING ALL THE COVER UP. THE WARDEN, S.I.S. DEPARMENT, OR THE UNIT TEAM. I JUST WANT TO GET TO THE BOTTOM OF THIS. IF YOU CAN HELP OR GUIDE ME ON WHAT STEP TO TAKE NEXT I WOULD GLADLY APPRECIATED. THANK YOU FOR YOU TIME

Edilio Cruz

BEN 1330.16F
July 1, 2010
Attachment A

DOCUMENTATION OF INFORMAL RESOLUTION ATTEMPT

Bureau of Prisons Program Statement 1330.16, Administrative Remedy Program, dated December 31, 2007, requires in most cases, that inmates attempt informal resolution of grievances prior to filing a formal written complaint. This form will be used to document your efforts toward informally resolving your grievance.

Inmate Name: EDWIN CRUZ **Reg. No.:** 39327-054 **Unit:** A-4

Specific Complaint and Requested Relief: ON AUG 16, A DAY AFTER I GOT ASSAULTED by THE S.H.U. L.T, L.T JONES, I HAD WROTE TO THE S.I.S L.T, L.T CANN SO HE CAN COME AND TAKE PICTURES OF MY INJURIES, HE FAILED TO DO SO AFTER MY MANY REQUEST, POLICY AND PROCEDURE IF A INMATE REPORT AN ASSAULT by STAFF, SOME body FROM S.I.S. HAVE TO COME DOWN AND TAKE PICTURE AND FOLLOW UP ON THE COMPLAIN THEY DIDN'T do THAT. Who is THEY TRYING TO COVER UP.

Efforts Made by Staff Informally Resolve Grievance (be specific): THIS WAS REFERRED TO THE SIS DEPARTMENT.

Comments:

Correctional Counselor's Review / Date — Unit Manager's Review / Date 5/24/11

Date Informal Resolution Given to Inmate	8-23-11	Date Informal Resolution Received	8-23-11	Date BP-9 Given to Inmate	
Staff Initials	AW	Staff Initials	C.	Staff Initials	

BEN 1330.16F
July 1, 2010
Attachment A

DOCUMENTATION OF INFORMAL RESOLUTION ATTEMPT

Bureau of Prisons Program Statement 1330.16, Administrative Remedy Program, dated December 31, 2007, requires in most cases, that inmates attempt informal resolution of grievances prior to filing a formal written complaint. This form will be used to document your efforts toward informally resolving your grievance.

Inmate Name: EDWIN CRUZ **Reg. No.:** 39327-054 **Unit:** A-4

Specific Complaint and Requested Relief: ON AUG 8, I HAVE HAD COMPLAIN TO THE WARDEN ABOUT A FLOOD WE HAD ON AUG 5, ON S.H.U. THE S.H.U L.T. L.T JONES AND THE OTHERS STAFF WASNT TO HAPPY ABOUT ME TALKING TO THE WARDEN, EVER SENCE THAT HAPPENED I BEEN REFUSING STUFF THE I SHOULD HAVE COMING BUT THEY TURN ME DOWN, ON AUG 15, I WAS ASSAULTED BY THE S.H.U L.T. L.T. JONES BECAUSE I WOULDNT TAKE MY OLD CELL BACK, AFTER I TOLD THE S.H.U L.T. THE I WASN'T GETTING ALONG WITH HIM. THE ADMINISTRATION HAS FAILED TO FOLLOWED POLICY AND PROCEDURE BY NOT PULLING OUT L.T. JONES FROM S.H.U. IM FORCE TO MOVE AROUND WITH HIM IN HER

Efforts Made by Staff Informally Resolve Grievance (be specific):

THIS WAS REFERRED TO THE SIS DEPARTMENT.

Comments:

Correctional Counselor's Review / Date

Unit Manager's Review / Date 8/29/11

Date Informal Resolution Given to Inmate	8-23-11	Date Informal Resolution Received	8-29-11	Date BP-9 Given to Inmate	
Staff Initials		Staff Initials		Staff Initials	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Edwin Cruz, Plaintiff, vs. Bureau of Prisons; United States of America; Lt. Jones; Officer Johnson; Officer Robinson, Defendants.	) C/A No. 5:12-02149-CMC-KDW)))))))))))	ORDER

This is a civil action filed by a federal prisoner. Therefore, in the event that a limitations issue arises, Plaintiff shall have the benefit of the holding in *Houston v. Lack*, 487 U.S. 266 (1988) (prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to District Court). Under Local Civil Rule 73.02(B)(2) of the United States District Court for the District of South Carolina, pretrial proceedings in this action have been referred to the assigned United States Magistrate Judge.

By order issued on August 9, 2012, Plaintiff was given a specific time frame in which to bring this case into proper form. ECF No. 9. Plaintiff substantially complied with the court's order, and this case is now in proper form.

PAYMENT OF THE FILING FEE:

By filing this case, Plaintiff has incurred a debt to the United States of America in the amount of $350. *See* 28 U.S.C. § 1914. This debt is not dischargeable in the event Plaintiff seeks relief under the bankruptcy provisions of the United States Code. *See* 11 U.S.C. § 523(a)(17). The Prison Litigation Reform Act (PLRA) of 1996 permits a prisoner to file a civil action without **pre**payment of fees or security, but requires the prisoner "to pay the full amount of the filing fee" as funds are available. *See* 28 U.S.C. § 1915(a) and (b). **The agency having custody of Plaintiff shall collect payments from Plaintiff's prisoner trust account in accordance with 28 U.S.C. § 1915(b)(1) and (2), until the full filing fee is paid.** *See Torres v. O'Quinn*, 612 F.3d 237, 252 (4th Cir. 2010)("We hold that 28 U.S.C. § 1915(b)(2) caps the amount of funds that may be withdrawn from an inmate's trust account at a maximum of twenty percent *regardless of the number of cases or appeals the inmate has filed.*") (emphasis in original).

TO THE CLERK OF COURT:

The Clerk of Court is directed not to authorize the issuance and service of process against Defendant Bureau of Prisons ("BOP"), unless the Clerk of Court is instructed to do so by a United States District Judge or a Senior United States District Judge.

The Clerk of Court is directed to issue the summonses, and to forward a copy of the complaint (ECF No. 1) and the Forms USM-285 to the Marshal for service upon the remaining Defendants. The Clerk of Court shall indicate on the summonses that Defendants have sixty (60) days in which to file an answer. *See* Fed. R. Civ. P. 12(a)(3). The Clerk of Court may sign the Forms USM-285 on behalf of the Plaintiff, if the Plaintiff has neglected to do so. *A copy of this Order must be provided to the United States Marshal.*

The Office of the Clerk of Court shall not enter any change of address submitted by the Plaintiff which directs that mail be sent to a person other than the Plaintiff unless that person is an attorney admitted to practice before this Court who has entered a formal appearance.

TO THE UNITED STATES MARSHAL:

The United States Marshal shall serve the complaint on all Defendants except the Bureau of Prisons. Additionally, the Marshal shall serve copies of the pleading upon the United States Attorney for the District of South Carolina and the Attorney General of the United States under Rule 4(i) of the Federal Rules of Civil Procedure.* The United States Marshals Service is advised that it must expend a reasonable investigative effort to locate a defendant once a defendant is properly identified. *See Greene v. Holloway*, No. 99-7380, 2000 WL 296314, at *1 (4th Cir. 2000) (citing with approval *Graham v. Satkoski*, 51 F.3d 710 (7th Cir. 1995)).

If the information provided by Plaintiff on the Forms USM-285 is not sufficient for the Marshal to effect service of process, after reasonable investigative efforts have been made to locate a properly identified Defendant, the Marshal should so note in the "Remarks" section at the bottom of the Form USM-285.

TO DEFENDANTS:

Defendants United States of America, Lt. Jones, Officer Johnson, and Officer Robinson are directed to file an answer to the complaint or otherwise plead.

TO PLAINTIFF:

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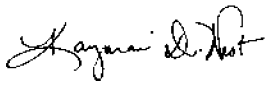
* The mailing address of the United States Attorney for the District of South Carolina is 1441 Main Street — Suite 500, Columbia, South Carolina 29201. The mailing address of the Attorney General of the United States is Department of Justice, Room B-103, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

.

Plaintiff **must** provide, and is responsible for, information sufficient to identify Defendants on the Forms USM-285. The United States Marshal cannot serve an inadequately identified defendant, and un-served defendants may be dismissed as parties to this case.

Pursuant to Rule 5 of the Federal Rules of Civil Procedure, any documents filed subsequent to the initial pleading must be served on parties. Unless otherwise ordered, service of subsequently filed documents on a defendant represented by an attorney is made on the attorney. Service on attorneys who have made an appearance in this court is effected by the court's Electronic Case Filing system through a computer generated notice of electronic filing. However, prior to Defendants' attorney making an appearance in this court, Plaintiff must serve Defendants with any documents Plaintiff files subsequent to the initial pleading and file a certificate of service that states who was served, what document was served, and how the document was served.

IT IS SO ORDERED.



September 13, 2012
Florence, South Carolina

Kaymani D. West
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Edwin Cruz, Plaintiff, vs. United States of America, Lt Jones, et al., Defendants.	)	C/A No.: 5:12-cv-2149-CMC-KDW *Roseboro* Order to Plaintiff

One or more defendants filed a motion to dismiss (pursuant to Fed. R. Civ. P. 12) or a motion for summary judgment (pursuant to Fed. R. Civ. P. 56) asking the court to dismiss your case. Because you are not represented by counsel, this "*Roseboro* Order"[1] is issued to advise you of the dismissal/summary judgment procedures and the possible consequences if you fail to respond adequately to defendant's motion. Please carefully review this information, including the attached excerpts of the Federal Rules of Civil Procedure regarding motions to dismiss and motions for summary judgment.

You have 34 days from the date of this order to file any material in opposition to the motion that defendant filed. If you fail to respond adequately, the court may grant the defendant's motion, which may end your case.

Explanation of Motions to Dismiss

Motions to dismiss can be filed pursuant to Fed. R. Civ. P. 12. Many motions to dismiss are filed under Fed. R. Civ. P. 12(b)(6), in which defendants usually argue that the law does not provide a right to relief for claims that a plaintiff makes in his complaint. Because motions to dismiss usually concern questions of law and not questions of fact, the court presumes as true the plausible facts of the complaint for the purpose of a motion to dismiss.

The court decides a motion to dismiss on the basis of the applicable law and the pleadings, meaning the complaint, defendant's answer (if any), the exhibits attached to the complaint, documents that the complaint incorporates by reference (provided they are both undisputed and pertinent to the pleaded claims), and materials of which the court may take judicial notice. In some cases, the parties present materials outside of the pleadings, such as affidavits or declarations in support of or in opposition to the motion to dismiss. If the court, in its discretion, considers materials outside of the pleadings, the motion to dismiss is converted to a motion for summary judgment under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 56(d).

[1]The court enters this order in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) (requiring the court provide explanation of dismissal/summary judgment procedures to pro se litigants).

Explanation of Motions for Summary Judgment

Motions for summary judgment filed by defendants pursuant to Fed. R. Civ. P. 56 argue that the plaintiff's claims are not supported by the specific facts of the case. For example, in a civil rights case brought under 42 U.S.C. § 1983, a defendant may argue in a motion for summary judgment that the facts in the plaintiff's case do not rise to the level of a constitutional violation that would entitle him to relief. Because motions for summary judgment concern both questions of law and questions of fact, if the court finds that there is not any genuine dispute as to any material fact on a claim, the court will determine which party is entitled to judgment under the law. The court decides a motion for summary judgment on the basis of the applicable law, the pleadings, discovery, affidavits, declarations, and any other properly-submitted evidence.

Your Response to the Defendant's Motion

Your filing in opposition to the defendant's motion should be captioned either as "Response to Motion to Dismiss" or "Response to Summary Judgment," as applicable, and should include the following: (1) an explanation of your version of the facts, if different from defendant's version of the facts; and (2) your legal argument regarding why the court should not grant the motion and end your case. Rule 56(c) requires that you support your version of all disputed facts with material such as depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Your failure to support facts in dispute with such material may result in the court granting the motion. Any affidavits or declarations you file in opposition to summary judgment must be based on personal knowledge, contain facts admissible in evidence, and be signed by a person who would be competent to testify on matters contained in the affidavit or declaration if called to testify about them at trial. The court will not consider affidavits, declarations, or exhibits that are unrelated to this case, nor will it consider affidavits or declarations that contain only conclusory statements or argument of facts or law. If you fail to dispute the defendant's version of the facts with proper support of your own version, the court may consider the defendant's facts as undisputed.

All affidavits, declarations, or other evidence you submit to the court must be made in good faith and the facts sworn to in the affidavit or affirmed in the declaration must be true. All affidavits and declarations submitted in this case are submitted under penalties of perjury or subornation of perjury. 18 U.S.C. §§ 1621 and 1622. If the court finds that a party has presented affidavits, declarations, or other evidence in bad faith or only to delay the action, the court may order sanctions, payment of fees, or hold that party in contempt of court.

IT IS SO ORDERED.

January 2, 2013
Florence, South Carolina

s/Kaymani D. West
United States Magistrate Judge

EXCERPTS OF FEDERAL RULES OF CIVIL PROCEDURE
Rule 12 and Rule 56 (effective December 1, 2010)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions, Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading. [OMITTED]

...

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) **Joining Motions.**

(1) **Right to Join.** A motion under this rule may be joined with any other motion allowed by this rule.

(2) **Limitation on Further Motions.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) **Waiving and Preserving Certain Defenses.**

(1) **When Some Are Waived.** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) **When to Raise Others.** Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) **Lack of Subject-Matter Jurisdiction.** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) **Hearing Before Trial.** If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 56. Summary Judgment

(a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) **Objection That a Fact Is Not Supported by Admissible Evidence.** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) **Materials Not Cited.** The court need consider only the cited materials, but it may consider other materials in the record.

(4) **Affidavits or Declarations.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;
(2) allow time to obtain affidavits or declarations or to take discovery; or
(3) issue any other appropriate order.

(e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;
(2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or
(4) issue any other appropriate order.

(f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or
(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) **Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) **Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Edwin Cruz,	)	
	)	
Plaintiff	)	C/A # 5:12-cv-2149-CMC-KDW
	)	SCHEDULING ORDER
vs	)	
	)	
United States of America, Lt Jones, et al.,	)	
	)	
Defendants.	)	

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following schedule is established for this case, which involves a pro se litigant:

1. Motions to amend pleadings shall be filed no later than **March 13, 2013.** Amendments of pleadings beyond this date will not be permitted absent extraordinary circumstances.

2. Discovery shall be completed no later than **April 15, 2013.** All discovery requests shall be served in time for the responses thereto to be served by this date.

3. All other motions, except those to complete discovery, those nonwaivable motions made pursuant to Fed. R. Civ. P. 12, shall be filed on or before **May 1, 2013.** (Fed. R. Civ. P. 16(b)(2)).

IT IS SO ORDERED.

s/Kaymani D. West

Florence, S. C.
February 13, 2013

Kaymani D. West
United States Magistrate Judge

Page 0802 of 1341

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Edwin Cruz, Plaintiff, v. United States of America; Lt. Jones; Officer Johnson; Officer Robinson, Defendants.	C/A NO. 5:12-2149-CMC-KDW **OPINION and ORDER**

This matter is before the court on Plaintiff's *pro se* complaint, filed in this court pursuant to the Federal Tort Claims Act (FTCA) and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(d), DSC, this matter was referred to United States Magistrate Judge Kaymani D. West for pre-trial proceedings and a Report and Recommendation ("Report"). On April 25, 2013, the Magistrate Judge issued a Report recommending that Defendants' motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and (b)(6) be granted and this matter be dismissed with prejudice. The Magistrate Judge advised Plaintiff of the procedures and requirements for filing objections to the Report and the serious consequences if he failed to do so. After requesting and receiving an extension of time to do so, Plaintiff filed objections to the Report on May 29, 2013.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo*

determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b).

After conducting a *de novo* review as to objections made, and considering the record, the applicable law, the Report and Recommendation of the Magistrate Judge, and Plaintiff's objections, the court agrees with the conclusion of the Report that Defendants' motion to dismiss[1] should be granted as to Plaintiff's *Bivens* claims. However, the court finds that the record as it now exists is inadequate to determine whether Defendants Jones and/or Robinson were acting within the scope of employment. Accordingly, the court denies Defendants' motion to dismiss Plaintiff's FTCA claims without prejudice.

I. DEFENDANT LT. JOHNSON

Plaintiff sues "Lt. Johnson," who is alleged to have stood outside a cell while Defendant Lt. Jones allegedly assaulted Plaintiff on August 15, 2011. *See* Compl. at 2, 3 (ECF No. 1). However, as noted by Defendants in a footnote to the motion to dismiss and/or for summary judgment, "[t]here are two officers named Johnson employed at FCI Bennettsville. FCI staff were unable to determine which staff member was being sued, therefore, service was not accepted and authority has not been requested for the United States Attorney's Office to represent the unknown Officer Johnson." Mot.

[1]Rule 12(b)(6) provides that if a motion to dismiss for failure to state a claim is filed and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgement and disposed of as provided in Rule 56." In this case, Defendants have filed declarations and a variety of supporting materials in connection with the brief regarding the motion to dismiss. Accordingly, the motion to dismiss has been considered and analyzed as a motion for summary judgment.

to Dism. at 1, n.1 (ECF No. 36).[2] Plaintiff has not sought to correct this deficiency. Accordingly, Defendant "Lt. Johnson" has not been served with a copy of the summons and complaint in this matter, nor has he made an appearance in this matter. Therefore, Defendant "Lt. Johnson" is dismissed from this action without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

II. REMAINING DEFENDANTS/CLAIMS

A. BIVENS CLAIMS

On December 27, 2012, Defendants (except Defendant Johnson) moved to dismiss Plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (b)(6), contending, *inter alia*, that Plaintiff failed to exhaust administrative remedies on the *Bivens* claims contained in the complaint.[3]

An action for damages filed pursuant to *Bivens* does not lie against the United States, as "[a]ny remedy under *Bivens* is against federal officials individually, not the federal government." *Randall v. United States*, 95 F.3d 339, 345 (4th Cir. 1996). Additionally, a *Bivens* action cannot lie against Defendants Jones or Robinson in their official capacities. *Doe v. Chao*, 306 F.3d 170, 184 (4th Cir. 2003). Accordingly, Plaintiff's *Bivens* claims are dismissed with prejudice as to Defendant United States of America and Defendants Jones and Robinson in their official capacities.

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[2]Pursuant to the declaration submitted by Lt. Leroy Jones, the officers who accompanied him in moving Plaintiff to another cell on August 15, 2011, were Defendant Robinson, Senior Officer Specialist Shawn Brock, and Senior Officer Rory Thompson. Decl. of Leroy Jones at ¶ 6 (ECF No. 36-10). Plaintiff has not sued either Brock or Thompson.

[3]Although Section 1983 does not apply to federal prisoners (since it is restricted to "state" actors), an analogous private cause of action against federal officials for monetary damages is implied directly under the Constitution, in this case the Eighth Amendment, under the seminal case, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Fourth Amendment claim).

Plaintiff argues the Report errs in finding he failed to exhaust administrative remedies because the actions of prison officials rendered the administrative remedy process unavailable. *See* Obj. at 2 (ECF No. 67) (arguing a "delay" in request for appropriate forms). The cases cited by Plaintiff support the proposition that if prison officials affirmatively thwart an inmate's attempt to exhaust administrative remedies, the remedy becomes "unavailable," and an inmate is accordingly excused from the statutory exhaustion requirement. However, when a process becomes unavailable because an inmate does not comply with procedural rules, "the process is not unavailable but rather forfeited." *Kaba v. Stepp*, 458 F.3d 678, 684 (7th Cir. 2006).

Additionally, Plaintiff maintains "because of conflicting affidavits and sworn pleadings in this case, the Fourth Circuit Court of Appeals has held that summary judgment is precluded under these circumstances." Obj. at 3. Plaintiff's sworn assertion in response to Defendants' properly supported dispostive motion is "[t]hat I attempted to file an administrative grievance on the matter but all efforts were frustrated." Decl. of Edwin Cruz at ¶ 10 (ECF No. 43-1).

The record reflects Plaintiff made a variety of attempts to exhaust administrative remedies with officials at FCI – Bennettsville, the Southeast Regional Office, and the Office of General Counsel relating to both conditions of the Special Housing Unit (SHU) and the alleged assault. *See generally* Attachs. to Compl. (ECF No. 1-2 at 4-6); Attachs. to Decl. of Tami Cassaro (ECF No. 36-3 at 7-18). However, a careful review of the record reveals Plaintiff's general and conclusory assertion that "all efforts were frustrated" fails to establish that prison officials were responsible for Plaintiff's failure to exhaust administrative remedies on these claims, as Plaintiff does not provide evidence of what specific "efforts" he undertook to properly exhaust administrative remedies on his *Bivens* claims.

1. BUREAU OF PRISONS ADMINISTRATIVE REMEDIES

As relevant to the discussions below, the United States Bureau of Prisons (BOP) has a three-tiered administrative grievance process. *See* 28 C.F.R. §§ 542.10, *et seq.* An inmate may first seek to informally resolve his complaint by filing Form BP-8, and if the matter cannot be resolved informally, the inmate must then file a formal written "Administrative Remedy Request" (Form BP-9) within twenty (20) calendar days following the date on which the basis for the complaint occurred. 28 C.F.R. §§ 542.13, 542.14(a). If the inmate is dissatisfied with the response he receives on the BP-9, he may appeal the decision to the Regional Director within twenty (20) calendar days of the date of the Warden's response by filing Form BP–10. 28 C.F.R. § 542.15. Finally, the inmate may appeal the decision of the Regional Director to the General Counsel within thirty (30) calendar days of the Regional Director's response by filing Form BP–11. *Id.*

All formal requests for administrative remedy are logged into a national database and given a unique identifying number. Decl. of Tami Cassaro (Cassaro) at ¶ 5 (ECF No. 36-3). As explained by Cassaro, Supervisory Attorney for the United States Bureau of Prisons,

> [a]n extension is added to the [initial unique identifying] number which denotes the level at which the claim is filed. Subsequent appeals of an issue will have the same identification number with a different extension identifying the level where filed. The extension '-F1' indicates the filing was at the institution or field level. The extension '-R1' indicates the filing was at the regional level. The extension '-A1' indicates the filing was at the national level. If an appeal is rejected and re-filed at the same level, perhaps correcting the identified deficiencies, then the number will change but the letter will remain the same. For example, the extension '-R2' indicates the appeal was rejected at the regional level once and the inmate has re-filed, presumably after correction of the noted deficiencies.

Id.

2. SHU CONDITIONS

Turning to the record, even assuming Administrative Remedy (hereinafter "AR") 662974-R1 was an appeal of AR 656985-F1 (and therefore should not have been assigned a separate identifying number by the Southeast Regional Office), Plaintiff did not appeal AR 662974-R1 to General Counsel. Instead, it appears Plaintiff attempted to comply with the directive contained in AR 662974-R1 by filing AR 665978-F1 with officials at FCI – Bennettsville. However, when provided the Warden's response to AR 665978-F1 indicating that the "allegations [contained in the BP-9] will be reviewed for appropriate disposition" but that Plaintiff would not receive "further information regarding the disposition," Plaintiff did not appeal that decision to the Southeast Regional Office, despite being provided explicit instructions regarding compliance (*i.e.*, the timing within which and where an appeal should be sent). Accordingly, Plaintiff did not properly exhaust his administrative remedies relating to conditions in the SHU.[4]

3. EXCESSIVE FORCE

As to the alleged use of excessive force, Plaintiff filed a BP-9 with officials at FCI – Bennettsville, which was assigned number AR 656983-F1. The Warden issued her decision, indicating that the "allegations [contained in the BP-9] will be reviewed for appropriate disposition" but that Plaintiff would not receive "further information regarding the disposition." Plaintiff filed an appeal of the Warden's decision with General Counsel, designated as AR 656983-A1, which was rejected with the notation that Plaintiff was required to file a BP-10 at the Southeast Regional Office

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[4]Instead of waiting for any decision by the Warden on AR 665978-F1, Plaintiff filed two BP-10's at the Southeast Regional Office, AR 669606-R1 and AR 670415-R1. Both of these BP-10's were rejected at the Regional level, and he did not appeal either of these decisions to General Counsel.

before filing with General Counsel. Plaintiff was given fifteen (15) days to correct this and other deficiencies with AR 656983-A1. Decl. of Tami Cassaro at ¶ 8 (ECF No. 36-3). Cassaro declares that Plaintiff "has not submitted such appeal to the Regional Office." *Id.* Review of the "Administrative Remedy Generalized Retrieval" attachment to Cassaro's declaration indicates, however, that Plaintiff filed AR 656983-R1 with the Southeast Regional Office on March 20, 2012.[5] *See* ECF No. 36-3 at 8. In any event, even though Plaintiff eventually filed with the Southeast Regional Office, he failed to comply with the time limits contained in General Counsel's decision in AR 656983-A1. Accordingly, Plaintiff failed to properly exhaust his administrative remedies relating to the alleged assault.

4. CONCLUSION – *BIVENS* CLAIMS

For these reasons, Plaintiff failed to exhaust administrative remedies regarding any *Bivens* claims he asserts, and they are therefore dismissed with prejudice.

B. FEDERAL TORT CLAIMS ACT (FTCA)

The Report concludes Plaintiff has exhausted his administrative remedies regarding his FTCA claims,[6] but that Defendants should be dismissed as "Plaintiff's conclusory statements are insufficient to establish that Defendants failed to discharge their legal duty of care to him." Report at 13 (ECF No. 54).

A plaintiff may recover against the United States only to the extent that it has expressly

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[5]The printout shows that the filing was received March 20, 2011. However, as the original Request for Administrative Remedy was not filed until September 20, 2011, this appears to be an error. *See* ECF No. 36-3 at 8.

[6]Plaintiff has failed to exhaust any claims regarding failure to train officers, and does not claim otherwise.

waived sovereign immunity. *Welch v. United States*, 409 F.3d 646, 650 (4th Cir. 2005) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Congress waived the sovereign immunity of the United States for certain torts committed by federal employees when it enacted the Federal Tort Claims Act (FTCA) in 1946. *Kerns v. United States*, 585 F.3d 187, 194 (4th Cir. 2009) (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)). However, the FTCA is a limited waiver of immunity, imposing tort liability on the United States only "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, and only to the extent that "a private person[ ] would be liable to the claimant in accordance with the law of the place where the act or omission occurred," *id.* § 1346(b)(1). In other words, a claimant "has an FTCA cause of action against the government only if [ ]he would also have a cause of action under state law against a private person in like circumstances." *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991).

The FTCA "serves to convey jurisdiction when the alleged breach of duty is tortious under state law, or when the Government has breached a duty under federal law that is analogous to a duty of care recognized by state law." *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 969 (4th Cir. 1992). Thus, the substantive law of each state establishes the cause of action. *Kerns*, 585 F.3d at 194; *Unus v. Kane*, 565 F.3d 103, 117 (4th Cir. 2009). In the case at bar, the substantive law is the decisional law of the state of South Carolina.

Unlike a *Bivens* action, which lies against the individual officers in their individual capacities only, an action under the FTCA is pursued against Defendant United States, not individual federal employees, so long as the employee was acting within the scope of employment. *See, e.g.*, 28 U.S.C. §§ 2671, 2679(a), (b)(1) (providing that FTCA does not authorize suits against federal agencies, and FTCA remedy is exclusive with respect to injuries caused by federal employees acting

within the scope of their employment); *Sheridan v. Reidell*, 465 F. Supp. 2d 528, 531 (D.S.C. 2006); *see also Jackson v. Kotter*, 541 F.3d 688, 693 (7th Cir. 2008) ("The only proper defendant in an FTCA action is the United States."); *Galvin v. Occupational Safety & Health Admin.*, 860 F.2d 181, 183 (5th Cir. 1988) ("Thus, an FTCA claim against a federal agency or employee as opposed to the United States itself must be dismissed for want of jurisdiction.").

The Federal Employee Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act amendment to the FTCA, provides that:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

See 28 U.S.C. § 2679(d)(1). "[I]mmunity under the Westfall Act, like other forms of absolute and qualified immunity, is an immunity from suit rather than a mere defense to liability." *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1154 (4th Cir. 1997).

However, "[f]or the Act to kick in, the employee must notify the Attorney General of the suit; the Attorney General must certify that the defendant employees were acting within the scope of their employment when the tort occurred; and, if he refuses to so certify, the employees themselves must petition the district court." *Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir. 1991 (citing 28 U.S.C. §§ 2679(c), (d)). No certification or petition has been filed in this case. Given the elaborate statutory procedures for notification, certification, and petition, the court is without sufficient information to "determine on its own initiative whether the suit is against a federal employee acting within the scope of his employment." *Id. See also U-Haul Intern., Inc. v. Estate of Albright*, 626 F.3d 498, 501 (9th Cir. 2010) ("The Westfall Act doesn't empower the district court

sua sponte to abrogate the federal government's sovereign immunity and subject it to the risk of liability.").

Accordingly, the court denies without prejudice Defendants' motion to dismiss Plaintiff's claims under the FTCA. As this matter is to be remanded for further pretrial proceedings, the court provides the following guidance to the Magistrate Judge and the parties.

Defendants' motion and the Report analyze Plaintiff's claims as if the only tort claim asserted in the complaint is a negligence claim. *See* Report at 12-13. But Plaintiff asserts claims against the United States, Jones, and Robinson under the FTCA for "assault and battery, failure to protect, failure to provide adequate medical care, and negligence . . . ." Compl. at ¶ 4. In the end, a review of the record must focus on the conduct which gave rise to Plaintiff's claims. *Benavidez v. United States*, 177 F.3d 927, 931 (10th Cir. 1999).

Additionally, the Report finds "Plaintiff's conclusory statements are insufficient to establish that Defendant[ ] failed to discharge [its] legal duty of care to him." Report at 13. In so doing, the Report errs in making a credibility determination against Plaintiff, the non-moving party. "It is not [this court's] job to weigh the evidence." *Gary v. Spillman*, 925 F.2d 90, 95 (4th Cir. 1991). This court "must view the facts, and all reasonable inferences that may be drawn from those facts, in the light most favorable to the non-moving party." *Meyers v. Baltimore Cnty., Md.*, 713 F.3d 723, 730 (4th Cir. 2013). The parties present conflicting affidavits and declarations, submitted under penalty of perjury, regarding the events of August 15, 2011. Additionally, Plaintiff's medical records, although not completely supportive of Plaintiff's damages claim, are some additional evidence supporting Plaintiff's version of events. When presented with conflicting versions of the facts, the court cannot make a determination of the facts without passing judgment on the credibility of

witnesses and other evidence. *See Davis v. Zahradnick*, 600 F.2d 458, 460 (4th Cir. 1979) (holding that summary judgment is not appropriate if the resolution of material issues depends upon credibility determinations).

If certification is filed pursuant to § 2679(d) that Defendants Jones and Robinson were acting within the scope of employment, Defendant United States would become the sole defendant in this matter. If, however, it is determined that Defendants Jones and Robinson were not acting within the scope of employment, Defendant United States would be dismissed and Plaintiff's remaining state law claims against Jones and Robinson would proceed in this court only if there is an independent basis for federal jurisdiction or this court exercises supplemental jurisdiction pursuant to 28 U.S.C. § 1367(d).

This matter is remanded to the Magistrate Judge for further pretrial proceedings consistent with this order relating to Plaintiff's claims under the FTCA.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON McGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
September 13, 2013

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Edwin Cruz, Plaintiff, v. United States of America, Lt. Jones, Officer Robinson, Defendants.	)	C/A No. 5:12-2149-RMG-KDW ORDER (Notice to Plaintiff Regarding Substitution of USA for Defendants Jones and Robinson)

Plaintiff, a pro se prisoner, brought this action alleging claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 1346 and 28 U.S.C. § 2671, *et seq.* In a September 13, 2013 Order, the court granted Defendants' Motion to Dismiss as to Plaintiff's *Bivens* claims, but denied without prejudice Defendants' Motion to Dismiss Plaintiff's FTCA claims because the record did not contain sufficient information from Defendant United States of America ("USA") regarding whether Defendants Lt. Jones and Officer Robinson were acting within the scope of their federal employment for purposes of the FTCA claims. ECF No. 73.

Defendant USA's Motion for Substitution of Party:
Explanation and Instruction to Plaintiff

On September 27, 2013, Defendant USA filed a Motion for Substitution of Party ("Motion"), in which it seeks to have itself substituted as the only Defendant in the place of named Defendants Jones and Robinson. Defendant USA's requested relief includes having the court dismiss Jones and Robinson as defendants. ECF No. 77. Attached to the Motion is the Certification of Scope of Employment filed pursuant to 28 U.S.C. § 2679(d)(1) ("Certification"), in which the Attorney General of the United States, through the United States Attorney for the District of South Carolina, certifies that Defendants Jones and Robinson "were at all times relevant acting within the scope of their employment as employees of the Department of Justice, Federal Bureau of Prisons." Certification 1, ECF No. 77-1. Defendant USA served Plaintiff with a copy of the Motion and the Certification by United States Mail. *See* Mot. 4, ECF No. 77.

When considering a certification such as the one filed by Defendant USA herein, the FTCA provides the following instruction to the court:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such

> claim in a United States district court *shall* be deemed an action against the United States under the provisions of this title and all references thereto, and the United States *shall be substituted* as the party defendant.

28 U.S.C. § 2679(d)(1) (emphasis added). As part of this substitution process, the court is to dismiss individually named defendants who are certified to have been acting within the scope of employment. In other words, because Defendant USA has certified Jones and Robinson were acting within the scope of their federal employment, if the court accepts the certification and grants the Motion, Defendant USA alone will become the proper Defendant for Plaintiff's FTCA claims. Despite the mandatory language of § 2679(d)(1) ("district court shall . . ."), the United States Supreme Court has held that substitution of the United States and dismissal of named individual employees is subject to judicial review. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430-31 (1995). In *Gutierrez*, the Court noted that certifications by the United States that its employee was acting within the scope of his or her employment ordinarily "occasion no contest[]" and plaintiffs then confront "a financially reliable defendant[,]" the United States." 515 U.S. at 422. However, the Court reviewed the FTCA's provisions and history and determined the district court was not required to accept the Attorney General's certification that an employee was acting within the scope of employment if opposing parties challenged the certification and argued the employees were not acting within the scope of employment at the relevant time. *Id.* at 434-37. Rather, the court may consider opposing arguments and determine whether to grant or deny a Motion for Substitution.

To Plaintiff:

Pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), Plaintiff is advised that Defendant USA's Motion for Substitution of Party, if granted, will dismiss Defendants Jones and Robinson as parties to this matter, substituting Defendant USA as the only Defendant as to the remaining claims raised in the Complaint.[1] If it is determined that Defendants Jones and Robinson were not acting within the scope of employment, the court would recommend Defendant USA's Motion for Substitution of Party be denied, thereby dismissing Defendant USA as a party, and this matter would proceed against Defendants Jones and Robinson in this court only if there is an independent basis for federal jurisdiction or the court exercises supplemental jurisdiction pursuant to 28 U.S.C. § 1367(d). *See* ECF No. 73.

If Plaintiff wishes to oppose Defendant USA's Motion for Substitution of Party and its Certification that Defendants Jones and Robinson were acting within the scope of their employment at all times pertinent to matters in Plaintiff's Complaint, he must do so within 34 days from the date of this Order (November 25, 2013). If Plaintiff fails to respond adequately, the court may grant Defendant USA's Motion. Only information relevant to whether Defendants Jones and Robinson were acting within the scope of their employment at times relevant will be considered.

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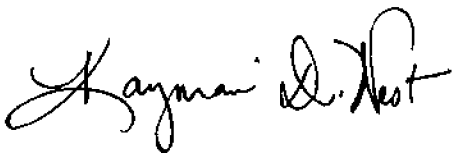
[1] In the court's September 13, 2013 Order, your other claims against Defendants Jones and Robinson were dismissed over your objections. ECF No. 73. Further, your claims against Officer Johnson were dismissed without prejudice because he was not served with the Complaint. *Id.* Those issues are no longer being considered by this court.

IT IS SO ORDERED.



October 22, 2013
Florence, South Carolina

Kaymani D. West
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Edwin Cruz, Plaintiff, v. United States of America, Lt. Jones, Officer Johnson, Officer Robinson, Defendants.	)	C/A No. 5:12-2149-CMC-KDW ORDER

Plaintiff, a pro se prisoner, brings this action alleging claims pursuant to the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 1346 and 28 U.S.C. § 2671, *et seq.*[1] This matter is before the court on Defendants' Motion for Substitution of party filed on September 27, 2013. ECF No. 77. Plaintiff filed an opposition to Defendants' motion on November 18, 2013, ECF No. 84, Defendants filed a reply to Plaintiff's response on December 2, 2013, ECF No. 87, and Plaintiff filed a sur-reply on December 27, 2013, ECF No. 88. Under Local Civil Rule 73.02(B)(2) of the United States District Court for the District of South Carolina, pretrial proceedings in this action have been referred to the assigned United States Magistrate Judge.

I. Factual Background

In his Complaint filed on August 1, 2012, Plaintiff alleges that while housed at the Federal prison at Bennettsville, South Carolina, he was assaulted by Defendant Jones on August 15, 2011, while handcuffed and in his cell, "while . . . [Defendant] Robinson remained standing outside the cell door." ECF No. 1 at 2-3. Plaintiff alleges he suffered a bruised rib cage, a

[1]Plaintiff's claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) were dismissed by the court on September 13, 2013. *See* ECF No. 73.

chipped tooth, lower back problems, and mental and emotional trauma for which he requested and received psychological help. *Id.* at 3. Plaintiff contends that the actions of Defendants Jones and Robinson constituted assault and battery, and negligence in violation of South Carolina common law. *Id.* at 3-4.[2] In response to these allegations, Defendant Jones attests that he moved Plaintiff to another cell on August 15, 2011, without incident and without any use of force. Jones Aff. ¶ 6, ECF No. 36-10. Jones states that Defendant Robinson, Officer Brock, and Officer Thompson witnessed the entire interaction. *Id.* Defendant Robinson attests that he helped Defendant Jones and two other officers escort Plaintiff, who was in hand restraints, to another cell. Robinson Aff. ¶ 4, ECF No. 39-1. Defendant Robinson attests that Defendant Jones remained alone in the cell to speak with Plaintiff and at no time did Defendant Jones hit or kick Plaintiff. *Id.*

II. Analysis

Defendant United States of America moves for the entry of an order substituting the United States as Defendant in this matter in the place of Defendants Jones and Robinson. ECF No. 77 at 1. United States Attorney, William N. Nettles, certifies pursuant to 28 U.S.C. § 2679(d)(1) and (2) that Defendants Jones and Robinson, employees of the Federal Bureau of Prisons ("BOP"), were acting within the scope of their employment at the time of the incident alleged in the Complaint. ECF No. 77-1.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, also known as the Westfall Act, "'accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.'" *Osborn v.*

[2] Plaintiff asserts the United States is liable under the FTCA for the unlawful actions of Defendants Jones and Robinson as they were acting within the scope of their employment. ECF No. 1 at 3-4.

Haley, 549 U.S. 225, 229 (2007). Under the Westfall Act, when a federal employee is named in a tort suit, the Attorney General or his designees may certify that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Id.* 229-30 (quotation omitted). Pursuant to § 2679(d) of Title 28 of the United States Code,

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). "However, when a certification decision is challenged . . . the appropriateness of substitution is subject to judicial review," *Lee v. U.S.*, 171 F. Supp. 2d 566, 573 (M.D.N.C. 2001), and the certification by the United States Attorney constitutes prima facie evidence that the employee was acting within the scope of his employment, *Berkeley-Dorchester Counties Econ. Dev. Corp. v. U.S. Dept. of Health and Human Serv.*, 395 F. Supp. 2d 317, 322 (D.S.C. 2005). To rebut the certification, "a plaintiff must 'alleg[e] sufficient facts that, taken as true, would establish that the defendant['s] actions exceeded the scope of [his] employment.'" *Wuterich v. Murtha*, 562 F.3d 375, 381 (D.C.Cir. 2009) (quotation omitted). To meet this burden, Plaintiff "must come forward with 'specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation.'" *Lee*, 171 F. Supp. 2d at 573. In determining whether Plaintiff has met his burden of rebutting the prima facie case, the district court may not simply defer to the certification decision, but must review the scope-of-employment question under a de novo standard. *Webb v. United States*, 24 F. Supp. 2d 608, 613 (W.D.Va. 1998).

The district court "must apply the law of the state in which the alleged tort occurred to ascertain whether the federal employee was acting within the scope of his employment." *Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000). In this matter, whether Defendants Jones and Robinson exceeded their scope of employment will be analyzed under the laws of South Carolina because that is where the events in the Complaint took place. Under South Carolina law, "[i]f the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." *Murphy v. Jefferson Pilot Communications Co.*, 613 S.E.2d 808, 812 (S.C. Ct. App. 2005); *see also Jamison v. Howard*, 247 S.E.2d 450, 451 (S.C. 1978) (holding that under South Carolina law, an act falls within the scope of employment even if the employee exceeded his or her authority and even if the employee acted contrary to the express orders of the employer); *South Carolina Budget & Control Bd. v. Prince*, 403 S.E.2d 643, 646-47 (S.C. 1991). Moreover, "if there is doubt as to whether a servant was acting within the scope of his employment, the doubt will be resolved against the master." *Prince*, 403 S.E.2d at 647.

Despite alleging in his Complaint Defendants Robinson and Jones were acting within the scope of their employment, Plaintiff objects to Defendants' Motion to Substitute and "asserts that all the defendants should be held individually and collectively responsible for violating Plaintiff's rights under Tort." ECF No. 85 at 2. More specifically, Plaintiff argues that Defendants Robinson and Jones acted outside their scope of employment when they:

> (1) Entered Plaintiff Cruz' cell in the SHU in violation of the policy;
>
> (2) Knowingly and willfully handcuffed Cruz and dragged him along the hallway to the side pocket cell;
>
> (3) Deliberately did not tape record the incident in violation of the policy to hide the proof of their wrong doings;

> (4) Assaulted Plaintiff along with other officers (while Plaintiff remained in handcuffs) until Plaintiff lost consciousness, broke his tooth, broke his ribs, and his, entire face, body and head were covered in bruises;
>
> (5) Left Plaintiff bleeding in the SHU cell and refused to permit any one to bring him the much needed medical care; and
>
> (6) Consistently stone walled Plaintiff's all efforts to seek redress of grievances through the Administrative Remedy process.

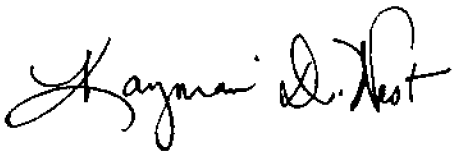
ECF No. 88 at 2-3.

Applying South Carolina law's decidedly broad view of acts in furtherance of the master's business, the relevant inquiry in this matter is whether Defendants Robinson and Jones were acting in furtherance of BOP business in their interactions with Plaintiff. After a thorough review of the record, the undersigned finds that the alleged assault on Plaintiff took place during work hours, on BOP premises, and when Defendants Robinson and Jones were acting within their authority as BOP correction officers. The undersigned further finds that Plaintiff has not offered any evidence, other than conclusory allegations, that Defendants Robinson and Jones' actions were motivated by personal considerations, and not work-related concerns. "Various courts have held that evidence of this type supports the conclusion that an employee was acting within the scope of his employment at the time of the alleged assaults." 171 F. Supp. 2d 566, 576. *See Wallen v. Domm*, 700 F.2d 124, 125-26 (4th Cir. 1983) (explaining that an assault by a supervisor, in a supervisor's office, was within the scope of the supervisor's employment, where the substance of the discussion was work-related); *Crittenden v. Thompson-Walker Comp., Inc.*, 341 S.E.2d 385, 387 (S.C. Ct. App. 1986) (finding an employee's assault to be within the scope of his employment because, among other factors, the employee's relationship with the injured party "arose solely from his position as [the employer's] employee.").

Accordingly, the undersigned finds that Plaintiff has failed to rebut the certification that Defendants Robinson and Jones were acting with the scope of their employment when the

alleged assault occurred, and therefore grants United States' motion, ECF No. 77, to be substituted as a Defendant in place of Defendants Robinson and Jones.

IT IS SO ORDERED.



February 21, 2014
Florence, South Carolina

Kaymani D. West
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Edwin Cruz, Plaintiff, v. United States of America, Defendant.	)	C/A No. 5:12-2149-RMG-KDW AMENDED SCHEDULING ORDER

Plaintiff, a pro se prisoner, brought this action alleging claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Federal Torts Claims Act ("FTCA"), 28 U.S.C. § 1346 and 28 U.S.C. § 2671, *et seq.* In a September 13, 2013 Order, the court granted Defendants' Motion to Dismiss as to Plaintiff's *Bivens* claims, but denied without prejudice Defendants' Motion to Dismiss Plaintiff's FTCA claims because the record did not contain sufficient information from Defendant United States of America ("USA") regarding whether Defendants Lt. Jones and Officer Robinson were acting within the scope of their federal employment for purposes of the FTCA claims. ECF No. 73. After considering the Motion of Defendant USA to substitute itself for Defendants Jones and Robinson, as well as Plaintiff's response and the parties' replies, ECF Nos. 77, 84-88, the court granted the Motion to Substitute, ECF No. 89. Remaining before the court are Plaintiff's FTCA claims against Defendant USA.

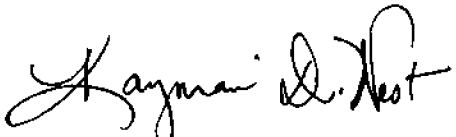
Previously, the court had granted Defendants' Motion to Stay Discovery, ECF No. 50, and denied Plaintiff's Motion to Compel, ECF No. 48, without prejudice and with leave to refile, pending the court's ruling on Defendants' Motion to Dismiss. *See* Docket Text Order, ECF No. 52. As orders have been entered regarding Defendants' Motion to Dismiss and Motion to Substitute, the court establishes the following abbreviated amended schedule as to the claims and parties now remaining in this case:

1. Discovery shall be completed no later than **June 13, 2014**. All discovery requests shall be served in time for the responses thereto to be served by this date.

2. All other motions, except those to complete discovery and those nonwaivable motions made pursuant to Federal Rule of Civil Procedure 12, shall be filed on or before **June 30, 2014**. Fed. R. Civ. P. 16(b)(2).

No extensions to these deadlines will be granted.

IT IS SO ORDERED.



April 23, 2014
Florence, South Carolina

Kaymani D. West
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Edwin Cruz, Plaintiff, vs. United States of America, Defendants.	)	C/A No.: 5:12-cv-2149-RMG-KDW *Roseboro* Order to Plaintiff

One or more defendants filed a motion to dismiss (pursuant to Fed. R. Civ. P. 12) or a motion for summary judgment (pursuant to Fed. R. Civ. P. 56) asking the court to dismiss your case. Because you are not represented by counsel, this "*Roseboro* Order"[1] is issued to advise you of the dismissal/summary judgment procedures and the possible consequences if you fail to respond adequately to defendant's motion. Please carefully review this information, including the attached excerpts of the Federal Rules of Civil Procedure regarding motions to dismiss and motions for summary judgment.

You have 34 days from the date of this order to file any material in opposition to the motion that defendant filed. If you fail to respond adequately, the court may grant the defendant's motion, which may end your case.

Explanation of Motions to Dismiss

Motions to dismiss can be filed pursuant to Fed. R. Civ. P. 12. Many motions to dismiss are filed under Fed. R. Civ. P. 12(b)(6), in which defendants usually argue that the law does not provide a right to relief for claims that a plaintiff makes in his complaint. Because motions to dismiss usually concern questions of law and not questions of fact, the court presumes as true the plausible facts of the complaint for the purpose of a motion to dismiss.

The court decides a motion to dismiss on the basis of the applicable law and the pleadings, meaning the complaint, defendant's answer (if any), the exhibits attached to the complaint, documents that the complaint incorporates by reference (provided they are both undisputed and pertinent to the pleaded claims), and materials of which the court may take judicial notice. In some cases, the parties present materials outside of the pleadings, such as affidavits or declarations in support of or in opposition to the motion to dismiss. If the court, in its discretion, considers materials outside of the pleadings, the motion to dismiss is converted to a motion for summary judgment under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 56(d).

[1]The court enters this order in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975) (requiring the court provide explanation of dismissal/summary judgment procedures to pro se litigants).

Explanation of Motions for Summary Judgment

Motions for summary judgment filed by defendants pursuant to Fed. R. Civ. P. 56 argue that the plaintiff's claims are not supported by the specific facts of the case. For example, in a civil rights case brought under 42 U.S.C. § 1983, a defendant may argue in a motion for summary judgment that the facts in the plaintiff's case do not rise to the level of a constitutional violation that would entitle him to relief. Because motions for summary judgment concern both questions of law and questions of fact, if the court finds that there is not any genuine dispute as to any material fact on a claim, the court will determine which party is entitled to judgment under the law. The court decides a motion for summary judgment on the basis of the applicable law, the pleadings, discovery, affidavits, declarations, and any other properly-submitted evidence.

Your Response to the Defendant's Motion

Your filing in opposition to the defendant's motion should be captioned either as "Response to Motion to Dismiss" or "Response to Summary Judgment," as applicable, and should include the following: (1) an explanation of your version of the facts, if different from defendant's version of the facts; and (2) your legal argument regarding why the court should not grant the motion and end your case. Rule 56(c) requires that you support your version of all disputed facts with material such as depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Your failure to support facts in dispute with such material may result in the court granting the motion. Any affidavits or declarations you file in opposition to summary judgment must be based on personal knowledge, contain facts admissible in evidence, and be signed by a person who would be competent to testify on matters contained in the affidavit or declaration if called to testify about them at trial. The court will not consider affidavits, declarations, or exhibits that are unrelated to this case, nor will it consider affidavits or declarations that contain only conclusory statements or argument of facts or law. If you fail to dispute the defendant's version of the facts with proper support of your own version, the court may consider the defendant's facts as undisputed.

All affidavits, declarations, or other evidence you submit to the court must be made in good faith and the facts sworn to in the affidavit or affirmed in the declaration must be true. All affidavits and declarations submitted in this case are submitted under penalties of perjury or subornation of perjury. 18 U.S.C. §§ 1621 and 1622. If the court finds that a party has presented affidavits, declarations, or other evidence in bad faith or only to delay the action, the court may order sanctions, payment of fees, or hold that party in contempt of court.

IT IS SO ORDERED.

July 1, 2014
Florence, South Carolina

s/Kaymani D. West
United States Magistrate Judge

EXCERPTS OF FEDERAL RULES OF CIVIL PROCEDURE
Rule 12 and Rule 56 (effective December 1, 2010)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions, Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading. [OMITTED]

...

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) **Joining Motions.**

(1) **Right to Join**. A motion under this rule may be joined with any other motion allowed by this rule.

(2) **Limitation on Further Motions.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) **Waiving and Preserving Certain Defenses.**

(1) **When Some Are Waived**. A party waives any defense listed in Rule 12(b)(2)-(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) **When to Raise Others**. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) **Lack of Subject-Matter Jurisdiction**. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) **Hearing Before Trial**. If a party so moves, any defense listed in Rule 12(b)(1)-(7)--whether made in a pleading or by motion--and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 56. Summary Judgment

(a) **Motion for Summary Judgment or Partial Summary Judgment**. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) **Procedures.**

(1) **Supporting Factual Positions**. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;
(2) allow time to obtain affidavits or declarations or to take discovery; or
(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;
(2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or
(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or
(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

From: <SCDEfilingstat@scd.uscourts.gov>
To: <scd_ecf_nef@scd.uscourts.gov>
Date: 7/2/2014 2:20 PM
Subject: Activity in Case 5:12-cv-02149-RMG-KDW Cruz v. Bureau of Prisons et al Order

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

RECEIVED
2014 OCT 15 P 1:48

EDWIN CRUZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 5:12-cv-2149-RMG

ORDER

This matter comes before the Court on the Report and Recommendation (R & R) of the Magistrate Judge (Dkt. No. 111), recommending that Defendant's Motion for Summary Judgment (Dkt. No. 101) be granted in part and denied in part.

I. Background

Plaintiff, a federal prisoner, filed this Complaint in August of 2012, alleging claims under the Federal Tort Claims Act (FTCA) and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (*See* Dkt. No. 1). In September of 2013, Defendant "Lt. Johnson" was dismissed without prejudice because he had not been served and had not appeared in the action, and Plaintiff's *Bivens* claims were dismissed with prejudice for failure to exhaust administrative remedies. (Dkt. No. 73). Thus, only Plaintiff's FTCA claims remain. In February of 2014, the United States was substituted for the remaining individual defendants. (Dkt. No. 89).

Defendant filed a Motion for Summary Judgment on all of Plaintiff's FTCA claims. (Dkt. No. 101). The Magistrate Judge recommended (1) granting summary judgment as to Plaintiff's failure to train staff and failure to follow procedure claims for failure to exhaust

administrative remedies; (2) granting summary judgment as to Plaintiff's negligence claims for failure to photograph injuries, unsanitary prison conditions, and medical negligence; and (3) denying summary judgment as to Plaintiff's assault and battery and failure to protect claims. (Dkt. No. 111). Neither party filed objections to the R & R.

II. Discussion

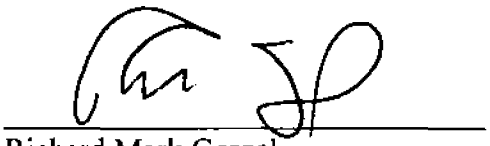
The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). This Court is charged with making a de novo determination of those portions of the R & R to which specific objection is made.

Here, however, because no objection has been made, this Court "must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P 72 advisory committee note). Moreover, in the absence of specific objections to the R&R, the Court need not give any explanation for adopting the Magistrate Judge's analysis and recommendation. *See Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983).

The Court has carefully reviewed the pleadings, the parties' briefing, and the R & R, and concludes that the Magistrate Judge correctly applied the relevant law to the operative facts in this matter. The Court, therefore, ADOPTS the Magistrate Judge's Report and Recommendation, (Dkt. No. 111), as the order of this Court. Accordingly, Defendant's Motion for Summary Judgment (Dkt. No. 101) is **GRANTED IN PART** and **DENIED IN PART**. The

Court DENIES summary judgment as to Plaintiff's claims for assault and battery and failure to protect and GRANTS summary judgment as to the remainder of Plaintiff's FTCA claims.

IT IS SO ORDERED.



Richard Mark Gergel
United States District Judge

October 15, 2014
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

RECEIVED
USDC. CLERK CHARLESTON, SC

2014 OCT 15 P 1:48

Edwin Cruz,

Plaintiff,

vs.

United States of America,

Defendant.

Civil Action No. 5:12-cv-2149-RMG-KDW

ORDER

This action was filed by Plaintiff *pro se* against Defendant United States of America under the Federal Tort Claims Act. The Court recently granted in part and denied in part Defendant's motion for summary judgment. In reviewing Plaintiff's remaining claims, it appears to the Court that this *pro se* litigant has colorable claims but lacks the capacity to properly present such claims at a trial in this matter. *Zuniga v. Effler*, 2012 WL 2354464 (4th Cir. 2012). In such a circumstance, the Court has the discretion to appoint counsel for the *pro se* litigant if the party is unable to afford counsel. 28 U.S.C. § 1915(e)(1). The Court finds that appointment of counsel is proper in these circumstances and hereby appoints Cory Manning and Jarrett Coco of the Richland County Bar as counsel for Plaintiff.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court

October 15, 2014
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Edwin Cruz,	)	C/A No.: 5:12-cv-02149
	)	
Plaintiffs,	)	
	)	SCHEDULING ORDER
v.	)	
	)	Judge Richard Mark Gergel
United States of America.	)	
	)	
Defendant.	)	

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following schedule is established for this case. This order is entered to administer the trial of cases in a manner consistent with the ends of justice, in the shortest possible time, and at the least possible cost to litigants.

1. Motions in Limine: Motions in limine must be filed no later than **March 1, 2015**.

2. Pretrial Disclosures: No later than twenty-one (21) days prior to jury selection the parties shall file and exchange Fed. R. Civ. P. 26(a)(3) pretrial disclosures. Within fourteen (14) days thereafter, a party shall file and exchange Fed. R. Civ. P. 26(a)(3) objections, any objections to use of a deposition designated by another party and any deposition counter-designations under Fed. R. Civ. P. 32(a)(4).

3. Pretrial Briefs: Parties shall furnish the Court and serve pretrial briefs five (5) business days prior to the date set for jury selection (Local Civil Rule 26.05). Attorneys shall meet at least five (5) business days prior to the date set for submission of pretrial briefs for the purpose of exchanging and marking all exhibits. See Local Civil Rule 26.07.

4. Trial: This case is subject to being called for jury selection and/or trial on or after **April 1, 2015**.

The parties' attention is directed to the Special Instructions for Cases Before Judge Richard Mark Gergel available on the District Court's website at www.scd.uscourts.gov.

October 24, 2014
Charleston, South Carolina

Richard Mark Gergel
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Edwin Cruz,	)	Civil Action No. 5:12-cv-02149-RMG
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
United States of America,	)	
	)	
Defendant.	)	

PROTECTIVE ORDER

Upon consent of the parties, IT IS HEREBY ORDERED THAT:

1. Information relating to the law enforcement and security activities of the Bureau of Prisons ("BOP") has been identified by the United States (hereinafter "government") as sensitive and confidential law enforcement information regarding the policies, methods, techniques, procedures, guidelines and intelligence for BOP operations. If disseminated, individuals who have access to the information might use it to undermine the efforts of BOP to enforce the government's obligations to provide a safe and secure environment for prisoners.

2. It is in the public interest to protect against any risk of circumvention of law that might result from disclosure of sensitive and confidential law enforcement information as described in this Order.

3. Therefore, in order to protect against the disclosure of sensitive and confidential law enforcement, investigatory, and official information, while at the same time, observing the requirements of Rule 26 of the Federal Rules of Civil Procedure and the Constitution, and to permit the parties to discover and, if otherwise admissible, make reasonable use at trial and other

matters in this litigation, information relevant to the subject matter of this case, it is hereby ordered as follows:

ORDER

4. During discovery in this case, Plaintiff has requested production of documents, records, and other information that may involve the disclosure of the government's sensitive and confidential law enforcement information regarding the policies, methods, techniques, procedures, guidelines, and intelligence for BOP operations, specifically the Office of Internal Affairs ("OIA") report of its investigation. This document details the policies, methods, techniques, procedures, guidelines, and intelligence for BOP operations and thus constitutes sensitive and confidential law enforcement, investigatory, and official information. Accordingly, this Order is entered for the purpose of protecting against improper disclosure of the OIA report.

5. This Order shall govern the disclosure of the protected documents about the government's policies, methods, techniques, procedures, guidelines, and intelligence for BOP operations. For purposes of this Order, such protected documents and deposition testimony will be deemed "sensitive" and "confidential" for purposes of this case and any appeals.

6. The government shall designate the documents that fall under the category of protected documents covered by this Order by marking each page of such document "Do Not Release This Document to an Inmate."

7. Disclosure of the protected documents and information shall be subject to the following conditions:

a. Disclosure to Plaintiff. The attorneys of record for the Plaintiff, Edward Cruz ("Plaintiff's Counsel"), and employees of the Nelson Mullins Law Firm who have a need to

review the information in order to assist in the preparation of the Plaintiff's case, may be permitted to see copies of the protected documents covered by this Order. The OIA Report may be shown to Plaintiff Cruz, but he may not possess or retain a copy of the protected document as it may impact prison security or a person's safety.

b. Any expert witnesses formally retained and designated by the parties as experts regarding policies, methods, techniques, procedures, guidelines and intelligence for BOP operations may be permitted to see the protected documents covered by this Order, provided such experts have first executed the written statement set forth in section 7.d below, and comply with the provisions of that section. However, the Plaintiff himself is not permitted to retain copies of the protected documents as stated in section 7.c (Limitations on Further Disclosure.). Plaintiff's Counsel shall use the protected documents and information solely for the purposes of this litigation and no other.

c. Limitation on Further Disclosure. Plaintiff's Counsel shall not make any disclosure of the protected documents or protected information, including the contents thereof or any information derived from the protected documents or protected information, except as allowed by this Order.

d. Applicability of Order to Other Persons. No person to whom disclosure of protected information or protected documents is made pursuant to this Order (or the contents thereof) shall make disclosure of such matters to any other person unless the disclosure is reasonably and in good faith calculated to aid in the preparation of trial of this specific legal action and no other. Plaintiff's Counsel shall ensure that any other person to whom disclosure

may be made pursuant to this Order shall, prior to such disclosure, have read, understood, and acknowledged in writing his or her agreement to be bound by this Order as follows:

> **I, _____, declare under penalty that I have read and understand the terms of this Order issued by the United States District Court on February_____, 2015. I understand that this Order remains in effect during and after conclusion of this litigation, and I agree to be bound by it. I understand that I may be subject to penalties for contempt of Court if I violate this Order.**
>
> **Dated: _____**

This written requirement applies, but is not limited, to paralegals, secretaries, expert witnesses, and other individuals and entities who may be employed or retained by Plaintiff's Counsel to assist in the preparation or trial of this specific legal action and no other. Plaintiff's Counsel shall be responsible for maintaining the signed original of each such written statement until the conclusion of these proceedings, including any appeal, and shall produce such written statements to the government for inspection upon demand.

e. Storage of Protected Documents. The protected documents and protected information shall not, under any circumstances, be left in an open or unsecured location where unauthorized persons (such as unauthorized employees of counsel, cleaning personnel, etc.) might have an opportunity to read them.

f. Limitations on Non-Litigation Use of Information. The sole purpose for which the protected information and protected documents are being disclosed to Plaintiff's Counsel is to allow them to prepare and litigate this specific legal action, and no other. Plaintiff's Counsel may not use such protected information or protected documents (or the contents thereof) for any other purpose, including use as background material, or for inclusion in

books, magazines, newspapers, or other publications. Plaintiff's Counsel are specifically prohibited from placing any of the protected information or protected documents (or the contents thereof) on the Internet.

SO ORDERED, this 19 day of February 2015.

RICHARD M. GERGEL
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Edwin Cruz,	) Civil Action No. 5:12-02149-RMG
	)
Plaintiff,	)
	)
v.	)
	)
United States of America,	)
	)
Defendant.	)

AMENDED SCHEDULING ORDER

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of this Court, the Scheduling Order in this case (ECF No. 120) is hereby amended as follows:

1. Motions in Limine: Motions in limine must be filed no later than **June 30**, 2015.

2. Pretrial Disclosures: No later than twenty-one (21) days prior to jury selection the parties shall file and exchange Fed. R. Civ. P. 26(a)(3) pretrial disclosures. Within fourteen (14) days thereafter, a party shall file and exchange Fed. R. Civ. P. 26(a)(3) objections, any objections to use of a deposition designated by another party and any deposition counterdesignations under Fed. R. Civ. P. 32(a)(4).

3. Pretrial Briefs: Parties shall furnish the Court and serve pretrial briefs five (5) business days prior to the date set for jury selection (Local Civil Rule 26.05). Attorneys shall meet at least five (5) business days prior to the date set for submission of pretrial briefs for the purpose of exchanging and marking all exhibits. See Local Civil Rule 26.07.

4. Trial: This case is subject to being called for jury selection *and/or* trial on or after **July 1, 2015**.

RICHARD M. GERGEL
U.S. DISTRICT JUDGE

March 5, 2015
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ORANGEBURG DIVISION

Edwin Cruz,	)	Civil Action No. 5:12-cv-02149-RMG
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
United States of America,	)	
	)	
Defendant.	)	

The court, having been advised by counsel that the parties have settled, hereby orders that this action be dismissed without costs and without prejudice. If settlement is not consummated within a reasonable time, either party may, within 60 days, petition the court to reopen the action and restore it to the calendar. *See* Fed. R. Civ. P. 60(b)(6). In the alternative, to the extent permitted by law, either party may, within 60 days, petition the court to enforce the settlement. *Fairfax Countywide Citizens v. Fairfax Cnty.*, 571 F.2d 1299 (4th Cir. 1978).

The dismissal hereunder shall be *with prejudice* if no action is taken under either alternative within 60 days from the filing date of this order.

IT IS SO ORDERED.

Richard Mark Gergel
United States District Judge

May 21, 2015
Charleston, South Carolina

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0844 of 1341

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Page 0846 of 1341

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Page 0858 of 1341

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of the Freedom of Information and Privacy Act

U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

February 28, 2015

ADMINISTRATIVE APPEAL REMAND MEMORANDUM

TO: **Eugene Baime**
Supervisory Attorney-Advisor
FOIA/PA Section
Office of General Counsel
Federal Bureau of Prisons

FROM: **Melanie Ann Pustay**
Director

Sean R. O'Neill
Chief, Administrative Appeals Staff

SUBJECT: **Instructions for Processing Administrative Appeal Following Remand**

Request No. 2014-07650	Requester's Name: Lonnie Davis
Appeal No. AP-2015-00217	Subject of Request: Copies of administrative remedies with responses dated 2014 concerning mail complaints

The administrative appeal referenced above has been remanded by this Office to BOP for further processing. At this time, please reopen this file and perform the following actions, subject to any applicable fees:

1. Please perform a search for records responsive to that aspect of the request seeking records concerning certain administrative remedies regarding mail complaints;

2. Please process all responsive records located subsequent to the appeal; and

3. Please send any and all releasable records to the requester directly, subject to any fees.

The OIP attorney reviewing this administrative appeal coordinated this action through Fernando Blanco of the FOIA Section. If you have any further questions concerning this action, please do not hesitate to contact Jessica Farace at 202-305-0705.

REGNO: 14880-057 NAME: DAVIS, LONNIE
RSP OF...: MEM UNT/LOC/DST: BEALE QTR.: Z05-110UDS RCV OFC: SER
REMEDY ID: 672836-R1 SUB1: 25FM SUB2: DATE RCV: 01-30-2012
UNT RCV..:E/F QTR RCV.: E02-219U FACL RCV: COP
UNT ORG..:E/F QTR ORG.: E02-219U FACL ORG: COP
EVT FACL.: MCR ACC LEV: RESP DUE:
ABSTRACT.: REQUEST COMMISSARY RECEIPTS FR 10/09-03/11
STATUS DT: 02-10-2012 STATUS CODE: REJ STATUS REASON: UTF
INCRPTNO.: RCT: EXT: DATE ENTD: 02-10-2012
REMARKS..:

REGNO: 14880-057 NAME: DAVIS, LONNIE
RSP OF...: MEM UNT/LOC/DST: BEALE QTR.: Z05-110UDS RCV OFC: COP
REMEDY ID: 674972-F1 SUB1: 13BM SUB2: DATE RCV: 02-06-2012
UNT RCV..:E/F QTR RCV.: E02-219U FACL RCV: COP
UNT ORG..:E/F QTR ORG.: E02-219U FACL ORG: COP
EVT FACL.: COP ACC LEV: COP 1 RESP DUE: SUN 02-26-2012
ABSTRACT.: ALLEGES CUSTODY CLASSIFICATION POINTS INACCURATE
STATUS DT: 02-08-2012 STATUS CODE: CLO STATUS REASON: WDN
INCRPTNO.: RCT: P EXT: DATE ENTD: 02-06-2012
REMARKS..:

G0002 MORE PAGES TO FOLLOW . . .

U.S. Department of Justice
Federal Bureau of Prisons

Freedom of Information/Privacy Act *Southeast Regional Office*

March 2, 2015

Coleman Johnson
Reg. No. 51933-083
Federal Correctional Institution
P.O. Box 725
Edgefield, South Carolina 29824

Dear Mr. Johnson:

The Federal Bureau of Prisons is in receipt of your Freedom of Information Act/Privacy Act (FOIA) request. Your request has been assigned a number and forwarded to the processing office noted below. Please make a note of the request number and processing office as you will need to include it in any correspondence or inquiry regarding your request.

FOIA/PA Request Number: 2015-03198
Processing Office: SER
Requested Records: 1) Document reflecting Edgefield Employee's qualified to act as Duty Officer on October 19, 2014; 2) Copy of the BP-A 583.055 that was filed detailing the incident that caused the institution to be temporarily locked down on October 19, 2014; 3) Document reflecting the name of the FCI Edgefield Duty Officer Coordinator on October 19, 2014

Due to the large number of requests received by the Bureau of Prisons for disclosure of records pursuant to the Freedom of Information and Privacy Acts, and due to the limited resources available to process such requests, the Bureau of Prisons has adopted a first-in/first-out practice of processing all incoming requests.

Your request has been placed in chronological order based on the date of receipt and will be handled as expeditiously as possible when it is assigned for processing. While most requests can be processed within 20 working days, exceptions may exist.

Unless you indicated otherwise, by submission of your request, you have agreed to pay fees up to $25.00, as stated in 28 C.F.R. 16.3(c). Please note that pursuant to 28 C.F.R. 16.11, we are required to charge fees for time spent searching for or duplicating responsive documents. If we anticipate that your fees will be in excess of $25.00 or the amount you have indicated you are willing to pay, we will notify you of the estimated amount. At that time, you will have the option of modifying your request to reduce fees.

If you have questions regarding the status of your request, you may contact the SER at 803-637-1454. You can also check the status of your request on line at http://www.bop.gov/PublicInfo/execute/foia.

SERO EDG 02-10-15

F.O.I.A. Central Office - BOP
320 1st. Street N.W.
Washington, DC 20534

Received
FEB 19 2015
FOIA/PA Section
Federal Bureau of Prisons

Re: F.O.I.A. Request

Dear F.O.I.A. Clerk,

This is a request made pursuant to the Freedom of Information Act, Title 5, United States Code, Section 552(a), in conjunction with the Privacy Act. The following information regarding the Edgefield FCI institution, as of October 19, 2014, is requested:

1) Which Edgefield officers were qualified to act and/or be placed in the position of DUTY OFFICER and trained in accordance to P5502.10, on the date of 10-19-14?

2) I am requesting also a copy of the BP-A 583.055 that was filed, detailing the incident that caused the institution to temporarily be locked down on 10-19-14?

3) Also requested is the name of the Edgefield Duty Officer Coordinator that held such position on 10-19-14.

Thank you for your cooperation and please know that I agree to pay up to a maximum of $20 without any additional approval. However, I strongly request a fee waiver because this is primarily a request for only myself - an individual requestor. As provided in the Frredom of Information Act, I

will expect to receive a reply within (20) working days.

Sincerely,

Coleman Leake Johnson, Jr. 51933-083

Edgefield Federal Correctional Institution

P.O. Box 725

Edgffield, SC. 29824-0725

Miles Mediation & Arbitration Services, LLC

SETTLEMENT MEMORANDUM

The case of Mandaris Ellington v USA

was mediated on this 5 *day of* November *2013 and the parties have agreed as follows:*

1. Defendant(s) USA has agreed to pay, and Plaintiff(s) Mandaris Ellington has agreed to accept the sum of $ 50,000, on full & final settlement of this claim.

2. Upon payment of settlement proceeds, Claimants agree to:
   - Dismiss this case with prejudice, and
   - Execute a general release &indemnification agreement.

3. Plaintiff(s) agree to satisfy any & all outstanding liens related to their respective causes of action.

Additional Terms: _____

This memorandum contains all the essential elements of the terms and conditions of the settlement of this case. This is only intended as a written memorandum of a binding Settlement Agreement resolving all claims arising from the above legal dispute. The formal settlement documents will be prepared and executed by all parties as soon as possible.

Plaintiff(s)	Date	Defendant(s)	Date
	11-5-13		5 NOV. 2013

Neutral's Signature: _____

Would you be willing to be contacted regarding entering your case in the CaseMetrix database?
Pl Counsel - Yes_____ No_____ Def Counsel - Yes_____ No_____

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

AUG 28 2012

JAMES N. HATTEN, Clerk
By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MANDARIS ELLINGTON,	:	
	:	**CIVIL ACTION**
Plaintiff,	:	**FILE NO.** 1:12-CV-2979
vs.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendants.	:	

COMPLAINT FOR DAMAGES

COMES NOW Plaintiff MANDARIS ELLINGTON and files this Complaint for Malpractice Damages respectfully showing this Honorable Court the following:

PARTIES & JURISDICTION

1.

This Honorable Court has jurisdiction pursuant to 28 U.S.C. §§ 1346(b) and 2671, et seq., as this in an action for damages resulting from personal injuries caused by the negligent act of an employee of Defendant United States of America ("Defendant Government") while acting within the scope of his or her employment. Venue is proper in this Court under 28 U.S.C. § 1391 because it is the judicial district

in which a substantial part of the events or omissions giving rise to the claim occurred.

2.

Attached and incorporated by reference as Exhibit "A" is the affidavit of Jerry Ballentine, D.O., who is qualified as an expert witness on the issues raised in this Complaint. Said affidavit specifies at least one negligent act or omission on the part of the defendants and the factual basis that underlies the negligent acts or omissions that resulted in injuries to Mandaris Ellington ("Mr. Ellington").

3.

Upon good information and belief, the Federal Bureau of Prisons ("BOP") is a division of the Department of Justice and an agency of Defendant Government and whose purpose is to confine prisoners in controlled environments, which includes providing health care services to prisoners. Upon good information and belief, the United States Penitentiary in Atlanta, Georgia ("Atlanta USP") is operated by BOP and houses medium security male inmates in the Atlanta, Georgia, area. Upon good information and belief, Atlanta USP provides health care services to prisoners through Health Services. Atlanta USP is located at 601 McDonough Blvd, S.E., Atlanta, Fulton County, Georgia, 30315. Therefore, Defendant Government is subject to the jurisdiction and venue of this Court. Upon good information and belief,

Defendant Government is not required to file a registered agent and county of agent with the Georgia Secretary of State. Upon good information and belief, Defendant Government can be served at the The United States Attorney's Office, Richard B. Russell Federal Building, 75 Spring Street, S.W., Suite 600, Atlanta, Georgia 30303.

4.

Upon good information and belief, this case is subject to the Federal Tort Claims Act under which Mr. Ellington has filed the appropriate forms and provided appropriate notice and is now filing suit against Defendant Government for the negligence of the Atlanta USP and their staff physicians, physician assistants, nurse practitioners, and any other health care providers responsible for evaluating, examining, and treating him at the Atlanta USP for his injuries, including infection, following an altercation with another inmate. Mr. Ellington's Form 95 filed in accordance with the Federal Tort Claims Act is attached as Exhibit "C." Attached as Exhibit "D" is BOP's denial of Mr. Ellington's claim.

5.

Upon good information and belief, at the time of the events outlined in this Complaint, Leonor Bonnet-Engebretsen, M.D., and any and all nurses, technicians, and other personnel at Atlanta USP who participated in evaluating, examining, and

treating Mr. Ellington between approximately June 21, 2010, and approximately June 26, 2010, undertook a medical provider/patient relationship with Mr. Ellington.

6.

Upon good information and belief, at all times material hereto, Leonor Bonnet-Engebretsen, M.D., and any and all nurses, technicians, and other personnel at Atlanta USP who participated in evaluating, examining, and treating Mr. Ellington, between approximately June 21, 2010, and approximately June 26, 2010, were actual or apparent employees and/or agents of BOP and Defendant Government, as defined by 28 U.S.C. § 2671, and were acting in the course and scope of their employment, and thus Defendant Government is responsible for their negligent acts or omissions and any injuries and damages arising therefrom.

FACTUAL BACKGROUND

7.

On June 21, 2010, Mr. Ellington, an inmate at Atlanta USP, presented to Health Services at Atlanta USP, where he was evaluated by Deborah Davidson, R.N.

8.

Mr. Ellington reported that he had been involved in an altercation, during which hit another inmate in the mouth and injured his hand.

9.

Mr. Ellington's right hand was swollen and ecchymotic, with a laceration to the knuckle of the middle finger. He was unable to move his index and middle fingers.

10.

Nurse Davidson irrigated the wound to remove debris, then covered and immobilized the hand.

11.

An x-ray was done and ruled out any fractures of the hand.

12.

Mohammed Naeem, MLP, noted swelling. He sutured the laceration and bandaged the hand.

13.

Topical antibiotics were ordered at 1209, but no oral antibiotics were prescribed.

14.

The care provided was reviewed by Dr. Bonnet-Engebretsen on June 22, 2010, at 0741.

15.

On June 22, 2010, at or about 1301, Mr. Ellington was again evaluated by Nurse Davidson, complaining of pain.

16.

Nurse Davidson noted that the hand was swollen, warm to the touch, and draining. Mr. Ellington had a temperature of 99.4 F.

17.

Nurse Davidson reported these findings to MLP Naeem and documented his response that the medications he had prescribed were being processed.

18.

This was approximately 24 hours after the order was given by MLP Naeem.

19.

Nurse Davidson's notes were cosigned by Dr. Bonnet-Engebretsen and reviewed by MLP Naeem.

20.

On June 25, 2010, at 2050, Mr. Ellington was evaluated by Ray Tookes, R.N., complaining of aching, throbbing pain which was 8 on a scale of 10.

21.

Mr. Ellington's hand was swollen and warm to the touch. The swelling persisted up to the forearm. There were also blisters near the suture site.

22.

No antibiotics were ordered at this time.

23.

Nurse Tookes requested evaluation by MLP Naeem. There is also documentation that Vickie Scott-Lewis, ARNP, was requested to review the case, and Dr. Bonnet-Engebretsen was requested to co-sign the documents.

24.

Dr. Bonnet-Engebretsen did not co-sign the documents until July 7, 2010, at which time Mr. Ellington was hospitalized.

25.

Nurse Scott-Lewis evaluated Mr. Ellington on June 26, 2010. Mr. Ellington's hand and forearm were wrapped in ACE bandage.

26.

Nurse Scott-Lewis noted that the arm was warm above the ACE bandage.

27.

Nurse Scott-Lewis ordered an antibiotic, Cephalexin 500 mg., to be taken orally every twelve hours.

28.

It is unclear whether Mr. Ellington ever received any of the medications which were ordered for him.

29.

On June 26, 2010, at 2140, Mr. Ellington reported to Nurse Tookes, with a 102.2 fever.

30.

Mr. Ellington was transferred to an outside medical facility, where he was diagnosed with a serious infection and treated with IV antibiotics.

31.

Mr. Ellington required skin grafts and lengthy medical treatment.

COUNT I.

MEDICAL NEGLIGENCE

32.

Plaintiffs adopt and reallege paragraphs 1 - 31 of this Complaint as if fully set forth herein.

33.

Leonor Bonnet-Engebretsen, M.D., and any and all nurses, technicians, and other personnel at Atlanta USP, were required to exercise that degree of care and skill ordinarily employed by health care providers generally when dealing with like conditions and similar circumstances as Mr. Ellington experienced between approximately June 21, 2010, and approximately June 26, 2010.

34.

Leonor Bonnet-Engebretsen, M.D., and any and all nurses, technicians, and other personnel at Atlanta USP performing care on Mr. Ellington between approximately June 21, 2010, and approximately June 26, 2010, deviated from the standard of care outlined in the immediately preceding paragraph in that they failed to exercise degree of care and skill required by health care providers generally, *inter alia*, failing to recognize that the laceration on Mr. Ellington's hand was more likely

than not due to contact with human teeth, to realize the extreme risk of infection from such a bite, to order oral antibiotics, and to assure that they were received in a prompt and timely manner.

35.

As a direct and proximate result of the failure to exercise appropriate care on the part of Leonor Bonnet-Engebretsen, M.D., nurses, technicians, and other individuals at Atlanta USP performing care on Mr. Ellington between approximately June 21, 2010, and approximately June 26, 2010, Mr. Ellington developed a severe infection, requiring lengthy and painful treatment, and resulting in cosmetic changes and possible permanent movement problems in the hand.

WHEREFORE, Plaintiff respectfully demand judgment against Defendant Government in money damages in excess of $75,000 and costs of Court. Plaintiff demands bench trial. Plaintiff requests that this Court grant such other and further relief as is just and appropriate.

COUNT II.

LIABILITY OF DEFENDANT GOVERNMENT

PURSUANT TO 28 U.S.C. § 2674

36.

Plaintiffs adopt and reallege paragraphs 1 - 35 of this Complaint as if fully set forth herein.

37.

At all times material hereunto, Leonor Bonnet-Engebretsen, M.D., nurses, technicians, and other individuals at Atlanta VAMC performing care on Mr. Ellington between approximately June 21, 2010, and approximately June 26, 2010, were acting within the course and scope of their actual or apparent employment or agency with Defendant Government, and as their actual or apparent employer/principal and pursuant to 28 U.S.C. § 2674, Defendant Government is liable for their negligent acts or omissions and any injuries and damages arising therefrom.

WHEREFORE, Plaintiff respectfully demands judgment against Defendant Government in money damages in excess of $75,000 and costs of court. Plaintiff demands bench trial. Plaintiff requests that the Court grant such other and further relief as is just and appropriate.

Respectfully submitted,

James H. Webb, Jr.
Bar No. 744275
Brandon R. Taylor
Bar No. 108752
Jordan M. Jewkes
Bar No. 940491
Attorneys for Plaintiff
Mandaris Ellington

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jwebb@webb-firm.com
btaylor@webb-firm.com
jjewkes@webb-firm.com

CERTIFICATION OF FONT

This certifies that pursuant to Local Rule 5.1 that the above and foregoing has been prepared using Times New Roman font, 14 point.

This 28 day of August, 2012.

Respectfully submitted,

James H. Webb, Jr.
Bar No. 744275
Brandon R. Taylor
Bar No. 108752
Jordan M. Jewkes
Bar No. 940491
Attorneys for Plaintiff
Mandaris Ellington

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jjewkes@webb-firm.com

STATE OF NEW YORK

COUNTY OF Westchester

AFFIDAVIT OF JERRY BALENTINE, D.O.

COMES NOW Jerry Balentine, D.O., who, after being duly sworn, does depose and say:

1.

My name is Jerry Balentine, D.O. I am a physician duly licensed to practice medicine in the State of New York. I am of the age of majority. I am a member of the same profession as the practitioners whose conduct is at issue in this affidavit. I have actual professional knowledge and experience in the area of practice or specialty in which my opinion is given in this affidavit, as reflected in this affidavit and in my Curriculum Vitae, which has been attached hereto and incorporated herein by reference as Exhibit "1." At the time I signed this affidavit, and at the time of the negligent acts I discuss herein, I was licensed by an appropriate regulatory agency to practice my profession in the state in which I was practicing or teaching in that profession. I am qualified as an expert by virtue of my knowledge, skill, experience, training, and education regarding the issues raised in this affidavit. I am also qualified to give opinions regarding the acceptable standard of care and conduct expected of the professionals whose conduct is at issue in this affidavit. I have actively practiced in my area of specialty for at least three of the last five years both immediately preceding my signing of this affidavit, and preceding the negligent acts I discuss herein, with sufficient frequency to establish an appropriate level of knowledge in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the professionals whose conduct is at issue in this affidavit. Specifically,



during three of the five years immediately preceding these events, I have regularly and routinely evaluated patients with injuries received during a physical altercation with sufficient frequency to have an appropriate level of knowledge regarding the appropriate evaluation and treatment for lacerations received during an altercation and the adverse events which can occur in the absence of prompt and appropriate treatment.

2.

The facts in this case upon which I base my opinions are of a type reasonably relied upon by experts in our particular field.

3.

The testimony I have given herein is, in my opinion, based upon sufficient facts to allow me to arrive at opinions concerning whether or not any of the health care providers in this matter deviated from appropriate standards of care. The testimony I have given herein is the product of reliable principles and methods, and I have applied those principles and methods reliably to the facts of this case in arriving at the opinions I express herein. Further, the primary issue in this case involves principles which are the same or similar for any and all physicians or other licensed health care providers, including nurses, technicians, and/or nurse practitioners, evaluating patients with injuries received during a physical altercation with another person.

4.

I have been asked to review the medical care provided to Mandaris Ellington by Leonor Bonnet-Engebretsen, M.D., and various other health care personnel, including nurses, nurse practitioners, medical technicians, and other persons who I assume to be agents, servants, or employees of the Federal Bureau of Prisons between approximately June 21, 2010, and

approximately June 26, 2010. In the course of my review, I have read or reviewed medical records from the following:

1. Copies of medical records from Federal Bureau of Prisons;

2. Copies of medical records from Atlanta Medical Center.

5.

Upon good information and belief, Leonor Bonnet-Engelbreten, M.D., and any other physicians, technicians, nurse practitioners, nurses, and/or other health care providers evaluating and treating Mandaris Ellington on behalf of the Federal Bureau of Prisons were employees or agents or apparent employees or apparent agents of the Federal Bureau of Prisons, and thus the Federal Bureau of Prisons is responsible for the evaluation and care provided by these employees or agents to Mr. Ellington.

6.

Because of my background, training and experience, I am familiar with the standard of care and skill ordinarily employed by the medical profession generally when treating patients such as Mandaris Ellington under similar conditions and like surrounding circumstances as are contained in the medical records I have reviewed. Further, I do and have evaluated patients with injuries to the hand from a physical altercation with sufficient regularity to be knowledgeable about the standards of care for physicians, physician assistants, nurse practitioners, nurses, and any other health care providers performing evaluations and/or providing care to patients with hand injuries from physical altercations.

7.

Among other things, my review of the documents and other information I have referenced in paragraph four above, reveals that:

a. On June 21, 2010, Mr. Ellington presented to Health Services, where he was evaluated by Deborah Davidson, R.N.

b. Mr. Ellington reported that he had hit someone in the laundry and injured his hand.

c. Mr. Ellington's right hand was swollen and ecchymotic, with a laceration to the knuckle of the middle finger. He was unable to move his index and middle fingers.

d. Nurse Davidson irrigated the wound to remove debris, then covered and immobilized the hand.

e. An x-ray was done and ruled out any fractures of the hand.

f. Mohammed Naeem, MLP, noted swelling. He sutured the laceration and bandaged the hand.

g. Topical antibiotics were ordered at 1209, but no oral antibiotics were prescribed.

h. The care provided was reviewed by Dr. Bonnet-Engebretsen on June 22, 2010, at 0741.

i. On June 22, 2010, at or about 1301, Mr. Ellington was again evaluated by Nurse Davidson, complaining of pain.

j. Nurse Davidson noted that the hand was swollen, warm to the touch, and draining. Mr. Ellington had a temperature of 99.4 F.

k. Nurse Davidson reported these findings to MLP Naeem and documented his response that the medications he had prescribed were being processed.

l. This was approximately 24 hours after the order was given by MLP Naeem.

m. Nurse Davidson's notes were cosigned by Dr. Bonnet-Engebretsen and reviewed by MLP Naeem.

n. On June 25, 2010, at 2050, Mr. Ellington was evaluated by Ray Tookes, R.N., complaining of aching, throbbing pain which was 8 on a scale of 10.

o. Mr. Ellington's hand was swollen and warm to the touch. The swelling persisted up to the forearm. There were also blisters near the suture site.

p. No antibiotics were ordered at this time.

q. Nurse Tookes requested evaluation by MLP Naeem. There is also documentation that Vickie Scott-Lewis, ARNP, was requested to review the case, and Dr. Bonnet-Engebretsen was requested to co-sign the documents.

r. Dr. Bonnet-Engebretsen did not co-sign the documents until July 7, 2010, at which time Mr. Ellington was hospitalized.

s. Nurse Scott-Lewis evaluated Mr. Ellington on June 26, 2010. Mr. Ellington's hand and forearm were wrapped in ACE bandage.

t. Nurse Scott-Lewis noted that the arm was warm above the ACE bandage.

u. Nurse Scott-Lewis ordered an antibiotic, Cephalexin 500 mg., to be taken orally every twelve hours.

v. It is unclear whether Mr. Ellington ever received any of the medications which were ordered for him.

w. On June 26, 2010, at 2140, Mr. Ellington reported to Nurse Tookes, with a 102.2 fever.

x. Mr. Ellington was transferred to an outside medical facility, where he was diagnosed with a serious infection and treated with IV antibiotics.

y. Mr. Ellington required skin grafts and lengthy medical treatment.

8.

Based on my review of these medical records and on my background, training, expertise, knowledge, experience, and familiarity with the degree of care and skill ordinarily employed by the medical profession generally when dealing with like conditions and similar circumstances, I am of

the opinion that when Mr. Ellington presented to the Health Clinic reporting that his hand had been injured in a fight, the presence of a laceration clearly indicated impact with a sharp object, more likely than not the teeth of the party with whom he had fought. It is further my opinion that because there was a laceration, the health care providers evaluating Mr. Ellison should have been aware that it was more likely than not that the injury occurred from the teeth of the party with whom he had the fight. A laceration from a human mouth has very high likelihood of infection. It was incumbent that Mr. Ellington be administered oral antibiotics by one of the several health care providers who evaluated him or his records on or about June 21, 2010.

9.

Based on my review of these medical records, the facts I have been asked to assume, and on my background, training, expertise, knowledge, experience, and familiarity with the degree of care and skill ordinarily employed by the medical profession, I am of the opinion that the standards of care required Nurse Davidson, MLP Naeem, Dr. Bonnet-Engebretsen, and any other health care providers evaluating and/or treating Mr. Ellington on or about June 21, 2010, to recognize that the laceration on Mr. Ellington's hand was more likely than not due to contact with human teeth, to realize the extreme risk of infection from such a bite, to order oral antibiotics, and to assure that they were received in a prompt and timely manner. Because Nurse Davidson, MLP Naeem, Dr. Bonnet-Engebretsen, and any other health care providers evaluating and/or treating Mr. Ellington on or about June 21, 2010, deviated from the standards of care as I have outlined it herein, Mr. Ellington developed a severe infection, requiring lengthy and painful treatment, and resulting in cosmetic changes and possible permanent movement problems in the hand.

10.

I have not expressed all of my theories of negligence in this affidavit; as I understand Georgia law, I am only required to state one act of negligence for each potential defendant.

11.

All of the opinions I have expressed herein were expressed within a reasonable degree of medical probability.

12

All of the opinions I have expressed herein constitute my opinions at this time and are based on information which I have been given. I reserve the right to change my opinions if further information is received which impacts on opinions herein given.

13.

I make this affidavit with the understanding that I am attesting that the contents herein are true and correct and knowing that it is being executed for the purpose of being used in support of a medical malpractice action under Georgia law.

FURTHER AFFIANT SAYETH NOT.

Jerry Balentine, M.D.

Sworn to and subscribed before me this 23rd **day of** August, **2012.**

Notary Public
My commission expires: July 16, 2016

JONATHAN PERRY KAPLAN
Notary Public - State of New York
NO. 01KA6235041
Qualified in Dutchess County
My Commission Expires 7/16/2016

Jerry Ray Balentine, D.O. , FACEP , FACOEP
St. Barnabas Hospital ; 4422 Third Ave. ; Bronx , N.Y. 10457
(718) 960-6371 (voice) ; (718) 960-6577 (fax)
jbalentine@sbhny.org

12/07-Present	**Executive Vice President and Chief Medical Officer** St. Barnabas Hospital and Healthcare System Third Ave. and 183rd St. Bronx, New York , 10457-2594
11/09 – Present	**Academic Chair ; Department of Emergency Medicine** New York College of Osteopathic Medicine Westbury , New York
7/91-Present	Attending Physician, Department of Emergency Medicine St. Barnabas Hospital, Bronx, New York
4/04-12/07	Senior Vice President and Chief Medical Officer St. Barnabas Hospital
1/98 – 1/2009	Medical Director St. Barnabas Hospital, Bronx, New York
7/97- 7/2000:	Co-Director, Department of Emergency Medicine St. Barnabas Hospital, Bronx, New York
6/96 – 7/98:	Residency Director NYCOM/St. Barnabas Hospital Emergency Medicine Residency
7/97- 7/98:	Director, Department of Emergency Medicine Union Hospital, Bronx, New York
7/93- 6/97:	Associate Director, Department of Emergency Medicine St. Barnabas Hospital, Bronx, New York
7/94-7/98	Attending Physician, Department of Emergency Medicine Union Hospital, New York City
7/92- 6/99	Attending Physician, Department of Emergency Medicine Lincoln Hospital, New York City
Residency:	
7/91- 6/92	Chief Resident New York Medical College/Lincoln Hospital Emergency Medicine Residency
7/89-6/92	New York Medical College/Lincoln Hospital Emergency Medicine Residency

EXHIBIT "2" To AFFIDAVIT

Internship:

St.Joseph's Hospital
Philadelphia, PA

Education:

Philadelphia College of Osteopathic Medicine
Doctor of Osteopathic Medicine, 1988

Western Maryland College, Westminster, Md.
Bachelor of Arts, 1983

Liselotte Gymnasium (High-School) ;
Mannheim, West-Germany, 1979

Certifications:

American Board of Emergency Medicine

Professional Organization:

Fellow , New York Academy of Medicine
American College of Physician Executives
American Osteopathic Association
American College of Emergency Medicine (FACEP)
American College of Osteopathic Emergency Medicine

Appointments:

Professor ; Emergency Medicine
New York College of Osteopathic Medicine

Member , Board of Directors
New York College of Osteopathic Medicine Educational Consortium

Adjunct Professor ; Department of Medical Sciences
New York College of Podiatric Medicine

Faculty Associate , Center for Global Health
New York Institute of Technology

Clinical Assistant Dean ,New York College of Osteopathic Medicine
Westbury , N.Y.

Council of Affiliated Deans
Weill Cornell Medical College ; 2003 - 2007

Adjunct Clinical Assistant Professor of Emergency Medicine
Weill Medical College ; Cornell University ; 2003 – 2007

Awards:

NY State Emergency Physician of the Year Award ; 2009

St .Barnabas Hospital Residents Mentoring Award 2005

NYCOM President's Service Award 2002

Internship: Faculty Emergency Medicine Award

St. Joseph's Award (Best Housestaff/Nursing/Patient Relationship)

Committees/ Projects:

Vice-Chair , N.Y. State Board of Medicine ; 2011 - present

President ; New York Chapter , American College of Emergency Physicians ; 2006 - 2008

Member , **State Trauma Advisory Council NYS** , Department of Health ; 2007 – present

Member ; **N.Y. State Board of Medicine** ; 11/2007 - Present

Member , New York Organ Donor Network Performance Improvement Committee 1/2012 – present

NYCOMEC ; **Board of Directors** ; Finance Committee 2006 – present

Reviewer ; American Journal of Managed Care 10/2009 – present

Board of Directors (2000 – 2010), New York Chapter , American College of Emergency Physician

Medical Author/Editor ; http://www.medicinenet.com/ ; On-line Layperson Medical Textbook

Medical Author/Editor : http://www.emedicinehealth.com On-line Layperson Medical Textbook

Medical Editor and co-founder ; www.newyorkmedicaljournal.org On-line medical journal

ACOEP GME Committee ; 1994 – 2009

Emergency Medicine Specialist Member ; Data and Safety Monitoring Board of NIH funded study ;"Trial of Asthma Patient Education" ; 6/2005 – 6/2009

NY State Board of Medicine , Auxiliary Member ; 2004 - 2007

Medical Editor/Author ; Emergency Medicine Textbook www.emedicine.com ; Internet based medical textbook

Committee Member , Program and Trainee Review Committee
American Osteopathic Association (2002 – 2007)

Editor (2001 – 2003) ; AAEM Emergency Medical and Family Health Guide ; www.emedicine.com ; Internet Based Publication

Chair, Graduate Medical Education Committee 1996-2004
American College of Osteopathic Emergency Physicians

ACOEP CME Committee 1996 – 1999

Cochrane Field Coordinator; 1/94-6/96; Review of "Academic Emergency Medicine " for the Cochrane Institute; London, England

Publications/ Presentations:

Diffuse large B-Cell lymphoma presenting as Asthma ; Cassandra Scott, D.O. ; Jerry Balentine , D.O. ; Ilmana Fulger , M.D. Poster Presentation ; 2012 ACOEP Spring Seminar ; Phoenix ; Arizona

The Validity of Imaging and Physical Examination in Diagnosing Acute Appendicitis ;Patel S , Looney K, Chan A, Rabines A, Balentine J, Perlstein D 2010 AOA National Meeting ; Las Vegas

Contributing Author ; **Webster's New World™ Medical Dictionary ;** 3rd edition (May, 2008) ; Wiley Publishing, Inc

Contributing Author and Editor ; MedicineNet.com ; Including chapters on Shock ; Hernias ; Tracheostomy ; Blood Transfusion

Balentine J, Lombardi DP. Scarlet Fever. eMedicine from WebMD. Updated March 19, 2010. Available at: http://emedicine.medscape.com/article/785981-overview

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Pituitary Disorders , Chapter in **Essentials of Emergency Medicine** ; R. Aghababian Editor , 2006 ; Jones and Bartlett publishers

The Resource Ratio: A Planning Metric For Hospital Emergency Preparedness ; Lazar E , Albert J. , Silber S , Berger L , Balentine J and al ; Poster at GNYHA Foundation Symposium ; November 2005

Prospective Validation of a Predictive Model for Isolating Inpatients with Suspected Pulmonary Tuberculosis ; Wisnevski JP , Henschke C , Balentine J et al ; **Archives of Internal Medicine** ; Vol 165 ; Feb 28, 2005 ; 453 – 457

Perioperative Use of Betablockers in Noncardiac Surgery: A Multicenter Educational Intervention to Achieve Best Practice Guidelines: **Critical Pathways in Cardiology: A journal of Evidence Based Medicine**. 3(2):62-67, June 2004. Quinn, Debra MD ; Balentine , Jerry DO ; Kadish , Lawrence MD et al.

Clinical Manual of Pediatric Emergency Medicine **Academic Emergency Medicine** March 2004 , Vol 11, No 3 ; pg 327 ; Book Review

Prospective Validation of a Pulmonary Tuberculosis Prediction Model ; Wisnevski J , Henschke C , Balentine J ; **Society of General Internal Medicine 26th National Meeting** ; Abstract Presentation

SARS –Public Health Implications ; University of Bejing MBA program Internet based – Educational Conference ; June ; 2003

Failure Mode and Effect Analysis ; J. Balentine , D.O. ; **Empire State Epic ;** March/April , 2003

Child Abuse – Diagnosis and Management ;
Academic Emergency Medicine ; 2002 – 9: 966-967; Book Review
HERIS: An Academic Healthcare System's Response to Emergecny Preparedness. Silber , S ; Lazar , E ; Gotham , I ;Kadish , L ; Balentine , J . **NYACEP Research Forum** ; July 2002 ; Bolton Landing , New York

NYPORTS – Implication for Emergency Physician ; J. Balentine , D.O. ; **Empire State Epic ;** June/July , 2002

Infectious Disease Emergencies ; **Foresight** ; J. Balentine , D.O. ; National ACEP Risk Management Publication ; Issue 50 ; February 2001

Emergency Medicine – A Comprehensive Guide to the Specialty ; Edited by K . Harkin , M.D. ; Chapter on Osteopathic Emergency Medicine ; EMRA 2001

Balentine J, Kessler D: "Scarlet Fever"
Chapter in Online E.M. Textbook
www.emedicine.com; Scott Plantz, MD, Editor

Balentine J, Eisenhart A: "Aortic Stenosis"
Chapter in Online E.M. Textbook
www.emedicine.com; Scott Plantz, MD, Editor

Balentine J, Tahmin L: "Aortic Regurgitation"
Chapter in Online E.M. Textbook
www.emedicine.com, Scott Plantz, MD, Editor

The Manual of Emergency Airway Management ; R. Walls Editor ; Book review ; **Annals of Emergency Medicine** , 2001 Vol 37 (1): 123-124

Medical Conduct Process ; J. Balentine , D.O. ; **Empire State Epic** June , 2000

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Evaluating Applicants to emergency medicine residency programs ; Balentine J , Gaeta T, Spevack T ; **The Journal of Emergency Medicine** ; 1999 ; Vol 17 (1) : 131-134

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Pain Management Training – Housestaff Perception. Balentine, J. Biancella , M. Goodrich, A. ; Presentation ; **1998 AOA National Convention** ; New Orleans

"Pituitary Disorders", Chapter in **Emergency Medicine: A Concise Review** ; Dr. Aghababian editor; 1998 Lippincott-Raven ;

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Lectures:

Invited lecturer at Local and National meetings (topics/locations available upon request)

References provided upon request

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Georgia

MANDARIS ELLINGTON

Plaintiff(s)

v.

UNITED STATES OF AMERICA

Defendant(s)

Civil Action No. 1:12-CV-2979

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* UNITED STATES OF AMERICA
THE UNITED STATES ATTORNEY'S OFFICE
RICHARD RUSSELL FEDERAL BUILDING, SUITE 600
75 SPRING STREET, SW
ATLANTA, GA 30303

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

BRANDON R. TAYLOR, ESQ.
JORDAN M. JEWKES, ESQ.
WEBB, WADE & TAYLOR, LLC
400 WESTPARK COURT, SUITE 220
PEACHTREE CITY, GA 30269

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

JAMES N. HATTEN
CLERK OF COURT

Date: AUG 28 2012

Signature of Clerk or Deputy Clerk

Personally sent
8/28/12 LDC

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MANDARIS ELLINGTON,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	FILE NO. 1:12-CV-2979-WSD
vs.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendants.	:	

STIPULATION OF DISMISSAL

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), Plaintiff files this stipulation of dismissal, signed by all parties that have appeared, dismissing this action with prejudice.

Respectfully submitted this 24th day of February 2014.

/s/ Jordan M. Jewkes
James H. Webb, Jr.
Bar No. 744275
Brandon R. Taylor
Bar No. 108752
Jordan M. Jewkes
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SALLY QUILLIAN YATES
UNITED STATES ATTORNEY

/s/ Lisa D. Cooper

Lisa D. Cooper
Assistant United States Attorney
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600 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30303
(404) 581-6303 (telephone)
(404) 581-6150 (facsimile)

CERTIFICATION OF FONT

This certifies that pursuant to Local Rule 5.1 that the above and foregoing has been prepared using Times New Roman font, 14 point.

This 24th day of February 2014.

Respectfully submitted,

/s/ Jordan M. Jewkes
James H. Webb, Jr.
Bar No. 744275
Brandon R. Taylor
Bar No. 108752
Jordan M. Jewkes
Bar No. 940491
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CERTIFICATE OF SERVICE

This is to certify that undersigned counsel for plaintiff in the above-named action filed the foregoing STIPULATION OF DISMISSAL with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

Lisa D. Cooper
Assistant United States Attorney
United States Attorney's Office,
600 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30303

This 24th day of February, 2014.

WEBB, WADE & TAYLOR, LLC

Attorneys for Plaintiff
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/s/Jordan M. Jewkes
Jordan M. Jewkes
Ga. Bar No. 940491

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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Page 0910 of 1341

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of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CASE NO. _____

ESTATE OF JOSE R. RIOPEDRE, through FERNANDO MENDEZ, personal representative of the Estate of Jose R. Riopedre, and SUSANA MENDEZ, individually, as wife of Jose R. Riopedre

Plaintiffs,

v.

UNITED STATES OF AMERICA, and J. SOLVIK, TAMALA MIDDLETON, CHRIS ORR, RICHELLA LAWSON, RAGANOLD R. WILLIAMS SR, R. WALLACE, M.L. RIVERA, ANITA CANO, JOHN J. ENZINNA, T. HORVATH, S. WILLIAMS, V. ROBINSON, DR.ROBERT BENFORD, LT. SNEED, and G.S. BONDURANT, and JOHN DOES 1-8, individually,

Defendants. **JURY TRIAL DEMANDED**

_____/

COMPLAINT

Comes now the ESTATE OF JOSE R. RIOPEDRE, by and through plaintiff FERNANDO MENDEZ, his personal representative and administrator, and comes now plaintiff SUSANA MENDEZ, wife of the decedent (collectively "Plaintiffs") and bring this Complaint against the above styled Defendants for damages associated with the decedent's wrongful death, survival, the deprivation of decedent's constitutional rights, loss of consortium and other associated torts and claims further alleged herein. Damages include both compensatory and punitive damages. In support Plaintiffs allege as follows:

PRELIMINARY STATEMENT

1. Jose R. Riopedre (hereinafter the "Decedent"), under intense distress due to his improperly treated depression and anxiety disorders, committed suicide while serving as an inmate of the Federal Corrections Institute ("FCI") in Estill, South Carolina (hereinafter "the facility" or "Estill").
2. This action is brought by the estate of the decedent, through his personal representative, and by the wife of decedent.
3. This is an action by Plaintiffs for violations of the Decedent's Eighth Amendment and Fifth Amendment rights and for the wrongful death of the decedent, survival, and loss of consortium or companionship.
4. This suit seeks an end to individual defendants' unconstitutional and unlawful practices and monetary relief for decedent's wrongful death and associated harm, along with other damages against Defendants.

JURISDICTION

5. This action arises, under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The *Bivens* claims arise under the Fifth and Eighth Amendments to the United States Constitution as applied to federal employees and inmates through *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971), *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Carlson v. Green*, 466 U.S. 14 (1980) (specifically allows a *Bivens claim* for 8th amendment violations and prison suicides).
6. Jurisdiction is also, therefore, conferred on this Court by 28 U.S.C. § 1331.
7. The Court has personal jurisdiction of the *Bivens* defendants because the alleged incident and facts giving rise to it occurred within the confines of this Court at the Federal

Correctional Institution (FCI) located in Estill, in Hampton County, South Carolina, causing the wrongful death of Mr. Riopedre.

8. The action also arises under involves survival, loss of consortium/companionship of spouse and other laws of the State of South Carolina.

9. Jurisdiction is conferred on the Court by 28 U.S.C. §1331and the supplemental jurisdiction of this court pursuant to 28 U.S.C. §1367.

VENUE

10. Venue is proper in the Beaufort Division, District of South Carolina pursuant to 28 U.S.C. §1391 in that this is a division where a substantial part of the events or omissions giving rise to the claim occurred.

PARTIES

Plaintiffs:

11. Fernando Mendez is personal representative/administrator of the estate of the decedent Jose R. Riopedre. Mr. Mendez was duly appointed by the probate courts of the State of Florida, in Miami-Dade County Circuit Court, Probate Division, case number 11-1073. He has satisfied all qualification requirements of the State of South Carolina to bring this suit on behalf of the Estate of Jose R. Riopedre, for the benefit of any heirs, beneficiaries, and distributees, through filings with Hampton County Probate Court, case number 2012-ES250068. *See* S.C. Code Ann. § 62-4-205.

12. Susana Mendez is the wife of the decedent and brings claims in her own right for loss of consortium.

Defendants:

13. The United State of America a.k.a. the United States oversees the United States Department of Justice Bureau of Prisons and the facility located in Estill.

14. Individual "Prison Staff" include: Mildred L. Rivera (Warden of the facility) J. Solvik (Operations Lieutenant), Tamala Middleton (Clinical nurse), Chris Orr (Senior Officer), Richella Lawson (Officer), Raganold R. Williams, Sr. (Senior Officer, OIC at time of incident), R. Wallace (Senior Officer, OIC preceding incident, Special Housing Observation Officer at time of incident), Anita Cano (Case Manager), John J. Enzinna (Cook Supervisor), T. Horvath (Case Manager), S. Williams (Senior Officer), Dr. Robert Benford, V. Robinson, Senior Officer Lt. Sneed, Officer and G.S. Bondurant. The individuals are appropriate defendants to this *Bivens* action as it is brought against federal officials in their official personal capacities and is not considered to be an action against the United States. It is therefore not barred by sovereign immunity.

FACTS

15. Two ghastly dates mark the beginning and the end of Jose Riopedre's stay at the FCI in Estill in 2009, 9/11, 2009 and Halloween 2009. The latter marked the end of Mr. Riopedre's life on this earth.

16. On July 15, 2009, in, the United States District Court of Maryland, Jose Riopedre was sentenced to one year and one day and was later committed to a minimum security facility in Estill, South Carolina.

17. Jose Riopedre had suffered from, and been medically diagnosed with "severe, disabling clinical depression and anxiety" and had been seeking outpatient treatment, along with taking his prescribed strong anti-depressive medications.

18. As stated in Mr. Riopedre's Psychiatrist's 2008 letter, the decedent had developed intense disturbances of mood and thought content, in addition to severely intense obsessive thoughts about financial and legal issues.

19. The same Plan documents that Mr. Riopedre's skills status, as it related to his Mental Health, was satisfactory, and to a 5% degree required attention.

20. The person who was listed in the Acknowledgement of Inmate Parts 3 & 4 of his United States Department Justice Federal Bureau of Prisons report to be contacted in case of illness or death was Mr. Riopedre's wife, Susana Mendez, who stood by her husband while he was being treated for debilitating depression that required psychotropic medication prior to his being committed to Estill in September, 2009 and had requested that the Judge provide that Mr. Riopedre receive help for his depression in prison.

21. In fact, as documented in Inmate Property Report, dated September 9, 2009, Mr. Riopedre had no socks, towels, or articles that could facilitate his suicide in light of his previously diagnosed depression that led a Federal Court Judge to take note of his mental state at sentencing.

22. Mr. Riopedre's Intake Screening Form dated September 9, 2009 at 12:40 PM documents that he was not involved in ongoing cooperation with Federal agents or testified in court or was involved in a gang, such that he would have to be isolated or placed in Special Housing Unit [hereinafter "SHU"].

23. Special Housing Unit involved a type of solitary confinement for Mr. Riopedre.

24. The Federal Bureau of Prison's performed a standard Inmate Screening on September 10, 2011 that document Mr. Riopedre was treated for Depression from 2006 through 2009, (that same year) and was prescribed Paxil for his Depression.

25. The Federal Bureau of Prison Screening Document of Mr. Riopedre dated September 9, 2009 states erroneously:"Hx of Mental Health Treatment: No".Hx is an abbreviation for "medical history" in medical documentation usage.

26. Mr. Riopedre, in his own handwriting, alerted Prison officials on his Psychology Services Inmate Questionnaire dated September 11, 2009 that he had received treatment for a nervous or mental problem and had received medication

27. The standard warning regarding patients who are removed from Paxil is:

> "You may become suicidal, especially at the beginning of your treatment and any time that your dose is increased or decreased."

28. Mr. Riopedre who was already being treated for Depression, stopped taking Paxil on his own prior to being committed to Estill, thus increasing his risk for suicide without review by a psychiatrist at the facility.

29. Despite being previously diagnosed; having ongoing, debilitating Depression with a heightened risk for suicide; not being provided his previously diagnosed anti-depressant medication, Paxil; his requests for treatment of his mental disorder; his family's requests for treatment of his mental disorder; and a Federal Court's concerns for his safety, his Psychology Data System Intake Screening of September 10, 2009, prepared by Robert W. Benford, II, demonstrates no attempt to review Mr. Riopedre's medical records or to contact his treating doctors.

30. Dr. Robert Benford directed, in violation of Mr. Riopedre's right to be free from an Eighth Amendment mandate against cruel and unusual punishment, and right to reasonable medical, psychiatric, and or psychological dictated standards of care, with deliberate indifference, as documented in the aforementioned report as to mental health assistance for Mr. Riopedre:

> "No programs/treatment are recommended at this time"

31. Mr. Riopedre's Inmate Skills Development Plan, dated October 20, 2009, documents that on or about 9/11/2009, Mr. Riopedre was assigned to the SHU.

32. In effect at the time of Mr. Riopedre's commitment in 2009 to Estill, the United States Department of Justice, Federal Bureau of Prisons, had promulgated a Program Statement regarding Suicide Prevention Program April 5, 2007 [hereinafter "Statement"].

33. The aforementioned Statement specifically dealt with the heightened risk of inmates for suicide who were placed in solitary confinement in SHU:

> "Inmates in SHU's: Inmates in Administrative Detention or Disciplinary Segregation Status often may be at a higher risk for suicidal behavior."

34. Mr. Riopedre who had not committed any documented actions warranting disciplinary action, was known to prison officials to have suffered from debilitating depression, had recently stopped taking psychotropic medication, and had been not allowed to visit with his family who had driven up from Miami, Florida, was placed in a confined SHU used for disciplinary inmates.

35. The individual defendants did this with deliberate indifference to Mr. Riopedre's right to be free from cruel and unusual punishment and right to due process of law.

36. Mr. Riopedre's forced confinement to SHU was reviewed on September 11, 2009, September 25, 2009, October 2, 2009, October 9 2009, and October 25, 2009.

37. Mr. Riopedre's attorney in Miami, Ana Davide, contacted Estill multiple times, and sometimes multiple times in one day, to challenge the actions of the Defendants in isolating Mr. Riopedre.

38. There were e-mail correspondences from Ana Davide to Estill documenting these attempts on October 2nd and 7th, 2009.

39. Mr. Riopedre's forced confinement to SHU was authorized by Lt. Sneed, and reviewed by Officer G.S. Bondurant, and approved by Warden Mildred L. Rivera on each of the previously stated review dates with deliberate indifference to Mr. Riopedre's rights under the Eighth Amendment to the United States Constitution against Cruel and Unusual

Punishment and the Fifth Amendment Right to be free from unlawful government action without Due Process of Law.

40. The only reason given on Special Housing Review for Violation or Reason for Mr. Riopedre to be in isolation in SHU, which weekly heightened his risk of suicide, was "Pending Reclassification" on Six (6) separate occasions and weeks.

41. The Defendants, did this with deliberate indifference to Mr. Riopedre's right to be free from cruel and unusual punishment and right to due process of law.

42. The Statement states additionally:

> Inmate Removal from the SHU. The Program Coordinator will arrange to have an inmate exhibiting significant potential for suicide to be removed from the SHU and placed on suicide watch. Ordinarily, once the crisis is over, the inmate will be returned to satisfy any *sanction* [emphasis added] that was imposed
> Program Statement regarding Suicide Prevention Program, April 5, 2007

43. The Statement clearly recognizes that SHU's are reserved for inmates sanctioned for disruptive or illegal behavior. Mr. Riopedre exhibited neither of these traits.

44. The Statement goes on to describe the housing an inmate on suicide watch should be placed in:

> a. Housing. Each institution must have one or more rooms designated specifically for housing an inmate on suicide watch. . . .
> b. The primary concern in designating a room for suicide watch must be the ability to observe, protect, and maintain adequate control of the inmate.
> c. The room must permit easy access, privacy, and unobstructed vision of the inmate at all times.
> d. The suicide prevention room may not have fixtures or architectural features that would easily allow self-injury.
>
> Program Statement regarding Suicide Prevention Program, April 5, 2007

45. Mr. Riopedre was placed in a SHU that allowed only a limited view of the interior of the cell with only a small window and that was difficult to enter. The unit had fixtures and bars from which an inmate could hang himself, all of which violated the above listed policy limitations placed on defendants with respect to suicidal inmates.

46. The Defendants, did this with deliberate indifference to Mr. Riopedre's right to free be from cruel and unusual punishment and right to due process of law.

47. The Statement also created a fellow inmate observer program to assist the facility in preventing suicides. The policy mandates:

    a. The observer and the suicidal inmate will not be in the same room/cell and will have a locked door between them.
    b. The person performing the suicide watch must have means to summons help immediately.

48. On October 30th, 2009, within hours of Mr. Riopedre's death, the Federal Bureau of Prisons, Warden Rivera and all the other individual named defendants caused a mentally ill inmate, Harry Castro, to be placed in the unit with Mr. Riopedre to observe Mr. Riopedre's actions, that included Mr. Riopedre tying multiple socks and/or pieces of material together and around his neck, attaching it to bars in his unit and hanging himself. As a result of Defendants' actions and/or failures to act, Mr. Riopedre ultimately died following the hanging.

49. The Defendants did this with deliberate indifference to Mr. Riopedre's right to be from cruel and unusual punishment and right to due process of law.

50. There was no means for Mr. Castro to alert officers to any suicidal actions by Mr. Riopedre, other than banging on a mostly solid door, which had only a small window that prevented the officers from seeing the actions of Mr. Riopedre within the unit.

51. The Statement also highlights what actions must be taken when an Inmate Observer alerts of a suicide attempt by a fellow inmate:

    a. In all cases, when an inmate observer alerts staff to an emergency situation, staff must immediately respond to the suicide watch room and take necessary action to prevent the inmate on watch from incurring debilitating injury or death. In no case will an inmate observer be assigned to a watch without adequate provision for staff supervision or without the ability to obtain immediate staff relief.
    Program Statement regarding Suicide Prevention Program, April 5, 2007

52. The Statement also calls for constant observation of an inmate at risk for suicide.

53. There was no constant monitoring of Mr. Riopedre.

54. The individual defendants performed and allowed the foregoing with deliberate indifference to Mr. Riopedre's rights to be free from cruel and unusual punishment and to due process of law.

55. In fact, on October 23, 2009, in a Memo prepared by Pam Weathers, there was documented a monitored call between Mr. Riopedre and his wife. During the call he indicated that he felt very bad, and he complained about his close confinement. This was yet another indication of Mr. Riopedre's fragile mental state ignored by Defendants. It is probable that this failure occurred, in part, because Ms. Weathers did not speak Spanish, which is the language Mr. Riopedre spoke. Defendants were on notice of Mr. Riopedre's language limitations.

56. The United States has a large array of facilities throughout the country with larger numbers of Spanish speaking personnel but placed Mr. Riopedre, whose primary language was Spanish, in a facility with limited Spanish speaking personnel.

57. The decedent's right to be free from cruel and unusual punishment, to due process of law, and to be provided equal protection under the law have been deprived by the failure to provide translation.

58. The danger related to protective custody is so severe that that the Statement in the United States Department of Justice, Federal Bureau of Prison's "Sample" Suicide Prevention Information states:

    a. **Protective Custody**-Inmates who volunteer to enter protective custody are at high risk for suicide, especially during the first 72 hours in SHU
    b. **Long-term Protective Custody Inmates** – These inmates are particularly vulnerable to depression that can lead to a suicide attempt, and should be monitored closely while in they are in SHU.[emphasis added]

c. **Inmates Taking Medication for Mental Health Reason**-These inmates are vulnerable to developing suicidal thoughts and attempting suicide by overdosing on their medication.

59. The United States Department of Justice, Federal Bureau of Prisons, issued a Program Statement relating to Personal Property, Inmate, on December 28, 2005 [hereinafter "Statement relating to Personal Property"] that required each inmate be afforded additional secured space outside his cell for additional personal property.

60. The Statement relating to Personal Property specifically states:

a. Civilian clothing (i.e. clothing not issued to the inmate by the Bureau or purchased by the inmate from the commissary) ordinarily is not authorized for retention by the inmate.
b. The Inmate Personal Property List (Attachment A) includes all personal property an inmate can retain at every institution. . . .
c. Staff shall consider as nuisance contraband any item ... excessive quantities of it present a health . . . hazard . . . ."
d. Attachment A specifically authorizes a maximum of five (5) socks per inmate and one (1) towel per inmate.

61. Mr. Riopedre had what appeared to be Thirty (30) Pairs of socks in his SHU. [Exhibit "A"] on October 31, 2009, that had accumulated in less than 30 days, in violation of the Prison's own policies.

62. Had there not been deliberate indifference to its own policies, the Defendants would have prevented Mr. Riopedre's suicide.

63. The individual defendants did this with deliberate to Mr. Riopedre's rights to be free from cruel and unusual punishment and to due process of law.

64. On October 31, 2009, at 6:18 A.M. Mr. Riopedre's fellow inmate and observer Harry Castro, started to bang on his cell door and yelled, according to a Memorandum dated October 31, 2009 by Richella Lawson, demonstrating deliberate indifference in violation of Mr. Riopedre's rights not to be placed in an inherently dangerous location:

"his cellmate had hanged himself but I couldn't see his cellmate because of a blind spot in the corner"

65. Present were Senior Officer Chris Orr, Lt. Solvik, Officer S. Williams, Officer M. Hill, Officer R. Lawson, and Miss Middleton and other defendants.

66. At 6:20 AM, according to a Memorandum prepared by Chris Orr, Senior Officer on October 31, 2009, Harry Castro, demonstrating to :

"Started yelling, *"HELP"! HELP HELP! MY CELLIE NEEDS HELP"*

67. Chris Orr's Memorandum of October 31st, 2009 documents that Harry Castro started yelling after 6:20 AM:

"He needs help! Please help him!"

68. The documented evidence shows that while Harry Castro was begging and screaming for help for Jose Riopedre, Mr. Riopedre was dying.

69. The Defendants allowed Mr. Riopedre to die and to die with deliberate indifference to Mr. Riopedre's right to be free from cruel and unusual punishment and to due process of law.

70. The evidence shows that while Harry Castro was screaming for help no one opened the SHU cell door to save Mr. Riopedre's life or even see Mr. Riopedre from 6:18 AM through 6:28 AM or 6:28 AM, or from 6:28 AM to 6:38 AM or from 6:38 AM to 6:48 AM.

71. The Defendants did this with deliberate indifference to Mr. Riopedre's right to be free from cruel and unusual punishment and to due process of law.

72. Finally at 6:48 AM according to all documented evidence including a Memorandum dated October 31, 2009 by Officer Specialist Williams, at 6:48 the first call for help was answered and individual defendants entered Mr. Riopedre's SHU cell.

73. The Defendants did this with deliberate indifference to Mr. Riopedre's right to be free from cruel and unusual punishment and to due process of law.

74. During his confinement, Mr. Riopedre, who was diagnosed on record with severe depression and anxiety, was not given proper supervision and care by the prison staff, or proper psychological care and there was a failure to properly assess his mental state.

75. Much of the decedent's first 50 days were spent in solitary confinement, and although he could not adequately communicate in English, he was not furnished with a Spanish interpreter through whom he could have communicated his condition to the guards or other staff.

76. Throughout his 50 day detention at the Defendants' facility, Mr. Riopedre showed increasing outward signs of fragility and mental instability through severe weight loss.

77. Mr. Riopedre was additionally not allowed to see his family when they traveled to visit him.

78. Despite Mr. Riopedre's medical history, severe weight loss, and deteriorating condition, Defendants allowed him to suffer by failing to provide him treatment, punished him by placing him in long-term, unnecessary, solitary confinement, deprived him of communication, prevented him from visiting with his family and put him in conditions preventing appropriate monitoring and then allowed him to accumulate a large, and completely inappropriate, number of tube socks, that were a dangerous instrumentality, which he ultimately used to take his life.

79. Before killing himself, but after being removed from solitary confinement, Mr. Riopedre was placed in a SHU cell with Harry Castro, an inmate who also had psychological issues yet was receiving care from a case manager.

80. On October 31, 2009, after suffering from lack of proper treatment for his severe clinical depression and anxiety, being held in solitary confinement for an extended period, and being given little supervision for someone in his fragile state, Jose Riopedre hanged himself in his cell via a network of tube socks and/or pieces of material tied to the upper bunk of the cell.

81. After the incident, defendant Case Manager T. Horvath visited the cellmate of the Plaintiff decedent, inmate Harry Castro, in order to make sure he was doing well due to his psychological history and to arrange for psychological consultations. Had Jose Riopedre received similar care, his suicide would have been averted.

GENERAL ALLEGATIONS

82. Due to the documented nature and severity of Mr. Riopedre's condition, the Defendants demonstrated a clear deliberate indifference to the medical needs of the decedent.

83. There was a failure to properly assess Mr. Riopedre's condition by Defendants.

84. There was a failure to properly house Mr. Riopedre by Defendants.

85. There was a failure to properly monitor Mr. Riopedre and his actions by Defendants.

86. There was a failure to intervene when Mr. Riopedre was in distress by Defendants.

87. Although the decedent could not speak English well, he was not provided with a Spanish interpreter or any other means with which to communicate his condition. By not granting Mr. Riopedre proper medical treatment and by not supplying proper supervision to Mr. Riopedre despite his fragile state, the Defendants demonstrated a deliberate indifference to the conditions leading directly to his suicide and denied him equal protection of the law.

88. Additionally, by allowing Mr. Riopedre to accumulate copious amounts of tube socks, despite his medical history and clearly deteriorating condition, the Defendants

demonstrated complete indifference to the obvious severity of Mr. Riopedre's condition and signs of self-destructive behavior.

89. Mr. Riopedre's death could have been prevented had he been given his proper medication, given proper visitation rights with doctors and his family, prevented from accumulating copious amounts of tube socks, properly monitored throughout his deteriorating condition, and, if necessary, placed on suicide watch.

90. Jose Riopedre died as a result of the United States facility not properly training its officers to properly monitor inmates and observe obvious self-destructive tendencies, the United States and its agents not providing proper medical care to the decedent, the United States and its individual agents failing to properly monitor Jose Riopedre given his obviously precarious condition and a failure by Defendants to take prompt action when the decedent attempted to kill himself.

COUNT I

***Bivens* Claim for Violation of Decedent's Eighth Amendment Rights: Protection from Cruel and Unusual Punishment by Fernando Mendez**

91. Plaintiffs re-allege and re-affirm the allegations set forth in paragraphs one (1) through One Hundred Ten (110) as if fully set forth herein.

92. All Defendants including defendant "Prison Staff," individually and collectively, demonstrated a clear indifference to the known conditions of the decedent that led to his suicide under their care.

93. It is true that jail inmates are much more likely to commit suicide than free persons are-in fact, nine times as likely. Lindsay M. Hayes & Joseph R. Rowan, National Study of Jail Suicides: Seven Years Later (National Center on Institutions and Alternatives, Feb. 1988). According to the study just cited 12.9 percent of jail suicides occur within the

first three hours of confinement, 32.8 percent within the first 24 hours, 62.1 percent within the first two weeks, 72.8 percent within the first month, 89.2 within the first four months, and 97.4 within the first seven months. Only 10.8 percent of suicides occur after 5 months.

94. The psychiatric condition most closely associated with suicide is severe ("clinical") depression, which the Prison Staff knew Mr. Riopedre suffered from.

95. Defendant Prison Staff individually and collectively, demonstrated a deliberate indifference to the known conditions of the decedent that led to his suicide under their care by failing to follow their own policies and procedures previously enumerated that had they been followed would have saved Mr. Riopedre's life. *Jutzi-Johnson v. U.S.*, No. 96-C-5708, U.S. Dist. Ct., N.D. Ill. (March 29, 2000).

96. Defendant Prison Staff, individually and collectively, and specifically defendant Case Managers, Anita Cano and T. Horvath, who were responsible for evaluating and treating inmates at the center, violated decedent's constitutional rights, demonstrated deliberate indifference and demonstrated negligence that rose to the level of gross negligence towards decedent's safety by:

    a. Failing to properly supervise and provide support to the decedent, especially in regard to his severe and documented psychological issues.

    b. Failing to take action to ensure decedent's safety either through direct action, such as placing him under suicide watch or warning the guards.

    c. Failing to grant decedent similar psychological support for his documented psychological condition as that was granted to other similarly situated inmates such as his cellmate, Harry Castro.

97. Defendant Prison Staff, individually and collectively, had the resources, knowledge, and duty to offer the decedent the same diligence and duty of care that other inmates received.

98. By having either ignored Mr. Riopedre's condition or somehow remaining ignorant to the decedent's worsening condition, despite documented knowledge of severe psychological disorders, the defendant Prison Staff were deliberately indifferent to the conditions that led to his death of the decedent.

99. Individual defendant Prison Staff who were responsible for monitoring the FCI center, demonstrated a deliberate indifference to the decedent's conditions by:

    a. Deliberately placing him in SHU for no reasonable justifiable reason despite Mr. Riopedre's known clinical depression, weaning off of Paxil, and ongoing mental health issues;

    b. Failing to provide an appropriate level of surveillance to Mr. Riopedre despite his severe weight loss and obviously worsening condition;

    c. Failing to take the appropriate actions or give proper and timely notifications to the appropriate personnel about the decedent's visibly deteriorating condition and weight-loss;

    d. Failing to properly supervise decedent and allowing Mr. Riopedre to collect copious amounts of tube socks, which hold little use in bulk, fashion them into a rope, and ultimately kill himself;

    e. Failing to notice or take action over obviously suicidal behavior both over the fifty days preceding his death, and on the day of his death;

    f. And the other aforementioned actions in Paragraphs 1-119

100. By having either ignored Mr. Riopedre's situation or somehow remaining ignorant to the decedent's worsening situation and collection of tube socks, the individual

defendant Prison Staff on duty at the facility have demonstrated clear indifference or a negligence that rose to the level of gross negligence towards their duty to monitor Mr. Riopedre.

101. Defendant Tamala Middleton, the clinical nurse on call at the time of the decedent's death, as well as Dr. Robert Benford , demonstrated clear indifference to the decedent's conditions, and his rights to be free from cruel and unusual punishment, by:

a. Failing to properly supervise or provide proper medication and support to the decedent.

b. By not properly caring for the decedent or trying to take action despite his worsening condition and documented proof of severe psychological disabilities, Ms. Middleton and Dr. Benford demonstrated clear indifference to Mr. Riopedre's condition, or at the least gross negligence.

102. Defendant Lieutenant J. Solvik, Operations Lieutenant for the facility, and Warden Rivera and other defendants demonstrated a deliberate indifference to Mr. Riopedre's and other inmates' 8th amendment rights by not supplying an adequate medical staff to the inmates, especially given that many, such as Mr. Riopedre, had severe and documented mental illnesses.

103. As head of operations for the facility, and with knowledge that many of the inmates, including Mr. Riopedre, needed psychological care, Defendants by not providing a proper pharmacy to supply and distribute medication, demonstrated a indifference to the needs of psychologically troubled inmates.

104. The Defendants demonstrated deliberate indifference by not opening the door of his cell for thirty (30) minutes while Mr. Riopedre's cellmate Harry Castro was begging them to save Mr. Riopedre's life.

105. As a result of the inadequate supervision and medical support supplied to Mr. Riopedre by the "Prison Staff," Mr. Riopedre suffered cruel and unusual punishment which led him to take his own life.

106. Mr. Riopedre suffered greatly in his final few days of life.

107. As a result of individual defendants "actions, the heirs of Jose Riopedre are entitled to relief from the individual prison staff defendants. "*Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971). *Estelle v. Gamble*, 429 U.S. 97 (1976) (The US Supreme Court held that an indifference to the medical needs of inmates is a violation of the 8th amendment to the US constitution and constitutes cruel and unusual punishment.) *Daniels v. Williams*, 474 U.S. 327 (1986) (Held that although mere negligence is not enough to trigger a cause of action for government liability, gross negligence may suffice to demonstrate constitutional claims.) *Carlson v. Green*, 466 U.S. 14 (1980).

COUNT II

Claim for Loss of Consortium, Love and Companionship by Susana Mendez

108. Plaintiffs re-allege and re-affirm the allegations set forth in paragraphs one (1) through one hundred twelve One Hundred and Seven (107) as set forth herein.

109. Susana Mendez was the loving wife of Mr. Riopedre.

110. Ms. Mendez as a result of the actions of the Defendants has lost the loving companionship, care and comfort of her husband for the rest of her life.

111. The Defendants owed a duty of care to Mr. Riopedre to allow him to live.

112. The Defendants breached their duty of care through deliberate indifference as alleged previously.

113. As a result of Mr. Riopedre's death under supervision of the Defendants, Mr. Riopedre's widow faces hardship and injury due to her loss of companionship, mental

pain and anguish, and loss of decedent's earning potential, for which she entitled to collect damages from the United States.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests this Court to:

114. Declare the actions complained of herein to be in violation of the Fifth and Eighth Amendment to the United States Constitution as well as South Carolina and Federal law.

115. Enter judgment in favor of Plaintiffs and against Defendants.

116. Award Plaintiff damages to compensate for their injuries including:

a. costs and attorney's fees;

b. nominal, compensatory, and special damages;

c. pain and suffering;

d. loss of consortium;

e. punitive damages; and

f. all other relief that this court deems just and proper under the circumstances.

117. Enter judgment in favor of Plaintiffs and against the Defendant United States

a. Award damages to compensate Plaintiff for their injuries

i. In the amount over $75,000;

ii. costs and attorneys' fees; and

iii. all other relief that this court deems just and proper under the circumstances.

118. Award Plaintiffs any other relief that this court deems just and proper under the circumstances.

DEMAND FOR JURY TRIAL

PLAINTIFFS hereby demand a jury trial on all issues triable by a jury.

Dated: September 26, 2012

Respectfully submitted,

\s\ Dionè Carroll
Dionè Carroll, Esq.
Local Counsel
SC Dist. Ct. Bar: 11347
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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

CASE NO. 12-02806-TMC-JCA

ESTATE OF JOSE R. RIOPEDRE,
by and through FERNANDO MENDEZ,
as the Personal Representative of the
Estate of Jose R. Riopedre,

Plaintiff,
vs.

MILDRED L. RIVERA, ROBERT BINFORD,
JAMES SOLVIK, TAMALA MIDDLETON,
CHRIS ORR, RAGANOLD WILLIAMS,
RICHELLA LAWSON, RICHARD WALLACE,
ANITA CANO, TRACY HORVATH,
SCOTT WILLIAMS, VERNON ROBINSON,
PAUL SNEED, and GREGORY BONDURANT,
JOHN J. ENZINNA, DR. DERICK PHILLIPS,
STEPHEN BUCKLER, PAM WEATHERS,
JEREMY DALLAS, CHRISTOPHER BUSH,
C. WIGGINS, M. HILL, and JOHN DOES 1-8,
individually, and in their individual capacities,

Defendants.

_____/

AMENDED COMPLAINT & JURY DEMAND

Comes now the ESTATE OF JOSE R. RIOPEDRE, by and through Plaintiff Fernando Mendez, the personal representative and administrator (hereinafter referred to as "Plaintiff") and files this AMENDED COMPLAINT against the above listed Defendants, as well as additional unknown officials and/or agents of the United States Bureau of Prisons, for damages associated with the Riopedre's wrongful death, survival, the deprivation of Riopedre's constitutional rights under the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution,

Riopedre's suffering and death while incarcerated, damages to compensate Plaintiff and Riopedre's spouse and family for their own pain and suffering and the loss of Riopedre's companionship as a result of the death of Jose R. Riopedre due to the denial of his medical needs, and all other claims as alleged herein. Plaintiff seeks both compensatory and punitive damages. In support Plaintiffs allege as follows:

NATURE OF THIS ACTION

This is a Bivens action for damages based on the abuse and wrongful death of Jose R. Riopedre, who at the time of his death on October 31, 2009, was a minimum security inmate at the FCI Estill in South Carolina. As alleged below, Riopedre suffered from depression and anxiety disorders prior to, at the time Riopedre self-surrendered, and during his incarceration, to which Defendants exhibited deliberate indifference, and that as a result was not properly treated, as constitutionally required resulting in Riopedre's death.

Riopedre died in an incident determined by the Hampton County, South Carolina, coroner to have been a suicide. Riopedre's death was preventable, and was the result of Defendants' actions and failures to act, all in violation of the rights guaranteed by the Constitution of the United States of America;

PRELIMINARY STATEMENT

1. Jose R. Riopedre (hereinafter the "Riopedre"), under intense distress due to his improperly treated depression and anxiety disorders, committed suicide while serving a term of imprisonment of one year and one day, as an inmate of the Federal Corrections Institute ("FCI") in Estill, South Carolina (hereinafter "the facility" or "Estill");
2. This action is brought by the estate of the Riopedre, through his Personal Representative, Fernando Mendez;

3. This is an action by Plaintiffs for violations of the Riopedre's First, Fifth, Eighth and Fourteenth Amendment rights and for the wrongful death of the Riopedre, survival, and loss of consortium or companionship;
4. This suit seeks an end to individual defendants' unconstitutional and unlawful practices of the Defendants and monetary relief for Riopedre's wrongful death and associated harm, along with other damages against Defendants;

JURISDICTION

5. This action arises under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The *Bivens* claims arise under the Fifth and Eighth Amendments to the United States Constitution as applied to federal employees and inmates through *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971), *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Carlson v. Green*, 466 U.S. 14 (1980) (specifically allows a *Bivens claim* for 8th amendment violations and prison suicides).
6. Jurisdiction is also, therefore, conferred on this Court by 28 U.S.C. § 1331;
7. The Court has personal jurisdiction of the *Bivens* Defendants because the substantial part of the alleged incidents, actions, and facts resulting in the death of Riopedre occurred within the confines of this Court's jurisdiction at the Federal Correctional Institution (FCI) located in Estill, in Hampton County, South Carolina, causing the wrongful death of Jose R. Riopedre;
8. The action also arises under involves survival, loss of consortium and companionship of spouse and other laws of the State of South Carolina;
9. Jurisdiction is conferred on the Court by 28 U.S.C. §1331 and the supplemental jurisdiction of this court pursuant to 28 U.S.C. §1367;

VENUE

10. Venue is proper in the Beaufort Division, District of South Carolina pursuant to 28 U.S.C. §1391 because a substantial part of the acts or omissions that gave rise to the Riopedre's death and Plaintiff's claims occurred in Estill, South Carolina;

PARTIES

Plaintiffs:

11. Fernando Mendez is personal representative/administrator of the Estate of the Riopedre Jose R. Riopedre. Mr. Mendez was duly appointed by the probate courts of the State of Florida, in Miami-Dade County Circuit Court, Probate Division, Case Number 11-1073-CP-02. He has satisfied all qualification requirements of the State of South Carolina to bring this suit on behalf of the Estate of Jose R. Riopedre, for the benefit of any heirs, beneficiaries, and distributees, through filings with Hampton County Probate Court, Case Number 2012-ES250068. *See* S.C. Code Ann. § 62-4-205;

Defendants:

12. The Defendants in this action include, but are not limited to the following listed individuals who were employed by the Federal Bureau of Prisons, at all times relevant hereto, hereinafter referred to as "Prison Staff", the same which include: Mildred L. Rivera (former Warden of FCI Estill); James Solvik (Operations Lieutenant); Tamala Middleton (Registered Nurse); Chris Orr (Senior Officer); Richella Lawson (Senior Officer); Raganold R. Williams, Sr. (Senior Officer Specialist, OIC at time of incident); Richard Wallace (Senior Officer Specialist, OIC preceding incident, Special Housing Observation Officer at time of incident); Anita Cano (Case Manager); John J. Enzinna (Cook Supervisor and present at the time of the incident); Tracy Horvath (Case

Manager); Scott Williams (Senior Officer Specialist); Dr. Robert Binford (Staff Psychologist); Vernon Robinson (Senior Officer); Paul Sneed (Lieutenant); Gregory S. Bondurant (Captain at the time of the incident but is currently an Associate Warden at FCI Victorville, CA), Stephen Buckler, Pam Weathers, Jeremy Dallas, Christopher Bush, C. Wiggins, and M. Hill. The aforementioned Prison Staff are appropriate defendants to this *Bivens* action as it is brought against them in their individual capacities and all the individuals are federal law enforcement officials and/or officers who acted under color of federal law and Plaintiff's complaint is not an action against the United States and it is therefore not barred by sovereign immunity.

FACTS

13. Two ghastly dates mark the beginning and the end of Jose Riopedre's stay at the FCI Estill in 2009: (a) Friday, September 11, 2009; and, (b) Saturday, October 31, 2009 (Halloween Day). The first date marks the day that Riopedre voluntarily reported and self-surrendered to FCI Estill in compliance with U.S. District Judge Peter J. Messitte's Order [DE94], dated August 11, 2009 (see *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM). The latter date marked the end of Mr. Riopedre's life on this earth, only 51 days after arriving at FCI Estill, South Carolina;

14. On July 15, 2009, Jose Riopedre was sentenced to one year and one day in the U.S. District Court for the District of Maryland (see DE 86 and DE90 in *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM) and was permitted to remain free, on bond, while awaiting designation and classification by the Federal Bureau of Prisons, at which time Riopedre would voluntarily surrender. Subsequent to Riopedre's sentencing he was designated to a minimum security facility at Estill, South Carolina;

15. On Friday, September 9, 2009, Riopedre arrived at the Federal Prison Camp in Estill, South Carolina, without incident;

16. Riopedre was designated to FPC Estill by the Federal Bureau of Prisons based on his minimum security designation and classification and was notified by the Federal Bureau of Prisons to report to FPC Estill;

17. Riopedre complied fully with the self-surrender order issued by the Honorable Judge Peter J. Messitte in *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM;

18. After only two days at the Federal Prison Camp at FCI Estill, South Carolina, Riopedre's nightmare began to unfold, and on September 11, 2009 @ 8:40 A.M. an Administrative Detention Order was issued and Riopedre was immediately taken into the Special Housing Unit (hereinafter referred to as SHU) to begin serving what turned out to be his death sentence;

19. Notwithstanding the Federal Bureau of Prisons' need to maintain security, Bureau officials knew and/or should have known from their own records that Riopedre had suffered from, and been medically diagnosed with "severe, disabling clinical depression and anxiety" and had been seeking outpatient treatment, along with taking his prescribed strong anti-depressive medications, including PAXIL;

20. As stated in Riopedre's Psychiatrist's 2008 letter, the Riopedre had developed intense disturbances of mood and thought content, in addition to severely intense obsessive thoughts about financial and legal issues;

21. The Bureau's Plan documents that Mr. Riopedre's skills status, as it related to his Mental Health, was satisfactory, and to a 5% degree required attention;

22. The person who was listed in the Acknowledgement of Inmate Form, Parts 3 & 4, of Riopedre's United States Department Justice Federal Bureau of Prisons report to be

contacted in case of illness or death was Riopedre's wife, Susana Mendez, who stood by her husband while he was being treated for debilitating depression that required psychotropic medication prior to Riopedre being committed to the SHU at FCI Estill on September 11, 2009;

23. It was known, or should have been known, to the Federal Bureau of prisons officials that a request had been made by his attorney to Judge Messitte to recommend that the Federal Bureau of Prisons provide Riopedre with mental health counseling receive help for his depression during his incarceration and the same was recommended by Judge Messitte;
24. In fact, as documented in Inmate Property Report, dated September 9, 2009, Riopedre had no socks, towels, or articles that could facilitate his suicide in light of his previously diagnosed depression that led a Federal Court Judge to take note of his mental state at sentencing;
25. Riopedre's Intake Screening Form, dated September 9, 2009, at 12:40 PM, documents that he was not involved in ongoing cooperation with Federal agents or testified in court or was involved in a gang, such that he would have to be isolated or placed in SHU;
26. Riopedre was certainly not a flight risk, otherwise U.S. District Judge Peter J. Messitte would not have allowed him to voluntarily self-surrender to the institution;
27. For Riopedre, being confined to the SHU was tantamount to solitary confinement. Inmates in the SHU must remain locked up in a small cell for the most part containing a steel double bunk bed, a small open shower with no door (with or without hot water), small steel desk-chair combination (bolted to the floor and wall) or concrete shelf and small cylindrical concrete bench, and a stainless steel, combination toilet and sink;
28. In SHU, Inmates are locked up 24-hours each day without being able to leave the cell except for some instances where they are allowed to go to a recreation yard which is

essentially a fenced-in cage, where all an inmate can do is walk around in circles for one hour or less, when such an opportunity is afforded the inmate;

29. In SHU, communication to family and friends is severely limited and telephone calls generally are permitted when authorized and many times at the discretion of the prison staff, including the inmate's counselor, case manager, and/or the corrections officer on duty. More often than not, most inmates in the SHU have little or almost no telephone communication with their family or friends for days, weeks or months at a time;
30. The Federal Bureau of Prison's performed a standard Inmate Screening on September 10, 2011, that documents that Riopedre was treated for Depression from 2006 through 2009, (that same year) and was prescribed Paxil for his Depression;
31. The Federal Bureau of Prison Screening Document of Mr. Riopedre dated September 9, 2009 states erroneously: "Hx of Mental Health Treatment: No". Hx is an abbreviation for "medical history" in medical documentation usage;
32. Riopedre, in his own handwriting, alerted Prison officials on his Psychology Services Inmate Questionnaire, dated September 11, 2009, that he had received treatment for a nervous or mental problem and had received medication;
33. As early as 2001, it was well documented that the withdrawal symptoms from Paxil could be much more severe than at first thought and could even plunge users into the depths of depression due to the increase of serotonin and decrease of serotonin metabolism that it produces;
34. In fact, in March of 2004, the FDA issued a Public Health Advisory that provided further cautions to physicians, their patients, and families and caregivers of patients about the need to closely monitor both adults and children with depression, especially at the

beginning of treatment, or when the doses are changed with either an increase or decrease in amount;

35. The standard warning regarding patients who are removed from Paxil is:

> "You may become suicidal, especially at the beginning of your treatment and any time that your dose is increased or decreased."

36. Riopedre, who was already being treated for Depression, had stopped taking Paxil on his own prior to being committed to FCI Estill, thus increasing his risk for suicidal thoughts, and despite this fact known to Federal Bureau of Prisons officials, Riopedre was placed in isolation in the SHU without the proper review, evaluation, and determination of what, if any, medically necessary medications should have been prescribed and given to Riopedre by a psychiatrist at the facility;

37. Despite being previously diagnosed; having ongoing, debilitating depression with a heightened risk for suicide; not being provided his previously diagnosed anti-depressant medication, Paxil; his requests for treatment of his mental disorder; his family's requests for treatment of his mental disorder; and a Federal Court's concerns for his safety, his Psychology Data System Intake Screening of September 10, 2009, prepared by Dr. Robert W. Binford, demonstrates deliberate indifference to Riopedre's medical and mental health needs and confirms that no attempt was made to adequately review Riopedre's medical records or to contact his treating doctors;

38. It is well known to officials at the Federal Bureau of Prisons that at the initial screening of inmates, many inmates will not disclose any thoughts of suicide, depression, or other mental illness, because it is common knowledge by the inmates that such disclosure could definitely be a one-way ticket to the SHU, and for this reason the intake screening of an

inmate with a history of depression or mental illness should be given great care and attention, despite what is being reported by the inmate;

39. Dr. Robert Binford stated in reports prepared by him that "No programs/treatment are recommended at this time" for Riopedre to Riopedre's detriment and with deliberate indifference to Riopedre's mental health in violation of Riopedre's right to be free from an Eighth Amendment prohibition against cruel and unusual punishment;

40. Dr. Robert Binford stated in reports prepared by him that "No programs/treatment are recommended at this time" for Riopedre to Riopedre's detriment and with deliberate indifference to Riopedre's mental health in violation of Riopedre's right to reasonable medical, psychiatric, and/or psychological dictated standards of care;

41. Riopedre did not receive access to a level of care comparable to that available in the community, as mandated by the Federal Bureau of Prisons, Program Statement 5310.13, Institution Management of Mentally Ill Inmates, which states:

> Psychological services within each institution should be sufficient to ensure that every inmate with a documented need and/or interest in psychological treatment has access to a level of care comparable to that available in the community and consistent with the overall mission of the institution.

42. Riopedre's Inmate Skills Development Plan, dated October 20, 2009, documents that on September 11, 2009, Riopedre was assigned to the SHU;

43. In effect at the time of Riopedre's commitment in 2009 to FCI Estill, the United States Department of Justice, Federal Bureau of Prisons, had promulgated a Program Statement, numbered P5324.08, entitled, Suicide Prevention Program, April 5, 2007;

44. Program Statement P5324.08 specifically dealt with the heightened risk of inmates for suicide who were placed in solitary confinement in SHU, and on page 6, paragraph 2, sub-paragraph c, it states:

> "c. **Inmates in SHUs.** Inmates in Administrative Detention or Disciplinary Segregation status often may be at a higher risk for suicidal behavior. Inmates being transferred into the SHU **will** be monitored for signs of potential suicide risk...."

45. Riopedre who had not committed any documented actions warranting disciplinary action, was known to prison officials to have suffered from debilitating depression, had recently stopped taking psychotropic medication, and had been not allowed to visit with his family who had driven up from Miami, Florida, and two days after arriving at the Federal Prison Camp at Estill, South Carolina, he was placed in the SHU, which is generally reserved for isolating inmates who have committed infractions of rules or regulations, inmates whose safety may be in jeopardy if left in the general population, for short overnight stays when an inmate be scheduled to be transported to a medical facility outside of the prison, or when an inmate may be waiting to be released to general population because there is no bed or bunk available;

46. It is a well-known fact to Bureau officials that many inmates "game the system" and may report to staff a "perceived" threat or conflict with another inmate as a retaliatory measure, and that by reporting such a threat or conflict, inmates oftentimes force prison officials to send other inmates to the SHU;

47. The individual defendants, responsible for Riopedre's designation and classification, care and custody, and medical and mental health care needs, did, with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and right to due process of law, deprive Riopedre of his rights under the First, Fifth, Eighth, and Fourteenth;

48. Riopedre's forced confinement to SHU was reviewed on September 11, 2009, September 25, 2009, October 2, 2009, October 9 2009, and October 25, 2009;

49. Ana Davide, the Florida attorney in Miami who represented Riopedre in the case of U.S. vs. Jose Riopedre, Case 8:06-cr-00580-PJM, contacted FCI Estill multiple times, and

sometimes multiple times in one day, to challenge the actions of the Defendants in isolating Riopedre;

50. On October 2, 2009, attorney Ana Davide contacted officials at FCI Estill by email to try to challenge Riopedre's continued detention in SHU;

51. And again, on October 7, 2009, attorney Ana Davide contacted officials at FCI Estill by email to try to challenge Riopedre's continued detention in SHU;

52. Mr. Riopedre's forced confinement to SHU was authorized by Lieutenant Paul Sneed, and/or Lieutenant C. Wiggins, and the same was reviewed by Captain G.S. Bondurant, and approved by Warden Mildred L. Rivera on each of the previously stated review dates with deliberate indifference to Riopedre's rights under the Eighth Amendment to the United States Constitution against Cruel and Unusual Punishment and the Fifth Amendment Right to be free from unlawful government action without Due Process of Law, as well as the First and Fourteenth Amendments, as previously stated herein;

53. On six (6) separate occasions over a six-week period, the only reason given on a Special Housing Review for Violation or Reason Form as to why Riopedre should be in isolation in the SHU, was that Riopedre was "pending reclassification" and prison officials with deliberate indifference to Riopedre's mental health and ever increasing anxiety, depression, and risk of suicide;

54. The Defendants, individually and collectively, who were responsible for the care, custody and well-being of Riopedre, with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment, his right to due process of law, and his right to the standard of medical care required under the law, did little or nothing to ensure those constitutional rights;

55. Program Statement P5324.08 states:

> **Inmate Removal from the SHU.** The Program Coordinator will arrange to have an inmate exhibiting significant potential for suicide to be removed from the SHU and placed on suicide watch. Ordinarily, once the crisis is over, the inmate will be returned to satisfy any *sanction* [emphasis added] that was imposed

56. Program Statement P5324.08 clearly recognizes that SHU's are reserved for inmates sanctioned for disruptive or illegal behavior. Mr. Riopedre exhibited neither of these traits and it was incumbent on the prison officials to either expedite his pending re-classification to minimize the adverse psychological impact the SHU was having on Riopedre, or to place Riopedre on Suicide Watch as a precaution and in the abundance of caution, especially considering Riopedre's medical and other records that should have been red flags for prison officials to heed;

57. Program Statement P5324.08 goes on to describe the housing an inmate on suicide watch should be placed in:

    a. Housing. Each institution must have one or more rooms designated specifically for housing an inmate on suicide watch. . . .
    b. The primary concern in designating a room for suicide watch must be the ability to observe, protect, and maintain adequate control of the inmate.
    c. The room must permit easy access, privacy, and unobstructed vision of the inmate at all times.
    d. The suicide prevention room may not have fixtures or architectural features that would easily allow self-injury.

58. Riopedre was placed in a cell in SHU that allowed only a limited view of the interior of the cell with only a small window and that was difficult to enter. The unit had fixtures and bars from which an inmate could hang himself, all of which violated the above listed policy limitations placed on defendants with respect to suicidal inmates;

59. Because of Riopedre's medical and psychiatric history, the fact that he had been taking Paxil prior to arriving at FPC Estill, and other documentation as provided in Riopedre's inmate records, prison officials should have placed Riopedre in the suicide watch cells, made for that purpose;

60. Prison officials failed to consider the totality of the information available to them regarding Riopedre's medical and psychiatric condition, the inquiries from family members, his attorney, and even a Congressional inquiry that was initiated by the Honorable Lincoln Diaz-Balart;

61. The Defendants did this with deliberate indifference to Mr. Riopedre's right to free be from cruel and unusual punishment and right to due process of law;

62. Program Statement P5324.08 also created a fellow inmate observer program to assist the facility in preventing suicides. The policy mandates:

    a. The observer and the suicidal inmate will not be in the same room/cell and will have a locked door between them.
    b. The person performing the suicide watch must have means to summons help immediately.

63. On October 30th, 2009, within hours of Mr. Riopedre's death, Defendants, all being federal prison officials at FCI Estill, including Warden Mildred Rivera, caused Harry Castro, a mentally ill inmate who was known to suffer from bipolar disorder and other mental disorders, to be placed in the cell occupied by Riopedre;

64. In the early morning of October 31, 2009, on Halloween Day, Riopedre apparently tied multiple socks and/or torn sheets around his neck and attached them to the cell window bars, and hanged himself. As a result of Defendants' omissions, actions and/or failures to act, Riopedre ultimately died as a result of the hanging;

65. At all times relevant hereto, the Defendants acted with deliberate indifference to Riopedre's right to be from cruel and unusual punishment and right to due process of law;

66. Defendants, knowing of Riopedre's medical and mental health history, the information contained in his Presentence Investigation Report, having heard his telephone conversations with family members and others, the numerous messages sent by his

attorney, Ana Davide, and other available information, should have placed Riopedre on suicide watch and assigned an Inmate Observers and staff to watch over him 24-hours a day;

67. Program Statement P5324.08 also highlights what actions must be taken when an Inmate Observer alerts of a suicide attempt by a fellow inmate:

    a. In all cases, when an inmate observer alerts staff to an emergency situation, staff must immediately respond to the suicide watch room and take necessary action to prevent the inmate on watch from incurring debilitating injury or death. In no case will an inmate observer be assigned to a watch without adequate provision for staff supervision or without the ability to obtain immediate staff relief.

68. Program Statement P5324.08 also calls for constant observation of an inmate at risk for suicide;

69. There was no constant monitoring of Riopedre and the records made available to Plaintiff by the Federal Bureau of Prisons does not demonstrate that that Riopedre was being monitored as Riopedre should have been because of his medical history and mental health problems and severe depression ;

70. All of the individual defendants that were directly responsible for the designation and classification, the care and custody, and the medical and mental health care of Riopedre, acted with deliberate indifference to Riopedre's rights to be free from cruel and unusual punishment and to due process of law;

71. In fact, on October 23, 2009, in a Memo prepared by Pam Weathers, she documented a monitored telephone call between Riopedre and his wife. During the call he indicated that he felt very bad, and he complained about his close confinement. Although in some circumstances such complaints may seem normal to a prison official, this was yet another indication of Riopedre's fragile mental state ignored by Defendants, because they failed to take into account his known medical and mental health illness and severe depression.

It could be argued by Defendants that this failure occurred, in part, because Pam Weathers did not speak Spanish, which was Riopedre's native language, but this argument would fail because Defendants were well aware and on notice of Riopedre's language limitations;

72. The Federal Bureau of Prisons has a large number of facilities throughout the country with almost 35% of the inmate population who are Hispanic. Less than 15% of the Bureau's prison staff is Hispanic. Riopedre, whose primary language was Spanish, was designated to a facility with limited Spanish speaking prison staff;

73. The Riopedre's right to be free from cruel and unusual punishment, to due process of law, and to be provided equal protection under the law have been deprived by the prison staff's failure to be able to obtain accurate translations of his telephonic and other communications;

74. The danger related to protective custody is so severe that that the Statement in the United States Department of Justice, Federal Bureau of Prison's "Sample" Suicide Prevention Information states:

    a. **Protective Custody**-Inmates who volunteer to enter protective custody are at high risk for suicide, especially during the first 72 hours in SHU
    b. **Long-term Protective Custody Inmates** – These inmates are particularly vulnerable to depression that can lead to a suicide attempt, and should be monitored closely while in they are in SHU.[emphasis added]
    c. **Inmates Taking Medication for Mental Health Reason**-These inmates are vulnerable to developing suicidal thoughts and attempting suicide by overdosing on their medication.

75. The United States Department of Justice, Federal Bureau of Prisons, issued a Program Statement relating to Personal Property, Inmate, on December 28, 2005 [hereinafter "Statement relating to Personal Property"] that required each inmate be afforded additional secured space outside his cell for additional personal property.

76. The Statement relating to Personal Property specifically states:

a. Civilian clothing (i.e. clothing not issued to the inmate by the Bureau or purchased by the inmate from the commissary) ordinarily is not authorized for retention by the inmate.
b. The Inmate Personal Property List (Attachment A) includes all personal property an inmate can retain at every institution. . . .
c. Staff shall consider as nuisance contraband any item ... excessive quantities of it present a health . . . hazard . . . ."
d. Attachment A specifically authorizes a maximum of five (5) socks per inmate and one (1) towel per inmate.

77. Based on the records and photographs provided by prison officials, it appeared that Riopedre had what appeared to have accumulated a large number of socks and sheets in the short time he was isolated in the SHU, in violation of the Bureau's own policies;

78. But for the prison officials deliberate indifference to its own policies, the Defendants would have prevented Riopedre's death;

79. It is a well known fact that in cases where an individual, such as in this case with Riopedre, who is deprived of oxygen, whether by drowning, attempted hanging, or some other means, the first five to eight minutes are crucial, if not critical, in receiving life saving emergency medical treatment. Once Defendants were made aware of the situation, they acted with deliberate indifference to Riopedre's rights to be free from cruel and unusual punishment and to due process of law;

80. On October 31, 2009, at 6:18 A.M., according to a Memorandum dated October 31, 2009 by Richella Lawson, Harry Castro, the inmate who had been placed in Riopedre's cell the night before, started to bang on the cell door and yelled. According to the Lawson's Memorandum, when she arrived at the cell she observed the following:

"his cellmate had hanged himself but I couldn't see his cellmate because of a blind spot in the corner"

81. Critical minutes passed without Defendants rendering life saving emergency care which could have prevented Riopedre's death, an omission that demonstrates deliberate indifference to Riopedre's constitutionally mandated rights to reasonable care;

82. On the morning of October 31, 2009, various prison reports indicate that present at the scene that morning were Defendants Chris Orr, James Solvik, Scott Williams, Officer M. Hill, Richella Lawson, and Tamala Middleton, and others;

83. At 6:20 AM, according to a Memorandum prepared by Defendant Chris Orr on October 31, 2009, inmate Harry Castro started yelling,

"HELP"! HELP HELP! MY CELLIE NEEDS HELP"

84. Chris Orr's Memorandum of October 31st, 2009 documents that Harry Castro started yelling after 6:20 AM:

"HE NEEDS HELP! PLEASE HELP HIM!"

85. The documented evidence shows that while Harry Castro was begging and screaming for help for Riopedre, Riopedre was dying;

86. The Defendants actions allowed Riopedre to die, and such actions constitute deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and to due process of law;

87. The evidence shows that while Harry Castro was screaming for help no one opened the cell door to Riopedre's cell to provide life saving emergency medical care or first aid measures to save Riopedre's life or even see Riopedre from 6:18 AM through 6:28 AM or 6:28 AM, or from 6:28 AM to 6:38 AM or from 6:38 AM to 6:48 AM;

88. The Defendants failed to act and respond appropriately in an emergency medical situation and Defendants' actions were with deliberate indifference to Riopedre's right to be free

from cruel and unusual punishment and to due process of law and his right to reasonable medical care;

89. Finally, at 6:48 AM according to all documented evidence, including a Memorandum dated October 31, 2009 by Officer Specialist Williams, at 6:48 the first call for help was answered and individual defendants entered Riopedre's SHU cell;

90. The Defendants did this with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and to due process of law;

91. During his confinement, Riopedre, who was diagnosed on record with severe depression and anxiety, was not given proper supervision and care by the prison staff, or proper psychological care and there was a failure to properly assess his mental state;

92. Much of the Riopedre's first 51 days in prison were spent in solitary confinement, and although he could not adequately communicate in English, he was not furnished with a Spanish interpreter through whom he could have communicated his condition to the guards or other staff;

93. Throughout his 51-day detention in SHU at the Defendants' facility, Riopedre showed increasing outward signs of fragility and mental instability through severe weight loss;

94. Riopedre was additionally not allowed to see his family when they traveled to visit him;

95. Despite Riopedre's medical history, severe weight loss, and deteriorating condition, Defendants allowed him to suffer by failing to provide him treatment, punished him by placing him in long-term, unnecessary, solitary confinement, deprived him of communication, prevented him from visiting with his family and put him in conditions preventing appropriate monitoring and then allowed him to accumulate a large, and completely inappropriate, number of tube socks and other materials, that were a dangerous instrumentality, which he ultimately used to take his life;

96. Before killing himself, but after being removed from solitary confinement, Riopedre was placed in a SHU cell with Harry Castro, an inmate who also had psychological issues yet was receiving care from a case manager;

97. On October 31, 2009, after suffering from lack of proper treatment for his severe clinical depression and anxiety, being held in solitary confinement for an extended period, and being given little supervision for someone in his fragile state, Riopedre hanged himself in his cell via a network of tube socks and/or pieces of material tied to the upper bunk of the cell;

98. After the incident, defendant Tracy Horvath visited Harry Castro, the inmatewho had been placed into Riopedre's cell the night before the incident, in order to make sure he was doing well due to his psychological history and to arrange for psychological consultations. Had Jose Riopedre received similar care, his suicide would have been averted;

GENERAL ALLEGATIONS

99. Due to the documented nature and severity of Riopedre's condition, the Defendants demonstrated a clear deliberate indifference to the medical needs of the Riopedre;

100. There was a failure to properly assess Riopedre's condition by Defendants;

101. There was a failure to properly house Riopedre by Defendants;

102. There was a failure to properly monitor Riopedre and his actions by Defendants;

103. There was a failure to intervene when Riopedre was in distress by Defendants;

104. Although the Riopedre could not speak English well, he was not provided with a Spanish interpreter or any other means with which to communicate his condition. By not granting Riopedre proper medical treatment and by not supplying proper supervision to Riopedre despite his fragile state, the Defendants demonstrated a deliberate indifference

to the conditions leading directly to his suicide and denied him equal protection of the law;

105. Additionally, by allowing Riopedre to accumulate copious amounts of tube socks and other linens, despite his medical history and clearly deteriorating condition, the Defendants demonstrated complete indifference to the obvious severity of Riopedre's condition and signs of self-destructive behavior;

106. Riopedre's death could have been prevented had he been given his proper medication, given proper visitation rights with doctors and his family, prevented from accumulating copious amounts of tube socks, properly monitored throughout his deteriorating condition, and, if necessary, placed on suicide watch;

107. Riopedre died as a result of a number of omissions and actions of Defendants, individually and jointly, by not being properly trained, failure to adequately monitor inmates and observe obvious self-destructive tendencies, not providing proper medical care to the Riopedre, failing to properly monitor Riopedre given his known medical and mental health history, and failure by Defendants to take prompt action when the Riopedre attempted to kill himself;

COUNT ONE

***Bivens* Claim for Violation of Riopedre's Eighth Amendment Rights: Protection from Cruel and Unusual Punishment by Fernando Mendez, personal representative of the Esther of Jose R. Riopedre**

108. Plaintiffs re-allege and re-affirm the allegations set forth in paragraphs one (1) through one hundred and seven (107) , as if fully set forth herein;

109. All of the Defendants, individually and collectively, demonstrated a clear indifference to the known conditions of the Riopedre that led to his suicide under their care;

110. It is true that jail inmates are much more likely to commit suicide than free persons are-in fact, nine times as likely. Lindsay M. Hayes & Joseph R. Rowan, National Study of Jail Suicides: Seven Years Later (National Center on Institutions and Alternatives, Feb. 1988). According to the study just cited 12.9 percent of jail suicides occur within the first three hours of confinement, 32.8 percent within the first 24 hours, 62.1 percent within the first two weeks, 72.8 percent within the first month, 89.2 within the first four months, and 97.4 within the first seven months. Only 10.8 percent of suicides occur after 5 months;

111. The psychiatric condition most closely associated with suicide is severe ("clinical") depression, which the Defendants knew Mr. Riopedre suffered from;

112. Defendants, individually and collectively, demonstrated a deliberate indifference to the known conditions of the Riopedre that led to his suicide under their care by failing to follow their own policies and procedures previously enumerated that had they been followed would have saved Mr. Riopedre's life. *Jutzi-Johnson v. U.S.*, No. 96-C-5708, U.S. Dist. Ct., N.D. Ill. (March 29, 2000);

113. All of the Defendants, individually and collectively, and specifically Defendants Anita Cano and Tracy Horvath, who were responsible for evaluating and treating inmates at the center, violated Riopedre's constitutional rights, demonstrated deliberate indifference and demonstrated negligence that rose to the level of gross negligence towards Riopedre's safety by:

a. Failing to properly supervise and provide support to the Riopedre, especially in regard to his severe and documented psychological issues;

b. Failing to take action to ensure Riopedre's safety either through direct action, such as placing him under suicide watch or warning the guards;

c. Failing to grant Riopedre similar psychological support for his documented psychological condition as that was granted to other similarly situated inmates such as inmate Harry Castro;

114. Defendants, individually and collectively, had the resources, knowledge, and duty to offer the Riopedre the same diligence and duty of care that other inmates received;

115. Defendants, individually and collectively, were deliberately indifferent to the conditions that led to his death of Riopedre by failing to recognize Riopedre's documented medical and psychological history and failing to recognize and act upon Riopedre's worsening condition despite Riopedre's a well documented history of severe psychological disorders;

116. Defendants, individually and collectively, who were responsible for care and custody, and providing adequate medical and psychological care to Riopedre, demonstrated a deliberate indifference to the Riopedre's conditions by:

a. Deliberately placing him in SHU for no reasonable justifiable reason despite Riopedre's known clinical depression, weaning off of Paxil, and ongoing mental health issues;

b. Failing to provide an appropriate level of surveillance to Mr. Riopedre despite his severe weight loss and obviously worsening condition;

c. Failing to take the appropriate actions or give proper and timely notifications to the appropriate personnel about the Riopedre's visibly deteriorating condition and weight-loss;

d. Failing to properly supervise Riopedre and allowing Mr. Riopedre to collect copious amounts of tube socks, which hold little use in bulk, fashion them into a rope, and ultimately kill himself;

e. Failing to notice or take action over obviously suicidal behavior both over the fifty days preceding his death, and on the day of his death;

f. And the other aforementioned actions in Paragraphs 1-116

117. By having either ignored Riopedre's situation or somehow remaining ignorant to the Riopedre's worsening situation and collection of tube socks, the Defendants, individually and collectively, who were on duty at the facility demonstrated a clear indifference or a negligence that rose to the level of gross negligence towards their duty to monitor Riopedre;

118. Defendant Tamala Middleton, the clinical nurse on call at the time of the Riopedre's death, as well as Dr. Robert Binford, demonstrated clear indifference to the Riopedre's conditions, and his rights to be free from cruel and unusual punishment, by:

a. Failing to properly supervise or provide proper medication and support to the Riopedre;

b. By not properly caring for the Riopedre or trying to take action despite his worsening condition and documented proof of severe psychological disabilities, Tamala Middleton and Dr. Robert Binford demonstrated clear indifference to Riopedre's condition, or at the least gross negligence;

119. Defendant Lieutenant James Solvik, Operations Lieutenant for the facility, and Warden Mildred Rivera and other defendants demonstrated a deliberate indifference to Riopedre's and other inmates' 8th amendment rights by not supplying an adequate medical staff to the inmates, especially given that many, such as Riopedre, had severe and documented mental illnesses;

120. Defendants, individually and collectively, with knowledge that Riopedre, needed psychological care, failed to provide the proper medication that could have helped

Riopedre cope with his circumstances, demonstrated a indifference to the needs of Riopedre;

121. Defendants, individually and collectively, demonstrated deliberate indifference by not opening the Riopedre's cell door and rendering first aid resuscitative aide and/or emergency care until approximately thirty minutes after they were alerted to the emergency nature of Riopedre's condition by Harry Castro, who was begging them to save Riopedre's life;

122. As a result of the inadequate supervision, inadequate training, failure to follow prison protocols, and delay in providing Riopedre with immediate first aid resuscitative measures and/or emergency medical care, Riopedre suffered cruel and unusual punishment;

123. Riopedre suffered greatly in the final 51 days of his life and eventually succumbed to the pressures of being isolated in SHU by his attempted suicide that did not have to end in his death, but for the deliberate indifference of Defendants, all acting individually and collectively;

124. As a result of individual defendants "actions, individually and collectively, the heirs of Jose Riopedre are entitled to relief from the individual Defendants. "*Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971). *Estelle v. Gamble*, 429 U.S. 97 (1976) (The US Supreme Court held that an indifference to the medical needs of inmates is a violation of the 8th amendment to the US constitution and constitutes cruel and unusual punishment.) *Daniels v. Williams*, 474 U.S. 327 (1986) (Held that although mere negligence is not enough to trigger a cause of action for government liability, gross negligence may suffice to demonstrate constitutional claims.) *Carlson v. Green*, 466 U.S. 14 (1980);

125. Plaintiff alleges that Defendants, individually and collectively, also violated Riopedre's First and Fourteenth Amendment rights;

126. Riopedre had a constitutionally protected right under the First and Fourteenth Amendments;

127. Defendants, individually and collectively, deprived Riopedre of his constitutionally protected rights;

128. The Plaintiff lacks a statutory cause of action, or an available statutory cause of action does not provide monetary compensation against Defendants, individually and collectively;

129. No "special factors" suggest that the Court should decline to provide the judicial cause of action and remedy in this case;

130. No appropriate immunity can be raised by the individual defendants as a result of Riopedre's death;

131. Plaintiff has an interest in his relationship with his brother-in-law, as the brother of Riopedre's widow, Susanna Mendez, which is protected by the First and Fourteenth Amendment to the Constitution;

132. These constitutional interests survived the death of Riopedre;

133. Defendants intentionally interfered with this interest by demonstrating deliberate indifference to Riopedre's right to receive adequate medical and psychiatric care and to be free from cruel and unusual punishment;

134. The actions of the Defendants, individually and collectively, were in violation of Riopedre's Fifth and Eighth Amendment rights and Plaintiff's First and Fourteenth Amendment rights, as guaranteed by the Constitution of the United States;

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests this Court to:

135. Declare the actions complained of herein to be in violation of the First, Fifth and Eighth, and Fourteenth Amendment to the United States Constitution as well as South Carolina and Federal law;

136. Enter judgment in favor of Plaintiffs and against all Defendants, individually and jointly;

137. Award Plaintiff damages to compensate for their injuries including:

a. costs and attorney's fees;

b. nominal, compensatory, and special damages;

c. pain and suffering;

d. a sum to compensate Plaintiff for his own pain and suffering and that of Riopedre's widow for the loss of companionship and Plaintiff's right to familial association;

e. punitive damages in sum as to deter Defendants conduct of this nature in the future; and,

f. all other relief that this court deems just and proper under the circumstances.

138. Enter judgment in favor of Plaintiffs and against all the Defendants, individually and collectively;

a. Award damages to compensate Plaintiff for their injuries

i. In the amount over $75,000;

ii. costs and attorneys' fees; and,

iii. all other relief that this court deems just and proper under the

circumstances;

139. Award Plaintiffs any other relief that this court deems just and proper under the circumstances.

DEMAND FOR JURY TRIAL

PLAINTIFFS hereby demand a jury trial on all issues triable by a jury.

Dated: October 19, 2012

Respectfully submitted,

\s\ Dionè Carroll
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ATTORNEYS FOR THE PLAINTIFF

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

CASE NO. 8:12-2806-TMC-JDA

ESTATE OF JOSE R. RIOPEDRE, by and through FERNANDO MENDEZ, as the Personal Representative of the Estate of Jose R. Riopedre, and SUSANA MENDEZ, individually, as wife of Jose R. Riopedre,

Plaintiffs,
vs.

MILDRED L. RIVERA, ROBERT BINFORD, JAMES SOLVIK, TAMALA MIDDLETON, CHRIS ORR, RAGANOLD WILLIAMS, RICHELLA LAWSON, RICHARD WALLACE, ANITA CANO, TRACY HORVATH, SCOTT WILLIAMS, VERNON ROBINSON, PAUL SNEED, and GREGORY BONDURANT, JOHN J. ENZINNA, DR. DERICK PHILLIPS, STEPHEN BUCKLER, PAM WEATHERS, JEREMY DALLAS, CHRISTOPHER BUSH, C. WIGGINS, M. HILL, and JOHN DOES 1-8, individually, and in their individual capacities,

Defendants.

_____/

SECOND AMENDED COMPLAINT & JURY DEMAND

Comes now the ESTATE OF JOSE R. RIOPEDRE, by and through plaintiff Fernando Mendez, the personal representative and administrator and comes now plaintiff Susana Mendez, wife of the decedent (hereinafter collectively referred to as "Plaintiffs") and file this **SECOND AMENDED COMPLAINT** against the above listed Defendants, as well as additional unknown officials and/or agents of the United States Bureau of Prisons, for damages associated with the

decedent Jose R. Riopedre's (hereinafter "Riopedre") wrongful death, survival, the deprivation of Riopedre's constitutional rights under the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Riopedre's suffering and death while incarcerated, damages to compensate Plaintiffs, including Riopedre's spouse, and his family for their own pain and suffering and the loss of Riopedre's companionship and familial association as a result of the death of Jose R. Riopedre due to the denial of his medical needs, and all other claims as alleged herein. Plaintiffs seek both compensatory and punitive damages. In support Plaintiffs allege as follows:

NATURE OF THIS ACTION

This is a Bivens action for damages based on the abuse and wrongful death of Jose R. Riopedre, who at the time of his death on October 31, 2009, was a minimum security inmate at the FCI Estill in South Carolina. As alleged below, Riopedre suffered from depression and anxiety disorders prior to, at the time Riopedre self-surrendered, and during his incarceration, to which Defendants exhibited deliberate indifference, and that as a result was not properly treated, as constitutionally required resulting in Riopedre's death.

Riopedre died in an incident determined by the Hampton County, South Carolina, coroner to have been a suicide. Riopedre's death was preventable, and was the result of Defendants' actions and failures to act, all in violation of the rights guaranteed by the Constitution of the United States of America.

PRELIMINARY STATEMENT

1. Riopedre, under intense distress due to his improperly treated depression and anxiety disorders, committed suicide while serving a term of imprisonment of one year and one day, as an inmate of the Federal Corrections Institute ("FCI") in Estill, South Carolina (hereinafter "the facility" or "Estill").

2. This action is brought by the estate of the Riopedre, through his Personal Representative, Fernando Mendez and by his wife Susana Mendez in her individual capacity.
3. This is an action by Plaintiffs for violations of the Riopedre's First, Fifth, Eighth and Fourteenth Amendment rights and for the wrongful death of the Riopedre, survival, and loss of consortium or companionship and familial association.
4. This suit seeks an end to individual defendants' unconstitutional and unlawful practices of the Defendants and monetary relief for Riopedre's wrongful death and associated harm, along with other damages against Defendants.

JURISDICTION

5. This action arises under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The *Bivens* claims arise under the Fifth and Eighth Amendments to the United States Constitution as applied to federal employees and inmates through *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971), *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Carlson v. Green*, 466 U.S. 14 (1980) (specifically allows a *Bivens claim* for 8th amendment violations and prison suicides).
6. Jurisdiction is also, therefore, conferred on this Court by 28 U.S.C. § 1331.
7. The Court has personal jurisdiction of the *Bivens* Defendants because the substantial part of the alleged incidents, actions, and facts resulting in the death of Riopedre occurred within the confines of this Court's jurisdiction at the Federal Correctional Institution (FCI) located in Estill, in Hampton County, South Carolina, causing the wrongful death of Jose R. Riopedre.
8. The action also arises under and involves survival, loss of consortium and companionship of spouse and other laws of the State of South Carolina.

9. Jurisdiction is conferred on the Court by 28 U.S.C. §1331 and the supplemental jurisdiction of this court pursuant to 28 U.S.C. §1367.

VENUE

10. Venue is proper in the Beaufort Division, District of South Carolina pursuant to 28 U.S.C. §1391 because a substantial part of the acts or omissions that gave rise to the Riopedre's death and Plaintiffs' claims occurred in Estill, South Carolina.

PARTIES

Plaintiffs:

11. Fernando Mendez is personal representative/administrator of the Estate of the Riopedre Jose R. Riopedre. Mr. Mendez was duly appointed by the probate courts of the State of Florida, in Miami-Dade County Circuit Court, Probate Division, Case Number 11-1073-CP-02. He has satisfied all qualification requirements of the State of South Carolina to bring this suit on behalf of the Estate of Jose R. Riopedre, for the benefit of any heirs, beneficiaries, and distributees, through filings with Hampton County Probate Court, Case Number 2012-ES250068. *See* S.C. Code Ann. § 62-4-205.

12. Susana Mendez is the wife of the decedent and brings claims in her own right for loss of consortium and loss of familial association.

Defendants:

13. The Defendants in this action include, but are not limited to the following listed individuals who were employed by the Federal Bureau of Prisons, at all times relevant hereto, hereinafter referred to as "Prison Staff", the same which include: Mildred L.

Rivera (former Warden of FCI Estill); James Solvik (Operations Lieutenant); Tamala Middleton (Registered Nurse); Chris Orr (Senior Officer); Richella Lawson (Senior Officer); Raganold R. Williams, Sr. (Senior Officer Specialist, OIC at time of incident); Richard Wallace (Senior Officer Specialist, OIC preceding incident, Special Housing Observation Officer at time of incident); Anita Cano (Case Manager); John J. Enzinna (Cook Supervisor and present at the time of the incident); Tracy Horvath (Case Manager); Scott Williams (Senior Officer Specialist); Dr. Robert Binford (Staff Psychologist); Vernon Robinson (Senior Officer); Paul Sneed (Lieutenant); Gregory S. Bondurant (Captain at the time of the incident but is currently an Associate Warden at FCI Victorville, CA), Stephen Buckler, Pam Weathers, Jeremy Dallas, Christopher Bush, C. Wiggins, and M. Hill. The aforementioned Prison Staff are appropriate defendants to this *Bivens* action as it is brought against them in their individual capacities and all the individuals are federal law enforcement officials and/or officers who acted under color of federal law and Plaintiffs' complaint is not an action against the United States and it is therefore not barred by sovereign immunity.

FACTS

14. Two ghastly dates mark the beginning and the end of Jose Riopedre's stay at the FCI Estill in 2009: (a) Friday, September 11, 2009; and, (b) Saturday, October 31, 2009 (Halloween Day). The first date marks the day that Riopedre voluntarily reported and self-surrendered to FCI Estill in compliance with U.S. District Judge Peter J. Messitte's Order [DE94], dated August 11, 2009 (see *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM). The latter date marked the end of Mr. Riopedre's life on this earth, only 51 days after arriving at FCI Estill, South Carolina;

15. On July 15, 2009, Jose Riopedre was sentenced to one year and one day in the U.S. District Court for the District of Maryland (*see* DE 86 and DE90 in *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM) and was permitted to remain free, on bond, while awaiting designation and classification by the Federal Bureau of Prisons, at which time Riopedre would voluntarily surrender. Subsequent to Riopedre's sentencing he was designated to a minimum security facility at Estill, South Carolina;
16. On Friday, September 9, 2009, Riopedre arrived at the Federal Prison Camp in Estill, South Carolina, without incident;
17. Riopedre was designated to FPC Estill by the Federal Bureau of Prisons based on his minimum security designation and classification and was notified by the Federal Bureau of Prisons to report to FPC Estill;
18. Riopedre complied fully with the self-surrender order issued by the Honorable Judge Peter J. Messitte in *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM;
19. After only two days at the Federal Prison Camp at FCI Estill, South Carolina, Riopedre's nightmare began to unfold, and on September 11, 2009 @ 8:40 A.M. an Administrative Detention Order was issued and Riopedre was immediately taken into the Special Housing Unit (hereinafter referred to as SHU) to begin serving what turned out to be his death sentence;
20. Notwithstanding the Federal Bureau of Prisons' need to maintain security, Bureau officials knew and/or should have known from their own records that Riopedre had suffered from, and been medically diagnosed with "severe, disabling clinical depression and anxiety" and had been seeking outpatient treatment, along with taking his prescribed strong anti-depressive medications, including PAXIL;

21. As stated in Riopedre's Psychiatrist's 2008 letter, the Riopedre had developed intense disturbances of mood and thought content, in addition to severely intense obsessive thoughts about financial and legal issues;
22. The Bureau's Plan documents that Mr. Riopedre's skills status, as it related to his Mental Health, was satisfactory, and to a 5% degree required attention;
23. The person who was listed in the Acknowledgement of Inmate Form, Parts 3 & 4, of Riopedre's United States Department Justice Federal Bureau of Prisons report to be contacted in case of illness or death was Riopedre's wife, Susana Mendez, who stood by her husband while he was being treated for debilitating depression that required psychotropic medication prior to Riopedre being committed to the SHU at FCI Estill on September 11, 2009;
24. It was known, or should have been known, to the Federal Bureau of prisons officials that a request had been made by his attorney to Judge Messitte to recommend that the Federal Bureau of Prisons provide Riopedre with mental health counseling receive help for his depression during his incarceration and the same was recommended by Judge Messitte;
25. In fact, as documented in Inmate Property Report, dated September 9, 2009, Riopedre had no socks, towels, or articles that could facilitate his suicide in light of his previously diagnosed depression that led a Federal Court Judge to take note of his mental state at sentencing;
26. Riopedre's Intake Screening Form, dated September 9, 2009, at 12:40 PM, documents that he was not involved in ongoing cooperation with Federal agents or testified in court or was involved in a gang, such that he would have to be isolated or placed in SHU;
27. Riopedre was certainly not a flight risk, otherwise U.S. District Judge Peter J. Messitte would not have allowed him to voluntarily self-surrender to the institution;

28. For Riopedre, being confined to the SHU was tantamount to solitary confinement. Inmates in the SHU must remain locked up in a small cell for the most part containing a steel double bunk bed, a small open shower with no door (with or without hot water), small steel desk-chair combination (bolted to the floor and wall) or concrete shelf and small cylindrical concrete bench, and a stainless steel, combination toilet and sink;
29. In SHU, Inmates are locked up 24-hours each day without being able to leave the cell except for some instances where they are allowed to go to a recreation yard which is essentially a fenced-in cage, where all an inmate can do is walk around in circles for one hour or less, when such an opportunity is afforded the inmate;
30. In SHU, communication to family and friends is severely limited and telephone calls generally are permitted when authorized and many times at the discretion of the prison staff, including the inmate's counselor, case manager, and/or the corrections officer on duty. More often than not, most inmates in the SHU have little or almost no telephone communication with their family or friends for days, weeks or months at a time;
31. The Federal Bureau of Prison's performed a standard Inmate Screening on September 10, 2011, that documents that Riopedre was treated for Depression from 2006 through 2009, (that same year) and was prescribed Paxil for his Depression;
32. The Federal Bureau of Prison Screening Document of Mr. Riopedre dated September 9, 2009 states erroneously: "Hx of Mental Health Treatment: No". Hx is an abbreviation for "medical history" in medical documentation usage;
33. Riopedre, in his own handwriting, alerted Prison officials on his Psychology Services Inmate Questionnaire, dated September 11, 2009, that he had received treatment for a nervous or mental problem and had received medication;

34. As early as 2001, it was well documented that the withdrawal symptoms from Paxil could be much more severe than at first thought and could even plunge users into the depths of depression due to the increase of serotonin and decrease of serotonin metabolism that it produces;

35. In fact, in March of 2004, the FDA issued a Public Health Advisory that provided further cautions to physicians, their patients, and families and caregivers of patients about the need to closely monitor both adults and children with depression, especially at the beginning of treatment, or when the doses are changed with either an increase or decrease in amount;

36. The standard warning regarding patients who are removed from Paxil is:

> "You may become suicidal, especially at the beginning of your treatment and any time that your dose is increased or decreased."

37. Riopedre, who was already being treated for Depression, had stopped taking Paxil on his own prior to being committed to FCI Estill, thus increasing his risk for suicidal thoughts, and despite this fact known to Federal Bureau of Prisons officials, Riopedre was placed in isolation in the SHU without the proper review, evaluation, and determination of what, if any, medically necessary medications should have been prescribed and given to Riopedre by a psychiatrist at the facility;

38. Despite being previously diagnosed; having ongoing, debilitating depression with a heightened risk for suicide; not being provided his previously diagnosed anti-depressant medication, Paxil; his requests for treatment of his mental disorder; his family's requests for treatment of his mental disorder; and a Federal Court's concerns for his safety, his Psychology Data System Intake Screening of September 10, 2009, prepared by Dr. Robert W. Binford, demonstrates deliberate indifference to Riopedre's medical and

mental health needs and confirms that no attempt was made to adequately review Riopedre's medical records or to contact his treating doctors;

39. It is well known to officials at the Federal Bureau of Prisons that at the initial screening of inmates, many inmates will not disclose any thoughts of suicide, depression, or other mental illness, because it is common knowledge by the inmates that such disclosure could definitely be a one-way ticket to the SHU, and for this reason the intake screening of an inmate with a history of depression or mental illness should be given great care and attention, despite what is being reported by the inmate;

40. Dr. Robert Binford stated in reports prepared by him that "No programs/treatment are recommended at this time" for Riopedre to Riopedre's detriment and with deliberate indifference to Riopedre's mental health in violation of Riopedre's right to be free from an Eighth Amendment prohibition against cruel and unusual punishment;

41. Dr. Robert Binford stated in reports prepared by him that "No programs/treatment are recommended at this time" for Riopedre to Riopedre's detriment and with deliberate indifference to Riopedre's mental health in violation of Riopedre's right to reasonable medical, psychiatric, and/or psychological dictated standards of care;

42. Riopedre did not receive access to a level of care comparable to that available in the community, as mandated by the Federal Bureau of Prisons, Program Statement 5310.13, Institution Management of Mentally Ill Inmates, which states:

> Psychological services within each institution should be sufficient to ensure that every inmate with a documented need and/or interest in psychological treatment has access to a level of care comparable to that available in the community and consistent with the overall mission of the institution.

43. Riopedre's Inmate Skills Development Plan, dated October 20, 2009, documents that on September 11, 2009, Riopedre was assigned to the SHU;

44. In effect at the time of Riopedre's commitment in 2009 to FCI Estill, the United States Department of Justice, Federal Bureau of Prisons, had promulgated a Program Statement, numbered P5324.08, entitled, Suicide Prevention Program, April 5, 2007;

45. Program Statement P5324.08 specifically dealt with the heightened risk of inmates for suicide who were placed in solitary confinement in SHU, and on page 6, paragraph 2, sub-paragraph c, it states:

> "c. **Inmates in SHUs**. Inmates in Administrative Detention or Disciplinary Segregation status often may be at a higher risk for suicidal behavior. Inmates being transferred into the SHU **will** be monitored for signs of potential suicide risk...."

46. Riopedre who had not committed any documented actions warranting disciplinary action, was known to prison officials to have suffered from debilitating depression, had recently stopped taking psychotropic medication, and had been not allowed to visit with his family who had driven up from Miami, Florida, and two days after arriving at the Federal Prison Camp at Estill, South Carolina, he was placed in the SHU, which is generally reserved for isolating inmates who have committed infractions of rules or regulations, inmates whose safety may be in jeopardy if left in the general population, for short overnight stays when an inmate be scheduled to be transported to a medical facility outside of the prison, or when an inmate may be waiting to be released to general population because there is no bed or bunk available;

47. It is a well-known fact to Bureau officials that many inmates "game the system" and may report to staff a "perceived" threat or conflict with another inmate as a retaliatory measure, and that by reporting such a threat or conflict, inmates oftentimes force prison officials to send other inmates to the SHU;

48. The individual defendants, responsible for Riopedre's designation and classification, care and custody, and medical and mental health care needs, did, with deliberate indifference

to Riopedre's right to be free from cruel and unusual punishment and right to due process of law, deprive Riopedre of his rights under the First, Fifth, Eighth, and Fourteenth;

49. Riopedre's forced confinement to SHU was reviewed on September 11, 2009, September 25, 2009, October 2, 2009, October 9 2009, and October 25, 2009;

50. Ana Davide, the Florida attorney in Miami who represented Riopedre in the case of U.S. vs. Jose Riopedre, Case 8:06-cr-00580-PJM, contacted FCI Estill multiple times, and sometimes multiple times in one day, to challenge the actions of the Defendants in isolating Riopedre;

51. On October 2, 2009, attorney Ana Davide contacted officials at FCI Estill by email to try to challenge Riopedre's continued detention in SHU;

52. And again, on October 7, 2009, attorney Ana Davide contacted officials at FCI Estill by email to try to challenge Riopedre's continued detention in SHU;

53. Mr. Riopedre's forced confinement to SHU was authorized by Lieutenant Paul Sneed, and/or Lieutenant C. Wiggins, and the same was reviewed by Captain G.S. Bondurant, and approved by Warden Mildred L. Rivera on each of the previously stated review dates with deliberate indifference to Riopedre's rights under the Eighth Amendment to the United States Constitution against Cruel and Unusual Punishment and the Fifth Amendment Right to be free from unlawful government action without Due Process of Law, as well as the First and Fourteenth Amendments, as previously stated herein;

54. On six (6) separate occasions over a six-week period, the only reason given on a Special Housing Review for Violation or Reason Form as to why Riopedre should be in isolation in the SHU, was that Riopedre was "pending reclassification" and prison officials with deliberate indifference to Riopedre's mental health and ever increasing anxiety, depression, and risk of suicide;

55. The Defendants, individually and collectively, who were responsible for the care, custody and well-being of Riopedre, with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment, his right to due process of law, and his right to the standard of medical care required under the law, did little or nothing to ensure those constitutional rights;

56. Program Statement P5324.08 states:

> **Inmate Removal from the SHU.** The Program Coordinator will arrange to have an inmate exhibiting significant potential for suicide to be removed from the SHU and placed on suicide watch. Ordinarily, once the crisis is over, the inmate will be returned to satisfy any *sanction* [emphasis added] that was imposed

57. Program Statement P5324.08 clearly recognizes that SHU's are reserved for inmates sanctioned for disruptive or illegal behavior. Mr. Riopedre exhibited neither of these traits and it was incumbent on the prison officials to either expedite his pending re-classification to minimize the adverse psychological impact the SHU was having on Riopedre, or to place Riopedre on Suicide Watch as a precaution and in the abundance of caution, especially considering Riopedre's medical and other records that should have been red flags for prison officials to heed;

58. Program Statement P5324.08 goes on to describe the housing an inmate on suicide watch should be placed in:

    a. Housing. Each institution must have one or more rooms designated specifically for housing an inmate on suicide watch. . . .
    b. The primary concern in designating a room for suicide watch must be the ability to observe, protect, and maintain adequate control of the inmate.
    c. The room must permit easy access, privacy, and unobstructed vision of the inmate at all times.
    d. The suicide prevention room may not have fixtures or architectural features that would easily allow self-injury.

59. Riopedre was placed in a cell in SHU that allowed only a limited view of the interior of the cell with only a small window and that was difficult to enter. The unit had fixtures

and bars from which an inmate could hang himself, all of which violated the above listed policy limitations placed on defendants with respect to suicidal inmates;

60. Because of Riopedre's medical and psychiatric history, the fact that he had been taking Paxil prior to arriving at FPC Estill, and other documentation as provided in Riopedre's inmate records, prison officials should have placed Riopedre in the suicide watch cells, made for that purpose;

61. Prison officials failed to consider the totality of the information available to them regarding Riopedre's medical and psychiatric condition, the inquiries from family members, his attorney, and even a Congressional inquiry that was initiated by the Honorable Lincoln Diaz-Balart;

62. The Defendants did this with deliberate indifference to Mr. Riopedre's right to free be from cruel and unusual punishment and right to due process of law;

63. Program Statement P5324.08 also created a fellow inmate observer program to assist the facility in preventing suicides. The policy mandates:

    a. The observer and the suicidal inmate will not be in the same room/cell and will have a locked door between them.
    b. The person performing the suicide watch must have means to summons help immediately.

64. On October 30th, 2009, within hours of Mr. Riopedre's death, Defendants, all being federal prison officials at FCI Estill, including Warden Mildred Rivera, caused Harry Castro, a mentally ill inmate who was known to suffer from bipolar disorder and other mental disorders, to be placed in the cell occupied by Riopedre;

65. In the early morning of October 31, 2009, on Halloween Day, Riopedre apparently tied multiple socks and/or torn sheets around his neck and attached them to the cell window bars, and hanged himself. As a result of Defendants' omissions, actions and/or failures to act, Riopedre ultimately died as a result of the hanging;

66. At all times relevant hereto, the Defendants acted with deliberate indifference to Riopedre's right to be from cruel and unusual punishment and right to due process of law;

67. Defendants, knowing of Riopedre's medical and mental health history, the information contained in his Presentence Investigation Report, having heard his telephone conversations with family members and others, the numerous messages sent by his attorney, Ana Davide, and other available information, should have placed Riopedre on suicide watch and assigned an Inmate Observers and staff to watch over him 24-hours a day;

68. Program Statement P5324.08 also highlights what actions must be taken when an Inmate Observer alerts of a suicide attempt by a fellow inmate:

    a. In all cases, when an inmate observer alerts staff to an emergency situation, staff must immediately respond to the suicide watch room and take necessary action to prevent the inmate on watch from incurring debilitating injury or death. In no case will an inmate observer be assigned to a watch without adequate provision for staff supervision or without the ability to obtain immediate staff relief.

69. Program Statement P5324.08 also calls for constant observation of an inmate at risk for suicide;

70. There was no constant monitoring of Riopedre and the records made available to Plaintiffs by the Federal Bureau of Prisons do not demonstrate that that Riopedre was being monitored as Riopedre should have been because of his medical history and mental health problems and severe depression ;

71. All of the individual defendants that were directly responsible for the designation and classification, the care and custody, and the medical and mental health care of Riopedre, acted with deliberate indifference to Riopedre's rights to be free from cruel and unusual punishment and to due process of law;

72. In fact, on October 23, 2009, in a Memo prepared by Pam Weathers, she documented a monitored telephone call between Riopedre and his wife. During the call he indicated that he felt very bad, and he complained about his close confinement. Although in some circumstances such complaints may seem normal to a prison official, this was yet another indication of Riopedre's fragile mental state ignored by Defendants, because they failed to take into account his known medical and mental health illness and severe depression. It could be argued by Defendants that this failure occurred, in part, because Pam Weathers did not speak Spanish, which was Riopedre's native language, but this argument would fail because Defendants were well aware and on notice of Riopedre's language limitations;

73. The Federal Bureau of Prisons has a large number of facilities throughout the country with almost 35% of the inmate population who are Hispanic. Less than 15% of the Bureau's prison staff is Hispanic. Riopedre, whose primary language was Spanish, was designated to a facility with limited Spanish speaking prison staff;

74. The Riopedre's right to be free from cruel and unusual punishment, to due process of law, and to be provided equal protection under the law have been deprived by the prison staff's failure to be able to obtain accurate translations of his telephonic and other communications;

75. The danger related to protective custody is so severe that that the Statement in the United States Department of Justice, Federal Bureau of Prison's "Sample" Suicide Prevention Information states:

    a. **Protective Custody**-Inmates who volunteer to enter protective custody are at high risk for suicide, especially during the first 72 hours in SHU
    b. **Long-term Protective Custody Inmates** – These inmates are particularly vulnerable to depression that can lead to a suicide attempt, and should be monitored closely while in they are in SHU.[emphasis added]

c. **Inmates Taking Medication for Mental Health Reason**-These inmates are vulnerable to developing suicidal thoughts and attempting suicide by overdosing on their medication.

76. The United States Department of Justice, Federal Bureau of Prisons, issued a Program Statement relating to Personal Property, Inmate, on December 28, 2005 [hereinafter "Statement relating to Personal Property"] that required each inmate be afforded additional secured space outside his cell for additional personal property.

77. The Statement relating to Personal Property specifically states:

a. Civilian clothing (i.e. clothing not issued to the inmate by the Bureau or purchased by the inmate from the commissary) ordinarily is not authorized for retention by the inmate.
b. The Inmate Personal Property List (Attachment A) includes all personal property an inmate can retain at every institution. . . .
c. Staff shall consider as nuisance contraband any item ... excessive quantities of it present a health . . . hazard . . . ."
d. Attachment A specifically authorizes a maximum of five (5) socks per inmate and one (1) towel per inmate.

78. Based on the records and photographs provided by prison officials, it appeared that Riopedre had what appeared to have accumulated a large number of socks and sheets in the short time he was isolated in the SHU, in violation of the Bureau's own policies;

79. But for the prison officials deliberate indifference to its own policies, the Defendants would have prevented Riopedre's death;

80. It is a well known fact that in cases where an individual, such as in this case with Riopedre, who is deprived of oxygen, whether by drowning, attempted hanging, or some other means, the first five to eight minutes are crucial, if not critical, in receiving life saving emergency medical treatment. Once Defendants were made aware of the situation, they acted with deliberate indifference to Riopedre's rights to be free from cruel and unusual punishment and to due process of law;

81. On October 31, 2009, at 6:18 A.M., according to a Memorandum dated October 31, 2009 by Richella Lawson, Harry Castro, the inmate who had been placed in Riopedre's cell the night before, started to bang on the cell door and yelled. According to the Lawson's Memorandum, when she arrived at the cell she observed the following:

"his cellmate had hanged himself but I couldn't see his cellmate because of a blind spot in the corner"

82. Critical minutes passed without Defendants rendering life saving emergency care which could have prevented Riopedre's death, an omission that demonstrates deliberate indifference to Riopedre's constitutionally mandated rights to reasonable care;

83. On the morning of October 31, 2009, various prison reports indicate that present at the scene that morning were Defendants Chris Orr, James Solvik, Scott Williams, Officer M. Hill, Richella Lawson, and Tamala Middleton, and others;

84. At 6:20 AM, according to a Memorandum prepared by Defendant Chris Orr on October 31, 2009, inmate Harry Castro started yelling,

"HELP"! HELP HELP! MY CELLIE NEEDS HELP"

85. Chris Orr's Memorandum of October 31st, 2009 documents that Harry Castro started yelling after 6:20 AM:

"HE NEEDS HELP! PLEASE HELP HIM!"

86. The documented evidence shows that while Harry Castro was begging and screaming for help for Riopedre, Riopedre was dying;

87. The Defendants actions allowed Riopedre to die, and such actions constitute deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and to due process of law;

88. The evidence shows that while Harry Castro was screaming for help no one opened the cell door to Riopedre's cell to provide life saving emergency medical care or first aid measures to save Riopedre's life or even see Riopedre from 6:18 AM through 6:28 AM or 6:28 AM, or from 6:28 AM to 6:38 AM or from 6:38 AM to 6:48 AM;

89. The Defendants failed to act and respond appropriately in an emergency medical situation and Defendants' actions were with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and to due process of law and his right to reasonable medical care;

90. Finally, at 6:48 AM according to all documented evidence, including a Memorandum dated October 31, 2009 by Officer Specialist Williams, at 6:48 the first call for help was answered and individual defendants entered Riopedre's SHU cell;

91. The Defendants did this with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and to due process of law;

92. During his confinement, Riopedre, who was diagnosed on record with severe depression and anxiety, was not given proper supervision and care by the prison staff, or proper psychological care and there was a failure to properly assess his mental state;

93. Much of the Riopedre's first 51 days in prison were spent in solitary confinement, and although he could not adequately communicate in English, he was not furnished with a Spanish interpreter through whom he could have communicated his condition to the guards or other staff;

94. Throughout his 51-day detention in SHU at the Defendants' facility, Riopedre showed increasing outward signs of fragility and mental instability through severe weight loss;

95. Riopedre was additionally not allowed to see his family when they traveled to visit him;

96. Despite Riopedre's medical history, severe weight loss, and deteriorating condition, Defendants allowed him to suffer by failing to provide him treatment, punished him by placing him in long-term, unnecessary, solitary confinement, deprived him of communication, prevented him from visiting with his family and put him in conditions preventing appropriate monitoring and then allowed him to accumulate a large, and completely inappropriate, number of tube socks and other materials, that were a dangerous instrumentality, which he ultimately used to take his life;

97. Before killing himself, but after being removed from solitary confinement, Riopedre was placed in a SHU cell with Harry Castro, an inmate who also had psychological issues yet was receiving care from a case manager;

98. On October 31, 2009, after suffering from lack of proper treatment for his severe clinical depression and anxiety, being held in solitary confinement for an extended period, and being given little supervision for someone in his fragile state, Riopedre hanged himself in his cell via a network of tube socks and/or pieces of material tied to the upper bunk of the cell;

99. After the incident, defendant Tracy Horvath visited Harry Castro, the inmate who had been placed into Riopedre's cell the night before the incident, in order to make sure he was doing well due to his psychological history and to arrange for psychological consultations. Had Jose Riopedre received similar care, his suicide would have been averted;

GENERAL ALLEGATIONS

100. Due to the documented nature and severity of Riopedre's condition, the Defendants demonstrated a clear deliberate indifference to the medical needs of the Riopedre;

101. There was a failure to properly assess Riopedre's condition by Defendants;

102. There was a failure to properly house Riopedre by Defendants;

103. There was a failure to properly monitor Riopedre and his actions by Defendants;

104. There was a failure to intervene when Riopedre was in distress by Defendants;

105. Although the Riopedre could not speak English well, he was not provided with a Spanish interpreter or any other means with which to communicate his condition. By not granting Riopedre proper medical treatment and by not supplying proper supervision to Riopedre despite his fragile state, the Defendants demonstrated a deliberate indifference to the conditions leading directly to his suicide and denied him equal protection of the law;

106. Additionally, by allowing Riopedre to accumulate copious amounts of tube socks and other linens, despite his medical history and clearly deteriorating condition, the Defendants demonstrated complete indifference to the obvious severity of Riopedre's condition and signs of self-destructive behavior;

107. Riopedre's death could have been prevented had he been given his proper medication, given proper visitation rights with doctors and his family, prevented from accumulating copious amounts of tube socks, properly monitored throughout his deteriorating condition, and, if necessary, placed on suicide watch;

108. Riopedre died as a result of a number of omissions and actions of Defendants, individually and jointly, by not being properly trained, failure to adequately monitor inmates and observe obvious self-destructive tendencies, not providing proper medical care to the Riopedre, failing to properly monitor Riopedre given his known medical and mental health history, and failure by Defendants to take prompt action when the Riopedre attempted to kill himself;

COUNT ONE

***Bivens* Claim for Violation of Riopedre's Eighth Amendment Rights: Protection from Cruel and Unusual Punishment by Fernando Mendez, personal representative of the Esther of Jose R. Riopedre**

109. Plaintiffs re-allege and re-affirm the allegations set forth in paragraphs one (1) through one hundred and eight (108) , as if fully set forth herein;

110. All of the Defendants, individually and collectively, demonstrated a clear indifference to the known conditions of the Riopedre that led to his suicide under their care;

111. It is true that jail inmates are much more likely to commit suicide than free persons are-in fact, nine times as likely. Lindsay M. Hayes & Joseph R. Rowan, National Study of Jail Suicides: Seven Years Later (National Center on Institutions and Alternatives, Feb. 1988). According to the study just cited 12.9 percent of jail suicides occur within the first three hours of confinement, 32.8 percent within the first 24 hours, 62.1 percent within the first two weeks, 72.8 percent within the first month, 89.2 within the first four months, and 97.4 within the first seven months. Only 10.8 percent of suicides occur after 5 months;

112. The psychiatric condition most closely associated with suicide is severe ("clinical") depression, which the Defendants knew Mr. Riopedre suffered from;

113. Defendants, individually and collectively, demonstrated a deliberate indifference to the known conditions of the Riopedre that led to his suicide under their care by failing to follow their own policies and procedures previously enumerated that had they been followed would have saved Mr. Riopedre's life. *Jutzi-Johnson v. U.S.*, No. 96-C-5708, U.S. Dist. Ct., N.D. Ill. (March 29, 2000);

114. All of the Defendants, individually and collectively, and specifically Defendants Anita Cano and Tracy Horvath, who were responsible for evaluating and treating inmates

at the center, violated Riopedre's constitutional rights, demonstrated deliberate indifference and demonstrated negligence that rose to the level of gross negligence towards Riopedre's safety by:

a. Failing to properly supervise and provide support to the Riopedre, especially in regard to his severe and documented psychological issues;

b. Failing to take action to ensure Riopedre's safety either through direct action, such as placing him under suicide watch or warning the guards;

c. Failing to grant Riopedre similar psychological support for his documented psychological condition as that was granted to other similarly situated inmates such as inmate Harry Castro;

115. Defendants, individually and collectively, had the resources, knowledge, and duty to offer the Riopedre the same diligence and duty of care that other inmates received;

116. Defendants, individually and collectively, were deliberately indifferent to the conditions that led to his death of Riopedre by failing to recognize Riopedre's documented medical and psychological history and failing to recognize and act upon Riopedre's worsening condition despite Riopedre's a well documented history of severe psychological disorders;

117. Defendants, individually and collectively, who were responsible for care and custody, and providing adequate medical and psychological care to Riopedre, demonstrated a deliberate indifference to the Riopedre's conditions by:

a. Deliberately placing him in SHU for no reasonable justifiable reason despite Riopedre's known clinical depression, weaning off of Paxil, and ongoing mental health issues;

b. Failing to provide an appropriate level of surveillance to Mr. Riopedre despite his severe weight loss and obviously worsening condition;

c. Failing to take the appropriate actions or give proper and timely notifications to the appropriate personnel about the Riopedre's visibly deteriorating condition and weight-loss;

d. Failing to properly supervise Riopedre and allowing Mr. Riopedre to collect copious amounts of tube socks, which hold little use in bulk, fashion them into a rope, and ultimately kill himself;

e. Failing to notice or take action over obviously suicidal behavior both over the fifty days preceding his death, and on the day of his death;

f. And the other aforementioned actions in Paragraphs 1-116

118. By having either ignored Riopedre's situation or somehow remaining ignorant to the Riopedre's worsening situation and collection of tube socks, the Defendants, individually and collectively, who were on duty at the facility demonstrated a clear indifference or a negligence that rose to the level of gross negligence towards their duty to monitor Riopedre;

119. Defendant Tamala Middleton, the clinical nurse on call at the time of the Riopedre's death, as well as Dr. Robert Binford, demonstrated clear indifference to the Riopedre's conditions, and his rights to be free from cruel and unusual punishment, by:

a. Failing to properly supervise or provide proper medication and support to the Riopedre;

b. By not properly caring for the Riopedre or trying to take action despite his worsening condition and documented proof of severe psychological disabilities,

Tamala Middleton and Dr. Robert Binford demonstrated clear indifference to Riopedre's condition, or at the least gross negligence;

120. Defendant Lieutenant James Solvik, Operations Lieutenant for the facility, and Warden Mildred Rivera and other defendants demonstrated a deliberate indifference to Riopedre's and other inmates' 8th amendment rights by not supplying an adequate medical staff to the inmates, especially given that many, such as Riopedre, had severe and documented mental illnesses;

121. Defendants, individually and collectively, with knowledge that Riopedre, needed psychological care, failed to provide the proper medication that could have helped Riopedre cope with his circumstances, demonstrated a indifference to the needs of Riopedre;

122. Defendants, individually and collectively, demonstrated deliberate indifference by not opening the Riopedre's cell door and rendering first aid resuscitative aide and/or emergency care until approximately thirty minutes after they were alerted to the emergency nature of Riopedre's condition by Harry Castro, who was begging them to save Riopedre's life;

123. As a result of the inadequate supervision, inadequate training, failure to follow prison protocols, and delay in providing Riopedre with immediate first aid resuscitative measures and/or emergency medical care, Riopedre suffered cruel and unusual punishment;

124. Riopedre suffered greatly in the final 51 days of his life and eventually succumbed to the pressures of being isolated in SHU by his attempted suicide that did not have to end in his death, but for the deliberate indifference of Defendants, all acting individually and collectively;

125. As a result of individual defendants "actions, individually and collectively, the heirs of Jose Riopedre are entitled to relief from the individual Defendants." *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971). *Estelle v. Gamble*, 429 U.S. 97 (1976) (The US Supreme Court held that an indifference to the medical needs of inmates is a violation of the 8th amendment to the US constitution and constitutes cruel and unusual punishment.) *Daniels v. Williams*, 474 U.S. 327 (1986) (Held that although mere negligence is not enough to trigger a cause of action for government liability, gross negligence may suffice to demonstrate constitutional claims.) *Carlson v. Green*, 466 U.S. 14 (1980);

126. Plaintiffs allege that Defendants, individually and collectively, also violated Riopedre's First and Fourteenth Amendment rights;

127. Riopedre had a constitutionally protected right under the First and Fourteenth Amendments;

128. Defendants, individually and collectively, deprived Riopedre of his constitutionally protected rights;

129. The plaintiff Estate lacks a statutory cause of action, or an available statutory cause of action does not provide monetary compensation against Defendants, individually and collectively;

130. No "special factors" suggest that the Court should decline to provide the judicial cause of action and remedy in this case;

131. No appropriate immunity can be raised by the individual defendants as a result of Riopedre's death;

132. Plaintiff personal representative has an interest in his relationship with his brother-in-law, as the brother of Riopedre's widow, Susanna Mendez, which is protected by the First and Fourteenth Amendment to the Constitution;

133. These constitutional interests survived the death of Riopedre;

134. Defendants intentionally interfered with this interest by demonstrating deliberate indifference to Riopedre's right to receive adequate medical and psychiatric care and to be free from cruel and unusual punishment;

135. The actions of the Defendants, individually and collectively, were in violation of Riopedre's Fifth and Eighth Amendment rights and his First and Fourteenth Amendment rights, as guaranteed by the Constitution of the United States;

COUNT II

Claim for Loss of Consortium, Love, Companionship and Familial Association by Susana Mendez

136. Plaintiffs re-allege and re-affirm the allegations set forth in paragraphs one (1) through One Hundred and thirty-five (135) as set forth herein;

137. Susana Mendez was the loving wife of Mr. Riopedre.

138. As a result of the actions of the Defendants Ms. Mendez has lost the loving companionship, care and comfort of her husband and familial association with him for the rest of her life.

139. The Defendants owed a duty of care to Mr. Riopedre to allow him to live;

140. The Defendants breached their duty of care through deliberate indifference as alleged previously;

141. As a result of Mr. Riopedre's death under supervision of the Defendants, Mr. Riopedre's widow faces hardship and injury due to her loss of companionship, mental

pain and anguish, and loss of decedent's earning potential, for which she entitled to collect damages;

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court to:

142. Declare the actions complained of herein to be in violation of the First, Fifth and Eighth, and Fourteenth Amendment to the United States Constitution as well as South Carolina and Federal law;

143. Enter judgment in favor of Plaintiffs and against all Defendants, individually and jointly;

144. Award Plaintiffs damages to compensate for their injuries including:

a. costs and attorney's fees;

b. nominal, compensatory, and special damages;

c. pain and suffering;

d. a sum to compensate Plaintiff Estate for decedent's pain and suffering and compensate for Riopedre's widow for loss of companionship and right to familial association;

e. punitive damages in sum as to deter Defendants conduct of this nature in the future; and,

f. all other relief that this court deems just and proper under the circumstances.

145. Enter judgment in favor of Plaintiffs and against all the Defendants, individually and collectively;

a. Award damages to compensate Plaintiffs for their injuries

i. In the amount over $75,000;

ii. costs and attorneys' fees; and

iii. all other relief that this court deems just and proper under the circumstances;

146. Award Plaintiffs any other relief that this court deems just and proper under the circumstances.

DEMAND FOR JURY TRIAL

PLAINTIFFS hereby demand a jury trial on all issues triable by a jury.

Dated: October 30, 2012

Respectfully submitted,

s/ Dionè Carroll
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ATTORNEYS FOR THE PLAINTIFFS

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

CASE NO. 8:12-2806-TMC-JDA

ESTATE OF JOSE R. RIOPEDRE, by and through FERNANDO MENDEZ, as the Personal Representative of the Estate of Jose R. Riopedre, and SUSANA MENDEZ, individually, as wife of Jose R. Riopedre,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, and MILDRED L. RIVERA, ROBERT BINFORD, JAMES SOLVIK, TAMALA MIDDLETON, CHRIS ORR, RAGANOLD WILLIAMS, RICHELLA LAWSON, RICHARD WALLACE, ANITA CANO, TRACY HORVATH, SCOTT WILLIAMS, VERNON ROBINSON, PAUL SNEED, and GREGORY BONDURANT, JOHN J. ENZINNA, DR. DERICK PHILLIPS, STEPHEN BUCKLER, PAM WEATHERS, JEREMY DALLAS, CHRISTOPHER BUSH, C. WIGGINS, M. HILL, and JOHN DOES 1-8, individually, and in their individual capacities,

Defendants.

_____/

THIRD AMENDED COMPLAINT & JURY DEMAND

Comes now the ESTATE OF JOSE R. RIOPEDRE, by and through plaintiff Fernando Mendez, the personal representative and administrator and comes now plaintiff Susana Mendez,

wife of the decedent (hereinafter collectively referred to as "Plaintiffs") and file this **THIRD AMENDED COMPLAINT** against the above listed Defendants, as well as additional unknown officials and/or agents of the United States Bureau of Prisons, for damages associated with the decedent Jose R. Riopedre's (hereinafter "Riopedre") wrongful death, survival, the deprivation of Riopedre's constitutional rights under the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Riopedre's suffering and death while incarcerated, damages to compensate Plaintiffs, including Riopedre's spouse, and his family for their own pain and suffering and the loss of Riopedre's companionship and familial association as a result of the death of Jose R. Riopedre due to the denial of his medical needs, and all other claims as alleged herein. Plaintiffs seek both compensatory and punitive damages. In support Plaintiffs allege as follows:

NATURE OF THIS ACTION

This is a Bivens action for damages based on the abuse and wrongful death of Jose R. Riopedre, who at the time of his death on October 31, 2009, was a minimum security inmate at the FCI Estill in South Carolina. As alleged below, Riopedre suffered from depression and anxiety disorders prior to, at the time Riopedre self-surrendered, and during his incarceration, to which Defendants exhibited deliberate indifference, and that as a result was not properly treated, as constitutionally required resulting in Riopedre's death.

Riopedre died in an incident determined by the Hampton County, South Carolina, coroner to have been a suicide. Riopedre's death was preventable, and was the result of Defendants' actions and/or omissions and failures to act, all in violation of the rights guaranteed by the Constitution of the United States of America.

PRELIMINARY STATEMENT

1. Riopedre, under intense distress due to his improperly treated depression and anxiety disorders, committed suicide while serving a term of imprisonment of one year and one day, as an inmate of the Federal Corrections Institute ("FCI") in Estill, South Carolina (hereinafter "the facility" or "Estill").
2. This action is brought by the estate of the Riopedre, through his Personal Representative, Fernando Mendez and by Susana Mendez, the widow of Jose R. Riopedre, in her individual capacity.
3. This is an action by Plaintiffs for violations of the Riopedre's First, Fifth, Eighth and Fourteenth Amendment rights and for the wrongful death of the Riopedre, survival, and loss of consortium or companionship and familial association.
4. This suit seeks an end to individual defendants' unconstitutional and unlawful practices of the Defendants and monetary relief for Riopedre's wrongful death and associated harm, along with other damages against Defendants.

JURISDICTION

5. This action arises under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The *Bivens* claims arise under the Fifth and Eighth Amendments to the United States Constitution as applied to federal employees and inmates through *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971), *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Carlson v. Green*, 466 U.S. 14 (1980) (specifically allows a *Bivens claim* for 8th amendment violations and prison suicides).
6. Jurisdiction is also, therefore, conferred on this Court by 28 U.S.C. § 1331.

7. The Court has personal jurisdiction of the *Bivens* Defendants because the substantial part of the alleged incidents, actions, and facts resulting in the death of Riopedre occurred within the confines of this Court's jurisdiction at the Federal Correctional Institution (FCI) located in Estill, in Hampton County, South Carolina, causing the wrongful death of Jose R. Riopedre.

8. The action also arises under and involves survival, loss of consortium and companionship of spouse and other laws of the State of South Carolina.

9. Jurisdiction is conferred on the Court by 28 U.S.C. §1331 and the supplemental jurisdiction of this court pursuant to 28 U.S.C. §1367.

10. This action also arises under the Federal Tort Claims Act, Title 28 of the United States Code. 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), and 2671 - 2680. Also, the FTCA regulations can be found in Title 28 of the Code of Federal Regulations. 28 C.F.R. §§ 14.1 - 14.11, 543.30 - 543.32, as an action pursuant to the Federal Tort Claims Act may be brought against the United States for property damage, personal injury, or death "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."

VENUE

11. Venue is proper in the Anderson Division, District of South Carolina pursuant to 28 U.S.C. §1391 because a substantial part of the acts or omissions that gave rise to the Riopedre's death and Plaintiffs' claims occurred in Estill, South Carolina, and it is the Division to which the case was assigned by the Case Manager assigned to the Division for the U.S. District Court for South Carolina.

PARTIES

Plaintiffs:

12. Fernando Mendez is personal representative/administrator of the Estate of the Riopedre Jose R. Riopedre. Mr. Mendez was duly appointed by the probate courts of the State of Florida, in Miami-Dade County Circuit Court, Probate Division, Case Number 11-1073-CP-02. He has satisfied all qualification requirements of the State of South Carolina to bring this suit on behalf of the Estate of Jose R. Riopedre, for the benefit of any heirs, beneficiaries, and distributees, through filings with Hampton County Probate Court, Case Number 2012-ES250068. *See* S.C. Code Ann. § 62-4-205.

13. Susana Mendez is the wife of the decedent and brings claims in her own right for loss of consortium and loss of familial association.

Defendants:

14. The Defendants in this action include, but are not limited to the following listed individuals who were employed by the Federal Bureau of Prisons, at all times relevant hereto, hereinafter referred to as "Prison Staff", the same which include: Mildred L. Rivera (former Warden of FCI Estill); James Solvik (Operations Lieutenant); Tamala Middleton (Registered Nurse); Chris Orr (Senior Officer); Richella Lawson (Senior Officer); Raganold R. Williams, Sr. (Senior Officer Specialist, OIC at time of incident); Richard Wallace (Senior Officer Specialist, OIC preceding incident, Special Housing Observation Officer at time of incident); Anita Cano (Case Manager); John J. Enzinna (Cook Supervisor and present at the time of the incident); Tracy Horvath (Case Manager); Scott Williams (Senior Officer Specialist); Dr. Robert Binford (Staff

Psychologist); Vernon Robinson (Senior Officer); Paul Sneed (Lieutenant); Gregory S. Bondurant (Captain at the time of the incident but is currently an Associate Warden at FCI Victorville, CA), Stephen Buckler, Pam Weathers, Jeremy Dallas, Christopher Bush, C. Wiggins, and M. Hill. The aforementioned Prison Staff are appropriate defendants to this *Bivens* action as it is brought against them in their individual capacities and all the individuals are federal law enforcement officials and/or officers who acted under color of federal law and Plaintiffs' complaint is not an action against the United States and it is therefore not barred by sovereign immunity.

FACTS

15. Two ghastly dates mark the beginning and the end of Jose Riopedre's stay at the FCI Estill in 2009: (a) Friday, September 11, 2009; and, (b) Saturday, October 31, 2009 (Halloween Day). The first date marks the day that Riopedre voluntarily reported and self-surrendered to FCI Estill in compliance with U.S. District Judge Peter J. Messitte's Order [DE94], dated August 11, 2009 (see *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM). The latter date marked the end of Mr. Riopedre's life on this earth, only 51 days after arriving at FCI Estill, South Carolina;

16. On July 15, 2009, Jose Riopedre was sentenced to one year and one day in the U.S. District Court for the District of Maryland (*see* DE 86 and DE90 in *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM) and was permitted to remain free, on bond, while awaiting designation and classification by the Federal Bureau of Prisons, at which time Riopedre would voluntarily surrender. Subsequent to Riopedre's sentencing he was designated to a minimum security facility at Estill, South Carolina;

17. On Friday, September 9, 2009, Riopedre arrived at the Federal Prison Camp in Estill, South Carolina, without incident;
18. Riopedre was designated to FPC Estill by the Federal Bureau of Prisons based on his minimum security designation and classification and was notified by the Federal Bureau of Prisons to report to FPC Estill;
19. Riopedre complied fully with the self-surrender order issued by the Honorable Judge Peter J. Messitte in *U.S. vs. Jose Riopedre*, Case 8:06-cr-00580-PJM;
20. After only two days at the Federal Prison Camp at FCI Estill, South Carolina, Riopedre's nightmare began to unfold, and on September 11, 2009 @ 8:40 A.M. an Administrative Detention Order was issued and Riopedre was immediately taken into the Special Housing Unit (hereinafter referred to as SHU) to begin serving what turned out to be his death sentence;
21. Notwithstanding the Federal Bureau of Prisons' need to maintain security, Bureau officials knew and/or should have known from their own records that Riopedre had suffered from, and been medically diagnosed with "severe, disabling clinical depression and anxiety" and had been seeking outpatient treatment, along with taking his prescribed strong anti-depressive medications, including PAXIL;
22. As stated in Riopedre's Psychiatrist's 2008 letter, the Riopedre had developed intense disturbances of mood and thought content, in addition to severely intense obsessive thoughts about financial and legal issues;
23. The Bureau's Plan documents that Mr. Riopedre's skills status, as it related to his Mental Health, was satisfactory, and to a 5% degree required attention;

24. The person who was listed in the Acknowledgement of Inmate Form, Parts 3 & 4, of Riopedre's United States Department Justice Federal Bureau of Prisons report to be contacted in case of illness or death was Riopedre's wife, Susana Mendez, who stood by her husband while he was being treated for debilitating depression that required psychotropic medication prior to Riopedre being committed to the SHU at FCI Estill on September 11, 2009;
25. It was known, or should have been known, to the Federal Bureau of prisons officials that a request had been made by his attorney to Judge Messitte to recommend that the Federal Bureau of Prisons provide Riopedre with mental health counseling receive help for his depression during his incarceration and the same was recommended by Judge Messitte;
26. In fact, as documented in Inmate Property Report, dated September 9, 2009, Riopedre had no socks, towels, or articles that could facilitate his suicide in light of his previously diagnosed depression that led a Federal Court Judge to take note of his mental state at sentencing;
27. Riopedre's Intake Screening Form, dated September 9, 2009, at 12:40 PM, documents that he was not involved in ongoing cooperation with Federal agents or testified in court or was involved in a gang, such that he would have to be isolated or placed in SHU;
28. Riopedre was certainly not a flight risk, otherwise U.S. District Judge Peter J. Messitte would not have allowed him to voluntarily self-surrender to the institution;
29. For Riopedre, being confined to the SHU was tantamount to solitary confinement. Inmates in the SHU must remain locked up in a small cell for the most part containing a steel double bunk bed, a small open shower with no door (with or without hot water),

small steel desk-chair combination (bolted to the floor and wall) or concrete shelf and small cylindrical concrete bench, and a stainless steel, combination toilet and sink;

30. In SHU, Inmates are locked up 24-hours each day without being able to leave the cell except for some instances where they are allowed to go to a recreation yard which is essentially a fenced-in cage, where all an inmate can do is walk around in circles for one hour or less, when such an opportunity is afforded the inmate;

31. In SHU, communication to family and friends is severely limited and telephone calls generally are permitted when authorized and many times at the discretion of the prison staff, including the inmate's counselor, case manager, and/or the corrections officer on duty. More often than not, most inmates in the SHU have little or almost no telephone communication with their family or friends for days, weeks or months at a time;

32. The Federal Bureau of Prison's performed a standard Inmate Screening on September 10, 2011, that documents that Riopedre was treated for Depression from 2006 through 2009, (that same year) and was prescribed Paxil for his Depression;

33. The Federal Bureau of Prison Screening Document of Mr. Riopedre dated September 9, 2009 states erroneously: "Hx of Mental Health Treatment: No". Hx is an abbreviation for "medical history" in medical documentation usage;

34. Riopedre, in his own handwriting, alerted Prison officials on his Psychology Services Inmate Questionnaire, dated September 11, 2009, that he had received treatment for a nervous or mental problem and had received medication;

35. As early as 2001, it was well documented that the withdrawal symptoms from Paxil could be much more severe than at first thought and could even plunge users into the depths of

depression due to the increase of serotonin and decrease of serotonin metabolism that it produces;

36. In fact, in March of 2004, the FDA issued a Public Health Advisory that provided further cautions to physicians, their patients, and families and caregivers of patients about the need to closely monitor both adults and children with depression, especially at the beginning of treatment, or when the doses are changed with either an increase or decrease in amount;

37. The standard warning regarding patients who are removed from Paxil is:

> "You may become suicidal, especially at the beginning of your treatment and any time that your dose is increased or decreased."

38. Riopedre, who was already being treated for Depression, had stopped taking Paxil on his own prior to being committed to FCI Estill, thus increasing his risk for suicidal thoughts, and despite this fact known to Federal Bureau of Prisons officials, Riopedre was placed in isolation in the SHU without the proper review, evaluation, and determination of what, if any, medically necessary medications should have been prescribed and given to Riopedre by a psychiatrist at the facility;

39. Despite being previously diagnosed; having ongoing, debilitating depression with a heightened risk for suicide; not being provided his previously diagnosed anti-depressant medication, Paxil; his requests for treatment of his mental disorder; his family's requests for treatment of his mental disorder; and a Federal Court's concerns for his safety, his Psychology Data System Intake Screening of September 10, 2009, prepared by Dr. Robert W. Binford, demonstrates deliberate indifference to Riopedre's medical and

mental health needs and confirms that no attempt was made to adequately review Riopedre's medical records or to contact his treating doctors;

40. It is well known to officials at the Federal Bureau of Prisons that at the initial screening of inmates, many inmates will not disclose any thoughts of suicide, depression, or other mental illness, because it is common knowledge by the inmates that such disclosure could definitely be a one-way ticket to the SHU, and for this reason the intake screening of an inmate with a history of depression or mental illness should be given great care and attention, despite what is being reported by the inmate;

41. Dr. Robert Binford stated in reports prepared by him that "No programs/treatment are recommended at this time" for Riopedre to Riopedre's detriment and with deliberate indifference to Riopedre's mental health in violation of Riopedre's right to be free from an Eighth Amendment prohibition against cruel and unusual punishment;

42. Dr. Robert Binford stated in reports prepared by him that "No programs/treatment are recommended at this time" for Riopedre to Riopedre's detriment and with deliberate indifference to Riopedre's mental health in violation of Riopedre's right to reasonable medical, psychiatric, and/or psychological dictated standards of care;

43. Riopedre did not receive access to a level of care comparable to that available in the community, as mandated by the Federal Bureau of Prisons, Program Statement 5310.13, Institution Management of Mentally Ill Inmates, which states:

> Psychological services within each institution should be sufficient to ensure that every inmate with a documented need and/or interest in psychological treatment has access to a level of care comparable to that available in the community and consistent with the overall mission of the institution.

44. Riopedre's Inmate Skills Development Plan, dated October 20, 2009, documents that on September 11, 2009, Riopedre was assigned to the SHU;

45. In effect at the time of Riopedre's commitment in 2009 to FCI Estill, the United States Department of Justice, Federal Bureau of Prisons, had promulgated a Program Statement, numbered P5324.08, entitled, Suicide Prevention Program, April 5, 2007;

46. Program Statement P5324.08 specifically dealt with the heightened risk of inmates for suicide who were placed in solitary confinement in SHU, and on page 6, paragraph 2, sub-paragraph c, it states:

> "c. **Inmates in SHUs**. Inmates in Administrative Detention or Disciplinary Segregation status often may be at a higher risk for suicidal behavior. Inmates being transferred into the SHU **will** be monitored for signs of potential suicide risk...."

47. Riopedre who had not committed any documented actions warranting disciplinary action, was known to prison officials to have suffered from debilitating depression, had recently stopped taking psychotropic medication, and had been not allowed to visit with his family who had driven up from Miami, Florida, and two days after arriving at the Federal Prison Camp at Estill, South Carolina, he was placed in the SHU, which is generally reserved for isolating inmates who have committed infractions of rules or regulations, inmates whose safety may be in jeopardy if left in the general population, for short overnight stays when an inmate be scheduled to be transported to a medical facility outside of the prison, or when an inmate may be waiting to be released to general population because there is no bed or bunk available;

48. It is a well-known fact to Bureau officials that many inmates "game the system" and may report to staff a "perceived" threat or conflict with another inmate as a retaliatory

measure, and that by reporting such a threat or conflict, inmates oftentimes force prison officials to send other inmates to the SHU;

49. The individual defendants, responsible for Riopedre's designation and classification, care and custody, and medical and mental health care needs, did, with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and right to due process of law, deprive Riopedre of his rights under the First, Fifth, Eighth, and Fourteenth;

50. Riopedre's forced confinement to SHU was reviewed on September 11, 2009, September 25, 2009, October 2, 2009, October 9 2009, and October 25, 2009;

51. Ana Davide, the Florida attorney in Miami who represented Riopedre in the case of U.S. vs. Jose Riopedre, Case 8:06-cr-00580-PJM, contacted FCI Estill multiple times, and sometimes multiple times in one day, to challenge the actions of the Defendants in isolating Riopedre;

52. On October 2, 2009, attorney Ana Davide contacted officials at FCI Estill by email to try to challenge Riopedre's continued detention in SHU;

53. And again, on October 7, 2009, attorney Ana Davide contacted officials at FCI Estill by email to try to challenge Riopedre's continued detention in SHU;

54. Mr. Riopedre's forced confinement to SHU was authorized by Lieutenant Paul Sneed, and/or Lieutenant C. Wiggins, and the same was reviewed by Captain G.S. Bondurant, and approved by Warden Mildred L. Rivera on each of the previously stated review dates with deliberate indifference to Riopedre's rights under the Eighth Amendment to the United States Constitution against Cruel and Unusual Punishment and the Fifth

Amendment Right to be free from unlawful government action without Due Process of Law, as well as the First and Fourteenth Amendments, as previously stated herein;

55. On six (6) separate occasions over a six-week period, the only reason given on a Special Housing Review for Violation or Reason Form as to why Riopedre should be in isolation in the SHU, was that Riopedre was "pending reclassification" and prison officials with deliberate indifference to Riopedre's mental health and ever increasing anxiety, depression, and risk of suicide;

56. The Defendants, individually and collectively, who were responsible for the care, custody and well-being of Riopedre, with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment, his right to due process of law, and his right to the standard of medical care required under the law, did little or nothing to ensure those constitutional rights;

57. Program Statement P5324.08 states:

> **Inmate Removal from the SHU.** The Program Coordinator will arrange to have an inmate exhibiting significant potential for suicide to be removed from the SHU and placed on suicide watch. Ordinarily, once the crisis is over, the inmate will be returned to satisfy any *sanction* [emphasis added] that was imposed

58. Program Statement P5324.08 clearly recognizes that SHU's are reserved for inmates sanctioned for disruptive or illegal behavior. Mr. Riopedre exhibited neither of these traits and it was incumbent on the prison officials to either expedite his pending re-classification to minimize the adverse psychological impact the SHU was having on Riopedre, or to place Riopedre on Suicide Watch as a precaution and in the abundance of caution, especially considering Riopedre's medical and other records that should have been red flags for prison officials to heed;

59. Program Statement P5324.08 goes on to describe the housing an inmate on suicide watch should be placed in:

    a. Housing. Each institution must have one or more rooms designated specifically for housing an inmate on suicide watch. . . .
    b. The primary concern in designating a room for suicide watch must be the ability to observe, protect, and maintain adequate control of the inmate.
    c. The room must permit easy access, privacy, and unobstructed vision of the inmate at all times.
    d. The suicide prevention room may not have fixtures or architectural features that would easily allow self-injury.

60. Riopedre was placed in a cell in SHU that allowed only a limited view of the interior of the cell with only a small window and that was difficult to enter. The unit had fixtures and bars from which an inmate could hang himself, all of which violated the above listed policy limitations placed on defendants with respect to suicidal inmates;

61. Because of Riopedre's medical and psychiatric history, the fact that he had been taking Paxil prior to arriving at FPC Estill, and other documentation as provided in Riopedre's inmate records, prison officials should have placed Riopedre in the suicide watch cells, made for that purpose;

62. Prison officials failed to consider the totality of the information available to them regarding Riopedre's medical and psychiatric condition, the inquiries from family members, his attorney, and even a Congressional inquiry that was initiated by the Honorable Lincoln Diaz-Balart;

63. The Defendants did this with deliberate indifference to Mr. Riopedre's right to free be from cruel and unusual punishment and right to due process of law;

64. Program Statement P5324.08 also created a fellow inmate observer program to assist the facility in preventing suicides. The policy mandates:

e. The observer and the suicidal inmate will not be in the same room/cell and will have a locked door between them.
f. The person performing the suicide watch must have means to summons help immediately.

65. On October 30th, 2009, within hours of Mr. Riopedre's death, Defendants, all being federal prison officials at FCI Estill, including Warden Mildred Rivera, caused Harry Castro, a mentally ill inmate who was known to suffer from bipolar disorder and other mental disorders, to be placed in the cell occupied by Riopedre;

66. In the early morning of October 31, 2009, on Halloween Day, Riopedre apparently tied multiple socks and/or torn sheets around his neck and attached them to the cell window bars, and hanged himself. As a result of Defendants' omissions, actions and/or failures to act, Riopedre ultimately died as a result of the hanging;

67. At all times relevant hereto, the Defendants acted with deliberate indifference to Riopedre's right to be from cruel and unusual punishment and right to due process of law;

68. Defendants, knowing of Riopedre's medical and mental health history, the information contained in his Presentence Investigation Report, having heard his telephone conversations with family members and others, the numerous messages sent by his attorney, Ana Davide, and other available information, should have placed Riopedre on suicide watch and assigned an Inmate Observers and staff to watch over him 24-hours a day;

69. Program Statement P5324.08 also highlights what actions must be taken when an Inmate Observer alerts of a suicide attempt by a fellow inmate:

g. In all cases, when an inmate observer alerts staff to an emergency situation, staff must immediately respond to the suicide watch room and take necessary action to prevent the inmate on watch from incurring debilitating injury or death. In no case will an inmate observer be assigned to a watch without adequate provision for staff supervision or without the ability to obtain immediate staff relief.

70. Program Statement P5324.08 also calls for constant observation of an inmate at risk for suicide;

71. There was no constant monitoring of Riopedre and the records made available to Plaintiffs by the Federal Bureau of Prisons do not demonstrate that that Riopedre was being monitored as Riopedre should have been because of his medical history and mental health problems and severe depression ;

72. All of the individual defendants that were directly responsible for the designation and classification, the care and custody, and the medical and mental health care of Riopedre, acted with deliberate indifference to Riopedre's rights to be free from cruel and unusual punishment and to due process of law;

73. In fact, on October 23, 2009, in a Memo prepared by Pam Weathers, she documented a monitored telephone call between Riopedre and his wife. During the call he indicated that he felt very bad, and he complained about his close confinement. Although in some circumstances such complaints may seem normal to a prison official, this was yet another indication of Riopedre's fragile mental state ignored by Defendants, because they failed to take into account his known medical and mental health illness and severe depression. It could be argued by Defendants that this failure occurred, in part, because Pam Weathers did not speak Spanish, which was Riopedre's native language, but this

argument would fail because Defendants were well aware and on notice of Riopedre's language limitations;

74. The Federal Bureau of Prisons has a large number of facilities throughout the country with almost 35% of the inmate population who are Hispanic. Less than 15% of the Bureau's prison staff is Hispanic. Riopedre, whose primary language was Spanish, was designated to a facility with limited Spanish speaking prison staff;

75. The Riopedre's right to be free from cruel and unusual punishment, to due process of law, and to be provided equal protection under the law have been deprived by the prison staff's failure to be able to obtain accurate translations of his telephonic and other communications;

76. The danger related to protective custody is so severe that that the Statement in the United States Department of Justice, Federal Bureau of Prison's "Sample" Suicide Prevention Information states:

    h. **Protective Custody**-Inmates who volunteer to enter protective custody are at high risk for suicide, especially during the first 72 hours in SHU
    i. **Long-term Protective Custody Inmates** – These inmates are particularly vulnerable to depression that can lead to a suicide attempt, and should be monitored closely while in they are in SHU.[emphasis added]
    j. **Inmates Taking Medication for Mental Health Reason**-These inmates are vulnerable to developing suicidal thoughts and attempting suicide by overdosing on their medication.

77. The United States Department of Justice, Federal Bureau of Prisons, issued a Program Statement relating to Personal Property, Inmate, on December 28, 2005 [hereinafter "Statement relating to Personal Property"] that required each inmate be afforded additional secured space outside his cell for additional personal property.

78. The Statement relating to Personal Property specifically states:

k. Civilian clothing (i.e. clothing not issued to the inmate by the Bureau or purchased by the inmate from the commissary) ordinarily is not authorized for retention by the inmate.
l. The Inmate Personal Property List (Attachment A) includes all personal property an inmate can retain at every institution. . . .
m. Staff shall consider as nuisance contraband any item ... excessive quantities of it present a health . . . hazard . . . ."
n. Attachment A specifically authorizes a maximum of five (5) socks per inmate and one (1) towel per inmate.

79. Based on the records and photographs provided by prison officials, it appeared that Riopedre had what appeared to have accumulated a large number of socks and sheets in the short time he was isolated in the SHU, in violation of the Bureau's own policies;

80. But for the prison officials deliberate indifference to its own policies, the Defendants would have prevented Riopedre's death;

81. It is a well known fact that in cases where an individual, such as in this case with Riopedre, who is deprived of oxygen, whether by drowning, attempted hanging, or some other means, the first five to eight minutes are crucial, if not critical, in receiving life saving emergency medical treatment. Once Defendants were made aware of the situation, they acted with deliberate indifference to Riopedre's rights to be free from cruel and unusual punishment and to due process of law;

82. On October 31, 2009, at 6:18 A.M., according to a Memorandum dated October 31, 2009 by Richella Lawson, Harry Castro, the inmate who had been placed in Riopedre's cell the night before, started to bang on the cell door and yelled. According to the Lawson's Memorandum, when she arrived at the cell she observed the following:

"his cellmate had hanged himself but I couldn't see his cellmate because of a blind spot in the corner"

83. Critical minutes passed without Defendants rendering life saving emergency care which could have prevented Riopedre's death, an omission that demonstrates deliberate indifference to Riopedre's constitutionally mandated rights to reasonable care;

84. On the morning of October 31, 2009, various prison reports indicate that present at the scene that morning were Defendants Chris Orr, James Solvik, Scott Williams, Officer M. Hill, Richella Lawson, and Tamala Middleton, and others;

85. At 6:20 AM, according to a Memorandum prepared by Defendant Chris Orr on October 31, 2009, inmate Harry Castro started yelling,

"HELP"! HELP HELP! MY CELLIE NEEDS HELP"

86. Chris Orr's Memorandum of October 31st, 2009 documents that Harry Castro started yelling after 6:20 AM:

"HE NEEDS HELP! PLEASE HELP HIM!"

87. The documented evidence shows that while Harry Castro was begging and screaming for help for Riopedre, Riopedre was dying;

88. The Defendants actions allowed Riopedre to die, and such actions constitute deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and to due process of law;

89. The evidence shows that while Harry Castro was screaming for help no one opened the cell door to Riopedre's cell to provide life saving emergency medical care or first aid measures to save Riopedre's life or even see Riopedre from 6:18 AM through 6:28 AM or 6:28 AM, or from 6:28 AM to 6:38 AM or from 6:38 AM to 6:48 AM;

90. The Defendants failed to act and respond appropriately in an emergency medical situation and Defendants' actions were with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and to due process of law and his right to reasonable medical care;

91. Finally, at 6:48 AM according to all documented evidence, including a Memorandum dated October 31, 2009 by Officer Specialist Williams, at 6:48 the first call for help was answered and individual defendants entered Riopedre's SHU cell;

92. The Defendants did this with deliberate indifference to Riopedre's right to be free from cruel and unusual punishment and to due process of law;

93. During his confinement, Riopedre, who was diagnosed on record with severe depression and anxiety, was not given proper supervision and care by the prison staff, or proper psychological care and there was a failure to properly assess his mental state;

94. Much of the Riopedre's first 51 days in prison were spent in solitary confinement, and although he could not adequately communicate in English, he was not furnished with a Spanish interpreter through whom he could have communicated his condition to the guards or other staff;

95. Throughout his 51-day detention in SHU at the Defendants' facility, Riopedre showed increasing outward signs of fragility and mental instability through severe weight loss;

96. Riopedre was additionally not allowed to see his family when they traveled to visit him;

97. Despite Riopedre's medical history, severe weight loss, and deteriorating condition, Defendants allowed him to suffer by failing to provide him treatment, punished him by placing him in long-term, unnecessary, solitary confinement, deprived him of

communication, prevented him from visiting with his family and put him in conditions preventing appropriate monitoring and then allowed him to accumulate a large, and completely inappropriate, number of tube socks and other materials, that were a dangerous instrumentality, which he ultimately used to take his life;

98. Before killing himself, but after being removed from solitary confinement, Riopedre was placed in a SHU cell with Harry Castro, an inmate who also had psychological issues yet was receiving care from a case manager;

99. On October 31, 2009, after suffering from lack of proper treatment for his severe clinical depression and anxiety, being held in solitary confinement for an extended period, and being given little supervision for someone in his fragile state, Riopedre hanged himself in his cell via a network of tube socks and/or pieces of material tied to the upper bunk of the cell;

100. After the incident, defendant Tracy Horvath visited Harry Castro, the inmate who had been placed into Riopedre's cell the night before the incident, in order to make sure he was doing well due to his psychological history and to arrange for psychological consultations. Had Jose Riopedre received similar care, his suicide would have been averted;

GENERAL ALLEGATIONS

101. Due to the documented nature and severity of Riopedre's condition, the Defendants demonstrated a clear deliberate indifference to the medical needs of the Riopedre;

102. There was a failure to properly assess Riopedre's condition by Defendants;

103. There was a failure to properly house Riopedre by Defendants;

104. There was a failure to properly monitor Riopedre and his actions by Defendants;

105. There was a failure to intervene when Riopedre was in distress by Defendants;

106. Although the Riopedre could not speak English well, he was not provided with a Spanish interpreter or any other means with which to communicate his condition. By not granting Riopedre proper medical treatment and by not supplying proper supervision to Riopedre despite his fragile state, the Defendants demonstrated a deliberate indifference to the conditions leading directly to his suicide and denied him equal protection of the law;

107. Additionally, by allowing Riopedre to accumulate copious amounts of tube socks and other linens, despite his medical history and clearly deteriorating condition, the Defendants demonstrated complete indifference to the obvious severity of Riopedre's condition and signs of self-destructive behavior;

108. Riopedre's death could have been prevented had he been given his proper medication, given proper visitation rights with doctors and his family, prevented from accumulating copious amounts of tube socks, properly monitored throughout his deteriorating condition, and, if necessary, placed on suicide watch;

109. Riopedre died as a result of a number of omissions and actions of Defendants, individually and jointly, by not being properly trained, failure to adequately monitor inmates and observe obvious self-destructive tendencies, not providing proper medical care to the Riopedre, failing to properly monitor Riopedre given his known medical and mental health history, and failure by Defendants to take prompt action when the Riopedre attempted to kill himself;

COUNT ONE

***BIVENS* CLAIM FOR VIOLATION OF RIOPEDRE'S EIGHTH AMENDMENT RIGHTS: PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT BY FERNANDO MENDEZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSE R. RIOPEDRE**

110. Plaintiffs re-allege and re-affirm the allegations set forth in paragraphs one (1) through one hundred and nine (109) , as if fully set forth herein;

111. All of the Defendants, individually and collectively, except the United States, demonstrated a clear indifference to the known conditions of the Riopedre that led to his suicide under their care;

112. It is true that jail inmates are much more likely to commit suicide than free persons are-in fact, nine times as likely. Lindsay M. Hayes & Joseph R. Rowan, National Study of Jail Suicides: Seven Years Later (National Center on Institutions and Alternatives, Feb. 1988). According to the study just cited 12.9 percent of jail suicides occur within the first three hours of confinement, 32.8 percent within the first 24 hours, 62.1 percent within the first two weeks, 72.8 percent within the first month, 89.2 within the first four months, and 97.4 within the first seven months. Only 10.8 percent of suicides occur after 5 months;

113. The psychiatric condition most closely associated with suicide is severe ("clinical") depression, which the Defendants knew Mr. Riopedre suffered from;

114. Defendants, individually and collectively, demonstrated a deliberate indifference to the known conditions of the Riopedre that led to his suicide under their care by failing to follow their own policies and procedures previously enumerated that had they been

followed would have saved Mr. Riopedre's life. *Jutzi-Johnson v. U.S.*, No. 96-C-5708, U.S. Dist. Ct., N.D. Ill. (March 29, 2000);

115. All of the Defendants, individually and collectively, and specifically Defendants Anita Cano and Tracy Horvath, who were responsible for evaluating and treating inmates at the center, violated Riopedre's constitutional rights, demonstrated deliberate indifference and demonstrated negligence that rose to the level of gross negligence towards Riopedre's safety by:

o. Failing to properly supervise and provide support to the Riopedre, especially in regard to his severe and documented psychological issues;

p. Failing to take action to ensure Riopedre's safety either through direct action, such as placing him under suicide watch or warning the guards;

q. Failing to grant Riopedre similar psychological support for his documented psychological condition as that was granted to other similarly situated inmates such as inmate Harry Castro;

116. Defendants, individually and collectively, had the resources, knowledge, and duty to offer the Riopedre the same diligence and duty of care that other inmates received;

117. Defendants, individually and collectively, were deliberately indifferent to the conditions that led to his death of Riopedre by failing to recognize Riopedre's documented medical and psychological history and failing to recognize and act upon Riopedre's worsening condition despite Riopedre's a well documented history of severe psychological disorders;

118. Defendants, individually and collectively, who were responsible for care and custody, and providing adequate medical and psychological care to Riopedre, demonstrated a deliberate indifference to the Riopedre's conditions by:

r. Deliberately placing him in SHU for no reasonable justifiable reason despite Riopedre's known clinical depression, weaning off of Paxil, and ongoing mental health issues;

s. Failing to provide an appropriate level of surveillance to Mr. Riopedre despite his severe weight loss and obviously worsening condition;

t. Failing to take the appropriate actions or give proper and timely notifications to the appropriate personnel about the Riopedre's visibly deteriorating condition and weight-loss;

u. Failing to properly supervise Riopedre and allowing Mr. Riopedre to collect copious amounts of tube socks, which hold little use in bulk, fashion them into a rope, and ultimately kill himself;

v. Failing to notice or take action over obviously suicidal behavior both over the fifty days preceding his death, and on the day of his death;

w. And the other aforementioned actions in Paragraphs 1-116

119. By having either ignored Riopedre's situation or somehow remaining ignorant to the Riopedre's worsening situation and collection of tube socks, the Defendants, individually and collectively, who were on duty at the facility demonstrated a clear indifference or a negligence that rose to the level of gross negligence towards their duty to monitor Riopedre;

120. Defendant Tamala Middleton, the clinical nurse on call at the time of the Riopedre's death, as well as Dr. Robert Binford, demonstrated clear indifference to the Riopedre's conditions, and his rights to be free from cruel and unusual punishment, by:

x. Failing to properly supervise or provide proper medication and support to the Riopedre;

y. By not properly caring for the Riopedre or trying to take action despite his worsening condition and documented proof of severe psychological disabilities, Tamala Middleton and Dr. Robert Binford demonstrated clear indifference to Riopedre's condition, or at the least gross negligence;

121. Defendant Lieutenant James Solvik, Operations Lieutenant for the facility, and Warden Mildred Rivera and other defendants demonstrated a deliberate indifference to Riopedre's and other inmates' 8th amendment rights by not supplying an adequate medical staff to the inmates, especially given that many, such as Riopedre, had severe and documented mental illnesses;

122. Defendants, individually and collectively, with knowledge that Riopedre, needed psychological care, failed to provide the proper medication that could have helped Riopedre cope with his circumstances, demonstrated a indifference to the needs of Riopedre;

123. Defendants, individually and collectively, demonstrated deliberate indifference by not opening the Riopedre's cell door and rendering first aid resuscitative aide and/or emergency care until approximately thirty minutes after they were alerted to the

emergency nature of Riopedre's condition by Harry Castro, who was begging them to save Riopedre's life;

124. As a result of the inadequate supervision, inadequate training, failure to follow prison protocols, and delay in providing Riopedre with immediate first aid resuscitative measures and/or emergency medical care, Riopedre suffered cruel and unusual punishment;

125. Riopedre suffered greatly in the final 51 days of his life and eventually succumbed to the pressures of being isolated in SHU by his attempted suicide that did not have to end in his death, but for the deliberate indifference of Defendants, all acting individually and collectively;

126. As a result of individual defendants "actions, individually and collectively, the heirs of Jose Riopedre are entitled to relief from the individual Defendants." *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971). *Estelle v. Gamble*, 429 U.S. 97 (1976) (The US Supreme Court held that an indifference to the medical needs of inmates is a violation of the 8th amendment to the US constitution and constitutes cruel and unusual punishment.) *Daniels v. Williams*, 474 U.S. 327 (1986) (Held that although mere negligence is not enough to trigger a cause of action for government liability, gross negligence may suffice to demonstrate constitutional claims.) *Carlson v. Green*, 466 U.S. 14 (1980);

127. Plaintiffs allege that Defendants, individually and collectively, also violated Riopedre's First and Fourteenth Amendment rights;

128. Riopedre had a constitutionally protected right under the First and Fourteenth Amendments;

129. Defendants, individually and collectively, deprived Riopedre of his constitutionally protected rights;

130. The plaintiff Estate lacks a statutory cause of action, or an available statutory cause of action does not provide monetary compensation against Defendants, individually and collectively;

131. No "special factors" suggest that the Court should decline to provide the judicial cause of action and remedy in this case;

132. No appropriate immunity can be raised by the individual defendants as a result of Riopedre's death;

133. Plaintiff personal representative has an interest in his relationship with his brother-in-law, as the brother of Riopedre's widow, Susanna Mendez, which is protected by the First and Fourteenth Amendment to the Constitution;

134. These constitutional interests survived the death of Riopedre;

135. Defendants intentionally interfered with this interest by demonstrating deliberate indifference to Riopedre's right to receive adequate medical and psychiatric care and to be free from cruel and unusual punishment;

136. The actions of the Defendants, individually and collectively, were in violation of Riopedre's Fifth and Eighth Amendment rights and his First and Fourteenth Amendment rights, as guaranteed by the Constitution of the United States;

COUNT TWO

CLAIM FOR LOSS OF CONSORTIUM, LOVE, COMPANIONSHIP AND FAMILIAL ASSOCIATION BY SUSANA MENDEZ

137. Plaintiffs re-allege, re-affirm, and incorporate by reference all of the allegations set forth in paragraphs one (1) through One Hundred and thirty-six (136) as set forth herein;

138. At all times material hereto, Susana Mendez was the loving wife of Mr. Riopedre.

139. As a result of the actions and/or omissions of the Defendants Susana Mendez has lost the loving companionship, care and comfort of her husband and familial association with him for the remainder of her life.

140. The Defendants owed a duty of care to Mr. Riopedre to allow him to live;

141. The Defendants breached their duty of care through deliberate indifference as alleged previously;

142. As a result of Mr. Riopedre's death under supervision of the Defendants, Mr. Riopedre's widow faces hardship and injury due to her loss of companionship, mental pain and anguish, and loss of decedent's earning potential, for which she entitled to collect damages;

COUNT THREE

WRONGFUL DEATH UNDER THE FEDERAL TORT CLAIMS ACT

143. The Plaintiffs, Fernando Mendez, the personal representative and administrator and Susana Mendez, wife of the decedent (hereinafter collectively referred to as "Plaintiffs"), reallege and incorporated by referenced all of the Plaintiffs' factual allegations as set forth in paragraphs one (1) through one-hundred and forty-two (142) of their Complaint alternatively against the United States of America ("Defendant" or the "Government").

Plaintiff brings this suit for damages arising from the death of Jose Riopedre (" Jose Riopedre") under the Federal Tort Claims Act ("FTCA") as follows:

144. This Court has jurisdiction pursuant to the provisions of 28 U.S.C. § 1346(b) under the FTCA;

145. On March 4, 2011, Plaintiff submitted her administrative claim under the FTCA, 28 U.S.C. § 2671, et seq. The claim seeks money damages in the amount of Forty Million Dollars ($40,000,000.00) for Pedro Riopedre's death that was caused by the negligence of the Government;

146. On _____, the Government, acting by and through the U.S. Department of Justice, Federal Bureau of Prisons, denied Plaintiff's claim;

147. A true and correct copy of the _____ denial of Plaintiff's claim is attached hereto as Exhibit "A."

148. Plaintiffs have exhausted their FTCA administrative remedies, and under 28 U.S.C. §2675(a) is entitled to institute this action under the FTCA against the Government;

149. Venue is proper in this Court under 28 U.S.C. § 1402 because the Defendant engaged in the conduct of which the Plaintiffs set forth in their complaint in the U.S. District Court, District of South Carolina;

150. All conditions precedent to the maintenance of this action have been met, waived, or excused;

151. Service of process may be perfected upon the Government under Federal Rule of Civil Procedure 4(i)(1) by delivering a copy of the summons and complaint to the United States Attorney for the District of South Carolina, U.S. Attorney's Office, Wells Fargo

Building, 1441 Main Street, Suite 500, Columbia, SC 29201, (or by sending a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office), and by sending a copy by registered or certified mail to the Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001;

152. Plaintiffs have completed service of process on both the United States Attorney for South Carolina and the United States Attorney General, as required by law;

153. Plaintiffs are SUSANA MENDEZ, the widow of Mr. Riopedre, and FERNANDO MENDEZ, as the Personal Representative of the Estate of Jose R. Riopedre;

154. Mr. Riopedre died while in the custody of the Federal Bureau of Prisons at Federal Correctional Institution at Estill, South Carolina;

155. Plaintiffs, SUSANA MENDEZ and FERNANDO MENDEZ (as personal representative of the Estate of Jose Riopedre), allege and incorporate by reference herein, all of the allegations that each made in the Administrative Tort Claims each submitted to the Federal Bureau of Prisons, numbered TRT-SER-2011-00170 and TRT-SER-2011-04367 [See attached letters as part of Collective Exhibit "A"];

156. The Government's failure to provide proper medical treatment to Mr. Riopedre breached the applicable standard of care and was negligent. The negligence included, but was not limited to, the conduct of the physician and of the nursing staff and, furthermore, the failure to properly supervise and monitor the performance of the physician. The systematic failure by the physician to review the results of the physical examinations for

over a year's time should have been discovered through the exercise of reasonable care on the part of the physician's supervisors. Additionally, all the factual allegations contained in paragraph 1-143 are incorporated herein. The United States had a duty to reasonably monitor, supervise, and maintain the safety and life of Mr. Riopedre and breached its duty, thus resulting in the death of Mr. Riopedre;

157. The negligent acts and omissions of the Government or its agents who were acting within the course and scope of their employment proximately caused the death of Mr. Riopedre. It is reasonably foreseeable that the routine failure by staff physicians to review the findings of the physical examinations of prisoners will result in the failure to identify and treat both chronic and emergent medical conditions;

158. South Carolina law permits patients who have been injured by the negligent failure of a physician or of medical staff to properly examine and diagnose such patient to maintain actions for damages. Additionally, those who detained, supervised, and monitored the Decedent had a duty of care to protect Mr. Riopedre and failed to do so. The claim submitted herein by Plaintiffs is one which would be available to her under South Carolina state law if the United States were a private person;

159. The Defendant is liable for the full value of the life of Mr. Riopedre as a result of his wrongful death in the amount of forty million dollars ($40,000,000.00);

WHEREFORE, Plaintiffs request that they be awarded forty million dollars ($40,000,000.00) under the FTCA for the wrongful death of Mr. Riopedre and such other further relief as the Court may deem just and proper;

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court to:

a. Declare the actions complained of herein to be in violation of the First, Fifth and Eighth, and Fourteenth Amendment to the United States Constitution as well as South Carolina and Federal law;

b. Enter judgment in favor of Plaintiffs and against all Defendants, individually and jointly;

c. Award Plaintiffs damages to compensate for their injuries including:

(1) costs and attorney's fees;

(2) nominal, compensatory, and special damages;

(3) pain and suffering;

(4) a sum to compensate Plaintiff Estate for decedent's pain and suffering and compensate for Riopedre's widow for loss of companionship and right to familial association;

(5) punitive damages in sum as to deter Defendants conduct of this nature in the future; and,

(6) all other relief that this court deems just and proper under the circumstances.

d. Enter judgment in favor of Plaintiffs and against all the Defendants, individually and collectively;

(1) Award damages to compensate Plaintiffs for their injuries

(a) In the amount over $75,000;

(b) costs and attorneys' fees; and,

(c) all other relief that this court deems just and proper under the

circumstances;

e. Award Plaintiffs any other relief that this court deems just and proper under the circumstances.

DEMAND FOR JURY TRIAL

PLAINTIFFS hereby demand a jury trial on all issues triable by a jury.

Dated: October 30, 2012

Respectfully submitted,

s/ Dionè Carroll
Dionè Carroll, Esq.,
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ATTORNEYS FOR THE PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Jose R Riopedre, *Estate of Jose R Riopedre through Fernando Mendez personal representative*; Susana Mendez, *individually as wife of Jose R Riopedre*	)	CA No. 8-12-cv-2806-TMC-JDA
Plaintiff(s),	)	
vs.	)	**CONFERENCE AND SCHEDULING ORDER**
James Solvik; Tamala Middleton; Chris Orr; Richella Lawson; Raganold Williams; Richard Wallace; Mildred L Rivera; Anita Cano; John J Enzinna; Tracy Horvath; Scott Williams; Vernon Robinson; Robert Binford; Paul Sneed; Gregory Bondurant; John Does 1-8; Stephen Buckler; Pam Weathers; Jeremy Dallas; Christopher Bush; C Wiggins; M Hill; and Dr Derick Phillips,	)	
Defendant(s).	)	

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following schedule is established for this case. Discovery may begin upon receipt of this order.

1. A conference of the parties pursuant to Fed. R. Civ. P. 26(f) ("Rule 26(f) conference") shall be held no later than 20 days from the date of this order.[1] At conference the parties shall confer concerning all matters set forth in Fed. R. Civ. P. 26(f) and whether the schedule set forth in this order is appropriate.[2]

2. No later than fourteen (14) days after the Rule 26(f) conference the required initial disclosures under Fed. R. Civ. P. 26(a)(1) shall be made.[3]

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[1]Plaintiff's counsel shall initiate the scheduling of the Rule 26(f) conference with all counsel known to plaintiff regardless of whether they have filed appearances.

[2]The parties shall also consider whether they wish to consent to trial before a United States Magistrate Judge. See attached Notice of Availability of United States Magistrate Judge.

[3]Pursuant to Fed. R. Civ. P. 26(a)(1), the parties may, by stipulation, agree not to make some or all of the Rule 26(a)(1) initial disclosures. If such a stipulation is made, it shall be confirmed in writing between the parties. See Fed. R. Civ. P. 29 and Local Civil Rule 29.01.

3. No later than fourteen (14) days after the Rule 26(f) conference the parties shall file a Rule 26(f) Report in the form attached to this order. **With this Report, counsel for each party shall file and serve a statement certifying that counsel has (1) discussed the availability of mediation with the party; (2) discussed the advisability and timing of mediation with opposing counsel; and advise the court whether the parties agree to mediation.** Parties are hereby notified that Local Civil Rule 26.03 lists additional queries to be answered in the Rule 26(f) Report.

4. Motions to join other parties and amend the pleadings (Fed. R. Civ. P. 16(b)(3)(A)) shall be filed no later than **March 18, 2013**.

5. Plaintiff(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Plaintiff(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **April 17, 2013** (Fed. R. Civ. P. 26(a)(2)).[4]

6. Defendant(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Defendant(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **May 17, 2013** (Fed. R. Civ. P. 26(a)(2)).

7. Counsel shall file and serve affidavits of records custodian witnesses proposed to be presented by affidavit at trial no later than **May 17, 2013**. Objections to such affidavits must be made within fourteen (14) days after the service of the disclosure. (See Fed. R. Evid. 803(6), 902(11), or 902(12) and Local Civil Rule 16.02(D)(3)).

8. Discovery shall be completed no later than **June 17, 2013**. Discovery shall be deemed completed within this time only if discovery is initiated at such time as to afford the responding party the full time provided under the applicable rule of the Federal Rules of Civil Procedure in which to respond prior to the discovery completion date noted in this paragraph.

(The parties may, with the consent of all counsel, conduct discovery up to the time of trial, provided the deadlines in this order are not affected.)

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[4]Concurrent with the identification of each expert and subject matter, each party shall serve (but not file): 1) a complete copy of the most current curriculum vitae of each expert or a detailed summary of his qualifications to testify on each identified subject; 2) (a) a complete statement of all opinions to be expressed by each expert and the basis and reasons therefor; (b) the data and other information considered by the expert in forming the opinions, (c) any exhibits to be used as a summary of or support for the opinions, and (d) citations of any treatise, text or other authority upon which each expert especially relied; and 3) a copy of each expert's report if a report has been prepared.

9. All other motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than **July 1, 2013** (Fed. R. Civ. P. 16(b)(2)). *See* below ¶ 11 for motions in limine deadline.

10. No later than **August 30, 2013**, the parties shall file and exchange Fed. R. Civ. P. 26(a)(3) pretrial disclosures. Within fourteen (14) days thereafter, a party shall file and exchange Fed. R. Civ. P. 26(a)(3) objections, any objections to use of a deposition designated by another party and any deposition counter-designations under Fed. R. Civ. P. 32(a)(6).

11. Motions in limine must be filed two weeks prior to jury selection.

12. Parties shall furnish the Court pretrial briefs seven (7) days prior to the date set for jury selection (Local Civil Rule 26.05). Attorneys shall meet at least seven (7) days prior to the date set for submission of pretrial briefs for the purpose of exchanging and marking all exhibits. See Local Civil Rule 26.07.

13. This case is subject to being called for jury selection and trial on or after **October 1, 2013**.

A request for a continuance of the trial date must be agreed to and signed by the party and his attorney requesting and/or consenting to the continuance.

The court directs the parties' attention to Local Rule 7.00 which governs motion practice. Hearings on motions are not automatic. The court may decide motions without a hearing. If a party opposes a motion which has been filed, that party must file a response to the opposed motion within fourteen (14) days of the date the motion was filed. If no such response in opposition is filed, the court will assume that the party consents to the court's granting the motion.

Any motions pending on the date of the Bar Meeting *will be heard at the Bar Meeting* and you should be prepared to argue them at that time.

NOTICE: You are expected to be available for trial of this case during the month of October 2013 unless the court notifies you of a later date. If you presently have a conflict during the month of October, notify the court in writing within seven (7) days of the date of this order. You will not be excused without leave of court.

s/Timothy M. Cain
United States District Judge

January 2, 2013
Greenville, South Carolina

Pursuant to Local Civil Rule 83.I.08, this order is being sent to local counsel only.

The following referenced documents can be found at www.scd.uscourts.gov:

1) Rule 26(f) Report
2) Notice of Availability of United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Jose R Riopedre et al,	)	
	)	
Plaintiffs,	)	CA No. 8-12-cv-2806-TMC-JDA
	)	
vs.	)	
	)	**ORDER TO CONDUCT**
James Solvik et al,	)	**MEDIATION**
	)	
Defendants.	)	

Failure to comply with this order may result in sanctions.

A mediation is to be completed in the above-referenced matter prior to **June 24, 2013**, on a date agreed to by the parties. Upon completion of the mediation, the court is to be advised of the results.

Attorneys primarily responsible for handling the trial, parties and/or insurer representatives with full settlement authority[1] are ordered to be present in person, and will only be excused for good cause shown. Every person who is excused from attending in person must be available to participate by telephone unless otherwise ordered. Lack of discovery or settlement authority is no excuse for failure to appear and participate. At the mediation, primary trial counsel, along with parties and/or their insurer representatives, should be prepared to negotiate on this case in a mutual, good faith effort to reach a fair and reasonable settlement. If a settlement is not reached, settlement discussions will be inadmissible in court.

If any reason exists why you and your client should not participate in this scheduled conference, you must advise the court in writing no later than ten days from the date of this order.

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[1]"Full settlement authority" for the defendant means an individual who can decide to offer the plaintiff a sum up to the existing demand of the plaintiff or the policy limits of any applicable insurance policy, whichever is less. "Full settlement authority" for the plaintiff means the plaintiff himself or herself or a representative of the plaintiff who can make a binding decision on behalf of the plaintiff or plaintiffs.

Notices have been sent to all counsel of record. Counsel are responsible for notifying and ensuring the presence of parties and/or insurer representatives as described above.

IT IS SO ORDERED.

s/ Timothy M Cain
United States District Judge

January 2, 2013
Greenville, South Carolina

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Jose R Riopedre, *Estate of Jose R Riopedre through Fernando Mendez personal representative;* Susana Mendez, *individually as wife of Jose R Riopedre* Plaintiff(s),	)	CA No. 8-12-2806-TMC-JDA
vs.	)	**AMENDED CONFERENCE AND SCHEDULING ORDER**
James Solvik; Tamala Middleton; Chris Orr; Richella Lawson; Raganold Williams; Richard Wallace; Mildred L Rivera; Anita Cano; John J Enzinna; Tracy Horvath; Scott Williams; Vernon Robinson; Robert Binford; Paul Sneed; Gregory Bondurant; John Does 1-8; Stephen Buckler; Pam Weathers; Jeremy Dallas; Christopher Bush; C Wiggins; M Hill; Dr Derick Phillips; United States of America, Defendant(s).	)	

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following schedule is amended for this case.

1. A conference of the parties pursuant to Fed. R. Civ. P. 26(f) ("Rule 26(f) conference") shall be held no later than **20 days from the date of this order.**[1] At conference the parties shall confer concerning all matters set forth in Fed. R. Civ. P. 26(f) and whether the schedule set forth in this order is appropriate.[2]

2. No later than **fourteen (14) days after the Rule 26(f) conference** the required initial disclosures under Fed. R. Civ. P. 26(a)(1) shall be made.[3]

---

[1]Plaintiff's counsel shall initiate the scheduling of the Rule 26(f) conference with all counsel known to plaintiff regardless of whether they have filed appearances.

[2]The parties shall also consider whether they wish to consent to trial before a United States Magistrate Judge. See attached Notice of Availability of United States Magistrate Judge.

[3]Pursuant to Fed. R. Civ. P. 26(a)(1), the parties may, by stipulation, agree not to make some or all of the Rule 26(a)(1) initial disclosures. If such a stipulation is made, it shall be confirmed in writing between the parties. See Fed. R. Civ. P. 29 and Local Civil Rule 29.01.

3. No later than **fourteen (14) days after the Rule 26(f) conference** the parties shall file a Rule 26(f) Report in the form attached to this order. **With this Report, counsel for each party shall file and serve a statement certifying that counsel has (1) discussed the availability of mediation with the party; (2) discussed the advisability and timing of mediation with opposing counsel; and advise the court whether the parties agree to mediation.** Parties are hereby notified that Local Civil Rule 26.03 lists additional queries to be answered in the Rule 26(f) Report.

4. Motions to join other parties and amend the pleadings (Fed. R. Civ. P. 16(b)(3)(A)) shall be filed no later than **May 17, 2013**.

5. Plaintiff(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Plaintiff(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **June 17, 2013** (Fed. R. Civ. P. 26(a)(2)).[4]

6. Defendant(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Defendant(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **July 17, 2013** (Fed. R. Civ. P. 26(a)(2)).

7. Counsel shall file and serve affidavits of records custodian witnesses proposed to be presented by affidavit at trial no later than **July 17, 2013**. Objections to such affidavits must be made within fourteen (14) days after the service of the disclosure. (See Fed. R. Evid. 803(6), 902(11), or 902(12) and Local Civil Rule 16.02(D)(3)).

8. Mediation shall be completed on or before **August 1, 2013**. See [Doc. 31] mediation order for requirements.

9. Discovery shall be completed no later than **August 16, 2013**. Discovery shall be deemed completed within this time only if discovery is initiated at such time as to afford the responding party the full time provided under the applicable rule of the Federal Rules of Civil Procedure in which to respond prior to the discovery completion date noted in this paragraph.

---

[4]Concurrent with the identification of each expert and subject matter, each party shall serve (but not file): 1) a complete copy of the most current curriculum vitae of each expert or a detailed summary of his qualifications to testify on each identified subject; 2) (a) a complete statement of all opinions to be expressed by each expert and the basis and reasons therefor; (b) the data and other information considered by the expert in forming the opinions, (c) any exhibits to be used as a summary of or support for the opinions, and (d) citations of any treatise, text or other authority upon which each expert especially relied; and 3) a copy of each expert's report if a report has been prepared.

(The parties may, with the consent of all counsel, conduct discovery up to the time of trial, provided the deadlines in this order are not affected.)

10. All other motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than **September 3, 2013** (Fed. R. Civ. P. 16(b)(2)). *See* below ¶ 12 for motions in limine deadline.

11. No later than **October 30, 2013**, the parties shall file and exchange Fed. R. Civ. P. 26(a)(3) pretrial disclosures. Within fourteen (14) days thereafter, a party shall file and exchange Fed. R. Civ. P. 26(a)(3) objections, any objections to use of a deposition designated by another party and any deposition counter-designations under Fed. R. Civ. P. 32(a)(6).

12. Motions in limine must be filed two weeks prior to jury selection.

13. Parties shall furnish the Court pretrial briefs seven (7) days prior to the date set for jury selection (Local Civil Rule 26.05). Attorneys shall meet at least seven (7) days prior to the date set for submission of pretrial briefs for the purpose of exchanging and marking all exhibits. See Local Civil Rule 26.07.

14. This case is subject to being called for jury selection and trial on or after **December 2, 2013**.

A request for a continuance of the trial date must be agreed to and signed by the party and his attorney requesting and/or consenting to the continuance.

The court directs the parties' attention to Local Rule 7.00 which governs motion practice. Hearings on motions are not automatic. The court may decide motions without a hearing. If a party opposes a motion which has been filed, that party must file a response to the opposed motion within fourteen (14) days of the date the motion was filed. If no such response in opposition is filed, the court will assume that the party consents to the court's granting the motion.

Any motions pending on the date of the Bar Meeting *will be heard at the Bar Meeting* and you should be prepared to argue them at that time.

NOTICE: You are expected to be available for trial of this case during the month of December 2013 unless the court notifies you of a later date. If you presently have a conflict during the month of December, notify the court in writing within seven (7) days of the date of this order. You will not be excused without leave of court.

s/ Jacquelyn D Austin
United States Magistrate Judge

February 20, 2013
Greenville, South Carolina

Pursuant to Local Civil Rule 83.I.08, this order is being sent to local counsel only.

The following referenced documents can be found at www.scd.uscourts.gov:

1) Rule 26(f) Report
2) Notice of Availability of United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Estate of Jose R. Riopedre, by and through Fernando Mendez, as the Personal Representative of the Estate of Jose R. Riopedre, and Susana Mendez, individually, as wife of Jose R. Riopedre, Plaintiff, v. United States of America, and Mildred L. Rivera; Robert Binford; James Solvik; Tamala Middleton; Chris Orr; Raganold Williams; Richella Lawson; Richard Wallace; Anita Cano; Tracy Horvath; Scott Williams; Vernon Robinson; Paul Sneed; Gregory Bondurant; John J. Enzinna; Dr. Derick Phillips; Stephen Buckler; Pam Weathers; Jeremy Dallas; Christopher Bush; C. Wiggins; M. Hill; John Does 1-8; individually, and in their individual capacities, Defendants.	)	C/A NO. 8:12-cv-02806-TMC-JDA **SECOND CONSENT AMENDED SCHEDULING ORDER**

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following schedule is amended for this case.

4. Motions to join other parties and amend the pleadings (Fed. R. Civ. P. 16(b)(3)(A)) shall be filed no later than **July 17, 2013**.

5. Plaintiff(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Plaintiff(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has

been disclosed to other parties by **August 19, 2013** (Fed. R. Civ. P. 26(a)(2)).[4]

6. Defendant(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Defendant(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **September 17, 2013** (Fed. R. Civ. P. 26(a)(2)).

7. Counsel shall file and serve affidavits of records custodian witnesses proposed to be presented by affidavit at trial no later than **September 17, 2013**. Objections to such affidavits must be made within fourteen (14) days after the service of the disclosure. (See Fed. R. Evid. 803(6), 902(11), or 902(12) and Local Civil Rule 16.02(D)(3)).

8. Mediation shall be completed on or before **October 1, 2013**. See [Doc. 31] mediation order for requirements.

9. Discovery shall be completed no later than **October 16, 2013**. Discovery shall be deemed completed within this time only if discovery is initiated at such time as to afford the responding party the full time provided under the applicable rule of the Federal Rules of Civil Procedure in which to respond prior to the discovery completion date noted in this paragraph.

(The parties may, with the consent of all counsel, conduct discovery up to the time of trial, provided the deadlines in this order are not affected.)

10. All other motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than **November 4, 2013** (Fed. R. Civ. P. 16(b)(2)). See below ¶ 12 for motions in limine deadline.

11. No later than **December 30, 2013**, the parties shall file and exchange Fed. R. Civ. P. 26(a)(3) pretrial disclosures. Within fourteen (14) days thereafter, a

[4]Concurrent with the identification of each expert and subject matter, each party shall serve (but not file): 1) a complete copy of the most current curriculum vitae of each expert or a detailed summary of his qualifications to testify on each identified subject; 2) (a) a complete statement of all opinions to be expressed by each expert and the basis and reasons therefor; (b) the data and other information considered by the expert in forming the opinions, (c) any exhibits to be used as a summary of or support for the opinions, and (d) citations of any treatise, text or other authority upon which each expert especially relied; and 3) a copy of each expert's report if a report has been prepared.

party shall file and exchange Fed. R. Civ. P. 26(a)(3) objections, any objections to use of a deposition designated by another party and any deposition counter-designations under Fed. R. Civ. P. 32(a)(6).

12. Motions in limine must be filed two weeks prior to jury selection.

13. Parties shall furnish the Court pretrial briefs seven (7) days prior to the date set for jury selection (Local Civil Rule 26.05). Attorneys shall meet at least seven (7) days prior to the date set for submission of pretrial briefs for the purpose of exchanging and marking all exhibits. See Local Civil Rule 26.07.

14. This case is subject to being called for jury selection and trial on or after **February 3, 2014**.

A request for a continuance of the trial date must be agreed to and signed by the party and his attorney requesting and/or consenting to the continuance.

The court directs the parties' attention to Local Rule 7.00 which governs motion practice. Hearings on motions are not automatic. The court may decide motions without a hearing. If a party opposes a motion which has been filed, that party must file a response to the opposed motion within fourteen (14) days of the date the motion was filed. If no such response in opposition is filed, the court will assume that the party consents to the court's granting the motion.

Any motions pending on the date of the Bar Meeting *will be heard at the Bar Meeting* and you should be prepared to argue them at that time.

NOTICE: You are expected to be available for trial of this case during the month of February 2014 unless the court notifies you of a later date. If you presently have a conflict during the month of February, notify the court in writing within seven (7) days of the date of this order. You will not be excused without leave of court.

s/ Jacquelyn D Austin
JACQUELYN D. AUSTIN
United States Magistrate Judge

March 27, 2013
Greenville, South Carolina

Pursuant to Local Civil Rule 83.I.08, this order is being sent to local counsel only.

Roy Lathrop - Activity in Case 8:12-cv-02806-TMC-JDA Riopedre et al v. United States of America et al Order on Motion for Extension of Time

From: <SCDEfilingstat@scd.uscourts.gov>
To: <scd_ecf_nef@scd.uscourts.gov>
Date: 8/13/2013 4:09 PM
Subject: Activity in Case 8:12-cv-02806-TMC-JDA Riopedre et al v. United States of America et al Order on Motion for Extension of Time

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U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 8/13/2013 at 4:07 PM EDT and filed on 8/13/2013
Case Name: Riopedre et al v. United States of America et al
Case Number: 8:12-cv-02806-TMC-JDA
Filer:
Document Number: 67(No document attached)

Docket Text:
TEXT ORDER DENYING [66] Motion for Extension of Time by Plaintiff. Plaintiff seeks an extension of time of thirty days to "propound expert discovery and supplement their Complaint with an expert declaration[]". Plaintiff claims that a pre-suit expert declaration, pursuant to S.C. Code 15-36-100, is to be filed by September 19, 2013. The Court notes, however, that this case was filed almost a year ago, on September 26, 2012. The Court allowed Plaintiff to amend this complaint a month later, on October 19, 2012 [Doc. 11], and again on October 30, 2012 [Doc. 24]. The Court entered a Scheduling Order in this case on January 2, 2013. [Doc. 30.] On February 2, 2013, Plaintiff again moved to amend the complaint which the Court allowed. [Doc. 40.] Additionally, the Scheduling Order was amended at the request of the parties on February 20, 2013. [Doc. 44.] After the 26(f) conference in this matter, on March 27, 2013, the Scheduling Order was again amended. [Doc. 50.] On July 17, 2013, Plaintiff moved to amend the Complaint to make some non-substantive changes. [Doc. 60.] With the consent of the Defendant, the Court allowed Plaintiff to substitute the Third Amended Complaint with the corrected complaint. [See, Doc. 40.] According to the Scheduling Order in this matter, the identification of Plaintiff's Expert Witnesses is due August 19, 2013. Plaintiff, now,

seeks to extend all scheduling order deadlines an additional 30 days, but has provided the Court with no explanation as to why an expert witness has not already been identified, or what factors prevent Plaintiff from so identifying an expert in the time allowed under the applicable Scheduling Order [Doc. 50].

Without taking a position on Plaintiff's need for a pre-suit expert declaration, or the timeliness or effect of such a declaration at this time, the Court puts the parties to this action on notice that it is not inclined to grant any additional amendments to the Complaint in this action and is not inclined to extend the Scheduling Order deadlines again, absent extraordinary circumstances. Signed by Magistrate Judge Jacquelyn D Austin on 8/13/13.(kmca)

8:12-cv-02806-TMC-JDA Notice has been electronically mailed to:

Barbara Murcier Bowens barbara.bowens@usdoj.gov, belinda.beard@usdoj.gov, falisha.mclamore@usdoj.gov, jerai.l.green@usdoj.gov, lisa.gillam@usdoj.gov, mmarlow@bop.gov, rlathrop@bop.gov, sateedra.revander@usdoj.gov, saundra.woods@usdoj.gov, trippon@bop.gov

Dione Cherie Travis Carroll dione@carroll-law-offices.com, info@chavez-deleon.com, jdeleon@chavez-deleon.com

John De Leon jdeleon@chavez-deleon.com, rsantos@chavez-deleon.com

8:12-cv-02806-TMC-JDA Notice will not be electronically mailed to:

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Jose R Riopedre, *Estate of Jose R Riopedre through Fernando Mendez personal representative*; Susana Mendez, *individually as wife of Jose R Riopedre*,	)	CA No. 8-12-2806-TMC-JDA
Plaintiff(s),	)	
vs.	)	**THIRD AMENDED SCHEDULING ORDER**
United States of America; Mildred L Rivera; Robert Binford; James Solvik; Tamala Middleton; Chris Orr; Raganold Williams; Richella Lawson; Richard Wallace; Anita Cano; Tracy Horvath; Scott Williams; Vernon Robinson; Paul Sneed; Gregory Bondurant; John J Enzinna; Dr Derick Phillips; Stephen Buckler; Pam Weathers; Jeremy Dallas; Christopher Bush; C Wiggins; M Hill; John Does 1-8, *individually, and in their individual capacities*,	)	
Defendant(s).	)	

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following schedule is amended for this case.

8. Discovery shall be completed no later than **November 4, 2013**. Discovery shall be deemed completed within this time only if discovery is initiated at such time as to afford the responding party the full time provided under the applicable rule of the Federal Rules of Civil Procedure in which to respond prior to the discovery completion date noted in this paragraph.

(The parties may, with the consent of all counsel, conduct discovery up to the time of trial, provided the deadlines in this order are not affected.)

9. Mediation shall be completed on or before **November 6, 2013**. See [Doc. 31] mediation order for requirements.

10. All other motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than **November 20, 2013**. (Fed. R. Civ. P. 16(b)(2)). *See* below ¶ 11 for motions in limine deadline.

11. No later than **January 15, 2014**, the parties shall file and exchange Fed. R. Civ. P. 26(a)(3) pretrial disclosures. Within fourteen (14) days thereafter, a party shall file and exchange Fed. R. Civ. P. 26(a)(3) objections, any objections to use of a deposition designated by another party and any deposition counter-designations under Fed. R. Civ. P. 32(a)(6).

12. Motions in limine must be filed two weeks prior to jury selection.

13. Parties shall furnish the Court pretrial briefs seven (7) days prior to the date set for jury selection (Local Civil Rule 26.05). Attorneys shall meet at least seven (7) days prior to the date set for submission of pretrial briefs for the purpose of exchanging and marking all exhibits. See Local Civil Rule 26.07.

14. This case is subject to being called for jury selection and trial on or after **February 19, 2014**.

s/ Jacquelyn D Austin
United States Magistrate Judge

October 21, 2013
Greenville, South Carolina

Pursuant to Local Civil Rule 83.I.08, this order is being sent to local counsel only.

Roy Lathrop - Activity in Case 8:12-cv-02806-TMC-JDA Riopedre et al v. United States of America et al Order to Show Cause

From: <SCDEfilingstat@scd.uscourts.gov>
To: <scd_ecf_nef@scd.uscourts.gov>
Date: 6/6/2014 12:53 PM
Subject: Activity in Case 8:12-cv-02806-TMC-JDA Riopedre et al v. United States of America et al Order to Show Cause

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*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 6/6/2014 at 12:52 PM EDT and filed on 6/6/2014
Case Name: Riopedre et al v. United States of America et al
Case Number: 8:12-cv-02806-TMC-JDA
Filer:
Document Number: 99(No document attached)

Docket Text:
TEXT ORDER TO SHOW CAUSE. The Court has reviewed Defendants' [88] Motion for summary judgment and Plaintiff's [92] response. The Court finds that the issue of whether Plaintiff complied with the statutory requirements of S.C. Code. Ann. 15-30-100 has not been sufficiently briefed. The requirements of this statute are not merely procedural, but substantive. *See Rotureau v. Chaplin*, 2009 WL 5195968 (D.S.C. Dec. 21, 2009). Plaintiff is to file a brief, not to exceed seven (7) pages, showing cause as to why the claim under the Federal Torts Claim Act should not be dismissed for failure to comply with the statute's requirement of filing an expert affidavit contemporaneously with the complaint. Plaintiff shall file the brief by noon on June 13, 2014. Defendants may respond, but are not required to do so. Any response from Defendants should be filed by noon on June 18, 2014. (Show Cause Response due by noon on 6/13/2014. Defendants Reply due by noon on 6/18/14) Signed by Magistrate Judge Jacquelyn D Austin on 6/6/14. (kmca)

8:12-cv-02806-TMC-JDA Notice has been electronically mailed to:

Barbara Murcier Bowens barbara.bowens@usdoj.gov, LMeredith@bop.gov, belinda.beard@usdoj.gov, falisha.mclamore@usdoj.gov, jwiencek@bop.gov, lisa.gillam@usdoj.gov, rlathrop@bop.gov, sateedra.revander@usdoj.gov, saundra.woods@usdoj.gov, trippon@bop.gov

Christie V Newman christie.newman@usdoj.gov, belinda.beard@usdoj.gov, lisa.gillam@usdoj.gov, sateedra.revander@usdoj.gov, saundra.woods@usdoj.gov

Dione Cherie Travis Carroll dione@carroll-law-offices.com, info@chavez-deleon.com, jdeleon@chavez-deleon.com

John De Leon jdeleon@chavez-deleon.com, rsantos@chavez-deleon.com

8:12-cv-02806-TMC-JDA Notice will not be electronically mailed to:.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

C/A NO. 8:12-02806-TMC-JDA

Estate of Jose R. Riopedre, by and through
Fernando Mendez, as the Personal Representative
of the Estate of Jose R. Riopedre, and
Susana Mendez, individually, as wife of
Jose R. Riopedre,

Plaintiffs,

vs.

United States of America, and
Mildred L. Rivera; Robert Binford; James Solvik;
Tamala Middleton; Chris Orr; Raganold Williams;
Richella Lawson; Richard Wallace; Anita Cano;
Tracy Horvath; Scott Williams; Vernon Robinson;
Paul Sneed; Gregory Bondurant; John J. Enzinna;
Dr. Derick Phillips; Stephen Buckler; Pam Weathers;
Jeremy Dallas; Christopher Bush; C. Wiggins;
M. Hill; John Does 1-8; individually, and in their
individual capacities,

Defendants.

PLAINTIFFS' RESPONSE TO OSC REGARDING APPLICATION OF S.C. CODE. ANN. 15-30-100

COME NOW, Plaintiffs responding to the June 6, 2014, OSC regarding whether Plaintiffs have complied with S.C. Code. Ann. §15-30-100 and "why the claim under the Federal Torts Claim Act should not be dismissed for failure to comply with the statute's requirement of filing an expert affidavit contemporaneously with the complaint." [DE 99]

I. PLAINTIFFS' DISPUTED FACTS UNDER THE FTCA ARE "FOR FAILURE TO RESPOND AND FAILURE TO PREVENT CONTRABAND USED IN SUICIDE," NOT FOR MALPRACTICE

In the FTCA administrative claim, dated May 15, 2012 at page 8 (attached to and adopted in the Third Amended Complaint ("TAC") as Exhibit A and adopted in the FTCA count at ¶155 [DE 40]) Plaintiffs contended that the negligent conduct included, without limitation: "Failing to promptly respond when alerted to his actual suicide attempt by his cell mate." The TAC further alleges, without limitation, that Mr. Riopedre died due to the "failure by Defendants to take prompt action when the Riopedre attempted to kill himself". (TAC para. 109; *see, also,* Plaintiffs Sup. Interrogatory Response, No. 10 [DE 92, Exh. 49]). To the extent that there were other FTCA theories in the case that arguably might implicate S.C. Code. Ann. 15-30-100, they have been abandoned, and are not implicated by the Opposition to the Summary Judgment Motion.

Plaintiffs' Opposition to the summary judgment motion asserted that

> "Defendants admit that the documentation created the day of the incident reflects the time line above [that is, a 30 minute delay]. (DE 88 at pgs.37-38) **It particularly relates to Officers Lawson, R. Williams, Orr and Wallace, the first notified of the situation.**
>
> Defendants apparently have 're-thought' the time line since being sued and argue that their documentation, prepared the day of the incident, is somehow less accurate than their memories now as summarized in the Points and Authorities (DE 88 pgs. 38-40). **The defendants simply assert that all documented the same day, almost contemporaneous, was 'not the case.**" (DE 88 pg. 38) **The central disputed facts for the FTCA claim . . . revolve around the time issue and whether the duress**

call and/or knowledge of the defendants that the incident was occurring was at 6:18/6:20 AM or at/about 6:48 AM'" [DE 92 pg. 4 (emphasis added)]

In Opposing Summary Judgment, Plaintiffs stated the issues as:

> "Disputed Fact No. 1: **Did The Duress Call Occur At 6:18/6:20 AM as reflected in the [BOP] documentation** listed above and as defendants admit was in the documentation? . . .
>
> Officers on duty in the SHU on October 31, 2009, Lawson, Wallace, R. Williams, and Orr all document and confirm they were notified of the emergency situation between 6:18 and 6:20 a.m. October 31, 2009. . .
>
> . . . .
>
> **Medical emergency was not called in special housing until 6:48 a.m., and aide was not provided until sometime thereafter**. . . After the medical emergency, staff headed to SHU to render assistance. [*See* Plaintiffs' Exhibit 3] **The cell door was not opened until Lieutenant Solvik arrived. [Plaintiffs' Exhibit 6] Thus, Mr. Riopedre had to have been hanging more than 28 minutes before someone cut him down and rendered CPR.**
>
> Disputed Fact No. Two: Was the Defendants' response time reasonable and consistent with the standard of care or negligent? It was negligent. (Aiken Decl. paras.9-19)
>
> . . .
>
> Disputed Fact No. Three (For *Bivens* claim only): Was the Defendants response time deliberately indifferent? It was. (Aiken Decl. paras.9-19)
>
> Disputed Fact No. Four: Was allowing decedent to accumulate contraband to use in a suicide attempt negligent. It was negligent. (Aiken Decl. para 20)
>
> Disputed Fact No. Five (For *Bivens* claim only): Was allowing decedent to accumulate contraband to use in a suicide attempt deliberate indifference. It was. (Aiken Decl. para 20)" [DE 92 pg. 5-8 (emphasis added)]

Disputed facts numbered (1), (2) & (4) addressed the factual issues for the FTCA claims. [DE 92 pg. 5-8] There were only two theories advanced in the Response to the Summary Judgment Motion under the FTCA:

1. That the correctional officers inexplicably took half an hour to respond and open the cell door in response to an urgent duress call for help (see, e.g., "And, Chris Orr was informed at 6:20 too because "A [sic] inmate started beating on his cell door and

yelling Help!, Help! Help! My cellie needs help." [Plaintiffs' Exhibit 4]. " (Disputed Facts Nos. 1 & 2); and/or,

2. That the correctional officers negligently allowed decedent to stockpile materials to use in the suicide (Disputed Facts No. 3)

Disputed Facts Nos. 3 and 5 also advanced a *Bivens* claim, albeit on a much more limited and narrower basis than the entire *Bivens* claim. Disputed Fact Nos. 3 & 5 only rely on those operative facts that also support the FTCA claim. [1] That is, to the extent that Fact Nos. 3 and 5 dealt with the *Bivens* claim it was much narrower than the entire *Bivens* claim discussed in DE 92, pgs. 16- 32 (that is, addressing, without limitation, the broader issues of suicide prevention, the impact of isolation, individualized assessments, and the warning signs).

The conduct challenged by the FTCA claim was without reference to any specifics about the inmate, or the inmate's history or condition, in the SHU. It was focused on the unreasonable response time.

II. S.C. CODE. ANN. 15-30-100 (G) IS INAPPLICABLE BECAUSE THE FTCA CLAIM DOES NOT INCLUDE ANY PROFESSIONS OR DISCIPLINES SUBJECT TO THE STATUTE.

S.C. Code. Ann. 15-30-100 (G) is inapplicable because the FTCA claim does not include any professions or disciplines subject to the statute. Subsection (G) provides that "[t]his section applies to the following professions: (1) architects; (2) attorneys at law; (3) certified public accountants; (4) chiropractors; (5) dentists; (6) land surveyors; (7) medical doctors; (8) marriage and family therapists; (9) nurses; (10) occupational therapists; (11) optometrists; (12) osteopathic physicians; (13) pharmacists;(14) physical therapists; (15) physicians' assistants; (16)

[1] *Bradich ex rel. Estate of Bradich v. City of Chicago*, 413 F.3d 688, 690-692 (7th Cir. 2005) is particularly persuasive with respect to the *Bivens* claims, especially failure to properly respond contention. *Bradich* held that "[t]hese times could be inaccurate. But on summary judgment, when the non-moving party receives the benefit of all reasonable inferences,, we must assume that the officers took ten minutes to seek help--and that they wasted much of that interval." (413 F.3d pg. 691)

professional counselors; (17) professional engineers; (18) podiatrists; (19) psychologists; (20) radiological technicians; (21) respiratory therapists; and (22) veterinarians."

The correctional officers whose conduct is at the core of, or even referenced in, Plaintiffs' FTCA claim are not within Subpart G. Accordingly, S.C. Code. Ann. 15-30-100 is inapplicable.

Further, and in the alternative, this is not an action for professional negligence within S.C. Code. Ann. 15-30-100 (B) or against a health care facility. It is against a correctional facility for the failure of its corrections officer sounding in simple negligence.

It should be noted that declaration of Dr. Patrick Goldsmith is not cited nor referenced as supporting the FTCA claim (or even the failure to timely respond claim under *Bivens*).

It should further be noted that the declaration of James Britenburg, MD, was included in the opposition to support the contention that by this 20 plus minute delay resulted, to a medical certainty that Mr. Riopedre would die. (James Britenburg, MD, paras G-I) It did not address the issue of standard of care of the response by any Doctor or otherwise. But instead, by leaving decedent hanging for an extra 20 plus to thirty minutes harm was caused.

III. PROFESSIONAL NEGLIGENCE IS NOT AT ISSUE AND, THEREFORE, S.C. CODE. ANN. 15-30-100 IS INAPPLICABLE

Professional negligence within S.C. Code Ann, 15-30-100, subparts (B) and/or (G). Further, S.C. Code. Ann. 15-30-100(C)(2) provides;

> 'The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.' (S.C. Code. Ann. 15-30-100(C)(2))

Under 18 U.S.C. § 4042, the BOP is obligated to provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States and provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States. 18 U.S.C. § 4042(a)(2), (3); *Irvin v. Owens*, No. 9:10-01336-RMG, 2012 U.S. Dist. LEXIS 59632, 2012 WL 1534787, at *13-14 (D.S.C. Apr. 30, 2012)

Further, Program Statement, U.S. Department of Justice, Federal Bureau of Prisons OPI: OGC, NUMBER: 3420.09, DATE: 2/5/99, SUBJECT: Standards of Employee Conduct, specifically provides:

> "RESPONSIVENESS
> a. Inattention to duty in a correctional environment can result in escapes, assaults, and other incidents. Therefore, employees are required to remain fully alert and attentive during duty hours.
>
> b. **Because failure to respond to an emergency may jeopardize the security of the institution, as well as the lives of staff or inmates, it is mandatory that employees respond immediately and effectively to all emergency situations."**(Id. (**emphasis added**))

Additionally, as noted above, it is BOP mandatory policy to respond immediately to emergencies, BOP's obligation to provide medical care and assistance (since decedent has no other options), and 18 U.S.C. § 4042 clearly provided a duty that was breached. (see, also, DE 92 pgs. 11-15)

It is respectfully submitted that if Plaintiffs' contentions are accepted, and the correctional personnel ignored the distress call and cries for help for up to 30 minutes, the expertise of an expertise witness while potentially helpful is not needed.

In fact, the Defendants' Memorandum of Points and Authorities in support of the Motion For Summary Judgment, tried to justify the delayed, response without conceding it, as follows:

> "Anyone familiar with inmates and prisons knows and understands that inmates commonly press and activate the cell duress alarms for many different reasons, including for non-emergencies such as requesting tissue paper, reporting a problem with the toilet, wanting writing paper or utensils, etc. With this in mind, it is not unreasonable for employees to not respond immediately to a duress alarm that has been activated in a cell where there is no knowledge of perceived risk of harm." (DE 88 Page 40)

Common sense allows one to reject such contention. Ignoring duress calls is akin to playing "Russian roulette" with inmates' lives and well-being. Further, Aiken, Plaintiffs' correctional expert (and not an expert of the kind requiring an expert affidavit pursuant to S.C. Code. Ann. 15-30-100) took exception to this contention:

> "In my opinion, it is without question 'unreasonable' to fail to immediately respond to a duress alarm, especially in a high security environment such as SHU. The inmate's only option for medical help during a medical emergency is correctional personnel. The inmate (or the inmate's cell mate) cannot arrange for his or her own medical care (be it a stroke, heart attack or suicide attempt), call 911 or take other steps to protect themselves or have family or friends come to their aid. The inmate's only viable option during critical emergencies is the duress call. Similarly, if there is a violent or deadly confrontation with a cell mate, the inmate can't retreat or escape, or otherwise evade the attacker. It is, therefore, essential that personnel take each duress alarm seriously because failure to do so can, and invariably will, in some cases result in death or serious injury. If the duress button is used improperly by an inmate, the inmate may be counseled and subject to discipline for such improper use. Placing inmates' lives at risk by not taking the duress button seriously because some inmates may abuse it is not an appropriate option." (Aiken paras. 13-15)

The Government even noted, albeit by playing lip service to the fact it was not conceding it, twice that "[a]t the most, and the Government does not concede this, the Plaintiffs have stated a cause of negligence in the initial response to the suicide, not deliberate indifference." [DE 88 pg. 41; see, also, DE 88 pg.43 ["At the most, in this entire *Bivens* cause of action, the Plaintiffs have possibly stated a mere claim for negligence."] It is respectfully submitted the type of expert declaration contemplated by 15-30-100 is not required for this simple negligence claim.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court's OSC be deemed fully responded to and the matter not dismissed. In the alternative, out of an overabundance of caution, Plaintiffs request that the Third Amended Complaint and pending Opposition to Summary Judgment be deemed to conform to proof to satisfy the OSC or, in the alternative, Plaintiffs be given leave to amend.

Respectfully submitted,

/s/ Dionè Carroll

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SC Bar: 78185
FL Bar: 0037753
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ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2014 the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and that the foregoing document is being served this day on all counsel of record through CM/ECF or in some other authorized manner for those counsel of parties who are not authorized to receive electronically Notices of Electronic Filing.

Respectfully submitted,

/s/ Dionè Carroll

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ATTORNEYS FOR THE PLAINTIFFS

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON/GREENWOOD DIVISION

Estate of Jose R. Riopedre, through Fernando Mendez, personal representative of the Estate of Jose R. Riopedre, and Susana Mendez, individually as wife of Jose R. Riopedre, Plaintiff, vs. United States of America, et al, Defendant.	Civil Action No. 8:12-2806-BHH **ORDER OF DISMISSAL**

The Court having been advised by counsel for the parties that the above action has been settled,

IT IS ORDERED that this action is hereby dismissed without costs and without prejudice. If settlement is not consummated within sixty (60) days, either party may petition the Court to reopen this action and restore it to the calendar. Rule 60(b)(6), F.R.Civ.P. In the alternative, to the extent permitted by law, either party may within sixty (60) days petition the Court to enforce the settlement. Fairfax Countywide Citizens v. Fairfax County, 571 F.2d 1299 (4th Cir. 1978).

IT IS SO ORDERED.

s/Bruce H. Hendricks

BRUCE H. HENDRICKS

UNITED STATES DISTRICT JUDGE

June 15, 2015

Greenville, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Estate of Jose R. Riopedre, by and through Fernando Mendez, as the Personal Representative of the Estate of Jose R. Riopedre, and Susana Mendez, individually, as wife of Jose R. Riopedre,	)	C/A NO. 8:12-cv-02806-BHH
Plaintiffs,	)	
vs.	)	
United States of America, and Mildred L. Rivera; Robert Binford; James Solvik; Chris Orr; Raganold Williams; Richella Lawson; Richard Wallace; Paul Sneed; Gregory Bondurant; John J. Enzinna; Dr. Derick Phillips; Stephen Buckler; Pam Weathers; Christopher Bush; C. Wiggins; John Does 1-8; individually, and in their individual capacities,	)	
Defendants.	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. §2677

It is hereby stipulated by and between the undersigned plaintiffs (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or

omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of Three Hundred and Seventy-five Thousand Dollars ($375,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiffs or their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether

known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiffs or their guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiffs. Plaintiffs specifically agree and stipulate, and the defendants consent pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, to dismissal with prejudice of all claims based upon alleged constitutional violations otherwise known as *Bivens* claims and all claims against individual defendants Robert Binford, James Solvik, Chris Orr, Raganold Williams, Richella Lawson, Richard Wallace, John J. Enzinna, Dr. Derick Phillip, Stephen Buckler, Pam Weathers, and Christopher Bush.

This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by electronic funds transfer as per the following:

A. Name of Bank:
B. Street Address of Bank:
C. City, State and Zip Code of Bank:
D. Attorney Tax ID Number:
E. Routing Number:
F. Name of Account:
G. Account Number:

Plaintiffs' attorney agrees to distribute the settlement proceeds among the plaintiffs, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. Federal law, codified at 31 U.S.C. § 3716, requires the Department of the Treasury and other disbursing officials to offset Federal payments to collect delinquent tax and non-tax debts owed to the United States, and to individual states (including past-due child support). Due to concerns that the payment being made pursuant to this Settlement Agreement might be subject to an offset, Plaintiff Susana Mendez has contacted the Treasury Department to find out if she is subject to offset. Upon information and belief, based on Plaintiff Mendez's conversation of June 12, 2015, she is not subject to an offset by the Treasury Department. The United States Attorney's Office for the District of Maryland has also been contacted and the United States Attorney for the District of Maryland agrees that it will not seek to forfeit any funds from the settlement of the instant lawsuit pursuant to the Final Order of Forfeiture issued on January 13, 2010, in *United States v. Susana Mendez*, Crim. No. PJM-06-0580 in the United States Court for the District of Maryland, as it is deemed in the interest of the United States. The instant forbearance does not apply to or have any impact on any future funds that may be available to Plaintiff Mendez that are eligible for collection, and does not apply to or have any impact on the

ability of the United States Attorney for the District of Maryland to seek the forfeiture under the Final Order of Forfeiture in *United States v. Susana Mendez*, Crim. No. PJM-06-0580 of any property other than any funds derived from the settlement of the instant lawsuit.

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this _____ day of _June, 2015.

_____

Barbara M. Bowens
Attorney for Defendant,
United States of America

Executed this _____ day of June, 2015.

John deLeon
Attorneys for Plaintiffs

Executed this _____ day of June, 2015.

Dione Carroll
Attorneys for Plaintiffs

Executed this _____ day of June, 2015.

_____

Susana Mendez
Plaintiff

Executed this _____ day of June, 2015.

Fernando Mendez
Plaintiff

Executed this _____ day of June, 2015.

_____

Evan T. Shea
Assistant U.S. Attorney
Asset Forfeiture and Money Laundering Section
(With Respect to Paragraph 10 Only)

Executed this _____ day of June, 2015.

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JEREMY MARQUISE CARTER,

Plaintiff,

vs.

BRYAN MOON, et al.,

Defendants.
_____/

CASE NO. 5:12-cv-269-Oc-10PRL

FILED
2015 OCT -2 A 10:07

PLAINTIFF'S MOTION TO REOPEN CASE FOR FURTHER PROCEEDINGS

Plaintiff, Jeremy Marquise Carter, respectfully moves this Honorable Court for entry of an Order reopening the above-styled case for further proceedings, pursuant to Local Rule 3.08(b), and Rule 60(b), Fed.R.Civ.P., and states as follows:

1. On or about July 13, 2015, Defendants filed with this Honorable Court a Notice of Settlement, pursuant to Local Rule 3.08, suggesting that the case be dismissed with prejudice and that the court file be closed administratively because the case has been settled.

2. Counsel for Defendant served upon Plaintiff, on or about July 22, 2015, a "Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claim Pursuant to 28 U.S.C. §2677", agreeing to pay the sum of $5,000.00.

3. Plaintiff executed the July 22, 2015 settlement agreement and returned same to counsel for the Defendants on or about August 2, 2015.

4. On or about July 27, 2015, this Honorable Court entered an Order dismissing the above-styled case with prejudice, subject to the right of any party to move the Court within sixty days from the date of the Order for the entry of a stipulated final order or judgment, or on good cause shown, to reopen the case for further proceedings.

5. Because Defendants have breached the underlying settlement agreement, Plaintiff respectfully moves this HOnorable Court for entry of an Order reopening the above-styled case for further proceedings, as if the case had not been dismissed on the suggestion of settlement.

Dated: September 26, 2015

Respectfully Submitted,

Jeremy Marquise Carter
Plaintiff, pro se
Register No. 71851-004
FCI Jesup
2680 U.S. Hwy 301 South
Jesup, Georgia 31599

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Assistant U.S. Attorney Yohance A. Pettis, at the Office of the U.S. Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602, by United States Mail, this 26th day of September 2015.

Respectfully Certified,

Jeremy Marquise Carter
Plaintiff, pro se

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

*** FIRST AMENDED ***

CIVIL RIGHTS COMPLAINT FORM

JEREMY MARQUISE CARTER,
Register No. 71851-004

CASE NO. 5:12-269-Oc-10TBS

Plaintiff,

vs.

BRYAN MOON, Associate Warden;
TAD SCHNAUFNER, Factory Manager;
JAMES MOODY, Factory Foreman;
SHANNON JOHNSON, Case Manager;
JORGE PASTRANA, Warden;
DAVID DECAMILLA, SIS Lt.;
THOMAS MATTHEWS, SIS Tech.;
UNITED STATES OF AMERICA;
RICHARD MARTIN, Unit Manager;
BRIAN E. FORD, Case Manager;
FEDERAL PRISON INDUSTRIES;
DAN MOORE, Corporate Officer;
DENNIS MERRION, Office Manager;
PAUL LAIRD, General Manager;

Defendants.
_____/

FILED
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CLERK, US DISTRICT COURT
MIDDLE DISTRICT OF FL
OCALA, FLORIDA

Plaintiff, Jeremy Marquise Carter, sues defendants Bryan Moon, Tad Schnaufner, James Moody, Shannon Johnson, Jorge Pastrana, David Decamilla, Thomas Matthews, United States of America, Richard Martin, Brian E. Ford, Federal Prison Industries, Dan Moore, Dennis Merrion, and Paul Laird, pursuant to 5 U.S.C. §552(a)(4)(B); 5 U.S.C. §552b; 28 U.S.C. §1331; 28 U.S.C. §1346; 28 U.S.C. §1367(a); 28 U.S.C. §1491(a)(1); 29 U.S.C. §207; 29 U.S.C. §785.11; 42 U.S.C. §2000e, et seq.; Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); the Florida Civil Rights Act, Fla.Stat. 760.01, et seq.; the Florida Whistleblowers Act, Fla.Stat. 448.102; the Florida Deceptive Unfair Practices and Trade Act, Fla.Stat. 501.211; the Florida Human Rights Act, Fla.Stat. 760, et seq; and the Florida Civil Remedies for Criminal Practices Act, and states the following in support:

[1]: Because the Government Civil Rights Complaint Form is restricted to 28 U.S.C. §§1331 and 1346, and Plaintiff alleges causes of action under 5 U.S.C. §552; 28 U.S.C. §§1331, 1346, and 1367(a), 29 U.S.C. §§207 and 785, 42 U.S.C. §2000e, Bivens, the Florida Civil Rights Act, The Florida Whistleblowers Act, the Florida Deceptive Unfair Practices and Trade Act, the Florida Human Rights Act, and, inter alias, the Florida Civil Remedies for Criminal Practices Act, it is Plaintiff's intelligent and voluntary decision to duplicate the template of the Form in all respects in a manner sufficient to permit inclusion of the other appropriately-filed claims.

I. PLAINTIFF:

State your full name, inmate number (if applicable), and full mailing address in the lines below:

Name of Plaintiff: Jeremy Marquise Carter
Inmate Number: 71851-004
Prison or Jail: FCI Jesup
Mailing Address: 2680 US Hwy 301 South
Jesup, Georgia 31599

II. DEFENDANTS:

State the name of the Defendant in the first line, official position in the second line, place of employment in the third line, and mailing address. Do the same for every Defendant:

(1) Defendant's name: Bryan Moon
Official position: Associate Warden
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(2) Defendant's name: Tad Schnaufner
Official position: Factory Manager
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(3) Defendant's name: James Moody
Official position: Factory Foreman
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(4) Defendant's name: Shannon Johnson
Official position: Case Manager
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(5) Defendant's name: Jorge Pastrana
Official position: Warden
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(6) Defendant's name: David DeCamilla
Official position: SIS Lieutenant
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(7) Defendant's name: Thomas Matthews
Official position: SIS Technician
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(8) Defendant's name: United States of America
Official position: Government
Employed at: United States of America
Mailing Address: 400 North Tampa Street, Suite 3200
Tampa, Florida 33602

(9) Defendant's name: Richard Martin
Official position: Unit Manager
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(10) Defendant's name: Brian E. Ford
Official position: Case Manager Coordinator
Employed at: Federal Bureau of Prisons
Mailing Address: 846 N.E. 54th Terrace
Coleman, Florida 33521

(11) Defendant's name: Federal Prison Industries
Official position: Entity
Employed at: Federal Prison Industries
Mailing Address: 400 N.W. First Street, Administrative Division
Washington, D.C. 20534

(12) Defendant's name: Dan Moore
Official position: General Manager
Employed at: Federal Prison Industries
Mailing Address: 400 N.W. First Street, Administrative Division
Washington, D.C. 20534

(13) Defendant's name: Dennis Merrion
Official position: Corporate Officer
Employed at: Federal Prison Industries
Mailing Address: 400 N.W. First Street, Administrative Division
Washington, D.C. 20534

(14) Defendant's name: Paul Laird
Official position: Corporate Officer
Employed at: Federal Prison Industries
Mailing Address: 400 N.W. First Street, Administrative Division
Washington, D.C. 20534

NOTE: THE COURT WILL NOT REVIEW THE COMPLAINT UNLESS THE FOLLOWING QUESTIONS HAVE BEEN ANSWERED IN FULL:

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES:

Exhaustion of administrative remedies is required prior to pursuing a civil rights action regarding conditions or events in any prison, jail or detention center. 42 U.S.C. §1997e(a). Plaintiff is warned that any claims for which the administrative grievance process was not completed prior to filing this lawsuit may be subject to dismissal.

IV. PREVIOUS LAWSUITS:

NOTE: FAILURE TO DISCLOSE ALL PRIOR CIVIL CASES MAY RESULT IN THE DISMISSAL OF THIS CASE.

A. Have you initiated other actions in **state court** dealing with the same or similar facts/issues involved in this action?

Yes(✓) No( )

1. Type of action (civil rights, habeas corpus, etc.): civil rights, breach of contract, slander, labor standards, property rights, Freedom of Information Act and Privacy Act mandamus proceedings, and state torts, taking of property without just compensation, etc.

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Bryan Moon, Tad Schnaufner, James Moody, Shannon Johnson, Jorge Pastrana, Lt. David DeCamilla, and Thomas Matthews

3. County and judicial circuit: Sumter County
   Fifth Judicial Circuit

4. Case docket #: 2012-CA-571

5. Approximate filing date: April 2012

6. If not still pending, date of dismissal: Removed May 12, 2012

7. Basis of dismissal: case removed to U.S. District Court by Government Defendants under 28 U.S.C. §1442(a)(1).

8. Facts and claims of case: same and exact facts and claims of the instant civil action subjudice.

B. Have you initiated other actions in **federal court** dealing with the same or similar facts/issues involved in this action?

Yes(✓) No( )

1. Type of action (civil rights, habeas corpus, etc.): habeas corpus

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Warden, FCC Coleman Medium (Jorge Pastrana)

3. County and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:12-cv-00170-WTH-TBS

5. Approximate filing date: March 30, 2012

6. If not still pending, date of dismissal: April 30, 2012

7. Basis of dismissal: failure to notify court of change of address, construed by district court as failure to prosecute.

8. Facts and claims of case: Defendants deprived Plaintiff of due process throughout course of underlying disciplinary proceedings.

C. Have you initiated other actions (besides those listed in Questions (A) and (B)) in **either state or federal court** that relate to the fact or manner of your incarceration (including habeas corpus petitions) or the condition of your confinement (including civil rights complaints about any aspect of prison life, whether it be general circumstances or a particular episode, and whether it involved excessive force or some other wrong)?

Yes(✓) No( )

If YES, describe each action in the space provided below. If more than one, describe all additional cases on a separate piece of paper, using the same format as below:

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Harley Lappin, et al.

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:09-cv-00473

5. Approximate filing date: October 2009

6. If not still pending, date of dismissal: January 20, 2010

7. Reason for dismissal: failure to notarize indigency affidavit

8. Facts and claims of case: prison officials deprived me of access to the courts by confiscating my legal documents.

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Harley Lappin, et al.

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:09-cv-273-Oc

5. Approximate filing date: 2009 (cannot recall exact date)

6. If not still pending, date of dismissal: September 11, 2009

7. Reason for dismissal: failure to complete 6-month account printout

8. Facts and claims of case: prison officials deprived me of access to the courts by confiscating my legal documents.

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Harley Lappin, et al.

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:09-cv-173-10

5. Approximate filing date: November 2008

6. If not still pending, date of dismissal: May 28, 2009

7. Reason for dismissal: failure to complete 6-month account printout

8. Facts and claims of case: prison officials denied me access to the courts by confiscating my legal documents of active litigation.

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Palm Beach Sheriff's Office

3. District and judicial division: U.S. District Court S.D.Fla. Miami

4. Case docket #: 05-80175-CV-WJZ

5. Approximate filing date: 2005 (cannot recall exact date)

6. If not still pending, date of dismissal: 2006 (cannot recall exact date)

7. Reason for dismissal: search of vehicle valid on other grounds

8. Facts and claims of case: officers violated my Fourth Amendment rights by conducting an unlawful inventory search on my vehicle.

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Jorge Pastrana, et al.

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: cannot recall (documents confiscated)

5. Approximate filing date: (cannot recall exact date)

6. If not still pending, date of dismissal: January 28, 2010

7. Reason for dismissal: failure to disclose previous case history

8. Facts and claims of case: prison officials deprived me of my right to adequate dental care and dental malpractice.

1. Type of action (civil rights, habeas corpus, etc.): FOIA

2. Parties to previous action:

a. Plaintiff(s): Jeremy Marquise Carter

b. Defendant(s): U.S.D.O.J., EOUSA, and F.B.I.

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:04-cv-206-RH

5. Approximate filing date: 2004 (cannot recall exact date)

6. If not still pending, date of dismissal: 2008 (cannot recall exact date)

7. Reason for dismissal: I was awarded summary judgment (partial)

8. Facts and claims of case: government agencies failed to comply with requirements of Freedom of Information Act.

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

a. Plaintiff(s): Jeremy Marquise Carter

b. Defendant(s): Warden

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:06-cv-384-WTH

5. Approximate filing date: cannot recall (approximately 2006)

6. If not still pending, date of dismissal: cannot recall

7. Reason for dismissal: cannot recall

8. Facts and claims of case: cannot recall (documents confiscated)

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

a. Plaintiff(s): Jeremy Marquise Carter

b. Defendant(s): Harley Lappin, et al

3. District and judicial division: U.S. District Court S.D.FLa. miami

4. Case docket #: cannot recall (documents confiscated)

5. Approximate filing date: cannot recall

6. If not still pending, date of dismissal: cannot recall

7. Reason for dismissal: cannot recall (documents confiscated)

8. Facts and claims of case: cannot recall (documents confiscated)

1. Type of action (civil rights, habeas corpus, etc.): habeas corpus

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): United States of America

3. District and judicial division: U.S. District Court S.D.Fla. Miami

4. Case docket #: 04-80853-CIV_HURLEY

5. Approximate filing date: August 2004

6. If not still pending, date of dismissal: March 2006

7. Reason for dismissal: motion denied after evidentiary hearing

8. Facts and claims of case: ineffective assistance of counsel, unlawful search and seizure, prosecutorial misconduct, and sentencing error occurring during the course of underlying criminal prosecution.

1. Type of action (civil rights, habeas corpus, etc.): habeas corpus

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): State of Florida

3. District and judicial division: U.S. District Court S.D.Fla. Miami

4. Case docket #: cannot recall

5. Approximate filing date:cannot recall, approximately 2005-2006

6. If not still pending, date of dismissal: cannot recall

7. Reason for dismissal: cannot recall (documents confiscated)

8. Facts and claims of case: prior convictions invalid and prior guilty plea was unconstitutionally obtained.

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Jorge L. Pastrana, et al

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:09-272-Orl

5. Approximate filing date: 2009 (cannot recall exact date)

6. If not still pending, date of dismissal: January 28, 2010

7. Reason for dismissal: failure to check YES at §IV(C) of Complaint Form.

8. Facts and claims of case: cannot recall (possible dental case or case case alleging confiscation of legal documents)

1. Type of action (civil rights, habeas corpus, etc.): habeas corpus

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Michael J. Satz, State Attorney

3. District and judicial division: Broward County Circuit Court

4. Case docket #: 11019352 (03)

5. Approximate filing date:

6. If not still pending, date of dismissal: pending

7. Reason for dismissal: pending

8. Facts and claims of case: State Attorney unlawfully withheld exculpatory evidence (confession of third-party) from me prior to my state disposition

1. Type of action (civil rights, habeas corpus, etc.): cannot recall

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): cannot recall

3. District and judicial division: cannot recall others

4. Case docket #: cannot recall others

5. Approximate filing date: cannot recall others

6. If not still pending, date of dismissal: cannot recall others

7. Reason for dismissal: cannot recall others

8. Facts and claims of case: cannot recall others

D. Have you ever had, either while you were incarcerated or while you were not incarcerated, any actions in **federal court** dismissed as frivolous, malicious, failing to state a claim, or prior to service? If so, identify each and every case so dismissed:

Yes(✓) No( )

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Jorge L. Pastrana, et al.

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:09-cv-272-Orl Name of Judge: Antoon

5. Approximate filing date: 2009 (cannot recall exact date)

6. If not still pending, date of dismissal: January 28, 2010

7. Reason for dismissal: failure to check YES at §IV(C) of Complaint

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Harley Lappin, et al.

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:09-cv-00473 Judge: Hodges

5. Approximate filing date: October 2009

6. If not still pending, date of dismissal: January 20,2010

7. Reason for dismissal: failure to have affidavit of indigency notarized

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Harley Lappin, et al.

3. District and judicial division: U.S. District Court M.D. Fla. Ocala

4. Case docket #:5:09-cv-173 Judge: Hodges

5. Approximate filing date: November 2008

6. If not still pending, date of dismissal: May 28, 2009

7. Reason for dismissal: failure to file complete 6 month account printout and have staff sign financial certificate.

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Warden

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:06-cv-384 Judge: Hodges

5. Approximate filing date: cannot recall (documents confiscated)

6. If not still pending, date of dismissal: cannot recall

7. Reason for dismissal: cannot recall (documents confiscated)

1. Type of action (civil rights, habeas corpus, etc.):

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Harley Lappin, et al.

3. District and judicial division: cannot recall (documents confiscated)

4. Case docket #: 5:09-cv-273 Judge: Hodges

5. Approximate filing date: 2009 (cannot recall exact date)

6. If not still pending, date of dismissal: September 11, 2009

7. Reason for dismissal: failure to file complete 6 month account

1. Type of action (civil rights, habeas corpus, etc.): habeas corpus

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Warden, FCC Coleman Medium

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:12-cv-00170-WTH-TBS Judge: Hodges

5. Approximate filing date: March 30, 2012

6. If not still pending, date of dismissal: April 30, 2012

7. Reason for dismissal: failure to notify court of change of address

1. Type of action (civil rights, habeas corpus, etc.): civil rights

2. Parties to previous action:

   a. Plaintiff(s): Jeremy Marquise Carter

   b. Defendant(s): Harley Lappin, et al.

3. District and judicial division: U.S. District Court M.D.Fla. Ocala

4. Case docket #: 5:09-cv-00473 Judge: Hodges

5. Approximate filing date: October 2009

6. If not still pending, date of dismissal: January 20, 2010

7. Reason for dismissal: failure to notarize indigency affidavit

1. Type of action (civil rights, habeas corpus, etc.): habeas corpus
2. Parties to previous action:
   a. Plaintiff(s): Jeremy Marquise Carter
   b. Defendant(s): United States
3. District and judicial division: U.S. District Court S.D.Fla.
4. Case docket #: 9:11-cv-81397-DTKH
5. Approximate filing date: November 2011
6. If not still pending, date of dismissal: February 2012
7. Reason for dismissal: construed as second and successive

1. Type of action (civil rights, habeas corpus, etc.): cannot recall
2. Parties to previous action:
   a. Plaintiff(s): Jeremy Marquise Carter
   b. Defendant(s): cannot recall others
3. District and judicial division: cannot recall others
4. Case docket #: cannot recall others
5. Approximate filing date: cannot recall others
6. If not still pending, date of dismissal: cannot recall others
7. Reason for dismissal: cannot recall others

NOTICE OF POSSIBILITY OF OTHER CASES

Plaintiff maintains to this Honorable Court that, notwithstanding the listing of cases previously filed by him, dismissed by the court, etc., as requested under Section IV (A),(B),(C), and (D), there is a possibility that other cases may have been filed that Plaintiff, in good faith, simply cannot recall at this time. Plaintiff's legal documents were previously confiscated by prison officials, see Carter v. Lappin, Case No. 5:09-00473, which makes it impossible for Plaintiff to recall all previous cases filed by him. The Plaintiff has made a good faith effort to recall all cases previously filed by him, and has listed those cases, supra, for the Court's review.

V. STATEMENT OF FACTS:

State briefly the FACTS of this case. Describe how each Defendant was involved and what each person did or did not do which gives rise to your claim. In describing what happened, state the names of persons involved, dates, and places. Do not make any legal arguments or cite to any cases or statutes. You must set forth separate factual allegations in separately numbered paragraphs. You may make copies of this page if necessary to supply all the facts. Barring extraordinary circumstances, no more than five (5) additional pages should be attached. **(If there are facts which are not related to this same basic incident or issue, they must be addressed in a separate civil rights complaint.)**

1. Plaintiff Jeremy Marquise Carter has been employed by the Federal Prison Industries since 2005 as a Project Management Supervisor Clerk and subsequent April 2007 as a Factory Manager Clerk.

2. Since on or about 2008, Plaintiff has worked hundreds of hours off the clock assisting various staff in performing their job descriptions and completing staff evaluations that staff were supposed to complete but could not, Washington-based projects that staff were supposed to complete, but could not, and other staff functions.

3. Plaintiff was never paid for these hours worked off of the clock.

4. In the midst of preparing reports and completing other miscellaneous projects for staff members, Plaintiff discovered that Defendants were violating OSHA standards and other conservational mandates.

5. Plaintiff threatened to disclose the excessive waste of materials and the excessive burden on taxpayers yielded by the Defendants' incompetent furniture manufacturing process.

6. On or about April 2011 Plaintiff, during off-duty hours, contemplated and invented a formula to change the manner in which to manufacture furniture at Coleman, which would save the furniture factory more than $100,000.00 per month in costs.

7. Plaintiff originated and maintained a property right in his Green Project invention.

8. Plaintiff complained to Defendants Schnaufner and Moon that the factory was wasting a substantially-excessive amount of tax payer dollars with its current furniture manufacturing process.

9. Defendants Schnaufner, Moon and Moody threatened Plaintiff not to disclose his allegations to anyone if he wants to continue working in UNICOR.

10. Defendant Moody advised Plaintiff "what happens in UNICOR stays in UNICOR."

11. Defendants' furniture manufacturing process violated OSHA standards relevant to waste provisions.

12. Defendants' furniture manufacturing process violated United States Department of Justice's provisions and mandates dealing with conserving materials and reducing waste.

13. Defendants were disposing of furniture waste in excess of tons per day.

14. On or about May 2011, Plaintiff brought his invention to the attention of Defendant Schnaufner, Defendant Moon, Project Manager Supervisor Jennifer Telfare, Project Manager Terry Winfrey, Project Manager Becky Reid, Accounting Supervisor Kimberly Owens, Accounting Specialist Angela Johnson-Case, Factory Foreman Justin Rose, Factory Foreman Waite, Factory Manager Rytter, and Factory Manager James Moody.

15. Defendants Schnaufner, Moody and Moon instructed Plaintiff to initiate the invention on Coleman furniture production immediately.

16. Defendants Schnaufner, Moody and Moon agreed to compensate Plaintiff for the invention and ensure that Federal Prison Industries compensate Plaintiff 1% of the net savings under the Federal Prison Industries' "Ideas for Dollars Program" in exchange for Plaintiff's initiation of the invention.

17. Defendants Schnaufner, Moody and Moon knew the foregoing statements to compensate Plaintiff and to ensure that Plaintiff is compensated for his invention were false at the time they made the statements.

18. Defendants Schnaufner, Moody and Moon intended for Plaintiff to rely on the false assurances of being compensated for his invention only to induce Plaintiff into initiating his invention of Coleman furniture manufacturing.

19. Defendants Schnaufner, Moon and Moody intended to quiet Plaintiff and quell Plaintiff's intended disclosures and complaints to outside agencies of the Defendants' unlawful furniture manufacturing process when misleading Plaintiff into believing he would be paid for his Green Project invention.

20. Based upon the foregoing assurances of Defendants Moon and Schnaufner, Plaintiff initiated his invention, and named the invention "The Green Project".

21. Had Defendants not assured Plaintiff that he would be compensated for his invention, Plaintiff would not have disclosed nor initiated the invention.

22. Plaintiff was required to change the factory's "lay-up" tickets in order to accomodate the implementation of his invention.

23. Plaintiff had to change the manner of computer data entry to accomodate the implementation of his invention.

24. The Coleman furniture factory and Defendants saved $317,000.00 during the first two months of its enactment.

25. After observing the Defendants' saving more than $317,000.00 during the first two months of enacting his invention, Plaintiff inquired about his promised compensation.

26. Defendant Bryan Moon advised Plaintiff that he would not be compensated for his invention because the Ideas for Dollars Program was not for inmate inventions, but was rather for staff inventions.

27. The Ideas for Dollars Program is available to inmate inventors.

28. Plaintiff appealed Defendant Moon's decision to Defendants Dan Moore, Dennis Merrion, and Paul Laird on or about August 2011.

29. On or about the August 31, 2011, Defendant Moore, Merrion, and Laird contacted Defendant Moon and instructed Defendant Moon to compensate Plaintiff for the invention under the Ideas for Dollars Program.

30. On September 1, 2011, Defendant Schnaufner subsequently called Plaintiff into his office and ridicule Plaintiff for notifying Defendants Moore, Merrion and Laird of the in-house problems with compensating Plaintiff for his invention.

31. Defendant Schnaufner advised Plaintiff that Defendant Moon was not happy with being contacted by Defendants Moore, Merrion and Laird, and that Defendant Moon wanted Plaintiff fired.

32. Defendant Schnaufner ridiculed and harassed Plaintiff that (i) Plaintiff would be fired from UNICOR soon because of Plaintiff's actions, (ii) Plaintiff could no longer be trusted as a clerk, and (iii) Plaintiff embarrased Defendant Schnaufner as Factory Manager.

33. Defendant Schnaufner called Plaintiff a "snitch" and a "boy" throughout this discussion.

34. Defendant Schnaufner instructed Plaintiff to go to his computer and remove all entries in the company's SAP Program mentioning the Green Project that could be seen by Washington officials.

35. Defendant Schnaufner instructed Plaintiff to destroy all documents that mentions the Green Project and that could be later read by Washington officials.

36. Defendant Schnaufner advised Plaintiff that Defendant Moon wanted to speak to Plaintiff when Defendant Moon arrived at work later that day.

37. Subsequently, Defendant Moon called Plaintiff into his office and threatened Plaintiff that Plaintiff would not be working in UNICOR much longer in retaliation for his complaints to Washington officials.

38. Defendant Moon accused Plaintiff of something dealing with having "pie or egg thrown in his face" by sending a copy of the Green Project to Defendants Moore, Merrion and Laird in Washington.

39. Defendant Moon threatened Plaintiff that Moon would make sure Plaintiff was not compensated under the Ideas for Dollars Program in retaliation for Plaintiff complaining to Washington officials.

40. Defendant Moon ridiculed and harassed Plaintiff that Moon never had a "black clerk" working for him before, let alone a "black clerk" that he could not trust.

41. Defendant Moon ridiculed and harassed Plaintiff that Plaintiff was a "traitor" to the factory and that Plaintiff would close the factory down with his actions of "snitching to Washington".

42. Defendant Moon ridiculed and threatened Plaintiff that the last blackie who tried to make him look like a fool found himself shipped to Pollock, and the same could happed to Plaintiff.

43. Defendant Moon ridiculed and harassed Plaintiff as being "stupid" and "selfish" for sending Plaintiff's written invention to Washington, and not allowing the matter to be resolved in-house.

44. On this date, subsequent the riduculing, harassment, and intimidation from Defendant Moon and Schnaufner, Plaintiff was pushed to a "nervous break down", began experiencing migranes and shivers, and was rushed to medical via a "medical emergency" by Factory Foreman Waite.

45. Medical officials diagnosed Plaintiff and observed that Plaintiff was in fact suffering from migraines and experiencing shivers.

46. Medical officials instructed Plaintiff not to report back to work that day, and provided Plaintiff with a medical order (Medical Convalescence) prohibiting Defendants from calling Plaintiff back to the factory on that date.

47. Medical officials also prescribed Plaintiff 100mg tablets of Ergotamine to take for his migraines and shivers.

48. Medical officials were very concerned about Plaintiff's "hostile work environment", and referred Plaintiff to the Physchology Department, unbeknownst to Plaintiff.

49. Thereafter, during the remainder of his employment in the factory, Defendants Schnaufner and Moon attacked Plaintiff with initimidating stares, snarls, and insults, seeking to make Plaintiff's employment in the factory miserable.

50. Defendants Schnaufner and Moon spread rumors throughout the furniture factory that Plaintiff was a racist and that Plaintiff could not be trusted.

51. Defendants Schnaufner and Moon spread rumors throughout the furniture factory that Plaintiff was going to get all of the staff members fired by Plaintiff's "snitching" to Washington.

52. Defendants Moon and Schnaufner spread rumors throughout the furtniture factory to staff and inmate workers that Plaintiff was going to get the factory "closed" due to Plaintiff's snitching to Washington.

53. Defendants Schnaufner and Moon thereafter audibly, yet indirectly attacked Plaintiff with verbal insults of being a "snitch", "smart monkey", and a "black genius like that so-called president".

54. Defendants Schnaufner and Moon would audibly call Plaintiff these names with the intent to ensure that Plaintiff heard the names.

55. Defendants Schnaufner and Moon would also come into Plaintiff's vicinity, and criticize President Obama while staring at Plaintiff, stating racially-inappropriate allegations and insults, to wit: "black motherfuckers can't think outside of the cotton fields", "coon motherfuckers don't know shit", "black son of a bitch needs to be hung".

56. Defendants Schnaufner and Moon advised all factory staff not to trust Plaintiff and to watch Plaintiff closely, because Plaintiff was a whistleblower.

57. Defendants Schnaufner and Moon began calling on white inmates to do Plaintiff's assignments, stating out loud for Plaintiff to hear that "I don't want to deal with no smart ass niggers this morning".

58. Defendant Moon taunted Plaintiff that Moon was going to advise everyone that Plaintiff's invention was not a new idea and that the formula underlying Plaintiff's invention was normal practice for many years prior to Plaintiff's presentation of the invention.

59. Defendant Moon advised all interested parties that Carter plagiarized the Green Project idea.

60. Plaintiff did not plagiarize the Green Project idea.

61. Defendant Federal Prison Industries furniture plants were not manufacturing furniture in the manner outlined by the Green Project prior to Plaintiff's invention of the Green Project.

62. On September 13, 2011, Defendant Schaufner provided Plaintiff with another copy of Plaintiff's Ideas for Dollars proposal, with an attachment falsely stating that Plaintiff's Tennessee Oak invention was not a new idea, the idea was suggested by others prior to Plaintiff, and that the process Plaintiff invented was implemented at the factory prior to Carter's invention.

63. Plaintiff thereafter went into Defendant Moon's office and expressed disagreement with the false statement asserting that the formula of Plaintiff's invention was previously suggested and implemented at the factory.

64. Plaintiff advised Defendant Moon that Plaintiff was going to file administrative remedies and appeal the statement.

65. Defendant Moon advised Plaintiff that if Plaintiff went and "snitched again" and filed an administrative remedy on the issue, Plaintiff would be fired.

66. Defendants Schnaufner and Moon also distributed to staff and inmate workers, on Spetember 13, 2011, a Memorandum to All Unicor Staff, dated September 13, 2011, listing factories which were closed, stating that Plaintiff's snitching and crying to Washington would bring the same fate for the Coleman factory.

67. Plaintiff later that day discussed the issue with his Unit Counselor, Counselor Roederschimer, and requested an administrative remedy to file on the issue.

68. Plaintiff also typed an email to his friend, stating: "[H]eadaches again. It's official. These racist motherfuckers are stressing me out at work and causing these headaches. I had another run in with the hea man today about the green project. I have come to realize that he does not like the fact of a 'nigger' inmate coming up with an idea that saves the factory over $30,000.00 per month -- It's an embarassment to him, especially in light of the fact that he disregarded the idea when I first brought it to him, and he only reconsidered after Washington sent it back down and made him look at it."

69. Plaintiff thereafter filed an Informal Resolution Form regarding the fraud perpetrated by Defendant Moon to deny Plaintiff compensation for his invention.

70. On September 16, 2011, Plaintiff typed another email to a friend, stating: "[H]ey you .. apology accepted! -- It's understandabel with work and everything .. believe me, I know how it gets. I'm going through a little office politics nowadays with UNICOR regarding an invention I proposed in which they adopted, but later claims that the idea was previously implemented at the facility. LTM -- I think the problem is the idea coming from not only a prisoner, but a black prisoner -- LTM -- Wish me luck because I feel like I'm in DC my damn self. LTM -- No need to beat yourself up about your last lost. I don't think anyone got beat as bad as my Steelers. Baltimore beat the life out of us last week -- keep in touch and know that you're never forgotten on this end."

71. On September 19, 2011, Defendant Moon advised Plaintiff that Counselor Roederschimer gave Moon my Information Resolution Form for a response, and that he (Moon) was searching for a way to terminate me from UNICOR.

72. Defendant Moon indicated to Plaintiff that he was on a "coon hunt".

73. Defendant Moon responded to Plaintiff's Information Resolution Form on September 19, 2011.

74. Also on September 19, 2011, Defendant Moon conducted a search of Plaintiff's factory workstation for contraband, but found none.

75. Also on September 19, 2011, Defendant Moon reviewed all of Plaintiff's recent phone calls for any impropriety which may have been therein, but found none.

76. Also on September 19, 2011, Defendant Moon conducted a search of Plaintiff's housing quarters for contraband or impropriety, but found nothing.

77. Also on September 19, 2011, Defendant Moon searched Plaintiff's emails with the intent to find something incriminating against Plaintiff to subject Plaintiff to disciplinary action.

78. Defendant Moon encountered the September 13, 2011 email written by Plaintiff expressing his First Amendment right to expression, and instructed Defendant DeCamilla to prepare an incident report against Plaintiff and ensure that Plaintiff is found guilty of the incident report and terminated from Federal Prison Industries employment.

79. On September 20, 2011, Defendant DeCamilla filed an incident report against Plaintiff alleging "insolence towards staff".

80. In the incident report written by Defendant DeCamilla, DeCamilla mentions that Defendant Moon is in charge of the UNICOR factory.

81. On September 20, 2011, Plaintiff was served the incident report by Lieutenant Bullock.

82. Lieutenant Bullock informed Plaintiff that Defendant Moon instructed Defendant DeCamilla to write the incident report, and that Defendant Moon wanted me out of UNICOR.

83. Plaintiff wrote a letter to Defendants Moore, Merrion, and Laird, complaining of the retaliation encountered as a result of his contact with these three Defendants regarding his invention.

84. On September 22, 2011, when Plaintiff reported to work at 7:30a.m., FPI Accounting Supervisor Kimberly Owens stopped Plaintiff at the front door, and advised Plaintiff that, Defendant Moon instructed her to fire me from UNICOR, allow me to clean out my workstation, and leave the factory immediately.

85. Plaintiff went back to his housing unit and submitted an Inmate Request to Staff form, inquiring with Ms. Owens that: "[T]his morning when I walked in to work, you advised me that I was terminated from UNICOR, and to return back to me unit. I would like to know UNICOR's reasons for my termination. Thanks in advance for your prompt response."

86. Defendant Moon later contacted Defendant Johnson and instructed Defendant Johnson to hurry up and convene a disciplinary hearing on the disciplinary report against Plaintiff, to find Plaintiff guilty, and to sanction Plaintiff to loss of job and remove Plaintiff from his Federal Prison Industries employment.

87. Defendant Johnson advised Defendant Moon that Unit Manager Richard Martin was at USP-2 at that moment, and that she would have to await his return prior to convening the disciplinary hearing against Plaintiff.

88. Defendant Moon instructed Defendant Johnson to go ahead with the disciplinary hearing immediately, and to utilize the secretary to sit on the disciplinary committee, notwithstanding the fact that the secretary was not certified nor approved to sit on the disciplinary committee.

89. Defendant Johnson repeated this conversation with Defendant Moon to her inmate orderly.

90. Minutes later, Defendant Johnson convened a disciplinary hearing, with Secretary Braxton, at approximately 12:30p.m., and deprived Plaintiff of his due process right to call witnesses, his right to present a defense, and his right to an impartial decisionmaker.

91. When Plaintiff moved to present his First Amendment defense, and the fact that no staff was mentioned in his email, Defendant Johnson stopped Plaintiff from doing so and stated that she did not want to hear a defense from Plaintiff because (1) SIS had written the incident report, (2) she was contacted by Defendant Moon about the incident report, and (3) Defendant Moon instructed her to find Plaintiff guilty and sanction Plaintiff to a loss of his UNICOR job, and that's what she was going to do.

92. When Plaintiff moved to present call witnesses (staff attorney to confirm First Amendment right to expression, TRULINCS personnel who assured Plaintiff at the initial TRULINCS townhall that inmates could not be punished for emails that do not contain threats, escape plans, circumvention, or criminal elements), Defendant Johnson stopped Plaintiff and denied Plaintiff his due process right to call witnesses, stating (1) SIS had written the incident report, (2) she was contacted by Defendant Moon about the incident report, and (3) Defendant Moon instructed her to find Plaintiff guilty and sanction Plaintiff to a loss of Plaintiff's UNICOR job, and that's what she was going to do.

93. Defendant Johnson followed Defendant Moon's instructions and found Plaintiff guilty of the disciplinary report and removed Plaintiff from employment with Federal Prison Industries.

94. Defendant Johnson was a biased decisionmaker as chairwoman of the disciplinary committee.

95. Plaintiff appealed Defendant Johnson's disciplinary decision to Defendant Warden Jorge Pastrana.

96. Defendant Pastrana denied Plaintiff's discplinary appeal, stating that the UDC complied with Bureau of Prisons' regulations, based the decision on the greater weight of the evidence of the reporting officer's statement and imposed proper sanctions.

97. Plaintiff thereafter appealed the disciplinary decision to the Federal Bureau of Prisons' Regional Director.

98. The Regional Director granted Plaintiff's appeal and remanded the matter back to the institution for a rehearing.

99. At the rehearing, Plaintiff presented his defense and was found not guilty, and the incident report was expunged.

100. Following the rehearing, Defendant Johnson accused Plaintiff of stealing her 7-Up soda from the refrigerator of the conference room where Carter was observed making a legal phone call.

101. Defendant Johnson instructed Secretary Mason to write Plaintiff an incident report for stealing the 7-Up soda.

102. Plaintiff did not steal Defendant Johnson's 7-Up soda.

103. Defendant Johnson's false statement that Plaintiff stole her 7-Up soda ruined Plaintiff's reputation and caused staff to begin having Plaintiff place legal calls in another room because of the alleged theft.

104. Defendant Johnson was upset that secretarial or unit manager staff would not write Plaintiff an incident report for the theft allegation, and advised other staff that Plaintiff was paying Defendant Martin for preferential treatment in the unit.

105. Defendant Johnson's allegation that Plaintiff was paying Defendant Martin for preferential treatment caused damage to Plaintiff's reputation and caused staff to begin having Plaintiff go downstairs to make legal calls and acquire other unit team matters.

106. Plaintiff was not and has never paid Defendant Martin for preferential treatment.

107. Plaintiff thereafter sought to be reinstated in Federal Prison Industries.

108. Defendants Schnaufner, Johnson, Moon, Moody, Pastrana, and DeCamilla, refused to reinstate Plaintiff's Federal Prison Industries employment.

109. White inmates who have previously had their incident reports expunged have been reinstated into UNICOR (Kraack and Gossett).

110. Defendants refused to reinstate Plaintiff back into UNICOR on the basis of race.

111. Defendants refused to reinstate Plaintiff back into UNICOR on the basis of retaliation.

112. Defendants Schnaufner, Moon, Moody, and Johnson began spreading rumors around the institution that Plaintiff was a "racist whistleblower", and that Plaintiff needed to be transferred before he caused any more problems for Coleman staff.

113. Defendant Johnson threatened Plaintiff that Plaintiff's complaints and grievances are what caused her not to score Plaintiff to low custody.

114. Plaintiff filed a complaint with the Federal Bureau of Prisons' Office of Internal Affairs about the retaliation, harassment, and impropriety of Defendants.

115. Plaintiff observed various discussions amongst staff about him and detailed those discussions witnessed on emails to his family and friends.

116. Plaintiff later filed a complaint with the Equal Employment Opportunity Commission about the retaliation, harassment, and impropriety of Defendants.

117. Plaintiff later filed a complaint with Congresswoman Corrine Brown about the retaliation, harassment, and impropriety of the Defendants.

118. Subsequently, Plaintiff was approached by Defendant Johnson, who advised Plaintiff that staff were aware of Plaintiff's complaint to the Equal Employment Opportunity Commission, and that staff were not happy about it.

119. Plaintiff subsequently submitted a Freedom of Information Request upon Defendants, seeking the disclosure and production of all records relating to his Green Project invention.

120. Plaintiff subsequently submitted a Freedom of Information Act Request upon the Defendants seeking disclosure and production of any previous submissions of an invention similar to Plaintiff's, as alleged by Defendants.

121. Plaintiff subsequently submitted a Freedom of Information Act Request, seeking the disclosure of all personnel records for Defendant Moon.

122. Plaintiff subsequently filed a Freedom of Information Act Request seeking the disclosure of all documents associated with his transfer from Coleman to Jesup.

123. Plaintiff subsequently filed a Privacy Act request seeking to review his institutional file and challenge the accuracy of false and misleading notations therein.

124. Defendants unlawfully withheld the records sought by Plaintiff under the foregoing Freedom of Information Act requests outlined above.

125. Defendants have unlawfully refused to permit Plaintiff to view his inmate institutional file.

126. On February 12, 2012, Defendant Johnson called Plaintiff for issuance of "legal mail", being records partially responding to Plaintiff's FOIA Request relevant employee records of Defendant Moon.

127. Defendant Johnson opened and read through the documents enclosed in the legal mail.

128. After reading the documents, Defendant Johnson remarked to Plaintiff that Plaintiff should not be permitted to have the documents.

129. On February 13, 2012, Defendant Johnson called Plaintiff again for the issuance of legal mail, and remarked to Plaintiff, "we finally got rid of your complaining butt," while smiling to Plaintiff.

130. When Plaintiff asked Defendant Johnson what she meant by the remark, Defendant Johnson responded: "I hear it's warming up out there."

131. On February 14, 2012, Defendants removed Plaintiff from the facility and placed Plaintiff on a bus travelling to Tallahassee, Florida to be redesignated at FCI Jesup, Georgia.

132. Defendants Matthews and Martin later searched through and discarded a majority of Plaintiff's personal and legal property prior to shipping Plaintiff's property to Plaintiff at Jesup.

133. Defendants searched Plaintiff's legal property for any and all documents associated with the cause of actions pertinent in the instant case subjudice.

134. Defendants held Plaintiff's property for weeks after Plaintiff's transfer to Jesup, Georgia in retaliation for Plaintiff's grievances and complaints.

135. Defendants' unlawful retention of Plaintiff's legal property interfered with Plaintiff's pending sale of his Miami condominium to Joe Bazan of Empire Realty.

136. Defendants retention of Plaintiff's legal property interfered with Plaintiff's business relations and court proceedings pertinent his Miami condominium.

137. Plaintiff's converted Plaintiff's Green Project invention to its own personal use and refused to return exclusive use of the Green Project to Plaintiff upon Plaintiff's demand.

138. Defendants continue to deprive Plaintiff of his exclusive rights to his Green Project and to Plaintiff's personal and legal property seized after Plaintiff's transfer.

139. Plaintiff filed an Administrative Tort Claim with the Defendants pertinent Defendant's obligation to compensate Plaintiff for Defendant's enrichment from his Green Project invention.

140. Defendants denied Plaintiff's Administrative Tort Claim.

141. Plaintiff filed an Administrative Tort Claim with Defendants seeking compensation for back pay wages lost as a result of his unlawful termination from UNICOR following the expungement of his incident report.

142. Defendants denied Plaintiff's Administrative Tort Claim.

143. Plaintiff filed an Administative Tort Claim with Defendants seeking compensation for hours Plaintiff worked off the clock during his UNICOR employment.

144. Defendants denied Plaintiff's Administrative Tort Claim.

145. Plaintiff filed an Administrative Tort Claim seeking compensation for the loss and/or destruction of his personal and legal property lost and/or destroyed by Defendants Matthews and Martin.

146. Defendants denied Plaintiff's Administrative Tort Claim.

147. Defendants' false statements about Plaintiff made to staff and inmates caused Plaintiff to encounter various scuffles with inmates who threatened Plaintiff that he better not get the factory closed down after hearing of Defendants' comments that Plaintiff was going to get the factory closed.

148. Defendants' false statements about Plaintiff caused Plaintiff to encounter a significant amount of hostility from white inmates and white staff who were advised by Defendants that Plaintiff was a racist.

149. Defendants' false statements about Plaintiff caused Plaintiff to encounter a significant amount of hostility from the prison population and staff after inmates and staff were apprised of Defendants' labeling Plaintiff as a "snitch" and a "whistleblower".

150. Defendants false statements about Plaintiff subjected Plaintiff to hatred, disgust, ridicule, contempt, disgrace, and injured Plaintiff's reputation both inside and outside of prison.

151. Defendants' actions have denied Plaintiff of all economically beneficial or productive use of his property, and state law provides Plaintiff with no process for obtaining just compensation or the state process is inadequate as reflected by the Defendants' removal of this action from state court.

152. Plaintiff conferred a benefit on the Defendants, the Defendants have knowledge of the benefit, the Defendants accepted and retained the

153. benefit conferred upon them by Plaintiff, and the circumstances demonstrate that it would be inequitable for the Defendants to retain the benefit without paying fair value for it.

154. Plaintiff's complaints and grievances were constitutionally protected.

155. Defendants retaliated against Plaintiff for his grievances and complaints by discharging Plaintiff from UNICOR, refusing to reinstate Plaintiff to UNICOR after the expungement of his disciplinary report, refusing to properly compute Plaintiff's custody points to LOW security, and transferring Plaintiff to Jesup, Georgia.

156. Defendants have not compensated Plaintiff for his Green Project invention.

157. Defendants breached the oral contract to compensate Plaintiff for implementation of his invention.

158. Defendants discharged Plaintiff from his UNICOR employment in retaliation for Plaintiff's grievances, complaints, and reports of unlawful activity and employment practices of the Defendants.

159. Defendants have intentionally inflicted emotional distress upon Plaintiff through Defendants' slanderous, harassing and retaliatorial acts.

160. Defendants have deprived Plaintiff of his First Amendment right to freedom of speech by censoring and sanctioning Plaintiff for his September 13, 2011 email to his friend.

161. Plaintiff notified Defendants Pastrana, Moore, Merrion, Laird, United States of America and Federal Prison Industries of Defendants' Moon, Schnaufner, Moody, Johnson, Matthews, and DeCamilla's unlawful acts and practices.

162. Defendants Pastrana, Moore, Merrion, Laird, United States of America and Federal Prison Industries failed to act, protect, investigation, and/or rectify the wrongdoings.

163. Defendants Martin, Ford, and Pastrana prepared and submitted a request for Plaintiff's transfer from Coleman, Florida to Jesup, Georgia, knowing that said transfer was being done in retaliation for Plaintiff's grievances and complaints against the foregoing Defendants.

164. Defendants United States of America and Federal Prison Industries condoned the unlawful acts and practices of Defendants Schnaufner, Moon, Moody, Johnson, Matthews, DeCamilla, Martin, Pastrana, Ford, Moore, Merrion, and Laird.

165. Defendants Federal Prison Industries and United States of America unlawfully retains Plaintiff's property rights in the Green Project.

VI. STATEMENT OF CLAIMS:

COUNT ONE: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Schnaufner, Moon, Moody, Federal Prison Industries, and United States of America committed fraud in the inducement.

COUNT TWO: Plaintiff realleges paragraphs as if fully forth herein, and allege that Defendants Schnaufner, Moon, Moody, Federal Prison Industries, and United States of America breached the underlying contract to compensate and reward Plaintiff for initiation of Plaintiff's furniture manufacturing process invention.

COUNT THREE: Plaintiff realleges paragraphs as if fully forth herein, and allege that Defendants Schnaufner, Moon, Moody, Federal Prison Industries, and United States of America unlawfully took Plaintiff's furniture manufacturing process invention without just compensation, violative of the Fifth Amendment to the U.S. Constitution.

COUNT FOUR: Plaintiff realleges paragraphs as if fully forth herein, and allege that Defendants Schnaufner, Moon, Moody, Federal Prison Industries, and United States of America was, is and remains unjustly enriched by implementation of Plaintiff's furniture manufacturing process invention.

COUNT FIVE: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Johnson, Pastrana, DeCamilla, Matthews, Federal Prison Industries, Martin, Ford, Moore, Merrion, and Laird retaliated against Plaintiff for Plaintiff's threats to disclose unlawful practices and grievances and complaints of unlawful acts and practices set forth above.

COUNT SIX: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Pastrana, Federal Prison Industries, Moore, Merrion, and Laird subjected Plaintiff to a hostile work environment as set forth above.

COUNT SEVEN: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Johnson, Pastrana, DeCamilla, Federal Prison Industries, Moore, Merrion, and Laird retaliatorially discharged Plaintiff from Plaintiff's Federal Prison Industries employment for Plaintiff's threats to disclose unlawful practices and grievances and complaints of unlawful acts and practices set forth above.

COUNT EIGHT: Plaintiff reallages paragraphs as if fully set forth herein, and allege that Defendants Moon, Johnson, Pastrana, and DeCamilla deprived Plaintiff of his due process rights throughout the underlying disciplinary hearing process set forth above.

COUNT NINE: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon and Schnaufner subjected Plaintiff to defamation of character and slander by stating to third parties that Plaintiff was a "racist", "snitch", and that Plaintiff plagiarized the furniture manufacturing process invention Plaintiff invented and titled The Green Project.

COUNT TEN: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Johnson subjected Plaintiff to defamation of character and slander by stating to third parties that Plaintiff stole Johnson's 7-Up soda and that Plaintiff was paying Defendant Martin for preferential treatment.

COUNT ELEVEN: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Johnson, Pastrana, DeCamilla, Federal Prison Industries, Moore, Merrion, and Laird subjected Plaintiff to racial discrimination by refusing to rehire Plaintiff after Plaintiff's incident report was expunged.

COUNT TWELVE: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendant Johnson retaliated against Plaintiff by failing to lower Plaintiff's prison custody classification points because of Plaintiff's threats to disclose unlawful practices and grievances and complaints of unlawful acts and practices set forth above.

COUNT THIRTEEN: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Johnson Pastrana, DeCamilla, Martin, Ford, Federal Prison Industries, Moore, Merrion, and Laird retaliated against Plaintiff by transferring Plaintiff to Jesup, Georgia, and further away from his family because of Plaintiff's threats to disclose unlawful practices and grievances and complaints of unlawful acts and practices set forth above.

COUNT FOURTEEN: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Johnson Pastrana, DeCamilla, Matthews, Martin, Ford, Federal Prison Industries, Moore, Merrion, and Laird retaliated against Plaintiff by disposing of Plaintiff's personal and legal property after transferring Plaintiff to Jesup, Georgia because of Plaintiff's threats to disclose unlawful practices and grievances and complaints of unlawful acts and practices set forth above.

COUNT FIFTEEN: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Johnson, Pastrana, DeCamilla, Matthews, United States of America, Martin, Ford, Federal Prison Industries, Moore, Merrion, and Laird -- all subjected Plaintiff to negligence by depriving Plaintiff of his legal property pertinent Plaintiff's condominium litigation.

COUNT _____: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner,

Moody, Johnson, Pastrana, DeCamilla, Matthews, United States of America, Martin, Ford, Federal Prison Industries, Moore, Merrion, and Laird -- all committed conversion by converting Plaintiff's invention to their own use and refusing to return Plaintiff's invention to Plaintiff after demand.

COUNT SEVENTEEN: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Johnson, Pastrana, DeCamilla, Matthews, United States of America, Martin, Ford, Federal Prison Industries, Moore, Merrion, and Laird -- all subjected Plaintiff to deprivation of his property, without probable cause and in violation of Plaintiff's Fourth Amendment right.

COUNT EIGHTEEN: Plaintiff realleges paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Johnson, Pastrana, DeCamilla, Matthews, United States of America, Martin, Ford, Federal Prison Industries, Moore, Merrion, and Laird -- all

COUNT NINETEEN: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Pastrana, United States of America, Federal Prison Industries, Moore, Merrion, and Laird committed tort and is liable in tort for compensating Plaintiff for back pay wages loss as a result of the false incident report and Plaintiff's improper removal from UNICOR.

COUNT TWENTY: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Pastrana, United States of America, Federal Prison Industries, Moore, Merrion, and Laird committed tort and is liable in tort for compensating Plaintiff for use and enrichment from Plaintiff's furniture manufacturing invention.

COUNT TWENTY-ONE: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Pastrana, United States of America, Federal Prison Industries, Moore, Merrion, and Laird committed tort and is liable in tort for compensating Plaintiff for time Plaintiff worked off the clock.

COUNT TWENTY-TWO: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Pastrana, United States of America, Federal Prison Industries, Moore, Merrion, and Laird committed tort and is liable in tort for compensating Plaintiff for Plaintiff's property lost following Plaintiff's transfer from Coleman to Jesup, Georgia.

COUNT TWENTY-THREE: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants United States of America and Federal Prison Industries unlawfully withheld records sought by Plaintiff and disclosable under the Freedom of Information Act, pertaining to the employee records of Defendant Moon.

COUNT TWENTY-____: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants United States of

America and Federal Prison Industries unlawfully withheld records sought by Plaintiff and disclosable under the Freedom of Information Act regarding the Green Project.

COUNT TWENTY-FIVE: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants United States of America and Federal Prison Industries unlawfully withheld records sought by Plaintiff and disclosable under the Freedom of Information Act regarding Plaintiff's transfer from Coleman, Florida to Jesup, Georgia.

COUNT TWENTY-SIX: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants United States of America unlawfully withheld records sought by Plaintiff and disclosable under the Privacy Act as it relates to Plaintiff's inmate file.

COUNT TWENTY-SEVEN: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Moody, Pastrana, United States of America, Federal Prison Industries, Moore, Merrion, Laird, Johnson, DeCamilla, Matthews, Ford and Martin subjected Plaintiff to intentional infliction of emotional distress.

COUNT TWENTY-EIGHT: Plaintiff reallege paragraphs as if fully set forth herein, and allege that Defendants Moon, Schnaufner, Johnson, Pastrana, and DeCamilla deprived Plaintiff of his First Amendment right to freedom of speech by censoring and/or punishing Plaintiff for exercising his free speech in communications with his friends.

VII. RELIEF REQUESTED:

As relief, Plaintiff seeks $500,000.00 from the Defendants, individually, and disclosure of the records sought under the Freedom of Information Act and Privacy Act and a transfer to the Federal Correctional Institution, Miami, Florida, as well as a declaratory judgment acknowledging Plaintiff's property rights in his Green Project invention.

Plaintiff also demands trial by jury as to all cause of actions pled herein.

Dated: June 18, 2012

Respectfully Submitted,

Jeremy Marquise Carter
Plaintiff, pro se
Register No. 71851-004
FCI Jesup
2680 US Highway 301 South
Jesup, Georgia 31599

VERIFICATION

I, Jeremy Marquise Carter, hereby swear under the penalty of perjury, and pursuant to Title 28, United States Code, Section 1746, that the foregoing statements are true and correct.

Jeremy Marquise Carter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Assistant U.S. Attorney Yohance Pettus, at the Office of the U.S. Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602, by United States Mail, this 19th day of June 2012.

Jeremy Marquise Carter

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JEREMY MARQUISE CARTER,

Plaintiff,

v. CASE NO. 5:12-cv-269-Oc-10PRL

BRIAN MOON, et al.,

Defendants.

ORDER

This case is before the Court on Defendants Bryan Moon, Tad Schnaufner, James Moody, Shannon Johnson, Jorge Pastrana, David DeCamilla, Thomas Matthews, Richard Martin, Bryan E. Ford, Dan Moore, Dennis Merrion, Paul Laird, Federal Prison Industries ("FPI"), and the United States of America's (collectively "Defendants") Notice of Settlement Pursuant to Local Rule 3.08. It is hereby **ORDERED** as follows:

1. The instant case is **DISMISSED WITH PREJUDICE** subject to the right of any party to move the Court within **sixty (60) days** from the date of this Order for the entry of a stipulated final order or judgment, or on good cause shown, to reopen the case for further proceedings. *See* Local Rule 3.08(b). In the event no motions are filed within this time, upon the expiration of this period, judgment will be entered in accordance with this Order, and no further action will be taken in this case.

2. The Clerk of Court is directed to administratively close this case and to

terminate any pending motions.

DONE AND ORDERED in Ocala, Florida, this 27th day of July, 2015.

WM. TERRELL HODGES
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
Jeremy Marquise Carter
Counsel of Record

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
Southern District of Florida

CHRISTINE O'CONNOR,
as personal representative of
the estate of GUY ALESSI,
decedent,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

SUMMONS IN A CIVIL CASE

CASE NO:

13-20098-CIV-Martinez/McAliley

Cps# 135214
1/23/13 @ 426pm

To Defendant: Mr. Wifredo A. Ferrer
U.S. Attorney for the Defendant
UNITED STATES OF AMERICA
99 N.E. 4TH Street
Miami, FL 33132
(305) 961-9001

C Ramell
1/23/13

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY

Michael B. Feiler, Esq.
Feiler & Leach, P.L.
901 Ponce de Leon Blvd.
Penthouse Suite
Coral Gables, Florida 33134
(305) 441-8818
(305) 441-8081 - fax

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

SUMMONS

January 10, 2013
DATE

Steven M. Larimore
Clerk of Court

s/Collette Quinones
Deputy Clerk
U.S. District Courts

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

CHRISTINE O'CONNOR,
as personal representative of
the estate of GUY ALESSI,
decedent,

Plaintiff,

v.

UNITED STATES OF
AMERICA,

Defendant.
_____/

COMPLAINT

Plaintiff, CHRISTINE O'CONNOR, as personal representative of the estate of GUY ALESSI, deceased, sues Defendant, UNITED STATES OF AMERICA, and states:

1. This is an action for money damages brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b) and §2671 *et seq.*

2. Venue is proper in this forum.

3. All conditions proceeding to the filing of this action have been fulfilled. Specifically, Plaintiff timely filed an Administrative Claim with the Department of Justice, Federal Bureau of Prisons ("BOP"), which claim was denied by way of letter dated July 13, 2012.

4. O'Connor is the duly appointed Personal Representative of the estate of ALESSI.

5. The potential beneficiaries of any recovery in this action and their relationship to the decedent are: Plaintiff CHRISTINE O'CONNOR, daughter and Personal Representative; LAURIE ALESSI, daughter; and CHERYL YOUNG, daughter.

6. At all times material, ALESSI was an inmate in BOP custody; as is relevant to this

claim, he was housed at FCI Miami.

7. At all times material, BOP was a federal agency, and all acts complained of herein by BOP agents or employees were undertaken within the course and scope of that agency.

8. At all times material, BOP had a duty to exercise due care for the health and safety of its inmates, including ALESSI.

9. ALESSI was 82 years old, with a known history on intake (March 31, 2010) of cardiac insufficiency, prior myocardial infarction, diabetes type 2, hyperlipidemia, hypertension, vertigo, and associated health problems.

10. On or around June 4, 2010, ALESSI was given disciplinary action that involved physical work, outside, in 90 degree plus heat. This was inappropriate for someone with ALESSI's known frailty.

11. While engaged in the work, ALESSI exhibited signs of distress; however, due to insufficient supervision, no intervention took place, and no cessation of work occurred.

12. Subsequently, ALESSI went into full blown cardiac arrest and collapsed; it was only then that any BOP staff took any actions at all.

13. By that time, it was too late, and ALESSI expired.

COUNT I – CLAIM FOR WRONGFUL DEATH

14. Plaintiff realleges Paragraphs 1-13 and incorporates them herein.

15. The actions of Defendant, as described, through its agents, constituted negligence, resulting in the wrongful death of ALESSI as defined in Section 768.16 et seq., Fla. St.

16. As a direct and proximate result of Defendant's conduct as set forth above, the surviving natural persons lost the support and services of the decedent from the date of his death as

well as future loss of support and services, the amount of decedent's probable net income and the replacement value of decedent's services, loss of the decedent's companionship, mental pain and suffering and medical expenses due to the decedent's injury and death paid by them, or some of them.

17. The decedent's estate lost earnings from the date of the decedent's injury to the date of the decedent's death, loss of prospective net accumulations of the decedent's estate and medical and funeral expenses due to the decedent's injury and death.

WHEREFORE, Plaintiff sues and demands judgment against Defendant for money damages, court costs, prejudgment interest on liquidated damages, and all other relief the Court sees fit to grant.

Respectfully submitted,

FEILER & LEACH, P.L.
Attorneys for Plaintiff
901 Ponce de Leon Blvd., Penthouse Suite
Coral Gables, FL 33134-3009
Tel. (305) 441-8818 Fax (305) 441-8081
mbf@flmlegal.com

By: /s/ Michael B. Feiler
Michael B. Feiler
Board Certified Civil Trial Lawyer
Fla. Bar No. 098477

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 13-20098-CIV-MARTINEZ-MCALILEY

CHRISTINE O'CONNOR, as personal representative of the estate of GUY ALESSI, decedent,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.
_____/

FINAL ORDER OF DISMISSAL AND ORDER DENYING ALL PENDING MOTIONS AS MOOT

THIS MATTER is before the Court upon the parties' Joint Stipulation of Dismissal with Prejudice (D.E. No. 12), filed on November 19, 2013. It is:

ADJUDGED that this action is **DISMISSED** with prejudice. It is also:

ADJUDGED that all pending motions in this case are **DENIED AS MOOT**, and this case is **CLOSED**. The Court shall retain jurisdiction for a period of ninety (90) days from the date of this Order to enforce the terms of the settlement agreement between the parties.

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of November, 2013.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge McAliley
All Counsel of Record

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of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 13-20098-Civ-Martinez

CHRISTINE O'CONNOR, as personal Representative of the estate of GUY ALESSI, decedent,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

It is hereby stipulated by and between the undersigned plaintiff and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of $5,000.00 which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims

for wrongful death, for which plaintiff or her guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and her guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and her guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or her guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims

under the Federal Tort Claims Act and avoiding the expenses and risks of further appeal and litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank:

B. Street Address of Bank:

C. City, State and Zip Code of Bank:

D. Federal Reserve Number:

E. Routing Number:

F. Name of Account:

G. Account Number:

9. Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 19th day of November, 2013.

Lawrence Rosen
Attorney for Defendant,
United States of America

Executed this 13th day of November, 2013.

Michael Benjamin Feiler, Esq.
Feiler & Leach, PL
901 Ponce De Leon Boulevard
Penthouse Suite
Coral Gables, Florida 33134

Executed this 13th day of November, 2013.

Christine O'Connor
Plaintiff, as Personal Representative and
Individually

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

vs. Case No. 4:13-cv-339-WS-GRJ

WARDEN ELOURNOY,
ASSISTANT WARDEN SMITH,
S.I.S. FOLKS,
ACTING CAPTAIN WAGNER,
LT. WHITE,
OFFICER CHAMBERS,
OFFICER HARVEY,
OFFICER BEACH,
and OFFICER INGE
sued in their individual capacities,
and THE UNITED STATES OF AMERICA,

Defendants.

_____/

THIRD AMENDED CIVIL RIGHTS COMPLAINT
PURSUANT TO BIVENS AND FTCA

COMES NOW, Jimmy Wakefield ("Plaintiff"), pro se, and with permission from this Honorable Court, and files this Third Amended Complaint Pursuant to Bivens and FTCA, as instructed by this Honorable Court by order dated February 19, 2014. The basis for this motion is as follows:

VERIFIED COMPLAINT FOR DAMAGES

I. Introduction

1. This is a Civil rights complaint filed by Plaintiff

Filed 03/24/14 USDC Fln 1 PM 1243

Jimmy Wakefield, pro se, a federal prisoner, and pursuant to Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388, 392-97, 91 S.Ct. 1999 (1971), for damages, of which he alleges violations of his constitutional rights under the Eighth Amendment, in that the Defendants violated his right to be free from cruel and unusual punishment, that the Defendants failed to protect the plaintiff, and that the Defendants were deliberately indifferent thereof. Plaintiff also alleges a claim pursuant to the Federal Tort Claims Act ("FTCA"), Title 28 U.S.C. §1346, of which he seeks damages for the tort of negligence.

II. Jurisdiction

2. This Court has jurisdiction over the plaintiff's claims of violation of federal constitutional rights under 28 U.S.C. §§1331(a) and 1343(a)(3), and the plaintiff's FTCA claims are authorized by 28 U.S.C. §1346.

3. The United States District Court for the Northern District of Florida, Tallahassee Division, is an appropriate venue under 28 U.S.C. §1391(b)(2) and §1402(b) in that these civil actions are brought forward in the district court where plaintiff resided when the violations, and/or acts, and/or omissions complained of occured.

4. Concerning this Court's jurisdiction over plaintiff's FTCA claim(s), the plaintiff filed an administrative tort claim over the occurrences complained of on May 11, 2012, within two years after those occurrences, and brought suit within six months of the mailing of the notice of final agency denial of that claim

as required by 28 U.S.C. §2401.

III. Parties

5. Plaintiff Jimmy Wakefield at all times relevant, up and to the occurence complained of on May 11, 2012, was confined by the Federal Burea of Prisons at the Federal Detention Center ("FDC") in Tallahassee Florida; plaintiff was subsequently transfered and now is confined at the United States Penitentiary Canaan in Waymart Pennsylvania.

6. Defendant Warden Flournoy at all times relevant was the Warden of FDC Tallahasse acting under the color of federal law. He was legally responsible for the operation of FDC Tallahassee and for the welfare of all the inmates in that prison. He is sued in his individual capacity.

7. Defendant Assistant Warden Smith at all times relevant was the Assistant Warden at FDC Tallahassee acting under the color of federal law. He is being sued in his individual capacity.

8. Defendant S.I.S. Folks at all times relevant was the S.I.S. Officer at FDC Tallahassee acting under the color of federal law. He is sued in his individual capacity.

9. Defendant "Acting Captain"/Officer Wagner at all times relevant was "Acting Captain" at FDC Tallahasse acting under the color of federal law. He is sued in his individual capacity.

10. Defendant Lt. White at all times relevant was a Lt. at FDC Tallahassee acting under the color of federal law. He

is sued in his individual capacity.

11. Defendant Officer Chambers at all times relevant was an Officer at FDC Tallahassee acting under the color of federal law. He is sued in his individual capacity.

12. Defendant Officer Harvey at all times relevant was an Officer at FDC Tallahassee acting under the color of federal law. He is sued in his individual capacity.

13. Defendant Officer Inge at all times relevant was an Officer at FDC Tallahassee acting under the color of federal law. He is sued in his individual capacity.

14. Defendant Officer Beach at all times relevant was an Officer at FDC Tallahasse acting under the color of federal law. He is sued in his individual capacity.

15. Defendant United States of America is named as defendant in that it is the only proper defendant in suit against the federal government for torts committed by its employees.

IV. Exhaustion of Available Remedies

16. Plaintiff exhausted all of his administrative remedies before filing this complaint.

V. Factual Statement

17. On May 11, 2012, plaintiff was in the SHU ("Special Housing Unit") over-flow unit at FDC Tallahassee.

18. "Upon Information and Belief" plaintiff's status was that of "Transeg", in that he was a "transfer" from another prison under "segregation" status.

19. Plaintiff's stay at FDC Tallahassee was the result of an investigation that culminated in: no incident report being filed, yet being submitted for SMU ("Special Management Unit") placement, and with the SMU submission being denied.

20. Plaintff knows of no reasons, policy or otherwise as to why he shouldn't of been placed in general population while at FDC Tallahassee; instead he spent his time at FDC Tallahassee in the SHU.

21. Plaintiff spoke with Lt. White on a number of occasions concerning his continued placement in the SHU and that due to no incident reports and a SMU denial that he shouldn't be placed in general population; "I can't do anything about that. You need to talk to the Warden," is what he said.

22. Plaintiff spoke with S.I.S. Folks on a number of occasions concerning his continued placement in the SHU and that due to no incident reports and a SMU denial that he should be placed in general population; S.I.S. Folks said, "It's my recommendation you stay here in the SHU."

23. Plaintiff spoke with Acting Captain Wagner on a number of occasions concerning his continued placement in the SHU and that due to no incident reports and a SMU denial that he should be placed in general population; Acting Captain Wagner said, "By policy, there is nothing I can do. The Warden can."; on another occasion he said to speak to the A.W. or the Warden."

24. Plaintiff spoke with Assistant Warden Smith on one occasion concerning his continued placement in the SHU and that due to no incident reports and a SMU denial that he should be placed

in general population; plaintiff further told the Assistant Warden of his conversations with Lt. White, S.I.S. Folks and Acting Captain Wagner, that they refused to help, recommend or act; Assistant Warden Smith smiled and walked away.

25. Plaintiff spoke with Warden Flournoy on one occasion concerning his continued placement in the SHU and that due to no incident reports and a SMU denial that he should be placed in general population; plaintiff further reiterated his conversations with Lt. White, S.I.S. Folks, Acting Captain Wagner and Assistant Warden Smith--all cocerning the same refusal to help, recommend or act; further, plaintiff told Warden Flournoy that his continued placement in the SHU was wrong; Warden Flournoy responded, "It is up to region." Plaintiff further told the Warden that his constitutional rights were being violated; the Warden responded, "Sue me," and walked away.

26. Though considered the SHU, the over-flow unit in which the plaintiff was housed in was a regular unit with regular cells (for all intensive purposes); most notably different, was that the cells did not have their own showers as the cells in the SHU did, and the showers in the over-flow unit are in the middle of the unit.

27. The showers in the over-flow unit were clearly visible from most of the cells in that unit.

28. Plaintiff, as well as the rest of the inmates housed in the over-flow unit, had to be escorted to the showers in the unit three times a week.

29. During the plaintiff's stay in the over-flow unit, he noted the lax regard of the officers for protocol and procedures.

30. Plaintiff watched the inmates go to the showers, numerous times, and receive razors from the officer, and then keep the razor[s] by: returning less than the amount allotted, failure of the officer to pick up the allotted razor[s], by passing the razor[s] to another shower and then claiming to not have received any razor[s] when the officer came to retrieve them, or by just refusing to return them.

31. Plaintiff asserts that on several occasions while housed in the over-flow unit at FDC Tallahassee, that he was escorted to the shower, given razors [multiple], and that they were not retrieved as necessary by policy (an officer failed to return for them).

32. While showering in the over-flow unit's showers, plaintiff was aware of the inmates passing and hiding razors in attempts to avoid collection.

33. While housed in the over-flow unit at FDC Tallahassee, an inmate desiring to go to recreation will be removed from his cell and escorted out of the unit to a special recreation area with multiple cages.

34. At about 8:00 am on May 11, 2012, plaintiff was at his cell-door window and was watching inmates being taken out for recreational purposes; Officers were searching some inmates, but not others, wanding some inmates, but not others, some of the wanding was cursory, some more thorough.

35. At aobut 9:00 am on May 11, 2012, plaintiff was taken out of his cell by Officer Beach for recreational purposes; Officer Beach hand-patted the plaintiff before escorting him

to the front door of the unit where he then did a "cursory" wave over the plaintiff with a hand-held metal detecting wand.

36. Officer Harvey then secorted plaintiff from the front of the unit to the recreation cage; inmates Voterburg and Lacy were already in the recreation cage and handcuffed.

37. Officer Harvey then placed the plaintiff in the cage with inmates Voterburg and Lacy and then locked the cage door. The plaintiff's handcuffs were first removed, then inmate Voterburg, and last came inmate Lacy's; the plaintiff then took off his jump suit and hung it on the fence.

38. Plaintiff moved to the fence and began a conversation with inmate Raimond who was in the next cage.

39. While speaking with inmate Raimond through the fence, the plaintiff was cut across the right side of his face, twice from behind. "Upon information and Belief" the plaintiff asserts he was cut with 2 razor blades that were melted into the handle of a toothbrush.

40. The plaintiff turned around and saw both inmates were looking at him; the plaintiff backed up to the fence and called for the Recreation Officer, Ms. Inge.

41. When Ms. Inge arrived, the plaintiff then asked her to call medical for him; Ms. Inge called the Operations Lt. Mr. White; plaintiff was then escorted to medical.

42. P.A. ("Pysicians Assistant") Perkins cleaned most of the blood off of the plaintiff and held pressure on his cuts until E.M.T.'s ("Emergency Medical Technicians") showed up and then placed him in the back of an ambulence and took

him to Tallahassee Memorial Healthcare.

43. While at Tallahassee Medical Healthcare, the plaintiff received 258 stiches in the right side of his face (cheek) and his right ear (which was cut all the way through).

44. Plaintiff asserts that he is permantly scarred and emotionally traumatized and will never, ever look the same.

45. Concerning his stay up and to the event of May 11, 2012, plaintiff asserts that on multiple occasions he noted Officer Beach, Officer Harvey, Officer Chambers and Officer Inge each forego procedural policy and pass out more than (multiple) razors at one time during showers.

46. Plaintiff also noted Officer Beach, Officer Harvey, Officer Chambers and Officer Inge each forego procedural policy and fail to collect the alloted razor[s] passed out during showers, and/or fail to collect the razor[s] at all.

47. Concerning his stay up and to the event of May 11, 2012, plaintiff asserts that on multiple occasions he noted Officer Beach, Officer Harvey, Officer Chambers and Officer Inge each forego procedural policy and fail to properly pat-down (search) inmates going to recreation, if at all.

48. Plaintiff also noted Officer Beach, Officer Harvey, Officer Chambers and Officer Inge each forego procedural policy and fail to properly "wand" (metal detect) inmates going to recreation, if at all.

49. "Upon Information and Belief", in approximately the month of November 2012, the plaintiff was then transferred to the United States Penitentiary ("U.S.P.") Canaan in Waymart

Pennsylvania, where he is currently incarcerated.

50. During the month of April 2013, without notification or preparation, the plaintiff was placed in transit and transferred to F.D.C. Oklahoma City for a brief stay and then retruned to F.D.C. Tallahassee.

51. While at F.D.C. Tallahassee, the Plaintidd was taken from his cell one day and escrorted to the Lt's Office, where the following Prison Officials were present:

a) S.I.S. Lt Folk,

b) Lt White,

c) United States Attorney "John Doe #3",

d) F.B.I. Agent "John Doe #4".

52. During this meeting, the prosecuting Attorney said that the Plaintiff was brought to see if he would be willing to testify against his attacker; plaintiff politely refused for a number of reasons, first and foremost due to the inherent political atmosphere as relates to a prisoner's health and safty while incarcerated.

53. Plaintiff was then in transit for, "Upon Information and belief" for two months before getting back to U.S.P. Canaan; plaintiff believes that the length of transit was retaliation due to refusing to aid legal pursuit and/or culpability of the plaintiff's attackers and because the plaintiff planned on following through with his legal claims.

CLAIMS FOR RELIEF

54. The failure of Officer Chambers, Officer Harvey, Officer Beach and Officer Inge to act on their knowledge of substantial risk or serious harm to plaintiff and other inmates by failing to follow policy and procedure in that they passed out more than one [multiple] razor[s] to inmates on numerous occasions, and then failed to retrieve and account for such razor[s], and as such violated the plaintiff's Eighth Amendment right to be free from deliberate indifference to his safety, to be free from cruel and unusual punishment, and to be free of the defendant's failure to protect the plaintiff.

55. The failure of Officer Chambers, Officer Harvey, Officer Beach and Officer Inge, as employees of the United States of America, to breach their duties and conforming to such standard of conduct concerning razor accountability, is cause in fact and a reasonably close causal connection to the plaintiff's injury in which he received 258 stiches.

56. The failure of Officer Chambers, Officer Harvey, Officer Beach and Officer Inge to act on their knowledge of substantial risk or serious harm to plaintiff and other inmates

by failing to follow policy and procedure in that they failed to properly pat-search and/or "wand" (use the hand held metal detector) on numberous occasions violated the plaintiff's Eighth Amendment right to be free from deliberate indifference to his safety, to be free from cruel and unusual punishment, and to be free of the defendant's failure to protect the plaintiff.

57. The failure of Officer Chambers, Officer Harvey, Officer Beach and Officer Inge, as employees of the United States of America, to breach their duties and conforming to such standard of conduct concerning properly pat-searching and "wanding" inmates going to recreation from SHU, is cause in fact and a reasonably close causal connection to the plaintiff's injury in which he received 258 stitches.

58. The failure of Officer Beach and Officer Harvey to act on their knowledge of substantial risk or serious harm to plaintiff, whose status was "transeg" (no greater than Administrative Detention equivalent), by noting and assigning plaintiff to a recreation cell with "Upon Information and Belief" SMU Status inmates, is a violation of plaintiff's Eighth Amendment rights to be free from deliberate indifference to his safety, to be free from cruel and unusual punishment, and to be free from the defendant's failure to protect the plaintiff.

59. The failure of Officer Beach and Officer Harvey, as employees of the United States of America, to breach their duties and conforming to such standard of conduct concerning placing certain status[ed] inmates with other status[ed] inmates in recreation cages from SHU, in that it was cause in fact and

a reasonably close causal connection to the plaintiff's injury in which he received 258 stitches.

60. The failure of Lt. White, Acting Captain Wagner, S.I.S. Folks, Assistant Warden Smith, and Warden Flournoy to act on their knowledge of policy and procedure, due process in fact, and such knowledge of substantial risk or serious harm to plaintiff, by refraining and refusing, without procedural or due process cause, to place plaintiff in general population, and to keep plaintiff in such quarters in which inmates with such status as SMU referals for violence and such, violated the plaintiff's Eighth Amendment right to be free from deliberate indifference to his safety, to be free from cruel and unusual punishment, and to be free of the defendant's failure to protect the plaintiff.

61. The failure of Lt. White, Acting Captain Wagner, S.I.S. Folks, Assistant Warden Smith, and Warden Flournoy, as employees of the United States of America, to breach their duties and conforming to such standards of conduct concerning placement in general population and mixing of status[es], is cause in fact and a reasonably close causal connection to the plaintiff's injury in which he received 258 stitches.

RELIEF REQUESTED

WHEREFORE, plaintiff request that the court grant the following relief:

A. Award compensatory damages in the following amounts:

1. $100,000 jointly and severly against defendants Warden Flournoy, Assistant Warden Smith, S.I.S. Folks, Acting Captain Wagner, Lt. White, Officer Chambers, Officer Harvey, Officer Beach, and Officer Inge for the physical and emotional injuries sustained as a direct result of deliberate indifference, in failing to protect, from cruel and unusual punishment, as provided by the Eighth Amendment.

2. $100,000 against defendant United States of America, in that as employees of the United States of America, Warden Flournoy, Assistant Warden Smith, S.I.S. Folks, Acting Captain Wagner, Lt. White, Officer Chambers, Officer Harvey, Officer Beach, and Officer Inge, had duties of which they breaced which were the proximate cause of plaintiff's injuries of which 258 stitches resulted.

B. Award Punited damages in the following amounts:

1. $20,000 each against defendants Warden Flournoy, Assistant Warden Smith, S.I.S. Folks, Acting Captain Wagner, Lt. White, Officer Chambers, Officer Harvey, Officer Beach, and Officer Inge.

C. Grant such other relief as it may appear that plaintiff is entitled to.

Respectfully Submitted,

Date: March 17th 2014

Jimmy Wakefield, Pro se
Reg. #16902-056
U.S.P. Canaan
P.O. Box 300
Waymart, PA 18472

CERTIFICATE OF SERVICE

I, Jimmy Wakefield, hereby certify that I furnished a true and accurate copy of "Third Amended Civil Rights Complaint Pursuant to Bivens and FTCA" to the below named by placing said document in the prison's internal legal mailing system on March 17th, 2014, postage pre-paid, first class, addressed to:

Pamela C. Marsh, USA
/s/ Winifred L. Acosta NeSmith, AUSA
111 N. Adams St. Fourth Floor
Tallahassee, FL 32301-7730

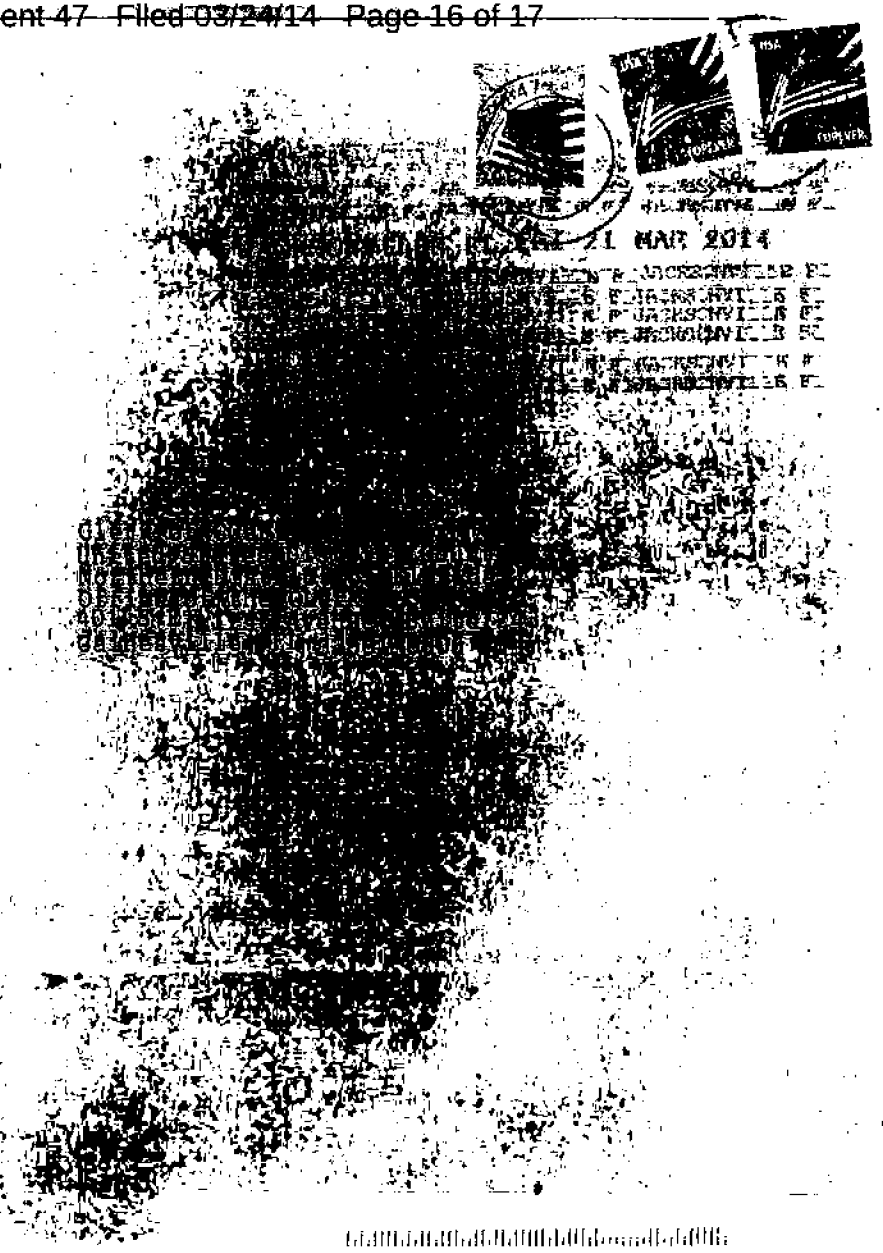
Jimmy Wakefield, Pro se
Reg. # 16902-056
P.O. Box 300
Wayamrt, PA 18472

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 17th day of March, 2014.

Jimmy Wakefield

Jimmy Wakefield #16081-058
United States Penitentiary - Canaan
P.O. Box 300
Waymart, PA 18472



LEGAL MAIL



IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF FLORIDA

Jimmy Wakefield,

Plaintiff,

vs.

United States of America,

Defendant.

4:13CV 339 WS/GRJ

Case No.

COMPLAINT FOR DAMAGES

JURY DEMAND

Rec'd 06/07/13 USDC Fla 1PM 0152

Filed 06/04/13 USDC Fla 4PM 0339

1. The Court has jurisdiction under the Federal Tort Claims Act.

2. On or about July 22, 2012, plaintiff submitted an Administrative Claim on claim for damage and injury to the United States Bureau of Prisons, Department of Justice. This claim was denied on January 28, 2013.

3. Plaintiff is a resident of the State of Florida.

4. Defendant United States of America is sued under the Federal Tort Claims Act for assault and negligence by law enforcement officers of the United States Bureau of Prisons.

5. On May 11, 2012, was assaulted by an inmate with a weapon obtained, fashioned, and possessed by the

negligence of government employees of the Bureau of Prisons, John Doe(s) One through Five, at Tallahassee Federal Detention Center, Northern District of Florida.

6. The actions and inactions of said officers constitute negligence, inter alia, in violation of Florida common law. Under the Federal Tort Claims Act, the defendant United States of America is liable to the plaintiff for the unlawful conduct of said officers as they were acting within the scope of their employment as law enforcement officers of the Bureau of Prisons.

7. The actions of said officers constitute negligence in violation of Florida common law. The officers had a duty to plaintiff to follow necessary procedures

to prevent inmates from possessing weapons like the one with which plaintiff was injured. This breach of duty constituted negligence in violation of Florida common law and was the direct and proximate cause of the plaintiff's pain and injury. (See Exhibit-A) Under the Federal Tort Claims Act the defendant United States of America is liable to the plaintiff for the unlawful actions of said officers as they were acting in the scope of their employment.

8. On the claim stated the plaintiff asks the Court to enter judgment against the United States of America.

9. On the claim stated, plaintiff asks the Court to enter judgment against defendant United States of America and to hold defendant liable to the plaintiff for compensatory damages.

10. For the injuries that the plaintiff suffered as a result of the claim stated, the plaintiff asks the Court to hold defendant liable for compensatory damages and the costs of this action.

VERIFICATION

I, Jimmy Wakefield, knowing the penalty of perjury, hereby swear that the foregoing is true and correct.

Jimmy Wakefield

Jimmy Wakefield
Reg No. 16902-056
FDC Tallahassee

May 30th 2013

C. C. File

EXHIBIT - A

#1)

Inmates That are Being housed in The Special Housing Unit (S.H.U) are permitted Shaving Razor's once a week in a United States Penitentiary S.H.U. When The OFFicer gives The inmate Razor's (2) per inmate He Log's There Cell # and amount of Razor's he gave The inmate or inmates in that Cell. When The OFFicer picks up The Razor's From The inmates, If the inmate Refuses To give the Razor's Back To The officer Then The inmate's are extracted From There Cell and all personal property is searched, Cell and inmate's Tell The Razor's are Recovered. Inmates also Recived disciplinary Write up.

Here at This Federal Detention Center Tallahassee, With no Shower's in The inmates Cell, The inmates are Taken To Shower From There Cell on Monday's, Wensday's and FRiday's every Week. Once The inmate is in The Shower and Request's Razor's, Then The staff Have a Log Book That They Write down The inmate's name and # and How Many Razor's He was given. Once The inmate Completes his shower The OFFicer (By policy) is To ReTRieve The Razor's From the inmate Before He Removes The inmate FRom The Shower. If inmate Refuses To give up The Razor's Then He is extRacTed and Him and His property is Searched To Recover The Razor's. Once The inmate gives up the Razor's the Staff Will go and Cross off The inmate in The Log Book To Show He (inmate) gave Back The Razor's. After All inmate's have showered, the Staff are Supost To Count The Razor's To make Sure All are Counted FOR and IF There not, then They go To The Log Book To See What inmate Was not CRossed OFF, and Then That inmate is extRacTed FRom His Cell and all his personal property, Cell and Self are Searched. If The Razor's are not Recovered Then all personal property is Confiscated and a disciplinary Write up is given. FOR any inmate To possess a Razor or Razor's in The Special Housing Unit (S.H.U) is TRuly a deliBeRate indifferent Towards inmates and also negligence By Staff To properley do There JoB By policy Standers. That is a Violation OF F.B.O.P. policy and also a Violation OF duty under 18.U.S.C. 4042.

C.C. File

UNITED STATES, Petitioner,

vs.

CARLOS MUNIZ and Henry Winston

374 US 150, 10 L Ed 2d 805, 83 S Ct 1850

[No. 464]

Argued April 22 and 23, 1963.

Decided June 17, 1963.

Claims § 82 - tort claims - right to sue - federal prisoners.

1. A person can sue under the Federal Tort Claims Act (28 USC §§ 1346 (b), 2671 et seq.) to recover damages from the United States Government for personal injuries sustained during confinement in a federal prison, by reason of the negligence of a government employee.

Annotation: p.1361, infra.

Claims § 12 - torts - applicable law.

2. Whether a claim is made out under the Federal Tort Claims Act (28 USC §§ 1346(b), 2671 et seq.) in a suit against the United States for personal injuries sustained during confinement in a federal prison, by reason of the alleged negligence of a government employee, depends upon whether a private individual under like circumstances would be liable under state law.

Annotation: p.1361, infra.<*pg. 806>

Claims § 12 - Federal Tort Claims Act - purpose.

3. The Federal Tort Claims Act (28 USC §§ 1346(b), 2671 et seq.), as part of the Legislative Reorganization Act of 1946, is designed not only to avoid injustice to those having meritorious claims hitherto barred by sovereign immunity, but also to eliminate the burden on Congress of investigating and passing upon private bills seeking individual relief.

Claims § 12 - government hospitals - negligent treatment.

4. The Federal Tort Claims Act (28 USC §§ 1346(b), 2671 et seq.) waives sovereign immunity for claims arising out of negligent treatment in government hospitals.

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Claims § 12 - Federal Tort Claims Act - exclusions.

5. Any liability of the United States for the administration of laws by the Securities and Exchange Commission or the Federal Trade Commission, or for any act of Congress or Executive Order, is excepted from the coverage of the Federal Tort Claims Act by 28 USC § 2680(a), which excludes claims based "upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid."

Claims § 12 - tort claims - discretionary functions - preservation of immunity.

6. Under 28 USC § 2680(a), governmental immunity is preserved for governmental activity relating to flood control, harbor and river work, and irrigation projects, to the extent that these activities constitute discretionary functions.

Statutes § 152, 154 - tort claims - passage of private bills.

7. Congress' passage of private bills for the relief of federal prisoners, after the decision of lower court cases construing the Federal Tort Claims Act as barring suits by federal prisoners, is not determinative as a construction of the Federal Tort Claims Act to bar such suits, and the acquiescence of subsequent Congresses does not of necessity constitute approval of this construction of the act.

Annotation: p.1361, infra.

Statutes § 152 - erroneous lower court decisions - legislative inaction.

8. The Supreme Court of the United States does not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation.<***pg. 807***>

Claims § 12 - tort claims - waiver of immunity - novel form of liability.

9. The Government's waiver of sovereign immunity under the Federal Tort Claims Act (28 USC §§ 1346(b), 2671 et seq.) is not restricted to circumstances in which governmental bodies have traditionally been responsible for misconduct of their employees, but extends to novel and unprecedented forms of liability as well.

Claims § 12; Workmen's Compensation § 4 - tort claims - compensation system.

10. The presence of a compensation system does not of necessity preclude a suit for negligence under the Federal Tort Claims Act (28 USC §§ 1346 (b), 2671 et seq.).

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Prisons and Convicts § 1; Workmen's Compensations § 10 - prison labor - compensation for injuries.

11. As of 1946, 18 USC § 744*l*, authorizing payment from the Prison Industries Fund of compensation to inmates of federal prison institutions or their dependents "for injuries suffered in any industry," provided coverage only for injuries incurred while engaged in prison industries and would not have covered injuries sustained by inmates as a result of negligent diagnosis and treatment of a benign brain tumor, or of negligence in allowing prisoners to intermingle without adequate supervision and in failing to provide enough guards to prevent assaults, and even under a 1961 amendment extending the coverage of 18 USC § 4126 to injuries "in any work activity in connection with the maintenance or operation of the institution where confined," there is no provision for nonwork injuries.

Statutes § 154 - amendment - legislative intent.

12. The alteration of a compensation scheme 15 years after Congress passed the Federal Tort Claims Act (28 USC §§ 1346(b), 2671 et seq.) does not provide reliable insight into Congress' intent in enacting the Federal Tort Claims Act.

Claims § 12 - intentional torts.

13. By reason of 28 USC § 2680(h), the Government is not liable for the intentional torts of its employees.

Claims § 12 - tort claims - immunity of officials under state law.

14. The liability of the United States under the Federal Tort Claims Act (28 USC §§ 1346(b), 2671 et seq.) for the negligence of its employees resulting in injuries to federal prison inmates is not restricted by state rules under which state prison officials are immune from suit in a like situation.

Annotation: p.1361, infra.

Claims § 12 - tort claims - "discretionary function" - law applicable.

15. Whether a "discretionary function" is involved, within the meaning of 28 USC § 2680(a), so as to exclude from the Federal Tort Claims Act claims based on the exercise or the failure to exercise such discretion, is a matter to be decided under 28 USC § 2680(a) rather than under state rules relating to political, judicial, quasi-judicial, and ministerial functions.

Prisons and Convicts § 1 - duty of care - Bureau of Prisons - applicable law.

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16. The duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 USC § 4042 independent of inconsistent state rules.

Claims § 12 - tort claims - federal prisoners - applicable law.

17. Even when a federal prison is within a federal enclave, the application of federal law in a Federal Tort Claims Act suit by an inmate therein is forestalled by 16 USC § 457, which provides that in any action brought to recover on account of injuries sustained in a place subject to the exclusive jurisdiction of the United States within the exterior boundaries of any <***pg. 808**> state, the rights of the parties shall be governed by the law of that state.

Annotation: p.1361, infra.

Claims § 12; Courts § 93.5 - tort claims - making exceptions.

18. There is no justification for the United States Supreme Court to read exemptions into the Federal Tort Claims Act beyond those provided by Congress; if the act is to be altered, that is a function for the same body that adopted it.

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COPY

BP-A0943 **Small Claims for Property Damage or Loss (31 U.S.C. § 3723)** CDFRM
MAY 09

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

1. Location where the property loss or damage occurred:	2. Name, address of claimant (Register number, street, city, state, and zip code):
Federal Detention Center Tallahassee 501 Capital Circle, N.E. Tallahassee, FL 32301 (Recreation YARD)	Jimmy Wakefield # 16902-056 Federal Detention Center Tallahassee 501 Capital Circle, N.E. Tallahassee, Fl 32301
3. Date and Day of Incident:	4. Time: (A.M. or P.M.):
FRiday May 11TH 2012	9:10 Am To 9:20 Am

5. Basis of Claim (State in detail the known facts and circumstances of the damage to, or loss, of privately owned property, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages, if necessary.):

See additional Attached Page.

6. Witnesses (Please provide the name and address (number, street, city, state, and zip code of each witness)):

none

7. Amount of Claim for Damage to, or loss of, privately owned property (in dollars) (Sum Certain Amount - Total Amount Of Claim):

Sum Certain Amount of 5,000,000,00 (5 million)

8. MAIL OR DELIVER CLAIM TO THE REGIONAL OFFICE WHERE THE CLAIM OCCURRED

Director of The Southeast Regional Office 3800 North Camp Creek Parkway, SW Building 2000 Atlanta GA 30331-5099

I CERTIFY THAT THE AMOUNT OF THE CLAIM COVERS ONLY DAMAGE TO, OR LOSS OF PRIVATELY OWNED PROPERTY CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM. yes

9. Signature of Claimant or Authorized Representative	10. Date
Jimmy Wakefield	7-22-12

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my Copy

Personal Injury Claim

I Jimmy. Wakefield #16902-0 Was a Victim of a assault while Being Housed AT The (F.D.C.T) Federal Detention Center Tallahassee. On Friday May 11th 2012, AT 9:00Am To 9:20Am, I was pulled From my Cell For my One Houre of Recreation By Officer MR. Beach. He Hand patted me down and then Walked me To the Front of the (S.H.U) Special Housing Unit and Waved a metal Detector over me as there supost To do all Inmates That are Removed or pulled out of the Cell For anything. Another Officer MR. Harvy escorted me From The Special Housing Unit To The Recreation yard. Once we got To the Rec. yard (cages), Inmate Voterburg and Inmate Lacy were already in The Rec. Cage. Once I was placed in The Same Cage With the 2 inmates ~~my Handcuffs were Removed and Then Voterburgs and last Lacy's~~. I Took OFF my Jumpsuit and Hung it on The Fence. I Started Talking To inmate Raimondi Through the Fence To the Rec. Cage next To the one I was in. While I Was Talking To inmate Raimondi I was cut across The Right side of my Face Twice From Behind. I was cut With 2 Razor Blades that Was melted into The Handle of a ToothBrush. When I Turned around Both inmates were looking at me so I Backed up To the Fence and Called the Recreation Officer Ms. Inge and asked Her To Call medical For me. She Called the Operation Lieutenant MR. White came and escorted me To medical. The P.A. Ms. Perkins Cleaned most of the Blood OFF of me and Held pressure on my Cut's Tell the E.M.S showed up. The E.M.S put me in the Back of a ambulance and Took me To Tallahassee Memorial [redacted] HealthCare. Once I was there I Received 258 Stitches in the Right side (Cheek) and Right ear that Was Cut all the way through. Due To B.O.P Staff's negligence under the B.O.P Federal Statute To provide For the Safe keeping, Care and protection For All persons Charged With or Convicted of Offenses against the United States. 18 U.S.C. § 4042. With the staff's negligence To Properly do there Job By policy in Which Caused my injuries and With the emotional, mental and physical pain and suffering and also the depression I'm Having To deal With Because of this assault, I'm asking The Sum Certain of 5,000,000,00 (5 Million) and I agree To accept said amount in Full Satisfaction and Final settlement of this Claim.

Sincerely,
Jimmy Wakefield #16902-056
Jimmy Wakefield #16902-056

C. C. File
7-22-12

To Whom [illegible]

COPY

U.S. Department of Justice
Federal Bureau of Prisons

Consolidated Legal Center
c/o Southeast Regional Counsel's Office
3800 Camp Creek Parkway, SW
Atlanta, GA 30331-6226

CERTIFIED MAIL
7011 0110 0001 3526 7201

Jimmy Wakefield
Register No. 16902-056
United States Penitentiary Canaan
P.O. Box 400
Waymart, PA 18472

Re: Administrative Tort Claim Number TRT-SER-2012-05652

Dear Claimant:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act, Title 28 U.S.C. 2672 et seq., and authority granted by 28 C.F.R. Section 0.172. Section 2672 of the Federal Tort Claims Act delegates to each federal agency the authority to consider, determine and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You claim staff failed to properly follow policy by failing to recover razors from inmates on shower days, and also by failing to shakedown inmates going to recreation. As a result, you state that on May 11, 2012, you were cut across the right side of your face and right ear, and your injuries required 258 stitches. Consequently, you seek five million dollars in damages.

We forwarded your claim to the institution for an investigation, and we reviewed the information you provided as well as staff reports. The investigation revealed that staff followed procedures by accounting for razors and by patting inmates down and searching them with handheld metal detectors before going to recreation. Despite said precautions, you were assaulted in the recreation yard and suffered multiple lacerations to the right side of your face and right ear that required medical attention and sutures; however, there is no evidence that such was caused by the negligent or wrongful act or

COPY

omission of any employee of the agency while acting within the scope of his office or employment. Consequently, your claim must be denied.

This letter will serve as a denial of your claim. If you are not satisfied with this determination, you may file suit in the appropriate United States District Court not later than six (6) months after the date of mailing of this notification.

Sincerely,

R. De Aguiar
Supervisory Attorney

1-28-13
Date

cc: Warden
Legal Liaison

Regional Administrative Remedy Appeal No. 699250-R1
Part B - Response

This is in response to your Regional Administrative Remedy Appeal receipted August 8, 2012. You allege staff at the Federal Detention Center in Tallahassee, Florida, placed you in the recreation cage with two inmates from another facility. You stated you were in transfer status from USP Coleman II and the other two inmates were in transfer status from USP Coleman I. You stated staff did not search the other two inmates with the metal detector as required. As a result you stated you were assaulted with a razor blade and received 250 stitches to the face. As relief, you ask for $5,000,000 for pain and suffering.

Your allegation of misconduct has been reviewed for appropriate disposition in accordance with policy. Allegations of misconduct are taken seriously. Staff are encouraged to be professional and to carry out all aspects of their duties without impartiality.

If you wish to seek monetary compensation for an injury or loss allegedly caused by staff negligence, you may consider filing a separate claim under the appropriate administrative claim process (i.e. 31 U.S. C.§3723 or the Federal Tort Claims Act).

Accordingly, this response to your Regional Administrative Remedy Appeal is for informational purposes only. If dissatisfied with this response, you may appeal to the Office of General Counsel, Bureau of Prisons, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in the Office of General Counsel within 30 calendar days of the date of this response.

1-17-13
Date

Regional Director, SERO

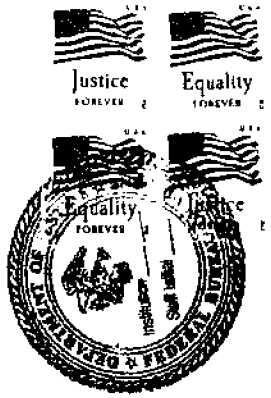
Never Recived a Responce From The General Counsel FoR the (B-P-11). The Appeal I Sent Them.

Sent Appeal To General Counsel on (12-13-12) December 13th 2012

Sincerely,
Jimmy Wakefield
J Wakefield #16902-056

Case 4:13-cv-00339-WS-GRJ Document 1 Filed 06/04/13 Page 17 of 17

Jimmy WakeField #16902-056
FederaL Detention CenTeR Tallahassee
501 Capitol CiRcle N.E.
Tallahassee, Fl 32301



OFFice OF The CleRK
United StaTes DiSTRiCT CouRT
NoRtheRn DiSTRiCT OF FloRidA
111 NoRth Adams STReeT, Suite 322
Tallahassee, FloRidA 32301-7730

"Legal Mail"

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

Tallahassee **DIVISION**

Amended

CIVIL RIGHTS COMPLAINT FORM

TO BE USED BY PRISONERS IN ACTIONS UNDER 28 U.S.C. § 1331 or § 1346

Jimmy Ray Wakefield,

Inmate # 16902-056.

(Enter full name of Plaintiff)

vs.

CASE NO: 4:13CV339 WS/GRJ

(To be assigned by Clerk)

United States,

_____,

_____,

_____,

_____.

(Enter name and title of each Defendant. If additional space is required, use the blank area below and directly to the right.)

ANSWER ALL QUESTIONS ON THE FOLLOWING PAGES:

Filed07/03/13 USDC Fln 1 PM 1225

I. PLAINTIFF:

State your full name, inmate number (if applicable), and full mailing address in the lines below.

Name of Plaintiff: Jimmy Ray WakeField
Inmate Number 16902-056
Prison or Jail: Federal Detention Center Tallahassee
Mailing address: 501 Capital Circle
Tallahassee, FL 32301

II. DEFENDANT(S):

State the name of the Defendant in the first line, official position in the second line, place of employment in the third line, and mailing address. Do the same for **every** Defendant:

(1) Defendant's name: United States
Official position: _____
Employed at: _____
Mailing address: _____

(2) Defendant's name: _____
Official position: _____
Employed at: _____
Mailing address: _____

(3) Defendant's name: _____
Official position: _____
Employed at: _____
Mailing address: _____

ATTACH ADDITIONAL PAGES HERE TO NAME ADDITIONAL DEFENDANTS

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Pursuant to 42 U.S.C. § 1997e(a), exhaustion of administrative remedies is required prior to initiating a civil rights action which alleges unlawful conditions or events in any prison, jail, or detention center. Plaintiff is warned that any claims for which the administrative grievance process was not completed prior to filing this lawsuit may be subject to dismissal.

IV. PREVIOUS LAWSUITS

NOTE: FAILURE TO DISCLOSE **ALL** PRIOR CIVIL CASES MAY RESULT IN THE DISMISSAL OF THIS CASE. IF YOU ARE UNSURE OF ANY PRIOR CASES YOU HAVE FILED, THAT FACT MUST BE DISCLOSED AS WELL.

A. Have you initiated other actions in **state court** dealing with the same or similar facts/issues involved in this action?

Yes( ) No(✓)

1. Parties to previous action:
   (a) Plaintiff(s): _____
   (b) Defendant(s): _____
2. Name of judge: _____ Case #: _____
3. County and judicial circuit: _____
4. Approximate filing date: _____
5. If not still pending, date of dismissal: _____
6. Reason for dismissal: _____
7. Facts and claims of case: _____

   _____

   (Attach additional pages as necessary to list state court cases.)

B. Have you initiated other actions in **federal court** dealing with the same or similar facts/issues involved in this action?

Yes( ) No(✓)

1. Parties to previous action:
   a. Plaintiff(s): _____
   b. Defendant(s): _____
2. District and judicial division: _____
3. Name of judge: _____ Case #: _____
4. Approximate filing date: _____
5. If not still pending, date of dismissal: _____
6. Reason for dismissal: _____

7. Facts and claims of case: _____

_____

(Attach additional pages as necessary to list other federal court cases.)

C. Have you initiated other actions (*besides those listed above in Questions (A) and (B)*) in **either state or federal court** that relate to the fact or manner of your incarceration (including habeas corpus petitions) or the conditions of your confinement (including civil rights complaints about any aspect of prison life, whether it be general circumstances or a particular episode, and whether it involved excessive force or some other wrong)?

Yes( ) No(✓)

If YES, describe each action in the space provided below. If more than one action, describe all additional cases on a separate piece of paper, using the same format as below.

1. Parties to previous action:
   a. Plaintiff(s): _____
   b. Defendant(s): _____
2. District and judicial division: _____
3. Name of judge: _____ Case #: _____
4. Approximate filing date: _____
5. If not still pending, date of dismissal: _____
6. Reason for dismissal: _____
7. Facts and claims of case: _____

_____

(Attach additional pages as necessary to list cases.)

D. Have you ever had any actions in **federal court** dismissed as frivolous, malicious, failing to state a claim, or prior to service? If so, identify each and every case so dismissed:

Yes( ) No(✓)

1. Parties to previous action:
   a. Plaintiff(s): _____
   b. Defendant(s): _____
2. District and judicial division: _____
3. Name of judge: _____ Case Docket # _____
4. Approximate filing date: _____ Dismissal date: _____
5. Reason for dismissal: _____

6. Facts and claims of case: _____

_____

(Attach additional pages as necessary to list cases.)

V. STATEMENT OF FACTS:

State briefly the FACTS of this case. Describe how each Defendant was involved and what each person did or did not do which gives rise to your claim. In describing what happened, state the names of persons involved, dates, and places. Do not make any legal arguments or cite to any cases or statutes. You must set forth separate factual allegations in separately numbered paragraphs. You may make copies of this page if necessary to supply all the facts. Barring extraordinary circumstances, no more than five (5) additional pages should be attached. **(If there are facts which are not related to this same basic incident or issue, they must be addressed in a separate civil rights complaint.)**

On Friday Morning May 11th 2012 AT 9:10 AM Officer A.C. Beach Came To my Cell To pull me For my one Hour of Recreation. Once I was cuffed and pulled out of my cell Officer A.C. Beach patted me down and escorted me To the Front of The S.H.U. Unit (special Housing Unit). Once There Officer A.C. Beach Ran a hand held Metal Detetor over me. Another Officer a MR. Harvy escorted me To the Recreation yard Where There are 5 Cages. Once We arrived To The Recreation yard, inmate Vorderbrug #53075-019 and inmate Lacey were already in Cage #3. Once I was placed in the Recreation Cage, I Had my Cuff's Removed First. Inmate Vorderbrug had His Cuff's Removed next and then inmate Lacey. I Removed my Jumpsuit and hung it on The Fence and inmate Raimondi Called me To the Fence Between Recreation Cage #3 and #2. As I was Talking To inmate Raimondi Through The Fence, I Was Cut across The Right side of my Face, ear and neck From Behind me. I was Cut By 2 Razor Blades That were in The End of a ToothBrush. Once I got Cut, I Turned around and Backed up To the Front of The Recreation Cage Where The Recreation Officer Ms. Inge was Standing and She seen The Blood all over me and she pushed her Stress Button on the Radio. The lieutenant MR. White Came and pulled me From The Recreation Cage and escorted me To medical Where he took pictures of my Face, ear and neck. I was Then Taken To Tallahassee Memorial Heath cure By E.M.T's that Were Called. Once I got To Tallahassee Memorial Heath Care I

Recived 258 Stitches To my Right cheek, ear and neck.

#1) By B.O.P policy, no inmate in The S.H.U. (special Housing Unit) Can have a Razor except when they Shaver. After They Shower The officer Takes Back The Razor.

#2) MR. J.V. Flournoy (Warden) Failed To properly Run a Detention Center By policy, Unsafe Conditions, no cameras on Recreation yard. He Failed To adequately Train or Supervise his Subordinates.

#3) Officer A.C. Beach Failed To properley shake down inmates Vorderburg and inmate Lacey When He pulled Them From There cell in The S.H.U. (special Housing Unit).

#4) officer Harvy Failed To properley Shake down Both inmates When him and officer A.C. Beach pulled Them (Lacey and Vorderburg) From There Cell For There Recreation Time.

VI. STATEMENT OF CLAIMS:

State what rights under the Constitution, laws, or treaties of the United States you claim have been violated. Be specific. Number each separate claim and relate it to the facts alleged in Section V. **If claims are not related to the same basic incident or issue, they must be addressed in a separate civil rights complaint.**

Unsafe Conditions, Cruel and unsual punishment's inflicted equal protection of the Law.

Eight and Fourteenth (section 1) of the Constitutional Amendments.

VII. RELIEF REQUESTED:

State briefly what relief you seek from the Court. Do not make legal arguments or cite to cases/ statutes.

declaratory and injunctive Relief, for the pain and suffering also for the physical and mental suffering, Punitive damages, Compensatory damages, Plaintiff's Cost's in this suit, Any additional Relief this Court deems Just, proper and equitable. The Value of my Face that Cannot Be Restored or Replaced.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS OF FACT, INCLUDING ALL CONTINUATION PAGES, ARE TRUE AND CORRECT.

June 30th 2013

[redacted]
(Date)

(Signature of Plaintiff)

IF MAILED BY PRISONER:

I declare (or certify, verify, or affirm) under penalty of perjury that this complaint was (check one):
☐ delivered to prison officials for mailing or ☒ deposited in the prison's internal mail system on:
the [redacted] day of [redacted] _____, 20 13.

Sunday June 30th

(Signature of Plaintiff)

Revised 03/07

Case 4:13-cv-00339-WS-GRJ Document 7 Filed 07/03/13 Page 8 of 8

Jimmy Wakefield # 16902-056
Federal Detention Center Tallahassee
501 Capitol Circle, N.E.
Tallahassee, Fl 32301

Liberty
FOREVER

United States Magistrate Judge
Mr. Gary R. Jones
U.S. District Court
401 S.E. First Avenue Roo
Gainesville, Fl 32601-689

Legal Mail

Mem O

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

v. Case No. 4:13-cv-339-WS-GRJ

UNITED STATES OF AMERICA,

Defendant.
_____/

ORDER

This case is before the Court upon Doc. 28, Defendant's Motion to Dismiss, and Doc. 29, Plaintiff's motion for leave to file an amended complaint. Defendant has filed a response in opposition to the motion for leave to amend. (Doc. 31.) Plaintiff, an inmate in the custody of the federal Bureau of Prisons (BOP) initiated this case by submitting a handwritten complaint. (Doc. 1.) The Court directed Plaintiff to amend on the Court's forms (Doc. 6), and the action is currently proceeding on Plaintiff's amended complaint (Doc. 7.) In his amended complaint, Plaintiff named the United States as the sole defendant and alleged that BOP officers at the Federal Detention Center failed to properly search inmates before releasing them for recreation time. The allegations stem from a May 11, 2012 incident where Plaintiff was stabbed by another inmate with a shank. (Doc. 7.)

On November 26, 2013, Defendant moved to dismiss Plaintiff's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and in the alternative, Federal Rules of Civil Procedure 12(b)(6) and 56. (Doc. 28.) On December 2, 2013, Plaintiff provided prison officials with a motion for leave to file an amended complaint and a proposed

amended complaint. (Doc. 29.) In his proposed amended complaint, Plaintiff no longer names the United States as a Defendant but instead names 12 BOP employees, four of whom work at Coleman and eight of whom work at the Federal Detention Center in Tallahassee. (Doc. 29.) The claims against the Federal Detention Center employees stem from the same May 2012 stabbing incident. The claims against the Coleman employees stem from Plaintiff's claims that he was improperly placed in administrative detention and assigned to the Special Management Unit. Plaintiff asserts both Federal Tort Claims Act (FTCA) and *Bivens*[1] claims against all defendants.

Pursuant to Fed. R. Civ. P. 15(a)(1)(B), Plaintiff is permitted to amend his complaint once as a matter of course within 21 days after service of a motion under Rule 12(b). Here, other than the Court's directive that Plaintiff submit his complaint on the Court's form, Plaintiff had not previously amended his complaint under Rule 15. Defendant served a motion to dismiss under Rule 12(b) on November 26, 2013, and Plaintiff filed a motion for leave to amend with a proposed amended complaint on December 2, 2013, well within the 21-day period provided for in Rule 15. Accordingly, Plaintiff is permitted to amend his complaint.

However, in its current state, [redacted] improperly contains two distinct sets of claims. While Plaintiff can bring forth FTCA and *Bivens* claims in the same cause of action,[2] he cannot bring two sets of claims that did not arise out of the

[1] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (holding that injured plaintiffs can bring a cause of action for damages against individual federal officers based on violations of constitutional rights).

[2] *See Denson v. United States*, 574 F.3d 1318, 1336 *et seq.* (11th Cir. 2009) (noting that, "[a]s co-extensive causes of action, *Bivens* and FTCA claims necessarily

same transaction or occurrence. Federal Rule of Civil Procedure 20(a)(2) states that multiple defendants may be joined in the same action only if, first, "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences." Second, there *must* be a "question of law or fact common to all defendants" in the action. Both prongs of the test must be met in order for joinder to be appropriate. *See Don King Prods., Inc. V. Colon-Rosario, et al.*, 561 F. Supp. 2d 189, 191 (D. Puerto Rico 2008). Here, Plaintiff has improperly joined the Coleman defendants and the Federal Detention Center defendants. While he may pursue claims against all defendants, he cannot do so in a single lawsuit. In light of Plaintiff's *pro se* status, the Court will afford him an opportunity to amend his complaint to reflect only defendants whose alleged wrongdoing arises out of the same transaction or occurrence and involves a common question of law or fact. Defendants must file a response to the Third Amended Complaint within 14 days of service of the Third Amended Complaint, as provided in Fed. R. Civ. P. 15(a)(3).

As to Defendant's pending motion to dismiss the amended complaint (Doc. 28), the argument asserted therein go to the claims raised in the amended complaint (Doc. 7), which has been superseded by Plaintiff's second amended complaint (Doc. 29) and will be superseded by a third amended complaint consistent with the instructions in this Order. Accordingly, the Court concludes that Defendant's Motion to Dismiss (Doc. 28) should be terminated as moot. Defendants may refile a Motion to Dismiss (or other response to the Complaint) without prejudice to reasserting any arguments previously raised in the Motion

---

arise from the same wrongful acts or omissions of a government official. . .").

to Dismiss.

Therefore, upon due consideration, it is hereby **ORDERED** that:

1. Plaintiff's motion for leave to file an amended complaint, Doc. 29, is GRANTED.

2. The Clerk is directed to docket attachment #1 to Doc. 29 as Plaintiff's Amended Complaint.

3. The **Clerk** shall send Plaintiff a **blank civil rights complaint form for federal prisoners.** Plaintiff shall file a Third Amended Complaint, including *only* claims pertaining to the same transaction, occurrence, or *factually related* series of transactions or occurrences. The Third Amended Complaint *must* pertain to a question of law or fact common to *all* named defendants. Plaintiff must file the Third Amended Complaint **on or before March 21, 2014.** Failure to comply with this order will result in a recommendation that this case be dismissed without further notice.

4. The **Clerk** is directed to terminate as a pending motion Defendant's Motion to Dismiss, Doc. 28.

5. Defendants must file their response to the Third Amended Complaint within 14 days of the date of service of the Third Amended Complaint.

DONE AND ORDERED this 19th day of February 2014.

s/ Gary R. Jones

GARY R. JONES
United States Magistrate Judge

2/19/14

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

2nd Am Compl.

JIMMY WAKEFIELD,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 4:13-cv-339-WS-GRJ (FTCA) &
Case No. _____ (Bivens);

REQUEST TO AMEND
AND JOIN ACTIONS

MOTION FOR LEAVE TO JOIN PETITIONERS FTCA AND BIVENS COMPLAINTS AND TO FURTHER AMEND JOINED COMPLAINT ADDING ADDITIONAL FACTS AND PARTIES

Plaintiff Jimmy Wakefield, a pro se prisoner currently in the custody of the Federal Bureau of Prisons, incarcerated at the United States Penitentiary Canaan in Waymart Pennsylvania, pursuant to Rules 15(a) and 19(a), Fed. R. Civ. P., requests leave to join and amend complaints adding facts and parties.

PROPER AND ADDED DEFENDANTS
PURSUANT TO BIVENS ACTION

1. In the plaintiff's original civil rights (Bivens) complaint, he erroneously named the United States of America as defendant.

2. Since the filing of the complaint, the plaintiff has determined that the proper defendants should be named, "Upon information and belief", as such:

a) Warden Drew at U.S.P. Coleman II,
b) Captain Williams at U.S.P. Coleman II,

Recd
~~Filed~~ 1213 13 UsDcFln1PM1202

19
Filed 0220 14 UsDcFln1AM1003

c) S.I.A. Noble at U.S.P. Coleman II,
d) Lt. Phelps at U.S.P. Coleman II,
e) Warden Faloney at F.D.C. Tallahasse,
f) Assistant Warden Smith at F.D.C. Tallahasse,
g) S.I.S. Folks at F.D.C. Tallahasse,
h) Acting Capt. Wagner at F.D.C. Tallahasse,
i) Lt. White at F.D.C. Tallahasse,
j) Officer Chambers at F.D.C. Tallahasse,
k) Officer Harvey at F.D.C. Tallahasse,
l) Officer Inge at F.D.C. Tallahasse;
**Defendants A-L, each in their individual capacity.

JURISDICTION

3. The Court has jurisdiction over the plaintiff's claims of violation of federal constitution rights under 42 U.S.C. §§1331(1) and 1343, in that he brings claims alleging that his Fifth Amendment "Due Process Clause" rights, and his Eighth Amendment protections against "Cruel and Unusual Punishment" rights, have been violated.

4. This Court has supplemental jurisdiction over the plaintiff's Federal Tort Claims Act (FTCA) claim under 28 U.S.C. §§1346(b), 2671 et seq. in that the United States is liable for the petitioner's claim of negligence for that very issue is a tort in the state of Florida where the conduct occurred.

FACTS

5. While being housed in the general population at U.S.P. ("United States Penitentiary") Coleman #2, a Muslim inmate assaulted a staff memeber in "I" block and the institution went on lock-

down.

6. A few days into the lock-down, the Plaintiff was removed from his cell and escorted to the Lt. Office and told that he was being placed in the S.H.U. ("Special Housing Unit") under S.I.S. ("Special Investigative Supervisor") investigation. The Lt. could offer no reasons why.

7. "Upon information and belief" the plaintiff was housed in the S.H.U. at U.S.P. Coleman #2 for approximately 4-6 weeks and "Upon information and belief" the investigation was pending his entire stay.

8. Lt. Rogers approached the plaintiff's cell and asked if they would be willing to "trans-seg" to Coleman Low and remain in the S.H.U. at that facility. The plaintiff and his cellmate agreed to the move and per the Lt.'s instructions filled out an "Inmate Request" for the required move. That evening the plaintiff and his cellmate were told to pack their property and were then "trans-seged".

9. However, the plaintiff and his cellmate were not "trans-seged" to Coleman Low, but rather to the S.H.U. at U.S.P. Coleman #1.

10. The plaintiff remained in "trans-seg" status while housed in the S.H.U. at U.S.P. Coleman #1, "Upon information

and belief", his entire stay there, which was approximately 6 months.

11. During the plaintiff's stay in the S.H.U. at Coleman #1, though under S.I.S. investigation, which as he understands "upon information and belief" should never last more than 90 days, he never recieved an incident report.

12. Plaintiff then asked Officer Ms. G. (her nickname and beginning of last name) what his status was and she told him that he was recommended for S.M.U. ("Special Management Unit") placement.

13. Though plaintiff never recieved an incident report for any wrong doing, Case Manager Lee then confirmed while making rounds in the S.H.U. that the plaintiff has been submitted for S.M.U. placement.

14. On an "Unknown" later date, the plaintiff was then told to pack his property; he was then "trans-seged" to F.D.C. ("Federal Detention Center") Tallahassee and placed in a unit that was operating as a S.H.U. holdover (complete lock-down).

15. "Upon information and belief" the plaintiff was on "Trans-seg" status and had been "denied" acceptance into the S.M.U. when on Friday May 11, 2012, at approximately 9 AM, the plaintiff was handcuffed and taken out of his cell by Officer

Beach for recreational purposes; Officer Beach then hand-patted (searched) the plaintiff before escorting him to the front door of the unit; he then did a "cursory" wave over the petitioner with a hand held metal detecting wand.

16. Officer Harvey then escorted the Plaintiff from the front of the unit to the recreation cage; Inmates Voterburg and Lacy were already in the recreation cage and handcuffed.

17. Officer Harvey then placed the Plaintiff in the cage with inmates and Voterburg and Lacey and locked the cage door; The Plaintiff's handcuffs were first removed, then inmate Voterburg's, and last came inmate Lacy's; the Plaintiff then took off his jumpsuit and hung it on the fence.

18. Plaintiff moved to the fence and began a conversation with inmate Raimond who was in the next cage.

19. While speaking with inmate Raimond through the fence, the Plaintiff was cut accross the right side of his face, twice, from behind. "Upon information and belief" the plaitiff asserts he was cut with 2 razor blades that were melted into the handle of a tootbrush.

20. The plaintiff turned around and saw that both inmates were looking at him; the plaintiff backed up to the fence and called for the recreation officer, Ms. Inge.

21. When Ms. Inge arrived, the Plaintiff then asked her to call medical for him; Ms. Inge called the Operation's Lt., Mr. White, and was then escorted to medical.

22. P.A. ("Physician's Assitant") Perkins cleaned most of the blood off of the plaintiff and held pressure on his cuts until the E.M.T.'s ("Emergency Medical Technician") showed up and then placed him in the back of an ambulance and took him to Tallahassee Memorial Healthcare.

23. While at Tallahassee Memorial Healthcare, the Plaintiff recieved 258 stiches in the right side of his face (cheek) and his right ear (which was cut all the way through).

24. Plaintiff asserts that he is permantently scarred and will never look the same.

25. "Upon Information and Belief" in approximately the Month of November 2013 the Plaintiff was then transferred to U.S.P. Canaan in Waymart Pennsylvania where he now is currently incarcerated.

26. During the month of April 2013, without notification or preparation, the plaintiff was placed in transit and transferred to F.D.C. Okalahoma City for a brief stay and then returned to F.D.C. Tallahassee.

27. the Plaintiff was then taken from his cell to another office, by the Lt's Office, in which the following prison officials were present:

a) Lt. S.I.S. Folk,
b) Lt. White,
c) United States Attorney "Unknown",
d) F.B.I. Agent "Unknown".

28. During this meeting, the Prosecuting Attorney said that the plaintiff was brought to see if he would be willing to testify against his attackers; plaintiff politely refused for a number of reasons, first and foremost due to the inherent political atmosphere as relates to a prisoner's health and safety while incarcerated.

29. Plaintiff was then in transit for, "Upon information

and belief" for two months before getting back to U.S.P. Canaan; petitioner believes that the length of transit was retaliation due to refusing to aid legal pursuit and/or culpability of the petitioner's attackers.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

30. The Plaintiff asserts that he has exhausted his administrative remedies with respect to all claims and all defendants pursuant to his Bivens claim and his FTCA claim.

CLAIMS FOR RELIEF

31. The actions of defendants Warden Drew, Captain Williams, S.I.A. Noble, and Lt. Phelps, denied the Plaintiff his "Due Process" rights under the Fifth Amendment in that he was placed in administrative detention without being given a reason nor an incident report and "Upon information and belief" in violation of B.O.P. policy; the plaintiff was further denied his "Due Process" rights when then never receiving a disciplinary/incident report was "trans-seged" from Coleman II to Coleman I, and continued to be housed in the S.H.U. under investigation; "upon information and belief" the plaintiff was was then submitted for S.M.U. placement (though never recieving an incident report nor a negative conclusion of an investigation).

32. After being "trans-seged" to F.D.C. Tallahasse, "Upon information and Belief" the plaintiff asserts that his "Due Process" rights under the Fifth Amendment continued to be violated in

that he continued to be held in administrative detention, though he had not recieved a disciplinary report, and that "upon information and belief" he had been denied referral to the S.M.U.

33. Plaintiff asserts that the violations of his Fifth Amendment rights to "due process" amounted to and culminated in the further violation of his Eight Amendment rights to protection against "cruel and unusual punishment" in that the incident which resulted in being attacked/assaulted would of never happened if his "due process" rights would of been recognized and given way to.

34. The actions of defendants Warden Faloney, Assistant Warden Smith, S.I.S. Folks, Acting Capt. Wagner, Lt. White, Officer Chambers, Officer Harvey, and Officer Inge, denied the plaintiff his protections against "Cruel and Unusual Punishment", specifically that those prison officials had a duty to protect the plaintiff from violence at the hands of other prisoners. **Farmer v. Brennan, 511 U.S. 825, 832, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994).**

35. The plaintiff asserts that the actions of the prison officials created liability for the defendant The United States of America and that his claim brought under an FTCA action of negligence is a tort in the state of Florida. **Miles v. Naval Aviation. Inc., 289 F. 3d 715, 722 (11th Cir. 2002)** (citing 28 U.S.C. §2674); further, the duty and care implicated

by the plaintiff's claims were first and foremost created by 18 U.S.C. §4042.

RELIEF REQUESTED

WHEREFORE, the plaitiff requests that the court grant the following relief:

A. Award compensatory damages in the following amounts:
   1. $100,000 jointly and severally against defendants Warden Drew, Captain Williams, S.I.A. Noble, and Lt. Phelps for the violation of the plaintiff's "due process" rights which culminated in the physical and emotional injuries sustained as a result of the plaintiff's assault.
   2. $250,000 jointly and severally against defendants Warden Faloney, Assistant Warden Smith, S.I.S. Folks, Acting Captain Wagner, Lt. White, Officer Chambers, Officer Harvey, and Officer Inge for the violation of the plaintiff's "due process" rights and protections against "cruel and unusual punishment" in that their actions culminated in the physical and emotional injuries sustained as a result of the plaintiff's assault.
   3. $1,000,000 against the United States of America in that prison officials' actions of negligence under the FTCA and Florida State Law for Torts created liability for the defendant such as their actions culminated in the physical and emotional injuries sustained as a result of the plaintiff's assault

B. Award punited damages in the following amounts:
   1. $50,000 each against defendants Warden Drew, Captain Williams, S.I.A. Noble, Lt. Phelps,

2. $100,00 each againts defendants Warden Faloney, Assistant Warden Smith, S.I.S., Folks, Acting Capt. Wagner, Lt. White, Officer Chambers, Officer Harvey, and Officer Inge.

C. Grant such other relief as it may appear that plaintiff is entitled.

Respectfully,

Jimmy Wakefield

Date: 12/2/2013

Jimmy Wakefield
U.S.P. Canaan
P.O. Box 300
Waymart, PA 18472

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the aforementioned motion 'Request to Amend and Join Actions' is true and correct.

Jimmy Wakefield

Jimmy Wakefield

Dated: 12/2/2013

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

vs. Case No: 4:13-cv-339-WS-GRJ

WARDEN FLOURNOY, et al.,

Defendants.
_____/

ORDER

This matter is before the Court on Doc. 47, Plaintiff's Third Amended Complaint. The Court previously granted Plaintiff's motion for leave to amend his complaint (Docs. 29, 44), and the Court finds that the Third Amended Complaint is deemed sufficient to alert the Defendants to the nature and basis of Plaintiff's claim. One Defendant – the United States of America – already has been served and is required to respond to the Third Amended Complaint. This Order directs service of the Third Amended Complaint on Plaintiff's behalf as to the remaining Defendants. Plaintiff has not provided addresses for Defendants Flournoy, Smith, Folks, Wagner, White, Chambers, Harvey, Beach, or Inge, but his Third Amended Complaint alleges that they are all employees at the Federal Detention Center in Tallahassee. Accordingly, service for each of these Defendants will be attempted at the following location: FCI Tallahassee, 501 Capital Circle NE, Tallahassee, FL 32301.

Accordingly, it is **ORDERED** that:

1. The clerk shall print a copy of the Third Amended Complaint and shall complete the USM-285 forms and AO-398 and AO-399 forms for the Defendants.

2. The clerk shall issue summons for each Defendant, indicating that each Defendant has sixty (60) days in which to file a response to the Third Amended Complaint, and refer the summons, a copy of this order, a service copy of the Third Amended Complaint, the completed USM-285 form and the completed AO-398 and AO-399 forms, to the United States Marshals Service (USMS). Pursuant to Fed. R. Civ. P. 4(c)(2), all costs of service shall be advanced by the United States.

3. Pursuant to Rule 4(d) of the Federal Rules of Civil Procedure, the USMS shall send a copy of the Third Amended Complaint, a copy of this order, a completed AO-398 form and a copy thereof, a AO-399 form, and a prepaid means of compliance to each Defendant through first class mail. The USMS shall mail the forms to each Defendant as soon as possible so that service or waiver of service can be completed within 120 days from the date of entry of this order on the docket.

4. If after thirty (30) days from the mailing of the waiver of service forms and the complaint a Defendant has not returned the waiver of service form (AO-399 form), the USMS shall personally serve the Defendant pursuant to Rule 4(e) of the Federal Rules of Civil Procedure. Upon completion of service, the USMS shall file with the clerk the return and a written statement of all costs incurred of making such personal service.

5. The clerk shall refer this file to the undersigned if the waiver form is returned for insufficient address or for similar reason, if service on a Defendant is returned unexecuted, or if the USMS has filed a statement of costs incurred for making personal service.

6. Each Defendant shall have sixty (60) days in which to file a response to the Third Amended Complaint.

7. No motion for summary judgment shall be filed by any party prior to entry of an initial scheduling order without permission of the court.

8. Counsel for Defendant shall file a notice of appearance within twenty (20) days of the date of service of the Third Amended Complaint.

9. Once a response to the Third Amended Complaint is filed, no amendments to the Third Amended Complaint shall be permitted by the court unless, as required by Rule 15 of the Federal Rules, Plaintiff files a separate motion for leave to so amend and provides a copy of the proposed amended complaint.

10. After a response to the Third Amended Complaint has been filed by Defendant, Plaintiff shall be required to mail to the attorney for each Defendant a copy of every pleading or other paper, including letters, submitted for consideration by the court. Plaintiff shall include with the original paper to be filed with the clerk of court a certificate of service stating the date a correct copy of the paper was mailed to Defendant or to the attorney representing Defendant. **Any paper submitted for filing after a response to the Third Amended Complaint has been filed by Defendant which does not contain a certificate of service shall be returned by the clerk and disregarded by the court**.

11. In accordance with 28 U.S.C. § 636(c)(2), the clerk shall forward to Plaintiff a form for consenting to trial by the magistrate judge, with the case number

written on it. If Plaintiff wishes to consent he should sign the form and forward it to counsel for Defendants, who, if both Defendants consent, shall return it to the clerk.

12. Plaintiff is reminded to keep the clerk of court advised of any change in his mailing address should he be transferred, released from prison, or otherwise be relocated. Failure to do so may result in the dismissal of Plaintiff's action for failure to prosecute if court orders are not able to reach Plaintiff.

13. **In any event, the Clerk shall refer this file to the undersigned forty-five (45) days from the date of this order.**

DONE AND ORDERED this 3rd day of April 2014.

s/ Gary R. Jones
GARY R. JONES
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

vs. Case No: 4:13-cv-339-WS-GRJ

WARDEN FLOURNOY, et al.,

Defendants.
_____/

ORDER

This cause is before the Court on Doc. 48, Defendant United States of America's Request to Extend the Defendants' Response Deadline. The Government requests a response deadline of 60 days to respond to Plaintiff's Third Amended Complaint. The Government advises that the Third Amended Complaint was served on March 24, 2014. The Court has directed service on the remaining defendants by separate order, and pursuant to that order they have 60 days from the date of service to respond.

Upon due consideration, it is **ORDERED:**

Defendant's request for extension of time, Doc. 48, is **GRANTED**. Defendant United States of America shall file a response to Plaintiff's Third Amended Complaint **on or before May 23, 2014.**

DONE AND ORDERED this 7th day of April 2014.

s/ Gary R. Jones
GARY R. JONES
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

vs. Case No: 4:13-cv-339-WS-GRJ

WARDEN FLOURNOY, et al.,

Defendants.
_____/

ORDER

This cause is before the Court on Doc. 48, Defendant United States of America's Request to Extend the Defendants' Response Deadline. The Government requests a response deadline of 60 days to respond to Plaintiff's Third Amended Complaint. The Government advises that the Third Amended Complaint was served on March 24, 2014. The Court has directed service on the remaining defendants by separate order, and pursuant to that order they have 60 days from the date of service to respond.

Upon due consideration, it is **ORDERED:**

Defendant's request for extension of time, Doc. 48, is **GRANTED**. Defendant United States of America shall file a response to Plaintiff's Third Amended Complaint **on or before May 23, 2014.**

DONE AND ORDERED this 7th day of April 2014.

s/ Gary R. Jones
GARY R. JONES
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

vs. Case No: 4:13-cv-339-WS-GRJ

WARDEN FLOURNOY, et al.,

Defendants.
_____/

ORDER

This cause is before the Court on Doc. 62, Defendant United States of America's Request to Extend the Defendants' Response Deadline. The Government requests a response deadline of 60 days to respond to Plaintiff's Third Amended Complaint. The Government advises that the Third Amended Complaint was served on March 24, 2014. The Court has directed service on the remaining defendants by separate order, and pursuant to that order they have 60 days from the date of service to respond. The Government requests an extension until July 11, 2014 so that it can file a joint response to the Third Amended Complaint on behalf of all Defendants.

Upon due consideration, it is **ORDERED:**

Defendant's request for extension of time, Doc. 62, is **GRANTED**. Defendant United States of America shall file a response to Plaintiff's Third Amended Complaint **on or before July 11, 2014.**

DONE AND ORDERED this 27th day of May 2014.

s/ Gary R. Jones
GARY R. JONES
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

v. CASE NO. 4:13-cv-339-WS-GRJ

UNITED STATES OF AMERICA et al.,

Defendants.

_____/

ORDER

This matter is before the Court on Doc. 64, a notice from the U.S. Marshals Service that service was not executed on Defendant SIS Folks. The USMS advises that personal service was attempted on this defendant at FCI Tallahassee, but "No known person of Folks works there." (Doc. 64.) In addition, the U.S. Attorney representing the remaining defendants recently advised the Court that "upon information and belief, there is no one identified as 'SIS Folks' employed in the Special Investigations Services (SIS) Unit at the Federal Detention Center, in Tallahassee, Florida." (Doc. 62, p. 2.)

Despite being granted permission to proceed as a pauper in this case, Plaintiff is ultimately responsible for serving Defendants. Accordingly, the Court shall grant Plaintiff an opportunity to provide an address for Defendant SIS Folks to the Clerk of Court. Plaintiff is warned, however, pursuant to Fed. R. Civ. P. 4(m) "if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or order that

service be made within a specified time."

Accordingly, it is hereby **ORDERED:**

1. Plaintiff shall provide the Court with an address for Defendant Folks **on or before June 27, 2014.**

2. Failure to comply with this order will result in a recommendation to the district judge that this case be dismissed as to Defendant Folks.

DONE AND ORDERED this 28th day of May, 2014.

s/ Gary R. Jones
GARY R. JONES
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

v. 4:13cv339-WS

UNITED STATES OF AMERICA,
et al.,

Defendants.

ORDER ADOPTING THE MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Before the court is the magistrate judge's report and recommendation (doc. 74) docketed October 16, 2014. The magistrate judge recommends that the defendants' motion to dismiss or, in the alternative, for summary judgment be granted as to (1) the plaintiff's Eighth Amendment claims against the individual defendants, and (2) the plaintiff's FTCA claim against the United States with respect to the plaintiff's housing assignment in the Bureau of Prisons ("BOP"). The magistrate judge recommends that the defendants' motion be denied to the extent the plaintiff sues the United States for negligently failing to adhere to the BOP's

razor and search policies. The plaintiff has filed objections (doc. 76) to the report and recommendation.

Having reviewed the record in light of the plaintiff's objections, the court finds that the magistrate judge's report and recommendation should be adopted.[1] Accordingly, it is ORDERED:

1. With the exception of the discussion relating to exhaustion, the magistrate judge's report and recommendation (doc. 74) is ADOPTED and incorporated by reference into this order.

2. The defendants' motion to dismiss or, in the alternative, for summary judgment (doc. 66) is GRANTED as to all claims except the plaintiff's FTCA claim with respect to the BOP's razor and search policies.

3. The individual defendants—Warden Flournoy, Assistant Warden Smith, S.I.S. Folks, Acting Captain Wagner, Lt. White, Officer Chambers, Officer

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[1] The magistrate judge recommends that the plaintiff's Eighth Amendment claim against the individual defendants be dismissed for failure to exhaust administrative remedies *and* for failure to state a claim. This court agrees that the plaintiff has failed to state a claim under the Eighth Amendment. With regard to exhaustion, however, the court finds that the parties, through opposing affidavits, have created an issue of fact that cannot be resolved on the defendants' motion to dismiss or for summary judgment. The court accordingly declines to adopt the magistrate judge's report and recommendation to the extent the matter of exhaustion is addressed. In any event, the defendants are entitled to dismissal of the plaintiff's Eighth Amendment claim under Rule 12(b)(6).

Harvey, Officer Beach, and Officer Inge—are DISMISSED from this action.

4. The clerk shall remand the case to the magistrate judge for further proceedings.

DONE AND ORDERED this 10th day of December, 2014.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

v. Case No. 4:13-cv-339-WS-GRJ

UNITED STATES OF AMERICA,

Defendant.

ORDER TO ANSWER AND NOTICE TO PLAINTIFF

Plaintiff, a federal prisoner proceeding *pro se*, is proceeding in a First Amended civil rights Complaint naming the United States as the sole Defendant and alleging that prison guards failed to follow Bureau of Prisons policies regarding inspection of inmates, and as a result, he was attacked by one or more inmates with razor blades. (Doc. 7.) Although Plaintiff describes his claims as constitutional in nature, based on the facts as presented in the Complaint and the type of wrongdoing Plaintiff alleges, the Court construes his Complaint as an action under the Federal Tort Claims Act (FTCA) and will direct service on Plaintiff's behalf.

The Clerk shall serve the United States by sending a copy of the First Amended Complaint (hereafter "Complaint") (Doc. 7) and this Order by registered or certified mail to the civil process clerk at the office of the United States Attorney for the Northern District of Florida, Gainesville Division, and by sending a copy of the Complaint and this Order by registered or certified mail to the Attorney General of the United States, Washington, D.C. The Defendant shall have **SIXTY (60) DAYS** from the date of service of process in which to answer or otherwise respond to the Complaint.

Before counsel has appeared for Defendant, Plaintiff shall send to Defendant a copy of every further pleading, motion, or other paper filed by Plaintiff in this case. After counsel has appeared for Defendant, the copy shall be sent directly to counsel for Defendant, rather than to the Defendant personally. Plaintiff shall include with each pleading, motion, or other paper submitted to be filed a certificate stating the date that an accurate copy of the pleading, motion, or other paper was mailed to Defendant or counsel for Defendant. If any pleading, motion, or other paper submitted to be filed and considered by the Court does not include a certificate of service upon Defendant or counsel for Defendant, it will be **stricken** by the Court.

Plaintiff shall immediately advise the Court of any change of address. She shall entitle the paper "Notice to the Court of Change of Address" and not include any motions in it. This notice shall contain only information pertaining to the address change and the effective date of such.

Both parties shall insure that all exhibits accompanying any pleadings which they submit to the Court shall be individually marked for identification and a table of contents or index shall be included to aid the Court in location of such documentary exhibits.

If Defendant files a motion to dismiss, Plaintiff shall have **TWENTY (20) DAYS** to file her response to the motion to dismiss. *Pro se* Plaintiff is advised out of an abundance of caution[1] that the granting of this motion would represent an adjudication of this case which may foreclose subsequent litigation on the matter. If Defendant files

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[1] See Griffith v. Wainwright, 772 F.2d 822 (11th Cir. 1985), and Milburn v. United States, 734 F.2d 762 (11th Cir. 1984) wherein the Court expressed concern about pro se litigants in summary judgment cases.

a motion to dismiss that is supported by affidavits or other documents, the Court will construe the motion to dismiss as a motion for summary judgment, and Plaintiff shall have **TWENTY (20) DAYS** to file his response. If Defendant files a motion for summary judgment, Plaintiff shall have **TWENTY (20) DAYS** to file his response. In preparing a response to a motion to dismiss (construed as a motion for summary judgment), or a motion for summary judgment, Plaintiff should be aware of the provisions of Rule 56 of the Federal Rules of Civil Procedure.

Rule 56 provides that when a motion for summary judgment is supported by affidavits and/or other documents, the party opposing the motion may not depend upon the mere allegations in his pleadings to counter it. Pursuant to Rule 56, the party opposing the motion must respond with counter sworn affidavits and/or documents to set forth specific facts showing that there is a genuine issue of material fact in dispute. If the opposing party fails to respond to the motion or responds, but the response does not comply with the requirements of Rule 56 as stated above, the Court may declare that the facts in the affidavits and/or documents supporting the motion are established as true and that there is no genuine issue of material fact in dispute. In that event, if the applicable law allows, the party or parties who filed the motion will be entitled to have the motion granted and final judgment entered in his/their favor based upon the pleadings, affidavits, and other documentation. If the motion is granted, there will be no trial, and the case will be terminated in this Court.

DONE AND ORDERED this 9th day of September 2013.

s/ Gary R. Jones

GARY R. JONES
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,

Plaintiff,

v. Case No. 4:13-cv-339-WS-GRJ

UNITED STATES OF AMERICA,

Defendant.
_____/

O R D E R

Pending before the Court is Plaintiff's "Motion to Join Petitioners FTCA and Bivens Complaints and to Further Amend Joined Complaint Adding Additional Facts and Parties." (Doc. 21.) Plaintiff seeks to add additional Defendants and new claims not raised in his first amended complaint. (Doc. 7.) The Court directed service of the first amended complaint on September 9, 2013, and the docket reflects that the U.S. Attorney was served on September 19, 2013 and the U.S. Attorney General was served on September 20, 2013. (Docs. 17, 19, 20.) Fed. R. Civ. P. 15(a)(1) provides that a party may amend a pleading once as a matter of course within 21 days of serving it or, in the case of Plaintiff's complaint, within 21 days after service of an answer.

Upon due consideration of the motion, it is **ORDERED** that:

Plaintiff's motion to join parties and amend his complaint, Doc. 21, is **DENIED AS MOOT.** Plaintiff may amend his complaint in accord with Fed. R. Civ. P. 15.

DONE AND ORDERED this 27th day of September 2013.

s/ Gary R. Jones
GARY R. JONES
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JIMMY WAKEFIELD,
Plaintiff,

vs. **Case No. 04:13cv-339-WS/GRJ**

UNITED STATES OF AMERICA,
Defendant.
_____/

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF CLAIMS

Plaintiff, JIMMY WAKEFIELD, an individual, and Defendant, UNITED STATES OF AMERICA, through undersigned counsel, pursuant to 28 U.S .C. § 2677, hereby enter into this Stipulation for Compromise Settlement and Release of Personal Injury Claims and hereby stipulate and aver as follows:

1. The parties hereby agree to settle and compromise all issues raised in the Complaint, and any amendment thereto, filed by JIMMY WAKEFIELD ("Complaint") against Defendant, the UNITED STATES OF AMERICA, in case number: 04:13cv-339-WS/GRJ in accordance with the terms of this agreement.

2. Plaintiff brought this action pursuant to the Federal Tort Claims Act.

3. Defendant, the UNITED STATES OF AMERICA, without admitting any liability on any claim brought, wishes to avoid the uncertainty, expense and delay of litigation and is willing to compromise and settle all past, present and/or future claims that the Plaintiff have or may have against the Defendant that arise from, or relate to, the allegations set forth in the Complaint, and any amendment thereto. The Plaintiff, JIMMY WAKEFIELD, hereby waives and releases any and all claims against the Defendant, UNITED STATES OF AMERICA, with

prejudice. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, of Plaintiff against the Defendant, the UNITED STATES OF AMERICA and any of its agencies, agents, contractors or employees, in any way arising from or relating to the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

4. The parties stipulate and agree to the terms and conditions set forth below, as follows:

a. That the UNITED STATES OF AMERICA and Plaintiff have agreed to settle this case for the sum of TWENTY THOUSAND DOLLARS AND NO CENTS ($20,000.00). Any settlement payment will be sent to the Plaintiff to be deposited into the inmate account of JIMMY WAKEFIELD, Inmate Number 16902-056. Plaintiff assumes responsibility for the payment of any and all liens of any entity on the settlement funds. Plaintiff, JIMMY WAKEFIELD, and Defendant, UNITED STATES OF AMERICA, agree that payment of the above funds shall be in full settlement and satisfaction of all claims, demands, rights, and causes of action of whatsoever kind and nature which the Plaintiff, or any of Plaintiff's successors, now have or may hereafter acquire against the UNITED STATES OF AMERICA, or any of its agencies, agents, contractors or employees, on account of or caused by the circumstances giving rise to the cause of action alleged by Plaintiff in his Complaint, or any amendment thereto, in this matter.

b. Plaintiff agrees to accept the payment listed above by the UNITED STATES O.F AMERICA stated in paragraph 4(a.) above, in full satisfaction and settlement of all claims and demands of any kind, whether by statute or law, which the Plaintiff, or any of his successors, may have or may hereafter acquire against the UNITED STATES OF AMERICA or

any of its agencies, agents, contractors or employees based upon, or derived from any and all causes of action asserted in this civil action, and Plaintiff agrees to release all such claims and demands.

c. In consideration for the payments to be made as set out above, Plaintiff, and any of his successors, agree to reimburse, indemnify, and hold harmless the UNITED STATES OF AMERICA and any of its agencies, agents, contractors or employees, from and against any and all claims, causes of action, liens, rights, or subrogated or contribution interests (whether such claims, causes of action, liens, rights, subrogated interests, or contribution interests sound in tort, contract, or statute) incident to, or resulting or arising from, the acts or omissions that gave rise to the above-captioned action, including claims or causes of action for wrongful death.

5. Plaintiff, and any of his successors, further agree that he is responsible for satisfying or resolving any liens or claims for payment or reimbursement by any individual or by any public or private entity, including an insurance company, Medicaid, and Medicare, arising from the injuries and claims that are the subject matter of this action. Plaintiff, and any of his successors, stipulate and agree that they will satisfy or resolve any and all such liens or claims for payment or reimbursement asserted by any such individual or entity.

6. This Stipulation for Compromise Settlement and Release of Claims is not an admission of liability or fault on the part of the UNITED STATES OF AMERICA, or any of its agencies, agents, contractors or employees, and it is specifically denied that they are liable to any claimant or the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

7. It is also agreed, by and among the parties that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed will be paid out of the settlement amount and not in addition thereto. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

8. Plaintiff represents that he has thoroughly read and reviewed this Stipulation for Compromise Settlement and Release of Claims and voluntarily accepts and agrees to all of its provisions. This Stipulation fully sets forth the entire agreement between the parties and supersedes any and all prior agreements or understandings, oral or written, between the parties. The parties acknowledge that this Stipulation fully and completely resolves all disputes and claims between them, whether known or unknown, administrative or judicial.

9. It is contemplated that this Stipulation may be executed in counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 28th day of May, 2015.

BY: _____
JIMMY WAKEFIELD

STATE OF: PA

COUNTY OF: Wayne

I, Jimmy Wakefield, being first duly sworn, state under penalty of perjury that I have reviewed this stipulation agreement and my signature above indicates my agreement to be bound by the terms stated herein.

SWORN TO AND SUBSCRIBED before me this 28th day of May, 2015, by _____, who is personally known to me or has produced DOP identification card as identification.

_____
Notary Public

{seal}

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Matthew Lavelle, Notary Public
Canaan Twp., Wayne County
My Commission Expires April 22, 2019
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

Executed this 28 day of May, 2015.

BY: _____
PAMELA C. MARSH
United States Attorney
WINIFRED L. ACOSTA NESMITH
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Kenneth R. Withers,

Plaintiff,

v.

The United States of America;

Defendants.

COMPLAINT
2:13-cv-3051-RMG-BHH

Plaintiff, complaining of the Defendants named above, would respectfully show unto this Honorable Court as follows:

JURISDICTION AND VENUE

1. Plaintiff seeks damages from Defendants under the Federal Tort Claims Act. Accordingly, this Court has jurisdiction of this case pursuant to 28 U.S.C. § 1346(b)(1).

2. The location of acts pertinent to this suit occurred in Edgefield County, South Carolina, and in Clay County, Kentucky, and venue is therefore proper in this Court.

PARTIES

3. Plaintiff Kenneth R. Withers, is a resident of Edgefield County, South Carolina, and an inmate at the Federal Correctional Institution in Edgefield, South Carolina. Plaintiff previously was a resident of Clay County, Kentucky, and an inmate at the Federal Correctional Institution in Manchester, Kentucky.

4. Defendant is the United States of America.

FACTUAL ALLEGATIONS

5. Plaintiff Kenneth R. Withers has been incarcerated for a number of years in a federal prison.

6. Plaintiff was diagnosed with intraocular hypertension and glaucoma in or about 2005, and received ongoing medical treatment, including prescription eye medication, to treat the condition.

7. Regular and ongoing treatment, including the use of prescription eye medication, is necessary to treat glaucoma, a permanent and incurable disease of the eyes capable of causing vision loss and blindness when untreated.

8. Defendants, acting individually or by and through their employees and agents, stopped providing the necessary prescription eye medications to Plaintiff on or about May 24, 2011. Despite repeated requests from Plaintiff, Defendants failed to provide the medication to Plaintiff until on or about April 26, 2012.

9. During this eleven-month period, Defendants also refused or neglected to schedule an appointment for Plaintiff with an eye doctor to assess the propriety of discontinuing his glaucoma medication. During this time, Plaintiff complained repeatedly to both corrections staff and to medical personnel about the failure to provide treatment for his glaucoma.

10. Plaintiff repeatedly prepared Inmate Staff Requests seeking medical care and the reinstatement of prescription eye medications. His requests were delayed, ignored or denied.

11. Plaintiff appealed the denial to the Federal Bureau of Prisons' Southeast Regional Office and the Central Office. His appeals were delayed, ignored or denied.

12. Instead of providing necessary medical care, Defendants transferred Plaintiff from FCI Manchester to FCI Edgefield on or about January 3, 2012, further delaying necessary treatment.

FOR A FIRST CAUSE OF ACTION
Negligence / Gross Negligence
Against Defendant United States of America under Federal Tort Claims Act

13. The allegations set forth above, not inconsistent herein, are realleged and reiterated as if set forth verbatim.

14. Defendant United States of America owed Plaintiff a non-delegable duty to properly and adequately supervise, oversee, examine, monitor, review, and provide appropriate care and medical treatment to him while he was incarcerated by the Federal Bureau of Prisons.

15. Upon information and belief, Defendant, acting by and through its duly authorized employees or agents, breached its duties of care by acting in a manner that was negligent in one or more of the following ways:

a) Failing to treat Plaintiff's glaucoma and eye disease;

b) Failing to arrange for appropriate examination and treatment by an eye doctor during the time from May 24, 2011, to April 26, 2012;

c) Failing to obtain a second opinion following the inexplicable decision by the government's contact optometrist to discontinue the medication needed for treatment of plaintiff's glaucoma on or about May 24, 2011;

d) Failing to recognize that it's contract optometrist's opinion that Plaintiff's glaucoma condition was "resolved" was patently incorrect and inconsistent with the published literature regarding the course and treatment of glaucoma;

e) Failing to test Plaintiff's intraocular pressures to determine whether his glaucoma was being controlled without medication;

f) In failing to immediately restart Plaintiff's glaucoma mediations after testing his intraocular pressures on or about January 19, 2012;

g) In failing to regularly test and/or retest Plaintiff's intraocular pressures;

h) Failing to possess, maintain, and utilize proper equipment for testing his

intraocular pressures;

i) Failing to properly monitor and treat Plaintiff's glaucoma condition in accordance with the accepted medical standards;

j) Failing or refusing to timely provide appropriate medical care and treatment to Plaintiff;

k) In failing or refusing to timely provide appropriate medications to Plaintiff;

l) Failing to timely conduct a visual field examination as recommended by Dr. Jeffrey Magun on or about April 26, 2012, and otherwise failing to provide appropriate follow up vision care examinations and treatment from April 26, 2012, to the present;

m) Otherwise failing to use reasonable care in the management and exercise of custody over Plaintiff with regard to treatment for his vision care; and

n) In otherwise failing provide the care that a reasonable physician and healthcare provider would provide under the circumstances.

16. As a result of the negligent and wrongful acts of Defendant with regard to the denial of appropriate vision care, Plaintiff has sustained a permanent partial loss of vision in both eyes. Plaintiff has suffered and will continue in the future to suffer loss of vision, physical pain and suffering, mental anguish, emotional distress, loss of enjoyment of life, lost earning capacity, and expenses for medical care.

WHEREFORE, having fully set forth his Complaint, Plaintiff prays for judgment against Defendant for actual damages in the amount of $5,000,000, the costs of this action, and for any such other and further relief as the Court may deem just and proper.

PROFFITT & COX, LLP

s/Ronald B. Cox

Ronald B. Cox, No. 6756
rcox@proffittcox.com
David Proffitt, No. 7503
dproffitt@proffittcox.com
8910 Two Notch Road, Suite 400
Columbia, SC 29223
Tel: (803) 834-7097
Fax: (888) 711-1057

Attorneys for Plaintiffs

November 7, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Kenneth R. Withers,	)	Civil Action No. 2:13-3051-RMG-BHH
	)	
Plaintiff,	)	
	)	
v.	)	**CONFERENCE AND SCHEDULING ORDER**
	)	
The United States of America,	)	
	)	
Defendant.	)	

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following schedule is established for this case. Discovery may begin upon receipt of this order.

1. A conference of the parties pursuant to Fed. R. Civ. P. 26(f) shall be held no later than **February 11, 2014**.[1] At conference the parties shall confer concerning all matters set forth in Fed. R. Civ. P. 26(f) and whether the schedule set forth in this order is appropriate and, if not, what modifications are necessary.[2]

2. No later than **February 25, 2014**, the required initial disclosures under Fed. R. Civ. P. 26(a)(1) shall be made.[3]

3. No later than **February 25, 2014**, the parties shall file a Rule 26(f) Report in the form attached to this order. Parties are hereby notified that Local Civil Rule 26.03 lists additional queries to be answered in the Rule 26(f) Report.

4. Motions to join other parties and amend the pleadings (Fed. R. Civ. P. 16(b)(3)(A)) shall be filed no later than **March 18, 2014**.

5. Plaintiff(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Plaintiff(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **April 17, 2014**. For all other

---

[1]Plaintiff's counsel shall initiate the scheduling of the Rule 26(f) conference with all counsel known to plaintiff regardless of whether they have filed appearances.

[2]The parties shall also consider whether they wish to consent to trial before a United States Magistrate Judge. See attached Notice of Availability of United States Magistrate Judge.

[3]Pursuant to Fed. R. Civ. P. 26(a)(1), the parties may, by stipulation, agree not to make some or all of the Rule 26(a)(1) initial disclosures. If such a stipulation is made, it shall be confirmed in writing between the parties. See Fed. R. Civ. P. 29 and Local Civil Rule 29.01.

expert witnesses, counsel should make the disclosures required by Fed. R. Civ. P. 26(a)(2)(C) by **April 17, 2014**.

6. Defendant(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Defendant(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **May 19, 2014**. For all other expert witnesses, counsel should make the disclosures required by Fed. R. Civ. P. 26(a)(2)(C) by **May 19, 2014**.

7. Counsel shall file and serve affidavits of records custodian witnesses proposed to be presented by affidavit at trial no later than **May 19, 2014**. Objections to such affidavits must be made within fourteen (14) days after the service of the disclosure. (See Fed. R. Evid. 803(6), 902(11), or 902(12) and Local Civil Rule 16.02(D)(3)).

8. Discovery shall be completed no later than **July 18, 2014**. All discovery requests shall be served in time for the responses thereto to be served by this date. De bene esse depositions must be completed by discovery deadline. No motions relating to discovery shall be filed until counsel have consulted and attempted to resolve the matter as required by Local Civil Rule 7.02.

9. Mediation shall be completed in this case on or before **July 18, 2014**. See Attached form setting forth mediation requirements. At least thirty (30) days prior to this mediation deadline, counsel for each party shall file and serve a statement certifying that counsel has: (1) provided the party with a copy of the mediation requirements; (2) discussed the availability of mediation with the party; and (3) discussed the timing of mediation with opposing counsel.

10. All other motions, except those to complete discovery, those nonwaivable motions made pursuant to Fed. R. Civ. P. 12, and those relating to the admissibility of evidence at trial, shall be filed on or before **August 18, 2014**. (Fed. R. Civ. P. 16(b)(3)(A)).

s/Bruce Howe Hendricks
United States Magistrate Judge

January 21, 2014
Charleston, South Carolina

Pursuant to Local Civil Rule 83.I.06, this order is being sent to local counsel only.

Attachments:
1) Rule 26(f) Report Form;
2) Notice of Availability of United States Magistrate Judge;
3) Mediation Initiation Form;
4) Mediation Requirements.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Kenneth R. Withers,	)	Civil Action No.: 2:13-3051-RMG-BHH
	)	
Plaintiff,	)	
	)	
v.	)	**RULE 26(f) REPORT**
	)	
The United States of America,	)	
	)	
	)	
Defendant.	)	

The parties, having consulted pursuant to Rule 26(f), Fed. R. Civ. P., hereby report as follows (check one below):

_____ We agree that the schedule set forth in the Conference and Scheduling Order filed_____ is appropriate for this case. **The parties' proposed discovery plan as required by Fed. R. Civ. P. Rule 26(f) and the information required by Local Civil Rule 26.03 will be separately filed by the parties.**

_____ We agree that the schedule set forth in the Conference and Scheduling Order filed _____ requires modification as set forth in the proposed Consent Amended Scheduling Order which will be e-mailed to chambers as required (use format of the Court's standard scheduling order). **The parties' proposed discovery plan as required by Fed. R. Civ. P. Rule 26(f) and the information required by Local Civil Rule 26.03 will be separately filed by the parties.**

_____ We are unable, after consultation, to agree on a schedule for this case. We, therefore, request a scheduling conference with the Court. **The parties' proposed discovery plan as required by 26(f) Fed. R. Civ. P., with disagreements noted, and the information required by Local Civil Rule 26.03 will be separately filed by the parties.**

(SIGNATURE PAGE ATTACHED)

PLAINTIFF(S)

DEFENDANT(S)

_____
Signature of Plaintiff's Counsel

_____
Printed Name of Plaintiff's Counsel and Party Represented

_____
Signature of Plaintiff's Counsel

_____
Printed Name of Plaintiff's Counsel and Party Represented

_____
Signature of Plaintiff's Counsel

_____
Printed Name of Plaintiff's Counsel and Party Represented

_____
Signature of Plaintiff's Counsel

_____
Printed Name of Plaintiff's Counsel and Party Represented

Dated: _____

_____
Signature of Defendant's Counsel

_____
Printed Name of Defendant's Counsel and Party Represented

_____
Signature of Defendant's Counsel

_____
Printed Name of Defendant's Counsel and Party Represented

_____
Signature of Defendant's Counsel

_____
Printed Name of Defendant's Counsel and Party Represented

_____
Signature of Defendant's Counsel

_____
Printed Name of Defendant's Counsel and Party Represented

Dated: _____

UNITED STATES DISTRICT COURT
for the
District of South Carolina

Kenneth R. Withers, Plaintiff v. The United States of America, Defendant	))))))	Civil Action No. 2:13-3051-RMG-BHH

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The following parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.

Parties' printed names	Signatures of parties or attorneys	Dates
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Reference Order

IT IS ORDERED: This case is referred to a United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Date: _____

_____
District Judge's signature

_____
Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

MEDIATION INITIATION FORM

Case: _____,

C/A No. _____

Please check the applicable box to indicate the status of the above referenced case:

- ❑ case settled prior to or without mediation
- ❑ case dismissed by court or pending ruling on summary judgment motion
- ❑ case to proceed to trial
- ❑ case continued to next term

OR

- ❑ case will be or has been mediated *(complete the following information):*

Mediator Name: _____Mediator Phone No._____

Date Mediation Scheduled to Occur *or* Date Mediation Completed:_____

Submitted by:_____
Signature:_____.
(Printed name of counsel)

For which party?:_____
Date:_____
(Name of party counsel represents)

Please fax completed form to Danny Mullis, ADR Program Director @ 843-579-1434 or mail to P.O. Box 835, Charleston, SC 29402.

IN THE UNITED STATES DISTRICT COURT)
FOR THE DISTRICT OF SOUTH CAROLINA)

MEDIATION REQUIREMENTS

Mediation is to be scheduled and completed in all cases, including those cases involving unrepresented parties. Mediation shall be completed by the date indicated in the scheduling order. A Mediation Initiation Form is attached for your use. Upon completion of the mediation, counsel shall advise the Court in writing only that the mediation has occurred, the date of the mediation, whether the case was settled in whole or in part, and whether a trial is required.

The parties should select a mediator consistent with Local Rule 16.06 D.S.C. A roster of certified mediators is available from the Clerk of Court or may be accessed under the Mediation heading at http://www.scd.uscourts.gov/cases.htm.

All parties and their lead trial counsel, having authority to settle and to adjust pre-existing settlement authority if necessary, are required to attend the mediation in person unless excused by the Court for good cause shown. Insurer representatives with decision-making authority also are required to attend in person, unless excused by the Court, if their agreement would be necessary to achieve a settlement. Every person who is excused from attending in person must be available to participate by telephone, unless otherwise ordered. At the mediation, parties, their insurer representatives and their primary trial counsel should be prepared to participate in a mutual, good faith effort to negotiate a fair and reasonable settlement. All necessary discovery should be completed prior to mediation. Lack of discovery or settlement authority is no excuse for failure to appear and/or participate. See Local Rule 16.09 D.S.C.

This form has been provided to all counsel of record and to all pro se parties. Counsel are responsible for notifying and ensuring the presence of parties and insurer representatives as described above. If a case has been mediated previously, counsel shall notify the Court immediately in writing.

Communications made in connection with or during the mediation are confidential and protected by Federal Rule of Evidence 408 and Federal Rule of Civil Procedure 68. If a settlement is not reached at mediation, settlement discussions are neither admissible at trial nor to be disclosed to the presiding judge. See Local Rule 16.08(C) D.S.C.

If any reason exists why any party or counsel should not participate in this mediation, the Court is to be advised of these reasons in writing immediately.

Any questions concerning the selection of a mediator or the mediation process generally should be referred to the court's ADR Program Director, Danny Mullis, at (843) 579-1435.

Bruce Howe Hendricks
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

KENNETH R. WITHERS,	)	Civil Action No. 2:13-03051-RMG-BHH
	)	
Plaintiff,	)	
	)	
v.	)	**AMENDED**
	)	**SCHEDULING ORDER**
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following schedule is established for this case.

1. No later than **February 25, 2014,** the required initial disclosures under Fed. R. Civ. P. 26(a)(1) shall be made.[1]

2. No later than **February 25, 2014,** the parties shall file a Rule 26(f) Report in the form attached to this order. Parties are hereby notified that Local Civil Rule 26.03 lists additional queries to be answered in the Rule 26(f) Report.

3. Motions to amend the pleadings (Fed. R. Civ. P. 16(b)(3)(A)) shall be filed no later than **March 18, 2014.**

4. Plaintiff(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Plaintiff(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **May 19, 2014**. For all other expert witnesses, counsel should make the disclosures required by Fed. R. Civ. P. 26(a)(2)(C) by **May 19, 2014**.

5. Defendant(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Defendant(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **June 18, 2014**. For all other expert witnesses, counsel should make the disclosures required by Fed. R. Civ. P. 26(a)(2)(C) by **June 18, 2014**.

---

[1] Pursuant to Fed. R. Civ. P. 26(a)(1), the parties may, by stipulation, agree not to make some or all of the Rule 26(a)(1) initial disclosures. If such a stipulation is made, it shall be confirmed in writing between the parties. See Fed. R. Civ. P. 29 and Local Civil Rule 29.01.

6. Counsel shall file and serve affidavits of records custodian witnesses proposed to be presented by affidavit at trial no later than **June 18, 2014**. Objections to such affidavits must be made within fourteen (14) days after the service of the disclosure. (See Fed. R. Evid. 803(6), 902(11), or 902(12) and Local Civil Rule 16.02(D)(3)).

7. Discovery shall be completed no later than **August 18, 2014**. All discovery requests shall be served in time for the responses thereto to be served by this date. De bene esse depositions must be completed by discovery deadline. No motions relating to discovery shall be filed until counsel have consulted and attempted to resolve the matter as required by Local Civil Rule 7.02.

8. Mediation shall be completed in this case on or before **August 18, 2014**. See Attached form setting forth mediation requirements. At least thirty (30) days prior to this mediation deadline, counsel for each party shall file and serve a statement certifying that counsel has: (1) provided the party with a copy of the mediation requirements; (2) discussed the availability of mediation with the party; and (3) discussed the timing of mediation with opposing counsel.

9. All other motions, except those to complete discovery, those nonwaivable motions made pursuant to Fed. R. Civ. P. 12, and those relating to the admissibility of evidence at trial, shall be filed on or before **September 17, 2014**. (Fed. R. Civ. P. 16(b)(2)).

s/Bruce Howe Hendricks
United States Magistrate Judge

February 10, 2014
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Kenneth R. Withers,	)	Civil Action No. 2:13-cv-03051-RMG-BHH
	)	
Plaintiff(s),	)	
	)	
v.	)	**SECOND AMENDED SCHEDULING ORDER**
	)	
The United States of America,	)	
	)	
Defendant(s).	)	

Pursuant to the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, the following amended schedule is established for this case.

1. Plaintiff(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Plaintiff(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **June 19, 2014**. For all other expert witnesses, counsel should make the disclosures required by Fed. R. Civ. P. 26(a)(2)(C) by **June 19, 2014**.

2. Defendant(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Defendant(s) expects to call as an expert at trial and certifying that a written report prepared and signed by the expert including all information required by Fed. R. Civ. P. 26(a)(2)(B) has been disclosed to other parties by **July 18, 2014**. For all other expert witnesses, counsel should make the disclosures required by Fed. R. Civ. P. 26(a)(2)(C) by **July 18, 2014**.

3. Counsel shall file and serve affidavits of records custodian witnesses proposed to be presented by affidavit at trial no later than **July 18, 2014**. Objections to such affidavits must be made within fourteen (14) days after the service of the disclosure. (See Fed. R. Evid. 803(6), 902(11), or 902(12) and Local Civil Rule 16.02(D)(3)).

4. Discovery shall be completed no later than **August 18, 2014**. All discovery requests shall be served in time for the responses thereto to be served by this date. De bene esse depositions must be completed by discovery deadline. No motions relating to discovery shall be filed until counsel have consulted and attempted to resolve the matter as required by Local Civil Rule 7.02.

5. Mediation shall be completed in this case on or before **August 18, 2014**. At least thirty (30) days prior to this mediation deadline, counsel for each party shall file and serve a statement certifying that counsel has: (1) provided the party with a copy of the mediation requirements; (2) discussed the availability of mediation with the party; and (3) discussed the timing of

mediation with opposing counsel.

6. All other motions, except those to complete discovery, those nonwaivable motions made pursuant to Fed. R. Civ. P. 12, and those relating to the admissibility of evidence at trial, shall be filed on or before **September 19, 2014**. (Fed. R. Civ. P. 16(b)(3)(A)).

s/Bruce Howe Hendricks
United States Magistrate Judge

May 13, 2014
Charleston, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

KENNETH R. WITHERS,	)	Civil Action No. 2:13-03051-RMG-WWD
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

THIRD AMENDED SCHEDULING ORDER

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of this Court, the Second Amended Scheduling Order in this case (ECF No. 16) is hereby amended as follows:

1. Discovery shall be completed no later than **October 2, 2014**. All discovery requests shall be served in time for the responses thereto to be served by this date. De bene esse depositions must be completed by discovery deadline. No motions relating to discovery shall be filed until counsel have consulted and attempted to resolve the matter as required by Local Civil Rule 7.02.

2. Mediation shall be completed in this case on or before **October 2, 2014**. At least thirty (30) days prior to this mediation deadline, counsel for each party shall file and serve a statement certifying that counsel has: (1) provided the party with a copy of the mediation requirements; (2) discussed the availability of mediation with the party; and (3) discussed the timing of mediation with opposing counsel.

3. All other motions, except those to complete discovery, those nonwaivable motions made pursuant to Fed. R. Civ. P. 12, and those relating to the admissibility of evidence at trial, shall be filed on or before **November 3, 2014**. (Fed. R. Civ. P. 16(b)(3)(A)).

WALLACE W. DIXON
UNITED STATES MAGISTRATE JUDGE

Charleston, South Carolina

August 19, 2014.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

KENNETH R. WITHERS,	)	Civil Action No. 2:13-cv-03051-RMG-WWD
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

FOURTH AMENDED SCHEDULING ORDER

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of this Court, the Third Amended Scheduling Order in this case (ECF No. 26) is hereby amended as follows:

1. Mediation shall be completed in this case on or before **October 7, 2014**. At least thirty (30) days prior to this mediation deadline, counsel for each party shall file and serve a statement certifying that counsel has: (1) provided the party with a copy of the mediation requirements; (2) discussed the availability of mediation with the party; and (3) discussed the timing of mediation with opposing counsel.

2. Discovery shall be completed no later than **November 17, 2014**. All discovery requests shall be served in time for the responses thereto to be served by this date. De bene esse depositions must be completed by discovery deadline. No motions relating to discovery shall be filed until counsel have consulted and attempted to resolve the matter as required by Local Civil Rule 7.02.

3. All other motions, except those to complete discovery, those nonwaivable motions made pursuant to Fed. R. Civ. P. 12, and those relating to the admissibility of evidence at trial, shall be filed on or before **December 18, 2014**. (Fed. R. Civ. P. 16(b)(3)(A)).

WALLACE W. DIXON
UNITED STATES MAGISTRATE JUDGE

Charleston, South Carolina

September 30, 2014.

RECEIVED
USDC, FLORENCE, SC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

2014 NOV 17 A 9:39

Kenneth R. Withers,	)	Civil Action No. 2:13-cv-03051-RMG
	)	
Plaintiff(s),	)	
	)	
-vs-	)	
	)	**ORDER OF DISMISSAL**
The United States of America.	)	
	)	
Defendant(s).	)	

The court having been advised by counsel for the parties that the above action has been settled,

IT IS ORDERED that this action is hereby dismissed without prejudice. If settlement is not consummated within sixty (60) days, either party may petition the Court to reopen this action and restore it to the calendar. Fed. R. Civ. P. 60(b). In the alternative, to the extent permitted by law, either party may within sixty (60) days petition the Court to enforce the settlement. Fairfax Countywide Citizens v. Fairfax Cnty., 571 F.2d 1299 (4th Cir. 1978). The dismissal hereunder shall be with prejudice if no action is taken under either alternative within (60) days from the filing date of this order.

AND IT IS SO ORDERED.

November 17, 2014
Charleston, South Carolina

Richard M. Gergel
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Kenneth R. Withers,	)	Civil Action No. 2.13-cv-03051-RMG-WWD
	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
United States of America,	)	
	)	
Defendant	)	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. ' 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of Ninety Thousand Dollars, ($90,000.00) which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his

guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank: First Community Bank

B. Street Address of Bank: 9822 Two Notch Road

C. City, State and Zip Code of Bank: Columbia, SC 29223

D. Federal Reserve Number: (b)(6)

E. Routing Number: (b)(6)

F. Name of Account: Proffitt & Cox, LLP Trust Account

G. Account Number: (b)(6)

Plaintiff's attorney agrees to distribute the settlement proceeds among the plaintiffs, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. ' 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 31st day of October, 2014

Barbara M. Bowens, Civil Chief
Attorney for Defendant,
United States of America

Executed this 29th day of October, 2014

Ronald B. Cox
Attorneys for Plaintiff

Executed this 29TH day of October, 2014

Kenneth R. Withers
Plaintiff

Page 1254 of 1341

Withheld pursuant to exemption

(b)(5)

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Withheld pursuant to exemption

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Page 1276 of 1341

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HOWARD BRONS	)(	
	)(	
Plaintiff	)(	
	)(	**Civil Action** _____
v.	)(	
	)(	
UNITED STATES OF AMERICA	)(	
Defendant	)(	

COMPLAINT FOR DAMAGES

COMES NOW Plaintiff and shows this Honorable Court as follows:

JURISDICTIONAL STATEMENTS

1.

Plaintiff, **HOWARD BRONS**, resides at 3432 Laura Ridge Rd. Nashville, TN 37167.

2.

The claims brought herein are brought against the defendant, the **United States of America**, are pursuant to the Federal Torts Claims Act, (28 U.S.C. §2671, *et seq.*) and 28 U.S.C. §§1346(b)(1), for money damages as compensation for personal injuries that were caused by the negligent and wrongful acts of employees and agents of the United States Government while acting within the scope of their offices and employment, under circumstances where the United States, if a private person, would be liable to the Plaintiff in accordance with the laws of the State of Georgia.

3.

Venue is proper in that all, or a substantial part of the acts and forming the basis of these claims occurred in the Northern District of Georgia, and arose from the negligent hiring and retention of Dr. Lewis Jackson (hereinafter "Dr. Jackson") at the U.S. Penitentiary in Atlanta, GA.

4.

Plaintiff has fully complied with the provisions of 28 U.S.C. §2675 of the Federal Tort Claims Act attached as Exhibit 1.

5.

This suit has been timely filed, in that Plaintiff timely served notice of his claim on The United States Department of Justice on or about April 2013. As of the date of this complaint, Defendant has denied liability.

FACTUAL STATEMENTS

6.

Paragraphs one through five are incorporated herein.

7.

On or about September 26, 2011, Plaintiff was an inmate at a U.S. Penitentiary in Atlanta, Georgia.

8.

On or about September 26, 2011, Plaintiff sought medical attention for psoriasis on his genitalia from the prison physician and federal employee, Dr. Lewis Jackson.

9.

On or about October 12, 2011, during a follow up medical attention visit Dr. Jackson, the prison physician, questioned Plaintiff about his genitalia and asked if

there was any "redness" when Plaintiff masturbated and began to engage in a sexual act by touching Plaintiff's penis with his hands.

10.

On or about October 12, 2011 Dr. Jackson continued to engage in a sexual act by touching Plaintiff's penis with his mouth and began preforming oral sex.

11.

At all times Plaintiff was in official detention and under the custodial, supervisory, and disciplinary authority of Defendant.

12.

At all times during the incident Dr. Jackson was an employee of the federal government.

13.

Dr. Jackson engaged in similar conduct to that performed on Mr. Brons with at least two other inmates at the same facility.

14.

The United States of America was or should have been aware of the similar conduct and incident involving Mr. Brons.

15.

At all times prior to the incident involving Mr. Brons, the United States of America was responsible for performing a back ground search on Dr. Jackson.

16.

The United States of America failed to perform a proper back ground search of Dr. Jackson.

17.

Had the United States of America performed a cursory back ground pre-employment and/or post-employment back ground review of Dr. Jackson they would have found that he was under prosecution at the time of the acts against Mr. Brons.

18.

At all times subsequent to the incidents involving Mr. Brons and others the United States of America was responsible for retention of Dr. Jackson.

19.

On or about November 26, 2012, Dr. Jackson plead guilty to three counts of Sexual Abuse of a Ward for conduct while he was a physician in the federal prison in Atlanta.

20.

On or about July 25, 2012, a criminal case 2012 CF2 012893 against Dr. Lewis Jackson was filed in the District of Columbia.

21.

On or about January 15, 2013, Dr. Jackson plead guilty to criminal case 2012 CF2 012893 for conduct while he was a physician in the DC jail.

COUNT I NEGLIGENT HIRING

22.

Paragraphs one through eighteen are incorporated herein.

23.

Defendant owed a duty to Plaintiff to exercise ordinary care in the selection of employees and not retain them when it has knowledge of incompetency and/or history of improper acts toward others.

24.

Defendant breached its duty when it hired Dr. Jackson with knowledge that he had assaulted an inmate in Washington D.C in or about 2008, prior to his hire date with the United States of America.

25.

As a direct and proximate result of the negligent conduct described herein, Plaintiff has suffered severe emotional and mental distress until the present, and will continue to experience mental and emotional anguish from said injuries into the future.

COUNT II NEGLIGENT RETENTION

26.

Paragraphs one through twenty five are incorporated herein.

27.

In 2008 Dr. Lewis Jackson was a physician at a federal prison in the District of Columbia wherein he violated an inmate by performing a series of sexual acts on him.

28.

In 2010 Dr. Lewis Jackson was a physician at a federal prison in Atlanta, Ga wherein he violated inmate Julius Leroy Harrison by performing a series of sexual acts upon him.

29.

Defendant knew, or should have known, that Dr. Jackson would have the propensity to sexually engage with another inmate given that he had forcefully attempted to do so with at least two (2) other inmates prior to Plaintiff and that he had done so prior to employment with the United States of America.

COUNT III RESPONDEAT SUPERIOR

30.

Paragraphs one through twenty nine are incorporated herein.

31.

Defendant United States of America employed Dr. Lewis Jackson to perform services at the Federal penitentiary.

32.

Defendant United States of America is responsible for the actions of Dr. Lewis Jackson as taken while an employee at the federal penitentiary.

COUNT IV RESPONDEAT SUPERIOR two

33.

Paragraphs one through thirty three are incorporated herein.

34.

Defendant United States of America employed human resources personnel among others to research, evaluate and investigate the back ground of such employees like Dr. Lewis Jackson.

35.

Defendant United States of America employed human resources personnel among others to monitor, supervise, and evaluate the work of such employees like Dr. Lewis Jackson.

36.

Defendant United States of America is responsible for the actions of those employees that research, evaluate and investigate the back ground of such employees like Dr. Lewis Jackson and/or monitor, supervise, and evaluate Dr. Lewis Jackson while an employee at the federal penitentiary.

COUNT V. DAMAGES

37.

Paragraphs one through thirty seven are incorporated herein

38.

As a direct and proximate result of the negligent conduct described herein, Plaintiff has suffered severe emotional and mental distress until the present, and will continue to experience mental and emotional anguish from said injuries into the future.

39.

The Plaintiff has incurred and will continue to incur medical expenses and treatment for his injury for which he seeks compensation from Defendant in the form of special and general damages.

WHEREFORE, Plaintiff prays for relief as shown as follows:

(a) For service of process to issue;

(b) For Judgment in his favor for general and special damages in the amount of one million dollars ($1,000,000.00);

(c) For an award of attorneys' fees and costs pursuant to 28 U.S.C.A. § 2412; and

(d) For whatever the court deems just.

Respectfully Submitted,

This 25 day of March, 2014,

Law Offices of Timothy J. Santelli, PC
s/Timothy J. Santelli__
Timothy J. Santelli
Georgia Bar Number 626166

The Law Offices of Timothy Santelli, P.C.
P.O. Box 19713
Atlanta, Ga 30325
(404) 351 – 8259(p)
(404) 577 – 2293(f)
santellilaw@bellsouth.net

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HOWARD BRONS	)(	
	)(	
Plaintiff	)(	
	)(	**Civil Action** _____
v.	)(	
	)(	
UNITED STATES OF AMERICA	)(	
Defendant	)(	

CERTIFICATION

Pursuant to LR 7.1 (D) ND GA., I certify that this document has been prepared in Times New Roman Font 14 point as approved by the Court in LR 5.1B, NDGA.

Law Offices of Timothy J. Santelli, PC
s/Timothy J. Santelli
Timothy J. Santelli
Georgia Bar Number 626166

The Law Offices of Timothy Santelli, P.C.
P.O. Box 19713
Atlanta, Ga 30325
(404) 351 – 8259(p)
(404) 577 – 2293(f)
santellilaw@bellsouth.net

Exhibit 1

CLAIM FOR DAMAGE, INJURY, OR DEATH	**INSTRUCTIONS:** Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit to Appropriate Federal Agency:	2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code.
Federal Bureau of Prisons: USP Atlanta	Howard Brons: 3432 Laura Ridge Rd. Nashville,TN 37167 Attorney: Timothy Santelli: P.O. Box 19713 Atlanta, Ga 30325

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
☐ MILITARY ☒ CIVILIAN	08/05/1981	Single	10/12/2011	5:00 pm

8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).

See Attached Sheet

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

None

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side).

None

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT.

See attached sheet

11. **WITNESSES**

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
Howard Brons (father of Claimant)	3432 Laura Ridge Rd. Nashville,TN 37167
Officer Rivera of Office of Inspector General	401 West Peachtree St NW, Atlanta, GA 30308
See attached sheet for additional persons	

12. (See instructions on reverse). **AMOUNT OF CLAIM** (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).
0.00	1,000,000	0.00	1,000,000

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side).	13b. PHONE NUMBER OF PERSON SIGNING FORM	14. DATE OF SIGNATURE
H. Howard Brons	615-968-0092	04-11-13

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).	Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

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95-109

NSN 7540-00-634-4046

STANDARD FORM 95 (REV. 2/2007)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of the vehicle or property.

15. Do you carry accident insurance? ☐ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☒ No

16. Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible? ☐ Yes ☒ No

17. If deductible, state amount.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☒ No

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

***(d)* Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.**

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid."

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, DC 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

Continuation of Question 8
Basis of Claim

1. On September 26, 2011, Claimant, Howard Brons, was an inmate at a U.S. Penitentiary in Atlanta, Georgia.
2. On or about September 26, 2011, Claimant sought medical attention for psoriasis on his genitalia from the prison physician and federal employee, Dr. Lewis Jackson. *See* Bureau of Prisons Health Services dated 09/26/2011 (hereinafter "Exhibit 1").
3. During this visit Dr. Jackson proscribed a topical cream and ordered Mr. Brons, to return for follow up treatment. *See* Exhibit 1.
4. On or about October 12, 2011, during the follow up visit Dr. Jackson questioned Claimant about his genitalia and asked if there was any "redness" when Mr. Brons masturbated.

5. Dr. Jackson then began to engage in a sexual act by touching Mr. Brons penis with his hands. *See* United States of America v. Lewis Jackson Grand Jury Charges, paragraphs #1 thru 6 (hereinafter "Exhibit 2");

a. See also Factual Proffer In Support of Guilty Plea, (hereinafter "Exhibit 3").
b. See also Victim notification statements dated 11/15/2012, 12/5/2012, and 2/4/2013 (hereinafter "Exhibit 4").

6. Dr. Jackson continued to engage in a sexual act by touching Mr. Brons penis with his mouth and began preforming oral sex. *See* Exhibits 2, 3, and 4.

7. As a direct result of the heinous acts described above, Mr. Brons has suffered damages described in question 10 and realleged herein.

Question 10
Personal Injury/Wrongful Death

1. Due to the heinous acts described in question 8 and realleged herein, Mr. Brons has suffered serious emotional distress which has manifested itself in physical symptoms. *See* Bureau of Prisons Health Services Clinical Encounter 11/02/2011, "Subjective complaint" pg 1; (hereinafter "Exhibit 5");

a. *See also* Consent to Use of Tricycle Antidepressant Medication 11/02/2011, (hereinafter "Exhibit 6");

b. *See also* Bureau of Prisons Health Services Clinical Encounter 12/02/2011 "Health Problems" pg 1 (hereinafter "Exhibit 7")

c. *See also* Bureau of Prisons Health Services Health Screen "Renew Medication Order" 12/20/2011 pg 4 (hereinafter "Exhibit 8").

c. *See also* Bureau of Prisons Health Services, Clinical Encounter, "Subjective Complaint", 12/23/2011 pg 1 (hereinafter "Exhibit 9").

d. *See also* Medication Administration Record 11/03/2011 thru 07/23/2011 (hereinafter "Exhibit 10"),

2. On or about October 2011 thru January 2012, Mr. Brons entered into a depression which caused him insomnia, anxiety, racing thoughts which caused him to bite his nails off, erratic moods swings, appetite suppression, and decreased energy. *See Exhibits 6 thru 10.*

3. OCGA § 34-7-20 states in part that "an employer must exercise ordinary care in the selection of employees, must not retain them after "knowledge of incompetency," and must warn other employees of dangers incident to employment that "the employer knows or ought to know but which are unknown to the employee." *See also* Tecumseh Products Co., Inc. v. Rigdon, 552 S.E.2d 910, 912 (Ga. Ap. Ct. 2001).

4. At the time of this heinous act, the Federal Bureau of Prisoners knew or should have known that Dr. Jackson, had previously assaulted another inmate in Washington D.C. in 2008. See also Juluis Leroy Harrison v. Dr. Lewis Jackson M.D., J.A. Keller, U.S.A pg 6 (hereinafter "Exhibit 2").

5. At the time of the assault, the Federal Bureau of Prisoners knew or should have known that Dr. Jackson, a federal employee, had violated three other inmates prior to the sexual act with Mr. Brons.

6. As a direct proximate result of the Federal Bureau of Prisoners reckless and negligent conduct described herein, Mr. Brons incurred severe injuries.

7. As a direct and proximate result of the reckless and negligent conduct described herein, Mr. Brons has suffered depression, anxiety, insomnia, lack of appetite and energy, and Mr. Brons manifesting these symptoms by biting his nails off.

Question 11

Additional Witnesses

1. Assistant U.S. Attorney Kurt R. Erskine
   75 Spring St. S.W.
   Suite 600
   Atlanta, GA 30303

2. Dr. R. Martinez, federal doctor at YAZ federal prison
   FCI Yazoo City Medium
   Federal Correctional Institution
   P.O. Box 5888
   Yazoo City, MS 39194

U.S. Department of Justice

Federal Bureau of Prisons

Southeast Regional Office

3800 Camp Creek Pkwy., SW., Bldg. 2000
Atlanta, Georgia 30331-6226

October 30, 2013

CERTIFIED MAIL
7011 1150 0001 4362 8402

Law Offices of Timothy J. Santelli. P.C.
Attorney at Law
P.O. Box 19713
Atlanta, GA 30325

RE: Administrative Claim Number TRT-SER-2013-04636
BRONS, Howard – Federal Register No. 16352-075

Dear Claimant:

Your claim has been considered for administrative settlement under the Federal Tort Claims Act (FTCA), Title 28 United States Code (U.S.C.) Section 2672 et seq., and authority granted by Title 28 Code of Federal Regulations (C.F.R.) Section 0.172. Section 2672 of the FTCA delegates to each federal agency the authority to consider, determine and settle any claim for money damages against the United States for loss of personal property or injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment.

You allege that on or about October 12, 2011, a physician employed by the Federal Bureau of Prisons (BOP) at the United States Penitentiary in Atlanta, Georgia, (USP Atlanta), engaged in a sexual act with Claimant Howard Brons, Federal Register Number 16352-075. You contend that the BOP either knew or should have known that this physician posed a threat to your client. Therefore, you maintain that the United States is liable on the basis of negligent hiring and retention. You assert that as a result of this alleged negligent conduct, Mr. Brons has suffered depression, anxiety, insomnia, lack of appetite and energy, and that the he manifests these symptoms by biting his nails. You are seeking $1,000,000 as compensation for his alleged personal injuries.

Your FTCA claim has been investigated. Our investigation could not establish that Mr. Brons suffered an injury caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of their office or employment. Based on the foregoing, your claim is denied. You are advised that if you are dissatisfied with our determination in this matter, you are afforded six (6) months from the date of mailing of this communication within which to bring an FTCA lawsuit in the appropriate United States District Court.

Sincerely,

Craig A. Simmons
Deputy Regional Counsel

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Georgia

Howard Brons
910 Nancy Dr.
Murpheysboro, Tn. 37129

Plaintiff(s)

v.

Civil Action No.

United States of America
Attorney General Eric Holder
950 Pennsylvania Ave.
Washington, DC 20530

Defendant(s)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States of America
Attorney General Eric Holder
950 Pennsylvania Ave.
Washington, DC 20530

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Timothy J. Santelli
P.O. Box 19713
Atlanta, Ga. 30325

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 03/25/2014

Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)*

was received by me on *(date)* .

❒ I personally served the summons on the individual at *(place)*

on *(date)* ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)*

, a person of suitable age and discretion who resides there,

on *(date)* , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* , who is

designated by law to accept service of process on behalf of *(name of organization)*

on *(date)* ; or

❒ I returned the summons unexecuted because ; or

❒ Other *(specify):*

My fees are $ for travel and $ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date:

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Georgia

Howard Brons
910 Nancy Dr.
Murpheysboro, Tn. 37129

Plaintiff(s)

v.

Civil Action No.

United States of America
Attorney General Eric Holder
950 Pennsylvania Ave.
Washington, DC 20530

Defendant(s)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Crai Simmons
Deputy Regional Counsel
Federal Board of Prisons
3800 Camp Creek Parkway, SW
Bldg 2000
Atlanta, Ga. 30331

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Timothy J. Santelli
P.O. Box 19713
Atlanta, Ga. 30325

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 03/25/2014

Signature of Clerk or Deputy Clerk

Civil Action No.

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was received by me on *(date)* .

❒ I personally served the summons on the individual at *(place)*

on *(date)* ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)*

, a person of suitable age and discretion who resides there,

on *(date)* , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* , who is

designated by law to accept service of process on behalf of *(name of organization)*

on *(date)* ; or

❒ I returned the summons unexecuted because ; or

❒ Other *(specify):*

My fees are $ for travel and $ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date:

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

JS44 (Rev. 1/13 NDGA)

CIVIL COVER SHEET

The JS44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket record. (SEE INSTRUCTIONS ATTACHED)

I. (a) PLAINTIFF(S)

Howard Brons
910 Nancy Dr.
Murpheysboro, Tn. 37129

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Rutherford County
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANT(S)

United States of America
Attorney General Eric Holder
950 Pennsylvania Ave.
Washington, DC 20530

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, TELEPHONE NUMBER, AND E-MAIL ADDRESS)

Timothy J. Santelli
P.O. Box 19713
Atlanta, Ga. 30325
404-351-8259
santellilaw@bellsouth.net

ATTORNEYS (IF KNOWN)

Attorney General Eric Holder
950 Pennsylvania Ave.
Washington, DC 20530

II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. GOVERNMENT PLAINTIFF
- ☐ 3 FEDERAL QUESTION (U.S. GOVERNMENT NOT A PARTY)
- ■ 2 U.S. GOVERNMENT DEFENDANT
- ☐ 4 DIVERSITY (INDICATE CITIZENSHIP OF PARTIES IN ITEM III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)
(FOR DIVERSITY CASES ONLY)

PLF	DEF		PLF	DEF	
☐ 1	☐ 1	CITIZEN OF THIS STATE	☐ 4	☐ 4	INCORPORATED OR PRINCIPAL PLACE OF BUSINESS IN THIS STATE
☐ 2	☐ 2	CITIZEN OF ANOTHER STATE	☐ 5	☐ 5	INCORPORATED AND PRINCIPAL STATE
☐ 3	☐ 3	CITIZEN OR SUBJECT OF A	☐	☐	

IV. ORIGIN (PLACE AN "X "IN ONE BOX ONLY)

■ 1 ORIGINAL PROCEEDING ☐ 2 REMOVED FROM STATE COURT ☐ 3 REMANDED FROM APPELLATE COURT ☐ 4 REINSTATED OR REOPENED ☐ 5 TRANSFERRED FROM ANOTHER DISTRICT (Specify District) ☐ 6 MULTIDISTRICT LITIGATION ☐ 7 APPEAL TO DISTRICT JUDGE FROM MAGISTRATE JUDGE JUDGMENT

V. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE - DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

28 U.S.C 2671 Federal Torts Claim Act

(IF COMPLEX, CHECK REASON BELOW)

- ☐ 1. Unusually large number of parties.
- ☐ 2. Unusually large number of claims or defenses.
- ☐ 3. Factual issues are exceptionally complex
- ☐ 4. Greater than normal volume of evidence.
- ☐ 5. Extended discovery period is needed.
- ☐ 6. Problems locating or preserving evidence
- ☐ 7. Pending parallel investigations or actions by government.
- ☐ 8. Multiple use of experts.
- ☐ 9. Need for discovery outside United States boundaries.
- ☐ 10. Existence of highly technical issues and proof.

CONTINUED ON REVERSE

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT $ _____ APPLYING IFP _____ MAG. JUDGE (IFP) _____

JUDGE _____ MAG. JUDGE _____ (Referral) NATURE _____ _____

VI. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT - "0" MONTHS DISCOVERY TRACK
- ☐ 150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT
- ☐ 152 RECOVERY OF DEFAULTED STUDENT LOANS (Excl. Veterans)
- ☐ 153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS

CONTRACT - "4" MONTHS DISCOVERY TRACK
- ☐ 110 INSURANCE
- ☐ 120 MARINE
- ☐ 130 MILLER ACT
- ☐ 140 NEGOTIABLE INSTRUMENT
- ☐ 151 MEDICARE ACT
- ☐ 160 STOCKHOLDERS' SUITS
- ☐ 190 OTHER CONTRACT
- ☐ 195 CONTRACT PRODUCT LIABILITY
- ☐ 196 FRANCHISE

REAL PROPERTY - "4" MONTHS DISCOVERY TRACK
- ☐ 210 LAND CONDEMNATION
- ☐ 220 FORECLOSURE
- ☐ 230 RENT LEASE & EJECTMENT
- ☐ 240 TORTS TO LAND
- ☐ 245 TORT PRODUCT LIABILITY
- ☐ 290 ALL OTHER REAL PROPERTY

TORTS - PERSONAL INJURY - "4" MONTHS DISCOVERY TRACK
- ☐ 310 AIRPLANE
- ☐ 315 AIRPLANE PRODUCT LIABILITY
- ☐ 320 ASSAULT, LIBEL & SLANDER
- ☐ 330 FEDERAL EMPLOYERS' LIABILITY
- ☐ 340 MARINE
- ☐ 345 MARINE PRODUCT LIABILITY
- ☐ 350 MOTOR VEHICLE
- ☐ 355 MOTOR VEHICLE PRODUCT LIABILITY
- ■ 360 OTHER PERSONAL INJURY
- ☐ 362 PERSONAL INJURY - MEDICAL MALPRACTICE
- ☐ 365 PERSONAL INJURY - PRODUCT LIABILITY
- ☐ 367 PERSONAL INJURY - HEALTH CARE/ PHARMACEUTICAL PRODUCT LIABILITY
- ☐ 368 ASBESTOS PERSONAL INJURY PRODUCT LIABILITY

TORTS - PERSONAL PROPERTY - "4" MONTHS DISCOVERY TRACK
- ☐ 370 OTHER FRAUD
- ☐ 371 TRUTH IN LENDING
- ☐ 380 OTHER PERSONAL PROPERTY DAMAGE
- ☐ 385 PROPERTY DAMAGE PRODUCT LIABILITY

BANKRUPTCY - "0" MONTHS DISCOVERY TRACK
- ☐ 422 APPEAL 28 USC 158
- ☐ 423 WITHDRAWAL 28 USC 157

CIVIL RIGHTS - "4" MONTHS DISCOVERY TRACK
- ☐ 441 VOTING
- ☐ 442 EMPLOYMENT
- ☐ 443 HOUSING/ ACCOMMODATIONS
- ☐ 444 WELFARE
- ☐ 440 OTHER CIVIL RIGHTS
- ☐ 445 AMERICANS with DISABILITIES - Employment
- ☐ 446 AMERICANS with DISABILITIES - Other
- ☐ 448 EDUCATION

IMMIGRATION - "0" MONTHS DISCOVERY TRACK
- ☐ 462 NATURALIZATION APPLICATION
- ☐ 465 OTHER IMMIGRATION ACTIONS

PRISONER PETITIONS - "0" MONTHS DISCOVERY TRACK
- ☐ 463 HABEAS CORPUS- Alien Detainee
- ☐ 510 MOTIONS TO VACATE SENTENCE
- ☐ 530 HABEAS CORPUS
- ☐ 535 HABEAS CORPUS DEATH PENALTY
- ☐ 540 MANDAMUS & OTHER
- ☐ 550 CIVIL RIGHTS - Filed Pro se
- ☐ 555 PRISON CONDITION(S) - Filed Pro se
- ☐ 560 CIVIL DETAINEE: CONDITIONS OF CONFINEMENT

PRISONER PETITIONS - "4" MONTHS DISCOVERY TRACK
- ☐ 550 CIVIL RIGHTS - Filed by Counsel
- ☐ 555 PRISON CONDITION(S) - Filed by Counsel

FORFEITURE/PENALTY - "4" MONTHS DISCOVERY TRACK
- ☐ 625 DRUG RELATED SEIZURE OF PROPERTY 21 USC 881
- ☐ 690 OTHER

LABOR - "4" MONTHS DISCOVERY TRACK
- ☐ 710 FAIR LABOR STANDARDS ACT
- ☐ 720 LABOR/MGMT. RELATIONS
- ☐ 740 RAILWAY LABOR ACT
- ☐ 751 FAMILY and MEDICAL LEAVE ACT
- ☐ 790 OTHER LABOR LITIGATION
- ☐ 791 EMPL. RET. INC. SECURITY ACT

PROPERTY RIGHTS - "4" MONTHS DISCOVERY TRACK
- ☐ 820 COPYRIGHTS
- ☐ 840 TRADEMARK

PROPERTY RIGHTS - "8" MONTHS DISCOVERY TRACK
- ☐ 830 PATENT

SOCIAL SECURITY - "0" MONTHS DISCOVERY TRACK
- ☐ 861 HIA (1395ff)
- ☐ 862 BLACK LUNG (923)
- ☐ 863 DIWC (405(g))
- ☐ 863 DIWW (405(g))
- ☐ 864 SSID TITLE XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS - "4" MONTHS DISCOVERY TRACK
- ☐ 870 TAXES (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - THIRD PARTY 26 USC 7609

OTHER STATUTES - "4" MONTHS DISCOVERY TRACK
- ☐ 375 FALSE CLAIMS ACT
- ☐ 400 STATE REAPPORTIONMENT
- ☐ 430 BANKS AND BANKING
- ☐ 450 COMMERCE/ICC RATES/ETC.
- ☐ 460 DEPORTATION
- ☐ 470 RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
- ☐ 480 CONSUMER CREDIT
- ☐ 490 CABLE/SATELLITE TV
- ☐ 891 AGRICULTURAL ACTS
- ☐ 893 ENVIRONMENTAL MATTERS
- ☐ 895 FREEDOM OF INFORMATION ACT
- ☐ 950 CONSTITUTIONALITY OF STATE STATUTES
- ☐ 890 OTHER STATUTORY ACTIONS
- ☐ 899 ADMINISTRATIVE PROCEDURES ACT / REVIEW OR APPEAL OF AGENCY DECISION

OTHER STATUTES - "8" MONTHS DISCOVERY TRACK
- ☐ 410 ANTITRUST
- ☐ 850 SECURITIES / COMMODITIES / EXCHANGE

OTHER STATUTES - "0" MONTHS DISCOVERY TRACK
- ☐ 896 ARBITRATION (Confirm / Vacate / Order / Modify)

*** PLEASE NOTE DISCOVERY TRACK FOR EACH CASE TYPE. SEE LOCAL RULE 26.3**

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF CLASS ACTION UNDER F.R.Civ.P. 23 DEMAND $_____

JURY DEMAND ☐ YES ■ NO (CHECK YES ONLY IF DEMANDED IN COMPLAINT)

VIII. RELATED/REFILED CASE(S) IF ANY

JUDGE_____ DOCKET NO._____

CIVIL CASES ARE DEEMED RELATED IF THE PENDING CASE INVOLVES: (CHECK APPROPRIATE BOX)
- ☐ 1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- ☐ 2. SAME ISSUE OF FACT OR ARISES OUT OF THE SAME EVENT OR TRANSACTION INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- ☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK INCLUDED IN AN EARLIER NUMBERED PENDING SUIT.
- ☐ 4. APPEALS ARISING OUT OF THE SAME BANKRUPTCY CASE AND ANY CASE RELATED THERETO WHICH HAVE BEEN DECIDED BY THE SAME BANKRUPTCY JUDGE.
- ☐ 5. REPETITIVE CASES FILED BY PRO SE LITIGANTS.
- ☐ 6. COMPANION OR RELATED CASE TO CASE(S) BEING SIMULTANEOUSLY FILED (INCLUDE ABBREVIATED STYLE OF OTHER CASE(S)):
- ☐ 7. EITHER SAME OR ALL OF THE PARTIES AND ISSUES IN THIS CASE WERE PREVIOUSLY INVOLVED IN CASE NO. _____, WHICH WAS DISMISSED. This case ☐ IS ☐ IS NOT (check one box) SUBSTANTIALLY THE SAME CASE.

Timothy J. Santelli 03/25/2014

SIGNATURE OF ATTORNEY OF RECORD DATE

Page 1298 of 1341

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

HOWARD BRONS,	)(	
	)(	
Plaintiff,	)(	**CIVIL ACTION NO.**
	)(	**1:14-CV-00864-WSD**
v.	)(	
	)(	
UNITED STATES OF AMERICA,	)(	
Defendant.	)(	

STIPULATION OF DISMISSAL

The parties hereby stipulate pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure that the above-captioned action is voluntarily dismissed with prejudice and without costs or fees to either party.

Respectfully submitted this 1st day of December, 2015.

/s Timothy J. Santelli

Timothy J. Santelli
Law Offices of Timothy J. Santelli, P.C.
P.O. Box 19713
Atlanta, GA 30325

/s Lisa Cooper

Lisa Cooper
Assistant US Attorney
600 Richard B. Russell Building
75 Ted Turner Drive
Atlanta, GA 30303

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

HOWARD BRONS,	)(	
	)(	
Plaintiff,	)(	**CIVIL ACTION NO.**
	)(	**1:14-CV-00864-WSD**
v.	)(	
	)(	
UNITED STATES OF AMERICA,	)(	
Defendant.	)(	

CERTIFICATION

Pursuant to L.R. 7.1(D) Northern District of Georgia, I certify that this document has been prepared in Times Roman Font 14 as approved by the Court in L.R. 5.1B Northern District of Georgia.

Law Offices of Timothy J. Santelli, P.C.

/s Timothy J. Santelli
TIMOTHY J. SANTELLI
Attorney for Plaintiff
Georgia State Bar No. 626166

Law Office of Timothy J. Santelli, PC
P.O. Box 19713
Atlanta, GA 30325
Telephone: (404) 351-8259
Facsimile: (404) 577-2293

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

HOWARD BRONS,	)(	
	)(	
Plaintiff,	)(	**CIVIL ACTION NO.**
	)(	**1:14-CV-00864-WSD**
v.	)(	
	)(	
UNITED STATES OF AMERICA,	)(	
Defendant.	)(	

CERTIFICATE OF SERVICE

I hereby certify that on the this date, I electronically filed the foregoing STIPULATION OF DISMISSAL with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record as follows:

Lisa Cooper
Assistant US Attorney
600 Richard B. Russell Building
75 Ted Turner Drive
Atlanta, GA 30303

This 1st day of December, 2015.

Law Offices of Timothy J. Santelli, P.C.

/s **Timothy J. Santelli**
TIMOTHY J. SANTELLI

Attorney for Plaintiff
Georgia State Bar No. 626166

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HOWARD BRONS,

Plaintiff,

v. **1:14-cv-00864-WSD**

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER

This matter is before the Court on the United States of America's ("Defendant") Motion to Dismiss [8] Howard Brons's ("Plaintiff") Complaint [1] for lack of subject-matter jurisdiction, and failure to state a claim upon which relief can be granted.

I. BACKGROUND

On March 25, 2014, Plaintiff filed against Defendant a four-count Complaint, in which he asserted claims for (1) negligent hiring, (2) negligent retention, (3) respondeat superior, and (4) "[r]espondeat superior two." In 2011, Plaintiff was an inmate at the United States Penitentiary in Atlanta, Georgia ("Penitentiary"). Plaintiff alleges that, on September 26, 2011, he was examined by Dr. Lewis Jackson ("Jackson"), a physician at the Penitentiary, in connection

with psoriasis on Plaintiff's genitalia. Plaintiff claims that, on October 12, 2011, Jackson asked Plaintiff "if there was any 'redness' when Plaintiff masturbated and [Jackson] began to engage in a sexual act by touching Plaintiff's penis with his hands." Compl. at ¶ 9. During this incident, Plaintiff states that Jackson continued to "engage in a sexual act by touching Plaintiff's penis with his mouth and began performing oral sex." Id. at ¶ 10. Plaintiff asserts that Jackson sexually assaulted at least two other inmates at the Penitentiary. Id. at ¶ 13.

On July 25, 2012, Jackson was indicted, in the District of Columbia ("D.C."), for sexually abusing an inmate in November 2008 at the Department of Corrections in D.C. Id. at ¶ 25. On January 15, 2013, Jackson pled guilty to those charges.

On August 28, 2012, Jackson was indicted, in the Northern District of Georgia, for making false statements to federal agents, and sexually abusing three inmates at the Penitentiary in October 2011. On November 26, 2012, Jackson pled guilty to the sexual abuse charges in this Court. See United States v. Jackson, No. 1:12-cr-00287-AT-AJB (N.D. Ga. 2012).

Based on these alleged facts, Plaintiff claims that, when Defendant hired Jackson sometime before October 12, 2011, Defendant failed to conduct "a cursory background pre-employment and/or post-employment background review of

Dr. Jackson," which, Plaintiff alleges, would have revealed that Jackson "was under prosecution at the time of the acts against [Plaintiff]." Id. at ¶ 17. Plaintiff asserts that Defendant breached its duty when it hired Jackson with knowledge that he assaulted an inmate in Washington, D.C., in or about 2008, "prior to his hire date with the United States of America." Id. at ¶ 24. Plaintiff alleges that "Dr. Lewis Jackson was a physician at a federal prison in the District of Columbia wherein he violated an inmate by performing a series of sexual acts upon him." Id. at ¶ 27. Plaintiff also alleges that "[i]n 2010 Dr. Lewis Jackson was a physician at a federal prison in Atlanta, Ga wherein he violated inmate Julius Leroy Harrison by performing a series of sexual acts upon him." Id. at ¶ 28.

On June 30, 2014, Defendant moved to dismiss the Complaint on the grounds that the Court does not have subject-matter jurisdiction to address Plaintiff's negligent hiring and negligent retention claims. Defendant argues that the decisions to hire, supervise and retain employees are "discretionary function[s]" of the United States that are not permitted to be brought under the Federal Tort Claims Act ("FTCA"). Defendant also argues that Plaintiff's respondeat superior claims are required to be dismissed because, under Georgia law, an employer is not vicariously liable for an employee's sexual misconduct when the employee's alleged acts are not within the employee's scope of

employment. Defendant also asserts that, under Georgia law, an employer cannot be vicariously liable for the negligent acts of its human resources personnel.

II. DISCUSSION

A. Legal Standard

1. Motion to Dismiss for Lack of Subject-Matter Jurisdiction

A motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure may be either a "facial" or "factual" attack. Morrison v. Amway Corp., 323 F.3d 920, 924-25 n.5 (11th Cir. 2003). In a facial attack on subject-matter jurisdiction, the Amended Complaint's allegations are deemed presumptively truthful, and the "court is required merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction." Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc., 524 F.3d 1229, 1233 (11th Cir. 2008) (citations omitted).

Factual attacks challenge subject-matter jurisdiction in fact, irrespective of the pleadings. Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel, 657 F.3d 1159, 1169 (11th Cir. 2011) (citations omitted). When resolving a factual attack, the Court may consider extrinsic evidence such as testimony and affidavits. Id. In a factual attack, the Court may independently weigh the facts and it is not "constrained to view them in the light most favorable to the

non-movant." Id. The plaintiff has the burden to prove that jurisdiction exists, including that the discretionary function exception does not apply. Slappery v. U.S. Army Corps of Engs., 571 F. App'x 855, 856 (11th Cir. 2014). The plaintiff is required to produce facts that support the existence of subject-matter jurisdiction by a preponderance of the evidence. Hobbs v. Blue Cross Blue Shield of Ala., 276 F.3d 1236, 1242 (11th Cir. 2001).

In evaluating a factual attack, the Court is not required to apply a Rule 56 summary judgment standard unless the jurisdictional basis of a claim is intertwined with the merits of the claim. Id. "[J]urisdiction becomes intertwined with the merits of a cause of action when a statute provides the basis for both the subject-matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." Morrison, 323 F.3d 926. Here, jurisdiction is not intertwined with the merits of Plaintiff's claims because the FTCA governs the subject-matter jurisdiction of the Court, and Plaintiff's substantive claims are based on Georgia negligence law. See Odyssey, 657 F.3d at 1170. The Court thus applies the Rule 12(b)(1) standard for factual challenges to subject-matter jurisdiction. Under a Rule 12(b)(1) standard, the Court is not required to view the facts in a light favorable to the plaintiff, or draw all inferences in plaintiff's favor, as it would under Rule 12(b)(6) or Rule 56, and the Court is free to independently weight the

facts. See Scarfo v. Ginsberg, 175 F. 3d 957, 961 (11th Cir. 1999); see also Odyssey, 657 F.3d at 1169 (on appeal, district court's determination of facts is reviewed for clear error).

The Court deems Defendant's Motion a facial and factual attack on the Complaint. It is considered a factual attack to the extent the Court was presented with and considered facts extrinsic to the Complaint, such as the date that Jackson was indicted in the Northern District of Georgia for sexual abuse.

2. Motion to Dismiss for Failure to State a Claim

Dismissal of a complaint, pursuant to Rule 12(b)(6), is appropriate "when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993). In considering a motion to dismiss, the Court accepts the plaintiff's allegations as true and considers the allegations in the complaint in the light most favorable to the plaintiff. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007); see also Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). The Court is not required to accept a plaintiff's legal conclusions as true. See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)),

abrogated on other grounds by Mohamad v. Palestinian Auth., — U.S. —, 132 S. Ct. 1702 (2012). The Court does not "accept as true a legal conclusion couched as a factual allegation." See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The complaint, ultimately, is required to contain "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.[1]

To state a plausible claim for relief, the plaintiff must plead factual content that "allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. "Plausibility" requires more than a "sheer possibility that a defendant has acted unlawfully," and a complaint that alleges facts that are "merely consistent with" liability "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (citing Twombly, 550 U.S. at 557); see also Arthur v. JP Morgan Chase Bank, NA, 569 F. App'x 669, 680 (11th Cir. 2014) (noting that Conley's "no set of facts" standard has been overruled by Twombly, and a complaint must contain "sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its

[1] The Supreme Court explicitly rejected its earlier formulation for the Rule 12(b)(6) pleading standard: "'[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Twombly, 550 U.S. at 577 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

face."). "A complaint is insufficient if it 'tenders naked assertions devoid of further factual enhancement.'" Tropic Ocean Airways, Inc. v. Floyd, — F. App'x —, No. 14-12424, 2014 WL 7373625, at *1 (11th Cir. Dec. 30, 2014) (quoting Iqbal, 556 U.S. at 678).

"To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims." Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1263 (11th Cir. 2004); see also White v. Bank of America, NA, — F. App'x —, No. 14-10318, 2014 WL 7356447, at *2 (11th Cir. Dec. 29, 2014) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.") (quoting Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002)).[2]

[2] Federal Rule of Civil Procedure 8(a)(2) requires the plaintiff to state "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In Twombly, the Supreme Court recognized the liberal minimal standards imposed by Federal Rule 8(a)(2) but also acknowledged that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." Twombly, 550 U.S. at 555.

B. Analysis

1. Negligent Hiring and Retention (Counts I and II)

The United States, in the FTCA, waives its sovereign immunity from liability for certain negligent acts committed by employees of the United States. Ochran v. United States, 117 F.3d 495, 499 (11th Cir. 1997). The United States does not waive its sovereign immunity for claims based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. § 2680(a). In determining if the "discretionary function" exception applies, the Court evaluates whether the federal employee's actions were (1) discretionary in nature, and (2) based on considerations of public policy. Cosby v. U.S. Marshals Service, 520 F. App'x 819, 820 (11th Cir. 2013). The first prong of the "discretionary function" exception is met unless "a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow." Id. (internal quotation marks and citations omitted). In the second prong, "the focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." Id.

Courts have consistently held that governmental action regarding employment and termination are an exercise of policy judgment and fall within the

discretionary function exception to the FTCA's waiver of sovereign immunity.[3] LeRose v. United States, 285 F. App'x 93, 97 (4th Cir. 2008); Sydnes v. United States, 523 F.3d 1179, 1185-86 (10th Cir. 2008); Bolduc v. United States, 402 F.3d 50, 60-62 (1st Cir. 2005); Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1217 (D.C. Cir. 1997); Tonelli v. United States, 60 F.3d 492, 496 (8th Cir. 1995). There is, however, at least in one Circuit, an exception to this general rule.

In Tonelli, the Eighth Circuit considered whether the "discretionary function" exception applied when the United States "fails to act when it had notice of illegal behavior." 60 F.3d at 496. The Eighth Circuit observed that "[f]ailure to act after notice of illegal action does not represent a choice based on plausible policy considerations," and found that the exception did not apply. Id. The Court concludes that Tonelli is consistent with our Circuit's consideration of the "discretionary function" exception in other types of cases and its reasoning would be followed in our Circuit. The Eight Circuit's reasoning in Tonelli may apply here because the facts alleged in Plaintiff's Complaint plausibly support that Defendant knew, or should have known, that Jackson was a sexual predator when Jackson was hired in 2011. Jackson is alleged to have sexually assaulted an inmate

[3] The Eleventh Circuit has not addressed this sovereign immunity issue directly.

at a "federal prison in the District of Columbia." Compl. at ¶ 27. Plaintiff also alleges that "[i]n 2010 [] Jackson was a physician at a federal prison in Atlanta Ga wherein he violated inmate Julius Leroy Harrison by performing a series of sexual acts upon him." Id. at ¶ 28. Plaintiff alleges that Defendant hired Jackson knowing about a sexual assault by Jackson on an inmate in or about 2008 in D.C., and hired, or retained, Jackson knowing about a sexual assault on an inmate, in 2010, in Atlanta.[4]

These alleged facts, which the Court considers to be true, support at this stage of the proceedings that the BOP's decision to hire, supervise and retain Jackson as a medical professional at the Penitentiary may not be protected by the discretionary function exception if the BOP failed to act after it knew, or had reason to know, that Jackson, in 2008 and 2010, sexually assaulted inmates in D.C. and Atlanta. After committing these alleged sexual assaults on inmates, Jackson was hired and retained by the Penitentiary in Atlanta. Three years after the first alleged sexual assault by Jackson on an inmate, Plaintiff alleges, Jackson sexually assaulted him while Plaintiff was an inmate at the Penitentiary. Whether these

[4] Jackson's alleged sexual abuse of an inmate in D.C. occurred before he was hired at the Penitentiary in Atlanta. Even if the 2010 Atlanta incident occurred at the same federal prison at which Plaintiff alleges he was assaulted and after Jackson was hired, the Court finds that the 2008 incident at the federal institution in D.C. is sufficient to invoke the reasoning and application of Torelli.

prior sexual assaults in D.C. and Atlanta were known, or should have been known, to the Government before it hired or retained Jackson at the Penitentiary is a disputed issue of fact. In considering Defendant's Motion to Dismiss as a facial and factual attack on the Complaint, the Court finds that the Complaint contains plausible allegations that Defendant may have acted negligently in hiring and retaining Jackson at the Penitentiary. If the facts show that Defendant knew, or had reason to know, that Jackson was a sexual predator, it is possible that Defendant is not entitled to the rely on the "discretionary function" exception to the FTCA. Defendant's Motion to Dismiss Plaintiff's claims for negligent hiring and negligent retention is denied.

2. Respondeat Superior Liability for Jackson's Conduct (Count III)

Count III of the Complaint alleges that Defendant is vicariously liable for Jackson's sexual misconduct at the Penitentiary. Under the FTCA, Defendant waives its sovereign immunity for

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). Georgia law thus determines whether Plaintiff can state a respondeat superior claim against the United States based on the October 12, 2011, sexual assault, alleged to have occurred in Georgia. See Bennett v. United States, 102 F.3d 486, 489 (11th Cir. 1996).

In Georgia, an employer is liable for torts committed by its employee if the employee acted (1) within the scope of the employer's business, and (2) in furtherance of the employer's business. Piedmont Hospital, Inc. v. Palladino, 580 S.E.2d 215, 217 (Ga. 2003). An employer is not liable for a tortious act committed by an employee "for purely personal reasons disconnected from the authorized business of the [employer]." Id. (internal quotation marks and citations omitted).

In Palladino, an employee of Piedmont Hospital ("Piedmont") was authorized to "check the plaintiff's groin area for any bleeding or complications, clean the area, and, if necessary, move [the plaintiff's] testicles in order to perform these tasks." Id. at 216. Piedmont's employee allegedly rubbed the plaintiff's penis with both hands, and placed his mouth near the penis. Id. The Georgia Supreme Court held that the employee's acts "(1) were committed for purely personal reasons associated solely with [the employee's] own gratification, and (2) were entirely disconnected from the scope of [his] employment with Piedmont []." Id. at 217. The Georgia Supreme Court also held that the

employee's actions were not in furtherance of Piedmont's business because the employee was not authorized to sexually stimulate the plaintiff's genitals. Id. at 218.

Jackson's alleged sexual assault on Plaintiff was outside the scope of his employment with the BOP because he committed the acts for his own sexual gratification. Jackson's actions also were not in furtherance of the BOP's business because he was not authorized to sexually stimulate Plaintiff's genitalia with his hands or his mouth. Count III of the Complaint is required to be dismissed.

3. Respondeat Superior Liability for Alleged Human Resources Negligence (Count IV)

Count IV of the Complaint asserts a claim against Defendant for the alleged negligence of human resources ("HR") personnel in failing to "monitor, supervise and evaluate the work" of Jackson. Plaintiff contends that Defendant "is responsible for the actions of those employees that research, evaluate and investigate the background of such employees like [Jackson] and/or monitor, supervise, and evaluate [Jackson] while an employee at the [Penitentiary]." Compl. at ¶ 36.

Defendant argues that, under Georgia law, an employer cannot be vicariously liable for the negligent acts of its HR personnel. Defendant's argument is based on a misinterpretation of a footnote in Doe v. Fulton-DeKalb Hosp. Auth.,

628 F.3d 1325, 1335 n.25 (11th Cir. 2010). In footnote 25, the Eleventh Circuit expressed doubt whether Georgia law allows a plaintiff to hold an individual employee in an HR department liable as a joint tort-feasor for the alleged negligence of an employee hired and vetted by the HR department. Id. In the same footnote, the Eleventh Circuit notes that it did not question the well-established principle that, under Georgia law, "negligence of an employee may expose an *employer* to liability under the theory of respondeat superior." Id.

Here, Plaintiff does not seek to impose liability on individual HR personnel. Plaintiff claims that Defendant—as the employer of Jackson and HR personnel—is liable, under a respondeat superior theory, for the negligence of its HR personnel in selecting and retaining Jackson at the Penitentiary. Because it is alleged that Jackson sexually assaulted an inmate in D.C. in 2008 and in Atlanta in 2010, and was hired and retained by the Penitentiary despite committing sexual misconduct in the past, the Complaint asserts a plausible respondeat superior claim against Defendant for the alleged negligence of its HR personnel in selecting and retaining Jackson. Defendant's Motion to Dismiss Count IV of the Complaint is denied.

III. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss [8] is

GRANTED IN PART and **DENIED IN PART**. It is **GRANTED** with respect to Plaintiff's respondeat superior claim, based on Jackson's conduct, in Count III. It is **DENIED** with respect to Defendant's argument that the Court lacks subject-matter jurisdiction over Plaintiff's negligent hiring and negligent retention claims in Counts I and II, and Plaintiff's respondeat superior claim, based on alleged human resources negligence, in Count IV.

SO ORDERED this 12th day of February, 2015.

William S. Duffey

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HOWARD BRONS,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	
vs.	:	1:14-CV-0864-WSD
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. ' 2677

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to settle this matter for thirteen thousand seven hundred and fifty dollars ($13,750.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and

personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff.

This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount will be made by check drawn on the Treasury of the United States for thirteen thousand seven hundred and fifty dollars ($13,750) and made payable to Howard Brons, plaintiff, and the Law Offices of Timothy J. Santelli, PC, plaintiff's attorney. The check will be mailed to plaintiff's attorney at the following address:

Law Offices of Timothy J. Santelli, PC
PO Box 19713
Atlanta, GA 30325

Plaintiff's attorney agrees to distribute the settlement proceeds to plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional

agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. ' 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Howard Brons Plaintiff	Date
Timothy J. Santelli Attorney for Plaintiff	Date
Darcy F. Coty Assistant United States Attorney Attorney for the United States of America	Date

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Attorneys for Plaintiff,
DEANNA HOUSTON

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEANNA HOUSTON, an individual,

Plaintiff,

vs.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, JULIO MACIAS, and DOES 1 through 50,

Defendants.

Case No. CV08-01076 PJW (SHx)

COMPLAINT

(Federal Tort Claims Act, 28 U.S.C.§2674); *Bivens* type action

[DEMAND FOR TRIAL BY JURY]

Plaintiff DEANNA HOUSTON herein alleges:

I.

PARTIES

1. Plaintiff, DEANNA HOUSTON, an individual, is and at all times mentioned herein was, a resident of the State of California, and within the boundaries of the Central District of the State of California. Plaintiff sues individually under the Federal Tort Claims Act, 28 U.S.C. §2674, for damages she sustained as a proximate

and direct result of the tortious, illegal and unlawful acts of defendant the State of California and its agencies, agents and employees.

2. Defendant, THE UNITED STATES OF AMERICA ("U.S.A.") is the entity of which the other defendants are agencies.

3. Defendants, U.S. DEPARTMENT OF JUSTICE ("U.S.D.J.") and FEDERAL BUREAU OF PRISONS ("FBP"), are agencies of Defendant the U.S.A., and at all relevant times were controlled and operated by the U.S.A.

4. Defendant JULIO MACIAS ("MACIAS") is an individual, and at all relevant times herein was a law enforcement officer, acting as a correctional officer at the Federal Correctional Complex in Victorville, California ("FCC Victorville"), and was an employee, agent and/or servant of Defendants U.S.A., U.S.D.J. and FBP, acting within the course and scope of said employment, agency and/or service and under color of authority.

5. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through 50, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff is informed and believes and thereupon alleges that each of the fictitiously named Defendants is legally responsible, intentionally, negligently, or in some other actionable manner for the events and happenings hereinafter referred to, and thereby legally caused the injuries, damages, and violations and/or and deprivation of rights hereinafter alleged. Plaintiff will seek leave of court to amend her complaint to state the true names and/or capacities of said fictitiously named Defendants when the same have been ascertained.

II.

JURISDICTION AND VENUE

6. This court has jurisdiction over this dispute and the parties pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1331, 1346, 2671-2680, et seq.

7. Venue is proper, pursuant to 28 U.S.C. §1391, as the underlying acts, omissions, events, injuries and related facts and circumstances upon which the

present action is based, occurred in the City of Victorville, State of California, and within the Central District of this Court.

III.

FACTUAL ALLEGATIONS

8. At all relevant times, Plaintiff was incarcerated at FCC Victorville, controlled, operated and/or managed by Defendants U.S.A., U.S.D.J. and FBP.

9. At all relevant times, Defendant MACIAS was a law enforcement agent, acting as a correctional officer at FCC Victorville, and was an employee, agent and/or servant of Defendants U.S.A., U.S.D.J. and FBP, acting in the course and scope of said employment, agency and/or service and under color of authority.

10. On or about July 2005, Plaintiff was assigned to work as a tool room clerk, and was supervised by Defendant MACIAS.

11. Beginning July 2005, and continuing until August 2005, Defendant MACIAS, while supervising Plaintiff's work, sexually assaulted Plaintiff, by telling her "you're very beautiful," "I would like to wrestle with you," "you have nice breasts," your ass looks nice," "nice legs," and "it must be very frustrating sexually for you being locked up." Defendant MACIAS further told Plaintiff he loved her and wrote her love letters. Although Plaintiff found these remarks and letters to be inappropriate, insulting and harassing, she did not confront Defendant MACIAS due to the position of authority Defendant MACIAS had over Plaintiff, and because she was threatened and intimidated by Defendant MACIAS.

12. Defendant MACIAS further sexually assaulted Plaintiff, by, ***inter alia***, grabbing her breasts, and placing his hand inside the front her pants and reaching down until his hand was on her vagina and he would rub it. Further, Defendant MACIAS ordered Plaintiff not to tuck in her tee shirt, so he could get underneath it and feel her breasts.

///

13. On or about August 2005, Defendant MACIAS ordered Plaintiff, who was authorized to drive a truck at the prison, to drive him to the windmill out in the desert. Upon arrival, Defendant MACIAS ordered Plaintiff to get out of the truck and go inside the windmill with him. Plaintiff refused, which angered Defendant MACIAS. He removed the keys from the ignition, and ordered Plaintiff to remove her pants. When Plaintiff refused, Defendant MACIAS yelled, "shut up and pull your pants down." Plaintiff became terrified and was in a state of shock. Defendant MACIAS then pushed Plaintiff's legs apart, placed his head between her legs and orally copulated her.

14. On another occasion, while Plaintiff was working in the tool room, Defendant MACIAS told Plaintiff that he was tired of Plaintiff "standing him up" and that he wanted to make love to her. Plaintiff started to cry, and told him, " I can't do that." Defendant MACIAS begged her, and when Plaintiff continued to refuse, he ordered her into the tool room. Once inside the tool room, Defendant MACIAS locked the door and ordered Plaintiff to take off her clothes. Defendant MACIAS then started kissing Plaintiff on her mouth, neck, breasts and upper legs. He picked her up and had sexual intercourse with her.

15. During this entire time, Plaintiff was crying continuously. After Defendant MACIAS was finished, Plaintiff asked if she could go to the restroom to clean up. While Plaintiff was cleaning up in the women's restroom, Defendant MACIAS walked in, pushed her against the wall and raped her from behind.

16. During the months of July-August 2005, Defendant MACIAS continued to sexually assault Plaintiff on various occasions, all while in the course and scope of his employment, and using the power and authority he had over Plaintiff.

17. During the entire period described herein above, Plaintiff chose not to report Defendant MACIAS' conduct, as she felt threatened and intimidated, and believed that if she did not comply, she would be victimized and retaliated against by Defendant MACIAS. Plaintiff was further afraid that if she told anyone about the

sexual assaults, Defendant MACIAS would use his position and authority to cease her visitation rights to see her five-year old son. Plaintiff was further afraid that she would be transferred away from Victorville prison, making it harder for her son, who resided in Victorville, to visit her, thereby reducing the frequency of his visits.

18. In August 2005, Plaintiff was ordered to perform a sexual assault examination, which revealed that she had, in fact, had sexual intercourse. Plaintiff was then transferred from Victorville to Dublin.

19. On or about April 20, 2007, Plaintiff duly filed an Administrative Claim, pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. §2675 et seq. Said claim was denied on August 30, 2007.

IV.

FIRST CAUSE OF ACTION

SEXUAL ASSAULT AND BATTERY

AGAINST DEFENDANTS U.S.A., U.S.D.J. and FBP

20. Plaintiff hereby realleges and incorporates each and every allegation set forth in Paragraphs 1 through 19 as fully as though set forth at length herein.

21. At no time did Plaintiff welcome, invite, solicit, or consent to any of Defendant MACIAS' sexual advances and assaults described herein above.

22. Plaintiff also alleges that she never consented to the contact by Defendant MACIAS, and that said contact was intentional, unlawful, harmful and/or offensive, and thus amounted to sexual assault and battery.

23. Defendant MACIAS was only able to have contact with her and commit the acts described herein above, due to the force and authority of the position he held. Defendant MACIAS had substantial authority and varied control over Plaintiff, by virtue of his position as a correctional officer, and used said authority and control to sexually assault and rape Plaintiff. By performing the acts described herein above, Defendant MACIAS misused and took advantage of his force and authority as a correctional officer.

24. In acting in the way described herein above, Defendant MACIAS acted with the intent to have sexual contact with Plaintiff in order to satisfy his own sexual gratification.

25. As a direct and proximate result of the acts described herein above, Plaintiff suffered humiliation, mental anguish, emotional and physical distress, insult, indignity, has been injured in her body, mind, health, emotional tranquility and peace of mind, has suffered anxiety, worry, sleepless nights, headaches, and has otherwise been damaged generally, actually, specially, and consequentially, all in a sum not yet fully ascertained.

26. The actions described herein above arise from the acts of Defendant MACIAS, a federal law enforcement officer, and, therefore, Defendants U.S.A., U.S.D.J. and FBP are liable for said actions pursuant to 28 U.S.C. §2680(h).

V.

SECOND CAUSE OF ACTION

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

AGAINST DEFENDANTS U.S.A., U.S.D.J. and FBP

27. Plaintiff hereby realleges and incorporates each and every allegation set forth in Paragraphs 1 through 26 as fully as though set forth at length herein.

28. Plaintiff is informed and believes, and thereupon alleges, that in performing the acts described herein above, Defendant MACIAS acted with the intent to force physical relations upon Plaintiff's body and person, knowing and intending that such contact would be offensive and insulting to Plaintiff. Plaintiff is further informed and believes and thereupon alleges, that the acts described herein above were outrageous and done with the intent of causing, or reckless disregard to the probability of causing, severe emotional distress, and did actually cause severe emotional distress to Plaintiff.

29. As a direct and proximate result of the acts described herein above, Plaintiff suffered the damages alleged herein above.

30. The actions described herein above arise from the acts of Defendant MACIAS, a federal law enforcement officer, and, therefore, Defendants U.S.A., U.S.D.J. and FBP are liable for said actions pursuant to 28 U.S.C. §2680(h).

VI.

THIRD CAUSE OF ACTION

NEGLIGENT HIRING, RETENTION AND SUPERVISION

AGAINST DEFENDANTS U.S.A., U.S.D.J. and FBP

31. Plaintiff hereby realleges and incorporates each and every allegation set forth in Paragraphs 1 through 30 herein above, as though fully set forth at length herein.

32. Plaintiff alleges that by incarcerating her, Defendants U.S.A., U.S.D.J. and FBP, acted to restrain her freedom to act on her own behalf, and, therefore, said Defendants stood in a special relationship with Plaintiff and were under an affirmative duty to protect Plaintiff and insure Plaintiff's safety and general well-being.

33. Plaintiff is informed and believes, and thereupon alleges, that at all relevant times, Defendant MACIAS was an agent and/or servant and/or employee of Defendants U.S.A., U.S.D.J. and FBP and was hired by them as a correctional officer to oversee inmates. Due to the trust and authority given to Defendant MACIAS by virtue of his position, and due to the power differential between Plaintiff and Defendant MACIAS by virtue of his position, a fiduciary and/or special relationship existed between Plaintiff and Defendants U.S.A., U.S.D.J. and FBP.

34. Plaintiff is further informed and believes, and thereon alleges, that by hiring and employing Defendant MACIAS, and placing him in a position of trust and special relationship with inmates, Defendants U.S.A., U.S.D.J. and FBP held Defendant MACIAS out to inmates in general and to Plaintiff in particular, as a competent and trustworthy correctional officer.

35. Plaintiff is informed and believes, and thereupon alleges, that Defendants U.S.A., U.S.D.J. and FBP owed Plaintiff a duty to use reasonable and due care in carefully selecting, retaining, and supervising their agents, servants and/or employees in general, and Defendant MACIAS in particular, and further, owed Plaintiff a duty to continuously review and evaluate the competency and fitness of their agents, servants and/or employees and to insure that their agents, servants and/or employees were fit and competent for the tasks for which they were hired.

36. Plaintiff is further informed and believes, and thereupon alleges, that Defendants U.S.A., U.S.D.J. and FBP had a duty to supervise their staff, agents, and employees, in general, and Defendant MACIAS in particular, because it placed them in a unique position of trust, confidence and authority, under which inmates in general, and Plaintiff in particular, should feel safe from sexual molestation and abuse.

37. Plaintiff further alleges that Defendants U.S.A., U.S.D.J. and FBP negligently, carelessly, recklessly, and/or in deliberate and reckless indifference to the rights of inmates, employed and retained employees, servants and/or agents, including Defendant MACIAS, who said Defendants knew, or reasonably should have known, had dangerous propensities for abusing and/or neglecting their authority and using, and/or allowing to be used, upon inmates such sexual assaults and batteries.

38. Plaintiff is informed and believes, and thereupon alleges, that Defendants U.S.A., U.S.D.J. and FBP failed to conduct a proper background check prior to hiring Defendant MACIAS, and failed to investigate and/or make proper inquiry regarding Defendant MACIAS' competency and fitness to perform the task for which he was hired, and further, that a proper background check and/or investigation and/or inquiry would have revealed that Defendant MACIAS was incompetent and unfit to perform the tasks for which he was hired.

///

39. Defendants U.S.A., U.S.D.J. and FBP knew, or reasonably should have known, of Defendant MACIAS' dangerous propensities as a sexual exploiter, and that he was unfit and incompetent for the specific tasks for which he was hired, and breached their duty to Plaintiff by hiring Defendant MACIAS, exposing him to Plaintiff and placing him in a position of trust and authority where he was able to harm Plaintiff, and did in fact harm Plaintiff.

40. Plaintiff further alleges that Defendants U.S.A., U.S.D.J. and FBP inadequately supervised, trained, controlled, assigned and disciplined their employees, servant and/or agents, including Defendant MACIAS, who said Defendants knew, or in the exercise of reasonable care should have known, had the afore-described propensities and character traits.

41. Plaintiff further alleges that Defendants U.S.A., U.S.D.J. and FBP maintained grossly inadequate procedures for reporting, supervising, investigating, reviewing, disciplining and controlling the conduct of their employees, servants and/or agents, including Defendant MACIAS, particularly with respect to illegal acts, assaults and batteries (sexual and otherwise).

42. By hiring Defendant MACIAS, despite his known dangerous propensities, and by failing to properly investigate and/or inquire regarding Defendant MACIAS' competency and fitness to perform the task for which he was hired, and further, by failing to continuously supervise and evaluate Defendant MACIAS, Defendants U.S.A., U.S.D.J. and FBP breached their duty to Plaintiff.

43. Plaintiff is further informed and believes, and thereupon alleges, that Defendant U.S.A., U.S.D.J. and FBP did nothing to stop Defendant MACIAS from engaging in inappropriate sexual conduct, even after they knew, or should have reasonably known, of Defendant MACIAS' deviant propensities.

44. Plaintiff further alleges that the wrongful conduct committed herein is just one typical example of the implementation of a larger policy, pattern and practice of Defendants U.S.A., U.S.D.J. and FBP to, under color of law, deprive inmates of

their inalienable rights, by failing to protect them from harm or violence by persons such as Defendant MACIAS. Furthermore, said conduct also evidences a related policy, pattern and practice of committing, condoning, ratifying, approving, and otherwise tacitly approving, by condoning, overlooking and failing to prevent by arrest or appropriate discipline, acts of assault and battery, sexual or otherwise.

45. As a direct and proximate result of the acts described herein above, Plaintiff suffered the damages alleged herein above.

VII.

FORTH CAUSE OF ACTION

VIOLATION OF CIVIL RIGHTS

(*BIVENS* TYPE ACTION)

AGAINST DEFENDANT MACIAS

46. Plaintiff hereby re-alleges and incorporates each and every allegation set forth in Paragraphs 1 through 45 herein above, as though fully set forth at length herein.

47. This cause of action arises under Title 42, United States Code, §§1983, 1985 and 1988, wherein Plaintiff seeks to redress deprivations under color of law, of rights, privileges and immunities secured to her by the Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States.

48. Plaintiff is informed and believes, and thereupon alleges, that in doing the acts described herein, Defendant MACIAS deprived her of her right to security of her person from sexual assaults and batteries and unjustified force and bodily injury in violation of the Fourth Amendment to the Constitution of the United States, her right to be free from cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States, and her right to Due Process of Law in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

49. As a direct and proximate result of the acts described herein above, Plaintiff suffered the damages alleged herein above.

50. The actions described herein above arise from the acts of Defendant MACIAS, a federal law enforcement officer, and, therefore, Defendants U.S.A., U.S.D.J. and FBP are liable for said actions pursuant to 28 U.S.C. §2680(h).

51. The actions described herein above were intended by Defendant MACIAS to cause injury to Plaintiff and/or was carried on by Defendant MACIAS with a conscious disregard of the rights and safety of Plaintiff, and was, therefore, malicious and oppressive, entitling Plaintiff to an award of punitive or exemplary damages against Defendant MACIAS in an amount to be determined at time of trial.

VIII

DAMAGES AND PRAYER

WHEREFORE, plaintiff prays for damages against defendants and each thereof as follows:

1. For general, actual, special and consequential damages according to proof at trial;
2. For punitive damages against Defendant MACIAS as warranted;
3. For reasonable attorneys' fees, including, but not limited to, pursuant to 42 U.S.C. §1988;
4. For cost of suit herein;
5. For such other and further relief as the Court may deem just and proper under all of the circumstances of this case.

Respectfully submitted,

LAW OFFICES OF GREGORY A. YATES, P.C.

Dated: February 12, 2008

GREGORY A. YATES
Co-Counsel for Plaintiff,
DEANNA HOUSTON

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COPY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEANNA HOUSTON,

Plaintiff(s)

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, JULIO MACIAS, and DOES 1-50

Defendant(s)

CASE NUMBER:

CV08-01076 PA (SHx)

SUMMONS

TO: THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to file with this court and serve upon plaintiff's attorney Gregory A. Yates, Esq. and David Drexler, Esq., whose address is:

LAW OFFICES OF GREGORY A. YATES, P.C., 16830 Ventura Blvd. Suite 250, Encino, CA 91436
and
LAW OFFICES OF DAVID DREXLER, 13808 Ventura Blvd.
Sherman Oaks, CA 91423

an answer to the [x] complaint [ ] _____ amended complaint [ ] counterclaim [ ] cross-claim which is herewith served upon you within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK, U.S. DISTRICT COURT

Date: February 15, 2008

By: LA'REE HORN
Deputy Clerk

1192

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge Percy Anderson and the assigned discovery Magistrate Judge is Stephen J. Hillman.

The case number on all documents filed with the Court should read as follows:

CV08- 1076 PA (SHx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

---

NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

[X] **Western Division**
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

[ ] **Southern Division**
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

[ ] **Eastern Division**
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself [ ])
DEANNA HOUSTON

DEFENDANTS
UNITED STATES OF AMERICA, U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, JULIO MACIAS, and DOES 1 through 50,

(b) County of Residence of First Listed Plaintiff (Except in U.S. Plaintiff Cases):
Los Angeles

County of Residence of First Listed Defendant (In U.S. Plaintiff Cases Only)

(c) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)
Gregory A. Yates, Esq. SBN 63259
LAW OFFICES OF GREGORY A. YATES
16830 Ventura Blvd., Suite 250
Encino, CA 91436
(310) 858-6944

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.)

- [ ] 1 U.S. Government Plaintiff
- [ ] 3 Federal Question (U.S. Government Not a Party)
- [X] 2 U.S. Government Defendant
- [ ] 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only
(Place an X in one box for plaintiff and one for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	[ ] 1	[ ] 1	Incorporated or Principal Place of Business in this State	[ ] 4	[ ] 4
Citizen of Another State	[ ] 2	[ ] 2	Incorporated and Principal Place of Business in Another State	[ ] 5	[ ] 5
Citizen or Subject of a Foreign Country	[ ] 3	[ ] 3	Foreign Nation	[ ] 6	[ ] 6

IV. ORIGIN (Place an X in one box only.)

[X] 1 Original Proceeding | [ ] 2 Removed from State Court | [ ] 3 Remanded from Appellate Court | [ ] 4 Reinstated or Reopened | [ ] 5 Transferred from another district (specify): | [ ] 6 Multi-District Litigation | [ ] 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: [X] Yes [ ] No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: [ ] Yes [X] No [ ] **MONEY DEMANDED IN COMPLAINT: $** _____

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
Violation of Civil Rights; Sexual Assault and Battery; Rape.

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES
- [ ] 400 State Reapportionment
- [ ] 410 Antitrust
- [ ] 430 Banks and Banking
- [ ] 450 Commerce/ICC Rates/etc.
- [ ] 460 Deportation
- [ ] 470 Racketeer Influenced and Corrupt Organizations
- [ ] 480 Consumer Credit
- [ ] 490 Cable/Sat TV
- [ ] 810 Selective Service
- [ ] 850 Securities/Commodities/ Exchange
- [ ] 875 Customer Challenge 12 USC 3410
- [ ] 890 Other Statutory Actions
- [ ] 891 Agricultural Act
- [ ] 892 Economic Stabilization Act
- [ ] 893 Environmental Matters
- [ ] 894 Energy Allocation Act
- [ ] 895 Freedom of Info. Act
- [ ] 900 Appeal of Fee Determination Under Equal Access to Justice
- [ ] 950 Constitutionality of State Statutes

CONTRACT
- [ ] 110 Insurance
- [ ] 120 Marine
- [ ] 130 Miller Act
- [ ] 140 Negotiable Instrument
- [ ] 150 Recovery of Overpayment & Enforcement of Judgment
- [ ] 151 Medicare Act
- [ ] 152 Recovery of Defaulted Student Loan (Excl. Veterans)
- [ ] 153 Recovery of Overpayment of Veteran's Benefits
- [ ] 160 Stockholders' Suits
- [ ] 190 Other Contract
- [ ] 195 Contract Product Liability
- [ ] 196 Franchise

REAL PROPERTY
- [ ] 210 Land Condemnation
- [ ] 220 Foreclosure
- [ ] 230 Rent Lease & Ejectment
- [ ] 240 Torts to Land
- [ ] 245 Tort Product Liability
- [ ] 290 All Other Real Property

TORTS PERSONAL INJURY
- [ ] 310 Airplane
- [ ] 315 Airplane Product Liability
- [ ] 320 Assault, Libel & Slander
- [ ] 330 Fed. Employers' Liability
- [ ] 340 Marine
- [ ] 345 Marine Product Liability
- [ ] 350 Motor Vehicle
- [ ] 355 Motor Vehicle Product Liability
- [ ] 360 Other Personal Injury
- [ ] 362 Personal Injury-Med Malpractice
- [ ] 365 Personal Injury-Product Liability
- [ ] 368 Asbestos Personal Injury Product Liability

TORTS PERSONAL PROPERTY
- [ ] 370 Other Fraud
- [ ] 371 Truth in Lending
- [ ] 380 Other Personal Property Damage
- [ ] 385 Property Damage Product Liability

BANKRUPTCY
- [ ] 422 Appeal 28 USC 158
- [ ] 423 Withdrawal 28 USC 157

CIVIL RIGHTS
- [ ] 441 Voting
- [ ] 442 Employment
- [ ] 443 Housing/Accommodations
- [ ] 444 Welfare
- [ ] 445 American with Disabilities - Employment
- [ ] 446 American with Disabilities - Other
- [ ] 440 Other Civil Rights

PRISONER PETITIONS
- 510 Motions to Vacate Sentence Habeas Corpus
- [ ] 530 General
- [ ] 535 Death Penalty
- [ ] 540 Mandamus/ Other
- [X] 550 Civil Rights
- [ ] 555 Prison Condition

FORFEITURE/PENALTY
- [ ] 610 Agriculture
- [ ] 620 Other Food & Drug
- [ ] 625 Drug Related Seizure of Property 21 USC 881
- [ ] 630 Liquor Laws
- [ ] 640 R.R. & Truck
- [ ] 650 Airline Regs
- [ ] 660 Occupational Safety/Health
- [ ] 690 Other

LABOR
- [ ] 710 Fair Labor Standards Act
- [ ] 720 Labor/Mgmt. Relations
- [ ] 730 Labor/Mgmt. Reporting & Disclosure Act
- [ ] 740 Railway Labor Act
- [ ] 790 Other Labor Litig.
- [ ] 791 Empl. Ret. Inc. Security Act

PROPERTY RIGHTS
- [ ] 820 Copyrights
- [ ] 830 Patent
- [ ] 840 Trademark

SOCIAL SECURITY
- [ ] 861 HIA (1395ff)
- [ ] 862 Black Lung (923)
- [ ] 863 DIWC/DIWW (405(g))
- [ ] 864 SSID Title XVI
- [ ] 865 RSI (405(g))

FEDERAL TAX SUITS
- [ ] 870 Taxes (U.S. Plaintiff or Defendant)
- [ ] 871 IRS - Third Party 26 USC 7609

VIII(a). IDENTICAL CASES: Has this action been previously filed and dismissed, remanded or closed? [X] No [ ] Yes
If yes, list case number(s):

FOR OFFICE USE ONLY: Case Number: _____

CV08-01076

COPY

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

VIII(b). RELATED CASES: Have any cases been previously filed that are related to the present case? [x] No [ ] Yes

If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

(Check all boxes that apply) [ ] A. Arise from the same or closely related transactions, happenings, or events; or

[ ] B. Call for determination of the same or substantially related or similar questions of law and fact; or

[ ] C. For other reasons would entail substantial duplication of labor if heard by different judges; or

[ ] D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: List the California County, or State if other than California, in which **EACH** named plaintiff resides (Use an additional sheet if necessary)

[ ] Check here if the U.S. government, its agencies or employees is a named plaintiff.

Los Angeles

List the California County, or State if other than California, in which **EACH** named defendant resides. (Use an additional sheet if necessary)

[x] Check here if the U.S. government, its agencies or employees is a named defendant.

List the California County, or State if other than California, in which **EACH** claim arose. (Use an additional sheet if necessary)

Note: In land condemnation cases, use the location of the tract of land involved.

San Bernardino (Victorville Prison)

X. SIGNATURE OF ATTORNEY (OR PRO PER): _____ **Date** 2-13-08

GREGORY A. YATES, ESQ.

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

JS-6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CENTRAL DIVISION

DEANNA HOUSTON, Plaintiff, v. UNITED STATES, *et al.*, Defendants.	NO. CV 08-1076 PA (Shx) [**ORDER DISMISSING CASE** Hon. Percy Anderson

IT IS HEREBY ORDERED THAT:

1. Plaintiff's action is dismissed with prejudice in its entirety;

2. Each party shall bear his, her or its own costs of suit and attorneys' fees; and,

3. The Court retains jurisdiction pending completion of the terms of the Stipulation for Compromise Settlement.

DATED: February 11, 2009

PERCY ANDERSON
United States District Judge

Presented by:

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/
DAVID A. DeJUTE
Assistant United States Attorney
Attorneys for the United States and for Julio Macias

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
DAVID A. DeJUTE, California Bar No. 153527
Assistant United States Attorney
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-2574
Telefax: (213) 894-7819
Email: david.dejute@usdoj.gov

Attorneys for the United States and
for Julio Macias individually

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CENTRAL DIVISION

DEANNA HOUSTON, Plaintiff, v. UNITED STATES, *et al.*, Defendants.	NO. CV 08-1076 PA (SHx) **STIPULATION FOR COMPROMISE SETTLEMENT AND [PROPOSED] ORDER** Hon. Percy Anderson

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiff Deanna Houston ("Plaintiff") and defendants the United States ("United States") and Julio Macias ("Macias")(collectively "Defendants") that the above-entitled action may be settled and compromised on the following terms and conditions:

///

///

///

///

1. The United States shall pay to Plaintiff the sum of two hundred and thirty-five thousand dollars ($235,000), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from the incident or circumstances giving rise to this suit, which Plaintiff or her heirs, executors, administrators, or assigns, and each and any of them, now have or may hereafter acquire against the Defendants or any of the Defendants' agents, servants or employees.

2. Plaintiff and her heirs, executors, administrators or assigns hereby executes a general release of the Defendants and agrees to accept the sum of two hundred and thirty-five thousand dollars ($235,000) in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from the incident or circumstances giving rise to this suit, which Plaintiff may have or hereafter acquire against the Defendants, their agents, servants or employees on account of the same subject matter that gave rise to the above-captioned lawsuit, including any future claim for personal injury, lost earnings, lost income, or medical expenses.

3. In addition, and notwithstanding anything to the contrary contained herein, Plaintiff explicitly releases any and all claims against the Defendants and all other defendants which the Plaintiff does not know or suspect to exist in her favor at the time she executes this stipulation and general release, which if known to Plaintiff would have materially affected Plaintiff's settlement with the Defendants.

///

4. Plaintiff, and her heirs, executors, administrators and assigns, further agrees to reimburse, indemnify and hold harmless the Defendants, as well as their agents, servants, and employees, from any and all causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or her heirs, executors, administrators or assigns, against any third party or against the Defendants, arising out of the incident or circumstances giving rise to this suit.

5. This Stipulation for Compromise Settlement shall not constitute an admission of liability or fault on the part of the Defendants, or their agents, servants, or employees, and is entered into by all parties herein for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

6. It is also agreed, by and among the parties, that the sum of two hundred and thirty-five thousand dollars ($235,000) represents the entire amount of the compromise settlement, and that the respective parties will each bear their own costs, fees, and expenses, and that any attorneys' fees owed by the Plaintiff will not be paid in addition to the terms of this Stipulation and Compromise Settlement.

7. Payment of the sum of two hundred and thirty-five thousand dollars ($235,000) will be made by check, processed by the National Finance Center, made payable as follows:

NAME	AMOUNT
Deanna Houston and Client Trust Fund of G. Yates	$235,000

8. Plaintiff's attorneys agree to distribute the settlement proceeds to Plaintiff, pursuant to the attorney-client fee agreement.

9. Plaintiff agrees that she will be obligated to pay any and all liens from any and all insurance companies, health care providers, attorneys, and any and all other persons or organizations who have or claim to have subrogated or assigned claims arising out of or related to the subject matter of this suit.

10. In consideration of the payment of the sum of two hundred and thirty-five thousand dollars ($235,000), as set forth above, Plaintiff agrees that the above-captioned action may be dismissed with prejudice.

11. Any and all individual taxation consequences as a result of this Stipulation are the sole and exclusive responsibility of the Plaintiff. Defendants do not warrant any representation of any tax consequences of this Stipulation. Nothing contained herein shall constitute a waiver by Plaintiff of any right to challenge any tax consequences of this Stipulation.

12. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

13. The undersigned represent that they have reviewed and understand this agreement, and that they are fully authorized to enter into the terms and conditions of this agreement and that they agree to be bound thereby.

DATED: DEANNA HOUSTON

DEANNA HOUSTON
Plaintiff

DATED: LAW OFFICES OF GREGORY A. YATES

GREGORY A. YATES
Attorneys for Plaintiff

DATED: Jan 16, 2009 LAW OFFICES OF DAVID DREXLER

DAVID DREXLER
Attorneys for Plaintiff

DATED: JULIO MACIAS

JULIO MACIAS
Defendant

DATED: THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

DAVID A. DeJUTE
Assistant United States Attorney
Attorneys for the United States

13. The undersigned represent that they have reviewed and understand this agreement, and that they are fully authorized to enter into the terms and conditions of this agreement and that they agree to be bound thereby.

DATED: DEANNA HOUSTON

DEANNA HOUSTON
Plaintiff

DATED: LAW OFFICES OF GREGORY A. YATES

GREGORY A. YATES
Attorneys for Plaintiff

DATED: LAW OFFICES OF DAVID DREXLER

DAVID DREXLER
Attorneys for Plaintiff

DATED: 2-10-09 JULIO MACIAS

JULIO MACIAS
Defendant

DATED: THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

DAVID A. DeJUTE
Assistant United States Attorney
Attorneys for the United States

13. The undersigned represent that they have reviewed and understand this agreement, and that they are fully authorized to enter into the terms and conditions of this agreement and that they agree to be bound thereby.

DATED: 1.28.09

DEANNA HOUSTON

DEANNA HOUSTON
Plaintiff

DATED: 2/2/09

LAW OFFICES OF GREGORY A. YATES

GREGORY A. YATES
Attorneys for Plaintiff

DATED: 2/2/09

LAW OFFICES OF DAVID DREXLER

DAVID DREXLER
Attorneys for Plaintiff

DATED:

JULIO MACIAS

JULIO MACIAS
Defendant

DATED: 2/11/09

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

DAVID A. DeJUTE
Assistant United States Attorney
Attorneys for the United States

FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

APR 29 2010

D. MARK JONES, CLERK

BY _____ DEPUTY CLERK

Jon D. Williams (8318)
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
SALT LAKE CITY, UTAH

MONICA LISONBEE, as Heir and Personal Representative of the Estate of VANCE LEE LISONBEE, Deceased

Plaintiff,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF

Complaint For Damages Under the Federal Tort Claims Act

Complaint For Violation of Constitutional Rights

Case: 1:10cv00058
Assigned To : Campbell, Tena
Assign. Date : 4/29/2010
Description: Lisonbee v. USA

PRISONS, FEDERAL CORRECTIONAL INSTITUTION LOMPOC HEALTH SERVICES ADMINISTRATOR LUIS COLCOL, JR., MEDICAL OFFICER DUC NGUYEN, FCI LOMPOC EMPLOYEES DOE 1-5; FEDERAL CORRECTIONAL INSTITUTION FORT WORTH HEALTH SERVICES ADMINISTRATOR MICHAEL AYMAN, CLINICAL DIRECTOR BUTCH TUBERA, MEDICAL OFFICER WILFREDO FELICIANO, FCI FORT WORTH EMPLOYEES ROE 1-5,

Defendants.

Judge:_____

COMES NOW the Plaintiff Monica Lisonbee, Heir and Personal Representative of Decedent Vance Lee Lisonbee, by and through counsel Jon D. Williams, and hereby complains, states and alleges as follows:

JURISDICTION

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The action arises under the Constitution and laws of the United States and is premised on the acts and omissions of defendants acting under the color of federal law.

2. Further, this action is brought pursuant to 28 U.S.C. § 1346(b)(1) in that

this is a claim against the United States of America and agencies of the United States of America for money damages accruing on or after January 1, 1945, for injury and personal injury caused by the negligent and wrongful acts and omissions of employees of the government while acting within the scope of their office or employment, under circumstances where the United States of America, if a private person, would be liable to the plaintiff in accordance with the laws of the places where the acts or omissions occurred.

3. Jurisdiction founded upon the federal law is proper in that this action is premised upon the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-80, the Eighth Amendment to the Constitution of the United States, and the United States Supreme Court's ruling in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

4. This is an action to redress under the color of statute, ordinance, regulation, custom or usage of rights, privileges, and immunities secured to the plaintiff by the Eighth Amendment of the Constitution of the United Sates and arising under the laws and statutes of the States of California, Texas, and Utah.

5. Plaintiff filed a tort claim with the Federal Bureau of Prisons ("FBOP")

on August 10, 2009. Plaintiff has waited the requisite six-month period for the agency to respond. Plaintiff deems the FBOP non-response a final denial of the claim under 28 U.S.C. § 2675(a).

6. Plaintiff has exhausted administrative remedies under 28 § U.S.C. 2401(b). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1346 where the United States is now the proper party.

VENUE

7. Venue is appropriate in the District of Utah because Plaintiff is a resident of the State of Utah. Decedent was a resident of the State of Utah at the time of his death and in the months preceding his death. (28 U.S.C. §§ 1391(b) and 1402(b)) (U.C.A. 78B-3-201).

PARTIES

Plaintiff

8. Plaintiff Monica Lisonbee is a resident of the State of Utah.

9. Plaintiff is the widow of Vance Lee Lisonbee, who was at the time of his death, a resident of the State of Utah.

10. At the time of Mr. Lisonbee's death, Plaintiff was living with Mr.

Lisonbee in Layton, Utah and was dependent upon him for support, love, and companionship.

11. Plaintiff is the heir and personal representative of the estate of Vance Lee Lisonbee. (U.C.A. 78B-3-106.5(1)(a))

12. Decedent Vance Lee Lisonbee , identified by inmate number 12999-081, was confined at the Federal Correctional Institution ("FCI") Lompoc, California from June 30, 2006 to February 25, 2008.

13. During this time period, Mr. Lisonbee was in the care and custody of the Federal Bureau of Prisons ("FBOP").

14. The Federal Bureau of Prisons had control over Mr. Lisonbee and a duty to exercise care with respect to his health and safety.

15. February 25, 2008 through February 27, 2008 Mr. Lisonbee was in transit from FCI Lompoc to FCI Fort Worth, Texas.

16. During this time period, Mr. Lisonbee was in the care and custody of the Federal Bureau of Prisons.

17. The Federal Bureau of Prisons had control over Mr. Lisonbee and a duty to exercise care with respect to his health and safety.

18. Mr. Lisonbee was confined at FCI Fort Worth from February 27, 2008 to December 10, 2008.

19. During this time period, Mr. Lisonbee was in the care and custody of the Federal Bureau of Prisons.

20. The Federal Bureau of Prisons had control over Mr. Lisonbee and a duty to exercise care with respect to his health and safety.

21. Mr. Lisonbee was confined at the Federal Medical Center Butner, North Carolina from December 10, 2008 until his release from custody on February 10, 2009.

22. During this time period, Mr. Lisonbee was in the care and custody of the Federal Bureau of Prisons.

23. The Federal Bureau of Prisons had control over Mr. Lisonbee and a duty to exercise care with respect to his health and safety.

24. Mr. Lisonbee was released from the custody of the Federal Bureau of Prisons on February 10, 2009.

25. He returned to the State of Utah to reside with his wife, Monica Lisonbee.

26. Mr. Lisonbee died on July 9, 2009. The cause of death was Metastatic Refractory Mixed Germ Cell Tumor.

Defendants

27. The United States of America is a sovereign entity named herein pursuant to the FTCA.

28. The United States Department of Justice ("USDOJ") is an agency of the United States of America and as such, is a sovereign entity named herein pursuant to the FTCA.

29. The Federal Bureau of Prisons ("FBOP") is a division or agency of the USDOJ and as such is a sovereign entity named herein pursuant to the FTCA.

30. The Federal Correctional Institution, Lompoc, California ("Lompoc") is a division or agency of the FBOP and as such is a sovereign entity named herein pursuant to the FTCA.

31. The Federal Correctional Institution, Fort Worth, Texas ("Fort Worth") is a division or agency of the FBOP and as such is a sovereign entity named herein

pursuant to the FTCA.

32. The FBOP is responsible for the care and custody of sentenced federal inmates.

33. The FBOP is responsible for the delivery of healthcare to inmates confined in FBOP facilities.

34. Healthcare providers are employed by the FBOP to fulfill the duty that adequate healthcare is provided to federal inmates.

35. Defendant Luis Colcol, Jr. Is the Health Services Administrator ("HSA") responsible for the management, oversight, and training of medical professionals at the Federal Correctional Institution ("FCI") Lompoc ("Lompoc"), California.

36. Vance Lee Lisonbee was confined at FCI Lompoc from June 30, 2006 until February 25, 2008.

37. Defendant Duc Nguyen is a medical officer, responsible to provide medical services to inmates incarcerated at FCI Lompoc.

38. Defendant FCI Lompoc Employees Doe 1-5 were other FCI Lompoc medical staff responsible for the medical care and treatment and custodial staff responsible for the custody and care of inmates incarcerated at FCI Lompoc during

the period of time from June 30, 2006 to February 25, 2008.

39. The defendants were aware of Vance Lee Lisonbee's need for medical treatment but, out of deliberate indifference, failed to provide or allow that treatment.

40. On information and belief, plaintiff believes that these defendants failed and/or refused to obtain and/or allow Mr. Lisonbee access to proper medical care and/or to inform others of the need for such care.

41. The true names of the Doe defendants are presently unknown to the plaintiff.

42. Defendant Michael Ayman, HSA, is responsible for the management, oversight, and training of medical professionals at FCI Fort Worth, Texas.

43. Vance Lee Lisonbee was confined at FCI Fort Worth February 27, 2008 until December 10, 2008.

44. Defendant Butch Tubera is the clinical Director at FCI Fort Worth.

45. Defendant Wilfredo Feliciano is a medical officer, responsible for the medical care of inmates confined at FCI Fort Worth.

46. Defendant FCI Fort Worth Employees Roe 1-5 were other FCI Fort

Worth medical staff responsible for the medical care and treatment of inmates incarcerated at FCI Fort Worth, Texas during the period of time from February 27, 2008 until December 10, 2008.

47. The defendants were aware of Vance Lee Lisonbee's need for medical treatment but, out of deliberate indifference, failed to provide and/or allow that treatment.

48. On information and belief, plaintiff believes that these defendants failed and/or refused to obtain and/or allow Mr. Lisonbee access to proper medical care and/or to inform others of the need for such care.

49. The true names of the Roe defendants are presently unknown to the plaintiff.

STATEMENT OF FACTS

50. Vance Lisonbee was incarcerated at the Federal Correctional Institution, ("FCI") Lompoc ("Lompoc"), California from June 30, 2006 until February 25, 2008.

51. On numerous occasions, beginning in early 2007, Mr. Lisonbee started complaining that his left testicle was swollen and painful.

52. He was prescribed a 30 day regimen of the antibiotic Cipro.

53. Medical staff at Lompoc did not perform an examination of his testicles, nor was an ultrasound ordered.

54. Mr. Lisonbee completed the 30 days of Cipro and returned to the medical department.

55. He was prescribed Cipro for an additional 30 days.

56. Lompoc medical staff did not examine the painful, swollen testicle.

57. Lompoc medical staff did not order an ultrasound.

58. Lompoc medical staff did not order blood tests for cancer markers.

59. Mr. Lisonbee completed the second round of Cipro.

60. His condition did not improve.

61. He returned to the Lompoc medical department.

62. Additional medical tests, such as an ultrasound, testicular examination, or blood tests for cancer markers were not completed.

63. Mr. Lisonbee was told that he had a hernia and that nothing further could be done for him.

64. Mr. Lisonbee continued to seek medical attention while incarcerated at Lompoc.

65. He continued to complain about the painful and swollen testicle.

66. In addition to seeking help from medical staff, Mr. Lisonbee made correctional staff and unit staff at Lompoc aware of his pain and discomfort.

67. Inmates in his housing unit observed the pain that Mr. Lisonbee suffered.

68. The FBOP has a duty to provide medical care to inmates incarcerated at Lompoc.

69. The duty was breached.

70. Medical staff at Lompoc did not provide the requisite level of medical care, expected of reasonably prudent health care providers.

71. Lompoc medical staff neglected to perform an examination to determine the cause of Mr. Lisonbee's painful, swollen testicle.

72. The negligent medical care is the proximate cause of Mr. Lisonbee's death from testicular cancer.

73. On February 25, 2008, Mr. Lisonbee departed Lompoc and was transferred to the Federal Correctional Institution Fort Worth ("Fort Worth"), Texas.

74. The transfer documents indicate that Mr. Lisonbee was transferred to

Fort Worth as an "essentially healthy male."

75. In fact, he was in extreme pain, suffering from a swollen, painful testicle.

76. Mr. Lisonbee arrived at Fort Worth on February 27, 2008.

77. The transfer referral prepared for the transfer to Fort Worth referenced that Lisonbee was healthy with no known medical problems, yet he was in extreme pain and continued complaining of the swollen testicle.

78. The reason for transfer from Lompoc to Fort Worth was noted to be for participation in the Residential Drug Abuse Program ("RDAP") at Fort Worth.

79. On March 25, 2008, while Mr. Lisonbee was incarcerated at Fort Worth, an ultrasound was completed.

80. According to Butner intake notes, dated 12/11/2008, K. Russell, PAC, the ultrasound revealed an enlarged testicle with a solid mass measuring 2.9 x 2.5 x. 2.6 cm., "highly suspicious for malignancy."

81. On April 8, 2008 Mr. Lisonbee was transported to a Fort Worth, Texas area hospital.

82. Mr. Lisonbee remained in the local hospital from April 8, 2008 to April

20, 2008.

83. During that hospital stay, his left testicle was surgically removed.

84. A note form the medical file, dated April 21, 2008, states that Mr. Lisonbee had "stage III mixed germ cell cancer of the testes."

85. The stage (typically I-IV) of a cancer describes the extent to which the cancer has spread.

86. Mr. Lisonbee received negligent, substandard medical care while at Lompoc, which is the proximate cause of his suffering and death.

87. Lompoc medical staff allowed the cancer to be left undetected and untreated until Mr. Lisonbee was transferred to Fort Worth.

88. For approximately one year, Mr. Lisonbee complained of pain and swelling in his testicles.

89. He asked medical staff at Lompoc for evaluation and treatment; however, the evaluation and standard of care routinely expected in a patient with similar symptoms and background was not provided.

90. After over one year of suffering with additional pain, surgeries, chemotherapy, and the knowledge that his condition would have been avoidable had

medical staff met their duty, Mr. Lisonbee died on July 9, 2009, at the age of 38.

91. The treating physician at the time of death advised Plaintiff that treatment of testicular cancer is highly successful if treatment is started sooner.

92. The death of Mr. Lisonbee was avoidable.

93. But for the negligent medical care at Lompoc, Mr. Lisonbee would have recovered from the cancer that ravaged his body and ultimately took his life.

94. The American Cancer Society ("ACS") reports that Testicular Cancer is highly treatable.

95. Further, the Journal of the American Medical Association ("JAMA") reports that "the risk of dying from testicular cancer is very low because it can be treated and even cured when found early."

96. Blood tests and ultrasound detect testicular cancer.

97. The physician treating Mr. Lisonbee from the date of his return to the State of Utah until his death advised that testicular cancer is highly treatable if detected early.

98. Lompoc medical staff neglected their duty to provide medical care to Mr. Lisonbee.

99. The neglect of Lompoc medical staff is the proximate cause of Mr. Lisonbee's death.

100. Testicular Cancer is highly treatable and rarely fatal if diagnosed and treated in a timely manner.

101. Further, the standard of care in the case of a male presenting with a swollen testicle is to order an ultrasound.

102. Swollen testes may be caused by trauma, hydrocele, epididymitis, or cancer.

103. Only an ultrasound and further examination can determine the cause.

104. The standard of care is to determine the cause of testicular pain and swelling.

105. Based on the foregoing information, it can be shown that medical staff at Lompoc owed a duty of care, based on established medical standards, to Mr. Lisonbee.

106. Lompoc medical staff breached the duty to provide appropriate medical care for Mr. Lisonbee.

107. The negligence of Lompoc medical staff is a direct cause of Mr.

Lisonbee's death.

108. Correctional officers working in the Lompoc visiting room ridiculed Mr. Lisonbee because of the extensive length of time he took to urinate.

109. The human dignity of Mr. Lisonbee was severely degraded.

110. Inmates in his housing unit observed the pain that Mr. Lisonbee suffered.

111. Inmates stated that Mr. Lionsbee's condition was visible and apparent.

112. While at FCI Fort Worth, Mr. Lisonbee was counseled by an oncologist that he had a very short "window of opportunity" to obtain life saving surgery and therapy.

113. Mr. Lisonbee sought assistance from Fort Worth medical staff, including defendant Feliciano.

114. Mr. Lisonbee was told by Defendant Feliciano that "because of his (Lisonbee's) status as a career offender, the government would not waste the money for medical treatment."

115. Mr. Lisonbee was essentially given a death sentence by uncaring, deliberately indifferent staff.

116. The lack of medical care and deliberate indifference made the

punishment of Mr. Lisonbee patently unjust and severe.

117. As his situation worsened, and his agony increased, Mr. Lisonbee sought help for pain management.

118. On several occasions, Defendant Feliciano refused to provide necessary prescription pain medication to Mr. Lisonbee, alleging that the prescriptions were not available.

119. Mr. Lisonbee was forced to go hours, sometimes completely overnight, without pain medication.

120. Upon the arrival of the new shift and different staff, the pain medication would be made available.

121. As his condition worsened, and his fears of death increased, Mr. Lisonbee was assisted with spiritual and pastoral care by other inmates.

122. Inmates prayed with Mr. Lisonbee and attempted to assist him in assessing his situation and facing his mortality.

123. Fort Worth medical staff, simply let Mr. Lisonbee know that he was a "career offender" and he did not matter as a human being.

124. The failure or inability of any Lompoc or Fort Worth officer or employee

to obtain or provide the necessary medical care for Mr. Lisonbee was a result of the defendants' deliberate indifference to the basic human need of Mr. Lisonbee.

125. The defendants' deliberate indifference to Mr. Lisonbee's serious medical needs caused him unnecessary and purposeless suffering and death.

126. As a proximate result of the defendants' unconstitutional actions and inactions, Mr. Lisonbee suffered torturous and prolonged physical pain, amounting to cruel and unusual punishment, loss of liberty, fear, emotional distress, loss of the ability to enjoy life, and loss of earning potential.

127. Mrs. Lisonbee lost the companionship and support of her husband, suffered great emotional distress, and incurred burial, legal, and other expenses and obligations associated with the death of Mr. Lisonbee.

DAMAGES

128. Throughout the incarceration of Mr. Lisonbee, agents of the United States had control over his movements, communications, and access to healthcare.

129. These agents had a duty to exercise reasonable care in fulfilling that duty.

130. The agents failed to do so.

131. Their failures are the proximate cause of the death of Mr. Lisonbee.

132. In his contacts with BOP medical staff, the healthcare providers failed to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time, in the profession or class to which he or she belongs, acting in similar circumstances.

133. Mr. Lisonbee spent the last year and a half of his life in and out of a cancer treatment center.

134. He did not have the opportunity to start a family with his wife.

135. His future was taken from him because of the negligence of medical staff at Lompoc.

136. Mr. Lisonbee had gone without standard medical care for over one year.

137. As a proximate result of the actions and inactions of the BOP health care providers, Mr. Lisonbee suffered torturous and prolonged physical pain, loss of life, loss of liberty, fear and emotional distress, and loss of the ability to enjoy life.

138. Mr. Lisonbee and his estate lost earnings, and earning potential.

139. The Plaintiff incurred legal and other expenses and obligations as a result of the illness and death of Mr. Lisonbee.

140. Mrs. Lisonbee suffered the loss of her husband's care, love, support, and services.

141. Mr. and Mrs. Lisonbee suffered irreparable harm.

142. Mr. Lisonbee suffered from constant pain, yet his pleas for help were ignored.

143. Mr. Lisonbee received no medical treatment until it was too late and his life could no longer be saved.

144. The couple lived their last months together in a state of emotional turmoil and fear, which could have been avoided had Lompoc medical staff acted in accordance with the established standard of care.

145. Mrs. Lisonbee is a young woman left without her husband.

146. She has lost her hopes of having a family.

147. She has lost her dreams of growing old with the man she loved and depended upon for support.

148. Mrs. Lisonbee watched her husband suffer for the last year of his life.

149. Mrs. Lisonbee watched her husband die in the home they shared.

150. Rather than a new beginning and a happy family, Mrs. Lisonbee was

greeted with the dark specter of death and a shell of the man she loved.

CLAIMS FOR RELIEF

151. The above described acts and omissions by health care providers who are agents of the United States constitute violations of the standard of care, including the degree of care, skill, and learning expected of reasonably prudent health care providers, acting in the same or similar circumstances as those described above.

152. Therefore, the United States is liable for injury and death resulting from the negligence.

153. The above described acts and omissions by defendants constitute a denial of Vance Lee Lisonbee's right to be free from cruel and unusual punishment in the form of inhume treatment and unnecessary physical pain and suffering, constituting a violation of his rights under the Eighth Amendment to the Constitution of the United States.

154. Mrs. Lisonbee demands $6,900,000.00.

155. Her demands are based on loss of support, loss of consortium, pain and suffering, and the extensive cost of medical care and treatment.

RELIEF REQUESTED

WHEREFORE, the plaintiff requests relief as follows:

1. Compensatory damages;

2. Punitive damages from any defendant found to have caused Vance Lisonbee's suffering and death through deliberate indifference to constitutional rights, to the extent permitted by law;

3. Costs, including reasonable attorney's fees, to the extent permitted by law;

4. Such other relief as may be just and equitable.

DATED this 29 day of April, 2010.

By _____
Jon D. Williams
Attorney at Law

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2010 MAY -3 PM 1:22
U.S. ATTORNEY'S OFFICE
DISTRICT OF UTAH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

MONICA LISONBEE, as Heir and Personal Representative of the Estate of VANCE LEE LISONBEE, Deceased,

Plaintiff,

v.

Civil Action No. 1:10cv00058

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION LOMPOC HEALTH SERVICES ADMINISTRATOR LUIS COLCOL, JR., MEDICAL OFFICER DUC NGUYEN, FCI LOMPOC EMPLOYEES DOE 1-5; FEDERAL CORRECTIONAL INSTITUTION FORT WORTH HEALTH SERVICES ADMINISTRATOR MICHAEL AYMAN, CLINICAL DIRECTOR BUTCH TUBERA, MEDICAL OFFICER WILFREDO FELICIANO, FCI FORT WORTH EMPLOYEES ROE 1-5,

Defendant,

Honorable Tena Campbell

SUMMONS IN A CIVIL ACTION

To: Assistant Attorney General for Administration
Justice Management Division
US DOJ 950 Pennsylvania Ave, NW
Washington, D.C. 20530-0001

Valerie Maxwell
United States Attorney's Office
185 South State Street, #300
Salt Lake City, Utah 84111

A lawsuit has been filed against you.

Within 60 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

Jon D. Williams
406 Felt Building
341 South Main Street
Salt Lake City, Utah 84111
Telephone: (801) 746-1460
Facsimile: (801) 746- 5613

Damian E. Davenport
406 Felt Building
341 South Main Street
Salt Lake City, Utah 84111
Telephone : (801) 531-6195
Facsimile: (801) 746- 5613

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

D. MARK JONES
Name of clerk of court

Date: 4/20/2010

Deputy clerk's signature

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on Valerie Maxwell, by:

(1) personally delivering a copy of each to the individual at this place, _____; or

(2) leaving a copy of each at the individual's dwelling or usual place of abode with _____ who resides there and is of suitable age and discretion; or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is _____; or

(4) returning the summons unexecuted to the court clerk on _____; or

(5) other Sending a copy of both via Certified Mail to 185 South State Street, # 300 Salt Lake City, Utah 84111.

My fees are $ 0 for travel and $ 0 for services, for a total of $ 0.

Date: 4/30/2010

Erica N. Beatty
Server's signature

Erica N. Beatty, Legal Assistant
Printed name and title

341 South Main Street, Suite 400
Server's address
Salt Lake City, Utah 84111

FILED
U.S. DISTRICT COURT

2011 MAY 23 A 10:25

DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

MONICA LISONBEE, as Heir and Personal Representative of the Estate of VANCE LEE LISONBEE, Deceased, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	:	Case No. 1:10cv00058TC **ORDER OF DISMISSAL WITH PREJUDICE** Judge Tena Campbell

Based on the Stipulation for Dismissal with Prejudice submitted herewith,

IT IS ORDERED that Plaintiff's Complaint is hereby dismissed with prejudice, with the parties bearing their own costs and fees.

DATED this 23RD day of May, 2011.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Court Judge

CARLIE CHRISTENSEN, United States Attorney (0633)
JEFFREY E. NELSON, Assistant United States Attorney (2386)
185 South State Street #300
Salt Lake City, Utah 84111
Telephone: (801) 524-5682
jeff.nelson@usdoj.gov

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

MONICA LISONBEE, as Heir and Personal Representative of the Estate of VANCE LEE LISONBEE, Deceased, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	:	Civil No.: 1:10cv00058TC **STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF CLAIMS** Judge Tena Campbell

It is hereby stipulated by and between Monica Lisonbee ("Plaintiff") and the United States of America (the "United States") as follows:

1. The parties hereby agree to settle and compromise each and every claim of any kind against the United States, whether known or unknown, arising directly or indirectly from the alleged acts or omissions that gave rise to the above-entitled action, under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release of Claims.

2. The United States agrees to pay to Plaintiff the cash sums set forth below in paragraph 2(a) to purchase the annuity contract described below in paragraph 2(b).

a. As soon as it is practicable after the execution of this Stipulation for

Compromise Settlement and Release of Claims, the United States will pay by wire transfer to

Cambridge Integrated Services Group, Inc. Premium Trust Account
Harris Bank N.A., 111 West Monroe Street, Chicago, IL 60603
Account Number: (b)(6)
ABA Bank Routing Number: (b)(6)

the sum of Four Hundred Twelve Thousand Five Hundred and 00/100 Dollars ($412,500.00) (hereinafter the "settlement amount"), from which the following disbursements will be made by Cambridge Integrated Services Group, Inc.:

- $150,000.00 Structured Settlement Annuity
  Prudential Life Insurance Company of America

- $262,500.00 by wire transfer to the following account:

  405 South Main St., Salt Lake City, UT 84111
  Jon David Williams DBA Jon D. Williams IOLTA
  Wells Fargo Bank, N.A.
  Account Number: (b)(6)
  ABA Bank Routing Number (b)(6)

b. The United States will purchase an annuity contract to make the following payments:

- $1,000.00, payable monthly, guaranteed for 10 years, which is 120 payments, beginning on August 15, 2011, with the last guaranteed payment on July 15, 2021

- $50,984.86 guaranteed lump sum payment on July 1, 2018

The annuity contract will be owned solely and exclusively by the United States and will be purchased as soon as practicable following the execution of this Stipulation for Compromise Settlement and Release of Claims. The parties stipulate and agree that the United States' only obligation with respect to said annuity contract and any annuity payments therefrom is to purchase the annuity contract, and they further agree that the United States does not guarantee or

insure any of the annuity payments. The parties further stipulate and agree that the United States is released from any and all obligations with respect to the annuity contract and annuity payments upon the purchase of the annuity contract.

The parties stipulate and agree that the annuity company that issued the annuity contract or its assignee will at all times have the sole obligation for making all annuity payments. The obligation of the annuity company to make each annuity payment will be discharged upon the mailing of a valid check in the amount of such payment to the address designated by the party to whom the payment is required to be made under this Stipulation for Compromise Settlement and Release of Claims. Checks lost or delayed through no fault of the annuity company will be promptly replaced by the annuity company, but the annuity company is not liable for interest during the interim.

The parties stipulate and agree that the annuity payments cannot be assigned, accelerated, deferred, increased, or decreased by the parties, that no part of any annuity payments called for herein or any assets of the United States or the annuity company are subject to execution or any legal process for any obligation in any manner, and that Plaintiff will not have the power or right to sell, assign, mortgage, encumber, or anticipate the annuity payments, or any part thereof, by assignment or otherwise.

Plaintiff and her, heirs, executors, administrators, or assigns hereby agree to maintain with the annuity company and the United States a current mailing address, and to notify the annuity company and the United States of the death of any beneficiary of the annuity contract within ten (10) days of death.

3. Plaintiff and her heirs, executors, administrators, or assigns hereby accept the cash

sums set forth above in paragraph 2(a) and the purchase of the annuity contract set forth above in paragraph 2(b) in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including any future claims for wrongful death and any claims for fees, costs, and expenses, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, death, or damage to property, and the consequences thereof, which the plaintiff or her heirs, executors, administrators, or assigns may have or hereafter acquire against the United States, its agents, servants, and employees on account of the same subject matter that gave rise to the above-captioned action. Plaintiff and her heirs, executors, administrators, and assigns do hereby further agree to reimburse, indemnify, and hold harmless the United States and its agents, servants, and employees from and against any and all such claims, causes of action, liens, rights, or subrogated or contribution interests incident to or resulting or arising from the acts or omissions that gave rise to the above-captioned action, including claims or causes of action for wrongful death.

4. This compromise settlement is specifically subject to each of the following conditions:

a. An agreement by the parties on the terms, conditions, and requirements of this Stipulation for Compromise Settlement and Release of Claims and the annuity contract. The parties stipulate and agree that the Stipulation for Compromise Settlement and Release of Claims and the compromise settlement are null and void in the event the parties cannot agree on the terms, conditions, and requirements of this Stipulation for Compromise Settlement and Release of Claims and the annuity contract. The terms, conditions, and requirements of this Stipulation for Compromise Settlement and Release of Claims are not severable and the failure to agree,

fulfill, or comply with any term, condition, or requirement renders the entire Stipulation for Compromise Settlement and Release of Claims and the compromise settlement null and void. The authorization by the Attorney General or the Attorney General's designee to negotiate and consummate a settlement for the amount agreed upon by the parties does not make the settlement binding upon the United States unless and until the other terms, conditions, and requirements of this Stipulation for Compromise Settlement and Release of Claims have been completely agreed upon in writing.

b. Each beneficiary of the annuity contract set forth above in paragraph 2(b) must be alive at the time of the purchase of the annuity contract. In the event of the death of any beneficiary prior to the purchase of the annuity contract, the entire Stipulation for Compromise Settlement and Release of Claims and the compromise settlement are null and void.

c. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain court approval of the settlement at their expense. Such court approval must be obtained prior to the purchase of the annuity contract set forth above in paragraph 2(b). Plaintiff agrees to obtain such approval in a timely manner, time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event Plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release of Claims and the compromise settlement are null and void.

5. Plaintiff stipulates and agrees that she is legally responsible for any and all liens or claims for payment or reimbursement that arise from or are related in any way to the claims asserted in the complaint herein, and that she will reimburse, indemnify, and hold harmless the

United States and its agents, servants, and employees from and against any and all such liens or claims for payment or reimbursement. Plaintiff and her attorney stipulate and agree that Plaintiff will satisfy or resolve any and all liens or claims for payment or reimbursement before any portion of the settlement payment is distributed to Plaintiff. For purposes of this Stipulation for Compromise Settlement and Release of Claims, a claim includes, but is not limited to, any claim or cause of action for reimbursement for any payments made to or on behalf of Plaintiff or her husband, Vance Lee Lisonbee, now deceased; any claim or cause of action for reimbursement for any goods or services provided to Plaintiff or Vance Lee Lisonbee; and any claim or cause of action for contribution, indemnification, or subrogation. Plaintiff and her attorney further agree that Plaintiff's attorney will provide to the United States evidence that each lien or claim has been satisfied or resolved and that the lienholder or claimant has waived and released its lien or claim. The evidence required by this paragraph may be satisfied by a letter from Plaintiff's attorney to counsel for the United States stating that each lien or claim has been satisfied or resolved and that each lienholder or claimant has waived and released its lien or claim.

6. This Stipulation for Compromise Settlement and Release of Claims is not and should not be construed as an admission of liability or fault on the part of the United States or its agents, servants, or employees, and it is specifically denied that they are liable to Plaintiff. This Stipulation for Compromise Settlement and Release of Claims is entered into by the parties hereto for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

7. The respective parties will each bear their own costs, fees, and expenses, and any attorney's fees owed by Plaintiff will be paid out of the settlement payment and not in addition

thereto. Pursuant to 28 U.S.C. § 2678, attorney's fees for services rendered in connection with this action cannot exceed 25% of the settlement payment.

8. The persons signing this Stipulation for Compromise Settlement and Release of Claims warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

9. Plaintiff's attorney agrees to distribute the settlement proceeds to Plaintiff after deducting allowable costs and fees and paying or resolving any lien or claim for reimbursement or payment for which Plaintiff has agreed to be legally responsible under the terms of this Stipulation for Compromise Settlement and Release of Claims. Plaintiff's attorney further agrees that he will cooperate in the preparation and filing of such documents as may be necessary to obtain a dismissal of the above-entitled action with prejudice, with each party bearing its own costs, expenses, and fees.

10. The parties agree that this Stipulation for Compromise Settlement and Release of Claims may be made public in its entirety pursuant to 5 U.S.C. § 552a(b), and Plaintiff expressly consents to such release and disclosure.

11. This Stipulation for Compromise Settlement and Release of Claims may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages will together be deemed to be one document.

Executed this 13 day of May, 2011.

Monica Lisonbee

MONICA LISONBEE

Executed this 13 day of May, 2011.

JON D. WILLIAMS
Attorney for Plaintiff

Executed this 13th day of May, 2011.

JEFFREY E. NELSON
Assistant United States Attorney

Executed this 16 day of May, 2011.

STANLEY L. MEAD, CFP
Cambridge Galaher Settlements
Structured Settlement Broker

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of the Freedom of Information and Privacy Act

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14550 Haynes Street
Van Nuys, CA 91411
(818) 947-5111 / (818) 947-5121 Fax

Attorneys for Plaintiff,
Craig B. Northington

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CRAIG BRYAN NORTHINGTON, Plaintiff, vs. KATHLEEN HAWK-SAWYER ET AL., Defendants.	**CASE NO: CV 04-1032-CBM (MLGx)** **SECOND AMENDED COMPLAINT (Jury Trial Demand)**

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PRAYER 92

V. DEMAND FOR JURY TRIAL 94

NOW COMES Plaintiff Craig Bryan Northington who brings this prisoner's civil rights and medical negligence action against the following Defendants: (1) governmental entities, United States of America; Federal Bureau of Prisons; and (2) the following real person Defendants, each in their individual capacities, Kathleen Hawk-Sawyer, Harley Lappin, Warden B.G. Compton [First name unknown], Warden Alvaro (a.k.a. Alex) Herrera, Bruce Barton, M.D., Ronald Cygnor, M.D., Thomas Krause, M.D., Sterling Pollack, M.D., Richard Gross, M.D., J.E. Gunja; Joseph Henderson, Mr. Misera [First name unknown], Mahesh Patel, Dewayne Evans, R. Johnson [First name unknown], David Shoemaker, Warden Slade [First name unknown], Kevin Dyre, Anthony Salanadan and All Other Parties Presently Unknown. Plaintiff Northington alleges, upon information and belief, except as to allegations that pertain to him or his counsel, as follows:

I. INTRODUCTION AND OVERVIEW OF THE ACTION

1. "When the State by affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, e.g., food, clothing, shelter, medical care, and reasonable safety, it transgresses the substantive limits set by the Eighth Amendment.[1]" Helling v. McKinney, 509 U.S. 25, 32 (1993)(citations omitted). Then, the Constitution imposes "a corresponding duty to assume some responsibility for his safety and general well being." Id.

2. Plaintiff Northington is a federal inmate of the federal

[1]The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const.Amend.VIII.

penitentiary system who suffers advanced liver disease. The district court reduced Northington's sentence after finding these life-threatening conditions justified a significant, downward departure from the otherwise applicable sentencing guideline range.

3. Since entering their custody in July 2000, the defendants have deliberately subjected Northington to a continuous nightmare of cruel and unusual punishment. Over the past five years, the named defendants have taken a direct part in systematically denying his necessary medical, dental and dietary care. These defendants initially mis-diagnosed his condition as being terminal, being too advanced for treatment. Northington exposed this error and sought treatment for his liver disease. Later, they feigned giving him medical and dental care, but this was an illusion. They further delayed his liver treatments when they mutilated his mouth in two botched oral surgeries: procedures that left shards of broken teeth painfully exposed through his gum lines nearly a year. The defendants not only inflicted agonizing pain to Northington's mouth, they also denied him the nutrition necessary to maintain his health. The real barrier standing between Northington and the treatment he needed, and what all the pretexts gave affect, was a simple, yet unconstitutional BOP policy to deny inmates treatment of advanced liver disease.

4. Northington brings this action to assert claims arising from two inter-related violations: (1) defendants' barriers to medical and dental care, and (2) defendants' medical and dental negligence. As alleged more fully below, Northington seeks the Court's injunctive relief to compel Defendants to provide necessary medical and dental care. He also seeks compensatory damages for the pain, anguish and disability Defendants inflicted upon him.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction in this action pursuant to 28 U.S.C. §§ 1331, 1332, 1346(b), 1367, 2672, 2674, 2675, 2677, 2679, 2680; 42 U.S.C. § 233(a); 42 U.S.C. § 1997e; Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the FTCA, and 5 U.S.C. § 552.

6. Venue is proper in this district pursuant to 28 U.S.C. §§ 1346 and 1391.

7. Though the acts and omissions that originally gave rise to Plaintiff's claims against Defendants Cyngor and Kraus originated in the states of Minnesota and Colorado respectively, the violations continued after Plaintiff was transferred to the United States Penitentiary ("USP") Lompoc, California and then to USP Victorville. All other claims brought occurred at USP Lompoc and USP Victorville.

III. PARTIES

A. Plaintiff

8. Plaintiff Craig Bryan Northington is a citizen of the United States and of the State of California who was incarcerated at Federal Medical Center, Rochester, Minnesota, Federal Detention Center (Englewood), Littleton, Colorado, USP Lompoc California and USP Victorville, California at the times the various violations alleged in this complaint arose. He is presently confined at the United States Penitentiary in Victorville, California, and assigned Federal Registration No. 18299-112.

B. Defendants

1. Governmental Entities

9. Defendant United States is located though the United States

Attorney for the Central District of California, Debra W. Yang, Room 7516, Federal Building, 300 North Los Angeles Street, Los Angeles, California, 90012 and the United States Attorney General, Alberto Gonzales, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

10. Defendant Federal Bureau of Prisons is an entity of the United States Government, Department of Justice, 320 First Street, NW, Washington, DC 20534.

11. Plaintiff will hereinafter collectively refer to the foregoing as "Governmental Entity Defendants."

2. Real Persons

12. Defendant Kathleen Hawk-Sawyer is a citizen of the United States and, at all material times until April 4, 2003, was employed as Executive Director for the Federal Bureau of Prisons, 320 First Street NW, Washington, D.C., 20534, at the time the claims alleged in this complaint arose. Plaintiff sues this defendant in her individual capacity in Count One and in her official capacity in Count Three.

13. Defendant Harley Lappin is a citizen of the United States and, at all material times since April 4, 2003, was employed as Executive Director for the Federal Bureau of Prisons, 320 First Street NW, Washington, D.C., 20534, at the time the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count One and in his official capacity in Count Three.

14. Defendant Robert Haro is a citizen of the United States and State of California and was employed as Western Regional Director for the Federal Bureau of Prisons, 7950 Dublin Blvd. 3 rd Floor, Dublin, California, 94568, at the time the claims alleged in this complaint

arose. Plaintiff sues this defendant in his individual capacity in in Count One and in his official capacity in Count Three.

15. Defendant J.E. Gunja is a citizen of the United States and the State of California, and was employed as Regional Director for United States Penitentiary - Bureau of Prisons, located at PO Box 5500 Adelanto, California 92301, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Counts One and Two and in his official capacity in Count Three.

a. Real Defendants affiliated with Federal Detention Center, Colorado

16. Defendant Thomas Krause, M.D. is a citizen of the United States and the State of Colorado, and was employed as Chief Medical Officer, Federal Detention Center - Bureau of Prisons, located at 9595 West Quincy Avenue, Littleton, Colorado, 80123, at the time the claims alleged in this complaint arose. Plaintiff sues this defendant in his in his official capacity in Counts Three and Four.

b. Real Defendants affiliated with Federal Medical Center, Minnesota

17. Defendant Ronald Cygnor, M.D. is a citizen of the United States and of Minnesota, and was employed as a medical doctor at the Federal Medical Center - Bureau of Prisons, located at 2110 East Center Street, Rochester, Minnesota, 55903-4600, at the time the claims alleged in this complaint arose. Plaintiff sues this defendant in his official capacity in Counts Three and Four.

c. Real Defendants affiliated with U.S.P. Lompoc

18. Defendant B.G. Compton is a citizen of the United States and

was employed as Warden of USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when some of the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Counts One and Two, and in his official capacity in Count Three.

19. Defendant Warden Alvaro (a.k.a. Alex) Herrera is a citizen of the United States and the State of California, and was employed as Warden at USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Counts One and Two and in his official capacity in Count Three.

20. Defendant Joseph Henderson is a citizen of the Unites States and the State of California, and was employed as a Warden's Assistant and Spokesman at the USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Three.

21. Defendant Mahesh Patel is a citizen of the United States and the State of California, and was employed as Health Services Administrator at the USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Three.

22. Defendant Dewayne Evans is a citizen of the United States and the State of California and was employed as Assistant Health Administrator at the USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Three.

23. Defendant Sterling Pollack, M.D. is a citizen of the United States and the State of California and was employed as Chief Medical Officer and Clinical Director at the USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Four.

24. Defendant Richard Gross, M.D. is a citizen of the United States and the State of California and was employed as a medical doctor at the USP Lompoc, 3901 Klein Blvd., Lomoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Four.

25. Defendant David Shoemaker is a citizen of the United States and the State of California, and was employed as Food Service Administrator at the USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Three.

26. Defendant Kevin Dyre is a citizen of the United States and the State of California and was employed as Food Service Officer at the USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Three.

27. Defendant Anthony Salanadan is a citizen of the United States and State of California and was employed as Assistant Health Service Administrator and/or Physician's Assistant at the USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged

in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Three.

28. Defendant R. Johnson, first name unknown, is a citizen of the United States and the State of California, and was employed as Housing Manager at the USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Plaintiff sues this defendant in her individual capacity in Count Two and in her official capacity in Count Three.

d. Defendants affiliated with U.S.P. Victorville

29. Defendant Warden Slade is a citizen of the United States and the State of California, and was employed as Warden at the USP Victorville, located at PO Box 5500 Adelanto, California 92301, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Counts One and Two and in his official capacity in Count Three.

30. Defendant Mr. Misera, first name unknown, is a citizen of the United States and the State of California, and was employed as Heath Services Administrator at the USP Victorville, located at PO Box 5500 Adelanto, California 92301, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official capacity in Count Three.

31. Defendant Bruce Barton, M.D. is a citizen of the United States and of California, and was employed as a medical doctor at USP Victorville, located at PO Box 5500 Adelanto, California 92301, when the claims alleged in this complaint arose. Plaintiff sues this defendant in his individual capacity in Count Two and in his official

capacity in Count Four.

32. Defendant(s) All Other Parties Presently Unknown are citizens of the United States and the States of California, Colorado, and Minnesota, and were employed as either correctional officers or administrators for the United States Marshal's Service or the Federal Bureau of Prisons, at or through their home offices at the addresses stated above. These Defendants are being sued in their individual and/or official capacities, and upon discovery of their individual names Plaintiff will name them as parties to this suit.

e. Non-Party Tortfeasors For Whom The United States of America Has Accepted Liability Pursuant to the Federal Tort Claims Act.

33. Joseph Rose, M.D. or D.D.S. is a citizen of the United States and the State of California, and was employed as Chief Dental Officer - USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. Doctor Rose is an officer commissioned in the Public Health Service. Plaintiff sues the United States, under the Federal Tort Claims Act, for the acts and omissions of Doctor Rose.

34. Randolph Mayberry, M.D. or D.D.S. is a citizen of the United States and the State of California, and was employed as a dentist for the Bureau of Prisons at USP Lompoc, 3901 Klein Blvd., Lompoc, California, 93436, when the claims alleged in this complaint arose. This Defendant is being sued in his individual capacity. Doctor Mayberry is an officer commissioned in the Public Health Service. Plaintiff sues the United States, under the Federal Tort Claims Act, for the acts and omissions of Doctor Mayberry.

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IV. STATEMENT OF MATERIAL FACTS

A. Defendants Deliberately Denied Northington Access to Medical Services and Denied Him Necessary Treatment, Thereby Causing Him Unnecessary Pain and Suffering and Worsening His Life-Threatening Disease.

35. Plaintiff incorporates herein by reference paragraphs 1 through 34 as though fully set forth herein.

36. On or about June 16, 2000, Plaintiff was arrested by the Federal Bureau of Investigation ("FBI") and was placed in the custody of the United States Marshals ("USM") at the Federal Detention Unit at the Santa Ana City Jail, Santa Ana, California, under Federal Registration No. 18299-112.

37. On or about June 17, 2000, Plaintiff advised medical personnel at the Santa Ana City Jail that he required immediate medical attention for a serious and life threatening medical condition, chronic Hepatitis Virus C ("HVC") infection, Grade III and with Stage 3 to Stage 4 liver disease with cirrhosis. Plaintiff further informed medical personnel that he had previously received medical care for this disease from the U.C.L.A. Medical Center in Los Angeles, California, and the University of Colorado Health Science Center in Denver, Colorado.

38. Thereafter, medical personnel whose identities are presently unknown to Plaintiff, failed to examine, evaluate, or treat Plaintiff for this serious life threatening illness. As a result, on or about August 15, 2000, Plaintiff became more seriously ill and was subsequently transferred to the Federal Metropolitan Detention Center ("FMDC") in Los Angeles, California, for emergency medical care.

39. Upon arrival at FMDC in Los Angeles, Plaintiff was placed in a medical/psychiatric unit. Thereafter, Plaintiff was denied

medical evaluation and treatment for his HVC and liver disease, and was only treated for the symptom of "depression" as a result of his disease.

40. On or about September 15, 2000, United States Marshall Service transferred Plaintiff to the Douglas County Jail (DCJ) in Castle Rock, Colorado to be held as a pre-trial federal detainee. Plaintiff immediately advised DCJ medical personnel that he required immediate treatment for chronic HVC infection and advanced liver disease. DCJ medical personnel told Plaintiff that his medical records would be obtained from the Colorado Department of Corrections ("DOC"), University of Colorado Health Science Center and U.C.L.A. Medical Center where he had received prior diagnosis and treatment.

41. Plaintiff's HVC and liver disease worsened before the DCJ doctors could obtain these records. He began suffering seizures on a daily basis, often injuring himself when he fell. Plaintiff's situation became critical, on or about November 13, 2000, prompting the prosecuting United States Attorney to file a motion in the United States District Court, District of Colorado, Hon. Wiley Daniels, to transport Plaintiff to a BOP medical facility for emergency treatment. Judge Daniels granted the motion and, on November 15, 2000, ordered for Plaintiff to be transported to a BOP medical center for "evaluation and treatment" for his chronic HVC infection and liver disease. Thereafter, Plaintiff was transported to the Federal Medical Center ("FMC") in Rochester, Minnesota.

42. After admittance to the FMC, Plaintiff was subsequently advised by Defendant Ronald Cygnor, M.D. that his seizures resulted from a condition known as "neuroleptic malignant syndrome" ("NMS") due to his liver no longer being able to adequately metabolize certain

medications, including lithium and imipramine, which Plaintiff had been prescribed and had taken since his incarceration in the federal detention unit at the Santa Ana City Jail.

43. Later, between March and May 2001, Dr. Cyngor told Plaintiff that, based upon his medical history and current blood tests, Plaintiff's liver disease had advanced too far to be treated and that Plaintiff was in need of a liver transplant that he could not obtain while a federal prisoner. Dr. Cyngor told Plaintiff that Plaintiff had between two and five years to live, depending on "God."

44. On or about May 15, 2001, Plaintiff was transferred from the FMC and to the Federal Detention Center, a BOP facility in Englewood/Littleton, Colorado. When Plaintiff in-processed through the FDC, he disclosed his chronic HVC and advanced liver disease and of his need for medical care to medical personnel.

45. On or about June 1, 2001, Plaintiff was seen by defendant Thomas Kraus, M.D., Chief Medical Officer for the FDC in Colorado. Plaintiff again disclosed his medical condition and requested a second medical opinion regarding his condition. Dr. Krause told Plaintiff that, while his chart noted that he came the FMC in Rochester, none of his medical records transferred with him. Accordingly, Dr. Kraus advised Plaintiff to continue taking the psychotropic medications then being prescribed to treat his depression. Dr. Kraus said he could not evaluated Plaintiff's HVC or liver disease further his medical records from FMC Rochester.

46. On or about July 1, 2001, Plaintiff's depression medications caused him to suffer the effects of NMS again. Plaintiff repeatedly reported to "sick-call" complaining of constant abdominal and joint pain, tremors, and hallucinations. Dr. Kraus examined him at least

three times between July and August 2001. After each examination, Dr. Kraus said nothing could be done to treat his pain or other symptoms.

47. Dr. Kraus examined Plaintiff, on or about August 23, 2001, and told him that, due to his advanced stage of liver disease and the information he received from FMC Rochester, Plaintiff's condition was "terminal." Plaintiff again asked for a second medical opinion based on an examination. Dr. Kraus told Plaintiff that the Executive Director of the BOP, Kathleen Hawk-Sawyer had issued a directive through the Medical Department of the Central Office of the BOP denying any and all pre-trial detainees, such as Plaintiff, treatment for HVC until that person had been convicted, sentenced, and designated to a BOP facility. Dr. Kraus explained that, because HVC caused and aggravated Plaintiff's liver disease, Defendant Hawk-Sawyer's directive precluded him from receiving treatment for his liver disease and from receiving a second opinion.

48. Based on Dr. Kraus' information, Plaintiff entered a plea agreement with the USA to expedite his medical treatment, and pled guilty on or about September 13, 2001.

49. On or about December 15, 2001, Plaintiff received a copy of the Pre-Sentence Report ("PSR") relevant to sentencing. The PSR included "Medical and Psychiatric Transfer Summaries" to the U.S. District Court upon Plaintiff's release and transfer from the FMC. The PSR revealed that Dr. Cyngor reported and recommended to the BOP that Plaintiff not receive any treatment for his HVC and liver disease.

50. Judge Daniels sentenced Plaintiff on or about January 3, 2002. Before passing sentence, Judge Daniels took evidence and made findings that Plaintiff's HVC and liver disease were sufficiently

serious to justify a downward departure from the mandatory minimum sentencing guidelines for Plaintiff's offense.

51. On or about February 5, 2002, Plaintiff was transferred to the United States Penitentiary ("USP") in Lompoc, California. When booked into USP Lompoc, Plaintiff advised medical personnel of his chronic HVC infection, liver disease and his need for medical care.

52. Between February 5, 2002 and March 15, 2002, Plaintiff reported to "sick-call" on at least two occasions complaining of pain and illness due to his HVC infection. Both times Lompoc personnel told Plaintiff that he must wait to be seen by defendants Richard Gross M.D. and/or Sterling Pollack M.D. because they were exclusively responsible for treating Plaintiff's disease.

53. On or about March 23, 2002, Plaintiff advised Dr. Gross of his medical history from the onset of his HVC infection. Plaintiff then asked Dr. Gross for a second medical opinion regarding his HVC and liver disease treatment. Dr. Gross said, that despite Plaintiff's claim that he had been diagnosed with HVC and the been committed to the FMC in Rochester for medical evaluation, there was nothing in his medical record to substantiate the claim of his serious medical condition. Plaintiff gave Dr. Gross a copy of the "transfer summary" as contained in his PSR to substantiate Plaintiff's serious medical condition and illness. Unpersuaded, Dr. Gross refused to treat or test Plaintiff for HVC and liver disease on the basis that he needed to obtain his medical records from the DOC in Colorado and from the FMC in Minnesota. Accordingly, Dr. Gross had Plaintiff sign three separate "Release of Medical Records" forms and advised him that he would be rescheduled for "chronic care" within the next 30 days.

54. Dr. Gross did not contact Plaintiff about his chronic care

needs until on or about June 26, 2002, despite the fact that Plaintiff reported to "sick-call" complaining of pain and illness. On that date Dr. Gross also told Plaintiff he had no memory of ever having seen or examined him before. Dr. Gross confessed to Plaintiff that he had failed to submit the "Consent Forms" to obtain Plaintiff's medical records from the DOC and FMC.

55. In response, Plaintiff asked Dr. Gross he have Plaintiff evaluated for a liver transplant and for placement on the National Organ Donor Transplant List. He also requested a prescription of herb "Milk-Thistle" and "Vitamin C" as a health supplement and treatment for his HVC. Plaintiff also asked Dr. Gross to treat his pain. Dr. Gross responded that the requests would have to be taken up with the USP Lompoc legal department. Dr. Gross admitted that Plaintiff's medical condition was "out of the realm of his expertise," so he would recommend Plaintiff to be seen and evaluated for treatment of his HVC by a "specialist." However, Dr. Gross told Plaintiff that his request for a liver transplant and to be placed on the National Organ Transplant List was denied on the ground that the BOP, under the directive of Kathleen Hawk-Sawyer, prohibited federal prisoners from receiving organ transplants regardless of the medical condition.

56. On or about August 2, 2002, Plaintiff was transported to the Marian Medical Center in Santa Maria, California, for consultation with Dr. Eric Jahnke, a gastroenterolotist, for consultation. Plaintiff informed Dr. Jahnke of his medical history regarding his HVC and liver disease dating back to 1994 when in the DOC Plaintiff had first begun to suffer symptoms. Plaintiff also told Dr. Jahnke about Dr. Gross's statement that the BOP prohibits organ transplants, letting him know that he was relying on whatever treatment may be

available to prolong his life. Dr. Jahnke promised to conduct his own examinations and evaluations despite the BOP doctors' prior conclusions and recommend to Dr. Gross and Dr. Pollack at USP Lompoc that Plaintiff be placed on a "special diet and vitamins".

57. On or about August 6, 2002, Plaintiff met with Dr. Gross and advised him that Dr. Jahnke had recommended and ordered several blood tests. Dr. Gross's believed some of the procedures were unnecessary and disregarded them. Dr. Gross also denied Plaintiff the special diet and vitamins Dr. Jahnke ordered. Furthermore, despite Plaintiff's continuing complaints of being in moderate to severe pain constantly, Dr. Gross still refused to treat Plaintiff's pain.

58. Dr. Jahnke completed his medical evaluation on or about October 10, 2002, and he advised Plaintiff that as an "only option" that would prolong his life, short of a liver transplant, was a one year treatment of "pegylated interferon and ribavirin."

59. On or about that same day, Dr. Gross told Plaintiff that, despite Dr. Jahnke's recommendations, Plaintiff would still need to be evaluated by the staff psychologist, Dr. Kerr, and additional blood tests would need to be performed in accordance with BOP "protocol" for the treatment of HVC. Plaintiff advised Dr. Gross that the psychology department at FMC Rochester had already cleared him for the interferon treatment, and that his still incomplete medical records showed that he met all requirements the BOP protocols imposed for interferon treatment. Dr. Gross refused to begin the treatment until Dr. Kerr cleared him.

60. Dr. Kerr gave Plaintiff the necessary clearance on or about November 18, 2002. Dr. Gross still refused to begin Plaintiff's treatment, now on the basis that further blood tests were required.

Yet, Dr. Gross failed to order any further blood tests through December 30, 2002, the day Plaintiff was called to the Lompoc medical unit for a blood test Dr. Jahnke had previously recommended but denied by Dr. Gross. Plaintiff advised the laboratory technician, Ms. Simon, that he intended to file grievances and to sue Dr. Gross and the other doctors responsible for denying and/or unnecessarily delaying his treatment. Ms. Simon passed this information to Dr. Gross, who threatened the Plaintiff. Specifically, he promised to further delay Plaintiff's treatments under the guise that further psychological examination was necessary and that he was going to refer Plaintiff back to Dr. Kerr, the Chief Psychologist at USP Lompoc. Dr. Gross made good on his threat; however, Dr. Kerr again cleared Plaintiff for the interferon treatment on or about January 10, 2003.

61. Plaintiff filed formal grievances against Dr. Gross and the BOP for denial of necessary medical care and unnecessary delay in providing medical treatment for his HVC and liver disease, for evaluation for placement on the National Organ Donor Transplant List, and for failing to evaluate and treat Plaintiff's chronic pain needs. Plaintiff initiated his administrative remedies on or about January 27, 2003, and his remedy grievance was assigned claim number 289711. He exhausted his administrative remedy when the BOP Central Office denied his appeal on or about July 23, 2003.

62. Dr. Gross told Plaintiff, on or about January 28, 2003, that the BOP Central Office approved the costs of treatment for Plaintiff's HVC. Yet because Dr. Jahnke had recommended that Plaintiff receive a treatment of "pegylated interferon", a medicine not yet approved for prescription at USP Lompoc, Plaintiff would have to wait until such medicine was approved at the facility.

63. Defendant Anthony Salanadan told Plaintiff, on or about February 1, 2003, the formal grievance Plaintiff had filed against Dr. Gross and other doctors of the BOP would only further delay and otherwise interfere with Plaintiff receiving treatment for his HVC.

64. On or about February 15, 2002, Dr. Gross and Defendant Dewayne Evans told Plaintiff that USP Lompoc had been approved to begin administering Pegainterferon, the pegylated interferon Dr. Jahnke recommended. They told Plaintiff he must sign a "contract" with the Schilling Corporation that governed the used of their drug.

65. Plaintiff started his Pegainterferon and Ribavirin treatments on or about February 20, 2003. Plaintiff was advised on that date of the known side effects of the treatment and that there was a certain medical protocol that would have to be followed during the course of treatment concerning being interviewed each week to check for possible side effects before his injection, obtaining his vital signs, and blood tests.

66. On or about March 15, 2003, Dr. Gross told Plaintiff that BOP policy limited his interferon treatment to 24 weeks, without regard to his specific health needs and regardless of the Schilling contract that required a one year treatment.

67. Plaintiff complained to acting Heath Services Administrator, Dewayne Evans, about Dr. Gross' intent to stop treatment automatically at 24 weeks regardless of Plaintiff's health needs. Mr. Evans promised that this would not happen. He said, at about 22 weeks into treatment, Plaintiff's RNA would be checked to determine whether he was responding to the treatment and if Plaintiff's RNA viral load of the HVC showed a significant drop, then Plaintiff would continue with the treatment for the full 52 weeks. At the time treatment began,

Plaintiff's RNA viral load was approximately 1,078,000.00.

68. On or about April 1, 2003, Plaintiff began to suffer from acute and sometimes serious pain throughout his back, constant diarrhea, and soft-tissue inflamation throughout his entire body (mouth, throat, sinuses, rectum, and penis). Plaintiff complained directly to Dr. Gross and other medical personnel at USP Lompoc and specifically informed Dr. Gross that Plaintiff attributed this serious side effect of the interferon/ribavirin medicines to his inability to eat most of the foods being served to him in the facility chow-hall due to dental injuries Plaintiff received in December 2002 and alleged infra, Section IVB. Dentists Dr. Rose and Dr. Mayberry, defendants' named herein, refused to order a "medical soft diet" for the injuries, causing Plaintiff to continue to lose weight due to lack of adequate nutrition. The Schilling Company had recommended that the ribavirin be taken with meals in order to increase the "absorption rate" of the medicine into the blood stream.

69. Dr. Gross told Plaintiff that it was not his responsibility or that of the medical department to assure that Plaintiff was receiving an adequate diet. Dr. Gross then suggested to Plaintiff that if he could not eat certain solid foods in the prison chow-hall due to his dental injuries, then it was Plaintiff's responsibility to purchase his own "soft foods" through the prison commissary. Dr. Gross then advised Plaintiff that he would just have to endure the side-effects of the interferon and ribavirin, or that Plaintiff could just choose to quit the drugs.

70. Dr. Gross reiterated that, regardless of Plaintiff's progress or side-effects, his treatment would be stopped at 24 weeks automatically. Dr. Gross refused to assist or treat Plaintiff in

receiving an adequate diet or to help alleviate any of the painful side-effects Plaintiff was suffering from.

71. As a result of Dr. Gross telling Plaintiff that his treatment for HVC would automatically be cut off without regard to his individual health care needs at 24 weeks, on or about April 14, 2003, Plaintiff initiated formal administrative grievances to receive the full course of interferon treatment unless otherwise indicated by his RNA viral load. Plaintiff also requested a second opinion regarding his interferon treatment. Plaintiff was assigned remedy grievance claim number 297577. He exhausted his administrative remedy when the BOP Central Office denied his appeal on or about September 24, 2003.

72. On or about April 15, 2003, Plaintiff began to feel a serious numbing sensation in his hands and feet. Plaintiff reported this condition to his work supervisor, Mr. Charles Henderson. Mr. Henderson reported Plaintiff's condition to defendant Evans. Evans told Henderson that Dr. Gross would be notified and Plaintiff would be examined. Neither Dr. Gross nor Mr. Evans contacted Plaintiff.

73. Plaintiff's numbness in his hands and feet had progressed through May into a severe burning sensation which made it too painful for Plaintiff to remain standing on his feet. He reported his condition at sick-call, asked to be excused from his work assignment and asked that Dr. Gross be notified immediately of his condition. Without examining Plaintiff, this person denied his requests. On or about May 7, 2003, Plaintiff again reported to sick-call complaining of the burning sensation in his hands and feet and was again denied an examination or an excuse from work.

74. On or abut May 22, 2003, Plaintiff contacted Defendant Salanadan, a Physician's Assistant, prior to receiving his interferon

injection. Plaintiff disclosed his serious side-effects to Mr. Salanadan, including severe insomnia that limited him to just a few hours of sleep every four to five days. Instead of examining Plaintiff, Salanadan accused Plaintiff of lying about his side-effects and thus refused to allow Plaintiff a "lay-in" from his prison job. This caused Plaintiff severe emotional distress. Only after Plaintiff threatened legal action against Mr. Salanadan did he give Plaintiff a one-day "lay-in" from his job assignment.

75. Dr. Gross contacted Plaintiff on or about June 5, explaining that he was reducing Plaintiff's interferon dosage due to his continuing weight loss from lack of eating. Plaintiff objected, again explaining to Dr. Gross that it was only because of the dental injuries that he suffered on two separate occasions by Dr. Mayberry and Dr. Rose, and the subsequent refusal to order a "soft medical diet" that Plaintiff had lost so much weight. Dr. Gross again advised Plaintiff that it was his own responsibility to feed himself through the prison commissary if he wanted a "soft diet". Plaintiff then complained to Dr. Gross about them still not having received his medical records, and Dr. Gross responded by admitting that Plaintiff's medical records from other facilities had apparently been lost.

76. Plaintiff asked about Dr. Gross' intent to stop his interferon treatment after 24 weeks, and Dr. Gross again informed him that BOP medical policy required that Plaintiff's interferon treatment be stopped at 24 weeks regardless of his individual health care needs.

77. Between June 5, 2003 and July 31, 2003, Dr. Gross failed and refused to evaluate and treat Plaintiff for the burning and numbing sensation in his hands and feet. Even though Plaintiff had complained that the sensation had spread into his spine Dr. Gross still refused

to provide Plaintiff with evaluation or treatment for this condition. Further, even though Dr. Gross was aware of the fact that Plaintiff was only averaging less than 12 hours sleep a week, Dr. Gross refused to excuse Plaintiff from his prison work assignment beyond one day a week- the day following his weekly injection.

78. On or about July 31, 2003, Plaintiff received his last interferon injection and notified Dr. Gross that it appeared that he had missed taking approximately 40 doses of his ribavirin due to facility "lock-downs" where he was not provided this medication when needed, or when he was unable to obtain this medication at the "med-line" window for one reason or another.

79. On or about August 7, 2003, Plaintiff submitted to be blood tested for the purpose of ascertaining his RNA HVC viral load. The result of that test showed that at that time the HVC was undetected and the Plaintiff's liver enzymes were normal, indicating that the interferon/ribavirin treatment had been working.

80. On or about August 19, 2003, Plaintiff complained to Dr. Gross that his hands and feet were still numb and that the sensation was continuing to spread throughout his body. Dr. Gross again advised Plaintiff that there was nothing he could do about it.

81. On or about August 29, 2003, Plaintiff again complained to Dr. Gross that he was in moderate pain and discomfort, that the numbness in his body was worsening, that he developed a strong metallic taste in his mouth, that he was more fatigued than he had ever been, and that he could no longer produce semen. Dr. Gross ignored these complaints and refused to evaluate and treat Plaintiff.

82. On or about October 6, 2003, Plaintiff again had his blood tested in accordance with BOP "protocols" and policies relative to a

follow-up evaluation after interferon treatment. The results of this test showed that Plaintiff's liver enzymes were again elevated in the "high" abnormal range, which Dr. Gross and Dr. Pollack told Plaintiff indicated that the interferon treatment had failed. Upon discovering the results of this blood test on or about October 16, 2003, Plaintiff contacted Dr. Gross and requested another RNA test to check Plaintiff's HVC viral load as being necessary to ascertain, based on Plaintiff's elevated ALT enzyme level, whether the interferon treatment had failed.

83. Plaintiff told Dr. Gross that, if in fact the treatment had failed, despite Dr. Gross, Dr. Pollack, Evans, Herrera, Haro, and Hawk-Sawyer's refusal to have Plaintiff evaluated for placement on the National Organ Donor Transplant List, Plaintiff would be renewing his request to be so placed. Dr. Gross responded, telling Plaintiff that he was only required to follow BOP medical protocols and policies relative to HVC treatment, without regard to Plaintiff's individual health concerns. Accordingly, Dr. Gross informed Plaintiff that for no reason would his RNA be tested for the presence of HVC until six months had passed from the date treatment had stopped.

84. On or about October 30, 2003, Plaintiff was contacted by Dr. Pollack and advised that in August 2003, unbeknownst to Plaintiff, Dr. Gross had referred him to a Neurologist to be examined outside the facility because of the numbing sensation that had spread throughout his body, Dr. Pollack told Plaintiff that for reasons unknown, Plaintiff's appointment with this Neurologist, which had been scheduled for November 2, 2003, had been cancelled by Warden Herrera. Dr. Pollack then showed Plaintiff a handwritten "blanket order" written by Warden Herrera stating that "This inmate will not leave the

facility." Accordingly, Dr. Pollack informed Plaintiff that due to the seriousness of his medical condition that he, as Chief Medical Officer and Clinical Director, would resubmit the request for this medical evaluation and treatment.

85. As a result of Warden Herrera prohibiting all of Plaintiff's medical treatment outside of the facility without cause, Plaintiff initiated a formal administrative grievance against Warden Herrera, believing and on the grounds that said action was in retaliation for Plaintiff filing grievances and tort claims against Warden Herrera and his medical/dental staff beginning in October 2003. Plaintiff was assigned remedy grievance claim number 315559. He exhausted his administrative remedy when he submitted his appeal to the BOP Central Office on February 4, 2004.

86. On or about December 8, 2003, Plaintiff complained personally to contacted Defendant Patel, a Health Services Administrator, of his dire need for medical attention outside the facility and regarding Dr. Gross' refusal to check Plaintiff's RNA for the presence of HVC to determine whether Plaintiff needed a liver transplant now as opposed to later. Mr. Patel told Plaintiff he would order Dr. Gross to examine and consult with Plaintiff that day.

87. Dr. Gross contacted and examined Plaintiff later that day for approximately an hour regarding Plaintiff's pain, numbness, and fatigue. At the conclusion of this examination, Dr. Gross advised Plaintiff that Warden Herrera was still refusing to allow Plaintiff to be seen by doctors outside the facility, which was interfering with Plaintiff's ability to be examined by a Neurologist and a liver specialist. Dr. Gross told Plaintiff there was nothing he could do.

88. Dr. Gross then informed Plaintiff that he would order

additional blood tests for the purpose of evaluating Plaintiff's joint pain and severe fatigue, but still would not be checking Plaintiff's RNA at that time. Dr. Gross concluded that in his professional opinion, Plaintiff was now suffering from a "major depressive disorder" that was compounding Plaintiff's medical condition, and that Plaintiff needed to be placed on medications to treat this condition as soon as possible. Dr. Gross then advised Plaintiff to see Dr. Kerr, Chief Psychologist, and that Dr. Gross would contact Dr. Jahnke for "clearance" of certain psychotropic medications that would not further damage Plaintiff's liver.

89. On or about December 15, 2003, Plaintiff was evaluated by Dr. Kerr, Chief Psychologist and a staff Psychiatrist, via video link-up with the FMC in Springfield, Missouri. He concluded that Plaintiff suffered from clinical depression and he ordered a psychotropic medication to begin immediately pending approval from Dr. Jahnke.

90. Between December 18, 2003 and January 1, 2004, Plaintiff reported to the med-line window at least four times requesting his medication to treat his depression. Each time the medical staff responsible for dispensing prescriptions told Plaintiff that Dr. Gross had not yet ordered the prescription.

91. On or about January 8, 2004, Plaintiff spoke to Dr. Gross in the main corridor and said that, in the month since Dr. Gross had last examined him, told him that he would order certain blood tests to evaluate Plaintiff's pain needs, and prescribed psychotropic drugs per Dr. Kerr's instructions, no blood samples had been taken, nor had any psychotropic drugs been given due to Dr. Gross' failure to approve the prescription. Dr. Gross told Plaintiff that he had issued the proper orders for both the blood tests and the prescription, and the

fact that Plaintiff had not received either was not his fault.

92. On or about the same day, January 8, 2004, Plaintiff was called to the medical department and the laboratory technician who collected blood samples told him that she received an order from Dr. Gross dated that day to obtain "special blood samples" from Plaintiff.

93. On or about this same day, January 8, 2004, Plaintiff initiated another formal administrative grievance against Dr. Gross for this unnecessary delay in providing medical treatment. Plaintiff was assigned remedy grievance claim number 324054. He exhausted his administrative remedy when he submitted his appeal to the BOP Central Office on April 22, 2004.

94. On or about February 9, 2004, Plaintiff had his RNA HVC viral load checked in accordance with "BOP protocol".

95. On or about February 10, 2004, Plaintiff was called to the "med-line" window and advised that his prescription for psychotropics had been approved by Dr. Gross and filled. Plaintiff then began taking the medication.

96. On or about February 17, 2004, Plaintiff was called to the medical department and contacted by Dr. Gross and Mr. Patel. Plaintiff was advised by both of these defendants that his blood tests for RNA HVC viral load had come back showing that not only was Plaintiff still infected with HVC, but that his viral load was 50% higher than it had been before the treatment started. In response, Plaintiff requested that Dr. Gross and Mr. Patel take immediate action to have Plaintiff evaluated for a liver transplant and to treat Plaintiff's pain and possible neurological disorder. Then Dr. Gross and Mr. Patel told Plaintiff that Warden Herrera had again cancelled Plaintiff's "outside" appointments with both a liver specialist and

a Neurologist and that there was nothing they could do.

97. In response to this statement, Plaintiff then informed Dr. Gross and Mr. Patel that he had filed a legal action against them, along with other doctors and employees of the BOP, alleging deliberate indifference in denying medical care and unnecessary delay in providing medical treatment, and seeking injunctive relief for the medical care he required.

98. On or about March 23, 2004, Plaintiff was contacted by Dr. Gross and advised that he was being referred to FMC for evaluation for a possible liver transplant. Dr. Gross then told Plaintiff that in order to complete this request, Plaintiff had to sign a written consent to be transferred. Dr. Gross then advised Plaintiff that it was a policy that must be adhered to by "all inmates who need to be evaluated at medical centers." Plaintiff signed the written consent, yet was later that day told by Dr. Kerr that no such policy existed. Thereafter, Plaintiff withdrew his written consent on the grounds the action taken by Dr. Gross in obtaining his consent was fraudulent and was done with the sole intent to remove Plaintiff from the jurisdiction of the U.S. District Court, Central District of California, since he knew that legal action had been taken.

99. On or about April 2, 2004, Plaintiff was contacted by Dr. Pollack, Mr. Patel, Dr. Mayberry, and Dr. Kerr. Dr. Pollack advised Plaintiff that he considered Plaintiff's condition an "emergency" which would override any other considerations. Accordingly, Dr. Pollack advised Plaintiff that he would be transferred to the FMC in Butner, North Carolina, as soon as possible for medical evaluation.

100. On or about July 31, 2004, Plaintiff was again taken to see Dr. Jahnke, who made a series of findings and recommendations as to

Plaintiff's condition.

101. Either that same week or the following week Plaintiff was suddenly notified that he was being transferred to USP Victorville. On or about August 10, 2004, Plaintiff notified R. Johnson, the Housing Manager of USP Lompoc, that he was being moved and he protested this decision based on the fact that he was awaiting implementation of Dr. Jahnke's recommendations.

102. The same day Plaintiff contacted Warden Compton and Mr. Patel and expressed concern that this transfer would result in unnecessary delay in his treatment and the implementation of the recommendations made by Dr. Jahnke. Plaintiff, however, was nonetheless transferred to USP Victorville, where he remains today.

103. At USP Victorville Plaintiff was caused to wait even longer for treatment, as the staff responsible for treating the day-to-day medical needs of their inmates had absolutely no medical training and had been pulled from clerical positions to fill medical positions as needed. Plaintiff immediately notified Dr. Barton and Mr. Misera about his illness and the recommendations made by Dr. Jahnke, which to this day have not been implemented. Dr. Thang Nguyen informed Plaintiff that USP Victorville was not bound by Dr. Jahnke's recommendations.

104. As a result of the denial of medical care, unnecessary delay in providing medical treatment, and other acts and/or omissions complained alleged above, Plaintiff has suffered continuous pain without proper evaluation and treatment, and has suffered extreme emotional distress consisting of nightmares, depression, anxiety, anger, and frustration. Plaintiff has received psychiatric care to treat the emotional distress and psychological injury he suffered as

a result of the acts/omissions relating to the denial of medical care and delay of treatment herein alleged.

105. Plaintiff exhausted his administrative remedies in accordance with 42 U.S.C. § 1997 *et seq.* In addition to the formal administrative grievances previously alleged, he submitted remedy grievances for the deliberate indifference to his serious medical conditions. Plaintiff was assigned remedy grievance claim numbers 289711, 297577, 314849 and 315559. He exhausted his administrative remedies when he submitted his appeal to the BOP Central Office on May 15, 2003, July 11, 2003, January 15, 2004, and February 4, 2004 respectively.

106. Plaintiff also filed his notices of claim, as required by FTCA, on or about June 3, 2003 which were denied on or about December 19, 2003.

B. Defendants Denied Northington Care To Treat His Serious Dental Conditions, Caused Him Serious Dental Injury, And By Denying Him An Appropriate Diet, Defendants Caused Northington Sever Injury. Pain, Suffering and Worsened His Serious Condition.

107. Plaintiff incorporates herein by reference paragraphs 1 through 106 as though fully set forth herein.

108. On or about April 15, 2002, Plaintiff reported to dental sick-call complaining of a serious toothache. Plaintiff was examined by Chief Dentist Dr. Joseph Rose, a defendant named herein, and informed that the tooth required extraction but due to infection which caused the tooth to abscess, Plaintiff would have to wait a couple of days and be called back to the dental department.

109. On or about this same date of April 15, 2002, Plaintiff later went to the med-line window requesting the pain medication and

antibiotics Dr. Rose told Plaintiff he would prescribe. Yet the pharmacist on duty informed Plaintiff that no such prescription had been received. From on about April 16, 2002, through about April 20, 2002, Plaintiff checked daily for these medications at the med-line window but was repeatedly told that no prescription had yet been received. Plaintiff's toothache subsided on its own, however the tooth remained extremely sensitive to hot and cold substances.

110. On or about June 1, 2002, Plaintiff was called to the Dental Clinic and advised that he was there for a "routing examination" where only x-rays would be taken. Plaintiff complained to the dental assistant that he had been waiting since mid-April to have a tooth extraction and that the tooth was still bothering him. The dental assistant then contacted Dr. Rose. Plaintiff was then escorted to Dr. Rose's office where Dr. Rose apologized for failing to have Plaintiff called back in April for tooth extraction, saying that "someone had dropped the ball."

111. Plaintiff accepted Dr. Rose's apology but expressed concern over his ability to eat an adequate and nutritious diet because his HVC and liver disease required him to be able to do so. It was becoming increasingly difficult for Plaintiff to do so because of the consistency of the food served in the main chow-hall considering that at the time Plaintiff had only three remaining back molars left to chew with. Plaintiff then explained to Dr. Rose that if he still felt it necessary to extract the tooth that had been bothering Plaintiff, it would make it more difficult for Plaintiff to eat. Plaintiff further explained that he was already taking a liquid food supplement prescribed by the medical clinic due to a slow and constant weight loss attributed to his liver disease. Plaintiff then went on to inform

Dr. Rose of the particulars of his disease, including the fact that he had been advised by previous doctors to refrain from taking Tylenol or Motrin for his pain needs.

112. Dr. Rose then examined Plaintiff's remaining teeth and, in conjunction with Plaintiff's medical concerns, informed Plaintiff that because of his medical problems it was his opinion that he should extract all of Plaintiff's remaining teeth with the exception of the two lower incisor to act as an anchor for the lower denture. Dr. Rose told Plaintiff that the extractions would be performed by Dr. Randolph Mayberry, a defendant named herein, and that Dr. Rose would request that the extractions be expedited over a period of the next few months. Dr. Rose also said that he would advise Dr. Mayberry that Plaintiff be prescribed pain medication other than Tylenol or Motrin.

113. Between June 1, 2002 and December 12, 2002, Dr. Mayberry only scheduled Plaintiff for two appointments and only extracted four of the 13 teeth Plaintiff needed pulled. On or about August 6, 2002, Plaintiff explained to Dr. Mayberry the need to have all his teeth extracted as soon as possible because of Plaintiff's medical concerns, and reminded Dr. Mayberry that Plaintiff could not take either Tylenol or Motrin for pain. Despite Dr. Mayberry's open acknowledgment of these concerns, over a six month period he only pulled four teeth and in both cases prescribed Tylenol and aspirin for pain despite Plaintiff's objections.

114. On or about December 12, 2002, Plaintiff was called to the Dental Clinic from his work assignment in the Cable Factory at approximately 2:30 P.M. Plaintiff was then contacted by both Dr. Rose and Dr. Mayberry, where he informed them both that he was awaiting approval of a kind of chemo-drug therapy to treat his liver disease

and that having the ability to eat and at least maintain his current weight was critically important to his health. Because Dr. Mayberry had not expedited Plaintiff's extraction as Plaintiff was told he would in June 2002 by Dr. Rose, both dentists decided that the best course of action would be to pull the eight remaining teeth all at once that day in an attempt to provide Plaintiff with dentures before he started his chemo-drug therapy for his liver disease. Plaintiff also noted to Dr. Rose that Dr. Mayberrry had prescribed Plaintiff Tylenol, and although he had prescribed Plaintiff aspirin on one prior occasion, Plaintiff's pain needs after the past two extractions went unmet. Dr. Rose then told Plaintiff he would request that Dr. Mayberry prescribe "something else".

115. On or about this same date of December 12, 2002, at approximately 3:15 P.M., Dr. Mayberry injected Plaintiff with lidocaine to numb his entire upper jaw and then instructed Plaintiff to wait in the waiting area while he finished up with another patient and allow the lidocaine to take effect. At approximately 3:30 P.M. Dr. Mayberry had Plaintiff placed in a dental chair where his assistant had Plaintiff sign a blank "consent form" which advised Plaintiff of certain potential complications. Plaintiff notes for the purpose of this complaint that at the time he signed the consent form there was no "time" or "date" written on the form.

116. At approximately 3:35 P.M. Dr. Mayberry started pulling the eight teeth. At approximately 3:45 P.M. the eighth and final tooth to be pulled broke at the gum-line leaving the whole root of the tooth in place. Dr. Mayberry then informed the Plaintiff that there was a "problem" and informed his assistant that they would "need to hurry" because Dr. Mayberry had plans with his family and wanted to leave the

facility by 4:00 P.M.

117. Dr. Mayberry then began to recklessly dig the root out which caused it to splinter and shatter. Instead of stopping at that juncture, Dr. Mayberry continued to try to dig out the pieces of shattered and splintered bone which not only macerated Plaintiff's buccal plate on both sides of the broken root, but also drove several small pieces of shattered bone deep into the soft tissue.

118. Without removing all of the splintered and shattered pieces of bone, at 3:55 P.M., Dr. Mayberry stopped probing and then stitched up Plaintiff's broken buccal plate and soft gum tissue around the protruding splintering bone and from the Plaintiff's gum. Dr. Mayberry didn't advise Plaintiff of the injuries he suffered and because of the lidocaine, although Plaintiff could hear and feel when Dr. Mayberry shattered the root, Plaintiff believed that he had removed all parts of the root successfully. At exactly 4:00 P.M., Dr. Mayberry escorted Plaintiff to the "Main Corridor" and radioed the L-Unit Officer that Plaintiff was on his way to the Unit for the facility 4:00 P.M. mandatory "stand-up count".

119. It was only at about 5:00 P.M. on this same date of on or about December 12, 2002, that Plaintiff could begin to feel the pain of the injuries. Plaintiff could feel the pieces of splintered bone protruding from the macerated gum line, not only from the inside, but also with his tongue. They were sharp enough to cut his tongue. At approximately 5:30 P.M. on the same date Plaintiff reported to the "med-line" window reporting his pain and inability to eat any kind of food, requesting to be provided whatever pain medication Dr. Mayberry had prescribed. Plaintiff was then informed that the pharmacy had not received any prescription from Dr. Mayberry on behalf of Plaintiff.

Accordingly Plaintiff was left in pain.

120. On or about December 13, 2002, Plaintiff reported to "dental sick-call" and was informed by the staff person on duty in the medical clinic that the Dental Department was closed and that Plaintiff would have to wait until Monday to be examined for his complaints of injury and pain due to it being a "dental case". So again Plaintiff was left in excruciating pain which rendered him unable to eat any of the foods being served in the prison chow-hall.

121. On or about December 15, 2002, Plaintiff could no longer tolerate the pain and hunger, having been unable to eat for the previous 72 hours, which was especially serious considering Plaintiff's liver disease. Thus at approximately 8:15 A.M. Plaintiff reported to the "med-line" window again complaining of serious pain and the need for immediate treatment.

122. At approximately 9:30 P.M. on that same day, on or about December 15, 2002, Plaintiff was called to the Medical Department and examined by Physician's Assistant Ms. Fernando who informed Plaintiff that it appeared he was developing an infection in the area where the dental injury occurred, and that because Dr. Mayberry had failed to provide any prescription for antibiotics or pain medication, Ms. Fernando would provide Plaintiff with enough of both to last him until the next morning when she ordered him to return to "dental sick-call".

123. On or about December 16, 2002, Plaintiff reported to "dental sick-call" and was contacted by Dr. Mayberry. Plaintiff complained to Dr. Mayberry that he had recklessly injured Plaintiff by "racing the clock" on December 12, 2002, so he could leave at 4:00 to go home. Plaintiff informed Dr. Mayberry that there were several pieces of large and sharp pieces of bone protruding from the area where Dr.

Mayberry had broken Plaintiff's tooth and that they were cutting Plaintiff's tongue. Plaintiff informed Dr. Mayberry that he had been left in serious pain ever since the lidocaine wore off and that Plaintiff had been unable to eat any food as a result of the injury and pain. Plaintiff also informed Dr. Mayberry that not only had he failed to inform Plaintiff of the injury when it occurred, but he also failed to remove the splinters of bone from his gum line, and instead just sewed them in order to be able to leave at 4:00 P.M. Furthermore, he had failed to provide Plaintiff with any pain medication or antibiotics. Plaintiff then requested that Dr. Mayberry extract the protruding splinters of bone, provide pain medication, and order Plaintiff a "soft food" diet until the injury healed.

124. In response, Dr. Mayberry informed Plaintiff that is was solely Dr. Mayberry's decision what kind of dental treatment he would receive and when he would receive it. Dr. Mayberry then informed Plaintiff that his request to have the splintered bone removed was denied and that he would just have to "go through the healing process". Dr. Mayberry also refused to provide Plaintiff with any pain medications or to order Plaintiff a "soft diet" from the chow-hall so that Plaintiff could eat. Instead, Dr. Mayberry advised Plaintiff that a "night-guard" would be ordered to fit over Plaintiff's two remaining teeth to prevent those teeth from further injuring Plaintiff when he tried to eat.

125. On or about December 20, 2002, Plaintiff contacted Dr. Rose, Chief Dental Officer, and complained that Dr. Mayberry had recklessly injured Plaintiff on December 12, 2002 when "racing the clock" in pulling Plaintiff's teeth, had failed and was refusing to address Plaintiff's pain and food needs, and was also refusing to take

corrective action to remove splintered bone fragments protruding from Plaintiff's gum line. In response, Dr. Rose examined Plaintiff's injuries and agreed he required corrective dental treatment. Dr. Rose told Plaintiff he would talk to Dr. Mayberry about removing the bone fragments, providing pain medication, and ordering a soft diet.

126. Between December 20, 2002, and January 9, 2003, Plaintiff had approximately eight contacts with either Dr. Mayberry and/or Dr. Rose where Plaintiff had complained of being in constant pain, that the provided "night-guard" did not function to allow Plaintiff to eat, and that Plaintiff had just been approved for Interferon drug therapy to treat his liver disease which necessitated an even greater need for him to be able to eat. Plaintiff had lost approximately ten pounds since December 12, 2002. Plaintiff had also informed both dentists that if they were going to continue to refuse to pull the bone fragments protruding from Plaintiff's upper gum line, Plaintiff needed to have his last back molar pulled in order to have any kind of ability to eat even soft foods as a result of the tooth also cutting into Plaintiff's gum. Yet to each of these requests to have Plaintiff's pain and diet needs addressed, both dentists refused them and would only insist that Plaintiff keep trying to use the night-guard when attempting to eat.

127. On or about January 10, 2003, Plaintiff initiated formal grievances against Dr. Mayberry for the reckless injury and refusing to address Plaintiff's pain and diet needs. Plaintiff was assigned remedy grievance claim number 289170 and then 289711. He exhausted his administrative remedy when he submitted his appeal to the BOP Central Office on May 15, 2003.

128. On or about January 12, 2003, Plaintiff started vomiting

blood and on or about January 13, 2003 reported to medical "sick call". Plaintiff was then examined by Physician's Assistant Futch, whom he informed that because he had been in so much dental pain for a month and Dr. Mayberry and Dr. Rose refused to treat him, he had resorted to taking large doses of aspirin, the only pain medication that could be obtained through the prison commissary. PA Futch then concluded that Plaintiff's internal bleeding was being caused by the excessive aspiring compounded by Plaintiff's inability to eat.

129. On or about that same day (January 13, 2003) PA Futch escorted Plaintiff to the Dental Clinic where he asked why Dr. Mayberry and Dr. Rose had not been addressing Plaintiff's pain and diet needs. Only Dr. Mayberry was present and he refused to give any reason. As a result, PA Futch had codeine sulfate prescribed for Plaintiff for one week, pending further evaluation by Dr. Rose.

130. Between January 13, 2003 and February 4, 2003, Plaintiff had contact with Dr. Rose and/or Dr. Mayberry on at least four more occasions where Plaintiff still complained of being in serious pain when he tried to eat and was still requesting that he be provided with a "soft mechanical diet". Still no action was taken to provide Plaintiff with food he could eat.

131. On or about February 4, 2003, Plaintiff was contacted by Dr. Rose in response to the grievance filed against Dr. Mayberry and not being provided a soft diet by either dentist. Dr. Rose then assured Plaintiff that action would be taken to provide Plaintiff with an adequate diet, especially in regards to Plaintiff's liver disease being aggravated as a result of his being unable to eat.

132. On or about February 5, 2003, Plaintiff was contacted by Dr. Rose, Acting Heath Service Administrator Dewayne Evans, and Food

Service Administrator David Shoemaker, defendants named herein, and informed by each of these parties that if Plaintiff continued to complain and insist upon receiving a "soft diet", he would be placed in "the hole" under conditions of punitive segregation.

133. Between about February 5, 2003, and March 15, 2003, Plaintiff had approximately six contacts with Dr. Rose who was in the process of trying to fit Plaintiff for dentures despite Plaintiff's dental injuries having not yet healed. During each of these encounters Plaintiff continued to inform Dr. Rose that he was still unable to eat due to his injuries and the pain when trying to chew. Plaintiff also advised Dr. Rose that since starting the Interferon treatment for his liver disease, it had become critical that he have an adequate diet, especially because of the anti-viral medication which is recommended taken with meals to increase the absorption rate. In response to each of Plaintiff's complaints, Dr. Rose said that he was "working on it".

134. Between about March 15, 2003 and May 1, 2003, Plaintiff had approximately another six contacts with Dr. Rose concerning the fitting of his dentures. During each of these contacts, Plaintiff advised Dr. Rose that because of the dental injury received in December 2002, where not only a piece of splintered bone was still protruding from his gum but many other smaller pieces of fractured bone were continuing to sequester from his gum tissue, it was impossible to even try to eat with the dentures because of the pain. Plaintiff also informed Dr. Rose that because of the three remaining teeth Dr. Rose chose to leave in originally, due to soft tissue inflammation in Plaintiff's mouth, he could not even eat the soft foods such as bread that he was being provided in the chow-hall as a

result of the remaining teeth chewing into the inflamed tissue. Plaintiff requested during this time period that Dr. Rose extract Plaintiff's remaining teeth so he could at least eat some of the food being provided. Yet between March 15, 2003 and May 1, 2003, Dr. Rose refused to do so.

135. On or about May 1, 2003, Plaintiff contacted Dr. Rose with Chief Psychologist Dr. Kerr who had been kept apprised of Plaintiff's medical and dental problems since May of 2002. Plaintiff again explained with Dr. Kerr present the constant pain he was in and the inability to eat which was affecting his health and medical treatment on Interferon. With Dr. Kerr present, Dr. Rose finally agreed to have Plaintiff's remaining three teeth pulled for "medical reasons" as a result of not being able to properly fit Plaintiff with dentures up to that time due to the dental injuries he suffered in December 2002.

136. On or about May 6, 2003, Plaintiff was called to the Dental Clinic to have Dr. Rose extract the remaining three teeth. Upon Plaintiff's arrival, Dr. Rose informed Plaintiff that it had been decided that Dr. Mayberry would do the extraction. Plaintiff objected and informed Dr. Rose that he and Warden Herrera had previously acknowledged, in response to Plaintiff's BP-9 grievance, that Dr. Mayberry would no longer have anything to do with Plaintiff's dental care. Dr. Rose then advised Plaintiff that if he wanted the three remaining teeth pulled, he would have to allow Dr. Mayberry to do the procedure, or otherwise sign a "refusal of treatment" form. Because Plaintiff was still unable to eat, Plaintiff was coerced into allowing Dr. Mayberry to extract the remaining teeth.

137. On this same date of May 6, 2003, Dr. Mayberry fractured another tooth, one of the incisors, and deliberately left part of the

tooth in the socket, protruding up out of the gum line, without informing Plaintiff. Thus again, after Plaintiff left the dental clinic and the lidocaine had worn off, Plaintiff was able to feel with his tongue another sharp piece of bone protruding from his gum line.

138. On or about May 7, 2003, Plaintiff contacted Dr. Rose and complained that Dr. Mayberry had again fractured a tooth during the procedure, and had failed to inform him, deliberately leaving the broken piece of root in the gum tissue knowing that Plaintiff was suffering from soft-tissue inflammation from the Interferon therapy, and again refused to prescribe a pain medication that Plaintiff could take. Dr. Rose then examined Plaintiff on the spot and acknowledged that "something" was protruding out of the socket where the incisor had been removed. But because the Dental Clinic was closed that day to the general inmate population (Segregation day) Plaintiff would have to wait until the following day to have the object removed from his gum. Dr. Rose then informed Plaintiff to report to "dental sick-call" on the following morning and said that he would discuss the matter with Dr. Mayberry.

139. On May 8, 2003, Plaintiff reported to "dental sick-call" and discovered that only Dr. Mayberry was present. Plaintiff then complained to Dr. Mayberry that there was a sharp piece of bone protruding from the gum line causing him pain, discomfort, and cutting his tongue. Dr. Mayberry then did a cursory examination and informed Plaintiff that there was nothing that he could or would do.

140. On the same date of May 8, 2003, Plaintiff, while trying to eat, embedded the piece of root deeper into the gum tissue. As a result, Plaintiff began to experience severe pain and reported it to the Unit staff. Plaintiff was then advised that the Dental Clinic was

closed and that he would have to wait until morning before he could be sent to the Dental Clinic.

141. On May 9, 2003, Plaintiff reported to Unit staff who then declared a "dental emergency", sending Plaintiff immediately to the Dental Clinic at approximately 7:30 A.M. Upon arriving in the Medical Department, Plaintiff observed Dr. Mayberry with both his and Dr. Rose's assistants talking in the corridor. Plaintiff contacted Dr. Mayberry immediately and informed him that he was in extreme pain where Dr. Mayberry had decided to leave the piece of tooth root protruding from Plaintiff's gum. In response, Dr. Mayberry informed Plaintiff that he had to wait until Dr. Mayberry was done doing some "house cleaning" duties.

142. At approximately 9:15 A.M. on this same date of May 9, 2003, and after waiting in the Medical Department for an hour and forty five minutes for emergency dental care, Plaintiff contacted Medical Record's Officer Ms. Duarte demanding that HSA Patel or the Shift Commander be called to see Plaintiff as a result of Dr. Mayberry's refusal to alleviate Plaintiff's extreme pain. Ms. Duarte then contacted Dr. Mayberry by telephone who was alone with the dental assistants in the Dental Clinic, and advised Dr. Mayberry that Plaintiff was demanding to see a supervisor. Ms. Duarte then informed Plaintiff that Dr. Mayberry was on is way.

143. At approximately 9:30 A.M. on the same day, May 9, 2003, Dr. Mayberry contacted and escorted Plaintiff to the Dental Clinic where he still made Plaintiff wait, though he did not have any other patients. At approximately 9:45 A.M., Dr. Mayberry then examined Plaintiff stating that although he had in fact deliberately left the piece of tooth root in the socket, if it was causing Plaintiff that

much pain he would remove it. In response, Plaintiff demanded that Dr. Mayberry call Mr. Patel or the Shift Commander to the Dental Clinic because Plaintiff was requesting that either x-rays or photographs be taken of his mouth before Dr. Mayberry removed the remaining piece of tooth.

144. In response, Dr. Mayberry informed Plaintiff that he would not call anyone and that he would not take an x-ray. Dr. Mayberry said that if Plaintiff continued to insist that Mr. Patel or the Shift Commander be called, Dr. Mayberry would consider it a "refusal of treatment" and Plaintiff could leave right then and stay in pain. Feeling backed into a corner, Plaintiff was again coerced by Dr. Mayberry into letting him have his way. Plaintiff then requested that Dr. Mayberry preserve the piece of root removed from Plaintiff's gum declaring it evidence of Dr. Mayberry's deliberately inflicting unnecessary injury and pain upon Plaintiff.

145. On the same day of May 9, 2003, and immediately after Dr. Mayberry had removed the piece of tooth root, Plaintiff reported the incident to the Dental Lab Technician, Mr. Bruce Tkachuk, who had come into the Dental Clinic. Mr. Tkachuk then contacted Dr. Mayberry when an officer arrived to escort Plaintiff from the Dental Clinic. Upon leaving the Medical Department, Plaintiff contacted Lt. Espinosa and reported that he had been assaulted by Dr. Mayberry, and requested an investigation. Lt. Espinosa then advised Plaintiff that in her opinion Plaintiff's complaints were more of a civil matter than a criminal one, so she wouldn't undertake any sort of investigation.

146. On or about May 12, 2003, Plaintiff initiated another formal grievance against Dr. Mayberry and Dr. Rose over the dental malpractice, assault and lack of appropriate dental care, including

being left in constant pain, left without corrective surgery in order to provide proper dentures, and left without a proper diet. Plaintiff was assigned remedy grievance claim number 305242 and then re-filed as 308537. He exhausted his administrative remedy when he submitted his appeal to the BOP Central Office on November 4, 2003.

147. On or about June 13, 2003, Plaintiff was contacted by Dr. Rose and informed that the reason he had been denied a "soft diet" since 2002 was that there was no policy at USP Lompoc to provide for such dietary needs. Dr. Rose then informed Plaintiff that he had spoken with Kevin Dyre, a defendant named herein, who worked as a supervisor in the facility kitchen, and that despite Plaintiff's dietary needs Mr. Dyre would only agree to provide him with some soft foods for the next three days. Dr. Rose told Plaintiff that after that there was nothing he could do, although he told Plaintiff that he had informed Dr. Pollack of the problem and that Plaintiff was not receiving an appropriate diet.

148. On or about June 15, 2003, Plaintiff was contacted by Dr. Rose and was informed that Dr. Rose had decided on his own authority that Plaintiff required dental surgery in order to have proper fitting dentures, despite the fact that Plaintiff had been denied his administrative request asking for the same relief. Dr. Rose subsequently informed Plaintiff, without any explanation, that the surgery would not occur.

149. Between June 15, 2003 and August 12, 2003, Dr. Rose continued to try to make the temporary dentures fit Plaintiff's mouth and gums, knowing that it would fail because of Plaintiff's dental injuries, the subsequent removal of Plaintiff's remaining teeth, and the fact that after 9 months there were still bone fragments

sequestering from Plaintiff's tissues. Plaintiff attempted to mitigate his injuries by attempting to use the dentures on several occasions, however the dentures caused Plaintiff too much pain and discomfort and could not help him function for the purpose of eating.

150. On August 12, 2003, Plaintiff initiated another formal grievance against Dr. Mayberry and Dr. Rose after discovering that they had been deliberately falsifying Plaintiff's dental records to cover up the injuries Plaintiff suffered, and to protect themselves from liability. Thus on or about August 20, 2003, after discovering that Dr. Rose had again falsified Plaintiff's dental records following a visit, Plaintiff complained to HSA Patel, requesting that an investigation be undertaken. Plaintiff was assigned remedy grievance claim number 305242 and then re-filed as 308537. He exhausted his administrative remedy when he submitted his appeal to the BOP Central Office on November 4, 2003.

151. On or about September 2, 2003, Plaintiff informed Dr. Rose that he could no longer allow Dr. Rose to attempt to treat Plaintiff because of the ongoing falsification of Plaintiff's dental records.

152. On or about September 19, 2003, Plaintiff contacted Dr. Pollack, Clinical Director, and informed him that both Dr. Mayberry and Dr. Rose had been falsifying Plaintiff's dental records to cover up for the reckless injuries inflicted upon him by Dr. Mayberry, deliberate indifference, and assault. Dr. Pollack, noting Plaintiff's complaint, refused to intercede. Accordingly, on this same date of September 19, 2003, Plaintiff advised Dr. Pollack that he would no longer submit to dental care by Dr. Rose.

153. On or about October 30, 2003, Plaintiff contacted Dr. Pollack complaining that he was still unable to eat solid foods due

to his dental injury that occurred in December 2002. Dr. Pollack then examined Plaintiff and advised him that he needed to see an oral surgeon to have the problem corrected. Yet because Warden Herrera had issued a "blanket order" prohibiting Plaintiff to have any "outside" medical appointments, Dr. Pollack did not know how to provide Plaintiff with the surgery he needed.

154. On or about November 3, 2003, Plaintiff was contacted by Dr. Rose who was insisting that Plaintiff allow Dr. Rose to perform the oral surgery required in order to provide Plaintiff with proper fitting dentures. But because Dr. Rose admitted that he wasn't an "oral surgeon" and because of the previous falsification of dental records, along with other acts that Plaintiff had been complaining of since December 2002 when Dr. Rose refused to do the necessary surgery, Plaintiff was compelled to refuse to permit Dr. Rose to perform the surgery.

155. Plaintiff was subsequently advised by Mr. Patel that there had been a referral for Plaintiff to see an oral surgeon outside the facility, but because of Warden Herrera's order denying Plaintiff out of facility medical treatments, those appointments were cancelled.

156. On or about December 3, 2003, Plaintiff was contacted by Dr. Rose and informed that a "new policy" had been enacted at USP Lompoc which now allowed Dr. Rose to prescribe Plaintiff a "mechanical soft diet" to be served to Plaintiff in the chow-hall. Accordingly, Dr. Rose advised Plaintiff that such an order had been provided to Mr. Shoemaker to provide Plaintiff with a "mechanical soft diet".

157. Despite Dr. Rose's medical order to provide Plaintiff with a "mechanical soft diet", Mr. Shoemaker, Mr. Dyre, and other Food Service employees refused to provide Plaintiff with anything other

than cottage cheese to substitute for all the meats, fruits, vegetables, and other foods like cookies, potato chips, etc. These were all foods that Plaintiff had not been able to eat for almost a year.

158. On or about January 3, 2004, after Plaintiff initiated another formal grievance for being denied the medically prescribed "mechanical soft diet", food service employees began to liquify all of Plaintiff's foods, including any and all soft foods that Plaintiff could eat, in retaliation for Plaintiff's grievance and to discourage Plaintiff from insisting on his special diet. Plaintiff was assigned remedy grievance claim number 324044. He exhausted his administrative remedy when he submitted his appeal to the BOP Central Office on April 13, 2004.

159. On or about April 1, 2004, Joyce Conley took over the position of Warden. As a result, Mr. Patel told Plaintiff that all prior requests from the Health Services Department for Plaintiff to receive outside medical and dental treatment would be resubmitted.

160. On or about April 30, 2004, Plaintiff was taken outside of USP Lompoc to Lompoc, California, for dental treatment by an oral surgeon. Plaintiff was advised by this oral surgeon that after surgery he would require "follow-up medical care". Plaintiff then advised the oral surgeon that he would not allow the only dentist at USP Lompoc, Dr. Mayberry (Dr. Rose retired in January 2004) to have anything to do with his care. The oral surgeon then said that he would not do the surgery unless it could be verified that Plaintiff would receive the necessary follow-up care after he returned to the facility. As a result, the oral surgeon contacted the facility by telephone and informed Plaintiff that either Dr. Pollack or Dr. Gross

would provide Plaintiff with follow-up care within five days of the surgery. To date no such follow-up care has been provided.

161. As of the date of filing this complaint, although he has now had the surgery he has needed since December 2002, which has corrected the damage complained of, Plaintiff is still without proper dentures to eat with. In USP Victorville dentist Dr. James Hicks' declaration, he stated that once impressions are made, it can take up to six months for the dentures to be ready to be fitted. However, the declaration also states that Plaintiff began the process back on September 13, 2004. On April 2, 2004, Plaintiff was contacted by Dr. Pollack, Mr. Patel, and Dr. Mayberry, where Plaintiff was asked whether he would allow Dr. Mayberry to proceed with providing Plaintiff with a new set of dentures which were in the process of being manufactured at the time Dr. Rose retired. Yet because of Dr. Mayberry's reckless actions resulting in injuries to Plaintiff and deliberate indifference to Plaintiff's injuries, pain, and dietary needs, along with the falsification of Plaintiff's dental records, Plaintiff had no choice but to respectfully refuse. As a result of his refusal, Dr. Mayberry ordered Mr. Shoemaker, Mr. Dyre, and all other Food Service employees not to provide Plaintiff with any variances in his diet.

162. Plaintiff has exhausted all administrative remedies required pursuant to 42 U.S.C. § 1997 et seq. In addition to the formal administrative grievances previously alleged, he submitted remedy grievances for the deliberate indifference to his serious dental conditions. Plaintiff was assigned remedy grievance claim numbers 291381, 308537 and 315559. He exhausted his administrative remedies when he submitted his appeal to the BOP Central Office on August 8, 2003, November 4, 2003, February 4, 2004 respectively.

163. and the FTCA, 28 U.S.C. § 2671 et seq. that are prerequisite to the claims alleged above.

C. Defendants Deliberately Interfered With Northington's Medical and Dental Treatment by Denying Him Access to His Medical And Dental Records, Thereby Causing Him Serious Injury, Pain and Suffering.

1. Defendants Denied Northington Medical Treatment By Denying Him Access to and Use of His Medical Records.

164. Plaintiff incorporates herein by reference paragraphs 1 through 163 as though fully set forth herein.

165. On or about May 15, 2001, Plaintiff was transferred from the FMC in Rochester, Minnesota, to the FDC in Littleton, Colorado after being admitted to the FDC in November of 2000 by federal court order for evaluation and treatment of his HVC and liver disease. When Plaintiff arrived at the FMC, his medical records from the Federal Detention Unit at the Santa Ana City Jail, Santa Ana, California, the Metropolitan Federal Detention Center, Los Angeles, California, and the Douglas County Jail, Castle Rock, Colorado, were transferred with him. Plaintiff had been incarcerated as a federal pre-trial detainee at each of these facilities under Federal Registration Number 18299-112 and each of these facilities had been receiving medical evaluations for Plaintiff's chronic care needs.

166. On or about May 15, 2001, and August 15, 2001, Plaintiff complained to Dr. Kraus, Chief Medical Officer at the FDC, that he was in need of medical treatment for his HVC and advanced liver disease. Plaintiff advised Dr. Kraus that he had recently spent approximately five months as a patient at the FMC where Plaintiff was advised by Dr. Ronald Cygnor that Plaintiff's medical condition was life threatening and beyond treatment. In response, Dr. Kraus informed Plaintiff

beginning in May 2001 that there were no medical records showing that Plaintiff had been evaluated at the FMC or any other federal prison facility, and thus in Dr. Kraus' opinion Plaintiff was delusional and exaggerating his medical condition. Dr. Kraus advised Plaintiff to seek psychiatric help and authorized that he be treated with psychotropic medications despite the fact that Plaintiff claimed to be suffering from neuroleptic malignant syndrome ("NMS"), a potentially fatal condition when psychotropic medications are prescribed.

167. As a result of not having Plaintiff's medical records transferred to and compiled at the FDC, Plaintiff began to suffer from the effects of NMS because of the psychotropic medications Dr. Kraus and other medical personnel prescribed. Beginning on or about September 1, 2001, Plaintiff began to suffer delusions, black-outs, hallucinations, tremors, and seizures, due to the psychotropic medication causing the NMS.

168. As previously alleged, Dr. Gross told Plaintiff nothing in his medical records from the FDC in Colorado substantiated his medical claims. Between March 23, 2002 and September 1, 2002, Dr. Gross and/or other unknown parties failed to obtain Plaintiff's medical records from the federal facilities previously confining him.

169. Despite being without Plaintiff's substantial medical records, Dr. Gross and Dr. Pollack decided to have Plaintiff evaluated for conventional treatment with Interferon. They denied his request to be evaluated for a liver transplant, even though Plaintiff had informed Dr. Gross that he had a twin brother who was willing to be evaluated for a "live donor liver transplant." On or about November 15, 2002, Plaintiff learned that Dr. Gross and Dr. Pollock had decided

to start him on Interferon treatment despite other doctors' opinions that it was too late for such treatment. They made their decision based, in part, on Dr. Jahnke's recommendation.

170. On or about December 30, 2002, Plaintiff initiated formal grievances against Dr. Gross, Dr. Pollack, and Other Parties Presently Unknown, for various medical claims of deliberate indifference and unnecessary delay and for failing to obtain Plaintiff's medical records that were needed in order to determine a proper course of treatment for his life threatening condition.

171. On or about February 20, 2003, Plaintiff began his Interferon/Ribavirin drug therapy without the doctors having his complete medical records.

172. On or about April 1, 2003, Plaintiff began to suffer from adverse side effects of the medical treatment prescribed by Dr. Gross and Dr. Pollack.

173. On or about June 3, 2003, Plaintiff filed a FTCA claim regarding medical complaints, which included Dr. Gross, Dr. Pollack, Mr. Evans, and Warden Herrera's failure to obtain Plaintiff's complete medical file before starting life-endangering medical treatment.

174. On or about October 1, 2003, Plaintiff initiated another formal grievance requesting that action be taken to correct his medical file to accurately reflect his medical problems, including the lasting side effects and resulting injury Plaintiff received as a result of the Interferon therapy and/or as a result of being denied an adequate diet during the course of treatment.

175. On or about October 30, 2003, Plaintiff contacted Mr. Evans, a defendant named herein, and personally complained of the lack of accurate record-keeping. Mr. Evans told Plaintiff that he did not have

the right, per USP Lompoc policy, to have every examination, contact, and complaint with doctor and/or nurses at USP Lompoc noted in his medical file.

176. On or about December 8, 2003, Plaintiff was contacted by Dr. Gross and Plaintiff submitted to an hour-long examination regarding his injuries incurred as a result of Interferon treatment. During the course of the extensive examination, Dr. Gross made several statements regarding special laboratory tests that needed to be conducted in order to evaluate Plaintiff's pain needs and his possible neurological disorder that he was being denied treatment for by Warden Herrera, who was disallowing him to be treated outside of the facility.

177. On or about January 8, 2004, after a month had passed and none of the laboratory tests Dr. Gross discussed had been conducted, Plaintiff finally received an updated copy of his medical file and discovered that Dr. Gross had failed to order the tests. Plaintiff also discovered that Dr. Gross had not entered a single piece of information in the chart regarding Plaintiff's extensive examination on December 8, 2003.

178. As a result of his discovery, Plaintiff initiated another formal grievance on or about January 8, 2004, against Dr. Gross for unnecessary delay in treatment and for failing to keep accurate medical records.

179. As a result of the incompleteness of his medical file due to behaviors of the defendants named herein, Plaintiff has been injured by the medical decisions other doctors have made in reliance on those records. Furthermore, Plaintiff's medical records have been consistently relied upon by Warden Herrera, Western Regional Director Robert Haro, a defendant named herein, and All Other Parties Presently

Unknown, in denying him his formal grievances in all his medical complaints, as well as in Plaintiff's complaint filed against Dr. Gross before the California Medical Board.

180. Plaintiff has exhausted his administrative remedies for purposes of 42 U.S.C. § 1997 regarding his grounds for relief on these medical records claims. Plaintiff filed remedy grievances alleging improper collection, maintenance and availability of his medical and dental records. He assigned remedy grievance claim number 289711, 291381, 308537 and 314849. He exhausted his administrative remedies when he submitted his appeal to the BOP Central Office on May 15, 2003, August 8, 2003, November 4, 2003, January 15, 2004, respectively.

2. Defendants Denied Northington Dental Treatment By Denying Him Access to and Use of His Dental Records.

181. On or about December 12, 2002, Plaintiff received dental injuries while receiving dental treatment from Dr. Mayberry, as alleged in this complaint. Between December 12, 2002, and January 10, 2003, Plaintiff had numerous contacts with Dr. Mayberry and Dr. Rose, where Plaintiff complained of the injury, the seriousness of the pain, and the fact that as a result he could not eat the foods being served in the facility chow-hall. On at least four occasions Plaintiff asserted that the injuries occurred as a result of Dr. Mayberry's reckless act of "racing the clock" in order to leave the facility by 4:00 because he had "plans with his family." On those at least four occasions, Plaintiff demanded that the injuries inflicted on him be corrected by whatever surgical means necessary. Although Dr. Rose advised Plaintiff on at least three occasions between December 12,

2002, and January 10, 2003, that surgery would be done in order to alleviate Plaintiff's pain, allow him to eat, and provide him with properly fitting dentures, Dr. Mayberry still refused to perform such surgery.

182. On or about January 10, 2003, Plaintiff initiated formal administrative grievances against Dr. Mayberry for his reckless actions which caused Plaintiff his injury and for being deliberately indifferent to Plaintiff's pain and diet needs.

183. On or about February 3, 2003, Plaintiff was contacted by Dr. Mayberry regarding the administrative grievance against him. Dr. Mayberry informed Plaintiff that his having filed the grievance wouldn't matter in that it would be Plaintiff's dental records, not his allegations, that would be given weight in any administrative decision.

184. On or about April 30, 2003, Plaintiff received a response from Western Regional Director Robert Haro informing him that the decision to provide Plaintiff with corrective surgery had been an option provided Plaintiff, but that according to his dental records it was an option he did not choose.

185. As a result of receiving this response from Mr. Haro, as well as a result of being assaulted by Dr. Mayberry again on May 6 through May 9, 2003, on or about May 15, 2003 Plaintiff submitted a "Request to Staff" to Medical Records Officer Duarte to obtain a complete copy of his dental records.

186. On or about June 15, 2003, Plaintiff contacted Ms. Duarte to inquire as to the reason he was yet to receive a copy of his dental records. Ms. Duarte informed him that she had been instructed by Dr. Rose not to provide Plaintiff a copy of his dental records until Dr.

Rose had the opportunity to review the records and authorized Ms. Duarte to copy and provide them to Plaintiff.

187. On or about July 10, 2003, Plaintiff finally received a copy of his dental records, and after careful review noted that both Dr. Rose and Dr. Mayberry had deliberately altered and falsified the records in order to cover up Dr. Mayberry's recklessness and the injuries suffered by Plaintiff as a result, as well as Dr. Rose, Dr. Mayberry, and other Named and Unnamed Defendant's possible liabilities for deliberate indifference to Plaintiff's injuries, pain, suffering, and lack of proper diet. Specifically, but not limited to, the incident on or about December 12, 2002 when Dr. Mayberry injured Plaintiff at approximately 3:45 PM was changed in both the record and on the consent form to read 12:15 PM in order to cover up Plaintiff's allegation, up to this point undenied by Dr. Mayberry, that Dr. Mayberry had been "racing the clock" to leave the premises by 4:00 PM.

188. Plaintiff also noted that Dr. Rose had never documented, or had removed, such documentation from Plaintiff's dental record regarding Plaintiff's "dental sick-call" contact and examination in March 2002 where Dr. Rose failed to treat Plaintiff for a toothache and abscessed tooth. Plaintiff further noted that beginning in June of 2002 when Dr. Rose falsely begins Plaintiff's dental record at USP Lompoc, until Plaintiff is injured by Dr. Mayberry in December 2002, the record is replete with entries regarding Plaintiff's pain based on a customary "pain scale" of "0 to 10", even though Dr. Rose had never asked Plaintiff what degree of pain he was in based upon such a scale, even once.

189. Plaintiff also noted that Dr. Mayberry falsified the time frames reflecting the exact times Plaintiff arrived at the

Medical Clinic for emergency dental treatment on May 9. 2003, as well as when Dr. Mayberry actually had contact with and extracted the piece of root from Plaintiff's gum. Plaintiff also noted that throughout the dental record, beginning on or about December 12, 2002, both Dr. Mayberry and Dr. Rose falsified the record by deliberately failing to document the exact nature and degree of the pain and suffering of the injuries caused by Dr. Mayberry on or about December 12, 2002.

190. As a result of discovering these deliberate acts of fraudulently falsifying Plaintiff's dental records, Plaintiff on or about August 5, 2003, and September 2, 2003, contacted Dr. Rose, Mr. Evans, Mr. Patel, Dr. Pollack, and Mr. Henderson, all defendants named herein, notifying that there was evidence through Plaintiff's immediate work supervisor, Mr. Charles Henderson in the Unicor Cable Factory, who wrote the security pass sending Plaintiff to the Dental Clinic at 2:30 PM on or about December 12, 2002, the video surveillance tapes of both the Medical Clinic and Main Corridor, and the pass written by Unit-L Officer Chezwick on May 9, 2003, proving that Dr. Mayberry and/or Dr. Rose had deliberately and fraudulently falsified Plaintiff's dental records to protect themselves and the BOP form tort claims.

191. Despite being provided this information, and despite Plaintiff's written requests to Special Investigation Officer Wells to conduct an investigation into this malfeasance, no action was ever taken. Instead, on or about September 12, 2003, Mr. Patel informed Plaintiff that both Mr. Henderson and Mr. Chezwick's pass book's had been destroyed, which would end any such investigation.

192. On or about September 2, 2002, Dr. Rose admitted to Plaintiff that he had falsified Plaintiff's assertion of pain in the

dental records because "all doctors have the discretion to assign patients' pain, especially prisoners, who have a tendency to always exaggerate theirs."

193. Defendants Mayberry and Rose engaged in acts and/or omissions of deliberate and fraudulent falsification intended to cover up Plaintiff's claims of dental malpractice and deliberate indifference to his dental and related health care needs, including without limitation, the denial of providing Plaintiff functioning dentures or an adequate diet.

194. Plaintiff exhausted all available administrative remedies for purposes of 42 U.S.C. § 1997 regarding his grounds for relief on his dental records claims. Plaintiff has exhausted his administrative remedies for purposes of 42 U.S.C. § 1997 regarding his grounds for relief on these medical records claims. Plaintiff filed remedy grievances alleging improper collection, maintenance and availability of his medical and dental records. He assigned remedy grievance claim numbers 289711, 291381, 308537 and 314849. He exhausted his administrative remedy when he submitted his appeal to the BOP Central Office on May 15, 2003, August 8, 2003, November 4, 2003, January 15, 2004, respectively.

D. Defendants Retaliated Against Northington, Causing Him Further Injury, Pain and Suffering Because He Pursued His Legal Rights Through the Prison Grievance System.

195. Plaintiff incorporates herein by reference paragraphs 1 through 194 as though fully set forth herein.

196. On or about March 20, 2003, Plaintiff was contacted by Physician's Assistant ("PA") Futch, who informed Plaintiff that he had overheard a conversation between doctors and administrators at USP

Lompoc concerning Plaintiff's grievance against Dr. Mayberry. PA Futch then told Plaintiff that there had already been talk in the medical department that as a result of Plaintiff's grievance against Dr. Mayberry the duration and quality of his medical care and treatment could be affected. PA Futch then advised Plaintiff that if there was any hope of him receiving a full year of Interferon drug therapy, as opposed to a 24-week period as it was being discussed in the medical department, that it would be in Plaintiff's best interest to drop his grievance against Dr. Mayberry.

197. On or about this same date of March 20, 2003, Plaintiff decided to drop his grievance against Dr. Mayberry if Mr. Shoemaker in Food Service would agree to provide Plaintiff with a "mechanical soft-food diet" to meet Plaintiff's nutritional needs.

198. On or about March 22, 2003, PA Futch informed Plaintiff that no one was willing to provide him with the diet he was requesting, thus Plaintiff continued with his formal administrative remedies.

199. On or about May 15, 2003, Plaintiff initiated another formal administrative grievance against Dr. Mayberry regarding his deliberate acts and omissions between May 6, 2003 and May 9, 2003 which resulted in Plaintiff being placed in deliberate pain.

200. On or about June 24, 2003, Plaintiff contacted Mr. Dewayne Evans, Assistant Health Service Administrator, and complained that Mr. Evans was failing to address or investigate Plaintiff's claim against Dr. Mayberry and was deliberately attempting to interfere with the administrative remedy process in order to delay or preclude Plaintiff from exhausting his administrative remedies. At that time, Plaintiff was contacted by Mr. Joseph Henderson, a defendant named

herein, who was the Warden's Assistant and Spokesman. Plaintiff explained to Mr. Henderson the events that took place between May 6, 2003 and May 9, 2003, claiming that Dr. Mayberry deliberately left a large piece of root in Plaintiff's gum knowing that Plaintiff was suffering from serious soft tissue inflammation at the time, and that after being notified of the injury on May 8, 2003, he refused to correct the matter, deliberately leaving Plaintiff in serious pain. Accordingly, Plaintiff advised Mr. Henderson that in Plaintiff's opinion, such acts and omissions constituted an assault.

201. In response, Mr. Henderson informed Plaintiff that if he pursued such a charge against Dr. Mayberry, he would be retaliated against, suggesting Plaintiff would be transferred from his designated facility and region.

202. On or about June 25, 2003, Plaintiff contacted Warden Herrera and reiterated the same events as he had told Mr. Henderson the previous day. Warden Herrera advised Plaintiff to address his claim in an administrative grievance and turn it in to Mr. Henderson, who as the Warden's Assistant, handled BP-9 grievances.

203. Beginning about April 1, 2003, Plaintiff began to suffer from serious side-effects of the Interferon/Ribavirin drug treatment he was then receiving. The worst of the side-effects was the soft-tissue inflammation that later progressed into a painful burning sensation in Plaintiff's hands, feet, back, and neck. During the months of April through July 2003, Plaintiff continuously reported this condition to his doctors and was told by Dr. Gross that he would have to wait and hope that the condition went away on its own after the Interferon/Ribaviron treatment was completed.

204. On or about July 30, 2003, Plaintiff's Interferon/Ribaviron

treatment was stopped, per BOP policy which limited Plaintiff to 24-weeks of treatment despite the manufacturers prescription, Plaintiff's contract with the manufacturer specifying and guaranteeing a full year of treatment, and Plaintiff's individual medical needs.

205. On or about August 26, 2003, Plaintiff contacted Dr. Gross and informed him that although the painful burning sensation had abated, Plaintiff's hands and feet were still extremely numb and causing him discomfort. Plaintiff informed Dr. Gross that he was beginning to experience an electrical sensation moving up into his spinal cord and that he was losing his ability to taste and smell and could no longer produce semen.

206. As a result of his examination and consultation with Dr. Gross, Dr. Gross advised Plaintiff that he would need to be examined by both a Neurologist and a "liver specialist".

207. On or about October 30, 2003, Plaintiff was contacted by Dr. Pollack and informed that Mr. Patel, Heath Services Administrator, had scheduled an appointment with Dr. Enti, a neurologist practicing in Lompoc, California, for November 2, 2003, but that Warden Herrera had issued a "blanket order" forbidding Plaintiff from leaving the facility for medical appointments. Dr. Pollack then informed Plaintiff that not only would that preclude him from being examined and evaluated by a neurologist, but would also preclude him from being examined and evaluated by an oral surgeon and a liver specialist. Dr. Pollack further advised Plaintiff that Dr. Pollack could not understand why Warden Herrera would issue such a "blanket order" denying Plaintiff medical care outside the facility when Warden Herrera had already allowed Plaintiff medical examinations and evaluations outside the facility on at least four prior occasions

between August and November 2002.

208. On or about this same date of October 30, 2003, Plaintiff initiated a formal complaint through the administrative grievance procedure alleging that the only possible reason Warden Herrera had to interfere with and deny Plaintiff medical evaluation and treatment outside the facility was in retaliation for Plaintiff's grievances and FTCA claims filed against BOP employees at Lompoc, including the Warden himself. Plaintiff requested that in accordance with BOP grievance policies, such a grievance against Warden Herrera be treated as a "sensitive matter", allowing Plaintiff to file his grievance and request for medical treatment directly with Western Regional Director Mr. Haro. Plaintiff was then advised by his counselor, Mr. Tuite, that Plaintiff's grievance against Warden Herrera would have to be answered by the Warden himself first.

209. On or about December 1, 2003, Plaintiff received a response from Warden Herrera stating that the cancellation of Plaintiff's appointments for medical treatment had been cancelled due to "security reasons" and that there was no evidence of his retaliation. Further, Warden Herrera stated that medical requests for examination by a neurologist and an oral surgeon would be resubmitted in the future for reconsideration.

210. Plaintiff was later informed by both Dr. Gross and Mr. Patel that Warden Herrera had again cancelled Plaintiff's medical appointments with a neurologist, an oral surgeon, and a gasternologist.

211. On or about April 15, 2004, Plaintiff was advised by Mr. Patel that all requests for Plaintiff's medical care and treatment had been resubmitted to the new Warden, Joyce Conley.

212. On or about April 30, 2004, Plaintiff was escorted to the City of Lompoc where he was treated by an oral surgeon who removed the fractured bone left in place by Dr. Mayberry and Dr. Rose.

213. On or about May 17, 2004, Plaintiff was escorted to the City of Lompoc, where he was examined by a neurologist, Dr. Enti, for numbness and shock sensations he suffered since his Interferon treatment. Dr. Enti attributed these and other neuropathic conditions to the interferon treatment and Plaintiff's HVC. Dr. Enti further attributed Plaintiff's complaints about the strong metallic taste in his mouth, loss of smell, and inability to obtain an erection or produce semen were all symptoms of his liver disease and not of a neurological disorder. Dr. Enti advised Plaintiff that he required the medical care of a liver specialist to address the more serious symptoms he was now suffering from.

214. As of the date of this Second Amended Complaint, he has yet to be reevaluated for placement on the National Donor Registry.

215. Plaintiff has exhausted all administrative remedies for purposed of 42 U.S.C. § 1997e regarding the denial of medical care and/or unnecessary delay in providing medical treatment and regarding Warden Herrera's retaliation and other forms of harassment by BOP staff. Plaintiff filed remedy grievances alleging improper collection, maintenance and availability of his medical and dental records. He assigned remedy grievance claim numbers 289711, 291381, 308537 and 315559. He exhausted his administrative remedy when he submitted his appeal to the BOP Central Office on May 15, 2003, August 8, 2003, November 4, 2003, February 4, 2004, respectively.

216. Beginning no later than June 2000 and continuing to the present, Defendants, through their policies, procedures and customs,

have continually, systematically and unlawfully denied Plaintiff *a system of ready access* to medical services and been deliberately indifferent to his serious medical and dental conditions in violation of his constitutional rights. Moreover, Defendants' continuing, systemic and unlawful conduct barring Plaintiff's access to medical care and continuing indifference to his serious conditions has tolled the running of any applicable statutes of limitation.

CAUSES OF ACTION
COUNT ONE

***Bivens* Civil Rights Claim**
[Fifth and Eighth Amendments]
(Against Defendants Hawk-Sawyer, Lappin, Haro, Gunja, Herrera, Slade, Compton, Henderson, Pollack, Patel and Evans)

217. Plaintiff re-alleges paragraphs 1 through 216 above and incorporate them herein by reference as though set forth in full.

218. When Plaintiff entered Defendants' custody, on or about June 2000, Defendants classified him as a "pre-trial detainee" in federal custody. While being held as a federal pre-trial detainee, Plaintiff was also a convicted prisoner of the State of Colorado and serving a State sentence.

219. At all times relevant herein, Defendants Hawk-Sawyer, Lappin, Haro, Gunja, Herrera, Slade, Compton, Henderson, Pollack, Patel and Evans, (collectively County One defendants) and each of them, were duly appointed and acting correctional officers, charged with creating, implementing and enforcing the regulations, policies, customs and usages of the United States of America, by and through its Federal Bureau of Prisons, U.S. Marshal Service and its U. S. Penitentiaries. As alleged more fully below, these defendants created, implemented and enforced policies that were deficient that

the policies themselves are a repudiation of constitutional rights and are the moving force of the constitutional violations alleged herein. Plaintiff sues the Count One Two defendants in their individual capacities for their deliberate indifference to Plaintiff's serious medical and dental conditions and dietary needs.

220. The applicable policies, procedures and customs include, without limitation:

1. Bureau policies, procedures and/or customs prohibiting federal pretrial detainees and inmates from being evaluated for, and receiving, liver transplants. *Supra*, ¶¶ 43, 47, 55, 61 and 83.

2. Bureau policies, procedures and/or customs prohibiting federal pretrial detainees and inmates, without regard to their individual health care needs, from receiving treatment with Pegainterferon, a pegylated interferon, based on whether the facility in which they are housed is qualified or approved to administer the drug. *Id.* ¶¶ 62, 64.

3. Bureau policies, procedures and/or customs restricting federal pretrial detainees and inmates, without regard to their individual health care needs, from receiving treatment with Pegainterferon, a pegylated interferon, to only a 24 week treatment regimen instead of the twelve (12) month regimen prescribed by the drug's manufacturer and Plaintiff's physician, Dr. Jahnke. *Id.* ¶¶ 66, 68-69 67, 71, 76 and 78.

4. Bureau policies, procedures and/or customs restricting federal pretrial detainees and inmates' receipt, without regard to their individual health care needs, of the special diet required to facilitate peg-interferon treatment, including but not limited to, administration of the ribavirin supplements with meals, the combination of which is necessary to improve the body's rate of interferon absorption, mechanical soft diet, and treatment of the severe and painful side-effects interferon treatment causes. *Id.* ¶¶ 68-70, 75.

5. Bureau policies, procedures and/or customs that deny federal pretrial detainees and inmates,

without regard to their individual health care needs, medical and dental treatment to alleviate or manage the painful side effects caused by peg-interferon treatments. *Id.* ¶¶ 75-84, 86-87, 111-159, 162- 164.

6. Bureau policies, procedures and/or customs requiring federal pretrial detainees and inmates suffering serious medical and dental conditions to continue working, without regard to their individual health care needs, while suffering serious pain - in this case, Plaintiff's severe side effects caused by the peg-interferon treatments. *Id.* ¶¶ 68-84.

7. Bureau policies, procedures and/or customs that authorize BOP personnel to use prison administrative and correctional proceedings to delay and deny federal pretrial detainees and inmates' receipt of medical treatment, without regard to their individual health care needs, in this case, Plaintiff's peg-interferon treatments, *id.* ¶¶ 84, and his continued evaluation by "outside" liver specialists and neurologists as prescribed by his prison physicians. *Id.* ¶¶ 83-86, 96 and 98.

8. Bureau policies, procedures and/or customs authorizing BOP personnel to use prison administrative and correctional proceedings to delay and deny federal pretrial detainees and inmates' receipt of dental treatment, without regard to their individual dental care needs. *Id.* ¶¶ 107-162.

9. Bureau policies, procedures and/or customs permitting BOP personnel to avoid documenting inmates' medical and dental history thereby permitting BOP personnel to conceal their negligent, reckless and malicious treatment of inmates from appropriate review and oversight, thereby ratifying such violations of inmates' rights to medical and dental care. *Id.* ¶¶ 36-162.

10. Bureau policies, procedures and/or customs authorizing BOP personnel to retaliate against federal pretrial detainees and inmates who express grievances about delays and denials of medical care by further denying and delaying said medical care. *Id.* ¶¶ 36-162.

221. Defendants, and each of them, are liable to Plaintiff Northington, pursuant to ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics***, 403 U.S. 388 (1971) because Defendants violated and/or conspired to violate his federally protected civil rights under the Fifth and Eighth Amendments to the United States Constitution as follows:

A. Defendants knowingly and intentionally denied and/or delayed Plaintiff's medical care and treatment and were deliberately indifferent to his serious medical needs as alleged more fully, *Supra*, ¶¶ 36-106.

B. Defendants knowingly and intentionally denied and/or delayed Plaintiff's dental care and treatment and were deliberately indifferent to his serious dental needs as alleged more fully, *supra*, ¶¶ 107-161;

C. Defendants failed to properly train, supervise, monitor, investigate and/or take corrective action against their custodial executives, medical personnel, staff, guards and prison employees as alleged more fully, *supra*, ¶¶ 36-161;

D. Defendants coerce, intimidate and retaliate against inmates who complain about the barriers to medical care as alleged more fully, supra, ¶¶ 36-161; and,

E. Plaintiff exhausted all administrative remedies by filing grievances through the USP grievance system for each of his civil rights claims medical, dental and dietary and procedures, by filing grievances relating to barriers to medical care as alleged more fully, supra, ¶¶ 162, 180, 194, 215.

222. Defendants, and each of them, have known Northington suffered from serious liver disease, and related ailments, since he entered the Bureau's custody in 2002. Defendants knew Plaintiff developed serious dental problems that interfered with his ability to eat nutritious meals.

223. Defendants, and each of them, began denying Northington the

medical and dental care he required from the start of his custody. Northington repeatedly notified Defendants, in person and through the penitentiary grievance procedures, that they were denying him necessary medical, dental and mental health treatment since he entered the Bureau's custody in 2002.

224. Defendants, and each of them, retaliated against Plaintiff because he pursued administrative grievances seeking to get necessary medical and dental treatment that Defendants have denied him. Defendants retaliated by further delaying and denying Plaintiff's treatment as alleged more fully above.

225. Defendants, and each of them, denied and delayed Northington from receiving his peg-interferon treatments, and ultimately reduced his treatment to 24 weeks, instead of the full year long treatment he was prescribed, without regard to his medical condition which showed he was responding well to the treatment. When Defendants stopped the peg-interferon treatment early, Plaintiff's liver disease returned to its pre-treatment condition, and thereafter became 50% more worse than it had been.

226. Defendants, and each of them, have prevented, and continue to prevent, Northington from being considered for placement on the National Organ Transplant List, despite knowing he will very likely die without a liver transplant.

227. Plaintiff steadily documented the barriers he faced through the prison grievance system, and by exhausting these administrative remedies, he placed Defendants on notice as to their continuing violations of his civil rights to necessary medical care.

228. Defendants have known about their unconstitutional barriers to medical care and services, barriers to dental care and services and

their retaliation against inmates since no later than 2002. Despite this knowledge, Defendants have and continue to withhold life saving treatment of Northington's liver disease and other conditions alleged more fully above.

229. Defendants, and each of them, ratified these violations and thereby endorsed them as the policy, procedure and/or custom of the United States of America, its Federal Bureau of Prisons, its United States Penitentiaries and its U.S. Marshal Service.

230. Defendants, and each of them, by and through their barriers to medical and dental care and their refusal to provide Northington the care and treatment he requires, have been and continue to be deliberately indifferent to his serious medical and dental conditions.

231. Since each Defendant was, at all relevant times, the policy maker, principal(actual and/or ostensible), master, and/or employer directing the Governmental Entity Defendants, and each of them, and since each defendant, in doing the things herein described, was acting within the scope of his or her authority as such policy maker, each Count One defendant is legally liable for the violation of Plaintiff's rights resulting from the implementation and/or application of their illegal policies to deny his necessary medical, dental and dietary services.

232. As a legal and proximate result of the aforementioned acts and omissions of Defendants, and each of them, Plaintiff's medical condition has substantially deteriorated and shortened his life expectancy.

233. As a legal and proximate result of the conduct of the Count One defendants, and each of them, Plaintiff suffered severe emotional distress and mental suffering, and was injured in his health,

strength, and activity and sustained injuries to his person, including disfigurement, all of which have caused and continued to cause plaintiff great mental and nervous pain and suffering.

234. Plaintiff sustained injuries that were a foreseeable result of said violations and/or breaches.

235. As a result of these injuries, Plaintiff has suffered, and will prove at trial, general damages in an currently-unknown amount according to proof at trial.

236. As a further legal and proximate result of said conduct of the Count One defendants, and each of them, Plaintiff will employ in the future physicians, surgeons, therapists, and others for examination, treatment and care, and thereby incurred and will incur medical and incidental expenses. As a result, Plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

237. As a further legal and proximate result of said conduct of the Count One Defendants, and each of them, Plaintiff will be prevented from attending his usual occupation. Moreover, as a legal result of the acts of Defendants, and each of them, Plaintiff's future earning capacity has been greatly impaired. As a result, plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

238. As a legal and proximate result of said conduct, Plaintiff is legally entitled to all remedies afforded him by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* , 403 U.S. 388 (1971) including *inter alia*, compensatory damages, punitive damages, attorneys fees and costs, and prejudgment interest against each Defendant.

239. The aforementioned conduct of all Defendants, and each of them, was willful, malicious, was intended to oppress Plaintiff Northington, and/or was undertaken with a conscious disregard of his rights, thereby entitling Plaintiff to an award of punitive damages.

240. Plaintiff exhausted available administrative remedies, as described in this complaint, by filing the appropriate grievances as each violation occurred.

241. Moreover, Plaintiff provided the Governmental Entity Defendants timely notice of his intention to bring this action by completing the pre-filing notice of claims procedures required by the Federal Tort Claims Act.

COUNT TWO

***Bivens* Civil Rights Claim**
[Fifth and Eighth Amendments]
(Against Defendants Haro, Gunja, Herrera, Slade, Compton, Pollack, Gross, Barton, Henderson, Patel, Evans, Misera, Patel, Salanadan, Shoemaker, Dyre and Johnson)

242. Plaintiff re-alleges paragraphs 1 through 241 above and incorporate them herein by reference as though set forth in full.

243. At all times relevant herein, Defendants Haro, Gunja, Herrera, Slade, Compton, Pollack, Gross, Pollack, Barton, Henderson, Patel, Evans, Misera, Patel, Salanadan, Shoemaker, Dyre and Johnson and each of them, (Collectively County Two Defendants) were duly appointed and acting medical and correctional employees at facilities where Defendant United States confined Plaintiff. Plaintiff sues the Count Two defendants in their individual capacities for their deliberate indifference to Plaintiff's serious medical and dental conditions and dietary needs.

244. The Count Two defendants, and each of them, have known

Northington suffered from serious liver disease, and related ailments, since he entered the Bureau's custody in 2002. Defendants knew Plaintiff developed serious dental problems that interfered with his ability to eat nutritious meals.

245. The Count Two defendants, and each of them, began denying Northington the medical and dental care he required from the start of his custody. Northington repeatedly notified Defendants, in person and through the penitentiary grievance procedures, that they were denying him necessary medical, dental and mental health treatment since he entered the Bureau's custody in 2002.

246. The Count Two defendants, and each of them, are liable to Plaintiff Northington, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) because Defendants violated and/or conspired to violate his federally protected civil rights under the Fifth and Eighth Amendments to the United States Constitution as follows:

A. The medical provider defendants (Cygnor, Krause, Pollack, Gross, Pollack and Barton) knowingly and intentionally denied and/or delayed Plaintiff's medical care and treatment and were deliberately indifferent to his serious medical needs as alleged more fully, *Supra*, ¶¶ 36-106.

B. The medical provider defendants knowingly and intentionally ratified the sadistic medical care, and lack of care, Plaintiff received. And, by their ratification, these Defendants were deliberately indifferent to his serious dental needs as alleged more fully, *supra*, ¶¶ 68 -75, 77, 81, 83, 86-105, 108-161;

C. The medical provider defendants, correctional defendants (Haro, Herrera, Henderson, Patel, Evans Compton, Gunja, Misera, Patel, Slade, and Salanadan) and food service defendants (Shoemaker and Dyre) knowingly and intentionally denied and/or delayed Plaintiff from receiving proper nutritional treatment and were deliberately indifferent to his serious dietary needs as

alleged more fully, *supra*, ¶¶ 57,68-70, 107-162;

D. The correctional services defendants knowingly and intentionally ratified and participated in a scheme to deny and delay Plaintiff's proper medical, dental and nutritional treatment. By taking the actions alleged, supra, ¶¶ 57,68-70, 107-162, these Defendants were individually deliberately indifferent to his serious medical, dental and dietary conditions;

E. The Count Two defendants, and each of them, were further deliberately indifferent to Plaintiff's medical, dental and dietary needs when, as alleged more fully, supra, ¶¶ 36 - 162, they coerced, intimidated and retaliated against him because he complained about the barriers preventing him from receiving necessary care and,

E. Plaintiff exhausted all administrative remedies by filing grievances through the USP grievance system for each of his civil rights claims medical, dental and dietary and procedures, by filing grievances relating to barriers to medical care as alleged more fully, supra, ¶ 162, 180, 194, 215.

247. Defendants, and each of them, denied and delayed Northington from receiving his peg-interferon treatments, and ultimately reduced his treatment to 24 weeks, instead of the full year long treatment he was prescribed, without regard to his medical condition which showed he was responding well to the treatment. When Defendants stopped the peg-interferon treatment early, Plaintiff's liver disease returned to its pre-treatment condition, and thereafter became 50% more worse than it had been.

248. Defendants, and each of them, have prevented, and continue to prevent, Northington from being considered for placement on the National Organ Transplant List, despite knowing he will very likely die without a liver transplant.

249. Defendants have known about their unconstitutional barriers to medical care and services, barriers to dental care and services and

their retaliation against inmates since no later than 2002. Despite this knowledge, Defendants have and continue to withhold life saving treatment of Northington's liver disease and other conditions alleged more fully above.

250. Defendants, and each of them, by and through their barriers to medical and dental care and their refusal to provide Northington the care and treatment he requires, have been and continue to be deliberately indifferent to his serious medical and dental conditions.

251. As a legal and proximate result of the aforementioned acts and omissions of Defendants, and each of them, Plaintiff's medical condition has substantially deteriorated and his life expectancy has dropped.

252. As a legal and proximate result of said conduct of all Defendants alleged in this Count, each of them, Plaintiff suffered severe emotional distress and mental suffering, and was injured in his health, strength, and activity and sustained injuries to his person, including disfigurement, all of which have caused and continued to cause plaintiff great mental and nervous pain and suffering.

253. Plaintiff sustained injuries that were a foreseeable result of said violations and/or breaches.

254. As a result of these injuries, Plaintiff has suffered, and will prove at trial, general damages in an currently-unknown amount according to proof at trial.

255. As a further legal and proximate result of the conduct by the Count Two defendants, and each of them, Plaintiff will employ in the future physicians, surgeons, therapists, and others for examination, treatment and care, and thereby incurred and will incur medical and incidental expenses. As a result, Plaintiff has suffered,

and will prove at trial, economic damages in an currently-unknown amount according to proof.

256. As a further legal and proximate result of said conduct of all Count Two defendants, and each of them, Plaintiff will be prevented from attending his usual occupation. Moreover, as a legal result of the acts of Defendants, and each of them, Plaintiff's future earning capacity has been greatly impaired. As a result, plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

257. As a legal and proximate result of said conduct, Plaintiff is legally entitled to all remedies afforded him by ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*** , 403 U.S. 388 (1971) including *inter alia*, compensatory damages, punitive damages, attorneys fees and costs, and prejudgment interest against each Defendant.

258. The aforementioned conduct of all Defendants, and each of them, was willful, malicious, was intended to oppress Plaintiff Northington, and/or was undertaken with a conscious disregard of his rights, thereby entitling Plaintiff to an award of punitive damages.

259. Plaintiff exhausted available administrative remedies, as described in this complaint, by filing the appropriate grievances as each violation occurred.

260. Moreover, Plaintiff provided the Governmental Entity Defendants timely notice of his intention to bring this action by completing the pre-filing notice of claims procedures required by the Federal Tort Claims Act.

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COUNT THREE
Negligence
(Against The United States of America)

261. Plaintiff re-alleges paragraphs 1 through 260 above and incorporate them herein by reference as though set forth in full.

262. At all times relevant herein, Defendants Haro, Herrera, Henderson, Patel, Evans, Compton, Gunja, Misera, Patel, Slade, Salanadan, Shoemaker, Dyre, Johnson, and each of them, were employees of Defendant United States (Collectively Count Three Employees) who assumes all liabilities for their negligent acts occurring within the course of and scope of their employment.

263. At all times material to this action, the defendants identified in paragraph 262 owed Plaintiff a duty of care to ensure that he received all necessary medical, dental and dietary required for his serious health conditions.

264. These defendants breached their duties of care to Plaintiff in the manner alleged, supra, ¶¶ 9 - 216.

265. As a legal, proximate and foreseeable result of said the Count Three Employees' conduct, Plaintiff has suffered, and continues to suffer, injuries to his person, health, strength, including permanent disability, shortened life expectancy, severe emotional distress and mental suffering, all of which have caused and continued to cause plaintiff great emotional pain, anguish and suffering.

266. As a result of these injuries, Plaintiff has suffered, and will prove at trial, general damages in an currently-unknown amount according to proof.

267. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff will employ in the future physicians, surgeons, therapists, and others for examination, treat-

ment and care, and thereby incurred and will incur medical and incidental expenses and other forms of economic damages in a currently-unknown amount according to proof.

268. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff will be prevented from attending his usual occupation. Moreover, as a legal result of the acts of Defendants, and each of them, Plaintiff's future earning capacity has been greatly impaired. As a result, plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

269. The aforementioned conduct of all Defendants, and each of them, was willful, malicious, was intended to oppress Plaintiff Northington, and/or was undertaken with a conscious disregard of his rights, thereby entitling Plaintiff to an award of punitive damages.

270. Since each real Defendant was, at all relevant times, the employee of Defendant United States, and since each defendant, in doing the things herein described, was acting within the scope of his or her authority as such agent and employee, the United States of America is legally liable for each and every action herein described of each real Defendant.

271. Plaintiff exhausted available administrative remedies, as described in this complaint, by filing the appropriate grievances as each violation occurred.

272. Moreover, Plaintiff provided the Governmental Entity Defendants timely notice of his intention to bring this action by completing the pre-filing notice of claims procedures required by the Federal Tort Claims Act.

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COUNT FOUR
Medical Malpractice
(Against the Unites States of America)

273. Plaintiff re-alleges paragraphs 1 through 272 above and incorporate them herein by reference as though set forth in full.

274. Beginning at the times and dates alleged more fully above, Defendants Barton, Cygnor, Krause, Pollack, Gross, and each of them, provided Plaintiff professional medical services and owed Plaintiff all applicable duties of care relating thereto.

275. Defendants Cygnor, Barton, Krause, Pollack, Gross and each of them, breached the applicable standards of care in the manner previously alleged, and restated herein.

276. Defendant Cygnor breached his professional duties of care, as a medical doctor, by denying Plaintiff necessary medical treatment for his serious medical conditions, including without limitation chronic Hepatitis Virus, liver disease with cirrhosis:

(1) by failing to examine or otherwise evaluate Plaintiff for treatment;

(2) by failing to identify treatment options, without regard to Bureau rules, regulations, protocols, practices, procedures and/or customs; and

(3) by telling Plaintiff, without examination, that his condition was terminal and beyond treatment.

277. Defendant Cygnor's acts and omissions constituting his breaches of care to Plaintiff denied and/or delayed treatment that would have managed, if not cured, Plaintiff's serious medical conditions. These acts and omissions are substantial factors in the pain, suffering and serious injury Plaintiff suffered as a legal result of being denied medical care and treatment.

278. Defendant Krause breached his professional duties of care, as a medical doctor, by denying Plaintiff necessary medical treatment

for his serious medical conditions, including without limitation chronic Hepatitis Virus, liver disease with cirrhosis:

(1) by failing to obtain Plaintiff's prior medical records from those State and federal correctional facilities where Plaintiff had been previously evaluated and diagnosed for treatment related to his HVC and liver disease;

(2) by denying Plaintiff medical care and treatment for his HVC and liver disease based solely on Bureau policies, procedures and/or customs denying such care and treatment to all federal pre-trial detainees based solely on his HVC status.

279. Defendant Krause' acts and omissions constituting his breaches of care to Plaintiff denied and/or delayed treatment that would have managed, if not cured, Plaintiff's serious medical conditions. These acts and omissions are substantial factors in the pain, suffering and serious injury Plaintiff suffered as a legal result of being denied medical care and treatment.

280. Defendant Gross breached his professional duties of care, as a medical doctor, by denying Plaintiff necessary medical treatment for his serious medical conditions, including without limitation chronic Hepatitis Virus, liver disease with cirrhosis:

(1) by failing to obtain Plaintiff's prior medical records from those State and federal correctional facilities where Plaintiff had been previously evaluated and diagnosed for treatment related to his HVC and liver disease;

(2) by denying, and when overruled he delayed, Plaintiff's medical care and treatment for his HVC and liver disease, to wit delaying Plaintiff's treatment with peg-interferon between October 2002 and March 2003, in direct contradiction of Dr. Jehnke's recommendation and based solely on Bureau policies, practices, procedures and/or customs denying such care and treatment to federal prisoners without regard to Plaintiff's individual health needs;

(3) by denying Plaintiff a mechanical soft diet, necessary in light of Plaintiff's serious dental condition, to improve Plaintiff's rate of absorption of the peg-interferon and ribavirin treatments;

(4) by refusing Plaintiff the full one year peg-interferon treatment, instead terminating the treatment at 24 weeks, minus approximately 40 administrations, based solely on Bureau policy, practice, procedures and/or customs, and without regard to Plaintiff's individual health needs and the fact that the treatment was controlling his disease;

(5) by refusing Plaintiff treatment of his serious and painful side-effects caused by the peg-interferon treatments between March 2003 and May 2003, and,

(6) by refusing or failing to keep accurate medical records documenting Plaintiff's condition and treatment that would inform Plaintiff's subsequent health care providers.

281. Defendant Gross' acts and omissions constituting his breaches of care to Plaintiff denied and/or delayed treatment that would have managed, if not cured, Plaintiff's serious medical conditions. These acts and omissions are substantial factors in the pain, suffering and serious injury Plaintiff suffered as a legal result of being denied medical care and treatment.

282. Defendant Pollack breached his professional duties of care, as a medical doctor, by denying Plaintiff, and allowing Plaintiff to be denied, necessary medical treatment for his serious medical conditions, including without limitation chronic Hepatitis Virus, liver disease with cirrhosis:

(1) by failing to obtain Plaintiff's prior medical records from those State and federal correctional facilities where Plaintiff had been previously evaluated and diagnosed for treatment related to his HVC and liver disease;

(2) by denying, and when overruled he delayed, Plaintiff's medical care and treatment for his HVC and liver disease, to wit delaying Plaintiff's treatment with peg-interferon between October 2002 and March 2003, in direct contradiction of Dr. Jehnke's recommendation and based solely on Bureau policies, practices, procedures and/or customs denying such care and treatment to federal prisoners without regard to Plaintiff's individual health needs;

(3) by denying Plaintiff a mechanical soft diet, necessary in light of Plaintiff's serious dental condition, to improve Plaintiff's rate of absorption of the peg-interferon and ribavirin treatments;

(4) by refusing Plaintiff the full one year peg-interferon treatment, instead terminating the treatment at 24 weeks, minus approximately 40 administrations, based solely on Bureau policy, practice, procedures and/or customs, and without regard to Plaintiff's individual health needs and the fact that the treatment was controlling his disease;

(5) by refusing Plaintiff treatment of his serious and painful side-effects caused by the peg-interferon treatments between March 2003 and May 2003, and,

(6) by refusing or failing to keep accurate medical records documenting Plaintiff's condition and treatment that would inform Plaintiff's subsequent health care providers.

283. Defendant Pollack's acts and omissions constituting his breaches of care to Plaintiff denied and/or delayed treatment that would have managed, if not cured, Plaintiff's serious medical conditions. These acts and omissions are substantial factors in the pain, suffering and serious injury Plaintiff suffered as a legal result of being denied medical care and treatment.

284. Defendant Barton breached his professional duties of care, as a medical doctor, by denying Plaintiff necessary medical treatment for his serious medical conditions, including without limitation chronic Hepatitis Virus, liver disease with cirrhosis: (1) by failing

to examine or otherwise evaluate Plaintiff for treatment;(2) by failing to identify treatment options, without regard to Bureau rules, regulations, protocols, practices, procedures and/or customs; and (3) by telling Plaintiff, without examination, that his condition was terminal and beyond treatment.

285. Defendant Barton's acts and omissions constituting his breaches of care to Plaintiff denied and/or delayed treatment that would have managed, if not cured, Plaintiff's serious medical conditions. These acts and omissions are substantial factors in the pain, suffering and serious injury Plaintiff suffered as a legal result of being denied medical care and treatment.

286. As a result of the above alleged actions, real Defendants Cygnor, Barton, Krause, Pollack, Gross, the Governmental Entity Defendants, and each of them, caused Plaintiff serious, permanent injury, pain and suffering.

287. Since each real Defendant was, at all relevant times, the agent (actual and/or ostensible), servant, and/or employee of Defendant United States, and since each defendant, in doing the things herein described, was acting within the scope of his or her authority as such agent and employee, the Governmental Entity Defendants, are legally liable for each and every action herein described of each real Defendant.

288. As a legal and proximate result of the aforementioned acts and omissions of Defendants, and each of them, Plaintiff's medical condition has substantially deteriorated and his life expectancy has dropped.

289. As a legal and proximate result of said conduct of all Defendants, and each of them, as alleged above, Plaintiff suffered

severe emotional distress and mental suffering, and was injured in his health, strength, and activity and sustained injuries to his person, including disfigurement, all of which have caused and continued to cause plaintiff great mental and nervous pain and suffering.

290. Plaintiff sustained injuries that were a foreseeable result of said breaches.

291. As a result of these injuries, Plaintiff has suffered, and will prove at trial, general damages in an currently-unknown amount according to proof.

292. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff will employ in the future physicians, surgeons, therapists, and others for examination, treatment and care, and thereby incurred and will incur medical and incidental expenses. As a result, Plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

293. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff will be prevented from attending his usual occupation. Moreover, as a legal result of the acts of Defendants, and each of them, Plaintiff's future earning capacity has been greatly impaired. As a result, plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

294. The aforementioned conduct of all Defendants, and each of them, was willful, malicious, was intended to oppress Plaintiff Northington, and/or was undertaken with a conscious disregard of his rights, thereby entitling Plaintiff to an award of punitive damages.

295. Plaintiff exhausted available administrative remedies,

as described in this complaint, by filing the appropriate grievances as each violation occurred.

296. Moreover, Plaintiff provided the Governmental Entity Defendants timely notice of his intention to bring this action by completing the pre-filing notice of claims procedures required by the Federal Tort Claims Act.

COUNT FIVE
Dental Malpractice
(Against The United States of America)

297. Plaintiff re-alleges paragraphs 1 through 296 above and incorporate them herein by reference as though set forth in full.

298. At all times relevant herein, Doctors Rose, Mayberry and each of them, were officers of the Public Health Service. Defendant United States of America has accepted responsibility for PHS officers' liabilities by and through the Federal Tort Claims Act.

299. Beginning on or about April 15, 2002, Doctors Rose, Mayberry, and each of them, provided Plaintiff professional dental services and owed Plaintiff all applicable duties of care relating thereto.

300. As alleged more fully above, Dr. Mayberry breached his professional duties of care, as a dentist and/or medical doctor, by negligently conducting dental treatment, denying Plaintiff, and allowing Plaintiff to be denied, necessary dental treatment for his serious dental conditions, including without limitation:

(1) by negligently failing to obtain Plaintiff's prior dental records from those State and federal correctional facilities where Plaintiff had been previously received dental treatment;

(2) by negligently delaying Plaintiff's dental treatment from between April through June 2002

and June to December 2002, and from December 2002 through April 2004;

(3) by negligently conducting oral surgery on Plaintiff by conducting such surgery when he was not an oral surgeon;

(4) by negligently conducting oral surgery on Plaintiff by fracturing and splintering Plaintiff's tooth in December 2002 and by leaving broken bone and tooth fragments protruding from Plaintiff's gum;

(5) by negligently conducting oral surgery on Plaintiff by fracturing and splintering Plaintiff's tooth in May 2003 and again leaving broken bone and tooth fragments protruding from Plaintiff's gum;

(6) alternatively, by conducting oral surgery on Plaintiff by fracturing and splintering Plaintiff's tooth in May 2003 and intentionally leaving broken bone and tooth fragments protruding from Plaintiff's gum in retaliation for Plaintiff's administrative grievance against this defendant;

(7) alternatively, by intentionally delaying Plaintiff's dental treatment between December 2002 through April 2004 in an effort to deliberately cover-up the misconduct of this defendant and others;

(8) by negligently allowing the injuries Plaintiff suffered, and that Defendant Mayberry caused, to continue untreated, thereby causing denying Plaintiff any meaningful chance to eat nutritious meals;

(9) by negligently failing to provide the dental care Plaintiff required to be fitted, properly, with dentures, thereby denying Plaintiff any meaningful chance to eat nutritious meals;

(10) by negligently failing to provide Plaintiff with a properly fitted denture device;

(11) by refusing or failing to keep accurate dental records documenting Plaintiff's condition and treatment that would inform Plaintiff's subsequent dental care providers; and

(12) by falsifying, removing and intentionally withholding material information from Plaintiff's

dental records to conceal his and other defendants' dental negligence.

301. Dr. Mayberry's acts and omissions constituting his breaches of care to Plaintiff denied and/or delayed treatment that would have managed, if not cured, Plaintiff's serious dental conditions. These acts and omissions are substantial factors in the pain, suffering and serious injury Plaintiff suffered as a legal result of being denied medical care and treatment.

302. As alleged more fully above, Dr. Rose breached his professional duties of care, as a dentist and/or medical doctor, by negligently supervising Mayberry, by conducting dental treatment, denying Plaintiff, and allowing Plaintiff to be denied, necessary dental treatment for his serious dental conditions as follows:

(1) by negligently failing to obtain Plaintiff's prior dental records from those State and federal correctional facilities where Plaintiff had been previously received dental treatment;

(2) by negligently delaying Plaintiff's dental treatment from between April through June 2002 and June to December 2002, and from December 2002 through April 2004;

(3) by negligently assigning Defendant Mayberry to conduct oral surgery on Plaintiff in December 2002 when Mayberry was not qualified to conduct an oral surgery;

(4) by negligently failing to supervise his dental staff and by failing to intervene to correct the injuries inflicted by Defendant Mayberry in December 2002 and by causing Plaintiff to suffer from having broken bone and tooth fragments protruding from his gum;

(5) by negligently assigning Defendant Mayberry to conduct oral surgery on Plaintiff in May 2003 when Mayberry was not qualified to conduct an oral surgery;

(6) by negligently failing to supervise his dental staff and by failing to intervene to correct the

injuries inflicted by Defendant Mayberry in May 2003 and by causing Plaintiff to suffer from having broken bone and tooth fragments protruding from his gum;

(7) by negligently allowing the injuries Plaintiff suffered by Defendant Mayberry conduct to continue untreated, thereby causing denying Plaintiff any meaningful chance to eat nutritious meals;

(8) by negligently failing to provide the dental care Plaintiff required to be fitted, properly, with dentures, thereby causing denying Plaintiff any meaningful chance to eat nutritious meals;

(9) by negligently failing to provide Plaintiff with a properly fitted denture device;

(10) by intentionally delaying Plaintiff's dental treatment between December 2002 through April 2004 in an effort to deliberately cover-up the misconduct of this defendant and others;

(11) by refusing or failing to keep accurate dental records documenting Plaintiff's condition and treatment that would inform Plaintiff's subsequent dental care providers; and

(12) by falsifying, removing and intentionally withholding material information from Plaintiff's dental records to conceal his and other defendants' dental negligence.

303. Dr. Rose's acts and omissions constituting his breaches of care to Plaintiff denied and/or delayed treatment that would have managed, if not cured, Plaintiff's serious dental conditions. These acts and omissions are substantial factors in the pain, suffering and serious injury Plaintiff suffered as a legal result of being denied medical care and treatment.

304. As a result of the above alleged actions, Doctors Rose, Mayberry and each of them, caused Plaintiff serious permanent injury, pain and suffering.

305. As a legal and proximate result of the aforementioned acts and omissions of Defendants, and each of them, Plaintiff's medical and

dental condition has substantially deteriorated and his life expectancy has dropped.

306. As a legal and proximate result of said conduct of all Defendants, and each of them, as alleged above, Plaintiff suffered severe emotional distress and mental suffering, and was injured in his health, strength, and activity and sustained injuries to his person, including disfigurement, all of which have caused and continued to cause plaintiff great mental and nervous pain and suffering.

307. Plaintiff sustained injuries that were a foreseeable result of said breaches.

308. As a result of these injuries, Plaintiff has suffered, and will prove at trial, general damages in an currently-unknown amount according to proof.

309. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff will employ in the future physicians, surgeons, therapists, and others for examination, treatment and care, and thereby incurred and will incur medical and incidental expenses. As a result, Plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

310. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff will be prevented from attending his usual occupation. Moreover, as a legal result of the acts of Defendants, and each of them, Plaintiff's future earning capacity has been greatly impaired. As a result, plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

311. Plaintiff exhausted available administrative remedies,

as described in this complaint, by filing the appropriate grievances as each violation occurred.

312. Moreover, Plaintiff provided the United States timely notice of his intention to bring this action by completing the pre-filing notice of claims procedures required by the Federal Tort Claims Act.

SIXTH CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(Against the United States of America)

313. Plaintiff incorporates herein by reference paragraphs 1 through 312 as though fully set forth herein.

314. In doing the acts described above, Defendants Hawk-Sawyer, Lappin, Compton, Herrera, Barton, Cygnor, Krause, Pollack, Gross, Gunja, Henderson, Misera, Patel, Evans, Johnson, Shoemaker, Slade, Dyre, Salanadan, and each of them, (Collectively Count Six Employees) and non-party tortfeasors Rose and Mayberry, to cause Plaintiff Northington to suffer humiliation, mental anguish and emotional and physical distress.

315. At all times relevant herein, the Count Six were employed by Defendant United States, and working withing said employment. Defendant United States has accepted responsibility for employees liabilities by and through the Federal Tort Claims Act.

316. In doing the acts described above, the Count Six defendants, and each of them, caused Plaintiff to suffer humiliation, mental anguish and emotional and physical distress.

317. At no time did Plaintiff consent to any of Defendants' actions as alleged above.

318. As a legal and proximate result of the aforementioned acts and omissions of Defendants, and each of them, Plaintiff's

medical condition has substantially deteriorated and his life expectancy has dropped.

319. As a legal and proximate result of said conduct of all Defendants, and each of them, as alleged above, Plaintiff suffered severe emotional distress and mental suffering, and was injured in his health, strength, and activity and sustained injuries to his person, including disfigurement, all of which have caused and continued to cause plaintiff great mental and nervous pain and suffering.

320. Plaintiff sustained injuries that were a foreseeable result of said breaches.

321. As a result of these injuries, Plaintiff Northington has suffered, and will prove at trial, general damages in an currently-unknown amount according to proof.

322. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff Northington will employ in the future physicians, surgeons, therapists, and others for examination, treatment and care, and thereby incurred and will incur medical and incidental expenses. As a result, Plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

323. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff Northington will be prevented from attending his usual occupation. Moreover, as a legal result of the acts of Defendants, and each of them, plaintiff's future earning capacity has been greatly impaired. As a result, plaintiff, and will prove at trial, economic damages in an currently-unknown amount according to proof.

324. The aforementioned conduct of all Defendants, and each of them, was willful, malicious, was intended to oppress Plaintiff Northington, and/or was undertaken with a conscious disregard of his rights, thereby entitling him to an award of punitive damages.

325. Plaintiff exhausted available administrative remedies, as described in this complaint, by filing the appropriate grievances as each violation occurred.

326. Moreover, Plaintiff provided the United States timely notice of his intention to bring this action by completing the pre-filing notice of claims procedures required by the Federal Tort Claims Act.

COUNT SEVEN
BREACH OF DUE CARE
5 U.S.C. § 552
(Against Defendant United States Bureau of Prisons)

327. Plaintiff incorporates herein by reference paragraphs 1 through 326 as though fully set forth herein.

328. At all times relevant herein, Defendants Hawk-Sawyer, Haro, Herrera, Henderson, Pollack, Patel and Evans (Count Seven Employees), and each of them, were duly appointed and acting correctional officers, charged with creating, implementing and enforcing the regulations, policies, customs and usages of the United States of America, by and through its Federal Bureau of Prisons and its U. S. Penitentiaries.

329. As legal and proximate result of their positions and responsibilities in operating the United States' penitentiaries, the United States BOP owed Plaintiff a duty of care to ensure his federally protected human rights.

330. In committing the acts set forth above, Defendant BOP

violated Plaintiff's federally protected rights by intentionally or willfully failing to maintain his medical records with such accuracy, relevance, timeliness, and completeness as is necessary to assure the adequacy of his heath care and that proper decisions were being made regarding his health.

331. Alternatively, the BOP, by and through the Count Seven Employees was deliberately indifferent to Plaintiff's serious medical conditions, to his need for prior medical records, to the absence, or purported absence, of his medical records, and to the delays and denials of medical care Plaintiff suffered as a result of the Bureau's failure to provide his medical records.

332. As a direct and proximate case of Defendants' actions, described in this complaint, Plaintiff has suffered great amount of injury, pain, and emotional distress, including, but not limited to the fact that life-saving treatment has been withheld and/or postponed, he has suffered severe side-effects from both his disease and the treatment, which could have been avoided with proper care and record-keeping.

333. As a legal and proximate result of the aforementioned acts and omissions of Defendants, and each of them, Plaintiff's medical condition has substantially deteriorated and his life expectancy has dropped.

334. As a legal and proximate result of said conduct of all Defendants, and each of them, as alleged above, plaintiff Craig B. Northington suffered severe emotional distress and mental suffering, and was injured in his health, strength, and activity and sustained injuries to his person, including disfigurement, all of which have caused and continued to cause plaintiff great mental

and nervous pain and suffering.

335. Plaintiff sustained injuries that were a foreseeable result of said breaches.

336. As a result of these injuries, Plaintiff Northington has suffered, and will prove at trial, general damages in an currently-unknown amount according to proof.

337. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff Northington will employ in the future physicians, surgeons, therapists, and others for examination, treatment and care, and thereby incurred and will incur medical and incidental expenses. As a result, Plaintiff has suffered, and will prove at trial, economic damages in an currently-unknown amount according to proof.

338. As a further legal and proximate result of said conduct of all Defendants, and each of them, Plaintiff Northington will be prevented from attending his usual occupation. Moreover, as a legal result of the acts of Defendants, and each of them, plaintiff's future earning capacity has been greatly impaired. As a result, plaintiff, and will prove at trial, economic damages in an currently-unknown amount according to proof.

339. The aforementioned conduct of all Defendants, and each of them, was willful, malicious, was intended to oppress plaintiff Northington, and/or was undertaken with a conscious disregard of his rights, thereby entitling him to an award of punitive damages.

340. Plaintiff exhausted available administrative remedies, as described in this complaint, by filing the appropriate grievances as each violation occurred.

341. Moreover, Plaintiff provided the Governmental Entity

Defendants timely notice of his intention to bring this action by completing the pre-filing notice of claims procedures required by the Federal Tort Claims Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants and each of them as follows:

ON THE FIRST, SECOND AND SEVENTH COUNTS:

1. For a temporary, preliminary and permanent injunction ordering Defendants to amend Plaintiff's medical and dental records to truthfully identify the treatment and health care services Plaintiff received;

2. For a temporary, preliminary and permanent injunction ordering Defendants to obtain all of Plaintiff's medical and dental records from the Federal Detention Unit and the Santa Ana City Jail, Santa Ana, California, the Metropolitan Federal Detention Center, Los Angeles, California, and the Federal Medical Center, Rochester, Minnesota, to be made a part of Plaintiff's medical records at USP Lompoc, or made available upon reasonable effort, with such;

3. For a temporary, preliminary and permanent injunction ordering Defendants to immediately arrange for Plaintiff to be examined and evaluated by a qualified gastrenologist/hepatologist so as to determine Plaintiff's current condition related to his HVC, advanced liver disease, and injuries suffered from the

Interferon-Ribavirin given and to determine what, if any, treatment should now be provided and if Plaintiff should be evaluated for placement of the National Donor Transplant list;

4. For a temporary, preliminary and permanent injunction ordering Defendants to immediately provide Plaintiff with properly fitted and functioning dentures;

5. For a temporary, preliminary and permanent injunction precluding Defendants from confining and subjecting Plaintiff to the ongoing unconstitutional conditions of confinement herein alleged;

6. For a temporary, preliminary and permanent injunction establishing a Compliance Schedule by which time Defendants must eliminate the barriers to medical care and to bring their health care system into compliance with the standards imposed by the Eighth Amendments to the United States Constitution;

ON ALL COUNTS:

7. For general damages in a sum according to proof;

8. For special damages in a sum according to proof;

9. For compensatory damages in a sum according to proof;

10. For punitive damages as provided by law against each individual Defendant;

12. For costs of suit herein;

13. For reasonable attorney's fees as provided by law;

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///

14. For interest as provided by law;

15. For such other and further relief as the Court may deem proper.

DATED: August 18, 2005

By: _____
MICHEL F. MILLS,

The Law Offices of Michel F. Mills, A Professional Corporation Attorneys for Plaintiff, Craig B. Northington

V. **DEMAND FOR JURY TRIAL**

Plaintiff herein demands trial by jury against all defendants.

DATED: August 18, 2005

By: _____
MICHEL F. MILLS,

The Law Offices of Michel F. Mills, A Professional Corporation Attorneys for Plaintiff, Craig B. Northington

FILED
CLERK, U.S. DISTRICT COURT
MAY 17 2013
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CRAIG BRYAN NORTHINGTON,

Plaintiff,

v.

RICHARD GROSS, AL HERRERA, DAVID SHOEMAKER, et al.,

Defendants.

No. CV 04-1032 CBM (MLGx)

COURT'S VERDICT FORM

Redacted

Trial Date: April 30, 2013

Courtroom: Hon. Consuelo B. Marshall

EIGHTH AMENDMENT CLAIM REGARDING MEDICAL CARE
DR. RICHARD GROSS

After considering the evidence presented at trial and the instructions provided by the Court, we the jury in the above-entitled action unanimously find as follows with respect to Plaintiff's Eighth Amendment claim against Dr. Richard Gross:

1. Did the Plaintiff face a substantial risk of serious harm or a serious medical need?

Yes	No
	No

If your answer to question 1 is yes, then proceed to question 2. If you answered no, proceed to question 7.

2. Was Dr. Gross deliberately indifferent to that risk of serious harm or serious medical need, that is, Dr. Gross knew of it and disregarded it by failing to take reasonable measures to address it?

Yes	No

If your answer to question 2 is yes, then proceed to question 3. If you answered no, proceed to question 7.

3. Did Dr. Gross's actions or failure to act cause harm to Plaintiff?

Yes	No

If your answer to question 3 is yes, then proceed to question 4. If you answered no, proceed to question 7.

4. Enter the amount of compensatory damages or nominal damages from Dr. Gross that you award to Plaintiff regarding Plaintiff's Eighth Amendment Claim and then proceed to Question 5.

Amount: $_____

5. Do you find that Plaintiff has proven by clear and convincing evidence that punitive damages should be awarded because Dr. Gross's conduct was malicious, oppressive, or in reckless disregard of Plaintiff's constitutional rights? Answer, then proceed to the next question.

Yes	No
_____	_____

6. If the answer to question 5 is yes, enter the amount of punitive damages from Dr. Gross that you award to Plaintiff as to Plaintiff's Eighth Amendment Claim. If the answer to question 5 is no, go on to question 7.

Amount: $_____

EIGHTH AMENDMENT CLAIM REGARDING MEDICAL CARE
MR. AL HERRERA

After considering the evidence presented at trial and the instructions provided by the Court, we the jury in the above-entitled action unanimously find as follows with respect to Plaintiff's Eighth Amendment claim against Mr. Al Herrera:

7. Did the Plaintiff face a substantial risk of serious harm or a serious medical or dental need?

Yes	No
	No

If your answer to question 7 is yes, then proceed to question 8. If you answered no, proceed to question 13.

8. Was Mr. Herrera deliberately indifferent to that risk of serious harm or serious medical or dental need, that is, Mr. Herrera knew of it and disregarded it by failing to take reasonable measures to address it?

Yes	No

If your answer to question 8 is yes, then proceed to question 9. If you answered no, proceed to question 13.

9. Did Mr. Herrera's actions or failure to act cause harm to Plaintiff?

Yes	No

If your answer to question 9 is yes, then proceed to question 10. If you answered no, proceed to question 13.

10. Enter the amount of compensatory damages or nominal damages from Mr. Herrera that you award to Plaintiff regarding Plaintiff's Eighth Amendment Claim and then proceed to Question 11.

Amount: $_____

11. Do you find that Plaintiff has proven by clear and convincing evidence that punitive damages should be awarded because Mr. Herrera's conduct was malicious, oppressive, or in reckless disregard of Plaintiff's constitutional rights? Answer, then proceed to the next question.

Yes	No
_____	_____

12. If the answer to question 11 is yes, enter the amount of punitive damages from Mr. Herrera that you award to Plaintiff as to Plaintiff's Eighth Amendment Claim. If the answer to question 11 is no, go on to question 13.

Amount: $_____

EIGHTH AMENDMENT CLAIM REGARDING NUTRITION
MR. DAVID SHOEMAKER

After considering the evidence presented at trial and the instructions provided by the Court, we the jury in the above-entitled action unanimously find as follows with respect to Plaintiff's Eighth Amendment claim against Mr. David Shoemaker:

13. Did the Plaintiff face a substantial risk of serious harm or a serious nutritional need?

Yes	No
	NO

If your answer to question 13 is yes, then proceed to question 14. If you answered no, proceed to question 19.

14. Was Mr. Shoemaker deliberately indifferent to that risk of serious harm or serious nutritional need, that is, Mr. Shoemaker knew of it and disregarded it by failing to take reasonable measures to address it?

Yes	No

If your answer to question 14 is yes, then proceed to question 15. If you answered no, proceed to question 19.

15. Did Mr. Shoemaker's actions or failure to act cause harm to Plaintiff?

Yes	No

If your answer to question 15 is yes, then proceed to question 16. If you answered no, proceed to question 19.

16. Enter the amount of compensatory damages or nominal damages from Mr. Shoemaker that you award to Plaintiff regarding Plaintiff's Eighth Amendment Claim and then proceed to Question 17.

Amount: $_____

17. Do you find that Plaintiff has proven by clear and convincing evidence that punitive damages should be awarded because Mr. Shoemaker's conduct was malicious, oppressive, or in reckless disregard of Plaintiff's constitutional rights? Answer, then proceed to the next question.

Yes	No
_____	_____

18. If the answer to question 17 is yes, enter the amount of punitive damages from Mr. Shoemaker that you award to Plaintiff as to Plaintiff's Eighth Amendment Claim. If the answer to question 17 is no, go on to question 19.

Amount: $_____

FIRST AMENDMENT RETALIATION CLAIM
MR. AL HERRERA

After considering the evidence presented at trial and the instructions provided by the Court, we the jury in the above-entitled action unanimously find as follows with respect to Plaintiff's First Amendment claim against Mr. Al Herrera:

19. Did Mr. Herrera take some adverse action against Plaintiff?

Yes	No
_____	NO

If your answer to question 19 is yes, then proceed to question 20. If you answered no, proceed to question 26.

20. Was this adverse action in retaliation for Plaintiff filing prison grievances and pursuing civil rights litigation?

Yes	No
_____	_____

If your answer to question 20 is yes, then proceed to question 21. If you answered no, proceed to question 26.

21. Would Mr. Herrera's actions chill or silence a person of ordinary firmness from filing prison grievances or pursuing civil rights litigation in the future?

Yes	No
_____	_____

If your answer to question 21 is yes, then proceed to question 22. If you answered no, proceed to question 26.

22. Did Mr. Herrera's actions reasonably advance a legitimate correctional goal?

Yes	No
_____	_____

If your answer to question 22 is no, then proceed to question 23. If you answered yes, proceed to question 26.

23. Enter the amount of compensatory damages or nominal damages from Mr. Herrera that you award to Plaintiff regarding Plaintiff's First Amendment Claim and then proceed to Question 24.

Amount: $_____

24. Do you find that Plaintiff has proven by clear and convincing evidence that punitive damages should be awarded because Mr. Herrera's conduct was malicious, oppressive, or in reckless disregard of Plaintiff's constitutional rights? Answer, then proceed to the next question.

Yes	No
_____	_____

25. If the answer to question 24 is yes, enter the amount of punitive damages from Mr. Herrera that you award to Plaintiff as to Plaintiff's First Amendment Claim. If the answer to question 24 is no, go on to question 26.

Amount: $_____

FIRST AMENDMENT RETALIATION CLAIM
MR. DAVID SHOEMAKER

After considering the evidence presented at trial and the instructions provided by the Court, we the jury in the above-entitled action unanimously find as follows with respect to Plaintiff's First Amendment claim against Mr. David Shoemaker:

26. Did Mr. Shoemaker take some adverse action against Plaintiff?

Yes	No
_____	NO

If your answer to question 26 is yes, then proceed to question 27. If you answered no, proceed to the end and sign and return the verdict form.

27. Was this adverse action in retaliation for Plaintiff exercising his First Amendment rights?

Yes	No
_____	_____

If your answer to question 27 is yes, then proceed to question 28. If you answered no, proceed to the end and sign and return the verdict form.

28. Would Mr. Shoemaker's actions chill or silence a person of ordinary firmness from requesting adequate nutrition in the future?

Yes	No
_____	_____

If your answer to question 28 is yes, then proceed to question 29. If you answered no, proceed to the end and sign and return the verdict form.

29. Did Mr. Shoemaker's actions reasonably advance a legitimate correctional goal?

Yes	No
_____	_____

If your answer to question 29 is no, then proceed to question 30. If you answered yes, proceed to the end and sign and return the verdict form.

30. Enter the amount of compensatory damages or nominal damages from Mr. Shoemaker that you award to Plaintiff regarding Plaintiff's First Amendment Claim and then proceed to Question 31.

Amount: $_____

31. Do you find that Plaintiff has proven by clear and convincing evidence that punitive damages should be awarded because Mr. Shoemaker's conduct was malicious, oppressive, or in reckless disregard of Plaintiff's constitutional rights? Answer, then proceed to the next question.

Yes	No
_____	_____

32. If the answer to question 31 is yes, enter the amount of punitive damages from Mr. Shoemaker that you award to Plaintiff as to Plaintiff's First Amendment Claim. If the answer to question 31 is no, proceed to the end and sign and return the verdict form.

Amount: $_____

Please sign and return this verdict form.

Redacted by the Court

Dated: 5/17/13

Foreperson

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CRAIG BRYAN NORTHINGTON, Plaintiff, v. KATHLEEN HAWK-SAWYER, et al., Defendants.	No. CV 04-1032 CBM (MLGx) **SECOND AMENDED JUDGMENT [420]** Trial Date: April 30, 2013 Courtroom: Hon. Consuelo B. Marshall

Consistent with the Court's Verdict Form, filed on May 17, 2013, the Court enters Judgment in favor of defendants Richard Gross, M.D., Al Herrera, and David Shoemaker against plaintiff Craig Bryan Northington.

Pursuant to the agreement of the parties, the parties will each bear their own costs, fees, and expenses.

IT IS SO ORDERED.

Dated: October 14, 2014

CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CRAIG BRYAN NORTHINGTON,

Plaintiff,

v.

KATHLEEN HAWK-SAWYER. ,et al.,

Defendant.

Case No. CV 04-1032-CBM (MLGx)

ORDER GRANTING JOINT MOTION TO VACATE [418]

Date: October 14, 2014
Time: 10:00 a.m.
Judge: Hon. Consuelo B. Marshall

The Court, having considered the parties' Joint Motion to Vacate (the "Motion"), along with the evidence in support thereof, and for good cause shown, hereby ORDERS that:

The Motion is GRANTED. The Court's Findings of Fact; Conclusions of Law (Docket No. 405) and Amended Judgment (Docket No. 410) are hereby VACATED.

Within five days of the entry by this Court of this Order, the parties will lodge a proposed Second Amended Judgment in favor of defendants Richard Gross, M.D., Al Herrera, and David Shoemaker and against plaintiff Craig Bryan Northington as to his Bivens claims.

Within ten days of the entry by this Court of this Order, pursuant to their agreement, the parties will file a signed copy of the Stipulation for Compromise Settlement that was attached to the Motion.

Dated: October 7, 2014

Hon. Consuelo B. Marshall
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CRAIG BRYAN NORTHINGTON, Plaintiff, v. KATHLEEN HAWK-SAWYER, et al., Defendants.	No. CV 04-1032 CBM (MLGx) **ORDER DISMISSING DEFENDANT UNITED STATES OF AMERICA WITH PREJUDICE [423]**

/ / /

/ / /

IT IS SO ORDERED that pursuant to the separately filed Stipulation for Compromise Settlement, defendant United States of America is hereby dismissed from this action with prejudice. Each party to bear its own costs and fees. The Court will retain jurisdiction over this action for 60 days from the date of the filing of this Order for the sole purpose of enforcing the settlement agreement.

DATED: November 12, 2014_

Consuelo B. Marshall
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

STEPHANIE YONEKURA
Acting United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ Jason K. Axe
JASON K. AXE
Assistant United States Attorney
Attorneys for Defendant
United States of America

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 0185 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

STEPHANIE YONEKURA
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E-mail: Jason.Axe@usdoj.gov
Attorneys for Defendant
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CRAIG BRYAN NORTHINGTON, Plaintiff, v. KATHLEEN HAWK-SAWYER, et al., Defendants.	No. CV 04-1032 CBM (MLGx) **STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677**

IT IS HEREBY STIPULATED by and between plaintiff Craig Bryan Northington ("Plaintiff") and defendant United States of America ("Defendant") as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of forty thousand ($40,000.00) Dollars, which sum shall include all attorney's fees, and which shall be in full settlement and satisfaction of any and all claims, demands, rights, and

causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which he may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States.

4. Plaintiff specifically agrees, as consideration for this Stipulation For Compromise Settlement, to waive the provisions of Section 1542 of the Civil Code of the State of California, and Plaintiff understands that said section provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the

release, which, if known by him must have materially affected his settlement with the debtor.

Therefore, and notwithstanding anything to the contrary herein, Plaintiff explicitly releases any and all claims against the United States of America, its agents, servants, and employees which Plaintiff does not know or suspect to exist in favor of Plaintiff at the time Plaintiff and his attorneys execute this Stipulation for Compromise Settlement, and which would have materially affected this settlement if such claim or claims had been known.

5. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

6. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

7. Along with the filing of this Stipulation for Compromise Settlement, the parties agree that they will lodge a proposed order dismissing the United States from this action with prejudice, all parties to bear their own costs and fees. The proposed order will request that the Court retain jurisdiction over this action for 60 days following the filing of the Stipulation for Compromise Settlement for the sole purpose of enforcing this settlement agreement.

8. The parties acknowledge that this Stipulation for Compromise Settlement does not include defendants Richard Gross, M.D., Al Herrera, and David Shoemaker, who obtained a judgment in their favor following a jury trial as to Plaintiff's claims against them. However, through a separate agreement,

defendants Gross, Herrera, and Shoemaker have agreed to waive any and all costs to which they may be entitled following trial of this matter, and contemporaneous with the filing of this settlement agreement, defendants Gross, Herrera, and Shoemaker will dismiss their application for costs with prejudice.

9. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

10. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

11. Payment of the settlement amount will be made by government wire transfer as per the following information, to be provided by Plaintiff:

A. Payee Account Name (Crowell & Moring Client Trust Account),

B. ABA Routing Number,

C. Payee Account Number,

D. Type of Account (Checking or Savings).

E. Financial Institution Name, City, State,

F. Social Security Number.

Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff.

12. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

13. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

14. This written agreement contains all of the agreements between the parties, and it is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing and must be signed and executed by the parties.

Respectfully submitted.

DATED: _____. CROWELL & MORING_____

- see attached page-
NATHANIEL J. WOOD, ESQ.
Attorneys for Plaintiff

DATED: _____. _____

- see attached page-
CRAIG BRYAN NORTHINGTON
Plaintiff

DATED: October 22, 2014____. STEPHANIE YONEKURA
Acting United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ Jason K. Axe
JASON K. AXE
Assistant United States Attorney
Attorneys for Defendant
United States of America

13. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

14. This written agreement contains all of the agreements between the parties, and it is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing and must be signed and executed by the parties.

Respectfully submitted,

DATED: 10/29/14.

CROWELL & MORING

NATHANIEL J. WOOD, ESQ.
Attorneys for Plaintiff

DATED: October 29, 2014

CRAIG BRYAN NORTHINGTON
Plaintiff

DATED: _____.

STEPHANIE YONEKURA
Acting United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

JASON K. AXE
Assistant United States Attorney
Attorneys for Defendant
United States of America

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Pasadena, CA 91101
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Fax: (626) 405-0952

Attorneys for Plaintiffs

FILED
08 APR -3 AM 11: 13
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY: MADO

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RUBY MURRILLO, individually, and as Administratrix of the Estate of MOISES MURRILLO; MOISES MURILLO, JR. ; CATALINA HERNANDEZ Plaintiffs, vs. UNITED STATES OF AMERICA; MICHAEL BENOV, WARDEN OF THE METROPOLITAN DETENTION CENTER; WHITE MEMORIAL HOSPITAL and DOES 1 TO 100. Defendants.	CASE NO. CV06-6699-ABC (JCX) (Audrey B. Collins District Judge) **PLAINTIFFS' SECOND AMENDED COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL** **1) Civil Rights Violations (*Bivens*)** **2) Negligence** **3) Battery**

COMPLAINT

COME NOW PLAINTIFFS, RUBY MURRILO, individually, and as Administratrix of the Estate of MOISES MURILLO; MOISES MURRILLO, JR., individually, CATALINA HERNANDEZ, individually, hereinafter collectively known as "Plaintiffs" and sue defendants for their violations of plaintiffs' rights under the 8th Amendment, for negligence, wrongful death and battery and allege as follows:

GENERAL ALLEGATIONS

1) Jurisdiction of this Court is invoked under 28 U.S.C. Section 1331 and 1343.

2) Venue properly lies in the Central District of the United States District Court of California as all the events described herein occurred in the County of Los Angeles, City of Los Angeles. Therefore venue lies in the Central District of California. (28 U.S.C. § 1391(b)(2)).

3) This is a complaint for money damages by plaintiffs for redress of deprivation under color of law of rights, privileges and immunities secured by the Eighth Amendment to the United States Constitution and under the laws and Constitution of the State of California.

4) At all times herein mentioned, plaintiffs RUBY MURILLO, MOISES MURILLO, JR. and CATALINA HERNANDEZ were citizens of the United States, residing in the City and County of Los Angeles and the State of California, within the Central Judicial District of this Court. Plaintiff MOISES MURILLO also resided residing in the City and County of Los Angeles and the State of California, within the Central Judicial District of this Court.

5) Plaintiffs RUBY MURILLO and MOISES MURILLO, JR. are, and were, at all times relevant herein, the natural born children of decedent MOISES MURILLO.

6) Plaintiff CATALINA HERNANDEZ is, and was, at all times relevant herein, the natural mother of plaintiffs RUBY MURILLO and MOISES MURILLO, as well as the wife, and widow, of decedent MOISES MURILLO.

7) The true names and/or capacities of all defendants are currently unknown to plaintiffs, who sue said defendants by fictitious names as DOES 1 through 100. When the true names and/or capacities of said fictitiously named defendants are ascertained, plaintiffs will seek leave to amend their complaint accordingly.

8) Plaintiffs allege that each defendant, whether designated by his/her true name or fictitiously named, is responsible in some manner for the injuries, damage or harm herein alleged.

9) Plaintiffs, RUBY MURILLO, MOISES MURILLO, JR. AND CATALINA HERNANDEZ, are successors in interest and heirs of the estate of the decedent, MOISES MURILLO, SR. This action for violation of the decedent's civil rights is brought by said plaintiffs on behalf of the estate of MOISES MURILLO, SR. as permitted by Sections 377.30 et seq. of the California Code of Civil Procedure. Furthermore, Plaintiffs, collectively, are entitled to bring this wrongful death action pursuant to Code of Civil Procedure Section 377.60 for the loss of love, companionship, comfort, affection, society, solace, moral support and all other recoverable damages arising from the wrongful death of decedent.

10) Defendant UNITED STATES of AMERICA is, and at all times mentioned was, responsible for the care and treatment provided to decedent plaintiff MOISES MURILLO by the federal agencies and employees under its control who maintained custody of decedent and were responsible for his physical care and treatment during that time as held in *DeShaney vs. Winnebago* (1989) 489 U.S. 189, 199-200; *see also*, *Estelle vs. Gamble* (1976) 429 US 97, 101-104.

11) Defendant MICHAEL BENOV is, and was at all times relevant here, the warden of the Metropolitan Detention Center in Los Angeles and also responsible for ensuring that decedent MOISES MURILLO received proper medical care and treatment from federal agents, employees, and others tasked with providing such care while decedent was detained by the government against his wishes.

12) Defendant WHITE MEMORIAL HOSPITAL is, and at all times mentioned herein was, a non-profit private hospital doing business in the City and County of Los Angeles and was responsible for providing care to decedent MOISES MURILLO.

13) Plaintiffs are informed and believe, and thereon allege, that each named and unnamed defendant is responsible for the harm to plaintiffs as alleged herein.

14) Plaintiffs filed a complete claim as required under the Federal Tort Claims Act (FTCA) on March 23, 2006.

15) Seven months after filing the completed claim, plaintiffs filed their original complaint with the District Court on October 20, 2006 based on the rejection of their FTCA claim by operation of law and have complied fully with the requirements of 28 U.S.C. §2675(a).

FACTS COMMON TO ALL ALLEGATIONS

16) On June 11, 2004, decedent MOISES MURILLO was arrested, detained and booked by the Los Angeles Police Department for a charge of Driving Under the Influence of Alcohol, namely Vehicle Code Section 23152(a), and then held in the Los Angeles County Jail.

17) On June 17, 2004, plaintiffs believe and allege that decedent MOISES MURILLO was transferred from the Los Angeles County Jail to a federal detention center under the control of defendant UNITED STATES of AMERICA and one of its duly constituted agencies handling immigration and deportation matters.

18) On July 14, 2004, decedent was interviewed by Kelly Nowak, Special Agent of the Bureau of Immigration and Customs Enforcement under file number A 20 016 694.

19) On or about July 15, 2004, decedent was transferred to the Metropolitan Detention Center in Los Angeles, California controlled by defendant UNITED STATES of AMERICA and defendant Warden MICHAEL BENOV, and as yet unknown and unidentified federal agents and employees with responsibility for the provision of medical care and treatment to individuals, such as decedent MOISES MURILLO, under their custody and control.

20) During the entire period of decedent's incarceration, he was in need of proper medical care and treatment, including, but not limited to, the proper administration of necessary medicines to counter the effects of his long term chronic hypertension (high blood pressure). While decedent was incarcerated in the custody of the U.S. Marshals and in the federal detention facilities hereinbefore

named, he was denied such appropriate medical care and medical attention and/or was provided inadequate medical care for his pre-existing medical condition, namely "chronic hypertension" (high blood pressure).

21) All defendants were aware of decedent's serious medical condition and related need for medical care and proper administration of medicines for his serious condition while decedent was in custody of federal authorities and were further aware of the serious potential consequences of failing to provide adequate medical care to decedent.

22) Furthermore, despite decedent's subsequent complaints of right-sided weakness, pain and discomfort, defendants, and all of them, failed to respond and provide proper medical assistance in a timely fashion.

23) As a direct result of defendants failure to provide adequate medication and medical care as needed and defendants' related failure to provide medical assistance in a timely fashion, MOISES MURILLO, suffered an intracerebral hemorrhage.

24) As a result of the failure to provide proper medical care and attention when needed, decedent was rushed to WHITE MEMORIAL HOSPITAL on October 22, 2004 and admitted into the intensive care unit. A CT scan of decedent's brain showed that in fact decedent had suffered bleeding in the brain. Decedent Moises Murillo's condition worsened until Mr. Murillo lost consciousness, required intubation, and his breathing had to be supported by a ventilator.

25) At this point, MOISES MURRILLO was in critical condition and required substantial life support for his continued well-being and care.

FACTS COMMON TO WHITE MEMORIAL HOSPITAL

26) Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 25, and hereby incorporates them herein as though set forth at length in their entirety.

27) On October 25, 2004, just 3 days after being placed on a ventilator, WHITE MEMORIAL HOSPITAL and its employees, agents, directors, physicians, nurses and medical staff, decided to unilaterally remove all life support systems in place without notifying the wife or children of MOISES MURILLO's condition and of their unilateral decision to terminate his life. They further failed to obtain the necessary consent from plaintiffs, including decedent, either individually or collectively prior to WHITE MEMORIAL'S decision to remove MOISES MURILLO from life support system.

28) Defendant WHITE MEMORIAL HOSPITAL's unilateral action was taken without approval of plaintiffs, including decedent, and deprived plaintiffs and each of them of the opportunity to seek a second opinion regarding defendant WHITE MEMORIAL HOSPITAL's decision that plaintiff was actually brain dead. Plaintiffs CATALINA HERNANDEZ, RUBY MURILLO, and MOISES MURILLO, JR. were deprived of the opportunity to say goodbye to their husband and father as a result of defendant WHITE MEMORIAL's non-consensual decision to remove decedent MOISES MURILLO from necessary life support systems. Defendant WHITE MEMORIAL HOSPITAL's actions constituted a battery on decedent MOISES MURRILLO, SR.

FIRST CAUSE OF ACTION
VIOLATIONS OF CONSTITUTIONAL RIGHTS FOR DELIBERATE INDIFFERENCE IN PROVIDING MEDICAL CARE BY PLAINTIFF ESTATE OF MOISES MURILLO AGAINST DEFENDANTS MICHAEL BENOV AND DOES 1-50

29) Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 28, and hereby incorporates them herein as though set forth at length in their entirety.

30) Defendants BENOV, and DOES 1-50 inclusive, were all aware of decedent's specific medical conditions and related needs for medical care. Throughout decedent's time in custody, said defendants and each of them, repeatedly failed to take care of decedent's medical issues, including refusing to provide proper medical care for injuries, improperly dosing plaintiff with medication for his hypertension, such that his blood levels were determined to be toxic on admission to the

emergency room of WHITE MEMORIAL HOSPITAL with a brain bleed, all of which impacted decedent's condition and ultimately contributed to his death.

31) Defendants and each of them condoned and ratified the following reckless and indifferent conduct, including but not limited to:

(a) Failing to provide or providing in a sporadic fashion or on an occasional basis, properly prescribed medication for chronic hypertension with the intended goal of denying MOISES MURILLO of his Constitutional Rights under the 8th Amendment of the United States Constitution.

(b) Failing to respond and provide medical care and attention in a timely fashion which contributed to complications and exacerbations associated with the intracerebral hemorrhage suffered by decedent.

(c) Failing and refusing to properly and adequately assess MOISES MURILLO'S physical and mental condition despite knowing of his serious hypertension condition and the probable results of their indifference to his well-being.

(e) Failing and refusing to monitor and record MOISES MURILLO'S medical condition and report meaningful changes to other physicians.

(f) Refusing to properly train and supervise employees, both professional and non-professional with direct responsibilities for providing medical care to decedent MURILLO.

32) Defendants and each of them, acted under authority granted them in their official capacity as federal officials and employees in ignoring decedent's medical needs and requirements and were deliberately indifferent to those needs despite their knowledge of decedent's hypertension condition.

33) Defendants repeatedly ignored decedent's requests for proper medical care despite their knowledge of the seriousness of decedent's hypertensive condition. In addition, defendants and each of them

recklessly failed to ensure that decedent received his necessary medication in the proper doses and at the appropriate times to the general harm and permanent damage of decedent.

34) Defendants' conduct constituted a violation of decedent's civil rights under the Eighth Amendment as determined by the Supreme Court of the United States in *Carlson vs. Green* (1980) 446 U.S. 14.

35) As a direct result of defendants' conduct, decedent MOISES MURILLO's medical condition deteriorated to the point that he was put on life support and ultimately died.

36) Decedent seeks recovery of all damages allowed his estate under the applicable survival statute found in California law, namely C.C.P. §377.30.

SECOND CAUSE OF ACTION
NEGLIGENCE BY ALL PLAINTIFFS AGAINST
ALL DEFENDANTS AND DOES 51-100

37) Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 36 above, and hereby incorporates them as though set forth at length in their entirety.

38) Plaintiffs allege that defendants and each of them, owed a duty to provide proper medical care and treatment to decedent MOISES MURILLO pursuant to the decisions of the U.S. Supreme Court in *Estelle vs. Gamble* (1976) 429 US 97, and in *Carlson vs. Green* (1980) 446 U.S. 14.

39) Defendants violated that duty of care to plaintiffs by providing inadequate and insufficient medical care through their repeated and reckless indifference to the medical needs of decedent MOISES MURILLO.

40) As a proximate result of the aforementioned intentional, reckless and planned acts of defendants and each of them, MOISES MURILLO suffered a slow, painful death. Furthermore, as a proximate result of defendants' conduct as stated above, MOISES MURILLO was caused to suffer severe pain and suffering from personal injuries, including but not limited to severe emotional distress, aggravation of his medical condition, and other serious medical conditions caused or aggravated by

the failure to provide medical care and monitoring, as mentioned in the facts common to these defendants.

41) As a direct legal result of their negligence, MOISES MURILLO died and plaintiffs CATALINA HERNANDEZ, RUBY MURILLO, and MOISES MURILLO, JR. were deprived of the love, companionship, comfort, care, assistance, protection, affection, society, moral support of decedent MOISES MURILLO.

42) Decedent seeks recovery of all damages allowed his estate under the applicable survival statute found in California law, namely C.C.P. §377.30.

43) Plaintiffs CATALINA HERNANDEZ, RUBY MURILLO, and MOISES MURILLO, JR. seek all damages and remedies allowed them under California law, namely C.C.P. §377.60 for the wrongful death of decedent MOISES MURILLO stemming from the negligence of defendants and each of them.

THIRD CAUSE OF ACTION
BATTERY BY PLAINTIFF MOISES MURILLO AGAINST DEFENDANT WHITE MEMORIAL HOSPITAL

44) Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 43, and hereby incorporates them herein as though set forth at length in their entirety.

45) This cause of action is not subject to California Civil Code §3333.2 as it involves an intentional tort and does not involve "professional negligence" or a negligent act or omission to act by a health care provider in the rendering of professional services.

46) Defendant WHITE MEMORIAL HOSPITAL through its employees, agents and physicians, on Friday, October 22, 2004, at about approximately 7:15 a.m. received a patient named MOISES MURILLO, at their hospital suffering from right sided weakness in the lower extremity. At the time he arrived at said hospital Mr. Murillo was conscious and alert.

47) Decedent MOISES MURILLO was admitted into the intensive care unit of defendant's hospital after being diagnosed with intracerebral hemorrhage.

48) After MOISES MURILLO lost consciousness and was deemed non-responsive to light, and exhibited no pain response or eye movement, he was intubated for respiratory distress.

49) Physicians at defendant WHITE MEMORIAL HOSPITAL deemed MOISES MURILLO's medical condition serious and put him on life support machinery on Friday October 22, 2004.

50) Three days later, early on Monday October 25, 2004, defendant WHITE MEMORIAL HOSPITAL unilaterally decided to terminate MOISES MURILLO's life support without his consent and without the benefit of an existing Do Not Resuscitate Order, and without discussing the decision to terminate with decedent's wife or children, plaintiffs herein.

51) Defendant WHITE MEMORIAL HOSPITAL's conduct constitutes a non-consensual touching and is therefore a battery under California law.

52) Plaintiffs seek all appropriate remedies allowed for the damages related to said battery by defendant WHITE MEMORIAL HOSPITAL.

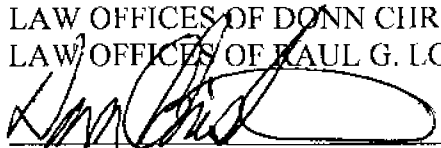
53) Plaintiffs are entitled to recover from said defendant all economic, non-economic, actual and compensatory damages, including, but not limited to his necessary medical and related expenses, past, present and future lost earnings, loss of future earning capacity, as well as mental, emotional and physical pain and suffering, in an amount presently unknown.

WHEREFORE, Plaintiffs, pray for judgment against all defendants, and each of them, as follows:

1. For general damages according to proof;
2. For special damages according to proof;
3. Reasonable attorneys fees and expenses of litigation, as allowed by law; and,
4. For costs incurred herein; and for such further relief as the Court may deem just and proper.

Dated: April 2, 2008

LAW OFFICES OF DONN CHRISTENSEN
LAW OFFICES OF RAUL G. LOMAS



Donn Christensen, Esq.
donn@donnlaw.com
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 70 South Lake Avenue, Suite 810, Pasadena, California, 91101.

On April 3, 2008, I served the foregoing document described as

PLAINTIFFS' SECOND AMENDED COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

on the interested parties in this action by the following means:

SEE ATTACHED SERVICE LIST

_____ VIA FEDERAL EXPRESS Said copies were placed in Federal Express envelopes which were then sealed and, with Federal Express charges to be paid by this firm, on this same date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the Federal Express Corp. on this date following ordinary business practices; and there is delivery service by Federal Express at the place so addressed.

_____ BY HAND Said copies were given directly to counsel of record as required by the California Code of Civil Procedure either personally, or to secretarial staff, as allowed by statute.

__X__ BY MAIL I placed the envelope for collection and mailing following ordinary practices. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. Under the practice it would be deposited with the United States Postal Service on that same day with postage fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in this declaration.

_____ BY FACSIMILE I sent the document by facsimile to the number for each counsel indicated on this proof of service.

Executed on April 3, 2008 at Pasadena, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Veronica Bustos

Raul G. Lomas, Esq.
Law Offices of Raul G. Lomas
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Pasadena, CA 91101

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Roger West, Esq.
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PROOF OF SERVICE

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Attorneys for Defendant United States

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RUBY MURRILLO et al. Plaintiff, v. UNITED STATES OF AMERICA Defendant	No. CV 06-6699 ABC (JCx) **ORDER RE RECEIPT AND FULL SATISFACTION AND STIPULATION TO DISMISS WITH PREJUDICE**

The court accepts the parties' RECEIPT AND FULL SATISFACTION AND STIPULATION TO DISMISS WITH PREJUDICE. This case is dismissed in its entirety with prejudice, with all parties to bear their own costs and fees.

IT IS SO ORDERED.

Dated: January 12, 2009

Audrey B. Collins

HON. AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
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Chief, Civil Division
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Attorneys for Defendant United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RUBY MURRILLO et al. Plaintiff, v. UNITED STATES OF AMERICA Defendant	No. CV 06-6699 ABC (JCx) **STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677** **[PROPOSED] ORDER FILED CONCURRENTLY**

IT IS HEREBY STIPULATED by and between plaintiffs RUBY MURRILLO, MOISES MURILLO JR., and CATALINA HERNANDEZ (plaintiffs), and defendant United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of SEVENTY FIVE thousand dollars ($75,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiffs and their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, their agents, servants, and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit related to the subject matter of this suit, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators, or assigns further agree to reimburse, indemnify, and hold

harmless the United States of America, their servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiffs and their guardians, heirs, executors administrators, or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, and it is specifically denied that they are liable to Plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of future litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by Plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount by the United States

will be made by check drawn on the Treasury of the United States for SEVENTY FIVE thousand dollars ($75,000.00) and made payable to Plaintiffs RUBY MURRILLO, MOISES MURILLO JR., and CATALINA HERNANDEZ, the Law Office of Donn Christensen and the Law Office of Raul Lomas, Plaintiffs' attorneys. Upon receipt of the check by the U.S. Attorney's Office, the check will be delivered to Plaintiffs' attorney Donn Christensen. Plaintiffs' attorney agrees to distribute the settlement proceeds to the plaintiffs.

9. In exchange for payment of the sum stated above, and contemporaneously with the payments set forth above, Plaintiffs will dismiss this action, with prejudice, and with each party bearing its own fees, costs, and expenses. The Court will retain jurisdiction over this case for a period of 120 days from the date this stipulation is approved by the Court.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

12. Plaintiffs agree that Plaintiffs are obligated to pay any and all liens from any and all insurance companies and any and all other persons or organizations who have or claim to have subrogated assigned claims arising out of or related to the

subject matter of this suit.

13. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

Dated: _____, 2008

By: (See attached)
DONN CHRISTENSEN
Attorney for Plaintiffs

Dated: _____, 2008

By: (See attached)
RAUL LOMAS
Attorney for Plaintiffs

DATED: 10/15/08 2008

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

By: _____
KEITH M. STAUB
Assistant United States Attorney
Attorneys for Defendant
THE UNITED STATES OF AMERICA

subject matter of this suit.

13. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

Dated: 10-10, 2008

By: _____
DONN CHRISTENSEN
Attorney for Plaintiffs

Dated: 10-10, 2008

By: _____
RAUL LOMAS
Attorney for Plaintiffs

DATED: _____, 2008

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

By: _____
KEITH M. STAUB
Assistant United States Attorney
Attorneys for Defendant
THE UNITED STATES OF AMERICA

PROOF OF SERVICE BY MAILING

I am over the age of 18 and not a party to the within action. I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On October 15, 2008, I served **Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677; [Proposed] Order** on each person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of mailing: October 15, 2008. Place of mailing: Los Angeles, California.

Person(s) and/or Entity(s) to Whom mailed:

Raul G Lomas
Raul G Lomas Law Offices
80 South Lake Ave., Suite 823
Pasadena, CA 91101

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: October 15, 2008 at Los Angeles, California.

ZENAIDA A. ROSACIA

Donn W. Christensen (SBN 196845)
Law Office of Donn Christensen
70 South Lake Avenue, Suite 810
Pasadena, California 91101
Tel: (626) 793-6760

Raul G. Lomas (SBN 106686)
18 South Marengo Avenue
Pasadena, CA 91101
Tel: (626) 792-9666

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUBY MURILLO, individually and as administratrix of the ESTATE OF MOISES MURILLO, MOISES MURILLO, JR, individually, and CATALINA HERNANDEZ, individually; Plaintiffs, vs. THE UNITED STATES OF AMERICA, and DOES 1 -10, Defendants.	CASE NO. CV06-6699 ABC (JCx) PLAINTIFFS' SETTLEMENT CONFERENCE STATEMENT DATE: October 8, 2008 TIME: 9:30 A.M. PLACE: Courtroom 20 312 No. Spring Street Los Angeles, CA Magistrate Judge Jacqueline Chooljian

TO THE HONORABLE MAGISTRATE CHOOLJIAN:

PLAINTIFFS hereby submit their Settlement Conference Statement as follows:

DATED: September 24, 2008

Respectfully Submitted,

DONN W. CHRISTENSEN
Attorney for Plaintiffs

Plaintiffs	**Counsel of Record:**
ESTATE OF MOISES MURILLO, RUBY MURILLO, MOISES MURILLO, JR., and CATALINA HERNANDEZ	**Donn Christensen & Raul Lomas**
Defendants	**Keith Staub, United States Asst. Attorney**
United States of America	

STATEMENT OF FACTS:

On June 11, 2004, the decedent, 69-year-old MOISES MURRILLO,was arrested, detained and booked by the Los Angeles Police Department for a charge of Driving Under the Influence of Alcohol, namely Vehicle Code Section 23152(a), and then held in the Los Angeles County Jail.

Moises Murillo, Sr. was transferred from the Los Angeles County Jail to a federal detention center on June 17, 2004 while awaiting deportation proceedings. Decedent was subsequently transferred to the Terminal Island Detention Center under the control of defendant United States of America.

On July 14, 2004, Moises Murillo, Sr. was interviewed by Kelly Nowak, Special Agent of the Bureau of Immigration and Customs Enforcement under file number A 20 016 694.

On or about July 15, 2004, Mr. Murillo was transferred to the Metropolitan Detention Center, Los Angeles, California, and identified by register number 30210-112.

During the entire period of incarceration, Moises Murillo, Sr. was in need of proper medication to counter the effects of chronic hypertension (high blood pressure). While decedent was incarcerated in the custody of the U.S. Marshals and in the federal detention facilities hereinbefore named, he was denied medical care and

medical attention and/or was provided inadequate medical care for his pre-existing medical condition, namely "chronic hypertension" (high blood pressure) prescribed to prevent the 69-year-old Mr. Murillo from suffering a transient ischemic attack, or TIA, due to his hypertensive condition and history of atrial fibrillation.

The obligation of defendant United States to provide proper medical care by this defendant has been well established since the United States Supreme Court's decision in *Estelle v. Gamble* (1976) 425 U.S. 97, (holding that "deliberate indifference to serious needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'").

Specifically, during the entire time of Moises Murillo's detention by defendant United States of America, he received improper and inadequate medical care related to the provision and monitoring of his blood pressure medication, known as Warfarin, or generically as Coumadin.

Mr. Murillo was taking the generic version of the drug, *i.e.*, Coumadin. Coumadin levels are monitored by a blood test known as the INR (Internationalized Normalized Ratio). *See* Exhibit One, *Managing Your Warfarin (Coumadin) Therapy: A Patient's Guide*, (2002) New York University, attached hereto, at p. 5. This blood monitoring is important because Coumadin "belongs to a category of drugs known as 'narrow range of effectiveness' drugs" because "there is a very narrow range where the drug is considered therapeutic." *Id.*, at p. 5. For most people, including decedent here, the therapeutic range requires a Coumadin blood level falling between 2.0 and 3.0. *Id.*, at pp. 5-6; *see also*, Exhibit Two, Diagnostic Medlab report on proper INR for Warfarin, at p. 2 of 4 (target INR for patients with history of atrial fibrillation between 2-3).

The monitoring of decedent's Coumadin levels was important because an INR level too low (< 1.5) places a patient "at risk for blood clots." *See* Exh. One, at p. 6. Alternatively, a Coumadin level, or INR, greater than 4.5 "places [a patient] at risk for

bleeding." *Id.*, at p. 6; *see also*, Exh. 2, at pp. 2-3 of 4 (noting that the patient bleeding risk increases from "1 in 4,000" for a patient in the target INR between 2 and 2.9 to a risk of "1 in 100" for a patient with an INR of 7 or more. Regular testing is important to avoid those dramatic risk increases because patients "often will not feel any symptoms" of having a Coumadin level that is too high or too low. *See* Exh. 1, at p. 6.

On September 30, 2004, A. Sinavsky, M.D., the clinical director for Metropolitan Detention Center - Los Angeles, ordered an increase in Mr. Murillo's Coumadin dosage to 5mg daily. *See* Exh. 3, Chronological Record of Medical Care. No record exists showing that Dr. Sinavsky's decision to increase Mr. Murillo's Coumadin dosage was ever revisited or followed up with blood testing to determine whether Mr. Murillo's Coumadin levels fell within the narrow range of effectiveness.

Roughly three weeks later on October 22, 2004, Moises Murillo, Sr.was transported to White Memorial Hospital complaining of right-sided weakness. He arrived at White Memorial about 7:15 A.M. *See* Exh. 4, ER Admission Record dated October 22, 2004, at p. 1. White Memorial Hospital's examination determined that Mr. Murillo "required hospitalization on account of intracerebral hemorrhage." *See* Exh. 4, ER Admission Record dated October 22, 2004, at p. 1. Mr. Murillo was deemed "conscious, alert and . . oriented on arrival." *Id.*, at p. 1 - Emergency Room Course. The blood level testing revealed that Mr. Murillo "was taking Coumadin *and his INR was more than 7*." *Id.* (*Emphasis added*). Dr. Ramadas Abboy concluded that Mr. Murillo's intracerebral bleed was "due to hypertension, Coumadin toxicity, or a combination of both." *Id.*, at p. 2.

Mr. Murillo lapsed into a coma and passed away on Monday, October 25, 2004 when he was taken off life support by White Memorial Hospital.

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DAMAGES:

Plaintiffs sue the United States for damages caused by defendant's negligent provision of medical care to decedent resulting in the death of Moises Murillo, Sr., the husband and father to the other named plaintiffs.

Pursuant to 28 USC § 2674, defendant United States is liable "in the same manner and to the same extent as a private individual under like circumstances." Thus, the damages law applicable to negligence actions in California apply to the instant action.

The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages consisting of the *pecuniary loss* suffered by the *heirs*. *See, e.g.*, 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 891, p. 350.

The damages awarded to an heir in a wrongful death action "may include (1) the loss of the decedent's financial support, services, training and advice, and (2) the pecuniary value of the decedent's society and companionship--but he may *not* recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss. *See*, Nelson, *supra*, at p. 793. "The damages recoverable in [wrongful death] are expressly limited to those *not* recoverable in a survival action under C.C.P. §377.34.

Pursuant to CACI No. 3291, two categories of damages are recoverable by wrongful death plaintiffs -- economic and noneconomic.

Economic damages include: "1. The financial support, if any, that [Moises Murillo, Sr.] would have contributed to the family during either the life expectancy that [Moises Murillo, Sr.] had before [his] death or the life expectancy of [Moises Murillo, Sr.], whichever is shorter; [P] 2. The loss of gifts or benefits that [Moises Murillo's heirs] would have expected to receive from [Moises Murillo, Sr.]; [P] 3.

Funeral and burial expenses; and [P] 4. The reasonable value of household services that [Moises Murillo, Sr.] would have provided." *See* CACI No. 3921.

Noneconomic damages include: "1. The loss of [Moises Murillo, Sr.]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support; [and] [P] [2. The loss of the enjoyment of sexual relations The instruction also provides that "[i]n determining [Moises Murillo, Sr.'s heirs]' loss, do not consider: [P] 1. [heirs]' grief, sorrow, or mental anguish; [P] 2. [Moises Murillo, Sr.]'s pain and suffering; or [P] 3. The poverty or wealth of [Moises Murillo, Sr.'s heirs]." (*Ibid.*)

General Damages for Negligent Death Claim

Catalina Hernandez - [Decedent's Wife] tort injuries	$100,000.00
Ruby Murillo- [Decedent's Daughter] tort injuries	$50,000.00
Moises Murillo, Jr. - [Decedent's Son] tort injuries	$50,000.00
Subtotal: General Damages	$200,000.00

Special and Consequential Damages

Loss of Financial Support:	$56,000.00	Present Value:	$48,751.37
Funeral Costs			$8,000.00
Subtotal: Special Damages			$56,751.37
TOTAL DAMAGES:			**$256,751.37**

Costs of Instant Lawsuit to date:

Other litigation costs:

Filing	$150.00
Clerical	$175.00
Postage	$16.30
Investigation costs	$2,112.20
Depositions	$00.00
Subpoenas	$00.00
Expert Consultation	$1,500.00
Mediation	$00.00
Total Costs (without fees)	$3,953.50

SETTLEMENT HISTORY

Plaintiffs' initial filing alleged claims against White Memorial Hospital also. That matter was settled between the parties for $10,000.00 dollars based primarily on the limited responsibility of White Memorial for decedent Moises Murillo's Coumadin toxicity and subsequent fatal brain bleed.

Packaged together the general and special damages result in a provable loss of $260,704.87, including fees and costs.

Plaintiffs demand settlement is commensurate with the figures shown above.

DATE: September 24, 2008

Respectfully Submitted,



DONN W. CHRISTENSEN
Attorney for Plaintiffs

EXHIBIT 1

PATIENT & FAMILY EDUCATION / NYU Medical Center

Warfarin March 2002

Managing Your

Warfarin (Coumadin®)

Therapy

A Patient's Guide

A Message To You

The goal of anticoagulation therapy with warfarin (**Coumadin®**) is to decrease the clotting ability of your blood so that blood clots are prevented. The most important aspect of warfarin therapy is to keep your levels within a therapeutic range. If your level goes too low, you are at risk for blood clots, if it goes too high, you are at risk for bleeding. Many factors can affect your level. In order to provide you with the safest and most effective therapy, your healthcare provider needs you to act as a partner in your care. Your role is to gain the necessary knowledge about your warfarin therapy and the factors that affect it, and then apply this knowledge to your daily activities. The purpose of this book is to empower you with that knowledge. If you have any questions or concerns about your warfarin therapy after reading this book, please speak with your healthcare provider

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What Is Warfarin (Coumadin®)?

Warfarin (Coumadin®) is an anticoagulant. *Anti* means against, and *coagulant* refers to blood clotting. Warfarin reduces the body's ability to make blood clots. Your healthcare provider wants you to take warfarin because your body may make clots that you don't need. These clots can cause a serious medical problem. A clot can move to another part of your body. For example, if a clot moves to your brain, it can cause a stroke.

The most common reasons for taking warfarin (Coumadin®) include:

- *Deep Vein Thrombosis (DVT):* this is a blood clot that occurs in a deep vein. They most often occur in the legs, but can occur in other parts of your body as well.
- *Pulmonary Embolus (PE):* this is a blood clot in the lung. Most often, the blood clot starts in the leg, breaks off, and travels to the lung.
- *Atrial Fibrillation or atrial flutter:* these are irregular heart rhythms that occur in the upper chambers of the heart (the atria). The atria do not empty all of the blood, which can cause the leftover blood to form clots. If a clot goes into your circulation, it can cause a stroke.

What Is Warfarin (continued)

- *Mechanical heart valve replacement:* blood clots can form on the mechanical heart valve. If a clot forms on the valve, it can prevent the valve from functioning, or if the clot breaks off into your circulation, it can cause a stroke. People with mechanical heart valve replacements must be on warfarin therapy for life.
- *Heart attack:* sometimes warfarin is taken after a heart attack to lower the risk of death, lower the risk of another heart attack, and lower the risk of stroke.
- *Stroke:* if a stroke is caused by a blood clot going to the brain, warfarin is used to prevent it from recurring.
- *Transient Ischemic Attack (TIA) or "mini stroke":* Warfarin is given to prevent a stroke from occurring.
- *After certain surgical procedures:* some surgical procedures place a person at high risk for developing a blood clot (for example, major orthopedic surgery). Warfarin is given temporarily after the surgery to prevent a clot from occurring.

Warfarin (Coumadin®) is sometimes given for reasons other than those listed. If you have any questions or don't understand something in this information, ask your healthcare provider for more information.

Warfarin Background

Warfarin was first discovered in 1939 after numerous cattle bled to death in North Dakota and Canada after eating improperly cured feed made from common varieties of sweet clover. The causative compound was identified as dicumarol, a coumarin compound. Further investigation led to the discovery of compound 42 (warfarin sodium) which emerged as a rodenticide in the 1940's. Investigators began experimenting with warfarin in humans in the 1950's, but its widespread use did not occur until it was used to treat President Dwight D. Eisenhower after a heart attack in the mid 1950's. Subsequently, warfarin sodium (derived from the *W*isconsin *A*lumni *R*esearch *F*oundation which held the original patent on warfarin) rapidly became the major oral anticoagulant used in the United States and throughout North America. Warfarin is now the 14th largest selling prescription drug, with over two million people in the United States taking it.

How Does Warfarin (Coumadin®) Work?

Warfarin (Coumadin®) partially blocks the re-use of vitamin K in your liver. Vitamin K is needed to make clotting factors that help the blood to clot and prevent bleeding. Vitamin K is found naturally in certain foods, such as green leafy vegetables. Warfarin (Coumadin®) reduces the body's ability to make blood clots. It can help stop harmful clots from forming and keeps clots from getting larger. Warfarin does not break up existing blood clots.
Warfarin (Coumadin®) begins to reduce blood-clotting within 24 hours after taking the drug. The full effect may take 72 to 96 hours to occur. The anti-clotting effects of a single dose of warfarin last 2 to 5 days, but it is important for you to take your dose as prescribed by your healthcare provider.

How is Warfarin (Coumadin®) Monitored and What Dose Do I Take?

Warfarin (Coumadin®) is monitored by a blood test called an INR (International Normalized Ratio). Warfarin belongs to a category of drugs known as "narrow range of effectiveness" drugs. This means that there is a very narrow range where the drug is considered therapeutic. For most indications, the INR range is 2.0 to 3.0. For people with mechanical heart valve replacements and certain other conditions, the range is 2.5 to 3.5. These ranges are general recommendations. Your healthcare provider might prescribe a different range, depending on your particular condition.

When your INR falls within your range (for example, between 2.0 and 3.0), this means that your level is "therapeutic". When your INR level goes below the range (for example, 1.5) this means your blood is "too thick", and places you at risk for blood clots. In this situation, your healthcare provider will prescribe a higher dose of warfarin for you to take. If your INR goes above your range (for example, 4.5) this means your blood is "too thin", and places you at risk for bleeding. In this situation, your healthcare provider will prescribe a lower dose of warfarin for you to take. Because warfarin (Coumadin®) affects each person differently, some people will be on small doses of warfarin and some will be on very large doses. Some people will achieve their appropriate INR quickly and others more slowly. *The dose of warfarin you need is the one that keeps the INR in the therapeutic range for your condition*. Many factors can affect your INR level including a change in diet, a change in medications, the onset of a new illness, or having to stop your warfarin for a procedure.

When a person first starts taking warfarin (Coumadin®) the INR level tends to fluctuate up and down until the correct dose of warfarin is found that keeps your INR level stable. It is therefore *very important* to get your INR level checked frequently. In general, when you first start warfarin you will need to get your INR level checked 2 to 3 times a week for the first two weeks, then one to two times a week for two weeks, then every other week, then once a month. This may vary, depending on how your INR levels are. If the INR level becomes stable quickly, you will go for INR blood tests less often, if the INR level does not become stable, you will need to go for INR blood tests more often.

When your INR level is too high or too low, you often will not feel any symptoms. This is why it is *so important* to get your INR blood tests done regularly!

Warfarin (Coumadin®) and Drug Interactions

Warfarin (Coumadin®) interacts with *hundreds* of drugs including prescription and non-prescription (over-the-counter) drugs. Drug interactions can cause your INR to go too high (placing you at risk for bleeding) or cause your INR to go too low (placing you at risk for blood clots). Examples of some drugs that interact with warfarin are given below. The list is by no means all inclusive. It is just to give you an idea of some of the more common drugs that interact with warfarin. It is *very important* for you to check with your healthcare provider before starting, changing, or stopping any drug, whether it be prescription or over-the-counter. If you need to be on a medicine that is known to interact with warfarin, it does not mean that you cannot take it. It does mean that you will need to get your INR monitored more closely when you start the new medicine.

Prescription Drugs (by class):	**Common Over-the-Counter Drugs:**
Antibiotics	Aspirin
Analgesics	Aleve
Anticonvulsants	Motrin
Antidepressants	Ibuprofen
Antiplatelet drugs	Cimetidine (Tagamet)
Diabetes drugs	Ranitidine (Zantac)
Gastrointestinal drugs	Pepto Bismol
Gout treatment drugs	Vitamin C (greater than 500 mg per day)
Lipid-lowering drugs	Vitamin E (Greater than 400 IU per day)
Steroids	Multivitamins containing Vitamin K
Thyroid drugs	Glucosamine & Chondroitin
Antiarrythmics	Coenzyme Q10
Antifungal drugs	

Drug Interactions With Herbal Medicines

Herbal medicines can also cause dangerous drug interactions with Warfarin (Coumadin®). Keep in mind that just because an herbal product is advertised to be "*all natural*" does not necessarily mean it is *safe*. Below is a list of herbal products known to interact with warfarin. The list is not all inclusive. If you want to take an herbal supplement, it is *very important* that you contact your healthcare provider before taking it.

Agrimony	Dandelion	Pau d'arco
Alfalfa	Fenugreek	Policosanol
Aloe Gel	Feverfew	Poplar
Aniseed Angelica (Dong Quai)	Garlic	Quassia
Arnica	German Sarsaparilla	Red Clover
Asa Foetida	Ginger	Senega
Aspen	Ginkgo Biloba	St. John's Wort
Bladder Wrack (Fucus)	Goldenseal	Sweet Clover
Black Cohosh	Green Tea	Sweet Woodruff
Black Haw	Horseradish	Tamarind
Bogbean	Licorice	Tonka Beans
Bromelain	Meadowsweet	Wild Carrot
Buchu Boldo	Mistletoe	Wild Lettuce
Capsicum	Nettle	Yarrow
Cassia	Onion	
Celery	Parsley	
Chamomile (German & Roman)	Passion Flower	

Diet and Warfarin (Coumadin®) Therapy

Warfarin (Coumadin®) interacts with vitamin K in your diet. Vitamin K is necessary in the blood clotting process. Food sources with the highest amount of vitamin K include dark green leafy vegetables. *This does not mean that you need to cut green leafy vegetables out of your diet.* These foods are heart healthy, they are high in lutein, which improves vision, and high in fiber, which is good for the gastrointestinal tract. The recommendation is to keep your diet *consistent.* This means that you should eat the same amount of vegetables from week to week. Do not eat a lot of dark green leafy vegetables one week, then none the following week. As long as you maintain a consistent amount of vitamin K in your diet, the warfarin will balance with it. If your vitamin K intake fluctuates, your INR level will fluctuate. Remember, just because a vegetable is green does not mean it is high in vitamin K. It is only the green leafy vegetables that are high in vitamin K.

Examples of vegetables *high* in vitamin K:	**Examples of vegetables *low* in vitamin K:**
Cabbage	Green beans
Broccoli	Peas
Spinach	Carrots
Escarole	Potatoes
Greens (collard greens, turnip greens, mustard greens)	Celery
Lettuce (except iceberg lettuce which is low in vitamin K)	Corn
Brussels sprouts	Cucumber
Endive	Eggplant
Kale	Tomato
Cauliflower (although it is white, it is in the same family as broccoli)	Pepper
	Zucchini

Other Dietary Considerations

Dietary Supplements: Many dietary supplements contain vitamin K. Examples of these products include Ensure, Boost, and Carnation Instant Breakfast. The fact that these products contain vitamin K does not mean you should not use them. As with diet, keep your vitamin K intake consistent. If you have never used these products but would like to start, contact your healthcare provider. You will need to get your INR level monitored more closely when you start them.

Vitamins: What vitamins are safe to take when you are taking warfarin (Coumadin®)? Below is a list of some of the most common vitamins and their effect on the INR level:

- B vitamins: no effect on the INR level
- Vitamin C: up to 500 mg per day will have no effect on the INR. Doses greater than 500 mg may lower the INR level
- Vitamin E: up to 400 IU per day will have no effect on the INR. Doses above 400 IU may increase the INR level.
- Multivitamins: most multivitamins contain small amounts of vitamin K. It is okay to take them, but as goes with diet, be consistent in taking them every day to prevent your vitamin K intake from fluctuating. If you are not using multivitamins but would like to start, contact your healthcare provider. You will need to get your INR level monitored more closely when you start them.

Alcohol: alcohol in moderation (up to 2 drinks per day) will have little effect on the INR level. Excess alcohol intake will elevate the INR level because both the alcohol and the warfarin (Coumadin®) are metabolized through the liver. If you have a problem with excessive alcohol intake and are taking warfarin, please speak with your healthcare provider. This lethal combination may place you at serious risk of a bleeding event.

Side Effects of Warfarin (Coumadin®)

The most serious side effect of warfarin (Coumadin®) is bleeding. To lower the risk of bleeding, be sure to get your INR level monitored regularly. Monitor yourself for:

- Nosebleeds
- Bleeding of gums when you brush your teeth
- Vomiting blood
- Blood in your urine
- Bowel movements that look red or black
- Unusual bruising
- Cuts that do not stop bleeding
- Excessive bleeding when you get your menstrual period or unexpected bleeding from the vagina
- Headache, dizziness, or weakness
- Unusual pain or swelling

If you develop *minor* bleeding (for example, a nosebleed or bleeding from the gums that stops within a few minutes) contact your healthcare provider. You will need to get your INR level checked.

If you develop *major* bleeding (for example, vomiting blood or a nosebleed that won't stop) ***go to the nearest emergency room.*** This could be a sign of a serious problem.

If you are involved in any kind of ***traumatic accident*** (for example, a car accident or falling down and hitting your head on the pavement) ***go to the nearest emergency room.*** You will need to get checked for internal bleeding.

Other side effects:

- Hair loss: hair loss is an infrequent side effect of warfarin therapy and is reversible.
- Rash: if you develop a rash after starting warfarin therapy notify your healthcare provider.

Other considerations:

- Pregnancy: if you become pregnant or are planning to become pregnant, notify your healthcare provider. Warfarin (Coumadin®) is dangerous to the unborn baby and should not be taken during pregnancy.
- Avoid any activity or sport that may result in a traumatic injury.
- You may find that if you get a cut or scratch it may bleed longer than when you were not taking warfarin. Just apply pressure to the area. It should stop within a few minutes.
- You may find that you bruise easier than when you were not on warfarin. Try to be careful!

Commonly Asked Questions About Warfarin (Coumadin®) Therapy

- **What is the best time to take warfarin (Coumadin®)?**

The most important thing to do is to take it at the same time each day. Ideally you should take it in the evening, but choose a time of day that you will remember to take it. On the days you are getting your INR level checked, do not take the warfarin before the blood test in case a change in your dosage needs to be made.

- **Should I take warfarin with food or on an empty stomach?**

Warfarin (Coumadin®) should be taken on an empty stomach, either one half hour before or one hour after a meal. Food impairs the absorption of the drug. It is okay to take it after a light snack, but don't take it after a full meal.

- **How long will I need to be on warfarin (Coumadin®)?**

It is up to your healthcare provider to determine how long you will need to be on warfarin. Warfarin is used to treat many different conditions. For some, you will only need to be on it temporarily, for others you may need to be on it for life.

- **What do I do if I travel?**

If necessary, your healthcare provider can make arrangements for you to have your INR level monitored while you are away. Remember to try to keep your diet consistent and to avoid excessive alcohol intake while you are away.

Commonly Asked Questions (continued)

- **What happens if I need surgery, dental work, or some type of invasive procedure?**

... time you are to have any type of procedure done that could place you at risk of bleeding, notify your healthcare provider. Depending on the procedure, the warfarin may need to be temporarily stopped, or you may need an alternative method of anticoagulation. Always check with the healthcare provider who is managing your warfarin therapy before stopping it for any reason.

- **How much warfarin (Coumadin®) is too much?**

There is no limit on the dosage of warfarin. You will need to take whatever dose keeps your INR level in the therapeutic range. For some people, it may be a very small dose, for others, it may be a large dose. If you hear from your friends or neighbors that they are taking a lower dose than you, don't let it upset you. Warfarin dosage is individualized to each particular patient.

Summary: The Do's and Don'ts of Warfarin (Coumadin®) Therapy

Do's:

- **Do** strictly adhere to the warfarin (Coumadin®) dosage prescribed by your healthcare provider.
- **Do** get your INR level monitored on a regular basis.
- **Do** eat a normal, balanced diet maintaining a consistent amount of vitamin K.
- **Do** tell your healthcare provider about any other medicines your are taking (prescription and over-the-counter) as well as herbal/nutritional supplements. Also, talk to your healthcare provider before you change, start, or stop taking any other medicines.
- **Do** monitor yourself for any signs of bleeding.
- **Do** tell anyone giving you medical or dental care that you are taking warfarin.
- **Do** wear a medic alert bracelet to identify yourself as being on warfarin.
- **Do** refill your prescriptions according to your healthcare provider's orders.
- **Do** notify your healthcare provider immediately if you experience any signs of bleeding or unusual symptoms.
- **Do** take your warfarin at the same time each day, on an empty stomach.

- **Do** speak to your healthcare provider about any concerns you may have about taking warfarin.

Don'ts:

- **Don't** take a double dose of warfarin (Coumadin®) the following day if you find you missed a dose on the previous day. Notify your healthcare provider if you miss any doses.
- **Don't** change your warfarin dosage without speaking to your healthcare provider.
- **Don't** change, start, or stop any medications or nutritional supplements without speaking to your healthcare provider.
- **Don't** make any drastic changes in your diet without speaking to your healthcare provider.
- **Don't** participate in any activity or sport that may cause a traumatic injury.
- **Don't** drink excessive alcohol.
- **Don't** take warfarin during pregnancy.

Additional Resources

National Stroke Association
1-800-STROKES *or* www.stroke.org

American Heart Association Stroke Connection "warmline"
1-800-553-6321 *or* www.americanheart.org

National Institute of Neurological Disorders and Stroke
1-800-352-9424 *or* www.ninds.nih.gov

Research Center for Stroke & Heart Disease
1-716-859-3900 *or* www.strokeheart.org

http://www.coumadin.com/
Provides consumers with information on oral anticoagulants

http://warfarinfo.com
Provides consumers with information on oral anticoagulants.

http://www.dvt.org/dvt/
An Internet resource for deep vein thrombosis and pulmonary embolism

EXHIBIT 2

HOME

LOCATIONS

collection rooms
via map
via list
- central auckland
- east auckland
north auckland
south auckland
west auckland
after hours
scheduled tests
weekends

PATIENTS

test instructions
faqs
feedback

CLINICIANS

test manual
forms
med-news
guidelines
our services
electronic results
test info
susceptibility
handbook
antibiotic guide
pathologists
courier instructions
pathologist search

SEARCH



PATIENTS - TEST INFORMATION

DIAGNOSTIC MEDLAB



OUR DISCLAIMER

Please see your health professional for further explanation of this information.

INR (INTERNATIONAL NORMALISED RATIO)

The INR is the test used to monitor warfarin anticoagulant therapy which is being increasingly widely used across the range of thromboembolic disease. Warfarin is a vitamin K antagonist and acts by reducing levels of Factors II (prothrombin) VII, IX and X. The INR is a standardised prothrombin ratio calibrated so that INR results from one laboratory are directly comparable with those from another.

A. Warfarin dosing regimens

The ½-life of warfarin is 36 hours and those of Factors II, VII, IX and X vary between 7 and 60 hours and for this reason, response to a dose change is slow with a lag of 3-4 days before a new equilibrium is achieved.

Although the INR is often requested as a semi-urgent test so that specimen collection, testing, reporting and dose change can all be done on the same day, the 3-4 day lag in INR response makes this urgency unnecessary. Dose changes can wait till the next day.

1. Standard warfarin regimen for rapid anticoagulation.

Standard dosing regimen:

day	INR	Warfarin dose (mg)
1	<1.4	10 (5 in older patients)
2	<1.8	5
3	<2.0	5
	2.0-2.2	5
	2.3-2.4	4
	2.5-2.7	3
	2.8-3.0	2
	3.1-3.5	1
	>3.5	-
		predicted maintenance dose
4	<1.4	>8
	1.4-1.7	6-8
	1.8-2.3	5
	2.4-3.0	4
	3.1-3.5	<3
	3.6-4.0	<2

Note: If 3.6-4.0, miss next day's dose, then give 2.0 mg.
If >4.1, miss 2 days' doses, then give 1.0 mg.

2. Alternative slower regimen

Can be used in older outpatients with chronic atrial fibrillation (except when on amiodarone).

Day	INR	Warfarin dose (mg)	Time to next change/INR
Day 1	<1.4	3 mg	1 week

Additional Tests
If your practitioner has written anything in the Additional Tests area on your request form, click here to go to our handbook of tests.

*** Appointment Needed**

Day 8	<1.8	4 mg	1 week
	1.8 - 2.5	3 mg	2 weeks
	2.5 - 4.0	2 mg	1 week
	>4.0	specialist advice	1-3 days (depending on INR level)

B. Target INR

The recommended target in the table below is a guide only and in selected patients a different level may be recommended.

Indication	Recommended INR Target
DVT prophylaxis in high risk situations	2 - 3
Treatment of VTE	2 - 3
Prevention of systemic embolism: atrial fibrillation valvular heart disease following mycocardial infarction tissue heart valves (<3 months)	2 - 3
Mechanical bileaflet or tilting disc heart valve. - older caged ball valve may need higher target	2.5 - 3.5
Recurrent thrombosis on Warfarin	3.0 - 4.0 (?)
Thrombosis in antiphospholipid syndrome	3.0 - 4.0 (?)

C. Excessive INR Respon

Sometimes a patient with a stable INR shows a marked change. Possible causes are:

- incorrect dosage (often associated with a prescription change) accounts for half of these unexpected changes.
- drugs

antibiotics	cardiac	anti-inflammatory	gastrointestinal
cotrimoxazole	amiodarone	phenylbutazone	omeprazole
erythromycin	clofibrate	piroxicam	cimetidine
fluconazole	propanolol	paracetamol	
miconazole	sulfinpyrazone		
metronidazole			
isoniazid			

- gastrointestinal disease è diarrhoea
- hepatic disease, congestive cardiac failure

Bleeding risk while on warfarin

Composite figures for overall risks:

fatal bleeding	0.25%
major bleeding	1-3%
minor bleeding	6-7%

INR level v patient bleeding risk

INR	events/100 pt years	estimated risk over 48hr period
2 - 2.9	4.8	1 in 4,000

3 - 4.4	9.5	1 in 2,000
4.5 - 6.9	40	1 in 500
>7.0	200	1 in 100

D. Management of overcoagulation

The urgency of correcting a high INR (above 4 if the target is 2.5) will depend on whether there is any bleeding and whether major or minor.

Therapeutic options are:

1. For all high INR's:

Stop warfarin, then restart at a lowered dose when INR is higher than target but <5.

INR	% dose reduction	Usual number (days) of omitted doses
4 - 5	25	0
5 - 6	25	1
6 - 8	33	2
>8	50	3

2. Vitamin K

Low dose vitamin K replacement (usually 1-2 mg initially) is used where the INR is excessively prolonged by warfarin as a consequence of vitamin K depletion. Replacement of vitamin K stores should make the subsequent response to warfarin more predictable. Vitamin K is usually administered orally or sc, occasionally IV. For oral replacement the appropriate volume can be drawn up into a tuberculin syringe from an ampoule (1 mg/0.5ml or 10 mg/ml) of vitamin K in a dose of 0.5-2 mg (see below). Larger doses of vitamin K (e.g. 5-10 mg) may make the patient resistant to further warfarin.

3. Prothrombin complex concentrate

Prothrombinex 25 u/kg or FFP 15 mls/kg is given for immediate correction when there is major bleeding.

Guidelines for severe overcoagulation

clinical	guideline
INR 6-8 without bleeding	• stop warfarin • restart in reduced dose when INR <5 • give 0.5-1mg oral/sc vitamin K if INR fails to shorten, or if reversal required within 24-48 hrs.
INR >8 with bleeding	• stop warfarin • restart in reduced dose when INR <5. • give 1-2 mg oral/sc vitamin K (repeat in 24hrs if necessary).
High INR and major bleeding	• stop warfarin • admit to hospital. • give vitamin K 5 mg sc/iv.

- give prothrombin complex concentrate (prothrombinex) 25 units/kg or FFP 15 mls/kg.

BACK

EXHIBIT 3

NSN 7540-00-634-4176 AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION (Sign each entry)
9/7/04	S: Requests Refill of Medication
OHU	O: AAO Ambo Alert
	A- S/P for Rib
	P: Motrin 800 MG - 1 PO TID prn pain #21 2 Refills

Patient education/instruction was given on
Eden
Patient understood instructions.

M. JAMIL, P.A.
MDC LOS ANGELES 9/8/04

A. SINA
CLINICAL DIRECTOR, M.D.
MDC LOS ANGELES

9/7/04
1148

MDC LOS ANGELES PHARMACY (213) 485-04
535 N. ALAMEDA STREET - LOS ANGELES, CA 90053
77560 M. JAMIL 09/07/04
MURILLO-ALVARADO, MOIS 30210-112
MDC LOS ANGELES HOUSING - G05-76
TAKE ONE TABLET EVERY EIGHT HOURS AS NEEDED

IBUPROFEN 800 MG TAB [redacted]
(2) Refill(s) 09/07/2004 TOG Rx'd 09/27/04
CAUTION: Federal/State law prohibits transfer of this drug to any person other than patient for whom prescribed.

9/30/04
(HTJ)

Lab Review

INR = 1.0
PT = 9.5
P - INCREASE COUMADIN TO 5 mg daily
& 90 day
PT, INR, PTT in the 2nd week 10/04 -
- ORDERED

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/AD NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: (For typed or written entries, give: Name - last, first, middle; ID No or SSAN; Sex; Date of Birth; Rank/Grade.)

Murillo Moises
30210-112

REGISTERED AT METROPOLITAN DETENTION CENTER
535 NORTH ALAMEDA STREET
LOS ANGELES, CA 90012-3401

A. SINA
CLINICAL DIRECTOR, M.D.
MDC LOS ANGELES

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record
STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/OMR
FIRMR (41 CFR) 201-8.202-1
USP LVN

EXHIBIT 4

HISTORY AND PHYSICAL

PATIENT NAME: MURILLO-ALVARADO, MOISES
MEDICAL RECORD NUMBER: 1026701
ACCOUNT NUMBER:
DATE OF ADMISSION: 10/22/04
ATTENDING PHYSICIAN: RAMADAS ABBOY, M.D.

HISTORY OF PRESENT ILLNESS AND EMERGENCY ROOM COURSE: The patient is a 69-year-old Hispanic male, an inmate of the Metropolitan Detention Center of Los Angeles, who was transferred to the White Memorial Medical Center emergency room for right sided weakness since the morning of the day of admission. He was brought in at about 7:15 a.m. I was called by the emergency room physician at about 10 o'clock saying that this patient requires hospitalization on account of intracerebral hemorrhage causing weakness of the right lower extremity. Apparently, he was conscious, alert, and was oriented on arrival. A CT scan of the brain showed intracerebral hemorrhage. His blood pressure was 174/89 mmHg. He was in atrial fibrillation. He was taking Coumadin and his INR was more than 7. We agreed that the patient should be admitted into the intensive care unit. Within the next half an hour or so, the patient's mental condition deteriorated further. A repeat CT scan showed worsening of the bleed and the patient lost consciousness. He was intubated and was ventilator supported. Meanwhile, Dr. Sinavasky from the Metropolitan Detention Center of Los Angeles contacted me and I went down to see the patient in the emergency room.

On evaluation in the emergency room, I found the pupils to be dilated and not reacting to light. He was not responsive to painful stimuli. He was intubated and was ventilator supported. The patient would not move his eyes when turning from side to side. I suspected that the patient may have had a brain death. I have recommended an apnea test.

At about 12:45 when I saw the patient, he is unresponsive to painful stimuli and withdraws the left lower extremity. The plantar is upgoing on the left side. Right side plantar response is not elicitable. He also has cough reflex. He is breathing at about 15 times per minute with a set rate of 10 per minute.

DIAGNOSES:

1. Intracerebral hemorrhage causing partial herniation of the brain.
2. Respiratory failure, ventilator supported.
3. Essential hypertension.
4. Atrial fibrillation, on Coumadin.
5. Coumadin toxicity.

The patient's intracerebral bleed could be due to hypertension, Coumadin toxicity, or a combination of both. The patient will be admitted to the intensive care unit and will keep the blood pressure controlled a little better and hyperventilate him.

CONDITION: Critical.

PROGNOSIS: Grave.

RA/ddi/gj
D:10/22/04
T:10/23/04
BY:01024
6H/1K7VY/J:41340
XZ:#6011340.OM4

RAMADAS ABBOY, M.D.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 70 South Lake Avenue, Suite 810, Pasadena, California, 91101.

On September 24, 2008 I served the foregoing document described as

PLAINTIFFS' SETTLEMENT CONFERENCE STATEMENT

on the interested parties in this action by the following means:

SEE ATTACHED SERVICE LIST

____ VIA FEDERAL EXPRESS Said copies were placed in Federal Express envelopes which were then sealed and, with Federal Express charges to be paid by this firm, on this same date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the Federal Express Corp. on this date following ordinary business practices; and there is delivery service by Federal Express at the place so addressed.

____ BY HAND Said copies were given directly to counsel of record as required by the California Code of Civil Procedure either personally, or to secretarial staff, as allowed by statute.

____ BY MAIL I placed the envelope for collection and mailing following ordinary practices. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing with the United States Postal Service. Under the practice it would be deposited with the United States Postal Service on that same day with postage fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in this declaration.

_X_ BY FACSIMILE I sent the document by facsimile to the number for each counsel indicated on this proof of service.

Executed on September 24, 2008 at Pasadena, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Veronica Bustos

The Hon. Magistrate Chooljian
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Attorneys for Plaintiffs

FILED
08 APR -3 AM 11: 13
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY: MADO

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RUBY MURRILLO, individually, and as Administratrix of the Estate of MOISES MURRILLO; MOISES MURILLO, JR. ; CATALINA HERNANDEZ Plaintiffs, vs. UNITED STATES OF AMERICA; MICHAEL BENOV, WARDEN OF THE METROPOLITAN DETENTION CENTER; WHITE MEMORIAL HOSPITAL and DOES 1 TO 100. Defendants.	CASE NO. CV06-6699-ABC (JCX) (Audrey B. Collins District Judge) **PLAINTIFFS' SECOND AMENDED COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL** **1) Civil Rights Violations (*Bivens*)** **2) Negligence** **3) Battery**

COMPLAINT

COME NOW PLAINTIFFS, RUBY MURRILO, individually, and as Administratrix of the Estate of MOISES MURILLO; MOISES MURRILLO, JR., individually, CATALINA HERNANDEZ, individually, hereinafter collectively known as "Plaintiffs" and sue defendants for their violations of plaintiffs' rights under the 8th Amendment, for negligence, wrongful death and battery and allege as follows:

GENERAL ALLEGATIONS

1) Jurisdiction of this Court is invoked under 28 U.S.C. Section 1331 and 1343.

2) Venue properly lies in the Central District of the United States District Court of California as all the events described herein occurred in the County of Los Angeles, City of Los Angeles. Therefore venue lies in the Central District of California. (28 U.S.C. § 1391(b)(2)).

3) This is a complaint for money damages by plaintiffs for redress of deprivation under color of law of rights, privileges and immunities secured by the Eighth Amendment to the United States Constitution and under the laws and Constitution of the State of California.

4) At all times herein mentioned, plaintiffs RUBY MURILLO, MOISES MURILLO, JR. and CATALINA HERNANDEZ were citizens of the United States, residing in the City and County of Los Angeles and the State of California, within the Central Judicial District of this Court. Plaintiff MOISES MURILLO also resided residing in the City and County of Los Angeles and the State of California, within the Central Judicial District of this Court.

5) Plaintiffs RUBY MURILLO and MOISES MURILLO, JR. are, and were, at all times relevant herein, the natural born children of decedent MOISES MURILLO.

6) Plaintiff CATALINA HERNANDEZ is, and was, at all times relevant herein, the natural mother of plaintiffs RUBY MURILLO and MOISES MURILLO, as well as the wife, and widow, of decedent MOISES MURILLO.

7) The true names and/or capacities of all defendants are currently unknown to plaintiffs, who sue said defendants by fictitious names as DOES 1 through 100. When the true names and/or capacities of said fictitiously named defendants are ascertained, plaintiffs will seek leave to amend their complaint accordingly.

8) Plaintiffs allege that each defendant, whether designated by his/her true name or fictitiously named, is responsible in some manner for the injuries, damage or harm herein alleged.

9) Plaintiffs, RUBY MURILLO, MOISES MURILLO, JR. AND CATALINA HERNANDEZ, are successors in interest and heirs of the estate of the decedent, MOISES MURILLO, SR. This action for violation of the decedent's civil rights is brought by said plaintiffs on behalf of the estate of MOISES MURILLO, SR. as permitted by Sections 377.30 et seq. of the California Code of Civil Procedure. Furthermore, Plaintiffs, collectively, are entitled to bring this wrongful death action pursuant to Code of Civil Procedure Section 377.60 for the loss of love, companionship, comfort, affection, society, solace, moral support and all other recoverable damages arising from the wrongful death of decedent.

10) Defendant UNITED STATES of AMERICA is, and at all times mentioned was, responsible for the care and treatment provided to decedent plaintiff MOISES MURILLO by the federal agencies and employees under its control who maintained custody of decedent and were responsible for his physical care and treatment during that time as held in *DeShaney vs. Winnebago* (1989) 489 U.S. 189, 199-200; *see also*, *Estelle vs. Gamble* (1976) 429 US 97, 101-104.

11) Defendant MICHAEL BENOV is, and was at all times relevant here, the warden of the Metropolitan Detention Center in Los Angeles and also responsible for ensuring that decedent MOISES MURILLO received proper medical care and treatment from federal agents, employees, and others tasked with providing such care while decedent was detained by the government against his wishes.

12) Defendant WHITE MEMORIAL HOSPITAL is, and at all times mentioned herein was, a non-profit private hospital doing business in the City and County of Los Angeles and was responsible for providing care to decedent MOISES MURILLO.

13) Plaintiffs are informed and believe, and thereon allege, that each named and unnamed defendant is responsible for the harm to plaintiffs as alleged herein.

14) Plaintiffs filed a complete claim as required under the Federal Tort Claims Act (FTCA) on March 23, 2006.

15) Seven months after filing the completed claim, plaintiffs filed their original complaint with the District Court on October 20, 2006 based on the rejection of their FTCA claim by operation of law and have complied fully with the requirements of 28 U.S.C. §2675(a).

FACTS COMMON TO ALL ALLEGATIONS

16) On June 11, 2004, decedent MOISES MURILLO was arrested, detained and booked by the Los Angeles Police Department for a charge of Driving Under the Influence of Alcohol, namely Vehicle Code Section 23152(a), and then held in the Los Angeles County Jail.

17) On June 17, 2004, plaintiffs believe and allege that decedent MOISES MURILLO was transferred from the Los Angeles County Jail to a federal detention center under the control of defendant UNITED STATES of AMERICA and one of its duly constituted agencies handling immigration and deportation matters.

18) On July 14, 2004, decedent was interviewed by Kelly Nowak, Special Agent of the Bureau of Immigration and Customs Enforcement under file number A 20 016 694.

19) On or about July 15, 2004, decedent was transferred to the Metropolitan Detention Center in Los Angeles, California controlled by defendant UNITED STATES of AMERICA and defendant Warden MICHAEL BENOV, and as yet unknown and unidentified federal agents and employees with responsibility for the provision of medical care and treatment to individuals, such as decedent MOISES MURILLO, under their custody and control.

20) During the entire period of decedent's incarceration, he was in need of proper medical care and treatment, including, but not limited to, the proper administration of necessary medicines to counter the effects of his long term chronic hypertension (high blood pressure). While decedent was incarcerated in the custody of the U.S. Marshals and in the federal detention facilities hereinbefore

named, he was denied such appropriate medical care and medical attention and/or was provided inadequate medical care for his pre-existing medical condition, namely "chronic hypertension" (high blood pressure).

21) All defendants were aware of decedent's serious medical condition and related need for medical care and proper administration of medicines for his serious condition while decedent was in custody of federal authorities and were further aware of the serious potential consequences of failing to provide adequate medical care to decedent.

22) Furthermore, despite decedent's subsequent complaints of right-sided weakness, pain and discomfort, defendants, and all of them, failed to respond and provide proper medical assistance in a timely fashion.

23) As a direct result of defendants failure to provide adequate medication and medical care as needed and defendants' related failure to provide medical assistance in a timely fashion, MOISES MURILLO, suffered an intracerebral hemorrhage.

24) As a result of the failure to provide proper medical care and attention when needed, decedent was rushed to WHITE MEMORIAL HOSPITAL on October 22, 2004 and admitted into the intensive care unit. A CT scan of decedent's brain showed that in fact decedent had suffered bleeding in the brain. Decedent Moises Murillo's condition worsened until Mr. Murillo lost consciousness, required intubation, and his breathing had to be supported by a ventilator.

25) At this point, MOISES MURRILLO was in critical condition and required substantial life support for his continued well-being and care.

FACTS COMMON TO WHITE MEMORIAL HOSPITAL

26) Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 25, and hereby incorporates them herein as though set forth at length in their entirety.

27) On October 25, 2004, just 3 days after being placed on a ventilator, WHITE MEMORIAL HOSPITAL and its employees, agents, directors, physicians, nurses and medical staff, decided to unilaterally remove all life support systems in place without notifying the wife or children of MOISES MURILLO's condition and of their unilateral decision to terminate his life. They further failed to obtain the necessary consent from plaintiffs, including decedent, either individually or collectively prior to WHITE MEMORIAL'S decision to remove MOISES MURILLO from life support system.

28) Defendant WHITE MEMORIAL HOSPITAL's unilateral action was taken without approval of plaintiffs, including decedent, and deprived plaintiffs and each of them of the opportunity to seek a second opinion regarding defendant WHITE MEMORIAL HOSPITAL's decision that plaintiff was actually brain dead. Plaintiffs CATALINA HERNANDEZ, RUBY MURILLO, and MOISES MURILLO, JR. were deprived of the opportunity to say goodbye to their husband and father as a result of defendant WHITE MEMORIAL's non-consensual decision to remove decedent MOISES MURILLO from necessary life support systems. Defendant WHITE MEMORIAL HOSPITAL's actions constituted a battery on decedent MOISES MURRILLO, SR.

FIRST CAUSE OF ACTION
VIOLATIONS OF CONSTITUTIONAL RIGHTS FOR DELIBERATE INDIFFERENCE IN PROVIDING MEDICAL CARE BY PLAINTIFF ESTATE OF MOISES MURILLO AGAINST DEFENDANTS MICHAEL BENOV AND DOES 1-50

29) Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 28, and hereby incorporates them herein as though set forth at length in their entirety.

30) Defendants BENOV, and DOES 1-50 inclusive, were all aware of decedent's specific medical conditions and related needs for medical care. Throughout decedent's time in custody, said defendants and each of them, repeatedly failed to take care of decedent's medical issues, including refusing to provide proper medical care for injuries, improperly dosing plaintiff with medication for his hypertension, such that his blood levels were determined to be toxic on admission to the

emergency room of WHITE MEMORIAL HOSPITAL with a brain bleed, all of which impacted decedent's condition and ultimately contributed to his death.

31) Defendants and each of them condoned and ratified the following reckless and indifferent conduct, including but not limited to:

(a) Failing to provide or providing in a sporadic fashion or on an occasional basis, properly prescribed medication for chronic hypertension with the intended goal of denying MOISES MURILLO of his Constitutional Rights under the 8th Amendment of the United States Constitution.

(b) Failing to respond and provide medical care and attention in a timely fashion which contributed to complications and exacerbations associated with the intracerebral hemorrhage suffered by decedent.

(c) Failing and refusing to properly and adequately assess MOISES MURILLO'S physical and mental condition despite knowing of his serious hypertension condition and the probable results of their indifference to his well-being.

(e) Failing and refusing to monitor and record MOISES MURILLO'S medical condition and report meaningful changes to other physicians.

(f) Refusing to properly train and supervise employees, both professional and non-professional with direct responsibilities for providing medical care to decedent MURILLO.

32) Defendants and each of them, acted under authority granted them in their official capacity as federal officials and employees in ignoring decedent's medical needs and requirements and were deliberately indifferent to those needs despite their knowledge of decedent's hypertension condition.

33) Defendants repeatedly ignored decedent's requests for proper medical care despite their knowledge of the seriousness of decedent's hypertensive condition. In addition, defendants and each of them

recklessly failed to ensure that decedent received his necessary medication in the proper doses and at the appropriate times to the general harm and permanent damage of decedent.

34) Defendants' conduct constituted a violation of decedent's civil rights under the Eighth Amendment as determined by the Supreme Court of the United States in *Carlson vs. Green* (1980) 446 U.S. 14.

35) As a direct result of defendants' conduct, decedent MOISES MURILLO's medical condition deteriorated to the point that he was put on life support and ultimately died.

36) Decedent seeks recovery of all damages allowed his estate under the applicable survival statute found in California law, namely C.C.P. §377.30.

SECOND CAUSE OF ACTION
NEGLIGENCE BY ALL PLAINTIFFS AGAINST
ALL DEFENDANTS AND DOES 51-100

37) Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 36 above, and hereby incorporates them as though set forth at length in their entirety.

38) Plaintiffs allege that defendants and each of them, owed a duty to provide proper medical care and treatment to decedent MOISES MURILLO pursuant to the decisions of the U.S. Supreme Court in *Estelle vs. Gamble* (1976) 429 US 97, and in *Carlson vs. Green* (1980) 446 U.S. 14.

39) Defendants violated that duty of care to plaintiffs by providing inadequate and insufficient medical care through their repeated and reckless indifference to the medical needs of decedent MOISES MURILLO.

40) As a proximate result of the aforementioned intentional, reckless and planned acts of defendants and each of them, MOISES MURILLO suffered a slow, painful death. Furthermore, as a proximate result of defendants' conduct as stated above, MOISES MURILLO was caused to suffer severe pain and suffering from personal injuries, including but not limited to severe emotional distress, aggravation of his medical condition, and other serious medical conditions caused or aggravated by

the failure to provide medical care and monitoring, as mentioned in the facts common to these defendants.

41) As a direct legal result of their negligence, MOISES MURILLO died and plaintiffs CATALINA HERNANDEZ, RUBY MURILLO, and MOISES MURILLO, JR. were deprived of the love, companionship, comfort, care, assistance, protection, affection, society, moral support of decedent MOISES MURILLO.

42) Decedent seeks recovery of all damages allowed his estate under the applicable survival statute found in California law, namely C.C.P. §377.30.

43) Plaintiffs CATALINA HERNANDEZ, RUBY MURILLO, and MOISES MURILLO, JR. seek all damages and remedies allowed them under California law, namely C.C.P. §377.60 for the wrongful death of decedent MOISES MURILLO stemming from the negligence of defendants and each of them.

THIRD CAUSE OF ACTION
BATTERY BY PLAINTIFF MOISES MURILLO AGAINST DEFENDANT WHITE MEMORIAL HOSPITAL

44) Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 43, and hereby incorporates them herein as though set forth at length in their entirety.

45) This cause of action is not subject to California Civil Code §3333.2 as it involves an intentional tort and does not involve "professional negligence" or a negligent act or omission to act by a health care provider in the rendering of professional services.

46) Defendant WHITE MEMORIAL HOSPITAL through its employees, agents and physicians, on Friday, October 22, 2004, at about approximately 7:15 a.m. received a patient named MOISES MURILLO, at their hospital suffering from right sided weakness in the lower extremity. At the time he arrived at said hospital Mr. Murillo was conscious and alert.

47) Decedent MOISES MURILLO was admitted into the intensive care unit of defendant's hospital after being diagnosed with intracerebral hemorrhage.

48) After MOISES MURILLO lost consciousness and was deemed non-responsive to light, and exhibited no pain response or eye movement, he was intubated for respiratory distress.

49) Physicians at defendant WHITE MEMORIAL HOSPITAL deemed MOISES MURILLO's medical condition serious and put him on life support machinery on Friday October 22, 2004.

50) Three days later, early on Monday October 25, 2004, defendant WHITE MEMORIAL HOSPITAL unilaterally decided to terminate MOISES MURILLO's life support without his consent and without the benefit of an existing Do Not Resuscitate Order, and without discussing the decision to terminate with decedent's wife or children, plaintiffs herein.

51) Defendant WHITE MEMORIAL HOSPITAL's conduct constitutes a non-consensual touching and is therefore a battery under California law.

52) Plaintiffs seek all appropriate remedies allowed for the damages related to said battery by defendant WHITE MEMORIAL HOSPITAL.

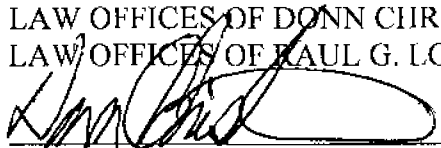
53) Plaintiffs are entitled to recover from said defendant all economic, non-economic, actual and compensatory damages, including, but not limited to his necessary medical and related expenses, past, present and future lost earnings, loss of future earning capacity, as well as mental, emotional and physical pain and suffering, in an amount presently unknown.

WHEREFORE, Plaintiffs, pray for judgment against all defendants, and each of them, as follows:

1. For general damages according to proof;
2. For special damages according to proof;
3. Reasonable attorneys fees and expenses of litigation, as allowed by law; and,
4. For costs incurred herein; and for such further relief as the Court may deem just and proper.

Dated: April 2, 2008

LAW OFFICES OF DONN CHRISTENSEN
LAW OFFICES OF RAUL G. LOMAS



Donn Christensen, Esq.
donn@donnlaw.com
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 70 South Lake Avenue, Suite 810, Pasadena, California, 91101.

On April 3, 2008, I served the foregoing document described as

PLAINTIFFS' SECOND AMENDED COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

on the interested parties in this action by the following means:

SEE ATTACHED SERVICE LIST

_____ VIA FEDERAL EXPRESS Said copies were placed in Federal Express envelopes which were then sealed and, with Federal Express charges to be paid by this firm, on this same date placed for collection and mailing at my place of business following ordinary business practices. Said envelopes will be deposited with the Federal Express Corp. on this date following ordinary business practices; and there is delivery service by Federal Express at the place so addressed.

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_____ BY FACSIMILE I sent the document by facsimile to the number for each counsel indicated on this proof of service.

Executed on April 3, 2008 at Pasadena, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Veronica Bustos

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RUBY MURRILLO et al. Plaintiff, v. UNITED STATES OF AMERICA Defendant	No. CV 06-6699 ABC (JCx) **ORDER RE RECEIPT AND FULL SATISFACTION AND STIPULATION TO DISMISS WITH PREJUDICE**

The court accepts the parties' RECEIPT AND FULL SATISFACTION AND STIPULATION TO DISMISS WITH PREJUDICE. This case is dismissed in its entirety with prejudice, with all parties to bear their own costs and fees.

IT IS SO ORDERED.

Dated: January 12, 2009

Audrey B. Collins

HON. AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

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Attorneys for Defendant United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RUBY MURRILLO et al. Plaintiff, v. UNITED STATES OF AMERICA Defendant	No. CV 06-6699 ABC (JCx) **STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677** **[PROPOSED] ORDER FILED CONCURRENTLY**

IT IS HEREBY STIPULATED by and between plaintiffs RUBY MURRILLO, MOISES MURILLO JR., and CATALINA HERNANDEZ (plaintiffs), and defendant United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of SEVENTY FIVE thousand dollars ($75,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiffs and their guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiffs and their guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, their agents, servants, and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit related to the subject matter of this suit, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiffs and their guardians, heirs, executors, administrators, or assigns further agree to reimburse, indemnify, and hold

harmless the United States of America, their servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiffs and their guardians, heirs, executors administrators, or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, and it is specifically denied that they are liable to Plaintiffs. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of future litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by Plaintiffs will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

8. Payment of the settlement amount by the United States

will be made by check drawn on the Treasury of the United States for SEVENTY FIVE thousand dollars ($75,000.00) and made payable to Plaintiffs RUBY MURRILLO, MOISES MURILLO JR., and CATALINA HERNANDEZ, the Law Office of Donn Christensen and the Law Office of Raul Lomas, Plaintiffs' attorneys. Upon receipt of the check by the U.S. Attorney's Office, the check will be delivered to Plaintiffs' attorney Donn Christensen. Plaintiffs' attorney agrees to distribute the settlement proceeds to the plaintiffs.

9. In exchange for payment of the sum stated above, and contemporaneously with the payments set forth above, Plaintiffs will dismiss this action, with prejudice, and with each party bearing its own fees, costs, and expenses. The Court will retain jurisdiction over this case for a period of 120 days from the date this stipulation is approved by the Court.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

12. Plaintiffs agree that Plaintiffs are obligated to pay any and all liens from any and all insurance companies and any and all other persons or organizations who have or claim to have subrogated assigned claims arising out of or related to the

subject matter of this suit.

13. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

Dated: _____, 2008

By: (See attached)
DONN CHRISTENSEN
Attorney for Plaintiffs

Dated: _____, 2008

By: (See attached)
RAUL LOMAS
Attorney for Plaintiffs

DATED: 10/15/08 2008

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

By: _____
KEITH M. STAUB
Assistant United States Attorney
Attorneys for Defendant
THE UNITED STATES OF AMERICA

subject matter of this suit.

13. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

Dated: 10-10, 2008

By: _____
DONN CHRISTENSEN
Attorney for Plaintiffs

Dated: 10-10, 2008

By: _____
RAUL LOMAS
Attorney for Plaintiffs

DATED: _____, 2008

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

By: _____
KEITH M. STAUB
Assistant United States Attorney
Attorneys for Defendant
THE UNITED STATES OF AMERICA

PROOF OF SERVICE BY MAILING

I am over the age of 18 and not a party to the within action. I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7516, Los Angeles, California 90012.

On October 15, 2008, I served **Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677; [Proposed] Order** on each person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of mailing: October 15, 2008. Place of mailing: Los Angeles, California.

Person(s) and/or Entity(s) to Whom mailed:

Raul G Lomas
Raul G Lomas Law Offices
80 South Lake Ave., Suite 823
Pasadena, CA 91101

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: October 15, 2008 at Los Angeles, California.

ZENAIDA A. ROSACIA

Donn W. Christensen (SBN 196845)
Law Office of Donn Christensen
70 South Lake Avenue, Suite 810
Pasadena, California 91101
Tel: (626) 793-6760

Raul G. Lomas (SBN 106686)
18 South Marengo Avenue
Pasadena, CA 91101
Tel: (626) 792-9666

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUBY MURILLO, individually and as administratrix of the ESTATE OF MOISES MURILLO, MOISES MURILLO, JR, individually, and CATALINA HERNANDEZ, individually; Plaintiffs, vs. THE UNITED STATES OF AMERICA, and DOES 1 -10, Defendants.	CASE NO. CV06-6699 ABC (JCx) PLAINTIFFS' SETTLEMENT CONFERENCE STATEMENT DATE: October 8, 2008 TIME: 9:30 A.M. PLACE: Courtroom 20 312 No. Spring Street Los Angeles, CA Magistrate Judge Jacqueline Chooljian

TO THE HONORABLE MAGISTRATE CHOOLJIAN:

PLAINTIFFS hereby submit their Settlement Conference Statement as follows:

DATED: September 24, 2008

Respectfully Submitted,

DONN W. CHRISTENSEN
Attorney for Plaintiffs

Plaintiffs	**Counsel of Record:**
ESTATE OF MOISES MURILLO, RUBY MURILLO, MOISES MURILLO, JR., and CATALINA HERNANDEZ	**Donn Christensen & Raul Lomas**
Defendants	**Keith Staub, United States Asst. Attorney**
United States of America	

STATEMENT OF FACTS:

On June 11, 2004, the decedent, 69-year-old MOISES MURRILLO,was arrested, detained and booked by the Los Angeles Police Department for a charge of Driving Under the Influence of Alcohol, namely Vehicle Code Section 23152(a), and then held in the Los Angeles County Jail.

Moises Murillo, Sr. was transferred from the Los Angeles County Jail to a federal detention center on June 17, 2004 while awaiting deportation proceedings. Decedent was subsequently transferred to the Terminal Island Detention Center under the control of defendant United States of America.

On July 14, 2004, Moises Murillo, Sr. was interviewed by Kelly Nowak, Special Agent of the Bureau of Immigration and Customs Enforcement under file number A 20 016 694.

On or about July 15, 2004, Mr. Murillo was transferred to the Metropolitan Detention Center, Los Angeles, California, and identified by register number 30210-112.

During the entire period of incarceration, Moises Murillo, Sr. was in need of proper medication to counter the effects of chronic hypertension (high blood pressure). While decedent was incarcerated in the custody of the U.S. Marshals and in the federal detention facilities hereinbefore named, he was denied medical care and

medical attention and/or was provided inadequate medical care for his pre-existing medical condition, namely "chronic hypertension" (high blood pressure) prescribed to prevent the 69-year-old Mr. Murillo from suffering a transient ischemic attack, or TIA, due to his hypertensive condition and history of atrial fibrillation.

The obligation of defendant United States to provide proper medical care by this defendant has been well established since the United States Supreme Court's decision in *Estelle v. Gamble* (1976) 425 U.S. 97, (holding that "deliberate indifference to serious needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'").

Specifically, during the entire time of Moises Murillo's detention by defendant United States of America, he received improper and inadequate medical care related to the provision and monitoring of his blood pressure medication, known as Warfarin, or generically as Coumadin.

Mr. Murillo was taking the generic version of the drug, *i.e.*, Coumadin. Coumadin levels are monitored by a blood test known as the INR (Internationalized Normalized Ratio). *See* Exhibit One, *Managing Your Warfarin (Coumadin) Therapy: A Patient's Guide*, (2002) New York University, attached hereto, at p. 5. This blood monitoring is important because Coumadin "belongs to a category of drugs known as 'narrow range of effectiveness' drugs" because "there is a very narrow range where the drug is considered therapeutic." *Id.*, at p. 5. For most people, including decedent here, the therapeutic range requires a Coumadin blood level falling between 2.0 and 3.0. *Id.*, at pp. 5-6; *see also*, Exhibit Two, Diagnostic Medlab report on proper INR for Warfarin, at p. 2 of 4 (target INR for patients with history of atrial fibrillation between 2-3).

The monitoring of decedent's Coumadin levels was important because an INR level too low (< 1.5) places a patient "at risk for blood clots." *See* Exh. One, at p. 6. Alternatively, a Coumadin level, or INR, greater than 4.5 "places [a patient] at risk for

bleeding." *Id.*, at p. 6; *see also*, Exh. 2, at pp. 2-3 of 4 (noting that the patient bleeding risk increases from "1 in 4,000" for a patient in the target INR between 2 and 2.9 to a risk of "1 in 100" for a patient with an INR of 7 or more. Regular testing is important to avoid those dramatic risk increases because patients "often will not feel any symptoms" of having a Coumadin level that is too high or too low. *See* Exh. 1, at p. 6.

On September 30, 2004, A. Sinavsky, M.D., the clinical director for Metropolitan Detention Center - Los Angeles, ordered an increase in Mr. Murillo's Coumadin dosage to 5mg daily. *See* Exh. 3, Chronological Record of Medical Care. No record exists showing that Dr. Sinavsky's decision to increase Mr. Murillo's Coumadin dosage was ever revisited or followed up with blood testing to determine whether Mr. Murillo's Coumadin levels fell within the narrow range of effectiveness.

Roughly three weeks later on October 22, 2004, Moises Murillo, Sr.was transported to White Memorial Hospital complaining of right-sided weakness. He arrived at White Memorial about 7:15 A.M. *See* Exh. 4, ER Admission Record dated October 22, 2004, at p. 1. White Memorial Hospital's examination determined that Mr. Murillo "required hospitalization on account of intracerebral hemorrhage." *See* Exh. 4, ER Admission Record dated October 22, 2004, at p. 1. Mr. Murillo was deemed "conscious, alert and . . oriented on arrival." *Id.*, at p. 1 - Emergency Room Course. The blood level testing revealed that Mr. Murillo "was taking Coumadin *and his INR was more than 7*." *Id.* (*Emphasis added*). Dr. Ramadas Abboy concluded that Mr. Murillo's intracerebral bleed was "due to hypertension, Coumadin toxicity, or a combination of both." *Id.*, at p. 2.

Mr. Murillo lapsed into a coma and passed away on Monday, October 25, 2004 when he was taken off life support by White Memorial Hospital.

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DAMAGES:

Plaintiffs sue the United States for damages caused by defendant's negligent provision of medical care to decedent resulting in the death of Moises Murillo, Sr., the husband and father to the other named plaintiffs.

Pursuant to 28 USC § 2674, defendant United States is liable "in the same manner and to the same extent as a private individual under like circumstances." Thus, the damages law applicable to negligence actions in California apply to the instant action.

The elements of the cause of action for wrongful death are the tort (negligence or other wrongful act), the resulting death, and the damages consisting of the *pecuniary loss* suffered by the *heirs*. *See, e.g.*, 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 891, p. 350.

The damages awarded to an heir in a wrongful death action "may include (1) the loss of the decedent's financial support, services, training and advice, and (2) the pecuniary value of the decedent's society and companionship--but he may *not* recover for such things as the grief or sorrow attendant upon the death of a loved one, or for his sad emotions, or for the sentimental value of the loss. *See*, Nelson, *supra*, at p. 793. "The damages recoverable in [wrongful death] are expressly limited to those *not* recoverable in a survival action under C.C.P. §377.34.

Pursuant to CACI No. 3291, two categories of damages are recoverable by wrongful death plaintiffs -- economic and noneconomic.

Economic damages include: "1. The financial support, if any, that [Moises Murillo, Sr.] would have contributed to the family during either the life expectancy that [Moises Murillo, Sr.] had before [his] death or the life expectancy of [Moises Murillo, Sr.], whichever is shorter; [P] 2. The loss of gifts or benefits that [Moises Murillo's heirs] would have expected to receive from [Moises Murillo, Sr.]; [P] 3.

Funeral and burial expenses; and [P] 4. The reasonable value of household services that [Moises Murillo, Sr.] would have provided." *See* CACI No. 3921.

Noneconomic damages include: "1. The loss of [Moises Murillo, Sr.]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support; [and] [P] [2. The loss of the enjoyment of sexual relations The instruction also provides that "[i]n determining [Moises Murillo, Sr.'s heirs]' loss, do not consider: [P] 1. [heirs]' grief, sorrow, or mental anguish; [P] 2. [Moises Murillo, Sr.]'s pain and suffering; or [P] 3. The poverty or wealth of [Moises Murillo, Sr.'s heirs]." (*Ibid.*)

General Damages for Negligent Death Claim

Catalina Hernandez - [Decedent's Wife] tort injuries	$100,000.00
Ruby Murillo- [Decedent's Daughter] tort injuries	$50,000.00
Moises Murillo, Jr. - [Decedent's Son] tort injuries	$50,000.00
Subtotal: General Damages	$200,000.00

Special and Consequential Damages

Loss of Financial Support:	$56,000.00	Present Value:	$48,751.37
Funeral Costs			$8,000.00
Subtotal: Special Damages			$56,751.37
TOTAL DAMAGES:			**$256,751.37**

Costs of Instant Lawsuit to date:

Other litigation costs:

Filing	$150.00
Clerical	$175.00
Postage	$16.30
Investigation costs	$2,112.20
Depositions	$00.00
Subpoenas	$00.00
Expert Consultation	$1,500.00
Mediation	$00.00
Total Costs (without fees)	$3,953.50

SETTLEMENT HISTORY

Plaintiffs' initial filing alleged claims against White Memorial Hospital also. That matter was settled between the parties for $10,000.00 dollars based primarily on the limited responsibility of White Memorial for decedent Moises Murillo's Coumadin toxicity and subsequent fatal brain bleed.

Packaged together the general and special damages result in a provable loss of $260,704.87, including fees and costs.

Plaintiffs demand settlement is commensurate with the figures shown above.

DATE: September 24, 2008

Respectfully Submitted,



DONN W. CHRISTENSEN
Attorney for Plaintiffs

Received (CV)

U.S. Attorney	Init.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RUBY MURRILLO, individually, and as Administratrix of the Estate of MOISES MURILLO;
PLAINTIFF(S)

v.

United States Dept. of Justice Fed. Bureau of Prisons; U.S. Citizenship & Immigration Services, (INS); Joseph Woodring, Warden of Terminal Island; Metropolitan Detention Center; Michael Benov,
DEFENDANT(S).

See Attached

CASE NUMBER

CV-06-6699 ABC (JCx)

SUMMONS

SVD U.S ATTY (CV) 9/24/07 3:10 PM

TO: THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to file with this court and serve upon plaintiff's attorney Raul G. Lomas & Donn Christensen, whose address is:

80 S. Lake Avenue, Suite 823, Pasadena, Ca 91101

Ans Due 11/23/07

an answer to the ☒ complaint ☐ _____ amended complaint ☐ counterclaim ☐ cross-claim which is herewith served upon you within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint.

Dated: 10/20/2006

Clerk, U.S. District Court

By: Terry R. Baker
Deputy Clerk

(Seal of the Court)

Donn Christensen, Esq. SBN 196845
LAW OFFICES OF DONN CHRISTENSEN
A Professional Corporation
70 S. Lake Avenue, Suite 810
Pasadena, Ca. 91101
(626) 793-6760

Raul G. Lomas, Esq. No. 106686
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(626) 792-9666

Attorneys for Plaintiffs,
Ruby Murillo, Moises Murillo, Jr., Catalina Hernandez,
Estate of Moises Murillo, Sr.

FILED
2006 OCT 20 P 1:33
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CAL.
LOS ANGELES
BY

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RUBY MURRILLO, individually, and as Administratrix of the Estate of MOISES MURILLO; MOISES MURILLO, JR.; CATALINA HERNANDEZ

Plaintiffs,

V.

UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS; U.S. CITIZENSHIP AND IMMIGRATION SERVICES, aka IMMIGRATION AND NATURALIZATION SERVICE (INS); JOSEPH WOODRING, WARDEN OF TERMINAL ISLAND PRISON; METROPOLITAN DETENTION CENTER; MICHAEL BENOV, WARDEN OF THE METROPOLITAN DETENTION CENTER; WHITE MEMORIAL HOSPITAL

Defendants.

CV-06-6699 ABC (JCx)

Case No.:

VIOLATION OF CONSTITUTIONAL RIGHTS PURSUANT TO 42 U.S.C. 1983, 1985 & 1988; NEGLIGENCE; BATTERY; INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS; SURVIVAL ACTION and WRONGFUL DEATH

DEMAND FOR JURY TRIAL

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COMPLAINT

COME NOW PLAINTIFFS, RUBY MURRILO, individually, and as Administratrix of the Estate of MOISES MURILLO; MOISES MURRILLO, JR., individually, CATALINA HERNANDEZ, individually, hereinafter collectively known as "Plaintiffs" and allege as follows:

I

VENUE AND JURISDICTION

1. This action is brought pursuant to 42 U.S.C. Section 1983, and the Fourth and Fourteenth Amendments of the United States Constitution. Jurisdiction is founded on 29 U.S.C. Sections 1131 and 1343(1),(2),(3) and (4), and the aforementioned statutory and Constitutional Provisions.

2. Venue is proper in the Central District of California. The injury and death occurred in the City of San Pedro and City of Los Angeles, respectively, within the geographic jurisdiction of the present court.

PARTIES

3. At all times relevant hereto, Plaintiffs, RUBY MURILLO, individually, MOISES MURRILLO, JR., individually, CATALINA HERNANDEZ, individually, AND ESTATE OF MOISES MURILLO, by and through their successors in interest, RUBY MURILLO, MOISES MURILLO, JR., and CATALINA HERNANDEZ, were residents of the County of Los Angeles, California.

4. Decedent, MOISES MURILLO, SR. was a resident of

the County of Los Angeles, California during any and all relevant times hereto.

5. Plaintiffs, RUBY MURILLO, individually, MOISES MURRILLO, JR., individually, were, and at all times herein mentioned in this complaint, are the natural children of decedent, MOISES MURILLO, SR., and at all times relevant hereto were residents of the County of Los Angeles, California.

6. Plaintiff, CATALINA HERNANDEZ, at all times relevant hereto, was the natural mother of RUBY MURILLO and MOISES MURILLO, JR.

7. Plaintiff, CATALINA HERNANDEZ, at all times relevant hereto, was the lawful wife of decedent MOISES MURILLO, SR.

8. Plaintiffs, RUBY MURILLO, MOISES MURILLO, JR. AND CATALINA HERNANDEZ, are successors in interest and heirs of the estate of the decedent, MOISES MURILLO, SR. This action for violation of the decedent's civil rights is brought by said plaintiff on behalf of the estate of MOISES MURILLO, SR. as permitted by Sections 377.30 et seq. of the California Code of Civil Procedure. Furthermore, Plaintiffs, collectively, are entitled to bring this wrongful death action pursuant to Code of Civil Procedure Section 377.60 for the loss of love, companionship, comfort, affection, society, solace, moral support and all other recoverable damages arising from the wrongful death of decedent. As to the civil rights

causes of action, plaintiffs' are suing for violations of their individual civil rights as well as for the violations of the decedents's rights prior to his death.

9. Defendant, UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, is and at all times herein mentioned was duly organized as an agency of the Department of Justice, in charge of federal detention centers, existing under federal law.

10. Defendant, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES aka IMMIGRATION AND NATURALIZATION SERVICE, is and at all times herein mentioned was, a duly organized federal entity under the auspices of the Department of Homeland Security.

11. Defendant, JOSEPH WOODRING, is the warden of TERMINAL ISLAND PRISON, duly operated and controlled by the Department of Justice.

12. Defendant, the METROPOLITAN DETENTION CENTER, is and at all times herein mentioned was, a duly organized entity as an agency of the Department of Justice, in charge of federal detention centers, existing under federal law.

13. Defendant, WHITE MEMORIAL MEDICAL CENTER, is and at all times herein mentioned was, a non-profit private hospital, doing business in the City of Los Angeles, County of Los Angeles, California.

FACTS COMMON TO ALL COUNTS/CAUSES OF ACTION

(As to all Defendants except White Memorial Hospital)

14. On June 11, 2004, the decedent, MOISES MURRILLO, (hereinafter referred to as "decedent") was arrested, detained and booked by the Los Angeles Police Department for a charge of Driving Under the Influence of Alcohol, namely Vehicle Code Section 23152(a), and then held in the Los Angeles County Jail.

15. Decedent was, on June 17, 2004 transferred from the Los Angeles County Jail to a federal detention center while awaiting deportation proceedings. Plaintiffs, on information and belief, believe that decedent was transferred to Terminal Island Detention Center.

16. On July 14, 2004, decedent was interviewed by Kelly Nowak, Special Agent of the Bureau of Immigration and Customs Enforcement under file number A 20 016 694.

17. On or about July 15, 2004, decedent was transferred to the Metropolitan Detention Center, Los Angeles, California, and identified by register number 30210-112.

18. During the entire period of incarceration, decedent was in need of proper medication to counter the effects of chronic hypertension (high blood pressure). While decedent was incarcerated in the custody of the U.S. Marshals and in the federal detention facilities hereinbefore named, he was denied medical care and medical attention and/or was provided inadequate medical

care for his pre-existing medical condition, namely "chronic hypertension" (high blood pressure).

19. All defendants were aware of decedent's medical condition while in custody of federal authorities and were further aware of the seriousness of decedent's medical condition and of the associated need of decedent to be provided all necessary medication prescribed by decedent's treating physicians to prevent decedent's hypertension and of the possible consequences of failing to provide adequate medical care.

20. Furthermore, when decedent began to complain of right sided weakness, pain and discomfort, defendants, and all of them, failed to respond and provide medical assistance in a timely fashion.

21. As a direct result of defendants' failure to provide adequate medication as needed and their failure to provide medical assistance in a timely fashion, MOISES MURILLO, suffered an intracerebral hemorrhage.

22. As a result of the failure to provide proper medical care and attention, decedent, was taken to WHITE MEMORIAL HOSPITAL on October 22, 2004 and admitted into the intensive care unit. A CT Scan of the brain showed that in fact decedent had suffered continued bleeding in the brain. MOISES MURRILLO's condition worsened, ultimately Mr. Murillo lost consciousness, and required intubation and his breathing was supported by a ventilator.

23. At this juncture, MOISES MURRILLO was in critical condition and required substantial life support for his continued well-being and care.

FACTS COMMON TO WHITE MEMORIAL HOSPITAL ONLY

24. Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 22 and 23, and hereby incorporates them herein as though set forth at length in their entirety.

25. On October 25, 2004, namely 3 days after being placed on a ventilator, WHITE MEMORIAL HOSPITAL and its employees, agents, directors, physicians, nurses and medical staff, decided to unilaterally remove all life support systems in place without notifying the wife or children of MOISES MURILLO's condition and of their unilateral decision to terminate his life. They further failed to obtain the necessary consent from plaintiffs, including decedent, either individually or collectively prior to WHITE MEMORIAL'S decision to remove MOISES MURILLO from life support system.

26. Plaintiffs were not afforded an opportunity to obtain a second opinion from other physicians prior to the termination of MOISES MURRILLO'S life because plaintiffs, either individually or collectively were not notified of WHITE MEMORIAL'S decision to terminate MOISES MURILLO'S life. Plaintiffs were not afforded an opportunity to respectfully say their "good-byes" if in fact that was necessary. Defendant WHITE MEMORIAL's non-

consensual removal of necessary life support systems was done out of the defendant's desire to keep down the costs of care provided to decedent based on their perception of decedent's ability to pay and based on his immutable racial characteristics, and ultimately caused the death of MOISES MURILLO, SR. by means of these actions which constituted a battery and violation of decedent's civil rights.

FIRST CAUSE OF ACTION

VIOLATIONS OF CONSTITUTIONAL RIGHTS FOR DELIBERATE INDIFFERENCE IN PROVIDING MEDICAL CARE BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS EXCEPT WHITE MEMORIAL HOSPITAL

27. Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 26, and hereby incorporates them herein as though set forth at length in their entirety.

28. Plaintiffs' individual civil rights, as guaranteed by the 4th, 5th and 14th Amendment fo the United States Constitution and Congress, were infringed upon by the defendants named in the caption of this cause of action. This cause of action arises under Title 42, United States Code, Sections 1983, 1985, and 1988, wherein plaintiffs' collectively and individually as the wife and children of the deceased MOISES MURILLO, seek to redress a deprivation under color of law of a right, privilege or immunity secured to them by the 4th, 5th and

14th Amendments to the United States Constitution and under the law and Constitution of the State of California.

29. The jurisdiction of this court is invoked under 28 U.S.C. Section 1943(4).

30. At all times mentioned herein, the above named defendant, JOSEPH WOODRING, was the warden of TERMINAL ISLAND PRISON and was duly appointed, qualified and acting as jailor and was responsible for providing adequate medical care for any and all persons under his custodial control. At all times mentioned herein, each said defendant was acting within the course and scope of such employment under color of law.

31. The true names of defendants, DOES 1 through 10, inclusive, is now unknown to plaintiffs who therefore sues said defendants by such fictitious names, but upon ascertaining the true identity of each DOE defendant, plaintiffs' will substitute same, or seek leave to do so, in lieu of such fictitious name.

32. Plaintiffs' are informed and believe, and based thereon allege that each said named and unnamed defendants are in some way responsible for the injuries plaintiffs have complained herein.

33. At all times herein, TERMINAL ISLAND PRISON, was and is, a duly organized federal agency of the Department of Justice, in charge of federal detention centers, existing under federal law including TERMINAL

ISLAND PRISON.

34. All times mentioned herein, the above captioned defendant, MICHAEL BENOV, the warden of METROPOLITAN DETENTION CENTER was duly appointed, qualified and acting as jailor and was responsible for providing adequate medical care for any and all persons under his custodial control. At all times mentioned herein, each said defendant was acting within the course and scope of such employment under color of law.

35. At all times herein, METROPOLITAN DETENTION CENTER, was and is, a duly organized federal agency of the Department of Justice, in charge of federal detention centers, existing under federal law including the METROPOLITAN DETENTION CENTER.

36. The defendants referred to in paragraphs 30 through 35 had authority to act, and were in fact acting within the scope and course of the UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS and within the scope and course of the UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES.

37. At all times mentioned herein, defendants were each acting as the employee, agent and representative of every other defendant herein, and within the course and scope of such employment and agency.

38. The acts, omissions and events herein described and complained of resulted in the hospitalization of MOISES MURILLO on October 22, 2004 and his ultimate death

on October 25, 2004.

39. Prior to said date, time and place aforementioned, defendants, JOSEPH WOODRING, WARDEN OF METROPOLITAN DETENTION CENTER, TERMINAL ISLAND PRISON, MICHAEL BENOV, METROPOLITAN DETENTION CENTER, UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, UNITED STATES CITIZENSHIP AND NATURALIZATION SERVICE, DOES 1 through 10, inclusive, and each of them, deprived plaintiffs' of the due process of law, in violation of the 4th, 5th and 14th Amendments to the United States Constitution, in that, each defendant knowingly and willfully ratified, approved or condoned the following conduct:

(a) Failed to provide or provided in a sporadic fashion or on an occasional basis, properly prescribed medication for chronic hypertension with the intended goal of denying MOISES MURILLO of his Constitutional Rights under the 4th, 5th and 14th Amendments of the United States Constitution.

(b) Failed to respond and provide medical care and attention in a timely fashion which contributed to complications and exacerbations associated with the itracerebral hemorrhage suffered by decedent.

(c) Refused and failed to make reasonable efforts to contact MOISES MURILLO'S family.

(d) Failed to and refused to properly and adequately assess MOISES MURILLO'S physical and mental condition.

(e) Failed and refused to monitor and record MOISES MURILLO'S medical condition and report meaningful changes to other physicians.

(f) Refused to properly train and supervise employees, both professional and non-professional.

40. As a proximate result of the aforementioned intentional, reckless and planned acts of defendants and each of them, MOISES MURILLO suffered a slow, painful death. Furthermore, as a proximate result of defendants' conduct as stated above, MOISES MURILLO was caused to suffer severe pain and suffering from personal injuries, including but not limited to severe emotional distress, aggravation of his medical condition, and other serious medical conditions caused or aggravated by the failure to provide medical care and monitoring, as mentioned in the facts common to these defendants.

41. As a proximate result of defendants acts of deliberate indifference to MOISES MURILLO'S serious medical needs, including chronic hypertension, and in not providing MOISES MURILLO with medical care, MOISES MURILLO, sustained great physical and mental pain, and shock to his nervous system prior to his death. Plaintiffs' contend that said conduct violated MOISES

MURILLO'S Constitutional Rights. Plaintiff, RUBY MURILLO, as Administratrix of the Estate of MOISES MURILLO, claims general damages on behalf of MOISES MURILLO from defendants' in the sum of $ 10,000,000.00.

42. By reason of the aforementioned acts and omissions of defendant's and each of them, plaintiffs were caused to incur funeral and related burial expenses in an amount as provided at trial.

43. By reason of the aforementioned acts and omissions of defendant's and each of them, plaintiffs have suffered loss of love, affection, consortium and future support, in an amount uncertain at this time but subject to proof at trial.

44. The aforementioned acts of all of the named individual defendants, DOES 1 through 10, and each of them, (except White Memorial Hospital) was done by each individual defendant knowingly, intentionally, and maliciously for the purpose of inflicting injury upon MOISES MURILLO and in reckless disregard of MOISES MURILLO'S safety, security or medical requirements and civil rights, and by reason thereof, plaintiffs claim exemplary and punitive damages, from each individual defendant (except White Memorial Hospital) in the sum of $10,000,000.00.

45. By reason of the aforementioned acts of defendants and each of them, plaintiffs were required to and did retain an attorney to institute and prosecute the

within action, and to render legal assistance to plaintiffs, so that they may vindicate the losses and impairments of their constitutional rights; and by reason thereof, plaintiffs each individually in their own capacity request payment by defendant's of a reasonable sum as and for attorneys fees pursuant to Title 42 U.S.C. Section 1988.

SECOND CAUSE OF ACTION

NEGLIGENCE BY ALL PLAINTIFFS AGAINST ALL DEFENDANTS EXCEPT WHITE MEMORIAL HOSPITAL

46. Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 45, and hereby incorporates them herein as though set forth at length in their entirety.

47. At all times alleged, Defendants', and each of them, acted negligently and recklessly concerning the manner in which MOISES MURILLO was treated by the defendants, and each of them, while he was within the custody and control of the federal bureau of prisons, more specifically while in the custody or control of the TERMINAL ISLAND PRISON and the METROPOLITAN DETENTION CENTER. In particular, and without limiting the generality of the foregoing, defendants, and each of them, failed to:

(a) properly and adequately assess MOISES MURILLO'S physical and mental status;

(b) respond and provide medical care and attention

in a timely fashion which contributed to complications and exacerbations associated with the intracerebral hemorrhage suffered by decedent.

(c) make reasonable efforts to contact MOISES MURILLO'S family.

(d) properly and adequately assess MOISES MURILLO'S physical and mental condition.

(e) properly train and supervise employees, both professional and non-professional.

(f) ensure that adequate numbers of employees with appropriate education and training were available to meet the medical needs of, and protect the rights of MOISES MURILLO.

48. As a direct and proximate result of defendants' conduct as alleged hereinbefore, and other uncovered negligent conduct, while MOISES MURILLO, was in the custody, care and control of the defendants, the Federal Bureau of Prisons, and each of them, he was caused to suffer severe pain and suffering from the failure to provide adequate medical care or to provide adequate medical care on a timely basis.

THIRD CAUSE OF ACTION

FOR BATTERY AGAINST WHITE MEMORIAL MEDICAL CENTER

49. Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 48, and hereby incorporates them

herein as though set forth at length in their entirety.

50. This cause of action is not subject to California Civil Code Section 3333.2 as it involves an intentional tort and does not involve "professional negligence" or a negligent act or omission to act by a health care provider in the rendering of professional services.

51. Defendants, WHITE MEMORIAL MEDICAL CENTER, and DOES 1 through 10, inclusive, and each of them, through their employees, agents and physicians, on Friday, October 22, 2004, at about approximately 7:15 a.m. received a patient named MOISES MURILLO, at their hospital suffering from right sided weakness in the lower extremity. At the time he arrived at said hospital Mr. Murillo was conscious and alert.

52. Decedent, MOISES MURILLO, was admitted into the intensive care unit of said hospital after being diagnosed with intracerebral hemorrhage.

53. After he lost consciousness and was not responsive to light, pain or eye movement, he was intubated for respiratory distress.

54. Physicians at said hospital deemed Mr. Murillo's medical condition as serious and put him on life support machinery.

55. Three days later, early on Monday, October 25, 2004, the physicians at WHITE MEMORIAL MEDICAL CENTER decided unilaterally to terminate life support for Mr.

Murillo without his consent, without the benefit of an existing Do Not Resuscitate Order, and without discussing the matter with decedent's wife, or children.

56. Plaintiffs' either individually or collectively, were not notified either by telephone or letter of their husband/fathers medical condition despite the fact that they resided in Los Angeles County at the time and the Metropolitan Detention Service knew of their address and telephone number.

57. No efforts were made to locate any of the plaintiffs prior to removing Mr. Murillo from life support machinery and Mr. Murillo died without the family knowing either where he was or what his present medical condition was, and were denied the opportunity to have defendant White Memorial's diagnosis and decision reviewed or confirmed.

58. Defendants and each of them, terminated Mr. Murillo's life without the consent of Mr. Murillo or his immediate family members who are the plaintiffs in this case. This conduct was done in order to save WHITE MEMORIAL MEDICAL CENTER money it would have to spend in maintaining a Hispanic prisoner without insurance benefits on life support until his family was notified and could reach a decision about the medical care of their husband, and father.

59. In fact their conduct was so abhorrent, that WHITE MEMORIAL HOSPITAL refused to report decedents death

for two days in violation of Government Code Section 27491.

60. The aforementioned acts of all of the named individual defendants, DOES 1 through 10, and each of them, was done by each individual defendant knowingly, intentionally, and maliciously. Plaintiffs claim exemplary and punitive damages, from WHITE MEMORIAL HOSPITAL in the sum of $10,000,000.00.

FOURTH CAUSE OF ACTION

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

61. Plaintiffs collectively allege and incorporate by reference all factual contents of paragraphs 1 through 60, and hereby incorporates them herein as though set forth at length in their entirety.

62. The acts of defendants, WHITE MEMORIAL MEDICAL CENTER, and DOES 1 through 10, inclusive, and each of them, in failing to contact family members of decedent MOISES MURILLO, prior to unilaterally removing life support system from decedent, constitute a negligent infliction of emotional distress on plaintiffs by defendants and each of them.

63. WHITE MEMORIAL MEDICAL CENTER'S outrageous acts and omissions detailed above amounted to intentional torts and do not constitute "professional negligence" under Civil Code 3333.2.

64. As a further act of "covering up" their conduct, defendant, WHITE MEMORIAL MEDICAL CENTER, failed

to notify the coroner's office of decedent's death for two days in violation of Section 27491.

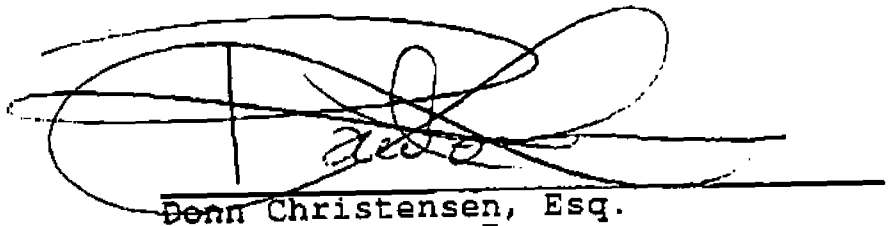
65. Plaintiffs are entitled to recover from these defendants, and each of them, economic, non-economic, actual and compensatory damages, including, but not limited to his necessary medical and related expenses, past, present and future lost earnings, loss of future earning capacity, as well as mental, emotional and physical pain and suffering, in an amount presently unknown.

WHEREFORE, Plaintiffs, pray for judgement against all defendants, and each of them, as follows:

1. For general damages according to proof;
2. For special damages according to proof;
3. Exemplary damages, but only against each of the individual defendants, in the amount of $10,000,000.00 as to each, or an amount sufficient to deter and to make an example of those defendants;
4. Reasonable attorneys fees and expenses of litigation, including those fees permitted by 42 U.S.C. Section 1988;
5. For costs incurred herein; and for such further relief as the Court may deem just and proper.

Dated: October 19, 2006

LAW OFFICES OF DONN CHRISTENSEN
LAW OFFICES OF RAUL G. LOMAS



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Attorneys for Defendant United States

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RUBY MURRILLO et al. Plaintiff, v. UNITED STATES OF AMERICA Defendant	No. CV 06-6699 ABC (JCx) **ORDER RE RECEIPT AND FULL SATISFACTION AND STIPULATION TO DISMISS WITH PREJUDICE**

The court accepts the parties' RECEIPT AND FULL SATISFACTION AND STIPULATION TO DISMISS WITH PREJUDICE. This case is dismissed in its entirety with prejudice, with all parties to bear their own costs and fees.

IT IS SO ORDERED.

Dated: January 12, 2009

Audrey B. Collins

HON. AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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of the Freedom of Information and Privacy Act

Welcome JENNIFER MARIE VICKERS | **Logout**

[redacted] ALERTS **MY WORK** [redacted]

CASE DETAILS

Back to Case Results **Case Actions:**

Case ID: CIV-WXR-2008-00626 **Short Description:** TARPLEY(NISHIMURA) V. UNITED STATES

CASE DETAILS | **CASE DOCS** | **CASE PERSONS** | **CASE DATES** | **CASE SUMMARY** | **CASE BLOG**

Case Login Information

Reference Number	1:06-cv-00665 DAE-BMK
Short Description	TARPLEY(NISHIMURA) V. UNITED STATES
Classification	Civil
Case Type	FTCA-Wrongful Death
Case Sub-Type	Medical
Current Region	WESTERN REGIONAL OFFICE
Current Institution	Honolulu (FDC)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	Honolulu (FDC)
Monetary Relief Sought	$4,000,000.00
Estimated Amount	$
Office	Honolulu
Jurisdiction	Hawaii
Responsible Legal Office	WXRO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	02/01/2008
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$
Total Amount Paid	$20,000.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	12/20/2006
Date Filed	12/15/2006

Case Progress

Current Owner	JENNIFER VICKERS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	
Further Case Classification	
Comments	REOPENED FOR PLN FOIA REQUEST

Reopen Case

EDWARD H. KUBO JR. (2499)
United States Attorney
District of Hawaii

DERRICK K. WATSON (Cal. Bar No. 154427)
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Attorneys for Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

ALVIN NISHIMURA, as Personal Representative of the Estate of Prince Tarpley, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CIVIL NO. 06-00665 DAE BMK STIPULATION AND ORDER RE: DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), and consistent with Paragraph 8 of the parties' November 2007 Stipulation for Compromise Settlement and Release of

Federal Tort Claims Act Claims Pursuant to 28 U.S.C. §2677, IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that this matter and all claims asserted herein, be dismissed with prejudice as to Defendant United States of America, all parties to bear their own fees and costs.

DATED: January 31, 2008, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

/s/ Derrick K. Watson

By: _____
DERRICK K. WATSON
Assistant U.S. Attorney

Attorneys for Defendant
UNITED STATES OF AMERICA

DATED: January 31, 2008, at Honolulu, Hawaii.

/s/ John Rapp

By: _____
JOHN RAPP
Attorney for Plaintiffs

DATED: Honolulu, Hawaii, February 1, 2008.

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

_____
David Alan Ezra
United States District Judge

Alvin Nishimura vs. United States of America, Civil No. 06-00665 DAE-BMK; STIPULATION AND ORDER RE: DISMISSAL WITH PREJUDICE

ORIGINAL

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Attorneys for Plaintiff
PRINCE TARPLEY

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
DEC 15 2006
at 9 o'clock and 4 min. M
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

PRINCE TARPLEY,	)	CIVIL NO. CV06 00665 BMK
	)	(Complaint; Summons)
Plaintiff,	)	
	)	COMPLAINT; SUMMONS
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

COMPLAINT

PRINCE TAPRLEY, for a claim for relief against Defendant UNITED STATES OF AMERICA, alleges:

1. Plaintiff is a citizen and resident of the State of Hawaii who is presently in the custody of Defendant United States of America.

2. Defendant and its Bureau of Prisons, in 2005 and continuing through the present, incarcerated Plaintiff, including at the Federal Detention Center in Honolulu in 2005 and early 2006.

3. This Court has jurisdiction over this matter pursuant to 28 USC § 1346(b)(1), in that this is an action against the United States for personal injury caused by the negligent act of an employee of the government while acting within the scope of his employment.

4. Plaintiff duly complied with the provisions of the Federal Court Claims Act by submitting a claim.

5. On or about October 30, 2006, Plaintiff's claim was denied.

6. The claim for relief alleged herein arose in the District of Hawaii.

7. Defendant owed a duty to Plaintiff to provide reasonable medical care.

8. Prior to receiving a colonoscopy in early May, 2006, Prince Tarpley had been complaining to employees of Defendant about rectal bleeding and had been seeking medical attention.

9. Prince Tarpley had an initial episode of bleeding when he was playing ball, and, shortly thereafter, sought medical attention from Defendant's employees.

10. Thereafter, he made recurring requests for medical attention.

11. The medical staff at the facility failed to take Prince Tarpley's concerns seriously.

12. The staff claimed that he simply had hemorrhoids.

13. Tarpley indicated that something was definitely wrong and different.

14. Tarpley informed the staff that it felt like he had a big rock inside him.

15. The staff suggested that Tarpley was simply trying to get pain medication.

16. Defendant's employees, including the U.S. Marshals, negligently caused delays in the provision of appropriate diagnostic care to Plaintiff.

17. In May, 2006, a colonoscopy finally was done and Tarpley was informed that he had an advanced cancer.

18. The doctor asked Tarpley why he had waited so long to come in.

19. As a legal cause of Defendant's negligence, Tarpley has had pain and other difficulties.

20. Before late 2005, Tarpley had been in reasonably good health.

21. Defendant and its employees were negligent in that they failed to diagnose, to address, and to treat Plaintiff's colon cancer in a timely fashion.

22. As a result of Defendant's negligence, Plaintiff has suffered pain, his chances of survival are lessened, his cancer has spread, Plaintiff did not receive the benefit of appropriate treatment modalities in a timely fashion, and Plaintiff has suffered general and special damages, including lost future income and loss of enjoyment of life, in such amounts as shall be shown.

WHEREFORE, Plaintiff prays for judgment against Defendant in such amounts as shall be shown at trial, together with interest, costs, attorney's fees, and such other relief as the Court deems just and proper in the circumstances.

DATED: Honolulu, Hawaii, Dec. 13, 2006.

JOHN RAPP
MYLES S. BREINER
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

PRINCE TARPLEY,	)	CIVIL NO.
	)	(Complaint; Summons)
Plaintiff,	)	
	)	SUMMONS
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

SUMMONS TO ANSWER COMPLAINT

TO DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to serve on Plaintiffs' attorneys, John Rapp, 810 Richards Street, Suite 810, Honolulu, Hawaii 96813, and Myles S. Breiner, 345 Queen Street, Suite 200, Honolulu, Hawaii 96813, an answer to the Complaint which is served on you with this summons, within ~~twenty~~ (~~20~~) Sixty 60 B*T days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint. Any Answer that you serve on the parties to this action must be filed with the Clerk for this Court within a reasonable period of time after service.

DATED: Honolulu, Hawaii, DEC 15 2006, 2006.

SUE BEITIA

CLERK OF THE ABOVE-ENTITLED COURT

Deputy Clerk, United States District Court, District of Hawaii

CV06 00665 DAE BMK

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

PRINCE TARPLEY

(b) County of Residence of First Listed Plaintiff Honolulu
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
JOHN RAPP Tel: (808) 428-5363
810 Richards St, Ste 810, Hon, HI 96813

DEFENDANTS

UNITED STATES OF AMERICA

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)
Office of the U.S. Attorney, U.S. District Court
300 Ala Moana Blvd, Honolulu, HI 96813

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- XX 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	XX 1	XX 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	XX 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health		☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other		☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability	CIVIL RIGHTS	PRISONER PETITIONS	☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	☐ 442 Employment	Habeas Corpus:	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 443 Housing/ Accommodations	☐ 530 General	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 444 Welfare	☐ 535 Death Penalty	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other		☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights		☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 440 Other Civil Rights	☐ 555 Prison Condition			☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property					☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

XX 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC Sec. 2671-2680

Brief description of cause:
failed to diagnose and treat cancer promptly

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ to be shown

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes XX No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 12/13/06

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

EDWARD H. KUBO JR. (2499)
United States Attorney
District of Hawaii

DERRICK K. WATSON (Cal. Bar No. 154427)
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Telephone: (808) 541-2850
Facsimile: (808) 541-3752
E-mail: derrick.watson@usdoj.gov

Attorneys for Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

ALVIN NISHIMURA, as Personal Representative of the Estate of Prince Tarpley, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CIVIL NO. 06-00665 DAE BMK STIPULATION AND ORDER RE: DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), and consistent with Paragraph 8 of the parties' November 2007 Stipulation for Compromise Settlement and Release of

Federal Tort Claims Act Claims Pursuant to 28 U.S.C. §2677, IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that this matter and all claims asserted herein, be dismissed with prejudice as to Defendant United States of America, all parties to bear their own fees and costs.

DATED: January 31, 2008, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

/s/ Derrick K. Watson

By: _____
DERRICK K. WATSON
Assistant U.S. Attorney

Attorneys for Defendant
UNITED STATES OF AMERICA

DATED: January 31, 2008, at Honolulu, Hawaii.

/s/ John Rapp

By: _____
JOHN RAPP
Attorney for Plaintiffs

DATED: Honolulu, Hawaii, February 1, 2008.

David Alan Ezra
United States District Judge

Alvin Nishimura vs. United States of America, Civil No. 06-00665 DAE-BMK; STIPULATION AND ORDER RE: DISMISSAL WITH PREJUDICE

ORIGINAL

DAVID J. GIERLACH 5041
500 Ala Moana Boulevard
Suite 330, 5 Waterfront Plaza
Honolulu, Hawaii 96813
Telephone: (808) 523-1332
Fax: (808) 526-2275
Email: gierlach33@aol.com

Attorney for Plaintiff

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

DEC 27 2006

at 9 o'clock and 40 min. A M
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARIA ZEPEDA, Plaintiff, vs. THE UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS; MICHAEL LACSON AND DOE DEFENDANTS 1 THROUGH 10, Defendants.	CIVIL NO. CV06 00676 HG KSC COMPLAINT

COMPLAINT

Plaintiff Maria Zepeda for her Complaint against Defendants United States of America, United States Department of Justice, Federal Bureau of Prisons,

Michael Lacson and Doe Defendants 1 through 10, alleges and avers as follows.

1. Plaintiff Maria Zepeda was at all times relevant, a resident of the State of Hawaii.

2. Defendant United States of America is a sovereign that has waived its immunity for certain claims, including the claims set forth herein and is liable for the acts of its employees and servants.

3. Defendant United States Department of Justice, Federal Bureau of Prisons is an agency of the United States Government which has waived any immunity from suit regarding cases such as the one herein.

4. Defendant Michael Lacson was at all times relevant, a resident of Hawaii and was employed by the United States Government and the United States Department of Justice, Federal Bureau of Prisons.

5. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as Doe Defendants and therefore sue said Defendants by such fictitious names. Plaintiff will amend her Complaint to allege their true names and thereon allege that each of the fictitiously named Defendants are responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages, as herein alleged, were proximately caused by their conduct. Plaintiff has made good faith and diligent efforts to identify said Defendants, including interviewing

individuals with knowledge of the claims herein. Plaintiff is informed and believes and therefore alleges that at all times herein mentioned, Defendants, and each of them, were the agents, servants and employees of each of the other Defendants herein, and were acting with the permission and consent and within the course and scope of said agency and employment.

6. Commencing in mid-2003 and concluding on July 2, 2004, Defendant Michael Lacson ("Lacson"), acting within the course and scope of his employment for the United States of America and the United States Department of Justice, Federal Bureau of Prisons, sexually assaulted the Plaintiff on numerous occasions.

7. At all times relevant, Plaintiff was an inmate at the Federal Detention Center in Honolulu, Hawaii and Lacson was a prison guard or other type of prison employee.

8. Plaintiff could not consent to the aforesaid sexual assaults.

9. At all times relevant, Defendants United States of America and the Federal Bureau of Prisons knew or should have known of the aforesaid sexual assaults yet failed to take any remedial steps to stop said assaults or to protect the Plaintiff.

10. A demand pursuant to the *Federal Tort Claims Act* was issued to

the United States Department of Justice and to the United States Federal Bureau of Prisons. Both demands were received by the aforesaid federal agencies on June 26, 2006.

11. The requisite time for the federal agencies to respond to the demand pursuant to the *Federal Tort Claims Act* has expired and Plaintiff is entitled to bring her claim in court. Jurisdiction and venue are proper in this forum.

COUNT I

12. Plaintiff realleges and incorporates by reference ¶¶ 1 through 11 as if said paragraphs were fully set forth herein.

13. Plaintiff's civil rights were violated by the conduct of the Defendant Lacson who acted within the course and scope of his authority as an employee of Defendant United States of America and the Federal Bureau of Prisons and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

COUNT II

14. Plaintiff realleges and incorporates by reference ¶¶ 1 through 13 as if said paragraphs were fully set forth herein.

15. Defendants the United States and the Federal Bureau of Prisons negligently supervised Defendant Lacson and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

COUNT III

16. Plaintiff realleges and incorporates by reference ¶¶ 1 through 15 as if said paragraphs were fully set forth herein.

17. Defendant United States and the Federal Bureau of Prisons negligently hired and/or retained Defendant Lacson and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

COUNT IV

18. Plaintiff realleges and incorporates by reference ¶¶ 1 through 17 as if said paragraphs were fully set forth herein.

19. Defendant Lacson intentionally made offensive physical contact on Plaintiff's person without her consent and as a direct and proximate result of said battery, Plaintiff has substantial general and special damages in an amount to be proved at trial.

COUNT V

20. Plaintiff realleges and incorporates by reference ¶¶ 1 through 19as if said paragraphs were fully set forth herein.

21. Defendant Lacson threatened Plaintiff to engage in an imminent battery without Plaintiff's consent and as a direct and proximate result of said assault, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

COUNT VI

22. Plaintiff realleges and incorporates by reference ¶¶ 1 through 21 as if said paragraphs were fully set forth herein.

23. Defendant Lacson intentionally caused Plaintiff to sustain serious emotional distress and as a direct and proximate result thereof, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

COUNT VII

24. Plaintiff realleges and incorporates by reference ¶¶ 1 through 23 as if said paragraphs were fully set forth herein.

25. Defendant Lacson and Defendants United States and Federal Bureau of Prisons negligently caused Plaintiff to sustain serious emotional distress

and as a direct and proximate result, Plaintiff has sustained substantial general and special damages in an amount to be proved at trial.

WHEREFORE, Plaintiff prays as follows:

A. That judgment enter in her favor on each count of the Complaint;

B. That she be awarded those general and special damages as are proved at trial;

C. That she be awarded her reasonable attorney's fees and costs incurred in this action;

D. That she be awarded such other and further relief as the Court deems just and equitable under the circumstances.

DATED: Honolulu, Hawaii, December 27, 2006.

DAVID J. GIERLACH
Attorney for Plaintiff

THE HONOLULU
BRANCH OFFICE
2008 MAY 22 PM 1:08

U.S. Department of Justice

United States Attorney
District of Hawaii

PJKK Federal Building
300 Ala Moana Blvd., Room 6-100
Honolulu, Hawaii 96850

(808) 541-2850
FAX (808) 541-2958

May 20, 2008

Phyllis Pyles, Director
Torts Branch, Civil Division
U.S. Department of Justice
P. O. Box 888
Ben Franklin Station
Washington, D.C. 20044

Re: Maria Zepeda v. USA, et al.
Civil No. 06-00676 HG KSC

Dear Ms. Pyles:

Please find attached copies of the following closing documents:

1. Order of Dismissal;
2. Judgment in A Civil Case;
3. Stipulation for Compromise Settlement and Release;
4. Letter dated 05/20/08 to David J. Gierlach acknowledging receipt of settlement check.

Since nothing further remains to be done, we are closing our file on this matter as of this date. If you have any questions, please call Thomas A. Helper at (808) 541-2850.

Very truly yours,

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By: _____
THOMAS A. HELPER
Assistant U.S. Attorney

TAH:cts
Enclosures

cc: Office of General Counsel (w/enclosures)
Federal Bureau of Prisons
320 First Street, N.W.
Room 754 HOLC
Washington, D.C. 20534

√Bureau of Prisons (w/enclosures)
FDC Honolulu
P. O. Box 30547
Honolulu, HI 96820-0547

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARIA ZEPEDA, Plaintiff, vs. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS; MICHAEL LACSON; DOE DEFENDANTS 1 THROUGH 10, Defendants.	CIVIL NO. 06-00676 HG-KSC ORDER OF DISMISSAL
UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Cross Claimants, vs. MICHAEL LACSON, Cross Defendant.	

ORDER OF DISMISSAL

The Court having been advised by counsel for the parties that the above-entitled proceeding has been

settled, the Court finding that the essential terms of a valid and binding settlement agreement have been stated, and

GOOD CAUSE APPEARING FOR DISMISSAL,

IT IS ORDERED that this action is hereby dismissed with prejudice, each party to bear its own costs and attorneys' fees. The Court retains jurisdiction to reopen the proceeding within thirty days of this Order, upon good cause shown, if the terms and conditions of the settlement have not been satisfied.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, May 7, 2008.

/s/ Helen Gillmor
Chief United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

Maria Zepeda

Plaintiff(s),

V.

United States of America, United States Department of Justice, Federal Bureau of Prisons, Michael Lacson, Doe Defendants 1 through 10,

Defendant(s),

JUDGMENT IN A CIVIL CASE

Case: 1:06-CV-00676-HG-KSC

United States of America, United States Department of Justice, Federal Bureau of Prisons,

Cross Claimant(s),

V.

Michael Lacson,

Cross Defendant(s).

[✓] **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED with prejudice, pursuant to the "Order of Dismissal" issued by Chief Judge Helen Gillmor on May 7, 2008.

May 8, 2008
Date

SUE BEITIA
Clerk

(By) Deputy Clerk

EDWARD H. KUBO, JR. 2499
United States Attorney
District of Hawaii

THOMAS A. HELPER 5676
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850-6100
Telephone: (808) 541-2850
Facsimile: (808) 541-3752
E-mail: tom.helper@usdoj.gov

Attorneys for Defendants
UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF
JUSTICE, FEDERAL BUREAU OF PRISONS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MARIA ZEPEDA, Plaintiff, vs. THE UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS; MICHAEL LACSON AND DOE DEFENDANTS 1 THROUGH 10, Defendants.	CIVIL NO. 06-00676 HG KSC STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE
UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Third-Party Plaintiff, vs.	

MICHAEL LACSON,)
)
Third-Party)
Defendant.)
)

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between Plaintiff Maria Zepeda (hereinafter "Zepeda") and defendants United States of America, United States Department of Justice, Federal Bureau of Prisons (hereinafter "Defendants"), by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts of omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. Defendants agree to pay the sum of $17,500 [SEVENTEEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS], which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or her guardians, heirs, executors, administrators, or assigns, and each of them, now have

or may hereafter acquire against Defendants, its agents, servants, and employees. Defendants will dismiss with prejudice their third-party complaint against defendant and third-party defendant Michael Jacson.

3. Zepeda, her guardians, heirs, executors, administrators or assigns hereby agree to accept the sum set forth in this Stipulation for Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against Defendants, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff, her guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless Defendants, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or her guardians, heirs, executors,

administrators or assigns against any third-party or against Defendants, including claims for wrongful death.

4. This Stipulation for Compromise Settlement is not, in no way intended to be, and should not be construed as, an admission of liability or fault on the part of Defendants, its agents, servants, or employees, and it is specifically denied that they are liable to Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorneys' fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of

the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiff fails to obtain such Court approval, the entire Stipulation for Compromise Settlement and Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by check drawn on the United States for Seventeen Thousand Five Hundred dollars ($17,500.00) and made payable to Maria Zepeda and David J. Gierlach, Esq. The check will be mailed to Thomas A. Helper at the following address:

U.S. Attorney's Office
District of Hawaii
Room 6-100, PJKK Federal Building
300 Ala Moana Blvd.
Honolulu, HI 96850

Zepeda's attorney agrees to distribute the net settlement proceeds due to Zepeda, and to promptly file a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses. The parties agree that the payment shall be for general damages only. Zepeda is responsible for payment of any taxes that may be due on the settlement proceeds. Defendants makes no representation as to any tax

consequences or liabilities Zepeda may incur as a result of this settlement.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. Section 552a(b).

DAVID J. GIERLACH
Attorney for Plaintiff

2/18/08
Date

Maria Zepeda
MARIA ZEPEDA

2-6-08
Date

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By
THOMAS A. HELPER
Assistant U.S. Attorney

Attorneys for Defendants

4/10/08
Date

U.S. Department of Justice

United States Attorney
District of Hawaii

PJKK Federal Building
300 Ala Moana Blvd., Room 6-100
Honolulu, Hawaii 96850

(808) 541-2850
FAX (808) 541-2958

May 20, 2008

HAND-DELIVERED

David J. Gierlach
500 Ala Moana Blvd., Ste. 330
Five Waterfront Plaza
Honolulu, Hawaii 96813

Re: Maria Zepeda v. USA
Civil No. 06-00676 HG KSC

Dear Mr. Gierlach:

We are enclosing a check in the amount of $17,500.00, check no. 2049 39462070, payable to Maria Zepeda and David J. Gierlach.

Please acknowledge receipt of this check by signing your name at the bottom of this letter. Thank you very much for your patience and cooperation.

Very truly yours,

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By _____
THOMAS A. HELPER
Assistant U.S. Attorney

TAH:cts
Enclosure

Receipt of check no. 2049 39462070
in the amount of $17,500.00

_____
DAVID J. GIERLACH
Attorney for Plaintiff

United States Treasury 15-51/000 P 178,486,684

Check No.

05 14 08 PHILADELPHIA, PA 2049 39462070

2049 39462070 20180002 M1 USTD 008MC00453



Pay to the order of MARIA ZEPEDA AND DAVID J GIERLACH
C/O THOMAS A HELPER AUSA
300 ALA MOANA BLVD RM 6-100
HONOLULU HI 96850

$**17500*00

17500.00

VOID AFTER ONE YEAR

002

⑈ 2049 ⑈ ⑆000000518⑆ 39462070⑈ 010508

Given Dismissal Docs

JOHN JAHRMARKT, ESQ. (SBN 175569)
JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard
Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax
jjlawyer@mail.com

Attorneys for Plaintiff
PHILLIP VINCENT

FILED
CLERK, U.S. DISTRICT COURT
MAY 16 2008
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP VINCENT, an individual, Plaintiff, v. FEDERAL BUREAU OF PRISONS; UNITED STATES PENITENTIARY IN LEAVENWORTH, KANSAS; METROPOLITAN DETENTION CENTER IN LOS ANGELES, CALIFORNIA and DOES 1 through 50, Inclusive, Defendants.	CASE NO.: CV08-03286 FMC PJWx **COMPLAINT FOR:** 1. CIVIL RIGHTS VIOLATIONS UNDER 42 U.S.C. § 1983 DEMAND FOR JURY TRIAL

JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard, Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax

Plaintiff PHILLIP VINCENT hereby allege:

1. This is an action by plaintiff PHILLIP VINCENT, for injuries sustained to his left eye causing blindness while incarcerated in a federal prison. The injures resulted from the progression of a fully treatable and curable medical condition that worsened during Plaintiff's nine month period of incarceration because of the deliberate indifference to Plaintiff's medical needs amounting to violation of Plaintiff's Constitutional right to be free of

cruel and unusual punishment and violating Plaintiff's civil rights.

THE PARTIES

2. Plaintiff PHILLIP VINCENT ("Plaintiff") is, and at all times relevant herein, was an individual and a resident of either Kansas or California.

3. Defendant Federal Bureau of Prisons ("BOP") is an agency of the United States Department of Justice, is responsible for the custody and care of sentenced federal inmates and is charged with the management and regulation of all Federal penal and correctional institutions, including Defendant UNITED STATES PENITENTIARY IN LEAVENWORTH, KANSAS ("LEAVENWORTH") and Defendant METROPOLITAN DETENTION CENTER IN LOS ANGELES, CALIFORNIA ("MDC-LA").

4. Defendant UNITED STATES PENITENTIARY IN LEAVENWORTH, KANSAS ("LEAVENWORTH") is a high security Federal penitentiary housing male inmates located in Leavenworth, Kansas.

5. Defendant METROPOLITAN DETENTION CENTER IN LOS ANGELES, CALIFORNIA ("MDC-LA") is an administrative facility within the BOP used for the detention of certain Federal inmates, pretrial offenders and other individuals. MDC-LA, LEAVENWORTH and the BOP shall hereinafter be known collectively as "Defendants"

6. Plaintiff is unaware of the true identity and capacity of each of the defendants named herein as Does 1 through 50, inclusive. Plaintiff will seek to amend this Complaint to state the names and capacities of said Doe

JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard, Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax

defendants when ascertained. Plaintiff is informed and believes and on that basis alleges that each of said Doe defendants was responsible for and contributed to the acts hereinafter alleged and that Plaintiff's damages were proximately caused by the acts and omissions of said fictitious defendants.

7. Plaintiff is informed and believes and on that basis alleges that, in engaging in the acts hereinafter alleged, each of the defendants was the agent, servant and employee of each of the other defendants, and performed each of the acts hereinafter alleged within the course and scope of such agency and employment and with the knowledge, consent, approval, authorization and ratification of each other defendant.

JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard, Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax

JURISDICTION AND VENUE

8. This Court has jurisdiction over this 42 U.S.C. § 1983 action pursuant to 28 U.S.C. § 1331. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b). Subject matter jurisdiction over those of Plaintiff's claims, if any, that arise under state law is based upon the principles of supplemental jurisdiction set forth in 28 U.S.C. § 1367, and the provisions of 28 U.S.C. § 1338(b).

9. On or about September 10, 2007, Plaintiff filed an Administrative Claim for Relief ("Tort Claim") under the Federal Tort Claims Act, Title 28 U.S.C. §1346(b), 2671 et. seq. with the U.S. Department of Justice, Federal Bureau of

Prisons, North Central Regional Office. On or about April 22, 2008, Plaintiff received written notice that the Tort Claim was denied.

10. During Plaintiff's period of incarceration, Plaintiff exhausted his administrative remedies with respect to the claims made hereunder. Nevertheless, because Plaintiff was not, at the time this action was filed, and no longer is, a prisoner confined in jail, prison, or other correctional facility, Plaintiff is not required to exhaust his administrative remedies pursuant to the Prison Litigation Reform Act, 42 U.S.C.S. § 1997e(a) prior to filing the within action.

JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard, Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax

BACKGROUND

11. In or about September 2006, Plaintiff was informed by an ophthalmologist that he had a serious medical condition with his left eye that could result in blindness if not treated. Plaintiff was told that he was suffering from a vitreous hemorrhage and that his optic nerve was detaching from his retina possibly tearing the retina and that blood was entering his eye. Plaintiff was told that laser eye surgery was necessary to correct this condition and that the prognosis was very good if properly treated. Plaintiff was further informed that if not treated, the retina would likely be irreparably torn and that blood in the eye would permanently obscure or totally block out his vision.

JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard, Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax

12. Notwithstanding this serious medical condition, testing of Plaintiff's eyes in September 2006 revealed an uncorrected visual acuity of 20/20 in both of Plaintiff's eyes.

13. Plaintiff immediately commenced preparation for scheduling the recommended surgery. Unfortunately, on or about December 4, 2006, Plaintiff was placed into custody in Defendant MDC-LA as a federal prison inmate after violating the terms of his Supervised Release (i.e., parole) with respect to a prior incarceration. Plaintiff was unable to receive any treatment for his eye before being placed into custody.

14. Upon Plaintiff's medical intake screening, he immediately informed medical staff at Defendant MDC-LA that he had a severe eye problem, to the extent that blood was leaking into his eye and was set for emergency surgery prior to his incarceration.

15. On December 8, 2006, Plaintiff filed an Inmate Request to Staff Form BP-S148.055 ("First Request") to the staff at Defendant MDC-LA. In the First Request, Plaintiff specifically informed Defendant MDC-LA staff of his eye problem. A true and correct copy of the First Request is attached hereto as Exhibit "A", and is fully incorporated herein by this reference.

16. Plaintiff did not receive any response to the First Request.

17. On January 4, 2007, Plaintiff again filed an Inmate Request to Staff Form BP-S148.055 ("Second Request")

to the staff at Defendant MDC-LA in which he stated that "my left eye is very blind. I can't hardly see out of it. I was told I needed an operation. Please help me." A true and correct copy of the Second Request is attached hereto as Exhibit "B", and is fully incorporated herein by this reference.

18. Plaintiff did not receive any response to the Second Request.

19. On February 2, 2007, Plaintiff again filed an Inmate Request to Staff Form BP-S148.055 ("Third Request") to the staff at Defendant MDC-LA in which Plaintiff stated that "I was told I would loose sight in eye if I did not get operation. Please help me." A true and correct copy of the Third Request is attached hereto as Exhibit "C", and is fully incorporated herein by this reference.

20. Plaintiff did not receive any response to the Third Request. However, Plaintiff was seen by an optometrist on or about March 30, 2007, who, being an optometrist and not a ophthalmologist, was unable to treat Plaintiff's condition. The optometrist prescribed eyeglasses and referred Plaintiff to visit an ophthalmologist. Defendant MDC-LA did not send Plaintiff to an ophthalmologist in response to the recommendation of the optometrist.

21. Instead, on April 13, 2007 Plaintiff was transferred to Defendant LEAVENWORTH. Upon his medical intake screening Plaintiff again made the medical staff aware of his eye problems

JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard, Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax

22. On April 19, 2007, Plaintiff filed another Form BP-S148.055 ("Fourth Request"), this time to the Defendant LEAVENWORTH staff detailing his eye problems, the fact that nothing had been done by Defendant MDC-LA and that his eyesight was getting worse everyday. A true and correct copy of the Fourth Request is attached hereto as Exhibit "D", and is fully incorporated herein by this reference.

23. Plaintiff did not receive any response to the Fourth Request.

24. On June 7, 2007, Plaintiff filed an Inmate Request to Staff Form BP-S148.055 ("Fifth Request") to the Chief Medical Officer at Defendant LEAVENWORTH, Dr. McCollom, about his eye problems. In the Fifth Request, Plaintiff wrote:

> "Please, please, please. Will someone help me with my eyes, I am almost completely blind in left eye. My vision gets worse by the day. Each passing day I have less vision. Will someone in medical please answer this copact..."

A true and correct copy of the Fifth Request is attached hereto as Exhibit "E", and is fully incorporated herein by this reference.

25. Plaintiff did not receive any response to the Fifth Request.

26. On or about August 1, 2007, Plaintiff's left eye filled with blood and Plaintiff was taken from Defendant LEAVENWORTH on an emergency basis to an eye doctor. The doctor was unable to treat Plaintiff told the medical staff

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at Defendant LEAVENWORTH that Plaintiff needed to see a specialist.

27. On August 8, 2007, for the first time since Plaintiff was remanded to custody on December 4, 2006, Plaintiff saw an eye specialist, Dr. Poulose. Dr. Poulose found that Plaintiff's vision in the left eye was reduced to light perception only. Dr. Poulose further noted that Plaintiff left eye exam revealed a vitreous hemorrhage with a hazy view of the retina and diagnosed proliferative retinopathy in both eyes, worse on the left. Dr. Poulose stated that Plaintiff needed further medical procedures.

28. Based upon information and belief, Dr. Poulose informed Defendant LEAVENWORTH medical staff of his finding and that Plaintiff had probably already lost the sight in his left eye and the same was happening to his right eye.

29. As of today's date, the vision in Plaintiff's left eye has not returned, either through medical intervention or otherwise.

30. On August 10, 2007, Plaintiff filed an Inmate Request to Staff Form BP-S148.055 ("Sixth Request") to the Chief Medical Officer Dr. McCollom requesting a copy of ALL MEDICAL RECORDS concerning his eyes. Again no response was forthcoming. A true and correct copy of the Sixth Request is attached hereto as Exhibit "F", and is fully incorporated herein by this reference.

31. On August 15, 2007, Plaintiff filed another Inmate Request to Staff Form BP-S148.055 ("Seventh Request") to the Chief Medical Officer Dr. McCollom requesting to know why no

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medical action was taking concerning his eyes until after his left eye went blind regardless of his numerous requests to medical staff. A true and correct copy of the Seventh Request is attached hereto as Exhibit "G", and is fully incorporated herein by this reference.

32. On August 27, 2007, the Plaintiff filed yet another Request to Staff Form BP-S148.055 ("Eighth Request") to Chief Medical Officer Dr. McCollom stating that he is almost blind in his right eye. A true and correct copy of the Eighth Request is attached hereto as Exhibit "H", and is fully incorporated herein by this reference

33. On August 30, 2007, the Chief Medical Officer Dr. McCollom finally answered Plaintiff's Inmate Request to Staff Form BP-S148.055 ("First Written Response") by stating "Appointment Made". A true and correct copy of the First Written Response is attached hereto as Exhibit "I", and is fully incorporated herein by this reference.

34. On September 11, 2007, Plaintiff filed another Request to Staff Form BP-S148.055 ("Ninth Request") to Chief Medical Officer Dr. McCollom stating that the condition of his right eye was worsening. A true and correct copy of the Ninth Request is attached hereto as Exhibit "J", and is fully incorporated herein by this reference.

35. On September 14, 2007, the Plaintiff filed another Request to Staff Form BP-S148.055 ("Tenth Request") to Unit Manager Mr. Gray stating that he would be released from incarceration in two months and requested to see an eye doctor for his worsening condition. A true and correct copy

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of the Tenth Request is attached hereto as Exhibit "K", and is fully incorporated herein by this reference.

36. On September 17, 2007, the Chief Medical Officer Dr. McCollom answered Plaintiff's Inmate Request to Staff Form BP-S148.055 ("Second Written Response") by stating "you will be seen by optometry and again referred appropriately." A true and correct copy of the Second Written Response is attached hereto as Exhibit "L", and is fully incorporated herein by this reference.

37. On October 1, 2007, the Plaintiff filed another Request to Staff Form BP-S148.055 ("Eleventh Request") to Medical Records stating that he would be going to a halfway house in November 2007 and requested all of his medical records regarding his eye treatments. A true and correct copy of the Eleventh Request is attached hereto as Exhibit "M", and is fully incorporated herein by this reference.

38. On November 1, 2007, again the Plaintiff filed another Request to Staff Form BP-S148.055 ("Twelfth Request") to Medical Records requested all of his medical records regarding his eye treatments. A true and correct copy of the Twelfth Request is attached hereto as Exhibit "N", and is fully incorporated herein by this reference.

39. On November 13, 2007, Plaintiff was released from incarceration. Regardless of Plaintiff's numerous requests and even after being informed by an optometrist that Plaintiff needed medical attention, the medical staff of both Defendant MDC-LA and Defendant LEAVENWORTH failed to act. Because both institutions did not act appropriately

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and take the Plaintiff seriously, Plaintiff is now blind in his left eye and his right eye is now failing him. Plaintiff's left eye blindness is something that could have been prevented had Defendants acted in accordance with Plaintiff numerous written requests.

Count I

(CIVIL RIGHTS VIOLATIONS UNDER 42 U.S.C. § 1983- against all Defendants)

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40. Plaintiff specifically reallege and incorporate by reference each and every allegation set forth above.

41. A plaintiff in a section 1983 action who has established the liability of the defendant is entitled to recover compensatory damages for the physical injury, pain and suffering, and mental anguish that he has suffered in the past--and is reasonably likely to suffer in the future--because of the defendants' wrongful conduct. The legislative history of section 1983 demonstrates that it was intended to "[create] a species of tort liability" in favor of persons who are deprived of "rights, privileges, or immunities secured" to them by the Constitution. Imbler v. Pachtman, 424 U.S. 409, 417 (1976). The deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment and states a cause of action under section 1983.

42. From the time that Plaintiff was placed into

custody in Defendant MDC-LA on December 4, 2006, Plaintiff had a serious need for medical attention. The medical necessity created by Plaintiff's eye problems detailed above, ultimately leading to blindness, constituted a serious medical need. Plaintiff's medical needs during his period of incarceration were serious because it was apparent that the failure to treat Plaintiff's condition would likely result in further significant injury and unnecessary and wanton infliction of pain if his medical needs were not met.

43. Notwithstanding the significance of Plaintiff's eye problems, Defendants were deliberately indifferent to Plaintiff's serious medical needs. This deliberate indifference is apparent from the continued refusal to allow Plaintiff to see a physician even after the numerous written requests. Pursuant to these requests, Defendants were specifically aware that Plaintiff had a severe eye problem, that blood was leaking into his eye, that he was set for emergency surgery prior to his incarceration and that this surgery was necessary to prevent further permanent eye injury and blindness.

44. As a direct and proximate result of Defendants' deliberate indifference to Plaintiff serious medical needs and the failure of Defendants to allow Plaintiff to be attended to by an ophthalmologist, Plaintiff suffered permanent left eye blindness which caused and continues to cause Plaintiff severe pain and discomfort and Plaintiff is informed and believes and based upon such information and believe alleges that he will in the future suffer pain,

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discomfort and disfigurement all to his general damages in a sum according to proof at the time of trial.

45. The aforementioned acts of Defendants were willful and malicious in that their conduct was intended to cause injury to Plaintiff and/or were carried on with a conscious disregard for Plaintiff, thereby warranting the assessment of exemplary and punitive damages against Defendants in an amount appropriate to punish them.

46. Plaintiff has incurred, and in the future will likely incur attorneys' fees in connection with the claims made herein. 42 U.S.C. § 1988 provides for the recovery of attorney's fees to the prevailing party in a Section 1983 action. It states in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

Plaintiff is therefor entitled to an award of reasonable attorneys' fees.

JURY DEMAND

47. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff hereby demands trial by jury of all issues so triable that are raised herein or which hereinafter may be raised in this action.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

ON THE FIRST CAUSE OF ACTION

1. For general damages according to proof at time of trial, but in excess of the minimum jurisdiction of this court, plus interest at the maximum legal rate

2. For special damages according to proof at time of trial;

3. For an award of reasonable attorneys' fees in cured herein;

4. For costs of suit incurred herein;

5. For such other and further relief as the Court deems just and proper.

Dated: May 14, 2008

JAHRMARKT & ASSOCIATES

By: _____
JOHN JAHRMARKT
Attorney for Plaintiff
PHILLIP VINCENT

JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard, Suite 2070
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EXHIBIT "A"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Eye Doctor	DATE: Dec. 8/2006
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: None	UNIT: 6N

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

While I was at the Ingelwood halfway house in La. Ca. in Oct & nov of 2006 I began Bleeding behind my Left Eye. I informed the halfway house. I went to the Hospital Emergency. They sent me to an Eye Specialist. I was told I need an operation. I Reported this when I came in to MDC La. I can't see out of my Left Eye. Due to Bleeding behind the Retina my vision is Bad in Left Side help.

Thank you Sincerely Phillip Vincent
cc: P.V. Files

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

Printed on Recycled Paper

EXHIBIT "B"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Sick Call Medical Staff	DATE: Jan 4/2007
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: None	UNIT: GN

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

My Left Eye is Very Blurry I can't hardly see out of it. I was told I needed an operation

Please help me

Thank you Phil Vincent
cc: PL, Files

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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EXHIBIT "C"

SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Medical	DATE: Feb. 2 /2007
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: none	UNIT: 6 n.

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Please I can't see hardly at all out of left Eye. I was told I would loose sight in Eye if I did not get operation.

Please help.

Mr. Vincent

cc: P. Vincent Files

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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EXHIBIT "D"

BP-S148.055 INMATE REQUEST TO STAFF IDFRM
SEP 96

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) EYE DOCTOR Optomatrist	DATE: 4/19/07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: N	UNIT: B

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

BEFORE Comming Back to Fed Custody I was to have an operation on left eye I had two eye specialist look at the eye they both agreed that I would loose my sight if I didn't get an operation the specialist say that I am breeding behind the retina. MDC-LA saw fit to do nothing except ship me here. my sight is blurred & dark its getting worse by the day. thank you Phillip Vincent

(Do not write below this line) CC: For File

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

EXHIBIT "E"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR. McCullagh	DATE: 6-7-07
FROM: Phil Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: CW	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

PLEASE, PLEASE, PLEASE, WILL SOMEON HELP ME WITH MY EYES, I AM ALMOST COMPLETELY BLIND IN LEFT EYE. MY VISION GETS WORSE BY THE DAY. EACH PASSING DAY I HAVE LESS VISION. WILL SOMEONE IN MEDICAL PLEASE ANSWER THIS COPOUT.

Thank you Vincent
PS HELP

(Do not write below this line) C.C. FOR P.V. FILES

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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EXHIBIT "F"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR McColough	DATE: 8/10/07
FROM: Phil Vincent	REGISTER NO.: 15293112
WORK ASSIGNMENT: UN	UNIT: B C

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

I am Requesting a copy of All my medical Files. All Files, Especially all concerning my Eyes. As of 8/2/07 I saw an outside optometrist. as of 8/8/07 I saw an outside optomalogist. An (Eye Serain.) Now that I am Blind in my left eye I do Apreciate the Bop's (Prompt medical calls) After 9 months of bleeding for Service (help). & Loosing 1/2 way house Due to Pore Attention on case management & medical staff. thank you

(Do not write below this line) C.C. For Pl. File

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WF)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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EXHIBIT "G"

UNICOR FEDERAL PRISON INDUSTRIES, INC.
LEAVENWORTH, KANSAS

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR McCullagh	DATE: 8/15/07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DR. McCullagh please tell me why I had to wait until I went completely blind in one eye before medical paid any attention to me? Tell me where endless copouts to medical went? Know one took me serious until I went blind? Here is yet another copout I am writing! There is no doubt in my mind this one will be unanswered in writing as well. Why? Can you tell me in writing why the B.O.P.s /Rules are not followed by Leavenworth.

(Do not write below this line) CC FOR PL. FILES

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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EXHIBIT "H"

UNICOR FEDERAL PRISON INDUSTRIES, INC.
LEAVENWORTH, KANSAS

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR. MC Collom	DATE: 8/27 07
FROM: Phil Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: B.L.

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Doctor I am Real Releasing in two months complete Discharge As you know. I am Informing you & medical again. I have done completely Blind In Left Eye as you know. Now Vision is Very Bad in Right Eye. As you were told by outside surgeon you & your staff are Doing Nothing I am almost completely Blind. What are you Doing Fix my Eyes OK Send me thank you Phil Vincent CC FOR PV F

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Copy - Inmate
(This form may be replicated via WP)

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EXHIBIT "I"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR McCullagh	DATE: 8/15/07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DR McCullough, please tell me why I had to wait until I went completely blind in one eye before medical paid any attention to me? tell me where endless copouts to medical went? know one took me serious until I went blind? Here is yet another copout I am writing! there is no doubt in my mind this one will be unanswered in writing as well. Why? can you tell me in writing why the B.O.P.s Rules are not followed by Leavenworth.

(Do not write below this line) CC FOR PV. Files

DISPOSITION:

Appointment made
(not sent)

Signature Staff Member

W. McCollum, MD
Clinical Director
USP/FPC Leavenworth

Date AUG 3 0 2007

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EXHIBIT "J"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Dr. McCollum	DATE: 9-11-07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BC

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DR. McCollum When Leaving the Eye Surgin on Last Week of August-07 He Perscribed Eye Drops with Antibiotics & also oral Antibiotics. Did you know that I got none (nothing) 2 weeks have gone By & I see worse out of my Right Eye than Before. Why Do you Do No Follow up. & Who are you going to make a nother appointment. I'm almost Blind In Both Eyes (thanks???) C.C. For R.V. File

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
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EXHIBIT "K"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) MR GRAY UNIT MANG.	DATE: 9/14/07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

MR. GRAY on 9/14/07 you told me that Everyone was in agreement that i go the next available bed at a half way house in Los Angeles Ca. Please Sir, who is Everyone!! & will i see an Eye Doctor again before i leave. as my vision in my only Eye is getting more Blurry by the Day! what do i do for treatments until i leave? i am not trying to push Buttons or be Rude i am concerned im not going to get propper Help in time Please Answer!! (Do not write below this line) C.C. FOR P.V. FILES

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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EXHIBIT "L"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Dr. McCollum	DATE: 9-11-07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DR. McCollum when leaving the eye surgin on last week of Agust-07 he perscribed eye drops with Anti Biotics & also oral Anti Biotics. Did you know that I got now. (nothing) 2 weeks have gone by & I see worse out of my Right Eye than Bef why do you do no follow up. & when are you going to make a nother appointment. I'm almost Bl in Both Eyes (thanks ???) CC: FOR RV. F

(Do not write below this line)

(over

DISPOSITION:

You will be seen by optometry + again referred appropriately.

Signature Staff Member W. McCollum, MD Clinical Director USP/FPC Leavenworth	Date SEP 17 2007

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

EXHIBIT "M"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
Medical (Records)	10-1-07
FROM: Phil Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT:	UNIT: BL.

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

I am going to halfway house In Early Nov. OF 2007 11/13/07 To be Exact. I am Requesting All medical Records Regarding my Eye treatments. Please Tell me what I must do? OR who I must See to Obtain them. OR at least to COPY them (Do not write below this line) C.C. FOR PL. FILES

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

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EXHIBIT "N"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Medical Records	DATE: 11-1-07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BC

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Dr. McCollou, Mr. Drennen, Mrs. Lovelace, All PAs. I have Requested my Medical Records For months. I have a Coppy of All Copouts to All of the Above names. & not one copout was ever even answerd. If it is my Legal write to have a Coppy of Records How Come no one will give me a Coppy. OR EVEN ANSWER a Copout. Lies, Lies, Lies, Shame on all of you. What Do you get a pay check For? I Am Asking a gain For a Coppy of Medical Records. Thank you. (OVER)

(Do not write below this line) C.C. For P.V. Records

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
(This form may be replicated via WP)

This form replaces BP-148.070 dated Oct 86 and BP-S148.070 APR 94

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SEP -8 AM 8:00
CLERK U.S. DISTRICT COURT LOS ANGELES CA 90012

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
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Fax: (213) 894-7819
Attorneys for Defendant
UNITED STATES OF AMERICA

JS - 6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PHILLIP VINCENT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. CV 08-3286 FMC (PJWx) ORDER Honorable Florence-Marie Cooper

Pursuant to the Stipulation for Compromise Settlement filed by the parties,

IT IS HEREBY ORDERED:

1. Plaintiff's action is dismissed with prejudice in its entirety;

2. Each party shall bear their own costs of suit and attorneys fees;

3. The Court retains jurisdiction pending payment of the settlement.

4. Upon deposit by the United States to the Registry of the

Court of a check in the amount of Seven Thousand Five Hundred Dollars ($7,500.00) made payable to the Clerk of the United States District Court for the Central District of California In Re: United States v. Phillip Vincent, Case No. CR 99-611 JFW ("Criminal Case"), as provided by the Stipulation for Compromise Settlement ¶ 10(b), the Clerk shall apply said funds pursuant to 18 U.S.C. §3612(i) to the principal amount of the criminal restitution judgment entered in the Criminal Case, which judgment shall be deemed satisfied by $7,500, thereby reducing the principal amount of the judgment from $14,505 to $7,005. No further order of the Court shall be required for the disbursement of said funds by the Clerk.

DATED: August 24, 2009

FLORENCE-MARIE COOPER
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

JAHRMARKT & ASSOCIATES

/s/
JOHN JAHRMARKT
Attorney for Plaintiff

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ Gwendolyn M. Gamble
GWENDOLYN M. GAMBLE
Assistant United States Attorney
Attorneys for Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP VINCENT, Plaintiff(s), vs. FEDERAL BUREAU OF PRISONS, et al. Defendant(s).	2:08-cv-03286-FMC-PJWx **ORDER FOR JURY TRIAL** 1. Discovery Cut-Off Date: May 15, 2009 2. Cut-Off Date for Filing Motion to Join Parties or Amend Pleadings: June 22, 2009 3. Cut-Off Date for Filing Motions: June 22, 2009 4. Expert Witness Exchange Deadline: Initial: March 20, 2009; Supplemental: April 17, 2009. 5. Final Pre-Trial Conference: August 10, 2009, at 9:30 a.m. 6. Trial Date: September 15, 2009, at 9:00 a.m.

SCHEDULING:

1. In General. The Court has established a cut-off date for joining parties or amending pleadings. All motions to join other parties or to amend the pleadings shall be filed and served on, or prior to, the cut-off date. All motions to join other parties or to amend the pleadings shall be noticed for hearing. All unserved parties are subject to dismissal at the time of the Pre-Trial Conference pursuant to Local Rule 16-7.1.

2. Discovery Cut-Off. The Court has established a cut-off date for discovery in this action. All discovery is to be completed on, or prior to, the cut-off date. Accordingly, the following discovery schedule shall apply to this Court.

A. Depositions. All depositions shall be scheduled to commence at

least five (5) working days prior to the discovery cut-off date. All original depositions to be used in trial shall be lodged with the Courtroom Deputy on the day of trial.

B. Discovery Motions. Any motion respecting the inadequacy of responses to discovery must have been heard by the discovery cut-off date. Counsel are expected to strictly comply with all local rules and the Federal Rules of Civil Procedure concerning discovery. Whenever possible, the Court expects counsel to resolve discovery problems among themselves in a courteous, reasonable, and professional manner. The Court expects that counsel will strictly adhere to the Civility and Professional Guidelines adopted by the United States District Court for the Central District of California in July of 1995.

LAW AND MOTION:

1. The Court has ordered the above cut-off date for the filing of motions in this action. All motions must be noticed so that the hearing takes place in accordance with this Court's directions for setting hearings on the webpage. Counsel shall comply with e-filing procedures and supply courtesy copies to the Court.

2. If oral argument is not required, counsel will be advised the week before the hearing date. If oral argument is to be heard, the Court will make every effort to issue a tentative ruling or an outline of issues on which argument should concentrate in advance of the hearing date. Please include your fax number on all pleadings. Counsel should check the district court's website at www.cacd.uscourts.gov under this Judge's profile to find any tentative rulings posted on Thursday afternoon or Friday before the scheduled oral argument.

3. All documents are to comply with Local Rule 11-3.1 and shall be prepared in 14-point font or larger or monospaced typeface with no more than 10 ½ characters per inch. Counsel are also directed to adhere to Local Rule 11-3.6, requiring that all documents be double spaced, and Local Rule 11-8, requiring that

all briefs that exceed 10 pages in length must have a table of contents and a table of authorities.

FINAL PRE-TRIAL CONFERENCE:

This case has been placed on calendar for a Final Pre-Trial Conference pursuant to Fed.R.Civ.P. 16 and Local Rule 16-7. Unless excused for good cause, each party appearing in this action shall be represented at the Final Pre-Trial Conference by the attorney who is to have charge of the conduct of the trial on behalf of such party. Counsel should be prepared to discuss streamlining the trial, including presentation of testimony by deposition excerpts or summaries, time limits, stipulations as to undisputed facts, and qualification of experts by admitted resumes.

STRICT COMPLIANCE WITH THE REQUIREMENT OF LOCAL RULE 16-1, et seq., IS REQUIRED BY THE COURT. Therefore, carefully prepared Memoranda of Contentions of Fact and Law, Witness List, Exhibit List, and a proposed Final Pre-Trial Conference Order shall be submitted in accordance with the Rules, and the form of the proposed Final Pre-Trial Order shall be in conformity with the format set forth in the Appendix A to the Local Rules.

The Memoranda of Contentions of Fact and Law are due twenty-one (21) days before the Final Pre-Trial Conference, and the proposed Final Pre-Trial Conference Order is to be lodged seven (7) days before the Final Pre-Trial Conference.

SETTLEMENT PROCEDURES:

A settlement procedure is required in every case pursuant to Local Rule 16-14, et seq. The Court will normally be guided by counsel's agreement as to what procedure is appropriate for this case and when the optimum time for that procedure is. Counsel are responsible for seeing that the settlement procedures are conducted well before the Final Pre-Trial Conference. Not to the exclusion of other procedures, the following are available:

(1) a settlement conference before the district judge or

magistrate judge assigned to the case; however, the undersigned shall not participate in settlement of a case to be tried without a jury;

(2) a settlement conference or mediation before an attorney selected from the Attorney Settlement Panel;

(3) the employment (at the parties' expense) of a private judge, a mediator, or arbitrator.

TRIAL PREPARATION FOR JURY TRIAL - MOTIONS, INSTRUCTIONS AND EXHIBITS:

THE COURT ORDERS that all counsel comply with the following in their preparation for trial:

1. MOTIONS IN LIMINE

All motions in limine must be filed no later than twenty-one (21) days before the Final Pre-Trial Conference. There is no need to provide the Court with proposed Orders on the Motions in Limine. The Court will rule on all motions in limine at the Final Pre-Trial Conference. **Failure to file motions in limine on time may result in a continuance of the trial date.**

2. JURY INSTRUCTIONS/SPECIAL VERDICT FORMS

Thirty-five (35) days before trial, plaintiff shall serve plaintiff's proposed jury instructions and special verdict forms on defendant. Twenty-eight (28) days before trial, defendant shall serve on plaintiff defendant's objections to plaintiff's instructions together with any additional instructions defendant intends to offer. Twenty-one (21) days before trial, counsel are ordered to meet and confer to attempt to come to agreement on the proposed jury instructions.

Fourteen (14) days before trial, counsel shall file with the Court a JOINT set of jury instructions on which there is agreement.

Reference to the instructions in the *Manual of Model Jury Instructions for the Ninth Circuit*, the *California Book of Approved Jury Instructions Civil*, or the *Judicial Council of California Civil Jury Instructions (CACI)*, shall be by number

only. The Court requests only a list of those numbered instructions, which the Court has accessible on its computer. Do not provide written copies of those instructions.

Defendant's counsel has the burden of preparing the joint set of jury instructions. At the same time each party shall file its proposed jury instructions which are objected to by any other party. Points and authorities in support of those instructions and in support of any objections are to be filed at least seven days prior to trial.

With respect to the parties' special instructions, each requested instruction shall be set forth in full; be on a separate page; be numbered; cover only one subject or principle of law; and not repeat principles of law contained in any other requested instruction.

During the trial and before argument, the Court will meet with counsel and settle the instructions. **Failure of counsel to strictly follow the provisions of this section may subject the non-complying party and/or its attorney to sanctions and shall constitute a waiver of jury trial.**

3. TRIAL EXHIBITS

Counsel are to prepare their exhibits for presentation at the trial by placing them in binders which are indexed by exhibit number with tabs or dividers on the right side. Counsel shall submit to the Court an original and one copy of the binders. The exhibits shall be in a three-ring binder labeled on the spine portion of the binder as to the volume number and contain an index of each exhibit included in the volume. Exhibits must be numbered in accordance with Local Rule 16.5.

The Court requires that the following be submitted to the Courtroom Deputy Clerk on the first day of trial:

a. The original exhibits with the Court's exhibit tags, yellow tags for plaintiff and blue tags for defendant, shall be stapled to the front of the exhibit on the upper right-hand corner with the case number, case name, and exhibit number

placed on each tag.

b. One bench book with a copy of each exhibit tabbed with numbers as described above for use by the Court. (Court's exhibit tags not necessary.)

c. Three (3) copies of exhibit lists.

d. Three (3) copies of witness lists in the order in which the witnesses may be called to testify.

e. If a daily transcript and/or real time reporting will be requested or is contemplated, the reporter is to be notified at least one week in advance of the trial date.

In jury cases where a significant number of exhibits are to be admitted, the Court encourages counsel, preferably by agreement, to consider ways in which testimony about exhibits may be made intelligible to the jury while it is being presented. Counsel may consider such devices as overhead projectors, jury notebooks for admitted exhibits, or blow-ups of important exhibits. The Central District has Elmo equipment which may be available for your use during trial. Call the Court's Space and Facilities Division at (213) 894-1400 to reserve audio visual equipment. Do not plan to pass exhibits up and down the jury box while court is in session.

All counsel are to meet not later than ten (10) days before trial and to stipulate, so far as is possible, to foundation, waiver of the best evidence rule, and to those exhibits which may be received into evidence at the start of the trial. The exhibits to be so received will be noted on the extra copies of the exhibit lists.

4. MINI OPENING STATEMENTS

On the first day of the trial, one attorney for each side is to deliver a mini-opening statement to the prospective jury panel, before jury selection begins. Each statement is to be no more than five minutes in length.

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JURY TRIAL:

After the initial day of trial, trial days are Tuesday through Friday from 8:00 a.m. to 1:30 p.m. with two fifteen-minute breaks, normally at 10:00 a.m. and 12:00 p.m. On the first day of trial, the Court will commence at 9:00 a.m. and conclude at 4:00 p.m. with the standard lunch break.

The Clerk is ordered to serve a copy of this Order on counsel for all parties to this action

DATED: December 8, 2008



FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Plaintiff(s),

vs.

Defendant(s).

CV FMC(x)

EXHIBIT LIST

SAMPLE FORMAT

EXH. No.	DESCRIPTION	IDENTIFIED	ADMITTED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Plaintiff(s),

vs.

Defendant(s).

CV FMC(x)

WITNESS LIST

SAMPLE FORMAT

WITNESSES FOR PLAINTIFF	DATES OF TESTIMONY
	(to be filled in during trial)
WITNESSES FOR DEFENDANT	

THOMAS P. O'BRIEN
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LEON W. WEIDMAN
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UNITED STATES OF AMERICA

JS - 6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PHILLIP VINCENT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. CV 08-3286 FMC (PJWx) **ORDER** Honorable Florence-Marie Cooper

Pursuant to the Stipulation for Compromise Settlement filed by the parties,

IT IS HEREBY ORDERED:

1. Plaintiff's action is dismissed with prejudice in its entirety;

2. Each party shall bear their own costs of suit and attorneys fees;

3. The Court retains jurisdiction pending payment of the settlement.

4. Upon deposit by the United States to the Registry of the

Court of a check in the amount of Seven Thousand Five Hundred Dollars ($7,500.00) made payable to the Clerk of the United States District Court for the Central District of California In Re: United States v. Phillip Vincent, Case No. CR 99-611 JFW ("Criminal Case"), as provided by the Stipulation for Compromise Settlement ¶ 10(b), the Clerk shall apply said funds pursuant to 18 U.S.C. §3612(i) to the principal amount of the criminal restitution judgment entered in the Criminal Case, which judgment shall be deemed satisfied by $7,500, thereby reducing the principal amount of the judgment from $14,505 to $7,005. No further order of the Court shall be required for the disbursement of said funds by the Clerk.

DATED: August 24, 2009

FLORENCE-MARIE COOPER
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

JAHRMARKT & ASSOCIATES

/s/
JOHN JAHRMARKT
Attorney for Plaintiff

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ Gwendolyn M. Gamble
GWENDOLYN M. GAMBLE
Assistant United States Attorney
Attorneys for Defendant
UNITED STATES OF AMERICA

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of the Freedom of Information and Privacy Act

Document 1

First Amended Complaint

JOHN JAHRMARKT, ESQ. (SBN 175569)
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Attorneys for Plaintiff
PHILLIP VINCENT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP VINCENT, an individual, Plaintiff, v. UNITED STATES OF AMERICA; W. MCCULLUM, an individual, and DOES 1 through 50, Inclusive, Defendants. [*This First Amended Complaint amends the caption as follows: United States of America and W. Mccullum are* ***Added as Defendants****. Federal Bureau of Prisons; United States Penitentiary in Leavenworth, Kansas; and Metropolitan Detention Center in Los Angeles, California are* ***Dropped as Defendants***]	CASE NO.: CV08-03286FMC(PJW) **FIRST AMENDED COMPLAINT FOR:** 1. CONSTITUTIONAL VIOLATION BY FEDERAL OFFICIALS (BIVENS); 2. MEDICAL MALPRACTICE (FEDERAL TORT CLAIMS ACT); AND 3. GENERAL NEGLIGENCE (FEDERAL TORT CLAIMS ACT). DEMAND FOR JURY TRIAL ON FIRST AND SECOND CAUSES OF ACTION ONLY

Plaintiff PHILLIP VINCENT hereby allege:

1. This is an action by plaintiff PHILLIP VINCENT, for injuries sustained to his left eye causing blindness while incarcerated in a federal prison. The injuries resulted from the progression of a fully treatable and curable medical condition that worsened during Plaintiff's nine month period of incarceration because of the neglect and deliberate indifference to Plaintiff's medical needs

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amounting to violation of Plaintiff's Constitutional right to be free of cruel and unusual punishment.

THE PARTIES

2. Pursuant to this first amended complaint the following parties are dropped as Defendants: FEDERAL BUREAU OF PRISONS; UNITED STATES PENITENTIARY IN LEAVENWORTH, KANSAS; and METROPOLITAN DETENTION CENTER IN LOS ANGELES, CALIFORNIA. In addition, the following parties are added as Defendants: UNITED STATES OF AMERICA and W. MCCULLUM. In addition, the caption is amended to reflect the changes in party Defendants.

3. Plaintiff PHILLIP VINCENT ("Plaintiff") is, and at all times relevant herein, was an individual and a resident of either Kansas or California.

4. Dropped Defendant Federal Bureau of Prisons ("BOP") is an agency of the United States Department of Justice, is responsible for the custody and care of sentenced federal inmates and is charged with the management and regulation of all Federal penal and correctional institutions, including Defendant UNITED STATES PENITENTIARY IN LEAVENWORTH, KANSAS ("Leavenworth") and Defendant METROPOLITAN DETENTION CENTER IN LOS ANGELES, CALIFORNIA ("MDC-LA"). BOP is hereby dropped as a Defendant.

5. Dropped Defendant UNITED STATES PENITENTIARY IN LEAVENWORTH, KANSAS ("Leavenworth") is a high security Federal penitentiary housing male inmates located in Leavenworth, Kansas. Leavenworth is hereby dropped as a Defendant.

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6. Dropped Defendant METROPOLITAN DETENTION CENTER IN LOS ANGELES, CALIFORNIA ("MDC-LA") is an administrative facility within the BOP used for the detention of certain Federal inmates, pretrial offenders and other individuals. MDC-LA is hereby dropped as a Defendant.

7. Defendant UNITED STATE OF AMERICA ("USA") is a sovereign governmental entity and is responsible for the proper administration, actions and inactions of its agencies, including BOP and its Federal penal and correctional institutions, including MDC-LA and Leavenworth.

8. Defendant W. MCCULLUM, an individual ("MCCULLUM"), at all times relevant, was a medical doctor employed by Leavenworth as its "Clinical Director." Based upon information and belief, MCCULLUM, at all times relevant, was charged with the responsibility of overseeing the medical needs of the prisoners of Leavenworth. MCCULLUM and USA shall hereinafter be collectively referred to as Defendants.

9. Plaintiff is unaware of the true identity and capacity of each of the defendants named herein as Does 1 through 50, inclusive. Plaintiff will seek to amend this Complaint to state the names and capacities of said Doe defendants when ascertained. Plaintiff is informed and believes and on that basis alleges that each of said Doe defendants was responsible for and contributed to the acts hereinafter alleged and that Plaintiff's damages were proximately caused by the acts and omissions of said fictitious defendants.

10. Plaintiff is informed and believes and on that

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basis alleges that, in engaging in the acts hereinafter alleged, each of the defendants was the agent, servant and employee of each of the other defendants, and performed each of the acts hereinafter alleged within the course and scope of such agency and employment and with the knowledge, consent, approval, authorization and ratification of each other defendant.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action pursuant 28 U.S.C. §1346(b) which provides Federal District Courts with "exclusive jurisdiction" over tort claims against the United States. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and §1402(b) in that a substantial part of the events or omissions giving rise to the claims made herein occurred within this district and because the Plaintiff resides in this district. Subject matter jurisdiction over those of Plaintiff's claims, if any, that arise under state law is based upon the principles of supplemental jurisdiction set forth in 28 U.S.C. § 1367, and the provisions of 28 U.S.C. § 1338(b).

12. On or about September 10, 2007, Plaintiff filed an Administrative Claim for Relief ("Tort Claim") under the Federal Tort Claims Act, Title 28 U.S.C. §1346(b), 2671 et. seq. with the U.S. Department of Justice, Federal Bureau of Prisons, North Central Regional Office. On or about April 22, 2008, Plaintiff received written notice that the Tort Claim was denied.

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13. During Plaintiff's period of incarceration, Plaintiff exhausted his administrative remedies with respect to the claims made hereunder. Nevertheless, because Plaintiff was not, at the time this action was filed, and no longer is, a prisoner confined in jail, prison, or other correctional facility, Plaintiff is not required to exhaust his administrative remedies pursuant to the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) prior to filing the within action.

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BACKGROUND

14. In or about September 2006, Plaintiff was informed by an ophthalmologist that he had a serious medical condition with his left eye that could result in blindness if not treated. Plaintiff was told that he was suffering from a vitreous hemorrhage and that his optic nerve was detaching from his retina possibly tearing the retina and that blood was entering his eye. Plaintiff was told that laser eye surgery was necessary to correct this condition and that the prognosis was very good if properly treated. Plaintiff was further informed that if not treated, the retina would likely be irreparably torn and that blood in the eye would permanently obscure or totally block out his vision.

15. Notwithstanding this serious medical condition, testing of Plaintiff's eyes in September 2006 revealed an uncorrected visual acuity of 20/20 in both of Plaintiff's eyes.

16. Plaintiff immediately commenced preparation for scheduling the recommended surgery. Unfortunately, on or about December 4, 2006, Plaintiff was placed into custody in MDC-LA as a federal prison inmate after violating the terms of his Supervised Release (i.e., parole) with respect to a prior incarceration. Plaintiff was unable to receive any treatment for his eye before being placed into custody.

17. Upon Plaintiff's medical intake screening, he immediately informed medical staff at MDC-LA that he had a severe eye problem, to the extent that blood was leaking into his eye and was set for emergency surgery prior to his incarceration.

18. On December 8, 2006, Plaintiff filed an Inmate Request to Staff Form BP-S148.055 ("First Request") to the staff at MDC-LA. In the First Request, Plaintiff specifically informed MDC-LA staff of his eye problem. A true and correct copy of the First Request is attached hereto as Exhibit "A", and is fully incorporated herein by this reference.

19. Plaintiff did not receive any response to the First Request.

20. On January 4, 2007, Plaintiff again filed an Inmate Request to Staff Form BP-S148.055 ("Second Request") to the staff at MDC-LA in which he stated that "my left eye is very blind. I can't hardly see out of it. I was told I needed an operation. Please help me." A true and correct copy of the Second Request is attached hereto as Exhibit "B", and is fully incorporated herein by this reference.

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21. Plaintiff did not receive any response to the Second Request.

22. On February 2, 2007, Plaintiff again filed an Inmate Request to Staff Form BP-S148.055 ("Third Request") to the staff at MDC-LA in which Plaintiff stated that "I was told I would loose sight in eye if I did not get operation. Please help me." A true and correct copy of the Third Request is attached hereto as Exhibit "C", and is fully incorporated herein by this reference.

23. Plaintiff did not receive any response to the Third Request. However, Plaintiff was seen by an optometrist on or about March 30, 2007, who, being an optometrist and not a ophthalmologist, was unable to treat Plaintiff's condition. The optometrist prescribed eyeglasses and referred Plaintiff to visit an ophthalmologist. MDC-LA did not send Plaintiff to an ophthalmologist in response to the recommendation of the optometrist.

24. Instead, on April 13, 2007 Plaintiff was transferred to Leavenworth. Upon his medical intake screening Plaintiff again made the medical staff aware of his eye problems

25. On April 19, 2007, Plaintiff filed another Form BP-S148.055 ("Fourth Request"), this time to the Leavenworth staff detailing his eye problems, the fact that nothing had been done by MDC-LA and that his eyesight was getting worse everyday. A true and correct copy of the Fourth Request is attached hereto as Exhibit "D", and is fully incorporated

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herein by this reference.

26. Plaintiff did not receive any response to the Fourth Request.

27. On June 7, 2007, Plaintiff filed an Inmate Request to Staff Form BP-S148.055 ("Fifth Request") to the Chief Medical Officer at Leavenworth, Defendant MCCOLLOM, about his eye problems. In the Fifth Request, Plaintiff wrote:

> "Please, please, please. Will someone help me with my eyes, I am almost completely blind in left eye. My vision gets worse by the day. Each passing day I have less vision. Will someone in medical please answer this copact..."

A true and correct copy of the Fifth Request is attached hereto as Exhibit "E", and is fully incorporated herein by this reference.

28. Plaintiff did not receive any response to the Fifth Request.

29. On or about August 1, 2007, Plaintiff's left eye filled with blood and Plaintiff was taken from Leavenworth on an emergency basis to an eye doctor. The doctor was unable to treat Plaintiff and told the medical staff at Leavenworth that Plaintiff needed to see a specialist.

30. On August 8, 2007, for the first time since Plaintiff was remanded to custody on December 4, 2006, Plaintiff saw an eye specialist, Dr. Poulose. Dr. Poulose found that Plaintiff's vision in the left eye was reduced to light perception only. Dr. Poulose further noted that Plaintiff left eye exam revealed a vitreous hemorrhage with

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a hazy view of the retina and diagnosed proliferative retinopathy in both eyes, worse on the left. Dr. Poulose stated that Plaintiff needed further medical procedures.

31. Based upon information and belief, Dr. Poulose informed Leavenworth medical staff of his finding and that Plaintiff had probably already lost the sight in his left eye and the same was happening to his right eye.

32. As of today's date, the vision in Plaintiff's left eye has not returned, either through medical intervention or otherwise.

33. On August 10, 2007, Plaintiff filed an Inmate Request to Staff Form BP-S148.055 ("Sixth Request") to the Chief Medical Officer Defendant MCCULLUM requesting a copy of ALL MEDICAL RECORDS concerning his eyes. Again no response was forthcoming. A true and correct copy of the Sixth Request is attached hereto as Exhibit "F", and is fully incorporated herein by this reference.

34. On August 15, 2007, Plaintiff filed another Inmate Request to Staff Form BP-S148.055 ("Seventh Request") to the Chief Medical Officer Defendant MCCULLUM requesting to know why no medical action was taking concerning his eyes until after his left eye went blind regardless of his numerous requests to medical staff. A true and correct copy of the Seventh Request is attached hereto as Exhibit "G", and is fully incorporated herein by this reference.

35. On August 27, 2007, the Plaintiff filed yet another Request to Staff Form BP-S148.055 ("Eighth Request") to Chief Medical Officer Defendant MCCULLUM stating that he

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is almost blind in his right eye. A true and correct copy of the Eighth Request is attached hereto as Exhibit "H", and is fully incorporated herein by this reference

36. On August 30, 2007, the Chief Medical Officer Defendant MCCULLUM finally answered Plaintiff's Inmate Request to Staff Form BP-S148.055 ("First Written Response") by stating "Appointment Made". A true and correct copy of the First Written Response is attached hereto as Exhibit "I", and is fully incorporated herein by this reference.

37. On September 11, 2007, Plaintiff filed another Request to Staff Form BP-S148.055 ("Ninth Request") to Chief Medical Officer Defendant MCCULLUM stating that the condition of his right eye was worsening. A true and correct copy of the Ninth Request is attached hereto as Exhibit "J", and is fully incorporated herein by this reference.

38. On September 14, 2007, the Plaintiff filed another Request to Staff Form BP-S148.055 ("Tenth Request") to Unit Manager Mr. Gray stating that he would be released from incarceration in two months and requested to see an eye doctor for his worsening condition. A true and correct copy of the Tenth Request is attached hereto as Exhibit "K", and is fully incorporated herein by this reference.

39. On September 17, 2007, the Chief Medical Officer Defendant MCCULLUM answered Plaintiff's Inmate Request to Staff Form BP-S148.055 ("Second Written Response") by stating "you will be seen by optometry and again referred appropriately." A true and correct copy of the Second Written Response is attached hereto as Exhibit "L", and is

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fully incorporated herein by this reference.

40. On October 1, 2007, the Plaintiff filed another Request to Staff Form BP-S148.055 ("Eleventh Request") to Medical Records stating that he would be going to a halfway house in November 2007 and requested all of his medical records regarding his eye treatments. A true and correct copy of the Eleventh Request is attached hereto as Exhibit "M", and is fully incorporated herein by this reference.

41. On November 1, 2007, again the Plaintiff filed another Request to Staff Form BP-S148.055 ("Twelfth Request") to Medical Records requested all of his medical records regarding his eye treatments. A true and correct copy of the Twelfth Request is attached hereto as Exhibit "N", and is fully incorporated herein by this reference.

42. On November 13, 2007, Plaintiff was released from incarceration. Regardless of Plaintiff's numerous requests and even after being informed by an optometrist that Plaintiff needed medical attention, Defendants and the medical staff of both MDC-LA and Leavenworth, including Defendant MCCULLUM failed to act. Because Defendants did not act appropriately and take the Plaintiff seriously, Plaintiff is now blind in his left eye and his right eye is now failing him. Plaintiff's left eye blindness is something that could have been prevented had Defendants acted in accordance with Plaintiff numerous written requests.

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Count I

(Constitutional Violation by a Federal Official - against all MCCULLUM and DOES 1-50)

43. Plaintiff specifically reallege and incorporate by reference each and every allegation set forth above.

44. In the case of Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 397, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), the United States Supreme Court held that a victim of a constitutional violation by a federal official may bring a claim for money damages despite the absence of a statute creating a private right of action. The right of a Bivens action was extended in Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), to recognize an implied action for damages against federal prison officials for violations of the Eighth Amendment. In Carlson, the Court held that federal prison officials could be sued for violations of the Eighth Amendment's prohibition on cruel and unusual punishment, notwithstanding the availability of a claim under the Federal Tort Claims Act against the United States. (*See also*, Godoy-Aguirre v. Gilkey (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 63979) The deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment and states a cause of action under Bivens.

45. From the time that Plaintiff was placed into custody in MDC-LA on December 4, 2006, Plaintiff had a

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serious need for medical attention. The medical necessity created by Plaintiff's eye problems detailed above, ultimately leading to blindness, constituted a serious medical need. Plaintiff's medical needs during his period of incarceration were serious because it was apparent that the failure to treat Plaintiff's condition would likely result in further significant injury and unnecessary and wanton infliction of pain if his medical needs were not met.

46. Notwithstanding the significance of Plaintiff's eye problems, Defendant MCCULLUM and other prison officials at MDC-LA and Leavenworth, currently described as DOE Defendants, were deliberately indifferent to Plaintiff's serious medical needs. This deliberate indifference is apparent from the continued refusal to allow Plaintiff to see a physician even after the numerous written requests. Pursuant to these requests, Defendant MCCULLUM and the DOE Defendants were specifically aware that Plaintiff had a severe eye problem, that blood was leaking into his eye, that he was set for emergency surgery prior to his incarceration and that this surgery was necessary to prevent further permanent eye injury and blindness.

47. As a direct and proximate result of the deliberate indifference of Defendant MCCULLUM and the DOE Defendants to Plaintiff's serious medical needs and the failure of Defendant MCCULLUM and the DOE Defendants to allow Plaintiff to be attended to by an ophthalmologist, Plaintiff suffered permanent left eye blindness which caused and continues to cause Plaintiff severe pain and discomfort and Plaintiff is

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10880 Wilshire Boulevard, Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax

informed and believes and based upon such information and belief alleges that he will in the future suffer pain, discomfort and disfigurement all to his general damages in a sum according to proof at the time of trial.

48. The aforementioned acts of Defendant MCCULLUM and the DOE Defendants were willful and malicious in that their conduct was intended to cause injury to Plaintiff and/or were carried on with a conscious disregard for Plaintiff, thereby warranting the assessment of exemplary and punitive damages against Defendant MCCULLUM and the DOE Defendants in an amount appropriate to punish them.

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Count II

(MEDICAL MALPRACTICE UNDER THE FEDERAL TORT CLAIMS ACT - against USA only)

49. Plaintiff specifically reallege and incorporate by reference each and every allegation set forth above.

50. The Federal Tort Claims Action ("FTCA") provides a remedy for "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment . . ." 28 U.S.C. § 2679(b)(1). The United States is the only proper defendant in a suit brought pursuant to the FTCA.

51. Because Plaintiff was a Federal prison inmate, Defendant USA owed Plaintiff a legal duty of care, including the duty to summon and provide Plaintiff with medical care,

including the diagnosis and treatment of Plaintiff's eye problems with the degree of knowledge and skill ordinarily possessed and exercised by members of the medical profession in similar circumstances. Specifically, "a public employee . . . is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care." Cal. Gov't Code § 845.6 (West 2001).

52. Defendant USA breached its duty of care as set forth herein by failing to provide Plaintiff with medical care during the period of his incarceration.

53. As a direct and proximate result of Defendant USA's failure to provide Plaintiff with medical care during the period of his incarceration, Plaintiff suffered permanent left eye blindness which caused and continues to cause Plaintiff severe pain and discomfort and Plaintiff is informed and believes and based upon such information and believe alleges that he will in the future suffer pain, discomfort and disfigurement all to his general damages in a sum according to proof at the time of trial.

Count III

(GENERAL NEGLIGENCE UNDER THE FEDERAL TORT CLAIMS ACT - against USA only)

54. Plaintiff specifically reallege and incorporate by reference each and every allegation set forth above.

55. Because Plaintiff was a Federal prison inmate,

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Defendant USA owed Plaintiff a legal duty of care to act reasonably and to refrain from unreasonable actions and inactions.

56. Defendant USA breached its duty of care as set forth herein by failing to allow Plaintiff access to medical care during the period of his incarceration.

57. As a direct and proximate result of Defendant USA's failure as set forth herein, Plaintiff suffered permanent left eye blindness which caused and continues to cause Plaintiff severe pain and discomfort and Plaintiff is informed and believes and based upon such information and believe alleges that he will in the future suffer pain, discomfort and disfigurement all to his general damages in a sum according to proof at the time of trial.

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JURY DEMAND

58. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff hereby demands trial by jury of all issues so triable that are raised herein or which hereinafter may be raised in this action. This demand does not apply to any claim made under the FTCA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

ON THE FIRST CAUSE OF ACTION

1. For damages according to proof at time of trial, plus interest at the maximum legal rate

2. For exemplary and punitive damages according to proof at time of trial;

3. For costs of suit incurred herein;

4. For such other and further relief as the Court deems just and proper.

ON THE SECOND CAUSE OF ACTION

1. For damages according to proof at time of trial, plus interest at the maximum legal rate

2. For costs of suit incurred herein;

3. For such other and further relief as the Court deems just and proper.

ON THE THIRD CAUSE OF ACTION

1. For damages according to proof at time of trial, plus interest at the maximum legal rate

2. For costs of suit incurred herein;

3. For such other and further relief as the Court deems just and proper.

Dated: June 14, 2008

JAHRMARKT & ASSOCIATES

By: _____
JOHN JAHRMARKT
Attorney for Plaintiff
PHILLIP VINCENT

JAHRMARKT & ASSOCIATES
10880 Wilshire Boulevard, Suite 2070
Los Angeles, California 90024
(310) 446-8989
(310) 446-8988 fax

EXHIBIT "A"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Eye Doctor	DATE: Dec. 8/2006
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: None	UNIT: 6N

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

While I was at the Ingelwood halfway house in La. Ca. in Oct & nov of 2006 I began Bleeding behind my Left Eye. I informed the halfway house. I went to the Hospital Emergency. They sent me to an Eye Specialist. I was told I need an operation. I Reported this when I came in to MDC La. I can't see out of my Left Eye. Due to Bleeding behind the Retina my vision is Bad in Left Side help.

Thank you Sincerely Phillip Vincent
cc: P.V. Files

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "B"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Sick Call Medical Staff	DATE: Jan 4/2007
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: None	UNIT: GN

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

My Left Eye is Very Blurry I can't hardly see out of it. I was told I needed an operation

Please help me

Thank you Phil Vincent
cc: PL, Files

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "C"

SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Medical	DATE: Feb. 2 /2007
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: none	UNIT: 6n

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Please I can't see hardly at all out of left Eye. I was told I would loose sight in Eye if I did not get operation.

Please help.

Mr. Vincent

cc: P. Vincent Files

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "D"

BP-S148.055 INMATE REQUEST TO STAFF IDFRM
SEP 96

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

TO: (Name and Title of Staff Member) EYE DOCTOR Optomatrist	DATE: 4/19/07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: CN	UNIT: B

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

BEFORE Comming Back to Fed Custody I was to have an operation on left eye I had two eye specialist look at the eye they both agreed that I would loose my sight if I didn't get an operation the specialist say that I am breeding behind the retina. MDC-LA saw fit to do nothing except ship me here. my sight is blurred & dark its getting worse by the day. thank you Phillip Vincent

(Do not write below this line) CC: For File

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "E"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR. McCullagh	DATE: 6-7-07
FROM: Phil Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: CN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

PLEASE, PLEASE, PLEASE, WILL SOMEON HELP ME WITH MY EYES, I AM ALMOST COMPLETELY BLIND IN LEFT EYE. MY VISION GETS WORSE BY THE DAY. EACH PASSING DAY I HAVE LESS VISION. WILL SOMEONE IN MEDICAL PLEASE ANSWER THIS COPOUT.

Thank you Vincent
PS HELP !!!

(Do not write below this line) C.C. FOR P.V. FILES

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "F"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR McColough	DATE: 8/10/07
FROM: Phil Vincent	REGISTER NO.: 15293112
WORK ASSIGNMENT: UN	UNIT: B C

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

I am Requesting a copy of All my medical Files. All Files, Especially all concerning my Eyes. As of 8/2/07 I saw an outside optometrist. as of 8/8/07 I saw an outside optomalogist. An (Eye Serain.) Now that I am Blind in my left eye I do Apreciate the Bop's (Prompt medical calls) After 9 months of bleeding for Service (help). & Loosing 1/2 way house Due to Pore Attention on case management & medical staff. thank you

(Do not write below this line) C.C. For Pl. File

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "G"

UNICOR FEDERAL PRISON INDUSTRIES, INC.
LEAVENWORTH, KANSAS

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR McCullagh	DATE: 8/15/07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DR McCullagh please tell me why I had to wait until I went completely blind in one eye before medical paid any attention to me? Tell me where endless copouts to medical went? Know one took me serrio until I went blind? Here is yet another copout I am writing! There is no doubt in my mind this one will be unanswered in writing as well. Why? Can you tell me in writing why the B.O.P.s /Rules are not followed by Leavenworth.

(Do not write below this line) CC FOR P.V. FILES

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "H"

UNICOR FEDERAL PRISON INDUSTRIES, INC.
LEAVENWORTH, KANSAS

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR. MC Collom	DATE: 8/27 07
FROM: Phil Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: B.L.

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Doctor I am Real Releasing in two months complete Discharge As you know. I am Informing you & medical again. I have done completely Blind In Left Eye as you know. Now Vision is Very Bad in Right Eye. As you were told by outside surgeon you & your staff are Doing Nothing I am almost completely Blind. What are you Doing Fix my Eyes OK Send me thank you Phil Vincent CC FOR PV F

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "I"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) DR McCullagh	DATE: 8/15/07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DR McCullough, please tell me why I had to wait until I went completely blind in one eye before medical paid any attention to me? tell me where endless copouts to medical went? know one took me serious until I went blind? Here is yet another copout I am writing! there is no doubt in my mind this one will be unanswered in writing as well. (why?) can you tell me in writing why the Bop.s Rules are not followed by Leavenworth.

(Do not write below this line) CC FOR PL. Files

DISPOSITION:

Appointment made
(not sent)

Signature Staff Member | Date

W. McCollum, MD
Clinical Director
USP/FPC Leavenworth

AUG 30 2007

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EXHIBIT "J"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Dr. McCollum	DATE: 9-11-07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BC

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DR. McCollum When Leaving the Eye Surgin on Last Week of August-07 He Perscribed Eye Drops with Antibiotics & also oral Antibiotics. Did you know that I got none (nothing) 2 weeks have gone By & I see worse out of my Right Eye than Before why Do you Do No Follow up. & Who are you going to make a nother appointment. I'm almost Blind In Both Eyes (thanks???) C.C. For R.V. File

(Do not write below this line)

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "K"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) MR GRAY UNIT MANG.	DATE: 9/14/07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

MR. GRAY on 9/14/07 you told me that Everyone was in agreement that i go the next available bed at a half way house in Los Angeles Ca. Please Sir, who is Everyone!! & will i see an Eye Doctor again before i leave. as my vision in my only Eye is getting more Blurry by the Day! what do i do for treatments until i leave? i am not trying to push Buttons or be Rude i am concerned im not going to get propper Help in time Please Answer!! (Do not write below this line) C.C. FOR P.V. FILES

DISPOSITION:

Signature Staff Member	Date

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EXHIBIT "L"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Dr. McCollum	DATE: 9-11-07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BL

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

DR. McCollum when leaving the eye surgin on last week of Agust-07 he perscribed eye drops with Anti Biotics & also oral Anti Biotics. Did you know that I got now. (nothing) 2 weeks have gone by & I see worse out of my Right Eye than Before why do you do no follow up. & when are you going to make a nother appointment. I'm almost Bl. In Both Eyes (thanks ???) CC: FOR RV. F

(Do not write below this line)

(over

DISPOSITION:

You will be seen by optometry + again referred appropriately.

Signature Staff Member W. McCollum, MD Clinical Director USP/FPC Leavenworth	Date SEP 17 2007

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EXHIBIT "M"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member)	DATE:
Medical (Records)	10-1-07
FROM: Phil Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT:	UNIT: BL.

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

I am going to halfway house In Early Nov. OF 2007 11/13/07 To be Exact. I am Requesting All medical Records Regarding my Eye treatments. Please Tell me what I must do? OR who I must See to Obtain them. OR at least to COPY them (Do not write below this line) C.C. FOR PL. FILES

DISPOSITION:

Signature Staff Member	Date

Record Copy - File; Copy - Inmate
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EXHIBIT "N"

BP-S148.055 **INMATE REQUEST TO STAFF** CDFRM
SEP 98
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

TO: (Name and Title of Staff Member) Medical Records	DATE: 11-1-07
FROM: Phillip Vincent	REGISTER NO.: 15293-112
WORK ASSIGNMENT: UN	UNIT: BC

SUBJECT: (Briefly state your question or concern and the solution you are requesting. Continue on back, if necessary. Your failure to be specific may result in no action being taken. If necessary, you will be interviewed in order to successfully respond to your request.)

Dr. McCollou, Mr. Drennen, Mrs. Lovelace, All PAs. I have Requested my Medical Records For months. I have a Coppy of All Copouts to All of the Above names. & not one copout was ever even answerd. If it is my Legal write to have a Coppy of Records How Come no one will give me a Coppy. OR EVEN ANSWER a Copout. Lies, Lies, Lies, Shame on all of you. What Do you get a pay check For? I Am Asking again For a Coppy of Medical Records. Thank you. (OVER)

(Do not write below this line) C.C. For P.V. Records

DISPOSITION:

Signature Staff Member	Date

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Document 2

Public Information Inmate Data

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 310-732-5179 FAX: 310-732-5291
RACE/SEX...: WHITE / MALE
AGE: 50

ACTUAL RELEASE METH.: GCT REL
ACTUAL RELEASE DATE.: 12-07-2007

ADMIT/RELEASE HISTORY

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
CLB	GCT REL	GOOD CONDUCT TIME REL (CCCA)	12-07-2007 0001	CURRENT
CLB	A-DES	DESIGNATED, AT ASSIGNED FACIL	11-13-2007 2230	12-07-2007 0001
3-L	RELEASE	RELEASED FROM IN-TRANSIT FACL	11-14-2007 0130	11-14-2007 0130
3-L	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	11-12-2007 0530	11-14-2007 0130
LVN	FURL TRANS	FURL W/UNESCORTED TRF TO A CCC	11-12-2007 0430	11-12-2007 0430
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	11-09-2007 1219	11-12-2007 0430
LVN	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	11-09-2007 0935	11-09-2007 1219
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	08-31-2007 1613	11-09-2007 0935
LVN	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	08-31-2007 1201	08-31-2007 1613
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	08-08-2007 1751	08-31-2007 1201
LVN	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	08-08-2007 1434	08-08-2007 1751
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	08-02-2007 1429	08-08-2007 1434
LVN	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	08-02-2007 1234	08-02-2007 1429
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	04-13-2007 1211	08-02-2007 1234
S38	RELEASE	RELEASED FROM IN-TRANSIT FACL	04-13-2007 1311	04-13-2007 1311
S38	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	04-13-2007 0645	04-13-2007 1311
OKL	HLD REMOVE	HOLDOVER REMOVED	04-13-2007 0545	04-13-2007 0545
OKL	A-HLD	HOLDOVER, TEMPORARILY HOUSED	04-05-2007 1830	04-13-2007 0545
3-J	RELEASE	RELEASED FROM IN-TRANSIT FACL	04-05-2007 1930	04-05-2007 1930
3-J	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	04-05-2007 1119	04-05-2007 1930
LOS	HLD REMOVE	HOLDOVER REMOVED	04-05-2007 0819	04-05-2007 0819
LOS	A-HLD	HOLDOVER, TEMPORARILY HOUSED	12-04-2006 1805	04-05-2007 0819
CLB	SUPV REL	SUPERVISED RELEASE CCC REMOVED	09-30-2006 2330	12-04-2006 1805
CLB	A-COM CON	COMMUNITY CONFINEMENT CASE	08-07-2006 0800	09-30-2006 2330
1-J	RELEASE	RELEASED FROM IN-TRANSIT FACL	08-07-2006 1100	08-07-2006 1100
1-J	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	07-18-2006 1210	08-07-2006 1100
CLB	ADMIN REL	ADMINISTRATIVE RELEASE	07-18-2006 0910	07-18-2006 0910
CLB	A-ADMIN	ADMINISTRATIVE ADMISSION	07-18-2006 0908	07-18-2006 0910
CLB	GCT REL	GOOD CONDUCT TIME RELEASE	04-12-2005 1155	07-18-2006 0908
CLB	A-DES	DESIGNATED, AT ASSIGNED FACIL	10-15-2004 1226	04-12-2005 1155
4-T	RELEASE	RELEASED FROM IN-TRANSIT FACL	10-15-2004 1526	10-15-2004 1526
4-T	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	10-14-2004 1039	10-15-2004 1526
SHE	FURL TRANS	FURL W/UNESCORTED TRF TO A CCC	10-14-2004 0739	10-14-2004 0739
SHE	A-DES	DESIGNATED, AT ASSIGNED FACIL	02-27-2004 1426	10-14-2004 0739
SHE	ESCORT TRP	ESC TRIP OTHER THAN LOCAL HOSP	02-27-2004 1231	02-27-2004 1426
SHE	A-DES	DESIGNATED, AT ASSIGNED FACIL	12-14-2000 0755	02-27-2004 1231

G0002 MORE PAGES TO FOLLOW . . .

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 310-732-5179 FAX: 310-732-5291

4-T	RELEASE	RELEASED FROM IN-TRANSIT FACL	12-14-2000 1055	12-14-2000 1055
4-T	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	12-14-2000 1035	12-14-2000 1055
SHE	HLD REMOVE	HOLDOVER REMOVED	12-14-2000 0735	12-14-2000 0735
SHE	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	12-05-2000 1819	12-14-2000 0735
B05	RELEASE	RELEASED FROM IN-TRANSIT FACL	12-05-2000 2119	12-05-2000 2119
B05	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	12-05-2000 0902	12-05-2000 2119
DUB	HLD REMOVE	HOLDOVER REMOVED	12-05-2000 0602	12-05-2000 0602
DUB	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	11-28-2000 1434	12-05-2000 0602
B13	RELEASE	RELEASED FROM IN-TRANSIT FACL	11-28-2000 1734	11-28-2000 1734
B13	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	11-28-2000 0722	11-28-2000 1734
LOS	HLD REMOVE	HOLDOVER REMOVED	11-28-2000 0422	11-28-2000 0422
LOS	A-HLD	HOLDOVER, TEMPORARILY HOUSED	05-16-2000 2000	11-28-2000 0422
3-H	RELEASE	RELEASED FROM IN-TRANSIT FACL	05-16-2000 2300	05-16-2000 2300
3-H	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	05-16-2000 1622	05-16-2000 2300
LOM	FED WRIT	RELEASE ON FEDERAL WRIT	05-16-2000 1322	12-05-2000 1818
LOM	A-DES	DESIGNATED, AT ASSIGNED FACIL	04-18-2000 0829	05-16-2000 1322
B12	RELEASE	RELEASED FROM IN-TRANSIT FACL	04-18-2000 1129	04-18-2000 1129
B12	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	04-18-2000 0700	04-18-2000 1129
LOS	HLD REMOVE	HOLDOVER REMOVED	04-18-2000 0400	04-18-2000 0400
LOS	A-HLD	HOLDOVER, TEMPORARILY HOUSED	04-14-2000 0744	04-18-2000 0400
LOS	ADM CHANGE	RELEASE FOR ADMISSION CHANGE	04-14-2000 0745	04-14-2000 0745
LOS	A-PRE	PRE-SENT ADMIT, ADULT	04-04-2000 1252	04-14-2000 0745
LOS	L HOSP USM	ESC TRP TO LOC HOSP W/RETN-USM	04-04-2000 0730	04-04-2000 1252
LOS	A-PRE	PRE-SENT ADMIT, ADULT	02-04-2000 1300	04-04-2000 0730
LOS	L HOSP USM	ESC TRP TO LOC HOSP W/RETN-USM	02-04-2000 0845	02-04-2000 1300
LOS	A-PRE	PRE-SENT ADMIT, ADULT	08-25-1999 1533	02-04-2000 0845
LOS	BAIL/BOND	BAIL/BOND	06-23-1999 0805	08-25-1999 1533
LOS	A-PRE	PRE-SENT ADMIT, ADULT	06-02-1999 1932	06-23-1999 0805

G0002 MORE PAGES TO FOLLOW . . .

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 310-732-5179 FAX: 310-732-5291
PRE-RELEASE PREPARATION DATE: 11-03-2007

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S PRIOR COMMITMENT.
THE INMATE WAS SCHEDULED FOR RELEASE: 12-07-2007 VIA GCT REL

----------PRIOR JUDGMENT/WARRANT NO: 020 ----------

COURT OF JURISDICTION.....: CALIFORNIA, CENTRAL DISTRICT
DOCKET NUMBER.....: CR 99-611-JFW
JUDGE.....: WALTER
DATE SENTENCED/PROBATION IMPOSED: 03-16-2000
DATE SUPERVISION REVOKED.....: 12-04-2006
TYPE OF SUPERVISION REVOKED.....: REG
DATE COMMITTED.....: 04-13-2007
HOW COMMITTED.....: COMMIT OF SUPERVISED REL VIOL
PROBATION IMPOSED.....: NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	$300.00	$00.00	$00.00	$00.00

RESTITUTION...: PROPERTY: NO SERVICES: NO AMOUNT: $14,205.00

----------PRIOR OBLIGATION NO: 010 ----------
OFFENSE CODE....: 551
OFF/CHG: 18 USC 2113(A) BANK ROBBERY, CT. 1

SENTENCE PROCEDURE.....: SUPERVISED RELEASE VIOLATION PLRA
SENTENCE IMPOSED/TIME TO SERVE.: 14 MONTHS
DATE OF OFFENSE.....: 09-29-1998

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 310-732-5179 FAX: 310-732-5291

----------PRIOR COMPUTATION NO: 020 ----------

COMPUTATION 020 WAS LAST UPDATED ON 09-06-2007 AT DSC AUTOMATICALLY
COMPUTATION CERTIFIED ON 09-12-2007 BY DESIG/SENTENCE COMPUTATION CTR

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS ARE INCLUDED IN
PRIOR COMPUTATION 020: 020 010

DATE COMPUTATION BEGAN.....: 12-04-2006
TOTAL TERM IN EFFECT.....: 14 MONTHS
TOTAL TERM IN EFFECT CONVERTED..: 1 YEARS 2 MONTHS
EARLIEST DATE OF OFFENSE.....: 09-29-1998

JAIL CREDIT.....	FROM DATE	THRU DATE
	06-15-2006	06-15-2006

TOTAL PRIOR CREDIT TIME.....: 1
TOTAL INOPERATIVE TIME.....: 0
TOTAL GCT EARNED AND PROJECTED..: 55
TOTAL GCT EARNED.....: 55
STATUTORY RELEASE DATE PROJECTED: 12-09-2007
SIX MONTH /10% DATE.....: N/A
EXPIRATION FULL TERM DATE.....: 02-02-2008

ACTUAL SATISFACTION DATE.....: 12-07-2007
ACTUAL SATISFACTION METHOD.....: GCT REL
ACTUAL SATISFACTION FACILITY....: CLB
ACTUAL SATISFACTION KEYED BY....: DT*

DAYS REMAINING.....: 55
FINAL PUBLIC LAW DAYS.....: 2

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE

PRE-RELEASE PREPARATION DATE: 10-12-2004

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S PRIOR COMMITMENT.
THE INMATE WAS SCHEDULED FOR RELEASE: 04-12-2005 VIA GCT REL

----------PRIOR JUDGMENT/WARRANT NO: 010 ----------

COURT OF JURISDICTION.....: CALIFORNIA, CENTRAL DISTRICT
DOCKET NUMBER.....: CR99-611-RAP
JUDGE.....: PAEZ
DATE SENTENCED/PROBATION IMPOSED: 03-16-2000
DATE COMMITTED.....: 04-18-2000
HOW COMMITTED.....: US DISTRICT COURT COMMITMENT
PROBATION IMPOSED.....: NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	$300.00	$00.00	$00.00	$00.00

RESTITUTION...: PROPERTY: NO SERVICES: NO AMOUNT: $14,205.00

----------PRIOR OBLIGATION NO: 010 ----------
OFFENSE CODE....: 551
OFF/CHG: 18 USC 2113(A) BANK ROBBERY, CT. 1

SENTENCE PROCEDURE.....: 3559 PLRA SENTENCE
SENTENCE IMPOSED/TIME TO SERVE.: 77 MONTHS
TERM OF SUPERVISION.....: 3 YEARS
DATE OF OFFENSE.....: 09-29-1998

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 310-732-5179 FAX: 310-732-5291

----------PRIOR COMPUTATION NO: 010 ----------

COMPUTATION 010 WAS LAST UPDATED ON 11-02-2001 AT SHE AUTOMATICALLY

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS ARE INCLUDED IN PRIOR COMPUTATION 010: 010 010

DATE COMPUTATION BEGAN.....: 03-16-2000
TOTAL TERM IN EFFECT.....: 77 MONTHS
TOTAL TERM IN EFFECT CONVERTED..: 6 YEARS 5 MONTHS
EARLIEST DATE OF OFFENSE.....: 09-29-1998

JAIL CREDIT.....	FROM DATE	THRU DATE
	06-01-1999	06-23-1999
	08-25-1999	03-15-2000

TOTAL PRIOR CREDIT TIME.....: 227
TOTAL INOPERATIVE TIME.....: 0
TOTAL GCT EARNED AND PROJECTED..: 263
TOTAL GCT EARNED.....: 263
STATUTORY RELEASE DATE PROJECTED: 04-12-2005
SIX MONTH /10% DATE.....: N/A
EXPIRATION FULL TERM DATE.....: 12-31-2005

ACTUAL SATISFACTION DATE.....: 04-12-2005
ACTUAL SATISFACTION METHOD.....: GCT REL
ACTUAL SATISFACTION FACILITY....: CLB
ACTUAL SATISFACTION KEYED BY....: DT*

DAYS REMAINING.....: 263
FINAL PUBLIC LAW DAYS.....: 0

S0039 ALL CURRENT COMPS ARE SATISFIED

Document 3

Transcript of Deposition of Plaintiff on March 19, 2009.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP VINCENT, an individual Plaintiff, VS. UNITED STATES OF AMERICA, Defendant.	)	CASE NO. CV08-03286FMC (PJW)

DEPOSITION OF PHILLIP MATHEW VINCENT, taken on behalf of the Defendant, at 300 North Los Angeles Street, Los Angeles, California, commencing at 10:18 a.m., Thursday, March 19, 2009, before ZAIRA JIMENEZ, C.S.R. No. 13283, pursuant to NOTICE.

* * *

APPEARANCES:

For Plaintiff:

JAHRMARKT & ASSOCIATES LAWYERS
BY: JOHN JAHRMARKT, Attorney at Law
10880 Wilshire Boulevard
Suite 2070
Los Angeles, California 90024
(310) 446-8989

For Defendant:

U.S. DEPARTMENT OF JUSTICE UNITED STATES ATTORNEY'S OFFICE
BY: GWENDOLYN M. GAMBLE, Attorney at Law
300 North Los Angeles Street
Suite 7516
Los Angeles, California 90012
(213 894-6684

Also Present:

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
BY: CORINNE M. NASTRO, Attorney advisor
535 North Alameda Street
Los Angeles, California 90012
(213) 485-0439x5187

I N D E X

WITNESS	EXAMINATION	PAGE
PHILLIP MATHEW VINCENT	By Ms. Gamble	4

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DEFENDANT'S		PAGE
1	Response to Interrogatories, 12 pages	92
2	Torrance Memorial Medical Center, 1 page	112
3	Aftercare Instructions, 1 page	112
4	Healthcare Partners dated 9/1/06, 1 page	116
5	Healthcare Partners dated 9/13/06, 1 page	117
6	Health Intake Assessment dated 12/4/06, 2 pages	127
7	Health Intake Assessment dated 4/13/07, 2 pages	184
8	Document Bates stamped JSR015, dated 11/9/07, 2 pages	224

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Vincent v. United States of America, et al.
Case No. 2:08-cv-03286-FMC-PJWx
Camara Declaration
Exhibit A

NCRSD * PUBLIC INFORMATION * 03-08-2009
PAGE 001 * INMATE DATA * 14:24:52
AS OF 03-08-2009

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 562-980-3536 FAX: 562-980-3543
RACE/SEX...: WHITE / MALE
AGE: 50

ACTUAL RELEASE METH.: GCT REL
ACTUAL RELEASE DATE.: 12-07-2007

ADMIT/RELEASE HISTORY

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
CLB	GCT REL	GOOD CONDUCT TIME REL (CCCA)	12-07-2007 0001	CURRENT
CLB	A-DES	DESIGNATED, AT ASSIGNED FACIL	11-13-2007 2230	12-07-2007 0001
3-L	RELEASE	RELEASED FROM IN-TRANSIT FACL	11-14-2007 0130	11-14-2007 0130
3-L	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	11-12-2007 0530	11-14-2007 0130
LVN	FURL TRANS	FURL W/UNESCORTED TRF TO A CCC	11-12-2007 0430	11-12-2007 0430
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	11-09-2007 1219	11-12-2007 0430
LVN	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	11-09-2007 0935	11-09-2007 1219
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	08-31-2007 1613	11-09-2007 0935
LVN	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	08-31-2007 1201	08-31-2007 1613
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	08-08-2007 1751	08-31-2007 1201
LVN	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	08-08-2007 1434	08-08-2007 1751
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	08-02-2007 1429	08-08-2007 1434
LVN	LOCAL HOSP	ESC TRIP TO LOCAL HOSP W/RETN	08-02-2007 1234	08-02-2007 1429
LVN	A-DES	DESIGNATED, AT ASSIGNED FACIL	04-13-2007 1211	08-02-2007 1234
S38	RELEASE	RELEASED FROM IN-TRANSIT FACL	04-13-2007 1311	04-13-2007 1311
S38	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	04-13-2007 0645	04-13-2007 1311
OKL	HLD REMOVE	HOLDOVER REMOVED	04-13-2007 0545	04-13-2007 0545
OKL	A-HLD	HOLDOVER, TEMPORARILY HOUSED	04-05-2007 1830	04-13-2007 0545
3-J	RELEASE	RELEASED FROM IN-TRANSIT FACL	04-05-2007 1930	04-05-2007 1930
3-J	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	04-05-2007 1119	04-05-2007 1930
LOS	HLD REMOVE	HOLDOVER REMOVED	04-05-2007 0819	04-05-2007 0819
LOS	A-HLD	HOLDOVER, TEMPORARILY HOUSED	12-04-2006 1805	04-05-2007 0819
CLB	SUPV REL	SUPERVISED RELEASE CCC REMOVED	09-30-2006 2330	12-04-2006 1805
CLB	A-COM CON	COMMUNITY CONFINEMENT CASE	08-07-2006 0800	09-30-2006 2330
1-J	RELEASE	RELEASED FROM IN-TRANSIT FACL	08-07-2006 1100	08-07-2006 1100
1-J	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	07-18-2006 1210	08-07-2006 1100
CLB	ADMIN REL	ADMINISTRATIVE RELEASE	07-18-2006 0910	07-18-2006 0910
CLB	A-ADMIN	ADMINISTRATIVE ADMISSION	07-18-2006 0908	07-18-2006 0910
CLB	GCT REL	GOOD CONDUCT TIME RELEASE	04-12-2005 1155	07-18-2006 0908
CLB	A-DES	DESIGNATED, AT ASSIGNED FACIL	10-15-2004 1226	04-12-2005 1155
4-T	RELEASE	RELEASED FROM IN-TRANSIT FACL	10-15-2004 1526	10-15-2004 1526
4-T	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	10-14-2004 1039	10-15-2004 1526
SHE	FURL TRANS	FURL W/UNESCORTED TRF TO A CCC	10-14-2004 0739	10-14-2004 0739
SHE	A-DES	DESIGNATED, AT ASSIGNED FACIL	02-27-2004 1426	10-14-2004 0739
SHE	ESCORT TRP	ESC TRIP OTHER THAN LOCAL HOSP	02-27-2004 1231	02-27-2004 1426
SHE	A-DES	DESIGNATED, AT ASSIGNED FACIL	12-14-2000 0755	02-27-2004 1231

G0002 MORE PAGES TO FOLLOW . . .

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 562-980-3536 FAX: 562-980-3543

4-T	RELEASE	RELEASED FROM IN-TRANSIT FACL	12-14-2000	1055	12-14-2000	1055
4-T	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	12-14-2000	1035	12-14-2000	1055
SHE	HLD REMOVE	HOLDOVER REMOVED	12-14-2000	0735	12-14-2000	0735
SHE	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	12-05-2000	1819	12-14-2000	0735
B05	RELEASE	RELEASED FROM IN-TRANSIT FACL	12-05-2000	2119	12-05-2000	2119
B05	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	12-05-2000	0902	12-05-2000	2119
DUB	HLD REMOVE	HOLDOVER REMOVED	12-05-2000	0602	12-05-2000	0602
DUB	A-BOP HLD	HOLDOVER FOR INST TO INST TRF	11-28-2000	1434	12-05-2000	0602
B13	RELEASE	RELEASED FROM IN-TRANSIT FACL	11-28-2000	1734	11-28-2000	1734
B13	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	11-28-2000	0722	11-28-2000	1734
LOS	HLD REMOVE	HOLDOVER REMOVED	11-28-2000	0422	11-28-2000	0422
LOS	A-HLD	HOLDOVER, TEMPORARILY HOUSED	05-16-2000	2000	11-28-2000	0422
3-H	RELEASE	RELEASED FROM IN-TRANSIT FACL	05-16-2000	2300	05-16-2000	2300
3-H	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	05-16-2000	1622	05-16-2000	2300
LOM	FED WRIT	RELEASE ON FEDERAL WRIT	05-16-2000	1322	12-05-2000	1818
LOM	A-DES	DESIGNATED, AT ASSIGNED FACIL	04-18-2000	0829	05-16-2000	1322
B12	RELEASE	RELEASED FROM IN-TRANSIT FACL	04-18-2000	1129	04-18-2000	1129
B12	A-ADMIT	ADMITTED TO AN IN-TRANSIT FACL	04-18-2000	0700	04-18-2000	1129
LOS	HLD REMOVE	HOLDOVER REMOVED	04-18-2000	0400	04-18-2000	0400
LOS	A-HLD	HOLDOVER, TEMPORARILY HOUSED	04-14-2000	0744	04-18-2000	0400
LOS	ADM CHANGE	RELEASE FOR ADMISSION CHANGE	04-14-2000	0745	04-14-2000	0745
LOS	A-PRE	PRE-SENT ADMIT, ADULT	04-04-2000	1252	04-14-2000	0745
LOS	L HOSP USM	ESC TRP TO LOC HOSP W/RETN-USM	04-04-2000	0730	04-04-2000	1252
LOS	A-PRE	PRE-SENT ADMIT, ADULT	02-04-2000	1300	04-04-2000	0730
LOS	L HOSP USM	ESC TRP TO LOC HOSP W/RETN-USM	02-04-2000	0845	02-04-2000	1300
LOS	A-PRE	PRE-SENT ADMIT, ADULT	08-25-1999	1533	02-04-2000	0845
LOS	BAIL/BOND	BAIL/BOND	06-23-1999	0805	08-25-1999	1533
LOS	A-PRE	PRE-SENT ADMIT, ADULT	06-02-1999	1932	06-23-1999	0805

G0002 MORE PAGES TO FOLLOW . . .

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 562-980-3536 FAX: 562-980-3543
PRE-RELEASE PREPARATION DATE: 11-03-2007

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S PRIOR COMMITMENT.
THE INMATE WAS SCHEDULED FOR RELEASE: 12-07-2007 VIA GCT REL

----------PRIOR JUDGMENT/WARRANT NO: 020 ----------

COURT OF JURISDICTION.....: CALIFORNIA, CENTRAL DISTRICT
DOCKET NUMBER.....: CR 99-611-JFW
JUDGE.....: WALTER
DATE SENTENCED/PROBATION IMPOSED: 03-16-2000
DATE SUPERVISION REVOKED.....: 12-04-2006
TYPE OF SUPERVISION REVOKED.....: REG
DATE COMMITTED.....: 04-13-2007
HOW COMMITTED.....: COMMIT OF SUPERVISED REL VIOL
PROBATION IMPOSED.....: NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	$300.00	$00.00	$00.00	$00.00

RESTITUTION...: PROPERTY: NO SERVICES: NO AMOUNT: $14,205.00

----------PRIOR OBLIGATION NO: 010 ----------
OFFENSE CODE....: 551
OFF/CHG: 18 USC 2113(A) BANK ROBBERY, CT. 1

SENTENCE PROCEDURE.....: SUPERVISED RELEASE VIOLATION PLRA
SENTENCE IMPOSED/TIME TO SERVE.: 14 MONTHS
DATE OF OFFENSE.....: 09-29-1998

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 562-980-3536 FAX: 562-980-3543

----------PRIOR COMPUTATION NO: 020 ----------

COMPUTATION 020 WAS LAST UPDATED ON 09-06-2007 AT DSC AUTOMATICALLY
COMPUTATION CERTIFIED ON 09-12-2007 BY DESIG/SENTENCE COMPUTATION CTR

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS ARE INCLUDED IN
PRIOR COMPUTATION 020: 020 010

DATE COMPUTATION BEGAN.....: 12-04-2006
TOTAL TERM IN EFFECT.....: 14 MONTHS
TOTAL TERM IN EFFECT CONVERTED..: 1 YEARS 2 MONTHS
EARLIEST DATE OF OFFENSE.....: 09-29-1998

JAIL CREDIT.....: FROM DATE THRU DATE
06-15-2006 06-15-2006

TOTAL PRIOR CREDIT TIME.....: 1
TOTAL INOPERATIVE TIME.....: 0
TOTAL GCT EARNED AND PROJECTED..: 55
TOTAL GCT EARNED.....: 55
STATUTORY RELEASE DATE PROJECTED: 12-09-2007
SIX MONTH /10% DATE.....: N/A
EXPIRATION FULL TERM DATE.....: 02-02-2008

ACTUAL SATISFACTION DATE.....: 12-07-2007
ACTUAL SATISFACTION METHOD.....: GCT REL
ACTUAL SATISFACTION FACILITY....: CLB
ACTUAL SATISFACTION KEYED BY....: DT*

DAYS REMAINING.....: 55
FINAL PUBLIC LAW DAYS.....: 2

NCRSD * PUBLIC INFORMATION * 03-08-2009
PAGE 005 * INMATE DATA * 14:24:52
AS OF 04-12-2005

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE

PRE-RELEASE PREPARATION DATE: 10-12-2004

THE FOLLOWING SENTENCE DATA IS FOR THE INMATE'S PRIOR COMMITMENT.
THE INMATE WAS SCHEDULED FOR RELEASE: 04-12-2005 VIA GCT REL

----------PRIOR JUDGMENT/WARRANT NO: 010 ----------

COURT OF JURISDICTION.....: CALIFORNIA, CENTRAL DISTRICT
DOCKET NUMBER.....: CR99-611-RAP
JUDGE.....: PAEZ
DATE SENTENCED/PROBATION IMPOSED: 03-16-2000
DATE COMMITTED.....: 04-18-2000
HOW COMMITTED.....: US DISTRICT COURT COMMITMENT
PROBATION IMPOSED.....: NO

	FELONY ASSESS	MISDMNR ASSESS	FINES	COSTS
NON-COMMITTED.:	$300.00	$00.00	$00.00	$00.00

RESTITUTION...: PROPERTY: NO SERVICES: NO AMOUNT: $14,205.00

----------PRIOR OBLIGATION NO: 010 ----------
OFFENSE CODE....: 551
OFF/CHG: 18 USC 2113(A) BANK ROBBERY, CT. 1

SENTENCE PROCEDURE.....: 3559 PLRA SENTENCE
SENTENCE IMPOSED/TIME TO SERVE.: 77 MONTHS
TERM OF SUPERVISION.....: 3 YEARS
DATE OF OFFENSE.....: 09-29-1998

G0002 MORE PAGES TO FOLLOW . . .

REGNO..: 15293-112 NAME: VINCENT, PHILLIP MATHEW

RESP OF: CLB / GOOD CONDUCT TIME RELEASE
PHONE..: 562-980-3536 FAX: 562-980-3543

----------PRIOR COMPUTATION NO: 010 ----------

COMPUTATION 010 WAS LAST UPDATED ON 11-02-2001 AT SHE AUTOMATICALLY

THE FOLLOWING JUDGMENTS, WARRANTS AND OBLIGATIONS ARE INCLUDED IN
PRIOR COMPUTATION 010: 010 010

DATE COMPUTATION BEGAN.....: 03-16-2000
TOTAL TERM IN EFFECT.....: 77 MONTHS
TOTAL TERM IN EFFECT CONVERTED..: 6 YEARS 5 MONTHS
EARLIEST DATE OF OFFENSE.....: 09-29-1998

JAIL CREDIT.....	FROM DATE	THRU DATE
	06-01-1999	06-23-1999
	08-25-1999	03-15-2000

TOTAL PRIOR CREDIT TIME.....: 227
TOTAL INOPERATIVE TIME.....: 0
TOTAL GCT EARNED AND PROJECTED..: 263
TOTAL GCT EARNED.....: 263
STATUTORY RELEASE DATE PROJECTED: 04-12-2005
SIX MONTH /10% DATE.....: N/A
EXPIRATION FULL TERM DATE.....: 12-31-2005

ACTUAL SATISFACTION DATE.....: 04-12-2005
ACTUAL SATISFACTION METHOD.....: GCT REL
ACTUAL SATISFACTION FACILITY....: CLB
ACTUAL SATISFACTION KEYED BY....: DT*

DAYS REMAINING.....: 263
FINAL PUBLIC LAW DAYS.....: 0

S0039 ALL CURRENT COMPS ARE SATISFIED

Vincent v. United States of America, et al.
Case No. 2:08-cv-03286-FMC-PJWx
Camara Declaration
Exhibit B

NCFSD 531.01 * INMATE HISTORY * 03-08-2009
PAGE 001 OF 001 * CASEWORKER * 14:56:59

REG NO..: 15293-112 NAME....: VINCENT, PHILLIP MATHEW
CATEGORY: CSW FUNCTION: PRT FORMAT:

FCL	ASSIGNMENT	DESCRIPTION	START DATE/TIME	STOP DATE/TIME
LVN	CSWB2	CAMARA EXT. 1416	11-09-2007 1219	11-12-2007 0430
LVN	CSWB2	CAMARA EXT. 1416	08-31-2007 1613	11-09-2007 0935
LVN	CSWB2	CAMARA EXT. 1416	08-08-2007 1751	08-31-2007 1201
LVN	CSWB2	CAMARA EXT. 1416	08-02-2007 1429	08-08-2007 1434
LVN	CSWB2	CAMARA EXT. 1416	04-13-2007 1211	08-02-2007 1234
OKL	HOM	HOLDOVER MALE	04-05-2007 1830	04-13-2007 0545
SHE	1B	B. FOSTER FTS:425-4371	02-27-2004 1426	10-14-2004 0739
SHE	1B	L. RIVERA FTS:425-4371	06-13-2001 1024	02-27-2004 1231
SHE	3A	T. BOLDT FTS 425-4349	12-14-2000 1445	06-13-2001 1024
SHE	UNASSG	UNASSIGNED NEW ARRIVALS	12-14-2000 0755	12-14-2000 1445
SHE	J2	S. MILLS FTS: 421-1511	12-07-2000 0920	12-14-2000 0735
SHE	UNASSG	UNASSIGNED NEW ARRIVALS	12-05-2000 1819	12-07-2000 0920
DUB	J	ARINDA COOLEY (FTS 462-0636)	11-28-2000 1434	12-05-2000 0602
LOM	CSW K	CSW K J. ANDREWS	04-18-2000 1148	05-16-2000 1322
LOM	CSW M/P-Z	M-UNT/J. YBARRA, 795-2470	04-18-2000 0829	04-18-2000 1148

G0000 TRANSACTION SUCCESSFULLY COMPLETED

Document 13

Medical Records from Dr. A. Poulose

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THOMAS P. O'BRIEN
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LEON W. WEIDMAN
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Attorneys for Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PHILLIP VINCENT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. CV 08-3286 FMC (PJWx) **EXPERT DISCLOSURE**

Defendant hereby discloses that it intends to offer the testimony of the following expert witness in the trial of this matter:

Dr. Lawrence P. Chong
1450 San Pablo Street, Suite 3618
Los Angeles, CA 90033

Attached hereto is Dr. Chong's curriculum vitae and report. Dr. Chong's fee for deposition testimony is $ 950 per hour for depositions at his office. Dr. Chong has agreed to testify at trial, and will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning his testimony, including any opinions he expects to give at trial, and its basis.

Defendant reserves the right to call as expert witnesses other physicians or medical practitioners involved in plaintiff's medical care/diagnosis and/or this case. Such individuals are known to plaintiff and his counsel and are identified more specifically in plaintiff's medical records, discovery responses, and expert disclosure. Defendant further reserves the right to call any expert witnesses disclosed by any other party to this action and to supplement this disclosure if necessary.

DATED: April 14, 2009

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

GWENDOLYN M. GAMBLE
Assistant United States Attorney
Attorneys for Defendant

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CURRICULUM VITAE

A. PERSONAL INFORMATION:

NAME IN FULL: **Lawrence Paul Chong, M.D.**

BUSINESS ADDRESS: Department of Ophthalmology
Keck School of Medicine of the
University of Southern California
Doheny Eye Institute
Richard K. Eamer Medical Plaza
1450 San Pablo Street, Suite 3617
Los Angeles, California 90033-4670

BUSINESS TELEPHONE: (323) 442-6466

HOME ADDRESS: 333 10th Street
Seal Beach, CA 90740

HOME TELEPHONE: (562) 493-4782

PLACE OF BIRTH: Los Angeles, California

CITIZENSHIP: U.S.A.

E-MAIL ADDRESS: lchong@usc.edu

B. EDUCATION:

HIGH SCHOOL: Alhambra High School
Alhambra, California
June, 1973

COLLEGE: University of Southern California
Los Angeles, California
B.S. Biology
June, 1977

MEDICAL SCHOOL: Harvard Medical School
Boston, Massachusetts
M.D. Medicine
June, 1981

INTERNSHIP:
Harbor-UCLA Medical Center
Los Angeles, California
Internal Medicine
June 1981 - June 1982

RESIDENCY:
Los Angeles County+USC Medical Center
Los Angeles, California
Ophthalmology
July 1982 - June 1985

FELLOWSHIP:
Duke University Eye Center
Durham, North Carolina
Retina/Vitreous Diseases
July 1985 - June 1986

HONORS AND AWARDS:
USC Valedictorian
Letters, Arts and Sciences, 1977
USC Order of the Palm
USC Phi Beta Kappa
USC Phi Kappa Phi
USC Trustee Scholar
Award for Excellence in Resident Training 1986
Best Doctors in America, 1996 – Present
American Academy of Ophthalmology Achievement Award, 1999
Honorary International Member of the Brazilian Vitreo-Retinal Society, 2004

LICENSURE:
California, #G048435, 1981
North Carolina, #286, 1985

BOARD CERTIFICATION:
American Board of Ophthalmology
June 2, 1987

C. PROFESSIONAL BACKGROUND:

ACADEMIC APPOINTMENTS:

Clinical Instructor in Ophthalmology
Department of Ophthalmology
Los Angeles County+USC Medical Center
Los Angeles, California
July 1986 - June 1987

Visiting Assistant Professor of Clinical Ophthalmology
Department of Ophthalmology
University of Southern California School of Medicine
Los Angeles, California
1987 - 1989

Assistant Professor of Clinical Ophthalmology
Department of Ophthalmology
University of Southern California School of Medicine
Doheny Eye Institute, Los Angeles, California
November 1989 - June 30, 1994

Associate Professor of Clinical Ophthalmology
Department of Ophthalmology
University of Southern California School of Medicine
Doheny Eye Institute, Los Angeles, California
July 1, 1994 – November 30, 2006

Professor of Clinical Ophthalmology
Department of Ophthalmology
University of Southern California School of Medicine
Doheny Eye Institute, Los Angeles, California
December 1, 2006 - Present

CLINICAL APPOINTMENTS:

Active Staff
Hollywood Presbyterian Medical Center, 2003 - Present

Active Staff
Doheny Eye Institute
Ambulatory Surgical Center, 1993 - Present

Courtesy Staff
San Gabriel Valley Medical Center, 1993 – Present

Active Staff
USC University Hospital, 1989 - Present

Active Staff
LAC+USC Medical Center, 1989 - Present

Active Staff
Norris Cancer Hospital , 1989 - 2001

Active Staff
Childrens Hospital of Los Angeles, 1989 - 1995

Active Staff
Doheny Eye Hospital, 1989 - 1993

Active Staff
Department of Veterans Affairs
Outpatient Clinic, 1989 - 1991

Chief of Retina Service
Department of Ophthalmology
City of Hope
1994 - 1996

Chief of Ophthalmology
Veteran's Administration
Outpatient Clinic
Los Angeles, California
1989 - 1991

SPECIFIC TEACHING RESPONSIBILITIES:

Medical Students:

Lectures for Introduction to Clinical Medicine (Second Year Students), 1991 - 1993
September 3, 1991
October 1, 1992
September 12, 1993
October 5, 1993

Lectures for Spring Basic and Clinical Science Rotation Objective Structure Clinic Assessment (OSCA) (Third Year Medical Students), 1991 - 1993
April 29, 1991
May 20, 1992
May 21, 1993

Lectures for Ophthalmology Medical Student Elective, 1993 - 1994
"Diabetic Retinopathy," 9:00-10:00 a.m., July 14, 1993
"Diabetic Retinopathy," 9:00-10:00 a.m., July 27, 1993
"Diabetic Retinopathy," 9:00-10:00 a.m., August 24, 1993
"Diabetic Retinopathy," 9:00-10:00 a.m., September 7, 1993
"Diabetic Retinopathy," 9:00-10:00 a.m., September 28, 1993
"Diabetic Retinopathy," 9:00-10:00 a.m., October 20, 1993
"Direct Ophthalmoscopy Workshop," 9:00-10:00 a.m., November 30, 1993
"Diabetic Retinopathy," 9:00-10:00 a.m., February 15, 1994
"Direct Ophthalmoscopy Workshop," 9:00-10:00 a.m., March 8, 1994

Residents:

Lectures for Ophthalmology Residents, 1990 - Present

"CRVO" Doheny Eye Institute, Los Angeles, CA, October, 1990.

"Macular Hole" Doheny Eye Institute, Los Angeles, CA, December 3, 1990.

"ROP" Doheny Eye Institute, Los Angeles, CA, May 6, 1991.

"CRVO" Doheny Eye Institute, Los Angeles, CA, August 5, 1991.

"Retinitis" Doheny Eye Institute, Los Angeles, CA, November 4, 1991.

"The Surgical Management of PVR" Doheny Eye Institute, Los Angeles, CA, February 1, 1993.

"Viral Retinitis (CMV)/Acute Retinal Necrosis Syndrome" Doheny Eye Institute, Los Angeles, CA, April 26, 1993.

"Retina," "Vitrectomy-Trauma" Doheny Eye Institute, Los Angeles, CA, July 1, 1993.

"Retina," "Vitrectomy-Trauma" Third Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 1, 1994.

"Introduction to Retina" First Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 1, 1994.

"Retinal Anatomy and Physiology" Doheny Eye Institute, Los Angeles, CA, August 5, 1994, 10:00am

"Vascular Disease Sickle Cell, HTN" Doheny Eye Institute, Los Angeles, CA, October 21, 1994, 10:00am

"Retina," "Vitrectomy-Trauma" Third Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 3, 1995.

"Introduction to Retina" First Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 6, 1995.

"Proliferative Vitreo-retinopathy" LAC-USC Medical Center, Los Angeles, CA, January 28, 1997.

"Retinopathy of Prematurity" LAC-USC Medical Center, Los Angeles, CA, February 11, 1997.

"Choroidal detachments" Resident Service, LAC-USC Medical Center, Los Angeles, CA, March 11, 1997.

"Retinal Drawing, Pathophysiology of Retinal Tear and Detachment" LAC-USC Medical Center, Los Angeles, CA, March 25, 1997.

"Retina," "Vitrectomy-Trauma" Third Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 1, 1999.

"Retina," "Vitrectomy-Trauma" Third Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 5, 2000.

"Introduction to Diabetic Retinopathy" First Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 7, 2000.

"Vitrectomy-Trauma" Third Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 2, 2001.

"Vitrectomy-Trauma" Third Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 1, 2002.

"Intro to Retina" Second Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 3, 2002.

"Diabetic Retinopathy" Third Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 10, 2002.

"Retina" Third Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 1, 2003.

"Diabetic Retinopathy" First Year Resident Orientation, Doheny Eye Institute, Los Angeles, CA, July 7, 2003.

"Proliferative Vascular Disease: FEVR, Eales, Sickle Cell, Pars Planitis, VKH, PIC, MFC, Sarcoidosis" Doheny Eye Institute, Los Angeles, CA, November 14, 2003.

"Diabetic Retinopathy #2 (Surgical)" Doheny Eye Institute, Los Angeles, CA, January 23, 2004.

"Myopia" Resident Retina Service. Doheny Eye Institute, Los Angeles, CA, May 28, 2004

"Diabetic Retinopathy" Doheny Eye Institute, Los Angeles, CA, July 5, 2005.

"Retinopathy of Prematurity" LAC-USC Medical Center, Los Angeles, CA, September 5, 2006.

"Treatment of CNV Retinitis" LAC-USC Medical Center, Los Angeles, CA, January 9, 2007.

"Surgical Diabetes" LAC-USC Medical Center, Los Angeles, CA, February 20, 2007.

"PVR" LAC-USC Medical Center, Los Angeles, CA, April 24, 2007.

"Surgical Treatment Diabetic Retinopathy" LAC-USC Medical Center, Los Angeles, CA, February 19, 2008.

"Intro to PVR" LAC-USC Medical Center, Los Angeles, CA, April 22, 2008.

Clinic Attending

Veteran's Administration Ophthalmology Outpatient Clinic, 1989 -1991

LAC+USC Diabetic Retina Clinic
1st year and 3rd year Residents, 1989 - Present

Doheny Clinic (2nd year) Residents, 1990 - Present

Children's Hospital Medical Center (Retinopathy of Prematurity and Retina Clinic-2nd year) 1989 - 1996

Fellows: Retina Clinical Fellows Teaching

Clinic Attending
Doheny Eye Center

O.R. Attending
Doheny Ambulatory Surgerical Center
USC University Hospital
San Gabriel Valley Medical Center
Hollywood Presbyterian Hospital
LAC+USC Medical Center

American Academy of Ophthalmology Annual Meeting Teaching Responsibilities:

Course Director:

1. American Academy of Ophthalmology Instruction Course: "The Portable Slitlamp Diode Laser: Theory and Practical Application for the General Ophthalmologist." Annual Meeting of the American Academy of Ophthalmology, Atlanta, GA. November 1, 1990.
2. American Academy of Ophthalmology Instruction Course: "The Portable Slitlamp Diode Laser: Theory and Practical Application for the General Ophthalmologist." Annual Meeting of the American Academy of Ophthalmology, Anaheim, CA, October 14, 1991.

3. American Academy of Ophthalmology Instruction Course: "The Portable Slitlamp Diode Laser: Theory and Practical Application for the General Ophthalmologist." Annual Meeting of the American Academy of Ophthalmology, Dallas,TX, November 11, 1992.

Course Instructor:

1. American Academy of Ophthalmology Special Focus/Skills Transfer Course: "Posterior Segment Laser/Fluorescein Angiography." Rancho Mirage, CA January 21-22, 1990

2. Keeler Microlase Breakfast Symposium: "Diode Laser Experiences." Annual Meeting of the American Academy of Ophthalmology, Atlanta, Georgia, October 29, 1990.

3. American Academy of Ophthalmology Laser Skills Transfer Course: "Laser Lab: Use of Binocular Indirect Ophthalmoscope Laser Delivery Systems." Annual Meeting, American Academy of Ophthalmology, Atlanta, Georgia, November 1, 1990.

4. American Academy of Ophthalmology Laser Skills Transfer Course:"Retinal Laser Application Laboratory: Use of Binocular Indirect Ophthalmoscope Laser Delivery System." Annual Meeting of the American Academy of Ophthalmology, Anaheim, CA, October 15, 1991.

5. American Academy of Ophthalmology Laser Skills Transfer Course:"Retinal Laser Application Laboratory: Use of Binocular Indirect Ophthalmoscope Laser Delivery System." Annual Meeting of the American Academy of Ophthalmology, Anaheim, CA, November 10, 1992.

6. American Academy of Ophthalmology Laser Skills Transfer Course:"Retinal Laser Application Laboratory: Use of the Slit Lamp Delivery System." Laboratory Instructor. Annual Meeting of the American Academy of Ophthalmology, Chicago, Il., November 15, 1993.

7. American Academy of Ophthalmology Laser Skills Transfer Course: "Retinal Laser Application Laboratory: Use of the Slip Lamp Delivery System." Annual Meeting of the American Academy of Ophthalmology, Atlanta, GA, October 31, 1995.

8. American Academy of Ophthalmology Laser Skills Transfer Course: "Binocular Indirect Laser: Retinal Laser Application Laboratory." Annual Meeting of the American Academy of Ophthalmology, Atlanta, GA, October 31, 1995.

9. American Academy of Ophthalmology Academy Skills Transfer Course: "Diabetes 2000 Workshop on Diabetic Retinopathy." Annual Meeting of the American Academy of Ophthalmology, Orlando, FL, October 26, 1999.

10. American Academy of Ophthalmology Academy Instruction Course Program: "Intraocular Manifestations of Systemic Diseases in AIDS Patients." Annual Meeting of the American Academy of Ophthalmology, Orlando, FL, October 27, 1999.

11. "Diabetes 2003: Course on Diabetic Retinopathy." Annual Meeting of the American

Academy of Ophthalmology, Anaheim, CA, November 15-18, 2003.

SERVICE TO UNIVERSITY:

Medical Director Microsurgical Advanced Design Laboratory (MADLAB)
Doheny Retina Institute
Doheny Eye Institute, Los Angeles, California
2004 - Present

Chief Operating Officer
Doheny Retina Institute
Doheny Eye Institute, Los Angeles, California
2001 - Present

Clinic Executive Committee
Doheny Eye Medical Group (USC)
1993 - Present

Director of Retina Service
Doheny Eye Medical Group (USC)
1993 – 2001

LAC+USC O.R. Committee
1993 – 1998

USC Laser Safety Committee (University-wide)
1993 - 1996
Director of Managed Care
Doheny Eye Medical Group (USC)
1993 – 1995

Planning/Marketing/Contracting Committee
USC Physicians
1993 - 1995

University Affiliates IPA Advisory Committee
USC

1993 - 1995

Managed Care Committee
Doheny Eye Medical Group (USC)
1993 - 1995

Information Systems Committee
Doheny Eye Institute (USC)
1993 - 1995

Doheny Eye Hospital: Clinical Services Committee
Doheny Eye Medical Group (USC)
1993 – 1995

Clinic Efficiency Committee
Doheny Eye Medical Group (USC)
1993 - 1994

Chairman Clinic Reengineering Task Force
1993 – 1994

External Business Relations Group
Doheny Eye Institute (USC)
1990 - 1993

USC Long Range Planning Sub-Committee on the
Ophthalmology Chief Residency
Chairman
1990 - 1991

Residency Training Committee
Department of Ophthalmology
University of Southern California
1989 - 1993

MILITARY SERVICE: None.

D. <u>SOCIETY MEMBERSHIPS:</u>

LOCAL:

California Association of Ophthalmology
1987 - Present

California Medical Association
1987 – Present

Association of Philippine Ophthalmologists in America
2001 - Present

NATIONAL/INTERNATIONAL:

American Academy of Ophthalmology
1987 - Present

American Medical Association
1987 - Present

Association for Research in Vision and Ophthalmology
1990 - Present

Retina Society
1994 - Present

Vitreous Society
1993 - Present

Club Jules Gonin
2000 – Present

Club Vit
2001 – Present

E. <u>CONSULTANTSHIPS</u>

PUBLIC SERVICE:

Retina Society
Ganciclovir Coverage Policy Task Force
1996

American Board of Ophthalmology

Associate Examiner
1995 – Present

American Board of Ophthalmology
Special Associate Examiner
2004

American Board of Ophthalmology
Office Record Review Module(s)
Myopia, Macular Degeneration, and Retinal Detachment
2007

PRIVATE SERVICE:

Allergan, Inc.
Retina Disease Advisory Panel
1995

F. <u>RESEARCH ACTIVITIES:</u>

COMPLETE BIBLIOGRAPHY: Appended

MAJOR AREAS OF RESEARCH INTEREST:

Vitrectomy Instrumentation and Techniques

RESEARCH IN PROGRESS:

Development of Minimally Invasive Vitrectomy Techniques and Instrumentation

Feasibility of Office Based Vitrectomy

Medical Director Microsurgical Advanced Design and Development Laboratory which consists of 2 engineers, 1 engineer machinist, 1 administrative assistant, 1 computer animator product designer

RESEARCH GRANTS IN PAST FIVE YEARS:

1. A Randomized, Parallel Double-Masked, Multicenter, Multicountry, $198,701/78

Phase111B Study of Protein Kinase C Inhibitor B-Diabetic Macular Edema to Prevent the Progression of Diabetic Eye Disease 5% Effort
Principal Investigator
Eli Lilly
1998 – 2004

2. A Randomized, Parallel Double-Masked, Multicenter, Multicountry, $120,661.25
Phase111B Study of Protein Kinase C Inhibitor B-Diabetic Diabetic MacularRetinopathy to Prevent the Progression of Diabetic Eye Disease 5% Effort
Principal Investigator
Eli Lilly
1998 – 2004

3. Microsurgical Advanced Design Laboratories $1,000,000
Medical Director 20% Effort
Bausch & Lomb
2004 – Present

G. <u>JOURNAL EXPERIENCE:</u> Editorial Board Member for:

The Brazilian Ophthalmological Journal (Revista Brasileira de Oftalmologia) 2007-2008

Ad hoc reviewer for:

Archives of Ophthalmology 1999 - present

American Journal of Ophthalmology 1993 - present

Ophthalmology 1994 - present

Retina 1996 - present

The Journal of Antimicrobial Chemotherapy 2001 - present

British Journal of Ophthalmology 2003 - present

Acta Ophthalmologica Scandinavia 2007 - present

EDITORSHIPS: Editor of Surgical Videos 4th E-Edition Ryan Book

H. BIBLIOGRAPHY:

PEER REVIEW JOURNALS:

1. **Chong, L.P.**, de Juan, Jr., E., McCuen, B.W. and Landers, III, M.B.: Endophthalmitis in a silicone oil-filled eye. Am J Ophthalmol 102(5):660-661, 1986.

2. **Chong, L.P.**, Machemer, R. and de Juan, E.: Vitrectomy for advanced stages of retinopathy of prematurity. Am J Ophthalmol 102(6);710-716, 1986.

3. Dugel, P.U., Rao, N.A., Forster, D.J., **Chong, L.P.**, Frangieh, G.T., and Sattler, F.: Pneumocystis carinii choroiditis and pentamidine. Am J Ophthalmol 110:113-117, 1990.

4. **Chong, L.P.**: A disposable iris retractor for vitrectomy. Am J Ophthalmol 112:731-732, 1991.

5. Alfaro, D.V., Tran, V.T., Runyan, T., **Chong, L.P.**, Ryan, S.J., and Liggett, P.E.: Vitrectomy for perforating eye injuries from shotgun pellets. Am J Ophthalmol 114:81-85, 1992.

6. Ghadially R. and **Chong, L.P.**: Ichthyoses and hyperkeratotic disorders. Dermatol Clin 10:597-607, 1992.

7. Moorthy, R.S., **Chong, L.P.**, Smith, R.E., and Rao, N.A.: Subretinal neovascular membranes in Vogt-Koyanagi-Harada syndrome. Am J Ophthalmol 116:164-170, 1993.

8. **Chong, L.P.**, Ozler, S.A., de Queiroz, J.M. and Liggett, P.E.: Indocyanine green-enhanced diode laser treatment of melanoma in a rabbit model. Retina 13:251-259, 1993.

9. Krueger, R.R., Morales, R.B., Smith, R.E., Sliney, D.H., and **Chong, L.P.**: New stroboscopic light source for intraoperative retinal fluorescein angiography. Arch Ophthalmol 112:240-422, 1994.

10. Krueger, R.R., Morales, R.B., **Chong, L.P.**, and Smith, R.E.: New stroboscopic light source and technique for intraoperative retinal fluorescein angiography during penetrating keratoplasty SPIE 2126:283-290, 1994.

11. Hudson, H.L., **Chong, L.P.**, Frambach, D.A., Valencia, M., Green, R.L., and Lopez, P.F.: Encircling panretinal laser photocoagulation may prevent macular detachment after vitrectomy for proliferative diabetic retinopathy. Internatl Ophthalmol 18:101-104, 1994.

12. Rutzen, A.R., Ortega-Larrocea, G., Dugel, P.U., **Chong, L.P.**, Lopez, P.F., and Rao, N.A.: Retinal and choroidal biopsy in intraocular inflammation: A clinicopathologic study. Tran Amer Ophthalmol Soc 112:431-458, 1994.

13. Rutzen, A.R., Ortega-Larrocea, G., Dugel, P.U., **Chong, L.P.**, Lopez, P.F., Smith, R.E., and Rao, N.A.: Clinicopathologic study of retinal and choroidal biopsies in intraocular inflammation. Am J Ophthalmol 119:597-611, 1995.

14. **Endophthalmitis Vitrectomy Study Group:** Results of the endophthalmitis vitrectomy study: A randomized trial of immediate vitrectomy and intravenous antibiotics for the treatment of postoperative bacterial endophthalmitis. Arch Ophthalmol 113:1479-1496, 1995.

15. Kim, J.W., Freeman, W.R., El-Haig, W., Maguire, A.M., Arevalo, J.F., Azen, S.P. and **The Vitrectomy for Macular Hole Study**. Baseline characteristics, natural history and risk factors to progression in eyes with Stage 2 macular holes: Results from a prospective randomized clinical trial. Ophthalmology 102:1818-1829, 1995.

16. Marx, J.L., Kapusta, M.A., Patel, S.S., LaBree, L.D., Walonker, F., Rao, N.A., and **Chong, L.P.**: Use of the ganciclovir implant in the treatment of recurrent cytomegalovirus retinitis. Arch Ophthalmol 114:815-820, 1996.

17. Patel, S.S., Rutzen, A.R., Marx, J.L., Thach, A.B., **Chong, L.P.**, and Rao, N.A.: Cytomegalovirus papillitis in patients with acquired immunodeficiency syndrome. Visual prognosis of patients treated with ganciclovir and/or foscarnet. Ophthalmology 103:1476-1482, 1996.

18. Chen, P.P., and **Chong, L.P.**: Coats'-like response in a patient with pars planitis. British J. Ophthal. 80:675-676, 1996.

19. Kim, J.W., Freeman, W.R., Azen, S.P., El-Haig, W., Klein, D.J., Bailey, I.L., and **The** Vitrectomy **for Macular Hole Study Group**: Prospective randomized trial of vitrectomy or observation for Stage 2 macular holes. Am J Ophthalmol 121:605-614, 1996.

20. **The Endophthalmitis Vitrectomy Study Group**: Microbiologic factors and visual outcome in the endophthalamitis vitrectomy study. AJO 122:830-846, 1996.

21. Han, D.P., Wisniewski, S.R., Wilson, L.A., Barza, M., Vine, A.K., Doft, B.H., Kelsey, S.F., and **The Endophthalmitis Vitrectomy Study Group**: Spectrum and susceptibilities of microbiologic isolates in the endophthalmitis vitrectomy study. AJO 122:1-17, 1996.

22. Guo, A.G., Lee, L.W., Rife, L.L., Kwitko, S., Rao, N.A., **Chong L.P.**, Ogden, T.E., and Smith R.E.: Anterior segment prosthesis development: retinal function following anterior segment removal. Cornea 16:88-93, 1997.

23. Freeman, W.R., Azen, S.P., Kim, J.W., El-Haig, W., Mishell III, D.R., Bailey, I, and **The Vitrectomy for Treatment of Macular Hole Study Group**: Vitrectomy for the treatment of full-thickness Stage 3 or 4 macular holes. Results of a multicentered randomized clinical trial. Arch Ophthalmol 115:11-21, 1997.

24. Banker, A.S., Freeman, W.R., Kim, J.W., Munguia, D., Azen, S.P., and **The Vitrectomy for Macular Hole Study**: Vision-threatening complications of surgery for full-thickness macular holes. Ophthalmology 104:1442-1453, 1997.

25. Bannerman, T.L., Rhoden, D.L., McAllister, S.K., Miller, J.M., Wilson, L.A., and **The Endophthalmitis Vitrectomy Study Group:** The source of coagulase-negative staphylococci in the endophthalmitis vitrectomy study. Arch Ophthalmol 115:357-361, 1997.

26. Wisniewski, S.R., Hammer, M.E., Grizzard, S., Kelsey, S.F., Everett, D., Packo, K.H., Yarian, D.L., Doft, B.H., and **the EVS Study Group**: An investigation of the hospital charges related to the treatment of endophthalmitis in the endophthalmitis vitrectomy study. Ophthalmology 104:739-745, 1997.

27. Barza, M., Pavan, P.R., Doft, B.H., Wisniewski, S.R., Wilson, L.A., Han, D.P., Kelsey, S.F., and **The Endophthalmitis Vitrectomy Study Group**: Evaluation of microbiological diagnostic techniques in postoperative endophthalmitis in the endophthalmitis vitrectomy study. Arch Ophthalmol 115:1142-1150, 1997.

28. Johnson, M.W., Doft, B.H., Kelsey, S.F., Barza, M., Wilson, L.A., Barr, C.C., Wisniewski, S.R., and **The Endophthalmitis Vitrectomy Study Group**: The endophthalmitis vitrectomy study. Relationship between clinical presentation and microbiologic spectrum. Ophthalmology 104:261-272, 1997.

29. Musch, D.C., Martin, D.F., Gordon, J.F., Davis, M.D., Kuppermann, B.D. and **The Ganciclovir Implant Study Group**: Treatment of cytomegalovirus retinitis with a sustained-release ganciclovir implant. N Engl J Med 10;337(2):83-90, 1997.

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8. **Chong, L.**P.: "Use of Adjuncts in Surgery for Age-Related Macular Degeneration." In Textbook of Age-Related Macular Degeneration Second Edition, Lim JI ed. Informa Healthcare, 2007.

9. **Chong,** L.P., Magalhães, O. Jr., De Boer, C., Fang, S., Kerns, R., McCormick, M., Texiera Pinto, A. and Humayun M.S.: "An Improved Understanding of Vitreous Cutting." In Emerging Technologies in Retinal Diseases, Eds: S. Saxena and S.R., Sadda. Jaypee Brothers Medical Publishers, 2009; 267-272.

IN PRESS:

1. **Chong, L.P.** and Chao, J.R.: "Retina Imaging." In Optical Coherence Tomography in Retina Diseases, Eds. S. Saxena and T. A. Meredith. Jaypee.

2. Chong, L.P.: "Vitreous Implants." In Basic Techniques of Ophtalmic Surgery, Eds. T. Gauthier.

3. Magalhaes, O., Barnes, A., DeBoer, C., Humayun, M., Chong, L.P., Bhadri, P., Fang, S.: "Guillotine Performance. Duty cycle analysis of vitrectomy systems." In Retinal Cases & Brief Reports.

BOOKS:

1. The Diabetic Education Study Group.: Detection and Referral of Diabetic Eye Disease: A Guide for Practicing Physicians, Carter Printing Company, Richmond, VA 1992.

2. Smiddy, W., **Chong, L.P.**, and Frambach, D.A.: Color Atlas of Ophthalmic Surgery: Retinal Surgery and Ocular Trauma J.B. Lippincott, Philadelphia, PA, 1995

I. PRESENTATIONS AT SCIENTIFIC/CLINICAL MEETINGS:

INVITED LECTURESHIPS:

1. Brooklyn Ophthalmological Society, Grand Rounds, Brooklyn, NY, "Clinical Evaluation of the Diode Laser." March 26, 1990.

2. St. Vincent's Hospital and Medical Center of New York, Department of Ophthalmology, Grand Rounds, New York City, NY "Clinical Evaluation of the Diode Laser." March 26, 1990.

3. St. Joseph's Hospital, Department of Ophthalmology, Grand Rounds, Orange, CA, "CMV Retinitis in the HIV + Patient." September 24, 1990.

4. Advanced Lasers in Ophthalmology Symposium, Medical Laser Industry Report, 1990 Annual Meeting, American Academy of Ophthalmology, Atlanta, Georgia, "Treatment of Retinal Disease with the Diode Semiconductor Laser." October 27, 1990.

5. Georgetown University School of Medicine, Department of Ophthalmology, Grand Rounds, Washington DC, "A Video Atlas of SLO Fluorescein Videoangiography Angiography." January 11, 1991.

6. Riverside Community Hospital, Department of Ophthalmology, Grand Rounds, Riverside, CA. "Diode Laser, Part II." June 12, 1992.

7. University of Southern California School of Medicine, Division of Endocrinology, Diabetes and Hypertension, Department of Medicine, Grand Rounds, Los Angeles, CA, "Diabetic Retinopathy." August 14, 1992.

8. Tianjin Eye Hospital, Department of Ophthalmology, Grand Rounds, Tianjin, People's Republic of China, "Clinical Applications of the Diode Laser," "Dye Enhanced Laser Treatment of Experimental Ocular Melanoma," "An RPE Selective Laser." October 27, 1992.

9. Beijing-Japan Friendship Hospital, Grand Rounds, Department of Ophthalmology, Beijing, People's Republic of China, "Clinical Applications of the Diode Laser," "Dye Enhanced Laser Treatment of Experimental Ocular Melanoma," "An RPE Selective

Laser." October 28, 1992.

10. 5th National Congress of Chinese Society of Ophthalmology, Beijing, People's Beijing, Republic of China, "An RPE Selective Laser." October 30, 1992.

11. Taiwan National Medical University, Department of Ophthalmology, Grand Rounds, Taipei, Taiwan, "Selective RPE Laser Photocoagulation," "ICG Enhanced Laser Treatment of Malignant Melanoma," "SLO Fluorescein Angiography Conference." February 22, 1993.

12. Veteran's General Hospital, Department of Ophthalmology, Grand Rounds, Taipei, Taiwan, "Selective RPE Laser Photocoagulation," "ICG Enhanced Laser Treatment of Malignant Melanoma," "SLO Fluorescein Angiography Conference." February 26, 1993.

13. California Pacific Medical Center, Department of Ophthalmology, Mini Symposium, San Francisco, CA, "Managed Eye Care for the 1990's." October 24-25, 1993.

14. VI Congresso Sul Brasileiro de Oftalmologia, Curitiba, Brazil, "Surgical Management of Macular Holes," "Clinical and Research Applications of Diode Laser," "Photoreceptor Transplantation." May 19-21, 1994.

15. San Gabriel Valley Optometric Society, Pasadena, CA, "Diagnosis and Treatment of Age Related Macular Degeneration." November 12, 1994.

16. The Ninth Annual Mid-Winter Sarasota Vitreo-Retinal Update Course, Sarasota, Florida, "ICG in ARMD: USC Experience," "SLO & Videoangiography: Is it Helpful in Diagnosis of ARMD?," "Photoreceptor Cell Transplantation," "Eye Wall Biopsy in Diagnosis of AIDS Retinopathy," "Ganciclovir Implant Delivery in CMV Retinitis," and "Results of the Diabetic Retinopathy Education Study." February 14-17, 1995.

17. 15th Congress of the Asia-Pacific Academy of Ophthalmology, Hong Kong, China,"Age-Related Macular Degeneration: Future Treatment." March 6-10, 1995.

18. Centro Brasileiro de Cirurgia de Olhos, Simposio Internacional de Retina e Vitreo, Goiania, Brazil, "The Treatment of CMV Retinitis by Intraocular Sustained Release Delivery," "Retinal Transplantation," "Vitreous, Retinal and Eyewall Biopsy in the Diagnosis of Opportunistic Infections in AIDS," "Ocular Applications of the Diode Laser." April 7-8, 1995.

19. Oculistas Associado, Department of Ophthalmology, Grand Rounds, Rio de Janeiro,

Brazil, "Intravitreal Ganciclovir Implant." April 13, 1995.

20. Manila Central University Medical Alumni Association in America Annual Convention, Hilton Hotel Anaheim, CA, "Diabetic Retinopathy." July 28 & 29, 1995.

21. California Pacific Medical Center, Department of Ophthalmology, Visiting Professor, Summer Hiatus Ancillary Retina Curriculum, San Francisco, CA. "Surgical Management of Retinal Detachment Complicated by PVR." August 27-29, 1995.

22. Fluminense Federal University, First Update Ophthalmological Course in Retina & Vitreous Diseases, Rio de Janeiro, Brazil, "Retinal Transplantation," "Vitreous, Retinal and Eyewall Biopsy in the Diagnosis of Opportunistic Infections in AIDS," "Drainage of Serous Choroidal Detachment," "Management of Expulsive Hemorrhagic Choroidal Detachment," "Pars Plana Lensectomy," and "Repair of Ruptured Globe." November 24-25, 1995.

23. Prontoclinica de Olhos, Department of Ophthalmology, Grand Rounds, Natal, Brazil, "Ganciclovir Implant", "Diagnostic Choroidal Biopsy." November 27, 1995.

24. University of Southern California School of Medicine, Doheny Vision Research Center, Issac Bekhor Seminar Series, Los Angeles, CA, "Selective Laser Photocoagulation of the Retinal Pigment Epithelium." April 5, 1996

25. California Pacific Medical Center/Pacific Vision Department of Ophthalmology Foundation Visiting Professor, Grand Rounds, San Francisco, CA. "Retinal and Eyewall Retinal-Choroidal Diagnostic Biopsy." January 6, 1997

26. Hospital de Olhos Pernambuco, Receife, Pernambuco, Brazil, Grand Rounds, "ICG Enhanced Laser Treatment of Choroidal Melanoma," "Use of Ganciclovir Implant for Recurrent CMV Retinitis," "Select R.P.E. Laser Therapy," "Use of Wide Angle View System in P.P.V." May 26, 1997

27. Update Course of the Hospital de Olhos Ruy Cunha, Ilheus, Bahia, Brazil, "ICG Enhanced Laser Treatment of Choroidal Melanoma," "Use of Ganciclovir Implant for Recurrent CMV Retinitis," "Selective R.P.E. Laser Therapy," "Use of Wide Angle View System in P.P.V." May 28-31, 1997.

28. Jornada de Atualizacao: Trauma Ocular, Campinas, Sao Paulo, Brazil, "Management of Intraocular Foreign Bodies," "Post-traumatic Ocular Infections," "Management of Dislocated Intraocular Lenses," "Choroidal Hemorrhagic Detachments," "Management of

Dislocated and Retained Lens Material," "Management of penetrating ocular injuries." October 17-18, 1997.

29. Fifth International Congress of Fondazione G.B. Bietti per lo Studio e la Ricerca in Oftalmologia: Anterior and Posterior Segment Surgery: Mutual Problems and Common Interests, Rome, Italy, "Management of Neovascular Glaucoma by Combined Vitrectomy and Seton Tube Placement," "Our Experience with Combined Penetrating Keratoplasy, Anterior Segment Reconstruction, Seton Tube Placement and Vitrectomy," September 24-27, 1997.

30. Phoenix Ophthalmology Society, Phoenix, AZ, "Novel Strategies in the Diagnosis and Management of AIDS Associated Intraocular Infection," January 10, 1998.

31. The 2nd International Symposium on: The Challenges & Controversies of Ophthalmology & Visual Sciences in the Next Millenium, Kowloon, Hong Kong, "The Multicenter Protease Kinase-B Inhibitor Clinical Trial: An Oral Systemic Agent for Diabetic Retinopathy," "Photodynamic Therapy of Subfoveal Choroidal Neovascular Membranes: The Multicenter Verteporfin Clinical Trial," August 20-23, 1998.

32. Salvador Retina Course: Salvador Brazil, "The Lilly PKE inhibitor trial for diabetic retinopathy," "Visudyne therapy for macular degeneration," "Macular translocation surgery for macular translocation," April 10-14, 2000,

33. Simpósio Internacional de Retina E Vitreo de Londrina, Londrina - Paraná, Brazil, "Evolution of Diabetic Vitrectomy," "PDT for ARMD," "Rifabutin Associated Uveitis.", April 7, 2001.

34. Grand Rounds Universitate de Sao Paolo, Sao Paolo, Brazil, "Evolution of Diabetic Vitrectomy." April 16, 2001.

35. University of California San Francisco, School of Medicine, Department of Ophthalmology, Visiting Professor. Grand Rounds. San Francisco, CA, "3M" Conference (Morbidity, Mortality, and Microsurgery), "Evolution of Diabetic Vitrectomy: A Single Surgeon's Perspective." March 29, 2001.

36. 107th Annual Meeting Japanese Ophthalmological Society, Kyushu, Japan, "Twenty-five Gauge Vitrectomy: in A Sutureless Approach to Intraocular Surgery." April 18-20, 2003.

37. Sao Paulo Macular Course, Sao Paulo, Brazil, "Intraocular Retinal Prosthesis," "25-Gauge Vitrectomy," "Biomedical Engineering and Vitreoretinal Surgery: New

Instruments." August 30, 2003.

38. Salvador Macular Course, Salvador, Brazil, "25-Gauge Vitrectomy." September 3, 2003.

39. Recife Grand Rounds, Hospital dos Ohlos, Pernambuco, Recife, Brazil, "25-Gauge Vitrectomy," "Intravitreal Prosthesis and Vitreo-retinal Surgeries," "Biomedical Engineering and Vitreoretinal Surgery: New Instruments." September 9, 2003.

40. The Eighteenth Annual Mid-Winter Sarasota Vitreo-Retinal Update Course, Sarasota, Florida, "Novel Approaches to Intraocular Drug Delivery," "Retina Chip: Vision for the Future?," "25-Gauge Vitrectomy," "Retinal Vascular Surgery." February 13-14, 2004.

41. Inaugural Meeting of the Centro de Estudos Hospital de Olhos, Niteroi, Rio de Janeiro, Brazil, "Retinal Prosthesis and Artificial Vision," "Sheathotomy in BRVO," "New MadLab Instrumentation," "Quantitative FA," "Update in PDT." March 30, 2004.

42. XXIX Congresso da Sociedade Brasileira de Retina e Vitreo, CentroSul, Florianopolis/SC, Brazil, "Novel Drug Delivery Systems," "Doheny Experience with Branch Retinal Sheathotomy," "Oclusões Vasculares da Retina-Modalidades de Tratamento," "Membrana Neovascular Coroidiana-Tratamento Cirúrgico," " Why I Prefer 25-Gauge Vitrectomy," "Retinopatia Diabética-Tratamento Cirúrgico," "Trauma Ocular," "New Madd Lab Vitrectomy Instrumentation," "Quantitative Fluorescein Angiography: The Next Steop in Imaging," "Office Based Vitrectomy: Myth or Reality." April 1-3, 2004.

43. II Curso Avancado de Cirurgia Vitreo-Retiniana: Diabetes e Complicacoes Cirurgicas, Sao Paulo-SP, Brazil, "Novel Drug Delivery System to the Eye," "Real Time 25-Gauge Surgical Vitrectomy Presentation and Discussion," Discussions de Casos Clinical (Grand Rounds), UNIFESP-EPM, Department of Ophthalmology, Federal University of Sao Paulo Schola Paulista Medical School, October 15-16, 2004.

44. 4º Curso Clínica Oftalmológica Pasteur. Actualizacion de Tópicos Relevantes, Santiago, Chile, "Angiografía Fluoresceínica Cuantitativa," "Nuevos Sistemas de Liberacion de Fármacos Oculares," "Vitrectomía 25G," "Soluciones de Ingeniería Biomédica Para Vitrectomía," "Evolución de la Vitrectomía en Diabéticos," "Diagnóstico y Tratamiento de Las Manifestaciones Oculares del SIDA," "Vitrectomía en el Trauma Ocular." November 12 and 13, 2004.

45. 4th St. Christoph Vitrectomy Meeting, Bellevue Des Alpes, Berne Switzerland, "Painless

Minimally Invasive Technique (25 Gauge Vitrectomy Without Scleral Buckle) for the Repair of Acute Retinal Detachment." January 26, 2005.

46. XXV Pan-American Congress of Ophthalmology, Invited Speaker, Santiago, Chile, "Prophylaxis for AMD (AREDS, Laser, Anecortave Acetate)." March 18-21, 2005.

47. XXX Congresso da Sociedade Brasileira de Retina e Vitreo, Blue Tree Park Angra dos Reis – Rio de Janeiro, Brazil, "More Rapid Visual Recovery with 25-Gauge Compared with 20 Gauge Vitrectomy," "Managing and Preventing Complications of 25 Gauge Surgery," "25 Gauge Vitrectomy Repair of Acute Rheghmatogenous Retinal Detachment: Does it Work?" April 14-16, 2005.

48. III Congresso dos Centros de Ensino de Oftalmologia do Parana, Hotel Pestana, Curitiba – Parana, Brazil, "No Suture Vitrectomy," "Retinal Prosthesis," "Drug Delivery System." November 11-12, 2005.

49. III Curso Avancado de Cirurgia e Tratamento de Doencas Maculares com o tema Novas Tecnicas no Tratamento das Doencas Maculares, Centro de Estudos e Pesquisas do Hospital Samaritano – SP, Brazil, "Improved Understanding of Vitrectomy: Qualitative High-Speed Video Analysis of Vitreous Movement Around the Aperture of Vitreous Cutters," "Improving Fiberoptic Light Sources," "Vitreous Removal Rates and Corresponding High-Speed Vide Performance Analysis of 25-Gauge Guillotine Electric and Pneumatic Handpiece," "An Improved Technique for the Management of Vitreous Loss by Anterior Segment Surgeons Using a Custom Phako Anterior Chamber Maintainer and Pars Plana Vitrectomy." December 9-10, 2005.

50. The Annual Meeting of the Penido Burnier Eye Institute, Invited Speaker, Campinas, Brazil, "Improved Understanding of Vitrectomy: Qualitative High Speed Video Analysis of Vitreous Movement Around the Aperture of Vitreous Cutters," "Vitreous Removal Rates and High-Speed Video Analysis of 25-Gauge Vitrectomy Cutters," "Update on the Artificial Retina," "Expanded Indications for 25-Gauge Vitrectomy," "Intravitreal Drug Delivery Devices." June 1-4, 2006.

51. Jornada Internacional do Grupo de Retina da Bahia e do Clube do Olho, Invited Speaker, Bahia, Brazil, "New Indications for 25-Gauge Vitrectomy," "Novel Retinal Imaging Systems," "Future Perspectives in Retina," "A New Understanding of Vitreous Cutting." December 8-9, 2006.

52. XVIII Jornada Sul Mineira de Oftalmologia, Hotel Monreale, Invited Speaker, Poços de Caldas MG, Brazil, "Artificial Vision" and "High-Tech Ophthalmology." June 22-23,

2007.

53. 40th Annual Reunion of the Dominican Society of Ophthalmology, Casa de Campo, La Romana, Dominican Republic, "Artificial Retina," "Diabetic Retinopathy Actualization Course," and "Macular Degeneration Actual Technique." June 28 – July 1, 2007.

54. 11th Annual Jornada de Actualizacao, Centro de Diagnostico Oftalmologico, VR, Baja Manso, Rio de Janeiro, Brazil, "Perspective in Diabetic Retinopathy" and "Artificial Vision." August 3-4, 2007.

55. 12th Congress of Chinese Ophthalmological Society (CCOS), Zhengzhou International Convention and Exhibition Center, Henan Province, Zhengzhou, China, "Improved Understanding of the Vitreous Cutting." August 29 – September 2, 2007.

56. The Annual Meeting of the Ophthalmological Society of Taiwan, Taipei Convention Center, Taipei, Taiwan, "Improved Understanding of Vitrectomy." December 14-17, 2007.

57. 5th St. Christoph Vitrectomy Meeting, Bellevue Des Alpes, Kleine Scheidegg, Wengen Switzerland, "Improving Success of 25 Gauge Vitrectomy Repair of Retinal Detachment: A Retrospective Review of 49 Consecutive Cases." January 27-31, 2008.

58. XII Congreso de La Sociedad Española de Retina y Vitreo, Zaragoza, Spain, "Improved Management of Neovascular Age-Related Macular Degeneration with Spectral OCT," "Overcoming Difficulties of 25 Gauge Vitrectomy for Retinal Detachment," "An Improved Understanding of Vitrectomy." March 7-8, 2008.

59. XXXIII Congresso da Sociedade Brasileira de Retina e Vitreo, Bahia Othon Palace Hotel – Salvador, Brazil, "Management of Severe Penetrating Ocular Injury by Twenty-Five Gauge Vitrectomy," "Why High Resolution OCT is the New Standard for the Management of Wet Age-Related Macular Degeneration," "Are Posterior Vitreous Detachment, Vitreo Macular Traction Syndrome, and Macula Hole Related? 3D OCT Study," "Improving the Success of 25-Gauge Vitrectomy Repair of Retinal Detachment," April 3-5, 2008.

60. 18th Annual Meeting of the Louisiana State University Health Sciences Center at Shreveport Ophthalmology Residents & Alumni, Petroleum Club, Shreveport, Louisiana, Visiting Professor, "An Improved Understanding of the Mechanism of Vitreous Cutting," June 7, 2008.

NATIONAL AND INTERNATIONAL MEETING PRESENTATIONS:

1. Association for Research in Vision and Ophthalmology Annual Meeting, Sarasota, FL, "The effects of alpha adrenergic agents on intravitreal membranes formed after posterior penetrating ocular trauma." April 1981.

2. Association for Research in Vision and Ophthalmology Annual Meeting, Sarasota, FL, "Pneumocystis carinii choroiditis following chronic aerosolized pentamidine therapy." May 1990.

3. USC School of Medicine Postgraduate Division, A Review for the Practicing Ophthalmologist Mauna Kea Beach Hotel, Kamuela, HI, "Tests of Macular Function" "Background Diabetic Retinopathy" "Retinal Detachment after Cataract Surgery" "Vitrectomy for Proliferative Vitreoretinopathy" "Vitrectomy for Retinopathy of Prematurity" "Vitrectomy for Macular Hole" August 4-11, 1990

4. American Academy of Ophthalmology Annual Meeting, Atlanta, GA, "Multifocal Choroiditis Due to Pneumocystis Carinii." October 28, 1990.

5. Third International Congress on Laser Technology in Ophthalmology, San Francisco, CA, "Indocyanine Green Enhanced Diode Laser Treatment of Melanoma in a Rabbit Model." May 23 and 24, 1991.

6. Keeler Instruments Inc. Breakfast Symposium, Annual Meeting of the American Academy of Ophthalmology, Anaheim Plaza Resort Hotel, Anaheim, CA, "Update on Diode Laser Technology at Doheny." October 14 and 15, 1991.

7. Association for Research in Vision and Ophthalmology Annual Meeting, Sarasota, FL, "Selective RPE damage by micro-pulse diode laser photocoagulation." May 1992.

8. Western Association for Vitreo-retinal Education Annual Meeting, Maui, HI, "Diode Laser Treatment of Diabetic Retinopathy and ARMD," "SLO Videoangiography: Is Conventional Angiography Dead?." July 20-22, 1992.

9. American Academy of Ophthalmology Annual Meeting, Dallas, TX, "The Diabetic Retinopathy Education Study: Improving Detection and Referral of Retinopathy by Primary Care Physicians." November 8-12, 1992.

10. Association for Research in Vision and Ophthalmology Annual Meeting, Sarasota, FL,

"A retinal laser which damages only the RPE: ultrastructural study." May 1993.

11. Western Association for Vitreo-retinal Education Annual Meeting, Maui, HI, "Preliminary results of the diabetic retinopathy educations study," "Doheny experience with indocyanine angiography," "RPE selective laser: Update and discussion of possible mechanisms of laser action." July 17-24, 1993.

12. USC School of Medicine Postgraduate Division, An Update for the Practicing Ophthalmologist Mauna Kea Beach Hotel, Kamuela, HI,"Retinal Detachments Following Cataract Extraction," "Diagnosis and Treatment of Diabetic Retinopathy," "Management of Dislocated Lens/IOL," "Ruptured Globe Repair in the 90's," "Management of Traumatic Retinal Detachment," and Retinopathy of Prematurity." August 14-21, 1993.

13. 26th Annual Scientific Meeting of the Retina Society, San Francisco, CA, "Selective RPE Damage by Micro-pulse Diode Laser Photocoagulation." September 29 - October 3, 1993.

14. 1993 Annual Meeting, American Academy of Ophthalmology, Chicago, Illinois, "Diode Laser Treatment of Diabetic Retinopathy." Tuesday, November 16, 1993.

15. 1993 Annual Meeting, American Academy of Ophthalmology, Chicago, Illinois, "Outcomes of the Diabetic Retinopathy Education Study." Sunday, November 16, 1993.

16. Association for Research in Vision and Ophthalmology Annual Meeting, "A keratoprosthesis for intraoperative fluorescein angiography and single port pars plana vitrectomy." May 1994.

17. Western Association for Vitreo-retinal Education Annual Meeting, Maui, HI, "Ganciclovir Implant for CMV," "Photoreceptor Transplantation." July 25-29, 1994.

18. Association for Research in Vision and Ophthalmology Annual Meeting, Fort Lauderdale, FL, "Ultrastructural comparison of frequency-doubled ND: YAG laser and argon laser trabeculoplasty." May 1995.

19. University of Oregon, Annual Gorge Update Columbia River, OR, "Surgical Management of Retinal Detachment Complicated by PVR" and "Retina and Choroidal Biopsy." July 1995.

20. Association for Research in Vision and Ophthalmology Annual Meeting, Fort

Lauderdale, FL, "Sublethal laser damage to the retinal pigment epithelium by micro-pulse diode laser in primate eye." May 1996.

21. XXth Meeting of the Club Jules Gonin and 29th Annual Scientific Session of the Retina Society Meeting, Bern, Switzerland, "The Use of the Ganciclovir Implant in the Treatment of Recurrent Cytomegalovirus Retinitis." September 1-6, 1996.
Regional/Local Presentations

22. XXIst Meeting of the Club Jules Gonin, Edinburgh, Scotland, "Management of Neovascular Glaucoma with Combined Vitrectomy and Pars Plana Seton Tube Insertion," August 28 - September 1, 1998.

23. 31st Annual Scientific Meeting of The Retina Society, Washington, DC "Management of Neovascular Glaucoma with Combined Vitrectomy and Pars Plana Seton Tube Insertion," September 24-27, 1998.

24. Western Association for Vitreo-retinal Education 7th Annual Meeting, Maui, HI, "The USC Experience with Macular Translocation for ARMD," "Incidents of Vitreous Washout Following Diabetic Pars Plana Vitrectomy: Impact of Wide Angle Viewing Systems and Aggressive Vitreous Base Dissection." July 3-5, 1999.

25. 1999 Annual Meeting, American Academy of Ophthalmology, Orlando, Florida, "Rifabutin-Associated Hypopyon Uveitis in Immunocompetent Individuals." Sunday and Monday, October 24 and 25, 1999.

26. 1999 Annual Meeting, American Academy of Ophthalmology, Orlando, Florida, "Efficacy of Ganciclovir Implant in Silicone Oil-Filled Eyes for CMV Retinitis." Monday, October 25, 1999.

27. 1999 Annual Meeting, American Academy of Ophthalmology, Orlando, Florida, "Vitreolensectomy and Transscleral Fixation of an Intraocular Lens in Marfan Syndrome." Tuesday, October 26, 1999.

28. 107th Association of Military Surgeons of the United States, The Society of the Federal Health Agencies Annual Meeting, Las Vegas, Nevada, "CMV Retinitis Management." November 5-10, 2000.

29. 33rd Annual Scientific Meeting of the Retina Society, Coral Gables, FL, "Evacuation of Submacular Hemorrhage Through the Fovea." November 30-December 3, 2000.

30. 34th Annual Scientific Meeting of the Retina Society, Chicago, IL, "Factors Influencing the Presence of Postoperative Vitreous Cavity Blood after Diabetic Vitrectomy." September 13-16, 2001.

31. Western Association for Vitreo-retinal Education Annual Meeting, Maui, HI, "Does Ruboxistaurin, a Protein Kinase Inhibitor, Reduce Progression of Diabetic Retinopathy and Diabetic Macular Edema? Results of a Multicenter Study," "The Doheny Experience with 25-Gauge Transconjunctival Surgery," June 29-July 2, 2003.

32. 21st Annual Meeting American Society of Retina Specialists, New York, NY, "Minimally Invasive Submacular Hemorrhage Evacuation," August 16-20, 2003.

33. 7th Annual Club Vit Meeting, Cape Cod, MA, "Solutions for the New Challenges Presented by 25-Gauge Vitrectomy," July 7-11, 2004.

34. 22nd Annual Meeting American Society of Retina Specialists, San Diego, CA, "Solutions for the New Challenges Presented by 25-Gauge Vitrectomy," August 16-20, 2004.

35. Western Association for Vitreo-retinal Education Annual Meeting, Maui, HI, "Faster Recovery of Vision After 25 Gauge Vitrectomy," "Minimally Invasive Repair of Retinal Detachment," "Repair of Penetrating Ocular Trauma with 25 Gauge Vitrectomy," July 3-6, 2005.

36. 23rd Annual Meeting American Society of Retina Specialists, Montreal, Quebec, Canada, "Clove Hitch Knot for Scleral Fixation of Dislocated IOL – with Temporary Externalization of the Haptics Through a Clear Cornea Incision," "Postoperative Visual Recovery Following 25-Gauge Transconjunctival Sutureless Vitrectomy is Faster Compared to Standard 20-Gauge Pars Plana Vitrectomy," July 16-20, 2005.

37. World Ophthalmology Congress 2006, Invited Speaker Gonin Society Symposium, Sao Paulo, Brazil, "To Stitch or Not to Stitch Small-Gauge Sclerotomies When Using Intra-Ocular Silicone Oil?," "25-Gauge Vitrectomy for Retinal Detachment," "Clove Hitch Knot for Scleral Fixation of Dislocated IOL – With Temporary Externalization of the Haptics Through a Clear Cornea Incision," Invited Speaker American Society of Retina Specialists Symposium, Sao Paulo, "25-Gauge Vitrectomy, How I Use it Currently," Brazil, February 19-24, 2006.

38. XXV Meeting of the Club Jules Gonin and 39th Retina Society Annual Meeting, Capetown, South Africa, "Improved Understanding of Vitrectomy: Qualitative High Speed Video Analysis of Vitreous Movement Around the Aperture of Vitreous

Cutters," October 15-20, 2006.

39. 7th Euretina Congress, Monte Carlo, Monaco, "High Resolution OCT: Adaptive Optics Scanning Laser Ophthalmoscopy," May 17-20, 2007.

40. 10th Annual Club Vit Meeting, Bachelor Gulch Beaver Creek, CO, "A Forward Imaging Needle Probe for Ocular Imaging," July 4-8, 2007.

41. Annual Scientific Meeting of the Retina Society, Boston, MA, "A Probe for Intraocular Optical Coherence Tomography Imaging," September 27-30, 2007.

42. 25th Annual American Society of Retina Specialists, Indian Wells, CA, "Performance Analysis of a Second Generation Pneumatic Cutter Engineered to Sustain a High Duty Cycle at High Cutting Rates: MID Labs Ave," December 1-5, 2007.

43. World Ophthalmology Congress 2008, Hong Kong, China, "Improved Understanding of Vitreous Cutting: A Quantitative Engineering Approach," Chair: "Retinal Imaging Scientific Program," June 28 – July 2, 2008.

44. XXVI Meeting of the Club Jules Gonin, St. Moritz, Switzerland, "Improving Success of 25-Gauge Vitrectomy Repair of Retinal Detachment: A Retrospective Review of 49 Consecutive Cases," September 10-13, 2008.

REGIONAL AND LOCAL MEETING PRESENTATIONS:

1. White Memorial Medical Center, One Day Symposium on Retina and Vitreous Surgery, Department of Ophthalmology, Los Angeles, CA, "Pneumocystis Choroiditis." February 23, 1990.

2. A Review for the Practicing Ophthalmologist USC School of Medicine Postgraduate Division, Mauna Kea Beach Hotel, Mauna Kea, HI "Tests of Macular Function," "Background Diabetic Retinopathy," "Retinal Detachment after Cataract Surgery," "Vitrectomy for Macular Hole." August 4-11, 1990.

3. 22nd Annual Doheny Meeting, Doheny Eye Institute, Los Angeles, CA, "Treatment of Retinal Disease with the Diode Semiconductor Laser." September 27, 1990.

4. 1991 Trauma Course Meeting, Doheny Eye Institute, Los Angeles, CA, "Management of Shotgun Perforating Injuries." March 15, 1991.

5. 1991 Technology Advances Course, Doheny Eye Institute, Dana Point, CA, "Clinical Diode Laser Applications." April 20, 1991.

6. 15th Annual Alumni-Residents Day, Doheny Eye Institute, Los Angeles, CA, "Indocyanine Green Enhanced Diode Laser Treatment of Experimental Melanoma." May 31 - June 1, 1991.

7. Pan American Academy of Ophthalmology Update Course in Ophthalmology, Los Angeles, CA, "Diode Laser Applications." October 10, 1991.

8. Medical and Surgical Retina in the 1990s, Jules Stein Eye Institute/Doheny Eye Institute, Beverly Hilton Hotel, Beverly Hills, CA, "Diode Laser Treatment of Diabetic Retinopathy," "Shot-Gun Perforation," "Treatment of Central Retinal Vein Occlusion", October 11, 1991.

9. Stereo Retinal Fundus Photography and Fluorescein Angiography Workshop, Doheny Eye Institute, Los Angeles, CA, "Basic Fluorescein Angiography Interpretation." November 23, 1991.

10. 23rd Annual Doheny Meeting, Doheny Eye Institute, Los Angeles, CA, "Dye-Enhanced Diode Laser Treatment of Melanoma," and "Retinal Complications of Cataract Surgery." December 5, 1991.

11. Residents' Day Meeting, Doheny Eye Institute, Los Angeles, CA, "Selective RPE Damage by Micropulse Laser." June 5, 1992.

12. Doheny Eye Institute Dedication Conference, Doheny Eye Institute, Los Angeles, CA, "RPE Selective Laser: A Retinal Magic Bullet." December 4, 1992.

13. Seminar on Retina Research, Doheny Eye Institute, Los Angeles, CA,"Selective Laser Photocoagulation of the Retinal Pigment Epithelium." USC Visual Science October 19, 1993.

14. Retina Update Program, Loew's Santa Monica Beach Hotel, Santa Monica, CA, "Academic Ophthalmology: Challenges Ahead With Healthcare Reform." May 7, 1994.

15. Annual Alumni-Residents Day Conference and Doheny Days, Doheny Eye Institute, Los Angeles, CA, "Intraocular Ganciclovir Implant for the Treatment of CMV Retinitis." 18th June 10-11, 1994.

16. American Academy of Ophthalmology Annual Meeting, Atlanta, GA, Discussion of "Diode Laser Contact Transscleral Retinal Photocoagulation: A Clinical Study." Oct. 30-Nov. 3, 1994.

17. CME Uveitis Update Course, Doheny Eye Institute, Los Angeles, CA,Management of Uveitis and Intraocular Inflammation. "Surgical Treatment of CMV Retinitis." Current Surgical and Medical May 6, 1995.

18. 19th Annual Alumni-Residents Day Conference and Doheny Days, Doheny Eye Institute, Los Angeles, CA, "Results of the Ganciclovir Implant Trial for CMV Retinitis." June 9-10, 1995.

19. Vail Vitrectomy Meeting, Vail, CO, "The Effectiveness of a Sustained Release Ganciclovir Implant for the Treatment of Recurrent CMV Retinitis." March 1996.

20. Doheny Eye Institute, Los Angeles, CA, "Uveitis/Ocular Inflammation Update." March 9, 1996.

21. Association for Research in Vision and Ophthalmology Annual Meeting, Moderator, Ft. Lauderdale, Florida, "Retina, Retinal Cell Biology; Laser: Experimental Section." May 1996

22. 20th Annual Alumni-Residents Day Conference and Doheny Days, Doheny Eye Institute, Los Angeles, CA, "The Effectiveness of a Ganciclovir Implant for Recurrent CMV Retinitis." June 7-8, 1996.

23. CME Uveitis Update Course, Doheny Eye Institute, Los Angeles, CA, "Surgical Management of CMV Retinitis Aids and the Eye," October 12, 1996

24. San Gabriel Valley Medical Center, Operating Room Inservice, "Scleral Buckling,Pars Plana Vitrectomy, and Ganciclovir Implantation," October 14, 1996.

25. 21st Annual Alumni-Residents Day Conference and Doheny Days, Doheny Eye Institute, Los Angeles, CA, "Efficacy of AG3340: A Novel Metalloprotease Inhibitor Pretreating Subretinal Neovascularization." June 13-14, 1997.

26. 22nd Annual Alumni-Residents Day Conference and Doheny Days, Doheny Eye Institute, Los Angeles, CA, "A Novel Systemic Therapy for Diabetic Retinopathy: Protein Kinase Inhibitor Clinical Trial." June 12-13, 1998.

27. Retina Update, Los Angeles, CA, "Macular Translocation Surgery: New Treatment for Macular Degeneration." February 13, 1999.

28. 30th Annual Doheny Days Conference, Doheny Eye Institute, CA, "Results of Macular Translocation for Subfoveal Choroidal Neovascular Membranes." June 11-12, 1999.

29. 69th MidWinter Clinical Conference, Research Study Club of Los Angeles, Los Angeles, CA, "Macular Translocation." January 28-30, 2000.

30. Vail Vitrectomy Meeting, Vail, CO, "A Calcium and Magnesium Free Retinal Detachment Solution for Macular Translocation Surgery: Toxicity and Efficacy." March 12-15, 2000.

31. Moderator for Retina/Vitreous Section. 31st Annual Doheny Days Conference, "A Calcium and Magnesium Free Retinal Detachment Solution for Macular Translocation Surgery: Toxicity and Efficacy Study in Rabbit and Humans." Doheny Eye Institute, Los Angeles, California, June 9-10, 2000.

32. Ophthalmology Symposium, Retina Update for the Millennium, "Submacular Surgery," "Management of Cystoid Macular Edema." Southern California Permanente Medical Group, Pasadena, CA. June 23-24, 2000.

33. Macular Degeneration Seminar: Implications of Laboratory & Clinical Research, "Macular Translocation & Submacular Surgery." Doheny Eye Institute, Los Angeles, CA. September 15 and 16, 2000.

34. Los Angeles Times Festival of Health, "Macular Degeneration." USC, Los Angeles, CA. September 17, 2000.

35. Healthy Living with Diabetes, "Understanding Eye Disease and Diabetes." USC, Los Angeles, CA. June 9, 2001.

36. 32nd Annual Doheny Days and Alumni/Residents Day Conference, "Factors Predicting Vitreous Cavity Blood Following Diabetic Vitrectomy.." Doheny Eye Institute, Los Angeles, California, June 15-16, 2001.

37. Moderator for Retina/Vitreous Section. 34th Annual Doheny Days Conference, "Does Ruboxistaurin, a Protein Kinase Inhibitor, Reduce Progression of Diabetic Retinopathy and Diabetic Macular Edema? Results of a Multicenter Study." Doheny Eye Institute, Los Angeles, California, June 13-14, 2003.

38. Retina Forum: New Innovations in the Treatment of Retinal Diseases, Doheny Eye Institute, Los Angeles, CA, "Minimally-Invasive Drug Delivery Systems for Management of Diabetic Macular Edema," "Sutureless (25-Gauge) Vitrectomy Surgery," October 18, 2003.

39. American Academy of Ophthalmology Annual Meeting, Anaheim, CA, Discussion of "Successful Management of Cataract Surgery—Associated Vitreous Loss with Sutureless Small-Gauge Pars Plana Vitrectomy." November 15-18, 2003.

40. 4th Annual Doheny Vision Research Seminar, Los Angeles, CA, "Microtechnological Solutions for Ocular Diseases: Bioelectronic Implants, Minimally Invasive Surgery, and Drug Delivery Platforms," "The Doheny Experience: Outcomes of 130 Consecutive Surgeries," "Retisert." January 9-10, 2004.

41. Vail Vitrectomy Meeting, Vail, CO, "25-TSV: The Next Generation." March 6-10, 2004.

42. Moderator for Retina/Vitreous Section. 35th Annual Doheny Days Conference, Los Angeles, CA, "Solutions for the New Challenges Presented by 25 Gauge Vitrectony Retina." Doheny Eye Institute, Los Angeles, California, June 11-12, 2004.

43. Current Concepts in Diabetic Eye Disease, "Surgical Methodology (Minimally Invasive Surgery for Non-Clearing Vitreous Hemorrhage)." Doheny Eye Institute, Los Angeles, California, March 12, 2005.

44. Doheny Saturday CME Course, "Surgery for AMD – Is There a Role? (tPA, SST, LMT, new instrumentation – Eye Concepts)." Doheny Eye Institute, Los Angeles, California, February 11, 2006.

45. 37th Annual Doheny Days and Alumni/Residents Day Conference, "Improved Understanding of Vitrectomy: Qualitative High Speed Video Analysis." Doheny Eye Institute, Los Angeles, California, June 16-17, 2006.

46. Vail Vitrectomy Meeting, "Biomedical Engineering, Moving from the Subjective to the Objective: Novel Methods of Assessing Cutting and Illumination." Vail Marriott Mountain Resort & Spa, Vail, Colorado, March 10-14, 2007.

47. Western Retina Study Club, Westin Hotel Pasadena, "It's not the Drive: Lessons Learned from a Second Generation Spring Retina Premature Cutter." Pasadena, CA, March 16-17, 2007.

48. Doheny Saturday CME Course, Surgical Retina, "Surgical Management of Diabetic Retinopathy 2007," Doheny Eye Institute, Los Angeles, California, April 14, 2007.

49. 38th Annual Doheny Days and Alumni/Residents Day Conference, "A Forward Imaging Probe for Intraocular OCT Imaging." Doheny Eye Institute, Los Angeles, California, June 15-16, 2007.

50. Doheny Saturday CME Course, Recent Advances in Retina, "Improving Outcomes in 25 Gauge Vitrectomy Repair of Retinal Detachment," Doheny Eye Institute, Los Angeles, California, February 9, 2008.

51 Association for Research in Vision and Ophthalmology Annual Meeting, "Improving Success of 25 Gauge Vitrectomy Repair of Retinal Detachment: A Retrospective Review of 49 Consecutive Cases." Ft. Lauderdale, Florida, April 27-May 1, 2008.

52. 39th Annual Doheny Days and Alumni/Residents Day Conference, "A Forward Imaging Probe for Intraocular OCT Imaging." Doheny Eye Institute, Los Angeles, California, June 13-14, 2008.

J. CONTINUING EDUCATION COURSES:

COURSE DIRECTOR:

1. Stereo Retinal Fundus Photography and Fluorescein Angiography Workshop,"Basic Fluorescein Angiography Interpretation." Doheny Eye Institute, Los Angeles, CA, September 19-20, 1992.

2. Retina Update Course: "The ETDRS, DRS and DRVS in the context of the Nineties," Doheny Eye Institute, Los Angeles, CA., February 8, 1997.

3. Retina Update Course: "Systemic Therapy for Diabetic Retinopathy: The Protein Kinase Inhibitor Diabetic Retinopathy Study" Doheny Eye Institute, Los Angeles, CA., April 4, 1998.

MODERATOR:

1. Keeler Microlase Breakfast Symposium: "Diode Laser Experiences." moderator, 1990 Annual Meeting, American Academy of Ophthalmology, Atlanta, Georgia, October 29,

1990.

2. Annual Meeting of The Association for Research in Vision and Ophthalmology: Retina, Retinal Cell Biology, Laser: Experimental. Fort Lauderdale, FL., April 21 - 26, 1996.

3. Annual Meeting of The Association for Research in Vision and Ophthalmology: Retina, Vitreoretinal Surgery III., Fort Lauderdale, FL., April 21 - 26, 1996.

K. COMMUNITY SERVICE:

1. "Diabetic Retinopathy." The Luminaires, Orange County Chapter Meeting Newport Harbor Art Museum, Newport Beach, CA, September 25, 1991.

2. "Solar Eclipse." Presented to the following organizations: KABC-TV, FOX-TV, KCLA-TV, KFWB-AM-Radio, KGIL-AM-Radio, Orange County Registry-newspaper, Los Angeles Daily News-newspaper, La Opinion-newspaper, Chinese Daily-newspaper, Los Angeles, CA., July 9 and 10, 1991.

3. "Diabetic Retinopathy." KRLA-AM-Radio, Los Angeles, CA., July 16 and October 7, 1991.

4. "The Retina: Your Key to Vision." Inaugural Meeting of Doheny Academé, Doheny Eye Institute, Los Angeles, CA., November 4, 1992.

5. "Diabetic Retinopathy." HealthSense Cable Television Program. April 22, 1993.

6. "Diagnosing Eye Disorders." Leadership Gift Club/Circle of Caring, Doheny Eye Institute. May 26, 1993.

7. "Ganciclovir Implant." AIDS Response Program. Crystal Cove Auditorium, University of California at Irvine, Irvine, CA, September 23, 1993.

8. "Learning About Diabetic Retinopathy." Braille Institute, Sight Center Seminar, Los Angeles, CA, April 30, 1996

9. "Recent Advances in the Treatment of Are Related Macular Degeneration" Doheny Academé. Doheny Eye Institute, Los Angeles, CA. September 24, 1996.

10. "Current Vitreo-retinal Research at the Doheny Eye Institute" Fiftieth Anniversary of Doheny Eye Institute Luncheon Series, Doheny Eye Institute, April 9, 1997.

11. "Understanding Age Related Macular Degeneration" Doheny Academé, Doheny Eye Institute, September 16, 1997.

12. "Taking Care of Your Vision with Diabetes" A Seminar Dedicated to People with Diabetes, Jerry's Foundation for Diabetic Research, Mayer Auditorium, USC School of Medicine, January 17, 1998.

13. "The Ganciclovir Implant: A Novel Drug Delivery System" Doheny Board of Directors, February 10, 1998.

14. "Advances in Age Related Macular Degeneration" Doheny Eye Institute Luncheon Series, Downtown Marriott Hotel, October 14, 1998.

15. "Overview of Current Research Studies on Macular Degeneration." Braille Institute, Sight Center Seminar, Alhambra Retirement Community, Alhambra, CA, December 1, 1998.

16. "Alcon Study" Renaissance Hotels Worthington FW, Fort Worth, Texas, May 15, 2000.

17. "Overview of Age-Related Macular Degeneration" Ask the Doctor Medical and Estate Planning Seminar, The Beverly Hilton Hotel–The Wilshire Room, Beverly Hills, CA, May 24, 2000.

18. "Macular Degeneration" Lecture to Doheny Eye Institute Board, April 8, 2000.

19. "Macular Degeneration and Retina Research" Doheny Eye Institute Luncheon and Presentation, Third Floor Conference Room, November 8, 2000.

20. "Macular Degeneration" Community Lunch & Learn Lecture Series, February 21, 2001.

21. "Healthy Living With Diabetes," 4th Annual Seminar for People with Diabetes and Their Families. Patient Education Program Keck School of Medicine, USC School of Medicine, Postgraduate Division. June 9, 2001

22. "Macular Translocation Surgery" Presented to K-CAL Channel 9. Health segment. Sponsored by San Gabriel Valley Medical Center. June 2001.

23. "The Aging Eye" Ask the Doctor Medical and Estate Planning Seminar, DoubleTree Westwood Hotel, Los Angeles, CA, August 5, 2003.

24. "The Aging Eye" Ask the Doctor Medical and Estate Planning Seminar, DoubleTree Westwood Hotel, Los Angeles, CA, September 22, 2004.

25. "The Aging Eye" Ask the Doctor Medical and Estate Planning Seminar, DoubleTree Westwood Hotel, Los Angeles, CA, September 14, 2005.

26. "Intraocular Drug Delivery " Doheny Board of Directors, March 13, 2008.

Document 15

Plaintiff's Expert Disclosures
Report of Dr. Alan Berg, M.D.,
Report of Jan Roughan,
Report of Alessandro Anfuso

JOHN JAHRMARKT, ESQ. (SBN 175569)
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(310) 226-7677 fax
jjlawyer@mail.com

Attorneys for Plaintiff
PHILLIP VINCENT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PHILLIP VINCENT, an individual, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CASE NO.: CV08-03286FMC(PJW) Hon. Florence-Marie Cooper PLAINTIFF'S EXPERT DISCLOSURE PURSUANT TO FRCP RULE 26 (a) (2)

Pursuant to Rule 26 (a) (2) of the Federal Rules of Civil Procedure and the Court's March 25, 2009 Order re: Expert Witness Exchange Deadlines, Plaintiff PHILLIP VINCENT ("Plaintiff") makes the following expert disclosures:

1. Dr. Alan Berg, Berg·Feinfield, 13320 Riverside Drive, Suite 114, Sherman Oaks, California 91423, Phone: 818-501-3937, Fax: 818-980-0651.

2. Jan Roughan, BSN, PHN, RN, CRRN, CNLCP, CCM, Roughan & Associates at LINC, 114 W. Colorado Blvd., Monrovia, California 91016, Tel: (626) 303-6333, ext. 16, Fax: (626) 303-8080.

JAHRMARKT & ASSOCIATES
2029 Century Park East, Suite 2100
Los Angeles, California 90067
(310) 226-7676
(310) 226-7677 fax

3. Alessandro F. Anfuso, MS, CVE, Rehabilitation Consultant, Anfuso Vocational Services, Inc., 1041 S. Garfield Ave, Suite 210, Alhambra, California 91801, (626) 588-1590, Fax: (626) 588-1599.

Unless otherwise stated in their report, each of the above experts has reviewed and relied upon all documents produced by each side and on the documents produced pursuant to third party subpoenas. All documents relied upon be any expert will be made available upon reasonable request. A copy of each expert's report is attached hereto. Pursuant to the agreement of the parties, disclosure of economists, if any, will be made along with the parties supplemental disclosures on or before May 8, 2009.

Dated: April 13, 2009

JAHRMARKT & ASSOCIATES

By: _____
JOHN JAHRMARKT
Attorney for Plaintiff
PHILLIP VINCENT

JAHRMARKT & ASSOCIATES
2029 Century Park East, Suite 2100
Los Angeles, California 90067
(310) 226-7676
(310) 226-7677 fax

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2029 Century Park East, Suite 2100, Los Angeles, California 90067.

On April 13, 2009, I served the foregoing documents described as:

PLAINTIFF'S EXPERT DISCLOSURE BY PURSUANT TO FRCP RULE 26 (a) (2)

on the interested parties in this action.

_X_ by **FACSIMILE / TELECOPIER/EMAIL**, addressed as stated on the attached mailing list or addressed as follows:

_ by placing _ the original x_ a true copy in a sealed envelope addressed as follows:

Gwendolyn M. Gamble, Esq.
Assistant United States Attorney
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012

__ I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

___ BY PERSONAL SERVICE, delivered the envelope by hand on the addressee above.

___ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_X_ (Federal) I declare under penalty of perjury under the laws of the United States that the above is true and correct. I further declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 13, 2009, at Los Angeles, California.



John Jahrmarkt

JAHRMARKT & ASSOCIATES
2029 Century Park East, Suite 2100
Los Angeles, California 90067
(310) 226-7676
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Expert Report of Dr. Alan Berg
Berg·Feinfield
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of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(6)

of the Freedom of Information and Privacy Act

BERG·FEINFIELD·TLC
VISION CORRECTION

2625 W. Alameda Avenue, Suite 208, Burbank, CA 91505
13320 Riverside Drive, Suite 114, Sherman Oaks, CA 91423
1437 San Marino Avenue, San Marino, CA 91108

CURRICULUM VITAE
Alan M. Berg, M.D.

EDUCATION:

Undergraduate:	University of California, Los Angeles, Los Angeles, California BA Psychology 1972
Medical School:	Bowman Gray School of Medicine of Wake Forest University MD 1976
Internship:	North Carolina Baptist Hospital Medicine, 1976-1977
Residency:	University of Southern California, Los Angeles County Medical Center Ophthalmology 1977-1980
BOARDS:	American Board of Ophthalmology 1981 American Board of Eye Surgery 1990
SOCIETIES:	American Academy of Ophthalmology 1981 American Intraocular Implant Society American Society of Cataract Refractive Surgery
HOSPITAL AFFILIATIONS:	American College of Eye Surgeons Providence St. Joseph Medical Center USC Los Angeles County Hospital
APPOINTMENTS:	Clinical Instructor of Ophthalmology - USC Chief of Ophthalmology - Providence St. Joseph Medical Center, 1989, 1992, & 1994 Chief of Ophthalmology - City of Hope Medical Center, 1980-1996
PUBLICATIONS:	Weekly medical column in Burbank Times newspaper Q & A format August 1986-Present Weekly medical column in the Tolucan newspaper Q & A format April 1986-Present Attendance, Kerato-Refractive Society Annual Meeting. Radial Keratotomy, Corneal Modification Techniques November 9, 1986 Article "*Common Sense Facts About Common Eye Problems*", featured in CIGNA and You Newsletter, Spring Issue 2002

TEACHING / INSTRUCTION:

Clinical Instructor, Los Angeles County/USC Medical Center 1980-Present

Stanford Course on Cataract Surgery - October 1983.

USC Cataract Course, Intraocular Lens Implantation, February 1981 and May 1983.

"Retinopathics at the Continuing Community Education Program."

Providence St. Joseph Medical Center May 1985.

"Phacoemulsification at the Ritz." 1988 & 1989. Sponsored by Coopervision.

"Diabetes: Prevention and Treatment of Complications." November 1989, Providence St. Joseph Medical Center.

Speakers Bureau Program, Marketing and Publications Department, Providence St. Joseph Medical Center, November 1989.

"Advances in Eye Care for the 90's." Burbank Community Hospital. December 1989.

"Eye and Systemic Disease." Providence St. Joseph Medical Center January 1990.

"Ocular Tumors." San Fernando Valley Optometric Society, April 1990.

"Laser Treatment of Eye Disorders." Medical Center of North Hollywood, October 1990.

Teaching Staff of Los Angeles County USC Medical Center - Clinical Instructor.

Teaching Staff Los Angeles Children's Hospital

Stanford Course on Cataract Surgery - October 15, 1983.

USC Cataract Course, Intraocular Lens Implantation 1981, Feb. 1982, May 1983.

Community Forum, Providence St. Joseph Medical Center, Cataract Surgery and Glaucoma 1982, 1984, 1985.

IOLAB Intraocular Lens Implant Seminar and Lab, Riverside Hospital, June 3, 1983, San Francisco, October 1983, and Whittier June 28, 1983.

Occupational Health Seminar, June 27, 1983 Occupational Health Seminar, Providence St. Joseph Medical Center, June 15, 1983,

IOLAB Extracapsular Cataract Extraction and Posterior Chamber IOL Implantation Seminar and Lab Lecture: October 3, 1984, Seattle WA, Laboratory: October 14, 1984, Renton, WA, AARP Seminar, Cataract Surgery, January 16, 1984.

ORC Post Academy Meeting in Kauai, Hawaii "Practice Management" October 1985.

Lion's Eye Club Regional Meeting, "New Advances in Eye Care." July 1985.

Providence St. Joseph Medical Center: "Retinopathies at the Continuing Community Education Program" May 1985.

Aimwell Health Education Program, Burbank Community Hospital: "Facts About Your Eyes", September 3, 10, 17, 24, 1985.

Occupational and Environmental Health American Lung Association of L.S. County Welding Conference and Seminar, February 1986.

Speaker, "The Eye and Systemic Disease." San Fernando Valley Optometric Society, January 29, 1987.

TEACHING / INSTRUCTION: continued

Speaker "Diabetes and the Eye." Providence St. Joseph Medical Center, August 28, 1986.

Attendance, American Academy of Ophthalmology Annual Meeting, September 29-October 1985.

Providence St. Joseph Medical Center, Chaired Annual Meeting on Advances in Eye Care, April 1987.

Providence St. Joseph Medical Center spoke to Dept. of Family Practice on Advances in Eye Care, May 1987.

Providence St. Joseph Medical Center spoke at Internal Medicine Meeting on Advances in Eye Care, May 1987.

Far Western Medical Association, Sun Valley, ID, January 31, to February 7, 1987.

Radial Keratotomy Course, University of Oklahoma, September 17, 1986.

Ophthalmology Convention Dallas, TX, November 1987.

Taught Course Coopervision Phacoemulsification update at Albuquerque, NM, on March 18, 1988.

Instructor: Teaching Course "Phacoemulsification at the Ritz on April 22 & 23, 1988, at Laguna Niguel.

Chairman: Department of Ophthalmology - Providence St. Joseph Medical Center 1987-1989.

Moderator: St. Joseph Community Forum, June 1988 on "Advances in Eye Care."

Instructor: "Phaco at the Ritz." August 26 & 27, 1988 sponsored by Coopervision

Instructor: "Phaco at the Ritz." Laguna Beach March 30 & 31, 1989 sponsored by Coopervision.

"Diabetes: Prevention and Treatment of Complications." Providence St. Joseph Medical Center, November 1989.

Speakers Bureau Program, Marketing and Public Relations Dept., Providence St. Joseph Medical Center, November 27, 1989.

"Advances in Eye Care of the 90s" Burbank Community Hospital, December 1989.

"Eye Care and Systemic Disease" Providence St. Joseph Medical Center, Burbank, January 1990

Lecture on "Ocular Tumors" to the San Fernando Valley Optometric Society on April 22, 1990.

Lecture "Laser Treatment of Eye Disorders" at Medical Center of North Hollywood, October 10, 1990.

Accepted and credentialed to work as Physician Advisor for California Medical Review, Inc. (CMRI), February 26, 1992.

Speaker at "Phaco Course" in Santa Barbara, Co-sponsored by Nidek, Kabi Pharmacia & Rhein, September 20, 1992.

District Director, Board Meetings, Los Angeles County Medical Association, July 1, 1992-June 30, 1993.

Voluntary Faculty of USC School of Medicine, promoted to Clinical Assistant Professor, July 1, 1993.

Speaker at the "Diabetes Community Forum", Providence St. Joseph Medical Center; Topic: "Good Diabetic Control and its Effect on the Eyes" November 10, 1993.

Lecture to Medical Assistants at Glendale Chapter of Medical Assistants Re: "Eye Diseases in the 90's" January 6, 1994.

District Director, Board Member of Los Angeles County Medical Association June 1992-1994.

Panel Member for Burbank City Council Candidates Forum, League of Women Voters, Glendale/Burbank, February 1, 1995.

TEACHING / INSTRUCTION: continued

Speaker at Providence St. Joseph Medical Center, Noon Conference, Topic: "Basics in Eye Care for the Primary Care Specialist." May 2, 1995.

Appointment to Resource Panel on Medical Review, Los Angeles County Medical Association, June 6, 1995

Speaker at the Retirement Public Employees Group on "Eye Care in the 90's." August 21, 1995

Speaker at Citizens Service Group on "Your Eyes in the 90's." August 17, 1995

Member of Advisory Board, Eye Care Specialist to advise and guide at the Freedom Vision Center, December 6, 1995

Noon Conference at Providence St. Joseph Medical Center titled "New Laser Applications in Eye Surgery." April 2, 1996

Re-elected Director on the Board of Directors of Lakeside Health Services, Inc. (2nd year) May 29, 1996

Re-elected Director on the Board of Directors of Lakeside Health Services, Inc. (3rd year) May 28, 1997

Appointed National Consultant, Merck Allergan Corporations 1998

Served on Conference Merck National Glaucoma Consultant Meeting, Colorado Springs, CO, June 1998.

Lecture at Providence St. Joseph Medical Center. "Advances in Refractive Surgery" October 1998

Lecture to San Fernando Optometry Society "Advances in Surgery." March 1999

Lecture at Providence St. Joseph Medical Center "Laser in Refractive Surgery, LASIK" April 1999

Key Speaker at Hawaii Ophthalmologic Society Annual Meeting, February 2000.

1. Cataract Surgery in the New Millennium.
2. LASIK - Preventing and Treating Complications.
3. New advances in ophthalmic surgery.
4. Marketing your LASIK practice.

Attended Advanced Glaucoma Surgery Seminar by STAAR Surgical, Sept. 23, 2000.

Horizons on Treatment of Hyperopia - LTK Procedure, Sutton Place Hotel, Newport Beach, CA. , Aug. 19, 2000.

Presby Corp Seminar for Treatment of Presbyopia, June 10 and 11, 2000.

Keravision Intac Corneal Ring Segment Seminar and training session, July 2000.

Nidek EC-5000 Excimer Laser Seminar and training session, Long Beach Laser Center, Long Beach, CA, January 2001.

Attended Symposium on Cataract, IOL and refractive Surgery, ASCRS, April 28 – May 2, 2001

VISX STAR S_3 Active Trak Excimer Laser System training session, Spring 2001.

"Refractive Surgery Update", San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, Spring & Fall 2000.

"Exciting Advances in 2001", San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, Spring & Fall 2001.

"Diabetes 2001", Saint Joseph Medical Center, October 2001.

"Retina Vitreous Update 2002", Good Samaritan Hospital, March 2002

TEACHING / INSTRUCTION: continued

VISX STAR S_3 Custom-Corneal Ablation Pattern Method Training Course, April 2002

"What's New in 2002?" San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, Spring 2002.

"What's New in 2002?" San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, Fall 2002.

VISX WaveScan® Custom Trials & Custom-CAP Update: "Marketing Advantages of the VISX WavePrint™ Consumer Campaign", Marina del Rey, CA, September 25, 2002

"Ocular Manifestation of Systemic Diseases" San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, Fall 2002.

"Eye Care for Mature People", Senior Citizens' Group, Temple Beth Hillel, Sisterhood Forum, December 18, 2002

"Refractive Surgery Updates", Guest Speaker at University of Virginia, Richmond, Virginia, March 2003

"Plenty to See in 2003" San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, Spring 2003

IntraLase Certification, Intralase Co., May 2003

VISX CustomVue Certification, VISX Co., June 2003

"Red Eyes and How to Treat Them", Guest Speaker, San Gabriel Valley Optometric Society, Pasadena, CA, September 10, 2003

"Advances in Refractive Surgery – Seeing Better Than 20/20", St. Joseph's Medical Center, Burbank, CA, October 2, 2003

"Red Eye for Primary Care", Guest Speaker for Alcon Laboratories, October 7 and 14, 2003, Sherman Oaks, CA

"Fall Eye Care Updates in 2003", San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, Fall 2003

Voted "Best Lasik-Laser Eye Center" by the readers of HealthBeat Magazine, a publication of the Los Angeles Daily News 2004

"The State of LASIK & Cataract Surgery 2004", San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, Spring 2004

VISX Fourier Wavefront Upgrade, a CustomVue Technology Certification, September 2004

Verisyse Phakic Intraocular Lens Training Certification, Advanced Medical Optics (AMO), New Orleans, October 21, 2004

"Fall Eye Care Updates in 2004", San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, November 2004

Intacs for Keratoconus HDE Course, New Orleans, November 2004

"New Refractive Options in 2005", San Fernando and San Gabriel Valley Optometric Continuing Education Meetings, May 2005

Alcon Travatan Dosing Aid Clinical Study Investigator, July 2005

Attended 2005 Xalatan Ophthalmology Consultant Meeting, San Francisco, August 6-7, 2005

VISX Iris Registration Upgrade, a CustomVue Technology Certification, September 2005

New Advances in Cataract Surgery, Belmont Village, Burbank, CA, September 13, 2005

New Advances in Cataract Surgery, Joslyn Center, Burbank, CA, October 5, 2005

"Diagnosis and Management of common and Unusual Corneal Diseases", C & E's Optometric Symposium, Garden Grove, CA, October 15, 2005

TEACHING / INSTRUCTION: continued

"Exciting Advances in Ophthalmology 2005", San Fernando, San Gabriel and Santa Clarita Valley Continuing Education Meetings, November 2005

"Refractive Surgery Update 2006", St. Joseph's Medical Center, Burbank, CA, January 12, 2006

"Refractive Surgery Update 2006", C & E's Optometric Symposium, Garden Grove, CA, January 29, 2006

Pacific Coast Refractive Symposium, VISX, Whistler, British Columbia, Canada, February 2006

"Comanaging LASIK, Lids & Lenses in 2006", San Fernando, San Gabriel and Santa Clarita Valley Continuing Education Meetings, Spring 2006

Channel 2 & Channel 9, "Contact Lens Corneal Infections", November 2006

"New Ophthalmic Diagnoses & their Treatments", San Fernando, San Gabriel and Santa Clarita Valley Continuing Education Meetings, Fall 2006

Attended American Academy of Ophthalmology Conference, Las Vegas, Nevada, November 2006

Guest Speaker at the Research Study Club, "Advanced Technology IOLs in Clinical Practice-ReZoom", Los Angeles, CA, January 2007

AMO (American Medical Optics) Consultant, January 2007

STAAR Surgical Visian ICL Certification Course, February 2007, Arizona

Attended American Society of Cataract & Refractive Surgery Symposium, San Diego, CA, April 2007

"Ophthalmic Updates in 2007", San Fernando, San Gabriel and Santa Clarita Valley Continuing Education Meetings, Spring 2007

"Controversies in Refractive Surgery", VISX-AMO Guest Speaker, Aspen, Colorado, July 2007

"LASIK 101", Guest Speaker on a Syndicated Talk Radio Show, Women Aloud, July 2007

"Dry Eye" Lecture, Dry Eye Advisory Summit, Alcon Speakers Alliance, Santa Monica, CA, August 28, 2007

Participated in Allergan Glaucoma National Consultant Meeting, Dana Point, CA, October 27, 2007

"Controversies in Refractive Surgery", C & E's Optometric Symposium, Garden Grove, CA, October 28, 2007

Television Interview Appearance on KOCE Public Television, American Health Journal, October 31, 2007 & November 2, 2007

"A New Season of Change at Berg-Feinfield TLC Vision Correction", San Fernando, San Gabriel and Santa Clarita Valley Continuing Education Meetings, Fall 2007

Certification on Allegretto Wave Custom Excimer Laser System, November 2007

Certification of Custom Monovision with the VISX Star S_4 Excimer Laser System, Telluride, Colorado, February 2008

"Comanagement – Together, We Make the Pieces Fit!", San Fernando, San Gabriel and Santa Clarita Valley Continuing Education Meetings, Spring 2008

"Sub-Bowman's Keratomileusis", Guest Speaker, TLC Refractive Surgery Summer Symposium, June 2008

"Enhancement – To Lift or not to Lift", Guest Speaker, AMO Advanced Refractive Invitation 2008, Aspen, Colorado, July 2008

Revised July 2008 /jl

Expert Report of Jan Roughan
Roughan & Associates at LINC
114 W. Colorado Blvd.
Monrovia, California 91016
Tel: (626) 303-6333, ext. 16, Fax: (626) 303-8080

Roughan & Associates at LINC, Inc.
Case Management ❖ Medical/Legal Consulting
114 West Colorado Boulevard ❖ Monrovia, California 91016
(626) 303-6333 ❖ Fax (626) 303-8080

Life Care Plan

ATTORNEY:	John Jahrmarkt, Esquire Jahrmarkt and Associates 2029 Century Park East Suite 2100 Los Angeles, CA 90067
PLAINTIFF:	Phillip Vincent
PREPARED BY:	Jan Roughan, BSN, PHN, RN, CRRN, CNLCP, CCM
IN CONJUNCTION WITH INFORMATION FROM REVIEW OF MEDICAL RECORDS, EXPERT REPORTS, DEPOSITIONS; AND/OR IN CONSULTATION WITH:	Alessandro Anfuso, MS, Vocational Rehabilitation Specialist Alan Berg, MD, Ophthalmologist Steven Charles, MD, Psychiatrist ⊗ Chris Counts, Mental Health Specialist ⊗
DATE PREPARED:	April 2009

⊗ unable to respond

DRAFT
4/13/2009

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Roughan & Associates at LINC, Inc.

Case Management ❖ Medical/Legal Consulting

114 West Colorado Boulevard ❖ Monrovia, California 91016

(626) 303-6333 ❖ Fax (626) 303-8080

Jan Roughan

Curriculum Vitae

PROFESSION

Rehabilitation Nurse/Case Management/Life Care Planning Specialist

SPECIAL INTERESTS

Health Policy/Quality Health Care/Case Management/Medical Legal Consultation/Life Care Planning

PRESENT/PAST POSITIONS AND APPOINTMENTS

- President, Roughan & Associates at LINC. Created, marketed, and implemented an independent medical, psychiatric, and legal case analysis and management business. The primary areas of service encompass the Western Region of the United States. Specialization includes both adult and pediatric population
- Consultant to MediCal with regard to establishing an internal case management program
- Independent Consultant to health care reimbursement and provider communities
- Chairman of the Group Health Committee of the National Insurance Rehabilitation Study Group
- Insurance Advisor to the National Head Injury Foundation
- Consultant to the Surgeon General of the United States on Health Affairs (e.g., AIDS)
- Insurance Industry Representative for Health Insurance Association of America
- Reimbursement and Program Advisor to several National Rehabilitation Programs
- Health Care Coalition Advisor on matters concerning catastrophic illness/injury
- Adviser to United States Congress, Office of Technology Assessment, Health Programs
- (e.g., Pediatrics)
- Product Development Consultant for industry response to continuum of care needs for special populations
- Peer Reviewer for Annual National Symposia, National Head Injury Foundation, Spinal Cord Injury Association
- Chairman of Case Management Society of America Third Annual Southern California Conference

SELECTED PREVIOUS POSITIONS

- Vice President and Business Manager/Director -- The Equitable Life Assurance Society, Case Management Services
- Healthcare Administration -- Nursing Supervisor of multispecialty acute care hospital
- Independent Critical Care Contractor -- Multispecialty acute care hospitals
- Critical Care Instructor -- Multispecialty acute care hospitals
- Health Promotion Consultant/Instructor, California State University (Los Angeles), Pasadena Community College and City of Alhambra, California

- Head Nurse, Cardiac Surgical Unit, National Medical Enterprises
- Program Director, Cardiac Rehabilitation, National Medical Enterprises

EDUCATION

- Claremont Graduate School, Executive Management Certificate Program, 1987
- California State University at Los Angeles, Bachelor of Science Degree/Public Health Nurse Certification, Nursing, 1981
- Rio Hondo Community College, Associate of Science Degree, Nursing, 1974

REGISTRATIONS AND CERTIFICATIONS

- Registered Nurse, License Number Z257276 since 1974
- Certified Rehabilitation Registered Nurse since 1991
- Certified Case Manager since 1993
- Certified Nurse Life Care Planner since 2004

RECOGNITIONS AND HONORS

- Named to Who's Who in American Rehabilitation Professionals in recognition of distinguished service in rehabilitation nursing, 1986
- Named to the National Distinguished Service Registry in recognition of distinguished service in medical and vocational rehabilitation, 1987
- Named to Who's Who in American Nursing in recognition of outstanding service provided in the field of nursing, 1993
- Named to *Marquis Who's Who in America*, 48th Edition in recognition of outstanding service provided to the field of nursing, 1994
- Peer Reviewer for the American Association for Spinal Cord Injury Nurses
- Peer Reviewer for National Head Injury Foundation

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SERVICES & FEE SCHEDULE

SERVICES:

- **Expert Testimony: Damages/Reasonableness of Past Meds**
- **Life Care Planning / Life Care Plan (opposing expert) Critique**
- **Mini/Preliminary Life Care Plan/Cost Projection for Mediation/Settlement Conference**
- **Expert Witness Identification**
- **Medical Record Review / Analysis / Impression / Organization / Summarization**
- **Video Services (Day In the Life; Settlement Brief; IME Evaluation; NDT / PT Evaluation; etc.)**
- **Medical Bill Auditing**
- **Independent Medical Evaluation (IME) Attendance**
- **Questions: Deposition / Cross Examination**
- **Medicare Set Aside Trust Analysis**

FEES:

Retainer Fee	**$ 4,000.00**
Associate / Project Manager	**$ 85.00 / hour**
Medical / Legal Professional (P)	**$ 125.00 / hour**
Case Management Professional (CMP)	**$ 125.00 / hour**
Medical / Legal Expert Professional (EP)	**$ 175.00 / hour**
Deposition Testimony/Trial Testimony/Arbitration	**$ 350.00 / hour**
IME Attendance (LA County) / Report	**$ 1,100.00 / day**
Video Services	**$ 1,600.00 / day**
Non-refundable case "set-up" fee	**$ 500.00**
Returned Check Fee	**$ 30.00**
Rush Charge	**Less than 30 days - $ 1,000.00** **Less than 45 days - $ 700.00**
Late Charge	**1% (past 30 days); 1.5% (past 90 days)**

SERVICES: Per Diem Rates

Healthcare Cost Management / Case Management Consulting	**$ 4,000.00 per day**
Seminars / Presentations	**$ 4,000.00 per day**

EXPENSES:

Travel Time	**Same As P, CMP, EP rates**	**Fax Charges**	**$ 0.35 per page**
Mileage	**$ .85 per mile**	**Copying Charges**	**$ 0.15 per page**

Please make checks payable to: Roughan & Associates at LINC, Inc.

Roughan & Associates at LINC, Inc.

Case Management ❖ Medical/Legal Consulting

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(626) 303-6333 ❖ Fax (626) 303-8080

April 13, 2009

John Jahrmarkt, Esquire
Jahrmarkt and Associates
2029 Century Park East
Suite 2100
Los Angeles, CA 90067

Re: Phillip Vincent

Dear Mr. Jahrmarkt:

In my best effort to comply with the Federal Rules, I submit the following:

1. I am a Rehabilitation, Case Management and Life Care Planning Nurse Specialist, and President of Roughan & Associates at LINC, a firm that provides case management and medical/legal consulting services. My Registered Nurse License (#257276) is current; and, is issued and updated every two years by the State of California. My Curriculum Vitae and fee schedule are attached herewith.

2. I do not maintain; and, as such, am unable to produce a list of the cases on which I have testified over the last five years. However, the cases that I "recollect" testifying on at Arbitration and/or Trial over the last several years are as follows:

   - Bacente vs. Scripps Hospital (2004)
   - Gonzalez vs. Thompson (2004)
   - Nemer vs. Metro Apartments (2004)
   - McCardle vs. MTA (2004)
   - Melendez vs. LACMTA (2005)
   - Patel vs. Infinity Ins. (2005)
   - Cabrera vs. Isuzu (2005)
   - Garcia vs. Loma Linda University Medical Center (2006)
   - Martin vs. State of California/Cal Trans (2006)
   - Day vs. Mt Diablo Medical Center (2007)
   - Gutierrez vs. City of Costa Mesa (2007)
   - Basco vs. Toyota (2007)
   - Baez vs. L&L Machinery (2007)

3. The enclosed Life Care Plan report summarizes my best estimate recommendations in respect to the above referenced individual's lifetime care needs and costs thereof.

4. My opinions, as depicted in the Life Care Plan report, were based upon: review of the available medical records; discussion with available family members; assessment of Phillip Vincent; and, consultation with those medical specialists listed on the cover page of the Life Care Plan, who provided their impressions and recommendations.

Should additional information become available, I reserve the right to amend the Life Care Plan in accordance with same. Meanwhile, should there be any questions and/or concerns, please do not hesitate to call me at the number referenced herein, at extension 16. In my absence, you may dial *8, extension 21 and Deborah Perlman, RN, who is familiar with the case, will be happy to assist you.

Sincerely,

Jan Roughan, BSN, PHN, RN, CRRN, CNLCP, CCM

Enclosure: Curriculum Vitae
Fee Schedule
Life Care Plan for Phillip Vincent

Expert Report of Alessandro F. Anfuso

Rehabilitation Consultant
Anfuso Vocational Services, Inc.
1041 S. Garfield Ave, Suite 210
Alhambra, California 91801
(626) 588-1590, Fax: (626) 588-1599

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Alessandro Anfuso, M.S., C.V.E.

Rule 26 Disclosures

	Gallard vs. Kim, ET. AL.		
Plaintiff	Horton, Barbaro & Reilly	Jay Horton	
	Orange County Superior Court	Case Number:	10113
	Huynh vs. Akhaven		
Plaintiff	Spray, Gould & Bower	Richard Turner	
	Workers Compensation Appeals Board	Case Number:	55-L006-171/4700.17433
	Maxie vs. City of Gardena		
Plaintiff	Robert Mann/ Donald W. Cook	Donald Cook	
	Los Angeles County Federal Court	Case Number:	235844
1992			
	Randall Lutes vs. Neiman Mechanical		
	Shelley & Graff	Cindy Graff	
		Case Number:	PAS0040044
1995			
	Kavin Javaheri vs. Mihoko Nelson, M.D.		
Plaintiff	Law Offices of Kirtland & Packard	Kenneth Powel	
	Los Angeles Superior Court	Case Number:	GC012474
	Wright vs. Interstate Enq., Inc.		
Plaintiff	Effres and Bryman	Andrew Bryman	
	Los Angeles Superior Court	Case Number:	EC016119
1996			
	Angela Encinas vs. St. Mary Medical Center		
Defense	Kegel, Tobin & Truce	D'Arcy Swartz	
	Workers Compensation Appeals Board	Case Number:	ANA0351968
	Morino vs. Fujita Corp. ET. AL		
Defense	Chapman and Glucksman	Randall Dean	
	Los Angeles Superior Court	Case Number:	SC021441
	Reyes vs. Kubik		
Defense	Benton, Orr, Duval, and Buckingham	Robert Davidson	
	Ventura County Superior Court	Case Number:	CIV162767
1997			
	Cosby-Clark vs. U.S.A.		
Defense	United States Attorneys Office/Central District	Sara Robinson	
	Los Angeles County Federal Court	Case Number:	CV96-7732
	Crystal vs. The Price Co.		
Defense	Chapman and Glucksman	Randall Dean	
	Los Angeles Superior Court	Case Number:	LC010171
	Tautkus vs. U.S.A.		
Defense	United States Attorneys Office/Central District	William Spivak	
	Los Angeles County Federal Court	Case Number:	CV95-1037
	Herman Vasquez vs. United States of America		
Defense	United States Attorneys Office/Central District	Sharla Cerra	
	Los Angeles County Federal Court	Case Number:	CV96-6510
	Boersma vs. Southern California Gas Co.		
Defense	Southern California Gas Company	Dan Clement	
	Los Angeles Superior Court	Case Number:	
	Griffin vs. U.S.A.		
Defense	United States Attorneys Office/Central District	Sharla Cerra	
	Los Angeles County Federal Court	Case Number:	CV95-6005
	Ponsetto vs. U.S.A.		
Defense	United States Attorneys Office/Central District	William Spivak	
	Los Angeles County Federal Court	Case Number:	EDCV95-0026

	Edwin T. Hensley vs. United States of America		
Defense	United States Attorneys Office/Central District Los Angeles County Federal Court	Kevin Finn Case Number:	CV96-5560
1998			
	Wright vs. Stang Manufacturing		
Defense	Chapman and Glucksman Workers Compensation Appeals Board	Rita Miller Case Number:	C980924
	James Lucas Prentice vs. United States of America		
Defense	United States Attorneys Office/Central District U.S. District Court/Central District of CA/Eastern	Nora Manella Case Number:	97-6185WMB
	Juan Torres vs. Santa Fe Plastics		
Defense	Law Offices of Zonni, Ginocchio and Taylor Workers Compensation Appeals Board	Jeffery Denicholas Case Number:	LAO723118, LAO 722789
	Dunn vs. The City of Torrance		
Plaintiff	Mane & Watson Los Angeles Superior Court	Carol Watson Case Number:	CV95-3069
	Moore vs. Waller		
Defense	Law Offices of Jacobs and Associates Ventura County Superior Court	Lisa Toczauer Case Number:	CIV178201
	Wright vs. G.S.T Industries		
Defense	Chapman and Glucksman Workers Compensation Appeals Board	Rita Miller Case Number:	C980924
1999			
	Marriman vs. John C. Hardwick, ET. AL.		
Plaintiff	Horton, Barbaro & Reilly San Diego Superior Court	Ned Reilly Case Number:	EC016821
	Nessler vs. Long Beach Community Hospital		
Plaintiff	Horton, Barbaro & Reilly Orange County Superior Court	Ned Reilly Case Number:	8435
	Gonzalez vs. Fassberg Construction Co., ET. AL		
Plaintiff	Aguilar & Sebartinelli Los Angeles Superior Court	Doreen Mercado Case Number:	BC185069
	Loh vs. The County of Alameda		
Defense	Patton, Wolen & Boxer Alameda County Superior Court	Steven Woolen Case Number:	802293-8
	Harvey vs. Schindler Elevator		
Defense	Law Offices of Tobin & Lucks LLP Workers Compensation Appeals Board	Frank Christine Case Number:	AHM0035455
	Virgil Wilson vs. Los Angeles County		
Plaintiff	Kegel, Tobin & Truce Workers Compensation Appeals Board	D'Arcy Swartz Case Number:	MON0255702
	Hanson vs. Yokohama Ribber Co., LTD.		
Plaintiff	Greene, Broillet, Taylor, Wheeler & Panish, LLP Los Angeles Superior Court	Timothy Wheeler Case Number:	GC016549
	Matthew Tyler Toste vs. City of Buena Park		
	Aitken, Aitken & Cohn	Darren Aitken Case Number:	OOCC05080
	Dolores Estrada vs. County of Riverside		
Defense	Rinos & Martin, LLP Riverside Superior Court	Laura Stephan Case Number:	RIC354324
2000			
	Eleanor Armstrong vs. Ryder Transportation Systems		
Plaintiff	Greene, Broillet, Taylor, Wheeler & Panish, LLP Los Angeles Superior Court	Frank O'Kane Case Number:	YC033031

	James Busby vs. Steve P. Rados		
Plaintiff	Stolpman, Krissman, Elber, Mandel &Katzman	Bernard Katzman	
	Workers Compensation Appeals Board	Case Number:	LB278765
	Audry Wright vs. University of Southern California Department of Public Safety		
Plaintiff	Jeffrey L. Linnetz, Attorney at Law	Jeffrey Linnetz	
	Workers Compensation Appeals Board	Case Number:	MON0188677
	Kathleen L. Gill vs. Mickey's		
Defense	Law Offices of Clinton M. Hodges	Clinton Hodges	
	Los Angeles Superior Court	Case Number:	SC063237
	Godinez vs. Santa Barbara Seafood, Inc.		
Defense	John E. Buttolph, Esq.	John Buttolph	
	Workers Compensation Appeals Board	Case Number:	LAO0713225
	Ward vs. Saenz		
Plaintiff	Tredway, Lumsdaine & Doyle	Matthew Kinley	
	Los Angeles Superior Court/Norwalk	Case Number:	VC028350
	Thomas Volpe vs. City of Los Angeles		
Plaintiff	McQueen & Ashman, LLP	Jean Wilcox	
	Los Angeles Superior Court	Case Number:	BC211765
	William Henderson vs. City of Santa Clarita		
Defense	Burke, Williams & Sorenson	Don Potter	
	Los Angeles Superior Court	Case Number:	PC01848
	Kim vs. McDonald's Corp., ET. AL.		
Plaintiff	Stolpman, Krissman, Elber, Mandel &Katzman	Thomas Stolpman	
	Los Angeles Superior Court	Case Number:	KC026119
	Parker vs. Rubell & United Parcel Service Inc.		
Plaintiff	Berglund, Johnson & Sommer	David Berglund	
	Los Angeles Superior Court	Case Number:	4664
	Manny Finocchio vs. Haralambos Beverage		
Defense	Kegel, Tobin & Truce	Gus Beskos	
	Workers Compensation Appeals Board	Case Number:	LAO0792024
	Muriel T. Despres vs. Hughes Aircraft Co.		
Plaintiff	Alan G. Barry, Esq.	Allan Barry	
	Workers Compensation Appeals Board	Case Number:	LBO173929
	Lindolfo Clemente vs. Bailly Showcase & Fixture Co., Inc.		
Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	VNO0418498
	Russell Lindblom vs. OCES		
	Horton, Barbaro & Reilly	Ned Reilly	
		Case Number:	
	Katina Jones vs. United States of America		
Defense	United States Attorneys Office/Central District	Sara Robinson	
	U.S. District Court/Central District of CA/Eastern	Case Number:	CV 00-00456
	Beltran vs. Stephenson & Sons		
Plaintiff	Law Office of John M. Urban	John Urban	
	Workers Compensation Appeals Board	Case Number:	AHM0064574
	Pagano vs. Colonna		
Defense	North America Risk Service	Lisa Trapane	
	San Bernardino Superior Court	Case Number:	RCV35946
	Clay vs. Swift Transportation		
Plaintiff	Berglund, Johnson & Sommer	David Berglund	
		Case Number:	CLA4171
	Ruperto Garrido vs. The French Tradition		
Plaintiff	Law Office of John M. Urban	John Urban	
	Workers Compensation Appeals Board	Case Number:	AHM0063482

Colin McCormick vs. Ray Enter; City of Santa Clarita

Defense	Burke, Williams & Sorenson	Peter Ezzell	
	Los Angeles Superior Court	Case Number:	PC012772

Sepulveda vs. Esco Transportation

Defense	Laskero & Associates	Stephen Laskero	
	San Bernardino Superior Court	Case Number:	RCV27092

2001

Arletha Davis vs. Los Angeles Unified School District

Defense	Sacks, Rivera & Zolonz	Zachary Sacks	
	Workers Compensation Appeals Board	Case Number:	LBO0288835, LBO0288836

Joan Peterson vs. County of Los Angeles

	Law Offices of George Slotnick	George Slotnick	
	Workers Compensation Appeals Board	Case Number:	VNO0371269

Mowery vs. Castle Floor Covering

Plaintiff	Rose, Klein & Marias, LLP	Esther Oz	
	Workers Compensation Appeals Board	Case Number:	VNO0405977

Francisco Menchaco vs. Commercial Die Casting

Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	VNO0442697

Garza vs. Ripley & Clausen Meat Packing, Inc.

Defense	Law Offices of McCormick, Siepler & Baker	Stuart Supowit	
	Los Angeles Superior Court	Case Number:	BC226435

Carlson vs. Centarus

Plaintiff	MacArhtur, Uribe, Hicks & Mims	Stephen Kaplan	
	Arbitration	Case Number:	01-04843

Efrain Garcia vs. City of Moreno Valley

Plaintiff	Jenkens & Gilchrist, LLP	Jeffery Freedman	
	U.S. District Court/Central District of CA/Eastern	Case Number:	EDCV 97-0302

Losif Camen vs. Bulio of America

Plaintiff	Perona, Langer, Beck, Lallande & Serbin	Charles Wear	
	Workers Compensation Appeals Board	Case Number:	SBR0304047

Ballestros vs. Craftsman Concrete

Plaintiff	Bruce C. Kordic & Associates	Bruce Kordic	
	Workers Compensation Appeals Board	Case Number:	SC12152

Butler vs. Tenet/Centinela Hospital Medical Center

Defense	Lister, Martin & Thompson	David Lister	
	Workers Compensation Appeals Board	Case Number:	VNO0329386, VNO032390

Levassieur vs. Johnson, ET. AL.

Plaintiff	Waterman & Harris	Martin Waterman	
	Riverside Superior Court	Case Number:	330370

Michael Miller vs. Tribune Company

Defense	Law Offices of Gray, York & Duffy, LLP	Amalia Taylor	
	Los Angeles Superior Court	Case Number:	PC029723

Richard E. Schroeder vs. Geraldine Marquerite Benfer

Plaintiff	Law Offices of Thomas P. Allen III	Thomas Allen	
	Los Angeles Superior Court	Case Number:	YC03828

Smith vs. The Visiting Nurses Assoc. & Pomona/San Bernardino Hospital

Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	SBR02681335

Enries vs. Tenet & USC Hospital

Defense	Peter D. Kusnitzow & Associates	Brian Watnick	
	Workers Compensation Appeals Board	Case Number:	VNO3477858

Lucy Marrero vs. First Credit Bank

Plaintiff	Rose, Klein & Marias, LLP	Harry Samarghachian	
	Workers Compensation Appeals Board	Case Number:	VNO 0334475, VNO 0384896

	Holm vs. Orchard Supply Hardware, ET. AL.	
Defense	LaFollette, Johnson, DeHaas, Fesler & Ames Los Angeles Superior Court	Christopher Thomas Case Number: NC028012
	Buff vs. Goodyear Tire	
Defense	Yoka & Smith Los Angeles Superior Court	Ana Escobar Case Number: BC189483
	Melvin Sewell vs. City of Torrance	
Defense	Lister, Martin & Thompson Workers Compensation Appeals Board	David Lister Case Number: Mon0214188
	Cosmo Padilla vs. Ramona Bottling Inc.	
Defense	State Compensation Insurance Fund Workers Compensation Appeals Board	Arthur Weinstein Case Number: VNO399226
	Warner vs. Southern California Gas Co.	
Defense	Sempra Energy San Luis Obispo Co. Superior Court	Dan Clement Case Number: CV00075
	Lawrence vs. Ortiz, Harbor/Santa Ana Towing, Inc.	
Plaintiff	Carpenter & Zuckerman Orange County Superior Court	John Capenter Case Number: 00C06674
	John Doe vs. House of Winston Mortuary	
Plaintiff	Law Offices of Rose, Klein & Marias Workers Compensation Appeals Board	Esther Oz Case Number: VNO395505
	Jesse W. Wren vs. Kaiser	
Plaintiff	Rinos & Martin, LLP Riverside Superior Court	M. Christopher Hall Case Number: PP-305
	Hippert vs. SFX Entertainment, ET. AL.	
Plaintiff	Tredway, Lumsdaine & Doyle Orange County Superior Court	Michael Lanphere Case Number: 00CC07070
	John Walchak vs. Kiewit Pacific	
Plaintiff	Law Offices of Rose, Klein & Marias Workers Compensation Appeals Board	Harry Samarghachian Case Number: MON0233284
	Calliva V. Kui & East Mission8 Investment, Inc.	
Plaintiff	MacArhtur, Uribe, Hicks & Mims Los Angeles Superior Court	Stephen Kaplan Case Number: M000190
	Degeorge vs. Guzman	
Plaintiff	Santiago & Rodnusky Los Angeles Superior Court	Artemio Santiago Case Number: PC025965
	Antonio Zavala vs. CLS Landscape/ Davis Trimming	
Defense	Law Offices of Wilson, Pesota & Fox Workers Compensation Appeals Board	Keith Gilmetti Case Number: ANA0331831
	Danny Williams vs. Allwaste/Signal Hill	
Defense	Gray and Prouty Workers Compensation Appeals Board	Stephen Berger Case Number: VNO0351635
	Robet Jones	
	Henry L. Jones	Henry Jones Case Number:
	Clint Floyd vs. World at Work Staffing Serivces	
Defense	Koletsky, Mancini, Feldman & Morrow Los Angeles Superior Court	Jack Hoskins Case Number: LC053423
	Dennis Black vs. The Home Depot	
Defense	Cooksey, Toolen, Gage, Duffy & Woog San Diego Superior Court	Pamela Lacey Case Number: GIC796953
	Daniel Duncan vs. VGM Investment; Walker	
Plaintiff	Carpenter & Zuckerman Los Angeles Superior Court	Sara Azari Case Number: SC 073489

Lisette Mace vs. Valencia Town Center

Defense	Glenn L. Silverii & Associates	Scott Kubis	
	Los Angeles Superior Court	Case Number:	PC030956

Cord vs. City of Dana Point

Defense	Law Offices of Lee A. Wood & Associates	Lee Wood	
	Orange County Superior Court	Case Number:	2000.46

Romero vs. Verizon

Defense	Jacobs & Solomon	Carl Jacobs	
	Workers Compensation Appeals Board	Case Number:	MON0254969

Perry Nadell vs. Bruce Schutte

Defense	Baker & Baker	William Baker	
	Los Angeles Superior Court	Case Number:	BC220065

Mason vs. U.S.A.

Defense	United States Attorneys Office/Central District	Sara Robinson	
	U.S. District Court/Central District of CA/Western	Case Number:	00-4363

Goldstrohm vs. Mandiola

Plaintiff	Horton, Barbaro & Reilly	Malena Leclair	
	Orange County Superior Court	Case Number:	00C13777

Julian Gonzalez vs. City of Los Angeles

Defense	Law Offices of Middlebrook, Kaiser & Popka	Scott Boyer	
	Los Angeles Superior Court	Case Number:	00015-2

Rosenau vs. Monumental General

Defense	Valdez & Associates	Wayne Kaneshiro	
	U.S. District Court/Central District of CA/Western	Case Number:	EDCV94-0078

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Gayle Gutierrez vs. LA County, Department of Health Services

Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	VNO0377443

Luevano vs. Colorama

Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	0418926

Ruth Robinson vs. Los Angeles County

Plaintiff	Kenton D. Koszdin	Kenton Koszdin	
	Workers Compensation Appeals Board	Case Number:	89LA600404

Hodges vs. City of Lake Forest

Defense	Law Offices of Lee A. Wood & Associates	Lee Wood	
	Orange County Superior Court	Case Number:	01CC05583

Goss vs. Big Bear Disposal, Inc.

Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	SBR248350

Dion Float vs. Fox Broadcasting

Defense	Koletsky, Mancini, Feldman & Morrow	Jack Hoskins	
	Los Angeles Superior Court	Case Number:	BC223255

Vint-Cowin vs. St. Marys

	Law Offices of Stevens & Minsky	Larry Minsky	
		Case Number:	

Taylor vs. Performance Plus Tire & Automotive

Plaintiff	Rose, Klein & Marias, LLP	Herbert Galperson	
	Workers Compensation Appeals Board	Case Number:	LBO265657, LBO265658

Paul Benton vs. San Gabriel Valley Water Co.; Integrated Claims Administrators, Inc.

Defense	Bradford & Barthel	Sandra Brownfield	
	Workers Compensation Appeals Board	Case Number:	AHM0062677

James Baker vs. Robinsons-May

Defense	Kegel, Tobin & Truce	Gus Beskos	
	Workers Compensation Appeals Board	Case Number:	AHM063769

	Woodrow Beckley vs. Crown City Plating	
Plaintiff	Von Mizener & Moore	Olaleye Moore
	Workers Compensation Appeals Board	Case Number: POM096459
	Robert Harner vs. Jacob Maarse Florist	
Plaintiff	Shelley & Graff	Cindy Graff
	Workers Compensation Appeals Board	Case Number: PAS0015334
	Michael Forth vs. Kelsey Peterson	
Plaintiff	Law Offices of Nick O'Malley	Nick O'Malley
	Orange County Superior Court	Case Number: 00CC0990
	Vega vs. Tuftco Corp.	
Plaintiff	Law Offices of Roque, Pringle & Moore	Ken Watase
	Workers Compensation Appeals Board	Case Number:
	Nelli Berdeguez	
Plaintiff	Law Offices of Rose, Klein & Marias	Harry Samarghachian
	Workers Compensation Appeals Board	Case Number: VNO0304626
	Thomas Craig Evans vs. Nancie's Sweeping	
Plaintiff	The Boccardo Law Firm, LLP	John Stein
	San Bernardino Superior Court - Rancho Cucamonga	Case Number: RCV046669
	Zenith vs. Roche	
Defense	Donner, Fernandez & Lauby LLP	Edward Fernandez
	Orange County Superior Court	Case Number: 01CC08323
	Moberg vs. Vane & Church of Latter-Day Saints	
Defense	Paul J. Shardlow, Esq.	Paul Shardlow
	Riverside Superior Court	Case Number: RIC342824
	Landman vs. Bohnert & Coremark Int'l	
Defense	Orrick, Herrington & Sutcliffe	Julie Noble
	San Diego Superior Court	Case Number: DOCSSC1:300050.1
	Maurice Causley vs. Mario Ramirez Contreras	
Plaintiff	Evie, McNeill & Wyatt	Eulanda Matthews
	Los Angeles Superior Court	Case Number: KC035609
	Jeffery Black vs. Gasaway	
Plaintiff	Law Offices of Michael S. Fields	Michael Fields
	Workers Compensation Appeals Board	Case Number:
	Johnnie R. Broaden vs. Los Angeles Community College District	
Defense	Bolden & Martin, LLp	Martha Henderson
	Workers Compensation Appeals Board	Case Number: VNO03943223, VNO0331732
	Michael Beltran vs. Horace Cypert	
Defense	John C. Wallace & Associates	John Wallace
	San Diego Superior Court	Case Number: W020392
	Edward E. Moore vs. Kaiser Foundation Health Plan	
Plaintiff	Horton, Barbaro & Reilly	Jay Horton
	Orange County Superior Court	Case Number: 10900
	Charles W. Johnson vs. Los Angeles County	
Plaintiff	Law Offices of Rose, Klein & Marias	Esther Oz
	Workers Compensation Appeals Board	Case Number: VNO0344935
	Mark A. Puopolo vs. Crunch Fitness Center	
	Law Offices of Carpenter & Zuckerman	John Carpenter
	Los Angeles Superior Court	Case Number: BC245787
	Beck vs. Cheryl Dixon-Lemmons	
Defense	Bremer, Whyte, Brown & O'Meara, LLP	Nelson Cohen
	Clark County, Nevada, District Court	Case Number: A465288
	Ann Dock vs. Joshua Kaye, M.D.	
Defense	Kamel & Maxwell	Richard Reade
	Los Angeles Superior Court	Case Number: YC040536

	De La Torre vs. Saunders Construction	
Plaintiff	Law Offices of David E. Gentry Workers Compensation Appeals Board	David Gentry Case Number: ANA0352505
	Brian Harmon vs. Larry Alva	
Plaintiff	Carpenter & Zuckerman	John Carpenter Case Number:
	Rocha vs. McCormick & Co., Inc.	
Defense	Piber, Marbury & Wolfe Monterey County Superior Court	Anthony Buchignani Case Number: M50387
	Mike Jenkins vs. Santa Ana Dialysis Center	
Defense	Murphy, Pearson, Bradley & Feeny Orange County Superior Court	Jennifer Johnston Case Number: 02CC10767
	Stephen McCarty vs. Southern California Edison	
Plaintiff	Hollins & Schechter San Bernardino Superior Court - Rancho Cucamonga	Andrew Hollins Case Number: 11046
	Thomas vs. B.F. Hopson & Sons	
Plaintiff	Gaylord & Nantais	Ned Gaylord Case Number: SA6008802
	Stephanie Payn vs. Cain	
Plaintiff	Linton & Bogorad Los Angeles Superior Court	Tanya Linton Case Number: CIV-205903
	Kerri Hawkins vs. M&S Trucking, Inc.	
Plaintiff	Law Offices of McCormick, Siepler & Baker Los Angeles Superior Court	Stephen Ziemann Case Number: BC245313
	Clarence Milloy vs. Composite Structures	
Plaintiff	George Slotnick Workers Compensation Appeals Board	Clarence Milloy Case Number: VNO039139; VNO0393140
	Herrera vs. Montgomery Wards	
Plaintiff	Law Offices of McClure & Carter San Diego Superior Court	Michael McClure Case Number: GIC770744
	Lee vs. Gandhu	
Plaintiff	Carpenter & Zuckerman Los Angeles Superior Court	John Capenter Case Number: 01CC15836
	Puopola vs. Church Fitness Center	
Plaintiff	Carpenter & Zuckerman Los Angeles Superior Court	John Carpenter Case Number: BC245787
	Watt vs. City of Compton	
Plaintiff	Horton, Barbaro & Reilly Los Angeles Superior Court	Kimberly Valentine-Sibert Case Number: NC028423
	Janine Champion vs. Moss Group	
Plaintiff	Law Offices of McCormick, Siepler & Baker Los Angeles Superior Court	Stephen Ziemann Case Number: LC059264
	Zenith Insurance Co. vs. Roche Excavating Co.	
Defense	Donner, Fernandez & Lauby LLP Orange County Superior Court	Edward Fernandez Case Number: 01CC08323
	Lawrence A. Yagy vs. Jon R. Reil	
Defense	Knapp, Peterson & Clarke Los Angeles Superior Court	Glenn Gilsleider Case Number: SC064216
	Becker vs. Becker	
Defense	Dick Vitolo Los Angeles Superior Court	Dick Vitolo Case Number: CF013626
	Stevens vs. Victor Corral, ET AL	
Defense	Wait & Childs Los Angeles Superior Court	Mary Childs Case Number: KC037471

Roobik Sorlis-Yaghoub vs. Pro Express Trucking

Plaintiff	Doumanian & Associates	Nancy Doumanian
	Los Angeles Superior Court	Case Number: SC0605066

Barbara Rainer vs. Buena Ventura Mobile Home Estates

Defense	Brady, Vorwerck, Ryder & Caspino	Wayne Robertshaw
	Ventura County Superior Court	Case Number: CIV214202

Meher J. Dalal vs. Khoren Tataryan

Defense	Pollard, Archer, Cranert, Googooia & Stevens	Joyce Maveredakis
	Los Angeles Superior Court	Case Number: SC068316

Frank Pinelli vs. Underground Technology Inc.

Plaintiff	Horton, Barbaro & Reilly	Kimberly Valentine-Sibert
	Los Angeles Superior Court	Case Number: BC224299, BC224337

Geroge Alvarez vs. Arrow Truck Bodies Equipment

Defense	Bistline & Cohoon	Adrieanne Hahn
	Los Angeles Superior Court	Case Number: BC237313

Cynthia Larosa vs. City of Mission Viejo

Defense	Law Offices of Lee A. Wood & Associates	Ricardo Hernandez
	Orange County Superior Court	Case Number: 01CC15836

Burwell vs. City of Los Angeles

Plaintiff	Fancell, Strickland, Roberts & Lawrence	Paul Beach
	U.S. District Court/Central District of CA/Western	Case Number: CV01-06375

William J. Young and Lisa I. Young vs. United States of America

Defense	United States Attorneys Office/Central District	Debra Yang
	U.S. District Court/Central District of CA/Western	Case Number: CV01-07756

Lerma vs. Shah, M.D.

Plaintiff	MW Roth, PLC	Mitchell Roth
	Los Angeles Superior Court	Case Number: KC037030

Patrick Bills vs. City of Rialto

Plaintiff	Owen & Bradley	Joanna Gorsage
	U.S. District Court/Central District of CA/Western	Case Number: ED01894

Annmarie Peterson vs. Avis Rent A Car System, Stephen K. Su

Plaintiff	Law Offices of Beam, Brobeck, West, Borges & Rosa LLP	David Brobeck
	Orange County Superior Court	Case Number: 01CC12980

Frances Jordan vs. Bank of America

Plaintiff	George Slotnick	Frances Jordan
	Workers Compensation Appeals Board	Case Number: VNO0397875, VNO0397876, V

Camacho vs. Pacific Electicord Company

Plaintiff	Law Offices of David E. Gentry	David Gentry
	Orange County Superior Court	Case Number:

Tarron Grim vs. Ben Ackerly

Defense	Barry Bartholomew & Associates	Mark Weiner
	Los Angeles Superior Court	Case Number: BC285817

Rydzewski vs. Relience Direct Insurance Company

Defense	Naulty, Scaricamazz & McDevitt	Cynthia Lofell
	Workers Compensation Appeals Board	Case Number: 10-00085

Kasandra Sanders vs. Lewis Schainuck MD, et al

Defense	Gittler & Bradford	Reid Smith
	Los Angeles Superior Court	Case Number: VC 036585

Louis Gagliardotto vs. James Fasbender

Defense	Pollard, Archer, Cranert, Googooia & Stevens	Joyce Maveredakis
	Los Angeles Superior Court	Case Number: KC037990

Wade vs. Ford Motor Co.

Defense	Bowman & Brooke	Anthony Thomas
	Marin County Superior Court	Case Number: CV993781

	Lopez vs. Pushcheck, M.D.	
	MW Roth, PLC	Mitchell Roth Case Number:
	Lopez vs. Kaiser	
Plaintiff	MW Roth, PLC Los Angeles Superior Court	Mitchell Roth Case Number: 3686
	Richard Morales vs. Henkels & McCoy, Inc.	
Plaintiff	Wright, Robinson, Osthime & Tatum Los Angeles Superior Court	Robert Harrison Case Number: BC269913
	Pete De Leon vs. Action Envelope	
Plaintiff	Law Offices of Robert Dourian Los Angeles Superior Court	Robert Dourian Case Number: BC270921
	Kenneth Harrington and Jeanette Harrington vs. Specialty Crane and Rigging	
Plaintiff	Law Offices of Rose, Klein & Marias Santa Barbara Superior Court	Steven Robinson Case Number: 01093006
	Dennis Myers vs.Vons Safeway Company P.S.I.	
Plaintiff	Shelley & Graff Workers Compensation Appeals Board	Cindy Graff Case Number: VNO 0422143;45
	David Fordham vs. GTE	
Plaintiff	Law Offices of Steven Tanner Workers Compensation Appeals Board	Steven Tanner Case Number: VE054392;-393
	Gross vs. Berg Lacquer Company	
Plaintiff	Law Offices of Inlow H. Campbell Los Angeles Superior Court	Francis Licata Case Number: BC261567
	Karen Carlson Varela vs. Barron Wage Hurlbut	
Defense	Wesierski & Zurek Orange County Superior Court	Christopher Wesierski Case Number: 01CC15472
	Willie J. McCaskill vs. Floyd E. Stephens, Amberwick Corporation	
Plaintiff	Law Offices of James R. Rosen Workers Compensation Appeals Board	Adela Carrasco Case Number: TC015147
	Castro vs. Davidson Ladder	
Plaintiff	Horton, Barbaro & Reilly Orange County Superior Court	Robert Younger Case Number: 0CC00774
	John V. Keith vs. Western Parcel Service	
Plaintiff	Law Offices of Rose, Klein & Marias Workers Compensation Appeals Board	Esther Oz Case Number: VNO0309495
	Ezequiel H. Ortega vs. Warehouse Technology, Inc.	
Defense	Law Offices of John Hill & Associates San Bernardino Superior Court - Rancho Cucamonga	Helen Shin Case Number: RVC057562
	Michael R. Musson vs. Robert F. Wagner	
Defense	Law Offices of Beam, Brobeck, West, Borges & Rosa LLP Orange County Superior Court	David Brobeck Case Number: 01CC16484
	Jose Manual Perez vs. Parkview Community Hospital; Dr. Kim	
	La Follette, Johnson, De Haas, Fesler,Silberberg & Ames	Robert Shepard Case Number:
	Johnson vs. TMT Pathway	
Defense	Stutz, Gallagher, Artiano, Shinoff &Holtz U.S. District Court/Southern District of CA	Susan Bartelstone Case Number: CV02-01638
	Isaac Irizarry vs. Carson Trailer, Inc.	
Defense	La Follette, Johnson, De Haas, Fesler,Silberberg & Ames Los Angeles Superior Court	Douglas Dickson Case Number: YC042744
	Linda Sandoval vs. McDonalds Corporation	
Defense	Pollard, Archer, Cranert, Googooia & Stevens Los Angeles Superior Court	Joyce Maveredakis Case Number: EC032481

	Lane Carey Dunn vs. American Freightways Services		
Plaintiff	La Follette, Johnson, De Haas, Fesler,Silberberg & Ames	Steven Odell	
	Los Angeles Superior Court	Case Number:	LC061311
	Anthony Perez vs. Eric C. Dahlberg		
Plaintiff	Thon, Beck & Vanni	Thomas Beck	
	Los Angeles Superior Court	Case Number:	KC039104
	Brennan Showers vs. State of California, ET AL.		
Plaintiff	Horton, Barbaro & Reilly	Frank Barbaro	
	Orange County Superior Court	Case Number:	00CC08377
	Michelle Edgington vs. Madison Bear Garden		
Defense	Law Offices of Bailey & Brown	William Schmidt	
	Butte Superior Court	Case Number:	127805
	John A. Ballagooijen vs. Otis Elevator Co.		
Defense	Arter and Hadden, LLP	Roxanne Wilson	
	Los Angeles Superior Court	Case Number:	BC278923
	Adelaide Vasquez vs. Bullocks/Macys		
Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	VNO 0350808;12
	Lopez vs. Kaiser		
Plaintiff	MW Roth, PLC	Mitchell Roth	
	Los Angeles Superior Court	Case Number:	3686
	David Domingo vs. AT&T		
Plaintiff	Law Offices of Carpenter & Zuckerman	Sara Azari	
	Tulare County Superior Court	Case Number:	01-198363
	Donna Robinson vs. Ryder		
Plaintiff	Gaylord & Nantais	Thomas Nantais	
	Workers Compensation Appeals Board	Case Number:	4-005172-0
	Erica Virgen vs. Dr. Joseph Harris		
Defense	Law Offices of Tuverson & Hillyard	Harmon Levine	
	Los Angeles Superior Court	Case Number:	TC011673
	Wiley vs. Cole		
Defense	Law Offices of Patterson, Ritner, Lockwood, Gartner & Jurich	Rose Carter	
	Los Angeles Superior Court	Case Number:	LC060076
	Contrerras vs. Greyhound		
Plaintiff	Law Offices of Robert Dourian	Robert Dourian	
	Los Angeles Superior Court	Case Number:	
	Bruce Wallace vs. Southwest Airlines Co.		
Defense	Piper Rudnick	Angela Dotson	
	Los Angeles Superior Court/Burbank	Case Number:	EC028679
	Vahan Ghazarian vs. Villa Rentals, Inc.		
Defense	La Follette, Johnson, De Haas, Fesler,Silberberg & Ames	Douglas Dickson	
	Orange County Superior Court	Case Number:	01CC12611
	Otoniel Gurrola vs. Fernando Padillo		
Plaintiff	Law Office of Sandor C. Fuchs	Sandor Fuchs	
	Los Angeles Superior Court	Case Number:	EC035344
	Leon Fishman vs. Bosley Medical Group		
Defense	Law Offices of Tobin & Lucks LLP	Paul Najoan	
	Workers Compensation Appeals Board	Case Number:	LAO0711075, 91-28924-148-0
	Jordon C. Carlson vs. De Anza Resort and Golf		
Defense	Campbell, Souhrada & Volk	John Campbell	
	San Diego Superior Court	Case Number:	GIC798933
	Elena Yee Espinoza vs. Viyolpam Sa De Cv		
Plaintiff	Bacalski, Byrne, Koska & Ottoson, LLP	Ruben Tarango	
	San Diego Superior Court	Case Number:	GIC779796

	Jorge Mesina vs. Trueflex/Pang Rubber Products Co.	
Plaintiff	Law Offices of Dallas Simmons	Daniel Gilson
	Los Angeles Superior Court	Case Number: BC259355
	Patricia Small vs. Gray Cox	
Plaintiff	Morris, Polich & Purdy, LLP	Michael West
	Los Angeles Superior Court	Case Number: 0013-22448
	Jose Villalpando vs. City of Los Angeles	
	Law Offices of Carpenter & Zuckerman	John Capenter
		Case Number:
	Harry D. Chadwick vs. United States of America	
Defense	United States Attorney's Office - Southern District of California	Kathryn Snyder
	U.S. District Court/Southern District of CA	Case Number: 02CV1059
	Ferndando Grassi vs. U.D.O. Partners II, L.P.; ET AL	
Plaintiff	Thon, Beck & Vanni	Gregory Vanni
	Los Angeles Superior Court	Case Number: PC029354
	Robert Bradbury vs. David Lyman Wood, III, M.D., et al.	
Plaintiff	Barbaro & Valentine, LLP	Kimberly Valentine-Sibert
	Judicate West - Santa Ana	Case Number: SCVSS095454
	Mary F. Garcia vs. Los Angeles County Metropolitan Transit Authority	
Defense	Law Offices of Tomaryn, O'Reilly & McDermott	Paul O'Reilly
	Los Angeles Superior Court	Case Number: BC272577
	Joel Miles vs. Anaheim Convention Center	
Plaintiff	Horton, Barbaro & Reilly	Ned Reilly
		Case Number:
	Mecina Bottaro vs. Aaron L. Ruskin	
Defense	La Follette, Johnson, De Haas, Fesler,Silberberg & Ames	Douglas Dickson
	Workers Compensation Appeals Board	Case Number: YC042215
	Gary Bella CK vs. Midway Hospital Center, ET AL	
Plaintiff	Thon, Beck & Vanni	Thomas Beck
	Los Angeles Superior Court	Case Number: BC252240
	De Leon vs. Action Envelope	
Plaintiff	Law Offices of Robert Dourian	Robert Dourian
	Los Angeles Superior Court	Case Number: BC 270921
	Eugenia Ribic vs. Air Conditioning Company, Inc.	
Plaintiff	Law Offices of McCormick, Siepler & Baker	Matt Rifat
	Los Angeles Superior Court	Case Number: EC032914
	Jenkins vs. Da-Vita Dialysis Center	
Plaintiff	Murphy, Pearson, Bradley & Feeny	Jennifer Johnston
	Orange County Superior Court	Case Number: 02CC10767, DIRL.110340.4
	Modesta Ocampo vs. Angelica Corporation	
Defense	Paul J. Shardlow, Esq.	Paul Shardlow
	Los Angeles Superior Court	Case Number: BC282553
	Hopkins vs. Paxton	
	Law Offices of Jeffrey C. McIntyre	Robert Garcia
		Case Number:
	Frank J. Pinelli vs. Hood Corporation	
Plaintiff	Law Offices of David E. Gentry	David Gentry
	Workers Compensation Appeals Board	Case Number: ANA0344946
	Patrick A. Malberg vs. Truong M.D.	
Defense	Law Offices of Tuverson & Hillyard	Jonathan Musgrove
	San Bernardino Superior Court	Case Number: SCVSS079981
	Kevin M. Enslen vs. Physicians Choice Walk in Medical Center	
Plaintiff	Rinos & Martin, LLP	M. Christopher Hall
	Los Angeles Superior Court	Case Number: PP-319

Kim A. Allen vs. Medex Courier Systems

Defense	Gilbert, Kelly, Crowley & Jennett	James Spaltro	
	Orange County Superior Court	Case Number:	02CC04581

Darlene Morris vs Huerta Trucking

Plaintiff	Law Office of Sandor C. Fuchs	Sandor Fuchs	
	Orange County Superior Court	Case Number:	02CC15588

Barbara Brockett vs. United States of America

Defense	United States Attorneys Office/Central District	Debra Yang	
	U.S. District Court/Central District of CA/Eastern	Case Number:	CV02-8858

Fadia Al-Yousef vs. Shelley M. Clark

Plaintiff	Law Offices of Dallas Simmons	Daniel Gilson	
	Los Angeles Superior Court	Case Number:	YC045198

Rachael Wilson vs. Advantage Manufacturing

Defense	Stutz, Gallagher, Artiano, Shinoff &Holtz	James Holtz	
	Humboldt Superior Court	Case Number:	DR020581

Linda Marie Bennett vs. Los Angeles Unified School District

Plaintiff	Robin, Carmack and Gonia, LLP	Elizabeth Gonia	
	Los Angeles Superior Court	Case Number:	LAO0749492

Tatiana Piermartiri vs. The Desert Sun Publishing Co.

Defense	Shupe & Reagan	R.q. Shupe	
	Riverside Superior Court	Case Number:	INC027405

Miguel Guillian vs. Fourth Street Rock Crusher

Plaintiff	Law Offices of David E. Gentry	David Gentry	
	Riverside Superior Court	Case Number:	344545

Sandy Shuart vs. Kaiser

Plaintiff	Gordon, Edelstein, Krepack, Grant, Felton & Goldstein	Adam Dombchik	
	Workers Compensation Appeals Board	Case Number:	VNO357479, PAS 0018680

Mussoni vs. Wayner, M.D., ET AL

Defense	Beam, Brobeck, West, Borges & Rosa LLP	Kelly Fortin	
	Orange County Superior Court	Case Number:	C0703-DJB

Koko Katalaris vs. Bowflew

Plaintiff	Law Offices of Carpenter & Zuckerman	Sara Azari	
	Workers Compensation Appeals Board	Case Number:	

Abraham Torres vs. County of Orange

Defense	Lynberg & Watkins	Courtney Hylton	
	Orange County Superior Court	Case Number:	

Cassandra Ockert vs. Jack Daniel Zacker

Defense	Schaffer, Lax, McNaughton & Chen	Kara Pape	
	Los Angeles Superior Court	Case Number:	MC012146

Renee Taira vs. Kaiser

Defense	Bonne Bridges, Mueller O'Keefe & Nichols	Ryan Koczara	
	Arbitration	Case Number:	10493

Smith vs. Soltec

Defense	Milani & Associates, Inc.	Frederick Glasser	
	Santa Barbara Superior Court	Case Number:	01041008

Finocchio vs. Haralambus Beverage

Defense	Kegel, Tobin & Truce	Gus Beskos	
	Workers Compensation Appeals Board	Case Number:	LAO0792024

Whitman vs. First Republic Bank

Plaintiff	Bragg, Serota & Kuluva	Christina Young	
	Los Angeles County U.S. District Court	Case Number:	SC073032

Servis vs. McCaughey

Plaintiff	Law Offices of Kirtland & Packard	Scott Schutz	
	Los Angeles Superior Court	Case Number:	V1901341-66

	Jose Beas vs. County of Los Angeles		
Defense	Manning & Marder, Kass Ellrod, Ramirez LLP	Edwin Lewis Case Number:	
	Gail Novack vs Howard Hoffman		
Defense	La Follette, Johnson, De Haas, Fesler,Silberberg & Ames Santa Barbara Superior Court	Douglas Dickson Case Number:	01112978
	Lokelani Ann Carpenter and Christopher Carpenter vs. Interstate Distributor Co.		
Defense	Law Offices of Lotz, Dodgett & Rawers Orange County Superior Court	Jennifer Kuzman Case Number:	O3CC14702
	Timothy Ostrowski vs. Fowler Trucking		
Defense	Law Offices of Tharpe & Howell Ventura County Superior Court	Heather O'Keefe Case Number:	CIV217474
2004			
	Charles R. Shaffner vs. Maersk Pacific Limited		
Defense	Law Offices of Keesal, Young & Logan Los Angeles Superior Court	Ryan Vicari Case Number:	NC033161
	Patricia Ann Warren vs. AT&T Corporation		
Defense	Brown & Kellner LLP Los Angeles Superior Court	Frank Marchetti Case Number:	BC289090
	Sheila Colby vs. Morris Rosenbloom & Company		
Defense	Kamel & Maxwell Los Angeles Superior Court	Rex Mills Case Number:	BC292734
	David Ghiloni vs. Delores Chapman; Thaddieus Harris, ET AL		
Defense	Law Offices of Mark G. Cunningham Los Angeles Superior Court	Mark Cunningham Case Number:	YC046284
	Muriel Avery vs. Oil Corporation		
Defense	Gilbert, Kelly, Crowley & Jennett San Bernardino Superior Court	James Spaltro Case Number:	VCV5024681
	Ernesto Navarro vs. Behr Building Company		
Plaintiff	Carpenter & Zuckerman Los Angeles Superior Court	John Capenter Case Number:	SC076733
	Sonja L. Jackson vs. Sarkis Katrdzhyan		
Plaintiff	Law Office of Sandor C. Fuchs Los Angeles Superior Court	Sandor Fuchs Case Number:	BC287698
	Michael Anthony Lewis vs. City of Los Angeles		
	Harris & Green	Giuseppe Castaldi Case Number:	EC035296
	Daniel Keith Hundley vs. Kaiser Foundation Hospitals		
Defense	Bonne Bridges, Mueller O'Keefe & Nichols	Richard Helgemo Case Number:	12809
	David Keith Hundley vs. Kaiser		
Defense	Bonne Bridges, Mueller, O'Keefe & Nichols/Riverside Arbitration	Richard Helgemo Case Number:	12809
	Tiffany Anne Broadway vs. Daniel M. Silver		
Plaintiff	Carpenter & Zuckerman Los Angeles Superior Court	Sara Azari Case Number:	LC 065358
	Michelle Rogella vs. Abraham B. Zulaikha		
Plaintiff	Carpenter & Zuckerman Los Angeles Superior Court	Sara Azari Case Number:	BC271729
	Veronica Estrada vs. Kedren Acute Psychiatric Hospital		
Defense	Kamel & Maxwell Los Angeles Superior Court	Jennifer Clingo Case Number:	BC27412
	Logan Lopez vs. Ameritrk Imports, Inc.		
Defense	Paul J. Shardlow, Esq. Kern County Superior Court/Metropolitan Division	Paul Shardlow Case Number:	S-1500-CV-249902-SPC

	Travis Bell vs. Mazin Sabri; Chino Valley Medical Center		
Defense	Aitken, Aitken & Cohn	Richard Cohn	
	Orange County Superior Court	Case Number:	02CC04398
	Marshall Wittkopf vs. County of Los Angeles		
Defense	Law Offices of David J. Weiss	Bob Nehoray	
	Los Angeles Superior Court	Case Number:	BC203339
	Ariana Ehtemam vs. Kaiser Foundation		
Plaintiff	Barbaro & Valentine, LLP	Frank Barbaro	
	Judicate West - Rancho Cucamonga	Case Number:	
	Jose Cerda vs. Alejandra Sanchez, MD		
Defense	Kamel & Maxwell	Rex Mills	
	Los Angeles Superior Court	Case Number:	GC032162
	Thomas Greenfield vs. Smart & Final		
Defense	Holstein, Taylor, Unitt & Law	Patricia Law	
	Los Angeles Superior Court	Case Number:	VC046622
	Alma Guerrero vs. Waxies Enterprises		
Defense	Forge & Rifat	Stuart Supowit	
	Los Angeles Superior Court	Case Number:	EC035089
	Paula El Sharei vs. County of Orange/Sherriff's Dept.		
Plaintiff	Perona, Langer, Beck, Lallande & Serbin	Charles Wear	
	Workers Compensation Appeals Board	Case Number:	LAO0811802
	Diane Price vs. 7-Eleven Inc.		
	Carpenter & Zuckerman	Adam Silverstein	
	Los Angeles Superior Court	Case Number:	LC 065086
	Keith Goddard vs. Burgess Washinton, Jr.		
Defense	Berman, Berman & Berman	Evan Berman	
	Riverside Superior Court	Case Number:	RIC379334
	Gerald Baker Jr. vs. Black & Decker		
Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	VNO037705
	Donald Dolmos vs. Pac Rim Unifreight, Inc		
Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	VNO 0486044
	Singer vs. Slominski		
Defense	Law Offices of Clinton M. Hodges	Clinton Hodges	
	Los Angeles Superior Court	Case Number:	PC033656
	Thomas L. Davis vs. Huynh		
	Thon, Beck & Vanni	Gregory Vanni	
		Case Number:	
	Lucila Lemus, Jesus Lemus vs. Southern California Gas Company		
Defense	Sempra Energy	Celeste Easton	
	Los Angeles Superior Court	Case Number:	PC034115
	Tiffany Anne Broadway vs. Daniel M. Silver		
Plaintiff	Carpenter & Zuckerman	Sara Azari	
	Los Angeles Superior Court	Case Number:	LC065358
	Wilfred Joseph Fields, Sr. vs. TXI Riverside Cement Co.		
Defense	Musick, Peeler, & Garrett	Kristen Love	
	U.S. District Court/Central District of CA/Western	Case Number:	CV 03-07708MMM (PJWx)
	Wilfred Joseph Fields, Sr. vs. TXI Riverside Cement Co.		
Defense	Musick, Peeler, & Garrett	Kristen Love	
	U.S. District Court/Central District of CA/Western	Case Number:	CV 03-07708MMM(PJWx)
	Victoria A. Carr vs. Harold Scott Carr		
Respondent	Law Offices of Gary W. Kearney	Gary Kearney	
	Los Angeles Superior Court	Case Number:	BD065919

	Steve Taraldsen vs. Hofer Properties		
Plaintiff	Law Office of Sandor C. Fuchs	Sandor Fuchs	
	Ventura County Superior Court	Case Number:	CIV223356
	Daniel Sandello vs. Kilroy Realty Corporation		
Plaintiff	Thon, Beck & Vanni	Kevin Callahan	
	Los Angeles Superior Court	Case Number:	YC046942
	Jennifer Garber vs. Cerritos Community College		
Defense	McCune & Harber	Jessica Garcia	
	Orange County Superior Court	Case Number:	03CC10683
	Hector Medina vs. Paul Chambers		
Defense	Law Offices of Mark G. Cunningham	Chandelle Buxton	
	Los Angeles Superior Court	Case Number:	VC040323
	Evelyn Price vs. Regents of the University of California		
Defense	Wilson, Pesota & Fox	Robert Goldberg	
	Workers Compensation Appeals Board	Case Number:	ANA0374695, 0374696, 03723
	Karen Horn and Lisa Friedl vs. Kathleen Burke		
Defense	Cassidy, Warner & Winstead	Bruce Winstead	
	Los Angeles Superior Court	Case Number:	PC032695Y
	Juan Waterman vs. Secretary Department of Veterans Affairs		
Defense	United States Attorney's Office - Southern District of California	Carol Lam	
	U.S. District Court/Southern District of CA	Case Number:	04cv0459-H
	Jennifer Culwell vs. Burrtec Waste		
Plaintiff	Girardi & Keese	Shawn McCann	
	San Bernardino Superior Court	Case Number:	RCV075536
	Salvador Ramos vs. Ronald A. Omerod		
Defense	Southern California Edison	Paul Pimentel	
	Santa Monica Courthouse	Case Number:	SC078938
	Manoutchehr Ebrahim vs. Jintana Jung		
Plaintiff	Law Offices of Carlo Noravian	Carlo Noravian	
	Arbitration	Case Number:	YAFAU44066
	James Williams vs. Keller Ladders		
Defense	Lewis, Brisbois, Bisgaard & Smith, LLP	Christina Karayan	
	Los Angeles Superior Court	Case Number:	NC034684
	Mary Ann Menezes vs. Bryon Duane Carl/York		
Defense	Hinshaw & Culbertson	Peggy Kolkey	
	San Joaquin Superior Court	Case Number:	CV021856
	Eva Kustos vs. Simi Valley USD		
Defense	McCune & Harber	Jessica Gillete	
	Ventura County Superior Court	Case Number:	SC037561
	Law Offices of Carpenter & Zuckerman	John Carpenter	
	Los Angeles Superior Court	Case Number:	
	Robert Chismar vs. NBC; Sedgwick CMS		
Plaintiff	Law Offices of Joanne Rossie	Joanne Rossie	
	Workers Compensation Appeals Board	Case Number:	VNO0386613, VNO0444532, V
	Frank Bugarin vs. City of Alhambra		
Plaintiff	Robert Mann/ Donald W. Cook	Donald Cook	
	Los Angeles Superior Court	Case Number:	LACV03-7544AHM
	William Cholensky vs. Allstate Building & Office		
Defense	Gilbert, Kelly, Crowley & Jennett	James Spaltro	
	Los Angeles Superior Court	Case Number:	PC02826
	Alma Duran vs. Tina Caton		
Defense	Law Offices of Maureen C. O'Hara	Greg Hill	
	Los Angeles Superior Court	Case Number:	VC038782

Bart Trevino V.A. & G, LLC & Vortex

Plaintiff	Thon, Beck & Vanni	Thomas Beck	
	Los Angeles Superior Court	Case Number:	BC276432

Otis Aitetiwa vs. Lyons Security Service

Plaintiff	Law Offices of Armen M. Tashjian	Armen Tashjian	
	Los Angeles Superior Court	Case Number:	BC289766

Mustafa Shehab vs. Dina Ragab, M.D.

Plaintiff	Law Offices of Robert Schlifkin	Robert Schlifkin	
	Los Angeles Superior Court	Case Number:	YC048509

Jody Alcarez vs. Acero International, Inc.

Plaintiff	Law Offices of Carlson & Johnson	Steven Carlson	
	Los Angeles Superior Court	Case Number:	VC041676

Jose Anguiano and Dolores Anguiano vs. Kaiser

Plaintiff	Law Offices of Michael S. Fields	Michael Fields	
	Arbitration	Case Number:	12020

2005

John Craft vs. Ralphs Grocery Co.

Plaintiff	Shelley & Graff	Cindy Graff	
	Workers Compensation Appeals Board	Case Number:	VNO0370447, VNO0370447, \

Khalid Bazzi vs. County of Los Angeles

Plaintiff	Law Offices of Alan Aghabegian	Alan Aghabegian	
	Los Angeles Superior Court	Case Number:	BC29588

Ramon Vargas vs. Reliance Company

Defense	Lewis, Brisbois, Bisgaard & Smith, LLP	Jenifer Kienle	
	Los Angeles Superior Court	Case Number:	BC312809

Carolyn Joyce vs. Starwood Hotels & Resorts

Plaintiff	Michaelman & Robinson	Teresa Wainman	
	Orange County Superior Court	Case Number:	04CC02572

Daniel Sanchez vs. Sprague Rents

Defense	Law Offices of Tharpe & Howell	M.anne Gregory	
	Los Angeles Superior Court	Case Number:	BC297931

Daniel Rivas vs. Stater Bros. Markets

Plaintiff	Law Offices of Carpenter & Zuckerman	John Carpenter	
	Los Angeles Superior Court	Case Number:	VC040439

Wayne and Terri Gibson vs. Lockheed Martin Corporation, et al

Defense	Jampol, Zimet & Wilcox	J.d. Henderson	
	Los Angeles Superior Court	Case Number:	MC014807

Brad/Fatima Mason vs. Lowe's Home Improvement

Defense	Law Offices of Tharpe & Howell	Gene Sharaga	
	Fresno Superior Court	Case Number:	03CECG03302

Marjorie L. Clemons vs. Kaiser

Plaintiff	Horton, Barbaro & Reilly	Frank Barbaro	
	Arbitration	Case Number:	12142

Tracey A. Ross and Brett Ross vs. Kaiser

Defense	Bonne Bridges, Mueller O'Keefe & Nichols	Brian Hoffman	
	Arbitration	Case Number:	4923

Michael Marino vs. Linda Marino

	Law Offices of Gary W. Kearney	Gary Kearney	
		Case Number:	

Denora Campos vs. WCI Electrolux

	Brouse-McDowell	Sallie Lux	
		Case Number:	

Brian Power vs. Gordon England (U.S.A.)

Defense	United States Attorneys Office/Central District	Debra Yang	
	U.S. District Court/Central District of CA/Western	Case Number:	LACV 03-7455-JSL (JWJX)

	Patty Hondorp vs. City of Huntington Beach	
Plaintiff	Thon, Beck & Vanni	Kevin Callahan
	Orange County Superior Court	Case Number: 03CC09608
	Michael Leroy Mosley vs. Hertz Vehicle Corporation	
Plaintiff	Mazursky, Schwartz, Daniels & Bradley	Arnold Schwartz
	Los Angeles Superior Court	Case Number: EC029193
	James Kaler and Adrienne Kaler vs. Hyatt Corp.	
Defense	Law Offices of Prindle, Decker & Amaro	Kristie Kawakami
	Hawaii Circuit Court/Second	Case Number: CIV03-1-0538(1)
	Carlos vs. Mitsubishi Consumer Electronic	
Plaintiff	Hinden & Breslavsky	Barry Hinden
	Workers Compensation Appeals Board	Case Number: LAO0734472, LAO0734471
	Graydon Harrah vs. Hewlett Packard Corp.	
Defense	Booth, Mitchell, & Strange	William Rummler
	Los Angeles Superior Court	Case Number: BC304976
	Anahid Mnaskanian vs. 21st Century Insurance	
Plaintiff	Doumanian & Associates	Nancy Doumanian
	Los Angeles Superior Court	Case Number: BC307845
	Nancy Zarco vs. Bernardo Amavizca, et al	
Plaintiff	Law Offices of Peter Cabrera	Chris Vader
	Riverside Superior Court	Case Number: INC036062
	Natile Shaffer v. Sosa Trucking	
	Bremer, Whyte, Brown & O'Meara, LLP	Nelson Cohen
		Case Number:
	Artamus Rodriguez v. Mildred Rey-Monroy	
Plaintiff	Blumberg Law Corporation	Nancy Wanski
	Los Angeles Superior Court	Case Number: BC321452
	Michael Foster vs. Vulcan Chain	
Defense	Wright, Robinson, Osthime & Tatum	Brian Inamine
		Case Number:
	Daniel Evard vs. Southern California Edison	
Plaintiff	Thon, Beck & Vanni	Daniel Powell
	Los Angeles Superior Court	Case Number:
	Francisco Menchaco vs. Commercial Die Casting	
Defense	Hallett & McCormick	Ilene Sheldon
	Workers Compensation Appeals Board	Case Number: VNO0442697
	Lisa Ann Parks vs. Rita Jenelle Rands	
Defense	Klute & Newton, LLP	E. Wallace Dingman
	San Bernardino Superior Court - Rancho Cucamonga	Case Number: RCVRS 070614
	Tracy Elaine Gibson vs. Andrea Froncillo	
	Law Offices of Alan Aghabegian	Alan Aghabegian
		Case Number:
	Jennifer Gomez vs. James Cecero/Top Dog Swimming Pool Repair	
Defense	Law Offices of Thomas O'Hagan	Paul Kwong
	Kern County Superior Court/Metropolitan Division	Case Number: S-1500-CV-252534-SPC
	Travis Radke vs. Walk Disney World Co.	
Plaintiff	Law Offices of Lavoie, McCain & Jarman	Richard McCain
	Orange County Superior Court	Case Number: 04CC09825
	Kebra Givens vs. Juam D. Lechuga	
Defense	Susson, Parrett, Morisaki & Odell	Steven Odell
	Los Angeles Superior Court	Case Number: TC 017795
	MacKenzie Diehl vs. United States	
Defense	United States Attorney's Office - Southern District of California	Kathryn Snyder
	U.S. District Court/Southern District of CA	Case Number: 04cv0488-J (AJB)

	Deborah A. Rubright vs. Scott A. Taylor		
Plaintiff	Law Offices of Carpenter & Zuckerman	John Carpenter	
	Los Angeles Superior Court	Case Number:	CIV 228264
	Ahalia Madahar vs. The Boeing Company		
Defense	Law Offices of McDermott & Clawson	Howard Stevens	
	Workers Compensation Appeals Board	Case Number:	AHM 0113245, AHM 0113246
	Jose Romeo Rocha et al vs. Brandon Matthew Houlette, et al		
Defense	Law Offices of Thomas O'Hagan	Paul Kwong	
	Los Angeles Superior Court	Case Number:	VC042282
	Gary Lee Gilmore		
	Law Offices of Stephen Tornay	Stephen Tornay	
		Case Number:	
	Diana Salcido vs. Cabazon Band of Mission Indians		
Plaintiff	Thon, Beck & Vanni	Anthony De Los Reyes	
	Cabazon Reservation Court	Case Number:	12837
	Dana Stinson vs. Leslie M. Gonzalez		
Plaintiff	Thon, Beck & Vanni	Daniel Powell	
	Orange County Superior Court	Case Number:	03CC07098
	Francisco Esquivel vs. Advance Trucking		
Defense	Jackson & Wallace	Erin Polisano	
	San Bernardino Superior Court/Barstow	Case Number:	BCVBS07522
	Maria A. Argumedo vs. Joseph Andre Gilles		
Plaintiff	Law Offices of Carpenter & Zuckerman	Paul Zuckerman	
	Los Angeles Superior Court	Case Number:	BC292124
	Kirtley vs. Interstate Eng., Inc.		
Plaintiff	Tredway, Lumsdaine & Doyle	Michele Ahrens	
	Orange County Superior Court	Case Number:	743825
	Richard Vallejo v. John Montevideo		
Plaintiff	Goeltz & Frederick	Thomas Goeltz	
	Orange County Superior Court	Case Number:	04CC03198
	Edward McShan vs. L.A. Times		
Plaintiff	Rose, Klein & Marias, LLP	Grace Cardenas	
	Workers Compensation Appeals Board	Case Number:	VNO0414173, VNO0424090, V
	John Flores vs. Ace Beverage Company		
Unknown	Law Offices of Goldschmid, Silver & Spindel	Lawrence Silver	
	Workers Compensation Appeals Board	Case Number:	MON0333066
	Albert DeSantiage vs. United States		
Defense	United States Attorney's Office - Southern District of California	Tom Reeve	
	U.S. District Court/Southern District of CA	Case Number:	SCE230669
	Higinio Macias vs. Salazar Trucking		
Plaintiff	Thon, Beck & Vanni	Kevin Callahan	
	Workers Compensation Appeals Board	Case Number:	VC042243
	David Neuwirth vs. Cigarettes Cheaper/Lumbermen's Mutual Causalty Co.		
Defense	Paul J. Shardlow, Esq.	Paul Shardlow	
	Workers Compensation Appeals Board	Case Number:	Unassigned
	Sherry Armstrong vs. Alpha Property Management		
Defense	Law Offices of King & Kennick	Michael Kennick	
	Los Angeles Superior Court	Case Number:	BC308887
	Marty Parill vs. United States		
Defense	United States Attorney's Office - Southern District of California	Kathryn Snyder	
	U.S. District Court/Southern District of CA	Case Number:	04CV1335
	Richard Ramirez vs. Earth and Ocean Sports		
Defense	Law Offices of King & Kennick	Adrianna Corrado	
	Madera Superior Court	Case Number:	CV18743

	Bonny Lee Tran vs. Cathay Bank	
Plaintiff	Hinshaw & Culbertson	Christine Kwong
	Los Angeles Superior Court	Case Number: BC340469
	Laurie Jenkins vs. Boise Cascade	
	Reilly & O'Brien	Ned Reilly
		Case Number:
	An Thi Trinh vs. Keun Sik Cho; G & J Flower	
Plaintiff	Dunn & Associates	Philip Dunn
	Los Angeles Superior Court	Case Number: SC084026
	Julie McKinnon vs. Golf Cart Express	
Plaintiff	Law Offices of Lewitt, Hackman, Shapiro, Marshall & Harlan	Andrew Shapiro
	Los Angeles Superior Court	Case Number: GIN043192
	Luis Acosta vs. Maxwell Ohikhuare	
Plaintiff	Law Offices Neil Howard	Neil Howard
	Los Angeles Superior Court	Case Number: KC042617
	Deysi Ruano vs. Queen of Angels Hospital	
Plaintiff	Law Offices Neil Howard	Neil Howard
	Los Angeles Superior Court	Case Number: BC320204
	Kevin Valencia vs. General Motor Corps.	
Defense	Bowman & Brooke	Katharine Schonbachler
	Los Angeles Superior Court	Case Number: KC044187
	Caleb Considine vs. Jane Abrams and Richard Abrams	
Defense	Daniels, Fine, Israel, Schonbuch & Lebovits	David Weisberg
	Los Angeles Superior Court	Case Number: SC085463
	Kathryn Greaux vs. Ormco/Sybron International	
Defense	Law Offices of Dabbah & Haddad	Shiloh Ramusson
	Workers Compensation Appeals Board	Case Number: LAO 0783262
2006		
	David Garcia vs. Ro	
Plaintiff	Thon, Beck & Vanni	Gregory Vanni
	Los Angeles Superior Court	Case Number: BC313696
	Zokhrab Galoyan and Anait Khayrapetyan vs. William A. Sanvik	
Defense	Susson, Parrett, Morisaki & Odell	Steven Odell
	Riverside Superior Court	Case Number: INC041655
	Bryant Wesley v. County of Los Angeles	
Defense	Manning & Marder, Kass Ellrod, Ramirez LLP	Timothy Kral
	Los Angeles Superior Court	Case Number: TC015596
	Alexis Perez v. U.S.A.	
	Law Office of James McCallion	James McCallion
		Case Number:
	Robert Sollfrank vs. Davidson Communities	
Defense	Morris & Sullivan	B.J. Haeck
	San Diego Superior Court	Case Number: GIC820745
	Simon Maah vs. The Marlon Mannor Apartments	
Defense	Murchison & Cumming Lawyers	Heather Mills
	Los Angeles Superior Court	Case Number: BC310866
	Felicia Solis vs. Rancho Framing, Inc., et al.	
Plaintiff	West, Seegmiller	William Seegmiller
	San Bernardino Superior Court-Victorville District	Case Number: VCVVS 036345
	Felicia A. Solis vs. Rancho Framing	
	West, Seegmiller	William Seegmiller
	San Bernardino Superior Court-Victorville District	Case Number: VCVVS036345
	Michael Garcia vs. UCLA Medical Center	
	Gelfand & Gelfand	Raymond Feinberg
		Case Number:

	Janet C. Bodinar vs. Capistrano Unified School District		
Defense	Law Offices of Robert Wheatley	Marla Reiter Case Number:	ANA 0289719
	Beverly A. Sparks vs. Anytime Cleaning		
Defense	Kamel & Maxwell Los Angeles Superior Court	Brian Swanson Case Number:	SC084898
	Pizzimenti vs. Pruitt		
Defense	Bremer, Whyte, Brown & O'Meara, LLP Clark County, Nevada, District Court	Nelson Cohen Case Number:	489555
	PanyiotesCharalambopoulos vs. Southwest Healthcare Systems		
	Carpenter & Zuckerman	John Capenter Case Number:	
	Karen Tuefert vs. St. Vincent Medical Center		
Plaintiff	Thon, Beck & Vanni Los Angeles Superior Court	Daniel Powell Case Number:	BC331977
	Tajsha Touree Thomas vs. Storetrieve		
Defense	Law Offices of Lydia Bouzaglou-Newcomb Los Angeles Superior Court	Greg Hill Case Number:	SC085226
	Antonio Padilla vs. Pomona College		
Defense	Cozen, O'Connor San Bernardino Superior Court - Rancho Cucamonga	Huey Cotton Case Number:	RCV082431
	Jesus Cerrillo vs. Nelco Products		
Defense	Law Offices of McDermott & Clawson Workers Compensation Appeals Board	Georgene Tibbetts Case Number:	AHM0071535, AHM0071983
	Gold vs. Home Depot		
	Sedgwick, Detert, Moran & Arnold	Sheryl Rosenberg Case Number:	
	Robert Hill vs. Gianna Youngblood		
Defense	Law Offices of Clinton M. Hodges Compton Superior Court	Clinton Hodges Case Number:	TC05706
	Abraham Caliboso vs. Ellis Industries		
Defense	Law Offices of Coral, Chase, Parish & Arnett Los Angeles Superior Court	Marc Garber Case Number:	TC018778
	Deanna Sprinkel vs. County of Los Angeles		
Defense	Thon, Beck & Vanni Los Angeles Superior Court	Thomas Beck Case Number:	GC034916
	Reyna Saavedra vs. Lillian Miller		
Defense	Law Offices of Tobin & Lucks LLP Workers Compensation Appeals Board	Frank Christine Case Number:	LAO0793819
	Mark L. Gautreaux vs. The Boeing Co.		
Defense	Law Offices of McDermott & Clawson Workers Compensation Appeals Board	Tina Washburn Case Number:	AHM0108173
	Jane Doe vs. Nicholas K. Nolte, et al.		
Defense	Morris, Polich & Purdy, LLP Los Angeles Superior Court	Douglas Hoang Case Number:	SC083616
	Maxie Jones vs. County of Los Angeles		
	Manning & Marder, Kass Ellrod, Ramirez LLP Los Angeles Superior Court	Timothy Kral Case Number:	CV05-5163
	Jane Doe vs. Nicholas K. Nolte		
Defense	Morris, Polich & Purdy, LLP Los Angeles Superior Court	Douglas Hoang Case Number:	SC083616
	Jill Erin Brown vs. Abercrombie		
Plaintiff	Carpenter & Zuckerman Los Angeles Superior Court	John Capenter Case Number:	SC084899

	Lisa Dunn vs. Mitzi Kapture		
Plaintiff	Carpenter & Zuckerman	John Carpenter	
	Los Angeles Superior Court	Case Number:	LC072222
	David Jackson vs. Home Depot		
Defense	Sedgwick, Detert, Moran & Arnold	Alison Hazan	
	Los Angeles Superior Court	Case Number:	VC039622
	Ramon Valdivia vs. Pac West Landscaping		
Plaintiff	West, Seegmiller	James Johnson	
	Riverside Superior Court	Case Number:	INC056898
	Raymond Sosa vs. Carlos A. Serrano		
Plaintiff	West, Seegmiller	James Johnson	
	San Bernardino Superior Court - Rancho Cucamonga	Case Number:	RCV094112
	Barry v. Superior Ready Mix Concrete, et al.		
Plaintiff	Beam, Brobeck, West, Borges & Rosa LLP	Byron Beam	
	Riverside Superior Court	Case Number:	RIC 429888
	Wehrle vs. Wehrle		
Plaintiff	Law Offices of Gary W. Kearney	Gary Kearney	
	Los Angeles Superior Court	Case Number:	GD033279
	Eric D. Anderson vs. Werner Corporation		
Plaintiff	Blumberg Law Corporation	John Blumberg	
	Riverside Superior Court	Case Number:	RIC432045
	Billie J. Segari vs. Robert W. Bashford		
Defense	Bremer, Whyte, Brown & O'Meara, LLP	Tyler Offenhauser	
	San Bernardino Superior Court/Barstow	Case Number:	BCV08534
	Gerardo Orozco vs. Kiner/Goodsell, Inc		
Plaintiff	Thon, Beck & Vanni	Thomas Beck	
	Los Angeles Superior Court	Case Number:	BC338633
	Carla C. Piper vs. Howard C. Mills, H&P Trucking, et al		
Defense	Bremer, Whyte, Brown & O'Meara, LLP	Nelson Cohen	
	Clark County, Nevada, District Court	Case Number:	A480994
	Rhoades vs. City of Los Angeles		
Plaintiff	Thon, Beck & Vanni	Gregory Vanni	
	Los Angeles Superior Court	Case Number:	BC321139
	Caleb Lopez vs. Borrowdale		
Plaintiff	Mashney Law Offices	Christopher Turpin	
	Orange County Superior Court	Case Number:	04CC10607
	Marcus Taylor vs. Klistoff & Sons Disposal		
Plaintiff	Carpenter & Zuckerman	John Carpenter	
	Los Angeles Superior Court	Case Number:	BC 333232
	Rebecca Correa vs. Target Corporarion		
Defense	Law Offices of Prindle, Decker & Amaro	Derek Classen	
	Los Angeles Superior Court	Case Number:	VC044631
	Marjorie Wroten vs. Target Corporation		
Defense	Law Offices of Prindle, Decker & Amaro	Derek Classen	
	Los Angeles Superior Court	Case Number:	BC334198
	Naomi Quintero vs. Swift Transportation Co., Inc., et al.		
Defense	Lewis, Brisbois, Bisgaard & Smith, LLP	Jenifer Kienle	
	Los Angeles Superior Court	Case Number:	BC337456
	Horace Gilchrist vs. PC Mall/Creative Computers		
Defense	Veatch, Carlson	Pete Almeida	
	Workers Compensation Appeals Board	Case Number:	MON0332238, MON0332239
	Karen Forsey vs. Matthew Noah Graber		
Plaintiff	Berenji & Mansouri	Pedram Mansouri	
	Los Angeles Superior Court	Case Number:	LC072602

	Margarita Partida vs. Horest Schmidt		
Plaintiff	West, Seegmiller	James Johnson	
	Riverside Superior Court	Case Number:	INC053459
	Robby Beck vs. VN Steel Fabrication		
Defense	Law Offices of Thomas O'Hagan	Paul Kwong	
	Los Angeles Superior Court	Case Number:	MC016566
	Atlantic Mutual Insurance Company vs. Billy Joe Martin, et al		
Defense	Susson, Parrett, Morisaki & Odell	Steven Odell	
	Ventura County Superior Court	Case Number:	CIV 235659
	Deanna/Naomi Velez vs. Jody/Alan Peter		
Plaintiff	West, Seegmiller	James Johnson	
	San Diego Superior Court	Case Number:	GIC853848
	Stephen & Mierva Harris vs. Danny Walton		
Plaintiff	West, Seegmiller	James Johnson	
	San Diego Superior Court	Case Number:	GIC855647
	Leonard Saldana		
Plaintiff	West, Seegmiller	H. Wayne Green	
	Orange County Superior Court	Case Number:	
	Paula Barthel vs. S.F.X. Entertainment		
Plaintiff	Thomas F. Martin A Professional Law Corporation	Thomas Martin	
	Judicate West - Santa Ana	Case Number:	AHM 0082652
	Robert D. Kiser vs. Sierra Ready Mix Limited Liability Company		
Defense	Brady, Vorwerck, Ryder & Caspino	Tracey Heinhold	
	Clark County, Nevada, District Court	Case Number:	A509551
	Violeta Carters vs. Citywide Parking Management		
Defense	Jackson & Wallace, LLP	Erin Polisano	
	Los Angeles Superior Court	Case Number:	VC045463
	Robert Gonzalez vs. Advance Truck Painting		
Plaintiff	West, Seegmiller	H. Wayne Green	
	Los Angeles Superior Court	Case Number:	VC045774
	Johnny Green vs. Thorpe Insulation Co. et al		
Defense	Jackson & Wallace, LLP	Erin Polisano	
	Los Angeles Superior Court	Case Number:	VC045459
	Sam Syouf/Rachid Masri vs. Roy L. Wimberly		
Plaintiff	Mashney Law Offices	Evan Blair	
	San Bernardino Superior Court	Case Number:	SCVSS125206
	Kelly Waters vs. Benny Lee, M.D.		
	Gelfand & Gelfand	Gary Gelfand	
		Case Number:	
	Alberto Salazar vs. Richard Baeza		
Plaintiff	West, Seegmiller	James Johnson	
	Los Angeles Superior Court	Case Number:	KC047435
	John Flores vs. Ralphs, Food 4 Less		
Defense	Law Offices of Stuart E. Rissman	Stuart Rissman	
	Los Angeles Superior Court	Case Number:	BC 322 330
	Ozziel Huerta vs. Home Depot U.S.A.		
Defense	Sedgwick, Detert, Moran & Arnold	Alison Hazan	
	San Diego Superior Court	Case Number:	GIC867966
	Robert Bachtel vs. Hirschi Masonry		
Defense	Bremer, Whyte, Brown & O'Meara, LLP	George Hand	
	Clark County, Nevada, District Court	Case Number:	A515526
	Espra Andrus vs. Mark Fulgham, Standard Plumbing Supply		
Defense	Nelson, Chipman, Payne & Burt	Michael Lichfield	
		Case Number:	040904243

	Luis Cabral vs. Star Reefers, Inc., et al.		
Defense	Cogswell, Nakazawa & Chang, LLP	Dena Aghabeg	
	Los Angeles Superior Court	Case Number:	NC 037861
	Victor Alvarez vs. Second Chance Body Armour		
	Green & Hall	Natalie Vu	
		Case Number:	
	Campbell vs. Second Chance Body Armour		
	Green & Hall	Natalie Vu	
		Case Number:	
	Kelly Walters v. Benny Lee		
	Gelfand & Gelfand	Raymond Feinberg	
		Case Number:	05-215728
	Mahela Morrow-Jones vs. American Indian Health & Services		
Defense	Kamel & Maxwell	John Maxwell	
	Santa Barbara Superior Court	Case Number:	1187367
	Dale Roy Smith vs. City of Gardena		
Defense	Manning & Marder, Kass Ellrod, Ramirez LLP	Timothy Kral	
	Torrance District Courthouse	Case Number:	YC051150
	Velasquez vs. U.S.A.		
Plaintiff	Law Office of James McCallion	James McCallion	
		Case Number:	
	Dora Velasquez vs. Sears, Roebuck & Co., et al		
Defense	Sedgwick, Detert, Moran & Arnold, LLP	Sheryl Rosenberg	
	San Bernardino Superior Court - Rancho Cucamonga	Case Number:	RCV 090679
	Carge Johnson		
	West, Seegmiller	James Johnson	
		Case Number:	
	Hung Wing Ng vs. Acorn Engineering Company, et al		
Plaintiff	Law Offices of George Slotnick	George Slotnick	
	Workers Compensation Appeals Board	Case Number:	VNO373525
2007			
	John Flores vs. Food 4 Less		
	Law Offices of Stuart E. Rissman	Stuart Rissman	
		Case Number:	BC 332330
	Lewis Young & Kathy Young vs. T. Anthony Michael, M.D.		
	Baker, Manock & Jensen	Donald Fishbach	
		Case Number:	
	Lewis Young vs. Carson Liu		
Defense	La Follette, Johnson, De Haas, Fesler,Silberberg & Ames	Donald Fesler	
	Los Angeles Superior Court	Case Number:	B312975
	Blettel vs. Home Depot		
Defense	Sedgwick, Detert, Moran & Arnold	Alison Beanum	
	Los Angeles Superior Court	Case Number:	BC357336
	Jorge Segura vs. Jorge Nunez		
Plaintiff	Law Offices of Peter Cabrera	Chris Vader	
	Riverside Superior Court	Case Number:	RIC434168
	Robert Anacker vs. Genil, Inc.		
Defense	Bragg, Serota & Kuluva	Christina Morovatio	
	Los Angeles Superior Court	Case Number:	VC045917
	Buddy Eloy Ramirez vs. Centinela Hospital Medical Center		
Plaintiff	The Rager Law Firm	Jeffrey Rager	
		Case Number:	YC052637
	Mendoza vs. Orthopedic Hospital		
Plaintiff	Law Offices of Richard T. Lobl	Richard Lobl	
		Case Number:	

	Eric Anderson vs. Facey Medical Group		
	Carpenter & Zuckerman	Amy Lee	
		Case Number:	
	Buddy Eloy Ramirez vs. Centinela Hospital Medical Center		
Plaintiff	The Rager Law Firm	Jeffrey Rager	
	Los Angeles Superior Court	Case Number:	YC052637
	William Anderson vs. Barney Trucking Inc.		
	Nelson, Chipman, Payne & Burt	Bruce Burt	
		Case Number:	
	Daniels vs. Brewster		
	Hollins & Schechter	Trent Evans	
		Case Number:	
	Rhyne McKrae vs. Susan Gerhartt, et al		
Plaintiff	Carpenter & Zuckerman	John Carpenter	
	Los Angeles Superior Court	Case Number:	BC 341649
	Janet Rostagni vs. Venator Group		
Defense	Wai & Connor, LLP	Steven Carbone	
	Workers Compensation Appeals Board	Case Number:	AHM82725, AHM82682, AHM8
	Juan Rodriguez vs. County of San Bernardino		
Defense	Manning & Marder, Kass Ellrod, Ramirez LLP	Timothy Kral	
	U.S. District Court/Central District of CA/Western	Case Number:	CV 06-01152 GPS (CWx)
	Jose Duran vs. Southern Califonia Edison		
	Southern California Edison	Patricia Cirucci	
	Los Angeles Superior Court	Case Number:	YC051394
	Toni Roque vs. Southern California Edison		
Defense	Southern California Edison	Patricia Cirucci	
	Los Angeles Superior Court	Case Number:	YC050548
	Johnny L. Green vs. David Christopher Cueto; Thrope Insulation Company		
Defense	Jackson & Wallace	Erin Polisano	
	Los Angeles Superior Court	Case Number:	VC045459
	Jazlyne Brianna Garcia vs. R.M.I. University Park Apartments		
	Brady, Vorwerck, Ryder & Caspino	Eric Larsen	
	Los Angeles Superior Court	Case Number:	A510589
	Clive Steggals-Davis vs. Gabriel Gamboa Alvarado		
Defense	Law Offices of Thomas O'Hagan	Paul Kwong	
	Los Angeles Superior Court	Case Number:	SC090555
	Sidney Zerah vs. Irving Klein		
Plaintiff	California Lawyers Group	Michael Brown	
	Los Angeles Superior Court	Case Number:	SC089943, SC090561
	Alfredo Mercado vs. Sky Chef's Inc.		
Defense	Manning & Marder, Kass Ellrod, Ramirez LLP	Mark Cwern	
	Los Angeles Superior Court	Case Number:	BC 356599
	Celso Garcia vs. Los Angeles County Metropolitan Transportation Authority		
Plaintiff	Law Offices of Carpenter & Zuckerman	Adam Silverstein	
	Los Angeles Superior Court	Case Number:	BC347772
	Grant vs. Professional Property Management		
Defense	Jackson & Wallace	Lori Vieira	
	Los Angeles Superior Court	Case Number:	LC075008
	Richard Hodges; Walter Jederberg vs. BOSA Development; Martinez Steel		
Defense	Lewis, Brisbois, Bisgaard & Smith, LLP	Jenifer Kienle	
	Orange County Superior Court	Case Number:	
	Lopez vs. INCA Plastic Molding		
Plaintiff	Von Mizener & Moore	Martin Von Mizener	
	Workers Compensation Appeals Board	Case Number:	AHM0050131

	Nicole Bristol vs. Michael Stars		
Defense	Jackson & Wallace	Jason Yu	
	Los Angeles Superior Court	Case Number:	SC085993
	Ronald Jones vs. City of Alhambra		
Plaintiff	Raymond G. Mori	Raymond Mori	
	Workers Compensation Appeals Board	Case Number:	ANA0369062, ANA0369061, A
	Nejera vs. Beharie		
Defense	La Follette, Johnson, De Haas, Fessler & Ames	Sara Pak	
		Case Number:	
	Shaun Aubry vs. Mark Fields		
	California Legal Team	Okorie Okorocha	
		Case Number:	
	Stacey Lee Sikkila vs. Cohen		
Plaintiff	Law Offices of Carpenter & Zuckerman	Amy Lee	
	Los Angeles Superior Court	Case Number:	SC089555
	Charter vs. Armor Transportation of California		
Defense	Forensic Group	Jim Edwards	
	Los Angeles Superior Court	Case Number:	SC054071
	Kyres vs. Gomez		
Defense	Gilbert, Kelly, Crowley & Jennett	James Spaltro	
	San Diego Superior Court	Case Number:	GIE029123
	Cinthya DeLira vs. Bristol Park, et al.		
Defense	Carroll, Kelly, Trotter, Franzen & McKenna	Gabriel Irwin	
		Case Number:	
	Riley Ebel vs. Human Potential Foundation		
Defense	Jacobs & Associates	Gary Jacobs	
	Santa Barbara Superior Court	Case Number:	1197735
	Alfred R. Macias vs. Archdiocese of Los Angeles		
Defense	McCune & Harber	Mampre Pomakian	
	Los Angeles Superior Court	Case Number:	GC035748
	Juan Campos vs. JLS		
Plaintiff	Thon, Beck & Vanni	Kevin Callahan	
	Los Angeles Superior Court	Case Number:	BC 358642
	Alfredo Mercado vs. Shy Chefs, Inc.		
	Manning & Marder, Kass Ellrod, Ramirez LLP	Mark Cwern	
	Los Angeles Superior Court	Case Number:	BC 356599
	Luis Gonzalez vs. SWH Corp. dba Mimi's Café		
	Doumanian & Associates	Nancy Doumanian	
		Case Number:	06CC08270
	Nicole Najera vs. Monterey Park Hospital		
Defense	La Follette, Johnson, De Haas, Fesler,Silberberg & Ames	Sara Pak	
	Los Angeles Superior Court - Pasadena	Case Number:	GC037777
	Richard Hodges; Walter Jederberg vs. BOSA Development		
Defense	Lewis, Brisbois, Bisgaard & Smith, LLP	Jenifer Kienle	
	Orange County Superior Court	Case Number:	06CC04888
	Lauretta Blackmon vs. North Tree Enterprises		
Plaintiff	West, Seegmiller	James Johnson	
	San Bernardino Superior Court	Case Number:	VCVVS 040839
	Luz Camposeco vs. Carlos Beharie, MD		
Defense	LaFollette, Johnson, DeHaas, Fesler & Ames	Christopher Wend	
	Los Angeles Superior Court	Case Number:	VC 048417
	Luz Camposeco vs. Carlos Baharie, M.D.		
Defense	La Follette, Johnson, De Haas, Fessler & Ames	Sara Pak	
	Los Angeles Superior Court	Case Number:	VC048417

	Tulio Espinoza Mera vs. Home Depot, USA	
Defense	Sedgwick, Detert, Moran & Arnold	Sheryl Rosenberg
	Los Angeles Superior Court	Case Number: VC 046288
	Joanne Cardona et al. vs. Dft Doe 1, et al.	
Defense	Sedgwick, Detert, Moran & Arnold	Alexandra Wilcox
	Los Angeles Superior Court	Case Number: BC308301
	Diaz vs. Forecast et al.	
	Berglund, Johnson & Sommer	David Berglund
		Case Number:
	Eric Ingelson v. Ryan Scott Druckenmiller	
Plaintiff	Carpenter & Zuckerman	John Carpenter
		Case Number:
	David Demos vs. Julio Landeros & Ryan's Express	
Defense	Brady, Vorwerck, Ryder & Caspino	Eric Larsen
	Clark County, Nevada, District Court	Case Number: A5145357
	Charles Colletta vs. J'S Maintenance	
Defense	McCune & Harber	Maureen Grisanti
	Los Angeles Superior Court	Case Number: VC046560
	Zahm vs. Johnson, et al.	
Defense	Ford, Walker, Haggerty & Behar	Jennifer Russell
	Los Angeles Superior Court	Case Number: G 7543985-100
	Vartan Akopian vs. Petros Artsrunian	
Defense	Veatch, Carlson	Mark Rudy
	Los Angeles Superior Court - Glendale	Case Number: EC044754
	Michael Long vs. Southern California Edison	
Defense	Southern California Edison	Richard Arko
	Orange County Superior Court	Case Number: 06CC10628
	Charles Colletta vs. J'S Maintenance	
Defense	McCune & Harber	Maureen Grisanti
	Los Angeles Superior Court	Case Number: VC046560
	Guadalupe Cortez v. Southern California Gas Company, et al.	
Defense	Sempra Energy	Celeste Easton
	Los Angeles Superior Court	Case Number: VC 07556
	Pozos vs. Providence Saint Joseph Medical	
	Law Offices of Richard T. Lobl	Richard Lobl
	Los Angeles Superior Court - Glendale	Case Number:
	Leila Hashemzadeh vs. YMCA	
Defense	McCune & Harber	Stephen Harber
	Los Angeles Superior Court	Case Number: BC361348
	Martin Wong v. Goss International	
Plaintiff	Thon, Beck & Vanni	Kevin Callahan
		Case Number:
	William Saavedra v. Maurice Franco	
Plaintiff	Carpenter & Zuckerman	John Carpenter
	Los Angeles Superior Court - Glendale	Case Number: EC044297
	Christina Fontanella vs. Service Air	
Defense	Graves & King	Cal Zidan
		Case Number: YC052814
	Ike vs. McPherson, M.D.	
Plaintiff	Thon, Beck & Vanni	Daniel Powell
	Los Angeles Superior Court	Case Number: BC346227
	Benavente vs. Q International Courier	
Defense	Bragg & Kuluva	Sherry Grguric
	Los Angeles Superior Court	Case Number: YC054883

	Davis vs. Fountain Valley Regional Hospital	
Defense	Cotkin & Collins	Brian Hill
	Orange County Superior Court	Case Number: 07CC04049
	Fullman vs. Rehab Plus	
Plaintiff	Horton, Barbaro & Reilly	Frank Barbaro
	Orange County Superior Court	Case Number: 775600
	Wendy Freeman vs. Saddle Ranch Chop House	
	Murchison & Cumming Lawyers	Nanette Reed
		Case Number: LC027439
	Ostos vs. Temme, et al.	
Plaintiff	Barbaro & Valentine, LLP	Frank Barbaro
	Los Angeles Superior Court	Case Number: EC043786
	Michael Packman vs. K-Mart	
Plaintiff	Law Offices of Alan Aghabegian	Alan Aghabegian
		Case Number:
	Melissa Orellana vs. Alvord USD; Pepsi Cola	
Defense	McCune & Harber	Mampre Pomakian
	Riverside Superior Court	Case Number: RIC441289
	Larsen vs. Lemans Corporation	
Defense	Campbell, Volk & Lauter	J. Douglas Caffarel
	San Diego Superior Court	Case Number: GIC881402
	Cuevas vs. Pucci	
Plaintiff	Law Offices of William Newkirk	William Newkirk
	Riverside Superior Court	Case Number: RIC457716
	Eli Figueras v. Western Corporation Federal Credit Union	
Defense	Richardson & Harman	Paul Schimley
		Case Number: LASCKC050451
	Geehwan Kim vs. Young Joon Lee	
Defense	Murchison & Cumming Lawyers	Jacqueline Nguyen
		Case Number:
	Lisa Schwartz vs. Marylin Giron	
Defense	Veatch, Carlson	Michael Brown
	Los Angeles Superior Court	Case Number: BC357045
	Katherine Griffiths vs. TruGreen LandCare	
Defense	Hinshaw & Culbertson	Peggy Kolkey
		Case Number:
	Lopez vs. Moss	
Defense	Baker, Manock & Jensen	Donald Fishbach
	Santa Barbara Superior Court	Case Number: 1247120
	Surjit Singh vs. Circle K Stores	
	Kegel, Tobin & Truce	Karen Ahlstedt
	Workers Compensation Appeals Board	Case Number: AHM 0084910
	Rhoades/Patterson vs. Adams et al.	
Plaintiff	Ganong & Wyatt	Philip Ganong
	Kern County Superior Court/Metropolitan Division	Case Number: S-1500 CV 952195-AEW
	Yong Lima vs. Curtis Jones, Jr.	
Plaintiff	Carpenter & Zuckerman	Paul Zuckerman
	Southwest	Case Number: YC055021
	Micahel Faust vs. CA Portland Cement Co.	
Plaintiff	Horton & Debolt	Laura Horton
	Los Angeles Superior Court	Case Number: BC321660
	Commerce vs. Jackson Limo Service	
Defense	Hosp, Gilbert, Bergsten & Phillips	Joe Hough
	Los Angeles Superior Court	Case Number: YC054283

ALESSANDRO F. ANFUSO, M.S., C.V.E.

Anfuso Vocational Services • www.anfusovocationalservices.com • anfuso@anfusovocationalservices.com
1041 S. Garfield Avenue • Suite 210 • Alhambra, California, 91801 • (626) 588-1590 • Fax (626) 588-1599
Federal Tax Identification Number: 95-4787073

CURRICULUM VITAE

PROFESSIONAL EXPERIENCE

Vocational consultation and expert testimony in civil litigation including personal injury, medical malpractice, sexual harassment, employment discrimination, and worker's compensation for defense and plaintiff

Professor responsible for teaching course work in rehabilitation counseling for undergraduate and graduate students

Development and administration of vocational assessment programs in both the public and private sectors

Evaluation, case management, and placement assistance for Veteran's with disabilities

Vocational evaluation and assessment of industrially injured workers

Delivery of vocational rehabilitation services to orthopedically, mentally, or developmentally disabled individuals

Career guidance, counseling and assessment of displaced workers, veterans, or private individuals

Vocational assessment and career guidance for GAIN and GROW participants

Assessment and career guidance for individuals with learning disabilities

Professional training and development of Rehabilitation Consultants, Vocational Evaluation Specialists, Insurance Industry Specialists, and Public Service Employees

Consultation in vocational service delivery to spinal cord injured individuals

Independent living services assessment and implementation

Pre-vocational counseling of disabled individuals

Substance abuse counseling

EDUCATION

1973 to 1975 — San Diego State University
Master of Science, Rehabilitation Counseling, May 30, 1975

1971 to 1973 — California State Polytechnic University, San Luis Obispo
Bachelor of Arts, Political Science, June 9, 1973

EMPLOYMENT

1980 to Present	Anfuso Vocational Services, Inc. Owner and President Rehabilitation Consultant
2003 to 2005	California State University, Los Angeles Charter College of Education, Division of Administration and Counseling Professor, Part-time – Rehabilitation Services
1997 to 2002	Forensis Group Senior Consultant Vocational Expert
1976 to 1980	San Gabriel Valley Training Center Supervisor, Work Evaluation Unit Vocational Evaluation Specialist
1975 to 1976	Department of Rehabilitation, State Of California Rehabilitation Counselor

CERTIFICATION

1984 to 2005	Vocational Evaluation and Work Adjustment Association Commission on Certification Vocational Evaluation Specialist - Certificate Number: 00843

HONORS

1995	National Association of Rehabilitation Professionals in the Private Sector Outstanding Individual Professional Member of the Year
1995	Southern California Rehabilitation Exchange Rehabilitation Professional of the Year
1992	Archie Brown Memorial Award Outstanding Service to the Rehabilitation Profession
1986	Southern California Rehabilitation Association Rehabilitation Professional of the Year

PROFESSIONAL AFFILIATIONS

International Association of Rehabilitation Professionals
National Rehabilitation Association
Vocational Evaluation and Work Adjustment Association
National Rehabilitation Counseling Association
California Faculty Association

PROFESSIONAL SERVICES

1996	Commissioner, Commission on Accreditation of Work Adjustment and Vocational Evaluation Specialists
1994	President of California Association of Rehabilitation Professionals
1992	Vocational Evaluation and Work Adjustment Association, California Chapter President
1991	Vocational Evaluation and Work Adjustment Association, California Chapter President Elect
1986	Southern California Rehabilitation Exchange, Second Vice-President
1985	Southern California Rehabilitation Exchange, First Vice-President
1984	Southern California Rehabilitation Exchange, Secretary
1981-1982	Vocational Evaluators in the Private Sector, President
1973	National Social Science Honor Society, Pi Gamma Mu, Member

PROFESSIONAL PRESENTATIONS

Farmers Insurance Group, Carefree, Arizona
Vocational Rehabilitation of Individuals with Surgical Backs and Expert Testimony

Farmers Insurance Group, Palm Springs, California
Vocational Rehabilitation of Individuals with Traumatic Brain Injuries and Expert Testimony

City of Los Angeles
Vocational Assessment Strategies for City of Los Angeles One Stops

Department of Public Social Services, GAIN Region 3
Effective Relationships in the Workplace and with Participants

Department of Public Social Services, GAIN Region 3
Vocational and Career Assessment of GAIN Participants

Department of Public Social Services, GAIN Region 3
Learning Disability Evaluation for GAIN Participants

Community Rehabilitation Industries
Effective Relationships in the Workplace and with Participants

Community Rehabilitation Industries
Vocational and Career Assessment of GAIN and RITE Participants

Orange County Applicants' Attorneys Association
Work Evaluation Services and Vocational Rehabilitation

Southern California Rehabilitation Exchange
Vocational Expert Testimony and LeBoeuf

Southern California Rehabilitation Exchange
California Workers Compensation Legislative Update

Insurance Education Association
Work Evaluation Services and Vocational Rehabilitation of Industrial Injured Employees

California Association of Rehabilitation Professionals
California Workers Compensation Legislative Update

Organization of Bilingual Rehabilitation Associates
California Workers Compensation Legislative Update

University of California, Irvine
Work Evaluation Services and Vocational Rehabilitation of Industrial Injured Employees

San Diego State University
1985 Commencement Speech: *Relativity of Disability and Provision of Service*

California Applicants' Attorneys Association
2002 Rating Seminar: *Functional Capacity Evaluation in Determination of Disability Rating*

Fee Schedule

Alessandro F. Anfuso
Rehabilitation Consultant
Anfuso Vocational Services, Inc.
1041 S. Garfield Ave, Suite 210
Alhambra, California 91801
(626) 588-1590, Fax: (626) 588-1599

Alessandro F. Anfuso's professional service fees are as follows:

Review of records, research, interviews, and report preparation	$300.00	per hour
Vocational testing or work evaluation	$350.00	per day
Deposition Testimony	$400.00	per hour
Expert Testimony	$2,000.00	per ½ day

GEORGE S. CARDONA
Acting United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
GWENDOLYN M. GAMBLE (State Bar No. 143267)
Assistant United States Attorney
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Email: gwen.gamble@usdoj.gov
Telephone: (213) 894-6684
Fax: (213) 894-7819
Attorneys for Defendant
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PHILLIP VINCENT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. CV 08-3286 FMC (PJWx) **NOTICE OF RECEIPT** Honorable Florence-Marie Cooper

RECEIPT IS HEREBY ACKNOWLEDGED by plaintiff Phillip Vincent, by and through his undersigned attorney of record, of an electronic funds transfer in the total amount of Two Hundred Forty Two Thousand Five Hundred Dollars ($242,500.00) in accordance with the parties' Stipulation for Compromise Settlement, filed on August 18, 2009.

DATED: September 17, 2009 JAHRMARKT & ASSOCIATES

JOHN JAHRMARKT
Attorney for Plaintiff

RECEIVED CLERK, LOS
SEP -8 AM 8:09
CENTRAL DISTRICT OF CALIFORNIA

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
GWENDOLYN M. GAMBLE (CA Bar No. 143267)
Assistant United States Attorney
Room 7516, Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Email: gwen.gamble@usdoj.gov
Telephone: (213) 894-6684
Fax: (213) 894-7819

Attorneys for Defendant
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

PHILLIP VINCENT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. CV 08-3286 FMC (PJWx) STIPULATION FOR COMPROMISE SETTLEMENT

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiff and defendant United States of America, that the above-captioned action may be settled and compromised on the following terms and conditions:

1. The United States of America agrees to pay the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, foreseen and unforeseen, arising from the incident or circumstances giving rise to this suit, which plaintiff, his heirs, executors, administrators, and assigns, now have or may hereafter acquire

against the United States of America, its agents, servants, and employees.

2. Plaintiff, his heirs, executors, administrators and assigns hereby execute a general release of the United States of America and agree to accept the settlement of Two Hundred Fifty Thousand Dollars ($250,000.00), in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, foreseen and unforeseen, arising from the incident or circumstances giving rise to this suit, which plaintiff, his heirs, executors, administrators, and assigns, now have or may hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned lawsuit, including, but not limited to, claims for wrongful death, personal injury, constitutional torts, lost earnings, lost income, or medical expenses.

3. This Stipulation for Compromise Settlement constitutes a general release. As additional consideration for this Stipulation, plaintiff, his heirs, executors, administrators, and assigns specifically waives and releases any and all known and unknown rights, claims, causes of action or demands which might otherwise be preserved or accrue under Section 1542 of the California Civil Code. Plaintiff understands that Section 1542 of the California Civil Code provides as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which, if known by him or her must have materially affected his or her settlement with the debtor."

Therefore and notwithstanding anything to the contrary herein, plaintiff, his heirs, executors, administrators, and assigns explicitly release any and all claims against the United States of America, its agents, servants, and employees, which plaintiff does not know or suspect to exist in his favor at the time he executes this Stipulation for Compromise Settlement, which if known to plaintiff would have materially affected this settlement with the United States of America.

4. Plaintiff, his heirs, executors, administrators, and assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from any and all causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from this or further litigation or prosecution of claims by plaintiff or his heirs, executors, administrators or assigns, and each of them, against any third party or against the United States, arising out of the incident or circumstances giving rise to this suit, including, but not limited to, any and all claims for wrongful death, personal injury, constitutional torts, lost earnings, lost income, or medical expenses.

5. Plaintiff, his heirs, executors, administrators, and assigns, agree that they will be obligated to pay any and all liens from any and all insurance companies, health care providers, attorneys, and any and all other persons or organizations who have or claim to have subrogated assigned claims arising out of or related to the subject matter of this suit.

6. This Stipulation for Compromise Settlement shall not constitute an admission of liability or fault on the part of the

United States, its agents, servants, or employees, and is entered into by all parties herein for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

7. It is also agreed, by and among the parties, that the settlement amount of Two Hundred Fifty Thousand Dollars ($250,000.00) represents the entire amount of the compromise settlement, and that the respective parties will each bear their own costs, fees, and expenses, and that any attorney's fees owed by the plaintiff will be paid as set forth below.

8. It is also understood, by and among the parties, that pursuant to Title 28, United States Code, Section 2678, attorneys fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

9. On June 4, 2009 a Notice of Judgment Lien for Restitution in favor of the United States was filed in the above-captioned action regarding a money judgement entered against Phillip Vincent in United States v. Phillip Vincent, Case No. CR 99-611 JFW in the principal amount of Fourteen Thousand Five Hundred and Five Dollars ($14,505.00). The parties agree that the sum of Seven Thousand Five Hundred Dollars ($7,500.00) will be deducted from the total settlement amount of Two Hundred Fifty Thousand Dollars ($250,000.00) and will be applied to Phillip Vincent's criminal restitution debt in the manner set forth below. Plaintiff, his counsel, heirs, executors, administrators, and assigns hereby disclaim any interest in the Seven Thousand Five Hundred Dollars ($7,500.00) to be applied to his restitution debt and will not seek any recovery therefrom. Pursuant to the Notice of Judgment Lien ¶ 8(b), an authorized representative of the judgment creditor has consented to this

settlement. A copy of the consent is attached to this Stipulation for Compromise Settlement.

10. The parties agree that payment of the total settlement amount of Two Hundred Fifty Thousand Dollars ($250,000.00) shall be made as follows:

a. Payment in the amount of Two Hundred Forty Two Thousand Five Hundred Dollars ($242,500.00) will be made to plaintiff by an electronic funds transfer to the John Jahrmarkt Trust Account. Plaintiff's attorney agrees to distribute the settlement proceeds to plaintiff. Plaintiff and his counsel agree that any attorneys' fees owed by plaintiff must be paid out of the Two Hundred Forty Two Thousand Five Hundred Dollars ($242,500.00) electronic funds transfer and not in addition thereto; and

b. Payment in the amount of Seven Thousand Five Hundred Dollars ($7,500.00) will be made into the Registry of the Court, by a check made payable to the Clerk of the United States District Court for the Central District of California In Re: United States v. Phillip Vincent, Case No. CR 99-611 JFW, to be applied by the Clerk to Phillip Vincent's criminal restitution debt in United States v. Phillip Vincent, Case No. CR 99-611 JFW. The Parties agree that after said funds are deposited into the Registry of the Court, pursuant to 18 U.S.C. §3612(i), the principal amount of the criminal restitution debt shall be deemed satisfied by $7,500, thereby reducing the principal amount of the judgment from $14,505 to $7,005. The parties further agree that collection efforts with regard to the criminal restitution debt may still be pursued by the judgment creditor but the balance of the settlement proceeds are, in the future and forever, exempt from collection. Plaintiff and his

counsel agree that any attorneys' fees owed by plaintiff will not be paid out of the funds to be deposited into the Registry of the Court. Plaintiff, his counsel, heirs, executors, administrators, and assigns hereby disclaim any interest in the funds to be deposited into the Registry of the Court and will not seek any recovery therefrom.

11. Any and all individual taxation consequences as a result of this Stipulation are the sole and exclusive responsibility of the plaintiff. Defendant does not warrant any representation of any tax consequences of this Stipulation. Nothing contained herein shall constitute a waiver by plaintiffs of any right to challenge any tax consequences of this Stipulation.

12. In consideration of the payment of the total settlement amount of Two Hundred Fifty Thousand Dollars ($250,000.00), as set forth above, plaintiff agrees that the above-captioned action may be dismissed with prejudice.

13. The parties agree that this Stipulation for Compromise Settlement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

14. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

15. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not

explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

16. The undersigned represent that they have reviewed and understand this agreement, and that they are fully authorized to enter into the terms and conditions of this agreement and that they agree to be bound thereby.

DATED: August 7, 2009

PHILLIP VINCENT
Plaintiff

DATED: August 7, 2009

JAHRMARKT & ASSOCIATES

JOHN JAHRMARKT
Attorney for Plaintiff

DATED: 8/18/09

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

GWENDOLYN M. GAMBLE
Assistant United States Attorney
Attorneys for Defendant
UNITED STATES OF AMERICA

CONSENT OF JUDGMENT CREDITOR

Judgment Creditor United States of America hereby consents to the settlement of the above captioned action.

DATED: 8/18/09

THOMAS P. O'BRIEN
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

BRENT A. WHITTLESEY
Assistant United States Attorney
Attorneys for Judgment Creditor
UNITED STATES OF AMERICA

RECEIVED
JUN 18 2008
LEGAL DEPT
PHOENIX CLC

FILED ___LODGED
___RECEIVED ___COPY
JAN 24 2008
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY

Larry Prescott, In Pro Per
5856 E. Tercel Drive
Tucson, AZ 85706
(520) 207-0941

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

1. LARRY PRESCOTT, a single man, Plaintiff, v. 2. UNITED STATES OF AMERICA Defendants.	CASE NO.: **COMPLAINT** (Tort; Non-Motor Vehicle; Medical Malpractice)

Plaintiff, in propria persona, states and alleges as follows:

I.

PARTIES

1. Plaintiff, LARRY PRESCOTT, is a single man and and at all material times was a resident of Pima County, Arizona.

2. Defendant is the UNITED STATES OF AMERICA.

JURISDICTION AND VENUE

3. Plaintiff, LARRY PRESCOTT was a citizen and resident of Pima County, Arizona at all pertinent times, and the cause of action on which this action

is based arose in that County. Venue is proper in the District of Arizona.

4. Plaintiff brings this action pursuant to the civil rights laws of the United States, 42 U.S.C. §§ 1981, 1983, 1985, and 1988 and u nder the Federal Tort Claims Act, 28 USC §§2671 et seq. Plaintiff previously complied with the administrative process pursuant to the Federal Tort Claims Act by serving an SF 95, which was subsequently denied.

5. This Court has jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331, 1343(a), and § 1346(B). Thus, this Court has jurisdiction of this matter.

FACTUAL BACKGROUND

6. In January 2005, Plaintiff, LARRY PRESCOTT, was jailed as an inmate at the Federal Correctional Institution (FCI) in Tucson; at the time of his initial incarceration it was noted that Plaintiff had chronic hypertension and required medication in order to control that hypertension; Mr. Prescott was initially prescribed anti-hypertensive medications for a period of approximately thirty days by the FCI medical staff; Mr. Prescott's prescription was never renewed by the medical staff of the FCI.

7. That on December 10, 2005, Plaintiff, while still an inmate at the FCI in Tucson, was evaluated at the Emergency Department of University Medical Center in Tucson, for a hypertensive emergency; that Plaintiff was discharged several hours later and returned to the FCI; that on December 11, 2005, Plaintiff suffered a right lacuna stroke and returned to UMC

where he remained until December 18, 2005.

CLAIMS FOR RELIEF

Count One

Civil Right Violations, 42 U.S.C. § 1983

8. Plaintiff reasserts and realleges each and every paragraph, 1 through 7, above, as though fully asserted herein.

9. Defendant is a state actor for purposes of 42 U.S.C. § 1983. Defendant is responsible as the final policymaker for the Federal Correctional Institute with the respect to policies of Federal Correctional Institute.

10. As persons responsible for providing and ensuring the welfare of and medical care to Plaintiff PRESCOTT while incarcerated at the Federal Correctional Institute, DEFENDANT UNITED STATES OF AMERICA owed a non-delegable duty of care to Plaintiff, PRESCOTT because Plaintiff, PRESCOTT, was an incarcerated inmate within the custody of the UNITED STATES OF AMERICA.

11. Defendant, UNITED STATES OF AMERICA, is responsible for the acts or omissions of its agents or employees under the doctrine of *respondeat superior.*

12. Defendant knew or should have known that Plaintiff, PRESCOTT, was not receiving his required medication and put at great risk as a result. However, despite its knowledge of Plaintiff, PRESCOTT'S, condition, Defendant breached its duty of care to Plaintiff, PRESCOTT, by failing to

provide reasonable and necessary medical care and treatment within the standard of care. Defendant's failure to provide medical care within the standard of care to Plaintiff, PRESCOTT, despite their knowledge regarding his condition and his requests for help, constituted deliberate indifference to Plaintiff's, chronic, urgent and life-threatening medical needs.

13. Plaintiff LARRY PRESCOTT'S severe injuries and significant damages were the direct and proximate result of unconstitutional policies, or customs of Defendant, UNITED STATES OF AMERICA, including but not limited to the improper medical care provided to inmate Plaintiff LARRY PRESCOTT, and the failure to train medical staff regarding the medical care of inmates with chronic conditions.

14. As a direct and proximate result of Defendant's breach of their duty of care to Plaintiff, LARRY PRESCOTT, as described herein, Plaintiff sustained severe and substantial injuries including but not limited to stroke.

15. That the actions of the Defendant were malicious, oppressive, intentional and willful and wanton; that the Defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others; that the acts and/or omissions of Defendant were committed with an evil mind such that the Plaintiff is entitled to an award of punitive damages.

WHEREFORE, Plaintiff prays for judgment as follows:

A. For other general damages, including but not limited to pain and suffering,

loss of enjoyment of life;

B. For special damages, including but not limited to medical expenses;

C. For lost wages, income, and other economic losses;

D. For taxable costs and pre- and post-judgment interest to the extent permitted by law;

E. For exemplary damages to the extent permitted by law;

F. For attorney's fees and costs pursuant to 42 U.S.C. § 1983;

G. For punitive damages; and

H. Such other relief as the Court deems just and proper.

Count Two

Negligence

16. Plaintiffs reassert and reallege each and every paragraph, 1 through 15, above, as though fully asserted herein.

17. Defendants owed a duty of care to Plaintiff, PRESCOTT, because Plaintiff was an incarcerated inmate within the custody of the UNITED STATES OF AMERICA.

18. Defendants knew or should have known that Plaintiff, PRESCOTT, was having serious difficulty with controlling his blood pressure and needed medication to control his blood pressure. However, despite their knowledge of Plaintiff, PRESCOTT'S, condition, Defendants breached their duty of care to Plaintiff, PRESCOTT, by failing to provide reasonable and necessary medical care and treatment within the standard of care.

Defendants' failure to provide medical care within the standard of care to Plaintiff PRESCOTT, despite his requests for help, constituted deliberate indifference to Plaintiff PRESCOTT'S, urgent and life-threatening medical needs.

19. Defendant UNITED STATES OF AMERICA, was responsible for the acts or omissions of its agents or employees under the doctrine of *respondeat superior.*

20. As a direct and proximate result of Defendants' breach of their duty of care to Plaintiff, PRESCOTT, sustained severe and substantial injuries including but not limited to stroke.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For other general damages, including but not limited to pain and suffering, loss of enjoyment of life, in an amount that is yet to be ascertained;

B. For special damages, including but not limited to medical expenses, in an amount that is yet to be ascertained;

C. For lost wages, income, and other economic losses, in an amount that is yet to be ascertained;

D. For taxable costs and pre- and post-judgment interest to the extent permitted by law, in an amount that is yet to be ascertained;

C. Such other relief as the Court deems just and proper.

Jury Demand

Plaintiff, Pursuant to Federal Rule of Civil Procedure 38(b), respectfully request a

trial by jury on all issues triable to a jury.

DATED this 24th Day of January, 2008

Larry Prescott, In Pro Per
5856 E. Tercel Drive
Tucson, AZ 857306
(520) 207-0941

Prescott, document 6/17/2008
Process Server 9:02am

UNITED STATES DISTRICT COURT

District of Arizona

LARRY PRESCOTT

Plaintiff,

Case No.: CV-08-61-TUC-CRP

SUMMONS IN A CIVIL CASE

V.

UNITED STATES OF AMERICA

Defendants

TO: United States of America

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY, **James R. Studwell, Healy & Studwell Law Firm, P.C., P.O. Box 57520, Tucson, Arizona 85732, (520) 790-1400** an answer to the compliant which is served on you with this summons, within 60 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. Any answer that you serve on the pa4rties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

CLERK

DATE

UNITED STATES DISTRICT COURT
12:58 pm, May 20, 2008
s/Richard H. Weare, Clerk
DISTRICT OF ARIZONA

(By) DEPUTY CLERK

A0 440 (Rev. 8/011) Summons in a Civil Action

RETURN OF SERVICE	
Service of Summons and Complaint was made by me	DATE
NAME OF SERVER (PRINT)	TITLE

Check one box below to indicate appropriate method of service

☐ Served personally upon the defendant. Place where served: _____

☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and Discretion then residing therein.

Name of person with whom the summons and complaint were left:

_____

☐ Returned unexecuted:

_____

☐ Other (specify):

_____

STATEMENT OF SERVICE FEES		
TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER

I Declare Under Penalty of Perjury Under The Laws of The United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date *Signature of Server*

_____
Address of Server

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Larry Prescott, Plaintiff, vs. United States of America, Defendant.	No. CV 08-061-TUC-RCC **ORDER**

Upon stipulation (Doc. 57) and good cause appearing,

IT IS ORDERED dismissing this action with prejudice, each party to bear its own costs, expenses, and fees.

DATED this 8th day of June, 2012.



Raner C. Collins
United States District Judge

Larry Prescott, Plaintiff, v. United States of America., Defendant.	CV-08-061-TUC-RCC **STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677**

It is hereby stipulated in the above-captioned matter, by and between the undersigned Plaintiff, Larry Prescott and Defendant United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of $82,500.00 which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sum set forth in this Stipulation for Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agrees to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of

further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The Plaintiff stipulates and agrees that he is legally responsible for any and all liens or claims for payment or reimbursement. Plaintiff and his attorneys stipulate and agree that the Plaintiff, by and through his attorneys, will satisfy or resolve any and all liens for payment or reimbursement asserted by any individual or entity before distributing to Plaintiff any portion of the amount paid pursuant to paragraph 2, above. The Plaintiff and his attorneys further agree that Plaintiff's attorneys shall, within ten (10) days of paying or resolving each such lien or claim for payment or reimbursement, provide to the United States evidence that such lien or claim has been satisfied or resolved and that the lienholder or claimant has waived and released its lien or claim. The evidence required by the terms of this paragraph may be satisfied by a letter from Plaintiff's attorneys representing to counsel for the United States that each such lien or claim has been satisfied or resolved and that each such lienholder or claimant has waived and released its lien or claim.

8. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the

settlement.

9. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank:
B. Street Address of Bank:
C. City, State, and Zip Code of Bank:
D. Routing Number:
E. Name of Account:
F. Account Number:

Plaintiff's attorneys agree to distribute the settlement proceeds to the Plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. It is contemplated that this Settlement Agreement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one such document.

12. This Settlement Agreement (consisting of five numbered pages and twelve numbered paragraphs) contains the entire agreement between the parties hereto, and Plaintiff acknowledges and agrees that no promise or representation not contained in this agreement has been made to him, and he acknowledges and represents that this Settlement Agreement contains the entire understanding between the parties, and contains all terms and conditions

pertaining to the compromise and settlement of the disputes referenced herein. No statement, remark, agreement, or understanding, oral or written, that is not contained herein shall be recognized or enforced, nor does this Settlement Agreement reflect any agreed-upon purpose other than the desire of the parties to reach a full and final conclusion of the litigation and to resolve the lawsuit without the time and expense of further litigation.

Executed this 30th day of April, 2012.

ANN BIRMINGHAM SCHEEL
Acting United States Attorney
District of Arizona

Gerald S. Frank

GERALD S. FRANK,
Assistant U.S. Attorney
Attorney for Defendant United States of America

Executed this 30th day of April, 2012.

Healy & Studwell Law Firm, PC

James R. Studwell

JAMES R. STUDWELL, Esq.
Attorney for Plaintiff
Tax I.D. No.

Executed this 30TH day of April, 2012.

Larry V. Prescott

LARRY PRESCOTT,
Plaintiff
Social Security No. 265-11-9681

Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-WXR-2009-00266 **Short Description:** NGERNTONGDEE V. UNITED STATES OF AMERICA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	2:09-cv-00213-RSM
Short Description	NGERNTONGDEE V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Wrongful Death
Case Sub-Type	
Current Region	WESTERN REGIONAL OFFICE
Current Institution	SeaTac (FDC)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	SeaTac (FDC)
Monetary Relief Sought	$
Estimated Amount	$
Office	Seattle
Jurisdiction	UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
Responsible Legal Office	FDC Seatac

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	05/07/2009
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$880,000.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	02/25/2009
Date Filed	02/19/2009

Case Progress

Current Owner	JENNIFER VICKERS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	
Private Case	No

Additional Case Information

Long Description	28:1331 FED. QUESTION: PERSONAL INJURY
Further Case Classification	REOPENED FOR PLN FOIA REQUEST
Comments	Consolidated under 08-1070, see for case documents

Home | Alerts | My Work | New Case | Search Main | Email

United States Department of Justice - Office of General Counsel & Review

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

TAWEESIN JAIME NGERNTONGDEE, as Personal Representative of the Estate of ROXANNA BROWN, Deceased, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	No. _____ COMPLAINT FOR DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT

Plaintiff Taweesin Jaime Ngerntongdee, as personal representative of the Estate of ROXANNA BROWN, deceased, claims as follows:

I. PARTIES

1.1 Plaintiff.

1.1.1 Plaintiff Taweesin Jaime Ngerntongdee is the Personal Representative of the Estate of Roxanna Brown. Ms. Brown's estate is being probated in the King County, Washington Superior Court under No. 08-4-04105-9 SEA. Mr. Ngerntongdee is a resident of Bangkok, Thailand. He is a citizen of Thailand and the United States. He is the only child of Roxanna M. Brown, deceased, who also was a citizen of both Thailand and the United States. At the time of Ms. Brown's death, Mr. Ngerntongdee was living with Ms. Brown in Bangkok

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Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

and was dependent on her for financial support. Ms. Brown was 62 years old was an internationally known and respected authority on Asian art, with no criminal record whatsoever.

1.2 Defendant.

1.2.1 Defendant United States of America owns the Federal Detention Center ("FDC") in SeaTac, Washington. The FDC is a federal facility operated by the Bureau of Prisons ("BOP"), an agency within the United States Department of Justice. The FDC and the United States BOP are health care providers as that term is defined in RCW 7.70 *et seq.* These agencies are responsible for the delivery of health care to inmates confined therein, and they employ health care providers to fulfill this duty. Decedent, Roxanna Brown, was confined as a pre-trial detainee at the FDC from May 9, 2008 until her death on May 14, 2008. During this same time period, Ms. Brown was in the care and custody of agents of the United States Department of Interior, the United States Marshals' Service, and the United States Department of Treasury, who had control over her and a duty to exercise care with respect to her health and safety.

II. JURISDICTION AND VENUE

2.1 The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1346 and 1402.

2.2 Plaintiff has filed tort claims with the BOP, as well as with the Department of Interior, the United States Marshals' Service, and the Department of Treasury. The last of these tort claims was filed on August 6, 2008. Plaintiff has waited the requisite six-month period for these agencies to respond, and herewith deems the non-response a final denial of the claims under 28 U.S.C. § 2675(a). Having thereby exhausted administrative remedies under 28 U.S.C.

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§ 2401(b), the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1346 where the United States is now the proper party.

2.3 Venue is appropriate in the Western District of Washington because a substantial part of the events complained of occurred in this District, Ms. Brown's estate is being probated in this District, and some of the Defendants reside in this District. *See* 28 U.S.C. §§ 1391(b) and 1402(b).

III. FACTS

3.1 On the evening of May 9, 2008, Roxanna Brown was arrested by agents of the United States.

3.2 From May 9, 2008 to May 14, 2008, Ms. Brown was in the exclusive custody of the United States and its agents. Most of this time she was held at the FDC in SeaTac, Washington. She was not allowed to secure release from custody through bail, and was not allowed to contact anyone by telephone except her court-appointed federal attorney.

3.3 By Monday, May 12, Ms. Brown had severe gastrointestinal symptoms, was vomiting and such in great pain that she was unable to go before a Magistrate Judge. Federal employees were responsible for Ms. Brown's detention and care on this day and the days preceding. At 9:14 p.m., Ms. Brown was seen by BOP Physician's Assistant ("PA") Manuell Lacist. According to the medical record, which was spare and incomplete and should have included more historical information, Ms. Brown complained that as of that morning she had "nausea" and "vomiting" of "clear to yellowish fluids." Ms. Brown also complained that she had had "loose clear stool since [that] morning," and "she went to the bathroom 8-10 times."

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3.4 On Tuesday, May 13, Ms. Brown's condition worsened. Ms. Brown was able to go to court that morning, accompanied by agents from the U.S. Marshal's Office, but she was obviously very ill. However, federal employees again failed or refused to take her to a hospital.

3.5 After her return on May 13, it was apparent that Ms. Brown was seriously ill and unable to walk or care for herself. Other inmates pointed this out to FDC corrections officers. Ms. Brown had been vomiting, and her vomit smelled like excrement. The other inmates had to carry her to a shower so she could clean herself.

3.6 Sometime before 7:58 p.m., Officer Priscilla Vaughan called the FDC clinic. According to Officer Vaughn, she reported that Ms. Brown "was throwing up," "was not feeling well," and "requesting medical to see her." The call was taken by Med Tech Rocelli Flores. According to Officer Vaughn, Med Tech Flores said that PA Lacist "had already left" and that she, Med Tech Flores, could not dispense medicine without authorization. Med Tech Flores took no further action in response to that call.

3.7 At 8:20 p.m., Officer Vaughan observed Ms. Brown was inside her cell and appeared to be sleeping. She again called to Med Tech Flores who, according to Officer Vaughn, "cautioned" Officer Vaughan to "let her sleep" and stated that she would notify PA Lacist (who she said was "on call").

3.8 Sometime between 8:20 p.m. and 9:30 p.m., BOP records indicate Med Tech Flores spoke with PA Lacist, who told Med Tech Flores that she could give Ms. Brown an antacid (pink bismuth). Neither Med Tech Flores nor PA Lacist examined Ms. Brown.

3.9 After lockdown at 10:00 p.m., other inmates heard Ms. Brown call for help from her cell. Some of them were so frightened and concerned they began praying for her. When another corrections officer finally responded to Ms. Brown's cries, the officer told her to get up

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off the cell floor and would not or could not open the cell door to examine or assist her. Although Ms. Brown was in agony and dying, the officer said she would have to wait for sick call in the morning to receive medical attention.

3.10 On May 14, at 2:07 a.m., the City of SeaTac Fire Department received a call from the FDC and dispatched EMT personnel who arrived at the detention center at 2:10 a.m.

3.11 Upon arrival, the SeaTac EMT officers discovered Ms. Brown "comatose-pulseless not breathing." According to an EMT officer's post-mortem report, Ms. Brown "was found supine in cell. Feces on the floor was mostly mopped . . . . CPR not initiated prior to arrival." The EMT officers tried to resuscitate Ms. Brown, but ceased at 2:28 a.m.

3.12 Throughout Ms. Brown's detention, agents of the United States had control over her movements, communications and access to health care. These agents had a duty to exercise reasonable care in fulfilling that duty, but failed to do so. These failures were a proximate cause of Ms. Brown's unnecessary and purposeless suffering and death.

3.13 The clinic staff at FDC, including MedTech Flores and PA Lacist, the United States, the BOP, and the FDC all acted as health care providers to Ms. Brown during the contacts with her described above. In those contacts, these health care providers failed to exercise the degree of care, skill, and learning expected of reasonably prudent health care providers at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances.

3.14 As a proximate result of the actions and inactions by these health care providers and other persons employed by Defendant United States, Ms. Brown suffered torturous and prolonged physical pain, loss of life, loss of liberty, fear and emotional distress, loss of the ability to enjoy life, and damage to reputation. Ms. Brown and her Estate lost earnings and earning

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potential and incurred burial, legal and other expenses and obligations. Mr. Ngerntongdee suffered a loss of his mother's care, love, support and services.

3.15 Plaintiff has obtained, pursuant to RCW 7.70.150, a Certificate of Merit by Dr. Joseph L. Heller that there is a reasonable probability that Defendant's conduct did not follow the accepted standard of care required to be exercised by the Defendant. Dr. Heller's Certificate of Merit is attached as Exhibit A and incorporated herein by reference.

3.16 Plaintiff has filed tort claims with the responsible agencies and given them notice of this claim to the extent required by both state and federal law.

IV. CLAIMS FOR RELIEF

4.1 The above described acts and omissions by non-medical agents of the United States and its agencies constitute common law negligence.

4.2 The above described acts and omissions by health care providers who are agents or agencies of the United States constitute violations of the standard of care, including the degree of care, skill, and learning expected of reasonably prudent health care providers in the state of Washington in 2008, acting in the same or similar circumstances as those described above; and therefore render the United States liable for injury and death resulting from health care under RCW 7.70 *et seq.*

V. RELIEF REQUESTED

WHEREFORE, the plaintiff requests relief as follows:

5.1 Compensatory damages;

5.2 Costs, including reasonable attorneys' fees, to the extent permitted by law.

5.3 Such other relief as may be just and equitable.

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705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

DATED this 19th day of February, 2009.

MacDONALD HOAGUE & BAYLESS

By _____
Timothy K. Ford, WSBA # 5986
David Whedbee, WSBA #35977
Attorneys for Plaintiff

MacDONALD HOAGUE & BAYLESS
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Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

FILED

2009 FEB 24 PM 2:48

U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

Martinez, Ewin Oscar.
FULL NAME

COMMITTED NAME (if different)

United States Penitentiary Victorville.
FULL ADDRESS INCLUDING NAME OF INSTITUTION

P.O. Box 5300. Adelanto, CA 92301.

#60137-004.
PRISON NUMBER (if applicable)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Ewin Martinez
PLAINTIFF,

v.

UNited States of America
DEFENDANT(S).

CASE NUMBER: EDCV09 00375 SVW (RC)
To be supplied by the Clerk

CIVIL RIGHTS COMPLAINT
PURSUANT TO (Check one)
☒ 42 U.S.C. § 1983, 42 U.S.C. § , and Tort Claim
☒ Bivens v. Six Unknown Agents 403 U.S. 388 (1971)

A. PREVIOUS LAWSUITS

1. Have you brought any other lawsuits in a federal court while a prisoner: ☒ Yes ☐ No

SSO

2. If your answer to "1." is yes, how many? Just one.

Describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on an attached piece of paper using the same outline.)

I was confided in the SHU for 30 days under the most unfortunated circumstances without any reasonable cause, but for retaliation.

2009 FEB 23 A 10:56

RECEIVED
CLERK, U.S. DISTRICT COURT
FEB 20
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

o this previous lawsuit:
aintiff Ewin Oscar Martinez.

Defendants UNited States of America, Leroy Minnis, Warden Willy, Captain Branch, etc.

b. Court Northern District of Atlanta, Georgia.

c. Docket or case number 1:05-cv-2241-ODE

d. Name of judge to whom case was assigned Orinda Evans

e. Disposition (For example: Was the case dismissed? If so, what was the basis for dismissal? Was it appealed? Is it still pending?) Dismissed

f. Issues raised: Retaliation, Sexual Abuse, extreme punishment

g. Approximate date of filing lawsuit: 02-16-2005

h. Approximate date of disposition 10-23-2006

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

1. Is there a grievance procedure available at the institution where the events relating to your current complaint occurred? ☒ Yes ☐ No

2. Have you filed a grievance concerning the facts relating to your current complaint? ☒ Yes ☐ No

   If your answer is no, explain why not

3. Is the grievance procedure completed? ☒ Yes ☐ No

   If your answer is no, explain why not

4. Please attach copies of papers related to the grievance procedure.

C. JURISDICTION

This complaint alleges that the civil rights of plaintiff Ewin Martinez
(print plaintiff's name)

who presently resides at USP Victorville, P.O. Box 5300, Adelanto, CA 92301.
(mailing address or place of confinement)

were violated by the actions of the defendant(s) named below, which actions were directed against plaintiff at United States Penitentiary Victorville.
(institution/city where violation occurred)

on (date or dates) 01/22/2007. _____, _____, _____.
(Claim I) (Claim II) (Claim III)

NOTE: You need not name more than one defendant or allege more than one claim. If you are naming more than five (5) defendants, make a copy of this page to provide the information for additional defendants.

1. Defendant Dr. Santini. resides or works at
(full name of first defendant)
Dr. Santini was moved from thi Institution to another, and I have not idea
(full address of first defendant)
where he is right now.
(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): ☐ individual ☒ official capacity. (both).

Explain how this defendant was acting under color of law:

Dr. Santini prescribed me a wrong medicine about which I was allergic. Ignoring what he did, I took that medicine for various days and the allergic reaction almos killed me

2. Defendant UNited States of America. resides or works at
(full name of first defendant)
The United States of America is liable because Dr. Santini is a Federal em-
(full address of first defendant)
ployee and his wrong doing occurred when he was working as official of the
(defendant's position and title, if any)
United States of America.

The defendant is sued in his/her (Check one or both): ☐ individual ☐ official capacity.

Explain how this defendant was acting under color of law:

_____

_____

3. Defendant _____ resides or works at
(full name of first defendant)

_____
(full address of first defendant)

_____
(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): ☐ individual ☐ official capacity.

Explain how this defendant was acting under color of law:

_____

_____

4. Defendant _____ resides or works at
(full name of first defendant)

_____
(full address of first defendant)

_____
(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): ☐ individual ☐ official capacity.

Explain how this defendant was acting under color of law:

_____

_____

5. Defendant _____ resides or works at
(full name of first defendant)

_____
(full address of first defendant)

_____
(defendant's position and title, if any)

The defendant is sued in his/her (Check one or both): ☐ individual ☐ official capacity.

Explain how this defendant was acting under color of law:

_____

_____

D. CLAIMS*

CLAIM I

The following civil right has been violated:

I arrived to this Institution of Jan.8,2007. I was without high-blood-pressure medicine for many days until Jan. 21,2007 when Dr. Santini prescribed me such medicine. Suddenly mine eyelids and lips became swollen, and the same happened with my genitals. I had pain in my face and pain in my genitals. On Monday morning I saw a P.A. (phisycian assistant) I she told me that I was intoxicated, and when she reviewed my medical file she found out that Dr. Santini prescribed me a wrong medicine. I complained him about it, and he simply said, "I had not time to review your file!" and oprder me to step out of his face. He almost killed me and when he saw me, instead to apologies, he insulted me. He wrongly prescribed me "Lisinopril" which had been declared ALLERGIC TO ME, and such information is everywhere in my medical file. His failure to see it first just before to prescribe any medicine made me sick and almost killed me. I pray for justice.

Supporting Facts: Include all facts you consider important. State the facts clearly, in your own words, and without citing legal authority or argument. Be certain you describe, in separately numbered paragraphs, exactly what each DEFENDANT (by name) did to violate your right.

*If there is more than one claim, describe the additional claim(s) on another attached piece of paper using the same outline.

E. REQUEST FOR RELIEF

I believe that I am entitled to the following specific relief:

To receive $150,000.oo in compensation for damage and the risk to die because the negligent behavior of an United States employee. If this court decides do not to resolve this complaint by itself (that mean, to order to the government to pay my compensation) then, I respectfully request trial by jury.

01 - 20 - 2009.
(Date)

(Signature of Plaintiff)

446755-R1 MARTINEZ, Ewin 60137-004
USP Victorville

This is in response to your Administrative Remedy Appeal of the Warden's decision dated April 9, 2007, in which you state you sought some type of punishment for medical staff because of negligence for withholding your high blood pressure medication for more than 15 days. You state you submitted several "cop-outs" warning about your high blood pressure, that you were prescribed a medication to which you are allergic. You state you took the medication for a whole weekend and your eyelids and lips become swollen. You state you asked medical staff how it was possible to prescribe a medication you are allergic to, and you claim they did not have time to see your file. For remedy, you are requesting that medical staff agree, in writing, to pay you $10,000, for pain and suffering, and in return you will drop the civil suit against the United States and medical staff.

Your appeal has been investigated. A review of your medical records and interviews with medical staff reveal upon your arrival at FCC Victorville on January 8, 2007, you were taking Fosinopril for your high blood pressure. On January 19, 2007, the pharmacy filled your prescription with Lisinopril, which is comparable to Fosinopril. There was no documentation in your medical record that you reported to Health Services to complain of swelling of your eyes and lips because of the medication you ingested.

On January 24, 2007, based on your complaint, the Clinical Director discontinued the Lisinopril and started you on Hydrochlorothiazide, since the medication Fosinopril is a non formulary medication, which requires approval from Central Office. Upon approval from Central Office on January 29, 2007, the staff physician ordered Fosinopril, which was dispensed to you on February 1, 2007.

Your request for monetary compensation ($10.000) cannot be addressed under the Administrative Remedy Program. Program Statement 1330.13, Administrative Remedy Program, paragraph c, notes that there are statutorily-mandated procedures in place for filing an administrative tort claim. Program S1320.06, Federal Tort Claims Act, outlines the procedure to file an administrative tort claim. You may obtain the appropriate forms by submitting an 'Inmate Request to Staff' through your Unit Team.

We found no evidence to support your claim that medical staff negligently prescribed you medication to which you are allergic.

This response is provided for informational purposes only. If you are dissatisfied with this response, you may appeal to the Office of the General Counsel, Bureau of Prisons, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in the General Counsel's office within 30 calendar days of the date of this response.

7-10-07
Date

Robert E. Meradden, Regional Director

Administrative Remedy No. 446755-A1
Part B - Response

You allege medical staff did not review your medical file when you were prescribed the medication lisinopril, which you reported having an allergy to during intake screening.

Relevant portions of your medical record have been reviewed which reveal you arrived at USP Victorville on January 8, 2007, with a history of high blood pressure, which was being treated with fosinopril and hydrochlorothiazide. An allergy to the medication, lisinopril, is noted on the intake screening form. However, fosinopril is not on the Bureau's National Formulary and Clinical Director discontinued the fosinopril and started lisinopril. Lisinopril was discontinued on January 24, 2007. On January 30, 2007, you received a prescription for Fosinopril 20 mg twice daily after non-formulary approval had been obtained from Central Office. There is no documentation in the medical record to support the claim that you experienced severe symptoms of swelling of your eyelids, lips and tongue.

The Administrative Remedy Program does not provide for monetary relief. Your request for monetary compensation should be pursued through the appropriate statutorily mandated procedure to resolve this issue.

This response is provided for informational purposes only.

November 27, 2007
Date

Harrell Watts, Administrator
National Inmate Appeals

EXHIBIT 1

PATIENT PROBL... / CDFRM

U. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

PROBLEM LIST

DATE NOTED	SIGNIFICANT DIAGNOSES	SIGNIFICANT OPERATIONS/ INVASIVE PROCEDURES	DATE
1/20/99	HX HTN ~~normal~~ [illegible]		
"	HX NIDDM (normal) [illegible]	UC CCC Dm	6/1/01
2-13-00	(+) PPD State HX TX		
		Dietitian 9/03	
		Optometrist 9/03	
10-08-02	CARE LEVEL = 2		
	CHD RISK PROFILE		
	#1 HYPERTENSION		
	#2 DIABETES MELLITUS		
	#3 TOBACCO LIST		
	#4 FAMILY HIST. OF PREMATURE CAD		
	#5 HIST. OF CAD (PERSONAL LIST)		
	#6 HYPERLIPIDEMIA		
4-17-03	fundoscopy done by optometrist		
4-22-04	Cough associated c̄ Lisinopril		
12-27-05	Care level 2		

ADVERSE / ALLERGIC DRUG REACTIONS (If none, record "No Known Drug Allergies")

NO KNOWN DRUG ALLERGIES

~~NKDA~~ Lisinopril 4-5-2004

(This form may be replicated via WP)

Z

EDWIN

60137-004

B

20.060 PATIENT PROBLEM LIST CDFRM
96
S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

PROBLEM LIST

DATE NOTED	SIGNIFICANT DIAGNOSES	SIGNIFICANT OPERATIONS/ INVASIVE PROCEDURES	DATE
APR 13 2006	Hypertension		
APR [illegible] 2006	Hyperglycemia		
APR [illegible] 2006	Care Level II		
		CHRONIC CARE	
		CARDIAC ____ DIABETIC ____	
		PULMONARY ____ GENERAL ____	
		HYPERTENSN X INFECT DIS ____	
	/1	MNTL HLTH ____ NEUROLOGY ____	
		ENDO ____ LIPID ____	

ADVERSE / ALLERGIC
DRUG REACTIONS
(If none, record "No Known Drug Allergies")

Lisinopril

Patient Identification (This form may be replicated via WP)

MARTINEZ, #60137-004
EWIN OSCAR
DOB: 60137-004

Printed on Recycled Paper

-S620.060 PATIENT PROBLEM LIST CDFRM
G 96
.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS

PROBLEM LIST

DATE NOTED	SIGNIFICANT DIAGNOSES	SIGNIFICANT OPERATIONS/ INVASIVE PROCEDURES	DATE
01-08-07	MEDICAL CLASSIFICATION CARE LEVEL 1 2 3 4		
6-8-07	Rem of (L) hip wart HTN		

ADVERSE / ALLERGIC
DRUG REACTIONS
(If none, record "No Known Drug Allergies")

LISINOPRIL 01-08-2007

Patient Identification
(Name, Reg #, DOB)

(This form may be replicated via WP)

MARTINEZ, #60137-004
EWIN OSCAR
DOB: 60137-004

NSN 7540-00-634-4178

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT TREATING ORGANIZATION (Sign each entry)
10-30-02 1120	S- Constipated - want something to clean me out
	O - 137/80 - 97.5 - 55 - 20 - Ø endorsem
	A - alteration in comfort
	P- 1) Milk of Magnesia 30cc now + then 30cc @ bedtime/protocol
	2) ↑ fluids today
	E - I/m instructed to drink more fluids and ambulate - Carpenter RN/
	B. CARPENTER, RN
12/29/02 1755	(S) A c/o infection to (1) eye x 3 days
	(O) A+Ox3, PERRLA, REU, ØSOB, (B) eyes c̄ clear conjunctiva, sclera normal, (1) upper eye lid approx 1cm area of very mild swelling noted, Ø redness noted, EOM's intact
	(A) No acute distress noted
	(P)(E) A instructed not to rub eyes, RTC in am for SC
	A. ROEHR, RN

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO.	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION: (For typed or written entries, give: Name - last, first, middle; ID No or SSN; Sex; Date of Birth; Rank/Grade.)

REGISTER NO. | WARD NO.

MARTINEZ
EDWIN

60137-004

DOB 09/02/53
FCC BEAUMONT - USP

USP BEAUMONT
PO BOX
BEAUMONT, TX 77720

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record
STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR (41 CFR) 201-9.202-1

7006 3450 0000 6307 6962

CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.

FORM APPROVED OMB No. 1105-0008 EXPIRES 5-31-95

1. Submit To Appropriate Federal Agency
Robert E. McFadden, REGIONAL DIRECTOR of BOP,
7950 Dublin Blvd. 3r floor.
Dublin, California 94568.-

2. Name, Address of claimant and claimant's personal representative, if any (See instructions on reverse.) (Number, street, city, state, and Zip Code)
Ewin Oscar Martinez.
#60137-004.
United States Penitentiary VICTORVILLE
P.O. Box 5500. Adelanto, CA 92301.

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. or P.M.)
Military X Civilian	02-09-1953	Single	January 21, 2007.	11:00 am.

8. Basis of Claim. (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

I am an inmate suffering of HIgh-Blood-Pressure. Doctor Santini, Hospital-Director, negligently prescribed me a wrong medicine about which I have been declared ALLERGIC. (See my Medical-Records). As consequence of such negligent action I was suffering of inflammation of my eyelids and lips, headeach and problems to sleep because suddenly I got something like asthma when I never suffered of asthma in my whole life. There is not doubt that Dr. Santini put my life in serious risk to die by poisoning me with a wrong medicine that clearly was described in my medical-history as ALLERGIC, but he prescribed me such medicine without to review my file. It is a serious negligent behavior.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, street, city, State, and Zip Code)

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side)

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT

Headeach, asthma, inflammation of eyelids and lips, difficult to sleep; poisoned with risk to die.

11. WITNESSES

NAME	ADDRESS (Number, street, city, State, and Zip Code)

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
	$150,000.oo		$150.000,oo

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of signatory	14. DATE OF CLAIM
		Feb.19,2008.

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM
The claimant shall forfeit and pay to the United States the sum of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
Imprisonment for not more than five years and shall be subject to a fine of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the United States. (See 18 U.S.C.A. 287.)

95-108
Previous editions not usable

NSN 7540-00-634-4046

STANDARD FORM 95 (Rev. 7-85)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2

EXHIBIT 2

EXHIBIT No. 3

PREVIOUS EDITION IS USABLE

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD | **CHRONOLOGICAL RECORD OF MEDICAL CARE**

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)
1/24/07 1230	ADMINISTRATIVE NOTE: Received chart [illegible] Lisinopril. D/C Lisinopril. Plan CSC w/ [illegible] days. George Santini, MD Clinical Director FCC Victorville
1/25/07 1400	Start Hydrochlorothiazide 25mg QAM x 180 days per Dr Santini. D/C Lisinopril since 1/24/07. Allergic to Lisinopril. 1/25/07 George Santini, MD Clinical Director FCC Victorville. [illegible]
1/26/07 1215	Admin Note. [illegible] Hydrochlorothiazide 50mg [illegible] daily [illegible] George Santini, MD Clinical Director FCC Victorville
1-29-07 1144	NFR for fosinopril 20mg T qd as pt came in on this medication due to allergy to Lisinopril. JESUS FERNANDEZ, MD

HOSPITAL OR MEDICAL FACILITY	STATUS	DEPART./SERVICE	RECORDS MAINTAINED AT
SPONSOR'S NAME	SSN/ID NO	RELATIONSHIP TO SPONSOR	

PATIENT'S IDENTIFICATION (For typed or written entries, give: Name - last, first, middle, ID No or SSN, Sex, Date of Birth; Rank/Grade) | REGISTER NO. | WARD NO.

Martinez 60137-004

CHRONOLOGICAL RECORD OF MEDICAL CARE
Medical Record
STANDARD FORM 600 (REV. 6-97)
Prescribed by GSA/ICMR
FIRMR (41 CFR) 201-9.202-1

MARTINEZ, #60137-004
EWIN OSCAR
DOB: 60137-004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EWIN MARTINEZ, aka EDWIN OSCAR MARTINEZ, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CASE NUMBER EDCV 09-0375-SVW(RC) **ORDER DIRECTING SERVICE OF PROCESS BY THE UNITED STATES MARSHAL**

An affidavit having been presented in compliance with the provisions of 28 U.S.C. § 1915, and an order having been filed permitting commencement of suit without full prepayment of filing fees;

IT IS ORDERED that the United States Marshal is authorized to proceed with service of process upon the following defendants only, without prepayment of costs, until further order of Court:

United States of America, a governmental entity; and

Dr. FNU Santini, an employee of the Bureau of Prisons, solely in his individual capacity;

IT IS FURTHER ORDERED that the United States Marshal shall mail a copy of the Summons and **Amended Complaint** by registered or certified mail to each of the following: (1) the United States Attorney for the Central District of California, or his or her authorized agent, addressed to the civil process clerk at the Office of the United States Attorney, Civil Division, Room 7516, Federal Building, 300 North Los Angeles Street, Los Angeles, California 90012; and (2) the Attorney General of the United States in Washington D.C.

DATED: June 16, 2009

/S/ ROSALYN M. CHAPMAN
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

Wilson, G CV

16

Wilson 2

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EWIN OSCAR MARTINEZ, Plaintiff, vs. UNITED STATES OF AMERICA, DR. GEORGE SANTINI, et. al., Defendants.	Case No. EDCV 09-0375-SVW(RC) ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the amended complaint and other papers along with the attached Report and Recommendation of United States Magistrate Judge Rosalyn M. Chapman, and has made a de novo determination.

IT IS ORDERED that:

(1) The Report and Recommendation IS APPROVED AND ADOPTED;

(2) defendant George Santini's motion to dismiss IS GRANTED, and all claims against defendant Santini are dismissed;

(3) defendant United States' motion to dismiss IS GRANTED, IN PART, and all claims are dismissed against defendant United States

except plaintiff's third cause of action for negligence under the Federal Tort Claims Act, and defendant United States shall file an answer to plaintiff's negligence claim within thirty (30) days of the date of this Order; and

(4) plaintiff's request for punitive damages is stricken.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order and the Magistrate Judge's Report and Recommendation by the United States mail on plaintiff.

DATED: _____

_____
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

RAR\09-00375.ado
3/25/10

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. EDCV 09-0375-SVW(RC) Date: November 30, 2009

Title: Ewin Martinez, aka Ewin Oscar Martinez v.
United States of America

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DOCKET ENTRY

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HON. ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE

Jake Yerke Deputy Clerk	None Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS: (IN CHAMBERS) ORDER TO SHOW CAUSE WHY THIS ACTION SHOULD NOT BE DISMISSED FOR PLAINTIFF'S FAILURE TO DILIGENTLY PROSECUTE

Effective February 23, 2009, plaintiff Ewin Martinez, a federal prisoner proceeding pro se and in forma pauperis, filed a complaint under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and on March 6, 2009, this Court initially ordered the United States Marshal to serve the summons and initial complaint and to file a Notice of Submission and USM-285s, showing all documents submitted to the Marshal, within thirty (30) days. At plaintiff's request, the Court extended this deadline to June 15, 2009. However, instead of filing these documents, on June 15, 2009, plaintiff voluntarily filed an amended complaint, and on June 16, 2009, this Court amended its Order to require the United States Marshal to serve defendants with the amended complaint and summons. The plaintiff never filed the Notice of Submission and USM-285s this Court ordered him to file.

On November 17, 2009, this Court ordered plaintiff to immediately file the Notice of Submission and USM-285 forms showing the documents he submitted to the United States Marshal.

Plaintiff still has not filed these documents. Plaintiff is advised that he has not complied with this Court's Order and has not filed the Notice of Submission and USM-285s showing documents he submitted to the United States Marshal to effect service of process on defendants, and defendants complain they have not been properly served due to plaintiff's failure to submit the correct number of documents to the United States Marshal.

The plaintiff is ordered to show cause why this action should not be dismissed for his failure to submit the necessary documents to the United States Marshal to properly effect service of process on defendants, and failure to diligently prosecute by, among other things, failing to file the documents this Court ordered. See Federal Rules Civil Procedure 41(b), Local Rule 41, and Link v. Wabash Railroad Co., 370 U.S. 626, 629-30 (1962), reh'g denied, 371 U.S. 873 (1962).

If plaintiff objects to such dismissal, he shall file and serve written objections to the dismissal with a memorandum of points and authorities within ten (10) days of the date of this Order. If there are no objections to the proposed dismissal, plaintiff shall so inform the Clerk in writing.

Service List:

Ewin Martinez,
aka Ewin Oscar Martinez
#60137-004
FCI Allenwood
P.O. Box 2000
White Deer, PA 17887-2000

case090\09-0375.20
11/30/09

Initials of Deputy Clerk JY

name: Ewin Martinez, aka Ewin Oscar Martinez

prisoner #: 60137-004

address: P.O. box 2000
White Deer, PA 17887-2000

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EWIN MARTINEZ, aka EWIN OSCAR MARTINEZ, Plaintiff, vs. UNITED STATES OF AMERICA, DR. GEORGE SANTINI, ET AL., Defendants.	Case No. EDCV 09-0275-SVW(RC) NOTICE OF SUBMISSION OF DOCUMENTS TO U.S. MARSHAL

Plaintiff hereby states under penalty of perjury that he has complied with the Court's Order dated June 1st. 2009. on June 8, 2009., plaintiff sent the following to the U.S. Marshal's Service:

X copies of the completed summon(s)

X completed USM - 285 form(s)

X copies of the Ewin O. Martinez, v. United States of America Complaint.\Amended Complaint Dr. Santini

Plaintiff further states under the penalty of perjury that plaintiff has not requested service by the U.S. Marshal upon any

person or entity other than those listed in the Court's order authorizing service of process by the U.S. Marshal Service.

DATE: November 23, 2009

PLAINTIFF, IN PRO PER

CA [illegible]
11/17/09

U. S. Department of Justice

United States Attorney
Central District of California

Geoffrey D. Wilson
Assistant United States Attorney
(213) 894-2420
(213) 894-7819 (FAX)

Federal Building, Suite 7516
300 North Los Angeles Street
Los Angeles, California 90012

September 24, 2009

VIA U.S. MAIL
Ewin Oscar Martinez
#60137-004
FCI Allenwood
P.O. Box 2000
White Deer PA. 17887-2000

Re: *Ewin Oscar Martinez v. United States, et al.*,
Case No. ED CV 09-0375 SVW RC

Dear Mr. Martinez:

This letter is to inform you that on Monday, September 28, 2009, Federal Defendants will file an *ex parte* application to extend their time to answer, move, or otherwise respond to your complaint, requesting a new date of December 3, 2009. This extension of time is necessary for Federal Defendants to properly respond to your complaint.

Please contact me if you will oppose this *ex parte* application to extend Federal Defendants time to answer, move, or otherwise respond to your complaint.

Thank you for your cooperation in this matter.

Very truly yours,

George S. Cardona
Acting United States Attorney

/s/

GEOFFREY D. WILSON
Assistant United States Attorney

U.S. Department of Justice
United States Marshals Service

PROCESS RECEIPT AND RETURN

See Instructions for "Service of Process by the U.S. Marshal" on the reverse of this form.

PLAINTIFF	COURT CASE NUMBER
Ewin Oscar Martinez	EDCV-09-0375-SVW(RC)
DEFENDANT	**TYPE OF PROCESS**
Dr. George Santini	Prisoner Civil Rights.

SERVE ➡ **AT**

NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
Dr. George Santini, Director HOSPITAL USP Victorville.

ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)
P.O. Box 5300, Adelanto California 92301.

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW:

Ewin Oscar Martinez.
#60137-004.
P.O. Box 2000.
White deer, PA 17887-2000.

Number of process to be served with this Form - 285	1
Number of parties to be served in this case	3
Check for service on U.S.A.	1

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE *(Include Business and Alternate Addresses, All Telephone Numbers, and Estimated Times Available For Service):*

Fold Fold

Signature of Attorney or other Originator requesting service on behalf of:	TELEPHONE NUMBER	DATE
☒ PLAINTIFF ☐ DEFENDANT	Prisoner, N/A	June 8, 2009

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY — DO NOT WRITE BELOW THIS LINE

I acknowledge receipt for the total number of process indicated. *(Sign only first USM 285 if more than one USM 285 is submitted)*	Total Process	District of Origin No. 1	District to Serve No 1	Signature of Authorized USMS Deputy or Clerk	Date 12/1/09

I hereby certify and return that I ☐ have personally served, ☐ have legal evidence of service, ☐ have executed as shown in "Remarks", the process described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., shown at the address inserted below.

☐ I hereby certify and return that I am unable to locate the individual, company, corporation, etc., named above *(See remarks below)*

Name and title of individual served *(if not shown above)*

☐ A person of suitable age and discretion then residing in the defendant's usual place of abode.

Address *(complete only if different than shown above)*

Date of Service | Time am / pm

Signature of U.S. Marshal or Deputy

Service Fee	Total Mileage Charges *(including endeavors)*	Forwarding Fee	Total Charges	Advance Deposits	Amount owed to U.S. Marshal or	Amount of Refund

REMARKS:

NOTE

PRIOR EDITIONS MAY BE USED

3. NOTICE OF SERVICE

FORM USM-285 (Rev. 12/15/80)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. EDCV 09-0375-SVW(RC) Date: December 1, 2009

Title: Ewin Martinez, aka Ewin Oscar Martinez v.
United States of America

==========

DOCKET ENTRY

==========

HON. ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE

Jake Yerke Deputy Clerk	None Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS: (IN CHAMBERS)

The Notice of Submission of Documents to U.S. Marshal plaintiff filed on December 1, 2009, does not advise the Court whether plaintiff submitted the original complaint or the amended complaint to the U.S. Marshal's Service, and plaintiff must file forthwith an amended Notice of Submission correcting this deficiency. Thus, the Order to Show Cause is not discharged.

Service List:

Ewin Martinez,
aka Ewin Oscar Martinez
#60137-004
FCI Allenwood
P.O. Box 2000
White Deer, PA 17887-2000

name: Ewin Martinez, aka Ewin Oscar Martinez

prisoner #: 60137-004

address: P.O. Box 2000
White Deer, PA 17887-2000

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EWIN MARTINEZ, aka EWIN OSCAR MARTINEZ, Plaintiff, vs. UNITED STATES OF AMERICA, DR. GEORGE SANTINI, ET AL., Defendants.	Case No. EDCV 09-0375-SVW(RC) NOTICE OF SUBMISSION OF DOCUMENTS TO U.S. MARSHAL

Plaintiff hereby states under penalty of perjury that he has complied with the Court's Order dated _____.

On _____, plaintiff sent the following to the U.S. Marshal's Service:

___ copies of the completed summon(s)

___ completed USM - 285 form(s)

___ copies of the _____
Complaint\Amended Complaint

Plaintiff further states under the penalty of perjury that plaintiff has not requested service by the U.S. Marshal upon any

person or entity other than those listed in the Court's order authorizing service of process by the U.S. Marshal Service.

DATE: _____

_____
PLAINTIFF, IN PRO PER

CASE090\09-0375.15
11/17/09

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
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Attorneys for Federal United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

EWIN OSCAR MARTINEZ Plaintiff, v. THE UNITED STATES OF AMERICA; et al., Defendants.	**No. EDCV 09-0375-SVW(RC)** **STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677** [Proposed] Order Filed Concurrently Herewith

IT IS HEREBY STIPULATED by and between *pro se* plaintiff, Ewin Oscar Martinez, Inmate Register Number 60137-004, ("Plaintiff"), and defendant United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement ("Stipulation for Compromise Settlement").

2. The United States of America agrees to pay the sum of ONE THOUSAND FIVE-HUNDRED dollars ($1,500.00) ("Settlement Amount"), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff and his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, agencies, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sum set forth in this Stipulation for Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, agencies, servants, and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit related to the subject matter of this suit, whether known or unknown, including those which if known to Plaintiff would have materially affected his settlement with the United States, and whether for compensatory or exemplary damages.

4. Plaintiff and his guardians, heirs, executors, administrators, or assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or

resulting from further litigation or the prosecution of claims by Plaintiff and his guardians, heirs, executors administrators, or assigns against any third party or against the United States, including claims for wrongful death.

5. This Stipulation for Compromise Settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, and it is specifically denied that it is liable to Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of future litigation.

6. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

7. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action, if any, shall not exceed 25 percent of the amount of the compromise settlement.

8. The persons signing this Stipulation for Compromise Settlement represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

9. Payment of the Settlement Amount by the United States will be made by government check made out to Plaintiff. Said check will be delivered to the United States Bureau of Prisons facility in which Plaintiff is housed at the time this settlement is approved by the court, currently the Federal Correctional Institution in Beaver, West Virginia ("FCI Beckley").

10. Upon the Court's approval of this Stipulation for Compromise Settlement, the Court will dismiss this action, with prejudice, and with each party bearing its own fees, costs, and expenses. The Court will retain jurisdiction over

this matter until the settlement funds are delivered as set forth in Paragraph 9 above.

11. The parties agree that this Stipulation for Compromise Settlement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

12. It is contemplated that this Stipulation for Compromise Settlement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document. Facsimiles of signatures, if transmitted by counsel for the signatory to counsel for the other party, shall be binding on the signatory.

13. Plaintiff agrees that Plaintiff is obligated to pay any and all liens from any and all insurance companies and any and all other persons or organizations who have or claim to have subrogated assigned claims arising out of or related to the subject matter of this suit.

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14. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

PRO SE PLAINTIFF

DATED: 6/16/2011

EWIN OSCAR MARTINEZ
Pro Se Plaintiff
US BOP Inmate, Register Number 60137-004

DATED: _____, 2011

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

GEOFFREY D. WILSON
Assistant United States Attorney

Attorneys for the United States of America

Plaintiff's Name James R. Willis
Inmate No. 68983-080
Address P.O. Box 24550
Tucson, AZ. 85734 - 4550

FILED
JAN 19 2010
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JW "See Attached pages" (Name of Plaintiff)

1:09-CV-01703-AWI-~~GSA~~-GSA-(PC) (Case Number)

vs.

COMPLAINT

See attached pages -1- and 2- (Names of all Defendants)

Bivens Action [403 U.S. 388 (1971)]
FTCA, 28 U.S.C § 1346

I. **Previous Lawsuits (list all other previous or pending lawsuits on back of this form):**

A. Have you brought any other lawsuits while a prisoner? Yes __ No ✓

B. If your answer to A is yes, how many? _____
Describe previous or pending lawsuits in the space below.
(If more than one, use back of paper to continue outlining all lawsuits.)

1. Parties to this previous lawsuit:

Plaintiff _____

Defendants _____

2. Court (if Federal Court, give name of District; if State Court, give name of County)

3. Docket Number _____ 4. Assigned Judge _____

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)

6. Filing date (approx.) _____ 7. Disposition date (approx.) _____

RECEIVED
JAN 19 2010
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

RECEIVED
JAN 19 2010

II. Exhaustion of Administrative Remedies

A. Is there an inmate appeal or administrative remedy process available at your institution?

Yes ✓ No ___

B. Have you filed an appeal or grievance concerning **ALL** of the facts contained in this complaint?

Yes ✓ No ___

If your answer is no, explain why not _____

C. Is the process completed?

Yes ✓ If your answer is yes, briefly explain what happened at each level. See attached pages "Exhaustion of Administrative Remedys" pg. -3- attached

No ___ If your answer is no, explain why not.

NOTICE: Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). If there is an inmate appeal or administrative remedy process available at your institution, you may not file an action under Section 1983, or any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.S. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1999 (9th Cir. 2002). **Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit.** Booth, 532 U.S. at 734.

III. Defendants

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant See attached pages is employed as "Defendants" at

B. Additional defendants See attached pages "Defendants", pgs. -3- thru -6-.

IV. **Statement of Claim**

(State here as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

See attached pages "Statement of Claim", and Factual Allegations. Attached pgs. -6- thru -13-

V. **Relief.**

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

See attached pages "Relief", pg. -14- Prayer for Relief.

I declare under penalty of perjury that the foregoing is true and correct.

Date July, 31st, 2009 Signature of Plaintiff James R. Willis

(Revised 2/15/2006)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

James R. Willis, Pro Se,

Plaintiff

v.

United States of America;

13 Official Employees of the Federal Bureau of Prisons (FBOP)

1. Harley G. Lappin, in his individual and official capacities;
2. Robert E. McFadden, in his individual and official capacities;
3. D. Smith, in his individual and official capacities;
4. Lieutenant Cobb, in his individual and official capacities;
5. Mr. Devere, in his individual and official capacities;
6. Lieutenant Paul, in his individual and official capacities;

Case no. 1:09-CV-01703-AWI-GSA(PC)

FTCA, [28 U.S.C § 1346 Tort Claim]

Bivens Action [403 U.S. 388 (1971)]

JURY TRIAL DEMANDED

7. Mr. Liwag, in his individual and official capacities;
8. Mrs. Bowles, in her individual and official capacities;
9. Mr. Fass, in his individual and official capacities;
10. Four unknown correctional officers, each one in their individual and official capacities,

Defendants

Amend pg. 1-2 (a) Caption Attached to pg. 2

11. Belinda Avalos, in her individual and official capacities;

12. C. Grant JW. ~~Grant~~, in her individual and official capacities.

AMENDED PAGE 3(a) attached to Page 3

I.A. JURISDICTION, "continued".

This federal Court has jurisdiction over Plaintiffs federal Tort Claims pursuant to Federal Tort Claims Act, 28 U.S.C. § 1346 (b)(1) and § 2671-2680

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES, "Continued".

D. Plaintiffs federal Tort, Administrative Claim No. TRT-WXR-2009-02029 was completed and denied May 26, 2009. Plaintiff mailed a cop of his Administrative Tort attached with his original Civil Complaint.

III. DEFENDANTS, "Continued">

A. UNITED STATES OF AMERICA, Employees of the Federal Bureau of Prisons.

14. Associate WARDEN, Belinda Avalos, United States Penitentiary, Atwater, CA.

15. Associate WARDEN, C. ~~Grant~~ Grant J.W., United States Penitentiary, Atwater. CA.

All of the defendants are sued in their individual capacities pursuant to 1331 Bivens Action [403 U.S. 388 (1971)] and in their official capacities pursuant to Federal Tort Claim Act 28. U.S. C. § 1346.

Amended Pg 6-7 (a) Attached to pg. 7

IV. A. STATEMENT OF CLAIM, "Continued" A., B. & C. Defendants listed as #14 & #15 each stand accused of the claims listed in the original complaint. (A,B,C,F,G,H)

H. The United States of America, "Government" through the negligent acts or omissions of its agents, "Did fail to protect the plaintiff from physical assault by other inmates".

1. By failing to properly investigate the plaintiffs request for protective custody.

2. By failing to thoroughly investigate the plaintiffs claims of being targeted for assault by various prison gangs.

3. by failing to properly identify the plaintiff as being more vulnerable to be assaulted due to being labeled as a "sex-offender".

4. By failing to properly monitor the movement of inmates during the time of the plaintiffs assault by 6 other inmates.

5. By failing to post ~~offices~~ officer's JW. on the sidewalk to help monitor and control the movement of inmates during a controlled move.

6. By failing to notice any indicator that an act of violence or assault was about to occur.

7. by failing to notice the actual assault as it occurred, and failing to intervene or stop the assault.

8. The defendants omissions were substantial factors in bringing about the attack on the plaintiff and his resulting injuries.

9. The defendants owed the plaintiff a duty to protect him from assault by other inmates, they each breached that duty, and that breach was the proximate cause of plaintiffs personal injuries and damages.

Amended Pgs 8-13 (a) Factual Allegations

"Continued" Attached to Pg. 13

28. On or about Aug. 24, 2007, Defendant Belinda Avalos wrote a letter to the Plaintiffs mother, in response to a letter that Plaintiffs mother had written to Defendant D. Smith. The letter plaintiffs mother wrote was concerning the plaintiffs special safety concerns.

29. Defendant Avalos stated that an investigation was conducted concerning plaintiffs request for protective custody; Defendant further states that Plaintiff did not cooperate with the investigation. Defendant also stated that USP Atwater staff was going to transfer the Plaintiff based on his refusal to leave the SHU.

30. Plaintiff was not transferred until after he was ordered from the SHU and subsequently assaulted on 10-09-07. To plaintiffs knowledge the only investigation conducted was the "SIS" asking inmate Mattox if he knew the Plaintiff "inmate Willis", and if the Plaintiff would be in danger in population at USP Atwater. To both questions Mattox responded, A. That he did not know the Plaintiff . B. That the Plaintiff would not have any trouble as far as he was concerned.

31. Plaintiff was never once interviewed concerning his request for protective custody, except at his initial intake interview with Defendant Lt. Cobb "SIS". In fact, everytime Plaintiff would see someone "staff", he asked what was going on with his situation. The answer was always similar. Either "I don't know" or "The matter is still under investigation".

32. In late August or early September 2007, the Plaintiff attempted to resolve this matter by utilizing the administrative remedy. Plaintiff first filed a BP-8 Informal Resolution with his unit team, however that BP-8 was not responded to,

33. On Sept. 14, 2007, Plaintiff filed a BP-9 Administrative Remedy with his unit team, Defendants Devere, Li Wag, & Bowles. He stated that he was proceeding with the BP-9 despite the defendants failure to respond to said BP-8.

34. In said BP-9 Administrative Remedy, Plaintiff explained precisely his safety concerns, and asked for either a state placement or transfer for protective custody. Said BP-9 was not processed because the BP-8 was not attached. Said BP-9 is Administrative Remedy #466507-F1.

35. This is just one of the many written and verbal attempts Plaintiff made to inform the defendants of his safety concerns and request for protective custody.

36. On Sept 13, 2007, Plaintiff once again wrote a request to staff member Defendant C. Gant, informing her of safety concerns, and explaining that Plaintiff had fear from one known gang that was at USP Atwater, CA. Plaintiff also spoke to A.W. C Gant on several occasions about plaintiffs safety concerns. Defendant C. Gant responded in writing on 10-10-07, a day after Plaintiff was assaulted.

I.A. JURISDICTION

This federal court has jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343 (a)(3).

I.B. VENUE

This district court for the Eastern District of California at Fresno California, is the appropriate venue, because a substantial part of the events or omissions giving rise to this claim occurred in this district.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Plaintiff has exhausted all of the available administrative remedies in the FBOP

B. The administrative remedies concerning the facts of this cl aim were completed March 17, 2008.

C. Despite plaintiffs good faith efforts to resolve this matter through the administrative remedies, the defendants deny responsibility. Therefore, plaintiff has no other recourse left in order to enforce his constitutional rights and receive compensatory and punitive damages as well as injunctive relief, so the plaintiff moves with this civil complaint. The administrative remedies present the facts of this civil complaint.

III. DEFENDANTS

1. Defendant Harley G. Lappin is director of the FBOP. He is responsible for the conditions and policies in the operation of every Federal facility operating within the Federal Bureau of Prisons, including USP Atwater, located in Atwater, CA. He is sued in his individual and official capacities.

2. Defendant Robert E. McFadden is the regional director for the Western Region of the FBOP. He is responsible for the conditions and policies in the operation of every Federal prison in the Western region, which does include USP Atwater. He is sued in his individual and official capacities.

3. Defendant D. Smith is the head warden at USP Atwater. He is responsible for the conditions and policies in the operation of the United States Penitentiary Atwater, in Atwater, CA. He is sued in his individual and official capacities.

4. Defendant Lieutenant Cobb, Special Investigations Supervisor (SIS). He is responsible for the investigation of plaintiffs request for protective custody. He is also responsible for investigations conducted at USP Atwater. He is sued in his individual and official capacities.

5. Defendant Devere is the unit manager for building 4 and 5, consisting at the time of 3 units: 4A, 5A, and 5B. He is responsible for the conditions and policies in the operation of the units under his management at USP Atwater, including 5A, which is the unit Mr. Willis, the plaintiff, was assigned to. He is sued in his individual and official capacities.

6. Defendant Lt. Paul is the lieutenant in charge of the special housing Unit (SHU). He is responsible for the conditions and policies in operating the SHU at USP Atwater. He is sued in his individual and official capacities.

7. Defendant Mr. Liwag is the case manager for inmates housed in 5A unit. He is responsible for the care and handling of individual cases of inmates assigned to his case load, including but not limited to, the preparation of inmate transfers to another institution for any reason. He is sued in his individual and official capacities.

8. Defendant Bowles is the unit manager for 6 building, consisting of units 6A and 6B. She was also acting unit manager for 5 building in Mr. Devere's absence during a period of time while Mr. Devere was out on sick leave. She is responsible for the conditions and policies in the operation of the units under her management and care of the inmates under her management. She is sued in her individual and official capacities.

9. Defendant Mr. Fass is the department head of institutional computer services. As part of his duties, he was occasionally assigned as the Institutional Duty Officer, (IDO). His duties are to act in the wardens stead, and to report the conditions and functions of various departments within USP Atwater. He is sued in his individual and official capacities.

10. Defendant Unknown Correctional Officer #1. Defendant, assigned to tower #7 yard watch on October 9, 2007 at USP Atwater. sued in individual and official capacities.

11. Defendant Unknown Correctional Officer #2, assigned as "compound one", on October 9, 2007. Duties include, but are not limited to patrol and security of the inside compound, housing units, sidewalks, recreation yard, etc., etc. at USP Atwater. He is sued in his individual and official capacities.

12. Defendant Unknown Correctional Officer #3, assigned as "Compound 2" on October 9, 2007. His duties are essentially the same as "Compound one". He is sued in his individual and official capacities.

13. Defendant Unknown Correctional Officer #4, was assigned to the facilities corridor on October 9, 2007. Duties include, but are not limited to, maintaining security in the facilities corridor, and maintaining visual security of the main sidewalk outside of the facilities corridor. Defendant is sued in her individual and official capacities.

IV. A. STATEMENT OF CLAIM

A. All of the above named defendants did knowingly and willingly violate the plaintiffs 8th amendment right to be free from cruel and unusual punishment, by failing to protect the plaintiff from serious assault by other inmates.

B. All of the above named defendants were aware of the violent and dangerous conditions that existed at USP Atwater leading up to the date of October 9, 2007, and afterwards. The defendants were also aware of the types of violent prisoners housed there, and of the potential threat posed against the plaintiff at USP Atwater.

C. Defendants, (listed one through nine above), each were and are aware of a substantial and ongoing risk of serious harm that exists against the plaintiff. Each of the defendants numbered as one through nine above, all failed to respond reasonably to protect the plaintiff from being assaulted. As a result of the defendants deliberate indifference, the plaintiff was seriously injured on October 9, 2007.

D. The defendants listed as "4 Unknown Correctional Officers", failed in their duty to protect the plaintiff from assault, by failing to properly monitor the movement of inmates during the time of the assault, by failing to see the assault, by failing to prevent or intervene, or to stop the assault,

E. Each of the above named defendants at the time relevant to the events described herein, acted and continued to act under the color of Federal Law.

F. Plaintiff was seriously injured when he was assaulted by 6 other inmates on October 9, 2007 at the United States Penitentiary in Atwater, California.

G. Aside from the serious physical injuries the plaintiff suffered, he continues to suffer from frequent headaches, blurred vision and dizzy spells. Plaintiff is also experiencing severe psychological and emotional trauma, including but not limited to, violent nightmares, severe panic attacks, anxiety and paranoia.

IV. B. FACTUAL ALLEGATIONS

1. The plaintiff was assaulted by 6 other inmates on October 9, 2007 at USP Atwater in Atwater, California, Merced County. The plaintiff has been targeted for assault by White Supremacist gangmembers, their associates and other prisoners, because plaintiff has a prior state sex offense conviction.

2. Aside from the assault of October 9, 2007, which is the cause of this claim, plaintiff was also assaulted at the United States Penitentiary, Victorville, (USP Victorville), on April 15, 2007 for the same reason and was subsequently transferred to the USP Atwater. After the October 9, 2007 assault, plaintiff was transferred to the USP Lee, Virginia, where he was again assaulted on April 21, 2008.

3. Plaintiff arrived on or about June 12, 2007 at USP Atwater. Upon his arrival he initially spoke with Defendant Lieutenant Cobb, SIS officer. The plaintiff informed defendant Cobb of the exact nature of the threat that existed against him, including informing the defendant about why plaintiff had trouble at his previous two institutions, and also that he believed that plaintiff had at least one known enemy at USP Atwater.

4. Defendant Cobb was aware of the plaintiffs previous threats against him at USP Pollock, LA and the assault that occurred against the plaintiff at USP Victorville, Ca., leading up to his transfer to USP Atwater CA. Defendant Cobb also knew the inmate who the plaintiff believed could pose a threat against him at USP Atwater.

5. Based upon this information, defendant Cobb placed the plaintiff in the Special Housing Unit, (SHU), pending a threat assessment investigation and possible "protective custody transfer".

6. On or about June 14, 2007, the plaintiff spoke to his case manager, defendant Liwag. The plaintiff explained his situation to the defendant and plaintiff gave him an inmate request to staff, commonly known in the FBOP as a "cop-out". Defendant Liwag told the plaintiff that if it was determined that a threat did exist against him, that he would be submitted for a transfer to another institution.

7. On or about June 21, 2007, plaintiff spoke with Warden Smith, (defendant Smith). Plaintiff then briefly explained to defendant Smith why he was in SHU. Defendant Smith told the plaintiff that when the threat assessment investigation was complete, a determination concerning the plaintiffs possible transfer would be made.

8. On or about late June or early July of 2007, plaintiff spoke with defendant Devere for the first time. Defendant Devere was not aware of the plaintiffs situation, but said that he would contact SIS Lt. Cobb about the plaintiffs investigation. Defendant Devere told the plaintiff that he would be gone on sick leave, and that unit manager Bowles, (defendant Mrs. Bowles), would be acting in his stead.

9. Also in June or July of the same year, the plaintiff w rote a letter to the regional director of the Western region, Defendant McFadden. The plaintiff informed defendant McFadden by letter of his concerns for his personal safety in hopes of enlisting the defendants help in effecting a transfer for the plaintiff.

10. Plaintiff received a response to said letter that was dated August 13, 2007. Plaintiff was notified that the threat assessment investigation was completed by the SIS on August 3, 2007, and it was determined that there was not a threat against the plaintiff, and that he would be released from the SHU to program in the general population at USP Atwater.

11. Upon receiving this letter and learning of this information, the plaintiff began reiterating his concerns and efforts to remain in protective custody, and effect a transfer.

12. The plaintiffs mother, Ms Connie Willis, also called the prison numerous times and wrote letters, including a letter to defendant Lappin, the director of the Federal Bureau of Prisons, (FBOP), The said letter is dated September 19, 2007, and in said letter she requested protective custody for plaintiff and a transfer to an institution where he could be safe and also program in general population.

13. The plaintiff received a response to this letter on October 19, 2007, 10 days after the Plaintiff was assaulted.

14. Between August 15, 2007, and September 25, 2007, the plaintiff notified the following defendants telling them that he would not be safe in the general population at USP Atwater: Warden D. Smith, SIS Lt. Cobb, SHU Lt. Paul, Unit Manager Mrs. Bowles, Unit Manager Mr. Devere, Case Manager Mr. Liwag, and computer services/Institutional Duty Officer Mr. Fass.

15. On or about September 19, 2007, the SHU Lieutenant, defendant Paul, spoke to the plaintiff about his request for protective custody. The plaintiff explained to him in detail the exact nature of the threat that exists against him. The plaintiff pleaded with defendant Paul to give him protective custody status. Defendant Paul told the plaintiff that he would be "ORDERED" to go to general population, and if he refused, that the plaintiff would receive an incident report.

16. On September 25, 2007, the plaintiff was ordered into general population, despite all of his attempts to receive protective custody from the defendants.

17. On the same day that the plaintiff was released from the SHU, he was approached by several inmate gang members, and the plaintiff was told that inmate Mattox wanted to meet with him. That evening the plaintiff met with inmate Mattox, who was accompanied by a number of other inmates. That meeting went without incident.

18. On September 26, 2007, the plaintiff again met with inmate Mattox, who was accompanied by 6 other inmates. Inmate Mattox told the plaintiff that there were rumors about the plaintiff being a sex offender, (Rapo). Inmate Mattox told the plaintiff that he had 3 weeks to produce any paperwork to clea r his name, "or else".

19. Immediately after this confrontation, the plaintiff spoke to his Unit Manager, Defendant Devere, and told him about his meetings with inmate Mattox. Plaintiff reaffirmed his belief that his safety and life were in danger at USP Atwater. Defendant Devere took no action after receiving this information.

20. On October 9, 2007, at about 11:45 AM, the plaintiff was brutally assaulted by 6 inmates, some of whom are White Supremacist gang members. This assault occurred in broad daylight at the corner of unit 6A, in front of the facilities corridor, where unknown correctional officer defendant #4 was assigned.

21. This assault against the plaintiff was allegedly not seen by any staff. It is unknown to the plaintiff whether or not this assault was recorded on any security cameras.

22. After the assault, the plaintiff was barely able to walk himself to the infirmary.

23. Plaintiff was transferred to the emergency room at Mercy Medical Center in Merced, California. About 5 or 6 hours later, plaintiff was transported back to USP Atwater California, and was placed in an observation cell in the medical department.

24. Plaintiffs head was severely swollen and mis-shapen, his left eye was swollen completely shut, his nose was broken, his left sinus cavity was fractured, and staples were required to close cuts in his scalp. Plaintiff also suffered a very severe brain contusion as a result of this assault.

25. On or about October 11, 2007, while plaintiff was in SHU, defendant Devere came to see him. Defendant Devere was seemingly shocked at how badly the plaintiff was beaten. Defendant Devere told plaintiff that he had heard about the incident, but did not realize how badly beaten the plaintiff was.

26. The plaintiff told defendant Devere that he would identify the attackers that he knew if his future safety could be insured. Defendant Devere took no action upon this information. To the plaintiffs knowledge, the assailants were in no way disciplined.

27. Since his transfer from USP Atwater, the plaintiff was again assaulted at USP Lee, Virginia on April 21, 2008.

28. Plaintiff is now housed at a special "SOMP" program located at USP Tucson, AZ. he has been placed there because the FBOP finally determined that the plaintiff could not safely program in the general population of a regular USP.

V. PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this court:

1. Declare that the acts and omissions described herein violated plaintiffs rights under the constitution and laws of the United States.

2. Enter preliminary and permanent injunctions ordering the Federal Bureau of Prisons, the named defendants, their successors, and all persons acting in concert with them, to protect the plaintiff from assault by White Supremacist gang members and their associates, and other known enemies.

3. Order the Federal Bureau of Prisons to implement an adequate classification system that identifies both dangerous inmates, and also vulnerable inmates, such as plaintiff, and a system to adequately separate the more vulnerable inmates from the more dangerous inmates.

4. Enter judgement in favor of the plaintiff for nominal, compensatory, and punitive damages as allowed by law in the amount of $5,000,000.00, (Five Million Dollars and zero cents), against each defendant, jointly and severally.

5. Order such additional relief as this court may deem just and proper.

Respectfully Submitted on this 31st day of July, 2009.

James R. Willis

James Ray Willis

68983-080

USP Tucson

PO Box 24550

Tucson, Az. 85734

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I James R. Willis, verify and declare under penalty of perjury under the laws of the United States of America, that the forgoing is true and correct.

Executed on this 31 day of July, 2009.

James R. Willis

James R. Willis

Plaintiff's Name James R. Willis
Inmate No. 68933-080
Address P.O. Box 24550
Tucson, AZ. 85734-4550

FILED
JUN 08 2010
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES RAY WILLIS, Pro Se,
(Name of Plaintiff)

vs.

HARLEY G. LAPPIN, et al., Defendants,
United States of America.
(Names of all Defendants)

1:09-cv-01703-AWI-GSA-(PC)
(Case Number)

COMPLAINT

Bivens Action [403 U.S. 388 (1971)]
FTCA, 28 U.S.C § 1346
"Second Amended Complaint"
Jury Trial Demanded

I. Previous Lawsuits (list all other previous or pending lawsuits on back of this form):

A. Have you brought any other lawsuits while a prisoner? Yes ___ No ✓

B. If your answer to A is yes, how many? N/A
Describe previous or pending lawsuits in the space below.
(If more than one, use back of paper to continue outlining all lawsuits.)

1. Parties to this previous lawsuit:

Plaintiff N/A

Defendants N/A

2. Court (if Federal Court, give name of District; if State Court, give name of County)
N/A

3. Docket Number N/A 4. Assigned Judge N/A

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)
N/A

6. Filing date (approx.) N/A 7. Disposition date (approx.) N/A

II. Exhaustion of Administrative Remedies

A. Is there an inmate appeal or administrative remedy process available at your institution?

Yes ✓ No___

B. Have you filed an appeal or grievance concerning **ALL** of the facts contained in this complaint?

Yes ✓ No___

If your answer is no, explain why not_____

C. Is the process completed?

Yes ✓ If your answer is yes, briefly explain what happened at each level.

See attached pages "Exhaustion of Administrative Remedy's and Exhaustion of Administrative Tort Claim" And attached Administrative Remedy's and Administrative Tort Claim.

No___ If your answer is no, explain why not.

NOTICE: Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). If there is an inmate appeal or administrative remedy process available at your institution, you may not file an action under Section 1983, or any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.S. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1999 (9th Cir. 2002). **Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit.** Booth, 532 U.S. at 734.

III. Defendants

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant See attached pages is employed as "Defendants" at

B. Additional defendants See attached pages "Defendants".

IV. Statement of Claim

(State here as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

See attached pages "Statement of Claim" and "Factual Allegations".

V. Relief.

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

See attached pages "Prayer for Relief"

I declare under penalty of perjury that the foregoing is true and correct.

Date June 2, 2010 Signature of Plaintiff James R. Willis

(Revised 2/15/2006)

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"SECOND AMENDED COMPLAINT"

Cs.#1:09-cv-01703-AWI-GSA-PC

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~~9. Attachments: (Atwater injury assesment,BP 11 Administrative Remedy,Form 95 TOTRT CLAIM.~~ JW

RECEIVED

JUN 08 2010

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

James R. Willis, Pro Se,

Plaintiff

v.

United States Of America,

Federal Bureau of Prisons,

1. Harley G. Lappin, in his individual capacities;

2. Robert E. McFadden, in his individual capacities;

3. Dennis Smith, in his individual capacities;

4. Belinda Avalos, in her individual capacities;

5. C. Gant, in her individual capacities;

6. Mr. Devere, in his individual capacities;

7. Leautenant Cobb, in his lndividual capacities;

8. Leautenant Paul, in his individual capacities;

9. Mr. Liwag, in his individual capacities;

10. Mrs. Bowles, in her individual capacities;

Cs. #1:09-cv-01703-AWI-GSA-PC

Bivens Action [28U.S 388(1971)]

FTCA, [28 U.S.C § 1346]

" Second Amended Complaint"

JURY TRIAL DEMANDED

"SECOND AMENDED COMPLAINT"

11. Mr. Fass, in his lnd-
vidual capacities;
12. Mr. Putnam, in his
individual capacities;
13. Four Unknown correct-
ional officers, in their
individual capacities;

I.Jurisdiction

1.This court has jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C.§ 1331 and 1343(a)(3);and the Federal Tort Claims Act"FTCA" 28 U.S.C.§1346(b)(1) and§2671-2680.This court is the appropriate venue,because the acts
or omissions giving rise to this claim ocurred in this district.

II.Exahaustion of adminlstrative remedies

A.Plaintiff has exhausted all available administrative remediesin the Federal Bureau of Prisons,herein after"FBOP". The facts of this claim were presented in the administrative remedies and also in the administrative tort claim ~~both~~ J.W. attached
with this complaint as part of the record in this complaint.

B.Despite the good faith efforts of the plaintiff to resolve this matter the defendants refuse to admit responsibility for the plaintiff's injuries or to compensate him.
thereore plaintiff brings this civil complaint.

III.Defendants

1.the United States of America,"USA",is responsible for its federal agencies and agents,including the Federal Bureau of Prisons"FBOP",and the "FBOP EMPLOYEES".They are sued in their official capacities.

2.Defendant Harley G. Lappin,is the director of the "FBOP".He is responsible for the conditions and the policies in the operation of every prison within the"FBOP",including the United states penitentary atwater"USP ATWATER".He is sued in his individual capacities.

3.Defendant Robert E. McFadden,is the regional director of the Western Region of the "FBOP".He is responsible for the conditions and policies of every prison in the Western Region of the "FBOP"includung "USP ATWATER".He is sued in his individual capacities.

4.Defendant Dennis D. Smith,is the Warden at "USP ATWATER",he is responsible for the conditions and the policies in the operations of that prison,He is sued in his individual capacities.

5.Defendant Belinda Avalos,is the Associate Warden at the "USP ATWATER".She is sued in her individual capacities.

6.Defendant C. Gant,is Associate Warden at the "USP ATWATER".She is sued in her individual capacities.

7.Defendant Leautenant Cobb,is Special Investigations Supervisor"SIS".He is responsible for the plaintiff's request for protective custody,and other such investigations at "USP ATWATER".He is sued in his individual capacities.

8.Defendant Devere,is the unit manager for building 4A & 5A,and 5B.He is responsible for the conditions and policies in the operation of the units under his management,including 5A,which is the unit the plaintiff was assigned to.He is sued in his individual capacities.

9.Defendant Leautenant Paul,is the leautenant in charge of the Special Housing Unit "SHU".He is sued in his individual capacities.

10.Defendant Mr. Liwag,is the case manager assigned to the plaintiff.He is responsible for the care and handling of the cases assigned to his case load including but not limited to, the preparation of inmate transfers to another institution for any reason.He is sued in his individual capacities.

11.Defendant Mrs. Bowles,is the unit manager for 6 building.She was acting as the Unit Manager for Mr. devere during his sick leave.She is sued in her individual capacities.

12.Defendant Mr. Fass,is the department head of the institutional computer services.As part of his duties he was occasionally assigned as the Institutional Duty Officer,"IDO".He is sued in his individual capacities.

13.Defendant Mr.Putnam,is the correctional counselor assigned to the plaintiff.He is sued in his individual capacities.

14.4 Unknown correctional Officer's,were assigned to control and monitor the movement of inmates during the time and date that the plaintiff was assaulted.Including the "Tower 7 officer" ,the Compuond 1&2 officer and the Facility cooridor officer.They are each sued in their individual capacities.

IV.A.Statement of Claim

1.All of the above named defendants did knowingly and willingly violate the plaintiff's 8th Amendment right to be free from cruel and unusual punishment,by failing to protect the plaintiff from serious assault by violent inmates.

2.All of the defendant's were aware of the violent and dangerous conditions that existed at "USP ATWATER",leading up to October 9, 2007.

3.Each of the Defendant's were aware of the real and the substantial risk of harm that existed against the plaintiff,"that he was vulnerable to be assaulted because of being labled as a sex-offender",and that the plaintiff was targeted for assault by violent gang members.

4.The defendants were deliberatly indifferent to the plaintiff's safety concerns,and the defendants failed to respond in a reasonable manner to protect the plaintiff.As a result of the defendants deliberate infifference the plaintiff was assaulted and seriously injured on Oct.9,2007.

5. The defendants listed as "4 unknown correctional officers",each failed in their duty to protect the plaintiff from being assaulted,"by failing to properly monitor the movement of inmates during the lunch movement,by failing to see the assault,and by failing to intervene to stop the assault.

6. Each of the defendants at the time relevent to the events described herein acted and continue to act under the color of federal law

7.The United States of America,"FBOP",did through the negligent acts and or omissions of it's agent's,"failed to protect the plaintiff from severe physical assault by other inmates".

A.By failing to properly investigate the plaintiff's repeated request for protective custody.

B.By failing to thoroughly investigate the plaintiff's claims that he was target for assault by various prison gangs.

C.By failing to identify the plaintiff of being more vulnerable to be assaulted due to his being labled as a sex-offender.

D.By failing to properly monitor the mass movement of the inmate population during the noon meal.

E.By failing to notice any indicator or indicator's that a fight or an assault was about to occur.

F.By failing to notice the actual assault as it occured and failing to intervene.

G.The defendant's acts or omissions were substantial factors in bringing about the assault on the plaintiff and his resulting injuries

H.The defendant's owed the plaintiff a duty to protect him from assault by other inmates by failing to do so they breached that duty.

8.Aside from the serious physical injuries the plaintiff suffered,he continues to suffer from frequent head aches,blurred vision and dizzy spells,plaintiff is also experiencing severe psychological and emotional trauma,including but not limited to,violent nightmares,severe panic attacks,anxiety and paranoia.

IV. B. FACTUAL ALLEGATIONS

1. The plaintiff was assaulted by 6 other inmates on October 9, 2007 at USP Atwater in Atwater, California, Merced County. The plaintiff has been targeted for assault by White Supremacist gangmembers, their associates and other prisoners, because plaintiff has a ~~prior~~ Current S.V. Enrolled. state sex offense conviction.

2. Aside from the assault of October 9, 2007, which is the cause of this claim, plaintiff was also assaulted at the United States Penitentiary, Victorville, (USP Victorville), on April 15, 2007 for the same reason and was subsequently transferred to the USP Atwater. After the October 9, 2007 assault, plaintiff was transferred to the USP Lee, Virginia, where he was again assaulted on April 21, 2008.

3. Plaintiff arrived on or about June 12, 2007 at USP Atwater. Upon his arrival he initially spoke with Defendant Lieutenant Cobb, SIS officer. The plaintiff informed defendant Cobb of the exact nature of the threat that existed against him, including informing the defendant about why plaintiff had trouble at his previous two institutions, and also that he believed that plaintiff had at least one known enemy at USP Atwater.

4. Defendant Cobb was aware of the plaintiffs previous threats against him at USP Pollock, LA and the assault that occurred against the plaintiff at USP Victorville, Ca., leading up to his transfer to USP Atwater CA. Defendant Cobb also knew the inmate who the plaintiff believed could pose a threat against him at USP Atwater.

5. Based upon this information, defendant Cobb placed the plaintiff in the Special Housing Unit, (SHU), pending a threat assessment investigation and possible "protective custody transfer".

6. On or about June 14, 2007, the plaintiff spoke to his case manager, defendant Liwag. The plaintiff explained his situation to the defendant and plaintiff gave him an inmate request to staff, commonly known in the FBOP as a "cop-out". Defendant Liwag told the plaintiff that if it was determined that a threat did exist against him, that he would be submitted for a transfer to another institution.

7. On or about June 21, 2007, plaintiff spoke with Warden Smith, (defendant Smith). Plaintiff then briefly explained to defendant Smith why he was in SHU. Defendant Smith told the plaintiff that when the threat assessment investigation was complete, a determination concerning the plaintiffs possible transfer would be made.

8. On or about late June or early July of 2007, plaintiff spoke with defendant Devere for the first time. Defendant Devere was not aware of the plaintiffs situation, but said that he would contact SIS Lt. Cobb about the plaintiffs investigation. Defendant Devere told the plaintiff that he would be gone on sick leave, and that unit manager Bowles, (defendant Mrs. Bowles), would be acting in his stead.

9. Also in June or July of the same year, the plaintiff w rote a letter to the regional director of the Western region, Defendant McFadden. The plaintiff informed defendant McFadden by letter of his concerns for his personal safety in hopes of enlisting the defendants help in effecting a transfer for the plaintiff.

10. Plaintiff received a response to said letter that was dated August 13, 2007. Plaintiff was notified that the threat assessment investigation was completed by the SIS on August 3, 2007, and it was determined that there was not a threat against the plaintiff, and that he would be released from the SHU to program in the general population at USP Atwater.

11. Upon receiving this letter and learning of this information, the plaintiff began reiterating his concerns and efforts to remain in protective custody, and effect a transfer.

12. The plaintiffs mother, Ms Connie Willis, also called the prison numerous times and wrote letters, including a letter to defendant Lappin, the director of the Federal Bureau of Prisons, (FBOP), The said letter is dated September 19, 2007, and in said letter she requested protective custody for plaintiff and a transfer to an institution where he could be safe and also program in general population.

13. The plaintiff received a response to this letter on October 19, 2007, 10 days after the Plaintiff was assaulted.

14.between Aug.15,2007 & Sept.26,2007 The plaintiff notified the ~~folling~~ J.W. defendants Verbally and by written inmate to staff request,herein after"Cop-Out".Plaintiff put each of the defendants at "USP ATWATER",that he had serious safety concerns if he were placed in the ganeral population,and that "he requested for them to reconsider his request for a protective custody transfer to another institution more suited for his special safety requirements".

15.Plaintiff was not interviewed concerning his request for protective custody,Except during his initial intake interview with defendant Lt..Cobb"SIS".In fact when the plaintiff would see any of the defendants,he would always put them on notice of his safety concerns,and ask what was going on with his situation.The answer that plaintiff recieved was always similar,Either"I dont know,or the matter is still under investigation, or You will be released from the "SHU" to program in the general population ".

16.On or about Aug.24,2007,Defendant Avalos Wrote a letter to the plaintiff's mother,in responce to a letter that Ms. Willis had written to defendant D. Smith.The letter that the plaintiff's mother wrote was concerning his serious safety concerns.

17.Defendant Avalos stated that the plaintiff was going to be transferred to another institution.However this transfer did not occur,"Until after the plaintiff was ordered from the SHU, and was subsequently assaulted"!

18.In late Aug. or early Sept. of 2007,Plaintiff attempted to resolve his safety concerns by utilizing the administrative remedies.He filed a BP-8 informal resolution with defendant Mr. Putnam,however said BP-8 was never responded to.

19.On Sept.14,2007,plaintiff filed a "BP-9 Adm. Remdy."With his unit team,defendants Devere,Li Wag,& Putnam.In said BP-9 plaintiff explained specifically his safety concerns,and asked for either a state placement or a protective costudy transfer.Said BP-9 was returned to him unprocessed,"Because the BP-8 was not attached as required".Plaintiff explained in his BP-9 that "JH" initialed he did not recieve his BP-8 from his unit team.Said BP-9 is ADm. Remdy#466507-F1

20.On Sept.13,2007,Plaintiff wrote a "COP-OUT"to staff,providing information about his safety concerns,about his fears of being targeted for assault by atleast one known prison gang at "USP ATWATER".Plaintiff also spoke to A.W. C.Gant on several occasions about his concerns.

21.On or about Sept.19,2007,Plaintiff spoke to the SHU leautenant "defendant Paul",at length about his safety concerns.Plaintiff explained in detail the exact nature of the threat that exist against him.Lt. Paul agreed that if plaintiff's allegations were true that "he would be in danger in (GP) at (USP ATWATER)".

22.Plaintiff pleaded with defendant Lt. Paul to place him on protective costudy status.Despite plaintiff's assertions, Lt.Paul still ordered him to leave the SHU, to be released to the general population.

23.On Sept.25,2007, the plaintiff was "ORDERED TO LEAVE THE SPECIAL HOUSING UNIT(SHU)",He was placed in the general population despite all of his attempts to recieve protective custody.

24.On the same day that plaintiff was released from the SHU, he was approached by several gang members, he was told that inmate "Kenneth Mattox" was waiting to speak with him.The plaintiff met with inmate Mattox who was accompanied by several other gang members.This meeting was without incident.

25.On Sept. 26,2007, the plaintiff again met with inmate who was accompanied by 6 other inmates.Inmate Mattox told the plaintiff that there was a rumor about thaplaintiff that "he was a "RAPO".Inmate mattox told the plaintiff that he would have 3 weeks to produce ~~paqper~~ Paper work to disprove this rumor.

26.Immediatly after this confrontation, the plaintiff spoke to his Unit Manager "defendant Devere",and told him about his confrontation with Mattox.Plaintiff reaffirmed his belief that his safety was in danger at USP ATWATER.Defendant Devere took no further action after receiving this information.

27.On October 9, 2007, at about 11:45 AM, the plaintiff was brutally assaulted by 6 inmates some of them white supremacist gang member's while inmate Mattox acted as a look out.This assault occured in broad day light at the corner of unit 6A,In front of the facilities,In plain view of the leautenants office, and the yard tower 7.

28.Staff did not attempt to render assistance to the plaintiff during the assault,staff claims not to have seen the assault.It is not known to the plaintiff whether or not this assault was recorded on any security cameras.

29.During the assault which plaintiff believes lasted between "3 to 5 minutes",He was severly beaten, his head was severly swollen and mishapen,his left eye was swollen completely shut,his nose was broken,his left sinus cavity was fractured,and staples were required to close cuts in his scalp.The plaintiff also suffered a very severe concussion.

30. The plaintiff reiterates that while he was in the "SHU",prior to being "ORDERED"to go to the general population that he notified all of the named defendants in this claim.He repeatedly told the defendants both verbally and by written request"COP-OUT",that"he had some very serious safety issues,that he had been targeted for assault by various groups,and that he had atleast one known enemy in general population at USP ATWATER".

31. After the plaintiff was assaulted on OCT.9,2007, he was finally transfered from USP ATWATER.

V. PRAYER FOR RELIEF

WHEREFORE,Plaintiff respectfully prays that this court:

1.Declare that the acts and omissions described herein violated plaintiffs rights under the constitutionand the laws of the United States,and were the cause of plaintiffs injury's.

2.Enter preliminary and permanent injunctions ordering the "FBOP",the named defendants,their successors,and all persons acting in concert with them,to protect the plaintiff from assault by White Supremacist gang members and their associates,and other known enemies.

3. Order the "FBOP"to implement an adequate classification system that identifies both dangerous inmates,and also vulnerable inmates,such as plaintiff,and a system to adequately seperate the more vulnerable inmates from assault by dangerous inmates.

4. Enter judgement in favor of the plaintiff for nominal,compensatory,and punitive damages as allowed by law in the amount of $1,500,000.00,(ONE MILLION FIVEHUNDREDTHOUSAND DOLLARS and Zero cents),against each defendant individually and severally.And for compensatory damages as allowed by law against the "United States of America.

Respectfully submitted on this the 2nd day of June, 2010.

James R. Willis

James Ray Willis

#68983-080

USP TUCSON

PO BOX 24550

Tucson, AZ.85734

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I James R. Willis , verify and declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Executed on this the 2nd day of, June, 2010.

James R. Willis

James R. Willis

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

INMATE INJURY ASSESSMENT AND FOLLOWUP
(Medical)

1. Institution	2. Name of Injured	3. Register Number
USP ATW	WILLIS, JAMES RAY	68983-080
4. Injured's Duty Assignment	5. Housing Assignment	6. Date and Time of Injury
unassigned	5A	10/9/07 approx. 1110
7. Where Did Injury Happen (Be specific as to location)	Work Related? ☐ Yes ☒ No	8. Date and Time Reported for Treatment
outside unit 6A		10/9/07 approx. 1125

9. Subjective: (Injured's Statement as to How Injury Occurred)(Symptoms as Reported by Patient)

"assault victim"

Signature of Patient

10. Objective: (Observations or Findings from Examination)

X-Rays Taken ____ Not Indicated ____

X-Ray Results

① (+) swelling (+) hematoma (+) eye shut
② multiple contusions all over head
③ (+) contusion w/ underlying laceration 1 cm - above (+) eyebrow
④ (+) contusion w/ laceration (+) fronto-parietal area
⑤ (+) abrasion both elbows

11. Assessment: (Analysis of Facts Based on Subjective and Objective Data)

see #10 ; No orbital fx

12. Plan: (Diagnostic Procedures with Results, Treatment and Recommended Follow-up)

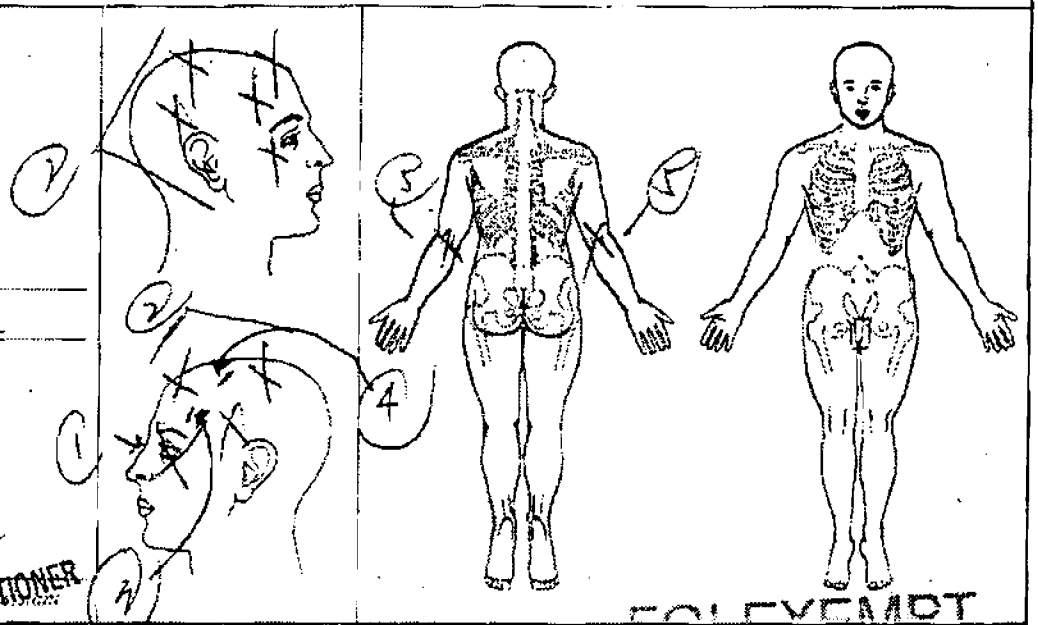
— clean wounds - referred to Dr. Franco & advised to send to ER

13. This Injury Required:

☐ a. No Medical Attention
☒ b. Minor First Aid
☐ c. Hospitalization
☒ d. Other (explain)

sent to ER

☐ e. Medically Unassigned
☐ f. Civilian First Aid Only
☐ g. Civilian Referred to Community Physician



Signature of Physician or Physician's Assistant

B. URBANO
MID LEVEL PRACTITIONER
USP ATWATER

FOI EXEMPT

Self Carbonated Form – If ballpoint pen is used, PRESS HARD

Original – Medical File
Canary – Safety
Pink – Work Supervisor (Work related only)
Goldenrod – Correctional Supervisor

BP-362(60)
FEBRUARY 1986

U.S. Department of Justice

Central Office Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Willis, James, R (LAST NAME, FIRST, MIDDLE INITIAL) 68983-080 (REG. NO.) D-417 (UNIT) VSP Lee (INSTITUTION)

Part A - REASON FOR APPEAL Please Note that I was in transit for over a month and only arrived here on 1-15-08. In my BP-9 I asked how I could be assaulted in broad daylight without any gaurds seeing said assault or protecting me? I have maintained that I am in danger from white Supremacist gangs, and I still am! fact: I was assaulted twice in 6 months in 2 seperate "USPs" both in the Western Region "Victorville and Atwater. fact: Staff at USP Atwater ordered me to "G.P." despite my many assertions of safety Concerns. fact: I was brutally assaulted on Oct 9, 2007 by 6 individuals, and the assault was not seen or stopped by Staff. fact: I was taken to the Emergency room in Merced California, I eventually had surgery to repair the damage from said assault. fact. I have continually asked to be separated from all known white supremacist gangs. fact: This has not occurred, I am at present in "G.P." around "Texas Aryan Brotherhood", "Aryan Resistance Militia", and "Soldiers of Aryan Culture" There should be a place where I can go and not be around these gangs. See Garza v. United States of America, USDC SD TX. Cs# B-02-154

1-20-08 (DATE) The Violence in the feds is out of control "Gang Violence"! James R. Willis (SIGNATURE OF REQUESTER)

Part B - RESPONSE

RECEIVED

JAN 31 2008

Administrative Remedy Section
Federal Bureau of Prisons

DATE GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE CASE NUMBER: 470996-A1

Part C - RECEIPT CASE NUMBER:

Return to: LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT:

DATE SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

BP-231(13)

Administrative Remedy No. 470996-A1
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal in which you request to be transferred to a Bureau facility in which your safety will not be jeopardized by gang activity. You claim to have been assaulted three times in as many institutions, because staff were deliberately indifferent and placed you in harm's way. You also seek disciplinary action against all staff involved.

Our information indicates you raised an allegation of having issues with certain inmate groups and claim the repetitive nature of the assaults is corroborating evidence. Yet, despite your concerns for your own safety, you were apparently less than cooperative with investigating staff, resulting in their inability to immediately verify any specific threat. However, following your October 2007 assault, staff investigated the incident and determined it would be best to effect your transfer. As such, you were transferred and admitted to USP Lee. Since then, records show you have been assigned to general population. Should you experience any further problems, we encourage you to immediately report it to staff. They will take any appropriate deemed necessary.

You request the discipline of staff for what you perceive to be deliberate indifference. We remind you the Administrative Remedy process is not the proper mechanism to seek such relief, as the discipline of staff is not an appropriate matter for inmate review compensation for appealing any agency decision is not relief available within the purpose and scope of Program Statement 1330.13, Administrative Remedy Program. There are long-established procedures in place for reconciling legitimate concerns of staff misconduct. As noted above, we do not have any information suggesting any staff wrongdoing in this regard.

Our review reveals the Warden and Regional Director adequately responded to the issues you raised in your appeal. We therefore concur with the responses provided. This response is for informational purposes only.

March 17, 2008
Date

Harrell Watts, Administrator
National Inmate Appeals

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:

Federal Bureau of Prisons
Western Regional Office
7338 Shoreline Drive
Stockton, CA 95219

2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.) (Number, street, city, State and Zip Code)*

James Willis 68983-080
USP Tucson
PO Box 24550
Tucson, AZ 85734

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. or P.M.)*
☐ MILITARY ☒ CIVILIAN	4-14-67	Single	October 9, 2007	11:45 AM

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)*

See attached.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See attached.

11. WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
See attached.	

12. *(See instructions on reverse)* AMOUNT OF CLAIM *(In dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	$20,000,000.00	N/A	$20,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
James R. Willis	N/A	1-22-09

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

CLAIM FOR DAMAGE, INJURY OR DEATH
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James Willis 68983-080

Claimant, Federal inmate James Willis, herein contends that on October 9, 2007, while in the custody of prison officials at United States Penitentiary Atwater, California, at approximately 11:45 AM the Claimant was seriously assaulted by six (6) inmates. Prison officials at USP Atwater did negligently or wrongfully, through acts or omissions, cause the Claimant to suffer severe, serious and life-threatening injury, to wit:

On October 9, 2007, Claimant was walking from his housing unit, 5A to the dining at approximately 11:45 AM. On approaching the corner of the West sidewalk and the South (Main) sidewalk, the Claimant was jumped by six (6) unknown assailants and severely beaten. (See attached map indicating the location of the attack and key landmarks referred to in this statement.) The assailants repeatedly beat the Claimant about the head, neck and upper torso with their fists and unknown objects. When the Claimant fell to the ground, the assailants continued to beat him with their fists, unknown objects and kicking him repeatedly with their reinforced-toed work boots. The attack lasted approximately five (5) minutes. As the assailants left, the Claimant heard one of the assailants say, "Come on, we got away with it. F**kin' rapo."

While the assault took place in plain view of prison staff no alert signaling trouble was announced and no assistance was directed to the point of the assault. Claimant refers to the attached map noting the location of the Central tower, the Main Corridor which was fully staffed and the Lieutenant's office which was direct across from the attack, a distance of aproximately 200 feet.

Claimant had to make it to his feet under his own power and was only able to stumble from the point of the attack to the Main Corridor. The Claimant was only then assisted by a corrections officer who helped him to the medical facility for assessment and treatment. Enroute to medical, Claimant passed a number of prison executives including Warden D. Smith. Claimant reminded Warden Smith that he had notified the Warden of the very real possibility of attack the Claimant faced and stated to the Warden, "See I told you what was going to happen if you put me in general population."

Claimant was taken for medical assessment and treatment at the prison's medical facility. The Claimant recalls being met at medical by an SIS officer who was taking pictures of the injuries Claimant sustained. The Claimant recalls being told that his injuries would require outside treatment. The Claimant lost conscienciousness while while at the prison medical facility. The Claimant's next recollection is waking at the Emergency Room of Mercy Medical Center, Merced, California.

The Claimant was treated for severe and life-threatening injuries. An extensive physical examination was performed of the Claimant including two (2) cat scans

CLAIM FOR DAMAGE, INJURY OR DEATH
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to assess damage to the Claimant's head and brain. Claimant was treated for multiple cuts, bruising, lascerations and contusions to his head, neck, arms, upper torso, groin and legs. Medical personnel diagnoised that the Claimant had suffered a serious brain concusion as a result of the beating he received. The Claimant was further diagnoised with a fractured left sinus cavity, a crushed labrum and crushed left and right nasal passages.

Claimant was returned to USP Atwater following outside medical attention and was placed in Administrative Segregation in the Special Housing Unit (SHU). While in SHU, Claimant continued to suffer with extreme pain and reported difficulty breathing as a result of the damage to his sinus region. Claimant further complained of dizziness, nightmares and difficulty sleeping.

As a result of the extensive damage to the Claimant's nasal region, Claimant required outside surgical intervention to repair the damage that resulted from the senseless beating.

Claimant alleges that prison officials were notified that the Claimant was in danger of serious injury and the very real possibility of death if placed in general population at USP Atwater. Despite notification by the Claimant, Claimant's family and information contained in the Claimant's Central File, prison officials negligently placed the Claimant in general population, subjecting him to the real possibility of assault. Prison officials owed the Claimant the right and duty to reasonably care for his safety and failed to protect the Claimant from needless injury.

The Claimant avers to the following in support of his allegations:

1. Claimant was a prisoner at USP Victorville, California on April 15, 2007 and was seriously assaulted by white supremaist gang members resulting in bodily injury. The reason for the assault was attributed to the fact that the Claimant had a charge of rape in his criminal history. As a result of the attack, which is detailed in his BOP Central File and referenced in letters by the Claimant and Claimant's family, Claimant was transferred to USP Atwater.

2. Claimant arrived at USP Atwater on June 12, 2007. During his intake interview, Claimant was interviewed by SIS Lieutenant Cobb. Claimant provided notice to Lieutenant Cobb at the interview that the Claimant fear for his safety and his life if he was placed in the general population at USP Atwater. This was in direct response to Lt. Cobb's question, "Do you know of any reason I should not put you on this yard?"

3. Claimant verified with Lt. Cobb the information contained in his Central File regarding the assault at USP Victorville and also threats which had been verified while Claimant was at USP Pollack, threats that resulted in the Claimant being transferred from USP Pollack to USP Victorville.

CLAIM FOR DAMAGE, INJURY OR DEATH
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4. Claimant notified Lt. Cobb that he was aware of a specific inmate that posed a substantial threat to the Claimant's safety. The inmate, Mattox was incarcerated with the Claimant at USP Pollack, was a member of the white supremaist group which had threatened the Claimant and had himself direct threatened the Claimant. Lieutenant Cobb verified to Claimant that inmate Mattox was a member of the general population and that he had ties to known gang activity.

5. Based on the detailed information provided by the Claimant, information contained in the Claimant's Central file and information relied upon by SIS Lieutenant Cobb, Claimant was placed in Protective Custody pending a threat assessment and housed in the Special Housing Unit (SHU) at USP Atwater. Lieutenant Cobb advised Claimant at that time that Claimant should anticipate a transfer to another institution.

6. On or about June 14, 2007, Claimant spoke with Case Manager Li Wag regarding his fear of being placed in general population. Claimant provided Li Wag with an Inmate Request Form which gave notice of the Claimant's concern for his safety at USP Atwater, detailed reasons for those concerns and requested transfer to a different state or Federal institution.

7. On June 21, 2007, Claimant provided notice to Warden D. Smith that he feared for his safety if placed in general population. The Warden acknowledged that he was aware of the Claimant's situation and that he understood that a threat assessment was being made. Warden Smith told Claimant that upon completion of the threat assessment, the possiblility of transfer would addressed.

8. On or about late June or early July, Claimant spoke with Unit Manager Devere who indicated that he was not familiar with the Claimant's situation. Claimant then provided Mr. Devere with details of his situation and giving him notice of his fears regarding placement in general population. Mr. Devere acknowledged that he understood the Claimant's concern and that he would follow-up with SIS Lieutenant Cobb.

9. Points 6,7 and 8 above are attested to in an affidavit by the Claimant's cell-mate while housed in the SHU at USP Atwater. Sworn affidavit attached.

10. On or about July 9, 2007, Claimant wrote BOP Regional Director for the Western Region, Mr. McFadden notifying him that the Claimant feared for his safety if required to join the general population at USP Atwater. Claimant requested that the Director assist in speeding the Claimant's transfer to a facility where the Claimant would be safe.

CLAIM FOR DAMAGE, INJURY OR DEATH
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11. Claimant's letter to the Regional Director was responded to by Warden Smith in a letter dated August 13, 2007. Warden Smith informed the Claimant in his letter that the SIS investigation had been completed on August 3, 2007. Despite Claimant providing specific information on the known threats, specific individuals and specific groups, the assessment of the Claimant's request for Protective Custody was determined to be unverified.

12. Between the period August 15, 2007 and September 25, 2007, Claimant notified verbally and in writing prison officials that he had not been interviewed regarding his request his request for protective custody and that Claimant believe that his life and safety were in jepordy if required to go into the general population. Claimant filed with prison officials a BP-8 in August 2007 which was not responded to, this was followed up by a BP-9 again providing notification to prison officials of Claimant's fear for his safety. Claimant's BP-9 while record, was rejected for lack of a BP-8.

13. Claimant informed the following prison officials between the period August 15, 2007 and September 25, 2007: Warden D. Smith, SIS Lt. Cobb, Associate Warden Avalous, CMC Officer Dreher, Duty Officer Fass, Unit Manager Devere, Unit Manager Bowles, Case Manager Li Wag, SHU Lt. Paul, and CHaplain Weaver. The above notifications were witnessed by and can be atested to by by inmate Casey Lawrence, Reg. No. 17991-075, who shared the cell with Claimant during this period.

14. In addition to Claimant's notification to prison officials, Claimant's mother also provided notice that Claimant feared for his life and safety. Claimant's mother, Connie Wells (Willis J.W.), wrote to the Regional Director for the Western Region, Robert McFadden on August 5, 2007. Claimant's mother received a response to her letter dated August 24, 2007 from Acting Warden Avalos for Warden Smith acknowledging her letter and stating that the SIS investigation could not verify Claimant's request for Protective Custody. The letter further states that the Claimant did not cooperate with the investigation. Claimant restates that at all times he cooperated with SIS investigators and provided specific information regarding the threats to his safety and life. Correction? intended J.W.

15. Claimant's mother sent another letter, dated Augst 25, 2007, again addressed to Regional Director McFadden. In this letter the Claimant's mother again notifies prison officials that she and the Claimant have reason to fear for his life and safety. Claimant's mother reminds officials that there is a known person on the compound at USP Atwater that poses a threat and states that she has been told by the Claimant that there is a "hit" out on him if he goes to general population.

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16. On September 19, 2007, Claimant's mother sent a letter to Director of the Bureau of Prisons, Harly G. Lappin expressing grave concern for the Claimant's life and safety. The letter restates the known facts about the fears of the Claimant. The letter further requests that the Claimant be provided Protective Custody and that the Claimant be transferred to another institution. This letter was responded by USP Atwater Warden Smith but not until 10-days after the assault on the Claimant.

17. On September 18, 2007, Claimant was ordered by correctional officers that he was to be released from the SHU and placed in general population. Claimant informed prison officials that he was refusing this order. Prison staff notified Claimant that he would receive an incident report for refusing the order.

18. On September 18, 2007, Claimant was served a disciplinary report by SHU Lieutenant Paul. Claimant notified Lt. Paul that he feared for his life and safety if placed in general population. Claimant was interviewed by Lt. Paul, in the lieutenant's office at which time the Claimant again provided specific details of his fear and concern. The Lieutenant agreed that if the Claimant's information was correct, the Claimant would indeed be in danger if placed in general population. He stated however that the matter was out of his hands.

19. Lieutenant Paul informed Claimant that if Claimant continued to refuse orders to program in general population, Claimant would face further disciplinary sanctions. At the conclusion of the interview with Lt. Paul, Claimant asked the Lieutentant if he could talk with SIS on his behalf and ask that they reopen the investigation. Lietenant Paul arestated that there was little he could do for the Claimant.

20. On September 25, 2007, Claimant was again ordered from the SHU to general population. Claimant was escorted to a holding area by the SHU property officer who was aware of the Claimant's situation and asked the Claimant if he would be okay out there. Claimant responded - NO.

21. Claimant was assigned to housing unit 5-A. That same day he was approached by an inmate known as Little John and told that inmate Mattox want to talk with the CLaimant immediately following the evening meal.

22. Claimant was approached the evening of September 25, 2007 by inmate Mattox and six (6) other inmates. Inmate Mattox shook the Claimant's hand and told the Claimant that they would talk the next day during recreation.

CLAIM FOR DAMAGE, INJURY OR DEATH
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Continuation Sheet Page 6 of 6

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23. On September 26, 2007, Claimant met with inmate Mattox on the recreation yard (inmate Mattox was again accompanied by six (6) othe inmates). Inmate Mattox informed the Claimant that there was a rumor on the compound that the CLaimant was a sex offender, specifically a "rapo". Inmate Mattox told the CLaimant that he had spoken up for the Claimant to the "yard shot caller" who was the leader of the white supremaist group, the Nazi Lowriders and that the CLaimant had been given three (3) weeks to provide paperwork that disproved the rumors.

24. On September 26, 2007, Claimant notified Unit Manager Devere of the conversation Claimant had with inmate Mattox and that the Claimant had been given a deadline to clear his name or face the consequences. Claimant restated his fears for life and safety, again reminding Mr. Devere of his need for Protective Custody and transfer.

25. Mr. Devere took no action regarding Claimant's notification.

26. On October 9, 2007, Claimant was brutally attacked and sustained serious life-threatening injuries.

Plaintiff's Name JAMES R. WELLIS
Inmate No. 68983-080
Address P.O. Box 24550
Tucson, AZ. 85734

FILED
JUL 08 2011
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES R. WELLIS, Pro Se
(Name of Plaintiff)

1:09-CV-01703-AWI GSA (PC)
(Case Number)

vs.

Dennis Smith, WARDen
Defendants, Et, AL.,
United States of America
(Names of all Defendants)

COMPLAINT

Bivens Action [403 U.S. 388 (1971)]
Federal Tort Claim Act
(Third Amended Complaint)
JURY TRIAL DEMANDED

I. Previous Lawsuits (list all other previous or pending lawsuits on back of this form):

A. Have you brought any other lawsuits while a prisoner? Yes ___ No ✓

B. If your answer to A is yes, how many? N/A
Describe previous or pending lawsuits in the space below.
(If more than one, use back of paper to continue outlining all lawsuits.)

1. Parties to this previous lawsuit:

Plaintiff N/A

Defendants N/A

2. Court (if Federal Court, give name of District; if State Court, give name of County)
N/A

3. Docket Number N/A 4. Assigned Judge N/A

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)
N/A

6. Filing date (approx.) N/A 7. Disposition date (approx.) N/A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES B. WILLIS, Pro Se,
Plaintiff,
V.
Dennis Smith, in his
Individual Capacities;
Belinda Avalos, in her
Individual Capacities;
Leautenant Cobb, In his
Individual Capacities;
Leautenant Paul, In his
Individual Capacities;
Mr. Devere, In his
Individual Capacities;
Mrs. Bowles, In her
Individual Capacities;
Mr. Li Wag, In his
Individual Capacities;
Carolyn Gant, In her
Individual Capacities;
The United States of America,
In the official Capacities;

Cs.# 1:09-cv-01703 AWI-GSA (PC)

Bivens Action [28 U.S. 388 - (1971)].

FTCA [28 U.S.C. § 1346].

"THIRD AMENDED COMPLAINT"

JURY TRIAL DEMANDED

II. Exhaustion of Administrative Remedies

A. Is there an inmate appeal or administrative remedy process available at your institution?

Yes ✓ No___

B. Have you filed an appeal or grievance concerning **ALL** of the facts contained in this complaint?

Yes ✓ No___

If your answer is no, explain why not_____

C. Is the process completed?

Yes ✓ If your answer is yes, briefly explain what happened at each level.

see attached pages "Exhaustion of Administrative Remedies".

No___ If your answer is no, explain why not.

NOTICE: Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). If there is an inmate appeal or administrative remedy process available at your institution, you may not file an action under Section 1983, or any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.S. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1999 (9th Cir. 2002). **Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit**. Booth, 532 U.S. at 734.

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Plaintiff has exhausted all available administrative remedies. The Facts of this claim were presented in the administrative remedies, and also in the administrative Tort claim.

Despite the plaintiff's good faith efforts to resolve this matter the defendants refuse to admit any responsibility for the plaintiff's injuries or to compensate him, or to make an offer of settlement. Therefore the plaintiff brings this claim.

II. JURISDICTION

This Court has jurisdiction over the plaintiff's federal claims pursuant to 28 U.S.C. § 1331 and 1343 (a)(3); and the Federal Tort Claims Act "FTCA" 28 U.S.C. § 1346(b)(1) and § 2671-2680. This Court is the appropriate venue, because the acts and or omissions giving rise to this claim did occur in this district.

III. **Defendants**

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant See attached pages is employed as _____ at _____

B. Additional defendants See attached pages, "Defendants".

IV. **Statement of Claim**

(State here as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

See attached pages, "Statement of Claim".

V. **Relief.**

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

See attached pages, "Prayer for Relief".

I declare under penalty of perjury that the foregoing is true and correct.

Date June 27, 2011 Signature of Plaintiff James R. Willis

(Revised 2/15/2006)

III. DEFENDANTS

1. Defendant Dennis Smith, was the Warden at "USP Atwater", during the events giveing rise to this Claim. He was responsible for the oversight of policies and Conditions ~~giving rise~~ and the operations of that prison; He is sued in his individual Capacities.

2. Defendant Belinda Avalos, the Associate Warden at "USP Atwater", during events giving rise to this claim; She is sued in her individual capacities.

3. Defendant Leautenant Cobb, the Special Investigation Supervisor "SIS". He was in charge of the investigation Concerning the plaintiffs claims and his request for protective custody, while at "USP Atwater"; He is sued in his individual Capacities.

4. Defendant Leautenant Paul, the Leautenant in charge of the special housing Unit "SHU", during the events giving rise to this claim; He is sued in his individual capacities.

5. Defendant Mr. Devere, the Unit Manager for Buildings 4A & 5A & 5B during the events giving rise to this claim, and was the ~~defe~~ Plaintiffs Unit Manager; he is sued in his individual Capacities.

6. Defendant Mrs. Bowles, she is the Unit Manager for 6 Building at "USP Atwater", she was acting in Mr. Devere's stead during his sick leave; She is sued in her individual Capacities.

III. Defendants, Continued

7. Defendant, Mr. Li Wag, the case manager assigned to the plaintiff at the time of the events giving rise to this claim; his duties include but are not limited to, preparation of inmates transfers, for any reason; He is sued in his individual capacities.

8. Defendant, Carolyn Gant, was an associate Warden at "USP Atwater" during the events giving rise to this claim; She is sued in her individual capacities.

9. Defendant, The United States of America, Federal Bureau of Prisons, ("FBOP"), employees while functioning in their official capacities, during the events giveing rise to this Claim.

IV. STATEMENT OF CLAIM

:Count I:

As to "defendants, Smith, Avalos, Cobb, Paul, Devere, Bowles Li Wag, and Gant", each of these defendants were aware of the specific threat that existed against the plaintiff, and the exact nature of that threat, ~~they~~ each failed to respond reasonably to protect the plaintiff, due to their deliberate indifference, the plaintiff was assaulted by other inmates, and was seriously injured", therefoce each of these defendants did violate the plaintiff's "Eigth Amendment Right, to be free from Cruel and unusual punishment."

:Count II:

As to "defendants, Smith, Avalos, Gant, Cobb, Devere, Paul",

IV Statement of Claim, Count II, continued

each of these defendants were aware of the "Out of Control and very violent conditions that were conducive to frequent inmate on inmate assaults", particularly by violent gang members against Vulnerable inmates such as the plaintiff, "due to his being labled as a Sex-offender", the defendants Knew or should have Known that he was at a higher risk of being assaulted at "USP Atwater", each of these defendants did fail to respond reasonably to ensure a more safe prison environment," because of their deliberate indifference towards the violent conditions at USP Atwater," the plaintiff was assaulted by other inmates and suffered Serious bodily injury" Therefore these ~~plaintiffs~~ defendants did violate the plaintiffs "8th Amendment Right to be free from Cruel and unusual punishment"

:Count III:

The United States of America, owed to the plaintiff a duty to protect him from being assaulted, by failing to do so, they did breach that duty, due to the negligent acts or omissions of its agents, the plaintiff was seriously assaulted because A). Failing to investigate the plaintiffs repeated request for protective custody, B). failing to transfer him, C). failing to monitor the movement of inmates at the time plaintiff was assaulted D.) failing to process the Plaintiffs administrative remedy E). Failing to notice indicators that an assault was about to ocurr, and failing to render assistance to the plaintiff while he was being assaulted.

IV. Statement of Claim, Continued

Each of the defendants at the time relevent to the events described herein acted and continue to act under the Color of federal law.

IV. STATEMENT OF CLAIM, Continued

'FACTUAL ALLEGATIONS'

1. The facts stated herein did ocurr at the "United States Penitentiary Atwater," ("USP Atwater"), located in Atwater California, Merced County, and took place between June 12, 2007 and October 9, 2007.

2. Aside from the assault of October 9, 2007, which is the cause of this claim, the plaintiff was assaulted at the "United States Penitentiary Victorville" ("USP Victorville") on April 15, 2007, and was subsequently transferred to the "USP Atwater". It was documented in the plaintiffs "Inmate Central File" that the reason for the assault at "USP Victorville" was due to the plaintiffs being labled a "Sex-offender."

3. Upon arrival at "USP Atwater" the plaintiff was Interviewed on June 12, 2007, by the "Special Investigation Supervisor, Leautenant Cobb", herein after "defendant Cobb". This initial interview was part of the plaintiffs intake screening. During this interview the ~~defen~~ new Plaintiff did notify "defendant Cobb" of his previous difficulties at his previous institutions. He informed defendant Cobb of the exact nature of the threat that existed against him. Of his belief that he was targeted for assault by various gang factions, due to Plaintiffs status as a "Sex-Offender." And that he had at least one Known enemy at "USP Atwater"

IV. Statement of Claim, continued

4. "Defendant Cobb" stated that he was aware of the plaintiff's recent trouble's at "USP Pollack, LA." in 2006, and the assault at "USP Victorville, CA." and that these incidents occured due to the plaintiff being lubled as a "Sex-offender". Defendant Cobb also knew the inmate whom the plaintiff believed posed a threat against him, "Kenneth Mattox" a known gang member.

5. Based upon this initial information, Cobb placed the plaintiff in the Special Housing Unit, ("SHU"), pending a threat assesment investigation.

6. On or about June 14, 2007, the plaintiff spoke to his Case Manager, "Defendant Liwag". The plaintiff explained his situation to Liwag, and gave him a written request to staff, ("Cop-Out"), in this request he outlined his safety concerns. His "Cop-Out" was not responded to by "deferdant Li Wag".

7. On or about June 21, 2007, Plaintiff spoke with "defendant Smith". The plaintiff explained his sitnation and concerns. "defendant Smith" stated that upon conclusion of the "threat assesment investigation", a decision concerning a possible transfer would be determined.

8. On or about late June or early July of 2007, Plaintiff spoke to "defendant Devere", he explained to "Devere" the exact nature of the threat against him. Devere stated that He would Contact the "SIS.Lt."

IV Statement of Claim, Continued

Cobb", about the plaintiffs investigation. Devere told the plaintiff that he would be gone on sick leave, and that "defendant Bowles" would be handling his case-load during his absence.

9. On July 7, 2007 the plaintiff wrote a letter to the regional Director, Mr. Robert McFadden hopeing to inlist his help in effecting a transfer. The plaintiff wrote in great detail about the events that led to his transfer to "USP Atwater" and the exact nature of his fears, this letter was recieved by the Regional Director on July 12, 2007. And a copy was forwarded to Warden Smith.

10. Defendant smith did not respond until August 13, 2007, to which he stated that the plaintiffs threat assesment investigation was Completed, and was "unverified", and that the plaintiff would be released from the SHU to begin programming in the General Population, ("G.P.") at USP Atwater. However, "S.I.S" never interviewed the plaintiff, while he was in "SHU", after his intake screening. UP to this point his information had been exact and specific, including in the above stated Correspondence to Mr. McFadden, which defendant Smith had no doubt read, yet the investigation was Completed August 3, 2007.

11. Upon recieving this information, the plaintiff began reiterating his Concerns, in an effort to effect a transfer.

IV. Statement of Claim, Continued

12. The Plaintiff enlisted his Mothers assistance, she began writing letters and calling prison officials in behalf of the plaintiff, including speaking to "defendants Mr. LiWay and Mr. Devere". Specifically reiterating the plaintiffs safety Concerns, and pleading with the defendants to give the plaintiff a transfer, which is a reasonable request, however that did not occurr, although either defendant LiWay or Devere, could have sought a transfer for the plaintiff.

13. The plaintiffs mother wrote atleast 4 letters in his behalf. (2) letters to Mr. McFadden, (1) letter to "Mr. Harley Lappin, Director of the Federal Bureau of prisons", and (1) letter to defendant Smith, These letters were written between August & September of 2007, atleast 2 of these letters were "notorized by a Notary public", and Contained specific details concerning the exact nature of the threat that existed against the plaintiff. These letters were sent down the chain of Command to "defendant Smith, defendant Devere, defendant LiWay", most of this information "letters" are easily verified as a matter of record and are in the plaintiffs Central file, "And placed the defendants on notices of his Concerns"

IV. Statement of Claim, Continued

14. Also in August, 2007 the plaintiff wrote a "CoP-Out" to defendant HiWag, he inquired about a possible transfer, and reminded HiWag of his concerns regarding his safety.

15. On August 16th, 2007, the plaintiff wrote (2) "Cop-Outs" to defendant Smith, he specifically conveyed his concerns about the threat assesment being unverified. The plaintiff stated "quote", [What part of my situation is unsubstantiated? 1). I began having problems at USP Pollock in 06' due to a "state sex-charge". S.I.S. Lt. Transu at Pollock can verify this, so Can C-building Unit manager Mrs. Mott, as well as the "100 series disciplinary report" I recieved in 06'. 2). I specifically had problems with the Aryan Circle "AC". there is one of their members on this yard who could stir up trouble for me.] The plaintiff further stated in this request to staff, "that he feared for his safety and life if forced into the General Population at "USP Atwater".

16. Plaintiff Knew that "USP Atwater" was a very violent and dangerous prison Controled by gangs, and "Vulnerable inmates, especially those labled as Sex-offenders or Snitches were routinely assaulted", Defendant Smith as well as the other defendants

IV. Statement of Claim, Continued

Were Well aware of the out of Control Violence at "USP Atwater", and that inmates who had any type of Sex-charges, if Known, "that such inmates were vulnerable to being assaulted", and in fact were routinely assaulted, the plaintiff has atleast (3) affidavits from other inmates who were at USP Atwater attesting to this fact, of rampant violence, and routine assaults against inmates such as the plaintiff. The plaintiff is also aware that even some of the gaurds at USP Atwater were very Concerned about the Violent and Dangerous Conditions there. Infact Congressman Cordova attempted a Congressional Inquirey, in behalf of the "Correctional officers Union" due to the dangerous conditions that existed at "USP Atwater", during the time defendant Smith was Warden there. It is a fact that defendant Smith Completely "refused" to respond to this Congressmans inquirey, that was done in behalf of the fellow officers. [redacted] Initialed by "J.W." [redacted] Initialed by "J.W." Just as he deliberatly ignored the safety concerns of the plaintiff.

17. On August 17, 2007, the plaintiff wrote a "Cop-Out" to defendant Bowles, in this Cop-Out he went into great detail about the "exact nature" of the threat

IV. Statement of Claim, continued

that existed against him, including naming one known enemy who was at "USP Atwater", (Kenneth Mattox), to which Mrs. Bowles made a notation by writing "Mattox" ~~[illegible]~~ inmate number above his name on the Cop-Out. The plaintiff personally handed this Cop-out to Bowles. She assured the plaintiff that she would personally look into this matter, however she never responded to this Cop-Out. This request to staff is a matter of record in the plaintiffs "Inmate Central file".

18. Defendant Gant responded to a cop-out that the plaintiff sent to Smith, outlining his safety Concerns. This response did not remedy his Concerns.

19. The plaintiff spoke to defendant Gant on atleast 3 different occasions, informing her of the exact nature of the threat that existed against him. It is consistant policy throughout the Federal Bureau of prisons, for the executive staff and department heads of an institution to visit the "SHU" atleast once per week, and stop at each cell door in order to discuss any problems that inmates in SHU need to address. It was during these weekly SHU visits, "The plaintiff spoke to Gant."

IV. Statement of Claim, Continued

20. The Plaintiffs Mother received a response to her correspondence, this response was dated Aug. 24, 2007. This Response was from Defendant Belinda Avalos, Associat Warden, Acting in Warden Smiths behalf. In said response, she stated that the threat assesment ~~would~~ was not substantiated," however Atwater staff did decide to seek a transfer for the plaintiff." However, no such transfer ever occurred.

21. In ~~early~~ or about September of 2007, the plaintiff spoke to defendant Avalos, and informed her that nobody from the "SIS Department" had come to see him in regards to any alleged investigation, since his placement in SHU. Nor had any body, to his Knowledge, begun the paperwork for this supposed transfer. The plaintiff then once again in detail reiterated his safety Concerns," Including the exact nature of the threat that existed against him." The plaintiff asked her to reopen the investigation. Defendant Avalos stated that she would look into the matter." However the plaintiff did not recieve a new investigation or a transfer."

22. On about Sept. 14, 2007 the plaintiff attempted to resolve his safety Concerns by means of the Administrative remedies. He first filed a BP-8 informal resolution with his Unit Counselor Mr. Putnam.

IV. Statement of Claim, continued

this BP-8 was never responded to.

23. The plaintiff then proceeded with a "BP-9 Adm. Remdy." he filed this with his Unit team Defendants Li Wag and Devere. In said BP-9 the plaintiff explained in "great detail" the exact nature of his safety concerns, He requested either a "protective custody transfer or a State placement". He explained that the BP-8 he filed with his Counselor was never responded to. Despite the seriousness of his request, his BP-9 was rejected, "Because the BP-8 was not attached as required". However, when a BP-9 is submitted that is of a "serious or life threatening nature", Per "FBOP Policy" it should be recieved and processed even without a BP-8 informal resolution. Never the less, this BP-9 was very specific and once again placed Defendants Li Wag and Devere on notice to the plaintiff's serious safety Concerns. this Remdy. is Number "Adm. Remdy. # 466507-F1.

24. On or about Sept. 19, 2007, plaintiff spoke to the "SHU Heautenant" Defendant ~~Do~~ Paul, in the defendants office at length about his safety issues. The plaintiff explained in great detail the exact nature of the ~~treat~~ threat that existed against him, Defendant Paul aggreed that if the plaintiff's

IV. Statement of Claim, Continued

allegations were true that "he would be in danger in (GP) at (USP Atwater)". The plaintiff pleaded with Lt. Paul to place him on Protective Custody Status. Despite the Plaintiff's allegations, Lt. Paul told him that he would be ordered to the General Population. That if plaintiff refused said order he would recieve incident reports "for refusing to program."

25. On Sept. 25, 2007, the plaintiff was "ORDERED TO LEAVE," the Special Housing Unit (SHU). He did so under great duress. He was placed in the General Population Housing Unit 5A, even dispite his many repeated attempts to recieve a Protective Custody Transfer.

26. On the day that the plaintiff was released "ordered from "SHU", he was approached by several gang members, he was told that "Kenneth Mattox" was waiting to see him. The plaintiff met with Mattox, who was accompanied by several other Gang Members, this meeting was without incident.

27. On Sept. 26, 2007 the plaintiff again met with inmate Mattox who was accompanied by 6 other inmates, including the shot Caller for the White inmates at "USP Atwater". Inmate Mattox told the plaintiff that there was a rumor that he was a "RAPO". The plaintiff was told he had 3 weeks to produce paperwork to disprove

IV. Statement of Claim, Continued

those rumors.

28. Immediately after this confrontation, the plaintiff spoke to his Unit Manager "Defendant Devere", and told him about his Conversation with Mattox. Plaintiff reafirmed his belief that his safety was in Danger at "USP Atwater". Defendant Devere took no action to protect the plaintiff, even after recieving this information.

29. On October the 9th, 2007 at about 11:45 AM, during the noon meal, the plaintiff was attacked and was brutally assaulted by 6 inmates, while inmate Mattox acted as a lookout. There were "NO" Correctional officers on the side walk monitoring the mass movement of the inmates at the time this assault occurred. The assault occurred in plainview of housing Unit 6A & 6B, in Plainview of the facilities coorridor, in plainview of the Leautenants office, and in plainview of the Central Yard Tower.

30. Staff did not attempt to render assistance to the plaintiff during this assault. The plaintiff was beaten from between "3 to 5 minutes", it is not Known whether or not this attack was recorded by any security Surveliance camera's. The plaintiff has an affidavit from one inmate who witnessed this assault.

IV. Statement of Claim, Continued.

31. During this assault the plaintiff was severely beaten, kicked with hard toed boots and stomped. He suffered serious bodily injury," His head was severely swollen and mishapen, his left eye was swollen completely shut, his nose was broken, his left sinus cavity was fractured he had deep lacerations in his scalp, and multiple scrapes and contusions all over his body."

32. He was taken to the "Mercy Medical Center, in Merced, CA., And eventually the plaintiff required Corrective surgery to repair the fractures in his face. He also suffered a severe Concussion as a result of this assault.

33. The plaintiff continues to have headaches and at times blurred vision and dizzy spells, and one visible scar. The plaintiff suffers from psychological distress as a result of the assault, "including but not limited to," Panic Attacks, Paranoia, and violent nightmares."

34. The plaintiff also points out that his specific safety issues were documented as a matter of record in his "inmate central file", Concerning the incidents at USP Pollock, LA. and USP Victorville, CA. Any of the defendants had acess to this information, Prior to the assault which occurred on Oct. 9, 2007.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully pray's that this Court:

1. Declare that the acts and omissions described herein violated the plaintiffs rights under the Constitution and the laws of the United States of America, and were the Cause of plaintiffs injury's.

2. Enter preliminary and permanent injunctions ordering the "Federal Bureau of Prisons", the named defendants, their successors, and all persons acting in concert with them, to protect the plaintiff from assault by white Supremacist gang member's and their associates and other Known threats.

3. Enter judgement in favor of the plaintiff for nominal, Compensatory and punitive damages as allowed by law in the amount of $250,000.00, (TWO HUNDRED AND FIFTY THOUSAND DOLLARS AND ZERO CENTS), against each defendant individually and Severally.

4. And for Compensatory Damages in the Amount of $50,000.00 (FIFTY THOUSAND DOLLARS AND ZERO CENTS) against the "United States of America".

5. And any other available relief that this Court deems appropriate, as allowed by law.

Respectfully submitted on this the 27th day of June, 2011.

James R. Willis
James Ray Willis
#68983-080
USP Tucson
P.O. Box 24550
Tucson, AZ. 85734

VERIFICATION

Pursuant to 28 U.S.C. § 1746, I James R. Willis, verify and declare under penalty of perjury under the Laws of the United States of America, that the foregoing is true and is Correct.

Executed on this the 27th day of June, 2011.

James R. Willis
James Ray Willis

Plaintiff's Name James R. Willis
Inmate No. 68983-080
Address P.O. Box 24550
Tucson, AZ. 85734-4550

RECEIVED FILED
SEP 28 2009
CLERK, U.S. DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK
SEP 28 2009
CLERK, U.S. DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JW "See Attached pages" (Name of Plaintiff)

1:09CV01703 GSA PC (Case Number)

vs.

See attached pages 1 and 2. (Names of all Defendants)

COMPLAINT

Bivens Action [403 U.S. 388 (1971)]

I. **Previous Lawsuits (list all other previous or pending lawsuits on back of this form):**

A. Have you brought any other lawsuits while a prisoner? Yes ___ No ✓

B. If your answer to A is yes, how many? _____
Describe previous or pending lawsuits in the space below.
(If more than one, use back of paper to continue outlining all lawsuits.)

1. Parties to this previous lawsuit:

Plaintiff _____

Defendants _____

2. Court (if Federal Court, give name of District; if State Court, give name of County)

3. Docket Number _____ 4. Assigned Judge _____

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)

6. Filing date (approx.) _____ 7. Disposition date (approx.) _____

II. **Exhaustion of Administrative Remedies**

A. Is there an inmate appeal or administrative remedy process available at your institution?

Yes ✓ No ___

B. Have you filed an appeal or grievance concerning **ALL** of the facts contained in this complaint?

Yes ✓ No ___

If your answer is no, explain why not

C. Is the process completed?

Yes ✓ If your answer is yes, briefly explain what happened at each level.

See attached pages "Exhaustion of Administrative Remedys" pg. -3- attached

No ___ If your answer is no, explain why not.

NOTICE: Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). If there is an inmate appeal or administrative remedy process available at your institution, you may not file an action under Section 1983, or any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.S. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1999 (9th Cir. 2002). **Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit.** Booth, 532 U.S. at 734.

III. **Defendants**

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant See attached pages is employed as "Defendants" at

B. Additional defendants See attached pages "Defendants" pgs. -3- thru -6-.

IV. **Statement of Claim**

(State here as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

See attached pages "Statement of Claim" and Factual Allegations. Attached pgs. -6- thru -13-

V. **Relief.**

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

See attached pages "Relief", pg. -14- Prayer for Relief

I declare under penalty of perjury that the foregoing is true and correct.

Date July 31st, 2009 Signature of Plaintiff James R. Willis

(Revised 2/15/2006)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

James R. Willis, Pro Se,
Plaintiff

v.

13 Official Employees of the Federal Bureau of Prisons (FBOP)

1. Harley G. Lappin, in his individual and official capacities;
2. Robert E. McFadden, in his individual and official capacities;
3. D. Smith, in his individual and official capacities;
4. Lieutenant Cobb, in his individual and official capacities;
5. Mr. Devere, in his individual and official capacities;
6. Lieutenant Paul, in his individual and official capacities;

Case no. _____

Bivens Action [403 U.S. 388 (1971)]

JURY TRIAL DEMANDED

7. Mr. Liwag, in his individual and official capacities;
8. Mrs. Bowles, in her individual and official capacities;
9. Mr. Fass, in his individual and official capacities;
10. Four unknown correctional officers, each one in their individual and official capacities,

Defendants

I.A. JURISDICTION

This federal court has jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343 (a)(3).

I.B. VENUE

This district court for the Eastern District of California at Fresno California, is the appropriate venue, because a substantial part of the events or omissions giving rise to this claim occurred in this district.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Plaintiff has exhausted all of the available administrative remedies in the FBOP

B. The administrative remedies concerning the facts of this cl aim were completed March 17, 2008.

C. Despite plaintiffs good faith efforts to resolve this matter through the administrative remedies, the defendants deny responsibility. Therefore, plaintiff has no other recourse left in order to enforce his constitutional rights and receive compensatory and punitive damages as well as injunctive relief, so the plaintiff moves with this civil complaint. The administrative remedies present the facts of this civil complaint.

III. DEFENDANTS

1. Defendant Harley G. Lappin is director of the FBOP. He is responsible for the conditions and policies in the operation of every Federal facility operating within the Federal Bureau of Prisons, including USP Atwater, located in Atwater, CA. He is sued in his individual and official capacities.

2. Defendant Robert E. McFadden is the regional director for the Western Region of the FBOP. He is responsible for the conditions and policies in the operation of every Federal prison in the Western region, which does include USP Atwater. He is sued in his individual and official capacities.

3. Defendant D. Smith is the head warden at USP Atwater. He is responsible for the conditions and policies in the operation of the United States Penitentiary Atwater, in Atwater, CA. He is sued in his individual and official capacities.

4. Defendant Lieutenant Cobb, Special Investigations Supervisor (SIS). He is responsible for the investigation of plaintiffs request for protective custody. He is also responsible for investigations conducted at USP Atwater. He is sued in his individual and official capacities.

5. Defendant Devere is the unit manager for building 4 and 5, consisting at the time of 3 units: 4A, 5A, and 5B. He is responsible for the conditions and policies in the operation of the units under his management at USP Atwater, including 5A, which is the unit Mr. Willis, the plaintiff, was assigned to. He is sued in his individual and official capacities.

6. Defendant Lt. Paul is the lieutenant in charge of the special housing Unit (SHU). He is responsible for the conditions and policies in operating the SHU at USP Atwater. He is sued in his individual and official capacities.

7. Defendant Mr. Liwag is the case manager for inmates housed in 5A unit. He is responsible for the care and handling of individual cases of inmates assigned to his case load, including but not limited to, the preparation of inmate transfers to another institution for any reason. He is sued in his individual and official capacities.

8. Defendant Bowles is the unit manager for 6 building, consisting of units 6A and 6B. She was also acting unit manager for 5 building in Mr. Devere's absence during a period of time while Mr. Devere was out on sick leave. She is responsible for the conditions and policies in the operation of the units under her management and care of the inmates under her management. She is sued in her individual and official capacities.

9. Defendant Mr. Fass is the department head of institutional computer services. As part of his duties, he was occasionally assigned as the Institutional Duty Officer, (IDO). His duties are to act in the wardens stead, and to report the conditions and functions of various departments within USP Atwater. He is sued in his individual and official capacities.

10. Defendant Unknown Correctional Officer #1. Defendant, assigned to tower #7 yard watch on October 9, 2007 at USP Atwater. sued in individual and official capacities.

11. Defendant Unknown Correctional Officer #2, assigned as "compound one", on October 9, 2007. Duties include, but are not limited to patrol and security of the inside compound, housing units, sidewalks, recreation yard, etc., etc. at USP Atwater. He is sued in his individual and official capacities.

12. Defendant Unknown Correctional Officer #3, assigned as "Compound 2" on October 9, 2007. His duties are essentially the same as "Compound one". He is sued in his individual and official capacities.

13. Defendant Unknown Correctional Officer #4, was assigned to the facilities corridor on October 9, 2007. Duties include, but are not limited to, maintaining security in the facilities corridor, and maintaining visual security of the main sidewalk outside of the facilities corridor. Defendant is sued in her individual and official capacities.

IV. A. STATEMENT OF CLAIM

A. All of the above named defendants did knowingly and willingly violate the plaintiffs 8th amendment right to be free from cruel and unusual punishment, by failing to protect the plaintiff from serious assault by other inmates.

B. All of the above named defendants were aware of the violent and dangerous conditions that existed at USP Atwater leading up to the date of October 9, 2007, and afterwards. The defendants were also aware of the types of violent prisoners housed there, and of the potential threat posed against the plaintiff at USP Atwater.

C. Defendants, (listed one through nine above), each were and are aware of a substantial and ongoing risk of serious harm that exists against the plaintiff. Each of the defendants numbered as one through nine above, all failed to respond reasonably to protect the plaintiff from being assaulted. As a result of the defendants deliberate indifference, the plaintiff was seriously injured on October 9, 2007.

D. The defendants listed as "4 Unknown Correctional Officers", failed in their duty to protect the plaintiff from assault, by failing to properly monitor the movement of inmates during the time of the assault, by failing to see the assault, by failing to prevent or intervene, or to stop the assault,

E. Each of the above named defendants at the time relevant to the events described herein, acted and continued to act under the color of Federal Law.

F. Plaintiff was seriously injured when he was assaulted by 6 other inmates on October 9, 2007 at the United States Penitentiary in Atwater, California.

G. Aside from the serious physical injuries the plaintiff suffered, he continues to suffer from frequent headaches, blurred vision and dizzy spells. Plaintiff is also experiencing severe psychological and emotional trauma, including but not limited to, violent nightmares, severe panic attacks, anxiety and paranoia.

IV. B. FACTUAL ALLEGATIONS

1. The plaintiff was assaulted by 6 other inmates on October 9, 2007 at USP Atwater in Atwater, California, Merced County. The plaintiff has been targeted for assault by White Supremacist gangmembers, their associates and other prisoners, because plaintiff has a prior state sex offense conviction.

2. Aside from the assault of October 9, 2007, which is the cause of this claim, plaintiff was also assaulted at the United States Penitentiary, Victorville, (USP Victorville), on April 15, 2007 for the same reason and was subsequently transferred to the USP Atwater. After the October 9, 2007 assault, plaintiff was transferred to the USP Lee, Virginia, where he was again assaulted on April 21, 2008.

3. Plaintiff arrived on or about June 12, 2007 at USP Atwater. Upon his arrival he initially spoke with Defendant Lieutenant Cobb, SIS officer. The plaintiff informed defendant Cobb of the exact nature of the threat that existed against him, including informing the defendant about why plaintiff had trouble at his previous two institutions, and also that he believed that plaintiff had at least one known enemy at USP Atwater.

4. Defendant Cobb was aware of the plaintiffs previous threats against him at USP Pollock, LA and the assault that occurred against the plaintiff at USP Victorville, Ca., leading up to his transfer to USP Atwater CA. Defendant Cobb also knew the inmate who the plaintiff believed could pose a threat against him at USP Atwater.

5. Based upon this information, defendant Cobb placed the plaintiff in the Special Housing Unit, (SHU), pending a threat assessment investigation and possible "protective custody transfer".

6. On or about June 14, 2007, the plaintiff spoke to his case manager, defendant Liwag. The plaintiff explained his situation to the defendant and plaintiff gave him an inmate request to staff, commonly known in the FBOP as a "cop-out". Defendant Liwag told the plaintiff that if it was determined that a threat did exist against him, that he would be submitted for a transfer to another institution.

7. On or about June 21, 2007, plaintiff spoke with Warden Smith, (defendant Smith). Plaintiff then briefly explained to defendant Smith why he was in SHU. Defendant Smith told the plaintiff that when the threat assessment investigation was complete, a determination concerning the plaintiffs possible transfer would be made.

8. On or about late June or early July of 2007, plaintiff spoke with defendant Devere for the first time. Defendant Devere was not aware of the plaintiffs situation, but said that he would contact SIS Lt. Cobb about the plaintiffs investigation. Defendant Devere told the plaintiff that he would be gone on sick leave, and that unit manager Bowles, (defendant Mrs. Bowles), would be acting in his stead.

9. Also in June or July of the same year, the plaintiff wrote a letter to the regional director of the Western region, Defendant McFadden. The plaintiff informed defendant McFadden by letter of his concerns for his personal safety in hopes of enlisting the defendants help in effecting a transfer for the plaintiff.

10. Plaintiff received a response to said letter that was dated August 13, 2007. Plaintiff was notified that the threat assessment investigation was completed by the SIS on August 3, 2007, and it was determined that there was not a threat against the plaintiff, and that he would be released from the SHU to program in the general population at USP Atwater.

11. Upon receiving this letter and learning of this information, the plaintiff began reiterating his concerns and efforts to remain in protective custody, and effect a transfer.

12. The plaintiffs mother, Ms Connie Willis, also called the prison numerous times and wrote letters, including a letter to defendant Lappin, the director of the Federal Bureau of Prisons, (FBOP), The said letter is dated September 19, 2007, and in said letter she requested protective custody for plaintiff and a transfer to an institution where he could be safe and also program in general population.

13. The plaintiff received a response to this letter on October 19, 2007, 10 days after the Plaintiff was assaulted.

14. Between August 15, 2007, and September 25, 2007, the plaintiff notified the following defendants telling them that he would not be safe in the general population at USP Atwater: Warden D. Smith, SIS Lt. Cobb, SHU Lt. Paul, Unit Manager Mrs. Bowles, Unit Manager Mr. Devere, Case Manager Mr. Liwag, and computer services/Institutional Duty Officer Mr. Fass.

15. On or about September 19, 2007, the SHU Lieutenant, defendant Paul, spoke to the plaintiff about his request for protective custody. The plaintiff explained to him in detail the exact nature of the threat that exists against him. The plaintiff pleaded with defendant Paul to give him protective custody status. Defendant Paul told the plaintiff that he would be "ORDERED" to go to general population, and if he refused, that the plaintiff would receive an incident report.

16. On September 25, 2007, the plaintiff was ordered into general population, despite all of his attempts to receive protective custody from the defendants.

17. On the same day that the plaintiff was released from the SHU, he was approached by several inmate gang members, and the plaintiff was told that inmate Mattox wanted to meet with him. That evening the plaintiff met with inmate Mattox, who was accompanied by a number of other inmates. That meeting went without incident.

18. On September 26, 2007, the plaintiff again met with inmate Mattox, who was accompanied by 6 other inmates. Inmate Mattox told the plaintiff that there were rumors about the plaintiff being a sex offender, (Rapo). Inmate Mattox told the plaintiff that he had 3 weeks to produce any paperwork to clear his name, "or else".

19. Immediately after this confrontation, the plaintiff spoke to his Unit Manager, Defendant Devere, and told him about his meetings with inmate Mattox. Plaintiff reaffirmed his belief that his safety and life were in danger at USP Atwater. Defendant Devere took no action after receiving this information.

20. On October 9, 2007, at about 11:45 AM, the plaintiff was brutally assaulted by 6 inmates, some of whom are White Supremacist gang members. This assault occurred in broad daylight at the corner of unit 6A, in front of the facilities corridor, where unknown correctional officer defendant #4 was assigned.

21. This assault against the plaintiff was allegedly not seen by any staff. It is unknown to the plaintiff whether or not this assault was recorded on any security cameras.

22. After the assault, the plaintiff was barely able to walk himself to the infirmary.

23. Plaintiff was transferred to the emergency room at Mercy Medical Center in Merced, California. About 5 or 6 hours later, plaintiff was transported back to USP Atwater California, and was placed in an observation cell in the medical department.

24. Plaintiffs head was severely swollen and mis-shapen, his left eye was swollen completely shut, his nose was broken, his left sinus cavity was fractured, and staples were required to close cuts in his scalp. Plaintiff also suffered a very severe brain contusion as a result of this assault.

25. On or about October 11, 2007, while plaintiff was in SHU, defendant Devere came to see him. Defendant Devere was seemingly shocked at how badly the plaintiff was beaten. Defendant Devere told plaintiff that he had heard about the incident, but did not realize how badly beaten the plaintiff was.

26. The plaintiff told defendant Devere that he would identify the attackers that he knew if his future safety could be insured. Defendant Devere took no action upon this information. To the plaintiffs knowledge, the assailants were in no way disciplined.

27. Since his transfer from USP Atwater, the plaintiff was again assaulted at USP Lee, Virginia on April 21, 2008.

28. Plaintiff is now housed at a special "SOMP" program located at USP Tucson, AZ. he has been placed there because the FBOP finally determined that the plaintiff could not safely program in the general population of a regular USP.

V. PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this court:

1. Declare that the acts and omissions described herein violated plaintiffs rights under the constitution and laws of the United States.

2. Enter preliminary and permanent injunctions ordering the Federal Bureau of Prisons, the named defendants, their successors, and all persons acting in concert with them, to protect the plaintiff from assault by White Supremacist gang members and their associates, and other known enemies.

3. Order the Federal Bureau of Prisons to implement an adequate classification system that identifies both dangerous inmates, and also vulnerable inmates, such as plaintiff, and a system to adequately separate the more vulnerable inmates from the more dangerous inmates.

4. Enter judgement in favor of the plaintiff for nominal, compensatory, and punitive damages as allowed by law in the amount of $5,000,000.00, (Five Million Dollars and zero cents), against each defendant, jointly and severally.

5. Order such additional relief as this court may deem just and proper.

Respectfully Submitted on this 31st day of July, 2009.

James R. Willis

James Ray Willis

68983-080

USP Tucson

PO Box 24550

Tucson, Az. 85734

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I James R. Willis, verify and declare under penalty of perjury under the laws of the United States of America, that the forgoing is true and correct.

Executed on this 31 day of July, 2009.

James R. Willis

James R. Willis

SHU-110

133

#1

Attachment 1

United States Penitentiary
Atwater, California

ADMINISTRATIVE REMEDY PROCEDURE FOR INMATES
INFORMAL RESOLUTION FORM

NOTE TO INMATE: You are advised that prior to receiving and filing a Request for Administrative Remedy Form BP-9 [BP-229(13)], you MUST ATTEMPT TO INFORMALLY RESOLVE YOUR COMPLAINT THROUGH YOUR Correctional Counselor. Briefly state ONE complaint below and list what efforts you have made to resolve your complaint informally and state the names of staff contacted.

Issued By: _____ (Initials of Correctional Counselor)
Date Issued To The Inmate: 10/11/07

INMATE'S COMMENTS:

1. Complaint: I was assaulted by Multiple attackers 10-5-07. This afte- I brought it to the attention of "SIS" and Warden Smith that I had Serious Concerns about going out to this Compound. However the powers that be Still ordered me out of "SHU" to the Compound after being in SHU 3 months.
2. Efforts you have made to informally resolve: I sent Cops-Outs to SIS Cubb, SHULT Paul, Warden Smith, A.W. Grant A.W. Avalos, CMC Dreher Case manager Hilbay. All Concerning Safety Issues, nothing was resolved.
3. Names of staff you contacted: Names above in informall absolution.

Date Returned to Correctional Counselor: _____

James Willis	69983-097	10-10-07
Inmate's Signature	Reg. Number	Date

CORRECTIONAL COUNSELOR'S COMMENTS:

1. Efforts made to informally resolve and staff contacted: Although ~~the matter is still under investigation, I~~ think it should now be evident, a threat exists at Atwater and you should be transferred.

Date BP-9 Issued: _____ Correctional Counselor

Unit Manager (Date)

Distribution: If complaint if NOT informally resolved - Forward original attached to BP-0 Form to the Executive Assistant.

#2A

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

REQUEST FOR ADMINISTRATIVE REMEDY

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Willis, James, R | 68983-080 | SHU A-110 | Atwater "USP"
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

Part A- INMATE REQUEST How is it that I can be assaulted in broad daylight on the side walk at the corner of 6-A, by multiple assailants and not one guard, or Tower saw the attack, nor any camera recorded this attack? I was brutally kicked and beaten by no less than 4 persons for a period of between 2 and 3 minutes. I was ordered out of SHU to the Compound around September 25, 2007. I had been in the "SHU" for 3 months. During this time I wrote numerous letters "Cop-outs", to various executive staff members, explaining my situation, that my safety & life is in danger. Nobody took my concerns to be valid." Well after being assaulted in only 2 weeks on the Compound it should now be evident. As I stated time and time again, my difficulties began in 2006 at "USP Pollock" with members of the "Aryan Circle" these dudes have a standing hit on me. I was assaulted in April 15, 2007 at USP Victorville by The "DWB" and skinheads - by order of the "California Brand A.B.". Now I have been assaulted here only 6 months later. It should now be evident that a threat does exist within the "F BoP" against my person. All of my problems are due to a "sex charge" from the State of "Texas". I am requesting that I be sent an appropriate institution where person in my situation can be reasonably safe, and may serve the remainder of my time productively in the general population. Or that I be given a State Placement.

James R. Willis

DATE | SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE | WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE | CASE NUMBER: _____

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____ _____ _____ _____ _____
LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

#2B

"Attachments" #1

Not only is it evident that a threat does in fact exist within the FBOP, a threat against my safety and wellbeing. It is furthermore evident that the staff here at USP Atwater, were negligent, and showed deliberate indifference, by not heeding my pleas for a transfer, and not protecting me from this assault. Not only did I notify various staff members here, I also wrote a letter to Mr. McFadden, and he redirected that letter back to Warden Smith here at "USP" Atwaters

The bottom line is this! 1) Despite all my pleas, and Cop-outs written to Various staff members, I was still ordered out of the "SHU" to this Compound, where I was viciously assaulted within 2 weeks after my release from "SHU". 2) I should not have been sent to USP Atwater from USP Victorville. 3) I was assaulted in broad daylight at main line during the lunch meal, "about", less than 100 feet from the Chow hall; not one guard, Tower, or camera witnessed this assault. 4) Now I am once again in the "SHU", living 3 persons in a 2 man cell, with one person on the floor. I am being deprived of my privileges that I would have in "General Population". It is as if I am being punished in "SHU" due to the fact that I was assaulted, I.E. Limited Commissary purchases, No Radio, No Newspaper or Magazines, Only 1 phone call per month, no access to watch Television Etc. Etc. 5) I sustained a broken nose, and a fracture in my left Sinus Cavity from this assault.

I appealed to Warden Smith on several occassions, Verbally and in writing, Stateing my Saftey Concerns, and requesting an immediate transfer. His failure to act upon my pleas Concerning my saftey has led to my being assaulted at USP Atwater.

Respectfully,

James B. Willis

#2C

PART B - RESPONSE TO REQUEST FOR ADMINISTRATIVE REMEDY

A/R # 470996-F1
WILLIS, James
Reg. No.: 68983-080
Unit: 5a

This is in response to your Request for Administrative Remedy received in my office on October 25, 2007 in which you request to be transferred to another facility.

A review of your case revealed that we immediately conducted an investigation into your request for protective custody status. However, during the course of the investigation you did not cooperate with the investigators assigned to the case. As such, we could not identify a specific threat at USP Atwater. In fact, you requested to leave protective custody and return to the general population on September 25, 2007. After your assault on October 9, 2007, you were immediately placed in the Special Housing Unit pending investigation. Further, after review of the incident staff have determined that you are not appropriate for the general population and will seek a transfer to another facility that will allow you to program within the general population.

Further, it is the policy of the Federal Bureau of Prisons, and the practice at USP Atwater to take allegations of being placed into protective custody seriously and to investigate these allegations. As such, should an inmate's claim of being housed in protective custody status be substantiated and/or if his safety is jeopardized, staff will take the appropriate steps to investigate the matter and to ensure an inmates continued safety.

Based on the above information, your Request for Administrative Remedy has been approved as we are requesting a transfer to the Designation and Sentence Computation Center on your behalf. If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

D. Smith, Warden

11-6-07
Date

U.S. Department of Justice #6A

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: Willis, James, R.	#68983-080	SHU-A-111	USP Atwater
LAST NAME, FIRST, MIDDLE INITIAL	REG. NO.	UNIT	INSTITUTION

Part A - REASON FOR APPEAL This Adm. Remedy Appeal is in response to BP-229 Cs. # 470996-F1 Refer to BP-8 and BP-9. Please note the response to BP-229 above numbered Adm. Remedy was signed by Warden Smith on 11-6-07, I did not receive it until today 11-22-0 effectively giving me only 4 Calendar days to respond. Which is an attempt by Warden Smith to deny me full access to Administrative Remedy's. Warden Smith asserts in his response that I initially requested protective Custody, and that SIS could not Identify a threat, meaning I was never in protective Custody Status. Then in his next sentence Warden Smith Contradicts himself by saying that I requested to leave protective Custody, yet according to him I was never in protective Custody, therefore how could I request to leave protective Custody on Sept. 25, 2007? I did not request to leave, I always asserted that my safety was in jeapardy and I need to be transferred. On Sept. 25, 2007 C.O. Sutherland Came to my cell and ordered me to Compound or I would receive an incident report. So I went to the compound and was assaulted, and now after said assault Warden Smith has determined that a threat does infact exist and I should now be transferred. Warden Smiths assertion that I would not Cocporate with the Threat assesment investigation is absolutely ludicrous. From the day of my arrival at USP Atwater I informed SIS of the exact nature of the threat against me in Cronological order from USP Pollock, To USP Victorville To the Present. See Attachment.

11-22-07	James R. Willis #68983-08
DATE	SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED

NOV 26 2007

REGIONAL DIRECTOR
WRO

DATE	REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE CASE NUMBER: 470996-R1

Part C - RECEIPT

CASE NUMBER: _____

Return to: _____ _____ _____ _____

LAST NAME, FIRST, MIDDLE INITIAL | REG. NO. | UNIT | INSTITUTION

SUBJECT: _____

DATE	SIGNATURE, RECIPIENT OF REGIONAL APPEAL

BP-230(13)
JUNE 2002

#6B

470996-R1 WILLIS, James 68983-080
USP Atwater

This is in response to your Regional Administrative Remedy Appeal of the Warden's decision dated November 6, 2007. In your appeal, you have indicated that you cannot be safely housed in your current facility. For remedy you are requesting, termination and pay reduction of staff members, an assignment of separation from all white supremacist groups, and a transfer to an appropriate facility.

Your appeal has been investigated. On November 27, 2007, you were approved for transfer from the United States Penitentiary (USP) Atwater by the Designation and Sentence Computation Center (DSCC). Your approval for placement in an alternate facility was made based on your custody and security needs in addition to alleged safety considerations. Any time you believe a specific threat to your safety exists, you should report it to institution staff and request protective custody.

You do not provide any evidence of staff misconduct. The original protective custody report dated August 3, 2007, states you did not provide any verifiable evidence of a threat. Based on the lack of documentation, there is no evidence that staff did not perform their duties or follow policy.

You have been appropriately reviewed and classified with an assignment of separation. The BOP will continually evaluate your security concerns and strive to place you in the most appropriate facility for your security and safety.

Based on the above, your request for administrative remedy is partially granted in that you have been approved for transfer. If dissatisfied with this response, you may appeal to the Office of the General Counsel, Bureau of Prisons, 320 First Street, NW, Washington, DC 20534. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

12/21/07
Date

Robert E. McFadden, Regional Director

#7A

U.S. Department of Justice

Federal Bureau of Prisons

Central Office Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-229(13) and BP-230(13), including any attachments must be submitted with this appeal.

From: Willis, James, R (LAST NAME, FIRST, MIDDLE INITIAL) 68983-080 (REG. NO.) D-417 (UNIT) VSP Lee (INSTITUTION)

Part A - REASON FOR APPEAL Please Note that I was in transit for over a month and only arrived here on 1-15-08. In my BP-9 I asked how I could be assaulted in broad daylight without any gaurds seeing said assault or protecting me? I have maintained that I am in danger from White Supremacist gangs, and I still am! fact: I was assaulted twice in 6 months, in 2 seperate "USPs" both in the Western Region "Victorville and Atwater. fact: Staff at USP Atwater ordered me to "G.P." despite my many assertions of safety Concerns. fact: I was brutally assaulted on Oct 9, 2007 by 6 individuals, and the assault was not seen or stopped by Staff. fact: I was taken to the Emergency room in Merced California, I eventually had surgery to repair the damage from said assault. fact: I have continually asked to be separated from all known white supremacist gangs. fact: This has not occurred, I am, at present in "G.P." around "Texas Aryan Brotherhood", "Aryan Resistance Militia", and "Soldiers of Aryan Culture" There should be a place where I can go and not be around these gangs. See Garza v. United States of America, USDC SD TX. Cs# B-02-154

1-20-08 (DATE) The Violence in the feds is out of control "Gang Violence"! James R. Willis (SIGNATURE OF REQUESTER)

Part B - RESPONSE

RECEIVED

JAN 31 2008

Administrative Remedy Section
Federal Bureau of Prisons

DATE GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE CASE NUMBER: 470996-A1

Part C - RECEIPT

CASE NUMBER:

Return to: (LAST NAME, FIRST, MIDDLE INITIAL) (REG. NO.) (UNIT) (INSTITUTION)

SUBJECT:

DATE SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

BP-231(13)

#7B

Administrative Remedy No. 470996-A1
Part B - Response

This is in response to your Central Office Administrative Remedy Appeal in which you request to be transferred to a Bureau facility in which your safety will not be jeopardized by gang activity. You claim to have been assaulted three times in as many institutions, because staff were deliberately indifferent and placed you in harm's way. You also seek disciplinary action against all staff involved.

Our information indicates you raised an allegation of having issues with certain inmate groups and claim the repetitive nature of the assaults is corroborating evidence. Yet, despite your concerns for your own safety, you were apparently less than cooperative with investigating staff, resulting in their inability to immediately verify any specific threat. However, following your October 2007 assault, staff investigated the incident and determined it would be best to effect your transfer. As such, you were transferred and admitted to USP Lee. Since then, records show you have been assigned to general population. Should you experience any further problems, we encourage you to immediately report it to staff. They will take any appropriate deemed necessary.

You request the discipline of staff for what you perceive to be deliberate indifference. We remind you the Administrative Remedy process is not the proper mechanism to seek such relief, as the discipline of staff is not an appropriate matter for inmate review compensation for appealing any agency decision is not relief available within the purpose and scope of Program Statement 1330.13, Administrative Remedy Program. There are long-established procedures in place for reconciling legitimate concerns of staff misconduct. As noted above, we do not have any information suggesting any staff wrongdoing in this regard.

Our review reveals the Warden and Regional Director adequately responded to the issues you raised in your appeal. We therefore concur with the responses provided. This response is for informational purposes only.

March 17, 2008
Date

Harrell Watts, Administrator
National Inmate Appeals

U.S. DEPARTMENT OF JUSTICE
Federal Bureau of Prisons

INMATE INJURY ASSESSMENT AND FOLLOWUP
(Medical)

1. Institution	2. Name of Injured	3. Register Number
USP ATW	WILLIS, JAMES RAY	68983-080
4. Injured's Duty Assignment	**5. Housing Assignment**	**6. Date and Time of Injury**
unassigned	5A	10/9/07 approx. 1110
7. Where Did Injury Happen *(Be specific as to location)*	***Work Related?*** ☐ Yes ☒ No	**8. Date and Time Reported for Treatment**
outside unit 6A		10/9/07 approx. 1125

9. Subjective: *(Injured's Statement as to How Injury Occurred)(Symptoms as Reported by Patient)*

"Assault victim"

Signature of Patient

10. Objective: *(Observations or Findings from Examination)*

① (+) swelling (+) hematoma (R) eye shut
② multiple contusions all over head ④ (+) contusion w/ laceration (R) frontal - parietal area
③ (+) contusion w/ underlying laceration 1 cm - above (R) eyebrow ⑤ (+) abrasion both elbows

X-Rays Taken _____ *Not Indicated* _____
X-Ray Results

11. Assessment: *(Analysis of Facts Based on Subjective and Objective Data)*

see #10 ; No orbital fx

12. Plan: *(Diagnostic Procedures with Results, Treatment and Recommended Follow-up)*

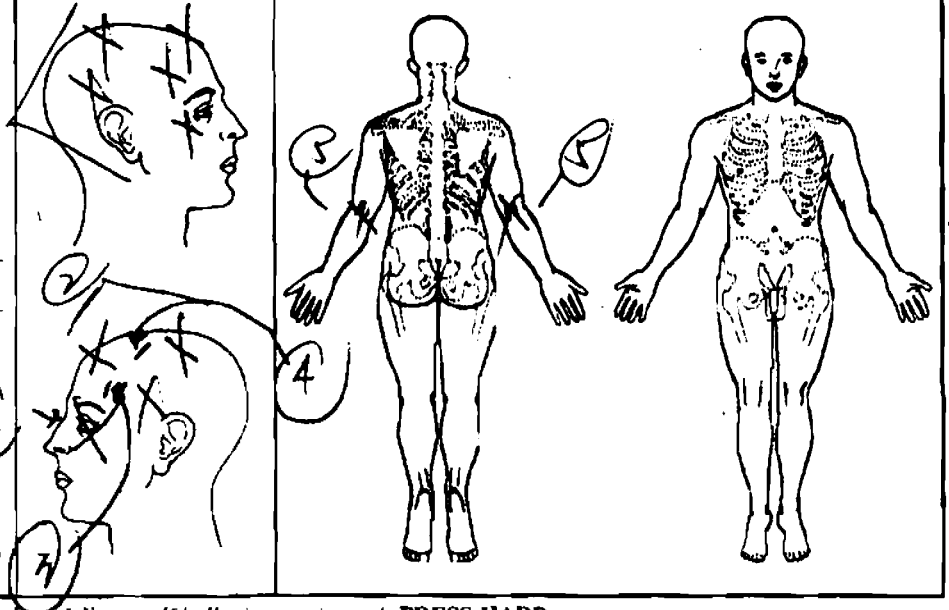
- clean wounds - referred to Dr. Franco & advised to report to ER

13. This Injury Required.

- ☐ a. No Medical Attention
- ☒ b. Minor First Aid
- ☐ c. Hospitalization
- ☒ d. Other *(explain)*

sent to ER

- ☐ e. Medically Unassigned
- ☐ f. Civilian First Aid Only
- ☐ g. Civilian Referred to Community Physician



Signature of Physician Assistant

B. URBANO
MID LEVEL PRACTITIONER
USP ATWATER

Self Carboned Form - If ballpoint pen is used. **PRESS HARD**

J. Franco, M.D.
Clinical Director

Original - Medical File
Canary - Safety
Pink - Work Supervisor *(Work related only)*
Goldenrod - Correctional Supervisor

USP LVN

BP-362(60)
FEBRUARY 1986

MARK S. SPITZER, D.O.
Diplomate, American Board of Otolaryngology
ASSOCIATED EAR, NOSE AND THROAT OF MERCED
Diseases & Surgery of the Head & Neck · Pediatric Otolaryngology · Facial Plastic Surgery
Sleep Disorders · Otolaryngic Allergy · Audiology

68983-080

October 15, 2007

J. Franco, MD
Clinical Director

Jon Franco, M.D.
USF/1 Federal Way
Atwater, CA 95301

RE: WILLIS, JAMES

Dear Jon:

I had the pleasure of evaluating James Willis. As you know, he was the victim of an assault approximately six days ago. He had a CT scan, and the disk was brought along and placed on the computer for evaluation. He has also been complaining of some disequilibrium. He has had some benign positioning vertigo that lasts for about twenty seconds, but he has also had some other problems associated with the concussion that he received from the assault. In addition, he does have a little bit of decrease in his air flow on the right side. His nose looks a little different and a little wider then it looked before, but he has had no double vision.

Otherwise, he has had relatively reasonable general health. At this point, he states the swelling is down quite a bit, and he is not having a lot of pain; but he is still having discomfort in the face. His past history includes no other on-going family problems, and his review of systems is otherwise noncontributory.

His physical exam reveals generalized resolving ecchymosis. His nasal bones are asymmetrical and slightly infractured on the right. Intranasally his septum is deviated anteriorly to the right and posteriorly to the left. There is only mild generalized edema. The extraocular movements are intact. There is no facial paralysis, and there does not appear to be any entrapment. There is no diplopia. There may be a subtle difference in swelling or positioning of the eye with minimal anophthalmos relatively speaking on the left, but there is still swelling from the injury. The oral cavity is benign, and there is no ecchymosis present. He has good occlusion. The posterior oropharynx is normal, and his neck exam is benign. There is a lot of tenderness along the orbital rim, as well as the facial bones in general; but I don't feel any step-off present.

410 E. Yosemite Avenue, Suite B · Merced, California 95340 · Telephone: (209) 722-9272 · Fax: (209) 724-9329

The CT scan confirms the septal deformity that is present, but there is also a blow-out fracture of the ethmoid sinus with a fragment extending medially. It does not appear as though there is any entrapment, and there is some opacification of the left ethmoid most consistent with blood from the time of the injury. There appears to be another area of herniated fat as well.

The consequences of this are difficult to predict. He seems to have reasonably good function currently; however, it is hard to determine whether the herniated fat would be an issue for his sinuses or not. He claims to have some chronic sinus problems, and this is a bigger concern. If that is the case, then repair of the wall and placing it back in position would certainly be helpful. If his nasal obstruction and his septal deviation is from this trauma, then repairing it would also be a prudent approach. Otherwise, I do not see any other eminent and dangerous problems for him.

I will call and discuss this with you, and we will move forward accordingly based on your recommendations as well.

Sincerely,

Mark S. Spitzer, D.O.

MSS:ds

68983-080

MERCY MEDICAL CENTER MERCED
Community Campus
301 East 13th Street
Merced, California 95340

Name:	**WILLIS, JAMES**	**MR No:**	**G000566342**
Acct #:	V00005082828	**Date of Visit:**	10/09/2007
DOB:	04/14/1967	**Pt Location:**	EMERGENCY DEPT.
Age:	40. **Sex:** M	**Dictated by:**	Ajinder Singh, MD

TIME SEEN:
Triage time is 1235 hours. Physician time is 1303 hours.

MODE OF ARRIVAL:
Patient brought in by police escort from jail.

HISTORY OF PRESENT ILLNESS:
I received a call from his doctor in the penitentiary this morning prior to his arrival to the emergency room who advised me that the patient had been a victim of physical assault in the jail and he was brought to the emergency room for evaluation of the facial and head injury.

This is a 40-year-old male patient who states he was walking back to his dorm in the jail when he was assaulted from behind. Two or 3 fellows restrained him and there were multiple people who assaulted him, punching and kicking him, at the jail about an hour prior to arrival at the emergency room. The patient states he has sustained lacerations and abrasions to the face and his left eye is swollen shut. The patient denies any pain in the eye and/or diminished vision. The patient denies any loss of consciousness per se. Denies headache, urinary, and/or bowel symptoms. Denies any history of convulsions and/or incontinence.

Review of the rest of the systems is otherwise, unremarkable. His GCS prehospital has been 15/15.

ALLERGIES:
PENICILLIN.

MEDICATIONS:
None.

PAST MEDICAL HISTORY:
Otherwise, negative.

PAST SURGICAL HISTORY:
Negative.

SOCIAL MEDICAL HISTORY:
Brought from jail.

EMERGENCY ROOM REPORT

From: 2093857838 Page: 3/14 Date: 10/24/2007 1:56:13 PM

Name:	WILLIS, JAMES	MR No:	G000566342
Acct #:	V00005082828	Date of Visit:	10/09/2007
DOB:	04/14/1967	Pt Location:	EMERGENCY DEPT.
Age: 40	Sex: M	Dictated by:	Ajinder Singh, MD

FAMILY HISTORY:
Unavailable.

PHYSICAL EXAMINATION:
VITAL SIGNS: Blood pressure is 148/92, pulse 88, respirations 18, temperature 98.1, and pulse oximetry 99% on room air which by ED physician evaluation is normal. His weight is 190 pounds.
GENERAL: On examination, this is an adult white male patient lying on his back. His hands are cuffed in front of him. He is alert, awake, and oriented.
HEENT: HEAD: Examination reveals a scalp laceration of about 2.7 cm in size on top of his vertex. He has abrasions to the face on the right side of the forehead. His left eye is swollen shut. He has a laceration on the left side of the forehead, about 0.7 to 0.9 mm in size, superficial and skin deep, no active bleeding is noted. Under the swollen eyelids there was concomitant movement of both eyeballs noted during the examination. The ball moving under the eyelid on the left side, on examination of the eye when pried open, reveals conjunctival swelling and ecchymosis. Pupils are normoreactive equally on both sides. No corneal injury noted on the limited exam and no pain in the eye reported by the patient.
NECK: Supple. Trachea is midline.
CHEST: Clear.
HEART: Heart sounds are normal.
ABDOMEN: Soft, nondistended, and nontender.
EXTREMITIES: Negative for pedal edema.
SKIN: Negative for any acute skin rashes.
MUSCULOSKELETAL: Negative for fractures or dislocations.
NEUROLOGIC: Negative for focal neurological deficits.

EMERGENCY DEPARTMENT COURSE:
The patient was given tetanus toxoid 0.5 mL intramuscularly. He was given pain relief with Dilaudid 1 mg intramuscularly, Zofran 4 mg intramuscularly, supervised by physician, by me.

Patient's CT scan of the brain, facial wounds, and orbits were obtained. His brain is negative for any acute brain injury. The CT of the facial bones and orbits revealed a nondisplaced nasal bone fracture and fracture of the medial side of the left orbital wall which is the lateral wall of the left ethmoid sinus with displacement medially towards the nose on his nasal septum by about 3.5 mm. The CT has been reviewed by me with Dr. Santano, the radiologist, in the

From: 2093857838 Page: 4/14 Date: 10/24/2007 1:56:14 PM

Name:	**WILLIS, JAMES**	**MR No:**	**C000566342**
Acct #:	V00005082828	**Date of Visit:**	10/09/2007
DOB:	04/14/1967	**Pt Location:**	EMERGENCY DEPT.
Age: 40	**Sex:** M	**Dictated by:**	Ajinder Singh, MD

radiology department. There is no evidence of entrapment of the extraocular muscles. The left eye globe is intact and normal.

In view of the fracture of the left ethmoid sinus and opacification and displacement of the lateral wall of the ethmoid sinus, I gave the patient antibiotic Ancef 1 g intramuscularly. Patient tolerated the intramuscular injection of Ancef well in view of his related history of penicillin sensitivity. The cross sensitivity to cephalosporin is low.

Repair of the lacerations were done in the emergency room under standard surgical precautions with Xylocaine 1% anesthesia. Three staples were placed to close the scalp laceration after cleaning, exploration, and irrigation. No foreign bodies were found in the bloodless field of the laceration. Good opposition and hemostasis were obtained. The laceration of the skin of the left forehead was closed with Dermabond after cleaning, irrigating, and drying.

IMPRESSION:
1. Acute physical assault.
2. Severe facial injury.
3. Scalp laceration, 2.7 cm.
4. Facial laceration, 0.7 cm.

PLAN:
Discharge the patient home with Keflex 500 mg p.o. t.i.d. and Motrin 600 mg p.o. t.i.d. p.r.n.

It is recommended that the patient will get ENT consult as an outpatient, wound check in 48 to 72 hours, and staple removal in 5 to 7 days. Return to the emergency room if condition worsens.

FINAL EMERGENCY DEPARTMENT DIAGNOSIS:
1. Acute physical assault.
2. Severe facial injury.
3. Scalp laceration, 2.7 cm.
4. Facial laceration, 0.7 cm.

Ajinder Singh, MD

AS /5553402

From: 2093857838 Page: 5/14 Date: 10/24/2007 1:56:14 PM

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of the form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. *(See instructions on reverse.)* *(Number, street, city, State and Zip Code)*
Federal Bureau of Prisons Western Regional Office 7338 Shoreline Drive Stockton, CA 95219	James Willis 68983-080 USP Tucson PO Box 24550 Tucson, AZ 85734

3. TYPE OF EMPLOYMENT	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME *(A.M. or P.M.)*
☐ MILITARY ☒ CIVILIAN	4-14-67	Single	October 9, 2007	11:45 AM

8. Basis of Claim *(State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)*

See attached.

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT *(Number, street, city, State, and Zip Code)*

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. *(See instructions on reverse side.)*

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See attached.

11. WITNESSES

NAME	ADDRESS *(Number, street, city, State, and Zip Code)*
See attached.	

12. *(See instructions on reverse)* AMOUNT OF CLAIM *(In dollars)*

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL *(Failure to specify may cause forfeiture of your rights.)*
N/A	$20,000,000.00	N/A	$20,000,000.00

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.

13a. SIGNATURE OF CLAIMANT *(See instructions on reverse side.)*	13b. Phone number of signatory	14. DATE OF CLAIM
James R. Willis	N/A	1-22-09

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant shall forfeit and pay to the United States the sum of $2,000 plus double the amount of damages sustained by the United States. *(See 31 U.S.C. 3729.)*	Fine of not more than $10,000 or imprisonment for not more than 5 years or both. *(See 18 U.S.C. 287, 1001.)*

CLAIM FOR DAMAGE, INJURY OR DEATH
Standard Form 95
Continuation Sheet Page 1 of 4

James Willis 68983-080

Claimant, Federal inmate James Willis, herein contends that on October 9, 2007, while in the custody of prison officials at United States Penitentiary Atwater, California, at approximately 11:45 AM the Claimant was seriously assaulted by six (6) inmates. Prison officials at USP Atwater did negligently or wrongfully, through acts or omissions, cause the Claimant to suffer severe, serious and life-threatening injury, to wit:

On October 9, 2007, Claimant was walking from his housing unit, 5A to the dining at approximately 11:45 AM. On approaching the corner of the West sidewalk and the South (Main) sidewalk, the Claimant was jumped by six (6) unknown assailants and severely beaten. (See attached map indicating the location of the attack and key landmarks referred to in this statement.) The assailants repeatedly beat the Claimant about the head, neck and upper torso with their fists and unknown objects. When the Claimant fell to the ground, the assailants continued to beat him with their fists, unknown objects and kicking him repeatedly with their reinforced-toed work boots. The attack lasted approximately five (5) minutes. As the assailants left, the Claimant heard one of the assailants say, "Come on, we got away with it. F**kin' rapo."

While the assault took place in plain view of prison staff no alert signaling trouble was announced and no assistance was directed to the point of the assault. Claimant refers to the attached map noting the location of the Central tower, the Main Corridor which was fully staffed and the Lieutenant's office which was direct across from the attack, a distance of aproximately 200 feet.

Claimant had to make it to his feet under his own power and was only able to stumble from the point of the attack to the Main Corridor. The Claimant was only then assisted by a corrections officer who helped him to the medical facility for assessment and treatment. Enroute to medical, Claimant passed a number of prison executives including Warden D. Smith. Claimant reminded Warden Smith that he had notified the Warden of the very real possibility of attack the Claimant faced and stated to the Warden, "See I told you what was going to happen if you put me in general population."

Claimant was taken for medical assessment and treatment at the prison's medical facility. The Claimant recalls being met at medical by an SIS officer who was taking pictures of the injuries Claimant sustained. The Claimant recalls being told that his injuries would require outside treatment. The Claimant lost conscienciousness while while at the prison medical facility. The Claimant's next recollection is waking at the Emergency Room of Mercy Medical Center, Merced, California.

The Claimant was treated for severe and life-threatening injuries. An extensive physical examination was performed of the Claimant including two (2) cat scans

to assess damage to the Claimant's head and brain. Claimant was treated for multiple cuts, bruising, lascerations and contusions to his head, neck, arms, upper torso, groin and legs. Medical personnel diagnoised that the Claimant had suffered a serious brain concusion as a result of the beating he received. The Claimant was further diagnoised with a fractured left sinus cavity, a crushed labrum and crushed left and right nasal passages.

Claimant was returned to USP Atwater following outside medical attention and was placed in Administrative Segregation in the Special Housing Unit (SHU). While in SHU, Claimant continued to suffer with extreme pain and reported difficulty breathing as a result of the damage to his sinus region. Claimant further complained of dizziness, nightmares and difficulty sleeping.

As a result of the extensive damage to the Claimant's nasal region, Claimant required outside surgical intervention to repair the damage that resulted from the senseless beating.

Claimant alleges that prison officials were notified that the Claimant was in danger of serious injury and the very real possibility of death if placed in general population at USP Atwater. Despite notification by the Claimant, Claimant's family and information contained in the Claimant's Central File, prison officials negligently placed the Claimant in general population, subjecting him to the real possibility of assault. Prison officials owed the Claimant the right and duty to reasonably care for his safety and failed to protect the Claimant from needless injury.

The Claimant avers to the following in support of his allegations:

1. Claimant was a prisoner at USP Victorville, California on April 15, 2007 and was seriously assaulted by white supremaist gang members resulting in bodily injury. The reason for the assault was attributed to the fact that the Claimant had a charge of rape in his criminal history. As a result of the attack, which is detailed in his BOP Central File and referenced in letters by the Claimant and Claimant's family, Claimant was transferred to USP Atwater.

2. Claimant arrived at USP Atwater on June 12, 2007. During his intake interview, Claimant was interviewed by SIS Lieutenant Cobb. Claimant provided notice to Lieutenant Cobb at the interview that the Claimant fear for his safety and his life if he was placed in the general population at USP Atwater. This was in direct response to Lt. Cobb's question, "Do you know of any reason I should not put you on this yard?"

3. Claimant verified with Lt. Cobb the information contained in his Central File regarding the assault at USP Victorville and also threats which had been verified while Claimant was at USP Pollack, threats that resulted in the Claimant being transferred from USP Pollack to USP Victorville.

James Willis 68983-080

4. Claimant notified Lt. Cobb that he was aware of a specific inmate that posed a substantial threat to the Claimant's safety. The inmate, Mattox was incarcerated with the Claimant at USP Pollack, was a member of the white supremaist group which had threatened the Claimant and had himself direct threatened the Claimant. Lieutenant Cobb verified to Claimant that inmate Mattox was a member of the general population and that he had ties to known gang activity.

5. Based on the detailed information provided by the Claimant, information contained in the Claimant's Central file and information relied upon by SIS Lieutenant Cobb, Claimant was placed in Protective Custody pending a threat assessment and housed in the Special Housing Unit (SHU) at USP Atwater. Lieutenant Cobb advised Claimant at that time that Claimant should anticipate a transfer to another institution.

6. On or about June 14, 2007, Claimant spoke with Case Manager Li Wag regarding his fear of being placed in general population. Claimant provided Li Wag with an Inmate Request Form which gave notice of the Claimant's concern for his safety at USP Atwater, detailed reasons for those concerns and requested transfer to a different state or Federal institution.

7. On June 21, 2007, Claimant provided notice to Warden D. Smith that he feared for his safety if placed in general population. The Warden acknowledged that he was aware of the Claimant's situation and that he understood that a threat assessment was being made. Warden Smith told Claimant that upon completion of the threat assessment, the possiblility of transfer would addressed.

8. On or about late June or early July, Claimant spoke with Unit Manager Devere who indicated that he was not familiar with the Claimant's situation. Claimant then provided Mr. Devere with details of his situation and giving him notice of his fears regarding placement in general population. Mr. Devere acknowledged that he understood the Claimant's concern and that he would follow-up with SIS Lieutenant Cobb.

9. Points 6,7 and 8 above are attested to in an affidavit by the Claimant's cell-mate while housed in the SHU at USP Atwater. Sworn affidavit attached.

10. On or about July 9, 2007, Claimant wrote BOP Regional Director for the Western Region, Mr. McFadden notifying him that the Claimant feared for his safety if required to join the general population at USP Atwater. Claimant requested that the Director assist in speeding the Claimant's transfer to a facility where the Claimant would be safe.

11. Claimant's letter to the Regional Director was responded to by Warden Smith in a letter dated August 13, 2007. Warden Smith informed the Claimant in his letter that the SIS investigation had been completed on August 3, 2007. Despite Claimant providing specific information on the known threats, specific individuals and specific groups, the assessment of the Claimant's request for Protective Custody was determined to be unverified.

12. Between the period August 15, 2007 and September 25, 2007, Claimant notified verbally and in writing prison officials that he had not been interviewed regarding his request his request for protective custody and that Claimant believe that his life and safety were in jepordy if required to go into the general population. Claimant filed with prison officials a BP-8 in August 2007 which was not responded to, this was followed up by a BP-9 again providing notification to prison officials of Claimant's fear for his safety. Claimant's BP-9 while record, was rejected for lack of a BP-8.

13. Claimant informed the following prison officials between the period August 15, 2007 and September 25, 2007: Warden D. Smith, SIS Lt. Cobb, Associate Warden Avalous, CMC Officer Dreher, Duty Officer Fass, Unit Manager Devere, Unit Manager Bowles, Case Manager Li Wag, SHU Lt. Paul, and CHaplain Weaver. The above notifications were witnessed by and can be atested to by by inmate Casey Lawrence, Reg. No. 17991-075, who shared the cell with Claimant during this period.

14. In addition to Claimant's notification to prison officials, Claimant's mother also provided notice that Claimant feared for his life and safety. Claimant's mother, Connie Wells (Willis ← J.W.), wrote to the Regional Director for the Western Region, Robert McFadden on August 5, 2007. Claimant's mother received a response to her letter dated August 24, 2007 from Acting Warden Avalos for Warden Smith acknowledging her letter and stating that the SIS investigation could not verify Claimant's request for Protective Custody. The letter further states that the Claimant did not cooperate with the investigation. Claimant restates that at all times he cooperated with SIS investigators and provided specific information regarding the threats to his safety and life. Correction? initialed J.W.

15. Claimant's mother sent another letter, dated Augst 25, 2007, again addressed to Regional Director McFadden. In this letter the Claimant's mother again notifies prison officials that she and the Claimant have reason to fear for his life and safety. Claimant's mother reminds officials that there is a known person on the compound at USP Atwater that poses a threat and states that she has been told by the Claimant that there is a "hit" out on him if he goes to general population.

16. On September 19, 2007, Claimant's mother sent a letter to Director of the Bureau of Prisons, Harly G. Lappin expressing grave concern for the Claimant's life and safety. The letter restates the known facts about the fears of the Claimant. THe letter further requests that the Claimant be provided Protective Custody and that the Claimant be transferred to another institution. This letter was responded by USP Atwater Warden Smith but not until 10-days after the assault on the Claimant.

17. On September 18, 2007, Claimant was ordered by correctional officers that he was to be released from the SHU and placed in general population. Claimant informed prison officials that he was refusing this order. Prison staff notified Claimant that he would receive an incident report for refusing the order.

18. On September 18, 2007, Claimant was served a disciplinary report by SHU Lieutenant Paul. Claimant notified Lt. Paul that he feared for his life and safety if placed in general population. Claimant was interviewed by Lt. Paul, in the lieutenant's office at which time the Claimant again provided specific details of his fear and concern. The Lieutenant agreed that if the Claimant's information was correct, the Claimant would indeed be in danger if placed in general population. He stated however that the matter was out of his hands.

19. Lieutenant Paul informed Claimant that if Claimant continued to refuse orders to program in general population, Claimant would face further disciplinary sanctions. At the conclusion of the interview with Lt. Paul, Claimant asked the Lieutentant if he could talk with SIS on his behalf and ask that they reopen the investigation. Lietenant Paul restated that there was little he could do for the Claimant.

20. On September 25, 2007, Claimant was again ordered from the SHU to general population. Claimant was escorted to a holding area by the SHU property officer who was aware of the Claimant's situation and asked the Claimant if he would be okay out there. Claimant responded - NO.

21. Claimant was assigned to housing unit 5-A. That same day he was approached by an inmate known as Little John and told that inmate Mattox want to talk with the CLaimant immediately following the evening meal.

22. Claimant was approached the evening of September 25, 2007 by inmate Mattox and six (6) other inmates. Inmate Mattox shook the Claimant's hand and told the Claimant that they would talk the next day during recreation.

23. On September 26, 2007, Claimant met with inmate Mattox on the recreation yard (inmate Mattox was again accompanied by six (6) othe inmates). Inmate Mattox informed the Claimant that there was a rumor on the compound that the CLaimant was a sex offender, specifically a "rapo". Inmate Mattox told the CLaimant that he had spoken up for the Claimant to the "yard shot caller" who was the leader of the white supremaist group, the Nazi Lowriders and that the CLaimant had been given three (3) weeks to provide paperwork that disproved the rumors.

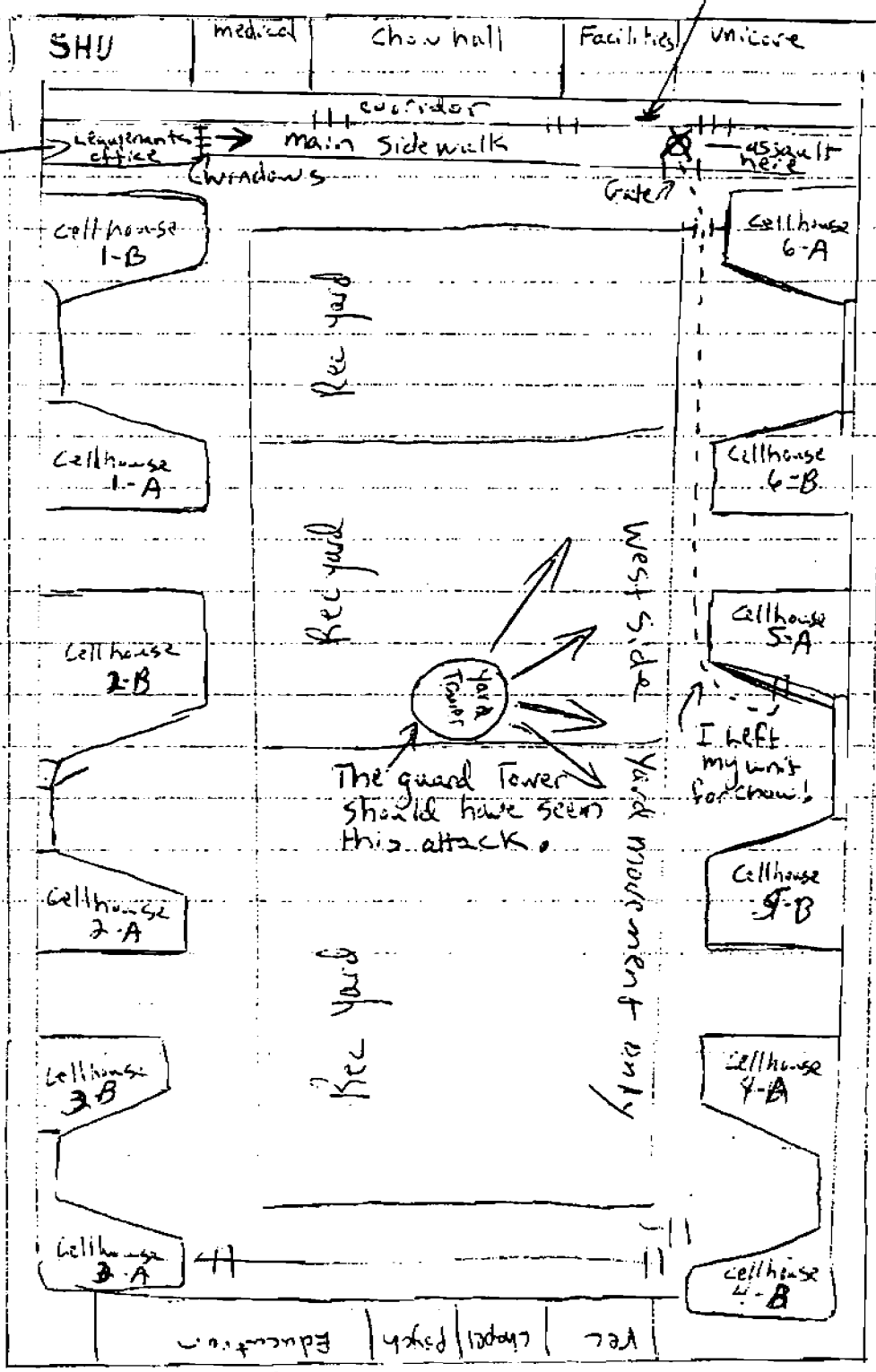
24. On September 26, 2007, Claimant notified Unit Manager Devere of the conversation Claimant had with inmate Mattox and that the Claimant had been given a deadline to clear his name or face the consequences. Claimant restated his fears for life and safety, again reminding Mr. Devere of his need for Protective Custody and transfer.

25. Mr. Devere took no action regarding Claimant's notification.

26. On October 9, 2007, Claimant was brutally attacked and sustained serious life-threatening injuries.

"USP Atwater Layout"

Located at Atwater California.



Notice I was assaulted 200 feet from his office windows face the West

I was assaulted Right here

It is unfathomed that not one guard should have seen this assault.

When the yard moves only one side of the yard moves at once So the Tower only has to watch one side at a time

West Yard

I left my unit for chow!

The guard Tower should have seen this attack.

There should also be one guard on the sidewalk in front of the chow hall, there wasn't. There are supposed to be 2 guards patrolling the sidewalk.

Please note at time of this assault Prison was so understaffed that 3 whole cellblocks were Closed down. How Could an understaffed Prison be Safe?

Just the fact that this assault was able to occurr for as long as it did at the noon meal on the main side walk, and was supposedly not seen is negligence!

AFFIDAVIT

STATE OF TEXAS X
X
COUNTY OF Burnet X

BEFORE ME, the undersigned authority, on this day personally appeared Connie Willis (Affiant), who, being by me duly sworn, made the following statements and swore that they were true:

"My name is Connie Willis and I reside in 1001 Pecan Valley Dr. Apt. 14, Marble Falls, Burnet Co. [redacted], County, Texas. I am of sound mind and capable of making this affidavit. I am personally acquainted with the facts herein stated. That I'm sending A. letter To Robert mc Fadden
Regional Director F.B.O.P
Western Region
756 Dublin Blvd. 3rd Floor
Dublin, CA. 98568

Connie Willis
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME by the above-named Affiant on August 28th 2007, to certify which witness my hand and official seal.

Janette Dee Bell
Notary Public

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8/23/07

CONNIE WILLIS
1001 PECAN VALLEY DR. APT 14
MARBLE FALLS, TX 78654
830-798-8239

Robert McFadden
Regional Director F.B.O.P.
Western Region
7526 Dublin Blvd., 3rd Floor
Dublin, CA, 985568

To: Mr. Robert McFadden:

Sir I am writing again regarding my son, James R. Willis, # 65983-080. He remains in the SHU at U.S.P. Atwater in Atwater, CA. on his arrival there 6/22/07. My son was placed in the SHU pending what is referred to as a "Threat Assessment". He was of the opinion that he would be transferred rather quickly, because it would not be safe for him to be put in the prison population at Atwater. So far that hasn't been the case. In fact he was told that Lt. Cobb has cleared him for general population.

My son has maintained that he has reason to believe his safety is in jeopardy at U.S.P. Atwater. It is my understanding

that an inmate, a member of the "Aryan Circle" who was involved in the incident at U.S.P. Pollock, La. is in the general population. I am very concerned about this. Because I know there is a hit out on him I feel his life is in jeopardy at this prison. Sir it is not easy for me to write this letter this situation is causing me much anxiety, many sleepless nights, this safety & well being are serious concerns for me. If anything happened to him I would never forgive myself nor will I rest until the matter was thoroughly investigated to my satisfaction.

James was assaulted by gang members 4/15/01 at U.S.P. Victorville. It seems the problems he is having is due to a "State Charge", he also had problems in many of dorms with White Supremacist gang members at U.S.P. Pollock, LA as I mentioned above.

Sir I am asking you to please see that my son is transferred to a prison where he can be reasonably safe and participate in rehabilitive programs.

I am writing to you as a very concerned mother and a law abiding citizen of our country. I will continue to be a voice in behalf of my son. I will write and call wherever I must in order to insure that my son is being treated fairly and to maintain his safety.

Sir I hope you will do all that is within your power to insure my son is transferred to a prison more appropriate for his situation. Please help my son. And may I remind you my son is a Christian and would do well in a prison with a large Christian population.

Sincerely,
Connie Lofflin

AFFIDAVIT

STATE OF TEXAS X
X
COUNTY OF Burnet - X

BEFORE ME, the undersigned authority, on this day personally appeared Connie Willis. (Affiant), who, being by me duly sworn, made the following statements and swore that they were true:

"My name is Connie Willis. and I reside in Marble Falls tx, county of Burnet. County, Texas. I am of sound mind and capable of making this affidavit. I am personally acquainted with the facts herein stated.

Connie Willis
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME by the above-named Affiant on Sept 21, 2007, to certify which witness my hand and official seal.

JANETTE DEE BALL
Notary Public, State of Texas
My Commission Expires
November 12, 2008

Janette Dee Ball
Notary Public

© SimpleLaw, Inc. (817) 581-0804

September 19, 2007

Director F.B.O.P
Harley Lappin
320 1st Street N.W.
Washington, D.C. 20534

Dear Mr. Harley Lappin:

Sir, I am writing this letter regarding my son, James R. Willis # 68983-080. He is currently in the Special Housing Unit at USP Atwater, in Atwater, C.A., where he has been in the "SHU" since his arrival from USP Victorville in Victorville, CA on June 12, 2007.

James was transferred to Atwater after being seriously assaulted by gang members at the USP Victorville on 4-15-07. He was also previously assaulted at USP Pollock by White Supremist gang members in May 2006. He believes the problems that he is having with these groups is due to a state charge he received. James has reason to believe that members from these groups are at USP Atwater and that they have a hit out on him. My son was placed in the SHU pending what is referred to as a "threat assessment." My son was of the opinion that he would be transferred rather quickly, but so far that isn't the case. In fact, he reports that Lieutenant Cobb had cleared him for general population. My son is currently refusing to leave to the SHU because he does not want to be injured or be forced to resort to violence to defend himself.

The fact that my son has not been transferred to another prison brings me great concern. I have written the Regional Director Mr. Robert McFadden in Dublin, CA twice. My first letter was written 8/5/07. I did not receive a reply from him, but received a letter from the warden of USP Atwater on 8/24/07. I am enclosing a copy for you. He stated my son would be transferred to another prison, which has yet to happen. My second letter to Mr. McFadden was mailed 8/29/07 and I have received no reply to this letter from anyone. I intend to write the office of Internal Affairs about the assault that occurred in Victorsville, as I have reason to believe that prison protocol was not being followed at the time (i.e., a guard was missing from duty at a particular gate).

I am asking you to please see that my son is transferred to a prison where he can be reasonably safe and where he can participate in positive programs. During his stay in prison, my son has become a Christian and has been previously very active in chapel and other Christian activities. Since he was last assaulted, he has been in confinement and not able to worship. I ask that you would take this into consideration when you consider his transfer. If there are any USP's with large Christian populations, I believe he would do well there. He only wishes to serve out the remainder of his sentence in safe and productive manner, without constant fear of being assaulted.

I am writing to you as a very concerned mother, a taxpayer, and a law abiding citizen. This situation is causing me great anxiety and many sleepless nights. If anything happened to my son, I would have difficulty forgiving myself. I will continue to be a voice on behalf of my son until

this matter is investigated and resolved in a matter that assures his basic safety. I will call and write to whomever I must in order to insure that my son is treated fairly.

I hope that you will do all that is within your power to insure that my son is transferred to a prison more appropriate for his situation. Your assistance in this matter is greatly appreciated.

Sincerely,

Connie Willis

Connie Willis

AFFIDAVIT OF TRUTH

Anthony Steven Wright A.W.

Affiant, Anthony Steven Wright
#06748-046 USP
P.O. BOX 24550
TUCSON, AZ. 85734

Date: 10-17-08

RE: James Ray Willis #68983-080
Incident(s) & Atwater U.S.P.

State of Arizona)
)SS. AFFIDAVIT OF TRUTH
County of Pima)

I, Affiant, Anthony Steven Wright, swear to the following to the best of my knowledge and belief under the penalty of perjury under the laws of the united states of America, TO WIT:

On or about June 15th, 2007 at USP Atwater located in Atwater California County of Merced inmate James R. Willis #68983-080 (hereinafter "Willis") was placed in SHU cell #112 at Atwater USP "A-Range". Inmate Willis in cell with affiant for about two or three weeks Willis told me (Affiant) he could not go to general population because he was having problems with white Supremasists gang members.

During the time Willis and affiant were cell mates affiant witnessed Willis notify several staff members including but not limited to the following: Warden D. Smith, SIS LT. Cobb, and Unit Manager J. De Vere.)

Inmate Willis notified the aforementioned staff members that if he were placed in general population (hereinafter "GP") that his life would be in danger Willis also told staff of at least one known enemy (inmate Maddox) who was a member of the Aryan Circle a.k.a AC who was in "GP" at Atwater USP, who posed a serious threat to Willis.

It is known by affiant that the forementioned staff members ignored Willis's request's for a protective custody transfer and that in fact Willis was ordered to go to GP at USP Atwater where Willis was brutally assaulted by other inmates.

On or about October the 10th, 2007 affiant looked out his cell door and noticed an inmate who was standing at the window of another cell directly across from affiant's cell about six feet away on A-range, said inmate was severely beaten-up and was almost un-recognizable[continued]

-this was inmate Willis his head was severely swolled and misshapen.

On or about October the 12th,2007 affiant heard a conversation between Unit Manager Mr. De Vere and inmate Willis Mr. De Vere told Willis that quote:("I did not realize that you had been beaten so badly")De Vere also told Willis that quote:(it should now be evident that a threat does exist and you will be transferred).

While affiant was at USP Atwater from 8-25-05 to about July 2008 inmates held a guard hostage affiant also heard inmates murder another inmate above affiant in the SHU and records will prove fact,and recently a correctional officer whom was a war hero working at Atwater was murdered at Atwater.

Inmates at USP Atwater were frequently assaulting other inmates and also staff. It was not uncommon for inmate on inmate assault's to go unnoticed and to not be stopped by staff. It was also not uncommon for the assailant's of such assaults to go unpunished.

The Captain Mr. Karge himself was stabbed at USP Atwater by violent gang member's.

I,myself-affiant witnessed many gang related assault's while in SHU unit of Atwater USP. Many of my cell-mate's while in SHU while at Atwater were beaten severely in general population by violent inmate's then placed in affiant's cell in SHU.

The record shows that USP Atwater was and is a very dangerous and violent United States Penitentiary.

Affiant will testify to the veracity to same,under the penalty of perjury under the laws of the State of California and the United States of America.

Done this 17th,day of October,2008,C.E.

/s/ Anthony Steven Wright
Anthony Steven Wright,Affiant

AFFIDAVIT OF LARY PETTY

I, LARY PETTY, DO HEREBY DECLARE pursuant to 28 USC § 1746 under penalty of perjury that this affidavit is a true and correct account of my observations concerning an attack on a Federal inmate, James Willis, by inmates at United States Penitentiary Atwater (USP Atwater) on October 9, 2007.

On October 9, 2007, I was in custody of the Bureau of Prisons at USP Atwater in Atwater, California. At approximately 11:30 am, I was walking from housing unit 4A toward the dining hall together with other inmates. It was at this time that I noticed six (6), possibly more, inmates standing in a group at the corner of the West sidewalk and the Main Corridor. I recognised these inmates because they were all known gang members and it appeared that they were waiting for someone. The possibility of trouble heightened my awareness of the situation. I witnessed two members of the group approach an inmate I now know to be inmate James Willis. The two began immediately striking inmate Willis in the face and about his head. The blow and shoving by the first two assailants forced inmate Willis to the ground at which time the others from the group began kicking and hitting inmate Willis.

The assault lasted just under five (5) minutes at which time the assailants scattered in different directions. I noted that the primary assailant was covered with blood and his hands appeared to be swollen, cut and bloody. Despite inmate Willis' repeated cries for help during and following the assault, there was no response from the guards or other prison staff. The was no signal by tower staff to alert others of trouble on the compound.

Inmate Willis was covered with blood and barely made it to his feet. At that time I could see that his face was covered in blood and he was bleeding severly. He stumbled to the Main Corridor where guards finally responded to him. I believe he was taken to medical at that time.

The spot where inmate Willis was assaulted is visible from many different vantage points including the Leiutenant's office, the main tower and the Main Corridor where guards were assigned for the afternoon meal and other

services. It is my belief that must have been noticed by prison staff and was surprised by the lack of response. No noticiable action was taken to secure the scene of the assault or to identify and restrain the assailants. Neither I or others who witnessed the assault were asked to provide statements to prison staff.

Following the attack, I heard from others that the reason inmate Willis had been attacked and brutally beaten was that he was a sex offender as that the gangs on the compound had decided that he should be used as an example of what would happen to all sex offenders at USP Atwater.

I did not see inmate Willis after the attack and did not know what had happened as a result of the assault. I assumed he had been transferred and word on the compound was that no one had been blamed for the incident. I met inmate Willis again at USP Tucson where he is now incarcerated.

Respectfully submitted this 14 day of December, 2005.

LARY PETTY
Reg. No. : 16451-045
USP Tucson
P.O. Box 24550
Tucson, AZ 85734

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

JAMES R. WILLIS,

Plaintiff,

v.

HARLEY G. LAPPIN, et al.,

Defendants.

_____/

1:09-cv-01703 GSA (PC)

ORDER GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS and ORDER DIRECTING PAYMENT OF INMATE FILING FEE BY USP TUCSON ARIZONA

Plaintiff is a federal prisoner proceeding pro se pursuant to Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971), and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Plaintiff has made the showing required by § 1915(a) and accordingly, the request to proceed in forma pauperis will be granted. Plaintiff is obligated to pay the statutory filing fee of $350.00 for this action. 28 U.S.C. § 1915(b)(1). Plaintiff is obligated to make monthly payments in the amount of twenty percent of the preceding month's income credited to plaintiff's trust account. USP Tucson is required to send to the Clerk of the Court payments from plaintiff's account each time the amount in the account exceeds $10.00, until the statutory filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

In accordance with the above and good cause appearing therefore, IT IS HEREBY ORDERED that:

1. Plaintiff's application to proceed in forma pauperis is GRANTED;

2. The Warden of USP Tucson or his designee shall collect payments from plaintiff's prison trust account in an amount equal to twenty per cent (20%) of the preceding

month's income credited to the prisoner's trust account and shall forward those payments to the Clerk of the Court each time the amount in the account exceeds $10.00, in accordance with 28 U.S.C. § 1915(b)(2), until a total of $350.00 has been collected and forwarded to the Clerk of the Court. The payments shall be clearly identified by the name and number assigned to this action.

3. The Clerk of the Court is directed to serve a copy of this order and a copy of plaintiff's in forma pauperis application on the Warden of USP Tucson, by U.S. mail.

4. The Clerk of the Court is directed to serve a copy of this order on the Financial Department, U.S. District Court, Eastern District of California, Fresno Division.

5. Within thirty (60) days of the date of service of this order, plaintiff shall submit a certified copy of his/her prison trust account statement for the six-month period immediately preceding the filing of the complaint, if plaintiff has not already done so.

IT IS SO ORDERED.

Dated: **October 7, 2009**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

HARLEY G. LAPPIN, et al.,

Defendants.

_____/

1:09-cv-01703 AWI-GSA (PC)

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL

(MOTION #9)

On January 19, 2010, plaintiff filed a motion seeking the appointment of counsel. Plaintiff does not have a constitutional right to appointed counsel in this action, Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and the court cannot require an attorney to represent plaintiff pursuant to 28 U.S.C. § 1915(e)(1). Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 298, 109 S.Ct. 1814, 1816 (1989). However, in certain exceptional circumstances the court may request the voluntary assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at 1525.

Without a reasonable method of securing and compensating counsel, the court will seek volunteer counsel only in the most serious and exceptional cases. In determining whether "exceptional circumstances exist, the district court must evaluate both the likelihood of success of the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity of the legal issues involved." Id. (internal quotation marks and citations omitted).

In the present case, the court does not find the required exceptional circumstances. Even if it is assumed that plaintiff is not well versed in the law and that he has made serious allegations which, if proved, would entitle him to relief, his case is not exceptional. This court is faced with similar cases almost daily. Further, at this early stage in the proceedings, the court cannot make a determination that plaintiff is likely to succeed on the merits, and based on a review of the record in this case, the court does not find that plaintiff cannot adequately articulate his claims. Id.

For the foregoing reasons, plaintiff's motion for the appointment of counsel is HEREBY DENIED, without prejudice.

IT IS SO ORDERED.

Dated: January 22, 2010

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS, Plaintiff, v. HARLEY G. LAPPIN, et al., Defendants.	1:09-cv-01703-AWI-GSA-PC ORDER GRANTING MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT (Docs. 7, 11, 12, 13 resolved) THIRTY DAY DEADLINE TO FILE SECOND AMENDED COMPLAINT ORDER FOR CLERK TO SEND COMPLAINT FORM TO PLAINTIFF

James R. Willis ("plaintiff") is a federal prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971). Plaintiff filed the complaint commencing this action on September 28, 2009. (Doc. 1.) On January 19, 2010, plaintiff filed a motion for leave to amend or supplement the complaint, along with a proposed First Amended Complaint, which was filed by the Clerk on January 19, 2010. (Docs. 7, 8.) On March 8, 2010, plaintiff filed a motion for the court to issue a ruling on his motion for leave to amend. (Doc. 11.) On April 26, 2010, plaintiff filed a motion for leave to clarify his prayer for relief in the complaint. (Doc. 12.) On April 26, 2010, plaintiff filed a motion for the court to initiate service of the complaint upon defendants. (Doc. 14.) The court here responds to plaintiff's requests for leave to amend the complaint and his request for initiation of service.

Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a party may amend only by leave of the court or by written consent of the adverse party, and leave shall be freely given when justice so requires. Fed.R.Civ.P. 15(a). When plaintiff submitted the proposed First Amended Complaint on January 19, 2010, he had not amended the complaint before, and no responsive pleading had been served in this action. Therefore, plaintiff had leave to file an amended complaint as a matter of course, and the First Amended Complaint was filed by the Clerk on January 19, 2010. (Doc. 8.)

Now, at this stage of the proceedings, plaintiff expresses a desire to clarify the prayer for relief in the First Amended Complaint. (Doc. 12.) To clarify the prayer for relief, plaintiff must file a Second Amended Complaint making the changes he requires. Because plaintiff has already amended the complaint once, he requires leave of court to amend the complaint again.

"Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so requires.'" AmerisourceBergen Corp. v. Dialysis West, Inc., 445 F.3d 1132, 1136 (9th Cir. 2006) (quoting Fed. R. Civ. P. 15(a)). However, courts "need not grant leave to amend where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in the litigation; or (4) is futile." Id. The factor of "'[u]ndue delay by itself . . . is insufficient to justify denying a motion to amend.'" Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 712,13 (9th Cir. 2001) (quoting Bowles v. Reade, 198 F.3d 752, 757-58 (9th Cir. 1999)).

Here, plaintiff's case has been pending since September 2009. The delay in litigation will be further extended if plaintiff is given leave to amend. However, given that the First Amended Complaint has not been served, and no other party has appeared in the action, amending the complaint will not prejudice the opposing party. The court finds no evidence of bad faith or futility in plaintiff's desire to clarify his prayer for relief. Therefore, in the interest of justice, plaintiff's motion to amend the complaint shall be granted.

Plaintiff is informed that he must demonstrate in his Second Amended Complaint how the conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See Ellis v.

Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

Plaintiff should also note that although he has the opportunity to amend, it is not for the purpose of adding new defendants relating to issues arising after September 28, 2009. In addition, plaintiff should take care to include only those claims that have been exhausted prior to the initiation of this suit on September 28, 2009.

Finally, plaintiff is advised that Local Rule 15-220 requires that an amended complaint be complete in itself without reference to any prior pleading. As a general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once an amended complaint is filed, the original complaint no longer serves any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each defendant must be sufficiently alleged. The Second Amended Complaint should be clearly and boldly titled "Second Amended Complaint," refer to the appropriate case number, and be an original signed under penalty of perjury.

With respect to plaintiff's request for the initiation of service upon defendants, the court will, *sua sponte*, direct the United States Marshal to serve the complaint only after the court has screened the complaint and determined that it contains cognizable claims for relief against the named defendants. Plaintiff can rest assured that he will receive all orders issued in his case as long as he keeps the court apprised of his current address.

Accordingly, it is HEREBY ORDERED that:

1. Plaintiff's motion for leave to file a Second Amended Complaint is GRANTED;

2. This order resolves plaintiff's motions for leave to amend the complaint, motion for a ruling, and motion for initiation of service, filed January 19, 2010, March 8, 2010, and April 26, 2010;

3. Plaintiff is granted thirty (30) days from the date of service of this order in which to file a Second Amended Complaint, using the court's form;

4. The Second Amended Complaint should be clearly and boldly titled "Second Amended Complaint," refer to case number 1:09-cv-01703-AWI-GSA-PC, and be an original signed under penalty of perjury;

5. The Clerk of the Court shall send one civil rights complaint form to plaintiff; and

6. Plaintiff is warned that the failure to comply with this order will result in a recommendation that this action be dismissed for failure to obey a court order.

IT IS SO ORDERED.

Dated: **May 20, 2010**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

v.

HARLEY G. LAPPIN, et al.,

Defendants.

/

1:09-cv-01703-AWI-GSA-PC

ORDER DENYING PLAINTIFF'S MOTION TO EXPEDITE SCREENING OF SECOND AMENDED COMPLAINT (Doc. 17.)

James R. Willis ("plaintiff") is a federal prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed the complaint commencing this action on September 28, 2009. (Doc. 1.) On January 19, 2010, plaintiff filed a motion for leave to amend or supplement the complaint, along with a proposed First Amended Complaint, which was filed by the Clerk on January 19, 2010. (Docs. 7, 8.) On April 26, 2010, plaintiff filed a motion for leave to clarify his prayer for relief in the complaint, and on May 21, 2010, the court granted plaintiff's motion. (Docs. 12, 15.) On June 8, 2008, plaintiff filed a Second Amended Complaint, along with a request for the court to expedite the screening of the complaint, because "[T]he events giving rise to the complaint happened almost '3 years' ago." (Docs. 16, 17.)

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).

The court screens complaints in the order in which they are filed and strives to avoid delays whenever possible. Plaintiff 's Second Amended Complaint was filed less than a week ago and will be screened in due time. Plaintiff has not shown good cause for the court to expedite the screening of his complaint.

Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for the court to expedite the screening of his complaint is DENIED.

IT IS SO ORDERED.

Dated: **June 13, 2010**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS, Plaintiff, v. HARLEY LAPPIN, et al., Defendants. /	CASE NO. 1:09-cv-01703 AWI GSA PC ORDER REQUIRING PLAINTIFF TO EITHER FILE AMENDED COMPLAINT OR NOTIFY COURT OF WILLINGNESS TO PROCEED ONLY ON CLAIMS FOUND TO BE COGNIZABLE (Doc. 1) RESPONSE DUE WITHIN THIRTY DAYS

Screening Order

I. Screening Requirement

Plaintiff is a federal prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to Bivens v. Six Unknown Federal Agents, 403 U.S. 388 (1971). Pending before the Court is the June 8, 2010, first amended complaint.[1]

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall

[1] Plaintiff filed his first amended complaint Pursuant to Federal Rule of Civil Procedure 15(a). The Court has not screened the original complaint.

dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

"Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions," none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a). "Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Swierkiewicz, 534 U.S. at 512. However, "the liberal pleading standard . . . applies only to a plaintiff's factual allegations." Neitze v. Williams, 490 U.S. 319, 330 n.9 (1989). "[A] liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." Bruns v. Nat'l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

II. Plaintiff's Claims

A. Summary of Complaint

Plaintiff is currently housed at the U.S. Penitentiary in Tucson, Arizona. Plaintiff brings this action against correctional officials employed by the U.S. Bureau of Prison (BOP) at the U.S. Penitentiary at Atwater. The events giving rise to the claims at issue in this action allegedly occurred at USP Atwater. Plaintiff claims that Defendants were deliberately indifferent to a risk to Plaintiff's safety, resulting in injury. Specifically, Plaintiff alleges that he was assaulted by other inmates because of his status as a sex offender. Plaintiff alleges that he advised Defendants of the specific threat to his safety, yet he was assaulted. Plaintiff names the following individual defendants: Harley Lappin, Director of the U.S. Bureau of Prisons (BOP); Robert E. McFadden, Wester Regional Director of the BOP; Dennis D. Smith, Warden at Atwater; Associate Warden Belinda Avalos; Associate Warden C. Gant; Lieutenant Cobb; Unit Manager Devere; Lieutenant Paul; Case Manager Liwag; Unit Manager Bowles; Duty Officer Fass; Correctional Counselor Putnam; Unknown correctional officers.

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III. Failure to Protect

"Prison officials have a duty to take reasonable steps to protect inmates from physical abuse." Hoptowit v. Ray, 682 F.2d 1237, 1250-51 (9th Cir. 1982). To establish a violation of this duty, the prisoner must establish that prison officials were "deliberately indifferent" to serious threats to the inmate's safety. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). To demonstrate that a prison official was deliberately indifferent to a serious threat to the inmate's safety, the prisoner must show that "the official [knew] of and disregard[ed] an excessive risk to inmate . . . safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference." Farmer, 511 U.S. at 837.

Plaintiff alleges that he is "vulnerable to be assaulted" because of his classification as a sex offender. Plaintiff alleges that he was targeted for assault by violent gang members. (Am. Compl. p. 6.) On October 9, 2007, Plaintiff was physically assaulted by 6 inmates. (Am. Compl. ¶ 1.)[2] Prior to Plaintiff's transfer to Atwater, he was assaulted at USP Victorville in April of 2007 for the same reason. (Am. Compl. ¶ 2.)

A. Defendant Lappin

Plaintiff's sole allegation regarding Defendant Lappin, the Director of the BOP, is that Plaintiff's mother wrote a letter to Director Lappin, requesting protective custody for Plaintiff and a transfer to an institution where he would be safe and be able to participate in general population programs.

Plaintiff must prove that the Defendants holding supervisory positions personally participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). There is no respondeat superior liability, and each defendant is only liable for his or her own misconduct. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948-49 (2009). A supervisor may be held liable for the constitutional violations of his or her subordinates only if he or she "participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List,

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[2] Plaintiff separately numbers his paragraphs in section IV B of his amended complaint, beginning on page 12. All numbered paragraphs in this order refer to section IV B, also titled by Plaintiff as "factual allegations."

880 F.2d 1040, 1045 (9th Cir. 1989); also Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Preschooler II v. Clark County School Board of Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997). An allegation that an inmate's mother wrote a letter to the Director of the BOP is insufficient to state a claim for relief. As noted above, Plaintiff must allege facts indicating that Lappin was personally aware of the danger to Plaintiff. Plaintiff must allege facts indicating that Director Lappin was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, and facts indicating that Lappin drew the inference. Farmer, 511 U.S. at 837. There are no allegations indicating that Lappin was aware of specific facts from which he could draw an inference that Plaintiff was subjected to a particular danger. Defendant Lappin should therefore be dismissed.

B. Defendant McFadden

In July of 2007, Plaintiff wrote a letter to Defendant McFadden, the Western Regional Director of the BOP. In that letter, Plaintiff "informed Defendant McFadden by letter of his concerns for his personal safety in hopes of enlisting the defendants help in effecting a transfer for the plaintiff." (Am. Compl. ¶ 10.) Plaintiff received a response to the letter in September of 2007, indicating that a threat assessment was completed by the SIS on August 3, 2007, and it was determined that there was not a threat against Plaintiff. That the threat assessment may have been incorrect does not subject the Regional Director to liability. As with Defendant Lappin, Plaintiff fails to allege facts indicating that Defendant McFadden was personally aware of a specific harm to Plaintiff. The facts alleged indicate that, to McFadden's knowledge, a threat assessment had been done. There are no facts alleged indicating that the threat assessment put McFadden on notice of any danger to Plaintiff. Defendant McFadden should therefore be dismissed.

C. Defendant Smith

On June 21, 2007, Plaintiff spoke to Defendant Warden Smith regarding his placement in SHU. Smith advised Plaintiff that when the threat assessment investigation was complete, a decision would be made regarding Plaintiff's possible transfer. Plaintiff's mother wrote a letter to Warden Smith, expressing her concern regarding Plaintiff's safety. Associate Warden Avalos wrote the response to Plaintiff's mother, indicating that Plaintiff was to be transferred. Plaintiff

has not alleged any facts indicating that Defendant Warden Smith personally knew of and disregarded a specific risk to Plaintiff. Taking the allegations of the amended complaint as true and liberally construed, Smith was aware that a threat assessment investigation was being completed. Such an allegation does not subject Smith to liability. That a warden receives a letter from an inmate's mother regarding the inmate's safety similarly fails to state a claim for relief. Plaintiff must allege facts indicating that Smith was personally aware of the particular danger to Plaintiff. He has failed to do so. Defendant Warden Smith should therefore be dismissed.

D. Defendant Avalos

The only conduct charged to Defendant Avalos is that she responded to Plaintiff's mother, indicating that Plaintiff would be transferred. Although Plaintiff may conclude that this subjects her to liability, Plaintiff must allege specific facts to support that conclusion. Plaintiff must allege facts indicating that Avalos was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, and facts indicating that Avalos drew the inference. Farmer, 511 U.S. at 837. Plaintiff has failed to do so. Defendant Avalos should therefore be dismissed.

E. Defendant Gant

Plaintiff alleges that on September 13, 2007, he wrote a "cop-out" to staff regarding his safety concerns. Plaintiff provided information regarding his fears of being targeted for assault by "at least one known prison gang at USP Atwater." (Am. Compl. ¶ 20.) As to Defendant Associate Warden Gant, Plaintiff alleges that he spoke to him on several occasions about his concerns. The Court finds the allegations as to Defendant Gant to be vague. Although Plaintiff has alleged that, despite his concerns, he was attacked by other inmates on account of his offense, he may not hold Defendant Gant liable based on allegations that he spoke to him "about his concerns." Plaintiff must specifically allege facts indicating what Defendant Gant knew, and how he knew it. Plaintiff must allege facts indicating that Gant was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, and facts indicating that Gant drew the inference. Farmer, 511 U.S. at 837. Plaintiff has failed to do so. Defendant Gant therefore be dismissed.

F. Defendant Devere

In late June or early July of 2007, Plaintiff spoke with Defendant Unit Manger Devere for the first time. Devere advised Plaintiff that he was not aware of his situation, and that he would contact Lt. Cobb about the investigation. On September 14, 2007, Plaintiff filed an inmate grievance, form BP-9, with his unit team, which included Devere.[3] In this grievance, Plaintiff "explained specifically his safety concerns, and asked for either a state placement or a protective custody transfer." (Am. Compl. ¶ 18.) The grievance was returned unprocessed, as Plaintiff failed to attach form BP-8. Plaintiff explained that he did not receive his BP-8 from his unit team.

Plaintiff was released from the SHU on September 25, 2007. The same day, he was approached by "several gang members," who told him that inmate Mattox would like to speak to him. Plaintiff met with Mattox, who was accompanied by several gang members. The meeting was without incident. The next day, Plaintiff again met with inmate Mattox and the gang members. Mattox told Plaintiff "that there was a rumor about plaintiff 'that he was a rapo.' Mattox told Plaintiff that he had three weeks to produce paperwork to disprove the rumor." (Am. Compl. ¶ 24.)

Immediately after this conversation, Plaintiff spoke to Devere, and related the confrontation with inmate Mattox. Plaintiff "reaffirmed his belief that his safety was in danger a USP Atwater." Devere took no further action. Plaintiff was assaulted on October 9, 2007. Liberally construed, Plaintiff has stated a colorable claim against Defendant Devere for failure to protect Plaintiff.

G. Defendant Cobb

Plaintiff arrived at USP Atwater on June 12, 2007. Upon his arrival, he spoke with Defendant Cobb, the Special Investigations Supervisor. Plaintiff advised Lt. Cobb "of the exact nature of the threat against him, including informing the defendant about why plaintiff had trouble at his previous two institutions, and also that he believed that Plaintiff had at least one known

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[3] The Bureau of Prisons has established an administrative remedy procedure governing prisoner complaints. The procedure is set forth at 28 C.F.R. § 542.10 et. seq. First, an inmate must attempt to resolve the issue informally by presenting it to staff on Form BP-8 before submitting a Request for Administrative Remedy. 28 C.F.R. § 542.13(a). If dissatisfied with the response, the prisoner may proceed with the formal filing of an Administrative Remedy Request, Form BP-9. 28 C.F.R. § 542.14(a). Upon denial by the institution, the prisoner may appeal the decision by filing a complaint with the Regional Director of the Bureau of Prisons. Form BP-10. 28 C.F.R. § 542.15(a). The Regional Director's decision may be appealed to the General Counsel in Washington, D.C. Form BP-11. Id. Appeal to the General Counsel is the final step in the administrative remedy process. Id.

enemy at USP Atwater." (Am. Compl. ¶ 3.) Plaintiff specifically alleges that Defendant Cobb was aware of the previous threats against him, and the assault at USP Victorville that led to his transfer to Atwater. Plaintiff alleges that Defendant Cobb knew the inmate that Plaintiff believed posed a threat against him. Liberally construed, Plaintiff has stated a colorable claim for relief against Defendant Cobb for failure to protect Plaintiff.

H. Defendant Paul

Plaintiff alleges that on September 19, 2007, he spoke to Defendant Lt. Paul, the SHU Lieutenant, "at length" about his safety concerns. Plaintiff "explained in detail the exact nature of the threat that exists against him." (Am. Compl. ¶ 21.) Plaintiff "pleaded" with Lt. Paul to place him on protective custody status. Lt. Paul ordered Plaintiff released from the SHU into general population. Liberally construed, Plaintiff has stated a colorable claim for relief against Defendant Paul for failure to protect Plaintiff.

I. Defendant Liwag

On June 14, 2007, Plaintiff submitted an inmate request to Defendant Liwag, his case manager. Plaintiff spoke to Liwag, explaining his situation. Liwag told Plaintiff that if it was determined that a threat existed, he would be submitted for transfer to another institution. (Am. Compl. ¶ 6.) Liwag was also a part of the unit team that Plaintiff submitted his grievance to in late August. As noted, the grievance was returned to Plaintiff unprocessed. There are no facts alleged indicating that Liwag processed the grievance, or was personally aware of the specific threat to Plaintiff. Plaintiff alleges generally that he explained his situation and filed a grievance. Plaintiff must allege facts indicating that Liwag was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, and facts indicating that Liwag drew the inference. Farmer, 511 U.S. at 837. Plaintiff has failed to do so. Defendant Liwag should therefore be dismissed.

J. Defendant Bowles

The only reference to Defendant Bowles in the amended complaint is that Defendant Devere, in June or July of 2007, told Plaintiff that he would be gone on sick leave, and that Defendant Bowles would be acting as the Unit Manager in his stead. Plaintiff alleges no facts

indicating that Defendant Bowles knew of and disregarded a specific risk to Plaintiff. Defendant Bowles should therefore be dismissed.

K. Defendant Fass

Plaintiff fails to charge Defendant Fass, the department head of institutional computer services, with any conduct. In order to hold Defendant Fass liable, Plaintiff must allege facts indicating that Defendant Fass knew of and disregarded a specific threat to Plaintiff. Plaintiff has failed to do so. Defendant Fass should therefore be dismissed.

L. Defendant Putnam

The only conduct charged to Defendant Correctional Counselor Putnam is that Plaintiff filed an administrative grievance with Defendant Putnam and that the grievance was rejected because Plaintiff failed to attached a BP-8 form to it. In the grievance, Plaintiff explained that he did not receive a BP-8 from his unit team. The sole conduct charged to Defendant Putnam is that he advised Plaintiff that the BP-8 was never received. There are no facts alleged indicating that Defendant Putnam processed the grievance, or was personally aware of the specific threat to Plaintiff. Plaintiff must allege facts indicating that Putnam was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, and facts indicating that Putnam drew the inference. Farmer, 511 U.S. at 837. Plaintiff has failed to do so. Defendant Putnam should therefore be dismissed.

M. Doe Defendants

Plaintiff names as defendants four unknown correctional officers. "As a general rule, the use of 'John Doe' to identify a defendant is not favored." Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). However, in situations where the identity of the alleged defendants will not be known prior to the filing of a complaint, a plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds. Id. (citing Gordon v. Leeke, 574 F.2d 1147, 1152 (4th Cir. 1978)). Plaintiff will therefore be granted leave to file an amended complaint that identifies the unnamed defendants.

IV. Conclusion and Order

Plaintiff's first amended complaint states a claim under the Eighth Amendment against Defendants Devere, Cobb and Paul for failure to protect Plaintiff. However, the first amended complaint does not state any cognizable claims against Defendants Lappin, McFadden, Smith, Avalos, Gant, Liwag, Bowles, or the unidentified correctional officers. The Court will provide Plaintiff with the opportunity to file an amended complaint curing the deficiencies identified by the Court in this order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff may not change the nature of this suit by adding new, unrelated claims in his amended complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no "buckshot" complaints).

If Plaintiff does not wish to file a second amended complaint and is agreeable to proceeding only on the claims identified in this order as cognizable, Plaintiff may so notify the Court in writing, and the Court will issue a recommendation for dismissal of the other claims and defendants, and will forward to Plaintiff three summonses and three USM-285 forms for completion and return. Upon receipt of the forms, the Court will direct the United States Marshal to initiate service of process.

If Plaintiff opts to amend, his amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what each named defendant did that led to the deprivation of Plaintiff's constitutional or other federal rights, Hydrick, 500 F.3d at 987-88. Plaintiff is reminded that "there is no pure respondeat superior liability, [and] a supervisor [may only be held] liable for the constitutional violations of subordinates 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.'" Id. at 988 (quoting Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)). Although accepted as true, the "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level . . . ." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007) (citations omitted).

Finally, Plaintiff is advised that an amended complaint supercedes the original complaint, Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and must be "complete in itself without reference to the prior or superceded pleading," Local Rule 15-220. Plaintiff is warned that "[a]ll causes of action alleged in an original complaint which are not alleged in an amended complaint are waived." King, 814 F.2d at 567

(citing to London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

Based on the foregoing, it is HEREBY ORDERED that:

1. The Clerk's Office shall send to Plaintiff a civil rights complaint form by a federal prisoner;
2. Within **thirty (30) days** from the date of service of this order, Plaintiff must either:
   a. File a second amended complaint curing the deficiencies identified by the Court in this order, or
   b. Notify the Court in writing that he does not wish to file an amended complaint and wishes to proceed only against Defendants Devere, Cobb and Paul for failure to protect Plaintiff.
3. If Plaintiff fails to comply with this order, this action will be dismissed for failure to obey a court order.

IT IS SO ORDERED.

Dated: **June 16, 2011**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR FILING A COMPLAINT BY A PRISONER UNDER BIVENS V. SIX UNKNOWN NAMED AGENTS OF FEDERAL BUREAU OF NARCOTICS, 403 U.S. 388 (1971)

I. Scope of Bivens Action

A Bivens action is available to challenge violations of the federal constitution or federal statutes which affect the conditions of your confinement or your treatment by government employees while in custody. Although you may ask for and obtain money damages or an injunction, the court cannot issue an order which could affect the length of your sentence in any way. Those types of claims may be raised only through a petition for a writ of habeas corpus. If you want to file a petition for a writ of habeas corpus, you must do so on the correct forms, which are provided by the Clerk of the Court on request.

A. Exhaustion of Administrative Remedies

If there is an inmate appeal or administrative remedy process available at your institution, you may not file a Bivens action, or an action under any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.C. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit. Booth, 532 U.S. at 734.

II. Packet

A copy of a complaint form is attached to this instruction sheet. In addition, included in the packet is an information sheet for prisoners seeking leave to proceed in forma pauperis (without prepayment of filing fees) and a copy of an application to proceed in forma pauperis. To file an action, you must send all the following items to the court:

1. An original and one copy of the complaint. You must keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original. If you wish to have a conformed copy of your complaint returned to you, you must send, in addition to the original, two extra copies and provide the court with a self-addressed postage paid envelope

2. Either a completed in forma pauperis application or the $350.00 filing fee.

NOTICE: Leave to proceed in forma pauperis allows a case to proceed without ***pre-payment*** of the filing fee. However, a prisoner who brings a civil action in forma pauperis shall nevertheless be required to pay the full amount of the filing fee. The court shall collect the filing fee through deductions from the prisoner's trust account. Dismissal of the case does not excuse payment of the full filing fee. See 28 U.S.C. § 1915.

III. Complaint Form

Your complaint must be legibly handwritten or typewritten. You must sign the complaint and declare under penalty of perjury that the facts stated in the complaint are correct. If you need additional space to answer a question, you should attach an additional blank page. You are required to state facts in support of each claim. The complaint should refer to the provision of the federal constitution or federal law on which you are relying, but should not contain legal arguments or citations.

IV. Venue

Your complaint should be filed in the Fresno Division of this court only if one or more of the named defendants is located in the Fresno Division of the Eastern District of California, or if your claim arose in the Fresno Division of this district. The Fresno Division of the Eastern District of California is comprised of the following counties: Fresno, Calaveras, Inyo, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne.

Your complaint should be filed in the Sacramento Division of this court only if one or more of the named defendants is located in the Sacramento Division of the Eastern District of California, or if your claim arose in the Sacramento Division of this district. The Sacramento Division of the Eastern District of California is comprised of the following counties: Alpine, Amador, Butte, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Sutter, Tehama, Trinity, Yolo, and Yuba..

V. Mailing the Forms

When all of the forms described in part II are completed, if you are filing your case in the Fresno Division, mail the original and copies to:

Clerk of the U.S. District Court
for the Eastern District of California
2500 Tulare Street, Room 1501
Fresno, California 93721

If you are filing your case in the Sacramento Division, mail the original and copies to:

Clerk of the U.S. District Court
for the Eastern District of California
501 "I" Street, Suite 4-200
Sacramento, California 95814

VI. After the Complaint is Filed

Once the complaint is filed, the court will review it and decide whether to order service of the complaint on the defendants. You will be sent a copy of any order the court issues. Because of the large volume of cases filed by inmates pending in this court, the court WILL NOT ANSWER INQUIRIES concerning the status of your complaint.

You must keep the Clerk of the Court informed of any change of address. If you fail to do so, the Clerk cannot be responsible for your failure to receive Court orders. This could result in the dismissal of your suit.

The Clerk of the Court cannot provide copies of documents to litigants, except at a charge of fifty cents ($0.50) per page. This charge also applies to litigants proceeding in forma pauperis. Therefore you must keep copies of all documents submitted to the court for your own records.

VII. Submission of Original Paper Exhibits

The Eastern District of California converted to an electronic filing, service, and storage system, effective January 3, 2005. Pro se litigants are exempt from the electronic filing requirement and must submit all documents to the court in paper. Local Rule 5-133(b)(2). Paper documents submitted by pro se litigants for filing will be scanned into the electronic court file by the Clerk's Office. After being scanned into the electronic court file, the paper documents will be retained in the Clerk's Office for a limited period of time and then discarded. Local Rule 39-138(d). For this reason, pro se litigants are cautioned not to send original exhibits to the court. If pro se litigants choose to submit exhibits to the court, the litigants shall retain their original exhibits and send photocopies to the court.

(revised 8/30/06)

Plaintiff's Name_____
Inmate No._____
Address_____
_____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

_____

(Name of Plaintiff) (Case Number)

vs. COMPLAINT

_____ Bivens Action [403 U.S. 388 (1971)]
_____
_____
_____
(Names of all Defendants)

I. **Previous Lawsuits (list all other previous or pending lawsuits on back of this form)**:

A. Have you brought any other lawsuits while a prisoner? Yes __ No __

B. If your answer to A is yes, how many? _____
Describe previous or pending lawsuits in the space below.
(If more than one, use back of paper to continue outlining all lawsuits.)

1. Parties to this previous lawsuit:

Plaintiff _____

Defendants _____
_____
_____
_____

2. Court (if Federal Court, give name of District; if State Court, give name of County)
_____

3. Docket Number _____ 4. Assigned Judge _____

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)
_____

6. Filing date (approx.) _____ 7. Disposition date (approx.) _____

II. Exhaustion of Administrative Remedies

A. Is there an inmate appeal or administrative remedy process available at your institution?

Yes___ No___

B. Have you filed an appeal or grievance concerning **ALL** of the facts contained in this complaint?

Yes___ No___

If your answer is no, explain why not_____

C. Is the process completed?

Yes___ If your answer is yes, briefly explain what happened at each level.

No___ If your answer is no, explain why not.

NOTICE: Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). If there is an inmate appeal or administrative remedy process available at your institution, you may not file an action under Section 1983, or any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.S. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1999 (9th Cir. 2002). **Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit.** Booth, 532 U.S. at 734.

III. **Defendants**

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant _____ is employed as _____ _____ at _____

B. Additional defendants _____

_____

_____

_____

IV. **Statement of Claim**

(State here as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

_____

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_____

V. **Relief.**

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

_____

_____

_____

_____

_____

_____

_____

I declare under penalty of perjury that the foregoing is true and correct.

Date_____ Signature of Plaintiff_____

(Revised 2/15/2006)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

HARLEY G. LAPPIN, et al.,

Defendants.

/

1:09-cv-01703-AWI-GSA-PC

ORDER DENYING PLAINTIFF'S MOTION FOR CLARIFICATION
(Doc. 23.)

Plaintiff James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed the Complaint commencing this action on September 28, 2009. (Doc. 1.) On January 19, 2010, Plaintiff filed the First Amended Complaint. (Doc. 8.) On April 26, 2010, Plaintiff filed a motion for leave to amend the complaint, which was granted by the Court on May 21, 2010. (Docs. 12, 15.) On June 8, 2010, Plaintiff filed the Second Amended Complaint. (Doc. 16.) On June 16, 2011, the Court issued a Screening Order. (Doc. 22.) On June 16, 2011, Plaintiff filed a motion for clarification of the Screening Order. (Doc. 23.) On July 8, 2011, Plaintiff filed a Third Amended Complaint. (Doc. 24.) Plaintiff's motion for clarification is now before the Court.

The Court's Screening Order of June 16, 2011 required Plaintiff to either file an amended complaint, or proceed with the claims found cognizable by the Court. Plaintiff requests clarification of the Screening Order with respect to the Court's findings of cognizable claims and defendants. At this

stage of the proceedings, in light of the fact that Plaintiff filed a Third Amended Complaint on July 8, 2011, the prior Screening Order is no longer of practical significance. The Third Amended Complaint has superceded the Second Amended Complaint, and Plaintiff's prior complaints no longer serve any function in the case. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). At this juncture, the Third Amended Complaint awaits screening by the Court. Therefore, clarification of the June 16, 2011 Screening Order would serve no purpose. Accordingly, Plaintiff's request for clarification of the Screening Order is DENIED.

IT IS SO ORDERED.

Dated: **September 1, 2011**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

v.

HARLEY G. LAPPIN, et al.,

Defendants.

/

1:09-cv-01703-AWI-GSA-PC

ORDER DENYING PLAINTIFF'S MOTION TO EXPEDITE SCREENING OF THIRD AMENDED COMPLAINT (Doc. 25.)

James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed the Complaint commencing this action on September 28, 2009. (Doc. 1.) This action now proceeds on the Third Amended Complaint, filed by Plaintiff on July 8, 2011, which awaits screening by the Court. (Doc. 24.) On July 8, 2011, Plaintiff filed a motion for the Court to expedite screening of the Third Amended Complaint. (Doc. 25.)

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). As a rule, the Court screens complaints in the order in which they are filed and strives to avoid delays whenever possible. Plaintiff 's Third Amended Complaint will be screened in due time. Plaintiff has not shown good cause for the Court to expedite the screening of his complaint.

Accordingly, IT IS HEREBY ORDERED that Plaintiff's motion for the Court to expedite the screening of his Third Amended Complaint is DENIED.

IT IS SO ORDERED.

Dated: September 6, 2011

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

v.

HARLEY G. LAPPIN, et al.,

Defendants.

/

1:09-cv-01703-AWI-GSA-PC

ORDER FINDING COGNIZABLE CLAIMS

ORDER FOR THIS ACTION TO PROCEED WITH PLAINTIFF'S THIRD AMENDED COMPLAINT AGAINST DEFENDANT UNITED STATES FOR NEGLIGENCE UNDER THE FEDERAL TORT CLAIMS ACT, AND AGAINST DEFENDANTS SMITH, AVALOS, COBB, PAUL, DEVERE, BOWLES, WAG, AND GANT FOR FAILURE TO PROTECT PLAINTIFF UNDER THE EIGHTH AMENDMENT

ORDER FINDING SERVICE OF COMPLAINT APPROPRIATE AND FORWARDING SERVICE DOCUMENTS TO PLAINTIFF FOR COMPLETION AND RETURN WITHIN THIRTY DAYS
(Doc. 24.)

I. RELEVANT PROCEDURAL HISTORY

Plaintiff James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971) and the Federal Tort Claims Act. Plaintiff filed the Complaint commencing this action on September 28, 2009. (Doc. 1.) On January 19, 2010, Plaintiff filed the First Amended Complaint. (Doc. 8.) On March 8, 2010, Plaintiff filed a motion for leave to amend the complaint, which was granted by the Court on May

21, 2010. (Docs. 11, 15.) On June 8, 2010, Plaintiff filed the Second Amended Complaint. (Doc. 16.) The Court screened the Second Amended Complaint pursuant to 28 U.S.C. § 1915A and issued an order on June 16, 2011, requiring Plaintiff to either file a Third Amended Complaint or notify the Court that he was willing to proceed only on the claims found cognizable by the Court. (Doc. 22.) On July 8, 2011, Plaintiff filed the Third Amended Complaint, which is now before the Court for screening. (Doc. 24.)

II. SCREENING REQUIREMENT

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

A complaint is required to contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)). While a plaintiff's allegations are taken as true, courts "are not required to indulge unwarranted inferences," Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Iqbal 129 S.Ct. at 1949. While factual allegations are accepted as true, legal conclusions are not. Id. The mere possibility of misconduct falls short of meeting this plausibility standard. Id.

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III. SUMMARY OF THIRD AMENDED COMPLAINT

Plaintiff is currently incarcerated at the United States Penitentiary in Tucson, Arizona ("USP-Tucson"). The events at issue in the Third Amended Complaint allegedly occurred at the United States Penitentiary in Atwater, California ("USP-Atwater"), while Plaintiff was incarcerated there. Plaintiff names as defendants Warden Dennis Smith, Associate Warden Belinda Avalos, Associate Warden Carolyn Gant, Lieutenant Cobb (Special Investigation Supervisor ("SIS")), Lieutenant Paul, Mr. Devere (Unit Manager for Buildings 4A, 5A, and 5B), Mrs. Bowles (Unit Manager for Building 6), Mr. Li Wag (Case Manager), and the United States.

Plaintiff alleges as follows in the Third Amended Complaint.

On April 15, 2007, Plaintiff was assaulted at the United States Penitentiary in Victorville, California ("USP-Victorville") and was subsequently transferred to USP-Atwater. It was documented in Plantiff's Central File that he was assaulted because of his sex-offender label.

On June 12, 2007, upon arrival at USP-Atwater, Plaintiff was interviewed by defendant Lt. Cobb. Plaintiff told defendant Cobb about his assault at USP-Victorville due to his status as a sex-offender and told Cobb that he had at least one known enemy at USP-Atwater. Defendant Cobb acknowledged that he was aware of Plaintiff's history and knew Plaintiff's enemy, Kenneth Mattox. Defendant Cobb placed Plaintiff in the Special Housing Unit ("SHU"), pending an investigation.

On June 14, 2007, Plaintiff spoke to his case manager, defendant Wag, explained his situation, and gave him a Cop-Out (written request) explaining his safety concerns. Defendant Wag did not respond to the Cop-Out.

On June 21, 2007, Plaintiff spoke to defendant Warden Smith about his situation. Warden Smith told Plaintiff that when the investigation was concluded, a decision whether to transfer Plaintiff would be made.

In late June or early July of 2007, Plaintiff explained his situation to defendant Devere. Defendant Devere told Plaintiff that he would contact the SIS Lt. Cobb about the investigation. Defendant Devere told Plaintiff he was going on sick leave, and defendant Bowles would be handling his caseload during his absence.

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On July 7, 2007, Plaintiff wrote a letter to Regional Director Robert McFadden, explaining his situation. The letter was received by McFadden on July 12, 2007. A copy was forwarded to Warden Smith. On August 13, 2007, Warden Smith responded that the investigation was completed, the threat against Plaintiff was unverified, and Plaintiff would be released into the General Population. SIS never interviewed Plaintiff while he was in the SHU. Upon receipt of this information, Plaintiff sought a transfer and enlisted his mother's assistance. Plaintiff's mother called and spoke to defendants Wag and Devere, reiterating Plaintiff's safety concerns and pleading for a transfer, but the transfer was not granted. She wrote at least four letters, two to Mr. McFadden, one to Harley Lappin (Director of the BOP), and one to Warden Smith, between August and September 2007. These letters were sent down the chain of command to Warden Smith, defendant Devere, and defendant Wag, and placed in Plaintiff's Central File.

In August 2007, Plaintiff wrote a Cop-Out to defendant Wag, requesting a transfer and reminding Wag of his safety concerns.

On August 17, 2007, Plaintiff wrote Cop-Outs to Warden Smith, conveying his concerns that the threat against him was determined to be unverified. Plaintiff explained the history of threats against him due to his sex-offender status and told the Warden that he feared for his life if forced into the General Population. Plaintiff knew that USP-Atwater was a very violent and dangerous prison controlled by gangs, and that inmates labeled as sex offenders or snitches were routinely assaulted.

On August 17, 2007, Plaintiff wrote a Cop-Out to defendant Bowles about his known enemy, Kenneth Mattox, and the threats against Plaintiff. Plaintiff handed the Cop-Out to Bowles, who assured Plaintiff she would look into this matter, but she never responded to the Cop-Out. A record of this Cop-Out is in Plaintiff's Central File.

Associate Warden Gant responded to the Cop-Out Plaintiff sent to Warden Smith. Plaintiff spoke to Gant on at least three occasions, during her routine visits to the SHU, informing her of the threat that existed against him.

On August 24, 2007, Associate Warden Avalos responded to Plaintiff's mother's correspondence, on Warden Smith's behalf. Avalos stated that the threat against Plaintiff was not substantiated, but USP-Atwater staff had decided to transfer Plaintiff. No such transfer occurred.

In September 2007, Plaintiff spoke to Associate Warden Avalos and told her that the SIS Department had not come to see him about the investigation since his placement in the SHU, and that he was not scheduled for transfer. Plaintiff told her of his safety concerns and asked for the investigation to be reopened. Avalos said she would look into the matter, but Plaintiff did not receive a new investigation or a transfer.

On September 14, 2007, Plaintiff filed a BP-8 informal resolution form with his Unit Counselor Mr. Putnam, requesting administrative remedies. The BP-8 form was never responded to. Plaintiff proceeded to file a BP-9 form, Log number #466507-F1, with defendants Wag and Devere, explaining his safety concerns and requesting a transfer. The BP-9 form was rejected because the BP-8 form was not attached as required, even though a BP-9 form of a serious or life threatening nature should be processed without completion of a BP-8 informal resolution.

On September 19, 2007, Plaintiff spoke to defendant Lt. Paul in Paul's office about his safety concerns, and Paul agreed that if Plaintiff's allegations were true, Plaintiff would be in danger in General Population. Although Plaintiff pleaded with Lt. Paul to place him on Protective Custody status, Lt. Paul told Plaintiff he would be ordered to the General Population, and if he refused the order, he would receive incident reports for refusing to program.

On September 25, 2007, Plaintiff was ordered to leave the SHU and place in the General Population. On September 26, 2007, Plaintiff encountered his enemy, inmate Kenneth Mattox, who was accompanied by six other inmates. Mattox told Plaintiff there was a rumor that Plaintiff was a "rapo" (imprisoned on a sex offense), and Plaintiff had three weeks to produce paperwork disproving it. Immediately after this confrontation, Plaintiff spoke to his Unit Manager defendant Devere and told him about the conversation with Mattox. Devere took no action to protect Plaintiff.

On October 9, 2007, during the noon meal, Plaintiff was attacked and brutally assaulted by six inmates, while inmate Mattox acted as a lookout. There were no correctional officers present on the sidewalk at the time of the assault. The assault occurred in plain view of Housing Units 6A and 6B, the Lieutenants Office, and the Central Yard tower, but staff did not assist Plaintiff. Plaintiff was severely beaten for three to five minutes, and kicked and stomped with hard-toed boots. Plaintiff's head was severely swollen and misshapen, his left eye was swollen completely shut, his

nose was broken, his left sinus cavity was fractured, and he had deep lacerations on his scalp and multiple scrapes and contusions all over his body. Plaintiff was taken to Mercy Medical Center in Merced, California, and required corrective surgery to repair his face. Plaintiff also suffered a concussion.

Plaintiff continues to have headaches, blurred vision, and dizzy spells. Plaintiff also suffers from panic attacks, paranoia, and violent nightmares as a result of the attack.

Plaintiff requests monetary damages and injunctive and declaratory relief.

IV. PLAINTIFF'S CLAIMS

A. Federal Tort Claims Act

The FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, waives the sovereign immunity of the United States for certain torts committed by federal employees. FDIC v. Meyer, 114 S.Ct. 996, 1000 (1994). The FTCA provides that district courts have exclusive jurisdiction of civil actions against the United States for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee" of the federal government while acting within the scope of his office or employment. 28 U.S.C. § 1346(b).

A claim under the FTCA is barred unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." United States v. Kubrick, 444 U.S. 111, 113 (1979) (*quoting* 28 U.S.C. § 2401(b)). The timely filing of an administrative claim is a jurisdictional prerequisite to the bringing of a suit under the FTCA, and, as such, should be affirmatively alleged in the complaint. Gillespie v. Civiletti, 629 F.2d 637, 640 (9th Cir.1980) (*citing* 28 U.S.C. § 2675). A claim may not be filed in federal court until the plaintiff has received a final denial of the claim from the appropriate agency. Id. "A district court may dismiss a complaint for failure to allege this jurisdictional prerequisite. However, the pleader should be given an opportunity to file an amended complaint to attempt to cure such pleading defects." Id.

In the Third Amended Complaint, Plaintiff alleges that he exhausted all available administrative remedies, including an "administrative Tort claim." (3ACP, Doc. 24 at 4:3-6.) In the Second Amended Complaint, Plaintiff alleged that he exhausted his remedies and attaching a copy of his Claim to the Federal Bureau of Prisons dated January 22, 2009. (2ACP, Doc. 16 at 7, 24-30.)

Plaintiff alleged in the First Amended Complaint that his Federal Tort Administrative Claim No. TRT-WXR-2009-2029 was completed and denied on May 26, 2009. (ACP, Doc. 8 at 7, ¶2.D.) As such, it appears on the face of the complaint that Plaintiff timely filed an administrative claim to a federal agency as required by 28 U.S.C. § 2675. Id. ("The timely filing of an administrative claim is a jurisdictional prerequisite to the bringing of a suit under the FTCA, and, as such, should be affirmatively alleged in the complaint.") (internal citation omitted).

Negligence

The elements of a negligence claim are duty, breach of duty, proximate cause, and damages. Minch v. Department of California Highway Patrol, 140 Cal.App.4th 895, 900-01 (Cal. App. 2006). Plaintiff alleges that the United States owed him a duty to protect him from being assaulted and breached that duty due to the negligent acts or omissions of its agents, the defendants. Plaintiff alleges that defendants failed to investigate Plaintiff's repeated requests for protective custody, failed to transfer Plaintiff, failed to monitor the movement of inmates at the time Plaintiff was assaulted, failed to process Plaintiff's prison grievance, failed to notice indicators that an assault was about to occur, and failed to render assistance to Plaintiff while he was being assaulted. Plaintiff alleges that as a result of defendants' conduct, he suffered serious injuries.

The Court finds that Plaintiff states a claim for negligence against the United States for the conduct of defendants Smith, Avalos, Cobb, Paul, Devere, Bowles, Wag, and Gant.

B. Bivens Claims

A Bivens action is the federal analog to suits brought against state officials under 42 U.S.C. § 1983. Hartman v. Moore, 547 U.S. 250, 126 S.Ct. 1695 (2006). Plaintiff alleges that individual prison employees at USP-Atwater violated his constitutional rights, which suggests a Bivens claim against federal officers. Iqbal, 129 S.Ct. at 1947-48 (citing Bivens, 403 U.S. 388, 91 S.Ct. 1999 (1971)); Correctional Serv. Corp. v. Malesko, 534 U.S. 61, 66, 122 S.Ct. 515, 519 (2001); Pollard v. GEO Group, Inc., 629 F.3d 843, 854 (9th Cir. 2010). A Bivens claim is only available against officers in their individual capacities, Morgan v. U.S., 323 F.3d 776, 780 n.3 (9th Cir. 2003); Vaccaro v. Dobre, 81 F.3d 854, 857 (9th Cir. 1996), and Plaintiff must allege facts linking each named defendant to the violation of his rights, Iqbal, 129 S.Ct. at 1948; Simmons v. Navajo County,

Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). The factual allegations must be sufficient to state a plausible claim for relief, and the mere possibility of misconduct falls short of meeting this plausibility standard. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

Eighth Amendment Claim - Failure to Protect

In 1980, the Supreme Court held that a federal inmate could bring suit for money damages against federal prison officials under the Eighth Amendment. Carlson v. Green, 446 U.S. 14, 24, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980). The Eighth Amendment protects prisoners from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. Farmer v. Brennan, 511 U.S. 825, 832-33, 114 S.Ct. 1970 (1994) (internal citations and quotations omitted). Prison officials have a duty to take reasonable steps to protect inmates from physical abuse, Id. at 833; Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005), and the failure of prison officials to protect inmates from attacks by other inmates may rise to the level of an Eighth Amendment violation where prison officials know of and disregard a substantial risk of serious harm to the plaintiff, e.g., Farmer, 511 U.S. at 847; Hearns, 413 F.3d at 1040.

The Court finds that Plaintiff states cognizable claims against defendants Smith, Avalos, Cobb, Paul, Devere, Bowles, Wag, and Gant for failure to protect him, in violation of the Eighth Amendment.

C. Relief Requested

In addition to monetary damages, Plaintiff also requests injunctive and declaratory relief.

Plaintiff is currently incarcerated at USP-Tucson, and the past events at issue in this action occurred at USP-Atwater. When an inmate seeks injunctive relief concerning the prison where he is incarcerated, his claims for such relief become moot when he is no longer subjected to those conditions. Nelson v. Heiss, 271 F.3d 891, 897 (9th Cir. 2001); Dilley v. Gunn, 64 F.3d 1365, 1368 (9th Cir. 1995); Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991). Further, any award of

equitable relief is governed by the Prison Litigation Reform Act, which provides in relevant part, "Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Based on the nature of the claims at issue in this action, which involve past conduct, Plaintiff is not entitled to injunctive relief and is therefore confined to seeking money damages for the violations of his federal rights.

With regard to declaratory relief, "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948). "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985). In the event that this action reaches trial and the jury returns a verdict in favor of Plaintiff, that verdict will be a finding that Plaintiff's rights were violated. A declaration that defendant violated Plaintiff's rights is unnecessary.

V. CONCLUSION AND ORDER

The Court finds that Plaintiff's Third Amended Complaint states a cognizable claim against defendant United States of America for negligence under the Federal Tort Claims Act, and against defendants Smith, Avalos, Cobb, Paul, Devere, Bowles, Wag, and Gant for failure to protect him, in violation of the Eighth Amendment. The Court will begin the process to initiate service upon the defendants by the United States Marshal.

Based on the foregoing, it is HEREBY ORDERED that:

1. The Court finds that Plaintiff states a cognizable claim against defendant United States of America for negligence under the Federal Tort Claims Act; and against

///

defendants Smith, Avalos, Cobb, Paul, Devere, Bowles, Wag, and Gant for failure to protect him, in violation of the Eighth Amendment;

2. This action shall proceed for money damages only;

3. Service is appropriate for the following defendants:

UNITED STATES OF AMERICA

WARDEN DENNIS SMITH

ASSOCIATE WARDEN BELINDA AVALOS

LIEUTENANT COBB

LIEUTENANT PAUL

UNIT MANAGER DEVERE

UNIT MANAGER BOWLES

CASE MANAGER LI WAG

ASSOCIATE WARDEN CAROLYN GANT

4. The Clerk of the Court shall send Plaintiff nine (9) USM-285 forms, nine (9) summonses, a Notice of Submission of Documents form, an instruction sheet, and a copy of the Third Amended Complaint filed on July 8, 2011 (Doc. 24);

5. Within **thirty (30) days** from the date of this order, Plaintiff shall complete the attached Notice of Submission of Documents and submit the completed Notice to the court with the following documents:

   a. Completed summonses;

   b. One completed USM-285 form for each defendant listed above; and

   c. Thirteen (13) copies of the endorsed Third Amended Complaint filed on July 8, 2011;

6. Plaintiff need not attempt service on defendants and need not request waiver of service. Upon receipt of the above-described documents, the court will direct the United States Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4 without payment of costs; and

7. The failure to comply with this order will result in a recommendation that this action be dismissed.

IT IS SO ORDERED.

Dated: November 29, 2011 **/s/ Gary S. Austin**
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

HARLEY G. LAPPIN, et al.,

Defendants.

/

1:09-cv-01703-AWI-GSA-PC

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT

(Motion #37)

NINETY-DAY DEADLINE

Plaintiff is a prisoner proceeding pro se in a civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971), and the Federal Tort Claims Act. On March 20, 2012, defendants United States of America, ,Smith, Avalos, Cobb, Paul, Devere, Bowles, Wag, and Gant ("Defendants") filed a motion to extend time to respond to the third amended complaint. Good cause having been presented to the court and GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that:

Defendants are granted ninety (90) days from the date of service of this order in which to respond to the third amended complaint.

IT IS SO ORDERED.

Dated: March 22, 2012

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

v.

HARLEY G. LAPPIN, et al.,

Defendants.

/

1:09-cv-01703-AWI-GSA-PC

ORDER DENYING MOTION TO SCHEDULE DISCOVERY

(Doc. 41.)

James R. Willis ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on September 28, 2009. (Doc. 1.) This action now proceeds on the Third Amended Complaint filed on July 8, 2011, against defendant United States of America for negligence under the Federal Tort Claims Act, and defendants Dennis Smith (Warden), Belinda Avalos (Associate Warden), Lt. Cobb, Lt. Paul, Unit Managers Devere and Bowles, Case Manager Liwag, and Carolyn Gant (Associate Warden) for failure to protect Plaintiff under the Eighth Amendment. (Doc. 24.)

On May 21, 2012, Plaintiff filed a motion for the Court to schedule discovery in this action. (Doc. 41.)

The Court will issue a scheduling order setting a schedule for discovery after defendants have filed an Answer to the complaint. Defendants have not yet responded to the complaint. Therefore, Plaintiff's motion is premature and shall be denied.

Accordingly, IT IS HEREBY ORDERED that Plaintiff's motion for the Court to schedule discovery in this action, filed on May 21, 2012, is DENIED.

IT IS SO ORDERED.

Dated: **June 4, 2012**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

HARLEY G. LAPPIN, et al.,

Defendants.

/

1:09-cv-01703-AWI-GSA-(PC)

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS

(Motion # 44)

Plaintiff's Response Due September 28, 2012

Plaintiff is a prisoner proceeding pro se in a civil rights action pursuant to Bivens v. Six Unknow Agents, 403 U.S. 388 (1971). On July 2, 2012, Plaintiff filed a motion to extend time to respond to Defendants' motion to dismiss. On July 11, 2012, Defendants filed a notice of non-opposition to the extension of time. Good cause having been presented to the court and GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that:

Plaintiff is granted an extension of time until September 28, 2012 in which to file a response to Defendants' June 20, 2012 motion to dismiss.

IT IS SO ORDERED.

Dated: July 12, 2012

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

HARLEY G. LAPPIN, et al.

Defendants.

_____/

1:09-cv-01703-AWI-GSA (PC)

ORDER GRANTING EXTENSION OF TIME FOR DEFENDANTS TO FILE A REPLY TO PLAINTIFF'S OPPOSITION (Doc. 49.)

DEADLINE: AUGUST 20, 2012

Plaintiff is a prisoner proceeding pro se with this civil rights action pursuant to 42 U.S.C. § 1983. On July 17, 2012, defendants United States of America, Warden Smith, Associate Warden Avalos, Lieutenant Cobb, Lieutenant Paul, Unit Manager Devere, Unit Manager Bowles, and Case Manager Li Wag ("Defendants") filed a motion to extend time to reply to Plaintiff's opposition to Defendants' motion to dismiss of June 20, 2012. (Doc. 49.)

I. DEFENDANTS' MOTION

Defendants have requested an extension of time to reply to Plaintiff's opposition to Defendants' motion to dismiss, in light of the Ninth Circuit's recent decision in Woods v. Carey, No. 09-15548, 09-16113, 2012 WL 2626912 (9th Cir. July 6, 2012). Defendants inform the Court that while Plaintiff was given Rand and Wyatt Notices via the Court's Second Informational Order

of January 6, 2012, Plaintiff was not given any notice at the time Defendants' motion to dismiss was filed, as required by Woods. Defendants report that on July 11, 2012, they served a copy of the Second Informational Order upon Plaintiff, providing the requisite Notice. Defendants request that Plaintiff be granted additional time to consider the information set forth in the Second Informational order and to file further opposition to the motion to dismiss, and that Defendants be granted an extension of time to reply to Plaintiff's opposition.

II. DISCUSSION

The Ninth Circuit's requirements to serve Rand and Wyatt Notices, and therefore the requirements discussed in the Woods decision, are not applicable to the motion to dismiss filed by Defendants in this case. In Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998), the Court required that adequate fair notice be provided to a pro se prisoner litigant to inform him of the requirements to defeat a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Woods, 2012 WL 2626912 at *3. In Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003), the Court extended the notice requirement, requiring that "fair notice of the requirements needed to defeat a defendant's motion to dismiss *for failure to exhaust administrative remedies* must also be provided to a pro se prisoner litigant." Id. (emphasis added).[1] In Woods, the Court required that the fair notice required by Rand and Wyatt be given to pro se prisoner litigants in civil rights cases *at the time of the motion*, rather than generic notice at the outset of the litigation. Id. at *4 (emphasis added). The Ninth Circuit has not extended this notice requirement to cases in which the defendant files a motion to dismiss which is not based on failure to exhaust administrative remedies.

In the present action, Defendants filed a motion to dismiss on June 12, 2012, for lack of subject matter jurisdiction over the negligence claims under the Federal Tort Claims Act, and for

[1] In extending the notice requirement, the Wyatt court "instructed that 'if the district court looks beyond the pleadings to a factual record in deciding the motion to dismiss for failure to exhaust . . . then the court must assure that [the plaintiff] has fair notice of his opportunity to develop a record.'" Woods, 12 WL 2626912 at *3 (quoting Wyatt, 315 F.3d at 1120 n. 14.)

Plaintiff's failure to state a Bivens claim, based on qualified immunity. (Doc. 43.) No part of Defendants' motion to dismiss is based on failure to exhaust administrative remedies. Therefore, the requirements to serve Rand and Wyatt Notices, as discussed in Woods, are not applicable to Defendants' motion to dismiss in this action, and the Court finds no good cause to allow Plaintiff additional time to oppose the motion to dismiss as a result of the decision in Woods or re-service of the Second Informational Order.

Plaintiff filed his opposition to Defendants' motion to dismiss on July 16, 2012. (Doc. 47.) Under Local Rule 230(l), Defendants have seven days after the opposition is served to file a reply. L.R. 230(l). The Court shall grant Defendants an extension of time to file a reply.

III. CONCLUSION

Based on the foregoing, and good cause appearing, IT IS HEREBY ORDERED that Defendants are granted an extension of time until August 20, 2012 in which to file a reply to Plaintiff's opposition to Defendants' motion to dismiss of June 12, 2012.

IT IS SO ORDERED.

Dated: July 19, 2012 **/s/ Gary S. Austin**
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,
Plaintiff,

v.

HARLEY G. LAPPIN, et al.,

Defendants.
_____/

1:09-cv-01703-AWI-GSA-PC

ORDER STRIKING SURREPLY
(Doc. 53.)

I. BACKGROUND

James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971) and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. Plaintiff filed the Complaint commencing this action on September 28, 2009. (Doc. 1.) The case now proceeds with the Third Amended Complaint filed on July 8, 2011, against defendant United States of America for negligence under the Federal Tort Claims Act; and against defendants Warden Dennis Smith, Associate Warden Belinda Avalos, Lieutenant ("Lt.") Cobb, Lt. Paul, Unit Manager Devere, Unit Manager Mrs. Bowles, Case Manager Liwag,[1] and Associate Warden Carolyn Gant for failure to protect Plaintiff, in violation of the Eighth Amendment.[2] (Doc. 24.)

[1] In the Third Amended Complaint, Plaintiff spelled this defendant's name as Li Wag. 3ACP at 2. Defendant has corrected the spelling to Liwag. Motion, Doc. 43-1 at 24 ¶4.

[2] To date, Defendant Gant has not been served with process or appeared in this action. (Doc. 35.)

On June 20, 2012, Defendants filed a motion to dismiss. (Doc. 43.) On July 16, 2012, Plaintiff filed an opposition to the motion. (Docs. 47, 48.) On August 20, 2012, Defendants filed a reply to the opposition. (Doc. 51.) On August 31, 2012, Plaintiff filed a surreply. (Doc. 53.)

II. SURREPLY

The Local Rules provide for a motion, an opposition, and a reply. Neither the Local Rules nor the Federal Rules provide the right to file a surreply, and the Court neither requested one nor granted a request on the behalf of Plaintiff to file one. Accordingly, Plaintiff's surreply shall be stricken from the record.

III. CONCLUSION

Based on the foregoing, Plaintiff's surreply, filed on August 31, 2012, is STRICKEN from the record.

IT IS SO ORDERED.

Dated: October 12, 2012 **/s/ Gary S. Austin**
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

HARLEY G. LAPPIN, et al.,

Defendants.

/

1:09-cv-01703-AWI-GSA-PC

ORDER DENYING PLAINTIFF'S MOTION TO PROHIBIT SPOLIATION OF EVIDENCE (Doc. 52.)

I. BACKGROUND

Plaintiff James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed the Complaint commencing this action on September 28, 2009. (Doc. 1.) This action now proceeds on the Third Amended Complaint filed by Plaintiff on July 8, 2011, against defendant United States for negligence under the FTCA; and against defendants Warden Dennis Smith, Associate Warden Belinda Avalos, Lieutenant ("Lt.") Cobb, Lt. Paul, Unit Manager Devere, Unit Manager Mrs. Bowles, Case Manager Liwag,[1] and Associate Warden Carolyn Gant for failure to protect Plaintiff, in violation of the Eighth Amendment.[2] (Doc. 24.).

On August 27, 2012, Plaintiff filed a motion seeking a court order to prohibit spoliation of evidence by Defendants. (Doc. 52.)

[1] In the Third Amended Complaint, Plaintiff spelled this defendant's name as Li Wag. 3ACP at 2. Defendant has corrected the spelling to Liwag. Motion, Doc. 43-1 at 24 ¶4.

[2] To date, defendant Gant has not been served with process or appeared in this action. (Doc. 35.)

II. MOTION TO PROHIBIT SPOLIATION OF EVIDENCE

"Spoliation of evidence is the 'destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation.'" Kearney v. Foldy & Lardner, LLP, 590 F.3d 638, 649 (9th Cir. 2009) (quoting Hernandez v. Garcetti, 68 Cal.App.4th 675, 680, 80 Cal.Rptr.2d 443 (1998)). "Litigants owe an uncompromising duty to preserve what they know or reasonably should know will be relevant evidence in a pending lawsuit, or one in the offing . . . ." JUDGE WILLIAM W. SCHWARZER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 11:125 (2004) (internal quotations and citations omitted). Further, the destruction of evidence is sanctionable conduct.

Plaintiff requests relief via a court order requiring the defendants to preserve all evidence in this action, or to refrain from spoliation of evidence, including but not limited to the following: "All investigative reports regarding the incidents giving rise to this claim, all post assault photographs taken of plaintiff, video recordings from security cameras of the actual assault against plaintiff, [t]he officer Post orders of Tower 7 (Yard Tower) all compound officers, facility cooridor [*sic*] officer, and Building 6A and 6B, for the time and date of the assault, [a]ny and all documentation in connection to plaintiff's requests for protective custody or transfers from between May of 2006 leading up to the assault of Oct. 2007, and until his transfer from USP-Atwater, with responses to such." Motion, Doc. 52 at 2.

Given the duty to preserve evidence, Plaintiff's motion shall be denied. The Court declines to presume that Defendants will destroy evidence, and Plaintiff has provided no evidence that evidence is in danger of being destroyed.

III. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that Plaintiff's motion to prohibit spoliation of evidence, filed on August 27, 2012, is DENIED.

IT IS SO ORDERED.

Dated: **December 4, 2012**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,	1:09-cv-01703-AWI-GSA-PC
Plaintiff,	ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (Doc. 56.)
vs.	
HARLEY G. LAPPIN, et al.,	ORDER GRANTING IN PART DEFENDANTS' MOTION TO DISMISS (Doc. 43.)
Defendants.	ORDER FOR THIS CASE TO PROCEED ONLY AGAINST DEFENDANT DEVERE FOR FAILURE TO PROTECT PLAINTIFF UNDER THE EIGHTH AMENDMENT
	ORDER DISMISSING ALL OTHER CLAIMS AND DEFENDANTS
_____/	

James R. Willis ("Plaintiff") is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On October 17, 2012, findings and recommendations were entered, recommending that Defendants' motion to dismiss be granted in part. (Doc. 56.) On November 14, 2012, Plaintiff filed objections to the findings and recommendations. (Doc. 57.) On November 16, 2012, Defendants filed objections to the findings and recommendations. (Doc. 58.)

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304, this Court has conducted a de novo review of this case. Having carefully reviewed the entire file, including the parties' objections, the Court finds the findings and recommendations to be supported by the record and proper analysis.

As explained by the Magistrate Judge, the failure of prison officials to protect inmates from attacks by other inmates may rise to the level of an Eighth Amendment violation where prison officials know of and disregard a substantial risk of serious harm to the plaintiff. E.g., Farmer v. Brennan, 511 U.S. 825, 847 (1994); Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). An officer can be held liable for failing to intercede if he had a "realistic opportunity" to intercede. Cunningham v. Gates, 229 F.3d 1271, 1289 (9th Cir. 2000). At issue in the pending motion to dismiss is whether Defendants are entitled to qualified immunity for Plaintiff's claims of failing to protect him. The Supreme Court in Saucier v. Katz, 533 U.S. 194 (2001), outlined a two-step approach to qualified immunity. The first step requires the court to ask whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier, 533 U.S. at 201; Bull v. City and County of San Francisco, 595 F.3d 964, 971 (9th Cir. 2010); Millender, 564 F.3d at 1148. "If the answer to the first inquiry is yes, the second inquiry is whether the right was clearly established: in other words, 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Millender, 564 F.3d at 1148 (quoting Saucier, 533 U.S. at 201). The court agrees with the Magistrate Judge that Plaintiff's statements to most Defendants – that he was afraid for his safety based upon Plaintiff's record and experiences at another prison – may entitle these Defendants to qualified immunity. However, given the additional information of a specific threat given to Defendant Devere, the court finds a reasonable officer would realize this situation required further immediate attention, particularly when Plaintiff had repeatedly warned Defendant Devere and others, prior to the specific threat, of possible harm to Plaintiff if he were placed in general population.

Accordingly, THE COURT HEREBY ORDERS that:

1. The Findings and Recommendations issued by the Magistrate Judge on October 17, 2012, are adopted in full;
2. Defendants' motion to dismiss, filed on June 20, 2012, is granted in part;
3. This case now proceeds only against defendant Unit Manager Devere, on Plaintiff's Bivens claims, for failure to protect Plaintiff under the Eighth Amendment.
4. All other claims and defendants are dismissed from this action;
5. Plaintiff's negligence claims against defendant United States are dismissed from this action for lack of subject matter jurisdiction, under the discretionary function exception of the Federal Tort Claims Act;
6. Plaintiff's Bivens claims against defendants Warden Dennis Smith, Associate Warden Belinda Avalos, Lt. Cobb, Lt. Paul, Unit Manager Mrs. Bowles, Case Manager Liwag, and Associate Warden Carolyn Gant, for failure to protect Plaintiff under the Eighth Amendment, are dismissed from this action based on qualified immunity;
7. Defendants United States, Smith, Avalos, Cobb, Paul, Bowles, Liwag, and Gant are dismissed from this action based on Plaintiff's failure to state any claims against them; and
8. This case is referred back to the Magistrate Judge for further proceedings.

IT IS SO ORDERED.

Dated: March 18, 2013

SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,	1:09-cv-01703-AWI-GSA (PC)
Plaintiff,	ORDER GRANTING DEFENDANT'S MOTION TO EXTEND TIME TO RESPOND TO COMPLAINT
vs.	
HARLEY G. LAPPIN, et al.,	(Motion #61)
Defendants.	45-DAY DEADLINE
_____/	

Plaintiff is a federal prisoner proceeding pro se in a civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971) and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. On April 2, 2013, defendant Devere filed a motion to extend time to respond to the complaint. Good cause having been presented to the court and GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that:

Defendant Devere is granted forty-five (45) days from the date of service of this order in which to respond to the complaint.

IT IS SO ORDERED.

Dated: April 4, 2013

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS, Plaintiff, v. HARLEY G. LAPPIN, et al., Defendants.	1:09-cv-01703-AWI-GSA **STIPULATION FOR DISMISSAL; ORDER**

Pursuant to the terms of a written Stipulation for Compromise and Settlement and Rule 41(a) of the Rules of Civil Procedure, the parties hereby stipulate that the Third Amended Complaint filed on July 8, 2011, be dismissed with prejudice, each party to bear their own attorney fees and costs.

IT IS SO STIPULATED.

Respectfully submitted,

Dated: May 17, 2013

/s/James R. Willis
James R. Willis, Plaintiff,
in pro per

Respectfully submitted,

Dated: May 17, 2013

BENJAMIN B. WAGNER
United States Attorney

By: /s/Jeffrey J. Lodge
JEFFREY J. LODGE
Assistant U.S. Attorney
Attorneys for Defendants

[PROPOSED] ORDER

The above stipulation is APPROVED, and this action is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: May 17, 2013

SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

HARLEY G. LAPPIN, et al.,

Defendants.

1:09-cv-01703-AWI-GSA-PC

ORDER FOR CLERK TO FILE PLAINTIFF'S EXPEDITED MOTION TO ENFORCE SETTLEMENT UNDER SEAL

I. BACKGROUND

James R. Willis ("Plaintiff") is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on September 28, 2009. (Doc. 1.) On May 20, 2013, the court dismissed this case with prejudice, pursuant to the parties' stipulation to a private settlement agreement reached between Plaintiff and Defendants. (Doc. 64.) On July 22, 2013, Plaintiff filed an Expedited Motion to Enforce Settlement.

II. SEALED DOCUMENTS

Federal courts have recognized a strong presumption that judicial records are accessible to the public. Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006). Generally, if a party seeks to seal a judicial record, the party bears the burden of overcoming this presumption by articulating "compelling reasons supported by specific factual findings" to justify sealing the records at issue. Id. In the case of non-dispositive motions, however, the

presumption in favor of public access does not apply with equal force. Id. at 1179. Thus, a showing of good cause will suffice to justify sealing a non-dispositive motion. Id. at 1180.

Pursuant to Federal Rule of Civil Procedure 5.2(d), a court "may order that a filing be made under seal without redaction," and the Supreme Court has acknowledged that the decision to seal documents is "one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case," Nixon v. Warner Communications, Inc., 435 U.S. 589, 599, 98 S.Ct. 1306, 1312 (1978). Courts should consider "the interests [of] the parties in light of the public interest and the duty of the courts." Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995) (quoting Nixon, 435 U.S. at 602).

Plaintiff's Motion

Plaintiff has filed a motion requesting the court to either enforce the parties' settlement agreement, allow the parties to amend the settlement agreement, or void the settlement agreement. Plaintiff has attached exhibits to the motion, which include copies of a letter of settlement offer and the private settlement agreement signed by Plaintiff and Defendants' counsel. Throughout the motion, Plaintiff discusses the parties' conversations and negotiations concerning the settlement.

Discussion

Because a motion to enforce, amend, or void a settlement agreement is only tangentially related to the merits of the underlying cause of action, it constitutes a non-dispositive motion, which requires a showing of good cause to justify sealing it. See Kamakana, 447 F.3d at 1179 (quotation omitted). The Court finds that, to the extent that Plaintiff's motion discusses or discloses the terms of the private settlement agreement, good cause exists to permit filing it under seal. See Phillips ex rel. Estates of Byrd v. General Motors Corp., 307 F.3d 1206, 1212 (9th Cir.2002) (noting that courts have granted protective orders to protect confidential settlement agreements); see also Shinn v. Baxa Corp., No. 07–cv–01648, 2008 U.S. Dist. LEXIS 57681, *4–5 (D.Nev. July 7, 2008) (permitting parties to file under seal settlement agreement that was the subject of motion to determine good faith settlement). Because

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Plaintiff's motion, consists entirely or substantially of material relating to the terms of the private settlement agreement, the motion in its entirety shall be filed under seal.

IV. CONCLUSION

Based on the foregoing, and good cause appearing, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion to Enforce Settlement, in its entirety, shall be filed under seal; and
2. The Clerk is DIRECTED to file Plaintiff's Motion to Enforce Settlement and its attached exhibits, filed on July 22, 2013, under seal.

IT IS SO ORDERED.

Dated: **July 24, 2013**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS, Plaintiff, vs. HARLEY G. LAPPIN, et al., Defendants.	1:09-cv-01703-AWI-GSA-PC ORDER RE PLAINTIFF'S REQUEST FOR CLARIFICATION (Doc. 67.) ORDER FOR PARTIES TO RESPOND WHETHER THEY AGREE THAT DOCUMENTS MAY BE UNSEALED THIRTY DAY DEADLINE TO RESPOND

I. BACKGROUND

James R. Willis ("Plaintiff") is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on September 28, 2009. (Doc. 1.) On May 20, 2013, the court dismissed this case with prejudice, pursuant to the parties' stipulation to a settlement agreement reached between Plaintiff and Defendants. (Doc. 64.) On July 22, 2013, Plaintiff filed an Expedited Motion to Enforce Settlement. (Doc. 66.) On July 25, 2013, the court entered an order for the Clerk to file Plaintiff's Expedited Motion to Enforce Settlement under seal. (Doc. 65.)

On August 5, 2013, Plaintiff filed a request for clarification of the court's order sealing his motion. (Doc. 67.)

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II. PLAINTIFF'S REQUEST FOR CLARIFICATION

Plaintiff disagrees with the court's decision to seal his motion. Plaintiff argues that the language of the settlement contract between the parties does not indicate that it is a private settlement agreement, but rather an agreement of full disclosure. Plaintiff asserts that Paragraph 9 of the agreement states, "The parties agree that this Stipulation for Compromise Settlement and Release, including all terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the Plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 522a(b)." (Motion, Doc. 67 at 2.)

Discussion

In its order, the court determined that good cause existed to seal Plaintiff's motion "to the extent that Plaintiff's motion discusses or discloses the terms of the private settlement agreement." (Order, Doc. 65 at 2:21-23.) The court termed the parties' agreement a "private settlement agreement" based on the fact that the parties did not use court assistance when discussing settlement or coming to an agreement. The court found good cause to seal Plaintiff's motion based on its disclosure of settlement negotiations between the parties, including the parties' conversations and written correspondence. (Id. at 2:13-16.)

If the parties agree that Plaintiff's motion, its exhibits, all related documents responsive to the motion, and information concerning the parties' settlement negotiations are not confidential, the court is then inclined to grant Plaintiff's motion, thus its exhibits, and all other related documents would be unsealed. To this end, the parties shall be required to file a written response to the court within thirty days, indicating whether they agree that Plaintiff's Expedited Motion to Enforce Settlement and all related documents, including documents disclosing the parties' settlement negotiations and agreements, may be maintained unsealed on the court's public record.

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III. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that:

1. This order resolves Plaintiff's request for clarification filed on August 5, 2013; and

2. Within thirty days of the date of service of this order, Plaintiff and Defendants' counsel shall each file a written response to the court, either:

   (1) indicating agreement that Plaintiff's Expedited Motion to Enforce Settlement and all related documents, including documents disclosing the parties' settlement negotiations and agreements, may be maintained unsealed on the court's public record;

   or

   (2) showing cause why said documents should be sealed on the court's record.

IT IS SO ORDERED.

Dated: **August 16, 2013**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

HARLEY G. LAPPIN, et al.,

Defendants.

1:09-cv-01703-AWI-GSA-PC

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE (Doc. 76.)

ORDER STRIKING PORTION OF DEFENDANTS' RESPONSE, TO THE EXTENT THAT IT ACTS AS A SURREPLY (Doc. 73.)

I. BACKGROUND

James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed this case on September 28, 2009. (Doc. 1.) On May 20, 2013, the court dismissed this case with prejudice, pursuant to the parties' stipulation to a settlement agreement reached between Plaintiff and Defendants. (Doc. 64.)

On August 19, 2013, the court entered an order requiring the parties to respond whether Plaintiff's Expedited Motion to Enforce Settlement ("Expedited Motion"), filed on July 22, 2013, and other documents regarding the parties' settlement, should be maintained on the court record under seal. (Doc. 69.) On September 9, 2013, Defendants filed a response to the order.

(Doc. 73.) On September 19, 2013, Plaintiff filed a motion to strike part of Defendants' response. (Doc. 76.) Defendants have not filed an opposition.

Plaintiff's motion to strike is now before the court.

II. PLAINTIFF'S MOTION TO STRIKE

Plaintiff requests the court to strike part of Defendants' September 9, 2013 response to the court's order. Plaintiff argues that Defendants improperly incorporated an argument into their response to the court's order which amounts to a surreply in support of Defendants' opposition to Plaintiff's Expedited Motion. Plaintiff argues that Defendants violated Local Rule 230 in submitting the surreply.

Surreply

A surreply, or sur-reply, is an additional reply to a motion filed after the motion has already been fully briefed. USLegal.com, http://definitions.uslegal.com/s/sur-reply/ (last visited November 5, 2012). The Local Rules provide for a motion, an opposition, and a reply. Neither the Local Rules nor the Federal Rules provide the right to file a surreply. A district court may allow a surreply to be filed, but only "where a valid reason for such additional briefing exists, such as where the movant raises new arguments in its reply brief." Hill v. England, 2005 WL 3031136, *1 (E.D. Cal. Nov. 8, 2005).

Here, the court finds no valid reason to allow a surreply, because Plaintiff did not raise any new arguments in his reply brief, and Defendants have not provided any reason their arguments could not have been made in their opposition to Plaintiff's Expedited Motion. The Court neither requested a surreply nor granted a request on behalf of Defendants to file one. Plaintiff's Expedited Motion was deemed submitted to the court on August 26, 2013. Local Rule 230(*l*). Therefore, Plaintiff's motion to strike shall be granted.

III. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to strike, filed on September 19, 2013, is GRANTED; and

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2. The portion of Defendants' response of September 9, 2013, which acts as a surreply in opposition to Plaintiff's Expedited Motion of July 22, 2012, is STRICKEN from the record.[1]

IT IS SO ORDERED.

Dated: **November 7, 2013**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

[1] "When a document is stricken, it becomes a nullity and is not considered by the court for any purpose." (Informational Order, Doc. 3 at 2 fn.1.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

DEVERE,

Defendant.

1:09-cv-01703-AWI-GSA-PC

ORDER STRIKING PLAINTIFF'S MOTIONS AS IMPERMISSIBLE FILINGS/SURREPLIES
(Docs. 81, 82.)

I. BACKGROUND

James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed this case on September 28, 2009. (Doc. 1.) This case proceeded on Plaintiff's Third Amended Complaint, filed on July 8, 2011, against defendant Devere ("Defendant") for failure to protect Plaintiff in violation of the Eighth Amendment.[1] (Doc. 24.) On May 20, 2013, the court dismissed this action with prejudice, pursuant to the parties' Stipulation for Dismissal and Rule 41(a) of the Federal Rules of Civil Procedure. (Doc. 64.)

On July 22, 2013, Plaintiff filed an Expedited Motion to Enforce Settlement. (Doc. 66.) On August 6, 2013, Defendant filed an opposition to the motion. (Doc. 68.) On August 26,

[1] On March 19, 2013, the court granted Defendants' motion to dismiss, dismissing all other claims and defendants from this action. (Doc. 60.)

2013, Plaintiff filed a reply to the opposition. (Doc. 71.) On January 15, 2014, the court entered findings and recommendations, recommending that Plaintiff's motion be denied. (Doc. 78.) On February 6, 2014, Plaintiff filed objections to the findings and recommendations. (Doc. 79.) On February 13, 2014, Defendant filed a reply to Plaintiff's objections. (Doc. 80.) The findings and recommendations have been submitted to the District Judge.

On March 3, 2014, Plaintiff filed a motion to strike portions of Defendant's reply, and a motion for imposition of sanctions upon counsel for Defendant for statements in the reply and for conduct during settlement negotiations. (Docs. 81, 82.) The court construes Plaintiff's motions as impermissible filings or surreplies.

II. SURREPLY

A surreply, or sur-reply, is an additional reply to a motion filed after the motion has already been fully briefed. USLegal.com, http://definitions.uslegal.com/s/sur-reply/ (last visited December 31, 2013). The Local Rules provide for a motion, an opposition, and a reply. Neither the Local Rules nor the Federal Rules provide the right to file a surreply. A district court may allow a surreply to be filed, but only "where a valid reason for such additional briefing exists, such as where the movant raises new arguments in its reply brief." Hill v. England, 2005 WL 3031136, *1 (E.D.Cal. Nov. 8, 2005).

Plaintiff's motions filed on March 3, 2014 seek to respond to Defendant's reply to Plaintiff's objections. The court's findings and recommendations permitted the parties to file *only* (1) "written objections" to the findings and recommendations within thirty days, and (2) "repl[ies] to the objections" within ten days after service of the objections. (Doc. 78 at 4:22-26.) The court neither requested further responses nor granted a request by Plaintiff to file one. Plaintiff has not shown good cause for the court to allow a further response at this juncture. Therefore, Plaintiff's motions shall be stricken from the record as impermissible responses to Defendant's reply to the objections.

Plaintiff's motions also seek to raise new arguments with respect to Plaintiff's Expedited Motion to Enforce Settlement. Plaintiff's Expedited Motion to Enforce Settlement, filed on July 22, 2013, was fully briefed and was submitted on the record under Local Rule

230(*l*) on August 26, 2013, when Plaintiff filed his reply to Defendant's opposition. (Doc. 68.) The Court neither requested a surreply nor granted a request by Plaintiff to file one. Plaintiff has not shown good cause for the court to allow him to file a surreply at this juncture. Therefore, Plaintiff's motions filed on March 3, 2014 shall also be stricken from the record as impermissible surreplies.

III. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's motions filed on March 3, 2014, are STRICKEN from the Court's record.

IT IS SO ORDERED.

Dated: **March 6, 2014**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

DEVERE,

Defendant.

1:09-cv-01703-AWI-GSA-PC

ORDER DENYING MOTION FOR RECONSIDERATION

ORDER STRIKING PLAINTIFF'S MOTION FOR SANCTIONS AS AN IMPERMISSIBLE SURREPLY

(Doc. 84.)

I. BACKGROUND

James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed this case on September 28, 2009. (Doc. 1.) This case proceeded on Plaintiff's Third Amended Complaint, filed on July 8, 2011, against defendant Devere ("Defendant") for failure to protect Plaintiff in violation of the Eighth Amendment.[1] (Doc. 24.) On May 20, 2013, the court dismissed this action with prejudice, pursuant to the parties' Stipulation for Dismissal and Rule 41(a) of the Federal Rules of Civil Procedure. (Doc. 64.)

[1] On March 19, 2013, the court granted Defendants' motion to dismiss, dismissing all other claims and defendants from this action. (Doc. 60.)

On July 22, 2013, Plaintiff filed an Expedited Motion to Enforce Settlement. (Doc. 66.) On August 6, 2013, Defendant filed an opposition to the motion. (Doc. 68.) On August 26, 2013, Plaintiff filed a reply to the opposition. (Doc. 71.) On January 15, 2014, the court entered findings and recommendations, recommending that Plaintiff's motion be denied. (Doc. 78.) On February 6, 2014, Plaintiff filed objections to the findings and recommendations. (Doc. 79.) On February 13, 2014, Defendant filed a reply to Plaintiff's objections. (Doc. 80.) The findings and recommendations have been submitted to the District Judge.

On March 24, 2014, Plaintiff filed a motion for the imposition of sanctions upon counsel for Defendants. (Doc. 84.) In the motion, Plaintiff raises objections to the court's order of March 7, 2014. The court construes Plaintiff's objections as a motion for reconsideration.

II. MOTION FOR RECONSIDERATION

Rule 60(b)(6) allows the Court to relieve a party from an order for any reason that justifies relief. Rule 60(b)(6) "is to be used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances . . ." exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and citation omitted). The moving party "must demonstrate both injury and circumstances beyond his control . . . ." Id. (internal quotation marks and citation omitted). In seeking reconsideration of an order, Local Rule 230(k) requires Plaintiff to show "what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion."

"A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law," Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (internal quotations marks and citations omitted, and "[a] party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation . . . " of that which was already considered by the Court in rendering its decision," U.S. v. Westlands Water Dist., 134

F.Supp.2d 1111, 1131 (E.D. Cal. 2001). To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. See Kern-Tulare Water Dist. v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D. Cal. 1986), affirmed in part and reversed in part on other grounds, 828 F.2d 514 (9th Cir. 1987).

Plaintiff objects to the court's order of March 7, 2014, striking Plaintiff's prior motion for sanctions, filed on March 3, 2014, as an impermissible filing and surreply. Plaintiff argues that "he previously raised the request for sanctions in his Expedited Motion to Enforce Settlement . . . [h]owever a motion requesting sanctions must be filed as a separate motion." (Motion, Doc. 84 at 2-3 ¶II.)

Plaintiff has not set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Therefore, the motion for reconsideration shall be denied.

III. SURREPLY

A surreply, or sur-reply, is an additional reply to a motion filed after the motion has already been fully briefed. USLegal.com, http://definitions.uslegal.com/s/sur-reply/ (last visited December 31, 2013). The Local Rules provide for a motion, an opposition, and a reply. Neither the Local Rules nor the Federal Rules provide the right to file a surreply. A district court may allow a surreply to be filed, but only "where a valid reason for such additional briefing exists, such as where the movant raises new arguments in its reply brief." Hill v. England, 2005 WL 3031136, *1 (E.D.Cal. Nov. 8, 2005).

Plaintiff's motion for sanctions, which raises a new argument in support of his Expedited Motion to Enforce Settlement,[2] is a surreply, because the Expedited Motion to Enforce Settlement was fully briefed and submitted on the record under Local Rule 230(*l*) on August 26, 2013, when Plaintiff filed his reply to Defendant's opposition. (Doc. 68.) Plaintiff now seeks to bring a new argument because "[h]e has now become aware that the Counsel for the Defendant has violated Local Rule 131(f) by signing the Plaintiff's name on [the parties'

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[2] In the Expedited Motion to Enforce Settlement, Plaintiff requested either (1) enforcement of the parties' settlement agreement, (2) allowing a stipulated amendment to the settlement agreement, or (3) voiding the agreement. (Doc. 66 at 4.)

stipulation to dismiss this case] electronically without first obtaining a signed original document from Plaintiff." (Motion, Doc. 84 at 3.)

The Court neither requested a surreply nor granted a request by Plaintiff to file one. Moreover, it appears that Plaintiff's motion for sanctions is without merit, because the court record shows Plaintiff's non-electronic signature on the parties' stipulation to dismiss this case, filed on May 17, 2013. (Doc. 63 at 1.) Thus, the court finds no valid reason to allow Plaintiff to file his motion for sanctions, or surreply, at this juncture. Therefore, Plaintiff's motion for sanctions shall be stricken from the record as an impermissible surreply.

IV. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for reconsideration of the court's order of March 7, 2014, is DENIED; and
2. Plaintiff's motion for sanctions, filed on March 24, 2014, is STRICKEN from the record as an impermissible surreply.

IT IS SO ORDERED.

Dated: **March 27, 2014**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS, Plaintiff, vs. DEVERE, Defendant.	1:09-cv-01703-AWI-GSA-PC ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (Doc. 78.) ORDER DENYING PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT, FOR LACK OF JURISDICTION (Doc. 66.)

James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed this case on September 28, 2009. (Doc. 1.) This case proceeded on Plaintiff's Third Amended Complaint, filed on July 8, 2011, against defendant Devere ("Defendant") for failure to protect Plaintiff in violation of the Eighth Amendment.[1] (Doc. 24.) On May 20, 2013, the court dismissed this action with prejudice, pursuant to the parties' Stipulation for Dismissal and Rule 41(a) of the Federal Rules of Civil Procedure. (Doc. 64.)

Plaintiff then filed a Plaintiff's motion for the Court to enforce the parties' settlement agreement. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C.

[1] On March 19, 2013, the court granted Defendants' motion to dismiss, dismissing all other claims and defendants from this action. (Doc. 60.)

§ 636(b)(1)(B) and Local Rule 302. On January 15, 2014, findings and recommendations were entered, recommending that Plaintiff's motion for the Court to enforce the parties' settlement agreement be denied for lack of jurisdiction. (Doc. 78.) On February 6, 2014, Plaintiff filed objections to the findings and recommendations. (Doc. 79.) On February 13, 2014, Defendant filed a reply to Plaintiff's objections. (Doc. 80.)

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304, this Court has conducted a de novo review of this case. Having carefully reviewed the entire file, including Plaintiff's objections and Defendant's reply, the Court finds the findings and recommendations to be supported by the record and proper analysis.

Accordingly, THE COURT HEREBY ORDERS that:

1. The Findings and Recommendations issued by the Magistrate Judge on January 15, 2014, are ADOPTED IN FULL; and
2. Plaintiff's motion for the Court to enforce the parties' settlement agreement, filed on July 22, 2013, is DENIED for lack of jurisdiction.

IT IS SO ORDERED.

Dated: April 18, 2014

SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

v.

HARLEY G. LAPPIN, et al.,

Defendant.

1:09-cv-01703-AWI-GSA-(PC)

ORDER GRANTING PLAINTIFF'S MOTION TO EXTEND TIME TO REPLY TO OPPOSITION

(Document # 89)

21-DAY DEADLINE

Plaintiff is a prisoner proceeding pro se in a civil rights action pursuant to 42 U.S.C. § 1983. On June 9, 2014, Plaintiff filed a motion to extend time to respond to defendants' opposition to plaintiff's motion to set aside the court's order of dismissal. Good cause having been presented to the court and GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that:

Plaintiff is granted twenty-one (21) days from the date of service of this order in which to file a response to defendants' opposition filed on May 28, 2014.

IT IS SO ORDERED.

Dated: **June 12, 2014**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

DEVERE,

Defendant.

1:09-cv-01703-AWI-GSA-PC

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION, WITH PREJUDICE
(Doc. 87.)

I. BACKGROUND

James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed this case on September 28, 2009. (Doc. 1.) This case proceeded on Plaintiff's Third Amended Complaint, filed on July 8, 2011, against defendant Devere ("Defendant") for failure to protect Plaintiff in violation of the Eighth Amendment.[1] (Doc. 24.) On May 20, 2013, the court dismissed this action with prejudice, pursuant to the parties' Stipulation for Dismissal and Rule 41(a) of the Federal Rules of Civil Procedure. (Doc. 64.)

[1] On March 19, 2013, the court granted Defendants' motion to dismiss, dismissing all other claims and defendants from this action. (Doc. 60.)

On July 22, 2013, Plaintiff filed a motion for the court to enforce the parties' settlement agreement. (Doc. 66.) On April 21, 2014, the court issued an order denying Plaintiff's motion, for lack of jurisdiction. (Doc. 86.)

On May 12, 2014, Plaintiff filed a motion to amend or set aside the court's dismissal order of May 20, 2013, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (Doc. 87.) On May 28, 2014, Defendant filed an opposition to the motion. (Doc. 88.) On July 7, 2014, Plaintiff filed a reply to the opposition. (Doc. 91.)

II. MOTION FOR RECONSIDERATION

Rule 60(b) allows the Court to relieve a party from an order for "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). Rule 60(b)(6) "is to be used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances . . ." exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and citation omitted). The moving party "must demonstrate both injury and circumstances beyond his control . . . ." Id. (internal quotation marks and citation omitted). In seeking reconsideration of an order, Local Rule 230(k) requires Plaintiff to show "what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion."

"A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law," Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (internal quotations marks and citations omitted, and "[a] party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation . . . " of that which was already considered by the Court in rendering its decision," U.S. v. Westlands Water Dist., 134

F.Supp.2d 1111, 1131 (E.D. Cal. 2001). To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. See Kern-Tulare Water Dist. v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D. Cal. 1986), affirmed in part and reversed in part on other grounds, 828 F.2d 514 (9th Cir. 1987).

Parties' Positions

Plaintiff requests reconsideration of the court's order of May 20, 2013, dismissing this action, on the grounds of bad faith conduct, mistake, misrepresentation, fraud, and other misconduct during settlement negotiations between the parties, which caused Plaintiff to enter into an unfair settlement agreement. Plaintiff also argues that Defendant's counsel breached the parties' contract because he did not comply with the terms of the settlement agreement during negotiations or in preparing the parties' stipulation of dismissal.

Defendant argues that Plaintiff improperly raises the same meritless issues rejected by the court in his previous motion to enforce the settlement agreement. Defendant argues that that no misrepresentations were made during settlement proceedings, there was no fraud or undue influence, the settlement was fair, the United States paid the settlement, and there is no basis for the court to exercise jurisdiction to modify or enforce the settlement agreement.

Plaintiff argues that he is entitled to relief pursuant to Rule 60(b)(1), because of Plaintiff's mistake in the judicial process, when he signed the stipulation for dismissal under the mistaken belief that the court would retain jurisdiction of the settlement contract.

Discussion

The issues raised by Plaintiff in his motion for reconsideration were resolved in the court's order of April 21, 2014, which denied Plaintiff's motion for the court to enforce the parties' settlement agreement. (Doc. 86.) Plaintiff has not set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decisions in this action. Therefore, Plaintiff's motion shall be denied, and no further motions for reconsideration or clarification shall be considered.

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III. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for reconsideration of the court's order of May 20, 2013, is DENIED, with prejudice; and
2. No further motions for reconsideration or clarification shall be considered by the court in this action.

IT IS SO ORDERED.

Dated: July 29, 2014

SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES R. WILLIS,

Plaintiff,

vs.

DEVERE,

Defendant.

1:09-cv-01703-AWI-GSA-PC

FINDINGS AND RECOMMENDATIONS, RECOMMENDING THAT PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT BE DENIED FOR LACK OF JURISDICTION
(Doc. 66.)

OBJECTIONS, IF ANY, DUE WITHIN THIRTY DAYS

I. BACKGROUND

James R. Willis ("Plaintiff") is a federal prisoner proceeding pro se in this civil rights action pursuant to Bivens vs. Six Unknown Agents, 403 U.S. 388 (1971). Plaintiff filed this case on September 28, 2009. (Doc. 1.) This case proceeded on Plaintiff's Third Amended Complaint, filed on July 8, 2011, against defendant Devere ("Defendant") for failure to protect Plaintiff in violation of the Eighth Amendment.[1] (Doc. 24.) On May 20, 2013, the court dismissed this action with prejudice, pursuant to the parties' Stipulation for Dismissal and Rule 41(a) of the Federal Rules of Civil Procedure. (Doc. 64.)

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[1] On March 19, 2013, the court granted Defendants' motion to dismiss, dismissing all other claims and defendants from this action. (Doc. 60.)

On July 22, 2013, Plaintiff filed an Expedited Motion to Enforce Settlement. (Doc. 66.) On August 6, 2013, Defendant filed an opposition to the motion. (Doc. 68.) On August 26, 2013, Plaintiff filed a reply to the opposition. (Doc. 71.) Plaintiff's motion is now before the court.

II. MOTION FOR ENFORCEMENT OF SETTLEMENT AGREEMENT

A. Plaintiff's Position

Plaintiff requests an expedited court order, either enforcing the parties' settlement agreement ("Agreement"), allowing a stipulated amendment to the Agreement, or voiding the Agreement. Plaintiff contends that the court maintains jurisdiction to enforce the Agreement.

Plaintiff argues that the Agreement, in which Defendant agreed to pay Plaintiff the sum of $3,000.00 in exchange for Plaintiff's dismissal of the case with prejudice, was breached or should be voided because on June 10, 2013, he received a motion from the U.S. Attorney in the Western District of Texas for a court order directing the federal Bureau of Prisons to turn over Plaintiff's $3,000.00 award for payment of Plaintiff's restitution. Plaintiff argues that the U.S. Attorney who negotiated the Agreement with Plaintiff made misleading comments during the telephonic settlement conference that led Plaintiff to believe the $3,000.00 was his money, "clear and free." (Motion, Doc. 66 at 9[2] ¶E.)

B. Defendant's Position

Defendant argues that the court lacks jurisdiction to re-write the Agreement, because the court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement.

Defendant also argues that Plaintiff is precluded from claiming that statements made during negotiations were misleading, because the Agreement expressly advised Plaintiff that "no warranties, representations, promises, and/or assurances of any types" were made during negotiations, and Plaintiff agreed in writing. (Opp'n, Doc. 68 at 5:12-15.)

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[2] Pagination is based on the Court's electronic court filing system (ECF). When the party's pagination on a document differs from the pagination used by ECF, the Court uses the pagination used by ECF.

Defendant also argues that the evidence shows nothing more than Plaintiff's unilateral mistake of fact and no undue influence, because there was no discussion of restitution, and no reasonable person would interpret paragraph 11 of the Agreement to mean that the "settlement [was] exempt from any other execution other than for taxes." (Opp'n at 6:2-4.)

In addition, Defendant argues that Plaintiff's motion constitutes a collateral attack on the turnover order made by the Western District of Texas, and his remedy is in the Western District of Texas.

C. Discussion

Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute. Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994.) A claim for breach of contract or a settlement agreement, even if part of the consideration for it is dismissal of a federal case, will not provide the basis for federal court jurisdiction. Id. at 381. This limited jurisdiction cannot be expanded by judicial decree. Id. at 377 (citing American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S.Ct. 534, 95 L.Ed. 702 (1951)). Lack of jurisdiction is to be presumed and the burden of proving jurisdiction rests with the party asserting jurisdiction. Kokkonen, 511 U.S. at 377.

Enforcement of a settlement agreement is "more than a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." Id. at 378. A district court lacks jurisdiction to enforce a settlement agreement following a dismissal of the action unless the district judge either: (1) expressly in the dismissal order, retains jurisdiction over the settlement agreement; or (2) incorporates the terms of the settlement agreement in the dismissal order. See id. at 381. Under those circumstances, a breach of the agreement would be a violation of a court order and the district court would have ancillary jurisdiction to enforce the agreement. Id. Absent those circumstances, however, remedying any breach of the settlement agreement requires initiation of a new lawsuit to enforce the contract. If the court does not retain jurisdiction to enforce the settlement agreement, the vehicle for the enforcement of the settlement agreement is a breach of contract claim in another proceeding, where "part of the consideration [for the contract] was dismissal of an earlier federal suit." Id.

Here, the parties filed a Stipulation for Dismissal with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). (Doc. 63.) All of the parties signed the Stipulation, and the court entered an order approving the Stipulation, dismissing the case with prejudice. (Id.; Doc. 64.) The district judge did not expressly retain jurisdiction over the parties' settlement agreement or incorporate the terms of the settlement agreement in the dismissal order.

The Agreement itself contains one provision regarding the court's retention of jurisdiction. It states: "The parties further agree that a Stipulation of Dismissal with Prejudice shall be filed upon execution of this Stipulation for Compromise, with the Court to retain jurisdiction to enforce the agreement." (Settlement Agreement, Exh. 3 to Motion, Doc. 66 at 32 ¶12.) However, the Stipulation for Dismissal and Order signed by the district judge and filed in this case does not contain any provisions regarding the court's retention of jurisdiction, and "neither the Rule nor any provision of law provides for jurisdiction of the court over disputes arising out of an agreement that produces the stipulation." Id. at 378. Therefore, any further enforcement of the Agreement is a matter for state court, and Plaintiff's motion to enforce the settlement must be denied for lack of jurisdiction.

III. CONCLUSION

Based on the foregoing, THE COURT HEREBY RECOMMENDS that Plaintiff's Expedited Motion to Enforce Settlement, filed on July 22, 2013, be DENIED for lack of jurisdiction.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within thirty days after being served with these findings and recommendations, the parties may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file

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objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **January 14, 2014**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TONY RICHARDSON, Plaintiff, v. UNITED STATES OF AMERICA and BRIAN KING HUMPHREYS, Defendants.	1:09-cv-02082-LJO/MJS **UNITED STATES' NOTICE OF PAYMENT** Honorable Michael J. Seng

cc. Yahara Heney

TO PLAINTIFF AND HIS ATTORNEY OF RECORD:

Defendant United States of America hereby submits the Inmate Income Transaction Details Report stating payment to Plaintiff Tony Richardson per the terms of the Stipulation for Compromise on January 25, 2012.

Respectfully submitted,

Date: February 23, 2012

BENJAMIN B. WAGNER
United States Attorney

By: */s/Alyson A. Berg*
ALYSON A. BERG
Assistant United States Attorney

CERTIFICATE OF SERVICE BY U.S. MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers;

That on February 23, 2012, she served a copy of:

UNITED STATES' NOTICE OF PAYMENT

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and its contents in the United States Mail at Fresno, California.

Addressee(s):

Mr. Tony Richardson
Inmate No. 11894-040
USP Hazelton
U.S. Penitentiary
P.O. Box 2000
Bruceton Mills, WV 26525
(Courtesy Copy)

/s/Bonnie L. L'Argent
Bonnie L. L'Argent

Federal Bureau of Prisons
TRUFACS
Inmate Income Transaction Details Report
Sensitive But Unclassified

Transaction Report

Inmate Reg. Number:	11894040	Payment Month:	
Inmate Name:	RICHARDSON, TONY	Administrative Hold:	No
System Transaction #:	2602483	Neg. Instr. Projected Release Date:	
Date/Time:	01/25/2012 02:07:58 PM	Neg. Instr. Date Released:	02/09/2012
Income Type:	Local Collections	Admin Hold Date Released:	
Fund Source Type:	HOLD - Negotiable Instr	Reference #:	466638
Amount:	$1,875.00	YREGDOC #:	
User Id:	TF05775	Sender Last Name:	UNKNOWN
		Sender Zip:	00000-0000

Comments:

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TONY RICHARDSON, Plaintiff, v. UNITED STATES OF AMERICA, BRIAN KING HUMPHREYS, Defendants.	1:09-cv-02082-LJO/MJS **STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF CLAIMS PURSUANT TO 28 U.S.C. § 2677 (SETTLEMENT AGREEMENT)**

It is hereby stipulated by and between the undersigned Plaintiff, Tony Richardson, (meaning any person, other than the Defendant, signing this Stipulation for Compromise Settlement and Release of All Claims Pursuant to 28 U.S,C, § 2677 ("Settlement Agreement"), whether or not a party to this civil action), and the United States of America (collectively "parties"), by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement, including but not limited to claims of personal injuries, negligence, negligent hiring, negligent supervision and/or property damages as a result of an incident on April 18, 2009 as alleged by Plaintiff in his complaints, or as the Plaintiff may have or could have alleged in his complaints in this action.

2. The United States of America agrees to pay to Plaintiff the sum of $2,500.00 in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for personal injuries and property damage, for which Plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, and their members and governing bodies, managers, agents, servants, employees, contractors, and subcontractors, on account of the conduct alleged in the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Any requirement for payment or obligation of funds by the United States shall be subject to the availability of appropriated funds. No provision of this Stipulation shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, and 1511-1519.

3. Plaintiff does hereby waive to the fullest extent possible under law any and all rights under Section 1542 of the California Civil Code, which reads as follows:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

The provisions of all comparable, equivalent, or similar statutes and principles of common law of California, or other states of the United States, and of the United States of America are also hereby expressly waived by Plaintiff to the same extent. In connection with such waiver and relinquishment, Plaintiff acknowledges that he may hereafter discover claims and damages presently unknown or unsuspected, or facts in addition to or different from those which Plaintiff now knows or believes to be true with respect to the matters released herein. Nevertheless, it is the intention of Plaintiff through this release, and with the advice of counsel, to fully, finally, and forever settle and release all such matters and claims relative thereto.

4. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, and their members and governing bodies, managers, agents, servants, and employees, contractors, and subcontractors, from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States.

5. Plaintiff warrants that he is the sole and lawful owner of all rights, title and interests in and to every claim and other matter which he purports to release herein, and that he has not heretofore assigned or transferred, or purported or attempted to assign or transfer to any person or entity any claims or other matters herein released. Plaintiff shall indemnify the United States of America, and its agencies, agents, employees and former employees, named and unnamed, and defend and hold harmless from, any claims arising out of or relating to any such assignment or transfer of any claims or other matters released herein.

6. This Settlement Agreement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, or its agents, servants, or employees, including those of the Federal Bureau of Prisons, and it is specifically denied that they are liable to Plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act, and avoiding the expenses and risks of further litigation.

7. It is also agreed, by and among the parties, that the amount specified in Paragraph 2 is the total amount of the compromise settlement, and that the all parties agree to bear their own attorney's fees, costs, fees, and expenses incurred in the above captioned action, and release each other from any claims for attorney's fees, costs, or expenses.

8. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, all attorney's fees for services rendered in connection with this action shall not exceed twenty-five per centum (25%) of the amount of the compromise settlement.

9. The person signing this Settlement Agreement warrants and represents that he possesses full authority to bind the persons on whose behalf he is signing to the terms of the settlement.

10. After execution of this Stipulation for Compromise Settlement and Release of Claims, Plaintiff agrees to dismiss his Second Amended Complaint with prejudice. Plaintiff's attorney agrees to distribute the settlement proceeds among Plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

11. Payment of the settlement amount by the United States of America will be made by government electronic funds. Payment of the settlement amount will be made by government wire transfer as per the following:

A.	Name of Bank:	Bank of America N.A.
B.	Street, Address of Bank:	1525 Market Street
C.	City, State , Zip Code:	San Francisco, CA 94103
D.	Routing Number:	(b)(6)
E.	Name of Account:	Law Offices of Christina DiEdoardo Client Trust Account
F.	Account Number:	(b)(6)

12. The parties understand, acknowledge and agree that this Settlement Agreement contains the entire agreement between the parties pertaining to the compromise and settlement of all claims referenced herein, and that no promise or representation not contained in this Settlement Agreement has been made to Plaintiff. This Settlement Agreement is executed without reliance on any representation as to tax consequences, and Plaintiff is responsible for the payment of all taxes that may be associated with the settlement payments.

13. The parties agree that this Settlement Agreement, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

14. Plaintiff acknowledges that he has read this Settlement Agreement, that he fully understands his rights and duties herein, and that he enters into this agreement freely and voluntarily. Plaintiff further acknowledges that he had sufficient opportunity to consult with counsel to explain the terms of this Settlement Agreement, and the consequences of signing it.

15. Any of the parties may file this Settlement Agreement in this or any other action or proceeding to enforce the terms and conditions of this Settlement Agreement. In any action or proceeding to enforce the terms or conditions of this Settlement Agreement, the prevailing parties shall be entitled to an award of their reasonable attorneys' fees, litigation expenses, and costs.

16. It is contemplated that this Settlement Agreement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Respectfully submitted,

Dated: November 30, 2011

BENJAMIN B. WAGNER
United States Attorney

By: _____
ALYSON A. BERG
Assistant U.S. Attorney

Dated: November 18, 2011

LAW OFFICES OF CHRISTINA DiEDOARDO

By: _____
CHRISTINA A. DiEDOARDO
Attorneys for Plaintiff

Dated: November 22, 2011

_____
TONY RICHARDSON

CHRISTINA A. DiEDOARDO
California Bar No. 258714
LAW OFFICES OF CHRISTINA DiEDOARDO
201 Spear Street Suite 1100
San Francisco, CA 94105
(415) 839-5098
Christina@diedoardolaw.com
Attorney for Plaintiff Tony Richardson

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

TONY RICHARDSON
Plaintiff,
vs.
FEDERAL BUREAU OF PRISONS, an agency of the United States Department of Justice; UNITED STATES DEPARTMENT OF JUSTICE, a department of the United States Government, WARDEN RIOS, an employee of the Bureau of Prisons at USP ATWATER, ASSISTANT WARDEN BELL, an employee of the Bureau of Prisons at USP ATWATER, ASSISTANT WARDEN SHINN, an employee of the Bureau of Prisons at USP Atwater, LT. PUTNAM, an employee of the BUREAU OF PRISONS at USP ATWATER, DOE BUREAU OF PRISON EMPLOYEES I-XX individually and in their capacity as employees at USP Atwater; DOE PRISONERS I-XX, individually and DOES I-XX, inclusive.
Defendants.

Case No.: 09-AT-00932

COMPLAINT FOR DAMAGES FOR VIOLATION OF CIVIL RIGHTS

JURY TRIAL DEMANDED

//

INTRODUCTION

I.
JURISDICTION

1. Mr. Richardson's federal causes of action arise under Title 42 of the United States Code, Section 1983 and 28 U.S.C. 1346(b)(1). Jurisdiction is conferred upon this Court by Title 28 of the United States Code, Sections 1331 and 1343 and 28 U.S.C. §1346(b)(1).

2. To the extent that Mr. Richardson is required to comply with the provisions of the Prison Litigation Reform Act ("PLRA") as set forth in 28 U.S.C. §2401(b), he has complied with those provisions by fully exhausting his administrative remedies[1] and by suffering a sufficient physical injury (to wit, rape) pursuant to Kenner v. Hemphill, 199 F. Supp 2d. 1264 (N.D. Fla. 2002).

II.
VENUE

3. Venue is proper in the United States District Court for the Eastern District of California pursuant to Title 28 United States Code Section 1391 (b)(2) in that the events which gave rise to this complaint arose within this judicial district. Additionally, venue is proper in the Eastern District of California pursuant to Title 28 United States Code Section 1391 (b) (1) because DEFENDANT WARDEN RIOS, DEFENDANT ASSISTANT WARDEN BELL, DEFENDANT ASSISTANT

---

[1] Counsel for Mr. Richardson contacted the Office of General Counsel for the Federal Bureau of Prisons via U.S. Mail and facsimile on September 22, 2009 to inquire whether or not Mr. Richardson had exhausted his remedies by the BOP issuing a Notice of Final Denial. Furthermore, counsel for Mr. Richardson advised the BOP that if she did not receive a response by October 7, 2009, she would conclude that it was BOP's position that Mr. Richardson had received a final denial, with the implication that October 7, 2009 would be seen as the date of final denial. As of November 28, 2009, counsel for Mr. Richardson has not received a response from BOP, accordingly, Mr. Richardson is informed and believes and thereon alleges that he constructively received a Notice of Final Denial on October 7, 2009.

WARDEN SHINN, DEFENDANT LT. PUTNAM as well as DOE BUREAU OF PRISON EMPLOYEES I-XX and DOE PRISONERS I-XX were resident within or incarcerated within this Judicial District at the time the events which gave rise to this complaint occurred. Finally, Defendants FEDERAL BUREAU OF PRISONS and Defendant UNITED STATES DEPARTMENT OF JUSTICE have, at all times relevant to this complaint, engaged in substantial and continuing contracts with this forum, including but not limited to the operation of USP Atwater.

III.
PARTIES

4. At all times relevant herein, Plaintiff TONY RICHARDSON was a prisoner at United States Penitentiary Atwater ("USP Atwater") and remains in custody of Defendant FEDERAL BUREAU OF PRISONS.
5. Defendant, FEDERAL BUREAU OF PRISONS, is and was at all times herein mentioned, an agency of the United States Department of Justice. It was in legal and actual control of the facility at USP Atwater during all times relevant to this complaint.
6. Defendant UNITED STATES DEPARTMENT OF JUSTICE is the federal government agency tasked with the safe custody of persons in federal civilian custody. It discharged its responsibilities through its agency, Defendant FEDERAL BUREAU OF PRISONS.
7. Defendant WARDEN RIOS was the employee of Defendant FEDERAL BUREAU OF PRISONS with operational command of USP Atwater during all times relevant to this complaint. Plaintiff will seek leave of Court to amend this Complaint to add in the Warden's true first name when it is disclosed through the discovery process.

8. Defendant ASSISTANT WARDEN BELL was an employee of Defendant BUREAU OF PRISONS who had executive control and responsibility of the employees at USP Atwater during all times relevant to this complaint. Plaintiff will seek leave of Court to amend this Complaint to add in the Assistant Warden's true first name when it is disclosed through the discovery process.

9. Defendant ASSISTANT WARDEN SHINN was an employee of Defendant BUREAU OF PRISONS who had executive control and responsibility of the employees at USP Atwater during all times relevant to this complaint. Plaintiff will seek leave of Court to amend this Complaint to add in the Assistant Warden's true first name when it is disclosed through the discovery process.

10. Defendant LT. PUTNAM was, at all times relevant herein mentioned, an employee of Defendant FEDERAL BUREAU OF PRISONS. Plaintiff will seek leave of court to amend this complaint to add his true first name once it is revealed through the discovery process.

11. Plaintiff is unaware of the true names of DEFENDANT DOE BUREAU OF PRISON EMPLOYEES I-XX at this time and reserves the right to seek leave of Court to amend this Complaint to identify these individuals as discovery proceeds.

12. Plaintiff is unable to identify all of the true names of DEFENDANT DOE PRISONERS I-XX at this time, because he is unaware of the names of some of them and because it would impose an unreasonable risk to his life and safety to name the others at this time. Plaintiff reserves his right to ask the Court to name certain DOE PRISONERS *in camera* and to name the others as discovery proceeds.

13. Plaintiff is unaware of the true names of DEFENDANTS I-XX at this time and reserves his right to seek leave of Court to amend this complaint as discovery proceeds.

IV.
FACTUAL ALLEGATIONS

14. On or about April 4, 2009, Mr. Richardson asked to be placed in protective custody at USP Atwater. A few days later, Mr. Richardson attempted to commit suicide by hanging himself.

15. Following this suicide attempt, Mr. Richardson was taken to see Defendant LT.PUTNAM.

16. Defendant LT. PUTNAM told Mr. Richardson that he would "make his stay in segregation miserable" if Mr. Richardson "ever disturbed his day with a suicide attempt again".

17. Mr. Richardson responded that he wanted no problems with Defendant LT. PUTNAM or his staff, but that he probably would attempt suicide again unless he was placed in a single-occupant cell.

18. Defendant LT. PUTNAM then told Mr. Richardson "When I say it's time for you to cell up, you better cell your ass up or I'll do exactly as I promised you boy, you hear me?" Mr. Richardson is African-American and a member of a culture for whom the term "boy" is one of extreme disrespect.

19. Shortly thereafter, Mr. Richardson was transferred to a different housing unit outside of Defendant LT. PUTNAM's responsibility.

20. However, on or about April 17, 2009, Defendants placed DOE PRISONER in Mr. Richardson's cell. Defendants knew or should have known that said DOE PRISONER had a previously documented history of mental illness and violent assaults on prisoners.

21. On April 18, 2009, said DOE PRISONER raped Mr. Richardson in the cell and then proceeded to attempt to take him hostage with a homemade knife, or shank.

22. As a direct and proximate result of the sexual assault and the injuries he suffered, Mr. Richardson had to be transported for treatment to an outside hospital.

23. From that date through the present, Defendants have refused to provide Plaintiff with the medical care he is entitled to pursuant to Estelle v. Gamble 429 U.S. 97 (1976).

24. Indeed, DEFENDANT DOE PRISON EMPLOYEES have responded with callous indifference, including but not limited to telling Mr. Richardson that he should just "kill himself" if he was so miserable.

25. This lawsuit followed.

FIRST CAUSE OF ACTION
BATTERY

26. Mr. Richardson incorporates by reference paragraphs 1 through 25 as if fully set forth herein.

27. On or about April 18, 2009, Defendant DOE PRISONER raped Mr. Richardson while both men were in protective custody at USP Atwater.

28. Following the rape, DOE PRISONER held a knife to Mr. Richardson's throat and held him hostage.

29. As a direct and proximate consequence of the rape and hostage taking, Mr. Richardson was subjected to a harmful and offensive contact by DOE PRISONER.

30. Mr. Richardson did not consent to either the sexual activity or being taken hostage.

31. But for the actions of DEFENDANTS WARDEN RIOS, ASSISTANT WARDEN BELL, ASSISTANT WARDEN SHINN, LT. PUTNAM AND DOE PRISON

EMPLOYEES, DOE PRISONER would not have been placed in Mr. Richardson's cell 24 hours prior to the rape.

32. Defendants WARDEN RIOS, and/or ASSISTANT WARDEN BELL, and/or ASSISTANT WARDEN SHINN, and/or LT. PUTNAM AND/OR DOE PRISON EMPLOYEES were on actual and/or constructive notice that DOE PRISONER had a past history of violent assaults on other prisoners. Furthermore, Defendants WARDEN RIOS, and/or ASSISTANT WARDEN BELL, and/or ASSISTANT WARDEN SHINN, and/or LT. PUTNAM AND/OR DOE PRISON EMPLOYEES had actual knowledge of Mr. Richardson's vulnerable physical and mental condition as a result of his recent suicide attempt prior to their decision to place DOE PRISONER in a cell with Mr. Richardson.

33. Plaintiff is informed and believes and thereon alleges that Defendant LT. PUTNAM approved the placement of DOE PRISONER in Mr. Richardson's cell notwithstanding the above facts because he wanted to retaliate against Mr. Richardson for "disturb[ing] his day" with the original suicide attempt.

34. The Defendants' conduct was the proximate cause of the harm suffered by Mr. Richardson and by reason of the acts set forth above by the Defendants, Mr. Richardson is entitled to damages in an amount according to proof at trial.

35. The Defendants WARDEN RIOS, and/or ASSISTANT WARDEN BELL, and/or ASSISTANT WARDEN SHINN, and/or LT. PUTNAM AND/OR DOE PRISON EMPLOYEES engaged in the aforementioned acts maliciously, callously, oppressively, wantonly, recklessly, fraudulently, with deliberate indifference to the rights of Mr. Richardson and with evil motive and/or intent and in disregard of the

rights of Mr. Richardson. Mr. Richardson is therefore entitled to and does seek an award of punitive damages in an amount according to proof at trial.

SECOND CAUSE OF ACTION
NEGLIGENCE

36. Mr. Richardson incorporates paragraphs 1 through 35 by reference as if fully set forth herein.

37. Because Defendants and each of them had legal custody of Defendant during all times relevant to this complaint, they owed him a duty of care to ensure his safety while he was incarcerated at USP Atwater.

38. Defendants breached this duty by placing DOE PRISONER, a man whom they knew had a past history of violent assaults against other prisoners and who was a member of a group (the DC Muslims) whom Mr. Richardson had previously requested protection from.

39. As a direct and proximate result of this breach, Plaintiff was raped and taken hostage by DOE PRISONER.

40. Because Defendants acted recklessly and with deliberate indifference to the rights of Mr. Richardson and with evil motive and/or intent and in disregard of the rights of Mr. Richardson, Mr. Richardson is therefore entitled to and does seek an award of punitive damages in an amount according to proof at trial.

THIRD CAUSE OF ACTION
FALSE IMPRISONMENT

41. Mr. Richardson incorporates paragraphs 1 through 40 by reference as if fully set forth herein.

42. Following his rape of Mr. Richardson, DOE PRISONER took him hostage and falsely imprisoned him by holding an improvised knife, or shank, to his throat with the intent to restrain his free movement around the cell.

43. Mr. Richardson did not consent to this confinement.

44. DOE PRISONER lacked any legal cause or reason to confine Mr. Richardson.

45. Said confinement was for an appreciable period of time, longer than 15 minutes.

46. DOE PRISONER's confinement of Mr. Richardson was the proximate cause of the damages suffered by Mr. Richardson.

47. Furthermore, but for the actions of the other Defendants, DOE PRISONER would never have been placed in Mr. Richardson's cell and thus would never have had the opportunity to harm Mr. Richardson.

48. The Defendants engaged in the aforementioned acts maliciously, callously, oppressively, wantonly, recklessly, fraudulently, with deliberate indifference to the rights of Mr. Richardson and with evil motive and/or intent and in disregard of the rights of Mr. Richardson. Mr. Richardson is therefore entitled to and does seek an award of punitive damages in an amount according to proof at trial.

FOURTH CAUSE OF ACTION
RETALIATION

49. Mr. Richardson incorporates paragraphs 1 through 48 by reference as if fully set forth herein.

50. Between April 4, 2009 and April 17, 2009, Defendant LT. PUTNAM threatened to make Mr. Richardson's stay in protective custody "miserable" if he repeated an earlier suicide attempt.

51. Defendant LT. PUTNAM acting with the authority derived from or with the support of DEFENDANTS WARDEN RIOS, ASSISTANT WARDEN BELL, ASSISTANT WARDEN SHINN and DOE PRISON EMPLOYEES, ultimately did retaliate against Plaintiff by placing DOE PRISONER, an inmate with a documented history of committing violent assaults, in Mr. Richardson's cell.

52. Defendants committed these acts notwithstanding the fact that DOE PRISONER had a violent history and was a member of a group (the DC Muslims) whom Mr. Richardson had previously requested protection from.

53. Defendants' actions were the proximate cause of the damages suffered by Mr. Richardson and by reason of the acts set forth above by the Defendants, Mr. Richardson is entitled to damages in an amount according to proof at trial.

54. The Defendants engaged in the aforementioned acts maliciously, callously, oppressively, wantonly, recklessly, fraudulently, with deliberate indifference to the rights of Mr. Richardson, and with evil motive and/or intent and in disregard of the rights of Mr. Richardson. Mr. Richardson is therefore entitled to and does seek an award of punitive damages in an amount according to proof at trial.

FIFTH CAUSE OF ACTION
NEGLIGENT HIRING

55. Mr. Richardson incorporates paragraphs 1 through 54 by reference as if fully set forth herein.

56. Defendants, and each of them, possessed a duty to the public to screen and diligently interview candidates for the Federal Bureau of Prisons in general and USP Atwater in particular with the objective of rejecting those who were physically, mentally or

morally unfit for service as a prison administrator, corrections officer or prison staff member.

57. Defendants breached this duty by hiring DEFENDANTS WARDEN RIOS, ASSISTANT WARDEN BELL, ASSISTANT WARDEN SHINN and LT PUTNAM as well as DOE PRISON EMPLOYEES at USP Atwater.

58. Said individuals were unqualified for service as prison administrators, corrections officers or prison staff members and Mr. Richardson's injuries were a direct and proximate result of their presence in a role they were not competent to perform.

59. Said breach was the proximate cause of the injuries suffered by Mr. Richardson on April 18, 2009 when he was raped by DOE PRISONER while in custody at USP Atwater.

60. Defendants' actions were the proximate cause of the damages suffered by Mr. Richardson and by reason of the acts set forth above by the Defendants, Mr. Richardson is entitled to damages in an amount according to proof at trial.

61. Furthermore, because Defendants acted recklessly to a level amounting to malice, Mr. Richardson is entitled to and requests an award of punitive damages in an amount according to proof at trial.

SIXTH CAUSE OF ACTION
NEGLIGENT SUPERVISION

62. Mr. Richardson incorporates by reference paragraphs 1 through 61 as if fully set forth herein.

63. Defendants, and each of them, had a duty to Mr. Richardson and all other members of the public to appropriately supervise the corrections officers and other employees at USP Atwater under their command.

64. Defendants, and each of them, breached this duty when Defendant LT PUTNAM believed it was appropriate to harangue a prisoner who had just attempted suicide with "disturb[ing] his day", when Defendant LT. PUTNAM caused DOE PRISONER to be placed in Mr. Richardson's cell and when DOE PRISON EMPLOYEES encouraged Mr. Richardson to kill himself after the rape.

65. Since 1991, it has been settled law in California that public employers have liability pursuant to the doctrine of *respondeat superior* for the torts committed by their employees

66. Defendants breach was the proximate cause of the injuries suffered by Mr. Richardson who is therefore entitled to seek and does seek an award of damages to be determined at trial according to proof.

67. Furthermore, because Defendants acted recklessly to a level amounting to malice, Mr. Richardson is entitled to and requests an award of punitive damages in an amount according to proof at trial.

DEMAND FOR JURY

MR. RICHARDSON DEMANDS THAT EACH OF HIS CLAIMS BE TRIED BEFORE A JURY

//

PRAYER FOR RELIEF

WHEREFORE Mr. Richardson prays for relief against all Defendants, and each of them, as follows:

1. For a money judgment representing compensatory damages, general damages, special damages and other sums according to proof at trial;
2. For a money judgment for mental pain and anguish and emotional distress according to proof at trial;
3. For punitive damages according to proof as set forth in this Complaint;
4. For attorney's fees and costs of suit pursuant to 42 U.S.C. §1988.
5. For prejudgment and post judgment interest;
6. For all such other relief as the Court deems just and proper.

DATED this 28th day of November, 2009

/S/*Christina A. DiEdoardo*
Christina A. DiEdoardo
California Bar No. 258714
Attorney for Mr. Richardson

//

BENJAMIN B. WAGNER
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Telephone: (559) 497-4000
Facsimile: (559) 497-4099

Attorneys for Defendant UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TONY RICHARDSON, Plaintiff, v. UNITED STATES OF AMERICA and BRIAN KING HUMPHREYS, Defendants.	1:09-cv-02082-LJO/MJS **NOTICE OF SETTLEMENT**

Pursuant to Local Rule 16-160, the parties hereby notify the Court that this matter has settled. Documents dismissing the action are forthcoming.

Respectfully submitted,

Date: December 5, 2011

BENJAMIN B. WAGNER
United States Attorney

By: /s/Alyson A. Berg
ALYSON A. BERG
Attorney for Defendant United States of America

Law Offices of Christina Diedoardo

Dated: December 6, 2011

(As authorized 12/06/11)
/s/Christina Diedoardo
CHRISTINA DIEDOARDO
Attorney for Plaintiff

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TONY RICHARDSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

/

CASE NO. CV F 09-2082 LJO MJS

ORDER AFTER SETTLEMENT
(Doc. 60.)

The parties' counsel notified this Court that settlement has been reached. Pursuant to this Court's Local Rule 160, this Court ORDERS the parties, **no later than January 17, 2012,** to file appropriate papers to dismiss or conclude this action in its entirety, or to show good cause why the action has not been dismissed.

This Court VACATES all pending dates and matters, including the December 14, 2011 pretrial conference and February 7, 2012 trial.

Failure to comply with this order may be grounds for the imposition of sanctions on counsel or parties who contributed to violation of this order. *See* Local Rules160 and 272.

IT IS SO ORDERED.

Dated: December 7, 2011

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

LArgent, Bonnie (USACAE)

From: caed_cmecf_helpdesk@caed.uscourts.gov
Sent: Thursday, December 08, 2011 11:57 AM
To: CourtMail@caed.uscourts.gov
Subject: Activity in Case 1:09-cv-02082-LJO-MJS Richardson v. Federal Bureau of Prisons, et al.

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
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U.S. District Court

Eastern District of California - Live System

Notice of Electronic Filing

The following transaction was entered on 12/8/2011 at 11:57 AM PST and filed on 12/8/2011
Case Name: Richardson v. Federal Bureau of Prisons, et al.
Case Number: 1:09-cv-02082-LJO-MJS
Filer:
Document Number: 61

Docket Text:
ORDER After Settlement re [60], signed by District Judge Lawrence J. O'Neill on 12/7/2011. This Court VACATES all pending dates and matters, including the December 14, 2011 pretrial conference and February 7, 2012 trial. (Marrujo, C)

1:09-cv-02082-LJO-MJS Notice has been electronically mailed to:

Bureau of Prisons Regional Counsel wxrolegalinfo@bop.gov

Alyson A. Berg alyson.berg@usdoj.gov, bonnie.largent@usdoj.gov, monica.lee@usdoj.gov, usacae.ecffrsgen@usdoj.gov

Christina Ann-Marie Diedoardo christina@diedoardolaw.com, chrisdiedoardo@yahoo.com

Jesse Gonzalez j6gonzalez@bop.gov

1:09-cv-02082-LJO-MJS Electronically filed documents must be served conventionally by the filer to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1064943537 [Date=12/8/2011] [FileNumber=5119366-0
] [a1d94297a58d3bbdab5fff0fd64d863c09e68b34759566320849909 2ad020f785c8

Page 1440 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 1441 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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HOME ALERTS MY WORK NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-WXR-2009-02045 **Short Description:** ARJANG PANAH V. UNITED STATES OF AMERICA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	2:09-cv-06535-GAF-PLA
Short Description	ARJANG PANAH V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	WESTERN REGIONAL OFFICE
Current Institution	
Incident Region	CONTRACT FACILITIES
Incident Institution	Taft (CI)
Monetary Relief Sought	$3,000,000.00
Estimated Amount	$
Office	Western Division - Los Angeles
Jurisdiction	UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
Responsible Legal Office	WXRO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	08/28/2012
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$425,000.00
Total Amount Paid	$425,000.00
Description	PREMISES LIABILITY CASE. $2.5 MILION+ SOUGHT. SETTLED FOR $425,000. COURT DENIED MSF FOR DISCRETIONARY FUNCTION. SOUGHT TO AVOID BAD CASE LAW.
Description	PREMISES LIABILITY CASE. $2.5 MILION+ SOUGHT. SETTLED FOR $425,000. COURT DENIED MSF FOR DISCRETIONARY FUNCTION. SOUGHT TO AVOID BAD CASE LAW.
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	12/10/2009
Date Filed	09/09/2009

Case Progress

Current Owner	JENNIFER VICKERS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	FTCA CASE DUE TO CONTRACTING COCCIDIOIDOMYCOSIS, KNOWN AS VALLEY FEVER WHILE AT TCI TAFT.
Further Case Classification	REOPENED FOR PLN FOIA REQUEST
Comments	Failure to warn, failure to provide safe environment, and negligent transfer to valley fever area.

QUINTON & PETIX
Stephen V. Petix, Esq. SBN 52706
Email: petix@quintonpetix.com
402 West Broadway, Suite 400
San Diego, California 92101
Telephone: (619) 234-1113
Facsimile: (619) 595-3147

Attorneys for Plaintiff,
Arjang Panah

2009 SEP -9 PM 2:01
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
BY:

FILED

COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARJANG PANAH, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil No. **CV09 -6535 GAF (PLAx)** **COMPLAINT FOR MONEY DAMAGES** (Federal Tort Claims Act) Judge: Ctrm:

Plaintiff ARJANG PANAH, an individual (hereinafter referred to as "Plaintiff" or "Plaintiff Panah"), by and through his attorneys of record, Quinton & Petix, by Stephen V. Petix, Esq., for his complaint for money damages against the UNITED STATES OF AMERICA, alleges:

I.

The Parties:

1. Plaintiff is a resident and citizen of the State of California, County of Los Angeles. Plaintiff brings this complaint for money damages for personal injuries suffered as a result of the negligent and wrongful acts and omissions of the officers, agents and employees of the defendant UNITED STATES OF AMERICA, employed by the Federal Bureau of Prisons.

2. Defendant is the UNITED STATES OF AMERICA, which operates and controls the Federal Bureau of Prisons (sometimes hereinafter denoted as the "BOP"), which is charged with maintaining custody of sentenced federal prisoners in its many correctional facilities throughout the United States, and whose officers, agents and/or employees negligently and recklessly exposed the Plaintiff to the potentially deadly disease known as Coccidioidomycosis (also known as "Valley Fever" or "San Joaquin Valley Fever") at its prison facility in Kern County, California, known as Taft Correctional Institution (or "Taft C.I.").

II.

Jurisdiction:

3. This action arises from, and this Court has jurisdiction over this action by virtue of the Federal Tort Claims Act, 28 U. S. Code §§ 1346(b), 2671, et seq. The Plaintiff has been injured by the negligent or wrongful acts and omissions of the officers, agents and/or employees of the Defendant UNITED STATES OF AMERICA, acting in the course and scope of their employment.

4. The acts and omissions of which Plaintiff complains took place in the State of California. Accordingly, the law of the State of California controls this action with respect to liability and damages. 28 U. S. Code §§ 1346(b)(1) and 2674.

5. On or about December 12, 2007, Plaintiff timely presented his administrative claim for money damages to the Federal Bureau of Prisons, at the South Central Regional Office, in Dallas, Texas. This claim was denied in writing on June 13, 2008, by the BOP Regional Counsel. Thereafter, on or about November 14, 2008, pursuant to 28 C.F.R. § 14.9(b), Plaintiff timely presented his request for reconsideration of his administrative tort claim, and, simultaneously pursuant to 28 C.F.R. § 14.2(c), submitted a timely amended administrative claim for damages for personal injury to the same BOP office, which was duly received

by the BOP on November 20, 2008. Subsequently, Plaintiff's amended administrative tort claim was also denied, by letter of the BOP Regional Counsel, dated March 13, 2009. Therefore, Plaintiff has exhausted his administrative claim remedy under 28 U. S. Code § 2675(a), and this suit is timely filed under 28 U. S. Code § 2401(b).

III.

Venue:

6. Venue is proper in the Central District of California, because the Plaintiff resides in this district. 28 U. S. Code §§ 1402(b) and 1391(e)(3).

IV.

The Facts Giving Rise to The Complaint:

7. Coccidioidomycosis (commonly known as "Valley Fever" or "San Joaquin Valley Fever" or simply as "cocci") has long been known as a serious infectious disease which is contracted by the inhalation of an airborne fungus, *Coccidioides immitis*, which is endemic in the soil of various areas of the Southwest. Nowhere is it more prevalent than in Kern County in the San Joaquin Valley of California.

8. In June of 1994, the U. S. Centers for Disease Control and Prevention (commonly referred to as the "CDC"), in its publication called the *Morbidity and Mortality Weekly Report* (MMWR) issued an article prepared by a group of physicians and scientists preeminent in the field of infectious disease, entitled "Coccidioidomycosis -- California, 1991-1993." The article reported on the devastating impact of Valley Fever in California, as well as the fact that in the years 1991 through 1993, 70% of the reported cases of coccidioidomycosis in California arose from Kern County, in the San Joaquin Valley. [See full article at: http://www.cdc.gov/mmwr/preview/mmwrhtml/00031453.htm]

9. In September of 1996 Doctors Theo N. Kirkland and Joshua Fierer, both of

the University of California, San Diego, School of Medicine, published an article in *Emerging Infectious Diseases* (another publication of the CDC), entitled "Coccidioidomycosis: A Reemerging Infectious Disease." In this article Doctors Kirkland and Fierer comment on the Valley Fever epidemic of 1991-1993 reported above, and state that: "Kern County, in the San Joaquin Valley, California, is one of the most highly coccidioidomycosis-endemic regions." They also point out later in the article that:

> Simple environmental measures, such as planting grass or paving roads in highly populated areas, decrease the amount of airborne dust and lower the risk for coccidioidomycosis. These measures do not necessarily eradicate *C[occidioides] immitus* from the soil but lower the risk for airborne dispersion of the organism. At present, no practical method exists for eliminating *C[occidioides] immitus* from the soil.

Drs. Kirkland and Fierer also discuss in their article the efforts to develop a vaccine to prevent Coccidioidomycosis, which as of the date of the article had not been successful. [See the full article cited above at: http://www.cdc.gov/ncidod/eid/vol2no3/kirkland.htm]

10. At no time pertinent to this action was there an effective human vaccine available to prevent the disease Coccidioidomycosis, and none exists today. And once contracted, there is no iatrogenic cure for the disease. Admittedly, the majority of those who contract the disease are asymptomatic and their infections resolve without therapy. One prospective study of cases of Coccidioidomycosis acquired during World War II by servicemen at three San Joaquin Valley airbases, reported that 60% were asymptomatic, 15% were not severe enough to require medical care, and 25% were clinically important and required a substantial amount of time off work. Another more recent study published in 1993, reporting on college students in Tucson who contracted

Coccidioidomycosis, indicated that 35% had a self-limiting pneumonia, although many of them were very ill for weeks to months.

11. It is generally accepted that less than 5% of Coccidioidomycosis infections disseminate and cause miliary disease, bone and joint infections (including osteomyelitis), skin disease, soft tissue abscesses, and meningitis. However, it is well known that disseminated Coccidioidomycosis is progressive, painful, and debilitating, and that it is uniformly fatal once it progresses to meningitis, if left untreated. Surgical excision of tissue and bone is the only medical response for some extrapulmonary infections of Coccidioidomycosis. Certain triazole compounds, including Fluconazole (400 mg/day), have been found to be effective in treating most presentations of Coccidioidomycosis; but the drug must be taken daily, and due to previously experienced high relapse rates when azole therapy is stopped, lifelong treatment with Fluconazole is recommended by Drs. Kirkland and Fierer, mentioned above. The drug is expensive; but failure to take it religiously is even more expensive. Hospitalization for a typical Valley Fever patient has been estimated at about $34,000.00; whereas the more complicated cases of disseminated Coccidioidomycosis, requiring multiple surgeries has been estimated at about $788,000.00, by another leading expert on this disease, Dr. Demosthenes Pappagianis, of U. C. Davis Medical School. [A. Furillo, "Disease clouds a prison's future," *The Sacramento Bee*, Sept. 9, 2007. (Online edition, Sacbee.com)]

12. In June of 2002, federal inmate Kevin Walker filed a claim against the United States for damages under the Federal Tort Claims Act (as well as *Bivens* claims against various entities and individuals), alleging negligence on the part of the Government for having transferred him in December 1999 to Taft C.I., a facility that was constructed by the United States with knowledge that the soil

upon which it was built was contaminated with fungal spores that are known to cause Valley Fever. *Walker v. United States*, 2007 WL 1577687, Case No. 1:02-cv-05801-AWI (E.D. Cal. 2007) (Ishii, D.J.), at *4. Walker also alleged that the Government knew about the presence of the fungal spore when it began transferring federal inmates to Taft C.I. in late 1997, but it did nothing to prevent inmates from being exposed to Valley Fever. *Walker v. United States*, 2008 WL 2074475 (E.D. Cal. 2008) (Austin, M.J.), at *2. In fact, he alleged that the BOP vetoed efforts by the private contractor operating the facility to plant grass to mitigate the dusty conditions. *Id.* The final disposition of this case is unknown, because the file is reported "sealed" by Pacer.

13. In January 2004 the BOP itself, i.e., the Chief of the BOP's Office of Quality Management, in Washington, D.C., through the BOP's Medical Director, issued a system-wide memorandum for all BOP Health Services Staff, which included a "Risk Management Alert" for Valley Fever. The alert described the disease as follows: "Valley Fever is another name for the ***sometimes deadly infection*** coccidioidomycosis." (Emphasis added.) The risk management alert goes on to explain [inexactly] that: "It is called valley fever because the organism that causes it is commonly found in the soil of the southwestern United States, Mexico and parts of Central and South America." (Actually, the term arose from the high prevalence of the disease in the San Joaquin Valley of California.) The BOP alert includes the recommendation that: "Persons at risk for valley fever should avoid exposure to dust and dry soil in areas where valley fever is common."

14. Epidemiological studies have established that, for unknown reasons, individuals of certain races are at higher risk for developing the disseminated form of Coccidioidomycosis, particularly African-Americans and Filipinos, for whom the risk is tenfold that of the general population. In his aforementioned complaint,

Taft C.I. inmate Kevin Walker, an African-American, included this among his allegations as proof that his assignment to Taft C.I. by the BOP was with disregard to his health and safety. *Walker v. United States*, Case No. 1:02-cv-05801-AWI, 2008 WL 2074475 (E.D. Cal. 2008) (Austin, M.J.), at *2. Regardless of this reality, the BOP employed no screening process to divert African-Americans or Filipinos from assignment to its Taft C.I., facility, which is situated in Kern County, described by Drs. Kirkland and Fierer as "one of the most highly coccidioidomycosis-endemic regions," and which is further located in the midst of dusty desert terrain, adjacent to irrigated and cultivated agricultural fields.

15. While certain races mentioned above are known to be at substantially higher risk of contracting the worst form of Valley Fever, i.e., disseminated Coccidioidomycosis, there is no known medical standard or test available for determining whether any member of the general population (not previously exposed to Coccidioidomycosis and immunized by prior infection) may or may not be susceptible to contracting this worst form of the disease, which some have described as being worse than cancer.

16. Based on the filing and litigation of the *Walker* case, mentioned above, and its own headquarters memorandum in January 2004, alerting its medical staff systemwide as to the danger of the disease Coccidioidomycosis (Valley Fever), the BOP had indisputable knowledge that this disease was potentially deadly, and that any federal inmate assigned to Taft C.I. was in danger of contracting the disease due to its physical location in the San Joaquin Valley amidst desert and agricultural terrain that generated the dust-borne spores of *Coccidioides immitis*. The only prudent courses open to the BOP were: (1) assign no individual to Taft C.I. who did not have a positive coccidioidin skin test indicating immunity; or (2) take extraordinary measures to prevent all non-immune inmates from exposure to the dust-borne disease; or (3) shut down the

facility as too dangerous for human habitation. Otherwise, the incarceration of human beings at Taft C.I. was the equivalent of conducting a human medical experiment on the inmates, without their consent. While the great percentage of inmates might be expected to survive the disease, for an unacceptable percentage of inmates, including the Plaintiff, assignment to Taft C.I. was a potential death sentence.

17. In May of 2004, in Buffalo, New York, Plaintiff Panah entered a plea of guilty to distribution of a controlled substance (Methamphetamine), and was sentenced by the District Court to serve 72 months in federal prison. Upon entering federal custody, the Plaintiff was in reasonably good health, and had not previously been exposed to the disease Coccidioidomycosis. Plaintiff came to the United States as a teenager, having been born in Tehran, Iran, and was a resident of Rancho Palos Verdes, California, from that time to the time of his arrest. He became a naturalized United States citizen in 2000. He did not travel to the San Joaquin Valley for business or pleasure at any time prior to his assignment to Taft C.I. by the BOP, in February of 2005.

18. Prior to his assignment to Taft C.I., the Plaintiff specifically requested that he be assigned to the BOP facility at Terminal Island, which was closer to his home in Rancho Palos Verdes, where he had resided with his parents prior to his arrest, or to the one at Lompoc, rather than at Taft C.I.. This request was denied by the BOP without any explanation.

19. While the Plaintiff was incarcerated at Taft C.I., the BOP failed to take any particular measures to protect the inmates at Taft from inhaling the naturally occurring airborne dust generated by the desert winds and nearby agricultural activities; nor did the BOP direct the private contractor operating the prison to take any such measures. Plaintiff Panah was not provided any special protective breathing masks or other devices, and to his knowledge there was no

special air conditioning equipment employed by the facility to filter out the dust occurring in the local environment. Nor was there any prohibition of outdoor activities during dusty conditions.

20. Plaintiff was informed during his imprisonment at Taft C.I. that out of some 1,400 inmates at the facility, perhaps as many as about 80 of them had developed Coccidioidomycosis symptoms acute enough and serious enough to require active treatment for the disease. He also learned that four Taft inmates died of Valley Fever while he was there, one of whom he knew personally.

21. Plaintiff Panah first experienced symptoms of Valley Fever on or about December 17, 2005, including a high temperature, constant coughing, loss of appetite, night sweats and chills, open sores on his body, weakness and fatigue; and by January 9, 2006, he had also developed a painful hydrocele (enlarged epididymis), manifesting itself as a swelling of his scrotum on the right side. After initial misdiagnosis and treatment of his illness as pneumonia, blood test results reported on or about January 11, 2006, confirmed that he was a victim of Valley Fever (Coccidioidomycosis), with a very high Complement Fixation Titer score of 1:512 (a measure of the antibodies for the disease in the blood). (This Titer score is level 9, with level 10 being the highest, at 1:1,024.) Fluconazole treatment (total 600 mg per day) and bed rest was initiated and, initially in early February 2006, his Titer score was reported at 1:128 (level 7). However, in early March and April 2006, Plaintiff's Titer score again climbed to 1:512. Eventually, in early May 2006, his Titer score was reduced to 1:256 (level 8), but various of the symptoms persisted, including the painful hydrocele.

22. At the time of his release from BOP custody, in or about February 2008, it was reported that Plaintiff's Coccidioidomycosis Complement Fixation Titer score was only 1:4 (level 2); however, not long after Plaintiff's release, testing by his private doctor at Kaiser Permanente reported a Titer score of 1:16

(level 4), and he has since experienced at least one period of illness in October 2008 when his Titer score was at 1:64 (level 6). It is apparent that the disease is still active in Plaintiff's body, and has the potential of resuming its devastating course, should he ever discontinue his daily medication with Fluconazole.

23. Plaintiff has been spending approximately $450.00 per month on doctor, health insurance and medicines since his release from custody, not including time lost from work. And despite his diligent efforts to take his daily medication for the disease, Plaintiff has found that he is very susceptible to any illness, including pneumonia or flu, since his immune system is apparently compromised by Coccidioidomycosis. A recent episode illustrates the point. Plaintiff recently contracted a common cold, but in his case this required emergency room admission and an assisted breathing device due to a collapsed lung. Plaintiff Panah also suffers from chronic bronchitis and asthma, which he never had before contracting Valley Fever at Taft C.I. Additionally, Plaintiff now has breathing problems, phlegm issues, and cannot exercise for an extended period of time, as he could before.

24. As a result of all of the above, Plaintiff's quality of life and enjoyment of life has severely deteriorated. His life expectancy has been decreased considerably. He has experienced severe physical pain and suffering from the various symptoms of the disease known as San Joaquin Valley Fever, when he first contracted the illness; and continues to experience physical discomfort over time, with exacerbated episodes of illness, as mentioned above. He will undoubtedly continue to experience similar pain and suffering in the future.

25. Further, Plaintiff Panah must now live with the anxiety and dread of the potential that he may have the disseminated form of Coccidioidomycosis, which could cause an agonizing course of progressive sickness and premature

death, should he for any reason be unable to continue his daily regimen of 400 mg of Fluconazole to suppress the disease's natural course, and maintain regular access to medical professionals familiar with the disease, who can continue the careful monitoring necessary to keep his Valley Fever in check. He will never be "cured" of Coccidioidomycosis. The best he can hope for is an uneasy truce with the disease, with the help of prescription drugs and knowledgeable doctors. Should Plaintiff lose his job or his health insurance, such hope would likely vanish.

V.

FIRST CAUSE OF ACTION

(Negligent or Wrongful Act or Omission)

(Failure to Provide Inmate with Safe and Habitable Prison)

26. Plaintiff hereby incorporates by reference paragraphs 1 through 25, above, as if set forth herein in full.

27. At all times pertinent to this action, the Defendant, through its agents, officers and employees acting within the scope of their offices and employment, had a nondelegable regulatory and common law duty to exercise reasonable care to provide the Plaintiff with a safe and habitable place of incarceration, where he could live and work without contracting a potentially fatal disease, despite his best efforts to pursue a healthy life style and avoid activities that might risk his health.

28. At all times pertinent to this action, the Defendant, through its agents, officers and employees acting within the scope of their offices and employment, negligently and recklessly failed to comply with the aforementioned duty, by instead incarcerating the Plaintiff at Taft, C.I., which it knew to be located on a site regularly immersed in dust containing the airborne spores of *Coccidioides immitis*, known to be the cause of the incurable and potentially deadly infectious disease Coccidioidomycosis (also known as Valley Fever or San Joaquin Valley Fever).

29. As a predictable result of the foregoing negligence or wrongful acts or omissions, the Plaintiff did, in fact, contract Coccidioidomycosis and has suffered the injuries and damages herein described.

VI.

SECOND CAUSE OF ACTION

(Negligent or Wrongful Act or Omission)

(Premises Liability:Failure to Operate and Maintain Prison Facility in Safe and Habitable Condition)

30. Plaintiff hereby incorporates by reference paragraphs 1 through 29, above, as if set forth herein in full.

31. At all times pertinent to this action, the Defendant, through its agents, officers and employees acting within the scope of their offices and employment, had a nondelegable regulatory and common law duty to exercise reasonable care to operate and maintain the Taft Correctional Institution (Taft C.I.) in such a manner as to ensure that it was reasonably safe and habitable for human beings, and that it harbored no latent defects that constituted a dangerous condition and an unreasonable risk of harm to the health and safety of the federal inmates assigned to said prison, including the Plaintiff.

32. At all times pertinent to this action, the Defendant, through its agents and employees acting within the scope of their offices and employment, negligently or wrongfully failed to take steps to either make the aforementioned dangerous condition of Taft C.I. safe or adequately warn Plaintiff of the dangerous condition, to wit, the prison's location on a site regularly immersed in airborne dust containing the airborne spores of *Coccidioides immitis*, all of which caused plaintiff to contract the incurable and potentially deadly infectious disease Coccidioidomycosis (also known as Valley Fever or San Joaquin Valley Fever), as alleged above, and to suffer the injuries and damages herein described.

//

VII.

THIRD CAUSE OF ACTION

(Negligent or Wrongful Act or Omission)

(Assignment of Plaintiff to Prison Facility Knowing It to Be Inherently Unsafe for Human Habitation)

33. Plaintiff hereby incorporates by reference paragraphs 1 through 32, above, as if set forth herein in full.

34. At all times pertinent to this action, the Defendant, through its agents, officers and employees acting within the scope of their offices and employment, knew or should have known that the physical environment in which Taft C.I. was situated was hazardous to human health, and a potentially fatal disease could be contracted by its inmates due to the presence of *Coccidioides immitis* in the soil surrounding the prison, which was impossible to eliminate from the soil and the air that carried the dust-borne fungus spores that cause the incurable and potentially deadly infectious disease Coccidioidomycosis (also known as Valley Fever or San Joaquin Valley Fever), as alleged above.

35. Despite the foregoing knowledge, the Defendant, through its agents, officers and employees acting within the scope of their offices and employment, and as the owner of Taft C.I., failed to provide the private contractor chosen to operate the prison with a facility that could provide the inmates assigned there with safe air to breathe, failed to provide the contractor with directions and guidance with respect to inmate activity restrictions to prevent dust inhalation, and failed to provide adequate equipment and resources to either reduce the disease-bearing dust or to prevent dust inhalation by the inmates assigned to Taft C.I. This prison was, in essence, a petri dish for Valley Fever, into which the BOP inserted human beings without their consent.

36. Despite the foregoing knowledge of the dangerousness of the disease Coccidioidomycosis, and the total inadequacy and inability of the prison facility and its management to prevent exposure of federal inmates to the disease, the Defendant as owner of the prison, and through its agents, officers and employees acting within the scope of their offices and employment, negligently and recklessly exercised its power and authority to assign Plaintiff Panah to Taft C.I., for an extended period of incarceration, effectively exposing him to Coccidioidomycosis without his consent and against his will, ignoring his request to be assigned elsewhere.

37. As a predictable result of the foregoing negligence or wrongful acts or omissions, the Plaintiff did, in fact, contract Coccidioidomycosis and has suffered the injuries and damages herein described.

VIII.

DAMAGES

38. As a direct and proximate result of the aforesaid negligent or wrongful acts or omissions, Plaintiff was hurt and injured in his health, strength, and activity, sustaining injury to his person, all of which has caused and continues to cause Plaintiff substantial physical pain and suffering and debilitation, as well as severe worry, anxiety and emotional distress, as to the potential future course of his incurable disease.

39. As a further proximate result of the aforesaid negligent or wrongful acts or omissions, Plaintiff has been damaged, in that he has incurred, and will continue to incur, medical and related expenses.

40. As a further proximate result of the aforesaid negligent or wrongful acts or omissions, Plaintiff has been damaged, in that he has lost substantial earnings from time to time, due to temporary total work disability due to illness, which has resulted in time lost from work, because of his physical injury (the

contracting of the disease Coccidioidomycosis). Plaintiff also faces a shortened work life expectancy, due to the continuing pain and discomfort, weakness and fatigue and pulmonary symptoms caused by the disease Coccidioidomycosis, of which he will never be cured, despite the diligent pursuit of appropriate medical treatment for said condition. Premature death due to the disease is likewise possible, should it disseminate and progress to meningitis.

IX.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment against the Defendant United States of America, as follows:

1. For general damages according to proof;
2. For medical and related expenses, according to proof;
3. For lost earnings, past and future;
5. For total money damages in the amount of $2,500,000.00.
6. For costs of suit incurred herein;
7. For interest, as allowed by law;
8. For such other and further relief as the Court may deem proper.

DATED: September 4, 2009

QUINTON & PETIX



By: STEPHEN V. PETIX
Attorneys for Plaintiff
Arjang Panah

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge Gary A. Feess and the assigned discovery Magistrate Judge is Paul L. Abrams.

The case number on all documents filed with the Court should read as follows:

CV09- 6535 GAF (PLAx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

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NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

[X] **Western Division** **312 N. Spring St., Rm. G-8** **Los Angeles, CA 90012**	[ ] **Southern Division** **411 West Fourth St., Rm. 1-053** **Santa Ana, CA 92701-4516**	[ ] **Eastern Division** **3470 Twelfth St., Rm. 134** **Riverside, CA 92501**

Failure to file at the proper location will result in your documents being returned to you.

Name & Address
Quinton & Petix, by
Stephen V. Petix
402 West Broadway, Ste. 400
San Diego, CA 92101
Phone: 619-234-1113

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Arjang Panah, PLAINTIFF(S) v. United States of America, DEFENDANT(S).	CASE NUMBER **CV09 -6535 GAF (PLAx)** SUMMONS

TO: DEFENDANT(S): United States of America

A lawsuit has been filed against you.

Within 60 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☑ complaint ☐ ____ amended complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Stephen V. Petix, whose address is Quinton & Petix, 402 West Broadway, Suite 400, San Diego, CA 92101. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Dated: SEP - 9 2009

Clerk, U.S. District Court
DODJIE GARGANTOS SEAL
By: _____ Deputy Clerk

(Seal of the Court)

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3).]

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself ☐)	DEFENDANTS
Aqang Panah	United States of America
(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)	Attorneys (If Known)
Quinton & Petix, by Stephen V. Petix 402 West Broadway, Suite 400 San Diego, CA 92101	

II. BASIS OF JURISDICTION (Place an X in one box only.)

☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S Government Not a Party)

☑ 2 U.S Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only
(Place an X in one box for plaintiff and one for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in this State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. ORIGIN (Place an X in one box only.)

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify): ☐ 6 Multi-District Litigation ☐ 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: ☐ Yes ☐ No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: ☐ Yes ☐ No ☑ MONEY DEMANDED IN COMPLAINT: $ 2,500,000.00

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
28 U.S. Code Secs. 1346(b), 2671 et seq. (Federal Tort Claims Act). Personal injury due to negligence/wrongful acts by Federal officers, agents or employees.

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES	CONTRACT	TORTS PERSONAL INJURY	TORTS PERSONAL PROPERTY	PRISONER PETITIONS	LABOR
☐ 400 State Reapportionment	☐ 110 Insurance	☐ 310 Airplane	☐ 370 Other Fraud	☐ 510 Motions to Vacate Sentence Habeas Corpus	☐ 710 Fair Labor Standards Act
☐ 410 Antitrust	☐ 120 Marine	☐ 315 Airplane Product Liability	☐ 371 Truth in Lending	☐ 530 General	☐ 720 Labor/Mgmt. Relations
☐ 430 Banks and Banking	☐ 130 Miller Act	☐ 320 Assault, Libel & Slander	☐ 380 Other Personal Property Damage	☐ 535 Death Penalty	☐ 730 Labor/Mgmt. Reporting & Disclosure Act
☐ 450 Commerce/ICC Rates/etc.	☐ 140 Negotiable Instrument	☐ 330 Fed. Employers' Liability	☐ 385 Property Damage Product Liability	☐ 540 Mandamus/ Other	☐ 740 Railway Labor Act
☐ 460 Deportation	☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 340 Marine	BANKRUPTCY	☐ 550 Civil Rights	☐ 790 Other Labor Litigation
☐ 470 Racketeer Influenced and Corrupt Organizations	☐ 151 Medicare Act	☐ 345 Marine Product Liability	☐ 422 Appeal 28 USC 158	☐ 555 Prison Condition	☐ 791 Empl. Ret. Inc. Security Act
☐ 480 Consumer Credit	☐ 152 Recovery of Defaulted Student Loan (Excl. Veterans)	☐ 350 Motor Vehicle	☐ 423 Withdrawal 28 USC 157	FORFEITURE/ PENALTY	PROPERTY RIGHTS
☐ 490 Cable/Sat TV	☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 355 Motor Vehicle Product Liability	CIVIL RIGHTS	☐ 610 Agriculture	☐ 820 Copyrights
☐ 810 Selective Service	☐ 160 Stockholders' Suits	☐ 360 Other Personal Injury	☐ 441 Voting	☐ 620 Other Food & Drug	☐ 830 Patent
☐ 850 Securities/Commodities/ Exchange	☐ 190 Other Contract	☐ 362 Personal Injury-Med Malpractice	☐ 442 Employment	☐ 625 Drug Related Seizure of Property 21 USC 881	☐ 840 Trademark
☐ 875 Customer Challenge 12 USC 3410	☐ 195 Contract Product Liability	☐ 365 Personal Injury-Product Liability	☐ 443 Housing/Accommodations	☐ 630 Liquor Laws	SOCIAL SECURITY
☑ 890 Other Statutory Actions	☐ 196 Franchise	☐ 368 Asbestos Personal Injury Product Liability	☐ 444 Welfare	☐ 640 R.R. & Truck	☐ 861 HIA (1395ff)
☐ 891 Agricultural Act	REAL PROPERTY	IMMIGRATION	☐ 445 American with Disabilities - Employment	☐ 650 Airline Regs	☐ 862 Black Lung (923)
☐ 892 Economic Stabilization Act	☐ 210 Land Condemnation	☐ 462 Naturalization Application	☐ 446 American with Disabilities - Other	☐ 660 Occupational Safety /Health	☐ 863 DIWC/DIWW (405(g))
☐ 893 Environmental Matters	☐ 220 Foreclosure	☐ 463 Habeas Corpus-Alien Detainee	☐ 440 Other Civil Rights	☐ 690 Other	☐ 864 SSID Title XVI
☐ 894 Energy Allocation Act	☐ 230 Rent Lease & Ejectment	☐ 465 Other Immigration Actions			☐ 865 RSI (405(g))
☐ 895 Freedom of Info. Act	☐ 240 Torts to Land				FEDERAL TAX SUITS
☐ 900 Appeal of Fee Determination Under Equal Access to Justice	☐ 245 Tort Product Liability				☐ 870 Taxes (U.S. Plaintiff or Defendant)
☐ 950 Constitutionality of State Statutes	☐ 290 All Other Real Property				☐ 871 IRS-Third Party 26 USC 7609

FOR OFFICE USE ONLY: Case Number: CV09-6535 GAF (PLAx)

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? ☑ No ☐ Yes
If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? ☑ No ☐ Yes
If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:
(Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or
☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or
☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named plaintiff resides.
☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles	

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named defendant resides.
☑ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH claim arose.
Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
UNKNOWN.	Kern County;

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties
Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER): _____ Date 9/4/2009

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ARJANG PANAH, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CASE NO. CV 09-6535 GAF (PLAx) **STIPULATION FOR DISMISSAL**

IT IS HEREBY STIPULATED AND AGREED by Plaintiff, Arjang Panah, and Defendant, United States of America, by and through their respective counsel, that the above-captioned action shall be dismissed with prejudice in its entirety.

Plaintiff and Defendant further stipulate and agree that each party shall bear his own attorneys' fees, expenses and costs of suit.

DATED: 8/13/12

FELDMAN AND WALLACH

JASON FELDMAN/IAN WALLACH
Attorneys for Plaintiff
Arjang Panah

DATED: 8/14/12

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ARJANG PANAH, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. CV 09-6535 GAF (PLAx) ORDER RE: JOINT STIPULATION TO EXTEND DEFENDANT'S RESPONSE DATE TO THE COMPLAINT

Upon consideration of the Stipulation of the parties, IT IS HEREBY ORDERED that time for defendant's time to answer or otherwise respond to the complaint shall be extended to February 1, 2010.

Dated: December 17, 2009

HONORABLE GARY A. FEESS
UNITED STATES DISTRICT JUDGE

JS-6

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ARJANG PANAH, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CASE NO. CV 09-6535 GAF (PLAx) **ORDER OF DISMISSAL WITH PREJUDICE**

Based upon the Stipulation for Dismissal filed by the parties, IT IS HEREBY ORDERED that:

/ / /

/ / /

1. The above-captioned action is dismissed in its entirety with prejudice;

2. Each party shall bear his own attorneys' fees, costs and expenses; and

3. The district court shall retain jurisdiction until the settlement proceeds are paid.

Dated: August 20, 2012

HONORABLE GARY A. FEESS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Arjang Panah,

Plaintiff,

v.

United States of America,

Defendants.

Case No. CV 09-06535-GAF (PLAx)

SCHEDULING AND CASE MANAGEMENT ORDER

SEE LAST PAGE FOR PRETRIAL AND TRIAL DATES

The purpose of this Order is to enable the parties and their counsel to know well in advance the schedule to which they will be expected to adhere. SEE THE LAST PAGE OF THIS ORDER FOR THE SPECIFIED DATES. Ordinarily the dates set forth on the last page are determined after consultation with the parties at the Rule 26(f) Scheduling Conference, and this Order is distributed to them at that time. Accordingly, the dates and requirements are firm. The Court is very unlikely to grant continuances, even if stipulated by the parties, unless the parties establish good cause through a concrete showing. **Because this order, in some respects modifies the applicable Local Rule of Civil Procedure, counsel are advised to read it carefully to avoid default on the obligations established herein. Counsel are advised to pay particular attention to the requirements of the Court in respect to the filing of motions for summary judgment and documents to be submitted at the pre-trial conference and trial.**

I. DISCOVERY CUTOFF

All discovery shall be completed by the discovery cutoff on the last page. **THIS IS NOT THE DATE BY WHICH DISCOVERY REQUESTS MUST BE SERVED; IT IS THE DATE BY WHICH ALL DISCOVERY IS TO BE COMPLETED.**

Any motion challenging the adequacy of responses to discovery must be filed timely, served and calendared sufficiently in advance of the discovery cutoff date to permit the responses to be obtained before that date, if the motion is granted. The Court requires compliance with Local Rule 37-1 and 37-2 in the preparation and filing of discovery motions. Except in the case of an extreme emergency which was not created by the lawyer briefing the motion, discovery motions may not be heard on ex parte application.

In an effort to provide further guidance to the parties, the Court notes the following:

1. Depositions. All depositions shall be scheduled to commence sufficiently in advance of the discovery cutoff date to permit their completion and to permit the deposing party enough time to bring any discovery motions concerning the deposition prior to the cutoff date.

2. Written Discovery. All interrogatories, requests for production of documents, and requests for admissions shall be served sufficiently in advance of the discovery cutoff date to permit the discovering party enough time to challenge (via motion practice) responses deemed to be deficient.

3. Discovery Motions. Whenever possible, the Court expects the parties to resolve discovery problems among themselves in a courteous, reasonable and professional manner. If they do so, resort to the Court for guidance in discovery is seldom necessary. The Magistrate Judge assigned to this case will rule on discovery motions.

4. Expert Discovery. Expert discovery is to be concluded by the discovery cutoff date. Accordingly, the disclosure of expert witnesses in full compliance with Rule 26(a)(2), of the Federal Rules of Civil Procedure is ordered no later than seventy (70) days before the discovery cutoff. Counter-designations are to be made

pursuant to Federal Rule of Civil Procedure 26(a)(2)(C).

5. Rule 26(e)(1) Supplementation: The parties are under a continuing obligation to supplement their Rule 26(a) disclosures; the Court expects the parties to disclose such materials immediately upon identification.

II. MOTIONS AND MOTION CUTOFF DATE

A. GENERAL PROVISIONS

All law and motion matters, except for motions in limine, must be set for hearing (not filing) by the motion cutoff date specified on the last page.

The parties must adhere to the requirements of the Local Rules. *See* C. D. Cal. R. 7-1 et seq. If any party does not oppose a motion, that party shall submit a written statement in accordance with Local Rule 7-16 that it does not oppose the motion. The parties should note that failure to meet the time limits set forth in Local Rule 7 may be deemed consent to the granting of the motion. C. D. Cal. R. 7-12. The Court will not decide late-filed motions.

Motion should be filed:	28 days before hearing date
Opposition is due:	21 days before hearing date
Reply is due:	14 days before hearing date

To insure that the Court receives oppositions and replies in a timely fashion, chamber's copies ***conformed to reflect that they have been e-filed***, should be deposited in the drop box in the back entrance way to the chambers of Courtroom 740 in accordance with Local Rules.

Issues left undetermined after the passage of the motion cutoff date should be listed as issues for trial in the pre-trial conference order. As an exception to the above, motions in limine dealing with evidentiary matters may be heard pursuant to the schedule attached hereto; however, the Court will not hear or resolve summary judgment motions disguised as motions in limine. In addition, delay which interferes with preparation by the Court and its staff may cause imposition of sanctions under Local Rule 83-7.

Ex parte practice is strongly discouraged. See Mission Power Eng. Co. v.

Continental Casualty Co., 883 F.Supp. 488 (C.D. Cal. 1995). The Court will require strict adherence to proper ex parte procedures for any ex parte application filed with the Court. Id. at 492; See C.D. Cal. R. 7-19.

B. APPLICATIONS AND STIPULATIONS TO EXTEND TIME

Applications to extend the time to file any required document or to continue any pretrial or trial date must set forth:

(i) the existing due date or hearing date;

(ii) specific, concrete reasons supporting good cause for granting the extension. In this regard, a statement that an extension "will promote settlement" is insufficient. The requesting party or parties must indicate the status of ongoing negotiations: Have written proposals been exchanged? Is counsel in the process of reviewing a draft settlement agreement? Has a mediator been selected?

(iii) whether there have been prior requests for extensions, and whether these were granted or denied by the Court.

The parties requesting the extension must provide the Court with a proposed order setting forth the proposed new dates and/or proposed new schedule.

C. SUMMARY JUDGMENT MOTIONS

As caseloads increase, the Court is seeing a corresponding increase in the filing of motions for summary judgment. These motions frequently do not comply with the requirements of the Local Rules in one or more respects, and there are ambiguities in the Local Rules regarding the preparation of the Separate Statement of Undisputed Facts and related materials. As a result the Court is receiving documents in a wide variety of formats, some that are not in compliance and some that may technically comply with the literal language of the rule, but which are confusing, difficult to decipher and interfere with the Court's ability to address these motions in an efficient and expeditious manner. To increase the Court's efficiency, and to assist counsel in structuring and focusing these motions, the Court is issuing the following order regarding the filing motions for summary judgment in this Court. The Court will require strict adherence to these requirements.

1. Separate Statement Of Undisputed Facts and Statement of Genuine Issues

The Separate Statement of Undisputed Facts is to be prepared in a two column format. The left hand column should set forth the allegedly undisputed fact. The right hand column should set forth the evidence that supports the factual statement. The fact statements should be set forth in sequentially numbered paragraphs. Each paragraph should contain a narrowly focused statement of fact. The Court has observed cases where an allegedly undisputed fact was set forth in three pages of text. This is unacceptable. Each numbered paragraph should address a single subject in as concise a manner as possible.

The opposing party's statement of genuine issues must be in two columns and track the movant's separate statement exactly as prepared. The document must be in two columns; the left hand column must restate the allegedly undisputed fact, and the right hand column must indicate either undisputed, or disputed. The opposing party may dispute all or only a portion of the statement, but if disputing only a portion, must clearly indicate what part is being disputed. Where the opposing party is disputing the fact in whole or part, the opposing party must, in the right hand column, label and restate the moving party's evidence in support of the fact, followed by the opposing party's evidence controverting the fact. Where the opposing party is disputing the fact on the basis of an evidentiary objection, the party must cite to the evidence alleged to be objectionable and state the ground of the objection and nothing more. **No argument should be set forth in this document.**

The opposing party may submit additional material facts that bear on or relate to the issues raised by the movant, which shall follow the format described above for the moving party's separate statement. These additional facts shall follow the movant's facts, shall continue in sequentially numbered paragraphs (i.e., if movant's last statement of fact was set forth in paragraph 30, then the first new fact will be set forth in paragraph 31), and shall set forth in the right hand column the evidence that supports that statement.

The moving party, in its reply, shall respond to the additional facts in the same manner and format that the opposition party is required to adhere to in responding to the

statement of undisputed facts, as described above.

2. Supporting Evidence

No party should submit any evidence other than the specific items of evidence or testimony necessary to support or controvert a proposed statement of undisputed fact. Thus, for example, the entire transcript of a deposition, entire sets of interrogatory responses, and documents that do not specifically support or controvert material in the separate statements, should not be submitted in support or opposition to a motion for summary judgment. Any such material will not be considered.

Evidence submitted in support or opposition to a motion should be submitted either by way of stipulation or as exhibits to declarations sufficient to authenticate the proffered evidence, and should not be attached to the Memorandum of Points and Authorities. The Court will accept counsel's authentication of deposition transcripts, of written discovery responses, and of the receipt of documents in discovery if the fact that the document was in the opponent's possession is of independent significance. Documentary evidence as to which there is no stipulation regarding foundation must be accompanied by the testimony, either by declaration or properly authenticated deposition transcript, of a witness who can establish its authenticity.

3. Objections to Evidence

If a party disputes a fact based in whole or in part on an evidentiary objection, the ground of the objection, as indicated above, should be stated in the separate statement but not argued in that document. Evidentiary objections are to be addressed in a separate memorandum to be filed with the opposition or reply brief of the party. This memorandum should be organized **to track the paragraph numbers of the separate statement in sequence**. It should identify the specific item of evidence to which objection is made, the ground of the objection, and a very brief argument with citation to authority as to why the objection is well taken. The following is an example of the format contemplated by the Court:

Separate Statement Paragraph 1: Objection to the supporting deposition transcript

of Jane Smith at 60:1-10 on the grounds that the statement constitutes inadmissible hearsay and no exception is applicable. To the extent it is offered to prove her state of mind, it is irrelevant since her state of mind is not in issue. FED. R. EVID. 801, 802.

N.B: DO NOT SUBMIT BLANKET OR BOILERPLATE OBJECTIONS TO THE OPPONENT'S STATEMENTS OF UNDISPUTED FACT: THESE WILL BE DISREGARDED AND OVERRULED.

4. The Memorandum of Points and Authorities

The movant's memorandum of points and authorities should be in the usual form required under Local Rule 7 and should contain a narrative statement of facts as to those aspects of the case that are before the Court. All facts should be supported with citations to the paragraph number in the Separate Statement that supports the factual assertion and not to the underlying evidence.

Unless the case involves some unusual application of Rule 56, the motion need only contain a brief statement of the Rule 56 standard; the Court is familiar with the Rule and with its interpretation under Celotex and its progeny. If at all possible, the argument should be organized to focus on the pertinent elements of the cause(s) of action or defense(s) in issue, with the purpose of showing the existence or non-existence of a genuine issue of material fact for trial on that element of the claim or defense.

Likewise, the opposition memorandum of points and authorities should be in the usual form required by Local Rule 7, and where the opposition memorandum sets forth facts, the memorandum should cite to paragraphs in the separate statement if they are not in dispute, to the evidence that contravenes the fact where the fact is in dispute, or, if the fact is contravened by an additional fact in the statement of genuine issues, the citation should be to such fact by paragraph number.

5. Timing

In virtually every case, the Court expects that the moving party will provide more

than the minimum twenty-eight (28) day notice for such motions. The moving party should deliver to chambers a copy of a diskette, in WordPerfect format (9.0 or earlier versions), containing the Statement of Uncontroverted Facts and Conclusions of Law. [***NOTE: Parties need not wait until the motion cutoff to bring motions for summary judgment or partial summary judgment. Early completion of non-expert discovery and filing of motions for summary judgment may eliminate or reduce the need for expensive expert depositions which are normally conducted in the last stages of discovery.***]

D. ORAL ARGUMENT

If the Court concludes that a motion can be resolved without argument, the Court will notify the parties in advance.

E. MOTIONS IN LIMINE

The parties must file motions in limine addressing the admissibility of evidence in accordance with Local Rule 7-3 by the date specified on the last page. The parties shall file their opposing and reply papers in accordance with Local Rules 7-9 and 7-10 respectively.

III. PRE-TRIAL CONFERENCE AND LOCAL RULE 9 FILINGS

A. GENERAL PROVISIONS

The Pre-Trial Conference ("PTC") will be held at 3:30 P.M. on the date specified, unless the Court expressly waived a PTC at the Status Conference. (In the rare cases where the Court waives a PTC, the parties must follow Local Rule 16-11 – specifically 16-11.2.) If adjustments in the Court's calendar to accommodate congestion become necessary, the Court may re-calendar the PTC instead of the trial date. Therefore, the parties should assume that if the PTC goes forward, the trial will go forward without continuance, although some brief period of trailing may prove necessary.

The lead trial attorney on behalf of each party shall attend both the PTC and all meetings of the parties in preparation of the PTC, unless excused for good cause shown in advance of the PTC.

A continuance of the PTC at the parties' request or by stipulation is highly unlikely. Specifically, failure to complete discovery is not a ground for continuance. In the unlikely

event that the Court agrees to continue the PTC, the trial date is likely to be delayed as a result. If a change in the trial date is necessitated or likely because of the Court's calendar or otherwise, modifications of that date will be discussed at the PTC.

At the PTC, the parties should be prepared to discuss means of streamlining the trial, including, but not limited to: bifurcation; presentation of foundational and non-critical testimony and direct testimony by deposition excerpts; narrative summaries and/or stipulations as to the content of testimony; presentation of testimony on direct examination by affidavit or by declaration subject to cross-examination; and qualification of experts by admitted resumes. The Court will also discuss settlement.

B. FORM OF PRE-TRIAL CONFERENCE ORDER ("PTCO")

The proposed PTCO shall be lodged fourteen (14) calendar days before the PTC. Adherence to this time requirement is necessary for in-chambers preparation of the matter. The form of the proposed PTCO shall comply with Appendix A to the Local Rules and the following:

1. Place in "ALL CAPS" and in **bold** the separately numbered headings for each category in the PTCO (*e.g.*, "**1. THE PARTIES**" or "**7. CLAIMS AND DEFENSES OF THE PARTIES**".)

2. Include a Table of Contents at the beginning.

3. In specifying the surviving pleadings under Section 1, please state which claims or counterclaims have been dismissed or abandoned. *E.g.* "Plaintiff's second cause of action for breach of fiduciary duty has been dismissed." Also, in multiple party cases where not all claims or counterclaims will be prosecuted against all remaining parties on the other side, please specify to which party each claim or counterclaim is directed.

4. In drafting Sections 5 and 6 of the PTCO, the Court expects that the parties will attempt to agree on and set forth as many non-contested facts as possible. The Court will usually read the uncontested facts to the jury at the start of the trial. A carefully drafted and comprehensively stated stipulation of facts will reduce the length of trial and increase jury understanding of the case.

5. *In specifying the parties' claims and defenses under Section 7, each party shall closely follow the examples set forth in Appendix A of the Local Rules.* As those examples demonstrate, the parties should attempt to state issues in terms of **the elements of the claims or defenses** (ultimate facts), not in the form of evidentiary fact issues, which outline the elements of the claims and defenses. The elements to most claims and defense can be found in the Ninth Circuit Model Jury Instructions, the California Book of Approved Jury Instructions (BAJI), and Devitt & Blackmar. Counsel are reminded that the purpose of this section is to focus and clarify the issues to be presented at trial. No argument is to be included in this section.

6. The Court may well submit fact issues to the jury in the form of findings on a special verdict. The issues of fact should track the elements of a claim or defense on which the jury will be required to make findings.

C. RULE 16 FILINGS; MEMORANDA; WITNESS LISTS; EXHIBIT LISTS

The parties must comply fully with the requirements of Local Rule 16. They shall file carefully prepared Memoranda of Contentions of Fact and Law (which may also serve as the trial brief), along with their respective Witness Lists and Exhibit Lists, all in accordance with Local Rules 16-3, 16-4, 16-5 and 16-6. See the last page for dates.

D. JURY INSTRUCTIONS, VERDICT FORMS, SPECIAL INTERROGATORIES

1. Fourteen (14) days before the Rule 16 meeting, the parties shall exchange proposed jury instructions, verdict forms and special interrogatories. Seven (7) days before the meeting, counsel shall exchange written objections, if any, to proposed jury instructions, verdicts and special interrogatories. At the Rule 16 meeting, the parties shall confer with the objective of submitting one set of agreed upon substantive instructions, verdict forms and, if necessary, special interrogatories. "Substantive jury instructions" means all instructions relating to the elements of all claims and defenses in the case. The Court would appreciate the parties delivering a chamber's copy of these filings in an electronic format compatible with WordPerfect at the time the documents are filed.

2. If the parties cannot agree upon one complete set of substantive instructions, verdict forms and/or special interrogatories, they shall file two documents with the Court: a joint document reflecting the agreed upon instructions, verdict forms, and a second document in the form of a joint statement regarding the disputed instructions, verdicts and interrogatories in the following format for each instruction, verdict or interrogatory in issue:

(a) A separate page containing the text of the disputed language with an identification of the party proposing it;

(b) Following the instruction, the opposing party's statement of objections to the instruction along with legal authority in support of the argument (not to exceed one page) and proposed alternative language where appropriate;

(c) The proposing party's response to the objection with legal authority supporting the proposed language, not to exceed one page.

Both the agreed upon set of instructions, and the joint statement re disputed instructions are to be filed with the Pre-Trial Conference Order and other Rule 16 documents fourteen (14) days before the Pre-Trial Conference.

3. All proposed jury instructions shall be in the format specified by Local Rule 51-2. The parties need not submit a separate copy of instructions without citations to authority.

4. A table of contents shall be included with all jury instructions submitted to the Court. The table of contents shall set forth the following:

(a) The number of the instruction;

(b) A brief title of the instruction;

(c) The source of the instruction; and

(d) The page number of the instruction.

For example:

Number	Title	Source	Page Number
1	Burden of Proof	9th Cir. 12.2	5

5. The Court directs counsel to use the instructions from the *Manual of Model Jury Instructions for the Ninth Circuit* (West 1997) where applicable. Where California law

is to be applied and the above instructions are not applicable, the Court prefers counsel to use the CACI forms. If neither of these sources is applicable, counsel are directed to use the instructions in Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions.*

6. Modifications of instructions from the foregoing sources (or any other form instructions) must specifically state the modification made to the original form instruction and the authority supporting the modification.

E. JOINT STATEMENT OF THE CASE AND REQUESTS FOR VOIR DIRE

At the Pre-Trial Conference, the parties shall lodge their proposed voir dire questions and their joint statement of the case which the Court shall read to all prospective jurors prior to the commencement of voir dire. The statement should be not longer than two or three paragraphs.

The Court conducts voir dire of all prospective jurors. The parties need not submit requests for standard voir dire questions, such as education, current occupation, marital status, prior jury service, etc., but should include only proposed questions specifically tailored to the parties and issues of the case.

F. FINDINGS OF FACT AND CONCLUSIONS OF LAW

For a non-jury trial, the parties shall lodge their proposed findings of fact and conclusions of law in accordance with Local Rule 52-1 not later than one week before trial. The Court would appreciate the parties delivering to chambers a copy of these findings on disk in WordPerfect 9.0 format. Please see the Court's Civil Trial Order.

IV. SETTLEMENT

Local Rule 16-15.2 provides that the Settlement Conference shall be concluded not later than 45 days before the Pretrial Conference. This Court requires a slightly different approach. The Settlement Conference shall take place not later than three weeks before the Pre-Trial Conference, which is after discovery is closed and motions have been heard. The Court expects that completion of all discovery and dispositive motions will help the parties assess their positions before they complete the costly pre-trial process under Local Rule 16. But sometimes parties find it more difficult to settle after they incurred the cost of

all discovery and motion practice. The Court therefore strongly encourages counsel and the parties to pursue settlement earlier. In any event, as indicated in the Schedule of Pretrial Dates attached hereto, the parties must file a Status Report re Settlement at the time that they lodge the Proposed Pretrial Conference Order, indicating whether they have conducted the Local Rule 16 Settlement Conference and/or what additional steps are being taken to achieve settlement.

This Court will not conduct settlement conferences in non-jury cases which he is to try. In jury cases, the Court will conduct a settlement conference at the parties' joint request if three conditions exist:

1. The parties are satisfied that the fact issues in the case will be tried to a jury.

2. All significant pre-trial rulings which the Court must make have been made.

3. The parties desire the Court to conduct the conference, understanding that if settlement fails, the Court will preside over trial of the case.

If the parties are inclined to select this Court to conduct a settlement conference, the parties should consult the Court's Standing Order re Settlement Conference so that they fully understand the Court's requirements for the settlement conference. That order will govern the settlement conference procedures before this Court, but may also serve as a useful reference for settlement conferences conducted pursuant to the other available procedures. Copies of that order and all other standard orders of this Court are available through the Courtroom Deputy Clerk or on the Central District of California website, at "www.cacd.uscourts.gov."

V. CONCLUSION

The Court thanks the parties and their counsel for their anticipated cooperation in carrying out these requirements.

IT IS SO ORDERED.

DATED: May 10, 2010

GARY ALLEN FEESS
United States District Judge

JUDGE GARY ALLEN FEESS
SCHEDULE OF TRIAL AND PRETRIAL DATES[1]

Matter	Time	Weeks before trial	Plaintiff(s) (Request)	Defendant(s) (Request)	Court Order
Trial (court) **Estimated length: 7-10 days**	8:30 am				06-14-11
[Jury trial] Hearing on Motions in Limine; Hearing on Disputed Jury Instructions	9:30 am	-1			06-06-11
[Court trial] File Findings of Fact and Conclusions of Law; Hearing on Motions in Limine		-1			
Pretrial Conference; **Motions in Limine to be filed;** **Proposed Voir Dire Qs Lodged and Agreed-to Statement of Case**	3:30 pm	-4			05-16-11
Lodge Pretrial Conf. Order; File Memo of Contentions of Fact and Law; Exhibit & Witness Lists; File Status Report re Settlement; File Agreed Upon Set of Jury Instructions and Verdict Forms; File Joint Statement re Disputed Instructions, Verdicts, etc.		-6			05-02-11
Last date to conduct Settlement Conference		-8			04-22-11
Last day for hearing motions	9:30 a.m.	-9			04-11-11
Discovery cut-off		-10			03-25-11
Last to Amend Pleadings or Add Parties					08-27-10

[1] Review the Court's Order re "Rule 26(f) Scheduling Conference" to be sure of the meaning of these terms.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. CV 09-6535-GAF (PLAx) **Date August 9, 2012**

Title: Arjang Panah v. United States of America

PRESENT: THE HONORABLE PAUL L. ABRAMS

☐ **U.S. DISTRICT JUDGE**
☒ **MAGISTRATE JUDGE**

Christianna Howard	courtsmart	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

ATTORNEYS PRESENT FOR PLAINTIFFS:
Jason K. Feldman
Ian Michael Wallach

ATTORNEYS PRESENT FOR DEFENDANTS:
Joanne I. Osinoff, AUSA

PROCEEDINGS: (FURTHER SETTLEMENT CONFERENCE)

Settlement conference held. Case settles. Material terms of settlement placed on the record. Defendant shall file the stipulated dismissal and related documents **no later than August 15, 2012**. A courtesy copy of the stipulated dismissal shall be delivered to this Court's clerk.

cc: Hon. Gary A. Feess
Counsel of record

3 : 00

Initials of Deputy Clerk ch

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Attorneys for Plaintiffs

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CLERK U.S. DIST. CT.
CENTRAL DIST. OF CALIF.
LOS ANGELES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS COTTINI and ELVIRA COTTINI, individually, and as Successors in Interest to JORGE OSVALDO COTTINI, deceased,

Plaintiffs,

v.

UNITED STATES OF AMERICA; MICHAEL BENOV, Warden of Metropolitan Detention Center of Los Angeles; CARLOS DEVEZA, Administrator of Metropolitan Detention Center of Los Angeles Health Services Department; ALEXANDER SINAVSKY, M.D., Clinical Director of Metropolitan Detention Center of Los Angeles Health Services Department; and DOES 1 THROUGH 50, inclusive,

Defendant(s).

CASE NO. CV10-00294 RGK(AJWx)

COMPLAINT FOR DAMAGES

1. **Federal Tort Claims Act (28 U.S.C. §1346(b)) (Wrongful Death)**
2. **Violations of Civil Rights (Bivens Action)**

JURY DEMAND

COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction is vested in this court under 28 U.S.C. section 1343 for violations of the 1871 Civil Rights Enforcement Act, as amended, including sections 1331 and 1367(a). Jurisdiction is additionally vested in this court under 28 U.S.C. §1346(b), as the United States is a named defendant. This action arises directly under the United States Constitution pursuant to Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971).

2. Venue is proper in the Central District of California under 28 U.S.C. section 1391(b) and 28 U.S.C. section 1402(b).

ADMINISTRATIVE CLAIM

3. On July 2, 2009, an Administrative Claim for Damages (Standard Form 95) was presented to the UNITED STATES OF AMERICA, FEDERAL BUREAU OF PRISONS (hereinafter "BOP") concerning the incident which forms the basis of this complaint. This claim was received by BOP on July 6, 2009. BOP responded to the claim in the form of a complete denial on January 5, 2010. Thus, Plaintiffs have filed this action within the requisite six month period as prescribed by 28 U.S.C.S. section 2675.

PARTIES

4. At all relevant times mentioned herein, Plaintiff CARLOS COTTINI was, and is, a resident of the State of California, County of Los Angeles. CARLOS COTTINI is the birth father of JORGE OSVALDO COTTINI, deceased, and is a Successor in Interest to JORGE OSVALDO COTTINI, and is entitled to bring certain causes of action set forth

herein pursuant to Section 377.30 of the California Code of Civil Procedure. (Attached herein are declarations designating CARLOS COTTINI and ELVIRA COTTINI as Successors in Interest to JORGE OSVALDO COTTINI, and a true and correct copy of the death certificate for JORGE OSVALDO COTTINI, furnished herewith pursuant to C.C.P. §377.32.)

5. At all relevant times mentioned herein, Plaintiff ELVIRA COTTINI was, and is, a resident of the State of California, County of Los Angeles. ELVIRA COTTINI is the birth mother of JORGE OSVALDO COTTINI, deceased, and is a Successor in Interest to JORGE OSVALDO COTTINI, and is entitled to bring certain causes of action set forth herein pursuant to Section 377.30 of the California Code of Civil Procedure. (Attached herein are declarations designating CARLOS COTTINI and ELVIRA COTTINI as Successors in Interest to JORGE OSVALDO COTTINI, and a true and correct copy of the death certificate for JORGE OSVALDO COTTINI, furnished herewith pursuant to C.C.P. §377.32.)

6. DEFENDANT THE UNITED STATES OF AMERICA is, and at all times relevant to the acts and omissions herein alleged was, a sovereign national entity, organized and existing pursuant to the powers of Congress, and the United States Constitution.

7. Plaintiffs are informed and believe, and thereupon allege, that at all relevant times mentioned herein, DEFENDANT, MICHAEL L. BENOV was, and is, a resident of the State of California, County of Los Angeles. At all times relevant to the acts and omissions herein alleged, MICHAEL L. BENOV was acting in the course and scope of his employment as the Warden of the Metropolitan Detention Center of Los Angeles (hereinafter "MDCLA").

8. Plaintiffs are informed and believe, and thereupon allege, that at all relevant times mentioned herein, DEFENDANT, CARLOS DEVEZA,

was, and is, a resident of the State of California, County of Los Angeles. At all times relevant to the acts and omissions herein alleged, CARLOS DEVEZA was acting in the course and scope of his employment as the Health Services Administrator of the Health Services Department (hereinafter "HSD") of MDCLA. As Administrator, DEFENDANT DEVEZA provided administrative supervision and direction to all HSD staff except the Clinical Director of HSD. At all times relevant to this action, DEFENDANT DEVEZA was thoroughly familiar with the healthcare and treatment available at MDCLA for inmates with chronic medical conditions. DEFENDANT DEVEZA reviewed JORGE OSVALDO COTTINI's medical file and prepared a declaration regarding JORGE OSVALDO COTTINI's medical condition, executed December 8, 2008, for the matter: *United States v. Cottini, et. al.*, CR 08-01201.

9. Plaintiffs are informed and believe, and thereupon allege, that at all relevant times mentioned herein, DEFENDANT, ALEXANDER SINAVSKY, M.D. was, and is, a resident of the State of California, County of Los Angeles. At all times relevant to the acts and omissions herein alleged, DEFENDANT ALEXANDER SINAVSKY, M.D. was acting in the course and scope of his employment as the Clinical Director of the Health Services Department of the Metropolitan Detention Center of Los Angeles.

10. Plaintiffs are unaware of the true names and capacities of those DEFENDANTS sued herein as DOE DEFENDANTS. Plaintiffs will amend this complaint to allege DOE DEFENDANTS' true names and capacities when that information becomes known to them. Plaintiffs are informed, believe, and thereon allege that these DOE DEFENDANTS are legally responsible and liable for the incident, injuries and damages hereinafter set forth, and that each of these DOE DEFENDANTS

proximately caused the injuries and damages by reason of negligent, careless, deliberately indifferent, intentional, willful or wanton misconduct, including the negligent, careless, deliberately indifferent, intentional, willful or wanton misconduct in creating and otherwise causing the incidents, conditions and circumstances hereinafter set forth, or by reason of direct or imputed negligence or vicarious fault or breach of duty arising out of the matters herein alleged. Plaintiffs will seek leave to amend this complaint to set forth the true names and identities of the unknown named DOE DEFENDANTS when they are ascertained.

11. DEFENDANTS, MICHAEL L. BENOV, CARLOS DEVEZA and ALEXANDER SINAVSKY, M.D., are sued herein in their individual and personal capacities in the Second Cause of Action. For the First Cause of Action, DEFENDANTS, MICHAEL L. BENOV, CARLOS DEVEZA and ALEXANDER SINAVSKY, M.D. were acting in their official capacities.

12. Plaintiffs are informed and believe and thereon allege that, at all times herein mentioned, each of the DEFENDANTS was the agent and/or employee and/or co-conspirator of each of the remaining DEFENDANTS, and in doing the things hereinafter alleged, was acting within the scope of such agency, employment and/or conspiracy and with the permission and consent of other co-DEFENDANTS.

INTRODUCTORY STATEMENT

13. DEFENDANT THE UNITED STATES OF AMERICA is a federal sovereign entity, and at all times relevant herein acted through its authorized federal agents.

14. A suit against the government for tort claims is proper here as this claim arises out of allegations of misconduct committed by

"investigative or law enforcement officers of the United States Government."

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

15. This Complaint seeks redress for the untimely and unjustified death of forty-six year old JORGE OSVALDO COTTINI. Mr. COTTINI's death was caused by the systemic and unconstitutional failure of the DEFENDANTS, UNITED STATES OF AMERICA, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, to take reasonable measures to protect the safety of, and provide adequate medical care for, inmates at the Metropolitan Detention Center of Los Angeles. Specifically, JORGE OSVALDO COTTINI was denied essential heart medication the entire time he was incarcerated at MDCLA despite his repeated complaints of dizziness, shortness of breath and chest pains, and despite his repeated pleas for his medication. JORGE OSVALDO COTTINI's pleas included a note from his primary care physician stating that he needed his heart medication to prevent heart attack or stroke. However, DEFENDANTS, and each of them, were deliberately indifferent to Mr. COTTINI's serious medical need for his prescribed medication, and willfully, deliberately, maliciously and/or negligently denied his essential heart medication prescribed by his primary care physician of five years, Thao Hoang, M.D. As a result, JORGE OSVALDO COTTINI died on January 18, 2009.

16. JORGE OSVALDO COTTINI died at White Memorial Medical Center while under the care and custody of MDCLA.

17. In 2007, JORGE OSVALDO COTTINI was diagnosed with hypertension, coronary artery disease, hypoxia, and supraventricular tachycardia, among other illnesses. JORGE OSVALSO COTTINI was able to

manage his illnesses by way of taking daily medication including, but not limited to, Diovan.

18. Forty-six year old JORGE OSVALDO COTTINI, was arrested in October 2008 and charged with RICO conspiracy. He was detained on October 21, 2008 at the Metropolitan Detention Center of Los Angeles ("MDCLA"), located at 535 N Alameda St Los Angeles, CA 90012, to await trial. He was denied release on bail on October 23, 2008 even though others, similarly situated, were released.

19. On October 21, 2008, upon his admission to MDCLA, JORGE OSVALDO COTTINI was referred to the HEALTH SERVICES DEPARTMENT ("HSD") of MDCLA where DEFENDANT CARLOS DEVEZA documented JORGE OSVALDO COTTINI's serious medical conditions and medication history, which included daily Diovan amongst other medications. That same day, medications were ordered; however without explanation, Diovan, on which JORGE OSVALDO COTTINI relied to treat his hypertension and heart condition, was not ordered.

20. On October 27, 2008, JORGE OSVALDO COTTINI again presented to HSD and was seen by DEFENDANT ALEXANDER SINAVSKY, M.D. who also documented JORGE OSVALDO COTTINI's hypertension and treatment by way of Diovan. However, DEFENDANT ALEXANDER SINAVSKY, M.D., inexplicably decided to discontinue JORGE OSVALDO COTTINI's Diovan medication to treat his hypertension.

21. Plaintiffs are informed and believe that on numerous occasions, JORGE OSVALDO COTTINI, complained to the staff at MDCLA and HSD of shortness of breath, dizziness and chest pains and was denied treatment. JORGE OSVALDO COTTINI called his mother, Plaintiff, Elvira Cottini, daily complaining that he was not receiving medication for shortness of breath and chest pains which he complained of on a daily

basis. JORGE OSVALDO COTTINI also requested his formerly prescribed medications from DEFENDANTS but he was willfully, maliciously, and/or negligently denied those medications.

22. On November 10, 2008, JORGE OSVALDO COTTINI called his mother, ELVIRA COTTINI, and again, complained of shortness of breath and chest pains. The next day, on November 11, 2008, JORGE OSVALDO COTTINI presented to HSD with chest pains and shortness of breath, his medications were documented as: Acetaminophen, Amlodipine, Hydrochlorothiazide and Lisinopril. However, it is unclear whether he ever received any medications. Furthermore, a stress test for atypical chest pain was recommended with a due date of November 28, 2008; however, evidence of completion of this test does not appear within the medical records.

23. On November 14, 2008, JORGE OSVALDO COTTINI submitted a request for a clinical visit stating the severity of his symptoms including dizziness lasting the entire day, chest pains, and difficulty breathing. JORGE OSVALDO COTTINI further explained that whenever he stood up or sat down he felt as if he would faint. However, DEFENDANTS, and each of them, willfully, maliciously and/or negligently denied this request for five days before finally granting JORGE OSVALDO COTTINI access to HSD.

24. On November 19, 2008, JORGE OSVALDO COTTINI was finally granted access to HSD. He presented on an emergency basis with dizziness, shortness of breath and increasingly worsening chest discomfort; however, due to the conscious disregard of DEFENDANTS, and each of them, JORGE OSVALDO COTTINI was denied adequate medication. JORGE OSVALDO COTTINI was not prescribed Diovan, the medication he was taking upon his incarceration, rather, the only change made to his

medication was a renewed prescription for Acetaminophen decreasing the amount which he was prescribed on November 12, 2008.

25. On November 19, 2008, Thao Hoang, M.D., JORGE OSVALDO COTTINI's primary physician for the past five years, wrote a letter to the staff at MDCLA and HSD to inform them of the seriousness of JORGE OSVALDO COTTINI's condition. Doctor Hoang explained that JORGE OSVALDO COTTINI "takes Diovan for his hypertension and ... must take his Diovan on a daily basis to control his blood pressure, so that it can prevent him from having a heart attack or stroke." However, this letter was received with deliberate indifference to JORGE OSVALDO COTTINI's serious medical condition and for the duration Mr. COTTINI was held in the custody of the MDCLA, he was never prescribed or given Diovan.

26. On December 23, 2008, JORGE OSVALDO COTTINI again presented to HSD. A cardiology consultation confirmed the presence of a possibly anginal chest pain, exertional dyspnea, leg swelling and "history consistent possibly with congestive heart failure which may be secondary to hypertensive disease; and hypertension." However, despite all of the warnings, verbal, written, and otherwise, JORGE OSVALDO COTTINI was still not prescribed Diovan. Furthermore, JORGE OSVALDO COTTINI called his mother the same day and told her that the staff at HSD told him he was very sick and he must return shortly. However, JORGE OSVALDO COTTINI was willfully, deliberately and/or negligently denied access to HSD until the weekend of his death January 16-18, 2009.

27. Plaintiffs are informed and believe that sometime in the early part of January 2009, while being strip searched in the same room as JORGE OSVALDO COTTINI, inmate Mike Mahoney witnessed as JORGE

OSVALDO COTTINI "pleaded" with the MDCLA staff for his medicine. According to Mr. Mahoney, Mr. COTTINI told guards, "I need my heart medicine. They will not give me the medicine I need to stay alive." The guards just shrugged, ignoring his pleas with deliberate indifference although his symptoms of distress were obvious even to a lay person. Mr. Mahoney wrote a statement to this effect.

28. On January 12, 2009, Plaintiff ELVIRA COTTINI visited her son, JORGE OSVALDO COTTINI, in the MDCLA. JORGE OSVALDO COTTINI was, yet again, complaining of chest pains; however, DEFENDANTS, UNITED STATES OF AMERICA, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, willfully, recklessly, and/or negligently refused to provide the necessary medical care and essential medication to Mr. JORGE OSVALDO COTTINI.

29. On January 15, 2009, JORGE OSVALDO COTTINI again called his mother, Plaintiff ELVIRA COTTINI with complaints of chest pains and shortness of breath.

30. On January 16, 2009, MDCLA officials finally responded to JORGE OSVALDO COTTINI's pleas and took him to HDS. After his initial examination, DEFENDANT ALEXANDER SINAVSKY, M.D. finally ordered JORGE OSVALDO COTTINI to White Memorial Medical Center for an evaluation of the Exertional Dyspnoea which had been plaguing Mr. JORGE OSVALDO COTTINI since his arrival at MDCLA. Mr. JORGE OSVALDO COTTINI never left White Memorial Medical Center. Within two days of his admission, on January 18, 2009, JORGE OSVALDO COTTINI went into respiratory arrest and died at the young age of forty-six.

31. Although medical records indicate that specific medications were prescribed to JORGE OSVALDO COTTINI, Plaintiffs are informed, believe, and thereby allege that during the entire time that JORGE

OSVALDO COTTINI was incarcerated at MDCLA, he pleaded with DEFENDANTS, UNITED STATES OF AMERICA, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, to give him his prescribed medication which was deliberately, willfully and/or negligently denied. Several inmates witnessed JORGE OSVALDO COTTINI pleading with the staff at MDCLA to give him his needed medication and his pleas being denied. Statements were written to this effect.

FOR THE FIRST CAUSE OF ACTION

(For Wrongful Death pursuant to the Federal Tort Claims Act)

(by All Plaintiffs against The United States of America)

32. Plaintiffs incorporate by reference all paragraphs set forth above as if fully set forth herein.

33. This cause of action is brought under the authority of the Federal Tort Claims Act, (FTCA) 28 U.S.C. §§1346(b), 2671 *et. seq.*, for wrongful death occasioned by the wrongful conduct and/or negligence of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50 who, while acting under color of law, and acting in the course and scope of their employment with the United States Federal Bureau of Prisons, at the MDCLA and the MDCLA's HSD, willfully, maliciously, deliberately and/or negligently denied essential medication to JORGE OSVALDO COTTINI causing his death.

34. DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, while acting under color of law, and acting in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS had a duty to provide for the safekeeping and care of inmates, including decedent, JORGE OSVALDO COTTINI. However, DEFENDANTS, and each of them, while acting under

color of law, and acting in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, systematically, willfully, recklessly, maliciously, deliberately and/or negligently denied JORGE OSVALDO COTTINI access to his essential medication, despite Mr. COTTINI's numerous pleas for his medication.

35. Plaintiffs are informed, believe, and thereby allege, that on numerous occasions, during the entire time that JORGE OSVALDO COTTINI was incarcerated at MDCLA, JORGE OSVALDO COTTINI pleaded with DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, who were acting under color of law, and acting in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, to provide his essential medication, which was continually and systematically denied.

36. Plaintiffs are informed, believe, and thereby allege, that had JORGE OSVALDO COTTINI received adequate medication, he would be alive today. However, due to the negligent and wrongful acts committed by DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, while acting under color of law, and acting in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, JORGE OSVALDO COTTINI died an unjustified and early death.

37. DEFENDANT, MICHAEL BENOV, as Warden of the MDCLA, while acting under color of law, and acting in the course and scope of his employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, had a duty to exercise reasonable and ordinary care under the circumstances, to ensure that JORGE OSVALDO COTTINI would receive the medicine and/or medical treatment he needed to remain alive. However, DEFENDANT, MICHAEL BENOV, while acting under color of law, and acting in the

course and scope of his employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, wrongfully, intentionally, recklessly, negligently and/or callously denied proper medical care and treatment and/or essential medication to Plaintiffs' decedent, JORGE OSVALDO COTTINI.

38. DEFENDANT, CARLOS DEVEZA, as Administrator of the HDS at MDCLA, while acting under color of law, and acting in the course and scope of his employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, had a duty to exercise reasonable and ordinary care under the circumstances, to ensure that JORGE OSVALDO COTTINI would receive the medicine and/or medical treatment he needed to remain alive. However, DEFENDANT, CARLOS DEVEZA, while acting under color of law, and acting in the course and scope of his employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, wrongfully, intentionally, recklessly, negligently and/or callously denied proper medical care and treatment and/or essential medication to Plaintiffs' decedent, JORGE OSVALDO COTTINI.

39. DEFENDANT, ALEXANDER SINAVSKY, M.D., as Clinical Director of the HSD at MDCLA, while acting under color of law, and acting in the course and scope of his employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, had a duty to exercise reasonable and ordinary care under the circumstances, to ensure that JORGE OSVALDO COTTINI would receive the medicine and/or medical treatment he needed to remain alive. However, DEFENDANT, ALEXANDER SINAVSKY, M.D., while acting under color of law, and acting in the course and scope of his employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, wrongfully, intentionally, recklessly, negligently and/or callously denied proper medical care and treatment and/or essential medication to Plaintiffs' decedent, JORGE OSVALDO COTTINI.

40. DEFENDANT, DOES 1-50, as guards, staff, and/or other employees of the UNITED STATES FEDERAL BUREAU OF PRISONS at the MDCLA including the HSD, while acting under color of law, and acting in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, had a duty to exercise reasonable and ordinary care under the circumstances, to ensure that JORGE OSVALDO COTTINI would receive the medicine and/or medical treatment he needed to remain alive. However, DEFENDANT, DOES 1-50, while acting under color of law, and acting in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, wrongfully, intentionally, recklessly, negligently and/or callously denied proper medical care and treatment and/or essential medication to Plaintiffs' decedent, JORGE OSVALDO COTTINI.

41. The death of the Plaintiffs' decedent, JORGE OSVALDO COTTINI, was legally and proximately caused by the above-described conduct of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, while acting under color of law, and acting in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS.

42. As a proximate result of the death of Paintiffs' Decedent, and the above-described conduct of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, while acting under color of law, and acting in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS, JORGE OSVALDO COTTINI's heirs have sustained substantial economic and non-economic damages resulting from the loss of the love, comfort, society, attention, services and support of Mr. COTTINI in an amount according to proof at trial.

43. As a further proximate result of the above-described conduct of the DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, while acting under color of law, and acting in the course and scope of their employment with the United States Federal Bureau of Prisons, and the death of JORGE OSVALDO COTTINI, Plaintiffs have incurred funeral and burial expenses in an amount according to proof at trial.

FOR THE SECOND CAUSE OF ACTION

COUNT ONE

(*Bivens* Action; For Violation of JORGE OSVALDO COTTINI'S Fifth Amendment Rights)

(by Plaintiffs CARLOS COTTINI and ELVIRA COTTINI, as Successors in Interest to JORGE OSVALDO COTTINI, against DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, in their individual and personal capacities)

44. Plaintiffs incorporate by reference all paragraphs set forth above as if fully set forth herein.

45. This cause of action is brought under the authority of Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971), and upon the Fifth Amendment to the United States Constitution against DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, in their individual and personal capacities. This cause of action is brought by PLAINTIFFS CARLOS COTTINI and ELVIRA COTTINI, as Successors in Interest to JORGE OSVALDO COTTINI, who would, but for his death, assert the constitutional claims set forth herein in his own right. Attached herein as Exhibit "1" are true and correct copies of the Successor in

Interest Declarations of CARLOS COTTINI and ELVIRA COTTINI, and the death certificate of JORGE OSVALDO COTTINI, as prescribed by California Code of Civil Procedure, Section 377.30, *et. seq.*

46. At all times relevant to the acts and omissions herein alleged, DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, were members of the UNITED STATES JUSTICE DEPARTMENT and the FEDERAL BUREAU OF PRISONS and were acting under color of law, and in the course and scope of their employment with the UNITED STATES FEDERAL BUREAU OF PRISONS.

47. Plaintiffs are informed and believe, and thereby allege, that in 2007, Plaintiffs' Decedent JORGE OSVALDO COTTINI was diagnosed with hypertension, coronary artery disease, hypoxia, and supraventricular tachycardia, among other illnesses and JORGE OSVALDO COTTINI was able to manage his illnesses by way of taking daily medication including, but not limited to, Diovan.

48. Plaintiffs are further informed and believe, and thereby allege, that JORGE OSVALDO COTTINI faced a serious medical need for medical attention and medications to control his conditions, which if denied, would result in a substantial risk of serious harm including, but not limited to, heart attack or stroke, resulting in death.

48. Plaintiffs are informed and believe, and thereby allege, that DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, knew of JORGE OSVALDO COTTINI's serious need for medical attention and medications to control his conditions and failed to take reasonable measures to address the needs of JORGE OSVALDO COTTINI.

49. Plaintiffs are informed and believe, and thereby allege, that DEFENDANTS CARLOS DEVEZA and DOES 1-25 knew of JORGE OSVALDO

COTTINI's serious need for medical attention and medications to control his conditions as DEFENDANT CARLOS DEVEZA documented JORGE OSVALDO COTTINI'S conditions and medications on October 21, 2008. Furthermore, DEFENDANT CARLOS DEVEZA signed a declaration on December 8, 2008 that he was familiar with Decendent COTTINI's care and condition, yet DEFENDANT CARLOS DEVEZA and DOES 1-25 disregarded the grave risk to JORGE OSVALDO COTTINI'S health by failing to prescribe medication to control JORGE OSVALDO COTTINI'S conditions in the first instance, and on subsequent occasions, after it became clear that Mr. COTTINI's health was steadily declining.

50. Plaintiffs are further informed and believe, and thereby allege, that DEFENDANT CARLOS DEVEZA and DOES 1-25 failed to take reasonable measures to treat JORGE OSVALDO COTTINI with the correct medication and were deliberately indifferent to his serious medical condition even after receiving continuous health requests and numerous pleas from JORGE OSVALDO COTTINI for his medication and even after receiving a letter from Decedent COTTINI'S primary care physician stating that Mr. COTTINI must take Diovan to control his conditions.

51. Plaintiffs are informed and believe, and thereby allege, that DEFENDANT ALEXANDER SINAVSKY, M.D. and DOES 1-25 knew of JORGE OSVALDO COTTINI's serious need for medical attention and medications to control his conditions as DEFENDANT CARLOS DEVEZA documented JORGE OSVALDO COTTINI'S conditions and medications (including Diovan) on October 27, 2008, yet disregarded the grave risk to JORGE OSVALDO COTTINI'S health by failing to prescribe medication to control JORGE OSVALDO COTTINI'S conditions in the first instance, and on subsequent occasions, after it became clear that Mr. COTTINI'S health was steadily declining.

52. Plaintiffs are further informed and believe, and thereby allege, that DEFENDANT ALEXANDER SINAVSKY, M.D. and DOES 1-25 failed to take reasonable measures to treat JORGE OSVALDO COTTINI with the correct medication and were deliberately indifferent to his serious medical condition even after receiving continuous health requests and numerous pleas from JORGE OSVALDO COTTINI for his medication and even after receiving a letter from Decedent COTTINI'S primary care physician stating that Mr. COTTINI must take Diovan to control his conditions.

53. Plaintiffs are informed and believe, and thereby allege, that DEFENDANTS MICHAEL BENOV and DOES 26-50 knew of JORGE OSVALDO COTTINI's serious need for medical attention and medications to control his conditions as it was documented by MDCLA's HDS on October 21, 2008 and October 28, 2008, and his symptoms were obvious to lay people. Yet DEFENDANTS MICHAEL BENOV and DOES 26-50 disregarded the grave risk to JORGE OSVALDO COTTINI'S health by failing to take reasonable measures to address the numerous pleas of JORGE OSVALDO COTTINI for his medications even after it became clear that Mr. COTTINI was not in good health and his health was steadily declining.

54. Plaintiffs are further informed and believe, and thereby allege, that DEFENDANTS MICHAEL BENOV and DOES 26-50 knew that on November 14, 2008 JORGE OSVALDO COTTINI wrote a request to see a Doctor noting that he was dizzy for the entire day, his chest pains were getting worse, he was having trouble breathing and he felt faint whenever he stood up, which was denied by DEFENDANTS MICHAEL BENOV and DOES 26-50. Furthermore, Plaintiffs are informed and believe, and thereby allege, that JORGE OSVALDO COTTINI verbally pleaded with DEFENDANTS MICHAEL BENOV and DOES 26-50 regularly to give him his

medications and Mr. COTTINI'S symptoms, including trouble breathing and dizziness, were obvious to DEFENDANTS MICHAEL BENOV and DOES 26-50; however DEFENDANTS MICHAEL BENOV and DOES 26-50 failed to take reasonable measures to address JORGE OSVALDO COTTINI'S condition and did not allow him to see someone in HSD until November 19, 2008 (five days after Mr. Cottini's written request on November 14, 2008). Moreover, DEFENDANTS MICHAEL BENOV and DOES 26-50 were deliberately indifferent to JORGE OSVALDO COTTINI'S serious medical condition even after receiving continuous health requests and pleas from JORGE OSVALDO COTTINI for his medication and even after receiving a letter from Decedent COTTINI'S primary care physician stating that Mr. COTTINI must take Diovan to control his conditions.

55. Notwithstanding knowledge of all of the above facts, including direct and personal knowledge that JORGE OSVALDO COTTINI was an inmate with a known heart condition and medical disorders, DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, intentionally and with deliberate indifference to JORGE OSVALDO COTTINI's medical condition and needs and the substantial and pervasive risks of harm from denial of his proper medications, while acting under color of law and in the course and scope of their employment, did deliberately and willfully deny JORGE OSVALDO COTTINI appropriate medical attention and medication including Diovan, violating his Fifth Amendment Due Process Rights.

56. As a direct and proximate result of this intentional and deliberate lack of medical care and proper medication, JORGE OSVALDO COTTINI died at the age of forty-six of a treatable and manageable heart condition.

57. In this manner, DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA,

ALEXANDER SINAVSKY, M.D. and DOES 1-50, failed to protect JORGE OSVALDO COTTINI'S life and safety, and denied him due process of law by acting with deliberate indifference to his serious medical condition to which protection JORGE OSVALDO COTTINI had a constitutional right, and thereby caused JORGE OSVALDO COTTINI to be exposed to the threat of serious bodily injury and/or death from heart attack, stroke, or coronary artery disease, and encouraged the realization of those threats, resulting in his death. DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, acted as they did in part because they knew or were otherwise aware that they would receive no discipline or punishment for their conduct and that their constitutionally violative conduct wold otherwise be ratified and condoned by their superiors.

58. Plaintiffs are informed and believe, and thereby allege, that JORGE OSVALDO COTTINI was systematically and continually denied access to adequate medical care which resulted in his death as previously described, all of which shocked the conscience, and constituted a deliberate indifference to JORGE OSVALDO COTTINI'S serious medical condition in violation of all Plaintiffs' due process rights to be free from arbitrary deprivations of life, liberty, property and the pursuit of happiness. By causing the death of JORGE OSVALDO COTTINI, the actions of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, also violated all Plaintiffs' right to associate with their son, their right to enjoy the care, companionship, familial relationship, and society of their son, and their right to be free from arbitrary and unreasonable government intrusions into their family unit, as DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50 intruded upon with

deliberate indifference and in a manner that shocks the conscience as they had knowledge of JORGE OSVALDO COTTINI'S serious medical needs.

59. All Plaintiffs had the right to be free from unreasonable intrusions into their family unit, secured to all plaintiffs by the provisions of the Fifth and Fourteenth Amendment to the United States Constitution. All of these interests were implicated by the wrongful conduct of DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, which proximately caused severe injury and death to JORGE OSVALDO COTTINI as described herein.

60. As a proximate result of the aforementioned acts and omissions of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, JORGE OSVALDO COTTINI went into respiratory arrest and died.

61. The aforementioned acts by or omissions of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50 and each of them, were willful, wanton, malicious and oppressive, done with a conscious disregard for the rights of Plaintiffs and constitute the type of despicable conduct that no civilized society should be forced to endure, and this conduct justifies the awarding of exemplary and punitive damages against the individual DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, in an amount to be proven at the trial of this matter.

62. As a proximate result of the aforementioned acts and omissions of said DEFENDANTS, and each of them, JORGE OSVALDO COTTINI sustained great physical and mental pain, injury and shock to his nervous system, fear, anxiety, anguish, torment, degradation, emotional distress, loss of strength, and sense, knowledge and awareness of impending death prior to his death.

63. As a direct and proximate result of the aforementioned acts, omission, customs, practices, policies and decisions of the DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, PLAINTIFFS and Plaintiffs' decedent, JORGE OSVALDO COTTINI, have suffered great mental and physical pain, suffering, anguish fright, nervousness, anxiety, grief, shock, humiliation, indignity, embarrassment, apprehension, and the loss of love, comfort, society, solace and support, all to their damage in a sum to be determined at trial. Additionally, PLAINTIFFS have been forced to incur substantial amounts for attorneys' fees, investigation expenses, and other expenses in the prosecution of the above articulated constitutional violations.

64. As a further result of these acts, Plaintiffs have lost past and future earnings and wages resulting from the loss of the support and services of decedent, JORGE OSVALDO COTTINI, in an amount to be determined according to proof at trial.

65. DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, acted willfully, knowingly, with reckless disregard and deliberate indifference to the known consequences of their acts and omissions, and purposefully with the intent to deprive Plaintiffs of their federally protected rights and privileges, and did in fact violate those rights and privileges entitling plaintiffs to punitive and exemplary damages in an amount to be proven at the trial of this matter.

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FOR THE SECOND CAUSE OF ACTION

COUNT TWO

(*Bivens* Action; For Violation of JORGE OSVALDO COTTINI'S Eighth Amendment Rights)

(by Plaintiffs CARLOS COTTINI and ELVIRA COTTINI, as Successors in Interest to JORGE OSVALDO COTTINI, against DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50 in their individual and personal capacities)

66. Plaintiffs incorporate by reference all paragraphs set forth above as if fully set forth herein.

67. This cause of action is brought under the authority of Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971), and upon the Eighth Amendment to the United States Constitution against DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, in their individual and personal capacities. This cause of action is brought by PLAINTIFFS CARLOS COTTINI and ELVIRA COTTINI, as Successors in Interest to JORGE OSVALDO COTTINI, who would, but for his death, assert the constitutional claims set forth herein in his own right. Attached herein as Exhibit "1" are true and correct copies of the Successor in Interest Declarations of CARLOS COTTINI and ELVIRA COTTINI, and the death certificate of JORGE OSVALDO COTTINI, as prescribed by California Code of Civil Procedure, Section 377.30, *et. seq.*

68. DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, failed to protect JORGE OSVALDO COTTINI'S life and safety by acting with deliberate indifference to his serious medical condition to which protection JORGE OSVALDO COTTINI had a constitutional right, and thereby caused JORGE OSVALDO

COTTINI to be exposed to the threat of serious bodily injury and/or death from heart attack, stroke, or coronary artery disease, and encouraged the realization of those threats, resulting in his death. DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, acted as they did in part because they knew or were otherwise aware that they would receive no discipline or punishment for their conduct and that their constitutionally violative conduct wold otherwise be ratified and condoned by their superiors.

69. As a proximate result of the aforementioned acts and omissions of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, JORGE OSVALDO COTTINI went into respiratory arrest and died.

70. JORGE OSVALDO COTTINI had the right to be free from cruel and unusual punishment and unlawful deprivations of his life and liberty. He also had the right to be free from deliberate indifference to his serious medical needs. All of these rights and privileges are secured to JORGE OSVALDO COTTINI by the provisions of the Eighth Amendment to the United States Constitution, and by Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971). All of these interests were implicated by the wrongful conduct of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, which proximately caused severe injuries to JORGE OSVALDO COTTINI, as described herein.

71. The aforementioned acts by or omissions of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50 and each of them, were willful, wanton, malicious and oppressive, done with a conscious disregard for the rights of Plaintiffs and constitute the type of despicable conduct that no civilized society should be

forced to endure, and this conduct justifies the awarding of exemplary and punitive damages against the individual DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, in an amount to be proven at the trial of this matter.

72. As a proximate result of the aforementioned acts and omissions of said DEFENDANTS, and each of them, JORGE OSVALDO COTTINI sustained great physical and mental pain, injury and shock to his nervous system, fear, anxiety, anguish, torment, degradation, emotional distress, loss of strength, and sense, knowledge and awareness of impending death prior to his death.

7. As a direct and proximate result of the aforementioned acts, omission, customs, practices, policies and decisions of the DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, PLAINTIFFS and Plaintiffs' decedent, JORGE OSVALDO COTTINI, have suffered great mental and physical pain, suffering, anguish fright, nervousness, anxiety, grief, shock, humiliation, indignity, embarrassment, apprehension, and the loss of love, comfort, society, solace and support, all to their damage in a sum to be determined at trial. Additionally, PLAINTIFFS have been forced to incur substantial amounts for attorneys' fees, investigation expenses, and other expenses in the prosecution of the above articulated constitutional violations.

74. As a further result of these acts, Plaintiffs have lost past and future earnings and wages resulting from the loss of the support and services of decedent, JORGE OSVALDO COTTINI, in an amount to be determined according to proof at trial.

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COUNT THREE

(*Bivens* Action; For Violation of all Plaintiffs' Fourteenth Amendment Rights)

(by All Plaintiffs against DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50 in their individual and personal capacities)

75. Plaintiffs incorporate by reference all paragraphs set forth above as if fully set forth herein.

76. This cause of action is brought by Plaintiffs CARLOS COTTINI and ELVIRA COTTINI, individually, under the authority of Bivens v. Six Unknown named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971), and upon the Fourteenth Amendment to the United States Constitution against DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, in their individual capacities. This cause of action is brought by PLAINTIFFS CARLOS COTTINI and ELVIRA COTTINI, as Successors in Interest to JORGE OSVALDO COTTINI, who would, but for his death, assert the constitutional claims set forth herein in his own right. Attached herein as Exhibit "1" are true and correct copies of the Successor in Interest Declarations of CARLOS COTTINI and ELVIRA COTTINI, and the death certificate of JORGE OSVALDO COTTINI, as prescribed by California Code of Civil Procedure, Section 377.30, *et. seq.*

77. Plaintiffs are informed and believe, and thereby allege, that JORGE OSVALDO COTTINI was systematically and continually denied access to adequate medical care which resulted in his death as previously described, all of which shocked the conscience, and constituted a deliberate indifference to JORGE OSVALDO COTTINI'S serious medical condition in violation of all Plaintiffs' due process

rights to be free from arbitrary deprivations of life, liberty, property and the pursuit of happiness. By causing the death of JORGE OSVALDO COTTINI, the actions of DEFENDANTS, MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, also violated all plaintiffs' right to associate with their son, their right to enjoy the care, companionship, familial relationship, and society of their son, and their right to be free from arbitrary and unreasonable government intrusions into their family unit, as DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50 intruded upon with deliberate indifference and in a manner that shocks the conscience as they had knowledge of JORGE OSVALDO COTTINI'S serious medical needs.

78. All Plaintiffs have the right to be free from unreasonable intrusions into their family unit, secured to all plaintiffs by the provisions of the Fourteenth Amendment to the United States Constitution. All of these interests were implicated by the wrongful conduct of DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY, M.D. and DOES 1-50, which proximately caused severe injury and death to JORGE OSVALDO COTTINI as described herein.

79. As a direct and proximate result of the aforementioned constitutional violations, all Plaintiffs have suffered great mental and physical pain, suffering, anguish, fright, nervousness, anxiety, grief, shock, humiliation, indignity, embarrassment, and apprehension, all to their damage in a sum to be determined at trial. Additionally, all Plaintiffs have been forced to incur substantial amounts for attorneys' fees, investigation expenses, and other expenses in the prosecution of the above articulated constitutional violations.

80. DEFENDANTS MICHAEL BENOV, CARLOS DEVEZA, ALEXANDER SINAVSKY,

M.D. and DOES 1-50, acted willfully, knowingly, with reckless disregard and deliberate indifference to the known consequences of their acts and omissions, and purposefully with the intent to deprive Plaintiffs of their federally protected rights and privileges, and did in fact violate those rights and privileges entitling plaintiffs to punitive and exemplary damages in an amount to be proven at the trial of this matter.

JURY DEMAND

81. All Plaintiffs hereby demand that a jury be empaneled for the trial of all causes of action set forth in this cause of action.

WHEREFORE, Plaintiffs pray for judgment against DEFENDANTS as follows:

1. For general damages in an amount to be determined according to proof at trial;
2. For medical and related expenses according to proof at trial;
3. For additional special damages according to proof at trial;
4. For costs of suit incurred herein;
5. For punitive damages against the individual DEFENDANTS in an amount to be determined according to proof at trial;
6. For attorneys' fees, investigation fees, and expert witness fees incurred herein; and

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7. For such other and further relief as the Court deems just and proper.

DATED: January 14, 2010

Respectfully submitted,

THE COCHRAN FIRM - LOS ANGELES

By: 

RANDY H. MCMURRAY
Rmcmurray@cochranfirm.com
Attorney for Plaintiffs

DECLARATION OF CARLOS COTTINI

1. The decedent's name who is the subject of this action for wrongful death is JORGE OSVALDO COTTINI.
2. On January 18, 2009, JORGE OSVALDO COTTINI, died as a result of coronary artery disease due to the failure of THE UNITED STATES OF AMERICA, ET. AL., to provide him with proper medical care while he was detained at the METROPOLITAN DETENTION CENTER OF LOS ANGELES .
3. No proceeding is now pending in California for the administration of the decedent's estate.
4. I am one of two successors in interest (as defined in Section 377.11 of the California Code of Civil Procedure) with respect to the decedent's interest in the within action.
5. I am the natural father of the decedent.
6. No other person has a superior right to commence the action or proceeding. The only other person who has the right to be substituted for the decedent in the pending action is his mother, ELVIRA COTTINI.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1-11-10
DATED

Carlos Cottini
CARLOS COTTINI

DECLARATION OF ELVIRA COTTINI

1. The decedent's name who is the subject of this action for wrongful death is JORGE OSVALDO COTTINI.
2. On January 18, 2009, JORGE OSVALDO COTTINI, died as a result of coronary artery disease due to the failure of THE UNITED STATES OF AMERICA, ET. AL., to provide him with proper medical care while he was detained at the METROPOLITAN DETENTION CENTER OF LOS ANGELES .
3. No proceeding is now pending in California for the administration of the decedent's estate.
4. I am one of two successors in interest (as defined in Section 377.11 of the California Code of Civil Procedure) with respect to the decedent's interest in the within action.
5. I am the natural mother of the decedent.
6. No other person has a superior right to commence the action or proceeding. The only other person who has the right to be substituted for the decedent in the pending action is his father, CARLOS COTTINI.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

1-11-2010
DATED

ELVIRA COTTINI

140 038

Acta número Novecientos treinta y ocho Tomo 9

En Florida Partido Vicente López de la

Provincia de Buenos Aires, a veinte [illegible]

de mil novecientos sesenta y dos Ante mí Felix Carlos Storni

Jefe de la Delegación del Registro Provincial de las Personas maternidad Santa Rosa Don Carlos Sebastián Cottini de veintiséis años, estado casado

nacionalidad argentino docente documento de identidad matrícula cuatro millones ciento setenta y siete mil ochocientos noventa y seis

domiciliado Jaramillo tres mil doscientos sesenta y uno Capital Federal

DECLARA: Que el día ocho del mes actual

a las catorce horas treinta en esta ciudad

NACIÓ una criatura del sexo masculino cuya existencia fue constatada por la partera Rosa Elsa Cardoso de Correa según certificado

archivado bajo el número de esta acta y que había recibido el nombre de Jorge Osvaldo siendo

su padre el declarante que firma Carlos S. Cottini

su madre Elvira Juana Cipolla de veinticuatro años argentina casada que hace [illegible] domiciliada con el declarante

sus abuelos paternos Pedro Cottini y Celestina Ricobene

y maternos Cayetano Cipolla y Ana María Luisa Baitelli

Leída esta acta, la firman conmigo

Carlos S. Cottini

Cottini Jorge Osvaldo

NOTAS MARGINALES

De acuerdo con lo dispuesto por el Art. 24 del Decreto Ley Nacional 8.204/63, modificado por Ley 18.527, este documento no podrá retenerse por autoridad Judicial o Administrativa ni por entidades o personas privadas, debiendo limitarse a tomar constancia o certificar por cualquier medio [illegible] ciente, el contenido del mismo.

Jorge Cottini's Argentinian Birth Certificate

Certifico que la persona cuyo nombre y apellido,
Nous certifions que la personne dont le prénom, nom
fotografía, firma e impresión digital figuran
photographie, signature et empreintes digitales figurent
al dorso, según documentación exhibida, es nacida
au verso, d'après la documentation exhibée, est née
en Vicente Lopez
à
provincia Buenos Aires
province
nacion Argentina
nation
el ___ ***de*** ___ ***de*** 1962
le ___ ***du*** ___ ***du***
de estado civil Soltero
d'état civil
y L.C./L.E./D.N.I. 18.839.696
et documentation

habiendo satisfecho los requisitos legales, se le
ayant satisfait les formalités légales, le présent Passeport
expide el presente Pasaporte.
lui est délivré.

Los Angeles 28 de Febrero de 2005

FIRMA/SIGNATURE
Roberto Diez
CONSUL ADJUNTO

N°. de Orden 1292
N°. de Arancel 6.6.1.
Derechos: $ 60°° (Sesenta)

Observaciones/Remarques/Remarks/Observações
Otorgado por actualización de pasaporte anterior.

Roberto Diez
CONSUL ADJUNTO

En nombre del Gobierno de la Nación Argentina, la autoridad que expide el presente pasaporte ruega y requiere, a todos aquellos a quienes pueda concernir, dejar pasar libremente a su titular y prestarle la asistencia y protección necesarias.

Au nom du Gouvernement de la Nation Argentine, l' Autorité octroyant le présent passeport, prie et sollicite a tous ceux que cela peut concerner de laisser passer librement et sans entraves à son titulaire et de lui prêter l'assitance et la protection necessaires.

In the name of the Government of the Argentine Republic, the authority issuing this passport requests and requires all those whom it may concern to allow the bearer to pass freely and afford him every assistance and protection of which he may stand in need.

Em nome do Governo da República Argentina, a autoridade que concede o presente passaporte, roga e solicita às autoridades competentes, deixar passar livremente o titular e prestar-lhe toda a assistência e proteção necessária.

Pasaporte C N°. 18.839.696

N°. de Registro 30/2005

Nombre y apellido Jorge Osvaldo COTTINI

IMPRESION DIGITO PULGAR

FIRMA DEL INTERESADO

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge R. Gary Klausner and the assigned discovery Magistrate Judge is Andrew J. Wistrich.

The case number on all documents filed with the Court should read as follows:

CV10- 294 RGK (AJWx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

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NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

[X] Western Division
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

[ ] Southern Division
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

[ ] Eastern Division
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

ORIGINAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CARLOS COTTINI and ELVIRA COTTINI, individually, and as Successors in Interest to JORGE OSVALDO COTTINI, deceased

PLAINTIFF(S)

V.

UNITED STATES OF AMERICA; MICHAEL BENOV, Warden of Metropolitan Detention Center of Los Angeles; CARLOS DEVEZA, Administrator of Metropolitan Detention Center of Los Angeles Health Services Department; ALEXANDER SINAVSKY, M.D., Clinical Director of Metropolitan Detention Center of Los Angeles Health Services Department; and DOES 1 THROUGH 50 Inclusive,

DEFENDANT(S).

CASE NUMBER

CV10-00294 RGK (AJWx)

SUMMONS

TO: DEFENDANT(S): _____

A lawsuit has been filed against you.

Within 60 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached [x] complaint [ ] _____ amended complaint [ ] counterclaim [ ] cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Randy H. McMurray , whose address is The Cochran Firm, 4929 Wilshire Blvd., Suite 1010, Los Angeles, CA 90010 . If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: 14 JAN 2010

By: _____
Deputy Clerk

(Seal of the Court)

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

ORIGINAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CARLOS COTTINI and ELVIRA COTTINI, individually, and as Successors in Interest to JORGE OSVALDO COTTINI, deceased

PLAINTIFF(S)

V.

UNITED STATES OF AMERICA; MICHAEL BENOV, Warden of Metropolitan Detention Center of Los Angeles; CARLOS DEVEZA, Administrator of Metropolitan Detention Center of Los Angeles Health Services Department; ALEXANDER SINAVSKY, M.D., Clinical Director of Metropolitan Detention Center of Los Angeles Health Services Department; and DOES 1 THROUGH 50 Inclusive,

DEFENDANT(S).

CASE NUMBER

CV10-00294 RGK (AJWx)

SUMMONS

TO: DEFENDANT(S): _____

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached [x] complaint [ ] _____ amended complaint [ ] counterclaim [ ] cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Randy H. McMurray, whose address is The Cochran Firm, 4929 Wilshire Blvd., Suite 1010, Los Angeles, CA 90010. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: 14 JAN 2010

By: _____
Deputy Clerk

(Seal of the Court)

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

CIVIL COVER SHEET

I (a) PLAINTIFFS (Check box if you are representing yourself ☐)

CARLOS COTTINI and ELVIRA COTTINI, individually, and as Successors in Interest to JORGE OSVALDO COTTINI, deceased

DEFENDANTS

UNITED STATES OF AMERICA; MICHAEL BENOV, Warden of Metropolitan Detention Center of Los Angeles, et al.

(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)

Randy H. McMurray, Esq. SBN 126888
Britany M. Engelman, Esq. SBN 238618
THE COCHRAN FIRM LOS ANGELES
4929 Wilshire Blvd., Suite 1010
Los Angeles, CA 90010
(323) 931-6200

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in this State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. ORIGIN (Place an X in one box only.)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify): ☐ 6 Multi-District Litigation ☐ 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: ☒ Yes ☐ No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: ☐ Yes ☒ No ☐ **MONEY DEMANDED IN COMPLAINT: $** 0.00

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

28 U.S.C. Section 1346(b)

VII. NATURE OF SUIT (Place an X in one box only.)

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce/ICC Rates/etc.
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Act
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Info. Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loan (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Fed. Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
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- ☐ 465 Other Immigration Actions

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- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS - Third Party 26 USC 7609

CV 10-00294

FOR OFFICE USE ONLY: Case Number: _____

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
CIVIL COVER SHEET

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? [X] No [ ] Yes

If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? [X] No [ ] Yes

If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

(Check all boxes that apply)
- [ ] A. Arise from the same or closely related transactions, happenings, or events; or
- [ ] B. Call for determination of the same or substantially related or similar questions of law and fact; or
- [ ] C. For other reasons would entail substantial duplication of labor if heard by different judges; or
- [ ] D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.

[ ] Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Carlos Cottini, Los Angeles	

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.

[ ] Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Elvira Cottini, Los Angeles	

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.

Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles	

*** Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties**

Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER): _____ Date January 14, 2010

Britany M. Engelman, Esq.

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

FILED

MAR 16 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS COTTINI, individually, and as Successors in Interest to Jorge Osvaldo Cottini, deceased, and ELVIRA COTTINI, individually, and as Successors in Interest to Jorge Osvaldo Cottini, deceased,

Plaintiffs - Appellees,

v.

UNITED STATES OF AMERICA; et al.,

Defendants - Appellants.

No. 11-55874

D.C. No. 2:10-cv-00294-RGK
Central District of California,
Los Angeles

ORDER

RECEIVED
CLERK, U.S. DISTRICT COURT
MAR 16 2012
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Pursuant to the stipulation of the parties, this appeal is voluntarily dismissed. Fed. R. App. P. 42(b). The parties shall bear their own costs and attorneys' fees on appeal.

This order served on the district court shall act as and for the mandate of this court.

FOR THE COURT

By: Margaret A. Corrigan
Circuit Mediator

MAC/Mediation 3-15-12

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-00294-RGK (AJWx)	Date	March 28, 2011
Title	**COTTINI, et al v. UNITED STATES OF AMERICA, et al**		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Individual Defendants' Motion for Summary Judgment (DE 37); Plaintiffs' Ex Parte Application to Extend Discovery Cut-off (DE 60)**

I. INTRODUCTION

On January 14, 2010, Carlos and Elvira Cottini ("Plaintiffs") filed suit individually and as successors in interest to their deceased son, Jorge Osvaldo Cottini ("Cottini"), against Michael Benov ("Benov"), Carlos Deveza ("Deveza"), and Alexander Sinavsky ("Sinavsky") (collectively, "Individual Defendants"). Plaintiffs allege violations of Cottini's Fifth Amendment rights by each of the Individual Defendants, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs also assert a claim against the United States for wrongful death pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346, which the Individual Defendants do not contest. Presently before the Court is the Individual Defendants' Motion for Summary Judgment on the *Bivens* claims, along with Plaintiffs' Ex Parte Application to Extend the Discovery Cut-Off. For the following reasons, the Individual Defendants' motion is DENIED in part, and DEFERRED in part. The Court GRANTS a 30-day discovery extension pursuant to the parties' stipulation as described in the Ex Parte Application.

II. FACTUAL BACKGROUND

During the period of time relevant to this case, Benov was the Warden of the Metropolitan Detention Center in Los Angeles ("MDC"). Sinavsky was the Clinical Director of MDC's Health Services Department, and Deveza was MDC's Health Services Administrator. Upon Cottini's arrival at MDC on October 21, 2008, Deveza screened him for medical problems and switched his blood pressure medication to comply with the Bureau of Prisons drug selection guidelines. Sinavsky reviewed a record of the screening and approved Deveza's decisions. On October 27, 2008, Sinavsky examined Cottini and noted "Exertional dyspnea" in the "Cardiovascular" section of his medical record. Sinavsky examined Cottini again on November 12, 2008, adding "Angina" to the medical record and noting Cottini's

history of hypertension and heart disease. Based on the November 12 examination, Sinavsky determined that Cottini should see a cardiologist by November 28. Two days after Sinavsky made this determination, on November 14, Cottini wrote a note to MDC's medical staff, complaining that he was dizzy all day long, having a hard time breathing, experiencing worsening chest pains, and passing out when trying to stand up. On November 19, 2008, Cottini was examined for these complaints "on an emergency basis" by a third-party member of the medical staff, who gave Cottini acetaminophen and sent him back to his cell. The November 28 due date for Cottini's cardiology consultation passed without any action from prison officials, and it was not until December 23, 2008 that the consultation finally occurred. The consulting cardiologist recommended additional medication and testing, but nobody acted on the cardiologist's advice until January 16, 2009, when Sinavsky examined Cottini, reviewed the cardiology report, and sent Cottini to the hospital. Two days later, Cottini died of coronary artery disease.

III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Upon such showing, the court may grant summary judgment "on all or part of the claim." Fed. R. Civ. P. 56(a)-(b).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp.*, 477 U.S. at 324. A fact is material only if it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over such facts amount to genuine issues if a reasonable jury could resolve them in favor of the nonmoving party. *Id.*

When there is specific evidence that is unavailable to the non-moving party and necessary to effectively oppose summary judgment, the Court may defer consideration of the motion, deny the motion, allow additional time to obtain evidence, or issue any other appropriate order. Fed. R. Civ. P. 56(d). The non-moving party is responsible for explaining why the necessary evidence is unavailable. *Id.*

IV. DISCUSSION

The Individual Defendants argue that summary judgment should be granted on the *Bivens* claims because Plaintiffs have not produced evidence sufficient to show that Cottini's constitutional rights were violated. The Individual Defendants also maintain that they are entitled to qualified immunity.

Plaintiffs explain that they have been unable to obtain some crucial evidence because the magistrate judge has stayed the depositions they requested pending a decision by the Court on the qualified immunity issue. Plaintiffs therefore ask the Court to deny summary judgment and allow additional time for discovery.

As described below, the Court **DENIES** summary judgment as to Sinavsky, and **DEFERS** consideration of summary judgment as to Benov and Deveza. The Court further finds that none of the Individual Defendants have established their entitlement to qualified immunity. Therefore, the Court

lifts the magistrate judge's stay on discovery and extends the discovery cut-off by 30 days, to April 25, 2011.

A. *Bivens* Claims

In *Bivens*, the Supreme Court recognized a private right of action for a citizen whose constitutional rights had been violated by federal officials acting under color of government authority. 403 U.S. at 389. The constitutional provision at issue in the present *Bivens* action is the due process clause of the Fifth Amendment, which prohibits the mistreatment of pretrial detainees. *See Bell v. Wolfish*, 441 U.S. 535-36 (1979). With respect to medical care specifically, due process dictates that "persons in custody have the established right to not have officials remain deliberately indifferent to their serious medical needs." *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (quoting *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996)) (internal quotation marks omitted). Thus, the Constitution requires that prisons provide access to medical staff who are able to treat prisoners' medical problems or arrange for "reasonably speedy" treatment at an outside facility. *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982).

The Supreme Court clarified the "deliberate indifference" standard in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). There, the Court held that deliberate indifference exists when a prison official disregards a substantial risk of serious harm. *Id.* The Court further explained that the prison official does not need to know that harm will result from his action or inaction. *Id.* at 835. Rather, it is enough that the official failed to act despite the known risk, and harm resulted. *Id.* at 842. The prison official's subjective knowledge of the substantial risk "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Id.* Thus, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.*

To overcome summary judgment in the present case, Plaintiffs must first provide evidence to show that Cottini had a serious medical need before he died. Then, Plaintiffs must point to evidence that each one of the Individual Defendants acted with deliberate indifference to Cottini's medical need by being aware of the risk created by the medical need and acting or failing to act despite that risk. As discussed below, the Court finds that Plaintiffs have presented such evidence against Sinavsky, and it is sufficient to create a genuine issue of material fact for trial. With respect to Deveza and Benov, the Court declines to render summary judgment until Plaintiffs have the opportunity to obtain additional evidence.

1. *Serious Medical Need*

A prisoner's health condition may amount to a serious medical need if a failure to treat the condition could result in further serious injury to the prisoner. *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994) (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992)). The evidence in this action shows that Cottini suffered from heart problems while confined at MDC, that his treatment was significantly delayed on two occasions, and that he died from a heart-related malady shortly after the second treatment delay. From this evidence, a reasonable jury could find that MDC's failure to provide Cottini with adequate treatment caused his death. Working backwards from this conclusion, the jury could determine that Cottini's heart problems constituted a serious medical need.

2. *Deliberate Indifference*

Deliberate indifference depends on the individual prison official's state of mind, so the Court analyzes the evidence separately with regard to each Individual Defendant.

i. *Alexander Sinavsky*

According to Plaintiffs' evidence, Sinavsky examined Cottini on November 12, 2008, and noted symptoms of angina and exertional dyspnea. As a result, Sinavsky ordered a cardiology consultation, to be completed by November 28. However, Sinavsky failed to insure that the consultation took place within the time period he specified. When the consultation finally took place on December 23, 2008, the consulting physician recommended that Cottini undergo further treatment, but Sinavsky failed to act on this recommendation for several more weeks. Sinavski finally examined Cottini again on January 16, 2009 and sent him to the hospital. Two days later, Cottini died.

Based on Sinavsky's role as Cottini's treating physician, combined with the delay in Cottini's treatment and his death shortly thereafter, a reasonable jury could find that Sinavsky knew of a substantial risk to Cottini's health, and failed to act despite this knowledge. Thus, Sinavsky's alleged deliberate indifference to Cottini's serious medical need presents a genuine issue for trial. The Court **DENIES** summary judgment as to Sinavsky.

ii. *Michael Benov*

Individual Defendants argue that summary judgment should be granted on the *Bivens* claim against Benov because, as the Warden of MDC, he was not involved in any decisions regarding Cottini's medical care. However, this line of argument fails because a prison official may be deliberately indifferent by ignoring a known risk that affects prisoners in general, rather than one prisoner in particular. *See Farmer*, 511 U.S. at 843. Moreover, the Constitution "requires that prison officials provide a system of ready access to adequate medical care," including reasonably speedy referrals to outside facilities if the prison is not equipped to render proper treatment. *Hoptowit*, 682 F.2d at 1253. Thus, if Benov knew that prisoners were at risk because MDC lacked a system for monitoring the health of prisoners with serious medical conditions, or an adequate system for processing referrals in a reasonably speedy manner, then he may have been deliberately indifferent by failing to act despite this risk.

So far, Plaintiffs have been unable to depose Benov and determine what he knew about the medical procedures that were applied in the course of Cottini's treatment. In light of the evidence that Cottini's Fifth Amendment rights may have been violated, it may be possible for a reasonable jury to find that Benov was deliberately indifferent to Cottini's serious medical needs. Further development of the evidentiary record is necessary before the Court can make this determination. Accordingly, the Court **DEFERS** consideration of summary judgment for Benov until after the close of discovery, pursuant to Fed. R. Civ. P. 56(d).

iii. *Carlos Deveza*

The evidentiary record is similarly undeveloped with respect to Deveza who, as the Health Services Administrator at MDC, may have known about dangerous deficiencies in MDC's healthcare procedures. The Court therefore **DEFERS** consideration of summary judgment for Deveza as well.

B. Qualified Immunity

The test for qualified immunity has two steps. First, the Court must determine whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Then, the Court must determine "whether the right was clearly established," meaning "[t]he contours of the right must have been clear enough that a reasonable official would have understood that he was violating the right." *Id.* at 201-02 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). *See also Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (holding that the sequence of steps is no longer mandatory). If the officer's

alleged conduct did not violate a constitutional right, or the right was not clearly established, then the officer is entitled to qualified immunity. *Id.* at 816. In the instant case, the Individual Defendants have failed to secure summary judgment on the constitutional violation itself. Therefore, they can establish qualified immunity only if a reasonable official in their circumstances would not have understood that he was violating Cottini's rights.

The Individual Defendants allegedly violated Cottini's Fifth Amendment rights by being deliberately indifferent to his serious medical needs. Assuming that these allegations are supported, the Individual Defendants cannot sustain a qualified immunity defense because "deliberate indifference is inconsistent with a finding of . . . qualified immunity." *Albers v. Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984), *rev'd on other grounds*, 475 U.S. 312 (1986). A public official cannot both be "deliberately indifferent" – i.e., consciously disregard a known, excessive risk to inmate safety, *Farmer*, 511 U.S. at 837 – and at the same time reasonably believe that his conduct conforms to clearly established law, *Harlow*, 457 U.S. at 818. Because a reasonable prison official would have known that the Individual Defendants' alleged deliberate indifference was unconstitutional, the Individual Defendants are not entitled to summary judgment based on qualified immunity.

C. Scheduling

As described above, the Court recognizes the need to permit additional time for discovery. Therefore, the 30-day discovery extension that the parties have stipulated to is **GRANTED**. The new discovery cut-off is April 25, 2011, and all other deadlines remain in effect.

The Court will consider the deferred portions of the present summary judgment motion after the new discovery cut-off. Plaintiffs may file supplemental briefing no later than May 2, 2011. The supplemental brief shall address only matters involving any additional evidence obtained from ongoing discovery efforts, and the brief shall not exceed 5 pages in length. Plaintiffs shall also attach a supplemental Statement of Disputed Facts. No additional filings will be accepted from the Individual Defendants on this motion.

V. EVIDENTIARY OBJECTIONS

To the extent the Court has relied on evidence to which the parties have objected, the Court overrules the parties' objections to that evidence.

VI. CONCLUSION

In light of the foregoing, the Court hereby **DENIES** the Individual Defendants' Motion for Summary Judgment as to Sinavsky, and **DEFERS** consideration of the motion as to Benov and Deveza. The Court hereby lifts the stay order issued by Magistrate Judge Andrew J. Wistrich on February 24, 2011, so discovery may proceed. The discovery cut-off date is now **April 25, 2011**, and all other deadlines remain in effect. The Court will rule on the deferred portions of the present motion after receiving any supplemental filings from Plaintiffs, which shall be filed no later than **May 2, 2011.**

IT IS SO ORDERED.

_____ : _____

Initials of Preparer slw

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-00294-RGK (AJWx)	Date	June 2, 2011
Title	**COTTINI, et al v. UNITED STATES OF AMERICA, et al**		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Supplemental Order Re: Individual Defendants' Motion for Summary Judgment (DE 37)**

I. INTRODUCTION

On March 28, 2011, this Court issued an Order Re: Individual Defendants' Motion for Summary Judgment ("Order"). The Order denied in part, and deferred in part, Defendants' motion, which sought summary judgment as to the *Bivens* claims. Specifically, the Court denied summary judgment on the issue of qualified immunity as to all three individual defendants. As to Defendant Sinavsky, the Court also denied summary judgment on the *Bivens* claim. As to the *Bivens* claims against Defendants Deveza and Benov, the Court deferred ruling on the motion until after discovery had been completed.

On May 2, 2011, pursuant to the Court's order, Plaintiffs filed a Supplement to Motion for Summary Judgment addressing only the issue of *Bivens* liability on the part of Defendants Deveza and Benov. Upon review of the additional evidence submitted by Plaintiffs, the Court **grants in part, and denies in part** summary judgment.

III. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper only where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Upon such showing, the court may grant summary judgment "on all or part of the claim." Fed. R. Civ. P. 56(a)-(b).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific admissible evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp.*, 477 U.S. at 324. A fact is material only if it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over such facts amount to genuine issues if a reasonable jury could resolve them in favor of the nonmoving party. *Id.*

When there is specific evidence that is unavailable to the non-moving party and necessary to effectively oppose summary judgment, the Court may defer consideration of the motion, deny the motion, allow additional time to obtain evidence, or issue any other appropriate order. Fed. R. Civ. P. 56(d). The non-moving party is responsible for explaining why the necessary evidence is unavailable. *Id.*

III. DISCUSSION

The Individual Defendants argue that summary judgment should be granted on the *Bivens* claims because Plaintiffs have not produced evidence sufficient to show that Cottini's constitutional rights were violated.

In *Bivens*, the Supreme Court recognized a private right of action for a citizen whose constitutional rights had been violated by federal officials acting under color of government authority. 403 U.S. at 389. The constitutional provision at issue in the present *Bivens* action is the due process clause of the Fifth Amendment, which prohibits the mistreatment of pretrial detainees. *See Bell v. Wolfish*, 441 U.S. 535-36 (1979). With respect to medical care specifically, due process dictates that "persons in custody have the established right to not have officials remain deliberately indifferent to their serious medical needs." *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (quoting *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996)) (internal quotation marks omitted). Thus, the Constitution requires that prisons provide access to medical staff who are able to treat prisoners' medical problems or arrange for "reasonably speedy" treatment at an outside facility. *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982).

The Supreme Court clarified the "deliberate indifference" standard in *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). There, the Court held that deliberate indifference exists when a prison official disregards a substantial risk of serious harm. *Id.* The Court further explained that the prison official does not need to know that harm will result from his action or inaction. *Id.* at 835. Rather, it is enough that the official failed to act despite the known risk, and harm resulted. *Id.* at 842. The prison official's subjective knowledge of the substantial risk "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Id.* Thus, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.*

As discussed in the Court's March 28 Order, evidence in the record shows that a reasonable jury could determine that Cottini's heart problems constituted a serious medical need. Therefore, to overcome summary judgment as to Defendants Deveza and Benov, Plaintiffs must point to evidence that each of the defendants acted with deliberate indifference to Cottini's medical need by being aware of the risk created by the medical need and acting or failing to act despite that risk.

A. Michael Benov

Individual Defendants argue that summary judgment should be granted on the *Bivens* claim against Benov because, as the Warden of MDC, he was not involved in any decisions regarding Cottini's medical care. However, this line of argument fails because a prison official may be deliberately indifferent by ignoring a known risk that affects prisoners in general, rather than one prisoner in particular. *See Farmer*, 511 U.S. at 843. Moreover, the Constitution "requires that prison officials provide a system of ready access to adequate medical care," including reasonably speedy referrals to outside facilities if the prison is not equipped to render proper treatment. *Hoptowit*, 682 F.2d at 1253. Thus, if Benov knew that prisoners were at risk because MDC lacked a system for monitoring the health of prisoners with serious medical conditions, or an adequate system for processing referrals in a reasonably speedy manner, then he may have been deliberately indifferent by failing to act despite this risk.

Plaintiffs have introduced evidence that in an inmate population of about 1,100, roughly 5-10 inmates every two weeks complained to Benov about medical concerns involving the health and services department ("HSD").(Pl.s' Supplemental Opp'n Brief ("Supplement"), Benov Dep., Ex. C, 143:22-144:16.) Rather than conducting an inquiry into the HSD to uncover systemic problems, Benov only called HSD regarding the specific individuals as issues came up. (Supplement, Benov Dep., Ex. C, 144:17-24.) Plaintiffs' evidence also indicates that direct supervision of the HSD and its head was not conducted by Benov, even though he is in charge of the entire MDC system, but rather, by associate wardens. (Supplement, Benov Dep., Ex. C, 75:19-25; 181:5-184:17, 185:17-187-3.)

The question is: does the evidence raise a triable issue as to whether Benov knew that inmates were at substantial risk of serious harm. Such knowledge may be found where the risk was so obvious that an inference can be made that Benov knew of the risk. *See Farmer*, 511 U.S. at 843. Upon review of Plaintiffs' evidence, the Court finds that Plaintiffs' falls short of raising a triable issue. First, the evidence shows only that 5-10 inmates, every two weeks raised medical concerns. The evidence fails to establish what types of medical concerns these complaints involved, serious medical needs or routine medical treatment. Second, the evidence fails to indicate how longstanding or pervasive the 5-10 complaints every two weeks were. While the evidence regarding the complaints and method of supervision may support an argument for possibly addressing the effectiveness of the system, it fails to raise a triable issue that Benov was deliberately indifferent to a substantial risk of serious harm to the inmates.

B. Carlos Deveza

According to the evidence, Deveza actively participated in Cottini's medical case by performing an intake health screening soon after Cottini's arrival at the MDC and adjusting Cottini's medication pursuant to the BOP National Formulary. (Defs.'Undisputed Facts, Nos. 1-4.) On November 12, 2008, Sinavsky examined Cottini, performed an EKG, and requested a cardiology consultation to occur by November 28, 2008. (Deveza Decl. at ¶ 5, attached Ex. 5.) The consultation did not occur by that date, but rather almost a month later, on December 23, 2008. (Deveza Decl. at ¶ 8.) On November 14, 2008, Cottini wrote a letter complaining of chest pain, dizziness, and passing out, which was received on November 20, 2008. (Deveza Decl. at ¶ 7(a).) On November 19, 1008, Cottini was seen on an emergency basis, complaining of dizziness, shortness of breath, and chest discomfort. (Deveza Decl. at ¶ 7.) On December 8, 2008, Deveza reviewed Cottini's medical file. (Supplement, Deveza Dep., Ex. A, 189:21-190:2.) After Cottini's December 23 cardiologist consult, the doctor generated a consultation note with follow-up recommendations. (Deveza Decl. at ¶ 8, attached Ex. 9.) The cardiologist never forwarded the note to HSD or otherwise contacted HSD regarding Cottini's

case.(Deveza Decl. at ¶ 8.) Plaintiffs' evidence establishes that the contract between HSD and MDI states that an outpatient report, accessible by Deveza, will be posted within three working days. (Supplement, Deveza Dep., Ex. A, 158:10-159:2.) It is Deveza's duty to follow up with MDI if a report is not issued in a timely manner. (Supplement, Deveza Dep., Ex. A, 180:9-181:5.) Deveza did not follow-up on the report until January 16, 2009, when the missing report was brought to his attention by Sinavsky. (Deveza Decl. at ¶ 9.)

While any of the evidence above, by itself, would be insufficient to raise a triable issue of material fact, analysis of the evidence in totality yields a different result. Based on (1) Deveza's role as the administrator of Cottini's case; (2) evidence regarding the time frame in which Deveza reviewed Cottini's medical file; and (3) Deveza's failure to follow-up on the missing outpatient report, the Court finds a triable issue as to whether Deveza was deliberately indifferent to Cottini's serious medical need.

IV. CONCLUSION

In light of the foregoing, the Court hereby **GRANTS** the Individual Defendants' Motion for Summary Judgment as to Benov, and **DENIES** summary judgment as to Deveza.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer slw

Robert V. Torres, Esq. (CA. Bar No. 142752)
Jennifer A. Bandlow, Esq. (CA Bar No. 265757)
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS COTTINI and ELVIRA COTTINI, Individually, and as Successors in Interest to JORGE OSVALDO COTTINI, deceased, Plaintiffs, vs. UNITED STATES OF AMERICA; MICHAEL BENOV, Warden of Metropolitan Detention Center of Los Angeles; CARLOS DEVEZA, Administrator of Metropolitan Detention Center of Los Angeles Health Services Department; ALEXANDER SINAVSKY, M.D., Clinical Director of Metropolitan Detention Center of Los Angeles Health Services Department; and DOES 1 through 50, inclusive, Defendants	**CASE NO.: CV10-00294 RGK (AJXx)** **REQUEST FOR DISMISSAL OF ENTIRE ACTION WITH PREJUDICE PURSUANT TO SETTLEMENT AGREEMENT** **Hon. R. Gary Klausner**

Pursuant to the Stipulation for Compromise Settlement, Document number 118, filed on March 13, 2012, the parties, by and through their counsel of record, request that this case be dismissed in its entirety, with prejudice, all parties to bear their own costs and fees.

Dated: April 12, 2012

THE COCHRAN FIRM – LOS ANGELES

By: /s/
Robert V. Torres, Esq., and
Jennifer A. Bandlow, Esq.
Attorneys for Plaintiffs, Elvira and Carlos Cottini

ANDRE BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

By: /s/
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Assistant United States Attorney
INDIRA J. CAMERON-BANKS
Assistant United States Attorney
Attorneys for Federal Defendants

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Erika.Johnson@usdoj.gov

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CARLOS COTTINI and ELVIRA COTTINI, individually and as successors in Interest to JORGE OSVALDO COTTINI, deceased Plaintiffs, v. UNITED STATES OF AMERICA, MICHAEL BENOV, Warden of Metropolitan Detention Center of Los Angeles, CARLOS DEVEZA, Administrator of Metropolitan Detention Center of Los Angeles Health Services Department, ALEXANDER SINAVSKY, M.D., Clinical Director of Metropolitan Detention Center of Los Angeles Health Services Department; and DOES 1-50 Inclusive Defendants.	No. CV 10-294 RGK (AJWx) **STIPULATION FOR COMPROMISE SETTLEMENT** Hon. Robert G. Klausner

IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiffs Carlos and Elvira Cottini ("Plaintiffs") and Defendant United States of America ("Defendant"), that the above-entitled action may be settled and compromised on the following terms and conditions:

1. Defendant agrees to pay to Plaintiffs the sum of Two Hundred Thousand Dollars ($200,000.00), which sum shall include all attorneys' fees and costs, and which shall be in full settlement and satisfaction of any and all claims arising out of the incident or circumstances giving rise to this suit.

2. Plaintiffs agree to accept the sum of Two Hundred Thousand Dollars ($200,000.00) in full settlement and satisfaction of any and all claims and demands that Plaintiffs' heirs, executors, administrators, or assigns may have against Defendant, its agencies, agents, and employees on account or arising out of the incident or circumstances giving rise to this suit.

3. In exchange for a payment of $200,000, paid on behalf of the United States only, Plaintiffs agree to dismiss with prejudice the Bivens claims against the individual defendants in exchange for mutual releases of all claims and an agreement that all individual parties bear their own attorneys' fees and costs incurred in both the district court action and the appeal.

4. In addition, and notwithstanding anything to the contrary herein, Plaintiffs explicitly release any and all claims against Defendant which the Plaintiffs do not know or suspect to exist in their favor at the time they execute this stipulation and general release, which if known to Plaintiffs would have materially affected this settlement if the claim or claims had been known. Plaintiffs, for themselves and their heirs, executors, administrators, agents, servants, employees or assigns, and each and any of them, expressly waives all rights under California Civil Code § 1542, which states: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if

known by him or her must have materially affected his or her settlement with the debtor.".

5. Plaintiffs and their heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless Defendant, its agents, servants, and employees from any and all causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his heirs, executors, administrators or assigns against any third party or against Defendant, arising out of the incident or circumstances giving rise to this suit.

6. This stipulation for compromise settlement shall not constitute an admission of liability or fault on the part of Defendant, its agents, servants, or employees, and is entered into by all parties herein for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

7. It is also agreed, by and among the parties, that the settlement amount of Two Hundred Thousand Dollars($200,000.00) for Plaintiffs represents the entire amount of the compromise settlement, and that the respective parties will each bear their own costs, fees, and expenses, and that any attorneys' fees owed by the Plaintiffs will be paid out of the settlement amount and not in addition thereto.

8. It is also understood, by and among the parties, that pursuant to Title 28, United States Code, Section 2678, any attorneys' fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

9. There shall be made payable jointly to Carlos and Elvira Cottini and The Cochran Firm, attorneys for Plaintiffs, a check for said compromise settlement of Two Hundred Thousand Dollars ($200,000.00), which amount is inclusive of all attorneys' fees and costs.

10. In exchange for payment of the sum stated above, and upon receipt of the settlement funds, Plaintiffs shall, forthwith, file with the Clerk of the above Court a

Stipulation for Dismissal of this entire action, with prejudice and without costs.

11. Plaintiffs agree that they will be obligated to pay any and all liens from any and all insurance companies, health care providers, attorneys, and any and all other persons or organizations who have or claim to have subrogated assigned claims arising out of or related to the subject matter of this suit.

12. Any and all individual taxation consequences as a result of this Stipulation are the sole and exclusive responsibility of the Plaintiffs. Defendant does not warrant any representation of any tax consequences of this Stipulation. Nothing contained herein shall constitute a waiver by Plaintiffs of any right to challenge any tax consequences of this Stipulation.

13. This written agreement contains all of the agreements between the United States and Plaintiffs, and is intended to be and is the final and sole agreement between the United States and Plaintiffs. The United States and Plaintiffs agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement between the United States and Plaintiffs, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

///

///

14. The undersigned represent that they have reviewed and understand this agreement, and that they are fully authorized to enter into the terms and conditions of this agreement and that they agree to be bound thereby.

DATED: March 13, 2012

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/
INDIRA J. CAMERON-BANKS
Assistant United States Attorney
ERIKA JOHNSON-BROOKS
Assistant United States Attorney
Attorneys for Federal Defendants

DATED: 3-13-2012

THE COCHRAN FIRM

ROBERT TORRES
JENNIFER BANDLOW
Attorneys for Plaintiffs

DATED: 3-13-2012

CARLOS COTTINI

ELVIRA COTTINI

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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RODMAN, **Plaintiff,** **v.** **UNITED STATES FEDERAL BUREAU OF PRISONS,** **Defendant.**	**CASE NO. CV10 321** BAT **PLAINTIFF'S COMPLAINT FOR NEGLIGENCE** **10-CV-00321-CMP**

Plaintiff, for his Complaint against Defendant, alleges the following:

I. PARTIES

1. Plaintiff Richard L. Rodman resides in Sedro Woolley, Skagit County, Washington. Mr. Rodman was injured in the Federal Detention Center at SeaTac, King County, Washington by Defendant's agents and/or employees.

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sanford@kinzeratlaw.com

2. Defendant United States Federal Bureau of Prisons ("BOP") operates a Federal Detention Center in SeaTac, King County, Washington. Defendants' agents and employees were Plaintiff's guards and medical providers.

II. JURISDICTION AND VENUE

3. The causes of action stated by Plaintiff in this Complaint arise out of alleged negligence by prison staff and medical care and treatment provided by Defendant, a government agency, in King County, Washington. Defendant operates a Federal Detention Center located in SeaTac, King County, Washington. All acts relevant to this Complaint occurred within this Judicial District.

4. Jurisdiction and venue are appropriate before the United States District Court for the Western District of Washington pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. § 1402(b).

5. On July 10, 2009, Plaintiff complied with 28 U.S.C. § 2675 by mailing, via certified mail, a Form 95 Claim for Damage, Injury, or Death, as well as associated materials, to the Federal Bureau of Prisons: Western Regional Office in Stockton, California. On July 20, 2009, the Western Regional Office received and processed Plaintiff's Form 95 Claim. On August 5, 2009, the claim was assigned to the SeaTac Federal Detention Center's local counsel. (See Exhibit 1). On January 20, 2010, the six (6) month waiting period expired, and Plaintiff's Claim has been left without action. The institution of this action is timely.

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III. STATEMENT OF CLAIM

6. On or about July 24, 2007, Plaintiff Richard Rodman was incarcerated in the Federal Detention Center in SeaTac, Washington.

7. On March 19, 2008, while incarcerated, Plaintiff experienced persistent lower right quadrant abdominal pain. Plaintiff was seen by Manuell Lacist, MLP, at the Bureau of Prisons ("BOP") Clinic on March 19, 2008. An examination of Plaintiff revealed tenderness to palpation of the right lower quadrant and right flank region. He was diagnosed with "calculus of kidney."

8. On the March 19, 2008 Plaintiff was again seen by Mr. Lacist who prescribed a Ketorolac Injection and Oxycodone/Acetaminophen for pain management. Mr. Lacist instructed Plaintiff to return if his condition worsened; Plaintiff was returned to his cell.

9. On March 21, 2008, Plaintiff's pain persisted and he was seen at the BOP clinic by Maria Luisa, M.D., who performed an X-Ray which "showed large amount of fecal matter, no renal or bladder stones noted." Dr. Luisa ordered Bisacodyl E.C. laxative tablets to be taken for 7 days. Plaintiff was returned to his cell.

10. Between March 21, 2008 and March 28, 2008, Plaintiff asked to see a doctor and complained to prison staff repeatedly of intense abdominal pain and no appetite. His requests to see a doctor were denied, and he was given only Ibuprofen medication.

11. On March 28, 2008, Plaintiff was seen by Stephen Leaf, PA-C, at the BOP Clinic who ordered Plaintiff to be transferred to the Emergency Room at Highline Medical Center, for a consultation for appendicitis.

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12. On March 28, 2008, Plaintiff was seen at Highline Medical Center Emergency Room, where he was diagnosed with probable perforated appendicitis, accompanied by severe inflammation of the right lower quadrant.

13. On March 29, 2008, Andrew Haputa, M.D., performed exploratory surgery at Highline Medical Center, during which he noted a clear open hole in the cecum, excreting fecal material, and necrotic tissue surrounding the appendix. Dr. Haputa found an "obliterated cecum with a massive phelgmonous area of involvement greater than 10 cm in all directions in this region, which involved the small bowel as well." He also found "trunks of fecal material . . . within the cavity prior to any surgical manipulation." Dr. Haputa then performed an ileostomy, attaching an ostomy appliance.

14. On March 31, 2008, the Highline Medical Center Lab diagnosed Plaintiff's condition as ruptured appendicitis with inflammation and fibrosis. Additionally, Plaintiff was diagnosed with acute serositis of the small bowel. The tissue surrounding the cecum showed "hemorrhage, granulation tissue, fibrosis, and microabcess formation."

15. Since his March 29, 2008 surgery, Plaintiff has developed severe pancreatitis and pancreatic pseudocysts, for which Plaintiff must seek regular treatment. Plaintiff continues to experience abdominal pain, and is under a strict diet and medication for management of his continued symptoms.

IV. FIRST CAUSE OF ACTION—NEGLIGENCE

16. Plaintiff restates and incorporates by reference paragraphs 1 through 15, above.

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17. Defendant is liable under the doctrine of Respondeat Superior for the acts and omissions of its agents and employees, including, but not limited to, prison guards, prison medical staff, prison supervisors and officials, and other BOP agents and employees of the Federal Detention Center in SeaTac, King County, Washington.

18. At all times material to Plaintiff's illness and subsequent injury, Defendant had a duty to provide adequate medical care to Plaintiff.

19. Defendant BOP breached its duty as stated in Paragraph 18, above, by failing to provide medical care to Plaintiff for seven (7) or more days, between March 21st and March 28th, 2008, during which time Plaintiff suffered from a serious illness which required medical treatment.

20. Defendant BOP's failure to provide medical care to Plaintiff prior to March 28th, 2008, is the direct and proximate cause of Plaintiff's injuries and damages, including, but not limited to, perforated appendicitis, internal scarring and adhesions, cholelithiathis, recurrent pancreatitis, pancreatic cysts and pseudocysts, severe abdominal pain and discomfort, and all medical, physical, and psychological problems associated therewith.

21. As a direct and proximate result of the aforementioned breach of duty by Defendant BOP, Plaintiff has suffered economic and non-economic damages, which will be proven specifically at the time of trial.

V. SECOND CAUSE OF ACTION—PROFESSIONAL NEGLIGENCE

22. Plaintiff restates and incorporates by reference paragraphs 1 through 21, above.

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23. At all times material to Defendant BOP medical staff's treatment of Mr. Morgan, there existed a physician/patient relationship between Plaintiff and Defendant's medical staff.

24. Defendant is liable under the doctrine of Respondeat Superior for the acts and omissions of its agents and employees, including, but not limited to: Manuell Lacist, MLP; Maria Luisa, M.D.; Allen Boeker, M.D., and other BOP medical staff at the SeaTac Detention Center.

25. BOP medical staff owed Plaintiff a duty to provide him with medical care and treatment with that degree of skill, care, and learning expected of a reasonably prudent medical assistant (Mr. Lacist) and a reasonably prudent Primary Care Physician (Dr. Luisa, Dr. Boeker) practicing in the State of Washington.

26. BOP medical staff breached their duty as stated in Paragraph 25, above, by failing to timely diagnose and treat Plaintiff's appendicitis prior to March 28, 2008.

27. BOP's medical assistant's and physicians' failure to diagnose and treat Plaintiff's appendicitis prior to March 28, 2008 is the direct and proximate cause of Plaintiff's injuries and damages, including, but not limited to: perforated appendicitis, internal scarring and adhesions, cholelithiathis, recurrent pancreatitis, pancreatic cysts and pseudocysts, severe abdominal pain and discomfort, and all medical, physical, and psychological problems associated therewith.

28. As a direct and proximate result of the aforementioned breach of duty by BOP's medical assistant and physicians, Plaintiff has suffered economic and non-economic damages, which will be proven specifically at the time of trial.

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VI. RELIEF REQUESTED

AS A RESULT OF THE ALLEGATIONS SET FORTH ABOVE, Plaintiff requests entry of judgment against Defendant as follows:

a) for general damages sustained to date, and in the future;

b) for medical costs and expenses incurred to date, and in the future;

c) for all financial losses suffered to date, and in the future;

d) for any additional and foreseeable costs and expenses incurred;

e) for reasonable attorneys fees and court costs herein; and

f) for such other and further relief as the court may deem appropriate.

DATED this 23 day of February, 2010.

LAW OFFICES OF SANFORD KINZER

By: _____
SANFORD KINZER, WSBA #8144
OF ATTORNEY FOR PLAINTIFF

LAW OFFICES OF
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U.S. Department of Justice

Federal Bureau of Prisons

Western Regional Office
7338 Shoreline Drive
Stockton, California 95219

August 5, 2009

RECEIVED
AUG 10 2009
LAW OFFICE OF
SANFORD KINZER

Sanford Kinzer
Attorney at Law
1206 N. Dolarway Road, Suite 110
Ellensburg, WA 98926

RE: Richard Rodman, Reg. No. 34967-086
Administrative Claim No. TRT-WXR-2009-05453
Received: July 20, 2009

Dear Mr. Kinzer:

This is to acknowledge receipt of the above referenced Claim for Damage, Injury or Death (Standard Form 95) that was submitted to or forwarded to this office under the provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671, et seq. As the legal representative for Richard Rodman, you seek compensation for alleged personal injury as a result of events occurring on and after March 19, 2008.

In accordance with the applicable provisions of the statute, this agency has up to six months from the date received in which to make a final determination of your administrative claim for damages. This time frame began on the date that your claim was received for filing and processing as noted above.

Based on the location of your allegations the following Consolidated Legal Center (CLC), will be handling your claim for investigation and response. Please note all future correspondence and change of address should reference the administrative claim number and be directed to the CLC indicated:

_____ Matt Carney, Supervisory Attorney
Federal Correctional Institution
37900 N. 45th Avenue
Phoenix, AZ 85086

__X__ Theresa Talplacido, Supervisory Attorney
Federal Detention Center
2425 South 200th St.
SeaTac, Washington 98198

_____ Eli Ben-Shmuel, Supervisory Attorney
Metropolitan Detention Center
535 North Alameda St.
Los Angeles, California 90012

____ Dennis Wong, Deputy Regional Counsel
Western Regional Office
7338 Shoreline Drive
Stockton, California 95219

Sincerely,

HARLAN W. PENN
Regional Counsel

EXHIBIT 1

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RODMAN,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendants.

Case No. C10-0321-JCC

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable John C. Coughenour, United States District Judge:

This matter comes before the Court on Plaintiff's unopposed motion to amend the complaint. (Dkt. No. 20.) The motion is GRANTED. Plaintiff is DIRECTED to file a new complaint on the ECF system.

DATED this 23rd day of September, 2010.

WILLIAM M. McCOOL, Clerk of Court

By */s/ C. Ledesma*
Deputy Clerk

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RODMAN, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. C10-0321-JCC ORDER

This matter comes before the Court on the parties' stipulation for dismissal (Dkt. No. 22). On the basis of the parties' representations, the Court DISMISSES this action with prejudice and without an award of fees or costs to any party.

DATED this 25th day of January 2011.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE United States District Court for the Western District of Washington

Richard L Rodman

Plaintiff,

v.

Case No.: 2:10-cv-00321-JCC
Judge John C Coughenour

United States Federal Bureau of Prisons

Defendant.

ORDER REGARDING DISCOVERY AND DEPOSITIONS

IT IS ORDERED that:

(1) **DISCOVERY**. All discovery matters are to be resolved by agreement if possible. If a ruling is needed as to any discovery questions, and counsel wish to avoid the time and expenses of a written motion, they may obtain an expedited ruling through a telephone conference call to the court at (206) 370-8800.

(2) **DEPOSITIONS**. Depositions will be conducted in compliance with the following rules:

(a) **Examination**. If there are multiple parties, each side should ordinarily designate one attorney to conduct the main examination of the deponent, and any questioning by other counsel on that side should be limited to matters not previously covered.

(b) **Objections**. The only objections that should be raised at the deposition are those involving a privilege against disclosure, or some matter that may be remedied if presented at the time (such as the form of the question or the responsiveness of the answer), or that the question seeks information beyond the scope of discovery. Objections on other grounds are unnecessary and should generally be avoided. All objections should be concise and must not suggest answers to, or otherwise coach, the deponent. Argumentative interruptions will not be permitted.

(c) **Directions Not to Answer**. Directions to the deponent not to answer are improper, except on the ground of privilege or to enable a party or deponent to present a motion to the court or special master for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress the party or the deponent, or for appropriate limitations upon the scope of the depositions (e.g., on the ground that the line of inquiry is not relevant nor reasonably calculated to lead to the discovery of admissible evidence). When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as the date of the communication, who made the statement in question, to whom and in whose presence the statement was made, other persons to whom the statement was

made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

(d) **Responsiveness**. Witnesses will be expected to answer all questions directly and without evasion, to the extent of their testimonial knowledge, unless directed by counsel not to answer.

(e) **Private Consultation**. Private conferences between deponents and their attorneys during the actual taking of the deposition are improper, except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the court for good cause shown, such conferences may, however, be held during normal recesses and adjournments.

(f) **Conduct of Examining Counsel**. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.

(g) **Courtroom Standard**. All counsel and parties should conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

(3) **RESPONSIBILITY OF PLAINTIFF'S COUNSEL**. This order is issued at the outset of the case, and a copy is delivered by the clerk to counsel for plaintiff. Plaintiff's counsel (or plaintiff, if pro se) is directed to deliver a copy of this order to each other party within ten (10) days after receiving notice of that party's appearance.

DATED: April 16, 2010

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

Hon. John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RODMAN,

Plaintiff,

v.

UNITED STATES OF AMERICA

Defendant.

NO. C10-0321-JCC

ORDER

Based upon the parties' stipulation (Dkt. No. 18), certain pretrial dates shall be as follows:

September 8, 2010: Disclose identity of expert witnesses and exchange expert reports.

October 8, 2010: Disclose identity of rebuttal experts and exchange rebuttal expert reports.

November 8, 2010: Discovery is to conclude.

December 6, 2010: Deadline for filing of dispositive motions.

DATED this 7th day of July, 2010

John C. Coughenour
United States District Judge

Judge John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RODMAN, Plaintiff, v. UNITED STATES OF AMERICA Defendant.	NO. C10-0321JCC PROTECTIVE ORDER

Plaintiff Richard L. Rodman and Federal Defendant United States of America, by and through their respective undersigned counsel, stipulate and agree to the following (Dkt. No. 16.):

1. This Stipulation and Order is agreed to and entered pursuant to Fed. R. Civ. P. 26(c), which provides for the issuance of protective orders limiting the disclosure of privileged and confidential documents and information in appropriate circumstances, and 5 U.S.C. §§ 552a(b)(11) and (g)(1), which provide an exception to the Privacy Act of 1974 for documents and information released pursuant to a court order.

2. This Stipulation and Order relates to the above captioned action, which is an action brought pursuant to the Federal Tort Claims Act, 28 U.S.C.§§ 1346(b), 2671-80.

3. Plaintiff Rodman has or may in the future commence discovery which seeks

disclosure of documents and information which the United States contends may be protected from release by the Privacy Act of 1974, 5 U.S.C. § 552a.

4. While Federal Defendant United States contends that disclosure of some of these documents and records ordinarily is prohibited in civil litigation, the Privacy Act provides, as an exception, that such records may be released "pursuant to the order of a court of competent jurisdiction." *See* 5 U.S.C. § 552a(b)(11). An order of this Court would therefore provide a basis for release of the requested documents and records to the Plaintiff pursuant to the Privacy Act and Fed. R. Civ. Pro. 26(c), as well as insulate the Federal Defendant from potential liability for improper disclosure. *See* 5 U.S.C. § 552a(g)(1).

5. The purposes of this Stipulation and Order include protecting the confidentiality of certain documents and information, protecting the identities of employees and others, and ensuring that the parties can obtain and pursue discovery with a minimum of delay and expense. Accordingly, the parties, subject to the Court's approval, stipulate and agree that the procedures set out in the ensuing paragraphs shall be followed with respect to information and documents contained in records produced by Federal Defendant or its representatives.

6. When used in this Stipulation and Order, the word "documents" means all written, recorded, electronic or graphic matter whatsoever, including, but not limited to, interrogatory answers; requests for admissions and responses thereto; documents produced by the parties or third-parties in this action, whether pursuant to Rule 34, subpoena, or by agreement; deposition transcripts and exhibits; and any portion of any court papers which quote from any of the foregoing.

7. All documents designated as "CONFIDENTIAL" by Federal Defendant shall be subject to this Stipulation and Order and shall be used solely in connection with this lawsuit. No document or information contained in a document designated as "CONFIDENTIAL" may be released or disclosed to any person other than:

a. the parties and their counsel in this action;

b. secretaries, paralegal assistants, and other employees and agents of counsel who are engaged in assisting counsel in the preparation of this action;

c. persons who provided the confidential information;

d. witnesses, and outside consultants and experts consulted or retained for the purpose of assisting in the preparation of this action, upon condition that, before making disclosure, counsel must obtain and retain an agreement in writing from the witness, outside expert or consultant reciting that he or she has read a copy of this Stipulation and Order and agrees to be bound by its provisions; and

e. any other person authorized by counsel for Federal Defendant to examine such materials.

8. Any person having access to confidential information shall be informed that it is Confidential and subject to a non-disclosure Order of the Court. No such person shall release or disclose those materials to any person other than those specifically identified in paragraph 7, above, without further order of the Court or stipulation of the parties.

9. Nothing in this Stipulation and Order shall bar or otherwise restrict counsel from rendering advice to her/his client with respect to this litigation, doing anything necessary to prosecute this action, or furthering the interests of her/his client, provided, however, that the plaintiff's counsel shall not release or disclose any confidential document to any other person where disclosure would be contrary to the terms of this Stipulation and Order.

10. In the event that the Plaintiff gives written notice to the Federal Defendant challenging designation of specific documents as Confidential and the parties cannot resolve the matter informally, the Plaintiff shall have ten judicial days to file a motion to lift the protections afforded the specific documents at issue under Federal Rule of Civil Procedure 26(c). During the ten judicial days and the pendency of any challenge, the parties will treat the documents as Confidential.

11. If counsel intend to file any motion, opposition, reply or any other filing with the Court and attach thereto or set forth therein any document or information that Federal Defendant has designated as Confidential, counsel responsible for the filing shall file a motion requesting leave to file the document under seal under Court Rule 5(g).

12. Within 60 days of the termination of this litigation, including any appeals therefrom, documents containing Confidential information and all copies and any portions thereof shall be returned to Federal Defendant or shredded, subject to applicable law.

13. Any specific part or parts of the restrictions imposed by this Stipulation and Order may be terminated at any time by an order of the Court. The Court may change the terms of this Stipulation and Order on its own motion after notice to the parties and an opportunity to be heard.

14. If necessary and appropriate, and with the Court's approval, the parties will file a revised Stipulation and Order prior to trial to address any circumstances at trial not specifically covered by this Stipulation and Order.

15. This Stipulation and Order is without prejudice to the rights of any party to seek or object to discovery permitted by Federal Rules of Civil Procedure, or by any statute or other authority, or to the rights of any party to made evidentiary objections at trial.

IT IS SO ORDERED.

DATED this 30th day of June, 2010

John C. Coughenour
United States District Judge

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. RODMAN, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. C10-0321 JCC

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant, signing this agreement, whether or not a party to this civil action), and defendant United States of America, by and through their respective attorneys, as follows:

1. The plaintiff and the defendant United States do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action or which are otherwise related in any way to the subject matter of the above-captioned action, under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay the sum of **Sixty-Five Thousand dollars ($65,000.00)**, which sum shall be in full settlement and satisfaction of any and all

UNITED STATES ATTORNEY
1201 Pacific Avenue, Suite 700
Tacoma, Washington 98402
(253) 428-3800

claims, demands, rights, and causes of action of whatsoever kind and nature, whether based upon federal or state constitution, statute or common law, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement as set forth in paragraph 1 of this Settlement Agreement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees, both current and former.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, whether based upon federal or state constitution, statute, or common law, including claims for wrongful death, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, damage to property and the consequences thereof, which they may have or hereafter acquire against the United States of America, its agents, servants and employees, both current and former, on account of the subject matter of this settlement as set forth in paragraph 1 of this Settlement Agreement, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees, both current and former, from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be,

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and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event that the plaintiff fails to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank: Bank of America, Edmonds Branch
B. Street Address of Bank: 306 Main Street
C. City, State and Zip Code of Bank: Edmonds, WA 98020
D. Federal Reserve Number:
(b)(6) E. Routing Number: [redacted]
F. Name of Account: Law Offices of David L. Crump IOLTA Trust Account
(b)(6) [redacted]
(b)(6) G. Account Number: [redacted]

Plaintiff's attorney agrees to distribute the settlement proceeds to the plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its

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own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 21st day of December, 2010.

Patricia D. Gugin
Attorney for Defendant,
United States of America

Executed this 20 day of December 2010.

David Crump
Attorney for Plaintiff

Executed this 17 day of Dec, 2010.

Richard Rodman
Plaintiff

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-WXR-2010-00981 **Short Description:** MONTENEGRO V. USA

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	2:10-cv-09601-CJC -RNB
Short Description	MONTENEGRO V. USA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	Medical
Current Region	WESTERN REGIONAL OFFICE
Current Institution	
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	Herlong (FCI)
Monetary Relief Sought	$8,000,000.00
Estimated Amount	$
Office	
Jurisdiction	CENTRAL DISTRICT OF CALIFORNIA
Responsible Legal Office	WXRO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	06/05/2012
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$50,000.00
Total Amount Paid	$50,000.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	06/18/2010
Date Filed	05/07/2010

Case Progress

Current Owner	JENNIFER VICKERS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	UPDATES ON CASES PREVIOUSLY REPORTED
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS; ORIGINAL WD TEX CASE: 3:10-CV-00168-FM-RPM
Further Case Classification	REOPENED FOR PLN FOIA REQUEST
Comments	med mal; TESTICULAR CANCER; DELAYED DIAGNOSIS

Home Alerts My Work | New Case Search Main Email

United States Department of Justice - Office of General Counsel & Review

JUDGE FRANK MONTALVO

AO 240 (Rev. 06/09) Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)

UNITED STATES DISTRICT COURT

for the

WESTERN DISTRICT OF TEXAS

2010 MAY 7 AM 9:24

ALEXANDER MONTENEGRO
Plaintiff
v.
THE UNITED STATES OF AMERICA
Defendant

Civil Action No.

EP 10 CV 0168

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (Short Form)

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury:

1. *If incarcerated.* I am being held at: FCC TUCSON, ARIZONA. If employed there, or have an account in the institution, I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.

2. *If not incarcerated.* If I am employed, my employer's name and address are:

My gross pay or wages are: $ _____, and my take-home pay or wages are: $ 15.00 per *(specify pay period)* Month.

3. *Other Income.* In the past 12 months, I have received income from the following sources *(check all that apply)*:

(a) Business, profession, or other self-employment	☐ Yes	☑ No
(b) Rent payments, interest, or dividends	☐ Yes	☑ No
(c) Pension, annuity, or life insurance payments	☐ Yes	☑ No
(d) Disability, or worker's compensation payments	☐ Yes	☑ No
(e) Gifts, or inheritances	☐ Yes	☑ No
(f) Any other sources	☐ Yes	☑ No

If you answered "Yes" to any question above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

Na

4. Amount of money that I have in cash or in a checking or savings account: $ 20.00 .

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name *(describe the property and its approximate value)*:
None

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses *(describe and provide the amount of the monthly expense)*:
None

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:
Minor child, however, have no ability to contribute to support.

8. Any debts or financial obligations *(describe the amounts owed and to whom they are payable)*:
None

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: 4-27-10

Alejandro Montenegro
Applicant's signature

Alexander Montenegro
Printed name

Received

JUDGE FRANK MONTALVO

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

2010 MAY -7 AM 9:24

CASE NO.:

ALEXANDER MONTENEGRO,

Plaintiff,

vs.

EP10CV0168

THE UNITED STATES OF AMERICA,

Defendant.
_____/

COMPLAINT

Plaintiff, ALEXANDER MONTENEGRO, pro se, sues THE UNITED STATES OF AMERICA, and alleges as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States and is premised on the acts and or omissions of defendant by and through its agents and or employees action under color of federal law as well as 28 U.S.C. § 1346 (b) (1) in that this is a claim against the United States of America and agencies of the United States of America for money damages accruing after January 1, 1945, for injury and personal injury caused by the negligent and wrongful acts and omissions of employees of the Government while acting within the scope of their office or employment, under circumstances where the United States of America, if a private

person, would be liable in accordance with the laws of the places where the acts and or omissions occurred.

2. Jurisdiction founded upon the federal law is proper in that this action is premised upon causes of action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, et. seq. the United States Supreme Court's ruling in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971), as well as pursuant to the Eighth Amendment to the Constitution of the United States of America.

3. This is an action to redress under the color of statutes, ordinances, regulations, custom or usage of rights, privileges and immunities secured to the plaintiff by the Eighth Amendment to the Constitution of the United States, the "FTCA", 28 U.S.C. § 2671, et. seq. and arising under the laws and statutes of the State of Texas.

4. Venue is appropriate in this Court pursuant to 28 U.S.C. §§ 1391 (e)(3) in that this is an action against the United States of America and agents thereof and the acts and or omissions complained of occurred in the State of Texas and or the plaintiff and or witnesses of plaintiff reside in the State of Texas.

5. Pursuant to the "FTCA", plaintiff on or about January 23, 2009 presented his claim via form SF95 to the appropriate federal agency for administrative settlement under the "FTCA". Subsequent correspondence on or after May 8, 2009 with the federal agency by plaintiff were treated by the agency as an amendment to plaintiff's SF95 as of the date of the receipt of such correspondence. No response to plaintiff's claim or amended claim is known to have been generated by the agency.

6. This action is timely pursuant to 28 U.S.C. § 2401(b) in that it was presented

to the agency within two (2), years of accrual of his claim and this action is filed within six (6) months of the date of any presumed denial of plaintiff's claim.

7. 28 U.S.C. § 2679(2)(A) expressly waives immunity for the defendant, its agents and employees acting within the scope of their employment and allows plaintiff to proceed against the United States for violations of his rights guaranteed by the United States Constitution.

8. Plaintiff brings this action within the appropriate statute of limitations of the respective state wherein the acts and or omissions of the defendant occurred.

9. Plaintiff has been deprived of a right secured to him by the Constitution and the laws of the United States.

10. Plaintiff has been denied of his rights by defendant, their agents and employees acting under color of federal law.

PARTIES

11. At all times material hereto, plaintiff, ALEXANDER MONTENEGRO, was an inmate at the FCI Victorville, California and subsequently at FCI Herlong, California.

12. At all times material hereto, defendant, UNITED STATES OF AMERICA, was and is a sovereign entity named properly herein under the "FTCA".

13. At all times material hereto, FCI Victorville and FCI Herlong were agencies of the Bureau of Prisons (BOP) which in turn was and is an agency of the United States of America.

STATEMENT OF FACTS

14. At all times material hereto, plaintiff was and is an inmate and under the full

custody and control of defendant.

15. As of on or about, 2004, while an inmate at FCI Victorville, plaintiff had been complaining repeatedly to the medical staff of experiencing severe pain in his groin area and, without an examination, was told he had a hernia. Plaintiff's complaints continued unaddressed during his incarceration at FCI Victorville.

16. Throughout the next one and a half (1½) years, plaintiff continued with similar complaints to the prison medical staff, even to the point of advising them of his risk of testicular cancer, still with no appropriate response.

17. On February 6, 2006 plaintiff was tested with the resulting findings being a mass found in his left testicle. The Impression noted was "Malignancy cannot be excluded. Surgical consultation suggested". No such consultation occurred.

18. Approximately June, 2006 plaintiff was transferred to FCI Herlong and continued complaining to the medical staff of his severe pain in his lower abdomen. He was misdiagnosed again, with little or no examination, as having a kidney stone and was provided a screen for urination to catch the allegedly passing stone.

19. On November 16, 2006 plaintiff, as a result of continued complaints finally received another diagnostic test again reflecting an abnormal mass in his left testicle, larger in size. An immediate urological consult was placed for the plaintiff.

20. Finally, after almost two (2) additional months of suffering, plaintiff was afforded a consultation with a private physician in January, 2007 who recommended immediate surgery after finding a tumor in plaintiff's left testicle. Surgery occurred January 31, 2007. Post surgical pathology revealed carcinoma.

21. Later, plaintiff was transferred to FMC Butner for continued cancer treatment.

22. Plaintiff has undergone substantial treatment and radical surgical procedures as a result of the negligence of the defendant and its' agents

23. This condition is permanent.

COUNT I
PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT FOR MEDICAL NEGLIGENCE

24. Plaintiff herein repeats, realleges and adopts each and every allegation in paragraphs 1 thru 23 above as if set forth specifically herein.

25. During all times material hereto plaintiff was in the custody, care and control and under the exclusive care and medical management of the agents and employees of the defendant and fully subject to any and all constraints and restrictions imposed by defendant upon plaintiff.

26. During the course of plaintiff's incarceration in defendant's institutions, plaintiff did receive negligent medical care and services from defendant through its medical staff.

27. During the course of plaintiff's incarceration, defendant, by and through its agents and employees negligently, carelessly and unskillfully rendered and failed to render proper medical care, services and treatment to the plaintiff by negligently, carelessly and unskillfully failing to provide plaintiff necessary and obvious treatment during the period of plaintiff's incarceration.

28. As a result of such negligent, careless and unskilled treatment or lack or

treatment of plaintiff by defendant, plaintiff has developed cancer to a degree far in excess of that which would otherwise have been treatable and as a result, plaintiff has suffered in the past and will continue to suffer in the future permanent injury, damage and disfigurement.

29. As a further result of such negligent treatment of plaintiff by defendant, plaintiff was deprived of a substantial possibility and or probability of early diagnosis of his cancer and thus further deprived and denied the substantial possibility for a cure and or significant lessening of the permanent and lasting effects of this disease on plaintiff and his future life expectancy and capacity for the enjoyment of life and plaintiff has been forced to endure significant and severe physical pain and suffering and will continue to experience such pain and suffering in the future as well as a significant shortened life expectancy.

30. Pursuant to the foregoing and the negligent acts and or omissions of defendant, plaintiff has been damaged in an indeterminate sum of money and herein demands judgment of a sum of not less than Eight Million ($8,000,000.00) Dollars.

COUNT II
PLAINTIFF'S CAUSE OF ACTION AGAINST DEFENDANT FOR DELIBERATE INDIFFERENCE

31. Plaintiff herein repeats, realleges and adopts each and every allegation in paragraphs 1 thru 30 above as if set forth specifically herein.

32. Plaintiff contends that defendant was at all times material hereto, fully aware of plaintiff's acute medical problem and plaintiff's need for urgent care and treatment during such time period.

33. Plaintiff was in need of urgent care and treatment while in the full and exclusive care, custody and control of defendant.

34. Plaintiff was denied medical treatment by defendant despite defendant's knowledge of the urgent need for such care and treatment during this extensive period of time.

35. The acts and omissions of defendant were sufficiently serious and blatant as to constitute a violation of plaintiff's rights.

36. Defendant was deliberately indifferent to the plaintiff's medical needs which indifference clearly exacerbated his condition leading directly to his current condition and resulting in his past and continuing pain and suffering.

37. As a further result of such deliberate indifference of plaintiff by defendant, plaintiff was deprived of a substantial possibility and or probability of early diagnosis of his cancer and thus further deprived and denied the substantial possibility for a cure and or significant lessening of the permanent and lasting effects of this disease on plaintiff and his future life expectancy and capacity for the enjoyment of life and further plaintiff has been forced to endure significant and severe physical pain and suffering and will continue to experience such pain and suffering in the future as well as a significant shortened life expectancy.

38. As a further result of such deliberate indifference plaintiff has suffered and will continue to suffer significant expenses.

39. By reason of the foregoing, plaintiff has been damaged in an indeterminate sum of not less than Eight Million ($8,000,000.00) Dollars and in addition, plaintiff

claims and demands an award of punitive damages.

RELIEF SOUGHT

WHEREFORE plaintiff demands judgment against defendant as follows:]

1. As to Count I, plaintiff demands judgment against defendant in an amount not less than Eight Million ($8,000.000.00) Dollars plus costs and any other relief to which the plaintiff may be entitled including attorney's fees in the event plaintiff is represented by an attorney.

2. As to Count II, plaintiff demands judgment against defendant in an amount not less than Eight Million ($8,000.000.00) Dollars plus costs and any other relief to which the plaintiff may be entitled including attorney's fees in the event plaintiff is represented by an attorney.

3. Plaintiff demands a jury trial of issues so triable.

Respectfully submitted,

Alexander Montegro,Register # 23385-180, pro se
c/o FCC Tucson
8901 S. Wilmot Rd.
Tucson, AZ 85756

COURT'S COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

2010 NOV 29 PM 2:41
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ME
DEPUTY

ALEXANDER MONTENEGRO, **Plaintiff,**	§	
v.	§	**EP-10-CV-168-FM**
UNITED STATES OF AMERICA, **Defendant.**	§	CV10 9601 - CJC (RNB)

FILED
2010 DEC 15 PM 12:13
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
BY

ORDER ADOPTING REPORT AND RECOMMENDATION

Before the Court is Plaintiff Alexander Montenegro's *pro se* complaint brought pursuant to the Federal Tort Claims Act[1] and *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics*.[2] Therein, Montenegro, a prisoner at the Federal Correctional Institution in Tucson, Arizona, alleges the Federal Bureau of Prisons denied him timely medical treatment while he was incarcerated at various institutions in California. Also before the Court is Defendant's motion to transfer venue. In the motion, Defendant claims all acts or omissions alleged in Montenegro's complaint occurred within the State of California and seeks an order transferring this case to the United States District Court for the Central District of California.

On October 29, 2010, the United States Magistrate Judge to whom this matter was referred issued a report and recommendation.[3] In his report, he recommended that the Court grant the Defendant's motion and transfer this case. He reasoned the majority of the factors recognized by the Fifth Circuit in deciding a motion to transfer venue support granting Defendant's motion. The Magistrate Judge gave Montenegro fourteen days to file written

A true copy of the original, I certify.
Clerk, U. S. District Court
By _____ Deputy

[1] 28 U.S.C. §§ 1346(b), 2671 *et seq.*

[2] 403 U.S. 388 (1971).

[3] *See* 28 U.S.C.A. § 636(b)(1)(B) (West 2010) (permitting a district court, on its own motion, to refer a pending matter to a United States Magistrate Judge for a report and recommendation).

objections to his proposed findings, conclusions, and recommendations.[4] To date, Montenegro has not responded.[5]

After independently examining the record for plain error,[6] the Court finds the Magistrate Judge's proposed findings of fact and conclusions of law are neither clearly erroneous nor contrary to law.[7] Accordingly, the Court enters the following orders:

1. The Court **APPROVES** and **ADOPTS** the Magistrate Judge's report and recommendation.

2. The Court **GRANTS** Defendant's motion to transfer venue.

---

[4] *See* 28 U.S.C.A. § 636(b)(1) ("Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.").

[5] *See Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988) ("[A] party is not entitled to de novo review of a magistrate's finding and recommendations if objections are not raised in writing by the aggrieved party . . . after being served with a copy of the magistrate's report."); Tex. W.D. LCVR. App. C, Rule 4(b) (Assignment of Duties to United States Magistrate Judges) (requiring that "written objections . . . specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections"); *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987) ("'[P]arties filing objections must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court.'") (quoting *Nettles v. Wainwright*, 677 F.2d 404, 410 n.8 (5th Cir. 1982) (en banc)).

[6] *See Morin* v. *Moore*, 309 F.3d 316, 320 (5th Cir. 2002) (stating that a litigant's failure to file written objections to magistrate judge's report . . . mandates plain-error review on appeal); *United States* v. *Kallestad*, 236 F.3d 225, 227 (5th Cir. 2000) ("A party who fails to file written objections to a magistrate judge's proposed findings and recommendations waives the objection, and on appeal we will review the issue for plain error only."); *Douglass* v. *United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (explaining that a party who fails to file timely written objections to the findings of fact and conclusions of law in a magistrate judge's report shall be barred from appealing the factual findings and legal conclusions adopted by the district court except in cases of plain error).

[7] *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989) ("[T]he 'clearly erroneous, abuse of discretion and contrary to law' standard of review . . . is appropriate . . . where there has been no objection to the magistrate's ruling.").

3. The Court therefore **ORDERS** the District Clerk to **TRANSFER** the instant cause to the United States District Court for the Central District of California for further proceedings.

SO ORDERED.

SIGNED on this 29 **day of November, 2010.**

FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ~~ALL COUNSEL~~ Plaintiff (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 2/11/2011

DEPUTY CLERK

FILED
CLERK, U.S.D.C. SOUTHERN DIVISION
FEB 11 2011
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDER MONTENEGRO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. CV 10-9601-CJC (RNB)

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed all the records and files herein, and the Report and Recommendation of the United States Magistrate Judge. No objections to the Report and Recommendation have been filed herein. The Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

IT THEREFORE IS ORDERED that plaintiff's Bivens claim against defendant United States of America is dismissed without leave to amend.

DATED: February 10, 2011

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-09601-CJC(RNBx) Date September 7, 2011

Title Alexander Montenegro v. United States of America

Present: The Honorable CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

Michelle Urie	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

Proceedings: (IN CHAMBERS) ORDER SCHEDULING PRETRIAL CONFERENCE AND JURY TRIAL

The Court hereby schedules the pretrial conference for June 11, 2012 at 3:30 p.m. and the jury trial for June 19, 2012 at 9:00 a.m. It is the policy of the Court to encourage disposition of civil litigation by settlement when such is in the best interest of the parties. Unless otherwise ordered, no later than forty-five (45) days before the Pre-Trial Conference, the parties **must** participate in a selected settlement procedure. The Court may, on its own motion, order the parties to settlement following the Pre-Trial Conference. Given the high costs of litigation and the enormous commitment of resources that a trial requires, the parties must explore every option for resolving their disputes, short of trial. The failure of any party to comply with the local rules and engage in meaningful settlement discussions may result in the imposition of sanctions against that noncomplying party.

: 0

Initials of Preparer mu

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUN 4 2012
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

NOTICE OF DOCUMENT DISCREPANCIES

To: ☒ U.S. District Judge / ☐ U.S. Magistrate Judge Cormac J. Carney

From: N. Interiano, Deputy Clerk Date Received: 5-30-12

Case No.: CV10-9601 CJC(RNBx) Case Title: Alexander Montenegro v. USA

Document Entitled: Motion Requesting Continuance

Upon the submission of the attached document(s), it was noted that the following discrepancies exist:

☐	Local Rule 11-3.1	Document not legible
☐	Local Rule 11-3.8	Lacking name, address, phone, facsimile numbers and email address
☐	Local Rule 11-4.1	No copy provided for judge
☐	Local Rule 19-1	Complaint/Petition includes more than ten (10) Does or fictitiously named parties
☐	Local Rule 15-1	Proposed amended pleading not under separate cover
☐	Local Rule 11-6	Memorandum/brief exceeds 25 pages
☐	Local Rule 11-8	Memorandum/brief exceeding 10 pages shall contain table of contents
☐	Local Rule 7.1-1	No Certification of Interested Parties and/or no copies
☐	Local Rule 6.1	Written notice of motion lacking or timeliness of notice incorrect
☐	Local Rule 56-1	Statement of uncontroverted facts and/or proposed judgment lacking
☐	Local Rule 56-2	Statement of genuine disputes of material fact lacking
☐	Local Rule 7-19.1	Notice to other parties of ex parte application lacking
☐	Local Rule 16-7	Pretrial conference order not signed by all counsel
☒	FRCvP Rule 5(d)	No proof of service attached to document(s)
☐	General Order 08-02	Case is designated for electronic filing
☐	Other:	

Note: Please refer to the court's Internet website at www.cacd.uscourts.gov for local rules and applicable forms.

ORDER OF THE JUDGE/MAGISTRATE JUDGE

IT IS HEREBY ORDERED:

☐ The document is to be filed and processed. The filing date is ORDERED to be the date the document was stamped "received but not filed" with the Clerk. Counsel* is advised that any further failure to comply with the Local Rules may lead to penalties pursuant to Local Rule 83-7.

Date U.S. District Judge / U.S. Magistrate Judge

☑ The document is **NOT** to be filed, but instead **REJECTED**, and is ORDERED returned to counsel.* Counsel* shall immediately notify, in writing, all parties previously served with the attached documents that said documents have **not** been filed with the Court.

6/4/12
Date

U.S. District Judge / ~~U.S. Magistrate Judge~~
CORMAC J. CARNEY

* The term "counsel" as used herein also includes any pro se party. See Local Rule 1-3.

COPY 1 -ORIGINAL-OFFICE COPY 2 -JUDGE COPY 3 -SIGNED & RETURNED TO FILER COPY 4 -FILER RECEIPT

GPO U.S. GOVERNMENT PRINTING OFFICE: 2011-771-111

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MAY 30 2012
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION
DEPUTY

RECEIVED & RETURNED - SOUTHERN DIVISION
CLERK, U.S. DISTRICT COURT
JUN - 4 2012
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALEXANDER MONTENEGRO,
Plaintiff

X
X
X
X
X
X

v.

Case No: CV 10-9601-CJC-(RNB)

UNITED STATES OF AMERICA,
Defendant.

MOTION REQUESTING A CONTINUANCE

Comes now, the Plaintiff, Alexander Montenegro, filing pro-se, and respectfully requests that this Court grant him a continuance. Specifically, because the Plaintiff has just discovered that his attorney, Mr. Stephen J. Goldstein, has abandoned his case, and has been acting as an attorney while disbarred. (Document enclosed)

The Plaintiff is incarcerated, at an extreme disadvantage because of his attorney's action, and therefore in need of an extension, to find new counsel. It is the Plaintiff's understanding that a court date has been set for June 11, 2012. The Plaintiff expects to be released from prison, to a halfway house on June 8, 2012. That halfway house is in El Paso, Texas, and is for a period of 6 months. Therefore, the Plaintiff would humbly request an additional 3 months, so that he can find counsel without violating any halfway house rules and regulations. That extension, if granted, would set a tentative court date sometime in March, of 2013.

The Plaintiff recognizes that pro-se law work is unacceptable in this matter, and therefore humbly requests that this Court grant him any consideration possible.

Respectfully submitted,

Alexander Montenegro
B.O.P.# 23385-180
FCI Tucson
PO Box 23811
Tucson, AZ 85734

cc: Clerk of Court (3)
US Attorneys Office

Attn: Clerk of Court
Please return a stamped "Filed" copy in the self-addressed stamped envelope provided.

Supreme Court of Florida

TUESDAY, JUNE 8, 2010

CASE NO.: SC10-17
Lower Tribunal No(s).: 2009-71,245(11M-OSC)

THE FLORIDA BAR vs. STEPHEN JAY GOLDSTEIN

Complainant(s) Respondent(s)

This is before the Court on The Florida Bar's Petition for Approval of Conditional Guilty Plea and Consent Judgment for Discipline,

IT IS ORDERED that the petition is granted, the consent judgment is approved, and respondent's disbarment shall be extended for a period of one year as stated under the terms and conditions set forth in the consent judgment.

Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Stephen Jay Goldstein in the amount of $1,250.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined. The filing of a motion for rehearing shall not alter the effective date of this disbarment.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, LABARGA, and PERRY, JJ., concur.

A True Copy
Test:

Thomas D. Hall

Thomas D Hall
Clerk, Supreme Court

SUPREME COURT OF THE STATE OF FLORIDA

bhp
Served:

KENNETH LAWRENCE MARVIN
WILLIAM MULLIGAN
STEPHEN JAY GOLDSTEIN

PUBLIC RECORD

6/10/10 6/10/10 6/10/10

The Florida Bar
www.floridabar.org

Stephen Jay Goldstein

Disbarred **Not eligible to practice in Florida**

ID Number:	144898
Address:	13899 Biscayne Blvd Ste 307 North Miami Beach, Florida 331811647 United States
Phone:	305.7026465
Fax:	305.7026466
E-Mail:	
vCard:	?
County:	Miami-Dade
Circuit:	11
Admitted:	04/26/1972
10-Year Discipline History	Yes

	Action Date	Reference
Disbarment	02-26-2009	**200970425**
Disbarment	06-08-2010	**200971245**

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[Revised: 05-03-2012]

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Alexander Montenegro
23385-180
Federal Correction Inst
P.O. Box 23811
Tucson, AZ 85734

MAY - 0 2012

CLERK, U.S. DISTRICT COURT
MAY 2 3 2012
CENTRAL DISTRICT OF CALIFORNIA
BY

CJC

Legal Mail

Clerk of Courts
United States District Court
Central California
312 N. Spring St. #68
Los Angeles, CA 90012-2095

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-09601-CJC(RNBx) Date June 5, 2012

Title Alexander Montenegro v. United States of America

Present: The Honorable	CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE
Michelle Urie	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

Proceedings: (IN CHAMBERS) ORDER VACATING PRETRIAL CONFERENCE AND TRIAL DATES AND STAYING CASE

The Court is in receipt of the Government's proposed pretrial conference order advising the Court that Mr. Montenegro will be released from custody in December 2012. It makes no sense for this matter to proceed until Mr. Montenegro is released from custody. Accordingly, the Court hereby vacates the pretrial conference and trial dates and stays this case in its entirety and schedules a status conference for January 28, 2013 at 3:00 p.m. to reschedule the trial and other case management dates.

: 0

Initials of Preparer mu

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
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Email: Joanne.Osinoff@usdoj.gov

Attorneys for Defendant
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALEXANDER MONTENEGRO, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. CV 10-9601 CJC (RNBx) ORDER OF DISMISSAL

Based upon the Stipulation for Compromise Settlement And Release filed by the parties, IT IS HEREBY ORDERED that:

1. The above-captioned action is dismissed in its entirety with prejudice;

2. Each party shall bear his own attorneys' fees, costs and expenses; and

///

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///

///

3. The district court shall retain jurisdiction until the settlement proceeds are paid in accordance with the Stipulation for Compromise Settlement and Release previously filed by the parties.

DATED: 6/8/12

HONORABLE CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

Presented by:
ANDRE BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/S/ Joanne S. Osinoff

JOANNE S. OSINOFF
Assistant United States Attorney
Attorneys for Defendant
United States of America

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Attorneys for Defendant
United States of America

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALEXANDER MONTENEGRO, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. CV 10-9601 CJC (RNBx) ~~PROPOSED~~ AMENDED ORDER OF DISMISSAL

Based upon the Stipulation for Compromise Settlement And Release filed by the parties, and the Request for Modification of Order submitted to the Court, IT IS HEREBY ORDERED that:

1. The above-captioned action is dismissed in its entirety with prejudice;

2. Each party shall bear his own attorneys' fees, costs and expenses;

///

///

///

///

3. The settlement proceeds shall be paid, as requested by Plaintiff Alexander Montenegro, by electronic funds transfer to the account of Maria deJesus Montenegro, plaintiff Alexander Montenegro's mother; and

4. The District Court shall retain jurisdiction until the settlement proceeds are paid in accordance with this Order.

DATED: 6/27/12

HONORABLE CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

Presented by:
ANDRE BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ Joanne S. Osinoff

JOANNE S. OSINOFF
Assistant United States Attorney
Attorneys for Defendant
United States of America

Page 1601 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Welcome WILSON J MOORER | Logout

HOME ALERTS **MY WORK** NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-WXR-2011-00918 **Short Description:** HOSLETT V. DHALIWAL, ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	3:11-cv-00674-KI
Short Description	HOSLETT V. DHALIWAL, ET AL
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	WESTERN REGIONAL OFFICE
Current Institution	Sheridan (FCI)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	Sheridan (FCI)
Monetary Relief Sought	$800,000.00
Estimated Amount	$
Office	Portland
Jurisdiction	DISTRICT OF OREGON
Responsible Legal Office	WXRO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	09/18/2014
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$
Total Amount Paid	$15,000.00
Description	SETTLED UNDER FTCA
Description	SETTLED UNDER FTCA
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	06/22/2011
Date Filed	06/02/2011

Case Progress

Current Owner	JENNIFER VICKERS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	UPDATES ON CASES PREVIOUSLY REPORTED
Private Case	No

Additional Case Information

Long Description	REOPENED FOR PLN FOIA REQUEST
Further Case Classification	
Comments	MEDICAL MALPRACTICE; DELIBERATE INDIFFERENCE; PAIN; INTERSTITIAL CYSTITIS

Home | Alerts | My Work | New Case | Search Main | Email

United States Department of Justice - Office of General Counsel & Review

ORIGINAL

Raymond James Hoslett, 82420-012
PO Box 5000, Sheridan OR 97378

RECVD 2 JUN '11 11:28 USDC-ORP

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON
AT PORTLAND

Raymond James Hoslett,
Plaintiff

Case # CV '11 - 674 KI

v.

Dr. Jaspal Dhaliwal, M.D.

Dr. Stephen Davis, M.D.

Mr. Steve De Laheras, H.S.A.

Mr. Israel Jacquez, A.W.P.

Jeff E. Thomas, Warden, et al.
DEFENDANTS

MOTION FOR APPOINTMENT OF COUNSEL UNDER 28 U.S.C. 1915(e)(1)

EXHIBITS:
(A) Letters from U.S. Senators Counter-letter Re. Lies
(B) Administrative Reme dies; i.e. the lies to the Western Regional Director

COMES NOW Petitioner, pro-se. Petitioner has filed this action and this Motion with the assistance of a 'jailhouse lawyer', the services of which Petitioner may not have further access. Thus, the quality and completeness of this action and motion do not necessarily reflect the ability of Petitioner to further prosecute this action.

28 U.S.C.1915 'In Forma Pauperis' MOTION

Petitioner has a family member who has paid the docket fee in this action for him, so he did not need to file 'In Forma Pauperis' for that specific need. However, Petitioner cannot obtain the funds for a counsel. Therefore, Petitioner requests the appointment of a counsel under the statute 28 U.S.C. 1915(e)(1).

PLAINTIFF HAS NOT WRITTEN THIS ACTION OR THESE FILINGS

Plaintiff's 'jailhouse lawyer' helper is aware that one technique employed to deny an attorney under 28 U.S.C. 1915(d) to a litigant (usually a prisoner) is to note that the filings, including the opening brief, make it appear that the plaintiff would be capable of handling the action himself. Curiously, another technique to deny an attorney is to note that the filings, conversely, are poor...and to declare that the plaintiff hasn't well-enough established a case to justify appointing an attorney. ("Damned if you do, damned if you don't...")

In order to avoid this, Petitioner states that a 'jailhouse lawyer' of questionable repute prepared his lawsuit, and that Petitioner will not much longer (if at all) have the assistance of that 'jailhouse lawyer'. Thus, Petitioner requests that the quality (or lack of same) of this instant document, nor the opening brief or other filings in this action, are employed to deny Petitioner an appointed attorney under 28 U.S.C. 1915(d).

See, for example, Rhodes v. Robinson, 2010 USAppLEXIS 18791 (9th Cir. 2010), deciding that 'exceptional circumstances' to appoint an attorney were not present, simply because that court claimed that the litigant seemed to be able to present his claims well.

'EXCEPTIONAL CIRCUMSTANCES' NOT SUPPORTED BY LAW 28 U.S.C. 1915(d) NOR APPRECIABLY EXPLAINED BY SUBSEQUENT CASELAW.

Present in virtually every case involving the question of an appointment of an attorney under 28 U.S.C. 1915(d) is the bare assertion that 'exceptional circumstances' are required to do so. A search of the history of 'exceptional circumstances' readily shows that this 'requirement' is not and was never present in the statute itself, and in fact its first use popped up in the case Shobe v. California, 362 F.2d 545, at 546 (9th Cir. 1966):

> "Nor do there appear to be "exceptional circumstances" [Weller v. Dickson, supra, 314 F.2d p 600] with respect to the matter of damages that would dictate the immediate litigation at the expense of others. He will lose no right to sue for the statute of limitations is tolled until his release. Cal CCP 352(3).

It is worth noting that despite the form of the seeming quotation above, "exceptional circumstances", that combination of words is simply not present at all in Weller v. Dickson, or <u>any</u> use of the word "exceptional"! Thus, it appears that three appeals judges in <u>Shobe</u>

managed to accomplish the amendment of statute 28 U.S.C. 1915(d) in 1966, but the United States Congress has neglected to follow-up and tell West Publishing to change the text in question.

A quote from Shobe, itself quoting Weller v. Dickson, reveals that this process of judicial amendment of law occurred during a period in which courts (including federal courts) were highly hostile to the rights of prisoners to employ the courts to challenge prison conditions. See Shobe v. California, 362 F.2d 545, at 546 (9th Cir. 1966):

> "This court has held that the discretion to deny state prisoners [a 28 U.S.C. 1915 appointed attorney] is 'especially broad' in civil actions against their wardens and other officials connected with the institutions in which they are incarcerated. Smart v. Heinze 347 F.2d 114, 116 (9th Cir. 1964). The basis for this additional latitude is no doubt the two policy considerations mentioned by Judge Duniway, concurring in Weller v. Dickson 314 F.2d 598, 604 (9th Cir. 1963):
>
> > "(1) That it would be disruptive of prison discipline to permit such a suit to proceed while the prisoner is still in custody, whether the prisoner be a federal convict or a state convict, and (2) that in the case of state convicts the maintenance of such suits in federal courts would produce an unseemly conflict between federal courts and state authorities."

Yes, that's really how they 'justified' the 'exceptional circumstances' condition which apparently has been added by judges to the text of 28 U.S.C. 1915(d). It is not surprising that courts felt this way in 1963-1966, although it is revealing that they would put this reasoning and opinion down on paper.

Fortunately, 'lock them up and throw away the key' is no longer the word of the day in regard to prisoner-initiated lawsuits challenging prison conditions. Nevertheless, a little remnant of this hostility remains, in every decision requiring 'exceptional circumstances' to be present before a counsel is appointed under 28 U.S.C. 1915(d).

Further, 45 years after Shobe was decided, and after about 240 'published' appeals-court cases in the Ninth Circuit have repeated the 'exceptional circumstances' requirement for appointment of counsel in 28 U.S.C. 1915(d), a review of the case record reveals extremely little further definition and disclosure as to what circumstances are 'exceptional', and which are not. A large majority of cases simply assert that the movant for a 1915(d) attorney 'has failed to show', or 'does not show', or 'the record does not reveal' that the 'exceptional circumstances' are present. Such decisions rarely identify which 'circumstances' aren't 'exceptional', or which ones are 'exceptional'.

Even a trained lawyer, and certainly a pro-se prisoner, remains completely unenlightened as to how to determine, let alone to demonstrate in his own filing, that his 'circumstances' are 'exceptional'. Nevertheless, and with virtually no guidance as to what circumstances are 'exception', Petitioner will attempt to show that his case and circumstances are 'exceptional'.

Petitioner must point out, however, that without such guidance, he should be granted another opportunity if this court declares that his case is not 'exceptional', so that he may further search for ways in which his case is 'exceptional'. Petitioner would very much appreciate, and may reasonably have a right to, a description of the standards by which this court (or any court within the Ninth Circuit) determines whether any given case is 'exceptional' for the purposes of appointing an attorney under 28 U.S.C. 1915(e)(1). Petitioner is aware that motions for reconsideration are 'disfavored', but they are indeed appropriate in circumstances where additional facts are uncovered which could not have been reasonably provided by 'due diligence'.

With virtually no guidance to litigants in caselaw in the Ninth Circuit appeals court or district court as to what might constitute facts supporting an 'exceptional circumstances' finding, all litigants are inherently unable to exercise 'due diligence' to state which facts their cases 'exceptional'. A Petitioner can do little more than guess as to whether his own circumstances are 'exceptional'. In part, this is because any given Petitioner cannot be expected to know about any case other than his own. He cannot be expected to know what facts would be considered 'exceptional' and which are typical.

WHY MY CASE IS 'EXCEPTIONAL'

Mine is a case complaining about inadequate medical treatment. To prove such a case will require access to facts in the records, which the BOP will try to avoid giving to me. The BOP has already attempted to conceal records from me, and delayed those records, in order to conceal the fact that they denied me access to medicine. There is no reason to believe that the BOP will begin to 'behave' now.

Further, medical lawsuits involve obscure technical facts, both in medicine and in law. An investigator will be necessary to look through BOP records, with the skill necessary to discover missing records, altered records, and secretly added records to cover up for previously-withdrawn records. That investigator will have to have access to technical assistance, probably from a doctor, to help him interpret the records he sees. Alone, unrepresented, I will have no such investigator, and I will not have any such doctor as a research source. The BOP won't want me to have any such thing.

Also, the BOP won't want to give me access to the computerized records, but without that I will have no way to determine if any record is missing, falsified, or inaccurate. Further, in order to determine whether my own treatment was in any way atypical or unusual, I will have to have access to others' medical records in the BOP, perhaps anonymized. But the BOP certainly won't want that!

Also, in order to determine if there were any facts justifying an alternative type of treatment, I would have to have access to some medical literature, which I at F.C.I. Sheridan simply do not have.

Further, if this case ever gets to trial, I would have to learn how to question and cross-examine expert witnesses from the other side, as well as obtaining those expert witnesses for me. I have no ability to do that. Nor do I have the ability even to enter a particular piece of physical evidence into the record of the trial, simply because I have never been to law school.

My case is also quite exceptional because, already, the BOP staff have written a highly false and misleading letter to United States Senators Barbara Boxer and Michael Crapo, of California and Idaho, respectively. The BOP's letter falsely claimed that I had been seen by a Pain Management Specialist, which was completely untrue. The letter also claimed that I had refused to take the medication prescribed by the specialist, which was also untrue. (Since I hadn't seen any Pain Management Specialist, there was no such prescription of pain-

relief medication to 'refuse'.)

Another lie in the BOP letter is its claim that:

"It should be noted, inmate Hoslett has stated in the past that the only medication that worked was a narcotic treatment, which currently is not clinically indicated"

Much to the contrary, I never asked for 'narcotic pain medication', which is borne out in my medical records.

Yet another lie in the BOP's letter is its claim that:

"Further, inmate Hoslett has been seen by our medical officers on numerous occasions since his surgical intervention, and there have been no complaints of pain during these visits."

To the contrary, my medical records reflect that every time I have gone to the medical department, I have made complaints of pain and I have requested pain-relief.

Furthermore, as can be seen in Claim 3 (page 4) of the suit:

"Also on December 28, 2010, Dr. Sajal C. Dutta M.D.., a Urologist Surgeon (Medicaid # 999999 and DEA# BD7711751) wrote a medication prescription for "Oxycodone Tablets, 5 mg Immediate release with a quantity of 30. Sig; Take 1-2 Tabs orally every 3 hrs as needed. Note: Dr. Dutta's staff also gave me Oxycodone prior to leaving Legacy Emanuel Hospital, for the trip back to FCI Sheridan. However, FCI Sheridan Medical Staff members (unknown to me at the time) did not follow Dr. Dutta's orders. In fact, Health Services changed the order to the following: "Oxycodone Tab 5 Mg. Time Release Quantity 6, Take 1 Tab orally twice a day, for three (3) days only! Thus, FCI Sheridan medical staff subverted Dr. Dutta's intent and advice, and apparently did so without ever informing me or Dr. Dutta of this mishandling of the prescription."

So, it is clear that the BOP staff at FCI Sheridan will go so far as to inflict at least 27 days of pain (30 days - 3 days) on me, and prescribe me less medicine than Dr. Dutta thought appropriate, and give me a lesser-effectiveness type of medicine (time release, rather than Immediate release) than Dr. Dutta had chosen.

It is clear, therefore, that the BOP staff will take advantage of their position over me to prevent me from even receiving good medical treatment, because they alone had control over the medicines and even control over the knowledge of the prescription that Dr. Dutta had written.

In a further display of abuse, the BOP Sheridan staff deliberately obstructed from me my medical records, so I only finally received them

approximately one (1) months ago. (early April 2011). Because of this obstruction, I did not learn until I had received the records that I had been prescribed that medicine by Dr. Dutta during my medical trip on December 28, 2010, and thus I also only then realized that the BOP had 'shorted' me 27 days of pain relief, had underprescribed pills (only twice per day rather than 3 times per day), and had actually given me a different prescription than what had actually been prescribed.

Thus, the BOP prevented me from even being aware that the misconduct was theirs, rather than merely being a mistake or a misunderstanding.

FALSE RECORDS ARE A STRONG POSSIBILITY HERE

Given the numerous false claims made to those United States Senators, as well as false claims the BOP made to the Western Regional Director of the BOP in their response to the Administrative Remedy process, both attached as exhibits in the suit, it appears quite likely that the FCI Sheridan staff initially intended (and may very well still intend) to falsify their records to comport with their statements to the United States Senators and/or the Western Regional Director of the BOP. That would explain why they made statements strongly at odds with the record, at least as I had eventually discovered. Obviously, I have very much been at the mercy of the BOP staff in regards to my medical treatment, but I am at least as equally at their mercy in regards to the accuracy of their records. Perhaps the BOP Sheridan staff merely <u>inadvertently</u> gave me the not-yet-falsified records, the ones which did not agree with what they told the Senators and the BOP Regional Director.

In order to detect this kind of fraud, it will be necessary for someone 'on my side' to examine the BOP's paper and computer records. It seems quite likely that the BOP Sherida staff will not want <u>me</u>, who they merely regard as a convicted felon as well as (now) an opponent in this lawsuit, to have access to their medical records (even my own) and access to the computer.

Further, this lawsuit will involve an investigation into the differences between my own treatment and those of others: Likewise, the BOP Sheridan staff will not want to give me access to the medical records of others, even if all I intend to do is to look into discriminatory treatment and patterns of medical neglect. In view of that, the participation of a lawyer on my side will be mandatory, for example to allay the fears of the BOP staff.

AFFIDAVIT CONCERNING ATTEMPT TO FIND REPRESENTATION

Plaintiff has attempted to find counsel for this action. Attached to this motion, infra, is an affidavit attesting to the various requests made to attorneys to take this case. Plaintiff understands that he should make a reasonable attempt to find attorneys, and he has done so. Plaintiff hereby offers to make further inquiries with additional attorneys if the number of attorneys he has contacted is insufficient. Plaintiff has seen legal references which suggest that contacting three (3) attorneys is considered sufficient. Plaintiff has contacted more than that.

WHERE IS COMPILATION OF 'EXCEPTIONAL CIRCUMSTANCES'

In view of the Ninth Circuit Court region's unexplained reliance on the 'exceptional circumstances' test for obtaining an appointed attorney under 28 U.S.C. 1915(e)(1), combined with a (still) very unclear definition of what constitutes 'exceptional circumstances', Plaintiff Hoslett requests an explanation of what aspects of a case would amount to 'exceptional circumstances'. Since Plaintiff does not know the law, and he does not know any other person's civil lawsuit sufficiently to determine what 'exceptional circumstances' typically amount to, Plaintiff requests that this court direct him to binding precedent in the Ninth Circuit Court region in which facts and circumstances were found that amounted to 'exceptional circumstances'.

Plaintiff Hoslett has seen that of virtually all the Ninth Circuit Appeals Court cases in the 1995-2011 time period referring to "exceptional circumstances" and the attorney-appointment statute 28 U.S.C. 1915, these opinions merely recite the 'exceptional circumstances' requirement, and/or declare that 'no exceptional circumstances exist in this case' without stating what would or would not be an 'exceptional circumstance'. Virtually no-one is being enlightened as to what amounts to an 'exceptional circumstance', and so nobody (including Plaintiff Hoslett) is being told how to determine whether his case has any 'exceptional circumstances'.

In light of this vague and ambiguous rule, Plaintiff Hoslett requests that this court agree that he has made a successful effort to show that his case is 'exceptional' within the meaning of 28 U.S.C. 1915(e)(1).

Finally, Plaintiff Hoslett requests that the non-lawyer inmate writing this motion state that in presenting this motion and action,

he (and not Plaintiff Hoslett) demonstrated an ability to bring this action, and further that the non-lawyer inmate will soon become unavailable to Mr. Hoslett. Thus, the quality of this motion and the action cannot be attributed to Plaintiff Hoslett for the purpose of determining whether Plaintiff Hoslett is capable of handling this action on his own, without an appointed attorney.

Signed, Raymond James Hoslett Dated, 5-12-2011

EXHIBIT A.

Letter To Hon. U.S. Senator Boxer From Warden Thomas, and Counter Letter Re. Lies. (Pages 1-5 Attached)

NOTE: Also see one page letter. (Page 6)

U.S. Department of Justice

Federal Bureau of Prisons

Federal Correctional Institution

Office of the Warden — *Sheridan, Oregon 97378*

March 14, 2011

The Honorable Barbara Boxer
United States Senator
Hart Senate Office Building, Suite 112
Washington, D.C. 20510

RE: **HOSLETT, Raymond James**
Reg. No. 82420-012

Dear Senator Boxer:

This is in response to your letter and enclosed correspondence from Mr. Jim Lane, Uncle of Raymond James Hoslett, an inmate currently confined at the Federal Correctional Institution (FCI) in Sheridan, Oregon. Mr. Lane states in his letter he would like his nephew to have the health care he is entitled to under Federal Law.

On October 26, 2010, inmate Hoslett had an initial consult with an Urologist for evaluation of his Chronic Interstitial Cystitis. The Urologist recommended a consult with a Pain Management Specialist for further pain treatment options. Several days after inmate Hoslett was seen by the Pain Management Specialist, he refused to take the medication prescribed by the specialist. On December 12, 2010, inmate Hoslett underwent a successful surgical procedure for his Interstitial Cystitis. A post surgical follow-up visit with the Urologist revealed that inmate Hoslett was doing well, and no further follow-up was necessary at that time. Currently, inmate Hoslett is being treated for chronic bladder pain with Pentosan Polysulfate. It should be noted, inmate Hoslett has stated in the past that the only medication that worked was a narcotic treatment, which currently is not clinically indicated. Further, inmate Hoslett has been seen by our medical officers on numerous occasions since his surgical intervention, and there have been no complaints of pain during these visits.

Be assured, Inmate Hoslett's health care will be monitored by our Health Services Department which provides appropriate medical treatment consistent with community standards.

I trust this response will address your constituents concerns. Please feel free to contact me should you require any additional information.

Sincerely,

J. E. Thomas
Warden

FILE

Raymond James Hoslett, 82420-012
F.C.I. Sheridan, PO Box 5000
Sheridan OR 97378
April 15, 2011

The Honorable Barbara Boxer
United States Senator
Hart Senate Office Bldg Suite 112
Washington DC 20510

RE: HOSLETT, Raymond James, Reg. No. 82420-012

Dear Senator Boxer,

Thank you for looking into the question of my medical treatment at F.C.I. Sheridan, where I am a prisoner. Unfortunately, I have just today seen a copy of a letter from the Federal Bureau of Prisons, Warden J.E. Thomas, that is a veritable fountain of mis-information regarding my case. I can say that, in part because I experienced the whole thing, but also because a day ago I finally received a copy of my medical records. The letter claims:

1. "On October 26, 2010, inmate Hoslett had an initial consult with an Urologist [...] Several days after inmate Hoslett was seen by the Pain Management Specialist, he refused to take the medication prescribed by the specialist.

The truth? I have never been seen by any "Pain Management Specialist" at any time, and certainly not days after October 26, 2010. I have no idea where they got this amazingly false claim.

Further, I have not refused to take any such medication, or to my recollection any other medication. Contrary to this, for many months I have been trying to get a consult with a Pain Management Specialist, without any success.

Contrary to the Warden's claim, at one point I was taken to a consult with the outside specialist (not a "Pain Management Specialist": A Urologist). That Urologist prescribed for me a 30-day prescription for a pain-relief drug, Oxycodone. I only found out about that a few weeks ago, that a F.C.I. medical staff member secretly changed the Urologist's prescription to a 3-day prescription for a twice-daily (time release) kind of medicine, rather than the 3-x-per day, non-time-release kind. This meant that I was subsequently in 27 days of pain. And no, I didn't see any "Pain Management Specialist" a few days later, nor at all up to and including today.

2. The letter claims, "...inmate Hoslett has stated in the past that the only medication that worked was a narcotic treatment..."

This is utterly false. I am seeking pain relief, not "narcosis". (Narcosis means sleep, and that would be produced by a "narcotic".)

Further, it is quite possible that my pain symptoms could be significantly relieved even by that temporary treatment that the Urologist prescribed for me (see item 1 above), but I can't know: Before I got even the first pill, the F.C.I. Sheridan staff had substituted THEIR OWN opinion of what I needed, rather than providing me the prescription prescribed by the outside Urologist.

3. The letter claims, "...inmate Hoslett has been seen by our medical officers on numerous occasions since his surgical intervention, and there have been no complaints of pain during these visits."

It is really impossible for me to imagine a bigger lie than this! To the contrary, I have been repeatedly and vociferously complaining of terrible pain each and every time I have contacted the F.C.I. Sheridan medical staff. I have been trying to get seen by a "Pain Management specialist" for many months, with no success at all so far. I am utterly aghast that the F.C.I. Sheridan staff would promote such an infamous lie as to say not only that I already saw such a person, but also that I refused to take prescribed medicine. Much to the contrary, it is F.C.I. Sheridan staff who are 'robbing' me of prescribed medicine, and concealing that fact for many months, and now they are lying about it.

PEOPLE ARE DYING OF INADEQUATE TREATMENT HERE

Two days ago, a prisoner named Jeff Melton died here, of medical reasons. Jeff died of "AA", Aortic Aneurysm, which the BOP had known he had for about two (2) years. Some deaths due to AA are unexpected and a surprise, but not Jeff's case. Jeff could have been saved, and alive today, if he had received an operation at any time during those two years. But the BOP didn't give him that operation, so Jeff is now dead.

The staff at F.C.I. Sheridan are simply out of control. A few weeks ago prisoners saw an incident where two staff members were talking outside 'B-Unit', where I reside. One staff member walked to the nearby rose bushes, broke off some thorns, and carefully placed them on the concrete benches where prisoners would shortly be sitting. One was injured. This kind of malicious behavior is inhuman and startling.

Please help me get the medical treatment (consult with a pain-management specialist) I have requested, and pain-management medicine that is being deliberately withheld from me. I continue to be in constant pain.

Sincerely,

Raymond J. Hoslett

Raymond James Hoslett

PLEASE SEE EXHIBIT A. ATTACHED

EXCERPT: From Warden Thomas, Tailored Response
QUOTE: "Several days after inmate Hoslett was seen by the Pain Management Specialist, he refused to take the medication prescribed by the specialist."

EXHIBIT A (Refutes Warden's Claim)

COUNTER: Federal BOP Medical records reflect the following by prison doctor Raymond E. Westermeyer dated August 8, 2010 re. Raymond J. Hoslett.

QUOTE: Under the title of plan, "No Pain Meds."
Under the title of Patient Education Topics,"indicated to him [Hoslett] that a pain specialist would be very unlikely to have additional suggestions."

PLEASE SEE EXHIBIT B. ATTACHED

EXCERPT: From Warden Thomas, Tailored Response.
QUOTE: "It should be noted, inmate Hoslett has stated in the past that the only medication that worked was a narcotic treatment, which currently is not clinically indicated."

EXHIBIT B. (Refutes Warden's Claim)

COUNTER: Federal BOP Medical records reflect the following by prison doctor Raymond E. Westermeyer dated 9-14-2010 re. Raymond J. Hoslett

QUOTE: Under the title of diagnosis comments, "does not ask for pain meds", and "states unequivocally that he is unhappy with chronic pain."

PLEASE SEE EXHIBIT C. ATTACHED

EXCERPT: From Warden Thomas, Tailored Response
QUOTE: "Inmate Hoslett has been seen by our med. officers on numerous occasions since his surgical intervention, and there have been no complaints of pain during these visits."

EXHIBITS C. and D. (Refutes Warden's Claim)

COUNTERS: Federal BOP Medical records reflect the following by prison doctor Raymond E. Westermeyer dated Sept 14, 2010 re. Raymond J. Hoslett
AND NOTE: Inmate request to staff member dated 3/17/2011 and it was addressed to the Assistant Warden of Programs (who is over Health Services Department - Medical).

QUOTE: Under the title of chief complaint general, "This man is bitterly unhappy with not getting relief from constant state of pain."

IT IS NOTEWORTHY TO MENTION, In said request to staff member, Mr. Booth, A.W.P. 3/17/2011, I complained about "Arbitrary denial of serious medical need, pain management/medication for the existence of chronic and substantial pain, etc."

PLEASE SEE EXHIBITS E. AND F. ATTACHED

EXCERPT: From Dr. Sajal C. Dutta, Urologist/Surgeon (consulting specialist) dated 10/26/2010.

QUOTE: "Risks and benefits of this procedure include, but are not limited to, worsening pain."

EXHIBITS: E. AND F. (Refutes Warden's Claim)

COUNTERS: Warden's Tailored Response (lies) by his subordinates

PLEASE NOTE: Interstitial Cystitis From Wikipedia. See last two sentences at bottom of Page One. Also, "Pain Control" and "Medication" Pages Ten and Eleven. Thank you.

NOTE: For the record, Pentosan Polysulfate is the generic name for the medicine Elmiron, which I have to take every day for my bladder --- It is not a pain-control medication.

(GOVERNMENT OFFICIALS -- D.O.J., Fed. BOP Lie to U.S. Senator)

In closing, I have pointed out and proved three (3) different lies in the Warden's response to an Honorable standing U.S. Senator. And that in inexcusable, not to mention the fact that the Warden and his subordinates have lied to my family members and have disrespected me with their blatant lies, and/or violations of my basic human rights. My claim is substantiated by facts only. For the record, I am not receiving the same community standards of health care (medical treatment) here, that the Warden claims we do -- So that is another lie.

Please help me, and thank you for your time.

Signed,

Raymond J. Hoslett

Raymond J. Hoslett

Mr. James Lane
P.O. Box 509
Oak View, CA 93022

January 19th, 2011

Honorable U.S. Senator Barbara Boxer (D)
112 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Boxer:

I am writing on behalf of my nephew, Raymond James Hoslett Reg. No. 82420-012, who is currently incarcerated in the Federal Bureau of prisons, at the Federal Correctional Institution in Sheridan, Oregon.

Raymond has an incurable and debilitating bladder disease known as Interstitial Cystitis, coupled with a Hunner's ulcer within the bladder wall of the urethra. As a result of this disease, Raymond suffers from a constant and debilitating pelvic floor, bladder and urethra pains.

He is currently prescribed, and regularly takes oral medication (Elmiron) for this condition, and has been informed he will likely require this or similar medication for the rest of his life. Although the Elmiron does minimally ease some to the discomfort associated with his condition and seems to occasionally aid in bladder function, this medication does nothing to alleviate the chronic pain associated with this illness.

Raymond was afforded a consult with a contract urologist specialist. In his report the urologist advised and recommended that he should be referred to a pain management specialist to prescribe and appropriate and effective pain control medication and regimen. To date, the prison doctor(s) or health services department has done nothing to address Raymond's constant pain. Yet my nephew has suffered incessantly for months now.

Refusal by the Federal B.O.P. or medical staff members, to provide Raymond with pain medication constitutes a deliberate indifference to his very serious medical needs, jeopardizes his future state of health and is a blatant deprivation of his constitutional protections.

Medical journals state the following regarding Interstitial Cystitis, or I.C., "The pain of I.C. has been rated equivalent to cancer pain, and may lead to central sensitization of untreated." Also, "Research has claimed that the quality of life of some I.C. patients is equivalent to those with end stage renal failure.

Under Federal Law, Raymond is entitled to the same community standards of health care, as if he was still in the community, yet that is not the case at F.C.I Sheridan, OR.

Therefore, I would like to ask for your help in this matter please, by contacting the Central Office of The Federal Bureau of Prisons, via letter at:

Director of Health Services, Fed. B.O.P
Dr. Newton E. Kin dig, M.D.
320 1st Street N.W., Mr. 454
Washington, D.C. 20534

Thank you in advance for your intervention and look forward to your reply.

Jim Lane



EXHIBIT B.

Administrative Remedies / Responses ; i.e., The lies provided by The Wardens Subordinates, To The Western Regional Dir. of The Fed. B.O.P. (PAGES 1-3)

NOTE: Also see ONE PAge AFFIDAVIT. (PAGE 4)

AFFIDAVIT

RAYMOND JAMES HOSLETT REG. No. 82420-012, BEING FIRST DULLY SWORN, DEPOSES AS FOLLOWS:

That my FAMILY AND I (MY Mother MS. LINDA Charpied) have CONTACTED, Five (5) LAW Firms AND / or ATTORNEY (s) IN the Portland AREA, that specialize IN "Medical MALPRACTICE re. Civil SUIT AGAINST The Federal B.O.P. / i.e., F.C.I. Sheridan, OR."
We ALSO CONTACTED ONE (1) ATTORNEY IN PORTLAND that Specializes Civil Rights LAW.
All of our Attempts proved fruitless. Not ONE will take A CASE like this ON A CONTINGENCY BASIS. Most APPEAR to be AFRAID to take ON A GOVERNMENT ENTITY, i.e., The D.O.J. / Fed. B.O.P.
AND All, REQUIRE A RETAINER. Therefore All WAS to No AVAIL.
After being IN Federal Prison for several YEARS, I'm NOT IN A POSITION to hire AN ATTORNEY, AND I'm to old to be ASKING my Family for help, AND thats the Gods honest Truth.

PURSUANT to 28 U.S.C. 1746, I declare under PENALTY of Perjury that the foregoing is true AND Correct.

Signed this 12th DAY of MAY, 2011.

Raymond James Hoslett

RAYMOND JAMES HOSLETT

MY COPY

618827-R1 HOSLETT, Raymond 82420-012
FCI Sheridan

This is in response to your Administrative Remedy Appeal of the Warden's decision dated January 11, 2011. You state you have an incurable and deliberating bladder disease known as Interstitial Cystitis. You state the Federal Correctional Institution (FCI) Sheridan Health Services Department has decided to disregard the Contract Specialist(s) recommendations in the use of narcotics, as treatment for your chronic pain. As a result, you state you are not receiving any pain management treatment whatsoever. You allege the Bureau is in violation of your Eighth Amendment protections. As remedy, you request FCI Sheridan staff comply with the contract urology Specialist(s) that you are provided consultation for pain management, and during the interim prescribed pain control medication in sufficient doses commensurate to your illness and pain level needs.

Your appeal has been investigated. A review of your medical records reveals on December 29, 2010, the Staff Physician ordered a new narcotic prescription for Oxycodone, 10 mg, to be taken twice daily to be dispensed at Pill-Line. This new prescription order was substituted to replace the Oxycodone previously prescribed at 5 mg, also to be taken twice daily. An administrative note on January 4, 2011, revealed the Physician Assistant (PA) submitted a consultation for a follow-up per the Urologist's request, due to a cystoscopy and bladder dilation diagnosed on December 28, 2010. You have been advised that during the interim while pending an appointment with the Urologist, if your condition worsens you are to sign-up for Sick Call for a reevaluation.

Based on our review of your medical treatment history, Health Services staff has been providing appropriate treatment and care for your chronic pain, based on Bureau's clinical practice guidelines and pharmacy matrix guidelines.

There was no evidence found to suggest staff violated your constitutional rights to receive adequate medical treatment and care.

This response is for informational purposes only. If dissatisfied with this response, you may appeal to the Office of the General Counsel, Bureau of Prisons, 320 First Street, NW, Washington, D.C. 20534. Your appeal must be received in the General Counsel's office within 30 calendar days of the date of this response.

1/31/2011
Date

Harlan W. Penn /for/
Robert E. McFadden, Regional Director

Hoslett, Raymond
Reg. No. 82420-012 (2B)

REQUEST FOR ADMINISTRATIVE REMEDY
SHE-618827-F1

Part B- RESPONSE

This is in response to your Request for Administrative Remedy received on December 15, 2010, wherein you are requesting medical treatment for your chronic medical condition.

You state that you suffer from an incurable and debilitating bladder disease known as Interstitial Cystitis, and that you suffer constant and debilitating pelvic floor, bladder and urethra pain. You also state in your remedy that the specialist stated you "should be referred to a pain management specialist for appropriate and effective pain control."

In review of the consult evaluation from the specialist stated, "consider a referral to a pain specialist." Outside consultants provide recommendations to the BOP staff physician. In your case, the BOP physician has placed you on what he considers to be appropriate medication, to aid in controlling your chronic pain.

On December 28, 2010, you saw the specialist who performed a cystoscopy and bladder dilatation. If you are still having pain from that procedure, you may make a sick call appointment to evaluate your pain.

Therefore, your Request for Administrative Remedy is for informational purposes only. If dissatisfied with this response, you may appeal to the Western Regional Director, 7338 Shoreline Drive, Stockton California 95219. Your appeal must be received in the Western Regional Director's office within 20 calendar days of the date of this response.

Date

J. E. Thomas, Warden

MY COPY

BP-8 response HOSLETT, Raymond 82420012

- seen by urologist on 10/26/2010. procedure not done because no anesthesiologist available. procedure has been re-scheduled.

- during 10/26/2010 urology consult, it was noted "consider" referral to pain specialist. at this time, your pain management issue will, and has been, addressed at a local level. you will not be referred to a pain specialist, at this time.

- seen on 11/02/2010 during sickcall, by medical staff, regarding the need for pain medication. discussed with medical officer, and narcotics are not recommended for pain management. inmate offered other medication, and adamantly refused.

- sickcall is available on monday, tuesday, thursday and friday.

NOTE: RECIEVED, TUE. 11-30-10 Author of RESPONSE UNKNOWN?

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that he is an inmate at F.C.I. Sheridan, OR., and is a person of such age and discretion to be competent to serve papers.

That on this ____ day of June 2011, a "Bivens Action under 28 U.S.C. 1331, Medical Malpractice Suit" and Motion for Appointment of Counsel, was served by placing said in a sealed envelope, addressed to the person hereafter named, at the place and add. stated below, and by depositing said envelope and contents in the U.S. Mail at F.C.I. Sheridan, OR..

Addressee:

Mr. Jeff E. Thomas, Warden
Wardens Office
Interdepartmental
Special Legal Mail

Raymond J. Hoslett 82420-012

Raymond James Hoslett, 82420-012

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

COPY

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS MR. RAYMOND JAMES HOSLETT

DEFENDANTS DR. JASPAL DHALIWAL, M.D., DR. STEPHEN DAVIS, M.D., D.O., C.D., MR. STEVE DE LAHERAS, H.S.A., MR. ISRAEL JACQUEZ, A.W.P., MR. JEFF E. THOMAS, WARDEN, et. Al.

(b) County of Residence of First Listed Plaintiff YAMHILL (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant YAMHILL (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

N./A.

Attorneys (If Known)

U.S. ATTORNEYS OFFICE

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☑ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☑ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R R & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl Ret Inc Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U S Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900 Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity).
BIVENS ACTION, EIGHTH AMENDMENT CLAIM.
Brief description of cause: ARBITARY DENIAL OF SERIOUS MEDICAL NEED, PAIN MANAGEMENT MEDICATION FOR THE EXISTENCE OF CHRONIC AND SUBSTANTIAL PAIN, ETC.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ 300,000.00 COMPENSATORY DAMAGES

CHECK YES only if demanded in complaint: JURY DEMAND: ☑ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE N./A. DOCKET NUMBER

DATE: MAR. 1st 2011

SIGNATURE OF ATTORNEY OF RECORD: N./A. Raymond J. Hoslett

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG JUDGE

82420-012

Ray Hoslett
PO. Box 5000
Sheridan, OR - 97378
United States

RECVD 2 JUN'11 11:28USDC-ORP

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Case# CV'11 - 674 KI

Raymond James Hoslett,
Plaintiff
v.
Dr. Jaspal Dhaliwal, M.D.
Dr. Stephen Davis, M.D.
Mr. Steve De Laheras, H.S.A.
Mr. Israel Jacquez, A.W.P.
Mr. Jeff E. Thomas, Warden, et al.
Defendants

BIVENS ACTION UNDER 28 U.S.C. 1331, MEDICAL MALPRACTICE

1.

A) Have you brought any other action or appeal in a court of The United States while a prisoner?
Answer: Yes

B) How many?
Answer: One (on this sentence)

Plaintiff: Raymond James Hoslett
Defendant: Richard B. Ives, Warden

Court: U.S. District Court, Eastern Division of California
Docket #: 2:10-CV-00406-KJM (HC)
Judge Assigned: K.J. Mueller

Disposition: Pending
Approximate Date of Filing: February 17th, 2010
Approximate Date of Disposition: Pending

2.

A) Place of confinement: FCI Sheridan, OR

B) Is there a prisoner grievance procedure in this institution?
Answer: Yes

C) Have you filed a grievance concerning the facts related to this complaint?
Answer: Yes

D) Is the grievance process completed?
Answer: Yes
Note: Grievance(s) and Federal Tort Claim are attached as Exhibits A and B.

3. PARTIES

A) Name of Plaintiff: Raymond James Hoslett
Security Identification Number: 82420-012
Address: FCI Sheridan – PO Box 5000 – Sheridan, OR 97378

B) Defendant Jaspal Dhaliwal is employed as a Medical Doctor at FCI Sheridan.
Defendant Stephen Davis is employed as a Clinical Director at FCI Sheridan.
Defendant Steve De Laheras is employed as a Health Services Administrator at FCI Sheridan.
Defendant Israel Jacquez is employed as the Associate Warden over Programs at FCI Sheridan.
Defendant Jeff E. Thomas is employed as the Warden at FCI Sheridan.

Additional Defendants: Dr. Raymond E. Westermeyer, M.D. a contract physician at FCI Sheridan who is no longer employed by the B.O.P. as of April 1st, 2011.

4. STATEMENT OF CLAIM

CLAIM 1

State what right under the Constitution, laws or treaties of the United States has been violated:

Federal prison officials are obligated under the Eighth Amendment to the U.S. Constitution to provide inmates with adequate medical care. This is a Constitutional Claim of Inadequate Care. Plaintiff has been treated with "Deliberate Indifference to Serious Medical Needs".

SUPPORTING FACTS:

Dr. Dhaliwal was my primary caregiver when I first arrived at FCI Sheridan, OR in April of 2010. I have an incurable and debilitating bladder disease known as Interstitial Cystitis, more commonly referred to as "I.C.", and also suffer from a Hunner's Ulcer within the bladder wall. Over the last several months I have consulted with FCI Sheridan medical personnel about these conditions, and have specifically informed medical personnel that I suffer constant and debilitating Pelvic Floor, Bladder and Urethra pain(s). I am currently prescribed, and regularly take oral medication (Elimiron) for this condition, and have been informed I will likely require this or similar medicine for the rest of my life. Although Elimiron does normally ease some of the discomfort associated with this condition, and seems to occasionally aid in bladder function, this medication does nothing to alleviate the chronic pain associated with this illness.

On Tuesday October 26th, 2010 I was afforded a consultation with a Contract Urologist Specialist. In his report and recommendation, the Contract Urologist advised and recommended that I "should be referred to a Pain Management Specialist" to prescribe an appropriate and effective pain control medication and regimen. On Tuesday November 2nd, 2010 I attended routine morning "Sick Call" and specifically requested to see my Attending Physician in hopes of obtaining relief from the overwhelming pain I am experiencing on a daily, constant basis. Unfortunately, medical staff adamantly refused to treat my pain, and advised me that I would not receive any type of pain management/medication—under any circumstances—period.

Note: WIKIPEDIA states the following in reference to "I.C.": "The pain of I.C. has been rated equivalent to cancer pain, and may lead to Central Sensitization if untreated."

Also, research has claimed that "The quality of life in some I.C. patients is equivalent to those with End-Stage Renal Failure". The New England Journal of Medicine states that "Only one in 100,000 people within the U.S. have I.C.".

The above mentioned facts substantiate a serious medical need, as well as the prison officials' actual knowledge of my serious medical needs. The officials' knowledge is proven by Direct Evidence: Sick Call Requests, Medical Records, Complaints, Formal Grievances, and Tort Claim. Note: The Federal B.O.P. computerized medical records for inmates is called "BMR".
Dr. Davis, M.D., D.O., Clinical Director oversees the Health Services Department at FCI Sheridan, OR, and is Dr. Dhaliwal's boss. Dr. Davis is fully aware of my medical status, and the fact that I suffer constant and debilitating Pelvic Floor, Bladder, and Urethra pain on a daily basis.

CLAIM 2

State what right under the Constitution, laws, or treaties of the United States has been violated.

Eighth Amendment violation for unnecessary and wanton infliction of pain, reckless disregard for a substantial risk of harm to Plaintiff, medical malpractice, arbitrary and capricious denial of serious medical needs, pain management/medication for chronic pain.

SUPPORTING FACTS:

Mr. De Laheras is the Health Services Administrator at FCI Sheridan, OR, i.e. the manager of all health services staff members, and is in charge of the day-to-day operations. In essence he is the Clinical Director's boss, and is also aware of my medical problems, etc. Under Federal B.O.P./FCI Sheridan "Rights and Responsibilities" No. 16, I have a right to complain about pain, and have my pain assessed by medical staff, and have pain treated accordingly. However, that is not the case here at FCI Sheridan. Drs. Dhaliwal and Davis, as well as H.S.A. De Laheras have violated my "basic human rights" by their reckless disregard for a substantial risk of harm to me, and their constant denials of my serious medical needs, i.e. pain-management medication—treatment for the existence of chronic and substantial pain.

Dr. Dhaliwal has subjected me to the "unnecessary and wanton infliction of pain" which has now caused central sensitization. Because of his failure to recognize and honor my serious medical needs, and his refusal to prescribe and provide adequate pain-control medication in sufficient dosage commensurate to indicated illness and pain-level needs. Reasonable doctors would perceive the medical need in question as important and worthy of treatment. Drs. Dhaliwal and Davis both know that my medical condition significantly affects my daily activities, and that I have the presence of chronic and substantial pain—yet they do nothing. Medical malpractice is so obvious that even a lay-person would easily recognize the necessity of a Doctor's attention. Refusal of adequate pain-control medication has now jeopardized my future health. This circumstantial proof may be shown by the deterioration of my health.

Mr. Israel Jacquez is the Assistant Warden of Programs at FCI Sheridan, OR. Under the title of A.W.P. he then oversees the Health Services Department and is responsible for all of the staff members within it, as well as issues and/or complaints that may arise regarding Federal Inmates' health needs, etc. It is noteworthy to mention the following: On two different occasions, Mr. Jacquez discussed my medical issues with me. He is therefore fully aware of the existence of chronic and substantial pain that I suffer from. After all, he is Mr. De Laheras' boss. The proof that he knows about me and my

situation, is in the grievance(s) i.e. BP-8, BP-9, BP-10, and BP-11 as well as the Federal Tort Claim that I filed.
(End of Claim 2)

CLAIM 3
State what right under the Constitution, laws, or treaties of the United States has been violated.

Eighth Amendment Medical Care Claim: The Federal Bureau of Prisons' Officials failure to reasonably respond by providing me with adequate care and treatment. The Officials' "Deliberate Indifference" caused damages, and is likely to injure me in the future; A violation of basic human rights.

SUPPORTING FACTS:
The rationale behind my transfer to FCI Sheridan, OR in April of 2010, was because my medical status was upgraded from a Care Level One (1), to a Care Level Two (2), and the fact that I am a "Chronic Care Inmate" that has to take medication for the rest of my life due to a Bladder Disease. Also the fact that I do have "Serious Medical Needs". Therefore, significant pain can constitute a serious medical need(s) even if they are not life threatening. Pain can constitute a serious medical need , even if the failure to treat it does not make the condition worse. This action clearly shows that the actions/or lack thereof, of medical staff members, could not be supported by legitimate medical judgment. The following is actionable harm from inadequate medical care. 1) A failure to inquire into facts necessary to make a professional judgment. 2) A failure to carry out the Consulting Contract Urologist, Specialist(s) recommendations. 3) A failure to provide adequate medical care etc. for almost eleven (11) months, I have complained about the pain in which I suffer, all to no avail. Those of The Health Services staff obviously do not care about my issues of pain, and they refuse to address the same. Their refusal to treat my chronic pain is unethical. While at FCI Hurlong, CA I had a surgical procedure performed on my bladder in November of 2009, and I spent seven (7) days as an inpatient at the "Outside Hospital" in Reno, NV. Within 72 hours, I was returned to the Emergency Room for one (1) day in regards to my bladder condition. Here at FCI Sheridan, OR, a surgical procedure was conducted again concerning my bladder on the date of Tuesday December 28th, 2010. I spent one (1) day in the "Outside Hospital", Legacy Emanuel Hospital. Also on December 28th, 2010, Dr. Sajal C. Dutta, M.D., A Urologist Surgeon (Medicaid#: 999999 and DEA# BD7711751) wrote a medication prescription for "Oxycodone Tablets, 5mg Immediate release with a quantity of 30. Sig; Take 1-2 Tabs orally every 3hrs. as needed.
Note: Dr. Dutta's staff also gave me Oxycodone prior to leaving Legacy Emanuel Hospital, for the trip back to FCI Sheridan. However, FCI Sheridan Medical Staff members (unknown to me at the time) did not follow Dr. Dutta's orders. In fact, Health Services changed the order to the following: "Oxycodone Tab 5mg. Time Release" Quantity: 6, Take 1 Tab orally twice a day, for three (3) days-only!

Thus, FCI Sheridan medical staff subverted Dr. Dutta's intent and advice, and apparently did so without ever informing me or Dr. Dutta of this mishandling of the prescription.
Note: The Urologist Surgeon stated that the procedure would only give me some temporary relief at best, and warned me that my chronic pain could get worse. "Although the pain in my urethra is temporarily gone, the pain in my bladder and pelvic-floor has gotten worse since surgical procedure." It should be noted that two of my family members have contacted their Senators in regard to the inadequate medical treatment here at FCI Sheridan, and have filed a formal complaint with the Oregon Medical Board against Dr. Dhaliwal. The medical malpractice is for the damages caused (Central Sensitization) and unprofessional treatment, culpable neglect of patient Hoslett, a human

being, by Physicians Dhaliwal and Davis.

The Warden of FCI Sheridan, OR Mr. Jeff E. Thomas is responsible for all of the staff members within the institution. He is the "C.E.O." of this prison and is responsible for the Health Services Department, as well as my health issues. He signed the response on my Administrative Remedy BP-9, and he is aware of the Federal Tort Claim that I filed.

5. RELIEF

I make a Jury Demand. Each Defendant is to be legally held liable to their individual capacities under color of law. The Defendants, et. Al. shall pay a total amount of $800,000 for Medical Malpractice, pain and suffering etc., to Plaintiff, as well as an amount of Exemplary (punitive) Damages as defined by this court. Petitioner requests a preliminary injunction mandating Defendants (B.O.P. Staff) to take Plaintiff to a Pain Management Specialist "forthwith" to prescribe and provide adequate pain control, and medication in sufficient dosage and frequency commensurate to indicate illness and pain level need.

Please. Thank you.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Signed this 25 day of April, 2011

Raymond James Hoslett, 82420-012

Raymond James Hoslett
Plaintiff, prays for relief.

Signature/Case Manager
"Authorized by the Act of July 27, 1955 to administer oaths (18 USC 4004)."

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RAYMOND JAMES HOSLETT,

Plaintiff,

v.

DR. JASPAL DHALIWAL, M.D.
DR. STEPHEN DAVIS, M.D.
MR STEVE DE LAHERAS, HSA.
MR. ISRAEL JACQUEZ, AWP.
MR. JEFF E. THOMAS, WARDEN et. al.

Defendants.

APPLICATION TO PROCEED
IN FORMA PAUPERIS

CASE NUMBER:

I, RAYMOND J. HOSLETT, declare that I am the plaintiff in the above-entitled proceeding; that, in support of my request to proceed without prepayment of fees under 28 U.S.C. § 1915, I declare that I am unable to pay the fees for this proceeding or give security therefor and that I am entitled to the relief sought in the complaint.

In support of this application, I answer the following questions under penalty of perjury:

1. Are you currently incarcerated: ☑ Yes ☐ No

If "Yes" state the place of your incarceration. F.C.I. SHERIDAN, OR.

If "Yes" have the institution fill out the Certificate portion of this application and attach a certified copy of your prison trust account showing transactions for the past six months.

2. Are you currently employed? ☑ Yes ☐ No

a. If the answer is "Yes" state the amount of your pay: $ 18.00 PER MONTH.

b. If the answer is "No" state the date of your last employment, the amount of your take-home salary or wages and pay period, and the name and address of your last employer.

3. In the past twelve months have you received any money from any of the following sources?

a.	Business, profession or other self-employment	☐ Yes	☑ No
b.	Rent payments, interest, or dividends	☐ Yes	☑ No
c.	Pensions, annuities, or life insurance payments	☐ Yes	☑ No
d.	Disability or workers compensation payments	☐ Yes	☑ No
e.	Gifts or inheritances	☐ Yes	☑ No
f.	Any other sources	☑ Yes	☐ No

If the answer to any of the above is "Yes" describe by that item each source of money and state the amount received and what you expect you will continue to receive. Please attach an additional sheet if necessary. RECEIVE $ 50.00 PER MONTH FROM FAMILY.

4. Do you have cash or checking or savings accounts, including prison trust accounts? ☑ Yes ☐ No

If "Yes" state the total amount: $ 150.93

PLEASE NOTE: I AM PAYING THE $350.00 FILING FEE UP FRONT.

5. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles or other valuable property? ☐Yes ☑No

If "Yes" list the asset(s) and state the value of each asset listed.

6. Do you have any other assets? ☐Yes ☑No

If "Yes" list the asset(s) and state the value of each asset listed.

7. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support.

FRP QUARTERLY PAYMENTS OF $ 25.00 IN RE. TO RESTITUTION.

I hereby authorize the agency having custody of me to collect from my trust account and forward to the Clerk of the United States District Court payments toward the full filing fee of $350.00 for a prisoner civil rights complaint or $5 for a petition for writ of habeas corpus in accordance with the Prison Litigation Reform Act, P.L. 104-134 (110 Stat. 1321), Section 804(a) (to be codified at 28 U.S.C. § 1915(b)).

I declare under penalty of perjury that the above information is true and correct.

5-20-11
DATE

Raymond T. Haslett, 82420-012
SIGNATURE OF APPLICANT

CERTIFICATE
(To be completed by the institution of incarceration.)

I certify that the applicant named herein has the sum of $ 150.93 on account to his/her credit at FCI SHERIDAN (name of institution). I further certify that during the past six months the applicant's average monthly balance was $ 156.31. I further certify that during the past six months the average of monthly deposits to the applicant's account was $ 156.31.

I have attached a certified copy of the applicant's trust account statement showing the transactions for the past six months.

5-20-2011
DATE

S. Rosal, SB CCC
SIGNATURE OF AUTHORIZED OFFICER

ORIGINAL

FILED27 JUN '13 10:29USDC-ORP

Raymond James Hoslett
Register No: 82420-012
Federal Correctional Institution
P.O. Box 5000
Sheridan, OR 97378

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RAYMOND JAMES HOSLETT, Plaintiff, -vs- JASPAL DHALIWAL, M.D., RAYMOND E. WESTERMEYER, M.D., and UNITED STATES, Defendants.	Case No: 3:11-cv-00674-KI AMENDED COMPLAINT WITH DEMAND FOR TRIAL BY JUDGE

NOW COMES Raymond James Hoslett, the Plaintiff, in pro se, and complains against the Defendants as follows:

A. JURISDICTION

1. DELIBERATE INDIFFERENCE.

This Honorable Court has jurisdiction over this Complaint pursuant to 28 U.S.C. §1331; 28 U.S.C. §1346; and Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed2d 619 (1971), as to all "deliberate indifference" claims.

2. FEDERAL TORT CLAIMS ACT, 28 U.S.C. §2671 et. seq.

This Honorable Court has jurisdiction over the Complaint pursuant to 28 U.S.C. §2671 et. seq., and United States v. Olson, 546 U.S. 43, 44, 126 S.Ct. 510, 163 L.Ed.2d. 306 (2005)("The FTCA authorizes private tort actions against the United States 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'"). See also Jachetta v. United States, 653 F.3d 898, 904 (9th Cir. 2011) (Following United States v. Olson, 546 U.S. at 44, in part as to FTCA claims); and Jerden v. Amstutz, 430 F.3d 1213, 1234-1235 (9th Cir. 2005)("Oregon has adopted a locality rule in medical malpractice actions whereby physicians have 'the duty to use that degree of care, skill, and diligence that is used by ordinarily careful physicians . . . and surgeon or a similar community.'" Or. Rev. Stat. §677.095 (2003)(last amended Aug. 5, 1997). Pursuant to Federal Rules of Evidence 601, the district court was required to follow Oregon locality rule when presented with the testimony of out-of-town medical experts who testify as to the appropriate standard of care local physician defendants. Under this evidnecitary rule, out-of-town experts must show 'knowledge of what is proper conduct by practioners in the community under circumstances similar to those which confronted the defendant.'" Creasey v. Hogan, Ore. 154, 637 P.2d 114, 122 (Or. 1081)).

B. EXHAUSTION OF ADMINSTRATIVE REMEDIES.

Plaintiff Raymond James Hoslett has exhausted all Adminstrative Remedy Program, 28 C.F.R. §542.10, et. seq., and the Federal Tort Claims Act, 28 C.F.R. §543.30, et. seq.

C. PARTIES.

1. Plaintiff Raymond James Hoslett, hereinafter referred to as "the Plaintiff," is a Federal inmate incarcerated within the Federal Bureau of Prisons, hereinafter referred to as the "BOP," and is currently imprisoned at the Federal Correctional Institution, hereinafter referred to as "FCI," located in Sheridan, Oregon, in the District of Oregon.

2. Defendant Jaspal Dhaliwal, M.D., hereinafter referred to as "Defendant Dhaliwal," was employed as the Medical Director at FCI Sheridan at all times relevant to the claims made herein. Defendant Dhaliwal is sued in his individual and official capacities.

3. Defendnat Raymond E. Westermeyer, M.D., hereinafter referred to as "Defendant Westermeyer," was employed as a "Contract Doctor" for the BOP and assigned to FCI Sheridan at all times relevant to the claims made herein. Defendant Westermeyer is sued in his individual and official capacities.

4. Defendant United States is a "Defendant" named herein pursuant to the Federal Tort Claims Act, hereianfter referred to

"FTCA," 28 U.S.C. §2671, et. seq., and the Oregon Tort Claims Act, hereianfter referred to as the "OTCA," Or. Rev. Stat. §677.095(2003).

5. That after completion of discovery, the Plaintiff will be able to fully set forth the specific duties and responsibilities of both Defendant Dhaliwal and Defendant Westmeyer for all times relevant to the claims made herein.

6. That Defendant Dhaliwal and Defendent Westermeyer have acted under color of state and federal law at all times relevant to this Amended Complaint pursuant to Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. at 392-398.

D. STATEMENT OF THE FACTS.

7. On April 14, 2010, the Plaintiff arrived at FCI Sheridan sufferring from an incurable and deliberating bladder disease known as "Interstitial Cystitis," more commonly referred to as "I.C." and a "Hunner's Ulcer" within the bladder wall.

8. On October 26, 2010, the Plaitniff was afforded a consulation with a contract "Urologist Specialist Sajal C. Dutta, M.D. (hereinafter referred to as "Dr. Dutta.").

9. On that same day, October 26, 2010, Dr. Dutta's diagnosis and prescribed treatment for Plaintiff's medical condition set forth in paragraph 8 above was:

CHIEF COMPLAINT: Interstitial Cystitis.

SUBJECTIVE: The patient returns today to follow-up. He continues to have issues with Interstitial Cystitis. he is already on Elmiron. He is wishing to proceed with cystoscopy hydrodistention. He states he has had that done previously and it has helped. Past medical history form is reviewed and updated.

PLAN: I had a long discussion with the patient regarding the current situation. I think it is reasonable to proceed with cystoscopy and hydroistention since he is already maximized on oral therapy. Therefore, we will go ahead and proceed with cystoscopy hydrodistention, possible bladder biospy, and retrograde pyelogram. **Risks and benefits of Procedure, worsening pain,** need for additional surgeries,a nd risks of anesthesia. He appears to have a good understanding and wished to proceed. . . . [Emphasis Added by the Plaintiff to show and prove that his post-operative pain could worsen by the surgery].

(PLaintiff's Exhibit 1).

10. Dr. Dutta ordered Oxycodone Tab 5 mg immediately upon release form the hospital after surgery to be taken 1 to 2 tablets orally every 3 hours as needed. (See Palintiff's Exhibit 2).

11. Dr. Dutta further ordered a cytoscopy hydrodistention and bladder biospy with a referral to a pain specialist. (See Plaintiff's Exhibit 3).

12. Plaintiff's Exhibit 3 shows and proves that Defendant Dhaliwal's claim that Defendant Westermeyer was the physician who regularly saw the Plaitniff and managed his care, including his pain management is on Page 8 of 10, paragraph 1, of his Motion for summary Judgment filed on October 15, 2012 was, and is, a falsehood, whereas, at the bottom of Plaitniff's Exhibit 3 is Defendant Dhaliwal's "Internal Stamp" on it. This in the Orders of treatment and the pain medication set forth in paragraph 10

herein. (See Plaintiff's Exhibit 3). In those Orders, Dr. Dutta further recommended that the Plaintiff be considered for a referral to a pain specialist. (See Plaintiff's Exhibit 3).

13. On August 11, 2011, the Plaintiff was seen by Defendant Westermeyer and complained to him that he was in severe pain and Defendant Westermeyer: (a) told the Plaintiff that he would receive no pain meds, see Plaintiff's Exhibit 4-6; (b) recorded in the Plaintiff's medical file that he discussed the Plaintiff's pain and using narcotics and that Dr. Dutta never uses narcotics for pain, see Plaintiff Exhibit 7, which is false, because it was Dr. Dutta who prescribed Oxycodone Tab 5 mg Immediate Release to take 1 to 2 tablets orally every three hours as needed on December 28, 2010, see Plaintiff's Exhibit 2; and (c) recorded in the Plaintiff's medical file that he sometimes refers to a pain specialist just because he doesn't want to manage the pain meds in his practice. (See Plaintiff's Exhibit 7).

14. On August 18, 2010, Defendant Westermeyer acknowledged that the Plaintiff: (a) had been diagnosed with Interstitial Cystitis for about one year; (b) had been transferred from another facility becuase of this medical condition; and (c) was now closer to his family. (See Plaintiff's Exhibit 8).

15. On the same day, October 18, 2010, the Plaintiff also requested pain medication, see Plaintiff's Exhibit 8, where Defendant Westermeyer denied to put him on chronic pain medication. (See Plaintiff's Exhibit 9).

(See Plaintiff's Exhibit 9).

16. Not being a pain specialist, Defendant Westermeyer denied the Plaintiff a referral to a pain specialist as a recommended by Dr. Dutta, a Urlogogist, see Plaintiff's Exhibit 3, not following what was actually a prescribed treatment by Dr. Dutta. (See Plaintiff's Exhibits 3 and 10).

17. On September 14, 2010, Defendant Westermeyer now claims that the Plaintiff did not request pain medication, but instead, just complained about being unable to sleep and being in chronic pain. (See Plaintiff's Exhibits 11 and 12).

18. On December 29, 2010, Defendant Westermeyer changed Dr. Dutta's order for Oxycodone Tab 5 mg -Immediate Release to take 1 to 2 tablets orally every three hours as needed without consulting Dr. Dutta and decreased the number of days to 15 days. (See Plaintiff's Exhibits 3 and 13).

19. The Plaintiff then filed this civil action and this Honorable Court appointed "Pro Bono Attorney Steven M. McCarty" to represent him.

20. That shortly after Attorney McCarthy was appointed, Attorney McCarthy came to FCI Sheridan to visit the Plaitniff in regards to this civil action.

21. On the same day, June 16, 2011, after Attorney McCarthy's visit with the Plaintiff, Dr. Davis examined the Plaintiff during a Chronic Care visit and noted that he complained of severe pain

due to his chronic medical condition of "Interstitial cystitis" and "Hunner's Ulcer" and asked for pain medication. (See Plaintiff's Exhibit 14).

22. On that same day, June 16, 2011, in response to the Plaintiff's complaint of chronic severe pain and his request for pain medication, Dr. Davis ordered Oxycodone HCI ER Tablet 10 mg orally two times a day x 30 days (Pill Line Only) for his chronic pain associated by his medical condition which he still receives to date. (See Plaintiff's Exhibits 15 through 18).[1]

23. Again, on that same day, June 16, 2011, Dr. Davis further ordered: (a) follow-up sick call as needed; (b) follow-up at Chronic Care Clinic as needed; and (c) pain management. (See Plaintiff's Exhibit 16).

24. On December 17, 2012, Attorney Dennis H. Black responding to this Honorable Court's "Order Appointing Pro Bono Counsel" contacted a Board Certified Urologist and told that Urologist the facts of the Plaitniff's incurable medical condition and this Urologist told Attorney Black the following in relevant part:

> He told me that, if the alleged facts could be substantiated, it appeared to him, based upon the oral representations he received from me, that conduct below the standard of care wa s provided to the Plaintiff."

(See Plaintiff's Exhibits 19 and 20).

E. CLAIMS

1. First Cause of Action.

23. That the acts of each of the Defendants set forth in paragraphs 8 through 24, and supported with Plaitniff's Exhibits 1 through 21, were deliberate indifference to the Plaintiff's serious medical need for pain medication prescribed by Dr. Dutta on October 26, 2010 and violated his Eighth Amendment right to be free from a wanton infliction of plain.

24. The denial of Oxycodone Tab 5 mg immediately upon his release from the hospital after surgery to be taken 1 to 2 tablets orally every 3 hours as prescribed by Dr. Dutta causing him the unnecessary and wanton infliction of serious pain from October 26, 2010 through June 16, 2011 when Dr. Davis ordered Oxycodone HCI ER tablet 10 mg orally - two time a day for 30 days. (See Plaintiff's Exhibits 3 through 13).

Deliberate indifference to a prisoner/s/inmate's serious pain is prohibited and constitutes deliberate indifference under the two-prong test set forth by the Ninth Circuit in Jetts v. Penner, 439 F.3d 1091, 1096-1098 (9th Cir. 2006), and was followed by the panel in Wihelm v. Rotman, 680 F.3d 1113, 1122-1123 & n. 8 (9th Cir. 2010), in pertinent parts:

> First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent . . . .

The second prong requires showing:

> (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the deliberate indifference. Jett, 439 F.3d at 1096. More generally, deliberate indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." . . .

Id. at 1122.

24. Denying the Plaintiff the medication prescribed by Dr. Dutta was deliberate indifference to his severe and continuous pain from October 26, 2010 to June 16, 2011. See Estelle v. Gamble, 429 U.S. 97, 104-105, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) ("Deliberate indifference can be manifested by prison guards intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."). See also Hamilton v. Endell, 981 F.2d 1062, 1066 (9th Cir. 1992) ("The Ninth Cirucit has found deliberate indifference where prison officials 'deliberately ignore the express orders of a prisoner's prior physician for reasons unrelated to the medical needs of the prisoner.").

2. Second Cause of Action.

25. That the acts of the Defendants set forth in paragraphs 7 through 24, and supported with Plaintiff's Exhibits 1 through was not only "deliberate indifference" to his serious medical need for the prescribed treatment, including the Oxycodone, by

Dr. Dutta, see plaitniff's Exhibits 1 through 3, was "medical negligence" under the Federal Tort Claims Act, 28 U.S.C. §2671, et. seq., under Oregon's Oregon Tort claims Act, Or. Rev. Stat. §677.095 (2003), or any amendment not known to the Plaintiff. See United States v. Olson, 546 U.S. at 44; Jachetta v. United States, supra at 904; and Jerden v. Amstutz, supra at 1234-1235, as his treatment for his severe pain fell below the Standard of Care of state physicians. See Plaintiff's Exhibit

F. RELEIF SOUGHT

WHEREFORE, the Plaintiff seeks the following relief:

A. issue an Order to continued to allow him to pursue discovery if the answers and documents sought in his First discovery requests create a need to seek addiiton discovery;

B. issue an Order to hire the Urologist that Attorney Black consulted with as an expert for him;

C. issue an Order Allowing him to dispose Dr. Dutta, or in the alternative, issue an Order for an Affidavit of Dr. Dutta as to why he prescribed the treatment for him, including the prescription for Oxycodone for his severe pain assosciated with medical condition;

D. issue an Order directing the Defendants' attorneys to provide him with all relevant statutory and/or case law for medical negligence for the State of Oregon as the same is

controlling stautory and case law authority herien pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671, et. seq., and United states v. Olson, 546 U.S. at 44, which is unavailabe to him at his current place of imprisonment;

E. issue an injunctive relief that may be deemed just and necessary as, although not an exhausted claim herein, he believes that the denial of Oxycodone was retaliation for pursuing Adminstrative Remedies;

F. damages in the amount of $100,000.00 for his claims made for "deliberate indifference" under Bivens;

G. actual damages in the amount $100,000.00 for "medical negligence" under the Federal Tort Claims Act, 28 U.S.C. §2671, et. seq.; and

H. grant such other, further and necessary, releif as deemded just and proper.

Signed this 24th day of June, 2013.

Respectfully submitted,

Raymond J. Hoslett

Raymond James Hoslett
Plaintiff In Pro se

---

1 Plaintiff's Exhibit 17 indicates that his monthly prescription for Oxycodone, see Plaintiff's Exhibit 15, was changed to Morphine SR 12 Hour 15 mg Tab UD which continues to date. See Plaintiff's Exhibit 18.

PLAINTIFF HOSLETT'S EXHIBITS

1 - 20

CASE NO: 3:11-CV-00674-KI

PLAINTIFF'S EXHIBIT: 1.

** INBOUND NOTIFICATION : FAX RECEIVED SUCCESSFULLY **

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01/06/2002 17:30 9099740158 PACIFIC REGIONAL OFF PAGE 01

The Urology Clinic, PC
PHYSICIANS & SURGEONS

Gregory A. Cost, MD
Sajal C. Dutta, MD
Jerry D. Glaja, MD
Michael J. Kaempf, MD
Jin-Hee Kim, MD
Gregory D. McCoy, MD
Kevin M. McEvoy, MD
Roger D. Ronnquist, MD
David K. Winchester, MD
Jennifer Botelho, PA-C
Xinyue Wang, PA-C
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503-274-4999
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503-255-3244
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503-692-4820
Fax 503-612-0793

Providence
5050 NE Hoyt Street
Suite 516
Portland, OR 97213
503-943-3265
Fax 503-517-8679

80420-012.

HOSLETT, RAYMOND J. **DOB:** 10/19/1961 **Date:** 10/26/2010

ID#: 116300

CHIEF COMPLAINT: Interstitial cystitis.

SUBJECTIVE: The patient returns today in follow-up. He continues to have issues with interstitial cystitis. He is already on Elmiron. He is wishing to proceed with cystoscopy hydrodistention. He states he has that done previously and it has helped. Past medical history form is reviewed and updated.

OBJECTIVE: **RECTAL:** Prostate is smooth, symmetrical, nontender, and no nodularity.

DIAGNOSTICS: None.

IMPRESSION: Interstitial cystitis.

PLAN: I had a long discussion with the patient regarding the current situation. I think it is reasonable to proceed with cystoscopy and hydrodistention since he is already maximized on oral medical therapy. Given his current situation, he is really not able to receive intravesical treatments. Therefore, we will go ahead and proceed with cystoscopy hydrodistention, possible bladder biopsy, and retrograde pyelogram. Risks and benefits of this procedure include, but are not limited to bleeding, infection, bladder perforation, worsening pain, need for additional surgeries, and risks of anesthesia. He appears to have good understanding and wished to proceed. PARQ conference was completed. We will set this up for sometime in the near future.

cc: Raymond E. Westermeyer, M.D.

D: 11/01/2010 T: 11/02/2010

SAJAL C. DUTTA, M.D.:bskb/bsri/bnab



PLAINTIFFS - EXHIBIT: 2

"BLUE CHEMICALLY SENSITIVE PAPER | HOLLOW "VOID" PANTOGRAPH | MICROPRINT BORDER | HEAT-SENSITIVE LOGO (on back)"

027898

Legacy Emanuel Hospital & Health Center
2801 N. Gantenbein Ave.
Portland, OR 97227
(503) 413-2200

Medication Prescription

Raymond HOSLETT DOB:10/19/61 Age: 49
27072 BALLSTON RD (503)843-4442 Wt: 084.90 kg
SHERIDAN , OR 97378 28Dec10

OxycoDONE Tab 5mg Immed Release DAW: N Qty: 30 TABS
TAKE 1 to 2 Tablets Orally
Every 3 Hours as needed
Refills: 00

DUTTA, SAJAL MD
(503)288-7303
Medicaid #:999999

Signature

BD7711751
DEA#

JAN 2011
Reviewed By
S. Davis, DO, CD

264297 (11/08)

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PLAINTIFF'S — EXHIBIT: 3

AUTHORIZED FOR LOCAL REPRODUCTION

MEDICAL RECORD	CONSULTATION SHEET

REQUEST

TO:	FROM: (Requesting physician or activity)	DATE OF REQUEST:
THE UROLOGY GROUP DR. DUTTA	STEPHEN DAVIS DO, CD	09/16/2010

REASON FOR REQUEST (Complaints and findings)

48 Y/O MALE WITH INTERSTITIAL CYSTITIS PLEASE SCHEDULE FOR CYSTOSCOPY AND BLADDER DILATION FOR BLADDER EVALUATION. (more)

Tuesday, October 26, 2010.

PROVISIONAL DIAGNOSIS

INTERSTITIAL CYSTITIS. (more)

DOCTORS SIGNATURE	APPROVED	PLACE OF CONSULTATION	
S. DAVIS DO, CD /S/	☑ YES ☐ NO	☐ BEDSIDE ☐ ON CALL	☐ ROUTINE ☐ TODAY ☐ 72 HOURS ☐ EMERGENCY

CONSULTATION REPORT

RECORD REVIEWED ☐ YES ☐ NO PATIENT EXAMINED ☐ YES ☐ NO TELEMEDICINE ☐ YES ☐ NO

(more)

Will schedule for cysto, hydrodistension, + bladder Bx.

→ Consider referral to pain specialist as well.

Please do PSA level + fax result.

(Continue on reverse side)

SIGNATURE AND TITLE	DATE
S DUTTA	10/26/10

HOSPITAL OR MEDICAL FACILITY	RECORDS MAINTAINED AT	DEPARTMENT/SERVICE OF PATIENT

RELATION TO SPONSOR	SPONSOR'S NAME (Last, First middle)	SPONSOR'S ID NUMBER (SSN or Other)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name - last, first, middle, ID no. (SSN or other); Sex; Date of Birth; Rank/Grade)	REGISTER NO.	WARD NO.
	82420-012	

HOSLETT, RAYMOND JAMES
10/19/1961
SHERIDAN FCI

CONSULTATION SHEET
MEDICAL RECORD
STANDARD FORM 513 (REV 4-98)
Prescribed by OCA/CBM FPMR 9-1 CFR 101-11.203(b)-10

11/2/10

J. DHALIWAL, MD
FCI/FPC/FDC SHERIDAN, OR

PLAINTIFF'S – EXHIBIT 4

Plaintiff to be seen by an Urologist in the community for an assessment. Plaintiff was in fact seen by the Urologist, Dr. Dutta, who recommended a course of treatment, and ultimately performed a surgical procedure to alleviate Plaintiff's symptoms on December 28, 2010. *Complaint* at 4. However, Dr. Dhaliwal did not examine or treat Plaintiff following May 20, 2010, and was not responsible for implementing Plaintiff's course of treatment. Instead, records demonstrate Dr. Westermeyer was the physician who regularly saw Plaintiff and managed his care, including pain management issues.

These undisputed facts demonstrate Dr. Dhaliwal provided treatment for Plaintiff's condition during the short time for which he was actively involved in Plaintiff's medical treatment, including a prescription for Elmiron, and a referral to be seen by an Urologist. Although Plaintiff may disagree with the specific treatment provided, a difference of opinion does not constitute deliberate indifference. *Sanchez*, 891 F.2d at 242. Even if the level of treatment provided was negligent, or as Plaintiff refers to it: "medical malpractice," *Complaint* at 3, 4, such negligence does not violate the Constitution. *Estelle*, 429 U.S. at 106. Accordingly, Plaintiff is unable to demonstrate a violation of his rights by Dr. Dhaliwal, who is entitled to judgment as a matter of law. Dr. Dhaliwal is therefore entitled to Qualified Immunity, and should be granted Summary Judgment.

II. DEFENDANT DHALIWAL WAS NOT PERSONALLY INVOLVED IN THE ALLEGED DEPRIVATIONS FOLLOWING MAY 20, 2010

In order to set forth a claim under *Bivens*, the plaintiff must set forth facts which show that the named defendant personally engaged in conduct with violated the plaintiff's constitutional rights. Respondeat superior or group liability is inapplicable in an individual capacity suit under *Bivens*. *See Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991); *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996). *See also, Jones v. Williams*, 297 F.3d 930, 934-35

Bureau of Prisons
Health Services
Clinical Encounter

PLAINTIFF'S EXHIBIT : 5

Inmate Name: HOSLETT, RAYMOND JAMES **Reg #:** 82420-012
Date of Birth: 10/19/1961 **Sex:** M **Race:** WHITE
Encounter Date: 08/11/2010 09:26 **Provider:** Westermeyer, Raymond **Facility:** SHE

Chronic Care encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Westermeyer, Raymond MD

Chief Complaint: GENERAL

Subjective: This 49 yo man has had interstitial cystitis for about 3 years, starting with bleeding ,and moving to suprapubic pain which he describes as quite severe and keeping him awake at night. No bowel symptoms. Has had a rectal exam in about 4 mos and was told this was normal. PSA was 0.5 on 5/23/2009. Has been working on elimination diet without any help. NSAIDs do not help. Gets worse at night. Urination "hurts". RAdiates to the tip of the penis. Takes a long time to start urinating. When he does hurts at the tip of penis even more. Laying on back is a little better ("9/10").

Has been seen by Dr. Duta, who I will call this afternoon 503-288-7303. He recommended increasing Elmira from 100 mg TID to 200 mg TID, or getting bladder dilation and DMSO treatment under anesthesia.

Emphasizes he needs stronger pain treatment, and says urologist recommended possible sending him to "pain specialist."

Pain Location:
Pain Scale:
Pain Qualities:
History of Trauma:
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

COMPLAINT 2 **Provider:** Westermeyer, Raymond MD

Chief Complaint: INFECTIOUS DISEASE

Subjective: Hep C positive since 1997, genotype 1a, and was treated 1999 for 24 weeks. Says his viral load came way down but did not go away entirely. Felt better after treatment. Says liver biopsy showed mild scarring.

Pain Location:
Pain Scale:
Pain Qualities:
History of Trauma:
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

Seen for clinic(s): General, Infectious Disease

OBJECTIVE:

Pulse:

#1

PLAINTIFF'S EXHIBIT #6

Inmate Name: HOSLETT, RAYMOND JAMES **Reg #:** 82420-012
Date of Birth: 10/19/1961 **Sex:** M **Race:** WHITE
Encounter Date: 08/11/2010 09:26 **Provider:** Westermeyer, Raymond **Facility:** SHE

Date	Time	Rate Per Minute	Location	Rhythm	Provider
08/11/2010	11:26 SHE	80		Regular	Westermeyer, Raymond MD

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
08/11/2010	11:26 SHE	140/75	Left Arm	Sitting	Adult-regular	Westermeyer, Raymond MD

Exam:

General

NAD
Abd voluntarily guarding intermittently in the lower abd, no specific or localized peritoneal signs of tenderness or rebound. Tight stomach muscles, but they relax when distracted. BTs good. No megaly or masses noted.

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Chronic hepatitis C w/o mention of hepatic coma	070.54	Current	02/08/2007	Not Improved/Same	Chronic
Diagnosis Comments: Stable unchanged, VL present, genotype pending					
Benign essential hypertension	401.1	Current	08/11/2010	Initial	Chronic
Health Problem Comments: Quite elevated, and requires better compliance and increased meds.					
Cystitis, unspecified	595.9	Current	10/16/2009	Not Improved/Same	Chronic

Diagnosis Comments:

This man complains of severe suprapubic which is due to interstitial cystitis by his history. He does have diagnosed IC per Urologist Dr. Duta. Dr. Duta has recommended increasing dose of Elmira or doing series of Bladder dilations/DMSO installations under anesthesia.

INMATE ~~HM~~ comes in her primarily and peristently and repeatedly saying he wants pain meds and "pain management" and from a "pain specialist" if necessary. He repeats it just isn't right to leave him in pain like this. He describes constant suprapubic pain, worse after urinating.

I have reviewed his old records and they seem to cooberate him being naive to narcotics. However, he starts right out talking about me providing pain medicines.

I describe to him the reason for avoiding chronic narcotics in non-cancerous pain, which would make him worse in several ways while providing limited relief for this type of pain.

I told him the primary role I saw myself in was to figure out ways to treat this and treat the underlying problem. He expressed no interest in treatment of this problem. He said he would not be willing to do the DMSO treatments. Turns out his main concern is that if he accepts the option to treat with weekly installations of DMSO, he might have to move to a level III facility which would take him away from family which are close to here relatively. In other words, to remain in this geographic location, he would rather not treat the problem specifically and would prefer to do no treatment and take chronic pain meds. I told him this was unacceptable. I told him ~~him~~ he would receive no pain meds. NSAIDs are ruled out due to Hep C and he says he is allergic to codeine and Tylenol.

INMATE ~~HM~~ has long-standing anxiety syptoms and panic attacks documented. Describes insomnia, states this is →

#2

PLAINTIFFS - EXHIBIT : # 7

Inmate Name: HOSLETT, RAYMOND JAMES Reg #: 82420-012
Date of Birth: 10/19/1961 Sex: M Race: WHITE
Encounter Date: 08/11/2010 09:26 Provider: Westermeyer, Raymond Facility: SHE

Description	ICD9	Status	Status Date	Progress	Type
caused by the pain.					
Cystitis, unspecified	595.9	Current	10/16/2009	Not Improved/Same	Chronic

Diagnosis Comments:

Discussed with Urologist Dr. Dutta (sp?). He has not much to offer. Can do bladder dilatation and see if it helps. Could try antispasmotics, usually not very helpful. He never uses narcotics for this. He sometimes refers to pain specialists, just because he doesn't want to manage the pain meds in his practice. This condition does not predispose inmate to any other conditions, like bladder CA.

PLAN:

New Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
Radiology	08/11/2010	Routine	No	

Reason for Request:

Hep C, needs liver biopsy

Provisional Diagnosis:

Hep C

Disposition:

Follow-up at Sick Call as Needed
Follow-up at Chronic Care Clinic as Needed
Discharged to Housing Unit-No Restrictions

Other:

PLAN:

See back in one week and tell him what I learned from talking to Dr. Duta regarding his condition and treatment.

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
08/11/2010	Counseling	Plan of Care	Westermeyer,	No Evidence of Learning

This is not solvable, but adding narcotics will only make the long-term condition worse.

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: No

Completed by Westermeyer, Raymond MD on 08/11/2010 14:22
Requested to be cosigned by Davis, Stephen DO.
Cosign documentation will be displayed on the following page.
Requested to be reviewed by Davis, Stephen DO.
Review documentation will be displayed on the following page.

#3

Bureau of Prisons
Health Services
Clinical Encounter

PLAINTIFFS EXHIBIT: 8

Inmate Name: HOSLETT, RAYMOND JAMES **Reg #:** 82420-012
Date of Birth: 10/19/1961 **Sex:** M **Race:** WHITE
Encounter Date: 08/18/2010 09:52 **Provider:** Westermeyer, Raymond **Facility:** SHE

Chronic Care encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Westermeyer, Raymond MD

Chief Complaint: GENERAL

Subjective: This man carries a diagnosis of interstitial cystitis for about one year. Was transferred here from another facility because of this medical problem, (it is also the closest facility to his family).

He complains bitterly mostly about the frequency of urination. May go 8 times per day, but as soon as he lays down, starts to have pain and increased frequency to as much as every 1/2 hour. Wants meds to help him with pain or frequency of urination. No visible bleeding as when this was first diagnosed. No fever or chills, urine not cloudy.

Was treated last fall for severe bleeding, and then after hospitalization and treatment for this was discharged back to prison and shortly thereafter developed urosepsis and had to return to hospital for a few days. He did have a bladder dilatation and he was nearly asymptomatic for 3 months. Then the symptoms started to gradually come back with more and more frequency, particularly at night.

Pain Location:
Pain Scale:
Pain Qualities:
History of Trauma:
Onset:
Duration:
Exacerbating Factors:
Relieving Factors:
Comments:

Seen for clinic(s): General

OBJECTIVE:

Exam:

General

No exam today, purely discussed with him and reviewed records.
Color good, no sign of pallor
Uptight
Has flat affect, but expresses quick dissatisfaction with the inability of our facility to make him comfortable. Is convinced he would be treated differently on the outside.

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Chronic hepatitis C w/o mention of hepatic coma	070.54	Current	02/08/2007	Not Improved/Same	Chronic

Health Problem Comments:

Treated 1999 for 24 weeks with Genotype 1a. Viral response not permanent and now back. had mild liver changes at that time prior to treatment. No retreatment contemplated at this time, just standard periodic checks.

Diagnosis Comments:

Any consideration for treatment on hold at this time.

#1

PLAINTIFFS - EXHIBIT # 9

Inmate Name: HOSLETT, RAYMOND JAMES **Reg #:** 82420-012
Date of Birth: 10/15/1961 **Sex:** M **Race:** WHITE
Encounter Date: 08/18/2010 09:52 **Provider:** Westermeyer, Raymond **Facility:** SHE

Description	ICD9	Status	Status Date	Progress	Type
Cystitis, unspecified	595.9	Current	10/16/2009	Not Improved/Same	Chronic

Health Problem Comments:

I will try an antispasmotic oxybutinin to see if this is helpful.

Diagnosis Comments:

This man has chronic interstitial cystitis. Not a lot of treatment modalities. Discussed with Dr. Dutta. Relayed the information to inmate. Inmate insists he is unhappy that we can't make him comfortable --- expects us to solve this with medicaitons. I have discussed chronic discomfort with him and in talking to him the major thing he keeps mentioning is the irritation to his cellie, and believes this is going to "come to an incident" if something is not done, he believes this is so annoying to his cellie. He mentions this more then he mentions the discomfort or the sleeplessness.

I will not put him on chronic pain meds for this problem. I will not put him on chronic meds for sleep, that is not really the issue, the problem is the frequency of urination.

I will ask for approval to have repeat cysto done by Dr. Dutta and request approval for repeat bladder dilation under anesthesia as well. Have told him I cannot give him any assurance that this will be approved.

I will check him CBC periodically. I will check back with him in one month.

I will check into the possibility of him having a private cell.

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Oxybutynin Tablet	08/18/2010 09:52	5 mg Orally -three times a day x 60 day(s)

Indication: Cystitis, unspecified

New Laboratory Requests:

Details	Frequency	End Date	Due Date	Priority
_Chronic Care Clinics-Cardiac-Complete Blood Count (CBC)/Diff	One Time		09/20/2010 00:00	Routine

Additional Information:

Please do close to this date for follow up.

New Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
Urology	08/18/2010	Routine	No	

Reason for Request:

This man has interstitial cystitis, extremely upsetting as he is having to get up to urinate about every 30-60 mins all night. Previous dilatation underanesthesia resolved his sx for about 3 mos last fall. Urologist Dr. Dutta told me that other treatments are even less effective for this condition. Since Dr. Dutta is our consulting urologist, believe he should at the least do his own cystoscopy and evaluate the bladder himself, and also have the permission to do the bladder dilatation if he still thinks this is a good treatment option.

Provisional Diagnosis:

Interstitial cystitis

2

PLAINTIFFS - EXHIBIT: 10

Inmate Name: HOSLETT, RAYMOND JAMES **Reg #:** 82420-012
Date of Birth: 10/19/1961 **Sex:** M **Race:** WHITE
Encounter Date: 08/18/2010 09:52 **Provider:** Westermeyer, Raymond **Facility:** SHE

Schedule:

Activity	Date Scheduled	Scheduled Provider
Chronic Care Visit	09/08/2010 09:00	Physician 02

f/u oxybutyin, cystitis
f/u on referral to urologist.

Disposition:

Follow-up at Sick Call as Needed
Follow-up at Chronic Care Clinic as Needed
Discharged to Housing Unit-No Restrictions

Other:

PLAN

1. will inquire about single cell (have done so, and almost entirely limited to handicapped)
2. will try antispasmotic oxybutynin
3. Will request approval for repeat cysto with urologistand approval for bladder dilatation under anesthesia and other treatments considered by urologist
4. see back in 3 weeks
5. periodic CBC levels.
6. No pain meds, no sleep aids.

biweekly CBC X 3

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
08/18/2010	Counseling	Plan of Care	Westermeyer,	Needs Reinforcement

Continues to insist that we should be able to do something medicinally tomake him more comfortable. Believes he would have "better" or different care on the outide. I assured him the treatment woud be no different if I were advising him on th outside. Indicated to him that a "pain specialist" would be very unlikely to have additional suggestions. 135

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: No

Completed by Westermeyer, Raymond MD on 08/18/2010 12:51
Requested to be cosigned by Davis, Stephen DO.
Cosign documentation will be displayed on the following page.
Requested to be reviewed by Davis, Stephen DO.
Review documentation will be displayed on the following page.

#3

Bureau of Prisons
Health Services
Clinical Encounter

PLAINTIFF'S EXHIBIT: 11

Inmate Name: HOSLETT, RAYMOND JAMES **Reg #:** 82420-012
Date of Birth: 10/19/1961 **Sex:** M **Race:** WHITE
Encounter Date: 09/14/2010 11:12 **Provider:** Westermeyer, Raymond **Facility:** SHE

Chronic Care encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Westermeyer, Raymond MD

Chief Complaint: GENERAL

Subjective: This man is bitterly unhappy with not getting relief from "constant state of pain" and inablity to sleep due to frequency of urination at night. Has urology consult pending scheduling.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma:

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

COMPLAINT 2 **Provider:** Westermeyer, Raymond MD

Chief Complaint: INFECTIOUS DISEASE

Subjective: This man has Hep C, but is in no condition emotionally to handle the thought or the stresses of possible Hep C treatment.

Pain Location:

Pain Scale:

Pain Qualities:

History of Trauma:

Onset:

Duration:

Exacerbating Factors:

Relieving Factors:

Comments:

Seen for clinic(s): General, Infectious Disease

OBJECTIVE:

Exam:

General

Very insistent that if we can't give him some relief, he will some how go somewhere that he can get help.

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Chronic hepatitis C w/o mention of hepatic coma	070.54	Current	02/08/2007	Not Improved/Same	Chronic

Health Problem Comments:

Treated 1999 for 24 weeks with Genotype 1a. Viral response not permanent and now back. had mild liver changes at that time prior to treatment. No retreatment contemplated at this time, just standard periodic checks.

Diagnosis Comments:

1

PLAINTIFFS - EXHIBIT: 12

Inmate Name: HOSLETT, RAYMOND JAMES **Reg #:** 82420-012
Date of Birth: 10/19/1961 Sex: M **Race:** WHITE
Encounter Date: 09/14/2010 11:12 Provider: Westermeyer, Raymond **Facility:** SHE

Description	ICD9	Status	Status Date	Progress	Type
Chronic bladder discomfort. Emotionally difficult problem, "really tired of this situation." Getting at his wits end and more and more frustrated, and says he is going to get into trouble with this problem if nothing is done.					
Cystitis, unspecified	595.9	Current	10/16/2009	Not Improved/Same	Chronic

Health Problem Comments:

I will try an antispasmotic oxybutinin to see if this is helpful.

Diagnosis Comments:

Worse and worse, very unhappy with inability to be comfortable. does not ask for pain meds or sleep meds but states unequivocally that he is unhappy with lack of sleep and chronic pain, and when I mention to him the negative effects of chronic pain meds and sleep meds, he counters that "every one will not agree with you." But still never asks for either. Says "I'm not a doctor."

Cystitis, unspecified	595.9	Current	10/16/2009	Not Improved/Same	Chronic

Health Problem Comments:

I will try an antispasmotic oxybutinin to see if this is helpful.

Diagnosis Comments:

I am sure I told him I was prescribing oxybutynin last time. He has never picked up the meds, and now says that this was never mentioned to him. Reiterated that this medication is available, that he is to take it 3 times per day to see if this is helpful. He doesn't seem interested in trying it.

PLAN:

Schedule:

Activity	Date Scheduled	Scheduled Provider
Chronic Care Visit Cystitis Hep C	11/15/2010 08:00	Physician 02

Disposition:

Follow-up at Sick Call as Needed
Follow-up at Chronic Care Clinic as Needed
Discharged to Housing Unit-No Restrictions

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
09/14/2010	Counseling	Plan of Care	Westermeyer,	Verbalizes Understanding

He understands, but only talks about how he is being neglected for this problem, but has no idea of what might be a better plan.

#2

PLAINTIFF'S EXHIBIT: 13

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	HOSLETT, RAYMOND JAMES			Reg #:	82420-012
Date of Birth:	10/19/1961	Sex:	M Race: WHITE	Facility:	SHE
Note Date:	12/29/2010 06:49	Provider:	Westermeyer, Raymond	Unit:	B07

Follow-up encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Westermeyer, Raymond MD

Changing medicine orders.

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	OxyCODONE HCl ER Tablet	12/29/2010 06:49	10 mg Orally -Two Times a Day x 3 day(s) Pill Line Only

Indication: Cystitis, unspecified

Discontinued Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	OxyCODONE HCl ER Tablet	*12/29/2010 06:49*	*5mg Tab Orally -Two Times a Day x 15 day(s) Pill Line Only*

Discontinue Type: *When Pharmacy Processes*
Discontinue Reason: *Order changed*
Indication:

Copay Required: No **Cosign Required:** No
Telephone/Verbal Order: No

Completed by Westermeyer, Raymond MD on 12/29/2010 06:56
Requested to be reviewed by Davis, Stephen DO.
Review documentation will be displayed on the following page.

NOTE: Dr. Westermeyer changed the consulting urologist / specialist, DR. DUTTA orders, without his verbal and/or written consent.

EXHIBIT: 14

Bureau of Prisons
Health Services
Clinical Encounter

Inmate Name: HOSLETT, RAYMOND JAMES			Reg #: 82420-012
Date of Birth: 10/19/1961	Sex: M	Race: WHITE	Facility: SHE
Encounter Date: 06/16/2011 12:28	Provider: Davis, Stephen DO		Unit: B07

Chronic Care encounter performed at Health Services.

SUBJECTIVE:

COMPLAINT 1 **Provider:** Davis, Stephen DO

Chief Complaint: Urinary Problem

Subjective: He has interstitial cystitis. He started having problem about three to four years ago. He has had several procedure done to his bladder with hydrodistention. His main problem is chronic pain. Hesitancy at night and frequency during the day. He is mainly looking for some pain relief.

Pain Location: Abdomen - Suprapubic

Pain Scale: 8

Pain Qualities: Burning | Deep | Intermittent

History of Trauma:

Onset: 1-5 Years

Duration: 1-5 Years

Exacerbating Factors:

Relieving Factors:

Comments:

Seen for clinic(s): General

ROS:

GU

General

Yes: Dysuria, Hesitancy, Nocturia, Pain or Colic

OBJECTIVE:

Pulse:

Date	Time	Rate Per Minute	Location	Rhythm	Provider
06/16/2011	12:49 SHE	74	Via Machine	Regular	Davis, Stephen DO

Blood Pressure:

Date	Time	Value	Location	Position	Cuff Size	Provider
06/16/2011	12:49 SHE	130/74	Left Arm	Sitting		Davis, Stephen DO

SaO2:

Date	Time	Value(%)	Air	Provider
06/16/2011	12:49 SHE	97	Room Air	Davis, Stephen DO

Weight:

Date	Time	Lbs	Kg	Waist Circum.	Provider
06/16/2011	12:49 SHE	194.0	88.0		Davis, Stephen DO

Exam:

General

Appearance/Nutrition

Yes: Alert and Oriented x 3, Appears in Pain

No: Dyspneic, Writhing in Pain, Appears in Distress

Inmate Name: HOSLETT, RAYMOND JAMES Reg #: 82420-012
Date of Birth: 10/19/1961 Sex: M Race: WHITE Facility: SHE
Encounter Date: 06/16/2011 12:28 Provider: Davis, Stephen DO Unit: B07

Exam:

Pulmonary

Observation/Inspection

Yes: Normal

Auscultation

Yes: Clear to Auscultation Bilaterally

Cardiovascular

Observation

Yes: Normal Rate, Regular Rhythm

Auscultation

Yes: Regular Rate and Rhythm (RRR), Normal S1 and S2

No: M/R/G

ASSESSMENT:

Description	ICD9	Status	Status Date	Progress	Type
Cystistis, chronic interstitial	595.1	Current	06/16/2011	Initial	Chronic

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Gabapentin Tablet/Capsule	06/16/2011 12:28	600 mg Orally -Two Times a Day x 180 day(s) Pill Line Only
	Indication: Nerve pain, neuralgia neuritis, radiculitis		
	Phenazopyridine Tablet	06/16/2011 12:28	200 mg Orally -three times a day x 30 day(s)
	Indication: Cystistis, chronic interstitial		
	OxyCODONE HCl ER Tablet	06/16/2011 12:28	10 mg Orally -Two Times a Day x 30 day(s) Pill Line Only
	Indication: Cystistis, chronic interstitial		

Renew Medication Orders:

Rx#	Medication	Order Date	Prescriber Order

PLAINTIFF'S — EXHIBIT = 16

Inmate Name: HOSLETT, RAYMOND JAMES
Reg #: 82420-012
Date of Birth: 10/19/1961
Sex: M Race: WHITE
Facility: SHE
Encounter Date: 06/16/2011 12:28
Provider: Davis, Stephen DO
Unit: B07

Renew Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
46078-SHE	Pentosan Polysulfate 100 MG Cap	06/16/2011 12:28	Take two capsules three times daily with water at least 1 hour before meals or 2 hours after meals for relief of bladder pain/discomfort. (NF Approval expires: 10/13/2011) x 180 day(s)
	Indication: Urinary complications, Cystitis, unspecified		
46079-SHE	Ranitidine 300 MG TAB	06/16/2011 12:28	Take one tablet each morning for heartburn or reflux. (Gastro CCC) x 180 day(s)
	Indication: Esophageal reflux		

New Laboratory Requests:

Details	Frequency	Due Date	Priority
Profile tests-General-Lipid Profile Profile tests-General-Urinalysis Profile tests-General-Comprehensive Metabolic Profile (CMP) Profile tests-General-CBC (Complete Blood Count)	One Time	08/01/2011 00:00	Routine

Schedule:

Activity	Date Scheduled	Scheduled Provider
Chronic Care Visit	09/15/2011 00:00	Physician 01

Disposition:

Follow-up at Sick Call as Needed
Follow-up at Chronic Care Clinic as Needed

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
06/16/2011	Counseling	Plan of Care	Davis, Stephen	Verbalizes Understanding

pain management.

Copay Required: No
Cosign Required: No
Telephone/Verbal Order: No

Completed by Davis, Stephen DO on 06/16/2011 13:21

PLAINTIFF'S EXHIBIT: 17

Bureau of Prisons
Health Services
Clinical Encounter - Administrative Note

Inmate Name:	HOSLETT, RAYMOND JAMES			Reg #:	82420-012
Date of Birth:	10/19/1961	Sex:	M Race: WHITE	Facility:	SHE
Note Date:	11/08/2012 06:39	Provider:	Clayton, Brian PA-C	Unit:	B07

Medication Renewal/Review encounter performed at Health Services.

Administrative Notes:

ADMINISTRATIVE NOTE 1 **Provider:** Clayton, Brian PA-C

Pt is requesting a medication renewal.

Renew Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
73441-SHE	Morphine SR 12 Hour 15 MG Tab CO	11/08/2012 06:39	Take one tablet by mouth twice daily chonic pain x 30 day(s) Pill Line Only

Indication: Cystistis, chronic interstitial, Bladder (pain), oth symptoms involving urinary sys

One Time Dose Given: No

Copay Required: No Cosign Required: Yes

Telephone/Verbal Order: Yes **By:** Grasley, Andrew M.D.

Telephone or Verbal order read back and verified.

Completed by Clayton, Brian PA-C on 11/08/2012 06:41

Requested to be cosigned by Grasley, Andrew M.D..

Cosign documentation will be displayed on the following page.

Inmate Name: HOSLETT, RAYMOND JAMES
Date of Birth: 10/19/1961
Encounter Date: 06/06/2013 10:45
Sex: M Race: WHITE
Provider: Clayton, Brian PA-C
Reg #: 82420-012
Facility: SHE
Unit: B07

PLAN:

New Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
	Ciprofloxacin Tablet	06/06/2013 10:45	500mg Orally -Two Times a Day x 5 day(s)
	Indication: Cystistis, chronic interstitial		
	One Time Dose Given: No		
	Bisacodyl E.C. Tablet	06/06/2013 10:45	5mg Orally daily x 3 day(s)
	Indication: Cystistis, chronic interstitial		
	One Time Dose Given: No		

Renew Medication Orders:

Rx#	Medication	Order Date	Prescriber Order
82948-SHE	Morphine SR/ER 12 Hour 15 MG Tab UD	06/06/2013 10:45	Take one tablet by mouth twice daily (chonic pain) x 30 day(s) Pill Line Only
	Indication: Cystistis, chronic interstitial, Bladder (pain), oth symptoms involving urinary sys		
	One Time Dose Given: No		

New Consultation Requests:

Consultation/Procedure	Due Date	Priority	Translator	Language
Urology			No	

Reason for Request:

Pt had a cystoscopy with bladder biopsy on 6/4/13. discharge papers indicate need for a follow-up appointment. No time range was specified.

Disposition:

Follow-up at Sick Call as Needed

Patient Education Topics:

Date Initiated	Format	Handout/Topic	Provider	Outcome
06/06/2013	Counseling	Access to Care	Clayton, Brian	Verbalizes Understanding

Copay Required: No **Cosign Required:** Yes
Telephone/Verbal Order: Yes **By:** Grasley, Andrew M.D.
Telephone or Verbal order read back and verified.

Completed by Clayton, Brian PA-C on 06/06/2013 11:06
Requested to be cosigned by Grasley, Andrew M.D..
Cosign documentation will be displayed on the following page.

PLAINTIFF'S EXHIBIT : 19

Dennis H. Black, OSB # 763984
Black, Chapman, Webber & Stevens
Attorneys at Law
221 Stewart Avenue, Suite 209
Medford, Oregon 97501
(541) 772-9850
Facsimile (541) 779-7430
litigation@blackchapman.com
Attorney for Plaintiff

12-17-2012

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT, Plaintiff, v. **JASPAL DHALIWAL, M.D., et al.,** Defendants.	Case No.: 3:11-CV-00674-KI **RESPONSE TO ORDER APPOINTING PRO BONO COUNSEL**

After making a thorough investigation into the possibility of being able to render effective assistance to the plaintiff, I must respectfully decline this appointment.

When I received this assignment from the court, my assistant obtained materials from the Pacer docket which I reviewed. I determined the case at its core involved the alleged improper provision of medical care for pain resulting from a urological condition. After familiarizing myself with an overview of the plaintiff's allegations, I contacted a board certified urologist. He told me that, if the alleged facts could be substantiated, it appeared to him, based

PLAINTIFF'S EXHIBIT : ■ 20

upon the oral representations he received from me, that conduct below the standard of care was provided to the plaintiff.

I then contacted the U.S. Attorney who filled me in on the happenings detailed in the Docket Sheet and informed me that he had filed a Motion for Summary Judgment on behalf of the sole remaining defendant, Jaspal Dhaliwal, M.D. He stated that Dr. Dhaliwal had testified under penalty of perjury that he was not involved in the care provided to plaintiff upon which the Complaint is based. The U.S. Attorney, Mr. Silver, had his assistant forward me a copy of the motion and supporting materials.

I next contact Steven M. McCarthy, the previous counsel for plaintiff. He corroborated what U.S. Attorney Ronald K. Silver had said and stated that the physician who appeared to be responsible for the decision complained of by the plaintiff, Dr. Raymond E. Westermeyer, was dismissed from the case for lack of service on September 6, 2012. Mr. McCarthy confirmed that Dr. Westermeyer had indeed not been served. I asked Mr. McCarthy to send me a copy of the file as soon as possible but, as of the date of the writing of this response, I have not received the file.

I then arranged to talk to the plaintiff over the telephone at the prison. In two separate conversations, I informed him that, since the declaration of Dr. Dhaliwal stated emphatically he played no part in the decision to withhold narcotic pain medication or a referral to a pain specialist on November 2, 2010, or thereafter, I did not see any way to effectively prosecute the case against Dr. Dhaliwal no matter what additional discovery might be able to be undertaken.

AO 440 (Rev. 12/09) Summons in a Civil Action

RECEIVED
JUN 2 1 2011
Warden's Office
FCI SHERIDAN

UNITED STATES DISTRICT COURT

for the

District of Oregon

Raymond James Hoslett

Plaintiff

v.

Dr. Jaspal Dhaliwal, M.D. et al.

Defendant

Civil Action No. 11-674-KI

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* JEFF E. THOMAS

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: MR. STEVEN M. McCARTHY, ATTORNEY AT LAW.

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 11-674-KI

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☑ I served the summons on *(name of individual)* WARDEN, JEFF E. THOMAS, who is designated by law to accept service of process on behalf of *(name of organization)* Fed. B.O.P. / U.S. MAIL, MAIL RM. STAFF MEMBER on *(date)* JUNE 8th, 2011 ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ — for travel and $ — for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 6-14-2011

Raymond James Hoslett
Server's signature

RAYMOND JAMES HOSLETT, 82420-012
Printed name and title

F.C.I., P.O. BOX 5000 SHERIDAN, OR. 97378
Server's address

Additional information regarding attempted service, etc:

NOTE: Please see (copy) ATTACHED Certificate of Service by MAIL.

JS 44 (Rev. 12/07)

MY COPY

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS MR. RAYMOND JAMES HOSLETT

DEFENDANTS DR. JASPAL DHALIWAL, M.D., DR. STEPHEN DAVIS, M.D., D.O., C.D., MR. STEVE DE LAHERAS, H.S.A., MR. ISRAEL JACQUEZ, A.W.P., MR. JEFF E. THOMAS, WARDEN, et. Al.

(b) County of Residence of First Listed Plaintiff YAMHILL
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant YAMHILL
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

N./A.

Attorneys (If Known)

U.S. ATTORNEYS OFFICE

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☑ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☑ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus - Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
BIVENS ACTION, EIGHTH AMENDMENT CLAIM.

Brief description of cause: ARBITARY DENIAL OF SERIOUS MEDICAL NEED, PAIN MANAGEMENT MEDICATION FOR THE EXISTENCE OF CHRONIC AND SUBSTANTIAL PAIN, ETC.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $ $00,000.00 COMPENSATORY DAMAGES

CHECK YES only if demanded in complaint:
JURY DEMAND: ☑ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE N./A. DOCKET NUMBER

DATE: MAR. 1ST 2011

SIGNATURE OF ATTORNEY OF RECORD: N./A. Raymond J. Hoslett

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

⇔82420-012⇔
Ray Hoslett
PO. Box 5000
Sheridan, OR - 97378
United States

COPY

RECVD 2 JUN '11 11:28 USDC-ORP

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Case# CV'11 - 674 KI

Raymond James Hoslett,
Plaintiff
v.
Dr. Jaspal Dhaliwal, M.D.
Dr. Stephen Davis, M.D.
Mr. Steve De Laheras, H.S.A.
Mr. Israel Jacquez, A.W.P.
Mr. Jeff E. Thomas, Warden, et al.
Defendants

BIVENS ACTION UNDER 28 U.S.C. 1331, MEDICAL MALPRACTICE

1.
A) Have you brought any other action or appeal in a court of The United States while a prisoner?
Answer: Yes

B) How many?
Answer: One (on this sentence)

Plaintiff: Raymond James Hoslett
Defendant: Richard B. Ives, Warden

Court: U.S. District Court, Eastern Division of California
Docket #: 2:10-CV-00406-KJM (HC)
Judge Assigned: K.J. Mueller

Disposition: Pending
Approximate Date of Filing: February 17th, 2010
Approximate Date of Disposition: Pending

$350.00 FILING FEE PAID

2.
A) Place of confinement: FCI Sheridan, OR

B) Is there a prisoner grievance procedure in this institution?
Answer: Yes

C) Have you filed a grievance concerning the facts related to this complaint?
Answer: Yes

D) Is the grievance process completed?
Answer: Yes
Note: Grievance(s) and Federal Tort Claim are attached as Exhibits A and B.

3. PARTIES

A) Name of Plaintiff: Raymond James Hoslett
Security Identification Number: 82420-012
Address: FCI Sheridan – PO Box 5000 – Sheridan, OR 97378

B) Defendant Jaspal Dhaliwal is employed as a Medical Doctor at FCI Sheridan.
Defendant Stephen Davis is employed as a Clinical Director at FCI Sheridan.
Defendant Steve De Laheras is employed as a Health Services Administrator at FCI Sheridan.
Defendant Israel Jacquez is employed as the Associate Warden over Programs at FCI Sheridan.
Defendant Jeff E. Thomas is employed as the Warden at FCI Sheridan.

Additional Defendants: Dr. Raymond E. Westermeyer, M.D. a contract physician at FCI Sheridan who is no longer employed by the B.O.P. as of April 1st, 2011.

4. STATEMENT OF CLAIM

CLAIM 1

State what right under the Constitution, laws or treaties of the United States has been violated:

Federal prison officials are obligated under the Eighth Amendment to the U.S. Constitution to provide inmates with adequate medical care. This is a Constitutional Claim of Inadequate Care. Plaintiff has been treated with "Deliberate Indifference to Serious Medical Needs".

SUPPORTING FACTS:

Dr. Dhaliwal was my primary caregiver when I first arrived at FCI Sheridan, OR in April of 2010. I have an incurable and debilitating bladder disease known as Interstitial Cystitis, more commonly referred to as "I.C.", and also suffer from a Hunner's Ulcer within the bladder wall. Over the last several months I have consulted with FCI Sheridan medical personnel about these conditions, and have specifically informed medical personnel that I suffer constant and debilitating Pelvic Floor, Bladder and Urethra pain(s). I am currently prescribed, and regularly take oral medication (Elimiron) for this condition, and have been informed I will likely require this or similar medicine for the rest of my life. Although Elimiron does normally ease some of the discomfort associated with this condition, and seems to occasionally aid in bladder function, this medication does nothing to alleviate the chronic pain associated with this illness.

On Tuesday October 26th, 2010 I was afforded a consultation with a Contract Urologist Specialist. In his report and recommendation, the Contract Urologist advised and recommended that I "should be referred to a Pain Management Specialist" to prescribe an appropriate and effective pain control medication and regimen. On Tuesday November 2nd, 2010 I attended routine morning "Sick Call" and specifically requested to see my Attending Physician in hopes of obtaining relief from the overwhelming pain I am experiencing on a daily, constant basis. Unfortunately, medical staff adamantly refused to treat my pain, and advised me that I would not receive any type of pain management/medication—under any circumstances—period.

Note: WIKIPEDIA states the following in reference to "I.C.": "The pain of I.C. has been rated equivalent to cancer pain, and may lead to Central Sensitization if untreated."

Also, research has claimed that "The quality of life in some I.C. patients is equivalent to those with End-Stage Renal Failure". The New England Journal of Medicine states that "Only one in 100,000 people within the U.S. have I.C.".

The above mentioned facts substantiate a serious medical need, as well as the prison officials' actual knowledge of my serious medical needs. The officials' knowledge is proven by Direct Evidence: Sick Call Requests, Medical Records, Complaints, Formal Grievances, and Tort Claim. Note: The Federal B.O.P. computerized medical records for inmates is called "BMR".
Dr. Davis, M.D., D.O., Clinical Director oversees the Health Services Department at FCI Sheridan, OR, and is Dr. Dhaliwal's boss. Dr. Davis is fully aware of my medical status, and the fact that I suffer constant and debilitating Pelvic Floor, Bladder, and Urethra pain on a daily basis.

CLAIM 2

State what right under the Constitution, laws, or treaties of the United States has been violated.

Eighth Amendment violation for unnecessary and wanton infliction of pain, reckless disregard for a substantial risk of harm to Plaintiff, medical malpractice, arbitrary and capricious denial of serious medical needs, pain management/medication for chronic pain.

SUPPORTING FACTS:

Mr. De Laheras is the Health Services Administrator at FCI Sheridan, OR, i.e. the manager of all health services staff members, and is in charge of the day-to-day operations. In essence he is the Clinical Director's boss, and is also aware of my medical problems, etc. Under Federal B.O.P./FCI Sheridan "Rights and Responsibilities" No. 16, I have a right to complain about pain, and have my pain assessed by medical staff, and have pain treated accordingly. However, that is not the case here at FCI Sheridan. Drs. Dhaliwal and Davis, as well as H.S.A. De Laheras have violated my "basic human rights" by their reckless disregard for a substantial risk of harm to me, and their constant denials of my serious medical needs, i.e. pain-management medication—treatment for the existence of chronic and substantial pain.

Dr. Dhaliwal has subjected me to the "unnecessary and wanton infliction of pain" which has now caused central sensitization. Because of his failure to recognize and honor my serious medical needs, and his refusal to prescribe and provide adequate pain-control medication in sufficient dosage commensurate to indicated illness and pain-level needs. Reasonable doctors would perceive the medical need in question as important and worthy of treatment. Drs. Dhaliwal and Davis both know that my medical condition significantly affects my daily activities, and that I have the presence of chronic and substantial pain—yet they do nothing. Medical malpractice is so obvious that even a lay-person would easily recognize the necessity of a Doctor's attention. Refusal of adequate pain-control medication has now jeopardized my future health. This circumstantial proof may be shown by the deterioration of my health.

Mr. Israel Jacquez is the Assistant Warden of Programs at FCI Sheridan, OR. Under the title of A.W.P. he then oversees the Health Services Department and is responsible for all of the staff members within it, as well as issues and/or complaints that may arise regarding Federal Inmates' health needs, etc. It is noteworthy to mention the following: On two different occasions, Mr. Jacquez discussed my medical issues with me. He is therefore fully aware of the existence of chronic and substantial pain that I suffer from. After all, he is Mr. De Laheras' boss. The proof that he knows about me and my

situation, is in the grievance(s) i.e. BP-8, BP-9, BP-10, and BP-11 as well as the Federal Tort Claim that I filed.
(End of Claim 2)

CLAIM 3
State what right under the Constitution, laws, or treaties of the United States has been violated.

Eighth Amendment Medical Care Claim: The Federal Bureau of Prisons' Officials failure to reasonably respond by providing me with adequate care and treatment. The Officials' "Deliberate Indifference" caused damages, and is likely to injure me in the future; A violation of basic human rights.

SUPPORTING FACTS:
The rationale behind my transfer to FCI Sheridan, OR in April of 2010, was because my medical status was upgraded from a Care Level One (1), to a Care Level Two (2), and the fact that I am a "Chronic Care Inmate" that has to take medication for the rest of my life due to a Bladder Disease. Also the fact that I do have "Serious Medical Needs". Therefore, significant pain can constitute a serious medical need(s) even if they are not life threatening. Pain can constitute a serious medical need , even if the failure to treat it does not make the condition worse. This action clearly shows that the actions/or lack thereof, of medical staff members, could not be supported by legitimate medical judgment. The following is actionable harm from inadequate medical care. 1) A failure to inquire into facts necessary to make a professional judgment. 2) A failure to carry out the Consulting Contract Urologist, Specialist(s) recommendations. 3) A failure to provide adequate medical care etc. for almost eleven (11) months, I have complained about the pain in which I suffer, all to no avail. Those of The Health Services staff obviously do not care about my issues of pain, and they refuse to address the same. Their refusal to treat my chronic pain is unethical. While at FCI Hurlong, CA I had a surgical procedure performed on my bladder in November of 2009, and I spent seven (7) days as an inpatient at the "Outside Hospital" in Reno, NV. Within 72 hours, I was returned to the Emergency Room for one (1) day in regards to my bladder condition. Here at FCI Sheridan, OR, a surgical procedure was conducted again concerning my bladder on the date of Tuesday December 28th, 2010. I spent one (1) day in the "Outside Hospital", Legacy Emanuel Hospital. Also on December 28th, 2010, Dr. Sajal C. Dutta, M.D., A Urologist Surgeon (Medicaid#: 999999 and DEA# BD7711751) wrote a medication prescription for "Oxycodone Tablets, 5mg Immediate release with a quantity of 30. Sig; Take 1-2 Tabs orally every 3hrs. as needed.
Note: Dr. Dutta's staff also gave me Oxycodone prior to leaving Legacy Emanuel Hospital, for the trip back to FCI Sheridan. However, FCI Sheridan Medical Staff members (unknown to me at the time) did not follow Dr. Dutta's orders. In fact, Health Services changed the order to the following:
"Oxycodone Tab 5mg. Time Release" Quantity: 6, Take 1 Tab orally twice a day, for three (3) days-only!

Thus, FCI Sheridan medical staff subverted Dr. Dutta's intent and advice, and apparently did so without ever informing me or Dr. Dutta of this mishandling of the prescription.
Note: The Urologist Surgeon stated that the procedure would only give me some temporary relief at best, and warned me that my chronic pain could get worse. "Although the pain in my urethra is temporarily gone, the pain in my bladder and pelvic-floor has gotten worse since surgical procedure."
It should be noted that two of my family members have contacted their Senators in regard to the inadequate medical treatment here at FCI Sheridan, and have filed a formal complaint with the Oregon Medical Board against Dr. Dhaliwal. The medical malpractice is for the damages caused (Central Sensitization) and unprofessional treatment, culpable neglect of patient Hoslett, a human

being, by Physicians Dhaliwal and Davis.

The Warden of FCI Sheridan, OR Mr. Jeff E. Thomas is responsible for all of the staff members within the institution. He is the "C.E.O." of this prison and is responsible for the Health Services Department, as well as my health issues. He signed the response on my Administrative Remedy BP-9, and he is aware of the Federal Tort Claim that I filed.

5. RELIEF

I make a Jury Demand. Each Defendant is to be legally held liable to their individual capacities under color of law. The Defendants, et. Al. shall pay a total amount of $200,000 for Medical Malpractice, pain and suffering etc., to Plaintiff, as well as an amount of Exemplary (punitive) Damages as defined by this court. Petitioner requests a preliminary injunction mandating Defendants (B.O.P. Staff) to take Plaintiff to a Pain Management Specialist "forthwith" to prescribe and provide adequate pain control, and medication in sufficient dosage and frequency commensurate to indicate illness and pain level need.

Please. Thank you.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Signed this 25 day of April, 2011

Raymond James Hoslett, 82420-012

Raymond James Hoslett
Plaintiff, prays for relief.

Signature/Case Manager CSM FCI Sheridan OR 4/29/11
"Authorized by the Act of July 27, 1955 to administer oaths (18 USC 4004)."

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

RAYMOND JAMES HOSLETT, Plaintiff,	)	Civil No. 11-674-KI
v.	)	
DR. JASPAL DHALIWAL, et al., Defendants.	)	ORDER

KING, Judge.

Plaintiff, an inmate at FCI Sheridan, brings this Bivens action *pro se*. Plaintiff has paid the requisite filing fee, and submitted an application to proceed *in forma pauperis* to support his request for the appointment of *pro bono* counsel.

IT IS ORDERED that plaintiff's application to proceed *in forma pauperis* (#1) is DENIED AS MOOT. However, plaintiff has demonstrated that he is not capable of paying the costs of counsel.

Additionally, the Court has determined that this case warrants the efforts to obtain *pro bono* counsel. Accordingly, plaintiff's motion for appointment of *pro bono* counsel (#3) is GRANTED.

Finally, plaintiff is advised that, because he is not proceeding *in forma pauperis* in this action, he is responsible for service of process under Fed. R. Civ. P. 4. The Clerk of the Court is DIRECTED to forward to plaintiff with this order six summonses for his use.

IT IS SO ORDERED.

DATED this 13th day of June, 2011.

/s/ Garr M. King
Garr M. King
United States District Judge

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that he is an inmate at F.C.I. Sheridan, OR., and is a person of such age and discretion to be competent to serve papers.

That on this 8th day of June 2011, a "Bivens Action under 28 U.S.C. 1331, Medical Malpractice Suit" and motion for appointment of Counsel, was served by placing said in a sealed envelope, addressed to the person hereafter named, at the place and add. stated below, and by depositing said envelope and contents in the U.S. Mail at F.C.I. Sheridan, OR..

Addressee:

Mr. Jeff E. Thomas, Warden
Wardens Office
Interdepartmental
Special Legal Mail

Raymond J. Hoslett 82420-012

Raymond James Hoslett, 82420-012

Eric J. Neiman, OSB #823513
eneiman@williamskastner.com
Rachel A. Robinson, OSB #084550
rrobinson@williamskastner.com
WILLIAMS, KASTNER & GIBBS PLLC
888 SW Fifth Avenue, Suite 600
Portland, OR 97204-2025
Phone: (503) 228-7967
Fax: (503) 222-7261
Attorneys for Defendant Raymond Westermeyer, MD

The Honorable Robert E. Jones

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RAYMOND JAMES HOSLETT,

Plaintiff,

v.

DR. JASPAL DHALIWAL, M.D.; DR. STEPHEN DAVIS, M.D.; MR. STEVE DE LA HERAS, H.S.A.; MR. ISRAEL JACQUEZ, A.W.P.; MR. JEFF E. THOMAS, WARDEN; et. al.,

Defendants.

Case No. 3:11-CV-0674-JO

JUDGMENT

Williams, Kastner & Gibbs PLLC
888 SW Fifth Avenue, Suite 600
Portland, OR 97204-2025
Telephone: (503) 228-7967• Fax (503) 222-7261

Based on the stipulations of dismissal filed by the parties,

IT IS ORDERED AND ADJUDGED that the above-captioned action is dismissed with prejudice and without costs or fees to any party.

DATED this 18th day of Sept, 2014.

HONORABLE ROBERT E. JONES
United States Senior District Judge

Submitted By:

Eric J. Neiman, OSB #823513
Rachel A. Robinson, OSB #084550
Attorneys for Defendant Raymond Westermeyer, MD

Williams, Kastner & Gibbs PLLC
888 SW Fifth Avenue, Suite 600
Portland, OR 97204-2025
Telephone: (503) 228-7967 • Fax (503) 222-7261

FILED15 JUN '11 11:35USDC-ORP

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

Raymond James Hoslett

Plaintiff,

v.

Dr. Jaspal Dhaliwal, M.D., et al.

Defendants.

CV 3:11-674-KI

ORDER APPOINTING PRO BONO COUNSEL FOR LIMITED PURPOSE

The Court previously granted plaintiff's Motion for Appointment of Counsel [3]. Steven M. McCarthy of McCarthy Law Offices is appointed as counsel for Plaintiff. The appointment shall be pursuant to the Court's Pro Bono Representation Program and is for the limited purpose of reviewing and investigating Plaintiff's claims and/or defenses.

The appointed attorney/law firm has 14 days to determine if a conflict of interest exists. If a conflict of interest exists, the attorney/law firm must mark the appropriate box on the attached Response to Order form and file it with the Court within 14 days of the filing date of this Order. This appointment will then be terminated and the Court will appoint substitute counsel.

If the appointed attorney/law firm has no conflict of interest but representation cannot be accepted for another reason, the attorney/law firm must specify the reason on the Response to Order form and file it with the Court within 14 days of the date of this Order.

If representation can be accepted, the appointed attorney/law firm must review the court file, contact Raymond James Hoslett, and, as appropriate, obtain and review available discovery materials and interview key witnesses. Upon completing this review and investigation, the appointed attorney/law firm must mark the appropriate box on the attached Response to Order form certifying

completion of the review and investigation and indicating that it has fulfilled the obligations of the appointment within 42 days of the filing date of this Order. The attorney/law firm is also to provide a written report and recommendation to Raymond James Hoslett, who will then proceed pro se. If an attorney/law firm appointed for a limited purpose finds that Plaintiff has a factual and legal basis to prevail on any claim or defense, it may choose to remain as counsel of record for all purposes by marking the appropriate box on the Response to Order form and filing it with the Court within 42 days of the date of this Order. The Court expects that representation will be accepted if Plaintiff has a factual and legal basis to prevail on any claim or defense.

The appointed attorney/law firm is entitled to be reimbursed by the Attorney Admission Fund for costs incurred to investigate Raymond James Hoslett's claim(s) and/or defenses up to $3,000.00. Reimbursable costs include copying costs, deposition costs or transcripts, travel expenses, telephone charges, electronic legal research, and other costs which are not otherwise recoverable from the opposing party. To obtain reimbursement, a Motion for Reimbursement of Out-Of-Pocket Expenses must be electronically filed together with copies of all receipts for expenditures.

DATED this 14th day of June, 2011.

GARR M. KING
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

Raymond James Hoslett

Plaintiff,

v.

Dr. Jaspal Dhaliwal, M.D., et al.

Defendants.

CV-11-674-KI

RESPONSE TO ORDER APPOINTING PRO BONO COUNSEL

In response to the Court's Order Appointing Pro Bono Counsel, the appointed attorney/ law firm certifies that:

☐ Due to a conflict of interest, termination of the appointment is requested.

☐ Termination of the appointment is requested for the following reason(s):

_____

_____

☐ After conducting a review and appropriate investigation of Raymond James Hoslett's claims and/or defenses, a written report and recommendation has been provided to Hoslett; therefore, representation under the Pro Bono Program is concluded.

☐ Representation of Raymond James Hoslett is accepted. If appropriate, a Substitution of Counsel will be filed to designate the responsible attorney continuing as counsel of record.

DATED this _____ day of _____, 20___.

_____

Signature

_____

Printed Name and OSB #

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

RAYMOND JAMES HOSLETT, 03:11-cv-674-KI

Plaintiff, ORDER

v.

DR. JASPAL DHALIWAL, M.D., et al.,

Defendants.

KING, Judge

Plaintiff, an inmate at FCI Sheridan, filed this Bivens action on or about June 2, 2011. Plaintiff paid the filing fee and, therefore, was responsible for service of process on defendants. On June 13, 2011, this Court directed the Clerk of the Court to send plaintiff six summonses for his use. Pursuant to Fed. R. Civ. P. 4(b), upon completing the summonses, plaintiff should have completed the summonses and returned them to the clerk to "sign, seal and issue [them] to the plaintiff for service on the defendant[s]." It appears from the record that plaintiff failed to

do so and, instead, served unissued summonses on defendants. See Documents (#11-#16).

This court may dismiss an action if service is not made upon a defendant within 120 days after the filing of the complaint. Fed. R. Civ. P. 4(m). However, if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. Id. A showing of "good cause" under Fed. R. Civ. P. 4(m), requires plaintiff to demonstrate excusable neglect and that "(a) the party to be served received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed." In re Sheehan, 253 F.3d 507, 512 (9th Cir. 2001).

Accordingly, IT IS ORDERED that plaintiff shall show cause in writing, within 30 days of the date of this order, why this action should not be dismissed for lack of service.

IT IS SO ORDERED.

DATED this 14 day of October, 2011.

Garr M. King
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

RAYMOND JAMES HOSLETT, 03:11-cv-674-KI

Plaintiff, ORDER

v.

JASPAL DHALIWAL, et al.,

Defendants.

KING, Judge

Plaintiff, an inmate at FCI Sheridan, filed this Bivens action on June 2, 2011. Plaintiff names six correctional officials and doctors as defendants. On June 15, 2011, *pro bono* counsel was appointed to represent plaintiff. In July, plaintiff attempted to serve multiple summonses which had *not* been issued by the Clerk of the Court. On October 14, 2011, I issued an order to show cause why this action should not be dismissed for lack of service.

Since the issuance of my order to show cause, Defendants Davis and Jacquez have waived service, and plaintiff's counsel has filed a return of service as to Defendant Dhaliwal. Additionally,

plaintiff's counsel represents that requests for waiver of service were mailed to all defendants, except Dhaliwal, at the end of October.

Based on the foregoing, I exercise my discretion to extend the time for service of the complaint. See Fed. R. Civ. P. 4(m); Efaw v. Williams, 473 F.3d 1038, 1041 (9th Cir. 2007); In re Sheehan, 253 F.3d 507, 513 (9th Cir. 2001). Accordingly, my order to show cause is WITHDRAWN. Plaintiff shall complete service of process, or obtain waiver thereof, within 60 days of the date of this order.

IT IS SO ORDERED.

DATED this 17 day of January, 2012.

Garr M. King
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RAYMOND JAMES HOSLETT, 3:11-cv-00674-KI

Plaintiff, ORDER

v.

DR. JASPAL DHALIWAL, M.D., et al.,

Defendants.

KING, Judge

Plaintiff, an inmate at FCI Sheridan, brings this *Bivens* action complaining that he has been denied adequate medical treatment. Currently before the court is plaintiff's motion for default (#26) and defendants' motion for extension of time (#29).

Plaintiff's motion for default (#26) is DENIED on the basis that plaintiff has failed to demonstrate that he delivered a copy of the complaint and summons to the U.S. Attorney for the District of Oregon, and to the Attorney General of the United States in Washington D.C, as is required by Fed. R. Civ. P. 4(i)(1).

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Defendants' motion for extension of time (#29) is GRANTED. The time for defendants to answer or otherwise respond to plaintiff's complaint is EXTENDED to July 5, 2012.

IT IS SO ORDERED.

DATED this 28th day of June, 2012.

/s/ Garr M. King
Garr M. King
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Raymond James Hoslett,

Plaintiff,

v.

Dr. Jaspal Dhaliwal, M.D., et al,

Defendants.

3:11-cv-00674-KI

SCHEDULING ORDER FOR CIVIL ACTIONS FILED BY PRISONERS

Pursuant to Fed. R. Civ. P. 16(b), this Scheduling Order shall be filed and served by the Clerk upon the parties or their counsel when the first answer is filed in this action. When the term "counsel" is used in this Scheduling Order, it shall include any and all parties appearing *pro se*.

IT IS HEREBY ORDERED:

1. Not later than **sixty (60) days** from the date of this order, counsel shall:

   (a) File all pleadings (Fed. R. Civ. P. 7(a) and 15).
   (b) Join all claims, remedies and parties (Fed. R. Civ. P. 18 and 19).
   (c) File pretrial, discovery and dispositive motions.
   (d) Complete all discovery
   (e) Disclose all experts (Fed. R. Civ. P. 26(a)).
   (f) Inform the court, in writing, if no dispositive motions will be filed by that party

2. Unless otherwise ordered by the court, there shall be no pretrial order.

3. **Stipulations for Extensions of Time Not Allowed:** Absent court approval for good cause shown by written motion, counsel may not stipulate to extend the deadlines imposed by this order.

4. **Consent to Trial by Magistrate Judge:** Upon consent of the parties, a U.S. Magistrate Judge may conduct any and all proceeding in this case, including trial and the entry of judgment. Any appeal from the Judgment would be directly to the United States Court of Appeals for the Ninth Circuit. See 28 U.S.C. § 636(c). A consent form is enclosed for execution by counsel.

THE DATE of the Clerk's file stamp shall constitute the date of this Order.

MARY MORAN,
Clerk of the Court

by: /s/ G. Williams
Deputy Clerk G. Williams

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

Raymond James Hoslett,

Plaintiff,

v. Civil Case No: 3:11-cv-00674-KI

Dr. Jaspal Dhaliwal, M.D., et al,

Defendants.

CONSENT TO JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

Under Fed. R. Civ. P 73(b), I/we consent to have a United States Magistrate Judge conduct any and all proceedings in this case, including entry of orders on dispositive motions, trial, and entry of final judgment. I/we understand that withholding consent will not result in any adverse consequences.

Under Fed. R. Civ. P. 73(c), I/we also understand that any appeal from a final order or judgment entered by a United States Magistrate Judge shall proceed directly to the Ninth Circuit Court of Appeals (and not to a District Judge).

DATED this _____ day of _____, 20_____.

Name of Party _____

Signature of party or attorney _____

Bar ID No: _____

(Mailing Address) _____

_____

(Telephone Number) _____

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RAYMOND JAMES HOSLETT,

Plaintiff,

v.

DR. JASPAL DHALIWAL, M.D., et al.,

Defendants.

Case No. 3:11-cv-00674-KI

ORDER

KING, Judge

Plaintiff filed his complaint on June 2, 2011. On January 20, 2012, I extended the time for plaintiff to complete service by 60 days. Despite this extension and the appointment of *pro bono* counsel, it does not appear from the record that plaintiff has completed service as to defendant Raymond Westermeyer.

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Accordingly, IT IS ORDERED that plaintiff shall show cause in writing, within 14 days of the date of this order, why his claims against defendant Westermeyer should not be dismissed for lack of service. See Fed. R. Civ. P. 4(m); In re Sheehan, 253 F.3d 507, 513 (9th Cir. 2001).

IT IS SO ORDERED.

DATED this 23rd day of July, 2012.

Garr M. King
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RAYMOND JAMES HOSLETT,

Plaintiff,

v.

DR. JASPAL DHALIWAL, M.D., DR. STEPHEN DAVIS, M.D., MR. STEVE DE LAHERAS, H.S.A., MR. ISRAEL JACQUEZ, A.W.P., JEFF E. THOMAS, WARDEN, et al.,

Defendants.

Civil Case No. 3:11-CV-00674-KI

OPINION AND ORDER

Steven M. McCarthy
McCarthy Law Offices
1265 Highway 51
Independence, Oregon 97351

Attorney for Plaintiff

S. Amanda Marshall
United States Attorney
District of Oregon
Ronald K Silver
Kevin C. Danielson
Assistant United States Attorneys
1000 SW Third Avenue, Suite 600
Portland, Oregon 97204-2902

Attorneys for Defendants

KING, Judge:

Plaintiff Raymond James Hoslett is incarcerated at FCI Sheridan. He brings a civil rights action against several of the doctors and other staff at the prison, alleging they violated his Eighth Amendment rights in failing to properly treat his debilitating bladder disease. Before the court is Defendants Davis, Jacquez, De Las Heras, and Thomas' Motion to Dismiss [34]. For the reasons below, I dismiss these defendants, as well as defendant Westermeyer. Defendant Dhaliwal filed an Answer and does not join in the motion.

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) will be granted if plaintiff fails to allege the "grounds" of his "entitlement to relief." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007) (quotation omitted). The Court elaborated on Twombly in Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009):

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Id., at 570, 127 S. Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id., at 556, 127 S. Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a

> complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id., at 557, 127 S. Ct. 1955 (brackets omitted).

Id. at 678 (quoting Twombly). The court should not accept as true allegations which are legal conclusions.

DISCUSSION

I. Defendant Westermeyer

I want to address another issue before considering the motion to dismiss. On July 23, 2012, I gave Hoslett fourteen days to show cause why his claims against defendant Westermeyer should not be dismissed for lack of service. Hoslett has not responded. Accordingly, I dismiss all claims against Westermeyer without prejudice.

II. Defendants Davis, Jacquez, De Las Heras, and Thomas

These defendants argue Hoslett has failed to allege facts showing these defendants personally violated Hoslett's Eighth Amendment rights.

The Eighth Amendment is violated if prison officials are deliberately indifferent to a prisoner's serious medical needs. Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004).

> To establish an Eighth Amendment violation, a prisoner must satisfy both the objective and subjective components of a two-part test. First, there must be a demonstration that the prison official deprived the prisoner of the minimal civilized measure of life's necessities. Second, a prisoner must demonstrate that the prison official acted with deliberate indifference in doing so.
>
> A prison official acts with deliberate indifference . . . only if the [prison official] knows of and disregards an excessive risk to inmate health and safety. Under this standard, the prison official must not only be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, but that person must also draw the inference. If a [prison official] should have been aware of the risk, but was not, then the [prison official] has not violated the Eighth Amendment, no matter how severe the risk. This subjective approach

> focuses only on what a defendant's mental attitude actually was. Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment Rights.

Id. (internal citation and quotation omitted).

Hoslett is unhappy with the medical treatment he has received for interstitial cystitis since the Bureau of Prisons moved him to FCI Sheridan in April 2010. He had a consultation with a contract urologist, had a surgical procedure on his bladder in December 2010, and takes the medication Elmiron to ease some of the discomfort associated with his condition. Hoslett alleges he suffers constant and debilitating pain in spite of this medical treatment.

The moving defendants contend the Complaint fails to plead sufficient facts demonstrating their personal involvement in the medical treatment of which Hoslett complains. They also claim some of them could only be vicariously liable as supervisors, which is insufficient under Section 1983.

> Under Section 1983, supervisory officials are not liable for actions of subordinates on any theory of vicarious liability. A supervisor may be liable only if (1) he or she is personally involved in the constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. A supervisor may be liable if the supervisor knew of the violations and failed to act to prevent them.

Snow v. McDaniel, 681 F.3d 978, 989 (9th Cir. 2012) (internal quotations and citations omitted).

Many of Hoslett's allegations discuss unnamed medical personnel. For example, Hoslett alleges he specifically informed medical personnel he suffers constant and debilitating pain, medical staff adamantly refused to treat his pain, and medical staff improperly changed the orders for oxycodone after his surgery.

The following allegations refer to specific defendants:

Dr. Dhaliwal is Hoslett's primary caregiver. Dr. Davis, as Clinical Director, oversees the Health Services Department at the prison and is Dr. Dhaliwal's boss. Dr. Davis is fully aware of Hoslett's medical status and the fact he suffers constant and debilitating pain.

Steve De Las Heras is the Health Services Administrator at the prison and manages all Health Services staff members. As the boss of the Clinical Director, De Las Heras is aware of Hoslett's medical problems.

Dr. Dhaliwal, Dr. Davis, and De Las Heras constantly denied Hoslett's need for pain management medication. Dr. Dhaliwal and Dr. Davis both know Hoslett's medical condition significantly affects his daily activities, but they do nothing.

Israel Jacquez is the Assistant Warden of Programs at FCI Sheridan and oversees the Health Services Department. Jacquez is De Las Heras' boss. Hoslett discussed his medical issues with Jacquez twice so Jacquez is fully aware of Hoslett's chronic and substantial pain.

Jeff Thomas is the Warden at FCI Sheridan and is responsible for all staff members within the institution. He signed the response to Hoslett's Administrative Remedy BP-9 and is aware of the medical issues.

As is clear from the allegations, Hoslett brings claims against De Las Heras, Jacquez and Thomas even though none of them are medical providers. Hoslett's allegations dwell on these defendants' supervisory roles at FCI Sheridan. The allegations are conclusory and do not allege sufficient facts for the court to draw a reasonable inference that these defendants are liable under a theory of supervisory liability based on the supervisor knowing of the constitutional violations and failing to prevent them. Claims under Section 1983 cannot rest on respondeat superior

liability. Moreover, negligence and medical malpractice do not constitute deliberate indifference. Toguchi, 391 F.3d at 1057 The allegations refer to medical malpractice several times. Thus, Hoslett fails to state a claim against De Las Heras, Jacquez, and Thomas that is plausible on its face.

Hoslett alleges Dr. Davis constantly denied his need for pain medication. As a doctor, he might be making decisions about Hoslett's treatment. The allegations, though, are more indicative of supervisory liability. Dr. Davis supervises Dr. Dhaliwal, Hoslett's primary caregiver. Hoslett alleges Dr. Davis knew about his pain but does not allege how Dr. Davis gained that knowledge, other than through his supervision of Dr. Dhaliwal. There are no specific allegations Dr. Davis ever treated Hoslett. Accordingly, Hoslett also fails to state a claim against Dr. Davis.

CONCLUSION

Defendants Davis, Jacquez, De Las Heras, and Thomas' Motion to Dismiss [34] is granted. All claims against these defendants are dismissed without prejudice. All claims against Westermeyer are dismissed without prejudice. The action will continue against Dr. Dhaliwal.

IT IS SO ORDERED.

Dated this 5th day of September, 2012.

/s/ Garr M. King
Garr M. King
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT
Petitioner.

Case No.: 3:11-cv-00674-KI

v.

SUMMARY JUDGMENT ADVICE NOTICE AND SCHEDULING ORDER

JASPAL DHALIWAL, M.D., et al.
Respondent.

_____ /

NOTICE-WARNING

This Notice is Required to be Given to You by the Court

The defendants have made a motion for summary judgment (Motion for Summary Judgment [45]) by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine dispute of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials, as provided in Rule 56(c), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine dispute of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

SCHEDULING ORDER

Plaintiff shall file his or her opposition to defendants' motion for summary judgment within 30 days of the date of this order. Defendants shall file their reply within 14 days thereafter, at which time defendants' motion for summary judgment shall be taken under advisement.

DATED this 22nd day of October, 2012.

/s/Garr M. King

Honorable Garr M. King
U.S. District Court Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT

Petitioner.

v.

JASPAL DHALIWAL, M.D., et al.

Respondent.

/

Case No.: 3:11–cv–00674–KI

ORDER TERMINATING PRO BONO APPOINTMENT

Upon notice to the Court that the appointed attorney/law firm has Counsel did not respond by Nov. 30 to the court's request for information on filing his response to the pending summary judgment motion,

IT IS HEREBY ORDERED that the Court terminates the appointment of Steven M. McCarthy as *Pro Bono* counsel for Raymond James Hoslett.

Raymond James Hoslett is to proceed *pro se* without appointed counsel.

The Clerk is directed to serve a copy of this order upon Raymond James Hoslett.

DATED this 3rd day of December, 2012

/s/Garr M. King

Honorable Garr M. King
U.S. District Court Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT

Petitioner.

v.

JASPAL DHALIWAL, M.D., et al.

Respondent.

/

Case No.: 3:11–cv–00674–KI

ORDER CONDITIONALLY APPOINTING PRO BONO COUNSEL FOR ALL PURPOSES

The Court hereby grants Plaintiff Raymond James Hoslett's Motion to Appoint Counsel [3] and conditionally appoints Dennis Black as counsel of record for all purposes.

Within 14 days of the date of this Order, the appointed attorney/law firm must file the Pro Bono Appointment Response Form with the Court with the appropriate option checked.

If representation is denied due to a conflict of interest or other specified reason, the appointment will be terminated and the Court will appoint substitute counsel.

For more information regarding pro bono forms, procedures, reimbursement of costs, or obtaining a pro bono civil rights mentor attorney, please refer to the Pro Bono Program Procedures document located on the Court's website or contact the Pro Bono Panel Administrator.

DATED this 4th day of December, 2012

/s/Garr M. King

Honorable Garr M. King
U.S. District Court Judge

Raymond James Hoslett

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT
Petitioner.

v.

JASPAL DHALIWAL, M.D., et al.
Respondent.

_____ /

Case No.: 3:11-cv-00674-KI

PRO BONO APPOINTMENT RESPONSE FORM

In response to the Court's Order Appointing Pro Bono Counsel, I hereby certify that:

☐ Representation of Raymond James Hoslett for all purposes is accepted. If appropriate, a Substitution of Counsel will be filed to designate the responsible attorney continuing as counsel of record.

☐ Termination of this appointment is requested based on the following conflict of interest:

_____

_____

☐ No conflict of interest exists. However, termination of this appointment is requested for the following reason(s):

_____

_____

DATED this _____ day of _____ _____.

_____
Signature

_____
Printed Name and Oregon State Bar No.

Dennis H. Black, OSB # 763984
Black, Chapman, Webber & Stevens
Attorneys at Law
221 Stewart Avenue, Suite 209
Medford, Oregon 97501
(541) 772-9850
Facsimile (541) 779-7430
litigation@blackchapman.com
Attorney for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT, Plaintiff, v. **JASPAL DHALIWAL, M.D., et al.,** Defendants.	Case No.: 3:11-CV-00674-KI **RESPONSE TO ORDER APPOINTING PRO BONO COUNSEL**

After making a thorough investigation into the possibility of being able to render effective assistance to the plaintiff, I must respectfully decline this appointment.

When I received this assignment from the court, my assistant obtained materials from the Pacer docket which I reviewed. I determined the case at its core involved the alleged improper provision of medical care for pain resulting from a urological condition. After familiarizing myself with an overview of the plaintiff's allegations, I contacted a board certified urologist. He told me that, if the alleged facts could be substantiated, it appeared to him, based

upon the oral representations he received from me, that conduct below the standard of care was provided to the plaintiff.

I then contacted the U.S. Attorney who filled me in on the happenings detailed in the Docket Sheet and informed me that he had filed a Motion for Summary Judgment on behalf of the sole remaining defendant, Jaspal Dhaliwal, M.D. He stated that Dr. Dhaliwal had testified under penalty of perjury that he was not involved in the care provided to plaintiff upon which the Complaint is based. The U.S. Attorney, Mr. Silver, had his assistant forward me a copy of the motion and supporting materials.

I next contact Steven M. McCarthy, the previous counsel for plaintiff. He corroborated what U.S. Attorney Ronald K. Silver had said and stated that the physician who appeared to be responsible for the decision complained of by the plaintiff, Dr. Raymond E. Westermeyer, was dismissed from the case for lack of service on September 6, 2012. Mr. McCarthy confirmed that Dr. Westermeyer had indeed not been served. I asked Mr. McCarthy to send me a copy of the file as soon as possible but, as of the date of the writing of this response, I have not received the file.

I then arranged to talk to the plaintiff over the telephone at the prison. In two separate conversations, I informed him that, since the declaration of Dr. Dhaliwal stated emphatically he played no part in the decision to withhold narcotic pain medication or a referral to a pain specialist on November 2, 2010, or thereafter, I did not see any way to effectively prosecute the case against Dr. Dhaliwal no matter what additional discovery might be able to be undertaken.

Since I did not see any way I could be of effective assistance to Mr. Hoslett, and since I saw no point in standing next to him and watching him take what I considered an inevitable loss given the current posture of the case, I told him I would inform the court that I would decline appointment on this matter.

I am sorry that I have not been able to be of any greater assistance to the court or Mr. Hoslett in this matter, but I believe that I have taken all practical means of investigating the claim to see if I could render any effective assistance as pro bono counsel.

DATED this 17th day of December, 2012.

BLACK, CHAPMAN, WEBBER & STEVENS

s/Dennis H. Black
Dennis H. Black, OSB # 763984
Phone: (541) 772-9850
Attorney for Plaintiff

CERTIFICATE OF CM/ECF FILING AND SERVICE [FRCP 5]

I, Beth E. Sund, hereby certify that on December 17, 2012I electronically filed the foregoing: RESPONSE TO ORDER APPOINTING PRO BONO COUNSEL with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Kevin C. Danielson
Ronald K. Silver
U.S. Attorney's Office
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204
Ph: 503-727-1000
Fax: 503-727-1117
kevin.c.danielson@usdoj.gov
ron.silver@usdoj.gov

I further certify I served a copy of the foregoing document by the method indicated below, and addressed to the party listed below. I am familiar with the practice of Black, Chapman, Webber & Stevens for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with the ordinary course of business, the above-mentioned document(s) would have been deposited with the United States Postal Service on the same day on which it was placed at Black, Chapman, Webber & Stevens for deposit:

✓ **BY MAIL:** I caused such envelope(s) to be deposited in the mail at my business address addressed to the addressee(s) designated. It is deposited with the United States Service on the same day in the ordinary course of business.

/ / /

Raymond James Hoslett
82420-012
Federal Correctional Institution
Inmate Mail/Parcels
P.O. Box 5000
Sheridan, OR 97378

DATED this 17th day of December, 2012.

BLACK, CHAPMAN, WEBBER & STEVENS

Beth E. Sund
Paralegal to Dennis H. Black, OSB # 763984
Phone: (541) 772-9850
Litigation@blackchapman.com
Attorney for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT
Petitioner.

v.

JASPAL DHALIWAL, M.D., et al.
Respondent.

/

Case No.: 3:11–cv–00674–KI

ORDER TERMINATING PRO BONO APPOINTMENT

Upon notice to the Court that the appointed attorney/law firm has declined representation,

IT IS HEREBY ORDERED that the Court terminates the appointment of Dennis H. Black as *Pro Bono* counsel for Raymond James Hoslett.

Raymond James Hoslett is to proceed *pro se* without appointed counsel.

The Clerk is directed to serve a copy of this order upon Raymond James Hoslett.

DATED this 21st day of December, 2012

/s/Garr M. King

Honorable Garr M. King
U.S. District Court Judge

Troy Dorrett - Activity in Case 3:11-cv-00674-KI Hoslett v. Dhaliwal, M.D. et al Order

From: <info@ord.uscourts.gov>
To: <nobody@ord.uscourts.gov>
Date: 1/2/2013 10:29 AM
Subject: Activity in Case 3:11-cv-00674-KI Hoslett v. Dhaliwal, M.D. et al Order

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 1/2/2013 at 10:28 AM PST and filed on 1/2/2013
Case Name: Hoslett v. Dhaliwal, M.D. et al
Case Number: 3:11-cv-00674-KI
Filer:
Document Number: 58(No document attached)

Docket Text:
Order - The court was unable to obtain new pro bono counsel for plaintiff. Plaintiff must proceed pro se without appointed counsel. By February 8, 2013, plaintiff may file any materials in response to the pending motion for summary judgment. Defendant may file a response by March 1, 2013. Ordered by Judge Garr M. King. (mja)

3:11-cv-00674-KI Notice has been electronically mailed to:

Kevin C. Danielson kevin.c.danielson@usdoj.gov, deanne.hoffer@usdoj.gov

Ronald K Silver ron.silver@usdoj.gov, deryl.looney@usdoj.gov, tdorrett@bop.gov

3:11-cv-00674-KI Notice will not be electronically mailed to:

Raymond James Hoslett
82420-012
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 5000
SHERIDAN, OR 97378

Troy Dorrett - Activity in Case 3:11-cv-00674-KI Hoslett v. Dhaliwal, M.D. et al Order on motion for Order

From: <info@ord.uscourts.gov>
To: <nobody@ord.uscourts.gov>
Date: 2/28/2013 12:37 PM
Subject: Activity in Case 3:11-cv-00674-KI Hoslett v. Dhaliwal, M.D. et al Order on motion for Order

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U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 2/28/2013 at 12:09 PM PST and filed on 2/28/2013
Case Name: Hoslett v. Dhaliwal, M.D. et al
Case Number: 3:11-cv-00674-KI
Filer:
Document Number: 63(No document attached)

Docket Text:
ORDER: The court has discretion under Federal Rule of Civil Procedure 4(m) to extend time for service. Plaintiff's Motion for Extension of Time to Serve and to Complete Discovery [61] is GRANTED so that plaintiff may proceed pro se now that pro bono counsel no longer represents him. Plaintiff must accomplish service on defendant Westermeyer, or obtain a waiver of service, by July 1, 2013. On September 6, 2012, the court dismissed the remaining defendants on the merits, and not for lack of service. The court will not extend the service deadline without plaintiff showing extreme good cause. The discovery deadline is extended to July 1, 2013. The court will allow plaintiff to file a response to Defendants' Motion for Summary Judgment [45] by July 1, 2013, and defendants may reply by July 18. 2013. Plaintiff's Motion for Order to Reissue Summonses and for the US Marshals Service to Serve the Summonses [60] is DENIED. The court will not order the US Marshals Service to serve process because plaintiff does not have in forma pauperis status (and did not seek it before paying his filing fee). Plaintiff may arrange for service through the US Marshals Service by completing Form USM-285, available at the Civil Intake Counter at the Clerks Office. The fee is currently $55 per hour per deputy marshal, plus mileage, or less if service can be done by mail. Questions can be answered by the Civil Desk at the US Marshals Service, 503-326-7807.

Alternatively, plaintiff may arrange for service through a private process server or by following the requirements in Federal Rule of Civil Procedure 4. The Clerk is ordered to send a blank summons to plaintiff for use with defendant Westermeyer. Plaintiff's Motion for an Order Compelling Attorney Steven M. McCarthy to Return All Records Obtained from Plaintiff and the Court in this Civil Action [62] is GRANTED. Mr. McCarthy is ordered to send plaintiff a copy of the file in this case. The Clerk is ordered to send a copy of this minute order to Mr. McCarthy. Ordered by Judge Garr M. King. (pc)

3:11-cv-00674-KI Notice has been electronically mailed to:

Kevin C. Danielson kevin.c.danielson@usdoj.gov, deanne.hoffer@usdoj.gov

Ronald K Silver ron.silver@usdoj.gov, deryl.looney@usdoj.gov, tdorrett@bop.gov

3:11-cv-00674-KI Notice will not be electronically mailed to:

Raymond James Hoslett
82420-012
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
P.O. BOX 5000
SHERIDAN, OR 97378

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT
Petitioner.

v.

JASPAL DHALIWAL, M.D., et al.
Respondent.

_____ /

Case No.: 3:11-cv-00674-KI

ORDER CONDITIONALLY APPOINTING PRO BONO COUNSEL FOR ALL PURPOSES

The Court, on its own motion, hereby conditionally appoints Judy Danelle Snyder as counsel of record for all purposes.

Within 14 days of the date of this Order, the appointed attorney/law firm must file the Pro Bono Appointment Response Form with the Court with the appropriate option checked.

If representation is denied due to a conflict of interest or other specified reason, the appointment will be terminated and the Court will appoint substitute counsel.

For more information regarding pro bono forms, procedures, reimbursement of costs, or obtaining a pro bono civil rights mentor attorney, please refer to the Pro Bono Program Procedures document located on the Court's website or contact the Pro Bono Panel Administrator.

DATED this 1st day of July, 2013

/s/Garr M. King

Honorable Garr M. King
U.S. District Court Judge

Raymond James Hoslett

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT
Petitioner.

v.

JASPAL DHALIWAL, M.D., et al.
Respondent.

_____ /

Case No.: 3:11–cv–00674–KI

PRO BONO APPOINTMENT RESPONSE FORM

In response to the Court's Order Appointing Pro Bono Counsel, I hereby certify that:

☐ Representation of Raymond James Hoslett for all purposes is accepted. If appropriate, a Substitution of Counsel will be filed to designate the responsible attorney continuing as counsel of record.

☐ Termination of this appointment is requested based on the following conflict of interest:

_____

_____

☐ No conflict of interest exists. However, termination of this appointment is requested for the following reason(s):

_____

_____

DATED this _____ day of _____, _____.

_____
Signature

_____
Printed Name and Oregon State Bar No.

Raymond James Hoslett

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

RAYMOND JAMES HOSLETT
Petitioner.

v.

JASPAL DHALIWAL, M.D., et al.
Respondent.

_____ /

Case No.: 3:11-cv-00674-KI

PRO BONO APPOINTMENT RESPONSE FORM

In response to the Court's Order Appointing Pro Bono Counsel, I hereby certify that:

☑ Representation of Raymond James Hoslett for all purposes is accepted. If appropriate, a Substitution of Counsel will be filed to designate the responsible attorney continuing as counsel of record.

☐ Termination of this appointment is requested based on the following conflict of interest:

_____

_____

☐ No conflict of interest exists. However, termination of this appointment is requested for the following reason(s):

_____

_____

DATED this 8th day of July, 2013.

Judy Danelle Snyder
Signature

JUDY DANELLE SNYDER
Printed Name and Oregon State Bar No. 732834

Troy Dorrett - Activity in Case 3:11-cv-00674-KI Hoslett v. Dhaliwal, M.D. et al Order on motion for extension of time

From: <info@ord.uscourts.gov>
To: <nobody@ord.uscourts.gov>
Date: 7/24/2013 9:39 AM
Subject: Activity in Case 3:11-cv-00674-KI Hoslett v. Dhaliwal, M.D. et al Order on motion for extension of time

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*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 7/24/2013 at 9:38 AM PDT and filed on 7/24/2013
Case Name: Hoslett v. Dhaliwal, M.D. et al
Case Number: 3:11-cv-00674-KI
Filer:
Document Number: 91(No document attached)

Docket Text:
ORDER: Granting Motion for Extension of Time for Plaintiff's Response to Dr. Dhaliwal's Motion for Summary Judgment and for Expert Witness Disclosure. [89]. Plaintiff's Response to Dr. Dhaliwal's Motion for Summary Judgment is due by 11/18/2013. Dr. Dhaliwal's Reply in Support of his Motion for Summary Judgment is due by 12/2/2013. Expert witness disclosures are due thirty (30) days after a ruling on all dispositive motions. Ordered by Judge Garr M. King. (pc)

3:11-cv-00674-KI Notice has been electronically mailed to:

Eric J. Neiman eneiman@williamskastner.com, ccarlson@williamskastner.com, jlehr@williamskastner.com, nbuzzetti@williamskastner.com

Judy Danelle Snyder judy@jdsnyder.com, debbie@jdsnyder.com, erin@jdsnyder.com, holly@jdsnyder.com, scott@jdsnyder.com

Kevin C. Danielson kevin.c.danielson@usdoj.gov, deanne.hoffer@usdoj.gov

Rachel A. Robinson rrobinson@williamskastner.com, wschaener@williamskastner.com

Ronald K. Silver ron.silver@usdoj.gov, deryl.looney@usdoj.gov, tdorrett@bop.gov

3:11-cv-00674-KI Notice will not be electronically mailed to:

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RAYMOND JAMES HOSLETT,

Plaintiff,

v.

JASPAL DHALIWAL, M.D., RAYMOND E. WESTERMEYER, M.D., and UNITED STATES,

Defendants.

Civil Case No. 3:11-CV-00674-KI

OPINION AND ORDER

Judy Danelle Snyder
Law Offices of Judy Snyder
1000 SW Broadway, Suite 2400
Portland, Oregon 97205

Attorney for Plaintiff

S. Amanda Marshall
United States Attorney
District of Oregon

Ronald K. Silver
Assistant United States Attorney
1000 SW Third Ave., Suite 600
Portland, Oregon 97204-2902

Eric J. Neiman
Rachel A. Robinson
Williams Kastner & Gibbs, PLLC
888 SW Fifth Avenue, Suite 600
Portland, Oregon 97204-2025

Attorneys for Defendants

KING, Judge:

Plaintiff Raymond James Hoslett is incarcerated at FCI Sheridan. He alleges prison staff failed to properly treat his debilitating bladder disease and associated pain. Before the court is the United States' Motion to Dismiss FTCA Claim as Time-Barred [95].

FACTS

On April 21, 2011, the Bureau of Prisons received an Administrative Tort Claim Hoslett filed under the Federal Tort Claims Act ("FTCA") alleging a medical malpractice claim against several doctors and staff at FCI Sheridan for their roles in the treatment of his bladder disease.

On June 2, 2011, Hoslett, acting pro se, filed the case pending before me alleging Eighth Amendment claims for acting deliberately indifferent toward Hoslett's serious medical needs. The defendants are the same individuals named in the Administrative Tort Claim; the United States was not named as a defendant in this case.

On June 14, 2011, the BOP denied Hoslett's Administrative Tort Claim via certified mail. The denial warned Hoslett he had six months from the post-marked date of the letter to bring suit in federal court if he was unsatisfied with the denial.

On July 13, 2011, the first pro bono counsel accepted representation of Hoslett. On December 3, 2012, the court terminated the representation of the first pro bono counsel. Hoslett proceeded pro se.

On June 27, 2013, Hoslett, acting pro se, filed an Amended Complaint which I previously gave leave to file so Hoslett could add allegations against one of the individual defendants based on newly received discovery. Hoslett also added the United States as a defendant. The Amended Complaint alleges two causes of action against all three defendants, including the United States; the first is an Eighth Amendment violation and the second is under the FTCA and the Oregon Tort Claims Act, ORS 30.260-30.300.

On July 24, 2013, the current pro bono counsel accepted representation of Hoslett.

LEGAL STANDARDS

An argument claiming lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) may be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Id. In a factual attack, the court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. Furthermore, the court is not required to presume the truthfulness of the allegations. The party

opposing the motion must furnish evidence necessary to satisfy its burden of establishing subject matter jurisdiction. Id.

DISCUSSION

The United States argues Hoslett's FTCA claim is untimely because he failed to file a lawsuit alleging that claim within six months following the denial of his administrative claim, as required under 28 U.S.C. § 2401(b). The United States contends Hoslett is not entitled to equitable tolling because he could have filed an amended complaint within the time period. The United States reasons it had not filed an answer or motion to dismiss until well after the time period ended; thus, Hoslett did not have to obtain leave from the court to amend in a timely manner. The United States also notes the first pro bono counsel was in place well within the deadline and could have amended the complaint.

Hoslett concedes his original Complaint was filed prematurely and his Amended Complaint was not filed within the six-month period after the administrative denial. Hoslett asks the court to equitably toll the deadline and hold the FTCA claim in the Amended Complaint was timely filed.

The FTCA's six-month limitations period in § 2401(b) is a nonjurisdictional claim-processing rule which is subject to equitable tolling. Kwai Fun Wong v. Beebe, __ F.3d __, No. 10-36136, 2013 WL 5539621, at *14, *17 (9th Cir. Oct. 9, 2013).

> [L]ong-settled equitable-tolling principles instruct that generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way. As to the first element, the standard for reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. It requires the effort that a reasonable person might be

> expected to deliver under his or her particular circumstances. Central to the analysis is whether the plaintiff was without any fault in pursuing his claim.
>
> With regard to the second showing, a garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling. Instead, a litigant must show that extraordinary circumstances were the cause of his untimeliness and . . . made it impossible to file the document on time. Accordingly, equitable tolling is typically granted when litigants are unable to file timely documents as a result of external circumstances beyond their direct control.

Id. at *18 (internal quotations, brackets, and citations omitted).

Hoslett's first argument supporting equitable tolling characterizes his original Complaint as alleging claims under the Eighth Amendment as well as a federal tort claim for medical malpractice against individuals employed by the United States. Hoslett claims the court should have screened the original Complaint under 28 U.S.C. § 1915A, realized he alleged claims for medical negligence against individual defendants who are immune from federal tort claim relief, and dismissed that portion of the Complaint. This would have given Hoslett notice within the six month FTCA window that he needed to remedy his premature filing to add the United States as the proper defendant under the FTCA. Because the court failed to provide this information in the initial screening, Hoslett asks the court to apply equitable tolling.

I disagree with Hoslett's interpretation of the original Complaint, which I read to only allege Eighth Amendment claims. Although Hoslett mentioned medical malpractice a few times and attached his FTCA Notice to the Complaint, each claim expressly refers to the Eighth Amendment. I conclude Hoslett did not attempt to allege a negligence claim in the Complaint. The court has an obligation to screen complaints and suggest how to fix the claims pleaded but does not have an obligation to suggest new defendants or claims. Bogovich v. Sandoval, 189

F.3d 999, 1001 (9th Cir. 1999) ("[a]lthough courts must construe pro se complaints liberally, courts should not undertake to infer in one cause of action a claim under a different cause of action"–plaintiff is "master to decide what law he will rely upon") (internal citation omitted).

Hoslett also contends the first pro bono attorney's conduct created an impediment to Hoslett's prosecution of this action substantial enough that the court should apply equitable tolling to the FTCA claim.

The six-month period for Hoslett to file an amended complaint alleging an FTCA claim ran from June 14, 2011, when he received the administrative denial, to December 14, 2011. Hoslett appeared pro se for approximately the first month of that period, until the court appointed the first pro bono counsel on July 13, 2011. It is appropriate to expect Hoslett to proceed with all necessary steps to prosecute his case during this first month period. Once pro bono counsel accepted the appointment, however, he should have taken over these duties, but unfortunately did not. Instead, the first pro bono counsel failed to respond to two dispositive motions, failed to serve one of the defendants, and failed to contact the court when ordered to file a response to a summary judgment motion or move to extend the time to file. This caused the court to terminate the appointment on December 3, 2012. Because of the lack of assistance from the first pro bono counsel, the court will equitably toll the clock for the entirety of his appointment. Thus, on December 3, 2012, Hoslett had approximately five more months in which to file an amended complaint.

On May 13, 2013, Hoslett filed a motion informing the court that he had been unable to obtain his medical records from the first pro bono counsel. Hoslett needed the records to determine how to amend his complaint. On June 5, 2013, I asked the United States' counsel to

provide a copy of the medical records to Hoslett by June 19, 2013. After reviewing the records, Hoslett filed the Amended Complaint on June 27, 2013, only eight days later.

By failing to provide Hoslett a copy of his medical records after being removed from the case, first pro bono counsel created a roadblock to Hoslett's ability to file the Amended Complaint. Thus, I will also equitably toll the period from December 3, 2012 until June 19, 2013, when Hoslett finally received his medical records after my intervention. When Hoslett filed the Amended Complaint on June 27, 2013, he did so after about five weeks of time during which he had the ability to do so, well within the six-month statutory period after equitable tolling.

I have been impressed throughout this case by Hoslett's efforts to prosecute his claims through thick and thin. The conduct of the first pro bono counsel created extraordinary circumstances blocking Hoslett's labors. I find he has pursued his rights diligently, and I will apply equitable tolling, making his FTCA claim timely filed.

///

///

///

CONCLUSION

The United States' Motion to Dismiss FTCA Claim as Time-Barred [95] is denied.

I raise a point which needs clarification. I read the Amended Complaint, drafted by Hoslett when he was proceeding pro se, to allege claims under the Eighth Amendment, the FTCA, and the Oregon Tort Claims Act against all three remaining defendants–Dhaliwal, Westermeyer, and the United States. I ask counsel to confer about which claims will be prosecuted against which defendants, and file any appropriate motions if there is a disagreement.

IT IS SO ORDERED.

Dated this 6th day of November, 2013.

/s/ Garr M. King
Garr M. King
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RAYMOND JAMES HOSLETT,

Plaintiff,

v.

JASPAL DHALIWAL, M.D., RAYMOND E. WESTERMEYER, M.D., and UNITED STATES,

Defendants.

Civil Case No. 3:11-CV-00674-KI

OPINION AND ORDER

Judy Danelle Snyder
Law Offices of Judy Snyder
1000 S. W. Broadway, Suite 2400
Portland, Oregon 97205

Attorney for Plaintiff

S. Amanda Marshall
United States Attorney
District of Oregon
Ronald K. Silver
Assistant United States Attorney
1000 S. W. Third Avenue, Suite 600
Portland, Oregon 97204-2902

Attorneys for Defendants

KING, Judge:

Plaintiff Raymond James Hoslett is incarcerated at FCI Sheridan. He alleges prison staff failed to properly treat his debilitating bladder disease and associated pain. On November 6, 2013, I denied the United States' Motion to Dismiss FTCA Claim as Time-Barred [95] after I applied equitable tolling to the time for Hoslett to file the claim against the United States in his Amended Complaint. I based the equitable tolling on the dismal performance of the first pro bono counsel, whose appointment I eventually terminated, and Hoslett's inability to obtain a complete copy of his medical records until I asked the United States' counsel to provide him one. Before the court is Defendant's Motion for Reconsideration [110].

The United States argues that any federal inmate may obtain a copy of all or a portion of their medical record on request. Hoslett was familiar with the procedure–between June 2009 and January 2013, Hoslett made over 30 requests for portions of his record and received approximately 200 pages. The entire record consisted of 1020 pages.

The United States does not dispute tolling approximately five months during the time the first pro bono counsel represented Hoslett. But it argues he had nearly all of the documents attached as exhibits to the Amended Complaint at the time I terminated that counsel's

representation, or alternatively, he knew how to obtain them and the remaining two documents. It claims he changed his strategy after further legal research, not after getting the full medical record. Thus, the United States asked me to dismiss the FTCA claim as time-barred.

Hoslett asks me to continue to find that equitable tolling saved his FTCA claim. He acknowledges he had some of his medical records prior to obtaining the full set after my intervention. But Hoslett states he had given some of the relevant records to the first pro bono counsel and never got them back. According to Hoslett, he was not consistently provided with records he requested and once was told he had already received numerous copies of the records sought so the prison would not recopy the records for his convenience. Most importantly, Hoslett contends that without access to the entire medical record, he could not be aware of what records he was missing or what additional documents in the record could support his claims.

I agree with Hoslett that it is hard to know what documents to request if you have not seen them previously. Medical records tend to get rather voluminous quickly. A complete set of the records, with none missing, would be helpful to anyone trying to formulate legal claims. For this reason, I decline to change my prior ruling and continue to find the FTCA claim was timely filed because of equitable tolling.

Defendant's Motion for Reconsideration [110] is denied.

IT IS SO ORDERED.

Dated this 9th day of January, 2014.

/s/ Garr M. King
Garr M. King
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RAYMOND JAMES HOSLETT,

Plaintiff,

v.

JASPAL DHALIWAL, M.D., RAYMOND WESTERMEYER, M.D., and **UNITED STATES**,

Defendant.

Civil Case No. 3:11-CV-00674-KI

OPINION AND ORDER

Judy Danielle Snyder
1000 SW Broadway, Suite 2400
Portland, Oregon 97205

Attorney for Plaintiff

Eric J. Neiman
Rachel A. Robinson
Williams, Kastner & Gibbs PLLC
888 SW Fifth Avenue, Suite 600
Portland, Oregon 97204-2025

Attorneys for Defendant Raymond Westermeyer, M.D.

KING, Judge:

Plaintiff Raymond James Hoslett alleges prison staff at FCI Sheridan failed to properly treat his debilitating bladder disease and associated pain. He alleges claims under the Eighth Amendment and the federal and Oregon tort claim acts. Before the court are Defendant Dhaliwal's Motion for Summary Judgment [45] and Defendant Westermeyer's Motion for Summary Judgment [123]. As explained below, I deny both motions.

FACTS

At all relevant times, Hoslett was an inmate at FCI Sheridan and Dr. Dhaliwal was an employee of the Bureau of Prisons. Dr. Westermeyer was a contract physician with the Bureau of Prisons, so FCI Sheridan's Clinical Director, Dr. Davis, had to review and co-sign his chart notes. If Dr. Davis was not onsite, Dr. Dhaliwal reviewed and co-signed Dr. Westermeyer's chart notes.

Hoslett was first incarcerated at FCI Herlong and then moved to FCI Sheridan when he was redesignated as a Medical Care Level II inmate. While at FCI Herlong, Hoslett was diagnosed with interstitial cystitis. He complained of constant pain, generally at a level of eight out of ten, hesitancy, and frequent urination at night. A urologist performed a surgical procedure called cystoscopy with hydrodistention and then prescribed Elmiron, 100 milligrams, twice daily.

Hoslett was transferred to FCI Sheridan on April 14, 2010.[1] The transfer paperwork stated that all medications should be continued until Hoslett was evaluated by a physician, unless otherwise indicated. RN Francis screened him on arrival and entered into the medical record that Hoslett should remain on Elmiron, per Dr. Dhaliwal's verbal order. The next day, Dr. Dhaliwal discontinued Hoslett's prescription for Elmiron without physically examining him. The doctor had never treated a patient with interstitial cystitis prior to Hoslett and had never prescribed or monitored Elmiron. He discontinued the prescription because he wanted to talk to Hoslett, order new labwork, and check on any side effects or interactions with other medications. At that time, Hoslett was not taking any other medication. Dr. Dhaliwal explained he discontinued the Elmiron because he was not knowledgeable about treatment with that medication.

On April 16, Hoslett sent an Inmate Request to the medical department explaining his interstitial cystitis diagnosis and urologist's advice to take Elmiron for the rest of his life. The response explained Hoslett was scheduled to see a doctor soon and could discuss the issue then.

On April 20, six days after Hoslett's transfer, Dr. Dhaliwal examined Hoslett for the first time and restarted the Elmiron, 100 milligrams, twice daily.

On May 20, Dr. Dhaliwal examined Hoslett for complaints of intense pain. The day before, Hoslett told the nurse practitioner that he had aching pain, at eight out of ten, in the suprapubic region with occasional sharp pains radiating into the tip of his penis. On June 1, the Utilization Review Committee approved Hoslett being examined by Dr. Dutta, a urologist in the community.

---

[1] All dates are in 2010 unless otherwise specified. Furthermore, the medical record is extensive. I describe below some, but not all, of the examinations.

Dr. Dutta examined Hoslett on July 21. He recommended increasing the Elmiron dosage from 100 milligrams twice a day to 200 milligrams three times a day and possibly performing another cystoscopy and hydrodistention. Dr. Dutta copied his report to Dr. Dhaliwal, but Dr. Dhaliwal did not review the report. Instead, Dr. Davis reviewed it on August 9. According to Dr. Westermeyer, the duty officer should have contacted medical personnel at the prison to reconcile Dr. Dutta's medication change when Hoslett returned from the appointment. This did not happen.

Dr. Westermeyer met with Hoslett on August 11 to discuss treatment options. Dr. Westermeyer then spoke to Dr. Dutta later the same day. During the conversation, Dr. Dutta did not recommend that Dr. Westermeyer either consider referring, or actually refer, Hoslett to a pain specialist. Dr. Westermeyer's chart note states:

> Discussed with Urologist Dr. Dutta (sp?). He has not much to offer. Can do bladder dilation and see if it helps. Could try antispasmodics, usually not very helpful. He never uses narcotics for this. He sometimes refers to pain specialists, just because he doesn't want to manage the pain meds in his practice.

Westermeyer Decl. Ex. A, at 3.

Dr. Westermeyer saw Hoslett on August 18 and refused to prescribe narcotic pain medication. Hoslett does not recall Dr. Westermeyer explaining his reasons for the refusal. Dr. Westermeyer believed narcotic pain medication was contraindicated because it would better serve Hoslett to treat the underlying condition and narcotics lose their effectiveness over time and cause worsening side effects, including contributing to more sensations of pain. Dr. Westermeyer did not refer Hoslett to a pain specialist because he thought it was extremely unlikely for a pain specialist to have any treatment suggestions not considered by Dr. Dutta and

himself. He did prescribe oxybutynin, an antispasmodic which Hoslett never took because Dr. Dutta told him it would not be very helpful. Dr. Westermeyer also started the approval process for Hoslett to undergo a cystoscopy with hydrodistention. After approval, all medical procedures to be performed outside the prison are set up by a scheduling nurse, and not Dr. Westermeyer. The prison can only transfer a few inmates a day so there is often a wait for non-life threatening conditions.

Dr. Dhaliwal had little active involvement in Hoslett's treatment after May 20; Dr. Westermeyer was the primary provider after that date, along with treatment by the specialist, Dr. Dutta. There are two exceptions. First, Dr. Dhaliwal co-signed, and Dr. Davis reviewed, Dr. Westermeyer's September 14 chart note stating Hoslett was bitterly unhappy with not getting relief from a constant state of pain and inability to sleep due to frequency of urination at night. The chart note also explained a urology consultation was being scheduled. Second, on November 2, Dr. Dhaliwal reviewed a consultation form sent by Dr. Dutta after he (Dr. Dutta) examined Hoslett on October 26. In the form, Dr. Dutta noted he would schedule Hoslett for a cystoscopy with hydrodistention and bladder biopsy, the prison should consider referral to a pain specialist, and he asked the prison to do a PSA level and send him the result. Dr. Dhaliwal ordered the PSA test on November 2, but did not examine Hoslett.

On October 15, Dr. Davis ordered the increased dosage of Elmiron originally prescribed by Dr. Dutta on July 21.

Hoslett was first transported for surgery on October 26, but no anesthesiologist was available at the hospital, so he returned to the prison.

On November 29, Dr. Westermeyer emailed the scheduling nurse to ask if Hoslett's procedure could have increased priority: "[Hoslett] is really eager to try this therapy, and I think given the circumstances, and his dramatic improvement in cooperation, it would be appropriate to schedule him as soon as possible and not have him go to the back of the line all over again." Snyder Decl. Ex. 40.

Hoslett finally had the surgery on December 28. Dr. Dutta prescribed 30 tablets of 5 milligrams oxycodone for pain with instructions to take 1 to 2 tablets every 3 hours as needed. When Hoslett returned to the prison, a nurse practitioner reconciled this prescription with the prison regulations which allow distribution of narcotics twice a day, and ordered 5 milligrams of oxycodone, twice a day. Dr. Westermeyer reviewed the nurse practitioner's order the next morning and concluded it was insufficient. He increased the medication order on December 29 to 10 milligrams of oxycodone, twice a day for 3 days, in an extended release form which would last twelve hours. Hoslett did not request a refill of the oxycodone after the three days.

Dr. Dhaliwal and Dr. Westermeyer both left FCI Sheridan in March 2011 and had no further involvement with Hoslett. In June 2011, Hoslett was prescribed oxycodone, morphine sulfate, and gabapentin, along with the Elmiron, and Dr. Dutta performed another cystoscopy with hydrodistention in May 2012. Hoslett has remained on narcotics since June 2011.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The initial burden is on the moving party to point out the absence of any genuine dispute of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate

through the production of probative evidence that there remains a fact dispute to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary judgment, the court "must view the evidence on summary judgment in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party." Nicholson v. Hyannis Air Serv., Inc., 580 F.3d 1116, 1122 n.1 (9th Cir. 2009) (internal quotation omitted).

DISCUSSION

I. Scope of the Eighth Amendment Claim

Hoslett filed the Amended Complaint pro se before the current pro bono counsel agreed to represent him. In the Eighth Amendment claim, Hoslett alleges defendants were deliberately indifferent to his serious medical need and inflicted pain on him by failing to follow all of Dr. Dutta's orders for pain medication from October 26, 2010 through June 16, 2011. Defendants ask the court to limit the Eighth Amendment claim to this conduct and time period.

Pro bono counsel's response also discusses other conduct, including Dr. Dhaliwal's change to Hoslett's Elmiron prescription on arrival at FCI Sheridan and both defendants' failure to refer Hoslett to a pain specialist, as Dr. Dutta suggested.

Even though pro bono counsel began representing Hoslett the following month, he filed the Amended Complaint pro se. The court must construe pro se complaints liberally. Engebretson v. Mahoney, 724 F.3d 1034, 1037 (9th Cir. 2013). Moreover, Hoslett loaded the Amended Complaint with numerous facts in response to my instructions after I granted a motion to dismiss for failure to state a claim. If Hoslett had merely pleaded that defendants violated the Eighth Amendment by showing extreme indifference during the treatment of his interstitial cystitis and associated pain, he would have satisfied the notice pleading requirement and alleged

a broad claim without date or conduct limitations. I will allow Hoslett to litigate his claims against defendants for all of their conduct from when Hoslett was transferred to FCI Sheridan to when defendants left the facility.

II. Dr. Dhaliwal

Dr. Dhaliwal contends his actions do not rise to the level of deliberate indifference, and he is entitled to qualified immunity. He seeks summary judgment against Hoslett's Eighth Amendment claim. When actively involved in Hoslett's treatment, Dr. Dhaliwal prescribed Elmiron and referred Hoslett to Dr. Dutta. Dr. Dhaliwal argues he did not examine or treat Hoslett after May 20 and was not responsible for implementing the course of treatment prescribed by Dr. Dutta.

Further, Dr. Dhaliwal claims he cannot be liable for the care documented in the records he reviewed after May 20 because Dr. Westermeyer was making medical decisions based on his own informed judgment. In the records, Dr. Dhaliwal could see Hoslett was still being referred to Dr. Dutta, a urologist, who scheduled him for the surgery that brought relief before Hoslett came to FCI Sheridan. Dr. Dhaliwal argues there is no evidence he was deliberately indifferent by failing to override Dr. Westermeyer's judgment.

Hoslett argues Dr. Dhaliwal was deliberately indifferent to his medical condition and pain. Hoslett notes Dr. Dhaliwal discontinued the Elmiron prescription on April 15 before examining Hoslett. He also claims Dr. Dhaliwal participated in his treatment after May 20. In support, Hoslett relies on Dr. Dhaliwal's reviews of Dr. Westermeyer's September 14 chart note and Dr. Dutta's October 26 consultation form. Hoslett alternatively argues Dr. Dhaliwal is liable as a supervisor because of his own inaction.

To determine whether a government employee is entitled to qualified immunity, the court uses a two-part test: (1) the court "must determine whether, viewed in the light most favorable to the plaintiff, the government employee violated the plaintiff's constitutional rights"; and (2) the court "must also determine whether the rights were clearly established at the time of the violation." Friedman v. Boucher, 580 F.3d 847, 852 (9th Cir. 2009).

The Eighth Amendment is violated if prison officials are deliberately indifferent to a prisoner's serious medical needs. Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012). "First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent." Id. (internal quotation omitted). To prove deliberate indifference, a prisoner must show "a purposeful act or failure to respond to a prisoner's pain or possible medical need" and "harm caused by the indifference." Id. Deliberate indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." Id. (internal quotation omitted). The harm does not have to be substantial. Id.

> [A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. Thus, a plaintiff's showing of nothing more than a difference of medical opinion as to the need to pursue one course of treatment over another [is] insufficient, as a matter of law, to establish deliberate indifference.

Id. (internal quotations and citations omitted).

Dr. Dhaliwal does not argue Hoslett did not have a serious medical need. I will turn to the second prong of the test–whether Dr. Dhaliwal showed deliberate indifference when treating Hoslett. I conclude a jury could find that Dr. Dhaliwal was deliberately indifferent and interfered with Hoslett's medical treatment by discontinuing the Elmiron prescription when Hoslett transferred to FCI Sheridan, and did so without examining or speaking to Hoslett or speaking to the doctor who had prescribed the medication at FCI Herlong. The fact that Dr. Dhaliwal was not knowledgeable about using Elmiron to treat interstitial cystitis is not evidence of a difference of opinion regarding a medical judgment. Moreover, four days later, Dr. Dhaliwal restarted the prescription. See Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir. 2000) (allegations support a finding that prison officials intentionally interfered with inmate's previously prescribed medical treatment by failing to provide a liquid diet ordered by the hospital when inmate returned from hospital with jaw wired shut to treat a fracture). There is no direct evidence that Hoslett suffered increased pain when Dr. Dhaliwal discontinued the medication, but the evidence of his pain and eventual surgery, even when taking the medication, and his Inmate Request asking the staff to keep him from running out of the medication, are sufficient to infer he was harmed.

There is no need to address the supervisor liability issue at this time. Furthermore, I am not limiting the Eighth Amendment claim to the discontinuation of Elmiron. I address that issue alone because it is a sufficient basis to rule on the pending motion. I deny Dr. Dhaliwal's motion for summary judgment against the Eighth Amendment claim.

II. Dr. Westermeyer

A. Eighth Amendment Claim

Dr. Westermeyer argues Hoslett cannot prove deliberate indifference because the record shows the doctor acted based on reasoned medical judgment, including his refusal to prescribe narcotics to combat Hoslett's chronic pain. According to Dr. Westermeyer, the oxycodone prescription from Dr. Dutta immediately after Hoslett's surgery had to be modified because it did not comply with prison regulations. Dr. Westermeyer contends there is no evidence that when he examined Hoslett on August 11, he was aware of and purposely ignored Dr. Dutta's increase of the Elmiron dosage. The doctor argues there is no evidence Hoslett suffered any harm from Dr. Westermeyer's treatment because Hoslett continued to have severe pain after Dr. Davis increased the Elmiron dosage on October 15 and eventually prescribed narcotics for chronic pain in June 2011.

Hoslett contends Dr. Westermeyer did not appropriately treat his severe pain, whether the pain is labeled as chronic or acute. He claims Dr. Westermeyer based the treatment decisions on his unreasonable conclusion that Hoslett was an uncooperative patient, and thus showed deliberate indifference to Hoslett's ongoing debilitating pain.

I first note the parties are arguing about nuances in the medical record, a record which is extensive. Such arguments make me wary about granting summary judgment. As with Dr. Dhaliwal, I will focus on a single incident, but I do not limit Hoslett's claim in doing so. Dr. Dutta increased Hoslett's Elmiron dosage significantly on July 21 but Dr. Westermeyer did not order the increase even though he examined Hoslett twice in August and once in September. Dr. Davis finally ordered the increase on October 15. Dr. Westermeyer argues he was not

deliberately indifferent because he was unaware of the increase, which should have been reconciled by the duty officer on July 21. At this stage of the proceedings, however, Hoslett is entitled to an inference that Dr. Westermeyer knew of Dr. Dutta's order when Dr. Westermeyer reviewed Hoslett's records during the three examinations before Dr. Davis finally prescribed the increase. See Jett v. Penner, 439 F.3d 1091, 1097 (9th Cir. 2006) (inmate is entitled to inference that prison doctor was aware of the community hospital's written aftercare instructions in his medical record to have an orthopedist recheck the inmate's fractured thumb within the next few days). A jury could find that knowledge of the increase, and failing to address it in any way based on a reasoned medical judgment, is interference with medical treatment sufficient to establish deliberate indifference.

There is also evidence on which Hoslett could argue Dr. Westermeyer's decisions were based to some extent on his conclusion that Hoslett was a difficult, uncooperative patient, who was insisting on narcotics when no doctor would prescribe them. Eventually, Hoslett was put on narcotics at the prison for control of chronic pain.

Consequently, I deny the motion for summary judgment against the Eighth Amendment claim.

B. Medical Malpractice Claims

When causation in a malpractice claim involves a complex medical question, a plaintiff must establish causation through expert testimony that "there is a reasonable medical probability that the alleged negligence caused the plaintiff's injuries." Pinkerton v. Tri-County Metro. Serv. Dist., 203 Or. App. 525, 530, 125 P.3d 840 (Or. App. 2005). Dr. Westermeyer seeks summary judgment against the federal and state medical malpractice claims, arguing Hoslett's expert does

not opine that his alleged negligence caused Hoslett any harm to a reasonable degree of medical probability.

I will assume Hoslett's claim involves a complex medical question.

Hoslett's expert is Dr. Moulsdale, a board certified urologist. Dr. Moulsdale opines Dr. Westermeyer failed to meet the standard of care by refusing to prescribe narcotic pain medication despite Hoslett's continued complaints of severe and chronic pain, by refusing to refer Hoslett to a pain specialist as recommended by Dr. Dutta, by failing to increase Hoslett's prescription for Elmiron as recommend by Dr. Dutta, and by altering Dr. Dutta's prescription for oxycodone following the December 28 surgery.

It is true Dr. Moulsdale did not explicitly state that Dr. Westermeyer's conduct caused Hoslett any harm to a reasonable degree of medical probability. Throughout the record, however, Hoslett complained over and over of severe pain. Three of the four particular types of conduct Dr. Moulsdale concludes failed to meet the standard of care directly relate to the treatment of pain. This is not a situation where the causal link is complicated–failure to treat severe pain leaves the patient in severe pain. Consequently, I find Dr. Moulsdale's declaration is adequate to create a factual issue, and I do not grant summary judgment against the medical malpractice claims.

///

///

CONCLUSION

Defendant Dhaliwal's Motion for Summary Judgment [45] and Defendant Westermeyer's Motion for Summary Judgment [123] are denied. The court will hold a telephone conference to schedule a trial date.

IT IS SO ORDERED.

Dated this 23rd day of April, 2014.

/s/ Garr M. King
Garr M. King
United States District Judge

Troy Dorrett - Activity in Case 3:11-cv-00674-JO Hoslett v. Dhaliwal, M.D. et al Scheduling

From: <info@ord.uscourts.gov>
To: <nobody@ord.uscourts.gov>
Date: 5/15/2014 2:55 PM
Subject: Activity in Case 3:11-cv-00674-JO Hoslett v. Dhaliwal, M.D. et al Scheduling

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U.S. District Court

District of Oregon

Notice of Electronic Filing

The following transaction was entered on 5/15/2014 at 2:54 PM PDT and filed on 5/15/2014
Case Name: Hoslett v. Dhaliwal, M.D. et al
Case Number: 3:11-cv-00674-JO
Filer:
Document Number: 157(No document attached)

Docket Text:
Scheduling Order by Judge Robert E. Jones: Jury Trial is set for 7/8/2014 at 09:00AM before Judge Robert E. Jones in Portland Courtroom 10A. (bp)

3:11-cv-00674-JO Notice has been electronically mailed to:

Eric J. Neiman eneiman@williamskastner.com, jlehr@williamskastner.com

Judy Danelle Snyder judy@jdsnyder.com, debbie@jdsnyder.com, erin@jdsnyder.com, holly@jdsnyder.com, scott@jdsnyder.com

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Ronald K. Silver ron.silver@usdoj.gov, deryl.looney@usdoj.gov, Shari.McClellan@usdoj.gov, tdorrett@bop.gov

3:11-cv-00674-JO Notice will not be electronically mailed to:

Raymond James Hoslett
Register No: 82420-012
Federal Correctional Institution
P.O. Box 5000
Sheridan, OR 97378

FILED09 JUL '13 10:44USDC-ORP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RAYMOND JAMES HOSLETT, Plaintiff, -vs- JASPAL DHALIWAL, M.D., et. al., Defendants.	Case No: 3:11-00674-KI NOTICE ON OFFER OF SETTLEMENT

PLEASE TAKE NOTICE that Raymond James Hoslett, the Plaintiff, in pro se, will offer his Offer of Settlement for discussion at A Telphonic Conference to discuss scheduling, motion for summary Judgmen and discovery on_____, 2013, at_____, in the above-entitled civil action.

Signed this 3rd day of July 2013.

R. J. Hoslett

Raymond James Hoslett
Plaintiff In Pro se

FILED09 JUL '13 10:44USDC-ORP

CERTIFICATE OF SERVICE

I, Raymond James Hoslett, under the penalty of perjury, hereby declares that I mailed a true copy of Notice of Offer of settlement, Offer of Settlement and Certificate of Service to: Ronald K. Silver, Assistant Untied States Attorney for Defendant Dhaliwal and Rachel A. Robinson, Attorney for Defendnat Westermeyer by placing the same in sealed envelopes fully address with First Class Postage prepaid thereon on this 3rd day of July, 2013.

Signed this 3rd day of July, 2013.

R. J. Hoslett

Raymond James Hoslett

FILED09 JUL '13 10:43USDC-ORP

Raymond James Hoslett
Register No: 82420-012
Federal Correctional Institution
P.O. Box 5000
Sheridan, OR 97378

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RAYMOND JAMES HOSLETT, Plaintiff, -vs- RAYMOND WESTERMEYER, M.D., JASPAL DHALIWAL, M.D., et. al., Defendants.	Case No: 3:11-cv-00674-KI OFFER OF SETTLEMENT

NOW COMES Raymond James Hoslett, the Plaintiff, in pro se, and offers the following settlement in the above-entitled civil action:

I. FACTS

1. The Plaintiff has set forth sufficient facts in his Complaint and supporting pleadings, Discovery Requests, which will prove that the Defendants were deliberately indifferent to his serious medical need by not following the prescribed treatment prescribed by the Specialist he was referred to by the Defendants.

2. Based upon the facts of paragraph #1, and those stated in the Plaintiff's Complaint and other pleadings, discovery will prove that the Defendants were deliberately indifferent to his serious pain caused by his serious irreversible medical condition by not providing him with the pain medication prescribed by the Specialist.

3. The Plaintiff was finally prescribed the medication for pain related to his irreversible medical condition after the filing of this Complaint.

4. The Plaintiff contends that a Settlement for his pain and suffering would resolve this case and save both this Honroable Court and the Defendants and their attorney from the unnecessary costs related to a long litigation.

II. ARGUMENT

5. Pursuant to Jett v. Penner, 439 F.3d. 1091, 1096-1098 (9th Cir. 2006), the Ninth Circuit set forth a two-pronged test to determine deliberate indifference to a medical need as follows, in pertinent parts:

> Plaintiff's §1983 claims alleges a violation of the Eighth Amendment arising from allegedly deficient medical treatment, on a theory of deliberate indifference to serious medical needs. Our test for deliberate indifference to medical needs is two-pronged:
>
> > First, the plaintiff must show s serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury "or the unnecessary and wanton infliction of pain." Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. [Emphasis Added by the Plaintiff].

In following the panel in Jett v. Penner, supra at 1096, another panel of the Ninth Cirucit held, in pertinent parts:

> The second prong requires showing:
>
> (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference. Jett, 439 F.3d at 1096. More generally, deliberate indifference MAY appear when prison officals deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." Id. . . . Under Jett, "[a] prisoner need not show his harm was substantial." Id., see also McGuckin, 974 F.2d at 1060 ("[A] findign that the defendnat's activities resulted in 'substantial' harm to the prisoner is not necessary.").

Therefore, if the Plaintiff were to proceed to trial, and he is sure he will overcome any "Motion for Summary Judgment" and/or "Motion to Dismiss," he believes that a jury would find in his favor of a much higher award which would in all likelihood result in costly subsequent appeals.

III. OFFER OF SETTLEMENT.

6. The Plaintiff seeks a "Settlement" of $100,000.00 payable to him within 106 days and he will voluntary dismiss this civil action agaisnt the Defendants.

7. That this Offer to settle this civil action for $100,000.00 will expire on OCT. 19, 2013.

Signed this 3rd day of July, 2013.

Respectfully submitted,

R. J. Hoslett

Raymond James Hoslett
Plaintiff in Pro se

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JERMAINE SATTERWHITE, Plaintiff v. MARIA LUISA DY, M.D.; MANUELL LACIST; KENDALL HIRANO, PA-C; DENISE DUBLE, FNP; JOHN AND JANE DOES 1-10 and UNITED STATES OF AMERICA. Defendants.	NO. 2:11-cv-00582 FIRST AMENDED COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff Jermaine Satterwhite and claims, alleges, and states as follows:

I. PARTIES

1.1 Plaintiff Jermaine Satterwhite ("Plaintiff Satterwhite") is a single adult man. At all relevant times, Plaintiff Satterwhite was in custody of the United States and the Bureau of Prisons ("BOP") as a prisoner. As such Plaintiff is entitled, under the protection of Amendment Eight to the U.S. Constitution, to be free of cruel and unusual punishment.

1.2 Defendant Maria Luisa Dy, M.D. ("Defendant Dy or "Dr. Dy"), at all relevant times, was a physician licensed to practice and practicing medicine in the State of Washington and

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upon information and belief, was an employee and/or agent of the BOP and of defendant United States of America.

1.3 Defendant Manuell Lacist ("Defendant Lacist"), at all relevant times, was a certified health care provider licensed to practice and practicing as a certified health care provider in the State of Washington and, upon information and belief, was an employee and/or agent of BOP and of defendant United States of America.

1.4 Defendant Kendall Hirano, PA-C ("Defendant Hirano"), at all relevant times, was a Certified Physician Assistant licensed to practice and practicing as a Physician Assistant in the State of Washington and, upon information and belief, was an employee and/or agent of the BOP and of defendant United States of America.

1.5 Defendant Denise Duble, FNP ("Defendant Duble"), at all relevant times, was a Family Nurse Practitioner licensed to practice and practicing as a Family Nurse Practitioner in the State of Washington and, upon information and belief, was an employee and/or agent of the BOP and of defendant United States of America.

1.6 Defendant United State of America is a governmental entity with jurisdiction and control of the Bureau of Prisons.

1.7 Upon information and belief, Plaintiff Satterwhite alleges that there may be other individuals, and/or entities who may be liable for Plaintiff's injuries and damages but whose identities are presently unknown and who, for purposes of this Complaint, are referred to as John and Jane Does. When the true names of these Defendants shall be discovered, this Complaint will be amended to add these names.

II. JURISDICTION, VENUE AND NOTICE OF CLAIM

2.1 Jurisdiction of the court is proper under 28 U.S.C. §§1331, 1343(3) and 1346.

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2.2 Venue is proper in this district pursuant to 28 U.S.C. §1391(b)(2) and §1391(e), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed. This is an action for medical negligence pursuant to 28 U.S.C §2674 (the Federal Tort Claims Act or "FTCA') and civil rights violations of Plaintiff's constitutional rights to be free of cruel and unusual punishment, ("*Bivens* claims").

2.3 Compensatory damages are sought pursuant to the FTCA and *Bivens* claims. Punitive damages are sought against all defendants sued in their individual capacity pursuant to the *Bivens* claims.

2.4 All governmental en*tities* were notified of this claim in a timely fashion and all administrative exhaustion and notice requirements under the FTCA statutes have been satisfied.

III. FACTS

3.1 . Plaintiff Satterwhite was incarcerated in the United States Bureau of Prisons' Federal Detention Center located at Seatac, Washington ("FDC Seatac") from approximately March 27, 2008 to April 21, 2009.

3.2 On March 27, 2008, Stephen Leaf, PA-C, a medical staff member at FDC Seatac, administered a skin test for tuberculosis ("TB") to Plaintiff Jermaine Satterwhite.

3.3 On March 29, 2008, Hany Sidhom, a staff member at FDC Seatac, measured the skin test reaction and found it to be 18 millimeters induration.

3.4 A TB skin test reaction of 18 millimeters induration is considered strongly positive for TB and indicative of latent TB.

3.5 On March 29, 2008, Linda Pedersen, ARNP, a staff member at FDC Seatac requested that a chest radiograph (x-ray) of Plaintiff' Satterwhite be obtained to rule out active TB.

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3.6 On April 4, 2008, the x-ray of Plaintiff Satterwhite's chest was performed and on April 7, 2008, the report stated that the chest x-ray was negative.

3.7 According Washington and national standards and protocols and according to the BOP's own policies and procedures, an inmate such as Plaintiff Satterwhite with a positive skin test of 18 millimeters and a negative chest x-ray is considered to have latent TB and be at high-risk for developing active TB and thus is high priority for treatment in order to prevent the development of active TB.

3.8 On April 8, 2008, Defendant Manuell Lacist obtained a medical history and performed a physical examination on Plaintiff Satterwhite. The medical history obtained by Defendant Lacist, as documented in the medical records, includes the fact that Plaintiff Satterwhite was found to have a highly positive TB skin test of 18 mm induration and a negative chest x-ray. In accordance with the BOP's own policies and procedures, Plaintiff Satterwhite should have been considered to have latent TB and was at high priority for anti-TB treatment. Despite this, Defendant Lacist made no recommendation for treatment or referral of Plaintiff to other medical staff member for treatment of TB.

3.9 Defendant Maria Luisa Dy, M.D. was the physician assigned to Plaintiff Satterwhite. She was responsible for providing direct care to him and for supervising the care provided to him by other medical staff members at FDC Seatac whose records she reviewed and co-signed. As the medical records document, Defendant Dy co-signed the record containing the physical examination by Defendant Lacist on April 8, 2008.

3.10 Despite the fact that she was assigned as Plaintiff Satterwhite's physician at FDC Seatac and her knowledge of Plaintiff Satterwhite's medical history, including that he tested highly positive for TB on March 29, 2008 and had a negative chest x-ray on April 4, 2008, Dr.

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Dy never examined Plaintiff Satterwhite, never prescribing any anti-TB medication to him and never implemented any plan for monitoring him. Instead, she merely co-signed the records of other providers, acquiescing in their decisions.

3.11 On January 27, 2009, Plaintiff Satterwhite submitted a written "Inmate Request to Staff" form. On the form, Plaintiff Satterwhite requested treatment for a productive cough that he had had for at least a month.

3.12 On January 30, 2009, Plaintiff Satterwhite was seen at the FDC Seatac medical facility by Defendant Kendall Hirano, PA-C, a Certified Physician Assistant. Defendant Hirano documented in the medical record that Plaintiff Satterwhite reported that he had been suffering from a productive cough for about a month that was worse at night and that had been producing green-colored sputum.

3.13 Despite Plaintiff Satterwhite's history of a highly positive TB skin test on March 29, 2008 and a negative chest x-ray on April 4, 2008 after which he was prescribed no anti-TB treatment, and despite the fact that he now presented with pulmonary symptoms indicating active TB, Defendant Hirano decided not to order a chest x-ray or any other diagnostic evaluation and or to prescribe any TB treatment. He also decided not to refer Plaintiff Satterwhite for evaluation and treatment by a physician. Instead, Defendant Hirano chose to incorrectly diagnosed Plaintiff Satterwhite with "***cough secondary to post-nasal drainage/allergic rhinitis***" and discharged him with only the recommendation that he purchase over-the-counter allergy tablets at the commissary.

3.14 Defendant Dr. Dy again co-signed Defendant Hirano's January 30, 2009 medical examination and evaluation of Plaintiff Satterwhite without seeing or examining Plaintiff Satterwhite or taking any further action including ordering any diagnostic tests or prescribing

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anti-TB treatment as required by standard of care and by national, state and BOP standards of care and protocols.

3.15 On March 16, 2009, Plaintiff Satterwhite returned to the medical facility where he was again seen by Defendant Hirano. Defendant Hirano documented in the medical record that Plaintiff Satterwhite was now suffering from sharp left-sided chest pain which was "aggravated with deep inspiration, yawning/sneezing, and trunk position," and that Plaintiff Satterwhite was continuing to have the productive cough that he had previously reported to Defendant Hirano as having started in December, 2008. On examination, Defendant Hirano found that Plaintiff Satterwhite had pain over his 5th and 6th rib costo-chondral joints of h is chest. The persistent productive cough and pain in the ribs and joints of the chest showed that not only did Plaintiff Satterwhite have active TB, but that the TB had spread to the chest wall from the lungs.

3.16 Despite Plaintiff Satterwhite's history of a highly positive skin test and pulmonary signs and symptoms indicating active and spread TB which Defendant Hirano, as a Certified Physician Assistant, had to have known were indicative of active TB, Defendant Hirano again decided not to prescribe any anti-TB treatment or refer Plaintiff Satterwhite for evaluation to determine the nature and extent of the TB and treatment by a physician as required. Instead, Defendant Hirano merely diagnosed Plaintiff Satterwhite with "***other anomalies of the ribs and sternum***" for which he prescribed indomethacin, an anti-inflammatory.

3.17 Despite these facts, Defendant Dr. Dy again co-signed the medical record documenting the examination by Defendant Hirano on March 16, 2009 without taking any action whatsoever, including failing to examine him, failing to order that he be further evaluated and failing to prescribe any anti-TB medications despite clear proof that Plaintiff Satterwhite had active TB that was spreading.

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3.18 On April 17, 2009, Defendant Denise Duble, FNP, a Family Nurse Practitioner, evaluated Plaintiff Satterwhite prior to his transfer to the federal correctional facility in Herlong, California. On the Bureau of Prisons Health Services Inmate Intra-system Transfer form, Defendant Duble documented that Plaintiff Satterwhite had a positive skin test measuring 18 mm on March 29, 2008 and a negative chest x-ray on April 4, 2008. Defendant Duble also documented that Plaintiff Satterwhite's current health problems included a cough and "other abnormalities of the ribs and sternum." However, Defendant Duble incorrectly states that Plaintiff Satterwhite's TB skin test indicated a "nonspecific reaction to tuberculin skin test" and that he had "no symptoms" of TB, despite the fact that Plaintiff Satterwhite's cough and pain in the ribs over the lung areas along with a highly positive TB skin test were all indicative of active TB. Instead of initiating prompt treatment for the now active and spreading TB and ordering a further evaluation and treatment for the TB as required by the applicable standard of care and state, national and BOP protocols and standards, she decided to authorize Plaintiff Satterwhite's transfer to the facility at Herlong with no diagnosis and no treatment or recommendations for treatment whatsoever.

3.19 On April 21, 2009, Plaintiff Satterwhite left FDC Seatac and on April 22, 2009 he arrived at the federal correctional facility in Herlong, CA ("FCI Herlong").

3.20 On the evening of May 2, 2009, Plaintiff Satterwhite reported to the medical facility at Herlong with symptoms of paresthesia (numbness) of both legs and continued pain in his chest.

3.21 On the morning of May 3, 2009, Plaintiff Satterwhite returned to the prison medical facility. He reported that he could not move his legs. He also reported that the symptoms were worse when he would lie on his side. He was assessed as having an elevated temperature of

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99 degrees Fahrenheit with "neurological component and possible infections" needing further evaluation.

3.22 On May 3, 3009, Plaintiff Satterwhite was transferred to St. Mary's Medical Center in Reno, Nevada where he was admitted. A chest x-ray revealed a lesion in the upper lobe of his right lung that measured 1.4 by 2.6 cm. He also had enlarged lymph nodes in the mediastinal, hilar and paratracheal areas and also in the azygoesophageal recess and the aortopulmonary window on computerized tomography (CAT). There were also lytic bone lesions present in the iliac wings, the right sacral ala, and the left pubic symphysis that were documented on both CAT and magnetic resonance imaging (MRI). A spinal MRI revealed a compression fracture of the 5th thoracic vertebra caused by an epidural mass that was compressing the spinal cord at T4 and T5, causing kyphotic deformity of the spinal cord at T5. The mass extended into the posterior mediastinum and the soft tissues. There was also a lesion present in the first lumbar vertebra. All of these lesions were proven to be caused by untreated, widespread, disseminated TB. Urinalysis also indicated kidney involvement with TB.

3.23 At 2am on May 4, 2009, Plaintiff Satterwhite underwent emergency decompression of the spinal cord performed by neurosurgeon David Leppla, M.D. The procedure required a thoracic spinal laminectomy that extended from T3 through T7 and involved drilling out laterally on both sides of the spinal cord, from pedicle to pedicle, until it was possible to insert a small biopsy forceps into the epidural space. At that point, pus was encountered indicating the presence of an epidural abscess which was determined to be infected with TB. During surgery, it was also noted that the tuberculosis had invaded the bone of the thoracic spine, causing instability. As Dr. Leppla's operative notes indicate, it was necessary for him to

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decompress the cord completely from pedicle to pedicle. Tissue samples were collected for pathological examination and culture.

3.24 Physician F. Kevin Murphy, M.D., F.A.C.P., a board certified internist and infectious disease specialist on staff at St. Mary's Medical Center took over management of Plaintiff Satterwhite's care after surgery. He started Plaintiff Satterwhite on four drugs to treat the active TB plus pyridoxine to control medication side effects.

3.25 On May 11, 2009, Plaintiff Satterwhite again underwent surgery by Dr. Leppla to stabilize his spine. Dr. Leppla performed an arthrodesis of T3 through T7 and instrumented fusions of T3-T4 and T5-7. This second spinal surgery involved using a high speed drill to enter the pedicle and then an awl to advance through the pedicle to the vertebral body. Bilateral pedicle screws were placed at T3 and T4, skipping the diseased segment at T5. Additional bilateral screws were used at T6 and T7. After placing the four pairs of screws, the distance from the distal to the proximal screw was measured and Dr. Leppla cut a bar to the appropriate length in anticipation of distracting across the collapsed T5 segment. The rod was dropped into the screws and the screws were secured down at T6 and T7 and then distracted across T5 in order to maintain or restore some of the body height that was lost because of the invasion of the TB into the bone. The set screws in T3 and T4 were then torqued down and snapped off. The high speed drill was again used to decorticate the area between the transverse process and the facets from the screw of T3 through the screw of T7. Allograft mixed with bone putty was then packed underneath the rod and between the screws for the arthrodesis. Additional specimens for culture were also obtained.

3.26 As a result of the undiagnosed and untreated TB, Plaintiff Satterwhite suffered permanent, severe and disabling injury to his spinal cord, including paralysis and loss of

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sensation to both legs. In addition to an epidural abscess in his spine and osteomyelitis in his vertebra, Plaintiff Satterwhite suffered severe pain, multiple surgeries, and endured intensive and painful physical therapy. He continues to have an abnormal neurological findings in his lower extremities and to suffer numbness of his legs and as well as a permanent impairment of his ability to walk. In addition, his ability to flex and extend his thoracic spine is also significantly limited and activities including lifting, sitting and bending are painful.

3.27 According to the infectious disease specialist from the Mayo Clinic who evaluated Plaintiff Satterwhite when he was transferred to the Federal Medical Center in Rochester, Minnesota in June, 2009 after his discharge from St. Mary Hospital, the fact that the surgical hardware in Mr. Satterwhite's spine during the two spinal surgeries had to be inserted into an operative bed that was infected with TB puts him at lifelong risk for recurrence of TB which will require life-long surveillance. He is also at risk for bacterial hematogenous infection of the extensive hardware placed to stabilize his spine.

3.28 According to infectious disease specialist Dr. F. Kevin Murphy, who cared for Plaintiff Satterwhite at St. Mary Hospital, all of the injuries and resulting disability Plaintiff suffered were entirely preventable had the Defendant health care providers at the Federal Detention Center in Seattle followed the standard of care and the nationally required protocols for treating a patient like him.

Plaintiff Satterwhite entered the Federal Detention Center in Seattle, Washington at the age of 35 with a diagnosable and treatable condition. Because the TB was ignored and untreated from March 29, 2008 until May 4, 2009, active TB infection developed and spread throughout Plaintiff Satterwhite's body including to his thoracic and lumbar spine,

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vertebrae, lymph nodes, pelvis, and kidneys causing permanent damage and physical disability.

IV. CAUSES OF ACTION

Bivens Claims for Cruel and Unusual Punishment and Violation of Constitutional Rights

4.1 Plaintiff Satterwhite incorporates by reference all allegations and statements contained in the preceding paragraphs, as if fully set forth here.

4.2 By his actions as alleged herein, Defendant Manuell Lacist violated Plaintiff Satterwhite's right to be free from cruel and unusual punishment and the right to adequate medical care under the Eighth Amendment of the United States Constitution by willfully and purposefully and with deliberate indifference failing to respond to and treat Plaintiff Satterwhite's known serious medical condition of latent TB.

4.3 When Defendant Lacist performed a medical history and physical examination on Plaintiff Satterwhite on April 8, 2008, he knew that Plaintiff Satterwhite had a highly positive TB skin test of 18 millimeters and a negative chest x-ray, both of which indicated that Plaintiff likely had latent TB, was at high risk for developing active TB and was a high priority for anti-TB treatment. He also knew that no anti-TB treatment had been provided to the Plaintiff as of that date.

4.4 Defendant Lacist also knew that failing to refer Plaintiff to another health care provider for anti-TB treatment and failing to order anti-TB treatment himself would likely cause Plaintiff to develop active TB, a very serious and life threatening disease.

4.5 Defendant Lacist also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

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4.6 Defendant Lacist willfully and purposefully and with deliberate indifference deprived Plaintiff Satterwhite of the essential medical care that Plaintiff required by failing to prescribe any anti-TB treatment, refer Plaintiff for evaluation and treatment by a physician or inform Plaintiff or any other health care providers at FCD SeaTac that Plaintiff had a positive skin test of 18 millimeters, which meant that Plaintiff likely had latent TB and required immediate anti-TB treatment and diagnosis for latent TB, knowing that his deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development of active TB, which is a life-threatening illness, cause the wanton infliction of unnecessary pain upon Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment.

4.7 At all material times, Defendant Lacist was acting under color of law by exercising power made possible because he was clothed in the authority of federal law.

4.8 As a result of Defendant Lacist's constitutional violations of Plaintiff Satterwhite's rights, Plaintiff Satterwhite sustained injuries and damages including the following:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life;

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d. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

e. The conduct of Defendant Lacist constituted acting in reckless disregard and deliberate indifference to Plaintiff's constitutional right to be free of cruel and unusual punishment and right to adequate medical care, entitling Plaintiff Satterwhite to punitive damages.

4.9 By his actions as alleged herein, Defendant Kendall Hirano violated Plaintiff Satterwhite's right to be free from cruel and unusual punishment and the right to adequate medical care under the Eighth Amendment of the United States Constitution by willfully and purposefully and with deliberate indifference failing to respond to and properly treat Plaintiff Satterwhite's known serious medical condition.

4.10 When Defendant Hirano examined Plaintiff Satterwhite on January 30, 2009, he knew that Plaintiff Satterwhite likely had active TB, as evidenced by a highly positive skin test of 18 millimeters in March 2008 and a productive cough lasting at least a month. Defendant Hirano also knew that Plaintiff Satterwhite had never been prescribed any anti-TB medications, thereby increasing the likelihood that he now had active TB, a very serious and life threatening disease. Defendant Hirano also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.11 When Defendant Hirano examined Plaintiff Satterwhite again on March 16, 2009, at which time the Plaintiff had sharp left-sided chest pain that was worse with deep inspiration and still had the productive cough that he had been suffering from since at least December, 2008, Defendant Hirano knew that Plaintiff's symptoms indicated he likely had active TB and that

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Plaintiff required treatment for active TB which he had never received. Defendant Hirano also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.12 Defendant Hirano willfully and purposefully and with deliberate indifference deprived Plaintiff Satterwhite the essential medical care he required by preventing Plaintiff from receiving anti-TB treatment, knowing that his deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development and progression of active TB, which is a life-threatening illness, cause the wanton infliction of unnecessary pain on Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment.

4.13 At all material times, Defendant Hirano was acting under color of law by exercising power made possible because he was clothed in the authority of federal law.

4.14 As a proximate result of Defendant Hirano's constitutional violations of Plaintiff Satterwhite's rights, Plaintiff Satterwhite sustained injuries and damages including the following:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

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d. Loss of the quality and enjoyment of his constitutional rights and life;

e. The conduct of Defendant Hirano constituted acting in reckless disregard and deliberate indifference to Plaintiff Satterwhite's constitutional right to be free of cruel and unusual punishment and his right to adequate medical care, entitling Plaintiff Satterwhite to punitive damages.

4.15 By her actions alleged herein, Defendant Maria Luisa Dy, M.D. violated Plaintiff Satterwhite's right to be free of cruel and unusual punishment and to adequate medical care under the Eighth Amendment of the United States Constitution by willfully and purposefully failing to respond to and treat Plaintiff Satterwhite's known serious medical condition.

4.16 Defendant Dy knew that also knew that when Plaintiff Satterwhite was examined on April 8, 2008 by Defendant Lacist, whose care she supervised and whose records she reviewed as evidenced by her signature, that Plaintiff Satterwhite likely had latent TB, as evidenced by a highly positive skin test of 18 millimeters and a negative chest x-ray, after which he was given no anti- TB treatment. Defendant Dy knew that failing to order anti-TB treatment to treat the latent TB would likely cause Plaintiff to develop active TB, a very serious and life threatening disease. Defendant Dy also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.17 Defendant Dy also knew that when Plaintiff Satterwhite was examined on January 30, 2009 by Defendant Hirano, whose care she supervised and whose records she reviewed as evidenced by her signature, that Plaintiff Satterwhite had active TB, as evidenced by a positive skin test of 18 millimeters and a negative chest x-ray, a productive cough for at least a month and no anti-TB treatment. Defendant Dr. Dy also knew that failing to prescribe anti-TB medications

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would result in the progression of the TB, a very serious and life threatening disease. Defendant Dy knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.18 Defendant Dr. Dy also knew that when Defendant Hirano, whom she supervised and whose records she reviewed as evidenced by her signature, examined Plaintiff Satterwhite again on March 16, 2009 Plaintiff Satterwhite again demonstrated the signs and symptoms of active TB that was now spreading, including a productive cough since December, 2009 and multiple areas of rib and chest pain, and that he had never been provided with anti-TB treatment. Defendant Dy knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.19 Defendant Dy willfully and purposefully deprived Plaintiff Satterwhite the essential medical care he required by acquiescing in the constitutional deprivations by Defendants Lacist and Hirano, including preventing Plaintiff from receiving any anti-TB treatment, knowing that the deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development and progression of active TB, which is a life-threatening illness, cause the wanton infliction of unnecessary pain on Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment.

4.20 Defendant Dr. Dy's actions, including reviewing and signing the medical records of Defendants Lacist and Hirano without ever examining Plaintiff Satterwhite, and failing to prescribe anti-TB treatment, or refer him for further evaluation and treatment, knowing that the

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deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development and progression of active TB, which is a life-threatening illness and cause the wanton infliction of unnecessary pain on Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment, were done with a reckless or callous indifference to Plaintiff Satterwhite's constitutional rights.

4.21 At all material times, Defendant Dy was acting under color of law by exercising power made possible because she was clothed in the authority of federal law.

4.22 As a proximate result of Defendant Dy's constitutional violations of Plaintiff Satterwhite's rights, Plaintiff Satterwhite sustained injuries and damages including as follows:

a. Non-economic damages including past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life;

e. The conduct of Defendant Dy constituted acting in reckless disregard and deliberate indifference to Plaintiff Satterwhite's constitutional right to be free

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of cruel and unusual punishment, and to adequate medical care, entitling Plaintiff Satterwhite to punitive damages.

4.23 By her actions alleged herein, Defendant Denise Duble, FNP, violated Plaintiff Satterwhite's right to be free from cruel and unusual punishment and the right to adequate medical care under the Eighth Amendment of the United States Constitution by willfully and purposefully and with deliberate indifference failing to respond to and treat Plaintiff Satterwhite's known serious medical condition of active TB.

4.24 When Defendant Duble reviewed Plaintiff Satterwhite's medical history on April 17, 2009 in preparation for his transfer to California, she knew that Plaintiff Satterwhite had developed active pulmonary TB, as evidenced by a highly positive skin test of 18 millimeters, a history of a persistent productive cough since December, 2008, and findings on examination by Defendant Hirano of multiple areas of rib and chest pain. Defendant Duble knew that failing to treat Plaintiff Satterwhite for active TB would likely cause the TB to progress, seriously threatening Plaintiff's health and life. Defendant Duble also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.25 Defendant Duble willfully and purposefully and with deliberate indifference deprived Plaintiff Satterwhite the essential medical care he required by denying Plaintiff from undergoing treatment and diagnosis for active TB and by incorrectly writing in the medical records that Plaintiff's TB test indicated "a nonspecific reaction to tuberculin test" and that Plaintiff "had no symptoms" of TB, knowing that her deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the progression of active TB, which is a life-threatening illness, cause the wanton infliction of

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unnecessary pain on Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment.

4.26 At all material times, Defendant Duble was acting under color of law by exercising power made possible because she was clothed in the authority of federal law.

4.27 As a result of Defendant Duble's constitutional violations of Plaintiff Satterwhite's rights, Plaintiff Satterwhite sustained injuries and damages including the following:

a. Non-economic damages including past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life;

d. Economic losses including future medical and health care expenses and loss of future earnings and earning capacity;

The conduct of Defendant Duble constituted action in reckless disregard and deliberate indifference to Plaintiff's constitutional right to be free of cruel and unusual punishment and right to adequate medical care, entitling Plaintiff Satterwhite to punitive damages.

FTCA Claim Against UNITED STATES for Negligent Medical Care (Non-Jury Claim)

4.28 Plaintiff Satterwhite incorporates by reference all allegations contained in the preceding paragraph, as if fully set forth here.

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4.29 All conditions precedent to this lawsuit have been performed and have occurred, including proving pre-suit notice to the United States pursuant to the FTCA and requesting administrative remedy by Plaintiff Satterwhite from the BOP. Six months have elapsed from the date a re-suit claim was filed and Plaintiff Satterwhite's request for administrative remedy from the BOP was rejected. Therefore, all administrative exhaustion requirements are met and this claim is ripe.

4.30 At all material times, the United States' employees and agents Dy, Lacist, Hirano and Duble negligently cared for and treated Plaintiff Satterwhite while he was incarcerated the FDC Seatac and provided medical care in a negligent manner and also acted with deliberate indifference to Plaintiff Satterwhite's serious medical condition.

4.31 Maria Luisa Dy, M.D., during the course and scope of her employment and/or agency by the United States and the Bureau of Prisons, negligently failed to exercise that degree of care, skill, and learning expected of a reasonably prudent physician at the time and in the profession to which she belonged and acting in the same or similar circumstances.

4.32 The negligent actions and failures to act by Defendant Dy constitute medical malpractice.

4.33 The negligence of Defendant Dy includes, but is not limited to, never examining, evaluating or treating Plaintiff Satterwhite for TB despite the facts that she was the physician assigned to Plaintiff Satterwhite's care, Plaintiff Satterwhite had a highly positive skin test of 18 millimeters on March 29, 2008 and a negative chest x-ray on April 4, 2008, which strongly indicated that he had latent TB and was at high-risk for developing active TB and required treatment to prevent the development of active TB; failing to order any anti-TB treatment whatsoever for Plaintiff Satterwhite, thereby allowing the latent TB to develop into active TB;

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failing to evaluate or treat Plaintiff Satterwhite for active TB despite the fact that he exhibited signs and symptoms clearly indicating the presence of active TB and; failing to supervise and intervene, thereby acquiescing when Lacist and Hirano, whose care she supervised, failing to evaluate and treat Plaintiff Satterwhite who was at high risk for and did develop active TB while he was under their care.

4.34 As a direct and proximate result of Dr. Dy's negligence, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages including past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of enjoyment and quality of life.

4.35 Dr. Dy also negligently failed to obtain Plaintiff Satterwhite's informed consent by failing to inform him of material facts, including that he had a highly positive skin test of 18 millimeters which strongly indicated that he had latent TB and was at high risk for developing active TB; that according to the standard of care and national, state and BOP standards and protocols, he required treatment to prevent the development of active TB; that the lack of anti-TB treatment would likely result in his developing active TB; that the pulmonary symptoms he developed, including a productive cough and the findings on examination of multiple areas of rib

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and chest pain, clearly indicated that he had active TB; that TB is a serious and life-threatening disease, that the failure to treat him for active TB would likely result in the TB spreading throughout his body and result in severe, permanent, and debilitating injury and death.

4.36 Dr. Dy also failed to inform Plaintiff Satterwhite regarding the recommended treatment for a person at high risk for developing active TB and for treatment of active TB. Dr. Dy also failed to inform Plaintiff Satterwhite of the recognized serious possible risks and complications of non-treatment, either before or after the TB became active.

4.37 Plaintiff Satterwhite was never provided with any written information or verbal explanation by Dr. Dy concerning the risks of treatment or non-treatment for TB.

4.38 A reasonably prudent patient like Plaintiff Satterwhite, under similar circumstances as those of Plaintiff Satterwhite, if informed of these material facts, would have demanded treatment had he known it was indicated and would not have consented to the lack of any treatment whatsoever to which he was subjected, having never been informed of these material facts.

4.39 As a direct and proximate result of Dr. Dy's failure to obtain Plaintiff Satterwhite's informed consent, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

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c. Economic losses consisting of past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of enjoyment and quality of life.

4.40 Kendall Hirano, PA-C, during the course and scope of this employment and/or agency by the United States and the Bureau of Prisons, negligently failed to exercise that degree of care, skill, and learning expected of a reasonably prudent certified physician's assistant at the time and in the profession to which he belonged and acting in the same or similar circumstances.

4.41 The negligent actions and failures to act by Defendant Hirano constitute medical malpractice.

4.42 The negligence of Defendant Hirano includes, but is not limited to, failing to evaluate and treat Plaintiff Satterwhite for active TB despite the facts that Plaintiff Satterwhite had a positive skin test of 18 millimeters on March 29, 2008, which strongly indicated that he was at high-risk for developing active TB; that when Hirano examined Plaintiff Satterwhite on January 30, 2009 he found that Plaintiff Satterwhite had signs and symptoms of active TB, including a productive cough, and; that when he examined Plaintiff Satterwhite again on March 16, 2009, he found the Plaintiff to have a persistent cough and in addition, multiple areas of rib and chest pain aggravated with inspiration, yawning and trunk position, all of which strongly indicated that he had active TB.

4.43 As a direct and proximate result of Hirano's negligence, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

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b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses consisting of past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of enjoyment and quality of life.

4.44 Hirano also failed to obtain Plaintiff Satterwhite's informed consent when he failed to inform him of material facts, including that he had a positive skin test of 18 millimeters which strongly indicated that he was at high risk for developing active TB; that according to national, state and BOP standards and protocols, Plaintiff Satterwhite required treatment to prevent the development of active TB; that lack of anti-TB treatment would likely result in his developing active TB; that the pulmonary symptoms he developed, including a productive cough and the findings he noted on examination of Plaintiff Satterwhite multiple areas of rib and chest pain, clearly indicated that he had active TB and; that TB was a serious and life-threatening disease, that the failure to treat him for TB could result in the TB spreading throughout his body and result in severe, permanent, and debilitating injury and death.

4.45 Hirano also failed to inform Plaintiff Satterwhite of the type of treatment for TB. Defendant Hirano also failed to inform Plaintiff Satterwhite of the recognized serious possible risks, complications, involved in the non-treatment of TB.

4.46 Plaintiff Satterwhite was never provided with any written information or verbal explanation by Hirano concerning the risks of treatment or non-treatment of TB, either before or after he developed a productive cough and pain involving the chest indicative of active TB.

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4.47 A reasonably prudent patient like Plaintiff Satterwhite, under similar circumstances as those of Plaintiff Satterwhite, if informed of these material facts, would have demanded treatment and would not have consented to the lack of any treatment had he known treatment was indicated.

4.48 As a direct and proximate result of Hirano's failure to obtain Plaintiff Satterwhite's informed consent, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life.

4.49 Manuell Lacist, during the course and scope of his employment and/or agency by the United States and the Bureau of Prisons, negligently failed to exercise that degree of care, skill, and learning expected of a reasonable certified health care assistant at the time and in the profession to which he belonged and acting in the same or similar circumstances.

4.50 The negligent actions and failures to act by Lacist constitute medical malpractice.

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4.51 The negligence of Lacist includes, but is not limited to, breaching the applicable standard of care by performing a physical examination on Plaintiff Satterwhite and noting that he had a highly positive TB skin test reaction of 18 mm and negative chest x-ray but failing to inform Plaintiff or any other healthcare providers at the detention center that Plaintiff had a positive skin test and failing to refer him for immediate anti-TB treatment, knowing that his deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development and progression of active TB, which is a life-threatening illness.

4.52 As a direct and proximate cause of Lacist's negligence, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of enjoyment and quality of life.

4.53 Denise Duble, FNP, during the course and scope of her employment and/or agency by the United States and the Bureau of Prisons, negligently failed to exercise that degree of care, skill, and learning expected of a reasonably prudent family nurse practitioner at the time and in the profession to which she belonged and acting in the same or similar circumstances.

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4.54 The negligent actions and failures to act by Duble constitute medical malpractice.

4.55 The negligence of Duble includes, but is not limited to, clearing Plaintiff Satterwhite for transfer to California despite information documented in his medical records stating that he had a highly positive TB skin test of 18 mm indicating he was at high risk for developing active TB, that he had a cough, and that he had abnormalities involving his ribs and sternum indicating that he had active TB that had spread, and that despite these facts stating in the records that he had a "nonspecific reaction to tuberculin skin test" and that he was "sx [symptom] free for 30 days." Duble also breached the standard of care by failing to immediately halt the transfer of Plaintiff Satterwhite to California and initiate his immediate evaluation and treatment for active TB.

4.56 As a direct and proximate result of Duble's negligence, Plaintiff was not treated for active TB but was instead transferred to California, causing him to suffer severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement.

c. Economic losses including past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life;

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4.57 Duble also failed to inform Plaintiff Satterwhite of material facts, including that Plaintiff Satterwhite had a positive skin test of 18 millimeters indicating that Plaintiff Satterwhite was at high-risk for developing active TB , that he developed signs and symptoms of active TB, including a productive cough and the findings on examination of multiple areas of rib and chest pain, that TB was a serious and life-threatening disease, and that the failure to immediately initiate treatment of Plaintiff Satterwhite for active TB rather than to transfer him to California could result in severe, permanent, and debilitating injury and death.

4.58 Duble also failed to inform Plaintiff Satterwhite of the forms of treatment for TB, or the recognized serious possible risks, complications, involved in the non-treatment of TB.

4.59 Plaintiff Satterwhite was never provided with any written information or verbal explanation by Defendant Duble concerning the risks of treatment or non-treatment for TB.

4.60 A reasonably prudent patient like Plaintiff Satterwhite, under similar circumstances as those of Plaintiff Satterwhite, if informed of these material facts, would have demanded treatment to prevent active TB and treatment for active TB when it developed and would not have consented to the lack of any treatment whatsoever to which he was subjected, having never been informed of these material facts. As a direct and proximate result of Defendant Duble's failure to obtain Plaintiff Satterwhite's informed consent, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

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b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life.

4.61 The United States is liable pursuant to the FTCA, 28 U.S.C 2674, for its employees' and/or agents' negligent care and negligent failure to administer appropriate care, which directly and proximately resulted in certain injury and disability to Plaintiff Satterwhite, all to his general damage.

4.62 As a direct and proximate result of the negligent acts, omission and conduct of the United States through its employees and agents, Plaintiff Satterwhite suffered and continues to suffer certain injuries, including: permanent spinal cord injury, numbness of his legs, a multi-level fused thoracic spine, invasion of TB into his chest, pelvis, kidneys and organs, back pain, loss of balance, inability to walk independently, back pain, limitation of range of motion, severe physical, mental and emotional pain and suffering and disfigurement and disability that will continue throughout his life.

4.63 As further direct and proximate result of the negligent acts, omission and conduct of the United States through its employees and agents, Plaintiff Satterwhite's ability to work, earn a living, support his children, engage in normal activities of daily life, and enjoy life are significantly and permanently reduced. Past and future medical expenses have been and will

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continue to be incurred throughout his lifetime in an amount not now known to Plaintiff Satterwhite.

FTCA Claim Against UNITED STATES for Negligent Establishment and Enforcement of Policies for Provision of Medical Care to Prisoners (Non-Jury Claim)

4.64 Plaintiff Satterwhite incorporates by reference all allegations contained in the preceding paragraph, as if fully set forth here.

4.65 All conditions precedent to this lawsuit have been performed and have occurred, including proving pre-suit notice to the United States pursuant to the FTCA and requesting administrative remedy by Plaintiff Satterwhite from the BOP. Six months have elapsed from the date a re-suit claim was filed and Plaintiff Satterwhite's request for administrative remedy from the BOP was rejected. Therefore, all administrative exhaustion requirements are met and this claim is ripe.

4.66 At all material times, the United States failed to use reasonable care in the establishment and enforcement of policies, procedures and directives for the provision of medical care to prisoners. The policies, procedures and directives were inadequate and were negligently enforced, causing Plaintiff Satterwhite to suffer certain injuries including permanent spinal cord injury, numbness of his legs, a multi-level fused thoracic spine, invasion of TB into his chest, pelvis, kidneys and organs, back pain, loss of balance, inability to walk independently, back pain, limitation of range of motion, severe physical, mental and emotional pain and suffering and disfigurement and disability that will continue throughout his life.

4.67 At all material times, the United States, through its employees and agents Dy, Hirano, Lacist and Duble, negligently implemented and/or applied BOP medical care policy, which required that an inmate such as Plaintiff Satterwhite with a positive skin test of 18

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millimeters and a negative chest x-ray is to be considered a high-risk for developing active TB and to be provided for treatment for latent TB in order to prevent the development of active TB and which required that an inmate, such as Plaintiff Satterwhite, who exhibited additional symptoms of active TB, following the failure to treat latent TB, including a productive cough over the duration of a month and the findings on examination of multiple areas of rib and chest pain, be treated for active TB, a very serious and life threatening disease. In addition to qualifying as negligence, the United States' action violated Plaintiff Satterwhite's constitutional right to adequate and reasonable medical care.

4.68 As a direct and proximate result of the negligent acts, omission and conduct of the United States through its employees and agents, Plaintiff Satterwhite suffered and continues to suffer certain injuries, including: permanent spinal cord injury, numbness of his legs, a multi-level fused thoracic spine, invasion of TB into his chest, pelvis, kidneys and organs, back pain, loss of balance, inability to walk independently, back pain, limitation of range of motion, severe physical, mental and emotional pain and suffering and disfigurement and disability that will continue throughout his life.

4.69 As further direct and proximate result of the negligent acts, omission and conduct of the United States through its employees and agents, Plaintiff Satterwhite's ability to work, earn a living, support his children, engage in normal activities of daily life, and enjoy life are significantly and permanently reduced. Past and future medical expenses have been and will continue to be incurred throughout his lifetime in an amount not now known to Plaintiff Satterwhite.

FTCA Claim Against UNITED STATES for Negligent Hiring/Retention (Non-Jury Claim)

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4.70 Plaintiff Satterwhite incorporates by reference all allegations contained in the preceding paragraph, as if fully set forth here.

4.71 All conditions precedent to this lawsuit have been performed and have occurred, including proving pre-suit notice to the United States pursuant to the FTCA and requesting administrative remedy by Plaintiff Satterwhite from the BOP. Six months have elapsed from the date a re-suit claim was filed and Plaintiff Satterwhite's request for administrative remedy from the BOP was rejected. Therefore, all administrative exhaustion requirements are met and this claim is ripe.

4.72 At all material times hereto, the United States negligently hired and retained medical health care providers to provide health care to federal prisoners, including Maria Luisa Dy, M.D., Manuell Lacist, Kendall Hirano, PA-C; and Denise Duble, who did not have the experience and qualifications necessary to provide adequate medical care to prisoners with latent and/or active TB, including Plaintiff Satterwhite. The United States knew or should have known that the providers taking care of Plaintiff Satterwhite were not qualified to make the medical determinations necessary for his care.

4.73 As a direct and proximate result of the negligent acts, omission and conduct of the United States through its employees and agents, Plaintiff Satterwhite suffered and continues to suffer certain injuries, including: permanent spinal cord injury, numbness of his legs, a multi-level fused thoracic spine, invasion of TB into his chest, pelvis, kidneys and organs, back pain, loss of balance, inability to walk independently, back pain, limitation of range of motion, severe physical, mental and emotional pain and suffering and disfigurement and disability that will continue throughout his life.

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4.74 As further direct and proximate result of the negligent acts, omission and conduct of the United States through its employees and agents, Plaintiff Satterwhite's ability to work, earn a living, support his children, engage in normal activities of daily life, and enjoy life are significantly and permanently reduced. Past and future medical expenses have been and will continue to be incurred throughout his lifetime in an amount not now known to Plaintiff Satterwhite.

FTCA Claim Against UNITED STATES for Negligent Supervision (Non-Jury Claim)

4.75 Plaintiff Satterwhite incorporates by reference all allegations contained in the preceding paragraph, as if fully set forth here.

4.76 All conditions precedent to this lawsuit have been performed and have occurred, including proving pre-suit notice to the United States pursuant to the FTCA and requesting administrative remedy by Plaintiff Satterwhite from the BOP. Six months have elapsed from the date a re-suit claim was filed and Plaintiff Satterwhite's request for administrative remedy from the BOP was rejected. Therefore, all administrative exhaustion requirements are met and this claim is ripe.

4.77 At all material times hereto, the United States negligently supervised its medical health care providers, including defendants Dy, Lacist, Hirano and Duble. Physicians, including Maria Luisa Dy, M.D., did not adequately supervise health care providers Lacist, Hirano and Dy who did not have the experience and qualifications necessary to provide adequate medical care to prisoners with latent and/or active TB, including Plaintiff Satterwhite, and the BOP did not adequately supervise physicians, including Maria Luisa Dy, M.D.

4.78 As a direct and proximate result of the negligent acts, omission and conduct of the United States and its' agents, Plaintiff Satterwhite suffered and continues to suffer certain

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injuries, including: permanent spinal cord injury, numbness of his legs, a multi-level fused thoracic spine, invasion of TB into his chest, pelvis, kidneys and organs, back pain, loss of balance, inability to walk independently, back pain, limitation of range of motion, severe physical, mental and emotional pain and suffering and disfigurement and disability that will continue throughout his life.

4.79 As further direct and proximate result of the negligent acts, omission and conduct of the United States through its employees and/or agents, Plaintiff Satterwhite's ability to work, earn a living, support his children, engage in normal activities of daily life, and enjoy life are significantly and permanently reduced. Past and future medical expenses have been and will continue to be incurred throughout his lifetime in an amount not now known to Plaintiff Satterwhite.

4.80

FTCA Claim Against UNITED STATES for Negligent Training
(Non-Jury Claim)

4.81 Plaintiff Satterwhite incorporates by reference all allegations contained in the preceding paragraph, as if fully set forth here.

4.82 All conditions precedent to this lawsuit have been performed and have occurred, including proving pre-suit notice to the United States pursuant to the FTCA and requesting administrative remedy by Plaintiff Satterwhite from the BOP. Six months have elapsed from the date a re-suit claim was filed and Plaintiff Satterwhite's request for administrative remedy from the BOP was rejected. Therefore, all administrative exhaustion requirements are met and this claim is ripe.

4.83 At all material times hereto, the United States negligently trained its medical health care providers, including physicians, nurses and other health care providers who were

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assigned to provide care to federal prisoners, in diagnosing and treating latent and active TB, including Maria Luisa Dy, M.D., Manuell Lacist, Kendall Hirano, PA-C; and Denise Duble, who did not have the training experience and qualifications necessary to provide adequate medical care to prisoners with latent and active TB, including Plaintiff Satterwhite.

4.84 As a direct and proximate result of the negligent acts, omission and conduct of the United States, through its employees and/or agents, Plaintiff Satterwhite suffered and continues to suffer certain injuries, including: permanent spinal cord injury, numbness of his legs, a multi-level fused thoracic spine, invasion of TB into his chest, pelvis, kidneys and organs, back pain, loss of balance, inability to walk independently, back pain, limitation of range of motion, severe physical, mental and emotional pain and suffering and disfigurement and disability that will continue throughout his life.

4.85 As further direct and proximate result of the negligent acts, omission and conduct of the United States through its employees and/or agents, Plaintiff Satterwhite's ability to work, earn a living, support his children, engage in normal activities of daily life, and enjoy life are significantly and permanently reduced. Past and future medical expenses have been and will continue to be incurred throughout his lifetime in an amount not now known to Plaintiff Satterwhite.

FTCA Claim Against UNITED STATES for Intentional Infliction of Emotional Distress (Non-Jury Claim)

4.86 Plaintiff Satterwhite incorporates by reference all allegations contained in the preceding paragraph, as if fully set forth here.

4.87 All conditions precedent to this lawsuit have been performed and have occurred, including proving pre-suit notice to the United States pursuant to the FTCA and requesting administrative remedy by Plaintiff Satterwhite from the BOP. Six months have elapsed from the

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date a re-suit claim was filed and Plaintiff Satterwhite's request for administrative remedy from the BOP was rejected. Therefore, all administrative exhaustion requirements are met and this claim is ripe.

4.88 At all material times hereto, the United States' treatment of Plaintiff during his incarceration, including but not limited to its failure to provide him with reasonable and humane medical care, was conducted in an extreme and outrageous manner with the knowledge and Plaintiff Satterwhite was unable to care for himself during his incarceration.

4.89 The United States, through the conduct of its employees and/or agents at the BOP, acted intentionally and/or with reckless disregard of causing emotional distress to Plaintiff Satterwhite.

4.90 As a direct and proximate result of the unlawful conduct of the United States, through its employees and/or agents, Plaintiff Satterwhite suffered and continues to suffer severe mental and emotional pain and suffering and disability that will continue throughout his life.

FTCA Claim Against UNITED STATES for Intentional and/or Negligent Failure to Summon Medical Care for Prisoner in Immediate Need of Care (Non-Jury Claim)

4.91 Plaintiff Satterwhite incorporates by reference all allegations contained in the preceding paragraph, as if fully set forth here.

4.92 All conditions precedent to this lawsuit have been performed and have occurred, including proving pre-suit notice to the United States pursuant to the FTCA and requesting administrative remedy by Plaintiff Satterwhite from the BOP. Six months have elapsed from the date a re-suit claim was filed and Plaintiff Satterwhite's request for administrative remedy from the BOP was rejected. Therefore, all administrative exhaustion requirements are met and this claim is ripe.

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4.93 At all material times hereto, the United States, through its employees and/or agents at the BOP, knew or had reason to know that Plaintiff Satterwhite was in immediate need of medical care and failed to take reasonable action to summon such care.

4.94 As a direct and proximate result of the United States', through its employees and/or agents at the BOP, intentional and/or negligent failure to administer appropriate care, Plaintiff Satterwhite suffered and continues to suffer certain injuries, including: permanent spinal cord injury, numbness of his legs, a multi-level fused thoracic spine, invasion of TB into his chest, pelvis, kidneys and organs, back pain, loss of balance, inability to walk independently, back pain, limitation of range of motion, severe physical, mental and emotional pain and suffering and disfigurement and disability that will continue throughout his life.

4.95 As further direct and proximate result of the negligent acts, omission and conduct of the United States, through its employees and/or agents, Plaintiff Satterwhite's ability to work, earn a living, support his children, engage in normal activities of daily life, and enjoy life are significantly and permanently reduced. Past and future medical expenses have been and will continue to be incurred throughout his lifetime in an amount not now known to Plaintiff Satterwhite.

V. JURY DEMAND

Plaintiff Satterwhite demands a jury trial to resolve all claims brought herein except for the claim against the United States of America under the FTCA which must be adjudicated by the Court.

VI. PRAYER FOR RELIEF

WHEREFORE Plaintiff prays that, after due proceedings, judgment be entered in favor of Plaintiff and against all Defendants, jointly and severally, and that this Court:

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a. Award Plaintiff all compensatory damages reasonable under the circumstances, in an amount of no less than $12 million, including physical pain and suffering, mental anguish, and emotional distress, disfigurement, disability, medical expense, wage loss, loss of enjoyment of life, loss of the right to be free of cruel and unusual punishment and any and all other compensatory damages allowable by law, for each count alleged in this Complaint.

b. Award Plaintiff punitive damages against all Defendants sued in their individual capacities and each of them;

c. Award Plaintiff all attorney fees and costs.

d. Award Plaintiff's legal interest on all liquidated damages from the date of the legal demand until paid

e. Award all damages to Plaintiff available under federal law and such other and further relief as the Court deems just and proper, including attorneys' fees and costs where applicable.

DATED this 17th day of August, 2011.

Law Offices of Michael Withey

/s/ Michael Withey
Michael Withey, WSBA #4787
Co-Counsel for Plaintiff Satterwhite

Law Office of Joanne R. Werner

/s/ Joanne R. Werner
Joanne R. Werner, WSBA #22470
Co-Counsel for Plaintiff Satterwhite

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

JERMAINE SATTERWHITE, Plaintiff v. MARIA LUISA DY, M.D.; MANUELL LACIST; KENDALL HIRANO, PA-C; DENISE DUBLE, FNP; and JOHN AND JANE DOES 1-10. Defendants.	NO. COMPLAINT FOR DAMAGES

COMES NOW the Plaintiff Jermaine Satterwhite and claims, alleges, and states as follows:

I. PARTIES

1.1 Plaintiff Jermaine Satterwhite ("Plaintiff Satterwhite") is a single adult man. At all relevant times, Plaintiff Satterwhite was in custody of the United States and the Bureau of Prisons ("BOP") as a prisoner. As such Plaintiff is entitled, under the protection of Amendment Eight to the U.S. Constitution, to be free of cruel and unusual punishment.

1.2 Defendant Maria Luisa Dy, M.D. ("Defendant Dy"), at all relevant times, was a physician licensed to practice and practicing medicine in the State of Washington and upon information and belief, was an employee and/or agent of the BOP.

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1.3 Defendant Manuell Lacist ("Defendant Lacist"), at all relevant times, was a certified health care provider licensed to practice and practicing as a certified health care provider in the State of Washington and, upon information and belief, was an employee and/or agent of BOP.

1.4 Defendant Kendall Hirano, PA-C ("Defendant Hirano"), at all relevant times, was a Certified Physician Assistant licensed to practice and practicing as a Physician Assistant in the State of Washington and, upon information and belief, was an employee and/or agent of the BOP.

1.5 Defendant Denise Duble, FNP ("Defendant Duble"), at all relevant times, was a Family Nurse Practitioner licensed to practice and practicing as a Family Nurse Practitioner in the State of Washington and, upon information and belief, was an employee and/or agent of the BOP.

1.6 Upon information and belief, Plaintiff Satterwhite alleges that there may be other individuals, and/or entities who may be liable for Plaintiff's injuries and damages but whose identities are presently unknown and who, for purposes of this Complaint, are referred to as John and Jane Does. When the true names of these Defendants shall be discovered, this Complaint will be amended to add these names.

II. JURISDICTION, VENUE AND NOTICE OF CLAIM

2.1 Jurisdiction of the court is proper under 28 U.S.C. §§1331 and 1343(3).

2.2 Venue is proper in this district pursuant to 28 U.S.C. §1391(b)(2), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed. Venue is also proper pursuant to 28 U.S.C. §1391(e), in that a substantial part of the acts or omissions giving rise to this claim within the judicial district in which this case is filed.

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2.3 This is an action for violation of Plaintiff' s constitutional rights to be free of cruel and unusual punishment, ("*Bivens* claims") , and pendent state claims for medical negligence and common law duties owed to him.

2.4 Compensatory damages are sought pursuant to applicable Washington statutes and compensatory and punitive damages are sought under the *Bivens* claims.

2.5 This court has supplemental jurisdiction to consider state causes of action under 28 U.S.C. §1367, as the ancillary state claims "form part of the same case or controversy" as the other counts for which this Court has federal jurisdiction.

III. FACTS

3.1 . Plaintiff Satterwhite was incarcerated in the United States Bureau of Prisons' Federal Detention Center located at Seatac, Washington ("FDC Seatac") from March 27, 2008 to April 21, 2009.

3.2 On March 27, 2008, Stephen Leaf, PA-C, a medical staff member at FDC Seatac, administered a skin test for tuberculosis ("TB") to Plaintiff Jermaine Satterwhite.

3.3 On March 29, 2008, Hany Sidhom, a staff member at FDC Seatac, measured the skin test reaction and found it to be 18 millimeters induration.

3.4 A TB skin test reaction of 18 millimeters induration is considered strongly positive for TB and indicative of latent TB.

3.5 On March 29, 2008, Linda Pedersen, ARNP, a staff member at FDC Seatac requested that a chest radiograph (x-ray) of Plaintiff' Satterwhite be obtained to rule out active TB.

3.6 On April 4, 2008, the x-ray of Plaintiff Satterwhite's chest was performed and on April 7, 2008, the report stated that the chest x-ray was negative.

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3.7 According Washington and national standards and protocols and according to the BOP's own policies and procedures, an inmate such as Plaintiff Satterwhite with a positive skin test of 18 millimeters and a negative chest x-ray is considered to have latent TB and be at high-risk for developing active TB and thus is high priority for treatment in order to prevent the development of active TB.

3.8 On April 8, 2008, Defendant Manuell Lacist obtained a medical history and performed a physical examination on Plaintiff Satterwhite. The medical history obtained by Defendant Lacist, as documented in the medical records, includes the fact that Plaintiff Satterwhite was found to have a highly positive TB skin test of 18 mm induration and a negative chest x-ray. In accordance with the BOP's own policies and procedures, Plaintiff Satterwhite should have been considered to have latent TB and was at high priority for anti-TB treatment. Despite this, Defendant Lacist made no recommendation for treatment or referral of Plaintiff to other medical staff member for treatment of TB.

3.9 Defendant Maria Luisa Dy, M.D. was the physician assigned to Plaintiff Satterwhite. She was responsible for providing direct care to him and for supervising the care provided to him by other medical staff members at FDC Seatac whose records she reviewed and co-signed. As the medical records document, Defendant Dy co-signed the record containing the physical examination by Defendant Lacist on April 8, 2008.

3.10 Despite the fact that she was assigned as Plaintiff Satterwhite's physician at FDC Seatac and her knowledge of Plaintiff Satterwhite's medical history, including that he tested highly positive for TB on March 29, 2008 and had a negative chest x-ray on April 4, 2008, Dr. Dy never examined Plaintiff Satterwhite, never prescribing any anti-TB medication to him and

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never implemented any plan for monitoring him. Instead, she merely co-signed the records of other providers, acquiescing in their decisions.

3.11 On January 27, 2009, Plaintiff Satterwhite submitted a written "Inmate Request to Staff" form. On the form, Plaintiff Satterwhite requested treatment for a productive cough that he had had for at least a month.

3.12 On January 30, 2009, Plaintiff Satterwhite was seen at the FDC Seatac medical facility by Defendant Kendall Hirano, PA-C, a Certified Physician Assistant. Defendant Hirano documented in the medical record that Plaintiff Satterwhite reported that he had been suffering from a productive cough for about a month that was worse at night and that had been producing green-colored sputum.

3.13 Despite Plaintiff Satterwhite's history of a highly positive TB skin test on March 29, 2008 and a negative chest x-ray on April 4, 2008 after which he was prescribed no anti-TB treatment, and despite the fact that he now presented with pulmonary symptoms indicating active TB, Defendant Hirano decided not to order a chest x-ray or any other diagnostic evaluation and or to prescribe any TB treatment. He also decided not to refer Plaintiff Satterwhite for evaluation and treatment by a physician. Instead, Defendant Hirano chose to incorrectly diagnosed Plaintiff Satterwhite with "***cough secondary to post-nasal drainage/allergic rhinitis***" and discharged him with only the recommendation that he purchase over-the-counter allergy tablets at the commissary.

3.14 Defendant Dr. Dy again co-signed Defendant Hirano's January 30, 2009 medical examination and evaluation of Plaintiff Satterwhite without seeing or examining Plaintiff Satterwhite or taking any further action including ordering any diagnostic tests or prescribing

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anti-TB treatment as required by standard of care and by national, state and BOP standards of care and protocols.

3.15 On March 16, 2009, Plaintiff Satterwhite returned to the medical facility where he was again seen by Defendant Hirano. Defendant Hirano documented in the medical record that Plaintiff Satterwhite was now suffering from sharp left-sided chest pain which was "aggravated with deep inspiration, yawning/sneezing, and trunk position," and that Plaintiff Satterwhite was continuing to have the productive cough that he had previously reported to Defendant Hirano as having started in December, 2008. On examination, Defendant Hirano found that Plaintiff Satterwhite had pain over his 5th and 6th rib costo-chondral joints of h is chest. The persistent productive cough and pain in the ribs and joints of the chest showed that not only did Plaintiff Satterwhite have active TB, but that the TB had spread to the chest wall from the lungs.

3.16 Despite Plaintiff Satterwhite's history of a highly positive skin test and pulmonary signs and symptoms indicating active and spread TB which Defendant Hirano, as a Certified Physician Assistant, had to have known were indicative of active TB, Defendant Hirano again decided not to prescribe any anti-TB treatment or refer Plaintiff Satterwhite for evaluation to determine the nature and extent of the TB and treatment by a physician as required. Instead, Defendant Hirano merely diagnosed Plaintiff Satterwhite with "***other anomalies of the ribs and sternum***" for which he prescribed indomethacin, an anti-inflammatory.

3.17 Despite these facts, Defendant Dr. Dy again co-signed the medical record documenting the examination by Defendant Hirano on March 16, 2009 without taking any action whatsoever, including failing to examine him, failing to order that he be further evaluated and failing to prescribe any anti-TB medications despite clear proof that Plaintiff Satterwhite had active TB that was spreading.

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3.18 On April 17, 2009, Defendant Denise Duble, FNP, a Family Nurse Practitioner, evaluated Plaintiff Satterwhite prior to his transfer to the federal correctional facility in Herlong, California. On the Bureau of Prisons Health Services Inmate Intra-system Transfer form, Defendant Duble documented that Plaintiff Satterwhite had a positive skin test measuring 18 mm on March 29, 2008 and a negative chest x-ray on April 4, 2008. Defendant Duble also documented that Plaintiff Satterwhite's current health problems included a cough and "other abnormalities of the ribs and sternum." However, Defendant Duble incorrectly states that Plaintiff Satterwhite's TB skin test indicated a "nonspecific reaction to tuberculin skin test" and that he had "no symptoms" of TB, despite the fact that Plaintiff Satterwhite's cough and pain in the ribs over the lung areas along with a highly positive TB skin test were all indicative of active TB. Instead of initiating prompt treatment for the now active and spreading TB and ordering a further evaluation and treatment for the TB as required by the applicable standard of care and state, national and BOP protocols and standards, she decided to authorize Plaintiff Satterwhite's transfer to the facility at Herlong with no diagnosis and no treatment or recommendations for treatment whatsoever.

3.19 On April 21, 2009, Plaintiff Satterwhite left FDC Seatac and on April 22, 2009 he arrived at the federal correctional facility in Herlong, CA ("FCD Herlong").

3.20 On the evening of May 2, 2009, Plaintiff Satterwhite reported to the medical facility at Herlong with symptoms of paresthesia (numbness) of both legs and continued pain in his chest.

3.21 On the morning of May 3, 2009, Plaintiff Satterwhite returned to the prison medical facility. He reported that he could not move his legs. He also reported that the symptoms were worse when he would lie on his side. He was assessed as having an elevated temperature of

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99 degrees Fahrenheit with "neurological component and possible infections" needing further evaluation.

3.22 On May 3, 3009, Plaintiff Satterwhite was transferred to St. Mary's Medical Center in Reno, Nevada where he was admitted. A chest x-ray revealed a lesion in the upper lobe of his right lung that measured 1.4 by 2.6 cm. He also had enlarged lymph nodes in the mediastinal, hilar and paratracheal areas and also in the azygoesophageal recess and the aortopulmonary window on computerized tomography (CAT). There were also lytic bone lesions present in the iliac wings, the right sacral ala, and the left pubic symphysis that were documented on both CAT and magnetic resonance imaging (MRI). A spinal MRI revealed a compression fracture of the 5th thoracic vertebra caused by an epidural mass that was compressing the spinal cord at T4 and T5, causing kyphotic deformity of the spinal cord at T5. The mass extended into the posterior mediastinum and the soft tissues. There was also a lesion present in the first lumbar vertebra. All of these lesions were proven to be caused by untreated, widespread, disseminated TB. Urinalysis also indicated kidney involvement with TB.

3.23 At 2am on May 4, 2009, Plaintiff Satterwhite underwent emergency decompression of the spinal cord performed by neurosurgeon David Leppla, M.D. The procedure required a thoracic spinal laminectomy that extended from T3 through T7 and involved drilling out laterally on both sides of the spinal cord, from pedicle to pedicle, until it was possible to insert a small biopsy forceps into the epidural space. At that point, pus was encountered indicating the presence of an epidural abscess which was determined to be infected with TB. During surgery, it was also noted that the tuberculosis had invaded the bone of the thoracic spine, causing instability. As Dr. Leppla's operative notes indicate, it was necessary for him to

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decompress the cord completely from pedicle to pedicle. Tissue samples were collected for pathological examination and culture.

3.24 Physician F. Kevin Murphy, M.D., F.A.C.P., a board certified internist and infectious disease specialist on staff at St. Mary's Medical Center took over management of Plaintiff Satterwhite's care after surgery. He started Plaintiff Satterwhite on four drugs to treat the active TB plus pyridoxine to control medication side effects.

3.25 On May 11, 2009, Plaintiff Satterwhite again underwent surgery by Dr. Leppla to stabilize his spine. Dr. Leppla performed an arthrodesis of T3 through T7 and instrumented fusions of T3-T4 and T5-7. This second spinal surgery involved using a high speed drill to enter the pedicle and then an awl to advance through the pedicle to the vertebral body. Bilateral pedicle screws were placed at T3 and T4, skipping the diseased segment at T5. Additional bilateral screws were used at T6 and T7. After placing the four pairs of screws, the distance from the distal to the proximal screw was measured and Dr. Leppla cut a bar to the appropriate length in anticipation of distracting across the collapsed T5 segment. The rod was dropped into the screws and the screws were secured down at T6 and T7 and then distracted across T5 in order to maintain or restore some of the body height that was lost because of the invasion of the TB into the bone. The set screws in T3 and T4 were then torqued down and snapped off. The high speed drill was again used to decorticate the area between the transverse process and the facets from the screw of T3 through the screw of T7. Allograft mixed with bone putty was then packed underneath the rod and between the screws for the arthrodesis. Additional specimens for culture were also obtained.

3.26 As a result of the undiagnosed and untreated TB, Plaintiff Satterwhite suffered permanent, severe and disabling injury to his spinal cord, including paralysis and loss of

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sensation to both legs. In addition to an epidural abscess in his spine and osteomyelitis in his vertebra, Plaintiff Satterwhite suffered severe pain, multiple surgeries, and endured intensive and painful physical therapy. He continues to have an abnormal neurological findings in his lower extremities and to suffer numbness of his legs and as well as a permanent impairment of his ability to walk. In addition, his ability to flex and extend his thoracic spine is also significantly limited and activities including lifting, sitting and bending are painful.

3.27 According to the infectious disease specialist from the Mayo Clinic who evaluated Plaintiff Satterwhite when he was transferred to the Federal Medical Center in Rochester, Minnesota in June, 2009 after his discharge from St. Mary Hospital, the fact that the surgical hardware in Mr. Satterwhite's spine during the two spinal surgeries had to be inserted into an operative bed that was infected with TB puts him at lifelong risk for recurrence of TB which will require life-long surveillance. He is also at risk for bacterial hematogenous infection of the extensive hardware placed to stabilize his spine.

3.28 According to infectious disease specialist Dr. F. Kevin Murphy, who cared for Plaintiff Satterwhite at St. Mary Hospital, all of the injuries and resulting disability Plaintiff suffered were entirely preventable had the Defendant health care providers at the Federal Detention Center in Seattle followed the standard of care and the nationally required protocols for treating a patient like him.

Plaintiff Satterwhite entered the Federal Detention Center in Seattle, Washington at the age of 35 with a diagnosable and treatable condition. Because the TB was ignored and untreated from March 29, 2008 until May 4, 2009, active TB infection developed and spread throughout Plaintiff Satterwhite's body including to his thoracic and lumbar spine,

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vertebrae, lymph nodes, pelvis, and kidneys causing permanent damage and physical disability.

IV. CAUSES OF ACTION

***Bivens* Claims for Cruel and Unusual Punishment and Violation of Constitutional Rights**

4.1 Plaintiff Satterwhite incorporates by reference all allegations and statements contained in the preceding paragraphs, as if fully set forth here.

4.2 By his actions as alleged herein, Defendant Manuell Lacist violated Plaintiff Satterwhite's right to be free from cruel and unusual punishment and the right to adequate medical care under the Eighth Amendment of the United States Constitution by willfully and purposefully and with deliberate indifference failing to respond to and treat Plaintiff Satterwhite's known serious medical condition of latent TB.

4.3 When Defendant Lacist performed a medical history and physical examination on Plaintiff Satterwhite on April 8, 2008, he knew that Plaintiff Satterwhite had a highly positive TB skin test of 18 millimeters and a negative chest x-ray, both of which indicated that Plaintiff likely had latent TB, was at high risk for developing active TB and was a high priority for anti-TB treatment. He also knew that no anti-TB treatment had been provided to the Plaintiff as of that date.

4.4 Defendant Lacist also knew that failing to refer Plaintiff to another health care provider for anti-TB treatment and failing to order anti-TB treatment himself would likely cause Plaintiff to develop active TB, a very serious and life threatening disease.

4.5 Defendant Lacist also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

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4.6 Defendant Lacist willfully and purposefully and with deliberate indifference deprived Plaintiff Satterwhite of the essential medical care that Plaintiff required by failing to prescribe any anti-TB treatment, refer Plaintiff for evaluation and treatment by a physician or inform Plaintiff or any other health care providers at FCD SeaTac that Plaintiff had a positive skin test of 18 millimeters, which meant that Plaintiff likely had latent TB and required immediate anti-TB treatment and diagnosis for latent TB, knowing that his deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development of active TB, which is a life-threatening illness, cause the wanton infliction of unnecessary pain upon Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment.

4.7 At all material times, Defendant Lacist was acting under color of law by exercising power made possible because he was clothed in the authority of federal law.

4.8 As a result of Defendant Lacist's constitutional violations of Plaintiff Satterwhite's rights, Plaintiff Satterwhite sustained injuries and damages including the following:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life;

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d. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

e. The conduct of Defendant Lacist constituted acting in reckless disregard and deliberate indifference to Plaintiff's constitutional right to be free of cruel and unusual punishment and right to adequate medical care, entitling Plaintiff Satterwhite to punitive damages.

4.9 By his actions as alleged herein, Defendant Kendall Hirano violated Plaintiff Satterwhite's right to be free from cruel and unusual punishment and the right to adequate medical care under the Eighth Amendment of the United States Constitution by willfully and purposefully and with deliberate indifference failing to respond to and properly treat Plaintiff Satterwhite's known serious medical condition.

4.10 When Defendant Hirano examined Plaintiff Satterwhite on January 30, 2009, he knew that Plaintiff Satterwhite likely had active TB, as evidenced by a highly positive skin test of 18 millimeters in March 2008 and a productive cough lasting at least a month. Defendant Hirano also knew that Plaintiff Satterwhite had never been prescribed any anti-TB medications, thereby increasing the likelihood that he now had active TB, a very serious and life threatening disease. Defendant Hirano also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.11 When Defendant Hirano examined Plaintiff Satterwhite again on March 16, 2009, at which time the Plaintiff had sharp left-sided chest pain that was worse with deep inspiration and still had the productive cough that he had been suffering from since at least December, 2008, Defendant Hirano knew that Plaintiff's symptoms indicated he likely had active TB and that

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Plaintiff required treatment for active TB which he had never received. Defendant Hirano also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.12 Defendant Hirano willfully and purposefully and with deliberate indifference deprived Plaintiff Satterwhite the essential medical care he required by preventing Plaintiff from receiving anti-TB treatment, knowing that his deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development and progression of active TB, which is a life-threatening illness, cause the wanton infliction of unnecessary pain on Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment.

4.13 At all material times, Defendant Hirano was acting under color of law by exercising power made possible because he was clothed in the authority of federal law.

4.14 As a proximate result of Defendant Hirano's constitutional violations of Plaintiff Satterwhite's rights, Plaintiff Satterwhite sustained injuries and damages including the following:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

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d. Loss of the quality and enjoyment of his constitutional rights and life;

e. The conduct of Defendant Hirano constituted acting in reckless disregard and deliberate indifference to Plaintiff Satterwhite's constitutional right to be free of cruel and unusual punishment and his right to adequate medical care, entitling Plaintiff Satterwhite to punitive damages.

4.15 By her actions alleged herein, Defendant Maria Luisa Dy, M.D. violated Plaintiff Satterwhite's right to be free of cruel and unusual punishment and to adequate medical care under the Eighth Amendment of the United States Constitution by willfully and purposefully failing to respond to and treat Plaintiff Satterwhite's known serious medical condition.

4.16 Defendant Dy knew that also knew that when Plaintiff Satterwhite was examined on April 8, 2008 by Defendant Lacist, whose care she supervised and whose records she reviewed as evidenced by her signature, that Plaintiff Satterwhite likely had latent TB, as evidenced by a highly positive skin test of 18 millimeters and a negative chest x-ray, after which he was given no anti- TB treatment. Defendant Dy knew that failing to order anti-TB treatment to treat the latent TB would likely cause Plaintiff to develop active TB, a very serious and life threatening disease. Defendant Dy also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.17 Defendant Dy also knew that when Plaintiff Satterwhite was examined on January 30, 2009 by Defendant Hirano, whose care she supervised and whose records she reviewed as evidenced by her signature, that Plaintiff Satterwhite had active TB, as evidenced by a positive skin test of 18 millimeters and a negative chest x-ray, a productive cough for at least a month and no anti-TB treatment. Defendant Dr. Dy also knew that failing to prescribe anti-TB medications

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would result in the progression of the TB, a very serious and life threatening disease. Defendant Dy knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.18 Defendant Dr. Dy also knew that when Defendant Hirano, whom she supervised and whose records she reviewed as evidenced by her signature, examined Plaintiff Satterwhite again on March 16, 2009 Plaintiff Satterwhite again demonstrated the signs and symptoms of active TB that was now spreading, including a productive cough since December, 2009 and multiple areas of rib and chest pain, and that he had never been provided with anti-TB treatment. Defendant Dy knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.19 Defendant Dy willfully and purposefully deprived Plaintiff Satterwhite the essential medical care he required by acquiescing in the constitutional deprivations by Defendants Lacist and Hirano, including preventing Plaintiff from receiving any anti-TB treatment, knowing that the deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development and progression of active TB, which is a life-threatening illness, cause the wanton infliction of unnecessary pain on Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment.

4.20 Defendant Dr. Dy's actions, including reviewing and signing the medical records of Defendants Lacist and Hirano without ever examining Plaintiff Satterwhite, and failing to prescribe anti-TB treatment, or refer him for further evaluation and treatment, knowing that the

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deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development and progression of active TB, which is a life-threatening illness and cause the wanton infliction of unnecessary pain on Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment, were done with a reckless or callous indifference to Plaintiff Satterwhite's constitutional rights.

4.21 At all material times, Defendant Dy was acting under color of law by exercising power made possible because she was clothed in the authority of federal law.

4.22 As a proximate result of Defendant Dy's constitutional violations of Plaintiff Satterwhite's rights, Plaintiff Satterwhite sustained injuries and damages including as follows:

a. Non-economic damages including past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life;

e. The conduct of Defendant Dy constituted acting in reckless disregard and deliberate indifference to Plaintiff Satterwhite's constitutional right to be free

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of cruel and unusual punishment, and to adequate medical care, entitling Plaintiff Satterwhite to punitive damages.

4.23 By her actions alleged herein, Defendant Denise Duble, FNP, violated Plaintiff Satterwhite's right to be free from cruel and unusual punishment and the right to adequate medical care under the Eighth Amendment of the United States Constitution by willfully and purposefully and with deliberate indifference failing to respond to and treat Plaintiff Satterwhite's known serious medical condition of active TB.

4.24 When Defendant Duble reviewed Plaintiff Satterwhite's medical history on April 17, 2009 in preparation for his transfer to California, she knew that Plaintiff Satterwhite had developed active pulmonary TB, as evidenced by a highly positive skin test of 18 millimeters, a history of a persistent productive cough since December, 2008, and findings on examination by Defendant Hirano of multiple areas of rib and chest pain. Defendant Duble knew that failing to treat Plaintiff Satterwhite for active TB would likely cause the TB to progress, seriously threatening Plaintiff's health and life. Defendant Duble also knew that Plaintiff had no other access to medical care because of his incarceration and that Plaintiff Satterwhite was not going to be released from incarceration in the foreseeable future to treat the life-threatening condition.

4.25 Defendant Duble willfully and purposefully and with deliberate indifference deprived Plaintiff Satterwhite the essential medical care he required by denying Plaintiff from undergoing treatment and diagnosis for active TB and by incorrectly writing in the medical records that Plaintiff's TB test indicated "a nonspecific reaction to tuberculin test" and that Plaintiff "had no symptoms" of TB, knowing that her deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the progression of active TB, which is a life-threatening illness, cause the wanton infliction of

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unnecessary pain on Plaintiff and violate Plaintiff's basic fundamental right to safe and humane confinement, constituting cruel and unusual punishment.

4.26 At all material times, Defendant Duble was acting under color of law by exercising power made possible because she was clothed in the authority of federal law.

4.27 As a result of Defendant Duble's constitutional violations of Plaintiff Satterwhite's rights, Plaintiff Satterwhite sustained injuries and damages including the following:

a. Non-economic damages including past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life;

d. Economic losses including future medical and health care expenses and loss of future earnings and earning capacity;

e. The conduct of Defendant Duble constituted action in reckless disregard and deliberate indifference to Plaintiff's constitutional right to be free of cruel and unusual punishment and right to adequate medical care, entitling Plaintiff Satterwhite to punitive damages.

Medical Malpractice and Breach of Duty to Obtain Informed Consent

4.28 Plaintiff Satterwhite incorporates by reference all statements and allegations contained in the preceding paragraphs, as if fully set forth here.

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4.29 Defendant Maria Luisa Dy, M.D. negligently failed to exercise that degree of care, skill, and learning expected of a reasonably prudent physician at the time and in the profession to which she belonged and acting in the same or similar circumstances within the State of Washington.

4.30 The negligent actions and failures to act by Defendant Dy constitute medical malpractice under Washington law.

4.31 The negligence of Defendant Dy includes never examining, evaluating or treating Plaintiff Satterwhite for TB despite the facts that she was the physician assigned to Plaintiff Satterwhite's care, Plaintiff Satterwhite had a highly positive skin test of 18 millimeters on March 29, 2008 and a negative chest x-ray on April 4, 2008, which strongly indicated that he had latent TB and was at high-risk for developing active TB and required treatment to prevent the development of active TB; failing to order any anti-TB treatment whatsoever for Plaintiff Satterwhite, thereby allowing the latent TB to develop into active TB; failing to evaluate or treat Plaintiff Satterwhite for active TB despite the fact that he exhibited signs and symptoms clearly indicating the presence of active TB and; failing to supervise and intervene, thereby acquiescing when Defendants Lacist and Hirano, whose care she supervised, failed to evaluate and treat Plaintiff Satterwhite who was at high risk for and did develop active TB while he was under their care.

4.32 As a direct and proximate result of Defendant Dr. Dy's negligence, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages including past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

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b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of enjoyment and quality of life.

4.33 Defendant Dy failed to obtain Plaintiff Satterwhite's informed consent by failing to inform him of material facts, including that he had a highly positive skin test of 18 millimeters which strongly indicated that he was at high risk for developing active TB; that according to the standard of care and national, state and BOP standards and protocols, he required treatment to prevent the development of active TB; that the lack of anti-TB treatment would likely result in his developing active TB; that the pulmonary symptoms he developed, including a productive cough and the findings on examination of multiple areas of rib and chest pain, clearly indicated that he had active TB; that TB was a serious and life-threatening disease, that the failure to treat him for active TB could result in the TB spreading throughout his body and result in severe, permanent, and debilitating injury and death.

4.34 Defendant Dy also failed to inform Plaintiff Satterwhite regarding the recommended treatment for a person at high risk for developing active TB and for treatment of active TB. Dr. Dy also failed to inform Plaintiff Satterwhite of the recognized serious possible risks, complications, involved in the non-treatment, either before or after the TB became active.

4.35 Plaintiff Satterwhite was never provided with any written information or verbal explanation by Defendant Dr. Dy concerning the risks of treatment or non-treatment for TB.

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4.36 A reasonably prudent patient like Plaintiff Satterwhite, under similar circumstances as those of Plaintiff Satterwhite, if informed of these material facts, would have demanded treatment had he known it was indicated and would not have consented to the lack of any treatment whatsoever to which he was subjected, having never been informed of these material facts.

4.37 As a direct and proximate result of Defendant Dr. Dy's failure to obtain Plaintiff Satterwhite's informed consent, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses consisting of past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of enjoyment and quality of life.

4.38 Defendant Kendall Hirano, PA-C negligently failed to exercise that degree of care, skill, and learning expected of a reasonably prudent certified physician's assistant at the time and in the profession to which he belonged and acting in the same or similar circumstances within the State of Washington.

4.39 The negligent actions and failures to act by Defendant Hirano constitute medical malpractice under Washington law.

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4.40 The negligence of Defendant Hirano includes, but is not limited to, failing to evaluate and treat Plaintiff Satterwhite for active TB despite the facts that Plaintiff Satterwhite had a positive skin test of 18 millimeters on March 29, 2008, which strongly indicated that he was at high-risk for developing active TB, and that when Defendant Hirano examined Plaintiff Satterwhite he found that he had signs and symptoms of active TB, including a productive cough and the findings on examination of multiple areas of rib and chest pain.

4.41 As a direct and proximate result of Defendant Hirano's negligence, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses consisting of past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of enjoyment and quality of life.

4.42 Defendant Hirano failed to obtain Plaintiff Satterwhite's informed consent when he failed to inform him of material facts, including that he had a positive skin test of 18 millimeters which strongly indicated that he was at high risk for developing active TB; that according to national, state and BOP standards and protocols, Plaintiff Satterwhite required treatment to prevent the development of active TB; that lack of anti-TB treatment would likely result in his developing active TB; that the pulmonary symptoms he developed, including a

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productive cough and the findings he noted on examination of Plaintiff Satterwhite multiple areas of rib and chest pain, clearly indicated that he had active TB and; that TB was a serious and life-threatening disease, that the failure to treat him for TB could result in the TB spreading throughout his body and result in severe, permanent, and debilitating injury and death.

4.43 Defendant Hirano also failed to inform Plaintiff Satterwhite of the type of treatment for TB. Defendant Hirano also failed to inform Plaintiff Satterwhite of the recognized serious possible risks, complications, involved in the non-treatment of TB.

4.44 Plaintiff Satterwhite was never provided with any written information or verbal explanation by Defendant Hirano concerning the risks of treatment or non-treatment of TB, either before or after he developed a productive cough and pain involving the chest indicative of active TB.

4.45 A reasonably prudent patient like Plaintiff Satterwhite, under similar circumstances as those of Plaintiff Satterwhite, if informed of these material facts, would have demanded treatment and would not have consented to the lack of any treatment had he known treatment was indicated.

4.46 As a direct and proximate result of Defendant Hirano's failure to obtain Plaintiff Satterwhite's informed consent, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

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b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life.

4.47 Defendant Manuell Lacist negligently failed to exercise that degree of care, skill, and learning expected of a reasonable certified health care assistant at the time and in the profession to which he belonged and acting in the same or similar circumstances within the State of Washington.

4.48 The negligent actions and failures to act by Defendant Lacist constitute medical malpractice under Washington law.

4.49 The negligence of Defendant Lacist includes, but is not limited to, breaching the applicable standard of care by performing a physical examination on Plaintiff Satterwhite and noting that he had a highly positive TB skin test reaction of 18 mm and negative chest x-ray but failing to inform Plaintiff or any other healthcare providers at the detention center that Plaintiff had a positive skin test and failing to refer him for immediate anti-TB treatment, knowing that his deprivation of medical care would cause Plaintiff a substantial risk of serious harm and subject him to further significant injury, including the development and progression of active TB, which is a life-threatening illness,.

4.50 As a direct and proximate cause of Defendant Lacist's negligence, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

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a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of enjoyment and quality of life.

4.51 Defendant Denise Duble, FNP, negligently failed to exercise that degree of care, skill, and learning expected of a reasonably prudent family nurse practitioner at the time and in the profession to which she belonged and acting in the same or similar circumstances within the State of Washington.

4.52 The negligent actions and failures to act by Defendant Duble constitute medical malpractice under Washington law.

4.53 The negligence of Defendant Duble includes, but is not limited to, clearing Plaintiff Satterwhite for transfer to California despite information documented in his medical records stating that he had a highly positive TB skin test of 18 mm indicating he was at high risk for developing active TB, that he had a cough, and that he had abnormalities involving his ribs and sternum indicating that he had active TB that had spread, and that despite these facts stating in the records that he had a "nonspecific reaction to tuberculin skin test" and that he was "sx [symptom] free for 30 days." Defendant Duble also breached the standard of care by failing to

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immediately halt the transfer of Plaintiff Satterwhite to California and initiate his immediate evaluation and treatment for active TB.

4.54 As a direct and proximate result of Defendant Duble's negligence, Plaintiff was not treated for active TB but was instead transferred to California, causing him to suffer severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement.

c. Economic losses including past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life;

4.55 Defendant Duble failed to inform Plaintiff Satterwhite of material facts, including that Plaintiff Satterwhite had a positive skin test of 18 millimeters indicating that Plaintiff Satterwhite was at high-risk for developing active TB , that he developed signs and symptoms of active TB, including a productive cough and the findings on examination of multiple areas of rib and chest pain, that TB was a serious and life-threatening disease, and that the failure to immediately initiate treatment of Plaintiff Satterwhite for active TB rather than to transfer him to California could result in severe, permanent, and debilitating injury and death.

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4.56 Defendant Duble also failed to inform Plaintiff Satterwhite of the forms of treatment for TB, or the recognized serious possible risks, complications, involved in the non-treatment of TB.

4.57 Plaintiff Satterwhite was never provided with any written information or verbal explanation by Defendant Duble concerning the risks of treatment or non-treatment for TB.

4.58 A reasonably prudent patient like Plaintiff Satterwhite, under similar circumstances as those of Plaintiff Satterwhite, if informed of these material facts, would have demanded treatment to prevent active TB and treatment for active TB when it developed and would not have consented to the lack of any treatment whatsoever to which he was subjected, having never been informed of these material facts. As a direct and proximate result of Defendant Duble's failure to obtain Plaintiff Satterwhite's informed consent, Plaintiff Satterwhite suffered severe, permanent and disabling injuries, including:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of enjoyment of a full and complete life;

b. The development and spread of active TB, spinal cord injury, risk for recurrent TB and infection of the hardware in his spine and further spinal cord injury; physical injury, impairment, disability and disfigurement;

c. Economic losses including past and future medical and health care expenses and loss of future earnings and earning capacity;

d. The loss of the enjoyment of the right to be free of cruel and unusual punishment and the loss of the quality of life.

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V. JURY DEMAND

Plaintiff Satterwhite demand a jury trial to resolve all claims brought herein.

VI. PRAYER FOR RELIEF

WHEREFORE Plaintiff prays that, after due proceedings, judgment be entered in favor of Plaintiff and against all Defendants, jointly and severally, and that this Court:

a. Award Plaintiff all compensatory damages reasonable under the circumstances, in an amount of no less than $12 million, including physical pain and suffering, mental anguish, and emotional distress, disfigurement, disability, medical expense, wage loss, loss of enjoyment of life, loss of the right to be free of cruel and unusual punishment and any and all other compensatory damages allowable by law, for each count alleged in this Complaint.

b. Award Plaintiff punitive damages against Defendants and each of them;

c. Award Plaintiff all attorney fees and costs.

d. Award all damages to Plaintiff available under Washington and federal law.

DATED this 25th day of March, 2011.

Law Offices of Michael Withey

/s/ Michael Withey
Michael Withey, WSBA #4787
Co-Counsel for Plaintiff Satterwhite

Law Office of Joanne R. Werner

/s/ Joanne R. Werner
Joanne R. Werner, WSBA #22470
Co-Counsel for Plaintiff Satterwhite

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HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE SATTERWHITE,

Plaintiff,

v.

MARIA LUISA DY, et al.,

Defendants.

CASE NO. C11-528 RAJ

ORDER DENYING MOTION TO DISMISS AND MOTION TO SUPPLEMENT

This matter comes before the court on the motions to dismiss and to supplement the record by federal defendants Maria Dy, Manuell Lacist, Kendall Hirano,[1] and Denise Duble. Dkt. # 35, #42. With respect to the motion to dismiss, defendants argue that plaintiff Jermaine Satterwhite's claims should be dismissed with prejudice because he failed to comply with the mandatory exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Satterwhite argues that defendants have failed to demonstrate that administrative remedies are available, and that prisoners are not

[1] The court dismissed defendant Hirano pursuant to the stipulation of the parties. Accordingly, the court has not addressed Mr. Hirano's arguments regarding absolute immunity.

required to exhaust remedies when prison officials render administrative relief constructively unavailable.

Having considered the memoranda, exhibits, and the record herein, the court DENIES the motion to supplement (Dkt. # 42) and the motion to dismiss (Dkt. # 35).

A. Motion to Supplement

On January 12, 2012, defendants moved to supplement the record based on one sentence: "Federal Defendants request leave to update the Court and the record as to Plaintiff Jermaine Satterwhite's current status and location, as well as the applicability of the BOP's Administrative Remedy Procedure to Mr. Satterwhite, in light of the Plaintiff's changed circumstances, which is set forth in the attached declaration." Dkt. # 42. Plaintiff argues that defendants improperly introduced new evidence and argument that violates Fed. R. Civ. P. 56(c), and that plaintiff is exempt from PLRA exhaustion requirements because he is no longer a prisoner for purposes of PLRA. Dkt. # 43. Defendants respond that plaintiff is bound by the PLRA because he was a prisoner at the time the action commenced. Dkt. # 44.

Plaintiff has not moved the court to strike material attached for the first time in defendants' reply in support of their motion to dismiss (*see* Dkt. #40 (Ringwood Decl.)), or attached to the motion to supplement the record (*see* Dkt. #42-1 (Straight Decl.)). Local Civ. R. 7(g). Rather, plaintiff asks the court to deny both of defendants' motions because they "improperly submit evidence and arguments that existed at the time they filed their original motion to dismiss and the documents and any argument pertaining to them should have been included in that motion." Dkt. # 43 at 4.

Plaintiff quotes the Sixth Circuit for the proposition that when new evidence or argument is included in a reply memorandum and a non-movant's ability to respond to the new evidence has been vitiated, a problem arises with respect to Rule 56. Dkt. # 43 at 6 (quoting *Seay v. Tenn. Valley Authority*, 339 F.3d 454, 481-82 (6th Cir. 2003)). In that

case, the district court relied on new evidence submitted with a reply in entering summary judgment three days after the reply brief was submitted. *Seay*, 339 F.3d at 481. The court concluded that plaintiff was not provided an adequate opportunity to respond to the new evidence. *Id.* In contrast to the nonmoving party in *Seay*, plaintiff has had opportunity to respond to the new evidence and arguments in his opposition to the motion to supplement.[2]

Nevertheless, the declarations of Mr. Straight (Dkt. # 42-1) and Mr. Ringwood (Dkt. # 40) do not comply with 28 U.S.C. § 1746 because they do not declare under penalty of perjury "that the foregoing is true and correct." Rather, they declare that "in accordance with the provisions of 28 U.S.C. § 1746 that the above is accurate to the best of my knowledge and belief." Dkt. # 40 at 8, # 42-1 at 5. Although the declarations reference section 1746, attesting that "the above is accurate to the best of my knowledge and belief" is not the same as attesting to the truth of the statement. Mr. Ringwood's failure to declare that his statements are true is not surprising given that portions of Mr. Ringwood's declaration do not appear to be based on personal knowledge. Rather, portions of the declaration appear to be pure speculation of what could have happened and improper opinion testimony. Fed. R. Evid. 602, 701. Additionally, Mr. Straight's declaration incorrectly states that "inmate Satterwhite has not filed any administrative remedies" despite defendants' concession that he did.

Accordingly, the court STRIKES the Straight and Ringwood declarations because they do not attest that their statements are true and correct as required by 28 U.S.C. § 1746.[3] Dkt. # 40, 42-1. *See Davenport v. Bd. of Trustees of State Ctr. Cmty. Coll. Dist.*,

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[2] The court notes that plaintiff incorrectly relies on Fed. R. Civ. P. 15(d), which governs supplemental pleadings. Motions and declarations are not considered pleadings under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 7.

[3] The court notes that the declarations of Jennifer Vickers and David Roff suffer from the same defect. Dkt. # 36 and # 37. Accordingly, the court also STRIKES these declarations. The

654 F. Supp. 2d 1073, 1083 (E.D. Cal. 2009) (declarations that state only that declarant had "personal knowledge of the facts" and "will testify to these at trial" rejected); *Cobell v. Norton*, 310 F. Supp. 2d 77, 84-85 (D.D.C. 2004) (statement based on "knowledge, information and belief" insufficient). The court will, however, take judicial notice of Exhibit 1 to the Ringwood Declaration, Program Statement 1330.16 (Dkt. # 40-1), which provides the Bureau of Prison's procedural guidelines for the administrative remedy program, and is available at www.bop.gov. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of official information posted on a governmental website, the accuracy of which was undisputed); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1223 n.2 (9th Cir. 2004) (taking judicial notice of a record of a state agency not subject to reasonable dispute).

Plaintiff seems to concede that the fact of plaintiff's release from prison is irrelevant, but then argues that the PLRA exhaustion requirements no longer apply to him. Dkt. #43 at 4:10-11, 9-11. The Ninth Circuit has held that "only individuals who are prisoners (as defined by 42 U.S.C. § 1997e(h)) at the time they file suit must comply with exhaustion requirements of 42 U.S.C. § 1997e(a).[4] *Talamantes v. Leyva*, 575 F.3d 1021, 1024 (9th Cir. 2009). Accordingly, a prisoner who files a lawsuit after s/he is released from custody is not required to exhaust administrative remedies. *Id.*

There is no dispute that plaintiff filed his complaint while he was a prisoner. Accordingly, plaintiff would still be required to exhaust administrative remedies. *See id.* ("[W]e will also adhere to the plain language of the statute as applied to a person who has been released from prison altogether."); *Page v. Torrey*, 201 F.3d 1136, 1140 (9th Cir.

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court notes that even if it had not stricken the declarations submitted by defendants, their motion to dismiss would still be denied for the reasons stated below.

[4] 42 U.S.C. 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

2000) (holding that "only individuals who, at the time they seek to file their civil actions, are detained as a result of being accused of, convicted of, or sentenced for criminal offenses are 'prisoners' within the definition of 42 U.S.C. § 1997e and 28 U.S.C. § 1915."). *See also Cox v. Mayer*, 332 F.3d 422, 425 (6th Cir. 2003) (plaintiff required to exhaust administrative remedies because he was a prisoner when he brought suit and suit implicates prison conditions); *Dixon v. Page*, 291 F.3d 485, 489 (7th Cir. 2002) (the fact that plaintiff was no longer a prisoner at the time of the appeal did not excuse him from exhaustion since he was a prisoner at the time the complaint was filed); *Becker v. Vargo*, Case No. 02-7380CO, 2004 WL 1068779, *3 (D.Or. 2004) (rejecting plaintiff's argument that since he had been released from prison, he was no longer a prisoner subject to PLRA exhaustion requirements).

Given that the court finds that the PLRA exhaustion requirements apply upon plaintiff's release from prison, the court finds that his change in status is irrelevant to the court's analysis of the motion to dismiss.

Accordingly, the court DENIES defendants' motion to supplement. Dkt. # 42.

B. Motion to Dismiss

Failure to exhaust administrative remedies under section 1997e(a) of the PLRA is an affirmative defense, and defendants have the burden of proving the absence of exhaustion. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). The proper procedure for challenging a prisoner's complaint for failure to exhaust administrative remedies is to file "an unenumerated 12(b) motion rather than a motion for summary judgment." *Wyatt*, 315 F.3d at 1119. "In deciding a motion to dismiss for failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact." *Id.* at 1119-20. A defendant must demonstrate that pertinent relief remained available, whether at unexhausted levels of the grievance process or through awaiting the results of the relief already granted as a result

of that process. *Brown v. Valoff*, 422 F.3d 926, 936-37 (9th Cir. 2005). Relevant evidence in so demonstrating includes "statutes, regulations, and other official directives that explain the scope of the administrative review process; documentary or testimonial evidence from prison officials who administer the review process, and information provided to the prisoner concerning the operation of the grievance procedure in this case, such as in the response memoranda in these cases." *Id.* at 937. "With regard to the latter category of evidence, information provided the prisoner is pertinent because it informs [the court's] determination of whether relief was, as a practical matter, 'available.'" *Id.* "The 'availability' of relief does not turn on what the prisoners might have been told at the time they filed their complaints, but rather on how the prison viewed and treated their complaint based on its own procedures." *Id.* at 942 n.17. "If the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice." *Wyatt*, 315 F.3d at 1120.

Program Statement 1330.16 provides the procedure for the administrative remedy program. The court finds section 13, entitled Remedy Processing, particularly relevant:

> a. Receipt. Upon receiving a Request or Appeal, the Administrative Remedy Clerk shall stamp the form with the date received, log it into the SENTRY index as received on that date, and write the "Remedy ID" as assigned by SENTRY on the form. . . .
>
> All submissions received by the Clerk, whether accepted or rejected, shall be entered into SENTRY in accordance with the SENTRY Administrative Remedy Technical Reference Manual.
>
> * * *
>
> b. Investigation and Response Preparation. The Clerk or Coordinator shall assign each filed Request or Appeal for investigation and response preparation.
>
> * * *
>
> Requests or Appeals shall be investigated thoroughly, and all relevant information developed in the investigation shall ordinarily be supported by written documents or notes of the investigator's findings. Notes should be sufficiently detailed to show the name, title, and location of the information provided, the date the

> information was provided, and a full description of the information provided. Such documents and notes shall be retained with the case file copy. When deemed necessary in the investigator's discretion, the investigator may request a written statement from another staff member regarding matters raised in the Request or Appeal. Requested staff shall provide such statements promptly. . . .
>
> c. Responses. Responses ordinarily shall be on the form designed for that purpose, and shall state the decision reached and the reasons for the decision. The first sentence or two of a response shall be a brief abstract of the inmate's Request or Appeal, from which the SENTRY abstract should be drawn. This abstract should be complete, but as brief as possible. The remainder of the response should answer completely the Request or Appeal, be accurate and factual, and contain no extraneous information. . . .
>
> Program Statements, Operations Memoranda, regulations, and statutes shall be referred to in responses whenever applicable, including section numbers on which the response relies. . . .

Dkt. # 40-1 at 11-13 (Ex. 1 to Ringwood Decl.).

Here, plaintiff submitted a Request on October 19, 2009. Dkt. # 39 at 6 (Ex. 1 to Satterwhite Decl.). It is undisputed that the Request was never entered into SENTRY as required by Program Statement 1330.16. It appears that on or around October 26, 2009, plaintiff's Request was rejected in a handwritten note: "A BP-9 is not the proper procedure for monetary damages. You must submit a tort claim form to the Western Regional Office Legal Counsel." *Id.* No response memorandum was entered into SENTRY, and the handwritten response does not seem to comply with Program Statement 1330.16. Most importantly, no other information was communicated to plaintiff in the response. The response did not state that the Request was rejected because it was untimely. *Contrast Marella v.Terhune*, 568 F.3d 1024, 1027 (9th Cir. 2009) (form rejecting appeal stated it was not timely filed). The response did not state that the Request was rejected because plaintiff submitted it to the wrong institution. The

Response did not state that further review or appeal was available. The Response did not state or otherwise indicate that an investigation would be undertaken.[5] The Response did not state that administrative remedies were available. Rather, the response stated "You **must** submit a tort claim . . . ." Dkt. # 39 at 6 (Ex. 1 to Satterwhite Decl.).

The court finds that the reasonable interpretation of the two sentence rejection is that no administrative relief was available. *See Brown*, 422 F.3d at 937-38 (no further administrative relief available where memorandum did not counsel that any further review was available). *See also Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010) (holding that "improper screening of an inmate's administrative grievances renders administrative remedies 'effectively unavailable' such that exhaustion is not required under the PLRA."). After the fact pontifications of what could have happened or possible reasons for rejection, without admissible evidence, does not satisfy defendants' burden. *See Brown*, 422 F.3d at 940 ("Establishing, as an affirmative defense, the existence of further 'available' administrative remedies requires evidence, not imagination."); *Sapp*, 623 F.3d at 825 (considering actual reasons administrative grievance was screened out).

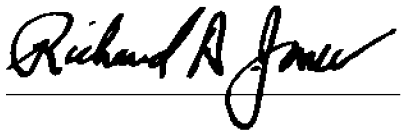
Accordingly, the court finds that defendant has failed to meet its burden of demonstrating that pertinent relief remained available. *Brown*, 422 F.3d at 936-37.

C. Conclusion

For all the foregoing reasons, the court DENIES defendants' motion to dismiss (Dkt. # 35) and motion to supplement (Dkt. # 42).

[5] The court notes that defendants have not presented any evidence that an investigation actually was undertaken prior to the rejection.

Dated this 5th day of March, 2012.



The Honorable Richard A. Jones
United States District Judge

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE SATTERWHITE,

Plaintiff,

v.

MARIA LUISA DY, M.D.; MANUELL LACIST; KENDALL HIRANO, PA-C; DENISE DUBLE, FNP; and JOHN AND JANE DOES 1-10 and UNITED STATES OF AMERICA,

Defendants.

No. 11-0528 RAJ

STIPULATED ORDER OF DISMISSAL WITH PREJUDICE RE: DEFENDANT KENDALL HIRANO

Noted on Motion Calendar: March 2, 2012

Pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, by and through the undersigned counsel, the parties hereby agree and stipulate that all claims against Defendant Kendall Hirano are dismissed with prejudice and that Kendall Hirano is dismissed from this action. Plaintiff does not dispute that United States Public Health Service ("PHS") officers are absolutely immune from suit. Plaintiff has learned that Kendall Hirano was and is a commissioned officer with the PHS, and, accordingly, agrees that he should be dismissed with prejudice on that basis. This stipulation and agreement does not address whether or not there are additional grounds to dismiss all claims against Kendall Hirano.

UNITED STATES ATTORNEY
1201 Pacific Avenue, Ste. 700
Tacoma, Washington 98402
253-428-3800

In exchange for this stipulation and agreement Kendall Hirano will not seek attorneys fees and costs from Plaintiff Satterwhite. Plaintiff and Defendant Hirano will bear their own attorneys fees and costs.

DATED this 2nd day of March, 2012.

Respectfully submitted,

JENNY A. DURKAN
UNITED STATES ATTORNEY

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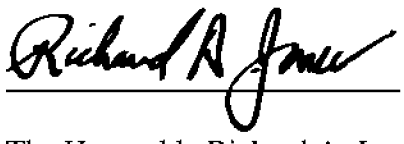
Attorney for Plaintiff Jermaine Satterwhite

ORDER

Based upon the foregoing Stipulation, IT IS SO ORDERED. All claims against Defendant Kendall Hirano are hereby dismissed with prejudice, and Kendall Hirano is dismissed from this action. The parties are to bear their own attorneys fees and costs.

DATED this 5th day of March, 2012.



The Honorable Richard A. Jones
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE E. SATTERWHITE,

Plaintiff(s),

v.

MARIA DY, et al.,

Defendant(s).

CASE NO. 2:11–cv–00528–RAJ

MINUTE ORDER REGARDING INITIAL DISCLOSURE, JOINT STATUS REPORT, and EARLY SETTLEMENT

I. Initial Scheduling Dates

Pursuant to the December 1, 2000 revisions to the Federal Rules of Civil Procedure, the Court sets the following dates for initial disclosure and submission of the Joint Status Report and Discovery Plan:

Deadline for FRCP 26(f) conference..... 4/24/2012
Initial Disclosure Pursuant to FRCP 26(a)(1)..... 5/1/2012
Combined Joint Status Report and Discovery Plan as Required by FRCP 26(f), and Local Rule CR 16..... 5/8/2012

If this case involves claims that are exempt from the requirements of FRCP 26(a) and (f), please notify Victoria Ericksen by telephone at (206) 370–8517.

II. Joint Status Report and Discovery Plan

All counsel and any pro se parties are directed to confer and provide the

Court with a combined Joint Status Report and Discovery Plan (the "Report") by . This conference shall be done by direct and personal communication, whether that be a face–to–face meeting or a telephonic conference. The Report will be used in setting a schedule for the prompt completion of the case. It must contain the following information by corresponding paragraph numbers:

1. A statement of the nature and complexity of the case.

2. A statement of which ADR method (mediation, arbitration, or other) should be used. The alternatives are described in Local Rule CR 39.1. If the parties believe there should be no ADR, the reasons for that belief should be stated.

3. Unless all parties agree that there should be no ADR, a statement of when mediation or another ADR proceeding under Local Rule CR 39.1 should take place. In most cases, the ADR proceeding should be held within four months after the Report is filed. It may be resumed, if necessary, after the first session.

4. A proposed deadline for joining additional parties.

5. A proposed discovery plan that indicates:

   A. The date on which the FRCP 26(f) conference and FRCP 26(a) initial disclosures took place;

   B. The subjects on which discovery may be needed and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

   C. What changes should be made in the limitations on discovery imposed under the Federal and Local Civil Rules, and what other limitations should be imposed;

   D. A statement of how discovery will be managed so as to minimize expense (e.g., by foregoing or limiting depositions, exchanging documents informally, etc.); and

   E. Any other orders that should be entered by the Court under FRCP 26(c) or under Local Rule CR 16(b) and (c).

6. The date by which the remainder of discovery can be completed.

7. Whether the parties agree that a full–time Magistrate Judge may conduct all proceedings, including trial and the entry of judgment, under 28 U.S.C. § 636(c) and Local Rule MJR 13. The Magistrate Judge who would be assigned

to this case is Judge Brian A. Tsuchida . Agreement in the Report will constitute the parties' consent to referral of the case to the assigned Magistrate Judge.

8. Whether the case should be bifurcated by trying the liability issues before the damages issues, or bifurcated in any other way.

9. Whether the pretrial statements and pretrial order called for by Local Rules CR 16 (e), (h), (i), and (l), and 16.1 should be dispensed of in whole or in part for the sake of economy.

10. Any other suggestions for shortening or simplifying the case.

11. The date the case will be ready for trial.

12. Whether the trial will be jury or non–jury.

13. The total number of trial days required.

14. The names, addresses, telephone numbers, and email addresses of all trial counsel.

15. If, on the due date of the Report, all defendant(s) or respondent(s) have not been served, counsel for plaintiff shall advise the Court when service will be effectuated, the reason why it was not made earlier, and shall provide a proposed schedule for the required FRCP 26(f) conference and FRCP 26(a) initial disclosures.

16. Whether any party wishes a scheduling conference prior to a scheduling order being entered in the case.

If the parties are unable to agree on any part of the Report, they may answer in separate paragraphs. No separate reports are to be filed.

The time for filing the Report may be extended only by court order. Any request for an extension should be made by telephone to Victoria Ericksen at (206) 370–8517.

If the parties wish to have a status conference with the Court at any time during the pendency of this action, such request should be directed to Victoria Ericksen at (206) 370–8517.

III. PLAINTIFF'S RESPONSIBILITY

This Order is issued at the outset of the case, and a copy delivered by the clerk to counsel for plaintiff (or plaintiff, if pro se) and any defendants who have appeared. Plaintiff's counsel (or the plaintiff, if pro se) is directed to serve copies of this Order on all parties who appear after this Order is filed within ten (10) days of receipt of service of each appearance. Plaintiff's counsel (or plaintiff, if pro se) will be responsible for starting the communications needed

to comply with this Order

IV. ALTERATIONS TO ELECTRONIC FILING PROCEDURES

As of June 1, 2004, counsel shall be required to electronically file all documents with the Court. Pro se litigants may file either electronically or in paper form. Information and procedures for electronic filing can be found on the Western District of Washington's website at www.wawd.uscourts.gov.

The following alterations to the Electronic Filing Procedures apply in all cases pending before Judge Jones:

- Section III, Paragraph F: When the aggregate submittal to the Court (i.e., the motion, any declarations and exhibits, the proposed order, and the certificate of service) exceeds **50 pages** in length, a paper copy of the document (with tabs or other organizing aids as necessary) shall be delivered to the Clerk's Office by 10:30 a.m. the morning after filing. The chambers copy must be clearly marked with the words "Courtesy Copy of Electronic Filing for Chambers."
- Section III, Paragraph L: Unless the proposed order is stipulated, agreed, or otherwise uncontested, the parties need not email a copy of the order to the judge's email address.

V. Early Settlement Consideration

When civil cases are settled early – before becoming costly and time consuming – all parties and the Court benefit. The Federal Bar Association Alternative Dispute Resolution Task Force Report for this district stated:

> [T]he major ADR–related problem is not the percentage of civil cases that ultimately settle, since statistics demonstrate that approximately 95% of all cases are resolved without trial. However, the timing of settlement is a major concern. Frequently, under our existing ADR system, case resolution occurs far too late, after the parties have completed discovery and incurred substantial expenditure of fees and costs.

The judges of this district have adopted a resolution "approving the Task Force's recommendation that court–connected ADR services be provided as early, effectively, and economically as possibile in every suitable case." The steps required by this Order are meant to help achieve that goal while preserving the rights of all parties.

If settlement is achieved, counsel shall notify Victoria Ericksen at (206) 370–8517.

VI. Sanctions

A failure by any party to comply fully with this Order may result in the imposition of sanctions.

DATED April 10, 2012.

s/ Richard A. Jones
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE E. SATTERWHITE,

Plaintiff(s),

v.

MARIA DY, et al.,

Defendant(s).

CASE NO. 2:11-cv-00528-RAJ

MINUTE ORDER SETTING TRIAL DATE AND RELATED DATES

JURY TRIAL DATE	**April 8, 2013**
Length of Trial	10 days
Deadline for joining additional parties	July 31, 2012
Deadline for amending pleadings	October 10, 2012
Disclosure of expert testimony under FRCP 26(a)(2)	October 10, 2012
All motions related to discovery must be noted on the motion calendar no later than the Friday before discovery closes pursuant to CR7(d)(3) and CR7(a)(2)(B).	
Discovery completed by	December 10, 2012
All dispositive motions must be filed by and noted on the motion calendar no later than the fourth Friday thereafter (see CR7(d))	January 8, 2013

Settlement conference per CR 39.1(c)(2) held no later than	February 7, 2013
Mediation per CR 39.1(c)(3) held no later than	March 11, 2013
All motions in limine must be filed by and noted on the motion calendar no later than the THIRD Friday thereafter	March 11, 2013
Agreed pretrial order due	March 25, 2013
Pretrial conference to be scheduled by the Court.	
Trial briefs, proposed voir dire questions, jury instructions, neutral statement of the case, and trial exhibits due	April 1, 2013

These dates are set at the direction of the Court after reviewing the Joint Status Report and discovery plan submitted by the parties. All other dates are specified in the Local Civil Rules. If any of the dates identified in this Order or the Local Civil Rules fall on a weekend or federal holiday, the act or event shall be performed on the next business day. These are firm dates that can be changed only by order of the Court, not by agreement of counsel or the parties. The Court will alter these dates only upon good cause shown. Failure to complete discovery within the time allowed is not recognized as good cause.

If the trial date assigned to this matter creates an irreconcilable conflict, counsel must notify Victoria Ericksen, courtroom deputy, at (206) 370–8517 within 10 days of the date of this Order and must set forth the exact nature of the conflict. A failure to do so will be deemed a waiver. Counsel must be prepared to begin trial on the date scheduled, but it should be understood that the trial may have to await the completion of other cases.

ALTERATIONS TO ELECTRONIC FILING PROCEDURES

As of June 1, 2004, counsel shall be required to electronically file all documents with the court. Pro se litigants may file either electronically or in paper form. Information and procedures for electronic filing can be found on the Western District of Washington's website at www.wawd.uscourts.gov.

The following alterations to the Electronic Filing Procedures apply in all cases pending before Judge Jones:

- Section III, Paragraph F: When the aggregate submittal to the Court (*i.e.*, the motion, any declarations and exhibits, the proposed order, and the certification of service) exceeds **50 pages** in length, a paper copy of the documents (with tabs or other organizing aids as necessary) shall be delivered to the Clerk's Office by 10:30 a.m. the morning after the filing. The chambers copy must be clearly marked with the words "Courtesy Copy of Electronic Filing for Chambers."
- Section III, Paragraph L: Unless the proposed order is stipulated, agreed, or otherwise uncontested, the parties need not email a copy of the order to the judge's orders email address.

PRIVACY POLICY

Pursuant to the General Order of the Court regarding Public Access to Electronic Case Files (filed May 29, 2003), parties are to redact the following information from documents and exhibits before they are filed with the court:

- Dates of Birth – redact to the year of birth
- Names of Minor Children – redact to the initials

- Social Security Numbers and Taxpayer–Identification Numbers – redact in their entirety
- Financial Accounting Information – redact to the last four digits
- Passport Numbers and Drivers License Numbers – redact in their entirety

The General Order was issued pursuant to the official policy on privacy adopted by the Judicial Conference of the United States and can be found on the court's website at http://www.wawd.uscourts.gov/docs. All documents filed in the above–captioned matter must comply with the Privacy Policy and the General Order.

COOPERATION

As required by CR 37(a), all discovery matters are to be resolved by agreement if possible. Counsel are further directed to cooperate in preparing the final Pretrial Order in the format required by CR 16.1, except as ordered below.

EXHIBITS

The original and one copy of the trial exhibits are to be delivered to chambers seven days before the trial date. Each exhibit shall be clearly marked. Exhibit tags are available in the Clerk's Office.

The Court hereby alters the CR 16.1 procedure for numbering exhibits: Plaintiff's exhibits shall be numbered consecutively beginning with 1; Defendant's exhibits shall be numbered consecutively beginning with the next number series not used by the Plaintiff. Duplicate documents shall not be listed twice. Once a party has identified an exhibit in the Pretrial Order, any party

may use it. Each set of exhibits shall be submitted in a three–ring binder with appropriately numbered tabs.

SETTLEMENT

Should this case settle, counsel shall immediately notify the courtroom deputy, Victoria Ericksen, at (206) 370–8517. Pursuant to CR 3(b), an attorney who fails to give the courtroom deputy prompt notice of settlement may be subject to such sanctions or discipline as the Court deems appropriate.

DATED: May 10, 2012

s/ *Victoria Ericksen*
Victoria Ericksen, Deputy Clerk to
Hon. Richard A Jones, Judge
(206) 370–8517

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE SATTERWHITE, Plaintiff, v. MARIA LUISA DY, M.D.; MANUELL LACIST; KENDALL HIRANO, PA-C; DENISE DUBLE, FNP; and JOHN AND JANE DOES 1-10 and UNITED STATES OF AMERICA, Defendants.	No. 11-0528 RAJ STIPULATION AND ORDER FOR STAY OF DISCOVERY **Noted on Motion Calendar: June 26, 2012**

COME NOW Plaintiff Jermaine Satterwhite and Federal Defendants Maria Luisa Dy, Manuell Lacist, Denise Duble, and United States of America, by and through their undersigned counsel of record, who hereby stipulate and agree:

1. Counsel for Federal Defendants has advised that potential conflicts issues have arisen relating to legal representation that need to be resolved with the assistance of the Department of Justice, Tort Branch, before discovery should continue.

2. Discovery by any party is stayed for thirty days from entry of this stipulation and order or until the potential issues are resolved, whichever comes first.

3. The thirty day period may be extended by mutual agreement for cause shown, or any party may move to extend or end the stay based upon circumstances then existing after thirty days. Plaintiff's requests for admissions and interrogatories to the United States will remain stayed during the pendency of any motion to extend or end the stay.

4. If new counsel enter an appearance for a party, it is anticipated and agreed that such

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Tacoma, Washington 98402
253-428-3800

stay will be voluntarily extended for such agreed period of time necessary to allow such counsel to become familiar with the case and answer discovery as to that party or parties represented. This amount of time will be negotiated in good faith by such counsel and Plaintiff's counsel.

5. If no new counsel are substituted (either within thirty days or such additional time agreed upon or ordered by the Court), then the stay shall expire and the outstanding written discovery shall be responded to within ten days.

DATED this 26th day of June, 2012.

Respectfully submitted,

JENNY A. DURKAN
UNITED STATES ATTORNEY

s/Patricia D. Gugin
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1201 Pacific Avenue, Ste. 700
Tacoma, WA 98402
Phone: 253-428-3832
Fax: 253-428-3826
E-mail: pat.gugin@usdoj.gov
Attorneys for Federal Defendants

s/Joanne R. Werner
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Phone: 206-448-7969
Fax: 206-448-7950
Email; joanne@jwernerlaw.com

s/Michael Withey
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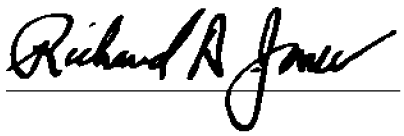
601 Union Street, Ste. 4200
Seattle, WA 98101
Phone: 206-405-1800
Fax: 866-793-7216
Email:mike@witheylaw.com
Attorneys for Plaintiff

ORDER

IT IS HEREBY ORDERED that the Parties' Stipulation and Order for Stay of Discovery is GRANTED for the reasons set forth in the Stipulation.

SO ORDERED.

DATED this 5th day of July, 2012.



The Honorable Richard A. Jones
United States District Judge

UNITED STATES ATTORNEY
1201 Pacific Avenue, Ste. 700
Tacoma, Washington 98402
253-428-3800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

Michael Withey
mike@witheylaw.com

Joanne R. Werner
joanne@jwernerlaw.com

I further certify that I have mailed by United States Postal Service, the foregoing document to the following non CM/ECF participant, addressed as follows:

DATED this 26th day of June, 2012.

s/Kathleen Cline

KATHLEEN CLINE

Legal Assistant

United States Attorney's Office

E-mail:
Kathleen.M.Cline@usdoj.gov

UNITED STATES ATTORNEY
1201 Pacific Avenue, Ste. 700
Tacoma, Washington 98402
253-428-3800

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE SATTERWHITE,

Plaintiff,

v.

MARIA LUISA DY, M.D.; MANUELL LACIST; KENDALL HIRANA, PA-C; DENISE DUBLE, FNP; and JOHN AND JANE DOES 1-10,

Defendants.

No. 11-0528 RAJ

STIPULATION AND ORDER

STIPULATION

Without waiver of any defense any defendant may assert in this action, pursuant to Fed. R. Civ. P. 6(b)(1) and Local Civil Rule 7(d)(1), Plaintiff Jermaine Satterwhite and Federal Defendants Maria Luisa Dy, M.D., Manuell Lacist, Kendall Hirano, PA-C, and Denise Duble, FNP ("Federal Defendants") hereby file this Stipulated Motion and Order requesting that the Court stay and continue the dates by which the Federal Defendants must respond to the Plaintiff's Complaint for the following reasons:

Since service of the Complaint, each Federal Defendant has expeditiously attempted to retain counsel pursuant to 28 C.F.R. § 50.15.[1] Those attempts continue and should be resolved

[1] Neither the Department of Justice nor the undersigned's office represents the Federal Defendants at this time. The undersigned, rather, enters into this stipulation in a limited capacity to represent the interests of the United States pursuant to 28 U.S.C. § 517.

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253-428-3800

within the next sixty days. Federal Defendants should have the benefit of counsel in preparing their defenses to Plaintiff's allegations. Additionally, the Plaintiff contemplates bringing a related action against the United States pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671, *et seq.* In that regard Plaintiff anticipates filing and serving an Amended Complaint adding the United States as a defendant and FTCA claims against the United States.

Therefore, the Plaintiff and Federal Defendants, by and through their respective counsel of record, hereby STIPULATE, AGREE, and JOINTLY REQUEST that the Court enter an order as follows: Federal Defendants' responses to the Complaint are stayed. Each Federal Defendant will serve his or her response to Plaintiff's anticipated Amended Complaint within sixty days of service pursuant to Fed. R. Civ. P.12(a)(3). Plaintiff will effect service of the Amended Complaint on Federal Defendants Dy, Lacist, and Hirano at their place of employment, FDC SeaTac, and not at their homes. The United States will cooperate and work with Plaintiff's counsel to advise Plaintiff's counsel when the aforementioned Federal Defendants are at work and present for service.

So stipulated and respectfully submitted this 9th day of August, 2011.

/s/Michael Withey
MICHAEL WITHEY WSBA # 4787
601 Union Street, Suite 4200
Seattle, WA 98104
Phone: 206-405-1800
Fax: 866-793-7216
Email: mike@witheylaw.com
Attorney for the Plaintiff

/s/Joanne R. Werner
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Fax: 206-448-7950
Email: joanne@jwernerlaw.com
Attorney for the Plaintiff

JENNY A. DURKAN
United States Attorney

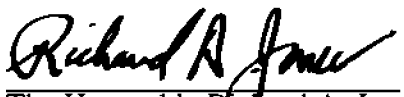
/s/ Patricia D. Gugin
PATRICIA D. GUGIN, WSBA # 43458
Assistant United States Attorney
U.S. Attorney's Office
Western District of Washington
1201 Pacific Avenue, Suite 700
Tacoma, WA 98402
Telephone: 253-428-3832
Fax: 253-428-3826
Email: pat.gugin@usdoj.gov

On behalf of the Federal Defendants,
pursuant to 28 U.S.C. § 517

[ORDER

The parties having so stipulated, it is so ORDERED.

DATED this 10th day of August, 2011.



The Honorable Richard A. Jones
United States District Judge

UNITED STATES ATTORNEY
1201 Pacific Avenue, Ste. 700
Tacoma, WA 98402
253-428-3800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

Michael Withey
mike@witheylaw.com

Joanne R. Werner
joanne@jwernerlaw.com

I further certify that I have mailed by United States Postal Service, the foregoing document to the following non CM/ECF participant, addressed as follows:

DATED this 9th day of August, 2011.

s/Kathleen Cline
KATHLEEN CLINE
Legal Assistant
United States Attorney's Office
E-mail: Kathleen.M.Cline@usdoj.gov

UNITED STATES ATTORNEY
1201 Pacific Avenue, Ste. 700
Tacoma, WA 98402
253-428-3800

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE E. SATTERWHITE,

Plaintiff,

v.

MARIA DY, et al.,

Defendants.

CASE NO. C 11-528RAJ

MINUTE ORDER

The following minute order is made by the direction of the court, the Honorable Richard A. Jones:

Judge Jones RECUSES himself from this action. The Clerk has reassigned this action to the Honorable John C. Coughenour in accordance with this District's case assignment procedures. All future captions shall have the case number C11-528 JCC.

Dated this 21st day of August, 2012.

WILLIAM M. MCCOOL
Clerk

s/Consuelo Ledesma
Deputy Clerk

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE E. SATTERWHITE,

Plaintiff,

v.

MARIA DY, et al.,

Defendants.

CASE NO. C11-0528-JCC

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable John C. Coughenour, United States District Judge:

The Court hereby ADOPTS the case management deadlines previously set by Judge Jones. *See* Dkt. No. 53.

DATED this 7th day of September 2012.

William M. McCool
Clerk of Court

s/Tim Farrell
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE United States District Court for the Western District of Washington

Jermaine E. Satterwhite

Plaintiff,

v.

Case No.: 2:11-cv-00528-JCC
Judge John C Coughenour

Maria Dy, et al.

Defendant.

ORDER REGARDING DISCOVERY AND DEPOSITIONS

IT IS ORDERED that:

(1) **DISCOVERY**. All discovery matters are to be resolved by agreement if possible. If a ruling is needed as to any discovery questions, and counsel wish to avoid the time and expenses of a written motion, they may obtain an expedited ruling through a telephone conference call to the court at (206) 370-8800.

(2) **DEPOSITIONS**. Depositions will be conducted in compliance with the following rules:

(a) **Examination**. If there are multiple parties, each side should ordinarily designate one attorney to conduct the main examination of the deponent, and any questioning by other counsel on that side should be limited to matters not previously covered.

(b) **Objections**. The only objections that should be raised at the deposition are those involving a privilege against disclosure, or some matter that may be remedied if presented at the time (such as the form of the question or the responsiveness of the answer), or that the question seeks information beyond the scope of discovery. Objections on other grounds are unnecessary and should generally be avoided. All objections should be concise and must not suggest answers to, or otherwise coach, the deponent. Argumentative interruptions will not be permitted.

(c) **Directions Not to Answer**. Directions to the deponent not to answer are improper, except on the ground of privilege or to enable a party or deponent to present a motion to the court or special master for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass or oppress the party or the deponent, or for appropriate limitations upon the scope of the depositions (e.g., on the ground that the line of inquiry is not relevant nor reasonably calculated to lead to the discovery of admissible evidence). When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as the date of the communication, who made the statement in question, to whom and in whose presence the statement was made, other persons to whom the statement was

made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

(d) **Responsiveness**. Witnesses will be expected to answer all questions directly and without evasion, to the extent of their testimonial knowledge, unless directed by counsel not to answer.

(e) **Private Consultation**. Private conferences between deponents and their attorneys during the actual taking of the deposition are improper, except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the court for good cause shown, such conferences may, however, be held during normal recesses and adjournments.

(f) **Conduct of Examining Counsel**. Examining counsel will refrain from asking questions he or she knows to be beyond the legitimate scope of discovery, and from undue repetition.

(g) **Courtroom Standard**. All counsel and parties should conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.

(3) **RESPONSIBILITY OF PLAINTIFF'S COUNSEL**. This order is issued at the outset of the case, and a copy is delivered by the clerk to counsel for plaintiff. Plaintiff's counsel (or plaintiff, if pro se) is directed to deliver a copy of this order to each other party within ten (10) days after receiving notice of that party's appearance.

DATED: September 10, 2012

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTONAT SEATTLE

JERMAINE SATTERWHITE,

Plaintiff,

vs.

MARIA LUISA DY, M.D.; MANUELL LACIST; DENISE DUBLE, FNP; JOHN AND JANE DOES 1-10, and UNITED STATES OF AMERICA.

Defendants.

No. C11-0528-JCC

ORDER OF DISMISSAL OF ALL CLAIMS

The Stipulation for Compromise Settlement and Release filed by Plaintiff and the United States of America (Dkt. No. 101) is accepted by the Court. Accordingly, all claims against Defendant United States under the Federal Tort Claim Act are DISMISSED with prejudice. Further, all separate claims against the individually named Defendants Maria Luisa Dy, Manuell Lacist and Denise Duble are DISMISSED with prejudice. Each party shall bear its own costs.

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Law Offices of Michael Withey
601 Union Street, Ste. 4200
Seattle, WA 98101
206-405-1800
Fax: 866-793-7216

DATED this 12th day of July, 2013.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

Respectfully submitted on this 11th day of July, 2013.

/s/ Michael Withey
MICHAEL WITHEY, WSBA 4787
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Attorneys for Plaintiff

/s/ Joanne R. Werner
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Fax: 206-448-7950
E-mail: joanne@jwernerlaw.com
Attorneys for Plaintiff

/s/ Christina N. Dimock

Agreed to Entry of Order

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Attorneys for the United States of America

/s/ Gregory P. Thatcher

Agreed to Entry of Order

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Attorneys for Defendant Denise Duble

/s/ Jeremy E. Roller

Agreed to Entry of Order

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Attorneys for Defendant Maria Luisa Dy

/s/ Michelle Peterson

Agreed to Entry of Order
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Attorneys for Defendant Manuell Lacist

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE E. SATTERWHITE,

Plaintiff,

v.

MARIA DY, et al.,

Defendants.

CASE NO. C11-0528-JCC

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable John C. Coughenour, United States District Judge:

This matter comes before the Court on the parties' stipulation and proposed order (Dkt. No. 95), which is incorporated herein by reference. This matter is hereby STAYED and no decision on any pending motions shall be rendered, nor further actions taken until the parties have either: (1) filed a Notice of Dismissal; or (2) submitted a status update to this Court, to be filed sixty (60) days from today, on May 20, 2013. All pre-trial deadlines that have not yet passed are hereby stricken and, if the settlement does not become final, shall be re-set upon the parties' request.

//

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DATED this 21st day of March 2013.

William M. McCool
Clerk of Court

s/Tim Farrell
Deputy Clerk

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The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE SATTERWHITE,

Plaintiff,

v.

MARIA LUISA DY, M.D.; MANUELL LACIST; DENISE DUBLE, FNP; JOHN AND JANE DOES 1-10 and UNITED STATES OF AMERICA,

Defendants.

No. C11-00528-JCC

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677

Note for Motion Calendar:
July 11, 2013

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant and the attorneys, signing this agreement, whether or not a party to this civil action), and the United States of America, by and through their respective attorneys, as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Settlement Agreement.

UNITED STATES ATTORNEY
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970

2. The United States of America agrees to pay the sum of $1.4 million, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Stipulation of Compromise Settlement in full settlement, satisfaction, and release of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against the United States of America, its agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America, its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs,

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executors, administrators or assigns against any third party or against the United States, including claims for wrongful death.

4. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, or employees, and it is specifically denied that they are liable to plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, "no attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title."

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the settlement at their expense. Plaintiff agrees to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event plaintiffs fail to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

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8. Payment of the settlement amount will be made by government wire transfer as per the following:

A. Name of Bank:
B. Street Address of Bank:
C. City, State and Zip Code of Bank:
D. Federal Reserve Number:
E. Routing Number:
F. Name of Account:
G. Account Number:

Plaintiff's attorney agrees to distribute the settlement proceeds to plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

10. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Respectfully submitted this 11th day of July, 2013.

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HAROLD MALKIN, WSBA 30986
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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERMAINE E. SATTERWHITE, Plaintiff, v. MARIA LUISA DY, M.D.; MANUELL LACIST; DENISE DUBLE, FNP; JOHN AND JANE DOES 1-10 and UNITED STATES OF AMERICA, Defendants.	CASE NO. C11-0528-JCC ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Jermaine Satterwhite claims that Defendant Manuell Lacist, a physician's assistant at the federal detention center where Satterwhite was incarcerated, violated Satterwhite's Eighth Amendment rights by failing to prescribe treatment for, recommend Satterwhite for treatment for, or otherwise respond to Satterwhite's latent tuberculosis infection. (Dkt. No. 16.) Currently before the Court are (1) Lacist's motion for summary judgment on the ground of qualified immunity (Dkt. No. 76) and (2) Satterwhite's motion for a continuance of the Court's decision on Lacist's motion (Dkt. No. 80). Having thoroughly considered the parties' briefing and the record, the Court finds oral argument unnecessary and hereby DENIES Lacist's motion for summary judgment (Dkt. No. 76) and DENIES Satterwhite's motion for a continuance (Dkt. No. 80) as moot, for the reasons explained herein.

I. BACKGROUND

The following comes from Satterwhite's first amended complaint and three documents Lacist asserts were in effect at the time of the alleged constitutional violation: the U.S. Bureau of Prison's Program Statements on Infectious Disease Management and Patient Care, and its Clinical Practice Guidelines for the Management of Tuberculosis ("Tuberculosis Guidelines"). (Dkt. No. 77 Exs. A, E, D.) Lacist submitted these documents with his motion for summary judgment and attests that he was "ordered to follow and adhere to" them when he was employed at the Federal Detention Center in Seatac, Washington ("FDC-Seatac"). (Dkt. No. 77 ¶¶ 7, 11, 13.) Because Lacist has moved for summary judgment, the Court interprets these documents, and draws all reasonable inferences from them, in the light most favorable to Satterwhite. *See Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 668 (9th Cir. 1980).

A. Tuberculosis and the Bureau's Program Statements and Guidelines

Tuberculosis is caused by infection with *M. tuberculosis*. (Dkt. No. 77 Ex. D at 51.) *M. tuberculosis* is transmitted through airborne respiratory droplets when an individual with active pulmonary tuberculosis coughs, sneezes, or speaks. (*Id.*) An individual who is infected with the organism but who has not developed active tuberculosis is deemed to have latent tuberculosis infection ("LTBI"). (*Id.*) Approximately 7–10% of infected persons who are not treated for LTBI develop active tuberculosis disease at some point in their lives. (*Id.*) Active tuberculosis is a serious, potentially life-threatening disease. *See McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997) ("highly contagious and deadly disease"); *Lauria v. Donahue*, 438 F. Supp. 2d 131, 135 (E.D.N.Y. 2006) ("the deadly disease"); *Stewart v. Taft*, 235 F. Supp. 2d 763, 765 n.1 (N.D. Ohio 2002) ("communicable and potentially deadly disease").

At the time of the alleged constitutional violation, the Bureau's Tuberculosis Guidelines and Infectious Disease Management Program Statement provided that the Bureau would screen each inmate for tuberculosis within two calendar days of initial incarceration using the Tuberculin Skin Test ("TST"), also known as the purified protein derivative ("PPD") test. (Dkt.

No. 77 Exs. A at 14, D at 53.) "The test is 'read' by measuring in millimeters (mm) the largest diameter of the indurated area (palpable swelling) on the forearm." (*Id.* Ex. D at 54.) An induration of 5 millimeters or greater was considered "TST-positive." (*Id.* at 55.) The Guidelines provided that all TST-positive inmates should be referred for a chest X-ray to rule out active tuberculosis disease. (*Id.*)

The Infectious Disease Management Program Statement provided that "[i]nmates will be evaluated and treated for latent TB infection or TB disease in accordance with guidance from the Medical Director" and that "[f]ollow-up periodic chest x-rays for inmates with previously positive tuberculin skin tests will be conducted based upon guidance from the Medical Director." (*Id.* Ex. A at 15–16; *see also id.* at 31 ("Once an institution physician determines a TB exposure has occurred, the exposed individuals will be offered evaluation and treatment for latent TB in accordance with the U.S. Public Health Service recommendations and guidance from the Medical Director.").) The Guidelines, which had been "updated to reflect recently issued guidance from Centers for Disease Control and Prevention (CDC) on TB control in correctional facilities," in turn provided that "all" "inmates who have a positive TST" of "10 millimeters or greater" "should be evaluated for LTBI treatment," and "[t]reatment of LTBI should be considered for all TST positive inmates regardless of age, when no medical contraindications to treatment exist, and previous adequate treatment has not been provided." (*Id.* Ex. D at 47, 55, 57; *see id.* at 51 ("Identification of latent TB infection provides an opportunity for providing treatment to prevent future development of TB disease."); *id.* at 53 ("[P]roviding treatment for those with latent TB infection [is an] important public health measure[].").) An exception to the rule of considering all TST-positive inmates with an induration of 10 millimeters or greater for LTBI treatment was that "[i]nmates in detention centers should ordinarily not be prescribed LTBI treatment if their anticipated incarceration is uncertain or is less than several months, unless [certain] . . . high priority indications have been identified . . . ." (*Id.* at 58.) Finally, certain individuals—such as "converters," whose TST reading had increased by 10 millimeters

or more in a two-year period and thus were at a higher risk of developing active tuberculosis—were "high priority candidates for LTBI treatment." (*Id.* at 57.)

According to the Guidelines, there were two "standard options for treatment of LTBI." (*Id.*) The "preferred regimen" was six to nine months of isoniazid by mouth along with pyridoxine: "**Nine months of isoniazid should be administered . . . , whenever feasible, for all . . . inmates.**" (*Id.* at 58 (emphasis in original).) The Guidelines provided that "[g]roup counseling or other structured educational efforts should be considered for inmates who refuse treatment for LTBI when treatment is clearly indicated" and that "[i]nmates who refuse treatment of LTBI should sign a refusal form to be kept in their medical record, documenting their declination of treatment." (*Id.* at 60, 62.)

The Guidelines also included a section on "TB contact investigations," which the prison was to carry out when it identified "a potentially infectious TB case" with whom others might have come into contact: "The goal of a TB contact investigation is both to identify other active cases of TB (rare) and *to identify and completely treat individuals with new latent TB infection*, particularly those at high risk for developing the disease." (*Id.* at 69 (emphasis added).) The Guidelines provided that "[f]ocus should be placed on identifying the highest risk contacts [*i.e.*, those with the greatest duration or concentration of exposure], completely screening them *and* providing a full course of treatment of LTBI for those who are infected." (*Id.* (emphasis in original).) Under "Infection Control Measures," the Guidelines provided, "Inmates should be advised of the importance of completing treatment for either TB disease or LTBI if diagnosed." (*Id.* at 75.) Finally, under "TB Program Management," the Guidelines provided that "[p]articular attention should be focused on ensuring," *inter alia*, that "[i]nmates are treated for LTBI in accordance with recommended guidelines." (*Id.* at 78.)

The Bureau's Program Statement on Patient Care provided that each prison would provide ambulatory care services through primary care provider teams ("PCPT"). (*Id.* Ex. E at 113.) Under the PCPT model:

> [E]ach inmate is assigned to a medical team of health care providers and support staff who are responsible for managing the inmate's health care needs.
>
> . . . . .
>
> [M]id-level providers (MLP) need to be available to provide diagnostic and treatment services to the inmate population . . . . [E]ach MLP [is] assigned a caseload of [a certain number of] inmates.
>
> . . . . .
>
> A physician will provide clinical oversight for multiple provider teams. The physician, as the licensed provider of the team, is responsible for the care that team delivers.
>
> . . . . .
>
> [T]he MLP is the PCPT's primary care provider . . . . The MLP will serve as the primary point of contact for inmates assigned to their caseload.

(*Id.* at 113–15.)

> The Program Statement on Patient Care also provided:
>
> **SOAP Format**. Patient encounters will be documented using the SOAP format:
> - **S**—Subjective or Symptomatic data
>
> **O**—Objective Data
> **A**—Assessment
> **P**—Plan
>
> **Patient education** is a required element of the treatment plan. Education may be documented under "**P**," or may be documented separately ("**SOAPE**").

(*Id.* at 120.)

B. Alleged Eighth Amendment Violation

Satterwhite was incarcerated at FDC-Seatac from approximately March 27, 2008 to April 21, 2009. (Dkt. No. 16 ¶ 3.1.) The TST that prison staff administered to Satterwhite upon his incarceration revealed an 18-millimeter induration. (*Id.* ¶ 3.3.) His chest X-ray was negative for active tuberculosis disease. (*Id.* ¶¶ 3.5–3.6.) On April 8, 2008, Defendant Manuell Lacist, a physician's assistant and "mid-level provider" at FDC-Seatac, performed a "History & Physical" exam of Satterwhite. (*Id.* ¶ 3.8; Dkt. No. 77 Exs. B–C.) Under "Tuberculosis," Lacist recorded that Satterwhite had a "Positive" "PPD Result" within the last year and that his chest X-ray was normal. (Dkt. No. 77 Ex. B at 33.) Lacist admits in his motion for summary judgment that he

knew from this information that Satterwhite had LTBI. (Dkt. No. 76 at 9; Dkt. No. 82 at 1.) In the History & Physical report, under "Potential Items For Follow-up," Lacist wrote, "PPD Administration Not Performed."[1] (Dkt. No. 77 Ex. B at 42.) Lacist recorded the following in Satterwhite's chronological record of medical care:

> S/O FOR H[ISTORY] & P[HYSICAL] SEE BEMR [MEDICAL RECORD]
> A P[HYSICAL] E[XAM], H[ISTORY] O[F] +[POSITIVE] PPD
> P/E [SICK CALL] COPAY EXPLAINED
> R[ETURN] T[O] C[LINIC] P[RO] R[E] N[ATA] [AS NEEDED]

(*Id.* Ex. C at 44.) Lacist did not discuss LTBI treatment with Satterwhite, did not refer him to a physician to be considered for treatment, and did not record anything under "plan" or "Potential Items For Follow-up" regarding treatment or follow-up monitoring. (*Id.* Exs. B, C.) Nothing in the record indicates that Satterwhite was contraindicated for LTBI treatment. (*Id.*)

Defendant Maria Luisa Dy, M.D. was the physician assigned to Satterwhite. (Dkt. No. 16 ¶ 3.10.) She co-signed the History & Physical report and chronological record of medical care that Lacist prepared. (Dkt. No. 77 Exs. B at 42, C at 44.)

On January 27, 2009—almost ten months after Lacist examined Satterwhite—Satterwhite submitted a request for treatment for a productive cough he had had for at least a month. (Dkt. No. 16 ¶ 3.11.) Kendall Hirano, another physician's assistant at FDC-Seatac, examined Satterwhite, did not order a chest X-ray or prescribe any tuberculosis treatment, and diagnosed Satterwhite with "cough secondary to post-nasal drainage/allergic rhinitis." (*Id.* ¶¶ 3.12–3.13.) Dr. Dy co-signed the exam and evaluation. (*Id.* ¶ 3.14.) On March 16, 2009, Hirano saw Satterwhite again and documented that he was suffering from chest pain and the same productive cough. (*Id.* ¶ 3.15.) Hirano diagnosed Satterwhite with "other anomalies of the ribs and sternum," and Dr. Dy again co-signed the exam and evaluation. (*Id.* ¶¶ 3.16–3.17.)

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[1] Because neither party addresses this "follow-up" section of the report, and because it is unclear to the Court what Lacist meant to convey when he wrote, "PPD Administration Not Performed," the Court does not consider this item of the record further.

On April 21, 2009, Satterwhite was transferred to the federal correctional facility in Herlong, California. (*Id.* ¶ 3.19.) On May 3, 2009, he was transferred to St. Mary's Medical Center in Reno, Nevada, where the hospital discovered a lesion in his right lung, enlarged lymph nodes, lytic bone lesions, a compression fracture of one of Satterwhite's vertebra caused by an epidural mass compressing the spinal cord, and a lesion in the first lumbar vertebra—all found to have been caused by untreated, widespread tuberculosis. (*Id.* ¶ 3.22.) Satterwhite underwent two spinal surgeries and currently suffers from a permanent disabling injury to his spinal cord, including paralysis and loss of sensation in both legs. (*Id.* ¶¶ 3.23, 3.25–3.26.)

Satterwhite brought a *Bivens* action for damages against Lacist, Dr. Dy, Hirano,[2] and a nurse at FTC-Seatac for allegedly violating his Eighth Amendment right to be free from cruel and unusual punishment. (*Id.* § IV.) *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Satterwhite alleges that Lacist violated his Eighth Amendment rights "by willfully and purposefully and with deliberate indifference failing to respond to and treat Plaintiff Satterwhite's known serious medical condition of latent TB," including by "failing to prescribe any anti-TB treatment, refer Plaintiff for evaluation and treatment by a physician[,] or inform Plaintiff or any other health care providers at FDC SeaTac that Plaintiff had a positive skin test of 18 millimeters." (*Id.* ¶¶ 4.2, 4.6.) Lacist now moves for summary judgment on the basis of qualified immunity.

II. DISCUSSION

A. Legal Standards

1. Summary Judgment

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). Where the

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[2] Satterwhite and Hirano subsequently stipulated to Hirano's dismissal with prejudice on the basis that Hirano, as a U.S. Public Health Service officer, was absolutely immune from suit. (Dkt. No. 45.)

party opposing a motion for summary judgment will have the burden of proof on an issue at trial, the moving party can prevail by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party meets this initial burden, the opposing party must then "set forth specific facts showing that there is a genuine issue for trial" in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quotation marks omitted); Fed. R. Civ. P. 56(e). In deciding a motion for summary judgment, a court draws all inferences in the light most favorable to the party opposing the motion. *Blair Foods*, 610 F.2d at 668.

2. Eighth Amendment

"The [Eighth] Amendment . . . requires that inmates be furnished with the basic human needs, one of which is 'reasonable safety,'" *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989)), and prison officials "must take reasonable measures to guarantee [such] safety.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)). "Having incarcerated [individuals], having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833; *see DeShaney*, 489 U.S. at 199–200. Specifically with respect to physical health:

> [D]enial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency . . . . [I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.

Estelle v. Gamble, 429 U.S. 97, 103–104 (1976) (quotation marks, citations, and indications of alteration omitted). "To establish an Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference." *Snow v. McDaniel*, 681 F.3d

978, 985 (9th Cir. 2012).

a. Objective Prong

The plaintiff must show an objectively serious deprivation. Exposure to an unreasonably high risk of harm satisfies this prong: In "situations in which exposure to toxic or similar substances [such as infection] would present a risk of sufficient likelihood or magnitude—and in which there is a sufficiently broad consensus that exposure of *anyone* to the substance should therefore be prevented—[]the Amendment's protection [is] available even though the effects of exposure might not be manifested for some time." *Helling*, 509 U.S. at 34. "[D]etermining whether [such] conditions of confinement violate the Eighth Amendment requires [(1)] a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to [the harmful toxin or infection]" and (2) an "assess[ment] [of] whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk"—*i.e.*, whether "the risk of which he complains is not one that today's society chooses to tolerate." *Id.* at 36. In the context of a medical provider's treating a prisoner for a complained-of malady or risk of disease, the question is whether "a reasonable doctor or patient would find [the complained-of harm or risk of harm] important and worthy of comment or treatment." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled in part on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997)).

For example, in *Helling*, the plaintiff alleged that he was assigned to a cell with another inmate who smoked five packs of cigarettes a day, that he had suffered health problems caused by exposure to environmental tobacco smoke ("ETS"), and that the defendants' failure to regulate or ban ETS jeopardized his health in violation of the Eighth Amendment. 509 U.S. at 28. The court of appeals held that "it would be cruel and unusual punishment to house a prisoner in an environment exposing him to levels of ETS that pose an unreasonable risk of harming his health," *id.* at 30, observing that "society's attitude had evolved to the point that involuntary

exposure to unreasonably dangerous levels of ETS violated current standards of decency," *id.* at 29. The Supreme Court affirmed, holding that the plaintiff had stated an Eighth Amendment claim on which relief could be granted by alleging that his compelled exposure to ETS poses an unreasonable risk to his health." *Id.* at 31.

The [*Helling*] Court analogized the case before it with hypothetical situations in which prison officials were deliberately indifferent to other types of potential harms, such as exposure of inmates to a serious, communicable disease.'" *Johnson v. Epps*, 479 F. App'x 583, 591 (5th Cir. 2012) (unpublished) (quoting *Helling*, 509 U.S. at 35). For example, in *Hutto v. Finney*, 437 U.S. 678 (1978), the Supreme Court observed that crowding prisoners into cells, where some prisoners suffer[] from infectious diseases such as hepatitis and venereal disease," *id.* at 682, is a prison condition[] for which the Eighth Amendment require[s] a remedy, even [if] it [i]s not alleged that the likely harm [will] occur immediately and even though the possible infection might not affect all of those exposed," *Helling*, 509 U.S. at 33. In *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), the court affirmed the district court's holding that allowing [s]ome inmates with serious contagious diseases . . . to mingle with the general prison population," alongside maintaining a host of other unsanitary and inhumane conditions, constitute[d] cruel and unusual punishment." *Id.* at 1300–03 (cited with approval in *Rhodes v. Chapman*, 452 U.S. 337, 352 n.17 (1981), and *Helling*, 509 U.S. at 34). In *Powers v. Snyder*, 484 F.3d 929 (7th Cir. 2007), the court observed that knowingly exposing a prisoner to hepatitis or other serious diseases could [] amount to cruel and unusual punishment in violation of the federal Constitution." *Id.* at 931 (citing *Barnes v. Briley*, 420 F.3d 673, 675 (7th Cir. 2005); *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997); *Billman v. Ind. Dep't of Corrs.*, 56 F.3d 785, 788–89 (7th Cir. 1995); *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006)). In *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988), the court observed that a plaintiff would have a colorable [Eighth Amendment] claim . . . if he could show that there is a pervasive risk of harm to inmates' of contracting the AIDS virus and if there is a failure of prison officials to reasonably respond to

that risk.'" *Id.* at 539–40 (quoting *Martin v. White*, 742 F.2d 469, 474 (8th Cir.1984)). In *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990), the court held that the plaintiff's allegations that "the defendants forced him to remain in a dormitory [whose] atmosphere was filled with friable asbestos" and that "defendants knew of the health danger and yet refused to move the plaintiff to an asbestos-free environment" stated a claim for "deliberate indifference to the plaintiff's serious medical needs." *Id.* at 1463. And in *DeGidio v. Pung*, 920 F.2d 525 (8th Cir. 1990), the court held that the prison staff's "serious and persistent instances of negligent and substandard efforts to remedy the tuberculosis epidemic . . . evidenced deliberate indifference to the inmates' serious medical needs." *Id.* at 531, 533 (quotation marks omitted); *see Castillo v. Solano Cty. Jail*, No. 2:08–cv–3080 GEB KJN P, 2011 WL 3584318, at *13 (E.D. Cal. Aug. 12, 2011) ("It is well accepted that . . . 'substantial risks of harm' include 'exposure of inmates to a serious, communicable disease . . . .'") (quoting *Helling*, 509 U.S. at 33).

b. Subjective Prong

The plaintiff must also show that his prison doctor was "deliberately indifferent" to his serious medical needs, which the courts equate with "subjective recklessness." *Estelle*, 429 U.S. at 104; *Snow*, 681 F.3d at 985. "[T]he [deliberate indifference] standard is 'less stringent in cases involving a prisoner's medical needs [than in cases involving disciplinary actions] because the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.'" *Snow*, 681 F.3d at 985 (quoting *McGuckin*, 974 F.2d at 1060) (quotation marks and indications of alteration omitted). "To show deliberate indifference, the plaintiff 'must show that the course of treatment the doctors chose was medically unacceptable under the circumstances' and that the defendants 'chose this course in conscious disregard of an excessive risk to plaintiff's health.'" *Id.* at 988 (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)); *see Farmer*, 511 U.S. at 847–48 ("[A] prison official may be held [deliberately indifferent] only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."); *Wilhelm v. Rotman*, 680

F.3d 1113, 1122 (9th Cir. 2012). Thus, if the measures available to "abate" the risk are "feasible, [are] readily implemented, and in fact significantly reduce a substantial risk of severe [harm]," and the official "refuses to adopt such an alternative in the face of these documented advantages, without a legitimate [] justification for [such refusal], then [that] refusal . . . can be viewed as 'cruel and unusual' under the Eighth Amendment." *Baze v. Rees*, 553 U.S. 35, 52 (2008).

Accidents, negligence, "ordinary lack of due care," mere "*inadvertent* failure to provide adequate medical care," decisions on matters of medical judgment, and mere medical malpractice do not constitute deliberate indifference. *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Estelle*, 429 U.S. at 105-08. But a showing of deliberate indifference requires "something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer*, 511 U.S. at 835. For example, being aware of but "ignor[ing] a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year" can constitute deliberate indifference. *Helling*, 509 U.S. at 33; *see Hunt v. Dental Dep't*, 865 F.2d 198, 201 (9th Cir. 1989) ("Prison officials are deliberately indifferent to a prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical treatment."). "In deciding whether there has been deliberate indifference to an inmate's serious medical needs, [the court] need not defer to the judgment of prison doctors or administrators." *Hunt*, 865 F.2d at 200.

Finally, a court "may infer the existence of [deliberate indifference] from the fact that the risk of harm is obvious." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (citing *Farmer*, 511 U.S. at 842); *cf., e.g.*, *McGuckin*, 974 F.2d at 1060 ("[T]he fact that an individual sat idly by as another human being was seriously injured despite the defendant's ability to prevent the injury is a strong indicium of callousness and deliberate indifference to the prisoner's suffering.").

3. Qualified Immunity

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional

rights of which a reasonable person would have known." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citation omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)); *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.") (quotation marks and indications of alteration omitted).

Lacist argues that the qualified immunity inquiry here is whether Satterwhite had "a [clearly established] constitutional right to latent tuberculosis medications." (Dkt. No. 76 at 14.) That frames the inquiry too narrowly. For a right to be clearly established, the very action in question need not have previously been held unlawful. *Creighton*, 483 U.S. at 640; *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011) (en banc) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances") (quoting *Hope*, 536 U.S. at 741); *see, e.g.*, *Jackson*, 90 F.3d at 331–32 ("The doctors contend that they are entitled to qualified immunity because there was no clearly established law requiring them to provide a kidney transplant to a prisoner on dialysis. The doctors state the issue too narrowly."). Instead, the question is whether "it would [] have been clear to a reasonable [physician's assistant] knowing what [Lacist] knew (viewed in the light most favorable to [Satterwhite]) that [doing nothing in the face of Satterwhite's LTBI], posed such a substantial risk of serious harm that [it] would be constitutionally impermissible." *Ramirez-Palmer*, 301 F.3d at 1053.

B. Preliminary Matters

The Court must first clear up some misconstructions of the record appearing in the briefing. First, Lacist states, "The BOP Clinical Practice Guidelines for Management of

Tuberculosis that are applicable to inmates in a detention facility, such as FDC-Seatac, provide that the inmate should ordinarily not be prescribed [latent tuberculosis infection] treatment if their anticipated incarceration is uncertain or is less than several months'" and "[a]ccordingly, Lacist was not authorized to recommend treatment for Satterwhite's latent tuberculosis, and consistent with Lacist's understanding of BOP policy, Lacist would not have presumed that Satterwhite would need to be referred for treatment in April 2008." (Dkt. No. 76 at 4–5 (alterations in original).) There is no evidence in the record that Satterwhite's anticipated incarceration was uncertain or less than several months. Thus, this section of the Bureau's Tuberculosis Guidelines does not stand for the proposition that Lacist was not authorized to recommend that Satterwhite be treated for LTBI, and it does not support rejecting a presumption that Satterwhite should be treated.

Second, Satterwhite misstates the definition of a "recent converter" as a person "who had a recent tuberculin skin test (TST) measuring 10 mm or more in a 2 year period" and then asserts that he fit this definition and was therefore a high priority for LTBI treatment. (Dkt. No. 78 at 6.) That is not the definition of "recent converter." A "recent converter" is an individual whose TST induration has *increased* by 10 millimeters or more in a two year period. (Dkt. No. 77 Ex. D at 55.) There is no evidence in the record of a prior TST result for Satterwhite against which to measure his 2008 induration of 18 millimeters—and thus no evidence supporting his assertion that he was a "recent converter."

Finally, Lacist asserts in his declaration:

> In all my years as a mid-level practitioner with the BOP, I have never been in charge of prescribing Latent TB or TB treatment to any resident. As part of my duties, I am involved with continuing the treatment process once it has started. At FDC-Seatac, the decision to treat latent TB is made by the Medical Director [Dr. Dy] in coordination with the Infectious Disease Coordinator.

(Dkt. No. 77 ¶ 8; *see* Dkt. No. 76 at 2 ("nor was Lacist authorized to prescribe such treatment"), 9 ("[A]s far as Lacist's [sic] knew, . . . the decision to treat or not treat Satterwhite's latent

tuberculosis was not his decision to make.") (citing Dkt. No. 77 ¶ 8, Exs. A, E).) The Court must address what Lacist's assertion, read in conjunction with the Guidelines and Program Statements, does and does not tend to show. Lacist's assertion does not create a genuine dispute of fact as to whether he was authorized to, or responsible for, evaluating Satterwhite for LTBI treatment, recommending an LTBI treatment or monitoring plan to Dr. Dy, or recommending that Dr. Dy consider such a plan. Indeed, the Program Statement on Patient Care provided that Lacist, as the mid-level provider assigned to Satterwhite, was Satterwhite's "primary care provider" and "primary point of contact" and was responsible for "provid[ing] diagnostic and treatment services" to Satterwhite. (Dkt. No. 77 Ex. E at 115, 113.) Moreover, the Program Statement required Lacist to document every patient encounter using the "SOAP" format, where "P" stands for "plan." (*Id.* at 120.) And the Guidelines provided that "all" "inmates who have a positive TST" of "10 millimeters or greater" "should be evaluated for LTBI treatment" where no contraindications are present. (*Id.* Ex. D at 55, 57.) The reasonable inference from this evidence that is most favorable to Satterwhite (which the Court must draw) is that Lacist, having been assigned to perform Satterwhite's History & Physical, was the person designated to "evaluate[]" Satterwhite for LTBI treatment, and to recommend an appropriate "plan" for the treatment or monitoring of Satterwhite's LTBI—or at least to recommend that Dr. Dy consider such a plan.

Lacist points the Court to the section of the Bureau's Infectious Disease Management Program Statement that says, "Follow-up periodic chest x-rays for inmates with previously positive tuberculin skin tests will be conducted based upon guidance from the Medical Director." (*Id.* Ex. A at 16.) "As such," he argues, "a reasonable person, such as Lacist, could understand that even if Satterwhite was not prescribed latent tuberculosis [treatment] at the time of the physical, he would not be at an excessive risk of harm given the continual monitoring required under the Guidelines." (Dkt. No. 82 at 10; *see* Dkt. No. 76 at 17.) The problem for Lacist is that the other evidence in the record suggests that the "guidance from the Medical Director" on follow-up periodic chest X-rays for a TST-positive individual like Satterwhite was that his

primary care provider team would develop a ~~"~~plan" for treating his LTBI or periodically monitoring his infection with chest X-rays. Indeed, in the almost ten months between when Lacist examined Satterwhite and when Satterwhite requested a medical appointment for a severe cough, not a single follow-up X-ray was performed on Satterwhite. This evidence suggests that follow-up X-rays would *not* occur automatically, that Satterwhite's primary care provider team (including Lacist) was responsible for scheduling such follow-ups, and that Lacist was aware of these circumstances. The Court, interpreting the evidence in the light most favorable to Satterwhite, infers that the ~~"~~guidance from the Medical Director" on conducting ~~"[~~f]ollow-up periodic chest x-rays for inmates with previously positive tuberculin skin tests" was that such inmates' primary care provider teams were responsible for implementing a ~~"~~plan" for conducting such follow-up monitoring, and that Lacist could not have counted on their automatic occurrence in the absence of treatment.

C. Analysis

Genuine issues of material fact preclude a grant of summary judgment for Lacist on the ground of qualified immunity at this stage of the proceedings.

1. Eighth Amendment

As discussed *supra*, it is well-established that knowingly confining a prisoner in a small space for a prolonged period of time with other prisoners who are infected with serious, contagious diseases (including, for example, tuberculosis), when there is not a sufficiently compelling penological reason for doing so, exposes the prisoner to an unreasonably high risk of harm and constitutes an objectively serious deprivation for purposes of the Eighth Amendment. *See, e.g.*, *Hutto*, 437 U.S. at 682; *Forbes*, 112 F.3d at 266; *Jeffries v. Block*, 940 F. Supp. 1509, 1514–15 (C.D. Cal. 1996) (~~"[~~t]here is no doubt" that exposure to tuberculosis-infected inmates presents a ~~"~~serious health risk" and a ~~"~~substantial risk of serious harm"). Here, the failure to treat Satterwhite's LTBI exposed him to a greater risk of harm than such hypothetical conditions of confinement would have: In the latter case, he would have been exposed to the mere *risk* of

being infected with *M. tuberculosis—i.e.*, of *developing* LTBI; in the case at bar, not treating Satterwhite's LTBI made his continued latent infection a *certainty*.

Moreover, the Bureau's Tuberculosis Guidelines and Infectious Disease Management Program Statement demonstrate that "there [wa]s a sufficiently broad consensus [at the time] that exposure of *anyone* [in Satterwhite's position] to the [risk of progressing from LTBI to active tuberculosis] should . . . be prevented" by treating his LTBI infection or, at a minimum, monitoring him for development of active tuberculosis. *Helling*, 509 U.S. at 34. Those Guidelines and Program Statement emphasized (1) testing every inmate upon initial incarceration, (2) considering every LTBI-positive, non-contraindicated prisoner for treatment, (3) monitoring latent and active cases, (4) "offer[ing] evaluation and treatment for latent TB in accordance with the U.S. Public Health Service recommendations and guidance from the Medical Director" to all inmates exposed to a "TB exposure" incident in the prison (Dkt. No. 77 Ex. A at 31), (5) "identify[ing] and *completely treat[ing]* individuals with new latent TB infection" resulting from contact with an infectious TB case (*Id.* Ex. D at 69, 71–72 (emphasis added)), (6) advising prisoners on "the importance of completing treatment for . . . LTBI if diagnosed" (*Id.* at 75), (7) counseling and educating prisoners who refused LTBI treatment and documenting incidents of such refusal, (8) "ensuring" that "[i]nmates [we]re treated for LTBI in accordance with recommended guidelines" (*Id.* at 78), and (9) adhering to "standard" treatment regimens for LTBI. These documents evince a societal consensus that the treatment of LTBI in prisons should be an opt-out scheme: A prisoner with LTBI would be treated unless there was an affirmative reason not to. In other words, "society's attitude had evolved to the point that involuntary exposure to [the risk of progressing from LTBI to active tuberculosis disease] violated current standards of decency." *Helling*, 509 U.S. at 29. The objective prong of the Eighth Amendment test is met here.

That Satterwhite was not a "high priority" candidate for LTBI—for example, that he was not a "recent converter"—does not show that his untreated, unmonitored infection did not

present a substantial risk of serious harm. Nor does the fact that "only" approximately 5% of infected persons develop active tuberculosis during the first year or two after infection (Dkt. No. 77 Ex. D at 51). Lacist cites to no case—and this Court can find none—standing for the proposition that a 5% risk of developing a serious, potentially life-threatening disease is, as a matter of law, not an objectively serious risk of harm. To the contrary, as discussed, it is well-established that knowingly exposing a prisoner to a substantially high *risk* of infection with a serious disease like tuberculosis is an objectively serious harm. Doing nothing to monitor or reverse a *certain* infection of the same serious disease, when the means of doing so are readily available to the medical provider—when in fact there is a "standard" treatment to reverse such an infection—creates no less serious a risk for the inmate. The Court finds support (albeit non-precedential) for this conclusion in *Tai Huynh v. Hubbard*, 471 F. App'x 591 (9th Cir. 2012) (unpublished disposition). In *Tai Huynh*, the plaintiff "allege[d] that after he tested positive for [latent] tuberculosis, defendants refused to administer a preventative tuberculosis treatment in a proper manner, and, as a result, he is now at a high risk of developing active tuberculosis and multi-drug resistant tuberculosis." *Id.* at 591. The Ninth Circuit reversed the district court's dismissal of the plaintiff's complaint: "[W]e cannot say that these allegations fail to state an Eighth Amendment injury." *Id.* (citing *Helling*, 509 U.S. at 32–35).

Construing the evidence in the light most favorable to Satterwhite, the subjective prong of the Eighth Amendment inquiry is also met: Measures available to "abate" Satterwhite's risk of developing active tuberculosis—namely, treating his LTBI, or closely monitoring him—were "feasible, [were] readily implemented, and in fact [would have] significantly reduce[d]" the likelihood of Satterwhite's developing active tuberculosis and associated complications, and Lacist "refuse[d] to adopt [those] alternative[s] in the face of these documented advantages, without a legitimate penological justification for [such refusal]." *Baze*, 553 U.S. at 52. Moreover, the Court infers that Lacist was aware that LTBI posed a substantially serious risk of harm to Satterwhite from the obviousness of that risk—as evidenced by the multitude of cases that had

already recognized that mere exposure to the substantial risk of developing LTBI was an objectively serious harm, and by the gravity with which the Bureau's Program Statement and Tuberculosis Guidelines treated tuberculosis. *See Hope*, 536 U.S. at 738. Though Lacist attests that "[a]t no time did I consider Mr. Satterwhite's positive PPD test to constitute an obvious and severe risk to his health" (Dkt. No. 77 ¶ 10), the obviousness of the risk permits an inference to the contrary and creates a genuine issue of fact as to Lacist's state of mind.

This case is distinguishable from those in which medical staff merely accidentally or negligently failed to properly diagnose or treat a prisoner. Lacist does not argue that he accidentally misdiagnosed Satterwhite; to the contrary, he admits he knew Satterwhite had LTBI. (Dkt. No. 77 ¶ 10.) Lacist does not argue that he knew he should have considered Satterwhite for treatment or scheduled Satterwhite for follow-up X-rays, but accidentally or negligently forgot to do so. He argues instead that he was fully apprised of the guidance in the Tuberculosis Guidelines and Program Statement on treating and monitoring LTBI (that he was in fact ordered to adhere to this guidance), that he was fully aware of Lacist's diagnosis, and that knowing what he knew, he affirmatively chose not to evaluate Satterwhite for, or recommend, treatment or monitoring. If Lacist was indeed responsible or authorized to make such recommendations (a fact still in dispute), then his failure to do so was not mere negligence; it was deliberate indifference to a serious medical need.

This case is also distinguishable from those involving a matter of medical judgment or a difference of opinion as to the appropriate diagnostic procedure or treatment course. The Tuberculosis Guidelines and Program Statements show that it would have been "medically unacceptable under the circumstances" to do nothing for Satterwhite—to refuse to consider him for treatment or treat him, and to schedule no follow-up X-rays to monitor his condition. *Snow*, 681 F.3d at 988. In other words, choosing to do nothing for Satterwhite would not have been a valid exercise of medical judgment. *Cf. McGowan v. Hulick*, 612 F.3d 636, 641 (7th Cir. 2010) (medical professional's actions may reflect deliberate indifference if he "chooses an easier and

less efficacious treatment [let alone no treatment or monitoring at all] without exercising professional judgment") (quotation marks omitted).

For these reasons, the cases to which Lacist cites for support do not help him. In *Martinez v. Boyd*, No. 08–cv–02181–PAB–MEH, 2009 WL 2766771 (D. Colo. Aug. 27, 2009), the plaintiff disagreed with the doctors' use of X-ray as their diagnostic tool, with their conclusion that the X-rays showed no sign of tuberculosis, and with their resulting decision to cease treatment of the plaintiff for tuberculosis but continue to monitor him monthly. *Id.* at *5. That was a mere "difference of opinion" between the plaintiff and the doctors as to his diagnosis and proper care. *Id.* at *6–7. In *Palladino v. Wackenhut Corrections*, No. CIV.A. 97–CV–2401, 1998 WL 855489 (E.D. Pa. Dec. 10, 1998), the doctors made a medical judgment not to treat the plaintiff for LTBI "because of his age and his foot condition." *Id.* at *1. And *Marcotte v. Monroe Corrections Complex*, 394 F. Supp. 2d 1289 (W.D. Wash. 2005), concerned a "mere disagreement over the reasonableness of [the defendant's] diagnosis, treatment, and follow-up . . . ." *Id.* at 1296. "Although an inmate is not entitled to demand specific care and is not entitled to the best care possible, he is entitled to reasonable measures to meet a substantial risk of serious harm." *Arnett v. Webster*, 658 F.3d 742, 754 (7th Cir. 2011). Doing nothing was not "reasonable" here.

Shaver v. CFG Healthcare, No. 09–cv–3280 (NLH)(JS), 2011 WL 3882287 (D. N.J. Sept. 2, 2011), is also inapposite. In that case, the plaintiff's TST "did not clearly demonstrate latent TB." *Id.* at *4. Moreover, the defendant put on evidence that "for latent TB, no medical treatment is necessary," and the plaintiff "cite[d] no authority to" the contrary. *Id.* Thus *Shaver*'s outcome resulted from the plaintiff's failure to put on any evidence of a constitutional violation.

Garcia v. Anderson, No. 08–4731 (ADM/JJG), 2009 WL 2900304 (D. Minn. Sept. 2, 2009), is also distinguishable. In that case, the defendant medical professionals "took no further affirmative action to evaluate transplantation as a treatment option" after a specialist determined the plaintiff would be a transplant candidate. *Id.* at *2. The court found no Eighth Amendment

violation, however, because in lieu of a transplant, the defendants "routinely performed" "laboratory tests and ultrasounds" and otherwise monitored the plaintiff to ensure that his condition "remained stable and relatively unchanged." *Id.* Here, as discussed, in lieu of treatment (or recommending treatment), Lacist did (or recommended doing) nothing. *Cf. Burks v. Raemisch,* 555 F.3d 592, 594 (7th Cir. 2009) ("A prisoner's statement that . . . medical personnel [were alerted] to a serious medical condition, that they did nothing in response, and that permanent injury ensued, is enough to state a claim on which relief may be granted—if it names the persons responsible for the problem.").

2. Clearly Established Violation

Assuming that Lacist had the responsibility or authority to recommend treating or monitoring Satterwhite's LTBI—which the Court infers he did—the question is whether a reasonable physician's assistant in Lacist's shoes would have been aware that not recommending treatment or scheduling follow-up monitoring "posed such a substantial risk of serious harm that [such inaction] would be constitutionally impermissible." *Ramirez-Palmer*, 301 F.3d at 1053. A reasonable physician's assistant would have been so aware. As discussed *supra*, it has long been established that deliberate indifference to conditions that expose prisoners to an unreasonable risk of contracting serious communicable diseases (including tuberculosis) violates the Eighth Amendment. And as the Court already explained, if unreasonably exposing an inmate to the substantial *risk* of being infected with *M. tuberculosis* is a clearly established violation of the Eighth Amendment, then doing nothing to reverse or at least monitor an inmate's *certain* infection—when the means of doing so are known to the defendant and at his disposal—is also a violation of clearly established law. *See, e.g.*, *Powell*, 914 F.2d at 1464 (denying defendants qualified immunity because the unlawfulness of defendants' refusal to place plaintiff in an asbestos-free environment, after plaintiff informed them that "exposure to friable asbestos threatened his life and health," "[c]ertainly . . . should have been apparent to the defendants in light of *Estelle*"); *Epps*, 479 F. App'x at 592 ("Here, Johnson has alleged that the policies and

practices that Epps implemented for the prison barbershop exposed Johnson to [] serious, communicable diseases and that Epps was aware of this risk and did nothing to eliminate that risk. In light of *Helling*, a reasonable official would understand that operating the barbershop in this fashion would violate Johnson's rights. As a result, Epps is not entitled to qualified immunity."). A reasonable physician's assistant, with the authority and responsibility the Court must infer Lacist had, would have known that doing nothing in the face of Lacist's LTBI ~~p~~osed such a substantial risk of serious harm that [it] would be constitutionally impermissible." *Ramirez-Palmer*, 301 F.3d at 1053.

III. CONCLUSION

For the foregoing reasons, the Court DENIES Lacist's motion for summary judgment (Dkt. No. 76) and DENIES Satterwhite's motion for a continuance (Dkt. No. 80) as moot.

DATED this 23rd day of January 2013.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-WXR-2011-01402 **Short Description:** TERRY CONNER V. UNITED STATES OF AMERICA

CASE DETAILS CASE DOCS CASE PERSONS CASE DATES CASE SUMMARY CASE BLOG

Case Login Information

Reference Number	5:11-cv-00760-VAP -SP
Short Description	TERRY CONNER V. UNITED STATES OF AMERICA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	SAF-Inmate
Current Region	WESTERN REGIONAL OFFICE
Current Institution	Victorville (USP)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	Victorville (USP)
Monetary Relief Sought	$25,000.00
Estimated Amount	$
Office	Eastern Division - Riverside
Jurisdiction	UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA
Responsible Legal Office	MDC Los Angeles

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	05/03/2013
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$5,000.00
Total Amount Paid	$5,000.00
Description	
Description	
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	09/26/2011
Date Filed	05/12/2011

Case Progress

Current Owner	JENNIFER VICKERS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	NONE
Private Case	No

Additional Case Information

Long Description	28:1331 FORMA PAUPERIS DENIAL
Further Case Classification	REOPENED FOR PLN FOIA REQUEST
Comments	Inmate ftca slip and fall

FILED
CLERK, U.S. DISTRICT COURT
SEP - 8 2011
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

NS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERRY CONNER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

EDCV11-760 VAP (SPx)

Civil Action No.

LODGED
CLERK, U.S. DISTRICT COURT
MAY - 9 2011
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FEDERAL TORT CLAIMS ACT
COMPLAINT FOR MONETARY DAMAGES

This is a civil complaint for monetary damages brought by Terry Conner, *pro se*, pursuant to the Federal Tort Claims Act, 28 USC §2671 et seq.

JURISDICTION

1. Jurisdiction before this Court is invoked pursuant to 28 USC §1346(b) and the Federal Tort Claims Act, 28 USC §2671 et seq., for severe physical injury to Plaintiff proximately caused by employees of the Federal Bureau of Prisons at the United States Penitentiary, Adelanto, CA.

LODGED
2011 MAY 12 PM 5:4
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY

PARTIES

2. At all time material to this complaint Plaintiff Terry Conner was incarcerated at the United States Penitentiary, Adelanto, CA (USP Victorville).

3. At all times material to this complaint, employees of United States proximately caused physical injury to Plaintiff at the USP Victorville, and therefore the United States is the sole Defendant in this action.

FACTS

4. On September 1, 2009, at approximately 10:30 am while incarcerated at USP Victorville, Adelanto, CA, Unit 4B, Cell #229 on the second floor of the unit, correctional staff were conducting cell searches. The institution was on lockdown status. While in his cell, Plaintiff was ordered to dress in boxer shorts, t-shirt, and a pair of shower shoes. Once dressed, Plaintiff was ordered to place his hands behind his back and was thereafter handcuffed from behind. Cell 229 was opened and the officer told Plaintiff he would be escorted downstairs to the first floor showers. Plaintiff advised the officer that Plaintiff was 66 years of age, has a problem maintaining proper balance because of a medically documented, long-standing hip injury, and that it would be unsafe for Plaintiff to be moved while handcuffed from behind down a full flight of open, corrugated steel stairs. Plaintiff requested to be placed in the second floor showers near his cell. The officer refused Plaintiff's request. The officer advised Plaintiff that he would hold Plaintiff's handcuffs by the connecting chain between cuffs to assist Plaintiff in maintaining Plaintiff's balance. As the officer and Plaintiff were negotiating the stairway from near the top of the stairs, Plaintiff's shower shoes got caught by a projecting metal flange, the officer released his hold on the handcuffs and Plaintiff lost his balance and fell headfirst. Plaintiff fell and rolled down the stairs, a distance of approximately 10 feet. Plaintiff suffered immediate injury, pain, and severe abrasions to his left knee, left shoulder, and head which caused profuse bleeding. Plaintiff also sustained injury to his right hip area. As Plaintiff was unable to walk on his own power and was almost rendered unconscious by the fall, correctional staff placed Plaintiff on a hospital gurney and moved him to the institution's Health Services Clinic. At the Health Services Clinic at

approximately 10:44 am, Plaintiff was treated by Jesus Fernandez, M.D., staff physician, USP Victorville. Dr. Jesus stopped the bleeding, bandaged the wounds, and injected Plaintiff with 30 MG/ML of Ketorolac. Dr. Jesus also prescribed 60 mg Intramuscularly Gluteal. Thereafter Plaintiff was returned to his cell.

5. On September 1, 2010, Plaintiff submitted a letter via US Postal Service in lieu of a Standard Form 95 setting forth the above cited facts to Harlan Penn, Regional Counsel, Western Regional Office, Stockton, CA. See Plaintiff's Exhibit 1 herewith attached and submitted.

6. Receipt of Plaintiff's letter for claim of physical injury is acknowledged by Harlan Penn in a letter dated September 8, 2010,. See Plaintiff's Exhibit 2 herewith attached and submitted. No further action or communication from Defendant or its agents has taken place.

LEGAL CLAIMS

WHEREFORE, the acts and omissions described above resulted in personal injury and were proximately caused by the correctional officer who was improperly escorting Plaintiff down stairs that were not designed or intended to be used while dressed in shower shoes and handcuffed from behind. As a result of the wrongful and negligent acts and omissions described above, Plaintiff continues to suffer ongoing and severe pain in his left knee, left shoulder, right hip, and intermittent headaches and has exacerbated difficulty in maintaining balance. Plaintiff seeks a bench trial, damages in the amount of $25,000, and such other and further relief as this Honorable Court deems just and equitable.

Dated: 5-5-11

Respectfully submitted,

Jerry Conner

Terry Conner
Plaintiff, pro se
Reg. No. 75158-011
USP Victorville
P.O. Box 5400
Adelanto, CA 92301

VERIFICATION

Plaintiff Terry Conner hereby verifies, under penalty for perjury, that the foregoing is true and correct and that the attached Exhibits 1 and 2 are true copies of the original documents currently under the care, custody, and control of agents of the Defendant.

Dated: 5-5-11

Terry Conner

Terry Conner
Plaintiff, pro se
Reg. No. 75158-011
USP Victorville
P.O. Box 5400
Adelanto, CA 92301



CLAIMANT'S STATEMENT OF FACTS

Claimant Terry L. Conner, #75168-011, hereby submits a statement of facts in support of his claim made against the United States pursuant to the Federal Tort Claims Act, 28 USC §2671 et seq.

FACTS

On September 1, 2009, at approximately 10:30 am while incarcerated at USP Victorville, Adelanto, CA, Unit 4B, Cell #229 on the second floor of the unit, correctional staff were conducting cell searches. The institution was on lockdown status. While in his cell, Claimant was ordered to dress in boxer shorts, t-shirt, and a pair of shower shoes. Once dressed, Claimant was ordered to place his hands behind his back and was thereafter handcuffed from behind. Cell 229 was opened and the officer told Claimant he would be escorted downstairs to the first floor showers. Claimant advised the officer that Claimant was 66 years of age, has a problem maintaining proper balance because of a medically documented, long-standing hip injury, and that it would be unsafe for Claimant to be moved while handcuffed from behind down a full flight of open, corrugated steel stairs. Claimant requested to be placed in the second floor showers near his cell. The officer refused Claimant's request. The officer advised Claimant that he would hold Claimant's handcuffs by the connecting chain between cuffs to assist Claimant in maintaining Claimant's balance. As the officer and Claimant were negotiating the stairway from near the top of the stairs, Claimant's shower shoes got caught by a projecting metal flange, the officer released his hold on the handcuffs and Claimant lost his balance and fell headfirst. Claimant fell and rolled down the stairs, a distance of approximately 10 feet. Claimant suffered immediate injury, pain, and severe abrasions to his left knee, left shoulder, and head which caused profuse bleeding. Claimant also sustained injury to his right hip area. As Claimant was unable to walk on his own power and was almost rendered unconscious by the fall, correctional staff placed Claimant on a hospital gurney and moved him to the institution's Health Services Clinic. At the Health Services Clinic at approximately 10:44 am, Claimant was treated by Jesus Fernandez, M.D., staff physician, USP Victorville. Dr.

Jesus stopped the bleeding, bandaged the wounds, and injected Claimant with 30 MG/ML of Ketorolac. Dr. Jesus also prescribed 60 mg Intramuscularly Gluteal. Thereafter Claimant was returned to his cell.

LEGAL CLAIMS

The acts and omissions described above resulted in personal injury and were proximately caused by the correctional officer who was improperly escorting Claimant down stairs that were not designed or intended to be used while dressed in shower shoes and handcuffed from behind. As a result of the wrongful and negligent acts and omissions described above, Claimant continues to suffer ongoing and severe pain in his left knee, left shoulder, right hip, and intermittent headaches and has exacerbated difficulty in maintaining balance. Claimant seeks a sum certain of $25,000 and such other and further relief as is deemed just and equitable.

Dated: 5-5-11

Terry L. Conner

Terry L. Conner
75158-011
USP Victorville
P.O. Box 5400
Adelanto, CA
92301

U.S. Department of Justice

Federal Bureau of Prisons

Western Regional Office
7338 Shoreline Drive
Stockton, California 95219

PLAINTIFF'S EXHIBIT 2

September 8, 2010

Terry Conner
#75158-011
USP Victorville
P.O. Box 5300
Adelanto, CA 92301

RE: Administrative Claim No. TRT-WXR-2010-06177
Received: September 8, 2010

Dear Mr. Conner:

This is to acknowledge receipt of your Claim for Damage, Injury or Death (Standard Form 95) that was submitted to or forwarded to this office under the provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671, et seq.

In accordance with the applicable provisions of the statute, this agency has up to six months from the date received in which to make a final determination of your administrative claim for damages. This time frame began on the date that your claim was received for filing and processing as noted above.

Based on the location of your allegations the following Consolidated Legal Center (CLC), will be handling your claim for investigation and response. Please note all future correspondence and change of address should reference the administrative claim number and be directed to the CLC indicated:

Matt Carney, Supervisory Attorney
Federal Correctional Institution
37900 N. 45th Avenue
Phoenix, AZ 85086

Theresa Talplacido, Supervisory Attorney
Federal Detention Center
2425 South 200th St.
SeaTac, Washington 98198

X Eli Ben-Shmuel, Supervisory Attorney
Metropolitan Detention Center
535 North Alameda St.
Los Angeles, California 90012

Dennis Wong, Deputy Regional Counsel
Western Regional Office
7338 Shoreline Drive
Stockton, California 95219

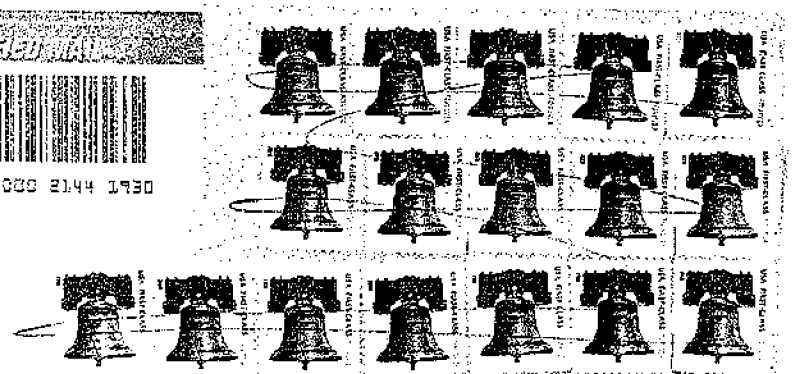
Sincerely,

Harlan Penn
Regional Counsel

Terry Conner
T51 58 011
USP Victorville
P.O. Box 5400
Adelanto, CA
92301

CERTIFIED MAIL

7010 1870 0000 2144 1930



ATT: INTAKE/DOCKET SECTION

CLERK OF THE COURT
US DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CA
90012

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY

This case has been assigned to District Judge Virginia A. Phillips and the assigned discovery Magistrate Judge is Sheri Pym.

The case number on all documents filed with the Court should read as follows:

EDCV11- 760 VAP (SPx)

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

---

NOTICE TO COUNSEL

A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).

Subsequent documents must be filed at the following location:

[ ] **Western Division**
312 N. Spring St., Rm. G-8
Los Angeles, CA 90012

[ ] **Southern Division**
411 West Fourth St., Rm. 1-053
Santa Ana, CA 92701-4516

[X] **Eastern Division**
3470 Twelfth St., Rm. 134
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

JS-6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

TERRY CONNER, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	NO. ED CV 11-760 JGB (SPx) ORDER APPROVING STIPULATION FOR COMPROMISE SETTLEMENT AND DISMISSAL OF ACTION

The Court approves the Stipulation for Compromise filed by the parties.

IT IS HEREBY ORDERED:

1. Plaintiff's action is dismissed with prejudice in its entirety.

2. Pursuant to the approved stipulation for compromise, each party shall bear their own costs of suit and attorneys fees.

3. The Court retains jurisdiction to enforce the terms of the settlement.

4. Upon receipt of the settlement funds from the United States, plaintiff shall file a receipt and full satisfaction advising the Court that the settlement funds have been received.

Dated this 3rd day of May, 2013.

JS-6

HONORABLE JESUS G. BERNAL
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ MMK
MARCUS M. KERNER
Assistant United States Attorney

Attorneys for Federal Defendant
United States of America

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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Page 2083 of 2287

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Page 2084 of 2287

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-WXR-2011-01429 **Short Description:** FURTNEY, JEFFREY V. UNITED STATES OF AMERICA ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	3:11-cv-01090-HO
Short Description	FURTNEY, JEFFREY V. UNITED STATES OF AMERICA ET AL
Classification	Civil
Case Type	FTCA & Bivens
Case Sub-Type	
Current Region	WESTERN REGIONAL OFFICE
Current Institution	Sheridan (FCI)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	Sheridan (FCI)
Monetary Relief Sought	$5,000,000.00
Estimated Amount	$
Office	Portland
Jurisdiction	DISTRICT OF OREGON
Responsible Legal Office	WXRO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	08/18/2012
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$80,000.00
Total Amount Paid	$80,000.00
Description	INMATE BURNED BY WATER. TEMPERATURE OF WATER ACCIDENTALLY SET TOO HIGH. INMATE SUFFERED EXTENSIVE BURNS. CASE SETTLED.
Description	INMATE BURNED BY WATER. TEMPERATURE OF WATER ACCIDENTALLY SET TOO HIGH. INMATE SUFFERED EXTENSIVE BURNS. CASE SETTLED.
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	10/03/2011
Date Filed	09/09/2011

Case Progress

Current Owner	JENNIFER VICKERS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	28:1331 FEDERAL QUESTION: BIVENS ACT
Further Case Classification	REOPENED FOR PLN FOIA REQUEST
Comments	Inmate burned by water exceeding required temperature guidelines.

Home Alerts My Work New Case Search Main Email

United States Department of Justice - Office of General Counsel & Review

AO 440 (Rev. 12/09) Summons in a Civil Action

RECEIVED
SEP 30 2011
Warden's Office
FCI SHERIDAN

UNITED STATES DISTRICT COURT

for the

DISTRICT OF OREGON

JEFFREY D. FURTNEY,
Plaintiff

v.

UNITED STATES OF AMERICA, J.E. THOMAS, UNKNOWN FACILITIES MANAGER, C. SIMMONS, C. OLSEN, A.W. JACQUEZ, AND ONE TO TEN UNKNOWN DEFENDANTS,
Defendant

Civil Action No. 11-CV-1090-HO

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
J.E Thomas
27072 BALLSTON RD., SHERIDAN, OR 97378
(FCI-SHERIDAN)

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

JEFFREY D. FURTNEY, 13687-041, P.O. BOX 5000, SHERIDAN, OR 97378

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 9-29-11

Signature of Clerk or Deputy Clerk

Civil Action No. 11-CV-1090-HO

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____, a person of suitable age and discretion who resides there,

on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

JEFFREY D. FURTNEY, Plaintiff pro se
13687-041
P.O. BOX 8000
SHERIDAN, OR 97378

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

JEFFREY D. FURTNEY,

PLAINTIFF,

V.

UNITED STATES OF AMERICA,
J.E. THOMAS,
UNKNOWN FACILITIES MANAGER,
C. SIMMONS,
C. OLSEN,
A.W. JACQUEZ,
ONE TO TEN UNKNOWN DEFENDANTS TO BE IDENTIFIED THROUGH DISCOVERY AND TRIAL,

SUED INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

DEFENDANT(S).

CASE NO. CV '11-1090-HO

COMPLAINT

*** JURY TRIAL DEMAND ***

I. JURISDICTION AND VENUE

1. This is a civil action authorized by Bivens v. Six Unknown Federal Narcotics Agents 403 U.S. 388 (1971). This Honorable Court has jurisdiction under 28 U.S.C. Section 1331. Plaintiff seeks declaratory relief under 28 U.S.C. Sections 2201 and 2202. This Court also has jurisdiction over claims brought under the Federal Tort Claims Act (FTCA) brought pursuant to 28 U.S.C. Section 1346(b).
2. The Plaintiff has complied with all prerequisites to a suit under the FTCA in that:
   a. On January 25, 2011 the Plaintiff timely filed an administrative claim for the matters in dispute in this action in the amount of $500,000 with the Federal Bureau of Prisons Western Regional Office.
   b. The United States of America, by and through its agency, the Federal Bureau of Prisons, denied the Plaintiff's administrative claim and on April 1, 2011 mailed via Certified Receipt # 7006 3450 0001 1121 6982 its notice of denial, a copy of which is attached to this Complaint as Exhibit "A".

c. This action was timely commenced following the denial of the administrative claim.

3. The United States District Court for the District of Oregon, Portland Division, is the appropriate venue under 28 U.S.C. Section 1391(b)(2) because the events giving rise to these claims occurred within this district.

II. PLAINTIFF

4. Plaintiff, Jeffrey D. Furtney is and was, at all times relevant, serving a term of imprisonment at Federal Correctional Institution, Sheridan, OR (FCI-Sheridan). All legal mail must be clearly marked as such and sent to the Plaintiff listing his Federal Register No. 13687-041 at P.O. Box 8000, Sheridan, OR 97378.

III. DEFENDANTS

5. Defendant, UNITED STATES OF AMERICA, is named pursuant to the FTCA.
6. Defendant, J.E. THOMAS is the WARDEN of FCI-Sheridan.
7. Defendant, UNKNOWN FACILITIES MANAGER, is the FACILITIES MANAGER of FCI-Sheridan.
7. Defendant, C. SIMMONS, is a CORRECTIONS COUNSELOR at FCI-Sheridan.
8. Defendant, C. OLSEN, is a CORRECTIONS OFFICER at FCI-Sheridan.
9. Defendant, A.W. JACQUEZ, is an ASSOCIATE WARDEN at FCI-Sheridan.
10. There are between ONE AND TEN UNKNOWN DEFENDANTS to be identified through discovery and trial.
11. At all times mentioned in this complaint, each DEFENDANT acted under the color of law.

IV. FACTS

12. On November 22, 2010 the Plaintiff was in the mop closet of Unit 1A, one of the eight housing units at FCI-Sheridan.
13. The Plaintiff had received an insulin injection which is customary for him to receive prior to the evening meal.
14. The Plaintiff turned on the water on a sink located in the mop closet. Suddenly, the Plaintiff had a diabetic seizure and blacked out.
15. With the water still running, the Plaintiff fell into the sink.
16. For an unknown amount of time the Plaintiff, experiencing a sudden decrease in blood sugar, was incoherent, laying in the sink, and unable to help himself as 180 degree water ran over his body.
17. The Plaintiff somehow managed to walk around the corner and collapsed on the upper-tier of Unit 1A.

18. When the Plaintiff fell he sustained a broken left leg. Additionally, the Plaintiff received 2nd and 3rd degree burns on over 20% of his body including his head, neck, back, shoulder, side, arm, and right hand.
19. Upon notification of this, the Unit Officer ordered all inmates to cell in and summoned emergency medical response. The responding FCI-Sheridan medical staff determined that the Plaintiff's blood sugar had significantly dropped from when he received his insulin injection earlier that evening.
20. The Plaintiff was taken to the Legacy Emanuel Hospital Burn Center (Legacy Emanuel) located at 2801 N. Gantenbein, Portland, OR 97227.
21. The Plaintiff received emergency treatment for burns which included skin grafts taken from his right armpit to waist area and treatment for his broken leg. The Plaintiff remained at Legacy Emanuel for around three weeks and was discharged on December 13, 2010.
22. While the Plaintiff was in the hospital the hot water was tested and the results confirmed that the temperature of the hot water was 180 degrees.
23. DEFENDANT JACQUEZ told the Plaintiff that the "heat exchanger is broken" and they had to call in an "outside" expert to fix it.
24. An administrative remedy response from Robert E. McFadden, Western Regional Director for the Federal Bureau of Prisons (BOP) stated, in part - "[a]ccording to our investigation, you were involved in an accident on November 11, 2010, (sic) while washing a pair of work boots in the mop sink. Investigation found that an Accutemp thermostat controller that controls the water temperature had malfunctioned. This controller was replaced on March 10, 2011, and the current water temperature is at 115 degrees. The water temperature is set according to the Facilities Manual, Chapter 6, Section E, Paragraph 1; Primary hot water temperatures must be maintained as low as possible while still ensuring an adequate supply of 105 degrees Fahrenheit water at the tap in inmate housing areas."
25. Another administrative remedy response from Harrell Watts, National Inmate Appeals Administrator states that "[o]ur review reveals the Warden and Regional Director adequately responded to the issues you raised in your appeal. As indicated by the Regional Director, an investigation found that the Accutemp thermostat controller that controls the water temperature had malfunctioned. The controller was replaced and the current water temperature is at 115 degrees. The temperature is set according to the Facilities Manual. * * * The Administrative Remedy Program does not provide for monetary relief. Your request

for monetary compensation should be pursued through the appropriate statutorily mandated procedure to resolve this issue.

26. DEFENDANT(S) UNKNOWN FACILITIES MANAGER, A.W. JACQUEZ, and J.E. THOMAS were made aware of the fact that there were problems with regulating the water temperature at FCI-Sheridan prior to when the November 22, 2010 emergency situation arose in regard to the Plaintiff.

27. In a handwritten document entitled "AFFIDAVIT" another inmate writes, in part: "I [Name Redacted] was standing outside of [DEFENDANT] C. Simmons office door with another inmate, [Name Redacted] and we listened for over 10 minutes as Counselor Simmons discussed the contents of grievances filed by other inmates with inmate [Name Redacted]. He stated "don't complain about the hot water issue with me, go complain to Furtney in One Unit who's trying to sue us."

28. Another inmate notified the Plaintiff that guards working in the Special Housing Unit (SHU) including DEFENDANT OLSEN notified inmates who were in the SHU that the reason the hot water was off was because of the Plaintiff.

29. Still, another inmate notified the Plaintiff that both DEFENDANTS J.E. THOMAS and A.W. JACQUEZ also blamed the Plaintiff for the reasons there were issues with the hot water.

V. LEGAL CLAIMS

/// FIRST CLAIM FOR RELIEF ///
Unsafe Conditions of Confinement

30. Plaintiff repeats and reiterates each and every allegation contained in the paragraphs of this complaint designated "1" through "28" inclusive, with the same force and effect as though each were fully set forth at length here.

31. It is well established that persons involuntarily confined have a constitutional right to safe conditions of confinement. See ///Youngberg v. Romero/// 457 U.S. 307, 315-16 (1982).

32. The Eighth Amendment entitles inmates in a penal institution to an adequate level of personal safety. This is required because inmates, by reason of their confinement, cannot provide for their own safety. See ///Estelle v. Gamble/// 429 U.S. 97, 103-04 (1976); ///Hoptowit v. Spellman/// 753 F.2d 779, 784 (9th Cir. 1985///; see also, ///Osolinski v. Kane/// 92 F.3d 6.1, 938 (9th Cir. 1996).

33. DEFENDANT(S) were deliberately indifferent to the health and safety of the Plaintiff and did subject him to a substantial risk of serious harm.

34. DEFENDANT(S) acted or failed to act despite their knowledge of the substantial risk of serious harm.

35. DEFENDANT(S) were deliberately indifferent to the Plaintiff's well-being when they consciously disregarded an excessive risk of harm to his health and/or safety.

36. Because of the DEFENDANT(S) actions the Plaintiff has suffered severe and painful injuries, permanent scarring, and mental and emotional distress.

37. DEFENDANT(S) violated rights secured by the Plaintiff under the Eighth Amendment of the Constitution of the United States of America and the Plaintiff is entitled to recover for violations of these rights under ///Bivens/// supra.

38. As a result of the DEFENDANT(S) conduct described herein the Plaintiff has suffered damages and injuries.

/// SECOND CLAIM FOR RELIEF ///
Retaliation

39. Plaintiff repeats and reiterates each and every allegation contained in the paragraphs of this complaint designated "1" through "38" inclusive, with the same force and effect as though each were fully set forth at length here.

40. DEFENDANT(S) took adverse action against the Plaintiff because of the fact that Plaintiff was exercising his legal rights in filing grievances and/or suing the DEFENDANT(S).

41. DEFENDANT(S) adverse action would chill or silence a person of ordinary firmness from future First Amendment activities.

42. DEFENDANT(S) adverse action did not reasonably advance a legitimate correctional goal.

43. DEFENDANT(S) violated rights secured by the Plaintiff under the First Amendment of the Constitution of the United States of America and the Plaintiff is entitled to recover for violations of these rights under ///Bivens/// supra.

44. As a result of the DEFENDANT(S) conduct described herein the Plaintiff has suffered damages and injuries.

/// THIRD CLAIM FOR RELIEF ///
Personal Injury

45. Plaintiff repeats and reiterates each and every allegation contained in the paragraphs of this complaint designated "1" through "44" inclusive, with the same force and effect as though each were fully set forth at length here.

46. On April 1, 2011 sent via Certified Receipt # 7006 3450 0001 1121 6982 the Plaintiff was DENIED "compensation for personal injuries as a result of events at FCI Sheridan on or around November 22, 2010."

47. The DEFENDANT(S) were negligent by failing to maintain equipment that regulated water temperature.

48. Failure to maintain this equipment caused personal injury to the Plaintiff to wit:

On November 22, 2010 the Plaintiff suffered a diabetic blackout and seizures and fell into a sink in the mop closet in Unit 1A at FCI-Sheridan.

The Plaintiff suffered a broken leg, burns on around 20% of his body which required skin grafts as a result of burns he sustained from the hot water, and mental and emotional trauma as a result of the Negligent actions of the DEFENDANT(S).

49. The Plaintiff is now permanently scarred for life.

50. As a result of the DEFENDANT(S) conduct described herein the Plaintiff has suffered damages and injuries.

VI. PRAYER

51. Plaintiff demands the following relief:

///FTCA///

A. $500,000 for Personal Injuries, mental and emotional trauma, and permanent scarring under the FTCA;

///BIVENS///

B. $1,500,000 in compensatory damages;

C. $3,000,000 in punitive damages,

D. Declaratory relief that DEFENDANT(S) violated Plaintiff's constitutional rights;

E. All reasonable attorney's fees, costs, and expenses; and

F. All other relief that is determined by the trier of fact to be appropriate under the circumstances.

Respectfully submitted this 7th day of September, 2011.

JEFFREY D. FURTNEY - PLAINTIFF PRO SE

VII. VERIFICATION OF COMPLAINT

I, Jeffrey D. Furtney, have read the foregoing complaint and hereby verify that the matters alleged therein are true and correct to the best of my knowledge and belief. I certify under the penalty of perjury under 28 U.S.C. Section 1746 that the foregoing is true and correct.

Executed this 7th day of September, 2011.

JEFFREY D. FURTNEY - PLAINTIFF PRO SE

U.S. Department of Justice

Federal Bureau of Prisons

Consolidated Legal Center

P.O. Box 13901
Seattle, Washington 98198

CV'11-1090-HO

April 1, 2011

Certified Receipt: 7006 3450 0001 1121 6982

Jeffrey Furtney
#13687-041
FCI Sheridan
P.O. Box 5000
Sheridan, OR 97378

Re: Tort Claim No. TRT-WXR-2011-02069
Received by Western Regional Office on January 31, 2011

Dear Mr. Furtney:

This is in response to the administrative claim submitted to the Western Regional Office under the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671, et seq. You seek $500,000.00 in compensation for personal injury as a result of events at FCI Sheridan on or around November 22, 2010.

Our investigation fails to disclose any evidence of negligence or other conduct for which the United States is liable.

Accordingly, your claim is denied. If you are not satisfied with this determination, you are afforded six months from the post marked date of this letter to bring suit in the appropriate United States District Court.

Sincerely,

Harlan Penn
Western Regional Counsel

Margaret Ogden
Supervisory Attorney

EX-A

Eryn Karpinski Hoerster, Bar #106126
E-Mail: ehoerster@gsblaw.com
Garvey Schubert Barer
Eleventh Floor
121 S.W. Morrison Street
Portland, Oregon 97204-3141
Telephone: 503 228 3939
Facsimile: 503 226 0259

Attorneys for Plaintiff
Jeffrey D. Furtney

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

JEFFREY D. FURTNEY,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 3:11-cv-001090-HO

STIPULATED JUDGMENT OF DISMISSAL WITH PREJUDICE

Based upon the stipulation of the parties, judgment is granted dismissing all claims with prejudice.

Dated this 18th day of Aug., 2012.

JUDGE MICHAEL R. HOGAN

IT IS SO STIPULATED:

UNITED STATES ATTORNEY

By s/ Natalie K. Wight
Natalie K. Wight, OSB #035576
Natalie.wight@usdoj.gov
Assistant United States Attorney
District of Oregon
(503) 727-1114
(503) 727-1117 (FAX)
Attorney for Defendants

GARVEY SCHUBERT BARER

By s/ Eryn Karpinski Hoerster
Eryn Karpinski Hoerster, OSB #106126
ehoerster@gsblaw.com
(503) 228-3939
(503) 226-0259 (FAX)
Attorney for Plaintiff

Presented by:

Eryn Karpinski Hoerster, OSB #106126
eheorster@gsblaw.com
GARVEY SCHUBERT BARER
Eleventh Floor
121 SW Morrison Street
Portland, Oregon 97204-3141
Phone: (503) 228-3939
Fax: (503) 226-0259

Of Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

Jeffrey D. Furtney,

Plaintiff,

v.

United States of America, et al,

Defendants.

3:11-cv-01090-HO

ORDER APPOINTING PRO BONO COUNSEL FOR ALL PURPOSES

The Court hereby appoints Eryn Karpinski Hoerster as counsel for Jeffrey D. Furtney for all purposes.

The appointed attorney/law firm has 14 days to determine if a conflict of interest exists. If a conflict of interest exists, the attorney/law firm must mark the appropriate box on the attached Response to Order form and file it with the Court within 14 days of the date of this order. This appointment will then be terminated and the Court will appoint substitute counsel.

If no conflict of interest exists but representation cannot be accepted for another reason, the attorney/law firm must specify the reason on the Response to Order form and file it with the Court within 14 days of the date of this Order.

If an attorney/law firm appointed for all purposes can accept representation, the appointed attorney/law firm must mark the appropriate box on the Response to Order form and file it with the Court within 14 days of the date of this Order.

The appointed attorney/law firm is entitled to be reimbursed by the Attorney Admission Fund for costs incurred to investigate Jeffrey D. Furtney's claims and/or defenses up to $3,000.00. Reimbursable costs include copying costs, deposition costs or transcripts, travel expenses, telephone charges, electronic legal research, and other costs which are not otherwise recoverable from the opposing party. To obtain reimbursement, a Motion for Reimbursement of Out-Of-Pocket Expenses must be electronically filed together with copies of all receipts for expenditures.

DATED this 17th day of January, 2012.

Michael R. Hogan
United States District Judge

Page 2099 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 2100 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 2101 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

United States District Court
DISTRICT OF OREGON
1227 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

Chambers of
JOHN JELDERKS
United States Magistrate Judge

April 23, 2012

Eryn K. Hoerster
Garvey Schubert Barer
121 SW Morrison Street, 11th Floor
Portland, OR 97204-3141

Natalie K. Wight
United States Attorney's Office
1000 SW Third Avenue
Suite 600
Portland, OR 97204

Re: Furtney v. United States of America et al, Case No. 3:11-cv-1090-HO

Dear Counsel:

This letter is to confirm that the settlement conference in the above case will be held May 21, 2012 at 10:00 am. We will meet in the jury room for Courtroom 605 in the Sandra Day O'Connor U.S. Courthouse in Phoenix, Arizona. This is the courtroom used by U.S. District Judge Stephen McNamee, whose offices are in Suite 625. It is my understanding that there will be five of us at the settlement conference including Plaintiff Jeffrey Furtney, Plaintiff's counsel Eryn Hoerster, Assistant U.S. Attorney Natalie Wight and Dominic Ayotte, representing the Bureau of Prisons. Everyone should be prepared to provide identification in order to gain access for the conference.

By Friday, May 11th, I would like counsel to each send a confidential letter to me containing the following:

(1) A brief outline of the issues involved in this litigation;

(2) Your respective positions with regard to settlement;

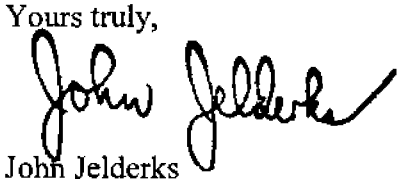
(3) Settlement proposal you believe would be fair; and

(4) Settlement proposal you would be willing to make in order to conclude the matter at this time.

As I am already in Arizona, please send the letter to me at:

15737 W. Roanoke Ave.
Goodyear, AZ 85395

Yours truly,



John Jelderks

JJ/amj

cc: Hon. Stephen McNamee
Hon. Michael R. Hogan
Mags Everette

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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Page 2113 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

MHB MACDONALD HOAGUE & BAYLESS

705 Second Avenue
Suite 1500
Seattle, Washington
98104-1745

Tel 206 622 1604
Fax 206 343 3961

Alec Bayless (1921-1991)
Francis Hoague (1909-1993)

Kenneth A. MacDonald
Retired

Miguel A. Bocanegra
Andrea Brenneke
Katherine C. Chamberlain
Andrew T. Chan
Mel Crawford
Timothy K. Ford
Katrin E. Frank
Felicia L. Gittleman
Ester Greenfield
Elizabeth Poh
Amy M. Royalty
Joseph R. Shaeffer
David J. Whedbee
Jesse Wing

December 21, 2011

VIA CERTIFIED MAIL NO. 7009 1410 0000 4989 1133

Harlan Penn, Esq.
Bureau of Prisons Regional Office
7338 Shoreline Drive
Stockton, CA 95219

Re: Craig James v. United States of America
Cause No. 2:11-cv-02125

Dear Mr. Penn:

Please find enclosed a summons and complaint in the above referenced matter. Pursuant to the Federal Rules of Civil Procedure copies of both documents have been provided to the Civil Process Clerk of the United States Attorney with the Western District of Washington.

Sincerely,

MACDONALD HOAGUE & BAYLESS

Timothy K. Ford

TKF:tf
Enclosures

United States District Court

for the

Western District of Washington

CRAIG JAMES,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Civil Action No. C11-2125 RSM

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

United States of America

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address is:

Timothy K. Ford, David J. Whedbee
MacDonald Hoague & Bayless
705 2nd Avenue, Suite 1500
Seattle, WA 98104

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: Dec 19, 2011

s/ Paula McNabb

Signature of Clerk or Deputy Clerk

PROOF OF SERVICE

This section should not be filed with the court unless required by Fed.. ***R. Civ. P. 4(1)***

This summons for (*name of individual and title, if any*) _____

was received by me on (*date*) _____ .

☐ I personally served the summons and complaint on the individual at (*place*)

_____ on (*date*) _____ ; or

☐ I left the summons and complaint at the individual's residence or usual place of abode with (*name*)

_____ , a person of suitable age and discretion who resides there,

on (*date*) _____ , and mailed a copy to the individual's last known address; or

☐ I served the summons and complaint on (*name of individual*) _____

who is designated by law to accept service of process on behalf of (*name of organization*)

_____ on (*date*) _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other (*specify*)

My fees are $_____ for travel and $ _____ for services, for a total of $_____ .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

CRAIG JAMES,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 2:11-cv-02125

COMPLAINT FOR DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT

Plaintiff Craig James claims as follows:

I. INTRODUCTION

This is a claim of medical negligence for damages against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.* From December 1, 2008 until June, 2009, Plaintiff Craig James was an inmate at the Federal Detention Center ("FDC") in SeaTac, Washington. During his incarceration, Plaintiff Craig James complained several times of decreasing vision in his right eye, but his health care providers at the FDC negligently failed to accurately and timely diagnose a retinal detachment, causing Mr. James permanent vision impairment.

II. PARTIES

2.1 Plaintiff.

2.1.1 Plaintiff Craig James is a resident of Clark County, Washington. At the time of the incident from which this lawsuit arises, Mr. James was an inmate in the custody of U.S.

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

Department of Justice ("DOJ"), Federal Bureau of Prisons ("BOP"), Federal Detention Center SeaTac ("FDC SeaTac") in King County, Washington.

2.2 Defendant.

2.2.1 Defendant United States owns and operates the FDC SeaTac facility where the pertinent events of this lawsuit occurred, and as such is a health care provider within the meaning of RCW 7.70.040.

III. JURISDICTION AND VENUE

3.1 The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1346, and 1402.

3.2 Venue is appropriate in the Western District of Washington because the events complained of occurred in this District.

IV. FACTS

4.1 From December 1, 2008 until as late as June 5, 2009, Plaintiff Craig James was an inmate at FDC SeaTac, and dependent on it for medical care.

4.2 On December 1, 2008, FDC SeaTac performed an intake screening examination on Mr. James. During this examination, Mr. James complained to FDC Physician's Assistant Kendall Hirano that he was having problems seeing out of his right eye, with decreased peripheral vision. Mr. Hirano failed to properly note this complaint, follow-up, or diagnose symptoms of a sight-threatening disorder in Mr. James's right eye. Mr. Hirano thus failed to exercise the degree of care, skill and learning of physician's assistants and health care providers practicing in the same or similar circumstances in the State of Washington.

4.3. On December 8, 2008, FDC SeaTac performed a second examination on Mr. James where he again complained of vision problems in his right eye, stating in particular that he

MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

was seeing "black spots" and losing his peripheral vision in the right eye, and that the condition was "increasingly worse." This time, FDC Physician's Assistant Stephen Leaf noted under "Pupils Comments" only that Mr. James had "decreased peripheral vision Right eye." The FDC supervising physician, Dr. M. Aslam, co-signed on Mr. James's medical "History and Physical."

4.4 In screening Mr. James on December 8, 2008, Dr. Aslam and Mr. Leaf failed to exercise the degree of care, skill and learning of physicians, physician's assistants, and health care providers practicing in the same or similar circumstances in the State of Washington, including by not properly documenting Mr. James's eye condition, by not following up with Mr. James, and by failing to diagnose symptoms of a sight-threatening disorder in Mr. James's right eye.

4.5 On March 16, 2009, Mr. James was again seen by Mr. Hirano. In this examination Mr. Hirano noted that Mr. James reported that "in November 2008, [he] began seeing black spots in visual field of right eye which led to him only being able to sense light." Mr. Hirano also noted that Mr. James "[r]ecently began to notice seeing black spots in left eye." Mr. Hirano stated that his examination of Mr. James "reveals opacity in the right eye with only light sensitivity."

4.6 Based on the symptoms reported on March 16, 2009, Mr. Hirano misdiagnosed Mr. James with a "cataract" in the right eye. He requested an "[o]ptometry" consultation, yet indicated that it warranted only "Routine" priority. In so doing, Mr. Hirano failed to exercise the degree of care, skill and learning of physician's assistants and health care providers practicing in the same or similar circumstances in the State of Washington, by failing to diagnose a detached retina in Mr. James's right eye and by not ordering immediate treatment for it. The FDC supervising physician, Dr. M. Aslam, similarly failed to exercise the degree of care, skill and

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learning of physicians and health care providers practicing in the same or similar circumstances in the State of Washington, by failing to diagnose Mr. James's eye condition and/or in not following up with Mr. Hirano regarding the mistaken diagnosis.

4.7 On April 13, 2009, Mr. James was seen by Dr. Brad Grimm, a contract physician. Dr. Grimm diagnosed Mr. James with "rhegmatogenous retinal detachment OD with macula off." While these symptoms indicated an emergency, Dr. Grimm noted only: "Patient needs retinal consult on urgent basis." Dr. Maria Luisa, the FDC physician who reviewed the chart note, failed to detect the emergent situation involving the retinal detachment and/or follow up to ensure a more rapid consultation with an ophthalmologist or surgeon. Dr. Luisa failed to exercise the degree of care, skill and learning of physicians and health care providers practicing in the same or similar circumstances in this state.

4.8 On or about May 5, 2009, Mr. James underwent surgical treatment to re-attach his right retina. Though the surgeon successfully re-attached the retina, the delay diminished the possibility of a full recovery and increased the chances of complications, including glaucoma and the need for silicone oil to maintain retina re-attachment.

4.9 According to his treating retinal surgeon, Mr. James still does not have and likely will not regain his depth of field, reading and driving ability, and full peripheral vision in his right eye. With earlier intervention and surgery, Mr. James would not have lost his vision to such an extent.

4.10 As a proximate result of the above-described acts and omissions, Mr. James suffered personal injuries, including but not limited to physical pain and suffering, emotional distress, loss of the ability to enjoy life, loss of vision, past and future medical expenses, loss of earning capacity, and disability.

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4.11 Defendant United States employed Kendall Hirano, Stephen Leaf, Dr. M. Aslam, Dr. Maria Luisa, and others who provided medical care to Mr. James at the FDC SeaTac, and they were its agents, acting in the scope of their employment in all the actions described herein. As such, the United States is vicariously liable for their acts and omissions.

4.12 In December 2010, Mr. James presented a Claim for Damages to the BOP under 28 U.S.C. § 2675. The Claim for Damages was denied on November 2, 2011.

V. CLAIMS FOR RELIEF

5.1 The above described acts and omissions constitute negligence causing injury resulting from health care under the law of the State of Washington. *See* Attachment A.

VI. RELIEF REQUESTED

WHEREFORE, Mr. James requests relief as follows:

6.1 Compensatory damages;

6.2 Costs, including reasonable attorneys' fees, to the extent permitted by law.

6.3 Such other relief as may be just and equitable.

DATED this 16th day of December. 2011.

MacDONALD HOAGUE & BAYLESS

By _____
Timothy K. Ford, WSBA # 5986
David Whedbee, WSBA #35977
Attorneys for Plaintiff

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Seattle, Washington 98104
Tel 206.622.1604 Fax 206.343.3961

ATTACHMENT A

TO COMPLAINT FOR DAMAGES

UNDER THE FEDERAL TORT CLAIMS ACT

DECLARATION OF DR. JACOB L. HELLER

Regarding Claim for Medical Negligence by Craig James

Dr. Jacob L. Heller states on oath:

1. I am a physician licensed to practice in the State of Washington. I am Board certified in Emergency Medicine and Internal Medicine. I am also familiar with the practices and responsibilities of physician's assistants as I work with and supervise them in my current practice environment. A copy of my curriculum vitae is attached to this Certificate.

2. I have reviewed the medical records for Craig James maintained by the Bureau of Prison ("BOP") and the Seattle Tacoma Federal Detention Center ("FDC") for the period of 2008 to 2009, in addition to records from Mr. James's medical care at Vitreoretinal Associates in Seattle, Washington while under the care of Dr. Robert W. Nash, MD. Based on my review of these records, and my knowledge of relevant treatment and practice protocols, guidelines, academic research, clinical trials and studies, and widely accepted clinical practices, it is my opinion that in providing health care to Craig James, the Federal Detention Center and its medical staff and agents, including Kendall Hirano, Stephen Leaf, Dr. M. Aslam, and Dr. Maria Luisa, failed to exercise the degree of care, skill and learning of physicians and health care providers practicing in the same or similar circumstances in the State of Washington, in the following respects:

A. On December 1, 2008, FDC SeaTac performed an intake screening examination on Mr. James. During this examination, Mr. James complained to FDC Physician's Assistant Kendall Hirano that he was having problems seeing out of his right eye, with decreased peripheral vision. Mr. Hirano failed to note

this complaint, follow-up, or properly diagnose symptoms of a sight-threatening disorder in Mr. James's right eye. It is my opinion that FDC Physician's Assistant Hirano failed to exercise the degree of care, skill and learning of physician's assistant and health care providers practicing in the same or similar circumstances in the State of Washington, by not noting that Mr. James was having decreased peripheral vision, and by not following up with him or properly diagnosing symptoms of a sight-threatening disorder in Mr. James's right eye.

B. On December 8, 2008, Mr. James presented to FDC Physician's Assistant Stephen Leaf with complaints of vision problems in his right eye, including complaints of "black spots" and loss of peripheral vision in his right eye, noting that the condition was getting "increasingly worse." The FDC supervising physician, Dr. M. Aslam, co-signed on the "History and Physical" section of the examination report. It is my opinion that Dr. Aslam and Mr. Leaf failed to exercise the degree of care, skill and learning of physicians, physician's assistants, and health care providers practicing in the same or similar circumstances in the State of Washington, by not properly documenting Mr. James's eye condition, by not following up with Mr. James, and by failing to diagnose symptoms of a sight-threatening disorder in his right eye.

C. On March 16, 2009, Mr. James complained to FDC Physician's Assistant Kendall Hirano that "in November 2008, [he] began seeing black spots in visual field of right eye which led to him only being able to sense light." Mr. Hirano also noted that Mr. James "[r]ecently began to notice seeing black spots in left eye." Mr. Hirano concluded that his examination "reveals opacity in the right

eye with only light sensitivity" and diagnosed Mr. James with a "cataract" in the right eye, requesting an "[o]ptometry" consultation with only "Routine" priority. It is my opinion that, based on these symptoms, Mr. Hirano failed to exercise the degree of care, skill and learning of physician's assistant and health care providers practicing in the same or similar circumstances in the State of Washington, by misdiagnosing Mr. James with a "cataract" in the right eye and by requesting an "[o]ptometry" consultation with only "Routine" priority. It is also my opinion that the FDC supervising physician, Dr. M. Aslam, similarly fell below the standard of care by failing to diagnose Mr. James's eye condition or follow up with Mr. Hirano regarding the mistaken diagnosis.

D. On April 13, 2009, Mr. James was seen by Dr. Brad Grimm, a contract physician. In this examination, Dr. Grimm diagnosed Mr. James with "rhegmatogenous retinal detachment OD with macula off." While these symptoms indicated an emergency, Dr. Grimm noted only: "Patient needs retinal consult on urgent basis." It is my opinion that the reviewing FDC physician, Dr. Maria Luisa, fell below the standard of care when she failed to detect the emergent situation of a retinal detachment or follow up to ensure a more rapid consultation with an ophthalmologist or surgeon, where retinal surgery ultimately occurred on May 5, 2009.

4. In my opinion, to a reasonable medical certainty, one or more of these failures by Kendall Hirano, Stephen Leaf, Dr. M. Aslam, and/or Dr. Maria Luisa to exercise due care in the treatment of Craig James, caused him serious pain and suffering and permanent damage to his right eye.

Dated this 15th day of December, 2011.

Dr. Jacob L. Heller

CURRICULUM VITAE

JACOB L. HELLER, M.D., M.H.A., F.A.C.E.P.

23 AUGUST 2011

PERSONAL DATA

Date of Birth	4 December 1948
Place of Birth	Brooklyn, New York
Office Address	Virginia Mason Medical Center 1100 Ninth Avenue H6-ER P.O. Box 900 Seattle, Washington 98111

EDUCATION

Queens College, C.U.N.Y.	
B.A. cum laude	1965-1969
New York University School of Medicine	
M.D., cum laude	1969-1973
University of Washington School of Public Health	
and Community Medicine, M.H.A.	2000-2003

INTERNSHIP AND RESIDENCY

University of Washington Affiliated Hospitals	
Internship, Internal Medicine	June 1973-June 1974
Residency, Internal Medicine	July 1974-June 1976

CERTIFICATION

Diplomate, American Board of Internal Medicine	September 1976
Advanced Trauma Life Support	November 1983
Advanced Cardiac Life Support	January 2011
Diplomate, American Board of Emergency Medicine	June 1986
Recertification	November 1996
Recertification	December 2006

PROFESSIONAL SOCIETIES

Alpha Omega Alpha	1972-present
American College of Emergency Physicians	1980-present
Disaster Committee (National)	1984-1985
Board Member, Washington State Chapter	1985-1990
Editor, Washington State Chapter Newsletter	1985-1995

Public Relations Committee (National)	1986-1987
Chairman, Public Relations Committee (State)	1986-1992
International Affairs Task Force	1988-1989
Chapter President (Washington State)	1988-1989
Public Affairs Task Force (National)	1990-1994
King County Medical Society	1980-present
Washington State Medical Association	1980-present
Political Action Committee (PAC) Board Member	1984-1990
Secretary Treasurer (PAC)	1985-1988
Chair, Board of Directors (PAC)	1989-1990
International Civil Defense Organization	1983-1993
World Association for Emergency and Disaster Medicine	1983-1993
American Medical Association	1980-present

TEACHING AND FACULTY APPOINTMENTS

University of Washington Department of Medicine	
Acting Instructor	1979-1980
Clinical Instructor	1982-1987
Clinical Assistant Professor	1987-1990
Clinical Associate Professor	1990-present

HOSPITAL APPOINTMENTS/CLINICAL PRACTICE

Medical Staff, Veterans Administration Hospital	
Seattle, Washington	1976-1978
Emergency Department Staff Physician	
Providence Hospital, Seattle, Washington	1979
Emergency Department Staff Physician	
University of Washington Hospital, Seattle, Washington	1979-1980
Emergency Department Staff Physician	
Virginia Mason Medical Center, Seattle, Washington	1980-present
Ship's Physician, Holland American Line	1990-1994

PRESENTATIONS

"The Mt. St. Helens Eruption, May 1980." Third World Congress on Disaster and Emergency Medicine. Rome, Italy, 1983.

Ibid. Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Atlanta, 1983.

"The 1984 Seattle Marathon." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Dallas, 1984.

"Moutaineering Medicine: The Seattle Mountain Rescue Council Experience." Fourth World Congress on Disaster and Emergency Medicine. Brighton, England, 1985.

Ibid. Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Las Vegas, 1985.
"Occupational Medicine in the Emergency Department." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Atlanta, 1986.
"Geriatric Medicine in the Emergency Department." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. New Orleans, 1987.
"The Horizon Air Crash." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. San Francisco, 1988.
Ibid. Scientific Paper. Fourth World Congress on Disaster and Emergency Medicine. Brisbane, Australia, 1988.
"Sledding Injuries in Seattle." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Washington, D.C., 1989.
"Emergency Medicine at Sea." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. San Francisco, 1990.
Ibid. Scientific Exhibit. Seventh World Congress on Disaster and Emergency Medicine. Montreal, Canada, 1991.
"Swimming Pool Heater Dysfunction: An Unusual Cause of Carbon Monoxide Poisoning." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Seattle, 1992.
Ibid. Scientific Exhibit. Eighth World Congress on Disaster and Emergency Medicine. Stockholm, Sweden, 1993.
"Emergency Injuries and Illnesses at an Urban Athletic Club." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Chicago, 1993.
"Emergency Department Utilization and Management of Dialysis Complications: Potential for Cost Reduction." Orlando, 1994.
"Emergency Department Management of Hyperkalemia." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Washington, D.C., 1995.
"Medical Effects of the 1996 Seattle Earthquake." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. New Orleans, 1996.
"Emergency Management of Shoulder Dislocations." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Chicago, 1998.
"Turning Tragedy into Teaching: AIDS Education in the ED." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Las Vegas, 1999.
"Disaster Medicine: Seattle Earthquake 2000." Scientific Exhibit. American College of Emergency Physicians Scientific Assembly. Philadelphia, 2000.

QUALITY ASSURANCE///CONTINUOUS QUALITY IMPROVEMENT

PRO/West/Qualis Health—A Professional Review Organization

Reviewing Physician	1987-present
Review Team Leader	1990-2000
Internal Quality Control Lead Physician	1990-2000

Role: Assessing and reviewing health care records for proper coding, utilization, and quality of care; interaction with PRO/West/Qualis Health staff and communication/correspondence with providers/practitioners required.

Member, Quality Assurance Council 1989-2000
Chair, Quality Assurance Council 1990-2000

Role: Making final determinations regarding quality of care, at times with the assistance of counsel; making recommendations to the Office of the Inspector General; devising quality improvement plans; sitting as member of peer review panel for appeals.

Member, Health Data Council 1993-1994
Member, Project Steering Council 1994-1995
Member, Project Feasibility Group 1995-1997

Role: Assessing opportunities for improvement in care for Medicare beneficiaries and devising studies and projects to facilitate and measure such improvement.

Principal Clinical Coordinator, Pneumonia Care Improvement Project 1993-1997

Role: Devise and manage improvement project to measure and assess processes of care for hospitalized patients with pneumonia; committee and study group work required.

Principal Clinical Coordinator, Mammography

Role: Devise and manage project to improve mammography use rates in Idaho, using various interventions; committee and study group work required.

Providence Health Plans

Associate Medical Director 1995-1998

Role: Utilization and quality management; policy, procedure and evidence-based guidelines development; establishment of Pharmacy and Therapeutics (P&T) Committee and serving as Chair; interaction with regulatory agencies; credentialing; network development.

Premera Blue Cross

Assistant Medical Director 1999-present

Role: Utilization management, clinical and payment policy development

SPECIAL AWARDS

Outstanding Young Men of America. 1982.

Distinguished Citizen of the State of Washington, 1986. Granted by Lieutenant Governor John A. Cherberg.

Seattle's Top Doctors: Emergency Medicine. *Seattle Magazine* peer survey, September 2005.

Seattle's Top Doctors: Emergency Medicine. *Seattle Magazine* peer survey, September 2006.

Seattle's Top Doctors: Emergency Medicine: *Seattle Metropolitan Magazine* peer survey, March 2007.

Seattle's Top Doctors: Emergency Medicine: *Seattle Magazine* peer survey, September 2007.

Seattle's Top Doctors: Emergency Medicine: *Seattle Magazine* peer survey, September 2008.

Seattle's Top Doctors: Emergency Medicine. *Seattle Metropolitan Magazine* peer survey, August 2009.

Seattle's Top Doctors: Emergency Medicine. *Seattle Metropolitan Magazine* peer survey, August 2010

Seattle's Top Doctors: Emergency Medicine. *Puget Sound Consumers' Checkbook* peer survey, Spring/Summer 2011

Seattle's Top Doctors: Emergency Medicine. *Seattle Metropolitan Magazine* peer survey, August 2011

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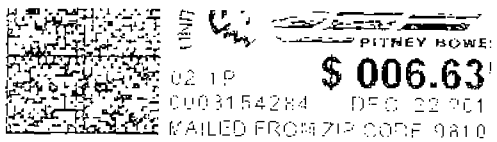



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First Class Mail

MHB MacDonald Hoague & Bayless
ATTORNEYS AT LAW
705 Second Avenue
Suite 1500
Seattle, Washington
98104-1745

TO: Harlan Penn, Esq.
Bureau of Prisons Regional Office
8339 Shoreline Drive
Stockton, CA 95219

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CRAIG JAMES, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	No. C11-2125 RSM STIPULATED ORDER OF DISMISSAL

Come now Plaintiff Craig James and Federal Defendant United States of America, by and through their undersigned counsel of record, who hereby agree and stipulate as follows:

Plaintiff Craig James and Federal Defendant United States of America have entered into a settlement of the above-captioned action. Therefore these parties, through their undersigned counsel and respective attorneys of record, now hereby stipulate to the dismissal with prejudice of the above-captioned action against the United States of America, with the parties to bear their own fees and costs.

UNITED STATES ATTORNEY
1201 PACIFIC AVENUE, SUITE 700
TACOMA, WASHINGTON 98402
(253) 428-3800

DATED this 15th day of January, 2013.

Respectfully submitted,

JENNY A. DURKAN
UNITED STATES ATTORNEY

s/Philip H. Lynch
PHILIP H. LYNCH, WSBA # 91005
1201 Pacific Avenue, Ste. 700
Tacoma, WA 98402
Phone: 253-428-3810
Fax: 253-428-3826
E-mail: phil.lynch@usdoj.gov

s/David J. Whedbee, Esq.
DAVID J. WHEDBEE, ESQ., WSBA # 35977
705 Second Avenue, Ste. 1500
Seattle, WA 98104
Phone: 206-662-1604
Fax: 206-343-3961
Email: davidw@mhb.com

ORDER

Based upon the foregoing Stipulation, **IT IS SO ORDERED.** The above-captioned action is dismissed with prejudice, with Plaintiff and Federal Defendant to bear their own fees and costs.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

Dated this 17th day of January 2013.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

Presented by:

JENNY A. DURKAN
UNITED STATES ATTORNEY

s/Philip H. Lynch
PHILIP H. LYNCH, WSBA # 91005
1201 Pacific Avenue, Ste. 700
Tacoma, WA 98402
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Fax: 253-428-3826
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s/David J. Whedbee, Esq.
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UNITED STATES ATTORNEY
1201 PACIFIC AVENUE, SUITE 700
TACOMA, WASHINGTON 98402
(253) 428-3800

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CRAIG JAMES,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. C11-2125 RSM

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE

It is hereby stipulated by and between the undersigned plaintiff (meaning any person, other than the defendant, signing this agreement, whether or not a party to this civil action), and defendant United States of America, by and through their respective attorneys, as follows:

1. The plaintiff and the defendant do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action or which are otherwise related in any way to the subject matter of the above-captioned action, under the terms and conditions set forth in this Stipulation for Compromise Settlement and Release ("Settlement Agreement").

2. The United States of America agrees to pay the sum of **Eight-Hundred Thousand Dollars ($800,000.00)**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily and personal

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injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement as set forth in paragraph 1 of this Settlement Agreement, including any claims for wrongful death, for which plaintiff or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America and its agents, servants, and employees.

3. Plaintiff and his guardians, heirs, executors, administrators or assigns hereby agree to accept the sums set forth in this Settlement Agreement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, including claims for wrongful death, arising from, and by reason of, any and all known and unknown, foreseen and unforeseen, bodily and personal injuries, damage to property and the consequences thereof, which they may have or hereafter acquire against the United States of America, and its agents, servants and employees on account of the subject matter of this settlement as set forth in paragraph 1 of this Settlement Agreement, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless the United States of America and its agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff or his guardians, heirs, executors, administrators or assigns against any third party or against the United States of America, including claims for wrongful death.

4. This Stipulation for Compromise Settlement and Release is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of the United States of America and its agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This Settlement Agreement is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

5. It is also agreed, by and among the parties, that the respective parties will each bear

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their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

6. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 *per centum* of the amount of the Settlement Agreement.

7. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement. In the event any plaintiff is a minor or a legally incompetent adult, the plaintiff must obtain Court approval of the Settlement Agreement at his expense. Plaintiff agree to obtain such approval in a timely manner: time being of the essence. Plaintiff further agrees that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner. In the event that the plaintiff fails to obtain such Court approval, the entire Stipulation For Compromise Settlement And Release and the compromise settlement are null and void.

8. Payment of the settlement amounts will be made as follows:

To Plaintiff Craig James in the amount of $473,369.52 by government wire transfer as per the following:

A. Name of Bank: U.S. Bank
B. Street Address of Bank: 723 1st Avenue
C. City, State and Zip Code of Bank: Seattle, WA 98104
D. Federal Reserve Number: Same as Routing Number
E. Routing Number: (b)(6)
F. Name of Account: MacDonald Hoague & Bayless IOLTA Trust Account
G. Account Number: (b)(6)

Plaintiffs' attorneys agree to distribute the plaintiff's settlement proceeds to the plaintiff, and to obtain a dismissal of the above-captioned action with prejudice, with each party bearing its own fees, costs, and expenses.

UNITED STATES ATTORNEY
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TACOMA, WASHINGTON 98402
(253) 428-3800

To the United States Forest Service, U.S. Department of Agriculture, restitution in the the amount of $326,630.48 by check made out to the United States District Court, Western District of Washington and sent to:

United States Attorney's Office
Financial Litigation Unit
Attn: Dawn Fernandez
700 Stewart Street, Ste. 5220
Seattle, WA 98101

9. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

///

///

UNITED STATES ATTORNEY
1201 PACIFIC AVENUE, SUITE 700
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(253) 428-3800

10. It is contemplated that this Settlement Agreement may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

Executed this 29th day of November, 2012.

Philip H. Lynch
Assistant United States Attorney
Attorney for the United States

Executed this 30th day of November, 2012.

David Whedbee, Esq.
Attorney for Craig James

Executed this 30 day of November, 2012.

Craig James, Plaintiff

UNITED STATES ATTORNEY
1201 Pacific Avenue, Suite 700
Tacoma, Washington 98402
(253) 428-3800

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CASE DETAILS

Back to Case Results **Case Actions:**

Case ID: CIV-WXR-2012-01189 **Short Description:** SKURDAL, GUSTOV V. FEDERAL DETENTION CENTER

CASE DETAILS **CASE DOCS** **CASE PERSONS** **CASE DATES** **CASE SUMMARY** **CASE BLOG**

Case Login Information

Reference Number	12-cv-00706-RSM-MAT
Short Description	SKURDAL, GUSTOV V. FEDERAL DETENTION CENTER
Classification	Civil
Case Type	Bivens
Case Sub-Type	
Current Region	WESTERN REGIONAL OFFICE
Current Institution	SeaTac (FDC)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	SeaTac (FDC)
Monetary Relief Sought	$
Estimated Amount	$
Office	Seattle
Jurisdiction	UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
Responsible Legal Office	WXRO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	03/06/2014
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$45,000.00
Description	NO STEPS TAKEN FOR RELIGIOUS ACCOMMODATION- SETTLED FOR $45K
Description	NO STEPS TAKEN FOR RELIGIOUS ACCOMMODATION- SETTLED FOR $45K
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	09/18/2012
Date Filed	04/23/2012

Case Progress

Current Owner	JENNIFER VICKERS
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	42:1983 PRISONER CIVIL RIGHTS (REQUEST FOR RELIGIOUS VEGAN DIET DENIED AT SET)
Further Case Classification	3/5/2014 PAYMENT RECEIVED BY USAO AND MAILED TO PLAINTIFF -CLOSE IN CM
Comments	REOPENED FOR PLN FOIA REQUEST

Home Alerts My Work New Case Search Main Email

[redacted] United States Department of Justice - Office of General Counsel & Review

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GUSTAV SKURDAL,

Plaintiff,

v.

FEDERAL DETENTION CENTER, et al.,

Defendants.

Case No. C12-706RSM

DISMISSAL ORDER

The Court having been notified of the settlement of this case, and it appearing that no issue remains for the court's determination,

IT IS ORDERED that this action and all claims asserted herein are DISMISSED with prejudice and without costs to any party.

In the event that the settlement is not perfected, any party may move to reopen the case, provided that such motion is filed within thirty (30) days of the date of this order. Any trial date and pretrial dates previously set are hereby VACATED.

IT IS SO ORDERED this 17 day of December, 2013.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Washington

Gustav Skurdal

Plaintiff(s)

v.

Civil Action No. 12-cv-00706-RSM-MAT

FEDERAL DETENTION CENTER, (FDC); MARION FEATHER, Warden of FDC; D. CARL, AW Operations; CHAPLIN WATSON, Religious Services; LT. T. MATTHEWS, Physician's Asst. Caretaker; D. Vo, Food Service; R. Holloway, Unit Case Manager; P. Drinkard, Unit Counselor; and John/Jane Does 1-50, inclusively,

Defendants.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* D. Carl; A.W. of Operations
c/o: SeaTac Federal Detention Center
2425 South 200th Street
Seattle, Washington 98198
Mailing: P.O. Box 13900
Seattle, Washington 98198

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Gustav Skurdal
837 1/2 West G Road
Hunbtley, Montana 59037

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 8-8-12

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GUSTAV SKURDAL, Plaintiff, v. FEDERAL DETENTION CENTER, *et al.*, Defendants.	CASE NO. C12-706-RSM-MAT ORDER DENYING MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AS MOOT AND REVOKING IFP STATUS

While plaintiff Gustav Skurdal was detained in the Federal Detention Center–SeaTac, he was granted *in forma pauperis status*, but his civil-rights complaint was not served because of fatal pleading deficiencies and because he asked to be granted additional time to file an amended complaint after his release. (Dkts. 7, 8.) Now living in a private, Montana residence, Mr. Skurdal has paid the $350 filing fee as a non-prisoner litigant, has filed an amended complaint, and has moved for a temporary restraining order and a preliminary injunction. (Dkts. 9, 10.) The Court **ORDERS** as follows:

1. Plaintiff's motion for a TRO/PI (Dkt. 10) is **DENIED** as moot. Mr. Skurdal is no

longer incarcerated and cannot show that he faces irreparable harm in the absence of injunctive relief while he resides in private Montana residence. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). Any concerns regarding what will occur if he is later detained in a federal facility are entirely speculative.

2. Mr. Skurdal's IFP status (Dkt. 7)—based on his financial disclosures and status as a prisoner—is **REVOKED.**[1] Mr. Skurdal has paid the $350 civil filing fee and is proceeding as a private litigant. **Mr. Skurdal is advised that he is personally required to serve his amended complaint and summons upon defendants without the Court's assistance.** *See generally* Fed. R. Civ. P. 4. "On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant." Fed. R. Civ. P. 4(b).

3. The Clerk is directed to send a copy of this Order to plaintiff and to the Honorable Mary Alice Theiler.

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[1] The Court earlier noted that Mr. Skurdal expressly stated that he had declined to exhaust administrative remedies within the prison grievance system before filing his federal action regarding prison conditions as is required by the Prison Litigation Reform Act ("PLRA"), *see* 42 U.S.C. § 1997e(a). (Dkt. 8, at 2.) The Court would have been required to dismiss a complaint by a prisoner who failed to exhaust administrative remedies prior to filing a federal lawsuit. *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) ("Exhaustion is no longer left to the discretion of the district court, but is mandatory.").

Dated this 13th day of July, 2012.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

Recommended for entry
this 9th day of July, 2012.

s/ Mary Alice Theiler
United States Magistrate Judge

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

Page 2148 of 2287

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GUSTAV SKURDAL,

Plaintiff,

v.

FEDERAL DETENTION CENTER, et al.,

Defendants.

Case No. C12-706RSM

DISMISSAL ORDER

The Court having been notified of the settlement of this case, and it appearing that no issue remains for the court's determination,

IT IS ORDERED that this action and all claims asserted herein are DISMISSED with prejudice and without costs to any party.

In the event that the settlement is not perfected, any party may move to reopen the case, provided that such motion is filed within thirty (30) days of the date of this order. Any trial date and pretrial dates previously set are hereby VACATED.

IT IS SO ORDERED this 17 day of December, 2013.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Washington

Gustav Skurdal

Plaintiff(s)

v.

Civil Action No. 12-cv-00706-RSM-MAT

FEDERAL DETENTION CENTER, (FDC); MARION FEATHER, Warden of FDC; D. CARL, AW Operations; CHAPLIN WATSON, Religious Services; LT. T. MATTHEWS, Physician's Asst. Caretaker; D. Vo, Food Service; R. Holloway, Unit Case Manager; P. Drinkard, Unit Counselor; and John/Jane Does 1-50, inclusively,

Defendants.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* D. Carl; A.W. of Operations
c/o: SeaTac Federal Detention Center
2425 South 200th Street
Seattle, Washington 98198
Mailing: P.O. Box 13900
Seattle, Washington 98198

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Gustav Skurdal
837 1/2 West G Road
Hunbtley, Montana 59037

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: 8-8-12

Signature of Clerk or Deputy Clerk

ERIC A. SEITZ
ATTORNEY AT LAW
A LAW CORPORATION

ERIC A. SEITZ 1412
DELLA A. BELATTI 7945
SARAH R. DEVINE 9673
820 Mililani Street, Suite 714
Honolulu, Hawaii 96813
Telephone: (808) 533-7434
Facsimile: (808) 545-3608

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JANE DOE, Plaintiff, vs. UNITED STATES OF AMERICA; RICHARD SEAMAN; AND DOE DEFENDANTS 1-10, Defendants.	)	CIVIL NO. 12-00640 ACK-RLP FIRST AMENDED COMPLAINT FOR DAMAGES; DEMAND FOR JURY TRIAL

COMPLAINT FOR DAMAGES

Plaintiff JANE DOE (hereinafter "Plaintiff"), by and through her undersigned attorneys, alleges and avers as follows:

I. Jurisdiction and Venue

1. This case arises under the Constitution and statutes of the United States of America and the State of Hawaii, inter alia.

2. Jurisdiction is proper in this forum pursuant to 28 U.S.C. §2674, inter alia. Any and all state law claims contained herein form part of the same case or controversy as gives rise to Plaintiff's federal law claims and therefore fall within the Court's supplemental jurisdiction pursuant to 28 U.S.C. §1367.

3. Venue is proper in this forum pursuant to 28 U.S.C. §1391, et seq.

III. Parties

4. Plaintiff is and was, at all times relevant, a resident of the State of Hawaii.

5. Defendant UNITED STATES OF AMERICA (hereinafter "Defendant UNITED STATES") is a sovereign that has waived its immunity for certain claims, including the claims set forth herein, and is liable for the acts of its employees and servants.

6. Defendant RICHARD SEAMAN (hereinafter "Defendant SEAMAN") is and was a resident of Hawaii and was employed by the United States Government and the United States Department of Justice, Federal Bureau of Prisons (hereinafter "BOP"), at all times pertinent hereto.

7. DOE DEFENDANTS 1-10 (hereinafter "DOE DEFENDANTS 1-10") are individuals whose true identities and capacities are as yet unknown to the Plaintiff and her counsel, despite

diligent inquiry and investigation, and who are responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages, as herein alleged, were proximately caused by their conduct. The true names and capacities of the Doe Defendants will be substituted as they become known. Plaintiff is informed and believes and therefore alleges that at all times herein mentioned, Doe Defendants, were the agents, servants and employees of each of the other Defendants herein.

IV. Factual Allegations

8. Commencing in September 2011, and concluding on or about December 8, 2011, Defendant Seaman sexually assaulted Plaintiff on numerous occasions.

9. At all times relevant Plaintiff was an inmate at the Federal Detention Center in Honolulu, Hawaii (hereinafter "Honolulu FDC").

10. At all times relevant Defendant SEAMAN was an officer and prison employee who was purporting to act within the course and scope of his employment for the United States of America and the Federal BOP.

11. On at least three occasions during the period between September 2011 and December 8, 2011, Defendant SEAMAN was permitted with the consent and/or knowledge of Defendant UNITED STATES and/or certain DOE DEFENDANTS 1-10 to be alone

with Plaintiff in unsupervised, camera-less areas of the Honolulu FDC.

12. During each of these three occasions Defendant SEAMAN sexually assaulted Plaintiff.

13. Plaintiff did not and could not consent to the aforesaid sexual assaults.

14. At all times relevant Defendants UNITED STATES, SEAMAN, and DOE DEFENDANTS 1-10 owed a duty of care to Plaintiff of "safekeeping, care. . . .[and] protection" pursuant to 18 U.S.C. § 4042(a)(2) and (3), inter alia.

15. Pursuant to Federal Bureau of Prisons Program Statement P5324.06, "Sexually Abusive Behavior Prevention and Intervention Program," April 27, 2005, (hereinafter "BOP 5324.06") it was a mandatory policy of Defendant UNITED STATES, at all times relevant hereto, to have "[s]tandard procedures. . .to detect and prevent sexually abusive behavior at all Bureau facilities."

16. According to BOP P5324.06, Defendant UNITED STATES' Sexually Abusive Behavior Prevention and Intervention Program "is comprised of five major areas," namely Prevention, Detection, Intervention, Investigation, and Discipline/ Prosecution.

17. Under the "Prevention" area of BOP P5324.06, "[a]ll staff" are required to be "trained on the components of

the prevention and intervention of sexually abusive behavior as outlined in" BOP P5324.06.

18. BOP P5324.06 further provides that all staff are required to be trained to "[p]articipate in intentional detection activities" as part of "Detection of sexually abusive behavior."

19. BOP P5324.06 further requires that "detection requires an intentional awareness by staff of institutional or unit climate" and requires that "[t]hrough actively paying attention to inmate "gossip," listening to inmate comments to staff, reading case files and Correctional Services "confidentials,". . . and monitoring isolated or "hot" areas of the institution, staff are able to better detect sexually abusive behavior."

20. BOP P5324.06 further provides that a Program Coordinator at each federal BOP facility "must provide supervisory oversight to ensure the coordination of institution departments in the prevention, detection, intervention, investigation and discipline/prosecution aspects as specified in this Program Statement."

21. BOP 5324.06 further directs that "[e]ach institution is required to have a current Institution Supplement that reflects the institution's unique characteristics and that

specifies how each institution will comply with this Program Statement."

22. At all times relevant hereto, FDC Honolulu failed to have sufficient policies and/or practices to intentionally detect and/or prevent sexually abusive behavior as required by BOP 5324.06.

23. The Institution Supplement for FDC Honolulu related to "Sexually Abusive Behavior Prevention and Intervention Program" is silent and devoid of any policies related to detection and prevention as required by BOP 5324.06.

24. Since 2003 there have been at least two other publicly published reports of sexual assaults by Federal BOP officers and/or employees upon female inmates housed at the Honolulu FDC.

25. Plaintiff is informed and believes that Defendant SEAMAN has been investigated previously by Defendant UNITED STATES and/or certain DOE DEFENDANTS 1-10 for reported sexual assaults and/or harassment of other female inmates at the Honolulu FDC.

26. On February 15, 2007, Jane Doe 2, a female inmate under Defendant SEAMAN's previous supervision reported, via signed affidavit, several instances of sexual misconduct in January and February 2007, by Defendant SEAMAN where he used indecent sexual langugae, isolated her during work hours in an

elevator, and sexually assaulted her by kissing her and placing his hands inside her pants.

27. Jane Doe 2 also reported that Defendant SEAMAN intimidated inmates he supervised with placement in the Special Housing Unit and reduced her work schedule after she informed him "I don't want no trouble; I just want to do my time and leave here" following the January 2007 incidents when SEAMAN assaulted her in the elevator.

28. In the course of an investigation, Plaintiff is informed and believes that Jane Doe 2 refused to sign a second affidavit regarding her performance of oral sex on Defendant SEAMAN and refused to cooperate further with the investigation; however, Jane Doe 2 did not recant the affidavit she had signed on February 15, 2007, and continued to report that "she was sticking with the affidavit she signed on February 15, 2007."

29. Defendant UNITED STATES concluded that the investigation regarding Jane Doe 2's allegations "revealed no pattern of inappropriate behavior by [Defendant] SEAMAN" and "[b]ased on the lack of evidence," the "charge of Abusive Sexual Contact is Not Sustained."

30. Based on Jane Doe's 2007 allegations and February 15, 2007, affidavit, and the two other publicly published reports of sexual assaults by Federal BOP officers and/or employees at Honolulu FDC, Defendant UNITED STATES had notice of

an institutional climate harmful to the "safekeeping" and "care" of female inmates.

31. At all times relevant Defendants UNITED STATES and DOE DEFENDANTS 1-10 knew or should have known about the danger posed by Defendant SEAMAN based upon the 2007 allegations against Defendant SEAMAN and the custom, policy, and/or practice of allowing him to be alone with female inmates in isolated or "hot" areas of the Honolulu FDC.

32. At all times relevant hereto, Defendants UNITED STATES and DOE DEFENDANTS 1-10, pursuant to BOP p5324.06 failed to intentionally detect and prevent Defendant SEAMAN's sexually abusive behavior against Plaintiff JANE DOE.

33. At all times relevant Defendants UNITED STATES and DOE DEFENDANTS 1-10 knew or should have known of the risks of inmates and employees being permitted into isolated, "hot" areas with one BOP employee that would facilitate sexual assaults of inmates, including Plaintiff, yet failed to take proper steps to protect the inmates.

34. At all times relevant Defendants UNITED STATES and DOE DEFENDANTS 1-10 knew or should have known of the dangerous, isolated, "hot" areas susceptible to the aforesaid sexual assaults yet failed to take any remedial steps to detect, prevent or remedy such dangerous situations and/or to protect the female inmates including Plaintiff.

35. Pursuant to the Federal Tort Claims Act a written claim was submitted to the Federal BOP on or about March 23, 2012.

36. On or about June 14, 2012, the Federal BOP denied Plaintiff's written claim, and Plaintiff is presently entitled to bring her claim in this Court.

COUNT I
(Assault and Battery)

37. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 36, above.

38. Acting outside the scope of his duties Defendant SEAMAN intentionally made offensive physical contact on Plaintiff's person without her consent, and as a direct and proximate result of said assault and battery Plaintiff has sustained substantial general, special, and punitive damages in amounts to be proven at trial.

COUNT II
(Intentional Infliction of Emotional Distress)

39. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 36, and 38, above.

40. Defendant SEAMAN intentionally caused Plaintiff to sustain serious emotional distress, and as a direct and proximate result thereof Plaintiff has sustained substantial

general, special, and punitive damages in amounts to be proven at trial.

COUNT III
(Negligence Claims)

41. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 36, above.

42. An institutional climate and/or pattern of sexual abuse of female inmates exists and has existed at the Honolulu Federal Detention Center prior to the assaults committed herein.

43. Defendant UNITED STATES owed duties to Plaintiff to exercise the requisite standard of care and skill ordinarily exercised by similar institutions and agencies to detect sexually abusive behavior and to take reasonable care to control Defendant SEAMAN to prevent him from committing sexually abusive behavior and sexual misconduct.

44. By failing to detect and prevent sexually abusive behavior of employees such as Defendant SEAMAN, Defendant UNITED STATES breached its duties of reasonable care owed to Plaintiff thereby proximately and directly causing the injuries to Plaintiff complained of herein.

45. Defendants UNITED STATES and certain DOE DEFENDANTS 1-10 negligently caused Plaintiff to sustain serious emotional distress, anxiety, embarrassment, humiliation, worry,

and anger, and as a direct and proximate result thereof Plaintiff has sustained substantial general and special damages in amounts to be proven at trial.

WHEREFORE, Plaintiff prays for relief as follows:

1. That judgment be entered in Plaintiff's favor on each count of the Complaint;

2. For general damages according to the proof thereof at trial;

3. For special damages according to the proof thereof at trial;

4. For reimbursement of her costs and expenses herein, including reasonable provision for her attorneys' fees; and

5. For such further and additional relief as the Court deems appropriate and just.

DATED: Honolulu, Hawaii, January 14, 2015.

/s/ Eric A. Seitz
ERIC A. SEITZ
DELLA A. BELATTI
SARAH R. DEVINE

Attorneys for Plaintiff

aACK

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

NOV 29 2012
at 7 o'clock and 25 min P M.
SUE BEITIA, CLERK

ORIGINAL

ERIC A. SEITZ
ATTORNEY AT LAW
A LAW CORPORATION

ERIC A. SEITZ 1412
DELLA A. BELATTI 7945
RONALD N.W. KIM 8306
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Telephone: (808) 533-7434
Facsimile: (808) 545-3608

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JANE DOE,	)	CIVIL NO. CV12 00640ACK RLP
	)	
Plaintiff,	)	COMPLAINT FOR DAMAGES;
	)	DEMAND FOR JURY TRIAL;
vs.	)	SUMMONS
	)	
UNITED STATES OF AMERICA; RICHARD SEAMAN; AND DOE DEFENDANTS 1-10,	)	
	)	
Defendants.	)	
	)	

COMPLAINT FOR DAMAGES

Plaintiff JANE DOE (hereinafter "Plaintiff"), by and through her undersigned attorneys, alleges and avers as follows:

I. Introduction

1. This is an action to redress the deprivation under color of statutes, ordinances, rules, regulations, customs, policies, practices, and/or usages of rights, privileges, and immunities secured to Plaintiff by the Eighth,

Fifth, and Fourteenth Amendments to the Constitution of the United States, inter alia, and 42 U.S.C. Section 1983, et seq., and Article I, Sections 5, and 12 of the Constitution of the State of Hawaii, inter alia.

II. Jurisdiction and Venue

2 This care arises under the Constitution and statutes of the United States of America and the State of Hawaii, inter alia.

3. Jurisdiction is proper in this forum pursuant to the Eighth Amendment of the United States Constitution, 42 U.S.C. §1983, 28 U.S.C. §1343, 28 U.S.C. §1346, and 28 U.S.C. §2671, et seq. Any and all state law claims contained herein are from part of the same case or controversy as gives rise to Plaintiff's federal law claims and therefore fall within the Court's supplemental jurisdiction pursuant to 28 U.S.C. §1367.

4. Venue is proper in this forum pursuant to 28 U.S.C. §1391, et seq.

III. Parties

5. Plaintiff is and was, at all times relevant, a resident of the State of Hawaii.

6. Defendant UNITED STATES OF AMERICA (hereinafter "Defendant UNITED STATES") is a sovereign that has waived its immunity for certain claims, including the claims set forth

herein, and is liable for the acts of its employees and servants.

7. Defendant RICHARD SEAMAN (hereinafter "Defendant SEAMAN") is and was a resident of Hawaii and was employed by the United States Government and the United States Department of Justice, Federal Bureau of Prisons (hereinafter "BOP"), at all times pertinent hereto.

8. DOE DEFENDANTS 1-10 (hereinafter "DOE DEFENDANTS 1-10") are individuals whose true identities and capacities are as yet unknown to the Plaintiff and her counsel, despite diligent inquiry and investigation, and who are responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages, as herein alleged, were proximately caused by their conduct. The true names and capacities of the Doe Defendants will be substituted as they become known. Plaintiff is informed and believes and therefore alleges that at all times herein mentioned, Doe Defendants, were the agents, servants and employees of each of the other Defendants herein.

IV. Factual Allegations

9. Commencing in September 2011, and concluding on or about December 8, 2011, Defendant Seaman sexually assaulted Plaintiff on numerous occasions.

10. At all times relevant Plaintiff was an inmate at the Federal Detention Center in Honolulu, Hawaii (hereinafter "Honolulu FDC").

11. At all times relevant Defendant SEAMAN was an officer and prison employee who was acting within the course and scope of his employment for the United States of America and the Federal BOP.

12. On at least three occasions during the period between September 2011 and December 8, 2011, Defendant SEAMAN was permitted with the consent and/or knowledge of Defendant UNITED STATES and/or certain DOE DEFENDANTS 1-10 to be alone with Plaintiff in unsupervised, camera-less areas of the Honolulu FDC.

13. During each of these three occasions Defendant SEAMAN sexually assaulted Plaintiff.

14. Plaintiff did not and could not consent to the aforesaid sexual assaults.

15. At all times relevant Defendants UNITED STATES, SEAMAN, and DOE DEFENDANTS 1-10 owed a duty of care to Plaintiff of "safekeeping, care. . . .[and] protection" pursuant to 26 U.S.C. § 4042.

16. Since 2003 there have been at least two other publicly published reports of sexual assaults by Federal BOP

officers and/or employees upon female inmates housed at the Honolulu FDC.

17. Plaintiff is informed and believes that Defendant SEAMAN has been investigated previously by Defendant UNITED STATES and/or certain DOE DEFENDANTS 1-10 for reported sexual assaults and/or harassment of other female inmates at the Honolulu FDC.

18. At all times relevant Defendants UNITED STATES and DOE DEFENDANTS 1-10 knew or should have known about the danger posed by Defendant SEAMAN and/or the custom, policy, and/or practice of allowing him to be alone with female inmates in unsupervised areas of the Honolulu FDC.

19. At all times relevant Defendants UNITED STATES and DOE DEFENDANTS 1-10 knew or should have known of the dangerous, unsupervised areas susceptible to the aforesaid sexual assaults yet failed to take any remedial steps to prevent or remedy such dangerous situations and/or to protect the female inmates including Plaintiff.

20. At all times relevant Defendants UNITED STATES and DOE DEFENDANTS 1-10 knew or should have known of the risks of inmates and employees being permitted into unsupervised areas with one BOP employee that would facilitate sexual assaults of inmates including Plaintiff yet failed to take proper steps to protect the inmates.

21. Pursuant to the Federal Tort Claims Act a written claim was submitted to the Federal BOP on or about March 23, 2012.

22. On or about June 14, 2012, the Federal BOP denied Plaintiff's written claim, and Plaintiff is presently entitled to bring her claim in this Court.

COUNT I
(Constitutional and/or 42 U.S.C. Section 1983 Violations Committed by Defendant Richard Seaman and Doe Defendants)

23. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 22, above.

24. Plaintiff's civil rights were violated by the conduct of Defendant SEAMAN and certain DOE DEFENDANTS 1-10 who acted within the course and scope of their authority as employees of the Federal BOP and Defendant UNITED STATES, and as a direct and proximate result thereof Plaintiff has sustained substantial general and special damages in amounts to be proven at trial.

COUNT II
(Assault and Battery)

25. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 10, and 12 through 22, above.

26. Acting outside the scope of his duties Defendant SEAMAN intentionally made offensive physical contact on Plaintiff's person without her consent, and as a direct and proximate result of said assault and battery Plaintiff has sustained substantial general, special, and punitive damages in amounts to be proven at trial.

COUNT III
(Intentional Infliction of Emotional Distress)

27. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 10, and 12 through 26, above.

28. Defendant SEAMAN intentionally caused Plaintiff to sustain serious emotional distress, and as a direct and proximate result thereof Plaintiff has sustained substantial general, special, and punitive damages in amounts to be proven at trial.

COUNT IV
(Constitutional and/or 42 U.S.C. Section 1983 Violations Committed by Defendant UNITED STATES)

29. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 22, above.

30. A pattern of sexual abuse of female inmates exists and has existed at the Honolulu Federal Detention Center prior to the assaults committed herein.

31. The assaults by Defendant SEAMAN resulted from Defendant UNITED STATES' lack of supervision and training of Defendant SEAMAN and/or DOE DEFENDANTS 1-10, and Defendant UNITED STATES' failure to adequately respond to well-known problems within the Honolulu Federal Detention Center, and as a direct and proximate result thereof Plaintiff has sustained substantial general and special damages in amounts to be proven at trial.

COUNT V
(Negligence Claims)

32. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 22, 30 and 31, above.

33. Defendants UNITED STATES and DOE DEFENDANTS 1-10 negligently caused Plaintiff to be in a situation where she was sexually assaulted, thereby suffering substantial general and special damages in amounts to be proven at trial.

VII. Count VI
(Negligent Training, Supervision, and/or Discipline)

34. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 22, 30, 31 and 33, above.

35. Defendants SEAMAN and certain DOE DEFENDANTS 1-10 herein acted outside the scope of their employment as officers with the federal BOP.

36. Defendant UNITED STATES owed duties to Plaintiff to exercise the requisite standard of care and skill ordinarily exercised by similar institutions and agencies in the State of Hawaii in training, supervising, and disciplining its employees and to take reasonable care to control such employees to prevent them from committing acts that injure third parties and/or to prevent opportunities for such injurious acts to occur.

37. By failing to properly train, supervise, and/or discipline Defendants SEAMAN and DOE DEFENDANTS, Defendant UNITED STATES breached its duties of reasonable care owed to Plaintiff thereby proximately and directly causing the injuries to Plaintiff complained of herein.

COUNT VII
(Negligent Infliction of Emotional Distress)

38. Plaintiff hereby realleges and incorporates all of the above allegations contained in Paragraphs 1 through 22, 30, 31, 33, and 35 through 37, above.

39. Defendants UNITED STATES and certain DOE DEFENDANTS 1-10 negligently caused Plaintiff to sustain serious emotional distress, anxiety, embarrassment, humiliation, worry, and anger, and as a direct and proximate result thereof Plaintiff has sustained substantial general and special damages in amounts to be proven at trial.

WHEREFORE, Plaintiff prays for relief as follows:

1. That judgment be entered in Plaintiff's favor on each count of the Complaint;

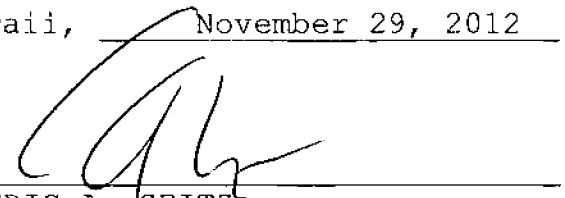
2. For general damages according to the proof thereof at trial;

3. For special damages according to the proof thereof at trial;

4. For reimbursement of her costs and expenses herein, including reasonable provision for her attorneys' fees; and

5. For such further and additional relief as the Court deems appropriate and just.

DATED: Honolulu, Hawaii, November 29, 2012.



ERIC A. SEITZ
DELLA A. BELATTI
RONALD N.W. KIM
SARAH R. DEVINE

Attorneys for Plaintiff

U.S. Department of Justice

United States Attorney
District of Hawaii

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300 Ala Moana Blvd., Room 6-100
Honolulu, Hawaii 96850

(808)541-2850
FAX (808) 541-2958

June 23, 2015

Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 888
Ben Franklin Station
Washington, D.C. 20044

Re: Jane Doe v. USA
Civil No. 12-00640 ACK RLP (USDC Hawaii)

Dear Sir/Madam:

We are enclosing a copy of the Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677, Stipulation for Dismissal and Consent Judgment in the above-referenced case. Since nothing further remains to be done, we are closing our file at this time.

Very truly yours,

FLORENCE T. NAKAKUNI
United States Attorney
District of Hawaii

By Thomas A. Helper
THOMAS A. HELPER
Assistant U.S. Attorney

TAH:jy
Enclosures
cc: Regional Counsel (w/encl.)
Western Region
Federal Bureau of Prisons
7338 Shoreline Drive
Stockton, CA 95219

Jennifer M. Merkle (w/encl.)
Senior CLC Attorney, FDC Honolulu
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Honolulu, Hawaii 96819

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Attorney for Defendant
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JANE DOE, Plaintiff, vs. UNITED STATES OF AMERICA; RICHARD SEAMAN; AND DOE DEFENDANTS 1-10, Defendants.	CIVIL NO. 12-00640 ACK RLP STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. §2677

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. §2677

It is hereby stipulated by and between the undersigned Plaintiff JANE DOE ("Plaintiff"), Defendant UNITED STATES OF AMERICA ("the United States"), and Defendant RICHARD SEAMAN ("Seaman") (collectively, "the parties"; Seaman and the United States are referred to collectively as "Defendants"), as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above captioned action under the terms and conditions set forth in this Settlement Agreement.

2. The United States of America agrees to pay to Plaintiff the sum of **$40,000.00 [FORTY THOUSAND AND NO/100 DOLLARS]**, which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof, resulting, and to result, from the subject matter of this settlement, including any claims for wrongful death, for which plaintiff, her guardians, heirs, executors, administrators, or assigns, and each of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

3. Seaman agrees to pay the sum of **$25,000.00[TWENTY-FIVE THOUSAND AND NO/100 DOLLARS]**, plus interest, to the United States, on the terms set forth in this paragraph.

a. Seaman will pay to the United States the sum of **$500.00 [FIVE HUNDRED AND NO/100 DOLLARS]** on the first day of each month, starting July 1, 2015, by delivering a certified or

cashier's check made payable to the United States Department of Justice and delivered to Courtney Kinoshita, United States Attorney's Office, District of Hawaii, 300 Ala Moana Boulevard, Room 6-100, Honolulu, Hawaii 96850.

b. Seaman will also sign the Judgment attached as Exhibit 1 and return it to the United States. The United States will not file the Judgment with the court unless Seaman fails to cure a default on this Agreement as set forth in sections c. and d. below.

c. If Seaman defaults on this Agreement, the United States shall notify him of the occurrence of default in writing using first class mail, postage prepaid and certified mail, return receipt requested, each directed to his last known address. If Seaman moves without notifying the United States or fails to receive the certified mail, he shall be deemed to have received the notice of default on the tenth (10th) day after the date the United States mailed the default notice. Notice of default and the opportunity to cure that default within 30 days shall be given hereunder no more than one (1) time.

d. If the default is not cured, the United States shall file the Judgment previously signed by Seaman in the amount comprised of the principal balance, accrued interest, and applicable penalties. This Court shall retain jurisdiction to enter the Judgment.

e. Interest shall accrue from July 1, 2015 at the legal post-judgment interest rate set forth in 28 U.S.C. § 1961 until paid in full.

4. Plaintiff, her guardians, heirs, executors, administrators or assigns hereby agree to accept the sum set forth in this Stipulation of Compromise Settlement in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen bodily and personal injuries, damage to property and the consequences thereof which they may have or hereafter acquire against Defendants, their agents, servants and employees on account of the same subject matter that gave rise to the above-captioned action, including any future claim or lawsuit of any kind or type whatsoever, whether known or unknown, and whether for compensatory or exemplary damages. Plaintiff, her guardians, heirs, executors, administrators or assigns further agree to reimburse, indemnify and hold harmless Defendants, their agents, servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from further litigation or the prosecution of claims by plaintiff, her guardians, heirs, executors, administrators or assigns against any third party or against Defendants.

5. This stipulation for compromise settlement is not, is in no way intended to be, and should not be construed as, an admission of liability or fault on the part of Defendants, their agents, servants, or employees, and it is specifically denied that they are liable to the plaintiff. This settlement is entered into by all parties for the purpose of compromising disputed claims under the Federal Tort Claims Act and avoiding the expenses and risks of further litigation.

6. It is also agreed, by and among the parties, that the respective parties will each bear their own costs, fees, and expenses and that any attorney's fees owed by the plaintiff will be paid out of the settlement amount and not in addition thereto.

7. It is also understood by and among the parties that pursuant to Title 28, United States Code, Section 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 per centum of the amount of the compromise settlement.

8. The persons signing this Settlement Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

9. Payment of the settlement amount will be made by government wire transfer pursuant to the following instructions provided by Plaintiff-s counsel:

A. Name of Bank: First Hawaiian Bank

B. Street Address of Bank: 999 Bishop Street

C. City, State and Zip Code of Bank:

Honolulu, Hawaii 96813

D. Routing Number: (b)(6)

E. Name of Account:

Eric A. Seitz, AAL, ALC - Client Trust Account

F. Account Number: (b)(6)

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and the plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. It is contemplated that this Stipulation may be executed in counterparts, with a separate signature page for each party. All such counterparts and signature pages,

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together, shall be deemed to be one document.

Executed this ___ day of , 2015.

FLORENCE T. NAKAKUNI
United States Attorney
District of Hawaii



By
THOMAS A. HELPER
Assistant U.S. Attorney
Attorneys for United States America

ERIC A. SEITZ
DELLA A. BELATTI
SARAH R. DEVINE
Attorneys for Jane Doe

RICHARD SEAMAN
Defendant

//

//

together, shall be deemed to be one document.

Executed this 28th day of April, 2015.

FLORENCE T. NAKAKUNI
United States Attorney
District of Hawaii

By _____
THOMAS A. HELPER
Assistant U.S. Attorney

Attorneys for United States America

DELLA A. BELATTI
ERIC A. SEITZ
RONALD N.W. KIM
SARAH R. DEVINE
Attorneys for Jane Doe

_____
RICHARD SEAMAN
Defendant

JANE DOE v. USA, et al.
CIVIL NO. 12-00640 ACK RLP
"STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE OF FEDERAL TORT CLAIMS ACT CLAIMS PURSUANT TO 28 U.S.C. § 2677"

together, shall be deemed to be one document.

Executed this 28th day of April, 2015.

FLORENCE T. NAKAKUNI
United States Attorney
District of Hawaii

By _____
THOMAS A. HELPER
Assistant U.S. Attorney
Attorneys for United States America

ERIC A. SEITZ
DELLA A. BELATTI
SARAH R. DEVINE
Attorneys for Jane Doe

RICHARD SEAMAN
Defendant

FLORENCE T. NAKAKUNI (#2286)
United States Attorney
District of Hawaii

THOMAS A. HELPER (#5676)
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Telephone: (808) 541-2850
Facsimile: (808) 541-3752
Email: Tom.Helper@usdoj.gov

Attorney for Defendant
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JANE DOE, Plaintiff, vs. UNITED STATES OF AMERICA; RICHARD SEAMAN; AND DOE DEFENDANTS 1-10, Defendants.	CIVIL NO. 12-00640 ACK RLP CONSENT JUDGMENT; ORDER

CONSENT JUDGMENT

The UNITED STATES OF AMERICA ("the United States") and RICHARD SEAMAN ("Seaman") stipulate that on April 28, 2015, a Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims ("Agreement") Pursuant to 28 U.S.C. § 2677, was entered between Plaintiff JANE DOE, Defendant UNITED

STATES OF AMERICA ("the United States"), and Defendant RICHARD SEAMAN ("Seaman").

The United States and Seaman stipulate and consent to the entry of judgment in favor of the United States and against Seaman in the amount of $25,000. Interest accrues from July 1, 2015, at the legal post-judgment interest rate set forth in 28 U.S.C. § 1961 until paid in full.

This Consent Judgment shall not be filed as long as Seaman pays to the United States Department of Justice, through the United States Attorney's Office, District of Hawaii, 300 Ala Moana Boulevard, Room 6-100, Honolulu, Hawaii 96850, a monthly payment in the sum of $500.00 [FIVE HUNDRED AND NO/100 DOLLARS] on the first day of each month, starting July 1, 2015, until paid in full.

This Consent Judgment shall not be filed until Seaman is given notice of default and the opportunity to cure that default as set forth in the Agreement.

The United States and Seaman consent to entry of a Consent Judgment in this case by the United States District Court for

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the District of Hawaii.

Dated: April 28, 2015, at Honolulu, Hawaii.

FLORENCE T. NAKAKUNI
United States Attorney
District of Hawaii

By _____
THOMAS A. HELPER
Attorneys for Defendant
United States of America

RICHARD LEAMAN
Defendant

APPROVED AND SO ORDERED:

Jane Doe v. USA, et al.
Civil 12-00640 ACK RLP
"CONSENT JUDGMENT"

FLORENCE T. NAKAKUNI (#2286)
United States Attorney
District of Hawaii

THOMAS A. HELPER (#5676)
Assistant U.S. Attorney
Room 6-100, PJKK Federal Bldg.
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Telephone: (808) 541-2850
Facsimile: (808) 541-3752
Email: Tom.Helper@usdoj.gov

Attorney for Defendant
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

JANE DOE, Plaintiff, vs. UNITED STATES OF AMERICA; RICHARD SEAMAN; AND DOE DEFENDANTS 1-10, Defendants.	CIVIL NO. 12-00640 ACK RLP STIPULATION FOR DISMISSAL; ORDER

STIPULATION FOR DISMISSAL

It is hereby stipulated by and between the parties above-named, by and through their respective counsel undersigned, pursuant to Rule 41(a)(1)(ii), Federal Rules of Civil Procedure, that the above entitled action as to defendant United States of America be dismissed with prejudice, each party to bear its own costs, expenses and fees. There are no remaining claims or parties.

Dated: June 18, 2015, at Honolulu, Hawaii.

FLORENCE T. NAKAKUNI
United States Attorney
District of Hawaii

/s/ Eric A. Seitz

/s/ Thomas A. Helper

By_____
THOMAS A. HELPER
Assistant U.S. Attorney
Attorneys for United States America

DELIA A. BELATTI
ERIC A. SEITZ
SARAH R. DEVINE
Attorneys for Jane Doe

/s/ Richard Seaman

RICHARD SEAMAN
Defendant

APPROVED AS TO FORM:
DATED: Honolulu, Hawaii, June 22, 2015

Alan C. Kay
Senior United States District Judge

Welcome WILSON J MOORER | Logout

HOME ALERTS MY WORK NEW CASE SEARCH MAIN EMAIL

CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-WXR-2014-00433 **Short Description:** SHIRLEY V. MANNING ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	
Short Description	SHIRLEY V. MANNING ET AL
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	WESTERN REGIONAL OFFICE
Current Institution	Sheridan (FCI)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	Sheridan (FCI)
Monetary Relief Sought	$100,000.00
Estimated Amount	$
Office	
Jurisdiction	
Responsible Legal Office	FCI Phoenix

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	03/25/2014
Type	Settled
Reason	
Sought	
Amount offered	$
Total Amount Paid	$6,000.00
Description	GLOBAL SETTLEMENT OF $7500, CONSISTING OF $1500 FROM INDIVIDUAL DEFENDANT AND $6000 FROM UNITED STATES.
Description	GLOBAL SETTLEMENT OF $7500, CONSISTING OF $1500 FROM INDIVIDUAL DEFENDANT AND $6000 FROM UNITED STATES.
Court Fee Paid ?	
Pro Se ?	

Case Initiation Dates

Date Received	01/06/2014
Date Filed	02/10/2013

Case Progress

Current Owner	DAVID HUBAND
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	28:1331 FEDERAL QUESTION: OTHER CIVIL RIGHTS
Further Case Classification	
Comments	

Leonard R. Berman

Attorney at Law

4711 SW Huber St. E-3
Portland, OR 97219
503-473-8787

CERTIFIED MAIL # 7011 1570 0000 6844 2954

December 31, 2013

Ms. Amanada Marshall
US Attorney
1000 SW Third Ave.
Portland, OR 97204

Re: Scott Shirley v. United States, Klamath County et al. CV 13-CV-236

Dear Ms. Marshall:

Enclosed please find the Summons and Amended Complaint naming the United States.

Very truly yours,

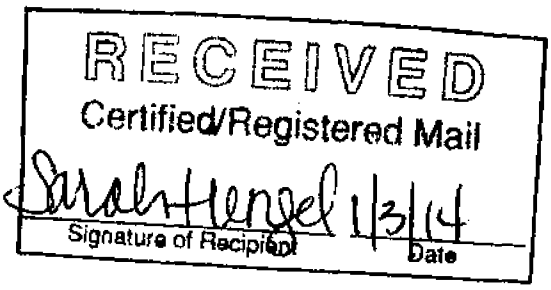
Leonard Berman
Attorney at Law
OSB # 96040
cc: Cl,

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

District of Oregon

Portland Division



Scott Shirley

Plaintiff

v.

Mr. Manning, et al

Defendant

Civil Action No. 3:13-CV-00236-PK

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Amanda Marshall, US Attorney, 1000 SW Third Ave, Portland, OR 97204

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Leonard Berman
4711 SW Huber #E3
Portland, OR 97219

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

MARY L. MORAN, Clerk of Court

Date: 12/12/2013

By: L. Frost, Deputy Clerk

AO 440 (Rev. 12/09) Summons in a Civil Action (Page 2)

Civil Action No.3:13-CV-00236-PK

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)*

was received by me on *(date)*

u I personally served the summons on the individual at *(place)* on *(date)* ; or

u I left the summons at the individual's residence or usual place of abode with *(name)* , a person of suitable age and discretion who resides there, on *(date)* , and mailed a copy to the individual's last known address; or

u I served the summons on *(name of individual)* , who is designated by law to accept service of process on behalf of *(name of organization)* on *(date)* ; or

u I returned the summons unexecuted because ; or

u Other *(specify):*

My fees are $ for travel and $ for services, for a total of $ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Leonard R. Berman
4711 SW Huber St., Suite E-3
Portland, OR 97219
(503) 473-8787
FAX (815) 642-9117
OSB # 96040
Easyrabbi@yahoo.com
ATTORNEY FOR PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
Portland Division

SCOTT SHIRLEY, Plaintiff, -vs- **UNITED STATES,** MR. MANNING, Personally, JOHN DOE, Personally, Defendants.	Case No. 3:13-cv-236 AMENDED COMPLAINT FOR CRUEL AND UNUSUAL PUNISHMENT, (8TH AM.), BATTERY, 42 USC 1983, BIVENS ACTION (JURY TRIAL REQUESTED)

1.

Plaintiff was an Oregon resident in FCI Sheridan. He now resides in Nevada.

2.

The defendants United Staes, Manning and Doe, believed to be named Siox, are employees of the United States of America and the BOP at FCI Sheridan. A Federal Tort Claim ACT (FTCA) Notice

was served in March and the six month waiting period has elapsed will be pending

COMMON FACTUAL ALLEGATIONS

3.

On or about March 23, 2011, between 10:50 and and 11:15 a.m. before "mainline," defendants Manning and John Doe, correctional officers for Unit 2-A and 2-B, intentionally positioned face-up thorns on the benches outside Unit 2, laughing and joking in the process, with the intent to harm inmates who might inadvertently sit on them, as witnesses by several inmates.

4.

Shortly thereafter, plaintiff Scott Shirley sat on the benches and suffered a thorn puncture wound to his posterior, that ultimately became infected and required surgical intervention. He suffered considerable, pain, discomfort and humiliation.

5.

Mr. Shirley exhausted all his administrative remedies at FCI Sheridan, a correctional institute run by defendant United States.

AS AND FOR A FIRST CAUSE OF ACTION

CRUEL AND UNUSUAL PUNISHMENT (8TH AM.)

6.

Plaintiff realleges all of the aforementioned paragraphs 1-5 as though fully set forth herein.

The actions and conduct of all defendants, while acting in the course and scope of their employment, resulted in the violation of Plaintiff's right to be

free of cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States, when said defendants Manning and Doe caused thorns to be lodged in the posterior of plaintiff, resulting in avoidable injuries to his person, the need for surgical medical care and caused wanton and needless infliction of pain and suffering.

AS AND FOR A SECOND CAUSE OF ACTION
BATTERY

12.

The conduct of defendants constituted battery of plaintiff.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for the following relief :

1. $100,000.00 in non-economic damages, attorney's fees, and punitive damages and costs and disbursements therein;

2. Such other and further relief as this Court deems just and proper.

3. Plaintiff requests a jury trial.

Dated this November 4, 2013.

Respectfully Submitted,

S//S Leonard R. Berman

LEONARD R. BERMAN, OSB# 96040
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SCOTT SHIRLEY,	)	
	)	Civil No. 03:13-cv-00236-PK
Plaintiff(s),	)	
	)	**ORDER OF DISMISSAL**
v.	)	
	)	
MR. MANNING, et al.,	)	
	)	
Defendant(s).	)	

The Court having been informed by counsel for the parties that this action has been settled,

IT IS ORDERED that this action is DISMISSED with prejudice and without costs and with leave, upon good cause shown within sixty (60) days, to have this order of dismissal set aside and the action reinstated if the settlement is not consummated. Pending motions, if any, are DENIED AS MOOT.

Dated this 25th day of March, 2014.

by Paul Papak

Paul Papak
United States Magistrate Judge

COPY

TIMOTHY P. MITCHELL; SBN 234130
THEMIS LAW GROUP
2000 Marengo Street, Suite G
Los Angeles, CA 90033
Tel: (310) 295-4748
Fax: (310) 492-5982

ATTORNEYS FOR PLAINTIFF, JOEL ARGENTO

FILED
13 JUL 12 PM 1:59
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY:

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOEL ARGENTO, an Individual,

Plaintiff,

vs.

UNITED STATES OF AMERICA, a Government Entity; UNITED STATES DEPARTMENT OF JUSTICE, a Government Entity; FEDERAL BUREAU OF PRISONS, a division of the U. S. DEPARTMENT OF JUSTICE, a Government Entity; UNITED STATES MARSHALS SERVICE, a Government Entity; DR. ROGELIO TAN TOH, M.D., an individual; DR. ALEXANDER SINAVSKY, M.D.; V. CASTILLO, MLP; and DOES 1 through 50 inclusive, 10

Defendants

Case No.: CV13- 5013 (CBM (JEMx)
Assigned to:

COMPLAINT FOR DAMAGES:

1) **VIOLATION OF CALIFORNIA GOVERNMENT CODE SECTION 835 CREATION OF A DANGEROUS CONDITION;**
2) **VIOLATIONS OF CALIFORNIA ADMINISTRATIVE CODE SECTION 1272;**
3) **VIOLATIONS OF CALIFORNIA GOVERNMENT CODE 845.6;**
4) **MEDICAL MALPRACTICE;**
5) **VIOLATIONS OF 42 U.S. CODE §1983;**

REQUEST FOR JURY TRIAL

JURISDICTION

1. This Court is the proper jurisdiction for this action because the location where the incident occurred is within Los Angeles County.

2. This Court is the proper jurisdiction for this action because the amount in controversy exceeds $25,000.00.

3. This Court is the proper venue because the incident occurred in this county and one or more defendants reside in Los Angeles County.

PARTIES

4. Plaintiff, Joel Argento, (hereinafter referred to as "ARGENTO" or "PLAINTIFF") is an individual who is now, and at all times relevant was, a resident of Los Angeles County.

5. Defendant UNITED STATES OF AMERICA, (hereinafter referred to as "USA") is a Government entity conducting business within the State of California.

6. Defendant U.S. DEPARTMENT OF JUSTICE, (hereinafter referred to as "DOJ") is a Government entity conducting business within the State of California.

7. Defendant FEDERAL BUREAU OF PRISONS, a division of the U.S. DEPARTMENT OF JUSTICE, (hereinafter referred to as "FBP") is a Government entity conducting business within the State of California.

8. Defendant, UNITED STATES MARSHALS SERVICE, (hereinafter referred to as "USMS") is a Government entity. Defendant USMS is conducting business within the State of California.

9. Defendant DR. ROGELIO TAN TOH, M.D., (hereinafter referred to as "DR. TOH") is a medical practitioner conducting business in the State of California.

10. Defendant DR. ALEXANDER SINAVSKY, M.D. (hereinafter referred to as "DR. SINAVSKY") is a medical practitioner conducting business in the State of California.

11. Defendant V. CASTILLO, MLP (hereinafter referred to as "MLP CASTILLO") is a person practicing medicine conducting business in the State of California.

12. PLAINTIFF does not know the true name of Defendant DOES 1 through 50, inclusive, and therefore sues them by those fictitious names. PLAINTIFF is informed and believes, and on the basis of that information and belief alleges, that each of those Defendants were in some manner negligently and proximately responsible for the events and happenings alleged in this complaint and for PLAINTIFF's injuries and damages.

13. PLAINTIFF is informed and believes, and based on this information and belief alleges, that at all times mentioned in this complaint, Defendants were the agents and employees of their co-Defendants, and in doing the things alleged in this complaint were acting within the course and scope of such agency and employment.

14. USA, DOJ, FBP, USMS, and DOES 1 through ~~25~~ 10 are collectively referred to as DEFENDANTS.

15. DR. TOH, DR. SINAVSKY, and MLP CASTILLO are medical practitioners within the BOP Health Services department working at the Metropolitan Detention Center (hereinafter referred to as "MDC").

16. DR. TOH, DR. SINAVSKY, MLP CASTILLO and DOES ~~26~~ 1 through ~~50~~ 10 are collectively referred to as the DEFENDANT DOCTORS.

FACTS

17. PLAINTIFF incorporates by this reference the allegations contained in paragraphs 1 through 16 as though fully set forth herein.

18. PLAINTIFF was incarcerated and housed in the MDC, a federal jail facility, located at 535 N. Alameda Street, Los Angeles California 90012 at all relevant times at issue in this action.

19. DEFENDANTS had issued to each bunk in the MDC a mattress. The mattresses extended beyond the boundaries of the bunk so that almost a foot of mattress hung over the edge of the bed.

20. On or about July 20, 2011, at approximately 10:30 P.M., while on his non-conforming mattress on the top bunk within the unit to which he was assigned at the MDC Jail facility, PLAINTIFF rolled over and fell to the floor fracturing his wrist, splitting his head open, and sustaining substantial injuries to his neck, back and legs. At all times relevant herein, DEFENDANTS, owned and controlled the MDC facility – as well as the bunk and the mattress where the alleged incident occurred. In addition DEFENDANTS, were responsible for the purchase, care, maintenance and upkeep of the bunk and the mattress.

21. PLAINTIFF was issued the bunk and the mattress from which he fell by DEFENDANTS, and/or their agents and employees, when he was incarcerated in the jail facility known as MDC in Los Angeles, California. The mattress was defective in that the dimensions of the mattress were approximately one (1) foot wider than a properly sized mattress which is compatible with the bunk or bed on which the PLAINTIFF slept.

22. As a result of his injuries, PLAINTIFF received, and continues to receive, medical care and treatment for his injuries.

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COMPLIANCE WITH GOVERNMENT CLAIMS STATUTES

23. On or about December 28, 2011, PLAINTIFF filed a claim for damages with the Federal Bureau of Prisons / United States Department of Justice. (A true and correct copy is attached hereto and herein incorporated by reference as Exhibit "1").

24. On or about January 23, 2012, DEFENDANTS acknowledged receipt of the Claim for Damages. DEFENDANTS indicated that they were referring the matter to the Federal Bureau of Prisons for their determination of the claim. PLAINTIFF has attempted on several occasions to establish whether the Federal Bureau of Prisons / U.S. Department of Justice has accepted or denied liability of the PLAINTIFF'S claim, but have been unable to establish its position on this matter.

25. On or about October 15, 2012, the DOJ issued a correspondence to PLAINTIFF indicating that it was acknowledging receipt of the Claim for damage, injury or death submitted under the provisions of the Federal Tort Claims Act. They indicated that the document was received by the FBP on or around September 21, 2012. The correspondence indicated that in accordance with the provisions of the United States Code ("U.S.C.") they have six months to make a final determination of the administrative claim for damages.

26. Pursuant to 28 U.S.C. §§2675, "...The failure of an agency to make final disposition of a claim within six months after it is filed shall, **at the option of the claimant any time thereafter**, be deemed a final denial of the claim for purposes of this section." (emphasis added.

27. PLAINTIFF has not received a final denial. The six month period for the DOJ to act ended on March 21, 2013.

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FIRST CAUSE OF ACTION FOR VIOLATION OF CALIFORNIA GOVERNMENT CODE SECTION 835 AGAINST DEFENDANTS, USA, DOJ, FBP, USMS, AND DOES 1 TO 2510

28. PLAINTIFF incorporates by this reference the allegations contained in paragraphs 1 through 27 as though fully set forth herein.

29. While sleeping on the top bunk-bed and mattress issued by DEFENDANTS, PLAINTIFF rolled over and fell to the floor, resulting in his fracturing his left wrist, splitting his head open, chipping his teeth, as well as sustaining severe damage to his back, neck and legs. The mattress was larger than the bunk bed area allowing for a portion to hang over the edge of the bunk. This created a dangerous condition that created a reasonably foreseeable risk of the kind of incident in which PLAINTIFF was involved.

30. The dangerous condition of the mattress appears to have been caused by the negligent and wrongful conduct of the DEFENDANTS currently unknown employee who was acting within the course of his or employment, and who issued the mattress to PLAINTIFF in the defective condition of being larger in width and length than the bunk-bed on which PLAINTIFF slept.

31. California Administrative Code Title 15, Section 1272 makes it clear that "any mattress issued to an inmate in any facility shall be enclosed in an easily cleaned, non-absorbent ticking, and ***conform to the size of the bunk*** ..." (Emphasis added)

32. "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the

kind of injury which was incurred, and that either: (a) ***A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition***; or (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (emphasis added) California Gov. Code §835

33. DEFENDANTS' violation of Cal. Admin. Code Title 15 §1272, through their negligent and wrongful act of issuing a non-conforming mattress to PLAINTIFF, created the dangerous condition in violation of Gov. Code §835.

34. When the PLAINTIFF's rolled over on the mattress, the defective over-size of the mattress allowed PLAINTIFF to fall off the edge of the bunk to the floor resulting in his fracturing his left wrist, splitting open his head, chipping his teeth and sustaining severe damage to his back, neck and legs.

35. PLAINTIFF is informed and believes, and thereon alleges, that the dangerous condition of the over-sized mattress permitted PLAINTIFF to fall to the ground and sustain injury.

36. PLAINTIFF is informed and believes and thereon alleges that but for the oversized mattress, he would have seen the edge of the bunk bed and not have fallen from the bunk to the floor causing injury to himself.

37. PLAINTIFF alleges that at all times relevant, DEFENDANTS owned the bunks at the MDC and purchased the mattresses for the MDC and therefore had actual knowledge of the oversized mattresses being issued to the PLAINTIFF.

38. PLAINTIFF alleges that at all times relevant herein, DEFENDANTS controlled and operated the MDC jail and/or facility and PLAINTIFF had no options as to his bunk or mattress.

39. PLAINTIFF alleges that the mattress was issued by DEFENDANTS to him for sleeping.

40. PLAINTIFF alleges that the mattress was in a dangerous condition due the negligent and wrongful acts of DEFENDANTS employee issuing a substantially over-sized mattress that extended over the side of the bunk by a foot.

41. PLAINTIFF further alleges that the dangerous condition of the mattress permitted PLAINTIFF to fall thereby suffering serious and significant injuries including a fractured left wrist.

42. PLAINTIFF alleges that DEFENDANTS were negligent in failing to exercise due care in the purchase, maintenance and issuance of the mattress to ensure that inmates were not subject to any unreasonable risk of harm when using the mattress.

43. PLAINTIFF alleges that the mattress had defects which would cause harm to any foreseeable user, such as PLAINTIFF.

44. PLAINTIFF further alleges that the dangerous condition in the mattress was in direct violation of California Administrative Code Title 15, Section 1272.

45. PLAINTIFF further alleges that DEFENDANTS, created the dangerous condition when they issued the non-conforming mattress to PLAINTIFF in violation of Government Code §835.

46. PLAINTIFF further alleges that the as yet unnamed and unspecified staff of the DEFENDANTS, are responsible for the dangerous condition which resulted in severe physical injury to the PLAINTIFF.

47. PLAINTIFF complained of his injury to DEFENDANTS but was ignored. Because PLAINTIFF was ignored, he was forced to suffer from his injuries for a long period of time which caused him further injury.

48. PLAINTIFF further alleges that DEFENDANTS are responsible for the breach of applicable medical care occasioned by their employees, which resulted in severe physical injury to the PLAINTIFF.

49. As a direct and proximate result of the DEFENDANTS negligence, carelessness, and recklessness in failing to issue a proper mattress that conformed to health and safety regulations, PLAINTIFF was severely injured.

50. PLAINTIFF has been harmed by DEFENDANTS in an amount currently unknown and according to proof, but in no manner is the amount less than the jurisdictional limits of this Court.

SECOND CAUSE OF ACTION FOR VIOLATIONS OF CALIFORNIA ADMINISTRATIVE CODE SECTION 1272 AGAINST DEFENDANTS USA, DOJ, FBP, USMS, AND DOES 1 THROUGH 25

51. PLAINTIFF incorporates by this reference the allegations contained in paragraphs 1 through 50 as though fully set forth herein.

52. While on the top bunk-bed and mattress issued by DEFENDANTS, PLAINTIFF rolled over and fell to the floor, resulting in his fracturing his left wrist, splitting his head open, chipping his teeth, as well as sustaining severe damage to his back, neck and legs. The mattress

was a dangerous condition that created a reasonably foreseeable risk of the kind of incident in which PLAINTIFF was involved.

53. The dangerous condition of the mattress appears to have been caused by the negligent and wrongful conduct of DEFENDANTS employee who was acting within the course of his or employment, and who purchased and issued the mattress to PLAINTIFF in the defective condition of being larger in width than the bunk which PLAINTIFF was assigned.

54. California Administrative Code Title 15, Section 1272 makes it clear that "any mattress issued to an inmate in any facility shall be enclosed in an easily cleaned, non-absorbent ticking, and ***conform to the size of the bunk*** ..." (Emphasis added)

55. DEFENDANTS' violation of this code, through their negligent and wrongful act of issuing a non-conforming mattress to PLAINTIFF, created the dangerous condition.

56. When the PLAINTIFF rolled over on the mattress, the defective size of the mattress permitted PLAINTIFF to fall off the bed, and resulting in his fracturing his left wrist, splitting open his head, and sustaining severe damage to his back, neck and legs.

57. PLAINTIFF is informed and believes, and thereon alleges, that the dangerous condition of the over-sized mattress permitted PLAINTIFF to fall to the ground causing severe injuries.

58. At all times relevant herein, DEFENDANTS controlled and operated the MDC jail and/or facility and purchased and issued the mattress to PLAINTIFF which permitted PLAINTIFF to fall off the bunk to the floor causing injury.

59. PLAINTIFF alleges that the mattress was too large for the bunk creating an overhang that created a dangerous condition, and it was the negligent and wrongful acts of the

DEFENDANTS' employee issuing a substantially over-sized mattress from which the PLAINTIFF fell which caused the dangerous condition.

60. PLAINTIFF alleges that DEFENDANTS were negligent in failing to exercise due care in the purchase, maintenance and issuance of the mattress to ensure that inmates were not subject to any unreasonable risk of harm when using the mattress.

61. PLAINTIFF alleges that the mattress had defects which would cause harm to any inmate, such as PLAINTIFF, sleeping on the mattress.

62. PLAINTIFF further alleges that the dangerous condition in the mattress was in direct violation of California Administrative Code Title 15, Section 1272 .

63. PLAINTIFF further alleges that DEFENDANTS created the dangerous condition when they issued the non-conforming mattress to PLAINTIFF.

64. As a direct and proximate result of the DEFENDANTS negligence, carelessness, and recklessness in failing to issue a proper mattress that conformed to health and safety regulations, PLAINTIFF was severely injured.

65. PLAINTIFF has been harmed by DEFENDANTS in an amount currently unknown and according to proof, but in no manner is the amount less than the jurisdictional limits of this Court.

THIRD CAUSE OF ACTION FOR A VIOLATION OF GOVERNMENT CODE §845.6 AGAINST DEFENDANTS DR. TOH, DR. SINAVSKY, MLP CASTILLO, USA, DOJ, FBP, USMS, AND DOES 1 THROUGH 25, 10

66. PLAINTIFF incorporates by this reference the allegations contained in paragraphs 1 through 65 as though fully set for the herein.

67. California Government Code §845.6 – "Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, ***except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care***." (emphasis added)

68. PLAINTIFF alleges that he was an inmate of DEFENDANTS and DEFENDANT DOCTORS at all times relevant, and that because he was an inmate of DEFENDANTS at all times relevant, they had a "Special Relationship" whereby DEFENDANT DOCTORS had an affirmative duty to protect the PLAINTIFF from foreseeable harm inflicted by a third party.

69. At all times relevant, DEFENDANT DOCTORS employees were acting within the course and scope of their employment for DEFENDANTS.

70. PLAINTIFF alleges that DEFENDANT DOCTORS were the ostensible, actual and implied agents of DEFENDANTS.

71. PLAINTIFF further alleges that all actions taken by DEFENDANT DOCTORS was taken with the permission, express or implied, of DEFENDANTS.

72. At all times relevant, DEFENDANTS' employees, who have yet to be identified and are presently unknown, were acting within the course and scope of their employment.

73. PLAINTIFF alleges that DEFENDANT DOCTORS were in charge of all testing, treatment, and prescriptions. Inmates did not receive any medical care from any outside medical facility except for supervised and controlled visits to area clinics for additional

treatment or testing which DEFENDANT DOCTORS were unable to provide. All medical needs were to be addressed by the DEFENDANT DOCTORS and were provided under the supervision and control of DEFENDANTS. Inmates, like PLAINTIFF, had no other recourse but to contact DEFENDANT DOCTORS for any medical issues.

74. PLAINTIFF further alleges that at all times relevant, DEFENDANT DOCTORS are duly licensed to practice medicine in the state of California.

75. PLAINTIFF further alleges that DEFENDANTS were negligent in failing to insure the competence of their medical staff through careful selection and review.

76. PLAINTIFF further alleges that DEFENDANTS were negligent in failing to carefully evaluate the quality of the medical treatment being rendered on their premises by their contracting and/or employed physicians and medical staff prior to July 20, 2011 and thereafter.

77. PLAINTIFF further alleges that inmates could not seek assistance of any outside medical providers for any additional evaluations and prescriptions for treatment. Inmates could only seek the medical care of DEFENDANTS' medical staff.

78. DEFENDANTS had a duty to protect PLAINTIFF and provide him with proper medical care while under their custody and control.

79. DEFENDANTS and their agents had a duty to provide medical care for all inmates under its control and supervision.

80. DEFENDANTS and their agents had a duty to have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same or similar locality, under similar circumstances.

81. DEFENDANTS and their agents had a duty to use the same degree of skill and care usually exercised by practitioners for the medical profession in the same or similar locality, under similar circumstances.

82. DEFENDANTS and their agents had the duty to use reasonable diligence in the application of the physician's learning and skill.

83. DEFENDANTS and their agents had the duty to use reasonable care in caring for PLAINTIFF. DEFENDANTS denied the proper treatment to PLAINTIFF.

84. On July 20, 2011, PLAINTIFF fell and injured himself as a result of DEFENDANTS issuing him a non-conforming mattress.

85. Between July 20, 2011 and August 16, 2011, PLAINTIFF was given Tylenol for the pain, but his wrist was never touched, set or repaired by the medical staff.

86. On August 16, 2011, PLAINTIFF was finally transported while in-custody by DEFENDANTS to an "outside" or independent orthopedic surgeon named Luigi Galloni, M.D, whose office is located at 711 West College Street, Suite 625, Los Angeles, CA 90012.

87. PLAINTIFF was informed by Dr. Luigi Galloni, M.D that given the type of wrist injury that the PLAINTIFF sustained, it was necessary for treatment to begin the first week following the injury, and that as a result of the non-treatment that PLANITIFF received from the DEFENDANTS for his wrist, it was possible that PLAINTIFF could lose the use of his left hand indefinitely.

88. On August 18, 2011, based on Dr. Luigi Galloni's diagnosis, as well as the unbearable pain that PLAINTIFF was experiencing from his wrist injury, PLAINTIFF made a request to Warden Thomas, and Dr. Sinausky, a staff physician at the Los Angeles County Jail, for adequate pain medication and proper treatment for PLAINTIFF's wrist injury.

89. As a result of these requests, on August 24, 2011, PLAINTIFF was transported to WHITE MEMORIAL HOSPITAL where ultra-sounds and other medical procedures were performed on PLAINTIFF.

90. On August 30, 2011, PLAINTIFF was transported to trauma surgeon, Dr Levi Harrison's, office located at 1560 E. Chevy Chase Ave, Suite #350, Glendale, CA 91206, where Dr. Harrison advised PLAINTIFF that his left wrist was "obliterated" and discussed doing immediate surgery on PLAINTIFF'S WRIST. Dr. Harrison also advised PLAINTIFF that PLAINTIFF'S hand and wrist would never be the same.

91. On September 19, 2011, approximately two (2) months after PLAINTIFF injured his left hand and wrist, surgery was performed on PLAINTIFF'S left hand and left wrist, and multiple pins and plates were placed in his hand and wrist. Dr. Harrison, the surgeon who performed surgery on the PLAINTIFF'S wrist, advised PLAINTIFF at that time that his left hand and wrist would never be like his right hand and wrist, and that with extensive surgery his left hand and wrist would only return to approximately sixty (60) percent of their normal function.

92. DEFENDANTS had a duty to adequately treat the PLAINTIFF's medical injuries, conditions; and, provide the proper medications for serious medical conditions – specifically PLAINTIFF"s left hand and wrist.

93. DEFENDANTS failed in its duty to PLAINTIFF when they failed to provide PLAINTIFF with timely and adequate treatment for his left hand and left wrist, as well as adequate medication to treat the pain he suffered from those injuries.

94. DEFENDANTS further breached its duties by failing to respond to PLAINTIFF, who following his fall and the sustaining of his injuries, attempted on a daily basis to obtain

adequate medical treatment and medication through frequent verbal and written requests for treatment to DEFENDANT, and/or its employees.

95. Due to DEFENDANTS apparent disregard for PLAINTIFF's condition, PLAINTIFF was denied immediate surgery and physical therapy that would have prevented the disfiguring, and significant loss of use, of his left hand and left wrist.

96. DEFENDANTS negligently, carelessly, recklessly, wantonly, and unlawfully provided medical care, information, monitoring, examination, diagnosis, and other medical services so as to directly and proximately cause the injury to PLAINTIFF.

97. As a direct and proximate result of DEFENDANTS numerous breaches and failures to provide adequate treatment and medication, PLAINTIFF sustained permanent injury to his left hand and wrist, and endured tremendous and unnecessary pain during the period of July 21, 2011 to September 20, 2011, as well as continued, daily back, neck and headaches.

98. PLAINTIFF has been harmed by Defendant(s) in an amount currently unknown and according to proof, but in no manner is the amount less than the jurisdictional limits of this Court.

FOURTH CAUSE OF ACTION FOR MEDICAL MALPRACTICE AGAINST DEFENDANTS DR. TOH, DR. SINAVSKI, MLP CASTILLO, USA, DOJ, FBP, USMS, AND DOES ~~26~~ 1 THROUGH ~~50~~ 10

99. PLAINTIFF incorporates by this reference the allegations contained in paragraphs 1 through 98 as though fully set for the herein.

100. PLAINTIFF alleges that he was an inmate of DEFENDANTS and DEFENDANT DOCTORS at all times relevant, and that because he was an inmate of DEFENDANTS at all times relevant, they had a "Special Relationship" whereby

DEFENDANT DOCTORS had an affirmative duty to protect the PLAINTIFF from foreseeable harm inflicted by a third party.

101. Title 15 California Code of Regulations §1200 – "(a) In Type I, II, III and IV facilities, the facility administrator shall have the responsibility to ensure provision of emergency and basic health care services to all inmates. Medical, dental, and mental health matters involving clinical judgments are the sole province of the responsible physician, dentist, and psychiatrist or psychologist respectively; however, security regulations applicable to facility personnel also apply to health personnel."

102. Title 15 California Code of Regulations §1206 – "The health authority shall, in cooperation with the facility administrator, set forth in writing, policies and procedures in conformance with applicable state and federal law, which are reviewed and updated at least annually and include but are not limited to: (a) summoning and application of proper medical aid; (j) the procurement, storage, repackaging, labeling, dispensing, administration/delivery to inmates, and disposal of pharmaceuticals;"

103. Title 15 California Code of Regulations §1208 – "The health authority, in cooperation with the facility administrator, shall develop a written plan for identifying, assessing, treating and/or referring any inmate who appears to be in need of medical, mental health or developmental disability treatment at any time during his/her incarceration subsequent to the receiving screening. This evaluation shall be performed by licensed health personnel."

104. Pursuant to the California Code of Regulations §§1200, 1206, and 1208, the Defendant had a duty to provide proper medical care for PLAINTIFF. This included the dispensing of medication to PLAINTIFF as required for his life threatening condition.

105. California Government Code §845.6 – "Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care."

106. At all times relevant, DEFENDANT DOCTORS employees were acting within the course and scope of their employment for DEFENDANTS.

107. PLAINTIFF alleges that DEFENDANT DOCTORS were the ostensible, actual and implied agents of DEFENDANTS.

108. PLAINTIFF further alleges that all actions taken by DEFENDANT DOCTORS was taken with the permission, express or implied, of DEFENDANTS.

109. PLAINTIFF further alleges that DEFENDANT DOCTORS were in charge of all testing, treatment, and prescriptions. Inmates did not receive any medical care from any outside medical facility except for supervised and controlled visits to area clinics for additional treatment or testing which DEFENDANT DOCTORS were unable to provide. All medical needs were to be addressed by the DEFENDANT DOCTORS and were provided under the supervision and control of DEFENDANT DOCTORS. Inmates, like PLAINTIFF, had no other recourse but to contact DEFENDANT DOCTORS for any medical issues.

110. PLAINTIFF further alleges that DEFENDANT DOCTORS were in charge of reviewing all medical histories of patients to provide the proper medical attention for serious medical conditions.

111. PLAINTIFF further alleges that at all times relevant, DEFENDANT DOCTORS were and are duly licensed to practice medicine in the state of California.

112. PLAINTIFF further alleges that DEFENDANT DOCTORS were negligent in failing to insure the competence of their medical staff through careful selection and review.

113. PLAINTIFF further alleges that DEFENDANTS' were negligent in failing to carefully evaluate the quality of the medical treatment being rendered on their premises by their contracting and/or employed physicians and medical staff prior to July 20, 2011 and thereafter.

114. PLAINTIFF further alleges that inmates could not seek assistance of any outside medical providers for any additional evaluations and prescriptions for treatment. Inmates could only seek the medical care of DEFENDANT DOCTORS.

115. DEFENDANT DOCTORS had a duty to protect PLAINTIFF and provide him with proper medical care while under their custody and control.

116. DEFENDANT DOCTORS and their agents had a duty to provide medical care for all inmates under its control and supervision.

117. DEFENDANT DOCTORS and their agents had a duty to have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same or similar locality, under similar circumstances.

118. DEFENDANT DOCTORS and their agents had a duty to use the same degree of skill and care usually exercised by practitioners for the medical profession in the same or similar locality, under similar circumstances.

119. DEFENDANT DOCTORS and their agents had the duty to use reasonable diligence in the application of the physician's learning and skill.

120. DEFENDANT DOCTORS and their agents had the duty to use reasonable care in caring for PLAINTIFF. DEFENDANT DOCTORS denied the proper treatment to PLAINTIFF.

121. On July 20, 2011, PLAINTIFF fell and injured himself as a result of DEFENDANTS issuing him a non-conforming mattress.

122. Between July 20, 2011 and August 16, 2011, PLAINTIFF was given Tylenol for the pain, but his wrist was never touched, set or repaired by the medical staff.

123. On August 16, 2011, PLAINTIFF was finally transported while in-custody by DEFENDANTS to an "outside" or independent orthopedic surgeon named Luigi Galloni, M.D, whose office is located at 711 West College Street, Suite 625, Los Angeles, CA 90012.

124. PLAINTIFF was informed by Dr. Luigi Galloni, M.D that given the type of wrist injury that the PLAINTIFF sustained, it was necessary for treatment to begin the first week following the injury, and that as a result of the non-treatment that PLANITIFF received from the DEFENDANTS for his wrist, it was possible that PLAINTIFF could lose the use of his left hand indefinitely.

125. On August 18, 2011, based on Dr. Luigi Galloni's diagnosis, as well as the unbearable pain that PLAINTIFF was experiencing from his wrist injury, PLAINTIFF made a request to Warden Thomas, and Dr. Sinausky, a staff physician at the Los Angeles County Jail, for adequate pain medication and proper treatment for PLAINTIFF's wrist injury.

126. As a result of these requests, on August 24, 2011, PLAINTIFF was transported to WHITE MEMORIAL HOSPITAL where ultra-sounds and other medical procedures were performed on PLAINTIFF.

127. On August 30, 2011, PLAINTIFF was transported to trauma surgeon, Dr Levi Harrison's, office located at 1560 E. Chevy Chase Ave, Suite #350, Glendale, CA 91206, where Dr. Harrison advised PLAINTIFF that his left wrist was "obliterated" and discussed doing immediate surgery on PLAINTIFF'S WRIST. Dr. Harrison also advised PLAINTIFF that PLAINTIFF'S hand and wrist would never be the same.

128. On September 19, 2011, approximately two (2) months after PLAINTIFF injured his left hand and wrist, surgery was performed on PLAINTIFF'S left hand and left wrist, and multiple pins and plates were placed in his hand and wrist. Dr. Harrison, the surgeon who performed surgery on the PLAINTIFF'S wrist, advised PLAINTIFF at that time that his left hand and wrist would never be like his right hand and wrist, and that with extensive surgery his left hand and wrist would only return to approximately sixty (60) percent of their normal function.

129. DEFENDANTS, including had a duty to adequately treat the PLAINTIFF's medical injuries, conditions; and, provide the proper medications for serious medical conditions – specifically PLAINTIFF"s left hand and wrist.

130. DEFENDANT DOCTORS failed in its duty to PLAINTIFF when they failed to provide PLAINTIFF with timely and adequate treatment for his left hand and left wrist, as well as adequate medication to treat the pain he suffered from those injuries.

131. DEFENDANT DOCTORS further breached their duties by failing to respond to PLAINTIFF, who following his fall and the sustaining of his injuries, attempted on a daily basis to obtain adequate medical treatment and medication through frequent verbal and written requests for treatment to DEFENDANT DOCTORS

132. Due to DEFENDANT DOCTORS apparent disregard for PLAINTIFF's condition, PLAINTIFF was denied immediate surgery and physical therapy that would have prevented the disfiguring, and significant loss of use, of his left hand and left wrist.

133. DEFENDANT DOCTORS negligently, carelessly, recklessly, wantonly, and unlawfully provided medical care, information, monitoring, examination, diagnosis, and other medical services so as to directly and proximately cause the injury to PLAINTIFF.

134. As a direct and proximate result of DEFENDANT DOCTORS numerous breaches and failures to provide adequate treatment and medication, PLAINTIFF sustained permanent injury to his left hand and wrist, and endured tremendous and unnecessary pain during the period of July 21, 2011 to September 20, 2011, as well as continued, daily back, neck and headaches.

135. PLAINTIFF has been harmed by DEFENDANTS in an amount currently unknown and according to proof, but in no manner is the amount less than the jurisdictional limits of this Court.

FIFTH CAUSE OF ACTION FOR VIOLATIONS OF 42 U.S. CODE §1983 AGAINST DEFENDANTS USA, DOJ, FBP, USMS DR. TOH, DR. SINAVSKI, MLP CASTILLO, AND DOES 1 THROUGH 50 10 INCLUSIVE

136. PLAINTIFF incorporates Paragraphs 1 through 135 as though fully set forth herein.

137. While sleeping on the top bunk-bed and mattress issued by DEFENDANTS, PLAINTIFF rolled over and fell to the floor, resulting in his fracturing his left wrist, splitting his head open, chipping his teeth, as well as sustaining severe damage to his back, neck and legs. The mattress was larger than the bunk bed area allowing for a portion to hang over the

edge of the bunk. This created a dangerous condition that created a reasonably foreseeable risk of the kind of incident in which PLAINTIFF was involved.

138. The dangerous condition of the mattress appears to have been caused by the negligent and wrongful conduct of the DEFENDANTS currently unknown employee who was acting within the course of his or employment, and who issued the mattress to PLAINTIFF in the defective condition of being larger in width and length than the bunk-bed on which PLAINTIFF slept.

139. PLAINTIFF was incarcerated and under the custody and control of the Defendants and as such is entitled to the protections of the 8th Amendment against cruel and unusual punishment.

140. On July 20, 2011, PLAINTIFF fell and injured himself as a result of DEFENDANTS issuing him a non-conforming mattress.

141. Between July 20, 2011 and August 16, 2011, PLAINTIFF was given Tylenol for the pain, but his wrist was never touched, set or repaired by the medical staff. PLAINTIFF was forced to endure the pain and suffering of a broken arm for over 25 days.

142. PLAINTIFF alleges that Defendant USMS was acting under the authority granted to them by Defendant USA and DOJ in their maintenance and control of the MDC jail facility.

143. PLAINTIFF alleges that the USMS is responsible for control of the housing of the inmates including the purchase and usage of mattresses at the MDC jail facility.

144. PLAINTIFF alleges that the USMS is responsible for obtaining emergency medical care for inmates who have been severely injured.

145. PLAINTIFF alleges that by ordering mattresses which were too large for the bunk beds, the USMS caused severe injury to Plaintiff because the mattress did not end at the edge of the bunk allowing Plaintiff to roll off the bunk and onto the floor fracturing his arm.

146. PLAINTIFF further alleges that USMS showed deliberate indifference when they failed to provide appropriate medical care to Plaintiff to fix his fractured arm for more than 25 days.

147. PLAINTIFF alleges that harm caused by the USMS while he was within the custody and control of the Defendants is a violation of the PLAINTIFF's 8th amendment right against cruel and unusual punishment.

148. PLAINTIFF alleges that Defendants deprived him of his civil rights, privileges, and immunities provided by the United States Constitution when Defendants had full custody and control of PLAINTIFF and then created a dangerous condition by providing an oversized mattress for his bunk bed and then when he was injured, the USMS failed to provide appropriate medical treatment.

149. As a result of the Defendants' actions, PLAINTIFF suffered PLAINTIFF sustained permanent injury to his left hand and wrist, and endured tremendous and unnecessary pain during the period of July 21, 2011 to September 20, 2011, as well as continued, daily back, neck and headaches.

150. PLAINTIFF has been harmed by Defendant(s) in an amount currently unknown and according to proof, but in no manner is the amount less than the jurisdictional limits of this Court.

PRAYER

WHEREFORE, PLAINTIFF requests judgment against DEFENDANT(S), and each of them, for the following:

1. General Damages:
   i. In an amount the Court deems fit for the first cause of action for VIOLATION OF CALIFORNIA GOVERNMENT CODE SECTION 835 FOR CREATION OF A DANGEROUS CONDITION;
   ii. In an amount the Court deems fit for the second cause of action for VIOLATIONS OF CALIFORNIA ADMINISTRATIVE CODE SECTION 1272;
   iii. In an amount the Court deems fit for the second cause of action for VIOLATIONS OF CALIFORNIA GOVERNMENT CODE 845.6;
   iv. $250,000 for the Fourth Cause of action for Medical Malpractice;
   v. In an amount the Court deems fit for the fifth cause of action for VIOLATIONS OF 42 U.S. CODE §1983
2. Special Damages for Plaintiff JOEL ARGENTO as established at the time of trial;
3. Prejudgment interest according to proof;
4. Attorneys fees and Costs;
5. Any and all damages which the court deems fit;
6. Any and all damages which are proven at trial.

THEMIS LAW GROUP

Dated: July 12, 2013

Timothy P. Mitchell, Esq.
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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOEL ARGENTO, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	Case No. CV 13-5013 CBM (JEMx) **ORDER APPROVING STIPULATION FOR COMPROMISE SETTLEMENT AND DISMISSAL OF ACTION [JS-6]**

Based upon the Stipulation for Compromise Settlement and Dismissal of Action, by and between plaintiff Joel Argento ("Plaintiff") and defendant United States of America, IT IS HEREBY ORDERED THAT:

1. Plaintiff's action is dismissed with prejudice in its entirety;

2. Each party shall bear his/its own costs, expenses, and attorney's fees; and

3. The Court retains jurisdiction pending payment of the settlement.

IT IS SO ORDERED.

Dated: October 15, 2014

HONORABLE CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOEL ARGENTO, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. CV 13-5013 CBM (JEMx) **STIPULATION FOR COMPROMISE SETTLEMENT AND DISMISSAL OF ACTION** Hon. John E. McDermott United States Magistrate Judge

IT IS HEREBY STIPULATED by and between Plaintiff JOEL ARGENTO ("Plaintiff"), and Defendant UNITED STATES OF AMERICA, by and through their respective attorneys, that the above-entitled action may be settled and compromised on the following terms and conditions:

1. The United States of America agrees to pay the sum of Forty Thousand Dollars ($40,000), which sum shall be in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, foreseen and unforeseen, arising from the incident or circumstances giving rise to this suit, which Plaintiff or his heirs, executors, administrators, or assigns, and each and any of them, now have or may hereafter acquire against the United States of America, its agents, servants, and employees.

2. Plaintiff and his heirs, executors, administrators or assigns hereby execute a general release of the United States of America and agree to accept the sum of Forty Thousand Dollars ($40,000) in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature, foreseen and unforeseen, arising from the incident or circumstances giving rise to this suit, which Plaintiff, his heirs, executors, administrators or assigns now have or hereafter acquire against the United States of America, its agents, servants, and employees on account of the subject matter that gave rise to the above-captioned lawsuit, including, but not limited to, claims for medical negligence, economic damages, medical expenses, non-economic damages, or any other type of injury or damage.

3. This Stipulation for Compromise Settlement constitutes a general release. As additional consideration for this Stipulation, Plaintiff, his heirs, executors, administrators, and assigns specifically waive and release any and all known and unknown rights, claims, causes of action or demands which might otherwise be preserved or accrue under Section 1542 of the California Civil Code. Plaintiff understands that Section 1542 of the California Civil Code provides as follows:

> A general release does not extend to claims which the creditor does not know or suspect to exist in their favor at the time of executing the

release, which, if known by him must have materially affected their settlement with the debtor.

Therefore and notwithstanding anything to the contrary herein, Plaintiff, his heirs, executors, administrators, and assigns explicitly release any and all claims against the United States of America, its agents, servants, and employees, which Plaintiff does not know or suspect to exist in his favor at the time he executes this Stipulation for Compromise Settlement, which if known to Plaintiff would have materially affected this settlement with the United States of America.

4. Plaintiff and his heirs, executors, administrators, or assigns further agree to reimburse, indemnify, and hold harmless the United States of America, its servants, and employees from and against any and all such causes of action, claims, liens, rights, or subrogated or contribution interests incident to or resulting from this or further litigation, or the prosecution of claims by Plaintiff and his heirs, executors, administrators, or assigns, against any third party or against the United States of America, arising out of the incident or circumstances giving rise to this suit.

5. This Stipulation for Compromise Settlement shall not constitute an admission of liability or fault on the part of the United States of America, its agents, servants, or employees, and is entered into by all parties for the purpose of compromising disputed claims and avoiding the expenses and risks of litigation.

6. It is also agreed, by and among the parties, that the settlement amount in the sum of Forty Thousand Dollars ($40,000) for Plaintiff represents the entire amount of the compromise settlement, and that the respective parties will each bear their own costs, fees, and expenses, and that any attorney's fees owed by Plaintiff will be paid out of the settlement amount and not in addition thereto.

7. It is also understood by and among the parties that pursuant to 28 U.S.C. § 2678, attorney's fees for services rendered in connection with this action shall not exceed 25 percent of the amount of the compromise settlement.

8. Payment of the settlement will be made by wire transfer in the total amount of Forty Thousand Dollars ($40,000) and made payable to the client account provided by Plaintiff's counsel, Anthony Ross. Mr. Ross agrees to distribute the appropriate settlement proceeds to Plaintiff.

9. Plaintiff agrees that he will be obligated to pay any and all liens from any and all insurance companies, health care providers, worker's compensation entities, attorneys, and any and all other persons or organizations who have or claim to have subrogated assigned claims arising out of or related to the subject matter of this suit.

10. Any and all individual taxation consequences as a result of this Stipulation are the sole and exclusive responsibility of Plaintiff. The United States of America does not warrant any representation of any tax consequences of this Stipulation. Nothing contained herein shall constitute a waiver by Plaintiff of any right to challenge any tax consequences of this Stipulation.

11. In consideration of the payment of the sum total of Forty Thousand Dollars ($40,000) as set forth above, Plaintiff agrees that the above-captioned action will be dismissed with prejudice.

12. The parties agree that this Stipulation for Compromise Settlement and Release, including all the terms and conditions of this compromise settlement and any additional agreements relating thereto, may be made public in their entirety, and Plaintiff expressly consents to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

13. This written agreement contains all of the agreements between the parties, and is intended to be and is the final and sole agreement between the parties. The parties agree that any other prior or contemporaneous representations or understandings not explicitly contained in this written agreement, whether written or

oral, are of no further legal or equitable force or effect. Any subsequent modifications to this agreement must be in writing, and must be signed and executed by the parties.

14. The persons signing this Stipulation for Compromise Settlement warrant and represent that they have reviewed and understand this agreement, and that they are fully authorized to enter into the terms and conditions of this agreement and that they agree to be bound thereby.

15. It is contemplated that this Stipulation may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, shall be deemed to be one document.

DATED: October 9, 2014

/s/ Joel Argento
JOEL ARGENTO
Plaintiff

DATED: October 9, 2014

THEMIS LAW GROUP

/s/ Anthony Ross
ANTHONY ROSS
Attorney for Plaintiff

DATED: October 8, 2014

STEPHANIE YONEKURA
Acting United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

/s/ Chung H. Han
CHUNG H. HAN
Assistant United States Attorney
Attorneys for Defendant
UNITED STATES OF AMERICA

Page 2227 of 2287

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

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Page 2231 of 2287

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Page 2232 of 2287

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of the Freedom of Information and Privacy Act

U.S. Department of Justice

United States Attorney
District of Hawaii

PJKK Federal Building
300 Ala Moana Blvd., Room 6-100
Honolulu, Hawaii 96850

(808)541-2850
FAX (808) 541-2958

September 11, 2014

Torts Branch
Civil Division
U.S. Department of Justice
P.O. Box 888
Ben Franklin Station
Washington, D.C. 20044

Re: Brandon Haleamau v. USA
Civil No. 14-00430 DKW BMK (USDC Hawaii)

Dear Sir/Madam:

We are enclosing a copy of the Complaint for Damages, filed on September 23, 2014, in the above-referenced case.

Our answer to the Complaint is due on or before January 15, 2015. Therefore, please request that the agency send us a litigation report, their administrative file, and their proposed response to the Complaint by January 8, 2015.

The Assistant U.S. Attorney assigned to this case is Thomas A. Helper. If you have any questions please feel free to call him at (808) 541-2850. Thank you for your assistance in this matter.

Very truly yours,

FLORENCE T. NAKAKUNI
United States Attorney
District of Hawaii

By _____
THOMAS A. HELPER
Assistant U.S. Attorney

TAH:jy
Enclosures

cc: Regional Counsel (w/encl.)
Western Region
Federal Bureau of Prisons
7338 Shoreline Drive
Stockton, CA 95219

Jennifer M. Merkle (w/encl.)
Senior CLC Attorney
FDC Honolulu
351 Elliot Street
Honolulu, Hawaii 96819

CV 14-00430 DKW-BMK

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
Sep 23, 2014
At 1 o'clock and 05 min PM

[✔] ORDER SETTING RULE 16 SCHEDULING CONFERENCE

[] ORDER SETTING STATUS CONFERENCE

for **Monday, December 22, 2014** at 9:30 a.m. before:

[✔] Magistrate Judge Barry M. Kurren in Courtroom 7

[] Magistrate Judge Kevin S.C. Chang in Courtroom 5

[] Magistrate Judge Richard L. Puglisi in Courtrooom 6

Pursuant to Rule 16 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") and Local Rule 16.2 of the Rules of the United States District Court for the District of Hawaii:

- Parties are reminded that, unless otherwise ordered by the Court, a meeting of the parties must occur at least 21 days prior to the Scheduling Conference and a report submitted to the Court. Except as otherwise provided by L.R. 26.1(c), no formal discovery may be commenced before the meeting of the parties.
- Each party shall file a Scheduling Conference Statement pursuant to L.R. 16.2(b), and shall attend in person or by counsel.
- Failure to file and/or attend will result in imposition of sanctions, (including fines or dismissal), under Fed.R.Civ.P. 16(f) and L.R. 11.1.

DATED at Honolulu, Hawaii on Tuesday, September 23, 2014.

/s/ Susan Mollway
Chief, U.S. District Judge

I hereby acknowledge receipt of the Order Setting Rule 16 Scheduling Conference.

Date September 23, 2014 Signature _____
Atty ( ) Secy ( ) Messenger ( )

THIS SCHEDULING ORDER IS ATTACHED TO THE INITIATING DOCUMENT (COMPLAINT/NOTICE OF REMOVAL) & MUST BE SERVED WITH THE DOCUMENT. PLEASE DO NOT REMOVE.



UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
OFFICE OF THE CLERK
300 ALA MOANA BLVD., RM C-338
HONOLULU, HAWAII 96850

Sue Beitia
CLERK

TEL (808) 541-1300
FAX (808) 541-1303

MEMO

To: All Federal Bar Members

From: Sue Beitia, Clerk of U.S. District Court, District of Hawaii

Date: September 23, 2014

Subject: Corporate Disclosure Statements

Federal Rule of Civil Procedure 7.1 and Criminal Rule 12.4 both address the filing of Corporate Disclosure Statements.

Both rules state "A party must:

(1) file the Rule 7.1(a) *(or 12.4(a))* statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

(2) promptly file a supplemental statement upon a change in the information that the statement requires."

Thank you for your cooperation in this matter.

ERIC A. SEITZ
ATTORNEY AT LAW
A LAW CORPORATION

ERIC A. SEITZ 1412
DELLA A. BELATTI 7945
SARAH R. DEVINE 9673
820 Mililani Street, Suite 714
Honolulu, Hawaii 96813
Telephone: (808) 533-7434
Facsimile: (808) 545-3608

Attorneys for Plaintiff
BRANDON HALEAMAU

UNITED STATES DISTRICT COURT * DISTRICT OF HAWAII *
ATTEST: A True Copy
District
Hawaii
By
Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRANDON HALEAMAU,	CIVIL NO. 14-00430
Plaintiff,	COMPLAINT FOR DAMAGES
vs.	
UNITED STATES OF AMERICA,	
Defendant.	

COMPLAINT FOR DAMAGES

Plaintiff BRANDON HALEAMAU (hereinafter "Plaintiff"), by and through his undersigned attorneys, alleges and avers as follows:

1. This is an action arising under the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq., for money damages as compensation for the personal injuries suffered by Plaintiff due to Defendant UNITED STATES OF AMERICA's failure to timely and adequately treat Plaintiff while he was incarcerated at the

Federal Detention Center located in Honolulu, Hawaii ("FDC Honolulu").

2. This Court is vested with jurisdiction over this matter pursuant to 28 U.S.C. § 1346(b).

3. Venue resides in the United States District Court for the District of Hawaii pursuant to 28 U.S.C. § 1402 as all of the acts and/or omissions that are the basis for this lawsuit occurred in the City and County of Honolulu, State of Hawaii, which is within the District of Hawaii.

4. Plaintiff is and was, at all times relevant, a resident of the State of Hawaii who was incarcerated as an inmate at FDC Honolulu at all times pertinent hereto.

5. Defendant UNITED STATES OF AMERICA (hereinafter "Defendant UNITED STATES") is named herein pursuant to 28 U.S.C. § 2674, as Plaintiff's injuries were caused by the negligent and wrongful acts and/or omissions of employees, officers, and/or agents of the United States Department of Justice, Federal Bureau of Prisons (hereinafter "Federal BOP"), at all times pertinent hereto.

6. On or about December 28, 2011, Plaintiff reported lower abdominal and scrotum pains to Nurse Practitioner Thomas R. Liles ("NP Liles") of FDC Honolulu's Health Services Unit.

7. Plaintiff explained to NP Liles that he believed he was suffering from a hernia.

8. NP Liles misdiagnosed Plaintiff's condition and prescribed him medication for a urinary tract infection.

9. On or about February 10, 2012, after Plaintiff's scrotum pain returned, he again reported to FDC Honolulu's Health Services Unit and explained that the pain and symptoms he was experiencing were due to a hernia.

10. [illegible] Plaintiff's condition and prescribed him an antibiotic that reduced the swelling but did not reduce Plaintiff's pain.

11. On or about June 8, 2012, Plaintiff experienced an allergic reaction due to something he ate and he was taken to the emergency department at The Queen's Medical Center.

12. While Plaintiff was being treated for hives and an allergic reaction, a nurse observed his inflamed scrotum and suggested that Plaintiff have it looked at.

13. Upon returning to FDC Honolulu, Plaintiff followed up on the Queen's nurse's suggestion and requested to see NP Liles regarding the continued pains in his scrotum.

14. This request was disregarded and on or about August 20, 2012, Plaintiff broke out with a fever and was sent immediately to FDC Honolulu's medical unit.

15. In addition to Plaintiff's high temperature, he again reported that his scrotum pain had returned and requested a doctor's opinion.

16. Plaintiff was then examined by David T. Ackley, M.D. ("Dr. Ackley") who diagnosed him with an inguinal hernia with obstruction and sent Plaintiff to the emergency department at The Queen's Medical Center for further testing.

17. Plaintiff's diagnosis of a left inguinal hernia was confirmed and he was scheduled to have surgery that day.

18. Plaintiff's surgery was postponed due to his high temperature and possible infection.

19. Upon discharge on August 29, 2012, Plaintiff was instructed to follow up with the Queen's doctor in one week to reschedule his surgery.

20. On or about September 24, 2012, Plaintiff was examined by Dr. Frederick Yost, who also diagnosed his left inguinal hernia and recommended surgical repair at The Queen's Medical Center.

21. On or about September 26, 2012, Dr. Ackley acknowledged receipt of this diagnosis and treatment recommendation.

22. Plaintiff's surgery finally was performed on November 26, 2012, after misdiagnoses by NP Liles and Dr. Ackley, and excruciating pain and enormous emotional distress to Plaintiff.

23. Before Plaintiff's reporting of lower abdominal and scrotum pains to NP Liles on or about December 28, 2011, Plaintiff had also explained to NP Liles and Dr. Ackley that he had scoliosis or curvature of the spine that required treatment to ease his lower back pains.

24. On or about September 23, 2011, Plaintiff's scoliosis or curvature of the spine was verified by a radiology examination conducted by FDC Honolulu that found and concluded his condition of "dextroscoliosis."

25. Upon receiving Plaintiff's radiology report, Dr. Ackley did not offer any treatment for Plaintiff's condition and provided Plaintiff with a chart of exercises he could follow to help with his lower back pains.

26. During the period of delayed treatment for Plaintiff's hernia, from the initial misdiagnosis to the day surgery was performed, Plaintiff was not able to complete any of the exercises on the chart that he had been provided by Dr. Ackley to treat his scoliosis and lower back pains.

27. At all times relevant employees, officers, and/or agents of the Federal BOP owed a duty of reasonable care to Plaintiff for his health, safekeeping, care and well-being.

28. The medical care and/or treatment provided to Plaintiff fell significantly below the standard for care in the community.

29. Employees, officers, and/or agents of the Federal BOP of Defendant UNITED STATES knew or should have known that their actions and/or omissions could foreseeably pose an unreasonable risk to the health, safety, and well being of Plaintiff.

30. Despite this notice, employees, officers, and/or agents of the Federal BOP of Defendant UNITED STATES failed to exercise reasonable care as to the health, safety, and well-being of Plaintiff, thereby acting negligently herein and proximately and directly causing the injuries to Plaintiff.

31. As a direct and proximate result of the foregoing Plaintiff suffered and continues to experience pain and suffering for Defendant UNITED STATES' employees', officers' and/or agents' failure to timely and adequately treat and provide for his health, safety, and care.

32. As a direct and proximate result of the foregoing Plaintiff has suffered great mental anguish, severe emotional distress, anxiety, embarrassment, humiliation, worry, and anger.

33. Pursuant to the Federal Tort Claims Act a written claim was submitted to the Federal BOP on or about November 18, 2013, by means of a Standard Form 95.

34. The Federal BOP denied Plaintiff's written claim in a letter dated March 25, 2014, and Plaintiff is presently entitled to bring his claims in this Court.

WHEREFORE, Plaintiff prays for relief as follows:

1. For general damages in amounts to be proven at trial;

2. For special damages in amounts to be proven at trial;

3. For reimbursement of his costs and expenses herein, including reasonable provision for his attorneys' fees; and

4. For such further and additional relief as the Court deems appropriate and just.

DATED: Honolulu, Hawaii, September 23, 2014.

/s/ Eric A. Seitz
ERIC A. SEITZ
DELLA A. BELATTI
SARAH R. DEVINE

Attorneys for Plaintiff
BRANDON HALEAMAU

Attorney Initiating Documents

U.S. District Court

District of Hawaii

Notice of Electronic Filing

The following transaction was entered by Seitz, Eric on 9/23/2014 at 12:42 PM HST and filed on 9/23/2014

Case Name: Haleamau v. United States of America
Case Number: 1:14-cv-00430
Filer: Brandon Haleamau
Document Number: 1
Judge(s) Assigned: None (please contact the court)

Docket Text:
COMPLAINT *FOR DAMAGES* against United States of America (Filing fee $ 400 receipt number 0975-1447389.), filed by Brandon Haleamau. (Attachments: # (1) Civil Cover Sheet)(Seitz, Eric)

1:14-cv-00430 Notice has been electronically mailed to:

Eric A. Seitz eseitzatty@yahoo.com, seitzoffice@yahoo.com

1:14-cv-00430 Notice will not be electronically mailed to:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1095854936 [Date=9/23/2014] [FileNumber=1783246-0
] [9c7a9688fd7806b9f30f9aa1566d0509b91bf62f5a217f56fa2218f4fa01a152013
0dc46c161210400cb5e425b2994180630202a93f6bff5115a2c3f8ae6e34f]]
Document description: Civil Cover Sheet
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1095854936 [Date=9/23/2014] [FileNumber=1783246-1
] [975420aab2736d3a465fba6cb3a99879cc1f1e857764a98c9cba02822a1725510c0
bd1471fa798aca5a256fcba7604c5398c26b40482d1c5e9ef1ebd058a82e4]]

ERIC A. SEITZ
ATTORNEY AT LAW
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ERIC A. SEITZ 1412
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Attorneys for Plaintiff
BRANDON HALEAMAU

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRANDON HALEAMAU, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CIVIL NO. 14-00430 DKW-BMK SUMMONS

SUMMONS

TO: THE ABOVE-NAMED DEFENDANT

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiff's attorney, Eric A. Seitz, 820 Mililani Street, Suite 714, Honolulu, Hawaii, 96813, an answer to Plaintiff's Complaint for Damages which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do

so, judgment by default will be taken against you for the relief demanded in Plaintiff's Complaint for Damages.

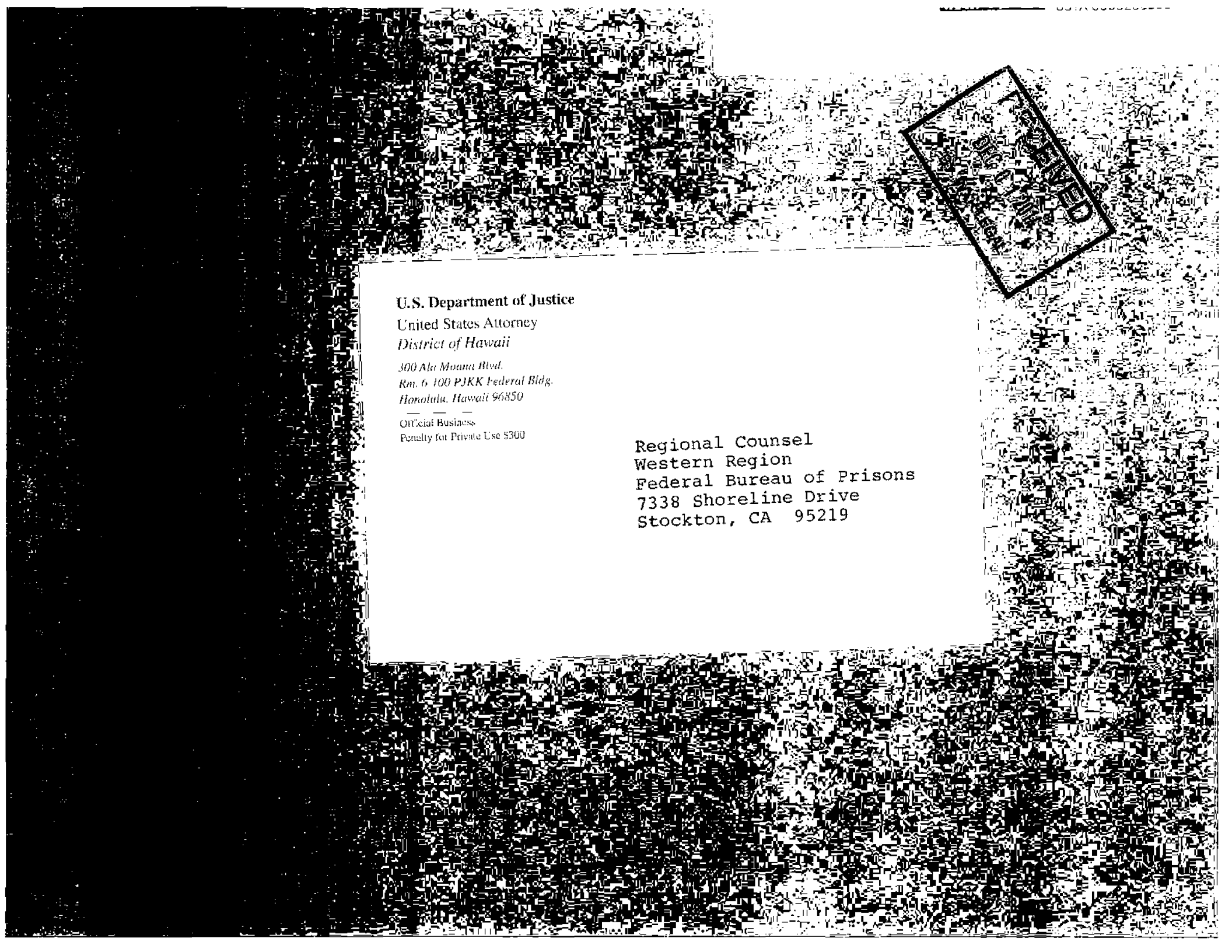
DATED: Honolulu, Hawaii, September 23, 2014.

SUE BEITIA, CLERK

Clerk

/S/ SUE BEITIA by EA, Deputy Clerk

By Deputy Clerk



U.S. Department of Justice
United States Attorney
District of Hawaii
300 Ala Moana Blvd.
Rm. 6-100 PJKK Federal Bldg.
Honolulu, Hawaii 96850

Official Business
Penalty for Private Use $300

Regional Counsel
Western Region
Federal Bureau of Prisons
7338 Shoreline Drive
Stockton, CA 95219

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

Brandon Haleamau, Plaintiff, vs. United States of America, Defendant.	)	1:14-CV-00430-DKW-BMK FIRST AMENDED RULE 16 SCHEDULING ORDER

FIRST AMENDED RULE 16 SCHEDULING ORDER

Pursuant to Fed. R. Civ. P. 16 and LR 16.2, a scheduling conference was held on August 27, 2015, before the Honorable Barry M. Kurren, United States Magistrate Judge. Appearing at the conference were Della A. Belatti, Esq. and Michael F. Albanese, Esq.

Pursuant to Fed. R. Civ. P. 16(e) and LR 16.3, the Court enters this scheduling conference order:

TRIAL AND PRETRIAL CONFERENCE SCHEDULING:

1. **NON-JURY** trial in this matter will commence before the Honorable Derrick K. Watson, United States District Judge on May 31, 2016, at 9:00 a.m.

2. A final pretrial conference shall be held on April 19, 2016, at 9:30 a.m. before the Honorable Barry M. Kurren, United States Magistrate Judge.

3. (RESERVED)

4. Pursuant to LR 16.6, each party herein shall serve and file a separate final pretrial statement by April 12, 2016.

MOTIONS:

5. All motions to join additional parties or to amend the pleadings shall be filed by CLOSED.

6. Other non-dispositive motions, except for motions in limine and discovery motions, shall be filed by March 2, 2016.

7. Dispositive motions shall be filed by December 30, 2015.

8. Motions in limine shall be filed by May 10, 2016.

Any opposition memorandum to a motion in limine shall be filed by May 17, 2016.

DISCOVERY:

9. Unless and until otherwise ordered by the Court, the parties shall follow the discovery plan agreed to by the parties herein pursuant to Fed. R. Civ. P. 26(f).

10. (RESERVED)

11. Pursuant to Fed. R. Civ. P. 26(a)(2), each party shall disclose to each other party the identity and written report of any person who may be used at trial to present expert evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. The disclosures pursuant to this paragraph shall be according to the following schedule:

a. Plaintiff shall comply by November 30, 2015.

b. Defendant shall comply by December 30, 2015.

Disclosure of the identity and written report of any person who may be called solely to contradict or rebut the evidence of a witness identified by another party pursuant to subparagraphs a and b hereinabove shall occur within thirty (30) days after the disclosure by the other party.

12. Pursuant to Fed. R. Civ. P. 16(b)(3) and LR 16.2(a)(6), the discovery deadline shall be April 1, 2016. Unless otherwise permitted by the Court, all discovery pursuant to Federal Rules of Civil Procedure, Rules 26 through 37 inclusive must be completed by the discovery deadline. Unless otherwise permitted by the Court, all discovery motions and conferences made or requested pursuant to Federal Rules of Civil Procedure, Rules 26 through 37 inclusive and LR 26.1, 26.2 37.1 shall be heard no later than thirty (30) days prior to the discovery deadline.

SETTLEMENT:

13. A settlement conference shall be held on April 4, 2016, at 10:30 a.m. before the Honorable Barry M. Kurren, United States Magistrate Judge.

14. Each party shall deliver to the presiding Magistrate Judge a confidential settlement conference statement by March 28, 2016. The parties are directed to LR 16.5(b) for the requirements of the confidential settlement conference statement.

15. The parties shall exchange written settlement offers and meet and confer to discuss settlement before the date on which settlement conference statements are due.

TRIAL SUBMISSIONS:

16. (RESERVED)

17. (RESERVED)

18. (RESERVED)

19. (RESERVED)

20. (RESERVED)

WITNESSES:

21. By May 10, 2016, each party shall serve and file a final comprehensive witness list indicating the identity of each witness that the party will call at trial and describing concisely the substance of the testimony to be given and the estimated time required for the testimony of the witness on direct examination.

22. The parties shall make arrangements to schedule the attendance of witnesses at trial so that the case can proceed with all due expedition and without any unnecessary delay.

23. The party presenting evidence at trial shall give notice to the other party the day before of the names of the witnesses who will be called to testify the next day and the order in which the witnesses will be called.

EXHIBITS:

24. By May 3, 2016, the parties shall premark for identification all exhibits and shall exchange or, when appropriate, make available for inspection all exhibits to be offered, other than for impeachment or rebuttal, and all demonstrative aids to be used at trial.

25. The parties shall meet and confer regarding possible stipulations to the authenticity and admissibility of proposed exhibits by May 10, 2016.

26. By May 17, 2016, the parties shall file any objections to the admissibility of exhibits. Copies of any exhibits to which objections are made shall be attached to the objections.

27. The original set of exhibits and two copies (all in binders) and a list of all exhibits shall be submitted to the Court the Thursday before trial.

DEPOSITIONS:

28a. By May 10, 2016, the parties shall serve and file statements designating excerpts from depositions (specifying the witness and page and line referred to) to be used at trial other than for impeachment or rebuttal.

b. Statements counter-designating other portions of depositions or any objections to the use of depositions shall be served and filed by May 17, 2016.

TRIAL BRIEFS:

29. By May 17, 2016, each party shall serve and file a trial brief on all significant disputed issues of law, including foreseeable procedural and evidentiary issues, setting forth briefly the party's position and the supporting arguments and authorities.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW:

30. Each party shall serve and file proposed findings of fact and conclusions of law by May 17, 2016.

OTHER MATTERS: None.

IT IS SO ORDERED.

DATED: Honolulu, Hawai'i, September 2, 2015.

/S/ Barry M. Kurren
Barry M. Kurren
United States Magistrate Judge

ERIC A. SEITZ
ATTORNEY AT LAW
A LAW CORPORATION

ERIC A. SEITZ 1412
DELLA A. BELATTI 7945
SARAH R. DEVINE 9673
820 Mililani Street, Suite 714
Honolulu, Hawaii 96813
Telephone: (808) 533-7434
Facsimile: (808) 545-3608

Attorneys for Plaintiff
BRANDON HALEAMAU

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRANDON HALEAMAU, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	CIVIL NO. 14-00430 DKW-BMK STIPULATION TO AMEND FIRST AMENDED RULE 16 SCHEDULING ORDER TO EXTEND DEADLINES (TRIAL DATE: May 31, 2016)

STIPULATION TO AMEND FIRST AMENDED RULE 16 SCHEDULING ORDER TO EXTEND DEADLINES

IT IS HEREBY STIPULATED by and between the parties herein, through their respective undersigned attorneys, that the Rule 16 Scheduling Order deadline to file dispositive motions and disclose experts be extended as follows:

MOTIONS:

...

7. Dispositive motions shall be filed by **March 29, 2016.**

...

DISCOVERY:

...

11. Pursuant to Fed. R. Civ. P. 26(a)(2), each party shall disclose to each other party the identity and written report of any person who may be used at trial to present expert evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence. The disclosure pursuant to this paragraph shall be according to the following schedule:

a. All plaintiffs shall comply by **January 29, 2016.**

b. All defendants shall comply by **February 29, 2016.**

Disclosure of the identity and written report of any person who may be called solely to contradict or rebut the evidence of a witness identified by another party pursuant to subparagraphs a and b hereinabove shall occur within thirty (30) days after the disclosure by the other party.

/

/

/

/

DATED: Honolulu, Hawaii, November 25, 2015.

/s/ Della A. Belatti
ERIC A. SEITZ
DELLA A. BELATTI
SARAH R. DEVINE

Attorneys for Plaintiff

DATED: Honolulu, Hawaii, November 25, 2015.

/s/ Micheal F. Albanies
FLORENCE T. NAKAKUNI
MICHAEL F. ALBANIES

Attorneys for Defendant
UNITED STATES OF AMERICA

APPROVED AND SO ORDERED:

DATED: Honolulu, Hawai'i, December 2, 2015.

/S/ Barry M. Kurren
Barry M. Kurren
United States Magistrate Judge

FLORENCE T. NAKAKUNI #2286
United States Attorney
District of Hawaii

MICHAEL F. ALBANESE #9421
Assistant U.S. Attorney
300 Ala Moana Boulevard, Rm. 6-100
Honolulu, Hawaii 96850
Telephone: (808) 541-2850
Facsimile: (808) 541-2958
Email: Michael.albanese@usdoj.gov

Attorneys for Defendant
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRANDON HALEAMAU, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	CIVIL NO. 14-00430 DKW BMK STIPULATION FOR DISMISSAL WITH PREJUDICE AS TO ALL CLAIMS AND ALL PARTIES AND ORDER

STIPULATION FOR DISMISSAL WITH PREJUDICE AS TO ALL CLAIMS AND ALL PARTIES AND ORDER

IT IS HEREBY STIPULATED by and between Plaintiff BRANDON HALEAMAU (hereinafter "Plaintiff") and Defendant UNITED STATES OF AMERICA (hereinafter "Defendant"), through their respective counsel, that the Complaint filed herein by Plaintiff on September 23, 2014, be hereby dismissed, with prejudice; and all other claims whatsoever field herein, be and they hereby are dismissed, with prejudice.

This Stipulation for Dismissal is based on Fed. R. Civ. P. 41(a)(1) and has been signed by counsel for all parties who have

made an appearance in this action. Each party agrees to bear their own costs. There are no remaining parties and/or issues.

DATED: Honolulu, Hawaii, March 16, 2016.

/s/ Eric A. Seitz

ERIC A. SEITZ
DELLA A. BELLATI
Attorney for Plaintiff
BRANDON HALEAMAU

DATED: Honolulu, Hawaii, March 17, 2016.

FLORENCE T. NAKAKUNI
United States Attorney
District of Hawaii

/s/ Michael F. Albanese

MICHAEL F. ALBANESE
Attorneys for Defendant
UNITED STATES OF AMERICA

APPROVED AND SO ORDERED:

Derrick K. Watson
United States District Judge

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information and Privacy Act

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Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 2261 of 2287

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CASE DETAILS

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Case Actions:

Case ID: CIV-WXR-2014-01501 **Short Description:** HALEAMAU V. USA

CASE DETAILS CASE DOCS CASE PERSONS CASE DATES CASE SUMMARY CASE BLOG

Case Login Information

Reference Number	1:14-cv-00430-DKW-BMK
Short Description	HALEAMAU V. USA
Classification	Civil
Case Type	FTCA-Personal Injury
Case Sub-Type	
Current Region	WESTERN REGIONAL OFFICE
Current Institution	Honolulu (FDC)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	Honolulu (FDC)
Monetary Relief Sought	$
Estimated Amount	$
Office	Hawaii
Jurisdiction	DISTRICT OF HAWAII
Responsible Legal Office	WXRO

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	03/08/2016
Type	Settled
Reason	
Sought	Compensatory Damages
Amount offered	$2,500.00
Total Amount Paid	$2,500.00
Description	
Description	
Court Fee Paid ?	No
Pro Se ?	No

Case Initiation Dates

Date Received	12/01/2014
Date Filed	09/23/2014

Case Progress

Current Owner	TIMOTHY RODRIGUES
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	NONE
Private Case	No

Additional Case Information

Long Description	28:2674 FEDERAL TORT CLAIMS ACT
Further Case Classification	
Comments	medical malpractice misdiagnosed hernia delay in treatment

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United States Department of Justice Office of General Counsel & Review

RICHARD M. BARNETT, Esq.
A Professional Law Corporation
SBN 65132
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105 West F Street, 4th Floor
San Diego, CA 92101
Telephone: (619) 231-1182
Facsimile: (619) 233-3221

Attorney for Plaintiff
DENNESTY DAWKINS

FILED
2014 SEP 17 PM 2:
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY:
COPY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DENNESTY DAWKINS, Plaintiff, vs. EVELYN CASTRO GREENSPAN, M.D., AND DOES 1-50 INCLUSIVE, Defendants.	Case No. LACV14-7269 PA (RZx) COMPLAINT FOR DAMAGES First Cause of Action- Bivens Claim for Inadequate Medical Care against all Individually Name Defendants and DOES 1-50 Second Cause of Action- Bivens Claim for Equal Protection Violation against all Individually and DOES 1-50

Plaintiff, DENNESTY DAWKINS ("Dawkins'), hereby files his Complaint as follows:

GENERAL ALLEGATIONS

1. Jurisdiction of the court is proper under 28 U.S.C. §§ 1331, 1343(3), and 1346.

2. Venue is proper in this district pursuant to 28 USC § 139 (b)(2), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed. Venue is also proper pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed and the

plaintiff is a resident of the judicial district.

3. This is an action for civil rights violations for *Bivens* claims for inadequate medical care and equal protection violations under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

4. Compensatory damages are sought pursuant to statutes, and the *Bivens* claims. Punitive damages are sought against all Defendants sued in their individually capacity pursuant to the *Bivens* claims.

5. This Court has supplemental jurisdiction to consider state causes of action under 28 USC § 1367, as the ancillary state claims "form part of the same case or controversy" as other counts for which this Court has jurisdiction.

6. All governmental entities were notified of this claim in a timely fashion and all administrative exhaustion have been satisfied.

PARTIES

7. Dennesty Dawkins is an adult male natural person and a resident of the State of California, County of Los Angeles. At all relative times, he was detained and in the custody of the United States Bureau of Prisons at FCI Terminal Island.

8. Evelyn Castro Greenspan, M.D., at all relevant times, was the Clinical Director of and Medical Officer with the Health Services Department of the Federal Correctional Institution, Terminal Island, California ("FCI Terminal Island"). She was also responsible for arranging specialized health care and hospitalization for detainees within the local community. At all material times, she was aware that DAWKINS had a serious medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. She is being sued in his individual capacity.

9. Defendants DOES 1-50 are business entities of unknown form who were the employers of the individually named Defendants and/or Does 1-50. Defendants Does 1-50 are herein sued under fictitious names. Their true names and capacities are unknown to Plaintiff. Based on information and belief, Plaintiff alleges that DOES 1-50 were the employees, officers, directors, managing agents, and/or supervisors of the UNITED STATES, and/or Does 1-50 who were acting within the scope and course of their employment and authority at all times relevant to this Complaint.

FACTUAL ALLEGATIONS

10. Dawkins was detained at FCI Terminal Island after conviction by the United States on May 1, 2012 and remains so incarcerated.

11. On or about May 1, 2012, Dawkins was diagnosed with recurring sarcoids - an auto-immune disease that attacks and destroys soft tissue, i.e., in this instant outbreak, plaintiff's left lung and right eye.

12. On May 15, 2012, plaintiff was examined by Retinal Specialist, Dr. Stanley Carson, M.D. He found and recommended plaintiff undergo preventive cataract surgery, to avoid becoming permanently blind in his right eye.

13. From May through September of 2012, plaintiff was repeatedly reassured by prison medical staff he was being scheduled to undergo the recommended cataract procedure. After repeated unjustified and needless delays, on September 21, 2012, he was informed by prison medical staff my retinal condition had irreversibly deteriorated, and he was now permanently blind in the right eye.

FIRST CAUSE OF ACTION

Bivens Claim for Inadequate Medical Care against all individual Defendants Castro-Greenspan and DOES 1-50

14. Plaintiff incorporates be reference all allegations contained in the preceding paragraphs of this Complaint, as it fully set forth here.

15. This is a claim against defendant Evelyn Castro Greenspan, all Defendants who were agents of the United States and named in their individual capacity, and DOES 1-50.

16. Defendant Castro-Greenspan and DOES 1-50 violated Plaintiff's right to adequate medical care under the Fifth, Eighth and Fourteenth Amendments of the United States Constitution by failing to treat Plaintiff's known serious medical condition.

17. At all material times, defendant Castro Greenspan and DOES 1-50 were aware that Dawkins was suffering from recurring sarcoids - an auto-immune disease that attacks and destroys soft tissue, i.e., in this instant outbreak, plaintiff's left lung and right eye.

18. Defendant Castro Greenspan and DOES 1-50 purposefully denied Dawkins essential medical care for, and were deliberately indifferent to his serious medical condition, despite knowledge that he had complained repeatedly about his progressive loss of vision in his right eye and that said Defendants knew he was not going to be released from custody to treat the condition in the foreseeable future.

19. The actions of defendant Castro Greenspan and DOES 1-50 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering "medical care" to Dawkins were so far below the acceptable standard that defendant Castro Greenspan and DOES 1-50 could not have been making a "medical" judgment in their decision to deny Dawkins a very basic and inexpensive diagnostic procedure to prevent blindness in his right eye.

20. The actions of defendant Castro Greenspan and DOES 1-50 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny Dawkins medical care was not based on a medical reason, but rather economic and/or other constitutionally impermissible

reasons unrelated to the provision of medical services, and demonstrated a purposeful, denial of essential medical care for a know serious medical condition, and , and were deliberately indifferent to his serious medical condition.

21. Defendant Castro Greenspan and DOES 1-50 acted with wilful and deliberate indifference to the serious health needs of plaintiff protected by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, subjected Plaintiff to dangerous and debasing conditions of confinement, and violated basic fundamental rights to safe and humane confinement. The inhumane conditions of confinement caused Plaintiff medical injuries as alleged in this Complaint. The conduct constituted cruel and unusual punishment and a violation of due process.

22. Defendant Castro Greenspan and DOES 1-50 violated clearly established law by failing to adequately treat a known serious medical condition.

23. As a result of the Defendant's constitutional violations of Plaintiff's rights, Plaintiff sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, an the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement which is permanent; and

c. Economic losses consisting of past and future medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

24. The conduct of each of the defendant Castro Greenspan and DOES 1-50 constitutes a reckless or callous disregard of Plaintiff's constitutional right to adequate medical care, entitling Plaintiff punitive damages.

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SECOND CAUSE OF ACTION
***Bivens* Claim for Equal Protection Violations against defendant Castro-Greenspan and DOES 1-50**

25. Plaintiff incorporates by reference all allegations contained in the preceding paragraphs of this Complaint, as if fully set forth here.

26. This is a claim against all Defendants who were agents of the UNITED STATES and named in their individual capacity, and DOES 1-50.

27. Defendant Castro Greenspan and DOES 1-50 violated Plaintiff's right to equal protection under the Fifth and Fourteenth Amendments of the United States' Constitution by failing to treat Plaintiff's known serious medical condition due to deliberate indifference to said serious medical condition, without a rational basis to do so.

28. At all material times, defendant Castro Greenspan and DOES 1-50 were aware that Dawkins had a progressive loss of vision in his right eye which required cataract surgery.

29. Defendant Castro Greenspan and DOES 1-50 purposefully denied Dawkins essential medical care for a known serious medical condition, despite knowledge that Dawkins was suffering from progressive deterioration of vision in his right eye and the diagnosis of that called for cataract surgery.

30. The actions of defendant Castro-Greenspan and DOES 1-50 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering "medical care" to Dawkins were so far below the acceptable standard that defendant Castro Greenspan and DOES 1-50 could not have been making a "medical" judgment in their decision to deny Dawkins a very basic and inexpensive diagnostic procedure to prevent blindness in his right eye.

31. The actions of the defendant Castro Greenspan and DOES 1-50 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny Dawkins medical care was not based on a

medical reason, but rather economic and/or other constitutionally impermissible reasons unrelated to the provision of medical services.

32. Defendant Castro Greenspan and DOES 1-50 were acting under color of law by exercising power made possible because of the Defendants were clothed with the authority of federal law.

33. Defendant Castro Greenspan and DOES 1-50 acted in violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments of the United States Constitution by discriminating against Dawkins based on his prisoner status with no rational basis to do so. In that regard, defendant Castro Greenspan and DOES 1-50 failed to approve a simple and inexpensive surgical procedure for Dawkins because he was a federal prisoner.

34. Defendant Castro Greenspan and DOES 1-50 violated clearly established law by violating Dawkins rights to equal protection under the United States Constitution.

35. As a result of the Defendants' constitutional violations of Plaintiff's rights, Plaintiff sustained injuries and damages as follows:

a. Non-economic damages consisting of past and future physical and mental pain and suffering, mental anguish, emotional stress, and the loss of the enjoyment of a full and complete life;

b. Physical impairment and disfigurement which is permanent; and

c. Economic losses consisting of past and future medical and health care expenses and loss of future earning capacity and ability to earn money in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that, after due proceedings, judgment be entered in favor of Plaintiff and against all Defendants, jointly and severally, that this Court:

///

(a) Award Plaintiff all compensatory damages reasonable under the circumstances, including physical pain and suffering, mental anguish and emotional distress, disfigurement, medical expenses, loss of enjoyment of life, and any other compensatory damages, for each count alleged in the Complaint;

(b) Award Plaintiff punitive damages against all Defendants sued in their individual capacity (Plaintiff acknowledges that punitive damages are not available against the governmental entity defendants)

(c) Award Plaintiff reasonable attorney's fees, expert fees, and court costs under 42 U.S.C. § 1988 for the prosecution of his 42 U.S.C. §1983 claims;

(d) Award Plaintiff reasonable attorney's fees' and court costs under state law for the prosecution of his state law claims;

(e) Award Plaintiff legal interest on all damages awarded from the date of judicial demand until paid; and

(f) Award Plaintiff such other and further relief as this Court deems just and proper.

Dated: 9-16-14

By: _____
RICHARD M. BARNETT
A Professional Law Corporation

Attorney for Plaintiff
Dennesty Dawkins

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Central District of California

DENNESTY DAWKINS

Plaintiff(s)

v.

EVELYN CASTRO GREENSPAN, M.D., and DOES 1-50, INCLUSIVE

Defendant(s)

Civil Action No. LACV14-7269 PA (RZx)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

EVELYN CASTRO, M.D.
FCI TERMINAL ISLAND
1299 SEASIDE AVENUE
SAN PEDRO, CA 90731

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

RICHARD M. BARNETT, APLC
105 WEST F STREET, 4TH FLOOR
SAN DIEGO, CA 92101

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: SEP 17 2014

Signature of Clerk or Deputy Clerk

1174

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* EVELYN CASTRO, M.D.
was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)*
_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)*
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)*
_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

RICHARD M. BARNETT, Esq.
A Professional Law Corporation
State Bar Number 65132
email:richardmbarnett@gmail.com
105 West F Street, 4th Floor
San Diego, CA 92101
Telephone: (619) 231-1182
Facsimile: (619) 233-3221

Attorney for Plaintiff
DENNESTY DAWKINS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DENNESTY DAWKINS, Plaintiff, vs. EVELYN CASTRO-GREENSPAN, M.D., AND DOES 1-10, INCLUSIVE, and UNITED STATES OF AMERICA, Defendants.	Case No. LACIV14-7269-PA(RZx) PLAINTIFF DENNESTY DAWKINS' SECOND AMENDED COMPLAINT FOR DAMAGES First Cause of Action-Bivens Claim for Inadequate Medical Care Second Cause of Action-FTCA Claim Against the United States for Medical Negligence (Non-Jury Claim)

Plaintiff DENNESTY DAWKINS ("Dawkins"), hereby files his Complaint as follows:

GENERAL ALLEGATIONS

1. Jurisdiction of the court is proper under 28 U.S.C. §§ 1331, 1343(3), and 1346(b)(1), *et seq*.

2. Venue is proper in this district pursuant to 28 U.S.C. § 139 (b)(2), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed. Venue is also proper pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the acts or omissions giving rise to this claim

occurred within the judicial district in which this case is filed and the plaintiff is a resident of the judicial district. This Court further has subject jurisdiction over this matter pursuant to 28 U.S.C. § 1316(b) in that this is a claim against the Defendant UNITED STATES of AMERICA, for money damages, accruing on or after January 1, 1945, for personal injury caused by the negligent and wrongful acts and omissions of employees of the Government while acting within the course and scope of their office or employment under the circumstances where the Defendant, if a private person, would be liable to the Plaintiff.

3. This is an action for civil rights violations for *Bivens* claims for inadequate medical care and equal protection violations under the Eighth Amendment to the United States Constitution.

4. Compensatory damages are sought pursuant to statutes and the *Bivens* claims. Punitive damages are sought against all Defendants sued in their individually capacity pursuant to the *Bivens* claims.

5. All governmental entities were notified of this claim in a timely fashion and all administrative exhaustion have been satisfied.

6. Additional jurisdiction founded upon federal law is proper in that this action is also premised upon a federal cause of action under the Federal Torts Claims Act (hereinafter "FTCA"), 28 U.S.C. § 2671, *et, seq*.

7. Pursuant to the FTCA 28 U.S.C. § 2671, *et. seq.*, Plaintiff, on or about September 20, 2014, presented his claim to the appropriate federal agency for administrative settlement under the FTCA requesting $2,500,000.00. By letter dated October 9, 2014, plaintiff's claim was finally denied in writing by the Western Regional Counsel of the Federal Bureau of Prisons and such denial was sent by certified or registered mail to the plaintiff.

8. This action is timely pursuant to 28 U.S.C. § 2401(b) in that this action was filed within six months of receipt of the certified letter sent by the federal agency denying the claim.

9. Venue is proper in this district pursuant to 28 U.S.C. § 139 (b)(2), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed. Venue is also proper pursuant to 28 U.S.C. § 1391(e), in that a substantial part of the acts or omissions giving rise to this claim occurred within the judicial district in which this case is filed and the plaintiff is a resident of the judicial district. This Court further has subject jurisdiction over this matter pursuant to 28 U.S.C. § 1316(b) in that this is a claim against the Defendant UNITED STATES of AMERICA, for money damages, accruing on or after January 1, 1945, for personal injury caused by the negligent and wrongful acts and omissions of employees of the Government while acting within the course and scope of their office or employment under the circumstances where the Defendant, if a private person, would be liable to the Plaintiff.

PARTIES

10. DENNESTY DAWKINS is an adult male natural person and a resident of the State of California, County of Los Angeles. At all relative times, he was detained and in the custody of the United States Bureau of Prisons at FCI Lompoc and/or FCI Terminal Island.

11. EVELYN CASTRO-GREENSPAN, M.D., at all relevant times, was the Clinical Director of and Medical Officer with the Health Services Department of the Federal Bureau Correctional Institution, Terminal Island, California ("FCI Terminal Island"). She was also responsible for arranging specialized health care and hospitalization for detainees within the local community. At all material times, she was aware that DAWKINS had a serious medical condition that required urgent medical attention, diagnosis, and treatment, and he purposefully denied him basic humane medical care for illegal and improper reasons unrelated to medical decision making and related functions. She is being sued in her individual capacity.

12. Defendants DOES 1-10 are business entities of unknown form who were the employers of the individually named defendants and/or DOES 1-10. Defendants

DOES 1-10 are herein sued under fictitious names. Their true names and capacities are unknown to Plaintiff. Based on information and belief, Plaintiff alleges DOES 1-10 were the employees, officers, directors, managing agents, and/or supervisors of the UNITED STATES, and/or DOES 1-10 who were acting within the scope and course of their employment and authority at all times relevant to this Complaint.

13. Defendant, UNITED STATES of AMERICA, is subject to suit for personal injury caused by the negligent and wrongful acts and omissions of employees of the Government while acting within the course and scope of their office or employment, under the circumstances where the Defendant, if a private person, would be liable to the Plaintiff, pursuant to the FTCA.

14. At all times material to this action, Defendant was responsible for the correct and prompt response to the health care needs of inmates in its custody.

15. At all times material to this action, Mr. DAWKINS was an inmate subject to the custody and control of the Defendant and subject to the care and treatment of the Defendant for any and all medical evaluation and treatment.

16. At all times material to this action, if Mr. DAWKINS required medical evaluation or treatment, his only avenue was to rely on the medical evaluation and treatment provided by the Defendant.

FACTUAL ALLEGATIONS

17. DAWKINS was detained at FCI Lompoc after conviction by the United States on May 1, 2012. He was later moved to FCI Terminal Island, and remains so incarcerated.

18. On or about May 1, 2011, DAWKINS was diagnosed with recurring sarcoids-an auto-immune disease that attacks and destroys soft tissue, i.e., in this instant outbreak, plaintiff's left lung and right eye.

19. On May 15, 2012, plaintiff was examined by Retinal Specialist, Dr. Stanley Carson, M.D. He found and recommended plaintiff undergo preventive cataract surgery, to avoid becoming permanently blind in his right eye.

20. From May 2012 through September of 2012, plaintiff was repeatedly reassured by prison medical staff he was being scheduled to undergo the recommended cataract procedure. After repeated unjustified and needless delays, on September 21, 2012, he was informed by prison medical staff his retinal condition had irreversibly deteriorated, and he was now permanently blind in the right eye.

FIRST CAUSE OF ACTION

Bivens Claim for Inadequate Medical Care against all individual Defendants Castro-Greenspan and DOES 1-10 (Eighth Amendment to the United States Constitution)

21. Plaintiff incorporates be reference all allegations contained in the preceding paragraphs of this Complaint, as it fully set forth here.

22. This is a claim against Defendant EVELYN CASTRO-GREENSPAN, all Defendants who were agents of the UNITED STATES and named in their individual capacity, and DOES 1-10.

23. Defendant CASTRO-GREENSPAN and DOES 1-10 violated Plaintiff's right to adequate medical care under the Eighth Amendment to the United States Constitution by failing to treat Plaintiff's known serious medical condition.

24. At all times, Defendant CASTRO-GREENSPAN and DOES 1-10 were aware that DAWKINS was suffering from recurring sarcoids- an auto immune disease that attacks and destroys soft tissue, i.e. in this instant outbreak, plaintiff's left lung and right eye.

25. Defendant CASTRO-GREENSPAN and DOES 1-10 purposefully denied DAWKINS essential medical care for, and were deliberately indifferent to his serious medical condition, despite knowledge that he had complained repeatedly about his progressive loss of vision in his right eye and that said Defendants knew he was not going to be released from custody to treat the condition in the foreseeable future.

26.The actions of the Defendant CASTRO-GREENSPAN and DOES 1-10 were so substandard and egregious that they were outside the course and scope of their employment. Their actions and judgments in ostensibly rendering "medical

care" to DAWKINS were so far below the acceptable standard that Defendant CASTRO-GREENSPAN and DOES 1-10 could not have been making a "medical" judgment in their decision to deny DAWKINS a very basic and inexpensive diagnostic procedure to prevent blindness in his right eye.

27. The actions of defendant CASTRO-GREENSPAN and DOES 1-10 were outside of the scope of "medical or related functions" as defined in 42 U.S.C. § 233(a) because their decision to deny DAWKINS medical care was not based on a medical reason, but rather economic and/or other constitutionally impermissible reasons unrelated to the provision of medical services, and demonstrated a purposeful, denial of essential medical care for a known serious medical condition, and, were deliberately indifferent to his serious medical condition.

28. Defendant CASTRO-GREENSPAN and DOES 1-10 acted with willful and deliberate indifference to the serious health needs of plaintiff protected by the Eighth Amendment to the United States Constitution, subjected Plaintiff to dangerous and debasing conditions of confinement, and violated basic fundamental rights to safe and humane confinement. The inhumane conditions of confinement caused Plaintiff medical injuries as alleged in this Complaint. The conduct constituted cruel and unusual punishment and a violation of due process.

29. Defendant CASTRO-GREENSPAN and DOES 1-10 violated clearly established law by failing to adequately treat a known serious medical condition.

SECOND CAUSE OF ACTION

FTCA Claim Against The United States
for Medical Negligence (Non-Jury Claim)

30. Plaintiff re-alleges all prior paragraphs of this Complaint and incorporates the same herein by reference. Plaintiff has properly presented his administrative claim pursuant to the requirements of 28 U.S.C. § 2675 (a). Pursuant to 28 U.S.C. § 2401, the claim is deemed denied by passage of more than six months without action by the UNITED STATES.

31. With respect to the second cause of action, plaintiff has named defendant UNITED STATES as the appropriate defendant under the Federal Torts Claim Act, 28 U.S.C. § 1346 (b). Upon certification by the UNITED STATES that these employees were acting within the scope of their offices and employment at the time of the incidents out of which this claim arises, the individuals named in the Second Cause of Action should be substituted out and this claim should proceed against the UNITED STATES only as the party defendant in this cause of action pursuant to 28 U.S.C. § 2679(d)(1).

32. Defendant has in its employ and/or agency doctors, nurses, and other medical care providers, over which it exercises control and supervision. At all times material to this action, Defendant authorized these agents and employees to act for Defendant when they committed the negligent acts alleged herein. Defendant's agents and employees accepted the undertaking of acting on behalf of Defendant when they committed the negligent acts alleged herein. Defendant had control over its agents and employees when they committed the negligent acts alleged herein.

33. The negligent acts of Defendant's agents and employees were committed while acting within the course and scope of their employ and/or agency with Defendant. Thus, Defendant is vicariously liable for the actions of its agents and employees when they committed the negligent acts alleged herein.

34. At all times material to this action, Defendant had a non-delegable duty to provide Plaintiff, Mr. DAWKINS, with reasonable medical care. Accordingly, Defendant is also vicariously liable for the actions of contracted-with medical providers.

35. At all times material to this action, Defendant, by and through its staff, physicians, employees and/or agents, acting within the course and scope of their employment and/or agency, undertook a duty to render medical care to Plaintiff, Mr. DAWKINS, in a skillful and careful manner and in accordance with the accepted standards of medical care and treatment rendered in such cases by physicians in San

Luis Obispo and Los Angeles Counties, California or in any similar medical community.

36. At all times material to this action, Defendant, by and through its staff, physicians, employees and/or agents, acting within the course and scope of their employment and/or agency, negligently breached the duty of care owed to Plaintiff, Mr. DAWKINS, by failing to examine, diagnose, care for, and treat Mr. DAWKINS in accordance with the accepted standards of care.

37. The care and treatment of the Plaintiff, Mr. DAWKINS, by the medical staff of the Defendant at Terminal Island, fell below the prevailing standard of professional care for a primary care physician in one or more of the following ways:

a. Failure to fully and properly document the symptoms experienced by the Plaintiff in the time period leading to his eventual blindness in his right eye.

b. Failure to properly consider and/or diagnose the Plaintiff's excruciating and severe pain in his right eye during the 18 months despite repeated visits to Defendant's health care providers.

c. Failure to properly consider and/or diagnose the Plaintiff's deterioration of vision in his right eye.

d. Failure and/or refusal to perform necessary medical testing when Plaintiff was experiencing pain in his right eye so it could be determined that the cause of Plaintiff's pain was due to sarcoids, an auto immune disease that attacks and destroys soft tissue, among other locations, an individuals eye.

e. Failure to make an immediate referral to an Ophthalmologist to determine the cause of Plaintiff's severe and excruciating pain in his right when the initial diagnosis and treatment were unsuccessful.

38. As the direct and proximate cause of the failure of Defendant's result of medical staff at FCI Lompoc and FCI Terminal Island to properly diagnose and treat Plaintiff's severe and excruciating pain between approximately March 2011, and

September, 2012, Plaintiff has suffered total blindness in his right eye.

39. It is more likely than not that if Plaintiff had been referred to an ophthalmologist in a timely fashion after the Defendant's initial diagnosis and treatment proved unsuccessful, Plaintiff would not have suffered total blindness in his right eye.

40. As the further direct and proximate result of the failure of medical staff at FCI Lompoc and FCI Terminal Island to properly diagnose and treat Plaintiff's severe and excruciating pain in his right eye between March 2011, and September 2012, Plaintiff has been permanently blind in his right eye and has lost the enjoyment associated with the use of a full and complete eye sight in his right eye.

41. As the direct and proximate result of the negligence, carelessness, and medical malpractice of the Defendant's employees and contractors, Plaintiff has suffered pain, mental anguish, bodily injury, and permanent disability, and will continue to suffer pain, mental anguish, bodily injury, and permanent disability in the future.

42. As the direct and proximate result of the negligence, carelessness, and medial malpractice of the Defendant's employees and contractors, Plaintiff is permanently disabled and unable to work in his former occupation when released from the care and custody of the Defendant.

Wherefore Plaintiff, DENNESTY DAWKINS, demands judgment against the Defendant, UNITED STATES of AMERICA as follows:

a. The sum of 2,500,000.00;

b. Costs of suit;

/ / /

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/ / /

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/ / /

c. Post-judgment interest; and

d. Such other relief as the court may deem just and proper.

Dated: May 13, 2015

Respectfully submitted,

/s/ Richard M. Barnett
Richard M. Barnett
A Professional Law Corporation

Attorney for Defendant
Dennesty Dawkins

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CASE DETAILS

Back to Case Results Case Actions:

Case ID: CIV-WXR-2015-00084 **Short Description:** DENNESTY DAWKINS V. EVELYN CASTRO GREENSPAN ET AL

CASE DETAILS | CASE DOCS | CASE PERSONS | CASE DATES | CASE SUMMARY | CASE BLOG

Case Login Information

Reference Number	2:14-cv-07269-PA-RZ
Short Description	DENNESTY DAWKINS V. EVELYN CASTRO GREENSPAN ET AL
Classification	Civil
Case Type	Bivens 8th Amend
Case Sub-Type	COC-Medical Condition
Current Region	WESTERN REGIONAL OFFICE
Current Institution	Terminal Island (FCI)
Incident Region	WESTERN REGIONAL OFFICE
Incident Institution	Terminal Island (FCI)
Monetary Relief Sought	$
Estimated Amount	$
Office	Western Division - Los Angeles
Jurisdiction	UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
Responsible Legal Office	MDC Los Angeles

Legal Liability Evaluation

Estimated Amount	$ -
Estimated Outcome	No evaluation can be made at this time

Case Resolution

Date	03/29/2016
Type	Settled
Reason	
Sought	
Amount offered	$150,000.00
Total Amount Paid	$15,000.00
Description	
Description	
Court Fee Paid ?	Yes
Pro Se ?	Yes

Case Initiation Dates

Date Received	01/21/2015
Date Filed	09/17/2014

Case Progress

Current Owner	SARAH SC
Case Status	Closed
Timeline Status	Closed
Monthly Report Status	SETTLEMENTS/AWARDS
Private Case	No

Additional Case Information

Long Description	28:1331 FEDERAL QUESTION: BIVENS ACT
Further Case Classification	
Comments	